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10 **IN THE UNITED STATES DISTRICT COURT**
11 **FOR THE DISTRICT OF MONTANA**
12 **MISSOULA DIVISION**

13 ALLIANCE FOR THE WILD ROCKIES,

14 Plaintiff,

15 vs.

16 TOM TIDWELL, Regional Forester of Region
One of the United States Forest Service, and
17 UNITED STATES FOREST SERVICE, an
agency of the U.S. Department of Agriculture,

18 Defendants.
19

CV 08-168-M-DWM-JCL

**COMPLAINT FOR INJUNCTIVE AND
DECLARATORY RELIEF**

20 **I. INTRODUCTION**
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23 1. This is a civil action for judicial review under the Administrative Procedure Act of the
24 U.S. Forest Service's April 20, 2007 Record of Decision (ROD) approving the Kootenai
25 National Forest Invasive Plant Management Project (Project) for the Kootenai National
26 Forest. Plaintiff Alliance for the Wild Rockies attests that the final decision approving
27 the Project is arbitrary and capricious, an abuse of discretion, and/or otherwise not in

1 accordance with law.

2 2. The ROD authorizes noxious weed treatment on 94,000 acres over the next 15 years.
3 Specifically, the ROD authorizes aerial herbicide application by helicopter on 30 - 35,000
4 acres, ground-based herbicide application on 45 - 55,000 acres, hand-pulling on five
5 acres, use of biological controls (i.e. weed-eating insects) on 375 acres, and seeding on 1 -
6 3,000 acres.

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

11 4. Plaintiff seeks declaratory and injunctive relief to protect Plaintiff's interests at law,
12 including its interests that the Forest Service comply with NEPA's mandates to consider
13 reasonable alternative actions, conduct Environmental Assessments for site-specific
14 projects that tier to a programmatic Environmental Impact Statement, candidly disclose
15 environmental impacts, and take a hard look at environmental impacts, as well as
16 NFMA's mandates to protect biodiversity, and mitigate harm and prevent irreparable
17 injury to the environment.

18 5. Plaintiff requests that the Court set aside the ROD approving the Project, pursuant to 5
19 U.S.C. § 706(2)(A), and that the Court enjoin the Forest Service from implementing this
20 Project.

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

24 **II. JURISDICTION**

25 7. This action arises under the laws of the United States and involves the United States as a
26 defendant. Therefore, this Court has subject matter jurisdiction over the claims specified
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1 in this Complaint pursuant to 28 U.S.C. §§ 1331, 1346.

2 8. An actual controversy exists between Plaintiff and Defendants. Plaintiff's members use
3 and enjoy the Kootenai National Forest for hiking, fishing, hunting, camping,
4 photographing scenery and wildlife, and engaging in other vocational, scientific, spiritual,
5 and recreational activities. Plaintiff's members intend to continue to use and enjoy the
6 area frequently and on an ongoing basis in the future.

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

13 10. Plaintiff submitted timely written comments concerning the Project and fully participated
14 in the administrative review and appeal process, thus it has exhausted administrative
15 remedies. Defendants' denial of Plaintiff's administrative appeal was the final
16 administrative action of the U.S. Department of Agriculture Forest Service. Thus, the
17 challenged decision is final and subject to this Court's review under the APA, 5 U.S.C.
18 §§ 702, 704, and 706.

19 **III. VENUE**

20 11. Venue in this case is proper under 28 U.S.C. § 1391(e) and LR 3.3(a)(1). Defendant
21 Tidwell, an officer of the U.S. Forest Service with its Region One office in Missoula,
22 resides within the Missoula Division of the United States District Court for the District of
23 Montana, and is the principal representative in this District of Defendant U.S. Forest
24 Service (Forest Service). The challenged decisions were upheld by the Regional Forester,
25 and are representative of official policies and procedures common to the Northern
26 Region.

IV. PARTIES

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2 12. Plaintiff ALLIANCE FOR THE WILD ROCKIES (Alliance) is a tax-exempt, non-profit public
3 interest organization dedicated to the protection and preservation of the native
4 biodiversity of the Northern Rockies Bioregion, its native plant, fish, and animal life, and
5 its naturally functioning ecosystems. Its registered office is located in Helena, Montana.
6 The Alliance has over 2,000 individual members, including members who reside on
7 private land within or close to the Kootenai National Forest, and more than 600 member
8 businesses and organizations, many of which are located in Montana. Members of the
9 Alliance work as fishing guides, outfitters, and researchers, who observe, enjoy, and
10 appreciate Montana’s native wildlife, water quality, and terrestrial habitat quality, and
11 expect to continue to do so in the future, including in the Project area. Alliance’s
12 members’ professional and recreational activities are directly affected by Defendants’
13 failure to perform their lawful duty to protect and conserve these ecosystems by
14 approving the challenged Project.

15 13. Defendant TOM TIDWELL is the Regional Forester for the Northern Region of the U.S.
16 Forest Service, and in that capacity is charged with ultimate responsibility for insuring
17 that decisions made at the National Forest (unit) level in the Northern Region are
18 consistent with applicable laws, regulations, and official policies and procedures.

19 14. Defendant UNITED STATES FOREST SERVICE is an administrative agency within the U.S.
20 Department of Agriculture, entrusted with the management of our National Forests.

V. PROCEDURAL BACKGROUND

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22 15. On April 20, 2007, Paul Bradford, Forest Supervisor for the Kootenai National Forest,
23 signed the Record of Decision approving the Kootenai National Forest Invasive Plant
24 Management Project (Project) on the Kootenai National Forest.

25 16. Plaintiff Alliance for the Wild Rockies filed an administrative appeal of the ROD on
26 June 11, 2007, and it was denied, constituting the final decision of the Forest Service.

VI FACTUAL ALLEGATIONS

- 17. The Project authorizes noxious weed treatment on 94,000 acres of the Kootenai National Forest over the next 15 years. Specifically, the Project authorizes ground-based herbicide application on 45 - 55,000 acres, aerial herbicide application on 30 - 35,000 acres, hand-pulling on five acres, use of biological controls (i.e. weed-eating insects) on 375 acres, and seeding on 1 - 3,000 acres.
- 18. The stated purposes of the Project are to prevent the introduction and spread of new and established noxious weeds, restore native plant communities and improve forage, treat weeds on private lands near the Forest, and limit the spread of weeds in wilderness areas.
- 19. The Environmental Impact Statement (EIS) for the Project does not consider any alternatives that include preventative measures, such as standards addressing road-building, timber harvest, or cattle grazing.
- 20. The Forest Service admits that the noxious weed problem on the Forest threatens native plant diversity, and is getting worse, and that the Project will not stop the spread of noxious weeds on the Kootenai National Forest.
- 21. The public overwhelmingly opposes the Project. Twelve of the 14 individual letters commenting on the Draft EIS opposed the Project. Six of ten organizations commenting on the Draft EIS opposed the Project. Additionally, a petition signed by over 90 local residents opposed the Project.
- 22. The Project authorizes herbicides to be aeri ally sprayed over areas with tree and shrub cover, and the design criteria do not limit spraying based on percent canopy closure.
- 23. The design criteria for aerial spraying do not preclude the use of any herbicide.
- 24. The design criteria state that the Forest Service will create an annual plan for weed treatment with site-specific interdisciplinary analysis and mitigation measures.
- 25. The EIS requires that the annual analysis maps annual herbicide application locations and determines (a) effects on local sensitive, threatened, or endangered plants, (b)

1 displacement areas for grizzly bears, (c) bald eagle nest buffer zones, (d) herbicide limits
2 for each affected 6th code HUC watershed, (e) cumulative effects of new regeneration
3 harvest, (f) cumulative effects from yearly livestock grazing, (g) cumulative effects of the
4 annual plan in general, and (h) wolf dens and rendezvous sites. The annual analysis for
5 2008 did not include this information and was not analyzed in an Environmental
6 Assessment (EA) subject to public notice and comment.

7 26. The design criteria allows aerial herbicide spraying if wind speed is less than six miles
8 per hour.

9 27. The most recent aerial herbicide drift study cited by the Forest Service in the Final EIS
10 recommends applying aerial herbicides as a last resort, and at speeds no greater than three
11 miles per hour, not applying during an inversion, and not applying when there is rain
12 forecasted in the next 24 hours. None of these measures were incorporated into the
13 design criteria for the Project.

14 28. The design criteria allow aerial herbicide application by helicopter for two days annually
15 in each grizzly bear management unit, and requires that adjacent undisturbed
16 “displacement areas” be available.

17 29. The Forest Service admitted that helicopter operations will occur over core grizzly bear
18 habitat and will displace grizzly bears up to one mile from spray operations.

19 30. The Forest Service admitted that herbicides will be aurally sprayed over spring forage
20 vegetation for grizzly bears, thereby killing native forage plants and rendering the area
21 unsuitable for foraging by grizzly bears for two to three years.

22 31. The EIS did not discuss the potential toxic effects of herbicides on grizzly bear
23 reproduction.

24 32. The Forest Service concluded that the Project would not have an adverse impact on
25 grizzly bears.

26 33. The Forest Service admitted that the application of one herbicide, 2, 4-D, at all
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1 application rates may have adverse impacts on migratory birds, particularly on the 30,000
2 acres proposed for aerial spraying. The Forest Service did not analyze the viability of
3 migratory birds on the Kootenai National Forest in light of this potential for adverse
4 impact.

5 34. The human health discussion in the Final EIS did not candidly disclose the actual physical
6 effects of herbicides on humans, as found in scientific studies. Instead it primarily
7 discussed the problem in terms of “hazard quotients” and undefined degrees of risk (low
8 risk, moderate risk, significant risk) determined by risk assessment modeling.

9 **VII. CLAIMS FOR RELIEF**

10 **FIRST CLAIM FOR RELIEF**

11 The Project EIS violates NEPA because it fails to consider
12 an alternative that included preventive measures.

13 35. All above paragraphs are incorporated by reference.

14 36. NEPA requires that agencies consider all reasonable alternatives in an Environmental
15 Impact Statement.

16 37. The first two listed purposes for the Project are to prevent noxious weed infestations.

17 38. The Forest Service acknowledged that road-building and maintenance, logging, and cattle
18 grazing have created and exacerbated noxious weed infestations and will continue to do
19 so in the future, even if the Project is implemented.

20 39. The Forest Service did not consider any EIS alternative with preventive measures, such as
21 Forest-wide thresholds or standards, that address these causes of the noxious weed
22 problem.

23 40. The Project therefore violates NEPA because the Forest Service failed to consider a
24 reasonable alternative with preventive measures that address the causes of noxious weed
25 infestations.

26 **SECOND CLAIM FOR RELIEF**

27 The Project ROD violates NEPA because the Forest Service will not conduct

1 NEPA analysis for its annual site-specific herbicide treatment plans.

- 2 41. All above paragraphs are incorporated by reference.
- 3 42. NEPA requires that agencies conduct an Environmental Assessment to determine and
4 mitigate the site-specific environmental impacts of a project, and ensure that the agency
5 and public are fully informed of the direct, indirect, and cumulative effects of a site-
6 specific action.
- 7 43. The ROD stated that the Forest Service will create an annual plan for weed treatment with
8 site-specific interdisciplinary analysis and mitigation measures. The annual analysis must
9 map annual herbicide application locations and determine (a) effects on local sensitive,
10 threatened, or endangered plants, (b) displacement areas for grizzly bears, (c) bald eagle
11 nest buffer zones, (d) herbicide limits for each affected 6th code HUC watershed, (e)
12 cumulative effects of new regeneration harvest, (f) cumulative effects from yearly
13 livestock grazing, (g) cumulative effects of the annual plan in general, and (h) wolf dens
14 and rendezvous sites.
- 15 44. The annual analysis for 2008 did not include this information and was not analyzed in an
16 Environmental Assessment (EA) subject to public notice and comment.
- 17 45. The Forest Service's failure to analyze its 2008 treatment plan in an Environmental
18 Assessment, and its plan (evidenced in the ROD) to continue this omission for all future
19 annual treatment plans, violates NEPA.

20 **THIRD CLAIM FOR RELIEF**

21 The Forest Service is violating NFMA by failing to address the causes
22 of noxious weed infestations in its Forest-wide Invasive Plant Management Plan.

- 23 46. All above paragraphs are incorporated by reference.
- 24 47. NFMA requires that the Forest Service maintain native plant diversity and avoid
25 irreversible damage to soils.
- 26 48. The Forest Service admits that noxious weed infestations destroy native plant diversity by
27 occupying native plant habitat and requiring repetitive herbicide treatments.

- 1 49. The Forest Service admits that noxious weed infestations may irreversibly degrade soil
2 productivity, quality, and quantity.
- 3 50. The Forest Service admits that major causes of the noxious weed infestations are its own
4 land management activities, including logging, road building and use, and cattle grazing.
- 5 51. The Forest Service admits that – even with herbicide application over thousands of acres
6 – its land management activities will to cause noxious weed infestations over thousands
7 of acres at increasing rates.
- 8 52. The Forest Service’s failure to address the causes of noxious weed infestations, by
9 requiring preventive measures in the EIS, violates NFMA because it is not ensuring the
10 protection of soils and native plant communities.

11 **FOURTH CLAIM FOR RELIEF**

12 The Forest Service is violating the APA and NFMA because the Project
13 will adversely impact the Cabinet-Yaak grizzly bear.

- 14 53. All above paragraphs are incorporated by reference.
- 15 54. The APA requires that agency findings be supported by substantial evidence in the
16 record.
- 17 55. NFMA requires that the Forest Service ensure species viability of native wildlife species.
- 18 56. The ROD authorized aerial herbicide application by helicopter over grizzly bear habitat
19 each year for 15 years, and admits that each application will displace grizzly bears up to
20 one mile.
- 21 57. In light of the precarious status of the Cabinet-Yaak grizzly bear, the Forest Service’s
22 finding that this displacement is not an adverse impact is arbitrary and capricious, in
23 violation of the APA, and the Project approval violates NFMA because it fails to ensure
24 the viability of the Cabinet-Yaak grizzly bear.

25 **FIFTH CLAIM FOR RELIEF**

26 The EIS violates NEPA and NFMA because the it does not
27 take a hard look at impacts of the Project on the viability of migratory songbirds.

- 1 58. All above paragraphs are incorporated by reference.
- 2 59. NFMA requires that the Forest Service ensure the viability of native wildlife species.
- 3 60. The Forest Service admits that herbicide application at all foreseeable rates may adversely
- 4 impact insectivorous migratory songbirds.
- 5 61. The Forest Service fails to include a discussion in the EIS regarding how it will ensure
- 6 the viability of insectivorous migratory songbirds in light of these likely adverse impacts.
- 7 The failure to include this discussion violates NEPA’s hard look requirement and
- 8 NFMA’s requirement to ensure species viability.

9 **SIXTH CLAIM FOR RELIEF**

10 The Forest Service is violating NEPA and the APA because the EIS does not take a
11 hard look at the adequacy of the mitigation measures for aerial herbicide drift.

- 12 62. All above paragraphs are incorporated by reference.
- 13 63. NEPA requires that the Forest Service take a hard look at the impacts of its projects, and
- 14 provide analytical support for proposed mitigation measures. Likewise, the APA requires
- 15 that the Forest Service support its decisions with substantial evidence in the record.
- 16 64. The most recent science on aerial herbicide drift – cited by the Forest Service in the EIS –
- 17 recommended the following mitigation measures: (1) applying aerial herbicides as a last
- 18 resort; (2) applying herbicides at speeds no greater than three miles per hour; (3) not
- 19 applying herbicides during an inversion; and (4) not applying herbicides when there is
- 20 rain forecasted in the next 24 hours.
- 21 65. The design criteria for the Project does not incorporate any of these mitigation measures,
- 22 and neither the ROD nor the EIS discuss why they have been excluded nor why the
- 23 existing design criteria are adequate.
- 24 66. The Forest Service’s failure to take a hard look at aerial herbicide drift mitigation
- 25 measures violates NEPA and the APA.

26 **SEVENTH CLAIM FOR RELIEF**

27 The EIS violates NEPA because it did not

1 candidly disclose the human health effects of herbicides.

2 67. All above paragraphs are incorporated by reference.

3 68. NEPA requires that the Forest Service candidly disclose and discuss the impacts of its
4 proposed projects in an EIS.

5 69. In the EIS discussion on the human health effects of herbicides on the general public, the
6 Forest Service discusses the issue in terms of risk levels and hazard quotients. It does not
7 candidly disclose the actual physical effects of these herbicides, as found in scientific
8 studies. The language of the EIS misleads the general public by implying that the only
9 people who may experience adverse health effects from herbicide exposure are
10 “sensitive” individuals and workers in occupational exposure scenarios.

11 70. The Forest Service’s failure to candidly disclose the potential physical effects of herbicide
12 exposure on the general public violates NEPA.

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14 **VII. REQUEST FOR RELIEF**

15 **For all of the above-stated reasons, Plaintiff requests that this Court:**

16 A. Declare that the Forest Service’s failure to consider an alternative that addresses the cause
17 of the noxious weed problem violated NEPA and NFMA;

18 B. Declare that the Forest Service’s plan and practice to avoid conducting an Environmental
19 Assessment for each annual herbicide treatment plan violates NEPA;

20 C. Declare that the Forest Service’s plan to spray herbicide by helicopter over grizzly bear
21 habitat fails to ensure the viability of the grizzly bear, in violation of NFMA;

22 D. Declare that the Forest Service’s failure to discuss the Project’s effects on the viability of
23 migratory songbirds in the EIS violates NEPA and NFMA;

24 E. Declare that the Forest Service’s failure to take a hard look at the adequacy of its
25 proposed mitigation measures for aerial herbicide drift violates NEPA;

26 F. Declare that the Forest Service’s failure to candidly disclose the physical effects of
27

- 1 herbicides on human health violates NEPA;
- 2 G. Enjoin the implementation of the Project;
- 3 H. Award Plaintiff its costs, expenses, expert witness fees, and reasonable attorney fees
- 4 under EAJA; and
- 5 I. Grant Plaintiff such further relief as may be just, proper, and equitable.
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7 DATED this 1st day of December, 2008

8
9 /s/ Rebecca K. Smith

10 Rebecca K. Smith
11 One of Plaintiff's Attorneys
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