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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

CENTER FOR BIOLOGICAL
DIVERSITY, WILDEARTH GUARDIANS,
IDAHO CONSERVATION LEAGUE, THE
LANDS COUNCIL and SELKIRK
CONSERVATION ALLIANCE,

Plaintiffs,

v.

U.S. FOREST SERVICE; VICKI
CHRISTIANSEN, in her official capacity as
Chief of the U.S. Forest Service; JEANNE
HIGGINS, in her official capacity as Forest
Supervisor for the Idaho Panhandle National
Forests; U.S. CUSTOMS AND BORDER
PROTECTION; CHAD WOLF, in his
official capacity as Acting Secretary of the
U.S. Department of Homeland Security; and
ROBERT JANSON, in his official capacity
as Acting Commissioner for U.S. Customs
and Border Protection,

Defendants.

Case No. 2:20-CV-00128-BLW

***AMICI CURIAE BRIEF OF
CONTINENTAL LANDS INC. IN
SUPPORT OF DEFENDANTS***

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**IDENTITY AND INTEREST
OF AMICUS CURIAE**

Chuck Roady (“Chuck”) is one of the principal owners of **Continental Lands Incorporated (“CLI”)**, a privately-held corporation that conducts various commercial operations on private property wholly surrounded by the Idaho Panhandle National Forest. The property owned by CLI has been private land since 1897. Commercial operations such as those conducted by CLI are vital to the welfare of rural economies in the Mountain West; regular and unimpeded access to private properties is essential to the economic success of these small businesses and the personal enjoyment of their owners. Federal regulations and restrictions on the access and use of these lands, as well as excessive interference from environmental organizations, have violated the private property rights and threatened the livelihood of individuals and small businesses such as Chuck and CLI.

Mountain States Legal Foundation (“MSLF”) is a nonprofit, public-interest legal foundation organized under the laws of the state of Colorado. MSLF is dedicated to bringing before the courts issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. Since its creation in 1977, MSLF attorneys have been involved in numerous cases seeking to protect Americans’ constitutional and civil liberties, as well as numerous cases seeking to ensure a limited and ethical government that allows individuals to practically and confidently act without unreasonable government action infringing on their individual rights.

Because this lawsuit is a direct threat to Americans’ rights to own and use their private property, CLI and MSLF respectfully submit this amicus curiae brief in support of Defendants.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Bog Creek Road Project (“Project”), related proposed road closures, and associated Final Record of Decision (“Final ROD”) reflect finely-tuned balancing of multiple constitutional, statutory, regulatory, policy, and practical factors appropriately taken into account by the U.S. Forest Service (“Forest Service”) and the U.S. Customs and Border Protection (“CBP”) (collectively referred to as “Agencies” and “Defendants”). As set forth in greater detail below, the Forest Service has a constitutional and statutory obligation to provide private inholders with reasonable access to their property. In deciding how to provide access, the Forest Service could appropriately take into consideration uses already underway for the benefit of other federal agencies such as the CBP.

Plaintiffs seek this Court’s interference with the Agencies’ careful efforts to balance these interests. Plaintiffs attempt to justify this request by focusing on only one face of a multi-faceted problem. Plaintiffs highlight specific environmental concerns and ignore all other considerations. And while Plaintiffs may have such one-dimensional interests, the Agencies do not and cannot. Third parties to the lawsuit, such as CLI and grazing permittees, have property or economic interests at stake that the Agencies are duty-bound to consider. Further, the public has an interest in the protection of property and the effective conduct of the CBP. When all competing obligations and interests are considered, Plaintiffs are wrong to assert that the Agencies violated the National Forest Management Act or the National Environmental Policy Act, that a balancing of all the harms favors an injunction, or that the public interest weighs in favor of an injunction.

This brief is submitted because no party has adequately presented the specific facts and issues and related considerations appertaining to the property rights of Amici, as inholders in the

premises, and regarding the material deleterious effect of Plaintiff's proposed injunctive relief on those rights. This brief respectfully seeks to remedy this deficiency. Amici specifically support the decision in the Final ROD concerning the mere change in designation for 21.9 miles of its east access routes from seasonally restricted to administratively open for private inholders. Plaintiffs have failed to show that expanding Government and CLI's current use of this stretch of road would cause irreparable harm to the environment; rather, they lump all aspects of the Final ROD together and argue that the Project, as a whole, will cause irreparable harm. Additionally, Plaintiffs did not balance the harms or consider the effect that an injunction would have on public interests. As such, Plaintiffs' Complaint fails on the merits and CLI's reasonable access via the east access route should be preserved.

The right of private citizens and businesses to own and use their private property to provide for their families and communities is a fundamental right enshrined in the American legal system. One of the most foundational aspects of private property ownership is the right to reasonably access such property, and failure to provide reasonable access is a violation of both constitutional and statutory principles. In this current era of over-regulation, it is paramount that we do not lose sight of the very real harms that these regulations impose on individuals and small businesses. This is particularly true in the Mountain West, where vast swaths of land are managed by the federal government.

CLI's property is located on the crest of the Selkirk Range in northwestern Boundary County, about 20 miles west-southwest from Porthill, Idaho. CLI's owners had historically accessed their private property via Boundary Creek Road (FSR 2450), which entered and re-entered Idaho from the north through Canada and connected to Blue Joe Creek Road (FSR 2546). AR 5107-70. Upon the United States Department of Homeland Security's ("Homeland

Security”) closure of this border crossing in 2001 however, CLI’s owners were required to access their property from the east and south via Forest Service access roads (portions of FSRs 1009, 636, 1011, and 2546, collectively referred to as “east access”). AR 5119. These east access roads were designated as seasonally restricted with limited motorized access until earlier this year when the Agencies, in their joint Final ROD on the Project and after consultation with CLI and other interested parties, *inter alia*, removed the seasonal restrictions for the east access roads and designated them as administrative open. *Id.* This change in designation allowed for increased access to CLI’s private property, provided the owners obtained a special use access instrument, and finally secured the reasonable access to which they are legally entitled.

Plaintiffs ask this Court to enjoin all aspects of the Project. Such an injunction would run contrary to the Agencies’ reasoned analysis and conclusion that opening such roads for private access is compatible with grizzly bear recovery and would strip CLI and its owners of their constitutional right of reasonable access to their land.

ARGUMENT

I. Chuck Roady’s Unique Relationship with the Lands in Question and Cooperation with Various Federal Agencies

Chuck is a man who grasps the unique issues and circumstances surrounding the lands of Idaho and Montana more than most. Having spent nearly his entire life close to the U.S.-Canada border, Chuck moved to Bonners Ferry, Idaho (“Bonners Ferry”) as a teenager and remained in-state for his college education, graduating from the University in Idaho in 1975. Shortly after graduation, Chuck immersed himself in the study of land management, beginning his career as a forester. This formative experience broadened Chuck’s understanding of the intricacies of land management; he witnessed first-hand the multiple uses that take place in our country’s forests and learned the importance of effectively balancing those interests, thereby ensuring that timber

harvesting and other commercial activities do not unduly interfere with the restoration and conservation of protected areas and endangered species.

In addition to his insights gained as a forester, Chuck's understanding of the region has increased tenfold through his experiences as a private property owner. Chuck and his wife, along with three other families, purchased CLI in 1997 and have owned the company ever since. CLI owns a private inholding within the Idaho Panhandle National Forest and its owners occasionally conduct commercial operations from that inholding, including timber logging, harvesting ornamental Alpine Fir Christmas trees, and gathering and selling decorative rock. While the owners do not currently conduct mining operations, a mine ("Continental Mine") is located on CLI's property. Though the owners do not depend on this land as their primary means of making a living, they still use the land for various commercial purposes and can ill-afford to lose access. Although their livelihood is their top concern, CLI's owners also treasure their land for a number of personal and recreational uses such as hiking, camping, wildlife viewing, spelunking, and cross-country skiing. Some of Chuck's most cherished memories come from the times he has spent traversing these lands with his family. For Chuck and the other owners, the property in question is vital to their pursuit of happiness and any loss of access would be devastating.

As both a private individual and a forester, Chuck has spent countless hours journeying across the area, becoming intimately familiar with the Idaho Panhandle, Kootenai, and Lolo National Forests. Chuck appreciates the importance of conservation and restoration of our country's cherished wild areas, having contributed to the cause numerous times. These undertakings include supplying clean fill dirt to mitigate mining impacts, planting 28 varieties of wild natural forest vegetation seeds to facilitate forest growth, vegetating the banks of Blue Joe

Creek, and installing water bars (erosion control) to prevent the wash out of roads in the area. Simply put, Chuck has spent more time in, and has a greater understanding of the forests of, northern Idaho and Montana than nearly anyone on the planet.

Although Chuck and the other owners simply wish to exercise their right to use their land for their economic and personal enjoyment, they have experienced several hardships. An understanding of the history and geography of the area is essential to understanding their plight. After spending several years exploring for and surveying various access routes, the original owner of the property, Albert Klockmann (“Klockmann”), patented the land beginning in 1897 for the primary purpose of conducting mining operations. Klockmann built Continental Mine, which is a lead-silver deposit hosted in metamorphosed sedimentary rocks of the Precambrian Wallace Formation. Victoria E. Mitchell, *History of the Idaho Continental Mine, Boundary County, Idaho*, Idaho Geological Survey (Staff Report 00-5, May 2000).

In 1903, Klockmann built Boundary Creek Road from the Kootenai Valley to the east to access the property. The road begins where West Side Road (county road 45) ends, jutting to the northwest along Boundary Creek and crossing into Canada briefly until forking south onto Blue Joe Creek Road and re-entering Idaho. From there, Blue Joe Creek Road provides a straight shot south to the private property. Due to the rugged terrain and long snowy winters, Klockmann chose to hire an Italian crew from the Alps to lead construction of the road. This route was used continuously by all CLI owners until being obliterated by the Forest Service near the turn of the recent century. Then, the Homeland Security closed off all unsecured border crossings after the terrorist attacks of 9/11/01. Chuck spoke with various officials within Homeland Security in hopes of retaining access from the northern border to no avail. In losing the border access route, CLI had no way to reach its property, as portions of the east access route (particularly FSR 1011)

were impassable due to brush and overgrowth. CLI was temporarily left without any access whatsoever to its property.

Chuck and the other CLI owners have unfortunately been fighting for access ever since the decision to close the border, and this litigation is just one of several road access issues that the owners have been forced into over the past two decades. Although the Alaska National Interest Land Conservation Act (“ANILCA”) requires the Secretary of Agriculture to provide access to private property located wholly within the boundaries of the National Forest System, the Forest Service initially refused to clear out the brush blocking the east access roads that snake through the Idaho Panhandle National Forest. Chuck spoke with the Chief of the Forest Service at the time, Tom Tidwell, who agreed that the agency was required to give CLI access to their land. The Forest Service subsequently cleared the roads for the owners so they could access their property. CLI has accessed its property continually and exclusively from the east via the east access route (and CBP) since then, despite occasional attempts by the Forest Service to impose seasonal access restrictions.

In the two decades following the closure of the northern border crossing, Chuck has taken significant steps to work cooperatively with the various federal agencies operating in the area. A shining example is Chuck’s accommodation of Homeland Security throughout the years in its quest to tackle national security issues. Chuck and the CLI owners have leased various sites within their property to Homeland Security in furtherance of national security. The agencies use this leased land, accessing it from the east, to fly drones and operate communications towers, motion sensors, and noise sensors to surveil the northern border. In addition to Homeland Security, CLI has openly worked with hydrologists and wildlife officials in the Forest Service and has allowed the United States Fish and Wildlife Service to conduct invertebrate studies on

CLI's land. These actions were not required to be taken; rather, Chuck and the other owners have gone out of their way and done everything possible to help these agencies. This spirit of cooperation should not go unnoticed. Chuck and CLI hope to advance this collaborative relationship by monitoring, documenting, and reporting all grizzly bear and endangered species sightings and suspicious human activities to appropriate agencies when taking trips to and from their property. The owners prefer cooperation over conflict; all they ask in exchange is that the agencies cease violating their right of access.

In approving the Final ROD for the Project, Defendants finally granted Chuck and CLI's owners the reasonable access they were legally due. Just as it seemed that the owners were on their way to justice, however, Plaintiffs decided to throw a wrench in the Agencies' plans by suing to overturn every aspect of the Project. If Plaintiffs were to gain an injunction, CLI will once again be hindered in its quest to maintain its legal access rights. Chuck, on behalf of CLI, requests that this Court affirm the Agencies' informed decision to grant CLI's owners reasonable access via the east access roads so that they can reliably reach their private inholding.

II. Owners of Private Property Must Be Given Adequate Access to their Land for Reasonable Enjoyment and Economic Purposes

Chuck and CLI's story is emulative of what all small business and property owners undergo when dealing with burdensome and often-conflicting agency regulations. Private property ownership is one of the cornerstones of a free society, and the right to access such property for economic and personal use is reflected throughout the American legal system. The Framers made this abundantly clear by enshrining this fundamental principle into the United States Constitution via the Due Process and Takings Clauses of the Fifth Amendment. U.S. CONST. Amend. V. In addition to these constitutional protections, various federal and state statutes reaffirm this right of reasonable access, particularly when the property is completely

surrounded by a National Forest or designated wilderness areas. 16 U.S.C. § 3210(a); 36 C.F.R. § 251.111; 16 U.S.C. § 1134(a). Taken together, this constitutional and statutory framework provides protections for private property owners seeking reasonable access to their land; protections the Agencies were required to consider and accommodate but that Plaintiffs completely disregard, inviting the Court to do the same.

A. ANILCA Ensures the Right of Individuals to Reasonably Access Their Private Property

Various federal and state statutes provide targeted protections for private property owners. This is particularly true in the context of private property surrounded by federally managed lands. Under ANILCA, the Secretary of Agriculture is required to provide access to private property located wholly within the boundaries of the National Forest System. 16 U.S.C. § 3210(a); 36 C.F.R. § 251.111. This access must be adequate to secure the property owner the reasonable use and enjoyment of their property, subject to terms and conditions the Secretary of Agriculture may prescribe. 36 C.F.R. § 251.110(c); *Adams v. United States*, 255 F.3d 787, 793 (9th Cir. 2001). Access is “adequate” if it allows for reasonable use and enjoyment of an inholding consistent with similarly situated non-Federal land while minimizing damage and disturbance to lands and resources. 16 U.S.C. § 3210(a); 36 C.F.R. § 251.111. ANILCA’s access provision applies to all lands within the National Forest System. *Mont. Wilderness Ass’n v. United States Forest Svc.*, 655 F.2d 951, 957 (9th Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

In *Mont. Wilderness Ass’n*, a private railroad company that owned timberland located wholly within the Gallatin National Forest acquired a permit from the Forest Service to construct an access road across national forest land. 655 F.2d at 952. Various groups sued to reverse the granting of the permit, arguing *inter alia* that the access provisions of ANILCA do not apply to

land outside of Alaska. *Id.* at 952–53. The court held that ANILCA’s access provision applies to all National Forest lands nationwide, and that the railroad had a right of access across federal land to its inholdings of timberland consistent with ANILCA. *Id.* at 957. The factual circumstances in *Mont. Wilderness Ass’n* are closely analogous to this case except that CLI is merely seeking to expand existing access rather than forge a new access path and this Court should follow the Ninth Circuit’s precedent in affirming access for private property wholly surrounded by National Forest Lands.

In this case, the Agencies affirmed and rightfully granted the CLI owners’ right of access via the existing east access route after determining that such route (i) met the overall needs of the grizzly bear by complying with the Forest Service Plan Amendments for Motorized Access Management within the Selkirk and Cabinet-Yaak Grizzly Bear Recovery Zones (“Access Amendment”) standards, (ii) minimized additional motorized access, (iii) mitigated effects by creating quality core habitat and through implementation of other mitigation measures, and (iv) minimized the impacts to grizzly bear movement north-south through the Blue-Grass Bear Management Unit, all while securing the owners their reasonable use and enjoyment of their property. Final ROD at 12. This decision was made in the Final ROD for the Project, which took into account the findings made in the Defendants’ joint Environmental Impact Statement (“EIS”). *Id.* at 4. The Final ROD was developed through collaborative efforts between the Forest Service, the CBP, and various stakeholders and members of the public, and was found to meet the goals and objectives established for the Project while meeting other resource needs. *Id.* CLI’s access is subject to several terms and conditions, most notably the requirement to proceed directly to and from the property and the prohibition on using the public lands surrounding the access roads. *Id.* at 5. The access provided by the Defendants is reasonable because it allows

CLI's owners to use and enjoy their property in a way that minimizes damage and disturbance to grizzly bears in the area.

The Defendants, in determining how to implement ANILCA's statutory mandate of reasonable access, diligently and thoroughly considered various alternatives before coming to the informed decision that continued and somewhat expanded utilization the east access roads would be reasonable for the property owners and would present a minimal threat to wildlife in the area. The Final ROD was designed so that the Access Amendment and the Idaho Panhandle National Forest's 2015 Land Resource Management Plan ("Forest Plan") would be brought into compliance. *Id.* at 12. It will provide 55.4 percent core habitat, exceeding the Access Amendment and Forest Plan standard of 55 percent while providing high-quality habitat. *Id.* at 11. In addition, it will result in an Open Motorized Route Density ("OMRD") of 31.3 percent and a Total Motorized Route Density ("TMRD") of 19.3 percent, in compliance with the standards of 33 percent for the OMRD and 26 percent for the TMRD. *Id.* at 12. The decision provided far less overall human presence and opportunity for associated disturbance and grizzly conflict than the other alternatives, *Id.* at 10, and best improves genetic connectivity for grizzly bears by seasonally restricting motorized access by limiting the number of trips (six) on FSR 636 to a livestock permittee only. *Id.* at 11. As such, Defendants' informed decision to provide access was in accordance with the law, and well considered and should not be overturned.

B. The Right of Individuals to Reasonably Access Their Private Property is Affirmed by Federal and State Statutes

Although ANILCA offers the protections most relevant to the facts of this case, similar protections offered by other statutes highlight CLI's fundamental right of property access. For example, the Wilderness Act of 1964 bans some activities in federally designated wilderness areas, including the use of motorized vehicles, motorized equipment, and other forms of

mechanical transport. 16 U.S.C. § 1133(c). In drafting this ban on motorized vehicles and equipment, however, Congress explicitly limited its scope by adding the clause “except as specifically provided for in this chapter, and subject to existing private rights.” *Id.* The Act specifically requires adequate access to be given to privately owned land completely surrounded by areas designated as wilderness. 16 U.S.C. § 1134(a). By carving out a grandfather clause, Congress intentionally affirmed the right of private property owners to access their property and preserved private access rights within otherwise conflicting environmental regulations.

Idaho also features a strong precedent of property access protection. Its constitution and state statutes, when taken together, clearly show that the power of eminent domain extends to every kind of property taken for public use, including the right of access to public streets. *Hughes v. State*, 328 P.2d 397, 402 (Idaho 1958). Idaho statutes offer additional context, stating that real property includes “that which is appurtenant to the land,” I.C. § 55-101, as well as all easements attached to the land. I.C. § 55-603. Easements are included in the classification of estates and rights in lands which may be taken for public use. I.C. § 7-702. The state legislature’s constitutional and statutory language provides a strong foundation for the inference that property access is a valid property right.

Congress and the Idaho legislature, in passing various statutes relating to property access and environmental/ecological protections, consistently chose to preserve legal protections for private property owners, whether through affirmative language or grandfather clauses which preserved existing rights. Defendants thoroughly considered CLI’s property rights together with the preservation of grizzly bear habitat and genetic connectivity in the Final ROD and made the informed decision that allowing private access via the east route best balanced these

considerations. Amici respectfully request that this Court uphold CLI's access rights as provided in the Final ROD.

C. The Fifth Amendment to the United States Constitution Affirms and Protects the Right of Individuals to Reasonably Access Their Private Property

It is no accident that the Framers chose private property as one of the three fundamental rights to which deprivation requires due process, with the two others being life and liberty. U.S. CONST. Amend. V. ("No person shall be . . . deprived of life, liberty, or property without due process of law") In addition, the Fifth Amendment requires the government to compensate property owners when it takes private property for public use. *Id.* ("[N]or shall private property be taken for public use, without just compensation.") This just compensation guarantee rests on principles of equity and fairness, ensuring that no individual landowner is forced to bear public burdens. *Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."). Such strong penalties logically serve as a deterrence for government overreach and illustrate the fundamental nature and high regard the Framers of the Constitution accorded private property rights.

While the most obvious form of taking is the taking of actual physical property, non-physical interests are also afforded protection. One of the non-physical interests of property ownership is the property right of access. William B. Stoebuck, *The Property Right of Access Versus the Power of Eminent Domain*, 47 TEX. L. REV. 733, 734 (1969). The bundle of rights incident to property ownership includes the right to reasonable ingress and egress from one's property onto a public way adjacent to the land, as well as the right to access the broader infrastructure system from the immediately adjacent road. 8A Philip Nichols, THE LAW OF

EMINENT DOMAIN § 16.01 (Julius L. Sackman & Russel D. Van Brunt eds., 3rd ed. 2013). These two elements combine to form a right of access that is definitively considered as a property interest. Kurt H. Garber, *Eminent Domain: When Does A Temporary Denial of Access Become a Compensable Taking?*, 25 U. MEM. L. REV. 271, 274 (1994).

Idaho is also firmly committed to the rule that access to property from an existing highway is a property right. *Mabe v. State ex rel. Rich*, 360 P.2d 799, 801 (Idaho 1961). Interference with property access has been held to be a taking of a property right in itself. *Farris v. City of Twin Falls*, 347 P.2d 996, 998 (Idaho 1959). Although Idaho case law has not defined “substantial impairment,” the impairment must involve more than a mere change in traffic flow and reasonable access must not remain. *State, Idaho Transp. Bd. v. HI Boise, LLC*, 282 P.3d 595, 599 (Idaho 2012).

CLI’s access will be substantially impaired if this Court grants Plaintiffs’ injunction and particularly if an injunction impedes eastern access. No functional route from the west exists, so by asking this Court to keep seasonal access restrictions on the east access roads, Chuck and the other CLI owners’ access will be completely cut off during most of the summer months—the precise months that are most enjoyable and productive to CLI.

To be clear, Amici support the aspect of the ROD/Project concerning the mere change in designation for 21.9 miles of its eastern access from restricted to administrative open for agencies and private inholders (what Plaintiffs describe as the second “component” of the Project) ECF No. 21 at 11. Even assuming that Bog Creek Road was fully functional and travel-worthy, without the eastern access CLI would be forced to access its property via a western route that is extensively circuitous and unreasonable. If access from the east is restricted, CLI’s owners will be forced to travel an estimated six-to-seven hours each way from their homes in

order to reach their property from the west. This western access route would approximately entail: (i) a 54 mile drive southwest along State Highway 2 from Bonners Ferry to Priest River, Idaho; (ii) a 44 mile drive north along State Highway 57 from Priest River to the Idaho-Washington border just north of Nordman, Idaho; (iii) a 25 mile drive via NF-1013 and NF-302 that snakes through rugged terrain and which crosses the border of Washington and eventually back into Idaho; (iv) a nearly 10 mile drive around the north side of Continental Mountain via Bog Creek Road to Blue Joe Creek Road, assuming Bog Creek Road is sufficiently repaired for motorized vehicle travel; and finally (v) a 7 mile drive south to the CLI property via Blue Joe Creek Road; that is not reasonable access. Thus while Plaintiffs' arguments should fail on the merits, any relief provided in this case must preserve CLI's reasonable access via the eastern access route.

The Constitution and multiple State and Federal statutes provide a strong framework for private property access rights, and these rights are bolstered by both United States Supreme Court and state court caselaw. The inquiry on whether access is reasonable or not, or whether access has been substantially impaired, is largely fact-based and will depend on the unique circumstances that arise from case to case. Defendants conducted a thorough analysis of all potential issues related to the Project, and through that analysis, made an informed and correct decision to provide CLI with access to its property.

III. An Injunction is not Warranted

Finally, Plaintiffs' request for injunctive relief must fail because Plaintiffs failed to balance the harms of all interested parties and that of the public interest, highlighting only environmental concerns. Under the Supreme Court's four-factor test for determining whether to award permanent injunctive relief, the prevailing plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law are inadequate to compensate for

that injury; (3) that considering the balance of hardships, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *Texans for Free Enter. v. Tex. Ethics Comm’n*, 732 F.3d 535, 536-37 (5th Cir. 2013) (quoting *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009)). A court’s power to order injunctive relief “depends, as in all other cases, on whether plaintiffs have established by a preponderance of the evidence, that there is ‘a reasonably certain threat of imminent harm to a protected species.’” *Aransas Project v. Shaw*, 775 F.3d 641, 663–664 (5th Cir. 2014) (quoting *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 925 (9th Cir. 2000)). Plaintiffs have failed to sufficiently balance the harms to Defendants and third parties such as CLI and have thus failed to demonstrate the elements needed for an injunction to be granted.

The Supreme Court has struck down injunctions in multiple environmental cases where the party seeking injunction has failed to adequately balance the harms to the public interest or otherwise demonstrate that irreparable injury is likely in absence of the injunction. *See Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008) (injunction struck because alleged irreparable injury to marine mammals was not sufficiently established and was outweighed by the public interest); *Amoco Prod. Co. v. Village of Gambrell, AK*, 480 U.S. 531, 545 (1987) (injunction struck because public interest favored continued oil exploration and leases would not cause alleged harm); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–166 (2010) (injunction improper where less drastic remedy is sufficient to redress injury); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982) (injunction improper where injunction is not the only means of ensuring compliance and integrity of the Nation’s waters, a public interest, was at stake); *Kleppe v. Sierra Club*, 427 U.S. 390, 407 (1976) (injunction improper where no actual harm has been shown).

Plaintiffs seek to enjoin the entire Project without showing that the expanded opening of the 21.9 miles of east access roads for private inholders would cause irreparable harm. By failing to fully analyze this aspect, Plaintiffs seek an injunction for harms that are no more than speculative. The possibility of a threat is not sufficient for an injunction, which requires a reasonably certain threat of imminent harm.

Friends of Lydia Ann Channel v. United States Army Corps of Eng'rs highlights the issue of failing to adequately balance the harms. 701 Fed. Appx. 352 (5th Cir. 2017). In *Friends*, a preliminary injunction was obtained stopping the operations of a barge fleeting facility, based on the alleged imminent endangerment of two turtle species. *Id.* at 353. The injunction was based entirely on one aspect, water conditions, and failed to consider other possible causes of the conditions. *Id.* The court held that neither of the plaintiff's theories had established a reasonably certain threat of imminent harm from the challenged action, and accordingly overturned the injunction. *Id.* at 357.

Just as in *Friends*, Plaintiffs here do not adequately balance the harms of an injunction, instead focusing solely on one particular harm. Plaintiffs highlight specific environmental concerns related to grizzly bear habitat but ignore all other considerations, namely the economic and property interests of third parties such as CLI and the public interests in the protection of property and effective agency conduct. As such, Plaintiffs are wrong to assert that a balancing of all the harms favors an injunction, or that the public interest weighs in favor of an injunction.

CONCLUSION

For the foregoing reasons, Amici respectfully ask this Court to uphold the Defendants' reasoned and correct decision recognizing CLI's right to retain reasonable access to its private property.

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Respectfully Submitted,

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