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Attorney for Plaintiff

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

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FRIENDS OF THE BITTERROOT,  
ALLIANCE FOR THE WILD  
ROCKIES,

Plaintiffs,

vs.

MATT ANDERSON, Supervisor,  
Bitterroot National Forest; LEANNE  
MARTEN, Regional Forester, U.S.  
Forest Service Northern Region; U.S.  
FOREST SERVICE,

Defendants.

CV-20-

COMPLAINT FOR INJUNCTIVE  
AND DECLARATORY RELIEF

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## I. INTRODUCTION

1. This is a civil action for judicial review under the Administrative Procedure Act of the U.S. Forest Service's (USFS) authorization of the Gold Butterfly Project (Project) on the Bitterroot National Forest (Forest).
2. Plaintiffs Friends of the Bitterroot and Alliance for the Wild Rockies attest that the decision approving the Project is arbitrary and capricious, an abuse of discretion, and/or otherwise not in accordance with law.
3. Defendants' approval of the Project violates 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., the Healthy Forest Restoration Act, 16 U.S.C. §6591 et seq, and the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 et seq.
4. Plaintiffs seek a declaratory judgment, injunctive relief, the award of costs, and expenses of suit, including attorney and expert witness fees pursuant to the Equal Access to Justice Act, 28 U.S.C. §2412, and/or such other relief as this Court deems just and proper.

## II. JURISDICTION

5. This action arises under the laws of the United States and involves the United States as a Defendant. Therefore, this Court has subject matter jurisdiction over the claims specified in this Complaint pursuant to 28 U.S.C. §§ 1331,

1346.

6. An actual controversy exists between Plaintiffs and Defendants. Plaintiffs' members use and enjoy the Forest for hiking, fishing, hunting, camping, photographing scenery and wildlife, and engaging in other vocational, scientific, spiritual, and recreational activities. Plaintiffs' members intend to continue to use and enjoy the area frequently and on an ongoing basis in the future.
7. The aesthetic, recreational, scientific, spiritual, and educational interests of Plaintiffs' members 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, HFRA, 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, 5 U.S.C. §§ 705 & 706, and 16 U.S.C. §1540.
8. Plaintiffs fully participated in the available administrative review processes for the Project; thus they have exhausted administrative remedies. The Court therefore has jurisdiction to review Plaintiffs' APA claims.

### III. VENUE

9. Venue in this case is proper under 28 U.S.C. §1391(e) and Local Rule

3.2(b). Defendant Anderson resides in Ravalli County, which is within the Missoula Division of the United States District Court for the District of Montana.

#### IV. PARTIES

10. Plaintiff FRIENDS OF THE BITTERROOT is a tax-exempt, non-profit public interest organization based in Hamilton, Montana and dedicated to preserving wildlands and wildlife, and protecting the forests and watersheds of their region as they work for a sustainable relationship with the environment. Members of the Friends of the Bitterroot observe, enjoy, and appreciate native wildlife, water quality, and terrestrial habitat quality, and expect to continue to do so in the future, including in the Project area. Their members' professional and recreational activities are directly affected by Defendants' failure to perform their lawful duty to protect and conserve these ecosystems. Friends of the Bitterroot brings this action on its own behalf and on behalf of its adversely affected members.
11. 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 Missoula, Montana. The Alliance has over

2,000 individual members, many of whom are located in Montana. Members of the Alliance observe, enjoy, and appreciate Montana's native wildlife, water quality, and terrestrial habitat quality, and expect to continue to do so in the future, including in the Project area. Alliance's members' professional and recreational activities are directly affected by Defendants' failure to perform their lawful duty to protect and conserve these ecosystems.

Alliance for the Wild Rockies brings this action on its own behalf and on behalf of its adversely affected members.

12. Defendant MATT ANDERSON is the Forest Supervisor for the Bitterroot National Forest, and is the decision-maker who signed the Record of Decision approving the Project.
13. Defendant LEANNE MARTEN is the Regional Forester for Region One/Northern Region of the U.S. Forest Service. Her office denied Plaintiffs' objections to the Project.
14. Defendant UNITED STATES FOREST SERVICE (USFS) is an administrative agency within the U.S. Department of Agriculture, and is responsible for the lawful management of our National Forests, including the Bitterroot National Forest.

## V. FACTUAL ALLEGATIONS

### A. Project and Project Area

15. The Gold Butterfly Project area includes 55,147 acres of National Forest System lands and is located within Ravalli County east of Corvallis, Montana in the Sapphire Mountains on the Bitterroot National Forest.
16. The Project area includes a portion of the Stony Mountain Inventoried Roadless Area but no treatment activities will occur within the Inventoried Roadless Area or Wilderness or Research Natural Areas.
17. The Project authorizes commercial logging on 5,461 acres, including clearcutting across wide swaths of forest.
18. The Project also allows non-commercial activities such as cutting smaller trees and planting trees on 7,238 acres.
19. The Project further allows prescribed burning activities on 4,854 acres.
20. In addition, the Project allows road maintenance on 80.1 miles, construction of 6.4 miles of new system road, which will be closed to the public, conversion of 0.22 miles of open public road to a non-motorized trail, decommissioning 5.8 miles of existing system roads, decommissioning of 16.5 miles of illegal “undetermined” roads, addition of 16.5 miles of illegal “undetermined” roads to the system as closed roads, construction of 7.7 miles of temporary road, construction of 8.5 miles of tracked line machine

trail, construction of 1.1 miles temporary skid trail, and closure (storage) of 5 miles of system road.

21. Finally, the Project will relocate two trailheads, create new horse campsites at the Gold Creek Campground, and replace Arrastra and Grizzly Creek culverts.
22. Regarding illegal roads, also referred to as “undetermined” roads, which are not lawfully on the Forest as part of the National Forest roads system but nonetheless exist on the ground, the Gold Butterfly project has about 33 miles total of these unlawful undetermined roads.
23. The Project allows approximately 16.5 miles of these undetermined roads to become part of the lawful transportation system and be stored, i.e. closed, after logging operations. These roads would be opened to accommodate commercial logging operations and log hauling in commercial logging units for this Project.
24. Another 16.5 miles of these undetermined roads would be decommissioned.
25. Project activities would require the transport of approximately 6,000-7,000 truckloads of material.
26. All Project activities are expected to be completed within 8 years of Project initiation.
27. All temporary roads and trails would be obliterated after use.

28. Temporary roads and trails would be closed to public use by a closure order during operations.
29. The Forest Service anticipates \$1,572,054 in total revenue from the Project.
30. The Forest Service anticipates the following costs from the Project:

|   |              |
|---|--------------|
| Sale Preparation                                    | -\$732,432   |
| Sale Administration                                 | -\$518,806   |
| Road BMP Upgrades                                   | -\$321,761   |
| Tree Planting                                       | -\$1,193,400 |
| Road Decommissioning                                | -\$1,000     |
| Road Storage  | -\$2,995     |
| Meadow Restoration, Herbicide                       | -\$1,000     |
| Meadow Restoration, Biocontrol                      | -\$3,000     |
| Willow Trailhead Relocation                         | -\$36,200    |
| Burnt Fork Trailhead Relocation                     | -\$21,000    |
| Non-Commercial Thinning                             | -\$78,995    |
| Non-Commercial Thinning, White Bark Pine            | -\$240,870   |
| Non-Commercial Thinning, Mechanical Fuels Reduction | -\$52,325    |
| Maintenance Burn                                    | -\$62,100    |
| Restoration Burn                                    | -\$521,600   |

|                                  |           |
|----------------------------------|-----------|
| Brush Disposal – Purchaser       | \$72,933  |
| Brush Disposal – Forest Service  | \$715,809 |
| Erosion Control                  | \$151,481 |
| Roadside Herbicide               | \$60,900  |
| Temporary Roads                  | \$86,722  |
| Road Maintenance                 | \$261,234 |
| Unusual Condition Adjustment**   | \$150,511 |
| Specified Roads -Construction    | \$381,739 |
| Specified Roads - Reconstruction | \$102,782 |
| Road Decommissioning             | \$3,440   |
| Road Storage                     | \$15,830  |

31. These costs add up to \$5,790,869, which means the Project results in a net

loss of \$4.2 million.

## **B. Procedural Background**

32. Scoping for the Project commenced on June 9, 2017.
33. The draft EIS was issued in June 2018, and the Forest Service accepted public comment from June 15, 2018 to July 30, 2018.
34. Over 100 individuals, including dozens of local residents, submitted comments on the draft EIS; the vast majority of commenters opposed the Project and requested a different alternative, including one comment letter signed by 3,000 members of the public. In summary, the majority of the public requested an alternative with no old growth logging and no new roads.
35. The final EIS and draft Record of Decision were issued in March 2019.
36. The Forest Service held a pre-decisional administrative objection period from July 3, 2019 to August 8, 2019.
37. 19 objections were filed against the Project.
38. On September 3, 2019, the Forest Service denied the objections.
39. A revised final EIS was issued in October 2019.
40. The final Record of Decision was issued on November 15, 2019.

## **C. Wildland Urban Interface Designation**

41. The Record of Decision (ROD) states: “Approximately 90 percent of treatment acres are within the insect and disease treatment area designated

under HFRA Title VI. Seventy-six percent of treated acres would occur within the Wildland-Urban Interface.”

42. The Final EIS for the Project implies that the “Bitterroot Community Wildfire Protection Plan (2006)” delineated the wildland urban interface used for the Project.
43. However, there is no map in the EIS that clearly sets forth the wildland urban interface as defined by the 2006 Bitterroot Community Wildfire Protection Plan.
44. Although a new wildland urban interface map was proposed in a 2009 update to the Bitterroot Community Wildfire Protection Plan, the Ravalli County Commissioners did not approve the newer 2009/2010 wildland urban interface map as described in a 2009 update to the Bitterroot Community Wildfire Protection Plan. *See* “Will a twice-burned county change its ways?,” High Country News (October 24, 2016); “County commissioners decline to act on WUI,” Bitterroot Star (December 28, 2011); Ravalli County Commissioners’ Meeting Minutes (December 20, 2011).
45. The 2006/2007 Bitterroot Community Wildfire Protection Plan wildland urban interface is defined as follows: “For the purposes of the CWPP, the Wildland Urban Interface (WUI) is defined as the zone where structures or other human development meet to intermingle with undeveloped wildland or

vegetative fuels. The width of the zone is determined on a site-specific basis to protect values at risk from wildland fire. At-Risk Communities are those communities identified and addressed in the CWPP that are considered at risk by wildland fire. At-Risk Communities, as defined in the Healthy Forest Restoration Act 2004, are comprised of:

- An interface community as defined in the notice “Wildland Urban Interface Communities Within the Vicinity of Federal Lands That Are at High Risk From Wildfire” issued by the Secretary of Agriculture and the Secretary of Interior in accordance with Title IV of the U.S. Dept. of Interior and Related Agencies Appropriations Act, 2001. OR
- A group of homes and other structures with basic infrastructure and services (such as utilities and collectively maintained transportation routes) within or adjacent to Federal land AND
- In which conditions are conducive to large-scale wildland fire disturbance event AND
- For which a significant threat to human life or property exists as a result of a wildland fire disturbance event.

At-Risk Ravalli County communities include: Florence, Stevensville, Victor, Pinesdale, Corvallis, Hamilton, Darby, West Fork, Sula, and other areas where numerous residents live in the Wildland Urban Interface in Ravalli County that meet the above mentioned criteria.” The EIS does not disclose this wildland urban interface definition or demonstrate that the Project wildland urban interface complies with this

definition.

46. In contrast, the 2009/2010 Bitterroot Community Wildfire Protection Plan wildland urban interface would have dramatically expanded the wildland urban interface, and included a one-mile buffer zone along the entire National Forest boundary, regardless of housing density.
47. It appears from maps discovered in the Project file that the Forest Service used the 2009/2010 wildland urban interface map rather than the 2006/2007 wildland urban interface map because the map used for the Project appears to contain a one-mile buffer zone along the entire National Forest boundary, regardless of housing density:
48. The Project file received by Plaintiffs does not contain the 2006/2007 wildland urban interface map that is currently in effect in Ravalli County.
49. Instead, the Project file contains two maps that both set forth the 2009/2010 Bitterroot Community Wildfire Protection Plan wildland urban interface map, which was never authorized by the Ravalli County Commissioners.
50. In response to public concerns and questions regarding the Project and how many people actually live adjacent to the Project area, the Forest Service refused to disclose any such analysis and instead simply stated:  
  
“Landownership including individual addresses for the WUI adjacent to the project area are available through Ravalli County tax records and the

Montana Cadastral Mapping Project (<http://svc.mt.gov/msl/mtcadastral>).”

51. In other words, although there is available data, the Forest Service did not complete an analysis of the available data on human or structure density to support its delineation of the Project wildland urban interface.
52. Indeed, it appears that the vast majority of private land along the Project area boundary is “vacant” agricultural land with no living units.
53. Accordingly, it is unclear how much, if any, of the Project area would meet the definition of wildland urban interface from the 2006 Bitterroot Community Wildfire Protection Plan, which adopts the statutory HFRA definition and requires either an “interface community” or a “[a] group of homes and other structures with basic infrastructure and services . . . .”
54. The Federal Register notice cited in the HFRA defines “interface community” as “3 or more structures per acre, with shared municipal services” or “a population density of 250 or more people per square mile . . . .” 66 Fed. Reg at 753, 2001 WL 7426.

#### **D. Old Growth**

55. Lesica (1996) estimates that old growth occupied 20 – 50% of the pre-settlement forest landscape in low and many mid elevation habitats, and between 18 and 37% in mid to upper elevation habitats.
56. The Project EIS discloses that the Sapphire area currently has only 10% old

growth, which is significantly less than historic conditions regardless of elevation.

57. Arno et al. (1995b) states that old growth ponderosa pine was abundant in the accessible lower elevation valleys and mountain slopes in western Montana and has been logged heavily for more than 100 years. They suggest that less than one percent of the old growth seral ponderosa pine type in western Montana has no history of logging.
58. Logging in the Bitterroot Valley started in the late 1840's and continued through the 1870's. Early logging was mostly to produce logs and other wood products for use by local farmers and ranchers. This subsistence logging took the most accessible timber from the foothills and lower slopes of the Bitterroot Mountains. Once nearby timber was exhausted, the mills were dismantled and moved to a new location.
59. In the 1880's through the early 1900's the Bitterroot's lumber industry expanded from subsistence logging and milling for local use to providing mass quantities of timber and lumber for hardrock mines, railroads and growing cities throughout Montana. Completion of the railroad to its terminus at Darby in 1889 allowed lumber companies to exploit timber on a large scale from the upper valley, along Tin Cup Creek and the West Fork of the Bitterroot. The logging by the Anaconda Copper Company was

extensive. In some areas “Nothing is left standing, for every tree over 6 inches in diameter is converted into lumber.”

60. This historic logging dramatically reduced the amount of old growth in the Bitterroot drainage, particularly the ponderosa pine in the lower elevations, and explains the lack of old growth in some 3rd order drainages today.
61. Old growth habitat in the Gold Butterfly Project area is composed largely of forest types dominated by Douglas-fir and ponderosa pine at lower to mid elevations, and Douglas-fir, Engelmann spruce and subalpine fir at mid to upper elevations.
62. The Project analysis indicates that old growth distribution within the Project area fails the applicable Forest Plan Standards for old growth habitat in one of the third order drainages designated as “Management Area 1,” and four of the third order drainages designated as “Management Area 2.”
63. The Project EIS represents that the Project will allow commercial logging of approximately 750 acres of old growth forest, including approximately 350 acres of clear-cutting.
64. In contrast, the Record of Decision states that no clear-cutting, i.e. “regeneration harvest,” will occur in old growth, though commercial logging will still occur in 750 acres of old growth forest.
65. The Record of Decision represents that the new logging prescription for

these old growth areas formerly proposed for clearcutting is to “leav[e] most of the large green trees and snags while removing mostly co-dominant and intermediate trees that show symptoms of susceptibility to western spruce budworm and/or other insects and diseases. In addition . . . create canopy openings around dominant ponderosa pine trees to encourage natural regeneration of ponderosa pine.” Additionally, two former clearcutting units (111 acres) in old growth will now be non-commercial, and “would remove target specie(s) within a unit up to a certain diameter limit.”

66. More specifically, internal agency meeting notes state that old growth logging will “remov[e]  $\frac{1}{2}$  to  $\frac{2}{3}$  of the basal area.”
67. Internal agency meeting notes further indicate that the criteria the Forest Service will use to determine whether a logged stand still counts as old growth “for most of the units is 8 TPA [trees per acre] over 21” dbh and 170 years or older” and “Whitebark pine and subalpine fir old growth requirements are 10 [trees per acre] > 13” dbh.”
68. Internal agency meeting notes further estimate “that at least  $\frac{1}{3}$  or slightly more of the overstory will remain in many of the units.”
69. The public was concerned about old growth logging, and noted in comments on the draft EIS that “[t]he DEIS does not provide a diameter limit on trees to be cut in old growth stands. The DEIS fails to explain how this meets

HFRA requirements.”

70. In response, the Forest Service stated: “Title VI of the Healthy Forest Restoration Act requires the project to maximize the retention of old growth and large trees, as appropriate for the forest type, to the extent that the trees promote stands that are resilient to insect and disease. A diameter limit is not specified in the HFRA language.”
71. Other than the two sentences quoted above, there is no analysis in the EIS for the Project regarding how old growth logging across 750 acres could be consistent with the HFRA mandate requiring maximum retention of old growth and large trees.
72. Internal agency meeting notes found: “During our conversations, it became obvious that it is difficult to definitively say that that old growth characteristics would be retained following treatment. Any treatment activity (e.g., logging, burning, etc.) has the potential to remove stands from old growth.”
73. Internal agency meeting notes further found: (1) “Have to verify old growth by measurement, not possible to use satellite imagery[;]” (2) “Cannot determine which units are old growth or the distribution of old growth until all the data is collected and processed[;]” and (3) “Cannot determine the need for treatment or type of treatments in old growth stands until data is

collected and processed.”

74. The HFRA only allows projects under 16 U.S.C. § 6591a (d) in order to “reduce the risk or extent of, or increase the resilience to, insect or disease infestation” or “reduce hazardous fuels.” Additionally, the area where the project occurs must be at risk of “substantially increased tree mortality due to insect or disease infestation” or at risk of “dieback due to infestation or defoliation by insects or disease” or “in an area in which the risk of hazard trees poses an imminent risk to public infrastructure, health, or safety.”
75. The Forest Plan defines “salvage harvest” as “the cutting of trees that are dead, dying, or deteriorating (e.g., because they are overmature or materially damaged by fire, wind, insects, fungi, or other injurious agencies) before they lose their commercial value as sawtimber.”
76. The Forest Plan defines “sanitation harvest” as “the removal of dead, damaged, or susceptible trees, essentially to prevent the spread of pests or pathogens and so promote forest hygiene.”
77. Forest Plan Forest-wide Management Standard (1)(e)(6) states: “Sanitation and salvage harvests may occur in stands classified as old growth if old growth characteristics are retained after logging.”
78. Forest Plan Forest-wide Management Standard (1)(e)(2) states: “Stand conditions that qualify as old growth will vary by habitat type and landform.

Criteria to consider for identifying old growth include:

- large trees, generally 15 per acre greater than 20 inches dbh for species other than lodgepole pine and 6 inches for lodgepole pine;
- canopy closure at 75 percent of site potential;
- stand structure usually uneven-aged or multistoried;
- snags, generally 1.5 per acre greater than 6 inches dbh and .5 per acre greater than 20 inches;
- more than 25 tons per acre of down material greater than 6 inches diameter;
- heart rot and broken tops in large trees are common; and
- mosses and lichens are present.”

79. The Forest Plan also provides the following definition of old growth: “A forest stand with 15 trees per acre greater than 20 inches dbh (6 inches in lodgepole pine) and canopy closure that is 75 percent of site potential. The stand is uneven-age or multistoried. There should be 1.5 snags per acre greater than 6 inches dbh; 0.5 snags per acre greater than 20 inches dbh; and 25 tons per acre of down material greater than 6 inches diameter. Heart rot and broken tops are common and mosses and lichens are present.”
80. In the Project EIS, the Forest Service admitted that it was not using the Forest Plan criteria/definition of old growth, but rather using an alternative

definition set forth in an internal agency document that has never been peer-reviewed, subjected to NEPA, or amended to the Forest Plan: “old growth criteria used were the more current R1 definitions in Green et al. (1992, errata 2005).”

81. Public commenters requested that the Forest Service clarify how the Project will retain the old growth characteristics required by the Forest Plan. In response, the Forest Service refused to address the issue in the EIS, and instead directed the public to a document in the Project file – the “Wildlife Specialist Report, pages 10-16 (PF-WILD-001).”
82. The Wildlife Specialist Report at pages 10-16 does not disclose the Forest Plan old growth definition/criteria or apply them, nor does it disclose the actual criteria used to assess old growth for the Project area.
83. Consistent with the agency meeting notes quoted above, a document in the project file designated as SILV-013 indicates that the following criteria were used to calculate old growth for the Project:
  - 10 trees per acre greater than 20 inches dbh in Douglas fir forest type and 8 trees per acre greater than 20 inches dbh in ponderosa pine forest type;
  - no requirements for canopy closure;
  - no requirements for uneven-aged or multi-storied structure;

- no requirements for snags per acre over 6 inches dbh or snags per acre over 20 inches dbh;
- no requirements for tons per acre for down material greater than 6 inches diameter;
- no requirements for heart rot and broken tops;
- no requirements for mosses and lichens.

84. Accordingly, the old growth criteria used for the Project are significantly less protective than the old growth definition and criteria set forth in the Forest Plan standard, although the Forest Service never clearly disclosed that fact to the public.

85. In particular, the Forest Plan mandates 15 large trees per acre for old growth, but the Forest Service old growth calculations for the Project only require 8 or 10 large trees per acre; also, the Forest Plan mandates 75% canopy closure, while the agency indicates the Project will only retain 33% canopy closure.

86. The Forest Plan further mandates that in Management Area 1, old growth must be in stands of at least 40 acres, and must comprise at least 3% of each third order drainage.

87. The Forest Plan further mandates that in Management Areas 2 and 3a and 3c, old growth must be in stands of at least 40 acres, and must comprise at least

8% of each third order drainage.

88. The Forest Plan further mandates that in Management Areas 3b old growth must be in stands of at least 40 acres, and must comprise either 25% or 50% of riparian areas.
89. Neither the Project EIS nor the Wildlife Specialist Report discloses whether all old growth acres counted in the Project area occur in stands of 40 acres or more.
90. A document in the Project file designated as SILV-006 appears to find that a number of stands are counted as old growth although they are less than 40 acres.
91. Without application of the Forest Plan old growth definition and criteria and the 40-acre stand size minimum, it is unclear how many drainages actually meet the Forest Plan old growth retention standards now or post-Project, and thus it is not possible to determine whether old growth logging is proposed for drainages that currently violate the Forest Plan old growth standards.
92. Moreover, if all areas designated for old growth logging by the Project are logged down to the Project old growth criteria, none of those areas will comply with the Forest Plan definition of old growth post-Project.

**E. Elk**

93. Many elk in this area winter on private lands several miles to the west of the Project area. Some of these elk travel through the Project area during their spring or fall migrations between winter range and summer range high in the Sapphires. However, many of the elk in HD 261 have essentially become year-round residents on lower elevation private lands, and no longer migrate to summer ranges due to the high road density on public lands.
94. In terms of population, the ten-year average from elk counts in the area (722) is below the elk count for the same area in 1987, when the Forest Plan was approved (792).
95. Forest Plan Forest-wide Management Standard (1)(e)(14) states: “Manage roads through the Travel Plan process to attain or maintain 50 percent or higher elk habitat effectiveness (Lyon, 1983) in currently roaded third order drainages. Drainages where more than 25 percent of roads are in place are considered roaded. Maintain 60 percent or higher elk habitat effectiveness in drainages where less than 25 percent of the roads have been built.”
96. Six different drainages in the Project area violate the Forest Plan elk habitat effectiveness standard.
97. The Project Record of Decision states: “Implementation of the Selected Alternative, as modified, will require a project-specific forest plan

amendment to the 1987 Bitterroot Forest Plan to suspend certain Forest Plan standards relating to elk habitat effectiveness and thermal cover. Discussion concerning the plan amendment and its effects is found in Appendix D of the Gold Butterfly FEIS.”

98. The Forest Service states: “The plan amendment is guided by the 2012 Planning Rule, which has different provisions from the 1982 Planning Rule procedures that the Forest Service used to develop the existing forest plan.”
99. Public commenters raised the concern that the EIS “fails to document an analysis consistent with the 2012 Planning Rule regarding amendments” and that the Forest Service failed to “use the best available scientific information to inform the amendment process.”
100. Public commenters further stated: “The purpose of the amendments, as stated in the FEIS, is ‘to allow six third order drainages in the analysis area to not meet EHE standards’. . . . To merely ‘allow’ deviation of the Forest Plan is not adequate justification . . . .”
101. The 2012 NFMA planning regulations require:
  - (b) Amendment requirements. For every plan amendment, the responsible official shall:
    - (5) Determine which specific substantive requirement(s) within §§ 219.8 through 219.11 are directly related to the plan direction being added, modified, or removed by the amendment and *apply such requirement(s) within the scope*

*and scale of the amendment. . . .*

(i) The responsible official's determination must be based on the purpose for the amendment and the effects (beneficial or adverse) of the amendment, and *informed by the best available scientific information*, scoping, effects analysis, monitoring data or other rationale.

(ii) When basing the determination on adverse effects:

(A) The responsible official must determine that a specific substantive requirement is directly related to the amendment when scoping or NEPA effects analysis for the proposed amendment reveals substantial adverse effects associated with that requirement, *or when the proposed amendment would substantially lessen protections for a specific resource or use.*

. . .

(6) For an amendment to a plan developed or revised under a prior planning regulation, *if species of conservation concern (SCC) have not been identified* for the plan area and if scoping or NEPA effects analysis for the proposed amendment reveals substantial adverse impacts to a specific species, *or if the proposed amendment would substantially lessen protections for a specific species*, the responsible official *must determine whether such species is a potential SCC, and if so, apply section § 219.9(b) with respect to that species as if it were an SCC.*

. . .

36 C.F.R. §219.13 (emphases added).

102. Accordingly, pursuant to the NFMA planning regulation requirements found at 36 C.F.R. §219.13, the Forest Service must:

(a) apply the relevant substantive planning regulation to the amendment,

(b) use the best available scientific information to inform the amendment, and

(c) determine whether the affected species is a potential species of conservation concern, and apply 219.9(b) if the amendment would substantially lessen protections for that species.

103. 36 C.F.R. §219.9 (a) requires: “The plan must include plan components, including standards or guidelines, to maintain or restore the diversity of ecosystems and habitat types throughout the plan area. In doing so, the plan must include plan components to maintain or restore: (i) Key characteristics associated with terrestrial . . . ecosystem types . . . .”

104. 36 C.F.R. §219.9 (b) requires:

(1) The responsible official *shall determine whether or not the plan components* required by paragraph (a) of this section provide the ecological conditions necessary to . . . *maintain a viable population* of each species of conservation concern within the plan area. If the responsible official determines that the plan components required in paragraph (a) are insufficient to provide such ecological conditions, *then additional, species-specific plan components, including standards or guidelines, must be included* in the plan to provide such ecological conditions in the plan area.

(2) If the responsible official determines that it is beyond the authority of the Forest Service or not within the inherent capability of the plan area to maintain or restore the ecological conditions to maintain a viable population of a species of conservation concern in the plan area, then the responsible official shall:

(i) *Document the basis for that determination* (§ 219.14(a)); and

(ii) *Include plan components*, including standards or guidelines, to maintain or restore ecological conditions within the plan area *to contribute* to maintaining a viable population of the species within its range. In providing such plan components, the responsible official shall coordinate to the extent practicable with other Federal, State, Tribal, and private land managers having management authority over lands relevant to that population.

(c) Species of conservation concern. For purposes of this subpart, a species of conservation concern is a species, other than federally recognized threatened, endangered, proposed, or candidate species, that is known to occur in the plan area and for which the regional forester has determined that the best available scientific information indicates substantial concern about the species' capability to persist over the long-term in the plan area.

105. Accordingly, pursuant to the NFMA planning regulation requirements found at 36 C.F.R. §219.9 (b), the Forest Service must:

(a) determine whether a particular species affected by an amendment is species of conservation concern;

(b) determine whether general forest plan standards and guidelines will protect adequate habitat to ensure viability of that species; and

(c) include additional species-specific standards and guidelines to protect habitat for that species in order to maintain/contribute to maintaining viable populations of that species if general standards and guidelines are insufficient to ensure viability.

106. Additionally, 36 C.F.R. §219.3 requires: “The responsible official *shall use* the best available scientific information to inform the planning process required by this subpart for . . . amending . . . a plan . . . . In doing so, the responsible official *shall determine* what information is the most accurate, reliable, and relevant to the issues being considered. The responsible official *shall document how* the best available scientific information was used to inform the . . . amendment decision . . . . Such documentation must: *Identify what information was determined to be the best available scientific information, explain the basis for that determination, and explain how the information was applied to the issues considered.*”
107. Similarly, 36 C.F.R. §219.14 (3) requires: “The decision document must include: . . . The documentation of how the best available scientific information was used to inform planning, the plan components, and other plan content, including the plan monitoring program (§ 219.3)[.]”
108. In its response to comments, the Forest Service acknowledged that “[m]ultiple objectors contend the project-specific amendment to the Forest Plan. . . violates NFMA and the 2012 Planning Rule.” However, it argued:
- The Forest Plan amendments included in the project are site-specific plan amendments to address elk habitat effectiveness, thermal cover, and hiding cover. The amendments are needed because the proposed action does not meet elk related Forest Plan Standards (See FEIS Appendix D). The

FEIS (Appendix D) describes the use of more current research to analyze elk habitat than what was utilized in the Forest Plan. The project addressed the above criteria of 36 CFR 219.13(a) by the following:

...

5. The Forest Service determined the substantive requirement the amendments applied is 219.10 (a)(5) – 10: Multiple Use – a- Integrated resource management for multiple use – 5 - Habitat conditions, subject to the requirements of § 219.9, for wildlife, fish, and plants commonly enjoyed and used by the public; for hunting, fishing, trapping, gathering, observing, subsistence, and other activities (in collaboration with federally recognized Tribes, Alaska Native Corporations, other Federal agencies, and State and local governments). FEIS Appendix D discusses how the plan amendment meets the planning rule requirement.

109. Regarding elk habitat effectiveness, Appendix D states:

[elk habitat effectiveness] s of 50% and 60% equate to 2 miles and 1 mile of open road per square mile, respectively (Lyon 1983). This standard supports the Forest Plan objectives of maintaining habitat to support viable populations of wildlife species, and cooperating with the state of Montana to maintain the current level of big game hunting opportunities.

...

The [elk habitat effectiveness] model described by Lyon was the best information available at the time the Plan was implemented. Subsequently, a model developed by Hillis et al. (1991) has been used in Bitterroot National Forest project planning to maintain elk security during hunting season when elk are most vulnerable.

110. Appendix D further states: “We have added an elk security analysis (Hillis et al. 1991) to our environmental analysis protocol that has proven to be a

better tool than [elk habitat effectiveness] analysis for achieving the Forest Plan objective to maintain elk populations and hunting season opportunities in cooperation with the Montana Department of Fish, Wildlife and Parks.”

111. The implication in Appendix D is that the Forest Service will implement a new, better elk habitat standard – Hillis elk security – to maintain viable populations of elk habitat on the Forest.
112. However, contrary to the 2012 planning regulations, the Forest Service fails to disclose in its decision documents what the best available science, Hillis et al (1991), actually requires, and the agency fails to document how Hillis et al (1991) was applied.
113. Hillis et al (1991) requires: “To provide a reasonable level of bull survival, each security area must be a nonlinear block of hiding cover  $\geq$  250 acres in size and  $\geq$  one-half mile from any open road. Collectively, these blocks must equal at least 30% of the analysis unit.”
114. Hillis et al (1991) further states: “Closed roads-Roads may be closed (to motorized travel) to provide security and a buffer between security areas and open roads. However, the minimum distance between open roads and security areas increases as closed-road densities increase within both the security area and buffer. Closed roads located within security areas may increase elk vulnerability by providing hunters with walking and shooting

lanes. Use of horses and increasing use of mountain bikes by hunters on closed roads allows them better access and increases elk vulnerability, compared to unroaded habitats. Therefore, roads within security areas should be kept to an absolute minimum.”

115. Elk security blocks currently constitute only 8.0% of the Project elk analysis unit.
116. Elk security areas are limited by an extensive road system in parts of the herd unit area and a lack of hiding cover in large areas.
117. Elk security blocks would be reduced to 7.7% from this Project.
118. There does not appear to be a calculation of closed roads anywhere in the Project record.
119. Thus, the Project area does not meet the Hillis standard now, and the Project will move the area farther away from meeting this standard. These facts are not disclosed to the public in the Project EIS or Record of Decision despite the statement or implication in the EIS that Hillis is the best available science that the Bitterroot National Forest now uses to maintain elk viability.
120. In summary, the Forest Service has eliminated the prior elk habitat standard (habitat effectiveness) for this Project area and replaced it with nothing; although the agency mentions Hillis, it does not actually apply that science. There is no discussion as to how the Forest Service can meet its mandate to

maintain or contribute to the maintenance of viable populations of elk in the area if there is no elk habitat standard at all that is actually applied to the area.

121. This Court has previously rejected a very similar approach where the Forest Service cited Hillis as the best available science but did not actually comply with it:

In its Final EIS, [] it wrote: “This Group recognized that Hillis et al. (1991) still represents the best science and is applicable to the ... Custer National Forest.” To now suggest that the “indicators” do not necessarily apply is misleading and flies in the face of the Final EIS's plain language.

Moreover, the Forest Service is not free to set aside the “indicators” as mere recommendations, since they were used “to show how proposed treatment is consistent with the Forest Plan standards to maintain and improve habitat for big game.” When the Forest Service employs criteria to show a project's compliance with NFMA or a Forest Plan, it must comply with those criteria, regardless of whether they are labeled as “advisory.” [] Otherwise, the EIS is “misleading in violation of NEPA.” []

*Native Ecosystems Council v. Weldon*, 848 F. Supp. 2d 1207, 1214–15 (D. Mont. 2012), *vacated as moot due to a wildfire that occurred during the appeal* by 2012 WL 5986475.

122. Regarding violations of specific regulatory provisions, the Forest Service fails to apply the substance of 36 C.F.R. §219.9 to the amendment, fails to determine whether the amendment substantially lessens protections for elk, fails to analyze whether elk should be treated as a species of conservation concern, fails to formally adopt Hillis as the elk standard that applies to the

Project, fails to disclose what Hillis requires, fails to disclose that the Project does not comply with Hillis, and fails to disclose that Project implementation will further violate Hillis.

123. The table below summarizes the Forest Service’s failures to demonstrate compliance with the NFMA planning regulations:

| NFMA PLANNING REGULATION REQUIREMENT   | CITATION                                   | ADDRESSED BY FEIS APP. D?  |
|--|--|--|
| Apply the relevant substantive regulation to the amendment, which is identified in this case as 219.10 (a)(5), subject to the requirements of § 219.9.             | 36 C.F.R. §219.13                          | No discussion or application of 219.9.   |
| Use the best available science.  | 36 C.F.R. §219.13                          | Implies Hillis is best available science but does not apply it.  |
| Determine whether amendment would substantially lessen protections for the affected species  | 36 C.F.R. §219.13                          | Not addressed.   |
| Determine whether the affected species is potential species of conservation concern  | 36 C.F.R. §219.13;<br>36 C.F.R. §219.9 (b) | Not addressed.   |
| Determine whether general forest plan standards and guidelines will protect adequate habitat to ensure viability of that potential species of conservation concern | 36 C.F.R. §219.9 (b)                       | Implies habitat effectiveness was necessary for viability but now believes Hillis should be used for same purpose. |

|   |  |  |
|---|--|--|
| <p>Include additional species-specific standards and guidelines to protect habitat for that potential species of conservation concern in order to maintain/contribute to maintaining viable populations of that species if general standards and guidelines are insufficient to ensure viability.</p> | <p>36 C.F.R. §219.9 (b)</p>                            | <p>Implies that Hillis should be applied for this purpose, but does not actually apply it.</p>                                     |
| <p>In the decision document, identify what information was determined to be the best available scientific information</p>   | <p>36 C.F.R. §219.3;<br/>36 C.F.R. §219.14<br/>(3)</p> | <p>Implies Hillis is best available science, but does not actually disclose the relevant habitat criteria set forth in Hillis.</p> |
| <p>In the decision document, explain the basis for that determination regarding what information was determined to be the best available scientific information</p>   | <p>36 C.F.R. §219.3;<br/>36 C.F.R. §219.14<br/>(3)</p> | <p>States that Hillis has “proven to be a better tool than EHE” to maintain viable populations of elk.</p>                         |
| <p>In the decision document, explain how the information was applied to the issues considered</p>   | <p>36 C.F.R. §219.3;<br/>36 C.F.R. §219.14<br/>(3)</p> | <p>No explanation of how Hillis criteria was applied.</p>  |

VI. CLAIMS FOR RELIEF

**FIRST CLAIM FOR RELIEF**

*The Forest Service’s failure to use the Forest Plan definition of old growth, and consequent failures to demonstrate compliance with Forest Plan old growth standards for retention and viability, violates NFMA, NEPA, and the APA.*

124. All previous paragraphs are incorporated by reference.
125. As discussed above, the Forest Plan sets forth a specific definition/criteria for old growth forest.
126. As discussed above, the Forest Service does not dispute that it did not apply the Forest Plan definition/criteria for old growth forest to the Project area.
127. Instead of using the Forest Plan definition/criteria for old growth forest, the Forest Service used less protective criteria.
128. The Forest Service's failure to use the Forest Plan definition of old growth renders it impossible to determine (a) whether the Project area complies with Forest Plan old growth retention standards, (b) whether old growth forest that will be logged by the Project (approximately 750 acres) will comply with the Forest Plan old growth definition after logging operations, (c) whether old growth logging is proposed in areas that will violate the Forest Plan old growth retention standards after Project logging, and (d) whether the Forest Service is ensuring the viability of species dependent on old growth forest (as required by Forest Plan standard) since viability is premised on application of the Forest Plan definition/criteria for old growth and not on the significantly less protective criteria that the agency actually applied to the Project. In other words, the entire old growth analysis for the Project area is invalid until the Forest Service applies the Forest Plan old growth definition.

129. The Forest Service’s failure to use the Forest Plan definition of old growth, and consequent failures to demonstrate compliance with Forest Plan old growth standards for retention and viability, violates NFMA and the APA.

The Ninth Circuit recently addressed a similar issue and found:

In its second NFMA claim, the Alliance contends that the Project’s definition for “old forest habitat” is inconsistent with the definition of “old forest” in the 2003 Forest Plan. Specifically, the Alliance contends that the Project uses the criteria for “old forest habitat” found in the WCS amendments, as opposed to the Plan.

Appendix A to the 2003 Forest Plan establishes the desired vegetative conditions for “old forest.” . . . a change to the definition of “old forest” potentially affects vegetation conditions throughout the Lost Creek Project.

Here, again, the Lost Creek Project deviates from a standard set forth in the Payette Forest Plan. . . . It also adopts the definition of “old forest habitat” from the WCS DEIS, instead of the definitions of “old forest” and “old growth” from the 2003 Plan. . . .

On this record we cannot say that the Forest Service “considered the relevant factors and articulated a rational connection between the facts found and the choice made.” []. The Forest Service’s decision to adopt a new definition of “old forest habitat” for the Project area is, accordingly, arbitrary and capricious.

*All. for the Wild Rockies v. United States Forest Serv.*, 907 F.3d 1105, 1116–17 (9th Cir. 2018).

130. The Forest Service’s failure to take a hard look at this issue in the EIS and

failure to fully and fairly disclose to the public in the EIS that it was applying an old growth definition significantly less protective than the Forest Plan old growth definition violates NEPA.

131. As the Ninth Circuit has held time and time again, the “scope of review does not include attempting to discern which, if any, of a validly-enacted Forest Plan's requirements the agency thinks are relevant or meaningful. If the Forest Service thinks any provision of the . . . Plan is no longer relevant, the agency should propose amendments to the . . . Plan altering its standards, in a process complying with NEPA and NFMA, rather than discount its importance in environmental compliance documents.” *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 961 (9th Cir. 2005).

### **SECOND CLAIM FOR RELIEF**

*The Forest Plan amendment approved for the Project violates NFMA and its regulations, NEPA, and the APA.*

132. All previous paragraphs are incorporated by reference.
133. As discussed above, the Project area violates the Forest Plan elk habitat effectiveness standard, and therefore, the Forest Service issued a Forest Plan amendment for the Project to eliminate the elk habitat effectiveness standard.
134. In the EIS Appendix D analysis of the Forest Plan amendment, the Forest Service implies that elk habitat effectiveness is no longer the best available

science; rather, Hillis et al (1991) security is now the best available science.

135. However, the EIS fails to disclose the criteria for Hillis elk security, which require at least 30% of an area to be maintained as elk security. The EIS also fails to disclose the fact that the Project analysis area currently only has 8.0% elk security, and the Project will further reduce that elk security to 7.7%. The failure to disclose this information renders the EIS misleading in violation of NEPA. Additionally, the Forest Service's failure to comply with the standard that it chose for itself in place of elk habitat effectiveness violates NFMA and is arbitrary and capricious in violation of the APA. *See Native Ecosystems Council*, 848 F. Supp. 2d at 1214–15 (same failures with regard to Hillis elk security).

136. Furthermore, the Forest Plan amendment violates a number of provisions from the 2012 NFMA planning regulations as detailed in the table above, and summarized here: the Forest Service fails to apply the substance of 36 C.F.R. §219.9 to the amendment, fails to determine whether the amendment substantially lessens protections for elk, fails to analyze whether elk should be treated as a species of conservation concern, fails to formally adopt Hillis as a Forest Plan standard, fails to disclose what Hillis requires, fails to disclose that the Project does not comply with Hillis, and fails to disclose that Project implementation will further violate Hillis. These failures to

comply with the NFMA planning regulations violate NFMA and the APA.

### **THIRD CLAIM FOR RELIEF**

*The Forest Service's use of HFRA Section 6591a (d) authority to approve the Project violates HFRA, NEPA, and APA.*

137. All previous paragraphs are incorporated by reference.
138. The Record of Decision (ROD) states: "This project is proposed under Healthy Forests Restoration Act (HFRA; 16 USC §6591) authority. The project area lies within Designated Areas that were requested by the Governor of Montana and designated by the Secretary of Agriculture."
139. The Record of Decision (ROD) states: "Analysis and documentation has been carried out in accordance with Section 602(d) of HFRA."
140. The HFRA mandates: "Projects carried out under this subsection shall be considered authorized hazardous fuel reduction projects for purposes of the authorities described in paragraph (2)." 16 U.S.C. § 6591a (d)(3).
141. The HFRA mandates: "An authorized hazardous fuel reduction project shall be conducted consistent with the resource management plan and other relevant administrative policies or decisions applicable to the Federal land covered by the project." 16 U.S.C. § 6512 (b).
142. In violation of 16 U.S.C. § 6512 (b), the Project is not consistent with the Bitterroot Forest Plan. First, as discussed above in the First Claim for

Relief, the Project violates the Forest Plan old growth requirements. Second, as discussed above in the Second Claim for Relief, the Project violates Forest Plan standards for elk habitat effectiveness and elk cover, as well as the implicitly-adopted elk security standard. Thus, the Forest Service cannot lawfully use the HFRA to authorize this Project.

143. In violation of NEPA, the Project EIS never discloses the HFRA forest plan consistency requirement at 16 U.S.C. § 6512 (b) to the public, and therefore fails to take a hard look at whether HFRA authority can be lawfully used to approve the Project.
144. In addition, the HFRA mandates: “The Secretary shall carry out projects under subsection (d) in a manner that maximizes the retention of old-growth and large trees, as appropriate for the forest type, to the extent that the trees promote stands that are resilient to insects and disease.” 16 U.S.C. § 6591a (e).
145. In violation of 16 U.S.C. § 6591a (e), the Project allows the logging of old growth and large trees across hundreds of acres – old growth logging will occur on approximately 750 acres. Moreover, as discussed above in the First Claim for Relief, the Forest Service refused to use the Forest Plan definition of old growth for the Project and instead used a less protective definition. Thus, although the Forest Plan requires retention of “large trees,

generally 15 per acre greater than 20 inches dbh for species other than lodgepole pine and 6 inches for lodgepole pine” in order to qualify as old growth, the Project analysis only required 10 trees per acre greater than 20 inches dbh in Douglas fir forest type and 8 trees per acre greater than 20 inches dbh in ponderosa pine forest type in order to qualify as old growth. The Forest Plan definition also requires 75% canopy closure in old growth where possible, but the Project allows logging down to 33% canopy closure in old growth. In other words, by using a less protective old growth definition than what the Forest Plan actually requires, the Forest Service has *minimized* retention of old growth and large trees in the Project area, not *maximized* retention of old growth and large trees as required under the HFRA.

146. Because the Project violates the HFRA, the Forest Service cannot lawfully use HFRA authority to approve this Project. Thus, the Project must be remanded for preparation of a new EIS under normal NEPA procedures, including but not limited to a full consideration of a reasonable range of alternatives.

## VII. RELIEF REQUESTED

For all of the above-stated reasons, Plaintiffs request that this Court award the following relief:

- A. Declare that the Project violates the law;
- B. Either vacate the Project decision or enjoin implementation of the Project;
- C. Award Plaintiffs their costs, expenses, expert witness fees, and reasonable attorney fees under EAJA; and
- D. Grant Plaintiffs any such further relief as may be just, proper, and equitable.

Respectfully submitted this 10th Day of July, 2020.

/s/ Rebecca K. Smith

Rebecca K. Smith

PUBLIC INTEREST DEFENSE CENTER, PC

Attorney for Plaintiffs