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Attorneys for Plaintiffs

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

Paul and Cathy Donohoe; Torian
Donohoe; Kyle and Anna Donohoe;
David and Kayce Arthun, and Castle
Creek Ranch L.P.,

Plaintiffs,

vs.

U.S. Forest Service, Forest Supervisor
Mary Erickson, District Ranger Ken
Coffin,

Defendants.

Case No.: _____

**COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF**

I. INTRODUCTION

1. Plaintiffs seek judicial review under the citizen suit provisions of the Administrative Procedure Act (APA) and the Endangered Species Act (ESA) of the United States Forest Service (Forest Service) analysis and authorization of a

trail construction project in the Initial Creek/West Fork of the Stillwater River Area (Project Area) of the Custer Gallatin National Forest, Beartooth Ranger District. The full scope of the Forest Service's proposed trail construction project was to construct three plus miles of trail as well as an associated foot/stock bridge over the Westfork of the Stillwater River between the Castle Creek Trailhead and Westfork of the Stillwater River Trailhead (Project).

2. The Forest Service purported to comply with the National Environmental Policy Act (NEPA) by using categorical exclusions (CatEx) to build the Project, which it did in two phases. Phase 1, consisting of reconstructing the trail between the Initial Creek Campground and West Fork of the Stillwater River Trail Head (West Fork Trailhead), was completed in the fall of 2019. Phase 2 of the project has not yet started. The Project, if completed, will significantly impact and disrupt the natural balance and status quo of the area. The Forest Service has slated Phase 2 for implementation as soon as possible and has advised Plaintiffs that it may begin construction immediately. Besides the harm already caused, completing the Project will irreparably damage Plaintiffs' interest.

3. The Forest Service impermissibly segmented the Project to serve a single constituency, backcountry horse users, using funding and implementation under multiple Forest Service and Federal Highway Administration (FHWA) categorical exclusions. After responding to Plaintiffs' sixty-day notice of intent to sue letter

by initiating ESA Section 7 consultation with the United States Fish and Wildlife Service (USFWS), the Forest Service misrepresented the scope of the Project and its potential impacts on the threatened grizzly bear, rendering the consultation inaccurate and insufficient.

4. The Forest Service's approval of the Project under two separate Decision Memoranda was arbitrary and capricious, an abuse of discretion, was not in accordance with the law, and is not supported by substantial evidence in the record.

5. 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. §§ 1531 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*

6. Plaintiffs request the Court set aside the remainder of the Project pursuant to 5 U.S.C. § 706(2)(A) and enjoin implementation of the Initial Creek – Castle Creek Connector Trail portion of the Project (Phase 2).

7. Plaintiffs seek a declaratory judgment, injunctive relief, the award of costs and expenses of suit, including (if they prevail) attorney fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, and the Endangered Species Act, 16 U.S.C. § 1540(g)(4), and such other relief as this court deems just and proper.

II. JURISDICTION

8. 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 Plaintiffs' claims under 28 U.S.C. §§ 1331, 1346.

9. An actual controversy exists between Plaintiffs and Defendants. Plaintiffs use and enjoy the Custer-Gallatin National Forest for hunting, fishing, cattle grazing, camping, enjoying the scenery and wildlife, and engaging in other recreational activities. Plaintiffs' privately owned property is surrounded by the Project Area and within the Custer Gallatin National Forest, is immediately adjacent to the proposed trail construction Project, and is significantly impacted by all Forest Service decisions in the Project Area. Plaintiffs' agricultural business is conducted on lands within the Project Area and on private lands immediately outside the Project Area. Plaintiffs have substantial interest in the federal government's monitoring and management of the grizzly bear in the Greater Yellowstone population, especially in light of significant documented growth in bear population. Plaintiffs intend to continue to use and enjoy the area continuously for generations to come.

10. The Plaintiffs' recreational, aesthetic, economic, spiritual, and educational interest have been adversely affected and irreparably injured by Defendants' implementation of Phase 1 of the Project and will be irreparably damaged if

Defendants implement the remainder of the Project, Phase 2. These are concrete and actual damages and injuries caused by the Defendants failure to observe and comply with mandatory duties under NEPA, the ESA, NFMA, and the APA.

11. This Court has the authority to redress the Plaintiffs' injuries by granting the relief requested under the 28 U.S.C. §§ 2201-02 and 5 U.S.C. §§ 705-06.

12. Plaintiffs submitted timely comments and objections concerning the Project in the available NEPA scoping process for Phase 2 and no further opportunity for appeal was available under Forest Service regulations. They have, therefore, exhausted their administrative remedies.

13. Plaintiffs provided Defendants with the appropriate notice of intent to file suit for violations of the ESA.

III. VENUE

14. Venue is proper under 28 U.S.C. § 139 (e)(1) and L.R. 3.2(b). A substantial part of the events or omissions giving rise to this action occurred in Sweetgrass or Carbon County and the property that is the subject to the action is in Sweetgrass County, which according to L.R. 1.2(c) is in the Billings Division of the United States District Court for the District of Montana.

IV. PARTIES

15. Plaintiffs Torian Donohoe, Kyle Donohoe, Anna Donohoe, and David and Kacey Arthun are the shareholders of Castle Creek Ranch LP. All shareholders of

Castle Creek Ranch LP are members of a multi-generational family ranch, which has called the Project Area and surrounding community home for over 100 years. Castle Creek Ranch LP owns private land holdings within the Custer National Forest in the Project Area. These lands are immediately adjacent to the proposed Project's uncompleted trail construction, and the Forest Service's proposed new trail construction attempts to circumnavigate Castle Creek Ranch private lands. Torian Donohoe has a deep connection to and relationship with the Project Area and Castle Creek Ranch lands, as she grew up on the family's ranch. Kyle and Anna Donohoe live fulltime in the immediate vicinity of the Project Area with an address of Nye, MT. The couple produces their primary income from involvement in their family's ranching and outfitting enterprises, and they work daily with Plaintiffs Paul and Cathy Donohoe, Kyle's parents. David and Kayce Arthun reside in Absarokee, MT, which is only a short distance from the Project Area and Castle Creek Ranch LP. Kayce grew up on the family's ranch and is the daughter of Paul and Cathy Donohoe.

16. Plaintiffs Paul and Cathy Donohoe live on the family ranch a short distance from the Project Area on lands that are contiguous with those held by the members of Castle Creek Ranch LP. The couple produces their primary income from ranching and outfitting in the Project Area and surrounding vicinity. Paul outfits on private land holdings surrounding the Project Area and in several regions of the

Custer National Forest on a Forest Service outfitting permit. The couple has deep roots and connections to the Project Area and the region surrounding it that only a lifetime of caring for the land and experiencing the immense biological shifts over long periods firsthand can create. The couple is actively involved in civic committees and activities involved with shaping the future of the Nye community and the Custer National Forest.

17. Defendant Mary Erickson is the Forest Supervisor for the Custer Gallatin National Forest and is responsible for overseeing all activities and proposed actions in Custer Gallatin National Forest. She is responsible for ensuring the decisions made by all Custer National Forest personnel subordinate to her position follow their statutory obligations under NEPA, the ESA, the APA, and NFMA, and all other applicable laws, regulations, official policies, and relevant procedures. The Custer Gallatin Forest Supervisor's office is located in Gallatin County.

18. The Forest Service is an agency within the United State Department of Agriculture. The Forest Service is tasked with the lawful management of all National Forest lands, including the Custer Gallatin National Forest - Beartooth District, where the Project Area is located.

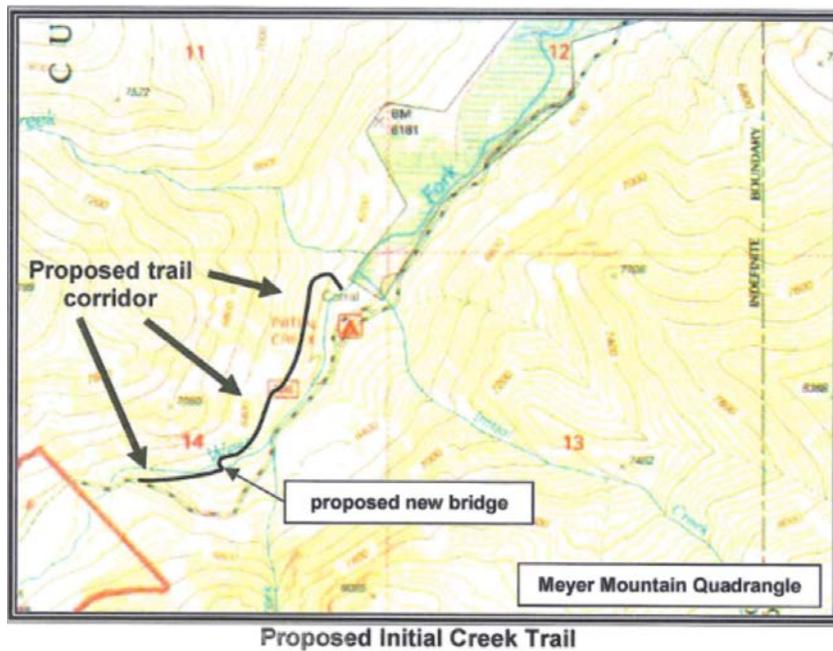
19. Defendant Kenneth W. Coffin is the District Ranger for the Custer National Forest – Beartooth District and is immediately responsible for the Decision Memo authorizing Phase 2 of Project construction in 2019. Coffin is also responsible, in

his official capacity, for assuring NEPA, the ESA, NFMA, and the Custer National Forest Management Plan are followed.

V. FACTUAL ALLEGATIONS

Project Location and Forest Conditions

20. The Project is located in Sweetgrass County Montana, in the Custer National Forest–Beartooth District. The Project is located in the area between Castle Creek Trail Head and the West Fork of the Stillwater Trailhead, including the Initial Creek Campground. The following is a Forest Service map of Phase 1:



21. The area outlined and shown in blue hash mark on the map above indicates Plaintiffs’ private lands. The “proposed new bridge” has been built by the Forest Service, as detailed herein.

2007 Fisheries Specialist Report

22. On December 18, 2007, Darin A. Watschke, Fishery Biologist for the Custer National Forest issued a Fisheries Report for Phase 1 of the Project. Watschke's report explicitly details the construction needed to complete Phase 1 of the project, noting the Forest Service will reconstruct "approximately 3,200 feet of road and 1,800-1900 feet of trail," construct a new bridge at the old bridge site to span the West Fork of the Stillwater River, and build "200-300" feet of new trail outside the old transportation system at the trail termini. See Ex. "A" attached. Watschke states that to bring the proposed trail up to standard "it will require removal of down fall and brush, and rocking of the proposed corridor" as well as grading in the newly constructed section. The Fisheries Report notes that if the project activities change after this evaluation is completed, an updated Biological Evaluation should be considered." The 2007 Fisheries Report was included as part of a biological assessment completed for Phase 1 in 2014, which described Phase 1 of the project in similar terms. The Fisheries Report has never been updated in consideration of, now proposed, Phase 2 of the project.

2010 Letter to Montana State Historical Preservation Officer

23. On May 3, 2010, Former Beartooth District Ranger Traute Parrie, through Forest Service employee Jeff Gildehaus, addressed a letter to the Montana State Historic Preservation Officer, Dr. Mark Baumler, seeking concurrence that the

“reconstruction of an abandoned historic road and trail” known as the “Bryant Road” would have “NO ADVERSE EFFECT to the qualities that make the road eligible for nomination on the NRHP” (National Register of Historic Places).

(Emphasis in original.) The Montana State Preservation Officer concurred on May 26, 2010 by stamping and returning the letter to the Forest Service.

24. The Forest Service maintains that this correspondence “propos[ed] to establish a new trail connecting the Initial Creek Campground with the West Fork Stillwater Trailhead.” Though the historic preservation concurrence letter notes the Bryant Road is 5.0 miles long, the projects description claims the project would only “consist of 200-300 feet of new construction and 5000-5100 feet of reconstruction . . . [and] [o]ne new bridge . . . across the West Fork of the Stillwater River” (Phase 1).

25. The Forest Service website contains a page titled “Faces of the Forest Service Meet Jeff Gildehaus.” Mr. Gildehaus is the Forest Service employee that signed the historic preservation concurrence letter for the District Ranger Parrie. Ironically, the website notes that Mr. Gildehaus sees his job as “eliminating bureaucratic red tape whenever he can.” <https://www.fs.usda.gov/faces-of-the-forest-service/meet-jeff-gildehaus>.

Biological Assessment for Initial Creek Trail Reconstruction Project

26. On December 11, 2014, the Forest Service issued a Biological Assessment for Threatened, Endangered, and Proposed Species for the Line Creek Basin Re-Alignment and Initial Creek Trail Construction Projects (2014 Biological Assessment).

27. The 2014 Biological Assessment describes the purpose of Phase 1 of the Project as follows:

The purpose is to provide trail access from the Initial Creek Campground to the West Fork Stillwater Trailhead. The proposed project would utilize an old transportation system encompasses approximately, 3,200 feet of road, and 1,800-1,900 feet of trail and a bridge site. Approximately 200-300 of new trail construction near the trail termini would be required. In addition, a pack and stock bridge would be installed at an old bridge site to span the West Fork Stillwater River.

28. The 2014 Biological Assessment confirmed that the grizzly bear population in the Custer National Forest–Beartooth District is steadily growing, and grizzly bears are present in the Project Area, stating:

Grizzly bear observations in and adjacent to the Beartooth Mountains have increased over the past several years, with an increase from 4 documented individual bears in 2009 and zero in 2010, to 12 in 2011, 27 to 29 individuals in 2012, and a minimum of 43 individuals in 2013 (Stewart 2014). Grizzly bear sightings have been documented . . . *within approximately 2 miles of the Initial Creek Trail in years 2002, 2006, and 2012* (Montana Natural Heritage Program database). Potential thus exists for grizzly bears to be present throughout the

Beartooth Mountains and *for individual bears to travel through both project areas.*

Letters of Recommendation to the Recreational Trails Program

29. Between March 3 and March 6, 2015, Ms. Beth Shumate at the Montana State Parks Recreational Trails Program (RTP), received numerous letters from members of the public supporting a grant proposal submitted by Forest Service employee Allie Wood to fund the purchase of the bridge materials needed for Phase 1 of the Project, which were submitted to the selection committee for a Recreational Trails Program grant.

30. The RTP is a federally funded grant program that supports Montana trails. Grant funds come from the Federal Highway Trust Fund, and funded projects must meet the requirements of a Federal Highway Administration (FHWA) NEPA categorical exclusion. 23 C.F.R. § 771.117.

31. Application materials for 2015 RTP grants recommend “the general public, adjacent landowners, and other interested parties should be involved from the onset.” Though the application materials note public involvement is not required it recommends “promotion of public participation [] through newspaper articles and any other means available, such as public meetings, federal quarterly newsletters, TV programs, radio announcements, etc.”

32. Application materials for 2015 RTP grants indicate that the “State Historic Preservation Officer (SHPO) must review each grant application . . . [and] if a

federal agency is involved, the agency must consult SHPO pursuant to the National Historic Preservation Act.”

33. To assure the proper NEPA and Montana Environmental Policy Act (MEPA) procedures have been followed prior to authorizing a project, the RTP committee allows federal to submit a “Environmental Analysis Tiering Letter” to assure NEPA requirements have been met.

34. On March 6, 2015, District Ranger Parrie signed an Environmental Analysis Tiering Letter stating that she had confirmed through internal and external scoping that there were no extraordinary circumstances related to Phase 1 of the Project.

35. Three days prior to confirming NEPA compliance in the Tiering Letter, on March 3, 2015, Forest Service employee Jeff Gildehaus signed and submitted a letter of support for the bridge materials grant to the Recreational Trails Program on behalf of District Ranger Parrie.

36. The letters of recommendation to the RTP were the only NEPA scoping conducted on Phase 1. These letters were obtained by direct contact of the interested parties by Forest Service employee Allie Wood. While the letters generally follow a “form” letter format that was likely provided to the parties, which announces support for Phase 1 of the Project, several letters make statements indicating the entire Project was already contemplated at this time.

These letters are primarily from horseback users, likely affiliated with Beartooth

Backcountry Horsemen, and announce a general enthusiasm for the “prospects for re-establishing an old historic route.”

37. RTP Grant applications were due no later than March 6, 2015. Forest Service employee Wood submitted the grant application on March 6, 2015 confirming all grant requirements had been met.

38. On May 29, 2015, the State Trails Advisory Committee (STAC) awarded an RTP Grant for the Project’s bridge materials in the amount of \$25,612.00.

2015 Decision Memo for Phase 1 of Trail Construction

39. On March 6, 2015, District Ranger Parrie issued a Decision Memo approving Phase 1 of the Project, construction of the portion of the trail between the Initial Creek Campground and the West Fork Trailhead and the associated bridge to cross the West Fork of the Stillwater River at the terminus of the new trail nearest the West Fork Trailhead. The Decision Memo is titled *The Initial Creek Bridge Installation and Deferred Trail Maintenance*.

40. Though issued under District Ranger Parrie’s authority, the Decision Memo was signed by Forest Service employee Jeff Gildehaus.

41. The Decision Memo states the trail and bridge are needed to “alleviate congested parking at the West Fork Stillwater trailhead by providing adequate trailer parking at the campground and a safe route via the historic route to the trailhead.”

Forest Service Employee Allie Wood's Letter Concerning NEPA Scoping

42. Though the exact date of the communication is not apparent in Forest Service documentation, Plaintiffs' information and belief is that on March 6, 2015, Forest Service employee Allie Wood conferred with Forest Service NEPA Coordinator Mark Slacks to determine the extent of scoping required for Phase 1 of the project. The intended recipient of this correspondence is also not apparent in the document provided to Plaintiffs from the Forest Service. The Plaintiffs did not receive a purpose and need, or scoping, correspondence from the Forest Service.

43. Ms. Wood was informed the letters she had sought in support of her RTP application would meet NEPA's scoping requirements. The corresponding document appears as follows in the record provided to Plaintiffs:

Friday 6 2015,

Re: Initial Creek Bridge and Trail Maintenance

I called Mark Slacks concerning external scoping for the Initial Creek Bridge Installation and Trail Maintenance project. The Initial Creek Bridge Installation and Trail Maintenance Project falls under 36 CFR 220.6 (e)(1) and requires a project folder and DM. My question to Mark was, to meet the external scoping requirement, do I need to issue a News Release/letter for comment. I informed I contacted a variety of user groups and individuals for Support Letters for the RTP grant. Mark said that ~~meant~~ ^{met} the intent of the external scoping.

Allie Wood

Forest Service's 2018 Scoping Letter

44. On March 2, 2018, District Ranger Ken W. Coffin, who replaced District Ranger Parrie as the District Ranger for the Beartooth Ranger District, sent a letter

to interested parties requesting that “comments related to issues and concerns regarding” the construction of Phase 2 of the Project be submitted to Allie Wood by March 16, 2018. The Forest Service’s proposed action to be addressed in the interested parties’ comments was the construction of the trail from the Castle Creek Trailhead to the Westfork Stillwater Trailhead (Phase 2).

45. Plaintiffs did receive this letter, and responded with written concerns over the project, including: whether there was a need for redundant access points to the same area of the Custer National Forest; potential inappropriate use of trail maintenance and construction funds when funding was already limited to care for existing trails; increases in traffic to the county road referred to as Limestone Road, which turns into a Forest Service Picket Pen road prior to Castle Creek Trailhead; concerns over installing gates, signage, and fencing on their impacted private lands, with their primary concern focused on the potential ramifications of cattle moving into the Initial Creek Campground area after trail implementation removes the existing forest barrier; and concerns over the fact the project had been approved.

46. Plaintiffs also raised concerns over their belief that Phase 2 had already seemingly been approved prior to scoping. These concerns arose because Plaintiff’s had not been notified either during Phase 1’s scoping or after Phase 1’s approval that the Forest Service intended to undertake the project; therefore,

when they saw the bridge materials in the Project Area they had no idea the bridge materials been acquired under an earlier decision memo and assumed the Forest Service was proposing the project all at one time.

47. The Forest Service never included Phase 1 of construction on the Schedule of proposed actions (SOPA) for the Custer National Forest.

2019 Decision Memo—The Initial Creek – Castle Creek Connector Trail

48. On April 15, 2019, District Ranger Coffin signed a Decision Memo for construction of the trail/road from the Castle Creek Trailhead to the Initial Creek Campground (2019 Decision Memo). This Decision Memo encompasses the actions Plaintiffs now seek to enjoin.

49. Though never mentioning any concerns with the current access road in Phase 1's Decision Memo, the Forest Service now provided the following relevant Background on Phase 2:

Access to the campground and the West Fork Stillwater Trailhead via the Forest Service Road #2841 which is classified as a Maintenance Level 3 road. Maintenance Level 3 is assigned to roads that are open and maintained for travel by a prudent driver in a standard passenger car. Roads in this maintenance level are typically low speed single lane with turnouts and spot surfacing. Although stock trailers are allowed on the road it was not designed to accommodate this type of traffic. The road is narrow and the turnouts are not adequate in size or strategic spacing to accommodate two way traffic of passenger and/or stock vehicles. The road is difficult to navigate with a stock trailer and can be hazardous when another vehicle or stock trailer is met along its corridor.

50. The proposed action for Phase 2 of construction is defined as:

The Beartooth Ranger District proposes to provide additional access to the Initial Creek Campground, and the West Fork Stillwater Trailhead via a non-motorized trail. The proposed action would utilize approximately 1.5 miles of the historic Bryant route and the construction of .5 miles of new trail on Forest Service lands to avoid a section of private property that the original route traversed.

51. The Forest Service defines the entire scope of work required for Phase 2's construction as "trail treading, deadfall and brush clearing across and within the proposed nonmotorized trail corridor."

52. The Forest Service states they will construct the trail "throughout the field season typically May-September," but does not state an exact or approximate implementation date for Phase 2. Based on observations of Forest Service activity in the area, Plaintiffs believe that the Forest Service may be preparing to begin construction immediately.

53. In responding to Plaintiffs concerns over the likelihood that the proposed action would increase traffic on the Stillwater County road known as Limestone Road, District Ranger Coffin response in the Decision Memo States:

As required by the Code of Federal Regulations, which provides direction for NEPA implementation (40 CFR 1500-1508), environmental analyses are intended to focus on and disclose effects on Federal Lands. The Limestone Road is a county road, therefore, is beyond the scope of this environmental analysis.

54. Limestone Road turns into Picket Pen Road, which is a Forest Service road; therefore, any concerns over increased traffic on Limestone should have been interpreted as also raising corresponding concerns on Picket Pen Road.

55. In response to Plaintiffs concerns over sufficient funding to maintain the trail and care for weed issues, District Ranger response states, “the existing prism is in excellent shape and require[s] minimal clearing and tread work.”

56. The District Ranger’s statement is a gross misrepresentation of the work required to complete Phase 2, which clearly reflects the Bryant Road/Trail has been abandoned for nearly 80 years. In addition, the statement neglects to note an additional small bridge will likely be needed to cross a small steep sided mountain stream.

57. The 2019 Decision Memo notes the Phase 2’s proposed actions were included in the quarterly SOPA. Plaintiffs cannot confirm this claim in the public record available.

Plaintiffs Raise Concerns to United State Representative Gianforte

58. On July 30, 2019, Plaintiffs Paul and Cathy Donohoe voiced their concerns with how the project had been implemented to United States Representative Greg Gianforte, expressly noting in their Privacy Release Form, that “the cattle will follow the trail to the Westfork Campground – this becomes a problem. They now

cannot get through due to dense forest growth - years ago the cattle were up in the campground on and off.”

Forest Service Response Letter to United States Representative Greg Gianforte

59. On August 16, 2019, Forest Supervisor Erickson responded to Gianforte’s inquiry.

60. Forest Supervisor Erickson states:

Current access is via the Initial Creek Road, a steep, rocky, narrow, backcountry road and while people do haul trailers, it is difficult and often unsafe to do so, especially during the hunting season when snow and icy conditions prevail. The new trail ties into the West Fork Stillwater River trailhead and would minimize these user safety concerns.

Various Conference Calls and Site Visits with Forest Service Officials

61. In April of 2018, District Ranger Coffin participated in a conference call with Plaintiffs Paul, Cathy, and Torian Donohoe. The Plaintiffs noted to District Ranger Coffin the previously stated concerns with their domestic cattle leaving Castle Creek’s inholdings and venturing into the Westfork of the Stillwater Trailhead area. Noting the forest growth had formed a natural barrier between the locations over time.

62. In May of 2018 District Ranger Coffin walked the proposed trail with Plaintiff Paul Donohoe.

63. In May of 2019 District Supervisor Erickson met with Plaintiffs via conference call.

64. In July of 2019 Forest Supervisor Erickson met with Plaintiffs Paul and Cathy Donohoe at the Castle Creek Campground to discuss Phase 2 of the Project but did not make herself available to physically walk the proposed trail to assess whether representations made in District Ranger Coffin's Decision Memo about Phase 2 were accurate.

65. Had Forest Supervisor Erickson physically inspected the Phase 2 project site at the time of meeting Donohoes, she would have discovered that District Ranger Coffin's claim that "the existing prism is in excellent shape and require[s] minimal clearing and tread work," is a gross misrepresentation of the site, which obviously reflects that the Bryant Road/Trail has been abandoned for nearly 80 years.

66. Site inspection reveals, the section of trail that is yet to be constructed transects an area that is heavily wooded, overgrown by significant underbrush, and repeatedly crisscrossed by large deadfall. Phase 2 construction also requires crossing a steep banked mountain stream, which evidence of stone bridge abutments on the embankments suggests was previously crossed by bridge. The photo below is indicative of the condition of the forest where Phase 2 will be constructed and was taken in the fall of 2019. Upon Plaintiffs' information and belief, the pink flagging marks the proposed path for the trail.



Plaintiffs FOIA Request

67. On August 26, 2019, Plaintiffs Paul and Cathy Donohoe sent the following FOIA request to the Forest Service,

We are requesting all paperwork from conception on the Initial Creek Trailhead Access Bridge via email. We want to see the scoping letter, list of people whom received the scoping letter, NEPA, Decision Memo, comments from general public, costs involved in building this bridge & any other paperwork regarding this bridge.

Forest Service FOIA Letter and Responsive Documents

68. On September 6, 2019, the Forest Service responded to the FOIA request. The FOIA letter accompanying the Forest Service's responsive documents itemized the costs associated with the bridge's construction, which noted anticipated costs because the bridge and trail work were not yet complete. Though

the Forest Service indicated it had included all responsive documents in their response, the documents provided to Plaintiffs did not include any receipts or statements corresponding for the specific costs noted in the accompanying letter.

69. Evidence in the record also indicates the documents provided were incomplete. For example, the 2015 Decision memo stated scoping was “accomplished through phone calls and e-mail to interested partners,” yet no e-mails were included with the FOIA documents.

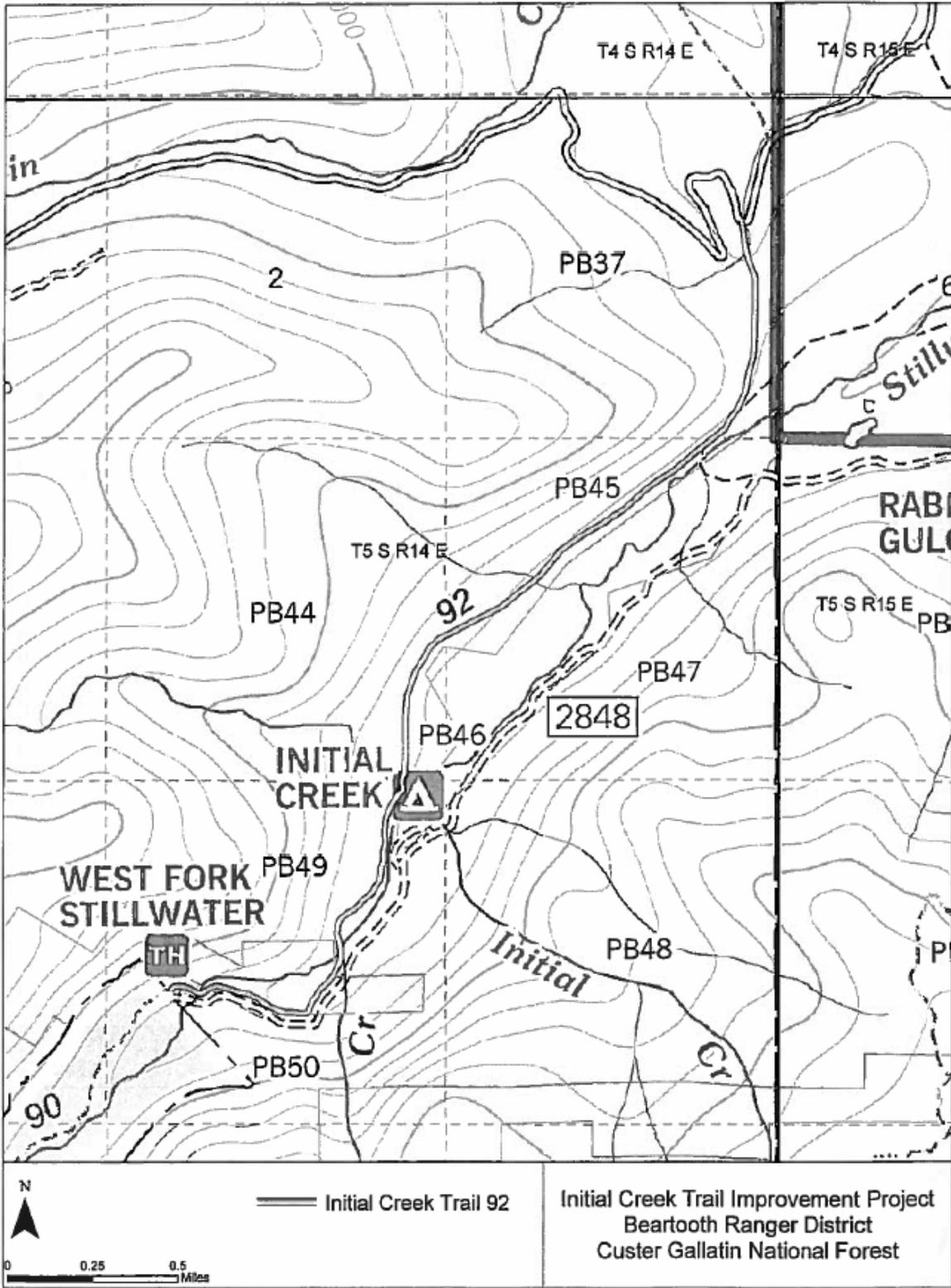
70. The Forest Service determined five records were responsive to Plaintiffs request: (1) District Ranger Traute Parrie’s letter to the Montana State Historic Preservation Officer seeking concurrence with the Forest Service opinion, with no associated attachments included (signed by Jeff Gildehaus); (2) a one page document stating the “Proposed Action” and the “Purpose and Need” for Phase 1 of the Project; (3) the Decision Memo for Phase 1 of the project (signed by Jeff Gildehaus on behalf of District Ranger Traute Parrie); (4) Nine letters of support to purchase bridge materials with an RTP grant addressed to the Montana Recreational Trails Program and one draft letter/e-mail to Forest Service employee Allie Wood stating the nine letters and corresponding outreach were sufficient scoping for Phase 1; and (5) the 2014 BA and associated 2014 Programmatic Biological Assessment.

Forest Service 2020 RTP Grant Application

71. On January 9, 2020, Forest Service employee Wood applied for a RTP grant to fund work on Phase 2 of the Project, defining the entire need for funding as follows:

The project consists of the general trail maintenance on approximately 260 miles on the Beartooth Ranger District trail system and 6 miles of trail Improvement on Initial Creek #92, West Rosebud #19, Line Creek Basin #7.4 and Palisades #109 trails also within the Beartooth Ranger district Custer Gallatin NF, Red lodge Montana. The work will occur between the months of May and Mid-October.

72. As indicated by the map attached to the RTP application, which follows, the Forest Service has now designated the entire Project, both Phase 1 and Phase 2, as “Initial Creek #92.”



73. The Forest Service’s application states the Initial Creek Trail work, Phase 2, will consist of “1. the improvement of approximately 1.5 miles of trail; 2. 50 large rock removal; [and] 3. 2500-4000 feet of grade work.”

74. 2020 RTP grants using a CatEx have similar requirements to 2015 applications. To use the FHWA CatEx the project cannot:

2. Result in a determination of adverse effect on historic properties pursuant to Section 106 of the National Historic Preservation Act;
3. Have a significant impact to planned growth or land use for the area;
4. Be expected to induce controversy on environmental grounds;
8. Affect federally listed or candidate species, or proposed or designated critical habitat, or have impacts subject to the conditions of the Bald and Golden Eagle Protection Act;

75. The Forest Service application did not address any of these requirements.

76. On December 23, 2019, District Ranger Coffin certified on the 2020 RTP grant application that reconstructing Phase 2 of the Project fell under Forest Service CatEx 36 C.F.R § 220.6(d)(4). This CatEx excludes further NEPA remove or preparation of Forest Service project file for “repair and maintenance of roads, trails and landline boundaries.”

77. District Ranger Coffin’s certification is inconsistent with the 2019 Decision Memo, which utilized CatEx 36 C.F.R § 220.6(e)(1), which requires a decision memo and Forest Service file, and applies to trail construction or re-construction.

78. Plaintiffs acknowledge that RTP application materials state that “trail projects on routes legally designated or otherwise appropriately approved by the land managing agency” are eligible for grant funds; however, Plaintiffs note that District Ranger Coffin had received Plaintiffs’ 60-day notice of ESA violations prior to RTP selections and did not update the Forest Service’s application, withdraw the Phase 2 from the application, or inform the selection committee of this change in status.

79. On April 17-18, 2020, at STAC’s RTP grant selection committee the Forest Service received a grant to carry out the work on Phase 2 of the Project.

Plaintiffs Notice of Violation of the Endangered Species Act and Intent to Sue

80. On March 11, 2020, Plaintiffs Paul and Cathy Donohoe, through their counsel, provided a 60-day notice of intent to sue for violations of the ESA to the Forest Service (60-Day Notice). This letter clearly outlined numerous problems with the Forest Service’s analysis on the Project and corresponding violations of the ESA.

81. Plaintiffs’ 60-Day Notice expressed Plaintiffs’ concerns over the trail providing unencumbered access for grizzly bears to travel into ranches and farms in lower elevations, stating,

Of particular concern for the Donohoes and the recovering grizzly population are the spring and early summer months, when bears emerge from hibernation to scarce food supplies at higher elevations in the Beartooth

Mountains. The proposed trail would lead grizzlies directly to ranches in lower elevation valleys commonly in the middle of calving or lambing in spring and early summer. Livestock predations and grizzly sightings in and around Red Lodge, Montana, which is only a short distance from the Project area and Donohoe's ranch, are well documented in recent years, and grizzlies were euthanized for repeat livestock predations in 2015, 2018, and 2019.

Revised Biological Assessment for the Project

82. In response to Plaintiffs' 60-Day Notice, on May 1, 2020, the Forest Service finalized a Revised Biological Assessment for the Initial Creek Trail and Realignment Project (Revised Biological Assessment), superseding the 2014 Biological Assessment and addressing some, but not all, of the violations and issues of concern noted in Plaintiffs' 60-Day Notice.

83. In summarizing the scope of the work needed to complete the project the Revised Biological Assessment notes, "work would be conducted during the summer field season by trail crews using hand tools, chainsaws, and *potentially blasting*."

84. The Revised Biological Assessment affirms the 2014 Biological Assessment's conclusions that grizzly populations are increasing Greater Yellowstone Area, noting :

Due to an increased population of grizzly bears and a wider distribution throughout the Greater Yellowstone Area (GYA), the potential for grizzly bear/human conflicts has increased over the decades. Continuation of

these upward trends suggests the potential for conflict may continue to increase in the future.

85. The Revised Biological Assessment summarized pertinent scientific literature on Grizzly food sources stating that “four key food groups have been identified that provide concentrations of proteins and fats that are essential sources of energy and nutrients for [grizzly] bears. These include ungulate biomass (obtained through direct predation as well as scavenging carcasses), spawning cutthroat trout ..., whitebark pine seeds, and army cutworm moths.”

86. “Ungulate biomass” includes but is not limited to cattle, sheep, pigs, horses, and goats, collectively “domestic livestock.”

87. The Revised Biological Assessment states that “[i]n addition to secure habitat related to motorized human access, other major human activities that affect grizzly bears and their habitat include permanent developments (aside from roads and trails) and domestic livestock grazing.”

88. With regards to permanent developments and domestic livestock grazing, the Revised Biological Assessment notes,

These types of land uses have historically been associated with human-bear conflicts that result in grizzly bear mortalities, primarily due to the presence of attractants such as human food, pet food, livestock feed, garbage, animals or carcasses that draw bears into areas or situation where they are removed either through management actions or defense of life or property.

89. The Revised Biological Assessment summarizes the impacts Phase 2's proposed construction will have on grizzly bear "Secure Habitat" as follows:

Grizzly Bears generally avoid areas with high road densities, reducing the amount of available habitat. Roads also provide access to remote areas which increases use of those areas, potentially increasing confrontations. Open Motorized Road Densities (OMARD) and total motorized road densities (TMARD) baseline standards were established in the 2006 and 2016 Conservation Strategies. The baseline for road densities and associated levels of secure habitat was set at those present in 1998. The proposed project is located outside of the designated RZ/PCA therefore the 1998 baseline does not apply. Despite this the reconstruction and realignment of the Initial Creek trail will not result in any change to the existing levels of OMARD, a slight reduction in TMARD, and a corresponding increase in secure habitat within the BAU (Table 2). These changes are associated with the designation of the existing road as non-motorized use only.

90. The Revised Biological Assessment summarized the trail reconstructions impact to livestock grazing on grizzly habitat as follows:

Commercial livestock grazing represents one of the activities associated with human use with the highest potential for negative conflict with grizzly bears. The Conservation Strategy sets a standard and application rules for the number and acreage of active livestock grazing allotments. The proposed action will not modify the existing permitted levels of commercial livestock grazing.

91. The Revised Biological Opinion found “the primary effect from the proposed action on grizzly bears involves the presence of humans within bear occupied habitat and the potential for human /bear encounters and conflict.”

92. The Revised Biological Opinion clearly states that human bear conflicts “may result in the intentional killing of a bear in defense of human life during direct confrontations” and “[d]irect mortality may also occur during agency control of nuisance bears.”

93. The Revised Biological Opinion highlights:

Of the active seasons spring and fall represent the most critical and present the greatest potential for human/bear conflict. During the spring and fall bears tend to be single minded in their pursuit of food and are often distributed at lower elevations in closer to proximity to the majority of human use.

94. The Revised Biological Opinion’s cumulative effects analysis reads as follows:

The Forest Service does not know of any activities that are reasonably certain to occur on nonfederal lands that will affect denning habitat, secure habitat, or TMARD in the future. Ongoing activities on private lands that may continue in the future include mineral development, firewood gathering, and recreational activities. These activities have the potential to disturb grizzly bears. These activities would generally be expected to occur in areas that are already avoided by grizzly bear. As these activities are occurring and are expected to continue in the future, it is unlikely that bears would avoid these areas to a greater degree than is currently occurring. When these effects are combined with the temporary

disturbance associated with the proposed Initial Creek Trail Reconstruction project, the cumulative impact on grizzly bear would be insignificant.

95. The Revised Biological Assessment concluded Phase 2 of the Project “may affect but will not likely adversely affect grizzly bear,” based on seven factors:

1. The Forest Service intends to continue to follow the current Food Storage Order.
2. The new trail/road is restricted to non-motorized use.
3. “OMARD would not change and there would be a slight reduction in TMARD resulting in a small increase secure habitat in the BAU following project completion (Table 2).”
4. “There will be no change to the number or capacity at developed sites. Use of the existing facilities would be consistent with currently allowable usage available to the public.”
5. “The proposed action will not modify the existing levels of commercial livestock grazing and the number and acreage of active commercial livestock grazing allotments would remain the same.”
6. “Activity types and location is consistent with existing allowable public use levels. These use levels have been in place for the past several decades and been associated with a period of grizzly bear growth and expansion.”

7. “Cumulative Effects would be insignificant.”

96. The Forest Service appended pages 5-8 of a Programmatic Consultation Summary it had allegedly completed on March 29, 2018 to the Revised Biological Assessment. The incomplete summary sheets describe the bridge’s construction as part of Phase 2 of the Project but were not provided to Plaintiffs in their FOIA request, are not referenced in the 2019 Decision Memo, and the description is not consistent with the Forest Service’s 2018 scoping notice or the 2019 Decision Memo’s statement of proposed action.

Forest Service request for FWS concurrence on Revised Biological Assessment

97. On May 4, 2020, District Ranger Coffin requested a letter of concurrence from Jodi Bush, Field Supervisor, Montana Ecological Services as required by the ESA. Montana Ecological Services is a division of the for the U.S. Fish & Wildlife Service (FWS).

Forest Service letter to Plaintiffs responding to Plaintiffs’ 60-Day Notice

98. On May 6, 2020, District Ranger Coffin formally replied to Plaintiffs’ 60-Day Notice, enclosing the Revised Biological Assessment, stating that informal consultation with United States Fish and Wildlife Services (USFWS) had been initiated, and claiming for the first time, that a biological evaluation had been completed on Phase 2 of the project in March of 2018.

Plaintiffs Letter Informing Forest Service of Continued ESA Violations

99. On June 10, 2020, Plaintiffs' counsel informed District Ranger Coffin and Forest Supervisor Erickson that review of the Revised Biological Assessment indicated it still failed to address many of the violations identified in the 60-Day.

Summer 2020—Substantial Improvements Were Made to Current Access Road

100. During the summer of 2020 Stillwater Mine made significant improvements and upgrades to the current access road significantly reducing any concerns over vehicles.

101. District Ranger Coffin had to be aware these improvements were scheduled for the current access road.

FWS Concurrence Letter

102. On August 13, 2020, FWS Office Supervisor Jodi L. Bush provided District Ranger Coffin with a letter informing him the FWS concurred with the Forest Service's determinations in the Revised Biological Assessment.

District Ranger Coffin Waits Three Weeks to Inform Plaintiffs

103. Waiting nearly three full weeks, late in the day on September 2, 2020, District Ranger Coffin informed Plaintiffs by e-mail that he intended to proceed with project implementation and his staff had already begun development and implementation plans for Phase 2. Plaintiffs believe construction work is imminent.

Livestock Grizzly Predation—Commercial and Scientific Data

104. Livestock predations by grizzlies in Montana have significantly escalated in recent years as proved by commercial evidence from the Montana Livestock Loss Board. <https://apnews.com/a6ed3420d44c7375d9cabe842846b0b1>.

105. Management bear removal and euthanasia from repeated livestock depredations is trending upward in recent years. The year prior to the 2019 Decision Memo was one of the deadliest years on record for grizzly bears in the Greater Yellowstone Ecosystem. <https://www.mtpr.org/post/following-record-year-yellowstone-grizzly-deaths-officials-discuss-conflict-solutions>.

106. Significant efforts are now being made by federal and state agencies and private groups to reduce domestic livestock/grizzly conflicts through a numerous conflict avoidance techniques. <https://www.fws.gov/mountain-prairie/pressrel/2020/06032020-USFWS-USDA-Providing-Additional-Support-Montana-Livestock-Producers.php>.

VI. CLAIMS FOR RELIEF

COUNT I

ESA Violation

**(Failure to Consider Increased Grizzly Conflicts
with Human Development and Domestic Livestock Grazing)**

107. Plaintiffs reallege, as if fully stated herein, each allegation contained in the preceding paragraphs.

108. The Forest Service's Revised Biological Assessment failed to properly consider and analyze the effects the Phase 2's construction will have on conflicts between human developments/domestic livestock grazing and the threatened grizzly bear; therefore, violating section 7 of the ESA, 16 U.S.C. § 1536 and the ESA's implementing regulations, 50 C.F.R. § 402.

109. The Forest Service is required to insure that any action it authorizes, funds, or carries out is not likely to "jeopardize the continued existence of any . . . threatened species or result in the destruction or adverse modification of habitat, 16 U.S.C. § 1536(a)(2). The grizzly bear is a threatened species.

110. Any action the Forest Service takes "that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species" jeopardizes the continued existence of the species, 50 C.F.R. § 402.2.

111. The purpose of a biological assessment is to evaluate the potential effects of the proposed action and determine whether a formal consultation or conference is necessary, 50 C.F.R. § 402.12.

112. When determining if the effects of the proposed action will jeopardize the continued existence of a species, the Forest Service must consider all consequences to the listed species including those consequences of other activities that are caused

by the proposed action. While the Forest Service must only consider those effects that would not have occurred but for the proposed action and only those effects reasonably certain to occur, they must consider effects that “occur later in time and may include consequences occurring outside the immediate area involved in the action,” 50 C.F.R. §§ 402.2, 402.17.

113. Forest Service documents repeatedly misrepresent and/or intentionally understate the extent of the construction and work needed to rehabilitate the Bryant road/trail, which has been abandoned for roughly 80 years. Forest Service documents make the repeated inaccurate claim that “although [the road was] abandoned, it was not rehabilitated and removed” and “[t]he original route and tread are still in place.” (2019 Decision Memo) The 2014 Decision Memo refers to the reconstruction of the trail/road as “Deferred Trail Maintenance.” In response to Plaintiffs’ concerns voiced during scoping for Phase 2 of the Project and during meetings with Forest Service personnel, the 2019 Decision Memo notes “the existing prism is in excellent shape and require[s] minimal clearing and tread work.” The Forest Service’s assertions promote an assumption that the section of trail proposed for reconstruction in Phase 2 is currently passable. This is not the case. Traversing the proposed path is only presently possible with considerable effort.

114. By depicting the trail construction Project in this manner, Defendants downplay the effects of the proposed action, insinuating it will have little to no impact on the status quo in the area, and that the coexistence of an expanding grizzly bear population and existing uses will not be altered.

115. Misrepresenting the current condition of the Bryant road/trail not only allowed the Forest Service to categorically exclude its actions from further NEPA review, but also mislead USFWS into concurring with their Revised Biological Assessment.

116. The Forest Service's Revised Biological Assessment states that "blasting" may be required to reconstruct the trail/road, which is inconsistent with the Forest Service's claims of minimal clearing and tread work. Plaintiffs also discussed the nature of the forest in the area of Phase 2's proposed trail construction with Forest Service officials during several in person meetings on the project and explained that as time has progressed since abandonment of the road forest growth and downfall have provided a significant natural barrier, which now blocks their cows from entering the Initial Creek Campground area from their adjacent private lands.

117. The same natural barrier has minimized the risk that grizzlies will venture from the remote West Fork of the Stillwater River into the low-lying ranchlands just beyond the Castle Creek Trailhead, which are outside the National Forest

boundary and dominated by livestock operations and significant human development.

118. As rationale for its final determination that the proposed actions for Phase 2 “may affect but will not likely adversely affect” grizzlies, the Forest Service notes that existing “use levels have been in place for the past several decades and been associated with a period of grizzly bear growth and expansion.” Defendants fail, however, to see the flaw in this rationale. As the grizzly population have expanded over the past several decades, forest growth, deadfall, and underbrush expansion in the Project Area have provided an ever-increasing buffer between relatively secure grizzly habitat and plaintiffs livestock operation and other human developments beyond that barrier—protecting grizzlies from the acknowledged ramifications of conflicts with human developments and domestic livestock production and preventing livestock predation losses to farms and ranches just outside the Project Area. The Forest Service’s proposed action now threatens the very status quo they assert has allowed grizzlies to thrive during recovery.

119. The Revised Biological Assessment notes that “ungulate biomass” is one of the essential sources of food for grizzlies. Cows are ungulates.

120. If the proposed action goes forward domestic livestock and human development conflicts are reasonably certain to increase, both because a growing grizzly population will have unencumbered access, via the reconstructed Bryant

road/trail, to low lying ranch lands during critical spring months when young livestock are easy pray and also because Plaintiff's livestock movements will no longer be hindered by the natural forest barrier that has developed since abandonment of the Bryant road.

121. For the Forest Service to conclude consequences or activities are reasonably certain to occur and are a consequence caused by the proposed action the finding must be based on "clear and substantial information, using the best scientific *and commercial data* available," 50 C.F.R. §§ 402.17.

122. Substantial increases in livestock and cattle losses to grizzly predation are well documented in both commercial data and scientific literature.

123. The 2014 Biological Assessment and the Revised Biological Assessment confirm that Grizzlies are located in or frequent the Project Area and surrounding vicinity. Plaintiffs have had personal sightings of grizzlies in the area.

124. By clearing the forest and reconstructing the road/trail it is reasonably certain there will be increased conflicts between grizzlies and livestock grazing either within the Project Area, where Plaintiffs currently graze on their private lands, or in the area just outside the Project Area, which is dominated by livestock operations and human development. As grizzlies are habitual carnivores any resulting conflict that results in the predation of livestock has a high likelihood of

causing a corresponding increase in grizzly mortality, either through a direct take or “nuisance” bear removal.

125. Defendants’ Revised Biological Assessment contains a cumulative effects analysis that states, “[o]ngoing activities on private lands that may continue in the future include mineral development, firewood gathering, and recreational activities.” The cumulative effects analysis does not discuss livestock grazing at all, even though livestock grazing currently occurs and has historically occurred on Plaintiffs’ private land in the Project Area. The Forest Service is aware Plaintiffs graze livestock in the Project Area, as a significant portion of previous meetings between the parties involved discussions on how the Forest Service intended to mitigate the effects of re-opening the Bryant Road on their cattle grazing operation. Plaintiffs and their predecessors have grazed livestock in the Project Area and its near vicinity for approximately 105 years.

126. In Forest Supervisor Erickson’s letter to Representative Gianforte, she summarily disregards the Plaintiffs’ livestock containment concerns and the risks associated with disrupting the areas balance, noting the Plaintiffs oppose construction because of “trespassing, weeds, and redundancy in the local trail network.”

127. The Forest Service is also responsible for considering the cumulative effects of its proposed action on the grizzly population in the Custer National Forest-

Beartooth District as a whole, not just on the Project Area and the immediate vicinity of the proposed action. The Revised Biological Assessment completely fails to address the cumulative effects of how opening a new trail/road access into an area dominated by human development and livestock grazing, where no access previously existed, will impact the grizzly population in the Beartooth District as a whole, which is experiencing a greater number of conflict takes that at any time in the past.

128. The Forest Service's failure to consider the effects its proposed actions will have on conflicts between the threatened grizzly bear with regard to human developments and domestic livestock grazing was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and/or the omission of such an analysis "is unsupported by substantial evidence in the record," 5 U.S. § 706.

COUNT II

ESA Violation

(Failure to consider effects of increased recreational use and increased motorized vehicle traffic from the proposed action.)

129. Plaintiffs reallege, as if fully stated herein, each allegation contained in the preceding paragraphs.

130. Despite substantial evidence in the record the Forest Service's Revised Biological Assessment failed to properly consider and analyze the effects Phase 2 of the project will cause with regard to increased motor vehicle traffic in the Project Area as well as the increased potential for grizzly/human conflict created

by increased accessibility (especially during critical feeding seasons); therefore, violating section 7 of the ESA, 16 U.S.C. § 1536, and the ESA's implementing regulations, 50 C.F.R. § 402.

131. The foundation of Defendants' rationale and a primary finding in the Revised Biological Assessment is that no reduction in secure habitat open motorized road densities and total motorized road densities will occur. In fact, the Forest Service implies the proposed action will actually increase secure habitat because of road reclassifications. That reasoning is inconsistent with the Forest Service's own stated purpose for the Project, i.e., to address increased vehicle use on existing roads and the overall increase in users to the area the proposed action will create.

132. Defendants combine their "secure habitat" rationale, which reflects only road density in an area, with a corresponding rationale that there will be "no change to the number or capacity developed sites." Developed sites are those sites like the Initial Creek Campground and the immediate locale of the Westfork of the Stillwater Trailhead. This rationale is, again, contrary to the stated purpose of the proposed action, which is to provide enhanced access to the Westfork of the Stillwater Trailhead and the backcountry beyond that point. There is no requirement to camp in designated campsites in the Custer National Forest-Beartooth District, so any rationale based on the number of designated sites is

misguided and fails to recognize the purpose of the proposed actions and the corresponding effects.

133. Much like Defendants' analysis of human development and domestic livestock grazing impacts, these rationales are inconsistent with the Forest Service's own assertions and the Project's record, which indicate the proposed action will both increase overall use of the area and extend use of the area into seasons when it was not previously accessible.

134. The 2019 Decision Memo states the Phase 2 trail is needed to supply additional access to the area because Forest Service Road #2841 is "difficult to navigate with a stock trailer" and "hazardous," which leads to the natural conclusion the proposed action is intended to increase user days in the area. Similar evidence indicating an intention to increase use to the area is scattered through the record. The corresponding impacts to the West Fork of the Stillwater area, implications on the backcountry accessed from the Westfork Trailhead, and the increased likelihood of human conflicts with the threatened grizzly bear are not analyzed in the Revised Biological Assessment.

135. The Forest Service also intends to make the area more accessible to humans during the "critical" spring and fall seasons, when "bears are single minded in their pursuit of food" and there is "the greatest potential for human/bear conflict" are of greater concern for grizzly bears in the West Fork of the Stillwater Area as well as

bears in the backcountry accessible from the trailhead, which is *Secure Habitat* for the bears.

136. Providing access to the West Fork of the Stillwater River and the Initial Creek Campground earlier in the spring is of particular concern given the Forest Service's recognition that grizzlies "are often distributed at lower elevations in closer proximity to the majority of human use at this time."

137. Forest Supervisor Mary Erickson notes in her letter to Representative Gianforte, that the proposed trail will be particularly helpful during "hunting season when snow and icy conditions prevail." Hunter confrontations with grizzlies are well documented in Montana and have increased in recent years. The proposed action is reasonably certain to increase those conflicts by providing access to a greater number of hunters to an area with a known grizzly presence and a substantial likelihood of a growing population.

138. The Forest Service record clearly indicates a greater number of horseback users will access the backcountry beyond the Westfork Trailhead if the proposed action is completed. This includes those hunting from horseback when the area may have been previously inaccessible. Horseback users are typically able to travel further into grizzly bear secure habitat than hikers, requiring the Forest Service to evaluate the potential effects of Phase 2 on conflicts with grizzlies in secure habitat beyond the Westfork Trailhead.

139. The Forest Service's failure to consider the effects its proposed actions will have on grizzly/human conflicts caused by an overall increase in use of the area and new and enhanced accessibility to the area during critical grizzly feeding seasons was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and/or "is unsupported by substantial evidence in the record," 5 U.S. § 706(2).

COUNT III
NFMA Violation
(Trail Standards)

140. Plaintiffs reallege, as if fully stated herein, each allegation contained in the preceding paragraphs.

141. Defendants' 2019 Decision Memo states the proposed action is "consistent with the Custer National Forest Land and Resource Management Plan," (Forest Plan) expressly noting it complies with the "Forest-wide Management Standards for Recreation: "The Forest trail system will be managed to provide for public safety, accessibility, user distribution, a variety of travel opportunities and further the management area goals." *Custer National Forest Management Plan*, § (2)(d)(1)(a).

142. Defendants' 2019 Decision Memo neglects to cite or comply with the provision of the Forest Plan that directly follows the above quoted provision: "Trail management will be coordinated with grizzly bear needs in grizzly habitat to

avoid conflicts and reduce user risks. Trails may be relocated or closed if necessary.” *Custer National Forest Management Plan*, § (2)(d)(1)(b).

143. By disregarding the second half of the Forest Plan’s trail management directives, Defendants have violated NFMA and failed to follow the Forest Plan regarding the significant grizzly bear risks in the project area. Defendants’ actions in that regard are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2).

144. The Forest Plan prescribes the following “Trail Construction” standards:

- a) Trail construction and reconstruction standards will be consistent with the purpose and use of the trail. The Trail Management Handbook (draft 10/83) provides guidelines for construction standards. Other specific standards which may apply to special trails such as scenic, disabled, or wilderness will be used.
- b) Trail construction and reconstruction priorities will be:
 - (1) to maintain existing trails in a safe, usable condition
 - (2) to meet nationally identified trail needs (North Country National Scenic Trail)
 - (3) and to provide additional dispersed recreation opportunities needed to relieve heavy use concentrations and increased demands.

145. Defendants’ failure to construct a bridge to cross the Westfork of the Stillwater River at the Initial Creek Campground during Phase 1 of construction is inconsistent with standards in the Forest Service Trails Management Handbook,

FSH 2309.18, Effective October 16, 2008, which indicates a bridge is likely needed for resource protection and appropriate access across the Stillwater River.

146. Construction of Phase 2 of the project is inconsistent with the Forest Plan's trail construction and reconstruction priorities. Contrary to Forest Service representations, the Bryant road/trail is not an existing trail. The Bryant road/trail was abandoned nearly 80 years ago. Phase 2 of the proposed trail is overgrown and impassable on foot or on horseback in its current state. Phase 2, therefore, does not have priority under the Forest Plan under Priority Standard (b)(1).

147. Phase 2 of the Project also does not provide access to additional dispersed recreational opportunities and is not needed to relieve heavy use concentrations and increased demands. Phase 2 is strictly a new access trail to dispersed recreational opportunities that already have adequate and recently enhanced access to them. Phase 2, therefore, does not have priority under the Forest Plan under Priority Standard (b)(2).

148. Defendants 2019 Decision Memo incorporates by reference the Forest Plan's "forest-wide goals, objectives, and management area standards." Relevant goals include:

- The goal for the management of Threatened and Endangered plant and animal species is to provide habitat that contributes to the recovery of the species. *Forest Plan*, p. 3.

- The goal of providing for public access to and within the Forest is to provide at least one access point per five miles of administrative boundary where there is not adequate access from inside National Forest System (*NFS*) land. At present there are a number of areas on the Forest that are not easily accessible by the general public as private lands adjacent to the Forest preclude access or roads/trails do not exist. Some additional access points are identified and over time access to the Forest will be increased. However, the intent will not be to provide road/trail access to all areas on the Forest. *Forest Plan*, p. 3.
- The goal of recreation management is to provide a broad spectrum of recreation experience opportunities for the benefit and enjoyment of the public, with due consideration for other forest uses and resources. *Forest Plan*, p. 4.

149. The proposed action is not driven by or consistent with the relevant “forest-wide” goals.

150. The Forest Service’s failure to follow the Custer National Forest Management Plan’s requirements with regards to “Trail Management” and “Construction,” and express disregard for the Forest Plan’s directive to manage trails in a manner that avoids grizzly/human conflicts violates NFMA and is “arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law” and or was “unsupported by substantial evidence in the record.” 5 U.S.C. § 706(2).

COUNT IV
NEPA Violation
(Improper Project Segmentation)

151. Plaintiffs reallege, as if fully stated herein, each allegation contained in the preceding paragraphs.

152. NEPA requires the Forest Service to take a “hard look” at the direct, indirect, or cumulative consequences and impacts of a proposed activity, including the context and intensity of significant consequences, before acting. 42 U.S.C. § 4332, 40 C.F.R. § 1508.27.

153. To categorically exclude an action the Forest Service must determine its actions do not “individually or cumulatively have a significant effect on the human environment.” 40 C.F.R. § 1508.4.

154. In implementing an action under a CatEx, the Forest Service must comply with certain NEPA- defined procedures as well as the agency - specific procedures applicable to categorical exclusions. 40 C.F.R. §§ 1507.3, 1501.2(d), 1502.9(c)(3), 1505.1, 1506.6(e), 1508.4 and 36 C.F.R. § 220.6.

155. NEPA “procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. . . .Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question. . . . The NEPA process is intended to help public officials make decisions that are based on understanding of

environmental consequences, and take actions that protect, restore, and enhance the environment.” 40 C.F.R. §1500.1.

156. When determining whether construction or reconstruction of a trail can be categorically excluded the Forest Service must determine the Project is a routine action, will not result in the existence of extraordinary circumstances, and will not result in uncertain or significant effects. 36 C.F.R. § 220.6 and 40 C.F.R. §§ 1507.3, 1508.4.

157. The Forest Service must give special consideration when it determines “federally listed threatened or endangered species or designated critical habitat” are implicated by their proposed actions, and while the existence of ESA considerations does not preclude the use of a CatEx, the Forest Service must evaluate the “cause-effect relationship between the proposed action and the potential effect” on the endangered or threatened species or their designated habitat, “and if such a relationship exists, the degree of the potential effect of a proposed action on the” endangered or threatened species “determines whether extraordinary circumstances exist.” 36 C.F.R. § 220.6(b).

158. For trail projects to be funded under a grant from the Montana Recreational Trails Program they must meet the requirements of 23 C.F.R. § 771.117 and 40 C.F.R. § 1508.4. These projects should not involve “significant environmental impacts.” Qualifying projects will undertake actions that “do not induce

significant impacts to planned growth or land use for the area; do not require the relocation of significant numbers of people; do not have a significant impact on any natural, cultural, recreational, historic or other resource; do not involve significant air, noise, or water quality impacts; do not have significant impacts on travel patterns; or do not otherwise, either individually or cumulatively, have any significant environmental impacts” 23 C.F.R. § 771.117(a). Projects that could be classified under this CatEx but involve “unusual circumstances,” as defined to include but not limited to “significant environmental impacts” or “substantial controversy on environmental grounds,” require preparation of the appropriate environmental studies to determine if the CatEx has been properly classified. 23 C.F.R. § 771.117(b).

159. “NEPA prohibits an agency from breaking up a large or cumulative project into smaller components in order to avoid designating the project a major federal action that would be subject to NEPA analysis requirements.” *Sierra Club v. Bosworth*, 510 F.3d 1016, 1028 (9th Cir. 2007).

160. Whether the Forest Service has improperly broken a larger project into smaller components (segmented) to avoid a NEPA evaluation of the larger effects of a project as a whole is determined by whether each component projects has “independent utility.” The test for such independence is “but for” causation: but

for one segment, the other federal project would not occur.” *See e.g. Sierra Club v. Bureau of Land Mgmt.*, 786 F.3d 1219, 1225 (9th Cir. 2015)

161. The Forest Service applied the same categorical exclusion in both Phase 1 and Phase 2 of the Project, for the “construction or reconstruction of trails.” 36 C.F.R. § 220.6(e)(1). Relevant examples provided for the use of this CatEx are, “constructing or reconstructing a trail to a scenic overlook” or reconstructing an existing trail to allow use by handicap individuals. 36 C.F.R. § 220.6(e)(1)(i-ii).

162. Constructing or reconstructing Phase 1 of the project has no independent utility without the eventual completion of Phase 2. Without Phase 2, it is literally a “bridge to nowhere”. Phase 1 lacks the necessary infrastructure to be utilized for the stated purpose because there is only a bridge to cross the Westfork of the Stillwater River at the end closest to the Westfork of the Stillwater Trailhead. To use the section of trail reconstructed during Phase 1 recreational users must ford or wade the Westfork of the Stillwater River at the end nearest the Initial Creek Campground, which is contraindicated by Forest Service safety policies, the nature of the river, the Forest Service administrative record for Phase 1, and the remoteness of the area.

163. Nor does Phase 2 have independent utility, because without Phase 1’s completion, the trail would not provide access to any meaningful resources of interest or any substantial recreational opportunities.

164. The administrative record confirms the Forest Service intentionally segmented the Project into two phases to utilize CatEx's in order to evade more substantial NEPA review and also to facilitate outside funding of the project, as these facts illustrate:

1. In 2010, the Forest Service sought concurrence of its opinion from the Montana State Historic Preservation Officer. This concurrence was not required to comply with Forest Service's CatEx regulations but is clearly indicated by the regulations the 2015 bridge grant and 2020 construction costs were awarded under. 23 C.F.R. § 771.117.
2. Phase 1 was approved by the Forest Service and received the grant for bridge materials in 2015; yet, primary construction of the bridge and Phase 1's trail work did not begin in earnest until three years later in 2018, well after Phase 2 was through the scoping process and the final decision was little less than a formality.
3. Phase 1 was not functional until months after Phase 2's Decision Memo was signed and over four years after receiving funding and initial approval. This timing indicates the Forest Service would have completed both phases of the Project simultaneously, had Plaintiffs not voiced considerable objections to Phase 2's construction.

4. The record as known to Plaintiffs does not disclose when the Forest Service intended to implement Phase 2, however, because even though specifying an implementation date for the project is required by Forest Service regulations, the Forest Service failed to do so in the 2019 Decision Memo. 36 C.F.R. § 220.6(f).
5. Inconsistent scoping and public notice procedures between Phase 1 and Phase 2 of the Project indicates Forest Service personnel intentionally segmented the Project to make limited scoping on Phase 1 appear permissible and a grant award more certain. The Forest Service was aware that had the Plaintiffs been contacted during Phase 1's scoping and if the Project was defined in its entirety at that time, the Plaintiffs would have stated their concerns and objections at the earliest opportunity. Delaying proper scoping until Phase 2 and intentionally delaying input from Plaintiffs, the primary party of interest in these actions, was in clear violation of NEPA's requirement to integrate "NEPA process with other planning at the earliest possible time." 40 C.F.R. § 1501.2 and 40 C.F.R. 1501.7.

165. The Forest Service's proclamation in the 2019 Decision Memo that it began "exploring the feasibility and desirability" of Phase 2 in 2017, not only suggest the project was segmented since inception, but is further proof the Forest Service

failed to follow NEPA's requirement to integrate NEPA "at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. *Id.*

166. Segmenting the project allowed the Forest Service to limit the letters sent to the Recreational Trails Program Grant Committee for Phase 1 to only favorable recommendations, avoiding the controversy involved with Phase 2's construction and a denial of the Forest Service's grant application.

167. The Forest Service, likewise, has likely not alerted the grant selection committee to the environmental and legal controversy surrounding the construction of Phase 2 in its 2020 grant application for RTP funds to undertake Phase 2's work, and when combined with the failure of the 2020 Revised Biological Assessment to properly evaluate the significant environmental impacts of Phase 2's construction on the grizzly bear, Phase 2's construction funding cannot properly qualify for funding under the FHWA CatEx.

168. The Forest Service's division of the Project into two phases to allow for construction and funding under four different CatEx's was "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law" and or was "unsupported by substantial evidence in the record." 5 U.S.C. § 706(2).

COUNT VI
NEPA Violation
(Failure to Consider Cumulative Impacts)

169. Plaintiffs reallege, as if fully stated herein, each allegation contained in the preceding paragraphs.

170. The Forest Services failed to evaluate and analyze the cumulative impacts of the Project given the documented rise in grizzly bear/livestock conflicts and grizzly bear human development conflicts in the Custer Gallatin National Forest, the Greater Yellowstone Area in general, and Montana at large. For this reason, the Forest Service's finding that the Project would not cause extraordinary circumstances or result in uncertain or significant effects violates NEPA and fails to meet the Forest Service burden to provide a "well-reasoned explanation" for categorically excluding the Project, with special regard to Phase 2's determination.

171. Under NEPA, a cumulative impact is defined 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." 40 C.F.R. 1508.7.

172. "Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. *Id.*

173. The Forest Service also failed to analyze or consider or made unreasonable conclusions concerning the cumulative impact of increasing overall use of the area and increasing or creating use in the area during seasons when the area has not typically been accessible.

174. The Forest Service determination that it was not required to consider the impacts of its proposed actions on non-federal infrastructure (Limestone Road) (2019 Decision Memo) is an incorrect statement of NEPA's requirements.

175. The Forest Service's failure to properly evaluate and analyze the cumulative impacts of the Project is a violation of NEPA. The corresponding conclusions that the Project will not result in the existence of extraordinary circumstances and will not result in uncertain or significant effects were "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law" and/or were "unsupported by substantial evidence in the record." 5 U.S.C. § 706(2).

COUNT VII
NEPA Violation
(Improper Scoping)

176. Plaintiffs reallege, as if fully stated herein, each allegation contained in the preceding paragraphs.

177. The Forest Service is required to scope all "proposed actions, including those that would appear to be categorically excluded from further analysis and documentation in an EA and EIS. 36 C.F.R. § 220.4.

178. While “no single scoping technique is required or prescribed” under the Forest Service’s scoping regulations, the Forest Service has included NEPA’s scoping regulations by express incorporation of 40 C.F.R. 1501.7. 36 C.F.R. § 220.4.

179. NEPA’s scoping regulations require the Forest Service to “invite the participation of . . . other interested persons (including those who might not be in accord with the action on environmental grounds). 40 C.F.R. 1501.7.

180. Plaintiffs believe that Forest Service employee Allie Wood was responsible for scoping Phase 1 of the Project. Wood’s correspondence with Forest Service NEPA coordinator, Mark Slacks, acknowledges that only Project proponents were contacted during scoping. Woods had previously applied for the Project’s bridge funding from the Southern Montana Resource Advisory Committee, which Plaintiff Cathy Donohoe was a member of at the time the proposal was made, but the funding request had not been granted for various reasons. Because of this prior interaction, Wood may have felt Plaintiffs would oppose the project during Phase 1 scoping and reduce the likelihood the bridge materials would be funded an RTP grant.

181. Exclusion of Plaintiffs from scoping was, therefore, an intentional violation of NEPA. 40 C.F.R. 1501.7.

182. Plaintiffs were clearly an “interested party” to the proposed action that should have been notified during the scoping of Phase 1.

183. As legacy residents of the Project Area for nearly 105 years; domestic livestock producers in the immediate Project Area and surrounding vicinity; hunting outfitters in the Custer National Forest, including the West Fork of the Stillwater River area, and surrounding private lands; recreational users of the Project Area; and people with a deep connection to the area and thorough understanding of the biological balance and natural status quo in the Project Area and surrounding vicinity, the Plaintiffs clearly had valuable insights into the area and knowledge of potential issues of environmental concern, and the Forest Service was obligated by regulation to notify them during scoping of Phase 1, just as it did during Phase 2.

184. Scoping was not an early and open process in violation of 40 C.F.R. § 1501.7.

185. As part of the scoping process the Forest Service is required to “[i]ndicate any public environmental assessments and other environmental impact statements which are being or will be prepared that are related to but are not part of the scope of the impact statement under consideration.” 40 C.F.R. § 1501.7(a)(5).

186. The Forest Service did not provide Plaintiffs with any notification during scoping that a revised biological screening would be completed in 2018 as part of the Phase 2 scoping and decision process.

187. There is no indication in the 2019 Decision Memo that a new screening was completed as part of the decision process in 2018, and the 2019 Decision Memo does not meet the requirements of 40 C.F.R § 1502.21 and 36 C.F.R. § 220.4 for incorporation of the document by reference.

188. Defendants did not provide Plaintiff's with the 2018 updated biological screening/assessment in response to their August 2019 FOIA request, even though the document was clearly responsive to their FOIA inquiries.

189. The 2018 screening was not completed until March 29, 2018, two weeks after closure of the comment period for Phase 2. By failing to identify the 2018 biological screening document during scoping and failing to allow interested parties a meaningful opportunity to review the document and comment before issuing it Decision Memo, the Forest Service violated NEPA. Both failures indicate the procedures employed were not the open process envisioned by NEPA. 40 C.F.R. §§ 1501.7 and 1501.7(a)(5).

190. The Forest Service failed to comply with NEPA's requirements to properly scope its proposed actions by not notifying and requesting input from the Plaintiff's during Phase 1, by failing to initiate an open scoping process as early as possible for the proposed action with regards to Phase 2, by failing to notify Plaintiffs concerning biological assessments that were to be completed or had been completed as part of Phase 2's decision process, and by impermissibly including

the 2018 Biological screening documents by reference into the 2019 Decision Memo. These failures establish the scoping process for the Project was “arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2).

VII. RELIEF REQUESTED

Plaintiffs request this Court grant the following relief, for the reasons previously stated:

- A. Declare that the Project violates the law;
- B. Declare the Revised Biological Assessment is arbitrary and capricious, and abuse of discretion, and not in accordance with the law and/or is not supported by substantial evidence in the record in violation of the Endangered Species Act, NEPA, and the Administrative Procedure Act, 5 U.S.C. 706(2).
- C. Set aside the Forest Service’s 2019 Decision Memo for The Initial Creek – Castle Creek Connector Trail.
- D. Enjoin implementation of the remainder of the Project for all actions in the 2019 Decision Memo.
- E. Declare the Forest Service illegally segmented the Project in violation of NEPA and declare Phase 2 of the project does not qualify for funding under the Montana Recreational Trails Program Grant and permanently enjoin the

Recreational Trails Program from paying any funds to the Forest Service for the remainder of the Project's construction. 23 C.F.R. § 771.117.

F. Permanently enjoin the Defendants from taking any actions in the future on Phase 2 of this project.

G. Award Plaintiffs their costs, expenses, expert witness fees, and reasonable attorney fees under EAJA; and

H. Grant Plaintiffs such further relief as may be equitable, just, and proper.

DATED this 16th day of September, 2020.

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