

Nos. 11-1378; 11-1384

**In The
Supreme Court of the United States**

—◆—
STATE OF WYOMING,

Petitioner,

v.

UNITED STATES DEPARTMENT
OF AGRICULTURE, et al.,

Respondents.

—◆—
COLORADO MINING ASSOCIATION,

Petitioner,

v.

UNITED STATES DEPARTMENT
OF AGRICULTURE, et al.,

Respondents.

—◆—
**On Petitions For Writs Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

—◆—
**BRIEF OF *AMICUS CURIAE*
COALITION OF LOCAL GOVERNMENTS
IN SUPPORT OF PETITIONERS**

—◆—
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INTRODUCTION

The Coalition of Local Governments (CLG)¹ respectfully submits this *amicus curiae* brief in support of the petitions for a writ of certiorari filed by the State of Wyoming and the Colorado Mining Association, in the case of *State of Wyoming v. United States Department of Agriculture*, ___ F.3d ___, 2011 WL 5022755 (10th Cir. 2011) Nos. 11-1378, 11-1384, respectively. Pursuant to Supreme Court Rule 37(3)(a), this *amicus curiae* brief is filed with the written consent of the Solicitor General and the Colorado Mining Association. The State of Wyoming and the defendant intervenors, the Wyoming Outdoor Council, *et al.* filed notices of consents to *amicus* briefs with this Court.

The petitions seek review of the United States Court of Appeals for the Tenth Circuit decision, which upheld the Roadless Area Conservation Policy of 2001 (Roadless Rule), 36 C.F.R. Part 294, Subpart B (2001) and reversed the Wyoming District Court's ruling that the United States Department of Agriculture,

¹ Pursuant to Rule 37.6 of the Rules of the Supreme Court, counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. All parties have consented to the filing of this brief. Those consents are being lodged herewith. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Forest Service promulgation of the Roadless Rule violated the National Environmental Policy Act (NEPA) procedures, 42 U.S.C. §4332, and unlawfully encroached on Congress's exclusive authority to identify and designate federal land as wilderness. This case involves matters of national importance that merit this Court's review. The Roadless Rule applies to 53 million acres of inventoried roadless areas (IRAs) located in the western states, including Wyoming, and precludes vegetation management practices that would lessen the likelihood of catastrophic wildfire in the affected states. The Roadless Rule further impedes approval of vegetation projects that might reduce the risk or severity of wildfires. As a result, western communities face increasing risk of catastrophic fire, due to the operation and implementation of the Roadless Rule. Throughout the past 11 years of implementation, the volume of dead and dying timber that cannot be removed except by fire has increased. Catastrophic wildfires also threaten the environment, because they burn hotter and are larger, destroy critical wildlife habitat and fish and wildlife, and cause soil erosion and invasions of noxious weeds in the post-fire events. So long as the Roadless Rule remains in effect, these IRAs are off-limits to all but minimal vegetation management leaving much of the western national forests and the nearby communities at risk.



INTEREST OF *AMICUS CURIAE*

The CLG is a voluntary association of local governments organized under the laws of the State of Wyoming to guide and develop public land policy in the affected counties. Constitution and By-laws of the Coalition of Local Governments, as amended, April 16, 2007. The CLG members include Lincoln, Sublette, Sweetwater, and Uinta Counties and the Little Snake River, Lincoln, Sweetwater County, Sublette County, and Uinta County Conservation Districts.

The local governments formed the Coalition in 2004, after the individual local governments had agreed to participate as cooperating agencies in land use planning for the Ashley and Bridger-Teton National Forests and the public land resource areas in the same region. The objective was to pool resources, information, and research so that the local agencies could be more effective in the planning negotiations. The Coalition's work has forged relationships that have aided in understanding the regional economy, resource challenges, and possible solutions to resource management issues.

CLG members have adopted county and conservation district land use plans that call for limited use of wildfire given the loss of soils, and loss of the land that would otherwise be used for livestock grazing, logging, and recreation. Lincoln County, Wyoming, Comprehensive Plan, Appendix 7.B (July 5, 2005); Sublette County Conservation District Public Land Use Policies, at 20 (Aug. 12, 2008); Sweetwater

County Conservation District Land & Resource Use Plan and Policy, at 64-65 (Feb. 3, 2011). The applicable plans also set land management policies to reduce soil erosion, provide forage for wildlife and livestock, reduce invasive plant infestations, and encourage the preservation of custom and culture of the communities. Carbon County Comprehensive Land Plan, at 78, 85, 91-93 (Nov. 9, 2010); Lincoln County, Wyoming, Comprehensive Plan, at 7-15, Appendix 7.B (July 6, 2005); Lincoln Conservation District Land Use and Natural Management Long Range Plan 2010-2015, at 25-30, 33-34; Lincoln County, Wyoming, Public Lands Policy, at 3-36 to 3-44; Sublette County Comprehensive Plan: County Vision, Goals & Policies, at 23-24, 51-52, 57-60 (Nov. 18, 2005); Sublette County Conservation District Long Range Plan 2009-2013, at 9-10, 14; Sublette County Conservation District Public Land Use Policies, at 11, 16-19, 23-24 (Aug. 12, 2008); Sweetwater County Comprehensive Plan, at 2.5-2.7 (Fall 2002); Sweetwater County Conservation District Land & Resource Use Plan and Policy, at 57-71, 94-96 (Feb. 3, 2011); Uintah County Comprehensive Plan, at 19-22, 22 (2011); Uintah County Conservation District Long Range Plan 2010-2015, at 6-7.

Under Wyoming law, county governments are authorized to establish and fund fire districts. Wyo. Stat. §§16-1-101, 16-1-104, 18-2-108. County governments sponsor and depend on municipal water systems that rely on waters flowing from the National Forests. *Id.* §18-2-101(a)(vi). Water supplies are affected by wildfire due to increased flows from snow

and rain and soil erosion. Wildfires also increase particulates in the air, thus affecting the health of county residents.

Western states and local governments have long worked with the Forest Service in signing and implementing agreements to coordinate and provide mutual aid for fire suppression and first response in responding to wildfires. Often the local fire districts are able to reach a wildfire sooner than the Forest Service fire response teams and are authorized to begin suppression efforts. In recent years, Lincoln County considered withdrawing due to inaction by the Forest Service in addressing the extent of the mountain pine beetle infestation and the severe threats to the communities in Lincoln County. App. 3, 2008 Wyoming Mountain Pine Beetle Aerial Detection Survey.



SUMMARY OF ARGUMENT

1. The Roadless Rule's prohibition on logging and related road building has led to a problem of national importance. The Roadless Rule imposes preservation management on about 53 million acres of the 173 million acres of federal lands that are part of the National Forest System, excluding Alaska. More than half of the land in Lincoln and Sublette Counties or 1.4 million acres are classified as IRAs. The majority of these lands are now infested with mountain pine

beetle and are dead or dying and are at acute risk for catastrophic wildfire.

2. The adoption and implementation of the Roadless Rule occurred after disparate national forest management policies facilitated the establishment of dense stands of mature, even-aged trees, which are now dead or infested with mountain pine beetle. These stands of rust-red trees cover much of the Rocky Mountains and are at extreme risk for catastrophic wildfires.

3. The Roadless Rule limits pre-fire vegetation treatments by prohibiting the removal of dead and dying trees unless they are of “small diameter” and the removal falls within specific exceptions. The Forest Service has also kept the approval process at the highest levels, which makes it difficult and time-consuming to secure approval to remove the dead trees before they burn. Moreover, wildland fire management policy priorities favor the use of fire as a natural ecological process and thus IRAs are often a lower priority for fire suppression and control unless structures or human lives are at stake or the wildfire was human-caused.

4. The Wyoming local governments and those of the other states face the threat of catastrophic wildfires that will pollute the water and air, and destroy wildlife habitat, all in the name of preventing future logging. The situation faced by the Wyoming local governments is duplicated throughout the western United States which has seen infestations of mountain pine beetle,

periods of drought, and a crippling regulatory scheme that makes it impossible to avoid catastrophic and destructive wildfires.



ARGUMENT

I. AMOUNT OF LAND AT RISK IS SIGNIFICANT

A. Wyoming IRAs

The boundaries of the Coalition member counties and conservation districts include or are next to the Bridger-Teton, Medicine Bow-Routt, Shoshone, and Targhee National Forests, as well as the Flaming Gorge National Recreation Area managed by the Ashley National Forest. App. 1, Wyoming Inventoried Roadless Areas on National Forest System Lands (Sept. 15, 2000). The Flaming Gorge National Recreation Area has 30,000 acres of IRAs and is located in both Uinta and Sweetwater Counties. The Medicine Bow National Forest falls within the boundaries of the Little Snake River Conservation District and has 82,200 acres of IRAs.

In just Lincoln and Sublette Counties there are more than 1.4 million acres of IRAs that were designated as closed to logging and new road construction. The Bridger-Teton National Forest covers most of the northern halves of Lincoln and Sublette Counties, and substantial portions of the National Forest lands are designated IRAs, including almost all of northern Lincoln County. United States Forest

Service, Roadless Area Conservation, Wyoming IRA on National Forest System Lands Map, Sept. 15, 2000. Since less than half of Lincoln and Sublette counties are reserved for National Forests, this is a significant percent of the national forest land and the regulation has had significant impacts in these counties. Natural Resources Committee, Hearings – Subcommittee on National Parks, Forests and Public Lands Legislative Hearing on H.R. 2578 and H.R. 1581, Testimony of Honorable Kent Connelly on *Wilderness and Roadless Area Release Act of 2011* (July 26, 2011), <http://www.naturalresources.house.gov/Calendar/EventSingle.aspx?EventID=252577>. These same National Forest lands are severely infested by the mountain pine beetle and related diseases. App. 2, 2008 Aerial Detection Survey.

B. Relevant Statutory Scheme

In 1897, Congress mandated that lands reserved for the National Forests be set aside primarily to provide timber for the needs of the citizens and to maintain favorable conditions for flows of water. 16 U.S.C. §475; *United States v. New Mexico*, 438 U.S. 696, 708 (1978) (“Congress intended national forests to be reserved for only two purposes – “[t]o conserve the water flows, and to furnish a continuous supply of timber for the people.”[14] 30 Cong. Rec. 967 (1897) (Cong. McRae). See *United States v. Grimaud*, 220 U.S. 506, 515 (1911). National forests were not to be reserved for aesthetic, environmental, recreational, or wildlife-preservation purposes.[15]”). These latter

objectives supplemented the purposes of the national forests and included recreation, livestock grazing, fish and wildlife habitat, and wilderness. Multiple-Use Sustained-Yield Act (MUSYA), 16 U.S.C. §528 (1960). The Forest Service continued to manage and offer timber for sale pursuant to the Organic Act, 16 U.S.C. §472 (repealed), until federal courts ruled that the law did not authorize the sale of timber unless it was dead or dying. *West Virginia Div., Izaak Walton League of Am. v. Butz*, 522 F.2d 945, 949-950 (4th Cir. 1975) (holding the Forest Service lacked authority to sell live timber). In response, Congress enacted the Renewable Resources Planning Act, which was amended two years later as the National Forest Management Act (NFMA), 16 U.S.C. §§1600-1614 (1976). Section 4 of NFMA sets out detailed specifications limiting the size of clearcuts and imposing mandatory regeneration standards which would prohibit sales in areas that did not meet regeneration objectives. *Id.* at §1604(g).

Until the 1990s, the National Forests were managed to produce timber, based on the primary purpose of providing timber to meet the needs of citizens. 16 U.S.C. §475. During this same time, the Forest Service also suppressed fires, consistent with the original intent of Congress.

The objects for which the forest reservations should be made are the protection of the forest growth against destruction by fire and ax, and preservation of forest conditions upon which water conditions and water flow

are dependent. The purpose, therefore, of this bill is to maintain favorable forest conditions, without excluding the use of these reservations for other purposes. They are not parks set aside for nonuse, but have been established for economic reasons. 30 Cong. Rec. 966 (1897) (Cong. McRae).”.

United States v. New Mexico, 426 U.S. at 708.

Logging mimics natural disturbance such as fire and established stands of even-aged timber. In response to litigation, criticism of below-cost timber sales, and changing philosophy within the agency, the Forest Service reduced the commercial timber programs significantly. Keiter, Robert B., *Breaking Faith With Nature: The Bush Administration and Public Land Policy*, 27 J.L.R. ENVL. 195, 225-226 (2007). The timber stands that would otherwise have been harvested are now mature or older than 100 years and are at risk for mountain pine beetle infestation.

The Wyoming forests have not seen significant commercial logging for more than 22 years. By way of example, the Bridger-Teton National Forest reduced its logging program from about 22 million board feet (mmbf) to 6.6 mmbf in 1988. *Intermountain Forest Industries Ass'n. v. Lyng*, 683 F. Supp. 1330, 1333 (D. Wyo. 1988). The reduction was made permanent in the Land and Resource Management Plan (LRMP) adopted in 1990, which provided for an annual sales quantity of about 11.7 mmbf for the first two decades. Bridger-Teton National Forest LRMP and Final Environmental Impact Statement at 6.

C. Roadless Rule Prohibits Most Logging and Vegetation Management Measures

The Forest Service adopted the Roadless Rule to prevent the altering or fragmenting of roadless landscapes, values, and characteristics caused by road construction and timber harvest. Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244 (2001). Notwithstanding the objective of ending road building and timber harvesting, the IRAs admittedly had many roads, developments, and residences existed within or just outside of the designated IRAs. This occurred because these were the areas released by Congress from consideration for wilderness and the respective land use plans allowed other land uses, including logging, road construction, and mineral development. 66 Fed. Reg. at 3249-3250. In Wyoming, the IRAs were released from further wilderness study, 16 U.S.C. §1132, n. Pub.L. 98-550, §401(b)(5) and the law further prohibited the Forest Service from studying the lands for wilderness again.

The Roadless Rule prevents and delays proactive management of high wildfire risk areas. The Roadless Rule restricts timber harvesting on IRAs to generally small diameter timber and only to reduce the risk of uncharacteristic wildfire effects, restore historic range of variability, or if incidental to another authorized activity. 36 C.F.R. §294.13(b)(1). Tree-killing insects, particularly the mountain pine beetle, primarily target larger diameter, older trees.

With regards to wildfire danger, the Roadless Rule permits a road to be built in IRAs if it “is needed to protect public health and safety in cases of an imminent threat of flood, fire, or other catastrophic event that, without intervention, would cause the loss of life or property.” 36 C.F.R. §294.12(b)(1). Similarly, timber may be harvested “to maintain or restore the characteristics of ecosystem composition and structure, such as to reduce the risk of uncharacteristic wildfire effects, within the range of variability that would be expected to occur under natural disturbance regimes of the current climatic period.” 36 C.F.R. §294.13(b)(1)(ii). However, the “cutting, sale, or removal” of timber must “generally be small diameter timber.” 36 C.F.R. §294.13(b)(1). The decision to approve any project in an IRA has been retained by either the Secretary or the Chief of the Forest Service since the adoption of the Roadless Rule in 2001. *See, e.g.,* United States Forest Service Chief Directive May 31, 2012 EPA, Final Ozone NAAQS Regulatory Impact Analysis, EPA-452/R-08-003, at 2-3 (March 2008) (“I am continuing to review certain activities planned in roadless areas to provide for a smooth transition (see enclosure). Projects will be reviewed to ensure we are applying a consistent approach to implementation of the 2001 Roadless Rule and that we are doing all we can to protect roadless area characteristics.”); *see also* USDA Secretary Memorandum 1042-156 (May 30, 2011), http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5308549.pdf.

The Forest Service has aggressively reduced the impact of tree-killing insects in non-IRAs by thinning

the dense, old growth forests to natural levels. USDA, Review of the Forest Service Response: The Bark Beetle Outbreak in Northern Colorado and Southern Wyoming, at 17 (Sept. 2011), <http://www.fs.fed.us/rmrf/docs/home/bark-beetle.pdf>. The Roadless Rule's prohibition on logging of large diameter timber precludes this proven and effective method of severe wildfire prevention and healthy forest management.

II. THE "PERFECT STORM" OF POLICIES AND DISEASE

A. Mountain Pine Beetle Epidemic

The affected Wyoming forests suffer from severe infestation of mountain pine beetle typical of native lodgepole and Ponderosa pines. *See* Appendix, Tab 2, Map of Wyoming Mountain Pine Beetle. The dead trees form dangerous fuel loads as part of the accumulated vegetation and these fuel loads are a major factor in ignition, either lightning or human-caused.

In the Rocky Mountains, the mountain pine beetle will periodically infest stands of trees. Only fires or logging are effective to eliminate the beetles. First, wildfire suppression management since 1897 in addition to the sharp reduction of timber harvest has created unnaturally dense, old growth forests with vegetation at multiple levels of the canopy and unnaturally high amounts of fuel wood on the ground. Fuel at several levels, especially at the ground level and lower shrubs, create much more severe fires. Second, tree killing insects, including the mountain pine beetle, have recently killed thousands of acres of

large lodgepole and whitebark pine trees. This will increase fuel loads as dead needles and branches fall off standing trees. Third, frequent droughts and high winds are common in western Wyoming. These conditions create a perfect storm for unnaturally severe, uncontrollable wildfires.

One third of the Bridger-Teton National Forest (BTNF) is lodgepole pine. United States Forest Service, Bridger-Teton National Forest, Five-Year Monitoring and Evaluation Report (BTNF 5-Year Review) (Sept. 24, 2009), https://fs.usda.gov/Internet/FSE_DOCUMENTS/fsbdev3_062631.pdf, at 5. Due to fire suppression management since the late 1800s and logging practices, the lodgepole pine forests are densely populated and evenly aged at 120 to 170 years. *Id.* at 6; Review of Beetle Response, at 3, *supra* at 9. Such conditions have resulted in abnormally large mountain pine beetle epidemics, which have decimated national forests in Colorado and Wyoming. *Id.* The mountain pine beetle, along with blister rust, also attacks the whitebark pines at higher elevations. *Id.* at 5. Historic fire suppression has resulted in continuous crowns and surface fuels in the whitebark pine forest, where unnaturally severe wildfires may also occur. *Id.* at 12-13.

Not only do these conditions enhance the likelihood of an unnaturally severe wildfire, but such conditions also favor widespread mountain pine beetle epidemics. BTNF 5-Year Report, at 6; Review of Beetle Response, at 4. The mountain pine beetle is the most aggressive and studied native tree killing insect in the western United States, though other

tree killing insects also exist. Outbreaks of mountain pine beetle occur approximately every 20 years and last between four and eight years until susceptible hosts are depleted. BTNF 5-Year Report, at 69. Generally, mountain pine beetles infest weak and injured trees, which may be due to earlier wildfires, drought, disease, other damage, or from inter-tree competition. *Id.* Trees that are 80 to 120 years old and at least 8 inches in diameter are attacked first. *Id.* Because of fire suppression management over the prior century and logging practices, the national forests are largely composed of “contiguous acres of lodgepole pine in densely stocked, mature stand conditions that were highly susceptible to bark beetle attack.” Review of Beetle Response, at 3. The decline in a commercial logging program, including the Bridger-Teton, reduced the removal of standing timber significantly by going from 28.5 million board feet (mmbf) to 14.4 of which about 7 mmbf was small diameter posts and poles in 1988. *Intermountain Forest Indus. Ass’n. v. Lyng*, 683 F. Supp. at 1333. The majority of the Wyoming national forests, including non-lodgepole pine areas, have suffered extraordinary insect and disease infestations, leaving unnaturally high levels of dead trees or fuel wood behind. BTNF 5-Year Report, at 11-13.

B. Catastrophic Wildfires

Past management practices, including fire suppression and reduced logging, recent periods of drought, and a strong cycle of mountain pine beetle

infestation have created perfect conditions for larger, catastrophic wildfires.

Wildfires, especially those started in areas where fuel loads are high, behave “uncharacteristically.” 66 Fed. Reg. at 3249, 3257-3258. They are also called catastrophic wildfires. These fires burn hotter and run faster than an average wildfire and will jump or spread from the crowns of the trees, rather than burning along the ground. This fire behavior has a number of significant environmental impacts. Such fires burn at higher temperatures, consume most, if not all, vegetation and sterilize the soils, robbing them of biological material. Post-fire rehabilitation is more difficult and these sites suffer higher soil erosion and invasions of noxious weeds. The hotter fires increase loss of wildlife habitat, and death of fish and wildlife, including species protected under the Endangered Species Act, 16 U.S.C. §§1531, *et seq.*

As unnaturally severe wildfires have ignited throughout the western United States over the past decade, the Forest Service has implemented policies to reduce fuel woods and thin forest densities. App. 3, USDA & DOI, The Healthy Forests Initiative Fact Sheet (HFI Fact Sheet), Aug. 2003. Congress enacted the Healthy Forests Restoration Act of 2003 to provide for forest management policies to protect communities even if such actions are necessary on IRAs. 16 U.S.C. §§6501-6591. The Forest Service adopted the procedural regulations, 36 C.F.R. Part 218, but continued to implement both the 2001 Roadless Rule and the 2005 state petition rule,

36 C.F.R. §§294.10-294.18 (2005); 73 Fed. Reg. 61456 (2008) (Idaho petition rule); 76 Fed. 21272 (2011) (Colorado petition rule).

Historically, the severity of wildfires in lodgepole pine forests increases with greater distribution of fuels between the ground and mature closed canopies when weather conditions are dry and windy. BTNF 5-Year Review, at 4. After the pine beetle epidemic, large portions of unnaturally dense and dead lodgepole pine trees cover the canopy while dead needles and branches litter the ground and other vegetation fills in between the ground and the canopy. Naturally occurring low to moderate severity wildfires occur with some frequency following a pine beetle epidemic, cleaning up dead trees and other fuel products. However, historic fire suppression management and reduced logging have left much of the fuel loads intact, waiting to contribute to an unnaturally severe wildfire. *Id.* at 6. Pine beetle epidemics followed by wildfires are one method to rejuvenate vegetation. The combination of more than 100 years of fire suppression and the policy changes to reduce or end commercial logging resulted in unnatural vegetation densities and amounts of fuel loads. Now any wildfire is likely to become catastrophic.

Regardless of whether the Forest Service chooses to maintain a policy of active wildfire prevention and suppression or adopt a policy which includes burn options, much of the national forests are unnaturally dense with unnatural amounts of fuel wood resulting from more than a century of wildfire suppression management. App. 3, HFI Fact Sheet at 1. The

additional factors, including Wyoming's dry and windy climate, forest fires near or within Lincoln, Uinta, Sweetwater, and Sublette counties, pose a severe threat to surrounding communities and the environment.

One third of the Bridger-Teton National Forest is represented by lodgepole pine. BTNF 5-Year Report, at 5. Without periodic fires or other major disturbances, shade tolerant species accumulate a dense undergrowth and brush. *Id.*; App. 3, HFI Fact Sheet. Most of the lodgepole pines are 120 to 170 years old, indicating that the last wildfire severe enough to replace lodgepole pine stands occurred between 1840 and 1890. *Id.* Because of fire suppression forest management policies over the last century, surface and moderate severity fires have been reduced, increasing the homogeneity of the landscape pattern and creating an environment where a wildfire "may exceed the range of natural variability." BTNF 5-Year Report, at 6. The management practices of the past 25 years where relatively few timber sales have occurred have created dense, homogeneous forests.

C. Wildland Fire Management Policy Limits Fire Suppression in IRAs

During promulgation of the Roadless Rule, the public expressed concern that the agency would not manage IRAs to reduce the risk of uncharacteristic wildfire effects. 66 Fed. Reg. at 3257. The Forest Service recognized that wildland fires are generally

increasing in size and severity since the first half of the 20th Century. FEIS Vol. 1, 3-73. Many wildland fires occurring in western ponderosa pine forests and associated with rangelands are larger, hotter and more lethal to vegetation, top soils, and human property. *Id.* at 3-77. The Forest Service acknowledged that uncharacteristic wildfire effects include “unnatural increases in wildfire size, severity, and resistance to control and the associated impacts to people and property.” 66 Fed. Reg. at 3258. These effects have been caused by past wildfire suppression, past timber harvesting, and past grazing practices. *Id.* “These have contributed to often-dramatic changes in some areas in wildfire frequency, size, and severity.” *Id.* (citing FEIS Vol. 1, 3-72 to 3-73). “The vegetative structure, density, and composition of these areas have changed when compared to less altered ecosystems.” *Id.* (citing FEIS Vol. 1, 3-144).

The Forest Service noted that hazardous fuel treatment in IRAs is not prohibited by the Roadless Rule as long as road construction or reconstruction is not necessary. *Id.* But such treatments still do not allow the removal of trees, unless they are of small diameter. 36 C.F.R. §294.13(b)(1). Instead, vegetative management must focus on removing small diameter trees while leaving the overstory trees intact. *Id.* For instance, the thinning of small diameter trees, which became established as the result of missed fire return intervals due to fire suppression. These conditions greatly increase the likelihood of uncharacteristic wildfire effects. *Id.* The cutting, sale, or removal of

timber in IRAs is also allowed when it is incidental to personal or administrative uses permitted by the Roadless Rule needed for personal or administrative uses, or an area where timber contract was sold before the Roadless Rule was promulgated as final but has not yet been logged. *Id.* (36 C.F.R. §294.13(b)(1)-(4)).

The Forest Service did admit that the new rule would cause a slight decrease in the ability to meet the goal of reducing uncharacteristic wildfire threats and a slight increase in the number of wildland fires that cause uncharacteristic effects. FEIS Vol. 3, 14.

The Federal Wildland Fire Management Policy provides that “[w]ildland fire will be used to protect, maintain, and enhance resources and, as nearly as possible, *be allowed to function in its natural ecological role.*” United States Forest Service, *2001 Federal Wildland Fire Management Policy: Guiding Principles, Policies, and Implementation Actions*, Ch. 3, p. 23, at <http://www.fs.fed.us/fire/management/policy.html> (Jan. 2001) (emphasis added). Response to wildland fire is based on ecological, social, and legal consequences of the fire. *Id.* The circumstances under which a fire occurs, the likely consequences to firefighters, public safety and welfare, and natural and cultural resources dictate the appropriate management response to a fire. *Id.* However, the protection of human life is the highest priority. *Id.*

The Forest Service issued the Guidance of Implementation of Federal Wildland Fire Policy in 2009,

which affirmed the 2001 policy. The 2009 Guidance clarifies the Wildland Urban Interface Policy response to wildfires, and the need for increased collaboration between federal agencies and tribal, local, and state agencies. The 2009 Guidance on the Use of Wildland Fire states “preference will be given for natural ignitions to be managed in meeting the role of fire as an ecological process.” *Id.* at 11. This policy illustrates the lower priority that wildland fire response will have, since it is rare that human life and property is at risk.

III. ROADLESS RULE PROHIBITS REMOVAL OF LARGE TREES, EVEN IF DEAD

A. Large Dead Trees Must Remain

The Roadless Rule prohibits removal of the infested trees unless they are of small diameter and are incidental to another authorized project or are necessary to maintain historic range of variability. 36 C.F.R. §294.13(b)(1). The Rule does not permit full scale removal of large trees, even if they are dead or falling down. Consequently, the Forest Service has not authorized large scale removal of these dead trees. With each passing year, the fuel loads increase, thus leading to ever larger wildfires, such as the 2002 Biscuit Fire which started in both an IRA and a wilderness area, and grew to almost 500,000 acres. *STATION FIRE: Forest Service’s Response Offers Potential Lessons for Future Wildland Fire Management*, p. 5 (GAO December 2011).

A proven method to reduce the impact caused by the mountain pine beetle and the extraordinary levels of fuels is to “thin” the forests by removing timber before infestation in order to return the forests to their natural densities. Review of Beetle Response, at 17. Such methods may require temporary roads to get the timber and other fuel woods out, but the method has reduced pine beetle infestation from 26% of trees in Shoshone National Forest to just 3% of trees and reduced the risk of severe fire. *Id.* at 5, 17. The Forest Service “estimates that by 2012, the majority of lodgepole pines in northern Colorado and southern Wyoming will be killed by the beetle.” Anna D. Chalfoun, Ph.D., Wyoming Cooperative Fish & Wildlife Research Unit, University of Wyoming, Wyoming: *‘Perfect Storm’ Fuels Mountain Pine Beetle Epidemic* (May 18, 2011).² Under the Roadless Rule regulations, effective methods of management, such as “thinning” and removing fuel loads, may not be implemented to potentially save lives and property and return the national forests to their natural condition.

B. HFRA Did Not Alter Roadless Rule Prohibition

After several years of severe and record breaking wildfires, Congress recognized the threat posed to

² Source found at <http://www.fws.gov/news/blog/index.cfm/2011/5/18/Wyoming-Perfect-Storm-Fuels-Mountain-Pine-Beetle-Epidemic>.

communities, municipal water supplies, and other Federal lands by the current state of the national forests and passed the Healthy Forests Restoration Act of 2003 (HFRA) to allow for the reduction in hazardous amounts of fuels in the national forests, to detect insect and disease infestations early, and to restore forest ecosystem components. 16 U.S.C. §6501. The year 2000 was the worst wildland fire season in 50 years, and in 2002, “88,458 fires burned 7.2 million acres, destroyed more than 842 structures, and [took] the lives of 23 firefighters. Four states – New Mexico, Oregon, Colorado, and Arizona – registered their worst fires in modern history.” App. 3, HFI Fact Sheet. HFRA provides appropriations to reduce unnaturally high amounts of wildfire fuels from forests in an effort to reduce the severity of these unnaturally strong wildfires. Projects pursuant to HFRA must comply with NEPA’s environmental analysis requirements, including public comment, and those that do submit public comments may object to final decisions and seek judicial review. *Id.* §104; 36 C.F.R. §§218.7, 218.14.

Though HFRA was passed after the adoption of the Roadless Rule and authorizes logging to reduce the risks of severe forest fire conditions in designated IRAs, the Forest Service has difficulty reconciling the competing mandates of the Roadless Rule and HFRA and did not amend the Roadless Rule to expand its vegetation management authority. Therefore, unnatural and dangerous conditions existing within IRAs cannot be effectively managed through timber and

debris removal in an effort to return the IRA lands to their natural state.

For instance, in western Wyoming, the Forest Service vegetation treatments consist of knocking down dead trees and burning them in place in the IRAs. Even then, the treatments involve a small percent of the overall infected area, thus protecting a watershed but not limiting the risk of wildfires by removing the dead trees or reducing the fuel loads.

C. Effects of Wildfire and Roadless Rule on Communities and Environment

By prohibiting most logging and road construction, the Roadless Rule prevents proactive management and delays wildfire prevention, suppression, and containment techniques. The wildfire itself deposits ash and particulates throughout the area and increases levels of ozone precursors, volatile organic compounds and NO_x. EPA, Final Ozone NAAQS Regulatory Impact Analysis, EPA-452/R-08-003, at 2-3 (March 2008) (“Natural NO_x sources include stratospheric intrusions, lightning, soils, and wildfires. Lightning, fertilized soils, and wildfires are the major natural sources of NO_x in the United States.”)

Coalition members face a very high risk of wildfire in western Wyoming, where much of the non-wilderness portions of the Bridger-Teton and the Shoshone National Forests are IRAs and are now infested. App. 2, 2008 Aerial Detection Survey. A catastrophic wildfire will convert the forested wildlife

habitat to open meadows for many decades, destroy designated critical habitat for threatened and endangered species, kill fish and wildlife, and directly threaten the rural communities throughout Wyoming.

Due to the current conditions of the national forests and the Roadless Rule restrictions, many Wyoming communities are threatened by the potential for severe wildfires which could be reduced or prevented by returning our national forests to their natural condition. However, the Roadless Rule prevents such necessary actions.



CONCLUSION

The Roadless Rule precludes management options to address the unnatural levels of fuel loads in designated IRAs. The consequence is that each summer brings greater catastrophic wildfires at tremendous costs to the environment and the local communities. This Court should take review of the Roadless Rule to address the legality given the significance this Rule has played in preventing wildfires and environmental damage.

Respectfully submitted,









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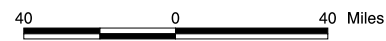
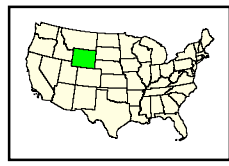
WYOMING

Inventoried Roadless Areas on National Forest System Lands

Categories of National Forest System Lands Within Wyoming

IRA, allows road construction or reconstruction	33% (3,085,000 acres)
IRA, does not allow road construction or reconstruction	2% (154,000 acres)
IRA, recommended wilderness	0% (17,000 acres)
Designated Areas outside of IRAs	35% (3,259,000 acres)
All Other National Forest System Lands	29% (2,721,000 acres)

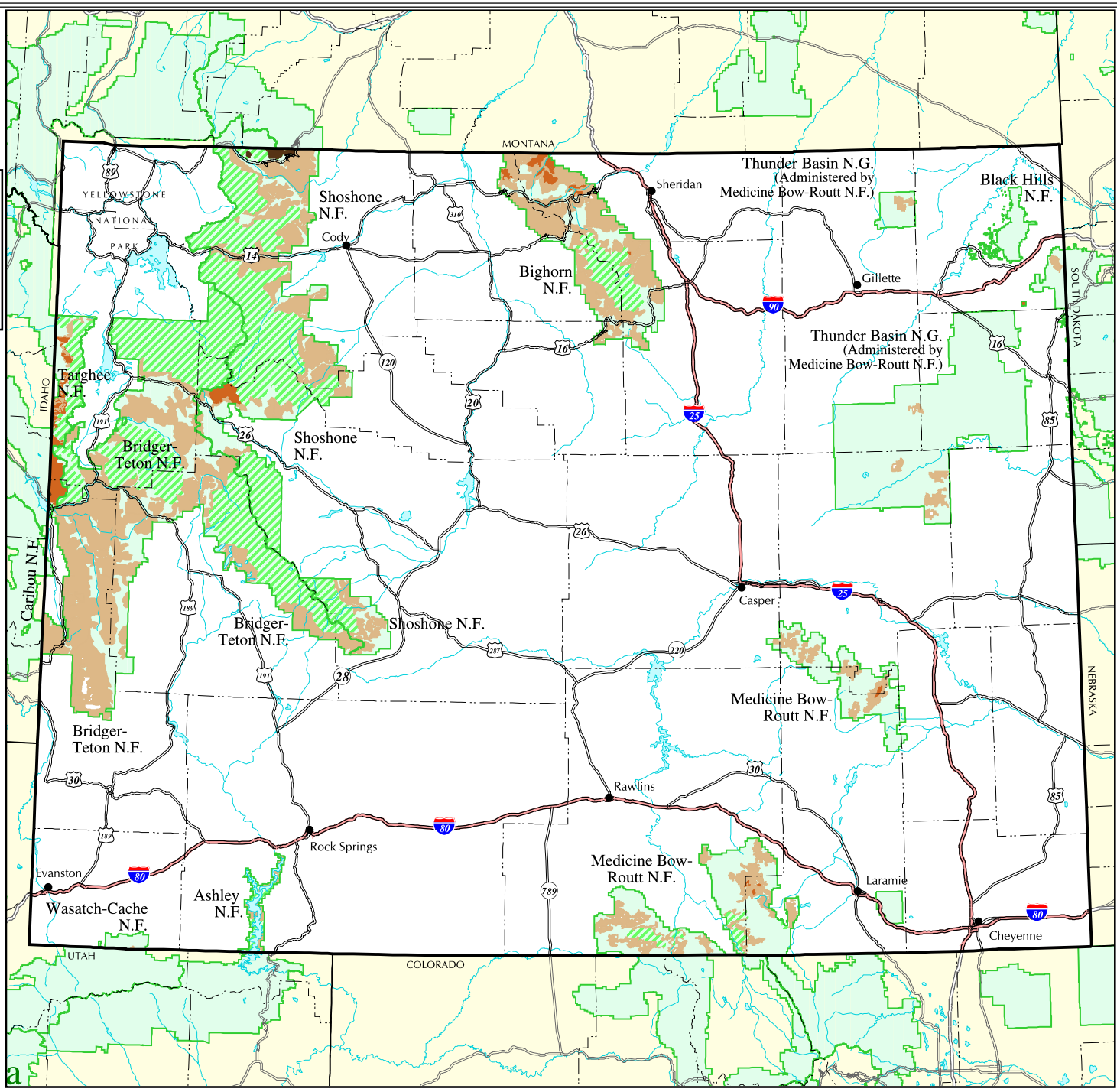
-  Inventoried Roadless Area where road construction or reconstruction is allowed
-  Inventoried Roadless Area where road construction or reconstruction is not allowed
-  Inventoried Roadless Area where road construction or reconstruction is not allowed, and the forest plan recommends as wilderness
-  Designated Areas outside of Inventoried Roadless Areas
-  National Forest System lands outside of Inventoried Roadless Areas - not all private land is shown on the map
-  Interstate Highway
-  Other Highways
-  County boundaries



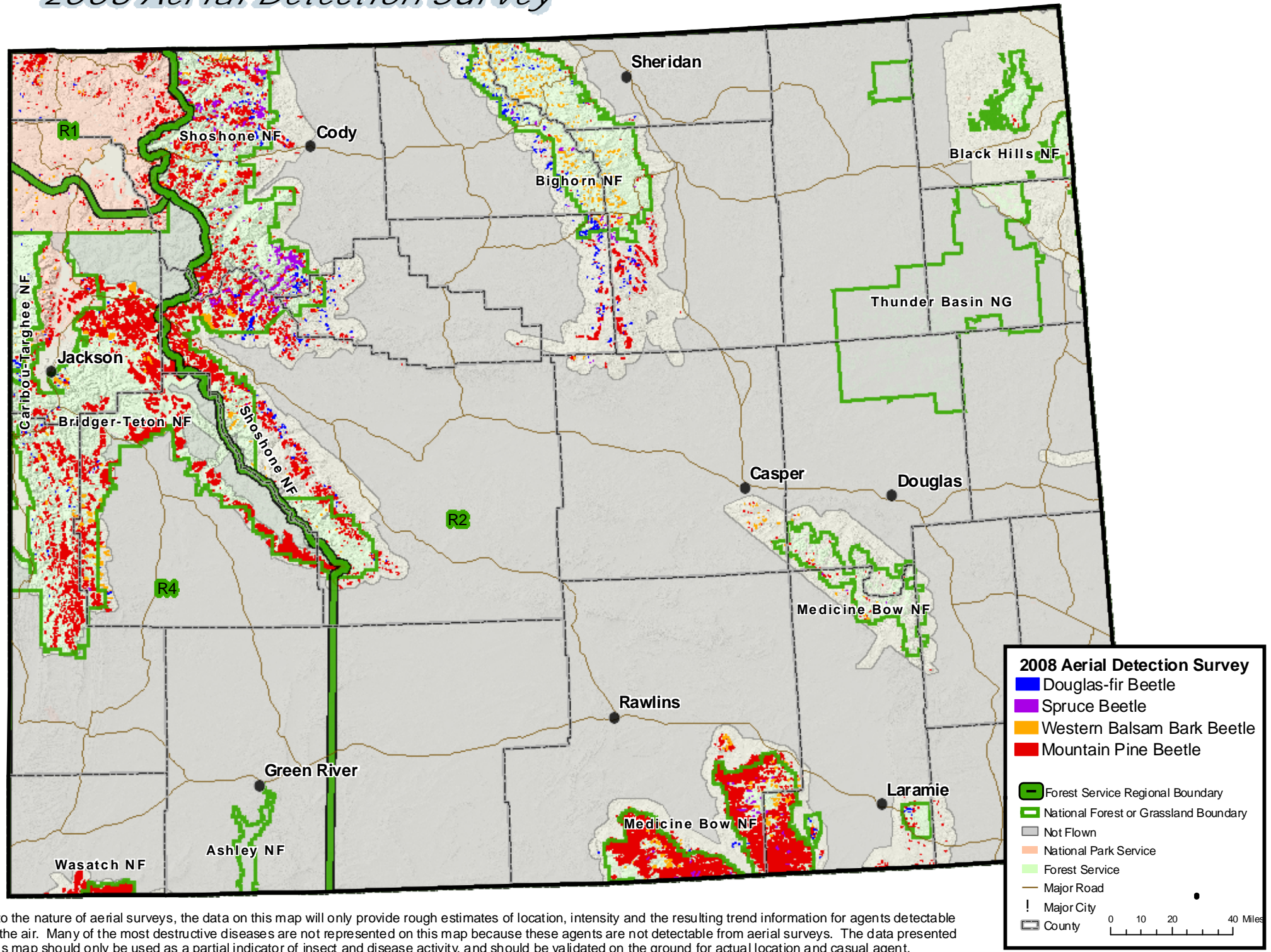
September 15, 2000
 Data Supplied by individual National Forests.
 Contact the National Forest Offices for further information.

Transverse Mercator Projection

The USDA Forest Service uses the most current and complete data available. GIS data and product accuracy may vary. Using GIS products for purposes other than those for which they were intended may yield inaccurate or misleading results. The USDA Forest Service reserves the right to correct, update, modify, or replace GIS products without notification.



2008 Aerial Detection Survey



Due to the nature of aerial surveys, the data on this map will only provide rough estimates of location, intensity and the resulting trend information for agents detectable from the air. Many of the most destructive diseases are not represented on this map because these agents are not detectable from aerial surveys. The data presented on this map should only be used as a partial indicator of insect and disease activity, and should be validated on the ground for actual location and causal agent. Shaded areas show locations where tree mortality or defoliation were apparent from the air. Intensity of damage is variable and not all trees in shaded areas are dead or defoliated.

[USDA LOGO] **FACT SHEET** [USDA SEAL]

United States United States
Department of Agriculture Department of Interior
Web: <http://www.usda.gov> Web: <http://www.doi.gov>

**The Healthy Forests Initiative
Record Resources Available to Fight
and Prevent Wildfires
New Administrative Tools Available
Congressional Action Needed**

Threat from Catastrophic Fires Continues

Our nation's forests and rangelands are at risk. An estimated 190 million acres of federal forests and rangelands in the United States, an area twice the size of California, face high risk of catastrophic fire. Decades of an accumulation of dense undergrowth and brush, along with drought conditions, insect infestation and disease and invasion by exotic species make forests and rangelands in many areas throughout the country vulnerable to environmentally destructive wildfires. Many ponderosa pine forests are 15 times denser than they were a century ago. Where 25 to 35 trees once grew on each acre of forest, now more than 500 trees are crowded together in unhealthy conditions.

In 2000, the United States suffered its worst wildland fire season in 50 years. Last year's fire season – among the worst in four decades – saw 88,458 fires burn 7.2 million acres, destroy more than 842 structures, and take the lives of 23 firefighters. Four states

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– New Mexico, Oregon, Colorado, and Arizona – registered their worst fires in modern history in 2002.

In 2003 large fires have appeared later in the year than in 2002. As of August 21, more than 42,500 wildland fires have burned more than 2.4 million acres. Despite the late start, the impacts have been as dramatic as 2000 and 2002. More than \$550 million have been spent on suppression efforts to date. Sixteen firefighters have lost their lives. The 84,750 acre Aspen Fire in Arizona burned through the community of Summerhaven destroying 333 homes and structures.

Fire danger levels across much of the western United States is expected to remain high to extreme throughout the summer and early fall. Drought, extensive tree mortality due to insect infestations and invasive plant species such as cheat grass has elevated the wildland fire risk.

The Administration is responding to this challenge by proposing record levels of funding for firefighting (up 55 percent from 2000), hiring additional fire fighters, purchasing additional equipment, accomplishing record levels of forest restoration (this year's projected 2.6 million acres will more than double the treatment acreage in 2000) and by advancing its Healthy Forests Initiative, including five administrative reforms and proposed legislation.

Major Improvements to the Wildland Fire Program

Since taking office, the Bush Administration has implemented major reforms to the wildland fire program while continuing to ensure compliance with environmental laws. In May of 2002, it reached agreement with the Western Governors' Association, state and local officials, and tribes on a 10-Year Comprehensive Strategy and Implementation Plan for reducing wildland fire risks to people, communities and the environment. This historic plan established a framework for protecting communities and the environment through collaboration on thinning, planned burns and restoration projects.

The 10-Year Plan is based on more than 90 years of experience and fire research showing that reducing hazardous fuels (underbrush, deadwood and overcrowded trees) near homes and structures and in strategic places across the landscape can significantly change wildfire behavior to reduce damage to communities and the environment.

Research confirms that reducing hazardous fuels further away from communities is just as important as placing treatments in and around homes and structures. Fast moving catastrophic wildfires that start far from communities in overly dense forests – like the historic RodeoChediski Fire that burned in Arizona in 2002 – can quickly threaten or destroy homes and other buildings, and often leave behind a charred landscape, ash-laden rivers and lakes,

spoiled habitat for threatened and endangered species, and sterile soils. Under the 10-Year Plan, Federal land management agencies are working with states and communities in an unprecedented effort to ensure that both communities and the forest and rangelands surrounding them are better protected from destructive wildfires.

The Bush Administration has established a Wildland Fire Leadership Council including representatives of federal, state, and local officials, and tribal interests to coordinate wildland fire management policies under the 10-Year Plan and to monitor accomplishment. This vital Council brings together senior officials to coordinate efforts to reduce the risk of catastrophic fire and improve the health of our forests, woodlands, and rangelands.

Since April 2002, the Council has:

- Reviewed and approved federal fuels treatment programs for fiscal years 2003 and 2004 for more than 5 million acres at a cost of more than \$825 million;
- Agreed on realignment of budget structures within the two departments to consistently track expenditures across agency lines;
- Developed a plan to reduce wildland fire suppression costs;
- Required collaboration with state and local officials on all fuels treatment projects;
- Developed common performance measures;

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- Developed an automated reporting system for federal agencies to track and measure performance; and
- Completed a Memorandum of Understanding between the Departments of Agriculture, Energy and the Interior to support the economic use of biomass from fuels treatments and post-fire environmental restoration projects.

More Resources Available to Prevent and Fight Fires

The Bush Administration has worked on a bi-partisan basis to increase the resources available for fire fighting and fire preventive fuels treatment work. As a result, federal dollars available in 2003 to fight fires have increased 55 percent since 2000.

Program	2000	2003	2004
Wildland Fire Preparedness	\$547,617*	\$887,408	\$892,472
Fire Suppression Operations	197,256	577,273	799,890
Other Operations:			
Hazardous Fuel Reduction	117,040	412,253	417,582
Rehabilitation and Restoration	20,000	26,948	24,500
Fire Facilities	0	1,838	0
Research and Development	0	21,288	21,427

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Joint Fire Sciences	0	7,948	8,000
Forest Health Management	0	16,824	11,934
Economic Action Program	0	4,967	0
Community and Private Assistance	0	0	0
State Fire Assistance	23,929	71,738	71,840
Volunteer/Rural Fire Assistance	3,240	23,128	23,283
Emergency Suppression Contingency	390,000	0	0
TOTAL, DOI and USDA	\$1,326,088	\$2,051,613	\$2,270,928

* Dollars are in the thousands. FY 2000 and 2003 are enacted levels; FY 2004 is the President's request.

More firefighting resources are also available. There are more firefighters, helicopters, airtankers, and heavy equipment to fight fires. This has allowed firefighters to do an outstanding job of fire fighting, controlling over 99 percent of wildfires on initial attack in 2002 and 2003.

Resource	FY 2000	FY 2003
Firefighters	12,131	15,330
Type I crews	68	90
Engines (all types)	2,197	2,581
Dozers/plows/tenders	286	335
Airtankers	64	72
Helicopters	119	151

This year, firefighting crews and equipment are pre-positioned as needed in states to provide effective initial wildfire attack. Additional helicopters and single engine airtankers are providing equivalent protection due to the reduced availability of large, multi-engine air tankers that have been grounded for safety reasons.

Record Amounts of Hazardous Fuels Treatment Work Accomplished

The long-term solution to catastrophic wildfires is to address their causes by restoring fire to fire-adapted ecosystems through reduction of hazardous fuels and returning our forests and rangelands to healthier conditions while ensuring compliance with NEPA and other environmental laws. Tree thinning and removal of dense underbrush can ensure thriving forests while reducing risks of catastrophic fires and the dangers they pose to firefighters, communities and the environment.

The Administration is meeting the challenge. Last year, Federal land management agencies treated a record 2.25 million acres, an increase of a million acres over FY 2000 levels. This year the agencies have already broken that record, treating 2.3 million acres to date, and expecting to treat a total of 2.6 million acres. The wildland-urban interface and public and private lands adjacent to communities at risk are a top priority – it is here where we invest nearly 65 per cent of our forest restoration dollars.

Still, there is much more work to be done – tens of millions of acres need treatment.

The President's Healthy Forests Initiative Being Implemented

While increased and sustained funding is critical to reducing catastrophic wildfires and improving forest health, the Bush Administration is also acting to ensure that these investments are producing more timely decisions, greater efficiency and better results on the ground. Under the Healthy Forests Initiative, the Administration has completed or proposed several administrative reforms, including:

1. Establishing new procedures provided for under the National Environmental Policy Act to allow priority fuel treatment (thinning and prescribed fire) and forest restoration (reseeding and planting) projects, identified through collaboration with state, local and tribal governments and interested persons, to proceed quickly without the need for lengthy environmental documentation. These procedures are based on peer-reviewed science and a review of over 2,600 similar projects where environmental analyses showed that no significant environmental impact occurred.
2. Improving the agencies' administrative appeal rules to expedite appeals of forest health projects and encourage early and more meaningful public participation. These improvements reduce complex procedures,

provide more timely decisions and provide great flexibility in emergency situations.

3. Providing guidance to Federal agencies to make consultations under the Endangered Species Act more timely while emphasizing long-term benefits to threatened and endangered species, and proposing new regulations under the Endangered Species Act (Section 7) to expedite consultation for forest health projects that are unlikely to harm threatened or endangered species or their habitat.

4. Providing guidance from the Council on Environmental Quality to improve environmental assessments for priority forest health projects. The Departments of Agriculture and the Interior are implementing this guidance by preparing assessments for fifteen pilot fuels treatment projects. These assessments will serve as templates for future work and are expected to be completed this summer.

On the legislative front, Congress enacted legislation proposed by the Bush Administration expanding stewardship contracting authority, which allows Federal agencies to enter into long-term (up to 10 years) contracts with small businesses, communities and nonprofit organizations to reduce wildfire risk and improve forest health. Stewardship contracts focus on desirable end results on the ground that improve forest health and provide benefits to communities.

The new authority allows contractors to keep wood products in exchange for the service of thinning trees

and the removal of brush and dead wood to prevent catastrophic wildfire while improving environmental conditions and adhering to applicable environmental regulations. Long-term contracts foster a public/private partnership to restore forest and rangeland health by giving contractors the incentive to invest in equipment and facilities needed to productively use material from forest thinning to make useful wood products or to produce biomass energy, all at tremendous savings to taxpayers.

Sixty-eight stewardship contracts are projected to be approved this year up from last year's total of 26. Substantially more stewardship contracts are expected to be approved in FY 2004.

Congress Should Complete Action on Healthy Forests Legislation

The Administration strongly supports the bipartisan bill. The House of Representatives passed H.R. 1904, the Healthy Forests Restoration Act that is based on legislation proposed by the Administration. This bill would provide critical new tools called for under the Healthy Forests Initiative to more effectively reduce wildfire risks and improve forest health.

The Healthy Forests Restoration Act establishes procedures to expedite forest and rangeland restoration projects on Forest Service and BLM lands. It focuses on lands (1) near communities in the wildland urban interface, (2) in high risk municipal watersheds, (3) that provide important habitat for

threatened and endangered species where catastrophic wildfire threatens the survival of the species, and (4) where insects or disease are destroying the forest and increasing the threat of catastrophic wildfire. It also provides more timely judicial review of forest health projects and ensures that courts consider both short and long-term effects of such projects before issuing injunctions to stop them. Additionally, the bill would:

1. Help communities more effectively use wood, brush and other plant materials removed in forest health projects as a fuel supply for biomass energy;
2. Authorize a program to support community-based watershed forestry partnerships that address critical forest stewardship, watershed protection and restoration needs at the state and local level;
3. Direct additional research focused on the early detection and containment of insect and disease infestations; and
4. Establish a private forestland easement program focused on recovering forest ecosystem types and protecting valuable wildlife habitat.

The Administration commends the House of Representatives for passing this bill with strong bipartisan support and the Senate Agriculture Committee for unanimously passing the bill out of committee. The Administration strongly encourages the Senate to quickly complete action on this important legislation.

For more information on the Healthy Forests Initiative, visit <http://www.fs.fed.us/projects/hfi/> or <http://www.doi.gov/hfi/newhfi/>

August 2003
