



July 19, 2022

Deb Haaland
Secretary
Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240
exsec@ios.doi.gov

Randy Moore
Chief, U.S. Forest Service
Department of Agriculture
1400 Independence Ave, S.W.
Washington, D.C. 20250-1111
randy.moore@usda.gov

Kurt Steele
Forest Supervisor
Flathead National Forest
650 Wolfpack Way
Kalispell, MT 59901
kurtis.steele@usda.gov

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

Dear Secretary Haaland, Chief Moore, and Supervisor Steele:

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”), 16 U.S.C. § 1540(g), we hereby provide notice that the United States Forest Service is in violation of the ESA, 16 U.S.C. § 1536(a)(2), for its arbitrary reliance on the U.S. Fish and Wildlife Service’s (“FWS”) legally deficient February 16, 2022 Biological Opinion (“Revised Biological Opinion”) for the Forest Service’s 2018 Land Management Plan for the Flathead National Forest (“Revised Forest 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. The Forest Service and FWS have sought to dismiss the impact of this new road-management direction by asserting that the Forest Service will maintain the habitat conditions that existed on the ground in the Flathead in 2011, but the agencies have failed to meaningfully consider that the Revised Forest Plan’s abandonment of longstanding road-reclamation requirements in favor of minimal entrance barriers alters on-the-ground road conditions throughout the Flathead National Forest grizzly bear and bull trout habitat. Based on this same oversight in FWS’s initial Biological Opinion addressing the Revised Forest Plan on November 22, 2017 (“Initial Biological Opinion”)—and following the initiation of a lawsuit against the Forest Service and FWS by Swan View Coalition and Friends of the Wild Swan—the U.S. District Court for the District of Montana has already issued an order holding, in part, that the agencies’ inadequate analyses violated the ESA. WildEarth Guardians v. Steele, No. CV 19- 56-M-DWM, 2021 WL

2590143 (D. Mont. June 24, 2021). Nevertheless, following FWS' completion of the court-ordered remand of the Initial Biological Opinion, the Forest Service and FWS have largely failed to correct these ESA violations in FWS' February 16, 2022, Biological Opinion ("Revised Biological Opinion").

In conducting its review of the Forest Plan under the ESA, FWS did not rationally grapple with the impacts of the Revised Forest Plan's new management direction, as the law requires, before concluding in the Revised Biological Opinion that the Revised Forest Plan will not jeopardize bull trout and grizzly bears in the Flathead. The Forest Service's reliance on FWS's Revised Biological Opinion therefore violates section 7 of the ESA and renders the Revised Forest Plan unlawful. 16 U.S.C. § 1536(a)(2); see Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt., 698 F.3d 1101, 1127-1128 (9th Cir. 2012) ("[A]n agency cannot meet its section 7 obligations by relying on a Biological Opinion that is legally flawed....").

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 grizzly bear habitat hinges on the fact that much of it remains a largely unroaded landscape. Roads and accompanying motor-vehicle use are one of the principal threats that grizzly bears continue to face in the Northern Rockies today. 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. 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 72-73 (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 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.¹ 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”). Amendment 19 also required the Forest Service 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; *see also* Amendment 19 EA, app. D. at 3 (defining “security core” as an “area that is at least 0.3 miles from open roads and high-intensity, non-motorized trails”).

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”).

The Revised Forest Plan abandons Amendment 19’s road-management direction and therefore weakens protections for grizzly bear habitat in multiple respects. First, although the Forest Service claims that the Revised Forest Plan maintains baseline road conditions that existed in 2011, Revised Plan Final EIS, vol. 2 at 173, vol. 4, Glossary at 2, the 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 the lesser 2011 baseline is illusory because the Revised Forest Plan moved the goal posts on what qualifies as a “reclaimed” road. Under the Revised Forest 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. Revised Forest Plan at 199 (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

¹ A bear management subunit is a subdivision of the Northern Continental Divide Ecosystem “representing the approximate size of an average annual female grizzly bear home range.” Revised Forest Plan at 172. Flathead National Forest, Forest Plan Amendment #19, Amended Environmental Assessment, at 136 (Mar. 1995) (“Amendment 19 EA”).

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, and instead allowing “impassable” roads to remain on the landscape without counting toward road density calculations, the Revised Forest Plan threatens to degrade the 2011 on-the-ground road conditions that the Revised Forest Plan purports to maintain. See Revised Biological Opinion at III-67 (stating that the Revised Forest Plan will “maintain on-the-ground conditions that have contributed to the growth and expansion of the NCDE grizzly bear population”). These road management changes further facilitate the proliferation of new roadbuilding in much of the Flathead’s formerly secure grizzly bear habitat by reducing the time and resource-costs required to remove roads from road-density calculations. Accordingly, there is no merit to the Forest Service and FWS’ claims that the Revised Forest 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 of whether 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 Forest Plan, roads once “reclaimed” by the Forest Service to offset new road construction can instead remain on the landscape indefinitely and displace grizzly bears from their habitat long after the roads have been “closed.” Id. at 54. Further, as a practical matter, motorized 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 Forest Plan’s new management direction threatens harm to grizzly bears in this way as well.

FWS’ Revised Biological Opinion overlooks the Revised Forest Plan’s weakening of protections for grizzly bears in multiple respects. First, as the U.S. District Court for the District of Montana held in its June 24, 2021 Order, unlike Amendment 19’s stringent reclamation requirements, the minimal road closures adopted by the Revised Forest Plan frequently fail to prevent motor vehicle trespass on putatively closed roads, and motorized users can and do remove and bypass minimal physical barriers. WildEarth Guardians, 2021 WL 2590143, at *868–69. Thus, the District Court held that “the Fish and Wildlife Service’s failure to consider the effect of ineffective road closures [in its Initial Biological Opinion] was arbitrary and capricious” and violated the ESA. Id. at *869.

Despite this explicit judicial determination, FWS again failed to meaningfully consider impacts to grizzly bears from unauthorized motorized use in the Revised Biological Opinion. The Opinion’s new analysis began by stating that FWS would not consider future unauthorized motorized use associated with ineffective road closures because such use is “not the result of a federal action and therefore not analyzed under effects of the action, but their influence is

considered for describing the environmental baseline.” Revised Biological Opinion at III-46. Nevertheless, FWS appeared to undertake a cursory review of adverse impacts to grizzly bears from such unauthorized activity, ultimately concluding that future unauthorized motor-vehicle use of roads closed by ineffective entrance barriers would not harm grizzly bears because past levels of unauthorized use had not caused grizzly bear populations to decline. *Id.* (“[T]he effects of any illegal motorized access on the grizzly bear population is likely low as evidenced by the NCDE grizzly bear population status...”). However, this conclusion failed to recognize that the Revised Forest Plan’s new direction will increase the number of roads closed only by entrance barriers and will therefore yield an ever-increasing mileage of roads susceptible to, and ultimately receiving, unauthorized motorized use in grizzly bear habitat. In short, FWS, and the Forest Service through its reliance on the Revised Biological Opinion, irrationally assumed that future adverse impacts to grizzly bears from ineffective road closures would mirror past impacts—even while the Revised Forest Plan fundamentally altered and weakened road closure requirements in the Flathead Forest’s grizzly bear habitat.

The FWS’s Revised Biological Opinion on the Revised Forest Plan also failed again to acknowledge the threat of new road proliferation and associated human disturbance of grizzly bear habitat that the Revised Forest Plan allows. Instead, FWS simply stated that the Revised Forest 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. Revised Flathead Biological Opinion at III-89; *see also id.* at III-6 (stating that the Revised Forest Plan will “require no net decrease to the ‘baseline’... for secure core and no net increase to the baseline for open motorized route density or total motorized route density” that existed in 2011).

Although the management changes associated with the Forest Service’s abandonment of Amendment 19 requirements were overlooked in the Revised Biological Opinion, their significant consequences for grizzly bear habitat security are already becoming apparent in a series of proposed new project decisions under the Revised Forest Plan. Under Amendment 19, only 3.2 miles of new roads were built in grizzly bear habitat on the Flathead National Forest from 1996 to 2010—and even this small amount was apparently offset by similar amounts of road reclamation. In contrast, while litigation over the Revised Forest Plan has proceeded, the Forest Service has advanced multiple projects that implement the Revised Forest Plan’s challenged provisions and involve significant roadbuilding totaling more than 66 miles of roads in grizzly bear habitat. The bulk of this roadbuilding involves just three projects, including the Mid-Swan (31.9 road miles), Bug Creek (13.3 road miles), and Frozen Moose projects (13 road miles). The Revised Forest Plan facilitates and incentivizes this new level of roadbuilding by diminishing the stringency of the requirement for offsetting road reclamation, thereby making it easier and less costly for the Forest Service to undertake construction of new forest roads. The Forest Service’s proposed onslaught of new roadbuilding under the Revised Forest Plan would result in a marked reduction in on-the-ground baseline grizzly bear security conditions, but the resulting impact to grizzly bears has escaped analysis under the ESA due to FWS’s arbitrary analysis in the Revised Biological Opinion.

In sum, by relying on FWS’s arbitrary Revised Biological Opinion to satisfy its own ESA obligations, the Forest Service violated the ESA in failing to determine, based on a rational analysis, whether the Revised Forest Plan’s weakened roadbuilding requirements will jeopardize

the grizzly bear, a threatened species. 16 U.S.C. § 1536(a)(2); see Ctr. for Biological Diversity v. BLM, 698 F.3d at 1127-28.

II. Bull Trout

The Forest Service similarly failed to rationally address the impacts on threatened bull trout of the Revised Forest Plan. Roads built in bull trout watersheds—including roads closed to human travel—threaten to degrade trout habitat conditions by delivering sediment to creeks. Revised Biological Opinion at II-47-49. 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 if not total roadbed collapse. See id. at II-48-49. 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. Revised Biological Opinion at II-21. Addressing the threat of sedimentation from roads therefore requires, according to FWS in its own bull trout recovery plan, “maintaining bridges, culverts, and [stream] crossings” and “decommissioning surplus roads and removing culverts and bridges on closed roads.” FWS, Recovery Plan for the Coterminous United States Population of Bull Trout, at 26 (2015).

As discussed, former Forest Plan Amendment 19 required the Forest Service to reclaim roads through stringent measures to meet road-density standards throughout most of the Forest, which included a requirement to remove all stream-aligned culverts when reclaiming roads. 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 their habitat in the Forest. See Amendment #19, Decision Notice, at 12.

As described above, however, the Revised Forest Plan abandoned Amendment 19’s mandatory road-reclamation requirements, including the requirement for culvert removal, thus subjecting bull trout to perpetual threats of erosion and sedimentation when roads and road culverts remain on the Flathead landscape. The Montana District Court’s June 24, 2021 opinion recognized this change and held that “[t]he scientific evidence does not support the Revised Plan’s shift away from mandatory culvert removal, particularly since the Fish and Wildlife Service endorsed culvert removal as one of the most effective bull trout protection tools just two years prior to” issuing its Initial Flathead Biological Opinion in 2017. WildEarth Guardians, 2021 WL 2590143, at *869; see also, id. at *871 (holding that FWS’s analysis regarding the “abandonment of the culvert removal requirement was arbitrary and capricious”).

In response, FWS’s Revised Flathead Biological Opinion acknowledged that failing to remove culverts “has the potential to adversely affect bull trout and bull trout critical habitat.” Revised Biological Opinion at II-53. As a result, FWS issued an incidental take statement accompanying the Revised Biological Opinion that required the Forest Service to “[r]emove all stream-aligned culverts when decommissioning roads in Conservation Watershed Network watersheds that have bull trout....” Id. at II-78 (emphasis added). However, FWS failed to recognize or acknowledge that the Revised Forest Plan contemplates that the Forest Service will

remove roads from road-density calculations not by “decommissioning” them, but rather by rendering them “impassable,” which is a distinct concept under the terms of the Revised Forest Plan. See Revised Forest Plan at 199 (defining “impassable” and “decommissioned” roads). Importantly, while the Revised Forest Plan allows the Forest Service to remove “decommissioned” roads from road-density calculations “as long as they meet the definition of impassable,” the converse is not true—there is no requirement that “impassable” roads also meet the definition of “decommissioned.” Id. (defining “decommissioned” to mean “[a]n unneeded road that has been stabilized and restored to a more natural state”).

In short, the Forest Service may easily circumvent FWS’s new culvert-removal requirement by rendering roads impassable (blocking the entrance) but not decommissioning (restoring them to a more natural state), thus allowing the Forest Service to remove roads from road-density calculations without removing stream-aligned culverts. FWS’s culvert-removal requirement therefore offers no guarantee of protections for bull trout. FWS failed to consider this significant limitation of its own prescribed new protection for bull trout habitat. In short, the inadequate culvert-removal requirement falls far short of addressing the ESA violation identified in the District Court’s June 24, 2021 Order.

FWS’s new culvert-removal requirement is also insufficient because it applies only in the so-called “conservation watershed network.” This network excludes significant portions of 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 Flathead River watersheds. Compare Revised Forest Plan, 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). Thus, FWS’s inadequate culvert-removal requirement again falls far short of addressing the ESA violation identified in the District Court’s June 24, 2021 Order.

Moreover, as with grizzly bears, FWS overlooked impacts to bull trout from the Revised Forest Plan’s abandonment of Amendment 19’s stringent road-reclamation requirements. FWS’s Revised Biological Opinion stated that the Revised Forest Plan’s “direction for the conservation watershed network” does “not allow[] a net increase of road network in these watersheds.” Revised Biological Opinion at II-50 (emphasis added). However, this assertion relied on a hortatory guideline that provides that “net increases in stream crossing and road lengths should be avoided,” Revised Forest Plan at 18 (emphasis added). 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”). Therefore, FWS was factually wrong to assert that the Revised Forest Plan does not allow increased road density in watersheds designated for fish conservation. Moreover, as with the culvert removal requirement, this hortatory guideline applies only in the “conservation watershed network,” which does not include significant designated critical bull trout habitat.

As discussed for grizzly bears, the Revised Forest Plan allows for new roadbuilding—and new culvert installation—throughout most of the Forest as long as the Forest Service compensates for such new construction by rendering other roads “impassable” by placing a minimal barrier across just the entrance of those otherwise usable roads. Flathead National Forest, Final Environmental Impact Statement for Land Management Plan, vol. 1, at 135 (Nov.

2018). That barrier will not prevent the unreclaimed roadbed from eroding, nor will it prevent culverts under the road from failing and releasing large amounts of sediment into bull trout habitat. Further, because the Revised Biological Opinion's culvert-removal requirement includes a loophole that allows culverts to remain on impassable roads, this new requirement guarantees no protections for bull trout. Finally, as discussed, FWS's Revised Biological Opinion failed to meaningfully consider that minimal barriers may allow motorized trespass on "impassable" roads, causing further sedimentation.

FWS's Revised Biological Opinion did not acknowledge or analyze these potential impacts to bull trout in concluding that the Revised Forest Plan will not likely jeopardize bull trout or adversely modify bull trout critical habitat. In its reliance on this revised Opinion, the Forest Service thus failed to rationally determine, based on a consideration of all relevant factors, whether the Revised Forest Plan's new management direction will jeopardize the survival of bull trout or adversely modify bull trout critical habitat in the Flathead. See Ctr. for Biological Diversity, 698 F.3d at 127-128. Therefore, the Forest Service's treatment of the revised Plan's provisions for bull trout habitat also violated the ESA. 16 U.S.C. § 1536(a)(2).

III. Conclusion

As set forth in this letter, the Forest Service violated the Endangered Species Act by relying on the U.S. Fish and Wildlife Service's unlawful Revised Biological Opinion and continuing to arbitrarily and capriciously dismiss the threat to grizzly bears and bull trout posed by the Revised Forest Plan's weakened reclamation standards, which enable increased roadbuilding, the proliferation of unauthorized motor use of roads, and permit culverts to remain on "impassable" roads. 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 in federal district court.

Sincerely,



Benjamin J. Scrimshaw