WildEarth GUARDIANS
A FORCE FOR NATURE

September 14, 2020

Via Email and Certified Mail

Secretary David Bernhardt
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Forest Supervisor Rodney Smoldon
Colville National Forest
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Colville, Washington 99114
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Chief Vicki Christiansen
U.S. Forest Service
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Re: Sixty-Day Notice of Intent to Sue the U.S. Forest Service for Violating Section 7 of the Endangered Species Act Regarding the Agency's Modifications to the Vehicle Class Designations and Motor Vehicle Use Maps for the Colville National Forest.

Dear Secretary Bernhardt, Chief Christiansen, and Supervisor Smoldon:

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 WildEarth Guardians and Conservation Northwest 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, by failing to consult or failing to reinitiate consultation before deciding to modify the vehicle class designations and the motor vehicle use maps applicable to the Colville National Forest. The Forest Service also violated Section 7 of the ESA by failing to ensure that those actions are not likely to jeopardize the continued existence of species protected by the ESA, or result in the destruction or adverse modification of critical habitat designated under the ESA, before making those modifications. *See* 16 U.S.C. § 1536(a)(2). WildEarth Guardians and Conservation Northwest intend to sue the Forest Service after the 60-day period has run unless the violations described in this notice are remedied. Kampmeier & Knutsen PLLC represents WildEarth Guardians and Conservation Northwest in this matter and any response to this notice of intent to sue should be directed to us at the addresses listed below.

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

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Portland, OR 97213

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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 the U.S. Fish and Wildlife Service ("FWS") or NOAA Fisheries (collectively, "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).

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 species listed as threatened or endangered under the ESA may be present in the area of agency action, the action agency must prepare a Biological Assessment ("BA") to determine whether a 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 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). According to the Services' 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 must complete a "biological opinion" ("BiOp") to determine whether the activity will jeopardize a 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).

An agency's ESA 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 in some circumstances. 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

Colville National Forest Motor Vehicle Use Map

In 2008, the Forest Service amended the 1988 Colville Forest Plan to clarify management direction to allow motor vehicle use only on designated roads, trails, and areas as required by the 2005 Travel Management Rule, 70 Fed. Reg. 68,264 (Nov. 9, 2005) (codified at 36 C.F.R. pt. 212, 251, 261, and 295). *See* April 10, 2008, Decision Notice & Finding of No Significant Impact for Forest Plan Amendment #31 – Clarification of Forest Plan Direction Regarding Motor Vehicle Use. The Forest Service requested informal consultation based on its 2008 Biological Evaluation that determined Amendment #31 was not likely to adversely affect gray wolf, grizzly bear, Canada lynx, woodland caribou, bull trout, and designated bull trout critical habitat. On April 1, 2008, FWS concurred with the Biological Evaluation that Amendment #31 was "not likely to adversely affect" gray wolf, grizzly bear, Canada lynx, woodland caribou, bull trout, or designated bull trout critical habitat. The FWS based its concurrence on the fact that habitat conditions for bull trout would improve with restricted motor vehicle use in riparian and stream habitat, and there would not be any adverse effects to designated bull trout critical habitat. FWS noted that its concurrence was "contingent upon implementing the project as described in the" Biological Evaluation, and the "project should be re-analyzed 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 in this consultation."

In 2019, the Colville National Forest issued an addendum to the 2017 motor vehicle use maps ("MVUMs") for the Colville National Forest that changed the vehicle use class designations for 26 road segments from "Roads Open to Highway Legal Vehicles" to "Roads Open to All Vehicles." *See* Attachment 1 ("Rationale and Justification for MVUM changes 2019" signed by

Forest Supervisor Rodney Smoldon); Attachment 2 (maps of changes). The new MVUM designations opened 128 miles of roads to all vehicle uses, including wheeled all-terrain vehicles ("WATVs"). On April 1, 2020 the Forest Service published new MVUMs reflecting these changed designations. *See* U.S. Forest Service, Motor Vehicle Use on the Colville National Forest (providing hyperlinks to MVUMs), available at https://www.fs.usda.gov/detail/colville/landmanagement/projects/?cid=fsbdev3_035243&fbclid=IwAR2v2NUVuDfaimYQ7qPQNBjr-_tQl0rrcO7JxQVH72N3QuJZIldlru32RRs (last accessed Sept. 4, 2020).

The new designations created loop rides, made connections to longer routes, and increased motorized vehicle access to the Colville National Forest. *See* Attachment 1. In turn, the Forest Service anticipated the new designations would create interest in the rides and connect areas of interest, recreational locations, towns, and other locations. *Id.* This would induce increased use of the roads by off-road vehicles including WATVs. *Compare* Attachment 1 (describing "interest and intent to increase the available opportunities for the use of off highway vehicles") *with* U.S. Forest Service Engineering Reports, *available at* https://www.fs.usda.gov/detailfull/colville/home/?cid=fseprd658192&width=full (last accessed Sept. 9, 2020) (analyzing the road segments prior to change in designation, many of which note average daily traffic being less than one vehicle per day).

Combined with increased popularity of riding off-road vehicles, the new designations will result in significant impacts to wildlife and its habitat on the forest. Best available science shows that motorized recreational use can harm water quality and soils, disrupt quiet landscapes, and harm wildlife and its habitat. *See, e.g.*, Attachment 3 (Switalski and Jones, 2012, Off-road vehicle best management practices for forestlands: A review of scientific literature and guidance for managers). Off-road vehicles including WATVs are designed, manufactured, and sold for off road travel. Motorized recreational use off of roads results in more direct impacts. *See, e.g.*, Attachment 4 (U.S. Forest Service, June 16, 2020 press release, Damage to South-End Meadows Slows Restoration Project on Colville National Forest) (documenting increased damage to meadows from motor vehicles operating off designated roads). Thus, in addition to the impacts from motorized recreational use of roads, the new designations and subsequent increase in use is likely to result in increased risk of illegal, off-road use and more direct impacts to wildlife and its habitat.

Species that occur on the Colville National Forest include, but are not limited to, threatened Canada lynx, threatened bull trout and its designated critical habitat, threatened grizzly bear, endangered woodland caribou and designated critical habitat, threatened yellow-billed cuckoo, as well as candidate species wolverine. These species are affected by motorized use, including WATVs, as further described below. *See also* Attachment 3. Thus, the Forest Service was required to consult over the impacts of the new vehicle class designations adopted in the 2019 addendum to the 2017 MVUMs, and published in the 2020 MVUMs, before issuing those maps. To the extent the Forest Service previously consulted over some of the designation decisions, it must reinitiate consultation because the Forest Service modified the action in a manner that causes effects to the listed species or critical habitat that was not considered in the prior consultation.

Canada Lynx

The Forest Service's decision to change the designation of certain roads on the Colville from open to highway legal vehicles only, to open to all vehicles (including WATVs), may impact Canada

lynx. In 2000, the FWS listed Canada lynx as threatened with extinction under the ESA in part of its range. 65 Fed. Reg. 16,052 (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 16,052-16,086. 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).

Lynx in the contiguous United States may exist as several smaller, effectively isolated populations. The primary factor driving lynx behavior and distribution is the distribution of snowshoe hare, their primary prey. 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]

The FWS's 2005 Recovery Outline for lynx identified core, secondary, and peripheral areas based on lynx occupancy, reproduction, and use, as documented by historical and current records. Six core areas, including the Kettle Range and Wedge, were identified in the lower 48 states to indicate where long-term persistence of lynx had been documented and are important for lynx recovery (*see* 2017 Biological Opinion for the Colville National Forest Plan Revision at 257):

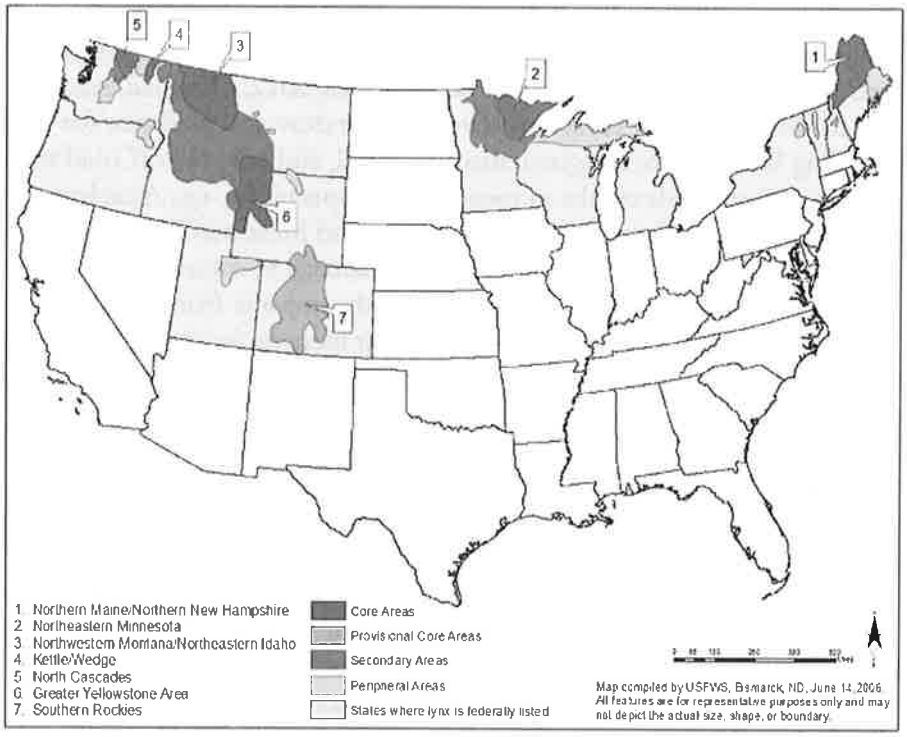


Figure 14. Areas identified as core, secondary, and peripheral as depicted in the Canada Lynx Recovery Outline (USFWS 2005; Figure 3.1 in ILBT 2013 p.37).

[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 Colville National Forest. *Id.* at 4.

Lynx have been documented in the northeastern corner of Washington state (McKelvey et al. 2000). Lynx tracks and individual lynx have been consistently observed on the Colville National Forest (Koehler et al. 2008, WDFW and USFS 2011). In the summers of 2016 and 2017, lynx were captured on remote camera while surveys were being conducted in the Kettle Range. There are 37 Lynx Analysis Units (LAUs) on the Colville, 13 of which are within the Kettle-Wedge Core Area (*see* 2017 Biological Opinion for the Colville National Forest Plan Revision at 265):

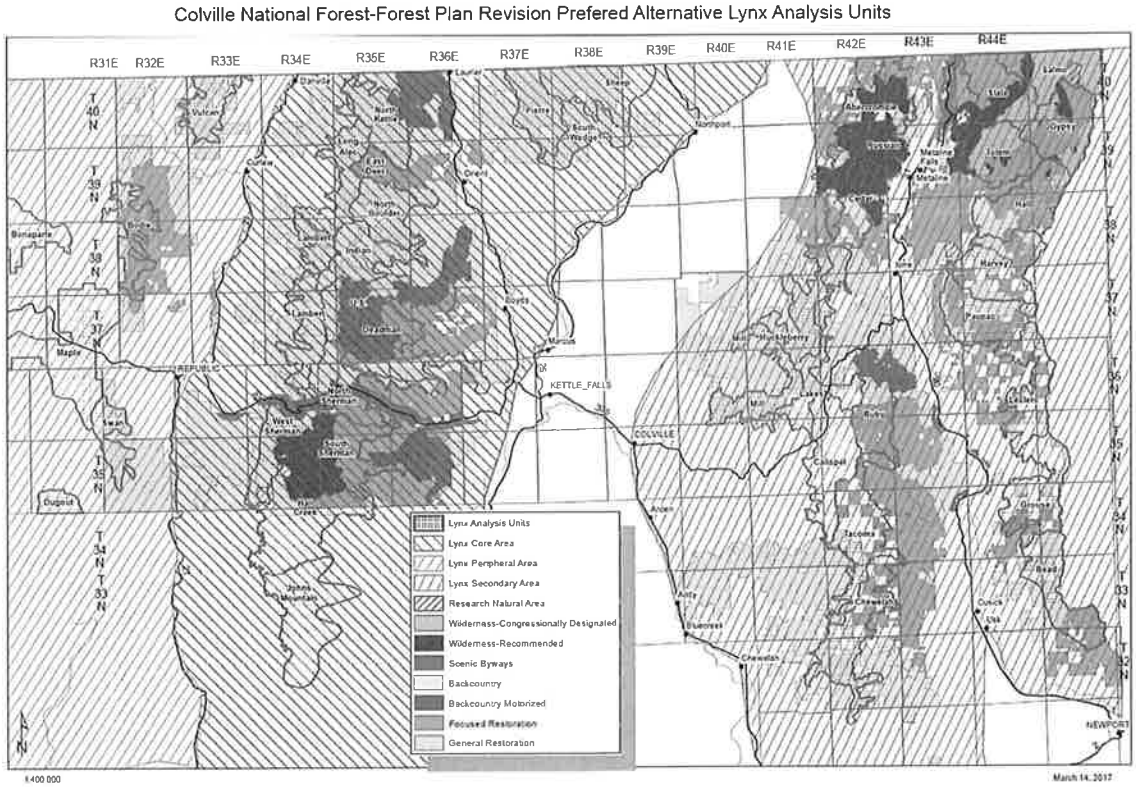


Figure 15. CNF Plan MAs and LAUs.

LAUs are meant to facilitate analysis and monitoring of the effects of management actions on lynx habitat.

The LCAS divided threats to lynx and lynx habitat into two tiers: those that have the potential to negatively affect lynx populations and habitat, and those that may affect individual lynx but are not likely to have a substantial effect on lynx populations and lynx habitat. The first tier includes climate change, vegetation management, wildland fire, and fragmentation of habitat. The second tier includes incidental trapping, recreation, minerals and energy exploration and development, illegal shooting, backcountry roads and trails, and domestic livestock grazing.

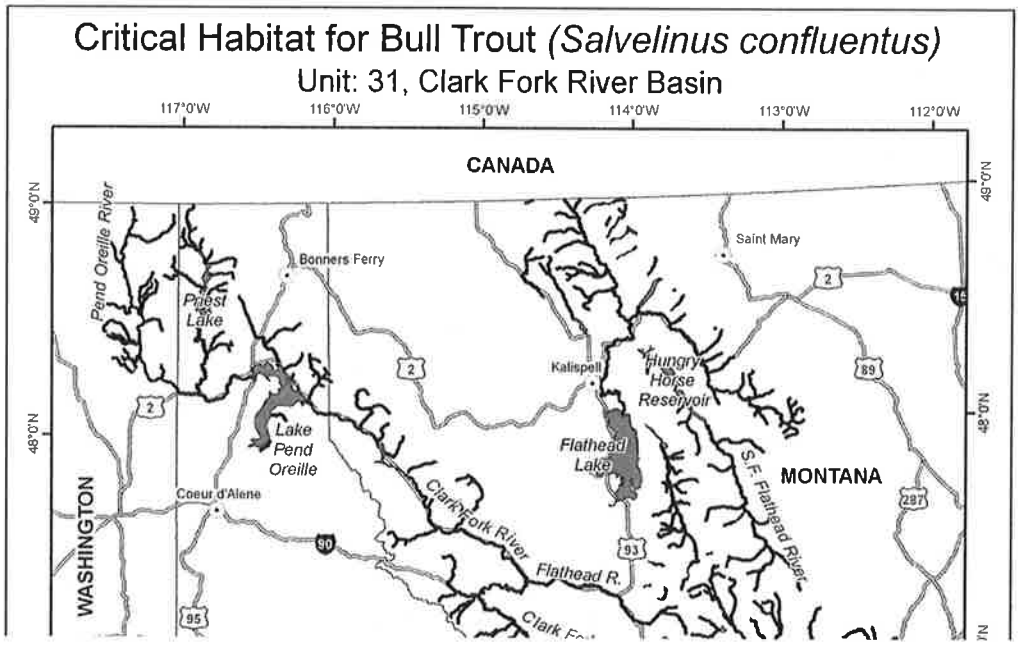
Recreational motorized use of roads may impact Canada lynx in numerous ways, including but not limited to habitat fragmentation, displacement, noise disruption, and vehicle collision. Habitat fragmentation occurs when recreational activity displaces lynx from its habitat and impair lynx movement and habitat connectivity. Because boreal forests along the southern part of lynx range are inherently patchier, any additional impact from human actions is exponentially greater.

Fragmentation can result in a reduction in snowshoe hare habitat and thus snowshoe hare densities and use by lynx (Koehler 1990a, Mowat et al. 2000. Forest roads can also become sources of lynx mortality at high traffic volumes and speeds. In addition, human access via forest roads allows for more hunting, and as a result increases the risk of incidental lynx mortality.

Bull Trout and its Critical Habitat

The Forest Service's decision to change the designation of certain roads on the Colville from open to highway legal vehicles to open to all vehicles, including WATVs, may impact bull trout and its designated critical habitat. In November 1999, all populations of bull trout within the coterminous United States were listed as a threatened species under the ESA. 64 Fed. Reg. 58910 (Nov. 1, 1999). The FWS designated critical habitat for bull trout most recently on October 18, 2010. 75 Fed. Reg. 63898 (Oct. 18, 2010). The rule designated a total of 19,729 miles of stream and 488,252 acres of reservoirs and lakes in the States of Washington, Oregon, Nevada, Idaho, and Montana as critical habitat for the bull trout. The 2015 recovery plan for bull trout identified historical habitat loss and fragmentation, interaction with nonnative species, and fish passage issues as the most significant primary threat factors affecting bull trout. *See* U.S. Fish and Wildlife Service, 2015 Recovery plan for the coterminous United States population of bull trout (*Salvelinus confluentus*), page iv. The Colville National Forest falls within two recovery units in the 2015 bull trout recovery plan: the Mid-Columbia and the Columbia Headwaters.

The Forest Service took Environmental DNA (eDNA) samples in 2015 from all streams on the Colville with bull trout critical habitat and detected bull trout in the West Branch of LeClerc Creek. Bull trout have been observed in Cedar Creek, South Fork Salmo River, Slate Creek, Sullivan Creek, Cedar Creek (Ione Creek), LeClerc Creek, Mill Creek, and Indian Creek. The eastern portion of the Colville has designated bull trout critical habitat in Unit 31, Clark Fork River Basin (*see* 75 Fed. Reg. 63,898, 64,061-64,067):



See also Attachment 5, 2017 Biological Opinion for the Colville National Forest Land and Resource Management Plan Revision, page 155 (Figure 7, map of Critical Habitat and [Management Areas] in the Pend Oreille River Watershed).

Roads often contribute to degraded baseline conditions in watersheds containing bull trout. *See, e.g.*, 2017 Biological Opinion for the Colville Forest Plan Revision at 139-140. Roads are a primary source of sediment impacts in watersheds with roads. Accumulation of fine sediment is detrimental to bull trout habitat. Lee et al. (1997) found a pattern of decreasing populations of bull trout with increasing road density. Sediment delivered to streams is greatest in riparian areas where roads cross the streams. Fords and approaches to the crossings deliver sediment directly to streams. Culverts can produce a large amount of sediment if the culvert plugs and fails. Travel management decisions affecting roads and trails are most likely to effect substrate embeddedness[2] and stream bank condition.[3] Plus roads and trails paralleling streams can interfere with large wood reaching the stream and cause increased erosion and decreased stream bank condition.

As just one example of how the Forest Service's change to vehicle class designations may impact bull trout and its designated critical habitat, the Forest Service newly designated Forest Road No. 1935000 as open to WATVs and other vehicles. Forest Road No. 1935000 runs adjacent to and crosses several times Harvey Creek, it crosses West Branch LeClerc Creek, it crosses Saucon Creek and several of its tributaries, and it crosses Middle Branch LeClerk Creek. Harvey Creek and LeClerk Creek are designated bull trout critical habitat. As another example, the Forest Service designated Forest Road No. 1200000 as open to WATVs and other vehicles and it crosses Mill Creek several times. Mill Creek is designated bull trout critical habitat and a tributary to Pend Oreille River which is also designated bull trout critical habitat. All of these streams are within watersheds identified by the Forest Service as either "Functioning at Risk" or "Not Properly Functioning" (*see* 2017 Biological Opinion for the Colville National Forest Plan Revision at 113):

[2] Which can be measured as change in total acreage open to motorized use, based on the assumption that embeddedness is related to the total area susceptible to erosion.

[3] Which can be measured as an inverse of stream crossings.

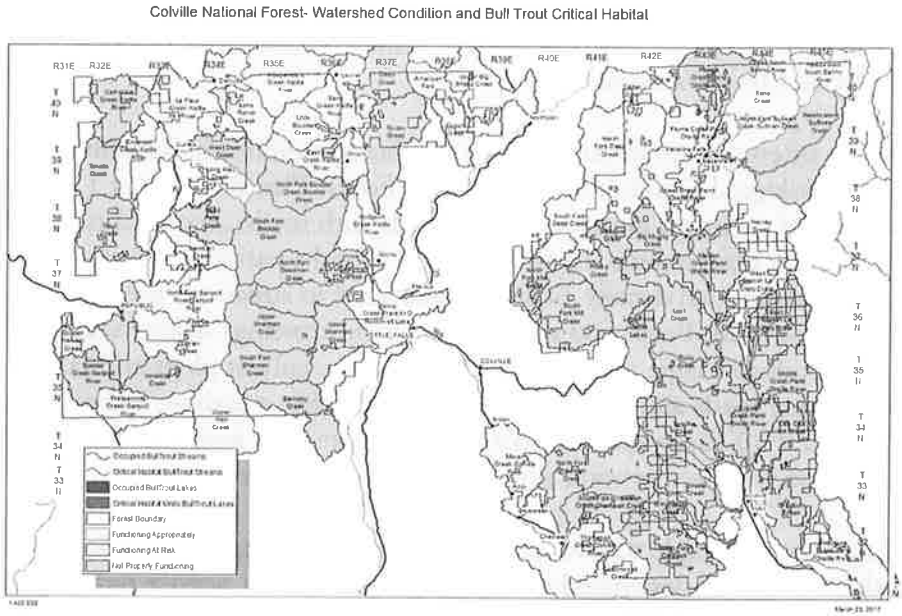


Figure 4. Functioning Condition by Watershed and Including Critical Habitat (from Figure 7 in BA, p.126).

Some of the stream segments are also identified as water quality impaired for stream temperature or dissolved oxygen (*see* 2017 Biological Opinion for the Colville National Forest Plan Revision at 123):

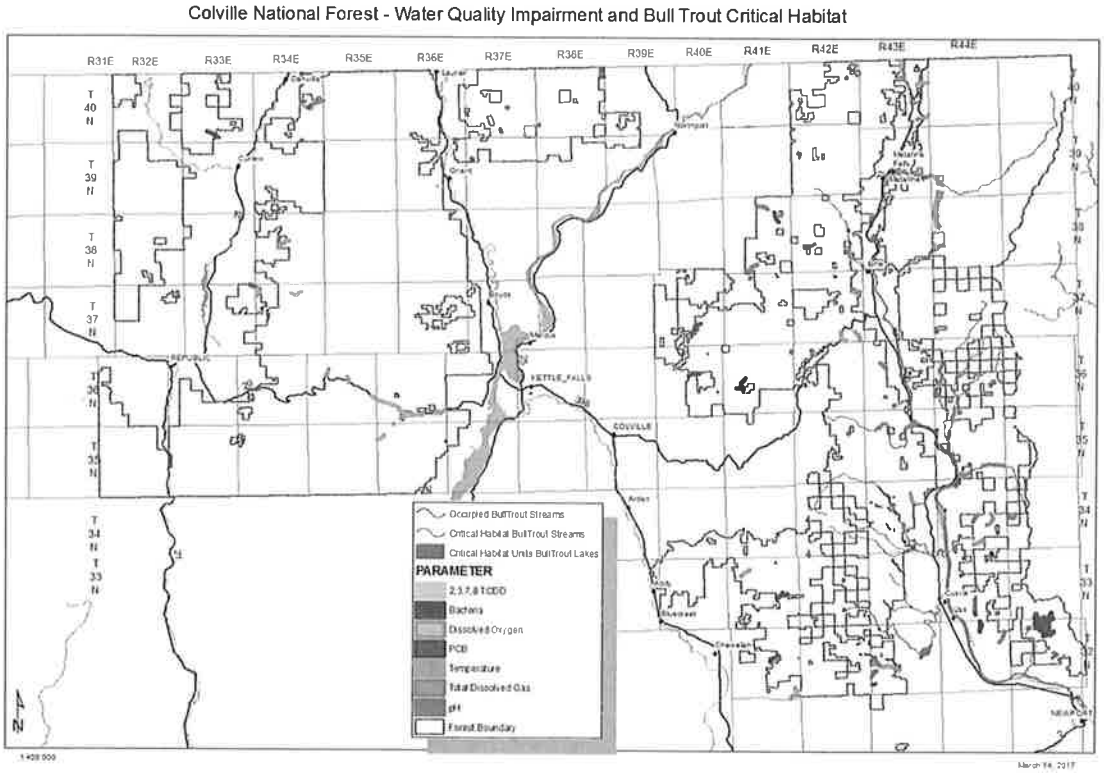


Figure 5. Water Quality Impairment and Bull Trout Critical Habitat.

The West Branch and East Branches LeClerc Creek are priority watersheds and also key watersheds. *See* 2017 Biological Opinion for the Colville National Forest Plan Revision at 134. Key watersheds are the priority for restoration. *Id.* (emphasis in original). Priority watersheds are used to target implementation of short-term, opportunistic restoration work. *Id.* The new MVUM designations may affect these streams and the creatures that live there, including bull trout. Accordingly, the FS should have consulted under the ESA to evaluate how opening new roads to WATV use may affect bull trout and other species.

Grizzly Bears

The Forest Service's decision to change the designation of certain roads on the Colville from open to highway legal vehicles only, to open to all vehicles (including WATVs), may impact grizzly bears. In 1975 the FWS listed all grizzly bears in the contiguous United States as a threatened species under the ESA. 40 Fed. Reg. 31,734 (July 28, 1975). In the 1975 listing, FWS determined grizzly bears in the contiguous United States were threatened by a combination of factors. 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.

In the 1993 Grizzly Bear Recovery Plan, the FWS identified six recovery areas grizzly bears are known to have inhabited and where suitable habitat available for grizzly bear conservation remains, including: (1) the Northern Continental Divide Ecosystem (NCDE); (2) the Greater Yellowstone Ecosystem; (3) the Cabinet-Yaak Ecosystem; (4) the Selkirk Mountains Ecosystem; (5) the Bitterroot Ecosystem; and (6) the North Cascades Ecosystem. *See* U.S. Fish and Wildlife Service, 1993 Grizzly Bear Recovery Plan. The Selkirk Ecosystem Recovery Zone includes approximately 2,200 square miles of northeastern Washington, northern Idaho, and southern British Columbia, Canada. The grizzly bear population in the Selkirk Ecosystem Recovery Area is estimated at approximately 80 grizzly bears.

The Selkirk Ecosystem Recovery Area has three grizzly bear management units ("GBMU") within the Colville National Forest: LeClerc, Salmo-Priest, and Sullivan-Hughes. *See* Attachment 6, 2017 Biological Opinion for the Colville Forest Plan Revision at 233 (Figure 12, map of Management Areas, GBMUs, and Core Areas). Threats to grizzly bears in the Selkirk Ecosystem include motorized access, human-caused mortality, small population size, and population fragmentation that resulted in genetic isolation. *Id.* at 228. Forest roads overlap with the three GBMUs on the Colville National Forest (2017 Biological Opinion for the Colville Forest Plan Revision at 241):

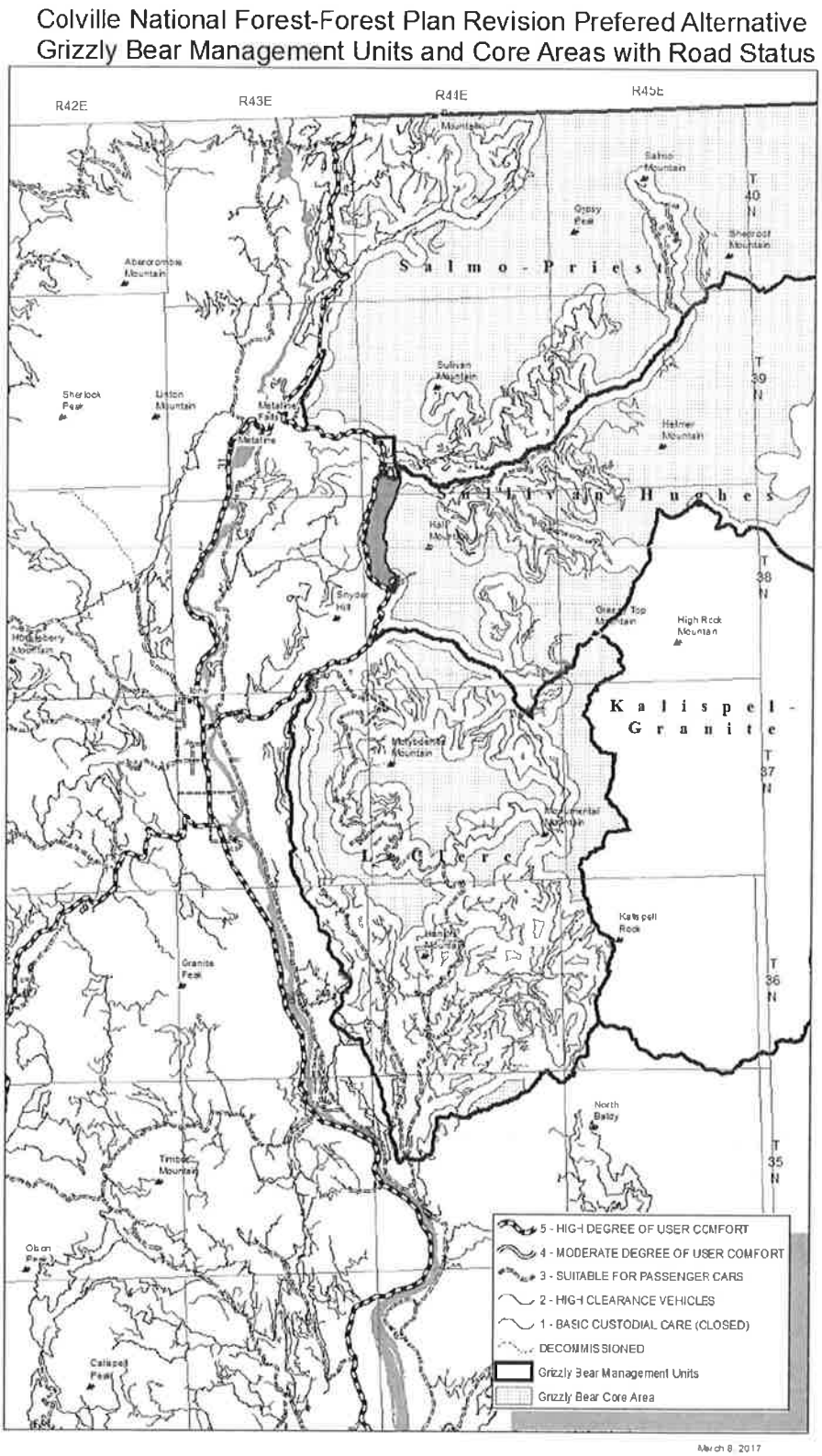


Figure 13. CNF Plan GBMUs and Roads

The FWS considers the management of roads to be one of the most important variables in managing grizzly bear habitat. Best available science makes clear that the presence of roads can have negative effects on natural systems and wildlife populations, including grizzly bears. *See* Proctor, et al. (2020). Harmful impacts to grizzly bears from roads include (1) increased human-caused mortality, (2) habitat displacement, (3) habitat fragmentation, and (4) direct habitat loss. *Id.* Grizzly bears are adversely impacted by roads through direct mortality from vehicle strikes and illegal harvest, and indirect mortality resulting from habituation to humans. Grizzly bears are also adversely impacted by roads through avoidance of key habitat as they attempt to move away from roads and road activity; through displacement from key habitat as they attempt to move away from roads and road activity; and through modification and fragmentation of their core habitat due to roads and road construction. The presence of roads to human population centers and the presence of dispersed motorized recreation in habitat around roads poses risks to grizzly bears. Human activities can displace grizzly bears from seasonal habitats, especially in riparian areas and wet meadows where recreation and grizzly bears may overlap seasonally. *See* 2017 Biological Opinion for the Colville Forest Plan Revision at 243. Access management is essential to reducing mortality risk to grizzly bears. Roads may cause some grizzly bears to habituate to humans. Grizzly bears that are habituated to humans suffer increased mortality risk.

Many grizzly bears will under-use or avoid otherwise preferred habitats that are frequented by humans due to road proximity and related opportunities for human access. This represents a modification of normal grizzly bear behavior that can result in detrimental effects. Grizzly bears will avoid roads and corridors adjacent to roads. Grizzly bears will also avoid roads and adjacent corridors even when the area contains preferred habitat for breeding, feeding, shelter, and reproduction.

Mace and Manley (1993) reported use of habitat by all sex and age classes of grizzly bears was less than expected where total road densities exceeded two miles per square mile. Mace and Manley (1993) also found that adult grizzly bears used habitats less than expected when open motorized route density exceeded one mile per square mile. Female grizzly bears in the Mace and Manley (1993) study area tended to use habitat more than 0.5 mile from roads or trails greater than expected. Large blocks of grizzly bear habitat free from human influence are vital to grizzly bears. Managing public motorized access to grizzly bear habitat is one of the most common and effective ways to maintain a level of separation between grizzly bears and humans. *See* 2017 Biological Opinion for the Colville Forest Plan Revision at 232. These landscapes allow the species to exist under natural, free-ranging conditions. Roads are the primary threat to these large blocks of grizzly bear habitat. Roads are a primary threat because they facilitate human presence and because they fragment large swaths of habitat into smaller blocks. The new MVUM designations may affect grizzly bears. Accordingly, the FS should have consulted under the ESA to evaluate how opening new roads to WATV use may affect that species.

Woodland Caribou

The Forest Service's decision to change the designation of certain roads on the Colville from open to highway legal vehicles only, to open to all vehicles (including WATVs), may impact woodland caribou. The FWS listed the southern Selkirk subpopulation of woodland caribou as endangered under the ESA in 1984. 49 Fed. Reg. 7,390 (Feb. 29 1984). In 2012, FWS designated approximately 30,010 acres as woodland caribou critical habitat. 77 Fed. Reg. 71042 (Nov. 28, 2012). In 2019, FWS amended the listing of the southern Selkirk population of woodland caribou by

defining the southern mountain caribou distinct population segment ("DPS"). 84 Fed. Reg. 52,598 (Oct. 2, 2019). The southern Selkirk subpopulation of woodland caribou occurs in the southern Selkirk Mountains of southeastern British Columbia, northeastern Washington (in Pend Oreille County), and northern Idaho, and is the only caribou herd that ranges into the contiguous U.S. *See* Wiles, G. J. 2017, Periodic status review for the woodland caribou in Washington, Washington Department of Fish and Wildlife, Olympia, WA. *See also* Attachment 7, 2017 Biological Opinion for the Colville Forest Plan Revision at 184 (Figure 10, map of Caribou Critical Habitat and Winter Recreation).

The range of the southern mountain caribou DPS in British Columbia, Canada, and the United States has declined by 60 percent since historical arrival of Europeans in British Columbia. 84 Fed. Reg. at 52,599. Threats to the southern mountain caribou DPS include small, declining, and isolated subpopulations; recent extirpation of two subpopulations; recent modeling predicting further declines and extirpation of subpopulations; and continuing and escalating threats. *Id.* at 52,611. Threats to caribou habitat within the southern mountain DPS include forest harvest, human development, recreation, and climate change. *Id.* at 52,612. The 1994 recovery plan for woodland caribou included an objective to establish a herd in the western portion of the Selkirk Mountains in Washington. *See* U.S. Fish and Wildlife Service 1994, Recovery Plan: Selkirk Mountain Woodland Caribou.

Roads, and motorized use of roads, may disrupt woodland caribou and fragment woodland caribou habitat. 84 Fed. Reg. at 52,613; U.S. Fish and Wildlife Service, 2019, Recovery outline for the southern mountain caribou distinct population segment of woodland caribou, page 7. Increased road systems have generated more human activity and human disturbance in habitat that was previously less accessible to humans. *See* 2017 Biological Opinion for Colville Forest Plan Revision at 171. Human development and its associated infrastructure can eliminate caribou habitat, alters the distribution and abundance of other ungulate species, provides travel corridors for predators, and increases human access to habitat that was previously difficult to access. *Id.* at 175. Roads and motorized access can result in poaching and accidental kills by hunters; accidental kills by vehicles; habitat fragmentation; increased predation of caribou; and disturbance to caribou during the critical winter period. *See* 2017 Biological Opinion for Colville Forest Plan Revision at 193. The new MVUM designations may affect woodland caribou. Accordingly, the FS should have consulted under the ESA to evaluate how opening new roads to WATV use may affect that species.

Western Yellow-billed Cuckoo

The Forest Service's decision to change the designation of certain roads on the Colville from open to highway legal vehicles only, to open to all vehicles (including WATVs), may impact the Western DPS yellow-billed cuckoo. The Western DPS of the yellow-billed cuckoo was listed as threated under the ESA in 2014. 79 Fed. Reg. 59992 (Oct. 3, 2014). There is currently no recovery plan for the Western yellow-billed cuckoo. The Western DPS yellow-billed cuckoo occurs across the Western United States, including Washington (78 Fed. Reg. 61,621, 61,631 (Oct. 3, 2013)):

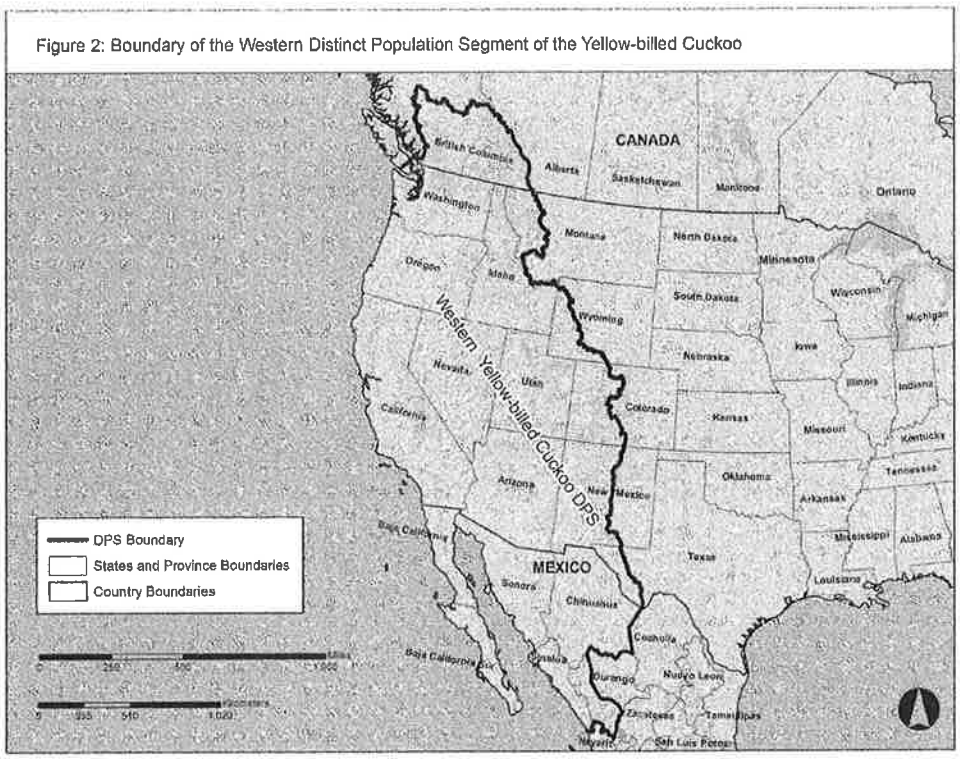


Figure 2. Western Yellow-billed Cuckoo distinct population segment boundary.

The Western yellow-billed cuckoo nests almost exclusively in low to moderate elevation multi-layered riparian woodlands that are 50 acres or larger. 78 Fed. Reg. 61,621 (Oct. 3, 2013). The greatest factor leading to the decline of the bird has been loss of habitat in its breeding range. *See* 2017 Biological Opinion for Colville Forest Plan Revision at 286. Forest activities that directly influence the quality and availability of habitat for the riparian-dependent yellow-billed cuckoo include management of forest roads, recreation sites, and vegetation treatments that occur within riparian habitats. *Id.* at 289. Altered hydrology of riverine systems from channelization by disturbance from activities associated with road use and recreation, construction, and maintenance impact the habitat by making systems less dynamic. *Id.* at 297. These activities can reduce effectiveness and connectivity of riparian habitat, disturb sensitive soils, and increase sediment delivery to streams. *Id.*

The Western DPS yellow-billed cuckoo are extremely rare in Washington. Between 1950 and 2000 there were 12 observations, 8 of which occurred in eastern Washington near the Cascades. In 2012 a bird was observed on the Little Pend Oreille National Wildlife Refuge, and in 2015 a bird was observed near Mazama, Washington. There are no known breeding Western yellow-billed cuckoo on the Colville, but there is potential habitat (*see* 2017 Biological Opinion for Colville Forest Plan Revision at 288-89):

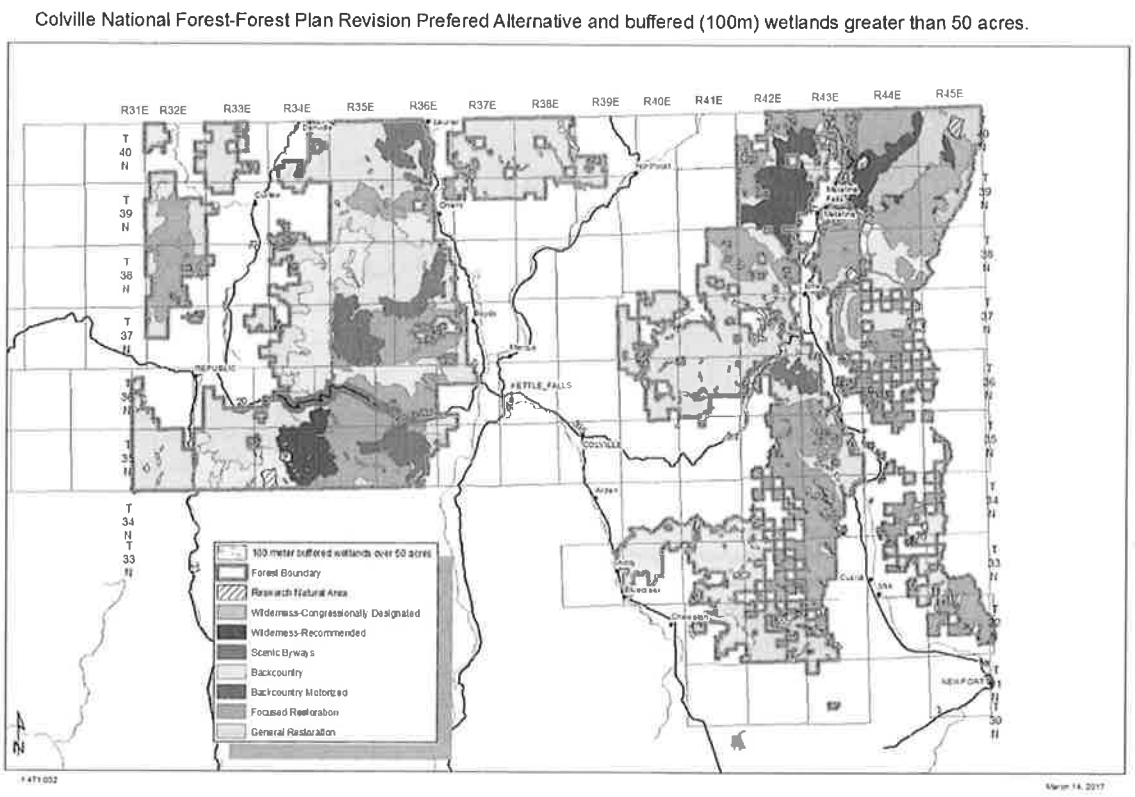


Figure 16. CNF Riparian areas greater than 50 acres in size.

The new MVUM designations may affect the western yellow-billed cuckoo. Accordingly, the FS should have consulted under the ESA to evaluate how opening new roads to WATV use may affect that species.

Wolverine

The Forest Service's decision to change the designation of certain roads on the Colville from open to highway legal vehicles only, to open to all vehicles (including WATVs), may impact 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. Trapping has been the primary cause of wolverine mortality (Banci 1994, Krebs et al. 2004, Lofroth and Ott 2007, Squires et al. 2007).

Wolverines occur on the Colville National Forest (*see* 2017 Biological Opinion for Colville Forest Plan Revision at 316):

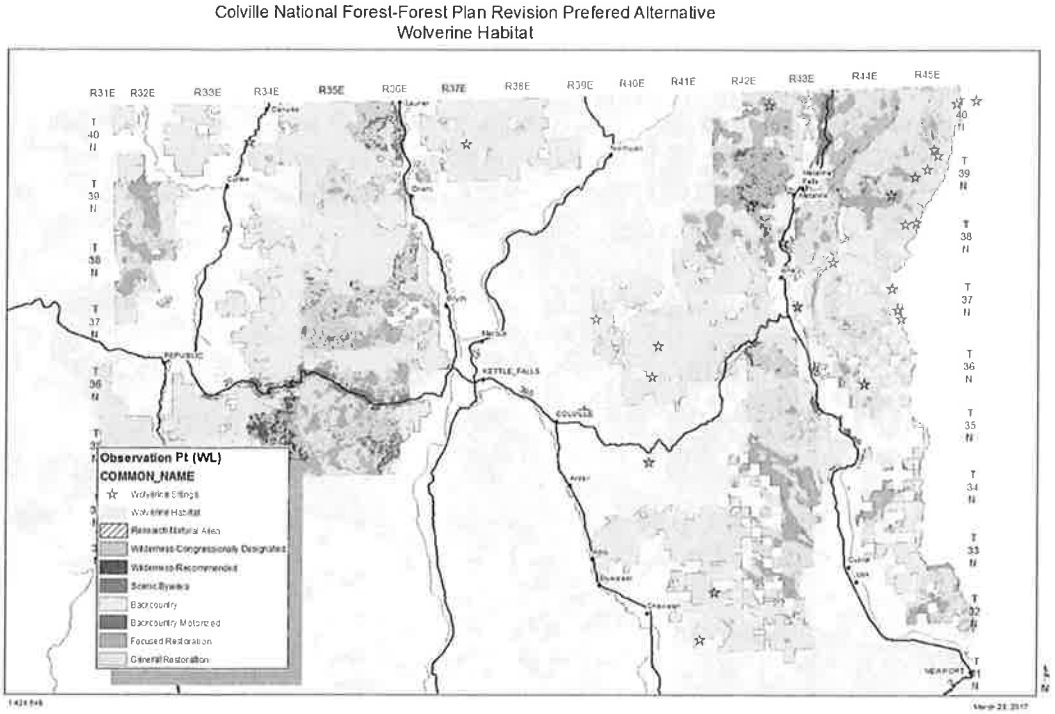


Figure 17. Potential Wolverine Habitat and Wolverine Observation Points. (Dates for the sightings were not available).

Roads – especially increased use of backcountry roads – may negatively impact wolverine. Krebs et al. (2007) found that female wolverine habitat use was negatively associated with roaded areas. May et al. (2006) found that wolverine natal dens were located away from roads and that this had a positive influence on successful reproduction. By providing increased access into the forest, roads may also increase the risk of incidental wolverine mortality due to increased trapping for other wildlife. The new MVUM designations may affect wolverine. Accordingly, the FS should have conferred under the ESA to evaluate how opening new roads to WATV use may affect that species.

ESA VIOLATIONS

The Forest Service violated Section 7 of the ESA, 16 U.S.C. § 1536, by failing to initiate and complete consultation, or to reinitiate and complete consultation, on the modifications to the vehicle use class designations and motor vehicle use maps for the Colville National Forest made in 2019 and 2020. 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 jeopardize the continued existence of any threatened or endangered species or result in the destruction or adverse modification of the critical habitat of such species. *See* 16 U.S.C. § 1536(a)(2).

Here, the modifications to the vehicle use class designations and motor vehicle use maps for the Colville National Forest made in 2019 and 2020 authorize new vehicle uses and will induce increased vehicle traffic on approximately 128 miles of roads in the Colville National Forest. By authorizing new vehicle traffic on those roads, the Colville National Forest has authorized and caused increased vehicle traffic on those and other roads in the forest. These Forest Service authorizations may affect ESA listed species that inhabit and use the Colville National Forest, including but not limited to: threatened Canada lynx, threatened bull trout and its designated critical

habitat, threatened grizzly bear, endangered woodland caribou, threatened yellow-billed cuckoo, as well as candidate species wolverine. The Forest Service's failure to initiate and complete consultation, or to reinitiate and complete consultation, on these actions violates the procedural consultation and conferral requirements of ESA section 7. It also violates the substantive requirements of that section by failing to ensure that the Forest Service's actions do not jeopardize any species protected by the ESA or adversely modify any critical habitat designated under the ESA. These violations are significant violations of the ESA.

Additionally, the Forest Service violated Section 7(d) of the ESA by adopting and implementing modifications to the vehicle use class designations and motor vehicle use maps for the Colville National Forest in 2019 and 2020 before completing adequate and lawful consultation. Such actions constitute an "irreversible and irretrievable commitment of resources" and warrant an injunction. *See* 16 U.S.C. §1536(d).

At the conclusion of the 60-day notice period initiated by this letter, WildEarth Guardians and Conservation Northwest intend to file a lawsuit against the U.S. Forest Service, the individuals named above, and the individuals that administer components of that agency, under the citizen suit provisions of the Endangered Species Act, 16 U.S.C. § 1540. WildEarth Guardians and Conservation Northwest will seek declaratory and injunctive relief to prevent further ESA violations and such other relief as is permitted by law, including recovery of plaintiff's costs, attorneys' fees, and expert witness fees.

Sincerely,

Kampmeier & Knutsen, PLLC

By: _____
Paul A. Kampmeier

WildEarth Guardians

By: _____
Marla Fox

cc: Barry Thom, Regional Administrator, NOAA Fisheries, West Coast Region, 1201 Northeast Lloyd Boulevard, Suite 1100, Portland, Oregon 97232

State Supervisor Brad Thompson, Washington Fish and Wildlife Office, U.S. Fish and Wildlife Service, 510 Desmond Drive SE, Suite 102, Lacey, Washington 98503

William Barr, U.S. Attorney General