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MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT

GALLATIN COUNTY

SAVE OUR GALLATIN FRONT,)	
)	Case No. DV-19-75B
)	
Plaintiff,)	Judge: Rienne H. McElyea
)	
v.)	
)	
MONTANA BOARD OF LAND)	PLAINTIFF’S MEMORANDUM
COMMISSIONERS and MONTANA)	IN SUPPORT OF MOTION FOR
DEPARTMENT OF NATURAL RESOURCES)	TEMPORARY RESTRAINING
AND CONSERVATION,)	ORDER AND PRELIMINARY
)	INJUNCTION
)	
Defendants.)	
)	
)	

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INTRODUCTION

Plaintiff Save Our Gallatin Front (“SOGF”) seeks a temporary restraining order and/or preliminary injunction to prevent defendant Montana Department of Natural Resources and Conservation (“DNRC”) from completing the auction for the Limestone West timber sale, which would log the last roadless valley in the foothills of the Gallatin Range south of Bozeman.

Injunctive relief is warranted because SOGF is likely to succeed on the merits of its claims. SOGF seeks to bid for a conservation license to protect the Limestone Creek drainage from road construction and logging while compensating state trust beneficiaries for the value of the Limestone West project timber. Montana law requires DNRC to solicit bids for the Limestone West timber sale, including from conservation license applicant SOGF, to secure “full, fair market value” for trust beneficiaries and, more broadly, to “secure the largest measure of legitimate and reasonable advantage to the state.” MCA §§ 77-1-202(1)(a), 77-5-208(1)(c). However, DNRC has established the terms of the Limestone West auction in an unfair, illegitimate, and unreasonable manner by demanding that SOGF provide an impermissible windfall to DNRC—not a fair or reasonable market value—to purchase a conservation license that would protect the Limestone Creek valley and its extraordinary wildlife habitat. DNRC’s conduct therefore violates the agency’s statutory duties.

Injunctive relief also is necessary to prevent irreparable harm to SOGF’s interests. DNRC has established an unfair and unlawful framework for the Limestone West timber sale auction that has hobbled SOGF’s ability to submit a bid for a conservation license. Further, even if Save Our Gallatin Front is able to bid in the illegal auction, allowing DNRC’s unlawful auction to proceed will irrevocably reveal SOGF’s bidding strategy such that SOGF would be irreparably disadvantaged in any subsequent lawful auction that DNRC might conduct. Finally, the Limestone West timber sale itself, and the logging and roadbuilding it threatens, would

irreparably harm the ability of SOGF members to use and enjoy the Limestone Creek valley in its undisturbed state.

For these reasons, SOGF requests a preliminary injunction preventing DNRC from completing the Limestone West timber sale auction pending a final judgment in this case. SOGF further requests a temporary restraining order pursuant to MCA § 27-19-314 if necessary to provide the Court with an adequate opportunity to rule on SOGF's request for a preliminary injunction before the Limestone West auction closes on March 5, 2019.

FACTUAL BACKGROUND

This case challenges the January 22, 2019 decision by DNRC and the Montana Board of Land Commissioners (“Land Board”) to conduct the Limestone West Timber Sale Project in the Limestone Creek drainage. See DNRC, Draft Record of Decision, Limestone West Timber Sale Project (Jan. 7, 2019) (Purtle aff., Ex. 1); Bd. of Land Comm'rs, Minutes (Jan. 22, 2019) (Purtle aff., Ex. 2).

The Limestone Creek drainage encompasses a last remnant of wild, undisturbed forest land extending from the edge of the Gallatin Valley into the high country of the Gallatin Range. From the mouth of this drainage southward, an unbroken tract of roadless land stretches all the way to Yellowstone National Park. See Compl. ¶ 16 (map). All the other foothill valleys south of Bozeman—Bear Canyon, Sourdough, Leverich, and Hyalite—have been roaded and logged to varying extents and receive high levels of year-round human activity. Steve Gehman, Wildlife Surveys in the Limestone West Area, Winter 2016-2017, at 4 (Apr. 2017) (“Gehman Wildlife Survey”) (Purtle aff., Ex. 3). Only Limestone remains undeveloped and pristine.

As a result of its wild character and diverse habitats, the Limestone area supports a high diversity of wildlife species. A survey performed in the winter of 2016-17 by wildlife biologist Steve Gehman documented that the Limestone drainage provides winter range for moose, elk,

white-tailed deer, and mule deer. Id. at 3. Gehman also documented use of the area by mountain lions, bobcats, red foxes, coyotes, American martens, short and long-tailed weasels, striped skunks, and a wolverine, prompting Gehman to conclude that “the Limestone West Area is a critical piece of a larger, and very important wildland complex of the Gallatin Mountains.” Id.

Gehman further documented that the Limestone area “provides abundant food and valuable habitat security” for moose, which he deemed “significant because moose numbers are declining throughout many regions of the northern Rocky Mountains, and any pockets of habitat supporting healthy moose are important to the long-term health and survival of moose in the region.” Id. at 4.

Although Gehman’s survey was conducted in winter, when bears are hibernating, he noted reports of black bear use of the Limestone drainage. Id. at 3. The Montana Department of Fish, Wildlife and Parks (“FWP”) has stated that black bears frequent the area and grizzly bears have been known to move through it. Letter from Sam B. Sheppard, Mont. Fish, Wildlife & Parks, to Chuck Barone, Mont. DNRC (Apr. 22, 2016) (Purtle aff., Ex. 4).

Gehman’s report also included documentation developed from year-round observations indicating that 120 bird species have been identified in the Limestone Creek area, of which at least 10 are deemed “Species of Concern” by FWP, meaning they are declining and may require concentrated conservation actions. Gehman Wildlife Survey at 2 & app. These include the golden eagle, northern goshawk, peregrine falcon, and pileated woodpecker. Id.

Gehman documented that the Limestone area received a very low level of human use during his survey period, translating to a high level of wildlife habitat security. Id. at 4. He stated that “this is significant because drainages to the east (Bear Canyon) and west of the study area (Bozeman Creek, Leverich Creek, and Hyalite Creek) receive very high levels of human

activity year-round.” Id. He concluded that the Limestone area offers wildlife “the only significant drainages on the eastern portion (i.e. east of Hyalite Creek) of the Gallatin Face that do not contain roads, easy public access, and high levels of human activity.” Id.

DNRC itself has recognized the Limestone drainage’s extraordinary wildlife habitat. In 1980, DNRC proposed to protect the area’s roughly 1,966 acres of state trust lands from development. DNRC prepared a draft management plan for those lands that described the Limestone area as “unique” because it is “virtually pristine and receives light use” and offers “impressive scenery and an abundance of wildlife, including moose and bald eagle.” DNRC, Draft Env’tl. Impact Statement, Bear Canyon Mgmt. Plan 34 (1980) (“1980 Draft EIS”) (Purtle aff., Ex. 5). DNRC further observed that the drainage’s “[s]teep, rocky hillsides” are “unstable in many areas” and the “valley bottom is relatively wide and wet with numerous boggy spots and unstable areas along the lower slopes.” Id. The agency concluded that these “severe topographic and soil conditions ... will continue to prevent development of the timber resource,” and therefore proposed to allocate the area to a watershed and wildlife management zone “[t]o protect the [area’s] unique water, wildlife, and scenic resources.” Id. at 34-35.¹

Now, however, DNRC, with approval from the Land Board, has adopted a diametrically opposite management approach for the Limestone drainage. In the challenged decision, the Land Board and DNRC have authorized a project to construct 6.7 miles of new roads into the Limestone Creek drainage to enable logging of 448 acres, mostly through clearcutting that would leave denuded hillsides visible from Bozeman. DNRC, Limestone West Timber Sale, Final

¹ DNRC never finalized this draft plan but instead issued a statewide forest land management plan in 1996 that did not address site-specific issues or make specific land-use allocations. See DNRC, State Forest Land Mgmt. Plan, Record of Decision 1 (1996), available at http://dnrc.mt.gov/divisions/trust/forest-management/limestone-west/SFLMP_LW.pdf.

Envtl. Impact Statement 74 (Dec. 2018) (“Final EIS”) (Purtle aff., Ex. 6). In its environmental analysis for this logging project, DNRC admitted that “new roads are likely to be used by the public and recreational use is likely to increase” and “disturbance and displacement of wildlife could be expected for several decades.” Final EIS, app. D at 22-23.

Plaintiff Save Our Gallatin Front is an organization of Gallatin Valley citizens who united to protect the unique Limestone Creek drainage from DNRC’s logging project. Recognizing DNRC’s asserted imperative to generate revenue from state trust lands in the Limestone area, SOGF applied to DNRC to offer a conservation license as an alternative to the timber sale under MCA § 77-5-208.

Section 77-5-208 authorizes DNRC, under direction of the Land Board, to “offer and provide a timber conservation license in lieu of the sale and harvesting of the timber” upon receipt of such an application. *Id.* § 77-5-208(1). A conservation license is “a temporary agreement restricting the harvest of timber on a state timber sale but not prohibiting other forms of use and management of the land and timber by the state.” ARM 36.11.451(10). In conducting a timber sale auction, DNRC must solicit bids for any conservation license along with a proposed logging contract “to ensure that the full, fair market value is secured for the beneficiaries” of the state trust. MCA § 77-5-208(1)(c). This is consistent with the Land Board and DNRC’s over-arching duty to manage state lands to “secure the largest measure of legitimate and reasonable advantage to the state.” *Id.* § 77-1-202(1)(a). Accordingly, if properly implemented, a conservation license would provide the state trust beneficiaries with full, fair compensation for the value of the trees involved in the proposed Limestone West Timber Sale Project without inflicting the environmental harms that would result from DNRC’s implementation of that project.

However, in the challenged decision, DNRC has set the terms of the conservation license alternative for the Limestone West Timber Sale in a manner that would not yield full, fair market value or a legitimate and reasonable return for the trees involved in the project. Instead, DNRC's approach would extract an unfair and impermissible windfall from the public. To successfully obtain a conservation license for the Limestone West timber sale project area, DNRC is requiring Save Our Gallatin Front to pay the entire stumpage value of the trees involved in the sale—i.e., the same value that a timber company must pay to log the trees—even though the trees would remain standing to be logged at the end of the conservation license period. DNRC, Limestone West Timber Sale Notice – FAQs (Purtle aff., Ex. 7). Moreover, DNRC is requiring Save Our Gallatin Front to pay this full stumpage value for a conservation license lasting only 25 years, even though it would take 90 to 100 years for the forest to grow back if it were logged instead of conserved. Final EIS at 87 (existing lodgepole pine stands are 100 years old), 237 (conservation license cost), 370 (subsequent timber sale could occur 90 years after logging). DNRC's approach thus would require Save Our Gallatin Front to pay 100 percent of the project's timber value even though the resulting conservation license would protect the forest for only 25 percent of the lifespan of the affected timber resource. This approach would enable DNRC to again auction the project—and again receive a payment of full stumpage value—after only 25 years, instead of waiting 90 to 100 years to auction a second logging project in the Limestone area if a timber company purchased the trees and logged them. In sum, DNRC's approach would enable the agency to sell the same trees twice, each time for a payment of full stumpage value, over a period of 25 years.

As a result of the challenged actions of the Land Board and DNRC, SOGF now faces a requirement to pay an unfair and unlawful price for a conservation license in DNRC's Limestone

West timber sale auction that is set to close on March 5, 2019. DNRC, Limestone West Timber Sale Notice – FAQs. Otherwise, the Limestone Creek drainage—which DNRC itself previously described as “unique,” “impressive,” and “virtually pristine,” 1980 Draft EIS at 34—will be sold to a timber company and then roaded and logged. Accordingly, SOGF now turns to this Court for relief.

ARGUMENT

This Court should issue temporary and/or preliminary injunctive relief to prevent DNRC from completing its unlawful auction for the Limestone West timber sale pending a final judgment in this case. SOGF is likely to succeed on its challenges to the Land Board and DNRC’s impermissible and unfair administration of the conservation license alternative, and completion of the Limestone West timber sale auction on the terms set by Defendants would irreparably injure SOGF. Accordingly, this Court should grant the requested relief.

I. STANDARD OF REVIEW

“District courts are vested with a high degree of discretion to maintain the status quo through injunctive relief.” Mack v. Anderson, 2016 MT 204, ¶ 12, 384 Mont. 368, 380 P.3d 730 (citing Shammel v. Canyon Res. Corp., 2003 MT 372, ¶ 12, 319 Mont. 132, 82 P.3d 912). The purpose of such preliminary injunctive relief is “to prevent further injury or irreparable harm pending an adjudication on the merits.” Flora v. Clearman, 2016 MT 290, ¶ 21, 385 Mont. 341, 384 P.3d 448 (citing Yockey v. Kearns Props., L.L.C., 2005 MT 27, ¶ 18, 326 Mont. 28, 106 P.3d 1185). Thus, as relevant here, this Court may issue a preliminary injunction when the applicant has (1) shown that the applicant is likely to succeed on the merits of the case, Mack, ¶ 15; and (2) shown that “it is at least uncertain, that the applicant will suffer irreparable injury prior to final resolution on the merits,” Davis v. Westphal, 2017 MT 276, ¶ 24, 389 Mont. 251, 405 P.3d 73 (emphasis deleted and citations omitted); see MCA § 27-19-201.

Further, where, as here, “an application for a[preliminary] injunction is made upon notice,” the court may issue a temporary restraining order enjoining “the adverse party, until hearing and decision of the application.” MCA § 27-19-314.

This Court may invalidate the challenged agency action where the Land Board and DNRC have acted arbitrarily, capriciously, or unlawfully. See Johansen v. Dep’t of Nat. Res. & Conservation, 1998 MT 51, ¶¶ 25-28, 288 Mont. 39, 955 P.2d 653; Friends of the Wild Swan v. Dep’t of Nat. Res. & Conservation, 2005 MT 351, ¶ 10, 330 Mont. 186, 127 P.3d 394.

II. SOGF IS LIKELY TO SUCCEED ON THE MERITS

SOGF is likely to succeed on the merits of its challenge to the Land Board’s and DNRC’s authorizations for the Limestone West timber sale. These agency decisions to charge SOGF the full stumpage value of the timber sale for a conservation license that would leave the affected trees standing and available for another sale in 25 years defy the Legislature’s intent to obtain “full, fair market value” and a “legitimate and reasonable advantage to the state” in such timber sale auctions—not an unfair windfall. MCA §§ 77-1-202(1)(a), 77-5-208(1)(c). Further, even assuming for the sake of argument that DNRC could permissibly charge full stumpage value for the Limestone West conservation license under Montana law—which it cannot do—the term of the license that Defendants established is arbitrarily short, and none of DNRC’s justifications for its short license term passes muster under applicable standards.

A. DNRC’s Decision To Charge Full Stumpage Value For the Conservation License Defies Legislative Intent

DNRC’s decision, approved by the Land Board, to charge SOGF the full stumpage value of the Limestone West timber sale for a conservation license ignores the Legislature’s intent in instructing DNRC to obtain “full, fair market value” in auctions that include such licenses. MCA § 77-5-208(1)(c). Because the trees subject to a conservation license remain standing to be

sold again at the end of the license term, the Legislature intended that “full, fair market value” for a conservation license would equal the lost expected interest income to trust beneficiaries due to deferral of the timber sale, not the full stumpage value of the timber.

In the 1990s, DNRC began to offer conservation licenses as an alternative to timber projects on certain parcels of state land. At the time, DNRC’s practice was to charge conservation licensees for the lost income to the trust due to deferral of the timber sale. See Mont. House Nat. Res. Comm., Hr’g on HB 485, 56th Legis., 1999 Reg. Sess., at 3-5 (Feb. 10, 1999) (hearing minutes) (Purtle aff., Ex. 8). In 1999, the Legislature introduced a bill to establish controls on DNRC’s new practice, in part by requiring prospective conservation licensees to compete with logging companies in an auction. Some legislators, however, raised a concern that requiring prospective licensees to bid against logging companies in a timber sale auction might extract an unfair windfall from the public because conservation licensees would be required to pay the same amount as a timber purchaser, while the trees would remain in place for a future timber sale. Then-Representative Hal Harper raised this issue during a House Natural Resources Committee hearing on the bill:

Rep. Harper described an example of a bid going to a logging company. The state gets the money and is left with a clear cut. If a conservation group, with a lower bid, were to get the easement the state gets the money and still has the entire resource left plus the habitat. He asked if there should be an adjustment made for this reason.

Id. at 4. Then-DNRC Director Bud Clinch responded that the agency would avoid this unfair result by charging conservation licensees for lost interest income to the trust due to deferral of the timber sale, rather than the full stumpage value of the timber:

The process in the past proceeds when the value of the timber is established. The lost interest income is calculated and that is what the license is charged for. In a conservation license, the purchaser is not buying the timber, they are buying the right to defer that for a ten year period of time. They are not charged the rate of the timber, they are

charged the hypothetical amount of lost interest earnings if it had been sold at that amount and put the money into the trust and had collected interest based on the current rate of return. There is a differential in what the actual cost of the license would be. It would be a discounted amount of the bid amount. The process is the most equitable way to deal with the issue, protecting the trust beneficiaries by really only charging lost interest income.

Id. at 4-5 (emphases added). Clinch described the price calculation in nearly identical terms at a later Senate hearing on the bill:

How the conservation license concepts works is when an applicant proposes to defer a certain portion of a sale. They calculate the volume of timber that is being removed currently using the estimated sale price it might sell for based on what they know is happening in the market price. If they know the timber is selling for \$200 per 1000, they calculate how much timber is going to be lost in the timber sale as a result, multiply it out to arrive at the full value of the timber being deferred. Because they are purchasing is a ten year deferral, they then take the cumulative value and calculate the lost interest income. If they had sold under the estimated appraisal value, how much money would they lose in interest. That is how price is determined.

Mont. Sen. Nat. Res. Comm., Hr'g on HB 485, 56th Legis., 1999 Reg. Sess., at 14-15 (Mar. 12, 1999) (hearing minutes; emphasis added) (Purtle aff., Ex. 9).

The Montana Supreme Court has frequently relied on such legislative hearing testimony by agency officials to guide construction of a statute that the agency will administer. See Matter of Brogan, 283 Mont. 413, 420, 942 P.2d 100, 105 (1997) (relying on hearing testimony by Montana Fish, Wildlife and Parks in holding that MCA § 87-4-427, concerning game farms, should be construed as remedial statute); Fandrich v. Capital Ford Lincoln Mercury, 272 Mont. 425, 430-31, 901 P.2d 112, 115 (1995) (relying on hearing testimony by State Human Rights Commission administrator in construing amendment to the Montana Human Rights Act). Such reliance is especially appropriate in this case given the established statutory construction rule “that in adopting a statute the legislature is presumed to have acted with knowledge of the previous construction of similar statutes and to have adopted such construction. This rule applies

not only to acts previously construed by the courts, but has equal application to statutes previously construed by the executive or administrative department of the government.” Vantura v. Mont. Liquor Control Bd., 113 Mont. 265, 124 P.2d 569, 571 (1942) (citations omitted).

Here, Director Clinch’s 1999 testimony about DNRC’s existing practice in establishing a fair value for conservation licenses necessarily reflected his agency’s construction of its fundamental statutory duty to administer state trust assets to “secure the largest measure of legitimate and reasonable advantage to the state.” MCA § 77-1-202(1)(a). That duty is similar to the conservation license statute’s mandate for DNRC to secure “full, fair market value” for trust beneficiaries, id. § 77-5-208(1)(c); both require full—but equitable—compensation to the trust. Moreover, the Court need not “presume” that the 1999 Legislature acted with knowledge of DNRC’s construction of this parallel statutory framework; Director Clinch explained the agency’s practice to the Legislature, which made no change in that practice when it enacted the conservation license statute. Accordingly, pursuant to the rule stated in Vantura, 113 Mont. 265, 124 P.2d at 571, when the Legislature enacted the conservation license statute, it understood and intended that DNRC would obtain “full, fair market value” under that statute by requiring conservation license purchasers to compensate the state trust for the lost interest income that the trust would have received if the timber had been immediately sold for logging.

Not only does this construction of the conservation license statute accord with legislative intent, it also is essential to avoid “absurd results” under the language of Defendants’ governing statutory mandates—results that Representative Harper predicted in 1999, and that would flow from Defendants’ challenged action today. Mont. Sports Shooting Ass’n, Inc. v. Mont. Dep’t of Fish, Wildlife & Parks, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003 (“Statutory construction should not lead to absurd results if a reasonable interpretation can avoid it.”) (citing State v.

Letasky, 2007 MT 51, ¶ 11, 336 Mont. 178, 152 P.3d 1288). As in Representative Harper’s example, here DNRC’s approach to the conservation license alternative to the Limestone West timber sale would enable DNRC to “get[] the money and still ha[ve] the entire resource left plus the habitat.” Mont. House Nat. Res. Comm., Hr’g on HB 485, 56th Legis., 1999 Reg. Sess., at 4 (Feb. 10, 1999). DNRC intends to charge SOGF the full stumpage value for the Limestone West timber sale—the same price as a logging company—even though SOGF’s purchase would leave the trees standing and available for logging after the license expires in 25 years, at which point DNRC could turn around and sell the same trees—again at the full stumpage value price—a second time. It is absurd to conclude that the Legislature’s direction for DNRC to secure “full, fair market value” for trust beneficiaries, MCA § 77-5-208(1)(c) (emphasis added), and a “legitimate and reasonable advantage to the state,” id. § 77-1-202(1)(a) (emphases added), was meant to authorize the agency to sell the same trees twice, each time at full stumpage value.

Indeed, DNRC’s own economic analysis reveals the unfairness of DNRC’s position. DNRC’s Final EIS included an appendix in which the agency purported to justify its approach to the conservation license alternative. According to a hypothetical scenario examined in that document, if DNRC were to sell a Limestone West logging contract today, it would receive a stumpage value of approximately \$462,489. Final EIS at 376 (Table 5). If, instead, DNRC sold a ten-year conservation license for the Limestone West trees at full stumpage value today, and then sold the same timber again after ten years, DNRC’s total revenue from these trees—taking into account the time value of money in light of the ten-year delay in the logging sale—would jump to \$770,348. Id. Thus, DNRC would have boosted the present value of the Limestone

West timber by more than \$300,000 by doing nothing more than offering the same trees for sale twice over a ten-year period.²

As explained by Dr. Thomas Power, a research professor in the University of Montana Economics Department whom SOGF retained to submit an expert economic analysis to DNRC, “[i]t certainly would be beneficial to the state if it could actually sell the same timber twice or, even, more often, but that is largely a financial fantasy, not a likelihood worth modeling.” Power Consulting, Inc., *The Appropriate Price and Time Duration of a Conservation License in the Context of the Limestone West Timber Sale 4* (Oct. 29, 2018) (“Power Review”) (Purtle aff., Ex. 10). Nor is demanding that the public pay for such fantastical windfalls a lawful approach to obtaining “full, fair market value” and a “legitimate and reasonable advantage” for the state trust, as Montana law requires. MCA §§ 77-1-202(1)(a), 77-5-208(1)(c).

As the foregoing discussion demonstrates, the Land Board’s and DNRC’s decision to charge SOGF full stumpage value, rather than lost income to the state trust, to obtain a conservation license for the Limestone West timber sale is unlawful. It also makes a significant difference in the amount that SOGF would be required to pay for the conservation license. DNRC estimates that full stumpage value for the Limestone West timber sale would amount to \$376,002. Final EIS at 77. By contrast, based on Dr. Power’s calculations, it appears that the present value of the lost interest earnings to the state trust beneficiaries from a 25-year conservation license would likely be \$100,000 to \$120,000. Power Review at 16. Defendants thus seek to charge SOGF more than three times the rate intended by the Legislature for a

² DNRC examined a 10-year license scenario in this appendix because it initially proposed a Limestone West conservation license term of 10 years, but the same fundamental flaw in Defendants’ approach applies under a 25-year license term. See Final EIS at 376 (30-year conservation license would yield \$644,044 total revenue).

conservation license. For this reason alone, the challenged actions of the Land Board and DNRC are arbitrary, capricious, and unlawful.

B. DNRC’s Determination of the Conservation License Term is Arbitrary

In the alternative, even assuming for the sake of argument that it were lawful for Defendants to demand that SOGF pay full stumpage value rather than lost interest income to the trust beneficiaries to purchase a conservation license for the Limestone West timber sale—which it is not for the reasons stated—it was still arbitrary and unlawful for the Land Board and DNRC to set the term for such a license at a shorter period than would be required to conduct a second timber sale in the Limestone West project area.

Pursuant to a DNRC regulation, “[t]he duration of the timber conservation license shall be determined within” the environmental review process for a timber sale, “but shall not in any event exceed” the maximum lease period for state lands (other than those used for power or school sites), which is 99 years. ARM 36.11.452(9); MCA § 77-1-204(1). As it turns out, this 99-year maximum license period closely approximates the period required for the Limestone West timber to grow back after logging such that DNRC could feasibly auction a second timber sale in the area. Final EIS at 375 (Table 3). Nevertheless, DNRC offered SOGF only a 25-year conservation license term, even though it will require SOGF to pay the full stumpage value of the timber to secure that license.

This approach again creates an unfair windfall for the agency. As explained by Dr. Power in his expert comment to DNRC:

The proposed timber sale would remove standing timber that it will take almost a century to restore. The winning timber harvest bidder will have purchased the equivalent of more than a century of wood fiber growth. The winning forest conservation license bidder would expect its license to extend until DNRC expects another major commercial harvest at this site to take place. Just as the winning bidder for logging the site would win the right to cut and carry away a century’s worth of wood fiber, the

winning conservation license bidder should win the right to protect that site from commercial timber harvest for 90 to 100 years going forward[.]

Power Review at 9. In sum, if SOGF is required to pay the same value for a conservation license that a logging company pays to remove the trees, then, as a matter of “fair” market value and “legitimate and reasonable advantage” to the state, MCA §§ 77-1-202(1)(a), 77-5-208(1)(c), SOGF’s license should purchase a right to the affected trees for an equivalent period of time. Otherwise, DNRC would, again, extract an unfair windfall from the public.

DNRC’s attempts to justify its windfall approach during the administrative process for the Limestone West timber sale are unpersuasive. DNRC argued that a short-term license is justified because a catastrophic event such as fire, insect infestation, or a market crash could harm the timber value if logging does not occur immediately, and the risk of such an event is greater for a longer license term. Final EIS at 76-77, 374. However, as Dr. Power pointed out in his expert analysis, the risk of fire or insect mortality or market fluctuations exists regardless whether logging occurs now or later. Power Review at 12-13. Further, because a conservation license at full stumpage value would fully compensate DNRC for the value of approximately a century’s worth of timber, the risk to DNRC from a conservation license with an equivalent term is not loss of the value of the timber—which it would already have pocketed—but loss of an opportunity to extract an unfair windfall from the public by selling the same trees twice.

DNRC also argued that it needs to maximize the amount of timber available for logging, and, to do so, must log sooner rather than later. See Final EIS at 76-77, 373. However, DNRC’s own analysis demonstrates that cumulative timber volumes over two logging cycles at the Limestone West project site will reach a maximum if logging is delayed for 100 years—not, as DNRC asserts, if logging occurs immediately. Final EIS at 375 (Table 3) (estimated cumulative logging volume).

More fundamentally, DNRC's attempted justifications focus on DNRC's purported imperative to maximize "timber production" and "revenue" from the Limestone West site. Final EIS at 373, 377. When pressed by the public about the need to balance such economic considerations with environmental harms, DNRC repeatedly responded that, "[u]nfortunately, our educational beneficiary institutions require tangible funding in the form of currency to continue to function, which requires the implementation of revenue-generating projects from state trust lands on a regular basis." Final EIS, app. D at 39, 44. Indeed, in the Final EIS for the Limestone West timber sale, DNRC asserted that it "is charged with the responsibility of generating the largest measure of reasonable and legitimate revenue to the trust beneficiaries from actions such as this proposed timber sale." Id. at 365 (emphasis added).

However, Montana law requires DNRC to "secure the largest measure of legitimate and reasonable advantage"—not revenue—to the state trust, MCA § 77-1-202(1)(a), and the referenced "advantage" is not "exclusively an economic one." Friends of the Wild Swan v. Dep't of Nat. Res. & Conservation, ¶ 20; accord Friends of the Wild Swan v. Jewell, 2014 WL 4182702, at *8 (D. Mont. Aug. 21, 2014) (rejecting "strict revenue-generating view" of state trust lands). The trust mandate equally encompasses "maintenance efforts to ensure long-term sustainability," Friends of the Wild Swan v. Dep't of Nat. Res. & Conservation, ¶ 20, which includes "considering consequences to wildlife and the environment," Ravalli Cty. Fish & Game Ass'n v. Mont. Dep't of State Lands, 273 Mont. 371, 379, 903 P.2d 1362, 1368 (1995), and may extend to maintaining undeveloped forest areas to provide wildlife habitat, see Friends of the Wild Swan v. Jewell, 2014 WL 4182702, at *8. In fact, the Montana federal district court in Friends of the Wild Swan v. Jewell specifically rejected DNRC's contention that its "mandate to

generate revenue for the trust beneficiaries” precluded consideration of maintaining additional secure wildlife habitat on state forest lands. *Id.* (quotations and citation omitted).

In this case, the Land Board and DNRC focused on revenue considerations to reject any license term longer than 25 years. Yet the defendants’ proffered rationales are contrary to legislative intent as construed by the Montana Supreme Court and Montana federal district court in cases interpreting the Land Board’s and DNRC’s statutory trust obligations. For this reason too, defendants’ challenged actions are arbitrary, capricious, and unlawful and SOGF is likely to succeed on the merits.

III. THE LIMESTONE WEST TIMBER SALE AUCTION THREATENS SOGF WITH IRREPARABLE HARM

As demonstrated above, the Land Board’s and DNRC’s decisions to authorize the Limestone West timber sale auction were unlawful. In addition, implementation of those decisions through DNRC’s completion of the auction now under way would irreparably harm SOGF’s interests, justifying temporary and/or preliminary injunctive relief from this Court.

First, if the auction is completed with a conservation license alternative as currently framed by the Land Board and DNRC, Save Our Gallatin Front will irreparably lose its opportunity to compete fairly for the Limestone West conservation license. See Palantir USG, Inc. v. United States, 129 Fed. Cl. 218, 291 (2016) (holding that “a protester suffers irreparable harm if it is deprived of the opportunity to compete fairly for a contract”; collecting cases) (quotations and citations omitted), aff’d, 904 F.3d 980 (Fed. Cir. 2018). This is because the conservation license terms established by DNRC severely hinder SOGF’s ability to submit a bid for such a license. As a conservation organization formed of local Gallatin Valley citizens, SOGF must conduct fundraising to collect money for a conservation license bid. Tousignant Aff. ¶ 9. Yet, as described by SOGF Board Chairman Tim Tousignant, DNRC’s approach

requires SOGF “to pay for 100 years’ worth of the timber value of the Limestone West project in order to protect the forest for only 25 years.” Id. As Tousignant further attests, the unfair nature of DNRC’s proposed bargain makes it extremely difficult for SOGF to raise funds from public sources for the necessary bid. Id. For this reason alone, defendants’ conduct threatens SOGF with irreparable harm.

Moreover, even if SOGF is able to collect the necessary funds and submit a bid, it would still suffer irreparable harm from disclosure of its bid in DNRC’s unlawful auction. Absent injunctive relief, DNRC will open bids and award the high bidder a contract for the Limestone West project on March 5, 2019. DNRC will then, consistent with its practice, post a summary of the bids it received on the sale, including the exact amount of SOGF’s bid. See, e.g., Mont. DNRC Timber Sale Summary (Purtle aff., Ex. 11) (listing amounts bid by each company participating in Ten Lions timber sale). Having seen this initial bid, logging companies seeking to outbid SOGF could use the information they gained about SOGF’s bidding strategy and valuation of the conservation license to defeat SOGF in any subsequent auction. See Great Lakes Dredge & Dock Co. v. United States, 60 Fed. Cl. 350, 370 (2004) (finding irreparable harm based on disadvantage to bid protestor in future bidding because protestor’s “competitors would ... have a comprehensive price breakdown on how [protestor] views the project” as a result of protestor’s bid in initial, unlawful bidding); Tousignant Aff. ¶ 10. At a minimum, disclosure of SOGF’s bid would give competitors information about the results of SOGF’s fund-raising efforts. Id. Thus, even if this Court were ultimately to enter judgment in SOGF’s favor and order DNRC to conduct a second, lawful auction, SOGF’s bid in the auction now being conducted by DNRC would “be a ‘sitting duck,’ serving as a target in the next round of bidding.” Great Lakes Dredge & Dock Co., 60 Fed. Cl. at 370 (citation omitted). No order from this

Court—except the injunctive relief SOGF now seeks in this motion—can remedy the resulting competitive disadvantage that SOGF would suffer.

Second, once the auction is completed, implementation of the impending Limestone West timber project itself threatens irreparable harm to the interests of SOGF members, because it would irrevocably harm their ability to “view, experience and utilize” the Limestone area in its “undisturbed state.” All. for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011) (quotations omitted). SOGF members value the Limestone Creek drainage because it is wild and pristine, providing habitat for numerous species of sensitive wildlife and constituting the northernmost portion of a larger tract of public roadless lands stretching south to Yellowstone National Park. Breeding Aff. ¶¶ 3-8 (attaching photos); Tousignant Aff. ¶¶ 3-5, 7; Webb Aff. ¶¶ 3-6. The Limestone West project, if allowed to proceed, would carve 6.7 miles of new roads into the Limestone Creek valley. Final EIS at 76. The project would also log 448 acres of trees, mostly through clearcutting. Id. at 74. As DNRC itself acknowledges, “new roads are likely to be used by the public and recreational use is likely to increase” after the project, and road building and logging would cause “disturbance and displacement of wildlife” that could persist “for several decades.” Final EIS, app. D at 22-23. In sum, if implemented, the Limestone West timber sale would destroy the pristine and undisturbed qualities of the Limestone Creek valley that define its value for members of SOGF. For this reason too, SOGF’s interest would be irreparably harmed. See All. for the Wild Rockies v. Marten, 253 F. Supp. 3d 1108, 1111 (D. Mont. 2017) (holding that logging and roadbuilding would cause irreparable harm to plaintiffs’ “recreational, scientific, spiritual, vocational and educational interests” in viewing and utilizing affected area “in its undisturbed state”) (quotations omitted); Breeding Aff. ¶¶ 9-11; Tousignant Aff. ¶ 7; Webb Aff. ¶ 7.

IV. ANY INJUNCTION BOND SHOULD NOT EXCEED \$7,793

Finally, MCA § 77-1-110(2) provides that, if a court awards injunctive relief “concerning a decision of the [Land Board] or [DNRC] approving a use ... of state lands that would produce revenue for any state lands trust beneficiary, the court shall require a written undertaking for the payment of damages that may be incurred by the trust beneficiary if the board or the department is wrongfully enjoined or restrained.” Here, damages, if any, to the state trust beneficiaries from SOGF’s requested injunction would be limited to lost income to the trust due to delay in auctioning the timber sale, pending any appeal of such an injunction order to the Montana Supreme Court—a period unlikely to exceed one year. In an attached affidavit, Dr. Power has estimated the value of such lost trust income at \$7,793. Power Aff. ¶ 6. Accordingly, any injunction bond required by the Court should not exceed that amount.

CONCLUSION

For the foregoing reasons, SOGF respectfully requests that this Court issue a preliminary injunction preventing DNRC from completing the Limestone West timber sale auction pending a final judgment in this case. SOGF further requests that this Court issue a temporary restraining order pursuant to MCA § 27-19-314 if necessary to provide the Court with an adequate opportunity to rule on SOGF’s request for a preliminary injunction before the Limestone West auction closes on March 5, 2019.

Respectfully submitted this 31st day of January, 2019.

A handwritten signature in blue ink, appearing to read 'T. J. Preso', written over a horizontal line.

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