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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 West Reservoir Project, Flathead National Forest

Dear Secretary Burgum, Chief Schultz, and Supervisor Botello:

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 U.S. Forest Service (the “agency”) is in violation of ESA Section 7, 16 U.S.C. § 1536(a)(2), by failing to complete mandatory interagency consultation, and instead arbitrarily invoking emergency consultation procedures, in connection with the March 11, 2026 approval of the West Reservoir Project. Specifically, the project includes 4.7 miles of new road construction, despite the ongoing failure by the agency and the U.S. Fish and Wildlife Service to properly analyze the impacts of roads on imperiled species.

The West Reservoir Project decision represents the latest in an eight-year-long series of ESA violations by the agency concerning road management within the Flathead National Forest's habitat for grizzly bears and bull trout, both of which are listed as threatened species under the ESA. Beginning with issuance of the 2018 Revised Land Management Plan for the Flathead Forest ("Revised Forest Plan"), the Forest Service has repeatedly acted arbitrarily in attempting to justify the Revised Forest Plan's abandonment of a longstanding commitment to limit road development in key grizzly bear and bull trout habitat. As a result, the U.S. District Court for the District of Montana has twice determined that the Forest Service's attempted justifications were irrational and unlawful under Section 7 of the ESA. *See Swan View Coal. v. Haaland*, No. CV 22-96-M-DLC, 2024 WL 3219206, at *17 (D. Mont. June 28, 2024); *WildEarth Guardians v. Steele*, 545 F. Supp. 3d 855, 880–81 (D. Mont. 2021).

ESA Section 7 requires the Forest Service to consult with the U.S. Fish and Wildlife Service to ensure that actions that may affect ESA-listed species are "not likely to jeopardize the continued existence" of such species. 16 U.S.C. § 1536(a)(2). Such consultation concludes with the Fish and Wildlife Service's issuance of a biological opinion that details "how the agency action affects the species" and sets forth the Service's determination whether the species' continued existence will be jeopardized by the action. *Id.* § 1536(b)(3)(A). An agency action subject to the interagency consultation requirement of ESA Section 7 may not be implemented "until consultation is satisfactorily concluded." *Lane Cnty. Audubon Soc'y v. Jamison*, 958 F.2d 290, 295 (9th Cir. 1992).

Here, the interagency consultation requirement has not yet concluded. In its most recent ruling on the Forest Service's ESA compliance in connection with the Revised Forest Plan, the Montana district court held that the agency violated the ESA by irrationally relying on an arbitrary biological opinion issued by the Fish and Wildlife Service regarding the Revised Forest Plan's road-management provisions. *See Swan View Coal.*, 2024 WL 3219206, at *17. The court ruled that the Fish and Wildlife Service's biological opinion failed to legitimately evaluate the Revised Forest Plan's abandonment of prior road-building limitations in light of evidence that (1) many administratively "closed" roads are subject to unauthorized use that displaces grizzly bears from important habitat, (2) grizzlies are also displaced by the existence of even unused roads in their habitat, and (3) bull trout are likely to be harmed by the Forest Service's abandonment of a former requirement to remove culverts from forest roads. *Id.* at *7–16. Because the biological opinion failed to lawfully evaluate these issues, the Forest Service's reliance on the biological opinion to satisfy its own ESA obligations also violated the ESA. *Id.* at *17. In that same ruling, the Montana district court remanded the relevant provisions of the Fish and Wildlife Service's biological opinion for further consideration of the Revised Forest Plan's impacts on grizzly bears and bull trout. *See id.* at *17–19. As of this date, that remand continues.

Thus, to date the Forest Service and Fish and Wildlife Service have been unable to provide a justification for the Revised Forest Plan's framework for road management in grizzly bear and bull trout habitat that satisfies the requirements of ESA Section 7. Further,

due to this unlawful agency conduct, there is currently no legally valid biological opinion in place to ensure that road-management activities authorized under the Revised Forest Plan will not jeopardize the continued existence of grizzly bears and bull trout.

Nevertheless, the agency now purports to rely on the road-management direction of the Revised Forest Plan to authorize the West Reservoir Project. That project includes 4.7 miles of road construction and reconstruction within important grizzly bear and bull trout habitat in the Flathead National Forest, with admitted likely adverse effects on grizzly bears and bull trout. See U.S. Forest Serv., Decision Notice and Finding of No Significant Impact for the West Reservoir Project, at 2, 14 (Mar. 11, 2026) (“DN/FONSI”). Yet the Forest Service has not obtained a project-specific biological opinion from the Fish and Wildlife Service to ensure that the West Reservoir Project’s road construction and reconstruction activities will not jeopardize grizzly bears or bull trout in violation of ESA Section 7. Nor, as discussed above, has the Forest Service obtained a valid programmatic, forest-plan-level biological opinion to ensure against such jeopardy.

Lacking *any* biological opinion to demonstrate ESA Section 7 compliance for the West Reservoir Project, the Forest Service has attempted to sidestep Section 7’s requirements by invoking “emergency consultation procedures.” *Id.* at 14. The Forest Service claims these procedures allow it to pursue consultation with the Fish and Wildlife Service “informally through alternative procedures,” and advises that it “has provided the USFWS with biological assessments that include a detailed description of the project activities, an evaluation of the impacts to affected species, and a detailed list of design features to minimize the impact of activities on affected listed species.” *Id.* On this basis, the Forest Service appears to contend that it can build harmful roads in grizzly bear and bull trout habitat now and learn about the consequences for threatened species later.

However, the ESA emergency consultation regulations at 50 C.F.R. § 402.05 authorize alternative, informal consultation procedures to comply with ESA Section 7 only in legitimate emergency “situations involving acts of God, disasters, casualties, national defense or security emergencies, etc.” 50 C.F.R. § 402.05(a). As this language suggests, “[t]he emergency exception is meant for unexpected exigencies.” *Forest Serv. Emps. for Env’t Ethics v. U.S. Forest Serv.*, 397 F. Supp. 2d 1241, 1257 (D. Mont. 2005) (“*FSEEE*”); see also *Wash. Toxics Coal. v. U.S. Dep’t of Interior, Fish & Wildlife Serv.*, 457 F. Supp. 2d 1158, 1195 (W.D. Wash. 2006) (holding that “emergency” sufficient to trigger ESA emergency consultation regulations “includes the element of surprise and unexpectedness”). Here, however, the Forest Service identifies no unexpected exigency, but asserts only that the West Reservoir Project qualifies as an emergency action because it “will improve forest health and resilience and reduce potential wildfire impacts to important values at risk.” DN/FONSI at 3. The pursuit of these objectives arises from no surprising or unexpected conditions, but instead reflects longstanding forest health and wildfire-risk concerns that are widespread across large portions of the National Forest System. For this reason, the use of measures to address these concerns “is not unexpected but guaranteed; the only question is when and where [they] will be used.” *FSEEE*,

397 F. Supp. 2d at 1257. Accordingly, “[t]here is no reason why the [Forest Service] cannot conduct formal consultation with [the Fish and Wildlife Service] and no reason to find that the ESA requires anything less.” *Id.*

In sum, there is no emergency to justify the Forest Service’s evasion of ESA Section 7 requirements in authorizing the West Reservoir Project. Accordingly, the agency’s invocation of the ESA emergency consultation procedures and its failure to comply with ESA Section 7 before authorizing the West Reservoir Project were arbitrary and unlawful under the ESA. If these violations are not corrected within 60 days of your receipt of this letter, the parties to this notice letter will institute a legal action to challenge the approval of the West Reservoir Project in federal district court.

Sincerely,

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