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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

RESPONSE IN OPPOSITION TO
DEFENDANTS' CROSS-MOTION
FOR SUMMARY JUDGMENT
[DOC. 12] & REPLY IN SUPPORT
OF PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT [DOC. 8]

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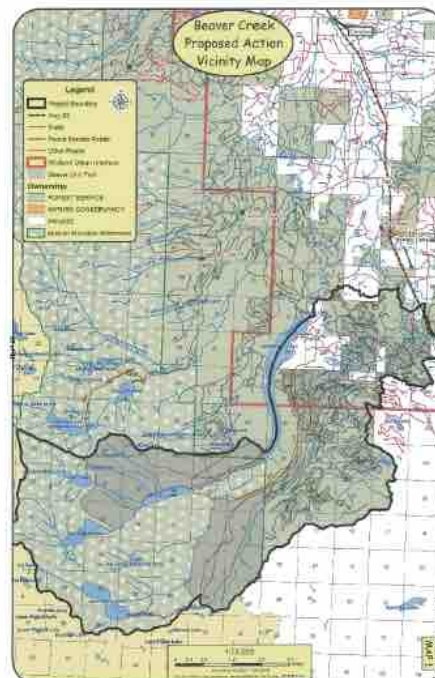
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I. RESPONSE & REPLY

A. The Glacier Loon and Beaver Creek Projects must be addressed in a single EIS.

As set forth in Friends’ opening brief, the Glacier Loon and Beaver Creek Projects (Projects) are directly adjacent, will occur simultaneously on the same Ranger District on the same National Forest, affect the same wildlife species and resources, have overlapping analysis areas, were proposed for the same purposes, and propose the same types of management activities. These Projects – which fit together like puzzle pieces – are in effect the same project split down the middle into two individual projects:



“Significance cannot be avoided . . . by breaking it down into small component parts.” 40 C.F.R. §1508.27(7). NEPA regulations require that these two Projects be analyzed in the same EIS. 40 C.F.R. §§1502.4(a), 1508.25(a)(2). “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 Biodiversity Project v. Blackwood*, 161 F.3d 1208,1215 (9th Cir.1998).

1. The Court should reject USFS’s strawman argument regarding connected actions; there is no such claim in this case.

USFS first argues that a single EIS is not required because the two Projects are not “connected actions” under 40 C.F.R. §1508.25(a)(1). Doc. 13 at 8-11. However, as Friends expressly stated in their opening brief: “Friends do not argue that the Projects are ‘connected’ actions under 40 C.F.R. §1508.25(a)(1) in this case” Doc. 9 at 8 n.1. USFS ignores Friends’ brief and makes this argument nonetheless in order to avoid squarely addressing 40 C.F.R. §1502.4(a). There is no legal prerequisite that projects must constitute “connected actions” under 40 C.F.R. §1508.25(a)(1) before the projects may be deemed to be “related to each other closely enough to be, in effect, a single course of action” as discussed in 40 C.F.R. §1502.4(a). To the contrary, §1508.25 lists “connected,” “cumulative,” and “similar” actions, and for “similar” finds that “an agency *may* wish to analyze these

actions in the same impact statement.” 40 C.F.R. §1508.25(a)(3)(emphasis added). This language in subsection (a)(3) is plainly discretionary, not mandatory, which means that not all types of actions discussed in §1508.25 require a single EIS.

In contrast, the plain language of §1502.4(a) states 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). This mandatory language – with no exception for §1508.25(a)(3) – means that the proposals “related to each other closely enough to be, in effect, a single course of action” under §1502.4(a) are not defined by or limited to only the types of actions addressed under §1508.25, because that section does not require a single EIS in all instances.

Therefore, USFS’s selective merging of these regulations is incongruent with the plain language and “[t]o defer to the agency’s position would be to permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation.” *Christensen v. Harris Cty.*, 529 U.S. 576,588 (2000). Additionally, USFS is not entitled to any deference in its interpretation here because this is a Council on Environmental Quality regulation, not a USFS regulation. *See U.S. Dept. of Treasury v. Federal Labor Relations Authority*, 996 F.2d 1246,1250 (D.C. Cir.1993) (“We generally do not grant any deference to the [agency’s] interpretation of regulations promulgated by other agencies.”)

2. The Projects will occur at the same time and commercial logging will occur during “inactive” status.

USFS states that the Project decisions were not signed at the same time, and further implies that “inactive” status in the affected grizzly bear subunits will prevent the Projects from occurring at the same time. Doc.13 at 9-11. First, although the decisions were not signed on the same day, both Projects will be implemented at the same time, which is the more relevant inquiry for cumulative effects. According to USFS, the timber sale portion of the Beaver Creek Project (referred to as “stewardship” by USFS) is planned for advertisement this year. Exhibit 1 at 1. As far as Friends are aware, these activities have not yet started. Additionally, USFS has signed the draft decision for the Glacier Loon Project and its Schedule of Proposed Actions indicates that USFS expects to begin implementing the Glacier Loon Project in June 2018.¹ Thus, USFS plans to implement both Projects this year.

Second, USFS represents that “[t]he Glacier Loon subunit will not become active for commercial activities again until 2021–2023. . . . The Beaver subunit was active for commercial activities from 2015 to 2017 and will not become active again

¹The Draft Decision Notice for the Glacier Loon Project is available online at <https://www.fs.usda.gov/project/?project=36946>. USFS’s Schedule of Proposed Actions (April 2018) is available online at <https://www.fs.fed.us/sopa/forest-level.php?110110>. The Court may take judicial notice of documents posted on a government website. *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992,998–99 (9th Cir.2010).

until 2024.” Doc. 13 at 10. This statement is irrelevant to cumulative effects because USFS plans to implement the Projects despite nominally “inactive” status. The Swan Valley Grizzly Bear Conservation Agreement (Agreement) defines “inactive” to mean “those [Bear Management Unit] subunits in which the Parties are not conducting Commercial Use activities.” H130:00006565. The Agreement defines “commercial use” as “major forest management activities . . . including, without limitation, road construction, road reconstruction and timber harvest, *but does not include Salvage Harvest.*” H130:00006564 (emphasis added). Thus, if USFS categorizes commercial logging as “Salvage Harvest,” then it may allow that commercial logging to occur during the “inactive” period.

For the Beaver Creek Project, USFS plans to conduct “pre-commercial thinning, road maintenance, tree planting, slash disposal and Salvage Harvest . . . when the subunit is inactive.” Z2:00061064. Although it was not disclosed in the Project Environmental Assessment, in an appendix to the draft Decision, USFS discloses: “The units that have been determined to meet the salvage criteria for the Selected Alternative, include [a list of 49 units].” F1:00001315. A comparison of these units to the final approved units indicates that only 14 commercial logging units, totaling 215 acres, are not considered salvage harvest. Z2:00061048-61051 (Table A1-2). The Project decision indicates that the Project contains 1,865 acres total of commercial logging. Z2:00061047 (Table A1-1). Thus, USFS plans to

implement the vast majority – 88% – of the commercial logging for the Project during the nominally “inactive” status of the affected grizzly bear subunits.

3. The law requires cumulative actions to be addressed together in a single EIS.

USFS argues: “As an initial matter, Plaintiffs do not establish that §1508.25(a)(2) requires all projects with cumulative effects to be analyzed in a single NEPA document. The black letter of the regulation simply says that projects with cumulatively significant effects should be ‘discussed in the same EIS.’” Doc. 13 at 11. It appears that USFS is arguing that “a single NEPA document” is something different than “the same EIS.” First, regardless, there is no EIS in this case: both Projects are analyzed in Environmental Assessments. Second, the law makes no such distinction:

C. Single Document Requirement

...

Under § 1508.25, two or more agency actions must be discussed in the *same impact statement* where they are “connected” or “cumulative” actions. 40 C.F.R. § 1508.25(a)(1), (2); *see also Earth Island Inst. v. United States Forest Serv.*, 351 F.3d 1291, 1306 (9th Cir.2003).

Klamath-Siskiyou Wildlands Ctr. v. BLM, 387 F.3d 989, 999 (9th Cir. 2004)

(emphasis added).

4. The citations USFS provides do not contain a “robust discussion” of potential cumulative effects from the Glacier Loon Project.

USFS argues: “Here, the Beaver Creek EA and supporting documents

contain a robust discussion of potential cumulative effects from the ‘reasonably foreseeable’ Glacier Loon Project. See Z-1:00060412, 00060519, 00060520, 00060616, 00060619, 00060626, 00060627, 00060647, 00060661, 00060674, and 00060675.” Doc. 13 at 11; *see also id.* at 16 (no citations to record provided). As set forth below, these citations each mention the name “Glacier Loon” but fail to provide a meaningful cumulative effects discussion of the two Projects:

a. Z1:00060412

This citation is two sentences that mention the general location, logging acreage, and road miles for the Glacier Loon Project and contain no analysis of effects from that Project.

b. Z1:00060519-20

This citation is a one-sentence conclusion about a plant called water howellia and there is no quantified or detailed information about effects from the Glacier Loon Project.

c. Z1:00060616

This citation states that some roads have been decommissioned and “the remaining actions have not yet been completed” for the Glacier Loon Project. Z1:00060616. This sentence is about the existing condition and does not provide any information about the effects from the Glacier Loon Project.

d. Z1:00060619

This citation states: “The only reasonably foreseeable activity in the analysis area is the Glacier Loon Project, which includes approximately 325 acres of commercial and pre-commercial vegetation management. This project is modeled to increase water yield by 1.1 percent and thus still not detectable to the lake’s hydrologic process (Project File U-8). There are no cumulative effects to Lindbergh Lake’s hydrologic processes.” Z1:00060619. This is a statement about the individual effect of Glacier Loon, not the cumulative effects of the two Projects together. Moreover, the representation that there are only 325 acres affected by Glacier Loon is inconsistent with the previous representation that 1,405 acres will be affected. *See* Z1:00060412.

e. Z1:00060626-27

The first page of this citation contains two conclusory sentences about Glacier Loon and three other projects, with no quantified or detailed information. Z1:00060626. Moreover, it is not a cumulative effects analysis because this statement occurs in the “no action” discussion. The next page (Alternatives 2 and 3 discussion) likewise contains one conclusory and boilerplate statement that mentions Glacier Loon and a number of other projects and contains no quantified or detailed information. Z1:00060627.

f. Z1:00060647

This citation provides a one paragraph conclusion about the effects of the Glacier Loon Project on lynx habitat. Z1:00060647. While this paragraph lists the number of acres to be logged individually in a part of the Glacier Loon Project, it fails to disclose the full extent of the Glacier Loon Project and fails to disclose the fact that the agencies determined that individually the Glacier Loon Project is likely to adversely affect lynx. U8b:00051671,77. There is no cumulative effects analysis of the two Projects together and no acknowledgement that these two adjacent Projects will each individually adversely affect lynx. Z1:00011642; U8b:00051671,77

g. Z1:00060661

This citation is a one-sentence laundry list of activities with no disclosure of effects of those activities. Z1:00060661. USFS's failure to provide any quantified or detailed information here is significant because this is purportedly USFS's cumulative effects analysis on lynx critical habitat, but there is no actual analysis of the cumulative effects of the two Projects on the primary constituent elements of lynx critical habitat; there is not even a disclosure of the effects of the Glacier Loon Project alone on lynx critical habitat. There is also no acknowledgement that the Glacier Loon Project on its own will likely adversely affect lynx critical habitat. U8b:00051677.

h. Z1:00060674-75

This citation provides a one paragraph conclusion about grizzly bears: “The Glacier Loon project is a planned USFS forest health and fuels reduction project that would occur in the Glacier Loon and Buck Holland Subunits. The Glacier Loon Project would reduce hiding cover in the Buck Holland Subunit by 157 acres. When considering both the Glacier Loon and Beaver Creek Project effects, the Buck Holland Subunit would still meet Forest Plan direction and cover would be distributed to allow secure grizzly bear travel throughout the subunit. The Glacier Loon Project is consistent with the SVGBCA, Amendment 19, and Forest Plan direction. . . . When considering the Cold Jim, Chilly James, Glacier Loon, and Beaver Creek Project effects, all of the affected subunits would still meet Forest Plan Direction and cover would be distributed to allow secure grizzly bear travel throughout the subunits. All of these projects are consistent with the SVGBCA, Amendment 19, and Forest Plan direction.” Z1:00060674-75.

These conclusory statements that the Projects comply with the Conservation Agreement, Amendment 19, and Forest Plan are not supported by any detailed or quantified information that demonstrate that the statements are actually true. In particular there is no disclosure of road density, which is the primary factor addressed in Amendment 19 to the Forest Plan. For example, there is no disclosure of (1) the fact that the Buck Holland subunit currently does not comply with the

19/19/68 non-discretionary objectives of Amendment 19, G12:00001701, or (2) the fact that during the Beaver Creek Project, open motorized access over one mile/square mile will increase to 30% of the Buck Holland sub-unit (which further violates the 19% limit), G12:00001709, or (3) the fact that during the Glacier Loon Project, open motorized access over one mile/square mile will increase to 24.7% of the Buck Holland subunit (which also further violates the 19% limit), Z9:00061866. If the existing condition, condition during the Beaver Creek Project, and condition during the Glacier Loon Project each individually violate the 19% objective, then the cumulative effect of the existing condition and these two Projects will also violate the objective, yet the Environmental Assessment represents to the public that USFS is complying with Amendment 19 in the Buck Holland sub-unit. Thus, not only does the Environmental Assessment lack an adequate cumulative effects analysis on this issue, but its conclusions and misrepresentations regarding Amendment 19 compliance are not supported by the record and violate NEPA: “To take the required ‘hard look’ at a proposed project’s effects, an agency may not rely on incorrect assumptions . . . in an EIS.” *See Native Ecosystems Council v. USFS*, 418 F.3d 953,964 (9th Cir.2005).

“To ‘consider’ cumulative effects, some quantified or detailed information is required. Without such information, neither the courts nor the public, in reviewing the Forest Service’s decisions, can be assured that the Forest Service provided the

hard look that it is required to provide.” *Neighbors of Cuddy Mountain v. USFS*, 137 F.3d 1372,1379 (9th Cir.1998). As set forth above, the citations provided by USFS mention the Glacier Loon Project in the sections for lynx, grizzly bears, lynx critical habitat, and certain aquatic resources, but fail to provide any meaningful cumulative effects analysis of the two Projects. The citations provide conclusory sentences with little to no detailed or quantified information about the cumulative effects of the two Projects.

In *Klamath-Siskiyou*, the Ninth Circuit rejected the same type of conclusory statements:

the only mention of cumulative effects in the two EAs comes in the form of generalized conclusory statements that the effects are not significant or will be effectively mitigated. At oral argument, counsel for the BLM assured us that to the eye of the “agency specialists,” the scant information included in the EAs is sufficient to determine what the cumulative environmental impacts will be and supports the conclusory statements that they will not be significant. . . . Even accepting the BLM's representation that “specialists” can understand the information in these EAs, the documents are unacceptable if they are indecipherable to the public.

. . .

The BLM cannot simply offer conclusions. Rather, it must identify and discuss the impacts that will be caused by each successive timber sale, including how the combination of those various impacts is expected to affect the environment, so as to provide a reasonably thorough assessment of the projects' cumulative impacts.

387 F.3d at 996, 1001. The same reasoning applies to this case.

Moreover, in its Statement of Disputed Facts, USFS admits that the majority of resources discussed in the Beaver Creek Environmental Assessment contain no mention of the Glacier Loon Project at all. Doc. 14 at 11-12. Specifically, USFS does not discuss the cumulative effects of the Glacier Loon Project for the following resource sections: 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.” Doc. 14 at 11-12. This admission by USFS undermines any argument that there is a robust discussion of the cumulative effects of the Glacier Loon Project in the Beaver Creek Environmental Assessment.

5. The cases cited by USFS are either inapposite or actually support Friends’ claim.

The cases cited by USFS in its brief either do not control this case or actually support Friends’ claim. For example, in *Friends of the Wild Swan v. Weber*, there is no “cumulative actions” claim. 767 F.3d 936,943 (9th Cir.2014). In *Inland Empire Public Lands Council v. USFS*, there is no “cumulative actions” claim. 88 F.3d 754,764 (9th Cir.1996). *Kleppe v. Sierra Club* addresses not “cumulative actions” but rather a request for a region-wide EIS, and finds that absent a region-wide proposal, there is no need for a region-wide EIS. 427 U.S. 390,414-415

(1976). *Nat'l Wildlife Fed'n v. F.E.R.C* reiterates the holding in *Kleppe* that “an EIS need not delve into the possible effects of a hypothetical project” 912 F.2d 1471, 1478 (D.C.Cir.1990). Here, Glacier Loon is not a hypothetical project.

Muckleshoot Indian Tribe v. USFS supports Friends’ position: “Our review of the record suggests that the Plum Creek transaction was not remote or highly speculative. Rather, it was reasonably foreseeable and it should have been considered in the EIS. . . . Given the virtual certainty of the transaction and its scope, the Forest Service was required under NEPA to evaluate the cumulative impacts of the Plum Creek transaction.” 177 F.3d 800,811-12 (9th Cir.1999). Here, as in *Muckleshoot*, the Glacier Loon project is “not remote or highly speculative” but instead “was reasonably foreseeable and it should have been considered in the EIS” *Id.*

Methow Forest Watch v. USFS addresses whether Forest-wide special use permits for helicopter skiing needed to be addressed in the same EIS as snowmobiling permits. 383 F.Supp.2d 1263,1270 (D.Or.2005). *Methow* is not precedent and the facts are not remotely similar to the facts of this case, in which there are two directly adjacent logging projects in a single Ranger District. It was reasonable for the District of Oregon in *Methow* to hold that the “cumulative actions” and “single EIS” requirements do not apply to two different types of Forest-wide special use permits. However, if the “cumulative actions” and “single

EIS” requirements do not apply to the facts of this case, one wonders when those requirements would ever apply.

Finally, *N. Alaska Env'tl. Ctr. v. Norton* does not address the cumulative actions regulation, but instead addresses whether one regional EIS must address the cumulative effects of another regional EIS. 361 F.Supp.2d 1069,1082 (D. Alaska 2005), *aff'd* 457 F.3d 969 (9th Cir.2006).

6. Both *Blue Mountains* and *Earth Island* support Friends’ position.

The primary legal authority that Friends rely on for this claim is *Blue Mountains* because the facts of that case are the most similar to the facts of this case. In *Blue Mountains*, the Ninth Circuit held: “the Forest Service identified five potential logging projects in the same watershed, including the Big Tower project at issue No document explores the collective impact of these projects. . . . [the plaintiff] argues that the Forest Service should have evaluated the cumulative impacts of these sales in a single EIS. We agree.” 161 F.3d at 1214–15. Here, as in *Blue Mountains*, USFS has approved two logging projects in the same watershed and should have evaluated cumulative effects in a single EIS. *Id.*

USFS attempts to distinguish *Blue Mountains* by arguing that “the agency *has* conducted a robust cumulative effects analysis of the relevant impacts of Glacier Loon that may impact cumulatively with the Beaver Creek Project.” Doc. 13 at 16 (emphasis in original). As discussed above in Section I.A.4., however, this

representation is not supported by a review of the citations provided by USFS: the vast majority of resource areas addressed in the Beaver Creek Environmental Assessment contain no mention at all of the Glacier Loon Project, and the few areas that mention it contain a perfunctory and inadequate discussion.

USFS also argues that this Court should find for USFS under the Ninth Circuit's preliminary injunction opinion in *Earth Island Institute v. USFS*. Doc. 13 at 16. However, in *Earth Island*, the Ninth Circuit set forth the factors that it deems most important: "the agency was not required to prepare a single EIS for these actions, at least *under the circumstances presented here*: [1] prior administrative boundaries, [2] different patterns of ownership and destruction, [3] disparate timetables, and [4] separate supervisory personnel." 351 F.3d 1291, 1306 (9th Cir. 2003)(emphasis added). In contrast, in this case, all four of these factors weigh in favor of a single EIS: Unlike *Earth Island*, which addresses timber sales on two different National Forests, in this case (1) the Projects are on the same National Forest; (2) the Projects have the same patterns of ownership and destruction, which are part Legacy Lands, part historic National Forest lands used for logging, and part Mission Mountain Wilderness; (3) the Projects have the same timetable – both will commence implementation this year; and (4) the Projects have the same supervisory personnel – both Projects occur under the same District Ranger and the same Forest

Supervisor. *See id.* Thus, all four *Earth Island* considerations weigh in favor of a single EIS here. 351 F.3d at 1306.

7. There are substantial questions whether the Projects will have cumulatively significant impacts.

USFS states: “The two projects will cumulatively improve grizzly bear habitat in the Buck Holland bear management subunit” Doc. 13 at 17. USFS also states: “the accumulation of these effects is actually beneficial.” *Id.* Not only does USFS fail to provide a citation to the record for these assertions, but the statements also incorrectly imply that a beneficial cumulative effect cannot be significant. To the contrary, NEPA regulations explicitly state the opposite: “A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.” 40 C.F.R. §1508.27.

Moreover, the representations that Friends “fail to identify anything environmentally significant” and “identify no Forest Plan standard that would be violated either individually or cumulatively” are false. Doc. 13 at 17. Friends argue at length in their opening brief about the two primary Forest Plan violations posed by this Project: violation of Amendment 19 and violation of the elk open road density standard. Doc. 9 at 12-27. Additionally, (1) the destruction of several thousand acres of lynx critical habitat, (2) the admitted current and future adverse effects on grizzly bears and lynx, (3) the high road density in wetlands and other

moist areas that violate the best available science, the Montana Elk-Logging Study, the Forest Plan and NFMA, and (4) the high road density that violates the Amendment 19 grizzly bear protections, which violates the Forest Plan and NFMA, all indicate potentially significant cumulative effects between the Beaver Creek and Glacier Loon Projects.

As discussed in the NEPA regulations, significance may be determined by reference to the “degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the [ESA].” 40 C.F.R. §1508.27(9). Additionally, significance may be determined by reference to whether “the action threatens a violation of Federal . . . law or requirements imposed for the protection of the environment.” 40 C.F.R. §1508.27(10). Both of these provisions are thus applicable. These issues “raise substantial questions” that the Projects 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 the reclaimed road definition in Amendment 19 in violation of NFMA and NEPA.

In the Environmental Assessment for the Project, USFS does not disclose the full definition of reclaimed road, as set forth in Forest Plan Appendix TT, and as set forth in full in Friends’ Statement of Undisputed Facts at ¶65. Doc. 10 at 19-21;

U26:00056217-00056220. USFS points to three sentences in the Environmental Assessment and argues that “the Forest Service *did* fully disclose the definition of ‘reclaimed road.’” Doc. 13 at 21 (emphasis in original). However, the full definition of reclaimed roads is two pages of single-spaced text found in Forest Plan Appendix TT. U26:00056217-00056220. USFS unlawfully glosses over each detail in the reclaimed roads definition that it is not complying with.

The details matter in this case because this precise definition was the result of years of litigation and persistence by grizzly bear conservationists, and was crafted to apply precise scientifically-based definitions. *See Res. Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1308 (9th Cir. 1993); U26:00055974. As USFS states in the Amendment 19 Environmental Assessment: “In response to comments that the definitions of restricted and reclaimed roads and core area did not adequately express our intent, additional text to clarify definitions, calculation methods, and management intent relative to motorized access densities . . . would be incorporated into the Forest Plan as Unbound Appendix TT.” U26:00056104; *see also* U26:00056130, 56217 (noting that USFS was intentionally defining “reclaimed roads” with more precision).

As the Ninth Circuit holds: “Our scope of review does not include attempting to discern which, if any, of a validly-enacted Forest Plan’s requirements the agency thinks are relevant or meaningful. If the Forest Service thinks any provision of the

[Forest] Plan is no longer relevant, the agency should propose amendments to the [Forest] Plan altering its standards, in a process complying with NEPA and NFMA, rather than discount its importance in environmental compliance documents.”

Native Ecosystems Council, 418 F.3d at 961. Thus, if USFS wishes to change the details of the reclaimed road definition, it must amend the Forest Plan; it may not simply gloss over and ignore the details of this hard-won definition.

1. USFS ignores the requirement to treat roads in a manner that prevents both motorized and non-motorized use.

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. As set forth in Friends’ Statement of Undisputed Facts, at least eight miles of roads to be designated as “stored” roads will still be passable immediately following Project implementation. Doc. 10 at 17-19. In this calculation, Friends includes roads that are currently impassable, but which USFS will clear and use for log-hauling for the Project prior to “storage;” thus, at the close of the Project they will be passable because they will have been cleared and thus no longer vegetated.

USFS indicates this intent to use these particular roads for log-hauling during the Project before “storing” them by including the phrase “after haul” in Table A1-7. Z2:00061059-61. USFS informed Friends of this fact in response to comments: “the Beaver Creek EA, Table 110 and 111 . . . provides a description of activities

that will likely occur to decommission or store roads. *This description also identifies if the road will be used for haul . . .*” F1:00001262 (emphasis added). Table 111 in the 2015 Environmental Assessment, W1:00058637, corresponds to the final table set forth at Table A1-7 in the Decision Notice, Z2:00061059-61. Thus, agency counsel’s representation to the contrary that “Table A1-7 [] nowhere states that these roads will be cleared or used for log hauling,” Doc. 13 at 27, is false according to the agency itself.

Because at least eight miles of stored roads will still be passable for use as a non-motorized or motorized travelway at the close of the Project, these roads must be included in the calculation for total motorized route density until they are impassable, i.e. fully effective as a reclaimed road: “Roads that have been treated, but that do not yet fully satisfy the definition of reclaimed road will be included in calculations for total motorized access route density.” U26:00056217-00056220.

Notably, instead of addressing the Table A1-7 stored roads that are the focus on this claim, USFS inexplicably and misleadingly draws the Court’s attention to Table A1-6, which is the table listing the roads to be “decommissioned.” Z2:00061059. Doc. 13 at 24. Friends’ claim regards stored roads, which are addressed in Table A1-7. This misleading decommissioned roads section of USFS’s brief is irrelevant to the claims in this litigation. Doc. 13 at 23-24.

Additionally, in response to Friends’ photographic evidence that berms and

boulders do not prevent motorized or non-motorized public use of travelways, USFS responds with a paragraph of assertions without citations. Doc. 13 at 26. The unsupported assertions about whether USFS had issued a closure order or assigned stored road status for the road in the photograph is beside the point. The point is that there is a berm and boulders in front of the road, and members of the public are simply walking and/or driving around that berm and boulders and using the road. X4:00060012. Thus, simply placing a berm or boulders at the front of the road does not “preclude its use as a motorized or non-motorized travel way,” as required under the reclaimed roads definition. U26:00056218. This is precisely why the reclaimed roads definition explicitly requires more than a physical obstruction. U26:00056217- 00056220.

2. USFS ignores the requirement to address the lag time before reclamation is fully effective.

A key aspect of the reclaimed roads definition mandates:

The acceptable lag time for the treatment to become effective and the expected persistence of people to continue to use a road should dictate the amount and type of initial, and perhaps follow-up, treatment required. *Greater initial revegetation and barrier work will be required if the expectation is to meet reclaimed road criteria in one year as opposed to ten years*, or if heavy ORV pressure is expected on the barrier structures. These factors should be described and considered in the design of treatments for each site.

U26:00056219 (emphasis added). USFS does not dispute that it did not address these factors in the Project Environmental Assessment.

This provision is critical because it mandates that “[g]reater initial revegetation *and* barrier work will be *required*” in situations such as this case where USFS wants to immediately count stored roads as reclaimed in order to subtract them from total road density calculations. U26:00056219 (emphasis added). In violation of this definition, there appears to be no initial revegetation work planned for stored roads for this Project, other than “passive,” i.e. natural regeneration. Z2:00061059-61 (Table A1-7).

Agency counsel ignores this language from the reclaimed roads definition and argues that “revegetation is not a required component of a ‘reclaimed road.’” Doc. 13 at 28. In addition to ignoring the plain language of the definition quoted above, this argument also ignores the agencies’ own prior statements about the revegetation requirement. For example, in preparation for the first reconsultation on Amendment 19, USFS Flathead National Forest Supervisor stated to FWS: “Roads utilized in calculations for Total Access Density include roads for which reclamation work has been completed, pulling of culverts, installation of drainage dips, distributing of rocks or debris on the road surface, *but the road has not revegetated to the level required to meet Amendment 19 reclamation requirements*. These roads have had all reclamation work completed, but *still must be counted for Total Density*

calculations.” Exhibit 2² at 3 (emphases added). Likewise, FWS represented: “*Reclaimed, also called obliterated or decommissioned, road is treated in a manner as to no longer function as a road. Barriers and revegetation of roadways are minimum treatments.*” U33:00056439 (emphases added).

Thus, the well-established understanding by the agencies until recently was that reclaimed roads are the same as decommissioned roads; and revegetation must be complete as a “minimum treatment” before the road may be removed from total road calculations. *Id.*

USFS further argues that “the routes placed into Intermittent Storage will be officially closed to motorized use. . . . NEPA does not require the Forest Service to analyze the potential environmental effects arising from the criminal conduct of third parties, even where such effects are reasonably foreseeable. [.]” Doc. 13 at 25 (citations omitted). This argument ignores the express requirement in Amendment 19 to address “the expected persistence of people to continue to use a road” and whether “heavy ORV pressure is expected on the barrier structures.” U26:00056219. By arguing that this analysis is not required under NEPA, USFS apparently concedes that it did not conduct this analysis.

²This Court may take judicial notice of this government document because “it was made publicly available by government entities [()], and neither party disputes the authenticity . . . or the accuracy of the information displayed therein.” *Daniels-Hall*, 629 F.3d at 998–99.

In its brief, USFS also argues that lag time would only be necessary to consider if USFS was relying solely on revegetation. Doc. 13 at 28. USFS argues that “[b]arriers, recontouring, and scattering of debris” would make the routes impassable. Doc. 13 at 28. First, “barriers” alone do not reclaim a road; the placement of a physical barrier only renders the road “restricted” under Amendment 19, not “reclaimed.” U26:00056217. Second, none of the eight miles of roads of concern to Friends have a prescription that includes recontouring or scattering of debris. Z2:00061059-61 (Table A1-7). Instead, the road segments will receive water bars and culvert removal: “All roads were reviewed in the field to identify work items needed for placement into ISS. Some of the roads would require active work, such as removing stream-aligned culverts and constructing water bars, while others are already in a self-maintaining state and would not require any active work (passive).” Z2:00061059.

In contrast, Table A1-6, which addresses decommissioned roads, does indicate that for some of those road segments “[b]arrier/partial re-contouring [is] needed at beginning of road.” Z2:00061058-59 (Table A1-6) . By expressly including “partial recontouring needed at beginning of road” in the “type of work anticipated” column for certain decommissioned roads, but excluding that prescription in the “type of work anticipated” column for stored roads, USFS

indicates that no “partial recontouring” is planned for the stored roads.

Z2:00061058-59 (Tables A1-6 and A1-7).

Although USFS repeatedly cites to conclusory statements or generalized promises regarding how stored roads might be treated, Doc. 13 at 27, these citations to general statements in the Environmental Assessment are superceded by the specific, detailed prescriptions for each individual road segment set forth in the final Decision Notice at Table A1-7. Z2:00061059-61. This specific table of individualized prescriptions for each road segment does not indicate any treatments for stored roads other than culvert removal and water bar placement. *Id.* Because these are the only treatments specifically prescribed, a number of these roads will not immediately meet the reclaimed roads criteria at the close of the Project.

3. The issuance of a closure order does not render a road “reclaimed.”

In several places in briefing, USFS appears to represent that so long as USFS issues a closure order, a road may be considered “reclaimed.” Doc. 13 at 29. First, a legal closure order is required for both “restricted” roads as well as “reclaimed” roads. U26:00056217. Thus, the issuance of a closure order does not necessarily indicate a reclaimed road. Second, the “reclaimed roads” definition states that “[a] legal closure order should be utilized until the reclamation treatment is effective.” U26:00056218. Until the reclamation treatment is fully effective, i.e. during the lag time, it must still be included in calculations of total motorized route density.

U26:00056219.

4. USFS fails to identify where in the record it explains its change in position to the public.

As noted in Friends’ opening brief, USFS’s interpretation, understanding, and representation to the public as recently as 2015 was that stored roads “would continue to count towards total motorized route density.” X4:00060049-50. In response, USFS does not dispute that in the Chilly James Environmental Assessment, it represents that “[stored] roads would continue to be counted in total road density.” Z10:00062100; *see also* Z11:00062197. Nonetheless, USFS attempts to distance that admission by arguing: “In Chilly James, the Flathead did not intend to make roads unusable by placing barriers and debris and obliterating the profile, so those roads were not considered ‘reclaimed’ through treatment.” Doc. 13 at 31. USFS lacks citations for this representation, and review of the record indicates that the opposite is true. The Chilly James Environmental Assessment actually states:

Treatment activities for roads put into [storage] are similar to decommissioning treatments and will include:

1. Removing all stream-aligned culverts or bridges,
2. Blocking the road entrance and abandoning the road to allow re-vegetation.

In addition, other active treatment could include any combination of the following:

1. Partial recontouring to fill ditches or remove unstable road shoulders, removing culverts and other drainage structures,
2. Ripping the roadbed to reduce compaction,
3. Installing water bars,
4. Out-sloping the road prism,
5. Seeding and fertilizing disturbed soil.

Z10:00062141. Thus, there is no material difference in the treatments for stored roads between Chilly James and Beaver Creek.

USFS also argues that Friends must identify an “official, final agency action establishing the policy they claim was reversed,” and argues that the email correspondence cited by Friends is insufficient. Doc. 13 at 29-30. However, USFS did take a final agency action – approval of the Chilly James Project. That Environmental Assessment represents that “[stored] roads would *continue* to be counted in total road density.” Z10:00062100(emphasis added). The use of the word “continue” indicates an existing position. Additionally, that Environmental Assessment proposes the same types of treatments as the Beaver Creek Project, as quoted at length above. Approving the Beaver Creek Project– another final agency action – with no material difference in proposed treatments for stored roads, but with a significant and material difference in the status of those roads under Amendment 19, is a significant change in position. Contrary to law, USFS has not

“display[ed] awareness that it is changing position” or “provide[d] good reasons for the new policy,” or provided a “reasoned explanation for disregarding facts and circumstances that underlay” its prior interpretation of Amendment 19. *Organized Village of Kake v. USDA*, 795 F.3d 956,966 (9th Cir.2015)(en banc). The “[u]nexplained inconsistency’ between agency actions is ‘a reason for holding an interpretation to be an arbitrary and capricious change.’” *Id.*

C. The Amendment 19 objectives are enforceable; USFS’s failure to either comply with the objectives or issue a Project-specific Forest Plan amendment violates NFMA.

In light of the fact that USFS is failing to comply with Amendment 19 19/19/68 objectives in the Project area, USFS argues that these objectives are not enforceable. Doc. 13 at 18-19, 38. The Ninth Circuit rejects this type of argument: “It is well-settled that the Forest Service’s failure to comply with the provisions of a Forest Plan is a violation of NFMA. As NFMA makes plain . . . instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans.’ 16 U.S.C. §1604(i).” *Native Ecosystems Council*, 418 F.3d at 961. Amendment 19 objectives are non-discretionary “provisions” of the Forest Plan, and are therefore binding. *See also Native Ecosystems Council v. Marten*, 883 F.3d 783,793 (9th Cir. 2018)(“the Forest Plan’s ‘goals’ are not just a wish list that imposes no obligations.”)

Moreover, USFS's own discussion in the Amendment 19 Environmental Assessment undermines this post-hoc argument by agency counsel: "The suggestion to establish access density standards rather than objectives *does not change the effects*. The . . . amendment to Forest-wide General Standard No. 1 clarif[ies] that the access density objectives of Amendment 19 are not discretionary."

U26:00056023 (emphasis added). Thus the record behind Amendment 19 indicates that these objectives have the same force and effect as standards. *Id.*

USFS further argues: "These objectives with timeframes were included in the original Amendment 19 decision notice in 1995. But the five and ten year timeframes have not expired. The Forest Service re-consulted with the Fish & Wildlife Service twice, in 2005 and 2014, to extend these time frames." Doc. 13 at 19. The Court should reject this argument that conflates ESA requirements with NFMA requirements. First, a reconsultation under the ESA may indicate that USFS is complying with Sections 7 and 9 of the ESA as they pertain to Amendment 19, *see* 16 U.S.C. §§1536(a), 1538(a), but ESA reconsultation alone does not change the text of Amendment 19 itself. Changing the requirements of Amendment 19 itself would require a Forest Plan amendment. *See Native Ecosystems Council*, 418 F.3d at 961; *see also* 36 CFR §219.13(a) ("a plan amendment is required to . . . change how . . . one or more plan components apply . . ."). In order to amend a Forest Plan, there must be a NEPA process: "The appropriate NEPA documentation for an

amendment may be an environmental impact statement, an environmental assessment, or a categorical exclusion, depending upon the scope and scale of the amendment and its likely effects.” 36 C.F.R §219.13(b)(3).

There was no project-specific Forest Plan amendment issued with the Beaver Creek Environmental Assessment/Decision Notice. USFS is well aware of this legal requirement, and in the past it has issued site-specific Forest Plan amendments to excuse non-compliance with Amendment 19’s 19/19/68 objectives. *See e.g. Swan View Coal. v. USFS*, 782 F.Supp.2d 1132,1135 (D.Mont.2011)(“The Moose Project includes two project specific amendments to the Forest Plan that excuse the failure to meet the 19/19/68 standards in the Werner Creek and Lower Big Creek Subunits”); *Swan View Coal. v. Barbouletos*, 2008 WL 5682092 at *5 (D.Mont. 2008)(“the inclusion of two project-specific amendments to the Forest Plan. The first relaxes Amendment 19's standards for . . . the Lower Whale Subunit The second project-specific amendment similarly alters Amendment 19 in the Canyon McGinnis Subunit”). Inexplicably, USFS has issued no such site-specific Forest Plan amendments in this case.

Moreover, even if this Court were to hold that an ESA consultation alone could amend a Forest Plan – which it cannot – the ESA reconsultation for Amendment 19 does not address the application of the 19/19/68 objectives to the

seven subunits that fell under the 19/19/68 objectives only after the 2010 Legacy Lands transfer. *See* H232:00010370, 10398-99, 19438. In this Project area, the 19/19/68 objectives began to apply to the Buck Holland subunit in 2010, *see* G17:00001896, which means that the Buck Holland subunit should have complied with the 5-year non-discretionary objectives of 19/24/60 by 2015. U11:00052338. It did not. The Buck Holland subunit also must comply with the 10-year non-discretionary objectives of 19/19/68 by 2020. U11:00052338. It will not. The post-Project status of Buck Holland will be 24/37/40, which will not meet either the 10-year objectives or the 5-year objectives. G12:00001709. Unless and until USFS amends Amendment 19 to excuse this noncompliance, this is a violation of the Forest Plan and thus a violation of NFMA. *Native Ecosystems Council v. USFS*, 418 F.3d at 961.

D. USFS fails to demonstrate compliance with the Forest Plan elk open road density standard.

As discussed in Friends’ opening brief, the Forest Plan contains a standard that prohibits open road density over 1.0 mile/square mile “during the elk use period” in “Areas with ‘moist sites.’” U11:00052354. Forest Plan Appendix DD defines “moist sites” and clarifies that protections for moist sites should be applied “during” timber harvest. H79:00004397. “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*, 137 F.3d at 1377.

USFS argues that “nothing requires the agency to calculate open road density during the elk use period” Doc. 13 at 35. This is an apparent admission that USFS did not conduct this analysis for the Project. In defense of this failure, USFS first argues that a standard that limits road density is not an elk security standard. Doc. 13 at 32. This argument ignores the plain language of the Forest Plan, which uses the word “security” in the standard, U11:00052353, and explains that limiting road density has “a more significant influence on elk security than most other factors combined.” H79:00004391-4392.

USFS also argues that “areas with moist sites” is a term that is not defined by the Forest Plan. Doc. 13 at 32-33. However, “moist sites” is defined by Forest Plan Appendix DD: moist sites “are often found at the heads of drainages, bordering streams or marshy meadows, or occupying moist swales or benches.” H79:00004397. USFS states that “Plaintiffs argue” that this is the definition of moist sites, Doc. 13 at 33, but the Montana Elk-Logging Study is part of the Forest Plan – it is Forest Plan Appendix DD – therefore its definitions are Forest Plan definitions. U11:00052312.

Based upon an assumption that it can ignore the “moist site” definition from Forest Plan Appendix DD, and implicitly admitting that it did not disclose the road density standard or a calculation of road density under that standard, USFS argues that it was adequate to simply conclude that moist sites are “located away from

roads” Doc. 13 at 33. First, regardless of whether this interpretation of “moist sites” is correct, USFS must still disclose the 1.0 mile/square mile road density standard to the public in the Environmental Assessment and demonstrate compliance. *Neighbors*, 137 F.3d at 1377.

Second, USFS’s conclusion that moist sites only occur at the headwaters of drainages and in roadless and wilderness areas, Z-1:00060754, is not entitled to any deference because it ignores the plain language of Forest Plan Appendix DD, H79:00004397. *Native Ecosystems Council*, 418 F.3d at 960 (USFS interpretation does not control where it is plainly inconsistent with Forest Plan). Forest Plan Appendix DD states that moist sites “are often found at the heads of drainages, bordering streams or marshy meadows, or occupying moist swales or benches.” H79:00004397. Thus, the Forest Plan definition is not limited to the headwaters of drainages, roadless areas, and wilderness areas. *Id.* Under the full Forest Plan definition, which includes streams, marshy meadows, and moist swales or benches, H79:00004397, there are a number of areas that contain moist sites in the Project area:



In response to this reality, USFS argues that “[s]treams and wetlands identified in the aquatics analysis are not equivalent to “moist sites” that are important to and used by elk. The map is not an accurate depiction of moist sites and should be disregarded in that connection.” Doc. 13 at 34-35. There is no explanation provided for this post-hoc conclusion by agency counsel, and no citation to any agency document in the record that includes such an analysis. The Court “cannot gloss over the absence of a cogent explanation by the agency by relying on the post hoc rationalizations offered by defendants in their . . . briefs.” *Humane Soc. of U.S. v. Locke*, 626 F.3d 1040,1049 (9th Cir.2010).

USFS also argues that it did not need to provide a map of moist sites because there is no explicit Forest Plan requirement for such a map. Doc. 13 at 34. The Ninth Circuit rejected a similar USFS argument in *WildEarth Guardians v. Montana Snowmobile Ass'n*, 790 F.3d 920,926-927 (9th Cir.2015). As in *WildEarth Guardians*, here although USFS was not required to present the data on open road density for “areas with moist sites” in any particular format, USFS must provide this data in some format. USFS has failed to provide this information in any format, and providing a map on remand would be the most logical course of action, just as it was in *WildEarth Guardians*. *Id.*

Finally, USFS argues that “open road density in the Project area overwhelmingly comports with the ‘less than one linear mile per square mile’

metric,” but none of the citations actually disclose linear open road density in a format that can be compared to the 1.0 mile/square mile standard. Doc. 13 at 35 (citing Environmental Assessment Z1:00060753, Amendment 19 Monitoring Report Z4:00061108, and Amendment 19 2015 Report Maps Z5:00061137). Instead, these calculations all address the Amendment 19 19/19/68 objectives. *Id.* USFS next argues that Friends’ calculations should be ignored because Wilderness areas should not be excluded and the map found in the administrative record economics section is inapplicable. Doc. 13 at 35-36. USFS fails to explain, however, why Friends’ calculation of open road density that did not exclude Wilderness areas, and did not use the offending map, is incorrect. Doc. 13 at 35-36. As set forth in Friends’ Statement of Undisputed Facts, there will be 80.9 miles of open roads during Project implementation. Doc. 10 at 31 (citing R1:00040929, H250:00011619, 11658). These calculations are based upon USFS’s Beaver Creek Transportation Summary (R1) and USFS’s Biological Assessment for the Project (H250); they are not based upon any map. With a total Project area of 51.2 square miles, including the Wilderness area, open road density will be 1.6 miles/square mile during the Project. *Id.* This does not comply with the 1.0 mile/square mile standard. USFS ignores this fact.

Even if the Court disregards Friends’ calculation, the fact remains that USFS should have conducted this calculation in the record, and provided this information

to the public during the NEPA process, but it did not. The failure to conduct this analysis in the record violates both NFMA and NEPA. *Native Ecosystems Council*, 418 F.3d at 963.

E. USFS must initiate ESA reconsultation on Amendment 19 to address the application of the 19/19/68 objectives to the seven Legacy Lands grizzly bear subunits that now fall under those requirements.

This claim asks the question: “Where, if anywhere, in the Amendment 19 Biological Opinion does FWS analyze the effects of applying the 19/19/68 objectives to the seven Legacy Lands subunits?” In their brief, the agencies do not directly answer this question, but instead argue in general that the existing Amendment 19 Biological Opinion is adequate because (1) 19/19/68 is an unenforceable goal, (2) the agencies plan to complete a new consultation at the end of 2018 or for the Revised Forest Plan, and (3) the baseline road conditions and existing levels of incidental take did not change as a result of the Legacy Lands transfer. Doc. 13 at 38-40. However, as set forth in more detail below, because the agencies fail to show anywhere in the Amendment 19 Biological Opinion where FWS actually analyzed the effects of applying the 19/19/68 objectives to the seven Legacy Lands subunits, these are new effects that have not yet been analyzed in a biological opinion, and therefore the plain language of the reconsultation regulation applies here. 50 C.F.R. §402.16(b),(c).

As a preliminary matter, there is no longer any dispute that the Amendment

19 19/19/68 non-discretionary objectives now apply to the seven Legacy Lands subunits that were not subject to those requirements prior to 2010. *See* Doc. 14 at 15, ¶104. Additionally, these objectives are enforceable, as discussed above in Section I.C.

The reconsultation regulation, 50 C.F.R. §402.16(b)&(c), applies here because the effects to grizzly bears in the seven Legacy Lands subunits from the application of the 19/19/68 non-discretionary objectives, including both the 5-year objectives and 10-year objectives, are effects that have not been considered in a FWS biological opinion: neither the 1995, 2005, nor 2014 Amendment 19 Biological Opinion addresses the effects of the application of the 19/19/68 objectives to these seven subunits. As set forth in detail below, the most recent consultation – the 2014 Biological Opinion – expressly applies 19/19/68 only to the “40 subunits” that the objectives originally applied to.

For example, Appendix A to the 2014 Biological Opinion is a map with a key that represents that lined units are units with less than 75% National Forest lands, and the map incorrectly represents that the seven Legacy Land subunits still fall within that description. H232:00010427 (incorrectly indicating that Lion Creek (22), Piper Creek (27), Meadow Smith (23), Cold Jim (28), Hemlock Elk (29), Buck Holland (24), and Glacier Loon (30) still have less than 75% National Forest Lands).

Appendix B is “[a]ccess management status of subunits where the numeric A19 management direction or amended A19 management direction apply,” and the list of units does not include the seven Legacy Lands units. H232:00010428.

Appendix C represents that only the no net gain of roads and no net loss of core standards apply to the Legacy Land subunits. H232:00010429. Appendix D lists “[s]ubunits with greater than 75% Forest ownership and A19 management direction as of 2012” and does not include the seven Legacy Land subunits. H232:00010430.

Appendix E contains (1) the “2012 Percent open motorized route densities of over one mile/[square] mile[] on Forest subunits where A19 applies[,] A19 management direction is $\leq 19\%$ > 1.0 mi/[sq] mi[], unless amended (lighter shaded bars),” (2) the “2012 Percent total motorized route densities of over one mile/[square] mile[] on Forest subunits where A19 applies[,] A19 management direction is $\leq 19\%$ > 2.0 mi/[sq] mi, unless amended (lighter shaded bars),” and (3) the “2012 Percent core on Forest subunits where A19 applies[,] A19 management direction is $\geq 68\%$ CORE, unless amended (lighter shaded bars).” H232:00010431-33. In other words, the first three figures in Appendix E disclose the 2012 condition for each of the three objectives. The next three figures in Appendix E further provide the “2018 anticipated” condition and comparison to each of the three objectives. H232:00010434-36. Each of these six figures excludes the seven Legacy Lands subunits that should be included as of 2010.

Likewise, Appendix F represents that the “subunits where the numeric A19 management direction of 19/19/68 applies, unless amended (40 subunits)” do not include the seven Legacy Land subunits. H232:00010437-38. And finally, Appendix G is the “2012 Status of the 40 subunits where the numeric A19 management direction applies,” which again excludes the seven Legacy Land subunits. H232:0010439.

In short, every one of these Appendices in the 2014 Amendment 19 Biological Opinion incorrectly represents that the 19/19/68 objectives only apply to the 40 originally affected subunits, and the analysis only assesses whether these original 40 subunits will comply with the objectives by 2018. H232:00010427-439. There is no acknowledgement that 19/19/68 objectives also apply to the seven Legacy Land subunits starting in 2010, and no discussion whether those seven Legacy Land subunits will comply with the 19/19/68 objectives by 2018. *See* H232:00010434-36 (2018 analysis).

USFS argues: “If, at the end of 2018, any subunits do not comply with Amendment 19’s objectives, and consultation has not occurred for a Revised Forest Plan, the Forest Service will reinitiate consultation at that time.” Doc. 13 at 38 (citing H232). To the contrary, this citation cites to the 2014 Amendment 19 Biological Opinion (H232), which as discussed at length above, does not apply the objectives to the seven Legacy Land subunits, and does not discuss whether the

seven Legacy Land subunits will comply by 2018. H232:00010434-36.

Regardless, USFS nonetheless argues that the 2014 Amendment 19 Biological Opinion considers the “baseline” of these seven subunits and, presumably, that suffices. Doc. 13 at 39-40. To the contrary, a biological opinion must contain a “detailed discussion of the effects of the action on listed species.” 50 C.F.R. §402.14(h)(2). The “baseline” in an ESA consultation is not the same as the “effects of the action” as set forth in the ESA regulations: “Effects of the action refers to the direct and indirect effects of an action on the species . . . together with the effects of other activities that are interrelated or interdependent with that action, that will be *added to the environmental baseline*.” 50 C.F.R. §402.02 (emphasis added). Thus, the baseline is just the starting point; the analysis must include the baseline, but it must also include the effects caused by the action. *Id.* The 2014 Amendment 19 Biological Opinion fails to provide this required analysis of the “effects of the action” of implementation of 19/19/68 on grizzly bears in the Legacy Lands subunits. 50 C.F.R. §402.14(h)(2); §402.02.

Even if FWS does eventually provide a new biological opinion for the Revised Forest Plan that applies 19/19/68 to the seven Legacy Lands subunits, there is as yet no such biological opinion. As this Court has previously stated, “the Project cannot go forward until consultation on the effects of the Forest Plan on the grizzly bear is complete. It would constitute an irretrievable commitment of

resources that might be contrary to the result of the consultation process and could lead to irreparable harm, and it would foreclose the implementation of alternative measures.” *Native Ecosystems Council v. Krueger*, 946 F.Supp.2d 1060,1076–77 (D.Mont.2013).

Finally, the agencies’ repeated citations to internal letters stating their own legal conclusion that reconsultation is not required are not determinative of this issue because those conclusions ignore the plain language of the reconsultation regulation. *See* Doc. 13 at 38-40. For example, in *Cottonwood Environmental Law Center v USFS*, the same agencies had long maintained that they did not need to reinitiate Forest Plan consultation on the Lynx Amendment, and both this Court and the Ninth Circuit held that their position was incorrect under the plain language of the regulation. *Cottonwood Env'tl. Law Ctr. v. USFS*, 789 F.3d 1075,1085-1086 (9th Cir.2015). The Supreme Court denied the petition for a writ of certiorari. *USFS v. Cottonwood Env'tl. Law Ctr*, 137 S.Ct. 293 (2016).

Here, although Friends rely on a different sub-section of the regulation than *Cottonwood*, the plain language of the regulation requires reconsultation: “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). The

transfer of land ownership to USFS in 2010 and the resulting application of 19/19/68 to seven additional subunits was either new information or a modification of the action. The application of these strict road density requirements with both 5-year and 10-year deadlines will have effects on the grizzly bears in these seven subunits. As set forth above at length, the 2014 Biological Opinion does not address the effects on grizzly bears from applying 19/19/68 to these seven subunits; thus, grizzly bears in these seven subunits may be affected “in a manner or to an extent not previously considered” in any Amendment 19 Biological Opinion. Accordingly, reconsultation is required under the plain language of the regulation. 50 C.F.R. §402.16(b),(c).

II. CONCLUSION

For all of the above-stated reasons, Friends respectfully requests that the Court grant summary judgment in Friends’ favor, enjoin the Project, and grant any such further relief as may be equitable.

Respectfully submitted April 12, 2018.

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CERTIFICATE OF COMPLIANCE

The foregoing consolidated response and reply brief contains 9,750 words, in accordance with the 9,750 word limit set by the Parties' Case Management Plan.

Doc. 6. In accordance with Local Rule 7.1, a table of contents, table of authorities, and index of exhibits are included in this brief.

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