

AGENDA
SPECIAL MEETING OF THE BOARD OF LAND COMMISSIONERS
August 31, 2015, at 9:00 a.m.
State Capitol, Room 303
Helena, MT

ACTION ITEM

815S-1 Proposed Settlement Agreement and Release: *Friends of the Wild Swan, et al. v. S.M.R. Jewell, et al.* in U.S. Court of Appeals for the Ninth Circuit (Appeal Nos. 14-35875, 14-35923 and 14-35927) and U.S. District Court for the District of Montana (No. 9:13-cv-00061-DWM)

Benefits: Common Schools, Eastern College – MSU/Western College – University of Montana, Montana Tech, MSU 2nd, MSU Morrill, Pine Hills, Public Buildings, School for the Deaf and Blind

Location: Beaverhead, Deer Lodge, Flathead, Gallatin, Granite, Jefferson, Lake, Lewis and Clark, Lincoln, Madison, Mineral, Missoula, Park, Ravalli, Sanders, and Silver Bow Counties

Approved 5-0

PUBLIC COMMENT

815S-1

Proposed Settlement Agreement and Release:

***Friends of the Wild Swan, et al. v. S.M.R.
Jewell, et al. in***

**U.S. Court of Appeals for the Ninth Circuit
(Appeal Nos. 14-35875, 14-35923 and 14-
35927) and U.S. District Court for the District
of Montana (No. 9:13-cv-00061-DWM)**

**Land Board Agenda Item (Special Meeting)
August 31, 2015**

815S-1 Proposed Settlement Agreement and Release: *Friends of the Wild Swan, et al. v. S.M.R. Jewell, et al.* in U.S. Court of Appeals for the Ninth Circuit (Appeal Nos. 14-35875, 14-35923 and 14-35927) and U.S. District Court for the District of Montana (No. 9:13-cv-00061-DWM)

Location: Beaverhead, Deer Lodge, Flathead, Gallatin, Granite, Jefferson, Lake, Lewis and Clark, Lincoln, Madison, Mineral, Missoula, Park, Ravalli, Sanders, and Silver Bow Counties

Trust Benefits: Common Schools, Eastern College – MSU/Western College – University of Montana, Montana Tech, MSU 2nd, MSU Morrill, Pine Hills, Public Buildings, School for the Deaf and Blind

Trust Revenue: N/A

Item Summary

In 2003, the Department of Natural Resources and Conservation (DNRC) began the process of developing a Habitat Conservation Plan (HCP) in order to apply for an Incidental Take Permit (permit) pursuant to Section 10 of the federal Endangered Species Act (ESA).

The Montana Forested State Trust Lands HCP outlines conservation strategies aimed at minimizing or mitigating impacts to grizzly bear, Canada lynx, bull trout, westslope cutthroat trout, and Columbia redband trout while sustaining forest management on state trust lands. The HCP and associated permit cover forest management activities on approximately 548,000 acres of state trust land in western Montana.

On December 19, 2011, the Montana Board of Land Commissioners (Land Board) approved the HCP/EIS Record of Decision to adopt the HCP. In February 2012, a permit was issued to DNRC by the U.S. Fish and Wildlife Service (USFWS) for a 50-year period.

On March 18, 2013, Earthjustice filed a complaint against the USFWS in the U.S. District Court for the District of Montana, Missoula Division, on behalf of Friends of the Wild Swan, Montana Environmental Information Center, and Natural Resources Defense Council (*Friends of the Wild Swan et al. v. Salazar et al.*, Case No. C-13-61-M-DWM). The complaint alleged that the USFWS improperly issued a permit to DNRC in violation of ESA and the National Environmental Policy Act (NEPA). The complaint specifically targeted conservation strategies associated with bull trout and grizzly bear.

On May 15, 2013, the Land Board voted to direct the DNRC to file a Motion to Intervene in order to adequately defend the interests of the state of Montana and trust beneficiaries.

On August 21, 2014, U.S. District Court Judge Molloy issued an Order in *Friends of the Wild Swan, et al. v. S.M.R. Jewell, et al.* (No. 9:13-cv-00061-DWM). Judge Molloy found in favor for the Defendants and Intervenor-Defendants on four points; and, found in favor for the Plaintiffs on one point. Specifically, Judge Molloy granted the Plaintiffs' motion pertaining to grizzly bear mitigation, finding that the USFWS did not demonstrate adequately that DNRC had mitigated impacts to grizzly bears to the "Maximum Extent Practicable" when adopting a new management strategy for the Stillwater and Coal Creek State Forests (Stillwater Block). Judge

Molloy further ordered that the HCP remain in effect while the matter was on remand with the exception of the portion of the plan that abandoned grizzly bear security core (security core) in the Stillwater Block. Thus, he enjoined DNRC from implementing the portion of the HCP in the Stillwater Block that would affect any of the security core areas managed prior to the adoption of the HCP in 2012.

This Order required the immediate shutdown of active timber harvest operations in security core. This affected partially four timber sales; and, entirely two timber sales currently under contract.

In October 2014, the U.S. Department of Justice on behalf of the USFWS filed a Motion to Appeal to the Ninth Circuit Court of Appeals followed by the Plaintiffs and the DNRC respectively (U.S. Court of Appeals for the Ninth Circuit; Appeal Nos. 14-35875, 14-35923 and 14-35927).

Since the spring of 2015, the Plaintiffs and the DNRC have engaged in extensive settlement negotiations to resolve the disputes specifically over grizzly bear conservation measures in the Stillwater Block and bull trout conservation strategies.

The attached Settlement Agreement addresses provisions to resolve the respective appeals of the Plaintiffs and the Intervener-Defendants in U.S. Court of Appeals for the Ninth Circuit and the parties' respective claims and defenses in the U.S. District Court for the District of Montana.

Some of the key provisions include:

- agreed upon geographical boundaries and conservation measures associated with Grizzly Bear Security Zones in the Stillwater Block;
- agreed upon timelines associated with corrective actions in bull trout watersheds;
- completion of timber sales and forest improvement activities that were enjoined by the district court Order; and
- stipulated processes for the DNRC to adopt these measures into administrative rule and into the Northern Continental Divide Ecosystem (NCDE) Conservation Strategy.

While the Defendants (Department of Justice on behalf of the USFWS) are not signatories to the agreement, they will be jointly filing to dismiss their appeal in the Ninth Circuit, as well as support the district court's acceptance of the Settlement Agreement.

The DNRC has asked the Land Board to hold a Special Land Board Meeting to expedite this Settlement Agreement to the District Court of Montana. Such an expedition may increase the likelihood that the timber operators holding timber sales that are currently enjoined may be able to operate this operating season should the injunction be lifted in district court.

DNRC Recommendation

The director recommends the Land Board direct DNRC to enter into this Settlement Agreement to resolve the respective appeals in the U.S. Court of Appeals for the Ninth Circuit and the respective claims and defenses in the U.S. District Court for the District of Montana.

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

)	
FRIENDS OF THE WILD SWAN;)	
MONTANA ENVIRONMENTAL)	
INFORMATION CENTER; and)	
NATURAL RESOURCES DEFENSE)	
COUNCIL;)	Case No. 9:13-cv-00061-DWM
)	
Plaintiffs,)	
)	
v.)	
)	
S.M.R. JEWELL, Secretary, U.S.)	
Department of the Interior, in her official)	
capacity; and UNITED STATES FISH)	
AND WILDLIFE SERVICE)	
)	
Defendants.)	

SETTLEMENT AGREEMENT AND RELEASE

I. GENERAL TERMS

To resolve the Parties’ respective appeals in the U.S. Court of Appeals for the Ninth Circuit (Appeal Nos. 14-35923 and 14-35927), and the parties’ respective claims and defenses in No. 9:13-cv-00061-DWM, U.S. District Court for the District of Montana, the Plaintiffs Friends of the Wild Swan, Montana Environmental Information Center, and Natural Resources Defense Council (collectively, Plaintiffs) and Intervenor-Defendants Montana Department of Natural Resources and Conservation (DNRC) and the Montana Board of Land

Commissioners (Land Board) agree to the following:

1. DNRC shall adopt the Conservation Measures set forth in this Settlement Agreement (Agreement) by promulgating them as rules in DNRC's Forest Management Administrative Rules of Montana (ARMs) following statutory requirements of the Montana Administrative Procedures Act (MAPA) within six months following the entry of an order by the U.S. District Court for the District of Montana adopting the terms of this Agreement as an order of the Court.
2. DNRC shall also include these Conservation Measures as habitat conservation standards in the Northern Continental Divide Ecosystem (NCDE) Conservation Strategy, which would remain in place following de-listing of the grizzly bear. DNRC, following entry of an order by the U.S. District Court for the District of Montana adopting the terms of this Agreement as an order of the Court, shall immediately submit these Conservation Measures to the U.S. Fish and Wildlife Service to be adopted into the Final NCDE Conservation Strategy.
3. Once codified in Forest Management ARMs and the NCDE Conservation Strategy, any future modifications of these Conservation Measures would be done following formal procedures outlined in the NCDE Conservation Strategy, and revision of the Forest Management ARMs following MAPA

rule-making procedures. Any changes made through formal rule-making require final approval by the Land Board. No such modifications or changes shall be made by DNRC or the Land Board while the DNRC Habitat Conservation Plan (HCP) remains in effect. Further, while these Conservation Measures complement the DNRC HCP in its current form, these Conservation Measures shall be required, with or without the HCP in place.

4. Except as provided in Part II.3 below, implementation of this Agreement will not prohibit or restrict existing and future activities that are located totally or partially in areas previously managed as “Stillwater Core” and that are located outside of lands identified in Attachment A as Grizzly Bear Security Zones (Security Zones). This includes projects that were affected by the injunction issued by the U.S. District Court for the District of Montana on August 21, 2014 in Case No. 9:13-cv-00061-DWM.

II. CONSERVATION MEASURES

1. **Agreement Area:** Within the land area referenced in the DNRC HCP as the Stillwater Block (90,517 acres), which includes blocked lands on the Stillwater and Coal Creek state forests, DNRC shall establish 7 Security Zones totaling 22,007 acres as identified in Attachment A.
2. To minimize adverse impacts to grizzly bears, DNRC shall comply with the

following restrictions within the 7 Security Zones.

- a. Motorized activities, including public, DNRC administrative, and DNRC commercial forest management activities, will be prohibited during the grizzly bear non-denning season each year, April 1 – November 15 (non-denning season).
- b. Motorized activities will be allowed during the grizzly bear denning season only, November 16 – March 31 (denning season).
- c. DNRC commercial forest management activities will be allowed during the denning season below 6,300 feet elevation.
- d. No permanent road construction will be allowed.
- e. The DNRC shall construct and reclaim any temporary roads and skid trails in a manner to prevent future use by motorized vehicles, including off-road vehicles, during the non-denning season.
- f. When conducting DNRC commercial forest management activities near identified Security Zones during the non-denning season, the DNRC will minimize the duration of air- and ground-based harvest activities to the extent practicable, particularly in known areas of seasonal importance for bears.
- g. DNRC will minimize the duration of administrative activities near Security Zones to the extent practicable.

- h. The DNRC shall make efforts to design helicopter flight routes in a manner that avoids and/or minimizes flight time across Security Zones during the non-denning season, and/or known seasonally secure areas.
 - i. Where practicable, the DNRC shall design flight paths to occur greater than one mile from potentially affected Security Zones during the non-denning season, or areas of known seasonal importance.
 - j. Subject to Part II.2.f and g above, short-term disturbance will be allowed in any Security Zones at any time and for the necessary duration to address road sedimentation issues required by the HCP Aquatic Conservation Strategies and Forest Management ARMs.
3. On the remaining 68,510 acres of blocked lands outside of Security Zones, DNRC shall comply with the following measures:
- a. Access management and seasonal restrictions and road construction requirements will be implemented according to the DNRC HCP Transportation Plan measures that apply to Class B Lands as defined in the HCP (commitments GB-ST1, GB-ST4, and GB-ST5).
 - b. Motorized public activities, DNRC commercial forest management activities and DNRC administrative activities are allowed during the denning and non-denning seasons as allowed by the DNRC HCP

Transportation Plan.

4. Subject to the provisions of Part II.2.f-i above, DNRC will complete timber sale and forest improvement activities currently under contract that overlap Security Zones identified in Attachment A. DNRC will expedite these activities to shorten the amount of time disturbance will occur in Security Zones. These include:
 - a. activities on 27 acres of Upper Whitefish Timber Sale (approved by the Land Board on April 19, 2012) as identified in Attachment B; and
 - b. activities on 6 acres of Swedish Chicken Site Prep Project (contract signed on June 13, 2014) as identified in Attachment C.
5. Until DNRC completes activities under 4.a. and b. above, DNRC shall relocate 33 acres of Security Zone as mitigation to retain 22,007 acres of Security Zones at all times. Once these activities are complete, DNRC shall adhere to Security Zones as found in Attachment A.

III. ADDITIONAL TERMS OF THE AGREEMENT

1. DNRC will complete corrective actions as specified in the HCP on high-risk sediment sites located within bull trout watersheds by 2027, and will prioritize and complete corrective actions at high-risk sediment sites in bull trout critical habitat by 2024.
2. Plaintiffs waive their right to challenge future DNRC management of grizzly

bear habitat that was previously Stillwater Core on the ground that such management violates the Endangered Species Act, 16 U.S.C. § 1531 et seq., as long as Conservation Measures for the Security Zones herein described remain as requirements in administrative rule and the NCDE Conservation Strategy and DNRC complies with them. Plaintiffs reserve their right to challenge DNRC non-compliance with any Conservation Measure requirements and/or any modification or change made to the Conservation Measure requirements by DNRC or the Land Board.

3. Plaintiffs and the State forever release and covenant not to sue or to file any administrative claim against one another with respect to any and all civil claims between them that were or could have been made in the underlying legal action concerning the DNRC HCP; provided, however, that nothing in this Agreement shall affect or impair claims to enforce this Agreement.
4. The parties to this Agreement agree that they will each bear their own attorneys' fees and costs and hereby release one another from any claims for such fees and costs. Plaintiffs reserve their right to seek an award of attorneys' fees and costs from the Federal Defendants in Case No. 9:13-cv-00061-DWM, U.S. District Court for the District of Montana.
5. The undersigned representatives of each party certify that they are fully authorized by the party they represent to agree to the Court's entry of the

terms and conditions of this Agreement and do hereby agree to the terms herein. None of the provisions or obligations of this Agreement shall become binding and effective unless and until the Court enters an Order adopting the terms of this Agreement. The Effective Date of this Agreement shall be the date the Court enters the Order.

6. The terms of this Agreement constitute the entire agreement of the Parties with regard to Plaintiff's claims set forth in the above-captioned case, and no statement, agreement or understanding, oral or written, which is not contained herein, shall be recognized or enforced.
7. The parties hereby stipulate and respectfully request that the Court retain jurisdiction to oversee compliance with the terms of this Agreement and to resolve any motions to modify such terms. See Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375 (1994).

Dated: _____

 Timothy J. Preso
 Jenny K. Harbine
 Earthjustice
 313 East Main Street
 Bozeman, MT 59715
 (406) 586-9699
 Fax: (406) 586-9695
 tpreso@earthjustice.org
 jharbine@earthjustice.org
 amaxwell@earthjustice.org

Attorneys for Plaintiffs

Dated: _____

MARK C. PHARES*
Special Assistant Attorney General
Montana Department of Natural Resources and
Conservation
1625 11th Avenue
Helena, MT 59620-1601

JON BENNION
Deputy Attorneys General
Montana Department of Justice
215 North Sanders
Helena, MT 59620-1401

**Counsel of Record for Defendant-Intervenors*



Zone 5
3029 Acres

Zone 4
1560 Acres

Zone 1
2198 Acres

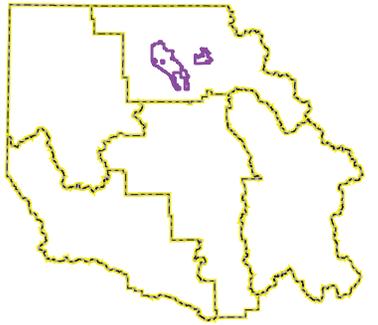
Zone 2
6565 Acres

Zone 3
4934 Acres

Zone 6
1409 Acres

Zone 7
2312 Acres

Area of Interest
Northwest Land Office



Legend

- Stillwater and Coal Creek Block Lands
- Proposed Grizzly Bear Security Areas**
- Security Zone
- Public Motorized Access**
- Open Roads
- Seasonally Open Roads
- Restricted Roads
- Land Ownership**
- MT DNRC
- MT FWP
- National Park Service
- Plum Creek
- Stoltze Lumber

Updated 8/26/15

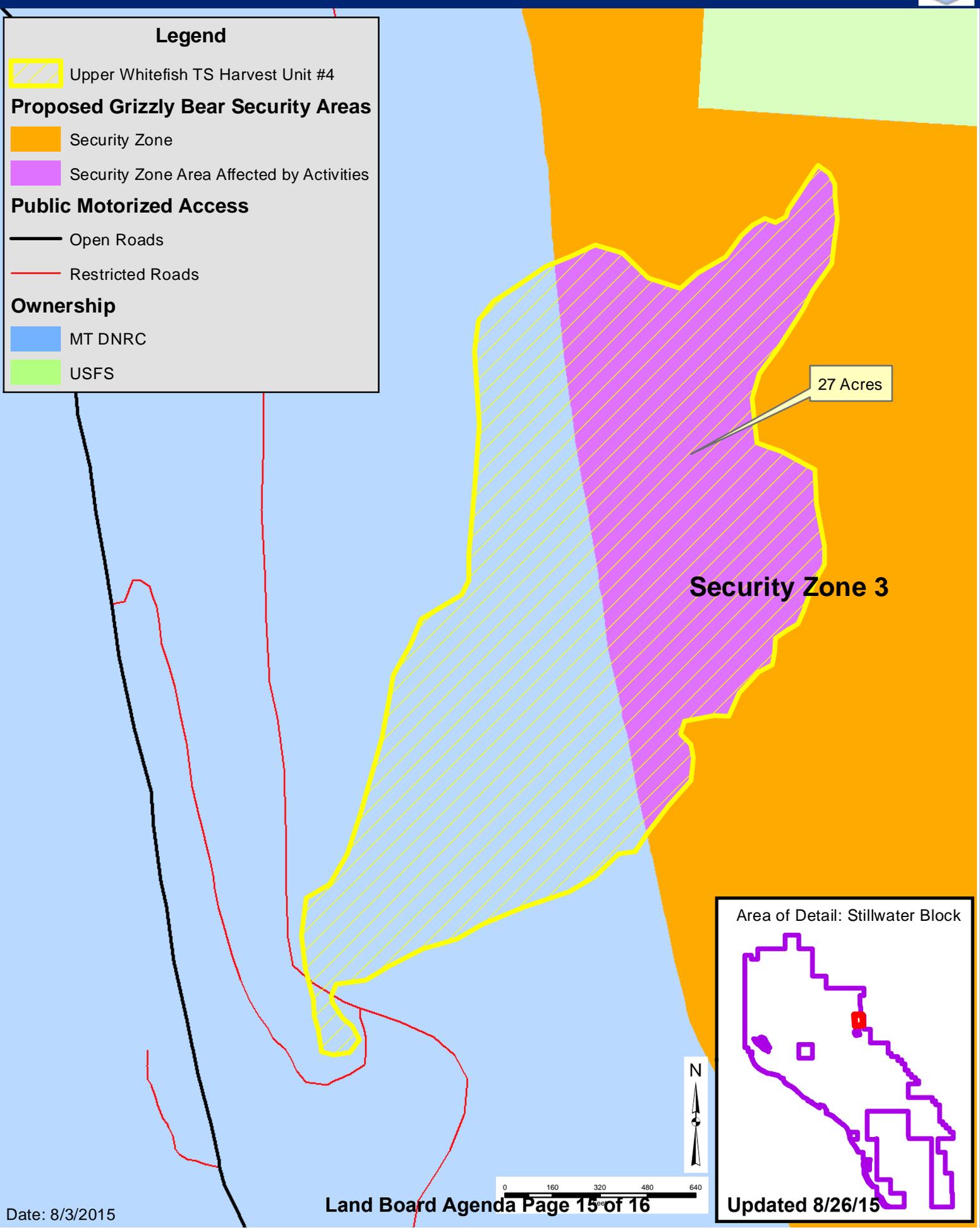
Chris Forstall & Leah Bredinger
Date: 8/3/2015





Legend

-  Upper Whitefish TS Harvest Unit #4
- Proposed Grizzly Bear Security Areas**
-  Security Zone
-  Security Zone Area Affected by Activities
- Public Motorized Access**
-  Open Roads
-  Restricted Roads
- Ownership**
-  MT DNRC
-  USFS



Security Zone 3

27 Acres

Area of Detail: Stillwater Block

Updated 8/26/15





Legend

 Swedish Chicken Site Prep Unit #3

Proposed Grizzly Bear Security Areas

 Security Zone

 Security Zone Area Affected by Activities

Public Motorized Access

 Open Roads

 Restricted Roads

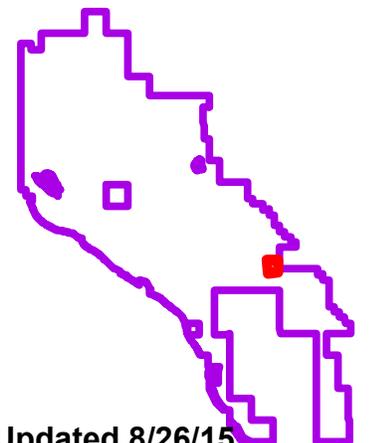
Ownership

 MT DNRC

Security Zone 3

6 Acres

Area of Detail: Stillwater Block



0 130 260 390 520