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Attorney for Plaintiffs

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

SWAN VIEW COALITION, FRIENDS)	
OF THE WILD SWAN, NATIVE)	
ECOSYSTEMS COUNCIL, and)	CV-16-
ALLIANCE FOR THE WILD ROCKIES)	
)	
Plaintiffs,)	COMPLAINT FOR
)	DECLARATORY AND
vs.)	INJUNCTIVE RELIEF
)	
CHIP WEBER, Flathead National)	
Forest Supervisor, LEANNE MARTEN,)	
Regional Forester of Region One of the)	
U.S. Forest Service, and the UNITED)	
STATES FOREST SERVICE, an agency)	
of the Department of Agriculture,)	
)	
Defendants)	

I. INTRODUCTION

1. This is a civil action for judicial review under the Administrative Procedure Act of the U.S. Forest Service's (Forest Service) Decision Notice and Finding of No Significant Impact authorizing the Cold Jim Project in the Flathead National Forest (Flathead).
2. Plaintiffs Swan View Coalition, Friends of the Wild Swan, Alliance for the Wild Rockies, and Native Ecosystems Council contend that these decisions are arbitrary and capricious, an abuse of discretion, and/or otherwise not in accordance with law, and request that the challenged decision be set aside accordingly.
3. Defendants' decisions violate 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 Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.*, and the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et seq.* Plaintiffs sent a 60-day Notice of Intent to sue under the citizen's provision of the ESA on Nov. 29, 2016, and intend to amend the Complaint to reflect those claims at the expiration of the 60 day period, absent appropriate relief from the agencies.

4. Plaintiffs request at this time that the Court set aside the September 14, 2016 Decision Notice and Finding of No Significant Impact for the Cold Jim Fuels Reduction and Forest Health Project pursuant to 5 U.S.C. § 706(2)(A) and permanently enjoin implementation of the Project as approved, pending preparation of an Environmental Impact Statement.
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 as 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 Flathead 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 challenged decision. These are actual, concrete injuries caused by Defendants' failure to comply with mandatory duties under NFMA, 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 Glacier Loon Project, and fully participated in available administrative review and appeal processes, thus they have exhausted administrative remedies. Defendants' denials of Plaintiffs' administrative appeals were the final administrative actions of the U.S. Department of Agriculture Forest Service. Thus, 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).
11. Defendant Marten, the chief representative for U.S. Forest Service Region One, and the chief representative of the U.S. Forest Service in the State of Montana, resides within the Missoula Division of the United States District

Court for the District of Montana.

IV. PARTIES

12. Plaintiff SWAN VIEW COALITION (Coalition) is a non-profit conservation organization dedicated to conserving water quality and quiet, secure habitats for fish, wildlife and people on the Flathead National Forest and greater Flathead River Basin. Its members use these areas, including the Cold Jim Project area, for recreation, employment, wildlife viewing, photography, research, education, aesthetic enjoyment, spiritual rejuvenation, and other activities. The Coalition's office is located in Kalispell, Montana. Its members are directly affected by Defendants' failure to perform their lawful duty to protect and conserve these ecosystems. The Coalition brings this action on its own behalf and on behalf of its adversely affected members.
13. Plaintiff FRIENDS OF THE WILD SWAN (Friends) is a non-profit conservation organization dedicated to the conservation of water quality, fish and wildlife habitat on the Flathead National Forest. Its members use the Swan Valley for recreation, wildlife viewing, photography, research, aesthetic enjoyment, foraging, fishing and other activities. Friends' office is in Big Fork, Montana. Friends are concerned that any more industrial

logging projects in this already fragmented area will adversely affect wildlife habitat, adversely affect its members interests, and violate a number of laws.

14. Plaintiff ALLIANCE FOR THE WILD ROCKIES (Alliance) 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 Cold Jim Project area in the Flathead National Forest. The professional and recreational activities of Alliance's members 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.
15. 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 Flathead 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 Flathead National Forest, including the Cold Jim Project area. Native Ecosystems Council brings this action on its own behalf and on behalf of its adversely affected members.

16. Defendant CHIP WEBER is the Flathead National Forest Supervisor who signed the challenged Decision Notice in his official capacity, and in that capacity he is also charged with ensuring that decisions made on the Flathead National Forest are consistent with applicable laws, regulations, and official policies and procedures.
17. 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 Flathead National Forest, are consistent with applicable laws, regulations, and official policies and procedures.
18. 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 Flathead National Forest.

V. PROCEDURAL BACKGROUND

19. Plaintiffs individually and collectively exhausted their administrative remedies for the Cold Jim Project, in addition to the Chilly James Project not challenged here, but included in the cumulative effects analysis for the Cold Jim Project, by filing timely comments on draft NEPA documents as well as objections to the Regional Forester of the Draft Decision Notice.
20. On October 7, 2015, the Forest Service decided Plaintiffs' objections to the Draft Decision Notice, allowing the Cold Jim Project to go forward with minor adjustments after issuing a final Environmental Assessment.
21. The Forest Service signed the Final Decision Notice/Finding of No Significant Impact (Decision) authorizing the Cold Jim Project on September 14, 2016.
22. Based upon information and belief, as of the date of the filing of this Complaint, the Forest Service has not yet awarded or commenced any commercial timber sales for the Cold Jim Project.

VI. FACTUAL ALLEGATIONS

23. The Cold Jim Fuels Reduction and Forest Health Project (“Project”) Area lies within the boundaries of the Cold Jim Grizzly Bear Subunit. The project area is located 3 miles northwest of the community of Condon, MT, and contains approximately 33,289 acres of land (2,036 acres is private land) within the Flathead National Forest in Lake and Missoula Counties, Montana. The project area also contains approximately 12,939 acres of the Mission Mountains Wilderness (39 percent of the project area). The Cold Jim Project Area lies within the Swan Lake Ranger District of the Flathead National Forest.
24. The Project Decision Notice and Finding of No Significant Impact (“Decision”) is tiered to the 2004 “Seeley Swan Community Wildfire Protection Plan,” which was carried forward into the 2008 update. In 2013, a revised Seeley-Swan Fire Protection Plan was released that included a new WUI line based on parcel boundaries.
25. Neither the 2004 Seeley Swan Fire Plan nor the 2013 revision was subject to independent NEPA analysis, and yet it is the Wildlife Urban Interface delineated therein, as well as the policy choices in that document, that drive the purpose and need for the Project.
26. The Decision authorizes: fuel reduction and forest health treatment of

affected stands on approximately 1,155 acres of National Forest System (NFS) lands (1,112 acres within the Wildland Urban Interface, or WUI, and 43 acres outside the WUI), including 620 acres of commercial thinning, 30 acres of clearcuts, 45 acres of overstory removal, and 40 acres of selective overstory removal; hand planting of desired species on about 49 acres within regeneration treatment units; prescribed fire; an estimated 3.1 miles of temporary road construction to augment the existing 21.5 miles of haul routes over systems roads; and, decommissioning of an estimated 1.9 miles of systems roads (about 1%).

27. According to the Decision, “In the face of climate change and population pressures, there has now developed a complex matrix of natural and anthropogenic disturbance within which management regimes must be superimposed to meet national forest and national policy objectives. Restoration of degraded lands means rebuilding functional ecosystems, but not necessarily restoring sites to resemble their original conditions in all aspects.”
28. Forest Service science (Cohen, 1999) reviewed scientific evidence and policy directives on the issue of fire in the wildland/urban interface and recommended that the Forest Service focus its efforts on structure ignitability rather than extensive wildland fuel management: “[Research

shows] that effective fuel modification for reducing potential WUI fire losses need only occur within a few tens of meters from a home, not hundreds of meters or more from a home. This research indicates that home losses can be effectively reduced by focusing mitigation efforts on the structure and its immediate surroundings.”

29. In spite of the importance of the threatened and endangered Grizzly Bears, Canada Lynx, and Bull Trout to recovery of ecosystem integrity, and their value to the public reflected in the Endangered Species Act and related laws, and despite the fact that the Project Analysis Area includes cumulatively degraded habitat conditions for these species, the Purpose & Need stated for the Project is all about fire concerns, related “forest health” concerns (e.g., potential for insect infestations) and providing wood products, with no mention of fish and wildlife habitat concerns.
30. The Project as approved was determined by the Forest Supervisor to likely adversely affect the Grizzly Bear, the Canada Lynx, and Canada Lynx Critical Habitat in the Project Area.
31. It was determined by the Forest Supervisor that the Project may affect, but is not likely to adversely affect, the Bull Trout and Critical Bull Trout Habitat in the Project Area.
32. A “No Jeopardy” determination was made by the Forest Supervisor for

the Wolverine.

33. For the Grizzly Bear, the baseline condition in the Cold Jim subunit would continue to be adverse to grizzly bears, as the subunit does not meet road density objectives set forth in Amendment 19 of the Flathead National Forest Plan (A19).
34. Between 2009 and 2014, Critical Habitat for Canada Lynx decreased in the Cold Jim project area by approximately 9,038 acres.
35. From 2007 to date, the total acreage of lynx habitat treated or proposed to be treated (have gone through consultation with USFWS), including the proposed action, is 8,934 acres.
36. Winter mature multi-story foraging habitat is important and currently limiting for lynx. Removal of larger trees from mature multi-story forest stands to reduce competition and increase tree growth or resistance to forest insects may reduce the horizontal cover (e.g., boughs on snow), thus degrading the quality of winter habitat for lynx. Similarly, removing understory trees from mature multi-story forest stands reduces the dense horizontal cover selected by snowshoe hares, the primary prey of lynx, and thus reduces winter habitat for lynx.
37. Adverse effects to lynx as a result of the Cold Jim Project are likely to occur due to the treatment of lynx foraging habitat (snowshoe hare

habitat). Cumulatively, the reduction of lynx foraging habitat is estimated to be 5 percent in the South Cold Lynx Analysis Unit (LAU) and 2 percent in the Piper LAU.

38. Winter foraging habitat has been identified as the most critical component dictating lynx population size and distribution.
39. Past logging on National Forest & Legacy lands (forest lands acquired from Plum in 2010) in the Project area has significantly reduced lynx winter habitat - by over half, and as much as two-thirds.
40. The cumulative degradation of lynx winter habitat from past logging in the Project area represents a significant adverse impact on Canada lynx habitat and species viability.
41. Utilizing winter habitat as a proxy for Canada lynx populations, there is a significant forest-wide downward trend over the life of the Flathead NF Plan.
42. The Project as approved would decrease snowshoe hare habitat in designated lynx habitat and in Canada lynx critical habitat by 178 acres, or approximately 2 percent of the estimated snowshoe hare habitat within the project analysis area.
43. In addition, the Project includes approximately 366 acres of pre-commercial thinning of forested habitats. Pre-commercial thinning has

been shown to reduce snowshoe hare numbers by as much as 200-300% due to reduced densities of sapling and shrub stems and decreased availability of browse. Researchers believe that the continuing practice of pre-commercial thinning could significantly reduce snowshoe hares across the range of lynx. (LCAS 2013)

44. The U.S. Fish & Wildlife Service (USFWS) concluded “that the Cold Jim Project is **not likely to jeopardize** the continued existence of Canada lynx.”
45. In support of its “no jeopardy” determination, USFWS found that -
“with the exception of adverse effects related to treatment of snowshoe hare habitat” - the effects to Canada lynx as a result of the Project would be insignificant and/or discountable.
46. The Flathead Forest Plan (Amendment 21) (“A21”) includes a goal to “maintain and recruit old growth forests to an amount and distribution that is within the 75 percent range around the median of the HRV [Historic Range of Variability].” Where existing conditions fall short of this goal, the Plan directs the Forest Service to “actively manage to recruit additional old growth.”
47. Historically, old-growth habitat comprised 15% to 60% of the Flathead NF. The current old-growth average in the area of the forest where the

Project is situated is only 6.9%.

48. In the Swan Valley, old growth forest types, or late-seral classes, are currently below the historical minimum value for all terrestrial community groups due to the cumulative impacts from land clearing in the valleys, timber harvest, and road construction. The major differences between current conditions and historical conditions are that the total amount of old growth forest habitat covers less land area, the patches of old growth forest are smaller in size, and remaining old growth forest habitat has changed both structurally and in distribution. This translates into smaller blocks of older forest that are not as "secure" for old growth associated species as larger blocks of old growth forest with more interior area.
49. The Flathead has completed numerous EAs for projects in the Swan Valley since adoption of A21, including Cold Creek, yet has consistently chose not to disclose the current status of old growth forest habitat and associated species in old-growth deficient project analysis areas, to designate recruitment old growth sufficient to meet A21 goals and objectives, or to explain its strategy for meeting those goals and objectives in a timely manner, and it continues to rely on data extrapolated 17 years ago for projects that it acknowledges are

detrimental to old growth habitat and the species associated with that habitat.

50. The Project does not include an active old growth recruitment strategy, does nothing of significance to move the area towards the HRV, removes over-story trees that would otherwise develop into old growth habitat, and fails to analyze how the analysis area will be brought into compliance with A21's goals and objectives.
51. A21 includes the following monitoring requirements:
 - Occupancy of old growth habitat by old growth associated wildlife species, forest bird distribution, productivity and survivorship; forest carnivore distribution, nesting territories and productivity of bald eagles and peregrine falcons; vegetation composition structure and pattern in relation to the historical range of variability; proportion of old growth forest and patch sizes by subbasin and watershed; and, success in implementing the structural retention standards (large live trees, snags, and coarse woody debris.)
 - Continue old growth survey to fill in data gaps and to verify conditions within candidate old growth stands.
 - Conduct Forest-wide analysis of reference conditions and trends in landscape patterns.

- Assess current and reference conditions to define landscape patterns including patch size, distribution, and connectivity at the watershed scale.
 - Sensitive species – In cooperation with federal, state and private organizations, conduct inventories of sensitive species and develop Species Conservation Strategies.
52. The Forest Service has yet to develop a single Species Conservation Strategy for old growth sensitive species at risk in the Flathead NF, in spite of the appearance of rapid declines in key species like the fisher, pine marten, and Northern goshawk.
53. Although a project may not harvest old growth forest, it may still affect old growth habitat and old growth associated species:
- Harvesting or burning adjacent to old growth can remove the edge buffer, reducing the effective size of old growth stands by altering interior habitats. Weather-related effects have been found to penetrate over 165 feet into a stand, while the invasion of exotic plants and penetration by predators and nest parasites may extend 1500 feet or more.
 - “Edge effects” are created when stands adjacent to old growth habitat are converted from a late- or mid-seral structural stage to an

early seral (seedling/sapling) structural stage (Harper et al. 2005).

54. The creation of edge adjacent to old growth forest has two negative effects on old growth: It directly affects the adjacent old growth stand or old growth block by reducing the interior integrity of the stand or block (*Russell et al.* 2001), and it narrows or eventually severs the connection between different old growth patches.
55. Approximately 6 miles of high contrast edge exists adjacent to verified old growth stands in the project area.
56. New edge effects would be created by the proposed regeneration treatments in Units 29 and 30, which are adjacent to existing old growth stands. This new edge created would total approximately 2,800 feet or 0.5 miles of old growth edge, increasing high contrast edge effects by over 8% from existing. Some trees in the affected old growth stands can be expected to blow down due to this impact, and this high contrast edge effect is expected to last for 30 years.
57. The Project is likely to negatively impact old-growth habitat and associated species due to high contrast edge effects, displacement, logging recruitment old growth, and construction of temporary roads on the edge of old growth stands.
58. Project haul routes and logging units adjacent to old growth stands will

only add to the existing 6 miles of high contrast edge adjacent to old growth, by including another half mile of edge adjacent to verified old growth - representing an 8% increase in edge effects.

59. One impact of the Project will be to spread invasive weeds into what is already a fragmented mosaic of small blocks of old growth habitat. The risk of invasive species spread, introduction, establishment, and persistence as a result of the Project will be high, creating an invasive species problem indefinitely into the future.
60. Noxious weeds are one of the top threats to biological diversity in our National Forests.
61. Research indicates that some old growth associated species, such as the pine marten need old growth in stand sizes of 250 to 500 acres to be effective. Pileated woodpeckers, another old growth associated species, require 100-250 acre stands. Goshawks, another old growth associated species, require an average nesting stand size of 40 acres in west central Montana, plus additional acres for post-fledgling habitat.
62. The verified old growth stands in the Project range from 5 acres to 154 acres, with the average being 50 acres. The Project would reduce existing continuity of forest canopy cover and tree density between existing patches of old growth, further exacerbating the effects of

fragmentation on old growth species viability.

63. Patch size correlates strongly with the numbers of species and individuals that can be supported and with rates of extinction and recolonization. According to some of the best available science considered by the Forest Service in approving the Project (USDA Forest Service, 1990), of 48 old-growth-associated species occurring in the Northern Region, about 60 percent are thought to require stands larger than 80 acres.
64. An average old growth stand size of 50 acres is insufficient for insuring the viability of old growth associated species.
65. One species that has been particularly affected by depletion of old growth habitat in the Northern Rockies is the (sensitive species) black-backed woodpecker, a fire-dependent species that relied on large old-growth reserves to supplement ephemeral burned habitat. With the increasing scarcity of old growth habitat, black-backed woodpeckers have become increasingly dependent upon burned habitat for their persistence.
66. According to one scientific paper, Cherry (1997): “The black-backed woodpecker appears to fill a niche that describes everything that foresters and fire fighters have attempted to eradicate. For about the

last 50 years, disease and fire have been considered enemies of the ‘healthy’ forest and have been combated relatively successfully. We have recently (within the last 0 to 15 years) realized that disease and fire have their place on the landscape, but the landscape is badly out of balance with the fire suppression and insect and disease reduction activities (i.e. salvage logging) of the last 50 years. Therefore, the black-backed woodpecker is likely not to be abundant as it once was, and continued fire suppression and insect eradication is likely to cause further decline.”

67. As documented in the Region One black-backed woodpecker assessment (Hillis et al., 2003), black-backed woodpeckers depend upon high densities of dead and dying trees that have been colonized by bark beetles and woodborer beetles. “These beetles and their larvae are most abundant within burned forests. In unburned forests, bark beetle and woodborer infested trees are found primarily in areas that have undergone natural disturbances, such as windthrow, and within structurally diverse old-growth forests.”
68. Dolan (1998a,b) cites the significance of cumulative impacts attributable to fire suppression and post-fire logging policies favored by the Forest Service: “It seems that we have a huge cumulative effects

problem here, and that each salvage sale removes habitat that is already very limited. We are having trouble avoiding a ‘trend to federal listing’ call for the BBWO in salvaging burns, unless comparable acres of fire-killed dead are being created through prescribed burns.”

69. The Decision is tiered not to the best available science on black-backed woodpeckers, but rather to a discredited literature survey performed by Region One USFS, which is based on false assumptions and has since been shown to be wildly inaccurate.
70. Amendment 21 designates the fisher and the lynx as old growth management indicator species for the Flathead National Forest.
71. The Swan Valley was one of three areas where fisher were re-introduced from Canadian populations in 1959-60. USFS 1994. After 1968, fisher - a small forest carnivore native to North America - occurrence was verified in the Flathead, Mission, Swan, and Whitefish Ranges (Vinkey 2003). The 1994 wildlife analysis for Swan Valley cites recent sightings by the Forest Service’s biologist, as well as referencing confirmation of presence by tracking surveys. USFS 1994 (p. IV-42).
72. Fishers generally avoid areas with significant human disturbance, preferring instead large areas of mature forest with relatively closed

canopy. USFS 1994.

73. Virtually all the predicted fisher habitat in the Swan Valley is located within 1/2 mile of a road, making them particularly vulnerable to trapping.
74. During the winters of 2012 and 2013, extensive carnivore surveys were done within the Swan Valley. The survey included transects to detect wolverine, fisher, and lynx tracks. If tracks were detected they were backtracked and DNA samples were extracted from hair or scat along the track. These samples were sent to a lab to be identified by species. Additionally, in 2012 fisher hair snare surveys were conducted systematically throughout the valley. In 2013, multi-species bait stations were erected systematically throughout the valley. Within the Cold Jim Project Area specifically, and the Swan Valley more generally, no fisher tracks were detected in either winter survey effort, and no fisher were detected through 2012 or 2013 DNA analysis of samples collected in the hair snare surveys.
75. The Forest Service has also been unable to find a single fisher, through use of tracking and bait stations, in the entire Southwest Crown of the Continent, including the Swan Lake, Seeley Lake and Lincoln Ranger Districts, in recent years.

76. In spite of the documented absence of fisher in the area of the Flathead NF where the Project is situated, the Forest Service still concluded that fisher populations are secure.
77. The Project will render 115 acres of potential habitat unsuitable for fisher for the next 40 years, and will treat another another 620 acres in a manner that is inconsistent with suitable fisher habitat.
78. Cutting units 15, 17, 19 have structural complexity, high canopy cover and large amounts of snag and coarse woody debris for fisher resting and denning habitat - representing the best quality fisher habitat in the project area. Regenerative treatments in these stands would open up the stands and result in unsuitable fisher denning/resting habitat, reducing the best quality fisher habitat by approximately 87 acres. This reduction is approximately 2 percent of the available denning/resting habitat in the project area, and 6 percent cumulatively with logging by The Nature Conservancy.
79. The EA concludes that the project “may impact individuals or habitat, will not likely contribute to a trend towards Federal listing or loss of viability to the population or species.”
80. The U.S. Fish & Wildlife Service recently determined that listing the fisher as threatened or endangered may be warranted under the ESA.

ER4-168 (81 Fed.Reg. 1368, Jan. 12, 2016).

81. The Forest Service either does not know, or has failed to disclose, what the baseline population of fisher is in the Project area, or on the Flathead NF as a whole, or what the population trend for fisher is in the Project area, or on the Flathead NF as a whole.
82. The Flathead Forest Plan requires the Forest Service to monitor the distribution of fishers, and the change in population status, in order to ensure that projects do not contribute to the loss of viability of fisher.
83. The Flathead Forest Plan requires the Forest Service to avoid adverse impacts to fisher or their habitats whenever possible, and to prepare a fisher management plan or conservation strategy to prevent the loss of population viability.
84. The Flathead has not completed a conservation strategy for fisher.
85. This Project does not avoid adverse impacts to fisher and their habitats but instead increases them.
86. The Forest Service uses a theoretical “proxy-on-proxy” approach for insuring the viability of fisher and related species under the Flathead Forest Plan.
87. Pursuant to the proxy-on-proxy approach to insuring viability, the Forest Service has assumed throughout the life of the Flathead Forest

Plan that maintaining certain levels of a specified type of habitat (a proxy for fisher populations) will assure the continued viability of fisher as a designated Management Indicator Species, or proxy, for the viability of a suite of species that favor that same kind of habitat.

88. While Courts have agreed that the proxy-on-proxy methodology has a rational basis in science, they have also held that the ultimate test for whether habitat as a proxy for populations is “whether it ‘reasonably ensures’ that the proxy results mirror reality.” See: *Gifford Pinchot Task Force v. United States Fish & Wildlife Serv.*, 378 F.3d 1059, 1066 (9th Cir., 2004) 1066 (quoting *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d at 972-73).
89. Although it is not a management indicator species, the pine marten is designated by Amendment 21 as another old growth associated species on the Forest.
90. Winter track surveys along transects from 1999 to 2009 in the Swan Valley indicate that “[p]ine marten track detections have been on a steep and alarming decline since this study started. Both the track detection probability and the frequency of track detections per mile have gone from relatively high to very low.”
91. The conclusion by Northwest Connections, the non-governmental

organization that conducts annual carnivore track surveys in the Swan Valley, is that "[a] concerted effort to protect and restore forest habitats for lynx, fisher and marten is needed."

92. The Forest's 2008-2010 monitoring report documents a significant increase in logging on the Forest between 2000-2010, most of which was clearcutting.
93. The northern goshawk is another old growth dependent species in the Flathead NF that prefers large patches of relatively closed canopied forest. Thus, in addition to lynx and fisher, the Forest Service designated the goshawk as an old growth management indicator species for the Project; specifically, goshawk is considered a good indicator species for closed-canopy old growth in larger patch sizes.
94. The Swan Valley covers approximately 733 square miles, nearly half of which is deemed suitable goshawk habitat that would be capable of supporting 40 nesting pairs.
95. While northern goshawks are known to occur in the Swan Valley, monitoring for goshawk conducted during the spring of 2013 detected only 3 active nests.
96. There are no known goshawk nest sites near any of the proposed treatment units, though it is presumed that the Project Area could

potentially support a minimum of two goshawk territories.

97. Past land management activities in the area, including timber management, road construction, residential development, and agricultural conversion, have decreased the amount of available old growth forest and the quality of remaining old growth forest, fragmenting the patches of old growth into smaller blocks that have less utility for affected species.
98. The Project would reduce goshawk habitat by at least 106 acres, and would reduce continuity of forest canopy cover and tree density between existing patches of old growth.
99. If natural vegetative processes were allowed to continue in the Cold Jim Project Area, without timber harvest, mature forest would be expected to ripen into old growth habitat, potentially connecting the currently fragmented, undersized blocks of verified old growth.
100. The cumulative effects of old growth habitat depletion and degradation in the Project area specifically, and the Swan Valley more generally, on the continuing viability of MIS like the fisher, and lynx, and on old growth dependent cavity dwellers like the northern goshawk, is nowhere disclosed in the EA.
101. The Project will result in undisclosed violations of the terms of a

Memorandum of Understanding between the Forest Service and the U.S. Fish & Wildlife Service intended to promote the conservation of neotropical migratory birds.

102. In demonstrating attempted compliance with Flathead Forest Plan Amendment 19 (A19) for the Project's cumulative effects analysis, the Forest Service failed to count what it terms "impassable roads" toward Total Motorized Route Density (TMRD) calculations, which are roads that it has chosen to keep as system roads, "storing" them for future utilization, and for which it has chosen to keep stream culverts in place, while at the same time rendering them "impassable" to motorized vehicles in the near term.
103. According to legal interpretations of A19, "a reclaimed road must be treated to preclude future use as a road or trail... through treatments such as recontouring to original slope, placement of natural debris, or revegetation with shrubs and trees... Roads that are treated for reclamation but not yet fully reclaimed must be included in the calculation of total motorized access density." *Swan View Coalition v. Barbouletos*, ___ F.Supp.2d ____ (D.Mt. 2008), 2008 WL 5682094.
104. The administrative record and the plain language of A19 show that a road must be reclaimed/obliterated/decommissioned (hereafter

“Reclaimed”) and removed from the System before it is no longer considered a road that must be included in calculations of TMRD.

105. Reclamation of roads is not absolutely required in Security Core pursuant to A19, and roads restricted by berms, boulders or dense vegetation may suffice, provided that “a monitoring plan to detect any erosion or culvert blockage problems” is designed and implemented.
106. The A19 administrative record does not support the notion that a road can remain in the System as a road and yet not be counted as a road in calculations of TMRD. As long as the road remains in the System, even if placed in Intermittent Stored Service (ISS) or any other “storage” or “impassable” category, it is considered a road and must be included in the calculation of total road miles and TMRD.
107. According to the Forest Service’s clear statements at the time of adopting A19: “To meet the standards and short-term objectives in MS-1 and MS-2 areas, approximately 350 miles of open roads and 125 miles of currently restricted roads would need to be reclaimed in the short term (5 years). To meet long term (10 years) standards and objectives, another 175 miles of already-restricted roads would need to be reclaimed.” See: Forest Plan Amendment 19 Amended Environmental Assessment, at p. 95 (February 1995).

108. A19 found the miles of reclaimed roads referenced in the preceding paragraph would also need to be decommissioned/removed from the Flathead NF road system. See: Forest Plan Amendment 19 Amended Environmental Assessment, at p. 97 (February 1995).
109. All annual A19 reports from the Flathead NF to U.S.F.W.S. accounted for reductions in TMRD by reporting the miles of road decommissioned, not simply reclaimed.
110. The A19 Amended Environmental Assessment (A19 EA) made clear that road reclamation refers to road that have been “obliterated and removed from the forest inventory,” including but not limited to removal of culverts from stream crossings, such that no more maintenance was required.
111. The A19 process and the Interagency Grizzly Bear Committee (IGBC) process on which it is based include the same three classifications of roads: Open, Restricted, and Reclaimed. Neither includes a category for “stored” or “impassable” roads that remain on the System yet would not be counted as roads in calculations of TMRD.
112. The Amended A19 EA estimated the miles of open road that will need to be closed to motor vehicles and the miles of open and already restricted roads that will need to be reclaimed to meet A19 standards. Nowhere does the EA mention that roads can be simply rendered “impassable” and retained as

part of the System while not being counted in calculations of TMRD.

Rather, an impassable road that remains on the road System was to be considered a Restricted road, and counted in calculations of TMRD until it had all of its stream-bearing culverts and bridges removed, fully met all other Reclaimed road criteria, and was removed from the System.

113. The the Decision Notice for Flathead NF Plan Amendment Standard A19, the “Forest-wide Objectives for Grizzly Bear,” requires that: “On all [Bear Management Unit] Subunits that are predominantly (greater than 75 percent) National Forest System land, our objective is to:

- limit high-density (> 1 mile/square mile) open motorized access to no more than 19% of a BMU Subunit within 5 years;
- limit high-density (> 2 miles/square mile) total motorized access to no more than 24% of a BMU Subunit in 5 years, and no more than 19% in 10 years; and
- provide security core areas that equal or exceed 60% of each BMU Subunit in 5 years, and 68 percent in 10 years.”

The shorthand for these objectives is 19/19/68. See, e.g., *Cabinet Resource Group v. U.S. Fish and Wildlife Service*, 465 F.Supp.2d 1067, 1073, n. 6 (D. Mont. 2006).

114. The Decision Notice for Amendment 19 included the following clarification: "The Alternative 3-corrected includes an amendment to Forest-wide General Standard No. 1 clarifying that the access density objectives of Amendment 19 are not discretionary."
115. The Cold Jim BMU Subunit includes >75% National Forest lands, and its baseline does not comply with the 19/19/68 objectives.
116. The Project will result in a near-term violation of the 19/19/68 for the protection of Grizzly Bear, exacerbating a problem with excessive road densities by increasing Open Road Density to 26%.
117. In 1986, the Regional Forester for Region One, USFS, identified a list of sensitive wildlife species, which was updated in June, 1994. Sensitive species are those for which viability is a concern. Included in this list of sensitive species was the fisher.
118. It was recognized when A19 was adopted that decreased motorized access density would improve the habitat effectiveness for numerous species of wildlife, including fisher, lynx, wolverine, and marten.
119. At the time when A19 was adopted, it was also recognized that fisher presence was documented across the Flathead NF. However, according to the A19 EA, "[c]urrent Forest Plan standards may not provide sufficient contiguous habitat for fisher. In the Swan Valley, the intermingled

ownership pattern may result in a fragmented pattern and insufficient amounts of mature and old-growth habitat.”

120. The Forest Service has failed to meet the non-discretionary objectives of A19 in a timely manner, and has instead amended the Flathead NF Plan on at least two occasions to extend the 5-year and 10-year deadlines for compliance with a view towards eventual forest plan revision.
121. While the Forest Service and U.S. Fish & Wildlife Service have been focused on the effects of extending A19 deadlines for road removal on grizzly bear, it appears that the failure to meet such deadlines has caused or contributed to the extirpation of at least one sensitive species that is particularly vulnerable to roads and the fragmented habitat associated with excessive road densities - the fisher.
122. Under the Flathead NF Plan, Management Area MA-15 is an allocation for “timberlands where timber management with roads is economical and feasible. A major goal is to emphasize cost-efficient production of timber while protecting the productive capacity of the land and timber resource.”
123. The Forest Service designated most, of the Legacy Lands in the Swan Valley as MA-15, and some as MA-9, without doing any NEPA analysis that considered a range of alternatives, and without any public involvement.
124. Thermal cover describes the ability of a forested stand to intercept snow

and provide winter protection for deer or elk (e.g., shallow snow depths, warmth). Winter thermal cover is very important to white-tailed deer populations. Timber harvest across the Swan Valley has altered the amount and juxtaposition of thermal cover, hiding cover, and forage. Timber harvest typically removes big game cover, including thermal cover.

125. Thermal cover is defined in the Flathead NF as forest vegetation averaging 60 feet in height with 70 percent canopy cover. The Forest Plan standard for MA-9 is to “[m]anage to achieve at least 50 percent of the area in winter thermal cover. Timber stand improvement will be applied only when adequate winter thermal cover and wildlife movement is assured.”
126. The Project Area’s MA-9 forests currently do not meet the Flathead NF Plan standard for winter thermal cover.
127. The Project includes timber stand improvement, or timber harvest that is “designed to ‘release’ stands by enlarging growing space for individual trees, reducing competition, and improving tree growth.”

VII. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF PURSUANT TO NEPA

The Cold Jim Project requires preparation of an Environmental Impact Statement.

- 1.1 All above paragraphs are incorporated by reference.
- 1.2 It was arbitrary and capricious to conclude that adverse impacts to

threatened, endangered, and sensitive species, as well critical habitat, prey species such as the snowshoe hare, and the apparent extirpation of sensitive species over the life of the forest plan, do not and will not continue to have significant effects on the human environment in Swan Valley and the surrounding community.

1.3 The Forest Service failed to take a hard look at the cumulative effects of continued forest plan implementation on sensitive and management indicator species, including but not limited to maintaining degraded habitat conditions associated with excessive road densities and logging.

1.4 It was arbitrary and capricious to determine that the Project will not significantly effect species that are associated with snowshoe hare as prey, including the Canada lynx and fisher, when the U.S. Fish & Wildlife Service determined that “adverse effects related to treatment of snowshoe hare habitat” were not insignificant.

1.5 The Decision is improperly tiered to the Seeley Swan Community Wildfire Protection Plan, which is a non-NEPA document that perpetuates USFS wildfire suppression policies that have significantly impacted black-backed woodpeckers and other fire-dependent species.

SECOND CLAIM FOR RELIEF PURSUANT TO NEPA

Designation of Legacy Lands under the Flathead NF Plan is a major federal action that has potentially significant environmental effects.

2.1 All above paragraphs are incorporated by reference.

2.2 The Project Area includes approximately 10,764 acres of so-called Legacy lands obtained by the United States as part of the Montana Legacy Project, which lands were incorporated into the Flathead NF in 2010.

2.3 While most of the Project Area is designated MA-15, the Forest Service never afforded the public an opportunity to comment on this allocation, and there have been significant changed circumstances in the area since adoption of the Flathead NF Plan, including but not limited to designation of critical habitat for Lynx and Bull trout.

2.4 Management Area designation determined which values will be protected, and what the priorities are. For MA-15, “[o]ther resources will be managed in a manner consistent with the timber management goals.”

2.5 Designation of Legacy lands as MA-15 was a major federal action with potentially significant environmental implications and impacts, thus requiring at least an Environmental Assessment to explore alternatives to how such lands should be managed and soliciting public comment and input.

THIRD CLAIM FOR RELIEF PURSUANT TO NEPA & NFMA

The Forest Service has failed to adequately consider the effects of continued forest plan implementation and habitat fragmentation on the viability of fisher as an MIS for species that require vast tracts of closed-canopied mature forest.

3.1 All above paragraphs are incorporated by reference.

3.2 One of the principal directives to the Forest Service pursuant to NFMA, and the reason for listing species as “sensitive,” is to protect forest species from the kind of population declines and loss of effective habitat that would result in a trend towards listing under the Endangered Species Act. Consistent with this prime directive, the Flathead NF Plan provides that “[p]roject decisions will not result in loss of species viability or create significant trends towards federal listing.

3.2 The Forest Service has failed to protect fisher from the cumulative adverse impacts of degradation and fragmentation of its habitat in the Swan Valley specifically, and the Flathead NF more generally, which has resulted from nearly three decades of implementing Forest Plan strategies that were expressly intended to insure the viability of fisher.

3.3 The Forest Service has failed to adequately monitor fisher populations and trends as well as the effects of habitat loss and degradation on those populations.

3.4 As the Project will adversely effect fisher habitat, and as fisher have effectively been exterminated from the Flathead NF, it was arbitrary and capricious not to consider the cumulative effects of continuing forest plan implementation on fisher viability, to consider the management area designation(s) that would be most beneficial to fisher recovery, and/or to consider an alternative that would restore fisher habitat connectivity and viability in the Project and cumulative effects

analysis areas.

FOURTH CLAIM FOR RELIEF PURSUANT TO NEPA & NFMA

The Cold Jim Project is not in compliance with A19 of the Forest Plan.

4.1 All above paragraphs are incorporated by reference.

4.2 The Forest Service arbitrarily and capriciously decided that roads which have not been reclaimed in a way that precludes future use no longer have to be counted in calculating total motorized access density, in violation of A19 of the Flathead NF Plan.

4.3 The Forest Service failed to take a hard look at the cumulative effects of its failure to comply with A19's non-discretionary standards for reducing motorized access in a timely manner on wildlife species that are adversely impacted by excessive road densities in the Flathead NF, including but not limited to grizzly bears, Canada lynx, fisher, and bull trout.

FIFTH CLAIM FOR RELIEF PURSUANT TO NEPA & NFMA

The Cold Jim Project is not in compliance with A21 of the Forest Plan and the Forest Service failed to take a hard look at impacts to old growth habitat and species associated with that habitat.

5.1 All above paragraphs are incorporated by reference.

5.2 The Forest Service is no longer complying with the monitoring requirements for old growth habitat and species set forth in the Flathead NF Plan.

5.3 The Project fails to comply with Forest Plan requirements for protecting and recruiting old growth habitat sufficient for meeting the needs of species associated with old growth habitat, including but not limited to developing conservation strategies for old growth sensitive species.

5.4 The Forest Service failed to take a hard look at the impacts of the Project on old growth habitat and associated species, including but not limited to impacts associated with spreading weeds into old growth stands.

SIXTH CLAIM FOR RELIEF PURSUANT TO NEPA & NFMA

The Cold Jim Project violates Flathead NF Plan standards for winter thermal cover.

6.1 All above paragraphs are incorporated by reference.

6.2 The Project seeks to treat MA-9 stands in violation of forest plan standards for protection of white-tailed deer and other big game.

6.3 The Forest Service failed to take a hard look at the impacts of the Project on big game habitat and associated species.

SEVENTH CLAIM FOR RELIEF PURSUANT TO NEPA & NFMA

The Cold Jim Project fails to ensure the viability of affected wildlife species.

7.1 All above paragraphs are incorporated by reference.

7.2 The continuing implementation of the Flathead NF Plan is cumulatively having significant adverse impacts on various species of wildlife that have proven to be particularly sensitive to the intrusion of roads and timber harvest, contrary to

the intent and direction of the plan.

7.3 The Forest Service has failed to supplement the EIS that supported adoption of the Flathead NF Plan in response to significant changed circumstances and new information regarding the impacts of forest plan implementation on wildlife diversity and species viability, contrary to the intent of Congress expressed in the National Forest Management Act and the National Environmental Policy Act.

7.4 The Forest Service has failed to develop and implement conservation strategies for the protection of sensitive species of wildlife affected by continuing implementation of the Flathead NF Plan, including but not limited to the fisher, the Northern goshawk, and the black-backed woodpecker.

7.5 The Forest Service continues to implement wildfire suppression policies that undermine the viability of the black-backed woodpecker pursuant to faulty scientific assumptions and models concerning populations and distribution.

VIII. REQUEST FOR RELIEF

For all of the above-stated reasons, Plaintiffs respectfully requests that this Court:

- A. Declare the Cold Jim Project Decision Notice and Finding of No Significant Impact arbitrary, capricious, or otherwise not in accordance with the law;
- B. Enjoin implementation of the Cold Jim Project;

C. Award Plaintiffs their costs, expenses, expert witness fees, and reasonable attorney fees under the Equal Access to Justice Act; and

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

Respectfully submitted this 15th day of December, 2016.

/s/ Thomas J. Woodbury

Thomas J. Woodbury

Attorney for Plaintiff