

AKLAND ND

LAW FIRM, PLLC

317 E. Spruce Street • PO Box 7274 • Missoula MT 59807 • 406 544-9863
aklandlawfirm@gmail.com

October 23, 2020

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

via certified mail

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

Director, U.S. Fish and Wildlife Service
1849 C. Street, NW
Washington, DC 20240

**RE: 60-Day Notice of Intent to Sue under the Endangered Species Act:
Revised Biological Opinion for the Soldier-Butler Project, Lolo National Forest**

You are hereby notified that Alliance for the Wild Rockies intends 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. Notifier will file suit after the 60 day period has run unless the violations described in this notice are remedied. The name, address and phone number of the Notifier giving notice of intent to sue is as follows:

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

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

Kristine M. Akland, Attorney at Law
Akland Law Firm, PLLC
P.O. Box 7472
Missoula, MT 59807
Tel: (406) 544-9863



NOV 02 2020

STATEMENT OF LAW

The grizzly bear was listed pursuant to the Endangered Species Act (ESA) (16 U.S.C. § 1531 et seq.) in the lower 48 states as a threatened species in 1975. 40 Fed. Reg. 31,734 (1975). A “threatened” species is “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20). The ESA provides for the “conservation of the ecosystems upon which threatened and endangered species depend.” *Id.* § 1531(b) “Conservation” means “the use of all methods and procedures which are necessary to bring any . . . species to the point at which the measures provided pursuant to this chapter are no longer necessary.” *Id.* § 1532(3).

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 this 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 (FWS), to evaluate the consequences of a proposed action on a listed species. 16 U.S.C. § 1536(a)(2).

If the expert agency’s 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.” Under the terms of Section 7(b)(4) and Section 7(o)(2), a taking that is incidental to and not intended as part of the agency action is not considered to be a prohibited taking under the ESA provided that such taking is in compliance 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 the 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.

The measures in an incidental take statement are non-discretionary and must be undertaken by the action agency so that they become binding conditions of any grant or permit issued, as appropriate, for the exemption in Section 7(o)(2) to apply. The action agency has a continuing duty to regulate the activity that is covered by this incidental take statement. If the action agency (1) fails to assume and implement the terms and conditions or (2) fails to require the applicant to adhere to the terms and conditions of the incidental take statement through enforceable terms that are added to the permit or grant document, the protective coverage of Section 7(o)(2) may lapse. To monitor the impact of incidental take, the action agency must report the progress of the action and its impact on the species to the expert agency as specified in the incidental take statement. 50 CFR § 402.14(i)(3).

If Section 7 consultation is completed, but later becomes inadequate, the agencies must reinitiate consultation. 50 C.F.R. § 402.16 (2015). “Reinitiation of formal consultation is required . . . [i]f 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.” *Id.* § 402.16(b). “If the data is new and the new data may affect the jeopardy or critical habitat analysis, then the FWS was obligated to reinitiate consultation pursuant to 50 C.F.R. § 402.16.” *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv.*, 378 F.3d 1059, 1077 (9th Cir. 2004). The duty to reinitiate consultation lies “with both the action agency and the consulting agency.” *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1229 (9th Cir. 2008).

ESA § 9 requires agencies ensure that proposed actions do not result in the “take” of any listed species. 16 U.S.C. § 1538(a)(1)(B). “Take” is defined under the ESA to mean “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or attempt to engage in any such conduct.” 16 U.S.C. § 1532(19).

PROCEDURAL HISTORY

The United States Forest Service (USFS) signed the Soldier-Butler Final Decision Notice and Finding of No Significant Impact authorizing the Soldier-Butler Project on April 17, 2020. On February 26, 2020, the United States Fish and Wildlife Service (FWS) issued a Biological Opinion and Incidental Take Statement for the Soldier-Butler Project. On June 23, 2020, Alliance for the Wild Rockies filed a 60-Day Notice of Intent to Sue under the ESA’s citizen suit provision, alleging violations of the ESA related to open road density and survival standards for female grizzly bears; the Forest Service’s failure to base its decision on the “best scientific and commercial data;” violations of ESA § 9 prohibitions on taking; its failure to analyze the nexus between the Ninemile DCA and the Grizzly Bear Recovery Plan and Conservation Strategy; and the Forest Service’s failure to consider other important aspects of the problem, such as the impact of illegal motorized use of administratively closed roads and a history of road closure violations. The USFS reinitiated consultation with the FWS on August 10, 2020. A Revised Biological Opinion, issued on October 2, 2020, indicated that the proposed action has not changed.

The Soldier-Butler Project area is fully within the Lolo National Forest and is governed by the Lolo National Forest Plan. The Lolo National Forest encompasses portions of three grizzly bear recovery areas: the Northern Continental Divide, Cabinet-Yaak, and Bitterroot ecosystems. The Project area is located in between all of these recovery areas, and thus provides a critical linkage area between them. The Soldier Butler Project falls within the area considered in the Forest Plan amendments related to the Northern Continental Divide Ecosystem (NCDE) Conservation Strategy. In particular, the Project falls within the Ninemile Demographic Connectivity Area (DCA). Habitat protections for the Ninemile DCA “focus on limiting linear miles of open road and maintaining current IRAs. [Inventoried Roadless Areas] as stepping stones to other ecosystems.”

The NCDE Amendments were signed in December of 2018 and amended the Lolo National Forest Plan with standards to protect grizzly bears. The NCDE Amendments underwent formal consultation in 2017. In the NCDE Amendments, and corresponding Biological Opinion and

incidental take statement (ITS), the FWS set forth reasonable and prudent measures and conservation measures that were necessary and appropriate to minimize the incidental take resulting from the proposed action.

In 2004, the FWS issued the Lolo National Forest Biological Opinion and incidental take statement regarding the effects of the Lolo National Forest Land and Resource Management Plan (Forest Plan) on grizzly bears. The USFS's 2004 Biological Assessment for the Lolo National Forest Plan identified access management and livestock grazing and food and attractant storage as issues that are likely to adversely affect grizzly bears. The FWS's 2004 Biological Opinion and ITS for the Lolo National Forest Plan states, "To implement the reasonable and prudent measure, the Forest will contact the Service if a net increase in permanent system roads exceeds 2 linear miles in the distribution area outside the recovery zone during the 4-year period succeeding this incidental take statement. Decommissioning of permanent system roads contributes to decreasing the net increase." In the terms and conditions section of the 2004 ITS, the Service stated, "At the end of a 4-year period commencing with the implementation of this biological opinion and incidental take statement, the Service will review the environmental baseline including annual monitoring reports described below to determine if conditions warrant modification or extension of the incidental take exception."

The FWS issued an amended incidental take statement in 2012 stating, "Since decommissioning of permanent system roads contributes to decreasing the net increase, the Forest could construct up to 7.14 miles of road and not exceed this incidental take statement. However, if the Forest constructs *more than* 7.14 miles of new permanent road in the action area outside of the NCDE recovery zone then the level of incidental take we anticipated in our surrogate measure of take in this amended incidental take statement would be exceeded and the level of take exempted would be exceeded."

GRIZZLY BEARS AND THE SOLDIER-BUTLER PROJECT

The USFS disclosed that in the Soldier-Butler Project area, "female grizzly bears with cubs could be using the project area in more than a transient manner—females could have established home ranges that overlap all or portions of the project area. Project activities, primarily those associated with timber harvest and haul on or adjacent to roads, could lead to disturbance and displacement of females with cubs." There has been "documented use of the Project area vicinity by multiple grizzly bears in recent years, including a female with cubs." Grizzly bears have been consistently documented outside the NCDE recovery zone boundary, including portions of the Missoula, Ninemile, Seeley and Superior Ranger Districts.

The Soldier-Butler Project area is heavily roaded. The Project Environmental Assessment states, "As currently mapped and inventoried, the entire road system in the Soldier-Butler analysis area contains approximately 400 miles of existing and previously decommissioned road under various jurisdictions (NFS, State, BLM and private)." The Environmental Assessment discloses that there are 144 miles of National Forest Service System Roads in the Project area. The Project will construct 7 miles of new permanent road and 9.4 miles of temporary roads and will add 35.4 miles of "undetermined roads" to the road system.

The Transportation Report discloses that 151 miles of unauthorized roads exist on the Project area; 137 are “undetermined” and 14 are “not needed.” All of these roads are currently closed to the public. “Undetermined roads” are unauthorized roads—not included in the Forest Service Road System and where long-term purpose and need has yet to be determined. The Transportation Report states that the Project will decommission 3.1 miles of National Forest System Roads. The Decision Notice states that the Project will decommission 100 miles of “Unneeded roads.” “Unneeded” or “not needed” roads are roads that are not part of the Forest Service Road system and have been determined to be not needed for long-term management of national forest resources. Undetermined and Unneeded roads have not been accounted for in any previous NEPA process or ESA consultation. The Transportation Report states that 31.8 miles of roads in the Project area will be decommissioned at level 3, 4, or 5 but that 72.9 miles of road would be decommissioned via “natural decommission” which is where the road is left to grow in and “naturalize” on its own.

The Project Decision does not authorize decommissioning of any Nation Forest System Roads. At a maximum, the Project will only decommission 3.1 miles of National Forest System roads. The remaining decommissioning will be to “undetermined” and “unneeded” roads.

The Revised Biological Opinion for the Soldier-Butler Project states that, “104 miles of road will be decommissioned, mostly via natural revegetation.” The Revised Biological Opinion concludes that “the net change in road would be a decrease of 97 miles of road.”

The Soldier-Butler Project area overlaps with the Frenchtown Face Ecosystem Restoration Project area (Frenchtown Face Project). The Frenchtown Face Project authorized decommissioning of 115 miles of roads, stating that “most of the road decommissioning, however, (approximately 110 of the 114.7 miles) will receive ‘Level III’ closures, which typically involve deep ripping of the road surface, drainage structure removal and restoration, and entrance closures through boulders.” The area where the Soldier-Butler and Frenchtown Face Projects overlap has 85 miles of roads that the Frenchtown Face Project authorized to be decommissioned. Only 15 miles in the overlap area have been decommissioned—70 miles out of the 85 miles have not yet been implemented. The Soldier-Butler Project reverses the Frenchtown Face Project decision to decommission the roads in the overlapped project area. Instead of decommissioning the remaining 70 miles the Frenchtown Face Project authorizes in the overlap area, the Soldier-Butler Project will only decommission 34 miles of road within the overlap area.

LEGAL VIOLATIONS

The Project results in an ESA § 9 violation, thus USFS and FWS must reinitiate consultation on the NCDE Amendments.

The Soldier-Butler Project does not comply with the 2017 NCDE Forest Plan Amendments’ Biological Opinion’s Reasonable and Prudent Measures, which state:

Biological opinions provide reasonable and prudent measures that are expected to reduce the amount of incidental take. Reasonable and prudent measures are those

measures necessary and appropriate to minimize incidental take resulting from proposed actions. Reasonable and prudent measures are nondiscretionary and must be implemented by the agency in order for the exemption in section 7(o)(2) to apply.

1. Minimize or reduce the potential for project-related mortality and displacement of grizzly bears.

The Forest Service wildlife biologist noted that, “Minimizing the impact of high motorized use on the landscape during the implementation of the Soldier Butler project falls under the expectations of our Forest Plan (1986), language in the Conservation Strategy (2018), and the impending NCDE Conservation Strategy Amendment—both in terms of Desired Conditions and Reasonable & Prudent Measures to reduce “take” of the species (from the Biological Opinion on the Conservation Strategy Amendment, 2018). In order to “lessen the effects of the project considerably and show the Forest Service’s intent to meet the recommendations in the Conservation Strategy and the Reasonable and Prudent Measures specified in the Biological Opinion for the [NCDE] amendments,” the wildlife biologist recommended the Forest Service implement specific motorized access changes proposed in Alternative 3:

My recommendation is that regardless of which alternative (or blend of alternatives) is selected for the Final Decision, the Forest should include these closures, commensurate with the start of the timber sale, as a conservation measure to offset the during-project effects to grizzly bears. Additional benefits would include the long-term increase in security areas for bears adjacent to the IRA in the Ninemile DCA, and the ability for the Forest to “bank” roughly 8 miles of road in the DCA that we could use in the future, on another project, to create additional open road or trail (e.g. a new motorized route, or connecting existing routes—as was suggested by public comment—elsewhere in the DCA in the future).

Disregarding these recommendations from its own wildlife biologist, the Project does not include these access changes.

In its Biological Assessment, the USFS identified specific conservation measures that would avoid, minimize or mitigate the adverse effects of the Soldier-Butler Project—specifically the significant reduction in secure habitat for grizzly bears during the 10-year project implementation. The FWS failed to consider or analyze these measures, or explain why it did not include these measures in the Project ITS, and failed to explain why the reasonable and prudent measures (and the terms and conditions it did include in the ITS) are adequate to protect grizzly bears and their secure habitat. The Project violates the NCDE’s reasonable and prudent measures, and therefore exceeds the amount of take authorized in the NCDE Biological Opinion and ITS, in violation of the ESA. The USFS and FWS must reinitiate consultation on the NCDE Amendments and the Project in this regard.

This violation particularly concerning because the amount of available secure habitat for grizzly bears during Project implementations will be severely limited.

The Project Biological Assessment and Biological Opinion Violate the ESA.

The USFS and FWS failed to analyze and disclose the reduction in secure habitat for grizzlies due to the large prescribed burning units in the Inventoried Roadless Areas that will be ignited by helicopter. The USFS repeatedly states that grizzly bears “that may want to avoid the disturbance in the Soldier Butler area” can go to “remote high elevations.” However, the Project will be using helicopters in the “remote high elevations.” It is well established that helicopters can cause stress and disturbance to grizzly bears. The Biological Assessment and the Biological Opinion fail to explain how helicopter use will further impact security in light of the Project’s significant reduction in security due to the increased use of roads.

Moreover, the Revised Biological Opinion and Biological Assessment assume that all private roads and roads open to administrative uses are “closed.” Conversely, many of the private roads lead to between 30 and 40 residences and have both administrative and unauthorized uses. The USFS actively negotiated with private landowners to obtain road access across these private properties as part of Project Implementation and knew the USFS would be using these roads for heavy administrative use during the life of the Project. The USFS acknowledges that many roads in the Project area that are “closed” to the public are illegally used. However, the USFS does not patrol the Project area and is not able to calculate the extent of unauthorized motorized use of these roads or the efficacy of closure devices or the extent of off-road motorized activity. These roads must be included in the analysis of impacts to grizzly bears in regard to open road density and security. Importantly, if these roads were included, the Project would exceed the take authorized by the Lolo National Forest Plan ITS and the NCDE ITS.

Thus, the Project Biological Assessment, Biological Opinion, and ITS are inadequate and not valid. The USFS must reinitiate consultation and adequately disclose baseline road data. If the USFS and FWS determine that the Project results in take that exceeds the Lolo National Forest Plan ITS and/or the NCDE ITS, it must reinitiate consultation on those programmatic actions.

USFS and FWS must reinitiate consultation on the Lolo National Forest.

The USFS and FWS must reinitiate consultation on the Lolo National Forest and the Project in light of the USFS failure to follow through on the Frenchtown Face Project’s promise to decommission roads in the overlap area. The agencies failed to adequately disclose the impacts of reversing the decision of the Frenchtown Face Project on the grizzly bears. Further, the agencies are required to analyze the cumulative impacts associated with the Soldier-Butler Project, which must include the Frenchtown Face Project because the USFS chose to reverse decisions made therein. The ESA does not require a cumulative impact analysis to include federal projects because the impacts of those projects should have already been considered and are therefore part of the baseline. However, here, the USFS changed and reversed a previous federal project, altering the effects analysis of that previous federal project and providing a faulty baseline for the Soldier-Butler Project. Thus, the agencies are required to analyze the impacts of the reversal of the Frenchtown Face Project decision on the Frenchtown Face Project area in addition to the Soldier-Butler Project area. The Soldier-Butler analysis is therefore inadequate. Further, the Action area analyzed during Project consultation is inadequate. The ESA defines action area as the entire area to be affected directly or indirectly by the federal action. Here, the

USFS reversal of the Frenchtown Face decision requires the Action area to encompass the Frenchtown Face Project Area and the Soldier-Butler Project area to adequately determine the effects of the Soldier-Butler Project on grizzly bears.

Further, during consultation for the NCDE Amendments and when the agencies updated the baseline conditions for Lolo National Forest Plan ITS, USFS and FWS assumed the USFS would complete the decommissioning as authorized in the Frenchtown Face Project. The USFS decision to reverse the Frenchtown Face Project decision to decommission roads results in a change in circumstances requiring reinitiation of consultation on both the NCDE Amendments and the Lolo National Forest Plan.

Neither the Biological Assessment nor the Revised Biological Opinion adequately disclose and analyze the total road density or disclose and analyze the open road density in the Project area. This is contrary to the best available science—the IGBST Roads Report. The Biological Assessment and Revised Biological Opinion fail to disclose the total linear road miles currently on the Project Area, how that number will change during and post Project implementation, and how that number will impact grizzly bears. The Biological Assessment and Revised Biological Opinion fail to adequately disclose and analyze the total road miles the Project will add to the USFS road system. The agencies must consider private roads, roads open to administrative uses, and roads that are being accessed by the public illegally in its analysis on road impacts.

The USFS discloses, and the FWS states, that the Project will decommission 104 miles of road in the Project area. However, the Project file reveals that almost all, if not all, of these roads are “undetermined”—meaning both that they are already closed and are not part of the road system *and* that they have not been previously analyzed in prior NEPA or ESA consultations. Further, the FWS concedes that these “undetermined roads” will be “naturally decommissioned” by the Project—meaning that the USFS will not do any physical work to decommission these roads. Thus, the USFS cannot count the decommissioning of these roads toward the net reduction of roads in the Project area. Further, the impact of reversing the Frenchtown Face Project decision to decommission 85 miles of roads in the overlap area is unknown. The agency’s failure to include these important aspects in its analysis violates the ESA.

Moreover, the Project will add roads to the road system in the Project area that result in a net increase of more the 7.14 linear miles. The statement that “the net change in road would be a decrease of 97 miles of road” in the Revised Biological Opinion for the Soldier-Butler Project is inaccurate and unsupported. The agencies cannot count decommissioning of undetermined and unneeded roads when determining the net increase or decrease of roads for purposes of complying with the Lolo National Forest Plan ITS and its reasonable and prudent measures because unneeded and undetermined roads were not considered during the original Forest Plan consultation.

This is important because by inaccurately stating that the Project would result in a net decrease of 97 miles, the USFS will be illegally authorizing the future construction of over 100 miles of new permanent roads in the Lolo National Forest in violation of the Lolo National Forest Plan ITS. Thus, because the USFS and FWS’s analyses and conclusion in this regard is wrong, the USFS and FWS must reinitiate consultation on the Lolo National Forest Plan. A net increase in

roads over 2 linear miles (now 7.14 miles) exceeds the ITS and the USFS and FWS requires reinitiating consultation on the Lolo National Forest Plan.

Additionally, the Project Environmental Assessment reveals that at least 137 miles of “undetermined roads” were discovered on in the Project Area alone. Prior to Project analysis, these roads were previously unknown or unaccounted for. Moreover, the Project authorizes the addition of 35 miles of “undetermined roads” to be added to the USFS road system. The addition of these new roads and the discovery of over 137 miles of “undetermined roads” within the Project area indicates a change in circumstances and constitutes new information that was not available at the time the USFS initiated consultation on the impacts of the Lolo National Forest Plan on grizzly bears. Thus, the USFS must reinitiate consultation on the impacts of the Lolo National Forest Plan on grizzly bears.

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; their actions do not result in unauthorized take of these species of wildlife; and 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 threatened species and their habitats. If the violations of law described above are not cured within 60 days, Notifier intends to file suit for declaratory and injunctive relief, as well as attorney and expert witness fees and costs.

Sincerely,

/s/Kristine M. Akland

Kristine M. Akland
Counsel for Notifier

cc:

US Attorney General
Department of Justice
950 Pennsylvania Ave, NW
Washington, DC 20530-0001

