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7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE DISTRICT OF MONTANA
9 MISSOULA DIVISION

10	NATIVE FOREST NETWORK, FRIENDS)	
	OF THE BITTERROOT and THE ECOLOGY)	
11	CENTER, INC.,)	Cause No. CV-06- - -M
12	Plaintiffs,)	
	vs.)	COMPLAINT FOR
13)	DECLARATORY AND
)	INJUNCTIVE RELIEF
14	DAVE BULL, in his official capacity as)	
	Forest Supervisor for the Bitterroot National)	
15	Forest; ABIGAIL KIMBELL, Regional)	
	Forester of Region One of the U.S. Forest)	
16	Service; and, UNITED STATES FOREST)	
	SERVICE, an agency of the U.S. Department)	
17	of Agriculture,)	
)	
18	Defendants)	

19 **INTRODUCTION**

20 1. This is a civil action for judicial review under the Administrative Procedure Act,
21 infra., of the final decision approving implementation of the Middle East Fork Hazardous Fuel
22 Reduction Project (ROD March 24, 2006) (hereinafter "Project" or "MEF Project"). Plaintiffs
23 allege that this decision is not in compliance with the procedure required by law, arbitrary and
24 capricious, an abuse of discretion, and/or otherwise not in compliance with the law. They seek

1 encouragement of public involvement for over sixteen years on the Bitterroot National Forest.
2 FOB members hike, hunt, fish and otherwise recreate in the MEF project area and their interests
3 are threatened by the proposed MEF project.

4 10. Plaintiff NATIVE FOREST NETWORK ("NFN") is a non-profit conservation
5 group, based in Missoula, Montana. NFN has a mission to protect and restore forests and wild
6 places. NFN and its members participate in, and are committed to, the protection of intact forest
7 ecosystems throughout the northern Rockies, including the Bitterroot National Forest. NFN staff
8 and members have a substantial interest in continuing to use the area where the Middle East Fork
9 Hazardous Fuel Reduction project is planned on the Bitterroot National Forest for hiking, hunting,
10 fishing, recreation, scientific study, family outing, camping and other pursuits and are adversely
11 affected and aggrieved by the USFS's failure to protect the remaining intact forests in the Middle
12 East Fork project area, failure to based this project on the best available science, and failure to
13 comply with the law.

14 11. Defendant DAVE BULL is the Supervisor for the Bitterroot National Forest, is the
15 designated "Responsible Official" for the challenged project, including the selection of alternatives
16 and designation of the preferred alternative, and is being sued in his official capacity.

17 12. Defendant UNITED STATES FOREST SERVICE ("FS") is responsible for the
18 lawful management of the National Forests, including the Bitterroot National Forest.

19 13. Defendant ABIGAIL KIMBELL is the Regional Forester of Region One of the U.S.
20 Forest Service. In that capacity, Defendant KIMBELL is the responsible for issuing the final post-
21 objection decision which authorized the project challenged in this Complaint, and is responsible
22 for ensuring the project comply with the laws relating to management of public resources on the
23 U.S. National Forests. She is sued in her official capacity.

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1 *Judicial Interpretation of a Substantive Environmental Statute*, 15 Pub. Land L. Rev. 53, 61-62
2 (1994).

3 17. Due to the history of intensive and scientifically inappropriate timber harvest and
4 harvest-related activities in the BNF, there is a continuing legacy of extensive soil damage in the
5 form of soil compaction and soil displacement. Middle East Fork Hazardous Fuel Reduction
6 Project Draft Environmental Impact Statement ("DEIS"), at 3.5-6 (USDA 2005).

7 18. The designated Middle East Fork Analysis Area in the Bitterroot National Forest
8 begins approximately 2 miles from the small town of Sula, Montana, but the forest treatment that
9 is closest to Sula is approximately 4 miles away. The bulk of the treatments occur between 5 and
10 10 miles distance from Sula and are surrounded principally by National Forest lands, not private
11 properties.

12 19. The MEF Analysis Area straddles the East Fork of the Bitterroot River, and thus
13 straddles small swaths of private property located along either side of the river. (DEIS MAP 2-1)
14 The private property comprises 8% of the analysis area. These small swaths of private property
15 compel 49% of the project area to be designated as "Wildland Urban Interface." (DEIS 1-3).

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17 **FORESTS AND WILDFIRE**

18 20. In December 2003 President George W. Bush enacted into law the Healthy Forest
19 Restoration Act ("HFRA"). 16 U.S.C. § 6501 et seq. This act expedites the process for approving
20 and implementing logging projects on public lands under the guise of protecting "at risk" lands
21 from wildland fire or insect and disease epidemics.

22 21. In Western Montana, wildland fire, insects, and disease play a historic and
23 fundamental ecological role in forest regeneration. Thus, *all* forests in Western Montana are "at

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1 risk" from fire *or* insects *or* disease, and thus HFRA would permit expedited logging in *any* non-
2 wilderness area of *any* National Forest in Western Montana at *any* time.

3 22. HFRA presupposes that forests and rangeland must be "protected" from
4 "catastrophic" wildfire, and that expedited logging will be effective in achieving this goal. *Id.*

5 23. Speculation that "catastrophic" fire will lay our forests and rangelands to waste is
6 contrary to the experience of wildfires, which typically burn in a mosaic of burn intensities across
7 the landscape, often introducing the kinds of structural complexity that benefits wildlife in the long
8 term, such as snags, additional soil nutrients, and downed woody debris.

9 24. There is substantial controversy among fire scientists over whether stand-
10 replacement fires are "weather" or "fuel" driven. Assumptions that fuel loads are determinative of
11 fire behavior are rigorously disputed by common knowledge found in the community of experts
12 and scientists, as reflected in published research in professional journals.

13 25. Fuel loads are often portrayed as determinative of fire severity in order to justify
14 excessive industrial scale logging, despite empirical data and studies revealing landscapes that
15 have experienced timber harvest or salvage cuts often experience enhanced wildfire intensity,
16 burning hotter and higher than un-logged areas. The Bitterroot fires of 2000 offer much evidence
17 that this is true on State, Darby Lumber and Forest Service lands in the Bitterroot Valley

18 26. In 2001 the U.S. Congress funded the National Fire Plan to reduce hazardous fuel
19 and restore forests and rangeland. In order to implement this plan the Secretaries of the Interior and
20 Agriculture developed a 10 year implementation plan to guide completion of collaborative,
21 community-based plans to address wildland fire issues. The Bitter Root Resource Conservation
22 and Development Area, Inc. received a grant from the USDA Forest Service - State & Private
23 Forestry to facilitate the development of a Community-based Wildland Fire Risk Mitigation Plan,

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1 or "Community Fire Plan". The Bitterroot Community Wildfire Protection Plan was completed in
2 July 2003.

3 27. The Bitterroot Community Wildfire Protection Plan was primarily the work of fire
4 officials, with very little supporting scientific evidence for the recommendations. The Forest
5 Service never completed an environmental analysis or an environmental impact statement for the
6 Bitterroot Community Wildfire Protection Plan to facilitate scientific scrutiny of the Plan and to
7 ensure that the Plan would not have significant adverse environmental impacts.

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9 **PUBLIC INVOLVEMENT**

10 28. On March 18, 2004 the BNF conducted a meeting in Sula, Montana to discuss the
11 "Middle East Fork project". The notification sent out by the BNF did not disclose that the project
12 was a hazardous fuel reduction project. At the meeting the Forest Service provided form letters
13 with pre-written questions to the participants. Only four people filled out forms and they provided
14 vague or non-specific one sentence answers. For example, one question asked, "[w]hat would you
15 like not to see in the project area?" and the response stated, "[n]o treesits and no lawsuits."

16 29. The BNF claims that "[b]ased on information gained from the March public
17 meeting specialists further developed and revised the recommendations into a proposed action. "
18 FEIS 1-10. However, the BNF does not specify what information was "gained" from these
19 meetings that they did not already possess, or how this new information affected their
20 recommendations and proposals.

21 30. The BNF claims that at the public meeting "there was strong support from
22 participants for the proposed action" FEIS 1-10. However, participant Jed Fitzpatrick recalls
23 that the meeting did not seem to discuss logging at all. Rather, the meeting focused on things the

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1 agency could do to benefit the local community: he recalls discussing things like back-country
2 access for horses, fishing access, and more toilets. Greg Lemon, *Middle East Fork FOB weighs*
3 *options for legal action*, Ravalli Republic (Oct. 5, 2005).

4 31. Plaintiff NFN has repeatedly asked to be put on the BNF's mailing list, prior and
5 subsequent to the March 18, 2004 meeting.

6 32. In an e-mail received by NFN's director Matthew Koehler, dated November 30,
7 2004, Sula district ranger Tracy Hollingshead accurately stated, "The notification for the Middle
8 East Fork meeting in Sula on March 18, 2004 was not sent to the Native Forest Network...."

9 33. The official BNF mailing list records that the following groups were all
10 *intentionally crossed off the mailing list* so as not to receive notice of the March 18, 2004 meeting:
11 Montana Wilderness Association, Wilderness Watch, Friends of the Clearwater, Bitterroot Trout
12 Unlimited, Bitterroot Backcountry Horsemen, Missoulian, KLYQ Radio, Center for Biological
13 Diversity, Intermountain Fire Sciences Lab, The Wilderness Society, and the Ravalli County Fish
14 and Wildlife Association. However, this selective notice is not disclosed by the language in the
15 FEIS that states "[a] letter announcing the meeting was sent to all private landowners in the area
16 and to interested publics and organizations [sic] on the Forest's mailing list." FEIS 1-10.

17 34. The statement in the FEIS that "[a] letter announcing the meeting was sent to all
18 private landowners in the area and to interested publics and organizations [sic] on the Forest's
19 mailing list" is false or intentionally misleading, and the Forest Service had information at the time
20 to that effect.

21 35. Plaintiff FOB was notified of the March 18 meeting but was misled to believe it
22 was a meeting about a much smaller and insignificant project with exactly the same name.

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1 36. The BNF held another meeting on September 29, 2004. This meeting was the first
2 and only official HFRA collaborative meeting. Individuals were given one week advanced notice
3 of this meeting. A total of 11 individuals signed in at the meeting.

4 37. On November 3, 2004 the BNF published a Notice of Intent (“NOI”) to prepare an
5 Environmental Impact Statement (EIS) for logging and other activities in the MEF Analysis Area.
6 Prior to the NOI issuance, the BNF had received a total of 5 comments on the project.

7 38. After the NOI was published, the BNF received 19 letters/e-mails during the
8 scoping period. Three organizations and eight individuals opposed the Project, while one
9 organization and six individuals supported it. The scoping comment period ended on December 8,
10 2004.

11 39. In response to the perceived ecological harm that would result from the BNF's
12 proposal, local forest protection groups - together with foresters, firefighters, restoration
13 practitioners, hunters and others - developed a community wildfire protection plan to protect and
14 restore old-growth forests, and called it the “Community Protection and Local Economy
15 Alternative.” The FS eliminated key restoration activities in the proposal and then included it in
16 the DEIS as Alternative 3.

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18 **WATERSHED & ROAD RESTORATION**

19 40. Defendant Bull refused to consider the complete Community Protection and Local
20 Economy Alternative. Instead, Bull eliminated the watershed and road restoration components,
21 claiming that the HFRA doesn't allow restoration work that isn't tied to logging.

22 41. A primary purpose of HFRA is "to enhance efforts to protect watersheds." 16
23 U.S.C. § 6501. HFRA further states that "the Secretary shall develop an annual program...that

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1 gives priority to authorized hazardous fuel reduction projects that provide for the protection of at-
2 risk communities *or* watersheds *or* that implement community wildfire protection plans." 16
3 U.S.C. § 6501(3)(emphasis added). Pursuant to the HFRA, watershed restoration work must be
4 part of a fuels reduction project in general, but it is not required to be restricted to only treatment
5 units where there is fuels reduction, nor must the watershed work be restricted based upon the
6 amount of logging.

7 42. Road restoration is an essential component of wildfire preparation work.
8 Immediately after the 2000 fires, the BNF had to perform "Burned Area Emergency
9 Rehabilitation" work. Most of the emergency work was road restoration work restoring culverts to
10 allow for increased runoff. If the purpose of this project is to prepare for wildfire, then road
11 restoration should be a top priority, and should be acknowledged from the outset, instead of
12 relegated to an emergency afterthought.

13 43. The restoration activities that the Forest Service eliminated from the Community
14 Protection and Local Economy Alternative would have provided local jobs restoring forest health
15 with watershed and road restoration work in the East Fork drainage. According to the best
16 available science, watershed and road restoration work is an integral part of restoring fire-adapted
17 ecosystems, which is a primary objective of this project.

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19 **DRAFT ENVIRONMENTAL IMPACT STATEMENT**

20 44. The Draft EIS (DEIS) was issued in April, 2005. The BNF's preferred alternative
21 (Alternative 2) prescribed a small amount of community protection work along with industrial
22 logging of approximately 3,800 acres of interior, old-growth forest. These old-growth forests are

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1 valuable habitat for elk, bighorn sheep, moose, bear, wolves, coyote, threatened bull trout,
2 cutthroat trout, goshawk, martin, pileated woodpecker, and flammulated owl.

3 45. The DEIS's proposed alternative ignored the fact that HFRA generally discourages
4 the logging of large trees, and says that with some exceptions the projects shall "focus largely on
5 small diameter trees, thinning strategic fuel breaks, and prescribed fire to modify fire behavior..."
6 16 U.S.C. § 6512(f)(1)(A). Conversely, Alternative 3 recognized this preference and proposed
7 such fuel reductions in the form of slashing and pruning, prescribed fire, pre-commercial thinning,
8 intermediate harvest, and some commercial logging.

9 46. The DEIS comment period lasted from April 20, 2005 to June 12, 2005. The DEIS
10 was clearly intended to justify a predetermined outcome that favored Alternative 2, and discounted
11 Alternatives 1 and 3. One way it set out to accomplish this was by loading speculations of worst-
12 case scenarios upon speculation. One Forest Service employee conceded this on page 3.5-14:

13 Quantification of potential soil loss through post-wildfire erosion and mass
14 movements is speculative because so many independent variables (severity,
15 climate, soil types, soil effects, etc.) need to be incorporated into the predictions.
16 The effort to quantify the worst-case scenario would therefore involve basing
17 probabilities upon other probabilities as predicted from models.

18 Speculative impacts were not distinguished from likely impacts. Rather, both were interwoven
19 in a transparent effort to favor Alternative 2.

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19 **RANGE OF VARIABILITY FROM HISTORIC CONDITIONS**

20 47. The DEIS portrayed the "historic condition" of many units as park-like ponderosa
21 stands, when in fact those stands presently are mixed conifer forest including many very large
22 Douglas firs that were already large when Lewis and Clark first discovered Western Montana.

23 48. The Forest Service's own experts question the validity of the BNF's "ecosystem
24 management" approach which strives to alter ecological systems to mirror what the FS

1 hypothesizes were “historic conditions” in the area. The controversy surrounding this management
2 approach and its potential impacts on species diversity was not disclosed by the Forest Service in
3 the NEPA process for the MEF Project.

4 49. In truth, the historic condition of many of the stands to be logged is a mix of
5 Ponderosa Pine and Douglas Fir. The DEIS presented no compelling scientific information or
6 inference to substantiate the core assumption that these mixed-species stands are an artificial
7 creation of fire suppression, nor did it offer any evidence that they are actually any more
8 vulnerable to "uncharacteristic wildfire" than other stand types.

9 50. The FS's assertion that current forest conditions are moderate-to-severe departures
10 from “historic conditions” in the MEF Project Area constitute a central assumption underlying the
11 stated purpose and need for the Project.

12 51. The Forest Service arrived at their assumption of “historic conditions” of the forest
13 in the MEF Project Area, in part, based upon analysis of a natural range of variability over the *past*
14 *200 years*, excluding extreme or rare ecological events. In support of the decision to limit their
15 analysis to conditions in the past 200 years, the Forest Service cited to *Schoonmaker & Foster*
16 (1991) as cited in *Landres et al.* (1999). FEIS, p. 3.2.6.

17 52. In fact, what *Landres et al.* (1999) says is that: “[f]or the Interior Columbia Basin
18 Ecosystem Management Project, for example, *Hann et al.* (1997) used the *last 2000 years* as the
19 appropriate temporal depth, based on studies showing the vegetation in this area was in relative
20 equilibrium with the macroclimate and native Americans during that time (*Schoonmaker and*
21 *Foster* 1991).” *Ibid.*, p. 1181 (emphasis added). Thus, this study does not support the Forest
22 Service determination to limit their referent period to 200 years, but instead specifically stated that
23 2,000 years was an appropriate time span.

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2 **BEETLES**

3 53. One of the three purposes for the Project listed in the DEIS is to "[r]estore stands
4 affected by the Douglas-fir bark beetle epidemic by treating infested areas and lands at imminent
5 risk of spread to promote healthy ecosystem function, composition, and structure." DEIS 1-5

6 54. The representation in the DEIS that logging in the analysis area will quell beetle
7 infestations ignores common sense that beetles may still infest the analysis area after logging, since
8 they still live in the forest immediately adjacent to the analysis area, and contradicts both science
9 and experience related to the efficacy of logging in response to such outbreaks.

10 55. On other occasions the Forest Service has even conceded that they cannot control
11 beetle outbreaks with management. "[T]he FEIS [for the Douglas-fir Bark Beetle Project on the
12 Colville and Idaho Panhandle National Forests] makes it abundantly clear that the USFS does not
13 believe the Project (*or any other forest management policy*) can reduce the number of Douglas-fire
14 bark beetles or prevent their spread to other stands of timber." *Kettle Range Conservation Group*
15 *v. U.S. Forest Service*, 148 F.Supp 2d 1107, 1135 (E.D. Wash. 2001) (citing Douglas-fir Bark
16 Beetle Project FEIS at App. A, A-32, A-34) (emphasis added).

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18 **PUBLIC RESPONSE**

19 56. The BNF received approximately 11,500 comments from public citizens in
20 response to the Draft Environmental Impact Statement. Approximately ninety-eight percent (98%)
21 of the comments expressed opposition to the BNF's preferred alternative (the Project) and support
22 in some form for the Community Protection and Local Economy Alternative (Alternative 3).
23 (FOIA request by Native Forest Network, August 14, 2005.)

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1 57. Defendant Bull conceded to the press that the fact that so many people spoke out
2 against the preferred alternative meant that there were quite a number of public citizens who
3 support another viewpoint. Michael Howell, *Middle East Fork Project FEIS released; Trees*
4 *marked in advance of decision; Environmentalists barred from press conference*, Bitterroot Star
5 (September 28, 2005).

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7 **PRE-DECISION ACTIVITY**

8 58. A FOIA request by Plaintiff NFN revealed in October 2005 that from
9 approximately April 22, 2005 to September 30, 2005 the BNF irretrievably committed resources,
10 including direct expenditure of more than \$208,000, preparing trees for logging in the treatment
11 areas designated in the BNF's preferred alternative. This FOIA request was provoked because
12 Plaintiffs witnessed trees already being marked for logging while the Forest Service was
13 supposedly still considering alternatives.

14 59. By irretrievably committing resources to preparing logging units *before* a decision
15 to log had been made, as well as *during* the public comment process which was supposed to
16 involve the public in the decision-making process, the BNF effectively prejudiced the outcome of
17 their decision-making process in violation of NEPA, which prohibits such expenditures due to the
18 potential for such biased decision-making.

19 60. Even apart from the fact that these expenditures are clear evidence that the final
20 decision was a foregone conclusion from the outset, as a practical matter once hundreds of
21 thousands of dollars are spent on an alternative, the decision-maker is going to be hard-pressed not
22 to choose that alternative.

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1 61. This adventitious bias only further magnified the already inherent bias that exists
2 when the Forest Service decides to approve logging, due to the financial interest that the Forest
3 Service has in facilitating logging on our National Forests, an institutional bias that dates back to
4 the coupling of budgets with logging outputs and has continued through perpetuation of close
5 relations with the timber industry. Because of this inherent bias, which has not escaped court
6 comment, it is especially critical that the Forest Service strictly observe NEPA procedure in order
7 to avoid actual or perceived biased decision-making processes.

8 62. Defendant Bull conceded to the press that marking the trees (before the EIS process
9 was completed) meant that he was "anticipating the decision [approving logging in the area]," and
10 that "[m]aybe in hindsight it was not the smartest thing to do." Michael Howell, *Middle East Fork*
11 *Project FEIS released; Trees marked in advance of decision; Environmentalists barred from press*
12 *conference*, Bitterroot Star (September 28, 2005).

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14 **RELEASE OF FINAL ENVIRONMENTAL IMPACT STATEMENT**

15 63. On September 22, 2005, the BNF released the MEF Final EIS (FEIS). BNF MEF
16 project manager Sandy Mack had assured that Plaintiffs would be notified of the date of the
17 release, and had informed Plaintiff NFN that the FEIS would be released the following week.
18 Mack and other BNF representatives did not notify NFN, or any other Plaintiff, of the true date of
19 the release until after the scheduled press conference.

20 64. Plaintiffs were timely notified of the September 22 release only because a media
21 representative called them for an interview on the subject. Aff. Larry Campbell ¶ 2 (October 24,
22 2005) (copy on file at Friends of the Bitterroot- Middle East Fork (FOB-MEF) Objection,
23 Appendix 3, October, 24, 2005).

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1 65. When three representatives for Plaintiffs, who were all local community members,
2 attempted to attend the press conference at the public office of the BNF announcing the release of
3 the FEIS, they were denied entry. One individual, president of FOB, was escorted out by an armed
4 Forest Service law enforcement officer wearing a bullet-proof vest. Perry Backus, *Activists*
5 *removed from Bitterroot forest office during EIS press conference*, Missoulain (Sept. 23, 2005).

6 66. The BNF hand-picked six local supporters of the Project to attend the September
7 22, 2005 press conference. Defendant Bull explained that the BNF thought this selective
8 representation "would be really powerful to show how much community support this project has,"
9 in spite of the 98% opposition expressed in public comments. *Id.*

10 67. Defendant Bull told FOB member Stewart Brandborg that Bull had been advised to
11 exclude the conservationists from the meeting. *Aff. Stewart Brandborg ¶ 15* (October 24, 2005)
12 (copy on file at FOB-MEF Objection, Appendix 1, October 24, 2005).

13 68. The FEIS did not disclose that there had been 11,500 comments on the proposed
14 project, 98% of which were opposed to the Forest Service's preferred alternative.

15 69. Plaintiffs filed timely objections to the FEIS.

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17 **RECORD OF DECISION**

18 70. The BNF issued the Record of Decision approving a modified Alternative 2 on
19 March 24, 2006. The ROD authorizes: treatment of 3,920 acres by prescribed fire and 1,018
20 acres of non-prescribed fire fuel treatments; 1,558 acres of slash removal; 1,428 acres of
21 intermediate harvest; 574 acres of sanitation and salvage harvest; 891 acres of
22 salvage/regeneration harvest; and 487 acres of commercial thinning. ROD at p. 8.

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1 71. The ROD modified the preferred alternative in the FEIS by reclassifying as non-old
2 growth six units previously classified as old-growth, thus preserving the decision to log them in the
3 selected alternative. Three other units that were previously classified as entirely old growth were
4 reclassified in part as non-old growth (scheduled for logging in the selected alternative), while
5 dropping portions of the units determined to still meet old-growth criteria. Another unit was
6 entirely dropped because it could not be re-classified. ROD at 11, 22-23, D-1 - D-2.

7 72. The ROD states that the Project will still allow commercial logging in 14 units that
8 were never field-verified to determine compliance with soil quality standards. ROD at 7.

9 73. Due to the reduction of logging from original Project calculations, the ROD states
10 that there will be less of an increase in sedimentation of the East Fork. ROD at A-19.

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12 **SOIL PRODUCTIVITY IMPACTS**

13 74. NFMA requires that agency actions “ensure that timber will be harvested from
14 National Forest System lands only where [soil] will not be irreversibly damaged.” 16 U.S.C.
15 §1604(g)(3)(E).

16 75. Region One Soil Quality Standards (R1-SQS) are relied upon by the BNF as a
17 proxy to maintain soil productivity and are proffered by the BNF to be below the threshold of
18 irreversible damage to soil prohibited by NFMA. The standards state:

19 Design new activities that do not create detrimental soil conditions on more than
20 15 percent of an activity area. In areas where less than 15 percent detrimental soil
21 conditions exist from prior activities, the cumulative detrimental effect of the
22 current activity following project implementation and restoration must not exceed
23 15 percent. In areas where more than 15 percent detrimental soil conditions exist
24 from prior activities, the cumulative detrimental effects from project
25 implementation and restoration should not exceed the conditions prior to the
26 planned activity and should move toward a net improvement in soil quality.

Region 1 Soil Quality Standards: FSM 2500-99-1; FSH 2509.18.

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1 76. The R-1 SQS has never received public review and comment nor has it been peer
2 reviewed. It was written by former R-1 soil scientist John Nesser and has been simply adopted by
3 administrative fiat. It sorely lacks any substantiation or verification of its assumptions by scientific
4 reports or studies. FOB-MEF Objection at 9.

5 77. The R1-SQS largely ignores the meaning of “soil productivity” in the terminology
6 of NFMA. In FSM 2500-99-1 the Forest Service claims “Soil quality is maintained when erosion,
7 compaction, displacement, rutting, burning, and loss of organic matter are maintained within
8 defined soil quality standards.” Even if the 15% soil quality standard is met in all Activity Areas
9 forestwide, and even if the soil conditions of land outside proposed activity areas could reasonably
10 be ignored, there can still be “significant or permanent impairment of the productivity of the land”
11 or irreversible damage to soils or other watershed conditions, prohibited by NFMA.

12 78. For example, the DEIS fails to consider the cumulative effects from permanent
13 impairment caused by the high road densities in the roaded portions of the project area, together
14 with past and proposed logging and roading, and existing soils damage from other sources, such as
15 grazing and recreation. Roads represent a permanent loss of the kind of soils productivity
16 necessary to support continued vegetative growth rates. Similarly, the effects of invasive weeds
17 associated with logging and roads on soils productivity, which is adversely impacted by such
18 weeds that compete with and crowd out natural vegetation, is not adequately accounted for in
19 considering impacts on soils productivity, either in the Regional SQS or in the challenged Project.

20 79. Most, if not all, of the activity units proposed for further treatment in the Project are
21 located in subwatersheds that already exceed, cumulatively, the 15% threshold established by the
22 R1SQS as a measure for irreversible losses in soils productivity.

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1 80. The Forest Management Handbook at FSH 2509.18 directs the FS to do validation
2 monitoring to “Determine if coefficients, S&Gs, and requirements meet regulations, goals and
3 policy” (2.1 – Exhibit 01). It asks “Are the threshold levels for soil compaction adequate for
4 maintaining soil productivity? Is allowing 15% of an area to be impaired appropriate to meet
5 planning goals?” The FS has never answered these questions with verification of their soil
6 standard, thus their hypothesis that the R1-SQS ensures soil productivity is an untested hypothesis.

7 81. The Northern Region specifically recognizes that the Standards must be validated.
8 FSM 2500-99-1 requires that Forest Supervisors must:

- 9 • Assess ... whether (soil quality standards) are effective in maintaining
10 or improving soil quality;
- 11 • Evaluate the effectiveness of soil quality standards and recommend
12 adjustments to the Regional Forester; and
- 13 • Consult with soil scientists to evaluate the need to adjust management
14 practices or apply rehabilitation measures.

15 82. The Forest Service has never performed adequate studies on the BNF to determine
16 if the Soil Standards work to maintain soil productivity. Such studies would include objective,
17 scientifically sound measurements of what the soil produces (grows) following management
18 activities. The EIS is unable to cite the results of any monitoring, either in the BNF or elsewhere in
19 accordance with the Standards, which would provide a basis for assuming the Regional Soil
20 Standards actually protect soil productivity.

21 83. The Forest Service conceded that the R-1 SQS has not been validated in response to
22 comments on the Black Ant Salvage DEIS, Lewis & Clark NF, when it stated:

23 A formal research study, the “Long Term Soil Productivity Study,” is currently
24 being conducted by the Research Branch of U.S. Department of Agriculture, Forest
25 Service to validate these soil quality standards.

26 (USDA Forest Service, 2002.)

1 84. The DEIS asserts that the R1-SQS is the standard for insuring compliance with
2 NFMA's mandate that soil productivity be maintained. DEIS at 3.5-11.

3 85. The BNF's Forest Soil Scientist assigned to the Project, Ken McBride, has
4 monitored soils on the Bitterroot National Forest for approximately 14 years. He has acquired a
5 unique localized knowledge of the characteristics of healthy forest soil conditions in the region.

6 86. McBride field-sampled 25 units in the project area. He observed soil conditions at
7 3889 data points. He conducted bulk density samples, infiltration tests, cone penetrometer
8 measurements, and air permeability tests using techniques which correlate to R1 soil quality
9 standards. He also took notes on soil structure in disturbed areas, root abundance related to soil
10 physical properties, vegetation characteristics related to soil properties, slump location and
11 description, habitat/vegetation type, and slope measurements. Open Letter from Ken McBride,
12 former BNF Forest Soil Scientist, *Middle East Fork Soil Peer Review Report of July 6 and July 7,*
13 *2005* 1-2 (September 22, 2005) (copy on file at FOB-MEF Objection, Appendix 4, October 24,
14 2005).

15 87. The soil results in the DEIS are not an accurate representation of the BNF's Soil
16 Scientist's findings. McBride's original report was intentionally altered by FS officials before it
17 was published in the DEIS, in order to justify logging. McBride stated in an email to BNF officials
18 Dave Bull, Terry Carlson, Tracy Hollingshead, and Berry Paulson on May 5, 2005:

19 [N]umerous (and I do mean numerous) important changes occurred. The changes
20 mostly are omissions of what I consider important information needed by readers,
21 reviewers, and the decision maker to properly understand and appreciate the
22 condition of the soil resource in the project area. I have carefully compared my
23 report to the DEIS and am dismayed at how differently it reads. The omissions are
24 by no means random, nor in any imaginable way accidental. Instead, there has
been a *consistent, deliberate removal of information* that accurately portrayed the
conditions of the soils and the prescriptions and mitigations needed to address
those degraded soil conditions.

1 Therefore, I cannot support the DEIS in terms of assuring we are meeting the
2 SQS. I can no longer say the proposed actions are legal regarding NFMA and
3 other pertinent laws and FS policies. I am very disappointed that *all my hard work*
4 *has been erroneously reinterpreted, rewritten and changed* far from what I wrote
5 and intended by the editor(s) who weren't even on the ground doing soils
6 investigations in this project area!

7 E-mail from Ken McBride, former BNF Forest Soil Scientist, to Dave Bull, Terry Carlson, Tracy
8 Hollingshead, and Berry Paulson, Forest Service Region One Officials, *Discrepancies between*
9 *Original Soil Reports and DEIS Representations* (May 5, 2005) (copy on file at FOB-MEF
10 Objection, Appendix 6, October, 24, 2005) (emphasis added).

11 88. BNF officials further manipulated McBride's expert data by (1) altering unfavorable
12 data found in DEIS chart 3.5-1, and (2) altering the captions of the table so that the information
13 would not be interpreted as showing 15% detrimental soil damage on more than 20% of the
14 treatment areas. DEIS table 3.5-1 was reprinted with the exact same numbers and unit
15 identification numbers in FEIS table 3.5-2, but the caption of the columns were changed and the
16 words "below" or "above" were omitted. The words "below" or "above" in the DEIS refer to
17 whether the existing detrimental soil damage is below or above R1 soil quality standards. Forest
18 Soil Scientist Ken McBride, who conducted the soil surveys and gathered the field data for that
19 table, asserts that the table does indeed represent detrimental soil damage, but the table caption was
20 changed by a BNF employee to try to show otherwise in the FEIS. Open Ltr from Ken McBride at
21 1-2.

22 89. The BNF also deleted language from the DEIS which read:

23 Past timber harvest activities in the Middle East Fork Area have resulted in soil
24 impacts that persist today, mainly in the form of soil compaction and
displacement caused by ground-based logging. *Field surveys focused on*
determining the amount of this legacy soil damage in order to relate that amount
to the current Regional Soil Quality Standards (USDA Forest Service 1999).
These Standards are used to determine long-term soil productivity in accordance
with the National Forest Management Act. Proposed ground-based units were

1 viewed as a special concern in that if they were tractor logged in the past, they
2 may currently exceed Soil Quality Standards (SQS).

3 Compare DEIS p. 3.5-6 (emphasis added) with FEIS p. 3.5-10 (emphasis added). The
4 above deleted language was the introduction to McBride's DEIS tables. The new
5 language in the FEIS, which follows the first table, states:

6 *This column does not represent the amount of detrimental soil damage in*
7 *each unit (FSM and Region 1 Handbook definitions) and thus does not*
directly equate to Region 1 Soil Quality Standards. Rather these numbers
illustrate a conservative approach to estimating existing soil condition.

8 90. Following McBride's two tables, relating detrimental disturbance he found in field
9 surveys (first table) and detrimental disturbance he found through photo and GIS interpretation
10 (second table), he states: "[a]s shown in the above table [sic], the following proposed treatment
11 units do not meet the Regional Soil Quality Standards: [list of 44 units]." DEIS at 3.5-9. The
12 FEIS removed that language and instead states, "As shown in the above tables, the following
13 proposed treatment units have a high level of existing soil disturbance... this disturbance may not
14 be detrimental. . . ." FEIS 3.5-12.

15 91. The FEIS deleted four entire pages of soil disturbance analysis done by McBride
16 that related research on slow soil recovery rates, diminished soil productivity, legacy soil damage,
17 and landscape analysis of soil damage by sub-watershed. Compare: DEIS at 3.5-9 – 3.5-12 with
18 FEIS 3.5-12 – 3.5-13.

19 92. The BNF claims that data in chapter 3 of the DEIS was changed to reflect, in part,
20 the peer review on July 6 and 7, 2005. The peer review report came to different conclusions than
21 McBride on the four units they surveyed.

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1 93. The peer review report was based on inadequate surveying and inadequate
2 interpretation. The team did not have the localized expertise that McBride possesses. The team
3 also only surveyed 77 data points, while McBride surveyed 3889.

4 94. The peer review team did not conduct bulk density samples, infiltration tests, cone
5 penetrometer measurements, and air permeability tests using techniques which could correlate to
6 R1 soil quality standards. Neither did they take notes on root abundance related to soil physical
7 properties, vegetation characteristics related to soil properties, slump location and description,
8 habitat/vegetation type, nor slope measurements. McBride's analysis included all of these factors.

9 95. Furthermore, the peer review report ignored the R1 Soil Quality Monitoring Task-
10 group (SOILMON) report of May 2000 (which lists the occurrence of platy or massive structure as
11 an indicator of "Detrimental" soil damage) when it did not ascribe detrimental soil damage to
12 observed platy or massive soil structure. If the peer review report had accounted for detrimental
13 soil damage according to the SOILMON report, their results would have been quite similar to
14 McBride's observations. Ltr. from Ken McBride at 1-2.

15 96. The Forest Service does not disclose McBride's responsible, opposing views
16 (objecting to the unscientific FS manipulation of his research) in relation to the detrimental soil
17 damage determination set forth in the FEIS.

18 97. The BNF initially purged 28 soil related documents from the project file when it
19 issued the FEIS. There was no description of the actual contents of the purged files anywhere in
20 the project file or in the project file index. BNF-MEF Project File and Project File Index.

21 98. Due in part to his experience with the MEF Project, McBride subsequently
22 terminated his employ with the Bitterroot National Forest. FOB-MEF Objection at 8.

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1 99. The entire analysis area averages 5.2 miles of road per square mile, not including
2 jammer roads associated with logging. The detrimental soil damage as disclosed does not take into
3 account the permanent loss of soil productivity from all logging roads and landings.

4 100. Fourteen units (activity areas) proposed for commercial logging were not sampled
5 on the ground, but were instead analyzed “based on aerial photo and professional interpretation”.
6 FEIS at 3.5-11, as modified by ROD at 7. This technique is not a reliable method for determining
7 the actual condition of soils on the ground. The complete degree of soil damage, especially of the
8 compaction from past management that is of primary concern, cannot be accurately determined
9 without on-the-ground surveying. The Forest Service concedes that aerial photo interpretation is
10 inadequate to assess compaction in its "Response to Comments" section. FEIS Appendix H at 1.

11 101. FEIS at 3.5-48 states that “[a] soil scientist field reviewed 47% of the proposed
12 units for existing site conditions. The remaining 53% were reviewed using air photos and past
13 operation data-bases (TSMRS).” The FEIS admits that site traverses are necessary for an accurate
14 estimate of soil damage and that soil damage in excess of standards can escape detection when
15 relying on TSMRS, rather than actual activity area traverses: “[t]he difficulty in assessing soil
16 effects is illustrated in the following examples. Unit 30b was found to be 19% disturbed (based on
17 field review), yet the field notes indicated no sign of logging entry. In addition, review of the
18 TSMRS database does not indicate any harvest entries.” EIS at 3.5-42.

19 102. The DEIS discloses that the 15% threshold for detrimental disturbance in a unit
20 found in the R1-SQS is the applicable standard for preventing irreversible soil damage. DEIS at
21 3.5-11.

22 103. The FEIS does not disclose the actual losses of soil productivity by activity area.

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1 104. The FEIS fails to disclose the implications of all land-type and other natural soil
2 productivity limitations, as disclosed in the DEIS, for detrimental soil impacts. Some land-types
3 have moderate or severe soil erosion and sediment hazard potential, and soil erosion or mass
4 wasting (a severe form of erosion) are both considered to be detrimental soil impacts. The FEIS
5 also fails to disclose the results of monitoring of past actions on these various land-types, or other
6 natural soil productivity limitations, which would reveal the relevant levels of soil impacts from
7 the various kinds of logging activities carried out in the past, as related to the kinds of logging
8 being proposed with this project.

9 105. The DEIS states on p. 3.5-7:

10 Other objectives of the field reviews were to ground-truth Suitable/Unsuitable
11 Lands as related to NFMA, to determine suitability of units for proposed
12 treatments based on soil and slope limitations and to document soil properties,
 vegetation data, habitat types, mass stability concerns, and erosion and
 compaction concerns.

13 However, the resultant determinations of suitability as per NFMA are not disclosed in the
14 DEIS, and this passage was completely deleted from the FEIS.

15 106. According to the DEIS:

16 Over the past 14 years, monitoring of summer, ground-based logging effects on
17 soils conducted on the Bitterroot National Forest by the Forest Soil Scientist has
18 shown that 75% of the monitored units failed to meet R-1 SQS. Over this period
 of monitoring the average detrimental soil damage from ground-based summer
 logging was 30%.

19 DEIS 3.5-20.

20 107. The DEIS reveals that the logging machines and methodology, with the exception
21 of machine piling of slash, are substantially the same today as those machines and methods that
22 have resulted in excessive soil damages in the past.

23

24

1 108. Altogether, there are 14 commercial (salvage/regeneration, intermediate, and
 2 sanitation/salvage treatments proposed) cutting units totaling 718 acres that were not deferred in
 3 the ROD (p.7) and were not traversed (see FEIS, p. 3.5 – 11). As indicated in the table below, all
 4 of these units are located in subwatersheds that are cumulatively already over the threshold for
 5 irreversible losses in soils productivity established by the RISQS:

6	<u>Unit #</u>	<u>acres</u>	<u>treatment</u>	<u>existing condition of subwatershed</u>
7	11	51	salv/regen	> 26% detrimental soil damage
	14	67	salv/regen	> 16% detrimental soil damage
8	15	43	salv/regen	> 16% detrimental soil damage
	22	36	salv/regen	> 16% detrimental soil damage
9	23	33	salv/regen	> 16% detrimental soil damage
	24	56	salv/regen	> 16% detrimental soil damage
10	29	88	intermediate	> 16% detrimental soil damage
	29a	38	sanitation/salv	> 16% detrimental soil damage
11	34	11	sanitation/salv	> 16% detrimental soil damage
	37	36	intermediate	> 16% detrimental soil damage
12	40	32	intermediate	> 26% detrimental soil damage
	47	155	intermediate	> 16% detrimental soil damage
13	50	31	intermediate	> 16% detrimental soil damage
	70	41	intermediate	> 16% detrimental soil damage

14
 15 109. As the DEIS reports, winter logging mitigations have proven ineffective in assuring
 16 compliance with the soils standards: “monitoring...over the past 14 years has shown that 58% of
 17 the ground-based winter logged monitored units failed to meet R-1 SQS. Winter logging resulted
 18 in an average of 16% detrimentally damaged soil.” (p. 3.5-21)

19 110. The DEIS reports at p. 3.5-14 that erosion from even severe fires is short lived,
 20 whereas compaction on the BNF has been reported to last upwards of 40 years. (p. 3.5-23)

21 111. The SQS and FEIS’s soil analysis also do not adequately take into account the long-
 22 term losses in site or land productivity due to noxious weed infestations facilitated by management
 23 actions. For example, in the Sheep Creek Salvage FEIS (USDA Forest Service, 2005a), the Forest
 24 Service discloses at p. 173:

1 Noxious weed presence may lead to physical and biological changes in soil.
2 Organic matter distribution and nutrient flux may change dramatically with noxious
3 weed invasion. Spotted knapweed (*Centaurea biebersteinii* D.C.) impacts
4 phosphorus levels at sites (LeJeune and Seastedt, 2001) and can hinder growth of
5 other species with allelopathic mechanism. Specific to spotted knapweed, these
6 traits can ultimately limit native species' ability to compete and can have direct
7 impacts on species diversity (Tyser and Key 1988, Ridenour and Callaway 2001).

6 OLD-GROWTH IMPACTS

7 112. The Bitterroot Forest Plan sets the following standards that require the designation
8 and protection of old-growth stands: there must be 3 – 8% old-growth habitat in each third order
9 drainage to ensure well-distributed old-growth habitat to sustain viable populations of wildlife
10 throughout the forest. Each management area (MA) has a specific numerical standard. The Middle
11 East Fork Analysis Area includes management areas 1, 2, 3a, 3b, and 8b. MA 1 requires 3% old-
12 growth habitat; MA 2 requires 8% old-growth habitat; MA 3a requires 8% old-growth habitat; MA
13 3b requires 50% old-growth in fisheries riparian areas and 25% old-growth in non-fisheries
14 riparian areas; MA 8b has no old-growth standard as it is grassland and non-suitable for timber
15 production. Bitterroot National Forest Forest Plan, September 1987, pp. III-4, III-10, III-16, III-24.

16 113. The BNF states that 10% old-growth habitat is the "weighted average" of its various
17 standards. *Lesica* (1995) states that the Northern Region's general goal of maintaining 10% of
18 forests as old-growth may result in the extirpation of some species. This is based on his estimate
19 that 20-50% of low and many mid-elevation forests were in old-growth condition prior to
20 European settlement (that is, "historic conditions" according to ecosystem management).

21 114. In response to DEIS comments which referenced *Lesica's* questioning of the 10%
22 standard in relation to species viability, the Forest Service agreed that *Lesica's* science was valid
23 and selected certain passages to print in the FEIS. But the Forest Service chose not to disclose and
24

1 discuss the passages which call into question the old-growth standard itself, dismissing the issue of
2 cumulative impacts from forest plan implementation in response to comments by asserting:
3 "Reassessing the Forest Plan Standard for the amount of old-growth to retain on a Forest wide
4 basis is outside the scope of this site specific project." FEIS Appendix H, p. 126.

5 115. The Project is, in fact, premised at least in part on the Forest Service's estimation of
6 "historic conditions," and thus the assessment that the BNF may be well outside historic conditions
7 for old-growth is relevant to environmental concerns with the Project's potential cumulative
8 impacts on old-growth species viability and wildlife diversity.

9 116. The BNF's assumption in the Forest Plan that 3- 8% old-growth habitat is enough to
10 maintain species viability in most management areas has never been validated with population
11 monitoring of old-growth dependent species. The unverified assumption that it is adequate is based
12 on stale science, and has been undermined by recent scientific data such as *Lesica's* research.
13 Nonetheless, the Forest Service refuses to consider forest plan amendments in approving projects
14 affecting old-growth that would be more protective of species viability, while it regularly adopts
15 forest plan amendments that are less protective of species viability in order to facilitate logging.

16 117. The MEF Project does not include a consistent, scientifically defensible definition
17 for designating old-growth habitat. The Forest Plan instead provides criteria "to consider" when
18 conducting old-growth inventories:

- 19 • large live trees, generally 15 per acre greater than 20 inches dbh for species other than
lodgepole pine;
- 20 • canopy closure at 75 percent of site potential;
- 21 • stand structure usually uneven-aged or multistoried;
- 22 • snags, generally 1.5 per acre greater than six inches dbh and .5 per acre greater than 20
inches;
- 23 • more than 25 tons per acre of down material greater than six inches diameter;
- heart rot and broken tops in large trees are common; and,
- 24 • mosses and lichens are present.

1 118. The BNF also references an alternative, similarly inconsistent standard, that it may
2 use to identify old-growth: the Region One, *Green et al.* (1992), old-growth characteristics. *Green*
3 *et al.* differentiates old-growth habitat in five categories that correspond to different forest types.
4 Each type of old-growth habitat has its own individual standard for minimum age of large trees,
5 minimum number of live trees with specified dbh and basal area measurements, dbh variation,
6 percentage of trees that are dead, percentage with a broken top, probability of downed woody
7 material, percentage of decay, number of canopy layers, and number of snags larger than 9 inches.
8 *Green et. al* advise that the numbers are only a guide, and they do not relate the various
9 characteristics and guidelines to the needs of old-growth obligates.

10 119. The MEF analysis appears to use both old-growth definitions interchangeably. It
11 states that there are no conflicts between the Forest Plan old-growth "standard" and the "standard"
12 proposed by *Green*. The BNF does not disclose which definition was used for the 2004 mapping
13 and verification of old-growth process. FEIS 3.6-6.

14 120. Areas within the analysis area that were not planned for treatment were not field
15 surveyed for the 2004 mapping and verification process. Instead, the TSMRS database was used to
16 map those areas. The FEIS does not disclose the specific characteristics that the TSMRS database
17 inventoried, does not compare those characteristics to the characteristics used to evaluate old-
18 growth habitat, and does not disclose confidence levels, standards of deviation, or “fall down”
19 factors associated with the TSMRS database, which in other forests has been shown to be wildly
20 inaccurate for estimating old-growth habitat levels (e.g., Idaho Panhandle NF, found by the
21 E.Dist.Ct. of WA to be more than 30% inflated).

22 121. The BNF does not consider large, old, live trees and large, old, dead trees as
23 contributing to old-growth habitat, unless they are a component of a stand that the BNF has

24

1 determined meets some unspecified old-growth habitat criteria. These large old trees will thus be
2 commercially logged in the Project (see, e.g., FEIS p. 3.6-7) without any consideration of their
3 importance to insuring the future viability of old-growth species, or their possible contributions as
4 stands of recruitment old-growth in light of recent science calling into question the adequacy of
5 BNF old-growth standards for ensuring future species viability.

6 122. Although the ROD nominally eliminated all proposed logging in old-growth
7 habitat, it still allows for the logging of the kind of large old trees, sometimes called “wolf trees”
8 and considered to be very valuable in forests where old-growth levels are depressed (e.g.,
9 neighboring Targhee NF), regardless of diameter. Dead, dying, and live old trees will all be
10 logged. See: ROD pp. 23, 32, 34. Additionally, the Project continues to allow logging of 10 units
11 of previously designated old-growth habitat which the ROD claims are no longer old-growth
12 habitat, because of mortality from beetle habitation. ROD E-1.

13 123. The BNF does not quantify the edge effect from logging next to old-growth stands,
14 in relation to the effectiveness of old-growth species’ habitat, nor does it adequately disclose the
15 fragmentation affects on old-growth habitat from the Project and previous management activities.

16 124. The Forest Service has never provided adequate protection for designated old-
17 growth in the BNF from fragmentation, resulting in a widespread loss of the snag habitat due to
18 firewood cutting and other activities adjacent to open roads. This impact, however, has never been
19 considered in any forest-wide analysis of old-growth species viability.

20 125. The relation between the areas designated for old-growth management and old-
21 growth species - that is, how these areas contribute to old-growth species’ viability - is not
22 adequately discussed by the FEIS. The BNF has never determined minimum viable population
23 levels for any management indicator species, nor has it ever specified the amount and distribution

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1 of habitat that would serve as a “proxy” for viable populations of all old-growth species, nor has it
2 ever monitored population trends of indicator species.

3 126. Region-wide, due to a long-standing focus of commercial logging on the kind of
4 large trees that are found in old-growth habitat, the Forest Service has consistently failed to meet
5 Forest Plan old-growth standards, and rather than addressing the concerns over the impacts of this
6 failure on diversity, has instead engaged in a persistent effort to deflect attention from the matter
7 by failing to keep accurate old-growth inventories, and refusing to monitor population trends of
8 designated indicator species in response to management activities, as required by Forest Plans and
9 NFMA. *Juel* (2003).

10 127. The Project does not meet the Forest Plan standard for old-growth habitat. The
11 FEIS conceded that in 15 out of 25 of the third-order drainages within the analysis area, there is
12 not enough old-growth habitat to sustain viable wildlife populations, FEIS 3.6-8, and the Forest
13 Service has not designated the next-best available habitat as replacement habitat to address present
14 and future short-falls in centuries-old habitat, nor have they adequately addressed the potential
15 impacts of sacrificing such replacement opportunities on long-term species diversity.

16 128. The FS states that after field review, 10 units which had previously been designated
17 old-growth habitat no longer qualify for protection as old-growth, highlighting the inaccuracy of
18 their assumptions throughout the BNF, and clearly inferring that the disclosed old-growth
19 deficiency may well be much higher than reported in the FEIS. ROD E-1.

20 129. The EIS did not disclose any of the hard data gathered from field-verified old-
21 growth inventories to support assumptions and the expert conclusions based thereon, as required
22 by NEPA, nor did it even disclose the criteria used to designate old-growth habitat, but instead
23 simply asserted that treatment areas have been field-surveyed.

24

1 130. In MA 1, the Project fails to meet the 3 % old-growth habitat standard in at least 5
2 out of 6 third order drainages.

3 131. In MA 2 the Project fails to meet the 8% old-growth habitat standard in at least 4
4 out of 10 third order drainages.

5 132. In MA 3a the Project fails to meet the 8% old-growth habitat standard in at least 6
6 out of 9 third order drainages.

7 133. The BNF concedes there is not enough old-growth in the Middle East Fork area. It
8 asserts that recruitment of old-growth was considered, but failed to designate any stands to be
9 protected as "recruitment old-growth." It attempts to obfuscate this critical issue by asserting that
10 because "old-growth is not necessarily 'virgin' or 'primeval'," it could develop following human
11 disturbances running the gamut from slashing and prescribed fire to salvage/regeneration
12 treatments, contrary to prevailing, peer-reviewed scientific opinion. It then concludes, without
13 citation to the best available science relevant to this analysis, that because there will always be a
14 chance for any area to develop into old-growth, none of the proposed treatments will have negative
15 effects on potential recruitment old-growth.

16 134. By the same logic attributed to the FS in the previous paragraph, the FS could
17 justify clear-cutting all old-growth habitat in the BNF by citing a need to clear the way for the
18 development of new old-growth habitat. This kind of unscientific thinking might be acceptable to
19 the profit-driven timber industry the FS seeks to serve, but has no place in a public lands
20 discussion where the law requires them to act as stewards of our lands by ensuring wildlife species
21 diversity.

22

23 **CONFLICT OF INTEREST**

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1 135. As a matter of common law, "[t]he USFS has a substantial financial interest in the
2 harvesting of timber in the National Forest." *Earth Island Institute v. U.S. Forest Service*, 2006
3 WL 767012 at 27 (9th Cir. (Cal.)). In many cases, including Region One, the FS appears to be
4 "more interested in harvesting timber than in complying with our environmental laws." *Id.*

5 136. The Ninth Circuit is correct in noting that "timber sales by the Forest Service
6 generate many millions of dollars... to an extent not immediately determinable, the sales create a
7 budget for the Forest Service that, in the conduct of more sales, make it independent of the normal
8 appropriation process." *Earth Island Institute v. U.S. Forest Service*, 351 F.3d 1291, 1310 (9th Cir.
9 2003) (Noonan, J., concurring).

10 137. The Forest Service estimates that it will make \$657, 058 from selling timber in the
11 Middle East Fork Project area, which is an addition to its congressionally appropriated budget.
12 See: Michael Howell, *Middle East Fork Fuel Reduction Project Approved: Modified Alternative*
13 *Drops 23 Cutting Units*, Bitterroot Star (April 5, 2006).

14 138. "In deciding whether or not a sale should be made, the Forest Service determines the
15 legal rights of a private corporation and the legal rights of those seeking to enforce the statutes
16 protecting the environment. The Forest Supervisor and the Regional Forester making this
17 determination are not judges in a black gown sitting on a bench, but as surely as such traditional
18 figures they are applying law to resolve a legal controversy. Their function can be called judicial or
19 quasi-judicial or even administrative without changing the relevant analysis because '[i]t has also
20 come to be the prevailing view that [m]ost of the law concerning disqualification because of interest
21 applies with equal force to ... administrative adjudicators.' *Gibson v. Berryhill*, 411 U.S. 564, 579,
22 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973), quoting Kenneth Davis, *Administrative Law Text*, § 12.04
23 (1972)." *Earth Island*, 351 F.3d at 1309.
24

1 139. Defendant Forest Supervisor Bull selected the preferred alternative over the
2 community-based alternative, the principal difference being that the selected alternative includes
3 significant commercial logging in the Middle East Fork in an area many members of the public felt
4 was not relevant to concerns with wildfire in the urban-wildland interface. Defendant Regional
5 Forester Kimbell issued the final decision approving commercial logging in the Middle East Fork.
6 Thus, Defendants acted in a judicial, or quasi-judicial capacity when approving the timber sale,
7 legitimately raising the issue of conflicts of interest in discharging their duties to serve the public
8 good by balancing environmental concerns with economic interests.
9

10 **WATERSHED IMPACTS**

11 140. The entire analysis area for the Project averages 5.2 miles of road per square mile,
12 not including jammer roads associated with past logging. The East Fork Bitterroot Watershed
13 includes 1,482 miles of roads, with 1,962 road stream crossings. See: Ltr. from John F. Wardell,
14 Dir., Montana Office of the U.S. EPA, *MEF- Comments 1-4* (June 9, 2005) (copy on file with
15 MEF-FEIS). These roads contribute 151.2 tons of sediment per year to streams within the project
16 area. FEIS at 3.3-13.

17 141. The East Fork is impaired and listed under the Clean Water Act as a 303(d)-listed
18 stream with an established TMDL (total maximum daily load), meaning that, “[a]ny activities that
19 move forward will need to demonstrate that further degradation of impaired waters does not
20 occur.” FEIS at 3.3-2.

21 142. The East Fork is impaired due to sediment and thermal modification from
22 silviculture, roads, fires, channelization, mineral extraction, and bank modification.

23 143. As a result of the Project, the East Fork could receive an additional 6.81 tons/year
24 of sediment in hydrologic unit 0503. ROD at A-19. As a result of log hauling on roads, the East

1 Fork could receive an additional 58 tons/year of sediment or more. According to the FEIS this
2 increase in sedimentation could be as high as 1,450 tons/year under wet conditions. FEIS at 3.3-27.

3 144. The BMPs and other road work said to reduce sedimentation have proven to be
4 significantly ineffective in practice, and will not be adequate or prevent additional discharges of
5 sediment to an already impaired stream, or to remedy cumulative impacts over time. This failure is
6 obviously implicated in the scientific literature. For example, *Beschta et al.* (2004) states:

7 It is perhaps widely accepted that “best management practices” (BMPs) can
8 reduce damage to aquatic environments from roads. Time trends in aquatic habitat
9 indicators indicate, however, that BMPs fail to protect salmonid habitats from
10 cumulative degradation by roads and logging (*Espinosa et al.* 1997.) *Ziemer and*
11 *Lisle* (1993) note a lack of reliable data showing that BMPs are cumulatively
12 effective in protecting aquatic resources from damage.

13 145. Road “improvement” work on the Bitterroot National Forest following the
14 Bitterroot Burned Area Recovery Plan also proved to be antiquated and not as effective as hoped,
15 as documented by reports from Jon Rhodes (8/20/02) and Chris Frissel (8/28/02 email to Cindy
16 Swanson).

17 146. Some of the road rehabilitation work in the project area is not tied directly to project
18 funds, which means it may be delayed quite a long time or never done at all. There is an annual
19 road maintenance shortfall on the BNF of \$2,245,000. The BNF can only afford to maintain 470
20 miles (18%) of its total road system because it receives \$662,000 each year for road maintenance
21 but needs a total of \$2,907,000 to actually maintain the roads. See: USDA Forest Service,
22 *Analysis of the Management Situation: Western Montana Planning Zone 4-2*,
23 <http://www.fs.fed.us/rl/wmpz/documents/ams> (Feb. 23, 2004).

24 147. Alternative 2 would increase sediments in streams by 16.26 tons/year due to
increases in equivalent clearcut acres (“ECA”). (DEIS p.3.3-14 to 3.3-33).

1 148. Colvert, Jennings Camp, Guide and Springer Creeks already exceed the
2 recommended ceiling of 20-25% equivalent clearcut area. (DEIS p.3.3-14 to p.3.3-33).

3 149. Colvert, Jennings Camp, Guide and Springer Creeks would all see significant
4 increases in ECA under Alternative 2.

5 150. Excessive ECAs, together with excessive soil compaction that increases runoff from
6 precipitation events, cumulatively will result in significantly increased runoff over natural levels in
7 affected drainages, with the associated potential impact to the integrity of stream channel function.

8 151. The effects of Project roads on streams was evaluated by estimating the amount of
9 sediment currently being produced and how that may change due to the proposed actions. For
10 road-produced sediment, the methodology used in the Draft Water Quality Restoration Plan and
11 Total Maximum Daily Loads for the Bitterroot Headwaters Planning Area (referred to as Draft
12 TMDL) was used. In this study, crossings within listed streams were reviewed and sediment area
13 and sediment contributions to streams measured and calculated. The results were extrapolated to
14 non-listed tributaries. In the East Fork, this amount was equivalent to 0.8 tons of sediment for each
15 crossing.

16 152. Both BNF field monitoring results and the Water Erosion Predictive Project Model
17 (WEPP) (Elliot et. al., 2002, PF-WAT-3) were used to estimate sediment contributions to streams
18 from proposed activities. WEPP was used to estimate the amount of sediment that could be
19 contributed given ground disturbance associated with vegetation management, yarding, landings,
20 and fuel reduction activities. ...(WEPP) estimates erosion the year following a disturbance (in this
21 case vegetation management/prescribed fire) and the probability of that erosion occurring.

22 153. WEPP was developed for use on forested landscapes and some of the background
23 field work that provided information for calibration was collected from study sites located on the

24

1 Bitterroot National Forest. WEPP also uses climate based upon local weather stations and
2 calibrated to the Middle East Fork based upon elevation, latitude and longitude to predict storm
3 events that could initiate erosion (PF-WAT-13). Inputs to the model for this analysis were based
4 upon local soils and local slope distances as determined for soil types within the Middle East Fork
5 area (PF-WAT-10).

6 154. However, none of the models used by the Forest Service to predict the adverse
7 impacts on streams already suffering from past mismanagement have been validated to ensure the
8 reliability of their predictions.

9 155. The EIS failed to present any 'confidence intervals, standard deviations or standard
10 errors in association with its conclusions' regarding the analysis of impacts to streams associated
11 with the Project. Thus, the information presented is not from a model that has been verified, and
12 the predictions are not therefore reliable.

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1 **CLAIMS FOR RELIEF**

2 [Note: All the following claims are brought under the APA, and for each claim, it is noted in the
3 heading what other statutes it is being brought pursuant to.]

4 **FIRST CLAIM FOR RELIEF [UNDER NEPA]**

5 Defendants irretrievably committed resources to their preferred alternative and censored contrary
6 science prior to a final decision which prejudiced the process and decision in violation of NEPA
7 and CEQ regulations.

8 156. Plaintiffs incorporate by reference all preceding paragraphs.

9 157. NEPA directs federal agencies to prepare a detailed environmental impact statement
10 ("EIS") prior to taking major federal actions that may significantly affect the quality of the
11 environment. 42 U.S.C. § 4332(2)(C).

12 158. NEPA requires that, during the EIS process, agencies take a "hard look" at the
13 environmental consequences of their actions. "[T]he comprehensive 'hard look' mandated by
14 Congress and required by the statute must be timely, and it must be taken objectively and in good
15 faith, not as a subterfuge designed to rationalize a decision already made." *Metcalf v. Daley*, 214
16 F.3d 1135, 1141-1142 (9th Cir. 2000).

17 159. Timely and properly sequenced compliance with NEPA requires that agencies
18 prepare an EIS "before any irreversible and irretrievable commitment of resources." *Id.* at 1143
19 (cites omitted).

20 160. The Council on Environmental Quality (CEQ) has promulgated regulations to
21 implement NEPA that are binding on all federal agencies. 40 C.F.R. § 1507.1. The CEQ
22 regulations establish guidelines for implementing the EIS process. 40 C.F.R. § 1502.2

23 161. According to the CEQ Regulations:
24

- 1 • "Agencies shall not commit resources prejudicing selection of alternatives before making a final decision." 40 C.F.R. § 1502.2(f).
- 2 • "Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying
- 3 decisions already made." 40 C.F.R. § 1502.2(g).

4 162. The proper EIS procedure mandated by NEPA and CEQ regulations, and the courts,
5 was disregarded and violated by the BNF when it irretrievably committed resources of taxpayer
6 funds of at least over \$208,000 to prepare logging units for the BNF's preferred alternative prior to
7 a final decision, prejudicing the selection of that alternative before a making a final decision. In
8 particular, the expenditure of such a large sum towards implementation of an action alternative
9 created a significant bias against the "No Action Alternative," since choosing "no action" would
10 result in the unnecessary loss of hundreds of thousands of dollars of taxpayer money.

11 163. Since the decision-making process was corrupted, and the outcome biased, by the
12 significant pre-decision expenditure of funds on implementation of the Project, the decision to
13 approve the Project is by necessity not in compliance with the procedure required by law, arbitrary,
14 capricious, an abuse of discretion, and otherwise not in accordance with NEPA.

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16 **SECOND CLAIM FOR RELIEF [UNDER NEPA/HFRA]**

17 Defendants failed to honor the public collaboration process mandated by both NEPA and HFRA,

18 and otherwise subverted public process in advancing a pre-determined outcome.

19 164. Plaintiffs incorporate by reference all preceding paragraphs.

20 165. A main thrust of the Healthy Forests Restoration Act is the process of collaborating
21 with the public:

22 (f) PUBLIC COLLABORATION.—In order to encourage meaningful public
23 participation during preparation of authorized hazardous fuel reduction projects,
24 the Secretary shall facilitate collaboration among State and local governments and
Indian tribes, and participation of interested persons, during the preparation of

1 each authorized fuel reduction project in a manner consistent with the
Implementation Plan.

2 16 U.S.C.A. § 6514(f).

3
4 166. NEPA requires that federal agencies shall encourage and facilitate public
5 involvement to the *fullest extent possible*. 40 C.F.R. § 1500.2.

6 167. The BNF's collaborative process for the Project consisted of one actual HFRA
7 collaboration meeting prior to the Notice of Intent to prepare the EIS. The BNF did not facilitate
8 any public collaboration other than going through the motions of the required EIS process for the
9 13 months subsequent to that meeting, and prior to the issuance of the FEIS with the preferred
10 alternative.

11 168. In DEIS commenting the BNF received about 11,500 comments from the public.
12 98% of the comments were opposed to the Project, based on what they believed was a thinly veiled
13 attempt to promote commercial logging. These participating citizens instead voiced strong support
14 for the authentic restoration and community protection work in Alternative 3.

15 169. Throughout the public process, Plaintiffs and their members were deceived,
16 excluded, misled, ignored, forcibly detained, or otherwise turned away by Defendants, in an
17 obvious attempt by Defendants to selectively control public participation, suppress widespread
18 opposition to the selected alternative, and to foster an illusion of widespread public support for that
19 pre-determined outcome.

20 170. Defendants' decisions to selectively exclude the responsible viewpoints of members
21 of the public who opposed the timber sale is a failure to facilitate authentic public collaboration
22 and involve the public to the fullest extent possible; in light of these failures, their decision to
23 approve the Project is not in accordance with the procedure required by law, and is arbitrary,

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1 capricious, an abuse of discretion, and otherwise not in accordance with NEPA, or for that matter
2 with the most basic, objective standards of fairness and due process under the law.

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THIRD CLAIM FOR RELIEF [UNDER NEPA]

5 Defendants manipulated data and failed to fully and fairly disclose and respond to the concerns
6 of their own soils scientist regarding the potential for irreversible losses in soils productivity.

7 171. Plaintiffs incorporate by reference all preceding paragraphs.

8 172. "Agencies shall insure the professional integrity, including scientific integrity, of
9 the discussions and analyses in environmental impact statements. They shall identify any
10 methodologies used and shall make explicit reference by footnote to the scientific and other
11 sources relied upon for conclusions in the statement." 40 C.F.R. § 1502.24

12 173. Concealment and misrepresentation of scientific data in an EIS is an abuse of
13 discretion. *Earth Island v. U.S. Forest Service*, 2006 WL767012 at 15 (9th Cir. (Cal.)).

14 174. When "commenters' evidence and opinions directly challenge the scientific basis
15 upon which the Final EIS rests and which is central to it," the Forest Service is "required to
16 disclose and respond to such viewpoints in the final impact statement itself." *Center for Biological*
17 *Diversity v. U.S. Forest Service*, 349 F.3d 1157, 1167-1169 (9th Cir. 2003).

18 175. NEPA regulations require that "[t]he agency shall discuss at appropriate
19 points in the final statement any responsible opposing view which was not adequately
20 discussed in the draft statement and shall indicate the agency's response to the issues
21 raised." 40 C.F.R. § 1502.9(b).

22 176. BNF officials initially purged the contrary scientific data of their own soil scientist
23 from the project file, and then consistently misrepresented, censored, and/or intentionally

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1 manipulated his findings and conclusions. Nowhere in the FEIS did the FS disclose and discuss
2 the internal scientific disagreements between their soil scientist and the reviewing officials, and
3 nowhere in the FEIS did the FS discuss the rationale for rejecting their own expert’s opinions,
4 advice, and objections.

5 177. Because BNF officials completely failed to disclose and discuss the intensely
6 conflicting scientific opinion of their own soil expert, and manipulated the actual findings of his
7 work in the EIS they selected the Project without full and fair disclosure of contrary scientific
8 views and relevant scientific data, and without abiding by NEPA's mandate for scientific integrity;
9 these failures render the Project's approval arbitrary, capricious, an abuse of discretion, and
10 otherwise not in accordance with NEPA.

11

12 **FOURTH CLAIM FOR RELIEF [UNDER NFMA AND NEPA]**

13 The Project fails to prevent irreversible losses of soils productivity in the MEF Project Area.

14 178. Plaintiffs incorporate by reference all preceding paragraphs.

15 179. NFMA requires that agency actions “ensure that timber will be harvested from
16 National Forest System lands only where [soil] will not be irreversibly damaged.” 16 U.S.C.
17 §1604(g)(3)(E).

18 180. The BNF identifies the R1-SQS as the applicable threshold to prevent irreversible
19 soil damage in the MEF. The R1-SQS state that activities should not result in cumulative
20 detrimental soil conditions of more than 15 percent of an activity area, excluding permanent roads.
21 FSM 2500-99-1; FSH 2509.18.

22 181. Even if the R1-SQS as incorporated into the FSM guidelines do not have the
23 independent force and effect of law, by relying on those guidelines in the EIS to demonstrate

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1 compliance with NFMA, the FS is bound by those standards as a matter of law. *Ecology Center v.*
2 *Austin*, 430 F.3d 1057, 1069-1070 (9th Cir. 2005).

3 182. NEPA requires that agencies take a "hard look" at the environmental effects of
4 their actions during the EIS process. *Earth Island Institute v. U.S. Forest Service*, 2006
5 WL767012 2 (9th Cir. (Cal.)) (cites omitted).

6 183. The FS's scientific methodology must be reasonably reliable and accurate. If data
7 or methods of analysis are based upon hypothesis, they must be verified in order to demonstrate
8 their reliability before the FS's use of that data or model can receive judicial deference under both
9 NFMA and NEPA. *Native Ecosystems Council v. U.S. Forest Service*, 428 F.3d 1233, 1250 (9th
10 Cir. 2005); *Lands Council*, 395 F.3d 1019, 1035 (9th Cir. 2005); *Ecology Center*, 430 F.3d at
11 1064; *Kettle Range Conservation Group v. U.S. Forest Service*, 148 F.Supp 1110, 1125-1127
12 (E.D.Wash. 2001).

13 184. Although the Forest Service requires monitoring and validation of the R1-SQS to
14 determine if they are effective for the purpose of ensuring soil productivity, neither the Northern
15 Region nor the BNF has ever verified the scientific assumptions underlying the standards, or
16 validated their effectiveness in ensuring continued soils productivity.

17 185. The R-1 SQS is inadequate and fails to prevent irreversible damage to soils because
18 it (a) potentially allows irreversible damage on 15% or more of the affected soils inside treatment
19 unit boundaries, (b) allows unlimited irreversible soil damage from compaction on roads and log
20 decks, (c) does not adequately account for cumulative impacts to soils productivity from extensive
21 logging and other adverse impacts within an affected drainage, infra., and (d) does not require
22 adequate monitoring of mitigation measures proposed for the purpose of restoring productivity.

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1 186. A questionable numerical soil quality standard that has never been verified nor
2 validated to demonstrate its reliability, either generally or within a specific forest, cannot ensure
3 soil productivity as required by NFMA; thus the BNF's dependence upon, and failure to fully
4 implement, the R1-SQS to ensure NFMA compliance is arbitrary, capricious, an abuse of
5 discretion and otherwise not in accordance with NFMA.

6 187. The R1-SQS fail to adequately account for cumulative soils impacts in a project
7 analysis area: the standards exclude consideration of impacts from past management activities
8 outside of the arbitrary and artificial boundaries of the current proposed activity areas. This
9 selective exclusion allows an area that has been heavily and repeatedly harvested, grazed, or
10 impacted by ORVs, to be treated the same as an area that has never been harvested, simply by the
11 expedient of how activity area boundaries are drawn. The MEF is such an area, as the watershed
12 has been heavily impacted by past timber harvest and other activities.

13 188. The EIS's heavy reliance on this inadequate and unverified standard which allows
14 such selective and arbitrary soil impact consideration does not constitute a "hard look" at the
15 cumulative impacts of management activities on soils productivity; the BNF's approval of the
16 Project without a "hard look" at cumulative soil impacts in the EIS is in violation of the procedure
17 required by law, arbitrary and capricious, an abuse of discretion, and otherwise not in accordance
18 with NEPA.

19 189. Even if the R-1 SQS of 15% detrimental disturbance could be presumed to be
20 effective in preventing irreversible soil damage, the BNF does not know the existing level of
21 detrimental soil disturbance on over 700 acres proposed for commercial logging. Instead, the FS
22 speculated what the disturbance level is based upon aerial photography and "professional
23 interpretation," failed to ever verify those speculations, and ignored the fact that all of these

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1 proposed units are located in disturbed landscapes where the impacted subwatershed currently
2 exceeds the 15% threshold. This application of the RISQS to further increase detrimental
3 disturbance over landscapes where the cumulative disturbance levels currently exceed the 15%
4 threshold clearly demonstrates the arbitrary nature of the RISQS, and points to the need to validate
5 the RISQS to determine cumulative impacts of losses in soils productivity on the ability of the
6 forest to recover naturally.

7 190. In light of the BNF's legacy of detrimental soil damage, and because the FS has
8 never verified soil conditions on over 700 acres of land proposed for commercial logging, approval
9 of a Project that will cause further losses in soil productivity over levels already deemed to be
10 excessive by the soils scientist with the greatest knowledge of the area, instead of restoring and
11 rehabilitating the watershed to allow for recovery before further disturbance, is arbitrary,
12 capricious, an abuse of discretion, and otherwise not in accordance with NFMA and NEPA
13 because the BNF failed to take a "hard look" at actual soil conditions in the area, and the Project
14 activities will further degrade, not ensure, soil productivity.

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FIFTH CLAIM FOR RELIEF [Under NFMA and NEPA]

17 The Decision to implement the Project fails to demonstrate compliance with Forest Plan
18 old-growth standards, does not insure the viability of management indicator and
19 sensitive species, and fails to adequately disclose the potential cumulative impacts on
20 sensitive and indicator old-growth and/or fire-dependent species

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20 191. Plaintiffs incorporate by reference all preceding paragraphs.

21 192. The National Forest Management Act (NFMA) imposes a substantive duty on the
22 Forest Service to “provide for diversity of plant and animal species.” 16 U.S.C. § 1604(g)(3)(B).

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1 This duty includes a mandate to maintain wildlife viability. *Ecology Center v. Austin*, 430 F.3d at
2 1062.

3 193. In order to estimate impacts of management activities on fish and wildlife
4 populations and diversity, certain species must be identified as “management indicator species”
5 (“MIS”). 36 C.F.R. § 219.19. Management alternatives are to be evaluated in terms of the quality
6 of habitat and the population trends of the MIS. *Id.* The BNF Plan identifies the pileated
7 woodpecker and the pine marten as MIS for old-growth dependent species on the Bitterroot
8 National Forest.

9 194. To ensure viability of the pileated woodpecker, pine marten and the old-growth
10 dependent species they represent, the BNF Plan adopts a proxy approach that requires a weighted
11 average of 10% of the forest be maintained as old-growth, such that the amount and distribution of
12 old-growth habitat will "ensure sufficient habitat for the maintenance of viable populations..." BNF
13 Forest Plan II-19. The BNF Plan further requires that this old-growth will be distributed
14 throughout the management areas (“MA”s), specifically to maintain a certain percentage in each
15 third order drainage. MA 1 requires 3% old-growth in each third order drainage, MA 2 requires
16 8% old-growth in each third order drainage, MA 3a requires 8% old-growth habitat in each third
17 order drainage; MA 3b requires 50% old-growth in fisheries riparian areas and 25% old-growth in
18 non-fisheries riparian areas; and MA 8b has no old-growth standard as it is grassland and non-
19 suitable for timber production. BNF Forest Plan pp. III-4, 10, 16, 24.

20 195. NEPA requires that agencies take a "hard look" at the environmental effects of
21 their actions during the EIS process. *Earth Island Institute v. U.S. Forest Service*, 2006
22 WL767012 2 (9th Cir. (Cal.)) (cites omitted).

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1 196. "Agencies shall insure the professional integrity, including scientific integrity, of
2 the discussions and analyses in environmental impact statements. They shall identify any
3 methodologies used and shall make explicit reference by footnote to the scientific and other
4 sources relied upon for conclusions in the statement." 40 C.F.R. § 1502.24.

5 197. The EIS must disclose the hard data relied upon by the FS to the public so that
6 citizens may properly challenge a FS action in court based on that underlying data, and not simply
7 based on second-guessing an agency's scientific conclusions *Idaho Sporting Congress v. Thomas*,
8 137 F.3d 1146, 1150 (9th Cir. 1998).

9 198. The FS's scientific methodology must be reasonably reliable and accurate. If data
10 or methods of analysis are based upon hypothesis, they must be verified in order to demonstrate
11 their reliability before the FS's use of that data or model can receive judicial deference under both
12 NFMA and NEPA. *Native Ecosystems Council v. U.S. Forest Service*, 428 F.3d 1233, 1250 (9th
13 Cir. 2005); *Lands Council*, 395 F.3d at 1035; *Ecology Center*, 430 F.3d at 1064; *Kettle Range*
14 *Conservation Group v. U.S. Forest Service*, 148 F.Supp 1110, 1125-1127 (E.D.Wash. 2001).

15 199. Methodology based upon stale scientific evidence is not reliable, and reliance upon
16 it in an EIS fails to meet the threshold of a NEPA "hard look" at environmental impacts. *Lands*
17 *Council*, 395 F.3d at 1036-1037; *Seattle Audobon Society v. Espy*, 998 F.2d 699, 703-705 (9th
18 Cir. 1993).

19 200. "If the Forest Plan's standard is invalid, or is not being met, then the Projects that
20 depend upon it to comply with the Forest Act are not in accordance with law and must be set
21 aside." *Idaho Sportin Congress v. Rittenhouse*, 305 F.3d 957, 966 (9th Cir. 2002).

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1 201. The Forest Plan standards allow the BNF to maintain as little as 3% old-growth,
2 while at the same time using no consistent criteria for the identification of old-growth, and
3 conducting no field monitoring of species.

4 202. Subsequent to the approval of the BNF Forest Plan, reliable scientific research has
5 shown that the Northern Region’s general goal of maintaining 10% of forests as old-growth is
6 inadequate to ensure species viability because it may result in the extirpation of some species. The
7 FS concedes that the scientific evidence is valid, but refused in the EIS to specifically address the
8 conflicting scientific view, by claiming that "[r]eassessing the Forest Plan Standard for the amount
9 of old-growth to retain on a Forest wide basis is outside the scope of this site specific project."
10 FEIS Appendix H, p. 126.

11 203. The BNF Forest Plan's old-growth standards are invalid because they are based
12 upon scientifically stale evidence and have never been verified with actual population monitoring
13 to determine if they actually insure species viability. The BNF's dependence on these stale and
14 unverified standards in the EIS fails to take a "hard look" at the actual environmental impacts of
15 the Project and fails to ensure species viability; in light of these failures the Project approval was
16 not in accordance with the procedure required by law, and is arbitrary, capricious, an abuse of
17 discretion, and otherwise not in compliance with NEPA and NFMA.

18 204. Even if the BNF Forest Plan's old-growth standards were adequate to create
19 enough habitat to maintain species viability, the BNF has no reliable, verified inventory of the
20 actual amount of existing old-growth habitat forest-wide. Thus the underlying data is unverified
21 and unreliable to support the BNF's habitat proxy model as a short-cut to ensuring species
22 viability.

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1 205. The FS claims that it verified the proposed activity units in the Project Area, but
2 nowhere in the EIS or ROD does the FS fully disclose the methodology used, and the hard data
3 gathered. The failure to disclose this underlying methodology and data is arbitrary, capricious, an
4 abuse of discretion, and otherwise in violation of NEPA.

5 206. Even if the Forest Plan standards were valid, the BNF has failed to meet its Forest
6 Plan old-growth requirements in the Project Area. The BNF concedes that the Middle East Fork
7 Analysis Area does not have the minimum amount of old-growth required by its Forest Plan to
8 ensure the viability of the pileated woodpecker and the old-growth species it is intended to
9 represent. More than half of the third order drainages in the analysis area do not meet minimum
10 standards set for old-growth in the Forest Plan.

11 207. Despite the deficiency of old-growth habitat, the Project will log large diameter
12 dead, dying, and live trees. The FS refused to consider designating recruitment old-growth habitat
13 that already contains these large old trees, and instead will log an unrestricted number of large
14 trees with an unrestricted diameter limit.

15 208. In addition, the Project will likely have a disparate impact on black-backed
16 woodpeckers, a fire-dependent species that is associated with old-growth habitat as well as beetle-
17 infested habitat. The Forest Service is doing nothing to ensure the viability of this sensitive
18 species, and the analysis provided in this Project is inadequate to fully disclose the potential
19 cumulative impacts on black-backed woodpecker viability.

20 209. The Project Area and BNF in general does not meet the BNF Forest Plan's old-
21 growth standard, and the Project itself fails to address this deficiency in a logical way, thus the
22 Forest Service is not ensuring the viability of the old-growth MIS and/or sensitive species in the

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1 BNF. The decision to proceed with the Project is therefore arbitrary and capricious agency action,
2 an abuse of discretion, and is in violation of NFMA.

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SIXTH CLAIM FOR RELIEF

5 The adjudication of the Project objections by the Forest Service is an inherent conflict of interest,
6 thus the Forest Service's approval of the Project is an abuse of discretion.

7 210. "The USFS has a substantial financial interest in the harvesting of timber in the
8 National Forest." *Earth Island Institute v. U.S. Forest Service*, 2006 WL 767012 at 27 (9th Cir.
9 (Cal.)). In many case the FS "appears to have been more interested in harvesting timber than in
10 complying with our environmental laws." *Id.*

11 211. "[T]imber sales by the Forest Service generate many millions of dollars... to an
12 extent not immediately determinable, the sales create a budget for the Forest Service that, in the
13 conduct of more sales, make it independent of the normal appropriation process." *Earth Island*
14 *Institute v. U.S. Forest Service*, 351 F.3d 1291, 1310 (9th Cir. 2003) (Noonan, J., concurring).

15 212. When deciding whether to approve a timber sale, the Forest Supervisor and Regional
16 Forester are acting in a judicial or quasi-judicial capacity. *Earth Island*, 351 F.3d at 1309.

17 213. The Forest Service will make an estimated \$657, 058 from selling timber in the
18 Middle East Fork Project area, which is an addition to its congressionally appropriated budget.
19 Michael Howell, *Middle East Fork Fuel Reduction Project Approved: Modified Alternative Drops*
20 *23 Cutting Units*, Bitterroot Star (April 5, 2006).

21 214. Defendant Forest Supervisor Bull selected the preferred alternative proposing
22 commercial logging in the Middle East Fork. Defendant Regional Forester Kimbell issued the final
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1 decision approving commercial logging in the Middle East Fork. Thus, Defendants acted in a
2 judicial, or quasi-judicial capacity when approving the timber.

3 215. "[O]fficers acting in a judicial or quasi-judicial capacity are disqualified by their
4 interest in the controversy to be decided...." *Tumey v. Ohio*, 273 U.S. 510, 522 (1927); *Earth*
5 *Island*, 351 F.3d at 1309-1310.

6 216. Because Defendants were acting in a judicial capacity and had a substantial financial
7 interest in approving the Project in order to sell timber, Defendants abused their discretion by
8 adjudicating the objections of the Project, and then approving the sale of timber in the Project area.
9

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11 **SEVENTH CLAIM FOR RELIEF [Under NFMA]**

12 The decision to implement the Project fails to ensure that impaired streams will
13 not be further degraded, in violation of water quality standards.

14 217. Plaintiffs incorporate by reference all preceding paragraphs.

15 218. The Clean Water Act ("CWA") requires states to list impaired streams and develop
16 management plans (including Total Maximum Daily Loads ("TMDL") for pollutants of concern)
17 for those impaired streams to avoid further damage. 33 U.S.C. § 1313(d). The East Fork of the
18 Bitterroot River is impaired and listed under the Clean Water Act as a 303(d) listed stream with a
19 draft TMDL.

20 219. The East Fork is impaired due to sediment and thermal modification from
21 silviculture, roads, fires, channelization, mineral extraction, and bank modification.

22 220. The Project will likely increase sedimentation of the East Fork, thereby further
23 degrading it in violation of applicable water quality standards.

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1 Project approval arbitrary and capricious, an abuse of discretion, and otherwise not in
2 compliance with NEPA and NFMA;

3 E. Declare that the R1 Soil Quality Standards are inadequate to ensure soil
4 productivity, and thus the BNF's continued reliance on them is arbitrary, capricious, an abuse of
5 discretion, and in violation of NFMA, and must be reassessed by a BNF Forest Plan amendment,
6 and supplemented by actual field monitoring of soil productivity.

7 F. Declare that Defendant's failure to verify actual soil conditions on 700 acres of
8 land proposed for commercial logging provides inadequate assurance that the Project will not
9 significantly impair or irreversibly damage soils, and fails to take a "hard look" at cumulative
10 impacts, thus rendering the Project approval arbitrary, capricious, an abuse of discretion, and in
11 violation of NFMA and NEPA;

12 G. Declare that Defendants' reliance on the Forest Plan's stale and unverified old-
13 growth standard provides inadequate assurance that the Project will ensure species viability, thus
14 rendering the Project approval arbitrary, capricious, an abuse of discretion, and in violation of
15 NFMA;

16 H. Declare that the BNF Forest Plan's old-growth standards are inadequate to ensure
17 species viability, and thus the BNF's continued reliance on them is arbitrary, capricious, an abuse
18 of discretion, and in violation of NFMA, and must be reassessed by a BNF Forest Plan
19 amendment, and supplemented by actual field monitoring of populations.

20 I. Declare that Defendants' failure to disclose the underlying methodology and data
21 supporting the old-growth field-verification determinations in the Project area violates EIS
22 disclosure requirements and is thus renders the Project's approval arbitrary, capricious, an abuse
23 of discretion, and otherwise not in accordance with NEPA.

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1 J. Declare that Defendant's failure to move towards complying with the Forest Plan
2 old-growth requirements Forest-wide and in the Project area by designating recruitment old-
3 growth habitat and refraining from logging large, old trees provides inadequate assurance that the
4 Project will ensure species viability, and fails to take a "hard look" at cumulative impacts, thus
5 rendering the Project approval arbitrary, capricious, an abuse of discretion, and in violation of
6 NFMA and NEPA;

7 K. Declare that Defendant's adjudication of the Project appeals, and subsequent
8 approval of the Project is a conflict of interest, and thus an abuse of discretion and the approval
9 of timber sales is therefore null and void.

10 L. Declare that Defendants' decision to approve and proceed with the Project was
11 made without adequate assurance that the Project will ensure no further damage to impaired
12 streams, and thus is arbitrary, capricious, an abuse of discretion, and otherwise in violation of
13 law;

14 M. Enjoin the implementation of the MEF Project on the BNF until the Forest
15 Service demonstrates compliance with the Clean Water Act and NFMA's mandates concerning
16 soil productivity and old-growth species viability, and enjoin Defendants from taking any further
17 action to implement the Project including advertising, offering for sale, or awarding any
18 contracts.

19 N. Set aside the Environmental Impact Statement and the Record of Decision
20 approving the Project.

21 O. Order that the NEPA process for the Project be started afresh, and that ultimate
22 decision-making power for the project shall be vested with a neutral arbitrator, or a forest
23 supervisor from a USFS Region outside of Region 1.

24

1 P. Order that the HFRA process for the Project be started afresh, and be modeled
2 after the successes of the Lolo/Deborgia project, including at least 3 public collaborative
3 meetings, at least 2 public collaboration field trips to the proposed treatment units, and
4 facilitation by an independent moderator/facilitator.

5 Q. Award Plaintiffs their costs, expenses, expert witness fees, and reasonable
6 attorney fees under applicable law; and

7 R. Grant Plaintiffs such further relief as may be just, proper, and equitable.

8

9 DATED this 26th day of April, 2006.

10

By: _____

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Attorney for Plaintiffs

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