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Pacific NW Regional Forester
Attn: Pacific NW National Scenic Trail
Comprehensive Plan Comments
1220 SW 3rd Avenue; Suite 1700
Portland, OR 97204

Submitted via portal:
<https://cara.fs2c.usda.gov/Public/CommentInput?project=52259>

RE: OBJECTION to Finding of No Significant Impact for Pacific NW National Scenic Trail Comprehensive Management Plan Environmental Assessment

The following objection is submitted on the Finding of No Significant Impact on the Pacific Northwest National Scenic Trail Comprehensive Plan Environmental Assessment (EA) of March 2023.

Projected Objected To

Pursuant to 36 C.F.R. § 218.8(d)(4), I object to the following project:

Project: Pacific Northwest National Scenic Trail Comprehensive Plan Project

Responsible Official and Forest/Ranger District: R6 - Pacific Northwest Region All Units

Timeliness

These objections are timely filed. Notice of the Draft Decision Notice and FONSI was published on July 13, 2023.

Lead Objector

As required by 36 C.F.R. § 218.8 (d)(3), the Objectors designate the “Lead Objector as follows:

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Interests and Participation of the Objectors

YVFC is a non-profit community organization working to ensure that the natural and human communities of northwest Montana are healthy and resilient. Its mission is maintain and restore the ecological integrity of this geographical zone by conserving habitat for native and sensitive species, particularly grizzly bears; encourage and support the development of local economy-based habitat conservation and ecological restoration; and educate local residents on the value of protected and restored landscapes for community and economic development, while advocating also for management that acknowledges the effects of climate change, particularly on endangered species. YVFC is dedicated to cultivating and encouraging meaningful dialogue between historically polarized groups. Forest Council members and supporters work in, use, and enjoy the Kootenai National Forest and the lands of the Pacific Northwest Trail (“PNT”) for recreation (including hunting, skiing, fishing, snowshoeing, horseback riding), nature study, photography and other artistic ventures, and spiritual renewal.

YVFC has and continues to actively advocate for increased protections for species and their habitats in the Yaak Valley. YVFC successfully sued Service for failing to produce a Comprehensive Plan within the statutorily prescribed timeframe. The organization is determined through its participation in the planning process to ensure the agencies’ analysis of grizzly bear impacts are grounded in best available science.

The Pacific Northwest Trail

The PNT was first proposed in the 1970s. In 1974, PNT enthusiasts teamed up with a Seattle congressman to designate the trail. In 1977, Congress authorized a study to determine the feasibility and desirability of constructing the Pacific Northwest Trail (PNT). The study was conducted jointly by the National Park Service and U.S. Forest Service.

In June of 1980, the Forest Service and the National Park Service (“NPS”) issued a report based on a joint study on the feasibility of designating the PNT. The findings of the study concluded that the PNT was neither feasible nor desirable and recommended the “no trail” alternative. The study specifically found that the development of the PNT “would likely have a major adverse impact on the endangered grizzly bear and on the many fragile high elevation areas the trail would cross.” Subsequently, upon the submission of the study to Congress, they declined to designate the PNT.

Despite the findings of the feasibility study, approximately twenty-nine years later, on March 30, 2009 Congress enacted the Omnibus Public Land Management Act of 2009, Pub.L. 111-11. A Title V of the Omnibus Public Land Management Act of 2009 designated six trails to the

National Trail System, including the PNT. Section 5 (e) of the NTSA mandates the Forest Service to issue a Comprehensive Plan ("CP") within two years of the Congressional designation.

As designated, the PNT runs approximately 1,200 miles from the Continental Divide to the Pacific Ocean. The trail goes through seven national forests, three national parks, a national historic reserve, six wilderness areas, as well as state forest and parks. The Service touts the trails goes through some of the most spectacular and scenic terrain of this spectacular terrain is the Yaak Valley. Nestled in the Kootenai National Forest, in the extreme northwest corner of Montana, lies the Yaak Valley. The Yaak Valley is located at the southern terminus of the Purcell Mountain Range in northwest Montana. The Yaak Valley's low elevation and high precipitation result in a climate described as "modified Pacific maritime" in character. Large larch, cedar, hemlock, spruce, Douglas, grand and alpine fir, ponderosa, lodgepole and white pine fill the landscape.

The Kootenai National Forest is home to an abundance of wildlife. It is also a vital link in the chain of wildlands that sweep north into Canada. Inhabitants include grizzly bears, wolves, lynx, mountain lions, wolverine, marten, fisher, mountain goats, great gray owls, bull trout, westslope cutthroat trout and inland redband trout.

The Yaak is considered by many conservation biologists to be key habitat for grizzly bear recovery in regards to providing linkage to other core recovery areas in all directions, including the Northern Continental Divide Ecosystem (includes Glacier/Bob Marshall populations), Selkirk Ecosystem (North Idaho) and the population in eastern and central Washington, as well as the Bitterroot Recovery Area and the larger grizzly populations in southern British Columbia.

The Yaak Valley is one of only six grizzly bear recovery areas in the lower forty-eight states, and has a drastically reduced from historic range level of scientifically documented grizzly bear activity. With estimates of only 44-54 grizzly bears remaining, the Cabinet/Yaak Grizzly Bear Recovery Area contains the lowest elevation grizzly population, as well as the most imperiled population, in North America. There are two recovery zones that overlap in the Kootenai National Forest: the Cabinet-Yaak Recovery Zone (CYGBRZ) and the North Continental Divide Recovery Zone (NCDE). The CYGBRZ is located in the KNF, IPNF, and a small portion of the Lolo National Forest. The goal for grizzly bear management is to provide sufficient quantity and quality of habitat to facilitate grizzly bear recovery. An integral part of the goal is to implement measures within the authority of the Forest Service to minimize human-caused grizzly bear mortalities.

51% of the 1156-mile route of PNT will pass through four of the six U.S. Grizzly Bear Recovery Zones. Nearly 7% (76 miles) of the total length of the northern PNT will pass through the CYGBRZ. Currently, Yaak is estimated to have only 20 or so grizzly bears, among the lowest density of interior North American populations. In the northern Yaak, some grizzly bears have home ranges shared with British Columbia. Recovery Bear Management Units (BMU) have been designated for grizzly bears in the CYGBRZ as part of recovery planning. Each BMU approximates the size of a female grizzly bear home range, including all seasonal (spring, summer, fall, winter den) habitat components.

The PNT as currently designated passes through three BMUs with demonstrated occupancy by female grizzly with young. The northern Yaak BMUs have the most female grizzlies with young occupancy, compared to the southern Yaak, likely reflective of higher value seasonal habitats and less human disturbance. Telemetry studies indicate some female grizzly bear home ranges have concentrated activities in the northern PNT area.¹ The PNT route was deliberately routed to include as many higher elevation scenic mountains as possible in the northern Yaak. This means a higher degree of overlap with grizzly bear summer, fall and den habitats than will occur if alternate routes at lower elevations would have been chosen.² This PNT's route was identified by a hiker's organizations.

It is estimated 24 miles or 35% of the northern PNT in the Yaak will cross low elevation areas (below 4,590 feet) where spring habitat types would occur, while the balance (44 miles or 65%) of the total PNT length in the Yaak overlaps with other seasonal habitat elevation zones. All the non-spring habitat (44 miles or 65%) is considered a fall habitat zone (above 4,590 feet--except for some grizzly use of ungulate carcasses at lower elevations in November). A subset of that (37 miles or 54%) is considered summer habitat above 4,929 feet. At the highest elevations (26 miles or 38%), the route is in winter den habitat beginning at elevations above 5,580 feet. Given the trail's location overlay, the use of the PNT may result in displacement of grizzly bears from critical habitats, with a high potential for significant adverse effects on survival and population recovery of the threatened Yaak grizzly bears.³

OBJECTIONS

I. THE PACIFIC NORTHWEST TRAIL IMPERILS THREATENED GRIZZLY BEARS

The ESA “obligates federal agencies ‘to afford first priority to the declared national policy of saving endangered species.’”⁴ The EA does not contain sufficient information for the public to truly gauge the impacts to listed grizzly bears and their habitat, particularly in the Yaak Valley, which a recent U.S. Fish & Wildlife Service 5-year assessment analyzed as the “least resilient” of all the subpopulations.⁵ The PNT traverses through four grizzly bear recovery zones. Each one of these zones are home to distinct populations with varying population stressors and recovery targets. For example, even basic information regarding what trail segments bisect which core grizzly habitat is not provided. The EA only identifies the location of the trail through recovery

¹Craighead-McCrory (2018), Potential Impacts of the Proposed Pacific Northwest National Scenic Trail Route on the Threatened Grizzly Bears and Their Recovery in the Yaak Watershed Area, NW Montana , p. 11.

² Craighead-McCrory (2018), p. 10.

³ Craighead-McCrory (2018), at 13.

⁴ *Pac. Coast Fed'n of Fishermen's Ass'n v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1084-85 (9th Cir. 2005) (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 185 (1978)).

⁵ U.S. Fish & Wildlife Serv., Grizzly Bear in the Lower-48 States, Five Year Status Review: Summary and Evaluation (2021) at 11 and 13.

zones but fails identify and address the trail's location through specific Bear Management Units (BMUs). Nor does the EA identify the varying degrees by which certain grizzly populations tolerate human presence and which are more likely to result in bear mortality. Instead, the EA is replete with broad generalizations and unsubstantiated summaries and is completely devoid of any hard data.

“NEPA requires more than a statement of platitudes, it requires appraisal to the public of the actual impacts of an individual project.”⁶ Generally, “when a recovery plan or conservation strategy exists for a species and is applicable to the actions being analyzed, [the agency should] **evaluate and document** consistency of the action with the recovery plan or conservation strategy.”⁷ The Forest Service Manual further directs an agency when conducting analysis of effect to consider the following factors:

1. the proportion of the species' total population and range that is in the analysis area or is affected by the action;
2. whether the habitat affected by the action is necessary for critical life functions (for example, feeding, breeding, nesting);
3. timing, frequency and duration of human activity, especially as it relates to significant behavioral modification;
4. any anticipated reductions in numbers or distribution of the species; and the potential of the species to recover from short-term impacts.⁸

Despite this guidance, the EA does not identify or document whether the action is consistent with the Grizzly Bear Recovery Plan. The Grizzly Bear Recovery Plan of 1993 sets goals and objectives for each grizzly bear recovery zone, and agencies proposing projects that may impact grizzly bears must assess whether any of these objectives will be impacted by the action. EA does not discuss or analyze the specific recovery plan objectives for grizzly bears in any of the four identified grizzly bear recovery zones. Of most concern to YVFC is the extremely sensitive and nearing-extirpation population of grizzly bears in the Cabinet-Yaak Ecosystem (“CYE”).

The subgoals for the Cabinet-Yaak Grizzly Bear Recovery Zone include the following:

- (1) Six females with cubs over a running 6-year average both inside the recovery zone and within a 10-mile area immediately surrounding the recovery zone, excluding Canada;

⁶ *Ctr. for Biological Diversity v. U.S. Forest Serv.*, No. CV 22-114-M-DWM, 2023 WL 5310633, at *11 (D. Mont. Aug. 17, 2023)

⁷ FSM 2672.43 – Procedure for Conducting Biological Evaluations (emphasis added).

⁸ *Id.*

- (2) 18 of 22 BMUs occupied by females with young from a running 6-year sum of verified evidence;
- (3) Known, human-caused mortality not to exceed 4 percent of the population estimate based on the most recent 3-year sum of females with cubs. No more than 30 percent of this 4 percent mortality limit shall be females. These mortality limits cannot be exceeded during any 2 consecutive years for recovery to be achieved.⁹

The Forest Service does not assess the status of any of the recovery plan’s objectives described above or analyze how the proposed action may impact any of these objectives. The EA makes no mention of the recovery plan objective and CYE subgoals. Rather, the CP simply states that because “nonmotorized trail use does influence calculation of [CYE] grizzly bear core habitat[]” the “average of 20 parties per week has been identified as a limiting factor for trail capacity on the trail stages passing through the two recovery zones.” EA at 220. The EA fails to contain any analysis of how grizzly bears in the Yaak ecosystem are moving toward recovery goals and how this action may have indirect impacts to achieving these goals.

This analysis is extremely important and mandated as “[o]ne of the factors an agency **must** consider in determining the significance of a project’s environmental impacts is “[t]he degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act.”¹⁰

A. The Forest Service Fails to Take a Hard Look at Baseline Conditions for Grizzlies

The Forest Service’s failure to address baseline conditions, population trends, and the project’s impacts on ESA-listed species such as grizzly bears, violates NEPA’s requirement that the agency take a hard look at the project’s environmental effects.¹¹ The Draft Wildlife Biological Evaluation (DBE) is devoid of any empirical evidence as to how the adoption of the trail plan will directly or indirectly impact grizzly bears. In fact, there is absolutely zero explanation as to how the agency came to their conclusions. Under the methodology section, the DBE describes a “high-level analysis” as compiling a list of federally-listed species and using GIS mapping to identify where the trail intersects critical habitat. The DBE does not provide any information on the different subpopulations, except for stating that the 2018 Craighead et al. is an unpublished

⁹ Servheen, Christopher, U.S. Fish and Wildlife Service, Grizzly Bear recovery plan (Sept. 10, 1993), at 3.

¹⁰ 40 C.F.R. § 1508.27(b)(9).

¹¹ See *Marsh v. Or. Nat. Res. Council*, 290 U.S. 360, 374 (1989) (“NEPA ... require[s] that agencies take a ‘hard look’ at the environmental effects of their planned action.”); *Half Moon Bay Fishermans’ Marketing Ass’n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988) (NEPA requires consideration of the environmental baseline); *Blue Mts. Biodiversity Proj. v. Blackwood*, 161 F.3d 1208, 1213 (9th Cir. 1998) (“General statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided.”) (quoting *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998)) (internal quotations omitted); *Or. Natural Desert Ass’n v. Rose*, 921 F.3d 1185, 1190 (9th Cir. 2019) (Agencies must establish adequate baseline conditions; otherwise, “there is simply no way to determine what effect the project will have on the environment and, consequently, no way to comply with NEPA.” (quoting *Great Basin Res. Watch v. BLM*, 844 F.3d 1095, 1101 (9th Cir. 2016))).

report that summarizes the potential impacts of the PNT on grizzly bears in Cabinet Yaak Ecosystem.

Had the agency reviewed the baseline conditions and population trends of the Cabinet Yaak grizzly bears, it would have to consider that:

The grizzly bear population in the CYE currently has low resiliency (Table 2, above). Despite high population trends and high and moderate adult female survival, *the CYE currently has a very low numbers of bears*, although this factor could improve as bears reproduce and expand in the future (Table 2, above). The CYE *is a smaller ecosystem that is still slowly recovering from being close to historical extirpation*, particularly in the Cabinets portion of the ecosystem This ecosystem also has a less diverse assortment of foods, particularly in the form of ungulate protein, although body fat levels indicate that individuals are relatively healthy (Kasworm et al. 2020a, pp. 55–56). *Large intact blocks of land are also somewhat limiting in the CYE due to its overall smaller size. Even though there are large protected areas within the CYE (with 44 percent designated as Wilderness or IRAs), as well as additional protections outside the CYE recovery zone and conservation efforts on private lands that improve security for grizzly bears, **habitat standards for motorized route densities have not yet been met in the CYE recovery zone, which limits the availability of large intact blocks of land in the CYE*** (Service 2021, pp. 220–221).¹²

The recent 5-Year Status Review indicated that the Forest Service grizzly management is the CYE is less protective than elsewhere:

Federal land managers have adopted land management plans that contain legally binding and enforceable science- and research-based measures and management practices designed specifically to conserve the grizzly bear in the lower-48 States, though these measures **are not yet fully implemented in the CYE**¹³

This is apparently a reference to the fact that National Forests in the CYE have not yet complied with land management plan motorized access components, and as a result these forests are failing to provide habitat for grizzlies that is secure from human disturbance. It is exactly this type of data and status review that should influence the agency’s confidence of relying on current management practices and decision-making. If current land management plans are not being enforced or implemented then why would they support “[t]hresholds and monitoring

¹² U.S. Fish & Wildlife Serv., Grizzly Bear in the Lower-48 States, Five Year Status Review: Summary and Evaluation (2021) at 8.

¹³ *Id.* at 20 (emphasis added).

responsibility ...be determined by the local managing unit[?]" Moreover, this detailed baseline data would have led to different conclusions regarding current on-the-ground impacts from existing use of the PNT.

Recently, in *Ctr. for Biological Diversity v. U.S. Forest Serv.*,¹⁴ the court admonished the USFS for its continued non-compliance with the Access Amendment by failing to consider the prevalent illegal or unauthorized road use in Kootenai National Forest. Ineffective route closures throughout the Kootenai National Forest are a longstanding issue known very well by the USFS.¹⁵ YVFC has been party to numerous challenges under ESA and NEPA where the court relied on their collected evidence of multiple gated or bermed roads that may have been bypassed by all-terrain vehicles or motorcycles and even documented user-created motor vehicle routes. Just this past June, YVFC prepared the *Insufficient Grizzly Barrier Report: CYE BMUs 14-15* which documented continued ineffective road closures in core grizzly bear habitat.¹⁶

Importantly, had the agency reviewed and analyzed the perilous state of the CYE grizzly population it may have concluded that proposals that will further disrupt grizzly habitat within this ecosystem will undermine progress toward recovery of grizzly bears and would likely have adverse impacts. Similarly, best available science based upon recent sampling identified 20 females and 24 males in the Cabinet-Yaak Recovery Zone, with 23 bears in the Cabinet and 21 bears in the Yaak portion of the ecosystem.¹⁷ This means the Yaak portion of the ecosystem may have as few as 21 bears, with perhaps approximately half of those bears being female bears. Thus, **any** impact or disturbance of bears in the Yaak ecosystem could have catastrophic consequences for attempts to maintain this tiny population.

The grizzly bear recovery plan states "[b]ecause of low estimated population and uncertainty in estimates, the current human caused mortality goal to facilitate recovery of the population is zero."¹⁸ During 2016-2021 the CYE bear population only met two of the four demographic recovery target from the grizzly bear recovery plan. The grizzly bear recovery plan has a 6-year average target of 6 females with cubs. During 2016-2021 there was only an average of 3.3 females with cubs, only a little over half of the recovery target. Even more alarming in an

¹⁴ CV 22-114-M-DWM, 2023 WL 5310633 (D. Mont. Aug. 17, 2023).

¹⁵ See *Alliance for the Wild Rockies v. Probert*, 412 F. Supp. 3d 1188, 1208 (D. Mont. 2019)(finding that the plaintiffs persuasively showed that data over the last eight years demonstrated that ineffective closures have contributed to increases in linear road miles and potentially impacted grizzly bears in ways not previously considered.); *Ctr. for Biological Diversity v. U.S. Forest Serv.*, --- F. Supp. 3d--- 2023 WL 3052299 (D. Mont. Apr. 24, 2023) (finding that there is an ongoing chronic problem of ineffective closures and unauthorized motorized access is a permanent issue in Kootenai National Forest.)

¹⁶ Bachman-YVFC Insufficient Grizzly Barrier Report: CYE BMUs 14-15 (June 2023) (attached as Exhibit A to these objections)

¹⁷ See "Selkirk/Cabinet-Yaak (SCY) Subcommittee of the Interagency Grizzly Bear Committee (IGBC)," May 9, 2019 meeting notes, available at http://igbconline.org/wp-content/uploads/2019/06/20190509_SCYMeetingMinutes.pdf (last viewed Mar. 28, 2023).

¹⁸ Servheen, Christopher, U.S. Fish & Wildlife Serv., Grizzly bear recovery plan (Sept. 10, 1993) at 84.

October 2022 presentation by U.S. Fish & Wildlife Service (“FWS”) they noted that there had been 3 additional deaths, 2 being non-natural, of female grizzlies in the CYE.

Forest Service completely ignored the population’s current condition and thus, failed to take a hard look at this precarious baseline status of the Cabinet-Yaak grizzly bear populations. Biologists believe that the non-natural death of just one or two females a year in that ecosystem could imperil the population. As the FWS has acknowledged, “populations with fewer than 50 to 100 adults are at high risk of extinction.”¹⁹ “Proctor et al. (2004) indicated the likelihood of extinction for a grizzly bear population of 50 individuals with vital rates similar to the CYE population was 85 percent.”²⁰ With such dire consequences it is clear the agency did not even look at, nonetheless incorporate any baseline data in its impacts and jeopardy analysis.

The Forest Service also failed to rationally examine the relative lack of secure habitat in the Cabinet-Yaak Ecosystem compared to other recovery zones with substantially larger and more stable grizzly bear populations (such as the Northern Continental Divide Ecosystem), as well as the Yaak region’s limited areas for displaced bears and associated risks of elevated human-caused mortality.²¹ Most importantly, the EA and the DBE do not address the fact that the traditional distinction between high-use versus low-use as a security standard no longer operates as best available science, despite FWS referencing the report in the October 7, 2020 Biological Opinion covering the KNF’s 2015 Land Management Plan (“KNF 2015 LMP”).²² This high-use threshold is the agency’s major limitation and basis for carrying capacity.

NEPA requires Forest Service to address the scientific analysis that calls into question the agency’s assumptions and conclusions, as noted above.²³ Additionally, failure to provide accurate information of high regarded crucial baseline data is a direct violation of NEPA.

¹⁹ U.S. Fish & Wildlife Serv., Biological Opinion on the Effects to Grizzly Bears, Bull Trout, and Bull Trout Critical Habitat from the Implementation of Proposed Actions Associated with Plan of Operation for the Revett RC Resources Inc. Rock Creek Copper/Silver Mine, at A-16 (2006) (“2006 Rock Creek Mine BiOp”) (citation omitted); see also Proctor, et al., Population Fragmentation and Inter-Ecosystem Movements of Grizzly Bears in Western Canada and the Northern United States, at 31, Wildlife Monographs 180:1–46 (2012) (“[P]opulations fewer than 50-100 adults are at higher risk of extirpation”) (citations omitted), attached as Ex. 1.

²⁰ 2006 Rock Creek Mine BiOp attached as Ex. 2 at A-14.

²¹ Mattson 2019 at 42; see also Mattson 2022 at 23-24, Section E.2

²² 28 August and reissued 7 October 2020 KNF LMP BiOp at 44 and 93.

²³ See *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1168 (9th Cir. 2003) (finding Forest Service’s failure to disclose and respond to evidence and opinions challenging EIS’s scientific assumptions violated NEPA); *Seattle Audubon Soc’y v. Moseley*, 798 F. Supp. 1473, 1482 (W.D. Wash. 1992) (“The agency’s explanation is insufficient under NEPA – not because experts disagree, but because the FEIS lacks reasoned discussion of major scientific objections.”), *aff’d sub nom. Seattle Audubon Soc’y v. Espy*, 998 F.2d 699, 704 (9th Cir. 1993) (“[i]t would not further NEPA’s aims for environmental protection to allow the Forest Service to ignore reputable scientific criticisms that have surfaced”); *High Country Conservation Advocates v. Forest Service*, 52 F. Supp. 3d 1174, 1198 (D. Colo. 2014) (finding Forest Service violated NEPA by failing to mention or respond to expert report on climate impacts).

Therefore, Forest Service must take a hard look at the baseline conditions for grizzlies and engage in formal consultation with FWS to assess the likelihood of jeopardy under ESA.

B. The EA and CP Fails to Consider Best Available Science

The EA and Draft CP has proposed visitor use thresholds within the Cabinet-Yaak and Selkirk Mountains grizzly bear recovery zones. The threshold is based on the antiquated and scientifically indefensible non-motorized “high-use” versus “low use” trail, as per KNF’s 2015 LMP, non-motorized use influences the calculation of core grizzly habitat. A “high use” trail has been identified as an average of 20 parties per week.

The Interagency Grizzly Bear Study Team (IGBST) established this metric in the 1980s as part of early efforts to assess the cumulative effects of humans on grizzly bears. One of the team members of the IGBST (currently known as IGBC) was Dr. David Mattson. Dr. Mattson has since disavowed this non-motorized high use metric of 20 parties a week as scientifically indefensible and inapplicable to such a small and sensitive population. By contrast, Mattson provides a comprehensive review and synthesis of current scientific information regarding the effects of non-motorized recreationists on grizzly bears.²⁴ This synthesis shows that the traditional distinction between high and low-use trails does not correlate with levels of impact on bears, and that some of greatest harm can occur when there are comparatively few hikers and other non-motorized recreationists using a trail.

Best available science finds that intersection of some of the most productive, heavily used, and preferred grizzly bear habitats in the Yaak region by the PNT guarantees that encounters between grizzly bears and trail users will be greater than expected by chance, along with related short-term and long-term impacts on bears, including flight, displacement, and avoidance.²⁵ These bear behaviors typically result in physiological stress and habitat alienation.²⁶ In the Yaak region, displaced bears would have few areas to go that are not closer to people and associated risks of elevated human-caused mortality.²⁷

Best available science concludes that “whether judged in absolute or comparative terms, foreseeable pedestrian activity on the proposed PNT is guaranteed to adversely affect the small highly vulnerable population of grizzly bears in the Yaak region.”²⁸ Particularly, “when spatial overlap with the highest regional densities of grizzly bears alone guarantees a high likelihood of encounter between trail users and bears with both short- and long-term impacts.”²⁹ Grizzly bear

²⁴ Mattson (2019), Effects of Pedestrians on Grizzly Bears: An Evaluation of the Effects of Hikers, Hunters, Photographers, Campers and Watchers

²⁵ Mattson (2019), at 39

²⁶ Mattson (2019) at 17-33.

²⁷ Mattson (2019) at 42; Mattson (2020), at 23-24.

²⁸ Declaration D. Mattson (2020) attached as Ex. 3, at 12.

²⁹ *Id.*

expert David Mattson recognized that “paradoxically, impacts will likely be exacerbated by low grizzly bear densities and pedestrian traffic light enough to preclude predictability for bears[,]”³⁰ which will likely lead to grizzly bears “being startled or surprised by trail users, or by simply responding as if encounters posed a threat.”³¹

Best available science also finds that grizzly bears will likely avoid the PNT as a natural consequence of strong reactions to encounters with trail users with resulting alienation from otherwise important foraging habitats and displacement into lower-elevation areas that are likely to be less secure from human-caused mortality.³² This in turn will amplify hazards for people and accentuate impacts for bears to the extent that off-trail pedestrian activity increases or spur trails are constructed through high-elevation open habitats.

Service must consider the report by Mattson covering the effects of “pedestrians” (i.e., people of foot) on grizzly bears includes a section that specifically addresses prospective impacts of the PNT on grizzly bears in the Yaak region.³³ Importantly, USFWS has already recognized the validity of this report by referencing in its 2020 Biological Opinion covering the Kootenai National Forest’s 2015 Land Management Plan (LMP).³⁴ Therefore, it is imperative that Service and FWS consider this best available science in establishing monitoring thresholds and resulting triggers for trail use through grizzly bear recovery zones.

The Service should consider that for any “critical habitat” for a federally listed species should be evaluated for removal from the trail’s route, unless there is site-specific data showing that high trail use is compatible with the protection and recovery of the species. The Service has already failed this sensitive population in securing core habitat and meeting its KNF 2015 LMP requirements. The Service is required to take an evidence-based hard look at all of these existing and prospective impacts as it relates to of human impacts arising on trails used by comparatively few hikers. Alternative trigger points and associated management actions related to use thresholds should incorporate and consider this emerging science, in lieu of the outdated and scientifically flawed approach evident to date.

Suggested Remedy: The Service should prepare subsequent NEPA document (preferably a draft EIS) that takes the requisite hard look of impacts to grizzly bear populations, including disclosure of all baseline conditions routed in best available science.

³⁰ *Id.*

³¹ *Id.* at 13.

³² Mattson (2019), Section 6.a

³³ Mattson (2019), at 36-42.

³⁴ USFWS (2020) Biological Opinion on the Effects of the Kootenai National Forest Land Management Plan on the Grizzly Bear, p. 44 and p. 93.

C. The EA Fails to Take the Required Hard Look at Impacts to Grizzly Bears

1. The EA Fails to Adequately Analyze Direct and Indirect Impacts to Grizzly Bears

The EA is replete with contradictions as to the direct and indirect impacts to grizzly bears. The EA makes general statements without any analysis or explanation as to how it reached its conclusion. The EA concludes:

It is not expected to result in disturbance of biological functions, injury, or mortality of individuals of any federally-listed species, and therefore would not jeopardize any federally-listed species. It is also not expected to result in alteration, degradation, or elimination of any critical habitat, and therefore would not result in destruction or adverse modification of critical habitats of any federally-listed species.³⁵

However, the DBE acknowledges real time, ongoing effects of trail usage identifying “behavioral responses such as increased flight and vigilance; changes in spatial or temporal habitat use; declines in abundance, occupancy, or density; physiological stress; reduced reproductive success; and altered species richness and community composition.”³⁶ It goes on to tout nevertheless, that the “proposed comprehensive plan may prevent or reduce the potential for effect of ongoing trail use on wildlife, thereby benefiting species.”³⁷

While this assertion sounds nice on paper, it is undermined by its EA’s conclusion that the “Plan would not authorize site-specific prohibitions or actions and therefore would result in no effect to any special-status species.”³⁸ This undercuts what management authority and actual implementation of the carrying capacity thresholds the comprehensive plan purports to hold, blatantly acknowledging “thresholds and monitoring responsibility would be **determined** by the local managing unit[.]”³⁹ (emphasis added).

Therefore, any safeguards the comprehensive management purport to mitigate potential impacts are merely guidelines.

Mitigation measures must be “developed to a reasonable degree” and neither a “perfunctory description” nor a “mere listing” of measures, in the absence of “**supporting analytical data**,” is sufficient to sustain a finding of no significant impact.⁴⁰ The public is entitled to be informed as

³⁵ EA at 39.

³⁶ DBE at 4.

³⁷ *Id.* at 7

³⁸ EA at 60.

³⁹ DBE at 6.

⁴⁰ *Nat'l Parks and Conservation Ass'n v. Babbitt*, 241 F.3d 722, 734 (9th Cir.2001)(emphasis added).

to what impacts the proposed action will likely cause, particularly when purported mitigating safeguards are essentially unenforceable.

Similar to its direct impact analysis, EA and DBE make contradicting assertions as to likely indirect impacts. Under NEPA regulations, indirect effects are those that are:

caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.⁴¹

NEPA requires “a reasonably close causal relationship between a change in the physical environment and the effect at issue.”⁴²

The EA concludes “[p]romotion of responsible use of the trail is not expected to lead to an indirect effect of additional use.”⁴³ This, however, again is contradicted by the conclusion that “[u]se is likely to increase as the attractiveness of this relatively little-used, long-distance trail becomes better known.”⁴⁴ Even though increased use may not be a direct effect of adopting the comprehensive management plan, NEPA clearly requires analysis of “*all* foreseeable direct *and indirect* impacts.”⁴⁵

It is reasonably foreseeable that as the comprehensive plan is adopted and the trail continues to be promoted as a National Scenic Trail increased use of the trail will likely occur. The EA addresses these impacts as it relates to humans stating that “[c]ommunities may experience change related to recreation use and patterns different [and] [c]ommunities with smaller populations may be more sensitive to changes in trail use and visitation.”⁴⁶ Similar to their human foes, smaller bear populations such as those in the CYE undoubtedly will be more sensitive to these alleged changes in recreational use patterns. The agency, however, wholly glosses over this potential.

Moreover, as noted above, the carrying capacity management guidance has no teeth, yet the adoption of the comprehensive plan will reasonably lead to the well-documented negative impacts of increased use on sensitive grizzly bear populations. It is unreasonable for the agency

⁴¹ 40 C.F.R. § 1508.8(b).

⁴² *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774, 103 S.Ct. 1556, 75 L.Ed.2d 534 (1983).

⁴³ DBE at 7.

⁴⁴ EA at 8.

⁴⁵ *Idaho Sporting Congress, Inc. v. Rittenhouse*, 305 F.3d 957, 973 (9th Cir.2002)

⁴⁶ EA at 70.

to make conclusive statements on the lack of impacts whilst relying on mitigating mechanisms that are uncertain to be employed. The agency must fully analyze and disclose to the public the actual indirect impacts of adopting this plan, particularly on the CYE grizzly bear population. Finally, Draft Wildlife Biological Evaluation presents an alternative justification for its lack of indirect effects, concluding that the “proposed action does not include ground disturbing activities and [therefore,] would not result in indirect effect to any wildlife species or habitat identified as an issued.”⁴⁷ Again, this statement is neither supported by hard data nor is it rational given the admitted incidental increase in use with the trail’s growing popularity. This is also disputed by the EA discussion of numerous activities such as installation of shelters and milepost, as well possible creation of water stations and inevitable spur trails.⁴⁸ The lack of “ground disturbing activities” do not absolve the agency of performing an indirect effects analysis on endangered species and their critical habitat. This determination is arbitrary, unreasonable and unsubstantiated given its position on increased use and associated trail maintenance activities and therefore, the agency should provide actual data-supported analysis on their conclusion that no indirect impacts will occur from adopting the comprehensive plan.

2. The EA Fails to Adequately Analyze Cumulative Impacts to Grizzly Bears

CEQ guidance states that a broader geographic scope of analysis is required for cumulative effects as compared to project-specific analysis.⁴⁹ “Cumulative effects analysis should be conducted on the scale of human communities, landscapes, or airsheds.”⁵⁰ Further, the appropriate scope for the analysis should be the largest of the geographic areas occupied by resources that are in the project’s “impact zone.”⁵¹

The DBE here inappropriately limits its cumulative impacts analysis for grizzlies simply finding that there would be no cumulative effects because there would be no direct or indirect effects. The DBE essentially relies on the 20-party threshold limit as a means to circumvent an meaningful review of grizzly bears in the Cabinet-Yaak ecosystem. “In a cumulative impact analysis, an agency must take a ‘hard look’ at all actions that may combine with the action under consideration to affect the environment.”⁵² This analysis should include “some quantified or detailed information that results in a useful analysis,” but may “characterize the cumulative

⁴⁷ DBE at 11

⁴⁸ EA at 4; DCMP at 70, see footnote 46; DCMP at 94.

⁴⁹ CEQ Guidance, Considering Cumulative Effects Under the National Environmental Policy Act, at 12 (1997), available at https://www.energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQConsidCumulEffects.pdf (last viewed Nov. 13, 2020).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Great Basin Res. Watch v. Bureau of Land Mgmt.*, 844 F.3d 1095, 1104 (9th Cir. 2016) (citing *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 605 (9th Cir. 2010))

effects of past actions in the aggregate without enumerating every past project that has affected the area.”⁵³

The DBE writes off cumulative impacts analysis by tiering to existing land management plans.⁵⁴ However, as recently noted in *Ctr. for Biological Diversity v. U.S. Forest Serv.*,⁵⁵ of these LMP’s such as in the KNF, have not been implemented, nor do they analyze the impacts of increased use of the PNT in grizzly bear recovery zones. In addition, to having less protected secure habitat because of failed compliance, the grizzly bears in the CYE are exposed to a variety of other exacerbating projects. For example, Black Ram timber project and Montanore Mine and Rock Creek Mine lie within the Cabinet-Yaak Recovery Zone and are likely to have cumulative impacts on grizzly bears in the area. Yet the EA and the DBE ignore the impacts of these projects.

The Forest Service’s approach of ignoring such impacts violates applicable NEPA regulations, which require the Forest Service to analyze the effects of all past, present, and reasonably foreseeable future actions on the affected grizzly bear population.⁵⁶ It also thwarts one of the “twin aims” of NEPA—to “ensure[] that the *agency* will inform the *public* that it has indeed considered environmental concerns in its decision-making process.”⁵⁷

At a minimum, NEPA requires the Forest Service to take a hard look at the impacts of the proposed Rock Creek and Montanore Mines, Black Ram timber project and the newly-proposed Knotty Pine logging project⁵⁸ as part of its cumulative effects analysis, as these all constitute “reasonably foreseeable” future projects that will significantly impact grizzly bears in the Cabinet-Yaak ecosystem.⁵⁹

Additionally, the Service must analyze the cumulative impacts as it relates to climate change and its impending effects on grizzly bears. Today, there is no greater call to caution than climate change. The Service describes the extent of the issue stating

⁵³ *Cnt. For Envtl. L. and Pol’y v. Bureau of Reclamation*, 655 F.3d 1000, 1007 (9th Cir. 2011).

⁵⁴ “National Forest Management Plans (forest plans) provide standards and guidelines for wildlife. Some plans (Idaho Panhandle National Forests and Kootenai National Forest) have retained decisions for grizzly bear (Access Amendment) and Canada lynx (Northern Rockies Lynx Management Direction), and in some cases reasonable and prudent measures based on forest plans Endangered Species Act Section 7 consultation.” DBE at 8.

⁵⁵ CV 22-114-M-DWM, 2023 WL 5310633 (D. Mont. Aug. 17, 2023).

⁵⁶ See 40 C.F.R. § 1502.7 (2019); see also *WildEarth Guardians v. Montana Snowmobile Ass’n*, 790 F.3d 920, 926-28 (9th Cir. 2015) (failure to provide public information about where impacts to wildlife would occur violated NEPA).

⁵⁷ *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983) (emphasis added).

⁵⁸ See Kootenai Nat’l Forest, Knotty Pine, <https://www.fs.usda.gov/project/?project=57657>

⁵⁹ 40 C.F.R. § 1508.27 (2019); see also, e.g., *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep’t of Interior*, 608 F.3d 592, 603 (9th Cir. 2010) (holding BLM violated NEPA by failing to take hard look at impacts of proposed mining operation in cumulative effects analysis).

“[s]cientific measurements spanning several decades demonstrate that changes in climate are occurring. In particular, warming of the climate system is unequivocal, and many of the observed changes in the last 60 years are unprecedented over decades to millennia. The current rate of climate change may be as fast as any extended warming period over the past 65 million years and is projected to accelerate in the next 30 to 80 years. Thus, rapid climate change is adding to other sources of extinction pressures, such as land use and human-cause mortality, which will likely place extinction rates in this era among just a handful of the severe biodiversity crises observed in Earth’s geological record.”⁶⁰

In 2016, the Council on Environmental Quality issued guidance for federal agencies in the NEPA review process, instructing that “[c]limate change is a fundamental environmental issue, and its effects fall squarely within NEPA’s purview.”⁶¹ It also acknowledges that “[c]limate change is a particularly complex challenge given its global nature and the inherent interrelationships among its sources, causation, mechanisms of action, the inherent interrelationships among its sources, causation, mechanisms of action, and impacts.”⁶²

Similarly, courts have become more critical of agencies’ rationale regarding the significance of a proposed action when the action will have impacts on global climate change.⁶³ Although NEPA’s implementing regulations somewhat cabin broader environmental analyses by stating that “[i]mpacts shall be discussed in proportion to their significance,”⁶⁴ a “hard look” under NEPA requires “a reasonably thorough discussion of the significant aspects of the probable environmental consequences[.]”⁶⁵ “Thus, it follows that if there is little chance that a Project will have significant impact on climate change, little analysis by the agency is required to meet NEPA’s ‘hard look’ standard.”⁶⁶

“With all in agreement that climate change as a result of carbon emissions is an increasingly serious national and global problem...the USFS has the responsibility to give the public an accurate picture of what impacts a project may have, no matter how ‘infinitesimal’ they believe they may be.”⁶⁷

⁶⁰ 82 Fed. Reg. 30,541.

⁶¹ Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and Effects of Climate Change in National Environmental Policy Act Reviews

⁶² *Id.* at 3.

⁶³ See *350 Mont. v. Haaland*, 50 F.4th 1254 (9th Cir. 2022).

⁶⁴ 40 C.F.R. § 1502.2(b)

⁶⁵ *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1194 (9th Cir. 2008) (internal quotation marks omitted).

⁶⁶ *Ctr. for Biological Diversity v. U.S. Forest Serv.*, No. CV 22-114-M-DWM, 2023 WL 5310633, at *24 (D. Mont. Aug. 17, 2023)

⁶⁷ *Id.* at *32.

Effects related to climate change may result in a number of changes to grizzly bear habitat, include a “reduction in snowpack levels, which may shorten the denning season, shifts in denning times, shifts in the abundance and distribution of some natural food sources, and changes in fire regimes.”⁶⁸ Climate change may also impact the [t]iming and frequency of human-grizzly bear interactions and conflicts[.]”⁶⁹ Human-bear interaction is the greatest threat to grizzly bear mortality. Therefore, Service has not conducted meaningful analysis of the cumulative impacts to the CYE grizzly bear population as it relates to climate change and fails to meet its hard look obligations.

Suggested Remedy: The Service should prepare subsequent NEPA document (preferably a draft EIS) that quantifies and discloses direct and cumulative impacts on grizzly bears, using the best available science.

3. The EA Fails to Consider a Reasonable Range of Alternatives

CEQ regulations require agencies to “use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.”⁷⁰ NEPA requires that federal agencies consider alternatives to recommended actions whenever those actions “involve[] unresolved conflicts concerning alternative uses of available resources.”⁷¹ “NEPA’s requirement that alternatives be studied, developed, and described both guides the substance of the environmental decision-making and provides evidence that the mandated decision-making process has actually taken place.”⁷²

In taking the “hard look” at impacts that NEPA requires, an EA must “study, develop, and describe” reasonable alternatives to the proposed action.⁷³ “A properly-drafted EA must include a discussion of appropriate alternatives to the proposed project.”⁷⁴ This alternatives analysis “is

⁶⁸ U.S. Fish and Wildlife Service. 2021. Species status assessment for the Grizzly bear (*Ursus arctos horribilis*) in the Lower-48 States: A biological report. U.S. Fish and Wildlife Service, Grizzly Bear Recovery Office at 196.

⁶⁹ *Id.* at 199.

⁷⁰ 40 C.F.R. § 1500.1(e)

⁷¹ 42 U.S.C. § 4332(2)(E)

⁷² *Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228 (9th Cir. 1988) (citation omitted).

⁷³ 42 U.S.C. § 4332(2)(C) & (E); 40 C.F.R. § 1508.9(b) (2019) (an EA “[s]hall include brief discussions ... of alternatives”). The Tenth Circuit explains that this mandate extends to EAs as well as EISs.

⁷⁴ *Davis v. Mineta*, 302 F.3d 1104, 1120 (10th Cir. 2002) (granting injunction where EA failed to consider reasonable alternatives).

at the heart of the NEPA process, and is ‘operative even if the agency finds no significant environmental impact.’”⁷⁵

Reasonable alternatives must be analyzed for an EA even where a FONSI is issued because a “nonsignificant impact does not equal no impact. Thus, if an even less harmful alternative is feasible, it ought to be considered.”⁷⁶ When an agency considers reasonable alternatives, it “ensures that it has considered all possible approaches to, and potential environmental impacts of, a particular project; as a result, NEPA ensures that the most intelligent, optimally beneficial decision will ultimately be made.”⁷⁷

In determining whether an alternative is “reasonable,” and thus requires detailed analysis, courts look to two guideposts: “First, when considering agency actions taken pursuant to a statute, an alternative is reasonable only if it falls within the agency’s statutory mandate. Second, reasonableness is judged with reference to an agency’s objectives for a particular project.”⁷⁸

Any alternative that is unreasonably excluded will invalidate the NEPA analysis. “The existence of a viable but unexamined alternative renders an alternatives analysis, and the EA which relies upon it, inadequate.”⁷⁹ The agency’s obligation to consider reasonable alternatives applies to citizen-proposed alternatives.⁸⁰

Courts hold that an alternative may not be disregarded merely because it does not offer a complete solution to the problem.⁸¹ Even if additional alternatives would not fully achieve the project’s purpose and need, NEPA “does not permit the agency to eliminate from discussion or consideration a whole range of alternatives, merely because they would achieve only some of the purposes of a multipurpose project.”⁸² If a different action alternative “would only partly meet

⁷⁵ *Diné Citizens Against Ruining Our Env’t v. Klein*, 747 F. Supp. 2d 1234, 1254 (D. Colo. 2010) (quoting *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1277 (10th Cir. 2004)). See also *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1050 (9th Cir. 2013) (in preparing EA, “an agency must still give full and meaningful consideration to all reasonable alternatives” (emphasis added) (internal quotation and citation omitted)); 40 C.F.R. § 1502.14 (2019) (describing alternatives analysis as the “heart of the environmental impact statement”).

⁷⁶ *Ayers v. Espy*, 873 F. Supp. 455, 473 (D. Colo. 1994)

⁷⁷ *Wilderness Soc’y v. Wisely*, 524 F. Supp. 2d 1285, 1309 (D. Colo. 2007).

⁷⁸ *Diné Citizens Against Ruining Our Env’t*, 747 F. Supp. 2d at 1255 (quoting *New Mexico ex rel. Richardson*, 565 F.3d at 709). See also *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1520 (9th Cir. 1992) (“nature and scope of proposed action” determines the range of reasonable alternatives agency must consider).

⁷⁹ *Id.* at 1256.

⁸⁰ See *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1217-19 (9th Cir. 2008) (finding EA deficient, in part, for failing to evaluate a specific proposal submitted by petitioner); *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1171 (10th Cir. 1999) (agency’s “[h]ard look” analysis should utilize “public comment and the best available scientific information”) (emphasis added).

⁸¹ *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972).

⁸² *Town of Matthews v. U.S. Dep’t. of Transp.*, 527 F. Supp. 1055 (W.D. N.C. 1981).

the goals of the project, this may allow the decision maker to conclude that meeting part of the goal with less environmental impact may be worth the tradeoff with a preferred alternative that has greater environmental impact.”⁸³The courts also require that an agency adequately and explicitly explain in the EA any decision to eliminate an alternative from further study.⁸⁴

The EA only considers two actions: (1) Alternative-1 Proposed Action and (2) No Action.

Service must include analysis of alternative proposed routes, other than No Action. Despite agency’s contention it is congressionally bound by this route, NEPA still requires that they include alternatives to the proposed action not within their jurisdiction of the agency.⁸⁵ An agency cannot dismiss an alternative simply because it would require an act of Congress to implement it.

Courts are clear that even if these proposed re-routes does not fully achieve the stated purpose and need, NEPA “does not permit the agency to eliminate from discussion or consideration a whole range of alternatives, merely because they would achieve only some of the purposes of a multipurpose project.”⁸⁶ As argued previously in submitted comments the agency has illegally narrowed the purpose and need to accommodate its foreordained proposed action. On numerous occasions YVFC requested that the agency sincerely consider a minor reroute of the portion of the PNT through the CYE’s core grizzly bear habitat, or in the alternative, lacking that, a moratorium on thru-hiking in the Yaak region until such point as the grizzly population in this ecosystem is recovered.

In scoping, YVFC proposed an alternative route that sends the PNT thru-hikers south of the Yaak Valley, away from grizzly core recovery zones, and along a similarly beautiful, wild, and remote in character. The proposed Southern Route, mapped below, goes over summits with sweeping views and lookout towers, through drooping cedar and hemlock forests, and through the larger trail towns of Libby and Troy. The Southern Route could bring economic benefits to the communities of Libby and Troy, as well as reduce border patrol interactions.

The southern route is closer to search and rescue operations and is accessible for a substantially longer hiking season. The PNT, as designated, requires hikers to take a 14-mile detour on the Yaak highway to meet even the most modest re-provisioning needs. The Southern Route passes through two larger cities providing hikers with resupply options. Under Service’s Optimal Location Review, the South Route is supported by numerous principles, most importantly

⁸³ *North Buckhead Civic Ass’n v. Skinner*, 903 F.2d 1533, 1542 (11th Cir. 1990).

⁸⁴ See *Wilderness Soc’y*, 524 F. Supp. 2d at 1309 (holding EA for agency decision to offer oil and gas leases violated NEPA because it failed to discuss the reasons for eliminating a “no surface occupancy” alternative); *Ayers*, 873 F. Supp. at 468, 473.

⁸⁵ *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999) (finding “NEPA regulations state that agencies shall ‘include reasonable alternatives not within the jurisdiction of the lead agency.’ 40 C.F.R. § 1502.14(c).”)

⁸⁶ *Town of Matthews v. U.S. Dep’t. of Transp.*, 527 F. Supp. 1055 (W.D. N.C. 1981).

allowing for the trail to sustain the types and amounts of expected use and can be maintained to avoid unacceptable environmental costs. The Southern Route is a non-substantial relocation that would address public safety and grizzly population concerns.

NEPA requires that the agency consider each of the proposed reasonable alternatives or explain why it would not do so. The Forest Service did neither, violating the law.

Suggested Remedy: The Service should prepare subsequent NEPA document (preferably a draft EIS) that quantifies and discloses the impacts of each alternative proposed route whether or not it requires Congressional action.

II. THE AGENCY MUST PREPARE AN EIS

Under NEPA the agency should prepare EIS as the proposed action raises substantial questions about whether it significantly affects the quality of the human environment. “Significance” under NEPA requires consideration of the action’s context and intensity.

The “particular[] identification of the geographic area within which [environmental impacts] may occur[] is a task assigned to the special competency of the appropriate agencies.” *Kleppe v. Sierra Club*, 427 U.S. 390, 413-14 (1976).

An EIS is required if substantial questions are raised on whether a project likely to have significant effects.

In considering the potentially affected environment, agencies should consider, as appropriate to the specific action, the affected area (national, regional, or local) and its resources, **such as listed species and designated critical habitat under the Endangered Species Act.** Significance varies with the setting of the proposed action. For instance, in the case of a **site-specific action,** **significance would usually depend only upon the effects in the local area.**⁸⁷

To determine if an EIS is necessary “agencies shall analyze the potentially affected environment and **degree** of the effects of the action.”⁸⁸ To the degree of effects, agency should consider:

- (i) Both short- and long-term effects.
- (ii) Both beneficial and adverse effects.
- (iii) Effects on public health and safety.

⁸⁷ 40 C.F.R. § 1501.3 (emphasis added)

⁸⁸ *Id.*

- (iv) Effects that would violate Federal, State, Tribal, or local law protecting the environment.⁸⁹

The Ninth Circuit has held:

that an EIS must be prepared if ‘substantial questions are raised as to whether a project ... may cause significant degradation to some human environmental factor.’ To trigger this requirement a ‘plaintiff need not show that significant effects will in fact occur,’ [but instead] raising ‘substantial questions whether a project may have a significant effect’ is sufficient.⁹⁰

Here, the PNT runs approximately 1,200 miles from the Continental Divide to the Pacific Ocean. The trail goes through seven national forests, three national parks, a national historic reserve, six wilderness areas, as well as state forest and parks. Over half of the 1156-mile route of PNT will pass through four of the six U.S. Grizzly Bear Recovery Zones. There are substantial questions as to whether increased use of this often remote and expansive trail system traversing across numerous jurisdictions may result in long term and potentially irreparable adverse impacts to CYE grizzly bears’ critical habitat and unstable population.

Suggested Remedy: The Service should prepare an environmental impact statement to evaluate and disclose the potentially significant impacts of the PNT and the implementation of the CP.

III. SERVICE MUST ENGAGE IN FORMAL SECTION 7 CONSULTATION

Enacted in 1973, the Endangered Species Act (“ESA”) is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”⁹¹ The ESA is meant to provide a means to conserve the ecosystems upon which endangered and threatened species depend and to provide a program to conserve endangered and listed species.⁹² To “conserve” means “to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.”⁹³

⁸⁹ *Id.* § 1501.3(b)(2).

⁹⁰ *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149-50 (9th Cir. 1998) (citations omitted) (emphasis original). See also *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 864- 65 (9th Cir. 2005) (“To trigger this [EIS] requirement a plaintiff need not show that significant effects will in fact occur, but raising substantial questions whether a project may have a significant effect is sufficient.” (internal quotations, citations, and alterations omitted)).

⁹¹ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

⁹² 16 U.S.C. § 1531(b).

⁹³ *Id.* § 1532(3).

To receive the full protections of the ESA, a species must first be listed by the Secretary of Interior as “endangered” or “threatened” pursuant to ESA Section 4.⁹⁴ A species is “endangered” when it is “in danger of extinction throughout all or a significant portion of its range.”⁹⁵ A species is “threatened” when it is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”⁹⁶

Section 7 of the ESA requires each federal agency, in consultation with FWS, to ensure that any proposed action is not likely to jeopardize the continued existence of a threatened or endangered species, or result in the destruction or adverse modification of its critical habitat.⁹⁷ To facilitate compliance with Section 7, the agency must first inquire with FWS to determine whether any listed or proposed species may be present in the area of the proposed action.⁹⁸ When a listed or proposed species may be present in the action area, the agency must prepare a “biological assessment” to determine whether the species or their critical habitat may be affected by the action.⁹⁹ If the agency determines that the proposed action may affect any listed species or critical habitat, it must engage in formal consultation with FWS.¹⁰⁰

A. At a Minimum the Agency Must Prepare a Biological Assessment

The agency has failed to meet its statutory obligations under ESA section 7 (c)(1). The FWS regulations distinguish between a Biological Assessment and Biological Evaluation, requiring only a Biological Assessment when there is a “major construction activity.” This however is an improper interpretation of the statute.

The Ninth Circuit has made this obligation clear.¹⁰¹ “Simply because the regulation requires a BA for major construction activities does not mean that it excuses the Forest Service from preparing a BA for projects that are not major construction activities.”¹⁰² “The text, structure, and purpose of ESA section 7(c)(1) unambiguously require an agency to obtain a species list and prepare a BA for any action where a listed species may be present.”¹⁰³

⁹⁴ *Id.* § 1533

⁹⁵ *Id.* § 1532(6).

⁹⁶ *Id.* § 1532(20).

⁹⁷ *Id.* § 1536(a)(2).

⁹⁸ *Id.* § 1536(c)(1).

⁹⁹ *Id.*

¹⁰⁰ 50 C.F.R. § 402.14

¹⁰¹ *Swan View Coalition v. Weber*, 783 F. App'x 675 (9th Cir. 2019)

¹⁰² *Native Ecosystems Council v. Marten*, 612 F. Supp. 3d 1146, 1160–61 (D. Mont. 2020)

¹⁰³ *Friends of Clearwater v. Petrick*, 588 F. Supp. 3d 1071, 1093 (D. Idaho 2022)

The DBE is no sufficient to inform the public as to whether the listed species will be adversely impacted. The DBE provides absolutely zero explanation as to the “No Effect” determination. The agency should complete a site-specific BA and receive concurrence from FWS on the project’s effects on grizzly bears. “This species-specific inquiry is separate from the agency’s analysis under NEPA—although there is considerable overlap.”¹⁰⁴ Courts have found that when there is acknowledgment of effects of a particular project on a species, the agency must conduct a site-specific analysis to determine the effects on that specific species of concern.¹⁰⁵ Here, the DBE acknowledges that the CYE bear population is a limiting factor or constraint related to carrying capacity and that could result in potential disturbance to wildlife behavior due to use levels. This type of disclaimer is effectively a concession that further site-specific analysis is required to determine the effects of PNT on CYE bear population.

B. Agency Should Prepare a Biological Opinion

Formal consultation results in the issuance of a “biological opinion,” (hereafter BiOP) where FWS concludes whether the proposed action is likely to jeopardize a listed species or result in the destruction or adverse modification of critical habitat.¹⁰⁶ If FWS concludes in the biological opinion that the proposed action is likely to jeopardize a listed species, FWS may recommend reasonable alternatives to avoid the likelihood of jeopardy so that the agency action may proceed.¹⁰⁷

During consultation, FWS **must** review all relevant information, **evaluate the current status of the species** or critical habitat, and **evaluate the effects and cumulative effects of the proposed action on the listed species and their critical habitat**.¹⁰⁸ For the purposes of the ESA, “[e]ffects of the action” are all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action. A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur.”¹⁰⁹ Moreover, “(e)ffects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action.”¹¹⁰ Cumulative effects “are those effects of future State or private activities, not

¹⁰⁴ *Native Ecosystems Council v. Marten*, 612 F. Supp. 3d 1146, 1158 (D. Mont. 2020) (citing *Sierra Club v. U.S. Army Corps of Eng'rs*, 295 F.3d 1209, 1219 (11th Cir. 2002))

¹⁰⁵ *Native Ecosystems Council v. Marten*, 612 F. Supp. 3d 1146, 1161 (D. Mont. 2020)

¹⁰⁶ *Id.* § 402.14(h).

¹⁰⁷ 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(2).

¹⁰⁸ 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)(1)–(3).

¹⁰⁹ 50 C.F.R. § 402.02(d).

¹¹⁰ *Id.*

involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.”¹¹¹ Throughout its analysis, the consulting agency must utilize the “best scientific and commercial data available.”¹¹² The agency has the duty to comply with Section 7(a)(2) after the issuance of a BiOp. After the completion of consultation, the action agency must determine whether and in what manner to proceed with the action in light of its Section 7 obligations and the BiOp.¹¹³

Suggested Remedy: The Service should prepare an environmental impact statement to evaluate and disclose the potentially significant impacts of the PNT and engage in formal consultation with FWS to conduct the requisite analysis under ESA.

CONCLUSION

Yaak Valley Forest Council hereby request a meeting to discuss potential resolution of issues raised in this objection, pursuant to 36 C.F.R. § 218.11(a). We hope that the Forest Service will use the objection process and such a meeting as opportunities to engage with stakeholders, including the Yaak Valley Forest Council to develop a comprehensive management plan that is legally and ecologically sound and enjoys broad support from all stakeholders.

If you have any questions about the content of these objections, we can be reached at the contact information listed below.

Sincerely,

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¹¹¹ *Id.*

¹¹² 16 U.S.C. § 1536(a)(2); 50 C.F.R. §402.14(d).

¹¹³ 50 C.F.R. § 402.15(a).