

until Defendants adopt a lawful approach to the auctioning of a conservation license alternative to the timber sale. That alternative would enable the public to compete fairly for the right to provide revenue to state trust beneficiaries while protecting the pristine and irreplaceable Limestone Creek drainage.

2. The Limestone Creek drainage encompasses a last remnant of wild, roadless forest land extending from the foothills of the Gallatin Valley into the high country of the Gallatin Range. From this drainage southward an unbroken tract of roadless land stretches all the way to Yellowstone National Park. 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. Only Limestone remains mostly undisturbed and pristine.

3. For this reason, the Limestone drainage provides exceptional habitat for a wide variety of sensitive wildlife species that are absent from, or significantly less abundant in, more developed and heavily trafficked areas south of Bozeman, including moose, elk, pine martens, and even wolverines and grizzly bears. The Limestone drainage also supports 120 bird species, including ten deemed “Species of Concern” by the Montana Department of Fish, Wildlife and Parks.

4. Recognizing 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”). 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 34-36.

5. 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 of trees, mostly through clearcutting that would leave denuded hillsides visible from Bozeman and surrounding residential and recreational areas. In its environmental analysis for this logging project, DNRC admitted that "disturbance and displacement of wildlife could be expected for several decades" as a result of this roadbuilding and logging and the increased human use of the Limestone area that would follow it. DNRC, Limestone West Timber Sale, Final Env'tl. Impact Statement, app. D, at 22 (Dec. 2018) ("Final EIS").

6. 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, Save Our Gallatin Front applied to DNRC to offer a conservation license as an alternative to the timber sale. In this regard, MCA § 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. MCA § 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). Section 77-5-208 provides for DNRC to include a conservation alternative along with a logging alternative in a timber sale auction, and to “solicit bids simultaneously for each alternative ... to ensure that the full, fair market value is secured for the beneficiaries.” MCA § 77-5-208(1)(c). Accordingly, if properly implemented, a conservation license would provide Save Our Gallatin Front with an opportunity to bid against logging companies in an auction for the Limestone West Timber Sale Project, and, if Save Our Gallatin Front were successful in the auction, would provide state trust beneficiaries with full, fair compensation for the value of the trees involved in the project without inflicting the environmental harms that would result from road construction and logging in the Limestone Creek drainage.

7. However, in the challenged decision, DNRC has not properly implemented the conservation license opportunity afforded by Montana law. DNRC has set the terms of the conservation license alternative for the Limestone West Timber Sale in a manner that would not yield the full, fair market value of the trees involved in the project, but instead would require members of the public to provide an unfair and impermissible windfall to DNRC. Specifically, 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 for potential future logging at the end of the conservation license period. 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. 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 about 25 percent of the lifespan of the affected timber resource. This approach would enable DNRC to again auction the project—and again extract from the public or a timber company 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.

8. Defendants' approach to the conservation license alternative does not allow Save Our Gallatin Front to compete fairly with timber companies in the auction for the Limestone West Timber Sale Project. For this reason, it violates Montana law governing DNRC's and the Land Board's administration of such licenses, which mandates fair market valuation of a conservation license to provide a legitimate and reasonable return to the state—not a windfall. Accordingly, Plaintiff Save Our Gallatin Front now turns to this Court for relief.

JURISDICTION AND VENUE

9. Plaintiff brings this action pursuant to the Uniform Declaratory Judgments Act, MCA §§ 27-8-101 – 313, which authorizes this Court to declare rights and legal relations and issue further relief based on a declaratory judgment when necessary and proper, MCA § 27-8-201. In so doing, this Court must determine whether Defendants 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 (holding district courts possess inherent authority to review state agency decisions that are not classified as contested cases under the Montana Administrative Procedure Act).

10. This Court has jurisdiction over Plaintiff's claims pursuant to MCA § 3-5-302(1)(b) and (c). See Friends of the Wild Swan v. Dep't of Nat. Res. & Conservation, 2005 MT 351, 330 Mont. 186, 127 P.3d 394 (exercising jurisdiction over claim challenging DNRC's administration of timber sale on trust lands).

11. Venue is proper in this district under MCA § 25-2-126(1) because Plaintiff's claim arose in, and Plaintiff resides in, Gallatin County.

PARTIES

12. Plaintiff Save Our Gallatin Front is a Montana corporation formed by Gallatin Valley citizens to advocate for protecting the Limestone Creek drainage from road construction and logging planned by DNRC pursuant to the Limestone West Timber Sale Project. Save Our Gallatin Front has an application for non-profit status pending before the federal Internal Revenue Service. Save Our Gallatin Front submitted an application for a conservation license to DNRC, along with extensive public comments, during the agency's administrative process leading up to the Limestone West Timber Sale Project authorization decision.

13. Plaintiff's members and volunteers use and enjoy the Limestone Creek drainage and surrounding national forest lands for a wide range of activities, including recreational pursuits such as hiking, hunting, camping, backpacking, bird watching, wildlife watching, and appreciation of undisturbed natural scenery, as well as spiritual renewal and aesthetic enjoyment. Plaintiff's interest in this area is sufficiently strong that Plaintiff is prepared to pay to protect the area from road construction and logging through the purchase of a conservation license from DNRC that provides fair compensation to the state trust beneficiaries. DNRC's challenged decision to proceed with the project on the terms stated in the project approval, and the Land Board's approval of that challenged decision, harm the interest of Plaintiff's members and

volunteers in using and enjoying the wild lands in the Limestone Creek drainage and maintaining a healthy and intact ecosystem there. These decisions also harm Plaintiff's interest in being afforded a fair opportunity to compete for and purchase a conservation license to protect the trees in the Limestone Creek drainage from logging and to protect the area itself from road construction. Accordingly, the legal violations alleged in this complaint cause direct injury to the aesthetic, conservation, recreational, scientific, educational, wildlife preservation, and economic interests of Plaintiff and its members and volunteers. These are actual, concrete injuries that are traceable to DNRC's and the Land Board's conduct and would be redressed by the relief requested in this complaint.

14. Defendant Montana Board of Land Commissioners was established pursuant to Article X, section 4, of the Montana Constitution, and consists of the governor, superintendent of public instruction, auditor, secretary of state, and attorney general. The Land Board exercises "general authority, direction, and control over the care, management, and disposition of state lands and, subject to the investment authority of the board of investments, the funds arising from the leasing, use, sale, and disposition of those lands or otherwise coming under its administration." MCA § 77-1-202(1). Montana law requires the Land Board to administer state lands to "secure the largest measure of legitimate and reasonable advantage to the state." Id. § 77-1-202(1)(a). This requirement to secure the largest legitimate and reasonable advantage for state trust beneficiaries "is not limited in purpose to financial return" and the "advantage" that the Land Board must secure is not "exclusively an economic one." Friends of the Wild Swan v. Dep't of Nat. Res. & Conservation, ¶¶ 20-21; 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 Natural 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. All timber sales on state lands are “subject to the approval and confirmation by the board, and no sale shall be deemed completed until after such approval and confirmation.” MCA § 77-5-205. The Land Board voted to approve DNRC’s Limestone West Timber Sale Project decision on January 22, 2019.

15. Under the direction of the Land Board, Defendant Montana Department of Natural Resources and Conservation “has charge of the selecting, exchange, classification, appraisal, leasing, management, sale, or other disposition of the state lands.” MCA § 77-1-301(1). Also under the direction of the Land Board, DNRC “may sell the timber crop and other crops of the forests after examination, estimate, appraisal, and report and under any rules established by the board.” Id. § 77-5-201(1). DNRC conducted the planning process for the Limestone West Timber Sale Project, including setting the terms of the conservation license alternative offered for that project, and submitted the project proposal for Land Board approval at the Board’s meeting on January 22, 2019.

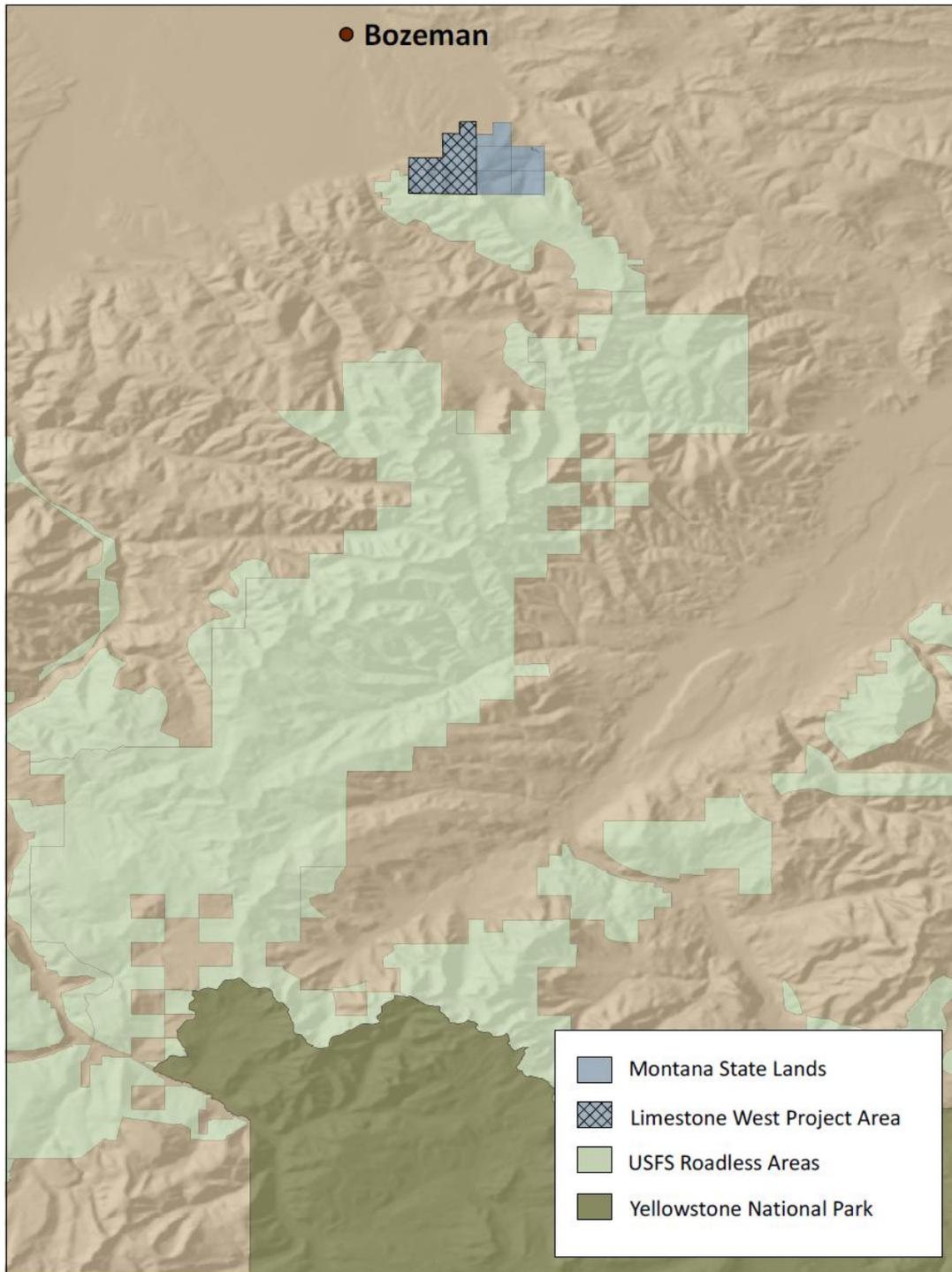
BACKGROUND

I. THE LIMESTONE CREEK DRAINAGE

16. As discussed above, the Limestone Creek drainage south of Bozeman is an area of wild forest land that DNRC itself has termed “unique,” “impressive,” and “virtually pristine.” 1980 Draft EIS at 34. Not only is the Limestone drainage itself roadless, but it forms part of a larger roadless tract of public land stretching southward down the spine of the Gallatin Mountain

Range all the way to Yellowstone National Park. Thus, the Limestone drainage offers a wild connection from Bozeman's back door straight to Yellowstone. See Figure 1.

Figure 1 – Map of the unroaded corridor extending from the Limestone Creek drainage to Yellowstone National Park



17. This undeveloped valley contains a high diversity of wildlife habitat types, including middle- to old-age Douglas-fir and lodgepole pine forests, old-growth spruce-fir forests, aspen stands, and large open hillsides.

18. As a result of its wild character and diverse habitats, the Limestone drainage supports a high diversity of wildlife. 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. 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. Indeed, the wildlife species most commonly documented in his survey was the pine marten, which Gehman deemed significant because marten numbers drop sharply in ranges to the north, and the Limestone “martens represent the northern-most segment of the Gallatin Range marten population, which is a stronghold for martens in the region.” Steve Gehman, *Wildlife Surveys in the Limestone West Area, Winter 2016-2017 2-3* (Apr. 2017) (“Gehman Wildlife Survey”).

19. Gehman’s survey also documented wolverine tracks in the Limestone area, “indicat[ing] that the Limestone West Area is a critical piece of a larger, and very important wildland complex of the Gallatin Mountains.” *Id.* at 3.

20. 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.

21. Although Gehman's survey was conducted in winter, when bears are hibernating, he noted reports of black bear use of the Limestone drainage. 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.

22. Gehman's winter survey also was not able to thoroughly document the presence of bird species in the Limestone drainage, but he appended 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. These include the golden eagle, northern goshawk, peregrine falcon, and pileated woodpecker.

23. 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. 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." Gehman Wildlife Survey at 4. 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.

II. DNRC'S LIMESTONE WEST TIMBER SALE PROJECT

24. In the midst of this wild valley with its exceptional wildlife habitat, DNRC has proposed a major road-building and logging project. DNRC first advised the public of its plans to log the Limestone area in March 2016, after which the agency held a "scoping" meeting in

Bozeman to solicit public comment on environmental issues to be considered in developing the project decision.

25. From the beginning, the project faced a high level of public opposition from the local community. Approximately 100 people attended DNRC's "scoping" meeting and 198 submitted written "scoping" comments to the agency. The vast majority opposed the project.

26. Also from the beginning, Save Our Gallatin Front worked to inform the public about the threat that the project posed to the Limestone drainage and to organize public advocacy for protecting the area from road construction and logging. To advance this effort, Save Our Gallatin Front in June 2016 applied to DNRC for a conservation license in lieu of a timber sale in the Limestone area pursuant to MCA § 77-5-208(1)(a), which provides that, "[d]uring the environmental review process" for such a timber sale, "an interested person shall provide to [DNRC] a written request that the department defer the sale ... and that a timber conservation license for the sale ... be authorized."

27. DNRC issued a draft environmental impact statement ("Draft EIS") concerning the proposed Limestone West Timber Sale Project on August 31, 2018. That document set forth three alternative management actions for the Limestone area.

28. Alternative A proposed 9.2 miles of new road construction and logging of 600 acres to yield 4.3 million board feet of timber. DNRC estimated that implementing this alternative would yield \$462,438 in revenue, of which \$189,600 would go to the state trust.

29. Alternative B proposed 6.5 miles of new road construction and logging of 373 acres to yield 2.7 million board feet of timber. DNRC estimated that implementing this alternative would yield \$318,240 in revenue, of which \$130,478 would go to the state trust.

30. Under both of these logging alternatives, most of the proposed logging would consist of clearcutting, which removes all trees from the impacted acres and would leave bare slopes visible from Bozeman and surrounding residential and recreational areas, including South Third Street, Fort Ellis Road, and the popular Triple Tree Trail. DNRC's Draft EIS admitted that implementation of these logging alternatives would displace some wildlife species, such as the pine marten, from the project area for decades. Further, despite the Montana Supreme Court's direction that the legal mandate for management of state trust lands under MCA § 77-1-202 "is not limited in purpose to financial return," Friends of the Wild Swan v. Dep't of Nat. Res. & Conservation, ¶ 21, the Draft EIS asserted that DNRC faces a state law mandate "of generating the largest measure of reasonable and legitimate revenue to the trust beneficiaries." Draft EIS at 340.

31. Unlike Alternatives A and B, Alternative C proposed issuance of a conservation license in response to Save Our Gallatin Front's application.

III. DNRC'S CONSERVATION LICENSE ALTERNATIVE

32. 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).

33. Despite state law authorizing a conservation license with a term as long as 99 years, DNRC's Alternative C conservation license option in the Draft EIS for the Limestone West Timber Sale Project offered Save Our Gallatin Front the opportunity to bid for a conservation license with a term of only 10 years. Further, the Draft EIS stated that Save Our

Gallatin Front would be required to pay the same price for this 10-year license as a timber company would pay to log the area—that is, the full stumpage value of the timber.

34. DNRC purported to justify its proposed 10-year conservation license term in an appendix to its Draft EIS for the Limestone West Timber Sale Project. In that discussion, DNRC asserted that a 10-year license term would enable DNRC to maximize the amount of timber production that could be realized from the forests of the Limestone Creek drainage. DNRC also asserted that a 10-year license term was optimal because it would maximize logging revenues while presenting a tolerable risk of resource degradation or loss due to events such as “fire events, forest health events, and regional forest product market shocks.” Draft EIS at 348.

35. During the public comment process on DNRC’s Draft EIS, Save Our Gallatin Front submitted a response to DNRC’s assertions concerning the proposed 10-year license term. Regarding DNRC’s assertion about maximizing timber volume through a 10-year license, Save Our Gallatin Front pointed out that DNRC’s own estimates of timber volumes that could be logged from the area under various conservation license terms actually demonstrated that a 99-year conservation license would maximize the logging volume available to DNRC from the Limestone project area. See id. at 345 (Table 1). Regarding DNRC’s assertion about minimizing the risk of loss or degradation of the affected trees, Save Our Gallatin Front pointed out that such risk would exist regardless whether a conservation license was issued, as the economic value of either an unlogged forest subject to a conservation license or a forest growing back after a timber sale could be impacted by wildfire, insect infestation, disease, or poor markets for wood fiber.

36. Save Our Gallatin Front also responded to DNRC’s proposal to require a payment of full stumpage value for a conservation license that would leave the affected trees unlogged. In

this regard, Save Our Gallatin Front pointed out that, when the Montana Legislature was considering enactment of the conservation license statute in 1999, DNRC itself advised the Legislature that the continuing availability of unlogged timber under such a license justified a different valuation approach for a conservation license than a logging contract. During the House Natural Resources Committee hearing on the bill that would eventually become the conservation license statute, then-Representative Hal Harper raised this issue:

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.

Mont. House Nat. Res. Comm., Hr'g on HB 485, 56th Legis., 1999 Reg. Sess., at 4 (Feb. 10, 1999) (hearing minutes). Then-DNRC Director Bud Clinch responded:

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 (emphasis 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). Thus, when legislators enacted the conservation license statute, they understood, based on Clinch's expert testimony, that the price of such a license would be set at the "hypothetical amount of lost interest earnings," not at the stumpage price of the timber. The Legislature's conservation license statute imposed new requirements and limitations on DNRC's conservation license authority, but made no change to the established DNRC pricing practice for such licenses.

37. Save Our Gallatin Front also submitted to DNRC an expert analysis of the agency's proposed conservation license alternative prepared by Thomas Power, Ph.D. Dr. Power is a research professor and professor emeritus in the University of Montana Economics Department, where he has been a researcher, teacher, and administrator for more than 40 years. Dr. Power is also the principal economist for Power Consulting, Inc.

38. In his analysis, Dr. Power demonstrated that DNRC's assertion that a 10-year license term was optimal because it would maximize logging revenues was simply an artifact of DNRC's selection of the 10-year term. That is because DNRC calculated the revenue that would accrue from selling the full stumpage value of the Limestone Creek timber in a conservation license transaction in year 0, and then again selling the full stumpage value of the same timber in a logging contract transaction with a timber purchaser in year 10—a result made possible by

DNRC's approach to the term and pricing of the conservation license option. As Dr. Power concluded, the peak in revenue calculated by DNRC from a 10-year license term "is the result of two similar payments being made over a ten-year period for the same timber harvest. It 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").

39. Dr. Power also critiqued DNRC's proposal to charge Save Our Gallatin Front for a conservation license at the same rate—full stumpage value—that DNRC would charge to a timber company that would log the site, even though Save Our Gallatin Front would be permitted to purchase a license of only 10 years' duration. In this regard, Dr. Power noted that DNRC's conservation license discussion assumed that it would take 90 to 100 years for the Limestone forests to regrow after logging such that a second logging project could be conducted.

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, not just ten years.

Id. at 9.

40. Dr. Power also pointed out that DNRC's proposal to charge Save Our Gallatin Front the full timber stumpage value for a conservation license was inappropriate given that, unlike a logging contract, the conservation license leaves the trees in place to be available for a later logging project, should that be deemed appropriate. In this regard, Dr. Power examined the

lost-interest approach to valuation of a conservation license that DNRC described in testimony before the 1999 Montana Legislature. As Dr. Power's analysis demonstrated, application of this lost-interest approach makes a significant difference in the price of a conservation license for the Limestone West Timber Sale Project. While DNRC's license valuation analysis estimated the full stumpage price for the project at \$462,489, Dr. Power estimated that the present value of the lost interest earnings to the state trust beneficiaries from a 10-year conservation license would be about \$54,000.

This was calculated beginning with the gross revenue from the timber sale: \$462,489. But only 41 percent of this gross value flows into state trust accounts as the "profit" after costs from the timber sale. That net benefit to the state trust accounts is \$189,000. We allow that deposit in the state trust accounts to accrue compound interest for ten years at 3.4 percent interest, the yield after inflation on DNRC's trust fund bond investment opportunities. That is also the interest rate/discount rate used by DNRC in its analysis of the appropriate time duration of a conservation license. About \$75,000 in interest is earned over the ten years. The present value of these interest earnings in the base year was \$54,000. Thus, the present value lost to the state trust accounts as a result of delaying the timber harvest for 10 years was \$54,000.

Power Review at 10 (footnotes omitted).

IV. THE CHALLENGED DECISION

41. Save Our Gallatin Front's comment letter constituted one of 171 such letters from individuals and organizations that DNRC received in response to its Draft EIS on the Limestone West Timber Sale Project. DNRC also held a public hearing regarding the project in Bozeman on September 24, 2018, which was attended by approximately 150 people, with 41 providing testimony. As during the scoping period, public comment overwhelmingly opposed the project.

42. DNRC issued its final EIS for the Limestone West Timber Sale Project on December 21, 2018.

43. In that document, DNRC set forth its proposed decision to select a logging alternative for the project that reflected a modified version of Alternative A from the Draft EIS. This approach called for 6.7 miles of new road construction into the Limestone Creek drainage to log 448 acres, yielding estimated revenue of \$376,002.

44. DNRC's rationale for this modification asserted that, "[b]y reducing the acreage treated, little economic loss would be realized and habitat-related effects associated with the removal of mature forest cover for wildlife would be intermediate to those analyzed under Alternatives A and B." Final EIS at 76. DNRC also asserted that impacts of road construction on wildlife would be reduced by limiting open roads in the project area to 2.8 miles after project completion; the remainder of the roads constructed for the project would be reclaimed.

45. However, in a document setting forth DNRC's responses to public comments, which DNRC released with the Final EIS, DNRC's own admissions undermined these assertions about the proposed project's impacts. DNRC acknowledged that, even under Draft EIS Alternative B—which proposed less road construction and logging than the modified Alternative A proposal set forth in the Final EIS—"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." *Id.*, app. D, at 22-23. DNRC also admitted that even reclaimed roads in the project area "would be expected to receive low to moderate use" by the public after logging concluded. *Id.*, app. D, at 94.

46. Regarding Alternative C, the conservation license alternative, DNRC proposed to modify the conservation license term from 10 years to 25 years based on public comment that "provided evidence that the probability of selling a 10-year deferral was low." Final EIS at 77. However, DNRC still proposed to charge Save Our Gallatin Front full stumpage value to

purchase a conservation license for the Limestone West Timber Sale Project, even though the trees at issue would remain to be logged after the license expired. DNRC also continued to insist that declining timber productivity in the Limestone area after 10 to 20 years, as well as the risk of loss or degradation of timber over time, justified its approach to the conservation license terms.

47. Further, despite the fact that Save Our Gallatin Front’s comment letter on the Limestone West Timber Sale Project pointed out that the Montana Supreme Court had rejected DNRC’s exclusively financial interpretation of the state trust land management mandate, DNRC’s Final EIS continued to assert that the agency “is charged with the responsibility of generating the largest measure of reasonable and legitimate revenue” from state lands. Final EIS at 366.

48. On January 7, 2019, DNRC issued a draft record of decision embodying the proposed project decision set forth in the Final EIS. The Land Board voted to approve DNRC’s proposed decision for the Limestone West Timber Sale Project on January 22, 2019.

49. As a result of the challenged actions of the Land Board and DNRC, Save Our Gallatin Front now faces a requirement to pay full stumpage value for the trees involved in the Limestone West Timber Sale Project to protect the area from logging, even though DNRC can auction the same trees again for another payment of full stumpage value in 25 years, whereas a logging company paying the same value would purchase the equivalent of more than a century of wood fiber growth on the project site. Unless Save Our Gallatin Front pays DNRC at this rate for a conservation license, the Limestone Creek drainage—which DNRC itself previously described as “unique,” “impressive,” and “virtually pristine,” 1980 Draft EIS at 34—will be roaded and logged, causing irreparable harm to Save Our Gallatin Front and its members.

FIRST CAUSE OF ACTION

(Violation of MCA §§ 77-1-202 and 77-5-208 through unlawful determination of value for conservation license)

50. Plaintiff hereby realleges and reincorporates Paragraphs 1 through 49, supra.

51. MCA § 77-5-208(1)(c) requires that DNRC shall solicit bids for a timber sale incorporating a conservation license alternative “to ensure that the full, fair market value is secured for the beneficiaries” of the state trust.

52. MCA § 77-1-202(1)(a) requires that the Land Board shall administer the state trust to “secure the largest measure of legitimate and reasonable advantage to the state.” As discussed, this mandate “is not limited in purpose to financial return” and encompasses environmental protection. Friends of the Wild Swan v. Dep’t of Nat. Res. & Conservation, ¶ 21.

53. In this regard, when the Montana Legislature was considering the conservation license statute in 1999, DNRC itself testified to legislative committees in the House and Senate that the cost of a conservation license would be based on the value of lost interest income to trust beneficiaries over the duration of the license term, rather than the full stumpage value of the affected timber, to reflect the fact that the affected trees remain available for logging after the license expires. In construing state statutes, the Montana Supreme Court has relied on such testimony to the Legislature by an agency official to interpret the intended meaning of a statute that the agency will administer. See Matter of Brogan, 283 Mont. 413, 420, 942 P.2d 100, 105 (1997); Fandrich v. Capital Ford Lincoln Mercury, 272 Mont. 425, 430-31, 901 P.2d 112, 115 (1995); Vantura v. Mont. Liquor Control Bd., 113 Mont. 265, 124 P.2d 569, 571 (1942). Accordingly, under the conservation license statute, MCA § 77-5-208(1)(c), the Legislature intended that payment of “full, fair market value” for a conservation license would

be determined based on the lost interest income to trust beneficiaries arising from issuance of such a license.

54. The conservation license alternative for the Limestone West Timber Sale Project approved by the Land Board and DNRC will not ensure full, fair market value to the state trust beneficiaries. Rather, by requiring Save Our Gallatin Front to pay full stumpage value rather than lost interest income to the trust beneficiaries, it will enable the Land Board and DNRC to reap a windfall from the public by selling the same trees twice, each time for a payment of full stumpage value, over 25 years.

55. For the same reason, the conservation license alternative for the Limestone West Timber Sale Project approved by the Land Board and DNRC will not secure a legitimate and reasonable advantage to the state.

56. The conservation license alternative for the Limestone West Timber Sale Project approved by the Land Board and DNRC is therefore arbitrary, capricious, and unlawful under MCA §§ 77-5-208(1)(c) and 77-1-202(1)(a).

SECOND CAUSE OF ACTION

(Violation of MCA §§ 77-1-202 and 77-5-208 through unlawful determination of term for conservation license)

57. Plaintiff hereby realleges and reincorporates Paragraphs 1 through 56, supra.

58. In the alternative, assuming for the sake of argument that it were lawful for the Land Board and DNRC to require Save Our Gallatin Front to pay full stumpage value rather than lost interest income to the trust beneficiaries to purchase a conservation license for the Limestone West Timber Sale Project, which it is not, it would be 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 project area. This is because a logging company paying full stumpage value

for the trees involved in the Limestone West Timber Sale Project would purchase the right to remove standing timber that would take a specified period—in this case, approximately 90 years—to restore such that a second timber sale could be offered. If Save Our Gallatin Front is required to pay the same value for a conservation license that a logging company pays to remove the trees, then its right to the affected trees should encompass an equivalent period of time to ensure a fair return to the state trust. Otherwise, the public would be required to provide a windfall to the Land Board and DNRC by purchasing the same trees twice, each time for a payment of full stumpage value, over 25 years.

59. Further, in rejecting a longer term for the Limestone West conservation alternative, DNRC misapplied its state trust land management duty by relying on almost exclusively, and prioritizing, economic considerations even though the trust mandate is not limited to financial return and extends to environmental considerations. Friends of the Wild Swan v. Dep't of Nat. Res. & Conservation, ¶ 21.

60. The conservation license alternative for the Limestone West Timber Sale Project approved by the Land Board and DNRC will not ensure full, fair market value to the state trust beneficiaries because it would require Save Our Gallatin Front to pay the same price as a logging company while obtaining a lesser right to the affected trees.

61. For the same reason, the conservation license alternative for the Limestone West Timber Sale Project approved by the Land Board and DNRC will not secure a legitimate and reasonable advantage to the state.

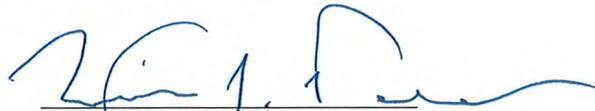
62. The conservation license alternative for the Limestone West Timber Sale Project approved by the Land Board and DNRC is therefore arbitrary, capricious, and unlawful under MCA §§ 77-5-208(1)(c) and 77-1-202(1)(a).

REQUEST FOR RELIEF

Therefore, Plaintiff Save Our Gallatin Front respectfully requests that this Court:

1. Declare unlawful and set aside the Land Board's and DNRC's approvals for the Limestone West Timber Sale Project;
2. Grant temporary, preliminary, and/or permanent injunctive relief prohibiting DNRC from conducting an auction for the Limestone West Timber Sale Project; and
3. Grant Plaintiff such additional relief as the Court may deem just and proper.

Respectfully submitted this 22nd day of January, 2019.



Timothy J. Preso
Joshua R. Purtle
Earthjustice
313 East Main Street
Bozeman, MT 59715
(406) 586-9699 | Phone
(406) 586-9695 | Fax
tpreso@earthjustice.org
jpurtle@earthjustice.org

Counsel for Plaintiff