

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. \_\_\_\_\_

MICHAEL W. WHITED,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

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**COMPLAINT**

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Plaintiff Michael W. Whited, by and through his undersigned attorneys, hereby files this Complaint against the Defendant United States of America, and alleges as follows:

**NATURE OF THE CLAIMS**

1. Mr. Whited brings this action against the United States pursuant to the Federal Tort Claims Act (“FTCA”), 28 U.S.C. §§ 2671–80. Mr. Whited seeks damages under the FTCA to redress tortious injuries to his real property, which were caused by the unlawful, continuing failure to act of the employees and/or agents of the United States Bureau of Land Management (“BLM”), acting within the scope of their office or employment. 28 U.S.C. §§ 2671–80.

2. Despite Mr. Whited’s diligent monitoring and communication with the BLM, the BLM has unlawfully failed to repair or remove a structure from the United States’ property immediately adjoining Mr. Whited’s property, resulting in its collapse onto Mr. Whited’s property and damages to his home. The damage continues to date. The BLM has: (a) breached

its duty to maintain artificial conditions on its land and remove or repair unsafe structures on its property so as not to cause injury to adjoining landowners; (b) trespassed upon Mr. Whited's property by allowing a structure on the United States' property to fall into disrepair and failing to repair or demolish the structure, causing the structure to collapse onto Mr. Whited's property and pushing debris directly into his house; and (c) caused a nuisance on Mr. Whited's property by creating a physical condition on the United States' property that interferes with Mr. Whited's use and enjoyment of his property.

3. Although the BLM has previously recognized the necessity of removing the structure from the United States' property, the BLM has failed to take any action. Eventually, following the collapse of the structure, the BLM took the position that it would not remove the collapsed structure, but instead told Mr. Whited he had permission to "remove any of the structure that is on [his] property, as well as any of the structure where encroachment onto [his] property is imminent," all at his own expense. Because removal of the collapsed structure would also require stabilizing the hillside behind the structure in order to prevent erosion and/or mudslides, the costs of such an undertaking are significant. Moreover, it is the United States' duty, not Mr. Whited's, to maintain its own property in such a manner that prevents damage to and interference with its neighbor's property. Mr. Whited therefore seeks compensatory damages to remedy the BLM's unlawful actions. *See* 28 U.S.C. § 2674.

### **JURISDICTION AND VENUE**

4. This Court has jurisdiction over Mr. Whited's FTCA claims pursuant to 28 U.S.C. § 1346(b). On January 17, 2017, Mr. Whited filed a Standard Form 95 with the BLM as required by 28 U.S.C. § 2675. A true and accurate copy of Mr. Whited's Standard Form 95 with all original exhibits is attached hereto as Exhibit 1.

5. The BLM had six months to respond to Mr. Whited's Form 95. 28 U.S.C. § 2675.

6. By decision dated August 1, 2017, the U.S. Department of the Interior denied Mr. Whited's claim. Accordingly, Mr. Whited satisfied the administrative exhaustion requirement of 28 U.S.C. § 2675. This Complaint is timely filed within six months of the denial. 28 U.S.C. § 2401(b); 28 C.F.R. § 14.9(b).

7. Venue is proper in this Court pursuant to 28 U.S.C. § 1402(c) because the United States is the defendant, the real property that is the subject of this action is situated in this judicial district, and all events giving rise to Mr. Whited's claims occurred in this judicial district.

### **PARTIES**

8. Plaintiff Michael W. Whited owns property located at 6148 Fourmile Canyon Drive in Boulder County, Colorado ("Whited Property"). Mr. Whited purchased the Whited Property on September 6, 1990 and has resided in the house on the Whited Property ("Whited House") ever since.

9. Defendant United States of America owns land immediately adjacent to the Whited Property in Boulder County, Colorado, and owns the structure located on that parcel. The United States is liable for the tortious actions of the BLM and its employees and/or agents within the scope of their employment. 28 U.S.C. §§ 2671, 2674.

### **LEGAL BACKGROUND**

10. The FTCA waives the sovereign immunity of the United States and permits a plaintiff to bring a civil action to recover monetary damages for the torts of federal employees and "persons acting on behalf of a federal agency" of the United States. 28 U.S.C. § 2671.

11. The FTCA provides that the United States is liable “in the same manner and to the same extent as a private individual under like circumstances” for the commission of torts. 28 U.S.C. § 2674.

12. In assessing tort claims under the FTCA, federal courts apply state law. 28 U.S.C. § 2674; *United States v. Olson*, 546 U.S. 43, 44, 46 (2005).

### **FACTUAL BACKGROUND**

#### **I. MR. WHITED OWNS PROPERTY IN BOULDER COUNTY, COLORADO, ADJACENT TO PROPERTY OWNED BY THE UNITED STATES.**

13. The legal description of the Whited Property is Lots 9-16, Block 2, Lots 1-2, 23-24, Block 3, Townsite of Wall Street, being a part of the Phillips Placer M.S. 276, located in the NW/4, Section 19, Township 1 North, Range 71 West, 6th P.M., County of Boulder, State of Colorado. This area of Boulder County is known as Fourmile Canyon.

14. The Whited House was originally a one-room mining cabin constructed in 1890. The Whited House faces southeast and is located in a narrow canyon. The front of the Whited House is directly adjacent to Fourmile Canyon Drive. The canyon topography rises steeply, directly behind the Whited House.

15. The United States owns a parcel of land behind the Whited Property that abuts the Whited Property to the northeast. The United States’ parcel is part of Boulder County Parcel No. 146119000098, which is generally described as the North Half of the Southwest Quarter and the North Half of the Southeast Quarter of Section 19, Township 1 North, Range 71 West of the 6th P.M., County of Boulder, State of Colorado.

16. The United States’ parcel is managed by the BLM. Specifically, the BLM Royal Gorge Field Office is responsible for managing the United States’ parcel.

17. A dilapidated mining structure of unknown origin (“BLM Shed”) is located on the United States’ parcel directly abutting the property line between the United States’ parcel and the Whited Property. The BLM Shed was constructed mostly of wood timbers and heavy stonemasonry. The proximity of the BLM Shed to Mr. Whited’s home cannot be understated. The BLM Shed is located less than ten feet from Mr. Whited’s house. The back of the BLM Shed is constructed directly into the hillside.

18. In September 2010, Fourmile Canyon suffered a wildfire that destroyed 169 homes, including the neighboring homes closest to the Whited Property on both sides. The hillside behind the Whited Property was damaged by the wildfire.

19. Upon information and belief, in May 2011, the BLM published a report titled “Intensive Cultural Resources Survey of the Four Mile Fire Burn Area of Potential Effect.”

20. The Colorado Historical Society performed a Cultural Resource Survey, dated August 2, 2013, which concluded that the BLM Shed was not eligible to be placed on the National Register of Historic Places or the State Register of Historic Properties.

21. The BLM Royal Gorge Field Office completed a “Limited-Results Cultural Resource Survey Form,” dated August 26, 2013. The Form anticipates that the “collapsing [BLM] [S]hed will be completely removed from the property.”

22. In September 2013, Fourmile Canyon suffered flooding so severe that the area was declared a national disaster.

**II. FROM 2011 TO 2016, MR. WHITED REPEATEDLY ATTEMPTED TO COMMUNICATE WITH THE BLM REGARDING THE DETERIORATING CONDITION OF THE BLM SHED.**

23. Subsequent to the 2010 Fourmile Canyon wildfire, Mr. Whited became concerned that the burn area on the United States’ parcel directly behind the Whited House was unstable

and posed a significant risk to the Whited Property. On March 30, 2011, Mr. Whited emailed John Smeins, the BLM contact provided by Boulder County's Fourmile Fire Recovery Manager, and requested a meeting to discuss the stabilization and rehabilitation of the United States' parcel.

24. On April 15, 2011, Mr. Smeins, a BLM hydrologist, met with Mr. Whited at the Whited Property. The purpose of Mr. Smeins' visit was to assess the rehabilitation required after the 2010 Fourmile Canyon wildfire. During this meeting Mr. Whited specifically pointed out the BLM Shed, and the poor condition thereof, and inquired about purchasing the strip of land behind his home so that he could repair or demolish the BLM Shed himself. Mr. Smeins informed Mr. Whited that before any action could be taken, a BLM archaeologist would have to perform a site visit to assess the area for artifacts or any features of historical value.

25. On April 18, 2011, Mr. Whited followed up with Mr. Smeins to inquire about the archaeologist's site visit.

26. On April 19, 2011, Mr. Smeins responded that BLM archaeologist Erin Watkins would be doing a site visit that day.

27. Following Ms. Watkins' site visit, the BLM sent Mr. Whited a letter, authorizing him to enter the United States' parcel, re-seed the hillside behind the Whited Property, and lay down straw wattle to stabilize the hillside and prevent further erosion. The BLM's letter, however, did not address the BLM Shed or the potential sale of a small portion of the United States' parcel.

28. Shortly thereafter, Mr. Whited reseeded the United States' parcel and installed straw wattle in response to the damage caused by the 2010 Fourmile Canyon wildfire, both at his own expense.

29. On October 17, 2011, having heard nothing from the BLM about the BLM Shed for six months, Mr. Whited followed up with Mr. Smeins, informing him that a portion of the ceiling of the BLM Shed had collapsed, and the rest of the BLM Shed was in poor condition and posed an imminent risk to the Whited Property. At that time, Mr. Whited again inquired about how to move forward with the purchase of the relevant portion of the United States' parcel abutting his property and/or whether he could repair the BLM Shed himself.

30. Mr. Smeins referred Mr. Whited to Debra Bellew, a BLM realty specialist. On November 4, 2011, Mr. Whited sent Ms. Bellew and Mr. Smeins photographs of the BLM Shed and again inquired about purchasing a portion of the United States' parcel or the repair/demolition of the BLM Shed. Mr. Whited did not receive a response.

31. After four months, on March 6, 2012, Mr. Whited again contacted Ms. Bellew and Mr. Smeins, warning that the winter's heavy snowfalls had resulted in additional structural damage to the BLM Shed and inquiring about its demolition.

32. On March 8, 2012, Ms. Bellew left Mr. Whited a voicemail message stating that understaffing prevented her office from performing a sale of the United States' parcel underlying the BLM Shed. She also indicated that such a sale would be very expensive.

33. On March 12, 2012, Mr. Whited again emailed Ms. Bellew and asked whether the BLM would either remove or rehabilitate the BLM Shed.

34. On March 14, 2012, Ms. Bellew responded via phone and left a voicemail for Mr. Whited stating that the BLM would be sending an archeologist to inspect the BLM Shed.

35. On March 26, 2012, a BLM archaeologist returned to the site to assess the historical value of the BLM Shed for the second time.

36. Thereafter, the BLM made no further contact with Mr. Whited for six months. On September 24, 2012, Mr. Whited followed up with Ms. Bellew only to learn she was no longer overseeing the BLM realty department.

37. On January 11, 2013, Mr. Whited followed up with Ms. Watkins. Ms. Watkins referred Mr. Whited to Steve Craddock, another BLM realty specialist. Ms. Watkins stated, “since I have seen the [BLM] [S]hed and its potential hazard I will try and do as much follow up as I can.” Ms. Watkins forwarded Mr. Whited’s email to Mr. Craddock, and provided Mr. Craddock with a brief history and summary of the situation.

38. Mr. Whited and Mr. Craddock corresponded fairly regularly between February 2013 and May 2013.

39. On February 20, 2013, Mr. Craddock asked Mr. Whited: “[I]f the demolition of the [BLM Shed] were to be approved, would you consider funding all or a portion of the cost of the additional survey work (if needed), site assessment, and demolition activities?”

40. On March 11, 2013, Mr. Whited responded: “I feel that any expenses associated with these tasks should be fully the responsibility of the BLM. Should the BLM give me permission, I would be more than willing to contribute to the rebuilding/repair of the shed, and would take full responsibility of future maintenance costs.” Once again, Mr. Whited inquired about the possibility of purchasing or leasing the United States’ parcel underlying the BLM Shed.

41. On March 22, 2013, Mr. Craddock wrote to Mr. Whited that:

I have had to seek input and guidance from other specialists in BLM to respond to some of the questions you posed. Unfortunately, due to schedule conflicts, competing priorities, and other issues beyond my control, it is taking a bit longer than I expected to gather the information I need.



In the meantime, please know that your questions and concerns have been noted and *a response is forthcoming*.

(emphasis added).

42. Despite his statement that a response would be forthcoming, Mr. Craddock never contacted Mr. Whited again. Mr. Whited even requested an update from Mr. Craddock on May 10, 2013, but Mr. Craddock never responded. In fact, no BLM employee ever independently followed up with Mr. Whited. Instead, Mr. Whited initiated all further contact with the BLM.

43. By letter dated August 28, 2013, Keith E. Berger, Field Manager of the BLM Royal Gorge Field Office, notified Edward Nichols, then-CEO of History Colorado, of the results of the report for Cultural Resources Project CR-RG-13-104 (P). Mr. Berger's letter concludes that "the BLM recommends that the Demolition of the [BLM] Shed Project proceeds." Mr. Whited, however, did not learn of the existence of the August 28, 2013 letter until August 3, 2016, when a copy was provided to him by Charlene Lucero, then-Acting Assistant Field Manager (Non-Renewable Resources) of the BLM Royal Gorge Field Office.

### **III. THE BLM FAILED TO REPAIR OR REMOVE THE BLM SHED FROM THE UNITED STATES' PROPERTY, RESULTING IN ITS COLLAPSE ONTO MR. WHITED'S PROPERTY.**

44. In the evening hours of March 11, 2016 or the early morning hours of March 12, 2016, the BLM Shed collapsed, falling forward onto the Whited Property and completely blocking the walkway behind the Whited House with a significant amount of rock, cement, and other heavy materials. The collapse of the BLM Shed also dislodged trees and pushed the trees into the back of the Whited House, including directly into the electrical load center.

45. On March 12, 2016, Mr. Whited reached out to Mr. Craddock to inform him that the BLM Shed had finally collapsed onto the Whited Property.

46. On March 14, 2016, Jay Raiford, then-BLM Non-Renewable Supervisor, responded to Mr. Whited, informing him that Mr. Craddock and Ms. Watkins no longer worked in the BLM Royal Gorge Field Office.

47. On March 23, 2016, Mr. Raiford notified Mr. Whited that he was “looking into” the situation. Mr. Raiford further communicated: “From looking over previous notes from staff long gone it appears this is quite a complicated matter with what I understand of the history and location of the [BLM Shed]. It is going to take some time to piece this all together.” Although Mr. Whited had not corresponded directly with Mr. Raiford prior to March 2016, Mr. Raiford had been copied on emails between Mr. Whited and other BLM employees since at least February 2013.

48. On April 9, 2016, Mr. Raiford visited the Whited Property to observe the BLM Shed firsthand. Mr. Raiford recognized the safety concerns present on the Whited Property and gave his personal assurances that he would not be leaving the BLM Royal Gorge Field Office, and that he would ensure that the BLM would act to remedy the situation.

49. Upon information and belief, Mr. Raiford photographed the collapsed BLM Shed during his April 9, 2016 visit to the Whited Property.

50. On April 27, 2016, Mr. Raiford informed Mr. Whited that he was being transferred to a different position and referred Mr. Whited to Keith Berger, Field Manager of the BLM Royal Gorge Field Office.

51. In light of the imminent risk of further damage to the Whited Property and given the safety hazards presented by the collapse of the BLM Shed, Mr. Whited was forced to personally remove the dislodged trees that were pushed into the Whited House and into the

electrical load center, and clear substantial, heavy debris from the walkway behind the Whited House.

52. Despite Mr. Whited's efforts, significant portions of the BLM Shed remain on the Whited Property. The unabated safety hazards caused by the BLM Shed and the destabilized state of the hillside behind the BLM Shed have and continue to diminish the market value of the Whited Property, interfere with Mr. Whited's use and enjoyment of the Whited Property, and cause Mr. Whited discomfort and annoyance.

53. Any further work done by Mr. Whited to continue removing portions of the BLM Shed would be futile unless the BLM agrees to stabilize the hillside immediately behind the BLM Shed. Otherwise, removal of the remaining portions of the BLM Shed would only cause a landslide onto the Whited Property and into the Whited House.

54. By letter dated May 25, 2016, Mr. Berger, Field Manager of the BLM Royal Gorge Field Office, notified Mr. Whited:

It has been determined that the BLM has no ownership of the structure on public lands; it has no historic values and is not eligible for the National Register of Historic Places. As such, you may remove any of the structure that is on your property as well as any of the structure where encroachment onto your property is imminent. You may construct a retaining wall, as needed, on the property line with the adjacent public lands. *Any construction of a retaining wall onto public lands would require a right-of-way application and processing.*

(emphasis added).

55. As required by the FTCA, on January 17, 2017, Mr. Whited filed a Form 95 with the BLM Colorado State Office claiming \$91,943.58 for damage caused to the Whited Property by the collapse of the BLM Shed.

56. By letter dated August 1, 2017, Patricia J. Reedy, the Acting Assistant Regional Solicitor for the Rocky Mountain Region, responded to Mr. Whited's Form 95 and denied his

claim for damages. Ms. Reedy reiterated that if Mr. Whited wished to “remove the [BLM Shed] at [his] own expense,” he should refer to the May 2016 letter from Mr. Berger.

**FIRST CLAIM FOR RELIEF**  
**(Federal Tort Claims Act)**  
**(Negligence)**

57. Mr. Whited realleges and incorporates by reference each allegation set forth above.

58. Under Colorado law, the essential elements of a cause of action for negligence are: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) injury to the plaintiff; and (4) a proximate cause relationship between the breach and the injury. *Casebolt v. Cowan*, 829 P.2d 352, 356 (Colo. 1992).

59. Under Colorado law, a landowner has an affirmative duty not to permit land to remain in an altered state, “if such altered state create[s] a condition the natural and foreseeable result of which would result in injury to the adjoining property.” *Moore v. Standard Paint & Glass Co. of Pueblo*, 358 P.2d 33, 33 (Colo. 1960).

60. The BLM, like any private property owner, has a duty to prevent artificial conditions on its land from injuring others. Restatement (Second) of Torts § 365 (1965) (A landowner is liable to those outside its land “for physical harm caused by the disrepair of a structure or other artificial condition thereof ....”).

61. As early as April 15, 2011, BLM hydrologist John Smeins physically visited the United States’ property and observed the condition of the BLM Shed. During this visit, Mr. Whited notified the BLM of the dilapidated condition of the BLM Shed and the risk it posed to his property.

62. By email dated January 11, 2013, BLM archaeologist Erin Watkins described the BLM Shed as a “potential hazard.”

63. By letter dated August 28, 2013, the BLM acknowledged that demolition of the BLM Shed should proceed, but failed to take any action.

64. On April 9, 2016, Mr. Raiford visited the Whited Property and observed the BLM Shed. He gave his personal assurance that the BLM would act to resolve the issue.

65. Despite the BLM’s repeated commitments that it would demolish or otherwise take care of the BLM Shed, the BLM took no action, which resulted in the collapse of the BLM Shed onto the Whited Property.

66. The BLM breached its duty as a landowner to Mr. Whited by failing to repair or remove the BLM Shed, which it knew posed an imminent, ongoing, and unavoidable threat of harm to the Whited Property.

67. The BLM’s breach of duty resulted in injury to the Whited Property, including a portion of the BLM Shed and a significant amount of rock, cement, and other materials collapsing onto the Whited Property. The collapse also dislodged trees and pushed them into the side of the Whited House, including directly into the electrical load center.

68. Given Mr. Whited’s repeated warnings, the BLM’s knowledge of the state of the BLM Shed, and BLM’s recommendation that the BLM Shed be demolished, the United States’ negligence proximately caused Mr. Whited’s injury, because the collapse of the BLM Shed was “the natural and foreseeable result” of the United States’ failure to repair or remove the BLM Shed and further stabilize the United States’ parcel.

69. The United States is liable for negligence in the same manner and to the same extent as a private individual under like circumstances. The United States will remain liable for

negligence unless and until it fully removes the BLM Shed and stabilizes the hillside on the United States' parcel to prevent any continuing and future injury to the Whited Property. Pursuant to the FTCA, Mr. Whited is entitled to compensatory relief for the damages caused by the BLM's negligence. 28 U.S.C. §§ 2671–80.

**SECOND CLAIM FOR RELIEF**  
**(Federal Tort Claims Act)**  
**(Trespass)**

70. Mr. Whited realleges and incorporates by reference each allegation set forth above.

71. Under Colorado law, “[t]he elements for the tort of trespass are a physical intrusion upon the property of another without the proper permission from the person legally entitled to possess the property.” *Hoery v. United States*, 64 P.3d 214, 217 (Colo. 2003). A trespass occurs when one intentionally enters land possessed by someone else, “or when an actor causes something else to enter the land. For instance, an ‘actor, without himself entering the land, may invade another’s interest in its exclusive possession by ... placing a thing either on or beneath the surface of the land.’” *Id.* (quoting Restatement (Second) of Torts §§ 158(a) cmt. I, 159(1) (1965)). Moreover, “[a] landowner who sets in motion a force which, in the usual course of events, will damage property of another is guilty of a trespass on such property.” *Id.* (citing *Miller v. Carnation Co.*, 516 P.2d 661, 664 (Colo. App. 1973)).

72. In March 2016, despite Mr. Whited’s continued warnings and the BLM’s own acknowledgment of the danger imposed by the BLM Shed, the BLM failed to take action, and the BLM Shed collapsed and impermissibly physically intruded onto the Whited Property.

73. The BLM’s inaction set in motion a force, which through the usual course of events, damaged the Whited Property.

74. The United States is liable for trespass in the same manner and to the same extent as a private individual under like circumstances. Pursuant to the FTCA, Mr. Whited is entitled to compensatory relief for the damages caused by the trespass of the BLM Shed. 28 U.S.C. §§ 2671–80.

**THIRD CLAIM FOR RELIEF**  
**(Federal Tort Claims Act)**  
**(Continuing Trespass)**

75. Mr. Whited realleges and incorporates by reference each allegation set forth above.

76. Under Colorado law, “[t]he elements for the tort of trespass are a physical intrusion upon the property of another without the proper permission from the person legally entitled to possess the property.” *Hoery*, 64 P.3d at 217.

77. “Colorado law recognizes the concepts of continuing trespass and nuisance for those property invasions where a defendant fails to stop or remove continuing, harmful physical conditions that are wrongfully placed on a plaintiff’s land.” *Hoery*, 64 P.3d at 220; *see Cobai v. Young*, 649 P.2d 121, 123 (Colo. App. 1984) (snow sliding from a roof onto plaintiff’s house constituted continuing trespass); *Hunter v. Mansell*, 240 P.3d 469, 476 (Colo. App. 2010) (shed and improvements encroaching on plaintiff’s property constituted continuing trespass). “[A]n actor’s failure to remove a thing tortiously placed on another’s land is considered a ‘continuing trespass’ for the entire time during which the thing is wrongfully on the land. Until the thing tortiously placed on the land, or underneath the land is removed, then liability for trespass remains.” *Hoery*, 64 P.3d at 218 (citations omitted).

78. In March 2016, the BLM Shed collapsed onto the Whited Property. Although Mr. Whited was forced to remove some portions of the BLM Shed that impermissibly entered his

property himself, other portions of the BLM Shed remain impermissibly on the Whited Property to date. Furthermore, portions of the BLM Shed will continue to impermissibly enter the Whited Property unless and until the BLM Shed is removed in its entirety and the hillside on the United States' parcel is properly stabilized.

79. As a result of the continuing trespass, the market value of the Whited Property is decreased and Mr. Whited is suffering ongoing discomfort and annoyance.

80. The United States is liable for continuing trespass in the same manner and to the same extent as a private individual under like circumstances. The United States will remain liable for continuing trespass unless and until it removes the BLM Shed and stabilizes the hillside on the United States' parcel to prevent any continuing and future injury to the Whited Property. Pursuant to the FTCA, Mr. Whited is entitled to compensatory relief for the damages caused by the continuing trespass of the BLM Shed. 28 U.S.C. §§ 2671–80.

**FOURTH CLAIM FOR RELIEF**  
**(Federal Tort Claims Act)**  
**(Continuing Nuisance)**

81. Mr. Whited realleges and incorporates by reference each allegation set forth above.

82. Under Colorado law, a nuisance occurs where an individual's interest in the use and enjoyment of his property is invaded. *Hoery*, 64 P.3d at 218. An invasion of the use and enjoyment of property may be: “(1) intentional and unreasonable; (2) unintentional and otherwise actionable under the rules for negligent or reckless conduct; or (3) so abnormal or out of place in its surroundings as to fall within the principle of strict liability.” *Public Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377, 391 (Colo. 2001) (citing Restatement (Second) of Torts § 822 (1965); *Baughman v. Cosler*, 459 P.2d 294, 299 (1969)).



83. “Generally, to be unreasonable, an interference must be significant enough that a normal person in the community would find it offensive, annoying, or inconvenient.” *Public Serv. Co. of Colo.*, 27 P.3d at 391 (citing Restatement (Second) of Torts § 821F (1965); *Lowder v. Tina Maria Homes, Inc.*, 601 P.2d 657, 658 (Colo. App. 1979)).

84. Under Colorado law, a continuing nuisance occurs “where a defendant fails to stop or remove continuing, harmful physical conditions that are wrongfully placed on a plaintiff’s land.” *Hoery*, 64 P.3d at 220.

85. In March 2016, the BLM Shed collapsed onto Mr. Whited’s property.

86. The collapsed BLM Shed physically invaded the Whited Property and interfered with Mr. Whited’s use and enjoyment of the Whited Property.

87. The collapsed BLM Shed encroached upon the Whited Property and dislodged trees causing them to push against the Whited House, including into the electrical load center, which further created a safety hazard and interfered with Mr. Whited’s use and enjoyment of the Whited Property.

88. A normal person in the community would find the BLM’s conduct, specifically the BLM’s failure to remove the BLM Shed and stabilize the hillside on the United States’ parcel, offensive, annoying, and inconvenient.

89. On March 12, 2016, Mr. Whited notified the BLM of the collapsed condition of the BLM Shed and the United States’ parcel.

90. As of the date of the filing of this Complaint, significant portions of the collapsed BLM Shed remain on the Whited Property.

91. The BLM has persisted in failing to abate its invasion of the Whited Property.

92. Portions of the BLM Shed will further continue to impermissibly enter the Whited Property if the BLM Shed is not fully removed from the United States' parcel. The status of the BLM Shed interferes with Mr. Whited's use and enjoyment of the Whited Property, diminishes the market value of the Whited Property, and causes Mr. Whited ongoing discomfort and annoyance.

93. As of the date of the filing of this Complaint, the hillside behind the BLM Shed on the United States' parcel remains unstable. The unstable hillside also diminishes the market value of the Whited Property and causes Mr. Whited ongoing discomfort and annoyance.

94. By failing to remove the BLM Shed and stabilize its property adjacent to the Whited Property, the BLM negligently and recklessly caused and continues to cause an unreasonable invasion to the Whited Property, thereby directly interfering with Mr. Whited's use and enjoyment of the Whited Property.

95. The United States is liable for nuisance in the same manner and to the same extent as a private individual under like circumstances. The United States will remain liable for continuing nuisance unless and until it removes the BLM Shed and stabilizes the hillside on the United States' parcel to prevent any continuing and future injury to the Whited Property. Pursuant to the FTCA, Mr. Whited is entitled to compensatory relief for the continuing nuisance created by the BLM. 28 U.S.C. §§ 2671–80.

### **DAMAGES**

96. Under Colorado law, “[d]amages available on trespass and nuisance claims can include not only diminution of market value or costs of restoration and loss of use of the property, but also discomfort and annoyance to the property owner as the occupant.” *Webster v. Boone*, 992 P.2d 1183, 1185 (Colo. App. 1999) (citing *Bd. of Cnty. Comm’rs v. Slovek*, 723 P.2d

1309 (Colo. 1986); *Burt v. Beautiful Savior Lutheran Church*, 809 P.2d 1064 (Colo. App. 1990)).

97. As fully detailed in Mr. Whited's Form 95, Mr. Whited originally requested \$91,943.58 in damages from the United States. This amount represents the fair market value cost to: (1) remove and dispose of the BLM Shed; and either (2) construct a retaining wall on the Whited Property and add backfill to stabilize the hillside on the United States' parcel directly adjacent to the Whited Property; or (3) construct a retaining wall on the United States' property directly adjacent to the Whited Property.

98. Mr. Whited claims an additional \$100.00 per day for the loss of use and enjoyment of the Whited Property, diminution in the market value of the Whited Property, and for discomfort and annoyance as the owner and occupant of the Whited Property from March 12, 2016 until the date the entire BLM Shed is removed and the United States' property is fully stabilized. The amount that has accrued up until the date of filing is \$67,700.00.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff Michael Whited respectfully requests the following relief:

1. Entry of judgment that the United States is liable for the negligent acts, trespass, and nuisances of the BLM and its employees and agents under the FTCA, 28 U.S.C. §§ 2671–80;
2. Entry of judgment that the BLM tortiously caused damage to the Whited Property in the amount of at least \$91,943.58, plus \$100.00 per day for continuing trespass and nuisance unless and until the BLM Shed is fully removed and the hillside on the United States' parcel is stabilized, plus any post-judgment interest that accrues pursuant to 31 U.S.C. § 1304(b);

3. Entry of judgment ordering the United States to pay any additional damages that accrue until the BLM Shed is fully removed and disposed of and until the United States' property is stabilized so as to prevent any further damage to the Whited Property;

4. Entry of judgment ordering the United States to pay any additional damages that are incurred by Mr. Whited should any of the existing estimates no longer accurately reflect the costs to remove and dispose of the BLM Shed and further stabilize the United States' property;

5. Award Mr. Whited costs, expenses, and attorneys' fees in accordance with law;

6. Award Mr. Whited such further relief as is just and equitable.

DATED this 18th day of January 2018.

Respectfully Submitted,

/s/ Jaimie N. Cavanaugh

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