

October 23, 2021

Objections Reviewing Officer USDA Forest Service  
Northern Region  
26 Fort Missoula Road  
Missoula, Mt. 59804

Dear Sir or Madam,

Thank you for the opportunity to file Objections to the Mid-Swan Landscape Restoration and Wildland Urban Interface Project. Note that I filed comments on this project in October 2020 (Attached) and signed onto comments by the Swan View Coalition as well. Please enter my Objections into the official record and keep me advised of progress on this project. In addition, please include by reference the current Objections filed by the Swan View Coalition and Friends of the Wild swan.

**Objection 1:** The Draft Record of Decision (DROD) fails to acknowledge, much less correct, significant deficiencies in the DROD, Flathead Forest Plan, or its Biological Opinion (BO) and Incidental Take Statement (ITS) identified by the District Court in Missoula on 6/24/21 (WildEarth Guardians et al. And Swan View Coalition et al. vs. Kurtis Steele et al. and David Bernhardt et al., Case 9:19-cv-00056-DWM, Document 116).

This case was not decided until after comments had closed on the DEIS and contains significant new information which the Flathead Forest is required to consider. Among other things, the Court found that:

\* The Revised Plan is arbitrary and capricious because it didn't consider the impacts of its departure from Amendment 19 (A19) road density and reclamation standards; Didn't consider the impact on the entire grizzly population; Did not adequately explain the adoption of the 2011 access conditions; and adopted a "flawed surrogate" in its take statement.

\* The Flathead Forest relied on a flawed 2017 Biological Opinion.

\* The effectiveness of road closure devices is an important aspect of the problem of road density. The USFWS failure to consider the effectiveness of closures is arbitrary and capricious. All Mid-Swan documents suffer from an identical failure.

\* The Biological Opinion doesn't consider whether the Revised Plan will have an effect on the Greater Yellowstone population despite the Ninth Circuits recent emphasis on the relationship between the NCDE and GYE populations.

USFWS violated the ESA when it failed to consider the effects of the Revised Plan on the national grizzly population.

\* Adoption of the 2011 Baseline is arbitrary and capricious. Road density and secure core habitat surrogate violates the ESA because 32 of 47 subunits (68%), already violate the Amendment 19 standards and there's no clear plan to return to those numbers.

The Flathead Forest blindly relies on that same 2011 Baseline and shows no intention of returning to Amendment 19's science-based standards.

\* The Forest Service violated the ESA to the extent that it relied on the Biological Opinion's flawed road reclamation determinations and road density surrogate.

\* Under "Remedy", the court ruled for "remand without vacatur", noting that "...Federal Defendants emphasized that, in the event of remand without vacatur, any project under the Revised Plan would have to be examined individually; if the project impacted roads, grizzly bears, or bull trout the project would require a site-specific consultation and biological assessment with the Fish and Wildlife Service."

However, in the nearly 4 months since the court's ruling, there's no evidence that the Flathead Forest is taking any of those actions to address the legal deficiencies identified by the court. In fact, nowhere in the DROD do I see even an acknowledgement that the court case took place. Rather, the Mid-Swan project appears to be advancing with no corrective action taken at all.

Remedy:

In criminal law there's a principal that says any action taken that's based on a prior illegal action, is itself illegal – the "Fruit of a Poisonous Tree" doctrine. In the case of the Mid-Swan Project, since it's based on a Forest Plan and a Biological Opinion that the court found to be "arbitrary and capricious", it too is arbitrary and capricious and contrary to law. The fact that the Forest Service has chosen to completely ignore the court ruling in this DROD only makes the transgression more serious. The only remedy is for the Flathead Forest to withdraw the Mid-Swan Project and the underlying Forest Plan in their entirety until they are brought into compliance with the court's findings.

**Objection 2:** Failure to use the best available science standards for Access Management and Road Decommissioning, and the substitution of the "arbitrary and capricious" 2011 Baseline and its surrogate recovery standards.

\* In its Response to Public Comments (C-33) the Forest Service makes the false claim that "...while Amendment 19 was based upon the best scientific information available at the time, research and monitoring of the NCDE grizzly bear population in subsequent years supports the change in the action alternatives for the Flatheads revised forest plan."

This is false from start to finish. In the years since Mace and Waller (1998) there has been no comparable scientific research that has supplanted their work. The referenced research and monitoring dealt with estimating the NCDE population, trend, and subunit occupancy, not the relationship between grizzly bear survival/mortality, road density and

use levels. The cited work by Ruby (2014) is from a master's thesis and fails to note that the Swan Valley has become a population sink in areas of high road density.

The recent District Court ruling out of Missoula recognized this reality when it found the departure from Amendment 19 standards to be "arbitrary and capricious." This is precisely what I argued, and the Flathead ignored, in my DEIS comments (P: 5).

\* Similarly, in throwing out the scientific A19 standards, both the Flathead Forest and USFWS claimed that the new 2011 Baseline numbers were the new science and should be adopted, essentially giving the Forest Service a "get out of jail free card" on meeting real road density standards. The USFWS assertion that this was based upon actual science rested on the claim that since the population, trend, and BMU occupancy were all up in 2011, the population was "recovered" under the ESA, and whatever road densities existed at that time were just fine for grizzlies.

As I noted in my DEIS comments (P: 5), these are the same exact claims that were thrown out by the federal court in D.C. in 1997 – 24 year ago. As I noted, Judge Friedman found the following:

'The FWS has not explained how minimum bear population and grizzly distribution goals consider how much habitat and of what quality is necessary for recovery, or how the answers to these questions can be derived from the 'females with cubs' and 'occupancy' criteria. Nor does the Recovery Plan's requirement that a Conservation Strategy (that will include minimum habitat values and additional monitoring methods) be implemented before any delisting process is commenced address this deficiency. The promise of habitat based recovery criteria sometime in the future is simply not good enough. The purpose of the habitat recovery criteria is to measure the effect of habitat quality and quantity on grizzly recovery See FWS Recovery Guidelines, A.R. Tab 78 at I-5. Such monitoring is not possible if there is no scale against which to gauge the status of the habitat." (Fund for Animals v. Babbitt, Civil Act. No. 94-1021 (PLF) and National Audubon Society v. Babbitt, Civil Act No. 94-1106 (PLF) (Consolidated) 1997.)'"

Remedy:

\* The Flathead Forest must abandon its scientifically unjustified reliance on the 2011 Baseline Standard for motorized access management and reinstitute the scientifically sound standards of Amendment 19, both on this project, and forest-wide. As noted by the recent District Court ruling (P: 35),

" The mere fact that the population was increasing from 2004-2011 does not justify moving away from the existing management requirements of Amendment 19. In effect, by recognizing that Amendment 19 laid the foundation for recovery of the NCDE population and then using that recovery as justification for getting rid of the existing access conditions, the Fish and Wildlife Service eschews Amendment 19 precisely because it is working. This section is arbitrary and capricious."

\* In addition to abandoning the 2011 Baseline generally, this project and the Forest Plan must abandon the related attempts to allow for “temporary” (5 years) increases in Open Motorized Route Density (OMRD +5%), increases in Total Motorized Route Density (TMRD +3%), and decreases in Secure Core (-2%). Rather, the Project must move immediately and forcefully to implement A19 standards throughout the Project area, and complete 100% of that effort within the Projects 15-year timeline or sooner.

As noted by the District Court (P: 42-43) USFWS/USFS have claimed that their 5%/3%/2% “triggers” in the Incidental Take Statement (ITS) are sufficient to protect grizzly bears. The Court found otherwise, as follows:

“...the trigger suffers from a fundamental flaw that the Service cannot elide with these standards. The BiOp acknowledges that 32 of the 47 subunits in the Forest do not meet the 19-19-68 benchmarks. FWS-002067. Given that the BiOp indicates that ‘some level of incidental take will occur’ when the 19-19-68 benchmarks are not met, FWS-002067, as Plaintiffs note, ‘it is especially unclear how the benchmarks provide a clear trigger for the 32 subunits that already exceed on or more of the benchmarks.’ (Doc. 100 at 35).

Additionally, Plaintiffs persuasively argue that the surrogate is inadequate because there is no requirement in the Revised Plan to return to the 2011 access conditions...As a result, the road density and secure core habitat surrogate violates the ESA.”

Clearly, if the BiOp violates the ESA then so does the Revised Forest Plan – And so does the Mid-Swan Project.

**Objection #3:** The DROD (and Forest Plan) have impermissibly substituted “Impassable Roads” for “Decommissioned Roads” when they are not remotely the same in terms of grizzly protection. In addition, The Forest refuses to count impassable road miles under Total Motorized Route Density (TMRD) giving a false picture of actual grizzly bear security. Finally, USFS and USFWS fail to recognize/accept that many road closures are ineffective.

The recent District Court ruling (P: 22-24) noted the following in terms of Impassable/Decommissioned roads:

“Amendment 19 required the Forest Service to reclaim and render a road inaccessible to motor vehicles before excluding the road from road-density calculations. FS-178392. A reclaimed road was defined as a road that ‘had been treated in such a manner so as to no longer function as a road or trail and has a legal closure order until reclamation treatment is effective...’

“Impassable roads may remain on the inventoried road system if use of the road is anticipated at some point in the future...Impassable roads do not count in the total motorized route density as long as the first 50 to 300 feet of the road ‘has been treated to make it inaccessible to wheeled motorized vehicles during the non-denning season.’ The problem as it relates to grizzly bears, according to the Plaintiffs, is that the ‘reclaimed

road’ standard from Amendment 19 ‘ensured the integrity of road closures and created a substantial disincentive for new road construction in grizzly habitat,’ while the mere ‘blocking’ required under the Revised Plan will not have the same effect...

“Thus the science indicates that, even where ‘permanent barriers’ are used, road closures may be ineffective and use may occur or continue. Both the Swan View Coalition Study and the Forest Service Study support that argument. Because the 2017 BiOp identified use management as the primary method of protecting grizzly bear habitat, which in turn maintains and protects grizzly bear populations, *see FWS-002005*, the Fish and Wildlife Service’s failure to consider the effect of ineffective road closures was arbitrary and capricious.” And since the Flathead Forest’s DROD and Forest Plan are based upon the same faulty assumptions, they too are arbitrary and capricious.

Remedy:

The Flathead Forest must return immediately to the standard that only roads that have been Decommissioned/Reclaimed and removed from the Systems Road Inventory may be removed from the TMRD calculations. All roads listed as Impassable or Intermittent Stored Service must be counted in the TMRD calculations. In addition, all roads “closed” with a gate or berm must be assumed to be open to illegal usage, and counted under TMRD. Finally, The Flathead Forest must follow the 1998 Interagency Grizzly Bear Guidelines, which consider gated roads to effectively be “Open.”

**Objection #4:** The DROD continues to put in place an artificially inflated Wildland Urban Interface (WUI) with no basis in science or law as a way to justify logging miles from any actual WUI.

\* In my comments on the DEIS (P: 2-3) I note that “The Wildland Urban Interface (WUI) is based upon the 2013 Seeley-Swan Fire Plan as stipulated in the Healthy Forests Restoration Act of 2003 (HFRA) which defined the WUI as, “An area within or adjacent to an at-risk community that is identified in recommendations to the Secretary in a community wildfire protection plan... (emphasis added).

As an example, the Flathead County Wildfire Protection Plan, P: 31 says, “As detailed in HFRA, a commonly accepted definition of the Wildlife Urban Interface is the zone where structures and other human developments meet and intermingle with undeveloped wildland and vegetative fuel (emphasis added).

However, both the Flathead Forest, Flathead County Fire Plan, and the Seeley-Swan Fire Plan depart significantly from the authorizing language of HFRA with buffers of 1.5 miles and more. None of this even remotely complies with the Act. The Flathead has tried to cover itself for this departure from the law by saying that their Purpose and Need is “to reduce fire behavior in the WUI and in areas that have influence on fire behavior within the WUI” (emphasis added). A further attempt is made at justification in the DROD’s Response to Public Comment where they note that the current increase in climate driven severe fires means that these fires are increasingly “spotting” well beyond

their perimeters and therefore, distant logging is needed to protect the actual WUI. While this observation on fire behavior may be correct, it does not justify the Forest's significant departure from HFRA on what constitutes the WUI.

Remedy:

The Forest Service must give up on its transparent effort to increase logging by artificially inflating the Wildland Urban Interface, and return to the plain language of HFRA that the WUI is an area "within or adjacent to" at risk communities or areas where structures and other human developments "meet and intermingle" with undeveloped wildland and vegetative fuel. As I noted in my DEIS comments, "A reasonable solution would be for the Forest Service to match the 150 foot wide "defensible space" on private property with a 150-foot buffer on public lands, or in the interest of being a good neighbor, perhaps a quarter mile."

**Objection #5:** The Mid-Swan Project impermissibly and unnecessarily allows logging in Inventoried Roadless Areas (IRAs).

\* Three primary issues spurred the development of the 2001 Roadless Area Conservation Rule: (1) Reducing the alteration and fragmentation of large, secure landscapes through prohibitions on logging and road construction/reconstruction; reducing the size of the future road system; and reducing controversy. Minor amounts of logging in small-diameter trees could be permitted if it benefited IRA characteristics. The Mid-Swan Project fails to meet any of these criteria.

\* The DEIS and DROD say that there will be no road construction proposed within IRA's, yet calls for several thousand acres of mechanized treatments that cannot be accomplished without bringing that mechanized equipment in over roads or created motorized routes. They also call for nearly 30,000 acres of non-mechanized treatments, which again, will require motorized routes (roads) to bring in men and equipment.

\* The DEIS and DROD note that the harvest will be "small-diameter and non-commercial" as though that will make the slightest difference to species like grizzly bears who will be actively displaced.

\* The vast majority of these illegal interventions into IRA's are caused by the Flathead Forest's determination to artificially inflate the Wildland Urban Interface far away from actual at-risk communities and structures.

Remedy:

\* As noted above, redraw Real WUI boundaries that reflect the clear intent of HFRA to protect areas "within or adjacent to communities at risk" where "structures and other human developments meet and intermingle" with undeveloped wildland and vegetative fuel. No logging miles from any actual, defensible WUI. This alone will remove most conflicts.

\* No logging in remaining IRA's because it will alter and fragment large, secure habitats; increase the size of an already bloated road system; and increase controversy – all in direct conflict with the stated intent of the 2001 Roadless Rule.

**Objection #6:** Contrary to assurances in the FEIS and DROD, the Project virtually guarantees that habitat connectivity will be further fractured and will remain so for decades.

\* By failing to include Impassable Roads in the TMRD inventory, the DROD ensures that large areas shown as “Secure” are secure in name only and will, in reality, fragment grizzly habitat in the already fragmented Swan Valley.

\* The Project Area has a road system of 567 miles, will only decommission 44.9 miles over 15 years (7.9%), and includes 56.8 miles of new road construction, an increase of 11.9 miles, further fracturing the landscape and placing grizzlies in greater danger.

\* Along with Wilderness, Inventoried Roadless Areas are some of the most secure grizzly habitat, yet the Forest intends to include mechanized treatments in more than 3300 acres of IRA's.

\* The Forest's failure to include high-use, non-motorized trails as areas to be buffered and removed from Core allows USFS to artificially increase claims of core protection where none actually exists. See my Attached DEIS comments refuting this bogus claim.

\* The Project radically departs from the long-term benchmark of 40-acre openings being the maximum allowed in grizzly habitat, to include openings of 80, 90, all the way up to 150 acres. As a result, grizzly hiding cover would be reduced from 63% down to 50%, which the Forest Service claims, with no research background provided, is just fine for grizzlies. For reference, a 150-acre opening could be a half-mile long on a side and even more damaging if it were elongated. Any Forest Service claim that such departures from the 40-acre benchmark will have no negative consequences for grizzlies simply doesn't pass the straight face test. To make matters worse, we're not told specifically where each of these openings will occur on the landscape, leaving the public blind until each project is underway.

\* The FEIS and DROD pretend that 5-year project elements and the roads associated with them are “temporary”, although there's no evidence that grizzlies, particularly females with cubs can be arbitrarily displaced from key habitats without serious consequences to feeding, breeding, and security (USFWS 2014). In addition, the Forest repeatedly claims that while grizzly and lynx habitat will be compromised in the short term, when it fully recovers in 20 years it will be much better. Grizzlies and lynx have to survive on an annual basis, not a 20-year time frame while hoping things will get better. Nowhere does the Forest explain where the ESA gives them a green light to compromise tens of thousands of acres of lynx critical habitat.

\* As I noted in my DEIS comments, riparian zones are some of the most important wildlife habitats throughout the west, and because they are cooler and more moist, are some of the most fire-resistant habitats on the landscape. When you look at the Project Area, riparian zones stand out like arteries weaving the landscape together. Yet the Forest Service plans to log and/or burn in 20% of IRMZ's and 68% of ORMZ's putting connectivity at risk landscape-wide.

\* In its Response to Public Comments (P: C-63) the Flathead reports that on ISS roads, culverts will be removed and these road crossing sites rehabilitated, except up to 10 existing culverts on these roads may be retained in place (emphasis added). Thus we have another Sham closure, providing Sham connectivity and habitat protection.

Cumulatively, the above actions will systematically fracture habitat connectivity project-wide, and will do so for up to 20 years, and perhaps more.

### Conclusions

- (1) As noted by the District Court, significant portions of the Forest Plan, FEIS, Biological Opinion, and Incidental take statements are illegal and must be corrected in consultation with the U.S. Fish and Wildlife Service. Yet nowhere in the FEIS or DROD are these facts acknowledged, much less corrected, leaving the public to comment only on illegal documents. All of the above documents must be withdrawn until such time as the Court directed changes have been made.
- (2) Amendment 19 to the Forest Plan must be immediately reinstated and the arbitrary/illegal 2011 Baseline, along with its with its scientifically unsupported 5%/3%/2% surrogate criteria for OMRD, TMRD, and Secure Core withdrawn.
- (3) The Forest must drop its use of “Impassable” roads as equivalent to “Decommissioned/Reclaimed” roads, and must place a priority emphasis on the latter. Impassable roads, whose primary purpose is to claim road closures that don’t actually exist, should be dropped. If they are continued in any form, they must mandate the pulling of All culverts, and counting their miles against TMRD.
- (4) Given the importance of riparian zones in creating a system of interconnected arterial wildlife habitat, all mechanized/motorized activity in the Interior RMZ's must be cancelled, and similar “treatments” scaled back significantly in the Outer RMZ's.
- (5) All WUI boundaries must be redrawn to reflect the HFRA language that these are to be areas where WUI lands “meet and intermingle”, and are “within or adjacent to” areas at risk. No more logging miles from real WUI.
- (6) The actions recommended in #5 above will solve many of the unwarranted and illegal intrusions into Inventoried Roadless Areas, however, given the role IRA's play in providing critical secure habitat, All logging and roading must be removed from these areas.

(7) The Endangered Species Act contains no provision for the Flathead Forest to enter critical lynx habitat with motorized/ mechanized equipment and impair or reduce that habitat in any way, and certainly not with 20-year recovery times. All such intrusions must be removed from the DROD, FEIS, BiOp, and Forest Plan.

(8) As noted above, The Mid-Swan Project across a wide range of its activities systematically fractures habitat connectivity throughout the area. These activities must be significantly modified or cancelled as I detailed. In addition, The Flathead must take a cumulative impacts view of all project treatments taken together, not singly as is now the case.

Sincerely,



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