



**ADVOCATES for the WEST**  
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**OCT 15 2018**

October 12, 2018

*Via certified mail; return receipt requested*

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**Re: Notice of Intent to Sue for Violations of ESA Section 7 and NEPA for  
Authorizing the Kilgore Mine Exploration Project**

Dear Sirs & Madam:

I write on behalf of my clients, the Idaho Conservation League (ICL) and the Greater Yellowstone Coalition (GYC), to provide this notice of intent to sue the United States Forest Service under the citizen suit provision of the Endangered Species Act (ESA), 16 U.S.C. §1540(g), for actions authorizing Otis Gold Corporation's Kilgore Mine Exploration Project ("Kilgore Project" or "Project") in the Dubois District of the Caribou-Targhee National Forest in Eastern Idaho. The Forest Service issued the Decision Notice and Finding of No Significant Impact (DN/FONSI) approving the Kilgore Project on August 20, 2018. As approved, mining company Otis Gold would build over 10 miles of new roads and conduct extensive drilling operations in suitable grizzly bear habitat over the next five years, starting as early as this fall. The Project site is located in the Centennial Mountains, which are part of an important expansion area and corridor linking the Greater Yellowstone (GYE) grizzly population with other grizzly bear populations in the Northern Rockies.

Previously listed under the ESA at "threatened," the GYE grizzly was delisted in 2017. When the Forest Service approved the Kilgore Project, the GYE grizzly was not listed, and the

Forest Service never completed ESA consultation with the U.S. Fish and Wildlife Service (FWS) over the Project's impacts to the GYE grizzly. However, ESA protections were recently restored in *Crow Indian Tribe, et al., v. U.S.*, CV 17-89-M-DLC (D. Mont. Sep. 24, 2018), and the GYE grizzly is now listed as threatened.

The Forest Service is in violation of ESA Section 7, 16 U.S.C. § 1536, by: (1) failing to consult with FWS over the effects of the Kilgore Project to GYE grizzly bears, other grizzly bears in the Northern Rockies, and their habitat; and (2) causing an irreversible or irretrievable commitment of resources by allowing the Project to proceed. The Forest Service is also in violation NEPA, 42 U.S.C. § 4321 *et seq.*, because the change in the regulatory status of GYE grizzly resulting from the *Crow Indian Tribe* decision, and the decision's recognition of the importance of habitat connectivity and gene flow, are new information and/or circumstances which may have significant impacts not already considered by the Forest Service when it approved the Project; therefore, the Forest Service must conduct supplemental NEPA and prepare a full environmental impact statement. *See* 40 C.F.R. § 1502.9(c)(1)(ii).

The Forest Service cannot allow Otis Gold to proceed with the Project until the agency completes ESA consultation and supplemental NEPA. Unless the Forest Service takes the steps necessary to remedy these ESA and NEPA violations, ICL and GYC intend to file suit in U.S. District Court following the expiration of the required 60-day notice period, seeking injunctive and declaratory relief.

### **PARTIES & ATTORNEYS GIVING NOTICE**

The parties giving notice are:

Idaho Conservation League  
Att'n: John Robison  
P.O. Box 844  
Boise, ID 83701  
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[jrobison@idahoconservation.org](mailto:jrobison@idahoconservation.org)

Greater Yellowstone Coalition  
Att'n: Kathy Rinaldi  
60 E. Little Ave.  
Driggs, ID 83422  
(208) 354-1593  
[krinaldi@greateryellowstone.org](mailto:krinaldi@greateryellowstone.org)

ICL and GYC are conservation organizations representing tens of thousands of supporters and members throughout Idaho and the Greater Yellowstone Ecosystem who care deeply about grizzly bears and are concerned about the short-term and long-term adverse impacts the Kilgore Mine Exploration Project will have to grizzly bears and their habitat.

The attorneys representing ICL and GYC in this notice are:

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## LEGAL BACKGROUND

### **The Endangered Species Act**

The Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, is the nation's preeminent wildlife protection law. Congress enacted the ESA 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 species. 16 U.S.C. § 1531(b).

Section 7(a)(2) of the ESA requires all federal agencies "insure that any action authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of [designated critical] habitat." 16 U.S.C. § 1536(a)(2). The ESA's implementing regulations require federal agencies to review their actions at the "earliest possible time" to determine whether an action may affect listed species or their critical habitat. 50 C.F.R. § 402.14.

To fulfill Section 7(a)(2)'s mandate, the "action agency" must consult with FWS if a proposed action "may affect" a listed species or its critical habitat. 16 U.S.C. § 1536; 50 C.F.R. § 402.14(a). The action agency prepares a biological assessment to evaluate the potential effects of the action on listed species and to determine whether a species is "likely to be adversely affected" (LAA) or "not likely to be adversely affected" (NLAA) by the action. 50 C.F.R. § 402.12. For LAA actions, the action agency must seek "formal" consultation with FWS. 50 C.F.R. § 402.14(a). For NLAA actions, the action agency may seek "informal" consultation with FWS. 50 C.F.R. § 402.14(b). During ESA consultation, the "consulting agency" (FWS) must review all relevant information, evaluate the current status of the species or critical habitat, and evaluates the effects and cumulative of the proposed action on the listed species and its critical habitat. 50 C.F.R. § 402.14(g)(1)–(3). Throughout its analysis, the consulting agency must utilize the "best scientific and commercial data available." 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d).

Informal consultation concludes with a Letter of Concurrence from the consulting agency. 50 C.F.R. § 402.14(b). A letter of concurrence is only appropriate when the BA or other information demonstrates that the action has no likelihood of adverse effect to the listed species. *Id.* See also FWS & NMFS, *Endangered Species Consultation Handbook* (1998), p. 3–12. Formal consultation results in a Biological Opinion (BiOp) from the consulting agency. The BiOp determines whether the proposed action is likely to jeopardize the continued existence of a listed species or adversely modify the species' critical habitat. The BiOp must include a detailed discussion of the current status of the species, the existing environmental conditions (or baseline), and the effects and cumulative impacts of the action, when added to the baseline, on listed species or critical habitat. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. §§ 402.14(g)(3), (h)(2). If the consulting agency makes a jeopardy determination, the BiOp may specify reasonable and prudent alternatives that will avoid jeopardy and will allow the agency to proceed with the action. 16 U.S.C. § 1536(b). After the completion of consultation, the action agency must determine whether and in what manner to proceed with the action in light of its Section 7 obligations and the BiOp. 50 C.F.R. § 402.15(a).

Section 7(d) of the ESA provides that during the consultation process, the action agency “shall not make any irreversible or irretrievable commitment of resources with respect to the agency action” which would have the effect of foreclosing the formulation of implementation of any reasonable and prudent alternative measures. 16 U.S.C. § 1536(d). Congress enacted Section 7(d) “to prevent Federal agencies from ‘steamrolling’ activity in order to secure completion of the projects regardless of their impact on endangered species.” *Pac. Rivers Council v. Thomas*, 936 F.Supp. 738, 745 (D. Idaho 1996) (quotation omitted).

### **The National Environmental Policy Act**

The National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370(h), is America’s basic “charter for protection of the environment.” 40 C.F.R. § 1500.1(a). The Council on Environmental Quality (CEQ) promulgates regulations implementing NEPA, which are binding on all federal agencies. 40 C.F.R. §§ 1500-1518.4. NEPA requires federal agencies to ensure fully informed decision-making and provide for public participation in environmental analysis and decision-making. 40 C.F.R. § 1500.1(b)-(c). NEPA serves two principal purposes: (1) it ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts, and (2) it guarantees that the relevant information will be made available to the public so it may play a role in the decision-making process. This “hard look” at an action’s impacts fosters both informed decision-making and informed public participation.

NEPA requires federal agencies to prepare an Environmental Impact Statement (EIS) for all “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). CEQ regulations list factors to consider when evaluating whether an EIS is required, which include: “[u]nique characteristics of the geographic area such as proximity to . . . ecologically critical areas”; “[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial”; “[t]he degree to which the possible effects on the human environment are uncertain or involve unique or unknown risks”; “[t]he degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration”; “[w]hether the action is related to other actions with individually significant impacts”; and “[w]hether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.” 40 C.F.R. § 1508.27(b).

An agency has a continuing obligation to comply with NEPA and must prepare a supplemental NEPA document when “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts” emerge. 40 C.F.R. § 1502.9(c)(1)(ii). Information is significant and requires supplemental NEPA analysis if it “is sufficient to show that the remaining action will ‘affec[t] the quality of the human environment’ in a significant manner or to a significant extent not already considered.” *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989). This duty to supplement applies whether the agency has prepared an EIS or an EA. *Idaho Sporting Congress Inc. v. Alexander*, 222 F.3d 562, 566 n.2 (9th Cir. 2000).

## FOREST SERVICE ESA VIOLATIONS

### **Violations of ESA Section 7(a)(2) for Failure to Consult**

The Forest Service authorized and retains authority over the Kilgore Project but has failed to complete mandatory consultation with FWS over the Project's impacts to the threatened GYE grizzly bear and other listed grizzly populations in violation of Section 7(a)(2) of the ESA. 16 U.S.C. § 1536(a)(2). The Forest Service prepared a biological assessment of the Project's impacts to listed wildlife species and submitted the biological assessment to FWS. FWS issued a letter of concurrence regarding Project impacts to wolverine and lynx; however, consultation was never completed for GYE grizzly and other grizzly populations in the Northern Rockies. Documents in the project record show the Forest Service determined the Kilgore Project "may affect" GYE grizzly bears, and the decision in *Crow Indian Tribe* shows that the Project's impacts to GYE grizzly mean the Project may also affect other populations of grizzly in the Northern Rockies; therefore, consultation with FWS is required over impacts to these listed grizzly populations. See 16 U.S.C. § 1536; 50 C.F.R. § 402.14(a).

### **Violations of ESA Section 7(d) for Irreversible and Irretrievable Commitment of Resources**

Section 7(d) of the ESA provides that during the consultation process the action agency "shall not make any irreversible or irretrievable commitment of resources with respect to the agency action" which would have the effect of foreclosing the formulation of implementation of any reasonable and prudent alternative measures. 16 U.S.C. § 1536(d). The Forest Service is causing an irreversible and irretrievable commitment of resources in violation of ESA Section 7(d) by authorizing the Kilgore Project without completing consultation for GYE grizzly. Allowing Otis Gold to improve existing roads, construct new roads, construct drilling areas, and undertake other mineral exploration activities approved by the Forest Service adversely affects GYE grizzly and its habitat, and adversely affects other grizzly populations, and will foreclose alternatives that avoid these harms.

## FOREST SERVICE DUTY TO CONDUCT SUPPLEMENTAL NEPA

The Forest Service approved the Kilgore Mine Exploration Project in its August 20, 2018 DN/FONSI based on a May 2018 Environmental Assessment (the EA). The DN/FONSI does not even mention grizzly bear, and while the EA includes a short assessment of impacts to GYE grizzly bears, the EA fails to disclose and consider the importance of the Project area and its surroundings as a grizzly bear corridor linking GYE bears and other grizzly populations. Significant new information from the recent decision in *Crow Indian Tribe*, No. CV 17-89-M-DLC (D. Mont. Sep. 24, 2018), shows the Forest Service must conduct supplemental NEPA. See 40 C.F.R. § 1502.9(c)(1)(ii).

In *Crow Indian Tribe*, the court vacated FWS's 2017 Final Rule delisting GYE grizzly bears and restored ESA status to the GYE grizzly. *Id.* at 1. The court found that FWS failed to consider an important aspect of the problem when it failed to analyze how the delisting of and reduced protections for GYE grizzly bears would affect the remaining members of the other listed lower-48 grizzly populations. *Id.* at 19–31. The court determined that "decreased

protections in the Greater Yellowstone Ecosystem necessarily translate to decreased chances for interbreeding” and emphasized that “the isolation and lack of connectivity between grizzly populations was a recognized threat at the time of the original listing.” *Id.* at 29–30.

The court also found FWS’s threats analysis was arbitrary and capricious and illogical when the agency determined it need not provide for natural connectivity or translocation of bears. The court found FWS misread two studies it relied on, both of which concluded that the long-term health of the GYE grizzly depends on the introduction of new genetic material. The court stated, “all evidence suggests that the long-term viability of the Greater Yellowstone grizzly is far less certain absent new genetic material,” but FWS “refused to analyze the issue of connectivity between the Greater Yellowstone grizzly and other populations.” *Id.* at 40.

Here, the Forest Service never considered these issues or the scientific studies cited in the *Crow Indian Tribe* decision. The EA and DN/FONSI fail to address how the Kilgore Project may prolong or increase the isolation and lack of connectivity between the GYE grizzly and other grizzly populations and never considered how this increase would adversely affect the GYE grizzly and other grizzly populations and decrease their chances of long-term survival by preventing the flow of genetic material. Because of the Project’s location within the important Centennial Mountains wildlife corridor, these impacts may be significant and require preparation of a full EIS to evaluate the potential impacts, develop alternatives, and consider appropriate mitigation measures. *See* 42 U.S.C. § 4332(2)(C).

Additionally, the change in regulatory status of the GYE grizzly from a Forest Service sensitive species to an ESA-listed threatened species is a significant new circumstance, which on its own requires supplemental NEPA. Impacts to ESA-listed species are one of the NEPA significance factors requiring an EIS. *See* 40 C.F.R. § 1508.27(b). Additionally, an EIS is required when an action threatens violation of a law, *see id.*; and without ESA Section 7 consultation and without ESA Section 9 “take” coverage, allowing the Project to proceed threatens violations of the ESA.

Furthermore, the legal and regulatory framework in the EA the Forest Service used to assess and mitigate against impacts to grizzly is significantly different now compared to when the EA was prepared and the Project was approved. Throughout the EA and project record documents, the Forest Service relied on the 2016 Conservation Strategy and the GYE grizzly’s delisted status to downplay concerns about adverse Project impacts. Now that the GYE grizzly bear is ESA-listed, the Forest Service needs to consider this changed circumstance, assess Project’s impacts within the new regulatory framework applicable to the GYE grizzly, and revisit the DN/FONSI.

### CONCLUSION

Unless the Forest Service stops the Kilgore Mine Exploration Project from proceeding until the agency completes ESA consultation and supplemental NEPA and takes steps necessary to protect the grizzly bear and its habitat from irreversible and irretrievable commitments of resources, ICL and GYC anticipate filing suit after 60 days from the date of this notice in Federal District Court, requesting injunctive and declaratory relief and recovery of its litigation expenses.

One of the principal reasons for the ESA notice requirement is to allow the parties to discuss resolution of claims short of litigation. During the 60-day notice period, John Robison at the Idaho Conservation League, Kathy Rinaldi at the Greater Yellowstone Coalition, Roger Flynn at the Western Mining Action Project, and I (contact information above) will be available to discuss remedies and actions that might be taken to assure compliance with the ESA and NEPA. If the Forest Service has any information suggesting that one or more of the violations outlined in this notice did not occur or is stated incorrectly, please immediately provide that information to me, specifying the violation in question.

Sincerely,



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Bryan Hurlbutt  
ADVOCATES FOR THE WEST

