

AKLAND

LAW FIRM, PLLC

317 E. Spruce Street • PO Box 7274 • Missoula MT 59807 • 406 544-9863

aklandlawfirm@gmail.com

January 21, 2020

VIA CERTIFIED MAIL

Secretary, U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

Director, U.S. Fish and Wildlife Service
1849 C Street, NW
Washington, DC 20240

Secretary, U.S. Department of Agriculture
1400 Independence Ave, SW
Washington, D.C. 20250-0003

Chief, U.S. Forest Service
201 14th Street, SW
Washington D.C. 20250

**RE: 60-Day Notice of Intent to Sue under the Endangered Species Act:
Upper Green River Area Rangeland Project**

You are hereby notified that Alliance for the Wild Rockies, Yellowstone to Uintas Connection, and Western Watersheds Project intend 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. Alliance will file the suit after the 60-day period has run unless the violations described in this notice are remedied. The names, addresses, and phone numbers of the organizations giving notice of intent to sue are as follows:

Michael Garrity, Executive Director
Alliance for the Wild Rockies
P.O. Box 505
Helena, Montana 59624
Tel: (406) 459-5936

Jason Christensen
Yellowstone to Uintas Connection
Box 280
Mendon, Utah 84325
Tel: (435) 881-6917

John Persell
Western Watersheds Project
P.O. Box 1770
Hailey, ID 83333

The names, addresses, and phone numbers of counsel for the notifier are as follows:

Kristine M. Akland, Attorney at Law
Akland Law Firm, PLLC
P.O. Box 7472
Missoula, MT 59807
Tel: (406) 544-9863

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 (FWS), 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 has held 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). A biological assessment “shall evaluate the potential effects of the action” on listed and proposed species to determine whether any such species are likely to be adversely affected by the action. 50 C.F.R. § 402.12(a). 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 ESA's regulations further define "effects of an action" as:

[T]he direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification.

50 C.F.R. § 402.02

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 at 764.

ESA § 9 requires agencies insure that proposed actions do not result in the "take" of any listed species. 16 U.S.C. § 1538(a)(1)(B). "Take" is defined under the ESA to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or attempt to engage in any such conduct." 16 U.S.C. § 1532(19). Habitat modification constitutes "take." *Marbled Murrelet v. Babbitt*, 83 F.3d 1060 (9th Cir. 1996).

LEGAL VIOLATIONS

The Forest Service's Wildlife Report for the Upper Green River Area Rangeland Project ("Project") determined that the Project "may affect," and is "likely to adversely affect" the grizzly bear, an ESA-listed species. Thus, the Fish and Wildlife Service (FWS) issued a Biological Opinion ("Biological Opinion") and an Incidental Take Statement ("ITS") in 2019. The FWS's Biological Opinion concluded that the Project would result in a take of 72 grizzly bears over a period of 10 years and concluded that this level of take would not jeopardize the continued existence of the grizzly bear. Thus, the FWS issued an ITS authorizing the lethal take of 72 grizzly bears in connection with the Project. The FWS's Biological Opinion and Incidental Take Statement are arbitrary and capricious, an abuse of discretion and violate the ESA.

The FWS violated ESA §7 when it failed to evaluate and disclose the impacts of the take of 72 grizzly bears in relation to the additional take of grizzly bears that FWS already has anticipated and/or authorized in the Greater Yellowstone Ecosystem. Further, the FWS failed to specify the number of female grizzly bears the ITS authorized to take. The Biological Opinion fails to distinguish between the impacts resulting from the take of female versus male grizzly bears. The Biological Opinion does not discuss and disclose the impacts of a disproportionate take of female grizzly bears on the overall population. Regarding the scale of analysis, Knight et al. (1988), Mattson (1993), Mattson & Merrill (2002, 2004), Merrill & Mattson (2003), Mowat et al (2013), and Nielson et al (2004) all emphasize the importance of addressing human impacts at a scale comparable to the life range of (minimally) a female grizzly: roughly 900 km², which is the approximate size of a Bear Management Unit.

The FWS failed to consider the best available science regarding the geographic importance of the Upper Green River. The Upper Green River sits squarely in an area with a high number of grizzly bear mortalities. Johnson et al (2004), Merrill and Mattson (2003), and Schwartz et al (2010) show the existence of extensive suitable habitat for grizzlies extending down through the Wind River Range, but with the Upper Green River area being a fracture zone largely because of the presence of grazing allotments and associated roads. The Biological Opinion fails to disclose and consider that the number of grizzly bear deaths in the Upper Green River is disproportionately higher than any other area in the Greater Yellowstone Ecosystem. Further, the Biological Opinion fails to disclose and consider that the Upper Green River is considered a fracture zone that impairs grizzly bear movement into and out of the Wind River Range. The Wind River Range south and east of the Upper Green River contain high-quality ecologically suitable habitat for grizzly bears. As a result of the take authorized by the ITS for Project, the Upper Green River will continue to function as a fracture zone.

Additionally, the Biological Opinion inaccurately assumes that the population of grizzly bears in the Upper Green River is increasing even though the population in the DMA is either stable or decreasing. The Biological Opinion understates the risk to the Greater Yellowstone Ecosystem grizzly bear population of continuing to kill the same and increased number of bears during the next 10 years. Likewise, the best available science contests the efficacies of killing predators, specifically grizzly bears, to reduce conflict. Knight & Judd (1983), Mattson & Merrill (2002), Merrill & Mattson (2003), Mowat et al (2013), and Murie (1948) all show a negative effect of livestock (cattle plus sheep) on the fates of grizzly bear individuals and populations. Knight & Judd and Murie explicitly state that those who wish to graze cattle in grizzly bear range should be willing to sustain the inevitable losses to depredation--Murie as early as the 1940s and Knight 40 years after.

Finally, the Biological Opinion fails to disclose and analyze the impact of past, present and future timber sales and the extensive, rapid and near complete loss of white bark pine in the Upper Green River on grizzly bears. The Biological Opinion fails to analyze and disclose impacts from the loss of white bark pine, loss of hiding cover, and increase in road density on grizzly bears in connection with the Project impacts. It is likely that these factors contribute to concentration of conflicts resulting in bear deaths in this relatively small area encompassed by the Upper Green River. The failure to analyze these cumulative impacts is a violation of the ESA. The IGBST Annual Reports provide numbers of conflicts on various grazing allotments, by year, going back to 1995, that, when compiled and graphed, show the sharp uptick in conflicts coincident with terminal decline in whitebark pine. The UGR complex of allotments has been consistently characterized as having "chronic conflicts" in the Reports (e.g., in the 2018 Annual Report, in Appendix A beginning on page 104). Ebinger et al (2015), Mattson (1997), and Schwartz et al (2013) show that either consumption of meat varies inversely with availability of pine seeds (Mattson) or has increased since decline of whitebark pine, presumably as a compensatory shift in diet (Ebinger and Schwartz). Macfarlane et al (2013) shows patterns of whitebark pine mortality as of 2009 in the GYE, including the UGR. This is the most comprehensive map of whitebark pine losses.

The FWS's "no jeopardy" conclusion is arbitrary and capricious and a violation of the ESA.

The Forest Service therefore cannot rely on the FWS's flawed Biological Opinion. To so is arbitrary and capricious and a violation of the ESA. Further, Forest Service analysis in the Wildlife Report is arbitrary and capricious and an abuse of discretion because it failed to apply the best available science, ignored evidence that the Forest Service and FWS has developed.

The Kendall Warm Springs dace is a listed species under the ESA. Only one population exists in the world and is located in Kendall Warm Springs in the Project area. The Forest Service concluded that the Project "may affect, not likely to adversely affect" the dace or its habitat. The FWS concurred. The Forest Service's conclusion is arbitrary and capricious because the Forest Service admits that livestock impacts could "cause dace to temporarily switch habitat, elevate turbidity, and alter submergent vegetative cover." Causing a switch in habitat is an illegal take under the ESA. Therefore, the Project violates the ESA's § 9 take prohibition. Finally, the ESA requires the Forest Service take actions to help recover the dace and therefore must demonstrate that the Project contributes to the conservation and recovery of the dace. The Forest Service fails to do so.

Enclosed is a flash drive containing the best available science referenced above and other supporting science. Please include these documents in the administrative record. If you are unable to access the contents of the flash drive please let me know immediately.

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, 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, the Alliance, Yellowstone to Uintas, and Western Watersheds Project intend to file suit for declaratory and injunctive relief, as well as attorney and expert witness fees and costs.

Sincerely,

/s/ Kristine M. Akland

Kristine M. Akland, Counsel for Notifier

cc: Tyler A. Abbott, Field Supervisor
Wyoming Ecological Services Field Office
U.S. Fish and Wildlife Service
VIA EMAIL: tyler_abbott@fws.gov

Rob Hoelscher, District Ranger
Pinedale Ranger District
Bridger-Teton National Forest
VIA EMAIL: rob.hoelscher@usda.gov

Enclosures