

No. 19-35004

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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SWAN VIEW COALITION, et al.,

Plaintiff-Appellants,

v.

CHIP WEBER, et al.,

Federal Defendant-Appellees.

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Appeal from the United States District Court for the District of Montana,  
Case No. 9:13-cv-00129-DWM, Hon. Donald W. Molloy, Senior District Judge

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**CONSENT BRIEF OF AMICI CURIAE AMERICAN FOREST RESOURCE  
COUNCIL AND MONTANA LOGGING ASSOCIATION IN SUPPORT OF  
FEDERAL APPELLEES**

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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure (Rule 26.1), the American Forest Resource Council, an Oregon non-profit corporation, states that it has no parent company and that no publicly-held companies own any of its stock. Also pursuant to Rule 26.1, the Montana Logging Association, a Montana non-profit corporation, states that it has no parent company and that no publicly-held companies own any of its stock.

Dated this 14th day of May, 2019.

/s/Julie A. Weis

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**STATEMENT OF IDENTITY, INTEREST AND AUTHORITY TO FILE  
(CONSENT)**

The American Forest Resource Council (AFRC) is a regional trade association representing more than 50 forest product businesses and forest landowners, and which advocates for sustained-yield timber harvests on public timberlands throughout the West to enhance forest health and resistance to fire, insects, and disease. AFRC and its members advocate on these forest health and public safety issues before agencies, legislatures, the public, and the courts. More information about AFRC and its members is available at <http://amforest.org/>.

The Montana Logging Association (MLA), a member of AFRC, is a trade association representing Montanans who work in the state's logging industry. Similar to AFRC, the MLA works to provide a strong, cohesive voice before agencies, legislatures, the public, and the courts on behalf of its more than 500 members who are engaged in the business of harvesting and transporting timber from forest to mill in Montana. The MLA also works to advance professional standards for its members by offering an Accredited Logging Professional program, a Professional Log Hauler program, and a Safety Services program. Additional information about the MLA is available at [www.logging.org/](http://www.logging.org/).

AFRC and the MLA have an interest in this case involving the Glacier Loon Fuels Reduction and Forest Health Project on Montana's Flathead National Forest.

MLA members Euchre Mountain Logging, Inc. and Pyramid Mountain Lumber Company hold the contracts for the Lunar Kraft and Swan Flat Stewardship Projects respectively, which are implementing portions of the Glacier Loon Project. Euchre Mountain Logging was operating the Lunar Kraft Stewardship Contract this winter but was ordered to suspend operations when this Court granted appellants' emergency motion for an injunction pending appeal.

The work that Euchre Mountain Logging was performing at the time of the injunction pending appeal, and that Pyramid Mountain Lumber Company hopes to perform later this year, is designed to reduce existing hazardous fuels conditions in the Project area, including in the dangerous wildland urban interface where people and their property are in particularly close proximity to wildlands and hence at heightened risk from wildland fire. Because AFRC and the MLA believe the public interest will be served by implementing the Glacier Loon Project and reducing fire risk in the wildland urban interface, they support federal appellees' (Forest Service) position that the district court properly lifted its prior injunction of the Project after the Forest Service completed additional environmental analyses.

AFRC and the MLA also have concerns regarding legal positions taken by appellants Swan View Coalition, et al. (collectively Swan View) that are contrary to the interests of amici's members. AFRC and the MLA thus seek to bring three additional issues to the Court's attention in this amicus brief:

- Wolverine: The Forest Service complied with the Endangered Species Act (ESA) with respect to potential Glacier Loon Project effects on the wolverine, a species that is proposed for listing, but not formally listed, under the ESA. ESA compliance for species proposed for listing is not the same as that for ESA-listed species. The Forest Service met its ESA obligations for the wolverine by relying on the programmatic biological assessment for wolverine, instead of by relying on a Project-level biological assessment;
- Grizzly Bear: The Forest Service complied with the ESA with respect to potential Glacier Loon Project effects on grizzly bears by tiering Project-level analysis to two programmatic biological opinions and incidental take statements. Appellants seek to undermine the value of programmatic analyses in the context of tiered consultations, which threatens to tie the hands of land managers who seek to improve forest conditions through active land management efforts like the Glacier Loon Project; and
- Lynx Critical Habitat Vacatur Request: The Court should allow the district court to consider Swan View's request for vacatur of its adverse rulings in 2014 and 2016 on Swan View's lynx critical habitat ESA reconsultation claim.

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, AFRC and the MLA submit this amici curiae brief with the consent of all parties.

**STATEMENT OF AUTHORSHIP AND FUNDING OF BRIEF**

Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, undersigned counsel states that no party's counsel authored any portion of this brief. Additionally, no party and no party's counsel, nor any other person or entity other than AFRC, has or is expected to contribute money intended to fund preparing or submitting this brief.

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## **INTRODUCTION**

The American Forest Resource Council (AFRC) and Montana Logging Association (MLA) are regional and state trade associations, respectively, that support implementation of the Glacier Loon Fuels Reduction and Forest Health Project on the Flathead National Forest. The Glacier Loon Project is an important forest health and restoration project that has been in litigation for more than five years. The district court first enjoined the Project in September 2014 and, after many years of careful agency environmental analyses, dissolved its injunction in December 2018, thereby allowing Project implementation to commence. *See generally* Excerpts of Record (ER) 3-10. The district court's order dissolving its injunction is the basis for Swan View's appeal.

MLA member Euchre Mountain Logging was in the midst of operating its Lunar Kraft Stewardship Contract as part of the Glacier Loon Project when, on March 13, 2019, this Court granted Swan View's motion for an injunction pending appeal. Docket Entry 26. The Forest Service quickly moved the Court for modification of the injunction pending appeal, explaining that already-felled timber lay on the forest floor and would irreparably deteriorate if not removed

from the woods in short order. Docket Entry 27 at 1-2, 4-5.<sup>1</sup> Due to Glacier Loon Project restrictions, the Forest Service respectfully requested that the Court modify its injunction by March 22, 2019 to allow the removal of already-felled timber – otherwise, the Forest Service explained, existing Project restrictions benefitting the grizzly bear would preclude the removal of the logs until mid-November 2019, by which time the logs would have been subject to the detrimental impacts of weather, insects and fungal infections. Docket Entry 27 at 4-5.

Swan View opposed the Forest Service’s motion, apparently preferring to see the logs wastefully decay on the ground. This Court then declined the Forest Service’s request that Euchre Mountain Logging be allowed to remove the down timber that had been felled during lawful operations. Docket Entry 32. The Court instead directed the Forest Service to first seek such relief in the district court. Docket Entry 32.

Given that the pre-existing deadline for ceasing activities in the Lunar Craft Stewardship Contract area was March 31, 2019, the Court’s denial effectively consigned the down timber to the irreparable processes of decay. The loss of the down timber unfortunately will inure to the detriment of natural resources in the Project area given that Euchre Mountain Logging’s Stewardship Contract requires

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<sup>1</sup> With the exception of compilations of documents like the Excerpts of Record and Federal Appellees’ Appendix, references to document page numbers refer to a document’s original pagination, which may differ from that of the ECF pagination.

the company to provide such services as “needed road decommissioning, re-contouring, fuels reduction and slashing and pre-commercial thinning in exchange for the value of the trees harvested.” Docket Entry 27, Ex. 1 at 2 (¶ 3). The loss of the down timber due to the inevitable course of decay is irreparable, as weather, insects and microbes are unhindered by injunctions. But an affirmance of the district court’s order dissolving the injunction will allow the Forest Service and independent woods workers like MLA members Euchre Mountain Logging and Pyramid Mountain Lumber Company to implement the important work of improving and restoring forest health conditions in the Project area.

The Forest Service started developing the Glacier Loon Project eight years ago “to reduce the risk of a high-severity landscape within the WUI [wildland urban interface], as identified in the community wildfire protection plan, improve forest health and resistance to insect epidemics, and provide wood products to local timber industry.” ER 129. The Forest Service’s initial Decision Notice and Finding of No Significant Impact issued in February 2013, ER 129, with litigation commencing later that year, ER 3, and an injunction and order of remand issuing in September 2014. ER 4. A little more than a year later, after the agencies had completed the additional environmental analyses on remand, the agencies asked the district court to dissolve its injunction. ER 4. The district court declined that

request, instead instructing the agencies to prepare a supplemental environmental assessment in conformance with the National Environmental Policy Act (NEPA).

The Forest Service's Supplemental Environmental Assessment (Supplemental EA) issued in April 2018, followed by a September 2018 Final Decision Notice and Finding of No Significant Impact. After further review, and upon the agencies' second motion to dissolve the injunction, the district court at long last lifted the Glacier Loon Project injunction. ER 10. Euchre Mountain Logging quickly commenced operations, with Pyramid Mountain Lumber Company intending to do so this summer during the June 16 through August 31 limited operating period allowed by the Swan Valley Grizzly Bear Conservation Agreement. Federal Appellees' Appendix, Docket Entry 19 (Appx) 3-4 (¶¶ 10-13). AFRC and the MLA urge the Court to affirm the district court's dissolution of the Glacier Loon Project injunction so that this important forest health and restoration project can finally be implemented.

**SPECIFIC CONCERNS OF THE AMERICAN FOREST RESOURCE  
COUNCIL AND MONTANA LOGGING ASSOCIATION**

**I. Implementation of the Glacier Loon Fuels Reduction and Forest Health Project is in the Public Interest Because the Project is Designed to Reduce Hazardous Fuels in the Wildland Urban Interface.**

The ecological restoration that will be accomplished through Glacier Loon Project implementation is in the public interest, and the interest of AFRC and

MLA members, particularly with respect to hazardous fuels reduction in and around the wildland urban interface.

The purpose and need for the Glacier Loon Project is threefold:

- **Hazardous Fuels Reduction**
  - Reduce the associated risk of high-severity landscape wildfire risk within the WUI as identified in the Seeley Swan Fire Plan.
  - Provide for a safer environment for the public and firefighters should a wildfire occur within the proposed treatment areas.
  - Increase the probability of stopping wildfires on NFS [National Forest System] lands before they burn onto private lands.
  
- **Improve Forest Health**
  - Improve and/or maintain the general health, resilience and sustainability of forested stands.
  - Reduce the risk of insect epidemics and severe disease infestations with the project area.
  
- **Provide Wood Products for Local Economics**
  - Provide forest products to the local timber industry – contributing to short-term forest products and providing for long-term sustainability of timber on NFS lands.

ER 129. All three purposes and needs are important to AFRC and the MLA, including MLA members Euchre Mountain Logging and Pyramid Mountain Lumber Company who hold the Lunar Kraft and Swan Flat Stewardship Sale Contracts, respectively. Appx 2 (¶ 4). However, the third purpose and need, i.e.,

the provision of forest products to the local timber industry, will flow naturally from the primary purposes of the Glacier Loon Project, namely the reduction of hazardous fuels and the improvement of forest health conditions.

Regarding hazardous fuels reduction, Glacier Loon Project implementation will strategically reduce forest fuel levels on 1,157 acres within the wildland urban interface, out of 1,397 treatment acres overall. ER 127. Thus the primary focus of the Project's fuels reduction work (approximately 83%) is in the wildland urban interface where people and property exist in close proximity to fire-prone wildlands. Reducing fuels in the wildland urban interface is becoming increasingly important because increased numbers of people are living in close proximity to federally-managed wildlands. ER 151 ("In the Swan Valley, there has been an increase in the number of people living in close proximity to NFS lands.").

Amici's concern about human life and safety is not hyperbole. As the Forest Supervisor stated in the Project's 2018 Decision Notice, "[t]he threat to life and property from high forest fuel hazards was unfortunately illustrated once again during the 2012 fire season in forestlands in the Swan Valley, other parts of Montana and other western states." ER 151. Indeed, the 2018 fire season in another western state, California, tragically illustrates the threat to life and property from high forest fuel levels in proximity to human habitation. *See, e.g.*, Ninth

Circuit Case No. 19-15384, Docket Entry 9-2 at 174-75 (Declaration of Klamath National Forest Supervisor ¶ 24) (describing the Klamathon fire, which killed one person, injured three firefighters and destroyed 82 homes; the Carr fire, which killed eight people, including three firefighters, injured an additional 11 firefighters and destroyed more than 1000 homes; the Mendocino Complex fire, which killed one firefighter, injured four additional firefighters and destroyed 280 homes; and the Camp fire, which killed 48 people and destroyed more than 7,600 homes).<sup>2</sup>

Project implementation will ameliorate wildfire risk to people, property and natural resources in the wildland urban interface. *See, e.g.*, ER 265 (stating that Project implementation will reduce “high-severity landscape wildfire risk within the WUI and provide a safer environment for the public and firefighters should a wildfire occur”); ER 151 (reducing forest fuels “in specific areas will create a safer environment for the firefighters and the public should a fire occur, and protect human and resource values in the event of a future wildfire”); ER 170 (“The fuel reduction and forest health treatments . . . . will result in improved community safety . . . .”). In contrast, the effects of non-action in the Project area (Swan View’s desired outcome), will include “denser and more closed in” forest canopies,

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<sup>2</sup> The Court may “take judicial notice of court filings and other matters of public record” that inform the issue on review. *Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006).

increased accumulations of hazardous fuels, an increase in “natural fuels hazards near private lands” and a heightened “risk of stand-replacing fire.” ER 152.

Project implementation also will improve forest health in the Glacier Loon Project area, where fire exclusion, insect infestations and other conditions over the years have caused decreased “vigor and resilience of the dominant overstory trees, resulting in poor growth, increased susceptibility to insects and disease, and increasing mortality.” ER 151. With Project implementation, the Forest Service anticipates increased “presence and health” of desired species in forest stands, a general improvement in the “health, resiliency, and sustainability of forest vegetative communities,” and a concomitant reduction in “the risk of insect and disease infestations . . . .” ER 152. In contrast, non-action in the Project area will result in “less vigorous and less resilient” trees, a reduced presence of desired tree species, increased insect and disease outbreaks, and “greater adverse social and environmental effects.” ER 152-53.

AFRC and the MLA believe it is time for this public safety and forest health Project to move forward. Amici therefore urge the Court to uphold the district court’s lifting of the Glacier Loon Project injunction.

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**II. Swan View’s Interpretation of What is Required for ESA Compliance with Respect to the Wolverine, a Species Proposed for Listing But Not Formally Listed Under the ESA, Sets the Bar Unduly High.**

Contrary to Swan View’s assertions, the Forest Service did not violate the ESA by failing to analyze potential wolverine impacts in a Project-level biological assessment. *See generally* Opening Br. at 24-25, 27-28. Nor was the U.S. Fish and Wildlife Service (FWS) required to issue a Project-level Letter of Concurrence regarding potential wolverine impacts. Opening Br. at 27-28. Swan View’s disdain for the Forest Service’s Programmatic Biological Assessment for North American Wolverine (wolverine programmatic biological assessment) also is not well taken. Opening Br. at 28-35. Overall, Swan View invites the Court to misread ESA implementing regulations, conflate the requirements for ESA-listed species with those for species like the wolverine that are only proposed for listing, and disregard programmatic environmental analyses that play a vital role in efficient and effective land management. Swan View’s advocacy threatens the health of the forest landscape and the wellbeing of those who live in and around the wildland urban interface.

First, the ESA does not mandate preparation of a Project-specific biological assessment for the wolverine. The ESA implementing regulations plainly state that a biological assessment is required only “for Federal actions that are ‘major construction activities.’” 50 C.F.R. § 402.12(b)(1) (so stating under the heading

“Preparation requirement”). The federal agencies’ Consultation Handbook says likewise. See [https://www.fws.gov/endangered/esa-library/pdf/esa\\_section7\\_handbook.pdf](https://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf) (stating at page xi in the glossary of terms that “[b]iological assessments must be prepared for ‘major construction activities’”). See also *San Carlos Apache Tribe v. U.S.*, 272 F. Supp. 2d 860, 874-75 (D. Ariz. 2003) (stating in the context of ESA-listed species that if a “proposed agency action is not a ‘major construction activity,’ the [biological assessment] is not required and the agency may make an independent evaluation of” project impacts on a listed species), *aff’d*, 417 F.3d 1091 (9th Cir. 2005).

The Glacier Loon Project is not a “major construction activity.” That term is defined by the ESA implementing regulations as “a construction project (or other undertaking having similar physical impacts) which is a major Federal action significantly affecting the quality of the human environment as referred to in [the National Environmental Policy Act, or NEPA].” 50 C.F.R. § 402.02. The Forest Supervisor determined that the Glacier Loon Project, which aims to reduce hazardous fuels levels and improve forest health, ER 129, “do[es] not constitute a major Federal action, and that the implementation of the Decision will not significantly affect the quality of the human environment.” ER 167. The Project thus was authorized pursuant to a Decision Notice and Finding of No Significant

Impact. *See generally* ER 123-336. That finding obviates the need for a biological assessment on wolverine potential impacts.

Second, because the Forest Service was not required to assess potential wolverine impacts in a Project-level biological assessment, FWS was not required to include the wolverine in a Project-level Letter of Concurrence. More fundamentally, Swan View appears to be conflating the ESA term “consult,” which applies to species that are listed, 16 U.S.C. § 1536(a)(2), with the ESA term “confer,” which applies to species proposed for listing. *Id.* § 1536(a)(4). *See, e.g.,* Opening Br. at 29 (describing a biological assessment as a “consultation document[.]”); Opening Br. at 31, 34 (referring to the use of the best available science in the ESA Section 7 consultation process). The terms “consult” and “confer” are not interchangeable.

Conferencing applies to projects that are “likely to jeopardize the continued existence of any species proposed to be listed” under the ESA. 16 U.S.C. § 1536(a)(4). This is a more lenient requirement than the “may affect” threshold for the ESA Section 7 consultation obligation involving listed species. *See, e.g., Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012) (stating that an agency may avoid the ESA Section 7 “consultation requirement only if it determines that its action will have ‘no effect’ on a listed species”). Here, the Forest Service and FWS found that implementation of the Glacier Loon Project

was not likely to jeopardize the continued existence of the wolverine, thereby obviating the need for conferencing. In making this determination, the Forest Service and FWS relied on the wolverine programmatic biological assessment, which brings amici to their third point.

In May 2014, after the wolverine had been proposed for ESA listing, the Forest Service issued the wolverine programmatic biological assessment to “describe and analyze a variety of projects routinely conducted on National Forest System lands within the Northern Region that are not likely to jeopardize the continued existence of the North American wolverine.” ER 493. Programmatic environmental documents are an important land management tool that facilitate efficient and effective land management by obviating the need for “repetitive discussions of the same issues and [allowing a] focus on the actual issues ripe for decision at each level of environmental review . . . .” 40 C.F.R. § 1502.20 (so stating in the context of NEPA environmental documents). As the district court stated with respect to the wolverine programmatic biological assessment, an agency may use such a tool where it ““is preparing to undertake a number of later, similar actions, the specifics of which have not yet been defined.”” ER 9 (quoting *Ctr. for Sierra Nevada Conserv. v. U.S. Forest Serv.*, 832 F. Supp. 2d 1138, 1144 (E.D. Cal. 2011) (citing *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv.*, 378 F.3d 1059, 1062 (9th Cir. 2004))).

The district court observed that activities covered by the wolverine programmatic biological assessment “included, *inter alia*, timber harvest, mechanical equipment use, roads and road maintenance, and forest products,” ER 8, which are the types of activities involved in Glacier Loon Project implementation. *See also* ER 493 (classifying activities covered by the wolverine programmatic biological assessment into 13 general categories with a more detailed explication of the categories included in Appendix A to the document). The wolverine programmatic biological assessment concluded that activities like timber harvest, mechanical equipment use, roads and road maintenance, and forest products activities are not a threat to the wolverine and, therefore, not likely to jeopardize the continued existence of the species:

In summary . . . climate change is the only primary threat to the wolverine . . . . Because wolverines are not dependent on specific vegetation or habitat features, infrastructure development and maintenance (secondary roads, communications sites, campgrounds, etc.) and land management activities (such as recreation, grazing, timber harvest, and prescribed fire) conducted on National Forest System lands were determined not to be a threat to the [wolverine].

ER 497. The FWS reviewed the wolverine programmatic biological assessment and concurred with the Forest Service’s determination that the assessed categories of routine activities on national forests like the Flathead were not likely to jeopardize the wolverine’s continued existence. ER 504-05.

The next step in the Forest Service’s wolverine analysis was to focus on Project-specific potential impacts on the species, which the agency did in its April 2018 Supplemental EA. *See generally* ER 346-52. Focusing on key needs of the wolverine as “measurement indicators,” ER 347, the Supplemental EA assessed Project impacts on natal security, prey base, and overall habitat security. ER 349-51. *See also* ER 351 (assessing cumulative effects on the wolverine). The Supplemental EA concluded that Project-specific wolverine impacts were consistent with those assessed in the wolverine programmatic biological assessment, as a result of which implementation of the Glacier Loon Project “would not jeopardize wolverine.” ER 352. *See also* ER 352 (pointing for support to the agency’s determinations that “[n]o activities would overlap temporally with wolverine natal denning,” the location of activities “would not likely displace wolverine during the summer months,” and Project implementation would have “minimal” impact on the species’ ungulate carrion prey base).

Swan View would have the Court ignore the wolverine programmatic biological assessment and FWS’s concurrence in same and instead require the agencies to start from scratch with the Forest Service preparing a Project-level biological assessment followed by FWS concurring in the agency’s determination. Swan View’s argument likely is motivated by a desire to see the Glacier Loon Project further delayed (to the detriment of people and natural resources in and

around the Project area), which AFRC and the MLA oppose. But amici also oppose Swan View's argument on the grounds that it threatens to undermine the value of programmatic environmental documents in a manner that would tie the hands of land managers and further slow the already glacial pace of efforts to restore the health of our nation's forests. Regardless of Swan View's motivation, the foregoing shows that Swan View's advocacy of an overly-rigid approach to ESA compliance for the wolverine is without merit.

**III. Swan View's Interpretation of What is Required for ESA Compliance With Respect to the Grizzly Bear Ignores the Tool of Tiered Consultations and Thereby Threatens to Impair Future Habitat Restoration Efforts.**

The foregoing wolverine discussion highlighted the important role played by programmatic environmental documents in fostering efficient and effective active land management. Programmatic documents play an especially key role when it comes to land management decisions involving grizzly bears, even though Swan View pays no heed to the grizzly bear programmatic decisions. *See generally* Opening Br. at 36-45.

The Glacier Loon Project area is subject to the Swan Valley Grizzly Bear Conservation Agreement (SVGBCA), the parties to which include the Forest Service, FWS, "Plum Creek Timber, Inc. . . . and the Montana Department of Natural Resources and Conservation . . . ." ER 443. Because grizzly bears are

wide-ranging animals that do not recognize jurisdictional boundaries, the SVGBCA's goal "is to cooperate and coordinate management activities in order to conserve grizzly bears in a mixed land-ownership environment." ER 443. The SVGBCA's requirements for projects like Glacier Loon, and the ways in which the Glacier Loon Project complies with such requirements, are displayed in tabular form at ER 444-45. FWS engaged in ESA consultation on the SVGBCA and, in 1995, "issued a programmatic non-jeopardy biological opinion and incidental take statement." ER 404. Activities under the Lunar Kraft and Swan Flat Stewardship Contracts are subject to, and constrained by, the SVGBCA for the benefit of the grizzly bear. *See, e.g.*, Appx 3-4 (¶¶ 8-11).

The Glacier Loon Project area also is subject to Flathead Forest Plan Amendment 19, which is "a comprehensive programmatic strategy that addresses grizzly bear habitat security" related to motorized access to Forest Service lands. ER 445. Amendment 19:

provides motorized access standards and objectives for grizzly bear habitat management. The forest standard includes "no net increase" in total or open motorized road access density and "no net decrease" in security core and "Forest Service actions will result in a net gain towards the objectives on National Forest System Lands."

ER 446 (further describing Amendment 19's numerical objectives). The Forest Service issued Amendment 19 in 1995 and, in 2009, issued a biological assessment that altered the timeline for meeting Amendment 19 objectives. ER 447

(explaining that the schedule was revised for a variety of reasons, including biological reasons, like evidence that the relevant grizzly bear population had grown substantially, and logistical reasons, like “unanticipated or impractical results” from application of Amendment 19 at the site-specific level). FWS engaged in ESA consultation on the Amendment 19 Revised Implementation Schedule and, in 2014, “issued a programmatic non-jeopardy biological opinion and incidental take statement.” ER 404.

Amendment 19 originally did not apply to the geographical area covered by the Glacier Loon Project. ER 446. But in 2014, the district court held that changed circumstances rendered Amendment 19 applicable to Glacier Loon’s two grizzly bear subunits. *See* ER 68. *See also* ER 446 (explaining that an increase in Forest Service land ownership due to a land donation triggered Amendment 19’s subsequent application). The district court therefore remanded the grizzly bear issue for a reexamination of the Forest Service’s conclusion that Glacier Loon Project implementation was not likely to adversely affect the grizzly bear (a determination in which FWS had concurred). ER 67-68. The resulting 2015 amended biological assessment documented the Forest Service’s reaffirmation that Glacier Loon Project implementation was “unlikely to have adverse effects on grizzly bears,” ER 451-52, a conclusion in which FWS again concurred. *See generally* ER 404-07.

Swan View unsuccessfully challenged that conclusion in the district court. *See* ER 17-12. In rejecting Swan View’s challenge, the district court acknowledged that whereas the existing “baseline access conditions in the [Project’s two grizzly bear] subunits ‘may affect and are likely to adversely affect’ bears,” Glacier Loon “itself ‘may affect but is *not* likely to adversely affect’ bears.”<sup>3</sup> ER 17-18 (emphasis added). Unlike Swan View, which disregarded FWS’s 1995 and 2014 programmatic biological opinions and incidental take statements on the SVGBCA and Amendment 19, ER 404, the district court rightly recognized that FWS based its concurrence on an evaluation of whether the Project’s impacts on the grizzly bear were consistent with the impacts already evaluated in the 1995 and 2014 programmatic biological opinions and incidental take statements. ER 18. *See also* ER 405 (conclusion of FWS that the “adverse effects on grizzly bears related to the proposed action fall with the scope of [the agency’s] 1995 and 2014 programmatic biological opinions and incidental take statements”).

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<sup>3</sup> Under the ESA Section 7 analysis, the relevant inquiry focuses on the effects of the agency action, not the effects of baseline conditions standing alone. *See, e.g., Nat’l Wildlife Fed’n v. NMFS*, 524 F.3d 917, 930 (9th Cir. 2008) (stating, for example, that agency action can only jeopardize a listed species if it causes some decline in the species’ “pre-action condition”).

In summarizing its conclusion, FWS explained that “with the exception of effects related to the existing access condition, the remaining effects to grizzly bears as a result of the proposed action would be insignificant and/or discountable.” ER 406. The district court upheld the agencies’ grizzly bear determination as reasonable and well-documented. ER 22.

AFRC and the MLA defer to the Forest Service for further discussion of Swan View’s disagreement with the district court’s holding, particularly regarding the insignificance of Project impacts on the grizzly bear. But amici point out that Swan View’s argument rests in large part on an improper disregard for the programmatic environmental documents governing grizzly bear-related land management actions, to which the Glacier Loon Project-specific documents are tiered.

**IV. The District Court, Not This Court, Should Consider Swan View’s Request for Vacatur of Its 2014 and 2016 Lynx Critical Habitat ESA Reconsultation Rulings.**

Finally, Swan View’s request for vacatur, which is short on reasoning and makes no effort to explain how the district court’s two historical lynx critical habitat decisions might have collateral legal consequences, Opening Br. at 56, appears unwarranted. At most, Swan View’s request for vacatur should be remanded for decision by the district court. As this Court has observed, “vacatur is not always appropriate when a case becomes moot on appeal.” *NASD Dispute*

*Resolution, Inc. v. Judicial Council of State of Cal.*, 488 F.3d 1065, 1068 (9th Cir. 2007). Rather, “vacatur [is] an ‘extraordinary remedy,’ one only available to appellants who ‘demonstrate . . . equitable entitlement’ to it.” *Id.* at 1069 (quoting *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 26 (1994)).

The district court’s first lynx critical habitat decision issued on September 25, 2014. *See* ER 72-74. There, the issue was whether the Forest Service improperly relied on the Northern Rockies Lynx Management Direction (Lynx Direction) in determining that Glacier Loon Project implementation was not likely to adversely modify or destroy lynx critical habitat. The district court acknowledged that the Forest Service could not rest its critical habitat determination “solely on the Project’s compliance with standards and guidelines derived from the Lynx Direction . . . .” ER 73. But the Forest Service had not done so. Rather, consistent with case law recognizing that an agency might properly rest its lynx critical habitat determination on a scientific determination that Project implementation “‘will have no adverse effects on the primary constituent elements of lynx critical habitat,’” ER 73 (quoting case law), the Forest Service had prepared such an analysis to serve as a “reasonable independent basis” for its “no adverse modification or destruction of lynx critical habitat” determination. ER 74. The district court therefore rejected Swan View’s assertion

that ESA reconsultation on the Lynx Direction was a prerequisite to Project implementation. ER 74.

Swan View states that because the district court's 2014 order ultimately remanded the case to the Forest Service, the remand order was not a final decision subject to Swan View's appeal under authority of *Alsea Valley Alliance v. Dep't of Commerce*, 358 F.3d 1181, 1184-85 (9th Cir. 2004). Opening Br. at 55. Swan View did not request certification of the lynx critical habitat reconsultation issue under 28 U.S.C. § 1292(b), which admittedly sets a high bar for obtaining appellate review.

The district court's second lynx critical habitat decision issued January 13, 2016. *See* ER 26-27. This was after issuance of the Ninth Circuit's *Cottonwood* decision, which held that "the Forest Service was required to reinitiate consultation when the FWS designated critical habitat in National Forests." *Cottonwood Env'tl. Law Ctr. v. U.S. Forest Serv.* decision, 789 F.3d 1075, 1088 (9th Cir. 2015). The district court again rejected Swan View's argument that ESA reconsultation on the Lynx Direction was a prerequisite to Project implementation both because the court already had decided the reconsultation issue on the merits and based on language in *Cottonwood*. ER 27.

Swan View reports that it again was precluded from appealing the district court's adverse ruling under authority of *Alsea Valley*. Opening Br. at 55. But by

that time, the court-ordered remand had been completed, with the district court instead leaving “the entire Project enjoined on other grounds.” *Id.* Despite the lack of a remand order, Swan View made no effort to pursue interlocutory review on the lynx critical habitat reconsultation issue.

After *Cottonwood*, reconsultation on the Lynx Direction was completed. Op. Br. at 56. Because that reconsultation afforded Swan View the relief that it had been seeking, Swan View seeks vacatur of the district court’s 2014 and 2016 lynx critical habitat decisions. For support, Swan View points to the vacatur decision in *Alliance for the Wild Rockies v. Savage*, 897 F.3d 1025, 1032 (9th Cir. 2018), which also involved the Lynx Direction. But in *Savage*, unlike here, the court described the issue as the Forest Service having “improperly relied on the Northern Rocky Mountains Lynx Management Direction (‘Lynx Amendment’) in determining the impact of Project activities on lynx and lynx critical habitat.” *Id.* at 1029. Here, the district court held that the Forest Service had not improperly relied on the Lynx Direction but instead had conducted a scientific analysis of Project impacts on the primary constituent elements of lynx critical habitat before reaching its “no adverse modification or destruction” determination. *See* ER 74, ER 27.

The crux of Swan View’s vacatur argument is this: whereas the district court determined Swan View was not entitled to its desired remedy on the facts of

this case, Swan View obtained its desired remedy via other, independent means and now seeks to import that remedy into this case to obtain vacatur of the district court's adverse rulings in 2014 and 2016. Under these circumstances, a more appropriate outcome would be for the Court to remand to the district court to determine whether to vacate "in light of 'the consequences and attendant hardships of dismissal or refusal to dismiss' and 'the competing values of finality of judgment and right to relitigation of unreviewed disputes.'" *Dilley v. Gunn*, 64 F.3d 1365, 1371 (9th Cir. 1995) (quoting *Ringsby Truck Lines v. W. Conf. of Teamsters*, 686 F.2d 720, 722 (9th Cir. 1982)).

Amici respectfully suggest that vacatur is unwarranted, but if the Court determines otherwise, the district court rather than this Court should decide the issue of vacatur.

### **CONCLUSION**

Amici curiae the American Forest Resource Council and Montana Logging Association appreciate the opportunity to put their concerns before the Court with the consent of the parties. Active land management in the Glacier Loon Project area is important to AFRC, the MLA and their many members who seek to see forest health conditions in the Project area improved for the benefit of people, property and forest resources. Amici are particularly concerned that conditions in the wildland urban interface be ameliorated as quickly as possible. Thus, based on

the foregoing, and for all of the reasons set forth by the federal appellees whom amici support in this litigation, the Court should affirm the district court's decision to lift the Glacier Loon Project injunction.

Dated this 14th day of May, 2019.

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,929 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word Version 1808, font size 14 and Times New Roman type style.

Dated this 14th day of May, 2019.

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**STATEMENT OF RELATED CASES**

Pursuant to Ninth Circuit Rule 28-2.6, the American Forest Resource Council and Montana Logging Association are not aware of any related cases pending before this Court.

Dated this 14th day of May, 2019.

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**CERTIFICATE OF SERVICE**

I hereby certify that on 14th day of May 2019, I caused the foregoing **CONSENT BRIEF OF AMICI CURIAE AMERICAN FOREST RESOURCE COUNCIL AND MONTANA LOGGING ASSOCIATION IN SUPPORT OF FEDERAL APPELLEES** to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that I have caused the foregoing document to be sent by electronic mail to the following non-CM/ECF participant:

None

/s/Julie A. Weis  
Julie A. Weis