

PUBLIC INTEREST

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May 11, 2011

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Chief Tom Tidwell
USDA Forest Service
201 14th Street SW
Washington, DC 20250

Director Jonathan Jarvis
US National Park Service
1849 C Street NW
Washington, DC 20240

Executive Officer Christian Mackay
State of Montana Dept. of Livestock
301 N. Roberts, Room 101
Helena, MT 59620

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

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

RE: 60 Day Notice of Intent to Sue under the Endangered Species Act

You are hereby notified that Alliance for the Wild Rockies (Alliance) intends to file a citizen suit pursuant to the citizen suit provision of the Endangered Species Act (ESA), 16 U.S.C. § 1540(g), for violations of the ESA, 16 U.S.C. § 1531 et seq. Alliance will file suit after the 60 day period has run unless the violations described in this notice are remedied.

The name, address, and phone number of the organization 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

The name, address, and phone number of counsel for the notifier are as follows:

Rebecca K. Smith, Attorney at Law
Public Interest Defense Center, P.C.
P.O. Box 7584
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STATEMENT OF FACTS

The Yellowstone grizzly bear is a sub-population of grizzly bear that is currently listed under the ESA. *See* 75 Fed. Reg. 14496 (March 26, 2010)(USFWS rule stating that “all grizzly bears in the lower 48 States are again listed as threatened”). Grizzly bears, icons of the American frontier, historically numbered between 50,000-100,000 and ranged throughout the western United States. With European settlement, grizzlies were “shot, poisoned, and trapped wherever they were found.” Human settlement and resource extraction pervaded the American West and displaced bears across the landscape. Killings by individuals and government bounty hunters quickened the bear’s extirpation. In a historical blink of an eye – from 1850-1950 – humans reduced bear numbers and habitat by 98-99% and restricted their range to a few remnant islands of wild country, including the Greater Yellowstone Ecosystem. When the grizzly bear was listed under the Endangered Species Act (ESA) in 1975, perhaps 1,000 individuals remained.

The bear's unique biology exacerbated the speed and depth of its decline and slows recovery efforts. It may take 10 years for a single female to replace herself. Young bears have overlapping home ranges with their mother's, making dispersal across the landscape a slow process. Adults, especially males, require vast home ranges. Humans remain intolerant of bears: mistaken identity by hunters, illegal killings, and removal of habituated bears still contribute heavily to bear mortality. Resource extraction activities, including mining, logging, and road-building, provide human access into grizzly habitat and increase the chances of lethal-to-grizzly human-bear encounters. Mechanized activities also displace bears from their habitat, which stresses them biologically and increases the risk of displacement onto private lands and other non-preferred habitat where chances for mortality increase due to increased risks of human encounters.

One type of motorized use that negatively affects grizzly bears are low-altitude helicopter over-flights. According to a National Park Service literature review of five different studies, helicopters cause grizzly bears to panic and flee "in nearly all cases." Grizzly bears never become tolerant of helicopters, even with frequent exposure. Grizzlies may abandon areas in response to even infrequent overflights, and the consequences of habitat abandonment can be serious, particularly for species whose high-quality habitat is already scarce. The Forest Service's own guidance document on determining how helicopters affect grizzly bears states:

Any human activities that would result in displacement or disturbance to bears sufficient to produce any of the results listed above [fleeing, physiological changes, increased heart rate, displacement to lower quality habitat, and increased energetic demands] should be considered a negative effect for the purposes of effects analysis in a Biological Assessment. Helicopter use clearly has the potential to produce these negative effects. Unless an extenuating circumstance exists, therefore, the appropriate effects determination for low altitude and high frequency *or* extended duration helicopter use is "may affect, likely to adversely affect."

Accordingly, multiple court decisions have consistently set aside, as arbitrary, agency actions that allowed low-altitude helicopter use in ESA-listed grizzly bear habitat. *Alliance for the Wild Rockies v. U.S. Forest Service*, CV-07-150-M-DWM, Order at 19-26 (D. Mont. July 30, 2008); *Alliance for the Wild Rockies v. Tidwell*, CV-08-168-M-JCL-DWM, Findings and Recommendations of United States Magistrate Judge at 16-23 (Dec. 23, 2009), *adopted in full by Alliance for the Wild Rockies v. Tidwell*, CV-08-168-M-JCL-DWM, Order at 2 (March 30, 2010); *Alliance for the Wild Rockies v. Bradford*, 720 F.Supp.2d 1193, 1213-1215 (D. Mont. 2010).

The National Park Service, U.S. Forest Service, and Montana Department of Livestock are currently planning to allow repeated low-altitude helicopter over-flights over occupied grizzly bear habitat within the Yellowstone Grizzly Bear Recovery Zone. Last year, on May 12, 2010, a grizzly bear was filmed fleeing from one of these hazing helicopters. These helicopter flights are ostensibly for the purpose of hazing wild bison into Yellowstone National Park so that cattle do not contract diseases from the wild bison. However, the relevant public and private lands in the area do not have any active cattle grazing. Additionally, the private landowners in the area overwhelmingly prefer the presence of bison and grizzly bears over the presence of low-altitude helicopters over their homes and property.

STATEMENT OF LAW

The ESA is the “most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978). The U.S. Supreme Court holds that Congress “clearly [] viewed the value of endangered

species as ‘incalculable,’” *id.* at 187, and that the “plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, *whatever the cost*,” *id.* at 184 (*emphasis added*). In passing the ESA, Congress wanted to save the grizzly bear from extinction. *Id.* at 183 - 84 (citing 119 Cong.Rec. 42913 (1973)).

The ESA contains powerful, non-discretionary requirements that protect listed species. The ESA Section 7 requires inter-agency consultation on activities that may affect listed species. If an activity is likely to adversely affect a listed species, the agencies must conduct formal consultation with a formal biological opinion and promulgate an incidental take statement with standards for the activity to avoid jeopardy. The ESA prohibits federal agency actions that will cause jeopardy to listed species. Inter-agency consultation must apply the best available science.

The ESA further prohibits any person from “taking” endangered species without an incidental take statement that permits the take. The take prohibition encompasses activities that harass or otherwise harm listed species. The prohibition against taking can be enforced against state and local governments. *Strahan v. Coxe*, 127 F.3d 155, 168 (1st Cir. 1997).

Accordingly, the agencies have violated, and are continuing to violate, the ESA for the following reasons:

1. Failure to conduct any ESA Section 7 consultation for the agencies’ 2011 decision to allow low-altitude helicopters flights throughout the Hebgen Basin over occupied grizzly bear habitat in the Yellowstone Grizzly Bear Recovery Zone including, but not limited to, areas otherwise closed to human use and/or motorized use for the purpose of protecting grizzly bears in occupied habitat during spring grizzly bear season, including the Richards

Pond area and the Gneiss Creek area inside Yellowstone National Park, as well as road *and* land closures on occupied grizzly habitat on the Gallatin National Forest outside of Yellowstone National Park;

2. *Failure to conduct* any Section 7 ESA consultation for the agencies' 2008 Adaptive Management Plan to increase helicopter hazing operations in the Hebgen Basin starting on May 15 annually over occupied grizzly bear habitat in the Yellowstone Grizzly Bear Recovery Zone during spring grizzly bear season;
3. Failure to provide a Biological Opinion and/or Incidental Take Statement for the adverse impact and take of grizzly bears from repeated low-altitude helicopter flights during hazing operations in the Hebgen Basin over occupied grizzly bear habitat in the Yellowstone Grizzly Bear Recovery Zone;
4. Failure to comply with the terms of the Gallatin National Forest Plan Biological Opinion and Incidental Take Statement that prohibit adverse effects on threatened Yellowstone grizzly bears, resulting in ongoing unpermitted take of threatened Yellowstone grizzly bears from helicopter overflights in violation of ESA Section 9;
5. Failure to comply with ESA Section 9 by allowing/causing past and ongoing unpermitted take of threatened Yellowstone grizzly bears from harassment and harm related to helicopter hazing operations that cause grizzly bears to flee, without an Incidental Take Statement. At least one incident of this harassment, which occurred on May 12, 2010, has been documented on film;
6. Failure to apply the best available science and new information and reinitiate Section 7

ESA consultation for the Gallatin Forest Plan on the issue of helicopter hazing effects on threatened grizzly bears on National Forest lands. The existing Biological Opinion and Incidental Take Statement for the Gallatin Forest Plan requires that “consultation should be reinitiated” if there are new impacts to grizzly bears that were not considered in the initial Biological Opinion and Incidental Take Statement. These new impacts that were not considered in that document include the following:

- a. the permitted increase in helicopter hazing in the Hebgen Basin since 2000;
- b. the mandatory haze back date for the Hebgen Basin, which is set at May 15 in the middle of spring grizzly bear season and therefore undisputedly overlaps with a time period when grizzly bears are out of their dens and may be present in the area;
- c. video documentation of direct harassment from at least one hazing helicopter on a fleeing grizzly bear, which amounts to an unpermitted take under ESA Section 9;
- d. new information/changed conditions that Hebgen Basin, including the Horse Butte area where hazing frequently takes place, is inhabited by grizzly bears during the same time frame as helicopter hazing operations take place;
- e. agencies’ failure to comply with the representation in the EIS for the Interagency Bison Management Plan that “[c]urrently, hazing operations would cease if there was evidence of grizzlies being active in the area;”
- f. numerous recent scientific studies, agency guidance documents, and court decisions that repeatedly find that low altitude helicopter flights have adverse

effects on threatened grizzly bears;

- g. the implementation of the Interagency Bison Management Plan in general; and
- h. helicopter hazing operations of bison in general.

7. Failure to apply the best available science and new information and reinitiate Section 7 ESA consultation for the inadequate, arbitrary, illegal, and stale U.S. Forest Service and National Park Service determination of “not likely to adversely affect” the threatened Yellowstone grizzly bear, and the U.S. Fish and Wildlife Service’s “letter of concurrence,” related to impacts of implementation of the Interagency Bison Management Plan on threatened Yellowstone grizzly bears. This consultation does not address multiple significant factors, including, but not limited to, the following:

- a. the permitted increase in helicopter hazing in the Hebgen Basin since 2000;
- b. the mandatory haze back date for the Hebgen Basin, which is set at May 15 in the middle of spring grizzly bear season and therefore undisputedly overlaps with a time period when grizzly bears are out of their dens and may be present in the area;
- c. video documentation of direct harassment from at least one hazing helicopter on a fleeing grizzly bear, which amounts to an unpermitted take under ESA Section 9;
- d. new information/changed conditions that Hebgen Basin, including the Horse Butte area where hazing frequently takes place, is inhabited by grizzly bears during the same time frame as helicopter hazing operations take place;

- e. agencies' failure to comply with the representation in the EIS for the Interagency Bison Management Plan that "[c]urrently, hazing operations would cease if there was evidence of grizzlies being active in the area;" and
- f. numerous recent scientific studies, agency guidance documents, and court decisions that repeatedly find that low altitude helicopter flights have adverse effects on threatened grizzly bears.

Accordingly, the agencies have ignored their duties under the ESA, 16 U.S.C. Section 1531 et seq., to ensure that their actions do not jeopardize threatened and endangered species, that their actions do not result in unauthorized take of these species of wildlife, and that their actions promote recovery of these species. The agencies' actions in this matter represent an unlawful departure from their legally binding mandate to protect and recover imperiled species and their habitats.

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

Sincerely,

A handwritten signature in black ink, appearing to be 'Rebecca K. Smith', written in a cursive style with a long horizontal flourish extending to the right.

Rebecca K. Smith, Counsel for Notifier

cc: Eric Holder, U.S. Attorney General
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