

December 21, 2017

Chief Tony Tooke
USDA Forest Service
201 14th Street SW
Washington, DC 20250

Secretary Sonny Perdue
U.S. Department of Agriculture
1400 Independence Ave., SW
Washington, DC 20250-0003

Secretary Ryan Zinke
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

Principal Deputy Director Greg Sheehan
USDI Fish & Wildlife Service
1849 C Street NW
Washington, DC 20240

RE: 60 Day Notice of Intent to Sue under the Endangered Species Act

You are hereby notified that Alliance for the Wild Rockies (AWR) intends to file a citizen suit pursuant to the citizen suit provision of the Endangered Species Act (ESA), 16 U.S.C. § 1540(g), for violations of the ESA, 16 U.S.C. §§ 1531, *et seq.* AWR will file suit after the 60 day period has run unless the violations described in this notice are remedied.

The names, addresses, and phone numbers of the organization giving notice of intent to sue is as follows:

Mike Garrity, Director
Alliance for the Wild Rockies
P.O. Box 505
Helena, MT 59624
406-459-5936

The names, addresses, and phone numbers of counsel for the notifier are as follows:

Timothy Bechtold
Bechtold Law Firm, PLLC
P.O. Box 7051

Missoula, MT 59807
406-721-1435
tim@bechtoldlaw.net

STATEMENT OF LAW

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 insure 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 (USFWS), to evaluate the consequences of a proposed action on a listed species. 16 U.S.C. § 1536(a)(2).

The Endangered Species Act provides that if the USFWS advises that a threatened, endangered or candidate species may be present in the project area, an action agency must conduct a biological assessment to identify any endangered or threatened species which is likely to be affected by such action. 16 U.S.C. § 1536(c)(1). The U. S. Court of Appeals for the Ninth Circuit hold that “[o]nce an agency is aware than a endangered species *may be present* in the area of its proposed action, the ESA requires it to prepare a biological assessment . . .” *Thomas v. Peterson*, 753 F. 2d 754, 763 (9th Cir. 1985) (emphasis added). The U.S. District Court for the District of Montana has outlined the procedure for determining whether to prepare a biological assessment as follows:

The Forest Service’s first step in complying with § 7 is to obtain from the USFWS “a list of any listed or proposed species or designated or proposed critical habitat that *may be present* in the action area.” 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(c)-(d) (emphasis added). If the USFWS advises that a listed species or critical habitat may be present, the Forest Service must complete a biological assessment to determine if the proposed action “may affect” or is “likely to adversely affect” the listed species. 16 U.S.C. § 1536(c)(1); 50 C.F.R. §§ 402.12 (f), 402.14(a), (b)(1); *Forest Guardians v. Johanns*, 450 F.3d 455, 457 (9th Cir. 2006). Once the biological assessment is completed, it must be shared with the USFWS. 50 C.F.R. § 402.120). “If [the USFWS] advises that no listed species or critical habitat may be present, the Federal agency need not prepare a biological assessment and further consultation is not required.” 50 C.F.R. §402.12(d).

Native Ecosystems Council v. Krueger, 946 F.Supp. 2d 1060, 1070 (D. Mont. 2013). The

“may be present” standard presents a low threshold for triggering the requirement that an agency prepare a biological assessment: Actual occupancy by a protected species is not required and “migratory species that ‘may be present’ at some point within the action area must be included in the species list.” *Krueger*, 946 F. Supp. at 1073 (citing Interagency Cooperation—Endangered Species Act of 1973, as Amended; Final Rule, 51 FR 19926-01 (Jun. 3, 1986)).

If the agency prepares a biological assessment, and the biological assessment concludes that the proposed action “may affect” but will “not adversely affect” a threatened or endangered species, the action agency must consult informally with the appropriate expert agency. 50 C.F.R. §§ 402.14(b)(1), 401.12(k)(1). If the action “is likely to adversely affect” a listed species, the action agency must formally consult with the expert agency, and the expert agency must provide the action agency with a Biological Opinion explaining how the proposed action will affect the species or its habitat. 16 U.S.C. § 1536(a-c); 50 C.F.R. Section 402.14. If the Biological Opinion concludes that the proposed action will jeopardize the continued existence of a listed species, it must outline “reasonable and prudent alternatives,” if any are available, that would allow an action agency to carry out the purpose of its proposed activity without jeopardizing the existence of listed species. 16 U.S.C. § 1536(b)(3)(A).

If the Biological Opinion concludes that the action will not result in jeopardy but may incidentally “take” or “harm” a protected species, the expert agency has authority to provide the action agency with an “incidental take statement.” 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). 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. During this assessment process, the agencies must use the best available science.

As defined in the ESA’s regulations, an “action” subject to consultation includes all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, right-of-way, permits, or grant-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air. 50 C.F.R. § 402.02. The U.S. Court of Appeals for the Ninth Circuit holds that this regulatory language “admit[s] of no limitations” and that “there is little doubt that Congress intended to enact a broad definition of agency action in the ESA . . .” *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1054 (9th Cir. 1994). Thus, ESA consultation is required for individual projects as well as for the promulgation of land management plans and standards. *Id.* “Only after the Forest Service complies

with § 7(a)(2) can any activity that may affect the protected [species] go forward.” *Pac. Rivers*, 30 F.3d at 1056-57.

The procedural consultation requirements in the ESA are judicially enforceable and strictly construed:

If anything, the strict substantive provisions of the ESA justify more stringent enforcement of its procedural requirements [than the provisions of the National Environmental Policy Act], because the procedural requirements are designed to ensure compliance with the substantive provisions. The ESA’s procedural requirements call for a systematic determination of the effects of a federal project on endangered species. If a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA’s substantive provisions will not result. The latter, of course, is impermissible.

Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985).

STATEMENT OF GENERAL FACTS

On May 7, 2013, Forest Supervisor Paul Bradford signed a Record of Decision (ROD) authorizing Alternative 3 of the Pilgrim Creek Timber Sale project. AWR filed suit over the Pilgrim Project alleging that the Pilgrim Project violated the Kootenai National Forest Plan Access Amendments Standard II(B), including specifically that the miles of roads behind earthen berms should be included in the linear miles of total roads in Bears Outside the Recovery Zone (BORZ) polygons on the forest. On May 17, 2017, the Ninth Circuit Court of Appeals held that the miles of road behind earthen berms did not count in the linear miles of total roads in BORZ areas. *See Alliance for the Wild Rockies v. Bradford*, 856 F.3d 1238 (9th Cir. 2017). The Ninth Circuit further held that “any closure that fails to effectively prevent motorized access also fails to comply with Standard II(B) of the Access Amendments.” *Id.* at 1243. Thereafter, investigators conducted a survey of berm effectiveness in the Clark Fork and Tobacco BORZ in the Kootenai National Forest in October of 2017, and discovered numerous berms that “fail to effectively prevent motorized access,” and thus fail to comply with Standard II(B) of the Access Amendments. See enclosed list and photos. Because the berms are ineffective at preventing motorized access, the Kootenai National Forest is not in compliance with the Incidental Take Statement for the Access Amendments and Pilgrim project, in violation of the ESA. Additionally, the agencies must reinitiate ESA consultation on the Access Amendments and Pilgrim Project because the original analyses presumed no motorized access would occur behind berms and that assumption has proven false. Moreover, the investigators discovered numerous roads, including roads with no berm whatsoever, that were unaccounted for in the Forest Service Road databases of linear miles of total roads in the BORZ polygons. Because these roads exist on the BORZ landscape with no berm that effectively prohibits motorized access, the linear miles of total roads in the

BORZ has increased over the baseline that is set forth in the Access Amendment. This also requires a new Incidental Take Statement under Section 9 and reinitiation of consultation under Section 7 for both the Access Amendment and the Pilgrim Project.

It is well established that roads are harmful to Grizzly bears. Grizzly bears tend to avoid heavily roaded areas. Further, the USFWS has explained that “[t]he most effective way to minimize the risk of adverse interactions between humans and bears is to provide spatial separation between areas of human activity and areas of bear activity” and that “[m]anaging public motorized access to grizzly bear habitat is one of the most common and effective ways to maintain a level of separation between grizzly bears and humans.”

The standards generally applicable in BORZ polygons include:

- 1). No permanent increases in the total linear miles of “open roads” and “total roads” are permitted.
- 2). Potential increases in linear miles of open or total roads must be compensated for with in-kind reductions concurrently or prior to such increases.
- 3). Temporary increases in total linear miles of roads are acceptable under the following conditions:
 - a. Newly constructed roads would be effectively gated and would be restricted with a CFR closure clarifying they are not open for public use.
 - b. These roads shall be closed immediately upon completion of activities requiring use of the road, except as described in Part II. A.1., above. Roads must be closed with a berm, guardrail or other measure that effectively prevents motorized access, and put in a condition such that a need for motorized access for maintenance is not anticipated for at least 10 years.

Open roads are roads that are open for all or part of the active bear year. The measurement of “total roads” includes roads that do not have restrictions on motorized use and roads that are closed to public motorized use.

In order to achieve compliance with the road standards that exist to protect the grizzly bear, the Forest Service must actually decommission the roads in a manner that will make them impossible for motorized use, or for walk-in use by hunters. Demonstrably, this has not occurred in the past. Because roads slated for earthen berms are not actually being decommissioned to a point where they deter motorized use, or use by hunters on foot, they should be included in total miles of linear roads.

CONCLUSION

The Forest Service has ignored its duties under the ESA, 16 U.S.C. § 1531 *et seq.*, to ensure that their actions do not jeopardize threatened and endangered species, that its actions do not result in unauthorized take of these species of wildlife, and that its actions promote recovery of these species. The agencies’ actions in this matter

represent an unlawful departure from their legally binding mandate to protect and recover imperiled species and their habitats.

If the violations of law described above are not cured within 60 days, AWR intends to file suit for declaratory and injunctive relief, as well as attorney and expert witness fees and costs.

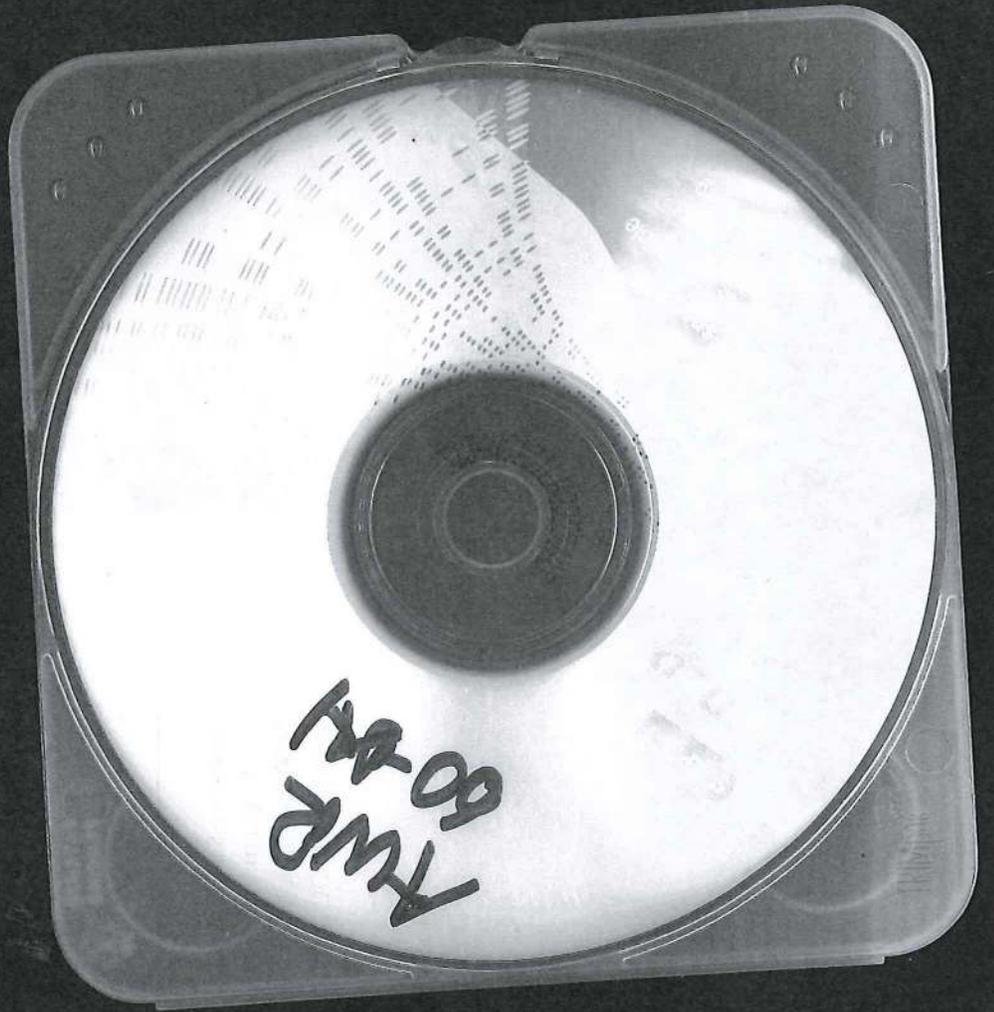
Sincerely,

A handwritten signature in cursive script, appearing to read "Timothy Bechtold". The signature is written in black ink and is positioned above the typed name.

Timothy Bechtold, Counsel for Notifier

cc: Jefferson Sessions, U.S. Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

BORZ	Road ID	Latitude	Longitude	Photos	Notes
Clark Fork	430 off shoot	N 48 00.294	W 116 01.512	2630, 2631, 2632, 2633, 2634, 2635, 2636	Evidence of ATV trail going around berm, then turns into single track.
Clark Fork	2273 off shoot (2)	N 47 54.763	W 115 56.701	2641, 2642, 2643, 2644	Path past berm
Clark Fork	2273 off shoot (3)	N 47 54.873	W 115 56.346	2645, 2646, 2647, 2648	Photo of trail behind berm
Clark Fork	2704 off shoot	N 48 01.387	W 115 54.249	2649, 2650, 2651	
Clark Fork	2744 off shoot (2)	N 47 59.155	W 115 55.096	2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666	1/2 berm intact, obvious two-track activity. Road is likely 2744H
Clark Fork	2214A	N 47 52.449	W 115 43.731	2680, 2681, 2682, 2683, 2684, 2685, 2686, 2687, 2688	Obvious ATV activity.
Clark Fork	14621	N 47 53.393	W 115 44.807	2690, 2691, 2692, 2693, 2694, 2695	ATV activity
Clark Fork	14622	N 47 53.393	W 115 44.807	2696, 2697, 2698	Restricted road without barrier
Clark Fork	2228	N 47 51.708	W 115 51.888	2703, 2704, 2705, 2706	Logs filling in the hole next to gate



TWR
60-241

PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT
OF THE RETURN ADDRESS, FOLD AT DOTTED LINE

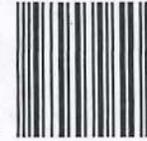
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