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By E-Mail and Certified Mail

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RE: Notice of Intent to Sue to Remedy Violations of the Endangered Species Act Regarding the U.S. Fish and Wildlife Service’s Biological Opinion for the Effects to the Grizzly Bear from the Upper Green River Area Rangeland Project, 06E13000-2019-F-0012 (April 29, 2019)

Dear Secretary Bernhardt, Director Skipwith, Field Supervisor Abbott, and District Ranger Hoelscher:

The Center for Biological Diversity (“Center”) and the Sierra Club hereby provide notice, pursuant to Section 11(g) of the Endangered Species Act (“ESA”), that the U.S. Fish and Wildlife Service (“FWS”) and the USDA Forest Service are in violation of the Endangered Species Act (“ESA”), 16 U.S.C. § 1536, with regard to the Biological Opinion for the Effects to the Grizzly Bear (*Ursus arctos horribilis*) from the Upper Green River Area Rangeland Project, 06E13000-2019-F-0012 (April 29, 2019) (“2019 BiOp”) and its accompanying Incidental Take Statement (“ITS”).

Specifically, FWS violated the ESA by relying on the implementation of conservation measures to conclude the Upper Green River Area Rangeland Project (“UGRA Project”) will not jeopardize grizzly bears even though the conservation measures are not reasonably certain to occur. FWS’s no jeopardy conclusion, therefore, is arbitrary and capricious, and the Forest Service’s reliance on that conclusion and the invalid 2019 BiOp is unlawful.

The Center for Biological Diversity is a non-profit conservation organization dedicated to the protection of native species and their habitats through science, policy and environmental law. The Center has more than 67,000 members across the world, including in Wyoming.

The Sierra Club is a national non-profit organization with 67 chapters and more than 665,000 members dedicated to exploring, enjoying, and protecting the wild places of the Earth; to practicing and promoting the responsible use of the Earth’s ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives.

This letter serves as notice that unless FWS withdraws the 2019 BiOp and ITS within 60 days of receipt of this notice, the Center and Sierra Club intend to challenge the agencies’ unlawful conduct in court.

I. STATUTORY BACKGROUND

Enacted in 1973, the ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). The ESA provides a means to conserve the ecosystems upon which endangered and threatened species depend and a program to conserve listed species. 16 U.S.C. § 1531(b). To receive the full protections of the ESA, a species must first be listed by the Secretary of the Interior as “endangered” or “threatened” pursuant to ESA section 4. *See id.* § 1533. The ESA defines an “endangered species” as “any species which is in danger of extinction throughout all or a significant portion of its range.” *Id.* § 1532(6). A “threatened” species is “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(20).

Section 7 of the ESA requires each federal agency, in consultation with a federal wildlife agency (FWS for the grizzly bear) to insure that any proposed action is not likely to jeopardize the continued existence of a listed species, or result in the destruction or adverse modification of critical habitat. *Id.* § 1536(a)(2). To “jeopardize the continued existence of” under the ESA means “to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02. When a listed species may be present in the action area and the proposed action may affect a listed species, the action agency must engage in formal consultation with FWS. *Id.* § 402.14.

To comply with formal consultation regulatory requirements, FWS must evaluate both the current status of listed species as well as the effects of the proposed action and cumulative

effects on the listed species. *Id.* § 402.14(g)(2)-(3). Agencies are required to “use the best scientific and commercial data available” in assessing impacts to protected species during the consultation process. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d). Based on this information, FWS must reach a “biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species” 50 C.F.R. § 402.14(g)(4). A biological opinion produced through section 7 formal consultation is a final agency action subject to judicial review under the arbitrary and capricious standard. *See Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1105 n.3 (10th Cir. 2010) (citing *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 422 F.3d 782, 709 (9th Cir. 2005)); *Biodiversity Legal Found. v. Babbitt*, 146 F.3d 12, 146 F.3d 1249, 1252 (10th Cir. 1998).

Even after the procedural requirements of consultation are complete, however, the ultimate duty to ensure that an activity does not jeopardize a listed species lies with the action agency. An action agency’s reliance on an inadequate, incomplete, or flawed biological opinion to satisfy its ESA section 7 duty is arbitrary and capricious. *See Defenders of Wildlife v. EPA*, 420 F.3d 946, 976 (9th Cir. 2005) (rev’d on other grounds, *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007)); *see also WildEarth Guardians v. U.S. Bureau of Reclamation*, 2015 WL 13651243, at *5 (D.N.M. Sept. 23, 2015) (citations omitted); *Mayo v. Jarvis*, 177 F. Supp. 3d 91, 146 (D.D.C. 2016).

II. FACTUAL BACKGROUND

A. The Background and Status of Grizzly Bears in the Greater Yellowstone Ecosystem

Grizzly bears once ranged throughout most of western North America, from the high Arctic to the Sierra Madre Occidental of Mexico, and from the coast of California across most of the Great Plains. Prior to European settlement, scientists believe that approximately 50,000 grizzly bears occupied the western United States between Canada and Mexico. With European settlement of the American West and a federally funded bounty program aimed at eradication, grizzly bears were shot, trapped, and poisoned, reducing the population to just two percent of their historic range. As a result of its precipitous decline, FWS listed the grizzly bear as a threatened species in the lower 48 states under the ESA in 1975. 40 Fed. Reg. 31734 (July 28, 1975).

Today, scientists estimate that less than 2,000 grizzly bears remain in the lower 48 states, occupying five isolated populations. The Greater Yellowstone Ecosystem (“GYE”), which includes grizzlies in the Upper Green, is one of those populations.

Grizzly bears have one of the lowest reproductive rates of all terrestrial mammals in North America, resulting primarily from the late age at first production, small average litter size, and the long interval between litters. 2019 BiOp at 12. The average age at first production is 5.5 years and the average litter size is two cubs. *Id.* According to the Interagency Grizzly Bear Study Team, grizzly bear population growth in the GYE has slowed to 0 to 2.2%. *Id.* at 16. The survival of a female grizzly bear and her cubs enables the grizzly population to grow. Thus, “providing maximum protection for females is essential to recovery.” 1993 Grizzly Bear Recovery Plan, Part One, at 5.

FWS has stated that “[t]he two primary challenges in grizzly bear conservation are the reduction of human-caused mortality and the conservation of remaining habitat.” 2019 BiOp at 13 (citing USFWS 1993). FWS acknowledges that “[l]oss and fragmentation of habitat is particularly relevant to the survival of grizzly bears.” *Id.* at 12. And studies have shown that grizzly bear persistence is “negatively associated with human and livestock densities.” *Id.* at 27 (citing Mattson and Merrill 1992). Unfortunately, grizzly bear mortalities have been on the rise in the GYE, with the 2019 BiOp estimating 62 grizzly bear deaths in 2018, 66 in 2017, 58 in 2016, and 70 in 2015, compared with 28 grizzly bear mortalities in 2014 and 29 in 2013.¹ *Id.* at 31. The Upper Green consistently represents the highest number of grizzly bear conflicts in the GYE, and since 1999, a total of 37 grizzlies have been incidentally taken in the action area identified for this project, including 35 within the Upper Green allotments. *Id.* at 38.

In the GYE, FWS and other agencies manage grizzly bears and their habitat by combining the “Primary Conservation Area” with “adjacent areas where occupancy by grizzly bears is anticipated and acceptable.” 2016 Final Conservation Strategy at 1, *available at* http://igbconline.org/wp-content/uploads/2016/03/161216_Final-Conservation-Strategy_signed.pdf (last visited Jan. 16, 2020). Combined, this forms the “Demographic Monitoring Area” (“DMA”), within which habitat is considered suitable to support grizzly bears and recovery criteria for grizzly bears are assessed. *Id.* at 4; 2019 BiOp at 26. All allotments included in the UGRA Project lie within the DMA. 2019 BiOp at 27.

B. The Upper Green River Area Rangeland Project and the 2019 BiOp

In approving the UGRA Project, the Forest Service authorized continued livestock grazing on numerous allotments in the Upper Green area, approximately 30 miles northwest of Pinedale, Wyoming, for a period of ten years. *Id.* at 4, 9. The grazing permits will authorize livestock grazing on 46,148 animal unit months for cattle on allotments encompassing approximately 176,641 acres.² *Id.* The closest allotments to Grand Teton National Park lie less than 30 miles away from the park boundary. Recognizing that the UGRA Project will undoubtedly affect grizzly bears, the Forest Service engaged in formal consultation with FWS in connection with the project. The culmination of this consultation was the 2019 BiOp and associated ITS at issue in this notice of intent letter.

FWS has determined that the action area for the UGRA Project is the Upper Green grazing allotments plus a 7.5-mile buffer. *Id.* at 8-9. FWS delineated the boundaries of the

¹ Some of the annual mortality numbers in the 2019 BiOp differ from those recorded online in the USGS database, and therefore may not reflect the best available data. See, e.g., USGS, 2015 Known and Probable Grizzly Bear Mortalities in the Greater Yellowstone Ecosystem, at <https://www.usgs.gov/data-tools/2015-known-and-probable-grizzly-bear-mortalities-greater-yellowstone-ecosystem> (last visited Jan. 21, 2019). Nevertheless, the trend of increasing mortalities is clear.

² “An animal unit month is the amount of forage for one mature cow or equivalent for one month based upon an average daily forage consumption of 26 pounds of dry matter per day. One animal unit month is equivalent to 1.32 animal unit months for a cow/calf pair and 0.7 animal unit month for a yearling.” UGRA Project FEIS Glossary at 598.

action area based upon the agency's interpretation of a 1982 study finding grizzly bears may generally be drawn to carcasses from a distance of 7.5 miles away. *Id.* at 8-9 (citing Craighead and Mitchell 1982). The identified action area is meant to reflect "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." 50 C.F.R. § 402.02.

In the 2019 BiOp, FWS predicts that grizzly bear occupancy and conflicts in the UGRA action area will rise, and as a result the need for management lethal removal of grizzly bears will also rise. *Id.* at 29, 35. Over the past twenty years, 37 grizzly bears have been killed in the action area as a result of conflicts with livestock, including 35 in the Upper Green grazing allotments. *Id.* at 38. Now, to account for the anticipated increase in grizzly bear occupancy in the action area, FWS has approved an Incidental Take Statement that allows for the lethal removal of up to 72 bears over the ten-year life of the UGRA Project. *Id.* at *ii.*, 43, 47-51. This ITS thus permits killing double the number of grizzly bears that have been killed over the past twenty years in just half the time.

Despite the large number of management removals permitted by the ITS, FWS concludes that the UGRA Project will not jeopardize GYE grizzly bears, relying heavily on the Forest Service's "commitment to implement their Conservation Measures." 2019 BiOp at 46. These conservation measures read as follows:

- (1) Bear Sanitation Guidelines will be followed for all camps associated with livestock operations as described and defined in Food Storage Order 04-03-330. Where outdoor toilets are available in Range Camps, keep doors closed and make toilets as "bear proof" as possible.
- (2) Riders are required to watch all livestock closely for sick, injured, or stray animals.
- (3) Forest Service employees designated by the Pinedale District Ranger will monitor allotments on a regular basis.
- (4) On Cattle Allotments: a) all carcasses **located within 0.5 mile** of Green River Lakes Road, Union Pass Rd, FS 605, 660, 663B and 663C, GRL and Whiskey Campgrounds, private cabins, Kendall and Fish Creek guard station, permitted cow camps, permitted outfitter camps, Waterdog Lakes, and North Beaver and Tosi trailheads will be removed if possible or moved so that the carcass is at least **0.5 mile away** from the above described facilities, trailheads or roads; b) all carcasses in locations not described in 1 above that pose a health or safety hazard to the public or to the environment will be removed if possible or moved so that the carcass is at least **0.25 mile from** live streams, springs, lakes, riparian areas, system roads and trails, developed recreation areas, dispersed camping sites, and picnic sites; and c) all sick or injured animals will be removed or treated. In the event that compliance with this measure is not physically possible, an exception may be granted per the discretion of the Pinedale District Ranger and/or his designated representative. In the event that rider safety is deemed an issue, an exception may be allowed as described in CM #5 below.

(5) Exceptions to requirements for removing or moving carcasses described in **CM #4** may be granted by the Pinedale District Ranger and/or his/her designated representative if human rider or herder safety is of concern. Rider or herder safety concerns include the possible presence of a grizzly bear in the immediate vicinity of carcasses, and carcasses being located in hazardous terrain such that attempting to move or remove may not be possible or unsafe. In such cases, a USFS employee or the WGFD bear specialist will be notified immediately of the hazard location and need for exception.

(6) The Forest will recommend that all permittees and their representatives (herders, riders, or other employees) carry bear spray while working within allotments. Additional recommendations are that spray canisters be holstered or otherwise carried so that they are available for use in the event of encounters with bears; storing spray canisters in back packs, saddle bags, and vehicles are acceptable methods of storage during non-working time periods. Only brands of Bear Spray certified by the Interagency Grizzly Bear Committee are recommended.

(7) Continue to identify and implement opportunities that reduce the potential for grizzly bear conflicts. The Forest has investigated and explored additional means of reducing grizzly bear-livestock conflicts, which included assessments of: a) cattle herding; and, b) where appropriate, and when permittees are willing participants, study sites may be developed within allotments to "test" new management actions.

(8) Through the permitting process and at annual meetings, the USFS will make grazing permittees aware of their responsibilities under the Endangered Species Act (ESA) in regards to laws and regulations concerning the taking of grizzly bears (Interagency Grizzly Bear Guidelines).

(9) Continue to work in cooperation with the Service, the Wyoming Game and Fish Department, and the Interagency Grizzly Bear Study Team to identify and collect information related to the habitat use, survival, reproduction, and depredation tendencies of grizzly bears inhabiting Livestock Grazing Allotments on Northern Portions of the Pinedale Ranger District.

Id. at 7-8 (emphases in original).

The conservation measures are meant to prevent grizzly bear conflicts with cattle and limit the number of management removals of grizzlies. *Id.* at 7, 41. Notably, many of the measures are rife with exceptions and subject to agency discretion. Also, many of the measures must be implemented by the Forest Service or even by the permittees themselves. FWS presumes that the Forest Service will enforce the conservation measures against the permittees. *Id.* at. 41.

III. LEGAL VIOLATIONS

FWS may not rely on conservation measures to conclude an agency action will not jeopardize the continued existence of a listed species unless the Conservation Measures are “reasonably specific, certain to occur, and capable of implementation.” *Ctr. for Biological Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139, 1152 (D. Ariz. 2002) (citing *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987)). Moreover, such measures “must be subject to deadlines or otherwise-enforceable obligations.” *Id.* And importantly, the measures “must address the threats to the species in a way that satisfies the jeopardy and adverse modification standards.” *Id.* In other words, if FWS relies upon conservation measures to support a “no jeopardy” opinion, those measures must be effective in actually protecting grizzly bears.

Here, without any analysis, FWS assumed that the conservation measures will effectively protect grizzly bears even though many of the actions described in the conservation measures have been in place for years with no reduction in the number of grizzly bear conflicts. As the BiOp recognizes, however, conflicts in the Upper Green area have been on the rise. 2019 BiOp at 28; *id.* at 30, Table 4. FWS predicts that conflicts, followed by grizzly bear mortality, will continue to increase in the UGRA Project area. *Id.* at 29, 35. In order to account for this increase, FWS approved an ITS permitting for the lethal removal of up to 72 grizzly bears over the next ten years in connection with the UGRA Project. *Id.* at *ii.*, 43, 47-51.

Despite predicting an increase in grizzly bear mortality in the UGRA Project area, and permitting the killing of up to 72 grizzly bears over the next ten years, FWS concluded that the UGRA Project would not jeopardize grizzly bears. *Id.* at 46. FWS premised its conclusion that the UGRA Project is not likely to jeopardize grizzly bears on the Forest Service’s commitment to implement and enforce the specified conservation measures:

After reviewing the specialists [sic] report, the current status of the grizzly bear in the action area, previous sources of information incorporated by reference (see literature cited), and the Forest’s commitment to implement their Conservation measures, and cumulative effects, it is the Service’s biological opinion that the effects of livestock grazing on the Allotments in the northern portions of the Bridger-Teton National Forest’s Pinedale Ranger District, west of the Wind River Mountain Range, as proposed, are not likely to jeopardize the continued existence of the grizzly bear.

Id. (emphasis added). In so concluding, FWS asserts that “[t]he risk of cattle/bear conflicts is minimized by implementation of conservation measures that are part of the grazing permit as a term and condition of the permits.” *Id.* at 41. FWS’s assumption that the conservation measures will effectively protect grizzly bears is misplaced, however, because many of the measures are voluntary or discretionary, ineffective at protecting grizzly bears, and not certain to occur.

FWS has not shown the measures are “certain to occur” because FWS must rely upon permittees to implement them. *Rumsfeld*, 198 F. Supp. 2d at 1152. Reliance on the proposed actions by others does not satisfy the ESA’s mandate that agencies insure their actions will not jeopardize protected species. See *Sierra Club v. Marsh*, 816 F.2d at 1385 (citing *Nat’l Wildlife*

Fed'n v. Coleman, 529 F.2d 359, 374 (5th Cir. 1976)). Here, although the BiOp claims that the Forest Service “will require implementation of the grizzly bear conservation measures,” (BiOp at 7), “even a sincere general commitment to” implement conservation measures is inadequate “absent specific and binding plans.” *Nat'l Wildlife Fed'n v. NMFS*, 524 F.3d 917, 936 (9th Cir. 2008). However, FWS fails to offer any specific and binding plans for implementing the conservation measures, instead relying upon permittees to take the required actions and counting on the Forest Service to enforce them. The Forest Service’s enforcement actions are completely discretionary, however, and even more tenuous given the discretionary nature of the measures themselves. Because FWS must rely on others to implement the conservation measures, reliance on the conservation measures to support a “no jeopardy” opinion is arbitrary, capricious, and not in accordance with law.

Additionally, many of the Conservation Measures, even if consistently implemented, will not be effective in protecting grizzly bears. For example, Conservation Measures 4 and 5 deal with requirements to move carcasses. However, Conservation Measure 4 only requires carcasses in the allotments to be moved, “if possible,” at least 0.5 miles from identified facilities, trailheads, or roads and at least **0.25 mile from** live streams, springs, lakes, riparian areas, system roads and trails, developed recreation areas, dispersed camping sites, and picnic sites. *Id.* at 7. Nothing prevents the permittees from moving carcasses deeper into the Allotments to accomplish this goal. This Conservation Measure is clearly aimed at human safety and does little to protect grizzly bears that generally avoid roads and places with high human presence anyway. On the contrary, moving the carcasses away from roads but not removing them from the UGRA Project area may actually draw grizzly bears deeper into the Allotments, creating a higher risk of a large number of cattle being susceptible to predation.

There are also numerous exceptions to these requirements, including if carcass removal is not physically possible, if rider safety is deemed an issue, or if human rider or herder safety “is of concern,” because grizzly bears are in the vicinity of the carcass or the carcass is located in hazardous terrain. *Id.* Although we agree that exceptions must be made to protect human safety, even if these Conservation Measures were somehow effective at protecting grizzly bears, the various exceptions make it impossible to know how often these Conservation Measures will actually be implemented. This is especially true where, as here, the Allotments are generally remote and located in steep and potentially hazardous terrain, and FWS has recognized that it may be difficult to even locate carcasses. *See id.* at 40 (“We recognize that complete cattle carcass removal from the allotments is not possible due to the large and remote areas grazed by livestock on the Allotments and the difficulty in locating all carcasses over such vast areas, or locating them in a timely manner.”). For these reasons, FWS should not have assumed that Conservation Measures aimed at carcass removal will be effective in protecting grizzly bears.

Some of the conservation measures also contain vague language, making it impossible to ensure consistent implementation and enforcement. For example, Conservation Measure 3 states that “Forest Service employees designated by the Pinedale District Ranger will monitor allotments *on a regular basis*.” *Id.* (emphasis added). What does “on a regular basis” mean? Does it mean once a week, once a month, or once a year? Without more direct and enforceable language, this Conservation Measure essentially becomes meaningless.

Other conservation measures cannot be considered “certain to occur” because they are merely voluntary or recommended. Under Conservation Measure 6, for example, the Forest Service “will recommend” that all permittees and their representatives carry bear spray while working within the allotments, and additionally recommend that bear is holstered or carried so that it is available should a grizzly bear encounter occur. *Id.* at 8. FWS cannot assume that recommendations are “reasonably certain to occur,” and thus cannot rely on this Conservation Measure as sufficient to mitigate the negative impacts to grizzly bears from the UGRA Project.

Finally, Conservation Measures 7, 8 and 9 all involve future meetings or assessments to identify other means of reducing grizzly bear conflicts. But courts have been clear that a commitment to monitor and assess the effectiveness of conservation measures in the future cannot save an otherwise faulty reliance on the measures in place to support a “no jeopardy” determination. *Rumsfeld*, 198 F. Supp. 2d at 1154-56 (holding the agency cannot delay identifying the measures necessary to mitigate the negative effects of the project on a listed species).

Because the Conservation Measures are not certain to occur, not designed to effectively protect grizzly bears, and are vague and discretionary, FWS’s reliance on the Conservation Measures to find that the UGRA Project will not jeopardize the continued existence of grizzly bears is arbitrary and capricious.

The Forest Service’s reliance on the 2019 Biological Opinion is also unlawful. An action agency cannot rely on a faulty biological opinion to fulfill its substantive section 7 duties to ensure it does not jeopardize the continued existence of a listed species. *See Defenders of Wildlife v. EPA*, 420 F.3d 946, 976 (9th Cir. 2005) (*rev’d on other grounds, Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007)); *Mayo v. Jarvis*, 177 F. Supp. 3d at 146. Here, the Forest Service relied on the 2019 BiOp produced by FWS in order to satisfy its ESA obligation regarding the authorization of the UGRA Project. Because the 2019 BiOp does not comply with the ESA or its implementing regulations, the Forest Service’s reliance on it is arbitrary and capricious, and in violation of the law.

IV. CONCLUSION

As set forth above, the parties to this letter intend to pursue litigation in federal court after sixty days, and will seek injunctive, declaratory, and other relief, including an award of fees and expenses incurred in investigating and prosecuting this action. To avoid litigation, FWS and the Forest Service should immediately halt reliance on the 2019 BiOp and ITS for lethal take of grizzly bears in the project area until the agencies reinitiate and lawfully complete formal consultation under section 7 of the ESA and its implementing regulations.

If you have any questions or wish to discuss this matter further, please contact us.

Sincerely,



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