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

ALLIANCE FOR THE WILD
ROCKIES AND NATIVE
ECOSYSTEMS COUNCIL,

Case No.: 9:12-cv-0055- DLC

DEFENDANTS' REPLY IN
SUPPORT OF MOTION TO
DISSOLVE INJUNCTION

Plaintiffs,

v.

LEANNE MARTEN, Regional Forester
of Region One of the Forest Service,
UNITED STATES DEPARTMENT OF
AGRICULTURE, FOREST SERVICE,
UNITED STATES FISH AND
WILDLIFE SERVICE, an agency of the
U.S. Department of the Interior,

Defendants.

EXHIBIT INDEX

<u>#</u>	<u>Title</u>
1	USFS Bozeman Municipal Watershed Fuels Reduction Project Revised Biological Assessment dated November 18, 2018 (ECF 81-1)
2	USFS East Boulder Fuels Reduction Project Revised Biological Assessment dated November 30, 2016 (ECF 81-2)
3	FWS Biological Opinion on the Northern Rockies Lynx Amendment dated October 18, 2017 (ECF 81-3)
4	USFS Biological Assessment on the Northern Rockies Lynx Amendment, dated June 30, 2017, and revised appendices dated September 2017 (ECF 81-4)
5	FWS Biological Opinion on Bozeman Municipal Watershed Project, dated December 17, 2018 (ECF 81-5)
6	FWS Biological Opinion on East Boulder Fuels Reduction Project, dated December 17, 2018 (ECF 81-6)
7	USFS Supplemental Information Report Determination Related to Canada lynx and lynx habitat consultation – Bozeman Municipal Watershed Project, dated April 15, 2019 (ECF 81-7)
8	USFS Bozeman Municipal Watershed Project Supplemental Information Report Determination, dated April 15, 2019 (ECF 81-8)
9	USFS East Boulder Fuels Reduction Project Supplemental Information Report – Determination, dated April 5, 2019 (ECF 81-9)
10	Supplemental Information Report Determination related to Canada lynx and lynx critical habitat consultation – East Boulder Fuels Reduction Project, dated April 2, 2019 (ECF 81-10)
11	Bozeman Municipal Watershed Project – Consideration of new Canada lynx science (ECF 81-11)
12	Canada Lynx New Science Analysis –East Boulder Fuels Reduction Project (ECF 81-12)

I. Effects to Matrix Habitat Are Insignificant.

Plaintiffs' primary argument against lifting the injunction is that the agencies did not adequately consider the two projects' potential to adversely affect lynx matrix habitat, one of the four primary constituent elements ("PCE" or "element") of the critical habitat designated under the Endangered Species Act ("ESA") for Canada lynx. ECF 84 at 3-12 ("Pl. Br.") However, in the ESA consultation over the Lynx Amendment's effect on lynx critical habitat, and in the two subsequent consultations for each of the two projects here, the agencies made repeated and express findings that these fuels management projects – and the Lynx Amendment in general – would have an insignificant effect on the matrix habitat element of lynx critical habitat because such projects would not create barriers to lynx movement.

This conclusion flows from the very reason the Fish and Wildlife Service ("FWS") included matrix habitat as an element of lynx critical habitat in the first instance. Rebuttal of Plaintiffs' argument centers on FWS' definition of the elements of lynx critical habitat. FWS defined lynx critical habitat as "boreal forest landscapes" including "(iv) matrix habitat (e.g. hardwood forest, dry forest, non-forest, or other habitat types that do not support snowshoe hares) that occurs between patches of boreal forest in close juxtaposition (at the scale of a lynx home range) such that lynx are *likely to travel through such habitat* while accessing patches of boreal forest within a home range." 50 C.F.R. § 17.95(a) (emphasis added); 79 Fed. Reg. 54,782, 54,812 (Sept. 12, 2014) (revised designation of lynx critical habitat). The primary conservation value of matrix habitat is to provide connectivity for lynx to travel among boreal forest areas, especially hare habitats. Ex. 3 at 10, 13 ("Lynx use matrix habitat to travel within their home range, but do not depend on it for prey species or denning sites"); *See also* 79 Fed. Reg. 54,799 (re: necessity of habitat connectivity); 78 Fed. Reg. 59,430, 59,434 (Sept. 26, 2013) ("[L]ynx incorporate the

matrix habitat... into their home ranges and use it for traveling between patches of boreal forest that support high hare densities where most lynx foraging occurs.”)

FWS identified this element of lynx critical habitat based on the current scientific research on lynx and their habitats. 79 Fed. Reg. at 54,805. This Court affirmed FWS’ definition of lynx critical habitat as “an agency decision within the scientific expertise of [FWS.]” *Wildearth Guardians v. U.S. Dep’t of Interior*, 205 F. Supp. 3d 1176, 1185 n.4 (D. Mont. 2016). The principle that the conservation value of matrix habitat is to provide connectivity for lynx movement is well-established, not (as plaintiffs aver) an assumption or unsupported finding. Pl. Br. 8, 11. FWS’ rationale for its definition of lynx critical habitat supports the analyses the agencies used in the ESA consultations under review here. Ex. 3 at 13, 18.

FWS has even pointed to thinning and fuel reduction projects occurring in matrix habitats as activities that “would *not* adversely affect lynx critical habitat, and would not require consultation.” 79 Fed. Reg. 54,827 (emphasis added). FWS reasoned that: “[i]n matrix habitat, activities that change vegetation structure or condition would not be considered an adverse effect to lynx critical habitat *unless those activities would create a barrier or impede lynx movement* between patches of foraging habitat and between foraging and denning habitat within a potential home range, or if they would adversely affect adjacent foraging habitat or denning habitat.” *Id.* (emphasis added). The distinct functions of different lynx habitats – and the limited function of matrix habitat to facilitate lynx movement - provides a reasoned basis for the agencies to focus their analysis of project effects on matrix habitat as they did. *See, e.g.*, Ex. 3 at 18-19.

Plaintiffs argue that the Services’ ESA Consultation Handbook requires a more elaborate analysis than the agencies provided. Pl. Br. 4-11. Nothing in the ESA’s statutory or regulatory regime requires the agencies to affirmatively address abstract propositions - such as “the longer the recovery rate the more severe the

disturbance” - untethered to any demonstration that such issues have any reasonable basis in fact. Pl. Br. 5, 9, 11. Such issues are not mandatory elements of the effects analysis where there is no factual or scientific information to suggest effects via such mechanisms are reasonably certain to occur here. 50 C.F.R. § 402.02 (definition of “effects of the action”); *Butte Env'tl. Council v. U.S. Army Corps of Eng'rs*, 620 F.3d 936, 948 (9th Cir. 2010) (rejecting argument that analysis had to consider localized impacts or rate of loss where no record evidence suggested such issues were important). An agency decision is reasonable unless it has “entirely failed to consider an important aspect of the problem.” *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007) (citation omitted). Plaintiffs have cited no scientific information suggesting that effects to matrix habitat from causal pathways such as disturbance severity or recovery rate are important issues here. Pl. Br. 9.

For example, Plaintiffs complain that project activities could take 12 years and that affected forest stands and treatment units could take decades to cycle through the successional process to return to current conditions. Where, as here, the treated areas of matrix habitat will not impede lynx movement, there is no force to Plaintiffs' assertion (Pl. Br. 11) that “the longer the recovery rate, the more severe the disturbance.” *See Butte Env'tl Council*, 620 F.3d at 948 (“[a]n area of a species' critical habitat can be destroyed without appreciably diminishing the value of critical habitat for the species' survival or recovery.”).

Rather, FWS advises that “for critical habitat analyses, many of the following considerations [i.e. those cited by Plaintiffs as necessary to characterize the effects of the action] can be addressed in terms of the effect on the functional suitability of the habitat to support the species.” ECF 84-1 at 4-30. As the ESA Consultation Handbook suggests: “the biology comes first.” ECF 84-1 at 1-2. It is sufficient then for the agencies to consider whether the project will impede lynx movement, i.e. whether the conservation value of the matrix habitat to provide habitat connectivity

will be maintained. There is no mandatory requirement under the ESA to evaluate, for example, the successional process for forested matrix habitat when the condition of a particular forest stand does not determine whether the area will remain functional matrix habitat.

Plaintiffs also complain that “the project analyses treat matrix habitat as ‘non-lynx habitat,’ give it lesser consideration, and fail to assess on-the-ground effects to this habitat within the project area and LAU.” Pl. Br. 9. They aim this criticism primarily at the Bozeman Project. Pl. Br. 7-12.

Plaintiffs’ first point is a meaningless swipe at the Lynx Amendment and its definition of lynx habitat as productive hare habitat. The Lynx Amendment defines “lynx habitat” as those forest habitats that “provide a prey base of snowshoe hare.” NRLMD-023734. However, “areas of critical habitat not mapped as lynx habitat [for Lynx Amendment purposes] generally provide matrix habitat.” Ex. 3 at 12. The Lynx Amendment affirmatively protects the function of matrix habitat with Objective All 01 and Standard All S1 (among others not relevant here). Standard ALL S1 requires that all vegetation management projects, including the two here, “must maintain habitat connectivity in an LAU.”¹ Ex. 3 at 19, 28-29 (“[U]nder this standard, Forest Service actions will not be permitted to degrade connectivity in lynx habitat or in linkage areas . . . [and] would ultimately conserve adequate connectivity

¹ Plaintiffs assert that the agencies should have set a numeric threshold for alteration of matrix habitat in the same way USFS set an “adjusted threshold” for limiting vegetation management in designated lynx critical habitat by reference to lynx habitat. Pl. Br. 8; Ex. 3 at 7 (explain the adjusted threshold). There is no obligation under the ESA to evaluate alternatives to an agency action such as the Lynx Amendment. And the Lynx Amendment already requires preserving connectivity for lynx movement and thus preserves the functionality and conservation value of the matrix habitat element. Plaintiffs also ignore that matrix habitat is not a limiting factor for lynx in the same way that snowshoe hare habitat is a limiting factor. Ex. 3 at 16; 79 Fed. Reg. at 54,786.

with occupied lynx critical habitat”); Ex. 4 at 21, 54 (same). In any event, in all three ESA consultations conducted on remand, the agencies used two, distinct criteria for assessing lynx-related impacts. They used the Lynx Amendment’s management direction to assess impacts to lynx and occupied lynx habitat, and also used the PCE of lynx critical habitat to assess impacts to lynx critical habitat in a separate analysis. *See, e.g.*, Ex. 4 at 29-30, 33; Ex. 3 at 29, 32.

The project-level ESA consultations support their findings that both vegetation management projects will maintain habitat connectivity and avoid impacts on connectivity and thus the potential for significant adverse effects to the matrix habitat element of critical habitat.² The Bozeman Project will affect 1,293 acres of the 27,860 acres (i.e. 4.6%) of available matrix habitat (PCE 1d) in the North Gallatin Lynx Analysis Unit. Ex. 1 at 37-38, 40, 42. USFS’ biological assessment analyzed whether any activities would affect connectivity for lynx movement, both to comply with the Lynx Amendment standard on connectivity and to evaluate the potential effects on the different elements of critical habitat.³ Ex. 1 at 22-25, 26-28, 40-42. The temporary alteration of matrix habitat due to project activities would “alter use patterns, but would not pose barriers to lynx movement” and would not “adversely affect adjacent foraging and denning habitat.” Ex. 1 at 40; *see also* Ex. 1 at 22-26.

Plaintiffs complain that the Bozeman project includes silvicultural treatments on ridgelines that will affect lynx movement. Pl. Br. 9. The biological assessment

² The Bozeman Project occurs in North Gallatin Lynx Analysis Unit. Ex. 1 at 9. The East Boulder project is located in the East Boulder Lynx Analysis Unit. Ex. 2 at 9.

³ The critical habitat effects analysis is largely duplicative of the occupied-lynx-habitat analysis using the Lynx Amendment standards because of the similar focus on the same habitat functions.

discussed this issue, finding that the few ridgeline fuel breaks will not result in open areas, but are designed as “shaded fuels break,” which “[d]ue to their width and the structure that would be retained . . . would not be considered a barrier to lynx movement across the landscape.” Ex. 1 at 23, *see also* Ex. 1 at 7, 18, 22-26, 28.

Plaintiffs also complain about the effects of thinning and the geographic concentration of activity in matrix habitat (and overall) in the Bozeman Project. Pl. Br. 10-11. The biological assessment explains that fuels reduction treatments, including pre-commercial thinning, will leave sufficient tree cover in both foraging and matrix habitat “to maintain travel and resting habitat for lynx.” Ex. 1 at 22, 23-25, 41; *see also* Ex. 11 at 5 (explaining that lynx “select against” dry forest at lower elevation, i.e. matrix habitat). It explains that the project will serve to maintain healthy riparian areas that lynx use for travel. *Id.* at 23. The biological assessment evaluates the several types of treatments and their locations in both foraging and matrix habitats to support its conclusion that the LAU will continue to provide adequate cover to maintain travel and resting habitat for lynx and “overall impacts to connectivity are expected to be insignificant at the scale of the LAU.” Ex. 1 at 22, 25, 40, 42.

Plaintiffs also mistakenly argue that the agencies unreasonably concluded that the effects to foraging habitat (i.e. snowshoe hare habitat that is PCE1a of lynx critical habitat) will be insignificant. Pl. Br. 11. The agencies actually concluded that the Bozeman project will have significant adverse effects on 1,080 acres of snowshoe hare habitat (PCE1a) due to alteration of horizontal vegetative cover. Ex. 1 at 38, 40; Ex. 5 at 6. Plaintiffs assert that this same logic should carry-over to analyze effects to matrix habitat.⁴ Pl. Br. 1. This makes no sense because foraging

⁴ Plaintiffs assert, without any support, that alteration of matrix habitat necessarily affects the functioning of adjacent foraging habitat. The agencies found otherwise.

habitat and matrix habitat have different conservation purposes. Matrix habitat is identifiable precisely as those forest types that do not and cannot serve as foraging habitat, itself defined as boreal forest types that include the horizontal vegetation features snowshoe hare need. Ex. 1 at 35. So long as lynx can transit through matrix habitat, connectivity is not significantly affected. Ex. 3 at 13. Looking beyond matrix habitat, the agencies also explained why the project's effects to foraging habitat do not impair connectivity or lynx movement in the Lynx Analysis Unit. Ex. 1 at 22-25. Plaintiffs' recitation of abstract considerations such as "disturbance severity" and "recovery rate" do not compel a different or additional analysis of whether project activity will impair the ability of lynx to effectively move between patches of foraging habitat or otherwise. The agencies have adequately explained why the salient issue for matrix habitat is not the state of the vegetation, but whether lynx movement will be impeded.

The Biological Opinion for the Bozeman project tiers to the Biological Opinion on the Lynx Amendment and incorporates both that analysis as well as the content of the USFS' biological assessment. Ex. 5 at 6. The project-level Biological Opinion confirms that this project's effects are consistent with the effects considered in the Lynx Amendment programmatic biological opinion on critical habitat. Ex. 5 at 4-6. Taken together, these analyses reasonably address Plaintiffs' concerns and support the conclusion that the effects of the Bozeman Project on the matrix habitat element (PCE 1d) of lynx critical habitat are not significant because the matrix habitat that will be treated will remain forested and effects to travel patterns will be temporary because the forest stands in these areas will regrow. The agencies had substantial reasons to conclude that lynx will remain able to traverse this matrix

Ex. 1 at 40. There is no basis to claim the agencies underestimated the acreage of adversely affected snowshoe hare habitat or denning habitat.

habitat to reach the foraging and denning habitats in this Lynx Analysis Unit and elsewhere.

In one conclusory sentence Plaintiffs claim, but do not identify, allegedly similar deficiencies in the East Boulder Project ESA consultation. Pl. Br. 12. There is no basis for argument that the agencies overlooked any relevant factor in finding that this project's alteration of 137 acres of the 34,681 acres of matrix habitat (0.2% of matrix habitat) in the East Boulder Lynx Analysis Unit is negligible at the scale of a home range and will not impede lynx travel between patches of boreal forest. Ex. 2 at 22-25; Ex. 6 at 6. A large portion of the project's treatments will occur outside of snowshoe hare habitat and along an existing, major road corridor, meaning that lynx remain able to use the majority of the Lynx Analysis Unit unimpeded by project effects. Ex. 2 at 12, 16. Moreover, all treatments will retain some degree of tree stand structure. Ex. 2 at 11.

The problems Plaintiffs perceive in the ESA consultations completed on remand lack any legal or factual basis and provide no basis to maintain the current injunction.

II. Supplemental NEPA Is Not Required.

USFS completed its original National Environmental Policy Act ("NEPA") analyses for each project after FWS designated critical habitat within the Gallatin National Forest. Thus the Bozeman Project Environmental Impact Statement ("EIS") (issued March 2010), the Supplemental EIS (issued November 2011) and the East Boulder Environmental Assessment (issued April 2011) identified that critical habitat and considered the effects of the project on critical habitat, including matrix habitat and habitat connectivity. BMW-000614–BMW-000635; BMW-00363-BMW00364; EB-00189-EB-000192; EB-000270-EB000276. The Court found these analyses unreasonably reliant on USFS compliance with Lynx Amendment standards where the agencies had not consulted over the Lynx

Amendment's effects to lynx critical habitat. ECF 39 at 20-21. The Court enjoined implementation of the two projects "pending completion of reinitiated consultation and any further procedures that might be required under the [NEPA] in light of the findings from that consultation." *Id.* at 47.

The agencies have now consulted over the effect of the Lynx Amendment on lynx critical habitat and over the effects of each of the two projects on, *inter alia*, lynx critical habitat. Ex. 1-6. Those consultations concluded with FWS' opinion that the Lynx Amendment is not likely to adversely modify or destroy lynx critical habitat, and that neither project will have that effect either. Ex. 3, 5, 6. Following those consultations, USFS evaluated whether it should undertake "any further procedures that might be required under [NEPA] in light of the findings from that consultation." ECF 39 at 47. Its project-specific determination for the Bozeman project finds that no supplemental NEPA analysis is required because the project's impacts "are within the scope and range of effects [estimated in 2010 as] disclosed in the [FEIS]" because the effects are essentially the same or slightly less. Ex. 7 at 4; *see also* Ex. 8 (Addressing issues beyond lynx); *see also* Ex. 9 & 10 (same for East Boulder project).

Plaintiffs nonetheless demand a supplemental Environmental Impact Statement (SEIS). Pl. Br. 13. But the Court did not order an SEIS regardless of the findings in the Lynx Amendment consultation. USFS has completed the underlying ESA consultations on lynx critical habitat that confirm the Lynx Amendment will have limited adverse effects on lynx critical habitat. Because there is no longer an underlying ESA procedural violation, USFS may reasonably rely, in part, on the Lynx Amendment's effects on critical habitat to evaluate each projects' effects on lynx critical habitat and their significance under NEPA.

For example, as regards Plaintiffs' primary concern with matrix habitat, as discussed *supra*, the Bozeman project ESA consultation found the effect on the

matrix habitat element insignificant because the vegetation treatments and other project activities will not impede lynx movement. Ex. 5 at 5-6. That finding is based on lynx biology and analysis of the project-specific activities, in addition to the Lynx Amendment requirement, applicable to this project, to preserve connectivity for lynx travel. USFS' consideration of these ESA findings in the NEPA analysis complies with the Court's Order. ECF 39 at 20, 47.

NEPA "[s]upplementation is not required where the agency, having taken a 'hard look' at reevaluation, 'determines that the new impacts will not be... significantly different from those already considered.'" *Idaho Wool Growers Ass'n v. Vilsack*, 816 F.3d 1095, 1107 (9th Cir. 2016); 40 C.F.R. § 1502.9(c) (NEPA supplementation requirement). There is no basis for the argument that either project could have environmental impacts to lynx critical habitat that USFS has not already considered. Rather, the ESA consultations bolster USFS' NEPA analyses by confirming that the Lynx Amendment, especially as applied here, has limited adverse effects to lynx critical habitat. USFS's findings that no supplemental NEPA analyses are required are reasonable and entitled to deference.

III. This Case Is Moot.

Plaintiffs have failed to distinguish *Alliance for the Wild Rockies v. Savage*, 897 F.3d 1025 (9th Cir. 2018). Alliance there advanced the same claim that a USFS project violated the ESA without first completing consultation over the Lynx Amendment. The different procedural postures of the two cases and Alliance's concession in *Savage* do not control a jurisdictional analysis. Plaintiffs may not bootstrap a new Complaint into this case where the Court lacks jurisdiction.

Respectfully submitted this 20th day of December, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d), I certify that the attached motion is proportionately spaced, has a typeface of 14 points or more, and contains 3238 words of text, according to the Microsoft Word software calculation, not including caption, tables of contents and authorities, signature block, and certificates of compliance and service.

By: /s/ John Martin

CERTIFICATE OF SERVICE

I hereby certify that on this day December 20, 2019, I filed a copy of this document electronically through the CM/ECF system, which caused all parties or counsel to be served by electronic means as reflected on the Notice of Electronic Filing.

By: /s/ John H. Martin