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VIA ELECTRONIC and CERTIFIED MAIL: RETURN RECEIPT REQUESTED

November 18, 2019

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RE: SIXTY-DAY NOTICE OF INTENT TO SUE FOR VIOLATIONS OF SECTION 7 OF THE ENDANGERED SPECIES ACT IN CONNECTION WITH THE AREA F EXPANSION OF THE ROSEBUD STRIP MINE

Dear Messieurs/Mesdames:

We represent the Montana Environmental Information Center, Indian People's Action, 350 Montana, WildEarth Guardians, and the Sierra Club (collectively, "Conservation Groups"). This letter provides you, the Action Agencies and Consulting Agencies listed above, with notice that the Conservation Groups intend to sue for numerous violations of the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, arising from the Action Agencies' complete failure to consult on the Area F expansion of the Rosebud Mine in Colstrip, Montana.

The Conservation Groups intend to challenge the action agencies' unlawful no effect determination and their complete failure to complete informal or formal consultation pursuant to Section 7(a)(2) standards of the Endangered Species Act, 16 U.S.C. § 1536(a)(2), 50 C.F.R. Part 400.

The Conservation Groups intend this letter to serve both as a notification that we are prepared to file suit, and an invitation to engage in productive discussions. We welcome the opportunity to work with the Service and the action agencies to improve the Area F expansion to ensure the preservation of the continued existence, survival, and recovery of the pallid sturgeon. If the Service and the action agencies and their officials do not take action within 60 days to remedy their violations of the ESA and APA, the Conservation Groups will be forced to pursue litigation over these claims.

This letter is provided pursuant to the sixty-day notice requirement of the citizen suit provision of the ESA. 16 U.S.C. § 1540(g).

I. Introduction and Factual Background

On June 18, 2019, the action agencies approved the Area F expansion of the Rosebud strip-mine, a 6,500 acre expansion that will operate for the next 19 years.¹ The agencies determined that the mine expansion would have no effect on pallid sturgeon on the basis that pallid sturgeon do not occur in the action area of the mine expansion.² In making this determination, the agencies refused to consider the reasonably foreseeable indirect and cumulative impacts to the Yellowstone River due to water withdrawals for the Colstrip Power Plant. The agencies did conclude that air pollution impacts to the Yellowstone River were indirect effects. However, despite being urged to do so by the public,³ they refused to consider the water withdrawals that are necessary to allow the plant to operate and the air pollution to occur. The agencies failed to offer *any* justification for this inconsistent omission.⁴ The agencies' refusal to consider the indirect and cumulative impacts of water withdrawals on the survival and recovery of pallid sturgeon rendered their no effect determination and their failure to complete consultation arbitrary and unlawful.

A. Pallid Sturgeon (*Scaphirhynchus albus*)

The lower Yellowstone River is a unique river. It contains the highest fish species richness in Montana and is a stronghold for native fish diversity.⁵ The fishing industry in the Missouri River basin in Montana, Wyoming, North Dakota, and South Dakota (of which the Yellowstone River is a part) brings in \$1 billion dollars of economic activity each year.⁶ This is an extremely valuable renewable

¹ ROD, Rosebud Mine Area F Federal Mining Plan at 28 (2019).

² ROD at 21-22; FEIS at 587.

³ FEIS App. F at F-175-76.

⁴ FEIS App. F at F-175.

⁵ Marcus Griswold, Ph.D., Pallid Sturgeon Memo. at 15 (2019) (attached as Exhibit 1). The entire Griswold memorandum details the indirect and cumulative impacts of water withdrawals to pallid sturgeon and, and in addition to being attached to this letter, is incorporate entirely here by reference.

⁶ Griswold at 16.

resource. Among the fish species that inhabit the Yellowstone River is the pallid sturgeon.

Pallid sturgeon are among the rarest surviving fish species in North America. Commercial harvest and pollution are associated with initial declines of river sturgeon, with a 10-fold decline in harvest mass observed between the 1890's and 1950. Once estimated to support over 1,000 adults, now, fewer than 125 naturally produced pallid sturgeon are estimated to live in the Upper Missouri Basin above Lake Sakakawea in North Dakota. Surviving wild sturgeon in the Upper Missouri River Basin are estimated to be at least 44 years old. Because of an extended larval drift phase of embryonic development, pallid sturgeon are particularly susceptible to habitat fragmentation.⁷

The U.S. Fish and Wildlife Service (Service) listed the pallid sturgeon (*Scaphirhynchus albus*) as endangered under the Endangered Species Act in 1990. 55 Fed. Reg. 36,641, 36,641 (Sept. 6, 1990). Pallid sturgeon remain endangered today. The Yellowstone River is critical to the survival and recovery of this unique species because—unlike the upper Missouri River—the Yellowstone River is largely unobstructed and because the sturgeon population in this reach has not hybridized, making it likely a genetically distinct population. Thus, there are approximately 125 unhybridized pallid sturgeon remaining and they depend on the ecological health of the Yellowstone River:

The Yellowstone River provides the most significant opportunity to sustain and enhance pallid sturgeon populations in the basin as a preferred spawning reach and potentially genetically distinct population given the hybridization with shovelnose sturgeon occurring in the lower basin. Spawning in the Yellowstone River was initially verified in 2007, and since that time, replicated verification of spawning by wild pallid sturgeon has occurred in the Yellowstone River. The upper Missouri River (encompassing 338 river kilometers), and the lower Yellowstone River (encompassing 114 river kilometers) are designated as a high priority action area for pallid sturgeon recovery efforts and are thought to contain river habitat that “provides

⁷ Griswold at 20.

the best opportunities for restoration of natural conditions conducive to natural recruitment.”

....

Based on a number of publications, the pallid sturgeon in the upper Missouri River basin appears to be genetically distinct. In 2014, the U.S. Fish and Wildlife Service released an updated recovery plan for the pallid sturgeon identifying the potential to recognize distinct population segments (DPS) for the pallid sturgeon based on criteria relating to separation and significance of population segments to the species. A study in 2002 by Trannah et al. found that the pallid sturgeon in the upper Missouri River basin were similar to each other, but different from the pallid sturgeon in the lower basin, indicating distinct populations. Further work by Schrey agreed with this idea, suggesting genetically isolated populations by distance, and specifically that Upper Missouri River basin pallid are the most genetically distinct. What has made the importance of the pallid sturgeon in the Upper Missouri River Basin even greater are the findings of high levels of hybridization between shovelnose and pallid sturgeon in the middle and lower basin. For example, the upper Missouri pallids were found to have much fewer hybrids than the lower ones. Of the 121 hybrids, only one was in the Great Plains Management Unit in the Upper Missouri Basin which includes the Yellowstone. Of the total 771 adults sampled, the breakdown was 8 in the two upper basin units (Great Plains Management Unit and Central Lowlands Management Unit and 113 in the two lower basin management units. What this suggests is that any small, even incremental change to the Yellowstone River population could have greater than expected impacts on the recovery of the species and maintenance of a pure population of pallid sturgeon.⁸

Pallid sturgeon are documented to have moved upstream in the Yellowstone River as far as the Cartersville Dam at Forsyth, Montana.⁹

⁸ Griswold at 21.

⁹ Griswold at 25.

The indirect and cumulative impact of continued large scale water withdrawals for the Colstrip Power Plant, fuel by the Rosebud strip-mine, for 19 more years threaten the survival and recovery of pallid sturgeon in the Yellowstone River.¹⁰ Water in the the Yellowstone River is already dramatically over-allocated—if just one-third of water rights were used the river would go dry.¹¹ The existing impacts of water withdrawals and climate change have already significantly reduced flows in the Yellowstone River, especially low flows during the summer months.¹² The continuing and worsening impacts of climate change—especially on the current high emissions trajectory (caused by continued heedless fossil fuel combustion)—may result in an addition 25% decrease in flows in the Yellowstone River.¹³ Worse, as climate change continues to dry out Montana and the inter-Mountain west, more water users will be forced to call on their existing water rights, creating a vicious cycle of ever increasing demands on dwindling water resources.¹⁴ The Colstrip Power Plant is one of the largest single users of water from the Yellowstone River, consuming (and not returning) approximately 50,000 acre feet per year, equivalent to about 50,000 homes, 16,000 to 37,000 pivot sprinkler systems, or 10,000 to 24,000 agricultural ditch systems.¹⁵ During low flows, the coal plant could consume 2.5% to 6.2% of the river’s flow.¹⁶ The reality of these impacts was apparent when the Mayor of Colstrip asked residents in August 2016 to stop watering their lawns and irrigating to allow the coal plant to continue to operate.¹⁷ It is also apparent in the coal plant’s recent effort to reconfigure its water intake bay on the Yellowstone River because, in their words, “we are having a problem getting enough water to our pumps for safe

¹⁰ Griswold at 27.

¹¹ Griswold at 27.

¹² Griswold at 7-10.

¹³ Griswold at 20, 27.

¹⁴ Griswold at 27.

¹⁵ Griswold at 15.

¹⁶ Griswold at 1.

¹⁷ Larry Mayer, Colstrip seeks to limit water use to help coal plant, Billings Gazette (Aug. 23, 2016) (attached as Exhibit 2).

operations.”¹⁸ This request occurred during, again in the words of the coal plant owners, “this extended heat wave” of 2016.¹⁹

Continued low flows and reduced flows in the Yellowstone River—particularly when combined with worsened drought and heatwaves due to climate change—adversely impact pallid sturgeon in myriad ways. Lower streamflow reduces oxygen in water, reduces important side channel habitat, disrupts spawning and movement, increases temperature, rates of predation, competition, and disease transmission.²⁰ Climate change exacerbates these impacts through reduced and earlier snowmelt, reduced streamflow, and increased droughts.²¹ As noted, as climate change reduces water availability generally (as it slowly desiccates the west), more water rights holders will be required to call upon their water rights, further reducing flows. Reduced flows will also harm pallid sturgeon by reducing the availability of prey.²² Reduced flows will also increase concentrations of pollutants that could also harm sturgeon, though this has not been studied in depth.²³

II. Legal Claims

The Conservation Groups intend to bring legal claims against the action agencies under the ESA. The action agencies violated section 7(a)(1), 7(a)(2), and 7(d), by unlawfully and arbitrarily reaching a no effect determination with respect to pallid sturgeon, by failing to complete consultation with respect to pallid

¹⁸ Emails between Steve Christian, Talen Montana, LLC, and state and federal regulators (Aug. 2016) (attached as Exhibit 3).

¹⁹ *Id.*

²⁰ Griswold at 16-17.

²¹ Griswold at 18-22.

²² Griswold at 25-26.

²³ Griswold at 21; *see* FEIS at 590-91 (noting that pollution deposition from power plant would contribute to cumulative pollution impacts to Yellowstone River, but failing to assess the cumulative effects).

sturgeon, and by making irreversible and irretrievable commitments prior to completing lawful consultation.

A. Statutory framework of the ESA Section 7, 16 U.S.C. § 1536

Section 7(a) of the ESA provides:

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an “agency 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 which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

16 U.S.C. § 1536(a). Section 7(c) further states:

(1) To facilitate compliance with the requirements of subsection (a)(2), each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on November 10, 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within

such other period as is mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

16 U.S.C. § 1536(c).

Finally, section 7(d) provides:

After initiation of consultation required under section (a)(2), the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable or prudent measures which would not violate subsection (a)(2) of this section.

16 U.S.C. § 1536(d).

When evaluating the effects of a proposed action, agencies must consider direct, indirect, and cumulative effects:

Effects of the action refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration.

50 C.F.R. § 402.02.²⁴ Cumulative effects are “those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.” *Id.* The analysis of effects must consider impacts in the action area, which is defined as “all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.” *Id.*

The “action area” is defined as “all areas to be affected directly or indirectly by the Federal activity and not merely the immediate area involved in the action.” 50 C.F.R. § 402.02.

“Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat.” 50 C.F.R. § 402.14(a).

An agency may avoid the consultation requirement only if it determines that its action will have “no effect” on a listed species or critical habitat. *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1447–48 (9th Cir.1996). Once an agency has determined that its action “may affect” a listed species or critical habitat, the agency must consult, either formally or informally, with the appropriate expert wildlife agency. If the wildlife agency determines during informal consultation that the proposed action is “not likely to adversely affect any listed species or critical habitat,” formal consultation is not required and the process ends. 50 C.F.R. § 402.14(b)(1). Thus, actions that have any chance of affecting listed species or critical habitat—even if it is later determined that the actions are “not likely” to do so—require at least some consultation under the ESA.

We have previously explained that “may affect” is a “relatively low” threshold for triggering consultation. *Cal. ex rel. Lockyer v. U.S. Dep’t of Agric.*, 575 F.3d 999, 1018 (9th Cir.2009). “ ‘Any possible effect,

²⁴ The Service subsequently revised these regulations on August 27, 2019, 84 Fed. Reg. 44,976, 44,976 (August 27, 2019). These rules did not go into effect, however, until October 28, 2019, well after the action agencies approved the Area F expansion. 84 Fed. Reg. 50,333, 50,333 (Sept. 25, 2019). In any event, the Service clarified, however, that despite the language change, the scope of agency consultation is the same. 84 Fed. Reg. at 44,990.

whether beneficial, benign, adverse or of an undetermined character,” triggers the requirement. *Id.* at 1018–19 (quoting 51 Fed. Reg. 19,926, 19,949 (June 3, 1986)) (emphasis in *Lockyer*). The Secretaries of Commerce and the Interior have explained that “[t]he threshold for formal consultation must be set sufficiently low to allow Federal agencies to satisfy their duty to ‘insure’” that their actions do not jeopardize listed species or adversely modify critical habitat. 51 Fed.Reg. at 19,949.

Karuk Tribe of Cal. v. U.S. Forest Serv., 681 F.3d 1006, 1027 (9th Cir. 2012).

B. Violations of Section 7 of the Endangered Species Act

Here, the action agencies violated their obligations under section 7 of the ESA and its implementing regulations. The agencies’ conclusion that the Area F expansion would have “no effect” on the pallid sturgeon was arbitrary and capricious, not based on the best available science, and unlawful. The determination was based on the unlawful and arbitrary decision to ignore the indirect and cumulative effects and consequences to pallid sturgeon from the Colstrip Power Plant’s massive water withdrawals of approximately 50,000 acre-feet per year from the Yellowstone River for the 19 years over which the Area F expansion will occur. The agencies defined the action area improperly to exclude the indirect effects of water withdrawals that are virtually certain to occur as a result of the proposed mine expansion.

The impacts of the water withdrawals to the Yellowstone River are reasonably certain to occur if the Area F expansion occurs. Virtually all of the coal from the Area F expansion is destined to Units 3 and 4 of the Colstrip Power Plant (with a small amount of high-sulfur, low-heat “waste coal” being trucked to the Rosebud Power Plant).²⁵ Given the high production costs for coal from Area F, there is no alternative market for this coal.²⁶ The Colstrip Power Plant, similarly, has no other source of coal and, in fact, is required by its permit to burn coal from

²⁵ Area F FEIS at S-12.

²⁶ Area F FEIS at 110-11 (noting lack of infrastructure for shipping coal and noting that building such infrastructure would be “cost prohibitive”); Boyd Co., Powder River Basin Coal Resource and Cost Study at 4-6 (2011) (“The Rosebud Mine currently has higher strip ratio than other mines in the PRB and associated higher production cost.”) (attached as Exhibit 4).

the Rosebud Mine.²⁷ The Colstrip Power Plant withdraws all water used at the plant, approximately 50,000 afy from the Yellowstone River.²⁸ Given baseline conditions of water quality and water quantity in the Yellowstone River and given projected reduced summer flows in the river due to the worsening impacts of climate change, the foreseeable indirect and cumulative effects of continued large-scale water withdrawals for the Colstrip Power Plant may adversely affect the continued survival and recovery of pallid sturgeon in the upper Missouri River basin.²⁹

Pallid sturgeon migrate upstream to the Carterville Dam at Forsyth, Montana, just below the water intake for the Colstrip Power Plant.³⁰ As noted above, reduced flows in the Yellowstone River—particularly in light of the worsening impacts of climate change—will have numerous harmful impacts on pallid sturgeon, including reduced oxygen in water, reduced side channel habitat, disrupted spawning and movement, increased temperature, increased rates of predation, competition, and disease transmission, reduced availability of prey, and increased concentrations of pollution. The action agencies unlawfully ignored these indirect and cumulative impacts to the Yellowstone River from the 19-year Area F expansion of the Rosebud Mine. The action agencies unlawfully and erroneously excluded water withdrawals from the mine from the action area and the indirect and cumulative effects of water withdrawals from the effects of the action. The irrationality of this decision is starkly demonstrated by their *inclusion* of the coal plant emissions and emissions deposition area in their analysis. As such, their no effect determination and their failure to complete consultation on the impacts of the mine expansion was arbitrary and unlawful. Similarly, the action agencies unlawfully failed to consider the impacts of the power plant pollution to pallid sturgeon in light of the degraded environmental baseline (in which large portions of the Yellowstone River are impaired for excessive pollution) and foreseeable cumulative effects. The Endangered Species Act requires the agencies to consider the *total* effects to the species. It is not enough to say that the actions' effects will only be a part of a larger problem. *Pac. Coast Fed'n of Fishermen's Ass'ns v. Gutierrez*, 606 F. Supp. 2d 1195, 1213 (E.D. Cal. 2008) (“The jeopardy

²⁷ Area F FEIS at 38.

²⁸ Griswold at 1; Area F FEIS at 180.

²⁹ *See generally* Griswold.

³⁰ Griswold at 24.

and habitat destruction determinations cannot be based upon piecemeal evaluations of incremental actions above the baseline. *NWF v. NMFS II*, explains “[u]nder this approach, a listed species could be gradually destroyed, so long as each step on the path to destruction is sufficiently modest. This type of slow slide into oblivion is one of the very ills the ESA seeks to prevent.”).

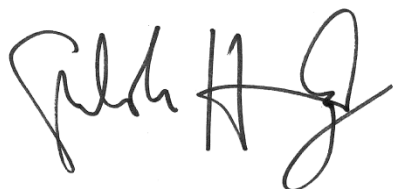
III. CONCLUSION

For the foregoing reasons, the action agencies have violated and continue to violate Sections 7 of the ESA by unlawfully determining that the indirect and cumulative effects of the mine expansion would not adversely affect the survival and recovery of pallid sturgeon, by unlawfully failing complete consultation with the Service, failing to use their authorities to conserve pallid sturgeon, making irreversible and irretrievable commitments of resources prior to completing lawful consultation, and failing to ensure that already-approved, ongoing actions in connection with the Area F expansion will not jeopardize the continued existence of pallid sturgeon.

The Conservation Groups would welcome the opportunity to meet with the action agencies to work to resolve these issues within the notice period. In the meantime, no coal mining, transportation, combustion or waste disposal activities should be allowed to move forward in Area F absent full compliance with Section 7 of the ESA. Instead, the action agencies must initiate ESA Section 7 consultation on impacts of Area F. If we do not hear from you or you do not act within 60 days to correct these violations of the ESA, the Conservation groups will pursue litigation in federal court against the agencies and officials named in this letter.

We will seek injunctive and declaratory relief, and legal fees and costs regarding these violations. Thank you for your time and consideration. If you have any questions or comments, please do not hesitate to contact us.

Sincerely,

A handwritten signature in black ink, appearing to read "Shiloh H. Hernandez". The signature is fluid and cursive, with a large initial "S" and "H".

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