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

NATIVE ECOSYSTEMS
COUNCIL, MONTANA
ECOSYSTEMS DEFENSE
COUNCIL

Plaintiffs,

vs.

FAYE KRUEGER, Regional
Forester of Region One of the U.S.
Forest Service, UNITED STATES
FOREST SERVICE, an agency of
the U.S. Department of Agriculture,
and UNITED STATE FISH &
WILDLIFE SERVICE, an agency of
the U.S. Department of the Interior,

Defendants.

CV 14-00196-DLC

**STATE OF MONTANA
ATTORNEY GENERAL AND
MONTANA DEPARTMENT OF
NATURAL RESOURCES AND
CONSERVATION'S AMENDED
MOTION FOR AND BRIEF IN
SUPPORT OF LEAVE TO FILE
AMICUS CURIAE BRIEF**

I. INTRODUCTION

The State of Montana Attorney General (hereinafter “Attorney General”) and the Montana Department of Natural Resources and Conservation (hereinafter “DNRC”) hereby file their *Withdrawal of Motion and Amended Motion for and Brief in Support of Leave to File Amicus Curiae Brief* (hereinafter “Amended Motion”).

This case concerns the validity of the United States Department of Agriculture Forest Service’s (hereinafter “USFS”) and the United States Department of Interior Fish & Wildlife Service’s (hereinafter “FWS”) administrative review of and decision on the Red Mountain/Chessman Reservoir Project (hereinafter “Project”). Plaintiffs have moved for a preliminary injunction on the Project, without fully explaining the potential consequences of an injunction to the State and the Helena community.

The DNRC is interested in this matter because of its statutory mandates and because, pursuant to those mandates, it has entered into a Master Stewardship Agreement with the USFS and a Supplemental Stewardship Agreement specific to the Project. An Amicus Brief is desirable and relevant in this matter because the DNRC has broad mandates to promote forest health, minimize wildland fire danger, provide wildland fire suppression, and protect watersheds from insect and disease infestation and fire. The Project falls squarely within these DNRC

statutory mandates. In addition, the Attorney General has Montana Constitutional and common law authority to intervene in all suits or proceedings which are of concern to the general public, including those affecting forestry resources in the State. *See generally* Mont. Code Ann. § 76-13-154.

The USFS and FWS cannot adequately represent these broad, state-based interests - including these interests as applied to the Helena community - that apply within the Project area, yet also reach far beyond the federal borders. Counsel for the Attorney General and DNRC has contacted and spoken with counsel for Plaintiffs. The Attorney General and DNRC stated on page 3 of their Motion for and Brief in Support of Leave to File Amicus Curiae Brief [Doc. 10] (hereinafter “Motion”) that “[c]ounsel for the Attorney General and DNRC has contacted and spoken with counsel for Plaintiffs, Robert M. Gentry (who has indicated that Plaintiffs do not object to this Motion), and has attempted to contact counsel for Plaintiffs, Guy R. Knudsen, but was unsuccessful in speaking with him about this Motion.” Subsequent to filing of the Motion, counsel for Plaintiffs, Guy R. Knudsen, contacted counsel for the Attorney General and DNRC to express Plaintiffs’ objection to the filing of an Amicus Curiae Brief in this matter. That clarification is the basis for the filing of this Amended Motion. Counsel for the United States, Mark S. Smith, has informed counsel for the Attorney General and DNRC that the United States takes no position on this Motion.

II. AMICI INTEREST IN THIS MATTER

Interest of the Montana Department of Natural Resources and Conservation

The DNRC files this Motion because it has broad statutory mandates to promote forest health, minimize wildland fire danger, provide wildland fire suppression, and protect watersheds from insect and disease infestation and fire.

The DNRC has an independent duty under Montana law to protect forest resources, watersheds, and Montana citizens from fire hazards. *See generally* Mont. Code Ann. § 76-13-104. This duty to Montana Citizens is supported by the Project's outcome and its projected benefits to reduce the existing fire hazard in and around the Project area.

Pursuant to Mont. Code Ann. § 76-13-104(1)(a), the DNRC is required to “ensure the protection of land under state and private ownership and to suppress wildfires on land under state and private ownership.” The DNRC expends millions of dollars each year in wildland fire suppression. The DNRC is also required to cooperate with all public and other agencies in the development, protection, and conservation of the forest, range and water resources of the state. *Id; see also* Mont. Code Ann. § 76-13-104(5). Since the 2007 Montana Legislature's passage of a “State Fire Policy,” it has been a clear and critical public-safety and risk-reduction priority “to minimize property and resource loss resulting from wildfire,”

to maintain “sound forest management activities to reduce fire risk, such as thinning, prescribed burning, and insect and disease treatments, improve the overall diversity and vigor of forested landscapes and improve condition of related water, wildlife, recreation, and aesthetic resources,” and to develop “fire protection guidelines for the wildland-urban interface” *See generally* Mont. Code Ann. §76-13-115.

The DNRC cooperates with federal agencies in wildland fire suppression on federal lands through the Northern Rockies Coordinating Group.

http://www.fs.fed.us/r1/fire/nrcg/about_index.htm; *see also* Mont. Code Ann. § 76-13-202. Federal lands do not exist in isolation, but are surrounded by State, private, and other public lands. Land management on one affects the other for the purposes of wildland fire suppression.

DNRC must work cooperatively with all forest resource entities to meet legislative goals and priorities. One step in protecting the forest resource, improving public safety and reducing risk and loss, is for the State through DNRC to represent the State’s interest in the federal forest management planning and policy process, by, for example, entering into stewardship agreements such as the one related to the Project. *See generally* Mont. Code Ann. § 76-13-702. Reduction of dangerous fuels from diseased and dead stands, particularly where fuel stands are in close proximity to homes and other structures, is a critical aspect of

protecting private and state property in Montana and ensuring the safety of its citizens. *See* Mont. Code Ann. § 76-13-145 (with respect to the “wildland-urban interface”).

Protection of watersheds, such as the Tenmile drinking water supply for the City of Helena, from the devastation of insect and disease infestation and from the consequential increase in fire danger is also a statutory charge for the DNRC. Specifically, Mont. Code Ann. §76-13-301 provides in relevant part: “(1) [i]t is the public policy of the state to: (a) protect and preserve forest resources from destruction by forest insect pests and tree diseases; (b) protect the forests and watersheds of Montana and restore those watersheds that are most affected by insect pests and tree diseases and are critical to water supplies. Mont. Code Ann. § 76-13-301(2) goes on to provide that “[i]t is further the public policy of the state to independently and through cooperation with the federal government and private forest landowners adopt measures to control, suppress, and eradicate outbreaks of forest insect pests and tree diseases.” *See also* Mont. Code Ann. §76-13-421. Mont. Code Ann. § 76-13-701 specifically declares that the policy of the state is “to promote the sustainable use of all public forests within the state through sound management and collaboration with local, state, and federal entities,” in part because:

...(a) there is overwhelming evidence that the management, protection, and conservation of watersheds in Montana is critical to the well-being of

the state;

(b) the water supplies of some of the state's most populous cities and surrounding areas originate in federally managed watersheds that are at risk for catastrophic wildfire, the severity of which could be reduced by proper management;

(c) a catastrophic wildfire in any one of those municipal watersheds would result in ash and sediment inundating and degrading the water supply, leaving tens of thousands of residents without drinking water, creating a severe public safety situation, and decimating millions of dollars worth of water infrastructure;...

These state duties relative to fire protection and suppression are distinct from the interests of the United States and are best presented by the Attorney General and the DNRC in a separate Amicus Brief to assist this Court in its review of the matters before it.

Interest of the State of Montana Attorney General

Montana's Constitution provides that "[t]he attorney general is the legal officer of the state and shall have the duties and powers provided by law." Mont. Const.art. VI, § 4(4). Pursuant to this authority, the Attorney General controls and manages all litigation on behalf of the state, and may intervene in all suits or proceedings which are of concern to the general public. *State ex rel. Olsen v. Public Service Comm'n*, 129 Mont. 106, 115, 283 P.2d 594 (1955). The Attorney General has both the right and the responsibility to promote the interest of all the citizens of the state and represent the state in all litigation of a public character. *Id.* Those public interests in the present case are vast, including the protection of the drinking water of the city of Helena, the jobs and economic benefits of logging,

wildlife habitat protection, reducing the risk of wildfire in the wildland-urban interface near residences, and overall forest health.

In addition, the Attorney General's interest in seeking leave to file an Amicus Brief with DNRC in this matter is supported and encouraged by the Montana Legislature. In 2013, The Montana Legislature passed and the Governor signed Senate Bill 201 (Hamlett – Cascade), which was meant to correlate sound federal forest management with Montana's constitutional right to a clean and healthful environment. The Bill sustained the Attorney General's existing authority to intervene in federal forest management cases on behalf of the State. *See* Mont. Code Ann. § 76-13-154(1) ("The attorney general has the authority to intervene in litigation or appeals on federal forest management projects"). This legislation passed with unanimous votes in the Montana House and Senate, thus clearly signaling the government's interest in having active State involvement in federal forest management litigation that affects public health, safety, forest health and Montana's economy.

III. AMICUS CURIAE BRIEF IS RELEVANT AND DESIRABLE

The DNRC and the Attorney General present interests that include but go far beyond the boundaries of the Project. While the Federal defendants are interested in the impacts to the Helena National Forest, the DNRC and the Attorney General are interested in the critical role the Project serves in improving forest health in the

State, mitigating wildland-fire suppression costs, and, most importantly, mitigating wildland-fire danger to the Tenmile watershed, to the City of Helena, and to the City of Helena's water supply. In addition, the Project was a culmination of public participation and planning; the DNRC and Attorney General bring the perspective of some of the many cooperators. The DNRC's and Attorney General's involvement in federal forest management - along with both the knowledge and the expertise regarding forest resources and fire suppression – may be helpful to the Court in determining whether this Project should be enjoined or if the risks are too great given the information presented by Plaintiffs. Notwithstanding the Project's outcome being supported by State laws, the DNRC and the Attorney General will provide a unique perspective on the Project's impacts beyond the borders of the Helena National Forest, thereby allowing this Court to render a more fully-informed analysis on the preliminary injunction issue.

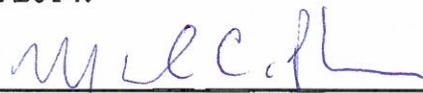
IV. TIMING OF AMICUS CURIAE BRIEF

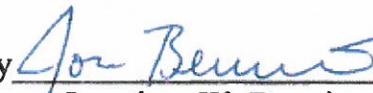
The DNRC and the Attorney General represent that they will comply with the filing deadline set for the Federal Defendants' Response to the Plaintiffs motion for preliminary injunction and file their Amicus Brief on or before August 13, 2014.

V. CONCLUSION

For the reasons stated above and with its desire to provide views on the merits as a friend of the court, the DNRC and the Attorney General respectfully request that this Court grant their *Motion for and Brief in Support of Leave to File an Amicus Curiae Brief* in this matter.

Respectfully submitted this 6th day of August 2014.

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CERTIFICATE OF SERVICE

I certify that on August 6th, 2014, I served a copy of the foregoing Brief in Support of Motion for and Brief in Support of Leave to File Amicus Curiae Brief via first class mail and electronic mail on the following:

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(d)(2)(E)

I certify that this brief contains 1879 words, exclusive of caption and certificates of service and compliance.

By 