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

IDAHO RIVERS UNITED, and	)	
FRIENDS OF THE CLEARWATER,	)	No. 3:16-cv-102
	)	
<i>Plaintiffs,</i>	)	
	)	<b>COMPLAINT</b>
v.	)	
	)	
NEZ PERCE-CLEARWATER FOREST	)	
SUPERVISOR CHERYL F. PROBERT;	)	
UNITED STATES FOREST SERVICE;	)	
NOAA FISHERIES; and U.S. FISH AND	)	
WILDLIFE SERVICE,	)	
	)	
<i>Defendants.</i>	)	

**INTRODUCTION**

1. Plaintiffs Idaho Rivers United (“IRU”) and Friends of the Clearwater (“FOC”) challenge the Johnson Bar Fire Salvage Project approved by the U.S. Forest Service through a Final Environmental Impact Statement (“FEIS”) and Record of Decision (“ROD”) signed on February 17, 2016, by Defendant Nez Perce-Clearwater National Forest Supervisor Cheryl F.

Probert. Plaintiffs also challenge the results of Endangered Species Act (“ESA”) consultations between the Forest Service and Defendants NOAA Fisheries and U.S. Fish and Wildlife Service (“FWS”) over the Project’s impacts on ESA-listed Snake River fall Chinook salmon, Snake River Basin steelhead, and Columbia River bull trout and their critical habitats.

2. Forest Supervisor Probert and the Forest Service (hereafter, “Forest Service Defendants”) authorized the Project to salvage timber in response to the Johnson Bar wildfire, which occurred in 2014. This Court has already addressed the Johnson Bar wildfire and the Forest Service’s draft EIS for the Johnson Bar Fire Salvage Project through related on-going litigation in *IRU v. Hudson*, No. 1:15-cv-169-BLW (D. Idaho), concerning the Forest Service’s approved use of a spur road to allow the Idaho Department of Lands (“IDL”) to log state lands burned in the same fire. In July 2015, Chief Judge Winmill enjoined that approval based, in part, on the massive sedimentation threatened into the Selway River from IDL’s proposed logging and road-building in the same watershed impacted by the Johnson Bar Fire Salvage Project now authorized for surrounding federal lands. *See id.*, Memorandum Decision and Order dated July 10, 2015 (*ECF Docket No. 19*).

3. The Johnson Bar Fire Salvage Project is a timber sale that will harvest approximately 34 million board feet of timber from 2,104 acres of Nez Perce National Forest land within the watershed of the Selway and Middle Fork Clearwater Wild and Scenic Rivers. The timber sale includes massive clearcutting, approximately 108.7 miles of road work, and at least thirteen helicopter landings within and adjacent to the designated Wild and Scenic Rivers corridor. All of the disturbance will occur on steep highly erosive soils, which drain into the Selway and Middle Fork Clearwater Rivers and their tributaries. These watersheds are also designated critical habitat for ESA-listed Snake River fall Chinook salmon, Snake River Basin

steelhead, and Columbia River bull trout.

4. The Forest Service Defendants have avowedly and single-mindedly pushed this Project forward for the purpose of recovering the value of “dead trees” to support the local economy, despite the harms it threatens to the Wild and Scenic River corridor, imperiled fish, soils, water quality, and other environmental values. By placing the primary emphasis of the Project on economic considerations and failing to consider any non-commercial management alternatives, the Forest Service Defendants have violated their statutory duties under Sections 10(a) and 12 of Wild and Scenic Rivers Act to manage the Middle Fork Clearwater and Selway River corridor to protect Wild and Scenic values.

5. The Forest Service Defendants’ approval of the Project also violates Section 3(d) of the Wild and Scenic Rivers Act, which required the Forest Service to adopt a comprehensive river management plan some two decades ago – a legal requirement the agency has flouted by continuing to rely on its original 1969 River Plan, which does not contain the comprehensive river protections required by the 1986 amendments to the Act. Plaintiffs request the Court to remedy this long-standing violation of law by requiring the Forest Service Defendants to comply with Section 3(d) of the Wild and Scenic Rivers Act through adoption of a valid, comprehensive river management plan within a reasonable schedule ordered by the Court.

6. Furthermore, the challenged FEIS, ROD and associated ESA consultations mislead the public and grossly underestimate the Project’s likely impacts to Wild and Scenic values, ESA-listed fish, soils, water quality and other environmental values. The analysis and decision further inadequately analyze the Project’s impacts in light of conditions that have significantly changed since the environmental analysis was initiated. While the Johnson Bar wildfire burned approximately 13,300 acres in 2014, an additional 47,000 acres of adjacent land

in the Selway River corridor burned during the summer of 2015. Yet the FEIS and ROD provide only a perfunctory analysis of these massive new fires to summarily conclude they will not alter the impacts of the Project.

7. The FEIS and ROD further violate the National Forest Management Act (“NFMA”), the National Environmental Policy Act (“NEPA”), and the ESA by failing to comply with Forest Plan standards, ignoring well-established science that contradicts their pre-determined outcome, considering an improperly restricted range of alternatives, and failing to adequately consider the cumulative impacts of the Project.

8. Because the Forest Service is moving rapidly now to award timber sales authorized under the Project, and will allow road work and clear cutting to begin in the near future, there is a substantial risk of immediate and irreparable harm to Wild and Scenic values and ESA-listed fish species and their designated habitat. Injunctive relief is necessary to prevent the same harms addressed through the preliminary injunction granted in *IRU v. Hudson, supra*.

9. Plaintiffs thus seek judicial review and relief reversing and setting aside the Defendants’ FEIS, ROD, and ESA consultations approving the Johnson Bar Fire Salvage Project; ordering the Forest Service to prepare a valid comprehensive river management plan in compliance with Section 3(d) of the Wild and Scenic Rivers Act; and enjoining all field work related to the Project pending full compliance with applicable laws.

#### **JURISDICTION AND VENUE**

10. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 because this action arises under the laws of the United States, including the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287; National Forest Management Act, 16 U.S.C. § 1601 *et seq.*; the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*; the National Environmental Policy Act, 42 U.S.C. § 4321

*et seq.*; the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.* (“APA”); the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*; and the Equal Access to Justice Act, 28 U.S.C. § 2412 *et seq.*

11. An actual, justiciable controversy now exists between Plaintiffs and Defendants. The requested relief is therefore proper under 28 U.S.C. §§ 2201-2202 and 5 U.S.C. §§ 701-06.

12. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) because all or a substantial part of the events or omissions giving rise to the claims herein occurred within this judicial district, and the affected public lands and resources are located in this judicial district.

13. Plaintiffs have exhausted all required administrative remedies prior to bringing this action.

14. The federal government waived sovereign immunity in this action pursuant to 5 U.S.C. § 702.

### **PARTIES**

15. Plaintiff IDAHO RIVERS UNITED (“IRU”) is an Idaho non-profit corporation with its principal place of business in Boise, Idaho. IRU is a membership-based conservation organization representing those who love the freedom, adventure, and solitude of Idaho’s rivers. IRU’s mission is to protect and restore the rivers of Idaho, and it has become a powerful force for safeguarding Idaho’s imperiled wild fish populations, protecting and enhancing stream flows and riparian areas, and defending and promoting the wild and scenic qualities of Idaho’s rivers.

16. Plaintiff FRIENDS OF THE CLEARWATER is a nonprofit conservation organization based in Moscow, Idaho. Friends of the Clearwater is a grassroots advocacy group that works to protect the public wildlands, wildlife, and waters of north-central Idaho, including the Clearwater and Selway Rivers. Since 1987, Friends of the Clearwater has strived to protect

biodiversity and wildlands in the central Idaho bioregion through a Forest Watch program, litigation, grassroots public involvement, outreach, and education.

17. Plaintiffs' members, supporters, and staff work, live, study, and recreate extensively throughout the Selway, Lochsa and Middle Fork Clearwater Wild and Scenic Rivers corridor; and they use and enjoy the public lands and waters of the rivers' corridors and watersheds for recreational, conservation, scientific, aesthetic and other uses. These uses will be harmed or impaired by the Defendants' decision challenged herein, including permanent damage to river water quality, ecosystem health, and Wild and Scenic values.

18. Defendant CHERYL F. PROBERT is the Forest Supervisor for the Nez Perce-Clearwater National Forests, who signed the Project ROD challenged here. She is sued in her official capacity, for her actions as an employee of the U.S. Forest Service.

19. Defendant UNITED STATES FOREST SERVICE is an agency or instrumentality of the United States, within the U.S. Department of Agriculture. The Forest Service is vested with the authority and duty to manage and protect the public lands and resources of the Nez Perce-Clearwater National Forests, including the Selway and Clearwater Wild and Scenic rivers corridor, at issue here.

20. Defendant NOAA FISHERIES (also referred to as National Marine Fisheries Service, or NMFS) is an agency or instrumentality of the United States, within the U.S. Department of Commerce, which is responsible for administering the consultation provisions of the ESA with regard to threatened marine species, including Snake River fall chinook salmon and Snake River Basin steelhead, at issue here.

21. Defendant U.S. FISH AND WILDLIFE SERVICE (FWS) is an agency or instrumentality of the United States, within the U.S. Department of Interior, which is responsible

for administering the consultation provisions of the ESA with regard to threatened and endangered terrestrial and freshwater aquatic species, including threatened Columbia River bull trout, at issue here.

22. Defendants' violations of law, as alleged herein, injure the aesthetic, commercial, conservation, scientific, recreational, educational, wildlife preservation, private property, procedural and/or other interests of Plaintiffs and their staff, supporters, and members. These are actual, concrete injuries caused by Defendants' violations of law, and the judicial relief sought would remedy, in whole or in part, Plaintiffs' injuries.

### **STATEMENT OF FACTS**

#### **The Selway and Middle Fork Clearwater Wild and Scenic Rivers**

23. The Johnson Bar Fire Salvage Project is a massive timber sale located within the region of the Selway and Middle Fork Clearwater Rivers, and is entirely within or adjacent to the their designated Wild and Scenic River corridor.

24. The Selway and Lochsa Rivers flow together near Lowell, Idaho to form the Middle Fork Clearwater River. This region has unparalleled history, wildlife, scenery, and recreational opportunities. Based on their outstandingly remarkable wild, scenic, recreational, and other values, the Selway, Lochsa, and Middle Fork Clearwater were the very first rivers to be designated by Congress as protected rivers when it enacted the Wild and Scenic Rivers Act in 1968. *See* 16 U.S.C. § 1274(a)(1).

25. The Wild and Scenic Rivers Act designates rivers with "outstandingly remarkable" resource values and protects them for the "benefit and enjoyment of present and future generations." *Id.* § 1271. The Forest Service is responsible for managing the Selway, Lochsa, and Middle Fork Clearwater Wild and Scenic River corridor according to Section 10 of

the Act, as follows:

Each component of the national wild and scenic rivers system shall be administered in such manner as to protect and enhance the values which caused it to be included in said system without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values. In such administration *primary emphasis* shall be given to protecting its esthetic, scenic, historic, archeologic, and scientific features.

16 U.S.C. § 1281(a) (italics added for emphasis).

26. To protect the outstandingly remarkable values of designated rivers under the Wild and Scenic Rivers Act, Section 12 of the Act requires the Forest Service to take actions on lands over which it has jurisdiction within and adjacent to designated Wild and Scenic Rivers. In taking such action, “[p]articular attention shall be given to scheduled timber harvesting . . . which might be contrary to the purposes of [the Act].” *Id.* § 1283(a).

27. In 1969, the Forest Service adopted a river management plan for the Middle Fork Clearwater, Lochsa and Selway rivers. *See* U.S.D.A. FOREST SERVICE, RIVER PLAN: MIDDLE FORK CLEARWATER INCLUDING THE LOCHSA AND SELWAY OF THE NATIONAL WILD AND SCENIC RIVER SYSTEM, (1969) (hereinafter “River Plan”). Four years later, the Forest Service developed management guides to provide more specific direction under the River Plan. *See* BITTERROOT, CLEARWATER, NEZ PERCE NATIONAL FORESTS, MANAGEMENT GUIDES: MIDDLE FORK OF THE CLEARWATER INCLUDING THE LOCHSA AND SELWAY (1973) (hereinafter “Management Guides”). Both the River Plan and Management Guides are incorporated by reference in the 1987 Nez Perce National Forest Plan, and thus form part of that Forest Plan. *See* NEZ PERCE FOREST PLAN, at V-2 and Appendix L (1987).

28. The River Plan has not been revised or updated since 1969, even though 1986 amendments to Section 3(d) of the Wild and Scenic Rivers Act established new requirements for comprehensive river management plans and required the agency to adopt such a comprehensive



river corridor management plan within 10 years. *See* 16 U.S.C. § 1274(d)(1)-(2).

29. The 1969 River Plan is very general, outdated, and does not meet the requirements of a comprehensive management plan under the 1986 amendments to the Act. Indeed, the Forest Service admitted in a recent analysis that the 1969 River Plan “does not meet the criteria established in Section 3 of the WSRA as amended in 1986,” and “lacks sufficient detail in several areas including monitoring, user capacities, and development plans.” *See* NEZ PERCE-CLEARWATER NATIONAL FORESTS, FOREST PLAN ASSESSMENT, 15-18, 15-22 (2014).

30. Notwithstanding the Forest Service’s own acknowledgement that the 1969 River Plan fails to meet the requirements of the Wild and Scenic Rivers Act, the Johnson Bar Fire Salvage Project’s FEIS asserts falsely, or misleadingly, that “[t]he Middle Fork Clearwater Wild and Scenic River has a River Plan as required by the Wild and Scenic Rivers Act.” NEZ PERCE-CLEARWATER NATIONAL FORESTS, JOHNSON BAR FIRE SALVAGE PROJECT FINAL EIS, p. 236 (2016). The FEIS does not address the River Plan’s inadequacies under the Act, or explain why, for the past thirty years, the Forest Service has not revised it in accordance with the Wild and Scenic River Act’s 1986 amendment requirements.

31. Even though the 1969 River Plan is outdated and insufficient under the 1986 amendments, nevertheless it does establish that timber may not be cut for commercial purposes within the Middle Fork Clearwater and Selway River corridors. Under the River Plan, timber harvest is allowed only for specific purposes when other management alternatives are impractical, stating that: “Timber cutting will be done only for the following:

- (a) Public safety and/or recreational purposes in selected areas.
- (b) Control of fire, insects and disease when such cutting is determined to be the only practical method of control
- (c) Approved road and trail locations.”

River Plan, at 11.

32. Furthermore, the Management Guides for the Middle Fork Clearwater and Selway Rivers reiterate that commercial timber harvest is not allowed, and that the River Plan and Management Guidelines apply within and adjacent to the designated Wild and Scenic River corridors. *See* Management Guides, at 10, 31, 34, 47. *Accord* 16 U.S.C. § 1283(a).

33. In spite of this clear direction, the Johnson Bar Fire Salvage Project's primary purpose is to recover the economic value of burned trees to support the local timber economy. Thus, the Project does not place a primary emphasis on Wild and Scenic values, violating both the Wild and Scenic Rivers Act and the Nez Perce National Forest Plan.

#### **The 2014 Johnson Bar Wildfire**

34. In late summer/early fall 2014, the Johnson Bar fire burned approximately 13,000 acres within the Selway and Middle Fork Clearwater River watersheds. Of that total, the fire burned approximately 314 acres of state land and 300 acres of private land.

35. Within the fire perimeter, trees and vegetation burned in a mixed-severity, mosaic pattern typical of fire behavior in the area. Overall, it was not a severe fire: about 84% of the area burned at a low to moderate intensity, while only 4% burned at a high intensity. The remaining 12% of the forest within the fire line was not burned.

36. Although the fire was low to moderate intensity, it burned primarily on steep slopes with highly erosive soils, within and adjacent to the designated Wild and Scenic River corridor. The Forest Service determined that the fire created a substantial risk of erosion and sedimentation impacts to the Selway River, Middle Fork Clearwater River, and several tributary streams. These rivers and their tributaries contain designated critical habitat for ESA-listed Snake River fall Chinook salmon, Snake River Basin steelhead, and Columbia River bull trout.

37. After the fire, adjacent private landowners and IDL moved quickly to harvest their burned timber, which prompted the related litigation currently ongoing in this District. *See IRU v. Hudson*, No. 1:15-cv-169-BLW (filed May 19, 2015). As noted above, the Court granted a preliminary injunction barring the IDL from using a Forest Service road due to the substantial risk of harm to the river corridor from IDL's planned salvage logging and road building. *See id.*, Mem. Decision and Order (*ECF Docket # 19*); *see also* Mullinix Declaration (*ECF Docket # 7-6*) (former Forest Service road engineer's testimony about risks posed by the IDL proposal).

### **2015 Wildfires**

38. From mid-summer to fall 2015, the Selway River corridor experienced massive wildfires adjacent to, and upstream from, the Johnson Bar Fire Salvage Project. The fires burned approximately 47,000 acres combined on both sides of the Selway River. Approximately fifteen miles of the Selway Wild and Scenic River corridor burned between the Johnson Bar Fire Salvage Project area and the Selway-Bitterroot Wilderness boundary.

39. The 2015 fires burned at a higher intensity than the Johnson Bar fire; approximately 22% of the area burned at a high intensity, versus 4% in the Johnson Bar fire. Accordingly, the Forest Service estimates that approximately 70% of the acres burned in the 2015 fires are at high risk for soil erosion hazards.

40. Most significantly, the Forest Service estimates potential sedimentation impacts to the Selway River watershed may range from 10,908 to 20,760 cubic yards per square mile, for each of the first two post-fire years. In comparison, the estimated sedimentation impact from the Johnson Bar fire is 940 cubic yards per square mile.

41. The Johnson Bar Fire Salvage Project FEIS and ROD fail to analyze how these significantly changed conditions will affect the impacts of the timber sale on the Selway and

Middle Fork Clearwater River watersheds. Following Plaintiffs' objections as part of the administrative appeal process, the Forest Service added some basic information about the 2015 fires to the FEIS, but has not actually analyzed their impacts with respect to the timber sale.

42. The Forest Service's ESA consultation for Columbia River bull trout was completed before the 2015 wildfires occurred. Thus, it is based on conditions that no longer exist and cannot be relied upon to ensure protection of bull trout and its designated habitat.

43. Similarly, the Forest Service's ESA consultation with NOAA Fisheries for Snake River fall Chinook salmon and Snake River Basin steelhead was initiated before the 2015 wildfires, and does not fully address the impacts of the fires, as discussed further below.

#### **PROCEDURAL HISTORY OF THE PROJECT**

44. Shortly after the Johnson Bar wildfire was extinguished, the Forest Service issued a public scoping letter for the proposed Johnson Bar Fire Salvage Project on October 14, 2014, which emphasized the need to utilize dead trees before they deteriorate and lose commercial value.

45. On October 16, 2014, the Forest Service published a Notice of Intent ("NOI") in the Federal Register to prepare an Environmental Impact Statement ("EIS") for the proposed Johnson Bar Fire Salvage Project. A second NOI was published on October 24, 2014, which corrected the public scoping time period from thirty to forty-five days.

46. On December 8, 2014, Plaintiffs submitted timely scoping comments in response to the October 24, 2014 NOI. Plaintiffs' scoping comments raised concerns about the economic viability of the project as well as the appropriateness of salvage logging after wildfires and the cumulative impacts on natural resources in the project area, among other issues.

47. On March 27, 2015, Plaintiffs received a letter from the Forest Service informing

them that a Notice of Availability (“NOA”) for the Johnson Bar Fire Salvage Project Draft Environmental Impact Statement (“DEIS”) would be published in the Federal Register on April 3, 2015. The letter also informed Plaintiffs of their opportunity to comment on the DEIS, and outlined the procedures and 45-day timeframe for commenting according to 36 C.F.R. Part 218.

48. On April 3, 2015, the Forest Service published a NOA in the Federal Register for the Johnson Bar Fire Salvage Project DEIS. The NOA was also published in the *Lewiston Tribune* newspaper on April 7, 2015, which included instructions for submitting public comments as part of the pre-decisional review process outlined in 36 C.F.R. Part 218. Copies of the Federal Register and newspaper notices were posted on the Forest Service’s website.

49. As noted, the Forest Service received scoping comments from Plaintiffs and others regarding concerns about timber harvesting within the Wild and Scenic River corridor. However, every action alternative in the DEIS included harvest within the Wild and Scenic River corridor.

50. On May 18, 2015, Plaintiffs submitted timely comments on the DEIS to the Forest Service.

51. In response to ESA consultation initiated by the Forest Service through a Biological Assessment (“BA”) prepared under Section 7 of the ESA, the FWS issued a Letter of Concurrence (“LOC”) on July 6, 2015, that concurred with the Forest Service’s assertion in the BA that the Project was not likely to adversely affect ESA-listed bull trout and 9.8 miles of designated bull trout critical habitat within the project area.

52. As noted, from early August 2015 through fall 2015, new wildfires burned approximately 47,000 acres of land surrounding the Johnson Bar Fire Salvage Project area, mostly upstream from the project area. The Forest Service’s ESA consultation with the FWS has

not addressed the impacts of these 2015 fires, and the FWS has not revisited its July 2015 LOC, to Plaintiffs' knowledge.

53. On October 7, 2015, the Forest Service posted a Final Environmental Impact Statement ("FEIS") and a Draft Record of Decision ("DROD") for the Project on its website. Notice of the FEIS, DROD, and the opportunity to comment was published in the *Lewiston Tribune* newspaper on October 9, 2015. No notification was published in the Federal Register.

54. The FEIS included an action alternative that eliminated timber harvesting within the Wild and Scenic River corridor. Remarkably, the DROD proposed to select that alternative modified to include timber harvest within the Wild and Scenic River corridor.

55. On November 23, 2015, Plaintiffs submitted timely objections to the FEIS and DROD to the Forest Service. Pursuant to the applicable Forest Service regulations and procedures, Plaintiffs participated in an objection resolution meeting on January 4, 2016, and received a final written response from the Objection Reviewing Officer on January 7, 2016.

56. The Objection Reviewer's response identified numerous deficiencies and errors in the FEIS and DROD, including changed conditions, and instructed the Forest Service to add substantial new information and analysis before proceeding to approve the Project.

57. The very next day – and without any notice to Plaintiffs or the public – the Forest Service posted an "updated" version of the FEIS on its website on January 8, 2016, purportedly in response to the Objection Reviewing Officer's instructions. This "updated" FEIS is twenty-five pages longer than the first FEIS and contains new information, including some discussion of the 2015 wildfires that surrounded the Johnson Bar Fire Salvage Project area, as well as additional documentation for fisheries, hydrology, soils, wildlife, vegetation, economics, roadless and wilderness areas, and opposing science. Yet the Forest Service deliberately did not

characterize the new version as a Supplemental EIS under NEPA, because it requires additional process and public involvement, which the Forest Service improperly sought to avoid.

58. Plaintiffs only received a letter from the Forest Service on January 14, 2016, informing them that a Notice of Availability for this “updated” FEIS would be published in the Federal Register on approximately January 15, 2016, and a final ROD would be issued no sooner than thirty days after publication. The letter did not invite or allow Plaintiffs to comment on the “updated” FEIS. The NOA was published in the Federal Register on January 15, 2016, but was not posted on the Forest Service’s website.

59. On February 17, 2016, the ROD for the Johnson Bar Fire Salvage Project was signed by Defendant Nez Perce-Clearwater National Forest Supervisor Cheryl F. Probert, based on the “updated” FEIS. The final ROD contains substantive changes to the selected alternative as a result of the Objection Reviewing Officer’s instructions.

60. The Forest Service waited until February 23, 2016, to post the final ROD for the Project on its website.

61. The final ROD authorizes Project implementation to begin immediately, including commercial timber harvest within and adjacent to the Wild and Scenic River corridor, as well as extensive construction and reconstruction of roads, logging trails, and helicopter landings.

62. The Forest Service has divided the Project’s timber harvesting into two timber sales. On February 23, 2016, the Forest Service announced the first timber sale, named “Hot Deck,” and will award the timber sale contract after auction on March 23, 2016. On March 2, 2016, the Forest Service announced the second timber sale, named “Peterson Point,” and will award the timber sale contract after auction on March 30, 2016.

**KEY DEFECTS OF THE PROJECT**

63. The Forest Service is using the excuse of the 2014 Johnson Bar wildfire to approve a massive commercial timber sale within and immediately adjacent to the Selway and Middle Fork Clearwater Wild and Scenic Rivers corridor, without fully assessing reasonable alternatives or likely impacts, in violation of NEPA; disregarding its duties under the Wild and Scenic Rivers Act to protect the river corridor; and violating requirements of its own Forest Plan, the National Forest Management Act, and the Endangered Species Act.

64. Section 10(a) of the Wild and Scenic Rivers Act requires the Forest Service to place a “primary emphasis” on Wild and Scenic values when managing designated rivers. Supporting the local timber economy is not a Wild and Scenic value. The Forest Service Defendants have violated their duties under the Act by placing a primary emphasis on supporting the local economy through a massive timber sale that adversely impacts the Wild and Scenic River corridor.

65. The timber sale will harvest and replant approximately 2,104 acres of National Forest land. Approximately 70% of the harvested acres will be clear-cut. Clear-cutting will occur from within the designated Wild and Scenic River corridor to a maximum of three miles away from the designated boundary. Timber harvesting will be visible from Highway 12 on the Middle Fork Clearwater River, and the Selway River road. The entire timber sale area is located in watersheds that drain into the Selway and Middle Fork Clearwater Rivers.

66. Harvesting timber for commercial purposes within and adjacent to the Wild and Scenic River corridor violates the Wild and Scenic Rivers Act, the River Plan, the Management Guidelines, and the Nez Perce National Forest Plan.

67. To get around the restrictions in these documents against commercial timber



harvest in the Wild and Scenic River area, the Forest Service alleges that commercial timber harvest is necessary to reduce the possibility of another wildfire in approximately twenty years. But the FEIS relies on anecdotal evidence and fails to consider well-established science contradicting this “reburn” theory. Thus, the Forest Service has not established that timber harvest is the only practicable method for controlling fire.

68. In an attempt to further justify commercial harvest, the FEIS asserts that clear-cutting and replanting is needed to “jump start” tree recovery to protect Wild and Scenic values. Yet there is no explanation of why a harvested and re-planted forest would meet Wild and Scenic objectives while a forest with evidence of natural disturbances would not.

69. Furthermore, the FEIS does not establish that commercial salvage harvesting is appropriate for meeting any resource goals beyond economic utilization of timber. The proposed action in the FEIS and selected alternative in the ROD fail to recognize post-fire landscape sensitivities or address the best available science regarding the impacts of salvage harvesting after wildfires.

70. Significantly, the FEIS does not explain how trees will be selected for harvest. The Johnson Bar wildfire burned in a mosaic pattern, leaving a forest of dead, dying, and living trees. The FEIS states repeatedly that no live trees will be cut and the “2002 Scott Mortality Guidelines” will be used to determine which trees are dead. However, these Scott Mortality Guidelines were created for use in the Blue Mountains of Oregon, which has different ecological conditions and forest species, and are designed for “determinations of relative tree survival up to one year after the fire for all conifer species included in the procedure.” SCOTT ET AL., FACTORS AFFECTING SURVIVAL OF FIRE INJURED TREES: A RATING SYSTEM FOR DETERMINING RELATIVE PROBABILITY OF SURVIVAL OF CONIFERS IN THE BLUE AND WALLOWA MOUNTAINS, at 3 (2002)

(emphasis added). The Scott Guidelines have not been calibrated for use on the Nez Perce-Clearwater National Forests, and the Johnson Bar wildfire burned more than a year and a half before the FEIS and ROD were issued.

71. Neither the FEIS or the ROD address this explicit limitation of the Scott Guidelines, or explain why the Scott Guidelines can still be validly used to determine whether trees on the Johnson Bar Fire Salvage Project area are dead more than one year after the wildfire.

72. The method of determining which trees are dead or alive is critical to the adequacy of analysis in the FEIS, ROD, and ESA consultations. These environmental analyses are replete with references to the assertion that only dead trees will be cut. The analyses rely heavily on that assertion to conclude there will be little or no change to the amount of water that runs off of the analysis area after timber harvesting, because dead trees do not transpire or remove water from the soil. However, the Scott Guidelines will be inappropriately used to guess which living trees are likely to die within the next five years. Thus, much of the FEIS, ROD and ESA consultation analysis are based on a false premise that only dead trees will be cut.

73. To facilitate the removal of the timber, the Forest Service will utilize approximately 146.3 miles of forest roads for harvesting, log hauling and tree planting operations. Of that total, the Forest will construct 2.3 miles of new temporary roads, reconstruct 16.9 miles of existing roads, perform maintenance and reconditioning work on 57.8 miles of existing roads, and use another 68.4 miles of existing roads for log hauling. Ten new and existing helicopter landings will be used for landing logs, one of which is located on the Selway River within the Wild and Scenic corridor.

74. The FEIS and ROD dismiss the impacts of the new road building by stating that new roadwork will be “hydrologically disconnected” from streams on the project area. But

neither document contains an explanation of what “hydrologically disconnected” means nor justifies this counter-intuitive assertion, when all the areas where new roads are to be built are higher elevation and runoff from the areas will inevitably flow downhill until meeting the Selway and/or Middle Fork Clearwater Rivers.

75. The extensive roadwork that will accompany the Johnson Bar Fire Salvage Project violates requirements in the 1998 Biological Opinion (“BO”) from the National Marine Fisheries Service (“NMFS”) for endangered steelhead in the Selway basin. Appendix 1 of the BO expressly prohibits the road work approved by the Forest Service for the Johnson Bar Salvage Project, stating:

Build new roads only to replace existing roads in RHCA’s, or directly repair human caused damage to steelhead habitat in streams.

Do not widen roads by increasing cut and fill slope areas in order to accommodate more traffic and/or larger vehicles than can presently use the road.

Do not open closed and revegetated roads for management purposes unless necessary to repair human-caused damage to steelhead habitat.

76. The FEIS includes alternative design criteria to mitigate the departure from the 1998 BO, but fails to adequately explain how the alternative measures will meet the objectives of the BO’s requirements by using the best available science.

77. The Forest Service has asserted that the timber sale will allegedly have a net benefit to soils and water quality because 21.3 miles of existing roads will be decommissioned; thus allegedly reducing the amount of sediment delivered to streams. However, the FEIS is devoid of any data that supports the assertion that decommissioning roads will result in any sediment reductions to the Middle Fork Clearwater and Selway watersheds.

78. Furthermore, the Nez Perce Forest Plan explicitly prohibits the use of watershed restoration to mitigate the effects of proposed activities. *See* Forest Plan, Amendment 20, WR-3. The roads identified for decommissioning in the FEIS and ROD are already closed, non-system roads. These roads have no relationship to Project activities and were selected merely to offset the impacts of new road building in other areas of the Project.

79. Regarding soils, the FEIS acknowledges that past management activities in the project area have caused Detrimental Soil Disturbance (DSD) and affected soil productivity; and that soils in the area are highly erosive after fire disturbances and removal of the litter and duff layers. The FEIS does not disclose how it assigns numerical acreages or percentages of DSD in activity areas caused by the effects of fire, and there is no rational calculation of DSD based upon measured or estimated “burn severity.” Furthermore, the FEIS does not cite any monitoring that provides any rational calculation of DSD based upon measured or estimated “burn severity.” The FEIS fails to demonstrate consistency with Forest Plan Standards and the Region 1 Soil Quality Standards; fails to accurately disclose existing amount of DSD within each activity area, or accurate estimates of DSD that would be attributable to project activities; and fails to provide reliable estimates of cumulative, post-project DSD in activity areas.

80. The FEIS further relies on flawed models to conclude that sedimentation from the timber sale’s activities will not have a detrimental effect on watersheds within the project area, including habitat for the ESA-listed fish species. Appendix A of the Nez Perce National Forest Plan requires an upward trend in habitat quality within watersheds that do not meet habitat objectives. The data in the FEIS shows either a lack of data or a current downward trend in watersheds within the Johnson Bar timber sale area. Conclusions in the FEIS that support an upward trend are based on FISHED and NEZSED models, which are not the best available

science and have known limitations. The FEIS does not adequately discuss the weaknesses of these models.

81. The FEIS does not explain whether the latest version of the elk habitat model (1997) was used in the FEIS, the version which this Court has required in other litigation. Regardless, the model protocol for either was misused as the two elk analysis areas are about 7,000 acres in size each, which is too large as the maximum effective calculation area is 5,000 acres, above which “the effects of a proposed activity may be significantly diluted.” Further, the FEIS admits it does not meet the Forest Plan objective for elk habitat effectiveness for one of the two elk analysis areas under any alternative. Thus, the Forest Plan standard to use the elk habitat model and the Forest Plan elk habitat objectives are not met.

82. In order to carry out ESA Section 7 consultation over the Project’s potential impacts to the ESA-listed fish species, the Forest Service prepared its BA in early summer 2015, which determined that the Project was “not likely to adversely affect” ESA-listed salmon or bull trout and their designated critical habitat; but found that the Project is “likely to adversely affect” listed steelhead and critical habitat.

83. As noted above, the FWS agreed with the Forest Service’s “not likely to adversely affect” determination for bull trout in a Letter of Concurrence (“LOC”) dated July 6, 2015. In that letter, the FWS acknowledged that the Project could result in additional sedimentation to bull trout habitat in the Selway and Middle Fork Clearwater Rivers, but “given the short duration and localization of potential sediment pulses, migratory subadult and adult bull trout can move past these areas into upstream spawning, rearing, and [other] habitat.”

84. Since the time that LOC was written, however, fifteen miles of the Selway River corridor upstream from the Johnson Bar Fire Salvage Project have burned; yet the Forest Service

has not attempted to reevaluate its conclusions or seek reinitiation of consultation with FWS.

85. In response to the Forest Service’s “likely to adversely affect” determination for steelhead, NOAA Fisheries issued a Biological Opinion (“BiOp”) and Incidental Take Statement (“ITS”) on February 12, 2016. The BiOp and ITS were posted on the Forest Service’s website on February 19, 2016—the same day the ROD was issued.

86. The BiOp and ITS rely on misleading statements in the FEIS and the Forest Service’s BA. Specifically, the BiOp assumes that only actually dead trees will be harvested; in other words, tree that no longer transpire or remove water from the soil. NOAA Fisheries relied on this false assertion to determine that timber harvesting will have virtually no effect on stream flow levels in the project area. But information added to the FEIS explains that green, transpiring trees will in fact be logged, if field personnel determine that they are “likely to die” in the next five years. Thus, the Project is likely to cause impacts to stream flows that were not considered in the BiOp and ITS.

### **FIRST CLAIM FOR RELIEF**

#### **Violation of Wild and Scenic Rivers Act Section 3(d) and APA**

87. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

88. This first claim challenges the Forest Service Defendants’ violation of Section 3(d) of the Wild and Scenic Rivers Act, as amended in 1986, in approving the Johnson Bar Fire Salvage Project FEIS and ROD without an updated comprehensive river management plan. *See* 16 U.S.C. § 1274(d)(1)-(2). This claim is brought pursuant to the judicial review provisions of the APA, 5 U.S.C. § 706.

89. Under the Wild and Scenic River Act’s 1986 amendments, Congress required in Section 3(d) that all newly-designated river segments must have a “comprehensive management plan for such river segment to provide for the protection of the river values.” 16 U.S.C. §

1274(d)(1). Congress specified that such a comprehensive plan “shall address resource protection, development of lands and facilities, user capacities, and other management practices necessary or desirable to achieve the purposes of this chapter.” *Id.*

90. For previously designated rivers, including the Selway and Middle Fork Clearwater Rivers at issue here, the 1986 amendments required that existing river plans must be reviewed and updated within ten years to meet the same requirements of “comprehensive management plans.” 16 U.S.C. § 1274(d)(1).

91. As alleged above, the Forest Service has not updated the existing River Plan for the Middle Fork Clearwater, Lochsa, and Selway Rivers since that River Plan was adopted in 1969. The 1969 River Plan does not meet the requirements of Section 3(d) of the Wild and Scenic Rivers Act for a comprehensive management plan providing for protection of river values, and lacks necessary details for evaluating project impacts to Wild and Scenic values, as provided under 16 U.S.C. § 1274(d)(1)-(2).

92. Without a valid comprehensive river management plan that complies with the requirement of Section 3(d) of the Wild and Scenic River Act, the Forest Service Defendants cannot adequately evaluate the impacts of the Johnson Bar Fire Salvage Project to determine whether it is meeting land management requirements under Sections 10 and 12 of the Act. *See* 16 U.S.C. § 1281(a), 1283(a). The 1969 River Plan does not adequately address and protect all Wild and Scenic values, and lacks monitoring for determining whether mitigation can adequately protect Wild and Scenic values. Accordingly, the monitoring section of the ROD does not include requirements for monitoring the effects of the Project on Wild and Scenic values. ROD at 19-20.

93. By approving the Project to proceed without a valid comprehensive management

plan for the Selway and Middle Fork Clearwater Rivers within the Project area and impacted by the Project, the Forest Service Defendants have thus violated Section 3(d) of the Wild and Scenic Rivers Act, 16 U.S.C. § 1274(d)(1)-(2), and the APA.

94. The Forest Service Defendants' violation of law as alleged herein is arbitrary, capricious, an abuse of discretion, not in accordance with the law, without observance of procedure required by law, and in excess of statutory jurisdiction, authority or limitations within the meaning of the judicial review provisions of the APA; and accordingly the FEIS and ROD must be held unlawful and set aside under 5 U.S.C. § 706(2).

WHEREFORE, Plaintiffs pray for relief as set forth below.

**SECOND CLAIM FOR RELIEF**  
**Violations of Wild and Scenic Rivers Act Sections 10 & 12 and APA**

95. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

96. This second claim challenges the Forest Service Defendants' violations of Sections 10(a) and 12(a) of the Wild and Scenic Rivers Act, 16 U.S.C. § 1281(a) & § 1283(a), for failing to place a primary emphasis on Wild and Scenic values within the Selway and Middle Fork Clearwater Rivers area. This claim is brought pursuant to the judicial review provisions of the APA, 5 U.S.C. § 706.

97. In approving the Johnson Bar Fire Salvage Project FEIS and ROD, the Forest Service Defendants expressly and unlawfully placed a primary emphasis on economic values within the Wild and Scenic Rivers area, in violation of Sections 10 and 12 of the Wild and Scenic Rivers Act.

98. As noted above, Section 10(a) of the Act requires the Forest Service to place a "primary emphasis" on protecting designated rivers' "esthetic, scenic, historic, archeological, and scientific features." 16 U.S.C. § 1281(a). To carry out that duty, Section 12(a) of the Act



requires the Forest Service to take actions to protect Wild and Scenic rivers on lands “within or adjacent to” the designated river corridor. *Id.* § 1283(a). Timber harvesting is the only specific concern listed in the management requirements of the Act. *Id.* These management requirements apply to the entire Johnson Bar Fire Salvage Sale Project area, regardless of whether specific project activities occur within or adjacent to the designated Wild and Scenic corridor. *See Wilderness Soc’y v. Tyrrel*, 918 F.2d 813, 819 (9th Cir. 1990).

99. However, the Forest Service Defendants’ avowed primary purpose for the Project is to “salvage dead and dying timber before it loses its economic value.” FEIS at 11. Reflecting that purpose, the ROD selected “Alternative 4 – Economic Feasibility” for implementation. ROD at 25. By allowing economic factors to drive the decision-making process, the Forest Service Defendants have violated their statutory duty to place a primary emphasis on Wild and Scenic values.

100. The Forest Service Defendants’ violations of law as alleged herein are arbitrary, capricious, an abuse of discretion, not in accordance with the law, without observance of procedure required by law, and in excess of statutory jurisdiction, authority or limitations within the meaning of the judicial review provisions of the APA; and accordingly the FEIS and ROD must be held unlawful and set aside under 5 U.S.C. § 706(2).

WHEREFORE, Plaintiffs pray for relief as set forth below.

**THIRD CLAIM FOR RELIEF**  
**Violation of NFMA And APA**  
**(Unlawful Commercial Timber Harvesting Within Wild and Scenic River Area)**

101. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

102. This third claim challenges the Forest Service Defendants’ violation of the National Forest Management Act, 16 U.S.C. § 1601 *et seq.*, and NFMA’s implementing

regulations by approving commercial timber harvesting within the Wild and Scenic River area through the Johnson Bar Fire Salvage FEIS and ROD, contrary to requirements of the Nez Perce Forest Plan. This claim is brought pursuant to the judicial review provisions of the APA. 5 U.S.C. § 706.

103. Under NFMA, the Forest Service must develop and regularly revise Forest Plans for each National Forest. 16 U.S.C. §§ 1604(a), (e) & (g)(3)(B). Once a Forest Plan has been developed, all subsequent agency actions, including site-specific management activities, must be consistent with the governing Forest Plan. 16 U.S.C. § 1604(i).

104. Commercial timber harvesting within the area of the Wild and Scenic Selway and Middle Fork Clearwater Rivers is prohibited by the existing River Plan and Management Guidelines, which are incorporated into the Nez Perce National Forest Plan. *See NEZ PERCE FOREST PLAN*, at V-2 and Appendix L (1987). As explained above, the River Plan and Forest Plan only allow timber harvesting when it is the only practicable method of achieving non-economic resource values, which is not the case here. Forest Plan at III-20; River Plan at 11. The Johnson Bar Fire Salvage Project FEIS and ROD violate the River Plan and the Nez Perce Forest Plan, and hence NFMA's consistency requirement, because they failed to consider any non-harvest action alternatives and because timber harvesting is not the only practicable method of achieving non-economic resource values in the Wild and Scenic area.

105. The Forest Service Defendants' violation of law as alleged herein is arbitrary, capricious, an abuse of discretion, not in accordance with the law, without observance of procedure required by law, and in excess of statutory jurisdiction, authority or limitations within the meaning of the judicial review provisions of the APA; and accordingly the FEIS and ROD must be held unlawful and set aside under 5 U.S.C. § 706(2).

WHEREFORE, Plaintiffs pray for relief as set forth below.

**FOURTH CLAIM FOR RELIEF**  
**Violation of NEPA And APA**  
**(Failure to Issue Supplemental EIS For Public Comment)**

106. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

107. This fourth claim challenges the Forest Service Defendants' violation of the National Environmental Policy Act, 42 U.S.C. § 4321 et seq., and implementing NEPA regulations, as well as the Forest Service's pre-decisional review process regulations, by approving the Johnson Bar ROD based on the so-called "updated" FEIS without issuing a Supplemental EIS for public comment following the 2015 wildfires. This claim is brought pursuant to the judicial review provisions of the APA. 5 U.S.C. § 706.

108. The Council on Environmental Quality ("CEQ") promulgates regulations implementing NEPA, which are binding on all federal agencies. 40 C.F.R. §§ 1500-1518.

109. Under the CEQ's NEPA regulations, the Forest Service is required to prepare and release for public comment a Supplemental EIS when there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii). The regulations further prohibit the Forest Service from taking any action or making any commitment of resources before making its final decision that would have an adverse environmental impact or prejudice or limit the choice of reasonable alternatives. *Id.* §§ 1502.2(f), 1506.1(a).

110. Similarly, under the Forest Service's regulations for its project level pre-decisional review process, the Forest Service must provide legal notice to the public and the opportunity to comment on supplemental or revised EISs that are based on new information or changed circumstances. 36 C.F.R. § 218.22(d).

111. The 2015 wildfires that burned extensive areas adjacent to and around the Johnson Bar Fire Salvage Project area constitute “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts” thus requiring the Forest Service to prepare and release a Supplemental EIS for public comment before approving the Project. 40 C.F.R. § 1502.9(c)(1)(ii).

112. As discussed above, the Objection Reviewing Officer required the Forest Service to add substantial new information and analysis regarding deficiencies in analysis, changed conditions, and errors in the initial FEIS and Draft ROD.

113. Rather than prepare a Supplemental EIS and release it for public comment, the Forest Service Defendants instead released the so-called “updated” FEIS in February 2016, which was used to approve the ROD for the Project. The public was not given proper legal notice nor allowed to comment on this “updated” FEIS.

114. The “updated FEIS” is twenty-five pages longer than the original FEIS, added substantive discussions of the impacts and changes resulting from the 2015 wildfires and subsequent salvage logging on non-Forest lands, as well as changes to the selected alternative. This constitutes a revision under 36 C.F.R. § 218.22(d), triggering the Forest Service’s duty to give public notice and allow comment on the “updated” FEIS, which the Forest Service refused to do.

115. The Forest Service regulations are clear as to what legal notice and opportunities for comment are required for a supplemental or revised EIS of this nature. Legal notice was required to be published in the *Lewiston Tribune*. 36 C.F.R. § 218.24(c)(2). A copy of that notice must be posted on the Forest Service’s Johnson Bar website within four days of the legal notice publication. *Id.* § 218.24(c)(3). Furthermore, as the objecting parties, Plaintiffs here (Idaho

Rivers United and Friends of the Clearwater) must be notified of their opportunity to comment on the “updated” EIS in accordance with the procedures outlined in 36 C.F.R. § 218.24(a)-(b). None of these requirements were met before issuance of the Johnson Bar Fire Salvage Project ROD.

116. A final decision and implementation of the Johnson Bar Fire Salvage Sale cannot proceed lawfully until the Forest Service complies with the pre-decisional review requirements explained above, and until the Forest Service releases a Supplemental EIS for public comment in accordance with NEPA and implementing regulations above.

117. The Forest Service Defendants’ violations of law as alleged herein are arbitrary, capricious, an abuse of discretion, not in accordance with the law, without observance of procedure required by law, and in excess of statutory jurisdiction, authority or limitations within the meaning of the judicial review provisions of the APA; and accordingly the FEIS and ROD must be held unlawful and set aside under 5 U.S.C. § 706(2).

WHEREFORE, Plaintiffs pray for relief as set forth below.

**FIFTH CLAIM FOR RELIEF**  
**Violations of NEPA And APA**  
**(Inadequate FEIS)**

118. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

119. This fifth claim challenges the Forest Service Defendants’ multiple violations of the National Environmental Policy Act, 42 U.S.C. § 4321 et seq., and implementing NEPA regulations, by approving the Johnson Bar Fire Salvage Project ROD based on the legally and scientifically inadequate FEIS. This claim is brought pursuant to the judicial review provisions of the APA. 5 U.S.C. § 706.

120. NEPA is our “basic national charter for protection of the environment.” 40

C.F.R. § 1500.1(a). One of NEPA’s fundamental goals is to “promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.” 42 U.S.C. § 4321.

121. The scope of NEPA review is quite broad, including disclosure and consideration of all reasonable alternatives, 40 C.F.R. § 1502.14(a), and direct, indirect, and cumulative effects, *id.* § 1508(b). The federal agency must “[r]igorously explore and objectively evaluate all reasonable alternatives,” “[d]evote substantial treatment to each alternative considered in detail including the proposed action,” and “[i]nclude reasonable alternatives not within the jurisdiction of the lead agency.” *Id.* § 1502.14(a)-(c).

122. Direct effects are caused by the action and occur at the same time and place as the proposed project. *Id.* § 1508.8(a). Indirect effects are caused by the action and are later in time or farther removed in distances, but are still reasonably foreseeable. *Id.* § 1508.8(b). Both types of impacts include “effects on natural resources and on the components, structures, and functioning of affected ecosystems.” *Id.* § 1508.8.

123. A cumulative impact is defined as:

[T]he impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

*Id.* § 1508.7.

124. NEPA obligates the agency to make available to the public high-quality information, including accurate scientific analyses, expert agency comments, and public comments before decisions are made and actions are taken. The CEQ’s NEPA regulations require that information used to inform NEPA analysis “must be of a high quality,” and that

“[a]ccurate scientific analysis . . . [is] essential to implementing NEPA.” *Id.* § 1500.1(b). The agency’s analysis must be based on professional and scientific integrity. *Id.* § 1502.24. To take the required “hard look” at a proposed action’s effects, an agency may not rely on incorrect assumptions or data.

125. As alleged hereinabove, and as will be presented in detail in further briefing before the Court, the Forest Service Defendants violated NEPA and its implementing regulations in multiple respects through issuance of the FEIS and ROD for the Johnson Bar Fire Salvage Project including, but not limited to, the following:

- a) Failure to consider a reasonable range of alternatives in light of the applicable statutory duties and protections, including those provided by the Wild and Scenic Rivers Act.
- b) Failure to fully and accurately evaluate the cumulative effects of the proposed action in association with past, present and reasonable foreseeable actions, including failure to adequately consider the impacts of the 2015 wildfires.
- c) Numerous failures to use accurate and high-quality scientific information and analysis, and to reveal any incomplete or unavailable data, including: misapplication of the Scott Guidelines; failure to consider the best available science regarding post-wildfire salvage logging impacts; failure to disclose soil disturbance calculations and use accurate science in making such calculations; reliance on flawed elk habitat and cover modeling that have already been held inadequate in other litigation; reliance on sedimentation models without adequately disclosing their limitations; and others.
- d) Otherwise failing to take a “hard look” at the Project’s likely impacts, affected environment, and baseline conditions.

126. The Forest Service Defendants’ violations of NEPA are arbitrary, capricious, an

abuse of discretion, not in accordance with the law, without observance of procedure required by law, and in excess of statutory jurisdiction, authority or limitations within the meaning of the judicial review provisions of the APA; and accordingly the FEIS and ROD must be held unlawful and set aside under 5 U.S.C. § 706(2).

127. WHEREFORE, Plaintiffs pray for relief as set forth below.

**SIXTH CLAIM FOR RELIEF**  
**Violations of NFMA and APA**  
**(Inconsistency with Forest Plan Requirements)**

128. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

129. This sixth claim challenges the Forest Service Defendants' violations of the National Forest Management Act, 16 U.S.C. § 1601 et seq., and NFMA's implementing regulations by issuing the Johnson Bar Fire Salvage FEIS and ROD that are not consistent with the applicable Nez Perce Forest Plan. This claim is brought pursuant to the judicial review provisions of the APA. 5 U.S.C. § 706.

130. As noted above, under NFMA's "consistency" requirement, all agency actions, including site-specific management activities, must be consistent with the governing Forest Plan. 16 U.S.C. § 1604(i).

131. The Forest Plan for the Nez Perce National Forest includes binding standards that apply to the Johnson Bar Fire Salvage Project, including binding standards incorporated from PACFISH, INFISH, and regarding soil disturbance, elk habitat and cover, and other requirements. The Forest Service's Johnson Bar Salvage Project FEIS and ROD violate the Forest Plan and NFMA in several respects, including but not limited to:

- a) Departing from the 1998 Biological Opinion for Steelhead;
- b) Failure to establish an upward trend in degraded watersheds;



- c) Using watershed restoration activities to mitigate the effects of the Project, rather than address existing problems;
- d) Failing to demonstrate compliance with Forest Plan and Regional soils disturbance standards;
- e) Violating Forest Plan standards for elk habitat and cover.

132. The Forest Service Defendants' violations of NFMA are arbitrary, capricious, an abuse of discretion, not in accordance with the law, without observance of procedure required by law, and in excess of statutory jurisdiction, authority or limitations within the meaning of the judicial review provisions of the APA; and accordingly the FEIS and ROD must be held unlawful and set aside under 5 U.S.C. § 706(2).

WHEREFORE, Plaintiffs pray for relief as set forth below.

**SEVENTH CLAIM FOR RELIEF**  
**Violations of the Endangered Species Act and APA**

133. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

134. This seventh claim for relief challenges the results of the ESA consultations over the Johnson Bar Fire Salvage Project between the Forest Service, FWS, and NOAA Fisheries. This claim seeks judicial review of final agency actions taken pursuant to the ESA, and is brought pursuant to the judicial review provisions of the APA. 5 U.S.C. § 706.

135. Section 7 of the ESA requires that a federal agency seeking to conduct an action that it authorizes, funds or carries out must ensure that the action does not "jeopardize" ESA-listed species or their critical habitat; and the federal "action" agency must fulfill this duty by conducting consultation with the FWS and/or NOAA Fisheries, pursuant to ESA Section 7(a)(2) and implementing regulations. *See* 16 U.S.C. § 1536(a)(2).

136. ESA Section 7 requires further that such consultation must be based on the "best scientific and commercial data available." 16 U.S.C. § 1536(a)(2).

137. The Forest Service's BA provided to the FWS and NOAA Fisheries during the ESA consultations was not based on the best scientific and commercial data available, but in fact was premised on false statements and inaccurate assertions concerning the scope, nature and potential impacts of the Project, including (but not limited to) the contentions that:

- (a) only dead trees would be salvage logged;
- (b) streams in the affected area are or will demonstrate an upward trend in water quality;
- (c) newly constructed and/or recommissioned roads would pose little risk to fish because the affected areas are allegedly "hydrologically disconnected" from the Selway and/or Middle Fork Clearwater rivers, and
- (d) others identified above or as will be presented to the Court in briefings.

138. NOAA Fisheries and FWS relied on the Forest Service's mischaracterizations and erroneous statements about the Project in issuing their respective BiOp/ITS and LOC for the Project, rendering the BiOp/ITS and LOC arbitrary, capricious, and contrary to law. They also failed to adhere to the express terms of the 1998 BiOp for steelhead in the Selway River in issuing their ESA concurrences, without having validly reinitiated consultation over that BiOp as required by law.

139. Defendants' violations of the ESA are arbitrary, capricious, an abuse of discretion, not in accordance with the law, without observance of procedure required by law, and in excess of statutory jurisdiction, authority or limitations within the meaning of the judicial review provisions of the APA; and accordingly the BiOp/ITS, LOC, FEIS and ROD must be held unlawful and set aside under 5 U.S.C. § 706(2).

WHEREFORE, Plaintiffs pray for relief as set forth below.

**REQUEST FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request that this Court grant the following relief:

A. Under any or all Claims for Relief above, order, adjudge, and declare that the Johnson Bar Fire Salvage FEIS and ROD are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law under the Wild and Scenic Rivers Act, NEPA, NFMA, the ESA, and/or the APA, and reverse and set aside the FEIS and ROD;

B. Under the First Claim for Relief above, enter declaratory relief holding that the Forest Service has violated its statutory duty under Section 3(d) of the Wild and Scenic Rivers Act, as amended in 1986, by failing to adopt a valid comprehensive river management plan for the Selway, Lochsa and Middle Fork Clearwater Rivers; and order the Forest Service to adopt a valid comprehensive river management plan for the Selway, Lochsa and Middle Fork Clearwater Rivers that complies with Section 3(d) within a reasonable schedule to be set by the Court;

C. Under the Seventh Claim for Relief above, order, adjudge and declare the LOC and/or BiOp/ITS are arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law under the ESA and APA, and reverse and set them aside as well as the ROD that relies upon them;

D. Enter such other temporary restraining order(s) and preliminary or permanent injunctive relief as hereafter prayed for by Plaintiffs;

E. Award Plaintiffs their reasonable costs, litigation expenses, and attorney's fees associated with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 et seq., and all other applicable authorities; and/or

F. Grant such further relief as the Court deems necessary or appropriate to redress the Defendants' legal violations and protect the public lands and resources within and surrounding

the Middle Fork Clearwater and Selway Rivers Wild and Scenic corridor.

DATED: March 11, 2016

Respectfully submitted,

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