

W. Adam Duerk  
KNIGHT NICASTRO MACKAY, LLC  
283 W. Front Street, Suite 203  
Missoula, Montana 59802  
Email: duerk@knightnicastro.com  
Ph: (406) 206-7102

Eric Waeckerlin  
Julian R. Ellis, Jr. (*pro hac vice admission pending*)  
BROWNSTEIN HYATT FARBER SCHRECK, LLP  
410 Seventeenth Street, Suite 2200  
Denver, Colorado 80202  
Email: ewaeckerlin@bhfs.com  
jellis@bhfs.com  
Ph: (303) 223-1100

Bella Sewall Wolitz (*pro hac vice admission pending*)  
BROWNSTEIN HYATT FARBER SCHRECK, LLP  
1155 F Street N.W., Suite 1200  
Washington, District of Columbia 20004  
Email: bsewallwolitz@bhfs.com  
Ph: (202) 296-7353

Elisabeth L. Esposito (*pro hac vice admission pending*)  
BROWNSTEIN HYATT FARBER SCHRECK, LLP  
1415 L Street, Suite 800  
Sacramento, California 95814  
Email: eesposito@bhfs.com  
Ph: (916) 594-9700

*Attorneys for Amici Curiae*

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

Forest Service Employees for  
Environmental Ethics,

*Plaintiff,*

No. 9:22-CV-168-DLC

v.

United States Forest Service,

*Defendant,*

Town of Paradise, California, Butte  
County, California, Plumas County,  
California, Rural County  
Representatives of California,  
American Forest Resource Council,  
National Alliance of Forest Owners,  
Federal Forest Resource Coalition,  
California Forestry Association,  
Montana Wood Products Association,  
Oregon Forest Industries Council,  
Washington Forest Protection  
Association, California Farm Bureau  
Federation, California Women for  
Agriculture, and National Wildfire  
Suppression Association,

*Amici Curiae.*

BRIEF OF AMICI CURIAE IN  
OPPOSITION TO PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT

**TABLE OF CONTENTS**

|  | <b>Page</b> |
|--|-------------|
| <b>TABLE OF AUTHORITIES</b> .....  | iv          |
| <b>INTRODUCTION</b> .....  | 1           |
| <b>INTEREST OF AMICI CURIAE</b> .....  | 2           |
| <b>BACKGROUND</b> .....  | 5           |
| <b>ARGUMENT</b> .....  | 8           |
| I. An Injunction Enjoining the Forest Service From the Aerial Deployment<br>of Fire Retardant Is Improper. ....  | 8           |
| A. The public-interest and balance-of-hardships factors weigh decidedly<br>against an injunction. ....   | 8           |
| 1. <i>Aerial deployment of fire retardant is crucial in saving lives,<br/>                communities, property, and natural resources.</i> .....  | 8           |
| 2. <i>Plaintiff’s requested injunction would jeopardize the carefully<br/>                coordinated system of wildfire response across federal, state,<br/>                and local government agencies</i> ..... | 15          |
| B. An injunction is unnecessary and inappropriate given the ongoing<br>NPDES permitting process. ....  | 18          |
| II. Outstanding Fact and Legal Issues Bar the Issuance of Injunctive<br>Relief Without Further Development and Analysis. ....  | 20          |
| A. Plaintiff’s NOI does not support nationwide relief. ....  | 21          |
| B. Further development is necessary to resolve facts issues and tailor<br>any injunction to lessen the impacts on coordinated wildfire<br>response by federal, state, and local agencies.....                        | 22          |
| <b>CONCLUSION</b> .....  | 24          |
| <b>CERTIFICATE OF COMPLIANCE</b> .....   | 26          |
| <b>CERTIFICATE OF SERVICE</b> .....  | 27          |

**TABLE OF AUTHORITIES**

|   | <b>Page(s)</b> |
|---|----------------|
| <b>Cases</b>  |                |
| <i>Ark. Wildlife Fed’n v. ICI Americas, Inc.</i> ,<br>29 F.3d 376 (8th Cir. 1994) .....                         | 20             |
| <i>Cal. Sportfishing Prot. All. v. Chico Scrap Metal, Inc.</i> ,<br>728 F.3d 868 (9th Cir. 2013) .....          | 19             |
| <i>EPA v. City of Green Forest</i> ,<br>921 F.2d 1394 (8th Cir. 1990) .....                                     | 20             |
| <i>Ellis v. Gallatin Steel Co.</i> ,<br>390 F.3d 461 (6th Cir. 2004) .....                                      | 19, 20         |
| <i>Env’t Conservation Org. v. City of Dallas</i> ,<br>529 F.3d 519 (5th Cir. 2008) .....                        | 20             |
| <i>Friends of Milwaukee’s Rivers v. Milwaukee Metro. Sewerage Dist.</i> ,<br>382 F.3d 743 (7th Cir. 2004) ..... | 20             |
| <i>Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.</i> ,<br>484 U.S. 49, 60 (1987).....             | 18             |
| <i>Hallstrom v. Tillamook Cnty.</i> ,<br>493 U.S. 20 (1989).....  | 21             |
| <i>Karr v. Hefner</i> ,<br>475 F.3d 1192 (10th Cir. 2007) .....   | 20             |
| <i>ONRC Action v. Columbia Plywood, Inc.</i> ,<br>286 F.3d 1137 (9th Cir. 2002) .....                           | 21–22          |
| <i>Piney Run Pres. Ass’n v. Cnty. Com’rs of Carroll Cnty.</i> ,<br>523 F.3d 453 (4th Cir. 2008) .....           | 20             |
| <i>Wash. Trout v. McCain Foods, Inc.</i> ,<br>45 F.3d 1351 (9th Cir. 1995) .....                                | 19, 21         |
| <i>Winter v. Nat. Res. Def. Council, Inc.</i> ,<br>555 U.S. 7 (2008).....                                       | 19             |



**TABLE OF AUTHORITIES (con't)**

*Statutes*

33 U.S.C. § 1319(g)(6)(A) .....18  
33 U.S.C. § 1365(b)(1)(A) .....21  
33 U.S.C. § 1365(b)(1)(B) .....18

*Federal Regulations*

40 C.F.R. § 135.3 .....21

## INTRODUCTION

Amici curiae<sup>1</sup> (collectively, the Wildfire Stakeholders) are a diverse group of local governments, property owners, and trade associations and businesses that benefit from federal wildfire response efforts. A central issue on summary judgment is whether the Wildfire Stakeholders' communities and businesses should be put in imminent danger by an order enjoining one of the most effective fire suppression tools that exist while the U.S. Forest Service (Forest Service) obtains a National Pollutant Discharge Elimination System (NPDES) permit. The Wildfire Stakeholders represent the victims that will suffer if the Court adopts Plaintiff Forest Service Employees for Environment Ethics' proposed injunction.

The Wildfire Stakeholders urge the Court to reject Plaintiff's ill-advised request for a broad injunction to restrict the Forest Service from deploying fire retardant from aircraft in emergency situations. It cannot be reasonably disputed that the use of fire retardant can be—and indeed has been—the difference between life and death, or whether communities and private property are saved and left standing or engulfed in flames. Additionally, the protection of life and property depends on a web of carefully coordinated wildfire-response systems between

---

<sup>1</sup> Amici curiae are the Town of Paradise, California, Butte County, California, Plumas County, California, the Rural County Representatives of California, American Forest Resource Council, National Alliance of Forest Owners, Federal Forest Resource Coalition, California Forestry Association, Montana Wood Products Association, Oregon Forest Industries Council, Washington Forest Protection Association, California Farm Bureau Federation, California Women for Agriculture, and National Wildfire Suppression Association. The Court granted the Wildfire Stakeholders leave to file an amicus brief in its March 30, 2023 order denying intervention. (*See* Order, Doc. 30, at 11.)

federal, state, and local governments across the country. An injunction would jeopardize these systems, endangering those protected. The issuance of a prohibitory injunction is therefore antithetical to the public interest and the balance of hardships unquestionably favors maintaining the status quo, particularly since the Forest Service and the EPA have agreed that the Service will pursue a NPDES permit. The Court should reject Plaintiff's invitation to step into the shoes of permit writers and issue a NPDES permit by way of injunction.

Not only that, but any injunction would require additional proceedings and analysis. On the law, Plaintiff's request for broad injunctive relief is improper because of procedural and substantive shortcomings in its injunctive-relief theory. For one, geographic scope constraints in Plaintiff's notice of intent to sue (NOI) circumscribe any injunctive relief that may be ordered. On the facts, before issuing any injunction, the Court must consider impacts on wildfire response efforts in each state affected and tailor any injunction to avoid the dangerous impacts on health and safety and private property that would result from restrictions on wildfire response coordination between federal, state, and local agencies. Currently, the record on this point is nonexistent.

In sum, the Wildfire Stakeholders ask the Court to deny Plaintiff summary judgment on its request for injunctive relief.

#### **INTEREST OF AMICI CURIAE**

The Wildfire Stakeholders represent the human, economic, and environmental interests threatened by devastation from wildfires. Among the Wildfire Stakeholders are local governments and associations of governments in

geographic areas that face the threat of catastrophic wildfires. The **Town of Paradise** was destroyed by the 2018 Camp Fire, which spread across a portion of the Plumas National Forest in **Butte County**, California before it burned 18,804 structures and killed 85 people. Before the Camp Fire, the population of Paradise was 26,256; as of January 1, 2020, the population was only 4,631. (Decl. of Kevin Phillips in Support of Mot. to Intervene (Phillips Decl.) ¶¶ 5, 7, 12, attached as **Exhibit 1.**) **Plumas County** is a county in California where over 80 percent of the land base is managed by the Forest Service and where the majority of private land is located within the federal Direct Protection Area, making Forest Service firefighters crucial first responders to wildfire. (Decl. of Greg Hagwood in Support of Mot. to Intervene (Hagwood Decl.) ¶ 4, attached as **Exhibit 2.**) Plumas County has been impacted by two of the top fifteen largest and most destructive fires in California history, both of which occurred in the last three years and started on or spread across national forests. (*Id.* ¶ 6.) One of these fires, the North Complex Fire, started in August 2020 and burned 318,935 acres in Plumas, Butte, and Yuba Counties, destroyed 2,352 structures, and caused 15 deaths. (*Id.* ¶ 7.) **Rural County Representatives of California (RCRC)** is an organization made up of 40 rural counties in California. RCRC represents its member counties by advocating on behalf of rural issues at the state and federal levels on issues that include land use, water and natural resources, housing, transportation, wildfire protection policies, and health and human services.

The Wildfire Stakeholders also include trade associations of forest products companies that own lands adjacent to national forests or purchase timber from the

Forest Service and other federal agencies, as well as organizations that support farming communities and firefighters. These organizations work, among other things, to improve federal and state laws, regulations, policies, and decisions regarding access to and management of public forest lands and protection of all forest lands. **American Forest Resource Council (AFRC)**, **California Forestry Association (Calforests)**, **Federal Forest Resource Coalition (FFRC)**, **Montana Wood Products Association (MWPA)**, **National Alliance of Forest Owners (NAFO)**, **Oregon Forest Industries Council (OFIC)**, and **Washington Forest Protection Association (WFPA)**, are voluntary, non-profit trade associations that represent forest landowners, work to promote long-term management of national forests, and advance the forest products industry to foster the best interests of the industry and public. Members of these organizations protect and manage millions of acres of forestlands, provide employment for tens of thousands of workers in rural communities, and represent major producers of softwood lumber, plywood, and engineered wood. AFRC specifically advocates for improved forest management, including sustained-yield harvests on public timberlands in the West to enhance forest health and resistance to fire, insects, and disease.

**California Farm Bureau Federation (CFB)** and **California Women for Agriculture (CWA)** are nonprofit associations representing California's diverse farming and ranching interests. Wildfires on national forests during the grazing season can threaten—and even kill—livestock, disrupt operations, and harm members that hold Forest Service grazing permits and threaten association members engaged in the production of agriculture near national forests.

And **National Wildfire Suppression Association** (NWSA) is a nonprofit comprised of approximately 250 member organizations throughout the United States, representing 10,000 private wildland firefighting professionals. When the magnitude of a fire event exceeds federal and state agency resources, these agencies contract with professional wildland fire contractors. NWSA has an acute interest in ensuring that the Forest Service can continue to aerially deploy fire retardant because it is an important tool in protecting firefighters' lives and improving the management of wildfires.

The Wildfire Stakeholders have a heightened interest in ensuring the Forest Service can quickly and effectively respond to wildfires, including by deploying fire retardant. Contrary to Plaintiff's unproven denial of retardant's effectiveness, the Wildfire Stakeholders have first-hand experience with retardant's ability to slow or reduce fire's rate of spread, intensity, and danger to the public.

### **BACKGROUND**

Plaintiff's complaint alleges a single claim under the Clean Water Act, challenging the Forest Service's aerial discharge of fire retardant in limited instances as part of the Service's integrated firefighting strategy. (*See* Compl., Doc. 1, ¶¶ 24 –37.) For relief, Plaintiff requests (1) a declaration that the Forest Service's "unpermitted discharges of retardant ... into waterways from aircraft" violate the Clean Water Act (*id.* at 9), and (2) an injunction "to compel the Forest

Service to comply with applicable environmental statutes, prevent irreparable harm, and satisfy the public interest” (*id.* at 10).

After the Forest Service answered the complaint, Plaintiff moved for summary judgment. Going beyond its innocuous request for injunctive relief to compel compliance consistent with the public interest, Plaintiff’s motion for summary judgment demands that the Court “enjoin the Forest Service from aerial application of retardants into navigable waters unless and until it obtains an NPDES permit to do so.” (Pl. Br. in Supp. of Mot. Summ. J. (Pl. Br.), Doc. 7 at 8; *see also id.* at 9.) In its motion, Plaintiff made no attempt to carry its heavy burden for obtaining a permanent prohibitory injunction against the government; nor did it cite or reference the mandatory injunction factors.

The Forest Service opposes summary judgment. Relevant here, the Forest Service explained that it has entered into a Federal Facility Compliance Agreement (the Compliance Agreement) with EPA both “to address the Forest Service’s discharge of pollutants during aerial fire retardant applications and to require the Forest Service to obtain NPDES permit coverage for discharges to waters.” (Forest Serv. Resp. in Opp’n to Pl. Mot. for Summ. J. (Forest Serv. Opp’n), Doc. 11, at 9; *see Perez Decl.*, Doc. 12, Attach. C-1 at 1.) The “objective ... of the Compliance Agreement is to cause the Forest Service to come into and remain in full compliance with all applicable [f]ederal, state, and local laws governing the discharge of pollutants into water of the United States.” (Forest Serv. Opp’n at 9.) The Forest Service and the EPA, however, recognize that the permitting process will take two to three years to complete. (*Id.* at 23.) During this period, “the

Compliance Agreement requires the Forest Service to use aerially[]delivered fire retardant according to the direction in the 2011 Record of Decision.” (*Id.* at 9–10.)

In reply, Plaintiff attempts to substantiate its request for injunctive relief for the first time. Strikingly, Plaintiff does not mention the human, economic, and environmental interests that would be damaged if it achieves its desired outcome. Rather, in dismissing the gravity of the hardships and public interest if the Court were to enjoin the Forest Service from fighting wildfires using the aerial deployment of fire retardant, Plaintiff flips the burden and states that “the Forest Service has no evidence that retardant actually works to deter the spread of fires.” (Pl. Reply in Supp. of Mot. Summ. J. (Reply), Doc. 24 at 7.) Yet, per Plaintiff, retardant is at least “25% effective at keeping fires under 300 acres.” (*Id.* at 9.) Retardant’s effectiveness is therefore exponentially greater than the less than one percent of drops that reach water, even in part. (*Id.*; Forest Serv. Opp’n at 1.)

Perhaps recognizing the equities are one-sided and against it, Plaintiff retreats from its request for an absolute prohibitory injunction and now asks the Court “to require the Forest Service to implement a 600-foot buffer around national forest waterbodies during the pendency of the agency’s application for a Clean Water Act permit.” (Reply at 10.) Plaintiff offers no exceptions for the preservation of human life or property, nor does it provide evidence to support the choice of a 600-foot buffer as the magic number.



## ARGUMENT

The Wildfire Stakeholders depend on the Forest Service's timely and effective response to wildfires to protect their communities, property interests, businesses, and to ensure public safety. Plaintiff's effort to enjoin the Forest Service from the nationwide aerial deployment of fire retardant while the Service completes the NPDES permitting process is misguided and fails on the law. Indeed, Plaintiff barely tries to carry its heavy burden for a prohibitory injunction.

The Wildfire Stakeholders maintain that no injunction should issue because: (1) an injunction is against the public interest and the balance of hardships tips sharply in favor of maintaining the status quo, and (2) the ongoing NPDES permitting process makes an injunction unnecessary (*see I, infra*). Even if the Court credits Plaintiff's evidence on these points, further legal and factual considerations are required before an injunction can be granted, including: (1) the legal effect of Plaintiff's NOI in limiting its request for relief, and (2) the tailoring necessary to avoid detrimental impacts on public safety and the coordinated wildfire response by federal, state, and local agencies (*see II, infra*).

### **I. An Injunction Enjoining the Forest Service From the Aerial Deployment of Fire Retardant Is Improper.**

#### **A. The public-interest and balance-of-hardships factors weigh decidedly against an injunction.**

- 1. Aerial deployment of fire retardant is crucial in saving lives, communities, property, and natural resources.*

The Wildfire Stakeholders have first-hand knowledge of the destruction and devastation of wildfires, particularly in the western United States. They represent the communities and industries impacted by wildfires that spread across National

Forest System lands before threatening non-federal lands and destroying homes, businesses, private timberlands, and other non-federal interests.

The hardships borne by the communities, property owners, and businesses devastated by catastrophic wildfires are real and significant. One of most tragic examples of the destruction caused by wildfires is the 2018 Camp Fire in California. The Camp Fire began and spread across a portion of the Plumas National Forest in Butte County, California, before burning 18,804 structures and killing 85 people in the Town of Paradise. (Phillips Decl. ¶¶ 7, 12.) Paradise alone suffered the loss of 11,000 homes, hundreds of businesses, thousands of utility structures, and five schools. (*Id.* ¶ 8.) Paradise’s population deteriorated in the wake of the Camp Fire, from 26,256 to only 4,631. Another example is the 2021 Dixie Fire in Plumas County, California. This fire burned almost *1 million acres*—an area the size of Glacier National Park—and is the second largest wildfire in California history. (Hagwood Decl. ¶ 8.) Critically, the Forest Service has responsibility for initial attack of wildfires across most of the public *and* private lands within Plumas County. (*Id.* ¶¶ 4-5.)

Because wildfires know no jurisdictional boundaries, the Wildfire Stakeholders must rely on the Forest Service’s firefighting efforts to protect their loved ones and their properties, including through the aerial deployment of fire retardant. Considering the significant interests at stake, it is difficult to imagine a scenario where the public-interest and the balance-of-hardships factors weigh more in favor of preserving the status quo. Nonetheless, Plaintiff maintains that a broad injunction is the proper remedy. To make this argument work, Plaintiff ignores the

human elements in the case and instead generally challenges the effectiveness of fire retardant. Per Plaintiff, the public-interest and hardships factors favor an injunction because “[t]here does not appear to be any actual public benefit” to the use of retardant. This is consistent with Plaintiff’s broader dystopian view: “wildfires are more akin to earthquakes or hurricanes: efforts to stop them are largely futile.” (Reply at 8 (quoting Higuera Decl. ¶ 7).)

As the Forest Service explains, Plaintiff’s view that fire retardant serves no public interest is disputed. Further, to evaluate whether to issue an injunction, the Court must evaluate the incredibly diverse interests and concerns that are at stake in the case. As the Forest Service recognizes, “the Court should not enter a nationwide or other broad injunction in the context of fire retardant discharges [because] the balance of hardships and public interest implicate many parties and their interests that are not before this Court.” (Forest Serv. Opp’n at 20.) The Wildfire Stakeholders represent some of those interests that would be placed in danger if Plaintiff is granted broad injunctive relief.

The aerial deployment of fire retardant is a critical tool in saving lives and communities and protecting private properties from destruction. No one knows or appreciates this more than those who live, work, and do business in fire country. For instance, Ken Pimlott, the former Director of the California Department of Forestry and Fire Protection (CAL FIRE) and 30-year veteran of the fire service, has responded to wildfires across the West and throughout California. (Decl. of Ken Pimlott (Pimlott Decl.) ¶ 3, attached as **Exhibit 3**.) He recounts “vivid examples where the aerial deployment of fire retardant was crucial in saving lives,

communities, property, and natural resources.” (*Id.* ¶ 4.) One example is the 2014 Boles Fire where the aerial deployment of fire retardant across the center of the community of Weed, California, saved over half of the town from the fire and prevented the destruction of hundreds of homes and businesses. Firefighters were able to contain the fire within a 516-acre footprint. The red line in the photo below is fire retardant that was dropped from an aircraft.



(*Id.* ¶ 5.) While fire burned through the foreground of the community depicted in the photo, the retardant drop stopped the wildfire from spreading further throughout the community. (*Id.*)

Similarly, fire retardant strategically applied along ridgelines played a key role in stopping the spread of the September 2022 Mosquito Fire and minimized its impact to the communities of Volcanoville and Georgetown, California.





(*Id.* ¶ 6.) Mr. Pimlott personally flew over the Mosquito Fire and witnessed the impact of aerial retardant as depicted in this photo. (*Id.*) During Mr. Pimlott’s 30-year career, he has encountered numerous other instances where the aerial deployment of fire retardant made a significant difference in firefighters’ ability to protect public safety, communities, property, and natural resources. (*Id.* ¶ 7.)

Mr. Pimlott’s experience is consistent with the experience of the Montana Department of Natural Resources and Conservation (Montana DNRC). Montana DNRC’s Forestry Deputy Division Administrator, Wyatt Frampton, recalls recent instances in Montana “where fire retardant drops made a meaningful difference for the protection of public safety, human life, preservation of property, and protection of natural resources.” (Decl. of Wyatt Frampton (Frampton Decl.) ¶ 7, attached as **Exhibit 4**.) Last year, in responding to the Matt Staff Road Fire, Montana DNRC relied heavily on the use of retardant to slow the spread and to prevent significant

loss that was threatened by the fire's rapid spread toward residential properties. (*Id.* ¶ 8.) The picture below is a retardant drop on the north edge of the fire.



(*Id.*, attach. 1 at 3.) The use of fire retardant stopped the fire front from advancing, which prevented what could have been significant property loss and threats to lives as well as residences and businesses. (*Id.* ¶¶ 8, 10.)

During the same month in 2022, the Mount Helena Fire began near downtown Helena, Montana. (*Id.* ¶ 9.) Because of its location less a mile from downtown, it posed a significant risk to human life and property, requiring a rapid, aggressive response using aerial drops of fire retardant. (*Id.*) Shown below, retardant was dropped between the fire and Helena to prevent the fire from reaching densely populated areas southwest of the City.



(*Id.*, attach. 3 at 2.) The use of fire retardant allowed Montana DNRC to contain the fire to approximately 18 acres. (*Id.* ¶¶ 9, 10, 11.)

These examples from Montana and California are a few of the many. Plaintiff attempts to distract from this reality by constructing a strawman from claims by an academic emphasizing that “most structure loss occurs under extreme conditions: high winds, with fire burning through very dry fuels.” (Reply at 8.) But, even if true, it does not follow that that retardant plays “no role” in stopping structures from being consumed from fire. (*Id.* at 9.) Simply, Plaintiff appeals to rhetorical flare over real-world application. Under the right conditions, fire retardant is effective—a conclusion that is uncontroverted.

In fact, Plaintiff concedes the effectiveness of fire retardant in other parts of its reply. Plaintiff urges the Court to accept statistics “that retardant is only used on 5% of fires [and] use of retardant is only 25% effective at keeping fires under 300



acres.” (Reply at 9.) These statistics make the Wildfire Stakeholders’ point: (1) that retardant use is reserved for a small subset of fires (5%) where seasoned professionals have determined that the extreme circumstances and danger to life and property justify its use, and (2) that fire retardant can and does play an important role in containing fires under certain circumstances.

2. *Plaintiff’s requested injunction would jeopardize the carefully coordinated system of wildfire response across federal, state, and local government agencies*

The significant public interests and hardships at issue extend beyond questions of retardant’s effectiveness. Plaintiff’s injunction would create a damaging ripple effect, impeding the close coordination between federal agencies and states when responding to wildfires. In Montana, the state and local governments “are entirely reliant on the [Forest Service] for the contracting and administration of vendors to provide fire retardant for large air tankers on the west and central parts of the state.” (Frampton Decl. ¶ 4.) Any injunction against the Forest Service would therefore “deprive Montana state and local government firefighters of their only access to retardant delivered by large air tankers for the majority of the state” (*id.*), which could be catastrophic as Montana enters its fire season (*see id.* ¶ 9). Without access to the aerial deployment of retardant, fires will “be more difficult to contain, more costly, and more destructive to Montana communities and ecosystems” (*id.* ¶ 4), because “Montana’s suppression system now will not leave sufficient time to develop alternative mechanisms to mitigate the loss of highly mobile and effective retardant delivery systems” (*id.* ¶ 6).



The burden and complication of an injunction would also impact other states. In California, CAL FIRE and the Forest Service operate a cooperative fire-protection program, which includes an integrated program of air attack. (Pimlott Decl. ¶ 9.) Under this program, air attack bases are located throughout the state based on a maximum 20-minute response time. This includes lands in the State Responsibility Area (SRA) where CAL FIRE has primary jurisdiction for the response to fires, and the Federal Responsibility Area (FRA) where federal agencies are primarily responsible for fire response. (*Id.*) Neither California nor the federal government has the resources to support aircraft bases in each region of the state; therefore, the federal and state governments work together to provide coverage and to deploy aircraft to respond to wildfires from the closest base without regard to which government owns or contracts for the aircraft. (*Id.*)

An injunction prohibiting the Forest Service from the aerial deployment of fire retardant would undermine this closely coordinated system and would significantly delay response times, including in California's most populous regions. (*Id.* ¶ 10.) For example, General William J. Fox Airfield (Fox Field) in Lancaster, California, is the closest air tanker base to the City and County of Los Angeles. (*Id.*) Fox Field, however, is a federal airbase. (*Id.*) If federal aircraft stationed at Fox Field were unable to deploy fire retardant in response to wildfire incidents, CAL FIRE would instead have to dispatch aircraft from Riverside or San Diego Counties to calls from the Los Angeles area. (*Id.*) This would significantly delay response times to many locations in Los Angeles County and would threaten public safety, communities, and natural resources. (*Id.*)

Likewise, an injunction would affect the type of aircraft available to quickly respond to wildfires in California because the state and federal air fleets operate as a complementary system. (*Id.* ¶ 11.) The Forest Service typically uses larger Type I and II aircraft, which can deploy ten times the volume than smaller Type III aircraft, which make up most of CAL FIRE's fleet. (*Id.*) As a consequence, the larger aircraft can only be reloaded and refueled at a limited number of bases in California, including CAL FIRE's base at McClellan in Northern California and the Forest Service's San Bernardino Tanker Base in Southern California. (*Id.*) Enjoining the Forest Service's aerial deployment of fire retardant would cause severe logistical challenges, including the potential elimination of reloading capability for large aircraft in Southern California and delaying flight times in response to fires in Southern California due to the need to reload at McClellan. (*Id.*) Again, this would threaten the effectiveness of the system and the ability to protect public safety, communities, and natural resources. (*Id.*)

By disrupting and delaying the complicated and interdependent system of joint response in California—as one example—Plaintiff's injunction would also:

- increase the burden on CAL FIRE aircraft to respond to fires on National Forest System lands;
- increase the flight hours on CAL FIRE's air tankers;
- reduce the availability of CAL FIRE's air tankers for response to new fires;
- reduce efficiencies resulting from coordination between the Forest Service and CAL FIRE, which enables the respective agencies to use specialized aircraft where they are most effective;
- compromise CAL FIRE's ability to continue to effectively respond to extended attack fires on federal lands in California; and

- increase the danger during periods of multiple large fires because California will be left with an insufficient number of aircraft to meet the initial and extended attack workload, placing an additional burden on state and local government aircraft and risking additional large fires.

(*Id.* ¶ 12.)

While the examples identified above are limited to Montana and California,<sup>2</sup> they demonstrate the significant public interests at stake and hardships that will befall the people and businesses that live and work in fire-prone areas if Plaintiff achieves its desired outcome. In sum, injunctive relief would be dangerous and, if Plaintiff’s requested relief is granted, it would cause unique human and economic harm in each state across the country.

**B. An injunction is unnecessary and inappropriate given the ongoing NPDES permitting process.**

The Clean Water Act’s citizen suit provision is “meant to supplement rather than to supplant governmental action.” *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987) (explaining citizen suits are proper only “if the Federal, State, and local agencies fail to exercise their enforcement responsibility”); *see* 33 U.S.C. § 1365(b)(1)(B) (barring citizen suits if the EPA or a state has commenced and is diligently prosecuting an enforcement action for the alleged violations prior to the date on which the citizen files the complaint); § 1319(g)(6)(A) (prohibiting citizen suits when either the EPA or a state “has commenced and is diligently prosecuting an action” to require compliance); *see*

---

<sup>2</sup> The Wildfire Stakeholders would, on request of the Court, welcome the opportunity to further aid in understanding the implications of the requested injunction on the coordinated response to wildfires in other states.

also *Cal. Sportfishing Prot. All. v. Chico Scrap Metal, Inc.*, 728 F.3d 868, 874–78 (9th Cir. 2013) (discussing both diligent prosecution bars); *Wash. Trout v. McCain Foods, Inc.*, 45 F.3d 1351, 1354 (9th Cir. 1995) (explaining that one of the two purposes served by the citizen suit notice is to “alert[] the appropriate state or federal agency, so administrative action may initially provide the relief the parties seek before a court must become involved”).

Even if the Compliance Agreement between the Forest Service and the EPA does not trigger the diligent prosecution bar per se, the diligent prosecution caselaw is instructive on why no injunction is required. That is, the government is already taking action to comply with the Clean Water Act requirements that Plaintiff seeks to enforce. *Cf. Wash. Trout*, 45 F.3d at 1354.

Nor will the policy behind the Clean Water Act be served by the issuance of an injunction that endangers public safety, private property, and natural resources. *Cf. Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008) (rejecting need to enjoin Navy’s sonar training while the Navy prepared a court-ordered EIS). Rather, EPA’s permitting process is the appropriate forum to balance the fact-specific considerations underlying the deployment of fire retardant and the requirements of the Clean Water Act. EPA’s conclusion that, while the permitting process is ongoing, the Forest Service may continue to aerially deploy fire retardant consistent with current policies deserves deference. *See Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 477 (6th Cir. 2004) (holding that “second-guessing of the EPA’s assessment of an appropriate remedy ... fails to respect the statute’s careful distribution of enforcement authority among the federal EPA, the States and

private citizens, all of which permit citizens to act where the EPA has ‘failed’ to do so, not where the EPA has acted but has not acted aggressively enough in the citizens’ view”); *see also Karr v. Hefner*, 475 F.3d 1192, 1197–98 (10th Cir. 2007) (explaining diligent prosecution does not have to be “far-reaching or zealous,” “an agency’s prosecutorial strategy [does not have to] coincide with that of the citizen-plaintiff”); *Friends of Milwaukee’s Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 760 (7th Cir. 2004) (explaining enforcement action will be considered diligent if “is capable of requiring compliance with the Act and is in good faith calculated to do so”); *Env’t Conservation Org. v. City of Dallas*, 529 F.3d 519, 529 (5th Cir. 2008) (observing that “[p]lacing the burden on the citizen-suit plaintiff to demonstrate that his claims are not mooted by the consent decree is ... in step with Congressional policy.”).<sup>3</sup>

## **II. Outstanding Fact and Legal Issues Bar the Issuance of Injunctive Relief Without Further Development and Analysis.**

Injunctive relief is unwarranted. Even more, Plaintiff’s requested injunction requires additional proceedings—with the participation of additional parties—to

---

<sup>3</sup> Other circuit courts have also recognized that consent decrees, which are akin to the Compliance Agreement, satisfy the diligent-prosecution bar. *See Ellis*, 390 F.3d at 461; *Ark. Wildlife Fed’n v. ICI Americas, Inc.*, 29 F.3d 376, 380 (8th Cir. 1994) (stating it would be “unreasonable and inappropriate” to find that a voluntary settlement does not satisfy the definition of diligent prosecution); *Piney Run Pres. Ass’n v. Cnty. Com’rs of Carroll Cnty.*, 523 F.3d 453, 460 (4th Cir. 2008) (finding plaintiff failed to meet its burden of proving a lack of diligent prosecution where the parties entered into a consent decree requiring civil penalties and mitigation of water temperature increases); *see also EPA v. City of Green Forest*, 921 F.2d 1394, 1403 (8th Cir. 1990) (holding “citizens’ claims brought prior to a government action are properly dismissed when a consent decree is entered in a later-filed EPA action.”).

ensure that any injunction comports with Plaintiff's NOI and to resolve material fact issues regarding the balance of hardships and the public interest. The injunction factors require that any injunction be narrowly tailored to avoid impacts on coordinated wildfire response by federal, state, and local agencies.

**A. Plaintiff's NOI does not support nationwide relief.**

The Clean Water Act's citizen suit provision requires would-be plaintiffs to provide 60-days' notice of an alleged violation before filing a lawsuit. 33 U.S.C. § 1365(b)(1)(A). Notice must be sent to the EPA's administrator and to the state in which the alleged violation occurs. *Id.* The 60-day notice requirement is jurisdictional. A citizen suit under the Clean Water Act must be dismissed if the plaintiff fails to give the requisite notice. *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 31 (1989) (construing near-identical notice requirement of the Resource Conservation and Recover Act's citizen suit provision); *Wash. Trout v. McCain Foods, Inc.*, 45 F.3d 1351, 1354 (9th Cir. 1995) (applying *Hallstrom* and dismissing citizen suit under the Clean Water Act due to deficient notice).

Plaintiff's notice is limited to alleging violations of the Clean Water Act in ten western states. (*See generally* Letter from T. Bechtold (NOI), dated June 23, 2022, attached as **Exhibit 5**.) The notice, however, does not set forth a nationwide violation to support Plaintiff's newly imagined injunction, nor did Plaintiff properly provide notice to each state as required by citizen suit provision. *See* 33 U.S.C. § 1365(b)(1)(A); *see also* 40 C.F.R. § 135.3. Because the Court lacks jurisdiction over alleged violations in at least 80 percent of the country, *see ONRC*

*Action v. Columbia Plywood, Inc.*, 286 F.3d 1137, 1143–44 (9th Cir. 2002), issuance of a nationwide injunction is improper.

**B. Further development is necessary to resolve fact issues and tailor any injunction to lessen the impacts on coordinated wildfire response by federal, state, and local agencies.**

Lives, livelihoods, and natural resources are at stake when the government responds to wildfire. Given the immense damage caused by wildfires, Plaintiff must show serious public health, economic, and environmental costs from the deployment of fire retardant to carry its burden on the public-interest and balance-of-hardships factors. Plaintiff has not met (and cannot meet) its burden. More problematically, Plaintiff’s requested injunction is mired in fact issues, particularly related to the public interest and hardships at stake in this litigation. The Forest Service identified many of the disputed facts in its opposition. (Forest Serv. Opp’n at 21–27.) But, respectfully, not even the Forest Service can understand and anticipate the full range of hardships and risks of an injunction. A developed record on these hardships and risks—either through trial or an evidentiary hearing on the merits—is necessary for any injunction to be issued.

Initially, the Wildfire Stakeholders join the Forest Service in disputing Plaintiff’s claim that the impacts on natural resources, ecosystems, and habitat would be more positive than negative under an injunction. Plaintiff emphasizes the importance of endangered aquatic species, but it is unclear if these species and their habitats would be best protected by an injunction enjoining the use of fire retardant. As the Forest Service explains, “the immediate effects of uncontrolled wildfire include increased water temperature, altered water chemistry, and

increased sediment suspension,” and the likelihood of negative impacts on aquatic species from aerial discharge of fire retardant is low: the majority of effects from intrusions of retardant appear to be “sub-lethal or indirect.” (*Id.* at 26–27.) Thus, further fact development is needed for the Court to determine the relevance of environmental considerations to the permanent-injunction factors.

The Wildfire Stakeholders further agree with the Forest Service that threats to human life and public safety from an injunction strongly weigh against injunctive relief. (*Id.* at 24.) Over 100 human lives were lost in just two of the fires described above in one state. The Forest Service emphasizes the role of fire retardant “to alleviate threats to human life, including firefighters.” (*Id.* at 24). Yet, Plaintiff fails to acknowledge the need to protect public safety in its briefing. Nor does it discuss whether there should be an exception from any injunction to protect human health and safety. The nature and scope of such an exception would have to be determined before an injunction could be issued.

Finally, as discussed in I.A.2, *supra*, critical fact issues remain over how enjoining the Forest Service from the aerial deployment of fire retardant would impact closely coordinated and existing firefighting response efforts in states like California where the Forest Service shares responsibility for wildfire response on federal, state, and private lands and in states like Montana that are reliant on the Forest Service for the contracting and administration of vendors to provide fire retardant for large air tankers. Before issuing an injunction, the Court must evaluate the impacts on state and local agencies, including the increased burden on their firefighting capabilities and aircraft. The Court must also consider exceptions



that would allow the Forest Service to continue to aerially deploy fire retardant on state and private lands consistent with existing federal obligations.

### **CONCLUSION**

Plaintiff's request for injunctive relief should be denied. An injunction is antithetical to the public interest and the hardships that would follow are remarkably one-sided. The aerial deployment of fire retardant saves lives, property, and natural resources, and an injunction would throw into disarray the carefully coordinated system of wildfire response across federal, state, and local agencies, endangering those on the front lines. Even more, an injunction in this case is particularly ill-advised because the Forest Service and the EPA are engaged in the exact permitting process that Plaintiff claims is necessary.

Dated: April 14, 2023.

Respectfully submitted,

*/s/ W. Adam Duerk*

---

W. Adam Duerk  
KNIGHT NICASTRO MACKAY, LLC  
283 W. Front Street, Suite 203  
Missoula, Montana 59802  
Email: [duerk@knightnicastro.com](mailto:duerk@knightnicastro.com)  
Ph: (406) 206-7102

Eric Waeckerlin  
Julian R. Ellis, Jr. (*pvh pending*)  
BROWNSTEIN HYATT  
FARBER SCHRECK, LLP  
410 Seventeenth Street, Suite 2200  
Denver, Colorado 80202  
Email: [ewaeckerlin@bhfs.com](mailto:ewaeckerlin@bhfs.com)  
[jellis@bhfs.com](mailto:jellis@bhfs.com)  
Ph: (303) 223-1100

Bella Sewall Wolitz (*pvh pending*)  
BROWNSTEIN HYATT  
FARBER SCHRECK, LLP  
155 F. Street, NW, Suite 1200  
Washington, District of Columbia  
20004  
Email: [bsewallwolitz@bhfs.com](mailto:bsewallwolitz@bhfs.com)  
Ph: (202) 296-7353

Elisabeth L. Esposito (*pvh pending*)  
BROWNSTEIN HYATT  
FARBER SCHRECK, LLP  
1415 L Street, Suite 800  
Sacramento, California 95814  
Email: [eesposito@bhfs.com](mailto:eesposito@bhfs.com)  
Ph: (916) 594-9700

*Attorneys for Amici Curiae*

**CERTIFICATE OF COMPLIANCE**

I certify the **Brief of Amici Curiae in Opposition to Plaintiff's Motion for Summary Judgment** complies with the type-volume limitation of Local Rule 7.1(d)(2)(A). The brief contains 5,848 words in a proportionally spaced font style, excluding caption, certificate of compliance, tables of contents and authorities, signature block, and any certificate of service.

*/s/ W. Adam Duerk*

---

W. Adam Duerk

**CERTIFICATE OF SERVICE**

I certify that on April 14, 2023, the **Brief of Amici Curiae in Opposition to Plaintiff's Motion for Summary Judgment** was served via CM/ECF on all counsel of record in the case.

*/s/ W. Adam Duerk*

---

W. Adam Duerk

# **Exhibit 1**

(Declaration of Kevin Phillips in Support of  
Putative Intervenors' Motion to Intervene)

W. Adam Duerk, IV  
KNIGHT NICASTRO MACKAY, LLC  
283 W. Front Street, Suite 203  
Missoula, Montana 59802  
Email: duerk@knightnicastro.com  
Ph: (406) 206-7102

Eric Waeckerlin  
Julian R. Ellis, Jr. (*pro hac vice admission pending*)  
BROWNSTEIN HYATT FARBER SCHRECK, LLP  
410 Seventeenth Street, Suite 2200  
Denver, Colorado 80202  
Email: ewaeckerlin@bhfs.com  
jellis@bhfs.com  
Ph: (303) 223-1100

Bella Sewall Wolitz (*pro hac vice admission pending*)  
BROWNSTEIN HYATT FARBER SCHRECK, LLP  
1155 F Street N.W., Suite 1200  
Washington, District of Columbia 20004  
Email: bsewallwolitz@bhfs.com  
Ph: (202) 296-7353

Elisabeth L. Esposito (*pro hac vice admission pending*)  
BROWNSTEIN HYATT FARBER SCHRECK, LLP  
1415 L Street, Suite 800  
Sacramento, California 95814  
Email: eesposito@bhfs.com  
Ph: (916) 594-9700

***Attorneys for Putative Intervenors***

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

Forest Service Employees for  
Environmental Ethics,

*Plaintiff,*

No. 9:22-CV-168-DLC

v.

United States Forest Service,

*Defendant,*

Town of Paradise, California, Butte  
County, California, Plumas County,  
California, Rural County  
Representatives of California,  
American Forest Resource Council,  
National Alliance of Forest Owners,  
Federal Forest Resource Coalition,  
California Forestry Association,  
Montana Wood Products Association,  
Oregon Forest Industry Council,  
Washington Forest Protection  
Association, California Farm Bureau,  
California Women for Agriculture, and  
National Wildfire Suppression  
Association,

*Putative Intervenor-Defendants.*

---

DECLARATION OF KEVIN  
PHILLIPS [TOWN OF PARADISE]  
IN SUPPORT OF PUTATIVE  
INTERVENORS' MOTION TO  
INTERVENE

I, Kevin Phillips, declare:

1. I am the Town Manager of the Town of Paradise, California (Paradise), Putative Intervenor in this action. The statements herein are based on my own personal knowledge and are true and correct. If called to testify to their accuracy, I could and would do so.

2. I have served as the Town Manager of Paradise since August 2020, and came to this position after serving as District Manager of Paradise Irrigation District (PID). As District Manager, I led PID through the difficult period of water restoration after the Camp Fire. Prior to serving as District Manager, I served as the Chief Financial Officer for PID for 10 years. I have been part of the Camp Fire response and recovery since the date of the fire.

3. I make this declaration in support of Putative Intervenor's Motion to Intervene filed concurrently herewith.

### **Introduction**

4. Originally settled during the Gold Rush era, Paradise and the area surrounding the community grew slowly during the first half of the 20th century. In 1970, the Paradise area population was 14,539. The Town of Paradise was incorporated in 1979; the population of the area that was incorporated increased by approximately 50 percent between 1970 and 1980, from 14,539 to 22,571. Paradise's population was 25,401 in 1990. The population grew to 26,408 in 2000, and to 26,218 in 2010.

5. In 2018, the population was estimated to be 26,256 prior to the devastating November 2018 Camp Fire, which destroyed nearly 14,000 housing



units total, including more than 11,000 in the Town of Paradise, which led to a significant population decline in the town. As of January 1, 2020, the population was estimated as only 4,631.

### **The Camp Fire**

6. On November 8, 2018, a faulty electric transmission line sparked a fire in the unincorporated Butte County community of Pulga, located about 10 miles north of the Town of Paradise. Due to a confluence of drought conditions and wind gusts of up to 35 miles per hour, the Camp Fire spread rapidly and in approximately six hours devastated significant portions of the unincorporated communities of Concow, Yankee Hill, and Magalia, and the Town of Paradise.

7. According to the California Department of Forestry and Fire Protection (“CalFire”), the Camp Fire is the deadliest and most destructive fire in California history, burning across 153,336 acres, destroying 18,804 structures and resulting in 85 civilian fatalities and several firefighter injuries, most of which were in or around the Town of Paradise.

### **Impacts**

8. An estimated 95 percent of the Town of Paradise was burned in the Camp Fire, leading to the loss or damage of 11,000 housing units, 450 commercial buildings, 5 schools, and thousands of utility structures. Of the schools that were destroyed, there were two elementary schools, Paradise Elementary and Ponderosa Elementary, a secondary school, Honey Run Academy, a high school, Ridgeview High School, and an Adult Learning Center.

9. Over 600 businesses were reported as damaged or destroyed by the Camp Fire, including the loss of many buildings of the Feather River Hospital, multiple gas stations, fast-food restaurants, and other retail establishments, a hotel, and a large, Safeway-anchored retail shopping center.

10. Recent wildfires have taken a staggering toll on the economy of Paradise. In just the first year after the Camp Fire, the Gross Regional Product (GRP), declined between 64 and 81 percent within the fire footprint; most of these losses were felt directly within the community of Paradise.

11. The Camp Fire also wrought unseen impacts on community members. A recent study of 725 individuals affected by the Camp Fire found significantly greater chronic symptoms of post-traumatic stress disorder, anxiety, and depression than control individuals not exposed to the fires.

12. Nearly all the 85 people that lost their lives in the Camp Fire were residents of Paradise. The oldest victim, age 99, was found on the front porch of her home with her wheelchair nearby. The youngest victim, age 20, was found in a bathtub with two family members. According to reports, the three generations of women had called 911 as the fire approached and, somehow, the phone line remained open as the house, and the three women, burned as helpless fire dispatchers listened to their screams.

### **Paradise's Interest in Intervention**

13. As illustrated by the Camp Fire, during fire season, the lives of the citizens of Paradise are in the hands of Forest Service firefighters.

14. The Forest Service deployed fire retardant from aircraft within Paradise in responding to the Camp Fire. Had federal firefighters been unable to use this important tool, I believe the terrible losses described above would have been substantially worse and more devastating.

15. Paradise has a critical interest in this case. Based on its geographic location adjacent to federal lands, our citizens are directly impacted by Forest Service fire suppression efforts and their lives and livelihoods would be threatened by any increase in wildfire that would result from the Forest Service being limited in its ability to deploy fire retardant from aircraft.

16. The Forest Service does not adequately represent Paradise or the people that call it home. Although Paradise and the Forest Service share the same ultimate goal of defending the aerial deployment of fire retardant, Paradise and its residents, visitors, and businesses have at stake the unique safety, property, and economic interests described above.

I declare under penalty of perjury that the foregoing is true and correct, and that this Declaration was executed on March 8th, 2023.

  
Kevin Phillips

# **Exhibit 2**

(Declaration of Greg Hagwood in Support of  
Putative Intervenor's Motion to Intervene)

W. Adam Duerk, IV  
KNIGHT NICASTRO MACKAY, LLC  
283 W. Front Street, Suite 203  
Missoula, Montana 59802  
Email: duerk@knightnicastro.com  
Ph: (406) 206-7102

Eric Waeckerlin  
Julian R. Ellis, Jr. (*pro hac vice admission pending*)  
BROWNSTEIN HYATT FARBER SCHRECK, LLP  
410 Seventeenth Street, Suite 2200  
Denver, Colorado 80202  
Email: ewaeckerlin@bhfs.com  
jellis@bhfs.com  
Ph: (303) 223-1100

Bella Sewall Wolitz (*pro hac vice admission pending*)  
BROWNSTEIN HYATT FARBER SCHRECK, LLP  
155 F Street N.W., Suite 1200  
Washington, District of Columbia 20004  
Email: bsewallwolitz@bhfs.com  
Ph: (202) 296-7353

Elisabeth L. Esposito (*pro hac vice admission pending*)  
BROWNSTEIN HYATT FARBER SCHRECK, LLP  
1415 L Street, Suite 800  
Sacramento, California 95814  
Email: eesposito@bhfs.com  
Ph: (916) 594-9700

***Attorneys for Putative Intervenors***

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

Forest Service Employees for  
Environmental Ethics,

*Plaintiff,*

No. 9:22-CV-168-DLC

v.

United States Forest Service,

*Defendant,*

Town of Paradise, California, Butte  
County, California, Plumas County,  
California, Rural County  
Representatives of California,  
American Forest Resource Council,  
National Alliance of Forest Owners,  
Federal Forest Resource Coalition,  
California Forestry Association,  
Montana Wood Products Association,  
Oregon Forest Industry Council,  
Washington Forest Protection  
Association, California Farm Bureau,  
California Women for Agriculture, and  
National Wildfire Suppression  
Association,

*Putative Intervenor-Defendants.*

---

DECLARATION OF GREG  
HAGWOOD [PLUMAS COUNTY,  
CALIFORNIA] IN SUPPORT OF  
PUTATIVE INTERVENORS'  
MOTION TO INTERVENE

I, Greg Hagwood, declare:

1. I am County Supervisor of District 4 for Plumas County, California (Plumas County), Putative Intervenor in this action. The statements herein are based on my own personal knowledge and are true and correct. If called to testify to their accuracy, I could and would do so.

2. I have been a resident of Plumas County since 1975. Before I was elected as County Supervisor of District 4 for Plumas County, I spent 31 years at the Plumas County Sheriff's Office, including 10 years as the elected Sheriff. I began my career in law enforcement as a Patrol Deputy in 1988, and over the years went on to become a Field Training Officer, Patrol Sergeant, SWAT team member, Investigations Sergeant, Chief Deputy Coroner, Under Sheriff and finally Sheriff-Coroner. In my career as a first responder, I worked closely with local, state, and federal governmental agencies, including on wildfire response and recovery efforts. Wildfire response and recovery continues to be an important part of my work as County Supervisor because Plumas County has been recently affected by some of the largest and most devastating wildfires in California history.

3. I make this declaration in support of Putative Intervenor's Motion to Intervene filed concurrently herewith.

### **Introduction**

4. Within Plumas County, over 80 percent of the land base is owned by the Forest Service. Therefore, the management of wildfires on National Forest System lands has a direct impact on the health, welfare, and economic prosperity of the residents of Plumas County.

5. A significant portion of the private land base in Plumas County, including the county seat of Quincy, is in the federal government’s Direct Protection Area, in which the federal government—led primarily the U.S. Forest Service—assumes the responsibility of maintaining a wildland fire protection system. A true and correct copy of a map showing the Direct Protection Areas in Plumas County, downloaded from <https://gacc.nifc.gov/oscc/cwccg/gis.php>, is attached hereto as **Exhibit A**.

6. Plumas County has been affected by two of the top fifteen largest and most destructive fires in California history, both of which occurred in the last three years and started on or spread across National Forests adjacent to private lands within Plumas County.

### **Recent Fire History**

7. The North Complex Fire started in August 2020, burned 318,935 acres in Plumas, Butte, and Yuba Counties, destroyed 2,352 structures, and caused 15 deaths. According to the California Department of Forestry and Fire Protection (“CalFire”), the North Complex fire was the fifth deadliest and seventh largest wildfire in California history.

8. Plumas County was also ravaged by the second largest wildfire in California history, the July 2021 Dixie Fire, which burned 963,309 acres across Plumas, Butte, Lassen, Shasta, and Tehama Counties, destroying 1,311 structures and causing one death.



### **Economic and Infrastructure Damage and Losses**

9. The economic impacts of recent wildfires have been diverse and wide-ranging.

10. Recent wildfires have exacerbated Plumas County's existing housing shortage, causing economic impacts to local residents and the County as a whole. Fire impacts include 779 damaged or destroyed residences and 144 damaged or destroyed commercial buildings, causing 609 newly vacant parcels and contributing to a 46 percent increase in average home sale prices from 2019 to 2022 and an 18 to 28 percent increase in average fair market rent rates (2017-2023).

11. Along with the losses to homes and businesses, Plumas County has suffered over \$500,000 in reduced property tax revenue in fiscal year 2022-2023. Public water and sewer agencies have also suffered revenue losses.

12. Recent fires have also resulted in an estimated 1,611 net job losses and an estimated 68 net businesses closed across Plumas County. The highest employment losses have been experienced in Public Administration (~45%), Transportation (~26%), Finance (~36%), and Healthcare (~25%) sectors. According to the Small Business Administration, over \$15 million in business losses have been verified in Plumas County.

13. Finally, Plumas County has experienced staggering infrastructure losses that have impacted residents in both tangible and intangible ways. In the communities of Greenville and Indian Falls alone there were 15,000 cubic feet of public road damages, according to a FEMA report dated 2023. The heart of historic

Greenville was severely damaged, with losses of public buildings including the Justice Court, Library, Town Hall, and Sheriff Substation, in addition to many more private homes and businesses. Residents also suffered extended power outages caused by recent fire impacts, including the loss of 1,000 power poles.

### **Natural Resources Impacts**

14. The recent wildfires have caused catastrophic natural resources impacts in Plumas County. Of the 768,130 acres recently burned in Plumas County, over 600,000 of those acres have experienced moderate-to-high soil burn severity.

15. Additionally, recent wildfires have caused public safety issues associated with tens of thousands of hazard trees along roads and trails, over 20,000 of which have already been removed at the expense of taxpayers.

### **Insurance Impacts**

16. From 2015-2018, the number of new and renewed policies in the voluntary insurance market fell by 8,700 in the 10 counties with the most homes in high or very high-risk areas, which included Plumas County.

17. The insurance problem has only gotten worse since 2018, in the wake of the recent wildfires.

### **Public Health and Social Services Impacts**

18. Wildfires, including the fires described above, are a public health concern because they can cause dangerously high levels of air pollution, including elevated levels of particulate matter and metals. These pollutants can cause increase the severity of asthma, other respiratory disease, inflammation, and

infections such as bronchitis and pneumonia, emergency department visits, and hospital admissions.

19. Beyond this, wildfires in Plumas County have caused impacts to the ability of County residents to access critical medical and dental services. For example, in 2021, the Dixie Fire impacted Greenville Rancheria's medical and dental facilities, resulting in patients driving four hours roundtrip to facilities in Red Bluff, California.

20. The recent wildfires have also impacted Plumas County's schoolchildren. During the 2021 fire season, at least 350 elementary school children and their families were impacted by the delayed beginning of the school year caused by wildfires.

### **Economic Damage/Losses**

21. Recent wildfires have taken a staggering toll on the economy of Plumas County. In just the first year after the Camp Fire, the Gross Regional Product (GRP), a measure of whether the economy is expanding or shrinking, declined between 64 and 81 percent within the fire footprint.

### **Plumas County's Interest in Intervention**

22. Plumas County has an important interest in this case because our County and its citizens are directly impacted by Forest Service fire suppression efforts. The lives and livelihoods of each resident and visitor to Plumas County would be threatened by any increase in wildfire that would result from the Forest Service being limited in its ability to deploy fire retardant.

23. As depicted in the map attached as Exhibit A, the federal government is responsible for maintaining a wildland fire protection system across the vast majority of the public and private land in Plumas County.

24. Residential fire protection on private lands in Plumas County may also be provided by one of approximately 20 local fire departments, many of which are strictly volunteer. There are no fire stations operated by CalFire in Plumas County.

25. Because the vast majority of the land base in Plumas County is managed by the federal government and most of the private lands within Plumas County are within the federal government's Direct Protection Area, residents of Plumas County are particularly reliant on—and impacted by—the federal government's wildfire suppression efforts on both public and private lands.

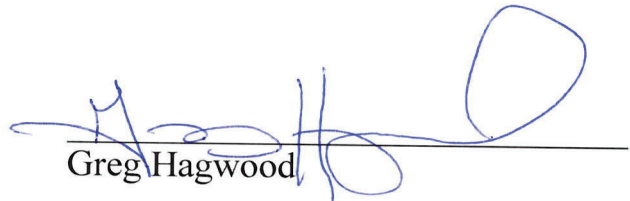
26. If the federal government is unable to rapidly suppress fires that threaten our communities, in many cases, Plumas County does not have the professional and volunteer capacity to engage in the suppression efforts necessary to protect communities. For example, Plumas County does not have aerial resources (e.g., aircraft) that are capable of engaging in initial attack and therefore relies on the federal government for effective initial attack.

27. Under extreme fire conditions, such as those seen in recent years, fires can grow tens of thousands of acres in a single day. It is therefore critical to communities located adjacent to national forests that Forest Service firefighters have every suppression tool available to protect life, public safety, and property.

28. Had federal firefighters been unable to use fire retardant deployed using aircraft as a tool in suppressing major fires in 2021, the losses described above could have been substantially worse and more devastating.

29. The Forest Service does not adequately represent Plumas County or its citizens and businesses. Although the parties share the same ultimate goal of defending the aerial deployment of fire retardant, Plumas County and its residents, visitors, and businesses have unique safety, property and economic interests at stake, which are described above.

I declare under penalty of perjury that the foregoing is true and correct, and that this Declaration was executed on March 8th, 2023.

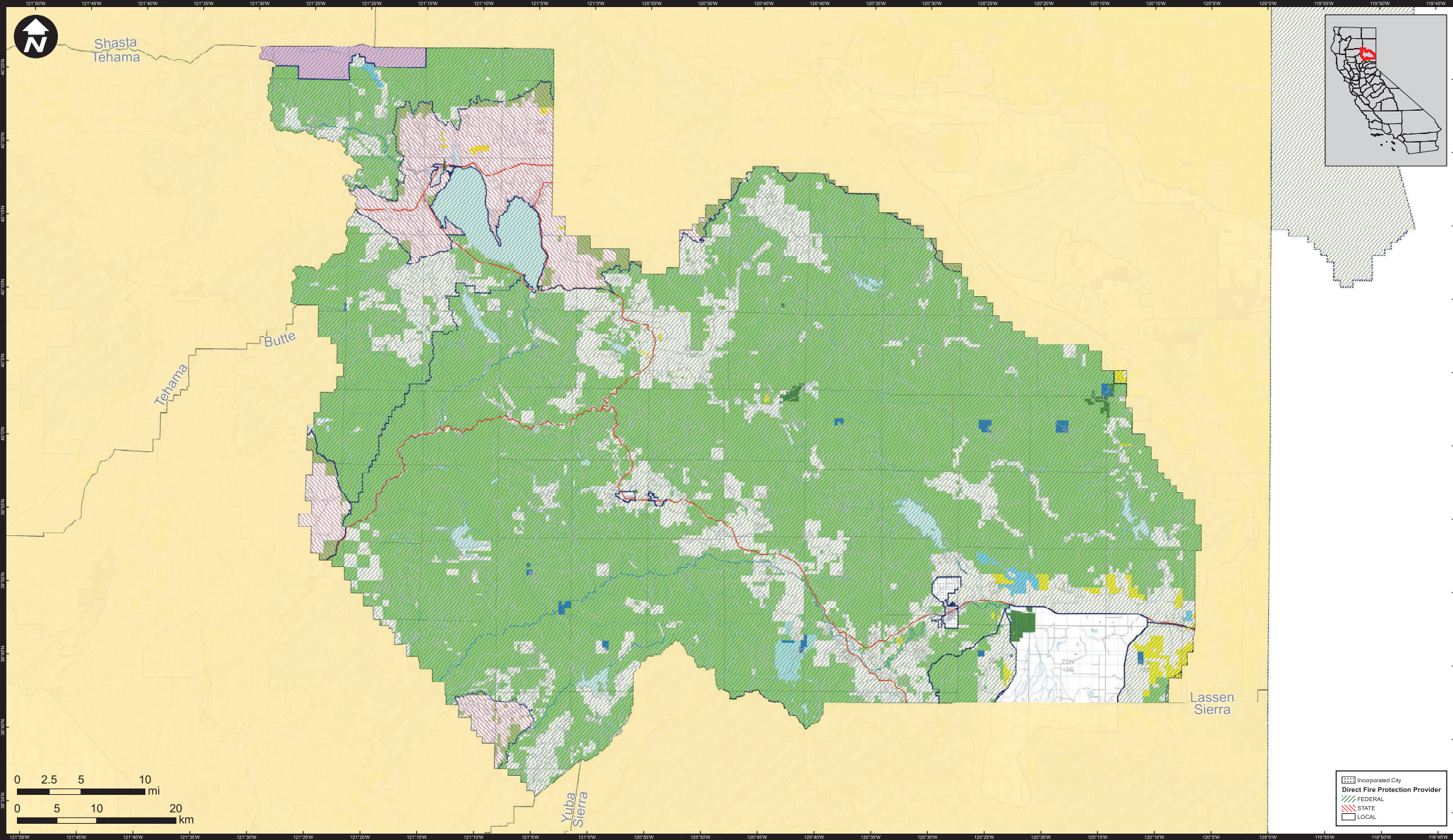
  
Greg Hagwood

**EXHIBIT A**



# DIRECT PROTECTION AREAS for WILDLAND FIRE PROTECTION

Produced for the California Wildfire Coordinating Group



# PLUMAS COUNTY

Data Sources:  
 Direct Protection Areas (DirectProtectionAreas\_22\_2)  
 Land Ownership (Ownership\_22\_1)  
 Incorporated Cities (Incorp\_22\_1)

DPA2022\_CountyMaps\_ArchD\_land\_5/16/2022  
 NAD 1983 California Teale Albers

**DIRECT PROTECTION AREA**  
 That area which, by law or pursuant to the terms of a cooperative agreement, is provided wildland fire protection by the State, Local or Federal Agencies. Direct protection areas may include a mixture of State, Federal, and Local responsibility areas.

This map was produced by the USFS Region 5 Fire and Aviation Geospatial Program. GIS data and product accuracy may vary. The Forest Service reserves the right to update, modify, or replace any or all of this data without notifying the users. The most current version of DPA can be found at:  
<https://gacc.nrc.gov/fsccowg/gis.php>

**Incorporated City**

**Direct Fire Protection Provider**

- FEDERAL
- STATE
- LOCAL

# **Exhibit 3**

(Declaration of Ken Pimlott in Support of Brief  
of Amici Curiae in Opposition to Plaintiff's  
Motion for Summary Judgment)



W. Adam Duerk, IV  
KNIGHT NICASTRO MACKAY, LLC  
283 W. Front Street, Suite 203  
Missoula, Montana 59802  
Email: [duerk@knightnicastro.com](mailto:duerk@knightnicastro.com)  
Ph: (406) 206-7102

Eric Waeckerlin  
Julian R. Ellis, Jr. (*pro hac vice admission pending*)  
BROWNSTEIN HYATT FARBER SCHRECK, LLP  
410 Seventeenth Street, Suite 2200  
Denver, Colorado 80202  
Email: [ewaeckerlin@bhfs.com](mailto:ewaeckerlin@bhfs.com)  
[jellis@bhfs.com](mailto:jellis@bhfs.com)  
Ph: (303) 223-1100

Bella Sewall Wolitz (*pro hac vice admission pending*)  
BROWNSTEIN HYATT FARBER SCHRECK, LLP  
1155 F Street N.W., Suite 1200  
Washington, District of Columbia 20004  
Email: [bsewallwolitz@bhfs.com](mailto:bsewallwolitz@bhfs.com)  
Ph: (202) 296-7353

Elisabeth L. Esposito (*pro hac vice admission pending*)  
BROWNSTEIN HYATT FARBER SCHRECK, LLP  
1415 L Street, Suite 800  
Sacramento, California 95814  
Email: [eesposito@bhfs.com](mailto:eesposito@bhfs.com)  
Ph: (916) 594-9700

*Attorneys for Amici Curiae*

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

Forest Service Employees for  
Environmental Ethics,

*Plaintiff,*

No. 9:22-CV-168-DLC

v.

United States Forest Service,

*Defendant,*

Town of Paradise, California, Butte  
County, California, Plumas County,  
California, Rural County  
Representatives of California,  
American Forest Resource Council,  
National Alliance of Forest Owners,  
Federal Forest Resource Coalition,  
California Forestry Association,  
Montana Wood Products Association,  
Oregon Forest Industries Council,  
Washington Forest Protection  
Association, California Farm Bureau  
Federation, California Women for  
Agriculture, and National Wildfire  
Suppression Association,

*Amici Curiae.*

DECLARATION OF KEN PIMLOTT  
IN SUPPORT OF BRIEF OF AMICI  
CURIAE IN OPPOSITION TO  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT

I, Ken Pimlott, declare:

1. I was appointed Director of the California Department of Forestry and Fire Protection (CAL FIRE) by Governor Jerry Brown in 2011, and served as Director until my retirement in December 2018. In my capacity as Director, I oversaw fire protection for over 31 million acres of privately owned lands in California and managed an agency that responded to over 5,600 fires per year with a field staff of over 7,000 employees. My appointment as Director of CAL FIRE came after approximately 30 years in the fire service. I earned my Bachelor of Science degree in Forest Resource Management from Humboldt State University, and I am licensed as a California Registered Professional Forester.

2. Since my retirement from CAL FIRE, I have continued working to make California communities more fire safe. I currently serve as the Chair of the El Dorado County Fire Safe Council, a non-profit organization committed to making El Dorado County, California more fire safe, including through community education and outreach. I am also working part time for the County of El Dorado facilitating the Wildfire Preparedness and Resilience Advisory Committee and helping establish a County Office of Wildfire Preparedness. I am a resident of El Dorado County, a member county of the Rural County Representatives of California (RCRC), one of the amicus parties in this action. The statements in this declaration are based on my own personal knowledge and are true and correct. If called to testify to their accuracy, I could and would do so.

3. Under my leadership, CAL FIRE and the State of California battled historic wildfires and an unprecedented bark beetle epidemic while at the same

time increasing the pace and scale of forest management and fire prevention. During my career, I have responded to wildfires across the West and throughout the State of California, including in the Town of Paradise, California, and in Plumas and Butte Counties, each of which are amicus parties in this action.

4. As former Director of CAL FIRE having spent my career in the fire service, I am aware of vivid examples where the aerial deployment of fire retardant was crucial in saving lives, communities, property, and natural resources.

5. For example, in September 2014, the Boles Fire threatened the community of Weed, located in Siskiyou County in Northern California. Firefighters were able to contain the fire within a 516-acre footprint, but not before it destroyed 165 structures, damaged seven more, and caused one injury. Although these were grave losses, the aerial deployment of fire retardant within the community of Weed saved over half of the town and prevented the destruction of hundreds more homes and businesses. The following photo depicts the effectiveness of the aerial deployment of fire retardant in stopping the spread of wildfire across the community of Weed. The red line shown in the photo is fire retardant that was deployed from an aircraft. The fire burned through the foreground of the community depicted in the photo, but was halted by the retardant drop, which stopped the wildfire from spreading further throughout the community.



6. Another recent example of the importance and effectiveness of the aerial deployment of fire retardant was on the Mosquito Fire, which burned in the American River Canyon between the communities of Forest Hill and Volcanoville, California during September of 2022. Strategic applications of retardant along ridgelines played a key role in stopping the spread of the fire on the south side of the river and minimizing impacts to the communities of Volcanoville and Georgetown. I personally flew over the fire while working on a separate project and witnessed the impact of aerial retardant as depicted in the following photo from the Mercury News.





7. These are just a few of the numerous examples I have encountered over the course of my career where the aerial deployment of fire retardant made a significant difference in our ability to protect public safety, communities, property, and natural resources.

8. In my fire career, I gained first-hand understanding of the close coordination between federal and state governments in deploying aerial resources to respond to wildfires, both on initial and extended attack.

9. In California, CAL FIRE and Region 5 of the U.S. Forest Service (Forest Service) have a long history of cooperative fire protection, including an integrated air attack program. Under this coordinated program, air attack bases are located throughout the State based on a maximum 20-minute response time to any location, including lands in the State Responsibility Area (SRA), where CAL FIRE

has primary jurisdiction for the response to fires, and the Federal Responsibility Area (FRA), where federal agencies have the primary responsibility for fire response. This goal of this coordinated system is the seamless, integrated deployment of aircraft for response to wildfires. Neither the State of California nor the federal government have the resources to support aircraft bases in each region of California. Therefore, the governments work together to provide coverage across the state. When fires occur, aircraft come from the closest base without regard to which government owns or contracts for the aircraft.

10. This closely coordinated system would be undermined if the Forest Service were enjoined from the aerial deployment of fire retardant. One impact of such an injunction would be significantly increased response times, including in the most heavily populated areas of California. For example, General William J. Fox Airfield (Fox Field) in Lancaster, California is the closest air tanker base to the City and County of Los Angeles. However, Fox Field is a federal aircraft base. If aircraft stationed at Fox Field were unable to deploy fire retardant, aircraft responding to wildfire incidents in Los Angeles would need to come from CAL FIRE bases in Riverside or San Diego Counties. This would significantly delay response times to many locations in Los Angeles County and would threaten public safety, communities, and natural resources.

11. Likewise, an injunction would affect the type of aircraft available to respond to wildfires in California. The Forest Service typically uses Type I and II aircraft. These are the largest aircraft capable of deploying the largest volumes of fire retardant, sometimes referred to as very large air tankers (VLAT). Examples of

Type I aircraft, include the DC-10, which is generally used for the protection of resources during extended attack in fighting wildfires, typically in rural settings, and carries up to 12,000 gallons of fire retardant in an exterior belly-mounted tank, which can be released in eight seconds. Due to the need to reload and refuel at an equipped aerial firefighting base, a limited number of bases in California—including CAL FIRE’s base at McClellan in Northern California and the Forest Service’s San Bernardino Tanker Base in Southern California—are serviceable for this large an aircraft. In contrast, CAL FIRE employs more Type III aircraft, which are smaller and typically used for fast initial attack delivery of fire retardant on wildland fires. For example, CAL FIRE employs approximately 23 Grumman S-2T Type III airtankers, which each carry up to 1,200 gallons of retardant. The state and federal aviation fleets therefore operate as a complementary system. An injunction on the Forest Service’s aerial deployment of fire retardant would cause severe logistical challenges, including the potential elimination of reloading capability for VLAT in Southern California and extending flight times for VLAT responding to fires in Southern California due to the need to reload at McClellan in Northern California. This would threaten the effectiveness of the system and the ability to protect public safety, communities, and natural resources.

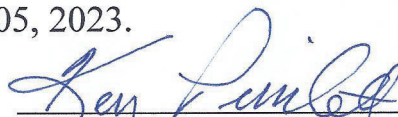
12. On March 7, 2012, in my capacity as Director of CAL Fire, I wrote a letter to the Chief of the Forest Service regarding logistical challenges resulting from the Forest Service’s then-aging fleet of airtankers, which had been reduced in size from 43 in 2000 to 11 in 2011. A true and correct copy of my March 7, 2012 letter is attached as Attachment 1. Since the date of that letter, the Forest Service



made great strides in improving and modernizing its national fleet of air tankers. My letter is instructive, however, because it highlights the challenges that would reoccur if the Forest Service were enjoined from the aerial deployment of fire retardant. Specifically, these challenges include:

- a. Increasing the burden on CAL FIRE aircraft to respond to fires on National Forest System lands;
- b. Increasing the flight hours on CAL FIRE's air tankers;
- c. Reducing the availability of CAL FIRE's air tankers for response to new fires;
- d. Reducing efficiencies resulting from coordination between the Forest Service and CAL FIRE, which enables the respective agencies to use specialized aircraft where they are most effective;
- e. Compromising CAL FIRE's ability to continue to effectively respond to extended attack fires on federal lands in California; and
- f. Increasing the danger that during periods of multiple large fires, California will be left with an insufficient number of aircraft to meet the initial and extended attack workload, placing an additional burden on state and local government aircraft and risking additional large fires that threaten lives and natural resources.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on April 05, 2023.

  
\_\_\_\_\_  
Ken Pimlott

**ATTACHMENT 1**



## DEPARTMENT OF FORESTRY AND FIRE PROTECTION

P.O. Box 944246  
 SACRAMENTO, CA 94244-2460  
 (916) 653-7772  
 Website: [www.fire.ca.gov](http://www.fire.ca.gov)



March 7, 2012

Tom Tidwell, Chief  
 USDA Forest Service  
 1400 Independence Avenue, South West  
 Room 4 NW, Yates Building  
 Washington D.C. 20250

Dear Chief Tidwell:

The California Department of Forestry and Fire Protection (CAL FIRE) and the United States Forest Service (USFS) Region 5 have a long history of cooperative fire protection, including an integrated air attack program. Air attack bases were located throughout the State based on a maximum 20 minute response time to any location, including both State Responsibility Area (SRA) and National Forest lands. CAL FIRE's fleet of 23-Type 3 air tankers, mixed with the assigned federal Type 1 air tankers, provided a mixture of aircraft to meet our joint initial attack goals, as well as the needs of extended attack and major fires.

The reduction in the number of federal air tankers from 43 in 2000, to 11 in 2011, has resulted in significant impacts on this integrated system, placing an increasing burden on CAL FIRE aircraft to respond to fires on National Forest lands. Initial and extended attack fires on federal lands are increasing the flight hours on CAL FIRE's air tankers and reducing their availability for response to new fires.

The USDA Forest Service Large Air Tanker Modernization Strategy (Strategy), released on February 10, 2012, is long overdue and is a critical step toward identifying the next generation large air tanker platform. I have concerns, however, that the Strategy falls short in several areas:

- The Strategy does not reference the individual needs of the States. The federal aviation program is critical to meeting the fire protection goals of the States as well as those of the federal agencies, especially in California. Fire fighting aircraft are a very limited resource and, therefore, it is critical that the national strategy include collaboration with the States to ensure the plan provides for efficient and integrated use of all assets.
- The identified optimum number of 18 to 28 aircraft is insufficient to meet the needs of the combined federal, state and local wildland firefighting missions. As the Strategy indicates, the current drought cycle will continue through the next decade,



March 7, 2012

Page two

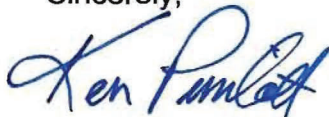
only exacerbating the already dry fuel conditions and potential for extreme fire behavior. Over half of California's most devastating fires have occurred within the last 10 years. The federal aviation program must build capacity back to a level that adequately supports the initial and extended attack needs, both nationally and within individual states. I am concerned that during periods of multiple large fires in other Regions, California will be left with an insufficient number of federal aircraft to meet the normal initial and extended attack workload. This places additional burden on CAL FIRE and local government aircraft and risks additional large fires that threaten lives and natural resources.

- The Strategy identifies a desire to look at dual mission aircraft that can transition from delivering retardant to transporting cargo or fire fighters. It is critical that aircraft identified as air tankers remain dedicated to initial attack response and that retardant systems be designed for the most effective delivery and application of retardant. Switching between multiple functions often leads to a reduction in performance for any given task.
- The Strategy does not adequately address the potential use of very large air tankers (VLATs), especially for the extended attack incidents. The VLAT should be considered to meet your interim needs, and as part of your long-term strategy. Use of the VLAT on extended attack incidents, where large amounts of retardant are required over extended periods of time, could free up other air tankers for initial attack incidents where they are arguably more effective.

CAL FIRE has maintained its own aviation program in California for many years and has worked very closely with our federal partners. We have a vested interest in an effective national aviation program that supports all of our missions. Unless there are a sufficient number of federal air tankers, CAL FIRE cannot continue to support extended attack fires on federal lands without adversely affecting our aviation program.

States stand ready to assist you in developing and implementing a plan for the appropriate number, type and location of federal air tankers. I look forward to discussing this issue with you and Tom Harbour in the near future.

Sincerely,



KEN PIMLOTT  
Director

Cc: (USFS) James Hubbard, Deputy Chief for State & Private Forestry  
(USFS) Tom Harbour, Director of Fire and Aviation Management  
(USFS) Randy Moore, Regional Forester Pacific Southwest Region  
(CAL FIRE) Andy McMurry, Deputy Director, Chief of Fire Protection  
(CAL FIRE) Caroline Godkin, Deputy Director of Legislation

# **Exhibit 4**

(Declaration of Wyatt Frampton in Support of  
Brief of Amici Curiae in Opposition to  
Plaintiff's Motion for Summary Judgment)

W. Adam Duerk, IV  
KNIGHT NICASTRO MACKAY, LLC  
283 W. Front Street, Suite 203  
Missoula, Montana 59802  
Email: duerk@knightnicastro.com  
Ph: (406) 206-7102

Eric Waeckerlin  
Julian R. Ellis, Jr. (*pro hac vice admission pending*)  
BROWNSTEIN HYATT FARBER SCHRECK, LLP  
410 Seventeenth Street, Suite 2200  
Denver, Colorado 80202  
Email: ewaeckerlin@bhfs.com  
jellis@bhfs.com  
Ph: (303) 223-1100

Bella Sewall Wolitz (*pro hac vice admission pending*)  
BROWNSTEIN HYATT FARBER SCHRECK, LLP  
1155 F Street N.W., Suite 1200  
Washington, District of Columbia 20004  
Email: bsewallwolitz@bhfs.com  
Ph: (202) 296-7353

Elisabeth L. Esposito (*pro hac vice admission pending*)  
BROWNSTEIN HYATT FARBER SCHRECK, LLP  
1415 L Street, Suite 800  
Sacramento, California 95814  
Email: eesposito@bhfs.com  
Ph: (916) 594-9700

*Attorneys for Amici Curiae*

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

Forest Service Employees for  
Environmental Ethics,

*Plaintiff,*

No. 9:22-CV-168-DLC

v.

United States Forest Service,

*Defendant,*

Town of Paradise, California, Butte  
County, California, Plumas County,  
California, Rural County  
Representatives of California,  
American Forest Resource Council,  
National Alliance of Forest Owners,  
Federal Forest Resource Coalition,  
California Forestry Association,  
Montana Wood Products Association,  
Oregon Forest Industries Council,  
Washington Forest Protection  
Association, California Farm Bureau  
Federation, California Women for  
Agriculture, and National Wildfire  
Suppression Association,

*Amici Curiae.*

DECLARATION OF WYATT  
FRAMPTON IN SUPPORT OF  
BRIEF OF AMICI CURIAE IN  
OPPOSITION TO PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT



I, Wyatt Frampton, declare:

1. I have been employed with the Montana Department of Natural Resources and Conservation (“DNRC”) from May 2007 through the present. During my career with DNRC I have been a wildland firefighter, incident commander, Unit Fire Management Officer, and Area Fire Management Officer. Since November 2022, I have served as the Forestry Deputy Division Administrator for the Agency’s Forestry and Trust Lands Division and am directly responsible for the agency’s fire management, Good Neighbor Authority, and Cooperative Forestry Programs. The statements herein are based on my own personal knowledge and are true and correct. If called to testify to their accuracy, I could and would do so.

2. The Montana Department of Natural Resources and Conservation (“DNRC”) is a Montana executive agency organized under the laws of the State of Montana for the purpose of selecting, exchange, classification, appraisal, leasing, management, sale or other disposition of state lands within the State of Montana. The Forestry and Trust Lands Division of DNRC is responsible for planning and implementing forestry and fire management programs throughout the state.

3. The Montana DNRC and Montana Local Government Fire Forces provide wildland fire protection to over 60 million acres in Montana, accountable for protection to over 65% of Montana’s land base. Fire retardant is a critical and effective tool that Montana state firefighters are trained to utilize when and where appropriate, and in a manner which will give them a tactical advantage when

aggressively suppressing wildfires while protecting human life, public safety, public and private property, and natural resources.

4. The DNRC and Montana Local Government Fire Forces are entirely reliant on the United States Forest Service (USFS) for the contracting and administration of vendors to provide fire retardant for large air tankers on the west and central parts of the state. On the east side there are some options available through the Department of Interior (DOI), but as a whole the USFS remains the primary supplier of fire retardant delivered by large aircraft for the state. The injunction requested by Plaintiffs would therefore deprive Montana state and local government firefighters of their only access to retardant delivered by large air tankers for the majority of the state. Aircraft-delivered retardant is the fastest, most efficient, and highest capacity asset at the disposal of Montana firefighters, allowing them to rapidly, efficiently, and effectively establish containment efforts in a manner unmatched by other wildfire fighting tools. Removing this tool will result in fires that are more difficult to contain, more costly, and more destructive to Montana communities and ecosystems.

5. Specifically, without fire retardant, managers will be more reliant on ground resources and helicopters. During a busy fire season, these resources are often in short supply, are less mobile than air-delivered retardant, and take much longer to transport between incidents.

6. The requested injunction would therefore disrupt wildfire response efforts in Montana, particularly given its timing, at a point when Montana's fire season is already underway. Montana has already experienced its first wildfires of

the season and a disruption to Montana's suppression system now will not leave sufficient time to develop alternative mechanisms to mitigate the loss of highly mobile and effective retardant delivery systems, leaving Montanans and our communities more vulnerable to catastrophic wildfires.

7. The Matt Staff Fire and Mount Helena Fire are recent examples of specific instances in Montana, of which I have personal knowledge, where fire retardant drops made a meaningful difference for the protection of public safety, human life, preservation of property, and protection of natural resources.

8. On August 4, 2022, the Matt Staff Road Fire began east of East Helena, Montana, and burned just over 1,500 acres prior to containment. Due to its proximity to populated areas, agricultural property, and popular recreational areas, it posed risk to human life, public safety, and private property. The Matt Staff Fire was first reported at approximately 2:00 P.M. on August 4, 2022, and spread rapidly toward residential properties due to wind direction and available fuels. The fire suppression response relied heavily on the use of fire retardant to slow fire spread toward structures enabling DNRC to quickly reduce the threat to human life and private property. Ultimately, fire retardant prevented significant property loss and enabled containment of the fire by August 8, 2022.

- a. Attachment 1 includes photos taken on August 6, 2022, from a DNRC helicopter and depict fire retardant use as a tool to suppress the Matt Staff Fire. Attachment 2 is a map depicting the location and perimeter of the Matt Staff Fire.

- b. As reflected in Attachment 1 and 2, the use of fire retardant effectively stopped the fire front from advancing. This allowed other on the ground fire suppression efforts to focus on other areas of the fire.

9. On August 28, 2022, the Mount Helena Fire began near downtown Helena, Montana, and burned approximately 18 acres prior to containment. Due to the location of the fire, less than one mile from downtown Helena, it posed significant risk to both human life, public safety, and private property. Rapid aggressive response to this fire, utilizing aerial fire retardant was required to prevent loss of life and property. Due to the effective response and coordination the fire was quickly contained with no reported injuries or damage.

- a. Attachment 3 includes photos taken on August 28, 2022, and depict fire retardant use as a tool to suppress the Mount Helena Fire.

Attachment 4 is a map depicting the location and perimeter of the Mount Helena Fire.

- b. As reflected in Attachment 3 and 4, the use of fire retardant effectively stopped the wildfire from spreading into heavy timber on the south and east flanks of the fire. This allowed other on the ground fire suppression efforts on other areas of the fire.

10. Both fires started under critical fire weather conditions and rapid containment of the fires with no loss of either life or property was only possible because of aerially delivered fire retardant.

11. Without the use of retardant in the foregoing incidents firefighters would have been required to either back off, or disengage completely to await more favorable fire behavior before reengaging. The likely result of such a change in tactics would have been larger fires; commitment of additional, costly, resources and firefighters; and greater risk to public safety in incidents where risk was already substantial.

12. The efficacy of fire retardant as a suppression tool during the Matt Staff Fire and Mount Helena Fire is consistent with my observation of its efficacy in other wildfire suppression efforts in Montana.

I declare under penalty of perjury that the foregoing is true and correct, and that this Declaration was executed on April 14, 2023.

  
Wyatt Frampton

**ATTACHMENT 1**



**ATTACHMENT 1**



Matt Staff Fire, Helena Montana, August 2023, Photo Credit Montana DNRC.

Fire retardant drop on the on the right flank of the fire (South side).





Matt Staff Fire, Helena Montana, August 2023, Photo Credit Montana DNRC.

Fire retardant drop on the on the left flank of the fire (North side).



Matt Staff Fire, Helena Montana, August 2023, Photo Credit Montana DNRC.

Fire retardant drop on the on the left flank of the fire (North side).





Matt Staff Fire, Helena Montana, August 2023, Photo Credit Montana DNRC.

Fire retardant drop on the on the left flank of the fire (North side).



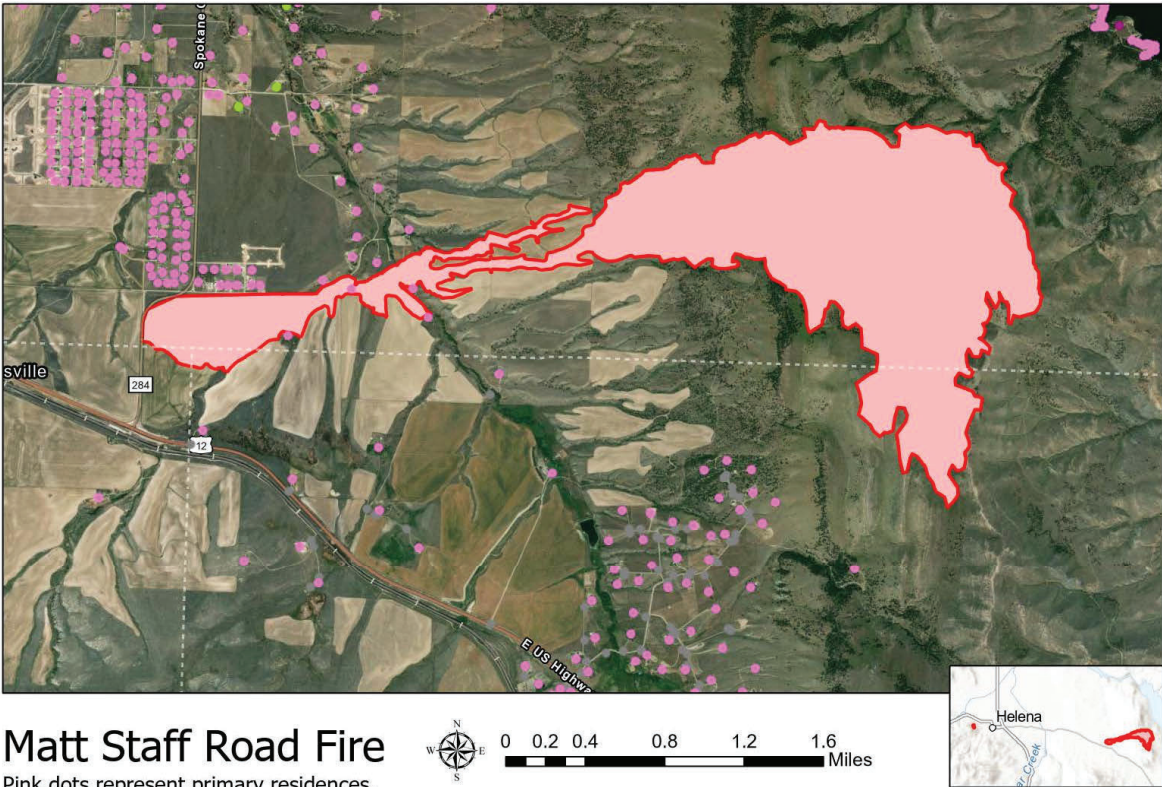
Matt Staff Fire, Helena Montana, August 2023, Photo Credit Montana DNRC.

Fire retardant drop on the on the left flank of the fire (North side).



**ATTACHMENT 2**

ATTACHMENT 2



**Matt Staff Road Fire**  
Pink dots represent primary residences.



**ATTACHMENT 3**



**ATTACHMENT 3**



Mount Helena Fire, Helena Montana, August 2023, Photo Credit Montana DNRC.

Fire retardant drop on the on the left flank of the fire (South side).



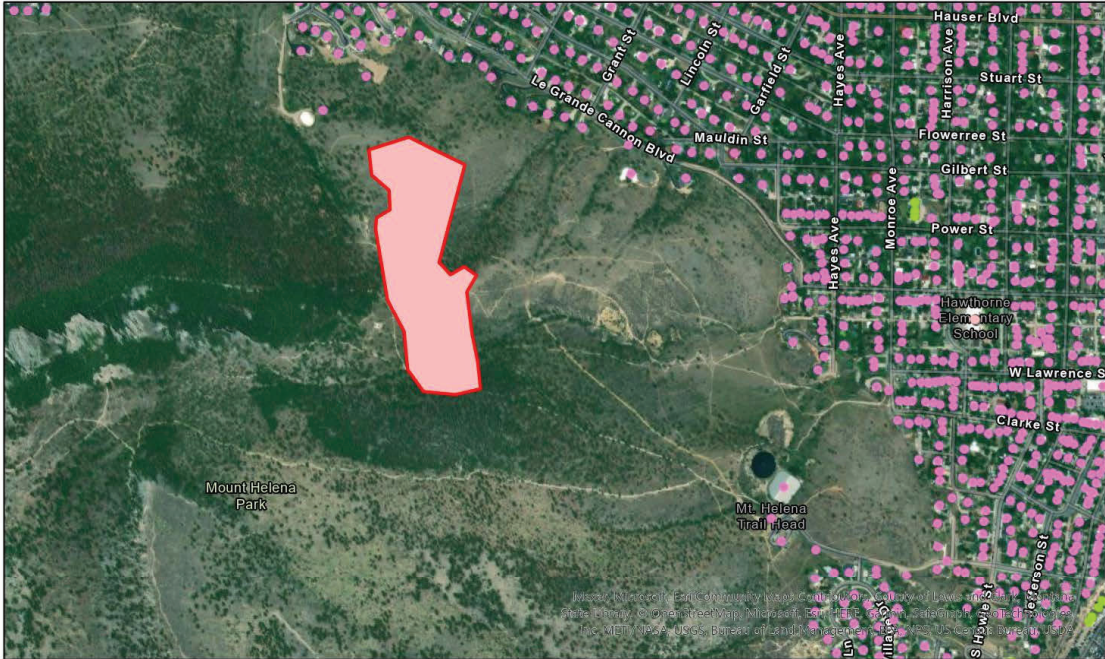
Mount Helena Fire, Helena Montana, August 2023, Photo Credit Montana DNRC.

Fire retardant drop on the on the heel of the fire (East side).

**ATTACHMENT 4**

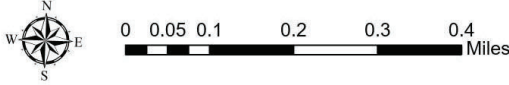


ATTACHMENT 4



# Mount Helena Fire

Pink dots represent primary residences



# **Exhibit 5**

(Letter from Tim Bechtold re FSEEE's Notice of Intent to File Suit against the Forest Service)

**BECHTOLD LAW FIRM, PLLC**

---

317 East Spruce Street  
PO Box 7051  
Missoula, Montana 59807  
www.bechtoldlaw.net

June 23, 2022

**VIA CERTIFIED MAIL**

Randy Moore, Chief  
U.S. Forest Service  
1400 Independence Ave., SW  
Washington, D.C. 20250-0003

Michael S. Regan, Administrator  
U.S. Environmental Protection Agency  
Aerial Rios Building, Mail Code 1101A  
1200 Pennsylvania Avenue, NW  
Washington, D.C. 20460

US EPA Region 6  
1201 Elm St  
Dallas, TX 75270

US EPA Region 8  
1595 Wynkoop Street  
Denver, CO 80202-1129

US EPA Region 9  
75 Hawthorne St.  
San Francisco, CA 94105

US EPA Region 10  
1200 6th Avenue, Suite 155  
Seattle, WA 98101

Washington Department of Environmental Quality  
P.O. Box 47600  
Olympia, WA 98504-7600

Oregon Department of Environmental Quality  
4026 Fairview Industrial Drive SE  
Salem, OR 97302

California State Water Resources Control Board  
Division of Water Quality  
NPDES Wastewater Unit, 15th Floor

FSEEE 60-Day Notice

June 23, 2022

Page 2 of 5

P.O. Box 100  
Sacramento, CA 95812-0100

Montana Department of Environmental Quality  
1520 E 6th Avenue  
Helena, MT 59601

Idaho Department of Environmental Quality  
1410 N. Hilton St.  
Boise, ID 83706

Nevada Division of Environmental Protection  
375 E. Warm Springs Road,  
Suite 200  
Las Vegas, NV 89119

Arizona Department of Environmental Quality  
1110 W. Washington St.  
Phoenix, AZ 85007

Utah Division of Environmental Quality  
P.O. Box 144870  
Salt Lake City, UT 84114-4870

Wyoming Department of Environmental Quality  
200 West 17th St.  
Cheyenne, WY 82002

Colorado Department of Public Health and Environment  
4300 Cherry Creek Dr.  
South Denver, CO 80246

**RE: Forest Service Employees for Environmental Ethics ("FSEEE") sixty-day notice of intent to file suit for violations of the Clean Water Act ("CWA") against the U.S. Forest Service ("USFS")**

I write to notify you that pursuant to CWA Section 505, 33 U.S.C. § 1365, FSEEE intends to bring suit against the USFS for its ongoing and continuous unpermitted discharges of retardant pollutants from aircraft point sources into navigable waters. FSEEE and its thousands of members are concerned about the USFS's continuing and serious violations of the Clean Water Act.

During the 60-day notice period, FSEEE is willing to discuss effective remedies for the violations described in this letter, and actions that might be taken to ensure the USFS complies with the Clean Water Act. If you wish to pursue such discussions prior to litigation, please contact me.



FSEEE 60-Day Notice

June 23, 2022

Page 3 of 5

The name, address, and phone number of the organization giving notice of intent to sue are as follows:

Andy Stahl, Executive Director  
Forest Service Employees for Environmental Ethics  
P.O. Box 11615  
Eugene, OR 97440  
Tel: 541-484-2692  
andys@fseee.org

The name, address, and phone number of counsel for the notifier is as follows:

Timothy Bechtold  
Bechtold Law Firm, PLLC  
PO Box 7051  
Missoula, MT 59807  
Tel: 406-721-1435  
tim@bechtoldlaw.net

### **Forest Service Employees for Environmental Ethics**

FSEEE is a 501(c)(3) non-profit corporation founded in 1989 that protect national forests and to reform the U.S. Forest Service by advocating environmental ethics, educating citizens, and defending whistleblowers. FSEEE is made up of thousands of concerned citizens, present, former, and retired Forest Service employees, other government resource managers, and activists working to change the Forest Service's basic land management philosophy. FSEEE is a unique concept—a national organization of government employees holding the Forest Service accountable for responsible land stewardship. FSEEE believes that the land is a public trust, to be passed with reverence from generation to generation. The Forest Service and other public agencies must follow the footsteps of Aldo Leopold, a pioneer of conservation, and become leaders in the quest for a new resource ethic. Together we must work toward an ecologically and economically sustainable future.

FSEEE's members use and enjoy the National Forest System for outdoor pursuits of every kind, including scientific research, boating, backpacking, birdwatching, camping, climbing, fishing, hunting, and sightseeing. In their pursuit of these activities, our members rely on clean water. Degradation of water quality from aerial retardant harms our members use and enjoyment of national forests, including their fish, wildlife, and plants, and their waters.

### **Legal Background**

CWA Section 505 allows citizens to bring suit in federal court against any person, including a federal agency, alleged to be in violation of the CWA. CWA Section 505(b) requires that 60 days prior to the initiation of a Section 505 citizen suit, citizens intending to bring suit must give notice of their intention to sue. Notice must be given to the EPA Administrator, the

FSEEE 60-Day Notice

June 23, 2022

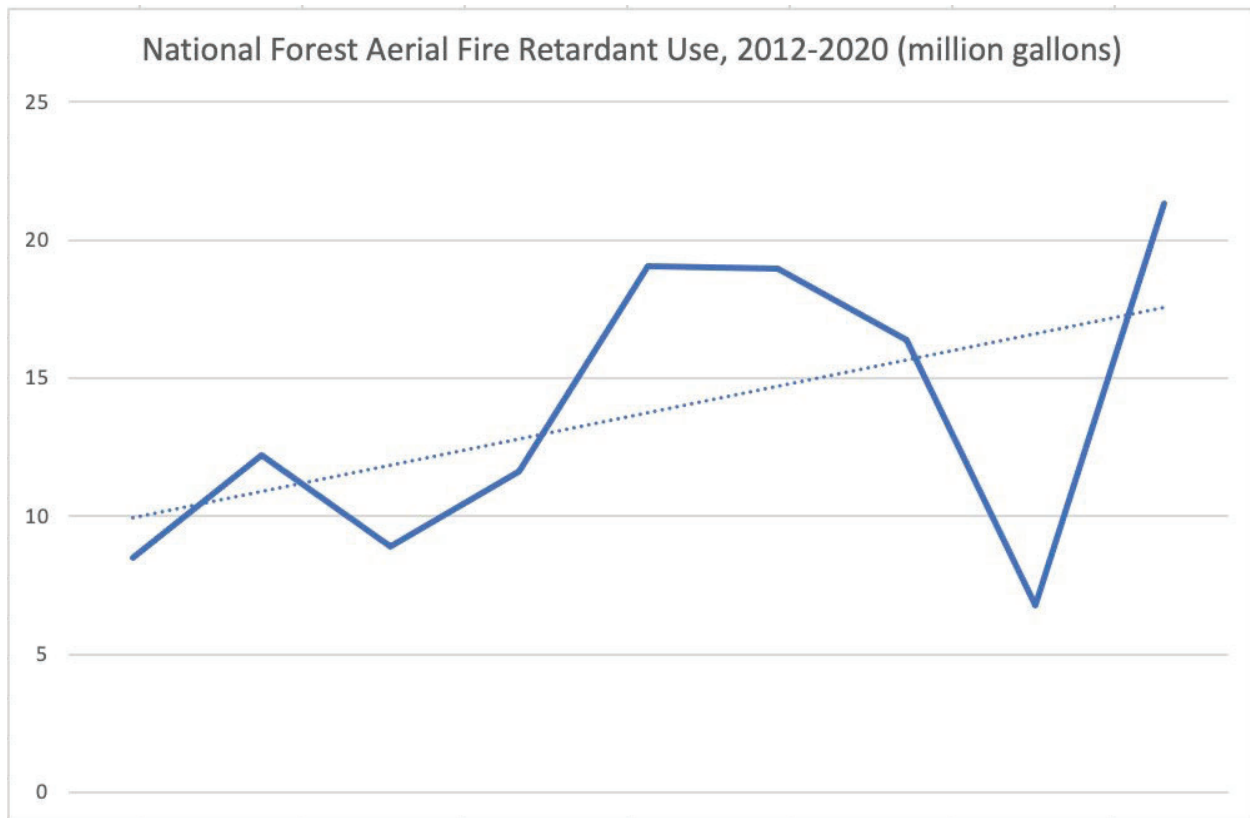
Page 4 of 5

relevant Regional Administrator(s) of the EPA, the state(s) in which the violations are occurring, and to the alleged violator. By this letter, FSEEE hereby puts the USFS on notice that unless the USFS ceases and desists discharging aerial fire retardant into navigable waters in violation of the CWA, FSEEE intends to file suit in the United States District Court following the expiration of the required 60-day notice period, seeking injunctive relief to prevent the illegal discharge of retardant into navigable waters.

### **Unpermitted Discharge Violations**

Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants from a point source to waters of the United States except in compliance with, among other conditions, a NPDES permit issued pursuant to § 402 of the CWA, 33 U.S.C. § 1342. Fire retardant is a pollutant. Aircraft are point sources. The U.S. Forest Service and its contractors have discharged and continue to discharge retardant from aircraft into navigable waters.

The USFS admits that between 2012 and 2019, on at least 376 occasions it discharged retardant pollutant, totaling 761,282.5 gallons, from aircraft directly into national forest navigable waters. *See* USDA-Forest Service, 2022, Nationwide Aerial Application of Fire Retardant on National Forest System Lands Draft Supplemental Environmental Impact Statement (Appendix D), available on-line at <https://www.fs.usda.gov/sites/default/files/2022-02/2022-Aerial-Fire-Retardant-DraftSEIS.pdf>. Retardant use is increasing, too, suggesting that more retardant will be discharged to navigable waters in the future:



FSEEE 60-Day Notice

June 23, 2022

Page 5 of 5

The Forest Service's "may affect" determination for 57 aquatic T&E species and its "likely to adversely affect" finding for an additional 32 aquatic species are further acknowledgements that the Forest Service regularly discharges aerial retardant pollution into waterways. *Id.*

The Forest Service asserts that a letter from EPA excuses its failure to obtain a NPDES permit. *See* Fire Retardant FEIS at 76 (citing "EPA letter from Susan Bromm"). However, the factual basis for the letter -- "operators [] are not discharging into waters of the US" -- is simply not true. *See* EPA letter of June 30, 2011. As discussed above, the Forest Service acknowledges hundreds of retardant discharges into waterways from misapplications and allowable exceptions. In addition, an EPA opinion cannot amend the Clean Water Act, which requires a NPDES permit for the discharge of fire retardant from aircraft into waterways.

In sum, the Forest Service's discharges of retardant pollutants into waterways from aircraft point sources is continuous, on-going, and unpermitted, in violation of the Clean Water Act.

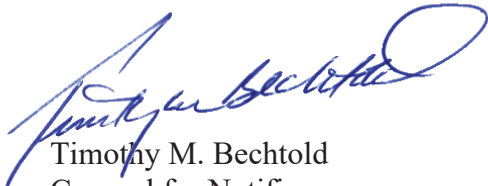
**Relief that FSEEE will seek.**

FSEEE will seek injunctive relief from the court to prevent further violations of the Clean Water Act pursuant to Sections 505(a) and (d), 33 U.S.C. § 1365(a) and (d), declaratory relief, prospective civil penalties to enforce compliance, and such other relief permitted by law. Section 505(d) of the Clean Water Act, 33 U.S.C. § 1365(d), permits prevailing parties or substantially prevailing parties to recover costs, including attorneys' fees and experts' fees associated with an enforcement action. FSEEE intends to seek recovery of such costs and expenses.

**Conclusion**

Upon the expiration of the 60-day notice period, FSEEE intends to file a citizen suit under Section 505(a) of the Clean Water Act for the violations described herein, and for any similar violations that occur after the date of this notice letter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Timothy M. Bechtold", is written over a printed name and title.

Timothy M. Bechtold  
Counsel for Notifier

cc: U.S. Attorney General  
U.S. Department of Justice  
950 Pennsylvania Ave., NW  
Washington, DC 20530-0001