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Re: Draft EIS and Proposed DNRC Habitat Conservation Plan

Dear Mike and Tim:

Thank you for the opportunity to comment on behalf of Montana Trout Unlimited regarding Montana DNRC's proposed Habitat Conservation Plan and for forested trust lands affecting three species listed as threatened under the Endangered Species Act, and two which have been identified as candidates for listing. We applaud DNRC for crafting a proposal that commits the agency to increased conservation of these species. We also compliment the agency for the rigor and forethought it put into crafting an HCP, as well as its openness to seek ideas. However, we believe the proposal falls short of what the agency could do for fish and wildlife conservation while still accommodating its obligations to generate revenue for the trust beneficiaries.

We have general comments as well specific comments directed primarily at the three affected fish species.

**No Action Alternative**

The DEIS errs (ES-11) when it concludes that the “no action” alternative provides the smallest amount of conservation available during the proposed permit term. That conclusion is speculative. “No action” only means there will be no HCP. No HCP means there will be no *authorized* incidental take. Thus, the only take that could occur would be *unauthorized*. There is nothing that prevents DNRC from unilaterally imposing conservation requirements on itself, or in partnership with others, that prevent incidental take. There is also nothing that prevents the Fish and Wildlife Service from exercising its authority to prevent illegal take. DNRC’s cooperation in the Swan Grizzly Bear Cooperative Agreement, and its role as a signatory to the State of Montana Bull Trout Restoration Plan (1999) and the State of Montana Memorandum of Understanding and Conservation Agreement for Westslope Cutthroat Trout and Yellowstone Cutthroat Trout (2007) indicate the agency can unilaterally act to help protect imperiled species without the legal insulation provided by an HCP and incidental take permit. Further, it should be mentioned that many of the commitments DNRC makes in the HCP, such as those related to sediment control on roads or riparian protection, are already in practice because they are regulatory requirements (ie. SMZ law, forest practice BMPs, etc.). The point is, “no action” in this DEIS does not necessarily mean implantation of an HCP, which authorizes a level of incidental take, provides superior conservation. We believe most of the management enhancements in this HCP targeted for native fish can be implemented without an HCP and take permit, and it can occur without DNRC abrogating its obligations to generate revenue for the trust beneficiaries.

### **Cumulative Effects of Multiple HCPs**

This HCP covers around 550,000 acres in western Montana. Plum Creek’s native fish HCP covers 1.4 million acres. DNRC and FWS maintain that the standard for HCPs and incidental take permits does not include a legal obligation to take steps that lead to recovery. The agencies maintain that HCPs are primarily meant to allow landowners to go about their business while posing only *de minimis* risk to imperiled species -- risk that is deemed “incidental, and thereby does not appreciably reduce the odds of recovery or add to extinction risk. This position basically means HCPs are not geared toward improving the status of imperiled species, but instead meant to preserve the status quo. The status quo population status for the native fish covered in this plan is at best stable locally, but primarily they are in decline at a watershed scale and rangewide. Therefore, to achieve the higher and more desirable objective of recovery – a level that ensures long-term persistence, de-listing and state management for listed species – most of the burden for recovery it appears will fall to landowners without HCPs, primarily federal land managers who must consult with the Fish and Wildlife Service under Section 7 of the ESA. In effect, when multiple HCPs are implemented over large landscapes it means the conservation burden for recovery is being shifted to an increasingly smaller portion of the historical range. This means activities on federal lands could and probably will be constrained further, and it means that some recovery will have to occur in less than ideal habitats. We find this problematic.

U.S. Fish and Wildlife Service and DNRC must disclose in the EIS how recovery can still be successful when affirmative steps towards recovery keep getting shifted to a smaller part of the landscape because of the accumulated effects of additional HCPs.

We find the DEIS evaluation of cumulative effects deficient in that it does not analyze in any meaningful fashion the role invasive species have on native fish. That role, we know, includes predation and competitive pressures from introduced lake trout, northern pike and brook trout. These issues are particularly vexing in the Flathead and Swan River basins. Native trout face additional, and significant, harm from hybridization posed by the presence of introduced rainbow and brook trout. Hybridization with rainbow trout (and locally Yellowstone cutthroats) is a problem throughout the DNRC HCP landscape. Hybridization between bull trout and brook trout is localized, and especially vexing in the Swan River drainage, including on some DNRC lands. Some research indicates that land management that degrades aquatic habitats – ie., through increases in embedded sediment or increases in water temperature -- can tip the competitive scale away from native fishes and towards invasive species such as brook trout.

### **Incomplete Disclosure of Relevant Fishery Data**

Though the documents provide maps and a few tables of bull trout, cutthroat trout and redband trout distribution, they include no data related to known abundance, actual occupied reaches, and known life histories or genetics. Without this detail it is difficult to determine at any landscape scale exactly how native fish populations will be affected. The distribution maps, for instance, are so general in nature they provide no insight on where the actual occupied reaches are, or how and where connectivity can be improved among isolate populations. These maps basically reflect presence and absence at the reach scale, but include no additional quantitative information. Further, it would have been helpful if the cutthroat data would have been arranged so reviewers could understand the specific locations of populations categorized as “core,” “conservation” and “sportfish,” as detailed in the state MOU and conservation plan. This would be helpful to understand how the HCP will contribute – or detract from – the priorities and objectives DNRC embraced when it signed the cutthroat MOU and plan. The HCP does say that additional fishery data “may” be collected by DNRC and FWP, but it doesn’t commit to it. It should, and it should include enumerated targets. We do appreciate that the plan recognizes that where data on native fish presence is not available, it’s streamside management will generally give native fish the benefit of the doubt by defaulting its highest level of RMZ protection (though, as we will detail, there are shortcomings with the specific protective commitments).

### **Relationship of the HCP to the State of Montana MOU and Conservation Plan for Westslope Cutthroat Trout and Yellowstone Cutthroat Trout**

We recommend that the final document demonstrate more clearly how DNRC and the U.S. Fish and Wildlife Service will contribute to the objectives of the cutthroat plan, which both agencies (and Montana Trout Unlimited) helped devise and signed. These objectives are:

**Objective 1.** Maintain and secure, and/or enhance all cutthroat trout populations designated as conservation populations, especially the genetically pure components.

**Objective 2.** Continue to survey waters to locate additional cutthroat trout populations and determine their distribution, abundance, and genetic status.

**Objective 3.** Seek collaborative opportunities to restore and/or expand populations of each cutthroat trout subspecies into selected suitable habitats within their respective historical ranges.

**Objective 4.** Continue to monitor cutthroat trout distributions, genetic status, and abundance using a robust, range-wide, statistically sound monitoring design.

**Objective 5.** Provide public outreach, technical information, inter-agency coordination, administrative assistance, and financial resources to meet the listed objectives and encourage conservation of cutthroat trout.

We acknowledge that the HCP need not address all these objectives. However, objective #1, which directly implicates existing conditions on the ground is important. It is unclear to us how an HCP and permit that allows incidental take, and which is not required to restore and enhance populations, squares with both DNRC's and FWS' commitments to "maintain, secure and/or enhance" cutthroat populations. We also don't understand how the HCP can help meet Objective #1 when there may be unsurveyed "conservation" populations on DNRC lands. The legal obligation of an HCP, according to DNRC and FWS, is basically to maintain the status quo, that is, ensure the amount of approved take is incidental and doesn't contribute further to the diminishment of a species. The status quo in most of the affected landscape, however, is population decline. Maintaining population decline does not square with the state agreement, nor does it necessarily meet the agencies' stated standard for HCPs.

We recommend that DNRC craft conservation commitments that do several things:

1. Commit to identify and then secure all existing conservation populations of westslope cutthroats through habitat protection and activities designed to expand populations (expanding small, isolate populations is sometimes the most important activity that can occur to secure populations). In order to expand populations to secure them, it will require protection and restoration activities on previously occupied – but connected -- habitat. And thus, DNRC should identify critical "future" habitat for expanded populations and accord it Tier 1 native fish protections.
2. Demonstrate more clearly that the "take" is genuinely incidental and will not impair the agency's ability to stabilize and, where essential to prevent loss of a population, its ability increase cutthroat numbers and habitat. It is difficult to determine exactly what activities DNRC plans during the permit period and where they will be in relation to existing populations of native fish.

## **DNRC Practicability Considerations**

DNRC's "practicability considerations" (Draft HCP 1-7) states that, "DNRC can only invest in conservation if there is reasonable scientific certainty of a conservation benefit," and "...DNRC can only consider those conservation measures where there are clear and certain conservation benefits." We don't argue with these points and generally agree with them. However, the same considerations should apply when the science is uncertain as to whether harvesting timber in a certain fashion, or in a certain sensitive area, or constructing roads in a sensitive drainage, will be harmful to an HCP species. That is if the science is uncertain about the potential to do harm, DNRC should employ the precautionary principle of doing no harm. There should be no guess work related to whether the take will exceed that which is "incidental."

## **Streamside Management Protection**

We appreciate how much time DNRC has devoted to developing strategies for riparian timber harvest. We also appreciate that DNRC is incorporating channel migration zones in its determinations for protective measures. But we find the proposed strategies in the preferred alternative for Tier 1 streams and lakes supporting HCP species unduly complicated and not protective enough. This proposal requires too small a no-harvest buffer and it includes too much discretion for determining the CMZ and what will and will and not be harvested outside the buffer but still inside the RMZ. We recommend several alternatives instead for Tier 1 streams and lakes with HCP species, in declining order of preference:

- Adoption of the "no harvest within the RMZ" proposal from Alternative 3, but instead increase the RMZ to 1.5 the width of the SPTH. This is simple, increases protection and still leaves DNRC many opportunities to harvest timber, albeit less along some streams.
- Adoption of Alternative 3 with the RMZ to be 1.5 X the width of the SPTH along those Tier 1 streams where DNRC owns at least 25 percent of the stream length (Note: a 25 percent standard for ownership in a planning landscape is what DNRC proposes imposing on itself as a trigger for its involvement in TMDL development. See draft HCP 2-9). This helps ensure DNRC's actions, if they affect most of a stream, are addressed. But it also allows the agency more leeway when it is the minority owner.
- Adoption of Alternative 3 with the RMZ to be 1.5 the width of the SPTH along those Tier 1 streams where DNRC owns considerable acreages of bull trout core habitat, such as the upper Stillwater, upper Whitefish Lake, Cyclone Lake Swan Lake drainages. Make the RMZ identical to Alternative 3 for all other Tier 1 native fish streams.

We make these recommendations for a RM1 strategy because:

- They don't affect that many acres, and therefore will have a small affect on DNRC's overall harvest and its obligations to generate revenue for the trust beneficiaries. The agency admits in the HCP that riparian harvest represents a small part of its anticipated harvest for the permit period.
- There is a high level of uncertainty in the science DNRC has applied to its recommendations. Much of the literature cited by DNRC is selective and based on findings presented as conference proceedings, but not peer reviewed and published. For instance, supporting literature cited on draft HCP 2-66 includes: Brown and Kryger (1971), which does not appear to have been peer-reviewed or published; Sugden and Steiner (1993), also not reviewed and published; Gomi et al (2003), also apparently not reviewed and published. Further, we could not find Martin et al (1985), Steinblums et al (1984), and Davies and Nelson (1994) in the list of references. The literature on streamside protection and how it relates to sediment filtering, woody debris recruitment, bank and channel stability and stream temperature is wide and varied. Inferences from most research indicates that a 25-foot no harvest buffer and 50 percent retention- harvest for the rest of the RMZ is at the lower end of the scale for providing sufficient recruitment of large woody debris over a 50-year period, which is the period for this permit. Further, buffer recommendations in many instances, and certainly in the case of what is recommended by DNRC, do not account for the affect canopy removal has along streams as it relates to the ability of timber stands to withstand wind-throw, which sometimes "recruits" decades of potential LWD to the stream in one event. Examples abound all over Montana, especially in streamside communities dominated by lodgepole pine and shallow-rooted spruces, where canopy removal too close to streamside trees amplified the effect of wind events in riparian buffer strips. However, rather than argue about what literature supports what (literature cited in the USDA Forest Service's INFISH Riparian strategy, for instance, argues for larger, nonharvested buffers than DNRC recommends), we recommend the agency take a more conservative -- but still not without risk -- approach, as we've suggested above, for a riparian protection strategy on Tier 1 streams.
- DNRC's proposal to allow "corridors" within the RMZ (draft HCP 2-72) to accommodate cable logging systems should only be approved if it includes an offset. For example, if it is necessary to encroach on a no-harvest zone to accommodate a cable system, then the amount of buffer harvested should be offset by an equal amount of unharvested area outside the minimum buffer in the same area. The site for the timber-retention offset should be in an area where the additional shade or potential recruitment of large woody debris could be beneficial beyond the regulatory minimum. This, importantly, would also create an incentive to ensure the allowance for corridors is kept to the minimum necessary.

- We disagree that DNRC needs to include additional harvest allowances inside RMZs to deal with insect infestations. This allows too much discretion and it is biologically unjustified. The size of DNRC's buffer and RMZ (as well as of those we propose) is simply too small to have a realistic affect on insect spread. Control of insect infestations with timber harvest, if it can even be achieved, can be done upslope outside the RMZ. There is nothing wrong from a fishery and water quality perspective of having dead or dying trees along a stream. In fact, it is preferable than having no trees.
- We disagree with the allowance (draft HCP 2-75) in which harvest of burned trees can occur within Tier 1 RMZ's but outside the buffer. Again, DNRC's buffer of 25 feet is already too small even when it's comprised of green trees. And thus, logging burned trees right up to a 25-foot buffer of similarly burned trees will compromise future woody debris recruitment, as well as the shade benefits that trees, including burned trees equal to or 1.5 X (as we recommend for an RMZ) the SPTH can have. It makes eminent sense from a woody debris, sediment interception and shade perspective, that when severe, stand-replacement fires occur within an SRZ, that the maximum number of standing burned trees be left onsite.
- Commitments for Tier 1 streams without HCP species, as well as those for Tier 2 and Tier 3 streams are not new commitments. DNRC merely says it will follow existing practices, which are tied to existing regulatory obligations. DNRC should enhance its riparian protection strategies for these streams for two reasons: 1.) these channels deliver water that is critical in quantity and quality to Tier 1 streams that support HCP fish species; 2.) Some of these streams might indeed seasonally support certain life-stages of HCP native species; and, 3.) some of these streams might be crucial as potential habitat for HCP native fish species in order to facilitate population security. We therefore recommend these RMZs:
  - For Tier 1 streams without HCP species and which either deliver water to reaches occupied by bull trout, cutthroats or redbands, or which are important for population expansion, the RMZ should be equal to that of the RMZ of the occupied reach.
  - For Tier 2 and 3 streams that potentially can deliver sediment to Tier 1 streams with native fish species, the RMZ should be 1 STMH wide, with a no-cut buffer of 25-feet, and tree retention in the rest of the RMZ to include at least 50 percent of the trees exceeding 8" dbh. This would reduce the potential for sediment delivery while providing ample cover for temperature regulation.

### **Fishery Connectivity**

We applaud DNRC's emphasis on replacing undersized or otherwise problematic culverts at road crossings. We support the design standards being proposed. We do believe, however, that the

agency needs to accelerate the schedule of replacement. The 15 and 30 year target dates for Tier 1 and other streams should be accelerated so that all problematic crossings are eliminated no later than Year 10 of the permit. We believe this target can be met if DNRC's inventory and analysis in Commitment FC1 included a larger emphasis on innovation in managing legacy roads. For instance, the agency needs to analyze in-depth the projected future needs of its entire transportation system, with an emphasis on identifying redundant roads that can be abandoned or decommissioned. In addition, this analysis should evaluate the effectiveness and costs of replacing existing culverts with alternative and temporary crossing structures that don't require significant engineering, road fill or ongoing maintenance (such as temporary bridges or even use of temporary, hardened fords). The point being, that all culverts don't have to be replaced, or if they do, the alternative doesn't have to be a culvert. These recommendations also apply to Commitments SD 1 and SD 2, which, as proposed, focus only on planning and inventory and not on implementation.

### **Sediment delivery and road management**

We largely support SD 1, SD 2, SD 3 and SD 4 as commitments. Not only do they make sense from a sediment delivery perspective, but they help ensure cost effectiveness. However, disappointingly, the HCP includes no target on what should ultimately be the complete road system for DNRC's lands, unit by unit, that best accommodates native fish species and the agency's management obligations. We believe that Alternative 3 reflects most closely where the agency ought to be headed in respect to a road inventory.

We further believe the objective for SD2 in which problems are corrected for roads along bull trout streams within 15 years and for other species within 25 years should be modified. We recommend shorter time frames -- no more than 10 years for roads along bull trout streams and no more than 15 years for other species. The reason we believe this can occur is that some of these roads will be dealt with anyway to benefit other species, or to accommodate other transportation priorities. In addition, the majority of DNRC's road system does not fit within these categories. Moreover, it makes sense from a maintenance and cost-efficiency basis to get the work done sooner than later. We recommend that commitment SD 2 be expanded beyond roads in which DNRC has sole ownership. DNRC should also correct problems on road reaches along streams where bull trout and other native species occur within its ownership when the agency owns at least 25 percent of the stream miles. Further, DNRC in developing and renewing its cooperative road agreements should work in concert with adjacent landowners to promote similar measures on non-DNRC road segments. FWS could consider developing a credit system, wherein if DNRC works on a cooperative basis with an adjacent landowner to significantly reduce impacts from a road that is significantly harming bull or cutthroat habitat (or even leads to removal of that road), then the State could count that against its obligation to do that on its holdings. The objective would be the same: reduce harm to native species.

### **Changed Circumstances and Adaptive Management**

We believe additional changed circumstances (draft HCP p 6-8) should include changes in the population status of any of the three species, perhaps when measured at the 4<sup>th</sup> Code HUC level. Significant declines or increases of HCP fish species – irrespective of suspected cause -- is a circumstance that should trigger FWS and DNRC review and adaptive management triggers. Those triggers could result in strengthening or even relaxing of HCP commitments.

As with other HCPs, the adaptive management and response formulas in this HCP have two significant weaknesses:

- They do not include any field auditing or field compliance monitoring by an independent source. That is, all field monitoring commitments as well as research are performed by DNRC and then reported to FWS. FWS' compliance review largely only covers timeliness and completeness. The data on implementation, effectiveness and results, however, is supplied by the permit holder, DNRC. It appears that FWS does not perform any random field monitoring that replicates DNRC's field methods to determine the quality of the reported data. The adaptive management system is thus captive to an honor system. FWS' role should include random field monitoring and tests so that it can better evaluate DNRC's implementation.
- Neither DNRC or FWS commit in the plan to specific funding and staffing levels to ensure the monitoring, reporting and management responses are implemented, or implemented in a timely fashion. Without these commitments, it is reasonable for the public to be skeptical that corrective measures might not occur if HCP commitments don't produce what they are intended to. The plan should include triggers at five-year intervals that if certain key tasks, such as measurable commitments that provide for riparian protection, road improvements, road and culvert replacement, etc. are not performed, that a process be implemented to cancel the permit. Further, if FWS does not adequately perform its pivotal monitoring role, triggers should be tripped that lead to cancellation of the permit. Though this may seem fair to DNRC, it does provide incentive for the State to apply pressure to ensure the FWS responsibility for monitoring the HCP be fully funded.

Again, we appreciate the opportunity to provide these comments.

Sincerely,

Bruce Farling  
Executive Director

