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STATE OF MONTANA

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

<p>ALLIANCE FOR THE WILD ROCKIES, Plaintiff,</p> <p>v.</p> <p>CHRISTOPHER SAVAGE, et al., Defendants,</p> <p>and</p> <p>KOOTENAI FOREST STAKEHOLDERS COALITION, a Montana Corporation and LINCOLN COUNTY, a political subdivision of the State of Montana,</p> <p>Defendant-Intervenors.</p>	<p>Cause No. 9:15-cv-00054-DLC</p> <p>AMICUS CURIAE BRIEF OF THE STATE OF MONTANA ATTORNEY GENERAL IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF CROSS MOTIONS FOR SUMMARY JUDGMENT</p>
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Pursuant to the Court's Order of November 20, 2015, the State of Montana Attorney General (Attorney General) hereby submits this *Amicus Curiae Brief in Opposition to Plaintiff's Motion for Summary Judgment and in Support of the United States' and Defendant-Intervenors' Cross Motions for Summary Judgment*.

Contrary to Plaintiff's assertions, the actions of the United States Forest Service and United States Fish and Wildlife Service (the Agencies) in developing the East Reservoir Project (Project) are not arbitrary or capricious, or in violation of federal law. Rather, the Agencies' actions and the underlying Project have been carefully tailored to achieve multiple critical goals relating to the health of the Kootenai National Forest and the species (endangered and otherwise) which reside there, including the forest's human neighbors. Plaintiff's motion should be denied and the cross motions should be granted.

INTRODUCTION

The State of Montana takes forest management very seriously, as “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.” Mont. Code Ann. § 76-13-701(2). The Montana Legislature has determined “that all public forests in Montana should be sustainably managed to maintain biodiversity, productivity, regeneration capacity, vitality and potential

to fulfill relevant ecological, economic and social functions[,]” Mont. Code Ann. § 76-13-701(2), and “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 and fish and wildlife habitat, areas for natural processes and allowances for multiple uses.” Mont. Code. Ann. § 76-13-701(3). In order to secure these goals, the Montana Legislature has made it “the policy of the state to promote the sustainable use of all public forests within the state through sound management and collaboration with local, state, and federal entities.” Mont. Code Ann. § 76-13-701(5).

This is a particularly important goal in northwestern Montana. The United States Forest Service (USFS) owns approximately 72 percent of the land in Lincoln County, and the county’s heavily forested landscape puts it at particular risk of wildland fire. *See* Lincoln County Community Wildfire Prevention Plan (Updated June 2013) at 3 (attached hereto as Ex. 1). The roughly 90,000-acre Project area in Lincoln County lies within the over 1.4 million acres of Kootenai National Forest land that Governor Bullock nominated as a priority landscape pursuant to section 8204 of the 2104 Agricultural Act, Pub. L. 113-79, 128 Stat. 915. Priority landscapes are those at significant risk of wildland fire or that face other major threats to forest health. *Id.* at 916. These acres were nominated at the request of Defendant-Intervenor Kootenai Forest Stakeholders Coalition and

reflect the exceptional collaborative efforts that have taken place among a diverse group of stakeholders in northwestern Montana. Letter to U.S. Forest Service, April 7, 2014 (attached hereto as Ex. 2). This collective approach is especially vital as wildfire and watersheds do not recognize land ownership or political boundaries. Prudent resource management therefore requires neighborly cooperation.

It is against this backdrop that the Attorney General appears in this case, for the Project is a paradigmatic example of the sort of holistic forest management that should be encouraged, and it is a project the State strongly supports.

I. THE PROJECT

The Project's multiple purposes and benefits illustrate its value. The Project will improve the resiliency of landscapes to enable better resistance to fire and disease and insect infestation, and will remove hazardous fuels to reduce the risks and costs of catastrophic wildland fire to both public and private land while also reintroducing fire to the ecosystem as an ecological process. FS029262-63.¹ It will enable the Kootenai National Forest to provide a variety of habitats to sustain both terrestrial and aquatic species by safeguarding or improving habitat security and water quality. *Id.* The Project will also provide important economic and

¹ Citations to the USFS's Administrative Record are "FS[bates number]".

social benefits to the community in the form of jobs, products, amenities and enhanced recreational opportunities. *Id.* The USFS's ability to carry out the Project to meet these goals was significantly advanced by the extensive public outreach and the collaborative process that led to the promulgation of the Final Environmental Impact Statement and Record of Decision for the Project, a process in which the State participated. *See, e.g.*, FS029123 (Letter from Kootenai Forest Stakeholders Coalition); FS000634 (Letter from Montana Department of Environmental Quality); Letter to U.S. Forest Service from DNRC Libby Unit Manager Mark Peck regarding East Reservoir Project, January 21, 2011 (attached hereto as Ex. 3).

II. THE ATTORNEY GENERAL'S INTERESTS

In addition to the importance of the Project for the people, species and landscape of northwestern Montana, the Attorney General is also strongly supportive of the Project because it advances a slew of other important State interests. 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 responsibility to promote the interest of all the citizens of the State and represent the State in all litigation of a public character. *Id.* This authority specifically includes litigation over federal forest management projects in general, *see* Mont. Code Ann. § 76-13-154(1), and litigation involving designated priority landscapes--such as this case--in particular. Mont. Code Ann. § 76-13-154(2)(b). The Attorney General also sits as a member of the Montana Board of Land Commissioners, Mont. Code Ann. § 2-15-501(8), which is responsible for the care, management and disposition of state lands. Mont. Code Ann. § 77-1-202. There are 4,092 acres of State Trust Lands within the Project area and another 243 acres of such lands adjacent to it. Declaration of Robert A. Harrington (Harrington), ¶ 10(c)(ii) (attached hereto as Ex. 4).

Through the Department of Natural Resources and Conservation (DNRC), the State also has extensive forest management responsibilities. As relevant to this case, these include wildland fire protection, hazardous fuels mitigation, forest health programs, the State Forest Assessment/Forest Action Plan, and the development of state forest policy. Harrington, ¶ 4. The Montana Legislature has specifically tasked the DNRC with ensuring the protection of land under state and private ownership and minimizing property and resource loss from fire through wildland fire suppression. *See* Mont. Code Ann. §§ 76-13-104, -115. As the

State's lead firefighting agency, the DNRC spends significant amounts of taxpayer dollars every year on fire suppression efforts. Harrington, ¶¶ 7-8. The following chart shows how large these costs are for the State:

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

Id., ¶ 7.

As part of its fire suppression duties, the DNRC is a member of the Northern Rockies Coordinating Group (NRCG), which is made up of state, federal and local firefighting and law enforcement agencies in Montana, North Dakota, Wyoming, part of northern Idaho and part of South Dakota. *Id.*, ¶ 8. The NRCG coordinates the fighting of fires in this region, and can dispatch members' resources to fight wildland fires that are not controlled on initial attack. *Id.* Consequently, the DNRC works closely with its federal partners to combat fires on federal lands, and federal agencies work closely with the DNRC to put out fires on state and private lands. *Id.* Since fire is heedless of land ownership status, forest conditions on federal land can affect the ability to fight fire on state and private land and vice versa. *Id.*, ¶¶ 8-9.

This is a particularly acute consideration in the Project area since the State and the USFS share fire protection responsibilities there. Harrington, ¶ 5. The

State is responsible for directly protecting 1,303 acres of land within the Project area, and its responsibility extends to approximately 50 percent of the eastern and southern boundaries of the Project area. *Id.* Moreover, unified command procedures are employed for firefighting within the Project area in order to minimize a fire's spread and to better protect the safety of the public, firefighters and property in the Project area. *Id.*, ¶ 6. This means that once a fire's location is determined, the entity with direct protection responsibility takes command of the fire response efforts, and the other wildfire agencies (*e.g.*, federal, state or local) provide aid and assistance. *Id.* As a result, it is highly likely that any large wildland fire occurring within the Project area will involve the expenditure of State funds in the suppression effort and the deployment of DNRC firefighting resources and managers. *Id.*

Indeed, during the 2015 fire season, the Dunn fire burned 65 acres and the Weigle fire burned 94 acres within or immediately adjacent to the Project area. *Id.*, ¶ 9. Both state and federal personnel worked to contain these fires, though the majority of the burn area fell within the DNRC's primary protection responsibilities. *Id.* Forest management activities previously carried out on the lands burned by these fires were essential to fire managers' ability to safely and quickly contain these fires. *Id.* These activities, which made such a difference during the 2015 wildland fire season, are very similar to those proposed as part of

the Project, and the continued ability of state, local and federal personnel to safely fight fires for the protection of communities and the landscape depend on efforts such as the Project. *Id.*

While safe and prudent forest management to minimize and contain the risk of wildland fire is an issue of statewide importance, there is a special consideration that makes it particularly critical in the Project area. The Project is located within the Environmental Protection Agency's National Priority Listing for the Libby Amphibole Asbestos Superfund site, and is immediately east of Operable Unit 3 (OU3), which is an area contaminated with asbestos from the W.R. Grace vermiculite mine. The city of Libby is potentially at significant risk from any wildland fire within OU3. Harrington, ¶ 10(e)(ii);

<http://cumulis.epa.gov/supercpad/cursites/csitinfo.cfm?id=0801744> (last accessed November 30, 2015).² For the last several years, multiple state, federal and local agencies have been evaluating the risks posed to the public and wildland

² Courts may take judicial notice of government websites under Federal Rule of Evidence 201. *E.g.*, *Daniels-Hall v. National Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010) (judicial notice of school district website); *Hawk Aircargo 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*, 499 F.3d 1218, 2007 WL 2421754, *6 (10th Cir. Aug. 28, 2007); *Denius v. Dunlap*, 330 F.3d 919, 926 (7th Cir. 2003).

firefighters³ by wildland fires in this area. Harrington, ¶ 10(e)(ii). It is possible that wildland fire occurring in the Project area could spread into OU3, which might then lead to the dispersal of airborne asbestos in smoke and convection columns throughout the Kootenai River and Flathead Valleys. *Id.*, ¶ 10(e)(iii). The health risks such asbestos-laden convection columns could pose, not least because of the potential for the smoke to be trapped by weather inversions for extended periods in the Kootenai and Flathead valleys, could be catastrophic. *Id.* The forest management activities contemplated by the Project play an important role in ameliorating that risk. *Id.*, ¶ 10(e)(iv).

The Project also advances the State's interest in ensuring landscape scale forest restoration. As noted above, the Project area is part of a priority landscape designated at the request of Governor Bullock in 2014. *See also* Harrington, ¶ 10(a)(ii). The Project benefitted as well from the comprehensive landscape assessment carried out by the USFS as part of the design and development of the Project. *See* FS 6936, *et seq.*, FS 29397. The Project contemplates important treatment efforts, including:

- 1) 8,845 acres of commercial timber harvest and associated fuel treatment;

³ As an example, wildland firefighters must employ specialized protective gear, including respirators, when engaged in wildland-fire suppression within the Libby Amphibole Asbestos Superfund site. Harrington, ¶ 10(e)(ii).

- 2) 5,775 acres of non-commercial thinning in order to improve growing conditions and to increase the composition of shade tolerant species in managed sapling-sized stands; and
- 3) 4,257 acres of prescribed fire treatment in order to restore natural fire regimes, reduce hazardous fuel loads and create ridgeline fuel breaks.

Id., ¶ 10(a)(i).

In addition, the Project provides critical support to Montana's wood products industry. It is intended to result in 39,000,000 board feet of sawlogs and 61,000 tons of non-sawlog materials, which will support the creation or retention of 629 jobs. Harrington, ¶¶ 10(d)(i)-(iii). Job creation and retention is of particular importance in northwestern Montana, which suffers from some of the highest unemployment rates in the State. See <http://www.lmi.mt.gov/> (last accessed November 30, 2015). Plaintiff's unwarranted efforts to halt the Project, were they to be successful, could have direct adverse effects on at least three Montana sawmills. Harrington, ¶ 10(d)(iv). Furthermore, beyond these immediate economic consequences, the impact to these mills would also affect the State's forest management abilities, since the maintenance of forest products markets is directly interrelated with the State's ability to carry out its mandate to utilize forested state trust lands to generate revenue for institutional trust beneficiaries. Mont. Code Ann. §§ 77-1-202(1)(a) and (b); Harrington, ¶ 10(d)(v).

Furthermore, through the DNRC's Forests in Focus Initiative, *see* <http://dnrc.mt.gov/divisions/forestry/forestry-assistance/forest-in-focus> (last accessed November 30, 2015), the State also supports partnerships and collaboration among stakeholders to ensure optimal long-term forest management and health. As part of this effort, the DNRC's Libby Unit manager has participated as a member of Defendant-Intervenor Kootenai Forest Stakeholders Group, which played a valuable role in the development of the Project. FS 29397-98; Harrington, ¶¶ 10(b) and 11. The DNRC has also worked closely with Defendant-Intervenor Lincoln County in the development and support of the Project. *Id.*, ¶ 11.

Last but certainly not least, the State, through the DNRC, and the USFS have carefully coordinated on road access issues as part of the design and scoping of the Project, since access to much of the state trust land within and adjacent to the Project area is reliant on USFS roads that will be either utilized or built as part of the Project. Harrington, ¶ 10(f). The USFS also needs access across state trust lands to manage some of the federal land within the Project area. *Id.* The Project, therefore, provides the opportunity for the State and the USFS to enter into a cost share agreement for road management and maintenance in the Project area to help conserve and best utilize the resources of both. These access issues are vital to the

Comment [A1]: JDW: Based on the edits and comments from Bob and Mark, I think this sentence is adequate and accurate based on our current information. If we get more information about any existing cost share agreements on Monday, we can plug that into Bob's declaration and here. I don't think I need to plug anything to back up this sentence as-is into Bob's affidavit, but let me know if anyone feels differently.

successful management of both state and federal forest land as well as to safe and effective efforts to combat wildland fire. *Id.*

III. PLAINTIFF'S SUMMARY JUDGMENT MOTION SHOULD BE DENIED AND THE CROSS MOTIONS FOR SUMMARY JUDGMENT SHOULD BE GRANTED.

The briefs of the United States (Dkt. 33) and of Defendant-Intervenors (Dkt. 40) in opposition to Plaintiff's motion for summary judgment and in support of their own cross motions for summary judgment amply demonstrate that Plaintiff's claims are ill founded and based on a selective and distorted reading of the administrative record. Plaintiff's conduct is particularly disheartening after the USFS conducted an extensive public outreach effort to solicit and address comments and concerns about the scoping and design of the Project, one in which Plaintiff failed to meaningfully participate. *See, e.g.*, FS029127-33 and FS029144-47. Indeed, Plaintiff completely failed to raise one of its major arguments, regarding an ostensible increase in the total number of linear road miles within the Tobacco Bears Outside Recovery Zone, during the comment process on the draft environmental impact statement for the Project. FS001732-44, 001754-63.

As the United States, Dkt. 33 at 5-9, and Defendant-Intervenors, Dkt. 40 at 8-10, correctly argue, Plaintiff's failure to raise this and other issues during

the administrative process should result in a finding that these unraised claims have been waived. Nor, as set forth in the briefs of the United States and Defendant-Intervenors, are these claims substantively justified. But the Attorney General also believes it important for this Court to be aware that Plaintiff's road miles claim, were it to be embraced, has the potential to significantly hamper prudent forest management practices throughout the Kootenai, Lolo and Idaho Panhandle National Forests pursuant to the 2011 Access Amendments.

These amendments to the USFS's Forest Plans for each of these three National Forests include guidelines regarding motorized vehicle access and security to ensure that the USFS meets its obligations under the Endangered Species Act (ESA), 16 U.S.C. §§ 1531, *et seq.* During the scoping process for the Access Amendments, the State expressed its interest in the need to preserve flexibility for prudent forest management while simultaneously ensuring the necessary legal protections for grizzly bears under the ESA. Harrington, ¶ 10(g). As discussed above, reasonable road access is vital for firefighting and other important forest management activities. Plaintiff's attempt in this case to count only new roads while discounting the decommissioning and status change of other roads—which, in fact, ensures that the Project will not lead to any net increase in road miles within the Project area (and thus that the Project is in compliance with

the Access Amendments)--runs directly counter to what the law requires and to what the health of the forest and the species that inhabit it demand. It should not be countenanced.

CONCLUSION

The East Reservoir Project is a carefully designed effort to safeguard and improve the health of over 90,000 acres of forest land within the Kootenai National Forest. It is the product of careful design and review and of significant stakeholder collaboration, and advances multiple important interests of the State of Montana. And it is fully compliant with the law. Plaintiff's motion for summary judgment should be denied and the cross motions for summary judgment should be granted.

Respectfully submitted this 30th day of November, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the clerk of the court for the United States District Court for the District of Montana, using cm/ecf system. Participants in the case who are registered cm/ecf users will be served by the cm/ecf system.

Participants in this case who are not registered cm/ecf users will be served via U.S. mail, postage prepaid.

Dated: November 30, 2015

/s/ Jeremiah D. Weiner

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule Local Rule 7.1(d)(2), I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 2,994 words, excluding certificate of service and certificate of compliance.

/s/ Jeremiah D. Weiner

JEREMIAH D. WEINER