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August 29, 2017

Via Certified Mail, Return Receipt Requested

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

Greg Sheehan, Acting Director
U.S. Fish and Wildlife Service
1849 C Street NW, Room 3331
Washington, D.C. 20240

Chief Tom Tidwell
U.S. Forest Service
1400 Independence Ave., SW
Washington, D.C. 20250

Supervisor Tricia O'Connor
Bridger-Teton National Forest
340 N. Cache, PO Box 1888
Jackson, WY 83001

Sixty-Day Notice of Intent to Sue Under § 7 of the Endangered Species Act

Dear Secretary Zinke, Chief Tidwell, Acting Director Sheehan, and Supervisor O'Connor:

In accordance with the sixty-day notice requirement of the Endangered Species Act (ESA), 16 U.S.C. § 1540(g), you are hereby notified that the following organizations intend to bring a civil action against the U.S. Forest Service and the officers and supervisors to whom this letter is directed (collectively, the Forest Service) for violating Section 7 of the ESA, 16 U.S.C. § 1536.

The name and address of the organizations giving Notice of Intent to Sue:

WildEarth Guardians
80 SE Madison St., Suite 210
Portland, OR 97214

Winter Wildlands Alliance
910 Main St., Ste. 235
Boise, ID 83702

Counsel for the party giving notice:

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As described herein, the Forest Service has violated the ESA by failing to consult under Section 7 with the U.S. Fish and Wildlife Service (FWS) concerning the effects of the over-snow vehicle (OSV) road, trail, and area designations adopted through publication of the Teton Division's 2016 over-snow vehicle use map (OSVUM) on listed and candidate species, thereby failing to ensure that its actions are not likely to jeopardize the continued existence of listed or candidate species, or result in the destruction or adverse modification of critical habitat. *See* 16 U.S.C. § 1536(a)(2).

We will file suit after the 60-day period has run unless the violations described in this notice are remedied.

Legal Background: Section 7 Consultation

Section 2(c) of the ESA establishes that it is “the policy of Congress that all Federal . . . agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of” the ESA. 16 U.S.C. § 1531(c)(1). The purpose of the ESA is to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered and threatened species . . .” 16 U.S.C. § 1531(b).

To implement this policy, Section 7(a)(2) of the ESA requires that each federal agency consult with FWS or NMFS to ensure that any action authorized, funded, or carried out by such agency is not likely to (1) jeopardize the continued existence of any threatened or endangered species or (2) result in the destruction or adverse modification of the critical habitat of such species. *See* 16 U.S.C. § 1536(a)(2).

The ESA's consultation requirement applies “to all actions in which there is discretionary Federal involvement or control.” 50 C.F.R. § 402.03. Agency actions requiring consultation are broadly defined by regulation to mean “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies” and include “actions directly or indirectly causing modifications to the land, water, or air.” 50 C.F.R. § 402.02.

If listed species may be present in the area of agency action, the action agency must prepare a Biological Assessment (BA) to determine whether the listed species may be affected by the proposed action. *See* 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. If the agency determines that its proposed action “may affect” any listed species, the agency must engage in “formal consultation” with FWS or NMFS (collectively, the Services). 50 C.F.R. § 402.14; *see also Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 99, 1018 (9th Cir. 2009) (“any possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the requirement.” (quoting 51 Fed. Reg. 19,926, 19,949 (June 3, 1986))).

The threshold for a “may affect” determination is very low, and ensures “actions that have any chance of affecting listed species or critical habitat—even if it is later determined that the actions are not likely to do so—require at least some consultation under the ESA.” *Karuk*

Tribe of Cal. v. U.S. Forest Serv., 681 F.3d 1006, 1028 (9th Cir. 2012). Under the Fish and Wildlife Service Consultation handbook, the “may affect” threshold is met if “a proposed action may pose *any* effects on listed species or designated critical habitat.” U.S. Fish and Wildlife Serv. & Nat’l Marine Fisheries Serv., *Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act* at xvi (1998) (emphasis in original). The regulations implementing the ESA require an examination of both the direct effects of the action as well as the indirect effects of the action, which are defined as “those effects that are caused by or will result from the proposed action and are later in time, but are still reasonably certain to occur.” 50 C.F.R. § 402.02. Therefore, an agency must consult in every situation except when a proposed action will have “no effect” on a listed species or critical habitat.

If the action agency concludes in a BA that the activity is not likely to adversely affect the listed species or adversely modify its critical habitat, and the Services concur with that conclusion in a Letter of Concurrence, then the consultation is complete. 50 C.F.R. §§ 402.12, 402.14(b). If, however, the action agency determines that the activity is likely to adversely affect the listed species or its critical habitat, then the Services complete a “biological opinion” (BiOp) to determine whether the activity will jeopardize the species or result in destruction or adverse modification of critical habitat. *Id.* § 402.14. If the Services determine that an action will jeopardize the species or adversely modify critical habitat, they may propose reasonable and prudent alternative actions intended to avoid such results. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)(5).

However, an agency’s Section 7 duties do not end with the issuance of a BiOp. The action agency “cannot abrogate its responsibility to ensure that its actions will not jeopardize a listed species; its decision to rely on a FWS biological opinion must not have been arbitrary or capricious.” *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep’t of Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990). *See also Defenders of Wildlife v. EPA*, 420 F.3d 946, 976 (9th Cir. 2005) (rev’d on other grounds).

Further, once the consultation is complete, the agencies have a duty to ensure that it remains valid. To this end, an agency must re-initiate consultation if certain “triggers” occur. 50 C.F.R. § 402.16. The ESA’s implementing regulations require the Forest Service to re-initiate consultation where discretionary Federal involvement or control over the action has been retained or is authorized by law and:

- (a) If the amount or extent of taking specified in the incidental take statement is exceeded;
- (b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
- (c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or
- (d) If a new species is listed or critical habitat designated that may be affected by the identified action.

50 C.F.R. § 402.16.

After consultation is initiated or reinitiated, ESA Section 7(d) prohibits the agency or any permittee from “mak[ing] any irreversible or irretrievable commitment of resources” toward a project that would “foreclos[e] the formulation or implementation of any reasonable and prudent alternative measures . . .” 16 U.S.C. § 1536(d). The 7(d) prohibition “is in force during the consultation process and continues until the requirements of section 7(a)(2) are satisfied.” 50 C.F.R. § 402.09.

Section 7(a)(4) of the ESA requires a Federal action agency to conference with the Services if the proposed action is likely to jeopardize a species proposed for listing or destroy or adversely modify proposed critical habitat. 16 U.S.C. § 1536(a)(4); 50 C.F.R. § 402.10(a). *See also* 50 C.F.R. § 402.02 (defining “[c]onference” as “a process which involves informal discussions between a Federal agency and the Service under section 7(a)(4) of the [ESA] regarding the impact of an action on proposed species or proposed critical habitat and recommendations to minimize or avoid the adverse effects.”). The agencies must record any results of a conference. *Id.* at § 401.10(e) (“The conclusions reached during a conference and any recommendations shall be documented by the Service and provided to the Federal agency”).

FACTUAL BACKGROUND

Bridger-Teton National Forest, Teton Division 2016 OSVUM

The Bridger-Teton National Forest is attempting to comply with subpart C of the Forest Service’s Travel Management Rule by publishing an OSVUM that adopts existing OSV route and area designations. The OSVUM, issued in 2016, authorizes OSV use on designated routes and areas, and prohibits OSV use in areas marked as closed. By issuing the OSVUM, the Forest Service has determined to reauthorize its existing winter recreation use designations rather than complete a new winter travel plan that complies with the requirements of the Travel Management Rule.

Threatened Canada lynx and grizzly bear, as well as candidate species wolverine, occur in the Teton Division of the Bridger-Teton National Forest. These species are affected by winter recreation use, as described below. Thus, the Forest Service was required to consult over the impacts of the OSV route and area designations adopted in the 2016 OSVUM before issuing that map. To the extent the agency previously consulted over some of these designation decisions when they were originally made in 1990, it must reinitiate consultation because the prior consultation occurred before these three species were listed or proposed for listing, because new information reveals the action may affect listed species or critical habitat in a manner or to an extent not previously considered, or because of changed circumstances about known habitat and species distribution since the original decision.

Canada lynx

In 2000, the FWS listed Canada lynx as threatened with extinction under the ESA in part of its range. 65 Fed. Reg. 16052 (March 24, 2000). It identified the inadequacy of existing

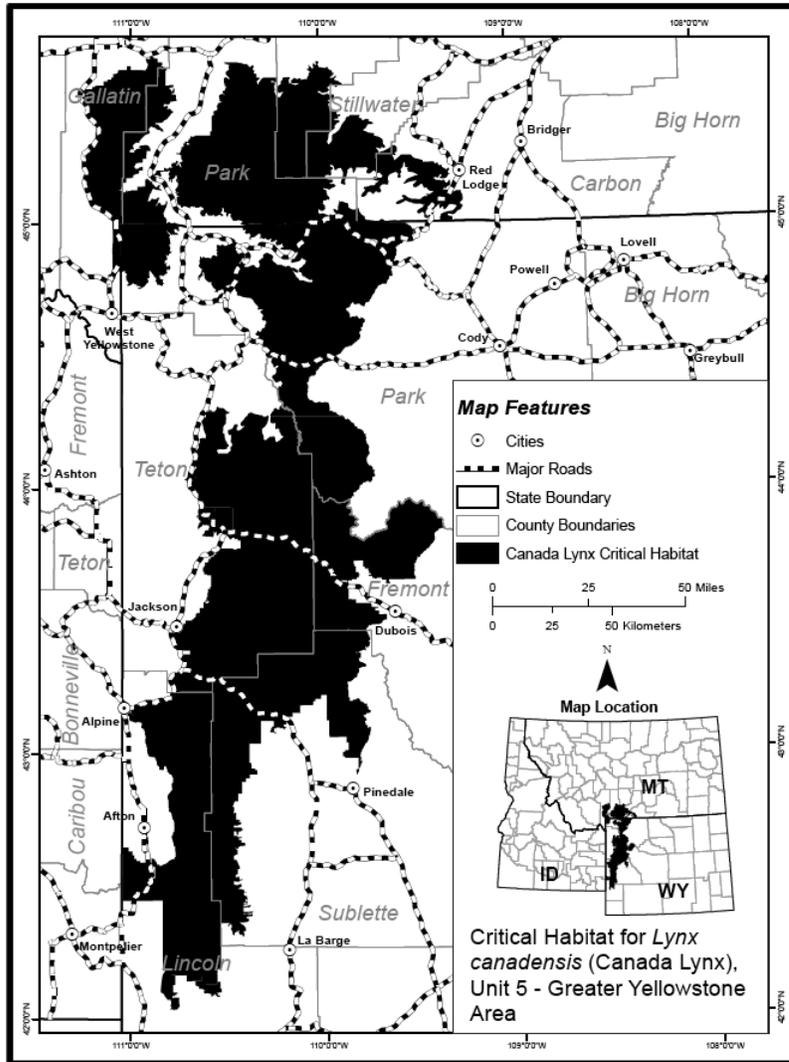
regulatory mechanisms, specifically the lack of guidance for conservation of lynx and lynx habitat in Forest Plans and Bureau of Land Management Resource Management Plans as the primary threat to the species. *Id.* at 16052-16086. The FWS published a clarification of findings in 2003, determining that threatened species designation was appropriate for the lynx. 68 Fed. Reg. 40076 (July 3, 2003). The primary factor driving lynx behavior and distribution is the distribution of snowshoe hare, their primary prey.

Lynx in the contiguous United States may exist as several smaller, effectively isolated populations. Metapopulation stability depends on habitat quality and successful dispersal between isolated habitat patches. The likelihood of subpopulation persistence declines with increasing fragmentation and isolation. Maintaining habitats to provide for dispersal movements and interchange among individuals and subpopulations may be the most important provision for maintenance of population viability in the Lynx Conservation Assessment and Strategy (LCAS).¹

Snow-tracking surveys identified lynx presence on the Bridger-Teton National Forest.² The FWS determined that habitats in the Bridger-Teton National Forest contain the physical and biological features essential to the conservation of lynx, and that the area has a long history of lynx presence. 74 Fed. Reg. 8616, 8643-8644 (Feb. 25, 2009). The following map shows Unit 5 of the lynx critical habitat that was designated in 2014, 79 Fed. Reg. 54,782, 54,846 (Sept. 12, 2014), and includes the Teton Division of the Bridger-Teton National Forest:

¹ Interagency Lynx Biology Team (ILBT), Canada lynx conservation assessment and strategy (3d ed. 2013), Forest Service Publication R1-13-19. The LCAS continues to fulfill important roles in promoting conservation of the species on federal lands like the Payette National Forest. *Id.* at 4.

² LCAS (3d ed. 2013) at 57. *See also* Bridger-Teton National Forest Over-Snow Vehicle Use and Canada lynx Habitat Map (Attachment A).



Snowmobiles may directly affect Canada lynx during winter months when the species is especially vulnerable by causing physiological responses like increased heart rate and elevated stress level.³ The noise from snowmobiles is likely detrimental to lynx, disturbing their ability to hunt and increasing stress. Studies on other large mammals that reside in lynx habitat indicate that snowmobiles elicit an even higher stress response than off road vehicles.⁴ Snowmobiles may disturb den sites during a time when lynx are rearing young.⁵ Snowmobiles may also displace lynx and disrupt otherwise quiet winter habitat by facilitating human access into historically remote winter forest landscapes, increasing lynx interactions

³ W.L. Gaines *et al.*, Assessing the cumulative effects of linear recreation routes on wildlife habitats on the Okanogan and Wenatchee National Forests (2003), Gen. Tech. Rep. PNW-GTR-586, available at <http://www.fs.fed.us/pnw/pubs/gtr586.pdf> (last accessed August 22, 2017), pages 5-6.

⁴ S. Creel *et al.*, Snowmobile Activity and Glucocorticoid Stress Responses in Wolves and Elk, 16 Conservation Biology 809, 812 (2002).

⁵ J.J. Claar *et al.*, Carnivores, in Effects of recreation on Rocky Mountain wildlife: a review for Montana (G. Joslin and H. Youmans, cords., 1999).

with humans, and increasing hunting, trapping, and poaching mortality.⁶ This in turn may result in direct collisions, death, habitat fragmentation, and potential population declines.⁷

Snow compaction from snowmobiles is another threat to lynx. Snow compaction may suffocate or alter the subnivean movements of small mammals on which lynx prey.⁸ Compacted snow trails may also allow coyotes to move into lynx habitat that coyotes previously used only seasonally. Lynx are well adapted to travel and hunt in the deep, powdery snow where snowshoe hares reside and benefit from a natural spatial segregation from other carnivores.⁹ One study in Montana found limited use of snowmobile trails by coyotes.¹⁰ But studies in Utah and Wyoming found extensive use of compacted snowmobile trails by coyotes, resulting in potential competition with and displacement of lynx.¹¹ The differing results are likely due to different snow characteristics, predator communities, and snowmobile use at the various sites.¹² Under the LCAS, the Forest Service assesses the potential for snowmobile trails to provide routes for competitors such as coyotes, bobcats and cougars based on the density of groomed or commonly used snowmobile routes in LAUs.¹³

Climate change is expected to reduce lynx habitat and numbers in designated lynx critical habitat Unit 5, with potential loss of snow suitable for lynx over most of the area by the end of this century, but with potential snow refugia in the Wyoming Range Mountains.¹⁴ Thus climate change represents a potential habitat-related threat to lynx in Unit 5. The FWS identified recreational development as another potential habitat-related threat to lynx in this unit.¹⁵

The Forest Service has not consulted over the effects of the 2016 OSVUM on Canada lynx or its designated critical habitat. OSV use designations made in the 1990 Teton Division Winter Travel Plan, and the supplemental decision notice in 1993, occurred before FWS listed lynx as threatened and designated critical habitat. In 2016, the Jackson Ranger District issued a Decision Memo that, *inter alia*, expanded the winter wildlife closure in the Crystal Butte area and modified the closure in the KC-Sink or Swim area, but the Forest Service did not consult on the effects of that decision.¹⁶ Because the Forest Service did not consult

⁶ Gaines (2003) at 11. *See also* 2008 Main Salmon BA at 7.

⁷ Gaines (2003) at 11-12.

⁸ W.D. Schmid, Snowmobile activity, subnivean microclimate and winter mortality of small mammals, 53 *Bulletin of the Ecological Society of America*, 37 (1972).

⁹ K.D. Bunnell *et al.*, Potential impacts of coyotes and snowmobiles on lynx conservation in the intermountain west, 34 *Wildlife Society Bulletin* 828 (2006).

¹⁰ J.A. Kolbe *et al.*, The effect of snowmobile trails on coyote movements within lynx home ranges, 71 *Journal of Wildlife Management* 1409 (2007).

¹¹ Bunnell (2006); E. Gese *et al.*, The Influence of Snowmobile Trails on Coyote Movements During Winter in High-Elevation Landscapes, 8 *Plos One* 1 (2013).

¹² J.L.B. Dowd *et al.*, Winter Space Use of Coyotes in High-Elevation Environments: Behavioral Adaptations to Deep-Snow Landscapes, 32 *Journal of Ethology* 29 (2014).

¹³ *See* LCAS (3d ed. 2013).

¹⁴ 79 Fed. Reg. 54826.

¹⁵ *Id.*

¹⁶ *See* Bridger Teton National Forest, Jackson Ranger District, Decision Memo Winter Use in the Cache Creek and Teton Pass Areas (2016).

before publishing the 2016 OSVUM, the OSV use designations adopted in the 2016 OSVUM were never assessed for their effects on Canada lynx or its critical habitat.

Grizzly Bear

The grizzly bear was listed as a threatened species under the ESA in the lower 48 states in 1975. 40 Fed. Reg. 31736 (July 28, 1975). The primary factors establishing the need to list grizzly bear were: (1) present or threatened destruction, modification, or curtailment of habitat or range; (2) overutilization for commercial, sporting, scientific, or educational purposes; and (3) other manmade factors affecting its continued existence. The two primary challenges in grizzly bear conservation are the reduction of human-caused mortality and the conservation of remaining habitat.

In 2007 the FWS identified the Yellowstone grizzly bear as a distinct population segment (DPS), determined it had recovered, and delisted the DPS. A 2009 district court order enjoined the FWS from removing the Yellowstone DPS from the list of threatened species, vacating the FWS's 2007 rule, and the Ninth Circuit Court of Appeals affirmed. *Greater Yellowstone Coalition v. Servheen*, 665 F.3d 1015 (9th Cir. 2011). The FWS again listed the Yellowstone grizzly population as threatened under the ESA in 2010. 75 Fed. Reg. 14496 (March 26, 2010). In 2017, the FWS identified the Greater Yellowstone Ecosystem (GYE) population of grizzly bears as a DPS, determined the DPS had recovered, and delisted the GYE grizzly bear DPS. 82 Fed. Reg. 30502 (June 30, 2017). The 2017 delisting is currently being challenged, and if successful could result in re-listing the GYE grizzly bear DPS.¹⁷

Grizzly bear occur on the Teton Division of the Bridger-Teton National Forest.¹⁸ The state of Wyoming's 2016 state management plan¹⁹ for grizzly bear shows the Teton Division contains suitable and occupied grizzly bear habitat:

¹⁷ See Complaint and Petition for Permanent Injunction and Declaratory Relief, *Crow Indian Tribe et al. v. United States*, No. 9:17-cv-00089 (June 30, 2017) (challenging GYE grizzly delisting decision). See also *Humane Society v. Zinke*, No. 15-5041 (D.C. Cir. Aug. 1, 2017) (reversing the FWS's decision to delist the Great Lakes gray wolf DPS because the agency "failed to reasonably analyze or consider" the impact of partial delisting and the species' historic range loss in its 2011 delisting rule).

¹⁸ See 82 Fed. Reg. 30504. See also Bridger-Teton National Forest Over-Snow Vehicle Use and Grizzly Bear Habitat Map (Attachment B).

¹⁹ Wyoming Game and Fish Department, Wyoming Grizzly Bear Management Plan (2016), page vi.

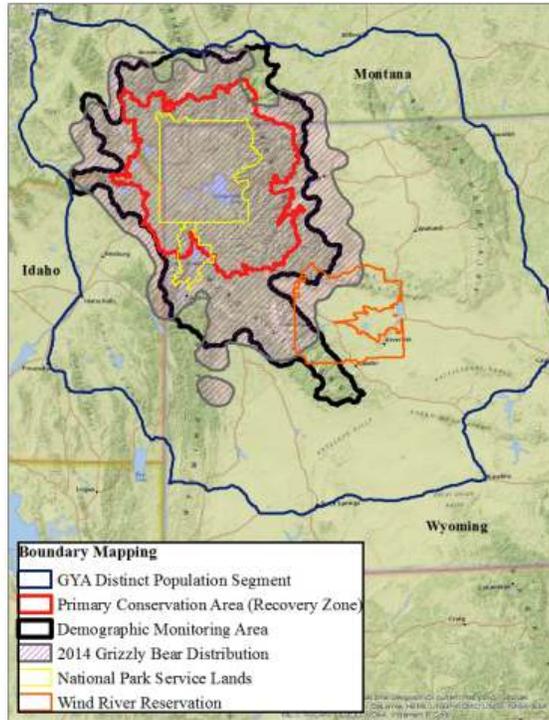


Fig. 1. Management and jurisdictional boundaries referenced throughout this plan.

This is consistent with information from the FWS:

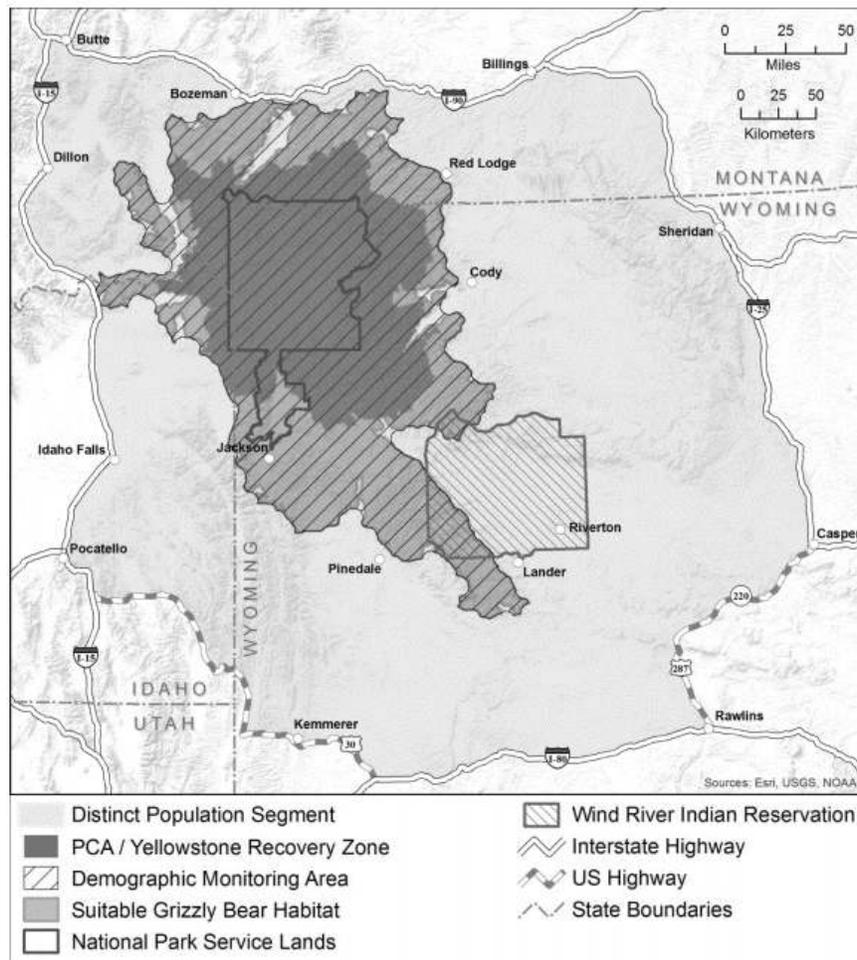


Figure 1. Map of the Greater Yellowstone Ecosystem (GYE). Boundaries are shown for: (1) the GYE grizzly bear Distinct Population Segment; (2) the Primary Conservation Area; (3) the Demographic Monitoring Area; (4) biologically suitable habitat (as defined in Factor A, below); and (5) National Park Service lands. An interactive map of the GYE boundaries is available at

<http://usgs.maps.arcgis.com/home/webmap/viewer.html?webmap=78152b8e0bde457ca95918fdd48c5352>.

Effects of snowmobiles on grizzly bears occur primarily when bears are entering or leaving their dens. Possible effects include den abandonment, loss of young, increased energetic costs while bears are in dens or displaced away from suitable habitat if outside dens, learned displacement from suitable habitat resulting from exposure to disturbance, and death. Grizzly bear denning habitat often overlaps with winter recreation areas, making them susceptible to disturbance, thereby increasing energy expenditures and the potential for den abandonment.²⁰ Grizzly bears typically den in relatively high elevation areas with more stable

²⁰ J.D.C. Linnell *et al.*, How vulnerable are denning bears to disturbance? 28 Wildlife Society Bulletin 2 (2000).

snow conditions and steep slopes.²¹ Direct mortality is possible if an avalanche is triggered on a slope where bears are hibernating.²² In general, grizzlies avoid roads²³ and select den sites one to two kilometers from human activity.²⁴ Snowmobiles can easily access these remote sites and therefore pose a potential for disturbance. A comprehensive review found human disturbance within one kilometer of a den site has a significant risk of causing abandonment, especially early in the denning season.²⁵

Snowmobiles may have direct harmful effects to emergent bears, mainly females and cubs. Because females with cubs have high energetic needs and cubs have limited mobility for several weeks after leaving the den, they remain in the den site area for several weeks after emergence from dens. Disturbance levels that cause a female to prematurely leave the den in spring or move from the den area could impair the fitness of the female and safety of the cubs.²⁶ The mean week of den emergence ranged from the third week in March to the fourth week in May.²⁷ It is important to provide secure habitat—areas free of motorized access—so bears are able to fully use available resources.²⁸

In its 1990 environmental assessment (EA) of the Teton Division Winter Travel Plan, the Forest Service noted that grizzly bear use of the Teton Division area between December 1 and April 30 is relatively low, and determined snowmobile use authorized under the plan would have “no effect” on the species.²⁹ The FWS concurred.³⁰ In 1993, the Forest Service re-evaluated the Teton Division Winter Travel Plan and made several changes but did not consult, concluding there would be no effect on any ESA listed species.³¹

In 2006, the Forest Service amended its 1990 Forest Plan to incorporate habitat and conservation standards to ensure conservation of habitat to sustain the grizzly bear population, update management and monitoring practices, and provide consistency among

²¹ *Id.*

²² G.V. Hilderbrand *et al.*, A Denning Brown Bear, *Ursus arctos*, Sow and Two Cubs Killed in an Avalanche on the Kenai Peninsula, Alaska, 114 *Canadian Field-Naturalist* 3 (2000).

²³ R.D. Mace *et al.*, Relationships Among Grizzly Bears, Roads and Habitat in the Swan Mountains, MT, 33 *Journal of Applied Ecology* (1996).

²⁴ Linnell (2000).

²⁵ *Id.*

²⁶ USDI, Fish and Wildlife Service, Endangered Species Act Section 7 Consultation Supplement to the Biological Opinion (2010) on the Effects of the 2009 Revision of the Beaverhead-Deerlodge National Forest Land and Resource Management Plan on Grizzly Bears (2013).

²⁷ M. Haroldson and F.T. van Manen, Estimating Number of Females with Cubs, *in* Yellowstone grizzly bear investigation: annual report of the Interagency Grizzly Bear Study Team (F.T. van Manen *et al.*, eds. 2014).

²⁸ USDA Forest Service, Forest Plan Amendment for Grizzly Bear Habitat Conservation for the Greater Yellowstone Area National Forests (2006), page 7.

²⁹ Jackson District, Buffalo Ranger District, Environmental Assessment – Teton Division Winter Travel Plan (1990), page 11.

³⁰ *Id.*

³¹ *See*, U.S. Forest Service, Supplemental Decision Notice, Finding of No Significant Impact and Environmental Assessment Supplement for Travel opportunities and regulations contained in the Teton Division Winter Travel Plan (1993).

the Greater Yellowstone Area forests.³² The amendment included a Guideline directing the forest to use localized area restrictions to address conflicts and monitoring to assess the impact of motorized access on secure grizzly bear habitat.³³ But the Forest Service did not make any changes to the Teton Division Winter Travel Plan in light of the Forest Plan amendment, and did not consult on how the OSV designations under the existing Winter Travel Plan might affect grizzly bear.

The Forest Service did not conduct a new consultation or reinitiate consultation before publishing the 2016 OSVUM. The Forest Service needed to consult over the effects of the OSV use designations adopted in the 2016 OSVUM on grizzly bear and its habitat due to new scientific information revealing that OSVs may affect grizzly bear in a manner or to an extent not previously considered and changed circumstances about known suitable habitat and grizzly bear distribution in the Teton Division since 1990.

Wolverine

In 2013 the FWS proposed to list the distinct population segment of the North American wolverine as threatened under the ESA. 78 Fed. Reg. 7864 (Feb. 4, 2013). After a district court vacated the FWS's 2014 withdrawal of its proposal, in 2016 the FWS reopened the public comment period on its proposal to list the distinct population segment of wolverine occurring in the contiguous United States as threatened under the ESA. 81 Fed. Reg. 71670 (Oct. 18, 2016). Factors affecting the wolverine's continued existence include projected decrease and fragmentation of wolverine habitat and range due to climate change, trapping, lack of regulatory mechanisms to address the threats to wolverine habitat from climate change, and loss of genetic diversity due to small population size.

Wolverines occur on the Bridger-Teton National Forest.³⁴ An ongoing study in Idaho, Montana, and Wyoming to assess the impact of winter recreation on wolverine collected data on wolverine presence in the Teton Mountains.³⁵ Researchers trapped a male wolverine in 2014 and 2015.³⁶

Snowmobile use commonly overlaps with wolverine denning habitat.³⁷ Dispersed recreational activities like motorized winter recreation have the potential to negatively impact wolverine by disrupting natal denning areas.³⁸ Wolverines have one of the lowest successful

³² Forest Plan Amendment for Grizzly Bear Habitat (2006).

³³ *Id.* at 5, 6.

³⁴ See 78 Fed. Reg. 7871; K. Murphy *et al.*, *Wolverines in Greater Yellowstone*, 19 *Yellowstone Science* 3 (2011). See also Bridger-Teton National Forest Over-Snow Vehicle Use and Wolverine Habitat Map (Attachment C), based on data from R.M. Inman, *Wolverine Ecology and Conservation in the Western United States*, Doctoral Thesis No. 2013:4, Faculty of Natural Resources and Agricultural Sciences (2013).

³⁵ K. Heinmeyer and J. Squires, *Wolverine – Winter Recreation Research Project: Investigating the Interactions Between Wolverines and Winter Recreation 2015 Progress Report* (Dec. 30, 2015).

³⁶ *Id.* at 4.

³⁷ Switalski (2016) at 15. See also Attachment C.

³⁸ See, e.g., R.M. Inman *et al.*, *Wolverine reproductive chronology*, *In: Wildlife Conservation Society, Greater Yellowstone Wolverine Program, Cumulative Report* (2007a); J. Krebs *et al.*, *Multiscale habitat use by wolverines in British Columbia, Canada*, 71 *Journal of Wildlife Management* 2180

reproductive rates known to mammals, and this is hypothesized as linked to winter energy constraints. Female wolverines select and enter dens and give birth in February to mid-March³⁹ and the overlap of winter recreation with this energetically taxing period is highly concerning. Any disturbance during this important winter period can negatively affect productivity and other vital rates.⁴⁰

Researchers have reported that female wolverines may be sensitive to human disturbance in the vicinity of natal and maternal dens, and disturbance from foot and snowmobile traffic has been purported to cause maternal females to abandon or move dens.⁴¹ One study found that females tended to avoid areas with heli-skiing and backcountry skiing areas.⁴² High-cirque snowmobile use, especially crosscountry use and “high marking,” may present a substantial threat to wolverines and their habitat. Preliminary findings from the ongoing study suggest wolverine exposed to higher levels of winter recreation in their home range may avoid recreated areas and move at higher rates in higher intensity recreation areas. In particular, denning female wolverines showed higher movement rate increases in response to higher intensity recreation areas, which causes higher expenditure of energy and reduced ability to hunt for food.⁴³

These behavioral changes can negatively affect individuals’ physiological stress levels and reproductive capacity in several ways, as evidenced in numerous studies on different species.⁴⁴ It may reduce the amount of time and thus ability of female wolverines to hunt or to utilize food caches. This would result in significant additive energetic effects, reducing foraging success for adult females already stressed by the demands of bearing and raising a litter.⁴⁵ In addition, this could reduce kit survival rates by increasing the potential for predation and exposure to cold temperatures. These results indicate that winter recreation may impact wolverines in as yet unknown ways.

As snowmobiling and backcountry skiing continue to grow in popularity and as snowpack

(2007); E.C. Lofroth and J. Krebs, The Abundance and Distribution of Wolverines in British Columbia, Canada, 71 *Journal of Wildlife Management* 2159 (2007); L.F. Ruggiero *et al.*, Wolverine conservation and management, 71 *Journal of Wildlife Management* 2145 (2007).

³⁹ A.J. Magoun and J.P. Copeland, Characteristics of wolverine reproductive den sites, 62 *Journal of Wildlife Management* 1313 (1998).

⁴⁰ R. May *et al.*, Impact of infrastructure on habitat selection of wolverines *Gulo gulo*, 12 *Wildlife Biology* 285 (2006); Krebs (2007).

⁴¹ S. Myrberget, The breeding den of the wolverine, 21 *Fauna* 108 (1968); Magoun and Copeland (1998); R.M. Inman *et al.*, Wolverine reproductive rates and maternal habitat in Greater Yellowstone, *In: Wildlife Conservation Society, Greater Yellowstone Wolverine Program, Cumulative Report* (2007b).

⁴² Krebs (2007).

⁴³ K. Heinmeyer and J. Squires, Wolverine – Winter Recreation Research Project: Investigating the Interactions Between Wolverines and Winter Recreation 2014 Progress Report (Oct. 27, 2014). The 2015 Progress Report did not include an executive summary of preliminary results like in previous reports.

⁴⁴ S.J. Creel *et al.*, Snowmobile activity and glucocorticoid stress responses in wolves and elk, 16 *Conservation Biology* 809 (2002).

⁴⁵ K. Heinmeyer and J. Squires, Wolverine – Winter Recreation Research Project: Investigating the interactions between wolverines and winter recreation use 2013 Progress Report (2013).

continues to decline due to climate change, there is increasing concern that wolverine denning habitat may become limiting. Recent warming has already led to substantial reductions in spring snow cover in the mountains of western North America.⁴⁶ Numerous recent and sophisticated studies support the conclusion that climate changes caused by global climate change are likely to negatively affect wolverine habitat.⁴⁷ Protection of denning habitat may be critical for the persistence of the species in the Rockies.

An additional concern related to snowmobile use is that motorized access leads to increased trapping pressure (direct or indirect capture) for some furbearers that prefer more mesic habitat conditions generally found at higher elevations or in riparian habitats, such as marten, fisher, lynx, and wolverine. Trapping season for these species is limited to the winter months, and most trappers prefer the relatively easy access to suitable habitat provided by snowmobiles. Wolverine populations in small, isolated mountain ranges can be very susceptible to trapping pressure.⁴⁸ Trapping pressure for these species is dramatically reduced if there is less snowmobile access.

The Forest Service has failed to conference with the FWS over the effects of the 2016 OSVUM. The OSV use designations in 1990 occurred before the FWS proposed wolverine for listing as threatened, and the Forest Service did not conference before publishing the 2016 OSVUM. Thus, the OSV use designations adopted in the 2016 OSVUM were never assessed for their effects on wolverine.

ESA VIOLATIONS

1. The Forest Service has violated the ESA by failing to consult, or reinstate consultation, under Section 7 regarding the impacts on Canada lynx and its critical habitat and on grizzly bear, and failing to conference under Section 7 regarding the impacts on wolverine associated with the adoption of existing OSV use designations through publication of the Teton Division's 2016 OSVUM. Section 7(a)(2) of the ESA requires that each federal agency consult with the Services to ensure that any action authorized, funded, or carried out by such agency is not likely to (1) jeopardize the continued existence of any threatened or endangered species or (2) result in the destruction or adverse modification of the critical habitat of such species. *See* 16 U.S.C. § 1536(a)(2). Section 7(a)(4) of the ESA requires a Federal action agency to

⁴⁶ P. Mote *et al.*, Declining mountain snowpack in western North America, 86 *Bulletin of the American Meteorological Society* 1 (2005); G.T. Pederson *et al.*, A century of climate and ecosystem change in Western Montana: what do temperature trends portend? 96 *Climatic Change* (2010).

⁴⁷ P. Gonzales *et al.*, Wolverines and Climate Change, Unpublished report (2008); J.F. Brodie and E. Post, Nonlinear responses of wolverine populations to declining winter snowpack, 52 *Population Ecology* 279 (2010); J.P. Copeland *et al.*, The bioclimatic envelope of the wolverine (*Gulo gulo*): do climate constraints limit its geographic distribution? 88 *Canadian Journal of Zoology* 233 (2010); K.S. McKelvey *et al.*, Climate change predicted to shift wolverine distributions, connectivity, and dispersal corridors. 21 *Ecological Applications* 2882 (2011); S. Peacock, Projected 21st century climate change for wolverine habitats within the contiguous United States. *Environmental Research Letters* (2011); K.M. Johnston *et al.*, Projected range shifting by montane mammals under climate change: implications for Cascadia's National Parks, 3 *Ecosphere* 11 (2012).

⁴⁸ J.R. Squires *et al.*, Sources and patterns of wolverine mortality in western Montana, 71 *Journal of Wildlife Management* 2213 (2007).

conference with the Services if the proposed action is likely to jeopardize a species proposed for listing or destroy or adversely modify proposed critical habitat. 16 U.S.C. § 1536(a)(4); 50 C.F.R. § 402.10(a). The Forest Service's failure to consult, or reinitiate consultation over effects to Canada lynx and grizzly bear, and failure to conference over effects to wolverine, from the Teton Division's 2016 OSVUM designations is a significant violation of the ESA.

2. The Forest Service is in violation of Section 7(d) of the ESA by adopting and implementing the 2016 OSVUM designations before adequate and lawful consultation is complete. Such actions constitute an "irreversible and irretrievable commitment of resources" and warrant an injunction. See 16 U.S.C. §1536(d).

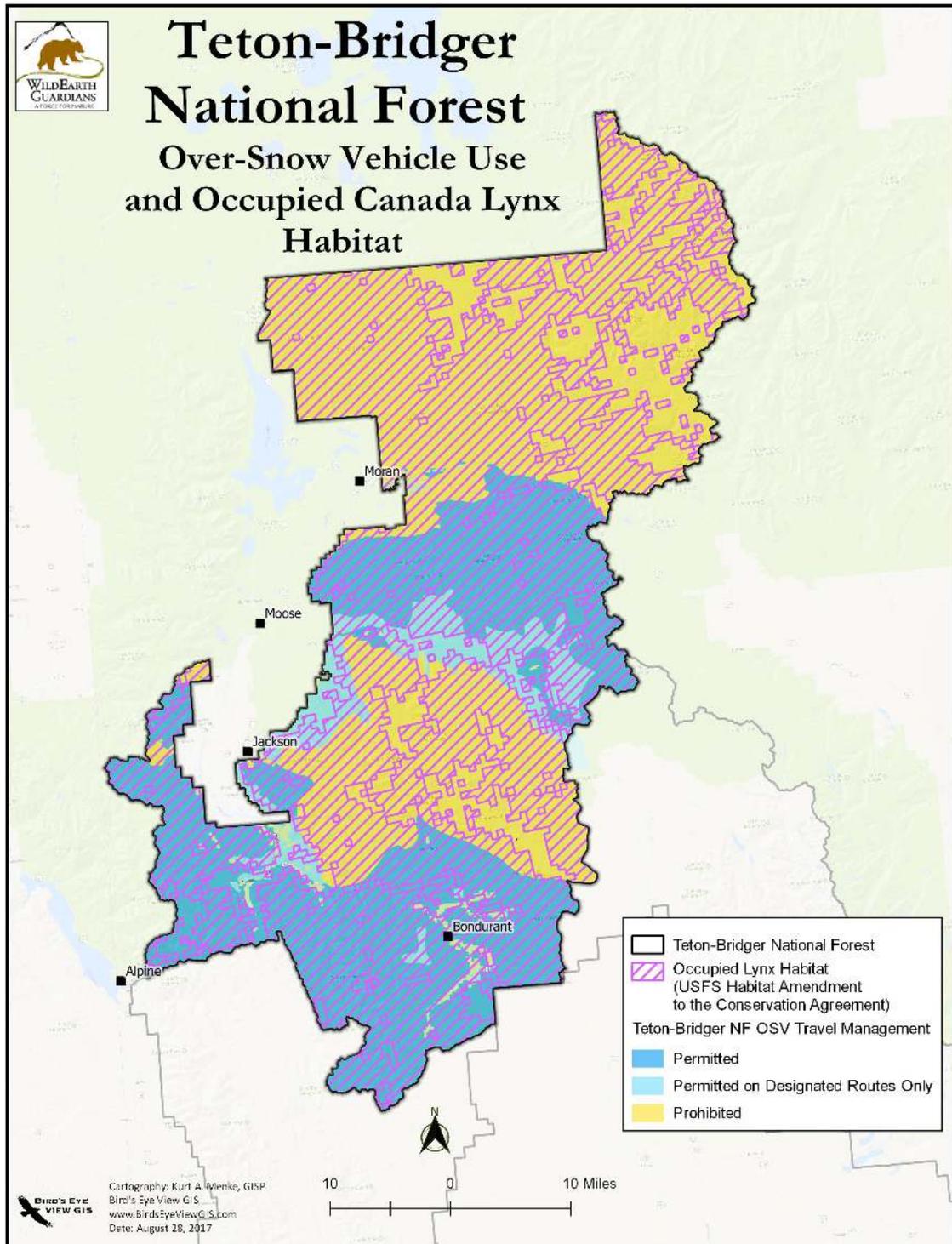
WildEarth Guardians and Winter Wildlands Alliance will initiate litigation over the Forest Service's ESA violations unless the Forest Service consults with FWS regarding the effects of the 2016 OSVUM designations, and prevents any irreversible or irretrievable commitment of resources from occurring until consultation is completed.

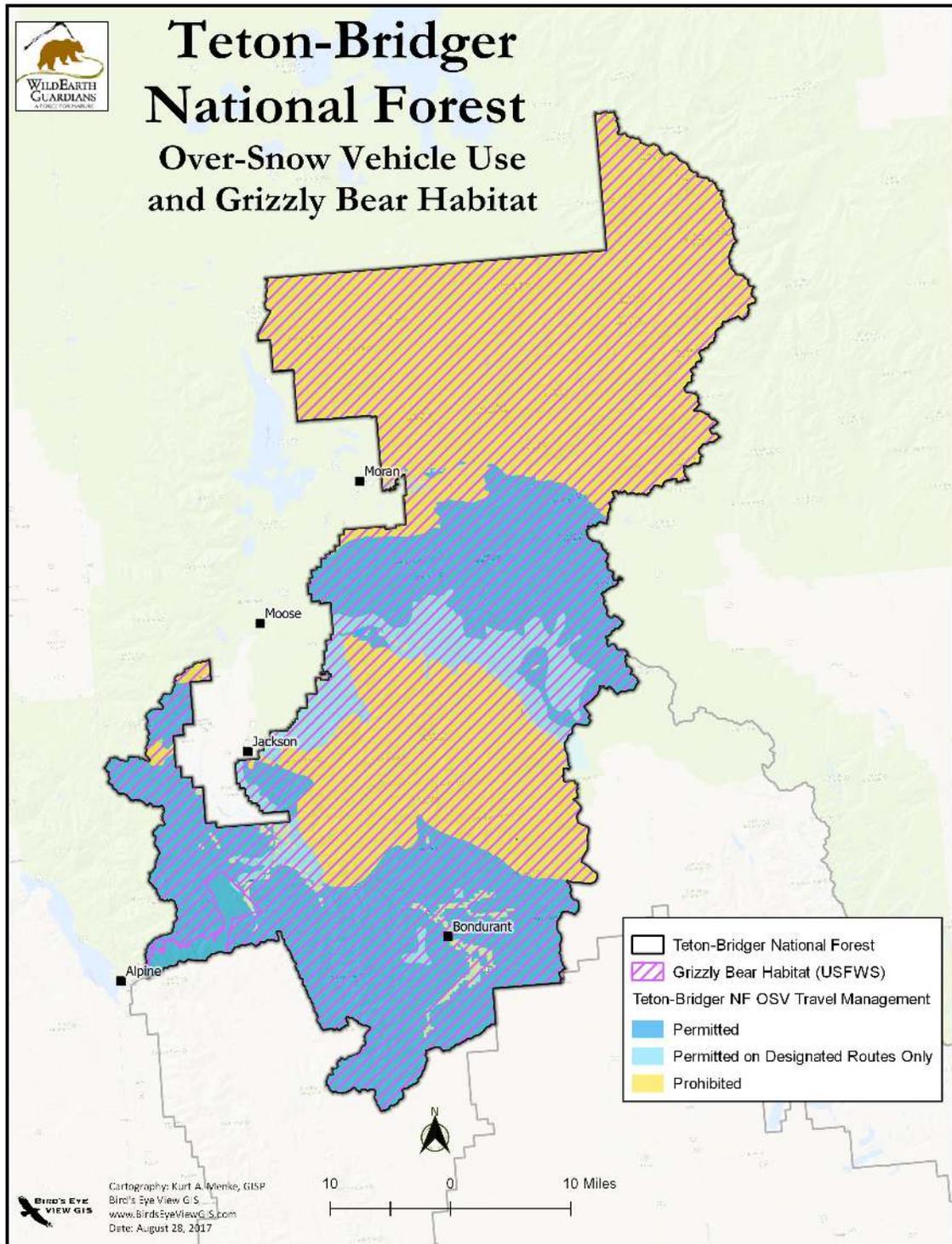
For the above stated reasons, the Forest Service has violated and remains in ongoing violation of the ESA. The 60-day notice requirement is intended to provide you an opportunity to correct the actions that are in violation of the ESA.

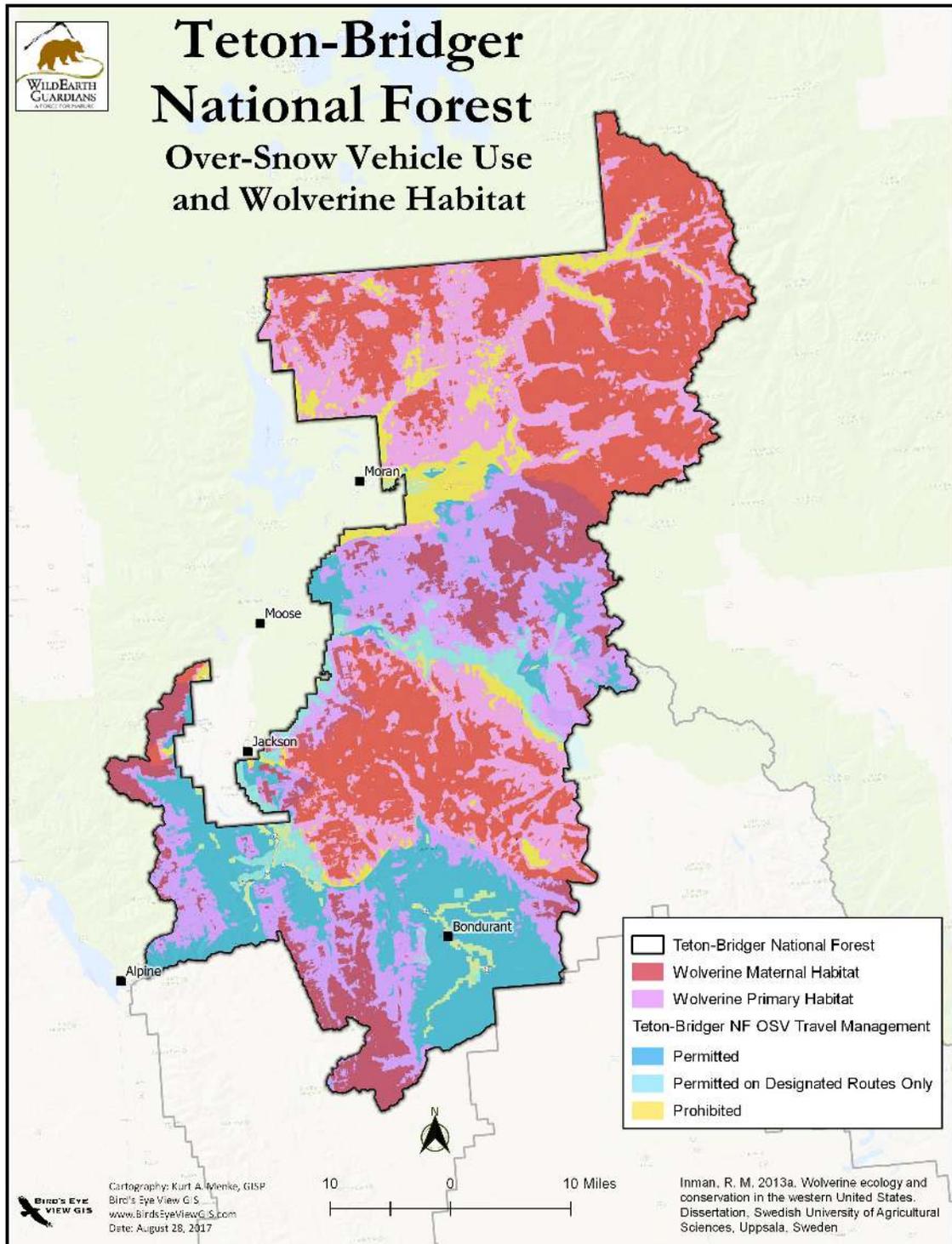
Sincerely,

Lauren Rule, Senior Staff Attorney
Advocates for the West

cc: Jeff Sessions, U.S. Attorney General







Teton Division Over-Snow Use Areas

