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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

ALLIANCE FOR THE WILD
ROCKIES,

Plaintiff,

vs.

MICHAEL MUNOZ, Rocky
Mountain District Ranger, Helena-
Lewis and Clark National Forest;
BILL AVEY, Supervisor, Helena-
Lewis and Clark National Forest; U.S.
FOREST SERVICE; U.S. FISH &
WILDLIFE SERVICE,

Defendants.

CV-20-

COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF

I. INTRODUCTION

1. This is a civil action for judicial review under the citizen suit provisions of the Endangered Species Act and the Administrative Procedure Act of the U.S. Forest Service's (USFS) and U.S. Fish and Wildlife Service's (FWS) authorizations of the Elk Smith Project (Project) on the Lewis and Clark portion of the Helena-Lewis and Clark National Forest (Forest), and the programmatic ESA consultation for the wolverine.
2. Plaintiff Alliance for the Wild Rockies attests that the decisions approving the Project and programmatic ESA consultation for wolverine are arbitrary and capricious, an abuse of discretion, and/or otherwise not in accordance with law.
3. Defendants' approval of the Project and programmatic ESA consultation for the wolverine and corresponding documents or lack thereof as written 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 (APA), 5 U.S.C. §§ 701 et seq.
4. Plaintiff seeks a declaratory judgment, injunctive relief, the award of costs, and expenses of suit, including attorney and expert witness fees pursuant to the Equal Access to Justice Act, 28 U.S.C. §2412, and the ESA, 16 U.S.C.

§1540(g)(4), and/or such other relief as this Court deems just and proper.

II. JURISDICTION

5. 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.
6. An actual controversy exists between Plaintiff and Defendants. Plaintiff's members use and enjoy the Forest for hiking, fishing, hunting, camping, photographing scenery and wildlife, and engaging in other vocational, scientific, spiritual, and recreational activities. Plaintiff's members intend to continue to use and enjoy the area frequently and on an ongoing basis in the future.
7. The aesthetic, recreational, scientific, spiritual, and educational interests of Plaintiff's members 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, 5 U.S.C. §§ 705 & 706, and 16 U.S.C. §1540.

8. Plaintiff sent Defendants a notice of intent to sue under the ESA on January 13, 2020. Thus, Plaintiff complied with the 60-day notice requirement for its ESA challenges and this Court has jurisdiction.
9. Plaintiff fully participated in the available administrative review processes for the Project; thus it has exhausted administrative remedies. Thus, the Court has jurisdiction to review Plaintiff's APA claims.

III. VENUE

10. Venue in this case is proper under 28 U.S.C. §1391(e) and Local Rule 3.2(b). Defendant Munoz resides in Teton County, which is within the Great Falls Division of the United States District Court for the District of Montana.

IV. PARTIES

11. 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. The Alliance has over 2,000 individual members, many of whom are located in Montana. Members of the Alliance observe, enjoy, and appreciate Montana's native wildlife, water quality, and terrestrial habitat quality, and expect to continue to do so in the future, including in the Project area. Alliance's members' professional

and recreational activities are directly affected by Defendants' failure to perform their lawful duty to protect and conserve these ecosystems.

Alliance for the Wild Rockies brings this action on its own behalf and on behalf of its adversely affected members.

12. Defendant MICHAEL MUNOZ is the District Ranger for the Rocky Mountain Ranger District on the Helena-Lewis and Clark National Forest, and is the decision-maker who signed and authorized the Elk Smith Project decision.
13. Defendant BILL AVEY is the Supervisor for the Helena-Lewis and Clark National Forest, and is the decision-maker who denied the administrative objections filed against the Project.
14. Defendant UNITED STATES FOREST SERVICE (USFS) is an administrative agency within the U.S. Department of Agriculture, and is responsible for the lawful management of our National Forests, including the Helena-Lewis and Clark National Forest.
15. Defendant UNITED STATES FISH AND WILDLIFE SERVICE (FWS) is an administrative agency within the U.S. Department of Interior and is responsible for lawful management of species proposed and listed under the Endangered Species Act.

V. FACTUAL ALLEGATIONS

A. Project and Project Area

16. The Elk Smith Project Area is a 24,220 acre area located within the 395,440 acre portion of the Bear-Marshall-Scapegoat-Swan Inventoried Roadless Area managed by the Helena-Lewis and Clark National Forest.
17. The Scapegoat Wilderness, which is the southern part of the Bob Marshall Wilderness Complex, lies immediately to the west of the Project area.
18. The Project area is located in the Northern Continental Divide Ecosystem Grizzly Bear Recovery Zone/Primary Conservation Area, as well as within designated critical habitat for lynx.
19. Listed and proposed species that may be present in the Project area include grizzly bears, lynx, and wolverines.
20. The Project area is entirely within the perimeter of the 1988 Canyon Creek Fire.
21. The Project Decision Notice (Decision) was signed on November 1, 2019, and authorizes the implementation of Alternative 2, the proposed action, from the Elk Smith Project Environmental Assessment (EA).
22. The Project consists of 10,331 acres of prescribed burning across 15 units.
23. All 10,331 treatment acres fall within the Inventoried Roadless Area boundary.

24. Helicopters will be used for burning operations in 10 units – Units 3, 4, 5, 6, 8, 10, 12, 13, 14, and 15 – amounting to up to 7,744 acres of helicopter-ignited burning.
25. In addition, tree-cutting of trees up to 16 feet tall will occur in Units 1, 2, 7, 9, and 11, for a total of 2,787 acres.
26. The Project Decision states that the Forest Service plans to begin implementation in 2020 and continue for five to ten years.
27. However, in a December 12, 2019 letter sent to local landowners, the Forest Service stated: “The earliest we anticipate project implementation would be summer of 2021.”

B. Procedural Background

28. The Forest Service conducted scoping for the Project in 2013.
29. The Forest Service produced a draft EA for public comment in 2016.
30. The Forest Service produced the EA and draft Decision Notice for the Project in April 2019.
31. The Forest Service allowed a 45-day administrative objection period for the draft Decision Notice.
32. The administrative objections filed against the Project were denied in July 2019.
33. The final Decision was signed and issued on November 1, 2019. At that

time, the Forest Service also issued a revised EA for the Project.

34. The Forest Service prepared a Biological Assessment for the Project in December 2018 regarding Project effects to lynx, lynx critical habitat, and grizzly bears.
35. The Biological Assessment states that the Project may affect and is likely to adversely affect lynx, lynx critical habitat, and grizzly bears.
36. The U.S. Fish and Wildlife Service issued a Biological Opinion and Incidental Take Statement for the Project in October 2019.

C. Wolverine Analysis

37. The wolverine is a species proposed to be listed under the ESA.
38. Wolverines may be present in the Project area.
39. Wolverines may be affected by Project activities.
40. The Forest Service did not analyze the effects of the Project on wolverines in the Project Biological Assessment.
41. FWS did not issue a letter of concurrence for the Project for wolverine.
42. Instead, the Forest Service tiered the Project to the programmatic ESA consultation for wolverine: “Effects of the project on wolverine (*Gulo gulo luscus*), a species proposed for listing, was conducted under the 2014 Programmatic Biological Assessment for the North American Wolverine (USDA Forest Service 2014b, USDI Fish and Wildlife Service 2014b);”

“Proposed species (wolverine *Gulo gulo luscus*) were addressed in a separate document covered under a programmatic consultation (USDA Forest Service 2014b, USDI Fish and Wildlife Service 2014b).”

43. The 2014 programmatic ESA consultation for wolverine does not cite any scientific literature in support of its conclusions; it only cites to the 2013 Proposed Listing Rule in the Federal Register.
44. The 2014 programmatic wolverine ESA consultation states: “The Federal Register does not present any information suggesting that additional regulatory limitations on the activities related to habitat impacts due to human use and disturbance may be required; and makes no recommendations regarding the placement of any thresholds or constraints (seasonal restrictions, acreage limits, avoidance areas, etc.) on these activities. In their summary regarding Factor A, the USFWS reported that the best scientific and commercial information available indicates that only the projected decrease and fragmentation of wolverine habitat or range due to future climate change is a threat to the species now and into the future. The available information does not indicate that other potential stressors such as land management, recreation, infrastructure development and transportation corridors pose a threat to the DPS (FR at 7880).”
45. The 2013 Proposed Listing Rule in the Federal Register was issued on

February 4, 2013 and does not consider any published scientific literature issued after 2012.

46. Over the past eight years, new research on wolverines has been published.
47. In August 2013, a new published, peer-reviewed scientific journal article in the Canadian Journal of Zoology found: “Wolverines were less likely to occur at sites with oil and gas exploration, forest harvest, or burned areas, even after accounting for the effect of topography. The relative paucity of wolverines in human-impacted portions of this range edge suggests that effective conservation requires managing landscape development, and research on the proximal mechanisms behind this relationship.” Fisher et al. 2013. Wolverines (*Gulo gulo luscus*) on the Rocky Mountain slopes: natural heterogeneity and landscape alteration as predictors of distribution. Can. J. Zool. 91: 706-716 (2013).
48. Additionally, extensive on-the-ground wolverine tracking efforts in the Helena-Lewis and Clark National Forest found: “Wolverine expert Jeff Copeland once defined wolverine habitat as being from 200m above to 200m below timberline. ... A more recent analysis by Copeland mapped snow persistence over a seven-year period as an indicator of wolverine habitat. This analysis showed that most of the Ogden Mountain to Nevada Creek Region did not have persistent snow during those seven years, and presumably would not be

considered good wolverine habitat. Because our wolverine use data contradict these attempts to define wolverine habitat based upon elevation and/or persistent snow, our project represents an interesting case study of wolverine behavior, and our results bring up other interesting questions. . . . Regardless of these questions, our data demonstrate that the Ogden Mountain to Nevada Creek Region represents valuable and heavily used wolverine habitat that would not even be considered as wolverine habitat in other analyses.” Gehman et al (April 2014). Snow-Tracking Surveys on the Helena National Forest.

49. The same on-the-ground wolverine tracking efforts have also documented “[d]eclining detections of carnivores during the past several winters [that] coincided with large-scale logging along Telegraph Creek and the Continental Divide south of MacDonald Pass, and increased snowmobile activity in the region.”
50. The analysis of Project effects on wolverine in the Project EA consists of three paragraphs:

Wolverine habitat is modeled by Copeland et. al. (2010) and Inman et. al. (2013). The Copeland model (Copeland et. al. 2010) relies on the number of years snow persists until March 31 to indicate areas where wolverine will den. Under the Copeland model there are 225 acres where snow persists in four out of seven years; 1,895 acres where snow persists in three out of seven years; 2,761 acres where snow persists in two out of

seven years; and 4,731 acres where snow persists in one out of seven years (Table 32). Inman modelled [sic] maternal habitat (suitable for use by reproducing females) and primary habitat (areas suitable for survival and use by resident adults). In the Elk Smith Project Area there are 180 acres of maternal habitat and 5,030 acres of primary habitat.

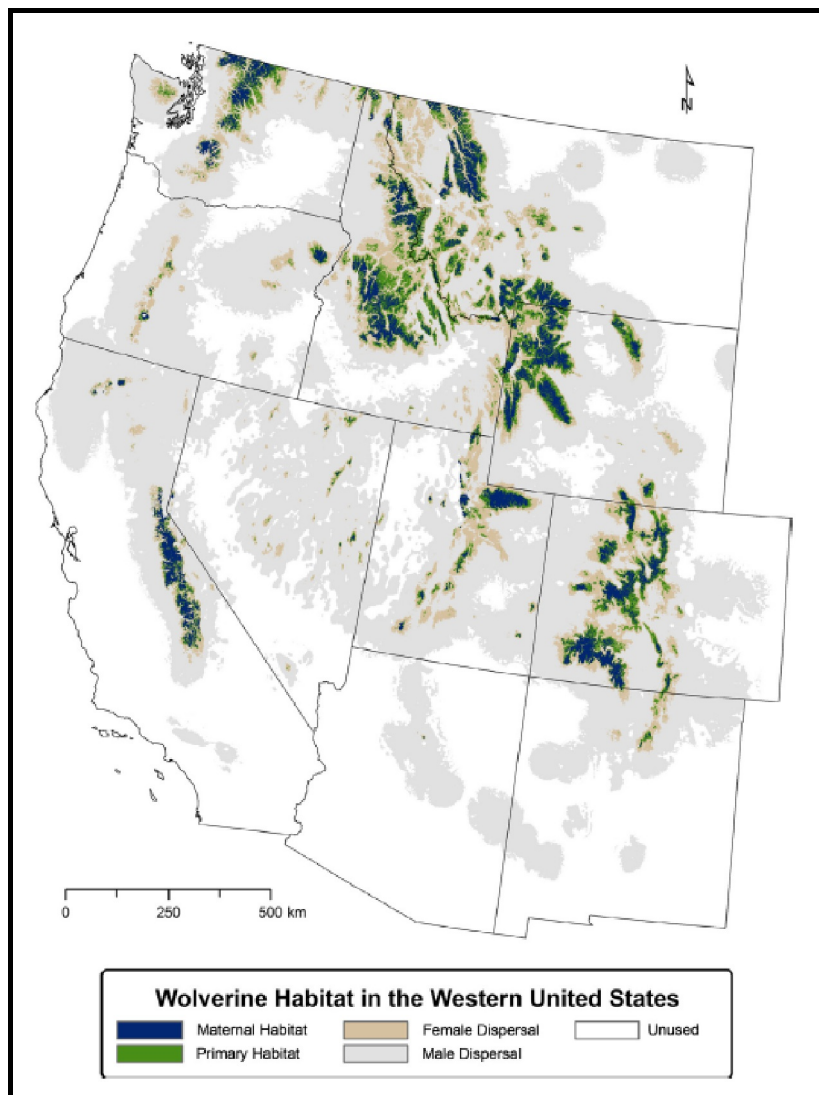
...

Wolverine

According to the Copeland model (Copeland et. al. 2010), from 225 to 4,731 acres of persistent snow cover are within treatment units (Table 32). The proposed action would not alter the snow cover levels. Under the proposed action, 0.6 acres of maternal habitat and 642 acres of primary habitat (as described by Inman et. al. 2013) are within proposed treatment units (UNIONWolverineAnalysis.xlsx). The parameters that model habitat include latitude adjusted elevation, terrain ruggedness, April 1 snow depth, road density, interpolated human density, distance to high elevation talus, distance to tree cover, and distance to April first snow. The only parameter altered by the proposed action is distance to tree cover. The proposed action would create openings of 20 to 100 acres in size in dense lodgepole stands. If the openings were perfect circles, they would be from 0.2 miles to 0.45 miles across; a distance that wolverine can easily travel. The openings would be irregularly shaped and would persist for three to five years before regenerating. It would be another two to four years before the trees are tall enough to provide cover for a wolverine (about four to five feet tall). Project operations could disturb foraging wolverine if they are present in area.

Because of the small amount of habitat potentially impacted in relation to an individual wolverines home range (approximately 100,000 acres in Montana; Hornacker and Hash 1981), and the short duration of the impact (from three to seven years), the Elk Smith Proposed Action would not jeopardize the continued existence of wolverine. See Appendix D for the Summary Sheet for Wolverine Programmatic Consultation (USDA FS 2014b, USDI FWS 2014b).

51. The Inman model for wolverine habitat identifies four types of wolverine habitat: (1) maternal, (2) primary, (3) female dispersal, and (4) male dispersal.
52. The map found at Figure 2 in Inman's published, peer-reviewed article illustrates the location of these four habitat types across Montana, and indicates that all of the Elk Smith Project area falls into one of these four categories:



53. The EA does not disclose the amount of female dispersal habitat for wolverines in the Project area.
54. The EA does not disclose the amount of male dispersal habitat for wolverines in the Project area.
55. The federal agencies have issued numerous NEPA analyses in the past that acknowledge that wolverines are likely to be displaced from helicopters in a manner similar to grizzly bears. For example, the Forest Service found that wolverine displacement is likely from helicopters involved in logging (Snow Talon EIS), helicopters involved in dam maintenance (Canyon/Wyant EIS), and helicopters involved in helicopter skiing (Kenai Heliski EIS).
56. The Helena National Forest has previously found that “[h]elicopter overflights could, however, disturb or displace individual[] [wolverines] from adjacent denning and foraging habitat during winter operations” and “summer helicopter operations do have some potential to disturb or displace foraging individual[] [wolverines].”
57. The Chugach National Forest found: “Denning females could be displaced by helicopter skiing activities occurring in denning areas and could abandon their den sites. Myrberget (1968) mentions four instances of den abandonment due to human disturbance and suggests that secondary dens may be less suitable. Direct contact occurred with two denning females in

Idaho in late April and May and resulted in den abandonment in both cases (Copeland 1996). Abandonment of den sites would adversely impact both the female wolverine and her kits.”

58. The EA does not analyze the impact on wolverines from helicopters.

D. Historic Conditions & Fire Return Intervals

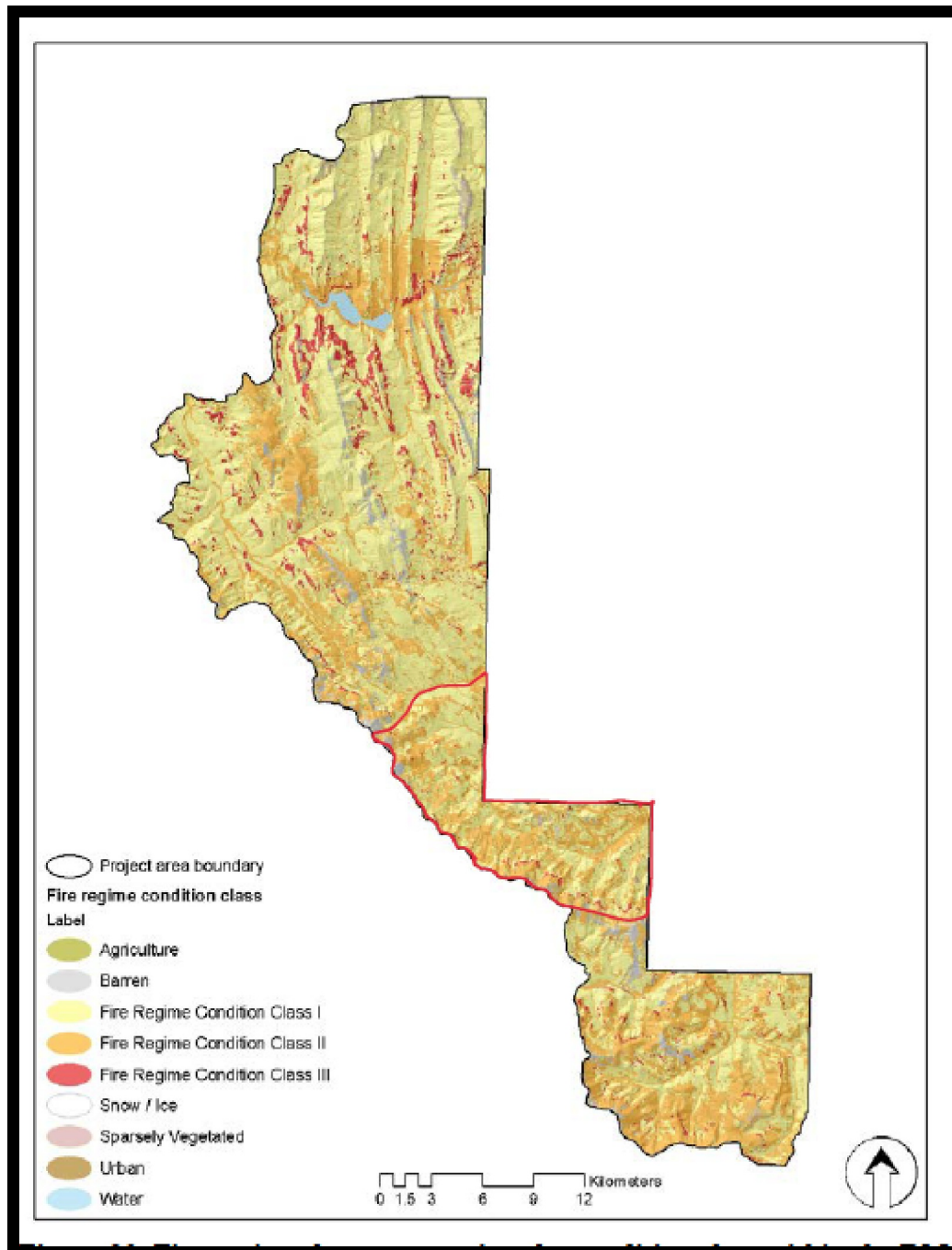
59. The Project EA states: “In 2010, the Helena – Lewis and Clark National Forest . . . initiated a landscape scale assessment of the Rocky Mountain Ranger District, Southern Analysis Area, which included the Elk Smith Project Area The analysis determined the Elk and Smith creeks area as having the greatest departures from historical conditions due to current conditions.”
60. The Project EA also represents that the area has “significantly departed from historic natural conditions.”
61. The Project Decision represents: “In 2010, the Helena – Lewis and Clark National Forest . . . initiated a landscape scale assessment of the Rocky Mountain Ranger District, Southern Analysis Area, which included the Elk Smith Project Area The analysis identified the Elk and Smith Creeks areas as having some of the greatest departures from historical conditions.”
62. The Project Objection denial letter states: “The Elk Smith EA project background section (p. 3) cites the 2010 Lewis and Clark National Forest

landscape assessment, which identified the project area [as] significantly departed from historic natural conditions.”

63. 32 years ago, in 1988, the Canyon Creek Fire burned through the Project area. The perimeter of the fire included all the Project treatment units.
64. The Forest Service recognizes five types of “fire regimes:” Fire Regime I (0- to 35-year frequency, low severity), Fire Regime II (0- to 35-year frequency, stand-replacement severity), Fire Regime III (35- to 100+ year frequency, mixed-severity), Fire Regime IV (35- to 100+ year frequency, stand-replacement severity), and Fire Regime V (200+ year frequency, stand replacement severity).
65. The landscape scale assessment of the Rocky Mountain Ranger District, Southern Analysis Area finds: “The majority of the analysis area is categorized as being in Fire Regime III, IV, or V (the longer fire-return interval regimes).”
66. Regarding this Project area, the EA states: “Research and analysis suggests that this particular landscape experienced fires of moderate severity on a return interval of approximately 35 to 100 years, with most literature indicating this return closer to 35 years than 100 years [citations].”
67. Fire Regime Condition Class (FRCC) is a national rating system that characterizes possible departure from historical fire regimes.

68. Condition Class 1 means that fire regimes are within a historical range.
69. Condition Class 2 means that fire regimes have been moderately altered from their historic range because fire frequencies have departed from historical frequencies by one or more return intervals.
70. Condition Class 3 means that fire regimes have been significantly altered from their historical range because fires have departed from historic frequencies by multiple return intervals.
71. The landscape scale assessment of the Rocky Mountain Ranger District, Southern Analysis Area finds: “approximately 58 percent of the analysis area is in Condition Class 1(within historical range) and only five percent is in Condition Class 3 or highly departed from historical conditions.”
72. The Project EA does not disclose the fact that only 5% of the Rocky Mountain Ranger District, Southern Analysis Area is highly departed from historical conditions.
73. The Project Decision does not disclose the fact that only 5% of the Rocky Mountain Ranger District, Southern Analysis Area is highly departed from historical conditions.
74. The Project Objection denial letter does not disclose the fact that only 5% of the Rocky Mountain Ranger District, Southern Analysis Area is highly departed from historical conditions.

75. The landscape scale assessment of the Rocky Mountain Ranger District, Southern Analysis Area contains a map to illustrate which areas are significantly departed from historic condition; the significantly departed areas are in red, and the Elk Smith Project area boundary is superimposed in red:



76. The map in the landscape scale assessment of the Rocky Mountain Ranger District, Southern Analysis Area indicates that there are few – if any – areas in the Elk Smith Project treatment units that are significantly departed from historic conditions.
77. The map in the landscape scale assessment of the Rocky Mountain Ranger District, Southern Analysis Area indicates that at least portions of the Elk Smith Project treatment units that propose tree-cutting in the Inventoried Roadless Area are located in areas that are yellow on the map, i.e. areas that are within historic range.
78. The Project EA does not disclose the historic departure map from the landscape scale assessment of the Rocky Mountain Ranger District, Southern Analysis Area.
79. The Project Decision does not disclose the historic departure map from the landscape scale assessment of the Rocky Mountain Ranger District, Southern Analysis Area.
80. The Project Objection denial letter does not disclose the historic departure map from the landscape scale assessment of the Rocky Mountain Ranger District, Southern Analysis Area.

E. Lynx Amendment

81. The Lewis and Clark Forest Plan includes the Northern Rockies Lynx

Management Direction, which is also referred to as the “Lynx Amendment.”

82. Lynx Amendment Standard VEG S2 mandates: “Timber management projects shall not regenerate more than 15 percent of lynx habitat on [National Forest System] lands in an [Lynx Analysis Unit] in a ten-year period.
83. The Lynx Amendment defines “timber management.” “Timber management consists of growing, tending, commercially harvesting, and regenerating crops of trees.”
84. The Lynx Amendment defines “[p]roject.” “All, or any part or number of the various activities analyzed in an Environmental Impact Statement, Environmental Analysis, or Decision Memo.”
85. The Forest Service states that as a result of the Project, “[t]he number of openings within the forested areas would increase, and as trees sprout and grow a younger age class of trees would develop. . . . the regenerated early stand initiation structural stage (3,897 acres) would become stand initiation structural stage that provides winter hare habitat. In the long term (100 to 150 years), as the regenerated trees grow and the size classes and structure converge, the habitat diversity would again decrease.”
86. The Forest Service states that “[t]he existing condition is 11 percent of the lynx habitat in early stand initiation. The proposed action would increase the

acres of early stand initiation to 2,991 acres, or 27 percent of the lynx habitat.”

87. Thus, the Project will increase “early stand initiation” lynx habitat by 16%.
88. A 16% increase in early stand initiation is the same thing as 16% regeneration.
89. Lynx Amendment Standard VEG S5 prohibits most “precommercial thinning projects” that reduce snowshoe hare habitat with certain exceptions.
90. The Lynx Amendment defines “precommercial thinning:” “Precommercial thinning is mechanically removing trees to reduce stocking and concentrate growth on the remaining trees, and not resulting in immediate financial return.”
91. The Forest Service states: “there are several units with proposed slashing of trees up to 16 feet tall prior to burning. The effect of slashing these smaller trees to hare habitat is similar to pre-commercial thinning[.]”
92. With some limitations, the Lynx Amendment allows the Forest Service to exempt a project from the VEG S2 and VEG S5 restrictions if the project area is in a wildland urban interface, as defined by the Healthy Forest Restoration Act.

F. Wildland Urban Interface (“WUI”)

93. Regarding Lynx Amendment Standard VEG S2, the Forest Service does not

disclose whether the units that will regenerate 16% of lynx habitat occur in the wildland urban interface.

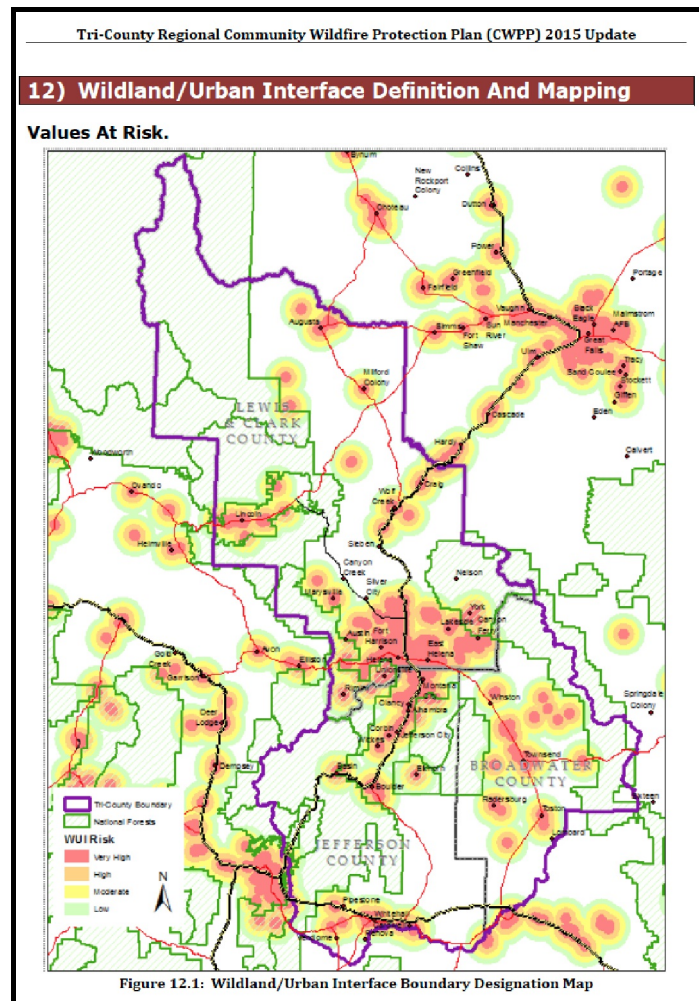
94. Regarding Lynx Amendment Standard VEG S5, the Forest Service represents that “slashing will only occur in units within the Wildland Urban Interface and 542 acres of exception will be applied. The portion of Unit 7 outside the Wildland Urban Interface will not be slashed.”
95. Similarly, FWS states: “542 acres will be treated using the exemptions from the vegetation standards for fuel treatment projects in the WUI.”
96. The Project Biological Assessment does not provide a definition or map of the WUI that was used for the Project.
97. The Project Biological Opinion does not provide a definition or map of the WUI that was used for the Project.
98. The Project EA represents: “The identification of treatment units, which can be found in Appendix B, in the Elk Smith Project Area also follows direction found in the Tri-County Fire Working Group, Regional Community Wildfire Protection Plan (2015). This Community Wildfire Protection Plan includes planning direction for Lewis & Clark, Jefferson, and Broadwater Counties. The entire Project Area is within Lewis & Clark County. Specifically, the Community Wildfire Protection Plan identifies wildland urban interface within the Project Area and contains recommendations on fuels treatments that

coincide with treatments and units identified in the Elk Smith Action

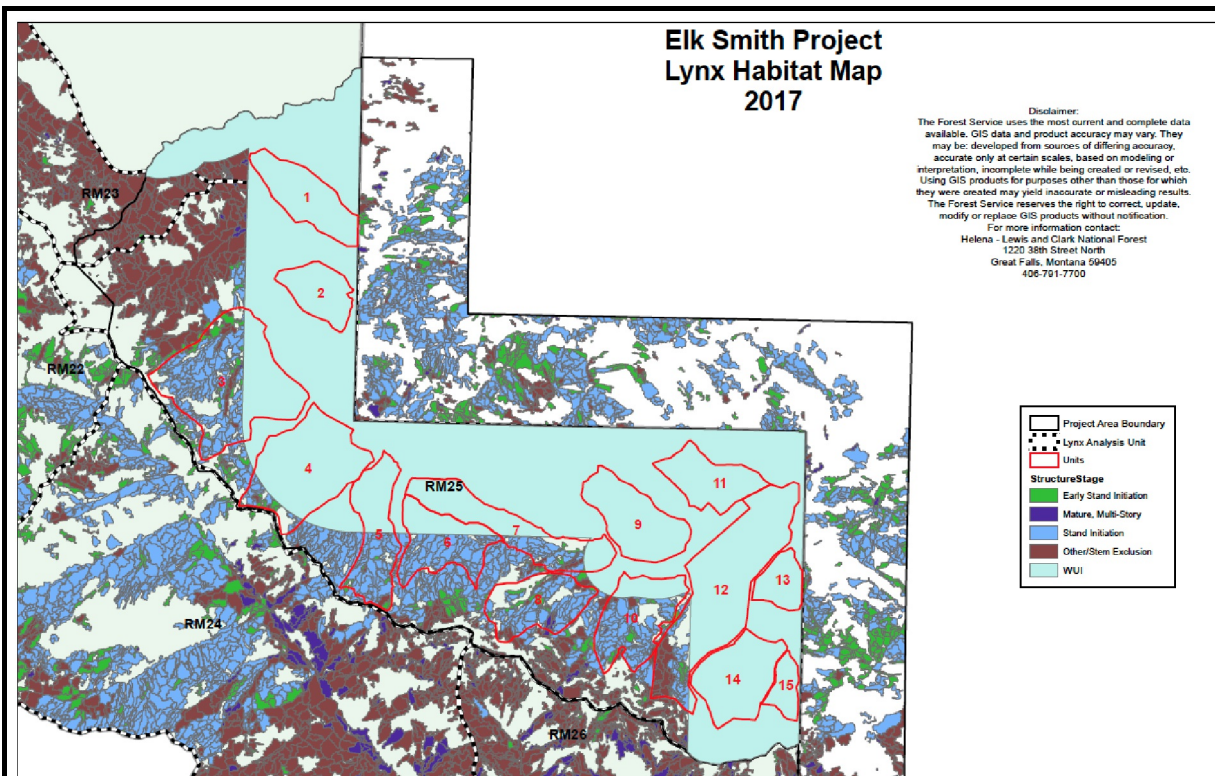
Alternative (Lewis & Clark Community Wildfire Protection Plan, 2015).”

99. The Project EA represents: “In addition, the majority of the Project Area is identified as Wildland Urban Interface (WUI) in the Tri-County Regional Community Wildfire Protection Plan (CWPP).”

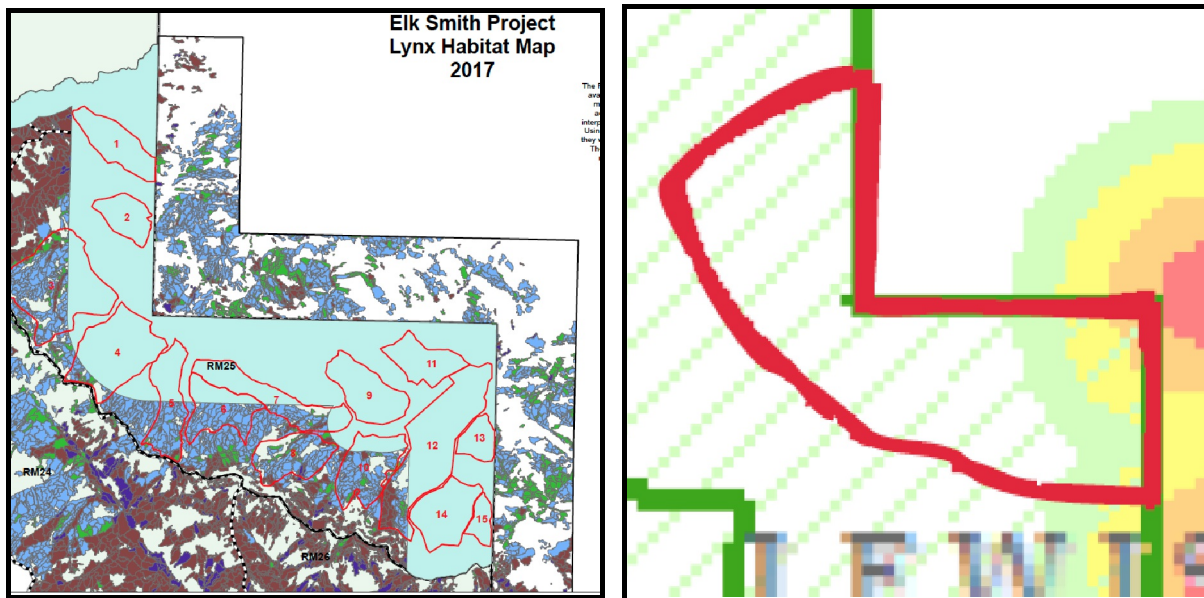
100. Contrary to this representation, the WUI map in the Tri-County Regional Community Wildfire Protection Plan (Tri-County Plan) only includes a small fraction of the Project area as WUI, as shown below:



101. The spreadsheet labeled as document “G12_2x” in the project file represents that Lynx Analysis Unit RM25 is 19,720 acres total, and 11,711 acres is wildland urban interface.
102. The spreadsheet labeled as document “G12_2x” in the project file represents that 2,855 acres within Project treatment units occur in wildland urban interface, specifically Units 1-7, 9-10, 12, 14, and 15.
103. The map labeled as document “G12_2o” in the project file shows where the Forest Service mapped wildland urban interface for the Project. This map was not disclosed to the public in the Decision, EA, BA, BiOp, or any of the specialist reports.



104. As demonstrated by comparison of the two maps, the map of wildland urban interface that the Forest Service created and used for the Project is not the same as the map of wildland urban interface used in the Tri-County Plan. A red line approximating the Project area has been superimposed on the Tri-County WUI map below:



105. As demonstrated above, the Tri-County Plan WUI covers a substantially smaller portion of the Project area than the G12_2o WUI that was actually used for the Project analysis.

106. There is no analysis in the record that discloses how many acres of Project units fall within the Tri-County WUI, as opposed to how many acres fall within the G12_2o WUI.

F. Grizzly Bear

107. The Project area contains 5,445 acres of mapped grizzly bear denning habitat; 817 acres of denning habitat will be burned by the Project.
108. The Project area contains 10,231 acres of mapped grizzly bear spring habitat; 4,707 acres of spring habitat will be burned by the Project.
109. The EA states: “broadcast or prescribed burning may occur in spring, when conditions are appropriate for achieving treatment objectives. Burning in five treatment units (Units 1, 2, 7, 9, and 11) and portions of three units adjacent to private land (Units 12, 13, and 14) could occur in Management Situation 1 habitat in spring.”
110. The EA states: “Ten units (7,544 acres) within the proposed action require the use of aerial ignition. Based on past experience (Owen, personal communication 2016), one or two burn windows (one to three consecutive days) occur each spring and one burn window occurs every other year in fall.”
111. While the EA discusses some recommendations of the Interagency Grizzly Bear Guidelines, those guidelines are not part of the Lewis and Clark Forest Plan.
112. The EA does not disclose, discuss, or apply the requirements of Appendix I

to the Forest Plan.

113. Forest Plan Appendix I, part (1), mandates:

1. Avoid human activities in identified grizzly bear habitat constituent elements or portions of constituent elements containing specific habitat values during the following seasonal use periods (see data summarization):

A. Spring habitat (concentrated use areas): April 1-June 30.

B. Breeding areas: May 1-July 15. (Currently identified breeding areas include upper Muddy Creek, the head of Rinkers Creek, the Ear Mountain area, and the head of the North Fork Dupuyer Creek.)

C. Alpine feeding sites: July 1-September 15.

D. Subalpine fir/whitebark pine habitat types: August 1-November 30.

E. Denning habitat: October 15-April 15.

114. Forest Plan Appendix I, part (2), mandates:

2. Avoid human activities in grizzly bear habitat components that provide important food sources during spring and early summer, April 1-July 15.

These habitat components include riparian shrub types, Populus stands, wet meadows, sidehill parks, and avalanche chutes. Maintain an undisturbed zone of at least 1/2 mile between activities and the edge of these habitat components where many important bear foods occur.

115. While the EA discloses grizzly spring habitat, it does not commit to avoiding human activities in those areas from April 1-June 30.

116. While the EA discloses grizzly denning habitat, it does not commit to avoiding human activities in those areas from October 15 - April 15.

117. The EA does not disclose or map the location of grizzly breeding areas, or commit to avoiding human activities in those areas from May 1-July 15.
118. The EA does not disclose or map the location of grizzly alpine feeding sites or commit to avoiding human activities in those areas from July 1 - September 15.
119. The EA does not disclose or map the location of grizzly subalpine fir/whitebark pine habitat types, or commit to avoiding human activities in those areas from August 1-November 30.
120. The EA does not disclose or map the location of grizzly bear habitat components that provide important food sources during spring and early summer, or commit to avoiding human activities in those areas from April 1-July 15, or commit to maintaining a ½ mile undisturbed zone between activities and the edge of these habitats. Examples of these habitats include riparian shrub types, Populus stands, wet meadows, sidehill parks, and avalanche chutes.

VI. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

The Forest Service's failure to analyze Project effects on the wolverine in the Elk Smith Project Biological Assessment and then receive Project concurrence from FWS violates the ESA and APA.

121. All previous paragraphs are incorporated by reference.
122. The Project is an “agency action” under the ESA.
123. Wolverines were proposed for listing under the ESA most recently in April 2016.
124. Wolverines may be present in the Project area.
125. Project activities may affect wolverines.
126. If, within an agency action area, a listed or proposed species “may be present, [the action] agency shall conduct a biological assessment” 16 U.S.C. §1536(c)(1).
127. The regulations state: “A biological assessment shall evaluate the potential effects of the action on listed and proposed species . . . and determine whether any such species or habitat are likely to be adversely affected by the action and is used in determining whether formal consultation or a conference is necessary.” 50 C.F.R. 402.12(a).
128. The regulations state: “The Federal agency shall submit the completed biological assessment to the Director for review. . . . If the biological assessment indicates that the action is not likely to jeopardize the continued existence of proposed species . . . and the Director concurs, then a conference is not required.” 50 C.F.R. 402.12 (j)(k).
129. The Forest Service prepared a December 2018 Biological Assessment for

the Elk Smith Project and included and analyzed grizzly bears, lynx, and lynx critical habitat, but the agency did not include the wolverine, or analyze Project effects on the wolverine, in the Biological Assessment for the Project.

130. Instead, the agency relies completely on the programmatic BA for wolverine.
131. The programmatic BA is insufficient because it does not meet the Forest Service's obligation to address the "direct and indirect effects of an action on the species ... together with the effects of other activities that are interrelated or interdependent with that action," 50 C.F.R. § 402.02, because it is too general.
132. The programmatic BA is inadequate because it is a brief document that covers a large area and addresses the science in very general terms.
133. The 12-page document covers all of Region 1, which encompasses 11 national forests across four states.
134. The programmatic BA asserts that the wolverine face only two threats to their survival: climate change (the primary threat), and harvest (the secondary threat).
135. Because wolverine are generally thought to be adaptable across habitat features and because most forest treatment activities occur in lower elevations (and wolverine tend to prefer high elevation habitat), the BA

concludes that general forest treatment activities are not a threat to wolverine's survival.

136. The BA then contains the following disclaimer: "some of the activities listed in the proposed action [such as timber harvest, mechanical equipment use, silvicultural treatments, range management, prescribed fire, weed control, etc.] have the potential to affect individual wolverines and/or their habitat, but not to the level of jeopardizing the continued existence of the wolverine."
137. The disclaimer is effectively a concession that further site-specific analysis is required to determine the effects of a particular project on local wolverine populations.
138. Despite the programmatic BA's assessment that most forest treatment activities do not occur in wolverine habitat, the Project EA discloses that this Project does indeed occur in wolverine habitat: under the Inman model, there are 5,030 acres of primary habitat and 180 acres of maternal habitat in the Project area. The analysis does not disclose how many acres of male and female dispersal habitat are in the Project area, but if it did, those totals would likely cover the entire Project area.
139. This alone is sufficient to take the Project outside the scope of the analysis contained in the programmatic BA.
140. Moreover, the EA concludes that "[p]roject operations could disturb

foraging wolverine if they are present in the area.” Although the EA does not use the same terminology as a BA, this is effectively a determination that the Project “may affect,” but “is not likely to adversely affect” wolverine.

141. The EA is not an adequate substitute for a BA because it does not address female dispersal habitat, male dispersal habitat, or the findings of wolverine tracking studies on the Forest and post-2012 peer-reviewed scientific literature that undermine prior assumptions regarding wolverine habitat modeling and the effects of land management operations on wolverines. Moreover, the EA completely fails to address the potential effects of helicopters on wolverines.
142. However, even assuming that the minimal analysis (i.e. three paragraphs) contained in the EA satisfied the Forest Service’s obligation to prepare a BA, its consultation obligations are still outstanding. The Forest Service’s failure to obtain FWS concurrence is arbitrary and capricious.
143. Accordingly, the Forest Service’s failure to include the wolverine, and analyze Project effects on wolverine, in the Elk Smith Project Biological Assessment, and then receive concurrence from FWS regarding Project-level effects, violates the ESA and APA and is arbitrary and capricious. *See Native Ecosystems Council v. Marten*, - - - F.Supp.3d - - - -, 2020 WL 1479059 (D. Mont. 2020)(reaching this holding in similar case).

SECOND CLAIM FOR RELIEF

The Forest Service's failure to fully disclose available information to the public and take a hard look at potential effects of the Project on wolverines in the Project Environmental Assessment violates NEPA and the APA.

144. All previous paragraphs are incorporated by reference.
145. The EA contains three paragraphs of discussion regarding the potential effects of the Project on wolverine.
146. The EA states: "Inman modelled [sic] maternal habitat (suitable for use by reproducing females) and primary habitat (areas suitable for survival and use by resident adults). In the Elk Smith Project Area there are 180 acres of maternal habitat and 5,030 acres of primary habitat."
147. The EA does not disclose that the Inman model also includes two other types of habitat: (1) female dispersal habitat, and (2) male dispersal habitat.
148. The EA does not disclose how many acres of male dispersal habitat are located within the Project area.
149. The EA does not disclose how many acres of female dispersal habitat are located within the Project area.
150. The EA does not disclose the results of wolverine snow-tracking efforts on the Helena-Lewis and Clark National Forest, as set forth in Gehman (2014).
151. Gehman (2014) found that the Copeland model for wolverine habitat, which

is based upon snowpack, did not accurately model actual occupied wolverine habitat on the Helena-Lewis and Clark National Forest: “our wolverine use data contradict these attempts to define wolverine habitat based upon elevation and/or persistent snow our data demonstrate that the Ogden Mountain to Nevada Creek Region represents valuable and heavily used wolverine habitat that would not even be considered as wolverine habitat in other analyses.”

152. Gehman (2014) further found “[d]eclining detections of carnivores during the past several winters [that] coincided with large-scale logging along Telegraph Creek and the Continental Divide south of MacDonald Pass, and increased snowmobile activity in the region.”
153. The EA also does not disclose published, peer-reviewed findings that “[w]olverines were less likely to occur at sites with oil and gas exploration, forest harvest, or burned areas, even after accounting for the effect of topography. The relative paucity of wolverines in human-impacted portions of this range edge suggests that effective conservation requires managing landscape development, and research on the proximal mechanisms behind this relationship.”
154. Finally, despite multiple prior agency analyses that find that helicopters will displace wolverines in a manner similar to grizzly bears, the EA contains no

analysis of how Project helicopter burning operations over almost 8,000 acres will impact wolverines.

155. The Forest Service's failure to fully and fairly inform the public, take a hard look, and disclose and address available scientific information regarding the potential impact of the Project on wolverines in the Project EA violates NEPA and the APA.

THIRD CLAIM FOR RELIEF

The Forest Service's misrepresentation in the EA that the Project area has "the greatest departures from historical conditions," and has "significantly departed from historic natural conditions," and its reliance on that false premise to authorize tree cutting in an Inventoried Roadless Area, violates NEPA, the APA, and the Roadless Rule.

156. All previous paragraphs are incorporated by reference.
157. All Project units are located within an Inventoried Roadless Area.
158. The Project allows tree-cutting in an Inventoried Roadless Area in Units 1, 2, 7, 9, and 11, for a total of 2,787 acres.
159. The origins of the Roadless Rule date back over four decades, when in 1972 the Forest Service embarked on a Roadless Area Review and Evaluation project ("RARE I") to identify roadless areas on National Forest lands and determine their suitability for designation as Wilderness.

160. As part of this effort, the Forest Service inventoried approximately 56 million acres that it deemed suitable for designation as Wilderness.
161. After the RARE I inventory was successfully challenged under NEPA, it was abandoned.
162. Four years later, the Forest Service began a more extensive Roadless Area Review and Evaluation project (“RARE II”), which also created an inventory of roadless areas that the Forest Service deemed suitable for designation as Wilderness.
163. Relying on this inventory, Congress designated approximately 35 million acres as Wilderness.
164. Areas that were identified as roadless during the RARE II inventory (“inventoried roadless areas” or “IRAs”), but were not subsequently designated as Wilderness by Congress, continued to be managed pursuant to each National Forest's individual forest plan.
165. In the late 1990s, the Forest Service revisited its road-management policy, noting that: (1) use of the National Forests had “shifted substantially toward recreation,” (2) there were insufficient funds to maintain existing roads, and (3) there was an “accumulation of new scientific information” suggesting that “ecological impacts from existing roads are more extensive than previously thought.”

166. On March 1, 1999, the Forest Service published an Interim Roadless Rule, which established an 18-month moratorium on road construction in IRAs.
167. Subsequently, on January 12, 2001, the Forest Service published the final Roadless Rule. 66 Fed. Reg. 3244 (Jan. 12, 2001).
168. The Roadless Rule states in part:

Prohibition on timber cutting, sale, or removal in inventoried roadless areas.

(a) Timber may not be cut, sold, or removed in inventoried roadless areas of the National Forest System, except as provided in paragraph (b) of this section.

(b) Notwithstanding the prohibition in paragraph (a) of this section, timber may be cut, sold, or removed in inventoried roadless areas if the Responsible Official determines that one of the following circumstances exists. The cutting, sale, or removal of timber in these areas is expected to be infrequent.

(1) The cutting, sale, or removal of generally small diameter timber is needed for one of the following purposes and will maintain or improve one or more of the roadless area characteristics as defined in § 294.11.

(i) To improve threatened, endangered, proposed, or sensitive species habitat; or

(ii) To maintain or restore the characteristics of ecosystem composition and structure, such as to reduce the risk of uncharacteristic wildfire effects, within the range of variability that would be expected to occur under natural disturbance regimes of the current climatic period;

(2) The cutting, sale, or removal of timber is incidental to the implementation of a management activity not otherwise

prohibited by this subpart;

(3) The cutting, sale, or removal of timber is needed and appropriate for personal or administrative use, as provided for in 36 CFR part 223; or

(4) Roadless characteristics have been substantially altered in a portion of an inventoried roadless area due to the construction of a classified road and subsequent timber harvest. Both the road construction and subsequent timber harvest must have occurred after the area was designated an inventoried roadless area and prior to January 12, 2001. Timber may be cut, sold, or removed only in the substantially altered portion of the inventoried roadless area.

36 C.F.R. § 294.13 (2005).

169. For over 15 years, the Roadless Rule was the subject of litigation. *See e.g.* *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1126 (9th Cir. 2002); *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1007 (9th Cir. 2009); *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1272 (10th Cir. 2011); *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 962 (9th Cir. 2015) (*en banc*); *Alaska v. United States Dep't of Agric.*, 273 F. Supp. 3d 102, 108–12 (D.D.C. 2017). Nonetheless, the Roadless Rule is still in effect.
170. In order to avoid the prohibition against tree cutting in an IRA, in this case, the Forest Service relies on the exemption at (b)(1)(ii): “To maintain or restore the characteristics of ecosystem composition and structure, such as

to reduce the risk of uncharacteristic wildfire effects, within the range of variability that would be expected to occur under natural disturbance regimes of the current climatic period.”

171. However, that exemption requires a showing that a project area needs tree-cutting in order to stay “within the range of variability that would be expected to occur under nature disturbance regimes”

172. In this case, in the EA, the Forest Service argues that this exception applies because the Project area has “the greatest departures from historical conditions,” and has “significantly departed from historic natural conditions” according to a 2010 Forest Service landscape assessment.

173. To the contrary, the 2010 landscape assessment finds that 58% of the landscape is within historic range, and only 5% of the landscape has experienced a significant departure from historic conditions. The Forest Service did not disclose this fact to the public in the Project EA.

174. More specifically, the map from the landscape assessment indicates that little, if any, of the Project area has significantly departed from historic conditions. The Forest Service did not disclose this fact to the public in the Project EA.

175. Furthermore, it appears that at least a portion of all or most of the tree-cutting units for the Project occur in an area that is within historic range,

according to the 2010 landscape assessment map. The Forest Service did not disclose this fact to the public in the Project EA.

176. Finally, the EA represents that the fire return interval for this Project area is 35-100 years between fires.
177. The Project area experienced a fire in 1988, i.e. 32 years ago.
178. The Forest Service fails to explain how an area with a fire return interval of 35-100 years could be significantly departed from historic conditions when it experienced a fire 32 years ago.
179. For these reasons, the Forest Service's misrepresentations and failure to disclose key facts to the public in the EA violate NEPA and the APA. Additionally, the Forest Service's decision to allow tree-cutting over 2,787 acres in an Inventoried Roadless Area that has not experienced significant departure from historic conditions, but instead has a majority of the area within historic range with no departure at all according to the agency's own undisclosed analysis, violates the Roadless Rule and the APA.

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FOURTH CLAIM FOR RELIEF

The Forest Service's misrepresentations to the public, failure to use the Forest Plan Lynx Amendment definition of wildland urban interface, and failure to establish compliance with Lynx Amendment standards VEG S2 and VEG S5, violates NEPA, NFMA, and the APA.

180. All previous paragraphs are incorporated by reference.
181. The standards in the Lynx Amendment are legally binding on the Forest Service, and the Forest Service must demonstrate that the Project complies with these standards.
182. The Project violates Lynx Amendment Standard VEG S2 because it will regenerate 16% of lynx habitat, and the standard sets a limit at 15% regeneration. This standard applies to all projects that include "regenerating crops of trees," and the Forest Service concedes that one of the results of the Project will be "regenerated early stand initiation structural stage" on 3,897 acres.
183. The Project also violates Lynx Amendment Standard VEG S5 because it allows "mechanically removing trees to reduce stocking and concentrate growth on the remaining trees" on 542 acres.
184. The wildland urban interface exemption from Lynx Amendment Standards VEG S2 and VEG S5 does not cover all affected units: (1) the Lynx

Amendment requires that the Forest Service use the definition of WUI from the HFRA; (2) the HFRA requires the use of the WUI from the governing Community Wildfire Protection Plan, if one exists; (3) the Tri-County Plan WUI governs this area; (4) the Tri-County WUI map was not used for the Project WUI analysis; and (5) instead, the Forest Service unlawfully created and applied its own G12_2o WUI map, similar to the legal error it committed in its analysis of the Telegraph Project. Moreover, the Forest Service never disclosed this sleight of hand to the public in the EA, BA, BiOp, Decision, or specialist reports.

185. The Forest Service's use of an incorrect WUI violates the Lynx Amendment and NFMA. Without the WUI exemption, the Project violates the Lynx Amendment and NFMA. The Forest Service's misrepresentations to the public that it was applying the Tri-County WUI and that "the majority of the Project Area is identified as Wildland Urban Interface (WUI) in the Tri-County Regional Community Wildfire Protection Plan (CWPP)" violate NEPA and the APA.
186. Similar to the Telegraph Project, the Forest Service must prepare a supplemental NEPA analysis for the Project that applies the correct WUI. In the new analysis, the Forest Service must reassess the application of the Lynx Amendment standards to the Project.

FIFTH CLAIM FOR RELIEF

*The Forest Service's failure to disclose and demonstrate compliance
with Forest Plan Appendix I requirements for grizzly bears
violates NEPA, NFMA, and the APA.*

187. All previous paragraphs are incorporated by reference.
188. In December 2018, the Forest amended the Lewis and Clark Forest Plan with the “Grizzly Bear Amendment.”
189. The Grizzly Bear Amendment Appendix 2 states that the following Lewis and Clark Forest Plan provisions were expressly retained:

Developed Recreation Forestwide Management Standards A-2, p. 2-25

(5) Administer provisions of the Endangered Species Act in occupied T&E species habitat (appendix I). Use the management guidelines developed under the Interagency Rocky Mountain Front Wildlife Monitoring/Evaluation Program to avoid or mitigate conflicts between developed recreation and T&E species (appendix I)

Minerals Forestwide Management Standards, Seismic Exploration G-1, p. 2-54

(14) Protect T&E wildlife species through compliance with the Endangered Species Act. Use the Interagency Guidelines to avoid or mitigate conflicts with seismic exploration and T&E species (appendix I).

Appendix I, Rocky Mountain Front Interagency Wildlife Guidelines. Part B–Species-Specific Management Guidelines. Grizzly Bear, pp. I-6 to I-8

1. Avoid human activities in identified grizzly bear habitat constituent elements or portions of constituent elements containing specific habitat values during the following seasonal use periods (see data summarization):

- A. Spring habitat (concentrated use areas): April 1-June 30.
- B. Breeding areas: May 1-July 15. (Currently identified breeding areas include upper Muddy Creek, the head of Rinkers Creek, the Ear Mountain area, and the head of the North Fork Dupuyer Creek.)
- C. Alpine feeding sites: July 1-September 15.
- D. Subalpine fir/whitebark pine habitat types: August 1-November 30.
- E. Denning habitat: October 15-April 15.

2. Avoid human activities in grizzly bear habitat components that provide important food sources during spring and early summer, April 1-July 15.

These habitat components include riparian shrub types, Populus stands, wet meadows, sidehill parks, and avalanche chutes. Maintain an undisturbed zone of at least 1/2 mile between activities and the edge of these habitat components where many important bear foods occur.

190. The Grizzly Bear Amendment Appendix 2 does not expressly remove the

following provisions:

Livestock Grazing Forestwide Management Standards D-4, p. 2-41 (5) Administer provisions of the Endangered Species Act in occupied T&E species habitat. Use the Interagency Wildlife Guidelines to avoid or mitigate conflicts between livestock grazing and T&E species (Appendix I).
Timber Harvest E-4, p. 2-45 (10) Administer provisions of the Endangered Species Act in occupied T&E species habitat. Use the Interagency Wildlife Guidelines to avoid or mitigate conflicts between timber harvest and T&E species (Appendix I).
Facilities Forestwide Management Standards, Maintenance and Construction of Roads, Trails, and Other Facilities L-4, p. 2-70 (33) Administer provisions of the Endangered Species Act in occupied T&E species habitat. Use the interagency wildlife guidelines to avoid or mitigate conflicts between road construction and use and T&E species (appendix I).

191. Thus, in the very least, Lewis and Clark Forest Plan Appendix I, numbers (1) and (2) are still in effect and legally binding on the Forest Service, and the Forest Service must demonstrate that the Project complies with these provisions.
192. The Forest Service does not disclose and demonstrate compliance with the Appendix I timing restrictions in the Project EA.

193. The Forest Service's failure to fully and fairly disclose to the public, and demonstrate Project compliance with, the Appendix I timing protections for grizzly bears violates NEPA, NFMA, and the APA.

SIXTH CLAIM FOR RELIEF

The Forest Service's failure to reinitiate programmatic ESA consultation on the wolverine violates the ESA and APA.

194. All previous paragraphs are incorporated by reference.
195. Reinitiation of ESA consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and: (1) If the amount or extent of taking specified in the incidental take statement is exceeded; (2) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (3) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence; or (4) If a new species is listed or critical habitat designated that may be affected by the identified action.
196. As set forth above, new information reveals that land management activities may have effects on wolverines that have not yet been considered by the

programmatic ESA consultation for wolverine. For example, field studies on the Helena - Lewis and Clark National Forest have found that the Copeland habitat model for wolverine is not reliably accurate at predicting where wolverines actually occur on the Forest. Additionally, published, peer-reviewed literature has found that land management activities do have the potential to have negative effects on wolverines. These findings fundamentally undermine the assumptions to the contrary in the programmatic wolverine consultation.

197. The agencies' failure to use the best available information and reinstitute programmatic ESA consultation for the wolverine violates the ESA and APA.

VII. RELIEF REQUESTED

For all of the above-stated reasons, Plaintiff requests 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 Plaintiff its costs, expenses, expert witness fees, and reasonable attorney fees under the ESA and/or under EAJA; and

D. Grant Plaintiff any such further relief as may be just, proper, and equitable.

Respectfully submitted this 3rd Day of April, 2020.

/s/ Rebecca K. Smith

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