



ADVOCATES for the **WEST**
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February 22, 2021

Via Certified Mail, Return Receipt Requested

Kevin Shea
Acting Secretary
U.S. Department of Agriculture
1200 New Jersey Ave, SE
Washington, DC 20590

Cheryl Probert
Forest Supervisor
Nez Perce-Clearwater National Forests
903 3rd Street
Kamiah, ID 83536

**Re: Notice of Intent to Sue Over Endangered Species Act Violations,
“End of the World Project,” Nez Perce National Forest, Idaho**

Dear Sir and Madam:

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 Friends of the Clearwater intends to bring a civil action against the Forest Service and its responsible officers for violating Section 7 of the ESA, 16 U.S.C. § 1536, and the ESA’s consultation regulations, 50 C.F.R. Part 402, in approving the End of the World Project on the Nez Perce National Forest in Idaho.

When it approved this massive, 13-year logging project, the Forest Service determined End of the World would have “no effect” on grizzly bear (*Ursus arctos horribilis*) and, thus, never engaged in Section 7 consultation with the U.S. Fish and Wildlife Service (USFWS) over effects to the species. Grizzly bear is listed as a “threatened” species under the ESA, and as confirmed by recent grizzly bear sightings and by recent USFWS determinations, grizzly bear “may be present” in the End of the World area. Contrary to the Forest Service’s no effect determination, grizzly bears may be adversely affected by the increase in road density, noise, risk of human conflict, and other disturbances and impacts associated with logging approximately 18,000 acres of forest and constructing 15 miles of roads as approved by the Forest Service. The Forest Service’s no effect determination is flawed, and the Forest Service is in violation of Section 7 for failing to consult with USFWS over effects to grizzly bears.

Unless you remedy the violations described in this notice, Friends of the Clearwater intends to file suit in federal district court after the 60-day notice period.

PARTY & ATTORNEY GIVING NOTICE

Friends of the Clearwater is a non-profit, grassroots advocacy group based in Moscow, Idaho that works to protect the public wildlands, wildlife, and waters of north-central Idaho. The name and address of the organization giving notice is:

Friends of the Clearwater
Att'n: Gary MacFarlane
PO Box 9241
Mosco, ID 83843
gary@friendsoftheclearwater.org

Counsel for the parties giving notice is:

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END OF THE WORLD PROJECT

The End of the World logging project encompasses nearly 50,000 acres of public lands in the Nez Perce National Forest approximately six miles south of Grangeville, Idaho. The project area is located on the Salmon-Clearwater Divide—the mountainous, forested ridge between the Salmon River and South Fork Clearwater River. Grizzly bear historically occupied this area. Today, the Salmon-Clearwater Divide is within the Experimental Population for the Selway-Bitterroot Recovery Area for grizzly bear, where the bear is expected to reestablish populations in order for the species to avoid extinction and recover. In recent years, verified and unverified reports of grizzly in the Selway-Bitterroot Recovery Area and its surroundings have increased, including in and near End of the World. For example, in 2019, a grizzly bear was documented within the project area, as confirmed by DNA testing. In spring 2020, grizzly tracks were located nearby along the South Fork of the Clearwater. USFWS now classifies End of the World as an area where grizzly “may be present.”

On January 25, 2021, the Forest Service signed a Decision Notice and Finding of No Significant Impact (DN/FONSI) authorizing the End of the World project based on an Environmental Assessment (EA). In addition to logging, End of the World includes prescribed burning, road construction, and other activities. Over 13 years, 18,000 acres of forest on the Salmon-Clearwater Divide would be logged to harvest 144,139,000 board feet of timber. Nearly 1,600 acres would be clearcut. The other 16,340 acres will be logged using “intermediate harvest” techniques. Fifteen miles of road would be constructed. While the Forest Service engaged in ESA Section 7 consultation with USFWS over effects of End of the World to other species, it did not consult over grizzly. The Forest Service acknowledged the recent grizzly bear sightings but determined End of the World would have “no effect” on grizzly.

LEGAL BACKGROUND

Congress enacted the Endangered Species Act “to halt and reverse the trend toward species extinction, whatever the cost.” *TVA v. Hill*, 437 U.S. 153, 184 (1978). The ESA’s stated purpose 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 . . . species.” 16 U.S.C. § 1531(b). One of the Act’s stated policies is “that all Federal . . . agencies shall seek to conserve [ESA-listed] species.” *Id.* § 1531(c)(1). The Supreme Court described the ESA as “a conscience decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies.” *Hill*, 437 U.S. at 185.

The “heart of the ESA” is the section 7 consultation requirement. *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011). Section 7 requires each federal agency to “insure that any action . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.” 16 U.S.C. § 1536(a)(2). “Only after the [agency] complies with [Section 7] can any activity that may affect the protected [species] go forward.” *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1055–57 (9th Cir. 1994). In making determinations under Section 7, agencies must “give the benefit of the doubt to the species.” *Connor v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988).

The first step in complying with Section 7 is to obtain “a list of any listed or proposed species or designated or proposed critical habitat that may be present in the action area.” 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(c). If listed species “may be present” in the area of agency action, the action agency must prepare a Biological Assessment (BA) to determine whether the proposed action directly and indirectly “may affect” the listed species. *See* 16 U.S.C. § 1536(c)(1); 50 C.F.R. §§ 402.02, 402.12(f), 402.14(a). If the agency determines the proposed action “may affect” any listed species, then it must consult with FWS. 50 C.F.R. § 402.14(a)–(b). If the agency determines in a BA that the action “may affect” and is “likely to adversely affect” any listed species, it must engage in “formal consultation” with USFWS. *Id.* If the agency determines in a BA that the action “may affect” but is “not likely to adversely affect” any listed species, then it can engage in “informal consultation” with USFWS. *Id.*

The threshold for a “may affect” determination is 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). “[A]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character” triggers the consultation requirement. *Kraayenbrink*, 632 F.3d at 496. In line with these authorities, USFWS’s consultation handbook explains that a “may affect” finding is required if proposed action “may pose **any** effects on listed species.” 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*, p. xvi (1998) (emphasis in original). Therefore, an agency must consult in every situation except when a proposed action will have “no effect” whatsoever on a listed species.

NOTICE OF ESA VIOLATIONS

The Forest Service is in violation of ESA Section 7, 16 U.S.C. § 1536(a)(1) and related regulations at 50 C.F.R. §§ 402.12, 402.14, by failing to consult, formally or informally, with USFWS over End of the World's effects to grizzly bear. As the Forest Service admits in its project approval documents, USFWS has determined that grizzly bear "may be present" in and around the End of the World project area.¹ The Forest Service also admits in the DN/FONSI, EA, and other documents in the project record that 13 years of extensive logging, road construction, and other activities approved for End of the World will disturb, displace, and destroy or degrade the habitat of numerous other wildlife species that are found, or may be found, in or near the project area. Yet, for grizzly bear, the Forest Service reached the opposite conclusion, claiming without any rational basis that there will be "no effect" and refusing to consult.

The End of the World project record shows, and other evidence confirms,² that there will likely be adverse effects to grizzly bear. Grizzly can be disturbed, displaced, and otherwise affected by noise, human presence, food and habitat loss, and other factors associated with logging 18,000 acres of forest, constructing 15 miles of road, and other activities authorized by End of the World. Grizzly are also frequently harmed, and even killed, as the result of human-bear interactions. To carry out the extensive logging and other activities the Forest Service approved for End of the World, many Forest Service, logging company, and other workers will spend time in grizzly habitat, increasing the risk of encounters and adding to the chance of habituation. Additionally, End of the World authorizes 15 miles of new roads to be constructed, decreasing secure grizzly habitat and further increasing the risk of people encountering grizzly both during and beyond the life of the project.

Because End of the World will undoubtedly have some possible adverse effects on grizzly, the Forest Service's failure to consult violates the ESA.

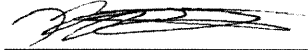
CONCLUSION

For the above stated reasons, the Forest Service has violated and remains in ongoing violation of the ESA. Unless you remedy these violations, Friends of the Clearwater intends to file suit against you in federal court. Please contact me if you would like to discuss this matter.

¹ See attached figures depicting current USFWS "may be present" areas and End of the World project area.

² See, e.g., USFWS, *Grizzly Bear (Ursus arctos horribilis) 5-Year Review: Summary and Evaluation* (Aug. 2011), pp. 31–38 (discussing destruction, modification, and curtailment of grizzly bear habitat and range, including by logging, and identifying the "primary impacts to grizzly bears associated with extractive activities such as timber harvest, mining, and oil and gas development are increases in road densities, with subsequent increases in human access, grizzly bear/human encounters, and human-caused grizzly bear mortalities") available at https://ecos.fws.gov/docs/five_year_review/doc3847.pdf (visited Feb. 21, 2020).

Sincerely,



Bryan Hurlbutt
Rebecca Strauss

Attorneys for Friends of the Clearwater

Cc. Via Certified Mail. Return Receipt Requested

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Fig. 1 - USFWS, "May Be Present" Map for Grizzly Bears

Available at <https://www.fws.gov/mountain-prairie/es/grizzlybear.php> (visited Feb. 12, 2021).

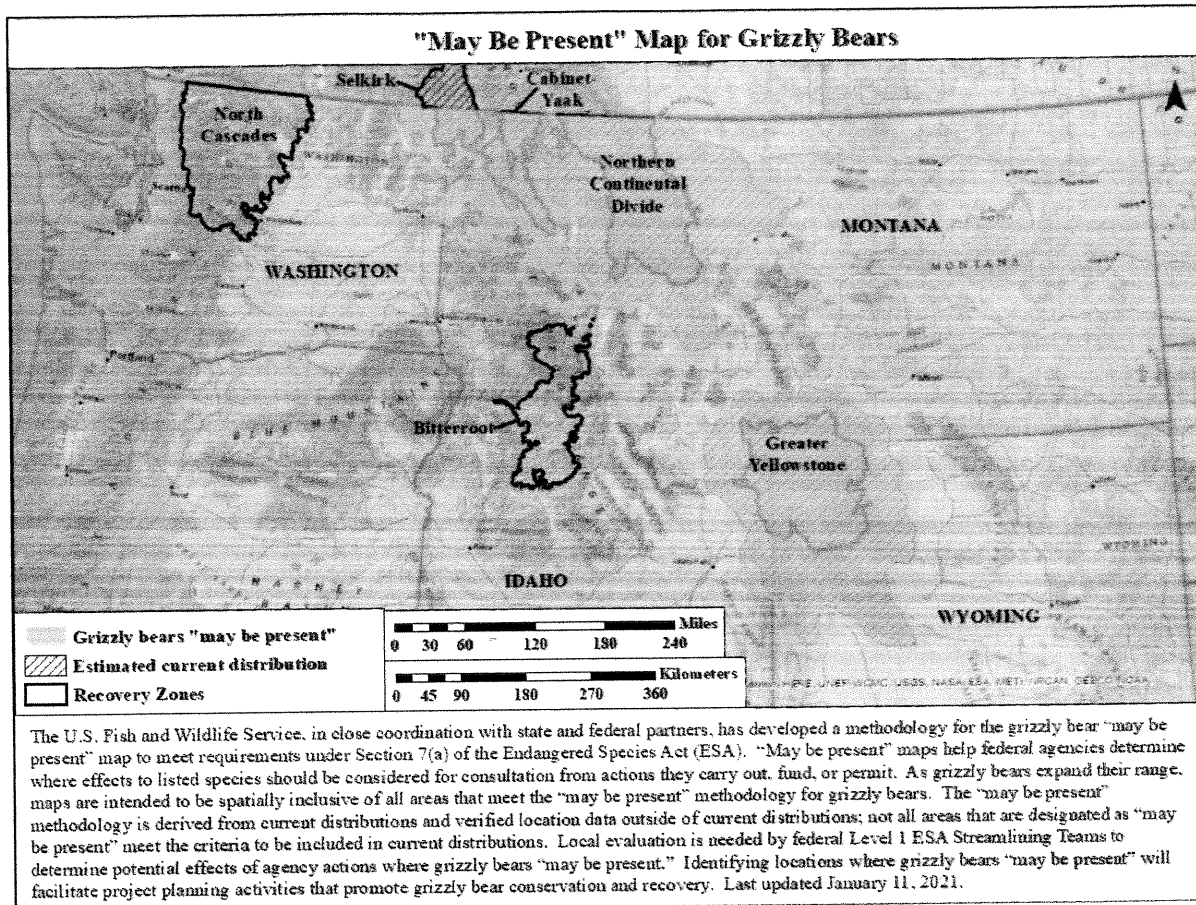


Fig. 2 – End of the World Vicinity Map

Reproduced from October 2019 Environmental Assessment.

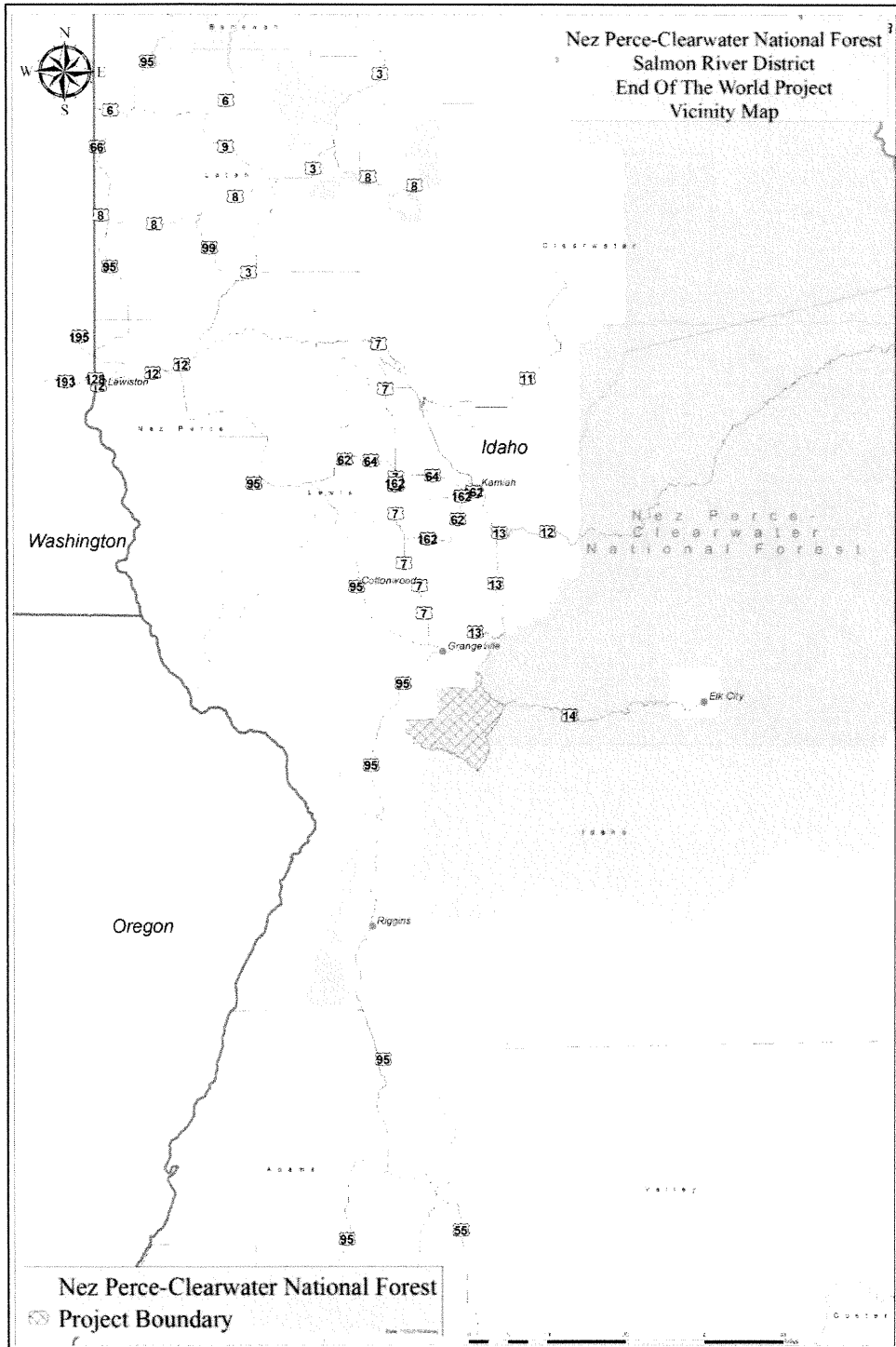


Fig. 2 – End of the World Project Detail Map

Reproduced from January 2021 Decision Notice and Finding of No Significant Impact.

