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BY E-MAIL AND CERTIFIED MAIL

RE: Sixty-Day Notice of Intent to Sue to Remedy Violations of the Endangered Species Act in the Revised Forest Plan for the Flathead National Forest and in the U.S. Fish and Wildlife Service's Biological Opinion on the Plan

Dear Secretary Bernhardt, Director Everson, Chief Christiansen, and Supervisor Weber:

On behalf of Swan View Coalition and Friends of the Wild Swan, and in accordance with the citizen suit provision of the Endangered Species Act ("ESA" or "Act"), 16 U.S.C. § 1540(g), we hereby provide notice that the United States Fish and Wildlife Service ("FWS") and United States Forest Service are in violation of the ESA, 16 U.S.C. § 1536(a)(2), with regard to the Forest Service's revised Flathead National Forest Plan and FWS's November 22, 2017 Biological Opinion concerning the Plan.

The revised Forest Plan abandons a longstanding Forest Service commitment to limit road development in key grizzly bear and bull trout habitat in the Flathead National Forest and to limit human uses of grizzly bear secure habitat. The Forest Service and FWS have sought to dismiss the impact of this new management direction by asserting that the Forest Service will maintain the habitat conditions that existed in the Flathead in 2011, but the agencies ignored that the revised Plan does not constrain the construction of new road mileage beyond the 2011 baseline as long as the Service takes minimal measures to block or obscure the entrances to the new roads. This represents a major departure from prior management requirements and threatens to significantly degrade grizzly bear habitat security. The revised Plan also abandons limits on human uses of roads and trails in secure bear habitat. Further, as to roadbuilding in bull trout

habitat in particular, the revised Plan replaced a formerly mandatory requirement to limit new road construction throughout the Forest with a voluntary guideline of limited geographic scope.

In conducting its review of the Forest Plan under the ESA, FWS did not rationally grapple with the impacts of this new management direction, as the law requires, before concluding in a Biological Opinion that the revised Forest Plan will not jeopardize bull trout and grizzly bears in the Flathead. The revised Plan and Biological Opinion therefore violate section 7 of the ESA. 16 U.S.C. § 1536.

I. Grizzly Bears

The Flathead National Forest encompasses 2.4 million acres of public land in northwest Montana, including large areas of public land adjacent to Glacier National Park. The Flathead therefore provides important habitat for the Northern Continental Divide Ecosystem (“NCDE”) population of grizzly bears, whose range extends from the Park southward down the spine of the Northern Rockies.

However, the value of the Flathead’s bear habitat hinges on the fact that much of it remains a largely unroaded landscape. As seminal research by Richard Mace and Timothy Manley in the 1990s demonstrated, the presence of roads in grizzly bear habitat, and the human intrusion those roads allow, negatively impact bears’ survival. This is because grizzly bears avoid roads, adjusting “their habitat use patterns in part” according to the density of roads in an area. Mace & Manley, South Fork Flathead River Grizzly Bear Project: Progress Report for 1992, at 25 (Apr. 1993) (“Mace & Manley 1993”). Researchers even observed bear “avoidance of high total road densities areas” where “roads were closed to public travel.” Mace & Waller, Final Report: Grizzly Bear Ecology in the Swan Mountains, Montana, at 73 (1997). FWS itself acknowledged in an earlier biological opinion analyzing this research that bears encountering vehicles, vehicle noise, and human noise associated with roads “learn to avoid the disturbance and annoyance generated by roads,” and “may not change this resultant avoidance behavior for long periods after road closures and lack of negative reinforcement [sic].” FWS, Biological Opinion on Amendment 19 to the Flathead National Forest Plan, at 15 (Jan. 6, 1995). Mace and Manley concluded that their findings concerning bear avoidance of roaded areas “suggest that if unroaded habitats are reduced in quantity or size, the number of adult females will eventually decline,” thus harming the grizzly bear population as a whole. Mace & Manley 1993 at 26.

In response to this research and a public campaign to protect grizzly bears from the threat of human intrusion, in 1995 the Forest Service promulgated Forest Plan Amendment 19 for the Flathead National Forest. This amendment set limits on the density of roads and trails allowed in key grizzly bear habitat. Specifically, Amendment 19 allowed “no net increase in total motorized access density greater than 2 miles per square mile” and “no net increase in open motorized access density greater than 1 mile per square mile” in bear management subunits throughout the Forest. Flathead National Forest, Forest Plan Amendment #19, Decision Notice, at 4 (Mar. 1995) (“Amendment 19 Decision Notice”). Further, Amendment 19 required the Forest Service to “limit high-density (> 1 mile/square mile) open motorized access to no more than 19 percent” of a bear management subunit “within 5 years” and “limit high-density (> 2 miles / square mile) total motorized access to ... no more than 19 percent in 10 years.” *Id.* Total motorized access density includes all roads that have not been fully reclaimed, while open motorized access density includes all roads that are open to public use during times of year when

grizzly bears are active and out of their dens. Flathead National Forest, Forest Plan Amendment #19, Amended Environmental Assessment, app. D at 2-3 (Mar. 1995). (“Amendment 19 EA”).

Finally, Amendment 19 acknowledged that non-motorized human uses of routes through the Forest also displace grizzly bears, requiring that restricted roads within “security core” grizzly bear habitat “may not receive high levels of non-motorized use” and defining security core as an “area that is at least 0.3 miles from open roads and high-intensity, non-motorized trails.” Amendment 19 EA, app. D at 3. Amendment 19 required the Forest to “provide security core areas that equal or exceed 60 percent of each [grizzly bear management subunit in the Forest] in 5 years, and 68 percent in 10 years.” Amendment 19 Decision Notice at 4. As recent science has demonstrated, such restrictions are important because non-motorized human recreation threatens to harm grizzly bear reproduction and survival, with possible population-level effects. See Fortin et al., Impacts of Human Recreation on Brown Bears (*Ursus arctos*): A Review and New Management Tool, PLOS One, at 18 (Jan. 5, 2016) (concluding that displacement due to human recreation can impact grizzly bear reproduction and survival).

Amendment 19 thus required the Forest Service both to limit new road construction and to reclaim existing roads in areas that did not already meet prescribed density standards. Even reclaimed roads could be excluded from total motorized access density only if they met stringent requirements: at a minimum, the Service had to treat the first 200 to 600 feet of the road “to preclude its use as a motorized or non-motorized travel way”; revegetate and scatter natural debris on the remainder of the road; and remove all stream-aligned culverts under the road. Amendment 19 EA, app. D at 2. Such treatment was intended to make the “reclaimed road no longer function as a road again.” Id. at 3. The Service has decommissioned about 730 miles of roads in this manner. Flathead National Forest, Final Environmental Impact Statement for Land Management Plan, vol. 2 at 143 (Nov. 2018) (“Revised Plan Final EIS”).

However, the Flathead’s recently issued revised Forest Plan weakens protections for grizzly bear habitat in multiple respects. First, it abandons the Service’s commitment to Amendment 19, eliminating its road density requirements and the limits on non-motorized human uses in security core that the Forest Service previously deemed vital to protecting grizzly bear habitat in the Northern Continental Divide Ecosystem. Flathead National Forest, Final Record of Decision for the Flathead National Forest Land Management Plan, at 8 (Dec. 2018).

Second, although the Forest Service claims that the revised Forest Plan maintains the road density conditions that existed in 2011, Revised Plan Final EIS, vol. 2 at 173, vol. 4, Glossary at 2, the revised Plan fails to do so. At the outset, because the Service never attained the Amendment 19 limits in many parts of the Flathead, this 2011 road density baseline is less protective of grizzly bears than the prior management regime. See Revised Plan Final EIS, vol. 2 at 325-26. Additionally, the revised Forest Plan’s commitment to maintaining even the less-protective 2011 baseline is illusory. Under the revised Plan, the Forest Service can build new roads in grizzly bear habitat without violating the 2011 baseline requirement as long as the Service puts a minimal barrier across the entrance of the road, such as a fallen tree. Flathead National Forest Land Management Plan, at 199 (Nov. 2018) (“Revised Forest Plan”) (defining “impassable”); id. at 207 (defining “total motorized route density” as excluding “impassable” roads). By contrast, under Amendment 19, roads in grizzly bear habitat counted against maximum road-density requirements unless the Service fully reclaimed them by, at a minimum, treating the first portion of the road “to preclude its use as a motorized or non-motorized travel

way”; revegetating and scattering debris on the remainder of the road; and removing all stream culverts under the road. Amendment 19 EA, app. D at 2. By abandoning this 1995 management framework, the revised Forest Plan threatens to allow roadbuilding to proliferate in much of the Flathead’s formerly secure grizzly bear habitat, degrading the 2011 baseline the revised Forest Plan purports to maintain. Similarly, the revised Plan allows high levels of non-motorized use to occur on trails in what has been renamed “secure core” grizzly bear habitat, a further departure from Amendment 19 requirements. See Revised Forest Plan at 201-02. Accordingly, there is no merit to the Service’s claim that the revised Plan will maintain 2011 road density and secure habitat conditions and thus adequately protect NCDE grizzly bears.

By opening the door to new road construction, the revised Forest Plan threatens a severe impact on grizzly bear habitat security. As researchers demonstrated more than twenty years ago, even closed roads threaten a detrimental impact on grizzly bear survival, because grizzly bears are displaced from roaded habitat, regardless whether or not the roads are open to public or administrative use. The revised Forest Plan, however, permits the Forest Service to leave closed roads in place, and in fact contemplates that some of these roads will be stored in a condition that will allow future use. See Revised Forest Plan at 199 (“Impassable roads may remain on the inventoried road system if use of the road is anticipated at some point in the future.”). Therefore, under the revised Plan, roads built for a short-term project on the Forest can remain on the landscape indefinitely and displace grizzly bears from formerly secure habitat long after the initial project use. Further, as a practical matter, human use is unlikely to dissipate on roads deemed “impassable” under the revised Forest Plan’s lax standards, which necessitate only a minimal barrier across the road entrance. Such minimal measures enable motor vehicle trespass on putatively closed roads; as grizzly bear scientists studying the impacts of road density on bears have asserted, “[u]nless a road has completely revegetated, managers should assume that some level of human use is occurring along closed roads, and grizzly bears will respond to that use.” Mace & Manley 1993, at 25. The revised Plan’s new management direction threatens harm to grizzly bears in this way as well.

In its Biological Opinion concerning the revised Forest Plan, FWS failed to acknowledge the threat of new road proliferation and associated human disturbance of grizzly bear habitat that the revised Plan allows. Instead, FWS simply stated that the revised Plan will not cause jeopardy because it “will require projects to results [sic] in no net increase above baseline conditions in” open motorized route density and total motorized route density. FWS, Biological Opinion on the Revised Forest Plan for the Flathead National Forest, at III-80 (Nov. 22, 2017) (“Flathead BiOp”). Thus, FWS’s finding that new forest management direction under the revised Plan will not jeopardize the Flathead’s grizzly bears unlawfully ignored an important factor that may impact the bears’ survival. See *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1121 (9th Cir. 2012) (“A Biological Opinion is arbitrary and capricious if it fails to ‘consider[] the relevant factors and articulate[] a rational connection between the facts found and the choice made.’”) (citation omitted).

Although the management changes associated with the Forest Service’s abandonment of Amendment 19 requirements were overlooked in the Biological Opinion, their significant consequences for grizzly bear habitat security are already becoming apparent. For example, under Amendment 19, only 3.2 miles of new road were built in grizzly bear habitat on the Flathead National Forest from 1996 to 2010, Flathead National Forest, Evaluation and Compliance with National Forest Management Act Requirements to Provide for Viability and

Diversity of Animal Communities, at 92 (updated Feb. 2017)—and even this small amount was apparently due to road construction already under contract when Amendment 19 was issued in 1995. By contrast, a single Flathead project already proposed to be implemented under the revised Forest Plan would build 60 miles of new roads, retain them in the road system, and not require that they be reclaimed and removed from the road system as required by Amendment 19. U.S. Forest Serv., Mid-Swan Landscape Restoration and Wildland Urban Interface Project, Scoping Document, at 21 (Oct. 2018). This will result in marked reductions in baseline grizzly bear security conditions present in 2011, but those reductions will be masked and ignored due to changes in how baseline conditions are defined and measured. Yet your agencies' ESA analyses ignored the revised Plan's allowance for such impacts.

In sum, FWS violated the ESA by failing to determine, based on a rational analysis, whether the revised Plan's weakened roadbuilding requirements will jeopardize the grizzly bear, a threatened species. 16 U.S.C. § 1536(a)(2). By relying on FWS's arbitrary Biological Opinion to satisfy its own ESA obligations, the Forest Service likewise violated the ESA. See id.

II. Bull Trout

FWS and the Forest Service similarly failed to rationally address the impacts on threatened bull trout of the revised Plan's allowance for new roadbuilding in the Flathead National Forest. Roads built in bull trout watersheds—including roads closed to human travel—threaten to degrade trout habitat conditions by delivering sediment to creeks. See Flathead BiOp at II-46. Further, stream-aligned culverts supporting a road can trap debris and, over time, fail, causing the stream to run over the roadbed with associated erosion and sedimentation. See id. at II-47. As FWS has acknowledged, such culvert failure is inevitable if culverts are not removed: “Whatever the design life, any crossing structure would have a 100% chance of failure over its installation life if it is not removed after the road is abandoned.” FWS, Biological Opinion on the Effects of the Moose Post-Fire Project on Bull Trout, at 40 (Nov. 14, 2002). Such stream pollution associated with roads and culverts is one of the primary factors that has threatened the bull trout's survival in the United States. Flathead BiOp at II-20.

As discussed, former Forest Plan Amendment 19 required the Service to reclaim roads according to stringent requirements to meet road density standards throughout the Forest. One of these reclamation requirements was to remove all stream-aligned culverts from the reclaimed roads, so that orphaned culverts in otherwise closed parts of the road system would not cause sedimentation in trout streams. Amendment 19 EA, app. D at 2. Although Amendment 19's primary purpose was to protect grizzly bears, managers also concluded that the Amendment 19 standards were important to conserve bull trout and other fish species in the Forest. See A19 Decision Notice at 65-67. In addition to the Amendment 19 requirements, under a 2015 programmatic biological opinion governing road maintenance activities throughout western Montana, the Forest Service was required to inspect annually any culverts remaining on closed roads. FWS, Biological Opinion on the Effects to Bull Trout and Bull Trout Critical Habitat from the Implementation of Proposed Actions Associated with Road-related Activities that May Affect Bull Trout and Bull Trout Critical Habitat in Western Montana, at 99 (Apr. 15, 2015) (Appendix E). Other individual projects on the Forest, such as the Chilly James Restoration Project, also provided for annual culvert monitoring in certain parts of the Forest. See Flathead National Forest, Chilly James Restoration Project, Decision Notice / FONSI, at DN-2 (Apr. 2016).

As described above, however, the revised Forest Plan abandons these mandatory road-reclamation and culvert monitoring requirements, thereby subjecting bull trout to new threats of erosion and sedimentation when culverts are left in place on unused roads.

The Plan's only nod toward addressing the resulting impacts on bull trout habitat was inclusion of a new guideline, which states that "net increases in stream crossings and road lengths should be avoided in riparian management zones unless the net increase improves ecological function in aquatic ecosystems." Revised Forest Plan at 18 (emphasis added). However, as a Forest Plan "guideline" describing what the Service "should" do, this provision is not mandatory, both by definition and by its own terms. See id. at 6 (defining "guideline"). Further, the new guideline applies only in the so-called "conservation watershed network," which excludes designated critical bull trout habitat, including Swan Lake and the land surrounding it, the headwaters of Cyclone Creek, and portions of the Swan River and North and Middle Forks of the Flathead River. Compare id., app. B at 2 (map of conservation watershed network) with Flathead National Forest, Biological Assessment for Threatened, Endangered, and Proposed Species, at 332-335 (Oct. 31, 2017) (maps of bull trout critical habitat). The new Plan's geographically limited guideline is therefore less protective than Amendment 19's forestwide requirements. Finally, the Forest Service has cited no scientific evidence to support the notion that an increase in roads and culverts in a watershed could ever "improve[] ecological function in aquatic ecosystems." Thus, the revised Forest Plan vitiates the Flathead's former roadbuilding restrictions and the benefits to bull trout those restrictions afforded.

Again, FWS ignored the threat of new road and culvert proliferation in its Biological Opinion concerning bull trout in the Flathead. Nowhere in the Biological Opinion did FWS acknowledge or rationally address the change from a mandatory to a hortatory road density restriction. See Ctr. for Biological Diversity, 698 F.3d at 1121. Indeed, FWS appeared to misunderstand the effect of the revised Plan guideline described above, stating that the Plan's "direction for the conservation watershed network" does "not allow[] a net increase of road network in these watersheds." Flathead BiOp at II-48-49 (emphasis added). Because FWS failed to rationally address threats to bull trout in the Biological Opinion, it violated the ESA, 16 U.S.C. § 1536(a)(2). The revised Forest Plan and Forest Service's reliance on the Biological Opinion similarly violate the ESA.

The Forest Plan further threatens bull trout habitat by abandoning the annual culvert inspection requirements set forth in FWS's 2015 road-maintenance biological opinion and the Chilly James Restoration Project Decision Notice, replacing them with a program under which each culvert would be checked only every six years. See Flathead National Forest, Culvert Monitoring Plan, at 1-4 (July 2016) (describing departure from 2015 monitoring requirements); Flathead BiOp at II-71-72. Thus, the new Plan's culvert monitoring regime is six times less protective of bull trout than the management requirement that it replaced. The Biological Opinion, however, failed to acknowledge this change or examine its effects. Flathead BiOp at II-71-72. Further, the Biological Opinion purported to amend culvert monitoring requirements imposed by bull trout incidental take statements associated with earlier projects on the Forest, but issued no new incidental take statement indicating the amount of take expected from the revised Forest Plan's new monitoring requirements. See id. ("This BO does not contain an

explicit incidental take statement.”) FWS and the Forest Service’s treatment of the revised Plan’s culvert monitoring requirements therefore also violated the ESA. 16 U.S.C. § 1536(a)(2).

III. Conclusion

As set forth in this letter, FWS and the Forest Service violated the ESA by arbitrarily dismissing the threat to grizzly bears and bull trout posed by roadbuilding and the proliferation of human use of roads and trails permitted under the revised Flathead National Forest Plan. If these violations are not corrected within 60 days of the receipt of this letter, the parties to this notice letter will institute a legal action to challenge the revised Forest Plan and associated Biological Opinion in federal district court.

Sincerely,



Joshua R. Purtle