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

ALLIANCE FOR THE WILD
ROCKIES, AND NATIVE
ECOSYSTEM COUNCIL
Plaintiffs,
vs.
LEANNE MARTEN, Regional Forester
of Region One of the U.S. Forest
Service, UNITED STATES FOREST
SERVICE, an agency of the
U.S. Department of Agriculture,

CV-

**COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF**

Defendants.

I. INTRODUCTION

1. This is a civil action for judicial review under the citizen suit provision of the Administrative Procedure Act which stems from the U.S. Forest Service's (Forest Service) authorizations, analyses, and lack thereof on the Custer Gallatin National Forest (Forest) related to and regarding the Decision Memorandum and Categorical Exclusion for the North Bridger Forest Health Project (Project).
2. Plaintiffs Alliance for the Wild Rockies and Native Ecosystem Council attest that the decisions approving the challenged authorizations, analyses, and lack thereof are arbitrary and capricious, an abuse of discretion, and/or otherwise not in accordance with law.
3. Defendants' actions or omissions violate the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4331 *et seq.*, and the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et seq.*, because: 1) The Forest Service failed to conduct any NEPA analysis prior to designating the Project Area for inclusion in the insect and disease treatment program under Title IV, Section 602, of the Healthy Forest Restoration Act (HFRA), as amended by

Section 8204 of the Agriculture Act (Farm Bill) of 2014. The Project Area is allegedly eligible for exclusion from full NEPA analyses by being designated for inclusion into the insect and disease treatment program. Thus, the designation of those lands as “treatment areas” under the program must comply with NEPA;

2) Prior to implementing a categorical exclusion from environmental review under NEPA, the Forest Service was required to document that the action to be undertaken is insignificant. Part of this “significance” analysis requires the Forest Service to address the cumulative impacts of the Action. The Forest Service failed to do so and is in violation of NEPA;

and 3) The Forest Service failed to discuss the unroaded areas of the Project Area in the context of its wilderness potential. The Project Area shares a boarder with the Bridger Inventoried Roadless Area (IRA). The Forest Service failed to discuss uninventoried roadless areas adjacent to the Bridger IRA in the context of their potential for wilderness designation, in violation of NEPA.

4. Plaintiffs request that the Court set aside the Project pursuant to 5 U.S.C. § 706(2)(A) and enjoin implementation of the Project.

5. 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 such other relief this Court deems just and proper.

II. JURISDICTION

6. 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.

7. An actual controversy exists between Plaintiffs and Defendants. Plaintiffs' members use and enjoy the Custer Gallatin National Forest National 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.

8. 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 NEPA, and the APA. The requested relief would redress these injuries and this Court has the authority to grant Plaintiffs' requested relief under 28 U.S.C. §§ 2201 & 2202, and 5 U.S.C. §§ 705 & 706.

9. Plaintiffs submitted timely written comments concerning the Project in the available administrative review process, thus they have exhausted administrative remedies. Therefore, the Court has jurisdiction to review Plaintiffs' APA claims.

III. VENUE

10. Venue in this case is proper under 28 U.S.C. § 1391(e) and LR 3.3(a)(1). Defendant Marten resides within the Missoula Division of the United States District Court for the District of Montana.

IV. PARTIES

11. Plaintiff NATIVE ECOSYSTEMS COUNCIL 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 Custer Gallatin National Forest for work and for 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 Custer Gallatin National Forest, including the Project area. Native Ecosystems Council brings this action on its own behalf and on behalf of its adversely affected members.

12. 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 in the Custer Gallatin National Forest. Alliance's members' professional and recreational activities are directly affected by Defendants' failure to perform their lawful duty to protect and conserve these ecosystems as set forth below. Alliance for the Wild Rockies brings this action on its own behalf

and on behalf of its adversely affected members

13. Defendant LEANNE MARTEN is the Regional Forester for the Northern Region/Region One of the U.S. Forest Service, and in that capacity is charged with ultimate responsibility for ensuring that decisions made at each National Forest in the Northern Region, including the Custer Gallatin National Forest, are consistent with applicable laws, regulations, and official policies and procedures.
14. Defendant UNITED STATES FOREST SERVICE (Forest Service) is an administrative agency within the U.S. Department of Agriculture, and is responsible for the lawful management of our National Forests, including the Custer Gallatin National Forest.

V. FACTUAL ALLEGATIONS

15. The Forest Service signed the Decision Memorandum (Decision Memo) authorizing the Project on August 27, 2018.
16. The Project Area is located approximately 13 miles northeast of Bozeman, MT in the Bridger Mountains.
17. The Project Area lies entirely within the Gallatin National Forest.
Id.
18. Specifically, the Project lies within the following township and range sections: T2N R6E Sections 22, 23, 24, 26, 27, 35, 36; T2N

R7E Sections 30-32; T1N R6E Sections 11, 12, 13, 24; T1N R7E Sections 5, 7, 8, 9, 14, 16, 18, 20-23.

19. The Project Area is approximately 10,200 acres in size and activities are proposed on approximately 2,300 acres within the Project Area.
20. The Project includes 2, 296 acres of commercial logging: 667 acres of clear cutting, 87 acres of “group selection” and 1, 542 acres of intermediate harvest.
21. The effects of the proposed activities will likely last between 15 and 100+ years.
22. The Project Area is immediately adjacent to the Bridger Inventoried Roadless Area (IRA).
23. Logging units within the Project Area border the Bridger IRA.
24. The Project was approved as part of an “insect and disease treatment program” in accordance with Healthy Forest Restoration Act [HFRA]. 16 U.S.C. § 6591 *et seq.* as amended by Section 8204 of the 2014 Farm Bill.
25. The Project was categorically excluded from NEPA pursuant to 16 U.S.C. § 6591b(a), which provides that certain projects may be categorically excluded from NEPA’s requirement that agencies

prepare an Environmental Impact Statement for “major Federal actions significantly affecting the quality of the human environment.”

26. 16 U.S.C. § 6591a and 16 U.S.C. § 6591b were enacted as part of the Farm Bill creates a Categorical Exclusion (CE) from NEPA (“Farm Bill CE”).
27. 16 U.S.C. § 6591a, titled, “Designation of treatment areas,” provides the Chief of the Forest Service with mechanisms for designating “landscape-scale areas” to address tree mortality from insects or disease in national forests. 16 U.S.C. § 6591a(b).
28. In the designated treatment areas, the Forest Service can “carry out priority projects . . . to reduce the risk or extent of, or increase the resilience to, insect or disease infestation in the areas.” 16 U.S.C. § 6591a(d)(1).
29. Projects may be categorically excluded from NEPA under the Farm Bill if they meet certain provision of 16 U.S.C. § 6591a(d).
30. At the subsequent request of Montana Governor Steve Bullock, Forest Service Chief Thomas Tidwell designated 4,955,159 acres as “threatened landscapes” in Montana (Designation).
31. No NEPA analysis was conducted prior to the Forest Service

Designation of 4,955,159 Montana acres as “threatened landscapes.”

32. The North Bridger’s Project Area is part of that Designation.
33. The Project was subject to scoping and public notice.
34. The Forest Service has determined that “Scoping is required for all Forest Service proposed actions, including those that would appear to be categorically excluded . . . Scoping is important to discover information that could point to the need for an EA or EIS versus a CE. Scoping is the means to identify the presence or absence of any extraordinary circumstances that would warrant further documentation in an EA or EIS. Scoping should also reveal any past, present, or reasonably foreseeable future actions with the potential to create uncertainty over the significance of cumulative effects.” FSH § 1909.15, Ch. 31.3.
35. Projects under the Farm Bill CE, “may be carried out in accordance with sections 6514, 6515, and 6516 of HFRA (16 U.S.C. § 6501 et seq.) 16 U.S.C. § 6591a(d)(3).
36. HFRA § 6514 notes: “Except as otherwise provided in this subchapter, the Secretary shall conduct authorized hazardous fuel reduction projects in accordance with—(1) the National

Environmental Policy Act of 1969 [42 U.S.C. 4321 et seq.] . . .”

16 U.S.C. § 6514(a)(1).

37. The Farm Bill does not obviate the Forest Service’s obligation to conduct a NEPA analysis before taking such a discretionary action to designate landscape-scale areas to address insect or disease threats. *Id.*
38. Under NEPA, a proposed action can only be categorically excluded from further analysis and documentation in an EIS or EA “if there are no extraordinary circumstances related to the proposed action” 36 C.F.R. § 220.6.
39. The Forest Service’s Handbook states, “If the degree of potential effect [of the Project] raises uncertainty over its significance, then an extraordinary circumstance exists, precluding use of a categorical exclusion.”
40. An extraordinary circumstance analysis is required when the Forest Service approves individual projects under the Farm Bill CE.

NORTH BRIDGER’S PROJECT CATEGORICAL EXCLUSION

41. The Scoping Notice states, “[T]he actions proposed for this project are categorically excluded from documentation in an EA. . .”

42. It further states, “A preliminary assessment indicates that the actions proposed for this project fall within a category of action authorized under Section 603 of the Healthy Forest Restoration Act (and also found in FSH 1909.15 Ch. 30, Section 32.3 – Categories Established by Statute, #3. Insect & Disease Infestation) that is excluded from documentation in an Environmental Assessment (EA) or Environmental Impact Statement (EIS).”
43. The Forest Service predetermined the Project would be categorically excluded prior to determining whether the Project’s impacts were insignificant.
44. The Project’s Scoping Notice makes a “Preliminary Extraordinary Circumstances Conclusion” in regards to the Project.
45. The Scoping Notice states, “CEQ regulations allow Federal agencies to exclude from documentation in an Environmental Assessment (EA) or Environmental Impact Statement (EIS) categories of actions that do not individually or cumulatively have a significant effect on the human environment. Based on the Agency’s experience and knowledge, the responsible official can conclude that if the action fits within an identified category and analysis shows there are no extraordinary circumstances, then the

action would not have significant effects.”

46. The Scoping Notice further states, “Resource considerations of the types and location of actions proposed, design features to be applied, and/or previous monitoring of similar actions indicates that the degree of potential effect from the proposed action to the following resources is expected to be no effect or minimal effect, resulting in no extraordinary circumstances.”
47. The Decision Memo states, “No extraordinary circumstances exist that warrant further analysis and documentation in an Environmental Assessment or Environmental Impact Statement.”

CUMULATIVE IMPACTS

48. The Scoping Notice states, “While the action proposed for this project are categorically excluded from documentation in an EA or EIS, resource specialists will consider cumulative effects as needed to make a final extraordinary circumstances determination that this category of actions does not individually or cumulatively have a significant effect on the human environment.”
49. The Scoping Notice further states, “At this time, specialists anticipate considering the following types of activities for the North Bridger’s Forest health project area with regards to cumulative

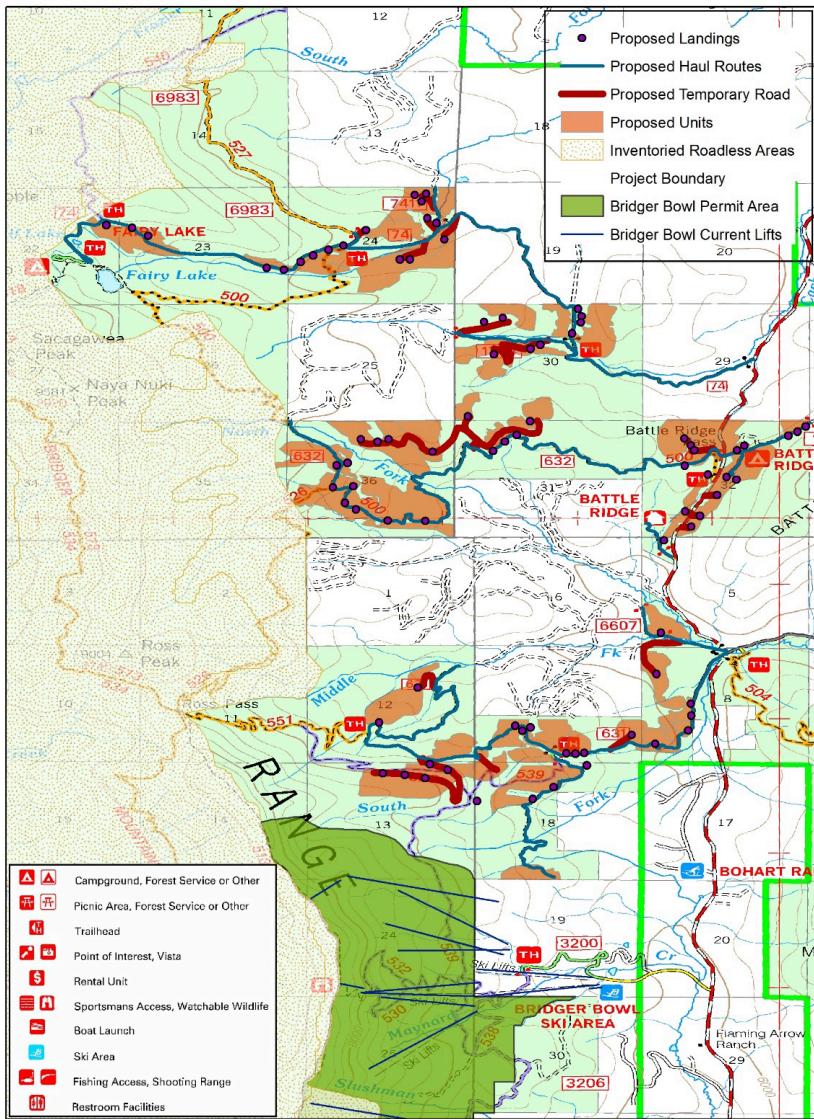
effects.”

50. The Notice then provides a table of general “anticipated cumulative effects considerations.”
51. The Scoping Notice discloses that the cumulative impacts analysis will be done “as needed” to make a final extraordinary circumstance determination.
52. No cumulative impacts analysis was performed during Scoping.
53. The Forest Service included an extraordinary circumstances analysis in the Decision Memo for the North Bridger’s Project.
54. The Decision Memo states, “Based on the agency’s expertise, the responsible official can conclude that if the action fits within an identified category and analysis shows that there are no extraordinary circumstances, then the action would not have significant effects.”
55. The Forest Service did not analyze cumulative impacts in the Decision Memo.

ROADLESS EXPANSE

56. The Project Area is immediately adjacent to the Bridger IRA:

North Bridgers Forest Health Project - Inventory Roadless



57. The Bridger IRA is larger than 5,000 acres.
58. Project units abut the IRA boundary and are within uninventoried roadless areas.
59. The Forest Service failed to disclose the number of acres within the Bridger IRA.

60. The Forest Service further failed to disclose the number of uninventoried roadless acres adjacent to the Bridger IRA.
61. The Forest Service's analysis of roadless acres is limited to the impact to the Bridger IRA: "No Direct Effects would occur within the IRA since the proposal meets the requirements of the Roadless Area Conservation Rule by not constructing or reconstructing roads or harvesting timber in North Bridgers inventoried roadless area."
62. The logging of a roadless area could have serious environmental consequences even if the roadless area is neither inventoried nor greater than 5,000 acres.
63. The Forest Service has determined, "Based on court history, projects on lands contiguous to roadless areas must analyze the environmental consequences, including irreversible and irretrievable commitment of resources on roadless area attributes, and the effects of potential designation as wilderness under the Wilderness Act of 1964. This analysis must consider the effects to the entire roadless expanse- that is both the roadless area and the unroaded lands contiguous to the roadless are."

VI. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

The Designation of Project Area as “threatened landscapes” violates the National Environmental Policy Act (NEPA).

64. All previous paragraphs are incorporated by reference.
65. The Defendants have authorized the North Bridger’s CE Project in violation of NEPA, 42 U.S.C. §§ 4321, *et seq.*, and its implementing regulations.
66. The Defendants failed to perform NEPA analysis prior to issuing a decision as to which areas to potentially designate as “threatened landscapes” in Montana pursuant to the 2014 Farm Bill. That improper decision included the area where North Bridger’s Project is located.
67. In authorizing the North Bridger’s Project prior to complying with NEPA as to the Designation of “additional landscape-scale areas. . . as needed to address insect or disease threats,” Defendants have taken final agency actions that are arbitrary, capricious, and otherwise not in accordance with law, or without observance of procedure required by law, within the meaning of the Administrative Procedure Act. 5 U.S.C. § 706(2). As such,

Defendants' actions should be held unlawful and set aside. *Id.*

SECOND CLAIM FOR RELIEF

The Forest Service failed to analyze cumulative effects of the North Bridger's Project, in violation of NEPA.

68. All previous paragraphs are incorporated by reference.
69. NEPA requires the Forest Service address cumulative effects of its proposed action.
70. Categorical exclusions are actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in NEPA procedures adopted by a Federal agency.
71. Before implementing a categorical exclusion from environmental review under NEPA, the agency must document that the action to be undertaken is insignificant, because the threshold question in a NEPA case is whether the proposed project will significantly affect the environment, thereby triggering the requirement for an environmental impact statement.
72. The Defendants made a determination to categorically exclude the Project during scoping and without determining whether the Project

would have significant impacts.

73. A determination of significance requires the agency to consider “[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts.” 40 C.F.R. §1508.27(b)(7).
74. The Forest Service failed to analyze cumulative impacts for the North Bridger’s Project in violation of NEPA.
75. The Forest Service was required to analyze the cumulative impacts of the Project prior to determining that the CE was the appropriate pathway to take but failed to do so here.
76. The Forest Service’s failure to analyze cumulative impacts of the North Bridger’s Project violates NEPA and the APA.

THIRD CLAIM FOR RELIEF

The Forest Service failed to analyze the wilderness potential of the Bridger Inventoried Roadless Area and the uninventoried roadless area contiguous to the Bridger IRA.

77. The possibility of future wilderness classification triggers, at the very least, an obligation on the part of the agency to disclose the fact that development will affect a roadless area.

78. The roadless areas adjacent to IRAs must be discussed in the context of the roadless area and the IRA's combined potential for wilderness designation.
79. The Forest Service is required to analyze the uninventoried roadless areas adjacent to the Bridger IRA in the context of the potential for wilderness designation in order to determine significance, but failed to do so here.
80. The Forest Service failure to analyze the uninventoried roadless area immediately adjacent to the Bridger IRA is a violation of NEPA and the APA.

VIII. RELIEF REQUESTED

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

- A. Declare that the Project, as approved, violates the law;
- B. Vacate the Project decision and remand the matter to the agency until such time as the agency demonstrates to this Court that it has adequately complied with the law;
- C. Set aside the Project Decision Memorandum and Categorical Exclusion;
- D. Enjoin implementation of the Project;
- C. Award Plaintiffs their costs, expenses, expert witness fees, and

reasonable attorney fees under EAJA; and

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

Respectfully submitted this 3rd Day of June, 2019.

/s/ Kristine M. Akland

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