



CLAIRE LOEBS DAVIS
ANN E. PREZYNA

ADDRESS: 20520 105TH AVE., SW
VASHON, WA 98070

PHONE: 206.601.8476

FAX: 206.456.5191

November 18, 2022

Via Email and Federal Express

Tom Vilsack, Secretary of Agriculture
U.S. Department of Agriculture
1400 Independence Ave. SW
Washington, D.C. 20250-0001
agsec@usda.gov

Deb Haaland, Secretary of the Interior
U.S. Department of the Interior
1849 C St. NW
Washington, D.C. 20240-0001
exsec@ios.doi.gov

Chief Randy Moore
U.S. Forest Service
1400 Independence Ave. SW
Washington, D.C. 20250-0001
Randy.moore@usda.gov

Martha Williams
Director
U.S. Fish and Wildlife Service
1849 C Street NW
Washington, D.C. 20240
Martha_williams@fws.gov

Rodney Smoldon, Forest Supervisor
Colville National Forest
765 S. Main St.
Colville, WA 99114-2507
rodney.smoldon@usda.gov

Brad Thompson
State Supervisor
Washington Fish and Wildlife Office,
U.S. Fish and Wildlife Service
510 Desmond Drive SE, Suite 102
Lacey, Washington, 98503
brad_thompson@fws.gov

Carin Vadala, District Ranger
Newport-Sullivan Lake Ranger District
315 N. Warren Ave
Newport, WA 99156-9061
carin.vadala@usda.gov

Re: Notice of Intent to Sue for Inadequate Analysis of Impacts on Grizzly Bear and Bull Trout of Colville National Forest Grazing Permit for the LeClerc Creek Allotment

Dear Secretaries Vilsack and Haaland, Chief Moore, Director Williams, Supervisors Smoldon and Thompson, and Ms. Vadala:

Pursuant to the Endangered Species Act (“ESA”),¹ this letter provides notice on behalf of The Lands Council, Kettle Range Conservation Group (“Kettle Range”), Western Watersheds Project (“Western Watersheds”), and WildEarth Guardians of an intent to sue the U.S. Forest Service (“Forest Service”) and the U.S. Fish and Wildlife Service (“FWS”) (collectively, the “Agencies”) and the officers and employees named herein, for violations of Sections 7 and 9 of the ESA, 16 U.S.C. §§ 1536, 1538. The Agencies violated the ESA by failing to adequately evaluate the impact of the May 28, 2021, issuance of a 10-year Term Grazing Permit for the

¹ 16 U.S.C. § 1540(g)(2)(A)(i).

LeClerc Creek and Tiger Hill Allotments (“LeClerc Permit”) on grizzly bear, bull trout, and bull trout habitat, including through the insufficient, flawed, and unsupported analysis contained in the Forest Service’s April 29, 2021 Biological Assessment (“LeClerc BA”) and FWS’s combined Biological Opinion and statement of concurrence (“2021 BiOp”) signed on June 25, 2021. As a result, the Forest Service and FWS have failed to meet their responsibility under the ESA to ensure that the LeClerc Permit will not jeopardize grizzly bear or bull trout or result in the destruction or adverse modification of bull trout habitat.

Unless the violations described in this notice are remedied, the organizations named above intend to sue FWS and the Forest Service after the end of the 60-day notice period, either through an independent action or by seeking to amend the complaint in *The Lands Council, et al. v. U.S Forest Service, et al.*, No. 2:20-CV-324-RMP (E.D. WA). Animal & Earth Advocates PLLC is representing The Lands Council, Kettle Range, Western Watersheds, and WildEarth Guardians in this matter, and any response to this notice should be directed to:

Claire Loeb Davis
Animal & Earth Advocates
20520 105th Ave., SW
Vashon, WA, 98070
claire@animalearthlaw.com
(206) 601-8476

I. ENDANGERED SPECIES ACT

The purpose of the ESA is to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered and threatened species[.]”²

Section 7 is acknowledged as “the heart of the ESA.”³ It provides that federal agencies “shall...insure” that that any action they authorize, fund, or carry out is “not likely to jeopardize the continued existence of any endangered [or threatened] species or result in the destruction or adverse modification of habitat of such species.”⁴ This obligation places the burden of any risk or uncertainty on the proposed action, giving the benefit of the doubt to threatened or endangered species.⁵

To ensure compliance with this substantive mandate, the ESA and its implementing regulations also impose procedural duties on agencies. These procedural requirements mandate

² *Id.* § 1531(b).

³ See *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 495, 496 (9th Cir. 2011).

⁴ 16 U.S.C. § 1536(a)(2).

⁵ See *Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987).

that an agency consult with the appropriate federal fish and wildlife agency⁶ regarding any action that “may affect” a listed species or its designated critical habitat.⁷ The ESA’s consultation requirement applies “to all actions in which there is discretionary federal involvement or control.”⁸ Agency “actions” requiring consultation include “all activities or programs of any kind authorized, funded, or carried out, in whole or in part,” by federal agencies, including those “directly or indirectly causing modifications to the land, water, or air.”⁹

If any species listed as threatened or endangered under the ESA might be present in the area of a proposed action, the agency taking the action must prepare a biological assessment to determine whether its action may affect the listed species.¹⁰ The “may affect” threshold is reached if the agency determines there will be “any possible effect, whether beneficial, benign, adverse or of an undetermined character.”¹¹ In making this determination, the action agency must examine both direct and indirect direct effects of the proposed action, including those effects that “may occur later in time and may include consequences occurring outside the immediate area involved in the action.”¹²

If an agency determines through its biological assessment that its action “may affect” but is “not likely to adversely affect” a listed species or its critical habitat, the regulations permit “informal consultation,” which is concluded if FWS concurs in writing with the action agency’s determination.¹³ An action is considered to “adversely affect” a species *unless* the “effects on listed species are expected to be discountable, or insignificant, or completely beneficial.”¹⁴ Discountable effects are those “extremely unlikely” to occur, while insignificant effects cannot be “meaningfully measure[d], detect[ed], or evaluate[d],” and should “never reach the scale where take occurs.”¹⁵ Critical habitat has been “adversely modified” under the ESA whenever there is a “direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species.”¹⁶

⁶ In this case, the consulting agency is FWS, while the National Oceanic and Atmospheric Administration conducts the consultation process for anadromous fish and marine mammals.

⁷ *Id.*; 50 C.F.R. § 402.14(a).

⁸ 50 C.F.R. § 402.03.

⁹ *Id.* § 402.02.

¹⁰ *See* 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12.

¹¹ *Cal. ex rel. Lockyer v. U.S. Dep’t of Agric.*, 575 F.3d 99, 1018 (9th Cir. 2009) (*quoting* 51 Fed. Reg. 19,926, 19,949 (June 3, 1986)).

¹² 50 C.F.R. § 402.02.

¹³ *Id.* § 402.14(a), (b).

¹⁴ *Endangered Species Consultation Handbook, Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act (1998)* at xv (available at https://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf) (“ESA Handbook”).

¹⁵ *Id.* at xvi.

¹⁶ *Id.* at xiii.

On the other hand, if the action agency determines its action is “likely to adversely affect” a listed species or critical habitat, or if FWS does not concur with the agency’s “not likely to adversely affect” determination, the action agency and FWS must engage in “formal consultation.”¹⁷ An agency may not proceed with these admittedly harmful activities until this formal consultation process is concluded.¹⁸ During formal consultation, FWS must prepare a biological opinion that uses the best scientific and commercial data available to evaluate the status of the listed species and the proposed action’s potential effects on the species and its critical habitat. ¹⁹The biological opinion must determine whether the action is “likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.”²⁰

A biological opinion must evaluate the direct, indirect, and cumulative effects of the proposed action within the action area and “add the effects of the action and cumulative effects to the environmental baseline in light of the status of the species.”²¹ The “environmental baseline” must include the past and present impacts of all federal actions and other human activities in the action area, including those that have already undergone consultation. ²²The “action area” includes “all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.”²³

Even after an action agency meets the procedural requirements of the ESA, it retains the ultimate substantive duty to ensure that its action does not jeopardize a listed species or result in the destruction or adverse modification of the habitat of such species. An action agency’s reliance on an inadequate, incomplete, or flawed biological opinion is arbitrary and capricious, and will not satisfy this duty.²⁴

Finally, Section 9 of the ESA prohibits all activities that cause a “take” of listed species, which is defined broadly to include any actions that harass, harm, wound, or kill a member of that species.²⁵ Harm is defined to include significant habitat modification or degradation that injures a listed species by significantly impairing its breeding, feeding, or sheltering behaviors, while harassment is an act that creates the likelihood of injury by annoying a species to the extent that it significantly disrupts breeding, feeding, or sheltering

¹⁷ See *id.* §§ 402.02, 402.14(a).

¹⁸ See 16 U.S.C. § 1536(d); *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1128 (9th Cir. 1998) (section 7(d) violated where agency executed contracts prior to completion of formal consultation).

¹⁹ 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d).

²⁰ 50 C.F.R. § 402.14(g)(4).

²¹ *Id.* § 402.14(g)(3)(4).

²² *Id.* § 402.12.

²³ *Id.* § 402.02.

²⁴ See *e.g.*, *Stop H-3 Ass’n. v. Dole*, 740 F.2d 1442, 1460 (9th Cir. 1984).

²⁵ 16 U.S.C. §§ 1538; 1533(d); 1532(19).

behaviors.²⁶

If FWS determines that an agency action may result in the incidental take of a listed species, it may issue an Incidental Take Statement (“ITS”) that (1) “specifies the impact of such incidental taking” on the species; (2) “specifies those reasonable and prudent measures” necessary to minimize such impact; and (3) “sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency[.]”²⁷

After consultation is complete, the action agency has a responsibility to ensure that it remains valid, and must re-initiate consultation if:

- (a) The amount or extent of taking specified in the incidental take statement is exceeded;
- (b) New information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
- (c) The identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or
- (d) A new species is listed or critical habitat designated that may be affected by the identified action.²⁸

Any agency failure to comply with the substantive or procedural mandates of the ESA is subject to judicial review under the ESA’s citizen suit provision.²⁹

II. FACTUAL BACKGROUND

A. LeClerc Grazing Allotment is within a Core Grizzly Bear Recovery Area

Grizzly bears are a threatened species under the ESA and a state-endangered species in Washington. Between 1800 and 1975, grizzly bear populations in the lower 48 States declined from a population of roughly 50,000 bears to fewer than 1,000 bears. A 2016 survey estimated that there were fewer than 1,800 grizzly bears in the continental U.S., occupying five isolated population segments, one of which is the Selkirk Mountains of Washington.

Grizzly bear populations may be “affected by direct and indirect effects of human activities, including: avoidance/displacement of individuals away from roads and road activity; habitat loss, modification, and fragmentation due to road use and road construction, including

²⁶ 50 C.F.R. § 17.3.

²⁷ 16 U.S.C. § 1536(b)(4)(C).

²⁸ 50 C.F.R. § 402.16(a)

²⁹ 16 U.S.C. § 1540(g)(1)(A).

vegetative and topographic disturbances; and direct mortality from road kills, legal and illegal harvest, and other factors resulting from increased human-bear encounters.³⁰

In 1993, FWS developed a Grizzly Bear Recovery Plan to “delineate reasonable actions that are believed to be required to recovery and/or protect” the grizzly bear.³¹ FWS identified four recovery zones, one of which is the Selkirk Mountains, and three evaluation areas for potential recovery.³² Recovery zones are designated because they provide all seasonal habitat needs for grizzly bears, and most known grizzly bear populations occur within these areas.³³ Within each zone, FWS designated Bear Management Units (BMUs), which are analysis areas that approximate the lifetime size of a female grizzly bear’s home range, and which are managed to maintain designated amounts of core habitat.

The LeClerc Creek grazing allotment (“LeClerc Allotment”) lies entirely within the LeClerc BMU. Dozens of potential and confirmed observations of grizzly bears or their sign have been documented in the LeClerc Allotment, and it provides “high quality spring, summer, and fall grizzly bear foraging habitat for males, females, and females with cubs.”³⁴ The 2019 Colville National Forest Resource Management Plan (“2019 Forest Plan) specifies that core grizzly habitat in the LeClerc BMU should not fall below 27% of the unit, and that if grazing occurs within this unit, the Forest Service will manage for the conditions of the species and its prey.³⁵

B. LeClerc Grazing Allotment Contains both Threatened Bull Trout and Designated Bull Trout Critical Habitat

The bull trout is one of the most threatened salmonids. It has been nicknamed the “grizzly bear of the fish world” due to its large size, fierce disposition, and reliance on pristine, unspoiled cold-water habitat.³⁶ Bull trout may be found in the coldest, cleanest waters of high mountainous areas and primarily live in deep pools of large, cold rivers and cold, clear lakes.

Bull trout require specific habitat components, often referred to as “the four Cs”: cold, clean, complex, and connected habitat. They require cold water temperatures (less than 12 degrees Celsius/54 degrees Fahrenheit); the cleanest water and stream substrates; complex stream habitat including deep pools, overhanging banks, and large woody debris; and

³⁰ 2021 BiOp at 2.

³¹ *U.S. Fish and Wildlife Service*, Grizzly Bear Recovery Plan (Sept. 10, 1993) at 9.

³² 81 Fed. Reg. 13,174, 13,181 (March 11, 2016).

³³ 2021 BiOp at 2.

³⁴ *Id.*

³⁵ *Id.*

³⁶ See, e.g., Montana Field Guide, Bull Trout – *Salvelinus confluentus*, <https://fieldguide.mt.gov/speciesDetail.aspx?elcode=AFCHA05020>.

connectivity between spawning and rearing areas and downstream foraging, migration, and overwintering habitats.

In 1999, FWS designated all species of bull trout within the coterminous U.S. as a threatened species under the ESA.³⁷ On October 18, 2010, FWS revised its designation of critical habitat for bull trout to include 19,729 miles of stream and 488,252 acres of reservoirs and lakes in Washington, Oregon, Nevada, Idaho, and Montana.³⁸ The Colville Forest contains 98 miles of designated bull trout critical habitat, 12.9 miles of which are along LeClerc Creek within the LeClerc Allotment.³⁹

Although the number of individual bull trout is uncertain and has been presumed to be low, the species has been observed in the West Branch of LeClerc Creek within the LeClerc Allotment, as recently as 2014.⁴⁰ In 2015, the Forest Service took Environmental DNA (eDNA) samples from all streams on the Colville with bull trout critical habitat and detected bull trout in the West Branch of LeClerc Creek. Other eDNA surveys have detected bull trout at higher frequencies and in multiple stretches of LeClerc Creek, including in the Middle Branch, over the past five years.

The Final Recovery Plan for the Coterminous United States Population of Bull Trout (“Bull Trout Recovery Plan”) acknowledges that habitat loss and fragmentation and fish passage issues are two of the most significant threat factors affecting the species, and that the availability of migratory corridors is “critical to the survival of bull trout.”⁴¹ Within the Pend Oreille River basin, wherein LeClerc Creek is a tributary, bull trout habitat is fragmented by the Albeni Falls Dam and Box Canyon Dam.⁴² In this area, a “primary threat” to bull trout habitat and bull trout recovery is riparian and instream degradation due to livestock grazing and other land management practices.⁴³

The impacts of livestock grazing on fish habitat are “well documented.”⁴⁴ Grazing pollutes water sources with elevated levels of fecal coliform; causes soil erosion and increases sediment in streams; destroys riparian vegetation that provides shade and stabilizes stream banks;

³⁷ Determination of Threatened Status for Bull Trout in the Coterminous United States, 64 Fed. Reg. 58,910 (Nov. 1, 1999).

³⁸ Revised Designation of Critical Habitat for Bull Trout in the Coterminous United States, 75 Fed. Reg. 63,898 (Oct. 18, 2010).

³⁹ *Id.*; U.S. Dep’t of Interior, Endangered Species Act - Section 7 Consultation, Biological Opinion, Colville National Forest Land and Resource Management Plan Revision (Oct. 24, 2017) (“Forest Plan BiOp”) at 112.

⁴⁰ 2021 BiOp at 6.

⁴¹ U.S. Fish and Wildlife Service, Recovery Plan for the Coterminous United States Population of Bull Trout (*Salvelinus confluentus*) (Sept 28, 2015) at 10.

⁴² Columbia Headwaters Recovery Unit Implementation Plan for Bull Trout (Sep. 2015) (“CHRUIP”) at D-17.

⁴³ *Id.*

⁴⁴ Forest Plan BiOp at 142.

and changes channel morphology, including widening channels and destabilizing banks.⁴⁵ Livestock may also cause direct mortality to fish populations, including by trampling the redds that spawning fish create to lay their eggs.⁴⁶

C. Comments on Proposed LeClerc Allotment Management Plan Raised Concerns about Impact on Bull Trout and Bull Trout Critical Habitat

The LeClerc Allotment spans 23,412 acres in the LeClerc Creek watershed, located in the Sullivan Lake Ranger District in Pend Oreille County.⁴⁷ The Forest Service approved the first and, to date, only Allotment Management Plan (“AMP”) for the LeClerc Allotment in 1982. Since the Forest Service approved the LeClerc AMP in 1982, there have been at least three attempts to reinstate the National Environmental Policy Act (“NEPA”) process to develop a new AMP. According to the Forest Service’s current NEPA schedule, it was supposed to finish conducting the NEPA analysis for a new AMP in 2019.⁴⁸

In 2015, the Forest Service published a Draft Environmental Impact Statement (“LeClerc DEIS”) as part of its most recent attempt to complete the NEPA process for the LeClerc Allotment.⁴⁹ Following comments on the DEIS, the Forest Service published the LeClerc FEIS on June 29, 2018, beginning a 45-day objection period.⁵⁰ Within days of issuing this notice, however, the Forest Service withdrew the LeClerc FEIS, cancelled the objection period, and put the LeClerc Project indefinitely on hold.⁵¹

During the comment period for the LeClerc DEIS, concerns about grazing’s impact on bull trout, bull trout critical habitat, and bull trout recovery efforts were expressed by Public Utility District #1 for Pend Oreille County (“POPUD”), the Kalispel Tribe, Washington

⁴⁵ See *id.* at 142; LeClerc FEIS at 90, 93, 95; CHRUIP at D-17.

⁴⁶ See Forest Plan BiOp at 142.

⁴⁷ U.S. Dep’t of Agriculture, LeClerc Creek Grazing Allotment Management Planning, Final Environmental Impact Statement (“LeClerc FEIS”) (Feb. 2018) at 2.

⁴⁸ U.S. Forest Service, National Allotment NEPA Schedule 2017-2028, at 64.

⁴⁹ See Environmental Impact Statements; Notice of Availability; EIS No. 20150277, Draft, USFS, WA, LeClerc Creek Grazing Allotment Management Planning, 80 Fed. Reg. 59775 (Oct. 2, 2015).

In the LeClerc DEIS and the July 2015 Biological Evaluation/Management Indicator Species Report (“Fisheries Specialist Report”) prepared as part of the DEIS, the Forest Service analyzed four alternatives: Alternative A—no change, which would reauthorize grazing under the terms and conditions of the existing permit; Alternative B—no grazing, which would not reauthorize grazing on the LeClerc Allotment; Alternative C, which would reauthorize grazing but incorporate modifications, resource damage mitigation measures, and an adaptive management plan; and Alternative D, which was similar to Alternative C but included changes suggested by permittee Fountain Ranch.

⁵⁰ Environmental Impact Statements; Notice of Availability; EIS No. 20180146, Final, USFS, WA, LeClerc Creek Grazing Allotment Management Planning, 83 Fed. Reg. 30730 (June 29, 2018).

⁵¹ Environmental Impact Statements; Notice of Availability; EIS No. 20180146, Final, USFS, WA, WITHDRAWN, LeClerc Creek Grazing Allotment Management Planning, 83 Fed. Reg. 31535 (July 7, 2018).

Department of Fish and Wildlife (“WDFW”), Environmental Protection Agency (“EPA”), and United States Department of Interior (“Interior Department”).

POPUD commented that it “cannot support any alternative that continues to allow grazing in the LeClerc Creek drainage,” because of its effect on stream restoration programs, including the Trout Habitat Restoration Program (“THRP”).⁵² POPUD wrote that the LeClerc drainage is “designated as a primary watershed for bull trout recovery,” and that neither of the modified grazing alternatives provide “sufficient stream protections to minimize damage” to stream habitat.⁵³

In its objection to the proposed AMP, the Kalispel Tribe wrote that only the “no grazing alternative is lawful,” claiming the “Forest Service has been unlawfully managing the Allotment since at least 1982.”⁵⁴ The Tribe noted the significant investment that bull trout recovery projects such as THRP have already made in the LeClerc watershed, adding that LeClerc “is not only the largest” of seven priority watersheds, but “has the most potential to provide the largest amount of quality native habitat when restored.”⁵⁵

WDFW commented that discontinuing grazing on the allotment would have “significant” benefits to bull trout critical habitat.⁵⁶ It voiced its concern that bull trout habitat recovery efforts “may be compromised by current livestock grazing practices occurring in riparian corridors throughout the allotment,” since POPUD surveys have shown that “in stream reaches where cattle have access, fish habitat function continues to be impacted.”⁵⁷

Similarly, the EPA noted that cattle grazing “may continue to contribute elevated sediment levels to streams in the watershed, resulting in fish mortality or egg loss.”⁵⁸ And DOI commented that continued grazing on the allotment would “render any riparian and stream habitat improvements made pursuant to the THRP moot,” and that the “only alternative that appears to adequately protect native fish habitats” is Alternative B, the no grazing alternative.⁵⁹

⁵² POPUD comment letter (Nov. 13, 2015) at 1.

⁵³ *Id.*

⁵⁴ Kalispel Tribe comment letter (Dec. 15, 2015) at 1.

⁵⁵ *Id.* at 3.

⁵⁶ WDFW comment letter (Dec. 14, 2015) at 2.

⁵⁷ *Id.* at 2.

⁵⁸ EPA comment letter (Dec. 16, 2015) at 5.

⁵⁹ DOI comment letter (Jan. 11, 2016) at 1-2.

D. Forest Service Acknowledged the Impact on Bull Trout and Bull Trout Critical Habitat and Consulted FWS During LeClerc AMP Process

The Fisheries Specialist Report incorporated into the LeClerc DEIS assessed the current habitat quality in the LeClerc Creek watershed as “not properly functioning.”⁶⁰ It concluded that, reauthorizing grazing would continue to “cause a downward trend to stream habitat conditions,” including in designated bull trout critical habitat.⁶¹

Given its assessment of the potential impact on bull trout critical habitat, the Forest Service consulted with FWS regarding the potential impacts of reauthorizing grazing during the most recent LeClerc AMP planning process. FWS received the Forest Service’s request for formal consultation on December 18, 2014.⁶² Following review of the Forest Service’s Biological Assessment and other supplemental information, FWS issued its Biological Opinion on March 11, 2016 (“2016 BiOp”).⁶³

The 2016 BiOp only analyzed one of the four alternatives identified in the LeClerc AMP. The Forest Service only “requested consultation on Alternative D,” and that Alternative D was selected during analysis as the “most likely scenario and is assessed in this Opinion.”⁶⁴

Alternative D proposed reauthorizing grazing on the LeClerc Allotment, but with substantial modifications and mitigation measures. Among other changes, Alternative D would: modify the allotment boundary, including dropping Fourth of July pasture and adding a pasture at Hanlon Meadows; specify a deferred grazing rotation system with approximate dates of use for each pasture; specify new range improvements to be constructed on the allotment, including additional fencing to prevent cattle drift and to exclude cattle from sensitive riparian areas; provide for three riparian Designated Monitoring Areas to implement Multiple Indicator Monitoring protocols; and require the Forest Service to implement an adaptive management plan to coordinate the monitoring of range and riparian resources and adjust grazing according to utilization standards.⁶⁵

The 2016 BiOp recognized that individual bull trout have been found in LeClerc Creek. It mentions a female bull trout that spawned in 2000, as well as an adult bull trout found in the West Branch of LeClerc Creek in 2014.⁶⁶ However, FWS concurred with the Forest Service’s

⁶⁰ Fisheries Specialist Report at 26.

⁶¹ *Id.* at 43.

⁶² *U.S. Dep’t of the Interior, Fish and Wildlife Service*, Biological Opinion for the LeClerc Creek Cattle Grazing Allotment Project (Mar. 11, 2016) at 1.

⁶³ *See id.*

⁶⁴ *Id.* at 6.

⁶⁵ *Id.* at 6-12.

⁶⁶ *Id.* at 5.

determination that impacts to bull trout are expected to be “insignificant.”⁶⁷ This concurrence was based on the low numbers of individual bull trout within the allotment, as well as specific mitigation measures incorporated into Alternative D, including “proposed fencing, grazing rotations, and other factors that minimize the extent and duration of impacts in any one area” and “the monitoring requirements that will ensure, after 3 years, that problems are addressed[.]”⁶⁸

The 2016 BiOp included a separate section addressing the Forest Service’s request for concurrence with a “not likely to adversely affect” determination on bull trout critical habitat.⁶⁹ The 2016 BiOp did not concur with the Forest Service’s determination that grazing was “not likely to adversely affect” bull trout critical habitat, but concluded that although “significant adverse effects to critical habitat” are expected at the local level, the grazing proposed in Alternative D “is not likely to destroy or adversely modify designated critical habitat.”⁷⁰

The 2016 BiOp’s Incidental Take Statement indicates that no incidental take is “anticipated or exempted,” and thus “no reasonable and prudent measures and terms and conditions are provided below.”⁷¹ However, if take is detected, the BiOP provides that the Forest Service must reinitiate consultation.⁷² The BiOp’s re-initiation notice also makes clear that “formal consultation is required” if “new information reveals effects” not previously considered, or if “the agency action is subsequently modified in a manner that causes an effect” not previously considered.⁷³

Finally, the 2016 BiOp recommends that to “minimize or avoid adverse effects,” the Forest Service should “consider relocating the LeClerc Allotment,” and if it is unable to do so, it should at least “completely fence or exclude riparian and wetland areas that support native salmonids.”⁷⁴

E. Recovery and Conservation Efforts Have Significantly Altered Current and Future Conditions for Bull Trout, Bull Trout Critical Habitat, and Bull Trout Recovery

Since the 2016 BiOp, there have been a number of developments in bull trout surveys and recovery efforts, which have greatly increased the likelihood that grazing on the LeClerc Allotment will adversely affect bull trout and adversely modify bull trout critical habitat.

⁶⁷ *Id.* at 6.

⁶⁸ *Id.* at 6, 31.

⁶⁹ *See id.*

⁷⁰ *Id.* at 31.

⁷¹ *Id.* at 32.

⁷² *Id.*

⁷³ *Id.* at 34.

⁷⁴ *Id.* at 33.

According to data collected by the Forest Service, there have been numerous detections of bull trout in the LeClerc Creek in the last five years. Bull trout have been detected through eDNA methods in Middle Branch LeClerc Creek in 2016, and in West Branch LeClerc Creek in four separate stream reaches in 2016, 2018, 2019, and 2020.⁷⁵

In the summer of 2018, an upstream fish ladder project was completed at Box Canyon Dam. This project was undertaken by POPUD pursuant to a 2010 settlement agreement (“2010 Agreement”) regarding the Box Canyon Dam license. The completion of this upstream fish ladder is expected to contribute to the restoration of habitat connectivity for bull trout in the Pend Oreille River basin.

In the summer of 2019, the 2010 Agreement was amended and a new off-license agreement was reached (“2019 Agreement”), again with respect to the Box Canyon Dam license. Among other provisions, the 2019 Agreement stipulates that POPUD is no longer responsible for the construction of a downstream fish ladder at Box Canyon Dam, but that it shall contribute funding to various other bull trout recovery efforts over the course of the next 25 years. Reports indicate in spring 2022, POPUD started operating a new \$40 million trap-and-haul upstream passage facility for fish, including bull trout.⁷⁶

On January 19, 2021, the United States Army Corps of Engineers released their work plans for the upcoming year, listing the Albeni Falls Dam fish passage as one of the construction projects slated for completion.⁷⁷ More recent reports on the fish passage indicate that it is in its final design phases, with Congress having appropriated \$68 million in the Army Corp budget to fund the fish passage.⁷⁸ The Albeni Falls Dam fish passage is listed in the 2019 Agreement, and is expected to greatly contribute to the restoration of bull trout habitat connectivity in the Pend Oreille River basin, as it will help connect existing bull trout populations in Lake Pend Oreille to historical bull trout spawning habitats in tributaries to the Pend Oreille River.⁷⁹

⁷⁵ See U.S. Forest Service, Range-wide bull trout eDNA Project map, at <https://usfs.maps.arcgis.com/apps/webappviewer/index.html?id=6d5597b2755c4c00a35613b7a1849760> (last updated June 5, 2021).

⁷⁶ K.C. Mehaffy, *With No Salmon, Kalispel Tribe Seeks Connectivity for Trout*, CLEARING UP, Aug. 12, 2022, available at https://www.newsdata.com/clearing_up/environment/with-no-salmon-kalispel-tribe-seeks-connectivity-for-trout/article_3ddf2b5a-19f5-11ed-8a06-afe7c8ec2503.html.

⁷⁷ See U.S. Army Corps of Engineers, 2021 Work Plan at <https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll6/id/2145>.

⁷⁸ K.C. Mehaffy, *With No Salmon, Kalispel Tribe Seeks Connectivity for Trout*, CLEARING UP, Aug. 12, 2022, available at https://www.newsdata.com/clearing_up/environment/with-no-salmon-kalispel-tribe-seeks-connectivity-for-trout/article_3ddf2b5a-19f5-11ed-8a06-afe7c8ec2503.html.

⁷⁹ See CHRUIP at D-17, D-29.

F. Issuance of LeClerc Permit, First Notice of Intent, and 2021 BiOp

On May 28, 2021, the Forest Service issued the LeClerc Permit, reauthorized grazing on the Tiger Hill and LeClerc Creek grazing allotments for another 10 years.⁸⁰ The Permit allows 101 cow/calf pairs to graze from June 1 to September 30 each year on the LeClerc Allotment.⁸¹ Under the Permit, cattle will have access to all 12.9 miles of designated bull trout critical habitat.⁸²

The Forest Service's issuance of the Permit is not a continuation or extension of the action analyzed during the 2016 BiOp. The Forest Service did not complete the new LeClerc AMP nor finalize the NEPA process for the AMP. The Permit makes no reference to that NEPA process, does not mention bull trout or bull trout critical habitat, and it does not incorporate any of the grazing modifications or mitigation measures proposed in the DEIS alternative analyzed by the 2016 BiOp. The Permit authorizes grazing within the existing allotment boundaries; it does not propose additional fencing to prevent cattle access to bull trout critical habitat; it does not specify a grazing rotation schedule; and it does not set any specific monitoring requirements that would ensure adequate protection of bull trout and bull trout critical habitat.

On July 10, 2021, The Lands Council, Kettle Range, Western Watersheds, and WildEarth Guardians send their first notice of intent to sue under the ESA related to the issuance of the LeClerc Permit, for the Forest Service's apparent failure to initiate consultation prior to issuance of the LeClerc Permit. The Forest Service responded on August 31, 2021, indicating that it had initiated consultation by sending the LeClerc BA to FWS on May 4, 2021 to initiate consultation. The Forest Service indicates that it received a Section 7(d) determination on May 26, 2021, prior to the issuance of the LeClerc Permit, although FWS did not sign the 2021 BiOp until June 25, 2021.

The 2021 BiOp contains two sections. The first section is a statement of concurrence with the Forest Service's conclusion in the LeClerc BA that the LeClerc Permit "may affect," but is "not likely to adversely affect" grizzly bear and bull trout.⁸³ The second section is a biological opinion, addressing the LeClerc BA's conclusion that continued grazing through the LeClerc Permit "is likely to adversely affect" bull trout critical habitat.⁸⁴

III. ESA VIOLATIONS

The Forest Service and FWS have failed to fulfill their substantive responsibility under the ESA to ensure that the LeClerc Permit does not jeopardize the grizzly bear or the bull trout,

⁸⁰ LeClerc Permit at 1.

⁸¹ LeClerc Permit at 1, 7.

⁸² See LeClerc DEIS at 138.

⁸³ LeClerc BA at 27, 61.

⁸⁴ *Id.* at 61.

and will not impair critical bull trout habitat. The Agencies' reasoning and conclusions in the LeClerc BA and the 2021 BiOp are riddled with contradictions, based on old data and stale science, and dependent upon unfounded and inaccurate hopes about future behavior.

A. The Service Was Required to Engage in Formal Consultation on the Impact of the LeClerc Permit on Grizzly Bear

The ESA requires a formal consultation on the impact of LeClerc Permit on grizzly bear, because the impacts are clearly not “insignificant and discountable,” and thus cannot support a conclusion that the LeClerc Permit on is not likely to adversely affect grizzly bear.

The 2021 BiOp concedes that in the absence of “implementing conservation measures to minimize and avoid effects to grizzly bears,” the LeClerc Permit “could result in livestock-grizzly bear conflicts and the loss of grizzly bear forage.”⁸⁵ Nevertheless, the 2021 BiOp concurs that the action is “not likely to adversely affect” grizzly bear, based almost entirely on the fact that FWS is “assuming that guidelines included in the Forest Plan will be implemented in a manner that fulfills the conservation purpose of the guideline, avoiding or mitigating undesirable effects to grizzly bears.”

FWS has no basis for the assumption that forms the linchpin to its concurrence. Indeed, its assumption that the 2019 Forest Plan guidelines will be enforced is contrary to the language of the 2019 Plan itself, and the Final Record of Decision (“Plan ROD”) approving the plan. To begin with, the guidelines in the 2019 Forest Plan are not binding on any third party (such as the party to the LeClerc Permit), and thus cannot be independently enforced to control or mitigate grazing on the LeClerc Allotment.⁸⁶ And both the Plan ROD and the 2019 Forest Plan make clear that the Forest Service *has no intention of enforcing these guidelines at least until it develops new AMPs*. The 2019 Plan indicates the Forest Service will “[c]omplete environmental analysis and *assess and update allotment management plans* to improve allotment management and protect and manage the resources present within them.”⁸⁷ The ROD is even more explicit, as it eliminates prior suggestions that the Forest Service would implement Plan guidelines through Annual Operating Instructions for grazing, and instead provides that “permits for ongoing uses will continue under direction contained in the existing permits that are compliant with the 1988 plan *until such time as a project-level analysis* is completed that incorporates revised land management plan direction.”⁸⁸

⁸⁵ 2021 BiOp at 2.

⁸⁶ In fact, the guidelines are not even binding on the Forest Service itself. Rather, the 2019 Plan provides that the Forest Service may deviate from plan guidelines, if it can show that an alternate action is “as effective in contributing to the maintenance or attainment of relevant desired conditions and objectives.”⁸⁶

⁸⁷ 2019 Forest Plan at 183 (emphasis added).

⁸⁸ Plan ROD at 53.

The Forest Service has not completed a “project-level analysis” of the LeClerc Allotment since it issued the last AMP for the allotment in 1982. This means that not only is the allotment not being managed in accordance with the guidelines of the 2019 Forest Plan—it has not even caught up with the guidelines of the *prior plan that was completed in 1988*. The 2021 BiOp acknowledges this glaring problem in its “conservation recommendations,” remarking mildly that the Forest Service “should complete a new Allotment Management Plan for the LeClerc Creek Allotment, as much of the grazing management described in the 1982 Allotment Management Plan is outdated and inconsistent with the proposed action.”⁸⁹

The 2021 BiOp acknowledges that without the implementation of Forest Plan guidelines, the LeClerc Permit is likely to have any number of adverse effects on grizzly bears. First, it notes that “grizzly bears may feed on sick, injured, young, or dead cattle, and associate the herd as a potential source of food.”⁹⁰ The 2021 BiOp then proclaims, without any basis, that calving occurs outside of grazing allotments, and “[s]ick, injured, or dying cattle are identified and removed from the allotment in a timely manner, reducing the potential for grizzly bears to associate livestock with food.” Conflicts between wolves and cattle in the Colville National Forest over the past three years have showed that this statement has no basis in fact, as such conflicts have repeatedly involved wolves that have been lured into conflict with cattle herds by the failure of livestock producers to prevent calves from being born on allotments, identify or remove sick and injured cattle, and remove dead livestock.⁹¹

The 2021 BiOp’s next assumption is that the proposed action includes turning cattle onto the allotment no earlier than June 15 of each year beginning in 2022, meaning that there would be less potential conflict with grizzly bears in spring forage areas, less consumption of spring forage by cattle, and less likelihood of conflict because the calves would be bigger when they were turned out.⁹² This assumption is directly contrary to the facts: The LeClerc Permit allows cattle to be turned out on June 1, 2022 for the entirety of its 10-year-term.⁹³

The 2021 BiOp concludes that effects to grizzly bears should be “insignificant and discountable,” due to the “later start of the grazing season beginning in 2022 [and] proposed measures to minimize the potential interactions between grizzly bears and livestock.”⁹⁴ The first of these assertions is contradicted by the face of the LeClerc Permit, and it is patently inappropriate for FWS to base a conclusion that adverse effects on grizzly bear are “extremely

⁸⁹ 2021 BiOp at 28.

⁹⁰ 2021 BiOp at 3.

⁹¹ Similarly, there is also no basis to claim that livestock will be managed in accordance with Washington’s Wolf Conservation and Management Plan, which sets forth standards and recommendations that have likewise been routinely violated by livestock owners grazing on Colville Forest allotments. *See* 2021 BiOp at 12.

⁹² 2021 BiOp at 3.

⁹³ LeClerc Permit at 1 (showing period of use extending from “6/1” to “9/30” of each year); LeClerc BA at 9 (the “turn-on date specified in the range permit would be June 1”).

⁹⁴ 2021 BiOp at 3.

unlikely” based on an unfounded assumption that “proposed measures” would be implemented at some future point in time. As a result, the 2021 BiOp’s conclusions concurrence with the Forest Service regarding grizzly bears was arbitrary and capricious, and the Agencies are required to engage in formal consultation to satisfy the ESA.

B. The Service Was Required to Engage in Formal Consultation on the Impact of the LeClerc Permit on Bull Trout

The 2021 BiOp’s conclusions about bull trout are similarly flawed. The FWS concedes that grazing in riparian areas “has the potential to have significant effects to bull trout or bull trout habitat in the form of trampling, water quality degradation, loss of vegetation and riparian cover, and channel modifications for cattle crossings (bridge or hardened crossings).”⁹⁵ It also concedes that “significant effects to water quality, habitat complexity, and prey base may occur in localized areas of the proposed LeClerc Creek Allotment where cattle have access to the stream.”⁹⁶ Nevertheless, it concurs with the Forest Service’s conclusion that the permit is “not likely to adversely affect” bull trout.

Once again this conclusion is based on faulty and unfounded assumptions. First, the FWS assumes that there are not currently any significant populations of bull trout in the LeClerc Creek Watershed, and that there are not expected to be any in the “foreseeable future without direct intervention.”⁹⁷ This assertion is based on a description of “current conditions,” for which FWS cites to a study that is eight years old.⁹⁸ It also ignores the concrete evidence of ongoing “direct intervention,” which involves the investment of tens of millions of dollars into improving bull trout habitat by tribal, public utility, and federal government entities. Nor are these improvements mere speculation (unlike the speculation that 2019 Forest Plan guidelines will be implemented and enforced)—significant progress has already been made in these efforts over the past several years, and substantial funds have already been allocated for additional work.⁹⁹

Second, FWS’s concurrence regarding bull trout suffers from the same fatal flaw as its concurrence regarding impacts to grizzly bear—it makes the unfounded assertion that the Forest Service is going to implement and enforce measures such as “grazing rotations” in the future, even though the 2021 BiOp elsewhere concedes that the unique structure of the LeClerc Allotment makes it impossible to keep cattle out of streambeds.

⁹⁵ *Id.* at 6.

⁹⁶ *Id.*

⁹⁷ *Id.* at 6.

⁹⁸ *Id.* (citing to 2014 paper).

⁹⁹ All these improvements were expected and foreseeable at the time the 2021 BiOP was issued. However, to the extent that FWS or the Forest Service were unaware of any of these developments at that time, such as the recent completion of a new project at the Box Canyon Dam, they would have an obligation to reinitiate consultation.

The FWS concurrence for bull trout is based on outdated data and false hopes and fails to consider current and reasonably foreseeable conditions. It is therefore arbitrary and capricious, and does not fulfill the Agencies' obligations under the ESA.

C. The 2021 BiOp Failed to Adequately Analyze Impact to Bull Trout Critical Habitat

Once again, the 2021 BiOp also bases its conclusion that the LeClerc Permit will not adversely affect critical bull trout habitat on the unfounded and incorrect assumption that the Forest Service will immediately implement the “conservation measures” included as standards and guidelines in the 2019 Forest Plan.¹⁰⁰ As explained above, this assumption is not reasonable. Neither is it reasonable for FWS to heavily and repeatedly rely on the assumption that the negative impacts of grazing will be mitigated because the Forest Service will suddenly engage in effective monitoring and adaptive management.¹⁰¹ The Forest Service's past failures to effectively monitor or manage grazing in this allotment are notorious—resulting in a “fatally defective adaptive management strategy,” which has become a “clearinghouse for known problems, plagued by funding and monitoring challenges, and intentionally designed to include ambiguous thresholds.”¹⁰² Neither FWS nor the Forest Service point to any reason to believe that the situation has changed, especially given that the FWS has still failed to update the 40-year-old AMP for the LeClerc Allotment.

And FWS's assumption that damage to the watershed would be mitigated by “several infrastructure improvements” made by the Forest Service in 2021 is contrary to the facts presented in both the LeClerc BA and other portions of the 2021 BiOp, which make clear that despite existing fencing, cattle drift is a “recurring problem,”¹⁰³ and acknowledge that there is a “small potential for significant changes to existing conditions.”¹⁰⁴ Indeed, as the 2021 BiOp recognizes, there “are no developed water sources within this allotment, so cattle are required to water at streams and undeveloped springs,” and as a result “significant adverse effects” to the aquatic environment are “likely” to continue.¹⁰⁵

In addition, FWS fails to rely on the best available science and data when analyzing the significance of the grazing impact on the LeClerc watershed. For example, it ignores extensive recent research in its evaluation of the impact of grazing, and instead cites exclusively to studies

¹⁰⁰ 2021 BiOp at 7. *See also id.* at 8-12 (describing crucial guidelines in the 2019 Forest Plan that contribute to the FWS concurrence); *id.* at 21 (“as part of this effects analysis, we are assuming that guidelines included in the Forest Plan will be implemented”); *id.* at 22 (“through compliance with the annual grazing use indicators defined in the Forest Plan”); *id.* at 23-27 (multiple similar statements in same vein).

¹⁰¹ 2021 BiOp at 21-25.

¹⁰² Kalispel Tribe comment letter at 8-9, 11; *see also* Kalispel Tribe comment letter at 3-11 and notes to those pages

¹⁰³ 2021 BiOp at 24-25.

¹⁰⁴ *Id.* at 22; *see also* LeClerc BA at 57.

¹⁰⁵ *Id.* at 23.

that are at least 20-years old for its review of “pertinent, but limited literature indicating that significant changes in hydrology do not occur consistently even under intensive grazing schemes.”¹⁰⁶ Neither does FWS make any serious attempt to look at the significant data and research available in order to perform the required evaluation of the cumulative effects of climate change.¹⁰⁷

FWS’s conclusion that the damage to the LeClerc watershed will not “result in diminishment of designated critical habitat for the bull trout as a whole” is largely based on its assertion that the LeClerc Permit will only impact 0.1% of total bull trout critical habitat within the critical habitat unit.¹⁰⁸ This assertion fails to take into account the significance of the core bull trout habitat within the LeClerc allotment, or its connectivity to other key stretches of habitat. The critical nature of this stretch of habitat is made clear by the extensive comments and objections entered during the LeClerc AMP process, and the tens of millions of dollars being spent to revive this stretch of habitat by private, tribal, commercial, and federal government entities.¹⁰⁹ LeClerc is not only the largest of the seven priority watersheds being revived through the Trout Habitat Restoration Program, it is also the one with the potential to provide the largest amount of quality bull trout habitat once it is restored.¹¹⁰ As the LeClerc BA concedes, “Le Clerc Creek is a core area habitat for bull trout within” the bull trout recovery plan, which “[c]ites livestock grazing as a primary threat to bull trout by causing riparian and instream degradation.”¹¹¹

FWS not only ignores the importance of this watershed in its conclusions, it also fails to consider the impact that grazing in the LeClerc allotment on the watershed as a whole. If grazing pollutes or warms the core bull trout habitat within the LeClerc Allotment, it will not only directly impact the water quality in the rest of the watershed; it will disrupt the connectivity of the watershed that the bull trout recovery plan has recognized as essential.¹¹² FWS’s consideration of cumulative impacts fails to take into account the combined impact of the grazing on the LeClerc allotment with grazing allowed in other parts of the watershed that are on

¹⁰⁶ 2021 BiOp at 24.

¹⁰⁷ *Id.* at 20-21; *see, e.g.*, LeClerc BA at 45, 51 (describing how grazing increases water temperatures and exacerbates the impact of climate change).

¹⁰⁸ *Id.* at 26.

¹⁰⁹ FWS also ignores the broader federal interest in the watershed under the Federal Power Act (“FPA”). Section 4(e) of the FPA authorizes the Department of the Interior to protect the utilization and purposes of federal land reservations from the effects of hydropower projects by including mandatory conditions in licenses issued by the Federal Energy Regulatory Commission (“FERC”). The Box Canyon Hydroelectric Project FERC license includes a number of these conditions due to the project’s inundation of nearly 500 acres of the Kalispel Indian Reservation. *See* Kalispel Tribe comment letter at 3.

¹¹⁰ *Id.*

¹¹¹ LeClerc BA at 36.

¹¹² *See* DOI comment letter at 1-2 (describing possibility that the damage done by grazing could render key restoration actions identified in the Bull Trout Recovery plan “moot”).

private land.¹¹³ Although the 2021 BiOp elsewhere acknowledges the importance of “ensuring connectivity among populations,” FWS does not even consider the combined impact that grazing on the LeClerc Allotment and surrounding private areas will have to this connectivity in formulating its conclusions.¹¹⁴

Indeed, the conclusions in the 2021 BiOp are directly at odds with most of its content, which repeatedly and explicitly describes the harm that cattle grazing has already done, and is expected to continue to do, to critical bull trout habitat.¹¹⁵ For example, the FWS concedes that grazing in the LeClerc allotment will “continue to degrade” water quality and quantity;¹¹⁶ will contribute to warmer stream temperatures;¹¹⁷ will result in potential changes to species diversity and food availability for bull trout that are “not completely understood”;¹¹⁸ will continue to contribute “significant adverse effects” to an aquatic environment that is “not properly functioning” due to past impacts of grazing;¹¹⁹ will continue to create sedimentation which already has the LeClerc Creek drainage functioning “at risk,” keeping it in the “existing degraded condition”;¹²⁰ will “increase soil bulk density, runoff, and root penetration resistance”;¹²¹ and will “likely...introduce nutrients that may affect water quality,” and which have already caused the LeClerc Creek drainage to be “‘not properly functioning’ due to high sediment content and temperature.”¹²² In light of these admissions, FWS has no reasonable basis for its conclusion that the LeClerc Permit is “not likely to destroy or adversely modify designated critical habitat.”¹²³

¹¹³ 2021 BiOp at 26; LeClerc BA at 61 (“On private ownership, the Forest will not be monitoring or managing cattle and negative effects to habitat may occur which may translate to downstream effects to critical habitat.”)

¹¹⁴ 2021 BiOp at 26.

¹¹⁵ *Id.* at 20-27.

¹¹⁶ *Id.* at 21.

¹¹⁷ *Id.* at 22.-23

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 22-23.

¹²⁰ *Id.* at 23.

¹²¹ *Id.* at 24.

¹²² *Id.* at 25.

¹²³ *Id.* at 27.

IV. CONCLUSION

The Forest Service and FWS have violated Section 7 of the ESA by failing to sufficiently analyze whether the LeClerc Permit will jeopardize the continued existence of grizzly bear and bull trout and impair critical bull trout habitat, and by failing to re-initiate consultation in light of new information. By issuing the LeClerc Permit, the Forest Service has engaged in an agency action that has resulted or will result in unlawful take of grizzly bear and bull trout under the ESA.

If action is not taken to cure these ESA violations, then after 60 days has elapsed from the date of the notice, The Lands Council, Kettle Range, Western Watersheds, and WildEarth Guardians intend to amend the suit in *The Lands Council, et. al v. U.S. Forest Service, et. al*,¹²⁴ to add claims brought under the ESA's citizen suit provision, 16 U.S.C. § 1540(g)(1)(A), and consistent with this letter.

I hope to hear from you soon regarding the steps you plan to take to cure these violations.

Respectfully,



Claire Loeb Davis
Animal and Earth Advocates, PLLC
20520 105th Ave., SW
Vashon, WA 98070
claire@animalearthlaw.com
(206) 601-8476

*Attorney for The Lands Council, Kettle Range
Conservation Group, Western Watersheds Project,
and WildEarth Guardians*

¹²⁴ WildEarth Guardians is not yet a party to this suit but intends to become a party upon amendment of the complaint.