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

NATIVE ECOSYSTEMS COUNCIL,)	
<i>et al.</i> ,)	CV 14-196-DLC
)	
Plaintiffs,)	
)	MEMORANDUM IN
v.)	OPPOSITION TO PLAINTIFFS’
)	MOTION FOR PRELIMINARY
FAYE KRUEGER, <i>et al.</i> ,)	INJUNCTION
)	
Defendants.)	
)	

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I. Introduction.

The Red Mountain Flume Chessman Reservoir Project will treat dead and dying trees along the Red Mountain flume and around the Chessman Reservoir about ten miles southwest of Helena, Montana. L03:61430. The “flume” is a man-made conveyance, consisting of a ditch, a pipeline, and a wood and sheet metal flume that carries water to Chessman Reservoir. *Id.* This is the primary water source for the 30,000 people in the City of Helena, Fort Harrison, and the Veterans’ Affairs hospital. *Id.* The flume and reservoir are “critical interconnected / interdependent infrastructure necessary to maintain Helena’s municipal water treatment system.” H08:37230.

Mountain pine beetle, western spruce budworm, and white pine blister rust have caused extensive tree mortality around the reservoir and adjacent to the flume. *Id.* This has created three problems: First, excessive fuel loads have created conditions ripe for a high intensity wildfire that could destroy the water supply infrastructure and pollute the reservoir with ash and sediment for years to come. L03:61430; H08:37230. Second, standing dead trees near the water supply infrastructure are falling with increasing frequency, and threaten Helena’s water supply (by crushing the flume, pipeline, trestles, etc.). DN at 2. Third, the dead trees also threaten, and are currently falling on, the fence that is meant to exclude cattle from the reservoir. *Id.* at 3. Cattle grazing on adjacent pastures exploit

fence breaches to access the reservoir, and every such incursion endangers the water supply with fecal-borne pathogens. *Id.* For all these reasons, the City of Helena, the State of Montana, and the Forest Service (“USFS”) believe the project must proceed immediately.

Plaintiffs seek the extraordinary remedy of a preliminary injunction pending the Court’s decision on the merits. But their brief provides no reason to enjoin the Project. As demonstrated below, Plaintiffs are not likely to succeed on the merits of their claims under the National Environmental Policy Act (“NEPA”) or Endangered Species Act (“ESA”). Plaintiffs also have not shown any irreparable harm to their interests. The alleged harms to their members are conclusory and speculative. The balance of the equities and the public interest also weigh heavily against an injunction. In fact, as demonstrated below and in the accompanying declarations, an injunction would be environmentally harmful, and would perpetuate an elevated risk of high-severity fire, putting structures, water quality, and habitat at risk. Accordingly, the Court should deny Plaintiffs’ motion.

II. PRELIMINARY INJUNCTION STANDARD

A preliminary injunction is an “extraordinary and drastic remedy,” *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008), one that “may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008) (quotation omitted). To succeed on a motion for a

preliminary injunction, a plaintiff must show that “he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *League of Wilderness Defenders v. Connaughton*, 752 F.3d 755, 759 (9th Cir. 2014).

Ninth Circuit law permits a preliminary injunction where a plaintiff shows “‘serious questions going to the merits’ and a balance of hardships that tips sharply towards the plaintiff . . . so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). This “sliding scale” test is inapplicable here because Plaintiffs show no likelihood of irreparable harm, and the public interest favors project implementation.

Plaintiffs must prove irreparable harm and success on the merits even though this case presents ESA claims. *League of Wilderness Defenders*, 752 F.3d at 759; *Conservation Congress v. U.S. Forest Service*, 720 F.3d 1048, 1054 (same).

Plaintiff must also show that the injunction is narrowly tailored to the specific violation at issue. *Nat’l Wildlife Fed’n v. Nat’l Marine & Fisheries Serv.*, 422 F.3d 782, 800 (9th Cir. 2005).

III. ARGUMENT

A. Plaintiffs are unlikely to succeed on the merits and raise no “serious questions.”

Plaintiffs’ brief presents claims based on the ESA and NEPA.¹ These claims are reviewed under the Administrative Procedures Act (“APA”), 5 U.S.C. §701 et seq. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 891 (9th Cir. 2002). Under the APA, agency actions may be set aside only if they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* “[T]his standard is highly deferential, presuming the agency action to be valid.” *Cal. Wilderness Coal. v. U.S. Dep’t of Energy*, 631 F.3d 1072, 1084 (9th Cir. 2011).

The Court must “not substitute [its] judgment for that of the agency.” *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008). Instead, the Court may reverse a decision as arbitrary and capricious only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Id.* The Court should be “most

¹ Plaintiffs cite NFMA as a basis for their claims (Br. 3), but advance no NFMA arguments in their brief.

deferential” when, like here, “the agency is making predictions, within its area of special expertise, at the frontiers of science.” *Id.* at 993.

As set forth below, Plaintiffs are not likely to succeed on the merits of their claims. Nor have Plaintiffs raised any “serious questions” on the merits, namely, questions that are “substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.” *Republic of the Phil. v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988) (quotation omitted).

1. Plaintiffs’ NEPA claims will fail.

NEPA requires federal agencies to take a “hard look” at the environmental consequences of their proposed actions before a final decision to proceed.

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-51 (1989).

NEPA establishes procedures for agencies to consider the environmental impacts of their actions, but does not dictate substantive results. *Robertson*, 490 U.S. at 350. None of Plaintiffs’ claims show a violation of NEPA’s requirements.

a. The Project is not a barrier to lynx movement.

Plaintiffs argue “the project’s opening of 400 acres, when added to the acreage of the reservoir itself, amounts to a winter north-south barrier for lynx of almost a mile in width.” Br. 7. Plaintiffs cite no authority for this assertion, and it is incorrect. Connectivity will be maintained around Chessman Reservoir.

I02_01:37875-97; D15_46:10294-500. The treatment units will create a series of

openings: some with few trees, some with open-grown overstory, some with open overstory but smaller trees in the understory. *Id.* Large snags (>20 inches dbh) will be retained everywhere they occur. *Id.* Trees of all sizes in riparian/wetland areas will be left largely intact. *Id.* Some openings will be separated by upland buffer strips. *Id.* No opening will be larger than 100 acres. *Id.* D15_46:10365-66, 10303; H08:37303-04; D05_64: 3191-94.

Project treatments will create neither a 333-acre clearcut nor a 400 acre opening. Rather, the project will create a mosaic of vegetative conditions in the travel corridor. Local blocks of cover would remain dispersed throughout treated units, provided by groups of green trees that survived the pine beetles, retained snags, large woody debris, and the other features described above. This mosaic comports with recommendations in the NRLMD (“...habitat connectivity for lynx consists of an adequate amount of vegetation cover arranged in a way that allows lynx to move around.” E443:29994), and will provide multiple alternate routes with cover. Indeed, the mosaic of vegetative conditions is actually better wildlife habitat than the lodgepole and snag monoculture. Costain ¶¶15-16.

b. The cumulative effects analysis included Clancy-Unionville.

Plaintiffs argue the NEPA analysis was deficient because it did not account for the cumulative effects of the Clancy-Unionville project. Br. 8. Contrary to Plaintiffs' claim, the analysis *did* explicitly address Clancy-Unionville. The Decision Notice, the Environmental Assessment, and multiple other record documents are shot-through with discussions and analyses of project impacts in tandem with Clancy-Unionville. The Decision Notice discusses Clancy-Unionville's adjacent vegetation treatment. L03:61445. In the Environmental Assessment, Clancy-Unionville is specifically discussed in the wildlife cumulative effects analysis. H08:37322 (elk security analysis); 37360 (goshawk); 37526 (pine marten), 37351 (lynx), 37306 (travel corridors and linkage zones – related to all species).

The Forested Vegetation report (D05_64) discusses past treatments in Clancy-Unionville stands, and how they influenced those sites (*Id.* at e.g., 3187, 3199). Plaintiffs claim Clancy-Unionville wrought “complete devastation of wildlife habitat.” Br. 7. But in reality, those stands had already been killed by mountain pine beetle. D05_64:3199. The only difference between untreated stands and Clancy-Unionville stands is that the former have more snags and downed debris. *Id.*; D15_46:10359.

Appendix B of the Wildlife Background Report and Biological Evaluation (“Wildlife Report”) lists all of the timber harvest and management activities that are “past”, “present / ongoing,” and “reasonably foreseeable,” specifically listing and discussing the “Clancy Unionville Vegetation Manipulation and Travel Management Project.” D15_46:10479. The analysis acknowledges that Clancy-Unionville harvest occurred in the past (“Harvest activities have been completed”) and that activities will continue (“fuels treatments are ongoing”). *Id.* The analysis also addresses the proximity of the two projects:

The Clancy-Unionville project area lies immediately adjacent to the Red Mtn Flume-Chessman Reservoir project area on the east, and one of its cutting units directly abuts the area southeast of Chessman Reservoir.

Id. In consideration of this proximity, a project unit (#14) was modified to avoid the creation of too large a contiguous opening. *Id.* Thus, not only did the agency consider the cumulative effects of Clancy-Unionville, they acted upon those considerations and modified the project.

Clancy-Unionville is also discussed in the Wildlife Report’s analysis of cumulative effects pertaining to “Lynx” and to “Travel Corridors and Linkage Zones” (which pertains to all species). D15_46:10368-69; 10430-32. Because of a clerical error, Clancy-Unionville was not listed in the Biological Assessment (“BA”). Costain 29, 53. Regardless, USFS still considered the cumulative effects of the project.

c. The cumulative effects analysis included the Telegraph project.

The Telegraph Project is currently in the analysis phase. It is west of the Continental Divide, about five miles south of Elliston, Montana. L05:61458; D15_46:10485. Plaintiffs acknowledge the agency's consideration of Telegraph but assert "beyond being simply mentioned, this reasonably foreseeable project was never analyzed in cumulative effects." Br. 8, 17. Wrong. The cumulative effects analyses in the EA, specialist reports, and elk amendment clearly show a "hard look."

The cumulative effects of Telegraph are discussed throughout the EA. In "Travel Corridors and Linkage Zones," Telegraph is identified as one of three reasonably foreseeable projects that, along with the Flume project, would not add to cumulative effects "in a way that would significantly alter the functional capacity of existing wildlife movement corridors of the Divide linkage zone." H08:37306-07. The analysis of "Elk Security Areas and Elk Habitat Effectiveness" finds that Telegraph will have no significant cumulative impact on elk security or summer range conditions. H08:37322-23, 37334-35. Telegraph was also discussed in terms of cumulative impacts on lynx habitat and the ability for lynx to inhabit the larger cumulative effects area. H08:37351-52.

In the Wildlife Report, Telegraph is analyzed as a reasonably foreseeable activity in the cumulative effects "Combination Area." D15_46:10368-70; 10390;

10404-05; 10430-32; 10446-47; 10485. Telegraph's cumulative effects are further assessed in relation to the site-specific Forest Plan Amendment. L05:61458-59; H09:37409-10. Thus, the cumulative effects of Telegraph were analyzed.

d. The site-specific amendment was warranted and proper.

The mountain pine beetle irruption that rolled through the Project area, and other disease outbreaks, have resulted in extensive stands of dead timber. That is the reason for the project. Regardless of whether this fuels reduction Project is implemented, the same loss in elk hiding cover is going to “occur naturally over the next few years due to extensive tree mortality and natural tree fall associated with the mountain pine beetle infestation” H09:37406. Plaintiffs suggest the Forest should “take steps to bring the Project area into compliance,” but that disregards reality: The trees are already dead and falling, and there are no “steps” USFS can take to change that fact. In fact, “the removal of hiding cover from Chessman Reservoir may in the long run be more beneficial for elk in terms of quickening the regeneration rate of new forests.” *Id.* The Project will also improve elk foraging habitat. Costain ¶¶15-16.

Standing dead trees do provide hiding cover, and removing those trees will temporarily diminish hiding cover in the short term. H09:37405. But the quantity of hiding cover removed by this project is tiny (up to 1% of the Elk Herd Unit).

Id. Disturbances to elk will be minimal, and even those will be mitigated by

measures from the Montana Cooperative Elk-Logging Study. H09:37406. Also, hiding cover will be retained elsewhere throughout the project area in quantities sufficient to support big game and other wildlife species, and sufficient to maintain or enhance elk habitat. H09:37408. Elk populations in the hunting district currently exceed Montana FWP objectives. H09:37407. There are vastly more elk thriving on and around the Forest today (13,943) than were forecast when the Forest Plan was signed (6,200). H09:37408. Thus, Plaintiffs lack any basis to claim the site-specific amendment portends any real world harm to elk.

Plaintiffs also lack any legal basis to attack the site-specific amendment. USFS may deviate from Forest Plan requirements, without violating NFMA, by adopting a site specific amendment. *Gifford Pinchot v. Clayton*, 783 F.Supp.2d 1160, 1167 (W.D.Wash.,2011); 16 U.S.C. § 1604(f)(4) (USFS may modify a forest plan “in any manner whatsoever.”). Perhaps mindful of this broad latitude, Plaintiffs mount a NEPA attack, arguing the methods for calculating hiding cover are inconsistent. Br. 12. But this claim lacks merit.

“Hiding cover” must conceal 90% of an adult elk at 200 feet. H09:37404. This cover can be identified using ground surveys or aerial photographs. Studies have proven that 40% canopy cover (seen in aerial photos) consistently correlates to a density of stems that conceals 90% of an elk at 200 feet. H09:37404; L05:61451; D15_46:10379-80; H11:31574; E226:18779-88; E404:27324-57.

Using this method, if 50% of an Elk Herd Unit has 40% or greater canopy cover, it passes muster under Forest Plan standards 3 and 4(a). D15_46:10395. When using ground surveys, only 35% of the Elk Herd Unit need be established as “hiding cover.” H09:37403.

Plaintiffs decry this as inconsistent methodology, but they completely fail to substantiate their theory. They never show that a calculation of hiding cover using the canopy cover method would differ from a calculation using ground surveys. And they cannot show such an inconsistency here, because the Forest Service ground-validated the accuracy of the canopy-cover method for this Project. D15_30:10203-06. Thus, the canopy cover method was proven accurate as applied to this area, and Plaintiffs’ NEPA claim must fail.

e. The cumulative effects analysis correctly excluded the possible future project in the Tenmile watershed.

Plaintiffs complain the agency “intentionally provided an incomplete cumulative effects analysis” because it did not disclose a potential project in the Tenmile watershed. Br. 15-17. Plaintiffs’ claim is based on a newsletter they “recently received.” Br. Exhibit 11. But the propriety of a cumulative effects analysis must be assessed from the date of the decision. *Camp v. Pitts*, 411 U.S. 138, 142 (1973). The Flume project was approved in April, 2014. At that time (and to date), the potential project that Plaintiffs refer to had not been proposed.

Br. Exhibit 11 (showing anticipated proposal date of July 2014).

Future actions are not “reasonably foreseeable,” and need not be included in cumulative effects analyses, while they are “in the initial planning stage” and while “specifics of the units (size and treatment prescription)” have not been identified. *Environmental Protection Information Center v. U.S. Forest Service*, 451 F.3d 1005, 1014 (9th Cir. 2006). Here, Plaintiffs do not show that the un-named future project was past the initial planning phase as of April, 2014. They do not show that unit sizes were known, or that treatment prescriptions were known (indeed there are no proposed treatment units depicted on Plaintiffs’ Exhibit 12). They do not prove that any of those specifics have been established to date. When and if this future project is proposed, the analysis on that project will account for the effect of earlier actions – like the Flume Project. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 20 (1976). There is no NEPA violation.

f. Public involvement complied with NEPA.

Plaintiffs say “there was a fatal lack of public involvement” because the final BA and Wildlife Report were not made available before the public comment period. Br. 17 (arguing this prevented public access to “agency determinations of impacts to the threatened grizzly bear and threatened Canada lynx.”). But the Preliminary Environmental Document (dated June 25, 2013 [G02_03:36986]) was supported by a draft Wildlife Report and BE (dated June 20, 2013[D15_20:8570]) that was publically available and that contained 181 pages of detailed information

on every category of wildlife.

Plaintiffs were also given copious information and opportunities to participate via in-person meetings with City, County, and State personnel (B01_02:38-39), scoping (B01_05:59-63; B01_11:74), news releases (B01_07:68-69), Collaborative Group Open House meetings (B01_09:71), community presentations (B01_14:78-79), and letters (G02_01:36983-84; H01:37181-82; I03_05:37936). *See also* L03:61433-34.

Plaintiffs are incorrect that USFS public participation regulations allow the agency to sandbag participants. A party's objections must be based on their previously submitted comments, *unless* the issue is based on new information that arose after the opportunity for comment. 36 C.F.R. §218.8(c). Thus, even if the BA or final Wildlife Report presented previously undisclosed information, Plaintiffs would not be prevented from objecting on the basis of such new information.

Contrary to Plaintiffs' claim, NEPA does not require USFS to provide a public comment period for the Biological Assessment. The BA is simply a document that facilitates ESA consultation. 50 C.F.R. § 402.02. It is not a NEPA document, and it does not contain or constitute information that is otherwise unavailable to the public: The analysis in the BA can be found in the draft and final Wildlife Reports. Thus, no information was withheld from the public, and there is

no NEPA violation.

2. Plaintiffs' ESA claims will not succeed.

Consistent with its obligations under ESA Section 7, USFS consulted with FWS concerning the Project's impact on the grizzly bear and Canada lynx ("lynx"), both designated as threatened species under the ESA. D15_03_11:05290-91 (summarizing past consultation history). In March 2014, USFS prepared a BA to analyze the Project's potential effects on grizzlies and lynx. D15_03_09:5185. The BA determined that the Project "may affect, but is not likely to adversely affect the lynx and the grizzly bear." *Id.* at 5185-86. Based on the BA, correspondence with USFS, and information in its own files, FWS agreed with this assessment. D15_03_11:05290-93; D15_03_09:5188-90.

a. The ESA analysis is based on the best available science.

Plaintiffs challenge the lynx and grizzly bear ESA analyses on the basis that the agencies failed to "utilize the best available scientific data." Br. 6-11. The ESA requires agencies to base their actions on "the best scientific and commercial data available." 50 C.F.R. §402.14(g)(8); 16 U.S.C. §1536(a)(2). What constitutes the "*best* scientific data" lies within the agency's "special expertise," and courts must generally be at their most deferential when examining such determinations.

Baltimore Gas & Elec. Co.v. Natural Resources Defense Council, 462 U.S.87

(1983) at 103. Absent superior data, occasional imperfections do not violate the ESA’s best available science standard because this standard “merely prohibits [an agency] from disregarding available scientific evidence that is in some way better than the evidence [it] relies on.” *San Luis & Delta-Mendota v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014).

Here, Plaintiffs not only fail to cite to *superior* scientific data, they fail to cite to *any* scientific data that contradicts the agencies’ reasoned ESA determinations.

(1) The best available science shows the Project will not adversely affect lynx or lynx habitat.

USFS determined, and FWS concurred, that the Project is “not likely to adversely affect” the lynx. D15_03_09:05187. As opposed to core occupied or critical habitat, the Project occurs in secondary occupied lynx habitat.² Costain ¶¶39. Lynx activity has not been reported or documented in the Project area. *Id.* ¶¶37, 47; D15_03_09:5520-22. Lynx presence is tied primarily to its principal prey, the snowshoe hare. Costain ¶34. The Project area supports relatively little functional snowshoe hare habitat, and most of what is present is highly fragmented in relatively small and isolated patches. *Id.* ¶47. USFS manages lynx according to

² Plaintiffs incorrectly claim the Project occurs within “core” occupied lynx habitat. Br. 6. In the Divide landscape, areas north of U.S. Highway 12 are “core” occupied habitat, and those south of the highway are “secondary” occupied habitat. D15_03_09:5225. The Project is south of Highway 12, and not in “core” habitat. *Id.*; Costain ¶ 39.

the standards and guidelines in the *Northern Rockies Lynx Management Direction ROD*, which is based on the best scientific data available. Costain ¶38; D15_03_02a:4846-4970; D15_28.

Plaintiffs argue that because the Project would render some winter snowshoe hare habitat “usuitable”, USFS cannot conclude that the Project will have minimal impacts to lynx. Br. 6-7.³ Of the 490 acres of potential lynx habitat affected, only 49 acres provide snowshoe hare habitat, thereby resulting in modification of 0.7% of the snowshoe hare habitat available to lynx. Costain ¶¶45-48. That is 0.7% of hare habitat, dispersed in fragmented patches, in an area where lynx have not been documented. Costain ¶47. Plaintiffs cite no scientific data indicating this minor modification of potential habitat will adversely affect lynx, so this claim must fail.

Plaintiffs claim the Project will create a movement barrier for lynx traversing the Project area. Br. 7. As noted above, §A(1)(a), lynx movement is not impeded. The Project retains local blocks of cover within the treated areas, along with adjacent untreated areas, in a configuration that allows lynx to move through the area. Costain ¶¶50-51; *Id.*; E338. Plaintiffs do not rebut these determinations.

³ The Project would modify a total of 49 acres of hare habitat, of which 32 acres is winter habitat. Costain ¶45. Plaintiffs’ use of 36 acres of winter habitat was based on an early estimate that was later revised down because the Project avoids wetland/riparian sites. *Id.*

(2) The best available science shows no adverse effect to grizzlies.

Plaintiffs disagree with USFS's determination, and FWS's concurrence, that the Project is "not likely to adversely affect" grizzlies. D15_03_09:5186; D15_03_11:5290-91. In the Northern Rockies, recovery efforts for grizzlies have focused on four occupied ecosystems. Costain ¶¶17. The closest of these, the Northern Continental Divide Ecosystem ("NCDE") Recovery Zone, is about 30 miles north of the Project area. *Id.* There is no direct evidence that grizzlies currently inhabit or move through the Project area. Costain ¶¶20, 25.

Plaintiffs argue that 38% core security habitat in the Project area is inadequate, and that 68% is required. Br. 9. But the 68% requirement only applies within grizzly recovery zones. Costain ¶¶21-22; D15_03_08:5238-39. The Project area is not within or adjacent to the NCDE Recovery Zone, or any other recovery zone. Costain ¶12. As such, the 68% core security standard does not apply to the Project area, and Plaintiffs' claim must fail.

Likewise, Plaintiffs inaccurately conclude that the open road density limitation of 0.55 linear miles per square mile applies here. This standard does not apply outside the NCDE Recovery Zone. F02:33990, 34177-81; Costain ¶22; D15_03_08:5238-39. Therefore, this claim must fail.

Finally, Plaintiffs wrongly conclude that the agencies failed to consider the impact of reduced cover on grizzlies traveling through the Project area. Br. 10.⁴ In fact, the BA considered the impact of reduced cover and found that, due to the size and configuration of the new openings, the Project would not discourage grizzly habitat use or prevent movement along a travel corridor. D15_03_09:5216-17. Rather, the Project will benefit grizzlies in two important ways: First, the treatment areas would enhance potential foraging opportunities through removal of woody debris. *Id.*; Costain ¶¶26. Second, the Project will produce substantial forest edge habitat, which grizzlies favor because of the juxtaposition of cover and foraging opportunities. Costain ¶¶ 26-27. The Project avoids wet habitats that provide the best foraging for grizzly bears and will protect important whitebark pine and aspen habitats. *Id.* These new patches of open habitat will provide diversity useful to grizzlies and that fit within the range of landscape patterns to which they are adapted. *Id.*

b. The site-specific amendment does not give rise to any ESA violation.

Plaintiffs argue that the site-specific Forest Plan amendment (exempting the project from elk hiding cover requirements) was flawed because it was not

⁴ The Project will elevate human presence in the Project area for up to 1.5 years, but, given the broad availability of suitable habitat and the lack of evidence of grizzlies in the Project area, the potential for bear-human confrontations is very low. D15_03_09:5216-17.

analyzed or “even mentioned” in the BA. Br. 11. But elk are not listed as threatened or endangered under the ESA, so there is no basis to address them in the BA. The BA and Concurrence Letter did, however, reasonably analyze the impacts of reduced hiding cover on ESA-species. D15_03_09:5291; D15_03_09:5215-16. In 10-15 years, hiding cover will mostly disappear in the Project area due to overstory collapse, thereby producing the same result. *Id.* Therefore, the BA reasonably discussed the site-specific amendment.

B. Plaintiffs do not “clearly show” irreparable harm.

An injunction should issue only where a plaintiff makes a “clear showing” and presents “substantial proof” in support of its arguments on each injunction factor. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (emphasis omitted) (citation omitted). With respect to irreparable harm, plaintiff must do “more than merely allege imminent harm sufficient to establishing standing[.]” *Associated Gen. Contractors v. Coal. For Econ. Equity*, 950 F.2d 1401, 1410 (9th Cir. 1991). Rather, their burden here is more specific: to show they will imminently suffer irreparable harm in the “absence of” the specific injunction they request. *Winter*, 555 U.S. at 22. Such harm must be “*likely*, not just possible.” *Alliance for the Wild Rockies*, 632 F.3d at 1131.

Here, Plaintiffs allege generalized harm to their aesthetic, recreational, spiritual and academic interests, and harm to their interests in protecting species

and habitats. Br. 20-21. These allegations are vague and conclusory. They do not establish the requisite causal link between any alleged harm and the Project itself. For instance, Plaintiffs allege generalized interests in protecting species and enjoying the Project area in its undisturbed state, but fail to explain with the required “substantial proof,” *Mazurek*, 520 U.S. at 972, how the Project will impede their ability to enjoy this area or how species will be irreparably harmed. Plaintiffs offer no evidence that the Project will irreparably harm lynx or grizzlies or their habitat. This is unsurprising because there is no evidence of lynx or grizzlies in the Project area. Costain ¶¶25, 37. Plaintiffs’ generalized expression of interest is insufficient. *Friends of the Wild Swan v. Christiansen*, 955 F. Supp. 2d 1197, 1202 (D. Mont. 2013) (rejecting motion for preliminary injunction because “Plaintiffs fail to allege site-specific harms”); *Native Ecosystems Council v. Krueger*, CV 13-167-M-DLC, 2014 WL 3615775 (D. Mont. July 21, 2014) (denying preliminary injunction motion because plaintiffs did not show “the Project will irreparably harm any endangered or threatened species.”).

Plaintiffs’ conclusory assertions of harm, without explaining specifically how Project activities harm these interests, fail “to show a particularized injury to their interests rather than an abstract injury to the environment.” *Sierra Forest Legacy v. Sherman*, 951 F. Supp. 2d 1100, 1111 (E.D. Cal. 2013). The Ninth Circuit has “decline[d] to adopt a rule that any potential environmental injury

automatically merits an injunction.” *Lands Council*, 537 F.3d at 1005. Fuels management on USFS land is no exception. *See Earth Island Inst. v. Carlton*, 626 F.3d 462, 474 (9th Cir. 2010) (“[The] argument that logging is per se enough to warrant an injunction because it constituted irreparable environmental harm was squarely rejected by *McNair*.”).

Plaintiffs’ argument that there is a presumption of irreparable injury where environmental harm is alleged ignores Supreme Court precedent that an injunction “is not a remedy which issues as of course,” even in environmental cases. *Weinberger v. Romero-Barcelo*, 456 U.S. at 311 (1982); *Winter*, 555 U.S. at 26 (finding other factors outweighed allegations of environmental harm). This of course assumes an environmental injury has been shown in the first place, which is not the case here.

In fact, the record undermines Plaintiffs’ assertions of harm to their interests. For example, part of the basis for the agencies’ ESA determinations is that Project activities will not impair habitat function and will even benefit species. D15_03_09:5215-16 (retaining travel corridors, enhancing foraging opportunities, and creating habitat diversification for grizzly bears), 5239 (retaining travel corridors for lynx). Because these habitats and functions will be maintained and enhanced, so too will Plaintiffs’ opportunities for wildlife viewing.

In *Bozeman*, this Court set forth a new, burden-shifting paradigm that places the burden on the defendant to disprove plaintiff's allegations of irreparable harm in ESA cases. *Alliance for the Wild Rockies v. Krueger*, 950 F.Supp.2d 1196 (D.Mont., 2013) ("*Bozeman*"). Defendants respectfully submit that this burden-shifting standard is incompatible with the Supreme Court's holding in *Winter*, as the *Bozeman* standard would allow an injunction based on something less than a demonstration of a likelihood of irreparable harm. *See, e.g., League of Wilderness Defenders*, 752 F.3d at 759-60 (noting in ESA case that *Winter* standard applies and burden rests with the plaintiff to prove irreparable harm is likely); *Conservation Congress*, 720 F.3d at 1054 (same).

But even if the *Bozeman* burden-shifting standard were applied, Plaintiffs have failed to "substantiate [their] claim by alleging a specific irreparable harm resulting from the ESA violation' so that the court may 'tailor an injunction to remedy that harm.'" *Alliance for the Wild Rockies*, CV-12-150-M-DLC, Exhibit A at 9. Plaintiffs have not shown how any alleged ESA violation "will jeopardize the continued existence of a specific endangered or threatened species or will destroy or adversely modify its critical habitat." *Id.* To the extent Plaintiffs' conclusory allegations may be construed to plead such claims, the evidence above more than refutes them.

C. The balance of equities and the public interest do not favor an injunction.

Analysis of the “balance of equities” and “public interest” merge when the Government is the opposing party. *Nken v. Holder*, 556 U.S. 418, 435 (2009). The “balance of equities” refers to the relative burdens or hardships to the plaintiffs versus other parties depending on if an injunction is issued. *Winter*, 555 U.S. at 24-31. The public interest inquiry primarily addresses impact on non-parties rather than parties. *Bernhardt v. L.A. Cnty.*, 339 F.3d 920, 931 (9th Cir.2003).

The equities and public interest do not favor an injunction here. Indeed, the public interest is manifest in the amicus brief from the State of Montana and in the declaration filed by the City of Helena: 30,000 Montanans have significant interests at stake, and their representatives have clearly stated that public interest favors denial of the injunction. The flume and Chessman Reservoir are a “critical piece of infrastructure” for Helena (*see* Alles Dec. [submitted with *amicus* brief], ¶6), and its importance to the City and people of Helena “cannot be overstated.” *Id.* at ¶9. It feeds their sole source of drinking water for nine months of the year (they otherwise supplement with Missouri River water purchased from Bureau of Reclamation). *Id.* at ¶6.

Right now, the flume, the reservoir, and the City’s supply of drinking water are in danger from dead stands of beetle and disease-killed trees adjacent to the flume and reservoir. *Id.* ¶¶11-23; Callery Dec. ¶4; Nunn Figures 1 &2. In the

event of a wildfire (which is likely in this area [Nunn ¶23]), this abundance of fuels would cause a fire to burn with high intensity, so that it would destroy the vegetation and habitat around the flume and reservoir, while also destroying the water supply infrastructure. Alles ¶14; Nunn ¶¶13-18.

The extreme heat of such a fire would also severely impact the soil, destabilizing it and making it especially susceptible to erosion – which would cause excessive sedimentation (estimated **450% higher** than if the area is treated) and other negative water quality impacts that could foul the water for years to come. Callery ¶¶9-12; Avey ¶21 (“The ash, fine sediment, nutrients, and other contaminants washed in from severely burned hillslopes would render the water in the Reservoir unsuitable for treatment.”). This high intensity fire, combined with limited access and lack of escape routes, would likely make the fire too dangerous to fight with ground crews. Nunn ¶¶23-26 (limited access / escape); Avey ¶20. Aircraft activity is limited around the project area and retardant drops are restricted. *Id.*

Even without fire, if the project is enjoined, impacts to the flume and reservoir are certain. The density of dead trees adjacent to the flume, and increasing tree fall rates, mean that the passage of time (and every strong wind) poses a real threat of crushing or guillotining the flume. Callery ¶¶14-17, 19. The trees also fall across and breach the fences that are meant to exclude cattle from the

reservoir. *Id.* When those breaches occur, cattle wade and defecate in the reservoir. *Id.*; Avey ¶¶22. Each time this occurs, the water supply is endangered by fecal-borne pathogens like cryptosporidium, which the Tenmile plant cannot remove. *Id.* These trees are falling right now, and – in lieu of the project – will continue to fall.

Implementing this Project on August 21 allows nine weeks of fuels reduction, and mitigates the compounding risks of fire this season and in seasons to come. Scott ¶¶19-20. It maximizes the cost savings of avoided damages to the water supply infrastructure. It allows the agency to start burning slash at the first opportunity this winter, in an area where air quality restrictions often preclude such burning. Avey ¶19 (Clancy-Unionville only able to burn on five days in the last three burn seasons).

Also, USFS is capable of instituting this project right now through a “stewardship agreement” (a mechanism whereby the contractor that removes the dead timber is “paid” by the value of that timber). Avey ¶¶9-14; Scott ¶¶21-22. As time passes, the dead lodgepole pine deteriorates, and loses value. Avey ¶27; Scott ¶¶22-24. As that value decreases, so does USFS’s ability to fund stewardship activities, like fuels thinning and road work that reduces sedimentation. *Id.* Also, the harvest activities supported by the stewardship agreement would sustain about 90 jobs, worth roughly \$5.2 million, in the Helena

area. Avey ¶30; Scott ¶¶25-28.

Plaintiffs make several “balance of equities” arguments, but none withstand scrutiny. First, the agency is not manufacturing the threat of fire based on the existence of an active mountain pine beetle infestation in the area. Br. 23. Indeed, current infestation is 0%, and trees are in the “gray stage.” *Id.* The fact that the bugs have moved on, however, does not diminish the quantity of dead trees they left in their wake, and does not diminish one iota the threat from high intensity *surface fires*. Nunn ¶¶9-18. Plaintiffs mischaracterize the agency’s analysis: USFS quotes Simard 2011 merely to define “gray stage” – the threat here is not predicated on red needles or crown fire, but on surface fire and excessive surface fuels. *Id.* ¶¶ 13-14, 17. That is why USFS used the BEHAVE and FOFEM model of fire effects (which deal with surface fire). *Id.* Plaintiffs’ crown fire arguments are inapplicable.

Second, Plaintiffs’ arguments about fuel models (Br. 24-25) are likewise erroneous, because they interchange Simard’s TSB (Time Since Beetle-outbreak) Class with Scott and Burgan’s Fuel Model Class. Nunn ¶18. The latter model shows the effects of existing heavy surface fuels: “...untreated, flame lengths would double, and fireline intensities would more than triple...” *Id.* at ¶15 (emphasis added). Thus, contrary to Plaintiffs’ claim, the threat of fire here is not “alarmist.”

Third, the detailed analysis in the record and declarations repudiates Plaintiffs' suggestion that the risks of fire are "speculation presented as fact," and misleading to the public. Br. 25. David Nunn has 18 years of experience managing forest fires and assessing fire hazards and wildfire behavior. Nunn ¶¶1-3. David Callery has 15 years of experience in water resources and wildfire impacts. Callery ¶¶1-2. Based on their personal knowledge of the project area (Callery ¶2; Nunn ¶5), they applied the correct analytical models to assess the dangers and impacts of wildfire around the flume and reservoir, as noted above. Plaintiffs fail to show a single defect in USFS's assessment. Moreover, experienced professionals from the Montana DNRC, the City of Helena, fire safety working groups, fire districts, and emergency service providers all agree with the agency's assessment. Alles ¶¶28-29.

Finally, the series of arguments Plaintiffs advance against USFS scientific methods (Br. 13-14) lack all merit. Plaintiffs may perceive the "fall rate" of beetle-killed trees to be slower, but they offer no data to rebut the agency's scientific determination that 90% of these trees will be horizontal 12-14 years after infestation. Scott ¶7. Plaintiffs argue that smaller trees (<5" diameter) would survive the beetle outbreak, but the issue here is the increased danger of stand-replacing wildfire caused by fuel accumulations – which those smaller trees would not survive. *Supra*. And while mountain pine beetles do not kill Douglas-fir,

subalpine fir, Engelman spruce and aspen, those species are uncommon in the project area. Scott ¶6 (project area is 90% lodgepole pine). Moreover, western spruce budworm and white pine blister rust have impacted non-lodgepole species in the project area. *Id.*

The balance of equities is simple: On the anti-injunction side of the ledger, there is a tiny project (1.2% of the watershed [Alles ¶8]), narrowly focused on reducing fuels along an existing set of water supply infrastructures where no grizzlies or lynx have been documented (Costain ¶¶25, 37), that will diminish 90% of existing sedimentation from 10.6 miles of roads in the project area (Callery ¶6; Avey ¶25), hasten the post-beetle recovery of elk habitat (H09:37406), improve forage values and wildlife habitat diversity (Costain ¶¶15-16), address the aftereffects of infestation and disease (Scott ¶¶6-9), address currently-falling hazard trees and extreme fire danger (Avey ¶21), restore healthy forest stand conditions (Scott ¶¶ 7, 13, 17) and protect tens of thousands of Helenans and millions of tax dollars (Alles ¶¶ 17, 19, 21, etc.) against needless loss. On the pro-injunction side, there are amorphous and unsupported claims of harm that do not demonstrate how any proposed project activity will actually irreparably harm the environment, habitat, or any species. The public interest and the balance of equities weigh heavily against an injunction.

CONCLUSION

Plaintiffs have not justified the extraordinary remedy of a preliminary injunction. The Court should deny Plaintiffs' motion.

Respectfully submitted this 13th day of August, 2014.

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CERTIFICATE OF COMPLIANCE

Pursuant to L. R. 7.1(d)(2), I certify that the attached brief is double-spaced, has a proportionally-spaced typeface of 14 points, and contains 6493 words of text.

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CERTIFICATE OF SERVICE

I certify that on August 13, 2014, I electronically filed the foregoing with the Clerk of the U.S. District Court of Montana using the CM/ECF system, which will send a Notice of Electronic filing to the counsel of record.

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