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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

NATIVE ECOSYSTEMS COUNCIL, ALLIANCE FOR THE WILD ROCKIES, and SHARON J. HAPNER, **Plaintiffs,** **v.** **TOM TIDWELL, Regional Forester of Region One of the U.S. Forest Service, and UNITED STATES FOREST SERVICE, an agency of the U.S. Department of Agriculture.** **Defendants.**	**CV-09-79-M-DWM** **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

I. INTRODUCTION

1. This is a civil action for judicial review under the Administrative Procedure Act of the U.S. Forest Service's March 6, 2009 Decision Notice/Finding of No Significant Impact approving the Smith Creek Vegetation Project in the

Livingston Ranger District of the Gallatin National Forest. Plaintiffs attest that the final decision approving the Project and implementing the Gallatin National Forest Land and Resource Management Plan (Forest Plan) is arbitrary and capricious, an abuse of discretion, and/or otherwise not in accordance with law.

2. The Decision Notice (DN) authorized hundreds of acres of commercial logging and the re-opening of formerly closed roads. Logging and the associated road use will eliminate old growth habitat, eliminate critical hiding cover for elk, create irreversible soil damage, and add sediment to already-degraded streams that provide habitat for the sensitive Yellowstone cutthroat trout.

3. Defendants' approval of the Project as written is a violation of the National Environmental Policy Act (NEPA), 42 U.S.C. 4331 *et seq.*, the National Forest Management Act (NFMA) 16 U.S.C. § 1600 *et seq.*, and the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et seq.*

4. Plaintiffs seek declaratory and injunctive relief to protect Plaintiffs' interests at law, including their interests that the Forest Service comply with NEPA's mandate to consider and disclose environmental impacts, and comply with

NFMA's mandate to protect biodiversity, and mitigate harm and prevent irreparable injury to the environment.

5. Plaintiffs request that approval of the Project be set aside pursuant to 5 U.S.C. § 706(2)(A); and that the Court permanently enjoin the Forest Service from implementing this Project.

6. Plaintiffs seek a declaratory judgment, injunctive relief, the award of costs of suit, including attorney and expert witness fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, and such other relief as this Court deems just and proper.

7. The Forest Service has notified members of the public that it is currently accepting sealed bids for the timber sale(s) for the Project until June 11, 2009. Thus, at the time of filing this Complaint, no timber sales have yet been awarded for the Project but may be so awarded in the near future.

II. JURISDICTION

8. NEC brings this civil action under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 et seq., the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 et seq., and the National Forest Management Act (NFMA), 16 U.S.C. §§ 1600 et seq . This Court has jurisdiction pursuant to 28 U.S.C.

§ 1331 (federal question), and may issue a declaratory judgment and further relief pursuant to 28 U.S.C. §§ 2201-02.

9. An actual controversy exists between Plaintiffs and Defendants. Plaintiffs use and enjoy the Gallatin National Forest, including the Livingston Ranger District, for hiking, fishing, hunting, camping, photographing scenery and wildlife, and engaging in other vocational, scientific, spiritual, and recreational activities. Plaintiffs intend to continue to use and enjoy the area frequently and on an ongoing basis in the future.

10. The aesthetic, recreational, scientific, spiritual, and educational interests of Plaintiffs have been and will be adversely affected and irreparably injured if Defendants implement the Project. These are actual, concrete injuries caused by Defendants' failure to comply with mandatory duties under NFMA, NEPA, and the APA. The requested relief would redress these injuries and this Court has the authority to grant Plaintiffs' requested relief under 28 U.S.C. §§ 2201 & 2202, and 5 U.S.C. §§ 705 & 706.

III. VENUE

11. Venue in this case is proper under 28 U.S.C. § 1391(e) and LR 3.3(a)(1). Defendant Tidwell, an officer of the U.S. Forest Service with its Region One office in Missoula, resides within the Missoula Division of the United

States District Court for the District of Montana, and is the principal representative in this District of Defendant U.S. Forest Service (Forest Service). The challenged decisions were upheld by the Regional Forester, and are representative of official policies and procedures common to the Northern Region.

IV. EXHAUSTION OF ADMINISTRATIVE REMEDIES

12. Plaintiffs exhausted their administrative remedies by submitting comments on the supplemental environmental assessment for the Project. Plaintiffs also filed administrative appeals of the final agency decision to implement the Project, but the agency stated that the decision was not subject to administrative appeal. The agency's rejections of Plaintiffs' administrative appeals stated that they were the final determination of the Department of Agriculture. Thus the challenged decision is final and subject to this Court's review under the APA, 5 U.S.C. §§ 702, 704, and 706.

V. PARTIES

13. Plaintiff ALLIANCE FOR THE WILD ROCKIES (AWR) is a nonprofit public interest organization based in Helena, Montana dedicated to the protection and preservation of the native biodiversity of the Northern Rockies Bioregion, including its native plant, fish, and animal life, and its naturally

functioning ecosystems. AWR has over 2,000 individual members and more than 600 member businesses and organizations, and has been involved in public land management in the area for 18 years. Members use and enjoy the Gallatin National Forest for hiking, fishing, hunting, camping, photographing scenery and wildlife, and engaging in other vocational, scientific, spiritual, and recreational activities. Members intend to continue to use and enjoy the affected area frequently and on an ongoing basis in the future. AWR's members have been and will be adversely affected and irreparably injured if Defendants are allowed to continue implementing the current Gallatin Forest Plan, and if they are allowed to implement the challenged timber sale. These are actual, concrete injuries caused by Defendants' failure to comply with mandatory duties under NFMA and NEPA. The requested relief would redress these injuries.

14. Plaintiff NATIVE ECOSYSTEMS COUNCIL (NEC) is a nonprofit public interest organization based in Three Forks, Montana, with an interest in protecting native ecosystems on public lands in the Northern Rockies. NEC has been active in public lands management for 15 years. Members use and enjoy the Gallatin National Forest for hiking, fishing, hunting, camping, photographing scenery and wildlife, and engaging in other vocational,

scientific, spiritual, and recreational activities. NEC's executive director Dr. Sara Johnson is a former wildlife biologist for the Forest. Members intend to continue to use and enjoy the affected area frequently and on an ongoing basis in the future. NEC's members have been and will be adversely affected and irreparably injured if Defendants are allowed to continue implementing the current Gallatin Forest Plan, and if they are allowed to implement the challenged timber sale. These are actual, concrete injuries caused by Defendants' failure to comply with mandatory duties under NFMA and NEPA. The requested relief would redress these injuries.

15. Plaintiff SHARON J. HAPNER (Hapner) is an individual homeowner in the Smith Creek drainage of the Crazy Mountains. She and her husband have owned their property and used their property and the surrounding area for 30 years, and intend to continue to do so in the future. Over the past three decades she has used the area and observed the ecology and evolution of the forest environment. Hapner has witnessed the environmental degradation of the area around her property from logging activities and her interests will be adversely affected and irreparably injured if Defendants are allowed to continue implementing the current Gallatin Forest Plan, and if they are allowed to implement the challenged timber sale. These are actual, concrete

injuries caused by Defendants' failure to comply with mandatory duties under NFMA and NEPA. The requested relief would redress these injuries.

16. Defendant TOM TIDWELL is the Regional Forester of Region One of the U.S. Forest Service. In that capacity, he is the official responsible for issuing the final decisions that authorized the actions challenged in this Complaint, and is responsible for ensuring the project comply with the laws relating to management of public resources on the U.S. National Forests. He is sued in his official capacity.

17. Defendant UNITED STATES FOREST SERVICE (Forest Service) is an agency of the United States Department of Agriculture, and is the federal agency primarily responsible for the lawful management of our National Forests, including the Gallatin National Forest.

VI. PROCEDURAL BACKGROUND

18. On December 18, 2007 Gallatin National Forest District Ranger Ron Archuleta signed a Decision Notice/Finding of No Significant Impact (DN) that authorized implementation of the Smith Creek Project. Plaintiffs filed timely administrative appeals of the DN and Defendants denied their appeals on March 12, 2008.

19. On July 1, 2008, Plaintiffs filed suit in this Court challenging the approval of the Project as a violation of NFMA, NEPA, and the APA.

20. On October 30, 2008, this Court held in part that Defendants violated NFMA by failing to map key elk habitat elements. This Court enjoined the Project and remanded to the Defendants.

21. On November 20, 2008, Defendants published a supplemental EA.

22. On March 6, 2009, Defendants issued a second DN approving the Project. The DN re-approved the original Smith Creek Project without any modifications.

23. In April 2009, Plaintiffs filed administrative appeals of the Project.

24. Defendants stated that the DN was not subject to appeal and refused to review Plaintiffs' appeals.

VII. FACTUAL ALLEGATIONS

A. Background

25. The Gallatin National Forest (Forest) is located in the Rocky Mountains of southern Montana. The Forest is directly adjacent to the north and west boundary lines of Yellowstone National Park.

26. Wildfire in the Forest "has played an integral role in shaping and perpetuating forest and range ecosystems . . . ." Specific roles of wildfire in

the Forest include creating habitat for wildlife such as cavity-nesting birds, and accelerating soil decomposition in an arid environment.

27. The Forest provides habitat for native elk herds, mule deer, moose, bighorn sheep, mountain goats, black bears, bald eagles, and grizzly bears. The Forest includes the headwaters of blue ribbon trout streams such as the Madison, Gallatin, and Yellowstone Rivers. Tributaries throughout the Forest provide spawning and rearing habitat for these downstream fisheries.

28. In recognition of the ecological importance of the Forest, the Forest Service committed itself to protecting fish and wildlife. In 1990, the Forest Service entered into a settlement agreement with the Madison-Gallatin Chapter of Trout Unlimited. The agreement allows management activities near waterways "only for the purpose of meeting riparian dependent resource objectives such as watershed, wildlife, or fisheries." The agreement further dictated that "[t]imber harvest activities designed to meet timber management objectives will not be scheduled in riparian areas." Additionally, in 1998, the Forest Service entered into an interagency agreement to conserve the Yellowstone cutthroat trout. It committed to "modify land use to provide the greatest degree of habitat and population protections."

B. Ecology and Management History of the Project Area

29. The analysis area for the Project is located on the west side of the Crazy Mountains, approximately 35 miles north of Livingston, Montana. This area is an isolated mountain range that is "visually spectacular," "topographically dramatic," and "has been the backdrop for Hollywood movies, such as 'The Horse Whisperer.'"

30. Elevations in the area range from 5,800 feet to 8,500 feet. The topography varies from rolling hills to steep terrain with saddles and ridges.

31. The area is predominately forested with Douglas-fir and lodgepole pine. Sites vary in moisture levels: the dominant cover type lodgepole pine and Douglas fir are found on the drier sites; Engelmann spruce and quaking aspen are found on the wetter sites. Grass and sagebrush meadows, as well as seeps, springs, fens, and willow carrs, are spread throughout the area.

32. This area naturally experiences stand-replacing wildfires that regenerate the forest. The area provides habitat for a number of wildlife species including songbirds, raptors, small mammals, forest carnivores, and big game animals.

33. There is a concentrated elk migration in the area in the fall.

34. The term "concentrated elk migration" means that elk travel quickly through the area.

35. Elk have summer habitat in and above the Project Area.

36. Elk also use the area in the spring.

37. Thirty-year residents of the area have observed that elk also may stay in the area during the warmer winters.

38. The area chosen for logging by the Project has been severely degraded by previous logging. One-third (4,800 acres) of the National Forest land in the affected timber compartment has been clearcut. An additional 600 acres have also been previously logged.

39. Evidence of past logging remains throughout the area: skid trails, piles of soil, temporary roads, landings, and depressions missing topsoil are common.

1. Road Density and Elk Habitat

40. The Smith Creek area has been "extensively roaded." In the 25.1 square mile Smith Creek watershed, there are 53 miles of open roads (i.e. 2.11 miles of road per square mile).

41. The current road density in the Smith Creek watershed renders the elk habitat in the area less than 50% effective. Even if elk habitat effectiveness is assessed at the larger Shields River Travel Planning Area, the habitat is still only 58% effective.

42. Until 2006, the Forest Plan required that the Forest Service maintain 70% elk habitat effectiveness in the Forest. This translates into less than or equal to 0.75 miles of road per square mile of land in each land area between 5,000 and 15, 000 acres. If a specific land area did not meet that standard, the Forest Service was required to close roads at the project analysis level in order to meet that standard.

43. In 2006, the Forest Service permanently removed the elk habitat effectiveness standard from the Forest Plan so that the Forest Service no longer must comply with a mandatory minimum percent for elk habitat effectiveness. Despite its removal from the Forest Plan, the Forest Service acknowledges that the standard is still scientifically valid: "[i]t will remain an appropriate tool for analyzing the effects of proposed timber sales and road construction activities."

2. Sedimentation, Water Quality, and Fish Habitat

44. Roads in the area are soft during the spring and fall and subject to "extreme rutting." The roads have poor drainage, poor maintenance, and heavy use when wet.

45. Some of the previous logging has occurred along riparian corridors, which has created unstable bank and channel conditions. Riparian logging has

also reduced the large woody debris available in streams; the reduction of this habitat component is the cause of all of the "primary physical habitat factors limiting fish populations" in Smith Creek and the East Fork.

46. Sedimentation from roads has led to channel instability in some riparian areas. In particular, the main East Fork road #6635 and a private road "contribute significant sediment loads . . . ."

47. Even roads that are officially "closed" by the Forest Service are still used by motor vehicles.

48. The legacy of degradation from past logging and road construction has created "sediment concerns" for the Forest Service. The upper segment of Shields River, into which Smith Creek drains, is listed by the Montana Department of Environmental Quality as an impaired stream under the Clean Water Act. The segment of the Shields River in the area is impaired primarily because of "upstream timber harvest."

49. Sediment levels in upper stem of Smith Creek are 27.3% above natural, and sediment levels in the East Fork of Smith Creek are 16.1% above natural.

50. There are "extremely high levels of silt" in the East Fork of Smith Creek.

51. Stream samples in the area in 2006 indicated "possible sediment impairment of all sites sampled" as evidenced by a lack of sediment-intolerant macroinvertebrates.

52. Smith Creek is classified as a Category A stream, which means that the native Yellowstone cutthroat trout are present. The cutthroat trout in the area are "extremely important to conservation and recovery of the species" and the area is a "core conservation population."

53. A recent survey showed that only a few cutthroat trout remain in the area. The cutthroat trout is declining in part due to "habitat degradation due to roads and timber harvest."

54. Two HUC 7 streams in the area have "existing in-stream fine sediment levels [that] already exceed channel competence [] and levels approach [East Fork] or exceed [Smith Creek] in-stream sediment guidelines." In these streams, fine sediment is approaching levels that "some studies found to severely limit reproduction" of Yellowstone cutthroat trout.

3. Soil Degradation

55. Due to past logging, the Forest Service estimates that pre-existing detrimental soil disturbance exceeds regional standards on four proposed logging units : A1, 36 %; B, 17 %; D, 26 %; and I, 22 %. These four units

amount to 64 % (almost two-thirds) of the acreage proposed for commercial logging activities.

4. Old Growth Habitat

56. The Forest Service does not know how much actual old growth habitat remains in the affected timber compartment.

57. The old growth analysis for the Project is based upon satellite imagery and the TSMRS (Timber Stand Management Resource System) database. With this model, the Forest Service estimated that the compartment contains 21% potential old growth habitat.

58. The Forest Service did not conduct field inventories (i.e. intensified gridding) in the timber compartment to ensure that each potential old growth stand, identified from stand data and satellite imagery, contained the associated characteristics set forth in the Forest Service's old growth protocol (Green et al. 2005).

59. The Forest Service does not disclose the limitations of relying on satellite imagery and the TSMRS database to estimate old growth habitat. In particular it did not note the accuracy of the potential habitat estimations, nor which necessary components of old growth habitat cannot be determined by reliance on broad stand data and satellite photos.

60. The Forest Service's own old growth protocol indicates that it is necessary to field-truth potential old growth in order to produce a valid estimate:

> **Because of the great variation in old growth stand structures, no set of numbers can be relied upon to correctly classify every stand**. In addition, the uncertainties of sampling and statistics introduce another need for caution in using stand data. The minimum criteria in the "tables of old growth type characteristics" are meant to be used as a screening device to select stands that may be suitable for management as old growth, and the associated characteristics are meant to be used as a guideline to evaluate initially selected stands. They are also meant to serve as a common set of terms for old growth inventories. Most stands that meet minimum criteria will be suitable old growth, but there will also be some stands that meet minimum criteria that will not be suitable old growth, and some old growth may be overlooked**. Do not accept or reject a stand as old growth based on the numbers alone; use the numbers as a guide.**

Green et al. (2005) at 11 (emphasis in original).

61. A different old growth model analysis conducted by the Forest Service indicated that the Crazy Mountains may contain as low as 5% potential old growth habitat.

5. Wildlife

62. The Forest Service does not have population trend information for wildlife species forest-wide or in the area of the Project. The Forest Service previously admitted that its assessments of indicator species lacked data so

that viability analyses were "mostly guesswork." Similarly, the Forest Service admitted that is analyses of sensitive species were "hit-or-miss."

63. The only wildlife surveys conducted for the Project were 3 days of goshawk surveys over 2 years. The Forest Service plans to assess the current wildlife situation after the decision has already been made, by "conduct[ing] further surveys within individual treatment units prior to beginning harvest activities."

C. Purpose and Need for the Project

64. The Forest Service admits that much of the area naturally experiences stand-replacing wildfire, which may occur only once in hundreds of years.

65. The Forest Service acknowledges: "Historically, large-scale, stand replacement fires wildfires was [sic] an important natural event that created and maintained habitats and their associated species assemblages."

66. The Forest Service states that the subalpine fir with lodgepole forest type may be within its range of variability in terms of wildfire occurrence.

67. The Forest Service admits that aspen is a fire-dependent species with return intervals of 20 to 130 years.

68. The Forest Service proposed the Smith Creek Project to lower "the intensity of potential wildfire behavior." This is the "main concern" in the area.

69. More specifically, the Forest Service states that an objective of the Project is to "creat[e] a more defensible area in a Wildland Urban Interface . . . ." The Forest Service states that it can lower wildfire intensity by "breaking up the vertical and horizontal continuity of vegetation and fuel conditions in the portions of the WUI in closest proximity to residences, other structures, and primary transportation routes."

70. The Forest Service does not analyze the likelihood that lightening will actually strike one of the logged units during the time that the logging is purportedly effective at reducing the rate of fire spread.

71. The Forest Service admits that the logging prescription will only reduce the likelihood of crown fire within the logged unit itself, and if a crown fire started in an adjacent area, it would continue as a crown fire in the logged unit.

72. The FS admits that a crown fire could still start in a logged unit if conditions were extremely windy or dry. Despite this recognition, and the recognition that global climate change could pose significant issues, the Forest Service did not address whether climate change-induced drought will render the logging treatments completely ineffective for their intended purpose.

73. The FS implies that the fuel treatments will "remain valid" for six to eight years. The FS did not address "future fuel reduction treatments needed to maintain post-treatment conditions."

74. The Forest Service admits that creating a 300 foot buffer around existing structures would protect them from wildfire: "[c]oncerns for the intensity and scale of changes to the current condition resulting from treatments in the Smith Creek WUI would be fully satisfied [by creating a 300 foot buffer around structure]." It states that the Project will "encompass[] the benefit" of such action "and much more."

75. The Forest Service does not cite to scientific support for its contention that logging in several patches throughout the Forest will protect the public more than if homeowners created defensible space around their homes.

76. The Forest Service did not disclose and discuss the responsible opposing scientific viewpoints found in the record that contradict and undermine the Forest Service's conclusion that the commercial logging authorized by the Project will reduce wildfire risk. The Forest Service did not disclose the uncertainty or controversial nature of its proposal.

D. Project Implementation

77. The Project is located completely within Timber Compartment 221, which includes 14,487 acres of Forest Service land. The Project authorizes commercial logging or hand-thinning on 810 acres, and prescribed burning on an additional 300 acres. More specifically, the Project allows commercial logging on up to 692 acres in nine units: A1 (52 acres); B (165 acres); C (112 acres); D (125 acres); E1 (34 acres); E2 (50 acres); F (60 acres); G (28 acres); and I (66 acres).

78. The Forest Service estimated that logging will take four to five years.

79. The Forest Service does not predict when, if ever, restoration activities that are part of the project will be completed.

80. The Project authorizes logging of large diameter green trees (live trees) as well as large diameter snags (dead trees). Logging of large trees will be permitted on at least 435 acres. The Project does not place any diameter limit on logging.

81. The Forest Service estimates that Project implementation will eliminate 112 acres of old growth forest. The Forest Service concluded that logging old growth forest is not a significant issue, and declined to address the issue in the main body of the EA.

82. The Project authorizes logging that the Forest Service "assume[s] [will] reduce available snags."

83. The Project allows the reopening of formerly closed roads.

84. Using a computer model, the Forest Service estimated that the Project will eliminate 16% of the suitable nesting habitat in the area for the goshawk, an old growth indicator species.

85. The Forest Service says that wolverines need to den in mature or old growth forest, and estimates that there are 504 acres of marginal wolverine denning habitat in the area. The Forest Service then directly contradicts itself by stating that there is no habitat for the wolverine in the area so none would be affected by logging. No further analysis is provided.

86. The Forest Service states that the Project will reduce roosting habitat (in mature canopy cover) for the sensitive Townsend's big-eared bat. It concludes without any citation or quantification that the roosting needs would be provided by other areas of the Forest, so the removal in the area is "not a limiting factor."

87. The Forest Service concluded that Project implementation would degrade 204 acres of potential habitat for the pine marten, an old growth indicator species.

88. The Forest Service concluded that the Project may temporarily displace elk, the big game indicator species.

89. The record indicates that the Forest Service estimated hiding cover at 62% of the area.

90. This hiding cover estimate is based upon the Montana Department of Fish, Wildlife, and Parks (MT FWP) definition of hiding cover, which is "a stand of coniferous trees having crown closure of greater than 40 percent."

91. The Forest Service misstated the hiding cover estimate throughout the EA and DN, representing to the public that hiding cover was 70-90%, when that number actually represents the total forested cover, including forested areas that do not provide hiding cover.

92. The Gallatin Forest Plan Amendment 14 requires the Forest Service to use the following definition of hiding cover: "Vegetation capable of concealing 90 percent of a standing adult big game animal from the view of a human at a distance equal to or less than 200 feet . . . ."

93. The Forest Service has admitted that using the MT FWP definition of 40% canopy closure provides a much more liberal estimate of hiding cover than using the definition that requires concealment of 90 percent or more of an elk at a distance of 200 feet. For example, in a hypothetical area where

hiding cover would be 60% under the MT FWP definition, there would only be approximately 42% hiding cover under the Gallatin Forest Plan definition.

94. Using the MT FWP definition, the Forest Service estimated that the Project will reduce hiding cover to 55 %. In direct contradiction of this disclosure, the Forest Service concluded that "[k]ey components such as cover [and] security areas . . . would remain unchanged with the proposed action . . . . None of the alternatives would result in adverse modification of big game or its associated habitat."

95. The Forest Service does not have population trend data for old growth indicator species in the timber compartment and admits its analysis does not "reflect a comprehensive assessment" of wildlife in the area. Nonetheless, it concluded that "[n]o species addressed would have significant impacts to their habitat."

96. The Project authorizes logging in riparian areas in units A1, A2, and G. The logging may remove up to 50 % of the large trees in these areas right up to 15 feet from perennial streams, and there is no diameter limit on the logging. The FS admits that logging in riparian areas "could jeopardize large woody debris recruitment into streams or rivers. Additional sediment

would reduce the quality of fisheries habitat and interfere with fish spawning."

97. The proposed logging will cause an increase in stream sedimentation: 2.7 tons in Smith Creek at the East Fork confluence; 2.2 tons in the East Fork at the Smith Creek confluence; and 4.3 tons in Smith Creek at the Shields River confluence. The Forest Service did not disclose the stream sedimentation expected from log-hauling on the roads in the area.

98. Despite the adverse impacts of riparian logging, and the unknown amount of sedimentation that will result from log-hauling on the roads, the Forest Service concludes that there will be no impact from the Project on the sensitive Yellowstone cutthroat trout.

99. The Forest Service estimates that proposed logging will increase detrimental soil disturbance by between 0 to 7.0 % in previously logged areas that already violate regional soil quality standards.

100. The Forest Service admitted that the proposed logging will only be in compliance with soil standards if "the soil protection BMPs are used and the specified restoration practices are carried out."

101. The Forest Service stated that it will mitigate the soil degradation by placing coarse woody debris along old roads.

102. The Forest Service admitted that it does not know how effective this mitigation will be: "there are no data to estimate quantitative measures of reduction." It does not discuss how mitigation can ensure compliance with numeric standards when there is no numeric estimates on effectiveness. It also does not address the fact that mitigation is speculative because it is based upon unsecured funding.

103. The Forest Service states that additional timber sales and livestock grazing in the area are reasonably foreseeable.

E. Restoration and Mitigation

104. Because of poor road quality in the area, the Forest Service has conducted road restoration on Smith Creek Road #991 and East Fork of Smith Creek Road # 6635 (Treatment A). This restoration work is not part of the Smith Creek Project. The Forest Service intended for this work to be completed prior to implementation of the Project.

105. The Forest Service did not disclose the new baseline conditions created by Road Treatment A. Instead the Forest Service averaged the benefits of Road Treatment A with the harm of commercial logging and road use from the Project, and did not disclose the amount to which the Project will degrade the new baseline conditions created by Road Treatment A.

106. The road restoration work referred to as Treatment B and Treatment C is included in the Smith Creek Project. The environmental effects of the Project are analyzed as if completion of these treatments is guaranteed. To the contrary, funding for these projects is speculative: the treatments will "be completed as funding allows." Thus the treatments will only "provide benefits to fishery habitat if sufficient funding is available whether from receipts generated from the harvested timber and other forest products or through other means."

107. The Forest Service proposes other "ecosystem restoration activities" as part of the Smith Creek Project, and the environmental effects of the Project are analyzed as if completion of these activities is guaranteed as well.

108. These activities include woody debris placement on old skid trails (to rehabilitate soil quality); aspen fencing (to protect trees from grazing livestock and wildlife); and the placement of a toilet facility in a parking area.

109. These activities are also dependent upon speculative funding. Specifically, the Forest Service states that fencing around aspen to prevent degradation from livestock grazing is "economically prohibitive" although it may be critical to regenerate the aspen.

110. The Forest Service proposes "thinning non-commercial small diameter products and slash removal" as part of the Project prescription. These activities are also dependent upon speculative funding.

111. In summary, although the EA and DN/FONSI analyze the restoration and mitigation activities as if their implementation is guaranteed, in reality most of them are not likely to be completed because they are dependent on speculative funding.

112. The Forest Service estimates that only 13 % of the restoration work will be funded by the Project.

113. The Forest Service will have to raise over one-half of a million dollars ($545,734.00) to complete the rest of restoration work represented in the EA. The Forest Service does not disclose the likelihood of success in this endeavor.

V. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

The Forest Service violated NEPA and NFMA because the Project will violate regional soil quality standards.

114. All previous paragraphs are incorporated by reference.

115. NFMA requires that agency actions "ensure that timber will be harvested from National Forest System lands only where [soil] will not be irreversibly

damaged." To implement this requirement, regional standards mandate that the Forest Service must abstain from logging in units that would result in more than 15% detrimental soil disturbance.

116. The Forest Service projects that at least four proposed logging units, or 64% of the acreage proposed for logging, already exceed the 15% standard. The Forest Service estimated that the proposed logging will add an additional 0 to 7.0 % disturbance to all of these areas.

117. The Forest Service's approval of a Project that increases detrimental soil disturbance above 15% violated NFMA, and therefore must be set aside under the APA.

118. Additionally, NEPA requires that agencies take a hard look at mitigation measures by supporting proposed mitigation measures with data and analysis on their efficacy.

119. Although the Forest Service proposes to mitigate the unlawful increase in detrimental soil damage, it admits that it does not know how effective the mitigation would be. Additionally, the record does not indicate any support for the proposed mitigation measures, and even if it did the mitigation may not ever happen because it may not be funded. These uncertainties were not disclosed and discussed in the EIS.

120. The Forest Service's failure to provide analytical support for its proposed mitigation measures violates NEPA, and the Project therefore must be set aside under the APA.

121. Because the Project threatens a violation of NEPA and NFMA, and because there is uncertainty regarding proposed soil mitigation, the Forest Service must complete a full EIS for the Project.

SECOND CLAIM FOR RELIEF

The Forest Service violated NFMA and NEPA by violating Forest Plan fish and wildlife standards in the Project Area and failing to take a hard look at the Project's individual and cumulative effects on fish and wildlife.

122. All previous paragraphs are incorporated by reference.

123. OLD GROWTH DEPENDENT SPECIES. The Forest Plan requires monitoring of population trends of old growth dependent species. The Forest Service has never monitored population trends of old growth indicator species and the Project will eliminate 112 acres of old growth habitat. The Forest Service did not mitigate its population monitoring failure with habitat monitoring because the Forest Service never conducted an old growth habitat field inventory in the Project Area (as dictated by its own monitoring protocol) to demonstrate compliance with the Forest Plan old growth standard. Instead the Forest Service used a habitat model based

on stale data, which the Forest Service admitted was biased and unstatistical.

124. ELK. The Forest Plan set out standards to ensure the viability of big game species. One standard is that specific elk habitat elements be mapped during each project level analysis. Despite the judicial remand on this issue, the Forest Service failed to map the elk migration route in the Project area. Another Forest Plan standard requires a mandatory minimum of 66.6% elk hiding cover. The record is unclear as to how the Forest Service determined hiding cover in the Project area. It appears that the Project area currently has 62% hiding cover according to the MT FWP definition and potentially 44% hiding cover according to the Forest Plan definition. The Project will further reduce hiding cover.

125. YELLOWSTONE CUTTHROAT TROUT. The Forest Plan requires that sensitive species habitat be managed to maintain sensitive species. The Forest Plan specifically lists the Yellowstone cutthroat trout as an example. Yellowstone cutthroat trout habitat in the Project Area is already significantly degraded from logging and road densities: only a few Yellowstone cutthroat trout remain in the area, and streams are approaching or exceeding sediment levels that "severely limit reproduction." Logging

will cause additional stream sedimentation in the area. The Forest Service failed to disclose the amount of sedimentation expected from log-hauling on roads, independent of the previously completed and unfunded proposed road treatments. The Project will violate the requirement to maintain habitat for the Yellowstone cutthroat trout by adding sedimentation to streams from logging in riparian areas, increased road use, and the reopening of formerly closed roads.

126. Therefore, the Forest Service's approval of the Project violated NFMA because the Forest Service is violating its own Forest Plan standards for the protections of old growth dependent species, elk, and Yellowstone cutthroat trout. The Project must be set aside under the APA for these NFMA violations.

127. Because the Forest Service has failed to do the requisite analyses to ensure Forest Plan compliance on these issues, the Forest Service's approval of the Project also violates NEPA because the Forest Service failed to take a hard look at the Project's individual and cumulative effects on affected fish and wildlife species.

128. The Forest Service must complete a full EIS for this Project because it violates NFMA, and because the effects are uncertain due to missing

information on population trends of old growth dependent species, actual old growth habitat in the Project area, mapping of elk migration, disclosure of method of analyzing hiding cover, and the disclosure of sedimentation expected from increased road use.

THIRD CLAIM FOR RELIEF

The Forest Service violated NFMA by implementing the Gallatin Forest Plan in this Project, because the Gallatin Forest Plan does not ensure species viability.

129. All previous paragraphs are incorporated by reference.

130. The Forest Plan was created in 1987 and incorporated the 1982 NFMA implementing regulations. The Forest Plan states that the GNF should "[p]rovide habitat for viable populations of all indigenous wildlife species and for increasing populations of big game animals."

131. The Forest Plan previously included a standard limiting road density on the Forest in order to provide secure elk habitat. In 2006 the Forest Service eliminated that requirement from the Forest Plan. Although roads are recognized as the primary factor that degrades elk habitat, the Forest Plan now contains no limit on road density to protect and restore secure elk habitat.

132. The lack of a Forest Plan road density standard is relevant to this Project because the original Forest Plan required that the Forest Service maintain

70% elk effective cover. The Project Area violates that standard with less than 50% elk effective cover. Previously, the Forest Service would have been required to close roads to meet the standard, but now that the standard has been removed, instead of closing roads to meet the standard, the Forest Service will reopen roads for log-hauling.

133. Therefore, the Forest Plan -- as implemented by this Project – violates NFMA because it does not require any restriction on road density to ensure viable populations of elk in the Project area. Because the Project was approved under an unlawful Forest Plan, it violates NFMA and must be set aside under the APA.

FOURTH CLAIM FOR RELIEF

The Forest Service violated NEPA because it failed to take a "hard look" at its policy of commercial logging for wildfire suppression.

134. All previous paragraphs are incorporated by reference.

135. The Forest Service presented the Project primarily as a means to reduce wildfire risk to residents in the Project Area, and presented its proposed management practices as uncontroversial and not uncertain. The Forest Service did not disclose and discuss contrary scientific viewpoints that undermine the efficacy of the proposed management techniques.

136. The Forest Service admits that stand-replacing fire is a necessary and natural process in the Project Area.

137. The Forest Service did not cite to a single scientific study that indicates that commercial logging in patches will reduce the chance of wildfire in the Project Area.

138. The Forest Service admits that if weather conditions are dry and hot enough, a wildfire will still burn through the units even if they are logged. Nonetheless, the Forest Service declined to address whether drought conditions likely to result from global climate change renders its intended treatments obsolete.

139. The Forest Service declined to address whether the logging will actually create worse fire conditions.

140. For the above stated reasons, the Forest Service's decision to implement its policy of logging for wildfire suppression in the Project Area violates NEPA because the Forest Service failed to take a hard look at that policy, including a failure to disclose and discuss contrary scientific viewpoints and uncertainty regarding its effectiveness and justification. The decision also violated the APA because it runs contrary to the evidence before the agency.

141. The proposed management techniques are controversial and uncertain, and

therefore the Project must be analyzed in a full EIS.

FIFTH CLAIM FOR RELIEF

The Forest Service violated NEPA because it failed to consider climate change in its analysis of the Project.

142. All above paragraphs are incorporated by reference.

143. The Project will eliminate 112 acres of old growth habitat.

144. Published scientific reports indicate that climate change will be exacerbated by commercial logging, specifically logging of mature and old growth forests.

145. The Project was proposed primarily to reduce wildfire risk.

146. Published scientific reports indicate that climate change will cause drought conditions that lead to increased wildfire severity.

147. The Forest Service did not consider how the logging of old growth forest authorized by the Project may exacerbate climate change, nor did it consider how increased drought conditions may render the proposed management activities obsolete in their attempt to reduce wildfire risk.

148. The Forest Service's complete failure to consider these important factors violated NEPA because the Forest Service failed to take a hard look at the issue of climate change and how it relates to the Project. Thus, the Project

must be set aside under the APA because the decision is arbitrary and violated NEPA.

149. The Forest Service must complete a full EIS for the Project because its effects and interactions with climate change are controversial and uncertain.

VI. REQUEST FOR RELIEF

THEREFORE, NEC respectfully requests that this Court:

A. Declare that the Forest Service violated NFMA because the Project violates regional soil quality standards;

B. Declare that the Forest Service violated NEPA because the soil mitigation measures are not supported with analytical information in the record;

C. Declare that the Forest Service violated NFMA and NEPA because the Forest Service did not demonstrate compliance with Forest Plan requirement to monitor population trends of management indicator species;

D. Declare that the Forest Service violated NFMA and NEPA because the Forest Service did not reliably demonstrate compliance with the Forest Plan old growth habitat standard;

E. Declare that the Forest Service violated NFMA and NEPA because the Forest Service did not demonstrate compliance with Forest Plan elk habitat standards;

F. Declare that the Forest Service violated NFMA and NEPA because the Forest Service did not demonstrate compliance with the Forest Plan requirement to maintain habitat for the sensitive Yellowstone cutthroat trout;

G. Declare that the Gallatin Forest Plan violates NFMA because it no longer contains any road density standard to ensure elk viability;

H. Declare that the Forest Service violated NEPA because it failed to take a hard look at its proposal to implement commercial logging for wildfire suppression;

I. Declare that the Forest Service violated NEPA because it failed to consider how the Project impacts and is impacted by global climate change;

J. Declare that the Forest Service must withdraw the Smith Creek Project, or alternatively complete a full environmental impact statement for the Project;

K. Enjoin implementation of the Smith Creek Project, including the sale of the Smith Creek Project timber sales;

L. Award Plaintiffs their costs, expenses, expert witness fees, and reasonable attorney fees under EAJA; and

M. Grant Plaintiffs such further relief as may be just, proper, and equitable.

Respectfully submitted this 5th Day of June.

/s/ Rebecca K. Smith
Rebecca K. Smith
Public Interest Defense Center, P.C.

Attorney for Plaintiff