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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 Amendment 40 to the Forest Plan for the Bitterroot National Forest

Dear Secretary Haaland, Chief Moore, and Supervisor Anderson:

This is a sixty-day notice on behalf of Friends of the Bitterroot, Friends of the Clearwater, Native Ecosystems Council, and WildEarth Guardians in accordance with the citizen-suit provision of the Endangered Species Act (ESA), 16 U.S.C. § 1540(g). The U.S. Forest Service is in violation of the ESA, 16 U.S.C. § 1536(a)(2), for arbitrarily relying on the FWS's legally deficient July 8, 2021 Biological Opinion on impacts to grizzly bears from Amendment 40 to the 1987 Land Management Plan for the Bitterroot National Forest and for failing to reinitiate consultation with the U.S. Fish and Wildlife Service (FWS) about impacts to bull trout. FWS is in violation of the ESA, 16 U.S.C. § 1536(a)(2), for issuing a legally deficient Biological Opinion regarding Amendment 40's impacts to grizzly bears.

Amendment 40 abandons a longstanding Forest Service commitment to limit the number of road miles open to motorized use in third-order drainages within the Bitterroot National Forest. Prior management direction required the Forest Service to maintain or improve open-road density conditions in Forest drainages by removing or closing roads before opening new roads to motorized use in Forest drainages. While originally intended to protect elk, this limitation on open-road densities also protected the Forest's grizzly bear and bull trout habitat. However, Amendment 40 abandoned this protective requirement, instead allowing the Forest Service to open or build unlimited road miles in Forest drainages without closing comparable road miles as was previously required.

The Forest Service and FWS failed to rationally examine impacts to grizzly bears and bull trout from abandoning these longstanding limitations on open-road densities in their habitat.

For grizzly bears, the Forest Service and FWS stated that Amendment 40 would not jeopardize grizzlies if the Forest Service maintained secure, unroaded grizzly bear habitat at 95 percent of current levels within the Amendment 40 action area or in any grizzly bear analysis unit. However, the agencies failed to justify—in contravention of prevailing grizzly bear science—their decision to allow the Forest Service to overinflate calculations of secure grizzly bear habitat by counting as secure habitat fractions of land as small as just one acre in size (approximately .00156 square miles). By counting inadequate fractions of unroaded land as “secure” habitat, Amendment 40 thus permits the Forest Service to significantly degrade grizzly bear habitat by increasing on-the-ground open-road densities in the Bitterroot National Forest without meaningfully decreasing administrative calculations of secure habitat intended to limit road use and protect grizzly bears.

With respect to bull trout, the Forest Service failed entirely to examine or consult with FWS regarding the sedimentation impacts to bull trout from this road-management change. Instead, the agency asserted without explanation that the Amendment will not impact bull trout.

In conducting its review of Amendment 40 and the Forest Plan under the ESA, the Forest Service violated section 7 of the ESA by relying on FWS's unlawful Biological Opinion for grizzly bears. 16 U.S.C. § 1536(a)(2); *see Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1127–28 (9th Cir. 2012) (“[A]n agency cannot meet its section 7 obligations by relying on a Biological Opinion that is legally flawed....”). For bull trout, the Forest Service violated ESA

section 7 by failing to reinitiate consultation with FWS about Amendment 40's new unexamined impacts to bull trout and bull trout critical habitat. 50 C.F.R. § 402.16(a)(3); *All. for Wild Rockies v. Probert*, 412 F. Supp. 3d 1188, 1205 (D. Mont. 2019). In turn, FWS violated the ESA by failing to rationally grapple with the impacts of Amendment 40's new management direction before concluding in its Biological Opinion that the Revised Forest Plan will not jeopardize grizzly bears. 16 U.S.C. § 1536(a)(2); *Ctr. for Biological Diversity*, 698 F.3d at 1107, 1121.

I. GRIZZLY BEARS

Situated in the Sapphire and Bitterroot Mountains surrounding the Bitterroot Valley, the Bitterroot National Forest encompasses more than 1.5 million acres of public land in west-central Montana and east-central Idaho.

The Bitterroot “was home to widespread grizzly bear populations until the middle of the 20th century when evidence of the bear’s last sign was found.” *All. For Wild Rockies v. Cooley*, 661 F. Supp. 3d 1025, 1030 (D. Mont. 2023). However, grizzly bears are again and increasingly using this habitat in recent years. *Ctr. for Biological Diversity v. Little*, No. 1:21-CV-00479-CWD, 2024 WL 1178565, at *19 (D. Idaho Mar. 19, 2024) (“there have been several transient grizzly bear sightings [in the Bitterroot Ecosystem] over the years, and grizzly bear range has been expanding into this area.”; *id.* at *3 (“grizzly bears have been seen in the [Bitterroot Ecosystem] in the past 15 years.”); *All. for Wild Rockies*, 661 F. Supp. 3d at 1030 (“grizzly bears have been seen in the Bitterroot Ecosystem” as recently as October 2022).

The value of the Bitterroot National Forest’s grizzly bear habitat depends on managing motorized access in the Forest. As seminal research by Richard Mace and Timothy Manley demonstrated in the 1990s, the presence of roads in grizzly bear habitat negatively impacts grizzly bears’ survival. In part, 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”). Indeed, contemporary research “indicates that grizzly bears consistently were displaced from roads and habitat surrounding roads, often despite relatively low levels of human use.” FWS BiOp at 19 (collecting studies). Therefore, “research suggests that grizzly bears benefit from road closures aimed at minimizing traffic on roads within important seasonal habitat, especially in low elevation habitats during the spring.” *Id.* at 20.

Prior management direction of the 1987 Bitterroot Forest Plan required the Forest Service to limit open-road densities—roads open to motorized use—throughout third-order drainages in the Forest to no more than 1 mile per square mile or 2 miles per square mile depending on the roading conditions that existed in 1987. *Compare* Bitterroot National Forest, Final Environmental Assessment for Amendment 40 at 14–15 (Sept. 2023) (describing 1987 Plan standard requiring 50 or 60 percent elk habitat effectiveness in drainages), *with id.* at 15 (noting “[a]n elk habitat effectiveness value of 50 percent equates to open road density of two miles per square mile, and a value of 60 percent equates to one mile of open road per square mile”). Although this requirement’s primary purpose was to protect elk habitat, these standards were also important to conserve grizzly bear habitat.

Amendment 40 eliminated the 1987 Bitterroot Forest Plan’s elk habitat effectiveness requirements limiting open-road densities in third-order drainages. Bitterroot National Forest, Amendment 40 Decision Notice, at 10 (Sept. 2023). Amendment 40 introduced no new requirements to mitigate resulting road-density impacts to grizzly bears. *See generally, id.*; *see also* Biological Opinion at 23 (“No standards exist that would limit the miles of routes that could be built in the future other than land designations”). Thus, under Amendment 40, the Forest Service may now open or construct new roads without closing other roads. This is a sharp departure from the more stringent requirements of the original 1987 Plan, which required the Forest Service to comply with road-density limitations by closing old roads before opening or constructing new roads in third-order drainages. Bitterroot National Forest, Bitterroot National Forest Plan Record of Decision, at 38 (Sept. 1987) (requiring Forest Supervisor to “ensure that ... all projects and contractual obligations are consistent with the Forest Plan”).

FWS concluded that this road-management change would not jeopardize grizzly bears as long as the Forest Service did not reduce available secure, unroaded habitat by more than 5 percent within Amendment 40 action area or in any of the eleven grizzly bear analysis units. However, FWS’s Biological Opinion allowed the Forest Service to overinflate current and future calculations of secure grizzly bear habitat by counting as secure habitat fractions of land as small as just one acre in size (approximately .00156 square miles). In practice, then, Amendment 40 allows the Forest Service to checkerboard the Bitterroot National Forest with roads open to motorized use without meaningfully decreasing administrative calculations of secure core intended to limit road use and protect grizzly bears.

FWS's conclusion that the Forest Service may maintain adequate grizzly bear secure habitat by preserving unroaded land in one-acre slivers stands in stark contravention to prevailing grizzly bear science. Research by Mace et al. (1996) defined secure habitat in the Montana Northern Continental Divide Ecosystem to include only contiguous roadless areas more than 2,500 acres in size. Biological Opinion at 12. Michael Proctor et al. recommended maintaining unroaded secure habitat in minimum sizes of 10 square kilometers (more than 2,471 acres). Proctor et al., *Effects of Roads and Motorized Human Access on Grizzly Bear Populations in British Columbia and Alberta, Canada* (2020). Gibeau et al. recommended minimum land sizes of more than 9 square kilometers (about 2,224 acres). Gibeau et al., *Managing for Grizzly Bear Security Areas in Banff National Park and the Central Canadian Rocky Mountains* (2001). Wayne Wakkinen and Wayne Kasworm's attempt to identify minimum secure habitat polygon sizes for grizzly bears in the Selkirk and Cabinet-Yaak Ecosystems was hampered by small sample sizes, but they nevertheless concluded that "if a minimum size occurs, it is likely between 2 [square miles (1,280 acres)] and 8 [square miles (5,120 acres)]," and further noted that—even then—"narrow strips of core habitat that may fit some minimum size criteria likely will not provide effective core habitat for bears." Wakkinen & Kasworm, *Grizzly Bear and Road Density Relationships in the Selkirk and Cabinet-Yaak Recovery Zones*, at 25 (1997). Thus, to effectively provide grizzly bear secure habitat, large tracts of contiguous, unroaded lands must be preserved.

While FWS acknowledged that "larger, less fragmented patches of secure habitat are likely the ideal for a grizzly bear," Biological Opinion at 12, the agency justified its decision to allow the Forest Service to count small, one-acre fractions of unroaded land as secure habitat because "no current research on grizzly bear habitat use exists for the Bitterroot Ecosystem to inform a minimum size patch of secure habitat that grizzly bears might use," Biological Opinion at 12. In other words, FWS disregarded decades of science regarding grizzly bear habitat needs because the research had not been specifically conducted within the Bitterroot National Forest.

Against the well-established science showing that grizzly bears in other habitats within the Lower-48 states require thousands of acres of uninterrupted unroaded habitat, FWS's decision to include one-acre patches of unroaded land in calculations of secure grizzly bear habitat "fails to 'consider[] the relevant factors and articulate[] a rational connection between the facts found and the choice made,'" as required. *Ctr. for Biological Diversity*, 698 F.3d at 1121 (9th Cir. 2012) (alterations in original) (citation omitted). Moreover, by relying on FWS's arbitrary

Biological Opinion to satisfy its own ESA obligations, the Forest Service violated the ESA in failing to determine, based on a rational analysis, whether Amendment 40's weakened road-management provisions will jeopardize the grizzly bear. 16 U.S.C. § 1536(a)(2); see *Ctr. for Biological Diversity*, 698 F.3d at 1127–28.

II. BULL TROUT

The Forest Service's abandonment of prior limitations on open road densities in the Bitterroot National Forest also threatens to degrade bull trout habitat. The Bitterroot National Forest contains the headwaters of the Bitterroot River in Montana and portions of the Selway and Salmon Rivers in Idaho. The clean, cold waters supported by the Forest provide important habitat for bull trout.

The value of the Bitterroot National Forest's bull trout habitat depends on managing motorized access in the Forest. FWS acknowledges that road use, construction, and maintenance in bull trout watersheds—and even in watersheds above bull trout occurrence—deliver harmful sediment to streams, which degrades bull trout habitat conditions. Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for Bull Trout in the Coterminous United States, 75 Fed. Reg. 63,898, 63,901 (Oct. 18, 2010). Therefore, as FWS admits, addressing the threat of sedimentation from roads requires “closing and stabilizing or obliterating, and stabilizing roads not needed for future management activities.” FWS, Biological Opinion for the Effects to Bull Trout from Continued Implementation of Land and Resource Management Plans in Eastern Oregon and Washington, Idaho, Western Montana, and Portions of Nevada, Attachment A at 8 (1998). It also requires “regulat[ing] ... traffic during wet periods to minimize erosion and sediment delivery.” *Id.* at 7.

As discussed, Amendment 40 authorizes the Forest Service to abandon its prior duties to regulate motorized access in the Bitterroot National Forest by entirely removing limitations on open-road densities in Forest drainages. Nevertheless, the Forest Service failed to acknowledge or examine resulting impacts to bull trout as required under the ESA and refused even to initiate ESA consultation with FWS about such impacts. Instead, the Forest Service's Biological Assessment stated only that “the Amendment will have No Effect on Bull Trout or designated critical habitat” and “[n]o further analysis for Bull Trout is necessary.” Bitterroot National Forest, Biological Assessment for Grizzly Bear, at 6 (Oct. 6, 2020).

The ESA requires the Forest Service to reinitiate consultation with FWS before modifying any action in a manner that affects bull trout. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.16(a)(3); *All. for Wild Rockies*, 412 F. Supp. 3d at 1205. The facts and science do not support the Forest Service's conclusion that Amendment 40 to the Bitterroot Forest Plan will have no effect on bull trout, which informed the agency's conclusion not to consult with FWS. The Forest Service's decision not to reinitiate consultation with FWS therefore violated the ESA.

III. CONCLUSION

As set forth in this letter, the Forest Service is in violation the Endangered Species Act by relying on FWS's unlawful Biological Opinion on impacts to grizzly bears and failing to reinitiate consultation with FWS on impacts to bull trout from the Amendment 40's elimination of prior restrictions on road miles open to motorized vehicles in third-order drainages. FWS is in violation of the ESA for issuing a legally deficient Biological Opinion for grizzly bears. 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 Amendment 40 in federal district court.

Sincerely,



Benjamin J. Scrimshaw