August 17, 2023

The Honorable Deb Haaland,
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Re: 60 Day Notice of Intent to Sue under the Endangered Species Act:
Bitterroot National Forest - Mud Creek Vegetation Management Project

Dear Ms. Haaland, Ms. Williams, Mr. Anderson, and Ms. Bush,

The Center for Biological Diversity (“Center”) provides you this notice of the U.S Forest Service’s and the U.S. Fish and Wildlife Service’s (“Agencies”) violations of the Endangered Species Act in relation to Mud Creek Vegetation Management Project. Implementation of the Project will violate sections 7 and 9 of the Act because the Agencies have failed to complete consultation on white bark pine and have failed to provide a detailed discussion of the action’s effects on bull trout, bull trout critical habitat and grizzly bears. If the Agencies do not agree to correct the violations as alleged in this letter, the Center will pursue litigation in federal court.

MUD CREEK PROJECT

The Mud Creek Project (“Project) is a large logging and burning project in the Southern Bitterroots. The Project authorizes 20-years of commercial logging across 13,700 acres; non-commercial logging across 26,282 acres; and prescribed burning and associated activities across over 40,000 acres of Forest Service public land within the West Fork Ranger District of the Bitterroot National Forest southwest of Darby, Montana. Despite the vastness of this Project, the Forest Service’s authorizes activities without determining or analyzing where and when these activities will take place. The Forest Service claims that the precise location, timing, and scope of the treatments will be decided during the time the Project is implemented and when crews are on the ground. The Forest Service calls this “conditions-based management.”
The Agencies have disclosed that the authorized activities “could occur in white bark pine populations” and will occur in occupied bull trout and designated bull trout critical habitat. Further, the U.S. Fish and Wildlife Service (“FWS”) has determined that grizzly bears may be present in the area.

On July 15, 2021, the Forest Service sent FWS a Biological Assessment for Whitebark Pine for the Mud Creek Project, requesting concurrence that the Project would “not likely jeopardize the continued existence” of the species. At that time, whitebark pine was proposed to be listed as threatened under the ESA. In response, FWS concurred and stated that once whitebark pine is listed as threatened, the Forest Service is required to reinitiate consultation. Whitebark pine was listed as threatened on December 15, 2022. The Agencies have yet to complete reinitiation of consultation on the Project’s effects to whitebark pine.

On March 31, 2021, the Forest Service requested formal consultation on bull trout and determined that the Project “may affect and is likely to adversely affect” bull trout and bull trout critical habitat. On December 30, 2022, FWS issued a Biological Opinion on the effects of the Project on bull trout and determined that the Project would not jeopardize the continued existence of bull trout or adversely modify bull trout critical habitat. FWS issued an Incidental Take Statement with vague and non-binding Terms and Conditions that do not mitigate the amount of take to the species.

On July 29, 2022, the Forest Service sent FWS a Biological Assessment for Canada Lynx, Grizzly Bear, and Northern American Wolverine. The Forest Service determined that the Project would not likely adversely affect grizzly bears. In its Biological Assessment, the Forest Service ignored their duty to comply with the Bitterroot National Forest Plan Incidental Take Statement, issued in 2021. FWS concurred on December 30, 2022, relying on incomplete and inaccurate information.

STATEMENT OF LAW

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 section 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 prohibits the “take” of any listed species without appropriate authorization by FWS. 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 either exempted by a 4(d) Rule or in compliance with an Incidental Take Statement. However, the section 7 requirement— the duty to initiate and complete consultation— does not change in any way for a threatened species with a species-specific 4(d) rule. 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 action 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 excepted from the ESA’s ban on take. 50 C.F.R. § 402.14(i)(5). During this assessment process, as with the entire consultation 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 to address impacts on any listed species or critical habitat, the agencies must reinitiate consultation. 50 C.F.R. § 402.16 (2015). “Reinitiation of formal consultation is required” if, among other criteria, “the amount or extent of taking specified in the incidental take statement is exceeded” Id. § 402.16(a). 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).

Lastly, 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.”).

LEGAL VIOLATIONS

Whitebark Pine:

As an initial matter, the authorization of the Project without completing consultation on the Project effects on whitebark pine violates the ESA. In a response letter to our conservation allies dated May 18, 2023, the Forest Service indicated that the Bitterroot National Forest reinitiated consultation on January 19, 2023 on the Project effects of whitebark pine and stated that consultation has been on-going since that time. The Forest Service stated,

Implementation of Mud Creek Project activities may occur as early as this summer and likely before consultation is complete. The listing of whitebark pine included a Final 4(d) Rule allowing exceptions to ESA prohibitions; Federal forest management and restoration are allowed if they would advance whitebark pine conservation, as is proposed by the Mud Creek Project.

While it may be true that the Final 4(d) Rule permits take of whitebark by Forest Service, as FWS conceded in the Final 4(d) rule itself, the section 7 consultation is still required in this instance:

This [section 7] obligation does not change in any way for a threatened species with a species-specific 4(d) rule. If a Federal action may affect a listed species, section 7(a)(2) requires consultation to ensure that the activity is not likely to jeopardize the species to satisfy the requirements in section 7(a)(2) of the Act, regardless of the substance of any applicable 4(d) rule. Thus, if a Federal agency’s action may affect whitebark pine, it must fulfill section 7(a)(2) consultation obligations in accordance with 50 C.F.R. part 402. . . For instance, although removal and reduction to possession of whitebark pine in the course of forest management conducted by a Federal agency are not prohibited under the 4(d) rule, these types of activities are still subject to 7(a)(2) consultation requirements if they may affect the species. Additionally, if a Federal agency determines that its action is not likely to adversely affect a listed species or its critical habitat, it must still receive our written concurrence, even if its activity, and the result of its activity, are not prohibited by the 4(d) rule.

Cite? Therefore, the Agencies’ failure to complete consultation and receive a concurrence or a biological opinion from FWS violates section 7(a)(2) of the Act. Until consultation is completed, the effects of the project on whitebark pine remain unknown. Thus, the agencies’ authorization of the Mud Creek project without completing its section 7 duties violates the ESA.

In addition, undertaking any activities before the consultation is complete clearly violates section 7(d), which prohibits, “[a]fter the initiation of consultation required under subsection 7(a)(2) . . .
any irreversible or irrevocable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent measures which would not violate subsection (a)(2).” 16 U.S.C. § 1536(a)(2).

**Bull Trout:**

Bull trout populations within the Bitterroots are declining and are at a very high risk of extirpation from climate change and sedimentation from high road density. Because the timing and site-specific location of Project activities are not yet known or disclosed, the Agencies fail to adequately discuss the Project impacts to particular populations of bull trout and reaches of critical habitat. Thus, the Agencies fail to adequately consider the Project’s impacts on bull trout and bull trout critical habitat.

Additionally, without knowing the specifics of the Project’s actions, the Agencies determined that “even with the highest efficacy of design feature implementation and BMP management, the potential for sediment to be delivered is still high on the Nez Perce Fork and Rombo Creek.” Despite this, FWS made a no jeopardy determination because “minimization measures (i.e. required design criteria and BMPs) employed by the Forest during implementation of the proposed action are likely to be effective in reducing sediment generated by the proposed project activities.” This arbitrary determination not only fails to acknowledge the fact that many mitigation measures are unknown and nonbinding but also that Bitterroot National Forest monitoring reports indicate an ongoing and near consistent failure of BMPs in reducing or eliminating sediment delivery across the Forest.

Moreover, the Terms and Conditions set forth in the Project’s Incidental Take Statement (“ITS”) for bull trout fail to provide any triggering and binding terms that mitigate take. Mitigation measures, which may be incorporated into terms and conditions, as done here, “cannot refer to generalized contingencies or gesture at hopeful plans; they must describe, in detail, the action agency’s plan to offset the environmental damaged caused by the Project.” *Center for Biological Diversity v. Bernhardt*, 982 F.3d 723 (9th Cir. 2020). All of the Terms and Conditions fail to comply with this mandate. For example, Term and Condition C states, “The Forest will devise and implement a long-term solution to minimize the perpetual sediment delivery of the miles of FR 468 within the Nez Perce Fork RHCA prior to the initiation of the third implementation unit (Blue Joint).” This Term and Condition is most certainly a “gesture at hopeful plans” and is especially concerning because the Blue Joint population of bull trout is the most at-risk population in the Bitterroots area. The generalized contingency in this term and condition thus violates the ESA. The remainder of the Terms and Conditions are similarly vague and indefinite and it will be impossible to know at which point the Forest Service fails to comply with them. This violates the ESA.

Additionally, the Terms and Conditions are not based in science or data and nor do they actually address the threats to the species in a way that satisfies the jeopardy and adverse modification standards, as required under the ESA. For example, Term and Condition E states that the Forest Service must monitor the number of log truck loads hauled out of the Project area. If the number reaches 500 trips on specific road sections and 2,000 trips on other specific road sections, “the Forest will ensure hauling is halted and will contact the Service to reinitiate consultation.”
However, the Agencies did not base this number of loads on any consideration relating to bull trout and did not adequately analyze whether the number of loads on these roads will affect bull trout and critical habitat. This violates the ESA.

Further, the Agencies fail to adequately analyze and disclose the Project’s effects on key populations of bull trout and critical habitat in the Project area. Specifically, the Agencies fail to analyze whether the alleged short-term impacts of the Project on a small and very at-risk populations of bull trout will push that population beyond its threshold, resulting in localized extirpation. In this way, the Agencies also failed to consider and analyze the best available information regarding bull trout in the Bitterroots because the agencies seemingly failed to adequately consider the Conservation Strategy for Bull Trout of USFS lands in Western Montana. The Conservation Strategy was drafted, in part, by the Forest Service and highlights the dire landscape and condition of bull trout populations and critical habitat in the Bitterroot. By failing adequately consider data regarding the Project, and data regarding the bull trout populations and critical habitat within the Project area, the Agencies violate the ESA.

Lastly, the ESA requires the Agencies to consider the Project effects on the “survival and recovery” of bull trout. Here, the Agencies entirely fail to analyze whether this Project will impede the recovery of bull trout. The record makes clear that it will.

In view of all of these deficiencies, the Agencies are in violation of their duty under section 7(a)(2) to “insure” that the Project is not likely to jeopardize the continued existence of the bull trout. 16 U.S.C. § 1536(a)(2).

**Grizzly bears:**

As FWS has recognized, connectivity between Recovery Zones, including the Bitterroot Ecosystem and the Northern Continental Divide Ecosystem, is necessary for the full recovery of grizzly bears. Over the past several years, more and more grizzly bears have been attempting to access the Bitterroots. Last week, three grizzly bears were found in three days in the Sapphire Mountains, on the east side of the Bitterroots.1 The increased number of grizzly bear sightings indicates that grizzly bears are trying to reestablish in the Bitterroots. Unfortunately, the Bitterroot National Forest, including the Mud Creek Project area, is heavily roaded. As the Agencies have acknowledged, the current degraded conditions of the Forest are likely why grizzly bears have been absent from the Bitterroots.

Rather than attempt to remediate the landscape and work toward the recovery of grizzly bears in the Bitterroots, the Mud Creek Project adds more motorized routes to the system, further increasing road density and decreasing secure habitat for grizzly bears. In this way, the Project violates the Terms and Conditions of the 2021 Biological Opinion and Incidental Take Statement for the Bitterroot National Forest Plan (“Forest Plan BiOp”), fails to provide a detailed discussion of effects of the action, and fails to consider best available science regarding road impacts on grizzly bears.

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The Forest Plan BiOp’s Terms and Conditions prohibit a decrease in secure habitat beyond 5\% of each Grizzly Bear Analysis Unit ("GBAU") over the lifetime of the Forest Plan. The Forest Plan BiOp identifies the baseline amount of secure habitat in each GBAU and the secure habitat in each GBAU following a 5\% reduction. The Terms and Conditions also states that if the total secure habitat in the Bitterroot Forest is reduced by more than 31,400 acres, the Forest must reinitiate consultation.

Here, the Forest Service issued a Biological Assessment for the Mud Creek Project finding that the Project may affect, but is not likely to adversely affect grizzly bears. FWS issued a two-page letter of concurrence. In the Biological Assessment, the Forest Service did not utilize the correct number of baseline acres of secure habitat as disclosed in the 2021 Forest Plan BiOp. The failure to use the correct number of baseline acres not only results in an inaccurate calculation of the Project’s reduction of secure core, it will also result in inaccurate future calculations for future compliance with the Terms and Conditions. The Forest Service’s provision of, and FWS’s reliance on, the Forest Service’s incorrect information and calculation violates the ESA. See Resources Ltd. v. Robertson, 35 F.3d 1300, 1305 (9th Cir. 1994)(holding that the Forest Service could not rely on a BiOp where the agency had failed to provide the FWS with complete, accurate data regarding potential grizzly bear impacts).

Moreover, the Forest Service fails to analyze and disclose whether this Project will reduce the total amount of secure core in the Bitterroot by more than 31,400 acres, requiring reinitiation of consultation of the Forest Plan. The Forest Service indicates that there are several past and present projects that will result in cumulative impacts to several of the Project resource indicators, including wildlife. Given the significance of this Project coupled with recent past and current projects, it is likely that the amount of secure habitat in the Bitterroot is reduced beyond that authorized in the 2021 Forest Plan BiOp and ITS. Thus, at a minimum, the Agencies failed to provide a detailed discussion of effects of the action on grizzly bears and at worst, the Agencies are required to reinitiate consultation on the Forest Plan.

Additionally, the Project will add a total of 30 miles of permanent motorized routes to the Forest Service system (8.95 miles of new permanent roads + 21 miles of new motorized trails). However, the Forest Service did not discuss or disclose the effects the 21 miles of new motorized trails will have in grizzly bear security and whether these new motorized trails will reduce secure habitat more than that disclosed. The Forest Service also cannot identify where and when the permanent roads will be constructed and thus cannot accurately discuss and disclose the impacts to secure habitat.

The Project also authorizes the construction of a total of 33.8 miles of temporary road. The Forest Service states that the effects of a temporary road are limited to the duration of the project “if the temporary roads are obliterated or made impassable after the project’s completion.” First, this statement is incorrect. As the Grizzly Bear Recovery Plan acknowledges, a road impacts grizzly bears beyond the life time of that individual road. This is because once a grizzly bear is impacted by a road, it avoids that area and teaches its cubs to avoid that area. Therefore, the impact of a temporary road lasts for generations. Further, the Forest Service itself acknowledges that “a temporary road is a road that exists on the landscape for no more than 5 years.” The
lifetime of the Project is 20 years. However, the Forest Service acknowledges that the temporary roads may not be obliterated or made impassable after the Project’s completion. Therefore, the Agencies must analyze the long-term impact of the “temporary” roads authorized by the Project.

Lastly, FWS has recognized that “managing human access to grizzly bear habitat would be the key to effective habitat management . . . by increasing habitat effectiveness.” Species Status Assessment for Grizzly Bears in the Lower-48 States at 106. The Interagency Grizzly Bear Committee Taskforce Report recognized that these impacts could be minimized through motorized access management of three parameters: (1) open motorized route density, (2) total motorized route density, and (3) core areas. Despite this, the Agencies entirely fail to discuss the Project impacts on route density in the Project area and thereby fail to discuss an important aspect of the problem relating to grizzly bears.

The ESA mandates that the Agencies use “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." 16 U.S.C. § 1532(3). By continuing to reduce the already degraded habitat, the Agencies’ fail to follow the ESA’s mandate. The Agencies have failed to provide a detailed discussion of effects of the action, failed to discuss and disclose best available science, and violated the terms and conditions of the Forest Plan BiOp and ITS, requiring reinitiation of consultation of the 2021 Forest Plan. Further, FWS’s failure to issue a Biological Opinion on the effects of the Project on grizzly bears violates the ESA.

CONCLUSION

The Agencies have failed to complete consultation on whitebark pine. The authorization of the Mud Creek Project prior to completion of the ESA violates section 7 of the Act. Further, the Agencies have ignored their duties under the ESA to utilize the best available science, to ensure that their 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 intends to file suit for declaratory and injunctive relief.

Sincerely,

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