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March 6, 2015

Tom Vilsak, Secretary,
U.S. Department of Agriculture
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Washington, D.C. 20250-0003

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U.S. Department of the Interior
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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:

Timothy Bechtold
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P.O. Box 7051
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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 insure 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 some 28 miles of ORV routes to "be retained and marked on the ground for off-road vehicles and other forest users."

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).

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 are no longer allowed under this Decision.

On 3/1/1995, the Forest Service issued Flathead Forest Plan Amendment 19. It utilized the best available science, not all of which was available in 1988, to establish standards 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.

In its most recent (March 2014) Annual Flathead National Forest Plan Amendment 19 Implementation Monitoring Report to FWS, the Forest Service reports the Peters Ridge subunit 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 meet Amendment 19 standards and adequately limit "incidental take."

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 consultation specifically over the 1988 Noisy Face Recreation Plan, even though new science and Amendment 19 indicate the Noisy Face Plan no longer provides adequate grizzly bear security nor adequate limits on "incidental take." FWS has issued several biological opinions concerning the continued implementation of Amendment 19, the most recent issued on 1/13/14. While these opinions have specifically revisited a number of prior consultations with Flathead National Forest, none have specifically revisited the 1988 Noisy Face biological opinion.

Sometime in the past ten years, the Forest Service began displaying the 13 miles of ORV routes retained in the 1988 Noisy Face Plan as motorized routes on its Swan Lake Ranger District maps and its Motor Vehicle Use Maps - assigning them numbers 901 through 907. While Swan View is disappointed this has occurred because the thrust of the 1988 Noisy Face Plan and process was to not promote the area as an ORV destination, it is the marking of those same trails on the ground that is expressly prohibited by the 1988 Decision Notice and FWS's 1988 biological opinion.

The Forest Service in the past year or so 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 9/24/2014, however, the Forest Service announced its intention to in Spring 2015 mark the retained ORV trails on the ground "with Carsonite Signs (plastic post signs) that have the trail number and ATV on them."

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 Amendment 19, which would most likely require the closure of the very trails the agency intends to mark as open to ORV use on the ground. The agency as recently as 2/26/2014 refused to take such affirmative actions and refused to not mark the ORV trails on the ground.

Moreover, on the afternoon of 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 meet Amendment 19 standards and provide adequate grizzly bear security.

LEGAL VIOLATIONS

In failing to reinitiate formal consultation over the 1988 Noisy Face Recreation Plan in light of new best available science, the subsequent Flathead Forest Plan Amendment 19, 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 Flathead Forest Plan Amendment 19, 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 routes.

Should the Forest Service mark any of the retained ORV trails on the ground, it will be in violation of Sections 7 and 9 of the ESA for taking measure 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.

Moreover, the Peters Ridge/Krause Basin area is designated lynx critical habitat and the Forest Service has failed to 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: Eric Holder, U.S. Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001