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17 **UNITED STATES DISTRICT COURT**
18 **FOR THE EASTERN DISTRICT OF WASHINGTON**

19 **ALLIANCE FOR THE WILD ROCKIES,**

20 Plaintiff,

21 v.

22 **UNITED STATES FOREST SERVICE;**
23 **VICKIE CHRISTIANSEN**, Chief of the
24 Forest Service, **KRISTIN BAIL**, Forest
25 Supervisor for the Okanogan-Wenatchee
26 National Forest; **GLENN CASAMASSA**,
27 Regional Forester for Region 6 for the U.S.
28 Forest Service; and the **UNITED STATES**
FISH AND WILDLIFE SERVICE,

Defendants.

No. 2:19-cv-00350-SMJ

[PROPOSED]
AMICUS CURIAE BRIEF
BY MEMBERS OF NORTH
CENTRAL WASHINGTON
FOREST HEALTH
COLLABORATIVE REGARDING
MOTIONS FOR SUMMARY
JUDGMENT [ECF NOS. 19, 20]

11/10/2020
With Oral Argument: 10:30 a.m.
Location: Spokane

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1 **I. INTRODUCTION**

2 Proposed *Amici Curiae*, members of the North Central Washington Forest
3 Health Collaborative (NCWFHC), submit this brief in connection with the Court’s
4 consideration of the Mission Restoration Project located on the Okanogan-
5 Wenatchee National Forest. This project has the Collaborative’s strong support
6 because it will benefit forest health, wildlife, fisheries, and the local economy. It is
7 a “win-win-win” for affected stakeholders which merits the Court’s approval.
8

9
10 The Mission Project is a culmination of four years of work on the part of
11 NCWFHC, its members, and the Methow Valley Ranger District. Not only have
12 collaborative members contributed their time, energy, and creativity, they have
13 committed hundreds of thousands of dollars in funding for data analysis as well as
14 area watershed improvements. Decl. of Christopher Branch, ¶¶ 12-24; AR 16787.
15
16 The Mission Project is a capstone to those investments and will make the dream of
17 healthy Buttermilk and Libby Creek watersheds a reality.
18

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20 **II. NCWFHC’S INTEREST IN THE MISSION RESTORATION**
21 **PROJECT**

22 NCWFHC originally launched in 2013, with facilitation by the Upper
23 Columbia Salmon Recovery Board, and is comprised of a diverse group of local
24 stakeholders. These include representatives of the timber industry, conservation
25 groups, tribal government, elected officials, and local, state and federal land
26 managers, working together to obtain the resources and community support to
27

1 accelerate landscape-scale forest restoration on the Okanogan-Wenatchee National
2 Forest.¹ Branch Decl. ¶ 5. NCWFHC has a strong interest in increasing the pace
3 and scale of restoration on the Forest, in part, through integrating upland and
4 aquatic restoration efforts. *Id.* ¶ 6. Although the National Forest provides unique
5 social, cultural, ecological and economic benefits to Washington, it is experiencing
6 uncharacteristically severe wildfire events, insect infestations, disease epidemics,
7 habitat loss, and hydrologic events. *Id.* For that reason, NCWFHC is using a
8 consensus-based approach to build momentum towards restoration efforts that will
9 also provide jobs, forest products, and recreational opportunities. *Id.*

13 The Mission Restoration Project's 50,200-acre planning area is within the
14 Buttermilk Creek and Libby Creek watersheds to the west of Carlton and Twisp.
15 *Id.* ¶ 9; AR 14747. Historically, the relatively dry portions of this landscape had
16 more frequent fires that maintained canopies of trees and shrubs to be more open,
17 allowing ground cover and grasses to diversify. Branch Decl. ¶ 9. Landscape
18 analysis of the Mission Restoration Project area indicates that the terrestrial
19 ecosystem has been altered from its natural historic and modeled future range of
20 variability. *Id.* Past management practices, such as timber harvest and fire
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26 ¹ As part of their commitment to collaboration, individual members of NCWFHC
27 have authorized the undersigned attorneys to appear on behalf of all the *amici*
28 listed in the Appendix.

1 exclusion, over the last century have resulted in densely stocked forest stands that
2 are susceptible to uncharacteristic outbreaks of insects, disease, and severe wildfire
3 behavior. These conditions also limit the ability to control wildfires in the
4 Wildland Urban Interface.
5

6 NCWFHC has been invested in the Mission Project since 2014, providing
7 significant investment in landscape analysis and field reconnaissance. NCWFHC
8 devoted countless hours providing the Forest Service with the necessary science-
9 based high-quality information that helped shape the purpose and need for the
10 project. From NCWFHC’s perspective, the Mission Project area has four
11 important features that drive synergistic opportunities for management activities
12 and would benefit from restoration work: habitat for endangered fish;
13 unsustainable vegetation composition; vulnerable wildlife habitat; and
14 opportunities for social and economic benefit. NCWFHC’s goals are further
15 described in the “Projects Workgroup Goals for the Mission Project.” *Id.*, Ex. A.
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20 During the early assessment phase of the project, the Forest Service met with
21 members of NCWFHC regarding how the collaborative group could help support
22 the mutual goal of increasing the pace and scale of forest restoration across the
23 landscape. The Methow Valley Ranger District staff identified the need for field
24 data collection, synthesis of Ecosystem Management Decision Support (EMDS)
25 data, and public forums to discuss the science-based landscape analysis and
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1 restoration efforts. *Id.* ¶ 13.

2 In response, NCWFHC invested funds and personnel to help gather data and
3 generate reports that would be used to develop the Mission Project's much-needed
4 landscape restoration work. NCWFHC initially invested approximately \$30,000 to
5 hire an external consultant, Dr. Derek Churchill from the University of
6 Washington, to develop and present draft landscape prescriptions and treatment
7 areas from initial EMDS modeling results. *Id.* ¶ 14. NCWFHC also provided
8 funding and personnel for stand data verification and, through its members,
9 provided funds to hire a fisheries biologist, John Crandall, to generate an Aquatics
10 Assessment Report. *Id.* ¶ 15, *see also id.*, Ex. E. Volunteers from the
11 collaborative group helped gather data on roads, culverts, road damage and user-
12 created roads. Finally, NCWFHC member Trout Unlimited, in collaboration with
13 the Confederated Tribes of the Colville Reservation, supported research to assess
14 the fish species in the project area through electrofishing. *Id.* All of this funding,
15 data collection, and research initiated by NCWFHC helped guide the scope,
16 purpose and need, and proposed action for the Mission Restoration Project.
17

18 NCWFHC also assisted the Forest Service with public outreach and
19 engagement related to the Mission Restoration Project. *Id.* ¶ 13. NCWFHC
20 organized a public meeting on January 27, 2015 in Twisp to present the proposed
21 landscape-restoration approach and results of Dr. Churchill's analysis. *Id.* ¶ 16.
22

1 NCWFHC organized a public field tour of the Mission Project area on April 21,
2 2015. *Id.* NCWFHC also facilitated a public meeting with a panel of experts to
3 address the use of commercial thinning in the project area on September 22, 2015.
4
5 *Id.* All of this public engagement was additive to the Forest Service's
6 requirements for engagement under NEPA.
7

8 Throughout the planning process, NCWFHC participated in numerous
9 meetings with Forest Service staff to address planning and resource management
10 issues. *Id.* ¶ 18. The Forest Service's Interdisciplinary Team (IDT) met with the
11 Project Workgroup to describe how the roads, vegetation, aquatic data, and initial
12 treatment proposal was used in the development of the Mission Restoration
13 Project's proposed action. *Id.* NCWFHC members provided the Forest Service
14 with forest products and economic expertise regarding treatment layout units for
15 the project. *Id.* ¶ 20.
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18 NCWFHC formally participated in the NEPA public participation process
19 and submitted scoping comments and comments to the Final Environmental
20 Assessment (EA) and Draft Decision Notice and Finding of No Significant Impact
21 (FONSI) for the project. *Id.* ¶¶ 17, 20. The Forest Service ultimately selected a
22 modified version of Alternative 2 in the Final Decision Notice. By working
23 closely with the Forest Service throughout the NEPA planning process for the
24 Mission Project, NCWFHC was ultimately able to reach consensus and give the
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1 project its full support.

2 NCWFHC has a continued interest in the implementation and monitoring of
3 the project and members of NCWFHC’s Projects Workgroup have been in
4 discussions with the Methow Valley Ranger District about strategic
5 implementation planning and leveraging financial resources to facilitate timely
6 implementation of the full decision. For example, NCWFHC members have
7 contributed funds, through direct grant funding and in-kind contributions with
8 technical staff expertise, for consultation related to habitat restoration work
9 associated with the project. *Id.* ¶ 23. NCWFHC members have also provided
10 assistance with the development of aquatics restoration projects involving Beaver
11 Dam Analogs (a man-made feature designed to mimic the form and function of a
12 natural beaver dam) which will be built this Fall. *Id.* In addition, NCWFHC
13 members have partnered in culvert enhancement work in the Ben Canyon Creek
14 area for the benefit of threatened steelhead, which was recently completed. *Id.*
15 NCWFHC’s Project Workgroup continues to include the Mission Restoration
16 Project as part of its Work Plan, by contributing funds and ongoing engagement
17 and expertise to ensure the success of project’s much-needed restoration work. *Id.* ¶
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25 Overall, the Mission Project embodies the idea that better results—for the
26 forest, its stakeholders, and local communities—can and should be achieved
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1 through collaborative efforts to find common ground and build partnerships among
2 everyone who has a stake in forest management.
3

4 **III. THE MISSION RESTORATION PROJECT COMPLIES WITH**
5 **NEPA AND THE ESA**

6 Though the Forest Service has primary responsibility for compliance with
7 environmental laws, *amici* wish to comment briefly on the merits of the case
8 before the Court. Specifically, plaintiff's contentions that the project will cause
9 significant adverse effects are incorrect. Instead, the project has been carefully
10 designed through a collaborative process to avoid such effects and to bring
11 restoration benefits to the landscape. Plaintiff's allegations misinterpret these
12 statutes and the science of forest restoration.
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15 **A. The project complies with NEPA.**

16 The planning area stretches across 50,200 acres. AR 16786. The project
17 activities affect a small portion of the planning area. Non-commercial forest
18 thinning, focused on reduction of ladder fuels, is planned on 8,367 acres. AR
19 14766. Prescribed fire is planned on 10,219 acres plus 179 landings. AR 14766-
20 67. The only commercial thinning treatments will cover 1,853 acres and are
21 centered on dry forest restoration. AR 14766. The commercial treatments thus
22 affect less than four percent ($\frac{1}{25}$) of the project area. Additionally, the project
23 includes 468 acres of soil restoration, replacement of 23 culverts, enhancement of
24 eight potential beaver habitat sites, one bridge replacement, 8.2 miles of coarse
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1 woody debris restoration, rock armoring at 6 stream crossings and hardening of
2 fords at 4 stream crossings. AR 14767. The project will also ultimately
3 decommission 34.3 miles of road. AR 14768. (The final decision added
4 decommissioning of two segments with lengths of 0.39 and 0.29 mi, respectively.
5 AR 16792.)

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8 A substantial portion of project costs will be funded by receipts from the
9 timber sale—the economic analysis indicates at least \$624,000 will be available.
10 AR 15066. If anything the eventual receipts could be more. While the EA
11 estimates log prices at \$397.80 per thousand board feet (MBF), recent reports
12 indicate market prices could easily reach \$468/MBF. Wash. Dep’t of Nat. Res.,
13 *Delivered Log Price Survey, July 2020*, available at [https://www.dnr.wa.gov/
14 publications/psl_ts_jul20_logprices.pdf?vqxkp](https://www.dnr.wa.gov/publications/psl_ts_jul20_logprices.pdf?vqxkp). While the non-timber-sale
15 elements of the project are estimated to cost \$2.11 million, AR 15063, the project
16 will itself generate a substantial amount of the funding. If log prices are as
17 estimated, that is \$624,000. And with current markets, that could easily reach
18 \$1,191,000. During implementation, the agency will work to identify the most
19 effective sequence. *Id.*

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24 The agency clarified that “beneficial effects of the action do not bias [the]
25 finding of no significant environmental effects, nor do beneficial effects mask
26 adverse effects.” AR 16802. The beneficial elements, moreover, are not later
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1 uncertain mitigation but are an integral part of the project.

2
3 In general, road reconstruction and maintenance would be implemented at
4 the beginning of the project as needed on all roads that would be used for
5 timber haul. Temporary roads constructed for the project would be
6 decommissioned *soon after timber harvest* on the unit has been completed.
7 Road closure and decommissioning would be spread out over the period of
8 the project or after completion of the project depending on where and when
9 funding is available. The IDT Fish Biologist and Hydrologist would
10 determine which roads are the highest priority for closure first, which may
11 depend on the type of funding available.

12 AR 14762 (emphasis added). These road closures are not the “mitigation” on
13 which plaintiff claims the decision relies.

14 Instead, the FONSI refers to a list of “[p]roject design features, best
15 management practices, mitigations, and monitoring measures.” AR 16803. These
16 measures are integrated into project design. AR 15118-51. There is no
17 contingency or uncertainty regarding their application. Thus, the cases plaintiff
18 relies on, Pl.’s MSJ at 21-22, are inapposite.

19 **B. The Forest Service complied with required procedures under the
20 ESA.**

21 Plaintiff contends that the project does not comply with the ESA with
22 respect to grizzly bears. As a result, they request the Court order reinitiated ESA
23 consultation at the *Forest Plan* level, not just on the project. Pl.’s MSJ at 29-35
24 (ECF No. 19). This claim should be rejected.

25
26 First, the record demonstrates that potential effects to grizzly bear from the
27 project do not rise above the “insignificant” or “discountable.” *See* AR FWS-

1 43308 (Consultation Handbook, defining “not likely to adversely affect” as “the
2 appropriate conclusion when effects on listed species are expected to be
3 discountable, insignificant, or completely beneficial”). One ordinarily would not
4 “(1) be able to meaningfully measure, detect, or evaluate insignificant effects; or
5 (2) expect discountable effects to occur.” AR FWS-43309. If the Forest Service
6 determines its action “may affect” a listed species or its critical habitat, the agency
7 must consult, either formally or informally, with the appropriate expert wildlife
8 agency, which for the bear is FWS. 50 C.F.R. § 402.14(a). In the event that the
9 FWS concurs in writing during informal consultation that the proposed action is
10 “not likely to adversely affect any listed species or critical habitat,” formal
11 consultation is not required, and the process ends. 50 C.F.R. § 402.14(b)(1);
12 *Friends of the Wild Swan v. Weber*, 767 F.3d 936 (9th Cir. 2014).

17 Here, the Forest Service determined in its Biological Assessment that the
18 project was not likely to affect grizzly bear. AR 15237. It acknowledged there
19 may be short-term disturbance if grizzly bears that could pass through the project
20 area, it would largely result in “increases in vegetation foods for bears and
21 ungulate prey and increases in [bear] core area.” AR 15295. The agencies found
22 little evidence that grizzly bear actually use the project area: “Habitat for the
23 grizzly bear and a food source (deer, plants) occur in the action area” and there was
24 a “confirmed sighting of a grizzly bear ... reported in 2015, approximately 60
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1 miles north of proposed Project activities.” AR FWS-00409.

2 FWS concurred in the not likely to adversely affect determination, noting
3 that “[t]he potential for temporary displacement and minor habitat alteration in the
4 Project area is likely to be insignificant to the survival, reproduction or distribution
5 of the grizzly bear.” AR FWS-00409. While it found potential to decrease habitat
6 quality for grizzly bears and their prey, such effects would be temporary. *Id.*

7 Further, “[t]he likelihood of direct disturbance to grizzly bears is discountable due
8 to their rareness, wide-ranging habitat use, and the tendency of this species to
9 avoid areas with human activity.” It found disturbance of prey species to be “short
10 term and insignificant, and therefore not likely to result in changes in survivorship
11 or reproductive success that could influence the availability of prey for grizzly
12 bears.” *Id.* Taken together, all these data supported a finding of no likely adverse
13 effect.
14

15 Second, none of these findings rested on the 1989 Okanogan Forest Plan
16 which is the source of plaintiff’s complaint. Pl.’s MSJ 26. Instead, the Biological
17 Assessment and concurrence letter provided independent and adequate grounds for
18 the project’s ESA compliance. Thus, even if the *Cottonwood* case applied to the
19 1989 Forest Plan, it does not mean that consultation must be reinitiated. *Alliance*
20 *for the Wild Rockies v. Krueger*, 950 F.Supp.2d 1196 (D. Mont. 2013), *aff’d sub*
21 *nom. All. for the Wild Rockies v. Christensen*, 663 F. App’x 515 (9th Cir. 2016),
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1 thus held that *Cottonwood* applies only when agencies rely on Forest Plan
2 “standards or guidelines that are derived from or the product of the underlying
3 ESA violation.” 950 F.Supp.2d at 1202. There is no such reliance on the Forest
4 Plan’s ESA compliance here.
5

6 **IV. CONCLUSION**
7

8 The Court should deny Plaintiff’s Motion for Summary Judgment and allow
9 the Mission Project’s restoration work to move forward.

10 Respectfully submitted this 28th day of August, 2020.
11

12 /s/ Lawson E. Fite
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CERTIFICATE OF SERVICE

I, Lawson E. Fite, hereby certify that I, on August 28, 2020, caused the foregoing to be served upon counsel of record through the Court’s electronic service system.

Dated: August 28, 2020

/s/ Lawson E. Fite
Lawson E. Fite