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January 21, 2020

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

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

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

**RE: 60 Day Notice of Intent to Sue - Crow Creek Pipeline Project -
Caribou-Targhee National Forest**

You are hereby notified that Alliance for the Wild Rockies and Yellowstone to Uintas Connection (collectively "Alliance") 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. They will file the suit after the 60-day period has run unless the violations described in this notice are remedied. 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, Director
Yellowstone to Uintas Connection
P.O. Box 280
Mendon, Utah 84325
Tel: (435) 881-6917

Counsel for the notifiers are as follows:

Rebecca K. Smith, Attorney at Law
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STATEMENT OF FACTS

On November 1, 2019, Mel Bolling, Forest Supervisor for the Caribou-Targhee National Forest, signed the Record of Decision authorizing the Crow Creek Pipeline Project (hereinafter "Project"). The Project authorizes a private company to construct an underground natural gas pipeline and a permanent clear-cut utility corridor across 18.2 miles of National Forest public lands in southeastern Idaho. The Project authorizes providing the private company with a 50-foot right-of-way during construction, and a permanent 20-foot right-of-way thereafter to maintain the pipeline. In addition to the pipeline itself and the utility corridor, there will also be above-ground facilities such as valves and staging areas.

The pipeline utility corridor will be, in actual effect, a permanent 18.2 mile road: motorized vehicles will use this corridor in perpetuity to maintain and inspect the pipeline and remove vegetation. The pipeline utility corridor will permanently cut through six different National Forest Inventoried Roadless Areas and thus cause permanent vegetation removal, increased sight-lines for poaching, increased weed spread, and abundant new opportunities for illegal motor vehicle use indefinitely in these areas.

The Forest Service requested a list of ESA species that may be present in the Project area from the U.S. Fish & Wildlife Service (FWS) Idaho and Wyoming offices. The Idaho FWS stated that lynx and wolverine may be present in the Project area, and the Wyoming FWS stated that grizzly bears, ute ladies' tresses

orchid, and yellow-billed cuckoo may be present in the Project area. Additionally, although not within the Project area, the 2014 rule designating lynx critical habitat indicates that lynx critical habitat is directly adjacent to the Project area. However, the Forest Service applied the 2009 lynx critical habitat map in its Biological Assessment, and ignored the more recent 2014 map. In the Project Biological Assessment, the Forest Service addressed only lynx and wolverine.

There are no benefits to public lands or wildlife from this Project. Instead, the Project is so inconsistent with the zoning, i.e. land management plan or forest plan, for these public lands that the Forest Service will have to enact a formal amendment to its land management plan in order for the Project to be lawful. This site-specific amendment to change the governing management plan for the entire National Forest for the benefit of a private natural gas company is a classic example of what land use planners call "spot zoning," i.e. giving one person special treatment while expecting everyone else to follow the rules. In essence, the federal taxpayers who own these public lands are subsidizing the profit margin of a private natural gas company at the expense of the ecological integrity of their public lands.

STATEMENT OF LAW

The ESA mandates: "each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on November 10, 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action." 16 U.S.C. § 1536 (c)(1).

In short, "[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). The Ninth Circuit holds that "[a] failure to prepare a biological assessment for a project in an area in which it has been determined that an endangered species may be present cannot be considered a de minimis violation of the ESA." *Thomas*, 753 F.3d at 763-764.

The "may be present" threshold includes migratory species that may be present "at

some point” within the action area, and the standard does not require confirmation that species are “actually known or believed to occur” in the area. 51 Fed. Reg. 19926, 19946 (June 3, 1986).

A plaintiff who alleges a procedural violation under Section 7 of the ESA, as opposed to a substantive violation under Section 9, need not prove that a listed species has in fact been injured. Instead, the plaintiff need only show that the challenged action “may affect” a listed species. “May affect” is a very low threshold and any possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the requirement. “While the ‘disturbance effects’ may be discountable or insignificant. . . ‘any possible effect’ requires the Forest Service to obtain the concurrence of the Wildlife Service in order to avoid consultation.” *Native Ecosystems Council v. Krueger*, 946 F.Supp.2d 1060,1079 (D. Mont.2013). Thus, “the appropriate conclusion when effects on listed species are expected to be discountable, or insignificant, or completely beneficial” is may affect, not likely to adversely affect; “no effect” is not the appropriate conclusion in that circumstance. *Id.*

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. Both the biological assessment and the biological opinion must use “the best scientific and commercial data available.” 16 U.S.C. § 1536(c).

LEGAL VIOLATIONS

1. GRIZZLY BEARS, UTE LADIES TRESSES ORCHID, YELLOW-BILLED CUCKOO

The FWS Wyoming Office provided the Forest Service with a species list that indicates that grizzly bears, the ute ladies’ tresses orchid, and the yellow-billed cuckoo may be present in the Project area:

Endangered Species Act Species

There is a total of 3 threatened, endangered, or candidate species on this species list.

Species on this list should be considered in an effects analysis for your project and could include species that exist in another geographic area. For example, certain fish may appear on the species list because a project could affect downstream species.

IPaC does not display listed species or critical habitats under the sole jurisdiction of NOAA Fisheries¹, as USFWS does not have the authority to speak on behalf of NOAA and the Department of Commerce.

See the "Critical habitats" section below for those critical habitats that lie wholly or partially within your project area under this office's jurisdiction. Please contact the designated FWS office if you have questions.

1. NOAA Fisheries, also known as the National Marine Fisheries Service (NMFS), is an office of the National Oceanic and Atmospheric Administration within the Department of Commerce.

Mammals

NAME	STATUS
Grizzly Bear <i>Ursus arctos horribilis</i> Population: U.S.A., conterminous (lower 48) States, except where listed as an experimental population There is proposed critical habitat for this species. The location of the critical habitat is not available. Species profile: https://ecos.fws.gov/ecp/species/7642	Threatened

Birds

NAME	STATUS
Yellow-billed Cuckoo <i>Coccyzus americanus</i> Population: Western U.S. DPS There is proposed critical habitat for this species. Your location is outside the critical habitat. Species profile: https://ecos.fws.gov/ecp/species/3911	Threatened

Flowering Plants

NAME	STATUS
Ute Ladies'-tresses <i>Spiranthes diluvialis</i> No critical habitat has been designated for this species. Species profile: https://ecos.fws.gov/ecp/species/2159	Threatened

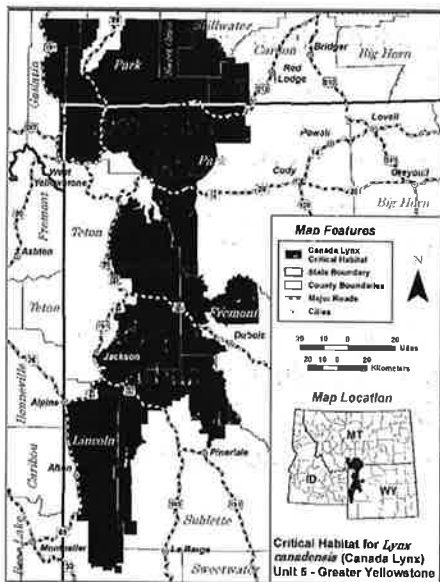
The ESA mandates that if FWS “advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action.” 16 U.S.C. § 1536 (c)(1).

Thus, once FWS identifies that a species “may be present,” that species must be included in the biological assessment for an analysis that determines whether the species may be affected. In this case, the Forest Service’s refusal to include the grizzly bear, ute ladies tresses orchid, and yellow-billed cuckoo in the Project Biological Assessment is a violation of the plain language of the ESA.

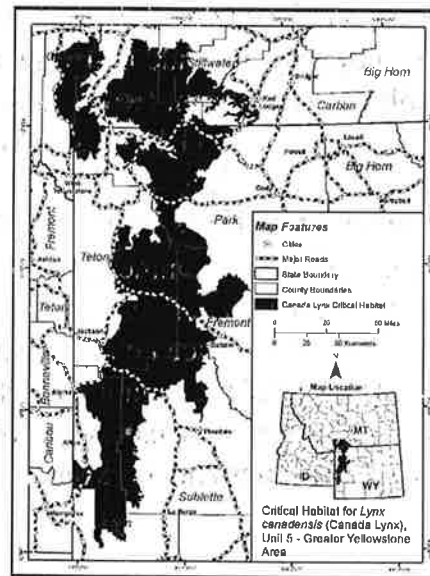
2. LYNX CRITICAL HABITAT

In the Biological Assessment for the Project, the Forest Service applied the 2009 map of lynx critical habitat, but that map was superceded by the 2014 map of lynx critical habitat. Thus, the statement in the Biological Assessment that “[t]he Action Area is approximately three miles to the west of mapped critical habitat situated in Lincoln County, Wyoming” is false. As set forth below, the 2014 rule expanded lynx critical habitat in the area; it is no longer three miles to the west of the Project area, but instead is directly adjacent to the Project area:

2009 Lynx Critical Habitat:



2014 Lynx Critical Habitat:



By creating an 18.2 mile clear-cut utility corridor that will introduce both lawful and unlawful motorized use and potentially unlawful vegetation removal activities in the area, the effect of the Project will not be limited to a narrow buffer that is the "Project area" but instead may reach into and affect the directly adjacent area of lynx critical habitat. The Forest Service's failure to use the 2014 map of lynx critical habitat in the Biological Assessment and failure to analyze potential impacts on this directly adjacent area of lynx critical habitat violates the best available science requirement and is arbitrary and capricious and in violation of the ESA.

3. LYNX

The Idaho FWS Office issued a species list that found that lynx may be present in the Project area. The EIS concedes that "lynx may move through the project area" The Forest Service concedes that the Project area "has been identified as potential linkage habitat between the 'core' Canada lynx habitat in Bridger-Teton National Forest and 'peripheral' habitat in the Ashley National Forest in Utah (USFS 2003b; USFS 2007)." The Forest Service concedes: "The disturbance associated with the construction (i.e., noise, light, human presence) has the potential to displace lynx from the Action Area (i.e., noise and light pollution will influence lynx to travel around the periphery of the Action Area rather than directly through it)." In summary, the Forest Service admits that the Project may result in "short-term habitat loss, a small amount of long-term habitat modification, and human related disturbance"

The ESA Section 7 Handbook finds that a "not likely to adversely affect" conclusion may only be made if all effects will be completely beneficial, discountable, or insignificant (which is defined as not capable of being measured, detected, or evaluated). The Forest Service addressed lynx in the Biological Assessment for the Project and stated that the Project was "not likely to adversely affect" lynx because effects would purportedly be "unmeasureable and insignificant." However, "unmeasureable" is not the only metric; the agency must also demonstrate that the effect is not capable of being detected and not capable of being evaluated. Avoidance behavior can be detected and/or evaluated, and is likely; therefore the effect cannot lawfully be characterized as "insignificant." Therefore, the agency's conclusion is contrary to the Section 7 Handbook and arbitrary and capricious and in violation of the ESA.

CONCLUSION

If the violations of law described above are not cured within 60 days, the Alliance intends to file suit for declaratory and injunctive relief, as well as attorney and expert witness fees and costs.

Sincerely,

/s/ Rebecca K. Smith

Rebecca K. Smith, Counsel for Notifier

cc: U.S. Attorney General
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FSM

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