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**ATTORNEY FOR PLAINTIFF**  
**UNITED STATES OF AMERICA**

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

<b>UNITED STATES OF AMERICA,</b>	
<b>Plaintiff,</b>	<b>CV- 17- -M</b>
<b>vs.</b>	
<b>BNSF RAILWAY COMPANY,</b>	<b><u>COMPLAINT</u></b>
<b>Defendant.</b>	

The United States of America, on behalf of its agency the United States Department of Agriculture, Forest Service, alleges as follows:

## I. THE PARTIES

1. Plaintiff is the United States of America, acting through the United States Department of Agriculture, Forest Service and its agent employees therein; more specifically the agents and employees of the Kootenai National Forest.
2. Defendant BNSF Railway Company (“BNSF”) was at all times relevant a Delaware corporation doing business in the state of Montana.

## II. JURISDICTION AND VENUE

3. This Court has jurisdiction under 28 U.S.C. § 1345 (United States as plaintiff), 28 U.S.C. § 2201 (the Declaratory Judgment Act) and, insofar as construction of federal law is concerned, 28 U.S.C. § 1331 (federal question).
4. A justiciable controversy exists between Plaintiff and Defendant and the relief requested by Plaintiff is proper pursuant to 28 U.S.C. §§ 2201-2202, and Rule 65 of the Federal Rules of Civil Procedure.
5. Venue is proper under 28 U.S.C. § 1391(b) in the Missoula Division of the District of Montana because the acts and omissions involve property located in this district.

## III. FACTS

### A. Background

6. BNSF owns and operates a rail line (“BNSF line”) which crosses the Kootenai National Forest. The location of the BNSF line is depicted on the

map attached as Exhibit A.

7. For over a half a century, various industrial timberland owners including St. Regis Paper Company, Northern Pacific Railway Company, Burlington Northern Inc., Champion International, Plum Creek Timber Company, and Plum Creek Timberlands, LLP (“Plum Creek”) and the Forest Service have constructed, operated and maintained several roads on the Kootenai National Forest. In 1962, industrial timberland owners entered into an agreement with the Forest Service (cost share agreement) wherein the parties agreed to maintain roads located on the Kootenai National Forest that are co-owned. The agreement requires sharing in the costs of road construction and maintenance, and easements for the jointly owned roads were granted by each party. The cost shared roads include the roads known as the Fisher River Road (Road #763), Wolf Creek Road (Road #36) and McKillop Creek Road (Road #535) (collectively, “the Cost-Share paved road system”). The location of the cost-share paved road system is depicted on Exhibit A. The easement for the Cost-Share paved road system is attached as Exhibit B.
8. BNSF is the successor in interest of the easement for the Cost-Share paved road system to Burlington Northern, Inc. (“BNI”) and Northern Pacific Railway Company. Northern Pacific and BNI originally granted easements for certain roads to the Forest Service, including portions of the Wolf Creek Road. BNI reserved rights to use the roads when Plum Creek took over

management of the timberlands in the 1990s. BNSF uses these roads, including the Wolf Creek Road, to access the BNSF line.

9. The easement requires that BNSF comply with the Secretary of Agriculture's rules and regulations regarding road use, operation, use, maintenance and traffic control. *See* Ex. B.
10. The easement also requires that BNSF not use the roads subject to the easement in a manner that "cause[s] substantial injury thereto" and that BNSF pay for or perform "maintenance and resurfacing of the road, to the extent necessary to restore the road to the condition existing at the start of use." *See* Ex. B at 2.
11. Prior to 2010, Plum Creek paid for BNSF's share of maintenance costs for the cost-share paved road system.
12. In 2010 Plum Creek officially informed the Forest Service that it would no longer cover BNSF's share of the maintenance on the cost-share paved road system.

**B. The BNSF derailment and clean up damages Wolf Creek Road**

13. On or about February 22, 2011, a train derailed from the BNSF line and spilled grain in an area along the BNSF line adjacent to the Wolf Creek Road. Multiple grain cars were damaged, and their contents spread over a large area within the railroad right of way.

14. BNSF did not notify the Forest Service about the derailment. BNSF hired a local contractor to load and haul the spent grain to the Lincoln County landfill near Libby, Montana. The contractor used the Wolf Creek Road to access the derailment and to remove the spilled grain using heavy equipment.
15. On or about March 14, 2011, Forest Service personnel were checking on the status of spring thaw and discovered damages to the road caused by BNSF cleanup of the derailment and grain spill. On March 14, 2011, the Wolf Creek Road was closed to overweight vehicles because the soft roadbed was unsuitable for commercial use at that time of year, in accordance with Forest Service regulations. After March 14, 2011, BNSF's use of the Wolf Creek Road was subject to overweight permit requirements authorizing use of the roads while the roads were closed to overweight vehicles during the late winter critical thaw period.
16. BNSF's contractor continued to use the Wolf Creek road for overweight hauling during the closure period when the road was most vulnerable to severe damage due to spring thaw.
17. During the clean-up, BNSF and the contractor acting at its direction caused significant damage to the asphalt surface of the Wolf Creek Road.

18. On or about March 15, 2011, Forest Service engineers discovered and began to document the damage using measurements, photos and video. The entire length of the damaged road was surveyed on foot.
19. The Forest Service later determined that the costs to fully repair Wolf Creek Road were estimated at \$1,355,561.78.
20. During 2011 meetings between the Forest Service and BNSF, the parties agreed that BNSF would pay for initial repairs in 2011 to address the most severely damaged segments of the Wolf Creek Road where the road was unserviceable due to the damage caused by BNSF. The parties in attendance at these meetings understood and intended that additional re-paving would be necessary, and additional expenditures would be required from BNSF to repair the extensive damage done to the Wolf Creek Road. The parties also agreed that annual repairs and maintenance would be negotiated for each subsequent year.
21. In 2011 and 2012, BNSF paid approximately \$223,119.25 for initial repairs to the Wolf Creek Road, which the Forest Service agreed to deduct from the total damages amount.
22. BNSF has since refused to pay for additional costs to repair the damages it caused to Wolf Creek Road as a result of the derailment and grain spill and cleanup.
23. On or about January 22, 2016, the Forest Service sent a bill for collection to

BNSF for the damages resulting from the derailment and clean-up in the amount of \$1,132,442.53. The bill for collection stated that it was due no later than February 22, 2016. A copy of the bill for collection is attached as Exhibit C.

**C. BNSF fails to pay annual road maintenance costs.**

24. The Secretary of Agriculture “may require the user or users of a road under the control of the Forest Service, including purchasers of Government timber and other products, to maintain such roads in a satisfactory condition commensurate with the particular use requirements of each. Such maintenance to be borne by each user shall be proportionate to total use.”  
16 U.S.C. § 537.
25. The easement for the cost-share paved road system, to which BNSF is a successor, requires BNSF to pay costs for maintenance and resurfacing and states that BNSF is subject to Forest Service regulations. *See Ex B.*
26. Plum Creek and the Forest Service perform an annual paved road system survey to determine maintenance and repair needs for the next year. The actual costs of annual maintenance and repair are shared among the cost share cooperators according to their commensurate use. These costs should be shared by all commercial users of the road including the Forest Service, Plum Creek Timber, and BNSF.

27. Road maintenance charges are based upon the Kootenai National Forest road maintenance appraisal program which assesses road maintenance fees for roads based upon the weight of vehicles and the maintenance level<sup>1</sup> for the roads used.
28. In approximately September 2012, BNSF paid \$55,857.59 towards asphalt maintenance on Wolf Creek Road. The Forest Service and BNSF had agreed that this amount would be considered a credit toward BNSF's outstanding obligation to pay for annual regular road maintenance. In September 2012, the Forest Service and Plum Creek collective spent approximately \$87,665.00 in asphalt repairs and maintenance on Wolf Creek Road.
29. In 2013, both the Forest Service and Plum Creek performed asphalt repairs to various Forest Service roads. BNSF did not contribute to the cost of annual road maintenance.
30. In 2014, the Forest Service and BNSF negotiated an agreement for annual maintenance and repair obligations, but BNSF later refused to adhere to the agreement. Again, the Forest Service and Plum Creek perform asphalt repairs and BNSF did not. BNSF continues to use the cost-share paved

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<sup>1</sup> Maintenance levels are Forest Service protocols that define the level of service provided by, and maintenance required for, a specific road.

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road system for commercial hauling without paying its commensurate share of annual road maintenance.

31. Since that time, the Forest Service and Plum Creek have continued to bear the costs of annual road maintenance without contribution from BNSF, whose actual use is over 50% of total use of all commercial traffic according to the results of a traffic study conducted by the Forest Service.

**D. BNSF fails to pay for overweight vehicle permits.**

32. Forest Service regulations allow the Forest Service to charge for the use of heavy vehicles. *See e.g.* 36 C.F.R. §§ 212.5, 261.54. Overweight permit fees are calculated on a per trip basis with a beginning point and end point when BNSF and other commercial operators uses heavy vehicles on certain roads during critical spring thaw.
33. On or about July 2, 2013, the Forest Service sent a bill for collection to BNSF for overweight permit fees up to and including 2013 Spring Break-up season in the amount of \$184,521.07.
34. BNSF failed to pay the amount, even after receiving additional letters and copies of the bill for collection in September, November, and December 2013 and January 2014. BNSF disputed the amount due, and on May 11, 2015, eventually agreed to pay \$150,000 for overweight permit fees from 2013.

35. On or about May 19, 2015, the Forest Service sent a bill for collection to BNSF for overweight permit fees for the 2014 Spring Break-up season in the amount of \$283,494.84. This amount was based on actual overweight permits issued to BNSF and the corresponding charges per trip. The bill for collection stated that it was due no later than June 18, 2015. A copy of the 2014 bill for collection is attached as Exhibit D.
36. On or about January 22, 2016, the Forest Service sent a bill for collection to BNSF for overweight permit fees for the 2015 Spring Break-up season in the amount of \$138,048.17. This amount was based on actual permits issued to BNSF and the corresponding charges per trip. The bill for collection stated that it was due no later than February 22, 2016. A copy of the 2015 bill for collection is attached as Exhibit E.
37. On or about February 10, 2017, the Forest Service sent a bill for collection to BNSF for overweight permit fees for the 2016 Spring Break-up season in the amount of \$171,574.93. This amount was based on actual permits issued to BNSF and the corresponding charges per trip. The bill for collection states that it is due no later than March 12, 2017. A copy of the 2016 bill for collection is attached as Exhibit F.
38. To date, BNSF has failed to pay the Forest Service for the 2014 or 2015 overweight permits fees, which are now past due and owing in the amount of \$421,543.01.

39. To date, BNSF has not paid the Forest Service for the 2016 overweight permits fees.
40. Interest and penalty at statutory rates continues to accrue on these delinquent debts.

**D. BNSF uses Forest Service roads without authorization**

41. Federal regulations prohibit the use of National Forest System roads for commercial hauling without written authorization or a permit.
42. Since the mid-1990s, BNSF has used and continues to use the following roads or road segments on the Kootenai National Forest without submitting a Road Use Permit Application or paying the required fee necessary to use the roads:

<b>Road Name</b>	<b>Road Number</b>	<b>Beginning Mile Post</b>	<b>Ending Mile Post</b>
Wolf Creek-Fortine	36	24	40.7
Cripple Horse	835	0	16
Southside	4402	0	8.1
Wolf Creek-Fortine C	36C	0	.07
Jumbo Lake A	3755A	0	.57
Sunday Creek	315	0	1.24
Sunday Mountain	3732	0	1.88
Jumbo Lake	3755	0	2.04
Upper Twin	15281	0	.08
Mock	3743	0	2.02
Lime Creek	3780	.5	.65
Butcher Creek	3606	0	.43

A map depicting the above roads is attached as Exhibit G.

43. BNSF has no easement of other authorization to use these roads, but continues to use them for commercial purposes.

**COUNT I (Breach of the cost-share easement)**

44. The United States incorporates all previous allegations as if set forth herein.
45. The easement for the cost-share paved road system, which includes Wolf Creek Road, required BNSF not to “cause substantial injury” to the road and

to pay for or perform “maintenance and resurfacing of the road, to the extent necessary to restore the road to the condition existing at the start of use.”

*See* Ex. B at 2.

46. BNSF has an obligation to pay for or perform the maintenance and resurfacing of Wolf Creek Road that is necessary as a result of the damages from the clean-up of any derailment or spill from the BNSF line.
47. BNSF has breached this obligation, and as a result, the United States has suffered damages as set forth above.
48. The United States has demanded payment from BNSF more than 30 days before the filing this Complaint. Demand for payment has not been met.

**COUNT II (Failure to pay annual maintenance costs)**

49. The United States incorporates all previous allegations as if set forth herein.
50. The Department of Agriculture laws and regulations, as well as the easement for the cost-share paved road system require BNSF to pay maintenance costs in proportion to their use of the cost-share paved road system.
51. BNSF has failed to pay annual maintenance costs every year since 2013.
52. BNSF is obligated to pay its proportionate share for maintenance of the cost-share paved road system since 2013, in addition to interest and penalty at statutory rates due on these delinquent debts.
53. BNSF is obligated to pay future annual maintenance costs, proportionate to its use of the cost-share paved road system

**COUNT III (Failure to pay overweight permit fees)**

54. The United States incorporates all previous allegations as if set forth herein.
55. BNSF is indebted to the United States for overweight permit fees in the amount of \$283,494.84 for 2014 and \$138,048.17 for 2015.
56. Although the United States has presented a demand for payment to BNSF for this debt, BNSF has failed to pay by the date due.
57. BNSF is obligated to pay the outstanding balance for overweight permits fees, in the amount of \$421,543.01, in addition to interest and penalty at statutory rates due on these delinquent debts.

**COUNT IV (Declaratory Judgment)**

58. The United States incorporates all previous allegations as if set forth herein.
59. The United States owns the land which comprises the Kootenai National Forest located in Libby County, Montana. The Property Clause vests Congress with “Power to dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States.” U.S. Const. Art. IV, ' 3, cl. 2.
60. Congress has exercised its authority under the Property Clause by delegating its authority to manage lands owned by the United States to agencies, such as the Forest Service. This authority is set forth in, among other statutes, the Organic Act of June 4, 1897, 16 U.S.C. § 475, the Federal Land and

Policy Management Act of 1976, 43 U.S.C. §1701, *et seq.*, and the National Forest Management Act of 1976, 16 U.S.C. § 1600, *et seq.*, and 16 U.S.C. § 551.

61. Forest Service regulations require written authorization to conduct commercial hauling on Forest Service Roads, and commercial hauling with permission also requires payment of annual road maintenance charges.
62. BNSF's unauthorized use of roads owned and managed by the Forest Service, as set forth above is a trespass upon the property of the United States and interferes with the Forest Service's authority to manage federal lands.

#### **COUNT V (Injunctive Relief)**

63. The United States incorporates all previous allegations as if set forth herein.
64. Unless enjoined from doing so, BNSF will continue to unlawfully use federal land located on Kootenai National Forest in Libby County, Montana by accessing roads owned by the Forest Service without a permit or other authority.
65. The United States has no adequate remedy at law which will prevent BNSF from continued use of federally owned lands. Harm to federally owned lands has already occurred and will continue to occur unless this Court enjoins BNSF from continued unauthorized use of federal lands within the Kootenai

National Forest in Libby County, Montana.

### **REQUEST FOR RELIEF**

WHEREFORE, the United States requests that this Court:

1. Enter judgment in its favor and against BNSF for \$1,132,442.53 in damages to the Wolf Creek Road;
2. Enter judgment in its favor and against BNSF directing BNSF to pay its share of annual maintenance costs for the cost-share paved road system since 2013;
3. Enter judgment directing BNSF to pay all delinquent charges for overweight fee permits, in the amount of \$421,543.01 and to pay the currently due charges for 2016 overweight fee permits in the amount of \$171,574.93;
4. Enter judgment declaring that the United States Forest Service, as authorized by the United States, has authority to regulate use of National Forest System Lands, and its regulations require written authorization to conduct commercial hauling of Forest Service Roads, and commercial hauling with permission also requires payment of annual road maintenance charges;
5. Enter judgment declaring that BNSF's unauthorized use of Forest Service roads detailed above constitutes an unlawful trespass on the property of the United States;



6. Grant preliminary and permanent injunctive relief restraining BNSF from unlawful use of federal lands located in Libby County, Montana without first complying with applicable federal law;
7. Award the United States continuing interest and penalties pursuant to 31 U.S.C. § 3717 and 31 C.F.R. § 901.9;
8. Award the United States post-judgment interest at the statutory rate; and
9. Pursuant to 28 U.S.C. § 2412(b), award costs and attorneys' fees; and further relief as this Court deems proper.

**DATED** this 17th day of February, 2017.

**MICHAEL W. COTTER**  
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