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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

NATIVE ECOSYSTEMS COUNCIL, MONTANA ECOSYSTEMS DEFENSE COUNCIL Plaintiffs, vs. FAYE KRUEGER, Regional Forester of Region One of the U.S. Forest Service, UNITED STATES FOREST SERVICE, an agency of the U.S. Department of Agriculture, and UNITED STATE FISH & WILDLIFE SERVICE, an agency of the U.S. Department of the Interior, Defendants.	**CV 14-00196-DLC** **STATE OF MONTANA ATTORNEY GENERAL AND MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION'S AMICUS CURIAE BRIEF IN OPPOSITION TO PRELIMINARY INJUNCTION**

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EXHIBIT 17 Western Forestry Leadership Coalition, "*The True Cost of Wildfire in the Western U.S"* (April 2010).

EXHIBIT 18 Jane Cottrell, Deputy Regional Forester, Region One, USFS Letter to Steve Kelly (Bozeman) (dated December 13, 2013)

The State of Montana Attorney General (Attorney General) and the Montana Department of Natural Resources and Conservation (DNRC) (collectively "State") hereby submit this *Amicus Curiae Brief in Opposition to Preliminary Injunction* pursuant to the Court's August 6, 2014 Order [Doc.12]. The need to protect the municipal water supply of the City of Helena from catastrophic wildfire with the carefully tailored Red Mountain/Chessman Reservoir Project (Project) outweighs Plaintiffs' interests and claims, which are not likely to succeed. The State supports the United States Department of Agriculture (USDA) Forest Service (USFS) and the United States Department of Interior Fish & Wildlife Service's opposition to Plaintiffs' *Motion and Brief in Support of Preliminary Injunction* dated August 1, 2014 [Docs.6,6-1]. Plaintiffs appear to take issuance of an injunction for granted. However, for the reasons explained below, a preliminary injunction in this case should not issue.

INTRODUCTION

DNRC has broad statutory mandates to promote forest health, minimize wildland fire danger, provide wildland fire suppression, and protect watersheds from insect and disease infestation and fire. The Attorney General has similar statutory and constitutional mandates to protect the public safety and welfare of the people of Montana. These broad mandates are comprised of local issues and local

people. It is this collective of local issues and projects which rise to populate the State's broader mandates to protect and promote wise resource management.

The importance of a project to the people who live and work in the area, like those in Helena, cannot be lost in the shuffle of Plaintiffs' complaint compendium. Plaintiffs never participated with the people of Helena to understand and craft a solution to their concerns. Dramatically absent from Plaintiffs' pleadings is any recognition or discussion of the importance of Helena's primary water supply. The people of Helena will be the ones to live with the effect of catastrophic wildfire, not the Plaintiffs. For this reason, the State begins with a focus on the local community, followed by a discussion of the State's interests.

I. UPPER TENMILE CREEK WATERSHED

The Upper Tenmile Creek watershed (Tenmile) provides the majority of the water supply to the City of Helena (City), approximately 30,000 people. A detailed description of the City water supply and issues is found in *Declaration of Ron Alles, City Manager Helena* (Alles), Exhibit (Ex.) 1. The Tenmile provides the City's sole source of water for nine months of the year. *Id*.,p.3; *Final Environmental Assessment, Tenmile Creek Water Supply Fuel Reduction Project*, Federal Emergency Management Agency (FEMA) (December 2008)(FEMA FEA) Ex. 2,p.1-1. The City has Tenmile water rights dating to the late 1800s. Alles, Ex.1,p.2. The other source of the City's water is the Missouri River through

Bureau of Reclamation (BOR) contracts. *Id.*,p.3. Missouri River water is treated by the Missouri Treatment Plant. *Id.*

Tenmile water flows through the 4.8-mile Red Mountain Flume (Flume) to the Chessman Reservoir (Reservoir), built in the early 1900s, where it is stored until piped to the Tenmile Treatment Plant. FEMA FEA, Ex.2,p.1-1. The Flume is a combination of open ditch, wooden trestles, pipeline, and sheet metal. *Id.* Approximately 2.1 miles of the Flume are on private land and 2.7 miles are on USFS land. *Id.* The fenced Reservoir is approximately 114 acres and located on USFS land. *Id.*; Alles, Ex.1,p.3; Project Map, *USFS Final Environmental Assessment* (FEA) [Doc.6-3,p.10] Ex.3.

FEMA found in 2008:

> The combined effects of past fire suppression, heavy fuels loads, an extended drought period, and an active pine beetle infestation have put forests in the Tenmile Creek drainage at risk of catastrophic wildfire…. A catastrophic wildfire would destroy the wooden timber and plank trestles of the Flume. Intense heat, fallen burned trees, and other debris would damage the metal Flume, diversions, and waste gates. Sediments and debris would impede water flow. It would also denude the watershed and cause erosion, which would destroy or render the entire Flume useless.

FEMA FEA, Ex.2,pp.1-1,1-2. After a wildfire, it would take 23 months to replace the Flume. *Id.* The City would be forced to use exclusively Missouri River water from the BOR. Alles, Ex.1,pp.7-8. The Missouri River Treatment Plant and infrastructure are not currently capable of handling a full City supply; infrastructure would need to be upgraded. *Id.* In addition to Flume-replacement

costs ($5,000,000), BOR water contracts, and infrastructure-upgrade costs ($7,250,000), costs to pump and run the Missouri Plant are higher ($306/million gallons) than the Tenmile Plant ($38/million gallons). *Id.*,pp.8-9. Fort Harrison (including VA Hospital) cannot receive Missouri River water unless $2,500,000 in additional infrastructure is built. *Id.*

II. THE TENMILE COLLABORATION

The City realized almost a decade ago that its Tenmile water supply was in jeopardy. In October 2007, the City hired a contractor to study the watershed. The contractor reported that the Tenmile was at risk for catastrophic wildfire. Alles, Ex.1,pp.4-5. The City passed *Resolution No. 19605* (September 2008) to convene a Tenmile Watershed Collaborative Committee (TMWCC) to develop options for watershed management to protect the City's water. *Resolution No. 19605*, Ex.4; Alles, Ex.1,pp.10-11. After public meetings, the TMWCC submitted consensus recommendations of options to the City (June 2009), which the City adopted. *TMWCC Recommendations*, Ex.5; Alles, Ex.1,p.12-13; Declaration of John Gatchell, Montana Wilderness Association (Gatchell) Ex.6.

The City was proactive. It applied for and received a grant under FEMA's Pre-Disaster Mitigation Program. FEMA FEA, Ex.2,p.1-1. The $312,831 grant combined with $104,277 from the City was used to conduct a fuel reduction project along the Flume to thin trees on City and private lands creating a fuel

break. *Id.* The City worked cooperatively with private landowners. Alles, Ex.1,p.12.

Concerns over catastrophic wildfire were heightened in 2009, with a wildfire on MacDonald Pass, southwest of Helena. *Id.*,pp.5-6. Fire experts warned the City that the fire could progress through Tenmile to Helena given the right conditions. *Id.* Fortunately, the fire was controlled. *Id.* In 2009, local and City fire officials also reviewed projections that a fire in the vicinity of Tenmile, Unionville, could progress rapidly into southern Helena. Alles, Ex.1,p.5; *see also* http://www.helenamt.gov/fire-department.html (Unionville/Helena Firespread), Ex.7.[1] The City also became aware of and publically shared examples of the potential impact of increased erosion with debris/ash flows loading streams and filling reservoirs after high intensity fires in other states. http://www.helenamt.gov/tmcwp/related-documents.html (Watershed Effects Final, *City of Helena Response*), Ex.8; Alles, Ex.1,p.6.

The increased awareness of potential catastrophic wildfire in the Tenmile prompted the Project. The Project is consistent with the TMWCC recommendations. Alles, Ex.1,p.12; Ex.5. The City's Tenmile website, http://www.helenamt.gov/tmcwp.html, documents extensive public notice and

[1] Courts may take judicial notice of government websites under Federal Rule of Evidence 201. *E.g., Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010)(judicial notice of school district website);*Hawk Aircargo, Inc. v. Chao.*, 418 F.3d 453, 457 (5th Cir.2005);*Coleman v. Dretke*, 409 F.3d 665, 667 (5th Cir.2005)(per curiam);*O'Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 2007 WL 2421754, *6 (10th Cir.Aug.28,2007);*Denius v. Dunlap*, 330 F.3d 919, 926 (7th Cir.2003).

press coverage of the issues, efforts to address mitigation, and the need for the Project. *Id.*; Gatchell,Ex.6,pp.2-4. Plaintiffs did not participate with the City. Alles,Ex.1,p.13; *see* Helena National Forest website, http://www.fs.usda.gov/detail/helena/home/?cid=STELPRDB5412992; *Red Mountain Flume Chessman Reservoir Final Decision Notice and Finding of No Significant Impact*, USFS (4/7/2014)(FONSI), [Doc.6-2].

The Project is closely tailored to protect the water supply. The proposed mitigation tracks the Flume and surrounds the fenced Reservoir to create a fuel break. *Map*, Ex.3. It comprises 490 acres of the Tenmile's 26,300 acres. Alles, Ex.1,p.4. About 90% of the lodgepole pine in the Project area is already dead or dying. Doc. 6-4,pp.18,82. The Project will reduce the potential for deadfall on the Flume and reduce fuel loading in the vicinity of the water supply infrastructure to decrease fire intensity. Docs.6-2,p.2.; 6-3,pp.14-15. Decreased fire intensity would: increase the likelihood that the Flume structure and surrounding forest would survive a fire; reduce the likelihood of high-severity burn impacts to soil; and reduce the probability of severe post-fire erosion and sediment/debris/ash delivery to the Flume and Reservoir. *Id.* The FONSI recognizes the severe impacts and staggering costs to municipal watersheds from wildfire. *Id.*; *see* Ex.8.

III. DNRC AND TENMILE

DNRC became involved with the Project under its broad mandates to

promote forest health, minimize wildland fire danger, provide wildland fire suppression, and protect watersheds from insect and disease infestation and fire. In July 2013, the USFS announced its *Western Watershed Enhancement Partnership* to work with local water users to mitigate wildfire risks to water supplies, signaling a willingness to work with local entities. http://www.usda.gov/wps/portal/usda/usdahome?contentid=2013/07/0147.xml., USDA Press Release, *Partnership to Protect America's Water Supply from Increased Wildfire Risk*, Ex.9. In September 2013, DNRC signed a Master Stewardship Agreement (MSA) with the USFS, to allow partnering on individual, mutually-beneficial projects. In December 2013, DNRC and the USFS began discussions regarding the possibility of partnering on the Project. Under the MSA, DNRC and the USFS negotiated the Red Mountain Flume/Chessman Reservoir Supplemental Project Agreement (SPA) from December 2013 to April 2014, with its execution on May 13, 2014. DNRC will provide Project administration and contractor oversight, subject to USFS supervision . The on-the-ground work will be performed by contractors. The chronology of the contracting proceeded as follows:

- May 27, 2014 – Published Notice of SPA Request for Proposal ("RFP");
- June 12, 2014 - Contractor pre-bid Project tour;
- July 11, 2014 - DNRC received 4 proposals;
- July 17, 2014 - Selection committee assembled to score and rank

proposals;

- July 30, 2014 - recommendation provided to DNRC Procurement Officer;
- August 21, 2014 - Proposed Project implementation starting date.

No contract has been executed, but DNRC has selected the successful contractor.

DNRC has invested considerable resources into the Project, including over 720 hours of staff time. Declaration of Robert A. Harrington (Harrington), Ex.11,p.9. For a more detailed description of the Project's chronology, see the attached Declaration of Dan Rogers (Rogers), Ex.10.

IV. THE STATE'S INTEREST

As previously explained, the State has broad statutory mandates and constitutional obligations relevant to this Project. The Attorney General and DNRC have independent statutory duties to protect forest resources from fire and insect and disease infestation, and to ensure those forests' beneficial water uses. In performing these duties, the State is cognizant that wildfire, watersheds, and forest management do not recognize ownership boundaries. Prudent resource management requires neighborly cooperation. The State's duties to its citizens is supported by the Project's anticipated benefits to the forested landscape and protection of the City's water supply.

A. Interest of the Attorney General

Montana's Constitution provides that "[t]he attorney general is the legal officer of the state and shall have the duties and powers provided by law." Mont.Const.Art.VI, §4(4). Under this authority, the Attorney General controls and manages all litigation on behalf of the State, and may intervene in all suits or proceedings which are of concern to the general public. *State ex rel. Olsen v. Public Service Comm'n*, 283 P.2d 594, 599 (1955). The Attorney General has the right and the responsibly to promote the interest of all the citizens of the State and represent the State in all litigation of a public character. *Id.* Those public interests in the present case are vast, including the protection of the City's drinking water, the jobs and economic benefits of forest resources, wildlife habitat protection, reducing the risk of wildfire in the wildland-urban interface (WUI) near residences, and overall forest health.

In 2013, the Montana Legislature and Governor prioritized watershed protection including those with Federal ownership with the enactment of Senate Bill 217[2] (SB217). SB217 was meant in part to correlate sound federal forest management with Montana's constitutional right to a clean and healthful environment. SB217 reaffirmed the Attorney General's authority to intervene in federal forest management cases on behalf of the State. *See* Mont.CodeAnn.

[2] http://leg.mt.gov/bills/2013/billpdf/SB0217.pdf

§76-13-154(1).

B. Interest of DNRC

DNRC is required to ensure the protection of land under state and private ownership and minimize property and resource loss from fire through wildland fire suppression. *See* Mont.CodeAnn. §§76-13-104,-115. The Montana Legislature found that certain forest management activities, including thinning, prescribed burning, and insect/disease treatments, reduce fire risk and improve overall forest diversity and vigor and improve the condition of the related water, wildlife, recreation, and aesthetic resources. *See* Mont.CodeAnn. §76-13-115(6),(7). The Legislature also found that development of fire-protection guidelines for the WUI is critical to improving public safety and reducing risk and loss. *Id.*

This Project falls under the umbrella of statewide programs DNRC administers. These programs include the following:

- Wildland Fire Protection;
- Hazardous Fuels Reduction;
- Forest Health Program;
- State Forest Assessment/Forest Action Plan, including:
    - Forest Biodiversity and Resilient Forests;
    - Wildfire and Public Safety;
    - Forest Products and Biomass Utilization;
    - Sustainable Urban Forest Landscapes; and,
    - Changing Forest Ownership Patterns;
- Forest Policy

For a more detailed description of these programs, see Harrington, Ex.11.

C. The Project is Consistent with Montana's Duty of Protection

Protection of watersheds, like the Tenmile, from the devastation of insect/disease infestation and from the consequential increase in fire danger is also a statutory charge for DNRC. Significantly, the Montana Legislature declared in SB217 the following policy:

> (4)[t]he legislature finds that:
>
> (a) there is overwhelming evidence that the management, protection, and conservation of watersheds in Montana is critical to the well-being of the state;
>
> (b) <u>the water supplies of some of the state's most populous cities and surrounding areas originate in federally managed watersheds that are at risk for catastrophic wildfire, the severity of which could be reduced by proper management</u>;
>
> (c) <u>a catastrophic wildfire in any one of those municipal watersheds would result in ash and sediment inundating and degrading the water supply, leaving tens of thousands of residents without drinking water, creating a severe public safety situation, and decimating millions of dollars worth of water infrastructure</u>;
>
> (d) a burned-out watershed also affects the timing of snow melt and stream flow, which detrimentally affects irrigation and fisheries; and
>
> (e) federal land managers are not giving due consideration to the constitutionally protected water rights of the state and its citizens, the exercise of which would be impaired by a catastrophic wildfire.

Mont.CodeAnn. §76-13-701(4)(emphasis added). Montana Legislators

proposed SB217 because of concern over potential, increased, sediment loads after wildfire. SB217, Hearing Senate Natural Resources Committee (2/6/2013), http://leg.mt.gov/css/Video-and-Audio/avsearch.asp?vbill=SB217&vSDt=12/05/2012&vEDt=05/06/2013.

This legislative policy is closely aligned with the Project's stated need, succinctly described on page 2, FEA, Doc. 6-4:

> The purpose of this project is to reduce the likelihood of physical damage to the municipal watershed infrastructure (flume and reservoir) in the event of a wildfire or from falling dead trees.
>
> This MPB [Mountain Pine Beetle] caused wide-spread tree mortality will result in elevated surface fuel loadings across the Tenmile Watershed including the project area in the relatively near future as dead trees fall.
>
> Currently, along the flume and around the reservoir, tree species composition of most stands is 90%+ lodgepole pine with lesser amounts of Douglas-fir, subalpine fir, spruce, five needle pine, and aspen. The mature lodgepole stands exhibit substantial mortality from MPB, while other species have been impacted by western spruce budworm or white pine blister rust (Milburn, Forested Vegetation Report). These dead lodgepole pine dominated stands are expected to begin falling within 5 years after death with 90% anticipated falling by year 14 (Mitchell and Preisler 1998).
>
> The expected surface fuel loading will create conditions in which a fire would burn intensely, with long duration, and would be difficult to suppress. The result of an intense fire of this nature would pose a direct risk to the flume structure, and could lead to post-fire erosion, sedimentation, ash deposition, and/or physical damage related to debris torrents that may impair the functionality of the flume and reservoir. Also, dead and dying hazard trees near the flume pose an immediate risk of physical damage to the structure when they fall (Thompson, Fire and Fuels Report p. 1, 2013).
>
> The flume and reservoir are critical interconnected/interdependent infrastructure necessary to maintain Helena's municipal water treatment system.

> If a major wildfire were to occur in the Tenmile drainage that damaged the existing flume structure and also increased sedimentation into the Red Mountain flume and Chessman Reservoir, the city would likely not be able to utilize the Tenmile water system as a municipal water source for a minimum of 23 months (FEMA 2008, page 1-2). Post fire effects could lead to accelerated erosion, ash deposition, and physical damage related to debris torrents that could impair the functionality of both the flume and reservoir.

Mont.CodeAnn. §76-13-301 also provides in relevant part: "(1) [i]t is the public policy of the state to: (a) protect and preserve forest resources from destruction by forest insect pests and tree diseases; (b) protect the forests and watersheds of Montana and restore those watersheds that are most affected by insect pests and tree diseases and are critical to water supplies. Mont.CodeAnn. §76-13-301(2) goes on to provide that "[i]t is further the public policy of the state to independently and through cooperation with the federal government and private forest landowners adopt measures to control, suppress, and eradicate outbreaks of forest insect pests and tree diseases." *See also* Mont.CodeAnn. §76-13-421. SB217 specifically amended Mont.CodeAnn. §76-13-701 to declare that the policy of the State is "to promote the sustainable use of all public forests within the state through sound management and collaboration with local, state, and federal entities."

DNRC must work cooperatively with all forest-resource entities to meet legislative goals and priorities. One step in protecting the forest resource, improving public safety, and reducing risk and loss is for DNRC, representing

the State's interest in the federal forest management planning and policy process, to enter into stewardship agreements like the SPA. Mont.CodeAnn. §76-13-702. Reduction of dangerous fuels from diseased/dead stands, particularly where fuel stands are in close proximity to homes and other structures (like the Flume), is a critical aspect of protecting private and state property in Montana and ensuring the safety of its citizens, while also ensuring the continued beneficial use of the resources on that property. *See* Mont.CodeAnn. §76-13-145 (including WUI). The Project will also mitigate the safety of firefighters, whether they are state, local or federal, in defending the Flume and associated structures, thereby complying with state law. *See* Mont.CodeAnn. §§76-13-104, 76-13-105 and 76-13-115.

Mont.CodeAnn. §76-13-702(3) further requires DNRC to promote forest management activities within and adjacent to the WUI , including development of community wildlfire protection plans. DNRC actively promotes forest management and fuels reduction on high-priority lands within the WUI, and the Project assists in that endeavor. *See* Doc.6-3,pp.6,45; Tri-County Fire Working Group, *Regional Community Wildfire Protection Plan*, Ex.12.

DNRC has since 2005, fulfilled these mandates in part by working cooperatively to establish modeling for Montana's priority watersheds. A summary of this modeling activity includes:

- 2005 - DNRC began modeling data statewide;
- In 2008, DNRC received and then subawarded several federal grants related to watershed restoration and municipal watershed;
- In 2010, the Montana Statewide Assessment of Forest Resources has developed, allowing for live-scenario building; and
- In 2014, the Governor's Proposed Priority Landscapes were submitted under the 2014 Farm Bill.

For a more detailed description of DNRC's recent modeling activities, see Rogers, Ex.10,pp.5-7.

D. Healthy Forests are Sustainable Forests

The Project dovetails with state law that involves sustainable forest management practices, including forest restoration, on Montana's forestlands. *See* Mont.CodeAnn. §76-13-702. The vegetation and road restoration treatments proposed in the Project are consistent with Mont.CodeAnn. §76-13-701(1). Forest entomologists and fire management experts in Montana agree that a significant causal factor of the current forest health trends and wildfire risk is due to the absence of diversity in the age and structure of forested stands, particularly lodgepole pine stands such as those in the Project area. The proposed thinning of green trees and replacing dead/dying trees with new stands of younger trees will help improve stand diversity in the Project area. Harrington, Ex.11,p.9. DNRC also has a concomitant duty to support the

Project's activities under the MSA and the SPA.

The Montana Legislature found in Mont.CodeAnn. §76-13-701(1) that the sustainable management of public forests in Montana is vital to conserving the State's natural resources and their economic and ecological potential for the benefit of all Montanans. Critical to that effort is the State's recognition that sustainable forest stewardship and management of Montana's public forests requires a balanced approach that ensures a stable timber supply, active restoration, healthy watersheds, fish and wildlife habitat, areas for natural processes, and allowances for multiple uses. Mont.CodeAnn. §76-13-701(3).

The Project is reflective of the intent and spirit of Montana's legislative directives and promotes the sustainable management of public forests for a multitude of benefits to Montanans. *See* Doc. 6-2,pp.1-4.

E. The Project Protects Activities that Rely on Forest Service Lands.

DNRC is directed to promote a viable forest, wood products industry, and other businesses and individual activities that rely on public forest lands. Mont.CodeAnn. §76-13-702(4). The Project will advance fuel reduction efforts and forest restoration work that promotes forest health, while protecting valuable timber stands within the area, and promoting forest-based employment activities (recreation and timber management) that rely on the USFS lands. The commercial timber and other work involved in the Project will create an

estimated 17 direct and 26 indirect jobs over the life of the Project and contribute $817,000 in direct labor income and $1,413,000 in total labor income in the economic impact area. FEA, Doc.6-4,p.160.

The Montana Legislature further directed DNRC to represent the State's interest in the federal forest management planning and policy process and to participate in and facilitate collaboration between traditional forest interests in reaching consensus-based solutions on federal land management issues. Mont.CodeAnn. §76-13-702(5),(10). TMWCC is a good example. Again, prudent statewide management requires multi-jurisdictional cooperation.

V. WATERSHED PROTECTION IN WESTERN STATES

DNRC's increased focus on the protection of municipal watersheds flows from the growing western awareness of the effects of catastrophic wildfires not only on infrastructure but on sediment/debris loads. High intensity fires are resulting in exponential increases in debris and sediment loads to water sources and municipal watersheds. Dredging and rehabilitation can be cost-prohibitive and take years.

Western communities have observed the aftermath of catastrophic wildfires on municipal watersheds and are taking action on watershed protection. The rainstorms after the 2002 Hayman fire in Colorado, which followed the 1996 Buffalo Creek fire, resulted in over 1,000,000 cubic yards of sediment

accumulating in Denver Water's (Denver) Strontia Springs Reservoir. http://www.denverwater.org/supplyplanning/watersupply/partnershipuSFS/; USDA Press Release, *Partnership to Protect America's Water Supply* (July 19, 2013), Ex.9. Denver spent approximately $26,000,000 on debris/sedimentation removal, water quality, reclamation and infrastructure. *Id.* The 2000 Cerro Grande fire in New Mexico increased the sediment accumulation rate for the Los Alamos Canyon Reservoir 140 times over that of the previous 57 years and generated $72,400,000 in emergency rehabilitation/mitigation costs. *Santa Fe Municipal Watershed Plan, Revision April 2013* (Santa FeMWP) Ex.13,p.3; Ex.9,p.2. The 2011 Las Conchas Fire caused Santa Fe and Albuquerque to shut down intakes due to ash accumulation. Ex.9,p.2. Cities like Santa Fe and Denver are partnering with the USFS to treat municipal watersheds by thinning trees and removing ground cover to reduce the threat of severe wildfire. *Id.;* Ex.13; http://www.denverwater.org/supplyplanning/watersupply/partnershipuSFS/. [3] USFS implemented its *Western Watershed Enhancement Partnership* to work with local water users to mitigate wildfire risks to water supplies and established its "Forests to Faucets" project, to rank and prioritize treatment of high-risk forests in municipal and agricultural watersheds, http://www.fs.fed.us/ecosystemservices/FS_Efforts/forests2faucets.shtml, Ex.14;

[3] Santa Fe estimated suppression/ rehabilitation/reservoir costs ranging from approximately $90,000,000 to $288,000,000 for a 10,000 to 40,000-acre wildfire. Santa FeMWP, Ex.13,p.1.

Ex.9. Under "Forests to Faucets," the Tenmile ranks in the 71-80 percentile for risk of wildfire and importance for drinking water. Ex.14,pp.3-5. The Project is part of this west-wide proactive response to municipal watershed protection and Montana's emerging mandate to protect and assist with watershed protection.

VI. FIRE SUPPRESSION

Contrary to Plaintiffs' implication, fire suppression is not an endeavor easily dismissed. The Flume and Reservoir are located in rugged terrain. Without thinning, the density of fuels will result in a high intensity ground fire. Doc 6-5,pp.10,14. The projected heat intensity, flame height, rate of spread, and rugged terrain of downfall will make it extremely risky for firefighters to engage any wildfire on the ground. *Id.*(with no action, flame length doubles and fireline intensities triple); Doc.6-9,p.16; *see* Black Mountain Fire discussion *infra;* USFS "*Western Bark Beetle Strategy, Human Safety, Recovery and Resiliency*" (June 11, 2011) (*Western Bark Beetle Strategy*), Ex.15,p.6 .

DNRC is the lead wildland firefighting agency for the State and has a vested interest in minimizing wildfire. It is a member of the Northern Rockies Coordinating Group (NRCG) comprised of federal, state, and local government firefighting and law enforcement agencies in Montana, Northern Idaho, North Dakota, South Dakota, and Wyoming. (http://www.fs.fed.us/r1/fire/nrcg/). Harrington, Ex.11,p.8. NRCG coordinates wildland firefighting in these regions,

dispatching resources to the highest priority wildfires consistent with regional and national dispatch and fire management agreements. *Id.* When wildfires escape initial attack, they are managed by progressively larger, more qualified incident-management teams. *Id*. DNRC and local governments work with federal partners to suppress fires on federal lands and federal partners work with DNRC and local governments to suppress fires on state and private lands. *Id*. Fire does not recognize ownership boundaries and the land management of one partner affects the ability to fight wildfires of another.

DNRC has historically participated in fire suppression on numerous fires originating on federal lands. *Id*. A significant number of those federal fires moved to private or state land. *Id*. Given the forest fuel condition and remote location, a wildland fire originating in the Project area during high to severe fire danger would not only threaten the City's water supply, but would likely result in a large wildfire that could spread to adjacent state and private lands. *Id.*

Fire suppression is not without cost. *See 2013 Update State of Montana Multi-Hazard Mitigation Plan Statewide Hazard Assessment, Montana Disaster and Emergency Services*, Chapter 4.4.1 (DES), Ex.16. In the last five fiscal years, DNRC has spent State tax dollars in the following amounts on fire suppression:

Fiscal Year	Total Cost	Reimbursements	Net Cost
2010	$6,695,714	($1,047,748)	$5,647,966
2011	$3,293,346	($807,571)	$2,485,775
2012	$20,357,103	($3,596,721)	$16,760,382
2013	$71,224,976	($14,000,275)	$57,224,701
2014	$19,658,832	($8,038,987)	$11,619,844

Harrington, Ex.11,p.7.

Fire protection in the immediate Project area is the responsibility of the USFS with Baxendale Fire Department (for the County) having responsibilities for the Flume and private land. DNRC's direct protection responsibility begins approximately 3 miles north of the Project area. *Id*.pp.5-7.

In the Helena area, safe and aggressive initial attack and unified command among local, state, and federal wildfire agencies is used for wildland fires to minimize fire spread and threats to firefighters, the public, and property. *Id*. A large wildland fire in the Project area would likely involve: USFS, DNRC, Baxendale Fire Department, and the Lewis and Clark County, Montana City, and Clancy Fire Departments. *Id*. When the fire location is determined, the entities with primary protection responsibility would establish unified command and the other fire entities will be present in a mutual-aid capacity. *Id*. It is probable that any large wildfire occurring within the Project area would involve DNRC firefighting resources and managers, and involve the expenditure of significant state funds directly related to fire suppression efforts. *Id*.

The 2012 Black Mountain Fire occurred in the Helena National Forest near the Project site. *Id*. The remoteness and abundant snags delayed initial ground attack due to safety. The decision was made to transfer the risk to air resources until it was safe to get ground resources on scene. The air resources were made up of DNRC helicopters, contract helicopters, and a heavy air tanker. Once the risk of rapid fire movement was removed, ground resources were able to attack the fire. The two- acre fire cost approximately $1,300,000 to suppress. *Id*.

Another example of overlapping jurisdiction near Helena was the 2000 Canyon Ferry Complex Fire. The Complex burned approximately 44,000 acres on state, private, and federal land. Western Forestry Leadership Coalition, "*The True Cost of Wildfire in the Western U.S"* (2010) Ex.17,p.6. The cost of suppression for the Complex was approximately $9,500,000. *Id; see also* DES, Ex.16,p.4-20.

VII. INJUNCTION SHOULD BE DENIED

A. Catastrophic Wildfire Risk

Before addressing the factors in *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008)(hereinafter *Winter*), the State is compelled to address Plaintiffs' condescending diminishment ("fire card") of the public interest in mitigating potential, catastrophic wildfire risk to the City and its water supply. Plaintiffs' fire-danger discussion is careless and superficial. Citations are incorrect

or non-existent. Studies are cited for the wrong proposition and information is not on point.

For example, Plaintiffs' confuse crown fires with ground fires. On p.23, Doc.6-1, Plaintiffs take issue with USFS's contention that untreated stands would result in fires that "burn intensely, with long duration, and would be difficult to suppress," citing to Ex. 3[Doc.6-4],p.4, (similar citation Doc.6-1,p.25). This citation is the table of contents for the FEA. Presuming Plaintiffs meant Exhibit 4[Doc.6-5] (USFS, *Fire and Fuels Specialist Report (Report)*) their discussion is still off-base. Plaintiffs cite a study by "Simard et al. 2011" as being contrary to the quoted statement. The USFS cites the Simard Study only for the proposition that the majority of the lodgepole pine in the Project area has entered the "gray stage," not for fire intensity. Doc.6-5,p 4. The Simard Study evaluated the correlation between beetle kill and "crown fires," (treetops). The USFS *Report* documented an increase in rate of spread, fireline intensity and heat per unit area for ground fires because of the dead and woody debris as the gray trees begin to fall under the FEA's no action alternative. Doc.6-5,pp.10,14. The *Report* further found that "flame lengths would double and fireline intensities would more than triple." *Id.* The conclusions were based on modeling by the USFS, not the study cited by Plaintiffs. The Simard Study (easily located on the internet[4]) was not

[4] http://www.esajournals.org/doi/pdf/10.1890/10-1176.1

ignored or kept from the public. The crown fire analysis was not on-point to the ground fire concern.

Similarly, Plaintiffs' argument and citation on Doc.6-1,p.24 to "Scott and Burgan (2005)" is convoluted and lacks detail. The Study is again not attached, but available on the internet.[5] Plaintiffs appear to quote from this 80-page study but without specific citation and context, it is impossible to follow.

Plaintiffs next cite an undated USFS document, Exhibit 15[Doc.6-16], discussing the spruce bark beetle. Setting aside that this folksy, two-page document gives lay advice on subalpine fir and spruce, it supports the USFS's Project analysis by stating "[o]nce the trees fall to the ground, a fire burning through the area may burn very hot and damage the soils." *Id.*p.1. In a more sophisticated analysis, the USFS found in its "*Western Bark Beetle Strategy*":

> As dead branches and trees fall, a heavy fuel bed is created, which poses an increased risk of a surface fire. The outbreak increases the number of acres of municipal watersheds and WUI (wildland-urban interface) in need of treatment to protect communities and infrastructure from fire…. The lack of safe egress and intense burning conditions created by standing beetle killed trees or down heavy slash, making fighting these types of fires extremely dangerous to fire fighters.

Ex.15,p.6; *see* Mont.CodeAnn.§76-13-115(1)(safety is paramount).

Plaintiffs also summarily state that logging and slash will increase the likelihood of wildfires, "at least in the short-term," Doc.6-1,p.20, citing Exhibit

[5] http://www.fs.fed.us/rm/pubs/rmrs_gtr153.pdf.

14[Doc.6-15]. Exhibit 14 is a one page excerpt from a "Little Slate" final environmental impact statement. There is no context and no description of the National Forest or the alternatives being considered.[6] There is insufficient detail to warrant the Court's attention.

The Plaintiffs offer no wildfire expertise. Their information is not on point to the documented, substantial wildfire risk. Careless drafting and selective misdirection characterize their argument and insult fire professionals and the people in the Helena community who live with the wildfire risk.

B. Plaintiffs Fail Under the *Winter* Factors

Plaintiffs clearly fail a *Winter* analysis. *Winter* requires a plaintiff seeking a preliminary injunction prove all of the following: 1) likelihood of success on the merits; 2) it is likely to suffer irreparable harm absent injunctive relief; 3) the balance of equities tips in its favor; and 4) injunctive relief is in the public interest. *Winter*, 555 U.S. at 20. Although the Ninth Circuit has recognized leeway in the analysis of these factors for Endangered Species Act claims under *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011), Plaintiffs' assertions are far too general to qualify even under this reduced standard. Moreover, this Court set the applicable standards for this case in *Alliance for the Wild Rockies et al. v.*

[6] This case appears to be Alliance for the Wild Rockies v. Brazell, 3:12-CV-00466-MHW, 2014 WL 3732649 (D.Idaho July 25, 2014)(injunction denied), a USFS thinning project five times the size of the Project.

Krueger et al, CV 12-150-M-DLC, 2014 WL 3865936 (D.Mont. August 6, 2014)(hereinafter *Krueger)*.

Plaintiffs' one-sided analysis must fail by law. Plaintiffs never acknowledged the interest and meaning of protecting the City's primary water supply, as opposed to an isolated recognition of "infrastructure." Plaintiffs presented no irreparable harm and no interest that would outweigh the treatment of the narrow Flume corridor and the immediate area around the fenced, manmade Reservoir to mitigate proactively and prudently the risk of catastrophic wildfire to prevent the loss of the City's primary water supply and damages in the millions of dollars.

1. Likelihood of Success on the Merits

Plaintiffs are not likely to prevail on the merits. While this issue is best explained by the Federal Defendants in their Response Brief, the USFS response to each Plaintiff demonstrates that their claims are without merit: 1) Letter to Sara Jane Johnson (Willow Creek, MT), December 13, 2013, [Doc.6-11]; and 2) Letter to Steve Kelly (Bozeman) December 13, 2013, Ex.18.

Plaintiffs further claim a fatal lack of public participation, Doc.6-1,p.17, and yet have known of the efforts to protect the City's water supply since 2008. FEMA issued its Final Environmental Assessment in December 2008, on the grant to the City for thinning along the Flume – similar project, in primarily the same

area, with the same purpose as the Project. FEMA FEA Ex.2. Steve Kelly commented on the FEMA FEA; he was "surprised" by the project and cited "lack of adequate public notice, and participation, prior to initiating the NEPA (EA) process," similar to comments in this case. *Id.*,p.8.2. In 2008, the City convened the TMWCC to discuss in open meetings options to protect its water supply. Alles, Ex.1,pp.10-12; Ex.4. Information and opportunities were available to the public, including the Plaintiffs, to participate and learn more about the issues. *Id.*; Gatchell, Ex.6,pp.2-4. Mr. Kelly is a member of the Board for the Alliance for the Wild Rockies, a member of the TMWCC that provided consensus recommendations to the City. Alles, Ex.1,p.11; TMWCC Recommendations, Ex.5; http://www.wildrockiesalliance.org/about/board.html.

2. Irreparable Harm

Plaintiffs' claims of irreparable harm due to lack of opportunity to recreate, spiritually enjoy, and otherwise observe the Project area are far too general, appear pretextual, and are not credible. Doc. 6-1,p.19; Docs.6-10,6-14; *See Krueger*, *6-*7. Plaintiffs appear to take this criterion for granted. The Project footprint is a narrow band along the Flume on a steep hillside and an area around the fenced, manmade Reservoir among mostly beetle-killed trees and downfall. The opportunity for recreational/spiritual/observational value would seem to be limited along the narrow Flume route and the fenced Reservoir surrounded by

gray trees and downfall, as opposed to the other available 98% of the watershed. *See* Gatchell, Ex.6,p.5.

Land disturbance does not appear irreparable; the proposed treatments are consistent with standard silvicultural and operational treatments in similar conditions across Montana. Harrington, Ex.11,p.9. Plaintiffs do not seem to take issue with the Flume footprint (similar to FEMA FEA), but only the area around the Reservoir. This represents approximately 332 acres, 1.2% of the watershed. Alles, Ex.1,p.4. The "clear cut" in this area includes leaving healthy "leave trees" such that the area will not be devoid of vegetation. Docs.6-3,pp.15-16; 6-4,pp.11-14. The Reservoir is fenced, so it is not a water source for wildlife. The band of disturbance is narrow.

The no-action alternative will increase harm through higher fire intensity, damaged soils, and by creating a situation where firefighting will be difficult. Ex.15,p.6; Doc.6-5,pp.10,14; Harrington, Ex.11,p.6 (Black Mountain Fire); FEMA FEA Ex.2,p.1-1; *Krueger*, *8 (catastrophic wildfire can be devastating to the environment); Doc.6-7,p.46 (fire destroys bear food). The Project will reduce the intensity of any fire, reduce fire damage to soils, and allow for healthy regeneration. Docs.6-5,pp.10,14;6-9,pp.1,50-51. The Project is not in a wilderness area untrammeled by man, but in a National Forest managed for multiple uses, including uses related to forest health and water-supply protection.

3. Balancing of Interests and Public Interest Weigh Heavily Against an Injunction

In this case, the balancing of interests and the public interest are inseparably intertwined. Plaintiffs present questionable, general personal interests in the limited Project area and the disturbance is minimal compared with the size of the watershed. In contrast, the risk to the City and potential damages are real and completely ignored by the Plaintiffs. The primary interests that weigh against an injunction include:

- USFA found that the no action will result in high intensity, faster spreading surface fires, doubling the flame heights and tripling fireline intensities. Doc.6-5, pp.10,14 (*USFS Fire and Fuels Specialist Report*).
- FEMA found the Tenmile drainage at risk for catastrophic wildfire. A wildfire could denude the watershed and cause erosion. FEMA FEA, Ex.2,p.1-1.
- Firefighting in the Project area will be difficult and expensive. Black Mountain Fire, Harrington, Ex.11,p.6; Ex.15,p.6; Mont.CodeAnn. §76-13-115(1)(safety is paramount).
- Plaintiffs present no expert evidence on the fire threat.
- Costs to City of a catastrophic wildfire would be well over $25 million and service from Tenmile would be lost for approximately 23 months, while the $30 million investment in the Tenmile Treatment Plants sits idle. Alles, Ex.1,pp.7-9; FEMA FEA, Ex.2,pp.1-1,1-2.
- A wildfire in Tenmile puts Helena at risk. Alles,Ex.1,pp.5-6.
- The Project is closely tailored to protect municipal infrastructure. Approximately 332 acres (1.2% of the watershed) will be disturbed around the fenced, manmade Reservoir. Alles, Ex.1,p.4.

An injunction thwarts proactive planning by local communities tailored to mitigate specific threats to their water supplies. It forestalls good forest

management to strategically reduce fuel loads and improve forest health. There must be room in this case to recognize the uncontroverted threat of wildfire to the City and its infrastructure without waiting for the catastrophe to occur to validate the damage. While the kinds of environmental issues raised by the Plaintiffs represent important values in general, they do not do so under the facts of this case when compared to the overwhelming public interest in completing the mitigation to effectuate the environmental and public safety purposes of the Project.

CONCLUSION

For the reasons set forth above, Plaintiffs fail to prove all of the *Winter* factors and an injunction should not issue.

Respectfully submitted this 13th day of August 2014.

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CERTIFICATE OF SERVICE

I certify that on August 13, 2014, I served a copy of the foregoing *State of Montana Attorney General and Montana Department of Natural Resources and Conservation's Amicus Curiae Brief in Opposition To Preliminary Injunction* via Court's CM/ECF system on the following counsel of record:

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(d)(2)(E)

I certify that this brief contains 6456 words, exclusive of caption and certificates of service and compliance.

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