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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

<p>FRIENDS OF RAPID RIVER, and FRIENDS OF THE CLEARWATER</p> <p>Plaintiffs,</p> <p>v.</p> <p>CHERYL PROBERT, Supervisor, NEZ PERCE-CLEARWATER National Forest, and VICTORIA CHRISTIANSEN, Chief of the U.S. Forest Service, an agency of the U.S. Dept. of Agriculture,</p> <p>Defendants.</p>	<p>Civ. No. 3:18-cv-465</p> <p>COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF</p>
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I. INTRODUCTION

1. This is a civil action for judicial review under the citizen suit provision of the Administrative Procedure Act of the U.S. Forest Service authorizations, analyses, and findings related to the Windy Shingle Project (Project) in the Clearwater National Forest.
2. Plaintiff Friends of the Clearwater attests that the recent decisions of Defendants which authorized timber harvest of trees on 2,510 acres, rehabilitation of 44 acres, prescribed fire on harvested and unharvested acres, construction of a fuel break, and road work 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.*, the National Forest Management Act (NFMA), 33 U.S.C. § 1601 *et seq.*, the Healthy Forest Restoration Act (HFRA), 16 U.S.C. § 6501 *et seq.*, and the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et seq.*, by failing to take a hard look at the potential direct, indirect and cumulative effects of habitat manipulation within the Windy Shingle project area, by making arbitrary and capricious decisions, or otherwise not being in accord with applicable law.
4. Plaintiff requests that the Court set aside the Project pursuant to 5 U.S.C. § 706(2)(A) and enjoin implementation pending preparation of an Environmental Impact Statement (EIS) pursuant to NEPA.
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 (EAJA) 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 Plaintiff and Defendants. Plaintiffs' members use and enjoy the Nez Perce-Clearwater National Forest and specifically the Windy Shingle boundary area for hiking, bird-watching, 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 continue to implement the Project. These are actual, concrete injuries caused by Defendants' failure to comply with mandatory duties under NEPA, NFMA 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 and objections 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), 16 U.S.C. § 6516(a), and LR 3.2(b)(1)(C). It involves a dispute over management of the Nez Perce-Clearwater National Forest. The office of Defendant Cheryl Probert, the Forest Supervisor of the Nez Perce-Clearwater National Forest is located in Kamiah, Lewis County, Idaho. Members of Plaintiff Friends of Rapid River live in Idaho County. The registered office for Plaintiff Friends of the Clearwater is in Moscow, Latah County, Idaho. The project is in Idaho County. Thus, venue is appropriate in the Central Division of the United States District Court for the District of Idaho.

IV. PARTIES

11. Plaintiff FRIENDS OF THE RAPID RIVER (FORR) is a grassroots ad hoc group of people whose common focus is to protect and preserve the wildness of the Rapid River in west central Idaho, its fish and wildlife resources, its tributaries, and the integrity of the watershed. FORR members live within the vicinity of the Windy Shingle project area or recreate within the Windy Shingle project area, or both. FORR is directly affected by Defendants' failure to perform their lawful duty to protect and conserve the ecological integrity of the Project's area.

12. FRIENDS OF THE CLEARWATER is a grassroots, Idaho-based, tax-exempt non-profit organization dedicated to protecting the public wildlands, wildlife, and waters in the Clearwater Basin of north-central Idaho. This includes

lands within the Nez Perce-Clearwater National Forest. FOC has over 800 members. FOC members recreate in the Windy Shingle project area.

13. Defendant VICTORIA CHRISTIANSEN is the Chief of the U.S. Forest Service and has the appropriate delegated statutory authority and responsibility to comply with federal law in the management of the federal public lands at issue in this litigation. She is sued solely in her official capacity.

14. Defendant CHERYL PROBERT is the Supervisor of the Nez Perce-Clearwater National Forest and responsible for ensuring that projects and decisions are consistent with the Nez Perce National Forest Plan and related authorities. She is sued solely in her official capacity.

V. FACTUAL ALLEGATIONS

PROCEDURAL BACKGROUND

15. The Agricultural Act of 2014 (P.L. 113-79, the “2014 Farm Bill”) was signed into law by President Obama on **February 7, 2014**. Section 602 of that Bill provided that: “(b) DESIGNATION OF TREATMENT AREAS.—(1) INITIAL AREAS.—Not later than **60 days after the date of enactment** of the Agricultural Act of 2014, **the Secretary shall**, if requested by the Governor of the State, **designate** as part of an insect and disease treatment program 1 or more landscape-scale areas, such as subwatersheds (sixth-level hydrologic units, according to the System of Hydrologic Unit Codes of the United States Geological Survey), in at least 1 national forest in each State that is experiencing an insect or disease epidemic. (2) ADDITIONAL AREAS.—**After the end of the 60-day period** described in paragraph (1), the Secretary may designate additional

landscape-scale areas under this section as needed to address insect or disease threats.” (emphasis added)

16. On May 20, 2014 - 102 days after the date of enactment of the Farm Bill - Defendant Forest Service Chief designated National Forest lands in Idaho, including the lands at issue in this litigation, for eligibility to be excluded from NEPA study and analysis pursuant to Section 8204 of the Agriculture Act of 2014 (Public Law 113-79), amending Title VI of the Healthy Forests Restoration Act of 2003 (HFRA) (16 U.S.C. § 6591 et seq.).

17. The effect of the May 20, 2014 Farm Bill designation is to permit categorical exclusion of fuels treatment projects from the normal environmental analysis and review requirements of NEPA, including the public involvement in decision-making that normally attaches to projects subject to the requirement to prepare an Environmental Assessment or Environmental Impact Statement.

18. Categorical exclusions created by the 2014 Farm Bill (Public Law 113-79) is codified under Title VI of the Healthy Forests Restoration Act, 16 U.S.C. § 6591 et seq.

19. No NEPA analysis, solicitation of public comment, or administrative review and appeal process was made available for this sweeping designation by the Chief, though the Windy Shingle Project would not have been eligible for a categorical exclusion from further NEPA analysis without it. As such, Plaintiffs have exhausted their administrative remedies in relation to the 2014 designation, and now challenge it in the context of implementation at the site-specific level.

20. The Forest Service released a Scoping Notice for the Windy Shingle Project on February 15, 2017.
21. Plaintiffs submitted timely comments in response to the Scoping Notice on or before March 17, 2017. This was the only opportunity for public comments on the proposal, and was without the benefit of subsequently generated specialists' reports.
22. Defendant Probert signed a Decision Memorandum ("DM") approving the Windy Shingle Project, pursuant to the Farm Bill's categorical exclusion provisions ("Farm Bill CE"), on October 13, 2017.
23. The Scoping Notice of February 15, 2017 did not address expansion of the McClinery pit, by approximately three acres, as "necessary to support this and future projects in the area." DM, pp. 6-7.
24. The McClinery pit is located on the edge of Cutting Unit 6F, just off the Forest Service road 517F. In the Windy Shingle Project, the Forest Service proposed to expand McClinery Pit. According to the Forest Service, the McClinery pit was developed in 1990 to support the Shingle Forks Timber Sale, and has available room for expansion. "Crushing surface and base aggregate sources at this site would provide a source for future aggregate placement projects in the area and provide a source of aggregate for maintenance needs on the nearby roads. The area of disturbance, including stockpile areas and pit excavation, would be approximately three acres. Disturbance would include clearing and grubbing source areas, crushing and sorting operations during production,

reserving topsoil where available and reclaiming the pit area with topsoil, seeding and placing slash where appropriate.” DM, pp. 6-7.

25. Expanding the McClinery gravel pit is an indefinite structural improvement.

26. According to the DM, “Reactivation of the McClinery pit was analyzed in specialist reports as appropriate to the resource.” DM-7. However, while recognizing that there is critical habitat for ESA-listed species “[d]ownstream of the project activity areas and generally outside of the project area” (p. 47), neither the Aquatics Resources Report nor the ESA Concurrence from NMFS (October 6, 2017) mentions the potential impacts from reactivating the pit on aquatic species.

27. The McClinery pit is generally upslope from, and about a half-mile south of, Papoose Creek, and about three-fourths of a mile north of Shingle Creek. Sediment from the pit draining southward would potentially impact Shingle Creek, which has a 1.8-mile stretch of designated critical habitat for Steelhead and Spring Chinook, while sediment draining northward would potentially impact Papoose Creek, which has a 1.5-mile stretch of designated critical habitat for Steelhead.

28. Categorically Excluded Projects carried out under Farm Bill are considered to be “authorized hazardous fuel reduction projects” under the Healthy Forest Restoration Act of 2003, as amended. 16 U.S.C. § 6591a(3)(d).

29. “Authorized hazardous fuel reduction projects” is a term statutorily defined by HFRA as “the measures and methods described in the definition of

‘appropriate tools’ contained in the glossary of the Implementation Plan.” 16 U.S.C. § 6511(2), (11).

30. “Appropriate tools” for an “authorized hazardous fuel reduction project” under the authority of the HFRA are defined as methods for reducing hazardous fuels, such as “prescribed fire, wildland fire use, and various mechanical methods such as crushing, tractor and hand piling, thinning (to produce commercial or pre-commercial produces), and pruning.” Implementation Plan, p. 18 (glossary).

31. Creating or expanding a gravel pit is not a method for reducing hazardous fuels pursuant to HFRA.

32. In addition to requiring eligible projects to maximize the extent of old growth, the Farm Bill requires that “[a]ll projects and activities carried out under this section shall be consistent with the and resource management plan established under” the Forest Act (NFMA). 16 U.S.C § 6591b(e).

33. Under the “Wildlife and Fish” heading for forest-wide management direction, standard (E) 7 of the Nez Perce National Forest Plan (“NFP”) requires the Forest Service to “[p]rovide management for minimum viable populations of old-growth and snag-dependent species by adhering to the standards stated in Appendix N.” Nez Perce Forest Plan p. II-19.

34. The Nez Perce Forest Plan defines old growth as forest stands that generally meets the following criteria: At least 15 trees per acre greater than 21 inches diameter at breast height, two or more canopy layers, at least .5 snags per acre greater than 21 inches diameter at breast height and at least 40 feet tall, signs of rot and decadence present, overstory canopy closure of 10-40 percent,

understory canopy closure of at least 40 percent, total canopy closure at least 70 percent, logs on the ground. NFPF Appx N, p. N-1.

35. In the Windy Shingle Project, management is proposed in approximately 326 acres of stands that possess old growth structural characteristics, including but not limited to constructing temporary roads with these stands and “intermediate” thinning treatments.

36. Some of these treatments will have the effect of converting stands that currently meet the old growth criteria from the forest plan into stands that no longer meet old growth criteria, due to reductions in the number of large, old trees. Vegetation Report, p. 29.

37. According to the Forest Service, temporary roads in old growth stands would effectively result in the loss of old growth habitat, requiring as many as 150 years to re-establish the old-growth character of these acres. Wildlife Report, p. 119.

38. NFPF Appendix N’s Old Growth Management Standard A2 (Identification and Designation of Old-Growth Stands) requires that “[o]ld-growth stands will be identified through the use of stand exam information, aerial photos, and field reconnaissance” and also requires the Forest Service to “[v]erify the quality, amount, and distribution of existing and replacement old-growth habitat *as part of project planning.*” NFPF, Appx. N, p. 2 (emphasis added).

39. NFPF Appendix N also requires stands to be “inventoried and prioritized with highest priority for inventory in those drainages with proposed timber sales or other activities that could adversely impact old growth.” NFPF, Appx. N, p. 2.

40. The NFPF Appendix N provides alternative rationales for complying with the inventory and prioritization process: where only five percent old growth exists in a drainage, then all stands should be managed as old growth; and, where more than 5 percent old growth exists, as appears to be the case in the Windy Shingle Project Area, then old-growth stands should be protected based on their priority ranking.

41. While the Forest Service has implemented the priority ranking system for past projects in the Nez Perce National Forest, no analysis of proposed old growth timber harvest based upon priority ranking of old growth stands was conducted as part of the Windy Shingle project documentation.

42. Subsequent to issuance of the Decision Memo approving the Windy Shingle Project, a wildfire burned in the vicinity of the Project Area, necessitating the preparation of Supplemental Information Report (SIR) by the Forest Service to determine whether or not new information or changed circumstances associated with the Rattlesnake Creek wildfire rendered the original NEPA analysis insufficient, so as to require further environmental analysis of potential impacts prior to implementing Windy Shingle. SIR p. 14-20.

43. According to the SIR, as of August 24, 2018, the fire had burned approximately 8,136 acres at that time, including approximately 1,501 acres in the Project area. SIR, p. 4.

44. According to the SIR, fire burn severity for the Rattlesnake Creek wildfire ranged from unburned to patches of high severity. SIR, p. 8.

45. According to the SIR's map of the fire perimeter and the map of the Forest Service's old-growth analysis area, the Rattlesnake Creek wildfire perimeter encompassed a portion of an old-growth analysis area along with several areas of identified forest plan old-growth.

46. The SIR does not include analysis from any specialist discussing the severity of the Rattlesnake Creek Fire's impacts to old growth across the old-growth analysis areas and/or on old-growth units outside of the Project's proposed-activity units.

47. The only retention strategy identified for large trees identified in the Windy Shingle Project is that required under the Forest Plan, which establishes "minimum" leave tree requirements and was not intended to "maximize" the retention of large trees after timber harvest treatments.

48. Management Area 20 (MA-20) in the Nez Perce Forest Plan "provide critical habitat for wildlife species dependent on old-growth forest conditions" and provides for old-growth and replacement old-growth stands. NPPF Chap III, p. 56.

49. The Nez Perce Forest Plan for MA-20 includes a standard prohibiting timber harvest in existing old-growth stands. NPPF Chap III, p. 56.

50. Unit 5 for the Windy Shingle Project overlaps with a Management Area that the Forest Service has designated as MA-20.

51. The Windy Shingle Project, as approved, includes the following treatments for portions of Unit 5: Shelterwood cut with reserves, clearcut with reserves, and commercial thinning.

VI. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

The Windy Shingle Decision violates the Healthy Forest Restoration Act

1. All above paragraphs are incorporated by reference.
2. The Forest Service violated the HFRA when it chose to include the McClinery gravel pit as part of the categorically excluded Windy Shingle Project.
3. Because McClinery gravel-pit expansion is not an activity that reduces hazardous fuels under the HFRA, and because Congress expressly designated narrow activities to be permissible under the Farm Bill's amendment to the HFRA (among which gravel-pit expansion was not included), gravel-pit expansions exceed the parameters of what is allowed under the Farm Bill's categorical exclusion under the Healthy Forest Restoration Act. Thus, the Forest Service exceeded its statutory authority by including a three-acre gravel-pit expansion in the Windy Shingle Project.
4. Contrary to representations in the Windy Shingle Decision Memo, the potential direct, indirect and cumulative impacts of the McClinery gravel-pit expansion on fisheries was not considered in the Aquatics Specialist Report.

SECOND CLAIM FOR RELIEF

The Windy Shingle Decision violates the National Forest Management Act and the Healthy Forest Restoration Act

1. All above paragraphs are incorporated by reference.
2. The National Forest Management Act of 1976 ("NFMA") imposes a substantive duty on the Forest Service to "provide for diversity of plant and animal communities . . ." 16 U.S.C. § 1604(g)(3)(B). This statutory intent is reflected in NFMA's 2005 implementing regulations by requiring the Forest Service to:

document how the best available science was taken into account in the planning process; evaluate and disclose substantial uncertainties in that science; evaluate and disclose substantial risks associated with plan components based on that science and document that the science was appropriately interpreted and applied.

36 C.F.R. § 219.11(a)(1)-(4).

3. The Farm Bill CE portion of HFRA requires the Forest Service to “consider[] the best available scientific information to maintain or restore the ecological integrity, including maintaining or restoring structure, function, composition, and connectivity” for categorically excluded projects. 16 U.S.C. §6591b(1)(B).
4. The Farm Bill provides that “[a]ll projects and activities carried out under this section shall be consistent with the [relevant] land and resource management plan,” and in a manner that “maximizes the retention of old-growth and large trees, as appropriate for the forest type, to the extent that the trees promote stands that are resilient to insects and disease.” 16 U.S.C. § 6591b, (b)(1)(A), (e).
5. Forest-wide Management Direction Standard (E) 7 requires the Forest Service to “[p]rovide management for minimum viable populations of old-growth and snag-dependent species by adhering to the standards stated in Appendix N.” NPEP Appx N, p. 2.
6. Appendix N Old-Growth Management Standard A2 (Identification and Designation of Old-Growth Stands) provides that: “[o]ld-growth stands will be identified through the use of stand exam information, aerial photos, and field reconnaissance;” that the Forest Service will “[v]erify the quality, amount, and distribution of existing and replacement old-growth habitat as part of project planning;” and, that old-growth stands will be “inventoried and prioritized [for retention] with highest priority for inventory in those

drainages with proposed timber sales or other activities that could adversely impact old growth.” NPFP Appx N, p. 2.

7. The Windy Shingle Project does not maximize old growth retention in a manner that is consistent with the best available scientific information required to be gathered prior to, or as a part of, project implementation by the Nez Perce National Forest Plan.
8. The Windy Shingle Project does not maximize the retention of large trees, as it requires no more than retaining enough large trees to meet the minimum requirements of “leave trees” and snags under the Nez Perce National Forest Plan, which is standard operating procedure for timber harvest under the Plan.
9. The Windy Shingle Project did not verify the quality of the old-growth inventory or prioritize old-growth stands for retention, either before or after the Rattlesnake Creek wildfire, which violates the forest-wide management direction Standard (E) 7 and Appendix N, section A(2).
10. The Forest Service has violated the forest plan standard that prohibits logging in Management Area 20 by approving logging in Unit 5 and in areas labeled as Management Area 20.
11. Because categorical exclusions, under 16 U.S.C. § 6591b(e), must comply with the applicable land-management plan, and because the Project violates the Nez Perce Forest Plan, the Project also violates categorical exclusions allowed under the Healthy Forest Restoration Act.

THIRD CLAIM FOR RELIEF

The Windy Shingle Decision violates the National Environmental Policy Act, the National Forest Management Act, and the Healthy Forest Restoration Act

1. All above paragraphs are incorporated by reference.
2. The Rattlesnake Creek wildfire created the potential for significant cumulative impacts to old growth species associated with the quality, amount, and distribution of existing and replacement old-growth habitat, including but not limited to the prioritization ranking of old growth stands for purposes of meeting NFMA's diversity mandate.
3. NEPA requires the Forest Service to supplement its environmental analysis whenever "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. §1502.9(c)(1)(ii).
4. Categorical exclusions are not available for projects where extraordinary circumstances or potentially significant cumulative impacts necessitate the preparation of an environmental analysis or impact statement. 40 C.F.R. §1508.4.
5. The impacts from the fire on old-growth inventory across the analysis area have the potential to reduce the size of old-growth stands or, alternatively, to lessen the quality and priority of old growth stands.
6. The Forest Service did not disclose or analyze the impact of the Rattlesnake Creek wildfire on the old-growth-analysis unit of concern in Windy Shingle.
7. Because the Forest Service did not take a comprehensive, hard look at the impacts of the Rattlesnake Creek fire on old-growth analysis areas at the appropriate scale, as a "proxy" for potential impacts to wildlife species associated with old growth habitat, it failed to assess the potential cumulative impacts of the Rattlesnake Creek wildfire and

proposed treatments/reductions in the Windy Shingle Project on the amount and quality of old-growth pursuant to the wildlife requirements set forth in the Nez Perce Forest Plan.

8. The Forest Service failed to analyze the fire-related impacts to old growth stands which could result in the reprioritization of existing old-growth areas on a project-level basis (both within and outside of designated units).

VII. RELIEF REQUESTED

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

- A. Declare the Idaho designation of areas eligible for categorical exclusion under the Farm Bill arbitrary, capricious, and/or otherwise not in accordance with law;
- B. Declare that the Windy Shingle Project is arbitrary, capricious, and/or otherwise not in accordance with law;
- C. Enjoin implementation of the Windy Shingle Project pending compliance with NEPA;
- D. Award Plaintiffs their costs, expenses, expert witness fees, and reasonable attorney fees under EAJA; and
- E. Grant Plaintiffs any such further relief as may be just, proper, and equitable.

Respectfully submitted this 23rd day of October, 2018.

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