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July 2, 2020

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U.S. Attorney General, U.S. Department of Justice  
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**RE: 60 Day Notice of Intent to Sue under the Endangered Species Act - Gold  
Butterfly Project on the Bitterroot National Forest**

You are hereby notified that Alliance for the Wild Rockies and Friends of the Bitterroot 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. They will file the claim after the 60 day period has run unless the violations described in this notice are remedied. Notifiers:

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The name, address, and phone number of Counsel for Notifiers:

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## STATEMENT OF FACTS

On November 15, 2019, the Forest Service issued the Record of Decision for the Gold Butterfly logging project on the Bitterroot National Forest. The Project allows commercial logging on 5,461 acres, including clearcutting across wide swaths of forest. The Project also allows non-commercial activities such as cutting smaller trees and planting trees on 7,238 acres. The Project further allows prescribed burning activities on 4,854 acres. In addition, the Project allows road maintenance on 80.1 miles, construction of 6.4 miles of new system road, which will be closed to the public, conversion of 0.22 miles of open public road to a non-motorized trail, decommissioning 5.8 miles of existing system roads, decommissioning of 16.5 miles of illegal “undetermined” roads, addition of 16.5 miles of illegal “undetermined” roads to the system as closed roads, construction of 7.7 miles of temporary road, construction of 8.5 miles of tracked line machine trail, construction of 1.1 miles temporary skid trail, and closure (storage) of 5 miles of system road. Finally, the Project will relocate two trailheads, create new horse campsites at the Gold Creek Campground, and replace Arrastra and Grizzly Creek culverts.

Regarding illegal roads, also referred to as “undetermined” roads, which are not lawfully on the Forest as part of the National Forest roads system but nonetheless exist on the ground, the Gold Butterfly project has about 33 miles total of these unlawful undetermined roads. The ID Team proposed that approximately 16.5 miles of these undetermined roads become part of the lawful transportation system and be stored, i.e. closed, after logging operations. These roads would be opened to accommodate commercial logging operations and log hauling in commercial logging units for this Project. Another 16.5 miles of these undetermined roads would be decommissioned.

Project activities would require the transport of approximately 6,000-7,000 truckloads of material. All Project activities are expected to be completed within 8 years of Project initiation. All temporary roads and trails would be obliterated after use. Temporary roads and trails would be closed to public use by a closure order during operations.

## STATEMENT OF LAW

The ESA mandates: “each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on November 10, 1978, request of the Secretary information whether any species which is listed or proposed to be listed *may be present* in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action.” 16 U.S.C. § 1536 (c)(1).

In short, “[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 (9<sup>th</sup> Cir. 1985). The Ninth Circuit holds that “[a] failure to prepare a biological assessment for a project in an area in which it has been determined that an endangered species may be present cannot be considered a de minimis violation of the ESA.” *Thomas*, 753 F.3d at 763-764. The “may be present” threshold includes migratory species that may be present “at some point” within the action area, and the standard does not require confirmation that species are “actually known or believed to occur” in the area. 51 Fed. Reg. 19926, 19946 (June 3, 1986).

The requirement for a biological assessment applies to proposed species, such as wolverines, if those

proposed species “may be present.” As the District of Montana recently held:

Here, the [ ] Project falls within the definition of “any agency action.” The Forest Service received information from FWS that wolverine “may be present” in the Project area. [ ]. These two facts trigger the Forest Service's obligation to prepare a BA for wolverine.

The programmatic BA is insufficient to meet the Forest Service's obligation to address the “direct and indirect effects of an action on the species ... together with the effects of other activities that are interrelated or interdependent with that action,” 50 C.F.R. § 402.02, because it is too general. The site-specific analysis contained in the EA and Wildlife Report, while tailored to the Project, did not fulfill the agency's consultation obligations because it did not receive FWS concurrence.

*Native Ecosystems Council v. Marten*, 2020 WL 1479059, at \*8 (D. Mont. Mar. 26, 2020).

A plaintiff who alleges a procedural violation under Section 7 of the ESA, as opposed to a substantive violation under Section 9, need not prove that a listed species has in fact been injured. Instead, the plaintiff need only show that the challenged action “may affect” a listed species. “May affect” is a very low threshold and any possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the requirement. “While the ‘disturbance effects’ may be discountable or insignificant, . . . ‘any possible effect’ requires the Forest Service to obtain the concurrence of the Wildlife Service in order to avoid consultation.” *Native Ecosystems Council v. Krueger*, 946 F.Supp.2d 1060,1079 (D. Mont.2013). Thus, “the appropriate conclusion when effects on listed species are expected to be discountable, or insignificant, or completely beneficial” is may affect; not likely to adversely affect; “no effect” is not the appropriate conclusion in that circumstance. *Id.*

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. Both the biological assessment and the biological opinion must use “the best scientific and commercial data available.” 16 U.S.C. § 1536(c).

Reinitiation of ESA consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and: (1) If the amount or extent of taking specified in the incidental take statement is exceeded; (2) 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; (3) 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 written concurrence; or (4) If a new species is listed or critical habitat designated that may be affected by the identified action. 50 C.F.R. § 402:16

## LEGAL VIOLATIONS

### 1. GRIZZLY BEAR - PROJECT CONSULTATION

The Project allows the addition of 6.4 miles of new roads and 16.5 miles of illegal, undetermined roads into the National Forest road system, less the decommissioning of 5.8 miles of existing system roads and creation of a non-motorized trail on 0.2 miles of open systems road, for a net increase of 16.9 miles in new permanent roads from Project. The FWS Letter of Concurrence for the Project states: “[s]ince the issuance of the Bitterroot Forest Plan biological opinion, the total amount of permanent road and constructed or proposed to be constructed to date, including this project, is 10.7 miles.” However, that number does not include the addition of 16.5 miles of undetermined roads in the Project area. When the 16.5 miles of undetermined roads are added, the total increase in new permanent roads is 27.2 miles. If the 6.0 miles of decommissioning and conversion to non-motorized trail is deducted, the net result is 21.2 miles of new system road. This amount of new permanent roads added to the system exceeds the number of new permanent roads permitted by the Forest Plan Incidental Take Statement, which only allows the addition of 17.1 miles of new permanent roads in the period 2019-2029 across the entire Bitterroot National Forest east of Highway 93. Exceeding this number from the Incidental Take Statement requires either reinitiation of ESA consultation on the Project or withdrawal and revision of the Project.

Additionally, the Forest Plan Incidental Take Statement prohibits any increase above 1.5 miles of open road/square mile in the the Eightmile-Burnt Fork-Big Birch-Willow Creek analysis area, which encompasses the Project action area. However, the Project Biological Assessment fails to address this requirement, and the Letter of Concurrence simply states that the Forest Service is in compliance. There is no disclosure in the Project consultation as to what the current open road density is now, nor what it will be post-Project, in the Eightmile-Burnt Fork-Big Birch-Willow Creek analysis area.

Furthermore, the Project consultation misleadingly dilutes actual open road density as experienced by wildlife by including an adjacent roadless area in the denominator even though no project activities are planned in that roadless area. By diluting open road density in this manner, the government misrepresents the high road density in the portion of the Project area where activities will actually occur, and thereby obscures the fact that the high road density in this area is a likely barrier to grizzly bears that may attempt to travel 15 miles west into the Bitterroot Grizzly Bear Recovery Zone. Thus, the Project consultation ignores the true role that Project open road density plays in preventing grizzly bears from re-occupying that recovery area. As an example of this misleading numbers game, the Project Biological Assessment states that open road density is 0.83 miles/square mile. However, the Forest Plan Biological Assessment & Biological Opinion used a different analysis unit and found that open road density was 1.5 miles/square mile, which is too high to ensure species viability for grizzly bears according to the Boulanger study cited at length in the Forest Plan Biological Assessment. And, according to the Project Wildlife Specialist Report, when open road density is assessed at the scale of third order drainages, the open road density can be as high as 3.7 miles/square mile. Such high open road density certainly acts as a barrier to any grizzly bear attempting to travel to the Bitterroot Recovery Zone. Yet, there is no real analysis of this issue. A similar flaw occurs in the analysis of secure habitat. The Project analysis includes a vast roadless area and thus claims 71% secure habitat, but when compared to the analysis of elk security areas there is a dramatic difference – elk security is only 8%.

Moreover, the Project consultation completely fails to address the important factor of total road density. Well-established science from the Interagency Grizzly Bear Committee (IGBC) has long held that in order

to adequately assess and manage habitat for grizzly bears, managers must address all three parameters: open roads, total roads, and secure habitat. Even though roads may be "closed," they often still receive motorized use from government employees and private contractors, as well as receiving unlawful motorized use from members of the public who simply drive around gates or guardrails, ignore signs, remove gate locks, or drive over berms. Thus, simply labeling a road as "closed" does not eliminate its impact. The practice of ignoring the impact of closed roads is expressly condemned by the Grizzly Bear Recovery Plan:

Roads closed to public use through the use of only signs or gates are often not effective (Zager and Jonke 1983). Funding and personnel necessary to maintain road closures and enforce regulations are rarely adequate, resulting in limited closure effectiveness. Roads closed with substantial physical barriers are more effective in prohibiting vehicular traffic, but are still often accessible by motorized all-terrain vehicles (ATVs), mountain bikes, and motorcycles. Also, long-distance visual access along roads in the forest environment is enhanced even beyond gates or other barriers because the road provides a visual pathway through the forest.

Administrative use often continues behind gates on roads although such roads are considered "closed" in road density calculations. A recent U.S. Forest Service proposal defines a "closed" road as one which is closed to public use and receives no more than 5 round trip administrative vehicular trips per week. A bear however, does not differentiate between agency and public use. To a bear that exhibits avoidance of road activity, a closed road receiving administrative use may be no different than an open road. Such bears will also avoid administratively used roads. Direct risk of mortality associated with administrative use is probably low, but continual administrative access directly contributes to habituation and a false sense of security for bears in areas which also contain open roads.

Current road closure policies in many areas do little to minimize the negative impacts of roads to grizzly bears. The two major impacts of roads that occur with either public or administrative use are 1) mortality along roads due to habituation and increased vulnerability and 2) avoidance of habitat due to the presence of roads, associated vehicle noise, and human activity.

In summary, public disregard of road closures, as well as continual administrative use, often reach such levels that the intent and objectives for the closures are no longer being met. These roads still receive substantial levels of human use and cannot legitimately be considered "closed" for their effects on bears when calculating the open road densities.

The concern with the government's failure to disclose total road density is particularly great in this case because there is no Forest Plan limit on total road density, and this Project allows a net increase of 16.9 miles in new permanent "closed" roads from Project. The government intends to allow contractor and agency motorized use of these roads in an unlimited fashion, which ultimately has the same effect on grizzly bears as if the roads were open to the public.

Finally, as the Schwartz study explains, managers must separately assess (1) secure habitat areas, and (2) the road density between those secure habitat areas because if they do not, they run the risk of having isolated islands of secure habitat that no grizzly bear can access because the bears cannot travel through

the heavily-roaded areas between the islands of secure habitat. Here, there is no analysis of road density *between* blocks of secure habitat, which renders the Project consultation analysis relatively worthless in terms of an actual analysis of how grizzly bears may move across the landscape.

For all of these reasons, the Project consultation for grizzly bears is arbitrary and capricious and fails to apply the best available science in violation of the ESA.

## 2. GRIZZLY BEAR - PROGRAMMATIC CONSULTATION

For many of the reasons discussed above, the Biological Assessment and Biological Opinion for the Bitterroot National Forest Plan for grizzly bears east of Highway 93 is also unlawful. First, the analysis arbitrarily ignores roads on private and state lands in both the environmental baseline and the analysis of cumulative effects. By ignoring these areas that are likely heavily-roaded, the agency creates a fictional account of the landscape that does not represent the actual landscape that a grizzly bear will face. Without a real understanding of the actual landscape, it is not possible to assess how a grizzly bear will move across the landscape and where there might be insurmountable barriers. This is particularly important because the Bitterroot Recovery Zone is located on the other side of Highway 93 and it is possible that grizzly bears could repopulate this area on their own if adequate linkage zones were created and maintained. In fact, there are large wildlife underpasses that were installed under Highway 93 for safe wildlife passage so there are routes that grizzlies could travel that would not involve crossing over a highway to reach the Bitterroot Recovery Zone. Yet, without a clear picture of road locations and densities across the whole landscape, the government and public are left without an ability to determine how to best help grizzly bears cross under the highway and repopulate the Bitterroot Recovery Zone on their own. This issue is simply ignored in the Forest Plan consultation.

Moreover, the consultation fails to address well-established IGBC parameters for grizzly bear habitat – OMRTD, TMRTD, and core habitat, expressed with a moving windows analysis. Without this information, it is simply not possible to assess whether the government is managing this habitat for grizzly bear recovery, or whether it is managing grizzly bear habitat to effectively preclude recovery. If the Forest Service insists on only addressing “open” road density, then in the very least it must include all roads that actually receive motorized use, which would include many “closed” roads. Conducting an analysis of only designated “open” roads creates a useless fiction because it ignores the actual motorized use on closed roads, undetermined roads, and other illegal motorized roads and trails. All motorized uses must be included in any biologically-defensible analysis of impacts on grizzly bears. Moreover, the agencies must assess secure habitat (core) areas and the road density between those areas separately in order to have a meaningful analysis and avoid creating isolated islands of secure habitat that are inaccessible to bears due to high road densities between those islands.

Finally, as noted above, when the 16.5 miles of illegal “undetermined” roads are permanently added to the road system with the Gold Butterfly Project, the Forest Service will exceed the Forest Plan Incidental Take Permit limit on the addition of new permanent roads. To the extent the agencies may argue that the Incidental Take Permit limit on new, permanent, closed roads does not include the new addition of illegal “undetermined” roads, then the Biological Assessment and Biological Opinion are arbitrary and capricious and contrary to the best available science because they would in effect allow unlimited increases in motorized use across the Forest without ever analyzing how that unlimited increase in motorized use will affect grizzly bears, whether it will jeopardize grizzly bears, and whether it will prevent recovery, i.e. repopulation of the Bitterroot Recovery Zone which is located on the other side of the highway.

For all of these reasons, the agencies' consultation for the Forest Plan's effect on grizzly bears is arbitrary and capricious and fails to apply the best available science in violation of the ESA.

### 3. WOLVERINE - PROJECT CONSULTATION

The Forest Service's refusal to prepare a Biological Assessment for the Project for wolverine is arbitrary and capricious and an abuse of discretion. Additionally, FWS must issue a Project-specific concurrence for a Forest Service no jeopardy determination. Wolverines occupy the Project area. Recent sightings in the Sapphires include: a female and a likely male photographed at a multi-carnivore bait station near the Sapphire Divide in March 2018; the same female photographed at a multi-carnivore bait station in the Stony Mountain IRA portion of the project area in January 2018; the same female and same likely male photographed at several multi-carnivore bait stations near the Sapphire Divide both within and in the proximity of the project area during winter 2017; and one wolverine seen on Trail #313 near Kent Peak in July 2011. Additionally, wolverines are on the FWS species list used by the Forest Service for the Project area. The Project allows the persistence of high road density and the addition of new roads added to the system, as well as logging of hundreds of acres of primary and maternal wolverine habitat, as well as dispersal habitat.

The law mandates that listed or proposed species that are on the FWS species list must be included in the Biological Assessment: "each Federal agency shall . . . request of the Secretary information whether any species which is listed *or proposed to be listed* may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment. . . ." 16 U.S.C. §1536 (c)(emphasis added). The Forest Service's violation of the plain statutory language violates the ESA. Additionally, the plain language of the ESA regulations requires concurrence by the FWS Director for any jeopardy determination for a proposed species: "If the *biological assessment* indicates that the action is not likely to jeopardize the continued existence of proposed species . . . and the Director concurs, then a conference is not required." 50 C.F.R. § 402.12 (k)(emphases added).

For these reasons, the District of Montana has already rejected the arguments of both agencies regarding a purported non-obligation to conduct a BA and concurrence for proposed species as abdication of unambiguous and lawfully-imposed obligations found in statute and regulation. *Native Ecosystems Council v. Marten*, 2020 WL 1479059, at \*4-6 (D. Mont. Mar. 26, 2020). In light of this Court ruling, the agencies can no longer claim ignorance; they must prepare a BA and letter of concurrence for wolverine for the Project prior to the implementation of any Project activities.

### 4. WOLVERINE - PROGRAMMATIC CONSULTATION

Instead of conducting an analysis of the effects of the action on wolverines in the Project ESA consultation, the agencies rely on a 2014 programmatic consultation. The 2014 programmatic biological assessment is premised entirely on the 2013 Proposed Listing Rule: it does not cite any scientific literature in support of its conclusions, but instead simply cites to the 2013 Proposed Listing Rule. In turn, the 2013 Proposed Listing Rule represented that "[f]ew effects to wolverines from land management actions such as grazing, timber harvest, and prescribed fire have been documented," and therefore the 2013 Proposed Listing Rule erroneously claimed that land management activities can never pose a threat to wolverines, individually or cumulatively, and therefore can never jeopardize wolverines, individually or cumulatively. The 2013 Proposed Listing Rule was issued on February 4, 2013 and did not consider any published scientific literature issued after 2012. Thus, the programmatic biological assessment does not even

consider, much less apply, any scientific research published after 2012. Over the past eight years, new research on wolverines has been published that undermines the agencies' original assumptions. For example, in August 2013, a new published, peer-reviewed scientific journal article was issued that disproves the assumptions. The article published in the Canadian Journal of Zoology found:

We surveyed wolverines at 120 sites along a natural and anthropogenic gradient using hair trapping and noninvasive genetic tagging. We used abundance estimation, generalized linear, and hierarchical models to determine whether abundance and occurrence was best predicted by natural land cover, topography, footprint, or a combination. Wolverines were more abundant in rugged areas protected from anthropogenic development. Wolverines were less likely to occur at sites with oil and gas exploration, forest harvest, or burned areas, even after accounting for the effect of topography. The relative paucity of wolverines in human-impacted portions of this range edge suggests that effective conservation requires managing landscape development, and research on the proximal mechanisms behind this relationship.

Fisher et al. 2013. Wolverines (*Gulo gulo luscus*) on the Rocky Mountain slopes: natural heterogeneity and landscape alteration as predictors of distribution. *Can. J. Zool.* 91: 706-716 (2013). Accordingly, the agencies can no longer in good faith ignore the impacts on wolverine from oil and gas exploration, forest harvest, or burning. The agencies are obligated to conserve the wolverine, and to do that effectively requires "managing landscape development," not ignoring it and pretending it poses no threats to wolverines.

Additionally, extensive on-the-ground wolverine tracking efforts in the Helena -Lewis and Clark National Forest have disproven the Copeland model's assumptions of wolverine habitat, which were adopted by the 2013 Proposed Rule and thus adopted by the programmatic biological assessment:

Wolverine expert Jeff Copeland once defined wolverine habitat as being from 200m above to 200m below timberline. We estimated timberline to be approximately 8,400 feet in the Ogden Mountain to Nevada Creek Region, based upon peaks along the nearby Continental Divide and in the Scapegoat Wilderness. We then analyzed 246 wolverine location data points (wolverine tracks, confirmed scats and hairs, and back track coordinates) from our four winters of study, representing a minimum of five wolverines (from DNA samples). The mean elevation of these points was 5,956 feet, or 745m below timberline, and the minimum elevation was 4,960 feet, or 1,058m below timberline.

A more recent analysis by Copeland mapped snow persistence over a seven-year period as an indicator of wolverine habitat. This analysis showed that most of the Ogden Mountain to Nevada Creek Region did not have persistent snow during those seven years, and presumably would not be considered good wolverine habitat. Because our wolverine use data contradict these attempts to define wolverine habitat based upon elevation and/or persistent snow, our project represents an interesting case study of wolverine behavior, and our results bring up other interesting questions.

Regardless of these questions, our data demonstrate that the Ogden Mountain to Nevada Creek Region represents valuable and heavily used wolverine habitat that would not even be considered as wolverine habitat in other analyses.



Gehman et al (April 2014). Snow-Tracking Surveys on the Helena National Forest.

The fact that wolverines were heavily using habitat that “would not even be considered as wolverine habitat” under the Copeland model is deeply troubling because the 2013 Proposed Rule and programmatic biological assessment rely so heavily on this snowpack and elevation model. To apply the precautionary principle and best available science as required by the ESA, the agencies must reexamine their heavy reliance on elevation and snow pack when modeling wolverine habitat. Finally, the same on-the-ground wolverine tracking efforts have also documented “[d]eclining detections of carnivores during the past several winters [that] coincided with large-scale logging along Telegraph Creek and the Continental Divide south of MacDonald Pass, and increased snowmobile activity in the region.” It is not plausible for the agencies to continue to argue that land management activities pose no threat to wolverine.

For these reasons, the agencies must reinitiate programmatic ESA consultation on wolverine because there is new information that reveals effects on wolverine that have not yet been considered. Alternatively, or in addition, the programmatic ESA consultation violates the ESA for failure to apply the best available science. Alternatively or in addition, the agencies must address this new information/best available science during Project-level consultations.

## **5. BULL TROUT CRITICAL HABITAT - PROJECT**

The Burnt Fork of the Bitterroot River is bull trout critical habitat. It is within the Bitterroot River Critical Habitat Sub-Unit, which is within the larger Clark Fork River Basin Critical Habitat Unit (Unit 31). The action area portion of the Burnt Fork is classified as spawning and rearing (SR) habitat. As part of the Clark Fork River Basin Critical Habitat Unit, critical habitat in the Gold-Butterfly action area is important for maintaining bull trout distribution within this unique geographic region that represents the evolutionary heart of the migratory adfluvial form of bull trout. Currently, Primary Constituent Elements (PCEs) of bull trout critical habitat in the Project area are not providing their intended recovery function and active restoration is needed for recovery of the species. FWS finds: “all PCEs in the action area are FUR [functioning at unacceptable risk], meaning they are below optimal conditions and are not fully providing their intended recovery function.”

The Forest Service states: “Bitterroot N.F. fisheries staff have documented the effects of both designated and dispersed recreation areas on riparian and instream conditions in the planning area, and in particular, the two-mile long section of the Burnt Fork near the Gold Creek campground and along the 312 road between the campground and the current Burnt Fork trailhead. The establishment of new horse campsites adjacent to the RHCA along the Burnt Fork increases the risk of recreation-induced indirect effects to bull trout critical habitat and the populations of bull trout that occupy the area. Although the footprint of the actual campsites would be small, based on use patterns observed elsewhere in the corridor and in other sites on the Forest, it is expected that some trees in the surrounding RHCA would be felled for firewood, reducing current and future shading and supplies of large woody debris. Stock use of the RHCA for travel, staking, watering, or grazing would adversely affect floodplain soils and generate new trails which would encourage additional use, and destabilize sensitive streambanks along the Burnt Fork. The proposed project includes design features intended to reduce or modify patterns of recreation use associated with the proposal, including placement of signs at the edge of the RHCA prohibiting fuelwood cutting; however, monitoring elsewhere on both the Burnt Fork and other locations throughout the Forest has shown that fuelwood cutting and firewood gathering persist even with signage.” Accordingly, the Forest Service acknowledges the “[p]otential for DEGRAD[ing critical habitat] due to

increase in recreation use adjacent to the Burnt Fork RHCA in the Gold Creek campground.”

The Forest Service concedes that the Project is likely to adversely affect bull trout. However, the Forest Service reached a determination of “Not Likely to Adversely Affect” for bull trout critical habitat. The Forest Service states: “Activities that release sediment (e.g., culvert removals) would have temporary effects adverse effects on streambanks and vegetation and long term benefits. Closure of the FSR 312 road would reduce recreation impacts to 3.7 miles of critical habitat on the Burnt Fork.”

However, the FWS’s ESA Section 7 Handbook states:

**Is likely to adversely affect** - the appropriate finding in a biological assessment (or conclusion during informal consultation) if any adverse effect to listed species may occur as a direct or indirect result of the proposed action or its interrelated or interdependent actions, and the effect is not: discountable, insignificant, or beneficial (see definition of “is not likely to adversely affect”). In the event the overall effect of the proposed action is beneficial to the listed species, but is also likely to cause some adverse effects, then the proposed action “is likely to adversely affect” the listed species. If incidental take is anticipated to occur as a result of the proposed action, an “is likely to adversely affect” determination should be made. An “is likely to adversely affect” determination requires the initiation of formal section 7 consultation. [Clarification of usage]

Due to the fact that the Forest Service concedes that the Project may have temporary adverse effects on bull trout critical habitat from activities that release sediment, and may degrade bull trout critical habitat due to the increase in recreational use in the Burnt Fork RCA, the conclusion for the Project must be “likely to adversely affect” because “the overall effect of the proposed action is beneficial to the listed species, but is also likely to cause some adverse effects.” Accordingly, the Forest Service must engage in formal consultation with FWS regarding bull trout critical habitat, resulting in a biological opinion that determines whether bull trout critical habitat will be adversely modified by the Project. The failure to conduct formal consultation for bull trout critical habitat violates the ESA.

#### CONCLUSION

If the violations of law described above are not cured within 60 days, Notifiers intend to file suit for declaratory and injunctive relief, as well as attorney and expert witness fees and costs.

Sincerely,

*/s/ Rebecca K. Smith*

Rebecca K. Smith, Counsel for Notifiers