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

CENTER FOR BIOLOGICAL DIVERSITY, ALLIANCE FOR THE WILD ROCKIES, YAAK VALLEY FOREST COUNCIL, WILDEARTH GUARDIANS, and NATIVE ECOSYSTEMS COUNCIL. Plaintiffs,	CV-22-91-DLC-KLD

vs. U.S. FOREST SERVICE; LEANNE MARTEN, Regional Forester of U.S. Forest Service Region 1; CHAD BENSON, Supervisor of the Kootenai National Forest; and U.S. FISH AND WILDLIFE SERVICE, Defendants, and KOOTENAI TRIBE OF IDAHO, Defendant-Intervenor.	**BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

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I. INTRODUCTION

Plaintiffs respectfully move this Court for a preliminary injunction against the Knotty Pine Project ("Project") on the Kootenai National Forest. The Knotty Pine Project allows for commercial logging of over 5,070 acres and extensive road reconstruction in the Kootenai National Forest and in the Cabinet-Yaak Grizzly Bear Recovery Zone. FS940; FS1654. At least four female grizzly bears reside in the Project area, which is entirely within Bear Management Unit ("BMU") 12. FS1643; FWS424.

On June 15, 2022, the Forest Service agreed that ground-disturbing activities associated with this Project would not take place until May 15, 2023, to allow parties to present argument on the merits to this Court and allow the Court to arrive at a decision on the merits prior to start of the Project. Despite these assurances, on November 5, 2022, the Forest Service informed Plaintiffs' counsel that over 2 miles of road had been rebuilt on October 24, 2022, including a road through grizzly bear core habitat. Defendants have now confirmed that further logging and road construction activities for the Project will commence as soon as May 15, 2023. The original briefing schedule in this case planned for all briefing to be complete by January 19, 2023. Doc. 12. After adjustments sought by Defendants and Defendant-Intervenors, the final reply briefs in support of summary judgment are now due on March 22, 2023. Doc. 47. Due to the foreshortened time period

between the planned start of Project activities and final briefing, Plaintiffs respectfully request preliminary injunctive relief to maintain the status quo and prevent imminent and irreparable harm until this Court has the opportunity to issue a final decision on the merits in this case. *Native Ecosystems Council v. Marten*, 334 F. Supp. 3d 1124, 1130 (D. Mont. 2018) ("The purpose of a preliminary injunction is to preserve the status quo and prevent the 'irreparable loss of rights' before a final judgment on the merits.")

II. STANDARD OF REVIEW

In general, "[a] plaintiff seeking a preliminary injunction must establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter v. NRDC*, 555 U.S. 7, 20 (2008). The Ninth Circuit applies a sliding scale test to these factors, which does not require absolute surety as to the "likelihood of success on the merits" prong. Instead, if the plaintiff can at least raise "serious questions going to the merits," and demonstrate "a balance of hardships that tips sharply towards the plaintiff," the plaintiff is entitled to preliminary injunctive relief "so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

Furthermore, in *Weinberger v. Romero-Barcelo*, the Supreme Court noted that requests for injunctions under the Endangered Species Act ("ESA") are not subject to the traditional equitable discretion afforded to requests for injunctive relief under the Clean Water Act:

> In *TVA v. Hill,* we held that Congress had foreclosed the exercise of the usual discretion possessed by a court of equity. There, we thought that "[o]ne would be hard pressed to find a statutory provision whose terms were any plainer" than that before us. . . . The purpose and language of the statute limited the remedies available to the District Court; only an injunction could vindicate the objectives of the Act.

456 U.S. 305, 313-14 (1982) (*citing TVA v. Hill,* 437 U.S. 153, 173 (1978)); *see also Amoco Prod. Co. v. Vill. of Gambell,* 480 U.S. 531, 543 n.9, 544 (1987) (requests for injunctions under Alaska National Interest Lands Conservation Act are subject to equitable discretion not afforded to requests for injunctions under the ESA).

Accordingly, in ESA cases, the injunction test is altered so that "the equities and public interest factors always tip in favor of the protected species." *Cottonwood Env't Law Ctr. v. USFS,* 789 F.3d 1075, 1090-91 (9th Cir. 2015) (emphasis added).

III. ARGUMENT

A preliminary injunction is necessary and appropriate in this case because the public interest and balance of equities tip sharply in Plaintiffs' favor by law,

there is a likelihood of irreparable harm in the absence of preliminary relief, and there are at least serious questions on the merits.

A. There is a Likelihood of Irreparable Harm in the Absence of Preliminary Relief.

Regarding the next prong of the preliminary injunction test, the Supreme Court holds that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod.*, 480 U.S. at 545. This Court recently held:

> A plaintiff must show that the requested injunction would forestall irreparable harm but need not show that the action sought to be enjoined is the exclusive cause of the injury, particularly where effects on listed species from individual agency actions 'cannot be cleanly divorced from effects' of broader operations, because '[l]isted species are exposed to the combined operations of the entire system.'

All. for the Wild Rockies v. Gassmann, 604 F. Supp. 3d 1022, 1037 (D. Mont. 2022). In *Gassmann,* three male transient grizzly bears were recorded in the project area, which was roughly two miles away from the Cabinet-Yaak Ecosystem ("CYE") recovery zone. *Id.* at 1034. The Court found that the Agencies' failure to adequately analyze effects to bears "leaves no scientific basis on which the Court could conclude that grizzly bears' habitat choices or movement patters are not likely to be affected by the Ripley Project. . ." *Id.* Thus, this Court held that

irreparable injury to individual grizzly bears was likely and warranted an injunction. *Id.* at 1034.

Here, even more concerning than the facts in *Gassmann*, the Knotty Pine Project area is located within the CYE recovery zone and at least four female grizzly bears, one with a yearling, reside within the Project area. FWS40; FWS424. Moreover, Agencies *expect* adverse effects to individual grizzly bears from Project activities. FWS40. FWS concedes that the Project will displace bears to "levels that impair their normal ability to readily find food resources needed to sustain fitness necessary for breading and producing cubs and finding shelter." *Id.* FWS expects this affect to 1-2 reproductive cycles. *Id*.

Further, the logging and road building authorized to begin in May is in spring bear habitat. Declaration of Anthony South (March 15, 2023) at ¶¶17-19 Excessive human disturbance (i.e., road building and logging) in spring bear habitat during the spring Bear Year (April 1-June 15), FS115, can significantly impact female bears who have high energetic needs to rear cubs. FWS1514; FWS108. After den emergence in spring, bears seek green vegetation at sites with early snow melt. FWS29. Additional energy expended by displacement from spring habitat by forest management activities during early spring season may result in a failure to obtain necessary resources to successfully reproduce and rear

young. *Id.* Therefore, irreparable injury to grizzly bears will likely result from the implementation of the Project activities set to begin this spring.

Additionally, the challenged activities will imminently and irreparably harm Plaintiffs' members' interests. Anthony South, a staffer at Yaak Valley Forest Council who resides within the Project area states:

> These harms are actual and imminent. On March 7, 2023, the Forest Service informed us, through our attorney, that Project activities could proceed as soon as May 15, 2023. If operations are allowed to proceed as planned, the area will be irreversibly degraded because once logging occurs, the Forest Service cannot put the trees back on the stumps, and our interests in the area will be irreparably harmed to the point that the area is no longer adequate for our esthetic, recreational, scientific, spiritual, vocational, and educational interests. In other words, this area will never look or be the same during my lifetime or the lifetimes of Plaintiffs' members. Additionally, regarding our interests in grizzly bears, the displacement of grizzly bears during the Project duration may cause grizzlies to avoid the area for generations afterwards since this type of avoidance behavior is a learned behavior that is passed on to cubs. Therefore, if the Project is implemented, grizzly bears may not occur in the Project area again during the lifetimes of our members.

South Declaration at ¶16.

This Court and the Ninth Circuit held that this exact type of harm to Plaintiffs' members' interests satisfies the irreparable harm prong of the preliminary injunction test. *Gassmann*, 604 F. Supp. 3d at 1035; *Cottrell*, 632 F.3d at 1135 (citations omitted). The Ninth Circuit reached a similar holding in *League of Wilderness Defs. v. Connaughton*:

> The logging of mature trees, if indeed incorrect in law, cannot be remedied easily if at all. Neither the planting of new seedlings nor the paying of money damages can normally remedy such damage. The harm here, as with many instances of this kind of harm, is irreparable for the purposes of the preliminary injunction analysis. . . . Like the plaintiffs in *Wild Rockies*, the . . . plaintiffs have shown that the Snow Basin project is likely to irreparably harm their members' interest in the project area. . . .

752 F.3d 755, 764-65 (9th Cir. 2014), *see also All. for the Wild Rockies v. Marten*, 253 F. Supp. 3d 1108, 1111 (D. Mont. 2017) ("Plaintiffs' expressed desire to visit the area in an undisturbed state is all that is required to sufficiently allege harm under ESA. . . . Plaintiffs have sufficiently alleged a likelihood of irreparable injury to warrant a preliminary injunction.").

The same is true in this case: "once logging occurs, the Forest Service cannot put the trees back on the stumps . . . . Therefore, this specific project will likely cause irreparable damage to our members' interests because it will harm our members' ability to view, experience, and utilize the area in its undisturbed state and thus prevent the use and enjoyment by our members of hundreds of acres of the Forest." South Declaration at ¶16. Notably, while the irreparable logging in *Cottrell* covered 1,652 acres, 632 F.3d at 1135, the irreparable logging in this case includes 5,070 acres of commercial logging, including over 1,000 acres of clearcutting. FS940.

As the Ninth Circuit reaffirmed in *Cottonwood*, "establishing irreparable injury should not be an onerous task for plaintiffs." 789 F.3d at 1090-91. That non-

onerous test is satisfied here because Plaintiff has demonstrated that a "specific project[] will likely cause irreparable damage to its members' interests." *Id*. at 1092.

For all of these reasons, there is a likelihood of irreparable harm in the absence of preliminary relief.

B. The Public Interest and Balance of Equities Tips Sharply in Plaintiffs' Favor.

1. The public interest and balance of equities tip sharply in Plaintiffs' favor by law because this case raises ESA claims.

The Supreme Court holds that "only an injunction [can] vindicate the objectives of the [ESA]." *Weinberger*, 456 U.S. at 313-14. "[C]ourts do not have discretion to balance the parties' competing interests in ESA cases" and ESA cases constitute "an unparalleled public interest . . . ." *Cottonwood*, 789 F.3d at 1090-91 (citing *TVA v. Hill*, 437 U.S. at 185, 187-88). In other words, "Congress altered the third and fourth prongs of the traditional four-factor test for injunctive relief in ESA cases" so that plaintiffs need only demonstrate a likelihood of irreparable harm to members' interests and serious questions on the merits in order to receive injunctive relief. *Id.; Cottrell*, 632 F.3d at 1135. Thus, "the equities and public interest factors always tip in favor of the protected species." *Cottonwood*, 789 F.3d at 1090-91.

As set forth in detail in summary judgement briefing, this case centers around protecting the imperiled Cabinet-Yaak grizzly bear, a species listed as threatened under the ESA. Doc. 30 at 16-37; Doc. 66 at 2-37. As this Court has held: "in ESA cases, Congress intended for courts to be guided by a policy of 'institutionalized caution' when confronted with requests for injunctive relief regarding listed species under the ESA." *Native Ecosystems Council v. Marten*, 334 F. Supp. 3d at 1130. For this reason, the balance of hardships and public interest tip sharply in Plaintiffs' favor by law. *Cottonwood*, 789 F.3d at 1090-91.

2. Even if there were no ESA claims, the irreparable harm of logging would outweigh the temporary delay of economic benefit to the Defendants.

In a previous ESA case, this Court held: "[b]ecause these factors 'always tip in favor of the protected species,' the Court declines to address Defendants' balance of equities and public interest arguments." *Native Ecosystems Council v. Marten*, 334 F. Supp. 3d at 1130 n.3 (citation omitted). Here as well, the Court need not address any balance of equities or public interest arguments from Defendants. *Id*.

Nonetheless, even if there were no ESA claims here, the temporary delay of economic benefit to the Defendants cannot outweigh the irreparable environmental injury to Plaintiff. In *Connaughton*, the Ninth Circuit explained that in a case like

this, the environmental harm to plaintiffs is irreparable, while the economic harm to the defendants is temporary and marginal:

> Intervenors raise two primary forms of harm: loss of jobs and loss of government revenue. If the preliminary injunction were granted, the intervenors would suffer both harms but, if the project proceeds, the harms would be mitigated in part once the [] plaintiffs' claims are resolved. Relying on the intervenors' data, the project will support about 300 directly and indirectly caused jobs and some $275,000 in revenue to the local governments. These numbers represent the benefits of the entire project, which is scheduled to take place over five years. Under *Sierra Forest*, we must consider only the portion of the harm that would occur while the preliminary injunction is in place, and proportionally diminish total harms to reflect only the time when a preliminary injunction would be in place. Because the jobs and revenue will be realized if the project is approved, the marginal harm to the intervenors of the preliminary injunction is the value of moving those jobs and tax dollars to a future year, rather than the present. The [] plaintiffs' irreparable environmental injuries outweigh the temporary delay intervenors face in receiving a part of the economic benefits of the project.

752 F.3d at 765-66 (emphasis added).

Thus, in this case, to the extent that Defendants wish the Court to consider economic harms, they must clearly calculate and disclose only those harms that would occur during "the time when a preliminary injunction would be in place . . . ." *Id*. As noted in *Connaughton*, this type of harm is limited to "the value of moving those jobs and tax dollars to a future year, rather than the present." *Id*. When analyzed properly in this framework, the temporary delay of receiving an economic benefit cannot and does not outweigh Plaintiff's "irreparable environmental injuries . . . ." *Id.; see also Cottrell*, 632 F.3d at 1137-38.

3. Mere speculation that a wildfire may occur in this area at some time in the future does not outweigh the irreparable environmental injury posed by the Project.

Over the past few decades, the Forest Service has routinely argued that commercial logging and road-building projects will prevent wildfire. Thus, Plaintiffs anticipate that Defendants may argue that a preliminary injunction should not be granted in this case because the Project area – like all forests in the Northern Rockies – is at risk of wildfire at some unspecified point in the future. However, this Court has rejected this argument:

> The balance of equities tips in favor of Alliance because it faces permanent damage if logging activity were to proceed and the Forest Service faces only delay. []. While mitigating the imminent risk of forest fires and insect infestation is a valid public interest,[], there is no indication of an imminent threat here. Without evidence of an imminent threat it would be difficult to say that the inability to mitigate such risks for a temporary period outweighs the public's interest in maintaining the environment and requiring that agencies follow proper procedures.

All. for the Wild Rockies v. Marten, 200 F. Supp. 3d 1110, 1112 (D. Mont. 2016).

The Ninth Circuit reached a similar holding in *Connaughton*: "Without evidence of an imminent threat, we cannot say that the inability to mitigate such risks for a temporary period outweighs the public's interest . . . ." 752 F.3d at 766. Likewise, this Court has held: "though there is the possibility of serious fire activity within the boundaries of the Project, there is no indication that this area is

at risk of imminent fire activity." *All. for the Wild Rockies v. Marten*, 253 F. Supp. at 1112.

Furthermore, the Ninth Circuit has recently dismissed a boilerplate Forest Service argument that logging reduces wildfire risk, and found that – contrary to this widely-made representation – there is a large body of scientific literature that finds that commercial logging does not reduce wildfire risk: "Throughout the USFS's investigative process, Appellants pointed to numerous expert sources concluding that thinning activities do not improve fire outcomes. In its responses to these comments and in its finding of no significant impact, the USFS reiterated its conclusions about vegetation management but did not engage with the substantial body of research cited by Appellants." *Bark v. USFS*, 958 F.3d 865, 871 (9th Cir. 2020).

The record in this case establishes similar findings. Logging creates open, sunny conditions that lead to dry, windy, invasive-weed-infested conditions, which make it easier for fire to ignite and spread. *See* FS8734-8735. Regarding one study of this issue, "the most intense fires are occurring on private forest lands, while lands with little to no logging experience fires with relatively lower intensity." FS8734. Further, "findings demonstrate that increased logging may actually increase fire severity," and that "decision-makers concerned about fire should target proven fire-risk reduction measures nearest homes and keep firefighters out

of harm's way by focusing fire suppression actions near towns, not in the back country." *Id*. Regarding the proven methods, a report authored by Jack Cohen, one of the Forest Service's own fire specialists, found that so-called 'fuel reduction activities' (i.e., timber sales) in national forests have no bearing on whether homes on adjacent private lands will burn. The only things that have any effect are removing flammable materials from within 10 to 20 meters of a home and reducing the 'ignitability' of the home itself. FS12076, 12073.[1]

In conclusion, in addition to the fact that "the equities and public interest factors always tip in favor of the protected species," *Cottonwood*, 789 F.3d at 1090-91, any economic harm from a preliminary injunction would be marginal and temporary, *see Connaughton*, 752 F.3d at 765-66, and statements about reducing wildfire risk are speculative at best and unsupported at worst. Accordingly, as in *Cottrell*, "the public interest in preserving nature and avoiding irreparable environmental injury" requires a preliminary injunction here. 632 F.3d at 1137-38.

For all of these reasons, the public interest and balance of equities tip sharply in Plaintiffs' favor.

[1] Additionally, on November 4, 2021, over 200 scientists and ecologists issued a letter to the Biden administration and Congress warning that logging like commercial thinning reduces the cooling shade of the forest canopy and increases wildfire intensity. See https://johnmuirproject.org/wp-content/uploads/2021/11/ScientistLetterOpposingLoggingProvisionsInBBB_BIF4Nov21.pdf

C. Plaintiffs raises serious questions on the merits.

"[T]he elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another. For example, a stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits." *Cottrell*, 632 F.3d at 1131 (citation omitted). Thus, the Ninth Circuit "has adopted and applied a version of the sliding scale approach under which a preliminary injunction could issue where the likelihood of success is such that 'serious questions going to the merits were raised and the balance of hardships tips sharply in [plaintiff's] favor.'" *Id*.

"Serious questions on the merits" are those that present a "fair ground for litigation and thus for more deliberative investigation." *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988). "Serious questions need not promise a certainty of success, nor even present a probability of success, but must involve a 'fair chance of success on the merits.'" *Cent. Or. Landwatch v. Connaughton*, 905 F. Supp. 2d 1192, 1198 (D. Or. 2012) (citation omitted). In other words, "a fair chance of success[] is all that is required." *Marcos*, 862 F.2d at 1362.

Plaintiffs satisfy the requirement of raising questions that present "fair ground for litigation" and a "fair chance of success;" therefore, they have adequately raised "serious question on the merits." Plaintiffs have thoroughly

briefed all claims in summary judgment briefing and incorporate the arguments made in their briefs here. Doc. 30 at 16-37; Doc. 66 at 2-37. However, Plaintiffs will summarize two of their key ESA claims below: 1) The U.S. Fish and Wildlife ("FWS") and Forest Service (together, "Agencies") failed to adequately consider the persistent and reoccurring presence of illegal roads when analyzing effects to grizzly bears; and 2) The Agencies failed to analyze and disclose the effects of accessing logging units in grizzly bear Core habitat.

1. Serious questions have been raised regarding the Agencies' failure to disclose and evaluate impacts from illegal roads on grizzly bears.

The record indicates, and Defendants do not dispute, that illegal roads are a recurring and consistent problem within the Project area. Doc. 61 at 75 (In briefing, Defendants do not dispute that "[i]llegal road usage exists in the Project area and BMU 12."). Defendants also acknowledge the importance of considering illegal roads in evaluating harm to grizzly bears. Doc. 59 at 19. However, FWS fails to adequately analyze the effects that illegal roads have on grizzly bears in the Project area.[2] FWS's plain dismissal of illegal road use in the Knotty Pine Project Biological Opinion ("Project BiOp") violates the ESA and the APA's mandates to

[2] The Forest Service similarly fails to disclose and analyze the impacts of illegal roads on grizzly bears, in violation of "hard look" and public involvement requirements and Kootenai National Forest Plan standards. *see* Doc. 30 at 19-25; Doc. 66 at 4-22.

consider the best available information and relevant factors. *Ctr. for Biological Diversity v. BLM,* 698 F.3d 1101, 1121 (9th Cir. 2012) ("*Center*") ("A Biological Opinion is arbitrary and capricious if it fails to 'consider [] the relevant factors and articulate [] a rational connection between facts found and choice made.'") (citation omitted). Specifically, the Agencies' refusal to consider the presence of illegal roads in the context of OMRD, TRMD, and Core calculations violates their legal obligation to provide a detailed discussion of the effects of the action because they are ignoring an important aspect of the problem, failing to consider the relevant factors, and failing to consider the best available information, in violation of the ESA and the APA. 50 C.F.R. § 402.14(h); *Center*, 698 F.3d at 1121; *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

ESA regulations mandate that biological opinions "*shall include* . . . [a] detailed discussion of the effects of the action on listed species." 50 C.F.R. § 402.14(h) (emphasis added). In undertaking this analysis, "the ESA requires the biological opinion to analyze the effect of the entire agency action." *Conner v. Burford*, 848 F.2d 1441, 1453 (9th Cir. 1988). The failure to address effects and consider important factors renders a biological opinion arbitrary and capricious. *Center*, 698 F.3d at 1121.

It is now widely accepted that "[r]oads pose the most imminent risk to grizzly bears." *Gassmann*, 604 F. Supp. 3d at 1031. In *All. for the Wild Rockies v.*

Probert, this Court determined that the failure to consider illegal roads during project-level consultation required the agencies to reinitiate consultation on the site-specific project to determine actual effects to grizzly bears. 412 F. Supp. 3d 1188, 1206 (D. Mont 2019). Similarly, in *Alliance v. Marten*, this Court found that the discovery of undetermined roads (i.e., illegal roads) during project-level consultation that had not been considered during Forest Plan consultation required the Agencies to reinitiate consultation in order to "reconsider[] in light of newly discovered roads to properly evaluate effects on grizzly bears." No. CV-20-156-M-DLC-KLD, 2021 WL 3561178, at *15 (D. Mont. Aug. 11, 2021). "Defendants have already recognized that roads have adverse effects on grizzly bears, rendering it unlikely Defendants' consideration of the effects of [illegal roads] would not impact the baseline." *Id*.

The record here shows that FWS has previously found that "[b]ears that experience such negative effects [from motorized use] learn to avoid the disturbance generated by roads. Such animals are unlikely to change this resultant avoidance behavior even after road closures and the lack of negative reinforcement." FWS5913. FWS acknowledges that "[e]ven occasional human-related vehicle noise can result in continued road avoidance and habitat loss. . ." *Id.* FWS has also found that "unpredictable random road use . . . may be even more disturbing to bears" because "[f]emales who have learned to avoid roads may also

teach their cubs to avoid roads [and] learned avoidance can persist for several generations." FWS5914. Thus, the use of illegal roads, regardless of the amount, has a negative effect on grizzly bears.

However, FWS fails to enter into an analysis that considers how the known illegal roads in the Project area will harm grizzly bears. Defendants claim that the Project BiOp adequately considers illegal road use by its determination that "most users follow travel regulations" and because the Forest Service closes illegal roads as "soon as they are able." FWS51; Doc. 59 at 21. However, not only does this ignore an important aspect of the problem – that "[e]ven occasional human-related vehicle noise can result in continued road avoidance and habitat loss…" as explained above, FWS591 – but it also contradicts FWS's recognition that best available science requires them to engage in an analysis of OMRD, TMRD, and Core when determining effects of the action on grizzly bears. FS2341. And further, it is at odds with FWS's acknowledgement that illegal roads exist in the Project area. FS1668. Therefore, FWS's failure to adequately consider illegal roads ignores an important aspect of the problem, and fails to consider relevant factors and best available science, in violation of the ESA and the APA. *WildEarth Guardians v. Steele*, 545 F. Supp. 3d 855, 868 (D. Mont. 2021); *State Farm*, 463 U.S. at 43.

Moreover, rather than use agency expertise to devise a method of analyzing impacts of illegal roads on grizzly bears, FWS categorically states that it is "unable to calculate the extent of effects" of illegal roads on grizzly bears because the information "is and will continue to be unpredictable." FWS26. FWS states that the effects "are not reasonably certain" but also acknowledges that illegal use will continue to occur. *Id.;* FWS51. The ephemeral nature of specific illegal roads does not allow FWS to entirely dismiss their effect on grizzly bears. As this Court acknowledged in *Probert*, even if a specific illegal road may be temporary (because the Forest Service may eventually close it), the fact that new illegal roads continue to appear on a regular basis means that this problem is not temporary. 412 F. Supp. 3d at 1204 ("[I]t is the permanency of the *overall* increase in mileage that matters under the take statement, not the permanency of specific roads.") The ESA and this Court require FWS to consider the persistent and recurring nature of illegal roads when analyzing effects to grizzly bears. *Id.* Therefore, FWS must engage in an analysis that incorporates the illegal road use they know currently occurs and will continue to occur.

2. Plaintiffs raise serious questions regarding FWS's failure to consider how access to units within grizzly bear Core will effect the species.

The Project authorizes over 1,300 acres of precommercial thinning in Core habitat for grizzly bears without disclosing how the units will be accessed and

without discussing the effect on grizzly bears, in violation of the ESA. Doc. 59 at 63. "Core" is defined, in part, as "high quality habitat within a BMU that contains no motorized travel routes or high use trails." FWS4598. In other words, the only "roads" allowed in Core are impassable roads or roads with effective barriers, other than gates, so *as to no longer function as a motorized route*." FWS464. As explained above, FWS acknowledges that best available science requires the consideration of impacts (reduction) to Core, in addition to impacts to total and open road density, when determining effects of a Project on grizzly bears. FS234.

The Project BiOp provides only one statement regarding access to the units in Core: "Treatments will be conducted by hand crews using chainsaws accessing the area primarily by open roads" (S. Hill, email communication, January 2021). FWS36. The Project BiOp represents that "the primary effect from these activities to grizzly bears are the result of people and equipment operating in grizzly bear habitat as well as the effects of roads used to access the timber stand." *Id.* However, nearly all of the units are *not* accessible by open or even restricted roads, and access would require reopening barriered roads. *See* SOUF ¶¶126-136. FWS does not provide any information regarding how loggers and logging equipment will access the precommercial thinning units in Core that are *not* accessible by open roads.

The email referenced in the Project BiOp creates even more of a factual inconsistency. FWS37; FWS367-368. First, this email was not provided to the public on the Forest Service website for the Project or in the Forest Service's response to Plaintiffs' FOIA request for the Project file. Doc. 30-2 at 6. Further, the email indicates that these units will be "walk-in only," which is significantly different from "accessed primarily by open roads." FWS367-368. FWS fails to further examine this discrepancy in the record and fails to provide any indication that it adequately considered access in grizzly bear Core. Therefore, the ESA consultation fails to consider an important aspect of the problem, in violation of the APA and the ESA. *Center*, 698 F.3d at 112.

"A biological opinion is arbitrary and capricious if it fails to 'consider[] the relevant factors and articulate[] a rational connection between the facts found and the choice made.'" *Id.* at 1121. In *Center*, the Ninth Circuit held that because a biological opinion "remain[ed] silent on the potential impacts of the Project's proposed groundwater withdrawal," it was "arbitrary and capricious in failing to examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made" *Id.* at 1124. There, the court found that because the record established that groundwater withdrawals were a "relevant factor" in determining possible effects to a listed fish, the biological opinion had to consider them. *Id.* The Ninth Circuit held:

> It is of course *possible*, as the government argues, that the groundwater withdrawals would ultimately have had no "discernible effect" on listed fish. But it is also plausible that groundwater depletions in Nevada and Oregon would have adversely affected Lahontan cutthroat trout and the listed suckers, especially in light of the conclusion in both the Biological Assessment and the Final Environmental Impact Statement that "*[a]ny* water depletion would represent an adverse impact on habitat" (emphasis added) for other listed fish within the project's action areas (i.e., the Colorado River Basin species). While the record certainly does not compel either conclusion, it does establish that the groundwater withdrawals were a "relevant factor" that required discussion in the Biological Opinion.

Id. (emphasis in original).

Similarly, here, road use is admittedly damaging to grizzly bears and incompatible with the concept of "Core" habitat. While it is "possible" that access to the precommercial thinning units in Core may not require motorized use, "it is also plausible" that access may require motorized use, and therefore reduce Core habitat in a manner not yet analyzed.

Even if this Court determines that these units will be accessed by foot[3], the BiOP fails to consider how this type of access will harm grizzly bears. FWS itself acknowledges that non-motorized access in Core is a factor that, in the Cabinet-

[3] Not only does this create a factual inconsistency with the documents available to the public, which seemingly authorize much more intrusive access in Core than FWS analyzed in the BiOP, it is also practically unlikely that loggers with chainsaws and other heavy equipment will walk multiple miles and hand pile thinned trees from thousands of acres of forest without the assistance of mechanized transport. *See* SOUF ¶¶135-136.

Yaak, can have population-level impacts to grizzly bears. FWS41. The BiOp section entitled "Non-motorized Access and Recreation" discusses how human access on hiking trails, ski trails, and campgrounds may affect grizzly bears. *Id.* Lacking from this discussion, however, is any analysis of loggers accessing dozens of units in Core. Therefore, even if access to these units in Core will be "walk-in only" – which is contrary to what the record states – the Project BiOp still fails to provide a detailed discussion of effects of the action, in violation of the ESA and the APA

Significantly, the precommercial thinning units and access to those units are within grizzly bear Core that is actually being used by female grizzlies and cubs. FS1665; FWS424. Females with cubs are critical for recovery and are one of the most important factors to consider when analyzing impacts on grizzly bear recovery. SOUF ¶80. This is particularly true for the small, isolated, inbred Cabinet-Yaak grizzly population, in which the death of one or two female bears could shift the entire population into a decline. FWS3018.

Thus, access to the precommercial thinning units in Core is a highly relevant factor that must be considered in order to determine the effect of the Project on grizzly bears. In *Center,* the Ninth Circuit held: "The Biological Opinion provides no indication at all that the FWS applied its expertise to [this] question . . . ." 698 F.3d at 1124. The same is true here. The singular sentence in the Project BiOP

does not show that FWS considered the relevant information and formulated a rational connection between the facts found and the choice made, in violation of the ESA and the APA. *Center,* 698 F.3d at 1121.

At minimum, FWS fails to discuss a relevant factor and provide a detailed discussion on the effects of the Project on grizzly bears. *Id.* at 1124. At worst, the Project as designed requires opening currently barriered roads, resulting in an increase in TMRD and/or OMRD and a decrease in Core that the FWS neither disclosed nor analyzed. Therefore, FWS's failure to address and discuss all of the Project's effects on grizzly bears is arbitrary and capricious. *Id.*; 50 C.F.R. § 402.14(h).

IV. CONCLUSION

The mandatory application of institutionalized caution in this case requires a preliminary injunction to maintain the status quo until the Court issues its determination on the merits. The Ninth Circuit held in *Cottonwood*: "As the [Supreme] Court made unmistakably clear: 'Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as 'institutionalized caution.' That fundamental principle remains intact and *will continue to guide district courts when confronted with*

requests for injunctive relief in ESA cases." 789 F.3d at 1091 (quoting *TVA v. Hill*, 437 U.S. at 194) (emphasis added).

For all of the reasons discussed above and in summary judgment briefing, Plaintiffs respectfully requests that the Court preliminarily enjoin implementation of the Knotty Pine Project. Briefing on cross-motions for summary judgment will soon be complete; thus, a preliminary injunction would likely be in place for less than one year and would simply maintain the status quo while the Court decides the merits of this case.

Respectfully submitted this 20th day of March, 2023.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief is 6,025 words excluding the caption, table of contents, table of authorities, index of exhibits, signature blocks, and certificate of compliance. Pursuant to Local Rule 7.1, a table of contents and table of authorities are included in this brief.

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