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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION

SWAN VIEW COALITION, FRIENDS OF )  
THE WILD SWAN, and ALLIANCE FOR )  
THE WILD ROCKIES, )

**COMPLAINT**

Plaintiffs, )  
)  
)

v. )  
)  
)

U.S. FOREST SERVICE and U.S. FISH & )  
WILDLIFE SERVICE, )  
)

Defendants. )  
)  
)

## I. INTRODUCTION

1. This is a civil action challenging the Flathead National Forest's April 10, 2009 Amended Record of Decision (AROD) for the Moose Post-Fire Project.
2. Defendants' actions are violations of the Endangered Species Act (ESA), 16 U.S.C. § 1533 *et seq.*; 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.* Plaintiffs Swan View Coalition, Friends of the Wild Swan, and Alliance for the Wild Rockies (collectively "Swan View) request that the approval of this project be "set aside" pursuant to the APA, 5 U.S.C. § 706(2)(A); and that the Court enjoin the Flathead National Forest from retaining culverts in decommissioned roads and from violating road density and grizzly bear security core standards, and require Defendants to comply fully with NEPA, ESA, NFMA and the APA.
3. Plaintiffs seek a declaratory judgment, injunctive relief, the award of costs of suit, including attorney and expert witness fees, and such other relief as this Court deems just and proper.

## II. JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over the claims specified in this Complaint pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. §§ 2201-02 (declaratory judgment), 28 U.S.C. § 2202 (further relief), the ESA, 16 U.S.C. §§ 1540 (citizen suit) and the APA, 5 U.S.C. §§ 701-06.

5. Venue in this case is proper under 28 U.S.C. § 1391(e). The Flathead National Forest is located in the Missoula Division of the United States District Court for the District of Montana and has its headquarters in Kalispell. The challenged decisions were made or approved by agency personnel in this judicial district. A substantial part of the events or omissions giving rise to the claims in this case occurred in this judicial district.

### **III. THE PARTIES**

6. Plaintiff Swan View Coalition, Inc. is a non-profit Montana corporation with its principal place of business at Kalispell, Flathead County. Swan View Coalition, Inc. is dedicated to the conservation of natural resources and the preservation of the Flathead National Forest. It has participated extensively in administrative actions to protect the Flathead National Forest from environmentally damaging plans and activities. Its members use and will continue to use the Flathead National Forest for work and for outdoor recreation of all kinds, including fishing, hunting, hiking, horseback riding, and cross-country skiing. Some of its members own land within or bordering the Flathead National Forest. The Forest Service's unlawful actions adversely affect Swan View Coalition, Inc.'s organizational interests, as well as its members' use and enjoyment of the Flathead National Forest, including the Moose Project area. Swan View Coalition, Inc. brings this action on its own behalf and on behalf of its adversely affected members.

7. Plaintiff Friends of the Wild Swan is a non-profit Montana corporation with its principal place of business at Swan Lake, Lake County. Friends of the Wild Swan is dedicated to the conservation of natural resources and the preservation of the Flathead National Forest. It has participated extensively in administrative actions to protect the Flathead National Forest from environmentally damaging plans and activities. Its members use and will continue to use the Flathead National Forest for outdoor recreation of all kinds, including fishing, hunting, hiking, horseback riding, and cross-country skiing. Some of its members own land within or bordering the Flathead National Forest. The Forest Service's unlawful actions adversely affect the organizational interests of Friends of the Wild Swan as well as its members' use and enjoyment of the Flathead National Forest including the Moose Project area. Friends of the Wild Swan brings this action on its own behalf and on behalf of its adversely affected members.

8. Plaintiff Alliance for the Wild Rockies is a tax-exempt, non-profit public interest organization dedicated to the protection and preservation of the native biodiversity of the Northern Rockies Bioregion, its native plant, fish, and animal life, and its naturally functioning ecosystems. Its registered office is located in Helena, Montana. The Alliance has over 3,000 individual members, many of whom reside in Montana, and more than 600 member businesses and organizations, many of which are located in Montana. The Alliance and its members derive or, but for the threatened status of grizzly bears, would derive

recreational, scientific, aesthetic, and commercial benefits from the existence in the wild of these species of bears through wildlife observation, study, and photography, and recreational and commercial fishing in the region, including the Moose Project area. The past, present, and future enjoyment of these benefits by the Alliance and its members has been, is being, and will continue to be irreparably harmed by Defendant's failure to comply with the ESA, NEPA, NFMA, and the APA.

10. The above-described aesthetic, conservation, and scientific interests of Plaintiffs and their members have been, are being, and, unless the relief requested is granted, will continue to be adversely affected and irreparably injured by the actions and omissions of Defendants within the meaning of the APA, NFMA, NEPA, and ESA. Plaintiffs' injury in fact is fairly traceable to Defendants' conduct and would be redressed by the relief that Plaintiffs seek in this case. Plaintiffs have no adequate remedy at law.

11. Defendant U.S. Forest Service is an agency of the United States of America within the Department of Agriculture.

12. Defendant U.S. Fish & Wildlife Service is an agency of the United States of America within the Department of Interior.

#### **IV. BACKGROUND**

13. On November 27, 2002 Flathead National Forest Supervisor Cathy Barbouletos signed the Moose Post-Fire Record of Decision. The selected

alternative featured removal of trees in an area burned by the Moose Fire. The selected alternative also featured some remediation measures that called for retention of culverts in roads to be decommissioned as well as opening a road currently closed in grizzly bear habitat.

14. Swan View filed suit in United States District Court for the District of Montana, alleging that the Moose Post-Fire ROD violated NFMA, NEPA, ESA, and APA. This Court ruled in favor of Defendants on all claims on December 12, 2006.

15. Swan View appealed this Court's ruling on Swan View's NFMA claim. On January 6, 2009, the Ninth Circuit issued a decision requiring this Court to remand the Moose Post-Fire Record of Decision to the Forest Service to "establish and apply a standard for evaluating when land use values 'compete' with grizzly bears' needs within the meaning of the Forest Plan" for the Flathead National Forest.

16. On March 19, 2009 Swan View sent a letter to the Flathead National Forest asking "to be fully informed in advance of, and subsequently involved in, the process by which you 'establish and apply a standard for evaluating when land use values compete with grizzly bears' needs within the meaning of the Forest Plan.'"

17. The Flathead National Forest never responded to Swan View's letter of March 19, 2009 in any way.

18. On April 10, 2009, Supervisor Cathy Barbouletos signed the Moose Post-Fire Amended Record of Decision, finding that the Moose Post-Fire Project was

“compatible” and thus did not “compete” with grizzly bears. The AROD confirmed all aspects of the original ROD.

19. The Flathead National Forest never solicited public comments or conducted any public process in formulating the provisions of the AROD.

20. On June 2, 2009 Swan View sent a 60-day Notice of Intent to Sue under the Endangered Species Act over the Moose Post-Fire Project AROD to the Secretary of Agriculture, the Secretary of Interior, the U.S. Forest Service, and others. The notice is attached here as Exhibit 1.

21. Neither the U.S. Forest Service (“Forest Service”) nor the U.S. Fish and Wildlife Service (“FWS”) has responded in any way to the 60-day Notice of Intent to Sue.

22. The Moose ROD acknowledges that the project will not comply with Flathead National Forest Plan Amendment 19 standards, due largely to re-opening a portion of Road #316 and by leaving 10 culverts in roads to otherwise be decommissioned by the Moose ROD and Big Mountain ROD.

23. The Moose ROD employs two site-specific Forest Plan amendments to allow the project’s noncompliance with Amendment 19 standards, one allowing stream-bearing culverts to remain in place on decommissioned roads and one allowing excessive road densities to allow a portion of Road 316 to be reopened.

24. The site-specific amendments to the Flathead National Forest Plan do not assure that four demographic recovery criteria—six-year average of 22 female

bears with cubs, six-year average of 10 female bears with cubs in Glacier National Park, human-caused mortality not to exceed 4% of the minimum population estimate, and human-caused mortality of female bears not to exceed 30% of total mortality—will be met.

25. In the Moose project, the USFS has modified significantly the provisions of the Flathead Forest Plan that relate to road closures, road obliteration, and compliance with the Interagency Grizzly Bear Guidelines. The Forest Service has abandoned numerous standards in the Forest Plan, specifically standards that call for road closures to achieve specific road densities for grizzly security, standards specifying road obliteration that includes elimination of passage structures over watercourses, and standards for minimizing harm to aquatic habitat that call for eliminating culverts.

26. The FWS determined the Flathead Plan would not jeopardize grizzly bears only after Amendment 19 was added to the Plan.

27. The Forest Service and FWS are required by § 7 of the ESA to insure that their actions are not likely to jeopardize the continued existence of threatened grizzly bears.

28. The Moose project AROD jeopardizes the continued existence of threatened grizzly bears and does not contribute to grizzly bear recovery.

29. The Moose project AROD is not compatible with the recovery of the grizzly bear population in the NCDE.

30. The Moose project AROD proposed activities compete with grizzly bear habitat.

31. The Moose project AROD does not favor the interests of the grizzly bear and therefore violates the Flathead Forest Plan and the ESA.

**COUNT 1**  
**NFMA**

32. Plaintiffs reallege each preceding paragraph as though stated in full.

33. Individual forest projects must be consistent with the applicable Forest Plan, including all amendments. 16 U.S.C. § 1604(i).

34. The Moose project AROD is inconsistent with the Flathead Forest Plan, including Amendment 19 and its standards, does not favor the needs of grizzly bears, and therefore violates NFMA, and is further arbitrary, capricious and an abuse of discretion in violation of APA § 706 (2).

**COUNT 2**  
**ESA**

35. Plaintiffs reallege each preceding paragraph as though stated in full.

36. The Forest Service and FWS fail here in their duties to conserve and recover grizzly bear populations under §7 of the ESA and its implementing regulations.

Which require that their actions are not likely to jeopardize or adversely affect listed species. *See* 16 U.S.C. § 1536(a)(2) and APA §§ 706(1) and (2).

**COUNT 3**  
**NEPA**

37. Plaintiffs reallege each preceding paragraph as though stated in full.
38. The Forest Service failed to conduct any public process when directed by the court to “establish and apply a standard for evaluating when land use values ‘compete’ with grizzly bears’ needs within the meaning of the Forest Plan” for the Flathead National Forest. This failure to solicit public comments and or conduct any public process is a violation of NEPA, and is further arbitrary, capricious and an abuse of discretion in violation of APA § 706 (2).

**RELIEF**

WHEREFORE, Plaintiffs respectfully request this Court to grant the following relief:

1. Issue a Declaratory Judgment that Defendants are in violation of NFMA, NEPA, and ESA.
2. Enter a Permanent Injunction enjoining the Forest Service from conducting any road-decommissioning activities that leave existing or re-installed stream-bearing culverts in place in the Moose Project area.
3. Enter a Permanent Injunction enjoining the Forest Service from re-opening portions of Road 316.

4. Enter a Mandatory Injunction ordering the Forest Service to remove stream-bearing culverts in each decommissioned road in the Moose Project area.
5. Award Plaintiffs their costs, including reasonable attorney and expert witness fees.
6. Grant any and all other relief that the Court deems just and proper under the circumstances.

Dated this 26th day of August, 2009.

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