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

NATIVE ECOSYSTEMS COUNCIL, ALLIANCE FOR THE WILD ROCKIES,

Plaintiffs,

vs.

LEANNE MARTEN, Regional Forester, USFS Region One, U.S. FOREST SERVICE, and U.S. FISH & WILDLIFE SERVICE,

Defendants,

and

SUN MOUNTAIN LUMBER, INC., a Montana Corporation,

Defendant-Intervenor.

CV 18–87–M–DLC

ORDER

In its May 26, 2020 Order ruling on the parties' cross-motions for summary judgment, the Court granted Federal Defendants' request to delay ruling on remedy in the event the court found a violation in the Forest Service's decision to implement the North Hebgen Multiple Resource Project ("the Project"), and to allow Federal Defendants the opportunity to provide additional briefing on whether

to remand with or without vacatur. (Doc. 85 at 41.) Purportedly due to workflow disruptions from the pandemic, Federal Defendants requested two extensions to file their brief. (Docs. 86, 88.) Now, instead of squarely addressing vacatur, Federal Defendants claim that no remedy is required because the agencies have subsequently corrected all deficiencies found in the Court's prior Order. (Doc. 90 at 2.) Along with their brief, Federal Defendants attach a supplemental information report ("SIR") recalculating elk hiding cover, a biological assessment ("BA") for wolverine, and a letter of concurrence from the Fish and Wildlife Service ("FWS"). (Docs. 90-1, 90-2, 90-3.) Plaintiffs claim the newly submitted work is inadequate because it does not comply with the National Environmental Policy Act ("NEPA"). (Doc. 92 at 7–8.) Procedurally, this case has become a mess.

Cognizant of its duty to construe the Federal Rules "to secure the just, speedy, and inexpensive determination of every action," Fed. R. Civ. Pro. 1, the Court will construe Federal Defendants' remedy brief as a motion under Rule 60 to dissolve the injunction.[1] Because the Court finds the work adequate, the Court will

[1] Having concluded that the Project violated various environmental laws, the appropriate remedy inevitably required remand, *see All. for the Wild Rockies v. United States Forest Serv.*, 907 F.3d 1105, 1121 (9th Cir. 2018), the only question was whether to remand with or without vacating the record of decision. Vacatur is the presumptive remedy, *id.*, however, where equity requires, a court may remand without vacatur upon weighing the "seriousness of the agency's errors against 'the disruptive consequences'" of delay, *Pollinator Stewardship Council v. U.S. E.P.A.*, 806 F.3d 520, 532 (9th Cir. 2015) (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993)). Attempting to analyze these factors when the

dissolve its injunction and allow the Project to proceed.

Background

The Project is located within the Greater Yellowstone Ecosystem on the Hebgen Ranger District of the Custer-Gallatin National Forest, just north of West Yellowstone, Montana. (Doc. 85 at 2.) The Project is designed to minimize damage from fire, improve forest health, and decrease human-grizzly bear interactions at a popular campground. (*Id.*) Eighty percent of the Project occurs in wildland urban interface. (*Id.*)

Plaintiffs brought suit on May 15, 2018, alleging the following four violations of federal law: (1) the Forest Service failed to consult on lynx and lynx critical habitat for Amendment 51 to the Forest Plan; (2) the Forest Service failed to conduct a BA for the Project and to receive the FWS's concurrence; (2) the

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Court has already seen the work required on remand is disingenuous. For example, it is difficult to construe the agency's failure to conduct a BA—which would ordinarily be considered a serious legal error, *Thomas v. Peterson*, 753 F.2d 754, 763 (9th Cir. 1985) *overruled on other grounds by Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1090 (9th Cir. 2015)—as anything other than harmless when the agency arrived at the same conclusion either way. Similarly, if the newly submitted work is adequate, then any delay, however minor, is unnecessarily disruptive to the Forest Service's timeline for Project implementation. Given the unique posture of this case, the Court believes it best to analyze Federal Defendants' brief as a motion under Rule 60. However, the Court must stress that its expedited review is not a reward for Federal Defendants' opportunistic tactics. The Court is troubled that counsel for Federal Defendants misrepresented the agencies' need for additional time, exploited the opportunity given to them to brief a narrow issue, and put Plaintiffs in the position of responding to the adequacy of a substantive issue under a strict word count—a task Plaintiffs accomplished, admirably. Finding no unfairness here, the Court will resolve this issue as efficiently as possible. In the future, the Court will be increasingly weary of granting counsel's requests that threaten the orderly adjudication of cases before it.

Forest Service erroneously calculated elk hiding cover; and (3) the Forest Service failed to analyze the Project in an environmental impact statement. (Docs. 1, 41.) Plaintiffs then moved for a preliminary injunction, which this Court granted upon finding that there was a likelihood of success on the merits of Plaintiffs' lynx consultation claim and that irreparable injury was likely to follow in the absence of such an injunction. *Native Ecosystems Council v. Marten*, 334 F. Supp. 3d 1124, 1133 (D. Mont. 2018).

Then, on summary judgment, Plaintiffs ultimately conceded that its lynx consultation claim was rendered moot by the agencies' subsequent programmatic analysis and consultation of Amendment 51, (Doc. 85 at 9), yet the Project remained subject to the injunction throughout this litigation. In its Order ruling on the parties' cross-motions for summary judgment, the Court held that the Forest Service had violated the Endangered Species Act ("ESA") and the Administrative Procedures Act ("APA") by failing to complete a BA for wolverine and violated the National Forest Management Act ("NFMA") and APA with its calculation of elk hiding cover. (*Id.* at 41.) Instead of vacating the record of decision in that Order, the Court granted Federal Defendants' request to provide additional briefing on the appropriate remedy and imposed a supplemental briefing schedule. (*Id.*) After a five-week extension, Federal Defendants submitted their brief along with a now-completed BA, a letter of concurrence from the FWS, and a SIR with a

revised calculation of elk hiding cover. (Docs. 90-1, 90-2, 90-3.) The Court must now decide whether, as a result of the additional work performed by the agencies, the injunction may be lifted.

Discussion

"A party seeking modification or dissolution of an injunction bears the burden of establishing that a significant change in facts or law warrants revision or dissolution of the injunction." *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000). A significant change in fact occurs when a party demonstrates its compliance with a court's prior order. *Id.*

A. The Elk Issue

The Court determined that the Project violated NFMA and APA because the Forest Service failed to use the entire elk analysis unit as the denominator to determine whether the Project complied with the Forest Plan's two-thirds density standard. (Doc. 85 at 33.) The Forest Service subsequently recalculated post-treatment elk hiding cover in the SIR. (Doc. 90-1 at 2.) As with the old calculations, the new calculations demonstrate that the Project amply complies with the Forest Plan's two-thirds standard and reaches substantially similar results.[2] Plaintiffs do not object to the content of the SIR. Instead, they argue that

[2] For example, post treatment coverage under the old method of calculation resulted in 93% dense hiding cover in the Buffalo Horn elk analysis unit ("EAU"), 88% in Cabin Creek EAU, and 96% in Henry's Mountain EAU. Under the new method, post treatment coverage will result

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