

Public Interest Defense Center, P.C.

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December 22, 2020

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

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

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

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

**RE: 60 Day Notice of Intent to Sue under the Endangered Species Act
- Castle Mountain Project on the Helena Lewis & Clark National
Forest**

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

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

Sara Johnson
Native Ecosystems Council
PO Box 125
Willow Creek, MT 59760
Tel: (406) 579-3286

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

Rebecca K. Smith, Attorney at Law
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STATEMENT OF FACTS

On December 19, 2019, the Forest Service signed a Record of Decision authorizing the Castle Mountains Project on the Belt Creek - White Sulphur Springs Ranger District of the Helena-Lewis and Clark National Forest in Meagher County, Montana. The Castle Mountains Project allows over 22,000 acres of logging and burning activities in the Castle Mountains. The Project also authorizes over 35 miles of road construction or reconstruction.

On December 2, 2020, the U.S. Fish and Wildlife Service issued a rule proposing to list whitebark pine (*Pinus albicaulis*) under the Endangered Species Act. The Castle Mountains Project area includes whitebark pine. The whitebark pine present in the Castle Mountains represents a major source within the larger geographic area. The Project proposes tree cutting and burning across thousands of acres where whitebark pine may be present. Regardless of whether individual activities are intended to impact whitebark pine, whitebark pine may be affected by damage from equipment and equipment trails, cutting, soil compaction and disturbance, mortality from prescribed burning, scorching from jackpot burning, trampling of seedlings and saplings, and removal of necessary microclimates and nursery trees needed for sapling survival. Additionally, hundreds of acres of whitebark pine habitat manipulation are proposed for the Project, including intentionally cutting and burning trees to create clearings up to 30 feet in diameter around individual whitebark pines. No discussion on the success rate of natural regeneration under these conditions is provided. The Forest Service states that seedlings may be replanted in clearings, but if it occurs at all, at most only on 10 - 15% of the cleared acres. No discussion of the success rate of planting seedlings in clearcuts is provided.

The Forest Service admits that whitebark pine is known to be present in the area and that the Project “may impact individuals. . .” The Forest Service further admits: “some adverse impacts are possible.” The Forest Service admits:

“Mechanical treatments could incidentally damage or kill some whitebark pines as tree removal equipment and personnel maneuver about the treatment areas. Some individual mortality can be expected in prescribed burn areas as well” The Forest Service further admits that “implementation of the project may cause incidental loss of whitebark pine seedlings and saplings”

Crucially, the Forest Service does not disclose or address the results of its only long-term study on the effects of tree cutting and burning on whitebark pine. This study, named “Restoring Whitebark Pine Ecosystems,” included prescribed fire, thinning, selection cuttings, and fuel enhancement cuttings on multiple different sites. The results were that “[a]s with all the other study results, there was very little whitebark pine regeneration observed on these plots.” See U.S. Forest Service, General Technical Report RMRS-GTR-232 (January 2010). More specifically: “the whitebark pine regeneration that was expected to result from this [seed] caching [in new openings] has not yet materialized. Nearly all sites contain very few or no whitebark pine seedlings.” Thus, even ten years after cutting and burning, regeneration was “marginal.” Moreover, as the Forest Service notes on its website: “All burn treatments resulted in high mortality in both whitebark pine and subalpine fir (over 40%).” Accordingly, the only proven method of restoration of whitebark pine is planting: “Manual planting of whitebark pine seedlings is required to adequately restore these sites.”

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).

Thus, the requirement for a biological assessment applies to proposed species, such as whitebark pine, if those proposed species “may be present.” *Native Ecosystems Council v. Marten*, - - - F.Supp.3d - - - -, 2020 WL 1479059, at *8 (D. Mont. 2020), *appeal dismissed*.

LEGAL VIOLATIONS

- 1. The effects of the action on whitebark pine must be analyzed in the Project Biological Assessment and FWS must issue a letter of concurrence.**

The Forest Service's refusal to prepare a Biological Assessment for the Project for whitebark pine is arbitrary and capricious and an abuse of discretion.

Additionally, FWS must issue a Project-specific concurrence for any Forest Service no jeopardy determination.

The Forest Service concedes that whitebark pine is present in the Project area and may be affected by the Project. The law mandates that both listed and proposed species 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). 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: "The Federal agency shall use the biological assessment in determining whether . . . a conference is required 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).

For these reasons, the agencies must prepare a BA and letter of concurrence for whitebark pine prior to the implementation of any further Project activities.

CONCLUSION

The Forest Service must withdraw the Project decision or formally suspend the Project in writing in a letter sent to all interested parties/member of the public, prepare a biological assessment for whitebark pine, and receive a letter of concurrence from FWS prior to any further implementation of the project. These analysis documents must be based on the best available science, including disclosure and application of General Technical Report RMRS-GTR-232

(January 2010), which finds that cutting and burning trees results in whitebark pine mortality and marginal to no whitebark pine regeneration, and that replanting is required for regeneration.

If the violations of law described above are not cured within 60 days, the Alliance intends 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 Notifier

CC:

U.S. Attorney General

U.S. Department of Justice

950 Pennsylvania Avenue, NW

Washington, DC 20530-0001

