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17 **IN THE UNITED STATES DISTRICT COURT**
18 **FOR THE EASTERN DISTRICT OF WASHINGTON**
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ALLIANCE FOR THE WILD ROCKIES,)

Plaintiff,)

v.)

JIM PENA, in his official capacity as)
Regional Forester of Region Six U.S.)
Forest Service, UNITED STATES)
FOREST SERVICE, an agency of the)
United States, and RODNEY SMOLDON,)
in his official capacity as Supervisor of)
the Colville National Forest)

Defendants.)
_____)

Case No.: 2:16-cv-00294

**AMENDED COMPLAINT
FOR INJUNCTIVE AND
DECLARATORY RELIEF**

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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”) authorizations, analyses, and lack thereof related to and regarding the North Fork Mill Creek A to Z Project (“NF Mill Creek Project” or “Timber Sale”) on the Colville National Forest (“CNF” or “Forest”).

2. Plaintiff Alliance for the Wild Rockies (“AWR”) attests that the agency’s authorizations, analyses, and lack thereof constitute agency action unlawfully withheld or unreasonably delayed, and/or are arbitrary and capricious, an abuse of discretion, and/or otherwise not in accordance with law, and/or in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, and/or without observance of procedure required by 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”), 16 U.S.C. §§ 1600 et seq., and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701 et seq.

4. Plaintiff seeks 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

1 other relief as this Court deems just and proper.

2 **II. JURISDICTION**

3 5. This action arises under the laws of the United States and involves
4 the United States as a Defendant. Therefore, this Court has subject matter
5 jurisdiction over the claims specified in this Complaint pursuant to 28 U.S.C.
6 §§ 1331, 1346.

7 6. An actual controversy exists between Plaintiff and Defendants.
8 Plaintiff's members use and enjoy the Colville National Forest, including the
9 Mill Creek area particularly, for hiking, fishing, hunting, camping,
10 photographing scenery and wildlife, and engaging in other vocational,
11 scientific, spiritual, and recreational activities. Plaintiff's members' interests in
12 the Mill Creek area are within the zone of interests protected by NEPA and
13 NFMA. Plaintiff's members intend to continue to use and enjoy the Mill
14 Creek area frequently and on an ongoing basis in the future.

15 7. The aesthetic, recreational, scientific, spiritual, and educational
16 interests of Plaintiff's members have been and will be adversely affected and
17 irreparably injured by the Timber Sale. These are actual, concrete injuries
18 caused by Defendants' failure to comply with mandatory duties under NFMA
19 and NEPA. The requested relief would redress these injuries and this Court
20 has the authority to grant Plaintiff's requested relief under 28 U.S.C. §§ 2201

1 & 2202, and 5 U.S.C. §§ 705 & 706.

2 8. Defendants failed to provide adequate scoping, meaningful public
3 notice and opportunity for comment, or an adequate administrative appeal
4 process for the Timber Sale. The Forest Service's approval of the Timber
5 Sale constitutes final agency action for which there is no other adequate
6 remedy in a court. Therefore, the Court has jurisdiction to review Plaintiffs'
7 claims under the APA. 5 U.S.C. § 704.

8 9. Plaintiffs submitted timely written comments and objections
9 concerning the Project in the available administrative review process, thus
10 they have exhausted administrative remedies. Defendants' review of
11 Plaintiffs' objections was the final administrative determination of the U.S.
12 Department of Agriculture, and no further review was available.

13 **III. VENUE**

14 10. Venue in this court is proper under 28 U.S.C. § 1391(e).
15 Defendants reside within the judicial district of the United States District
16 Court for the Eastern District of Washington.

17 **IV. PARTIES**

18 11. Plaintiff ALLIANCE FOR THE WILD ROCKIES is a tax-exempt,
19 nonprofit public interest organization dedicated to the protection and
20 preservation of the native biodiversity of the Northern Rockies Bioregion, its

1 native plant, fish, and animal life, and its naturally functioning ecosystems.
2 AWR is organized under the laws of the State of Montana, and its registered
3 office is in Missoula, Montana. AWR has over 2,000 individual members,
4 many of whom reside in Washington and Idaho in close proximity to the
5 Colville National Forest. AWR's members observe, enjoy, and appreciate
6 Washington's native wildlife, water quality, and terrestrial habitat quality, and
7 expect to continue to do so in the future, including in the NF Mill Creek
8 Project area. AWR's members' professional and recreational activities are
9 directly affected by Defendants' failure to perform their lawful duty to
10 protect and conserve these ecosystems as set forth below. AWR brings this
11 action on its own behalf and on behalf of its adversely affected members.
12 The Alliance and its members are or will be aggrieved within the meaning of
13 the APA by the challenged agency actions.

14 12. Defendant Jim Pena is the Regional Forester for the Northwest
15 Pacific Region/Region Six of the U.S. Forest Service, and in that capacity is
16 charged with ultimate responsibility for ensuring that decisions made at each
17 National Forest in the Region, including the Colville National Forest, are
18 consistent with applicable laws, regulations, and official policies and
19 procedures.

20 13. Defendant UNITED STATES FOREST SERVICE ("Forest

1 Service” or “USFS”) is an administrative agency within the U.S. Department
2 of Agriculture, and is responsible for the lawful management of our National
3 Forests, including the Colville National Forest.

4 14. Defendant Rodney Smoldon is the Supervisor of the Colville
5 National Forest, and in that capacity is responsible for the lawful
6 management of the Colville National Forest.

7 **V. FACTUAL ALLEGATIONS & APPLICABLE LAW**

8 15. The Council on Environmental Quality (“CEQ”) regulations for
9 implementing the procedural provisions of NEPA require:

10 NEPA procedures must insure that environmental information
11 is available to public officials and citizens before decisions are
12 made and before actions are taken. The information must be of
13 high quality. Accurate scientific analysis, expert agency
14 comments, and public scrutiny are essential to implementing
15 NEPA.

16
17 40 CFR § 1500.1(b).

18
19 16. According to NFMA the plans adopted by defendants must:

20 provide for multiple use and sustained yield of the products and
21 services . . . in accordance with the Multiple-Use Sustained-
22 Yield Act of 1960, and, in particular, include coordination of
23 outdoor recreation, range, timber, watershed, wildlife and fish,
24 and wilderness

25
26 16 U.S.C. § 1604(e)(1).

27
28 17. NFMA requires that each national forest be managed pursuant to

29 “one integrated plan . . . incorporating in one document or one set of

1 documents, available to the public at convenient locations, all of the
2 features required by [16 U.S.C. § 1604]” 16 U.S.C. § 1604(f)(1). Also,
3 the plans must be prepared “based on inventories of the applicable
4 resources of the forest[.]” 16 U.S.C. § 1604(f)(3).

5 18. Forest Plans adopted pursuant to NFMA must “provide for
6 obtaining inventory data on the various renewable resources, and soil and
7 water, including pertinent maps, graphic material, and explanatory aids[.]”
8 16 U.S.C. § 1604(g)(2)(B).

9 19. Among other things, Forest Plans adopted pursuant to NFMA
10 are required to:

11 (A) insure consideration of the economic and environmental
12 aspects of various systems of renewable resource management,
13 including the related systems of silviculture and protection of
14 forest resources, to provide for outdoor recreation (including
15 wilderness), range, timber, watershed, wildlife, and fish; (B)
16 provide for diversity of plant and animal communities based on
17 the suitability and capability of the specific land area in order to
18 meet overall multiple-use objectives, and within the multiple-
19 use objectives of a land management plan adopted pursuant to
20 this section, provide, where appropriate, to the degree
21 practicable, for steps to be taken to preserve the diversity of tree
22 species similar to that existing in the region controlled by the
23 plan; (C) insure research on and (based on continuous
24 monitoring and assessment in the field) evaluation of the effects
25 of each management system to the end that it will not produce
26 substantial and permanent impairment of the productivity of the
27 land; . . . [and] (E) insure that timber will be harvested from
28 National Forest System lands only where (i) soil, slope, or other
29 watershed conditions will not be irreversibly damaged; (ii)
30 there is assurance that such lands can be adequately restocked

1 within five years after harvest; (iii) protection is provided for
2 streams, stream-banks, shorelines, lakes, wetlands, and other
3 bodies of water from detrimental changes in water
4 temperatures, blockages of water courses, and deposits of
5 sediment, where harvests are likely to seriously and adversely
6 affect water conditions or fish habitat

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16 U.S.C. § 1604(g)(3).

10 20. NFMA also requires that:

11 (1) In the sale of trees, portions of trees, or forest products from
12 National Forest System lands . . . the Secretary of Agriculture
13 shall select the bidding method or methods which--
14 (A) insure open and fair competition; [and]
15 (B) insure that the Federal Government receive not less
16 than the appraised value as required by subsection (a) of
17 this section

18

19 16 U.S.C. § 472a(e)(1)(A)-(B). NFMA further requires the Secretary
20 to “report any . . . instances of possible collusive bidding or suspected
21 collusive bidding practices to the Attorney General of the United
22 States[.]” 16 U.S.C. § 472a(e)(3)(A). NFMA § 472a also requires that
23 the designation and supervised harvesting of trees be conducted by
24 persons employed by the Secretary of Agriculture. 16 U.S.C. §
25 472a(g).

26 **Defendants’ Actual “Bidding Process”**

27 21. In what is believed to be a first-of-its-kind contract for forest
28 products, the USFS here granted rights to conduct multiple related and

1 contiguous future logging projects to Vaagen Brothers Lumber Company
2 (“Vaagen Bros.”) in exchange for certain financial assurances.

3 22. Those related and contiguous projects – which the Forest
4 Service named the “A to Z Projects” – include the North Fork Mill Creek
5 Project (challenged herein), and the upcoming Middle Fork and South Fork
6 Mill Creek Projects, as well as the Onion and Little Twin Projects.

7 23. The Contract Solicitation issued by the Forest Service in 2013
8 described a planning area totaling 54,000 acres. The total acreage includes
9 44,000 acres in the North Fork, Middle Fork, and South Fork Mill Creek
10 projects. The NF Mill Creek Project challenged here includes
11 approximately 13,000 acres. The Onion Wildland/Urban Interface (“WUI”)
12 timber sale includes 5500 acres, and the Little Twin WUI timber sale
13 includes 4500 acres.

14 24. In the Mill Creek A to Z Stewardship Contract (the “Contract”
15 or “A to Z Stewardship Contract”) the Forest Service grants Vaagen Bros.
16 broad and sweeping authority over a portion of the CNF. The Contract
17 authorizes Vaagen Bros. to design the A to Z Projects, including where,
18 how, and how much to log; and the location and number of logging roads to
19 be constructed. The authority extends to the NF Mill Creek Project, and
20 includes not only overseeing and contracting for preparation of the

1 environmental analysis and specialist reports concerning environmental
2 impacts of the proposed projects, but also responsibility for writing the
3 NEPA documents themselves, and for designating, marking, and
4 supervising the harvest of forest products.

5 25. The Contract authorizes Vaagen Bros. to design the timber sales
6 in the planning area, and gives Vaagen Bros. exclusive rights to the timber.
7 As reported in the Newport Miner: “Vaagen said as part of this new process
8 they are automatically the contractor for the work but will still pay for the
9 timber. They will negotiate the price they pay if they feel it isn’t a fair
10 price.” AWR Objection Attachment #8.

11 26. Based upon information and belief, the contractual arrangement
12 between the Forest Service and Vaagen Bros. assures there will be neither
13 open nor fair competition for the right to cut the timber at issue here.

14 27. When questioned about the unusual contractual arrangement
15 with Vaagen Bros., under which the logger performs many tasks ordinarily
16 performed by public employees, the Forest Service responded that Vaagen
17 Bros. would recoup its costs associated with those activities “by not having
18 to competitively bid on the timber.” *See*, AWR Objection, Attachment #6
19 (downloaded from USFS web site).

1 28. Upon information and belief, the Forest Service will adjust the
2 compensation paid to Vaagen Bros. without using any public process, and
3 without disclosing the methodology for such adjustments.

4 **Purpose & Need of the NF Mill Creek Project**

5 29. According to the “North Fork Mill Creek A to Z Project
6 Environmental Assessment” (hereinafter, “EA”):

7 Proposed vegetation treatments are needed because forest
8 stands have become monotypic and overstocked compared to
9 the historic range of variability and are not on a trajectory to
10 match the desired future condition for a complex mosaic of
11 healthy forest stands. Overstocked stands have become more
12 prone to insect and disease outbreaks and stand-replacing
13 wildfire.

14
15 EA at 5.

16
17 30. The science relied upon by the USFS to justify this “ecosystem
18 management” project in relation to the Historical Range of Variability
19 (“HRV”) for the project area is a study that was never subject to
20 independent scientific peer review, and was not based upon data gathered
21 from the project area, or from the Colville National Forest generally.

22 31. According to at least one member of the Northeast Washington
23 Forestry Coalition (“NEWFC”), the collaborative group which initially
24 presented the idea for this project to the Forest Service (and of which
25 Vaagen Brothers is a member): “HRV ranges for structure stages comes

1 from internal memos by *Berube et al.* that to my knowledge were never
2 published or externally reviewed. They appear to be based on expert
3 opinion and there is little documentation as to how the numbers were
4 actually derived.” AWR Objection Attachment #14. And according to
5 *Berube et al.* (1993)¹ itself:

6 These determinations should be considered first approximations
7 for the ecosystem screening project. More site specific
8 descriptions of biophysical environments exist on the ground
9 than were able to be described for this exercise. As the Forest
10 moves into ecosystem management project planning, more
11 detailed descriptions will be necessary.

12
13 *Berube et al.* (1993) at 2.

14
15 32. More specifically, as stated in the EA, the project is premised on
16 the fire component of HRV, or Fire Regime Condition Class (“FRCC”),
17 described as:

18 a metric that estimates the departure of the forest from historic
19 fire processes and vegetation conditions. Fire regime condition
20 class is derived by comparing current conditions to an estimate
21 of the historical conditions that existed before significant Euro-
22 American settlement.

23
24 EA at 82.

¹ Berube, J., S. Brad, and C. Dammann. 1993. Initial Draft: Characterization
of Biophysical Environments and Historic Ranges of Variability. Internal
Memo.

1 33. This FRCC approach is a matter of controversy in the scientific
2 community. For example, and with particular relevance to the failure of the
3 EA to follow *Berube et al.*'s cautionary language about obtaining more site
4 specific data for the purpose of ecosystem management project planning:
5 “The FRCC relies on estimates of mean fire intervals, but does not require
6 that they be estimated on the basis of site-specific historical data.” *Rhodes*
7 (2007).²

8 34. Another study concluded that FRCC “was not able to predict
9 patterns of high-severity fire[.]” *Odion and Hanson* (2006).³ One of the
10 purposes of the project is to: reduce the threat of severe wildfire.” EA at 5.
11 And, consistent with the conclusions of the EA itself,

12 Condition Class identified nearly all forests as being at high
13 risk of burning with a dramatic increase in fire severity

² Rhodes, Jonathan, *The Watershed Impacts Of Forest Treatments To Reduce Fuels And Modify Fire Behavior* (February 2007) (Unpublished report, accessed on August 17, 2016 at: <http://pacificrivers.org/wp-content/uploads/2015/10/PRC-RES-Rhodes-Thinning-Paper-Final2-2-26-07.pdf>)

³ Odion, D.C., and Hanson, C.T., *Fire severity in conifer forests of the Sierra Nevada, California* (2006). *Ecosystems*, 9: 1177–1189.

1 compared to past fires. Instead, we found that the forests under
2 investigation were at low risk for burning at high-severity,
3 especially when both spatial and temporal patterns of fire are
4 considered.

5
6 *Odion and Hanson* (2006) at 1187. This contrary, peer-reviewed science was
7 presented to the Forest Service in the NEPA process. Nevertheless, the
8 Forest Service ignored the scientific controversy and found that “the effects
9 of the proposed project are not scientifically controversial.” Decision Notice
10 and Finding of No Significant Impact - North Fork Mill Creek A to Z
11 Project Environmental Assessment (“DN/FONSI”), p. 30.

12 35. Defendants based the asserted purpose and need for the Mill
13 Creek Project on assumptions that simply find no support in the best-
14 available, peer-reviewed science on this topic. These assumptions include:
15 that drier forests did not historically experience stand-replacing fires; that
16 fire regimes were frequent and nonlethal; that these stands were open and
17 dominated by large well-spaced trees; and that fuel amounts rather than
18 weather conditions determine fire severity.

19 36. For example, *Baker et al.* (2006)⁴ examined available data and

⁴ Baker, William L.; Thomas T. Veblen, and Rosemary L. Sherriff; Fire, fuels and restoration of ponderosa pine–Douglas fir forests in the Rocky Mountains, USA (2006). *Journal of Biogeography*.

1 concluded that:

2 [T]he variable-severity model, which emphasizes an important
3 role for severe fires in the historical fire regime, appears to
4 apply to a larger portion of the ponderosa pine–Douglas fir
5 zone in the Rocky Mountains than does the low-severity model
6 [relied upon by the Forest Service here]. In most Rocky
7 Mountain ponderosa pine–Douglas fir forests, the variable-
8 severity model, in which forest structures were shaped mainly
9 by infrequent severe fires, is consistent with the evidence of fire
10 history and tree age structures in these forests. Only limited
11 areas of ponderosa pine–Douglas fir forests in the Rocky
12 Mountains, primarily at low elevations and on xeric sites,
13 appear to have been shaped primarily by low-severity fires. To
14 assess which model may best fit a potential management area,
15 site-specific information on fire history and forest conditions is
16 required.

17

18 *Baker et al.* (2006) at 15.

19

20 37. Similarly:

21 *Bessie and Johnson* (1995) found that surface fire intensity and
22 crown fire initiation were strongly related to weather conditions
23 and only weakly related to fuel loads in subalpine forest in the
24 southern Canadian Rockies. . . . Observations of large forest
25 fires during regional droughts such as the Yellowstone fires in
26 1988 (*Turner, et al.* 1994) and the inland northwest fires of
27 1994 . . . raise serious doubts about the effectiveness of
28 intensive fuel reductions as ‘fire-proofing’ measures.

29

30 *DellaSala et al.* (1995)⁵ at 349. And, once again in relation to the need for

⁵ DellaSala, Dominick A., D. M. Olson, S. E. Barth, S. L. Crane, and S. A.

Primm, Forest health: moving beyond rhetoric to restore healthy landscapes

in the inland Northwest (1995). *Wildlife Society Bulletin*, 23(3): 346-356.

1 careful study of local conditions:

2 The premise behind many projects aimed at wildfire hazard
3 reduction and ecological restoration in forests of the western
4 United States is the idea that unnatural fuel buildup has resulted
5 from suppression of formerly frequent fires. This premise and
6 its implications need to be critically evaluated by conducting
7 area-specific research in the forest ecosystems targeted for fuels
8 or ecological restoration projects. Fire regime researchers need
9 to acknowledge the limitations of fire history methodology and
10 avoid over-reliance on summary fire statistics such as mean fire
11 interval and rotation period. While fire regime research is
12 vitally important for informing decisions in the areas of wildfire
13 hazard mitigation and ecological restoration, there is much need
14 for improving the way researchers communicate their results to
15 managers and the way managers use this information.

16
17 *Veblen* (2003)⁶ at 259.

18 38. Overwhelmingly, the best available science on wildfire
19 demonstrates that it is weather, especially in this new era of climate change,
20 and not vegetation or fuel loads, that is driving fire behavior in the Western
21 U.S. *DellaSala and Hanson* (2015)⁷, Ch. 13, pp. 382-384.

⁶ Veblen, Thomas T. 2003. Key Issues in Fire Regime Research for Fuels Management and Ecological Restoration. USDA Forest Service Proceedings RMRS-P-29.

⁷ DellaSala, Dominick A. and Chad T. Hanson, 2015. The Ecological Importance of Mixed- Severity Fires: Nature's Phoenix. Published by Elsevier Inc.

1 39. All of this contrary, peer-reviewed science, offered in opposition
2 to the stated purpose and need for the NF Mill Creek Project and the EA’s
3 reliance on a study that was *not* subjected to formal peer review,
4 demonstrates sufficient controversy of this management approach to
5 require an EIS under NEPA before deciding to proceed with this ecosystem
6 management strategy.

7 40. Defendant Supervisor Smoldon’s direction that the preparers of
8 the EA rely exclusively on a non-peer reviewed study (“Rodney [Smoldon]
9 has directed we use *Berube...*” AWR Objection, Attachment #13)
10 demonstrates that the project analysis was largely pre-determined, in
11 violation of NEPA.

12 41. If the Forest Service were to take a hard look at the science and
13 the conditions in the project area in an EIS, with all the public input
14 entailed in that process, it would have to consider the recommendations in
15 *Baker et al.* (2006), which cautions against the very type of logging-
16 friendly, aggressive management that has cumulatively led to the
17 degradation of forest and stream conditions throughout the life of the
18 Colville National Forest Plan (1988) (“CNF Plan CNF Plan”):

19 For the purpose of ecological restoration in Rocky Mountain
20 ponderosa pine–Douglas fir landscapes, the most appropriate
21 action at the present time is a mixture of modest passive and
22 active approaches. Undisturbed mature forests require little or

1 no restoration – a passive approach is best. Active approaches
2 may include a little thinning of young stands to enhance
3 structures typical of later stages of development, combined with
4 protection of old trees, reversal of adverse effects of logging
5 and livestock grazing, and changes in land uses so they do not
6 continue to cause degradation. Reintroduction of both low-
7 severity surface fires and high-severity fires may be feasible
8 under some circumstances of land use. **However,**
9 **reintroduction of fire should not be based on converting**
10 **dense mature stands into sparse open woodlands based on**
11 **the false premise that surface fires previously maintained**
12 **tree populations at low densities.** Thinning these forests is
13 likely to lead to renewed tree regeneration, hence a need for
14 renewed thinning, in a potentially endless, costly and futile
15 cycle that does not restore the forest.”
16

17 *Baker et al.* (2006) at 15. (emphasis added).

18 42. The kind of hard look required by NEPA for this approach to
19 ecosystem restoration is best handled in the forest plan revision process
20 currently under way in the CNF, since as *Kauffman* (2004)⁸ suggests, it is
21 the impacts from implementing these fire suppression policies that are
22 ‘catastrophic,’ while the wildfires they are attempting to prevent are
23 actually beneficial:

24 Large wildfires occurring in forests, grasslands and chaparral in
25 the last few years have aroused much public concern. Many

⁸ Kauffman, J. Boone, 2004. Death Rides the Forest: Perceptions of Fire
Land Use, and Ecological Restoration of Western Forests. *Conservation
Biology*, Vol. 18 No. 4, August 2004, pp. 878-882.

1 have described these events as ‘catastrophes’ that must be
2 prevented through aggressive increases in forest thinning. Yet
3 the real catastrophes are not the fires themselves but those land
4 uses, in concert with fire suppression policies that have resulted
5 in dramatic alterations to ecosystem structure and composition.
6 The first step in the restoration of biological diversity (forest
7 health) of western landscapes must be to implement changes in
8 those factors that have resulted in the current state of wildland
9 ecosystems. Restoration entails much more than simple
10 structural modifications achieved through mechanical means.
11 Restoration should be undertaken at landscape scales and must
12 allow for the occurrence of dominant ecosystem processes, such
13 as the natural fire regimes achieved through natural and/or
14 prescribed fires at appropriate temporal and spatial scales.

15
16 *Kauffman* (2004) at 878.

17
18 43. In general, for public lands management:

19 Substantial changes in disturbance regimes—especially changes
20 resulting from fire suppression, timber management practices,
21 and livestock grazing over the past 100 years—have resulted in
22 moderate to high departure of vegetation composition and
23 structure and landscape mosaic patterns from historical ranges.

24
25 USDA Forest Service & USDI BLM (2000),⁹ Ch. 4., p. 18.

26 44. Notwithstanding this acknowledgment by the Forest Service of
27 the cumulative impacts associated with forest ecosystem management
28 regimes generally, as discussed further below the defendants here failed to

⁹ USDA Forest Service & USDI Bureau of Land Management, 2000.

Interior Columbia Basin Supplemental Draft Environmental Impact
Statement.

1 address cumulative impacts or to require an EIS in which such impacts
2 would be considered more closely.

3 45. The EA's Purpose and Need is largely based on alleged
4 conditions of vegetation in the project area, which conditions the EA
5 asserts were caused by fire suppression policies implemented under the
6 CNF Plan. At the same time, the EA continues to implement those same
7 fire suppression policies, thus perpetuating one of the underlying causes of
8 adverse impacts allegedly justifying the project itself.

9 46. The Colville Forest Plan fire suppression policies are having
10 significant adverse cumulative impacts on affected environments and
11 resources, and it is thus arbitrary and capricious to continue implementing
12 such policies without preparing an EIS that considers a full range of
13 alternative approaches.

14 47. Historic forest-wide fire suppression in the CNF is leading to
15 stand-replacing fires outside what is natural, and alteration of fire regimes
16 has resulted in wide-scale disruption of habitats for wildlife, rare plants,
17 tree insect and disease patterns, tree mortality, snag production, and
18 increases in the occurrence of noxious weeds. However, such apparent
19 analyses and disclosures are nowhere to be found in this EA, in the EIS
20 supporting the CNF Plan itself, nor in any other CNF NEPA planning

1 document to which this analysis can be tiered.

2 48. The scale of ecological damage caused by the wide-scale fire
3 suppression program that began almost 100 years ago wasn't recognized
4 until after the Colville National Forest Plan was adopted in 1988. It thus
5 constitutes significant new information that has yet to result in any new
6 forest plan decisions or direction adopted after taking the requisite "hard
7 look" under NEPA.

8 49. To the extent that the NF Mill Creek Project implements the
9 direction in the CNF Forest Plan, it is continuing to implement the scale of
10 ongoing ecological damage disclosed under the "no-action" alternative for
11 Interior Columbia Basin Ecosystem Management Project (USDA FS &
12 USDI BLM 1996) ("ICBEMP"), which damage was not considered or
13 analyzed in the CNF planning process.

14 50. To the extent that the NF Mill Creek Project implements new
15 direction not contemplated by the 1988 CNF Plan, such as in response to
16 the scientific studies and analyses from ICBEMP, it does so in the absence
17 of any programmatic, forest-wide NEPA analysis -- the only way planning
18 decisions can be legally implemented pursuant to NFMA.

19 51. Thus, there is nothing to which the EA for this project can be
20 "tiered," as it seeks to implement a strategy that is outside the scope of the

1 EIS for the CNF Plan.

2 52. To comply with NEPA for a project like NF Mill Creek Project,
3 the USFS must either amend the CNF Plan with an EIS considering the
4 forest-wide impacts from this new strategy, or it must prepare an EIS for
5 the proposed project that analyzes those impacts in the cumulative effects
6 section at an appropriate landscape scale.

7 53. The EA fails to disclose how the vegetation patterns in the
8 Project Area that have resulted from past logging and other management
9 actions would influence future fire behaviors based upon the varying ages
10 of the past cuts, forest types, slash treatments, etc.

11 54. *Wisdom et al.* (2000)¹⁰ note that one of the CNF's management
12 indicator species, the Lewis' woodpecker, is associated closely with recent
13 burns and responds favorably to stand-replacing fires. The same has been
14 recognized for species like the black-backed woodpecker, which is actually

¹⁰ Wisdom, Michael J. et al., *Source Habitats for Terrestrial Vertebrates of Focus in the Interior Columbia Basin: Broad-Scale Trends and Management Implications* (May, 2000). General Technical Report PNW-GTR-485 USDA Forest Service Pacific Northwest Research Station, United States Department of the Interior BLM General Technical Report PNW-GTR-485.

1 dependent upon such “severe” wildfires.

2 55. The EA fails to consider the benefits of wildfire, including
3 stand-replacing wildfires, to CNF wildlife species. For example *Hutto*
4 (1995)¹¹ found: “Fires are clearly beneficial to numerous bird species, and
5 are apparently necessary for some.” *Id.* at 1052 “*Huff et al.* (1985) found
6 that the density and diversity of bird species in one- to two-year-old burned
7 forests in the Olympic Mountains, Washington, were as great as adjacent
8 old-growth forests.” *Hutto* (1995) at 1050. These habitat relations are not
9 disclosed or analyzed in the EA or in any NEPA document to which the EA
10 is tiered.

11 56. A more recent study noted that:

12 The profound failure of many decision makers to appreciate the
13 ecological value of burned forests stems from their taking too
14 narrow a view of what forests provide . . . Land managers,
15 politicians, and the public-at-large need to gain a better
16 appreciation of the unique nature of burned forests as ecological
17 communities . . . and how important the legacy of standing
18 deadwood is to the natural development of forests (*Franklin et*
19 *al.* 2000).
20

¹¹ Hutto, R.L. 1995. The composition of bird communities following stand-
replacement fires in northern Rocky Mountain (U.S.A.) conifer forests.
Conservation Biology 9:1041-1058.

1 *Hutto* (2006)¹² at 991. The EA provides no evidence that the collaborative
2 group that originally had the “idea” for this project -- or the USFS itself --
3 considered the benefits of the imagined wildfire events that they seek to
4 prevent with these kinds of repetitive timber harvests.

5 57. If the Forest Service is abandoning the strategies found in the
6 CNF Plan and Plan EIS in favor of managing the forest pursuant to new
7 wildfire strategies, as appears to be the case, then it needs to do so only
8 after taking a hard look at impacts and alternatives in an EIS prepared
9 pursuant to NEPA, or pursuant to the revised forest plan it is in the process
10 of developing.

11 58. Abandoning an existing CNF Plan and pursuing an alternative
12 strategy not considered in the forest planning process entails the potential
13 for significant environmental impacts. Such impacts must be given a “hard
14 look” under NEPA, preferably after revising the forest plan in accordance
15 with NFMA.

16 **Cumulative Effects Generally**

¹² Hutto, Richard L., 2006. Toward Meaningful Snag-Management
Guidelines for Postfire Salvage Logging in North American Conifer Forests.
Conservation Biology Volume 20, No. 4, 984–993, 2006.

1 59. CEQ’s NEPA implementing regulations provide that:
2 “[s]ignificance exists if it is reasonable to anticipate a cumulatively
3 significant impact on the environment. Significance cannot be avoided by
4 terming an action temporary or by breaking it down into small component
5 parts.” 40 C.F.R. §1508.27(b)(7).

6 60. Under the A to Z Stewardship Contract, Vaagen Bros. has
7 exclusive rights to log within the 54,000 acre contract planning area, which
8 includes 44,000 acres comprising the North Fork and the Middle and South
9 Fork Mill Creek projects.

10 61. All three forks of Mill Creek--North, Middle and South--are
11 hydrologically connected, contiguous drainages. The tree forks are all fish-
12 bearing streams that drain into the Colville River, which then flows into the
13 Columbia River.

14 62. The NF Mill Creek Project takes place within drainages that are
15 already significantly degraded from previous logging, roading, and ongoing
16 grazing activities. According to the Contract solicitation, the A to Z
17 Projects include another proposed large timber sale -- the upcoming Middle
18 and South Fork Mill Creek A to Z Project -- and Onion WUI and Little
19 Twin WUI.

20 63. The Forest Service scoping notice for the Middle and South Fork

1 Mill Creek A to Z Project (“M/S Fork Mill Project Scoping”) states:

2 This project is one of two planning phases being conducted
3 under the Mill Creek A to Z Stewardship contract... The first
4 phase, the North Fork Mill Creek A to Z Project, started in
5 November 2013 and is on-going. The second phase, the Middle
6 and South Fork Mill Creek A to Z Project is covered in this
7 packet.

8

9 Scoping for the Middle and South Fork Mill Creek A to Z Project,
10 dated July 30, 2015, p. 1.

11 64. The project manager of the A to Z Stewardship Contract has
12 given public presentations recognizing the novel approach of the Project,
13 identifying previous stewardship contracting projects as the “‘Traditional’
14 approach” and the process flowing out of the instant A to Z Stewardship
15 Contract as an “‘Experimental’ approach (A to Z).” See: Mill Creek A to Z
16 Project – Lessons Learned from Third-party NEPA Contracting.¹³
17 Presented 4/5/2016.

18 65. The A to Z Stewardship Contract was divided into at least two
19 independent projects. *Id.* at slide 4 (“For efficiency, we divided it into two
20 independent projects”).

21 66. The A to Z Stewardship Contract Project presentation illustrates

¹³[http://www.sustainablenorthwest.org/uploads/general/ThirdPartyNEPA_Te
ply_Thurs_11AM.pdf](http://www.sustainablenorthwest.org/uploads/general/ThirdPartyNEPA_Te
ply_Thurs_11AM.pdf) . Accessed August 11, 2016.

1 a number of novel procedural approaches to NEPA that occurred during the
2 planning of the “experimental” project. *Id.*

3 67. The North Fork Mill Creek EA identifies a project area that
4 “encompasses 12,802 acres of National Forest System lands,” EA at 2,
5 while the project area identified in the scoping notice for the Middle and
6 South Fork Mill Creek A to Z Project “encompasses about 33,110 acres...”
7 M/S Fork Mill Project Scoping, p. 1.

8 68. The Forest Service has broken down the A to Z Projects into
9 “component parts” within the meaning of 40 C.F.R. §1508.27(b)(7) in
10 reaching its Finding of No Significant Impacts.

11 69. The NF Mill Creek Project includes approximately 30 miles of
12 new roads in an area of the forest that is already heavily roaded. These
13 roads will exceed the road density standards contained in the CNF Plan to
14 protect wildlife and will result in adverse cumulative impacts to streams.
15 However, while the project is designed to last 10 years, the roads are
16 defined as “temporary.”

17 70. The North Fork Mill Creek A to Z Project Wildlife Specialist
18 Report, February 2016 (the “Wildlife Report”) at pages 26-27 states:

19 For most species, the project area boundary defined the scope
20 of analysis of direct and indirect impacts as Project activities
21 were the primary, reasonably foreseeable potential direct and
22 indirect impacts to wildlife Cumulative impacts were

1 considered in both the project area and adjacent, contiguous
2 watersheds (i.e., Onion Creek, South Fork Deep Creek, Middle
3 Fork Mill Creek, and Gillette Creek) as it was assumed that this
4 area would provide habitat that would support major life
5 functions (e.g., foraging, reproduction, and rearing) for the
6 majority of species of interest.

7

8 Wildlife Report at 26-27.

9 71. Notwithstanding this statement, the Wildlife Report and the EA
10 do not actually consider the cumulative effects in this area that will result
11 from the activities that will occur under the proposed Middle and South
12 Fork Mill Creek A to Z Project. Instead, the Wildlife Report states:

13 For the reasonably foreseeable future, the CNF is beginning to
14 plan for restoration activities in the Middle/South Fork of Mill
15 Creek that is anticipated to occur over the 2016-2023
16 timeframe. The scale of activity is anticipated to be comparable
17 to that in the North Fork Mill Creek A to Z Project.

18

19 Wildlife Report at 33-34. This is disclosure at best, but cannot reasonably
20 be considered to be the kind of scientific analysis of cumulative effects
21 required under NEPA.

22 72. The EA failed to undertake a cumulative impacts analysis for the
23 reasonably foreseeable projects in the North Fork, Middle Fork, and South
24 Fork of Mill Creek by arbitrarily and capriciously restricting the cumulative
25 effects analysis area to the NF Mill Creek project area itself.

26 73. The cumulative effects sections added to the EA are merely
27 perfunctory disclosures of the potential for cumulative effects, not actual

1 analyses of those effects. Most of this language was added after the public
2 comment period on the EA had closed. As Appendix C to the EA clearly
3 shows, there was no actual consideration of the cumulative effects from the
4 other reasonably foreseeable projects in the contract planning area (e.g.,
5 Middle/South Forks of Mill Creek, together with anticipated logging in the
6 Wildland/Urban Interfaces).

7 74. The Ninth Circuit Court of Appeals has held:

8

9 In accord with NEPA, the Forest Service must “consider”
10 cumulative impacts. 40 C.F.R. § 1508.25(c). To “consider”
11 cumulative effects, some quantified or detailed information is
12 required. Without such information, neither the courts nor the
13 public, in reviewing the Forest Service's decisions, can be
14 assured that the Forest Service provided the hard look that it is
15 required to provide. . . . General statements about “possible”
16 effects and “some risk” do not constitute a “hard look” absent a
17 justification regarding why more definitive information could
18 not be provided. . . .

19

20 Nor is it appropriate to defer consideration of cumulative
21 impacts to a future date. “NEPA requires consideration of the
22 potential impact of an action before the action takes place.” *City*
23 *of Tenakee Springs* [v. *Clough*], 915 F.2d [1308] at 1313
24 [emphasis omitted]. Because the three proposed sales in this
25 case were “reasonably foreseeable,” the Forest Service was
26 obligated to assess the cumulative impact of all sales

27

28 *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1379-
29 1380 (9th Cir. 1998).

30 **Forest Plan Implementation Monitoring**

31 75. The purpose of monitoring Forest Plan implementation is to

1 understand the effects of Forest Service management strategies as they are
2 implemented. NFMA itself requires that forest plans “insure research on
3 and (based on *continuous monitoring and assessment* in the field)
4 evaluation of the effects of each management system to the end that it will
5 not produce substantial and permanent impairment of the productivity of
6 the land[.]” 16 U.S.C. §1604(g)(3)(C) (emphasis added).

7 76. As the Colville Forest Plan states: “The Monitoring Plan . . .
8 identifies the key activities and outputs to be tracked during
9 implementation of this plan to ensure that activities reasonably conform to
10 the management area direction, and that outputs satisfy the objectives of the
11 plan.” CNF Plan at 5-11.

12 77. Forest Plan monitoring is a necessary component of evaluating
13 the impacts from implementing the forest plan at the project level. As the
14 Colville Forest Plan states:

15 Monitoring and evaluation each have a distinctly different
16 purpose and scope. In general, monitoring is designed to gather
17 the data necessary for evaluation. During evaluation, data
18 provided through monitoring are analyzed and interpreted. This
19 process will provide periodic summary data necessary to
20 determine if implementation is within the bounds of the Forest
21 Plan.”

22
23 CNF Plan at 5-11.

24
25 78. Included in the monitoring portion of the CNF Plan are such

1 items as: population trends and habitat uses of primary cavity nesters;
2 management indicator species habitats and utilization of those habitats for
3 species like the pine marten, pileated woodpecker, and 3-toed woodpecker;
4 fisheries habitat capability and productivity; and changes in soil
5 productivity after timber harvest operations. These monitoring tasks are to
6 be carried out “continuously” throughout the life of the plan based upon
7 assessments in the field, with annual reports and periodic evaluations of the
8 results reported annually.

9 79. The Forest Service has failed to comply with the monitoring
10 requirements under the Colville Forest Plan for all of the monitoring items
11 listed in the previous paragraph, each of which is relevant to the NF Mill
12 Creek Project.

13 80. When representatives of AWR asked for the CNF Plan-required
14 annual monitoring reports and associated evaluations recently, they were
15 told they would need to file a Freedom of Information Act (“FOIA”)
16 request. *See*: Juel Declaration.

17 81. The Forest Service added existing forest plan monitoring and
18 evaluation reports to the CNF web site in response to the FOIA request,
19 revealing a complete absence of forest plan implementation monitoring and
20 evaluation from 2003-2011.

1 82. In response to public comments regarding the absence of any
2 reference to forest plan monitoring and evaluation reports as part of the
3 NEPA process at issue here, the Forest Service tacitly admitted they have
4 dropped the ball in that regard: “Although no previous Monitoring &
5 Evaluation Reports were identified for previous Forest Service timber sales
6 in the Project area, the analysis is based on the existing condition; anything
7 done previously would be part of the existing condition.” Response To
8 Public Comments, p. 119.

9 83. Given the unsatisfactory ecological conditions of forests,
10 streams, and soils in the project area, and in light of the Forest Service
11 statement quoted in the preceding paragraph, it can be presumed that
12 continuing implementation of the CNF Plan (that is, “anything done
13 previously”) is cumulatively having unanticipated, significant adverse
14 environmental impacts on forest resources.

15 84. The near total absence of required CNF Plan implementation
16 monitoring, together with the Forest Service’s failure to undertake the kind
17 of hard look under NEPA at the project level that can only be accomplished
18 with an EIS, makes it impossible for the public to gauge the cumulative
19 impacts of the undisclosed extent of timber harvest authorized by this
20 privatization effort in our Colville National Forest.

1 **Cumulative Effects: grazing, climate change, and timber harvest**

2 85. The Committee of Scientists (1999)¹⁴, in advising the U.S.
3 Forest Service forest planning process pursuant to NFMA, recognized the
4 importance of forests for their contribution to global climate regulation.
5 Also, the 2012 Planning Rule recognizes, in its definition of “Ecosystem
6 services,” the “[b]enefits people obtain from ecosystems, including . . .
7 [r]egulating services, such as long term storage of carbon; [and] climate
8 regulation” 36 C.F.R. § 219.19.

9 86. The effects of climate change have already been significant,
10 particularly in the region encompassing the CNF, and particularly in
11 relation to wildfires since the CNF Plan was adopted. *Westerling, et al.*
12 state:

13 Robust statistical associations between wildfire and hydro-
14 climate in western forests indicate that increased wildfire
15 activity over recent decades reflects sub-regional responses to
16 changes in climate. Historical wildfire observations exhibit an
17 abrupt transition in the mid-1980s from a regime of infrequent
18 large wildfires of short (average of one week) duration to one
19 with much more frequent and longer-burning (five weeks) fires.
20 This transition was marked by a shift toward unusually warm

¹⁴ Committee of Scientists, Sustaining the People’s Lands:

Recommendations for Stewardship of the National Forests and Grasslands
into the Next Century (March 15, 1999).

1 springs, longer summer dry seasons, drier vegetation (which
2 provoked more and longer-burning large wildfires), and longer
3 fire seasons. Reduced winter precipitation and an early spring
4 snowmelt played a role in this shift. Increases in wildfire were
5 particularly strong in mid-elevation forests. . . . The greatest
6 increases occurred in mid-elevation, Northern Rockies forests,
7 where land-use histories have relatively little effect on fire
8 risks, and are strongly associated with increased spring and
9 summer temperatures and an earlier spring snowmelt.

10
11 *Westerling, et al.*¹⁵ at 3.
12

13 87. The EA does not analyze or disclose the body of science that
14 implicates logging activities as a contributor to reduced carbon stocks in
15 forests and increases in greenhouse gas emissions. It also fails to provide
16 any credible analysis as to how realistic and achievable its forest plan and
17 Project “Desired Conditions” for forest structure are in the context of a
18 rapidly changing climate since the “abrupt transition” of the mid-1980s.

19 88. In 1994, the BLM and USFS reported that western riparian areas
20 were in their worst condition in history, and livestock use, which is
21 typically concentrated in these areas, was the primary culprit (BLM and

¹⁵ Westerling, A. L., H. G. Hidalgo, D. R. Cayan, T. W. Swetnam, Warming and Earlier Spring Increases Western U.S. Forest Wildfire Activity (July 6, 2006). Science Express, Research Article, www.sciencexpress.org.

1 USFS 1994).¹⁶

2 89. Livestock grazing has numerous consequences for hydrologic
3 processes and water resources. Livestock can have profound effects on
4 soils, including the characteristics of productivity, infiltration, and water
5 storage, and these changed properties can, in turn, drive many other
6 ecosystem changes.

7 90. Soil compaction from livestock has been identified as an
8 extensive problem on public lands. See *Beschta et al.* (2013).¹⁷ The
9 combined effects of elevated soil loss and compaction caused by grazing
10 reduce soil productivity, further compromising the capability of grazed
11 areas to support native plant communities. *Id.* at 480. Erosion triggered by
12 livestock use continues to represent a major source of sediment, nutrients,

¹⁶ Rangeland Reform '94 EIS; Executive Summary, Chapter 3: Affected Environment, p. 25. (Prepared by The Department of the Interior, BLM in cooperation with the USDA Forest Service.)

¹⁷ Beschta, Robert L., et al., Adapting to Climate Change on Western Public Lands: Addressing the Ecological Effects of Domestic, Wild, and Feral Ungulates 51 *Envtl. Mgmt.* 474 (2013).

<http://www.springerlink.com/content/e239161819g0l117/fulltext.pdf>

1 and pathogens in western streams. *Id* at 480.

2 91. According to the best available science, climate change and
3 ungulates, singly and in concert, influence ecosystems at the most
4 fundamental levels by affecting soils and hydrologic processes. These
5 effects, in turn, influence many other ecosystem components and
6 processes—nutrient and energy cycles; reproduction, survival, and
7 abundance of terrestrial and aquatic species; and community structure and
8 composition. By altering so many factors crucial to ecosystem functioning,
9 the combined effects of a changing climate and ungulate use can affect
10 biodiversity at scales ranging from species to ecosystems, and can limit the
11 capability of large areas to supply ecosystem services *Id.* at 476.

12 92. Further, this peer-reviewed scientific study, *Beschta et al.*
13 (2013), suggests that climate change is causing additional stress to already
14 damaged western rangelands, and then offers management
15 recommendations for land managers to consider in addressing cumulative
16 impacts complicated by this changing climate. Among the relevant findings
17 and conclusions of the study are the following: in the western U.S., climate
18 change is expected to intensify even if greenhouse gas emissions are
19 dramatically reduced; included among the threats facing ecosystems as a
20 result of climate change are invasive species, elevated wildfire occurrence,

1 and declining snowpack; and, while federal land managers have begun to
2 adapt to climate-related impacts, they have yet to account for the
3 cumulative effects of climate and ungulates.

4 93. Climate impacts are compounded by heavy uses by livestock
5 and other grazing ungulates, which causes heightened levels of soil erosion,
6 soil compaction, and dust generation, and leads to stream degradation,
7 higher water temperatures, and pollution, cumulatively resulting in losses
8 of habitat for fish, birds and amphibians.

9 94. According to the best available science on the cumulative effects
10 of grazing and climate change, removing or significantly reducing grazing
11 is likely to be far more effective, in terms of cost and success, than
12 piecemeal approaches to addressing some of the concerns noted above in
13 isolation from each other.

14 95. Where livestock use continues, land managers are advised by
15 best available science to carefully document the ecological, social, and
16 economic consequences (both costs and benefits) of such uses in order to
17 minimize ungulate impacts to plant and animal communities, soils, and
18 water resources.

19 96. While the EA attempts to justify the NF Mill Creek Project
20 through reference to historic conditions on the forest, livestock (particularly

1 cattle) use on forest lands causes disturbances that are without evolutionary
2 parallel. *Beschta et al.* at 482. The combined effects of ungulates and a
3 changing climate present a pervasive set of stressors on public lands, which
4 are significantly different from those encountered during the evolutionary
5 history of the region's native species.

6 97. The asserted purpose and need for this project—restoring the
7 forest to its historic conditions--cannot reasonably be accomplished in the
8 absence of careful consideration of the relationships between fire
9 suppression, timber harvest, and grazing:

10 Identification of which land uses affected a stand proposed for
11 restoration is *essential*. Fire exclusion, logging and livestock
12 grazing do not have the same effects on these forests, their
13 effects vary with environment, and they require different
14 restoration actions. Before restoration begins, it makes sense to
15 modify or minimize the particular land uses that led to the need
16 for restoration, to avoid repeating degradation and ongoing,
17 periodic subsidies that merely maintain land uses at non-
18 sustainable levels (*Hobbs & Norton, 1996*). For example,
19 thinning an overgrazed forest, without restoring native
20 bunchgrasses lost to grazing, may simply lead to a new pulse of
21 tree regeneration that will have to be thinned again.

22
23 *Baker et al.* (2006) at 14-15.

24
25 98. Because livestock use is so widespread on public lands in the
26 American West, management actions directed at ecological restoration
27 (e.g., livestock removal, substantial reductions in numbers or length of
28 season, extended or regular periods of rest) need to be accomplished at

1 landscape scales. Such approaches, often referred to as passive restoration,
2 are generally the most ecologically effective and economically efficient for
3 recovering altered ecosystems because they address the root causes of
4 degradation and allow natural recovery processes to operate. *Beschta et al.*
5 (2012) at 10.

6 99. Therefore, since the purpose and need for the project is to restore
7 historic conditions, grazing and timber harvest impacts must be analyzed in
8 a comprehensive and thorough manner in order to disclose cumulative
9 impacts and achieve scientific integrity under NFMA and NEPA.

10 100. The EA does not properly analyze and disclose the cumulative
11 impacts of livestock grazing in the project area and fails to disclose
12 scientifically valid quantitative monitoring data to validate analyses for
13 affected resources within project area and within the cumulative effects
14 analysis area.

15 101. *Baker et al.* (2006), some of the best available science cited to
16 the Forest Service by AWR in the NEPA process for the NF Mill Creek
17 Project, includes a discussion of the significant cumulative effects of
18 livestock grazing on forest conditions. The EA ignores this science, even
19 though the EA uses these very conditions to justify the challenged project.

20 102. The authors of *Baker et al.* (2006) state:

1 Livestock grazing may have complex effects, but generally
2 increases tree density in formerly open stands and thereby
3 increases the fine fuels that contribute most to fire intensity and
4 severity. Removal of grass [through grazing] reduces
5 competition, allowing more trees to successfully regenerate,
6 shown experimentally in the Southwest (*Pearson*, 1942), and
7 also by paired comparisons in other parts of the West, in which
8 mesas subject to livestock grazing have much higher tree
9 density than do comparable nearby ungrazed mesas (*Rummell*,
10 1951; *Madany & West*, 1983). Grazing can also initially reduce
11 the quantity of fine grass fuels needed for surface fires, and the
12 onset of heavy grazing in south-western ponderosa pine
13 landscapes is temporally associated with a marked reduction in
14 surface fires (e.g. *Savage & Swetnam*, 1990). However, fine
15 fuels are likely not to have remained low for long. Higher tree
16 density increases fine fuels that lead to faster fire spread and
17 increases ladder fuels that lead fire into the canopy
18 (*Zimmerman & Neuenschwander*, 1984), together increasing
19 the potential for more fires and more severe fires.”

20

21 *Baker et al.* (2006) at 12-13.

22

23 103. *Belsky et al.* (1999)¹⁸ is a literature review of peer-reviewed
24 studies concerning the effects of livestock grazing on water resources. It
25 concludes:

26 Livestock grazing was found to negatively affect water quality
27 and seasonal quantity, stream channel morphology, hydrology,
28 riparian zone soils, instream and streambank vegetation, and
29 aquatic and riparian wildlife. No positive environmental
30 impacts were found. Livestock were also found to cause
31 negative impacts at the landscape and regional levels.”

¹⁸ Belsky, A.J. and J.L. Gelbard, *Livestock Grazing and Weed Invasions in the Arid West* (1999). Oregon Natural Desert Association, Bend, OR.

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Belsky et al. (1999) at 1-2.

104. The grazing-related EA for the Aladdin Allotment Complex, which is located in the NF Mill Creek Project Area, stated: “Monitoring will be carried out to ensure that the selected alternative has been implemented correctly and that the management practices, BMPs, and mitigation measures are achieving management standards. Monitoring results will be available to interested and affected parties.” Aladdin Allotment Complex Environmental Assessment, Colville National Forest, March 2005 (“Aladdin Allotment EA”), p. 34.

105. Based on information provided to AWR in response to a December 2015 FOIA, it appears the Forest Service has failed to conduct the monitoring promised in Aladdin Allotment Complex Environmental Assessment and Decision Notice.

106. The failure to carry out the promised insurance for achieving management standards in the Aladdin Allotment Complex EA represents unanticipated environmental impacts from grazing in the NF Mill Creek Project Area that have not been subject to NEPA.

107. It has been eleven years since the Aladdin Allotment EA approved management actions intended to reduce the adverse effects of grazing on riparian zones, streams, and wetlands. The NF Mill Creek

1 Project EA does not disclose the monitoring results of the grazing
2 operations as prescribed in the Aladdin Allotment EA.

3 108. The NF Mill Creek Project EA does not adequately disclose the
4 amount of direct, indirect or cumulative effects or site-specific
5 environmental harm being caused by cattle that continue to graze within the
6 effected area on state, private, and national forest lands.

7 109. Elsewhere, the CNF has acknowledged that “Natural and
8 constructed barriers keep cattle in the allotment and allow herding to be
9 more effective. Timber harvest and burning have the potential to remove
10 natural barriers that restrict cattle movement.” (USDA Forest Service
11 2001e)¹⁹ at 128.

12 110. Removing natural barriers that currently restrict cattle
13 movement in the NF Mill Creek Project Area represents a potential cause
14 of significant adverse environmental impacts.

15 111. There are high levels of “embeddedness” in the streams within
16 the allotment. This may be significantly impairing fish spawning success.

¹⁹ USDA Forest Service, 2001e. Gardin-Taco Ecosystem Restoration
Projects Draft EIS, Newport Ranger District, Colville National Forest,
(November, 2001).

1 The Aladdin Allotment Complex EA states: “High levels of embeddedness
2 exist in a majority of the reaches surveyed within the allotments. A major
3 factor affecting the level of embeddedness is the existing amount of soil
4 movement from sloughing stream banks. This is primarily occurring in the
5 pastures where cattle use is highest.” Aladdin Allotment EA at 54.

6 112. *Mazza* (2015)²⁰ addresses the importance of riparian areas,
7 especially headwater riparian zones: “Riparian areas, where the terrestrial
8 mingle with the aquatic, are special places. Riparian areas around
9 headwaters are particularly important because they have strong ecological
10 connections to uplands and provide resources to the downstream system.”
11 *Mazza* (2015) at 1.

12 113. Much of the proposed logging is in close proximity to the
13 headwaters of the affected streams. The existing and the proposed new
14 roads that will access timber harvest units could result in cattle accessing
15 the headwaters of these streams. Access by cattle and the damage they
16 cause to these headwater streams could result in adding significant amounts

²⁰ *Mazza*, Rhonda, Heed the Head: Buffer Benefits Along Headwater
Streams (Oct., 2015). Science Findings, USDA Forest Service, Pacific
Northwest Research Station, Issue 178.

1 of sediment to the water column, resulting in additional unfavorable
2 width/depth, and leading to warming of the affected headwater streams.

3 114. Four stream segments within the A to Z Stewardship Contract
4 project area are currently listed on Washington's Clean Water Act § 303(d)
5 Waterbody Assessment. One occurs in the North Fork planning area. One
6 water quality parameter is noted for a single stream segment within the
7 North Fork: bacteria. Construction of new roads and timber harvest could
8 provide corridors that increase access to riparian areas and stream channels.
9 Nonetheless, this issue was determined to be outside the scope of analysis
10 in the EA.

11 115. The cumulative impacts of livestock grazing in the Middle and
12 South Fork Mill Creek A to Z project area are also not analyzed or
13 disclosed in the NF Mill Creek Project EA.

14 **Hard Look Requirement**

15 116. Plaintiff AWR provided relevant scientific information, with
16 appropriate citations, during the comment period that contradicted
17 numerous assumptions and claims in the EA, as discussed above.

18 117. Almost without exception, however, the Forest Service refused
19 to respond to the scientific research, or the concerns raised in relation to
20 that research. Most notably, the Forest Service would not address the

1 studies that do not support its predetermined conclusion that substantial
2 logging, road-building, and grazing in the project area will not have any
3 significant impacts on fish, wildlife, or other forest resources.

4 118. In order to comply with NEPA’s requirement to take a “hard
5 look” at the NF Mill Creek Project’s effects, the Forest Service “may not
6 rely on incorrect assumptions or data in an EIS.” *Native Ecosystems*
7 *Council v. USFS*, 418 F.3d 953, 964 (9th Cir. 2005) (citing 40 C.F.R.
8 1500.1(b)).

9 **Species Viability and Habitat Assumptions**

10 119. Pursuant to NFMA, the Forest Service must demonstrate that a
11 site-specific project would be consistent with the land resource
12 management plan of the entire forest. 16 U.S.C. § 1604(i); See also 36
13 C.F.R. § 219.10.

14 120. With the Eastside Screens Forest Plan Amendment and the
15 specific Management Indicator Species (“MIS”) habitat provisions of the
16 Forest Plan, the CNF has relied exclusively upon project-level habitat
17 designations as its only viability strategy throughout the life of the plan,
18 and in the project at issue here. This is not consistent with applicable case
19 law, the Forest Service’s own best available science, or the Forest Plan
20 itself, and it fails to meet the scientific integrity requirements of NEPA.

1 121. In 1999, the Committee of Scientists issued a Forest Service-
2 commissioned report to inform the agency of best science available during
3 the process of considering new planning rules for implementing NFMA.
4 The Committee reported that: “*Habitat alone cannot be used to predict*
5 *wildlife populations. . . .* The presence of suitable habitat does not ensure
6 that any particular species will be present or will reproduce. Therefore,
7 populations of species must also be assessed and continually monitored.”
8 Committee of Scientists (1999) at 19-20 (emphasis added).

9 122. The Committee’s report stresses the importance of monitoring
10 as a necessary step for meeting the Forest Service’s overarching mission of
11 sustainability: “Monitoring is the means to continue to update the baseline
12 information and to determine the degree of success in achieving ecological
13 sustainability.” *Id.* at 27. The report further recommended that:

14 [T]he Forest Service monitor those species whose status allows
15 inference to the status of other species, are indicative of the
16 soundness of key ecological processes, or provide insights to
17 the integrity of the overall ecosystem. This procedure is a
18 necessary shortcut because monitoring and managing for all
19 aspects of biodiversity is impossible. No single species is
20 adequate to assess compliance to biological sustainability at the
21 scale of the national forests. Thus, several species will need to
22 be monitored. The goal is to select a small number of focal
23 species whose individual status and trends will collectively
24 allow an assessment of ecological integrity...

25
26 *Id.* at 109.

1 123. The Forest Service did not comply with the CNF Plan’s
2 monitoring requirements for population trends (e.g., for marten and primary
3 cavity excavators) and habitat levels and utilization by specific species.
4 Instead, the Forest Service chose to rely on theoretical models and habitat
5 assumptions to purport compliance with the requirement to provide for
6 species diversity in the CNF.

7 124. The EA and Wildlife Report rely exclusively upon the DecAID
8 procedure – a habitat proxy for providing the historic range of variability –
9 to insure the viability of the various wildlife species that depend upon snags
10 and downed woody debris.

11 125. The CNF Plan Standard for wildlife species that depend upon
12 snag (that is, dead tree) habitat relies on providing habitat for primary
13 cavity excavators (e.g., Pileated Woodpecker) as follows:

14 Maintain dead and defective tree habitat capable of supporting
15 at least 60 percent of the potential population of primary cavity
16 nesters within land areas that are generally no larger than
17 normal harvest unit size. . . . Specific numbers and sizes of
18 snags will be identified to fit the species needs for the particular
19 habitat being managed using appropriate guidelines from
20 Thomas, et. al. (1979). . . .Manage to provide a minimum of
21 two down, dead trees per acre. Minimum size of these logs will
22 be 15 feet long and 14 inches diameter at the small end. If logs
23 of this size are not available, the largest available ones will be
24 left.

25
26 CNF Plan at 4-57 and 4-58.
27

1 126. The CNF Plan requires the Forest Service to monitor primary
2 cavity excavators’ “population trends and snag numbers, sizes, species and
3 use,” including at least one pre- and post-project implementation analysis
4 per Ranger District per year. CNF Plan at 5-20.

5 127. According to the EA, there is a paucity of large snags and
6 downed woody debris across the CNF “due to past fires, logging, and the
7 lack of large snags that can be recruited as down logs.” EA at 161.

8 128. The Forest Service has failed to monitor population trends of
9 primary cavity nesters on the CNF, or to otherwise comply with its
10 monitoring requirements for these indicator species. The Forest Service
11 failed to disclose this forest-wide failure to monitor population trends of
12 species impacted by proposed logging in Mill Creek in the EA.

13 129. Since conditions in the project area and across the forest are not
14 adequate for supporting reproducing populations of snag and down log-
15 dependent wildlife, the Forest Service is no longer managing the forest
16 consistently with the Colville Forest Plan and NFMA.

17 130. It is natural processes, mainly disease and wildfire, that
18 produce snags and downed woody debris in a forest, not removal of trees
19 through commercial timber harvest.

20 131. Since commercial timber harvest is the dominant, if not sole,

1 reason snags are largely absent from the forested landscape, the Forest
2 Service is no longer capable of demonstrating compliance of timber harvest
3 projects with CNF Plan Standards, Objectives, and Guidelines due to the
4 cumulative effects of excessive timber harvest.

5 132. Continuing to harvest timber in habitats associated with
6 wildlife species that have been adversely impacted by previous harvests
7 without the protections intended to be provided by forest plan
8 implementation monitoring necessarily presents the potential for significant
9 adverse, cumulative impacts to affected species.

10 133. For snag-dependent wildlife species, the CNF Plan requires
11 that “[i]f suitable habitat does not currently exist in the proper distribution,
12 timber stands will be managed to provide it at the earliest possible time.”
13 CNF Plan at 4-56.

14 134. The EA admits, “In the short- to mid-term (e.g., 3 to 20 years),
15 harvest treatments would remove trees less than 21 inches dbh that could
16 eventually become snag habitat.” EA at 120. This would, presumably,
17 include 19 inch and 20 inch dbh trees in undisclosed quantities.

18 135. Timber stands with trees that are 19 inch and 20 inch dbh
19 would be able to provide suitable habitat for snag-dependent wildlife
20 species “at the earliest possible time” if those trees were not harvested.

1 Allowing logging to take 19 inch and 20 inch dbh trees is plainly
2 inconsistent with the CNF Plan direction to provide such habitat at the
3 earliest possible time.

4 136. Thus, in light of the lack of compliance with forest plan
5 requirements and expectations, and the exacerbation of the problems (e.g.,
6 fire suppression, timber harvest, and grazing) that have given rise to the
7 stated purpose and need for the NF Mill Creek Project, the project will have
8 a potentially significant impact on species viability that needs to be
9 analyzed in an EIS pursuant to NEPA.

10 137. Further logging in the project area will suppress the natural
11 processes that create snag and down wood habitat, according to the EA
12 itself.

13 138. Defendants' actions indicate the Forest Service is content to
14 assume that the proposed NF Mill Creek and other A to Z Project timber
15 sales will gradually improve wildlife habitat over a number of decades.
16 This assumption is neither supported by relevant science in the EA, nor
17 consistent with the requirements of the Forest Plan.

18 139. Equally unsupported is defendants' untenable, implicit
19 conclusion that presently-lacking snag and downed tree habitat would be
20 produced earlier by commercial logging than by refraining from removing

1 the potential future snags and downed trees in the first place.

2 **Fisher & Pine Marten**

3 140. According to some of the best available science on the small,
4 carnivorous mammals called fishers, *Ruggiero et al.* (1994b):²¹

5 [T]he fisher is unique to North America and is valued by native
6 and nonnative people as an important member of the complex
7 natural communities that comprise the continent's northern
8 forests. Fishers are an important component of the diversity of
9 organisms found in North America, and the mere knowledge of
10 the fisher's existence in natural forest communities is valued by
11 many Americans.

12
13 *Ruggiero et al.* (1994b) at 63. “The range and population levels of the
14 fisher have declined substantially in the past century, primarily the
15 result of trapping pressure and habitat alteration through logging”
16 *Witmer et al.* (1998)²² at 14 (citation omitted).

²¹ Ruggiero, Leonard F., Keith B. Aubry, Steven W. Buskirk, L. Jack Lyon,
and William J. Zielinski, *The Scientific Basis for Conserving Forest
Carnivores in the Western United States: American Marten, Fisher, Lynx,
and Wolverine* (Sept. 1994). Pacific Southwest Research Station, USDA
Forest Service. General Technical Report RM-254.

²² Witmer, Gary W.; Martin, Sandra K.; Sayler, Rodney D., *Forest Carnivore
Conservation and Management in the Interior Columbia Basin: Issues and*

1 141. The Colville National Forest recognizes that “[r]iparian areas
2 may be particularly important to (fisher).” (USDA Forest Service 2001e)²³
3 at 151.

4 142. Fishers have been extirpated from the Colville National Forest.
5 Proposed Action for Forest Plan Revision for the Colville National Forest
6 (June 2011), p. 37.

7 143. The Wildlife Report for the NF Mill Creek Project states,
8 “Fisher was a former sensitive species in Region 6” Wildlife Report at
9 40. The rationale provided by the Forest Service for removing the fisher
10 from its Sensitive Species list is that it has never been known to occupy the
11 CNF.

12 144. The Regional Forester's Special Status Species List, USDA
13 Forest Service - Pacific Northwest Region (January 2008), classified the

Environmental Correlates (1998). Gen. Tech. Rep. PNW-GTR-420. Portland,
OR: USDA Forest Service, Pacific Northwest Research Station. (Quigley,
Thomas M., ed.; Interior Columbia Basin Ecosystem Management Project:
scientific assessment).

²³ USDA Forest Service, 2001e. Gardin-Taco Ecosystem Restoration
Projects Draft EIS (Nov. 2001), Newport Ranger Dist., Colville Nat. Forest.

1 fisher as having “Documented occurrence” on the Colville NF, a
2 classification defined as “A species located on land administered by the
3 BLM or the Forest Service based on historic or current known sites of a
4 species reported by a credible source for which BLM and the Forest
5 Service has knowledge of written, mapped or specimen documentation of
6 the occurrence.” See: AWR Objection, Attachment #5.

7 145. The Washington Department of Fish and Wildlife recognizes
8 that fishers have in fact occupied the CNF.²⁴ Recently, the U.S. Fish and
9 Wildlife Service stated, “listing the fisher (Northern Rockies population)
10 may be warranted” under the Endangered Species Act.²⁵

11 146. The Wildlife Report analyzes fisher and pine marten together,
12 stating that they “use[] much the same habitat[.]” Wildlife Report at 40.
13 Thus, the marten is an indicator species for the fisher.

14 147. The Forest Service has not disclosed any data on pine marten
15 populations in the CNF as a whole, or in the project area.

16 148. Under the CNF Plan, marten are a management indicator

²⁴ See: <http://wdfw.wa.gov/conservation/fisher/>.

²⁵ 50 C.F.R. Part 17 [4500030115] Docket No.: FWS-R6-ES-2015-0104.

<http://www.regulations.gov/docket?D=FWS-R6-ES-2015-0104>.

1 species (“MIS”) with the following forest-wide standard:

2 Every 2 to 2 1/2 miles, provide units of at least 160 acres of
3 conifer timber in successional stages VI (old growth), or V
4 (Mature) where stage VI is not currently available. These stands
5 will have crown cover of 50 to 100 percent and will be of
6 species composition that will provide habitat suitable for
7 marten. Within these units preserve natural snag densities and
8 windthrown trees. Minimum objectives will be two snags per
9 acre more than 12 inches DBH, of which at least one in every
10 seven acres will be more than 20 inches DBH, and at least six
11 down trees per acre, preferably with root wads attached.”

12
13 CNF Plan at 4-58.

14
15 149. The CNF Plan requires the Forest Service to monitor
16 population trends and habitat occupation before and after timber harvest
17 treatments throughout the life of the plan. The USFS has not met this
18 obligation over the life of the plan.

19 150. The best science available on fishers from the Forest Service,
20 *Ruggiero et al.* (1994b), states that while “[t]he geographic distributions of
21 these species overlap considerably[,] . . . in the West martens tend to occur
22 at higher elevations than fishers.” *Ruggiero et al.* (1994b) at 61 (internal
23 citations omitted).

24 151. Fishers are also dependent upon more closed canopied forests
25 than are martens, and thus their recovery in the CNF will be significantly
26 impacted by projects like the one challenged here, which is designed to
27 open the forest up even more than previous timber harvest has done.

1 152. *USDA Forest Service* (2001e) indicates that:

2 Fishers prefer landscapes that have a high degree of mature
3 forest cover. There is some evidence that they use habitats
4 based more on the physical structure of the forest, and the prey
5 associated with forest structures, rather than a specific forest
6 type (*Buskirk and Powell*, in *USDA*, 1994b). Good overhead
7 canopy closure, a diversity of tree sizes and shapes, and dead
8 and downed wood are all important habitat components
9 (*USDA*, 1994b).”

10

11 *USDA Forest Service* (2001e) at 151.

12

13 153. Both *Sauder and Rachlow* (2014)²⁶ and *Weir and Corbould*
14 (2010)²⁷ address the influence of openings on fisher habitat occupancy
15 based on their data. *Weir and Corbould* predicts that a 5% increase in forest
16 openings will decrease the likelihood of fisher occupancy by 50%. *Weir*
17 *and Corbould* (2010) at 407. *Sauder and Rachlow* (2014) states that an
18 “increase of open area from 5% to 10% reduces the probability of

²⁶ Sauder Joel D. and Janet L. Rachlow, Both forest composition and configuration influence landscape-scale habitat selection by fishers (*Pekania pennanti*) in mixed coniferous forests of the Northern Rocky Mountains. 314 *Forest Ecology and Management* (2014) pp. 75–84.

²⁷ Weir, Richard D. and Fraser B. Corbould 2010. Factors Affecting Landscape Occupancy by Fishers in North-Central British Columbia (April 2010). 74 *Journal of Wildlife Management* No. 3, pp. 405-410.

1 occupation by fishers by 39%.” *Id.* at 80. *Sauder and Rachlow* also reported
2 that the median amount of open area within fisher home ranges was 5.4%.
3 *Id.* at 81. This is “consistent with results from California where fisher home
4 ranges, on average, contained < 5.0% open area (Raley et al., 2012)”²⁸
5 *Sauder and Rachlow* (2014) at 81.

6 154. Forested corridors are necessary for animals such as fishers to
7 move across a managed forest landscape and make full use of available
8 blocks of habitat.

9 155. The Colville Forest Plan (as amended) requires that at least two
10 corridors be maintained between neighboring core habitat areas for old
11 growth dependent species and other late and old structural stage stands.
12 These corridors must be at least 400 feet wide. Trees in these areas should
13 average at least 9 inches in diameter (or the largest available). Canopy
14 closure should meet or exceed 50%. Appendix B, Revised Interim

²⁸ Raley, C. M., E. C. Lofroth, R. L. Truex, J. S. Yaeger, and J. M. Higley,
Habitat ecology of fishers in western North America: a new synthesis (2012)
in Biology and conservation of martens, sables, and fishers: A New
Synthesis at 231-254 (Aubry, K.B., W.J. Zielinski, M.G. Raphael, G. Proulx,
and S.W. Buskirk, eds., Cornell University Press) (2012).

1 Management Direction Establishing Riparian, Ecosystem and Wildlife
2 Standards for Timber Sales, Regional Forester's Forest Plan Amendment #2
3 at 10. The Forest Service has failed to compare conditions in the project
4 area before and after logging to the direction provided in the CNF Plan.

5 156. In *Native Ecosystems Council v. Tidwell*, the Ninth Circuit
6 addressed a situation where the Forest Service attempted to use habitat as a
7 proxy to determine the impact of its proposed action on an MIS that was
8 absent from the project area. *Native Ecosystems Council v. Tidwell*, 599
9 F.3d 926 (9th Cir. 2010) (“*NEC*”). The court found that “[t]he proxy-on-
10 proxy approach’s reliability is questionable where the MIS is absent from
11 the project area.” *NEC*, 599 F.3d at 933.

12 157. NFMA’s underlying requirement to monitor population trends
13 makes it necessary to determine whether the agency’s use of habitat-as-
14 proxy is actually successful at tracking the viability of a given species
15 population. 599 F.3d at 936.

16 158. Under one federal court’s application of the holding in *NEC*,
17 “if the Forest Service cannot demonstrate that its habitat management
18 practices produce any known effect on species population,” – as with the
19 kind of monitoring the CNF Plan requires, but which the Forest Service has
20 failed to provide here – “its burden to show that the MIS are in the Project

1 Area in sufficient numbers to render habitat-as-proxy analysis meaningful is
2 greater” *Lands Council v. Cottrell*, 731 F. Supp. 2d 1074, 1086 (D. Idaho
3 2010) (emphasis added).²⁹

4 159. As in *Lands Council*, the Defendants in this case have failed to
5 adequately demonstrate that the MIS pine marten was present in the Project
6 Area in sufficient numbers to validate its use as a proxy for the fisher, or to
7 indicate that the agency has satisfied its statutory obligations.

8 **Northern Goshawk**

9 160. According to the EA, within the NF Mill Creek Project Area:

10 Two active and one historic northern goshawk nests were
11 located during 2014 surveys. In accordance with the Forest Plan
12 and the Regional Forester’s Forest Plan Amendment for
13 Eastside Screens, all three nests would be protected by 30-acre
14 no disturbance and 400-acre post-fledging area buffers centered
15 on the nest. . . . Treatments within all post-fledging areas would
16 include: commercial thinning (32% of area); precommercial
17 thinning (8% of area); shelterwood harvest (10% of area); and
18 retention (50% of area). These treatments, in conjunction with
19 design elements to retain large trees and snags, would move the
20 post-fledgling area towards more late and old structural forest
21 over time.”

22
23 EA at 120.

²⁹ *Lands Council* involved a NEPA and NFMA-based challenge to a project
on the Panhandle National Forest, which neighbors the CNF. *Lands
Council*, 731 F. Supp.2d at 1077-78.

1 161. The Forest Service can point to no population monitoring data
2 required by the CNF Plan to demonstrate either that a viable population of
3 goshawks still resides in the CNF, or that timber harvests have not
4 adversely affected population trends and/or habitat utilization for the
5 northern goshawk.

6 162. Studies have shown that while goshawks will continue to
7 inhabit and even return to nest sites after timber harvest, adverse effects of
8 timber harvest can potentially reduce their prey base to such an extent that
9 they will either not reproduce, or that their fledglings will not survive.

10 163. The Forest Service failed to consider the best available science
11 on the effects of timber harvest on goshawk reproduction success. For
12 example, according to one particularly relevant study cited to the Forest
13 Service by AWR:

14 After partial harvesting over extensive locales around nest
15 buffers, re-occupancy decreased by an estimated 90% and
16 nestling production decreased by an estimated 97%. Decreases
17 were probably due to increased competition from open-forest
18 raptors, as well as changes in hunting habitat and prey
19 abundance.

20
21 *Crocker-Bedford (1990)*³⁰ at 267.

³⁰ Crocker-Bedford, D.C., Goshawk reproduction and forest management
(1990). 18 Wildlife Society Bulletin, no. 3, pp. 262-269.

1 164. The snowshoe hare is associated with dense canopy
2 understories. The EA does not analyze or disclose the adverse effects of
3 commercial thinning, precommercial thinning, and shelterwood harvest on
4 snowshoe hare habitat and population abundance.

5 165. *Moser and Garton* (2009)³¹ reported that all goshawk nests
6 examined in their study area were found in stands whose average diameter
7 of overstory trees was over 12.2 inches and all nest stands had $\geq 70\%$ over-
8 story tree canopy. They described their findings as being similar to those
9 described by *Hayward and Escano* (1989), which reported that nesting
10 habitat “may be described as mature to overmature conifer forest with a
11 closed canopy[.]” *Moser and Garton* (2009) at 3.

12 166. Given the relative absence of population trend data for the
13 northern goshawk in the CNF generally, and in the project area in
14 particular, and according to at least some of the best science available on
15 the effects of timber harvest on goshawk reproduction, the treatments
16 chosen for the NF Mill Creek Project have the potential to result in

³¹ Moser, Brian W. and Edward O. Garton, Short-Term Effects of Timber Harvest and Weather on Northern Goshawk Reproduction in Northern Idaho (2009). 43 J. Raptor Res. (1):1–10.

1 significant adverse affects to goshawk viability.

2 **Wolverine**

3 167. According to the EA:

4 The wolverine has been recorded in and near the project area.
5 On August 13, 2014 the USFWS withdrew the petition to list
6 the wolverine as Threatened (50 CFR Part 17 Vol. 79 No. 156).
7 Because the wolverine is no longer a candidate species under
8 the ESA, it is managed as a U.S. Forest Service sensitive
9 species.

10

11 EA at 12.

12

13 168. The decision relied upon by the Forest Service from the
14 USFWS was vacated by a federal court, *Defenders of Wildlife v. Jewel*, No.
15 CV 14-246-M-DLC (D. Mont. April 4, 2016).

16 169. This significant new information contributes to the controversy
17 of the project, necessitating the preparation of a full EIS.

18 **Big Game Habitat**

19 170. Maintaining deer and elk winter habitat is a key focus of the
20 CNF Plan in protecting wildlife habitat in the forest. Deer and elk are the
21 MIS for Management Area (“MA”) 6 and MA 8.

22 171. Two of the four management area types in the project area, MA
23 6 and MA 8, representing approximately 14% of the total area, currently
24 exceed CNF Plan standard of 1.5 miles/section for road densities.

25 172. The best science available on big game habitat effectiveness,

1 *Christensen et al.* (1993),³² clearly shows that displacement increases as
2 open road densities increase. Optimum big game habitat will have less than
3 a mile of open roads per section, which means that about 70% of the
4 landscape is free from road displacement effects. *Id.* When open road
5 densities reach 2.0 miles/section, only about half, or 50% of the landscape,
6 remains free from displacement effects to big game. *Id.* When open road
7 densities exceed this 2.0 mile/section threshold, the affected areas make
8 only minor contributions to elk management goals.

9 173. The current open road density for MA 6 and MA 8 in the NF
10 Mill Creek Project Area is 1.9 miles per section.

11 174. According to the Project Economics and Logging Systems
12 Specialist Report (“Logging Economics Report”) for the NF Mill Creek
13 Project: “An extensive road system exists in the project area and remains
14 largely functional for timber activities. There are approximately 75 miles of
15 existing roads and approximately 46 miles of additional unmapped,

³² Christensen, Alan G.; L. Jack Lyon and James W. Unsworth, Elk
Management in the Northern Region: Considerations in Forest Plan Updates
or Revisions (Nov. 1993). USDA, Forest Service Intermountain Research
Station, General Technical Report INT-303.

1 unauthorized existing roads.” Logging Economics Report at 10.

2 175. The challenged Project includes construction of approximately
3 30 miles of new roads and reconstruction of some existing roads, though
4 the EA fails to disclose the portion of these new roads that will be placed
5 within MA 6 and MA 8.

6 176. None of the alternatives considered in the EA would bring the
7 project area into compliance with CNF Plan road density standards (by,
8 e.g., decommissioning roads).

9 177. Cumulatively, the NF Mill Creek Project will have severe
10 displacement and disturbance impacts to big game.

11 178. There are 20 logging units on big game winter range (Project
12 Wildlife Report, p. 96). Accessing these units will require an *undisclosed*
13 *number* of new “temporary” roads, in addition to potentially reopening and
14 upgrading existing non-system roads that are currently closed to public
15 travel.

16 179. It is likely that the current open road density of 1.9 miles per
17 section will increase to over 2 miles per section - the maximum level
18 generally tolerated by big game - during the life of the project.

19 180. These cumulative impacts are significant in relation to the
20 Forest Service’s own science, given the 2.0 miles per section threshold, and

1 will be most severe to big game in the winter season, since winter logging
2 may occur between December 1 and March 31. Wildlife Report at 96.

3 181. In addition to failing to address the potential adverse impacts
4 from violation of the forest plan road density standard, the project would
5 also reduce cover for MIS big game species. The EA compares the project
6 area with CNF Plan big game thermal cover standards, but does not
7 demonstrate consistency with the standards in terms of description of
8 thermal cover, amounts/ratios, and block sizes.

9 182. The Wildlife Report does not disclose compliance with Forest
10 Plan direction for all thermal cover on this winter range. The requirements
11 for minimum patches of at least 3-4 acres, a minimum width of at least 300
12 feet per patch, and a maximum distance between patches of no more than
13 600 feet, are not summarized for this Project.

14 183. While the Colville National Forest Plan direction for big game
15 winter ranges could provide a modicum of protection for winter habitat, the
16 Forest Plan's direction is not being implemented for the NF Mill Creek
17 Project. The agency's failure to implement the CNF Plan creates an
18 ongoing and, with renewed harvest activities, significant cumulative impact
19 to big game species.

20 184. The cumulative effects of excessive road densities on fish and

1 wildlife represents a significant environmental impact, particularly in a
2 forest that has not adequately protected same.

3 **Fisheries and Water Quality**

4 185. The NF Mill Creek Project EA based its impact analysis for
5 fisheries largely on modeling. In addition, the EA's "sediment delivery
6 modeling assumes that National Forest System Roads will continue to be
7 well maintained following completion of the project." EA at 89.

8 186. According to App. F of the 2014 Colville Forest-wide Travel
9 Analysis Report ("TAR"): "With funds being far below what is necessary
10 to keep the road system properly maintained, many roads do not get the
11 maintenance treatments they need on schedule and are falling into a severe
12 state of disrepair." TAR at 2.

13 187. The TAR states:

14 As maintenance costs have increased, allocated maintenance
15 funds have remained static or been significantly reduced
16 The increased use coupled with the decreased funds has
17 resulted in degraded soil, water, vegetation, and wildlife habitat
18 conditions. . . . *Funding for road maintenance is not adequate*
19 *to maintain the existing system and perform needed monitoring.*

20
21 TAR at 14 (emphasis added).

22
23 188. According to the Forest Service, it would take approximately
24 \$37 million more than currently budgeted to bring their entire road system
25 in the CNF back up to standard, and another \$4.3 million per year to

1 maintain those roads. TAR at 2.

2 189. Scientific information from government studies conducted for
3 the Interior Columbia Ecosystem Management Project strongly indicates
4 the high negative correlation between road density and fish habitat
5 conditions.

6 190. In spite of the budget shortfalls acknowledged elsewhere by the
7 Forest Service, and the stated reliance of sediment impact models on an
8 unwarranted assumption that roads will be properly maintained, the EA
9 failed to consider the potential for significant environmental impacts from
10 failures in road maintenance on water quality and fish habitat.

11 191. The EA failed to consider using funds generated by the project
12 to decommission forest roads, despite the fact that the TAR identifies road
13 segments in the project area that are no longer needed. The EA also failed
14 to disclose the potential impacts from foregoing such opportunities.

15 192. According to *Wisdom, et al. (2000)*³³,

³³ Wisdom, Michael J., et al., Source Habitats for Terrestrial Vertebrates of Focus in the Interior Columbia Basin: Broad-Scale Trends and Management Implications (May 2000). USDA Forest Service Pacific Northwest Research Station United States Department of the Interior BLM General Technical

1 Efforts to restore habitats without simultaneous efforts to
2 reduce road density and control human disturbances will curtail
3 the effectiveness of habitat restoration, or even contribute to its
4 failure; this is because of the large number of species that are
5 simultaneously affected by decline in habitat as well as by road-
6 associated factors.

7

8 *Wisdom, et al.* (2000) at 136.

9

10 193. The water quality analysis in the North Fork Mill Creek EA
11 fails to disclose water quality monitoring data gathered from effected
12 streams on the CNF, or to apply the best available science in arriving at a
13 decision of no impact.

14 194. The EA fails to accurately disclose sediment amounts and
15 sediment impacts to Project Area streams that will result from proposed
16 management actions.

17 195. Despite acknowledging that effected streams do not meet
18 accepted scientific standards for natural function, such as referent stream
19 width/depth ratios, the EA fails to disclose stream channel stability
20 assessments on specific reaches, as well as information regarding the
21 existence and effects of bedload and accumulated sediment. Without such
22 assessments, it is not possible to determine if the streams remain in a
23 natural state of equilibrium, as required to avoid continuing, cumulative

Report PNW-GTR-485.

1 degradation.

2 196. The EA fails to analyze and disclose potentially significant,
3 cumulative road-related impacts to water quality and fish.

4 197. The EA fails to disclose the full extent of grazing impacts to
5 the affected streams in the Project Area, or the potentially significant
6 cumulative impacts of grazing, the road system, timber harvest, and climate
7 change on water quality, stream equilibrium, and fisheries.

8 198. While the Fisheries Report for the NF Mill Creek Project states
9 that the width-to-depth ratios for the affected streams in the Project Area no
10 longer meet INFISH standards, the EA fails to analyze, or even disclose,
11 this potentially significant cumulative effects issue.

12 199. The EA does not disclose or explain why the width/depth ratios
13 for project area streams are no longer meeting healthy stream standards, or
14 whether and to what extent additional logging, road construction, and
15 grazing will separately or in combination exacerbate the problem.

16 200. Knowledge of existing stream channel stability is crucial in
17 evaluating how the affected streams in the project area would respond to a
18 large peak flow precipitation event, and consequently how these events
19 would further impact water quality and fish habitat that is currently in a
20 degraded condition.

1 201. Stream stability issues are of special concern in areas grazed by
2 cattle, due to the harmful effects cattle presence has within riparian areas,
3 on streambanks, and in the streambeds themselves.

4 202. There are several validated in-stream procedures to evaluate
5 channel morphology and stability, such as the Riffle Stability Index (“RSI”)
6 which is utilized in the neighboring Idaho Panhandle National Forest.

7 203. The RSI “addresses situations in which increases in gravel
8 bedload from headwaters activities is depositing material on riffles and
9 filling pools, and it reflects qualitative differences between reference and
10 managed watersheds. . . . [I]t can be used as an indicator of stream reach
11 and watershed condition and also of aquatic habitat quality.” *Kappesser*
12 (2002)³⁴ at 1069.

13 204. The February 2016 Hydrology Specialist Report for the NF
14 Mill Creek Project (“Hydrology Report”) states that “[s]tream channel
15 conditions fall slightly short of Inland Native Fish Strategy riparian
16 management objectives for width:depth ratio, streambank stability, and

³⁴ Kappesser, Gary B., A Riffle Stability Index to Evaluate Sediment Loading to Streams (August 2002). 38 *Journal of the American Water Resources Association* No. 4.

1 stream bank angle; however, conditions are considerably better than
2 elsewhere on the Colville National Forest.” Hydrology Report at 39.

3 205. Dismissing degraded environmental conditions in one area of
4 the CNF as a concern by pointing to measurably worse conditions
5 elsewhere in the Forest is not consistent with environmental protection laws
6 which govern the management of our national forests by federal land
7 managers.

8 206. The analyses referenced in the preceding paragraphs do not
9 constitute the “hard look” at the potentially significant cumulative impacts
10 of land disturbing activities on fisheries and water resources required by
11 NEPA.

12 207. The EA fails to set forth scientifically valid, quantitative data
13 gathered for the project area streams to determine peak water flows and
14 their effects on stream bank erosion and channel scouring during spring
15 runoff and/or rain-on-snow events. Most segment altering and channel
16 forming events occur during these instantaneous flows. The only
17 documentation of a peak flow event set forth in the Hydrology Report
18 shows the mean (average) spring peak flows – not the instantaneous peak
19 flows that are of most concern.

20 208. The Hydrology Report for the NF Mill Creek Project

1 acknowledges that peak flows can be altered by timber harvest activities
2 after removal of canopy, due to reducing the area of canopy interception of
3 precipitation, which in turn results in more snow accumulation and
4 snowmelt available for runoff, thereby increasing the risk of sedimentation
5 and erosion of streams. This represents a potentially significant adverse
6 environmental impact in an area where there are concerns with fisheries
7 and streams not meeting natural expectations.

8 209. Without a site-specific stream-reach evaluation of stream
9 channel stability, it is not possible to predict the direct, indirect and
10 cumulative effects of roads, cows, climate change, and logging to affected
11 streams and fish habitat with any reasonable degree of accuracy or
12 scientific integrity.

13 210. According to science provided to the Forest Service, “The
14 stability condition of a watershed may be broadly determined by evaluating
15 the level of harvest activity (ECA), its spatial distribution with regard to
16 headwater harvest and rain-on-snow risk and the density of roading in the
17 watershed with consideration of road location relative to geology and
18 slope” *Kappesser (1992)*³⁵ at 2. The EA does not explain why the Forest

³⁵ Kappesser, Gary, 1992. *Alternative Procedures for Watershed Analysis to*

1 Service has failed to provide this kind of basic information to the public.

2 211. The number, mileage and proximity of the roads to the
3 proposed logging units and streams are important for gauging potential
4 environmental impacts to fisheries and water quality because roads and
5 logging operations can have a significant direct impact on peak flows.
6 They can also cause significant indirect impacts on fish, stream channels,
7 and the potential for flooding, as the Forest Service well knows from
8 decades of experience with disastrous “unintended” consequences from
9 extensive logging operations.

10 212. Headwaters harvest is known to have a disproportionately large
11 influence on channel conditions.

12 213. Many of the roads to be utilized for the NF Mill Creek Project
13 are located in headwater areas, and in close proximity to streams.

14 214. As the Hydrology Report acknowledges, “Roads also can
15 potentially change watershed hydrology and peak flows. It has been
16 suggested that roads may increase peak streamflow by capturing subsurface

Determine Timber Harvest Opportunities and Evaluate the Need for a Forest
Plan Revision for the Idaho Panhandle National Forests. Gary Kappesser,
Forest Hydrologist, Idaho Panhandle National Forests, January 1992.

1 water in road cuts and by generating excess surface flows from compacted
2 road surfaces” Hydrology Report at 51.

3 215. The EA fails to disclose the Equivalent Clearcut Area (“ECA”)
4 that will result from the Project. Proposed roads and logging will create
5 additional openings in the project area which has the potential cumulatively
6 to significantly effect water quality and fish habitat.

7 216. In calculating the potential for “rain-on-snow” events that are
8 known to create a potential for significant damage to streams and fish
9 habitat in the winter, the Hydrology Report relied on temperature data *from*
10 *1960* to dismiss the potential for such events, ignoring completely the
11 higher temperatures that have come to be associated with the record annual
12 temperatures that have now become routine with our changing climate.

13 217. *USDA Forest Service (1994b)*³⁶ states “It is important to realize
14 that all models greatly simplify complex processes and that the numbers
15 generated by these models should be interpreted in light of field
16 observations and professional judgement.” *Id* at III-74. The Forest Service
17 has failed to validate the models it uses to address concerns with hydrology

³⁶ USDA Forest Service 1994b. Savant Sage Final EIS, Idaho Panhandle National Forests.

1 on the CNF, which is of particular concern given the poor record of road
2 maintenance on this forest.

3 218. The EA relies heavily on models in its effects analysis due to a
4 paucity of on-the-ground, scientifically credible, site specific information.

5 219. Defendants have not set forth a site-specific monitoring
6 program for the NF Mill Creek Project area that complies with the Forest
7 Plan.

8 220. Failure to follow CNF Plan monitoring requirements makes it
9 impossible for the Forest Service to determine the true extent of cumulative
10 impacts on water resources, to gauge the accuracy of its predictions of the
11 environmental impacts by reference to other timber sales, or to make the
12 appropriate adjustments to proposed timber sales.

13 221. Within the NF Mill Creek watershed, average annual sediment
14 delivery produced by existing roads is estimated by modeling to total 35.8
15 tons/year, about 6.8% above background rates.

16 222. Activities associated with new road construction and increased
17 haul traffic would increase average annual sediment delivery by about 34%
18 for the duration of harvest activities.

19 223. Logging and prescribed burning would increase sediment
20 delivery to affected streams by about another 29% above current levels.

1 224. The EA provides no reasoned basis for its implicit conclusion
2 that this 63% increase above current levels of road-generated sediment
3 production every year for at least eight years, when added to the existing
4 road-generated sediment (estimated at 6.8% above background levels),
5 would not constitute a significant impact to streams that are already out of
6 balance in terms of width:depth ratios.

7 225. As previously noted, the defendants’ “sediment delivery
8 modeling assumes that National Forest System Roads will continue to be
9 well maintained following completion of the project.” EA at 89. Yet
10 according to the Transportation Specialist Report (“Transportation
11 Report”):

12 Road maintenance funding is not adequate to maintain and sign
13 all roads to Forest Service standard... Due to an underfunded
14 road maintenance program, surface erosion, rutting, potholing,
15 brushed in ditches leading to clogged drainage systems can be
16 observed along many roads, increasing the potential for
17 landslides, which have [already] occurred in some instances
18 within the project area.

19
20 Transportation Report at 15-16.

21 226. According to the North Fork Mill Creek A to Z Project:
22 Biological Evaluation of Effects to Terrestrial and Aquatic Threatened,
23 Endangered, and Sensitive Species (“Biological Evaluation”), nearly half of
24 the culverts in the project area “appear to be inadequate to handle high

1 runoff events, increasing the risk of water flowing over the road surfaces,
2 thereby increasing erosion. Road-related sediment generation is increased
3 and in many instances delivered to streams, not maintaining water quality
4 per desired future conditions.” Biological Evaluation at 16.

5 227. It is arbitrary and capricious for the Forest Service to premise a
6 finding of no significant environmental impact to streams on an
7 unwarranted assumption that its presently-inadequate road maintenance
8 will somehow improve in the future. This is especially so because the
9 agency itself has recognized a significant lack of adequate funding for road
10 maintenance currently and in the foreseeable future, and has not identified
11 additional sources of funding in its budget to cover such a shortfall.

12 228. The EA fails to disclose whether the affected streams are
13 accumulating fine sediments as a result of past logging and roading
14 activities.

15 229. The EA fails to disclose the cumulative effects of sediment
16 loads from land disturbing activities on fisheries and/or stream channel
17 stability.

18 230. The models utilized to evaluate existing and proposed sediment
19 production from timber harvest and roads in the CNF have confidence
20 levels associated with them of +/- 50%, which means that they are not

1 reliable except for comparison purposes, and which indicates need for
2 actual measurements and monitoring in light of unnatural width: depth
3 ratios.

4 231. While all of the points in the preceding paragraphs were raised
5 in the NEPA process, the Forest Service chose to ignore them. Defendants
6 also failed to explain why the requested information could not be provided
7 to the public.

8 232. While acknowledging in the Hydrology Specialist Report that
9 there will be increases in peak flows from the proposed logging, the EA
10 asserts that these increases will be smaller than peak flow increases under
11 HRV³⁷ conditions. However, HRV conditions did not include roads along
12 streams and herds of cows in the forest eating riparian vegetation and
13 trampling streambanks.

14 233. It is also reasonable to assume under HRV conditions that
15 stream width-to-depth ratios, and thus stream stability, were natural and not
16 altered to some undisclosed extent.

17 234. The CNF Plan requires the Forest Service to maintain viable
18 populations of resident fish, in part by insuring that there are no appreciable
19 losses of habitat capability, productivity, trout species and size

³⁷ Historical range of variability.

1 composition, as measured annually.

2 235. The EA does not demonstrate that native fish populations in the
3 CNF are, on the whole, viable.

4 236. The EA fails to disclose the results of annual Forest Plan
5 Monitoring of fisheries required by the CNF Plan, or to explain the
6 potential environmental impact of proceeding with the project in the
7 absence of such data.

8 237. The CNF Plan Standards for fisheries requires the Forest
9 Service to “[r]ehabilitate habitats which have been degraded as a result of
10 management activities” CNF Plan at 4-61.

11 238. Fish surveys conducted within the project area reveal
12 unnaturally low fish populations: “Despite surveying [in the project area]
13 over 6.5 miles of stream currently classified as fish bearing, more than 206
14 high quality pools (min. 3ft² surface area x 1ft. deep) and nearly 600 pools
15 overall, *only 29 fish were sampled.*” Fisheries Specialist Report at 6.
16 (emphasis added).

17 239. The Fisheries Report does not attempt to explain or analyze
18 why the resident fish populations in the project area are so low; whether
19 current habitat conditions are adequate to support viable fish populations;
20 or, if they are not, what management actions would be required to recover

1 these fisheries.

2 240. Cobble “embeddedness” refers to a condition where large
3 material in a streambed – gravel sized rocks or larger (where trout lay their
4 eggs) – is infiltrated or surrounded by finer material, such as sand and/or
5 silt, leaving less space for hiding cover for smaller fish, as well as
6 reductions in the ability of water to supply oxygen to, and flush metabolic
7 wastes from, developing fish eggs in the streambed. (See, e.g., Aladdin
8 Allotment Complex Allotment Environmental Assessment (“Aladdin EA”),
9 n. 26, 15, p. 50.)

10 241. According to the Aladdin EA, the North Fork of Mill Creek
11 was at one time subject to stream surveys which revealed that cobble
12 “embeddedness” was found to be “high.” *Id.* at 52.

13 242. In spite of the near certainty of increased, cumulative sediment
14 delivery to Mill Creek as a result of timber harvest operations, the Forest
15 Service failed to disclose in the NF Mill Creek Project EA the high levels
16 of cobble embeddedness it had previously documented for the North Fork
17 of Mill Creek in 2005, or to explain why further, updated cobble
18 embeddedness surveys and determinations were not included as part of the
19 environmental study and analysis for the current project.

20 243. While nowhere disclosed or analyzed in the EA, the Fisheries

1 Specialist Report cites science for the proposition that sediment levels over
2 10% are problematic for fish: “*Bjornn and Reiser* (1991) summarize data
3 from several studies on the effects of fines, and show that rearing densities
4 decline as fines rise above 10 percent of the substrate in riffles...” Fisheries
5 Specialist Report at 47.

6 244. The Fisheries Specialist Report discloses average levels of
7 fines in the project area’s streams are estimated to be 23%, or more than
8 twice the level of concern for rearing densities in a stream where surveys
9 revealed unnaturally low levels of habitation. *Id.* at 19.

10 245. According to the Hydrology Specialist Report, while cattle
11 grazing in the area is largely associated with the currently degraded
12 condition of the streams, at least some of this sedimentation is attributable
13 to logging: “Extensive area of the North Fork Mill Creek watershed has
14 been logged using ground-based log skidding systems that caused extensive
15 soil disturbance and that may have added substantial sediment to streams.”
16 Hydrology Specialist Report at 18.

17 246. As approved, the NF Mill Creek Project would also utilize
18 ground-based log skidding systems that have the potential for adding
19 further substantial sediment to streams.

20

1 **Soil Productivity**

2 247. According to a scientific study on soil productivity provided to
3 the Forest Service:

4 Soil is a critical component to nearly every ecosystem in the
5 world, sustaining life in a variety of ways—from production of
6 biomass to filtering, buffering and transformation of water and
7 nutrients. . . . Despite the critical importance of maintaining
8 healthy and sustaining soils, conservation of the soil resource
9 on public lands is generally relegated to a diminished land
10 management priority. Countless activities, including livestock
11 grazing, recreation, road building, logging, and mining, degrade
12 soils on public lands.

13
14 Lacy (2001)³⁸ at 1.

15 248. *USDA Forest Service* (2014a)³⁹ states:

16 Management activities can result in both direct and indirect
17 effects on soil resources. Direct and indirect effects may include
18 alterations to physical, chemical, and/or biological properties.
19 Physical properties of concern include structure, density,
20 porosity, infiltration, permeability, water holding capacity,
21 depth to water table, surface horizon thickness, and organic
22 matter size, quantity, and distribution. Chemical properties
23 include changes in nutrient cycling and availability. Biological

³⁸ Lacy, Peter M., *Our Sedimentation Boxes Runneth Over: Public Lands
Soil Law As The Missing Link In Holistic Natural Resource Protection*, 31
Envtl. L. 433 (2001).

³⁹ USDA Forest Service, 2014a. *Como Forest Health Project Draft EIS*,
Darby Ranger District, Bitterroot National Forest (August 2014).

1 concerns commonly include abundance, distribution, and
2 productivity of the many plants, animals, microorganisms that
3 live in and on the soil and organic detritus.”

4
5 *Id.* at 3-279.

6 249. The CNF Plan requires the Forest Service to conduct follow-up
7 effectiveness monitoring – via field reviews, transects, and sampling – for
8 timber harvest areas in order to determine changes in soil productivity post-
9 harvest, and in order to limit damage to soils from timber harvest through
10 adaptive management.

11 250. While the NF Mill Creek Project Area has been logged
12 previously, the EA fails to disclose the results of effectiveness monitoring
13 for soils productivity following past timber harvests.

14 251. Regional Soil Standards instruct the Forest Service to:
15 Use soil quality standards to guide the selection and design of
16 management practices and prescriptions on a watershed scale.
17 Evaluate existing soil conditions on all ownerships within the
18 watershed and consider cumulative effects with the addition of
19 proposed actions on ecosystem sustainability and hydrologic
20 function. On a planned activity area, evaluate existing soil
21 conditions and design activities to meet soil quality standards.
22 Document adjustments to management practices, soil
23 conservation practices or restoration techniques necessary to
24 meet threshold values for the affected soil properties and
25 watershed conditions.

26
27 Forest Service Manual Portland, Oregon Title 2520 – Watershed
28 Protection And Management R-6 Supp. No. 2500.98-1 pages 4-5.

1 252. By limiting analysis of compliance with soil standards to
2 selected “activity areas,” the Forest Service failed to disclose the
3 detrimental impacts to soil productivity in the project area from past and
4 proposed timber harvest, and thus failed to demonstrate compliance with
5 Regional Soil Standards intended to avoid potentially significant
6 cumulative losses in soil productivity.

7 253. The Forest Service recognizes that adverse effects from soil
8 disturbances, such as compaction from logging equipment, occur at the
9 landscape level, where large areas of compacted and displaced soils can
10 “affect vegetation dynamics, runoff, and water yield regimes in a
11 subwatershed.” USDA Forest Service (2008f)⁴⁰ at 19. It has also recognized
12 that “[c]ompaction can indirectly lead to decreased water infiltration rates,
13 leading to increased overland flow and associated erosion and sediment
14 delivery to stream. Increased overland flow also increases intensity of
15 spring flooding, degrading stream morphological integrity and low summer
16 flows.” *Id.*

⁴⁰ USDA Forest Service, 2008f. Gold Crown Fuels Reduction Project Soil Specialists’ Report: Past Disturbance and Probable Impacts. Prepared by: Mark Vander Meer & Tricia Burgoyne, Soil Scientists, USDA Forest Service.

1 *Management Act*

2

3 257. All previous paragraphs are incorporated by reference.

4 258. Under NFMA, any sale of trees or forest products from our
5 national forests must involve an open, fair, and competitive bidding process
6 to insure that the Federal Government does not receive less than the
7 appraised value of the timber sold. 16 U.S.C. § 472a(e)(1).

8 259. Also under NFMA, both the designation – whether by
9 description or by prescription, and including any necessary marking – and
10 supervision of harvesting of trees, portions of trees, or forest products “shall
11 be conducted by persons employed by the Secretary of Agriculture[.]” 16
12 U.S.C. § 472a(g)(1).

13 260. Such persons employed by the Secretary of Agriculture: “(A)
14 shall have no personal interest in the purchase or harvest of the [forest]
15 products; and (B) shall not be directly or indirectly in the employment of the
16 purchaser of the products.” 16 U.S.C. § 472a(g)(2)(A)-(B).

17 261. Based upon information and belief, the sale of the trees to be
18 harvested as part of the NF Mill Creek Project was arranged without using a
19 bidding method insuring open and fair competition.

20 262. To the contrary, based on information and belief, the price for
21 the trees to be sold from the NF Mill Creek Project will be negotiated in

1 private meetings and/or in discussions between Vaagen Brothers and
2 representatives of the Forest Service, without public involvement or
3 scrutiny.

4 263. Based upon information and belief, responsibility for the
5 designation of timber harvest units and the selection of trees to be logged
6 within those units in the NF Mill Creek Project was delegated by the Forest
7 Service to Vaagen Brothers, the purchaser thereof.

8 264. Based upon information and belief, Vaagen Brothers is
9 personally interested, in the meaning of 16 U.S.C. § 472a(g)(2)(A), in the
10 purchase and/or harvest of the forest products to be removed from the CNF
11 under the NF Mill Creek Project.

12 265. The manner of sale of timber from the Colville National Forest
13 in the NF Mill Creek Project specifically, and the A to Z Project in general,
14 violates 16 U.S.C. § 472a and is arbitrary, capricious, an abuse of discretion,
15 or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

16 **SECOND CLAIM FOR RELIEF**
17

18 *The Forest Service Failed to Take a Hard Look at the Direct, Indirect, and*
19 *Cumulative Impacts of the NF Mill Creek Project on Fish, Wildlife,*
20 *Streams, and Soils in Affected Areas of the Colville National Forest*
21

22 266. All previous paragraphs are incorporated by reference.

23 267. NEPA requires that agencies take a “hard look” at the

1 environmental consequences of their proposed actions before the agencies
2 choose a particular course of action, without favoring a pre-determined
3 outcome.

4 268. NEPA requires federal agencies to prepare an EIS for “major
5 Federal actions significantly affecting the quality of the human
6 environment[.]” 42 U.S.C. § 4332(2)(C).

7 269. Federal regulations permit an agency planning a major federal
8 action to prepare an Environmental Assessment in order to determine
9 whether it must prepare an EIS. 40 C.F.R. §§ 1501.3, 1501.4; 36 C.F.R. §
10 220.7(b)(3)(i).

11 270. If the EA shows that the proposed action will have no significant
12 impact, the agency may issue a finding of no significant impact (“FONSI”)
13 and Decision Notice. 40 C.F.R. § 1501.4(e); 36 C.F.R. § 220.7(c).

14 271. If, however, the EA shows that the proposed activity will have a
15 significant impact, the federal agency must prepare an EIS before proceeding
16 with the proposed activity. 40 C.F.R. § 1508.13; 36 CFR § 220.6(c).

17 272. “Cumulative impact” is:

18 the impact on the environment which results from the
19 incremental impact of the action when added to other past,
20 present, and reasonably foreseeable future actions regardless of
21 what agency (Federal or non-Federal) or person undertakes
22 such other actions. Cumulative impacts can result from
23 individually minor but collectively significant actions taking

1 place over a period of time.

2

3 40 C.F.R. § 1508.7.

4 273. A significant environmental effect may exist even if the federal
5 agency believes that on balance the environmental effects of a proposal will
6 be beneficial. 40 C.F.R. § 1508.27(b)(1).

7 274. In making a determination of significance, the agency must
8 consider the various factors including, among others: the degree to which the
9 effects on the quality of the human environment are likely to be highly
10 controversial; the degree to which the possible effects on the human
11 environment are highly uncertain or involve unique or unknown risks; the
12 degree to which the action may establish a precedent for future actions with
13 significant effects or represents a decision in principle about a future
14 consideration; and, whether the action is related to other actions with
15 individually insignificant but cumulatively significant impacts. 40 C.F.R. §
16 1508.27(b).

17 275. Under the regulations, “[s]ignificance exists if it is reasonable to
18 anticipate a cumulatively significant impact on the environment.
19 Significance cannot be avoided by terming an action temporary or by
20 breaking it down into small component parts.” 40 C.F.R. § 1508.27(b)(7).

21 276. The segmentation of the anticipated timber harvest under the

1 Forest Service’s Mill Creek A to Z Stewardship Contract with Vaagen
2 Brothers into the North Fork, South Fork, and Middle Fork timber sales,
3 along with at least two other timber sales in the Wildland/Urban Interface, is
4 arbitrary, capricious, and an abuse of discretion, and has precluded the
5 requisite hard look at the cumulative impacts from all the combined logging
6 and roadbuilding authorized by that contract.

7 277. The EA and associated specialist reports for the NF Mill Creek
8 Project demonstrate that the affected area and its resident fish and wildlife
9 are already being significantly impacted by timber harvest, roads, fire
10 suppression, grazing and climate change, such as to necessitate the
11 preparation of an EIS before approving the proposed Project.

12 278. The Forest Service’s issuance of a Finding of No Significant
13 Impact for the NF Mill Creek Project, and failure to prepare an EIS, was
14 arbitrary, capricious, an abuse of discretion, or otherwise not in accordance
15 with law. 5 U.S.C. § 706(2)(A).

16 279. In light of the unusual contract arrangement between the Forest
17 Service and Vaagen Brothers, in which the Forest Service conveyed the
18 exclusive right to log the North Fork, Middle Fork, and South Fork
19 watersheds in the Colville National Forest for undisclosed compensation,
20 and which delegated responsibility to the contractor for design of the timber

1 sale as well as the study of its impacts on the environment, the decision to
2 forego an EIS and the failure to choose the “no action” alternative represent
3 a pre-determined outcome in violation of NEPA.

4 **THIRD CLAIM FOR RELIEF**

5 *The Forest Service’s Failure to Demonstrate Compliance with the Forest*
6 *Plan Violates NFMA*

7
8 280. All previous paragraphs are incorporated by reference.

9 281. NFMA mandates that individual timber sales on National Forests
10 must be consistent with the governing forest plan. 16 U.S.C. § 1604(i).

11 282. A violation of a forest plan provision is a violation of NFMA.

12 283. An agency’s failure to affirmatively demonstrate compliance with
13 a forest plan is a violation of NFMA.

14 284. An agency’s decision to implement management direction not
15 contained within an approved forest plan, in the absence of an EIS or a
16 supplement to the forest plan EIS, is a violation of NFMA.

17 285. Forest Service regulations explicitly require: “The approving
18 officer will insure that each timber sale contract . . . is consistent with
19 applicable land and resource management plans” 36 C.F.R. § 223.30.

20 286. The Forest Service has failed to monitor the cumulative and/or
21 forest-wide impacts of implementing the Colville National Forest Plan in
22 accordance with the plan itself and/or in accordance with NFMA’s

1 continuous monitoring and field assessment requirements, especially but not
2 limited to concerns over impacts of roads and timber harvest on management
3 indicator species and fisheries. 16 U.S.C. § 1604(g)(3)(C).

4 287. The Forest Service has failed to demonstrate that the NF Mill
5 Creek Project complies with numerous provisions of the Colville Forest Plan,
6 including but not limited to standards and guidelines for protection and
7 rehabilitation of fisheries, standards and guidelines for protecting wildlife by
8 demonstrating impacts of timber projects on management indicator species,
9 standards and guidelines for the protection of big game and habitat, standards
10 and guidelines for insuring soils productivity and sustained yield, and
11 validation of assumptions relied upon for estimating impacts through forest
12 plan implementation monitoring and evaluation.

13 288. The Forest Service's failure to demonstrate that the NF Mill
14 Creek Project complies with all provisions of the Forest Plan is arbitrary,
15 capricious, an abuse of discretion, or otherwise not in accordance with law. 5
16 U.S.C. § 706(2)(A).

17 **FOURTH CLAIM FOR RELIEF**

18
19 *The Forest Service's Failure to Demonstrate the Reliability of its Scientific*
20 *Assumptions, its Reliance on False Assumptions, and its Failure to Respond*
21 *to Concerns Supported by Contrary Science Violates Both NEPA and*
22 *NFMA.*

23

1 289. All previous paragraphs are incorporated by reference.

2 290. 40 C.F.R. § 1500.1(b) provides:

3 NEPA procedures must insure that environmental information
4 is available to public officials and citizens before decisions are
5 made and before actions are taken. The information must be of
6 high quality. Accurate scientific analysis, expert agency
7 comments, and public scrutiny are essential to implementing
8 NEPA.

9
10 40 C.F.R. § 1500.1(b).

11 291. 40 C.F.R. § 1502.24 provides:

12 Agencies shall insure the professional integrity, including
13 scientific integrity, of the discussions and analyses in
14 environmental impact statements. They shall identify any
15 methodologies used and shall make explicit reference by
16 footnote to the scientific and other sources relied upon for
17 conclusions in the statement

18
19 40 C.F.R. § 1502.24.

20 292. As stated in the CNF Plan itself: “The Forest Plan embodies the
21 provisions and the implementing regulations of the National Forest
22 Management Act of 1976 and other guiding documents.” CNF Plan at 1-1.

23 293. This continuing responsibility ensures compliance with the
24 statutory mandates of NFMA itself, which provides that forest plans “insure
25 research on and (based on continuous monitoring and assessment in the
26 field) evaluation of the effects of each management system to the end that it
27 will not produce substantial and permanent impairment of the productivity

1 of the land.” 16 U.S.C. § 1604(g)(3)(C).

2 294. On December 18, 2009 the Department of Agriculture issued a
3 final rule reinstating the National Forest System Land and Resource
4 Management Planning Rule of November 9, 2000, as amended (“2000
5 Rule”). 74 Fed. Reg. 67059-67075 (Dec. 18, 2009). The 2000 Rule states:

6 Projects implementing land management plans must comply
7 with the transition provisions of [36 CFR] § 219.35, but not any
8 other provisions of the 2000 planning rule. Projects
9 implementing land management plans and plan amendments, as
10 appropriate, must be developed considering the best available
11 science in accordance with § 219.35(a). Projects implementing
12 land management plans must be consistent with the provisions
13 of the governing plan.

14
15 74 Fed. Reg. 67074 (Dec. 18, 2009) (to be codified at 36 C.F.R. pt. 219).

16 295. The Finding of No Significant Impact and EA for the NF Mill
17 Creek Project are not based on accurate scientific information, high quality
18 information, continuous monitoring and assessment in the field, the
19 evaluation of the effects of each management system in accordance with
20 CNF Plan monitoring and evaluation requirements, or other disclosures and
21 assessments necessary to ensure that forest plan implementation and
22 management is not substantially and permanently impairing the productivity
23 of the land.

24 296. The Forest Service’s above-described actions violate applicable
25 provisions of NFMA and NEPA and are arbitrary, capricious, an abuse of

1 discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

2 **FIFTH CLAIM FOR RELIEF**

3 *The Forest Service’s Failure to Implement the Colville National Forest Plan*
4 *Monitoring Program and Subsequent Failure to Supplement the Forest Plan*
5 *FEIS to Consider Significant New Information and Changed Circumstances*
6 *Violates Both NEPA and NFMA.*

7
8 297. All previous paragraphs are incorporated by reference.

9 298. The Colville Land Resource Management Plan Final
10 Environmental Impact Statement defines the Forest Plan’s Monitoring
11 Program as the “Close evaluation of the implementation of Forest activities
12 for conformance with the standards and guidelines and objectives as stated
13 in the Forest Plan” (Glossary-21).

14 299. In order to demonstrate compliance with NFMA’s requirement
15 to provide diversity of plants and animals, the FEIS for the Colville Forest
16 Plan noted the following: “In order to insure that the product of this plan is
17 as desired, a monitoring plan has been developed in which both habitat
18 quantity and quality, and the response of wildlife populations will be tracked
19 As more is learned about any subject, additional questions will arise.
20 Therefore, both the information needs and the items to monitor are expected
21 to be updated as new needs are recognized.” CNF Forest Plan IV-43.

22 300. For old growth and mature forest dependent species, the FEIS
23 for the Colville Forest Plan stated: “Monitoring will be necessary for

1 distribution of habitat units maintained to meet needs of mature and old
2 growth forest-dependent species, and to ensure that all needed habitat
3 components are provided in sufficient supply within those units. Snag
4 distribution, characteristics, and use will need to be monitored to maintain a
5 data base of trends in snag habitat and dependent species.” CNF Forest Plan
6 IV-59.

7 301. The failure to comply with, and apparent abandonment of the
8 Colville Forest Plan Monitoring Program represents a significant changed
9 circumstance which required the Forest Plan EIS to be supplemented in
10 order to reconsider the direct, indirect, and cumulative impacts of forest plan
11 implementation on the diversity of plant and animal species in the absence
12 of implementation monitoring.

13 302. The extirpation of fisher announced by the Forest Service on or
14 about 2011 constituted significant new information concerning the direct,
15 indirect, and cumulative impacts of forest plan implementation on forest
16 wildlife, including but not limited to the failure of pine marten as a proxy for
17 mature and old growth dependent species of wildlife.

18 303. Due to the failed assumptions of the Colville Forest Plan and the
19 failure to supplement the Forest Plan EIS in response to changed
20 circumstances and new information, it was arbitrary and capricious to tier an

1 environmental assessment and finding of no significant impacts to the Forest
2 Plan EIS which assumed that continuous monitoring and assessment in the
3 field, in accordance with Chapter 5 of the Forest Plan, would be carried out
4 in order to gauge the impacts of forest management on fish and wildlife
5 species.

6 **RELIEF REQUESTED**

7 For all of the above-stated reasons, Plaintiff requests that this Court
8 award the following relief:

- 9 1) Declare that defendants' approval of the NF Mill Creek Project
10 was arbitrary, capricious, an abuse of discretion, or otherwise not in
11 accordance with law;
- 12 2) Permanently enjoin implementation of the NF Mill Creek
13 Project and issue any other such injunctive relief as may be warranted,
14 including but not limited to requiring additional mitigation and monitoring,
15 and/or voiding the Contract between the Forest Service and Vaagen Lumber;
- 16 3) Award Plaintiff costs, expenses, expert witness fees, and
17 reasonable attorney fees under the EAJA; and,
- 18 4) Grant Plaintiff any such further relief as may be just, equitable,
19 and proper.

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1 RESPECTFULLY SUBMITTED this 23rd day of February 2018.

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s/ Brian A. Ertz

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Brian A. Ertz

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ERTZ LAW, PLLC

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s/Richard A. Poulin

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Richard A. Poulin

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SCOPE Law Firm, PLLC

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Attorneys for Plaintiff