



May 17, 2022

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**RE: Sixty-day Notice of Violation of the Endangered Species Act:
Knotty Pine Project, Kootenai National Forest**

On behalf of the Center for Biological Diversity, WildEarth Guardians, Alliance for the Wild Rockies, Native Ecosystems Council, and the Yaak Valley Forest Council, we hereby provide notice, pursuant to Section 11(g) of the Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g), that the U.S. Fish and Wildlife Service (“FWS”) and the United States Forest Service (“USFS”) are in violation of the ESA, 16 U.S.C. § 1531 et seq., with regard to the Biological Opinion for the Effects of the Knotty Pine Project on Grizzly Bears (March 18, 2022) (“BiOp”) and its accompanying Incidental Take Statement (“ITS”), as well as the Kootenai National Forest Land Management Plan Biological Opinion (Aug. 28, 2020) (“Kootenai BiOp”) and the 2004 and 2013 Access Amendment Biological Opinion.

STATEMENT OF LAW

The grizzly bear was listed pursuant to the Endangered Species Act (16 U.S.C. § 1531 et seq.) in the lower 48 states as a threatened species in 1975. 40 FR 31,734 (1975). A "threatened" species is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20). The ESA provides for the "conservation of the ecosystems upon which threatened and endangered species depend." *Id.* § 1531(b). "Conservation" means "the use of all methods and procedures which are necessary to bring any ... species to the point at which the measures provided pursuant to this chapter are no longer necessary." *Id.* § 1532(3).

ESA § 7 requires that all federal agencies work toward recovery of listed species, and it contains both a procedural requirement and a substantive requirement for that purpose. Substantively, it requires that federal agencies ensure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any threatened or endangered species, or result in the adverse modification of critical habitat for such species. 16 U.S.C. § 1536(a)(2). To carry out the duty to avoid jeopardy and adverse modification of critical habitat, ESA § 7 sets forth a procedural requirement that directs an agency proposing an action (action agency) to consult with an expert agency, in this case, the U.S. Fish & Wildlife Service, to evaluate the consequences of a proposed action on a listed species. *Id.*

Section 9 of the ESA requires that agencies insure that the proposed action does not result in the “take” of any listed species. 16 U.S.C. § 1538(a)(1)(B). “Taking” under the ESA “means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.” *Id.* § 1532(19). The “take” prohibited by Section 9 need not be the result of purposeful action. *Nat’l Wildlife Fed. v. Burlington Northern Railroad*, 23 F.3d 1508, 1509 (9th Cir. 1994) (trains accidentally hitting and thereby taking grizzly bears constitutes an ESA violation).

Under the terms of section 7(b)(4) and section 7(o)(2), taking that is incidental to and not intended as part of the agency action is not considered to be prohibited taking under the ESA provided that such taking is in compliance with this Incidental Take Statement. FWS has the authority to issue an incidental take statement concurrent with a biological opinion if it concludes that incidental take is not likely to jeopardize the continued existence of the species. 50 C.F.R. § 402.14(i). An ITS authorizes the agency to “take” listed species without facing ESA liability. 16 U.S.C. § 1536(o)(2); 50 C.F.R. § 402.14(i)(5). This statement must specify the impact of such incidental taking on the species, set forth “reasonable and prudent measures” that the expert agency considers necessary to minimize such impact, and include the “terms and conditions” that the action agency must comply with to implement those measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)(1)(iv). If the action agency adopts such measures and implements their terms and conditions, the resulting level of incidental take authorized in the incidental take statement is exempted from the ESA’s ban on take. 50 C.F.R. § 402.14(i)(5). During this assessment process, the agencies must use the best available science. *Id.* § 402.14(d).

The measures in an incidental take statement are non-discretionary and must be undertaken by the action agency so that they become binding conditions of any grant or permit issued, as appropriate, for the exemption in section 7(o)(2) to apply. *Id.* § 402.14(i)(5). The action agency has a continuing duty to regulate the activity that is covered by this incidental take statement. *Id.* If the action agency (1) fails to assume and implement the terms and conditions or (2) fails to require the applicant to adhere to the terms and conditions of the incidental take statement through enforceable terms that are added to the permit or grant document, the protective coverage of section 7(o)(2) may lapse. *Id.* § 402.14(i)(4). To monitor the impact of incidental take, the action agency must report the progress of the action and its impact on the species to the Service as specified in the incidental take statement. *Id.* § 402.14(i)(3).

If Section 7 consultation is completed, but later becomes inadequate, the agencies must reinitiate consultation. 50 C.F.R. § 402.16 (2015). “Reinitiation of formal consultation is required ... [i]f new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered.” *Id.* § 402.16(b). “If the data is new and the new data may affect the jeopardy or critical habitat analysis, then the FWS [is] obligated to reinitiate consultation pursuant to 50 C.F.R. § 402.16.” *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv.*, 378 F.3d 1059, 1077 (9th Cir. 2004). The duty to reinitiate consultation lies “with both the action agency and the consulting agency.” *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1229 (9th Cir. 2008).

An action agency—here the Forest Service—cannot rely on a faulty biological opinion to fulfill its substantive section 7 duties to ensure it does not jeopardize the continued existence of a listed species. *See Defs. of Wildlife v. EPA*, 420 F.3d 946, 976 (9th Cir. 2005) (*rev’d on other grounds, Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644 (2007)); *Resources Ltd. Inc. v. Robertson*, 35 F.3d 1300, 1304 (9th Cir. 1994) (“Consulting with the FWS alone does not satisfy an agency’s duty under the Endangered Species Act.”).

FACTUAL BACKGROUND

The Knotty Pine Project⁵

On March 24, 2022, Forest Supervisor Chad Benson signed a Decision Notice and Finding of No Significant Impact authorizing the Knotty Pine Project (“Project”) on the Kootenai National Forest. And on March 27, 2022, FWS issued a Biological Opinion and Incidental Take Statement for the Knotty Pine Project finding that the Project may affect and is likely to adversely affect grizzly bears but will not result in jeopardy.

The Project is located in the Cabinet-Yaak grizzly bear recovery zone and within Bear Management Unit (“BMU”) 12 or the “Newton” BMU.¹ Many of the Project activities, including road work, logging, burning and helicopter ignition, occurs in grizzly bear secure core. The FWS determined that the Project will adversely affect the grizzly bear.

The Project authorizes logging and burning on 9,827 acres, the addition of 3.76 miles of “undetermined roads” to the National Forest System Roads, and reconstruction of 35 miles of roads to be used as haul roads. These roads “are intended for long-term access” and many will remain open to public vehicle travel after completion of the Project. Also, 11.57 miles of closed roads will be opened for Project activities. Following the Project, gated roads opened for the Project would return to the existing condition. However, barriered roads “opened for harvest would be managed as gated to allow for continued management of the area.” The Project also adds 2.2 miles of temporary roads which will be “decommissioned” following the project.

The Cabinet-Yaak Grizzly Bear is already imperiled. The most recent count of Cabinet-Yaak grizzly bears (published in 2021 for the 2020 monitoring year) is 45 bears (50 bears counted less

¹ A Bear Management Unit is an analysis area used to track habitat security and distribution criteria for female grizzly bears within the recovery zone.

5 bears dead), and the Grizzly Bear Recovery Plan requires 100 bears for the minimum viable population. In comparison, the 2019 monitoring year report counted 50 total bears (54 bears counted less 4 bears dead), while the 2018 monitoring year report counted 54 bears (no dead). Thus, the last three years the FWS has documented a decrease in the Cabinet-Yaak grizzly bear population. This actual number of bears on the landscape is the appropriate estimate for the Cabinet-Yaak grizzly bear population when analyzing effects of an action on this species. Here, the FWS's own data show a decline in the Cabinet-Yaak population and thus, the actual number of bears on the landscape- which shows a marked decline- should be used when analyzing the effects of an action on this species.

Further, the population is also failing every recovery target: it is failing the target for females with cubs; it is failing the target for distribution of females with cubs; it is failing the female mortality limit (which is 0 mortalities until 100 bears); and it is failing the mortality limit for all bears (also 0 mortalities until 100 bears). From 1982 to 1998, the population increased with a human-caused mortality rate of 0.71 mortalities per year. From 1999-2006, the population declined with a mortality rate of 2.25 per year. From 2007-2020, the mortality rate was 2.25 per year.

A 2016 peer-reviewed published study (Kendall et al (2016)² on the Cabinet-Yaak grizzly bear found: "Grizzly bear density in the CYE (4.3–4.5 grizzly bears/1,000 km²) was among the lowest of interior North American populations. The sizes of the Cabinet (n = 22–24) and Yaak (n = 18–22) populations were similar." Further: "The 2 populations in the CYE were demographically and reproductively isolated from each other and the Cabinet population was highly inbred." Thus, "the small size, isolation, and inbreeding documented by this study demonstrate the need for comprehensive management designed to support CYE population growth and increased connectivity and gene flow with other populations."

The study further finds: "In the small Cabinet and Yaak populations, the difference between growth and decline is 1 or 2 adult females being killed annually or not." Thus, the female mortality in 2019 and the additional female mortality in 2020 do not bode well for the population at this time.

More recently, in January 2021, FWS produced its Species Status Assessment for grizzly bears. The assessment concludes that the Cabinet-Yaak grizzly population has "low" resiliency, which means a low ability for populations to persist in the face of stochastic events, or for populations to recover from years with low reproduction or reduced survival. As noted in Kendall et al (2016), the Cabinet population would likely be extinct without artificial augmentation (i.e. trapping bears from other areas and trucking them into the CYE). The only circumstance under which this population would increase to "high" resiliency would be with a significant increase in conservation measures.

² Kendall et al (2016). Density, Distribution, and Genetic Structure of Grizzly Bears in the Cabinet-Yaak Ecosystems. *The Journal of Wildlife Management* 80(20) :314-331.

Considering the fact that roads pose the most imminent – and most controllable – threat to grizzly bears, the most effective measure would be to increase the CYE to high resiliency: application of scientifically-based road density limits across all areas where grizzlies may be present.

The agencies utilize “research benchmarks” based on average levels of access and secure habitat reported by Wakkinen and Kasworm (1997) to assess effects to grizzly bears from motorized use. These “benchmarks” state grizzly bears with cubs in the CYE are adequately supported when 33% of a female grizzly bear home range has OMRD less than or equal to than 1 mi/mi²; 26% of a female grizzly bear home range has TMRD less than or equal to than 2 mi/mi²; and a minimum of 55% of a female home range is comprised of Core area (roadless area or areas with barred roads.)

In 2020, the FWS issued a Biological Opinion and Incidental Take Statement for the impacts of the 2015 Kootenai National Forest Plan on grizzly bears. The 2015 Kootenai National Forest Plan includes Access Amendment Standards that set open motorized road density (OMRD), total motorized road density (TMRD) and core standards for each Bear Management Unit (BMU) within the Forest. The Knotty Pine Project is wholly encompassed in Bear Management Unit 12. The Access Amendment Standards for BMU 12 requires OMRD of less than or equal to 1 mi/mi² in at least 45% of the BMU; TMRD of less than or equal to 2 mi/mi² in at least 31% of the BMU; and at least 55% secure core. The standards for BMU 12 set by the Access Amendment do not meet the “research benchmarks” for motorized access effects on grizzly bears. In other words, the standards set by the Access Amendment in BMU 12 do not adequately support female grizzly bears.

The Project area is checkerboarded with public and private ownership. The Project area contains a plethora of private roads. However, the agencies fail to disclose how many miles of private and/or state road exists in the Project area and focus solely on the number of National Forest System roads within the Project area.

Grizzly bears do not calculate road density on a computer; they experience road density as it actually exists on the landscape. Thus, if the purpose of calculating road density is to analyze impacts to grizzly bears, then the calculation must include all roads actually encountered by bears. Otherwise, the analysis depends on the implausible premise that grizzly bears are only impacted by National Forest System roads and all other roads on the landscape have no effect on them. There is no scientific support for such a premise. The true landscape experienced by grizzly bears in the Knotty Pine Project area is not actually disclosed or analyzed in the Biological Assessment nor Biological Opinion.

Not only does the Project explicitly authorize the increase of total and open roads by building, opening, and reconstructing roads in the Project area, but also there is pervasive and ongoing illegal road use throughout the Project area. In October 2020, Yaak Valley Forest Council provided the USFS with a Road Barrier Survey (“YVFC Survey”) documenting extensive illegal road usage and ineffective barriers across the Knotty Pine Project area that were not accounted for when the agencies analyzed the Project. The YVFC Survey is attached hereto as Exhibit A. In

May of 2022, YVFC again surveyed the Project area and again found the same pervasive and ongoing illegal road use.

The Survey discloses twelve different user-created roads or roads with ineffective barriers as evidenced by active routes around berms, gates and barriers. These illegal roads were not included in the USFS 2020 Bear Year Annual Monitoring Summary Report (“Monitoring Report”), which documented five different illegal roads not identified in the YVFC Survey. The Forest Service has not remedied any of these illegal roads and did not discuss or disclose them in their Biological Assessment or Environmental Assessment for the Project, nor did FWS discuss them in the Biological Opinion. Instead, the Monitoring Report notes that the District will “consider inclusion in [Good Neighbor Authority] contract.”³ This means that rather than decommissioning illegal roads, the Forest Service will add them to the National Forest Roads System.

The Project area is also within lynx critical habitat and within the Thunder Lynx Analysis Unit. The Project authorizes logging, burning, and road building activities within the Thunder Lynx Analysis Unit and in lynx critical habitat. Lynx depend on multi-story and old growth forest structure to survive and reproduce. The Project will render approximately 2,000 acres of currently stable lynx habitat unsuitable and unusable.

LEGAL VIOLATIONS

THE USFS AND THE FWS MUST REINITIATE CONSULTATION ON THE KOOTENAI NATIONAL FOREST PLAN

The Kootenai National Forest (“KNF”) Biological Opinion and Incidental Take Statement provide specific, non-discretionary terms and conditions that, when followed, exempt the Forest Service from the prohibitions of Section 9 of the ESA. The failure to comply with terms and conditions of a take statement renders the action agency liable for “take” of the species and thus requires the action agency to reinitiate consultation on the action.

Here, the KNF Biological Opinion and Incidental Take Statement sets for the following Terms and Conditions:

1. When managing wheeled motorized access, the KNF shall use devices or methods on restricted roads and reclaimed/obliterated roads that are, at a minimum, consistent with the devices or methods recognize by the IGBC (1998, p3).
2. The KNF shall continue to monitor the effectiveness of access restriction devices or methods as described in the Proposed Action section of this Opinion, (i.e., 30 percent monitoring in BMUs and a combination of ad hoc and opportunistic monitoring in BORZ). If any access restriction devices or

³ Under the GNA, the USFS may give the authority to the State of Montana to log. Thus, the roads that will “consider inclusion in GNA contract” means that these illegal roads will likely be added to the road system.

methods are found to be ineffective, the KNF shall attempt to remedy the situation (i.e., respond with an appropriate fix) as soon as practical within the same bear year, or no later than the following bear year.

These Terms and Conditions implement the KNF Biological Opinion's Reasonable and Prudent Measure to "[r]educe the potential for displacement for grizzly bears related to wheeled motorized access." The KNF Biological Opinions also acknowledges that the failure to meet Reasonable and Prudent Measures requires the agencies to engage in reinitiation of consultation.

As stated above, the Forest Service was notified in October of 2020 that at least 12 illegal roads exist in the Project area. As of the date of this Notice, the Forest Service has yet to "respond with an appropriate fix" as required by the KNF Biological Opinion's Terms and Conditions. Instead, these roads remain on the landscape and have since at least October of 2020. Additionally, the illegal roads disclosed in the USFS's own 2020 Monitoring Report have also not been remedied. The Forest Service's failure to respond and fix these illegal roads amounts to a violation of the Terms and Conditions of the KNF Biological Opinion and thus a failure to meet the Reasonable and Prudent Measures, requiring the agencies to reinitiate consultation on the Forest Plan. Additionally, during reinitiation of consultation, all projects authorized under the Kootenai National Forest Plan, including Knotty Pine, must be enjoined.

THE 2022 KNOTTY PINE BIOLOGICAL OPINION AND BIOLOGICAL ASSESSMENT IS ARBITRARY AND CAPRICIOUS.

In the Knotty Pine Biological Opinion, the FWS acknowledges their receipt of Yaak Valley Forest Council's Road Report and states, "[t]he Report further corroborates data from the Forest showing that illegal motorized use has occurred in the action area." Yet the agencies fail to address how these illegal roads impact grizzly bears in violation of the ESA.

The FWS states that the "influence" of illegal roads "is considered for describing the environmental baseline." This decision, to include illegal roads in an "environmental baseline," is a violation of the ESA. The "environmental baseline" is defined to include past and present impacts of all Federal actions and other human activities in the action area including those that have already undergone Section 7 consultation. 50 C.F.R. § 402.12. Thus, the environmental baseline is where the agencies consider previous federal project impacts on the species in relation to the proposed project. *Id.* Illegal roads are not part of the environmental baseline because they have not undergone formal or early section 7 consultation. The same is true for undetermined roads.⁴ The Project authorizes the addition of undetermined roads to the system. The agencies failure to adequately analyze the impacts of illegal and undetermined roads is a violation of the ESA. Illegal roads must be considered as part of the effects analysis because they are future

⁴ Undetermined roads are road prisms that either (a) exist on the landscape from previous management activities or (b) were illegally created by users, but are not authorized as part of the National Forest System. Each undetermined road segment in the Project area is either (a) a former project road that was supposed to be "temporary" and removed from the landscape as part of that former project but instead was unlawfully left on the landscape by the Forest Service, or (b) an illegal user-created road.

activities that are reasonably certain to occur within the Project area and thus are “cumulative effects” as defined by the ESA. 50 C.F.R. § 402.02.

Additionally, the FWS completely fails to consider the private and state roads in analyzing the effects of the project on grizzly bears. These private and state roads are within BMU 12 and thus contribute to TMRD and OMRD. The agencies failure to directly consider the known illegal, undetermined, state, and private roads in the Project area is a failure to consider the best available information when determining effects of the action on grizzly bears and thus is a violation of the ESA. By failing to utilize the correct miles of roads in the Project area to determine effects of the Project, the agencies are inaccurately calculating the OMRD, TMRD, and Core in BMU 12. As the FWS itself admits, BMU 12 is already above research benchmarks which is causing an adverse impact to female grizzly bears and cubs.

Thus, the exclusion of non-Forest Service roads (state, private, illegal and undetermined roads) in the road density calculations and corresponding effects analysis has no scientific basis, is not the best available science, and is arbitrary and capricious because it does not accurately reflect the way grizzly bears experience the landscape and how they are affected by it.

At a bare minimum, the true road density (both open and total roads) on the landscape – as experienced by grizzly bears – should have been included in the cumulative effects analysis, which includes state and private actions. A biological assessment must include “[a]n analysis of the effects of the action on the species and habitat, including consideration of cumulative effects, and the results of any related studies.” 50 C.F.R. § 402.12(f)(4). “Cumulative effects are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.” 50 C.F.R. § 402.02. Use of illegal roads already is occurring and certain to occur in the future because the Forest Service has not taken steps to adequately fix or close these roads. Once the true road densities are calculated, it is those densities that must be compared to scientific literature to analyze effects to grizzly bears. By relying on a fictional road density that grizzly bears do not experience, the agencies have violated the ESA and acted in an arbitrary and capricious manner.

In fact, even without considering the lacking analysis of illegal roads, the agencies still fail to provide any accurate analysis of road density during and after the Project. Although the Project record discloses that many currently closed and/or barriered roads will be opened permanently, the agencies do not disclose the location or how many miles of currently closed or barriered roads will be opened. The Forest Service discloses that following the Project, these roads will be managed as gated (not barriered) to “allow for continued management of the area.” Further, “new roads constructed for use during harvest (not including temporary routes) would remain part of the gated road system upon completion of harvest activities.” *See* Project Wildlife Report at 22. Thus, the Project will add a significant number of roads to the landscape which will permanently increase the amount of TMRD and OMRD and decrease the available core. However, the agencies did not disclose and analyze the impacts these roads have on grizzly bears, particularly how OMRD, TMRD, and core will be affected. This is significant because the 2020 Kootenai National Forest Plan Biological Opinion states that re-opening

bermed/gated/barriered roads must be analyzed as creating “temporary” roads and must be considered as part of the TMRD and cannot be included in core unless they are obliterated.

The agencies’ failure to disclose and adequately analyze how the Project’s increase in roads will affect grizzly bears is arbitrary and capricious and demonstrates a failure to adequately determine whether the Project will jeopardize the grizzly bear in further violation of the ESA.

Another problem with the Project, as well as the Forest Plan consultation, is the agencies’ failure to fully disclose the population and (non)recovery status of the Cabinet- Yaak grizzly bear population. As recited at length above, the status is dire and the population is decreasing, but this was not fully disclosed and analyzed in the context of this Project or the Forest Plan. The FWS’s “estimated population” and “minimum population size” calculations are not based on best available science. Moreover, the ESA requires agencies give the benefit of the doubt to the species. H.R. Rep. No. 96-697, at 12 (1979) (Conf. Rep.), reprinted in 1979 U.S.C.C.A.N. 2572, 2576. The FWS’s reliance on a scientifically unsupported population estimate of 56-60 bears in the Cabinet-Yaak Recovery Zone is not based on the best available science and information and also reflects an improper environmental baseline against which to assess the Project’s impacts. This is a violation of the ESA.

For these reasons, the agencies have failed to apply the best available science and information during Project level consultation in violation of the ESA, and its analyses and conclusions regarding the impact of the Project on grizzly bears are arbitrary and capricious. FWS’s jeopardy determination is also thus inaccurate in further violation of the ESA.

THE AGENCIES MUST REINITIATE CONSULTATION ON THE ACCESS AMENDMENT.

In 2004, the agencies initiated and completed consultation on the Access Amendment’s effects on grizzly bears and determined that the Access Amendment would not jeopardize the continued existence of the grizzly bear. The FWS based its “no jeopardy” determination for the KNF Forest Plan on the implementation of the Access Amendment design elements. This no jeopardy determination was later affirmed in subsequent Biological Opinions in 2011, 2013, and again in 2020. The FWS stated in the 2013 Biological Opinion that it is “critical to understand” that the no jeopardy conclusion was based on the Forest Service implementing Access Amendment design features. The FWS stated that “if they are not implemented, our analysis may not remain valid and this opinion may be subject to reinitiation.”

The Access Amendment requires that any reduction of core area be compensated with in-kind replacement concurrently or prior to incurring the losses. Specifically, the Access Amendment states:

Routine forest management may be proposed in a core area block after 10-years of core area benefit. However, BMUs must remain at or above the core standard. Therefore, potential losses to existing core must be compensated with in-kind replacement concurrently or prior to incurring the losses. Such in-kind

replacement of core would be established within the affected BMU in accordance with the direction in Part I.B.1., above. For exceptions, see specialized circumstances outlined in Part I.D. concerning BMUs that exceed standards. Following management, core areas must subsequently be managed undisturbed for 10 years.

The Knotty Pine Project authorizes logging in grizzly bear core. To access these units, the Project authorizes the opening and reconstruction of currently barriered roads in grizzly bear core. However, the agencies not only fail to adequately disclose to the public that the Project allows the opening of currently barriered roads in core, but also fail to analyze the effects of opening barriered roads in grizzly bear core. Further, the use of currently barriered roads in core reduces existing core which, as required by the Access Amendment, must be compensated with in-kind replacement of the core. The agencies' failure to disclose and analyze the effect of opening currently barriered roads in core and their failures to replace the effective loss to grizzly bear core from these roads amounts to a violation of the ESA, is arbitrary and capricious, and requires the agencies to reinitiate consultation on the Project consultation as well as the Access Amendment.

THE AGENCIES FAIL TO ADEQUATELY ANALYZE PROJECT IMPACTS ON LYNX AND LYNX CRITICAL HABITAT.

The Forest Service's "not likely to adversely affect" determination for Canada lynx and its "not likely to adversely modify" determination for Canada lynx critical habitat and the FWS's concurrence, did not apply the best available science, was arbitrary and capricious, and thus inadequate under Section 7 of the ESA. Logging, burning, and road building activities will occur within the Thunder Lynx Analysis Unit ("LAU") and in lynx critical habitat and will render approximately 2,000 acres of currently stable lynx habitat unsuitable and unusable.

The KNF amended its Forest Plan to include the Northern Rockies Lynx Management Direction ("Lynx Amendment"). The Lynx Amendment applies standards to "lynx habitat" within LAUs. Additionally, the Lynx Amendment limits or prohibits logging depending on what structural stage the lynx habitat is in. Here, it appears that the agencies remapped lynx habitat in the project area without undergoing ESA consultation. The agencies also inaccurately designated forest structural stages, thereby avoiding compliance with Lynx Amendment standards. Moreover, the agencies failed to map the wildland urban interface in accordance with the definition found in the Healthy Forest Restoration Act. 16 U.S.C. § 6511(16). This violates the ESA's directive to apply and analyze best available science in violation of the ESA. The agencies must reinitiate consultation on the Project's impacts to lynx and lynx critical habitat.

The best available science since the adoption of the Northern Rockies Lynx Management Direction shows that the lynx population in Montana is declining; that lynx in Montana are at a threshold for viability due to low hare densities, and that even a small decline in hare densities may render an area unsuitable for lynx persistence. Direct, indirect, and cumulative declines in hare habitat from Project logging, burning, and road building activities were not adequately considered and hare habitat was not accurately mapped. Thus, Project impacts to hare habitat and

lynx habitat were not accurately portrayed. Additionally, the proposed Project will increase habitat fragmentation for lynx. Since lynx will not cross openings (Squires et al. 2010), and possibly thinned forests in the winter (Squires et al. 2010), fragmentation will be exacerbated by the Project. While the Forest Service notes the effect from logging of matrix habitat will “be insignificant,” it did not adequately discuss why logging and prescribed fire will not affect lynx and lynx critical habitat. Nor did the agencies discuss the Project’s effects on fragmentation along ridgelines, areas known to be important travel corridors for lynx, in its lynx discussion. To the extent that the agencies rely upon the Lynx Amendment without considering the most current, best available science, the agencies are in violation of the ESA. Additionally, the Project is likely to result in impacts to lynx that were not addressed in the Lynx Amendment and thus the Project is likely to result in unpermitted take of this species in violation of Section 9 of the ESA.

Therefore, the agencies must reinitiate consultation on the Lynx Amendment impacts and Project impacts on lynx and lynx critical habitat.

CONCLUSION

The agencies have ignored their duties under the ESA, 16 U.S.C. §1531 et seq., to utilize the best available science, to ensure that its actions do not jeopardize threatened and endangered species, to ensure their actions do not result in unauthorized take of these species of wildlife, and to ensure that their actions promote conservation and recovery of these species. The agencies’ actions in this matter represent an unlawful departure from its legally binding mandate to protect and recover threatened species and their habitats. If the violations of law described above are not cured within 60 days, the Center, Alliance for the Wild Rockies, Yaak Valley Forest Council, and WildEarth Guardians intend to file suit for declaratory and injunctive relief, as well as attorney and expert witness fees and costs.

Sincerely,



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