

Rebecca K. Smith
PUBLIC INTEREST DEFENSE CENTER, P.C.
P.O. Box 7584
Missoula, MT 59807
(406) 531-8133
publicdefense@gmail.com

Timothy M. Bechtold
BECHTOLD LAW FIRM, PLLC
P.O. Box 7051
Missoula, MT 59807
(406) 721-1435
tim@bechtoldlaw.net

Attorneys for Plaintiffs

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

FRIENDS OF THE WILD SWAN,
SWAN VIEW COALITION,
ALLIANCE FOR THE WILD
ROCKIES, and NATIVE
ECOSYSTEMS COUNCIL.
Plaintiffs,

vs.

RICH KEHR, U.S. Forest Service
Swan Lake District Ranger, CHIP
WEBER, U.S. Forest Service Flathead
National Forest Supervisor, LEANNE
MARTEN, U.S. Forest Service Region
One Forester, UNITED STATES
FOREST SERVICE, an agency of the
U.S. Department of Agriculture.
Defendants.

CV- 17-120-M-DLC

PLAINTIFFS' BRIEF IN SUPPORT
OF THEIR MOTION FOR
SUMMARY JUDGMENT

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I. INTRODUCTION

This is a civil action under the citizen suit provisions of the Administrative Procedure Act (APA) and Endangered Species Act (ESA) of the U.S. Forest Service's (USFS) authorizations, analyses, and lack thereof on the Flathead National Forest (Forest) related to and regarding the Beaver Creek Project (Project) and Forest Plan Amendment 19. Plaintiffs Friends of the Wild Swan, Swan View Coalition, Native Ecosystems Council, and Alliance for the Wild Rockies (collectively "Friends") attest that the decisions approving the challenged authorizations, analyses, and lack thereof are arbitrary and capricious, an abuse of discretion, and/or otherwise not in accordance with the National Environmental Policy Act (NEPA), 42 U.S.C. §4331 *et seq.*, the National Forest Management Act (NFMA), 16 U.S.C. §1600 *et seq.*, the ESA, 16 U.S.C. §1531 *et seq.*, and the APA, 5 U.S.C. §701 *et seq.*

II. STATEMENT OF FACTS

Pursuant to Local Rule 56.1, the relevant facts from the administrative record are set forth in Friends' Statement of Undisputed Facts.

III. STANDARDS OF REVIEW

This is an action brought in part under the ESA. 16 U.S.C. §1540(g). The Supreme Court holds that the preservation of endangered species takes "priority over the 'primary missions' of federal agencies." *Tennessee Valley Authority v.*

Hill, 437 U.S. 153, 187 (1978). Accordingly, reviewing courts must “afford[] endangered species the highest of priorities,” and act with “institutionalized caution” when reviewing ESA cases. *Cottonwood Envtl. Law Ctr. v. USFS*, 789 F.3d 1075, 1091 (9th Cir.2015). Courts must “give the benefit of the doubt to the species.” *Connor v. Burford*, 848 F.2d 1441, 1454 (9th Cir.1988).

Moreover, under the APA, reviewing courts “shall [] hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” or “(D) without observance of procedure required by law” 5 U.S.C. §706(2).

IV. ARGUMENT

A. USFS’s failure to analyze the Beaver Creek and Glacier Loon Projects in a single EIS, or otherwise fully address the cumulative effects of these Projects, violates NEPA and the APA.

NEPA requires federal agencies to prepare an EIS for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). “[T]imber projects are major ongoing federal actions.” *Sierra Club v. Bosworth*, 465 F.Supp.2d 931, 939 (N.D. Cal. 2006). An agency planning a timber sale project or other major federal action may prepare an Environmental Assessment in order to determine whether there are any significant impacts that must be analyzed in an EIS. 40 C.F.R. §1508.9.

By Executive Order, the Council on Environmental Quality issued regulations

for federal agencies implementing NEPA to direct the EIS process. Exec.Order No. 11991, 42 Fed.Reg. 26,967 (1977); 40 C.F.R. §§1500-1518. “The [Council on Environmental Quality] regulations are binding on all federal agencies and provide formal guidance to the courts for interpreting NEPA requirements.” *Trustees for Alaska v. Hodel*, 806 F.2d 1378, 1382 (9th Cir. 1986)(citing 43 Fed.Reg. 55,978 (1978)).

Council on Environmental Quality NEPA regulations require that “[p]roposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.” 40 C.F.R. §1502.4(a)(emphasis added). Separately, and in addition, these regulations require that two or more agency actions must be analyzed together in the same EIS if they are “cumulative” actions, “which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.” 40 C.F.R. §1508.25(a)(2).

Thus, “there are situations in which an agency is required to consider several related actions in a single EIS []. Not to require this would permit dividing a project into multiple ‘actions,’ each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.” *Thomas v. Peterson*, 753 F.2d 754, 758 (9th Cir. 1985)(internal citation omitted, overruled on other grounds). In order to determine whether a single EIS is required for timber sale projects, the

Ninth Circuit holds that if there are “substantial questions that [timber sale projects] will result in significant environmental impacts,” then “[a] single EIS, therefore [is] required to address the cumulative effects of these proposed sales.” *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1215 (9th Cir. 1998).

In *Blue Mountains*, “the Forest Service identified five potential logging projects in the same watershed, including the Big Tower project at issue in th[e] appeal.” *Id.* at 1214-1215. The Ninth Circuit held that “all of the proposed sales were reasonably foreseeable” and that “[a]t the very least, these sales raise substantial questions that they will result in significant environmental impacts. A single EIS, therefore, was required to address the cumulative effects of these proposed sales.” *Id.* at 1215.

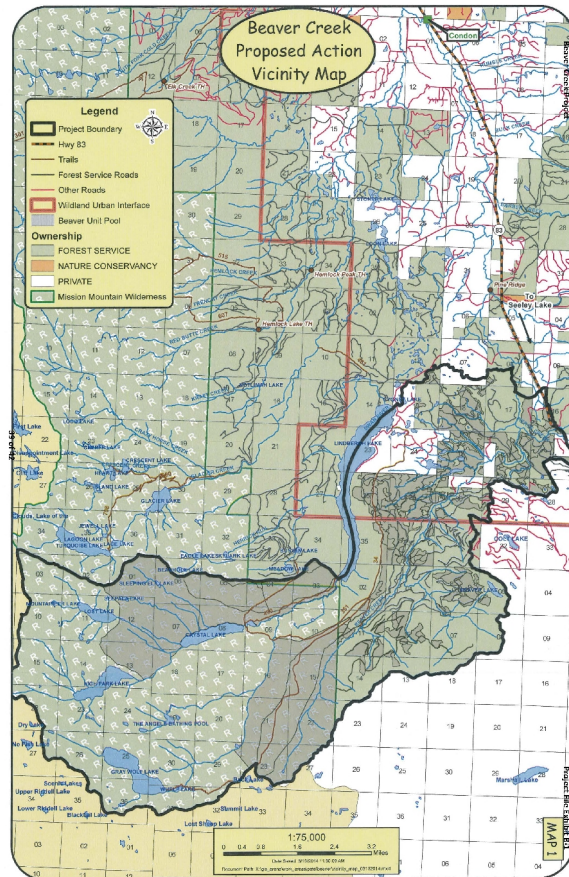
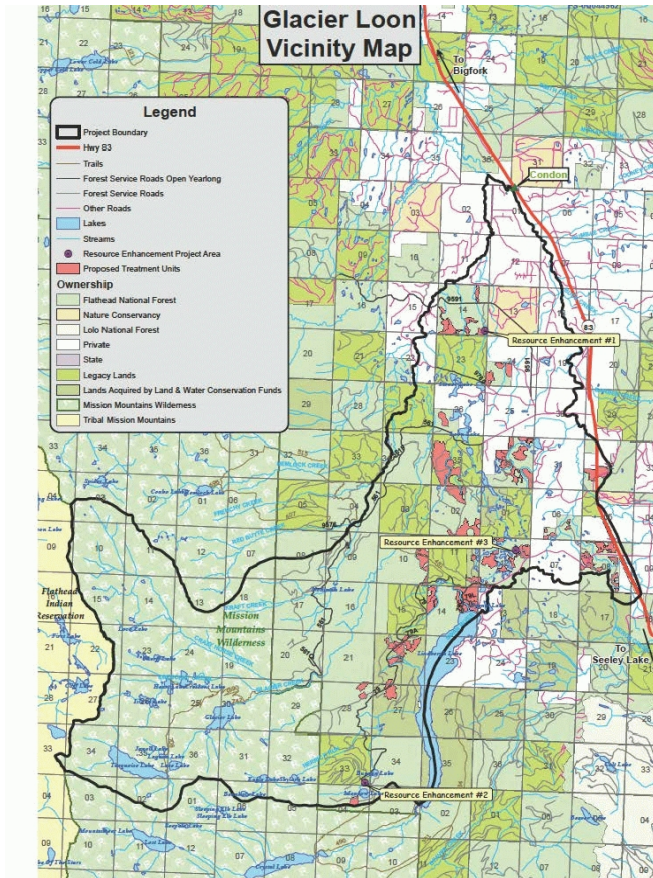
Likewise, the Ninth Circuit has held: “where several foreseeable similar projects in a geographical region have a cumulative impact, they should be evaluated in a single EIS.” *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1312 (9th Cir.1990) (citations omitted). In *Tenakee Springs*, as in *Blue Mountains*, the Ninth Circuit found that similar logging projects in the same geographic area required a single EIS. *Id.*; see also *W. Watersheds Project v. Bennett*, 392 F. Supp. 2d 1217, 1223-24 (D. Idaho 2005)(finding that separate Environmental Assessments for grazing activities must be combined into a single EIS).

1. The Beaver Creek and Glacier Loon Projects are related to each other closely enough to be a single course of action that must be addressed in a single EIS under 40 C.F.R. §1502.4(a).

As noted above, “[t]he [Council on Environmental Quality] regulations are binding on all federal agencies” *Trustees*, 806 F.2d at 1382. One such binding regulation requires that “[p]roposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.” 40 C.F.R. §1502.4(a)(emphasis added).

The Beaver Creek Project is located on the Swan Lake Ranger District of the Flathead National Forest in Missoula County, Montana. Z2:00060993. The Project area includes the entire eastern shore of Lindbergh Lake and portions of the Mission Mountain Wilderness. *Id.* The Glacier Loon Project is also located on the Swan Lake Ranger District on the Flathead National Forest in Missoula County, Montana. Z8:00061264. The Glacier Loon Project area includes the entire western shore of Lindbergh Lake and portions of the Mission Mountain Wilderness. *Id.*

As shown in the USFS maps below, the Beaver Creek and Glacier Loon Projects are directly adjacent to each other for the entirety of the east to west boundary line between them, and fit together like puzzle pieces. It appears as though the two Project areas were part of one large project area that was cut down the middle and divided into two smaller project areas:



Z8:00061750 (Glacier Loon Vicinity Map); B1:00000322 (Beaver Creek Proposed Action Vicinity Map).

Moreover, both Projects occur in the Lower Beaver Lynx Analysis Unit and Upper Beaver Lynx Analysis Unit, Z8:00061566, Z1:00060656, and the Buck Holland grizzly bear sub-unit, Z8:00061264, Z1:00060667. Additionally the purpose and need for the Glacier Loon Project is fully encompassed by the Beaver

Creek Project. USFS states that the three primary purposes for the Glacier Loon Project are (1) to reduce “hazardous fuels” to reduce wildfire risk, (2) to “improve forest health,” and (3) to “provide wood products for local economies.”

Z8:00061267-61268. The Beaver Creek Project also includes all of these purposes: (1) to “reduce the risk of uncharacteristic wildfire,” (2) to “improve forest health . . . ,” and (3) to “benefit the local economy” Z1:00060335-60336.

Finally, both Projects will be implemented simultaneously: USFS plans to implement Glacier Loon from 2017 through 2021, Z8:00061349; and USFS plans to implement Beaver Creek from 2017 through 2027, Z1:00060337.

There is no logical reason to split up this area into two smaller project areas with individual Environmental Assessments other than to avoid the preparation of a full EIS. Due to the facts that the two Projects are directly adjacent, have the same purpose, are occurring simultaneously, and are occurring in shared analysis areas with similar types of logging and road use, the Projects in this case “are related to each other closely enough to be, in effect, a single course of action,” which means that the Projects “shall be evaluated in a single impact statement.” 40 C.F.R. §1502.4(a)(emphasis added).

2. The Beaver Creek and Glacier Loon Projects will have cumulatively significant impacts that must be addressed in a single EIS.

Alternatively, or in addition, the Projects are “cumulative” actions, that “have

cumulatively significant impacts and should therefore be discussed in the same impact statement.” 40 C.F.R. §1508.25(a)(2).¹ As discussed above, in *Blue Mountains*, the Ninth Circuit held that “[a] single EIS . . . was required to address the cumulative effects” of five separate logging projects located in the same watershed. 161 F.3d at 1215. The same rationale applies here. USFS cannot lawfully avoid the cumulative significance of the two Projects simply “by ... breaking [the action] down into small component parts,” 40 C.F.R. § 1508.27(b)(7), as it has done in this case by dividing the area into two smaller Project areas, each with its own Environmental Assessment.

Cumulatively, the Glacier Loon and Beaver Creek Projects allow logging on 4,293 acres, construction of 11.4 miles of new temporary roads, and the reopening and use of 68 miles of currently gated or bermed roads. U8b:00051640, 68; Z2:00060993. In the Beaver Creek Environmental Assessment, USFS largely ignores and fails to disclose the cumulative effects of these activities. USFS only attempts to address cumulative effects from the Glacier Loon Project on two wildlife

¹Friends do not argue that the Projects are “connected” actions under 40 C.F.R. §1508.25(a)(1) in this case; therefore, the “independent utility” test does not apply here. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 894 (9th Cir. 2002)(“independent utility” test applies to determine “connected” actions but not to determine “cumulative” actions).

species – lynx and grizzly bear, Z1:00060648, 60674² – and ignores the cumulative effects of the two Projects’ activities on all other resource areas.

More specifically, in the Beaver Creek Environmental Assessment, USFS fails to discuss the cumulative effects of the Glacier Loon Project on the following resources: Soils, Forest Vegetation, Invasive Plants, Fire & Fuels, Air Quality, Sensitive Species, Old Growth Species, Big Game Species, Snag Species, Migratory Birds, Recreation, Wilderness, Lands, and Range, Scenery, Heritage Resource, Transportation, and Social and Economic Resource. Z1:00060312-60988.

Furthermore, of significant concern to Friends, in the Beaver Creek Environmental Assessment, USFS also fails to discuss the cumulative effects of the Glacier Loon Project on lynx critical habitat. Z1:00060312-60988. The Project area is within lynx Critical Habitat Unit 3. Z1:00060657. The Unit 3 Critical Habitat area “is essential to the conservation of lynx because it appears to support the highest density of lynx populations in the Northern Rocky Mountain region of the lynx's range. It also likely acts as a source for lynx and provides connectivity to

²Furthermore, the single paragraphs that mention Glacier Loon related to lynx and grizzly bear, Z1:00060648, 60674, are perfunctory and therefore do not constitute an adequate cumulative effects analysis. *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 994 (9th Cir. 2004). However, because USFS provides no discussion at all for all other resources, Friends focuses its argument on those more egregious failures.

other portions of the lynx's range in the Rocky Mountains” Z1:00060657.

A cumulative effects analysis must have at least some detailed or quantified information to pass legal muster, and the “analysis must be more than perfunctory; it must provide a useful analysis of the cumulative impacts of past, present, and future projects.” *Klamath-Siskiyou*, 387 F.3d at 994 (internal quotation mark omitted).

Providing “no quantified assessment of the[] combined environmental impacts” of reasonably foreseeable logging projects violates this basic NEPA requirement. *Id.* As in *Klamath-Siskiyou*, here there is “no quantified assessment of the[] combined environmental impacts” of Glacier Loon and Beaver Creek activities for the majority of resources that will be affected.

Moreover, here, as in *Klamath-Siskiyou*, one of the most glaring inadequacies relates to the lack of cumulative effects analysis on FWS-designated critical habitat. In *Klamath-Siskiyou*, the Ninth Circuit held that “[e]ach of the EAs recognizes that the proposed sales will adversely affect the habitat of spotted owls in a critical habitat unit But this total number [of affected acres] is not presented in either the Conde Shell or Indian Soda EA. More importantly, there is no discussion in any of the EAs about the effect of this loss on the spotted owl throughout the watershed” *Id.* at 997. Likewise, in this case, the Beaver Creek and Glacier Loon Projects will both adversely affect lynx critical habitat, Z1:00011649, U8b:00051677, but neither Environmental Assessment discloses the total number of

affected acres in the affected critical habitat unit, much less provide a discussion about the effect of this loss on lynx throughout the watershed. As in *Klamath-Siskiyou*, this failure violates NEPA. 387 F.3d at 997.

Finally, the facts in this case are even more compelling than the facts in *Klamath-Siskiyou* because here in the Beaver Creek Environmental Assessment, USFS did not even list the Glacier Loon Project as a reasonably foreseeable project in the cumulative effects table. Despite defining “reasonably foreseeable actions” to include those actions “in or near the analysis area,” that “will be implemented within the next 10 years,” Z1:00060410, USFS nonetheless represents that “[t]here are no ongoing or reasonably foreseeable timber harvest activities occurring on [National Forest System] lands within the project area,” Z1:00060409, and “[t]here is no ongoing or reasonably foreseeable road construction occurring in the project area,” Z1:00060410. This fact renders the agency’s NEPA violation more egregious than that in *Klamath-Siskiyou* because at least in that case the agency acknowledged the other timber sale projects in the watershed and offered a conclusory, though inadequate, cumulative effects discussion. 387 F.3d at 993-997.

In conclusion, USFS’s failure to analyze the Beaver Creek and Glacier Loon Projects in a single EIS violates NEPA, NEPA regulations, and the APA because the Projects are related to each other closely enough to be a single course of action that must be addressed in a single EIS and/or because the Projects will have

cumulatively significant impacts that must be addressed in a single EIS. 40 C.F.R. §1502.4(a); 40 C.F.R. §1508.25(a)(2). “Not to require [a single EIS] would permit dividing a project into multiple ‘actions,’ each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.” *Thomas*, 753 F.2d at 758. “At the very least, these sales raise substantial questions that they will result in significant environmental impacts. A single EIS, therefore, was required to address the cumulative effects of these proposed sales.” *Blue Mountains*, 161 F.3d at 1215.

B. USFS fails to demonstrate compliance with Forest Plan Amendment 19 in the Beaver Creek Environmental Assessment, in violation of NEPA, NFMA, and the APA.

NFMA requires that each National Forest develop a “Land and Resource Management Plan,” i.e. a forest plan. 16 U.S.C. §1604(a). All site-specific projects must be consistent with the governing forest plan. 16 U.S.C. §1604(i). The “Forest Service’s failure to comply with the provisions of a Forest Plan is a violation of NFMA.” *Native Ecosystem Council v. USFS*, 418 F.3d 953, 961 (9th Cir.2005). The basis for forest plan compliance “must be set forth with such clarity as to be understandable.” *Id.* at 963 (citation omitted).

The Flathead National Forest Plan contains mandatory provisions regarding conservation of grizzly bear habitat. Forest Plan Amendment 19 sets specific quantitative objectives for road management in grizzly bear habitat: “The grizzly

bear objectives and standards of Amendment 19 . . . are not discretionary.”

U11:00052338. Amendment 19 requires that all grizzly bear management subunits with over 75% National Forest System land must (1) limit high-density (over 1 mile/square mile) open motorized access to no more than 19% within 5 years, (2) limit high-density (over 2 miles/square mile) total motorized access to no more than 24% within 5 years, and no more than 19% within 10 years, and (3) provide security core areas that equal or exceed 60% within 5 years and 68% within 10 years.

U11:00052338. Collectively, these non-discretionary motorized access objectives are referred to as “19/19/68.”

In the Project area, both grizzly bear sub-units, Beaver Creek and Buck Holland, currently violate the non-discretionary 19/19/68 objectives. Z1:00060677; G12:00001701. After Project implementation, in a continued violation of NFMA, the Buck Holland sub-unit will not meet any of the 19/19/68 objectives. Post-project status will be 24/37/40. G12:00001709. However, the agencies represent that after Project implementation, the Beaver Creek subunit will meet the 19/19/68 objectives “due to the road decommissioning and storage work that is being proposed as part of the project.” G12:00001709.

The “storage work” refers to the Project proposal to place 12.6 miles of system road into “intermittent stored service” after the other Project activities are complete. Z1:00060379. “Intermittent stored service roads are [Maintenance

Level] 1 roads closed to motorized traffic that are placed in a self-maintaining condition” Z1:00060379. With intermittent stored service, “[t]he road prism remains on the landscape and on the National Forest Road System for future use.” Z1:00060370.

1. USFS must demonstrate compliance with the Amendment 19 “reclaimed roads” definition before it may subtract roads from total motorized access calculations.

Under Amendment 19, both open and closed roads must be counted in total motorized access calculations. Amendment 19 refers to closed roads as “restricted roads” and defines restricted roads as those roads that are physically obstructed and restrict motorized use. U26:00056217. Amendment 19 states: “All restricted roads will be included in calculating total motorized access route density.”

U26:00056218. Before USFS may subtract any roads from total motorized access calculations, the roads must be physically converted from restricted or open condition to “reclaimed” condition: “Reclaimed roads that fully satisfy the definition of a reclaimed road will not be included in calculations of open motorized access density, total motorized access density, or security core area. Roads that have been treated, but that do not yet fully satisfy the definition of a reclaimed road will be included in calculations for total motorized access route density.”

U26:00056217-00056220. Thus, the issue presented in this case is whether USFS will “fully satisfy the definition of a reclaimed road” at Project completion by

designating roads as “intermittent stored service.” *Id.*

Notably, USFS does not disclose the full definition of “reclaimed road” to the public in the Project Environmental Assessment, much less demonstrate compliance with all aspects of the definition; instead, USFS issues conclusory statements that “stored roads would be managed to meet the reclaimed definition and would not be counted in [total motorized access] . . . calculations.” Z1:00060677. USFS further concludes that stored roads will be immediately effective as reclaimed roads when the Project ends: “*At project completion* under either action alternative, the Beaver Creek Project would reduce [total motorized access] in the Beaver Creek subunit by 7 percent.” Z1:00060677 (emphasis added).

However, USFS cannot simply assume Forest Plan compliance; it must actually demonstrate compliance with relevant Forest Plan definitions: “Pursuant to the NFMA, the Forest Service must demonstrate that a site-specific project would be consistent with the land resource management plan of the entire forest.”

Neighbors of Cuddy Mountain v. USFS., 137 F.3d 1372, 1377 (9th Cir. 1998).

Thus, a failure to demonstrate compliance with the Forest Plan definitions violates NFMA. *Id.* at 1381.

2. USFS has failed to demonstrate compliance with the “reclaimed roads” definition.

In this case, contrary to USFS’s bare conclusions, the definition of reclaimed

roads does not include roads that are simply classified as “intermittent stored service” after a timber sale. Because the stored roads will be physically obstructed and have motorized use restricted, they will qualify as “restricted” roads under Amendment 19, but restricted roads are not the same thing as reclaimed roads; the former is included in total motorized access calculations and the latter is not.

U26:00056217-00056220.

As set forth below, Amendment 19 sets forth a detailed definition of reclaimed roads, and USFS has failed to demonstrate compliance with this definition. U26:00056218-00056219.

a. Placing a berm or gate in front of a road does not ensure that the road will no longer function as a road or trail, and does not preclude its use as a motorized or non-motorized travel way.

First, in order to qualify as a reclaimed road, a road must be “treated in such a manner so as to no longer function as a road or trailThis can be accomplished through one or a combination of treatments including: recontouring to original slope, placement of natural debris, or revegetation with shrubs or trees.” U26:00056217-00056220. USFS’s analysis indicates that other than removing culverts or adding water bars, most roads that will be placed into intermittent stored service “would not require any active work” and instead would have “passive” placement into “storage.” Z2:00061059. Presumably then, other than removing culverts and installing water bars to direct water flow, USFS intends to place a physical

obstruction such as a berm or gate at the front of each road, and hopes that the road will “passively” reclaim itself. However, merely placing a dirt berm or metal gate at the front of a road does not comply with the Amendment 19 reclaimed road definition because it does not ensure that the road no longer functions as a road or trail: any member of the public can simply walk or drive around berms or gates and thus continue to use the road as a road or a trail.

In order to illustrate this reality, Friends provided examples of this practice in the record. The photograph on the left shows that a berm and boulders were placed in front of Road 1678, but it is still obvious to the public that there is a road behind the berm and there is an obvious and well-trodden trail to the right of the berm. The photograph to the right shows ATV tire tracks in the mud beyond the berm, which proves that members of the public can and do simply drive around the berm.



X4:00060012. Thus, “passive” treatment in the form of placing a berm at the front of the road does not ensure compliance with the reclaimed road definition that a road must be “treated in such a manner so as to no longer function as a road or trail . . .” U26:00056217-00056220. These roads are still functioning as both roads and trails.

The reclaimed road definition further expounds on this requirement: in order to qualify as a reclaimed road, the road must be treated “so as to preclude its use as a motorized or non-motorized travel way . . .” U26:00056218. However, as noted above, most roads that will be placed into intermittent stored service “would not require any active work” and instead would have “passive” placement into “storage.” Z2:00061059. According to Table A1-7 in the Project Decision Notice, at least 8 miles of the roads to be converted to intermittent stored service will still be passable to motorized or non-motorized use immediately following Project implementation.³ Z2:00061059-61. Leaving a passable, recently-cleared logging road on the landscape with no “active work” to revegetate or recontour or obscure the road will not preclude its use as a “motorized or non-motorized travel way,” as demonstrated by the photographic evidence discussed above.

³The segments of roads 9658, 10590, 10737, 10739, 10742, and 10745 that are proposed for intermittent stored service will first be cleared and used for log-hauling for the Project, Z2:00061059-61, therefore although they are not passable now, they will be passable after Project implementation.

b. Preserving the road prism for future use does not indicate compliance with the Amendment 19 intent that a reclaimed road will no longer function as a road again.

The reclaimed road definition further requires: “(d) It is the intent in many cases that the reclaimed road no longer function as a road again. . . .”

U26:00056219. In direct contrast to this intent, with intermittent stored service, “[t]he road prism remains on the landscape and on the National Forest Road System for future use.” Z1:00060370.

c. USFS fails to acknowledge lag time before effective reclamation and expected persistence of people to continue to use the roads.

Another key aspect of the reclaimed roads definition mandates that USFS must “describe[] and consider[] in the design of treatments for each site” both “the expected persistence of people to continue to use a road” as well as “the amount and type of initial, and perhaps follow-up, treatment required.” U26:00056217-00056220. USFS must consider these factors to determine the lag time before a road will be fully reclaimed, i.e. to determine for example whether roads will “meet reclaimed road criteria in one year as opposed to ten years.” U26:00056217-00056220. In violation of Amendment 19, USFS fails to disclose and consider these factors, and in fact fails to acknowledge any potential for a lag period before the stored roads would fully meet reclaimed road criteria.

USFS’s failure to address lag time and the various factors that affect lag time

is critical because Amendment 19 requires that “Roads that have been treated, but that do not yet fully satisfy the definition of a reclaimed road will be included in calculations for total motorized access route density.” U26:00056217-00056220.

In contrast, in this case, USFS simply assumes that all stored roads will immediately meet all reclaimed road criteria: “At project completion under either action alternative, the Beaver Creek Project would reduce [total motorized access] in the Beaver Creek subunit by 7 percent.” Z1:00060677 (emphasis added).

This assumption of immediate reclamation is contrary to the plain language of Amendment 19 and therefore violates NFMA. *Native Ecosystems Council*, 418 F.3d at 965 (rejecting USFS position as “plainly inconsistent with the Forest Plan standard”).

3. USFS’s new interpretation in this case contradicts its prior interpretation that intermittent stored service roads are not reclaimed roads.

The large gulf between the requirements of the reclaimed road definition and the actual prescriptions and analysis (or lack thereof) for intermittent stored service roads makes more sense when placed in proper historical context. Until recently, USFS did not exclude intermittent stored service roads from total motorized access calculations: when Friends posed this question to the Flathead National Forest in 2015, USFS responded: “The draft [Environmental Assessment] states that stored roads in the Chilly James project would continue to count towards total motorized

route density Unfortunately, there is an error in the Road management/Transportation section that incorrectly states [intermittent stored service] roads are no longer counted in total route density . . . calculations.” X4:00060049-50.

Thus, USFS’s interpretation, understanding, and representation to the public as recently as 2015 was that intermittent stored service roads “would continue to count towards total motorized route density.” X4:00060049-50. Accordingly, USFS’s interpretation in this case is a recent change in position.

“‘Unexplained inconsistency’ between agency actions is ‘a reason for holding an interpretation to be an arbitrary and capricious change.’ ” *Organized Village of Kake v. USDA.*, 795 F.3d 956, 966 (9th Cir. 2015)(en banc)(citation omitted). “[A] policy change complies with the APA if the agency (1) displays awareness that it is changing position, (2) shows that the new policy is permissible under the statute, (3) believes the new policy is better, and (4) provides good reasons for the new policy, which, if the new policy rests upon factual findings that contradict those which underlay its prior policy, must include a reasoned explanation for disregarding facts and circumstances that underlay or were engendered by the prior policy.” *Id.*

In this case, there is an “unexplained inconsistency” between USFS’s prior interpretation that intermittent stored service roads are not reclaimed roads, and its 2017 re-interpretation in this case. Moreover, USFS fails to provide any reasons for the new interpretation. *See Kake*, 795 F.3d at 966. Due to USFS’s failure to

explain why it has suddenly changed its interpretation of Amendment 19 after over 20 years of implementation, its decision must be set aside as arbitrary and capricious. *Id*; see also *All. for the Wild Rockies v. Zinke*, 265 F.Supp.3d 1161, 1180-81 (D. Mont. 2017).

C. USFS's failure to demonstrate compliance with the Forest Plan elk open road density standard violates NEPA, NFMA, and the APA.

“NEPA’s purpose is twofold: (1) to ensure that agencies carefully consider information about significant environmental impacts and (2) to guarantee relevant information is available to the public.” *N.Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067,1072 (9th Cir.2011). “Informed public participation in reviewing environmental impacts is essential to the proper functioning of NEPA.” *League of Wilderness Defenders v. Connaughton*, 752 F.3d 755,761 (9th Cir.2014). If “the data is not available during the EIS process and is not available to the public for comment . . . the EIS process cannot serve its larger informational role, and the public is deprived of their opportunity to play a role in the decision-making process.” *N.Plains*, 668 F.3d at 1085. “Under NFMA, the Forest Service calculations need not be perfect. []. However, we must still be able reasonably to ascertain from the record that the Forest Service is in compliance with the [Forest] Plan standard.” *Native Ecosystems Council*, 418 F.3d at 963.

Under a section entitled “Security Areas,” the Forest Plan contains a standard

that prohibits open road density over 1.0 miles/square mile “during the elk use period” in “Areas with ‘moist sites.’” U11:00052354. The Montana Elk-Logging Study, which is incorporated into the Forest Plan as Appendix DD, clarifies that protections for moist sites should be applied “during” timber harvest.

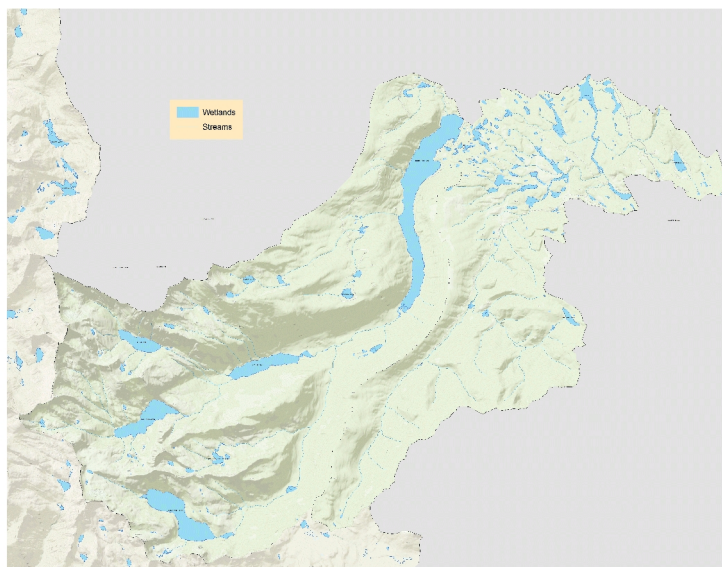
H79:00004397. The Montana Elk -Logging Study also clarifies that moist sites “are often found at the heads of drainages, bordering streams or marshy meadows, or occupying moist swales or benches.” H79:00004397.

In the Project Environmental Assessment, USFS does not acknowledge or disclose this Forest Plan standard to the public, but instead misrepresents that no such standard exists: “The Forest Plan does not have any standards for elk security.” Z1:00060761. In their comments on the Project, Friends stated: “The Forest Plan requires that the Forest Service maintain open road density at less than 1.0 mile/square mile or less in moist sites in elk summer habitat. The Environmental Assessment did not address this requirement or demonstrate compliance with it.” F1:00001345. USFS responded: “The [Environmental Assessment] discusses elk moist sites, road density and location within the project area (EA, p. 420-421).” F1:00001346.

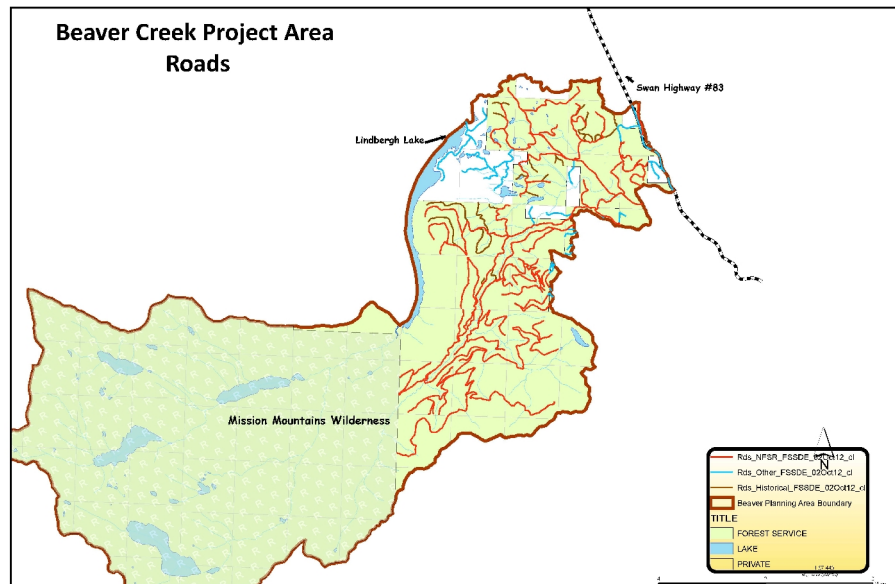
However, the cited pages of the Beaver Creek Environmental Assessment include only one paragraph that mentions moist sites and that paragraph does not disclose the Forest Plan standard or demonstrate compliance with the standard.

Z1:00060753-54. Moreover, the Environmental Assessment does not provide a map of the areas with moist sites or a calculation of linear open road density during the elk use period in the area with moist sites. *See* Z1:00060753-54. Without this basic information, and in violation of NEPA and NFMA, the public is left to guess as to whether USFS is complying with its Forest Plan standard. *Native Ecosystems Council*, 418 F.3d at 963; *see also WildEarth Guardians v. Montana Snowmobile Ass'n*, 790 F.3d 920, 927 (9th Cir. 2015) (finding that USFS EIS violated NEPA because it did “not provide the public adequate access to information about the impact of snowmobiles on big game wildlife and habitat.”)

Although USFS refused to provide maps of moist sites for elk or calculations of open road density during the elk use period in the areas with moist sites, Administrative Record Map M4 indicates that there are “moist sites” in the form of streams and wetlands/marshy areas throughout the Project area:



M4:00033734. Furthermore, Administrative Record Map S4 shows that there is a very high road density in these areas:



S4:00041525.

In light of the lack of useful information provided by USFS, Friends have attempted to conduct their own calculations of open road density near these moist sites. As set forth in Friends' Statement of Undisputed Facts, excluding the unroaded Wilderness from the denominator, open road density during Project implementation will be 3.5 miles/square mile in the Project area. *See* R1:00040929; H250:00011619, 658. In the Project area as a whole, open road density during Project implementation will be 1.6 miles/square mile in the Project area. *See* R1:00040929; H250:00011619, 658. Thus, under both calculations, it appears that USFS will violate its Forest Plan standard. U11:00052354.

This Court addressed a similar issue in *Hapner v. Tidwell*, another case in which USFS ignored its own Forest Plan requirements to map and analyze key elements of elk habitat, including “moist areas” of elk habitat:

This provision of the Forest Plan requires the agency to map key habitat components, and the agency does not argue that it has done this, nor does the record indicate that it has. Without a map to indicate where key habitat components are located, this makes it nearly impossible to be informed about whether a Project will impact the habitat components.

The plain language of the Forest Plan requires the Forest Service to map key habitat components for elk. AR 7–5 at 27 #5. While the record contains a map of hiding cover generally, this map does not indicate the location of any of the key habitat components listed in the Forest Plan. Therefore, the Project violates NFMA because the site-specific project is not consistent with the requirements of the governing forest plan.

Hapner v. Tidwell, 2008 WL 11350190, at *7 (D. Mont. 2008).

As the Ninth Circuit has held: “In an administrative appeal, we cannot divine the grounds for government decisions that are not explained or apparent.” *Native Ecosystems Council*, 418 F.3d at 965. In this case, as in *Native Ecosystems Council*, “[t]he Forest Service has failed to provide us with a satisfactory explanation supported by the record showing the necessary rational basis for its” conclusions regarding Forest Plan compliance. *Id.*

D. USFS and FWS have failed to reconsult on Amendment 19 regarding the application of 19/19/68 to the seven Swan Valley grizzly bear sub-units that have over 75% National Forest lands due to the Legacy Lands transfer.

In 1993, the Ninth Circuit set aside FWS’s “no jeopardy” opinion for the Flathead Forest Plan due to impacts on grizzly bears. The court held: “the Forest Service may reinitiate formal consultation with the FWS concerning the current amended Plan. Alternatively, the Forest Service may propose an amendment to the current amended Plan In any event, the Forest Service shall formally consult with the FWS concerning the current or proposed amended Plan” *Res. Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1308 (9th Cir. 1993). On remand, USFS prepared an Environmental Assessment and Decision Notice for Amendment 19 to the Forest Plan. U26:00055954-55955. FWS issued a biological opinion for Amendment 19 in 1995. *See* H136.

Amendment 19 required compliance with certain numeric motorized access objectives within 5 years, i.e. by 2000, but USFS did not comply with those objectives by 2000. U35:00056624. Therefore, USFS reinitiated ESA consultation in 2004 “to revise the implementation schedule” for Amendment 19. U35:00056623. In response, FWS issued a biological opinion and stated: “If Forest Plan revision and consultation has not been completed by the end of 2009, consultation should be reinitiated to analyse [sic] the effects of road densities in those subunits that do not meet [Amendment 19] or amended objectives.”

U33:00056519.

In 2009, USFS again reinitiated consultation to “revise the implementation schedule for [Amendment 19].” U36:00056666. In 2010, USFS acquired thousands of acres of “Legacy Lands” in the Swan Valley, which resulted in seven grizzly bear subunits (Lion Creek, Piper Creek, Meadow Smith, Cold Jim, Hemlock Elk, Buck Holland, and Glacier Loon) having over 75% National Forest land for the first time. H232:00010347; *see* U11:00052643 (19/19/68 applies to subunits with over 75% National Forest lands).

FWS did not issue its responsive biological opinion for Amendment 19 until 2014, during litigation over the Glacier Loon Project in *Swan View Coalition v Weber*. H232:00010283. Consistent with its litigation position in *Swan View*, FWS took the position in its 2014 Amendment 19 Biological Opinion that the 19/19/68 objectives from Amendment 19 do not apply to the seven Legacy Land subunits that have over 75% National Forest lands. H232:00010348; *see also* H232:000110332, 10438. Contrary to FWS’s position, this Court held that the 19/19/68 Amendment 19 objectives do apply to the Legacy Land subunits that have over 75% National Forest lands. 52 F.Supp.3d 1133, 1148 (D. Mont. 2014). Notably though, the Court expressly declined to consider whether ESA reconsultation on Amendment 19 was required because plaintiffs had not raised that issue at the summary judgment stage. *Swan View Coal. v. Weber*, 2016 WL

160654, at *6 (D. Mont. 2016).

Friends now expressly raise this issue at the summary judgment stage in this case. The application of 19/19/68 objectives to seven new grizzly bear units in the Swan Valley is a significant change that requires an updated reconsultation on Amendment 19. Reinitiation of ESA consultation “is required and shall be requested” by USFS “if new information reveals effects of the action that may affect listed species . . . in a manner or to an extent not previously considered” or “if the agency action is subsequently modified in a manner that causes an effect to the listed species . . . that was not considered in the biological opinion.” 50 C.F.R. § 402.16(b),(c). In *Cottonwood Environmental Law Center v. USFS*, the Ninth Circuit held that USFS was required to reinitiate ESA consultation on a forest plan amendment because the amendment was being applied to a new area that had not been addressed in the original consultation. 789 F.3d 1075, 1088 (9th Cir. 2015). Although that case dealt specifically with the application of a forest plan amendment to newly-designated critical habitat, here the circumstances are similar.

In this case, as in *Cottonwood*, USFS is now applying a forest plan amendment, the 19/19/68 objectives of Amendment 19, to a new area that was not addressed in the original ESA consultations - the seven Swan Valley Legacy Land grizzly bear subunits. By mandating additional reductions in road density in these seven units, Amendment 19 and the 19/19/68 objectives will have effects on the

Flathead National Forest that were not previously considered in prior consultations. 50 C.F.R. §402.16(b),(c). As set forth above at length, none of the prior biological opinions for Amendment 19, which were issued in 1995, 2005, and 2014, apply 19/19/68 to the seven Legacy Land subunits. This new circumstance requires reinitiation of consultation. 50 C.F.R. §402.16(b),(c).

V. CONCLUSION

For all of the above-stated reasons, Friends request that the Court grant summary judgment in Friends' favor, enjoin implementation of the Project, and grant any such further relief as may be just, proper, and equitable.

Respectfully submitted February 12, 2018.

/s/ Rebecca K. Smith

Rebecca K. Smith

PUBLIC INTEREST DEFENSE CENTER, PC

Timothy M. Bechtold

BECHTOLD LAW FIRM, PLLC

Attorneys for Plaintiffs

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief is 6,463 words, excluding the caption, table of authorities, table of contents, signature blocks, and certificate of compliance. Under Local Rule 7.1(d), a table of contents and table of authorities are provided for this brief.

/s/ Rebecca K. Smith

Rebecca K. Smith

PUBLIC INTEREST DEFENSE CENTER, P.C.

Timothy M. Bechtold

BECHTOLD LAW FIRM, PLLC

Attorneys for Plaintiffs