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10 *Attorneys for Plaintiffs*

11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE DISTRICT OF IDAHO
13 EASTERN DIVISION

14 ALLIANCE FOR THE WILD ROCKIES;
15 NATIVE ECOSYSTEMS COUNCIL;
16 YELLOWSTONE TO UNITAS
17 CONNECTION,

18 Plaintiff,

19 v.

20 UNITED STATES FOREST SERVICE;
21 VICKI CHRISTIANSEN, Chief of the
22 Forest Service; MEL BOLLING, Forest
23 Supervisor for the Caribou-Targhee
24 National Forest; FRANK BEUM, Acting
25 Regional Forester of Intermountain Region
26 4; and ELIZABETH DAVY, Ashton
Island Park District Ranger.

Defendants.

NO.

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

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I. NATURE OF ACTION

1. The United States Forest Service approved the Middle Henrys Aspen Enhancement (“Project”), which authorizes logging and burning in the Middle Henrys area in the Ashton Island Park Ranger District of the Caribou-Targhee National Forest.

2. The final decision to approve the Middle Henrys Aspen Enhancement Project and categorically exclude the Project from environmental review under National Environmental Policy Act was signed on July 9, 2020 by Ashton Island District Ranger for the Caribou Targhee National Forest Elizabeth Davy.

3. This action seeks judicial relief with respect to the July 9, 2020 final decision and categorical exclusion, ordering Defendants U.S. Forest Service, *et al.* to comply with the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4331 *et seq.*, the National Forest and Management Act (NFMA), 16 U.S.C. § 1600 *et seq.*, and the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.* The decision approving the Middle Henrys Aspen Enhancement Project was arbitrary and capricious, an abuse of discretion, and/or otherwise not in accordance with law.

4. Plaintiff requests that the Court set aside the Project decision pursuant to 5 U.S.C. § 706(2)(a) and enjoin implementation of the Project.

5. Plaintiff seeks a declaratory judgment, injunctive relief, an 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. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 because this action arises under the laws of the United States and involves the United States as a defendant.

1 7. Plaintiff submitted timely written comments concerning the Project and fully
2 participated in the available administrative review processes, thus exhausting its administrative
3 remedies. Defendants' issuance of the Middle Henrys Aspen Enhancement Decision Memo approving
4 the project and categorically excluding the action from an Environmental Impact Statement or
5 Environmental Assessment was a final administrative action of the U.S. Forest Service. Thus, the
6 Court has jurisdiction to review Plaintiff's APA claims.
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8 **III. VENUE**

9 8. Venue is proper in this Court under 28 U.S.C. 1391. All or a substantial part of the
10 events or omissions giving rise to the claims herein occurred within this judicial district, Defendants
11 reside in this district, and the public lands and resources and agency records in question are located in
12 this district.
13

14 **IV. PARTIES**

15 9. Plaintiff Alliance for the Wild Rockies (the "Alliance") is a tax-exempt, non-profit
16 public interest organization dedicated to the protection and preservation of the native biodiversity of
17 the Rocky Mountains; its native plant, fish, and animal life; and its naturally functioning ecosystems.
18 Its registered office is located in Missoula, Montana. The Alliance has over 2,000 individual members,
19 many of whom are located in Idaho. The Alliance brings this action on its own behalf and on behalf
20 of its adversely affected members.
21

22 10. Plaintiff Native Ecosystems Council (the "Council") is a non-profit Montana
23 corporation with its principal place of business in Three Forks, Montana. Native Ecosystems Council
24 is dedicated to the conservation of natural resources on public lands in the northern Rockies. Native
25 Ecosystems Council brings this action on its own behalf and on behalf of its adversely affected
26 members.

1 11. Plaintiff Yellowstone to Unitas Connection is a non-profit conservation organization
2 that works to restore fish and wildlife habitat in the Yellowstone to Unitas Corridor through the
3 application of science, education, and advocacy. Yellowstone to Unitas Connection brings this action
4 on its own behalf and on behalf of its adversely affected members.

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6 12. Defendant United States Forest Service is an administrative agency within the U.S.
7 Department of Agriculture and is responsible for the lawful management of our national forests,
8 including the Caribou-Targhee National Forest.

9 13. Defendant Vicki Christiansen is named in her official capacity as Chief of the Forest
10 Service.

11 14. Defendant Mel Bolling is named in his official capacity as Forest Supervisor of the
12 Caribou-Targhee National Forest.

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14 15. Defendant Frank Beum is named in his capacity as the acting Regional Forester for the
15 Intermountain Region, which is Region 4 of the U.S. Forest Service. In that capacity, he is charged
16 with ultimate responsibility for ensuring that decisions made at each national forest in the
17 Intermountain Region, including the Caribou-Targhee National Forest, are consistent with applicable
18 laws, regulations, and official policies and procedures.

19 16. Defendant Elizabeth Davy is named in her capacity as the District Ranger for the
20 Ashton Island Park District of the Caribou-Targhee National Forest.

22 **V. STATEMENT OF STANDING**

23 17. The interests at stake in this matter are germane to Plaintiff's organizational purposes.
24 Defendants' failure to prepare an environmental impact statement (EIS) and violations of the Forest
25 Plan will harm plant, wildlife, and natural ecosystems in the Caribou-Targhee National Forest and
26 thereby injure Plaintiff's members who use and enjoy those resources.

1 18. Plaintiff and its members observe, enjoy, and appreciate Idaho's native wildlife, water
2 quality, and terrestrial habitat quality, and expect to continue to do so in the future, including in the
3 Project area in the Caribou-Targhee National Forest. Members use and enjoy the waters, public lands,
4 and natural resources throughout areas covered by the Project for work, recreational, scientific,
5 spiritual, educational, aesthetic, and other purposes. Plaintiff's members enjoy hiking, camping,
6 fishing, bird watching, study, contemplation, photography, and other activities in and around the
7 waters and public lands throughout the Project area. Plaintiff and its members also participate in
8 information gathering and dissemination, education and public outreach, commenting upon proposed
9 agency actions, and other activities relating to the Forest Service's management and administration of
10 these public lands.
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12 19. Defendants' unlawful actions adversely affect Plaintiff's organizational interests, as
13 well as its members' use and enjoyment of the Caribou-Targhee National Forest, including the Project
14 area. The interests of Plaintiff and its members have been and will continue to be injured and harmed
15 by the Forest Service's actions and/or inactions as complained of herein. Unless the relief prayed for
16 herein is granted, Plaintiff and its members will continue to suffer ongoing and irreparable harm and
17 injury to their interests.
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19 20. The injuries to Plaintiff are likely to be redressed by a favorable decision of this Court
20 because Plaintiff is seeking an order declaring that Defendants have violated the NEPA, NFMA, and
21 APA and enjoining the Forest Service from implementation of the Project. That would, in turn, protect
22 and preserve the natural areas and plant, fish, and animal species the Plaintiff's members use and enjoy
23 until such time as the Forest Service proposes a project that complies with federal law.
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VI. FACTUAL ALLEGATIONS

A. The Affected Area

21. The Middle Henry's Fork Watershed is a pristine, remote, rural area located within Henry's Fork caldera that sits within the Island Park Caldera of the Caribou-Targhee National Forest.

22. The Henry's Fork Caldera includes the Big Bend ridge to the south, Last Chance and Box Canyon to the north, Thurman Ridge and Bishop Mountain to the West, and Hatchery Butte and Elk Butte to the east.

23. The Henry's Fork area is known for dense forests, grassy meadows, quality waterbodies, and abundant wildlife.

24. The Project will occur within the Middle Henry's Fork watershed of the Caribou-Targhee National Forest.

25. The Middle Henry's Fork watershed is the largest watershed in the Caribou-Targhee National Forest.

26. The Middle Henry's Fork watershed is approximately 120,000 acres.

27. Wetlands exist throughout the Middle Henry's Fork watershed and Project areas.

28. The Harriman Refuge is located within the Middle Henry's Fork Watershed and Project area.

29. The Thurmon Creek Research Natural Area is located within the Middle Henry's Fork Watershed and Project area.

30. The Middle Henry Project area is blessed with a rich environment and spectacular natural beauty. Wildlife abounds and the project area supports crucial populations of threatened and endangered fish, birds, and animals.

1 31. The Project area is suitable habitat for the following species: fisher, gray wolf, spotted
2 bat, Townsend's big-eared bat, boreal toad, Columbia spotted frog, American three-toed woodpecker,
3 boreal owl, great gray owl, bald eagle, Northern Goshawk, peregrine falcon, trumpeter swan, gray
4 wolf, elk, marten, moose, mule deer, silver haired bat, and snowshoe hare.

5 32. The following sensitive species are present in the Project area: boreal toad, Columbia
6 spotted frog, American three-toed woodpecker, boreal owl, great gray owl, bald eagle, Northern
7 Goshawk, peregrine falcon, trumpeter swan, gray wolf, elk, marten, moose, mule deer, silver haired
8 bat, and snowshoe hare.

9 33. There are five known boreal owl nests in the Project area.

10 34. There are four known great gray owl nest territories in the Project area.

11 35. There are eight known bald eagle nesting and primary use zones in the Project area.

12 36. There are six known goshawk territories in the Project area.

13 37. There are two known peregrine falcon aeries in the Project area.

14 38. There are two known trumpeter swan nesting territories in the Project area.

15 39. The Project area contains habitat and known occurrences of Endangered Species Act
16 listed species including the threatened Canada lynx, threatened grizzly bear, and proposed threatened
17 wolverine.

18 40. The Ashton-Island Park District where the Project is located is secondary Canada lynx
19 habitat.

20 41. The Project area is also within Canada lynx linkage habitat.

21 42. Lynx have been known to move across the Ashton-Island Park District in order to
22 access primary habitat within Yellowstone National Park.

23 43. The Project area is located within the Island Park bear analysis unit for the grizzly bear.

1 44. The Project area contains wolverine habitat and there have been two possible
2 wolverine detections in the Middle Henry's Fork Watershed.

3 45. The land management plan that is applicable to the Project is the 1997 Targhee Revised
4 Forest Plan (Forest Plan).

5 **B. The Middle Henry Aspen Enhancement Project**

6 46. The United States Forest Service approved the Middle Henry Aspen Enhancement
7 project which will allow, among other things, commercial logging, non-commercial thinning, and
8 burning in the Middle Henrys Fork Watershed in the Ashton-Island Ranger District of the Caribou-
9 Targhee National Forest.

10 47. The Project involves logging and/or burning across approximately 42,274 acres of the
11 Caribou Targhee National Forest.

12 48. The Project would impact approximately thirty-five percent of the entire Middle
13 Henry's Fork watershed.

14 49. The Project would harvest timber on approximately 3,575 acres of land within 500 feet
15 of a road.

16 50. The Project would harvest timber and conduct burning on approximately 5,312 acres.

17 51. The Project would conduct burning on approximately 33,387 acres.

18 52. In December 2019, Defendants United States Forest Service sought comments on the
19 proposed Project.

20 53. Plaintiff submitted timely comments to the proposed Project purpose and need letter.

21 54. In July 2020, Defendants United States Forest Service published a Decision Memo
22 approving the Project.

1 55. The Decision Memo asserts that the purpose of the project is “to move the condition
2 of aspen communities across the watershed towards a more desired state.”

3 **C. The Project Features Exceptional Circumstances Requiring Environmental**
4 **Review**

5 56. The United States Forest Service states that the Project is categorically exempt from
6 further environmental analysis in an Environmental Impact Statement or Environmental Assessment
7 under 36 C.F.R. § 220.6(e)(6).

8 57. Applicable federal regulations state, “A proposed action may be categorically
9 excluded from further analysis and documentation in an EIS or EA **only if there are no extraordinary**
10 **circumstances** related to the proposed action....” 36 C.F.R. § 220.6(a) (emphasis added).

11 58. The code provides a list of resource conditions that should be considered when
12 determining whether extraordinary circumstances warrant further environmental review under NEPA.
13 36 C.F.R. § 220.6(b).

14 59. Multiple resource conditions to determine “extraordinary circumstances” are present
15 in the Project area.

16 60. “Federally listed threatened or endangered species or designated critical habitat,
17 species proposed for Federal listing or proposed critical habitat, or Forest Service sensitive species,”
18 36 C.F.R. § 220.6(b)(1)(i), are present in the project area.

19 61. Flood plains and wetlands are present in the Project area. 36 C.F.R. § 220.6(b)(1)(ii).

20 62. “Congressionally designated areas, such as wilderness, wilderness study areas, or
21 national recreation areas,” 36 C.F.R. § 220.6(b)(1)(iii), are present in the Project area.

22 63. “Research natural areas,” 36 C.F.R. § 220.6(b)(1)(v), are present in the Project area.
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1 **D. The Project Will Result in Significant Environmental Impacts**

2 64. The Project will degrade habitat across approximately 42,274 acres within the Middle
3 Henrys Fork watershed.

4 65. The Project will result in significant adverse impacts to sensitive species.

5 66. The Project will result in significant adverse impact to ESA listed or proposed listed
6 species within the Project area.

7 67. The Project will significantly increase road and motorized activity in habitat for
8 sensitive and federally listed species.

9 68. The Project’s logging activities within 500 feet of the road will remove cover, further
10 exacerbating road impacts for species in the Project area.

11 69. The use of helicopters will result in significant adverse impacts on wildlife in the
12 Project area.

13 70. The logging, burning, and soil compaction involved with these Project activities will
14 result in significant adverse impacts to vegetation.

15 71. The logging, burning, and land disturbance involved with these Project activities will
16 result in erosion and pollution in the area that will result in significant adverse impacts to nearby water
17 quality.

18 72. The Project will result in significant impacts to migratory birds.

19 **E. The Project Does Not Provide Adequate Old Growth Data**

20 73. The Project Decision Memo asserts that “20 percent of the forested acres would be
21 comprised of a combination of old growth and late seral forest stage acres following the criteria
22 outlined in RFP.”
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1 74. The Project’s assertions about old growth are flawed because there is no reliable
2 inventory of old growth.

3 75. The Targhee Revised Forest Plan requires that the combination of old growth and late
4 seral forest stage acres be 20 percent or more of the forested acres in each principal watershed. Where
5 it exists, at least half of this should meet old growth characteristics.

6 76. In 2005, the court in *Native Ecosystems Council v. Bosworth* found that Targhee
7 National Forest has not completed a reliable inventory of old growth and there is uncertainty regarding
8 whether the Targhee Revised Forest Plan guideline for old growth was being met. *Native Ecosystems*
9 *Council v. Bosworth*, 2005 WL 2387594 (2005).

10 77. The United States Forest Service has not conducted a thorough inventory of old growth
11 in the Caribou-Targhee National Forest.

12 78. The current amount of late seral or old growth in the Project area is unknown.

13 79. Because the United States Forest Service has not completed a thorough inventory of
14 old growth, the agency’s assertions about maintaining old growth while also proposing to log or burn
15 roughly one-third of an entire watershed are unfounded.

16 80. The Project will not conserve wildlife that relies on old growth habitat.

17 **F. The Project Violates Woodpecker Snag Requirements in the Forest Plan**

18 81. The Targhee Revised Forest Plan requires habitat “Maintain snag habitat at greater
19 than 40 percent of the biological potential for woodpeckers.”

20 82. The Final Environmental Impact Statement for the Revised Forest Plan states that there
21 must be a 61 percent habitat potential for all woodpeckers and a 47 percent habitat potential for large
22 woodpeckers.

23 83. Large woodpeckers require at least a 12-inch snag.

1 84. The Decision Memo asserts that the Project will “maintain snag habitat at greater than
2 40 percent of the biological potential for woodpeckers.” But the Decision Memo does not mention the
3 size of the snags that will be preserved to provide habitat for large woodpeckers.

4 **G. The Project Violates the Northern Rockies Lynx Management Direction**

5 85. The Northern Rockies Lynx Management Direction provides management direction
6 for lynx conservation for the Caribou-Targhee National Forest.
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8 86. The Caribou-Targhee National Forest Plan was amended in 2007 to include the
9 Northern Rockies Lynx Management Direction objectives, standards, and guidelines (Lynx
10 Amendment).

11 87. The Lynx Amendment Standard ALL S1 requires that vegetation management
12 projects must maintain habitat connectivity in a linkage area.

13 88. The Lynx Amendment defines connectivity as consisting of “an adequate amount of
14 vegetation cover arranged in a way that allows lynx to move around.
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16 89. Landscape connectivity is an important component of lynx conservation, particularly
17 at the southern edge of their distribution.

18 90. Characteristics favorable for landscape level connectivity for lynx include forested
19 cover, an abundance of productive foraging habitat, and gentle-moderate terrain.
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21 91. Lynx usually avoid large unforested areas and prefer to move between primary habitat
22 sites under cover of mature forest, dense early-seral forest, or tall shrubs—typically following ridges
23 or riparian zones and moving through saddles.

24 92. Thinning can affect lynx movement across the landscape and can alter lynx distribution
25 within their home range (Squires et al. 2006, Squires et al. 2010).
26

1 93. Areas of high human use can also interrupt habitat connectivity and further fragment
2 lynx habitat (Ruediger et al. 2000, p. 2-18).

3 94. The Project authorizes timber harvest and prescribed burning that will remove cover
4 and productive foraging habitat for lynx resulting in the reduction of habitat connectivity.
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6 **VII. CLAIMS FOR RELIEF**

7 **FIRST CLAIM FOR RELIEF**

8 **VIOLATION OF NEPA AND THE APA**

9 **Failure to Conduct Environmental Review**

10 95. Plaintiff realleges and incorporates by reference all preceding paragraphs.

11 96. The National Environmental Policy Act of 1969, commonly known as NEPA, is “our
12 basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a) (2006).
13

14 97. NEPA requires federal agencies “to the fullest extent possible” to prepare an
15 environmental impact statement (EIS) for every major Federal action significantly affecting the quality
16 of the human environment.” 42 U.S.C. § 4332(2)(C). An EIS must “provide full and fair discussion
17 of significant environmental impacts and shall inform decisionmakers and the public of the reasonable
18 alternatives which would avoid or minimize adverse impacts or enhance the quality of the human
19 environment.” 40 C.F.R. § 1502.1. Under NEPA, an EIS must take a hard look at environmental
20 impacts, which includes considering all foreseeable direct and indirect impacts, without improperly
21 minimizing negative side effects. An EIS must take a hard look at “[t]he degree to which the action
22 may adversely affect an endangered or threatened species.” 40 C.F.R. § 1508.27(b)(9).
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24 98. The regulations implementing NEPA provide that certain categories of proposed
25 actions may be categorically exempt from preparing an Environmental Assessment or Environmental
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1 Impact Statement “if there are no extraordinary circumstances related to the proposed action.” 36
2 C.F.R. § 220.6(a).

3 99. The Defendants were required to consider the resource conditions set forth in 36 C.F.R.
4 §220.6(b) to determine the presence of extraordinary circumstances.

5 100. The Defendants failed to acknowledge or consider multiple extraordinary
6 circumstances related to this project.

7 101. The extraordinary circumstances applicable to this Project require the preparation of
8 an Environmental Assessment or an Environmental Impact Statement.

9 102. Defendants were required to prepare an EIS to analyze the Project’s probable
10 significant adverse environmental impacts alleged herein.

11 103. Defendants failed to take a hard look at the Project’s significant adverse environmental
12 impacts and failed to provide a full and fair discussion of those impacts.

13 104. Defendant’s actions as described above are arbitrary, capricious, not in accordance
14 with law, and without observance of procedures required by law, within the meaning of the APA, 5
15 U.S.C. § 706.

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18 **SECOND CLAIM FOR RELIEF**

19 **VIOLATION OF NFMA AND THE APA**

20 **Failure to Comply with the Targhee National Forest Revised Forest Plan**

21 105. NFMA mandates that Defendant’s activities carried out on National Forests must be
22 consistent with the applicable land management plan. 16 U.S.C. § 1604(i); 36 C.F.R. § 219.15(e).

23 106. The Targhee National Forest has not completed a reliable inventory of old growth and
24 there is uncertainty regarding whether the Targhee Revised Forest Plan guideline for old growth has
25 been met.
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1 107. The Project violates cavity nesting and snag habitat set out in the Forest Plan.

2 108. The Project fails to demonstrate compliance with the lynx amendment for maintaining
3 habitat connectivity in lynx linkage areas.

4 109. The failure to demonstrate compliance with Forest Plan standards is a violation of
5 NFMA.

6 110. Defendants' actions as described above are arbitrary, capricious, not in accordance
7 with law, and without observance of procedures required by law, within the meaning of the APA, 5
8 U.S.C. § 706.

10 **VIII. PRAYER FOR RELIEF**

11 Plaintiffs respectfully request that the Court grant the following relief:

12 A. Order, declare, and adjudge that the Defendants have violated the National
13 Environmental Policy Act, National Forest Management Act, and the Administrative Procedure Act,
14 and their implementing regulations as set forth above;

15 B. An order enjoining the Defendants from implementation of the Project;

16 C. An order vacating the Project Decision and requiring the Defendants withdraw the
17 finding that Project is categorically excluded from an Environmental Assessment or an Environmental
18 Impact Statement until such time as Defendants demonstrate to this court that they have adequately
19 complied with the law;

20 D. Award the Plaintiffs their costs, litigation expenses, expert witness fees, and reasonable
21 attorneys' fees associated with this litigation pursuant to the Equal Access to Justice Act, and all other
22 applicable authorities; and

23 E. Grant the Plaintiffs any such further relief as may be just, proper, and equitable.
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Dated this 16th day of December, 2020.

Respectfully submitted,

BRICKLIN & NEWMAN, LLP

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By: s/Claudia M. Newman

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