July 25, 2017

Secretary, U.S. Department of Agriculture

1400 Independence Ave, SW

Washington, D.C. 20250-0003

Secretary, U.S. Dept. of the Interior 1849 C Street, NW

Washington, DC 20240

Chief, U.S. Forest Service

201 14th Street, SW

Washington D.C. 20250

Director, U.S. Fish & Wildlife Service

1849 C Street, NW

Washington, D.C. 20240

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

 Moose Creek Vegetation Project, Helena - Lewis & Clark NF

You are hereby notified that the parties listed below intend to file a citizen suit claim 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.

The name, address, and phone numbers of the organizations giving notice of intent to sue are as follows:

Sara Jane Johnson, Exec. Dir. Mike Garrity, Exec. Dir.

Native Ecosystem Council Alliance for the Wild Rockies

P.O. Box 125 P.O. Box 505

Bigfork, MT 59911 Helena, MT 59624

406-886-2011 406-459-5926

The name, address, and phone number of counsel for the notifiers is as follows:

Thomas J. Woodbury

WildLands Defense

917 N. 7th St., Suite No. 1

Boise, MT 83702

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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 U.S. Court of Appeals for the Ninth Circuit holds that “[o]nce an agency is aware that an 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 (1985). If 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), 402.12(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. § 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. Throughout this assessment process, the agencies must use the best available science.

ESA consultation is required for individual projects as well as for the promulgation of land management plans and standards. Only after the Forest Service complies with §7(a)(2) can any activity that may affect the protected [species] go forward. *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, at 1054, 1056-57 (9th Cir. 1994).

On October 11, 2016, the Supreme Court denied the Forest Service’s petition for a writ of certiorari in *Cottonwood. U.S. Forest Service v. Cottonwood Environmental Law Center,* 2016 WL 2840129 (Oct. 11, 2016). During the appellate proceedings in *Cottonwood*, the Ninth Circuit had stayed its order for re-consultation on the Lynx Amendment to address critical habitat. Now that the certiorari petition in *Cottonwood* has been denied, 2016 WL 2840129, that stay is no longer in place, and the agencies must now consult on the Lynx Amendment.

ESA Section 7(d) mandates:

*(d) Limitation on commitment of resources*

*After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.*

16 U.S.C. §1536(d). It is well-established law that “timber sales constitute per se irreversible and irretrievable commitments of resources under [ESA] §7(d) . . . .” *Pacific Rivers Council v. Thomas*, 30 F.3d 1050,1057 (9th Cir.1994). Thus, “individual [timber]sales cannot go forward until the consultation process is complete on the underlying plans which the agency uses to drive their development.” *Lane County Audubon Soc. v. Jamison*, 958 F.2d 290, 295 (9th Cir. 1992).

These 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).

**LEGAL VIOLATIONS**

On February 27, 2017, William Avey, Forest Supervisor for the Helena - Lewis & Clark National Forest, signed a Decision Notice approving the Moose Creek Vegetation Project pursuant to a Categorial Exclusion approved in the Farm Bill (Section 8204 of the Agriculture Act of 2014, Public Law 113-79). All of the violations referenced herein are tiered to that decision.

According to the applicable forest plan standards:

(7) The occupied grizzly bear habitat (all of the Rocky Mountain Division) has been stratified according to “The guidelines For Management Involving Grizzly Bears in the Greater Yellowstone Ecosystem” (USFS, 1979). Forest management on occupied grizzly bear habitat will comply with this management direction.

According to supporting documentation for the Moose Creek Project: “The Moose Creek project would not occur in occupied grizzly bear habitat. [This] [s]tandard does not apply.”

Subsequent to this determination, however, there has been a confirmed sighting of a 3-year-old grizzly bear on the eastern flank in the central portion of the Big Belt mountain range west of White Sulphur Springs. In news reports (e.g., July 19 Missoulian), area biologist Jay Kolbe noted that grizzly tracks were first seen in May but were inconclusive until the reported photo confirmed those suspicions. "We've been getting sporadic reports for a couple of years in the Big and Little Belts from people we'd otherwise trust, but it takes something like this to confirm it," Kolbe said to the press. Kolbe also confirmed that it could be an indication that the bear has taken up residence in the area.

Accordingly, *Thomas v. Peterson*, 753 F. 2d 754 (1985) controls. The Forest Service must withdraw the Moose Creek DN, and re-initiate consultation to include grizzly bears in the area. Should the Forest Service attempt to proceed with the decision without consulting on grizzly bear, the parties will file suit seeking injunctive relief. In addition, any lawsuit challenging Moose Creek will also include a claim or claims under the ESA for Canada Lynx.

**Canada Lynx**

Currently, the Little Belts are identified as secondary, unoccupied habitat for the lynx in the U.S. Fish and Wildlife Service 2005 Recovery Outline, and included as such in the Northern Rockies Lynx Management Direction (hereafter "Lynx Amendment"). The Recovery Outline and Lynx Amendment also identified the Little Belts as a linkage zone, providing "stepping stone" habitat connections between the north and south lynx core habitats of Montana as part of a series of interloping mountain ranges - including the Castle Mountains, the Little Belt Mountains, the Big Belt Mountains, the Crazy Mountains, and then onto the well-recognized Continental Divide linkage corridor on the Helena National Forest. Thus the Little Belt Mountains provide essential habitat for lynx recovery by promoting population connectivity, and thus long-term viability of this species in Montana.

Unless lynx habitat is maintained in the mountain ranges that connect the north and south core habitat areas, the recovery of this threatened species will be compromised by reducing population exchange across Montana, which is essential for persistence. Thus, failure to maintain lynx habitat in these connecting mountain ranges likely dooms the persistence of this species in Montana. The planned Moose Creek Vegetation Project will add to past removal and degradation of lynx habitat in the Little Belt Mountains, and will cumulatively increase existing movement barriers and loss of prey habitat for lynx in this landscape. This project therefore impedes rather than promotes recovery of this threatened species, in violation of the ESA.

The Forest Service determined that the Moose Creek Project will not adversely impact the lynx, and that habitat connectivity will be maintained at levels that will allow it to provide an adequate linkage zone between lynx areas to the north and south. The U.S. Fish and Wildlife Service concurred with this assessment. This consultation between the agencies is inadequate because neither agency carefully considered the current best science in their determinations. These determinations apply the Lynx Amendment, whereby habitat connectivity in unoccupied lynx habitat is not required to be maintained. Maintaining habitat connectivity only has to be considered as per this conservation direction. The agencies have failed to demonstrate that the essential value of the Little Belt Mountains as a linkage zone for the lynx is actually being maintained due to past and planned forest thinning activities, activities which clearly create partial or complete barriers to lynx movement.

Review of the current best science for lynx in fact demonstrate that the proposed project will continue to erode the potential of the Little Belt Mountains to provide a linkage zone for lynx. Historic lynx populations were likely maintained by high habitat connectivity (1998 MFWP map). *Squires et al.* (2013) defined lynx movement as associated with dense forest stands, with over a 60% canopy. The *Kosterman* (2014) recommendation that lynx habitat contain at least 50% dense older forest indicates that lynx habitat and connectivity requires a relatively large percentage of older dense forests.

Current science also supports a recommendation by Forest Service research scientists that landscapes dominated by older, more dense forest habitat is the best means to ensure lynx persistence. *McKelvey et al.* (1999) noted that managing landscapes for the natural fire frequency would provide "an amenable" environment for lynx. Table 15.1 of this report identifies that a fire rotation period of 100 years would create 36% of the landscape in stands over 100 years in age, or suitable travel and winter habitat for lynx. A fire rotation age of 200 years would provide a landscape of 60% forest habitat over 100 years in age. And a fire rotation period of 300 years would provide a landscape with 71% of the forests over 100 years in age. Thus historical natural conditions for lynx must have contained landscapes dominated by older forest stands, which promoted lynx persistence. These Forest Service research scientists also noted that natural fire is likely essential for lynx because as opposed to clearcut forests, these burned habitats provide very dense young forest stands that are intermixed with dead trees killed by the fire.

Since the Little Belt Mountains may be essential for long term viability of lynx in Montana, by providing key and/or critical habitat, both agencies are complicit in the ongoing erosion of the Little Belt Mountains to provide a linkage zone across occupied habitats for lynx in Montana. The failure of the Forest Service to specifically identify lynx habitat corridors in the Project Area means that the impact of the project on connectivity is undefined. Thus agency conclusions that theses impacts will not be adverse are not supported with any analysis or science.The Lynx Amendment is clearly a violation of the ESA because it does not protect key habitat features for lynx conservation, which in this case are linkage areas between north and south core habitats.

The Montana district court has ruled that the existing analysis for lynx critical habitat is invalid, and needs to be redone. Since the Little Belt Mountains may be essential for long term viability of lynx in Montana, supra., by providing habitat connectivity between local populations, the preservation of habitat connectivity is essential for this landscape. Due to this factor, the Little Belt Mountains may be designated as lynx critical habitat; therefore, no irretrievable impacts created in these public forests is consistent with the ESA until the requirements for landscape connectivity are actually defined as per critical habitat, and as historic habitat.

Finally, Moose Creek is being implemented pursuant to the Farm Bill CE, under which the Forest Service Chief designated approximately 7,700 square miles of National Forest lands in Montana for the purpose of identifying qualifying projects. Included in this broad, discretionary designation are most of the Canada Lynx linkage zones referenced above, which raises serious questions concerning the consistency of this program with the ESA.

Ignoring NEPA’s applicability to programmatic decisions, the Chief did not conduct any NEPA analysis of the foreseeable indirect impacts[[1]](#footnote-1) this designation “to address insect or disease threats” could have - a violation of law that taints the whole program. See, e.g.: *California Wilderness Coal. v. U.S. Dep’t of Energy*, 631 F.3d 1072, 1098 (9th Cir. 2011); *N. Alaska Envtl. Ctr v. Kempthorne*, 457 F.3d 969, 973 (9th Cir. 2006). Had he done so, it likely would have triggered consultation with USFWS to determine the potential impacts of such widespread forest thinning on Canada lynx.

Here, as in *Sierra Club v.* *Bosworth*, supra., at 1019, it must be conceded that “no cumulative impacts analysis was performed” for the §602 designation. And, as the Court in *Bosworth* explained, “[t]hat an impacts analysis be done is of critical importance in a situation such as here, where the categorical exclusion . . . has the potential to impact a large number of acres.” Id. Thus here, just as in Bosworth*,* “[i]n order to assess significance properly, the Forest Service must perform a programmatic cumulative impacts analysis” for the § 602 designation. *Id*.

**CONCLUSION**

The agencies have ignored their duties under the ESA, 16 U.S.C. Section 1531 et seq., to ensure that their actions do not jeopardize threatened and endangered species, do not adversely modify critical habitat, do not result in unauthorized take of these species of wildlife, and do promote conservation and 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. After the expiration of 60 days, the Alliance intends to file for declaratory and injunctive relief, as well as attorney and expert witness fees and costs.

Sincerely,

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Thomas J. Woodbury

WildLands Defense

cc: U.S. Attorney General

U.S. Department of Justice

950 Pennsylvania Avenue, NW

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1. “Indirect effects” are defined as those effects “which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. § 1508.8. [↑](#footnote-ref-1)