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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.

FAYE KRUEGER, in her official capacity as Regional Forester of Region One of the U.S. Forest Service; U.S. FOREST SERVICE, an agency of the U.S. Department of Agriculture;U.S. FISH & WILDLIFE SERVICE, an agency of the U.S. Department of Interior,

Defendants.

CASE NO. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. The Blankenship Project ("Project") Area is comprised of more than 40,000 acres of land in the Little Belt Mountains of Montana. The Project proposes to treat over 1,000 acres of national forest land in the Lewis and Clark National Forest (the "Forest").

2. The U.S. Forest Service ("USFS")'s first step in complying with the Endangered Species Act ("ESA") is to determine whether ESA-threatened, endangered, or candidate (proposed for listing) species may be present in the Project Area.

3. If an ESA-listed or candidate species may be present, the USFS must prepare a Biological Assessment to determine if the Project will affect the species. The Canada lynx is a threatened species and the wolverine is a candidate species under the ESA. Both species may be present in the area. U.S. Fish and Wildlife Service (USFWS) Species List, Lewis and Clark National Forest (July 2, 2013).

4. On or about March 12, 2013, Plaintiff sent the Defendant agencies a 60-Day Notice of Intent to Sue under the ESA, alerting them of the failure to prepare a Biological Assessment for both the Canada lynx and the wolverine. A second 60-Notice of Intent to Sue was sent on or about December 13, 2013, alerting the agencies of their failure to use best

available science in their determination of Project effects on the threatened lynx.

5. First, this case is about the Forest Service's failure to use "best available science" and properly survey for Canada lynx and report those survey results, and the agencies' use of improper and inadequate survey results in the finding of "no adverse effects" for lynx, in violation of the NFMA, the NEPA, and the ESA.

6. And, by not disclosing lynx survey results to the public prior to its decision, and by not allowing for public comments on those results and their implications for the Project, the USFS did not allow the public an opportunity to weigh in on this information, in violation of the APA and the NEPA.

7. Second, despite the fact that the wolverine may be present in the Project area, the USFS never prepared a Biological Assessment to determine if the Project may affect the wolverine, or sought USFWS concurrence for its "no adverse effects" determination for wolverine, in violation of the NFMA, the NEPA, and the ESA.

8. Third, the Forest Service is violating the NFMA and the NEPA by failing to use the best available science and ensure the viability of old-growth-

dependent and snag-dependent species including the Northern goshawk.

9. Fourth, the USFS is violating the NFMA and the NEPA by failing to use the best available science and ensure the viability of the mule deer, a Forest management indicator species.

10. Plaintiff therefore asks this Court for declaratory and injunctive relief requiring the Forest Service to comply with the ESA, NEPA, and NFMA.

JURISDICTION

11. This is a civil action for judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq., of the United States Forest Service's Decision Notice and Finding of No Significant Impact ("DN" or "FONSI") authorizing implementation of the Blankenship Project (the "Project").

12. Plaintiff Alliance for the Wild Rockies alleges this decision is arbitrary and capricious, an abuse of discretion, and/or otherwise not in compliance with the law.

13. Defendants' approval of the Project as written is a violation of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 et seq., 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., and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 et seq.

14. Plaintiff requests that the Court set aside the decision approving the Project, pursuant to 5 U.S.C. § 706(2)(A), and that the Court enjoin the USFS from implementing the Project.

15. Plaintiff seeks declaratory and injunctive relief to mitigate, redress, or avoid irreparable injury to the environment and Plaintiff's interests under the law, and such other relief as this Court deems just and proper.

16. If Plaintiff prevails, Plaintiff will seek an award of costs of suit, including attorney and expert witness fees pursuant to the Endangered Species Act, 16 U.S.C. § 1540(g) and/or the Equal Access to Justice Act, 28 U.S.C. § 2412.

17. This action arises under the laws of the United States and involves the United States as a Defendant. This Court has subject matter jurisdiction over the claims specified in this complaint pursuant to 28 U.S.C. §§ 1331, 1346.

18. An actual, justiciable controversy exists between Plaintiff and Defendants. Plaintiff's members use and enjoy the Lewis and Clark National Forest for hiking, fishing, hunting, camping, photographing scenery and wildlife, looking for wildlife, and engaging in other

vocational, scientific, spiritual, and recreational activities. Plaintiff's members intend to continue to use and enjoy the affected area frequently and on an ongoing basis in the future.

19. The aesthetic, recreational, scientific, spiritual, and educational interests of Plaintiff's members have been and will be adversely affected and irreparably injured if defendants are allowed to continue implementing the Project as approved. These are actual, concrete injuries caused by Defendants' failure to comply with mandatory duties under the 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, and 5 U.S.C. §§ 705 and 706.

20. Plaintiff and Plaintiff's members submitted extensive, written comments concerning the Project and fully participated in the available administrative review and appeal processes, and thus have exhausted administrative remedies. Defendant Forest Service's denial of Plaintiff's administrative appeal was the final administrative action of the USFS. Thus, the challenged decision is final and subject to this Court's review under the APA, 5 U.S.C. §§ 702, 704, and 706. 19. More than sixty days ago, Plaintiff gave Defendants notice of intent to file this suit related to

its ESA claims pursuant to 16 U.S.C. §1540(g)(2)(A). Defendant Forest Service's violations of the ESA continue.

VENUE

21. Venue is proper in this case under 28 U.S.C. § 1391(e) and LR 3.3(a)(1). Defendant FAYE KRUEGER, the primary representative of Defendant USFS in the District of Montana, resides in the District of Montana. The Lewis and Clark National Forest, where the Blankenship Project is slated to occur, is located in the Great Falls Division of the United States District Court for the District of Montana, and a substantial part of the events and/or omissions giving rise to this action occurred in this District.

PARTIES

22. Plaintiff Alliance for the Wild Rockies ("AWR") is a Montana based tax-exempt, nonprofit 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. AWR has over 2,500 members, including many members who recreate in the Lewis and Clark National Forest and the Project area. AWR's registered office is located in Missoula, Montana.

AWR brings this action on its own behalf and on behalf of its adversely affected members.

23. Defendant FAYE KRUEGER is the Regional Forester for the Northern Region of the U.S. Forest Service, and in that capacity is charged with ultimate responsibility for ensuring that decisions made at the National Forest level in the Northern Region, including the Lewis and Clark National Forest, are consistent with applicable laws, regulations, and official policies and procedures. She is the highest official and representative of Defendant USFS in the District of Montana.

24. Defendant UNITED STATES FOREST SERVICE is an administrative agency within the U.S. Department of Agriculture, and is responsible for the lawful management of our National Forests, including the Lewis and Clark National Forest.

25. Defendant U.S. FISH & WILDLIFE SERVICE is an administrative agency with the U.S. Department of Interior, and is responsible for implementing the ESA with respect to terrestrial mammals such as the threatened lynx and other ESA-listed and ESA-proposed species.

PROCEDURAL BACKGROUND

26. On July 16, 2012, Lewis and Clark National Forest Supervisor Bill Avey issued a Decision Notice/Finding of No Significant Impact for the Blankenship Project.

27. On September 20, 2012, Plaintiffs filed an administrative appeal against the Project.

28. On November 5, 2012, Deputy Regional Forester Jan Cottrell upheld the Forest Supervisor's decision to implement the Project but required clarification of project impacts on mule deer and wolverine.

29. On February 7, 2013, the Forest Supervisor released a Supplemental Environmental Assessment (EA) for the Project. Plaintiff submitted comments on the Supplemental Environmental Assessment on March 11, 2013.

30. On or about March 12, 2013, Plaintiff sent the agencies a 60-Day Notice of Intent to Sue under the ESA, alerting the agencies that they failed to prepare a Biological Assessment for both the Canada lynx and the wolverine. Subsequently, USFWS added lynx to the list of species that may be present in the Lewis and Clark National Forest. The Forest Service then prepared a BA and initiated consultation for the Canada lynx, but not for wolverine.

31. On April 19, 2013, Forest Supervisor Avey signed a final Decision Notice/Finding of No Significant Impact authorizing implementation of the Project.

32. On or about December 13, 2013, Plaintiff submitted a 60-Day Notice of Intent to Sue under the ESA, describing the agencies' failure to use best available science for determining lynx presence and lynx habitat in the Project area, and for failing to ensure that the Project is not likely to jeopardize the threatened lynx and its habitat.

ENDANGERED SPECIES ACT BACKGROUND

33. The ESA's purpose is to provide a program to conserve threatened and endangered species and a means to protect the ecosystems upon which those species depend. 16 U.S.C. § 1531(b).

34. Section 7 of the ESA requires each federal agency to ensure that any action authorized, funded, or carried out by that agency "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of critical habitat. 16 U.S.C. § 1536(a)(2).

35. Procedurally, Section 7 requires that the agency proposing an action (the "action agency") to consult with the expert agency, in this case the FWS, to evaluate the consequences of a proposed action. Id.

36. An "action" subject to consultation includes all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by federal agencies in the United States. 50 C.F.R. § 402.02. "[T]here is little doubt that Congress intended to enact a broad definition of agency action in the ESA…." *Pacific River Council v. Thomas*, 30 F.3d 1050, 1054 (9th Cir. 1994). "Only after the Forest Service complies with Section 7(a)(2) can any activity that may affect the protected [species] go forward." *Id*. At 1056-57.

37. The Forest Service's first obligation in complying with Section 7 is to obtain from the FWS "a list of any listed or proposed species or designated or proposed critical habitat that may be present in the action area." 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(c)-(d).

38. "Once an agency is aware that an endangered [or proposed] species may be present in the area of its proposed action, the ESA requires it to prepare a biological assessment." *Thomas v. Peterson*, 753 F.2d 754, 763 (9th Cir. 1985).

39. The FWS has explicitly rejected limiting species lists to only those species that are known or believed to occur in the action area. "The [ESA] requires the Service to provide a list of all listed or proposed species that 'may be present' in the action area. Thus, migratory species

that 'may be present' at some point within the action area must be included in the species list." Interagency Cooperation-Endangered Species Act of 1973, as Amended, 51 Fed. Reg. 19926-01 (June 3, 1986).

40. If the Biological Assessment determines that the proposed action "may affect" but will "not adversely affect" such species, the action agency must informally consult with the expert agency. 50 C.F.R. §§ 402.14(b)(1), 402.12(k)(1).

41. On the other hand, if the Biological Assessment determines the action is "likely to adversely affect" the species, the action agency must enter into formal consultation with the expert agency, and the expert agency must issue a Biological Opinion explaining how the proposed action will affect the species or its habitat. 50 C.F.R. § 402.14.

42. "[T]he minimum threshold for an agency action to trigger consultation with the Wildlife Service is low." *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 496 (9th Cir. 2011), cert. denied, 132 S.Ct. 366 (2011) (citation omitted).

43. "[U]nder the ESA, agencies are required to assess the effect on endangered species of projects in areas where such species may be present. […] A failure to prepare a biological assessment is comparable

to a failure to prepare an environmental impact statement." *Thomas*, 753 F.2d 754 at 764.

44. Also, the ESA requires Federal agencies to prepare a Biological Assessment to determine whether a proposed action is likely to, among other considerations, "jeopardize the continued existence of species that are proposed for listing." See 50 CFR §402.02. The outcome of the Biological Assessment determines whether formal consultation or a conference is necessary. 50 C.F.R. §§ 402.02, 402.12.

45. "A biological assessment shall evaluate the potential effects of the action on listed and proposed species …" 50 C.F.R. § 402.12(a) (emphasis added).

46. The Administrative Procedure Act (APA) governs review of agency actions under ESA Section 7. *W. Watersheds Project*, 632 F.3d at 496 (citation omitted). The Court must determine whether the agency actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id*.

NEPA BACKGROUND

47. NEPA was enacted in 1969 to ensure procedural safeguards are in place before an agency takes action significantly affecting the human environment. 42 U.S.C. § 4332(2)(C).

48. The goal of NEPA is to ensure that agencies have the necessary information available to closely consider environmental impacts of a proposed project. 42 U.S.C. § 4332(2).

49. NEPA requires the USFS to prepare a full EIS for all "major Federal actions affecting the quality of the human environment." 42 U.S.C. §4332(2)(C). If it is determined that an action will have "significant" impacts on the human environment, an EIS must be prepared.

50. Factors determining significance include the following: "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial," 40 U.S.C. § 1507.27(b)(4), "[t]he degree to which the possible effects of the human environment are highly uncertain or involve unique or unknown risks" 40 U.S.C. § 1507.27(b)(6) (2000) and "[w]hether an action is related to other actions with individually insignificant but cumulative significant impacts. 40 C.F.R. § 1508.27(b)(7) (2000). "Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment." 40 C.F.R. § 1508.27 (b)(7) (2000).

51. Under NEPA, agencies are required to take a "hard look" at the potential environmental impacts of a proposed action. NEPA's "hard look"

requires a thorough examination of a reasonable range of alternatives of the proposed action. 40 U.S.C. § 4332(C)(iii).

52. NEPA mandates that the agency develop and evaluate alternatives to the proposed action. 42 U.S.C. § 4331 (C)(iii). The alternatives requirement is the "heart" of the NEPA and requires the acting agency to "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14(a).

53. "The NEPA process is intended to help public officials make decisions that are based on environmental consequences, and take actions that protect, restore, and enhance the environment." 40 C.F.R. § 1500.1(c). In taking a "hard look" at the environmental impacts of a project, an agency must rely on accurate scientific analysis. 40 C.F.R. § 1500.1(b).

54. NEPA requires: environmental information [be] available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. 40 C.F.R. § 1500.1(b).

55. NEPA requires that agency action ensure the "professional integrity, including the scientific integrity, of the discussions and analysis in Environmental Impact Statements." 40 C.F.R. § 1502.24.

NFMA/FOREST PLAN BACKGROUND

56. The National Forest Management Act (NFMA) creates a two-step process for the management of our national forests. *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1376 (9th Cir. 1998). The Forest Service must first develop a Land Resource Management Plan ("Forest Plan") for each unit of the National Forest System. 16 U.S.C. §1604(f)(1). For individual management actions within a forest unit, all relevant plans, contracts, or permits must be consistent with each forest's overall Forest Plan. Id. § 1604(I). Thinning projects, timber sales, and fuel reduction projects must be consistent with the relevant Forest Management Plan. *Id.*

57. NFMA imposes substantive obligations on the USFS, including the requirement "to provide for diversity of plant and animal communities." 16 U.S.C. § 1604(g)(3)(B).

58. The NFMA 1982 regulations were promulgated to ensure such diversity and mandate that the USFS maintain viable populations of species throughout the National Forests: Fish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area. For planning purposes, a viable population shall be regarded as one which has the

estimated numbers and distribution of reproductive individuals to ensure its continued existence is well distributed in the planning area. In order to ensure that viable populations will be maintained, habitat must be provided to support, at least, a minimum number of reproductive individuals and that habitat must be well distributed so that those individuals can interact with others in the planning area. 36 C.F.R. § 219.19 (2000).

59. The NFMA 1982 regulations require that viability be ensured through the utilization of a quantitative inventory analysis: communities and tree species consistent with the overall multiple-use objectives of the planning area. Such diversity shall be considered throughout the planning process. Inventories shall include quantitative data making possible the evaluation of diversity in terms of its prior and present condition. For each planning alternative, the interdisciplinary team shall consider how diversity will be affected by various mixes of resource outputs and uses, including proposed management practices. 36 C.F.R. § 219.26.

60. These regulatory requirements apply both to the forest plans as well as to site-specific implementation of those plans. 16 U.S.C. § 1604(i).

61. This requirement for insuring species viability with quantitative data is in accord with the NFMA requirement for "continuous monitoring and assessment," 16 U.S.C. § 1604(g)(3)(C), and the Forest Supervisor's duty to "obtain and keep current inventory data appropriate for planning and managing" the forest's resources, 36 C.F.R. § 212(d). "Viability analysis that uses all currently available scientific data is considered sound." *Lands Council v. McNair*, 629 F.3d 1070, 1081 (9th Cir. 2010), citing *Inland Empire Pub. Lands v. U.S. Forest Serv.,* 88 F.3d 754, 762 (9th Cir.1996).

62. The transition provision of the 2000 NFMA regulations require the Forest Service to consider the "best available science" when implementing site-specific projects within a forest plan. 36 C.F.R. § 219.35(a) (2001).

FACTUAL BACKGROUND

A. Proposed Blankenship Vegetative Treatment Project

63. The Lewis and Clark National Forest ("Forest") is located in the Rocky Mountains of north central Montana. The Forest covers 1.8 million acres of land, encompasses six mountain ranges, and provides habitat for threatened grizzly bears and Canada lynx, wolverine, northern goshawk, mule deer, and other wildlife.

64. The Blankenship Vegetative Treatment Project is located within the Forest in the northwestern portion of the Little Belt Mountains east of Monarch, Montana. Blankenship Project Environmental Analysis ("EA") at 2. The Project Area encompasses 40,700 acres in the Little Belt Mountains. EA 2-2. The Project proposes to treat approximately 1,100 acres of timber via commercial harvest, pre-burn slashing, and prescribed burning. EA 2-2. The Project also proposes to build 4.3 miles of temporary roads and to rebuild 2.3 miles of roads. EA 2-2.

65. Past treatments in the analysis area include 105 acres of commercial thinning, 1,555 acres of clearcutting, 977 acres of broadcast burning, 462 acres of slashing under the Belt Creek Range decision, and other activities on small acreages. EA 3-168.

B. <u>The Canada Lynx, an ESA-listed threatened species</u>

66. The Canada lynx is a specialist predator. Like its relative, the bobcat, the lynx is a compact predator with tufted ears and a black-tipped tail. 65 Fed. Reg. 16,052 (Mar. 24, 2000) ("Listing Rule"). These similarities have sometimes confused state wildlife officials, whose trapping records long maintained a single column for "lynxcats" (see *id*. at 16,054).

67. In 2000, USFWS listed the Canada lynx as threatened under the ESA. Listing Rule at 16052. The FWS determined that the lynx population of

the continental United States was threatened by "the lack of guidance for conservation of lynx and snowshoe hare habitat in the National Forest Land and Resource Plans." *Id*. The USFWS concluded that "it is imperative that lynx habitat and habitat for lynx prey [primarily snowshoe hare] be maintained and conserved on Federal lands." *Id*.

68. Since 2007, over 12,000 acres of habitat for the threatened Canada lynx has been treated on the Forest. *See* Lewis and Clark National Forest, Northern Rockies Lynx Management Direction Monitoring Report (2007-2012).

69. Montana's current population of lynx is estimated to be only about 300 animals. Squires et al. 2009, 2010. There is ample evidence to suggest that lynx "may be present" on the Forest and in the Project Area. For example, the USFS previously determined that at least part of the Forest is considered "occupied" by lynx. See Occupied Mapped Lynx Habitat Amendment to the Lynx Conservation Agreement (2005).

70. Maps showing Lynx Occurence/Distribution provided by the Montana Department of Fish Wildlife and Parks show lynx distribution extending to the Little Belt Mountains of the Forest.

71. Trapping seasons from 1959-60 through 1967 in north-central Montana, an area that includes the Little Belt Mountains, resulted in 268 lynx trapped over 8 seasons. Hoffman et al. 1969, Table 2 at 598.

72. Five lynx were trapped in the Little Belt Mountains in 1980, 1981 and 1982, including 2 in the Blankenship Project Area. Project Lynx Biological Assessment ("Lynx BA") at 13.

73. The Belt Creek Range EA (1998) for the Little Belt Mountains noted that Canada lynx are known to inhabit the Little Belt Mountains, and snow track surveys from 1995-1997 revealed an active lynx territory in the southern Little Belts. Belt Creek Range EA (1998).

74. Transient lynx from Colorado also have appeared in the Little Belt Mountains as recently as 2006. EA S-19. Eight of Colorado's 218 reintroduced lynx made 10 forays into Montana, lasting from 1 to 217 days. EA at S-19. Three of the individuals traveled through the Forest, at least one of which traveled through the Project Area.

75. The USFS notes the presence of lynx in the Little Belt Mountains in 2006. EA at S-19. The USFS notes numerous "anecdotal" lynx sightings in the Little Belt Mountains over a multiple-year period, defining "anecdotal sightings" as "generally tracks and reported sightings" (Lynx BA at 12), and from that concludes that "No verified [i.e., non-anecdotal]

reports have been documented in the Little Belt Mountains since 1982." Lynx BA at 16. However, the official protocol that the USFS itself uses for lynx surveys is a "snow-track based sampling framework that provides reliable distribution data for Canada Lynx" (Squires et al. 2004), indicating that the unwillingness by USFS to consider so-called "anecdotal" lynx sightings as evidence of lynx presence and activity is arbitrary.

76. In 2010, lynx surveys conducted by the USFS on the Forest found suspected lynx tracks in the Little Belt Mountains.

77. The Little Belt Mountains were mapped as lynx habitat in the 2000 Lynx Conservation Assessment and Strategy ("LCAS"). LCAS, Figure 1 at 4-1. The 2000 LCAS states that lynx presence has been verified in the Little Belt Mountains.

78. In 2007, the Northern Rockies Lynx Amendment ("Lynx Amendment") amended the Forest Plan for the Forest. The Lynx Amendment identifies three categories of lynx habitat in the Northern Rockies: core, secondary and peripheral. Lynx Amendment Record Of Decision ("Lynx Amendment ROD") at 31-32.

79. "Core areas" have strong long-term evidence of the persistence of lynx populations, with verified records of lynx occurrence over time and recent evidence of reproduction. Lynx Amendment ROD at 31.

80. "Secondary areas" are areas with historical records of lynx presence with no record of reproduction, or areas with historical records and no recent surveys documenting the presence of lynx and/or reproduction. Lynx Amendment ROD at 32. Secondary areas may be occupied or unoccupied. *Id.* at 32-33. The Lynx Amendment direction applies to occupied secondary areas and to unoccupied secondary areas should they become occupied. *Id.*

81. "Peripheral areas" are those where the majority of historical lynx records are sporadic and generally correspond to periods following cyclic lynx population highs in Canada. In peripheral areas, there is no evidence of long-term presence or reproduction that might indicate colonization or sustained use of these areas by lynx; however, some peripheral areas may provide habitat enabling successful dispersal of lynx between populations or subpopulations. Lynx Amendment ROD at 32.

82. The Lynx Amendment classified the Little Belt Mountains as secondary unoccupied lynx habitat. Lynx BA at 10; Lynx Amendment ROD Figure

1-1. There are persistent historical records of lynx presence in the Little Belt Mountains. *Id.*

83. According to the USFS, the Jefferson Division of the Forest has been described as "transient–secondary/ peripheral lynx habitat." Lynx BA at 5. However, within the Jefferson Division, the Little Belt Mountains, the Big Belt Mountains and Castle Mountains have been designated as "secondary lynx habitat," while three additional mountain ranges – the Highwood Mountains, Little Snowy Mountains, and Big Snowy Mountains – are designated as "peripheral lynx habitat." Lynx Amendment ROD, Figure 1-1.

84. The Project occurs in designated secondary lynx habitat. Forest Plan direction requires that the Little Belt Mountains must be managed as secondary lynx habitat that could become occupied by lynx in the future. Lynx BA.

85. In 2007, the USFWS issued a Biological Opinion on the effects of the Lynx Amendment. USFWS Biological Opinion on the effects of the Direction on the Distinct Population Segment of Canada Lynx ("Amendment Bi-Op"). The Amendment Bi-Op also included an incidental take statement for the Amendment and required the Forest

Service to implement certain "reasonable and prudent measures" to minimize incidental take of the lynx. Amendment Bi-Op at 81.

86. One of these measures, reasonable and prudent measure #3, states that "[o]n those Forests with currently unoccupied lynx habitat, lynx detection is needed to assess whether further management direction is warranted [...] to minimize or avoid adverse affects [SIC] to lynx. The Forest Service shall minimize harm to lynx attempting to establish or maintain home ranges in currently unoccupied secondary habitat at some point in the future, during the life of the proposed action." Amendment Bi-Op at 81.

87. The USFS acknowledges that "Term and Condition #4" mandates that the USFS shall work with USFWS to develop and complete an acceptable protocol to survey currently unoccupied lynx habitat in secondary areas. EA S-19.

88. In 2008, a draft lynx monitoring protocol was developed, which mandates "using the established Forest Service protocol (Squires et al. 2004) during winter in more accessible areas or the established Forest Service protocol (McDaniel et al. 2000) during the summer period in areas that are unavailable for winter sampling." EA S-19; 2008 Draft Lynx Monitoring Protocol.

89. Timing of surveys determines the reliability of the survey. The probability of detecting a lynx is only 23% if a survey is done one day after snowfall, while the probability of detection increases to 78% if the survey is done 7 days after snowfall. Squires et al. 2004 at 583. If 3 surveys are conducted one day after snowfall, the detection probability increases to 58%, while 3 surveys conducted 7 days after snowfall provides a 95% detection probability. *Id.*

90. As mandated by Term and Condition #4 of the Incidental Take Statement, and the 2008 draft lynx monitoring protocol, the USFS conducted winter surveys in February and March of 2010. Lynx BA at 13.

91. The USFS did not conduct any summer surveys as required by the 2008 draft lynx monitoring protocol. Lynx BA at 13.

92. In its Final Environmental Assessment issued April, 2013, the Forest Service acknowledged that its lynx surveys "did not meet protocol." EA at S-19.

93. In its Final Environmental Assessment, the Forest Service noted that "Because the surveys did not meet protocol, as described in the survey report, the forest is again conducting surveys during the winter of 2012-2013. The Blankenship project area is included in the surveys. These

surveys will meet Term and Condition #4 of the biological opinion." EA at S-19.

94. The Final Environmental Assessment was issued after the timeframe in which the USFS claimed it was planning to conduct surveys, but included no indication that such surveys had yet been conducted or evaluated. No new survey data was incorporated into the Final Environmental Assessment.

95. In its supplemental environmental assessment made available for public comment on February 8, 2013, the USFS made no mention of new lynx surveys having been conducted or analyzed, so that there was no opportunity for public comment on this issue. No information about the agency's lynx survey methodology or whether the agency had met its chosen survey protocol was available during NEPA review; thus, none of this information was available to the public at any time.

96. Despite the lack of any publicly-disclosed information on the "new lynx surveys", the Forest Service concluded in its Final Environmental Assessment that the Project would have "No Effect on lynx". EA at 3-134.

97. In July of 2013, approximately three months after the Decision Notice was signed, the USFS prepared a Biological Assessment for lynx. Lynx BA.

98. The July 2013 Lynx BA merely noted that "…the Forest again conducted surveys during the winter of 2012-2013. The Blankenship project area was included in the survey. There were no detections of lynx in the Little Belt Mountains during these winter track surveys." Lynx BA at 13.

99. The USFS did not conduct any summer surveys, as required by the 2008 Draft Lynx Sampling Protocol, "in areas that are unavailable for winter sampling." Lynx BA at 13.

100. The *post hoc* Biological Assessment for lynx provided no information whatsoever about the survey protocol that was used, number of surveys, intensity of the survey(s), or specific areas surveyed. However, the Lynx BA referenced the 2008 Draft Lynx Monitoring Protocol, which states, in part, "3. Apply the established USFS protocol (Squires, et al, 2004) in the winter period in the more accessible areas. Apply the established USFS protocol (McDaniel, et al, 2000) during the summer period in areas that are unavailable for winter sampling." Lynx BA at 13.

101. On July 29, 2013, the Lynx BA was provided to the USFWS, to support the USFS request for concurrence with the determination that the proposed project "may affect, but is not likely to adversely affect Canada lynx." USFS letter of request to USFWS, July 29, 2013.

102. In the Lynx BA provided to support USFS's request for concurrence on its determination for lynx, the 2008 Draft Lynx Sampling Protocol was referenced, but there was no indication that the USFS actually followed the protocol for its winter sampling, or what protocol was used, or any specific results of that sampling. Lynx BA, *passim*.

103. Again in the Lynx BA provided to support USFS's request for concurrence on its lynx determination, the USFS clearly omitted any reference to summer sampling results, as these had not been done, in violation of the 2008 sampling protocol. In its haste to obtain USFWS concurrence for its decision, the USFS left no time for summer sampling to be done, and made no effort to do so. Lynx BA, *passim*.

104. The July 29, 2013 request to USFWS for concurrence with the USFS's contention that the project is "not likely to adversely affect Canada lynx" was not accompanied by either protocols or results of the "new" 2012-2013 survey; however, it was accompanied by the conclusory statement that "There were no detections of lynx in the Little Belt Mountains during these winter track surveys." Lynx BA at 13.

105. On August 7, 2013, based on "the information and analysis in the biological assessment", USFWS issued its letter of concurrence that the

Project was unlikely to adversely affect the threatened Canada lynx. USFWS concurrence letter of August 7, 2013.

106. The USFWS issued its August 7, 2013 letter of concurrence on the basis of information which was inadequate, to wit, the lack of information about survey protocol and survey results, as well as information which was entirely missing, i.e., the lack of summer sampling protocol and results. As a result, the USFWS failed to both require and use the best available science in making its decision to concur with the USFS lynx determination. USFWS concurrence letter of August 7, 2013.

107. On June 2, 2013, in response to a Freedom of Information Act (FOIA) request, the USFS provided results of their 2013 winter lynx survey methods and surveys in the Little Belt Mountains. The USFS provided reports for surveys conducted in February through April of 2013. Little Belt Mountain, Lewis & Clark National Forest 2013 Lynx Survey Report ("2013 Lynx Surveys").

108. The USFS mapped 24 survey routes within the 33 grids in lynx habitat. One additional route was unmapped, bringing the total number of routes to 25. Survey routes were laid out in 21 of the 33 grids. Thus, 36% of the survey grids in lynx habitat lacked survey routes.

109. The USFS covered only small portions of lynx habitat by survey routes in an additional 6 grids. Thus, 18 of the total 33 grids, or 55%, had either limited or no sampling. 2013 Lynx Surveys.

110. The USFS acknowledges that "the eastern portion [of the Little Belt Mountains] lacked adequate snow to conduct surveys and were therefore unavailable for winter sampling"; i.e., this area was not sampled whatsoever. 2013 Surveys at 5.

111. The USFS admits that "The majority of surveys were completed within 1 or 2 days of snowfall," which is "shorter-than-recommended time interval between snowfall and survey". 2013 Surveys at 6.

112. The 22 field surveys completed in the winter of 2013 included 12 survey routes. Neither the survey reports nor the Lynx BA contain any discussion of the detection probability of these 12 survey routes. 2013 Surveys, and Lynx BA, *passim*.

113. Based on the information provided by USFS in response to the FOIA request, it appears that there were three survey routes located in the Blankenship Project Area (routes 11, 13 and 21). Route 11 was not surveyed; Route 13 was not surveyed, even though there was a lynx trapped on this route in 1981; Route 21 was surveyed on 2 days. One

survey day reported 24 sets of hare tracks. The second survey day reported rabbits across the whole route. 2013 Surveys.

114. Six surveys were completed either one or one-and-a-half days after snowfall. Ten surveys were completed 2 days after snowfall. Three surveys were completed 3 days after snowfall, and four surveys were completed 4 days after snowfall. Repeat surveys on some routes would have increased detection probability and would have brought the survey in compliance with protocol for "high" priority areas. 2013 Surveys.

115. Although survey protocol recommends that sample units be identified as high priority or low, depending on the type of habitat, the USFS did not classify such habitat because Project area stands do not "have as high of a horizontal density as habitat in western Montana where lynx research has been centered and where the survey protocol was developed and tested." This deviation from protocol was not demonstrated or validated by Squires (2004) or other best available science, and is based on speculation. 2013 Surveys at 5.

116. Although there was no systematic recording of snowshoe hare (lynx prey) tracks, the presence of hares was reported on 9 of 12 routes, or 75%. 2013 Surveys. Snowshoe hares appear to be well-distributed and

relatively abundant in lynx habitat in the Little Belt Mountains, which is within the historic range of the snowshoe hare. Hoffman et al. 1969, at 583.

117. For areas that are unavailable for winter sampling, the USFS must conduct summer surveys using its established protocol (McDaniel et al. 2000). EA S-19. Despite failing to survey significant portions of the established grids, and failing to distinguish between “high” and “low” priority grids, and otherwise failing to follow its own winter survey protocol, the USFS has not conducted any summer surveys for lynx. Lynx BA at 13.

118. The USFS admits that "habitat in the eastern portion of the Little Belt Mountains *would need further surveys to determine lynx presence*, either using the snow-track protocol if conditions became amenable, or the summer survey protocol described in McDaniels and others (2000)." 2013 Surveys at 6. Emphasis added.

119. Based on the information provided in the 2013 Lynx Surveys, the USFS sampling protocol deviated from that required by the 2008 Draft Lynx Monitoring Protocol (i.e., methods described in Squires et al. (2004) and McDaniel (2000)) in several respects including those indicated *supra*. 2013 Surveys.

120. The USFS has not followed its own survey protocol to determine if lynx are present in the Little Belt Mountains or the Project Area.

121. The Project Area, which includes over 40,000 acres in the Little Belt Mountains, contains suitable habitat for both foraging and denning for lynx. EA 3-184. The Project Area also provides high quality habitat for the snowshoe hare, the primary prey of the lynx. EA 3-184; Lynx Analysis Report at 3.

122. The Project Area is located in Lynx Analysis Unit ("LAU") LB4. An LAU is an area of at least the size used by an individual lynx, from about 25 to 50 square miles, and must contain at least 10 square miles of primary lynx habitat to support reproduction and survival. Lynx habitat occurs in LAU LB4.

123. The Project Area and logging units include mature multi-storied forest stands and late successional forest stands that provide good habitat for the snowshoe hare.

124. The Project would remove hundreds of acres of lynx denning and foraging habitat. EA 3-188. The USFS admits that "If any lynx were to move into the project area, implementation of the Blankenship Project could result in disturbance to them." EA 3-188.

125. Snowshoe hares are located throughout the Forest and the Project Area, and the 2010 surveys documented abundant snowshoe hare tracks, noting that specific areas of the Forest contain "great habitat" for snowshoe hares. Canada Lynx/Wolverine Snow Survey, Little Belt Mountain Range, Lewis and Clark National Forest (2010).

126. The Project would remove habitat for the snowshoe hare. Lynx Analysis Report at 3.

127. The Project's effects on lynx habitat were analyzed using the standards of the Lynx Amendment. The agency's reliance on the Lynx Amendment does not provide a valid assessment of project impacts on lynx, because the Amendment fails to use the most current and accurate scientific information on lynx management needs.

128. Current science based on research of lynx in Montana by the USFS Research Station in Missoula, Montana stresses the importance of lynx winter habitat. Squires et al. 2006. Abundant, large overstory trees, including trees whose boughs touch the snow surface, and abundant understory trees are needed to create multi-storied conditions suitable as lynx winter habitat. Squires et al. 2010 at 1653; Squires et al. 2006, Table 1 at page 14. Multistory forest structure can develop from natural processes, such as insects and diseases. Lynx Amendment ROD at 13.

There are 17,000 acres of forests in LAU LB4 that are potentially susceptible to mountain pine beetle infestations. Lynx BA at 15.

129. This new science was not incorporated into the conservation strategy defined by the Lynx Amendment. The Lynx Amendment only discusses winter snowshoe hare habitat (eg., ROD at 10, 11, 13, 36) and not winter lynx habitat.

130. Winter snowshoe hare habitat and lynx winter habitat are not synonymous and must be measured separately. Snowshoe hares in Montana use young, dense forest stands as well as multi-storied older forest stands in the winter. Lynx Amendment ROD at 11. Lynx winter habitat only consists of multi-storied older forest stands; lynx avoid young dense forest stands in the winter. Squires et al. 2006. This distinction is important because, as the FWS has determined, "it is imperative that lynx habitat and habitat for lynx prey [primarily snowshoe hare] be maintained and conserved on Federal lands." *Id.*, Listing Rule at 16052.

131. The USFS's science published in 2006 was validated by a peer-reviewed paper published in the Journal of Wildlife Management in 2010. Squires et al. 2010 at 1648, 1653, 1656. Appreciating regional differences in

lynx winter habitat use is fundamental to management and conservation of this species. *Id.* at 1655.

132. The Lynx Amendment does not provide a valid assessment of the Project's impacts on lynx. Retention and recruitment of lynx winter habitat has to be assessed to determine direct, indirect and cumulative impacts of the Project on lynx. Squires et al. 2006, 2010. The Amendment does not require the identification or recruitment of lynx winter habitat. Existing lynx winter habitat (multi-storied older forest stands) can be completely removed from a given LAU due to the 6% exemption provided in the Amendment. Lynx Amendment ROD at 20; ROD Attachment 1 at 4. The 6% exemption applies to all lynx habitat on an entire National Forest, whether it is occupied or unoccupied. *Id.*

133. The Project analysis does not apply the current best science on lynx winter habitat as per Squires et al. 2006 and Squires et al. 2010.

134. The Project will adversely affect lynx winter habitat due to the underburning of 212 additional acres of forest. Lynx BA at 15. These underburning treatments will reduce some of the horizontal cover present. Id. Removal of small understory trees will be implemented by both slashing and burning. Id. Table 1 at page 7-8). The recruitment of

lynx winter habitat will be significantly hindered by this slashing/burning.

135. The Project will create 370 acres of openings. Lynx BA at 17. Openings create an adverse impact to lynx because they do not cross openings in the winter. Squires et al. 2010 at 1654, 1655, 1657.

C. The North American wolverine, a species proposed for ESA listing

136. The North American wolverine is the largest terrestrial member of the weasel family. Wolverines typically live in remote areas far from human populations, generally at elevations of 6,500 feet and above. Many consider the wolverine to be a symbol of the wilderness, of everything that is wild and untamed.

137. Wolverines have a varied diet and feed primarily by scavenging mule deer, white-tailed deer, bighorn sheep, mountain goats, pronghorn antelope, and bison that are killed by other predators or that die of natural causes. Wolverines may kill larger ungulates such as elk and moose when the opportunity arises.

138. Wolverines use habitat ranging from Douglas-fir and lodgepole pine forest to subalpine whitebark pine forest (Copeland et al 2007).

139. Roads result in direct mortality to wolverines by providing access for trappers (Krebs et al 2007), and trapping is a major threat to wolverines (Squires et al 2007).

140. Female wolverines avoid roads and recently logged areas, and respond negatively to human activities. Krebs et al 2007.

141. Krebs et al (2007) states that "[f]emale wolverines, in winter and summer, have habitat associations that require careful considerations by land and resource managers. Human use, including winter recreation and the presence of roads, reduced habitat value for wolverines in our studies."

142. Wolverines are known to occur in the Little Belt Mountains, including in the Project Area. EA S-13. Additionally, the Project Area Contains both year-round habitat and potential natal denning habitat for wolverines. EA S-14.

143. Wolverines may be present in the Project area.

144. The Project contains one harvest unit (Unit 481) that occurs in wolverine habitat. EA S-14. The Forest Service admits that the Project "may affect" the wolverine by disturbing wolverines within the Project Area. EA S-15.

145. On February 4, 2013, the FWS published in the Federal Register a proposed rule to list the North American wolverine as threatened under the ESA. 50 CFR Part 17, February 4, 2013.

146. The ESA requires Federal agencies to prepare a Biological Assessment to determine whether a proposed action is likely to, among other considerations, "jeopardize the continued existence of species that are proposed for listing." See 50 CFR §402.02. The outcome of the Biological Assessment determines whether formal consultation or a conference is necessary. 50 C.F.R. §§ 402.02, 402.12.

147. The Lewis and Clark National Forest Plan, as amended, specifically requires that when "listed or *proposed species* or critical habitat *may occur in the project area*," "the *confirmed or suspected presence* of such species requires a "biological assessment" *regardless of the determination of the effect of the project on the species*." Forest Plan at Appendix J-8. Emphasis added.

148. The USFS's biological assessment for the Project does not address wolverines. The USFS failed to prepare a biological assessment for the wolverine, as required by both the ESA and the NFMA, and failed to either seek USFWS concurrence or initiate consultation with USFWS to determine the Project's effects on wolverines.

D. The Northern goshawk, an old-growth forest management indicator species (MIS), and other snag-dependent wildlife

149. The goshawk is an old growth management indicator species for the Lewis and Clark National Forest, in the category "Special Habitat Needs - Old Growth Forest." Lewis & Clark National Forest, Forest Plan at 6-14.

150. In its section on "NFMA Implementing Regulations", the Forest Plan specifically cites to the 1982 implementation regulation ("1982 planning rule") of the National Forest Management Act. Forest Plan at Appendix J-3.

151. Lack of goshawk foraging and nesting habitat has significantly reduced or eliminated the population of the MIS goshawk in the Project area.

152. The Blankenship Project area was surveyed for goshawk in 2007, 2008, 2009, 2010 and 2011. EA at 3-165.

153. In 2007, a single male goshawk was observed. In 2008, a single female goshawk was observed. In 2009, 2010 and 2011 there were no goshawks detected in the Project area. In 2009 a single inactive nest was found, but it was not identifiable to species, and there is no direct evidence that goshawk used this nest. EA at 3-165.

154. The agency failed to prepare an EIS to address the existing lack of goshawk habitat in the affected landscape.

155. The Little Belt Hazard Tree Removal Project includes 986 acres of the Project area and 1,138 acres of the analysis area. EA at 3-168.

156. Within the analysis area the project would increase the acres of openings and decrease the acres in each size class, would decrease habitat with greater than 5" dbh and 40% canopy cover, would decrease nesting habitat, and would decrease old growth. It would also result in disturbance in the analysis area. EA at 3-168.

157. Proposed vegetation treatments in the Project will alter foraging habitat percentages within stand size class and canopy cover: Acres of openings are already above that indicated by Reynolds and others (1992), and are already above the range found in the Northwestern Unites States. Disturbance in the analysis area by proposed treatments would further increase the acres of openings by 479 acres. EA at 3-169.

158. Forest Plan monitoring item C-8 provides that for the goshawk, "Old Growth Habitat" is monitored by sampling active nesting goshawk territories. EA at 3-159. This was not done, and the USFS acknowledges that "No conclusions on population trend are available from the monitoring data at this time." EA at 3-159.

159. The USFS admits that goshawk foraging habitat in the analysis area has been altered by past burning, salvage harvest, shelterwood cuts, clearcuts, firewood cutting and livestock grazing, and that the 1,721 acres of past harvest activities have removed habitat. EA at 3-172.

160. The USFS further acknowledges that the Blankenship Project will increase the openings category of foraging habitat, and reduce acres in the tree/10" plus size category and the 5.0" and >40% canopy, contributing to losses in these habitat categories from past activities. EA at 3-172.

161. Because the agency has failed to meet the monitoring requirements of the Forest Plan for the goshawk, there is no best available science, and the significance of further habitat reductions as a result of the Project is unknown; thus, there has been no comprehensive cumulative effects analysis.

162. Nonetheless, the USFS acknowledges that the Project "would result in changes in goshawk habitat that are cumulative to other activities in the analysis area", and that "Past harvest of nesting habitat would add to the loss of 791 acres of nesting habitat from the Blankenship Project." EA at 3-173.

163. The USFS acknowledges that "The proposed action would reduce the amount of old growth habitat by 361 acres." EA at 3-171. And, that the Project would result in a loss of 791 acres of nesting habitat. And, that future harvest of 50 to 75 acres of private land also has the potential to remove nesting habitat. And, that the planned hazard tree removal has the potential to further reduce known nesting habitat by 180 acres and old growth habitat by 124 acres. EA at 3-173.

164. Despite the acknowledged loss of goshawk habitat that will result from the Project, and despite not having been able to detect a single goshawk nest in the Project area over a five-year survey period (2007-2011), the USFS makes the claim that "Although there has been a reduction in nesting habitat and old growth, there is plenty remaining..." EA at 3-173.

165. The USFS further claims that "goshawk *on the Lewis and Clark National Forest do not appear to require* old growth habitat for nesting." EA at 3-171 (emphasis added). This directly contradicts USFWS publications which clearly state that "Goshawks nest in interiors of extensive, remote, mature and old-growth forests dominated by large trees." USFWS, Northern Goshawk Habitat Model, 2001.

166. Additional removal of goshawk foraging and/or nesting habitat will exacerbate the existing shortage of habitat, and will prolong the time period for habitat and goshawk population recovery to occur.

167. By failing to effectively monitor the goshawk, the USFS failed to use the current best available science to evaluate existing and projected impacts on the MIS goshawk and other old-growth-dependent species.

168. The Forest Plan sets a standard of "at least 2 snags/acre of 10 inches dbh or greater" as one "characteristic of an old growth forest" ("snag standard"). Forest Plan at 14.

169. The agency failed to demonstrate how the Forest Plan snag standard will be met within treated areas, and has therefore failed to demonstrate that the Project will not have a significant adverse impact on snag-dependent wildlife.

E. <u>The mule deer, a Forest Management Indicator Species (MIS)</u>

170. The mule deer is a Lewis and Clark National Forest Management Indicator Species (MIS), in the category of “commonly hunted and fished” wildlife. Forest Plan at 6-14.

171. The Supplemental EA at 7 notes that 146.4 acres of mule deer forested winter range will be logged and subsequently prescribed burned in the Project.

172. The Supplemental EA at 5, when referring to past management activities on mule deer winter range in Table 1, including 606 acres of timber harvest, claims that proposed activities will improve mule deer winter range. The Supplemental EA at 10 also claims that hazard tree removal on mule deer winter range will not remove the components of winter range identified as important. This is implausible, as timber harvest in forest stands will reduce thermal cover for mule deer. There is no analysis in the Supplemental EA that identifies this impact. The only impacts discussed are a hypothetical "potential" increase in forage, which allegedly would benefit mule deer. *Id.* at 5, 8, 10.

173. No Forest Plan monitoring results, or research reports, are cited to support the claim that logging forests on mule deer winter range will benefit the species due to increases in forage. In order to take a hard look at logging impacts, the agency would need to weigh the impacts of a "potential increase in forage" with the adverse impacts of removal of thermal cover. This was never done. Supplemental EA, *passim*.

174. All proposed treatments on mule deer winter range will remove thermal cover for deer. Adverse impacts on thermal cover will result from logging, slashing and burning. Logging includes 146.4 acres of forest on mule deer winter range. Supplemental EA at 7. A low intensity burn will

occur after harvest on most of the logged acres (except for unit 413-2 which only consists of 4 acres), resulting in the thinning of some thickets of trees. *Id.* at 8.

175. The Supplemental EA at 7 identifies that other treatment units on mule deer winter range include 162, 1674, 399, 374-1, 374-2, 407-1, 407-2, 50, and 90. These include 13 acres of slashing followed by a low-intensity burn in an opening, unit 162. *Id.* at 8; Decision Notice at 4. Low intensity burning is projected to kill up to 10% of the live tree canopy, and from 20-60% of the shrubs. *Id.* The mortality of trees from slashing was not identified.

176. Two of the units on mule deer winter range are 54 forested areas that will have no slashing, and a moderate understory burn. These include units 407-1 (18 acres) and 374-1 (36 acres). Decision Notice at 4. Moderate understory burns are projected to kill up to 30% of the live forest canopy. Supplemental EA at 8. The estimated mortality of shrubs was never identified. However, it could approach 100%, as a low understory burn can kill up to 60% of the shrubs.

177. The remaining treatment units on mule deer winter range include 247 acres of slashing of the understory in forested stands, followed by a moderate-intensity burn. These include units 1674 (15 acres), unit 399

(50 acres), unit 374-2 (33 acres), unit 407-2 (12 acres), unit 52 (43 acres) and unit 90 (94 acres). Decision Notice at 4-5. The loss of trees from burning could include 30% of the live canopy (Supplemental EA at 8), while the loss of trees from slashing was not reported.

178. Total degradation of mule deer thermal cover on their winter range in the Blankenship Project Area is 460 acres. This includes 146.4 acres of logging, 13 acres of burning openings, 54 acres of burning in forested stands, and 247 acres of slashing and burning in forested stands. This loss of thermal cover is never identified or discussed in the Supplemental EA. Supplemental EA, *passim*.

179. Rather than identifying adverse impacts of logging on mule deer forested winter range, the agency provided inaccurate information to conceal this impact. The USFS cites Mackie et al. (1998) to support the claim that commercial thinning of conifer canopies or reduction of understory conifer density may be neutral for mule deer on winter range. Supplemental EA at 3. However the Mackie et al. (1998) report referred to mule deer winter range *west* of the continental divide, where timber stands are far more extensive. The Bridger Mountain Range where the study took place is east of the Continental Divide, as are the adjacent Little Belt Mountains. Mackie et al. (1998) clearly noted *that*

logging on winter ranges in the Bridger Mountains would be detrimental to mule deer. (Emphasis added). The information in the report that discussed adverse impacts of timber harvest on mule deer winter range was not included in the Supplemental EA and thus was not disclosed to the public.

180. Pac et al. (1991) noted at 77 that forested stands accumulated 20-23% less snow than adjacent open sites and were preferred by deer for shelter and security over the entire spectrum of conditions encountered in winter: under heavy snow conditions under dense canopy, also during cold clear periods, mule deer use of dense timber stands reduces their heat loss, also snow crusting is reduced and reduces energy expenditure. A strategy of energy conservation is more appropriate to survival than foraging. *Id.* Thus, use of dense, mature timber by mule deer is advantageous because it provides a narrow temperature range, warmest average temperatures, lowest wind flow, and least hazardous snow conditions.

181. Although the Supplemental EA also cited the MFWP report by Pac et al. (1991), the USFS again failed to cite management recommendations for mule deer winter range provided in that report. The Pac (1991) report at 276 notes that "management of mule deer winter ranges should

emphasize the importance as maintenance habitats where deer conserve energy; forage characteristics are often of secondary importance to topographic characteristics and/or conifer timber stands that ameliorate temperature and snow depth; *timber management should emphasize retention of conifer timber stands on winter ranges.* (Emphasis added).

182. The Supplemental EA failed to define how the slashing and burning of smaller conifer trees on mule deer winter range will affect mule deer thermal cover. Although dense stands of mature conifers provide the most protection from severe weather, smaller conifers also provide thermal cover for deer, especially in less severe winter conditions. Black et al. (1976) at 19 reported that deer use small conifers and shrubs on winter range as thermal cover. Winter thermal cover must be coniferous vegetation, at least 5 feet tall, with a 60-75 percent crown closure, be at least 300 feet wide, and be at least 2 acres in size. Black et al. 1976, at 19.

183. Slashing and burning of more dense thickets of conifer habitat could clearly eliminate functional thermal cover for mule deer. The impacts of slashing on most proposed burning units was never addressed as per deer thermal cover. However, burning after logging will remove

"thickets" of smaller conifers, and tree torching is expected to create openings up to 3 acres in size.. Supplemental EA at 8.

184. The Supplemental EA at 5 claims, without supporting evidence, that all past burning activities improved mule deer foraging habitat, that these treatments on winter range would be beneficial to mule deer, and further identified past burning effects as "beneficial" cumulative effects. *Id.* at 8, 10. No Forest Plan monitoring was provided in support of this claim, and the claim runs counter to existing science, which demonstrates that mule deer winter range is degraded by slashing and burning activities in both openings and forested stands, by removing key forage species.

185. Mule deer studies have documented that various juniper shrubs provide key forage to mule deer in both winter and spring. Pac et al. 1991; Lovaas 1958. Thus, removal of juniper from winter range will adversely affect mule deer at other times of the year as well.

186. Moderate understory burns planned for most treatment units, with a projected shrub mortality that could exceed 60%, will remove juniper shrubs which are known to be a key winter forage species for mule deer in the Little Belt Mountains. As noted in the Project's Vegetation Treatment Project Understory Vegetation Report (March 7, 2012) at

page 4, common juniper does not have fire surviving regeneration properties, and is killed by anything but very light fires; creeping juniper also is damaged by fire. The same report at page 14 discusses the impact of burning on mule deer winter range: of the 17 shrub species analyzed, all are susceptible to top-kill from fire. This report at 15 claims that increases in other species due to fire would offset the potential decrease in common juniper, but no monitoring or research reports were provided to show that loss of key winter browse species is mitigated by retention of other less important browse species.

187. The agency has no monitoring data to validate that mule deer winter use was unchanged in areas that were previously logged, slashed and/or burned.

188. Mackie et al. (1998) at 137-138 addressed habitat enhancement for deer on winter ranges. Available research shows no evidence to demonstrate deer population increase as a result of treatments. The authors recommended that instead of treatments, habitat improvement projects for mule deer winter range should focus on acquisition of easements to protect winter range use, and that land use practices that eliminate important vegetation communities, such as multi-aged stands of conifer forests, are expected to have negative consequences. *Id.*

189. In the Supplemental EA at 5, where the USFS discusses cumulative impacts on mule deer winter range, it claims that the proposed action will have minimal, short-term impacts on mule deer habitat. In order for this to be plausible, pre-logging conditions of forested winter range would have to be re-established by approximately 5 years after logging. The agency provided no information to indicate this will occur on winter range.

190. Proposed logging of mule deer winter habitat in forest stand Unit 141 is in an old growth ponderosa pine forest (Supplemental EA at 7; Map 1 in Goshawk and Old Growth Analysis Report February 2012). Only a few large trees will be left for a seed source. *Id.* Large trees that are removed cannot redevelop after 5 years. A sparse forest stand will not have the same ability to modify severe weather conditions, and to reduce snow accumulation, as a more dense stand, important features for mule deer winter habitat (Mackie et al. 1998 at 136.

191. The Supplemental EA claims at 7 that the large trees in Unit 141 have been killed by bark beetles. Plaintiff's members visited this stand in the summer of 2012, and found little bark beetle mortality. Photos were provided of this stand in Plaintiff's appeal appendix for this project, demonstrating that the stand is mostly composed of live large trees.

192. The Supplemental EA at 9 states that forest thinning will result in increased forage, and that logging would increase structural diversity thereby increasing habitat diversity for mule deer on year-round habitat, and that understory burning and slashing would benefit mule deer by increasing forage. However, no research was identified supporting the contention that forage has been limiting to mule deer on this spring/summer range. No research projects or Forest Plan monitoring reports were cited to support agency contentions that treatments will benefit mule deer by increasing forage, or that removing vast amounts of conifer and juniper vegetation in logging and slashing and burning units will increase structural diversity. The USFS did not support this contention with any criteria about how habitat diversity was being measured before and after treatment, or why these changes would benefit mule deer.

193. Pac et al. (1983) at 14 note that based on their mule deer research project in the Bridger Mountains, silvicultural practices that convert overmature and old-growth stands into even-aged monotypes will remove and suppress the habitat diversity that now seems to maintain high deer densities; application of these practices to many presently

mature stands will effectively prevent their ultimate succession to "old growth," and would result in loss of optimal deer habitat for the future.

194. Pac et al. (1983) identified a key factor in the management of mule deer reproductive habitat: that the forest zones that constitute core habitat for mule deer in the Bridgers are late mature and "old growth" stands of Douglas fir and/or subalpine fir at intermediate elevations. Logging and applications of present intensive silviculture practices in these forest lands can be expected to reduce the capacity of this important deer habitat to support and produce animals.

195. The claim that removing trees would increase forage for mule deer is not generally applicable; studies have shown that logging of old growth forests has resulted in declines of both mule deer and white-tailed deer populations. Pac et al. 1983.

196. A factor not addressed in the agency's review of treatment effects on mule deer reproductive range was the impact on the seclusion of does required during the fawning season. Black et al. (1976, at 19) identify fawning cover as areas of low shrubs or small trees between 2-6 feet tall under approximately 50 percent overstory tree crown cover, and the optimum size of these cover patches is 1-5 acres. All of the proposed treatments will severely reduce fawning cover in treatment areas.

197. The direct and cumulative impacts of management activities on forested mule deer winter range cannot be determined from the Supplement EA. For example, Map 1 of the EA Supplement shows 1997 mapped mule deer winter range at 76,083 acres (Table 3 of Supplement). Map 1 also shows the original cumulative effects analysis area for mule deer. *Id.* at 6; Map 1, containing 24,415.5 acres. *Id.* at 6, Table 3. However, Map 1 shows the two separate areas approximately the same size. The reason for this large discrepancy is unknown, because the agency never provided any criteria for measuring adverse impacts on mule deer winter range, including treatment of thermal cover.

198. In addition, the past and future impacts on mule deer forested winter range was never addressed in the Supplemental EA.

199. The supplemental EA at 3 claims that mule deer winter range on National Forest lands is not necessary for the local mule deer population. This is implausible; supplemental EA maps 2 and 3 show that at least one-third (34.5%) of the total mule deer winter range for that landscape occurs on Forest Service lands. Also increased mule deer winter use of National Forest winter ranges will reduce the pressure on lower-elevation winter ranges on private lands during those years.

200. The USFS claims that winter range in the Blankenship landscape is not limiting to mule deer. Supplemental EA at 10. The basis for this conclusion is unknown. The criteria used to measure whether or not mule deer winter range was limiting in the Project landscape was never identified. The agency's evaluation of sufficiency of existing winter range was never defined to the public.

201. There have been extensive habitat impacts on mule deer in the Little Belt Mountains and Lewis and Clark Forest, none of which have assessed impacts on mule deer. These impacts include logging of 619 acres, and burning of 7424 acres of mule deer winter range on the Forest. Supplemental EA at 5 Table 1. The Belt Creek Range Analysis EA (1998) reports 5,426 acres of range burning to improve forage for livestock, and 10,377 acres of past logging in the Little Belt Mountains. There is no evidence these impacts were evaluated for mule deer winter or summer range, even though monitoring the impact of resource management activities on MIS populations is directed by the Forest Plan.

202. The agency has attempted to estimate the acres that would be affected by the Project, but they provided no monitoring data on what the effect will be from logging, slashing and burning. This can't be measured in the

office. It will require measurements of mule deer habitat use and population changes in the field in treatment areas.

203. The 1998 Belt Creek Range Analysis EA is outdated and should not be used to implement prescribed burning in the Blankenship Project Area.

204. The Blankenship 2012 EA at 3-156 notes that the Belt Creek Range Analysis decision includes 2,862 acres of prescribed fire within the analysis area and also within the project boundary. This EA is 15 years outdated, while the purpose of NEPA analyses is to define impacts for 5 years. The implementation of the proposed burns under that EA will have severe adverse impacts on mule deer, impacts that were never identified in the EA, including loss of forage, loss of thermal cover, and loss of hiding cover. These impacts were never identified in the Belt Creek Range Analysis EA. In addition, there has been no Forest Plan monitoring of these impacts. Continued use of this outdated EA, along with a failure of the agency to monitor the impacts of the proposed burning, are a violation of the NFMA requirements to maintain habitat for MIS and associated species.

FIRST CLAIM FOR RELIEF

The Forest Service and the Fish and Wildlife Service are violating the NFMA and the ESA because the agencies are failing to ensure the survival and recovery of the threatened Canada lynx. The Forest Service is

violating NEPA by failing to disclose survey and analysis information, and failing to take a hard look at Project impacts on Canada lynx.

205. All previous paragraphs are incorporated by reference.

206. ESA, NFMA, and NEPA require that the agencies use the best available science and insure the scientific accuracy and integrity of their analyses.

207. The best available science – including positive survey results from winter lynx tracking surveys conducted in the area, records that several radio-collared lynx have recently traveled through the Little Belt Mountains (including at least one lynx in the Project Area), the FWS's admission that other areas of the same Forest are "occupied" by lynx, numerous records of lynx being trapped or observed in the Little Belt Mountains, the presence of a known occupied lynx territory in the Little Belt Mountains as recently as 1997, the abundant presence of snowshoe hare, and abundant presence of suitable habitat for lynx and the snowshoe hare – indicates that lynx are likely present in the Project Area.

208. The proposed Project will adversely affect lynx by temporarily increasing road density, and by removing vegetative cover and habitat for lynx and their prey.

209. NFMA imposes substantive obligations on the Forest Service, including the requirement "to provide for diversity of plant and animal communities." 16 U.S.C. § 1604(g)(3)(B). This obligation requires the agency to consider the "best available science" when implementing site-specific projects within a forest plan. 36 C.F.R. § 219.35(a) (2001).

210. NEPA requires the agency to employ high quality environmental information and accurate scientific analysis before making its decisions. 40 C.F.R. § 1500.1(b).

211. The Forest Service based its analysis of the Project's effects on lynx and lynx habitat solely on the standards contained in the Northern Rockies Lynx Amendment. Lynx BA at 19; Id. at Appendix 2, pages 27-31. The Lynx Amendment is not based on the best available science because it does not contain the findings of Squires et al. 2006 and 2010. These studies constitute the best available science on lynx management needs in Montana and highlight the importance of retaining and recruiting lynx winter habitat.

212. NEPA and its implementing regulations require that environmental information be made "available to public officials and citizens before decisions are made…." 40 C.F.R. § 1500.1(b) (emphasis added). Public scrutiny is essential to implementing NEPA. *Id*.

213. The USFS is required to monitor the Forest to determine if lynx are present. EA S-19. It conducted surveys in 2010, but these surveys did not meet the agency's required protocol. *Id*.

214. The USFS conducted more surveys during the winter of 2012-2013. EA S-19. However, at the time of the Decision Notice, data from these surveys had not been analyzed and was not incorporated into the EA for the Project. Thus, no information about the surveys themselves, the agency's lynx survey methodology, or whether the agency had met its chosen survey protocol was available during NEPA review. There is no indication of how any of this information may have been considered by the agency prior to a final decision, and the information was not available to the public when the decision was made.

215. If the Forest Service had properly analyzed and disclosed Project impacts on Canada lynx, it would have had to disclose and respond to public reviews and critiques of this information—and that may have changed its ultimate decision.

216. The Forest Service's failure to take a hard look at Project impacts on the threatened Canada lynx, and its subsequent failure to hold its post-hoc decision documents to public review, is in violation of NEPA.

217. If and when the USFS completes lynx surveys according to mandated protocols, it must prepare a Supplemental NEPA analysis for public review of the agencies' new lynx analysis, consultation, and decision documents.

218. In violation of the APA and the NEPA, the Forest Service did not allow for public comment on its *post hoc* biological assessment for lynx.

219. The USFS's willful failure to use best available science, in the form of mandated survey protocols, in its determination that the Project will not adversely impact the lynx, is arbitrary and capricious in that it is not based on reasonable grounds or adequate consideration of the circumstances, and is therefore in violation of the ESA.

220. The USFWS's concurrence with the USFS determination of no adverse effects on the lynx, by failing to require the use and demonstration of best available science, is arbitrary and capricious in that it is not based on reasonable grounds or adequate consideration of the circumstances, and is therefore in violation of the ESA.

SECOND CLAIM FOR RELIEF

The Project and the agencies' analyses, actions, and omissions regarding the wolverine violate the ESA, NFMA, NEPA, and the APA

221. All previous paragraphs are incorporated by reference.

222. The wolverine is proposed for listing under the ESA and may be listed before or during Project activities.

223. Wolverines are present in the Little Belt Mountains and in the Project Area, and the Project may affect them.

224. The Final Rule for ESA Section 7 consultation regulations requires that the action agency address proposed species in a biological assessment: "A biological assessment contains information concerning listed *or proposed species* or designated or proposed critical habitat *that may be present* in the action area *and an evaluation of any potential effects of the action on such species and habitat*. A biological assessment should be used in determining whether formal consultation or a conference is required." 51 Fed. Reg. 19940 (June 3, 1996) Emphasis added.

225. The USFS did not complete a BA for the wolverine for the Project.

226. The USFS did not consult with the USFWS regarding the Project's potential impacts on the wolverine.

227. The agencies' failure to include the wolverine in the biological assessment for the Project violates the ESA and the APA and is arbitrary and capricious.

228. The agencies are also violating Section 9 of the ESA because there is no take permit that covers the Project's incidental take of wolverine.

THIRD CLAIM FOR RELIEF

The Forest Service is violating NFMA and NEPA by failing to ensure the viability of old-growth dependent and snag dependent species.

229. All above paragraphs are incorporated by reference.

230. The Forest Plan requires the Forest Service to manage old growth habitat to maintain viable populations of old growth dependent species and requires the Forest Service to monitor population levels of Management Indicator Species ("MIS").

231. The Northern goshawk was selected as a MIS for old growth forest dependent species on the Lewis and Clark National Forest.

232. Northern goshawk habitat is found within the Project analysis area, and the species is known to occur within the analysis area.

233. However, the USFS acknowledges that "No conclusions on population trend are available from the monitoring data at this time." EA at 3-159. Formal goshawk surveys failed to locate any individuals, and the USFS does not have nesting data for this species.

234. Because the USFS does not have population trend information for the goshawk in the analysis area, the agency has failed to meet the monitoring requirements of the Forest Plan for the goshawk, and the significance of further habitat reductions in the Project Area is unknown.

235. Despite the acknowledged loss of goshawk habitat that will result from the Project, and despite not having been able to detect a single goshawk nest in the analysis area over a five-year survey period (2007-2011), the USFS makes the claim that "Although there has been a reduction in nesting habitat and old growth, there is plenty remaining..." EA at 3-173.

236. The USFS claim that there is "plenty remaining" goshawk nesting habitat is apparently based in part on its own novel re-definition of nesting habitat: "goshawk on the Lewis and Clark National Forest do not appear to require old growth habitat for nesting." EA at 3-171.129.

237. Because the agency has no population monitoring data for the goshawk in the analysis area, and has no record of successful nest survey data, and uses conflicting definitions of what constitutes goshawk nesting habitat, the attempted analysis of cumulative effects fails, in violation of NEPA.

238. Because the USFS has no population trend data for this MIS species, it is relying on its own habitat estimates as a proxy-on-proxy approach for ensuring old growth and old forest-dependent species viability.

239. The 9th Circuit has held that where "the Forest Service predicts healthy populations of MIS based on habitat estimations, but there is no population trend data for the MIS and the evidence shows that the MIS no longer inhabit the area, the estimations do not mirror reality and reliance on proxy-on-proxy is arbitrary and illegal."

240. The USFS's reliance upon a proxy-on-proxy analysis that does not mirror reality and its subsequent determination that the Project will have no measurable effect on the MIS goshawk are in violation of NFMA. The USFS's failure to take a hard look at Project impacts on this MIS species is in violation of NEPA.

241. The Forest Plan sets a standard of "at least 2 snags/acre of 10 inches dbh or greater" as one "characteristic of an old growth forest" ("snag standard"). Forest Plan at 14.

242. The agency failed to demonstrate how the Forest Plan snag standard will be met within treated areas, and has therefore failed to demonstrate that the Project will not have a significant adverse impact on snag-dependent wildlife.

243. The NFMA requires that National Forests provide for viable populations of MIS species, and NFMA's consistency provision further requires the Forest to adhere to the monitoring requirements of its own Forest Plan, including the requirement to monitor population trends of snag-dependent wildlife species.

244. The USFS's failure to comply with Forest Plan monitoring for the snag-dependent MIS Northern three-toed woodpecker is a violation of NFMA requirements and has led to an uninformed decision in violation of NEPA.

FOURTH CLAIM FOR RELIEF

Agency claims regarding project impacts on mule deer habitat are a violation of the NEPA, NFMA and APA, because these claims conflict with the current available science, and because adverse project impacts are being presented instead as a benefit to mule deer, misleading the public as to the impact of agency management activities on this management indicator species.

245. The USFS claims that treatment of mule deer winter range will increase forage and thus be beneficial to mule deer is false and serves to conceal from the public the adverse impacts that will occur.

246. The USFS did not report planned removal of thermal cover on mule deer winter range, or identify adverse impacts that will result.

247. Because planned thermal cover removal and identification of adverse impacts was not done, information provided for public review on management impacts to mule deer winter range was inaccurate as per current available science.

248. The agency has failed to identify the adverse impacts to mule deer that will occur from logging, slashing and burning mule deer spring/summer/fall range.

249. The 1998 Belt Creek Range Analysis EA is outdated and should not be used to implement prescribed burning in the Blankenship Project Area. Continued use of this outdated EA, along with a failure of the agency to monitor the impacts of the proposed burning, are a violation of the NFMA requirements to maintain habitat for MIS and associated species.

REQUEST FOR RELIEF

Plaintiff requests that this Court award the following relief:

A. Declare that the Project violates the law;

B. Enjoin implementation of the Project;

C. Require that any future contemplated implementation of the Project be preceded by a full Environmental Impact Statement;

D. Award Plaintiff its costs, expenses, expert witness fees, and reasonable attorney fees under the ESA, EAJA or any other applicable provision of law; and,

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

Respectfully submitted this 26th day of February, 2014.

/s/ Timothy M. Bechtold
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