Objection against the Ashley National Forest Aspen Restoration Project

To: Objection Reviewing Officer
USDA Forest Service
Intermountain Region
324 25th Street
Ogden, Utah 84401

Thank you for this opportunity to object to the Ashley National Forest Aspen Restoration Project. Please accept this objection in pdf format from me on behalf of the Alliance for the Wild Rockies, Native Ecosystem Council, Yellowstone to Uintas Connection, and Wildlands Defense.

1. Objector's Name and Address:

Lead Objector Michael Garrity, Director, Alliance for the Wild Rockies (AWR), PO Box 505, Helena, MT 59624; phone 406-459-5936

And for

Sara Johnson, Director, Native Ecosystems Council (NEC), PO Box 125, Willow Creek, MT 59760; phone 406-459-3286

And for

Jason L. Christensen – Director Yellowstone to Uintas Connection (Y2U)
jason@yellowstoneuintas.org
435-881-6917

And for

Katie Fite
WildLands Defense
PO Box 125
Boise, ID 83701
208-871-5738

Signed this 24th day of July, 2022 for Objectors

/s/
Michael Garrity

2. Name of the Proposed Project

Ashley National Forest Aspen Restoration Project

3. Location of Project, Name and Title of Responsible Official

Ashley National Forest-wide, All Ashley National Forest lands outside of wilderness areas. The

Ashley National Forest covers the northeastern part of Utah and southwest Wyoming.

Counties: Daggett; Duchesne; Summit; Uintah; Wasatch; Sweetwater in Utah and Wyoming.

Susan Eickhoff, Forest Supervisor
Ashley National Forest

355 North Vernal Avenue
Vernal, UT 84078

4. Connection between previous comments and those raised in the Objection:

AWR, Y2U, NEC, and Wildlands Defense provided comments on the proposed project on July 6, 2021, and on December 1, 2019.

We wrote in our December 1, 2019 comments, starting with:

Wolverine

Recently, a US District Court ruling remanded the USFWS Withdrawal of its Proposed Rule to list the distinct population segment of the North American wolverine occurring in the contiguous United States as a threatened species under the Endangered Species Act for further consideration.[32] The ruling reviewed the science relating to the selection of denning sites in combination with snow presence during the natal period and recent analyses of potential climate change effects to snow pack that indicate a severe reduction in snow cover during this century with negative implications to wolverine populations. This factor alone should place …

The Forest Service responded:

Comment was made during initial scoping period prior to EAFONSI. Habitat is present, but species is unlikely to occur on the Ashley.

Page 9 of the wildfire BA BE states:

In 2014 a wolverine was documented on the north slope of the Uintas on the Uinta/Wasatch/Cache NF, and possible wolverine tracks were found by the UDWR near Dutch John on the Flaming Gorge RD that same year (Christensen 2015). However, these were likely a transient since no other documentation has been acquired since, and since no other occurrences were documented in the Uintas in the previous 20+ years (USDA Forest Service 2006, Berg and Inman 2010, Christensen 2015, USDA Forest Service 2010- 2017, USFWS 2020). A wolverine was trapped and collared in Rich County, Utah in March

of 2022 and released on the North Slope of the Uinta mountains (UDWR 2022). This wolverine spent a brief time in the Uinta mountains and then traveled west and north back to the area of Rich County (within a few weeks of its capture), where the signal was lost (personal communication UDWR 2022b). Wolverine are considered dispersers and there is no evidence of wolverine reproducing in Utah (USDA Forest Service 2006, Berg and Inman 2010, Christensen 2015, USDA Forest Service 2010-2017, USFWS 2020).

Therefore the Forest Service admits that wolverines do use the Ashley national Forest. In spite of this, there is no evidence that the Forest Service asked for a list a proposed, threaten, and endangered species in the project area as required by the Endangered Species Act.

Before you can sign the decision for the Ashley National Forest Aspen Restoration Project, the Forest Service must consult or conference with the U.S. Fish and Wildlife Service on the impact of the project on wolverines. Since the Forest Service has not done this, the project is in violation of the Endangered Species Act (ESA). This is new information that was not available when we submitted our comments.

The EA admits that there is wolverine habitat in the project area but states there were no wolverines even though the Wildlife BE, BA wolverines do use the project area. The purpose of the Endangered Species Act is to recover a

species not to keep their population at a threatened or endangered level in limited occupied habitat.

There is no evidence that the Forest Service searched for wolverines.

Please see the March 15, 2022 article below from the Salt Lake Tribune which states a wolverine was caught killing sheep six miles west of Randolph, Utah, and it is now wolverine in the first roaming the state wearing a GPS collar.

Caught killing sheep in Utah, a wolverine is now the first roaming the state wearing a GPS collar

https://www.sltrib.com/news/environment/2022/03/14/caught-killing-sheep-utah/

By Brian Maffly
| March 14, 2022, 12:50 p.m.
| Updated: March 15, 2022, 7:36 a.m.

A chance of a lifetime arose last week for wildlife biologists to track the West's most rare and elusive predators when a wolverine was captured after attacking sheep in northern Utah.

The Utah Division of Wildlife Resources, DWR, released the 4-year-old male, only the eighth confirmed wolverine

sighting in Utah since 1979, after equipping it with a GPS collar, which will enable officials to track its movements.

"It's amazing to get a chance to see a wolverine in the wild, let alone catch one," DWR northern region wildlife manager Jim Christensen said. "Having a collar on this wolverine will teach us things about wolverines in Utah that would be impossible to learn any other way."

Last year, wolverines were seen at least four times in Utah.

"Were we seeing the same animal or different animals?" Christensen said. "Having a collar on this animal will help us solve that riddle."

Wolverines are the largest land-dwelling member of the weasel family, famous for taking down much larger animals for prey and scaring larger predators off their kills. With their huge paws, they evolved are for over-snow travel and are known to cover vast distances.

Although wolverines have been pushed off much of their native range in the United States because of historic trapping and ongoing habitat loss, these rare animals have never been listed for protection under the endangered species act.

Declining snow cover from climate change and motorized recreation are now leading threats to wolverine's survival, according to the Center for Biological Diversity. The

group says only 300 known wolverines remain in the lower 48 states.

The opportunity to track a Utah wolverine arose around March 10 when a rancher discovered an animal killing sheep six miles west of Randolph, according to DWR. The animal fled and the rancher counted 18 sheep dead or injured in the attack.

Wildlife Services, an arm of the U.S. Department of Agriculture that eliminates wild animals that threaten livestock, searched for the animal by plane. After spotting a wolverine running through the snow, the searchers contacted DWR rather than shoot the rare predator.

State biologists immediately responded to try and capture the alleged culprit alive using barrel traps.

"There was so much activity in the area that morning," Christensen said, "I thought the wolverine would be long gone and we wouldn't be able to catch it."

All the deceased sheep were removed from the area, while the traps were deployed and rigged, each containing part of a sheep carcasses.

The next day, the sheepherder checked the traps to discover one containing the first wolverine ever captured in Utah.

DWR officials brought the animal to the Ogden office, where they sedated it, drew blood samples and examined it. The wolverine weighed 28 pounds and measured 41 inches in length.

"The animal had good, sharp teeth," Christensen said. "It was in really good condition."

They finally placed a GPS-equipped collar around its next and transported it to the north slope of the Uinta Mountains where it was released into the Uinta-Wasatch-Cache National Forest on March 11.

According to DWR, the GPS data derived from the wolverine's collar will show when and where the animal travels, the extent of its home range and the type of habitats it uses at different times of the year. Such information will be helpful for learning about the wolverine's behavior and for managing the species in Utah, which is the southern edge of the wolverine's range.

The project is in violation of NEPA, NFMA, the ESA, and the APA for not telling the public that there are wolverines in the Ashley National Forest, for not asking the U.S. FWS for a list of species that may be present in the project area, for not surveying for wolverines and for not formally

consulting or conferring with the U.S. FWS on the impact of the project on wolverines.

Remedy: Formally Consult or Conference with the U.S. Fish and Wildlife Service on the impact of the project on wolverines and then write an EIS that fully complies with the law.

We wrote in our December 1, 2019 comments:

The Scoping Report indicates the project will rely on Best Management Practices. These are assumed to be effective and relied upon. However, a fundamental aspect of NEPA is to take a "hard look" at current management, conditions, assumptions and implementation. A CE is not NEPA and allows the Forest Service to escape accountability for current degraded conditions it claims, such as conifer encroachment into aspen. But, what is the mechanism of this conifer encroachment and lack of recruitment in aspen stands. Is it past fire suppression? Livestock grazing?

What is the past history of this project area? What Forest actions or permitted activities play a role in the current

state of aspen, wildlife habitat, watershed health and other ecosystem attributes? There is no analysis of:

- *Validity of assumptions from previous NEPA processes*
- *Accuracy of predictions from previous NEPA processes*
- *Adequacy of Forest Service implementation of previous decisions*
- *Effectiveness of actions taken in previous decisions*

These above items are critical for effective decisions and outcomes and for the public to be informed. This can only be done under a NEPA process. Without this critical link the validity of the current assumptions cannot be determined. Without analyzing the accuracy and validity of the assumptions used in previous NEPA processes one has no way to judge the accuracy and effectiveness of the current analysis and proposals. The predictions made in previous NEPA processes also need to be disclosed and analyzed because if these were not accurate, and the agency is making similar decisions, then the process will lead to failure. For instance, if in previous processes the agency or permittee said they were going to do a certain monitoring plan or implement a certain type of management, meet certain goals and objectives, and these were never effectively implemented, it is important for the reader and the decision maker to know. If there have been problems with implementation in the past, it is not logical

to assume that implementation will now be appropriate. If prior projects have not been monitored to document and compare post project initiation conditions to baseline data, then there is no proof that models or BMPs are accurate, effective, or can be relied upon. What commitments have been made in the Forest Plan and subsequent project plans? Have these been realized?

The reliance on BMPs is a flawed approach that assumes they work. Ziemer and Lisle (1993) indicated that there are no reliable data showing that BMP's are cumulatively effective in protecting aquatic resources. Espinosa et al. (1997) provided evidence from case histories in Idaho that BMP's thoroughly failed to cumulatively protect salmonid habitats and streams from severe damage from roads and logging. In analyses of case histories of resource degradation by stereotypical land management (logging, grazing, mining, roads) several researchers have concluded that BMP's increased watershed and stream damage because they encourage heavy levels of resource extraction under the false premise that resources can be protected by BMP's (Stanford and Ward, 1993 , Rhodes et al., 1994 Espinosa et al., 1997). Stanford and Ward (1993) termed this phenomenon the "illusion of technique."

We also wrote in our comments signed by Sara Johnson:

- ***NEPA failure to complete "hard look" and "cumulative effects" analysis and provide effective***

alternatives

The Forest Service responded:

All appropriate determinations have been and an EAFONSI was conducted.

Page 1 of the cover letter for the draft decision states:

We are proposing to allow for treatments in any aspen community across the Ashley National Forest outside of designated Wilderness, approximately 177,707 acres. One or more of the following actions may be implemented: Prescribed burning, selectively cut conifers, aspen or both, girdling conifers within aspen stands, root separation, protection from browsing (including, but not limited to wildlife prooffencing, 6-8' high), protection from livestock using permitted grazing practices, planting aspen and controlling competing vegetation and or inventory and monitoring.

The Forest Service is violating NEPA by not telling the public where, when and what they will do and the effect of the project in violation of NEPA, NFMA and the APA. The Forest Service often refers to this new attempt to violate NEPA, "conditions based management."

Another reason that an EIS is need is to analyze the cumulative impacts. The Ashley Forest also has Scoped a

major "condition-based" Prescribed Fire EA - for burning up to 24,000 acres per year. There are similar large-scale Prescribed Fire EAs proposed across Region 4 (Salmon-Challis, Sawtooth, Caribou-Targhee, Fishlake, Manti-LaSal and Dixie Forests each of which would burn thousands or tens of thousands of acres of native vegetation communities representing habitats for a great diversity of wildlife species. These fire EAs, on top of all the other treatment/ manipulation and logging projects represent a foreseeable large-scale loss and fragmentation of habitat for many sensitive species, declining migratory birds, native carnivores and other wildlife.

Ashley Prescribed Fire EA:

https://www.fs.usda.gov/project/?project=61581

The Prescribed Fires turned wildfires in New Mexico - one of which was a pile burn that smoldered and then blew up - have highlighted serious risks with activities involved in this project. (I assume they will be pile burring in some of these aspen 'treatments"? An EIS is needed to analyze the threat of the prescribed fires getting out of control.

https://www.krqe.com/news/wildfires/officials-calf-canyon-fire-caused-by-pile-burn/

Please find attached, the Rosenberg paper on migratory bird declines which concluded, ***Our results signal an urgent need to address the ongoing threats of habitat loss,***

agricultural intensification, coastal disturbance, and direct anthropogenic mortality, all exacerbated by climate change, to avert continued biodiversity loss and potential collapse of the continental avifauna.

The EA needs to comply with the Migratory Bird Treaty Act and analyze the effect of the project on birds.

The EA provides little additional information on where burnings, logging will be or how the specifics on how the burning will occur. The EA is programmatic in that they want to log whenever and wherever for the next 20 years with no public over site of their activities. This is a violation of NEPA, NFMA, the APA, and the ESA.

Please see the article below for a ruling on a similar error by the Forest Service.

Federal court blocks timber sale in Alaska's Tongass National Forest

https://www.adn.com/alaska-news/2020/06/25/federal-court-blocks-timber-sale-in-alaskas-tongass-national-forest/

JUNEAU — A federal judge has blocked what would have been the largest timber sale in Alaska's Tongass National Forest in decades.

Wednesday's ruling ends the U.S. Forest Service's plan to open 37.5 square miles of old-growth forest on Prince of Wales Island to commercial logging, CoastAlaska reported.

The ruling by Judge Sharon L. Gleason also stops road construction for the planned 15-year project.

Conservationists had already successfully blocked the federal government's attempt to clear large amounts of timber for sale without identifying specific areas where logging would have occurred.

Gleason allowed the forest service to argue in favor of correcting deficiencies in its review and moving forward without throwing out the entire project, but ultimately ruled against the agency.

Gleason's ruling said the economic harm of invalidating the timber sales did not outweigh "the seriousness of the errors" in the agency's handling of the project.

The method used in the Prince of Wales Landscape Level Analysis was the first time the agency used it for environmental review on an Alaska timber sale.

The forest service, which can appeal the decision, did not return calls seeking comment.

Gleason's decision affects the Prince of Wales Island project and the Central Tongass Project near Petersburg and Wrangell.

The ruling triggers a new environmental review under the National Environmental Policy Act, said Meredith Trainor, executive director of the Southeast Alaska Conservation Council.

The ruling in the lawsuit brought by the council includes a requirement for public input on specific areas proposed for logging, Trainor said.

Tessa Axelson, executive director of the Alaska Forest Association, said in a statement that the ruling "threatens the viability of Southeast Alaska's timber industry."

Please see the following article by the American bar Association about the use of Condition-Based Management.

May 10, 2021

The U.S. Forest Service's Expanding Use of Condition-Based Management: Functional and Legal Problems from Short-Circuiting the Project-Planning and Environmental Impact Statement Process

Andrew Cliburn, Paul Quackenbush, Madison Prokott, Jim Murphy, and Mason Overstreet

https://www.americanbar.org/groups/environment_energy_resources/publications/fr/20210510-

the-us-forest-services-expanding-use-of-condition-based-management/

Condition-based management (CBM) is a management approach that the U.S. Forest Service has increasingly used to authorize timber harvests purportedly to increase flexibility, discretion, and efficiency in project planning, analysis, and implementation. The agency believes it needs this flexible approach because sometimes conditions on the ground can change more quickly than decisions can be implemented. In practice, however, CBM operates to circumvent the National Environmental Policy Act (NEPA) review framework by postponing site-specific analysis until the Forest Service implements the project, which effectively excludes the public from site-specific decisions, reduces transparency, and removes incentives for the agency to avoid harming localized resources. The practice should be curtailed by the Biden administration

NEPA requires federal agencies including the Forest Service to provide the public with "notice and an opportunity to be heard" in the analysis of "specific area[s] in which logging will take place and the harvesting methods to be used." Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 729–30 (1998). Site-specific public involvement can significantly improve projects because the agency may be unaware of harmful impacts or resource concerns until the public flags them during the environmental analysis process. Nationally, the Forest

Service drops about one out of every five acres it proposes for timber harvest based on information or concerns presented during the NEPA process, often due to public comments regarding site-specific information. Public Lands Advocacy Coalition, Comments on Proposed Rule, National Environmental Policy Act (NEPA) Compliance (June 13, 2019) (analyzing 68 projects that relied on environmental assessments).

The Forest Service appears to be abandoning the site-specific analysis model in favor of CBM. CBM projects use an overarching set of "goal variables"—predetermined management criteria that guide implementation—that Forest Service staff apply to on-the-ground natural resource "conditions" encountered during the course of project implementation, a period that can span years or even decades: essentially, when the Forest Service finds X resource condition on the ground, it applies Y timber harvest prescription. However, basic information regarding the project's details—such as unit location, timing, roadbuilding, harvesting methods, and site-specific environmental effects—is not provided at the time the Forest Service conducts its NEPA environmental review (when the public can weigh in), nor when it gives its final approval to a project (when the public can seek administrative review). Instead, site-level disclosures are made after NEPA environmental and administrative review is complete, depriving the public of opportunities to comment and influence the decision based on localized conditions.

While CBM is not a new management tool, the Forest Service has employed it for over a decade and it was used sparingly during the Obama administration. However, its use accelerated during the Trump administration and shows no sign of slowing. To date, dozens of Forest Service projects across the country have used CBM. See, e.g., Red Pine Thinning Project, Ottawa National Forest; Medicine Bow Landscape Vegetation Analysis, Medicine Bow-Routt National Forest; Sage Hen Integrated Restoration Project, Boise National Forest.

As the Forest Service's use of CBM continues, questions remain about its legality. Public-lands advocates argue that CBM violates NEPA's mandate that agencies take a hard look at the consequences of their actions before a project commences. This "look before you leap" approach was the primary purpose of NEPA and remains the statute's greatest strength. NEPA works by requiring an agency to consider alternatives and publicly vet its analysis whenever its proposal may have "significant" environmental consequences, 42 U.S.C. § 4332(2)(C), or implicates "unresolved conflicts" about how the agency should best accomplish its objective. Id. at § 4332(2)(E). However, CBM allows the Forest Service to circumvent the effects analysis process when exercising discretion about where and how to log decisions that often may have "significant" environmental consequences.

Only two federal cases have addressed CBM's legality. In WildEarth Guardians v. Connor, 920 F.3d 1245 (10th Cir. 2019), the Tenth Circuit approved a CBM approach for a

logging project in southern Colorado in Canada lynx habitat. The environmental assessment utilized CBM and analyzed three different alternatives, one of which was a worst-case scenario. For the worst-case scenario, the Forest Service assumed that the entire lynx habitat in the project area would be clear-cut. The Forest Service "took the conservative approach" because it "did not know precisely" where it would log in the lynx habitat areas. WildEarth Guardians, 920 F.3d at 1255. Based on this conservative approach, coupled with a comprehensive, region-wide lynx management agreement and its associated environmental impact statement, the court agreed with the Forest Service that its future site-specific choices were "not material" to the effects on lynx—i.e., that no matter where logging occurred, "there would not be a negative effect on the lynx." Id. at 1258–59.

However, a second case addressing CBM found that site-specific analysis was needed to satisfy NEPA's "hard-look" standard. In Southeast Alaska Conservation Council v. U.S. Forest Service, 443 F. Supp. 3d 995 (D. Ak. 2020), the court held that the Forest Service's Prince of Wales Landscape Level Analysis Project—a 15-year logging project on Prince of Wales Island in the Tongass National Forest—violated NEPA. The project would have authorized the logging of more than 40,000 acres, including nearly 24,000 acres of old growth, along with 643 miles of new and temporary road construction, but it "d[id] not include a determination—or even an estimate—of when and where the harvest activities or road construction . . . w[ould] actually occur." Id. at 1009. The

court found that this analysis was not "specific enough" without information about harvest locations, methods, and localized impacts. Id. at 1009–10. The court further held that a worst-case analysis could not save the project, because site-specific differences were consequential. Id. at 1013.

The Forest Service's widespread use of CBM also creates compliance challenges under the Endangered Species Act (ESA). Section 7(a)(2) of the ESA requires federal agencies to consult with the Fish and Wildlife Service and/or National Marine Fisheries Service whenever a proposed action "may affect" listed species or destroy or adversely modify its critical habitat to ensure that the action is "not likely to jeopardize" these species. 16 U.S.C. § 1536. CBM conflicts with that statutory requirement because it does not allow agencies to properly determine whether an action "may affect" or is "likely to jeopardize" a listed species when the consulting agencies do not know the specifics of when or where the action will be implemented, or what the site-specific impacts of the action may be.

For some projects, the Forest Service has tried to avoid this tension by conducting section 7 consultation prior to each phase of a CBM project, but this approach has run headlong into the general rule against segmenting project consultation duties under the ESA. See, e.g., Conner v. Burford, 848 F.2d 1441, 1457 (9th Cir. 1988). With few exceptions, section 7 consultation must cover the overall effects of the entire project at the initial stage before the

project can commence. Thus, regardless of whether agencies choose to consult up front or to consult in stages, the Forest Service is likely to face significant legal hurdles when its CBM project "may affect" listed species.

CBM is not only legally dubious, but also unnecessary. The Forest Service already has NEPA-compliant methods to deal with situations that require a nimble response to the needs of a dynamic landscape. In these cases, the Forest Service can complete a single "programmatic" analysis to which future site-specific decisions will be tiered. This programmatic approach allows the Forest Service to speed the consideration and implementation of site-specific, step-down proposals. Unlike CBM, this approach allows for public review of site-specific decision-making and administrative review of those decisions.

Surveying the regulatory horizon, the future of CBM in the Forest Service system is uncertain. The national forests face a host of complex challenges including climate-related crises, insect and forest pestilence, protecting and restoring biodiversity, and wildfire management. These challenges are made worse by budget and staff restrictions. Without adequate funding, the Forest Service must rely on imperfect tools like commercial logging, which can cause more harm than good in the wrong places.

But this is not the time to shortchange the most consequential decisions that the agency must make: determining where and how to act. During the final two

years of the Trump administration, the Forest Service attempted to explicitly codify CBM provisions in revisions to its NEPA regulations, although those provisions were dropped from the final rule. Simultaneously, other federal land-management agencies like the Bureau of Land Management have started to use CBM analogues in their NEPA-related planning documents. Although it is still early, the Biden administration's newly appointed Council on Environmental Quality team has yet to weigh in on CBM. If use of CBM continues in a manner that undermines public participation and NEPA's "hard look" standard, some of our riskiest land management projects may not receive proper environmental oversight.

The project is not taking a hard look as required by NEPA. Please withdraw the EA until site specific prescriptions and unit boundaries are firmed up, then issue and take comments on an EIS with appropriate prescriptions.

Please find attached the Federal District Court of Alaska's ruling on condition-based management.

The project is in violation of NEPA, NFMA, the ESA, the Forest Plan, and the APA. The Forest Service's response states the project was intentionally designed to not tell the public when and where the Forest Service plans log and burn.

We wrote in our comments:

The habitat provided or potentially provided for special status species such as Canadian lynx is not documented is the scoping notice. It is critical that the FS analyze the effect of livestock grazing, the effects of these so-called aspen treatment or restoration projects as well as any other past, present and foreseeable actions in the Uinta Mountains on Canada Lynx habitat and food base.

The Forest Service provides a map of historic lynx distribution showing that the Uintas have historically been used by Canada lynx. (Figure 3). There are core and peripheral or linkage areas. [1] ***The Uintas are a core area as will be discussed below***

[1] USDA Forest Service. 2007. Final Environmental Impact Statement Northern Rockies Lynx Management Direction National Forests in Montana, and parts of Idaho, Wyoming and Utah. Figure 1-1.

The Forest Service responded:

Species is unlikely to occur on the Forest.

Please see the column below from the November 28, 2004 Salt Lake Tribune that states lynx were in the Ashley National Forest in 2004 and could easily be there today.

Next time, let the missing lynx stay in Utah

https://archive.sltrib.com/story.php?ref=/opinion/ci_2475529

By Mike Medberry

November 28, 2004

A lone male Canada lynx living in Utah was recently captured and transported to Colorado for fear that bobcat hunters would trap and kill it. While that might have been a good decision one time for the Utah Division of Wildlife, it should not be repeated.

Lynx are a small cat about the size of a bobcat. They are beautiful, shy and a bit mysterious. They live at high elevations, where their enormous feet allow them to travel efficiently in deep snow. Their diet consists almost entirely of snowshoe hares and red squirrels.
They are nothing to be alarmed at. They don't bother sheep or cattle - or ranchers. They don't bother hunters. They are an important part of the ecological web of life.

Still, they have been declared a threatened species under the Endangered Species Act because their numbers have declined precipitously throughout their former range in the United States, including Utah. That has been due mainly to trapping and habitat destruction. Indeed, the last documented native wild lynx in Utah were caught in traps in the Uinta Mountains a couple of decades ago.

During the past few years, the state of Colorado, in an effort to restore its lynx population, reintroduced lynx captured in Canada into the San Juan Mountains. This last spring several litters were produced and the population appears to be growing.

There is no doubt that dispersing lynx from Colorado, and perhaps from Wyoming, will again travel to Utah in search of new territory. Their fate will be in the hands of Utah citizens, particularly state wildlife management officials.

Lynx are known to travel widely in search of vacant home ranges containing adequate prey sources or in search of mates. This lynx, which was fitted with a satellite collar to allow tracking of its movements, traveled from southern Colorado to the Uinta Mountains near Vernal in July, swimming the Colorado and the Green Rivers along the way.

Despite the fact that the Uintas offer the best lynx habitat in the state, it kept moving, traversing the south slope of the range to the mouth of Weber Canyon on the Wasatch front. From there it moved down the center of the state to near Kanab, then back to the Wasatch Plateau in Emory county, where it remained when the first snows of the season came. At the request of the Utah Division of Wildlife Resources (DWR), Colorado wildlife officials captured it and took it back to Colorado.

Alternatively, DWR might have simply protected the lynx by closing the region around it to trapping and by

educating trappers that a lynx was in the area. Perhaps they chose not to do this for fear that someone would have deliberately caught and killed it. If so, that is a sad commentary on one class of Utah citizens. Whatever the reason, instead of allowing it to remain, they had it removed.

It is important to realize that this lynx - and two others that moved from Colorado to Utah this summer - was not lost. There is suitable habitat for lynx in Utah and they belong here. Most likely these animals are searching for the best available habitat and for mates. In the course of time they might settle down and remain.

That lynx are native to Utah and are a threatened species only adds to reasons why they should be welcomed back to our state with open arms.

The Uintas provide excellent habitat for lynx, as Utah DWR mammals program coordinator Kevin Bunnell's recent scientific reports confirm, and moving the trapped lynx there would have put him closer to a female lynx known to be living in Utah where they might have mated.

Why the DWR did not choose another option that would have allowed this lynx to remain in Utah is hard to say. For example they might have protected the lynx in Utah and sought to recover a species that is rare and well-loved by the public. This former resident of our state should be greeted and welcomed as an old friend. It will return, as

friends are wont to do, so what is the point of sending dispersing lynx back to Colorado?

We believe that the Utah DWR should prepare a recovery plan for lynx as soon as possible. This plan should identify actions that citizens of Utah would support in recovering lynx to Utah and should be backed by professional scientific information. It would be a good thing for lynx and for the citizens of Utah.

Mike Medberry is program coordinator for the Western Wildlife Conservancy. He has worked for 15 years on conservation issues in Idaho and Utah. The conservancy's mission is to protect and conserve wildlife in an ecosystem stretching from Utah to Yellowstone with short-term goals of recovering lynx and wolves and protecting puma and bear in this region.

The Wildlife BA BE states on page 9:

In summary, the likelihood of an individual lynx being exposed to human activities facilitated by the project is very low given that the Ashley is considered unoccupied and that there are likely very few, if any lynx, on the Ashley NF other than the occasional wandering lynx transplant from Colorado at this point in time (Berg and

Inman 2010, Christensen 2015, ILBT 2013, USDA Forest Service 2006, USDA Forest Service 2007ab&c, USDA Forest Service 2010-2017).

In Case 9:12-cv-00027-DLC, the federal district court in Montana ruled that the Forest Service must consult with the U.S. Fish and Wildlife Service on the impact on a species even if the species is only transitory.

The order, starting on page 18 states:

The Forest Service all but admits that lynx may be present on the Forest. See e.g. FP:A02:343 ("The analysis in the EA does not state that lynx do not occur in the mountain range. What it says is that the Forest(and project area) is currently considered 'unoccupied' by the USFWS."); BDNF:Ll- 370:36-39 (recognizing that unoccupied secondary areas provide connectivity and linkages for lynx between core areas as well as for aging habitat). Similarly, the Wildlife Service, in its Biological Opinion on the Lynx Direction, emphasized that unoccupied habitat should be managed to "continue[] to facilitate and allow dispersal of lynx" and to "avoid or reduce effects on lynx." BDNF:Ll-384; BDNF:Ll-370:39. Thus, both agencies recognize that lynx may "occur,"travel through, or forage in "unoccupied" areas, and that management actions in unoccupied areas may affect those transient lynx as well as any lynx attempting to establish new home areas.

If a species "may" be present, the ESA obligates the agency to perform a biological assessment or inter informal consultation with the Wildlife Service to ensure that the proposed action will not adversely affect the species. Defendants have not provided a reasoned basis for its construction that the "may be present" standard requires occupancy. The Wildlife Service itself, analyzing section 7, once rejected the argument of a commenter who urged the Service "to include only species actually known or believed to occur in the action area":

The Service agrees that the species list should be tailored to the action area and that field personnel should take care that the list is not over inclusive. However, the Act requires the Service to provide a list o f 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; Final Rule, 51 FR 19926-01 (Jun. 3, 1986). Defendants now attempt to distinguish this response by distinguishing "migratory species" from transient species like the lynx, but the focus of the commentary was not limited in this manner. The Wildlife Service clearly rejected a standard which would require a species to be "actually known or believed to occur" in an area because it would conflict with the statutory language.

Although evidence of the presence of lynx in the Forest is not overwhelming, some evidence nevertheless exists that lynx may be present. Specifically, Squires et al. (2003), documented one set of lynx tracks in 2001 in the Anaconda range, part of which lies within the Big Hole landscape area, which is within the analysis area for wildlife security for the Project. Berg (2009) identified "possible" and "probable" lynx tracks in the Forest. Additionally, Berg found that though "most ofthe BDNF was ... likely not good lynx habitat," there were "significant exceptions" to this. FWS:004347. For example, "[r]esident lynx may have been present in the West Fork/Middle Fork Rock Creek vicinity" given the abundance o f snowshoe hare and forest structure, and "habitat was also pretty good in the Pioneer Mountains." ld. Berg also concluded:

The West Fork/Middle Fork Rock Creek and MacDonald Pass areas are likely important 'stepping stones' for lynx that may move between currently occupied habitat for this species in northwest Montana and the Greater Yellowstone Ecosystem. . . .[I]t is very likely that lynx were present on MacDonald Pass on the Helena NF, which is just north of the BDNF [and lynx] that use the MacDonald Pass area may also use adjacent forests on the BDNF.

ld. A 2003 Wildlife Service map also suggests the Forest may be within the range ofresident and dispersing lynx, FP:0-04: 264, and radio-collared lynx are actually known to have traveled through mountain ranges in the Forest,

though they did not stay in the Forest for long, FP:J075a:3.

None of this evidence is reliable enough to fit the criteria for "occupancy," and other evidence cited is arguably stale. But the Wildlife Service's decision to reject the evidence entirely is arbitrary and capricious, particularly considering the Wildlife Service's earlier position that the "may be present" standard does not require actual occurrence. On its face, the question o f whether lynx "may be present" in an area is less rigorous than the question of whether lynx "occupy" an area. Applying the occupancy definition to the first step in the process "create[s] metric more stringent than, and contrary to, what the ESA dictates." Alliance for Wild Rockies v. Lyder, 728 F. Supp. 2d 1126, 1137 (D. Mont. 201 0).

Of course, the Wildlife Service's construction is expedient-the agencies undoubtedly anticipate that they would conclude that an action in an unoccupied area that allegedly complies with the Lynx Direction would not adversely affect the lynx-but that does not permit the agencies to take the procedural shortcut that has occurred here. The agencies must first determine whether a species "may be present," under a reasonable interpretation ofthe Act's plain language. Only then should they consider the likelihood that the species will be affected, and that inquiry should be based on the performance of a biological assessment or informal consultation. Because the Wildlife Service substituted its "occupancy" standard for the ESA's "may be present" standard, the agencies

did not enter into informal consultation or have the opportunity to agree in writing that the action is "not likely to adversely affect" the lynx, despite the fact there is some evidence that lynx "may" be in the area. 50 C.F.R. § 402.13(a).

In summary, the Wildlife Service's "occupancy" standard bypasses the procedural protections of section 7, allowing it to ignore any evidence that does not fit the more rigorous standard. The agencies' interagency agreement to reach this result in unoccupied areas cannot override the statutory and regulatory language of the ESA or the Ninth Circuit's direction that "the minimum threshold for an agency action to trigger consultation with the Wildlife Service is low," W: Watersheds Project, 632 F.3d at 496, and "any possible effect, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement." /d. (citations omitted). Accordingly, the Project must be enjoined until the Wildlife Service reconsiders its listing determination in accordance with this opinion.

Please find the order for Case 9:12-cv-00027-DLC attached.

The DDN violates the ESA, NEPA, NFMA, and the APA Based on Impacts to Canada Lynx.

"The main cause of lynx mortality is starvation (USDA Forest Service 2007a, page 141). Therefore, lynx habitat conservation measures are currently focused on maintaining adequate quantities

of winter snowshoe hare habitat. Livestock grazing (and trampling) has the potential to reduce the regeneration of aspen, conifer, and willow communities, which in turn could reduce the amount and quality of snowshoe hare habitat."

The Forest Service Must Formally Consult on Lynx.

The agencies concede that the Project is likely to adversely affect the lynx. However, FWS failed to prepare a biological opinion for the Project. Instead, the agencies rely on 5-year old biological opinion for the Region-wide Northern Rockies Lynx Management Direction. This Region-wide programmatic biological opinion cannot and does not adequately substitute for a Project-specific biological opinion. The agencies' failure to complete ESA consultation before authorizing and implementing the Project violates the ESA. Additionally, the programmatic biological opinion relied upon does not address all the relevant factors for the Project and is not based on best available science.

The Agencies Must Complete A New Biological Assessment, Biological Opinion, Incidental Take Statement, And Lynx Management Direction Amendment For The Forest Plan For Lynx.

The agencies do not have in place a legally and scientifically adequate biological assessment, biological opinion, and incidental take statement for lynx for the Forest Plan for the Ashley N.F. although the agencies rely on the Forest Plan amendment appending the Northern Rockies Lynx.

Please find Kosterman attached and Holbrook attached. Kosternman finds that 50% of lynx habitat must be mature undisturbed forest for it to be optimal lynx habitat where lynx can have reproductive success and no more than 15% of lynx habitat should be young clearcuts, i.e. trees under 4 inched dbh. This contradicts the agency's assumption in the

Lynx Amendment that 30% of lynx habitat can be clearcut, and that no specific amount of mature forest needs to be conserved. It is now the best available science out there that describes lynx habitat in the Northern Rockies related to lynx viability and recovery. Kosterman's study demonstrates that the Lynx Amendment standards are not adequate for lynx viability and recovery, as previously assumed by the Forest Service.

Holbrook says all of lynx habitat has to be monitored. Have you monitored all 1.2 million acres for lynx?

The project will "Likely to adversely affect lynx which means that listed resources are likely to be exposed to the action or its environmental consequences and will respond in a negative manner to the exposure.

The project does not have a take permit from the U.S. F.W.S. and is in violation of the E.S.A., NFMA, the APA and NEPA. The ESA (Section 3) defines take as "to harass, harm, pursue, hunt, shoot,wound, trap, capture,

USFWS further defines "harm" as "significant habitat modification or degradation that results in death or injury to listed species by significantly impairing behavioral patterns such as breeding, feeding, or sheltering", and "harass" as "actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns which include, but are not

Since this is now the best available science we are hereby formally requesting that the Forest Service write a supplemental EIS for the Northern Rockies Lynx Management Direction and reinitiate consultation with the FWS for the Lynx Amendment to publicly disclose and address the findings of this study, and to allow for further public comment on this important issue of lynx recovery.

Forest Service response:

The Bear River range, Gannett Hills area, and McCoy Creek are linkage areas. Lynx may use the area as transient habitat and could be displaced in the short-term by project activities, no denning occurs in the project area, lynx historically have inhabited fire-adapted ecosystems, reintroducing fire to the area to increase resiliency may benefit lynx.

The proposed action may affect but is not likely to adversely affect Canada lynx.The project is in violation of NEPA, NFMA, ESA and the APA.

Remedy:

Withdraw the draft Decision Notice and write an EIS that fully complies with the law.

Formally Consult or Conference with the U.S. Fish and Wildlife Service on the impact of the project on lynx and write an EIS that fully complies with the law.

Aspen

We wrote in our comments dated, July 6, 2021:

1. ***This proposal is a violation of the National Environmental Policy Act (NEPA) because the agency has already determined that 177,707 acres of aspen and mixed conifer/aspen stands needs management intervention in order to restore historical conditions of aspen, without any assessments yet being completed.***

The draft EA notes that after this analysis is complete, specific project areas would be identified and on-the-ground assessments would be completed to determine the ecologic al specific conditions and an interdisciplinary review, the appropriate treatments for the project area would be selected from the list below; treatment actions would target the most effective management option and be followed by post-treatment monitoring; based on the monitoring results, additional management actions (from the list of treatments) may be implemented if needed to achieve restoration objectives. These various treatments are identified as necessary to maintain or improve aspen, including a broadcast burning, selectively cut conifers and aspen, removal of all aspen and conifers, commercial

use of cut material, killing just conifers, root separation, and protection from browsing by wildlife and livestock.

The specific treatment per aspen patch, and the rationale for this specific treatment, is never provided to the public. The specific reasons why these various treatments are needed to restore historical conditions of aspen are never provided to the public as well. For example, if conifers are to be removed from aspen stands, it is not clear why this is needed to restore historical conditions. If conifers have never occurred in aspen stands on the Ashley National Forest, this information needs to be provided to the public in order for the agency to support claims that conifers in aspen is an unnatural condition that needs management intervention. If conifers have not historically occurred in aspen stands, the current presence of aspen in conifers would have to be due to interruption of the natural fire cycle on this forest. The draft EA did not define how the interruption of the natural fire cycle on the forest was determined.

Also, the proposed treatment of fencing indicates that the agency recognizes that livestock browsing is having an impact on aspen regeneration. However, there is no information on what the current impact of this browsing is on aspen. The picture on the front of the draft EA is a strange example for the agency to use. It demonstrates a heavily grazed landscape with no aspen regeneration and a dying aspen clone due to regeneration failure. Although a few conifers are present, these are clearly not

responsible for a lack of aspen regeneration. This photo is a typical example of severe livestock grazing impacts on aspen. This photo demonstrates that the agency is proposing to do expansive management interventions in aspen without addressing the real problem, which is livestock browsing. The agency is misleading the public by concealing the ecological problem with aspen and claiming that various treatments other than removing livestock grazing will restore historical conditions.

1. ***The proposed treatments will severely degrade what little viability aspen stands have on the Ashley National Forest due to severe livestock browsing; this severe impact is concealed to the public, in violation of the NEPA.***

It is clear from the photo on the front of the project draft EA that livestock browsing is having a severe impact on aspen , by preventing regeneration. AS a result, that stand is old and dying. The agency includes possible fencing of treated aspen stands following treatments. However, this would be a massive undertaking, with 177,707 acres proposed for treatment. In addition, if the agency actually planned to fence treated aspen stands to keep the cattle out, it is unclear why this has not been done in the past to protect aspen stands. What the likely scenario is for this program is that the agency will spend vast amounts of tax payer dollars to try and increase grass for cows. These

cows will continue to browse off aspen regeneration, as they have done in the past. What remaining viability that these aspen stands have will be spent on regeneration that will be subsequently destroyed by livestock. This scenario was never identified in the draft EA. Failure to evaluate the actual impact of the proposed treatments means that the likely outcome of this program is not being disclosed to the public, in violation of the NEPA.

2. ***The agency did not provide any monitoring data to the public to demonstrate that the proposed treatments, which do not include removal of livestock, will increase aspen regeneration in treated stands; without supporting documentation that the proposed treatments will increase and maintain aspen regeneration, the agency is violating the NEPA as well as the Administrative Procedures Act (APA), since expansion of an aspen treatment program needs to be supported with evidence.***

The agency noted that from 2009-2018, there have been 9,934 acres of aspen restoration treatments on the Forest. However, there is no information provided to the public about the effectiveness of these treatments. We looked at the most recent Forest Plan Monitoring Report for 2013, and there is no information included on aspen treatments. This indicates that either these treated acres

are not actually being monitored to measure aspen regeneration success, or that these treatments are failures due to a lack of protection from livestock grazing. Since the agency is proposing to greatly expand these aspen treatments, from roughly a 1,000 acres per year to 17,707-8,888 acres over a 10-20 year period, the agency needs to demonstrate how past treatments have worked. The proposed increase of these treatments by roughly 9 to 17 times the current average acreage treated would indicate that past treatments have been very successful in improving the viability of aspen stands. However, there is no information ever provided that this actually occurred. In particular, the continued impact of livestock grazing on these 9,934 of previously-treated aspen acres needs to be provided to the public in order for the agency to demonstrate there is a rational basis for greatly expanding these treatments.

1. ***The agency is completing an EA for a project of 177,707 acres of aspen treatments, while the Fishlake National Forest completed an EIS for treating 55,106 acres.***

The Monroe Mountain Aspen Ecosystems Restoration Project on the Fishlake National Forest, completed in 2012, proposed to treat aspen on 55,106 acres with completion of an EIS. Yet the Ashley National Forest would treat over 3 times as many acres of aspen, including within Inventoried Roadless Areas, with just an EA. The level of analysis planned for the Ashley National Forest aspen treatment projects is far greater than the

Fishlake National Forest, and as such, has a potential to create far greater impacts to wildlife. There is no information provided in the draft EA as to how the Ashley National Forest determined that there will be no significant impacts on wildlife in spite of the large acreage to be treated, in comparison with the same treatment program on the Fishlake National Forest. The reasons for such a difference in the scale of analysis between these 2 projects were never defined to the public, to support this inconsistency in agency management actions.

2. *The proposed mitigation for aspen treatments, or fencing to keep livestock out, was never identified as a planned activity; mitigation measures are required to be effective if they are going to eliminate significant impacts to wildlife.*

There are no specific requirements in the proposed aspen treatments on the Ashley National Forest to fence treated areas to protect aspen regeneration from livestock. The cost of constructing fences around 177,707 acres of treated aspen would like be very expensive. These costs were not identified in the draft EA.

The Fishlake National Forest noted that for the Monroe Mountain Aspen Restoration Project, due to the high cost and continual maintenance, fencing is not a long term sustainable response option for protecting aspen sprouts from overbrowsing. So it is unclear how much protection,

if any, is actually planned for treated areas. This is essential information that is needed in order for the public to understand how treated aspen stands will be managed. If the agency is just going to do the treatments, and then walk away from them afterwards, without any protections from livestock, this impact must be addressed in the environmental analysis, and conclusions provided to the public as to what the success of these treatments is likely to be without protection from livestock grazing.

The Forest Service did not define how the previously treated 9,934 acres of treated aspen have been managed as per fencing. Have any of these areas been fenced, and if not, what has been the livestock impact on aspen regeneration?

Also, it is unclear as to how the agency will be able to effectively monitor the livestock use on regenerating aspen on roughly 9-17 thousand acres per year, with the cumulative total reaching the 177,707 acres after 10-20 years. If heavy browsing by livestock is going to be mitigated with this project implementation, the agency has to ensure that planned mitigation will actually occur. What will the person-power needs be for monitoring livestock use in treated aspen areas, and will the agency receive additional budgeting for these increased needs for monitoring?

3. ***The agency has violated the NEPA by failing to include an action alternative that would truly restore aspen, which is to remove livestock. Although the Ashley National Forest has not provided any actual monitoring data on the browsing use of aspen by livestock and wildlife, it is clear that livestock use, due to their sheer numbers and concentration within pastures, are the major impact on aspen recruitment. This is actually even noted in the Monroe Mountain Aspen Restoration Project on the Fishlake National Forest, where it was noted that aspen recruitment of 5-15 feet in height were uncommon, despite continued sprouting of aspen. This is a clear acknowledgement that livestock are browsing aspen sprouts repeatedly every grazing season. If aspen are repeatedly sprouting, the presence of any conifers should not be limiting aspen height to 5 feet or less. The mechanisms for conifers limiting aspen heights to under 5 feet would be unclear at best.***

   Even though there is widespread acknowledgement in the scientific community that livestock are preventing aspen recruitment, the proposed aspen treatments on the Ashley National Forest did not include an action alternative that would remove livestock from aspen areas. This would be a true restoration alternative, since livestock grazing is not a natural ecological process at the level that it

occurs. The photo on the front of the EA for the aspen restoration project is an excellent example of the severe impacts of livestock grazing on aspen. Since the purported purpose of this project is to restore aspen, the absence of an action alternative that would restore aspen by removing livestock is a NEPA violation.

The Forest Service responded:

Comment considered but no changes needed

The EA is in violation of NEPA for not responding to our comments. The project is in violation of NFMA, the Forest Plan, and the APA for not monitoring as required by the Forest Plan. The Forest Service has been proposing logging and burning projects to promote the growth of more aspen. But aspen regenerates by putting out shoots, not through seeds, and it's extensively documented that the major cause of aspen decline in the West is cattle browsing and trampling the young aspen, thus greatly limiting regeneration.

Despite the many excuses the Forest Service uses to promote more logging, aspen and conifers have existed together for millennia before cattle were introduced in the West and logging is not the answer. If the Forest Service really wants to regenerate aspen stands it is imperative to

follow the science and actively minimize cattle grazing in aspen groves.

Unfortunately, the Ashley Aspen Restoration Project does not restore aspen. Yet, instead of considering viable alternatives that would lighten the grazing pressure, the agency chose to destroy existing habitat for lynx and wolverine as well as other old growth-dependent species such as the Flammulated owl.

The Ashley National Forest's Revised Forest Plan's Final Environmental Impact Statement identifies aspen as a "habitat-at-risk" and specifically notes that aspen was "historically overgrazed" — which likely contributed to aspen decline due to the loss of regeneration. It is also notes that aspen need a "diversity of seral stages," putting the loss of tender aspen shoots to cattle grazing in direct contradiction to the Forest Plan's management recommendations. The document goes on to say aspen is at high departure from historic conditions in part due to heavy grazing which eliminates regeneration.

Cattle grazing is what's killing aspen. Please see the attached paper titled, "Long-term livestock grazing alters aspen age structure in the northwestern Great Basin by Beschta et al. 2014. The conclusion states:

Our results indicate that for areas grazed by livestock and where aspen recruitment is either absent or occurring at low levels, implementing strategies that eliminate or minimize the effects of livestock herbivory may be needed.

Given the vast amount of public land annually utilized by domestic ungulates (Beschta et al., 2013) and the large losses in aspen those lands have experienced to date (Bartos, 2001), reducing livestock grazing effects within and across ecoregions may be required for attaining ecological restoration of herbivore-altered plant communities. Such restoration is a press- ing need in the face of climate change if the ecological integrity of these plant communities and their ecosystem services are to be conserved.

The project is violating NEPA, NFMA, Forest Plan, and the APA for not following the best available science.

While it's true there's an ongoing aspen ecological crisis in the Intermountain West, the decimation of aspen stands is well-documented to be caused by cattle grazing. Unless the new shoots are protected, aspen are unable to successfully regenerate due to the continued browsing/trampling/ rubbing by cows and eventually die over time due to this repeated browsing.

The problem of over-grazing and trampling by livestock has been repeatedly identified. For example, only one of 40 aspen stands surveyed on Montana's Beaverhead-Deerlodge National Forest had healthy, surviving aspen suckers due to a failure of Forest Service programs to limit grazing of aspen stems by livestock.

The standard claim made that the heavy browsing of aspen suckers is due to wildlife, including mule deer instead of cattle grazing, was specifically monitored recently. This monitoring program documented 4.5 times the amount of cattle grazing on aspen in two weeks than mule deer use during the course of six months. Moreover, forage utilization by mule deer prior to livestock grazing was unobservable. But when livestock grazing was added to the mule deer use during the two weeks of monitoring, a stunning 70 to 90 percent of the understory vegetation's annual production was consumed. This report also noted that trampling of soils by livestock may also play a role in depressing aspen recruitment on allotments.

As in this project, mixed aspen/conifer stands are a natural condition on the landscape, and clearly do not represent "unnatural" conditions that need management intervention. The Forest Service even notes that succession of conifers into aspen is common as long as a conifer seed source exists, but that succession to only conifers may take hundreds of years. Simply put, there is no scientifically-supported ecological reason to remove conifers from aspen stands – particularly in Inventoried Roadless Areas.

Controlling livestock use is the obvious management intervention needed, not cutting out conifers. We would support a Forest Service project limiting cattle grazing to restore aspen stands since it's a scientifically-proven methodology.

Remedy:

Withdraw the draft decision and write an EIS that fully complies with the law or choose the no action alternative.

Roadless Rule
We wrote in our comment dated July 6, 2021:

1. ***The proposed treatment of 147,858 acres of aspen within inventoried roadless lands, which is 83% of the total planned for treatment, is a violation of the Roadless Area Conservation Rule.***

Table 1 of the draft EA identifies that most of the proposed treatments would occur within roadless lands. The agency claims this is consistent with the 2001 Inventoried Roadless Rule because it would maintain or improve one or more roadless area characteristics. The Migratory Bird Specialist Report for this project also claims that the aspen treatments will improve wildlife habitat. However, no references were ever provided to define why some wildlife species would increase with the aspen treatments. Also, the agency did not provide any references as to why creating a diversity of aspen age classes within a roadless area would improve the roadless area characteristics. The basis for creating different aspen age classes was never identified. As was noted in the Monroe Mountain Aspen Restoration project documents, aspen stands are typically multi-aged, with recruitment occurring possibly many times over time. Having an aspen stand with just one age class would be

very unusual. This would mean that as the stand aged, it would never produce sprouts. An aspen stand that did not produce any sprouts over it's lifetime would be a very unnatural stand, not a restored stand.

In addition, cutting down aspen stands to increase sprouting would have a very adverse impact on cavity nesting birds. Aspen stands have a very high value to cavity nesting birds, due to their high incidence of rot. Certainly cutting down aspen would not constitute habitat improvement for cavity nesting birds, which may comprise up to 25% of the local breeding bird populations in mixed conifer/aspen forests. Two species on the Ashley National Forest that require snags, including within aspen stands, include the red-naped sapsucker and three-toed woodpecker. Reducing snag habitat would be an adverse impacts on these MIS/sensitive bird species, as well as many other bird species, including within roadless lands. In regards to conifers in aspen stands, these are the only trees that will provide large, long-lived snags, including those needed by the great gray owl. Removing conifers will have an adverse impact on cavity-nesting birds. Removing conifers will also eliminate conifer seed sources, hiding cover for birds during the nesting season, thermal cover for adults and young fledged birds during the nesting season, and bark foraging opportunities for many bark-gleaning birds. Removal of conifers will therefore eliminate many important habitat features for birds.

The agency also failed to define why mixed conifer/aspen stands are an unnatural characteristic in roadless areas that need to be treated. The Ashley National Forest noted that only roughly 22% of the potential treatment aspen on the forest is persistent aspen, which lacks conifers, while 78% of the aspen contains conifers. There was never any science or agency monitoring information cited as to why conifers present in aspen stands is uncharacteristic, or bad for wildlife, so that removing conifers would restore historical conditions. Also, as noted previously, degrading wildlife habitat is inconsistent with purported claims of restoring historical conditions. This brings into question the need for the proposed treatments, since wildlife habitat will be degraded as a result. Given the current plight for many landbirds in the U.S., it is illogical that the Forest Service is claiming that destroying and/or degrading their habitat is a restoration project. This is a violation of the NEPA, the APA, the National Forest Management Act, as well as the Roadless Area Conservation Rule.

Given that the largest share of proposed treatments would address conifer removal within roadless lands, the wildlife and ecosystem benefits need to be defined to the public in order for the agency to represent these actions as habitat improvement and ecosystem restoration.

The agency claims that one problem with aspen regeneration is the lack of fire. Yet one of the purposes of the treatment of aspen is to create fuel breaks, so there will be less fire. Also, the agency did not provide any definitions of what would constitute "catastrophic fire" in the IRAs, if the aspen treatment projects do not move forward. The measures of "unnatural fires" need to be defined to the public, including where such fires have been recorded elsewhere on the Ashley National Forest.

In conclusion, the agency never identified why aspen in inventoried roadless areas should be treated so that each stand contains only a single age class, or why conifers should be removed from aspen to benefit wildlife. Along with this lack of information, the agency noted that these treatments in roadless area would involve massive disturbances to the landscape, which means these areas would be heavily trammeled. Examples of activities that would occur on up to almost 0.2 miles from any existing roads, including nonsystem roads where motorized use is illegal include: appearance of tree stumps for many years after cutting aspen and conifers; burned trees due to prescribed burns; burn piles from burned slash and trees; firebreak and control lines needed to surround up to 147,858 acres of treatment areas; and tracked vehicles needed to achieve mechanical treatments, even though motorized use is prohibited in roadless areas; the noise from these massive treatments would also destroy the natural solitude of these roadless lands for the public.

The agency claims that because these 147,858 acres of roadless area treatments constitute such a small percentage of the landscape, they would not cause an "untrammeled appearance" to the public. Claiming that the appearance of management activities within only a small percentage of roadless lands does not violate the roadless rule is not based on any criteria. There is no criteria in this rule that we are aware of that permits a certain percentage of the landscape to appear heavily managed by the agency.

It is unclear where access to these 147,858 acres of roadless lands will be available. There is no information in the draft EA as to what roads, including user-created and nonsystem roads, will be required to access roadless treatment areas. Will motorized access be increased on currently-closed roads in order to treatment roadless lands? If so, how is this consistent with the Roadless Area Rule? The maps of the proposed treatment areas are too small for the agency to identify travel routes and their current status. So the public is not being provided with the travel management information portion of this proposal, in violation of the NEPA.

Forest Service response:

The proposed project is consistent with the 2001 Inventoried Roadless Rule.

The Forest Service's representations and/or omissions in the EA, and its authorizations regarding tree cutting in an Inventoried Roadless Area, violate NEPA, the APA, and the Roadless Rule.

In the late 1990s, the Forest Service reached several findings regarding roads on National Forest lands: (1) use of the National Forests had "shifted substantially toward recreation," (2) there were insufficient funds to maintain existing roads, and (3) there was an "accumulation of new scientific information" suggesting that "ecological impacts from existing roads are more extensive than previously thought." Alaska v. USDA, 273 F.Supp.3d 102, 108 (D.D.C. 2017)(quoting 63 Fed. Reg. 4350, 4350 (Jan. 28, 1998)). Subsequently, on January 12, 2001, the Forest Service published the final Roadless Rule. 66 Fed.

Reg. 3244 (Jan. 12, 2001). The Roadless Rule prohibits road construction and tree cutting in designated "Inventoried Roadless Areas" subject to limited exceptions. See Alaska, 273 F.Supp.3d at 108.

For over 15 years, the Roadless Rule was the subject of litigation. See, e.g., Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1126 (9th Cir. 2002); California ex rel. Lockyer v. USDA., 575 F.3d 999, 1007 (9th Cir. 2009); Wyoming v. USDA, 661 F.3d 1209, 1272 (10th Cir. 2011); Organized Vill. of Kake v. USDA, 795 F.3d 956, 962 (9th Cir. 2015) (en banc); Alaska, 273 F.Supp.3d at 108–12. The Roadless Rule withstood these legal

challenges. In relevant part, regarding the prohibition on tree cutting, the Roadless Rule mandates:

Prohibition on timber cutting, sale, or removal in inventoried roadless areas.

(a) Timber may not be cut, sold, or removed in inventoried roadless areas of the National Forest System, except as provided in paragraph (b) of this section.

(b) Notwithstanding the prohibition in paragraph (a) of this section, timber may be cut, sold, or removed in inventoried roadless areas if the Responsible Official determines that one of the following circumstances exists. The cutting, sale, or removal of timber in these areas is expected to be infrequent.

(1) The cutting, sale, or removal of generally small diameter timber is needed for one of the following purposes and will maintain or improve one or more of the roadless area characteristics as defined in § 294.11.

(i) To improve threatened, endangered, proposed, or sensitive species habitat; or

(ii) To maintain or restore the characteristics of ecosystem composition and structure, such as to reduce the risk of uncharacteristic wildfire effects, within the range of variability that would be expected to occur under natural disturbance regimes of the current climatic period;

(2) The cutting, sale, or removal of timber is incidental to the implementation of a management activity not otherwise prohibited by this subpart;

... .
36 C.F.R. §294.13 (2005)(emphases added).

The Roadless Rule further explains the meaning of the phrase "incidental to" in subsection (b)(2) above as follows:

Paragraph (b)(2) allows timber cutting, sale, or removal in inventoried roadless areas when incidental to implementation of a management activity not otherwise prohibited by this rule. Examples of these activities include, but are not limited to trail construction or maintenance; removal of hazard trees adjacent to classified road for public health and safety reasons; fire line construction for wildland fire suppression or control of prescribed fire; survey and maintenance of property boundaries; other authorized activities such as ski runs and utility corridors; or for road construction and reconstruction where allowed by this rule.

66 Fed. Reg. 3258.
In this project, the Project area is located thoughout the Ashley National Forest including in Inventoried Roadless Area. B2b:0004747. The Project allows tree-cutting in this Inventoried Roadless Areas across the forest.

It is unclear whether the Forest Service will be reconstructing old roads, using illegal user-created roads, or using roads already closed by the Travel Plan in the Inventoried Roadless Area in order to conduct these activities; the Project EA only states that, "No roads would be constructed in roadless areas."

Page 5 of the EA states:

We are proposing to allow for treatments on up to 177,706 acres in any aspen community across the Ashley National Forest outside of designated Wilderness. Aspen restoration may also occur within Inventoried Roadless Areas (IRAs). Any tool or method used to treat aspen within the IRAs would be consistent with the 2001 Inventoried Roadless Rule, including the cutting, sale, or removal of generally small diameter timber and that the cutting, sale, or removal must maintain or improve one or more roadless characteristics. Heavy equipment use in the roadless areas will be limited to 1,000 feet from existing roads where slope allows (approximately 13,961 acres across 19 roadless areas). Equipment would drive cross country to access stands where terrain allows. Within any of the Research Natural Areas or proposed recommended wilderness identified during the Forest Plan revision effort, no mechanical treatments would be used to treat aspen (fire only). No roads (temporary or permanent) would be constructed in this project. Table 1 below presents the data for aspen treatments both within and outside of roadless areas. Approximately 9 percent of

aspen within roadless could be treated commercially with heavy equipment.

Page 12 of the EA states:

Inventoried Roadless/Potential Wilderness Areas

Inventoried Roadless

No roads would be constructed in roadless areas. The mechanical and prescribed burn treatments in aspen would create areas of early seral plant species that would increase plant size, age, and species diversity thereby improving animal diversity as well. Treatments would invigorate existing aspen stands and may lead to an increase in aspen on the landscape. Although stumps would remain in the mechanically treated areas and fire would be noticeable after implementation, effects would fade over time. Typically, about 3 to 5 years are needed for vegetation to regenerate. Activities proposed are consistent with the 2001 Roadless Rule. Design criteria included in this EA would ensure that only generally small diameter trees will be cut, sold, or removed in IRAs; larger trees may be girdled to reduce conifer competition. As such, any commercial sale of by-products of treatments will be generally small in diameter. Treatment of aspen stands will maintain and/or enhance the overall health and extent of aspen communities on the Forest and in IRAs. Maintenance and/or enhancement of a diverse composition of native tree species resulting from aspen treatments will maintain and/or improve the naturalness

and unique and special features that are considered roadless characteristics. See the roadless evaluation report in the project file for more information.

One exception to the ban on tree-cutting in a Roadless Area is the allowance for tree cutting when it "is needed . . . [t]o maintain or restore the characteristics of ecosystem composition and structure . . . within the range of variability that would be expected to occur under natural disturbance regimes. . . ." 36 C.F.R. §294.13 (b)(1)(ii). Thus, in order to determine whether the "outside historic range of variability" exception applies, it is necessary to compare the existing condition to the historic range.

There is no mention of this in the EA or the Roadless Evaluation.

Tree-cutting is not "incidental to" another management activity; it is the management activity. The Forest Service fails to acknowledge that the Roadless Rule provides a narrow definition of the phrase "incidental to" in the (b)(2) exemption:

Paragraph (b)(2) allows timber cutting, sale, or removal in inventoried roadless areas when incidental to implementation of a management activity not otherwise prohibited by this rule. Examples of these activities include, but are not limited to trail construction or maintenance; removal of hazard trees adjacent to classified road for public health and safety reasons; fire

line construction for wildland fire suppression or control of prescribed fire; survey and maintenance of property boundaries; other authorized activities such as ski runs and utility corridors; or for road construction and reconstruction where allowed by this rule.

66 Fed. Reg. 3258.

In the response the comments, the Forest Service wrote on page 52:

Any tool or method used to treat aspen within the IRAs would be consistent with the 2001 Inventoried Roadless Rule, including the cutting, sale, or removal of generally small diameter timber and that the cutting, sale, or removal must maintain or improve one or more roadless characteristics.

In the response the comments, the Forest Service wrote on page 60:

Design criteria included in this EA would ensure that only generally small diameter trees will be cut, sold, or removed in IRAs; larger trees may be girdled to reduce conifer competition. As such, any commercial sale of by-products of treatments will be generally small in diameter. Treatment of aspen stands will maintain and/or enhance the overall health and extent of aspen communities on the Forest and in IRAs. Maintenance and/or enhancement of a diverse composition of native tree species resulting from aspen treatments will maintain and/or improve the naturalness and unique and special features that are

considered roadless characteristics. Commentor should read the roadless evaluation report in the project file for more information.

Every one of these examples in the roadless rule that allows exceptions shows that the management activity itself is not any form of vegetation management, i.e. tree-cutting – instead the management activities are things like trail management, road management, firefighting, land surveys, ski runs, utility corridors, or lawful road construction. In contrast, here the management activity itself is vegetation management, i.e. tree-cutting.

The Forest Service's interpretation of exemption (b)(2) is contrary to the explanation of "incidental to" in the Roadless Rule, and if adopted, would swallow the rule. The Forest Service could simply avoid the tree-cutting ban by labeling every tree-cutting activity in a Roadless Area as something other than tree-cutting – such as "restoration" – and thereby circumvent the ban with euphemisms. This is clearly not the intent of the Roadless Rule. 66 Fed. Reg. 3258. Accordingly, the (b)(2) exemption does not apply here.

The Forest Service wrote in their roadless concurrence letter that they are using the following exception to the roadless rule:

36 CFR 294.13 Prohibition on timber cutting, sale, or removal in inventoried roadless areas.

(a) Timber may not be cut, sold, or removed in inventoried roadless areas of the National Forest System, except as provided in paragraph (b) of this section.

(b) Notwithstanding the prohibition in paragraph (a) of this section, timber may be cut, sold, or removed in inventoried roadless areas if the Responsible Official determines that one of the following circumstances exists. The cutting, sale, or removal of timber in these areas is expected to be infrequent.

(1) The cutting, sale, or removal of generally small diameter timber is needed for one of the following purposes and will maintain or improve one or more of the roadless area characteristics as defined in 36 CFR 294.11.

- ***(i) To improve threatened, endangered, proposed, or sensitive species habitat.***

- ***(ii) To maintain or restore the characteristics of ecosystem composition and structure, such as to reduce the risk of uncharacteristic wildfire effects, within the range of variability that would be expected to occur under natural disturbance regimes of the current climatic period.***

The Forest Service justifies using the exception by stating in the next paragraph of the roadless concurrence letter:

The mechanical and prescribed burn treatments in aspen would create areas of early seral plant species that would increase plant size, age, and species diversity thereby improving animal diversity as well. Treatments would invigorate existing aspen stands and may lead to an increase in aspen on the landscape.

Although stumps would remain in the mechanically treated areas and fire would be noticeable after implementation, effects would fade over time.

Since the Ashley claims there are no threatened or endangered species in the project area they are not claiming that they are improving habitat for threatened and endangered species.

The Ashley N.F. is using the following exception:

- ***(ii) To maintain or restore the characteristics of ecosystem composition and structure, such as to reduce the risk of uncharacteristic wildfire effects, within the range of variability that would be expected to occur under natural disturbance regimes of the current climatic period.***

The problem is there is no analysis showing that the Ashley National Forest is outside of the range of variability that would be expected to occur under natural disturbance regimes of the current climatic period.

The draft decision notice states on page on 1:

Heavy equipment use in the roadless areas will be limited to 1,000 feet from existing roads where slope allows (approximately 13,972 acres across up to 22 roadless areas). Equipment would drive cross country to access stands as terrain allows.

There is noting in the roadless rule that lets the Forest Service redefine the roadless rule as starting 1000 feet from a road. There is no exception to the roadless rule that it is legal to commercially log trees using mechanical equipment up to 1000 feet from a road.

The Roadless Are Evaluation for the Ashley NF Aspen Restoration Project defines the excluded road corridor:

Excluded Road Corridors: Many roads penetrate the interior of lands which are otherwise undeveloped on the Ashley National Forest. A 66 foot wide corridor (33 ft. from centerline) along each system road and a few selected routes was excluded from the roadless areas during the mapping process. These corridors are not part of the surrounding roadless areas. In the 2006 draft information packets these roads were described as "cherry stem" roads. This document uses excluded road corridors to describe these features.

Therefore the exclude road corridor is only 66 feet wide, 33 feet from the center line, not 1000 feet from the road.

Finally, the record in this case is unclear how the Forest Service will access the Project units in the Roadless Area. Although the Forest Service states that it will not build new roads in the Roadless Area, B2c:0005510, the transportation map does not show that Project units could be accessed by existing roads in the Roadless Area, and the Forest Service has avoided answering the question of how it will access those units, B2c:0005513. This Court recently addressed a similar issue. Hunters v. Marten, 470 F.Supp.3d 1151, 1167-1169 (D. Mont. 2020). This Court held: "It is simply not true that the Forest Service had no duty to communicate its transportation plan to the public. NEPA imposes upon the agency the duty to take a 'hard look' when it plans its actions and 'to provide for broad dissemination of relevant environmental information.'"

The Court further held:

[Plaintiffs] contend that the final EIS is inadequate because it is misleading. [].The Court agrees with the latter. Having already discussed at length why the Forest Service's treatment of the roadwork in the final EIS is inadequate and indicates bad faith, there is little more to say on the second issue. On remand, the Forest Service will be required to thoroughly develop its plan to bring heavy machinery into the roadless area.

The same type of analysis is necessary in this case as well. For all of these reasons, the Project violates the Roadless Rule and/or the Project EA fails to take hard look and provide accurate information and analysis to the public

regarding Roadless Rule compliance, in violation of the Roadless Rules NFMA, NEPA and the APA.

Remedy: Withdraw the Draft Decision Notice and write an EIS that fully complies with the law.

The Forest Service recognizes the value of forestland unencumbered by roads, timber harvest, and other development. Sometimes these areas are known as "inventoried roadless areas" if they have been inventoried through the agency's various Roadless Area Review Evaluation processes, or "unroaded areas" if they have not been inventoried but are still of significant size and

ecological significance such that they are eligible for congressional designation as a Wilderness Area.

Roadless areas provide clean drinking water and function as biological strongholds for populations of threatened and endangered species. Special Areas; Roadless Area Conservation; Final Rule, 66 Fed. Reg. 3,244, 3,245 (Jan. 12, 2001) (codified at 36 C.F.R. Part 294). They provide large, relatively undisturbed landscapes that are important to biological diversity and the long- term survival of many at-risk species. Id. Roadless areas provide opportunities for dispersed outdoor recreation, opportunities that diminish as open space and natural settings are developed elsewhere. Id. They also serve as bulwarks against the spread of non-native invasive plant species and provide reference areas for study and research. Id.

Other values associated with roadless areas include: high quality or undisturbed soil, water, and air; sources of public drinking water; diversity of plant and animal communities; habitat for threatened, endangered, proposed, candidate, and sensitive species and for those species dependent on large, undisturbed areas of land; primitive, semi-primitive non-motorized, and semi-primitive motorized classes of dispersed recreation; reference landscapes; natural

appearing cultural properties and sacred sites; and other locally identified unique characteristics.

We wrote in our comments:

The project will be a NFMA violation because it will promote the demise of aspen stands by burning out conifers without providing protection from livestock browsing.

The agency is violating the NEPA by claiming that conifer encroachment needs to be removed to promote aspen, when livestock grazing is almost always the problem with aspen failure to regenerate.

The agency is violating the NEPA by promoting fuel reduction projects as protection of the public from fire, when this is actually a very unlikely event; the probability of a given fuel break to actually have a fire in it before the fuels reduction benefits are lost with conifer regeneration are extremely remote; forest drying and increased wind speeds in thinned forests may increase, not reduce, the risk of fire.

The agency is violating the NEPA by providing false reasons for Presribed burning to the public by claiming that insects and disease in forest stands are detrimental to

the forest by reducing stand vigor (health) and increasing fire risk. There is no current science that demonstrates that insects and disease are bad for wildlife, including dwarf mistletoe, or that these increase the risk of fire once red needles have fallen.

The agency is violating the NEPA by claiming that prescribed burning is needed to create a diversity of stand structures and age classes; this is just agency rhetoric to conceal the

The agency is violating the NEPA by using vague, unmeasureable terms to rationalize the proposed burning to the public. How can the public measure "resiliency?" What are the specific criteria used to define resiliency, and what are the ratings for each proposed logging unit before and after treatment? How is the risk of fire as affected by the project being measured so that the public can understand whether or not this will be effective? How is forest health to be measured so that the public can see that this is a valid management strategy? What specifically constitutes a diversity of age classes, how is this to be measured, and how are proposed changes measured as per diversity? How are diversity measures related to wildlife (why is diversity needed for what speciese)? If the reasons for logging cannot be clearly identified and measured for the public, the agency is not meeting the NEPA requirements for transparency.

The agency is violating the NEPA by claiming that prescribed burning will benefit wildlife; the scoping document does not identify what habitat objectives will be addressed with burning, so the public is unable to understand how to comment on this claim.

Forest Service response:

Some commenters suggested that there should be an alternative that specifically addresses climate change, livestock grazing impacts on forest stands, understory conditions and aspen recruitment. The purpose and need defined for this project focuses on the need to restore fire to reduce the risk of uncharacteristic wildfire, improve resiliency of vegetation communities to disturbances, and improve ecological function. Therefore, the proposed action is limited to the use of prescribed fire and associated activities to address trends such as reduced winter precipitation, earlier spring snowmelt, and longer dry seasons which are associated with a changing climate. These conditions have created a need for a more proactive use of prescribed fire to reduce the severity of effects from a large, uncontrolled wildfire. The project also identifies that aspen restoration is one of the themes that be used to identify treatment locations as suggested by the commenter. Design elements identify that monitoring will

occur following prescribed burns to determine if livestock is using the treated area in a way that is detrimental to resources, but the management of livestock itself is outside the scope of the proposed action.

The project is in violation of NEPA, NFMA, and the APA.

The Forest Service ignored our comments and concerns.

The project is not following the best available science.

Across the western U.S., livestock grazing is a well-identified problem in regards to the lack of recruitment in aspen stands. As just one example, in an analysis area on the Beaverhead-Deerlodge National Forest, only 1 out of 40 surveyed aspen stands had successful regeneration, due to livestock browsing. Removal of livestock has been identified as a successful restoration activity for aspen (Beschta et al. 2014, Earnst et al. 2012). Without a limit to livestock utilization of no more than 20% of the current years liter growth, successful recruitment in aspen stands is not likely to happen (Burton 2004).

Remedy:

Withdraw the draft Decision Notice and write an EIS that fully complies with the law.

Thank you for your time and consideration of our concerns.

Sincerely yours,

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