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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO
NORTHERN DIVISION

FRIENDS OF THE CLEARWATER, and
ALLIANCE FOR THE WILD ROCKIES,

Plaintiffs,

vs.

JEANNE HIGGINS, Idaho Panhandle National
Forest Supervisor, UNITED STATES
FOREST SERVICE, an agency of the U.S.
Department of Agriculture, and UNITED
STATES FISH & WILDLIFE SERVICE, an
agency of the U.S. Department of Interior,

Defendants.

Case No: 2:20-cv-243

**COMPLAINT FOR INJUNCTIVE AND
DECLARATORY RELIEF**

I. INTRODUCTION

1. This is a civil action for judicial review under the Administrative Procedure Act and Endangered Species Act of the U.S. Forest Service's October 3, 2019 Decision Notice approving the Brebner Flat Project on the Idaho Panhandle National Forest.
2. Plaintiffs Friends of the Clearwater and Alliance for the Wild Rockies attest that the final decision approving the Project is arbitrary and capricious, an abuse of discretion, and/or otherwise not in accordance with law.
3. Defendants' actions or omissions violate 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 Endangered Species Act (ESA), 16 U.S.C. §§ 1513 et seq., and the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 et seq.
4. Plaintiffs request that the Court either vacate the Project decision or enjoin implementation of the Project pending compliance with federal law.
5. Plaintiffs seek a declaratory judgment, injunctive relief, the award of costs and expenses of suit, including attorney and expert witness fees pursuant to the ESA and/or Equal Access to Justice Act, 28 U.S.C. § 2412, and such other relief as this Court deems just and proper.

II. JURISDICTION

6. This action arises under the laws of the United States and involves the United States as a Defendant. Therefore, this Court has subject matter jurisdiction over the claims specified in this Complaint pursuant to 28 U.S.C. §§ 1331, 1346.
7. An actual controversy exists between Plaintiffs and Defendants. Plaintiffs' members use and enjoy the Idaho Panhandle National Forest, including the Brebner Flat Project Area, for hiking,

fishing, hunting, camping, photographing scenery and wildlife, and engaging in other vocational, scientific, spiritual, and recreational activities. Plaintiffs' members intend to continue to use and enjoy the area frequently and on an ongoing basis in the future.

8. The aesthetic, recreational, scientific, spiritual, and educational interests of Plaintiffs' members and staff have been and will be adversely affected and irreparably injured if Defendants implement the Project. These are actual, concrete injuries caused by Defendants' failure to comply with mandatory duties under NFMA, NEPA, ESA, and the APA. The requested relief would redress these injuries and this Court has the authority to grant Plaintiff's requested relief under 28 U.S.C. §§ 2201 & 2202, 16 U.S.C. § 1540, and 5 U.S.C. §§ 705 & 706.
9. Plaintiffs submitted timely administrative comments and objections for the Project. Therefore, Plaintiffs exhausted administrative remedies. Defendants' Decision was the final administrative action of the U.S. Department of Agriculture Forest Service. Thus, the Court has jurisdiction to review Plaintiffs' APA claims.
10. Plaintiffs sent Defendants a 60-day notice of intent to sue under the ESA in December 2019. Therefore, the Court has jurisdiction to review Plaintiffs' ESA claims.

III. VENUE

11. Venue in this case is proper under 28 U.S.C. § 1391(e) and Local Civil Rule 3.1. The Project is located in Shoshone County, so venue is proper in the Northern Division. Additionally, Defendant Higgins signed the Decision approving the Project, and her office is located in Kootenai County, also within the Northern Division.

IV. PARTIES

12. Plaintiff FRIENDS OF THE CLEARWATER is a tax-exempt, non-profit public interest

organization dedicated to the protection and preservation of the native biodiversity of North Central Idaho. Friends of the Clearwater strives to protect these areas, restore degraded habitats, preserve viable populations of native species, and recognize national and international wildlife corridors. Its registered office is located in Moscow, Idaho. Members of Friends observe, enjoy, and appreciate Idaho's native wildlife, water quality, and terrestrial habitat quality, and expect to continue to do so in the future, including in the Project area in the Idaho Panhandle National Forest. Friends' members' professional and recreational activities are directly affected by Defendants' failure to perform their lawful duty to protect and conserve these ecosystems by approving the challenged Project. Friends brings this action on its own behalf and on behalf of its adversely affected members.

13. Plaintiff ALLIANCE FOR THE WILD ROCKIES is a tax-exempt, non-profit public interest organization dedicated to the protection and preservation of the native biodiversity of the Northern Rockies Bioregion, its native plant, fish, and animal life, and its naturally functioning ecosystems. Its registered office is located in Missoula, Montana. Members of the Alliance observe, enjoy, and appreciate the Northern Rockies' native wildlife, water quality, and terrestrial habitat quality, and expect to continue to do so in the future, including in the Project area in the Idaho Panhandle National Forest. Alliance's members' professional and recreational activities are directly affected by Defendants' failure to perform their lawful duty to protect and conserve these ecosystems by approving the challenged Project. Alliance brings this action on its own behalf and on behalf of its adversely affected members.
14. Defendant JEANNE HIGGINS is the Forest Supervisor for the Idaho Panhandle National Forest. In that capacity, she is the official responsible for issuing the Decision that authorized the

Brebner Flat Project, and she is responsible for ensuring that the Project is in compliance with the ESA, NEPA, NFMA, and APA.

15. Defendant UNITED STATES FOREST SERVICE is an administrative agency within the U.S. Department of Agriculture, and is responsible for the lawful management of our National Forests, including the Idaho Panhandle National Forest.
16. Defendant UNITED STATES FISH & WILDLIFE SERVICE is an administrative agency within the U.S. Department of Interior, and is responsible for the lawful management of species protected by the ESA.

V. FACTUAL ALLEGATIONS

A. PROJECT DETAILS

17. On October 3, 2019, Defendant Higgins signed a Decision Notice & Finding of No Significant Impact authorizing the Brebner Flat logging project on the Idaho Panhandle National Forest.
18. The 11,779 Project area is located on the St. Joe Ranger District of the Idaho Panhandle National Forests within Shoshone County, Idaho.
19. The Project is located directly south of Avery, Idaho.
20. The Project includes commercial logging on 1,719 acres within the Theriault Creek, Kelly Creek, Williams Creek, and Siwash Creek drainages.
21. The Project also includes the following:
 - New permanent road construction - 2.02 miles
 - Non-system (illegal) roads added to the National Forest System - 1.36 miles
 - Temporary road construction - 4.24 miles
 - Road reconstruction - 2.96 miles

- Road maintenance - 36.44 miles
 - Non-system (illegal) road decommissioning - 1.30 miles
 - Road “storage” - 8.09 miles
22. The Project costs to the taxpayer include the following: (1) \$261,415.00 for BMP maintenance on haul roads, (2) \$38,394.73 for new temporary road construction & obliteration, (3) \$210,000.00 for piling of activity fuel - excavator, (4) \$6,000.00 for landing cleanup, (5) \$1,250.00 for system road cleanup ROW, (6) \$3,327.10 for erosion control, (7) \$276,001.96 for road construction/reconstruction - haul routes, (8) \$45,000.00 for culverts installation, upgrades, or removal - haul routes, (9) \$72,000.00 for road storage (gates, kelly humps, etc) - haul routes, (10) \$197,145.00 for fireline/fuel break construction - hand- brush disposal, (11) \$16,911.00 for fuel inventory - brush disposal, (12) \$240,000.00 for fuels burn - broadcast burn - brush disposal, (13) \$70,000.00 for burning activity fuel piles, (14) \$240,000.00 for KV site prep burning, (15) \$834,400.00 for regeneration planting, (16) \$23,712.00 for regen exams, (17) \$594,125.00 for sale preparation, and (18) \$404,005.00 for sale administration.
23. The total for the Project costs listed above is \$3,533,686.79.
24. The Forest Service anticipates \$3,142,950.10 in revenue from the Project.
25. On balance, the Project results in a net loss of \$390,736.69 to the federal taxpayer.

B. GRIZZLY BEARS

26. The Decision Notice states: “Endangered Species Act [:] There are no threatened and endangered wildlife species in the Brebner Flat project area. A biological assessment for bull trout has been completed for proposed action and Section 7 consultation will be completed prior to signing the final decision notice (EA pp. 26,34). There would be no effects to critical

habitat.”

27. The Project Biological Assessment did not include grizzly bears.
28. Appendix C of the Brebner Flat Wildlife Report states: “While there are no verified records or reports of grizzly bears on the St. Joe, in September of 2007 a male grizzly bear was shot and killed in the North Fork Clearwater River drainage south of the St. Joe Ranger District. This bear originated from the Selkirk area northwest of the St. Joe Ranger District. The route this bear took between the Selkirk area and where it was shot is not known, however, one possible route would have been the Bitterroot Divide along the Idaho/Montana border. . . . In light of the 2007 grizzly bear shooting, the U. S. Fish and Wildlife Service surveyed the North Fork of the Clearwater drainage and the upper St. Joe drainage to assess if there are any grizzly bears in the area. Although based on current knowledge, the potential for grizzly bear occurrence on the St. Joe Ranger District and in the project area cannot be totally dismissed, there is nothing to suggest any occurrence other than the possibility of transient individuals; with even the potential for that considered to be unlikely. No grizzlies were detected via DNA or by cameras at 91 sites in the Bitterroots during the surveys in 2008-09 (Servheen and Shoemaker 2010). There is no known grizzly bear population occupying the St. Joe Ranger District, and the U.S. Fish and Wildlife Service has determined that a resident population of grizzly bears does not exist in the Bitterroot Ecosystem at this time (USFWS 2000). There is no evidence or reason to suspect that grizzly bears are present on the St. Joe Ranger District. The St. Joe Ranger District is not within any Bear Management Unit (BMU), linkage zone, or area of known grizzly bear use. Based on the above reasons, any project occurring on the St. Joe Ranger District would have no effect on the grizzly bear.”

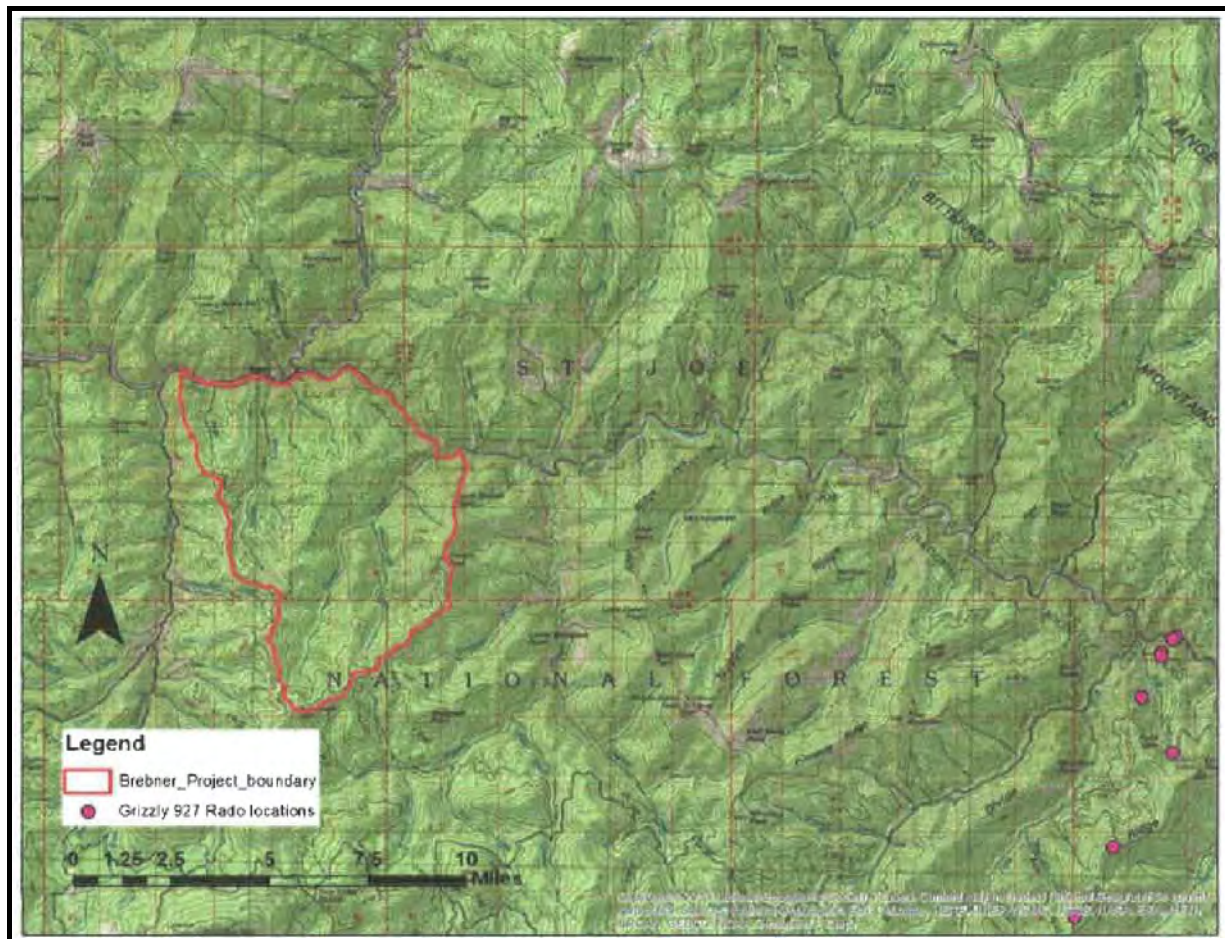
29. Regarding the 2007 grizzly bear mortality, FWS submitted the following information to the Western Federal Highway Lands Division in 2008 regarding the Little Joe Road EA: “In contrast to what is stated in the EA on p. 62, grizzly bears are expected to inhabit the Little Joe Project area. A grizzly bear, genetically identified as originating in the Selkirk Mountain population in North Idaho, was shot in the fall of 2007 by a black bear hunter in the Kelly Creek area approximately 45 miles SSE of the Little Joe Project area. While we have no exact route for the movement of this bear because it was unmarked, a straight line between the Selkirk Mountain origin of this bear and the location where it died in Kelly Creek passes directly through the Little Joe Project area.”
30. On June 23, 2019, the Bonner County Daily Bee published an article that found: “A grizzly that denned northeast of Clark Fork near Montana’s Spar Lake has turned up in the Kelly Creek drainage in Idaho’s Clearwater forest. According to the Fish and Wildlife Service, the 2-year-old collared male bear that was observed in the Cabinet Mountains near Spar Lake in 2018 moved south across the Clark Fork River, where it spent the summer before returning to den in the Cabinets last winter. The bear emerged in March, crossed the Clark Fork River in April and was located 40 miles southeast of Kellogg 10 days ago before making its way to the Kelly Creek drainage. The bear was spotted by a black bear hunter in Unit 10, where the black bear hunting season is currently open. Kelly Creek is a drainage of the North Fork of the Clearwater River, which flows into Dworshak Reservoir north of Orofino. The bear moved from the St. Joe area south of Kellogg to Kelly Creek in three days, according to USFWS data. Idaho Fish and Game, which manages the black bear hunting season in the state, is asking hunters throughout north and north central Idaho to make sure they can identify grizzly bears,

and to be aware of the increased frequency of grizzlies. “Black bear hunters in north-central Idaho, specifically those who are hunting in Unit 10 and 12, are asked to use increased vigilance after a radio-collared grizzly bear was spotted (there) by a hunter,” according to a USFWS press release. Unit 10 and 12 are not an area where hunters would normally expect to encounter a grizzly bear, although grizzlies have been encountered there in the past. In 2007, a hunter killed a grizzly he thought was a black bear while hunting near Kelly Creek, according to USFWS. “We want to make sure that hunters in the area be extra-vigilant and careful while afield, both in identifying their targets and while traveling to their hunting spot, because we do have at least one known grizzly bear in there,” said Jon Rachael, state game manager for Fish and Game.”

31. In October 2019, Idaho Fish and Game provided information to the Forest Service regarding a grizzly bear den found in the area in 2017: “Near Blackdome Peak, St. Joe National Forest. Drive road 301 from Avery to road 457. Park in turnout at saddle before peak. Den is on west aspect near the top of the ridge in boulder field among large (i.e. >5ft diameter boulders). There were two main caves beneath the rocks with hair, scat etc. It looked like there were remains of several birds, snowshoe hairs, ground squirrels etc as well as a few ungulate hairs. I collected 20 envelopes full of hair and scat (sample names: Den2017_1 – Den2017_20). Coordinates: 46.98791, -115.82269 Elevation: 6308 ft.” The email further states: “We submitted 11 scat samples and 6 hair samples to Wildlife Genetics International (WGI) for species testing and the results are as follows: 7 samples: Red Fox[,] 1 (scat) sample: Grizzly Bear[,] 9 samples: Failed.”
32. The grizzly bear den near Blackdome Peak is approximately 12 miles south of the Project area

and 9 miles south of EMU 7-6, which is the analysis area used to assess wildlife security for the Project area.

33. In its response to Plaintiffs' ESA 60-day notice, the Forest Service also disclosed a map showing that a different grizzly bear, radio-collared grizzly bear 927, was tracked traveling approximately 13 miles east of the Project area, and apparently within one mile of EMU 7-6, which is the analysis area used to assess wildlife security for the Project area:



34. In April of 2020, an Idaho Fish & Game press release provided more evidence of grizzly bear presence in Idaho: “Fresh grizzly bear tracks were confirmed by a Fish and Game conservation

officer in the Fish Creek Meadows winter recreation area about 7 miles south of Grangeville on April 18, 2020. Fish and Game officials warn hunters and recreationists to be Bear Aware because it is uncertain if the grizzly is still in the area or has moved on. Fish and Game's first evidence of a grizzly in the area came from game camera pictures in the same general vicinity in spring 2019, and biologists collected a hair sample. The hair sample was sent for genetic testing. Recent results matched a male grizzly bear radio collared by the U.S. Fish and Wildlife Service as a yearling in 2017 near the Idaho-British Columbia border. The radio collar fell off the bear in 2018."

35. Idaho's 2020 hunting regulations state that for Elk Management Zone 7: "Caution: grizzly bears may be encountered."

36. The Project is located in Elk Management Zone 7.

C. LYNX

37. The Project Biological Assessment did not include lynx.

38. The Brebner Flat Wildlife Report states: "On August 10, 2018, the USFWS online endangered species list was checked for the Brebner Flats project. Terrestrial endangered and threatened wildlife species on the list that may occur within the project area (Shoshone County) are limited to Canada lynx (*Lynx canadensis*)."

39. The Brebner Flat Wildlife Report states: "The Brebner Flats project would have No Effect to any threatened or endangered species. Canada lynx, grizzly bear, or woodland caribou are not known or suspected to occur within the Brebner Flats project area. Appendix C of this document discusses why each threatened and endangered species was not analyzed in detail for the Brebner Flats project."

40. Appendix C of the Brebner Flat Wildlife Report states: “Habitat analysis for lynx is based on the Northern Rockies Lynx Management Direction (NRLMD), (USFS 2007). Objectives, standards, and guidelines for the maintenance of lynx habitat and populations apply only to lynx habitat within Lynx Analysis Units (LAUs). Lynx Analysis Units were re-mapped in 2008 and documentation of that process can be found in project file (WL10). The Brebner Flats project area is not within an LAU due to the low amounts of suitable habitat on the western half of the St. Joe Ranger District. The nearest LAU is about 15 miles away from the project area (WL11). There is no lynx critical habitat identified on the St. Joe Ranger District (USFWS 2009). The species is not known or suspected in the project area. Based on the lack of suitable habitat and occurrence there would be no effect on lynx habitat or the species and would have no effect on lynx critical habitat. No further analysis and discussion is warranted.”

D. ST. JOE WILD & SCENIC RIVER

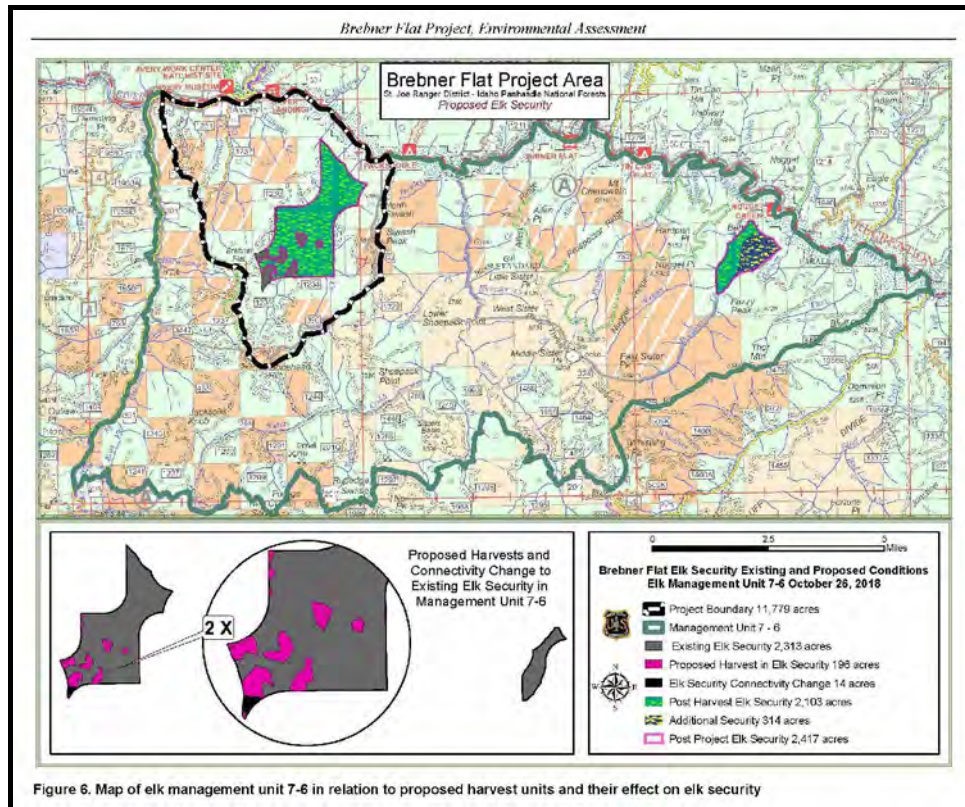
41. The Project Environmental Assessment represents that “[t]he project area . . . does not include . . . the wild and scenic river corridor”
42. However, the map of the Project area provided by the Forest Service in the Environmental Assessment shows that the Project area’s northern boundary is the St. Joe River, and that a portion of the Project area does fall within the St. Joe Wild and Scenic River Corridor.

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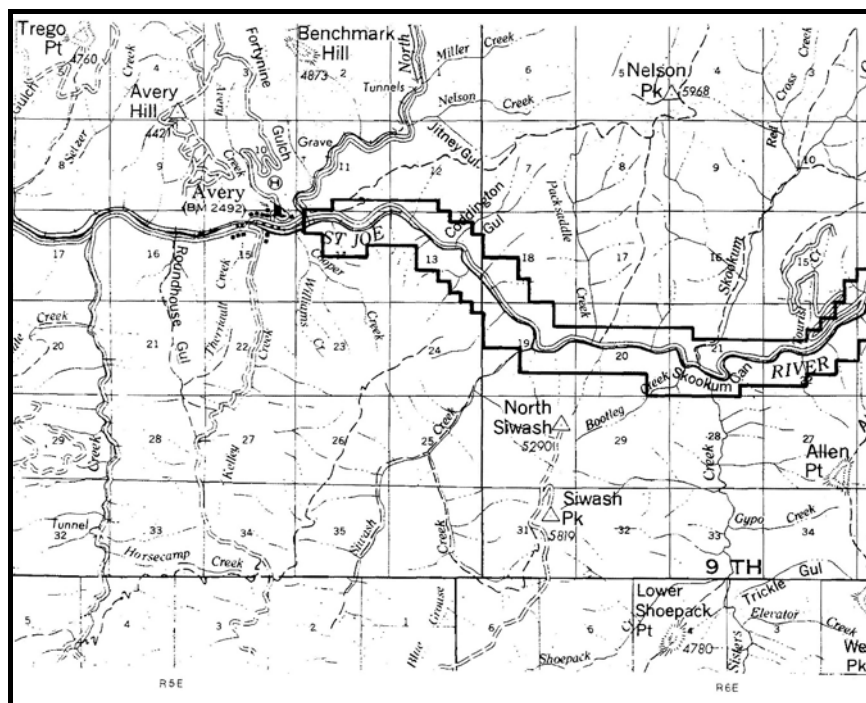
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43. The St. Joe Wild and Scenic River Management Plan also includes a map that shows that a portion of the corridor falls within the Project area.



44. Thus, the corridor for the St. Joe Wild and Scenic River is within the Project area.
45. The Brebner Flat project includes removal of fifteen culverts, considered water resource projects, in the Siwash tributary of the St. Joe Wild & Scenic River
46. Fish population is a primary indicator for fish values on the St. Joe Wild and Scenic River.
47. The September 13, 2018 draft Environmental Assessment, which was not made publicly available, states: “The hydrology report states that there could be a negative cumulative effect to the stability of Kelley, Siwash and Blue Grouse Creeks. Aquatic habitat has the potential to be negatively affected due to the negative changes to the stream channel. The cumulative effects from the proposed action ‘May effect- not likely to adversely affect’” bull trout population due to the potential for sediment generated in Kelley, Siwash, Theirault and Williams to reach the St. Joe River. The proposed action ‘May effect – not likely to adversely affect’ designated critical habitat within the St. Joe River due to the potential for sediment from the project area reaching the St. Joe River.”
48. The September 13, 2018 draft Environmental Assessment states: “This alternative does not contribute to the Forest Plan goal ‘for restoring aquatic habitat where past management activities have affected stream channel morphology by relying on natural processes to meet or move streams and riparian areas towards desired conditions[.]’ The alternative has the potential to slow natural process recovery of the fish bearing streams.”
49. The Project Environmental Assessment does not analyze or disclose a determination of the effects of the Project on the St. Joe Wild and Scenic River.
50. Plaintiffs filed comments on the EA raising the Forest Service’s failure to address the impact of sedimentation on the St. Joe Wild and Scenic River: “The same problems apply to the St. Joe

River. It is a designated as a Wild and Scenic River. There is no analysis in the EA of the impacts on this river even though sediment is expected to enter the river, at least according to the Hydrology Report, from the proposed timber sale. How would this sale affect the outstandingly remarkable values of the St. Joe River? This is not addressed even it must be considered since a portion of the river corridor is within the project area.”

51. In response to Plaintiffs’ EA comments, in a document in the project file that was not publicly available, the Forest Service stated: “The Wild & Scenic Rivers Act is addressed in Appendix B of the Recreation Report in the project file. No project activities are planned within the WSR boundary. Water resource activities are evaluated to determine (WSR Act, section 7(a)) if there will be an unreasonable diminishment of scenic, recreation, fisheries or wildlife qualities. No unreasonable diminishment was found.”
52. The Recreation Report was posted on the Forest Service’s website, but Appendix B was blank.
53. The project file contains Appendix B, a two-page document, but it was not made available to the public for comment before the Project decision was issued.
54. In the Decision Notice, the Forest Service states: “Parts of the northern boundary of the project area falls within the St. Joe Wild and Scenic River Corridor (WSR). There are no activities proposed within the WSR corridor. A Section 7 (a) Evaluation for the Wild and Scenic Rivers Act was completed (Project Record).”

E. ELK SECURITY

55. Revised Forest Plan Guideline “FW-GDL-WL-13. Elk.” states: “Management activities in elk management units should maintain existing levels of elk security (see glossary).”

56. The Revised Forest Plan states: “A project or activity must be consistent with all guidelines applicable to the type of project or activity and its location in the Plan area. A project or activity is consistent with a guideline in either of two ways: 1. The project or activity is designed in accordance with the guideline, or; 2. A project or activity design varies from the guideline but is as effective in meeting the intent or achieving the purpose of that guideline. The project documentation will describe how the project is consistent with the relevant guideline(s). When the project design varies from the exact wording of a guideline, project documentation must specifically explain how the project design is as effective in contributing to the maintenance or attainment of the guideline. Under this circumstance, a Plan amendment is not required. However, if a project or activity is not designed to comply with the intent or purpose of a guideline, an amendment to the Forest Plan is required.”
57. The Revised Forest Plan defines “security habitat (elk)” as follows: “Generally timbered stands on NFS lands at least 250 acres in size greater than 0.5 mile away from open motorized routes during the hunting season. Security is calculated for individual Elk Management Units (EMUs). Roads not open to the public for motorized use during the hunting season are not included in this calculation. The effects of non-motorized use and/or administrative motorized use of closed or temporary roads during the hunting season are not included in this calculation and would instead be analyzed separately at the project level.”
58. The Revised Forest Plan EIS states: “The IPNF will use the EMU as the analysis unit for elk security as this was the agreed upon measurement scale through coordination with the state of Idaho (IDFG).”
59. In the February 2018 scoping letter, the Forest Service stated: “Forest-wide guideline

FW-GDLWL-13 states, ‘Management activities in elk management units should maintain existing levels of elk security (see glossary).’ The proposed harvest may reduce vegetation to the extent that elk habitat security is decreased, which would not be consistent with the Forest Plan guideline to maintain existing levels of elk security.”

60. In a subsequent document, the Forest Service stated: “At the time of scoping the Brebner Flat project, it appeared that the proposed action would result in a loss of 210 acres of elk security in the Elk Management Unit 7-6 due to due to activities associated with timber harvest such as the construction of roads, tree plantings, and fuels treatments in the project area. If elk security was reduced, then a Forest Plan Amendment would have been required. During project development post-scoping, specialists conducted a more thorough analysis of the INFRA roads database and determined that there was an opportunity to create additional elk security in Elk Management Unit 7-6. The seasonal closure of approximately 1 mile of the OHV portion of road 1956E would increase elk security in the elk management unit by 314 acres, leading to a net gain in security of 94 acres. The proposal to amend the Forest Plan was no longer an alternative that needed to be carried forward.”
61. The EA states that existing elk security in EMU 7-6 is 2,313 acres.
62. The EA states: “The timber harvest activities in the project area would reduce the level of security to 2,103 acres. The reduction in elk security (210 acres) would be due to activities associated with timber harvest such as the construction of roads, tree plantings, gopher control, and fuels treatments in the project area.”
63. The EA states: “To compensate for this loss, the seasonal closure of the OHV portion of road 1956E would increase elk security in the elk management unit by 314 acres, leading to a net

gain in security of 94 acres (table 12).”

64. The Decision Notice clarifies: “Motorized trail 1956E is outside the project area boundary but within Elk Management Unit 7-6, which encompasses the project boundary. The motorized trail, which is designed for off-highway vehicles less than 50 inches in width, would change from no timing restrictions to a seasonal restriction of use between September 3 and December 16 each year to enhance elk security. The restriction would apply between milepost 11.2 and 12.3 for a total of 1.07 miles of trail affected. The trail would be signed during the seasonal restriction.”
65. There is no discussion in the Project EA regarding the efficacy of the Forest Service’s proposed mitigation measure – using a sign to close one mile of motorized trail and therefore assume that there will be a net increase in elk security instead of a net decrease in elk security.
66. Even when the agency installs a gate to create a road closure, ATV riders often simply drive around the gates: for example, in this Project area, the Forest Service found ineffective gates for Road 1234, Road 1235, Road 1247, and Road 1251.
67. The EA concedes: “there are a handful (5-10) of ‘problem’ gates that need to be monitored/repaired annually.”
68. A document in the project file prepared in response to public comments, but not shared with the public, states: “breaching of gates is always a concern to the agency. . . . but the public can be quite resilient in their endeavors to get behind them.”
69. The EA does not disclose whether the Forest Service includes these chronically failing gated roads in the calculation of elk security habitat, and if so, how that inclusion is justified.
70. In scoping comments on the Project, one local resident stated: “I’ve hunted up Kelly Creek and

the Siwash Peak area every year since 1962. At that time, it was basically a roadless unlogged forest. . . .My concern has to do with the way all this harvesting has affected elk and other wildlife. At first opening up some of this land would help elk habitat. However, year after year this is what I saw. The elk who were using the land prior the logging might return, but hunters were sitting on these clear cuts and any elk that showed up were shot. Cows could be harvested then. They learned quickly and now they don't use the open area. Maybe some moose and white tail deer. The numbers of actual forested areas are so scattered and too small. When the first 4 wheelers and hunters arrive, they take off. I have thought they take off down to the Brebner Flat area because this has been designated non-motorized and not many hunters go that far. Idaho Fish and Game have not allowed cows to be harvested in Unit 7 because the numbers of elk do not meet their management goals. Simply there just aren't that many elk. I strongly disagree with USFS putting new over 40-acre clear cuts and eliminating the elk security areas. . . . In summary I would like you to reconsider your plans to limit the elk secure areas in Brebner Flat. The elk are not flourishing and need the USFS to maintain a position to mitigate the damage already down by the private timber companies. I'd like you to add the economic value of hunting and other recreation activities to the value of leaving the forest whole.”

71. Another local resident stated: “Our family has been hunting and camping in the Kelly Creek/Siwash Peak area for over 50 years. In fact, we have been in that area for several weeks “every” year for over 50 years. We are probably more familiar with that drainage than anyone in the region and have seen all of the changes that have taken place over this time and how these changes have altered elk behavior. We were very fortunate to have had the ability to

hike through this area using the Cougar Creek, Horsecamp and Siwash Peak Trails as landmarks. It once was a beautiful area with a thriving elk population. These trails have all been destroyed by clear cut logging as have all the major game trails which were landmarks unto themselves. Sadly, these pathways are gone because of logging and more importantly because of this activity the elk behavior has changed so much. Because so much of the forest has been removed, the elk are forced to take cover in much smaller areas which leads me to the primary purpose for writing. If the logging you propose was in an area where recent logging had not been so drastic it would be acceptable, however it comes on the back end of very significant clearcutting of private and Forest Service land in the area and in fact, what you are proposing, is basically logging the only areas that haven't already been taken. The map below shows the logging in recent years in Red and your proposed areas for harvesting in Yellow. Excluding the drainages, the proposed logging is the majority of what timbered areas remain, especially in the Siwash Creek drainage:"



72. The letter continues: “The area in this map is greater than 20 square miles. The majority of the logging in red was in the form of clearcuts which completely eliminated the forested area. These clearcuts are in various stages of re-growth but none are suitable for sustaining elk habitat and many so brushy you can’t walk through. The elk have been forced to take refuge in the forested areas that border these clearcuts. To now come in and log 1,948 acres of these borders and add 17 more clearcuts will all but eliminate the timber areas available in the area. Your proposal suggests leaving buffer areas for elk habitat, but what you are doing is taking away the only buffer areas that currently exist. Any supposed buffers remaining will be either stream areas or extremely narrow patches, certainly not sufficient to provide cover.”
73. The letter continues: “As stated, the majority of the map area in red was clearcut. Now, workers have gone in some of the more mature areas and thinned the new growth by cutting down undesirable species and leaving them lying on the ground. This has made these sections even further useless to elk as they are nearly impossible to walk through. In the snow you can see the elk avoid these areas and walk around them inside the forested borders. Much of the areas you propose to log are the borders the elk need and where they currently reside.”
74. The letter continues: “So, on the back of one of the worst harvest seasons historically in this area, why would you possibly take measures to reduce feed, eliminate security and put additional pressure on the elk? Why would the Forest Service suggest modifying the Forest Plan to further log 2,000 acres, destroy 300 additional acres of elk habitat and add 17 more clearcuts when the area is already insufficient to restore the herds. And on top of that, intentionally change the regulations to allow you to accomplish such a detrimental plan. Not only does it not make any sense, it appears completely irresponsible and counter to your objectives.

I recognize you are not responsible for the poor practices on private land, but compounding the problem by your own actions is not a proper solution. Your plan will cause further harm to an already struggling elk population.”

75. The letter continues: “I have spoken to Fish and Game and they agree that creating several new large clearcuts in this area will be detrimental to the wildlife. Scaling back the project and/or leaving islands and larger corridors for the elk seems not only logical but responsible.

Harvesting 1,948 acres is not a huge operation and its economic impact is not critical.

Harvesting only 16% of the area is not critical to the health of the entire area. Most of the fuels for fire suppression have already been removed so there isn’t a critical fire danger being resolved by this program. However, taking a significant portion of the remaining elk habitat is critical for their ability to even remain at their current herd levels, let alone strengthen. The responsibility of the USFS in managing the commercial, recreational and wildlife management impacts on the forest seems to be significantly imbalanced by this proposal.”

76. The Forest Service did not disclose or address this map or these concerns in the Wildlife Report, EA, or Decision.

77. The Project is located in Unit 7 of the Panhandle Elk Zone.

78. Idaho’s most recent Elk Management Plan states: “Most of Unit 7 and the eastern part of Unit 6 are part of the St. Joe Bellwether Area, which is surveyed every few years. The elk population in this area almost doubled between 1998 and 2006, but has since declined dramatically. The 2012 survey showed about one third as many elk as estimated in 2006. IDFG would like to see the elk population in Units 6, 7, and 9 eventually increase by more than the 40% listed in our 10-year goals.”

79. The Forest Service did not disclose or address Idaho’s concern about the Panhandle Zone elk population and its dramatically declining trajectory in the Wildlife Report, EA, or Decision.

VII. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

The agencies’ failure to include the grizzly bear in the Project Biological Assessment and Letter of Concurrence violates the ESA; the “no effect” conclusion is arbitrary and capricious; and to the extent the FWS species list for the area does not include grizzly bears, it too is arbitrary and capricious and in violation of the ESA.

80. All above paragraphs are incorporated by reference.
81. The ESA mandates: “each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on November 10, 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action.” 16 U.S.C. § 1536 (c)(1).
82. In short, “[o]nce an agency is aware that an endangered species may be present in the area of its proposed action, the ESA requires it to prepare a biological assessment” *Thomas v. Peterson*, 753 F. 2d 754, 763 (9th Cir. 1985).
83. The Ninth Circuit holds that “[a] failure to prepare a biological assessment for a project in an area in which it has been determined that an endangered species may be present cannot be

considered a de minimis violation of the ESA.” *Thomas*, 753 F.3d at 763-764.

84. The Forest Service's first step in complying with this requirement is to obtain from FWS “a list of any listed or proposed species or designated or proposed critical habitat that may be present in the action area.” 50 C.F.R. § 402.12(c)-(d).
85. The “may be present” threshold includes migratory species that may be present “at some point” within the action area, and the standard does not require confirmation that species are “actually known or believed to occur” in the area. 51 Fed. Reg. 19926, 19946 (June 3, 1986).
86. A biological assessment must reach one of the following conclusions regarding a project’s effects: (1) no effect, (2) may affect, not likely to adversely affect, or (3) likely to adversely affect. *See Native Ecosystems Council v. Marten*, - - - F.Supp.3d - - - -, 2020 WL 1479059, at *6 (D. Mont. Mar. 26, 2020)(“a no effect determination does not obviate the need for a BA, as the BA is the mechanism by which an agency concludes that its proposed action will have ‘no effect,’ ‘may affect,’ or ‘is likely to adversely affect’ a listed or proposed species.”)
87. “May affect” is a very low threshold and any possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the requirement. “ While the ‘disturbance effects’ may be discountable or insignificant. . . ‘any possible effect’ requires the Forest Service to obtain the concurrence of the Wildlife Service in order to avoid consultation.” *Native Ecosystems Council v. Krueger*, 946 F.Supp.2d 1060, 1079 (D. Mont. 2013).
88. Thus, “the appropriate conclusion when effects on listed species are expected to be discountable, or insignificant, or completely beneficial” is may affect, not likely to adversely affect; “no effect” is not the appropriate conclusion in that circumstance. *Id.*

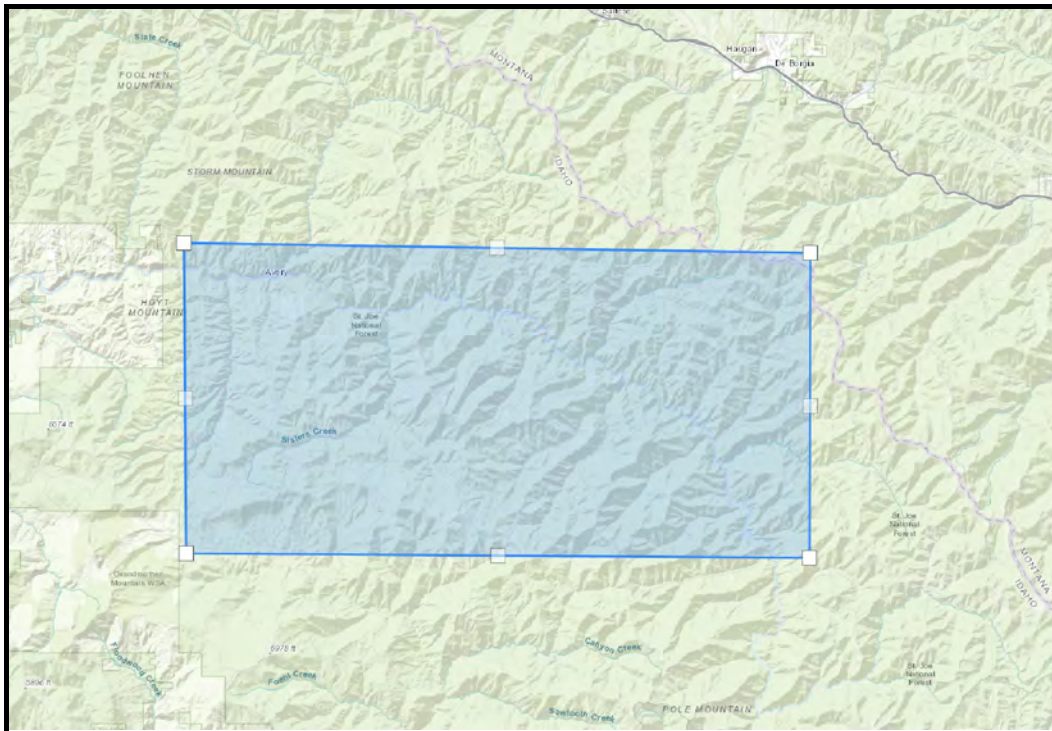
89. If the biological assessment concludes that the proposed action “may affect” but will “not adversely affect” a threatened or endangered species, the action agency must consult informally with the appropriate expert agency. 50 C.F.R. §§ 402.14 (b)(1), 402.12(k)(1).
90. If the action “is likely to adversely affect” a listed species, the action agency must formally consult with the expert agency, and the expert agency must provide the action agency with a Biological Opinion explaining how the proposed action will affect the species or its habitat. 16 U.S.C. § 1536(a)-(c); 50 C.F.R. § 402.14.
91. Both the biological assessment and the biological opinion must use “the best scientific and commercial data available.” 16 U.S.C. § 1536(c).
92. The Forest Service concedes that “the potential for grizzly bear occurrence on the St. Joe Ranger District and in the project area cannot be totally dismissed,” and it expressly acknowledges that there is a “possibility of transient individuals” in the area.
93. As noted above, grizzly bears have been confirmed both traveling through and denning in Idaho. EMU 7-6 is the analysis area for Project effects to wildlife security. Within the past few years, one radio-collared grizzly bear was tracked traveling less than one mile east of EMU 7-6, and a grizzly bear without a radio-collar denned approximately 9 miles south of EMU 7-6. A grizzly bear can easily travel either distance in a single day. As noted above, another grizzly bear moved from the St. Joe area south of Kellogg to Kelly Creek in three days according to FWS.
94. In addition to these known grizzly bears, there are likely other grizzly bears that are traveling through and/or denning in the area that simply don’t have radio collars and are more skillful at avoiding humans.

95. Due to potential presence in the area, the Idaho Fish & Game is now warning black bear hunters to be vigilant regarding potential grizzly bear presence. Idaho's 2020 hunting regulations state that for Elk Management Zone 7: "Caution: grizzly bears may be encountered." The Project is located in Elk Management Zone 7.
96. In the Revised Forest Plan Biological Opinion, FWS finds: "Grizzly bears may also be observed infrequently on other areas of the IPNF outside the recovery zones and BORZ areas. Therefore, the action area is the entire IPNF."
97. The "may be present" threshold for preparation of a biological assessment does not require permanent occupancy, but instead includes migratory or transient individuals that may pass through the area. Grizzly bears thus meet the "may be present" threshold in the project area; therefore, a Biological Assessment must be prepared. The Forest Service's failure to prepare a Biological Assessment for grizzly bears violates the ESA.
98. The District of Montana addressed a similar case and held: "no grizzlies have been sighted in the Project area itself. . . . [however] it is not necessary that grizzly bears occupy an area to satisfy the 'low threshold' for consultation. Grizzly bears 'may be present' if 'transitory bears [] might move through the project area.' []. The Project area has 'fairly good connectivity' with areas with known grizzly bear activity, [], and implicit in the Wildlife Report's and Environmental Assessment's discussion of the importance of preserving this connectivity is the possibility that grizzly bears, which are known to occur nearby and are a wide-ranging species, might travel through the Project area. . . . the first question in the section 7 analysis—whether grizzly bears may be present in the action area—must have been answered in the affirmative" *Native Ecosystems Council v. Krueger*, 946 F. Supp. 2d 1060, 1077 (D. Mont. 2013).

99. Additionally, “[w]hen a listed species ‘may be present,’ the Forest Service is required to prepare a biological assessment in order to determine if the proposed action ‘may affect’ the species.” *Id* at 1078.
100. The project meets the low “may affect” threshold. The project allows almost 2,000 acres of clearcutting in an area that has recently been heavily clearcut, and allows new permanent roads. Roads and clearcuts harm grizzly bears by increasing human access and providing greater sight distances to facilitate poaching. As discussed above, the Project will remove some of the last best forested buffer zones for wildlife. The grizzly bears that may travel through this Project area or analysis area are likely using those buffers for cover and the removal of those buffers may affect them by disrupting and/or inhibiting their attempts to migrate into areas like the Selway-Bitterroot Wilderness. The Project will reduce security, security habitat, and travel corridor habitat. The Project thus meets the low “may affect” threshold; the Forest Service’s “no effect” conclusion is arbitrary and capricious.
101. In addressing this issue in *Native Ecosystems Council*, the District of Montana held: “the Forest Service arbitrarily concluded that the Project would have no effect on grizzly bears . . . it failed to analyze important aspects of the problem, including whether the construction and use of temporary roads during Project activities may affect grizzly bears that may travel through the area.” 946 F. Supp. 2d at 1080. The same is true in this case.
102. Finally, the project file provided by the Forest Service to Plaintiffs does not include the FWS species list used by the Forest Service for the Project, and it is not clear whether the Forest Service ever requested and received an official species list from FWS. The Forest Service indicates that it conducted an online search, but FWS’s online tool expressly states: “A printed

resource list from the IPaC Explore Location page is not considered official USFWS correspondence for ESA consultation purposes.” It further states: “Section 7 of the Endangered Species Act requires Federal agencies to ‘request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action’ for any project that is conducted, permitted, funded, or licensed by any Federal agency. A letter from the local office and a species list which fulfills this requirement can only be obtained by requesting an official species list from either the Regulatory Review section in IPaC (see directions below) or from the local field office directly.” It is unclear whether the Forest Service took this required step.

103. Furthermore, when Plaintiffs used the online tool, which requires drawing a polygon on a map, the FWS online tool included grizzly bears in the species list for the polygon roughly drawn below around EMU 7-6.



104. Regardless, “migratory species that ‘may be present’ at some point within the action area must be included in the species list.” 51 Fed Reg 19926, 19946 (Jun. 3, 1986). To the extent the official FWS species list does not include grizzly bears as a species that “may be present” in the area, it is arbitrary and capricious and violates the ESA because the best available science indicates that grizzly bears “may be present” in the area.
105. For all of these reasons, the agencies’ failures with respect to the grizzly bear violate the ESA and APA.

SECOND CLAIM FOR RELIEF

The agencies’ failure to include the lynx in the Project Biological Assessment and Letter of Concurrence violates the ESA, and the “no effect” conclusion is arbitrary and capricious.

106. All above paragraphs are incorporated by reference.
107. The Wildlife Report for the Project states: “Terrestrial endangered and threatened wildlife species on the list that may occur within the project area (Shoshone County) are limited to Canada lynx (*Lynx canadensis*).”
108. Regardless of its express finding that lynx may be present in the project area, the Forest Service did not prepare a Biological Assessment for lynx for the Project. This failure violates the ESA. *Thomas v. Peterson*, 753 F. 2d 754, 763 (9th Cir. 1985).
109. The Forest Service states that its “no effect” conclusion is based on the fact that the Project area does not contain any designated “Lynx Analysis Units” under the Northern Rockies Lynx Management Direction, also called the “Lynx Amendment,” which is a regional forest plan amendment with management direction for lynx habitat. However, the agency admitted that lynx may be present; therefore the presence of an agency-constructed “lynx analysis unit” is

irrelevant. As the District of Montana recently held: “The Lynx Amendment only applies to ‘mapped lynx habitat on National Forest System land presently occupied by Canada lynx.’ . . . Lynx may be present in areas outside of mapped lynx habitat” *Native Ecosystems Council v. Marten*, 334 F. Supp. 3d 1124, 1132 (D. Mont. 2018).

110. The Forest Service also argues that lynx are not “known to occur” in the Project area. However, this too is irrelevant: “The Wildlife Service clearly rejected a standard which would require a species to be ‘actually known or believed to occur’ in an area because it would conflict with the statutory language.” *Native Ecosystems Council v. Krueger*, 946 F. Supp. 2d 1060, 1073 (D. Mont. 2013).
111. Thus, the agencies’ failure to include lynx in the Project Biological Assessment violates the ESA.
112. Additionally, the Forest Service’s conclusion that the Project will have “no effect” on lynx is arbitrary and capricious and an abuse of discretion.
113. It is well-established that logging affects lynx.
114. The Project includes clearcutting and removal of travel corridor hiding cover over nearly 2,000 acres (as discussed above), and as shown in the map above, Project area logging will remove the few forested buffers that remain in the area after intensive logging on private lands around the Project area.
115. Thus, the Project meets the low “may affect” threshold and the Forest Service’s “no effect” conclusion is arbitrary and capricious.
116. For all of these reasons, the agencies’ failures with respect to the lynx violate the ESA and APA.

THIRD CLAIM FOR RELIEF

The Forest Service's failure to take a hard look at Project impacts on the St. Joe Wild and Scenic River and address this issue in the Project EA violates NEPA, the Wild and Scenic River regulations, and the APA.

117. All above paragraphs are incorporated by reference.
118. The Wild and Scenic Rivers Act prohibits “developments . . . on any stream tributary” to a Wild and Scenic River if the development will “invade the area or unreasonably diminish the scenic, recreational, and fish and wildlife values present in the area on the date of designation of a river as a component of the National Wild and Scenic Rivers System.” 16 U.S.C. § 1278 (a).
119. The regulations provide explicit direction that potential impacts to a Wild and Scenic River must be assessed in project NEPA Environmental Assessments or Environmental Impact Statements: “The determination of the effects of a proposed water resources project shall be made in compliance with the National Environmental Policy Act (NEPA). To the extent possible, authorizing agencies should ensure that any environmental studies, assessments, or environmental impact statements prepared for a water resources project adequately address the environmental effects on resources protected by the Wild and Scenic Rivers Act” 36 C.F.R. § 297.6.
120. In turn, “NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.” 40 C.F.R. §1500.1 (b)

121. Thus, “[t]o take the required ‘hard look’ at a proposed project's effects, an agency may not rely on incorrect assumptions or data” in the NEPA analysis. *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 964 (9th Cir. 2005). Instead, the agency must provide the public with a full and fair discussion of potential effects and present complete and accurate information to decision makers and to the public. *Nat. Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 813 (9th Cir. 2005)
122. As noted above, the Project Environmental Assessment does not analyze or disclose a determination of the effects of the Project on the St. Joe Wild and Scenic River. Instead, the EA misleadingly represents that “[t]he project area . . . does not include . . . the wild and scenic river corridor”
123. As demonstrated above, the maps show that the Project area does include the St. Joe Wild and Scenic River Corridor.
124. In the Decision Notice, the Forest Service changed its position: “Parts of the northern boundary of the project area falls within the St. Joe Wild and Scenic River Corridor (WSR).”
125. The September 13, 2018 draft Environmental Assessment, which was not made publicly available, states: “The hydrology report states that there could be a negative cumulative effect to the stability of Kelley, Siwash and Blue Grouse Creeks. Aquatic habitat has the potential to be negatively affected due to the negative changes to the stream channel. The cumulative effects from the proposed action ‘May effect- not likely to adversely affect’” bull trout population due to the potential for sediment generated in Kelley, Siwash, Theirault and Williams to reach the St. Joe River. The proposed action ‘May effect – not likely to adversely affect’ designated critical habitat within the St. Joe River due to the potential for sediment from the project area

reaching the St. Joe River.”

126. The September 13, 2018 draft Environmental Assessment, which was not made publicly available, states: “This alternative does not contribute to the Forest Plan goal ‘for restoring aquatic habitat where past management activities have affected stream channel morphology by relying on natural processes to meet or move streams and riparian areas towards desired conditions[.]’ The alternative has the potential to slow natural process recovery of the fish bearing streams.”
127. In a project file document (also not made publicly available) with responses to Plaintiffs’ EA comments, the Forest Service did not dispute that the EA contains no analysis on the Project’s effects on the St. Joe Wild and Scenic River, but instead it argued that the Wild and Scenic Rivers analysis was located in Appendix B to the Recreation Report, which was posted on the agency’s website.
128. However, the Forest Service later conceded in its response to Plaintiffs’ administrative objection (also not publicly available) that “Appendix B in the draft Recreation Report is blank.”
129. Even if Appendix B had been included in the EA, or otherwise made publicly available, Appendix B is cursory and conclusory and does not assess whether the negative cumulative effects to bull trout and the St. Joe River from the Project amount to an invasion or unreasonable diminishment of fish values in the Wild and Scenic River.
130. The Forest Service’s failure to address the Project’s effects on the St. Joe Wild and Scenic River in the Project Environmental Assessment violates the WSR regulations, and therefore violates the APA because the EA is not in accordance with law. 36 C.F.R. § 297.6.

131. Additionally, the Forest Service's misleading representations and omissions in the EA, failure to take a hard look at this issue anywhere in the project file, and failure to fully and fairly inform the public regarding this issue before making a decision violate NEPA.

FOURTH CLAIM FOR RELIEF

The Forest Service's failure to take a hard look at cumulative effects on the declining elk population in the area, and failure to address the efficacy of the proposed mitigation measure for elk security, violates NEPA and requires a full EIS. In addition, the proposed mitigation measure – a posted sign – will fail to effectively prevent motorized use on Road 1956E; therefore, the Project will cause a net loss in elk security in violation of the Revised Forest Plan and NFMA.

132. All above paragraphs are incorporated by reference.
133. Cumulative effects are defined in NEPA's implementing regulations as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. §1508.7.
134. NEPA requires that where "several actions have a cumulative . . . environmental effect, this consequence must be considered in an EIS." *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1378 (9th Cir. 1998) (citation omitted)(emphasis added).
135. "In a cumulative impact analysis, an agency must take a 'hard look' at all actions that may combine with the action under consideration to affect the environment." *Great Basin Res. Watch v. Bureau of Land Mgmt.*, 844 F.3d 1095, 1104 (9th Cir. 2016) (citation and

quotation mark omitted)(emphasis added).

136. “[S]imply listing all relevant actions is not sufficient.” *Id.*
137. Instead, “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*, 137 F.3d at 1379.
138. Moreover, “[t]he ‘hard look’ must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made, [], and the final EIS must include a discussion of adverse impacts that does not improperly minimize negative side effects” *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 491 (9th Cir. 2011)(citations and quotation marks omitted).
139. “In order for Plaintiffs to demonstrate that the [agency] failed to conduct a sufficient cumulative impact analysis, they need not show what cumulative impacts would occur. To hold otherwise would require the public, rather than the agency, to ascertain the cumulative effects of a proposed action. []. Such a requirement would thwart one of the twin aims of NEPA- to ensure that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process. [] Instead, we conclude that Plaintiffs must show only the potential for cumulative impact. ” *Te-Moak Tribe of W. Shoshone of Nevada v. U.S. Dep’t of Interior*, 608 F.3d 592, 605 (9th Cir. 2010)(internal quotation marks and citations omitted).
140. In this case, there is a potential for cumulative effects on the local elk population, and the Forest Service has failed to conduct an adequate cumulative effects analysis of this issue. As

discussed above, the elk population in Zone 7 has dramatically decreased; the private lands surrounding the Project area have been heavily clearcut; and the Project will allow further clearcutting of some of the last best forested buffers for elk. Although the best available science requires at least 30% of an elk unit to provide elk security habitat, this elk unit now provides less than 5% elk security. Project activities will cause a further loss of elk security due to logging and new roads. Local residents who have hunted this area for decades shared their detailed observations of how logging has harmed the elk population over time in this area, and how the Project is likely to cause further cumulative harm in the area. Yet, the cumulative effects discussion in the EA is three vague sentences. This discussion fails to disclose the declining status of the area's elk population, fails to disclose in detail how logging and roads have harmed this population over time according to science and first-hand observations from local residents over decades, and fails to fully and fairly disclose how this Project will cumulatively impact and further harm this population. These failures violate NEPA.

141. As this Court held in a similar case: “Although the [] EA does provide some general statements about past degradation due to mining, timber harvest, human use, and fire suppression; the EA provides no analysis of what effect the current project may have on the area given the past degradation that has already occurred. Simply stating that past degradation has in fact occurred, while providing no analysis of how the proposed project itself may impact that already degraded environment, falls in the category of merely perfunctory analysis.” *Idaho Conservation League v. Bennett*, 2005 WL 1041396, at *5 (D. Id. 2005).
142. In addition to its failure to adequately disclose and analyze cumulative effects, the Project EA also completely fails to address the efficacy of the proposed mitigation measure – posting a sign

on Road 1956 E to “create” new elk security to mitigate for the loss of elk security from Project logging and road-building.

143. The Ninth Circuit holds that NEPA requires agencies to “analyze the mitigation measures in detail [and] explain how effective the measures would be. A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA.” *Northwest Indian Cemetery Protective Assn. v. Peterson*, 764 F.2d 581 (9th Cir. 1985).
144. The Ninth Circuit holds: “An essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective. . . . The Supreme Court has required a mitigation discussion precisely for the purpose of evaluating whether anticipated environmental impacts can be avoided. . . . A mitigation discussion without at least some evaluation of effectiveness is useless in making that determination.” *S. Fork Band Council Of W. Shoshone Of Nevada v. U.S. Dep’t of Interior*, 588 F.3d 718, 727 (9th Cir. 2009).
145. “The Forest Service’s perfunctory description of mitigating measures is inconsistent with the ‘hard look’ it is required to render under NEPA. Mitigation must be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated. [] A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA.” *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998)(citations & quotation marks omitted).
146. The analysis of the effectiveness of mitigation measures must be supported by analytical data. *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 733–34 (9th Cir. 2001)(overruled on other grounds by *Monsanto Co. v. Geertson Seed Farms*, 561 U.S.

139 (2010).

147. Furthermore, if “agencies lack the power to guarantee the improvements in question. . . . the proper course is to exclude them from the analysis and consider only those actions that are in fact under agency control or otherwise reasonably certain to occur.” *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 936 (9th Cir. 2008).
148. Accordingly, district courts routinely reject agency analyses that fail to address the effectiveness of proposed mitigation measures. *See e.g. Nat’l Tr. for Historic Pres. v. Suazo*, 2015 WL 1432632, at *12 (D. Ariz. 2015) (“Because the Final EIS lacks an evaluation of the effectiveness of the mitigation measures, and this evaluation is an “essential component of a reasonably complete mitigation discussion,” [], the Court finds the Final EIS’s discussion of mitigation measures inadequate under NEPA.”); *see also Gifford Pinchot Task Force v. Perez*, 2014 WL 3019165, at *39 (D. Or. 2014) (“the 2012 EA fails to address the effectiveness of the mitigation measures”).
149. Moreover, if the effectiveness of such mitigation is not assured, then the Forest Service cannot sign a FONSI and must prepare an EIS. *See e.g. Babbitt*, 241 F.3d 722, 733–34 ; *Foundation for North American Wild Sheep v. U.S. Dep’t of Agric.*, 681 F.2d 1172, 1178 (9th Cir. 1982)(finding that Forest Service had failed to establish that a road closure was an effective mitigation method and requiring a full EIS); *Sierra Club v. Bosworth*, 352 F. Supp. 2d 909, 924–25 (D. Minn. 2005) (“the Forest Service’s EA contains little to no analysis of any illegal use of ‘closed’ roads in the Project. This omission is particularly significant in light of . . . the questionable efficacy of road closures through use of berms and gates, and the Forest Service’s concession that such illegal uses have and do occur The analysis of this factor

favors the necessity of preparing an EIS.”)

150. As discussed above, Project logging and road-building will cause a loss of elk security, but the Revised Forest Plan mandates that all projects maintain elk security. Thus, the Forest Service proposed a measure – “creating” new elk security by posting a sign that states that a portion of a road is closed – in order to mitigate the otherwise significant impact of this Project. The EA simply assumes that this measure will be effective, and based on that assumption, represents that the Project will not violate the Revised Forest Plan. However, there is no discussion in the EA regarding the efficacy of this proposed mitigation measure. This failure to discuss the efficacy of the proposed mitigation measure in the EA violates NEPA’s hard look requirement. Furthermore, the record does not support the assumption that this mitigation measure will be effective – therefore, an EIS is required to address the significant impact of the Project.
151. Finally, the Forest Service’s failure to demonstrate compliance with the Revised Forest Plan violates NFMA. As discussed above, the posting of a sign alone will fail to prevent motorized access on Road 1956 E; therefore, the Project will result in a net loss of elk security. This reduction in elk security violates Revised Forest Plan FW-GDL-WL-13, which states: “Management activities in elk management units should maintain existing levels of elk security (see glossary).” The Forest Service’s reliance on an ineffective closure method to demonstrate Revised Forest Plan compliance is arbitrary and capricious, and violates the Revised Forest Plan and NFMA.

VIII. RELIEF REQUESTED

For all of the above-stated reasons, Plaintiffs request that this Court award the following relief:

- A. Declare that the Project violates the law;

- B. Either vacate the Project Decision or enjoin implementation of the Project;
- C. Award Plaintiffs their costs, expenses, expert witness fees, and reasonable attorney fees under EAJA and/or the ESA; and
- D. Grant Plaintiffs any such further relief as may be just, proper, and equitable.

DATED this 20th Day of May, 2020.

/s/Rebecca K. Smith
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