

December 2, 2014

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USDI Fish & Wildlife Service
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Faye Krueger
U.S. Forest Service
Regional Forester, Region One
PO Box 7669
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RE: 60 Day Notice of Intent to Sue under the Endangered Species Act

Dear Sirs and Madams:

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
Tel: (406) 459-5936

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

Timothy Bechtold
Bechtold Law Firm, PLLC
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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 October 27, 2014, Christopher Savage, Forest Supervisor for the Kootenai National Forest, signed a Record of Decision (ROD) authorizing implementation of the East Reservoir Project (Project), choosing Alternative 2 with modifications. The East Reservoir project area lies approximately 15 miles east of Libby, Montana, in Lincoln County, along the east side of Lake Koocanusa Reservoir. The analysis area is approximately 92,407 acres. The National Forest System (NFS) manages 78,546 acres, Montana State Department of Natural Resources and Conservation (DNRC) manages 4,032 acres, 1,322 acres are in private ownership, Plum Creek Timber Company (PCTC) owns 7,672 acres and the Corp of Engineers (COE) manages 802 acres. ROD 2-3. The Record of Decision authorizes management activities including several types of commercial timber harvest, precommercial thinning, commercial thinning and prescribed burning, in the Project Area. Part of the project area encompasses critical habitat for Canada lynx. Part of the project area is also included in the Bears Outside the Recovery Zone (BORZ) polygon identified as important habitat for the Grizzly bear.

In a document dated June 6, 2013, the USFWS determined that the following threatened, endangered and candidate species “may be present” on the Kootenai

National Forest and hence, in the project area: Grizzly bear, Canada lynx, wolverine, bull trout and white sturgeon. On May 31, 2013, the Forest Service completed a revised biological assessment considering possible effects from project implementation on grizzly bears and Canada lynx. The Forest Service did not complete a biological assessment for bull trout or white sturgeon because the Forest Service concluded that neither species was present in the project area, and hence, there would be no effect to those species. On August 8, 2013, the USFWS concurred with the Forest Service's determinations that the project was not likely to adversely affect the grizzly bear or Canada lynx. The USFWS did not review the Forest Service's determinations for bull trout or white sturgeon because no analysis of impacts to those species or their habitat was presented for the USFWS's review.

PROJECT CHALLENGES

1. THE AGENCIES MUST CONDUCT ESA CONSULTATION FOR THE THREATENED BULL TROUT.

The bull trout is listed as Threatened under the ESA. The Forest Service's analysis states that "Bull Trout [*sic*] are known from Lake Koochanusa [reservoir]," which lies on the eastern edge of the project area. Bull trout have thrived in the reservoir, and in the past, taking them has been permitted through a tag system. The fish are migratory and have been anecdotally mentioned in professional communications to migrate into Fivemile Creek, which is within the analysis area. The Forest Service asserts that "numerous" electroshock surveys of Fivemile Creek did not reveal bull trout presence. Although the Forest Service opined that "[a]n occasional fish may migrate into the system," the Forest Service concluded that the system did not contain suitable habitat for bull trout and hence, bull trout would not be considered present in tributary streams or affected by the proposed project. To support its determination that the project would have "no effect" on bull trout, the Forest Service explained, without citing any science to support its view, that "[i]t is believed that bull trout have been replaced by brook trout in streams above the Reservoir and within Dunn Creek." The Forest Service's analysis did not mention the four bull trout located during a 2007 electroshock survey of a stream segment labeled "Cripple #1," presumably referring to a segment of Cripple Horse Creek, within the project area.

The USFWS list of species that may be present in the project area included bull trout. The Forest Service did not conduct a biological assessment to determine whether the fish might be affected by the proposed action. Instead, the Forest Service unilaterally determined that bull trout were not present and would not be affected by the proposed action, despite anecdotal reports of bull trout presence in Fivemile Creek and documented bull trout presence in Cripple Horse Creek. The fact that bull trout may be present as a migratory species in the project area means that bull trout meet the low threshold for "may be present" and therefore must be analyzed in a biological assessment for the project. Moreover, the Forest Service does not have discretion to

ignore the USFWS list that indicates that bull trout are a species that may be present. If the Forest Service wants to provide its own list of “may be present” species, it must present that list to USFWS for concurrence prior to project implementation; it cannot simply unilaterally decide to ignore the USFWS list provided. Alternatively, the Forest Service could request a FWS species list that is more closely tailored to the project area, but it failed to do so here.

By failing to complete a biological assessment to determine whether the project may affect the Threatened bull trout, the Forest Service has violated the ESA § 7. Moreover, the USFWS never concurred with the Forest Service’s determination that the proposed action would have “no effect” on the bull trout.

2. THE FOREST SERVICE’S DETERMINATION THAT THE PROJECT WOULD HAVE NO EFFECT ON THE THREATENED BULL TROUT IS ARBITRARY AND CAPRICIOUS AND VIOLATES THE ESA.

The Forest Service’s determination that the project would have no effect on bull trout is premised on the conclusion that bull trout are not present in the project area. This analysis conflated the two distinct prongs “may be present” and “may affect.” The Forest Service’s analysis admits that migratory bull trout may use tributary streams in the project area. The Forest Service’s own stream surveys detected presence of bull trout in a stream reach in the project area. These findings satisfy the “may be present” standard.

The question of whether the proposed action “may affect” the Threatened bull trout is different and distinct. The activities proposed as part of the project, including road building, timber harvest and prescribed burning, are the types of activities that may affect bull trout habitat according the USFWS’s final rule on bull trout critical habitat. For the project in particular, these activities may increase sedimentation in streams in the project area, decreasing the quality of fish habitat. Most measured stream reaches are already failing to meet the Resource Management Objective for pool quality.

The Forest Service’s determination that there will be no effect on Threatened bull trout due to project activities is arbitrary and capricious because it relies on the incorrect assumption that bull trout are not present in the project area. The focus on whether bull trout are actually present in the project area is not the proper inquiry for a “may affect” determination, and ignores the fact that these are precisely the type of activities that degrade bull trout habitat and harm bull trout. Moreover, “may affect” means any possible effect, whether positive, negative, or benign. So even if the agency were arguing that there is a positive impact, the “may affect” threshold would be satisfied.

3. THE AGENCIES MUST CONDUCT ESA CONSULTATION FOR THE ENDANGERED WHITE STURGEON.

The white sturgeon is listed as Endangered under the ESA and is known to occur in the Kootenai River. Relying on scientific articles that are over twenty years old, the Forest Service determined that “[t]he white sturgeon is restricted to 168 miles of the Kootenai River between Cora Linn Dam in Canada and Kootenai Falls in Montana.” The recovery plan for white sturgeon, publically available on the USFWS website, however, identifies the Koocanusa Reservoir upstream of Libby Dam as part of the Kootenai River ecosystem that is important for white sturgeon recovery. The recovery plan also alludes to anecdotal evidence supporting presence of white sturgeon upstream of Kootenai Falls in Montana. The DEIS admits that “[p]otentially affected watersheds in the analysis area include Lake Koocanusa and the Kootenai River, Dunn Creek, Canyon Creek, Cripple Horse Creek, Warland Creek, Five Mile Creek and tributary streams to these drainages.”

The USFWS list of Threatened, Endangered, and candidate species that may be present in the project area included the Endangered white sturgeon. As noted in more detail above, and incorporated by reference here, the agency does not have the discretion to ignore the FWS list under the plain language of the ESA and its regulations. If the list states that the species may be present, the agency must prepare a biological assessment. The Forest Service did not conduct a biological assessment to determine whether the white sturgeon might be affected by the proposed action, or its critical habitat adversely modified. Despite acknowledging that the Kootenai River, which is the only habitat in which the Endangered white sturgeon occur, was a “potentially affected watershed” within the analysis area, the Forest Service unilaterally determined:

No activities are proposed that would directly affect potentially inhabited white sturgeon habitat. The proposed activities are situated over 20 stream miles from Kootenai Falls. No riparian or upland activities immediately adjacent to sturgeon habitat are proposed and as such the proposed activities would have no effect on white sturgeon or their habitat.

By failing to complete a biological assessment to determine whether the proposed action may affect the white sturgeon or adversely modify its critical habitat, the Forest Service has violated the ESA § 7. Moreover, the USFWS never concurred with the Forest Service’s determination that the proposed action would have “no effect” on the white sturgeon.

4. THE AGENCIES MUST REINITIATE AND COMPLETE ESA RECONSULTATION FOR THE LYNX AMENDMENT REGARDING LYNX CRITICAL HABITAT PRIOR TO IMPLEMENTING ANY MORE TIMBER SALES IN LYNX CRITICAL HABITAT

The Canada lynx is currently listed as Threatened under the ESA. In response to the decision extending ESA protections to the lynx, the Forest Service developed the “Lynx Amendment,” a programmatic plan amendment to the Forest Plans of eighteen National Forests in the Northern Rocky Mountains Analysis Area. *Salix v. U.S. Forest Serv.*, 944 F.Supp. 2d 984, 986 (D. Mont. 2013). In 2005, the Forest Service initiated formal consultation with the USFWS on the Lynx Amendment, pursuant to § 7 of the ESA. *Id.* At that time, the USFWS had not yet designated any critical habitat for lynx on

Forest Service lands. *Id.* Thus, the consultation did not include any consideration of whether the Lynx Amendment would adversely affect lynx critical habitat. *Id.* at 286-87. In 2007, the Forest Service completed consultation for the Lynx Amendment and incorporated the amendment into eighteen Forest Plans. *Id.* at 287. The USFWS subsequently designated lynx critical habitat on additional lands in Idaho, Montana and Wyoming, including areas within eleven National Forests that had been impacted by the Lynx Amendment. *Id.*; see also 79 Fed. Reg. 54782-54846 (Sept. 12, 2014). The Kootenai National Forest is one of the eighteen National Forests whose Forest Plans were amended by the Lynx Amendment. Although the Biological Opinion prepared for the Lynx Amendment considered the Amendment's effects on the species itself, it never analyzed the effects of the Amendment on lynx critical habitat. Those effects have never been analyzed or considered. The Kootenai National Forest, and the East Reservoir project area, specifically, are considered "occupied" by lynx, and the proposed project area encompasses habitat subsequently identified by the USFWS as lynx critical habitat. Until the agencies reinitiate and complete ESA consultation for the Lynx Amendment regarding lynx critical habitat, the Forest Service may not implement this logging project or any other in lynx critical habitat. See e.g., *Pac. Rivers*.

The proposed action encompasses "regeneration harvest" (clearcutting), precommercial thinning, commercial thinning, prescribed fire, and building permanent and temporary roads in lynx critical habitat. All of these activities are known to be harmful to lynx and its habitat. The Forest Service's determination that the project "may affect but is not likely to adversely affect" the Canada lynx and its critical habitat, and the USFWS's concurrence with that conclusion, is primarily premised on the Forest Service's compliance with the standards set forth in the Lynx Amendment, which has never been analyzed to determine its impact on lynx critical habitat. Specifically, the Forest Service concluded, and the USFWS concurred that:

Alternatives 2 and 3 may affect, are not likely to adversely affect the lynx. Likewise, Alternatives 2 and 3 may affect, are not likely to adversely affect designated critical lynx habitat. This determination is based on the facts that: 1) *these alternatives of the East Reservoir DEIS comply with all standards, guidelines, and objectives of the Northern Rockies Lynx Management Direction Record of Decision and its activities fall within the scope of those analyzed in the subsequent Biological Opinion (2007), more specifically, the project would not result in habitat conditions that would cumulatively contribute to the low level of species loss estimated by the 2007 BO;* 2) *these projects do not involve any activities that may result in increased areas of snow compaction, nor permanent loss of lynx habitat;* and 3) *although this project would temporarily affect the primary constituent sub-element, 'matrix' habitat and stem-exclusion stands, it meets ALL S1 [Lynx Amendment] standards, therefore maintaining habitat connectivity within and between associated LAUs.* Additionally, the project would not remove or significantly alter any of the other primary constituent sub-elements including: space; nutritional or physiological requirements; cover or

shelter; breeding or rearing sites; or habitats protected from disturbance that represent historic, geographical, and ecological distribution of the species.

DEIS 3-315 (emphasis added). Because the Forest Service never completed required ESA consultation on the Lynx Amendment, a decision that premises its determination that a project will not adversely modify lynx critical habitat on compliance with the Lynx Amendment is not adequate to protect the lynx and its critical habitat. The Forest Service's determination that the proposed action "may affect but is not likely to adversely affect" the Canada lynx, and the USFWS's concurrence with that determination, are arbitrary and capricious. Additionally, any negative impact on any individual lynx constitutes an adverse effect. This project meets that low threshold, thus the proper conclusion is likely to adversely affect.

5. THE AGENCIES' DETERMINATION THAT THE PROJECT IS NOT LIKELY TO ADVERSELY AFFECT THE CANADA LYNX IS ARBITRARY AND CAPRICIOUS.

Timber harvest is the "predominant" land use affecting lynx habitat. Canada lynx generally inhabit boreal forests that have cold winters with deep snow and that provide a snowshoe hare prey base. While timber harvest can be beneficial to lynx, management actions that create unusable openings, large monotypic stands, or reduce stem densities necessary for snowshoe hare generally harm the species. Thus, "regeneration" harvest and precommercial thinning are particularly harmful to the Canada lynx.

The Forest Service recognizes that human motorized access can also harm the Canada lynx. The DEIS states that "[o]utside of natural causes of death or habitat alteration, an increase in human motorized access and associated events . . . have likely had the greatest cumulative impact on the Canada lynx." The Lynx Amendment recognizes these impacts, for instance, in Guideline HU G9, which directs that motorized use should be restricted on new roads; that effective closures should be provided in road designs; and that when the project is over, these roads should be reclaimed or decommissioned, if not needed for other management objectives. Instead of making actual efforts to comply with this Guideline, however, the Forest Service simply concluded that the Guideline would not apply:

Guidelines HU G1 thru G12 are not applicable to this project. Alternatives 2 and 3 do propose to construct 9.3 to 8.1 miles (respectively) of new permanent roads; however, the roads are either outside of identified lynx habitat or would not impact habitat connectivity as designed. The temporary roads (4.3 to 4.1 miles) would be expected to have short-term impacts on lynx by possibly disrupting local movement patterns or use of a local area, however, HU G7 in [*sic*] only applicable to permanent roads.

The Forest Service concluded that HU G9 did not apply despite evidence that road designs for closed roads are not preventing motorized use. The Forest Service admitted:

“Violations of road closures by four wheelers and motorcycles are common Peak use periods are during the spring- summer for fishing and driving to view scenery/wildlife, and fall for hunting.”

In fact, the difference between a road that has been “decommissioned” or placed in stored service may be indiscernible on the ground. The Forest Service, in an IDT meeting, explained that, on the Kootenai National Forest, roads that are decommissioned or are in intermittent term service or intermittent stored service can look the same on the ground—it is the intent for future use that matters. At the IDT meeting, the Forest Service determined to transfer several road segments that had been listed as “decommissioned” in their road database to “intermittent stored service” in order to achieve Detrimental Soil Disturbance standards. In other words, the Forest Service’s own analysis reveals that any of these road classifications may be capable of use for motorized recreation and are, in fact, being used by motorized recreationists, regardless of their open or closed status.

The Forest Service’s conclusion that the project is not likely to adversely affect Canada Lynx, and the USFWS’s concurrence with that conclusion, are arbitrary and capricious. Logging is the most harmful thing the agencies could do in lynx habitat. Further, the project as proposed fails to ensure actual, effective road closures, to prevent impacts to lynx caused by increased motorized access. Any negative impact on any individual lynx constitutes an adverse effect. This project meets that low threshold, thus the proper conclusion is likely to adversely affect. Both agencies have violated the ESA.

6. THE AGENCIES’ DETERMINATION THAT THE PROJECT IS NOT LIKELY TO ADVERSELY AFFECT THE GRIZZLY BEAR IS ARBITRARY AND CAPRICIOUS.

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.” Three of the five grizzly mortalities that occurred in 2011 are known to have been human caused. For these reasons, standards for projects in Grizzly bear habitat provide strict limitations on road density.

One of the Bears Outside the Recovery Zone (BORZ) polygons, the Tobacco BORZ, in which standards for Grizzly bear habitat are in place, overlaps with the project area. Although this polygon has been reduced in size due to lack of documented grizzly bear presence, bears have been recorded as occurring within the Fivemile Creek drainage of the project area and the Cripple Horse Creek drainage of the project area. In addition, the Biological Assessment for grizzly bears discloses that “[t]here have been occurrences

of bears attracted to chickens, swine, and garbage immediately adjacent to the Tobacco BORZ on private lands.” BA, 14.

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 roads⁴ 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.

The Forest Service determined that the project was not likely to adversely affect the grizzly bear in part because it determined it was complying with these road standards. For instance, it reasoned: *“The East Reservoir Project does not propose any permanent increase in either linear open or total road miles above baseline conditions with a net reduction of 0.3 linear total roads and is therefore consistent with the 2011 Access Amendment and subsequent BO.”*

During the planning process for the project, after the Forest Service determined to transfer several road segments that had been listed as “decommissioned” in their road database to “intermittent stored service” in order to achieve Detrimental Soil Disturbance standards, the Forest Service noticed that it risked exceeding the total road density standards. Since one of the objectives was to reduce road density, the IDT determined to look at roads being considered for storage and consider them for decommissioning. On the Kootenai National Forest, roads that are decommissioned or are in intermittent term service or intermittent stored service can look the same on the ground—it is the intent for future use that matters. In addition, closures are not effective at preventing public use.

In determining that the proposed project was not likely to adversely affect the grizzly bear, the Forest Service relied on the fact that “the project would not result in measurable increases in recreation use of the Tobacco BORZ based on limited improvements.” However, it is evident from the Forest Service’s own analysis that

“decommissioning” means little and that roads that have been closed to the public or slated for decommissioning are still capable of recreational use and are being used for that purpose. Moreover, based on past performance by the Forest Service, it is unclear whether or to what extent these roads will actually be decommissioned. The additional roads that will be constructed for the project will improve access for motorized users and will potentially increase human-grizzly conflicts. Yet, these effects were neither disclosed nor analyzed in the BA.

Further, it is unclear whether the Forest Service is actually complying with its own road density standards, since the Forest Service has admitted that there is a disconnect between how roads are classified in the road database it relied on to calculate road density and what is actually on the ground. In order to achieve compliance with the road density 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 walk-in use by hunters. Apparently, this has not occurred in the past. Because roads slated for decommissioning are not actually being decommissioned to a point where they deter motorized use and use by hunters on foot, they should be included in total road density. If roads slated for decommissioning are included in the total road density, road density exceeds standards. The Forest Service’s determination, and USFWS’s concurrence, that the project is not likely to adversely affect the Threatened grizzly bear is arbitrary and capricious to the extent it relies on the Forest Service’s compliance with road density standards and assertion that no “improvements” to recreation will occur. Moreover, any negative impact on any individual grizzly bear constitutes an adverse effect. By creating disturbances from logging and road use and construction, grizzly bears may be displaced during project implementation. This project meets the low “adverse effect” threshold, thus the proper conclusion is likely to adversely affect.

7. THE FOREST SERVICE FAILED TO OBTAIN A LIST OF ESA-PROTECTED SPECIES SPECIFIC TO THE PROJECT AREA.

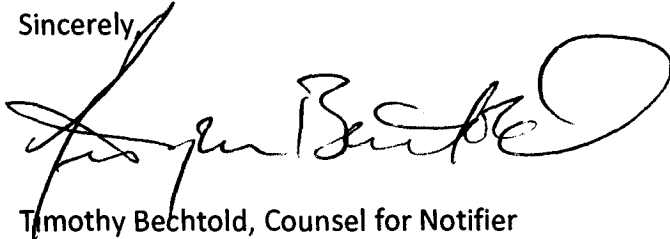
For the purposes of determining whether a protected species “may be present” in the project area, the ESA provides two avenues for an action agency. Either the agency may submit a list of species to the expert agency (in this case USFWS) for the expert agency’s concurrence, or the agency may request a list of species that may be present from the agency. 50 C.F.R. § 402.12(c)-(d). Here, the Forest Service took the latter route. However, the list of protected species the Forest Service obtained was a list of species that “may be present” on the whole Kootenai National Forest, and was not specific to the project area. By failing to request a list of protected species that “may be present” in the project area, specifically, the Forest Service violated the ESA.

CONCLUSION

The agencies have ignored their duties under the ESA, 16 U.S.C. § 1531 *et seq.*, to ensure that their actions do not jeopardize threatened and endangered species, that their actions do not result in unauthorized take of these species of wildlife, and that their 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, the Council intends to file suit for declaratory and injunctive relief, as well as attorney and expert witness fees and costs.

Sincerely,

A handwritten signature in black ink, appearing to read "Timothy Bechtold". The signature is fluid and cursive, with a large loop at the end.

Timothy Bechtold, Counsel for Notifier

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