

Matthew Bishop (MT # 9968)
Western Environmental Law Center
103 Reeder's Alley
Helena, MT 59601
Ph. (406) 324-8011
bishop@westernlaw.org

Local Counsel

Susan Jane M. Brown (WSB #31224, OSB #05460) *Pro Hac Vice* App. Pending
Western Environmental Law Center
4107 NE Couch St.
Portland, OR. 97232
Ph. 503-914-1323
brown@westernlaw.org

Counsel for Plaintiffs

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

ALLIANCE FOR THE WILD ROCKIES,
and NATIVE ECOSYSTEMS COUNCIL,
nonprofit corporations,

Plaintiffs,

vs.

JANE L. COTTRELL, in her official
capacity as acting Regional Forester, and
the UNITED STATES FOREST
SERVICE, an agency of the United States
Department of Agriculture,

Defendants.

Cause No. CV 03- M-DWM

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF

(NATIONAL ENVIRONMENTAL
POLICY ACT; NATIONAL
FOREST MANAGEMENT ACT;
APPEALS REFORM ACT;
ADMINISTRATIVE PROCEDURE
ACT)

INTRODUCTION

1. This case involves a challenge to the United States Forest Service's adoption of the revised Beaverhead-Deerlodge National Forest (BDNF) Land and Resource Management Plan (revised LRMP or revised Forest Plan) and the Rat Creek salvage timber sale, which implements the revised LRMP.
2. The revised LRMP does not ensure the protection and management of adequate snag habitat.
3. The proposed Project exacerbates the paucity of snag habitat by removing snags through logging an area that has already been burned and repeatedly logged in the past.
4. Plaintiffs seek an order:
 - a. declaring that the Forest Service violated the National Environmental Policy Act and its implementing regulations in preparing and approving the revised Beaverhead-Deerlodge LRMP;
 - b. declaring that the revised Beaverhead-Deerlodge LRMP, final environmental impact statement, and record of decision are insufficient as a matter of law, and Order the Forest Service to withdraw the revised LRMP, FEIS, and ROD until such time as the agency demonstrates to this court that it has adequately complied with the law;
 - c. declaring that Defendant failed to comply with National

Environmental Policy Act (NEPA), National Forest Management Act (NFMA), Appeals Reform Act (ARA), and the Administrative Procedure Act (APA) when it prepared the Rat Creek EA and Decision Notice/Finding of No Significant Impact (DN/FONSI);

d. enjoining Defendant and its contractors, agents, etc. from undertaking any activities related to the Rat Creek timber sale and the revised Beaverhead-Deerlodge LRMP unless and until Defendant has complied with NFMA, NEPA, ARA, and the APA;

e. declaring that the Defendant violated the ARA in promulgating the “emergency situation” regulation found at 36 C.F.R. § 215.2 (2003);

f. setting aside the “emergency situation” definition found at 36 C.F.R. § 215.2 (2003);

g. awarding Plaintiffs their reasonable attorneys fees and costs incurred in this action pursuant to the EAJA, 28 U.S.C. § 2412; and

h. granting Plaintiffs such additional and further relief as the Court deems just and equitable.

5. The requested relief is necessary to preserve the status quo, to prevent illegal agency action, and to forestall irreparable injury to the environment.

JURISDICTION, VENUE, AND BASIS FOR RELIEF

6. Jurisdiction is proper in this Court pursuant to 28 U.S.C. §§ 1331 (federal

question), 2201 (injunctive relief), 2202 (declaratory relief), and 28 U.S.C. § 1346 (United States as a defendant).

7. This cause of action arises under the laws of the United States, including the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 et seq.; the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 et seq.; the Appeals Reform Act (ARA), 16 U.S.C. § 1612 note; and the National Forest Management Act (NFMA) 16 U.S.C. §§ 1600 et seq.

8. An actual, justiciable controversy exists between Plaintiffs and Defendant. The requested relief is proper under 28 U.S.C. §§ 2201 & 2202, and 5 U.S.C. §§ 705 & 706.

9. The decision giving rise to this complaint was made in Missoula, Montana by the Forest Service's regional office. Venue is properly vested in this Court by 28 U.S.C. § 1391(e).

10. If Plaintiffs prevail, Plaintiffs will seek an award of costs and fees, including attorneys' fees, pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

PARTIES

11. Plaintiff ALLIANCE FOR THE WILD ROCKIES (AWR) 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. AWR has more than 2,000 individual members, many of whom reside in Montana, and more than 600 member businesses and organizations, many of which are located in Montana. Members of AWR work as fishing guides, outfitters, and researchers who observe, enjoy, and appreciate Montana's native wildlife and the water quality of aquatic ecosystems in Montana's lakes and streams, as well as the habitat quality of terrestrial ecosystems upon which they depend, and expect to continue to do so in the future, including in the Project area. Members professional and recreational activities are directly affected by Defendants' failure to perform their lawful duty to protect and conserve these ecosystems.

12. Plaintiff NATIVE ECOSYSTEMS COUNCIL (NEC) is a non-profit Montana corporation with its principal place of business in Three Forks, Montana. Native Ecosystems Council is dedicated to the conservation of natural resources on public lands in the Northern Rockies. Its members use and will continue to use the Beaverhead-Deerlodge National Forest for work and outdoor recreation of all kinds, including fishing, hunting, hiking, horseback riding, and cross-country skiing. The Forest Service's unlawful actions adversely affect Native Ecosystems Council's organizational interests, as well as its members' use and enjoyment of the Beaverhead-Deerlodge National Forest, including the Project area. Native Ecosystems Council brings this action on its own behalf and on behalf of its

adversely affected members.

13. Defendant JANE L. COTTRELL is acting Regional Forester of Region 1 of the United States Forest Service, which includes the Beaverhead-Deerlodge National Forest. She replaces Tom Tidwell, Regional Forester of Region 1, who signed the Record of Decision for the revised Beaverhead-Deerlodge Land and Resource Management Plan before being appointed Chief of the United States Forest Service on June 17, 2009. She is sued in her official capacity.

14. Defendant UNITED STATES FOREST SERVICE is responsible for the lawful management of the national forests, including the Beaverhead-Deerlodge National Forest. Region 1 of the Forest Service, the Northern Region, is headquartered in Missoula, Montana. The Northern Regional Office signed the Record of Decision for the revised Beaverhead-Deerlodge LRMP, which is challenged in this action.

SUMMARY OF FACTS AND LAW

The National Forest Management Act

15. In 1976 Congress enacted the National Forest Management Act (NFMA) 16 U.S.C. § 1600 et seq., which governs the Forest Service's management of the National Forests.

16. The NFMA establishes a two-step process for forest planning. The first step requires the Forest Service to develop, maintain, and revise Land and Resource

Management Plans (LRMP) for each national forest. 16 U.S.C. § 1604(a). The LRMP guides natural resource management activities forest-wide, setting standards, management area goals and objectives, and monitoring and evaluation requirements.

17. LRMPs must be revised at least every 15 years. 16 U.S.C. § 1604(f)(5).

18. Forest Plans do not become effective until 30 days “after completion of public participation” in the revision process. 16 U.S.C. 1604(j).

19. The completion of “public participation” in the LRMP revision process occurs when the Forest Service issues decisions on the pending administrative appeals of the revised LRMP. 36 CFR § 217.16 (1989).

20. This court has held that projects tiered to a revised forest plan under administrative appeal cannot be implemented before the plan appeal has been decided. *Native Ecosystems Council v. Reese*, 212 F. Supp. 2d 1227, 1234 (D. Mont. 2002).

21. The second step of the NFMA planning process requires that site-specific decisions must be consistent with the broader forest plan. 16 U.S.C. § 1604(i).

22. NFMA also required the Forest Service to establish regulations that ensure that in implementing site-specific projects, “the harvesting system to be used is not selected primarily because it will give the greatest dollar return or the greatest unit output of timber.” 16 U.S.C. § 1604(g)(3)(E)(iv).

The Appeals Reform Act

23. The ARA was passed by Congress in 1992 to counter a Forest Service proposal to eliminate administrative appeals for timber sales and other Forest Service actions. 16 U.S.C. § 1612 note. It provides for an automatic 45-60 day stay of a decision pending appeal, “[u]nless the Chief of the Forest Service determines that an emergency situation exists . . .” ARA § (e).

24. Emergency situations were determined to not include economic loss to the government in the Forest Service’s regulations prior to 2003, and were limited to fighting emergencies such as forest fires. 58 Fed. Reg. 58,904, 58,905, 58,913 (Nov. 3, 1993); 36 C.F.R. § 215.10(d) (1993).

25. The Forest Service changes the definition of “emergency situation” in 2003 to include situations “that would result in substantial loss of economic value to the Federal Government if implementation of the decision were delayed.” 36 C.F.R. § 215.2 (2003).

Revision of the Beaverhead-Deerlodge National Forest Land and Resource Management Plan (revised LRMP)

26. In 2002 , The Beaverhead-Deerlodge National Forest began its forest plan revision process.

27. In February 2008 , the BDNF released the final environmental impact statement (FEIS) and Record of Decision (ROD) for the BDNF revised Land and Resource Management Plan (revised LRMP).

28. With the release of the FEIS and ROD, the Forest Service initiated an administrative appeals period for the LRMP pursuant to 36 C.F.R. § Part 217 (1989).

29. Plaintiffs timely filed administrative appeals of the revised LRMP, which are still pending as of the date of this filing.

30. To date, the Forest Service has not completed the LRMP revision process, because it has not yet issued decisions on the pending administrative appeals of the revised LRMP. 36 CFR § 217.16 (1989).

31. The Rat Creek decision notice and finding of no significant impact (DN/FONSI) states that “the Rat Creek Salvage EA is tiered to the 2009 Beaverhead-Deerlodge National Forest Land and Resource Management Plan (Forest Plan).”

The National Environmental Policy Act

32. Congress enacted NEPA in 1969, directing all federal agencies to assess the environmental impact of proposed actions that significantly affect the quality of the environment. 42 U.S.C. § 4332(2)(C). NEPA’s disclosure goals are two-fold: (1) to insure that the agency has carefully and fully contemplated the environmental effects of its action, and (2) to insure that the public has sufficient information to challenge the agency’s action.

33. The Council on Environmental Quality (CEQ) promulgated uniform regulations to implement NEPA that are binding on all federal agencies. 42 U.S.C. § 4342; 40 C.F.R. §§ 1500 et seq.

34. The Forest Service is required under NEPA to prepare an environmental impact statement (EIS) for any “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C).

35. When it is not clear whether or not an action will require the preparation of an EIS, the regulations direct agencies to prepare a document known as an Environmental Assessment (EA) in order to determine whether an EIS is required. 40 C.F.R. §§ 1501.4(b), 1508.9.

36. In addition to helping an agency determine whether or not to prepare an EIS, an EA serves to help an agency comply with NEPA even when no EIS is necessary by including a discussion of the need for the action, the consideration of alternatives to the action, the environmental impacts of the action, and a listing of the agencies and persons contacted and consulted. 40 C.F.R. § 1508.9.

37. An adequate NEPA environmental analysis must consider both direct and indirect environmental impacts of the proposed action. 40 C.F.R. § 1508.8.

38. Direct effects are caused by the action and occur at the same time and place as the proposed project. 40 C.F.R. § 1508.8(a).

39. Indirect effects are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. 40 C.F.R. § 1508.8(b).

40. Both indirect and direct impacts include “effects on natural resources and on the components, structures, and functioning of affected ecosystems,” as well as “aesthetic, historic, cultural, economic, social or health [effects].” 40 C.F.R. § 1508.8(b).

41. NEPA requires that environmental information be made available to public officials and citizens before decisions are made and before actions are taken. 40 C.F.R. §1500.1 (b). The information must be of high quality. Id. The purpose of this requirement is to ensure that the public has information that allows it to question and understand the decision made by the agency.

42. The NEPA regulations promulgated by the CEQ also require the Forest Service to “insure the professional integrity, including scientific integrity, of the discussions and analyses” in the environmental documentation that it prepares. 40 C.F.R. § 1502.24.

43. Furthermore, the Forest Service must disclose the extent to which the impact of the proposed action is scientifically controversial. 40 C.F.R. §§ 1502.16(a), 1502.16(b), 1508.27(b)(4), 1508.27(b)(5).

Scientific Controversy Surrounding Post-Fire Salvage Logging

44. There is currently considerable debate within the scientific community and the general public over the environmental impacts of post-fire logging. As stated by a Forest Service report, public debate on post-fire logging has intensified, achieving significant public awareness in 1994 with the passage of the infamous “salvage rider.” While the “salvage rider” has expired, the intense debate over post-fire logging on public lands continues.

45. In March 1995, a team of university and agency completed the report entitled “Wildfire and Salvage Logging, Recommendations for Ecologically Sound Post-Fire Salvage Logging and Other Post-Fire Treatments On Federal Lands in the West.” This report is commonly referred to as the “Beschta Report” in recognition of its lead author, Dr. Robert Beschta, of Oregon State University. The Beschta Report, which was prepared to propose guidelines for post-fire salvage logging and other post-fire treatments, concluded that there is “no ecological need for immediate intervention on the post-fire landscape.” The Report finds that post-fire logging will likely cause significant adverse impacts.

46. Subsequent research has concurred with the original Beschta Report, generally reaching the consensus that post-fire salvage logging is a “tax on the environment.”

47. There is considerable evidence that persistent, significant adverse environmental impacts are likely to result from salvage logging, based on many past cases of salvage projects, plus researchers' growing knowledge of ecosystem functions and land-aquatic linkages. These impacts include soil compaction and erosion, loss of habitat for cavity nesting species, and loss of structurally and functionally important large woody debris.

48. The Beschta Report recommends that all post-fire salvage logging in sensitive areas be prohibited. "Salvage logging by any method must be prohibited on sensitive sites, including: in severely burned areas (areas with litter destruction), on erosive sites, on fragile sites, in roadless areas, in riparian areas, on steep slopes, or any site where accelerated erosion is possible." In addition, "the building of new roads in the burned landscape should be prohibited."

49. In August 1995, the Forest Service issued a response to the Beschta Report authored by Richard Everett (hereinafter, "Everett Report"). While emphasizing the need to assess the principles of the Beschta Report on a case-by-case basis, the Everett Report commended the Beschta Report for identifying potential problems associated with post-fire salvage logging.

50. In January, 2000, the Forest Service's Pacific Northwest Research Station completed a comprehensive review of the scientific literature on post-fire logging, entitled "Environmental Effects of Postfire Logging: Literature Review and

Annotated Bibliography” (hereinafter, “Literature Review”). The Literature Review recognized two opposing viewpoints concerning post-fire logging. Proponents argue that logging should be included as a component of rehabilitation techniques, while opponents argue that logging will exacerbate the effects induced by the fire. The Literature Review was prepared to address the debate between these opposing views “by gathering the limited scientific information on post-fire logging into one document.”

51. The Rat Creek EA does not disclose or discuss any of this, or subsequent, research counseling that post-fire salvage logging is ecologically damaging, or that the practice is highly controversial. Reading the EA, the public would have no way of knowing that a lively scientific and public debate is underway regarding the sagacity of post-fire salvage logging.

The Rat Creek Fire and the Upper Big Hole Watershed

52. In August and September of 2007, the Rat Creek Fire burned approximately 26,600 acres of the Beaverhead-Deerlodge National Forest, Bitterroot National Forest, and private land west of Wisdom, Montana.

53. The fire burned part of the Beaver Lake Inventoried Roadless Area Number 1-003.

54. The Rat Creek fire burned at varying intensities, completely consuming some areas of forest entirely, while leaving other stands, patches, and individual trees alive.

55. The fire caused soil heating and soil erosion in some areas, which have impacted water quality.

The Rat Creek Post-Fire Salvage Project

56. The Wisdom Ranger District proposes to harvest 1,652 acres within the Rat Creek Burn perimeter.

57. The proposed action will occur in thirty five harvest units ranging in size from 3 to 320 acres.

58. The harvest will be ground-based and will entail the construction of approximately 7 miles of new roads and the reopening of approximately 3 miles of existing roads.

59. The harvest will result in eleven forest openings exceeding 40 acres in size.

60. On July 22nd 2009, the Forest Service issued a decision notice and finding of no significant impact (DN/FONSI) for the Rat Creek salvage sale.

61. Accompanying the DN/FONSI, the USFS wrote in a cover letter that on July 1st 2009, Chief of the Forest Service Abigail R. Kimbell made the determination that an emergency existed consistent with 36 C.F.R. § 215.10(b), and that the Rat Creek DN/FONSI was not subject to a stay of implementation pending

administrative appeal of the project. No other documentation accompanied the emergency situation determination.

62. On June 17th 2009, Department of Agriculture Secretary Tom Vilsack appointed Tom Tidwell as the new Chief for the U.S. Forest Service. Ms. Kimbell has not been Chief of the Forest Service since that time.

CLAIMS FOR RELIEF

COUNT 1

(NFMA Violation)

Failure to Resolve Administrative Appeal of Revised LRMP Prior to Implementing Site-Specific Project

63. Plaintiffs incorporate by reference all preceding paragraphs.

64. NFMA states that revised LRMPs do not become effective until 30 days “after completion of public participation” in the revision process. 16 U.S.C. 1604(j).

65. The completion of “public participation” in the LRMP revision process occurs when the Forest Service issues decisions on the pending administrative appeals of the revised LRMP. 36 CFR § 217.16 (1989).

66. The Forest Service has not yet issued a final determination regarding Plaintiffs’ administrative appeal of the revised Beaverhead-Deerlodge LRMP. Defendant has also not indicated whether it has resolved all other outstanding administrative appeals of the revised LRMP.

67. This court has held that projects tiered to a revised forest plan under administrative appeal cannot be implemented before the plan appeal has been decided. *Native Ecosystems Council v. Reese*, 212 F. Supp. 2d 1227, 1234 (D. Mont. 2002). Specifically, this court held that failure to decide LRMP appeals prior to implementing a site-specific project “prevents and administrative appellant from developing a full administrative record on any project tiered to a [land and resource] plan,” and would be akin to acknowledging that “Lewis Carroll was right when he said in *Alice in Wonderland*, ‘No! No! Sentence first – verdict afterwards.’” *Id.*

68. The Rat Creek decision notice and finding of no significant impact (DN/FONSI) states that “the Rat Creek Salvage EA is tiered to the 2009 Beaverhead-Deerlodge National Forest Land and Resource Management Plan (Forest Plan).”

69. The Forest Service’s decision to implement the Rat Creek project before 30 days after concluding the public participation in the LRMP revision process is arbitrary, capricious, and not in accordance with NFMA. 5 U.S.C. § 706(2)(A).

70. Plaintiffs are entitled to their reasonable fees, costs, and expenses associated with this litigation pursuant to the EAJA, 28 U.S.C. § 2412.

COUNT 2

(NEPA Violation)

Failure to Adequately Analyze Cumulative Environmental Impacts

71. Plaintiffs incorporate by reference all preceding paragraphs.

72. The Rat Creek EA fails to identify and evaluate the cumulative impacts of the project as required by NEPA. 40 C.F.R. § 1508. Cumulative effects are defined as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” 40 C.F.R. § 1508.7.

73. The Rat Creek EA fails to adequately analyze the cumulative impacts of the Rat Creek Project in light of the extensive history of timber harvest, grazing, mining, roadside salvage logging, area salvage logging, and fire suppression in the Tie-Johnson Management Area.

74. The Forest Service notes in the Rat Creek EA that, “only 2,308 acres...remain untreated or unburned” in the planning area, but fails to take the requisite next step of analyzing the impact of an additional 1,652 acres of timber harvest, grazing, mining, roadside salvage logging, area salvage logging, and fire suppression on the natural resources in the area.

75. The failure of the Forest Service to consider the cumulative impacts of past harvest, grazing, grazing, mining, roadside salvage logging, area salvage logging, fire suppression, and other activities in the Rat Creek EA is arbitrary, capricious, and not in accordance with NEPA. 5 U.S.C. § 706(2)(A).

76. Plaintiffs are entitled to their reasonable fees, costs, and expenses associated with this litigation pursuant to the EAJA, 28 U.S.C. § 2412.

COUNT 3

(NEPA Violation)

Failure to Disclose and Analyze Opposing Scientific Opinion Regarding the Snag Retention Standard (Revised LRMP)

77. Plaintiffs incorporate by reference all preceding paragraphs.

78. The Forest Service has an affirmative duty to disclose and analyze scientific information counseling against the activities proposed by the agency or calling into question the expected environmental effects of a proposed action. 40 C.F.R. §§ 1402.9(b), 1502.24. See also, 40 C.F.R. § 1508.27(b)(4). This information must be discussed in the body of the Environmental Impact Statement.

79. The revised Beaverhead-Deerlodge National Forest Land and Resource Management Plan (revised LRMP, or revised forest plan) requires the Forest Service to retain 6.4 snags greater than 15 inches in diameter at breast height (dbh) in Pinus contorta woodland harvest areas.

80. The revised LRMP allows the per-acre standard to be waived where snag retention goals will be met “for the project area as a whole.”

81. By quantifying snag retention at the project scale, the revised LRMP standard can be used to effectively nullify the per-acre snag retention requirement, with the result that the Defendant may leave no snags in any given harvest unit.

82. While the Agency’s decision to leave all snags greater than 15” dbh reflects the paucity of large snags across the landscape, the lack of any snag direction for mid-sized snags in the revised LRMP means that in any given harvest unit, and across the project area as a whole, few to no snags may be left standing.

83. Without addressing species-specific numeric requirements, the scientific consensus is that minimum per-acre requirements must be met to maintain viable wildlife populations in post-burn areas. The scientific literature recommends that snags be retained in clumps across harvested areas.

84. In contrast to scientific direction, the revised LRMP utilizes Forest Service-generated snag guidelines that were not subject to peer-review. These guidelines are not mandatory and may be disregarded when they prove inconvenient.

85. The Forest Service fails to disclose and discuss outside scientific literature recommending snag retention standards that differ from its own internally generated documentation. NEPA requires the agency to disclose and analyze in

the final environmental impact statement for the revised LRMP the scientific information that contradicts the intended effect of the proposed project.

86. The Forest Service's failure to disclose and analyze scientific information counseling against the activities proposed by the agency, or that call into question the expected environmental effects of the proposed action, and to insure that the proposed alternative supports the purpose and need, is arbitrary, capricious, and not in accordance with law. 5 U.S.C. § 706(2)(A).

87. Plaintiffs are entitled to their reasonable fees, costs, and expenses associated with this litigation pursuant to the EAJA, 28 U.S.C. § 2412.

COUNT 4

(NEPA Violation)

Failure to Disclose and Analyze Opposing Scientific Opinion Regarding the Snag Retention Standard (Rat Creek Project)

88. Plaintiffs incorporate by reference all preceding paragraphs.

89. The Forest Service has an affirmative duty to disclose and analyze scientific information counseling against the activities proposed by the agency or calling into question the expected environmental effects of a proposed action. 40 C.F.R. §§ 1402.9(b), 1502.24. See also, 40 C.F.R. § 1508.27(b)(4). This information must be discussed in the body of the Environmental Assessment.

90. In the Rat Creek Salvage EA, the Forest Service indicates that a snag retention standard of 6.4 snags greater than 15” DBH will be maintained consistent with the revised Forest Plan standard for Pinus contorta woodland.

91. The EA explicitly states that snag retention standards will be applied “across the sum total acreage of all harvest units, or the sum total acreage of the burn perimeter” with the result that no snags may be retained in any given harvest unit.

92. Although the Defendant has decided to comply with the faulty revised LRMP standard and retain all snags greater than 15” dbh in the Rat Creek project, the lack of any requirement to retain mid-sized snags means that in any given harvest unit, and across the project area as a whole, few to no snags may be left standing.

93. Without addressing species-specific numeric requirements, the scientific consensus is that minimum per-acre requirements must to be met to maintain viable wildlife populations in post-burn areas. The scientific literature recommends that snags be retained in clumps across harvested areas.

94. In contrast to scientific direction, the Rat Creek project utilizes Forest Service-generated snag guidelines that were not subject to peer-review. These guidelines are not mandatory and may be disregarded when they prove inconvenient.

95. The Forest Service fails to disclose and discuss outside scientific literature recommending snag retention standards that differ from its own internally generated documentation. NEPA requires the agency to disclose and analyze in the Rat Creek EA the scientific information that contradicts the intended effect of the proposed project.

96. The Forest Service's failure to disclose and analyze scientific information counseling against the activities proposed by the agency, or that call into question the expected environmental effects of the proposed action, and to insure that the proposed alternative supports the purpose and need, is arbitrary, capricious, and not in accordance with law. 5 U.S.C. § 706(2)(A).

97. Plaintiffs are entitled to their reasonable fees, costs, and expenses associated with this litigation pursuant to the EAJA, 28 U.S.C. § 2412.

COUNT 5

(NEPA Violation)

Failure to Disclose and Analyze Opposing Scientific Opinion Regarding Post-Fire Logging

98. Plaintiffs incorporate by reference all preceding paragraphs.

99. The Forest Service has an affirmative duty to disclose and analyze scientific information counseling against the activities proposed by the agency or calling into question the expected environmental effects of a proposed action. 40 C.F.R. §§

1402.9(b), 1502.24. See also, 40 C.F.R. § 1508.27(b)(4). This information must be discussed in the body of the Environmental Assessment.

100. The scientific literature indicates that leaving small diameter trees on the landscape, but removing large diameter trees, will contribute to fire severity, intensity, and spread, thus increasing the overall risk of uncharacteristic wildfire. Salvage logging will not reduce fuel loads, and in fact is likely to increase them. The Forest Service has failed to disclose and analyze the scientific information on this issue in the body of the Rat Creek Environmental Assessment.

101. The Forest Service itself has acknowledged that there is no scientific evidence that supports the theory of catastrophic reburn. Nevertheless, the agency has proposed a project based on removing large diameter trees to reduce this risk. NEPA requires the agency to disclose and analyze in the EA the scientific information that contradicts the intended effect of the proposed project.

102. The EA fails to mention significant peer reviewed and Forest Service-commissioned scientific studies that find no significant link between post fire salvage operations and reduced risks or intensity of future burns.

103. The Forest Service's failure to disclose and analyze scientific information counseling against the activities proposed by the agency, or that call into question the expected environmental effects of the proposed action, and to insure that the

proposed alternative supports the purpose and need, is arbitrary, capricious, and not in accordance with law. 5 U.S.C. § 706(2)(A).

104. Plaintiffs are entitled to their reasonable fees, costs, and expenses associated with this litigation pursuant to the EAJA, 28 U.S.C. § 2412.

COUNT 6

(NEPA Violation)

An Environmental Impact Statement is Required

105. Plaintiffs incorporate by reference all preceding paragraphs.

106. NEPA requires the Defendant to prepare an EIS when a major federal action is proposed which may significantly affect the quality of the environment. 42 U.S.C. § 4332(2)(C).

107. In determining whether a proposed action may “significantly” impact the environment, both the context and intensity of the action must be considered. 40 C.F.R. §1508.27.

108. In evaluating intensity, the agency must consider numerous “significance” factors including whether the environmental impacts are likely to be controversial, the degree to which the impacts may be uncertain or unknown, the degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration, whether the action is

related to other actions with cumulatively significant impacts, and whether the action may threaten a violation of state or federal law. 40 C.F.R. §1508.27(b).

109. The Rat Creek project proposes to conduct salvage logging operations after a fire, an action that has controversial, uncertain, and unknown impacts. 40 C.F.R. §§ 1508.27(b)(4), (b)(5).

110. The Rat Creek project may have cumulatively significant impacts when combined with the effects of historic management, the Rat Creek fire, fire suppression activities, and future proposed projects. 40 C.F.R. § 1508.27(b)(7).

111. The Defendant has attempted to implement a site-specific project before the completion of the administrative appeal process for the revised Beaverhead-Deerlodge LRMP, as required by the National Forest Management Act. Therefore, the Rat Creek project threatens a violation of federal law. 40 C.F.R. § 1508.27(b)(10).

112. The Defendant has failed to prepare an EIS for the Rat Creek project, despite the presence of several significance factors. The Defendant's decision to implement and proceed with the proposed action without first preparing an EIS is arbitrary, capricious, and not in compliance with NEPA. 5 U.S.C. § 706(2)(A).

113. Plaintiffs are entitled to their reasonable fees, costs, and expenses associated with this litigation pursuant to the EAJA. 28 U.S.C. § 2412.

COUNT 7

(NEPA Violation)

Emergency Situation Determination Unsupported by Qualified Experts

114. Plaintiffs incorporate by reference all preceding paragraphs.

115. The Forest Service has made an Emergency Situation Determination (ESD) on the proposed project, claiming that immediate implementation is necessary to avoid “substantial loss of economic value to the Federal Government if implementation of the decision were delayed.” 36 C.F.R. § 215.2.

116. The Defendant has failed to support the ESD by information from qualified experts, as required by NEPA. 40 C.F.R. § 1502.6 (environmental documents “shall be prepared using an inter-disciplinary approach which will insure the integrated use of the natural and social sciences...The disciplines of the preparers shall be appropriate to the scope and issues identified in the scoping process”).

117. Additionally, the Forest Service Manual states that “the [interdisciplinary] team must have the expertise to identify and to evaluate the potential direct, indirect, and cumulative social, economic, physical, and biological effects of the proposed action and its alternatives.” FSH 1909.15.12.01, 12.1.

118. The Forest Service has failed to employ even one economist or sociologist on the interdisciplinary team. There is no information in the Rat Creek EA or DN/FONSI to support the contention that there is an “emergency” warranting

expediting the Rat Creek project by eliminating the stay of implementation pending administrative appeal.

119. Consequently, the Forest Service's Emergency Situation Determination is arbitrary, capricious, and not in accordance with NEPA. 5 U.S.C. § 706(2)(A).

120. Plaintiffs are entitled to their reasonable fees, costs, and expenses associated with this litigation pursuant to the EAJA, 28 U.S.C. § 2412.

COUNT 8

(Appeals Reform Act Violation)

Failure to Demonstrate the Need for an Emergency Situation Determination

121. Plaintiffs incorporate by reference all preceding paragraphs.

122. The regulations implementing the Appeals Reform Act provide for an emergency situation determination when "immediate implementation of all or part of a decision is necessary for relief from hazards threatening human health and safety or natural resources on those NFS or adjacent lands; or that would result in substantial loss of economic value to the Federal Government if implementation of the decision were delayed." 36 C.F.R. § 215.10 (2003); 16 U.S.C. § 1612 note.

123. The Forest Service has failed to show how expeditious implementation of the project will avoid substantial economic loss to the government. The economic analysis for the project indicates the action alternative will result in negative income; only the no action alternative will result in no net loss for the government.

Given that the agency has already admitted that the proposed action will result in negative income, alleging that an emergency exists because the government will lose money on a timber sale is arbitrary and capricious. 5 U.S.C. § 706 (2)(A).

124. The only detrimental effect of delay (if any) of implementation of the Rat Creek project would be the economic loss suffered by any third-party timber company that contracts to log the Rat Creek project (the Forest Service has yet to auction and award the timber sale). The U.S. Treasury will not realize any income from the implementation of this project. The Forest Service itself will suffer a loss by selling this timber, as the cost of preparation and sale administration outweigh the income generated by the sale. There is no economic emergency present in this case.

125. The Forest Service has failed to demonstrate that there will be a substantial economic loss to the government if this project is not implemented immediately. Any economic loss from delay in implementation will fall on an as-yet unidentified and speculative third party bidder, not the government. The Forest Service's use of the Emergency Situation Determination is arbitrary, capricious, and not in accordance with NFMA. 5 U.S.C. § 706(2)(A).

126. Plaintiffs are entitled to their reasonable fees, costs, and expenses associated with this litigation pursuant to the EAJA, 28 U.S.C. § 2412.

COUNT 9

(Appeals Reform Act Violation)

The Emergency Situation Determination Based on Economic Loss to the Government is Ultra Vires

127. Plaintiffs incorporate by reference all preceding paragraphs.

128. The National Forest Management Act (NFMA) provides not only for planning on national forests, but also for public participation in the planning process. 16 U.S.C. §§ 1600, 1612.

129. In 1989, the Forest Service revised its regulations pertaining to public participation in the decisionmaking process. Among other provisions, those regulations provided the public with the opportunity to comment on and administratively appeal decisions implementing LRMPs.

130. In 1992, Congress passed the Appeals Reform Act (ARA), which amended the National Forest Management Act and clarified the public participation process required by NFMA. 16 U.S.C. § 1612 note.

131. In 2003, the Forest Service revised the regulations pertaining to public participation in decisions implementing LRMPs. Among other things, the 2003 NFMA Notice, Comment, and Appeal regulations permit the Forest Service to make an “emergency situation determination” for projects “for which immediate implementation of all or part of a decision is necessary for relief from hazards threatening human health and safety or natural resources on those NFS or adjacent

lands; or that would result in substantial loss of economic value to the Federal Government if implementation of the decision were delayed.” 36 C.F.R. § 215.2 (2003).

132. Neither the ARA nor NFMA mention “economic loss to the government” as a reason for expediting project implementation by exempting that project from administrative appeal. The 1989 regulations similarly did not provide for an exemption to the administrative appeal process for projects where economic loss to the government may occur as a result of a delay in implementation.

133. The defendants have violated the ARA section (e) by promulgating the “emergency situation” definition found at 36 C.F.R. § 215.2 (2003), which defines an “emergency situation” to which the automatic stay-pending appeal provision of the ARA does not apply, to include those situations which might cause “substantial loss of economic value to the Federal Government if implementation of the decision were delayed,” and by applying that regulation to the Rat Creek Project.

134. The Forest Service’s use of the Emergency Situation Determination is arbitrary, capricious, and not in accordance with NFMA. 5 U.S.C. § 706(2)(A).

135. Plaintiffs are entitled to their reasonable fees, costs, and expenses associated with this litigation pursuant to the EAJA, 28 U.S.C. § 2412.

RELIEF REQUESTED

Plaintiffs respectfully request that this court:

1. Declare that the Forest Service violated the National Environmental Policy Act and its implementing regulations in preparing and approving the revised Beaverhead-Deerlodge LRMP;
2. Declare that the revised Beaverhead-Deerlodge LRMP, final environmental impact statement, and record of decision are insufficient as a matter of law, and Order the Forest Service to withdraw the revised LRMP, FEIS, and ROD until such time as the agency demonstrates to this court that it has adequately complied with the law;
3. Declare that the Forest Service violated the National Environmental Policy Act, the National Forest Management Act, Administrative Procedure Act, Appeals Reform Act, and their implementing regulations in preparing and approving the Rat Creek project;
4. Declare that the Rat Creek environmental assessment and decision notice/finding of no significant impact are insufficient as a matter of law, and Order the Forest Service to withdraw the EA and DN/FONSI until such time as the agency demonstrates to this court that it has adequately complied with the law;
5. Declare that the “emergency situation” definition of 36 C.F.R. § 215.2 (2003) violates the Appeals Reform Act;

6. Enjoin the Forest Service and its agents from proceeding with the revised LRMP and Rat Creek project, or any portion thereof, unless and until the violations of federal law set forth herein have been corrected to the satisfaction of this court;
7. Set aside the “emergency situation” definition found at 36 C.F.R. § 215.2 (2003);
8. Award Plaintiffs their costs of suit and attorneys fees; and
9. Grant Plaintiffs such other and further relief as the Court deems just and equitable.

DATED this 24th day of July, 2009.

Respectfully submitted,

/s/ Matthew Bishop
Matthew Bishop (MT # 9968)
Western Environmental Law Center
103 Reeder’s Alley
Helena, MT 59601
Ph. (406) 324-8011
bishop@westernlaw.org

Local Counsel for Plaintiffs

Susan Jane M. Brown (WSB #31224, OSB
#05460) *Pro Hac Vice* App. Pending
Western Environmental Law Center
4107 NE Couch St.
Portland, OR. 97232
Ph. 503-914-1323
brown@westernlaw.org

Counsel for Plaintiffs