BECHTOLD LAW FIRM, PLLC

317 East Spruce Street
PO Box 7051
Missoula, Montana 59807
www.bechtoldlaw.net

August 26, 2019

Secretary, U.S. Department of Agriculture
1400 Independence Ave, SW
Washington, D.C. 20250-0003

Chief, U.S. Forest Service
201 14th Street, SW
Washington D.C. 20250

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

RE: 60-Day Notice of Intent to Sue under the Endangered Species Act: Willow Creek Vegetation Management Project in the Helena National Forest

You are hereby notified that Alliance for the Wild Rockies and Native Ecosystems Council (collectively Alliance) intend 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. Alliance will file the 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 organizations giving notice of intent to sue are as follows:

Michael Garrity, Executive Director
Alliance for the Wild Rockies
P.O. Box 505
Helena, Montana 59624
Tel: (406) 459-5936

Dr. Sara Jane Johnson, Executive Director
Native Ecosystems Council
P.O. Box 125
Willow Creek, MT 59760
Tel: (406) 285-3611

The name, address, and phone number of counsel for the notifier are as follows:

Timothy Bechtold
Bechtold Law Firm, PLLC
PO Box 7051
Missoula, MT 59807
Tel: 406-721-1435

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 ensure 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 has held 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 (9th Cir. 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. 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, rights-of-way, permits, or grants-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 . . . ." *Pacific 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." *Pacific 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 at 764.

LEGAL VIOLATIONS

The agencies' approval of the Willow Creek Project on the Helena National Forest violates the ESA for the following reasons:

The December, 2018 amendments to the Helena Forest Plan abandon longstanding Forest Service commitments to limit road development in important grizzly bear habitat and to limit human use and access to grizzly bear habitat. Nothing constrains the Forest Service from allowing temporary roads from proliferating on the landscape in Zone 1 grizzly bear habitat. Given that the agencies are aware that road closure effectiveness is largely ineffectual when roads are not obliterated, the new forest plan allowances are a significant step down from the Amendment 19 road closure requirements, which required that closures make the reclaimed roads to no longer be able to function as a road. Similarly, road standards in the prime conservation areas also weaken protections for grizzly bears by eliminating road density requirements and limits on on-motorized human use previously deemed essential to protecting grizzly bear habitat. The December, 2018 amendments allow new road construction in grizzly bear habitat without commensurate removal of existing roads, and allows proliferation of roads on the landscape as long as a barrier is placed on a road. The agencies are aware that barriers are routinely ineffective in preventing access to forest roads, and completely ineffective at preventing non-motorized access to forest roads. In the biological opinion for the amendments, FWS fails to acknowledge the threat of road proliferation and associated human disturbance of grizzly bear habitat allowed by the amendments. FWS's finding that the new management direction under the amendments will not jeopardize grizzly bears unlawfully ignored an important factor that may impact the grizzly bear's survival. FWS violates ESA by failing to conduct a rational analysis and determination of whether the weakened road

allowances will jeopardize the threatened grizzly bear. By relying on the arbitrary biological opinion, the Forest Service likewise violates the ESA.

The ESA requires that agencies consider the direct and indirect effects of actions, together with the effects of actions that are interrelated or interdependent. Here the agencies have not taken into consideration the direct and indirect effects of interrelated and interdependent projects approved under 16 USC § 6951a and 16 USC §6951b. This failure is a violation of 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 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. If the violations of law described above are not cured within 60 days, Alliance intends to file suit for declaratory and injunctive relief, as well as attorney and expert witness fees and costs.

Sincerely,

Timothy M. Bechtold
Counsel for Notifier

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

CERTIFIED MAIL

Bechtold Law Firm, PLLC
PO Box 7051
Missoula, MT 59807

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Secretary, U.S. Department of Agricu
1400 Independence Ave, SW
Washington, D.C. 20250-0003

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