

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. 15-858

WILDEARTH GUARDIANS,

Plaintiff.

vs.

TAMARA CONNER, in her official capacity as District Ranger, Leadville Ranger District, San Isabel National Forest, United States Forest Service, and

UNITED STATES FOREST SERVICE, a federal agency of the United States Department of Agriculture,

Federal Defendants.

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**PETITION FOR REVIEW SEEKING DECLARATORY AND INJUNCTIVE RELIEF**

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1. Plaintiff WildEarth Guardians respectfully files this civil suit challenging the actions of Federal Defendants Tamara Conner and the United States Forest Service (“Forest Service”) to authorize the Tennessee Creek Project in Colorado. This suit alleges violations of the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 *et seq.*

**JURISDICTION AND VENUE**

2. This Court has jurisdiction pursuant to 28 U.S.C. § 1331. Final agency action exists that is subject to judicial review pursuant to 5 U.S.C. § 704. An actual, justiciable controversy exists between WildEarth Guardians and the Forest Service. The Court has authority to issue

declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 & 2202 and 5 U.S.C. §§ 705 & 706.

3. Venue in this court is proper under 28 U.S.C. § 1391 because all or a substantial part of the events or omissions giving rise to the claims herein occurred within this judicial district. The first named defendant's office is located within this judicial district. The Environmental Assessment ("EA") at issue in this litigation was prepared within this judicial district. The lands affected by the Tennessee Creek Project are located within this judicial district.

4. Plaintiff has exhausted any and all available and required administrative remedies.

#### **PARTIES**

5. Plaintiff WILDEARTH GUARDIANS is a non-profit organization dedicated to protecting and restoring the wildlife, wild places, wild rivers, and health of the American West. WildEarth Guardians has more than 76,500 members and activists across the American West, including many who reside in the State of Colorado. WildEarth Guardians' members regularly recreate throughout Colorado, including on the Leadville Ranger District of the San Isabel National Forest, the Eagle-Holy Cross Ranger District of the White River National Forest, and throughout the Tennessee Creek Project area, for the purposes of hiking, recreation, bird watching, observing and attempting to observe wildlife such as Canada lynx and wolverine, solitude, and other recreational and professional pursuits. WildEarth Guardians' members have engaged in these activities in the past, and intend to do so again in the near future. WildEarth Guardians and its members have a procedural interest in ensuring that all Wildlife Services activities comply with all applicable federal statutes and regulations. The interests of WildEarth

Guardians and its members will be irreparably impaired if the Tennessee Creek Project is allowed to proceed without compliance with federal environmental laws.

6. The aesthetic, recreational, scientific, educational, and other interests of WildEarth Guardians and its members have been and will continue to be adversely affected and irreparably injured if the Forest Service continues to act and fails to act as alleged, and affirmatively implements the action that WildEarth Guardians challenges with this litigation. These are actual, concrete, particularized injuries caused by the Forest Service's failure to comply with mandatory duties under the APA and NEPA. The relief sought in this case would, if granted, redress these injuries.

7. Defendant TAMARA CONNER is the District Ranger for the Leadville Ranger District of the San Isabel National Forest. She is sued in her official capacity. As the District Ranger for the Leadville Ranger District, Ms. Conner signed the Decision Notice and Finding of No Significant Impact for the Tennessee Creek Project. Ms. Conner is the federal official with responsibility for all of the Forest Service officials' actions and inactions challenged in this Petition for Review.

8. Defendant UNITED STATES FOREST SERVICE is an agency of the United States and is a division of the Department of Agriculture. The Forest Service is charged with managing the lands and resources within the San Isabel and White River National Forests in accordance with federal laws and regulations.

### **FACTS**

9. The Tennessee Creek Project ("Project") is a vegetation management project to be implemented on the Leadville Ranger District of the San Isabel National Forest and the Eagle-

Holy Cross Ranger District of the White River National Forest in Colorado. The majority of the Project would be implemented on the Leadville Ranger District of the San Isabel National Forest.

10. The Project area covers 16,450 acres of land. The Project would be implemented over a ten-year period. The Project authorizes more than 12,000 acres of logging in the Project area. The Project authorizes 2,370 acres of clear cutting within the Project area. The Project authorizes 6,765 acres of commercial thinning within the Project area. The Project authorizes treatment of 9,480 acres of mapped lynx habitat within the Project area. The Project authorizes 6,040 acres of prescribed fire within the Project area. The Project authorizes construction of 20 miles of temporary roads within the Project area. The Project authorizes opening of 1.5 miles of previously closed roads within the Project area.

11. The Project area is roughly geographically located between Leadville, Colorado and Aspen, Colorado. The Project area is located near Colorado's tallest peak, Mt. Elbert. The Project area is located near Colorado's second tallest peak, Mt. Massive. The Project area is bisected by the Continental Divide National Scenic Trail. The Project area is located near a number of federal wilderness areas. The Project area is located near Colorado Roadless Areas. The Mount Massive Wilderness is immediately adjacent to the Project area. The Holy Cross Wilderness is immediately adjacent to the Project area. The Hunter-Frying Pan Wilderness is located five miles from the Project area. The Collegiate Peaks Wilderness is located six miles from the Project area. The Buffalo Peaks Wilderness is located eight miles from the Project area. The Eagles Nest Wilderness is located twelve miles from the Project area. The Project area provides habitat for Canada lynx (*Lynx Canadensis*) ("lynx"), wolverine, and elk. Canada lynx

live within the Project area. Wolverine live within the Project area. Elk live within the Project area.

12. On June 20, 2012, the Leadville District Ranger announced its intent to consider whether to authorize the Project. On November 6, 2012, the Leadville District Ranger announced commencement of a 30-day comment period, and solicited scoping comments in a scoping notice to interested parties.

13. On December 17, 2013, the Leadville District Ranger announced the availability of a draft Environmental Assessment for the Tennessee Creek Project. A 30-day comment period on the draft Environmental Assessment began on December 19, 2013.

14. On December 10, 2013, the Forest Service submitted a Biological Assessment to the U.S. Fish and Wildlife Service to assess the effects of the Project on lynx, a species listed under the Endangered Species Act (“ESA”) as threatened with extinction in the lower 48 states. On March 14, 2014, the Forest Service submitted a revised Biological Assessment to the U.S. Fish and Wildlife Service. The Biological Assessment is incorporated by reference into the EA. The EA relies upon the Biological Assessment for its environmental analysis.

15. On April 11, 2014, the Leadville District Ranger announced the availability of the final Environmental Assessment and draft Decision Notice and Finding of No Significant Impact (“DN/FONSI”) for the Project. A 45-day objection period began on April 17, 2014.

16. On June 2, 2014, WildEarth Guardians submitted an objection to the Tennessee Creek Project Environmental Assessment and draft DN/FONSI. WildEarth Guardians’ objection was timely. In July 2014, WildEarth Guardians participated in objection resolution meetings with the Forest Service in an attempt to resolve WildEarth Guardians’ objections to the Tennessee Creek

Project. During the July 2, 2014 objection resolution meeting, the Forest Service informed WildEarth Guardians that it had updated its December 2013 Biological Assessment and replaced it with a March 2014 Biological Assessment. Before the July 2, 2014 objection resolution meeting, the Forest Service had not made the March 2014 Biological Assessment available to the public. The Forest Service did not make the March 2014 Biological Assessment available to the public before the objection deadline for the Tennessee Creek Project. The Tennessee Creek Project EA and draft DN/FONSI do not mention that the revised Biological Assessment had been prepared and submitted to the U.S. Fish and Wildlife Service. The parties were unable to resolve WildEarth Guardians' objections to the Tennessee Creek Project.

17. On July 14, 2015, the U.S. Fish and Wildlife Service sent a letter to the Forest Service concurring in the Forest Service's determination that the Tennessee Creek Project may affect but is not likely to adversely affect lynx.

18. On July 16, 2014, the Forest Service responded to WildEarth Guardian's objection to the Tennessee Creek Project. The reviewing officer instructed the responsible official to proceed with issuance of the Decision Notice.

19. The Forest Service has not determined where all aspects of the Project will be implemented within the Project area. The Forest Service determined that it would map the locations of logging units after the DN/FONSI authorizing the Tennessee Creek Project was signed. The Forest Service will not conduct site-specific NEPA analysis after determining where logging will occur within the Project area. For the purposes of NEPA analysis, the Forest Service assumed that all mapped lynx habitat would be logged through the implementation of the Project.

20. Lynx are medium-sized cats with long legs, large paws and webbed toes adapted to walking on snow, long tufts on the ears, and a short, black-tipped tail. Adult male lynx average about 22 pounds in weight and 33.5 inches in length (head to tail). Adult female lynx average about 19 pounds in weight and 32 inches in length.

21. Snowshoe hares are the primary prey for lynx. Snowshoe hares are widely distributed across North America and are associated with boreal and subalpine forests. The range of snowshoe hare extends from Alaska, across most of Canada, and southward into large portions of the western United States, including the Cascades and Sierra Nevada Mountains (reaching into central California) and the Rocky Mountains (reaching into southern Utah and northern New Mexico).

22. The distributions of snowshoe hare and lynx overlap across much of North America. Snowshoe hare comprise 35-97% of the lynx's diet across both species' range. In Colorado, over 65% of all documented kills made by lynx were of snowshoe hares. Studies reveal the summer diet of lynx may include a greater diversity of prey species than in winter, due to greater seasonal availability of prey. Lynx prey on other species when relative densities of snowshoe hare populations are low. This is particularly true in the lynx's southern range, where the densities of hares are relatively lower.

23. Red squirrels are an important secondary food source for lynx and the main alternate prey during periods of low hare abundance. Other prey species taken by lynx include cottontail rabbits, grouse, flying squirrels, ground squirrels, porcupine, beaver, mice, vole, shrews, weasels, fish, and ungulates as carrion. Male lynx have opportunistically killed white-tailed deer and mule

deer in the southern extent of their range when deep snow hindered deer movements and increased their vulnerability to predation.

24. Lynx are habitat specialists that select mature multi-storied stands with high horizontal cover and low topographic relief, primarily composed of mature Englemann spruce and subalpine fir trees with lesser components of lodgepole pine and Douglas-fir. This environment supports a high density of snowshoe hares, the lynx's primary prey.

25. Lynx breeding occurs during March or April. Male lynx are incapable of breeding during their first year and males are not known to help rear their young. Female lynx typically stay in natal dens on average for 21 days and may use 2-3 maternal dens in a given year. Litter size of adult female lynx averages 2-5 kittens during periods of hare abundance. Natal and maternal den sites are used until kittens reach about 6-8 weeks of age. For denning habitat to be functional, it must be in or adjacent to foraging habitat. Common components of natal and maternal den sites are large woody debris (root wads and downed logs) and dense horizontal cover.

26. The average home range for lynx is 39.6 square km (31.1 square km for females and 42.9 square km for males). Daily movements of lynx within their home ranges are centered on continuous forests. Lynx generally avoid large openings (both natural and created) when moving through their home ranges. Lynx travel, on average, about 4.2 miles per day but may increase daily movements when snowshoe hare densities decrease.

27. Dispersal is the permanent movement of an animal to a new home range. Lynx disperse. Female lynx tend to establish home ranges adjacent to their mother while young males are more like to disperse. Dispersal distances of up to 620 miles have been recorded for lynx. Longevity



records indicate that lynx live up to 16 years in the wild, though life spans vary between regions due to different sources and rates of mortality.

28. Lynx occur in the Southern Rockies, from south-central Wyoming, through Colorado, and into north-central New Mexico. There are 17 verified records of lynx from Colorado between 1878-1974. In 1973, two lynx were trapped on Vail Mountain in Eagle County Colorado. A statewide survey conducted from 1978-1980 by the Colorado Division of Wildlife, now known as Colorado Parks and Wildlife, found that a population of lynx persisted in Eagle, Pitkin, Lake, and Clear Creek Counties, with evidence of lynx occurrence in Grand and Park Counties.

29. From 1999 to 2006, 218 lynx were reintroduced into the San Juan Mountains in Colorado. In 2010, after completing over a decade of monitoring, Colorado Parks and Wildlife announced that all of the benchmarks for a successful lynx reintroduction had been met. The reintroduced lynx: (1) demonstrated a high rate of survival and low mortality rates over the long term (particularly in good habitat); (2) remained in good habitat at densities sufficient for breeding; (3) reproduced successfully and are “recruiting” lynx into the population; and (4) on balance, lynx recruitment equaled or exceeded mortality over an extended period of time. Based on radio telemetry location data, lynx presence is verified on all national forests in Colorado, Rocky Mountain National Park, the Medicine Bow National Forest in Wyoming, and the Carson and Santa Fe National Forests in New Mexico.

30. Lynx have been observed within the Tennessee Creek Project area. Lynx reside within the Tennessee Creek Project area. Lynx use the Tennessee Creek Project area as a travel corridor.

31. John Squires has conducted lynx research within the Tennessee Creek Project area. In 2013, John Squires trapped, collared, and released three lynx in or near the Tennessee Creek Project area.

32. The Tennessee Creek Project would have a negative effect on lynx winter foraging habitat. The Tennessee Creek Project would degrade lynx denning habitat within the Project area for more than 100 years following implementation of the Project.

33. The Forest Service assumes it will treat 9,480 acres of lynx habitat within the Tennessee Creek Project area. The Forest Service has not quantified the amount of occupied lynx habitat that will be treated through the implementation of the Tennessee Creek Project. The Forest Service has not quantified the amount of mapped lynx habitat that will be treated through the implementation of the Tennessee Creek Project. The Forest Service did not and has not analyzed how much lynx denning habitat exists in the Tennessee Creek Project area. The Forest Service did not and has not quantified how much lynx denning habitat exists in the Tennessee Creek Project area. The Forest Service did not and has not analyzed how much lynx denning habitat would be degraded in the Tennessee Creek Project area after implementation of the Project. The Forest Service did not and has not analyzed how much lynx denning habitat would be removed in the Tennessee Creek Project area after implementation of the Project. The Forest Service did not and has not quantified how much lynx denning habitat would be degraded in the Tennessee Creek Project area after implementation of the Project. The Forest Service did not and has not quantified how much lynx denning habitat would be removed in the Tennessee Creek Project area after implementation of the Project.

34. The Forest Service has not mapped the Project area to determine which parts of the Project area contain greater than 35% horizontal cover. The Forest Service has not quantified how much of the Project area contains greater than 35% horizontal cover.

35. Following implementation of the Tennessee Creek Project, approximately 6% of the Tennessee Pass Lynx Analysis Unit (“LAU”) and the Massive LAU would be in unsuitable condition. The Tennessee Pass LAU would have 1,160 acres changed to unsuitable habitat as a result of implementation of the Tennessee Creek Project. The Massive LAU would have 1,330 acres changed to unsuitable habitat as a result of implementation of the Tennessee Creek Project. This would result in up to 30 years of negative effects for lynx in the Tennessee Pass LAU and the Massive LAU.

36. On October 28, 2008, the Forest Service signed a Record of Decision for the Southern Rockies Lynx Amendment (“SRLA”). The SRLA amended the Forest Plans for National Forests in Colorado and parts of Wyoming. The SRLA amended the Forest Plans for the Pike-San Isabel National Forests. The SRLA amended the Forest Plan for the White River National Forest. The purpose of the SRLA was to ensure consistent management of lynx habitat on Forest Service lands in the Southern Rockies. All site-specific projects and activities on national forests must be consistent with the applicable LRMP. Projects on Forest Service lands covered by the SRLA must follow and comply with the management guidelines contained in the SRLA. The San Isabel National Forest amended its LRMP to include the SRLA. The White River National Forest amended its LRMP to include the SRLA.

37. The SRLA contains objectives, standards, and guidelines for activities on Forest Service lands covered by the SRLA. Guideline VEG G11 relates to lynx denning habitat. Guideline VEG

G11 provides that if lynx denning habitat is lacking, vegetation management projects should be designed to retain coarse woody debris piles to provide lynx denning habitat in the future.

**FIRST CLAIM FOR RELIEF  
VIOLATIONS OF NEPA**

**COUNT I**

**FAILURE TO DISCLOSE AND ANALYZE THE DIRECT, INDIRECT, AND  
CUMULATIVE IMPACTS OF THE PROPOSED ACTION AND ITS ALTERNATIVES**

38. Plaintiff incorporates by reference all preceding paragraphs.

39. The regulations implementing NEPA require the Forest Service to disclose and analyze the environmental effects of the proposed action and alternatives to it. 40 C.F.R. § 1500.1(b).

The regulation explains that “NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.

The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.” *Id.*

40. The Forest Service is required to disclose and analyze the direct, indirect, and cumulative effects of the proposed action on the environment. 40 C.F.R. §§ 1502.16, 1508.7, 1508.8, 1508.25(c)(3), 1508.27(b)(7). The Forest Service has failed to disclose and analyze the direct, indirect, and cumulative impacts of the proposed action and its alternatives. For example (but not limited to):

- a. The EA, the March 2014 Biological Assessment, and DN/FONSI fail to disclose and analyze the direct, indirect, and cumulative effects (past, present, and reasonably foreseeable future) of the proposed action and its alternatives on lynx, lynx winter habitat, lynx linkage areas, and lynx denning habitat.

- b. The EA, the March 2014 Biological Assessment, and DN/FONSI fail to quantify the cumulative effects (past, present, and reasonably foreseeable future) of other activities (federal, state, and private) within and near the Project area on lynx habitat, lynx winter habitat, lynx linkage areas, and lynx denning habitat.
- c. The EA, the March 2014 Biological Assessment, and DN/FONSI fail to quantify the amount of lynx winter habitat, lynx linkage areas, and lynx denning habitat that will be removed or degraded by the proposed action and its alternatives.

41. The Forest Service has failed to disclose and analyze the direct, indirect, and cumulative impacts of the proposed action and alternatives to it as required by NEPA, which is arbitrary, capricious, and not in accordance with the APA. 5 U.S.C. § 706(2)(A).

**COUNT II**  
**FAILURE TO CONSIDER A REASONABLE RANGE OF ALTERNATIVES**

42. Plaintiff incorporates by reference all preceding paragraphs.

43. The Tennessee Creek Project EA and DN/FONSI fail to consider a reasonable range of alternatives.

44. NEPA requires that the Forest Service “[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.” 40 C.F.R. 1502.14(a).

45. Members of the public asked the Forest Service to consider a number of alternatives for the Tennessee Creek Project. Among the alternatives proposed by the public were:

- a. an alternative to implement only the non-logging aspects of the Tennessee Creek Project, including culvert rehabilitation, removing non-functioning culverts, closing non-system routes, and erosion reduction improvements;

- b. an alternative that did not construct any new roads and used only existing roads;
- c. an alternative that did not result in the degradation of lynx denning habitat within the Project area for 150 years.

46. The alternatives proposed by the public were reasonable. The alternatives proposed by the public would have met the purpose and need for the project. The EA and DN/FONSI failed to consider any of the alternatives proposed by the public. The EA and DN/FONSI fail to explain why these alternatives were not considered. The EA and DN/FONSI fail to explain why these alternatives were not reasonable. The EA and DN/FONSI fail disclose any additional alternatives that were considered but that were not analyzed in detail.

47. The Forest Service has failed to consider a reasonable range of alternatives as required by NEPA, which is arbitrary, capricious, and not in accordance with the APA. 5 U.S.C. § 706(2)(A).

### **COUNT III**

#### **FAILURE TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT**

48. Plaintiff incorporates by reference all preceding paragraphs

49. NEPA requires the Forest Service to prepare an EIS when a proposed major federal action may significantly affect the quality of the environment. 42 U.S.C. § 4332(2)(C). In determining whether a proposed action may “significantly” impact the environment, both the context and intensity of the action must be considered. 40 C.F.R. §1508.27.

50. In evaluating intensity, the agency must consider numerous “significance” factors, including impacts that may be both beneficial and adverse; the unique characteristics of the geographic area such as proximity to ecologically critical areas; the degree to which the effects

on the quality of the human environment are likely to be highly controversial; the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks; the degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration; the degree to which the action may adversely affect an endangered or threatened species or its habitat; and whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment. 40 C.F.R. § 1508.27(b).

51. If the agency's action may be environmentally significant according to any of the criteria, the agency must prepare an EIS. The presence of any single significance factor can require the preparation of an EIS. The presence of several significance factors, when considered cumulatively, can require the preparation of an EIS.

52. The Tennessee Creek Project EA and DN/FONSI authorize federal action that would have a significant effect on the environment. The authorized action implicates a number of the significance factors that individually require the preparation of an EIS. The authorized action implicates a number of the significance factors that cumulatively require that an EIS be prepared. The authorized action would have significant adverse impacts. The authorized action may have significant beneficial impacts.

53. The Forest Service did not prepare an EIS for Tennessee Creek Project. The significance factors implicated by the authorized action are significant individually. The significance factors implicated by the authorized action are significant when considered cumulatively. The Forest Service's decision to authorize and implement the Tennessee Creek Project without first

preparing an EIS is arbitrary, capricious, and not in compliance with NEPA. 5 U.S.C. § 706(2)(A).

### **PRAYER FOR RELIEF**

Plaintiff respectfully requests that this Court:

1. Declare that the Forest Service violated NEPA and its implementing regulations in designing, analyzing, and implementing the Tennessee Creek Project EA and DN/FONSI;
2. Vacate the Tennessee Creek Project EA and DN/FONSI;
3. Enjoin the Forest Service and/or its agents from proceeding with the Tennessee Creek Project, or any portion thereof, unless and until the violations of federal law set forth herein have been corrected to this satisfaction of this Court;
4. Award Plaintiff costs, attorneys fees, and other expenses under the Equal Access to Justice Act; and
5. Grant Plaintiff such other and further relief as the Court deems just and equitable.

Respectfully submitted and dated this 23rd day of April, 2015.

/s/ John R. Mellgren  
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