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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

FOREST SERVICE EMPLOYEES FOR
ENVIRONMENTAL ETHICS,

Plaintiff,

vs.

UNITED STATES FOREST SERVICE,
UNITED STATES FISH & WILDLIFE
SERVICE, and NATIONAL MARINE
FISHERIES SERVICE,

Defendants.

Cause No. CV-08-43-M-DWM

SECOND AMENDED COMPLAINT

INTRODUCTION

1. In this Second Amended Complaint Plaintiff Forest Service Employees for Environmental Ethics (FSEEE) challenges the actions of Defendants United States Forest Service, United States Fish and Wildlife Service, and National Marine Fisheries Service on these agencies' environmental analyses, conclusions, and decisions regarding the aerial application of chemical fire retardant.

2. As required by litigation in a related matter, *Forest Service Employees for Environmental Ethics v. United States Forest Service*, CV-03-165-M-DWM (D. Mont), the

Forest Service entered into formal consultation with the United States Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) on the aerial application of chemical fire retardants on national forests and conducted an environmental analysis on the aerial application of chemical fire retardants on national forests. The Forest Service eventually issued an Environmental Assessment (EA) on the aerial application of chemical fire retardants on national forests.

3. In response to the request for formal consultation, both NMFS and FWS eventually issued a Biological Opinion (BiOp) that determined that the aerial application of fire retardant results in jeopardy for threatened and endangered species under its purview, however both NMFS and FWS offered a Reasonable and Prudent Alternative (RPA) that, if adopted by the Forest Service, would allow the Forest Service to avoid jeopardy.

4. The Forest Service adopted the RPAs and issued a Decision Notice (DN) and Finding of No Significant Impact (FONSI) on the aerial application of chemical fire retardant.

5. As more fully set forth below, FSEEE alleges here that the actions of the Defendant agencies in this matter were arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law under the Endangered Species Act (ESA), 16 U.S.C. § 1636(a)(2), the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, and the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.* FSEEE seeks declaratory and injunctive relief to mitigate, redress, or avoid irreparable injury to the environment and its interests under the law.

6. If FSEEE prevails, FSEEE will seek an award of costs and attorneys' fees pursuant to the ESA and/or the Equal Access to Justice Act, 28 U.S.C. § 2412.

JURISDICTION

7. This action arises under the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*; and the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*; as more fully set forth below. This Court has jurisdiction under 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1361 (mandamus); 28 U.S.C. §§ 2201-02 (declaratory judgment and further relief); and the APA, 5 U.S.C. §§ 701 *et seq.*

8. An actual, justiciable controversy exists between Plaintiff and Defendants. Plaintiff has exhausted any administrative remedies. This Court has the authority to grant the relief requested.

9. The DN and FONSI are the final administrative determination of the Department of Agriculture.

10. The FWS BiOp is the final administrative determination of the Department of the Interior.

11. The NMFS BiOp is the final administrative determination of the Department of Commerce.

VENUE

12. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e), LR 1.9(e) and 1.11(a)(1). The Forest Service Northern Region headquarters is located in this Division. The Forest Service regularly uses chemical fire retardant to fight wildfires on national forests within this District. The chemical retardants used by wildland firefighting agencies are tested and approved by the United States Department of Agriculture's Missoula Technology and Development Center, located in this Division. The Forest Service also has a Fire Sciences Lab

and Smokejumper Base in this Division. Plaintiff has members who reside in this Division, and who have been injured by the Forest Service actions and activities complained of herein.

PARTIES

13. Plaintiff Forest Service Employees for Environmental Ethics is a nonprofit organization, with its principal place of business in Eugene, Oregon. FSEEE is composed of thousands of concerned citizens, present, former and retired Forest Service employees, and other resource managers. FSEEE's mission is to forge a socially responsible value system for the Forest Service based on a land ethic that ensures ecologically and economically sustainable resource management. FSEEE members hold the Forest Service and other agencies accountable for responsible and legal land stewardship.

14. FSEEE's members hike, fish, camp, photograph scenery and wildlife, and engage in other vocational, scientific, and recreational activities throughout the national forest system, including Montana. FSEEE's members derive recreational, inspirational, scientific, and aesthetic benefit from their activities within these national forests. FSEEE's members intend to continue to use and enjoy these and other areas on the national forests frequently and on an ongoing basis in the future, including this year.

15. The aesthetic, recreational, scientific, and religious interests of FSEEE's members have been and will be adversely affected and irreparably injured if the Forest Service continues to act and fails to act as alleged herein. These are actual, concrete injuries caused by the failure of the Forest Service, NMFS, and FWS to comply with mandatory duties under NEPA, ESA, the APA, and other federal laws. The injuries would be redressed by the relief sought.

16. FSEEE has exhausted any available administrative remedies. Reviewable final agency action exists and is subject to this Court's review under 5 U.S.C. §§ 702, 704, and 706.

17. Defendant United States Forest Service is an agency of the United States Department of Agriculture, and is responsible for the lawful management of our national forests.

18. Defendant United States Fish and Wildlife Service is an agency of the United States Department of the Interior.

19. Defendant National Marine Fisheries Service is part of the National Oceanic and Atmospheric Administration, an agency of the United States Department of Commerce.

BACKGROUND

20. On October 9, 2007, the National Marine Fisheries Service (NMFS) issued a Biological Opinion (BiOp) finding that the aerial application of fire retardant by the US Forest Service would jeopardize the continued existence and recovery of threatened and endangered species under its purview.

21. NFMS also delineated a reasonable and prudent alternative (RPA) it determined, if implemented by the Forest Service, would allow the Forest Service to avoid jeopardy.

22. The Forest Service issued an Environmental Assessment (EA) on the aerial application of fire retardant on October 10, 2007.

23. On October 11, 2007 Forest Service Chief Gail Kimbell signed a Decision Notice (DN) and Finding of No Significant Impact (FONSI) on the aerial application of fire retardant on the National Forest System.

24. On February 18, 2008 the US Fish and Wildlife Service (FWS) issued a BiOp finding that the aerial application of fire retardant would jeopardize the continued existence and recovery of threatened and endangered species under its purview.

25. FWS also delineated a RPA it determined, if implemented by the Forest Service, would allow the Forest Service to avoid jeopardy.

26. On February 18, 2008, Forest Service Chief Gail Kimbell accepted the RPA and signed a Decision Notice and Finding of No Significant Impact on the aerial application of fire retardant on the National Forest System.

27. In compliance with 16 U.S.C. § 1540(g)(2), on March 28, 2008 FSEEE sent a 60-Day Notice of Intent to Sue for violation of the ESA to the Secretaries of the Interior, Agriculture, and Commerce, as well as the Attorney General and Chief of the Forest Service.

28. The Forest Service subsequently reinitiated consultation related to Oregon coast coho salmon, and NFMS subsequently released an amended Biological Opinion on June 5, 2008, and then a Biological Opinion including Oregon coast coho salmon on July 25, 2008, and the Forest Service again accepted the RPA.

29. In compliance with 16 U.S.C. § 1540(g)(2), on August 18, 2008 FSEEE sent a 60-Day Notice of Intent to Sue for violation of the ESA to the Secretaries of the Interior, Agriculture, and Commerce, as well as the Attorney General and Chief of the Forest Service to take into account the amended Biological Opinion. Sixty days have passed since the notice was served, and the violations complained of in the notice letter are continuing at this time.

30. The ESA commands that all federal agencies “shall, in consultation with and with the assistance of” a federal wildlife agency (here, FWS and NMFS), “insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species.” 16 U.S.C. § 1536(a)(2). Interior Department regulations implement this consultation requirement by directing that formal consultation is required before a federal agency may take “any action [that] may affect listed species.” 50 C.F.R. § 402.14(a).

31. Formal consultation results in the issuance of a biological opinion by the FWS and/or NMFS. If the wildlife agency concludes in the biological opinion that the proposed action is likely to jeopardize an endangered species or threatened species, the wildlife agency may recommend reasonable alternatives to avoid the likelihood of jeopardy so that the agency action may proceed. See 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3). If the wildlife agency concludes in the biological opinion that the agency's proposed action is not likely to jeopardize a protected species, FWS and/or NMFS still must specify the amount or extent of any incidental "taking" of the species that may be authorized to occur as a result of the action. Under the ESA, the term "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). If a biological opinion authorizes any incidental "taking" of a protected species, it must specify measures to minimize such takings, as well as the "terms and conditions" that the agency must follow in implementing such measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)(1)(i), (ii), (iv).

32. Section 7(a)(2) of the ESA requires every federal agency to "use the best scientific and commercial data available" in assessing impacts to protected species. 16 U.S.C. § 1536(a)(2).

33. Section 7(a)(2) imposes two obligations upon federal agencies. The first is procedural and requires that agencies consult with the FWS and/or NMFS to determine the effects of their actions on endangered or threatened species and their critical habitat. 16 U.S.C. § 1536(b). The second is substantive and requires that agencies insure that their actions not jeopardize endangered or threatened species or their critical habitat. 16 U.S.C. § 1536(a)(2).

34. NEPA "is our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). NEPA's twin aims are to ensure that federal agencies consider significant aspects of

the environmental impacts of their proposed actions, and to ensure that agencies will inform the public that environmental concerns have been considered in agency decision-making.

35. NEPA requires federal agencies to prepare an environmental impact statement (EIS) in connection with all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). The required EIS must describe, inter alia, “the environmental impact of the proposed action” and “alternatives to the proposed action.” 42 U.S.C. § 4332(2)(C)(i), (iii). NEPA further provides that agencies must “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(2)(E).

36. NEPA’s implementing regulations flesh out these statutory requirements. They provide that agencies must “[r]igorously explore and objectively evaluate all reasonable alternatives.” 40 C.F.R. § 1502.14(a).

37. The regulations further provide that “[a]gencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements.” 40 C.F.R. § 1502.24. In this regard, the regulations mandate that, in cases where “there is incomplete or unavailable information” concerning “reasonably foreseeable significant adverse effects on the human environment,” an agency preparing an EIS must either: (1) if the information “is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant,” obtain and include the information in its analysis, 40 C.F.R. § 1502.22(a); or (2) if the information “cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known,” include in the EIS a statement making clear the unavailability of the information, use “existing credible scientific evidence which is

relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment,” and “evaluat[e] . . . impacts based upon theoretical approaches or research methods generally accepted in the scientific community.” 40 C.F.R. § 1502.22(b).

CLAIMS FOR RELIEF

COUNT 1

38. The Forest Service’s use of chemical fire retardant in fighting fires on national forests constitutes a major federal action that significantly impacts the quality of the environment.

39. NEPA requires federal agencies to prepare an Environmental Impact Statement (EIS) for any proposed major federal action that may significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C). The EIS must include an analysis of any adverse environmental impacts that cannot be avoided should the project be implemented, alternatives to the proposed action, and any irreversible and irretrievable commitment of resources which would be involved if implemented. 42 U.S.C. § 4332(2)(C).

40. The Forest Service’s EA inadequately assessed the impacts of aerial application of chemical fire retardant on fish and threatened and endangered plants, and failed to consider indirect impacts of aerial application of chemical fire retardant, as well as impacts of connected and cumulative actions, all in violation of NEPA and its implementing regulations.

41. The Forest Service has failed to develop or consider alternatives to its regular use of chemical fire retardant in fire-fighting operations, in violation of NEPA. 42 U.S.C. § 4332(2)(C), *see also* 42 U.S.C. § 4332(2)(E).

42. The Forest Service's decision to issue a FONSI and not to prepare an EIS was arbitrary, capricious, or otherwise not in accordance with law in violation of NEPA and the APA, 5 U.S.C. § 706(2).

COUNT 2

43. In issuing its October 9, 2007 biological opinion, its June 5, 2008 amended biological opinion, and its July 28, 2008 biological opinion, NMFS failed to address and include an Incidental Take Statement in violation of ESA and its implementing regulations, and the APA, 5 U.S.C. §§ 701-706.

COUNT 3

44. In issuing its February 18, 2008 biological opinion, FWS failed to address and include an Incidental Take Statement in violation of ESA and its implementing regulations and the APA, 5 U.S.C. §§ 701-706.

COUNT 4

45. In issuing its February 18, 2008 biological opinion, FWS concluded that implementation of its RPA relieves its jeopardy finding. FWS provided no rational basis for its conclusion that implementation of its RPA relieves its jeopardy finding concerning the effects of fire retardant on the threatened and endangered species under its purview.

46. The FWS RPA fails to ensure that threatened and endangered species or their critical habitat will not be jeopardized by the aerial application of chemical fire retardants.

47. Accordingly, the FWS decision that its RPA relieves jeopardy is not justified by the best available science, fails to ensure that it will not jeopardize endangered or threatened species or their critical habitat, and is arbitrary, capricious, an abuse of discretion, and otherwise contrary to law, in violation of ESA, 16 U.S.C. § 1536(a)(2), and the APA, 5 U.S.C. §§ 701-706.

COUNT 5

48. In issuing its February 18, 2008 biological opinion, FWS failed to assess the impacts of fire retardant use on designated critical habitat for the recovery of threatened and endangered species, in violation of ESA, 16 U.S.C. § 1536(a)(2), and the APA, 5 U.S.C. §§ 701-706.

COUNT 6

49. In issuing its February 18, 2008 biological opinion, FWS failed to assess the direct and indirect effects and effects of other activities that are interrelated or interdependent with the application of fire retardant. FWS also failed to assess the environmental baseline and the anticipated impacts of all proposed federal projects in the action area that have already undergone formal or early section 7 consultation. FWS failed to consider the effects of fire retardant use within the context of other existing human activities that impact the listed species, in violation of ESA, 16 U.S.C. § 1536(a)(2), and the APA, 5 U.S.C. §§ 701-706.

WHEREFORE, Plaintiff Requests the Following Relief:

- A. Declare that the Forest Service's failure to prepare an EIS to assess and disclose the impacts of its regular use of chemical fire retardant violates NEPA and APA;
- B. Set aside the Forest Service's EA, DN and FONSI as contrary to law;
- C. Declare that the NFMS BiOps violate ESA and APA;
- D. Declare that the FWS BiOp and RPA violate ESA and APA;
- E. Grant Plaintiff injunctive relief to compel the Forest Service, NFMS and FWS to comply with applicable environmental statutes, prevent irreparable harm, and satisfy the public interest;

- F. Award Plaintiff its costs, expenses, expert witness fees, and reasonable attorney fees under applicable law; and
- G. Grant Plaintiff such further relief as may be just, proper, and equitable.

DATED this 17th day of October, 2008

/s/ Timothy M. Bechtold

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