



September 25, 2019

VIA EMAIL AND CERTIFIED MAIL RETURN RECEIPT REQUESTED

Diana Trujillo, Forest Supervisor
Pike and San Isabel National Forests
U.S. Department of Agriculture, Forest Service
2840 Kachina Drive
Pueblo, CO 81008
dmtrujillo@fs.fed.us

Re: Notice of Intent to Sue Over Ongoing Violations of ESA Sections 7 and 9 from Failure to Ensure no Jeopardy to Greenback Cutthroat Trout from Trail Impacts in Bear Creek Watershed

Dear Forest Supervisor Trujillo:

On behalf of the Center for Biological Diversity (“Center”), I am writing to notify you that you are in violation of Section 7 and Section 9 of the Endangered Species Act, 16 U.S.C. § 1536, 1538 (“ESA” or “Act”), for actions authorized by the U.S. Department of Agriculture, Forest Service in connection with the Bear Creek Watershed Restoration Project (“Project”), including implementation and maintenance of motorized and non-motorized trails in Bear Creek watershed, and to request that you take immediate action to remedy these violations. The Center provides this letter to you in accordance with the ESA citizen suit 60-day notice requirement, to the extent notice is deemed necessary by a court. 16 U.S.C. § 1540(g)(2).

The actions of the Pike and San Isabel National Forests (“Forest”) described in this notice are harming Bear Creek’s greenback cutthroat trout (*Oncorhynchus clarki stomias*) (“greenback”) and amount to unauthorized take of a federally listed species, and the Forest has violated the requirement to ensure that its actions do not jeopardize the threatened greenback. 16 U.S.C. §§ 1536(a)(2), 1538(a)(1)(B); 50 C.F.R. § 402.16(a)(3). Specifically, the Forest has failed to abide by its own Proposed Action to relocate motorized Trail 667 out of Bear Creek’s Water Influence Zone (“WIZ”) and around Kineo Mountain, and it is otherwise managing the Captain Jack trails system in such a way as to cause jeopardy to the threatened greenback, in violation of ESA Section 7(a)(2). The Forest and the U.S. Fish and Wildlife Service (“FWS”) have failed to reinstate consultation over the change in location of Trail 667 from the Proposed Action and the resulting new effects to the greenback. Due to these ongoing failures and management of the trail system in Bear Creek watershed, the Forest is also illegally taking greenback cutthroat trout in violation of Section 9 of the ESA.

If the Forest does not remedy these ongoing violations of Section 7 and Section 9 of the ESA, the Center intends to commence litigation against you and other responsible government officials or employees acting in their official capacity.

The Center is a non-profit public interest organization with over 1.4 million members and supporters throughout the United States, including Colorado. The Center and its members are dedicated to protecting diverse native species and habitats through science, policy, education, and law. Our members are harmed by the Forest Service’s continuing failures to ensure no jeopardy to and prevent illegal take of the rare greenback cutthroat trout, a threatened species under the ESA.

I. Statutory Background

A. The Endangered Species Act

Congress enacted the Endangered Species Act in 1973 to provide for the conservation of endangered and threatened fish, wildlife, and plants, and their natural habitats. 16 U.S.C. §§ 1531, 1532. The Act is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *TVA v. Hill*, 437 U.S. 153, 180 (1978). Its fundamental purposes are “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b). To fulfill these purposes, the Act requires the Secretaries of the Interior and Commerce (for terrestrial and marine species, respectively) to add species to the endangered and threatened species lists to prevent extinction. *Id.* § 1533(a). Importantly, the Act imposes substantive and procedural obligations on all federal agencies to implement programs for the conservation of listed species and to ensure that their actions are not likely to jeopardize the continued existence of any listed species. *See id.* §§ 1536(a)(1), (a)(2), 1538(a); 50 C.F.R. § 402.10.

1. *Section 7(a)(2) Duty to Ensure No Jeopardy to Listed Species*

For terrestrial or freshwater species listed under the Act, Section 7(a)(2) mandates that each federal agency 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); 50 C.F.R. § 402.14(a). Agencies must consult with FWS whenever an agency action “may affect” a listed species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). 50 C.F.R. § 402.14. 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, by Federal agencies in the United States.” 50 C.F.R. § 402.02.

If the identified agency action “is subsequently modified in a manner that causes an effect to the listed species...that was not considered in the biological opinion or written concurrence,” either the federal action agency or FWS must reinitiate consultation to ensure that its actions do not cause jeopardy to the species. 50 C.F.R. § 402.16(a)(3).

2. *Section 9 Prohibition on the Take of Listed Species*

Section 9 of the ESA prohibits any “person” from “taking” or causing take of any member of a listed species, including the greenback. 16 U.S.C. § 1538(a). The term “take” is defined broadly to include “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” or cause another to do so. 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.” In addition, “harm” is defined as “an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” The ESA’s legislative history supports “the broadest possible” reading of the prohibition against take.

The ESA authorizes private enforcement of the take prohibition through a broad citizen suit provision. 16 U.S.C. § 1540(g)(1). “[A]ny person may commence a civil suit on his own behalf to enjoin any person, including...any...governmental instrumentality or agency...who is alleged to be in violation of any provision of [the ESA].” *Id.* Citizens may seek to enjoin both present activities that constitute an ongoing take and future activities that are reasonably likely to result in a take. The ESA’s citizen suit provision also provides for the award of costs of litigation, including reasonable attorney and expert witness’ fees. *Id.* at § 1540(g)(1).

II. Factual Background

A. Greenback Cutthroat Trout

Greenback cutthroat trout, Colorado’s state fish, is a federally threatened salmonid whose population has suffered since it was first listed as an endangered species with the enactment of the ESA in 1973. Bear Creek EA at 7, 46. Although development of the greenback’s recovery plan in 1978 prompted FWS to downlist the fish to threatened status, greenbacks are currently only present in the wild in two locations: Bear Creek, where they occupy only 3.4 miles of stream, and Zimmerman Lake. *Id.* at 46. As an ESA-protected species, “take” or killing, injuring, harassing, or harming greenbacks is prohibited. 16 U.S.C. § 1538(a).

Like most cutthroat, greenbacks require cool, clear, well oxygenated water and require different habitat types for different life stages. The health of suitable habitat depends on water quality and quantity. Optimal greenback habitat is clear, cold water, with silt-free rocky substrate in riffle-run areas. Watershed Assessment at A-12. Conversely, fine sediments harm fish and other aquatic organisms when they smother fish eggs in redds and fill spaces between substrates where aquatic insects live. Watershed Assessment at A-12.

The greenback is threatened due to several factors including loss of high-quality trout stream habitat through logging, livestock grazing, water diversions, mining, and municipal and industrial pollution. Biological Opinion at 15-21. High sediment loads, pollution, and stream diversions further degrade greenback habitat. *Id.* at 14. In particular, erosion and sedimentation into streams can smother fish eggs and emerging fry, cutting off oxygen necessary for survival.

2009 Five-Year Review at 17; Bear Creek EA at 15. Sediment forms a layer on the streambed that can impair greenback spawning and can fill in deeper areas of the stream that are necessary for overwintering in frozen climates, for refuge in times of drought, and as protection habitat from predators. 2009 Five-Year Review at 17; Bear Creek EA at 83.

As it fills with sediment, an instream pool's depth and area are reduced, limiting available fish habitat. Biological Opinion at 17; Bear Creek EA at 15. Cutthroat favor pools over other portions of the stream channel in nearly all seasons because they provide cover from predators, and refuge from streamflow and inclement conditions including floods and winter ice formation. *Id.* Pools are particularly important habitat for survival during harsh winters that are typical of mid to high elevation ranges. *Id.*

Recent studies have revealed that the sole remaining genetically pure population of greenback cutthroat trout consists of approximately 750 adults that reside only in Bear Creek. Watershed Assessment at A-12. Spawning, egg development and hatching, and early rearing occurs in Bear Creek from May through August. ROD/FONSI at 24.

B. Bear Creek Watershed Trail Use, Sedimentation

Bear Creek is a small, headwater tributary of Fountain Creek, located on the east slope of Pikes Peak in the Arkansas River drainage in El Paso County Colorado, just five miles southwest of Colorado Springs. Watershed Assessment at 1; Bear Creek EA at 14. Due to its proximity to Colorado Springs, Bear Creek watershed is a popular recreation destination. It is host to a network of multiple-use recreation trails, including motorized and non-motorized, which are heavily trafficked by recreators who access the area on foot, horseback, mountain bike, and on motorized vehicles like motorcycles and dirt bikes. Bear Creek EA at 114.

The primary cause of fish habitat degradation in Bear Creek is excess sedimentation. Bear Creek EA at 15. The unstable soils and weathered, decomposing Pikes Peak granite that form the steep slopes of the watershed are very erosive, causing washouts and high sediment deposits into Bear Creek during spring melts and heavy rain events. Watershed Assessment at 13; Aquatic Habitat Assessment at 2. Sediment is deposited into Bear Creek from roads, trails, mining activities, illegal trail use, hill slope erosion, high-intensity wildfire, channel processes, and other natural sources. Watershed Assessment at A-6. High sediment loads into Bear Creek directly impair and degrade spawning and rearing habitat and activities of the greenbacks. Bear Creek EA at 15. During the spring and summer, from May through August, the timing of high-recreation use in the watershed coincides with prime spawning, egg development and hatching, and early rearing time for greenbacks. Bear Creek EA at 88; ROD/FONSI at 24.

C. The Center's 2012 Lawsuit and Settlement Terms

On September 17, 2012, the Center filed a Petition for Review and Complaint for Declaratory and Injunctive Relief alleging that the Forest Service failed to consult with the U.S. Fish and Wildlife Service ("FWS") to ensure that motorized trail designation and maintenance in the Bear Creek watershed does not jeopardize the continued existence of the greenback cutthroat trout. *Ctr. for Biological Diversity v. Marr, et al.*, No. 12-2460 (D. Colo. Filed Sept. 17, 2012).

Specifically, the Center challenged the Forest Service's designation and maintenance of trails 665, 667, 668, 701, and 720. *Id.*

In November 2012, the parties entered into a settlement agreement with the following terms, in relevant part. First, the Forest committed to temporarily close the following trails to motorized vehicle use: (a) Trail 665 in its entirety; (b) Trail 668 in its entirety; (c) Trail 701 in its entirety; (d) Trail 720 at the junction with Trail 701; and (e) Trail 667 at both points A, at the junction of Trail 701, and B, on the saddle on the trail, as marked on the map attached as Exhibit A to the agreement.¹ Rev. Stip. Settlement Agmt., ECF No. 30 at 2, *id.*

Second, the Forest agreed to temporarily close the trails through a three-part process: (1) administrative closure; (2) signage of the closures at the trailhead and/or appropriate points on the trail; and (3) installation of one fiberglass post in the middle of the trail, along with a secondary post as necessary to display the Forest Order closing the trail to motorized use. *Id.* The Forest committed to complete these procedures within 10 days of the Court's entry of the settlement agreement. *Id.*

Third, the Forest agreed to complete an assessment of the watershed and ensure that any decisions arising from the assessment comply with all legal substantive and procedural requirements, including ESA Section 7 consultation with FWS.² The Forest agreed to keep all portions of the trails closed until it completed ESA Section 7 consultation.

D. Bear Creek Watershed Assessment

In August 2013, the Forest Service completed the Bear Creek Watershed Assessment. Pike & San Isabel National Forests, Cimarron and Comanche National Grasslands, Pikes Peak Ranger District, Final Bear Creek Watershed Assessment (Aug. 2013) ("Watershed Assessment"). The Watershed Assessment considered whether the Forest should change the existing trail system through construction, maintenance, decommissioning, or obliteration of motorized and non-motorized roads and trails to benefit greenbacks. *Id.* at 5. It also considered other options such as seasonal closures, the types of recreational uses allowed, and whether to include roads or trails in the recommended system, as well as other actions to protect or improve conditions in the watershed, like improving riparian habitat and reducing wildfire risk. *Id.*

Roads and trails in Bear Creek watershed, "particularly High Drive and Trails 666 and 667, are hydrologically connected to Bear Creek where they are located in the WIZ and at stream crossings." Watershed Assessment at 27. At the time it was assessed, about 40 percent of the trails were located in the WIZ. Watershed Assessment at 27. Because Bear Creek's banks have a high erosion rate, roads and trails have the potential to cause pollutants and sediment to enter Bear Creek and its tributaries, particularly where the trail is located within the WIZ and at stream crossings. Watershed Assessment at 27.

¹ Portions of trail 667 are not on Forest Service Land. Bear Creek watershed is managed in partnership between the Forest Service and El Paso County.

² The Forest Service began the Watershed Assessment in the 2012 season.

The Watershed Assessment made important recommendations for the health of Bear Creek watershed and its resident greenbacks, including closing and rehabilitating several trails. Watershed Assessment at 35, 40. It also recommended minimizing human contact with the water in Bear Creek by re-routing trails out of the WIZ, reducing the number of water crossings, and developing educational materials and signs on the trails. Watershed Assessment at 35, 40. It also recommended prohibiting recreation special events until best management practices (“BMPs”) are developed. Watershed Assessment at 39.

E. September 2013 Flooding and Sedimentation

In September 2013, heavy rainfall caused significant floods and eroded many trails in the watershed, contributing exceptionally high sediment loads into Bear Creek. Many stream banks were damaged, and segments of the stream and trails became much closer in proximity as a result of erosion. The road that runs through the watershed, High Drive, sustained heavy damage from these floods. Bear Creek EA at 51.

F. Bear Creek Watershed Restoration Project

The Forest Service initiated the Bear Creek Watershed Restoration Project (“Project”) to implement recommendations of the 2013 Watershed Assessment and protect greenback cutthroat trout while allowing for certain types of recreation. ROD/FONSI at 1, 12. The Project’s main objectives were to improve greenback habitat, improve water quality, restore stream and trail stability to address sedimentation into Bear Creek, reduce sedimentation from tributaries, reduce the hydrologic connectivity of roads and trails, and decommission and rehabilitate certain unauthorized campsites and mining activities. *Id.* at 2.

Among other stream and trail rehabilitation work, the Project set out to close certain motorized trails within the watershed and relocate others to areas outside of Bear Creek’s WIZ to reduce sedimentation from runoff. *Id.* at 2-7. The most significant change to the trail system was proposed for Trail 667, known as “Captain Jacks” or “Buckhorn” trail, and planned to decommission the existing single-track motorized trail that traversed the upper area of Bear Creek (Old Trail 667), traveled through the WIZ and, in certain stretches, went directly through Bear Creek itself. *Id.* at 4. The proposed action (Alternative B) called for a new Trail 667 to be rerouted away from Bear Creek, outside the WIZ and generally outside of Bear Creek Basin entirely, along the south slope of Kineo Mountain. *Id.* at 4, 8.

G. Bear Creek Watershed Restoration Project NEPA Process

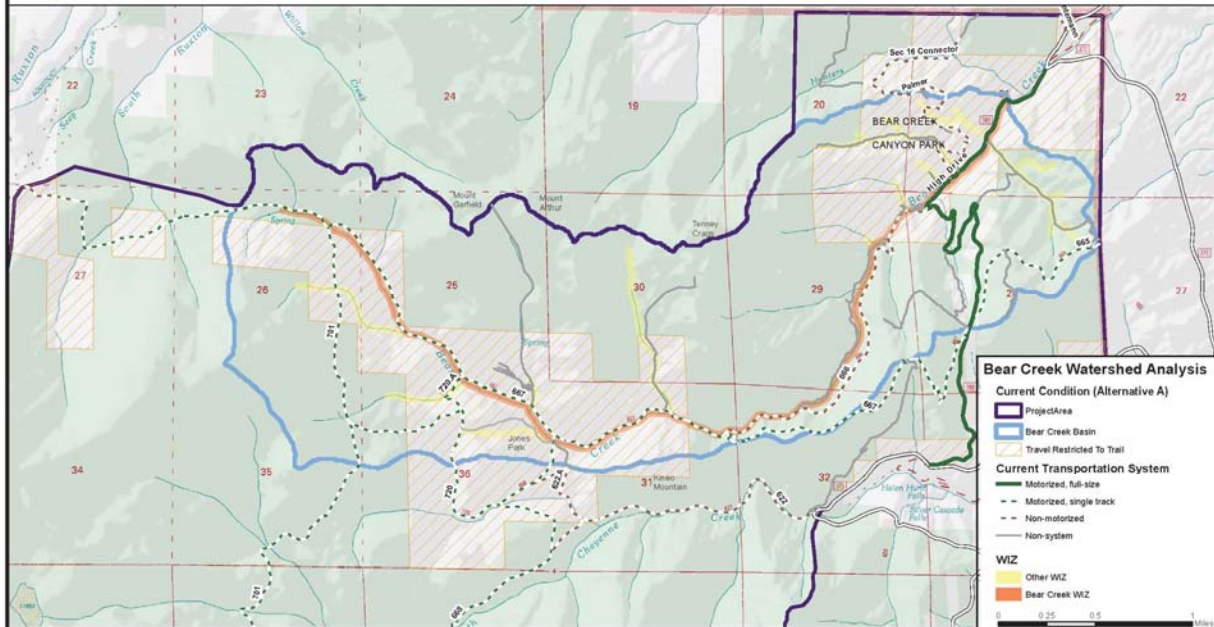
Consistent with the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h (“NEPA”), the Forest completed an Environmental Assessment (“EA”) for the Project in May 2015. The EA defines the WIZ to include the “geomorphic floodplain (valley bottom), riparian ecosystem, and inner gorge of perennial and intermittent streams,” and specifies that, at minimum, the “horizontal width (from top of each bank) is the *greater* of 100 feet or the mean height of mature dominant late-seral vegetation.” Bear Creek Watershed EA at 12 FN 2 (emphasis added). In the analysis area, the WIZ is “set at 100 feet from 2, 3 and 4th order streams because the mature dominant late-seral vegetation does not reach this height.” *Id.* As

explained above, the original EA and the Proposed Action developed in the NEPA process called for trails in the watershed to be moved outside the WIZ where feasible to ensure the viability of the population of greenbacks. Environmental Assessment at 40. The Proposed Action specified that the Forest would relocate Trail 667 around Kineo Mountain and outside Bear Creek basin, which is outlined in light blue on the map below depicting the current trails system on the watershed compared with the Proposed Transportation System (Alternative B).

Bear Creek Watershed EA

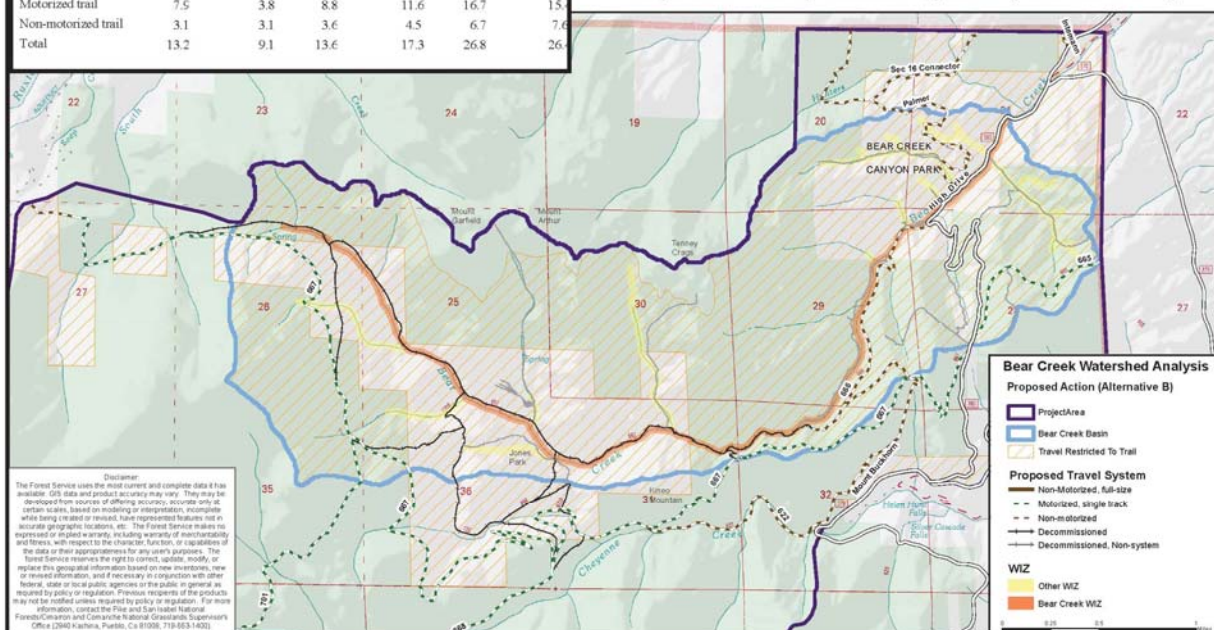


Current Transportation System (Alternative A)



Route Type	In Watershed (miles)		Out of Watershed (miles)		Total (miles)	
	Existing	Recommended	Existing	Recommended	Existing	Recommended
Road	2.2	2.2	1.2	1.2	3.4	3.4
Motorized trail	7.5	3.8	8.8	11.6	16.7	15.4
Non-motorized trail	3.1	3.1	3.6	4.5	6.7	7.6
Total	13.2	9.1	13.6	17.3	26.8	26.0

Proposed Transportation System (Alternative B)



Disclaimer:
The Forest Service uses the most current and complete data it has available. GIS data and product accuracy may vary. They may be developed from sources of differing accuracy, accuracy only as certain scales, based on modeling or interpretation, incomplete while being created or revised. Best representation of features and accurate geographic locations, etc. The Forest Service makes no expressed or implied warranty, including warranty of merchantability and fitness, with respect to the character, function, or capabilities of the data or their appropriateness for any user's purposes. The Forest Service reserves the right to correct, update, modify, or replace this geographic information based on new information, new or revised information, and if necessary in conjunction with other federal, state or local public agencies or the public in general, as required by policy or regulation. Previous recipients of the products may not be notified unless required by policy or regulation. For more information, contact the Plac and San Isabel National Forests/Continental Divide National Scenic Area Supervisor's Office (2040 N. 1st Ave., Pueblo, CO 81008, 719-663-1400).

H. The Forest's Consultation with FWS about Bear Creek Watershed Restoration Project

Under Section 7(a)(2) of the ESA, the Forest consulted with FWS in 2015 to ensure that the Project would not cause jeopardy to the greenback. U.S. Fish & Wildlife Service, Biological Opinion at 1. The consultation considered, among other elements of the Proposed Action, whether the rerouting of the new Trail 667 “away from Bear Creek, generally outside of the watershed and completely out of the Water Influence Zone (WIZ)” would cause jeopardy. Biological Opinion at 4. FWS issued its Biological Opinion on February 17, 2016, concluding that the proposed action “may affect the greenback” but that the Project was “not likely to jeopardize the continued existence of the species.” *Id.*

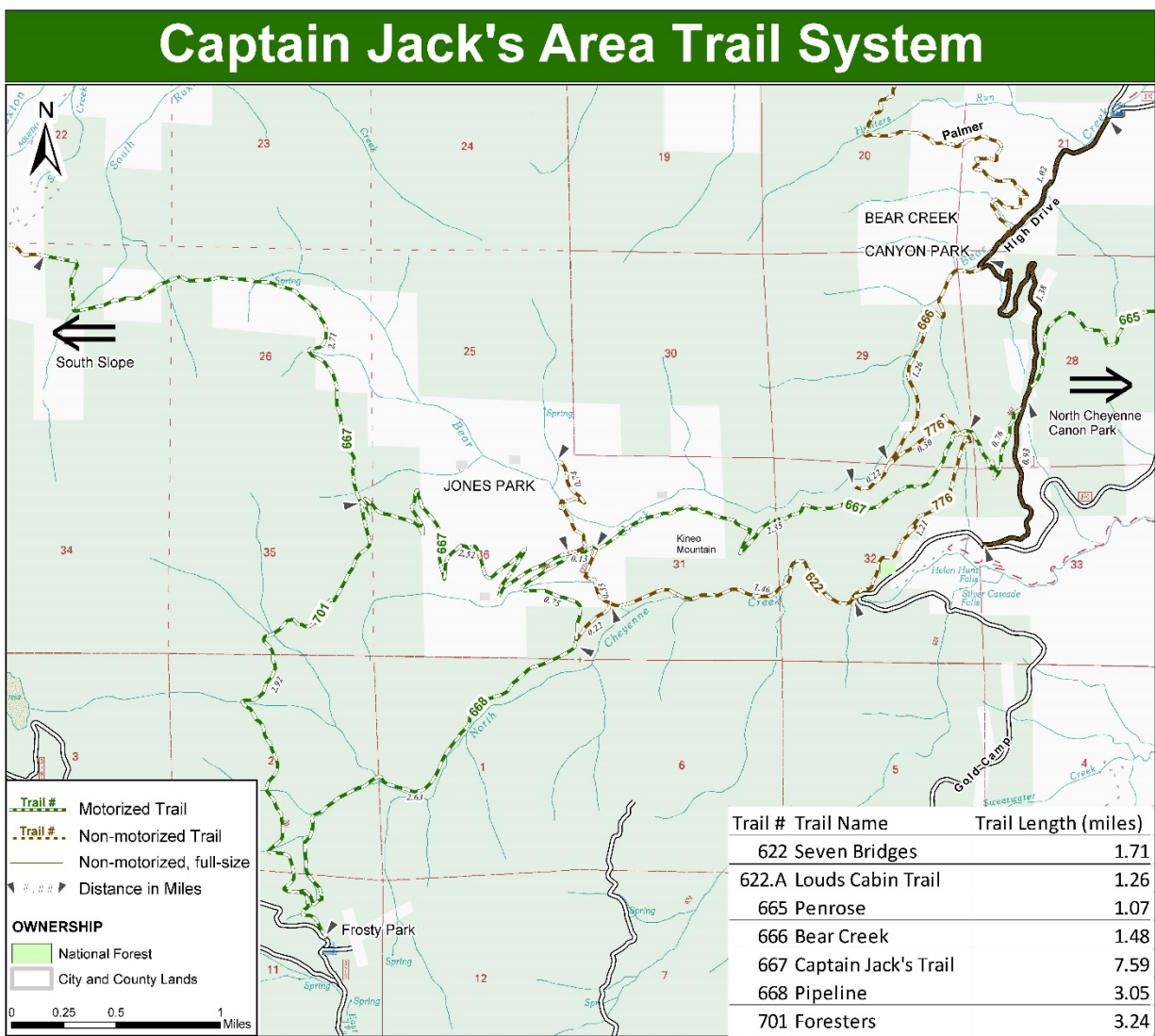
I. The Pike-San Isabel National Forest's Intra-Agency Agreement with Trails Unlimited to Perform Trail System Work in Bear Creek Watershed

In July 2017, the Forest and Trails Unlimited, of the Forest Service Enterprise Program, entered into an agreement in which the Forest would pay Trails Unlimited to construct and decommission portions of Trail 667 in the watershed. Intra Agency Agreement at 1. The Statement of Work attached to the agreement specified that Trails Unlimited would provide the “personnel, equipment, and expertise necessary” for Project trail work, which included “routine maintenance of water control measures, layout, new construction, re-contouring, decommissioning, etc.” *Id.* at 4, Exhibit A. For Trail 667, Trails Unlimited would reconstruct 5.05 miles and decommission 2.5 miles. *Id.* The Project was set to begin “on or about July 01, 2016” and would be complete “by September 30, 2016.” *Id.* at 7.

However, on August 9, 2016, September 9, 2016, and June 26, 2017, the Forest and Trails Unlimited amended the work order, increasing Project funding. In the August 9, 2016 amendment, the Project's completion date was extended from September 30, 2016 to September 30, 2017, with no changes to the work to be performed. The June 26, 2017 amendment extended the Project's term to “on or before March 31, 2019.” In addition to increasing funding and extending the project timeline once more, the June 26, 2017 amendment also included minor changes to the work order including scheduling, travel, Project resource assignment, and hour distribution. Upon information and belief, other than these logistical amendments, the parties did not further amend the work order.

J. Current Trail Conditions on the Forest

The Forest Service did not re-route Trail 667 outside Bear Creek basin. Instead, although the Forest Service relocated the trail out of Bear Creek itself, the trail remains almost entirely within Bear Creek basin. It travels along a steep northern side slope of Kineo Mountain, where runoff and sediment loading into Bear Creek are most significant. In fact, the trail is located so close to Bear Creek in some places such that it is apparent that portions of the trail remain within the WIZ, contrary to the Watershed Assessment's recommendations, the Proposed Action presented in the NEPA process, and the action subject to consultation with FWS, in violation of the ESA as described below. The 2019 Captain Jack's Area Trail System map provided below shows the current location of Trail 667, different location from the Project's Proposed Action.



III. The Forest's Violations of the Endangered Species Act

Although the Project aimed to improve greenback habitat by addressing sedimentation, there is no readily available evidence indicating that the Forest has taken steps to ensure no jeopardy to the greenback from the *current* trail system in Bear Creek watershed. Neither the Forest nor FWS have reinitiated consultation over the changed location of Tail 667 to ensure no jeopardy to the greenback. By not consulting and/or reinitiating consultation with FWS about the trail on a steep slope above one of the last remaining habitats for greenbacks, a trail which may even run through the WIZ, the Forest is in violation of Section 7 of the ESA. The Forest is also in violation of Section 9 by constructing and maintaining trails that increase sediment loads in Bear Creek, directly harming, harassing, and even injuring and killing greenbacks, which constitutes impermissible take of a threatened species.

A. The Forest Failed to Comply with ESA Section 7(a)(2).

The Forest Service has failed to ensure that its actions are not likely to jeopardize the continued existence of greenbacks. Although the Forest consulted over one trail system shown in the map above as Proposed Transportation System (Alternative B), that trail system is not the current trail system on the Forest. If it had implemented the Proposed Transportation System, the Forest would have ensured that all trails were located entirely out of the WIZ and largely outside of Bear Creek basin altogether. Specifically, the Forest planned to locate Trail 667 out of Bear Creek and around Kineo Mountain, connecting with the other trails farther upslope from the section connecting to Jones Park. However, the current Trail System map above shows that Trail 667 is not located around Kineo Mountain but instead remains only slightly upslope of Bear Creek on the north side of Kineo Mountain. The trail's current location is inconsistent with the Proposed Action subject to ESA consultation with FWS in 2016, and it will significantly increase sedimentation into Bear Creek due to erosion from motorcycle use on the trail and runoff from precipitation events.

No documentation has been provided to the Center or the public to suggest that Trail 667 meets the 2016 BiOp terms and conditions or BMPs, and there is a serious concern that the trail is constructed in a way that directly harms greenbacks, amounting to unauthorized take of the threatened species. Indeed, there are serious questions about whether the current Trail 667 is, in fact, wholly located outside of the WIZ.

Importantly, the Environmental Assessment defines the WIZ as including all of the geomorphic floodplain, riparian, and the inner gorge. Bear Creek Watershed EA at 12 FN 2. Only the minimum width of the WIZ should be determined using mature dominant late-seral vegetation, and only in the absence of other definable geomorphic features, such as floodplain, riparian vegetation, and inner gorge. *Id.* The current Captain Jack Trail System map shows that the Forest did not follow its own definition of the WIZ, but instead chose to ignore the geomorphic features and use an arbitrary minimum standard for 2nd, 3rd, and 4th order streams rather than assessing the channel form as defined.

Had the Forest actually assessed the geomorphic characteristics of Bear Creek within the segment of Trail 667 now located on the steep north slope of Kineo Mountain, the agency would have clearly understood that the relocated route is within the WIZ as defined by the EA, given that the new trail is located within the *inner gorge* of the stream. The new trail is located approximately 400 to 500 vertical feet above the stream. However, the slopes leading directly from the trail to stream exceed 100% (45 degrees) throughout the relocated segment. The horizontal distance between the new trail and river's edge varies from 300 to 500 feet depending on the steepness of the hillslope. There is no floodplain buffer at the toe of the hillslope, and the riparian vegetation consists of only a thin green line along the river's edge.

The Forest Service's Geomorphic Classification System (Haskins, D.M., Et al, 1998) defines the "inner gorge" as including and being formed by mass wasting landforms:

valley inner gorge [Mass Wasting Landform] A complex mass wasting feature which develops on the lowermost slopes adjacent to stream channels. This landform

generally has slope gradients in excess of 65 percent, and is separated from the upslope area by a distinct break in slope. The valley inner gorge is formed primarily through mass wasting triggered by channel downcutting, lateral cutting, oversteepening and/or undercutting of the slope.

These mass wasting landforms of the valley inner gorge involve recurring erosion and deposition of loose gravel and soils by gravity, rain events, and snowmelt. The key to defining the upper limit of the inner gorge is the characteristic break in slope. At no point along the relocated segment of Trail 667 on Kineo Mountain's north side does the slope of the hillside between the stream and the trail exhibit a break in slope resulting in a decrease in hillslope of less than 65% (33 degrees). The inner gorge, in fact, extends well above the current trail's location, and any sediment generated from the trail is routed down ephemeral swales directly into Bear Creek.

In short, Trail 667 is currently located *within* the WIZ. Frequent use of the trail is harming and will continue to harm greenbacks because its location on an instable slope causes significant sedimentation after disturbance (i.e. motorcycle traffic and other high impact uses of the trail). Although the Proposed Action planned to relocate Trail 667 south of Kineo Mountain to reduce impacts to greenbacks and the Forest consulted over that location, the Forest did not locate the trail as proposed. Neither the Forest nor FWS has reinitiated consultation to ensure that the current Trail 667 location will not jeopardize this last genetically pure population of greenbacks in Bear Creek.

Thus, in failing to abide by the Proposed Action and, instead, locating Trail 667 within the WIZ and on the steep north slope of Kineo Mountain, the Forest Service's actions are causing jeopardy to the greenback, in violation of Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2). Additionally, because the current location of Trail 667 was not considered as part of the Proposed Action and because there are new effects to the species as a result of the current placement of Trail 667 and the management of Captain Jack Trail System, the Forest Service and FWS have failed to reinitiate consultation to ensure no jeopardy to the species, in violation of 50 C.F.R. § 402.16.

B. The Pike and San Isabel National Forest is Liable for Take Under ESA Section 9.

The Pike and San Isabel National Forest, along with certain Forest Service employees including the Forest Supervisor, are in violation of Section 9 of the ESA due to the unauthorized take of threatened greenback cutthroat trout.

As discussed above, both harm and harassment constitute take under Section 9. 16 U.S.C. § 1538(a). The Forest has engaged and continues to engage in acts that harm and harass Bear Creek cutthroat trout. The current trail system in the Bear Creek watershed includes trails that run immediately adjacent to and upslope of Bear Creek. Most alarmingly, the Forest's failure to move portions of Trail 667 out of Bear Creek basin and out of the WIZ and its construction and maintenance of the trail in its current location causes or contributes to high sediment loads into Bear Creek. As discussed above, sediment loads into Bear Creek directly harm greenback spawning and rearing behavior and degrade habitat. The Forest's trail construction and management, including its failure to properly regulate illegal motorized trails, is

causing increased sedimentation that directly harms and harasses greenbacks and, thus, amounts to illegal take under Section 9 of the ESA.

IV. Conclusion

The Pike and San Isabel National Forest is in violation of Sections 7 and 9 of the ESA as a result of its actions related to the Bear Creek Restoration Project, including the construction and maintenance of Trail 667 in a location not considered in the Proposed Action as well as other motorized trails within Captain Jack's Trail system. While we hope to avoid litigation on this issue, if the Forest does not act to correct the violations described in this letter, the Center will pursue litigation against it in U.S. District Court 60 days from receipt of this notice.

If you have any questions, wish to discuss this matter, or feel this notice is in error, please do not hesitate to contact me.

Sincerely,



Margaret E. Townsend
Staff Attorney
CENTER FOR BIOLOGICAL DIVERSITY
P.O. Box 11374
Portland, OR 97211-0374
(971) 717-6409
mtownsend@biologicaldiversity.org

cc: Vicki Christiansen
Chief of the Forest Service
U.S. Department of Agriculture, Forest Service
1400 Independence Ave, SW
Washington, DC 20250-1111
vcchristiansen@fs.fed.us

Margaret Everson
Principal Deputy Director Exercising the Authority of the Director
U.S. Fish and Wildlife Service
1849 C Street NW, Room 3331
Washington, DC 20240-0001
Margaret_everson@fws.gov

Sonny Perdue, Secretary
U.S. Department of Agriculture
1400 Independence Ave. SW
Washington, D.C. 20250
agsec@usda.gov

David Bernhardt, Secretary
U.S. Department of the Interior
1849 C Street NW
Washington, D.C. 20240
doiexecsec@ios.doi.gov

Drue DeBerry
Acting Colorado Field Supervisor
Colorado Ecological Services Field Office
U.S. Fish and Wildlife Service
P.O. Box 25486 DFC (MS 65412)
Denver, CO 80225-0486
coloradoes@fws.gov