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April 19, 2013

Jerri Marr, Forest Supervisor
Pike and San Isabel National Forests
2840 Kachina Drive
Pueblo, CO 81008

Allan Hahn, District Ranger
Pikes Peak Ranger District
601 South Weber
Colorado Springs, CO 80903

*Delivered via U.S. Certified Mail Return Receipt Requested
and to Mr. Hahn without exhibits via fax at: 719-477-4233*

cc: Thomas Vilsack, Secretary
U.S. Department of Agriculture
1400 Independence Ave. SW
Washington, DC 20250

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

Susan Linner, Colorado Field Supervisor
Colorado Ecological Services Field Office
U.S. Fish and Wildlife Service
P.O. Box 25486
Denver, CO 80225-0486

RE: Formal Notice of Intent to Sue

Dear Sirs and Madams:

This serves as formal notice by our clients Trails Preservation Alliance, Colorado Motorized Trail Machine Association, Colorado Off Highway Vehicle Coalition, Don Riggle and David Leinweber (collectively, the “Petitioners”) of their intent to sue the United States Forest Service; Jerri Marr, Supervisor, Pike and San Isabel National Forests; Allan Hahn, District Ranger, Pikes Peak Ranger District (collectively, the “Forest Service”) for violations of the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA”) resulting from the Forest Service’s actions and ongoing oversight regarding recreational use of the Bear Creek watershed. Petitioners include nonprofit groups committed to effective, sustainable and equitable management of trail-based recreation opportunity, as well as fishermen and conservationists committed to active and effective management of Colorado’s waters and supported fisheries and aquatic populations. Petitioners, including through their members, reside in the vicinity of Bear Creek, have recreated within the watershed including on all of its Forest Service trails, and have concrete plans to continue such activities to the extent authorized by the Forest Service.

Bear Creek, at least according to the Forest Service, contains “the sole known remaining population of genetically pure greenback cutthroat trout” (*Oncorhynchus clarkia stomias*). Draft Bear Creek Watershed Assessment, USFS (March, 2013) (“BCWA”) at 1 (viewed April 19, 2013 at https://fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5412309.pdf). The greenback cutthroat trout (“GBCT”) is Colorado’s state fish and is listed as threatened under the ESA. *Id.* The Forest Service has taken agency action, most notably through Forest Order 12-21 (December 6, 2012) (attached hereto as Exhibit “A”) which has resulted in adverse impacts to GBCT or increased the risk of adverse impacts to GBCT. The Forest Service has exercised its ongoing discretion in a manner that has resulted in adverse impacts to GBCT or increased the risk of adverse impacts to GBCT. This Notice describes on behalf of the Petitioners the alleged violations of the ESA represented by the above-described conduct of the Forest Service.

If there is a threat to GBCT in Bear Creek, that threat results from the mere existence of trails that, by their physical location and characteristics, can produce harmful levels of sediment to the stream. There was not a rational basis for the Forest Service to immediately close specified trails to motorcycles while allowing other uses to not only continue, but increase, while leaving the trails in place to continue producing sediment. If immediate measures were needed to protect GBCT, the Forest Order 12-21 motorcycle-only closure did not go far enough. Since the Forest Service has already instituted that closure to motorcycles, Petitioners hereby request that it take the additional connected steps of closing the trails to all uses and taking immediate corrective action as may be necessary to comply with the ESA and protect GBCT.

BACKGROUND

Petitioners will attempt to summarize the relevant history involving the Forest Service’s management of the Bear Creek watershed. The BCWA outlines much of that information. The watershed contains about 3,602 acres located roughly four to eight miles west-southwest of

downtown Colorado Springs on the east flank of Pikes Peak. The watershed includes nonfederal lands such as those owned by Colorado Springs Utilities and the City of Colorado Springs, in addition to the 2,331 acres owned by the United States and managed by the Pikes Peak Ranger District of the Pike and San Isabel Forests. *See*, BCWA at 13. The physical environment includes rocky, coarse textured soils with thin ground cover that are “particularly vulnerable to rill and gully erosion if protective ground cover is removed” and that are, once disturbed, “difficult to rehabilitate.” *Id.*

The watershed supports “an important recreation area along the Front Range of Colorado, providing motorized and non-motorized recreation opportunities on a well-established trail network.” *Id.* at 1. The transportation network in and near the Bear Creek watershed consists largely of trails and “was not so much constructed as developed in place based on historic and possibly prehistoric travel routes” which in many instances “do not meet modern standards in terms of gradient, drainage, or proximity to streams.” *Id.* at 14. This route network, and particularly its single track trails, are a prized recreational resource that has received regular and continuing use, including motorcycle use, for decades. *Id.* at 30.

Perhaps counter-intuitively, at least through the lens of an aggressive preservationist worldview, it is in the disturbed Bear Creek watershed that the “sole known remaining population of genetically pure” GBCT persist. *Id.* at 14. The BCWA notably avoids discussion of whether GBCT are native to Bear Creek. While some sources report this as a native population, there is other evidence to suggest the population was introduced. In fact, logic suggests that the disconnected and limited nature of the Bear Creek microsystem may factor prominently in any unique continuation of GBCT there, allowing the species to survive while withstanding threats such as hybridization and predation that have apparently eliminated it from previously-occupied habitats shared with other fish species.

Sedimentation appears to be a factor of particular concern, if not primary concern, in managing GBCT in compliance with the ESA. *See* BCWA at 25. The construction, and subsequent existence, of a road/trail network can be a significant source of sediment to the watershed. Numerous factors affect the degree and nature of sediment production from any route prism, which can include location, proximity to water sources, soil types/route surfaces, route sloping, buffering, precipitation/drainage and other factors. It is the physical existence of the route, in complex interplay with environmental factors such as those listed above, far more than either the volume or modality of human travel, that is causally related to sediment production:

The effect on just opening and closing roads, really, from the modeling I’ve looked at and what I’ve seen, you know, from my experience, that it’s the existence of the road. It’s the road crossing and condition of the culverts. It’s, you know, roads that are occupied within a flood plain of a stream. These are the main factors that effect water quality. So whether that road is open or closed it has no effect. So really just the opening – or the closing of roads doesn’t have a large effect on water quality from what occurred with either plan.

Testimony of Robert C. Davies (December 8, 2004) at 47-48 in *The Lands Council v. Stringer*; Case No. CV-03-344-N-MHW (D.Idaho) (Exhibit “B” hereto); *see also, id.* at 16-17 (location of route is critical factor, downplaying role of traffic); at 20 (location of road and stream crossings “the most significant factor influencing sedimentation”); at 26-27 (“[t]here’s not an improvement to water quality just by closing roads”); at 36 (“the obvious and best solution is just to not have the road there”). The setting of this testimony is noteworthy, as it was presented in what became a five-day evidentiary hearing on remedy in a case challenging a travel planning decision made by the Coeur d’Alene River Ranger District of the Panhandle National Forest in northern Idaho. Mr. Davies was, at the time, the District hydrologist with a background in fisheries biology. The Forest Service seems to recognize and agree with many of Mr. Davies’ observations, for a primary component of the recommended management strategy seems to be obliteration of routes that criss-cross Bear Creek, regardless of whether they receive motorized or non-motorized travel. BCWA at 40 (recommending minimization of stream crossings and routes in “water influence zone”); BCWA Figure 4, Recommended Transportation System (depicting closure to all use and decommissioning of Trails 666 and 667 in closest proximity to Bear Creek).

The proper focus on physical route characteristics rather than mode of travel should be particularly important for the sedimentation analysis in the Bear Creek watershed. The stream crossing of greatest concern is arguably involves Trail 666 in the northwest corner of section 32, just beyond the proposed redirection of that trail to High Drive. That crossing involves active talus slopes on both sides, with a heavily affected and shallowed crossing. *See* Exhibits “C” and “D” hereto, photos of westernmost creek crossing of Trail 666 taken. Petitioners are particularly concerned that this crossing, in what threatens to be a very low water year, will create a total barrier to fish movement this summer. While it is true that stream crossings exist on the previous motorcycle Trail 667, those have long been and until issuance of the Forest Order had continued to be high priorities for bridge installation, retaining walls, sediment fencing and related maintenance projects. *See*, BCWA at A-6 (Table A6 showing 13 perennial stream crossings for Trail 667, but noting that 12 of 13 “have been upgraded with bridges to reduce sediment input”). In short, the non-motorized Trail 666 presents sedimentation and management concerns at least as great as, and arguably greater than, Trail 667 when it was receiving motorcycle use and associated active maintenance.

The management situation was functional and improving, particularly given the building momentum in the watershed working group, in which some Petitioners were actively participating. Apparently dissatisfied with the status quo or the existing management trajectory, The Center for Biological Diversity (“Center”) submitted on May 10, 2012 a Notice of Intent to Sue (“NOI”) advising the Forest Service of alleged violations of Sections 7 and 9 of the ESA “resulting from Forest actions related to off-road vehicle (“ORV”) use in the Bear Creek watershed.” Eventually the Center filed suit on September 17, 2012 in *Center for Biological Diversity v. Marr*, Case No. 1:12-cv-02460-JLK (D.Colo.). Some of the Petitioner organizations obtained intervenor status in that case. Without filing an answer and in the face of Center’s threats to seek a preliminary injunction, the Forest Service entered a settlement agreement with Center, which was filed November 21, 2012. The Court denied the initial agreement *sua sponte*, but a slightly modified second agreement was filed on November 28th, and approved by the Court on November 30, 2012. While the agreement admits neither liability nor any of Center’s

allegations, it commits the Forest Service to unspecified Section 7 compliance and closures of certain trails to continuing motorized access. Immediately following and in direct reference to the settlement the Forest Service issued Forest Order 12-21.

SUMMARY

To the extent any violations were legitimately identified in the Center's Notice, they have not been cured. In fact, the agency response to the Center's Notice and lawsuit, specifically including Forest Order 12-21, constitutes an independent violation(s) and/or has exacerbated any possible harm, habitat loss, or take of the GBCT.

The Petitioners support effective management of multiple use trails in the Bear Creek watershed, and beyond. To the extent the Forest Service, cooperators and interested publics are now engaged in an effort toward that goal through the pending Bear Creek Watershed Assessment, the Petitioners support and will remain fully engaged in that effort, as well as ongoing and future management. Bear Creek is a unique site in proximity to a major city which particularly requires state-of-the-art management. That management has in the past and should continue in the future to include reasonable opportunities for motorcycles and mountain bikes, including the historically-prized single track routes rarely found in a remote forested setting so close to a city like Colorado Springs.

The Petitioners do not believe that immediate closure of the Restricted Trails through Forest Order 12-21 or otherwise was warranted. Nor do the Petitioners support the Forest Service's decision to settle the Center's lawsuit. The Petitioners do not believe that the Center could have prevailed on its asserted claims. Nothing in this Notice should be read or may be construed as support for any of the agency decisions, implicit findings, or underlying positions of the Center. Regardless of the legitimacy of those claims or the Forest Service's decision to settle, the rationale adopted by the agency in taking those discretionary actions cannot be reconciled with Forest Order 12-21 and its ongoing management of the Bear Creek Watershed and associated trail system. Specifically, it is the presence of the trail system that is primarily responsible for sediment delivery to the watershed. No one has ever established, nor do we think they could establish, that travel by motorcycles is a singular, or even unique, causative factor in the sedimentation or habitat analysis for the GBCT population in Bear Creek. The agency's actions in response to the Center's lawsuit through Forest Order 12-21 and otherwise have thus not improved the situation in any meaningful way for the GBCT. In fact, the actions taken have failed to address fundamental habitat issues but have changed secondary factors for the worse. If the GBCT faced threats, these post-settlement developments, particularly when combined with developing environmental conditions, make the plight of the GBCT far more dire than it was prior to the Center ever filing notice.

Petitioners hereby formally put the Forest Service on notice that the agency actions detailed above violate ESA Section 7 consultation requirements and result in unlawful take under ESA Section 9. 16 U.S.C. §§ 1536 and 1538. This Notice is provided pursuant to the ESA's 60-day citizen suit notice requirement, to the extent such notice is deemed necessary. 16 U.S.C. § 1540(g). Petitioners additionally advise of the ability, and retain their full rights, to

commence an action sooner than 60-days as allowed by the Act to prevent “an emergency posing a significant risk to the well-being” of GBCT. 16 U.S.C. § 1540(g)(2)(C).

The Forest Service is Violating Section 7.

Whatever violation of Section 7 could be plausibly asserted by Center was repeated, if not more egregiously, by Forest Order 12-21. Petitioners hereby incorporate by reference the legal background and discussion of ESA Section 7 from Center’s NOI. In short, the Forest Service has a duty to consult with the Secretary of the Interior, through the U.S. Fish and Wildlife Service (“FWS”), to ensure that “any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species . . .” 16 U.S.C. § 1536(a)(2). The definition of agency “action” is broad and includes “all activities or programs of any kind authorized, funded, or carried out, in whole or in part” including “the granting of licenses, contracts, leases, easements, rights-of-way, [or] permits” and any “actions directly or indirectly causing modifications to the land, water, or air.” 50 C.F.R. § 402.02. The connection of Forest Order 12-21 to the court-approved settlement does not exempt the agency from compliance with the ESA.

Forest Order 12-21 does not alleviate any alleged threats to GBCT. It is in fact “new” agency action that triggered a Section 7 consultation duty. Petitioners recognize the existence of greater regulatory detail for motorized versus non-motorized use, but the regulatory basis for Forest Order 12-21, 36 CFR part 261, is not limited to motorized travel and may encompass any use of a road or trail, including non-motorized use.

It is insightful to run through the allegations of Center’s NOI. First, Center asserts that Trail 667 “is a highly disturbed corridor and severely eroded along most of its length” and “includes areas of obvious sediment delivery to the creek.” NOI at 6. Whatever veracity attaches to these accusations is (a) equally applicable to Trail 666; and (b) not alleviated or mitigated by closing Trail 667 to motorcycle while allowing the route to persist, and be used by other modes of access. Indeed, Petitioners have visited the area since issuance of Forest Order 12-21, and advise the Forest Service that non-motorized use is greater and is having greater impacts than preceded the Forest Order. Second, Center alleges Trail 667 is “the main conduit for users of illegal trails.” Again, this is not uniquely a motorized travel issue and the Forest Service, contrary to Center, states that user-created routes “are used primarily for foot traffic.” BCWA at 25. Finally, Center expresses concern over “informal campsites” in the watershed. Again, there is no connection solely to motorcyclists. The nature of the trail in proximity to Colorado Springs suggests it would be a particularly unlikely place for a “backcountry” motorcycle camping trip. The Forest Service recognizes a “small number of people illegally use the area for camping” without suggesting it is a “motorized” issue. Indeed, the Forest Service observed that “[r]educing or removing human uses from the Bear Creek watershed may improve conditions for the fish and its habitat” without suggesting that action designating a sediment-producing trail for non-motorized access triggers any less duty under the ESA than allowing continuation of motorized access on the same trail. *Id.* (emphasis added).

Petitioners wish to reiterate that current observations suggest that sedimentation concerns are now greater than they were prior to Forest Order 12-21. In part this is due to what appears a potential “perfect storm” (or the lack of one thereof) for the GBCT. Bear Creek is a very small creek in high water years, and the relative lack of streamflow in the coming months is a concern to Petitioners and many local residents. The coming season falls in a series of relatively low-water years and Bear Creek has not run at historical full volume since about 1999. Additionally, the volume of non-motorized traffic along Trail 666 and 667 is now greater, perhaps due in part to the perception of exclusive use. *See*, BCWA at A-29 (generally describing balance between motorized and non-motorized use and reality that non-motorized users “of the trail network generally have a high expectation of encountering a wheeled vehicle”).

Forest Order 12-21 was an agency action that triggered some duty under Section 7. Through the litigation-driven rush to issue Forest Order 12-21 the Forest Service completely ignored an effort to even consider, let alone comply with, Section 7.

The Forest Service is Violating Section 9.

Petitioners also incorporate by reference and reassert the Section 9 allegations of Center’s NOI. Section 9 of the ESA specifically prohibits the “take” of endangered or threatened species, 16 U.S.C. § 1538(a)(1)(B), a term broadly defined to mean “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). The term “harm” includes “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R. § 17.3. The term “harass” means “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” *Id.* The ESA’s legislative history supports “the broadest possible” reading of “take.” *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 704-05 (1995). “Take” includes direct as well as indirect harm and need not be purposeful. *Id.* at 704.

The subject of Center’s operative allegations is “motorcycle trails.” *See* Center NOI at 8. As described above, it is “trails” that create sedimentation concerns far more than “motorcycle” versus “hiking” versus “mountain biking” versus “equestrian” trails. Whatever merit existed in Center’s allegations remains unabated, and any “take” attends the continued existence of those portions of Trail 667 and 666 posing the greatest sedimentation risks. Again, the situation now is worse than it was in Spring, 2012, when the Center presented the NOI.

The Forest Service has taken and continues to take GBCT in the absence of an incidental take permit or other authorization, in violation of ESA Section 9.

CONCLUSION

The Forest Service is violating ESA Sections 7 and 9 as described in this Notice. Petitioners respectfully request the Forest Service take the following immediate actions to address the concerns raised in this Notice: (a) immediate closure to all but administrative use of all trail(s) within the immediate Bear Creek water influence zone; and (b) expeditious completion of the Bear Creek Watershed Assessment process, including recommended trail construction and re-route and associated trail removal/obliteration.

Sincerely,

MOORE SMITH BUXTON & TURCKE, CHARTERED

/s/

Paul A. Turcke

/nt

Enclosure(s)