

# BECHTOLD LAW FIRM, PLLC

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September 16, 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:  
East Fork Rock Creek Reservoir, Beaverhead-Deerlodge National Forest**

You are hereby notified that Alliance for the Wild Rockies and Save the Bull Trout (collectively SBT) 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. SBT 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

Chuck Irestone, Executive Director  
Save the Bull Trout  
412 East Spruce Street #5  
Missoula, MT 59802  
Tel: (406) 721-4634

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  
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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 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

On March 29, 2013 the USFWS released a Biological Opinion on the East Fork Rock Creek Fish Screen. FWS identified several areas of concern to bull trout, including, inter alia, effective minimum pool height of the reservoir, flushing flows, instream flows and dewatering, entrainment in irrigation ditches, and degraded stream channels. FWS issued an Incidental Take Statement for the fish screen project that required the Forest Service to assume and implement the terms and conditions of the ITS in order to avoid §9 unauthorized take of the ESA-listed bull trout. The Forest Service subsequently issued a Decision Notice and Finding of No Significant Impact adopting the terms and conditions of the Biological Opinion. The DN&FONSI provided that the Forest Service would engage in §7 consultation with FWS to address the impact to bull trout of the Montana DNRC's management of the reservoir to control water storage and the volume of water releases, the DNRC's management of diversion headgate to divert water to the Flint Creek Ditch, and the operation, evaluation, and maintenance of the fish screen. The Forest Service has not complied with this requirement in the DN&FONSI, in violation of law.

### 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, SBT 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