



**ADVOCATES for the WEST**  
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August 30, 2021

*Via Certified Mail, Return Receipt Requested & Email*

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Tom Vilsack, Secretary  
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**Re: Notice of Intent to Sue Over Endangered Species Act Violations,  
“Sage Hen Integrated Restoration Project,” Boise National Forest, Idaho**

Dear Mses. Haaland, Williams, Christiansen, and Brummett, and Mr. Vilsack:

In accordance with the sixty-day notice requirement of the Endangered Species Act (ESA), 16 U.S.C. § 1540(g), you are hereby notified that the Idaho Conservation League intends to bring a civil action against the U.S. Forest Service, the U.S. Fish and Wildlife Service (FWS), and you (in your official capacity) for violating the ESA, 16 U.S.C. § 1531 *et seq.*, concerning the Sage Hen Integrated Restoration Project on the Boise National Forest in Idaho. As approved by the Forest Service, the Sage Hen Project involves constructing up to 83.1 miles of roads, commercially harvesting timber on up to 18,000 acres of National Forest land, and removing and replacing culverts, among other activities, in occupied bull trout habitat in the Upper Squaw Creek watershed over the next twenty years.

Bull trout (*Salvelinus confluentus*) is listed as a “threatened” species under the ESA and face dire conditions in the Sage Hen Project area. The project area includes all occupied and suitable bull trout habitat for the Upper Squaw Creek Core Area. Bull trout in the Upper Squaw Creek Core Area are at

“high risk,” two of the four local bull trout populations in the core area appear to no longer exist, and current population numbers in the core area are unknown. Additionally, climate change is projected to hit the Upper Squaw Creek Core Area particularly hard compared to other core areas, with projections of “greatly reduced” suitable habitat in Upper Squaw Creek by 2040.

The Forest Service prepared a Biological Assessment, which concluded that the Sage Hen Project is likely to adversely affect bull trout. FWS prepared a Biological Opinion and signed off on the project, despite the dire conditions in the core area, the lack of population data, and the project’s expected adverse effects to bull trout. As set forth in this letter, FWS’s Biological Opinion is unlawful and so too is the Forest Service’s reliance on the Biological Opinion. Unless you remedy these violations, the Idaho Conservation League intends to file suit in federal district court after the 60-day notice period.

### **PARTY & ATTORNEY GIVING NOTICE**

The Idaho Conservation League is a non-profit based in Boise, Idaho, that represents over 35,000 members and supporters to protect public lands, water quality, and fish and wildlife throughout Idaho. As part of this work, the Idaho Conservation League participates in multiple forest collaboratives in Idaho and is on the Steering Committee for the Boise Forest Coalition. The name and address of the organization giving notice is:

Idaho Conservation League  
Att’n: Randy Fox  
311 Lake St.  
McCall, ID 83638  
[rfox@idahoconservation.org](mailto:rfox@idahoconservation.org)

Counsel for the party giving notice is:

Bryan Hurlbutt  
*Advocates for the West*  
PO Box 1612  
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### **LEGAL BACKGROUND**

Congress enacted the Endangered Species Act “to halt and reverse the trend toward species extinction, whatever the cost.” *TVA v. Hill*, 437 U.S. 153, 184 (1978). The ESA’s stated purpose 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 . . . species.” 16 U.S.C. § 1531(b). One of the Act’s stated policies is “that all Federal . . . agencies shall seek to conserve [ESA-listed] species.” *Id.* § 1531(c)(1). The Supreme Court described the ESA as “a conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies.” *Hill*, 437 U.S. at 185.

The “heart of the ESA” is the section 7 consultation requirement. *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011). Section 7 imposes a substantive duty on each federal agency to “insure that any action . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.” 16 U.S.C. §1536(a)(2). “Action” is defined broadly to mean “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies.” 50 C.F.R. § 402.02.

The first step in complying with Section 7 is to obtain “a list of any listed or proposed species or designated or proposed critical habitat that may be present in the action area.” 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(c). If listed species “may be present” in the area of agency action, the action agency must prepare a Biological Assessment (BA) to determine whether the proposed action directly and indirectly “may affect” the listed species. *See* 16 U.S.C. § 1536(c)(1); 50 C.F.R. §§ 402.02, 402.12(f), 402.14(a). If the agency determines the proposed action “may affect” any listed species, then it must consult with FWS. 50 C.F.R. § 402.14(a)–(b). If the agency determines in a BA that the action “may affect” and is “likely to adversely affect” any listed species, it must engage in “formal consultation” with FWS. *Id.* If the agency determines in a BA that the action “may affect” but is “not likely to adversely affect” any listed species, then it can engage in “informal consultation” with FWS. *Id.*

The purpose of consultation is to ensure the action at issue “is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [designated critical] habitat of such species.” 16 U.S.C. § 1536(a)(2). As defined by the ESA’s implementing regulations, an action will cause jeopardy to a listed species if it “reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02. Destruction or adverse modification of critical habitat is defined as “a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.” *Id.*

During formal consultation, the Service must “review all relevant information” regarding the action area, whether provided by the action agency or not. 50 C.F.R. § 402.14(g)(1). The Service must evaluate both the current status of listed species and critical habitat in the action area, as well as the effects of the proposed action and cumulative effects on listed species and critical habitat. *Id.* § 402.14(g)(2)–(3). Then, based on this information, the Service must reach a “biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.” *Id.* § 402.14(g)(4). In carrying out the consultation process, “each agency shall use the best scientific . . . data available.” 16 U.S.C. § 1536(a)(2).

After formal consultation is completed, the Service must provide the action agency with a “biological opinion” explaining how the proposed action will affect the listed species or habitat. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14. If the biological opinion concludes that the action will not result in jeopardy, the Service must provide an “incidental take statement” specifying the

impact of such incidental taking on the species, any “reasonable and prudent measures” that the Service consider necessary to minimize such impact, and setting forth the “terms and conditions” that must be complied with by the agency to implement those measures. 16 U.S.C. § 1536(b)(4).

The term “take” is defined broadly to include “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect.” 16 U.S.C. § 1532(19). FWS further defined “harass” to include “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, including breeding, feeding, or sheltering.” 50 C.F.R. § 17.3. In addition, “harm” is defined to “include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” *Id.*

Under ESA Section 7(a)(2), the action agency, like the Forest Service here, also must independently ensure that its actions do not result in jeopardy or adverse modification of critical habitat. *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987); *Defenders of Wildlife v. Martin*, 454 F. Supp. 2d 1085, 1096–99 (E.D. Wash. 2006) (holding that Forest Service failed to comply with ongoing obligation under ESA § 7(a)(2) to insure against jeopardy). As the Ninth Circuit has held: “Consulting with the Service alone does not satisfy an agency’s duty under the Endangered Species Act. An agency cannot ‘abrogate its responsibility to ensure that its actions will not jeopardize a listed species; its decision to rely on a Service biological opinion must not have been arbitrary or capricious.’” *Resources Limited, Inc. v. Robertson*, 35 F.3d 1300, 1304 (9th Cir. 1994) (quotation omitted). Thus, an action agency cannot meet its substantive obligations under Section 7 of the ESA by relying on a biological opinion that is legally flawed. *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1127–28 (9th Cir. 2012).

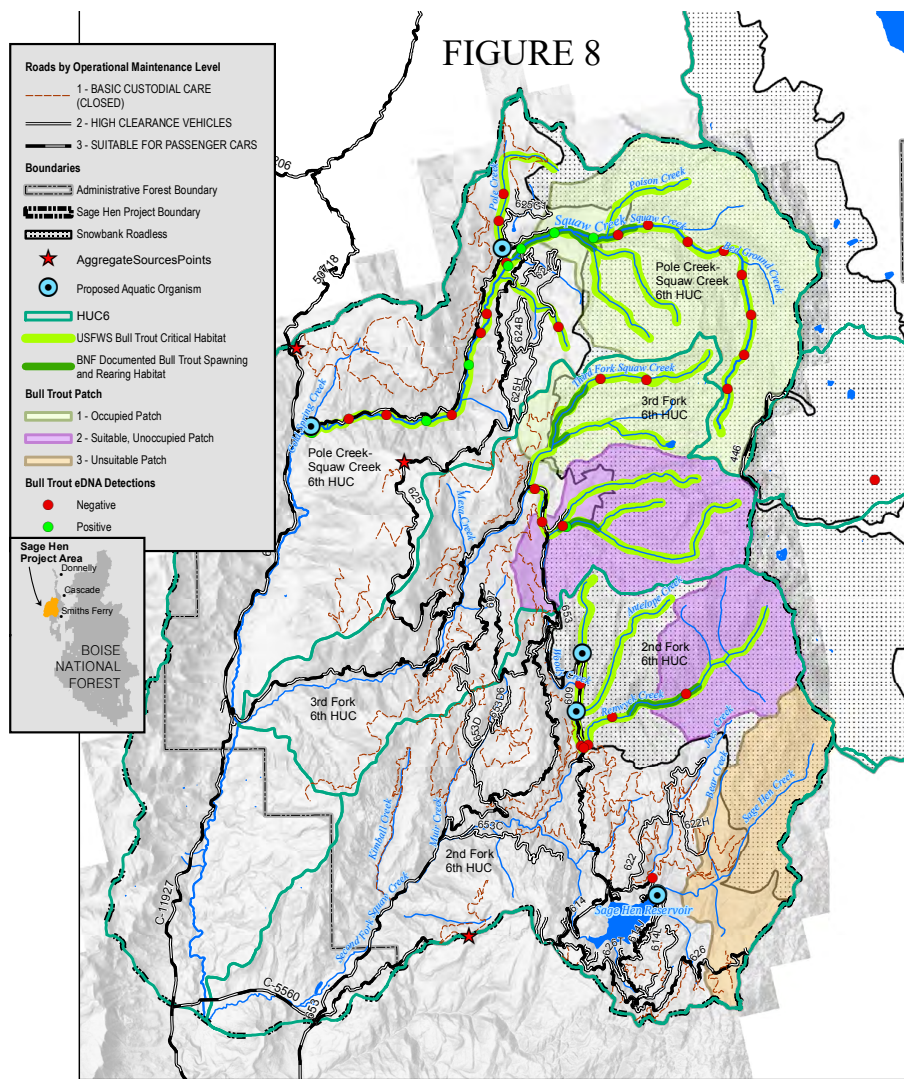
Without a legally adequate biological opinion and incidental take statement in place, any activities likely to result in incidental take of members of listed species are unlawful. 16 U.S.C. § 1538(a)(1)(B). Accordingly, anyone who undertakes such activities, or who authorizes such activities, *id.* § 1538(g), may be subject to criminal and civil federal enforcement actions, as well as civil actions by citizens or others for declaratory and injunctive relief. *See id.* § 1540.

### **FACTUAL BACKGROUND**

On April 14, 2021, the Forest Service signed a Decision Notice authorizing the Sage Hen Project based on the project’s Environmental Assessment and Finding of No Significant Impact (EA/FONSI). The Sage Hen Project would occur on approximately 68,000 acres of public lands on the Emmett Ranger District of the Boise National Forest in the West Mountains in Gem and Valley Counties, Idaho. The project area includes parts of the Snowbank Inventoried Roadless Area and includes the entire Upper Squaw Creek watershed, including the Pole Creek-Squaw Creek, Second Fork Squaw Creek, and Third Fork Squaw Creek subwatersheds. The Sage Hen Project authorizes constructing up to 83.1 miles of new temporary roads, commercially harvesting up to 18,000 acres of forest, removing and replacing culverts, resurfacing and maintaining roads, and other activities throughout the project area over the next twenty years.

The Sage Hen Project area is in the Upper Squaw Core Area, which is one of 22 core areas within the Upper Snake Recovery Unit for bull trout, which was listed as a threatened species in 1999. 64 Fed. Reg. 58910 (1999). The Upper Squaw Core Area is now isolated from other core areas and contains only “resident” bull trout populations. The core area is listed as having four resident populations of bull trout, all of which are within the project area, but only two resident populations have been documented during recent surveys. Primary threats to bull trout in the core area include upland riparian land management (livestock grazing), connectivity impairment, and nonnative fishes (predation, competition, and hybridization). Additionally, all three subwatersheds in the project area are functioning at “unacceptable risk” for sediment/turbidity metrics. As depicted in Figure 1, many project area streams are designated critical habitat, suitable habitat, and/or occupied habitat for bull trout; however, the Forest Service’s most recent sampling detected bull trout in only a small portion of these areas.

Fig 1. Aquatics Map (reproduced from Sage Hen Biological Assessment, App’x D).



USDA Forest Service - Sage Hen Project  
Aquatics Map

This map is intended to depict physical features as they generally appear on the ground and may not be used to determine the ownership, legal boundaries, legal jurisdiction, including relative ownership and/or to resolve any boundary disputes. It is not to be used as a legal document. Users are advised to consult the appropriate governmental offices for resolution of any boundary or jurisdictional issues. Changes to this map may occur without notice. The National Forest may be subject to reallocation or other vehicle use. Check a Motor Vehicle Use Map, or map at the local Forest Office, for motor vehicle access information. Motor Vehicle Use Maps may be obtained from the map and have been approved for use by the public. This map is not suitable for navigation.

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The Forest Service prepared the Biological Assessment, dated November 4, 2020, for the Sage Hen Project. On November 13, 2020, the Forest Service submitted the Biological Assessment to FWS and requested initiation of formal consultation under ESA Section 7. The Biological Assessment was updated and re-transmitted to FWS on November 16, 2020. In the Biological Assessment, the Forest Service determined the project may affect and is likely to adversely affect bull trout and bull trout designated critical habitat, including from stream dewatering and fish handling during culvert replacements, as well as from increased sediment delivery related to road construction, road use and maintenance, culvert replacements, and timber harvest, among other effects.

In January 2021, FWS issued the *Biological Opinion for the Sage Hen Integrated Restoration Project*, 01EIFW00-2020-F-0174 (Jan. 6, 2021) (hereinafter, the “Biological Opinion”). FWS determined vegetation management, road, and culvert activities are “expected to have temporary, negative effects via sediment/turbidity” and are “expected to alter juvenile and adult bull trout behavior and may cause temporary injury.” FWS also determined that the removal of culverts in bull trout habitat “may result in the mortality or injury of bull trout juveniles or adults due to electroshocking and instream construction.” FWS estimated fish salvage could result in 24 bull trout being captured and handled and experiencing sub-lethal effects with up to 14 bull trout mortalities.” FWS acknowledged that 14 bull trout mortalities “will reduce the population size, the number of available spawners, and genetic diversity within resident populations.”

In the Biological Opinion, FWS concluded that the project will not jeopardize the continued existence of bull trout and will not destroy or adversely modify its designated critical habitat. The Biological Opinion includes an Incidental Take Statement for expected, unavoidable take of bull trout that would occur during culvert replacements.

### **NOTICE OF ESA VIOLATIONS**

Relying on a legally flawed biological opinion violates the action agency’s substantive duties under ESA Section 7 to ensure against jeopardy and adverse modification of critical habitat. *See Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 532 (9th Cir. 2010). “An agency cannot meet its Section 7 duties by relying on a legally flawed biological opinion or failing to discuss information that might undercut the opinions conclusions.” *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 751 (9th Cir. 2020). Here, FWS’s Biological Opinion for the Sage Hen Project contains numerous legal errors described below that the Forest Service, as the action agency, should have known not to rely upon it to fulfill its substantive duties under ESA Section 7.

First, FWS assumed larger, more stable bull trout populations exist in the project area than is supported by the information presented in the Biological Opinion. FWS stated in the Biological Opinion that “current population estimates are unknown” but that in 2008 around 250 to 1,000 bull trout were estimated to inhabit the Upper Squaw Creek core area. Throughout the Biological Opinion, FWS assumed there is still—thirteen years later—a population of 250 to 1,000 bull trout. Based on all other information FWS presented in the Biological Opinion, however, there is no rational basis for assuming there are still 250 to 1,000 bull trout in the core area. Since at least 2008, FWS has classified the core area as “high risk,” which it defines as an “area at high risk because of extremely limited and/or rapidly declining numbers, range, and/or

habitat, making the bull trout in this core area highly vulnerable to extirpation.” FWS, *Bull Trout (Salvelinus confluentus) 5-Year Review: Summary Evaluation* (2008). And as FWS admits in the Biological Opinion, bull trout and habitat in the Squaw Creek Core Area have been and are being harmed by climate change, livestock grazing, habitat fragmentation, non-native fish, water diversions, and other cumulative effects. Additionally, while the core area was previously believed to support four local populations of bull trout, FWS now believes two of those populations have been extirpated. Furthermore, in one of the two local populations that still exists (in the Third Fork of Squaw Creek), the Forest Service’s recent eDNA sampling had only a single positive detection; the other samples were all negative (*see* Fig. 1 above). All of this information and similar information in the Biological Opinion shows there is no reasonable basis to assume there are still 250 to 1,000 bull trout in the core area and indicates that there could be significantly fewer bull trout today than there were in 2008.

Second, FWS mistakenly expected the Sage Hen Project to last only ten years and based many conclusions in the Biological Opinion on this mistake. The Forest Service’s Biological Assessment states that the project will last “twenty years”—twice as long as FWS analyzed—or until about 2041. Other project documents confirm that the Forest Service expects timber harvest to take roughly ten to fifteen years to complete, and that it will take additional years to reclaim roads and complete other project activities. By arbitrarily cutting the project timeframe in half, FWS failed to consider the entire project and its true effects. For example, FWS dismissed any synergistic effects the project will have with climate change and other cumulative effects that are already harming bull trout, and will continue to harm bull trout in the decades to come. With respect to climate change, FWS said modeling shows suitable bull trout habitat in the core area will be “greatly reduced” by 2040. But FWS determined it could ignore these severe climate change effects since the project will conclude within ten years. FWS made similar mistakes with respect to other ongoing, cumulative effects, including effects from improper livestock grazing, water diversions, and non-native fish.

Third, even if the project is completed in less than twenty years, such as within ten years (as FWS mistakenly expected), FWS arbitrarily dismissed the combined effects of the Sage Hen Project together with cumulative effects harming bull trout in the area over the next ten years. In light of the poor conditions and troubling trends already present in this high risk core area, ten years is far from insignificant. Again, FWS admitted in the Biological Opinion that climate change, improper livestock grazing, water diversions, non-native fish, and other factors were harming the project area’s struggling bull trout populations and that these threats are expected to continue. Specifically with respect to climate change, again FWS determined that from 2020 to 2040 climate change will result in “greatly reduced” suitable habitat in the Upper Squaw Creek Core Area and the project area. But FWS claims since the project will be completed within 10 years (by roughly 2031), climate change is not expected to contribute to effects along with the project. However, the fact that FWS expects suitable habitat to be “greatly reduced” by 2040, says nothing about how much suitable habitat will be lost by 2031. FWS’s analysis effectively assumes suitable habitat conditions will remain unchanged until 2040 and then will suddenly be “greatly reduced” in 2040, but not before 2040. FWS thus ignored climate change effects that are projected to occur by 2031 and at other times before 2040, which could be very significant. And FWS made similar mistakes with respect to other ongoing, cumulative effects and their combined effects with the project of the next ten years.

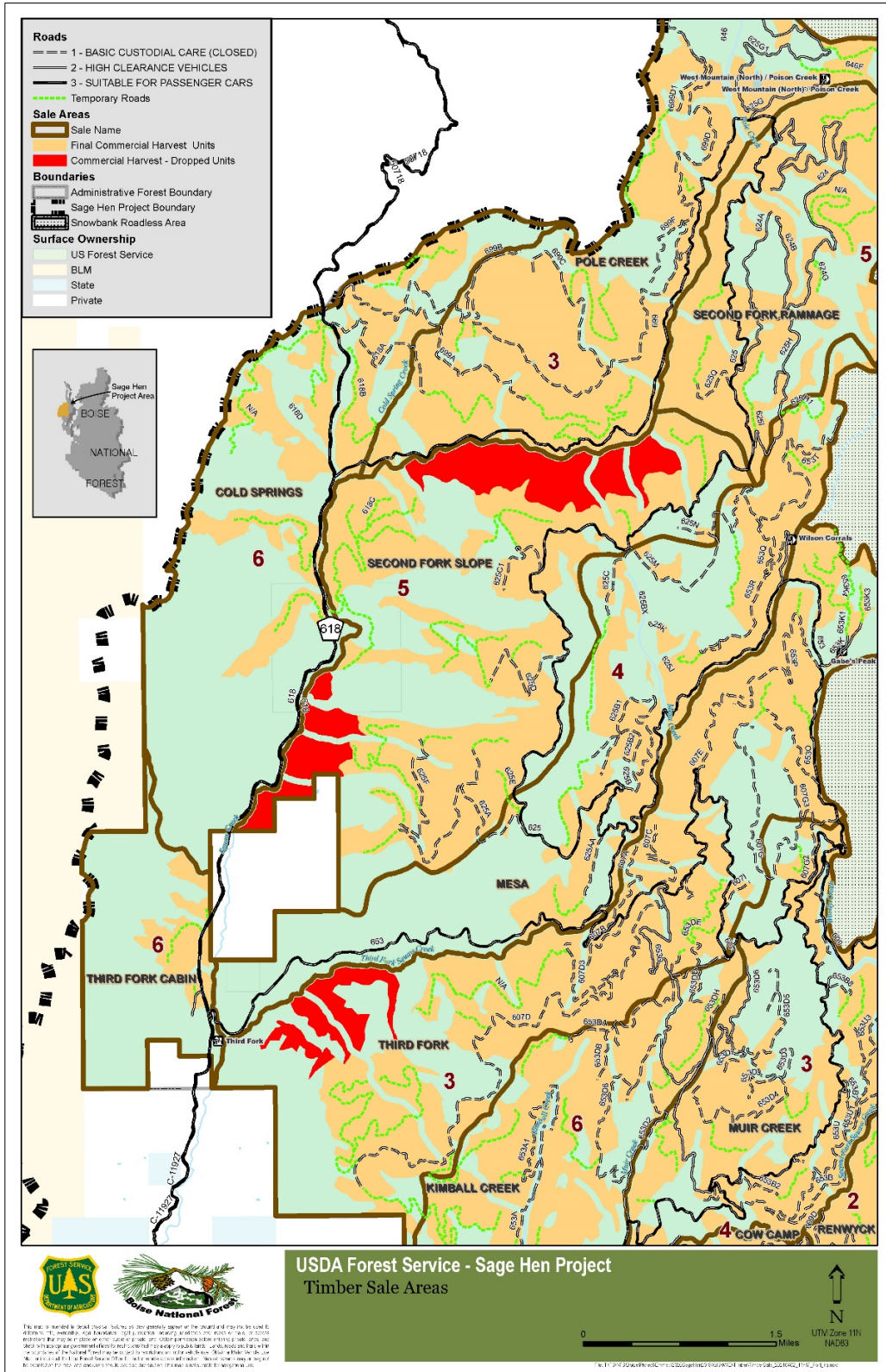
Fourth, FWS admitted in the Biological Opinion that the Sage Hen Project, while it is underway, will generate and deliver sediment to streams, primarily from road activities, and that sediment can harm bull trout and degrade habitat in numerous ways. FWS, however, dismissed the sediment impacts by repeatedly stating that in the long term, after the project is complete, sediment delivery rates will fall to below pre-project levels. FWS made gross generalizations and oversimplifications about these long-term improvements in sediment delivery. The Forest Service's sediment modeling, which FWS relied on in the Biological Opinion, shows that most of the meaningful improvements in sediment delivery that would occur after the project is completed will occur in the Second Fork subwatershed—a subwatershed where bull trout are already extirpated. Considering the streams where bull trout are or may still be present, the sediment modeling shows that sediment levels will remain essentially the same in the long term as they are today, and will be significantly worse in some streams where bull trout may be present. This does not bode well for Upper Squaw Creek bull trout, as the area is already “high risk” and “functioning at unacceptable risk” for sediment/turbidity. But FWS failed to consider this by generalizing that sediments levels will be reduced in the long term.

Fifth, FWS improperly downplayed and dismissed the supposedly “short-term” sediment impacts that will occur while the project is underway for the next ten to twenty years. Again, FWS admitted in the Biological Opinion that Sage Hen Project, while underway, will cause additional sediment to enter streams throughout the project area. In fact, the Forest Service expects so much sediment from the project that aquatic life beneficial uses might not be met in the Third Fork Squaw Creek subwatershed and in mid and lower reaches of the Squaw-Pole subwatershed. These are the only two subwatersheds in the core area that still have documented bull trout populations. But FWS dismisses this as “short term” and unimportant. When fish are already in a precarious state, watersheds are already functioning at “unacceptable risk” due to sediment/turbidity, and habitat conditions are on the decline, a project that delivers more sediment over the next decade or two—to the point where beneficial uses might no longer be met—cannot simply be dismissed as short term and insignificant.

Sixth, FWS ignored the construction, maintenance, and use of stream crossings in the Biological Opinion. With the exception of the four locations where the Forest Service might install new culverts to improve aquatic organism passage, the Biological Opinion fails to even mention stream crossings, even though constructing, maintaining, and using roads at stream crossings is known to cause many direct and indirect harmful impacts bull trout and bull trout habitat, through sediment delivery, streambank and streambed alterations, and other effects. For example, to access some logging units, the Forest Service authorized logging trucks to ford Squaw Creek in an area likely occupied by bull trout. *See* Figures 2 & 3 below (identifying location of ford and showing photograph). In the Biological Opinion, FWS failed to even acknowledge this ford, let alone consider the effects of whatever construction, maintenance, log haul, and decommissioning will take place there. Similarly, there is no acknowledgment of any other stream crossings for the project. The Biological Opinion fails to identify and consider the number, type, and location of crossings, and fails to consider the impacts of constructing, maintaining, and using them, and fails to authorize and minimize any incidental take from the crossings.



Fig. 2. Map of Timber Sale Areas (reproduced from Decision Notice, Fig. 1). The ford in Fig. 3 is located just east of Road 618, close to where the 618C road network connects to Road 618.



*Fig. 3. June 7, 2021 Photograph of Squaw Creek Ford Approved by Forest Service to Access the “618C” Road Network and Logging Units in the “Second Fork Slope” Timber Sale Area*



Seventh, throughout the Biological Opinion, FWS relied on the “project design features” (PDFs) and other mitigation that the Forest Service identified in the Biological Assessment. FWS failed to consider that many of these PDFs are vague, nonbinding, and highly uncertain to occur under the “conditions based management” (CBM) approach the Forest Service employed for the project. As approved, the Forest Service set up a CBM process for considering specific road, harvest, and other activities as they arise in the future; only at this future point will the Forest Service (or logging company) determine which design features or other mitigation to apply and how they apply. FWS cannot assume now that any specific measures will in fact be implemented. Furthermore, many of the PDFs are so vague and non-specific that even when they do apply to a particular activity, there is still no basis for FWS to reasonably rely upon them. For example, PDF “SW-6”, which may apply to some road and timber harvest activities, instructs: “Install erosion control where necessary and appropriate to minimize sediment delivery to streams from road and management activities, including temporary roads and landings.” Nowhere in PDF SW-6 does the Forest Service specify when it is “necessary and appropriate” to install erosion control or what erosion control measures must be installed, and nowhere does it specify what it means to “minimize” sediment delivery. This is just one example of the PDFs and other fish-related measures that are too vague, unenforceable, and uncertain to rely upon in the Biological Opinion.

Eighth, FWS fails to address bull trout recovery in the Biological Opinion. Under ESA regulations, FWS's jeopardy analysis must consider not just survival, but "survival and recovery" of the species. 50 C.F.R. § 402.02. In the Biological Opinion, FWS fails consider what effect the Sage Hen Project will have on bull trout recovery. And for the reasons already discussed above, there is no reasonable basis for finding the Sage Hen Project will not impede bull trout recovery, given the harms FWS admitted the project will cause to bull trout in this vulnerable, downward-spiraling core area.

Finally, FWS's Incidental Take Statement is inadequate, because it authorizes incidental take associated only with the four culvert replacements, while failing to authorize any other incidental take caused by the Sage Hen Project. The Forest Service's sediment modeling, which FWS relied on in the Biological Opinion, shows that road activities, timber harvest, and other project activities will cause elevated sediment at levels high enough to harm and harass bull trout in the Pole-Squaw and Third Fork subwatersheds. Additionally, stream crossings like the Squaw Creek ford discussed above could directly kill and will likely harm or harass bull trout. But FWS failed to authorize any take caused by these and similar road and timber activities in the Incidental Take Statement, and failed to include reasonable and prudent measures and terms and conditions to minimize such take, ensure against jeopardy, and set a trigger for reinitiation of consultation.

These flaws render FWS's Biological Opinion arbitrary and capricious and otherwise not in accordance with law, and by relying on the legally flawed Biological Opinion, the Forest Service is in violation of its substantive duties under ESA Section 7(a)(2).

### **CONCLUSION**

For the above stated reasons, the Forest Service and FWS have violated and remain in ongoing violation of the ESA. Unless you remedy these violations, the Idaho Conservation League intends to file suit against you in federal court, seeking declaratory and injunctive relief and recovery of costs, expert fees, and attorney fees. This notice is based on good faith information and belief after reasonably diligent investigation. However, if any of the foregoing is factually erroneous or inaccurate, please notify me promptly to avoid unnecessary litigation. Moreover, the U.S. Supreme Court and other courts have often noted that the purpose behind the 60-day notice requirement of the ESA and other statutes is to encourage settlement discussions among parties and avoid potential litigation. In that spirit, I encourage you to contact the Idaho Conservation League in order to seek an amicable resolution of this matter. You may also contact me to discuss settlement or any other matters related to this notice letter.

Sincerely,



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Bryan Hurlbutt

*Attorney for Idaho Conservation League*