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May 12, 2021

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SENT VIA EMAIL & CERTIFIED MAIL

RE: 60 Day Notice of Intent to Sue to Remedy Violations of the Endangered Species Act

You are hereby notified that Swan View Coalition (Swan View) 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. and its implementing regulations, 50 C.F.R. § 402 et seq. Swan View will file the 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 organization giving notice of intent to sue are as follows:

Keith Hammer, Chair
Swan View Coalition
3165 Foothill Road
Kalispell, MT 59901
Tel: (406) 755-1379

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

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STATEMENT OF LAW

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

The U.S. Court of Appeals for the Ninth Circuit hold that “[o]nce an agency is aware that an endangered species may be present in the area of its proposed action, the ESA requires it to prepare a biological assessment” *Thomas v. Peterson*, 753 F. 2d 754, 763 (9th Cir. 1985). If the biological assessment concludes that the proposed action “may affect” but will “not adversely affect” a threatened or endangered species, the action agency must consult informally with the appropriate expert agency. 50 C.F.R. §§ 402.14 (b)(1), 402.12(k)(1). If the action “is likely to adversely affect” a listed species, the action agency must formally consult with the expert agency, and the expert agency must provide the action agency with a Biological Opinion explaining how the proposed action will affect the species or its habitat. 16 U.S.C. § 1536(a-c); 50 C.F.R. § 402.14. If the Biological Opinion concludes that the proposed action will jeopardize the continued existence of a listed species, it must outline “reasonable and prudent alternatives,” if any are available, that would allow an action agency to carry out the purpose of its proposed activity without jeopardizing the existence of listed species. 16 U.S.C. § 1536(b)(3)(A).

If the 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.” 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 their 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.

As defined in the ESA’s regulations, an “action” subject to consultation includes all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air. 50 C.F.R. §402.02. The U.S. Court of Appeals for the Ninth Circuit holds that this regulatory language “admit[s] of no limitations” and that “there is little doubt that Congress intended to enact a broad definition of agency action in the ESA” *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054 (9th Cir. 1994). Thus, ESA consultation is required for individual projects as well as for the promulgation of land management plans and standards. *Id.* “Only after the Forest Service complies with § 7(a)(2) can any activity that may affect the protected [species] go forward.” *Pacific Rivers*, 30 F.3d at 1056-57.

The procedural consultation requirements in the ESA are judicially enforceable and strictly construed:

If anything, the strict substantive provisions of the ESA justify more stringent enforcement of its procedural requirements [than the provisions of the National Environmental Policy Act], because the procedural requirements are designed to ensure compliance with the substantive provisions. The ESA's procedural requirements call for a systematic determination of the effects of a federal project on endangered species. If a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result. The latter, of course, is impermissible.

Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir.1985).

BACKGROUND

On 11/16/1987, Fish and Wildlife Service issued a draft “jeopardy” biological opinion regarding the effects of Flathead National Forest’s proposed Noisy Face Recreation Plan, which was being

crafted to limit off-road-vehicle (ORV) trails and competitive racing in the Noisy Face Geographic Unit, which includes Management Situation One grizzly bear habitat in the Peters Ridge Grizzly Bear Management Subunit, which in turn includes the Peters Ridge/Krause Basin area. In pertinent part, the draft proposal called for 14.6 of the approximately 28 miles of ORV routes to “be retained and marked on the ground for off-road vehicles and other forest users.”

Document 01

FWS offered a reasonable and prudent alternative, formal consultation was reinitiated, and a “no-jeopardy” biological opinion was issued on 3/14/1988. The biological opinion and the 3/18/1988 Noisy Face Recreation Plan Decision Notice both require: “Approximately 13 miles [of non-system roads and trails] will be retained for use by ORV’s and other forest users. Routes will NOT be marked on the ground. Motorized use will be restricted from April 1 to July 1 and from September 1 to November 30, in the Krause Creek-Peters Ridge area.” (Emphasis added).

Documents 02,03

The 3/18/1988 Decision Notice further requires that “ORV use of these routes not scheduled for retention will be discouraged by placement of barriers such as trees and brush in the trail.” Competitive ORV races, which were previously authorized by Special Use Permits, are no longer allowed under this Decision.

In 1995, the Forest Service and Fish and Wildlife Service established “research benchmarks” for minimizing the incidental take of grizzly bears. The agencies utilized the best available science, not all of which was available in 1988, to establish thresholds for Open Motorized Route Density, Total Motorized Route Density, and Grizzly Bear Security Core. For grizzly bear subunits like Peters Ridge, which includes the Krause Basin area, OMRD cannot exceed one mile per square mile in more than 19% of the subunit, TMRD cannot exceed two miles per square mile in more than 19% of the subunit, and Security Core must exist in at least 68% of the subunit.

Document 04

The Peters Ridge subunit, which includes Krause Basin, remains far from compliance with the above metrics: at 52%/25%/34%, respectively, compared to the required <19%/<19%/>68%. This means more motorized routes need to be closed to motorized use and more motorized routes need to be decommissioned to minimize “incidental take.”

Documents 05, 06

The 3/14/88 Noisy Face biological opinion concludes: “This opinion is based on the information contained in the Proposed Decision Notice . . . and Forest Service biological evaluation. If new information reveals effects of the action or if the proposed action is modified in any way which may affect the grizzly bear in a manner or to an extent not considered in this opinion, formal Section 7 consultation should be reinitiated.”

The Forest Service has not reinitiated formal consultation specifically over the 1988 Noisy Face Recreation Plan, even though new science and the “research benchmarks” derived from it indicate the Noisy Face Plan no longer provides adequate grizzly bear security nor adequate limits on “incidental take.” While FWS has issued several biological opinions concerning the application of the “research benchmarks” to the Flathead’s grizzly bear management subunits, none have specifically revisited the 1988 Noisy Face biological opinion.

On 1/10/08, the Flathead's Hungry Horse and Glacier View Ranger Districts began "the process of evaluating roads, trails, and areas available for motor vehicle use as directed in the 2005 National Forest Service Travel Management Rule," inviting the public to an open house and to submit comments during the travel planning process that would produce a Motor Vehicle Use Map (MVUM) for those Districts. That letter also noted that Swan Lake Ranger District, where the Peters Ridge grizzly bear subunit and Krause Basin are located, would publish a MVUM "in September 2009." [Document 07](#)

Swan Lake Ranger District (SLRD), however, never did commence such a public involvement process for evaluating its roads, trails, and areas available for motor vehicle use. Nor did SLRD announce it intended to publish a MVUM. Nonetheless, SLRD now reports it issued its first MVUM in 2010 and the same motorized road and trail system shown on the MVUM began showing up on its Swan Lake Ranger District maps soon after - assigning the routes purportedly retained in the 1988 Noisy Face Plan as numbers 901 through 907. The routes shown on the MVUM and District maps, however, are not consistent with the routes retained and shown in the 1988 Noisy Face Plan. [Documents 08, 09](#)

The Travel Planning Rules at 36 CFR 212.52 do not allow changes in motorized route designations without prior public notice and opportunity for public comment. As mentioned above, the 3/14/88 Noisy Face biological opinion requires the reinitiation of formal consultation if the route system is modified "in any way" that may change the effects to grizzly bear. The Flathead National Forest has neither initiated a public review and comment process for the motorized route changes in Krause Basin nor has it reinitiated formal consultation with FWS over those changes.

These map errors have been published year after year in subsequent versions of the maps, even though Swan View Coalition has brought the errors to SLRD's attention on numerous occasions. On 8/2/15, Swan View Coalition advised SLRD that its maps were not consistent with the 1988 Noisy Face Plan, offered to meet with SLRD over the matter, and undertook its own on-the-ground motorized route GPS and photo inventory in Krause Basin. SLRD did not engage in the offered conversation and map corrections. On 2/25/21, Swan View Coalition attempted again to engage SLRD in this conversation and submitted maps showing where the SLRD maps are inconsistent with the 1988 Noisy Face Plan. Swan View Coalition has received no response in this regard. [Documents 10, 11, 12, 13, 14](#)

The Forest Service has recognized enforcement of the 1988 Noisy Face Recreation Plan has been inadequate, with ORV use occurring unlawfully during seasons closed to protect wildlife, and with more user-created ORV routes appearing on the landscape. On 9/2/2014, however, the Forest Service announced its intention in Spring 2015 to mark the retained ORV trails on the ground "with Carsonite Signs (plastic post signs) that have the trail number and ATV on them." [Document 15](#)

Swan View has repeatedly notified the Forest Service that the 1988 Noisy Face Recreation Plan and biological opinions expressly considered marking the retained ORV trails on the ground and expressly rejected the idea. Swan View has repeatedly asked the agency to instead take the

measures necessary to bring the area into compliance with the grizzly bear “research benchmarks,” which would most likely require the closure of the very trails the agency intends to mark as open to ORV use on the ground.

On 3/5/2015 the Flathead National Forest released its “Proposed Action - Revised Forest Plan.” It identifies on a map 1,578 acres in the Peters Ridge/Krause Basin area as a “Focused Recreation Area” wherein it describes the “primary activities” as “motorized trails on designated routes.” This would further institutionalize ORV use of the area, promote ORV use over lower-impact non-motorized activities allowed in the area, and would preclude closure of these trails to motorized uses in order to meet the “research benchmarks” and provide adequate grizzly bear security. [Document 16](#)

On 3/6/15, Swan View Coalition issued a 60-day notice of intent to file suit over the Flathead’s intentions to mark the retained ORV routes on-the-ground. The Flathead responded to the notice on 4/29/15, writing “Management direction will remain consistent with the 1988 Decision and the March 14, 1988 Biological Opinion as the ‘routes will not be marked on the ground.’ The Flathead National Forest will continue travel management in the area consistent with the 1988 decision until a new decision, if any, is made to change site-specific management direction. There is currently no such proposal.” [Documents 17, 18](#)

On 12/24/18, the Flathead issued a revised Forest Plan designating Krause Basin as a “Focused Recreation Area [with] Featured Activities [on] Nonmotorized trails and limited motorized trails on designated and signed routes.” The “limited motorized trails” in Krause Basin continue to be displayed and numbered as routes 901-907, but remain inconsistent with the ORV trails to be retained in the 1988 Noisy Face Plan. [Document 19](#)

Also in response to the 60-day notice, SLRD issued a 4/27/15 “Noisy Face Recreation Management Decision - Terrestrial Biological Assessment Amendment” to FWS, requesting a letter of concurrence on its findings regarding lynx and lynx critical habitat, while claiming “The determination for grizzly bear is that the March 18, 1988 Noisy Face Recreation Management Decision does not require reinitiation of consultation . . .” However, the Assessment Amendment attached maps (similar to its MVUM and District maps) showing motorized routes in Krause Basin inconsistent with the 1988 Noisy Face Plan. It made no note of those changes and ignored FWS’s 3/14/88 Biological Opinion on the Noisy Face Plan requiring that formal consultation be reinitiated if the retained motorized routes were “changed in any way” that may change the effects to grizzly bear. On 5/11/15, the Flathead informed Swan View Coalition that “No communication regarding this [Biological Assessment] has been received back from USFWS as of the date of this response to you.” [Documents 20, 21](#)

On 4/22/21, the Flathead issued a press release inviting public comment by May 12 on 19 individual Special Use Permits (SUPs) it is proposing to issue to groups and businesses for summertime uses of the Flathead National Forest. About one-third of these SUPs involve motorized tours in lynx and grizzly bear habitat, including one SUP that would be issued to Snowbike Nation for 200 user days of guided motorcycle rides in Krause Basin and elsewhere in

lynx and grizzly bear habitat. The SUP would abide by the MVUM, which in Krause Basin includes trails not to be retained in the 1988 Noisy Face Plan. This SUP would be issued under a Categorical Exclusion from the preparation of an Environmental Assessment (EA) or Environmental Impact State (EIS), as would the other 18 SUPs. [Documents 22, 23, 28](#)

In a similar fashion, the Flathead issued 10 SUPs for Winter 2020-21, half of which were for guided motorized vehicle tours in the habitats of lynx and grizzly bears. And, in 2020, the Flathead proposed 12 summertime SUPs for grizzly bear and lynx habitat, several of which were for guided motorized vehicle tours. All of these SUPs were issued using a Categorical Exclusion and none of them, either individually or collectively, have been subject to the more stringent analyses required in an EA or EIS. None of these 41 SUPs have been the subject of formal consultation with FWS. [Documents 24, 25](#)

Moreover, on 3/9/21, the Flathead's Spotted Bear Ranger District proposed to build four new rental cabins near the border of the Bob Marshall Wilderness without preparing either an EA or EIS on the effects of providing overnight shelter for motorized vehicle enthusiasts and tours during both summer and winter, adjacent to areas where motorized vehicles are not allowed. In the current batch of 19 SUPs being proposed, one would provide guided UTV (large All Terrain Vehicles) to essentially the same area as where the four new rental cabins have been proposed, though the cabin proposal makes no mention of being a destination for guided ATV, UTV and snowmobile tours. [Documents 26, 27](#)

In summary, the Flathead is in the process of issuing a SUP for guided motorcycle rides on routes not authorized in the 1988 Noisy Face Plan or any subsequent travel planning where it was made clear that the authorized motorized route system was being changed there. And it remains the Flathead's goal to mark those motorized routes in Krause Basin on the ground, whether or not they were routes lawfully retained by the 1988 Noisy Face Plan. In short, where the 1988 Noisy Face Plan was written to make the Krause Basin area no longer attractive to motorized vehicle use in order to protect grizzly bears and other wildlife, including a prohibition on the permitting of ORV races, the Flathead is intent on promoting Krause Basin as a Focused Recreation Area and to promote motorized use there through trail signs and the permitting of commercial motorcycle tours. This has not been the specific subject of renewed formal consultation with FWS over the 1988 Noisy Face Plan, nor has the Flathead's plans to issue dozens of recreation SUPs and to expand its rental cabin system been the subject of formal consultation with FWS.

LEGAL VIOLATIONS

In failing to reinitiate formal consultation over the 1988 Noisy Face Recreation Plan in light of new best available science, the subsequent establishment of "research benchmarks" for minimizing the incidental take of grizzly bear, continued violations of the Noisy Face Plan by motorized vehicles, and other changed circumstances, the Forest Service and Fish and Wildlife Service are in violation of Sections 7 and 9 of the ESA.

In failing to bring the Peters Ridge Grizzly Bear Management Subunit into full compliance with

those “research benchmarks,” the agencies are in violation of Section 7 of the ESA and Section 9 of the ESA for allowing excessive “incidental take” due to excessive motorized roads and routes and inadequate enforcement of roads and routes closed to motorized vehicles.

Should the Forest Service mark any of the retained ORV trails on the ground or should it fail to correct its maps and allow motorized use on routes not retained in 1988, it will be in violation of Sections 7 and 9 of the ESA for taking measures expressly forbidden by its own Noisy Face Decision and FWS’s Noisy Face biological opinion - measures necessary to adequately limit “incidental take” of grizzly bear and necessary to remain within the findings of biological effects in the biological opinion.

The Forest Service has failed to undertake formal consultation with FWS over its SUP program and the expansion of its Rental Cabin program, in violation of Sections 7 and 9 of the ESA.

Moreover, the Peters Ridge/Krause Basin area is designated lynx critical habitat and the Forest Service has failed to formally consult regarding the impacts of the above described activities on this designated critical habitat.

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 and adversely modify critical habitat, that their actions do not result in unauthorized take of these species of wildlife, and that 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 imperiled species and their habitats. If the violations of law described above are not cured within 60 days, Swan View intends to file suit for declaratory and injunctive relief, as well as attorney and expert witness fees and costs.

Sincerely,

/s/Timothy Bechtold,
Counsel for Notifier

cc: U.S. Attorney General
U.S. Department of Justice
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Washington, DC 20530-0001