

BECHTOLD LAW FIRM, PLLC

317 East Spruce Street
PO Box 7051
Missoula, Montana 59807
www.bechtoldlaw.net

June 9, 2020

Secretary, U.S. Department of Agriculture
1400 Independence Ave, SW
Washington, D.C. 20250-0003
agsec@usda.gov

via email and certified mail

Chief, U.S. Forest Service
201 14th Street, SW
Washington D.C. 20250
vcchristiansen@fs.fed.us

Secretary, U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240
exsec@ios.doi.gov

**RE: 60-Day Notice of Intent to Sue under the Endangered Species Act:
Soldier-Butler Project, Lolo National Forest**

You are hereby notified that the Flathead-Lolo-Bitterroot Citizen Task Force (Notifier) intends to file a citizen suit pursuant to the citizen suit provision of the Endangered Species Act (ESA), 16 U.S.C. § 1540(g) for violations of the ESA, 16 U.S.C. § 1531 et seq. Notifier will file suit after the 60 day period has run unless the violations described in this notice are remedied. The name, address and phone number of the Notifier giving notice of intent to sue is as follows:

Patty Ames, President
Flathead-Lolo-Bitterroot Citizen Task Force
P.O. Box 9254
Missoula, Montana 59807
Tel: 415-535-3440

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

Timothy Bechtold
Bechtold Law Firm, PLLC
PO Box 7051
Missoula, MT 59807
Tel: 406-721-1435

STATEMENT OF LAW

The grizzly bear was listed pursuant to the Endangered Species Act (ESA) (16 U.S.C. § 1531 et seq.) in the lower 48 states as a threatened species in 1975. 40 FR 31,734 (1975). A "threatened" species is "any species which is likely to become an endangered species within the foreseeable future throughout all or a

significant portion of its range." 16 U.S.C. § 1532(20). The ESA provides for the "conservation of the ecosystems upon which threatened and endangered species depend." Id. §1531(b) "Conservation" means "the use of all methods and procedures which are necessary to bring any ... species to the point at which the measures provided pursuant to this chapter are no longer necessary." Id. § 1532(3).

ESA § 7 requires that all federal agencies work toward recovery of listed species, and it contains both a procedural requirement and a substantive requirement for that purpose. Substantively, it requires that federal agencies ensure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any threatened or endangered species, or result in the adverse modification of critical habitat for such species. 16 U.S.C. § 1536(a)(2). To carry out the duty to avoid jeopardy and adverse modification of critical habitat, ESA § 7 sets forth a procedural requirement that directs an agency proposing an action (action agency) to consult with an expert agency, in this case, the U.S. Fish & Wildlife Service (FWS), to evaluate the consequences of a proposed action on a listed species. 16 U.S.C. § 1536(a)(2).

If the Biological Opinion concludes that the action will not result in jeopardy but may incidentally "take" or "harm" a protected species, the expert agency has authority to provide the action agency with an "incidental take statement." This statement must specify the impact of such incidental taking on the species, set forth "reasonable and prudent measures" that the expert agency considers necessary to minimize such impact, and include the "terms and conditions" that the action agency must comply with to implement those measures. 16 U.S.C. § 1536(b)(4). If the action agency adopts such measures and implements their terms and conditions, the resulting level of incidental take authorized in the incidental take statement is excepted from the ESA's ban on take. During this assessment process, the agencies must use the best available science.

As defined in the ESA's regulations, an "action" subject to consultation 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 or upon the high seas. Examples include, but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air. 50 C.F.R. § 402.02. The U.S. Court of Appeals for the Ninth Circuit holds that this regulatory language "admit[s] of no limitations" and that "there is little doubt that Congress intended to enact a broad definition of agency action in the ESA . . ." *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054 (9th Cir. 1994). Thus, ESA consultation is required for individual projects as well as for the promulgation of land management plans and standards. Id. "Only after the Forest Service complies with §7(a)(2) can any activity that may affect the protected [species] go forward." *Pacific Rivers*, 30 F.3d at 1056-57.

The procedural consultation requirements in the ESA are judicially enforceable and strictly construed: If anything, the strict substantive provisions of the ESA justify more stringent enforcement of its procedural requirements [than the provisions of the National Environmental Policy Act], because the procedural requirements are designed to ensure compliance with the substantive provisions. The ESA's procedural requirements call for a systematic determination of the effects of a federal project on endangered species. If a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result. The latter, of course, is impermissible. *Thomas v. Peterson*, 753 F.2d at 764.

LEGAL VIOLATIONS

The Soldier-Butler Project, the formal consultation process and the Biological Opinion are not consistent with the ESA. The Decision, formal consultation process and Biological Opinion:

- 1) violate the open road density and survival standards for female grizzly bears in Zone 1 of the Northern Continental Divide Ecosystem (NCDE);
- 2) used methods and information that were not based upon the “best scientific and commercial data,” and excluded the best available scientific information on open road density;
- 3) violate ESA § 9 prohibitions on taking;
- 4) fail to analyze the nexus between the Ninemile DCA and strategic level grizzly bear recovery contained in the Grizzly Bear Recovery Plan and the Conservation Strategy.
- 5) ignore other important aspects of the problem by failing to consider the impact of illegal motorized use of administratively closed roads and failing to disclose the history of road closure violations including destruction of closure devices such as locks, gates, boulders and humps.

Violations of the Conservation Strategy

The Conservation Strategy at page 10 states:

Management Zone 1 (7,514 mi², 19,460 km²) provides a buffer around the PCA, where the population objective is continual occupancy by grizzly bears.

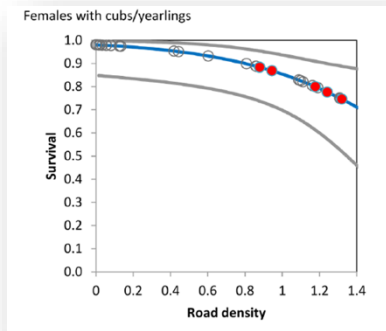
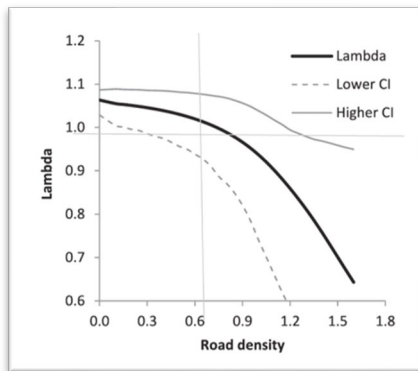
In addition, occupancy of this area by grizzly bears will allow for future connectivity with other grizzly bear ecosystems. On the northwest and southwest corners of Zone 1, there are two DCAs with specific habitat measures to support female grizzly bear occupancy and eventual dispersal to the CYE and BE.

The PCA and Zone 1 together (16,439 mi², 42,578 km²) will be the area within which population data are collected and mortality limits apply, as described in Chapter 2. This combined area will be referred to as the DMA.

Based upon the best “scientific and commercial data available,” as discussed below, Notifier shows violations. The Forest Plan Amendments for Grizzly Bear Habitat (Plan Amendments) and Chapter 4 of the Conservation Strategy detail habitat management standards for grizzly bear habitat. For Zone 1, including the Ninemile DCA, maximum allowable open road density is 2mi/mi².

The Conservation Strategy survival standard for independent females, based on a six-year running average, is currently 93% (Costello, et al. 2020). The Conservation Strategy open road density standard for Zone 1 violates this survival standard for females with cubs and yearlings by providing for just 85% survival rate, as shown in the graphs below (Proctor, et al. 2019; Boulanger and Stenhouse 2014). Within the Project Area, the current baseline condition supports about a 75% survival rate for females with cubs and yearlings. Within the Ninemile DCA, current open road density supports less than 50% survival. Current open road density within the Project Area prior to project implementation is 2.2mi/mi². The EA and Project files estimated local open road density as high as 7.7mi/mi² within the Project Area over ten years by adding 16 total miles of permanent and temporary roads associated with the Project and 58 miles

of road closed to the public but open for heavy administrative traffic for the life of the Project.



The Plan Amendments, Conservation Strategy and the EA incorrectly interpreted the data in Boulanger and Stenhouse (2014) by assuming that any female presence at OMRD up to 2.4mi/mi² equates to the 93% survival standard that applies to Zone 1, which it clearly does not. In fact, information that was available to the FS and FWS includes research reviewed by Proctor, et al. (2019) showing grizzly bear population density is lower in areas with more than about 1mi/mi² OMRD. Both the existing baseline condition plus the deleterious effects of the Soldier-Butler Project do not meet these standards and will lead to increased unsustainable and illegal female mortality.

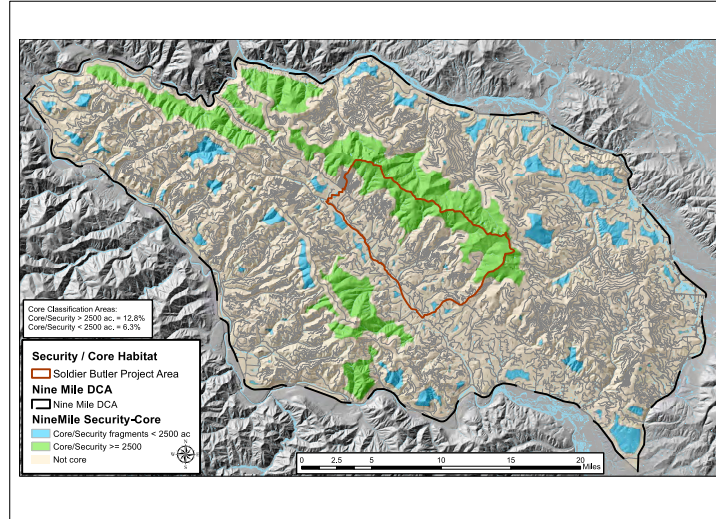
Illegal taking under ESA §9.

Using Proctor, et al.'s parameters, the baseline condition in the Project Area and the DCA are nowhere near meeting road density and secure core. Secure core this size is just 30.5% of the Project Area and only 12.8% of the DCA. In the Project Area, OMRD $\geq 1\text{mi/mi}^2$ (0.6km/km²) is 63.8% of the area and in the DCA 84.6%. The more lethal level of $\geq 2\text{mi/mi}^2$ (1.2km/km²) comprises 67.7% of the Project Area and 78.1% of the DCA. This level of impact was not revealed in the EA, Biological Opinion or Decision Notice. The baseline condition is blocking occupancy and movement of grizzly bears from the NCDE to the Cabinet-Yaak and Bitterroot Recovery Areas and the actual level of take is much higher than revealed in the EA or Biological Opinion. Therefore, the terms and conditions in the Biological Opinion were designed to mitigate a lower level of impact and incidental take than actually exists in both the baseline condition and the expected conditions resulting from the ten-year schedule of project-related activity.

This information shows that ESA § 9 is being violated by allowing excessive take of grizzly bears by violating the standards in the Conservation Strategy and ignoring the best available scientific information related to road management and female grizzly bear mortality.

Adding the impact to the current damage to grizzly bears impairs the function of the DCA and grizzly bear recovery as the Ninemile DCA is the only area that could provide connectivity between the NCDE, Cabinet-Yaak and Bitterroot Recovery Areas, a strategic level recovery goal. In fact, the ID Team notes (3/3/17) state the Action Alternative would exacerbate the road situation for grizzly bears:

The more aggressive alternative would likely result in leaving more roads on the landscape; Fewer travel access restrictions; Keeping more roads as storage (3SN) rather than decommissioning (3DN).



Violations of ESA §7(a)(2) by failing to use the best scientific and commercial data available

There is significant information regarding the Project that was available but was not used for the analysis contained in the EA, the formal consultation process or the Biological Opinion issued on February 26, 2020. The failure to base the EA, consultation process and Biological Opinion on the best available science is a violation of § 7(a)(2).

The Proctor, et al. paper (2019) was published in the *Ursus* scientific journal and was widely known and available. The lead author is well known to the FWS as he is a longtime cooperator with the agency. Co-author Dr. Gordon Stenhouse co-authored the Boulanger and Stenhouse (2014) paper that the FS and FWS cite to. They reviewed a far broader set of studies from interior grizzly bear populations and set parameters for sustaining females with cubs including open road density ≤ 1 mi/mi² (0.6km/km²). Secure, essentially roadless core ≥ 10 km² should comprise $\geq 60\%$ of a bear management unit. They wrote:

Motorized access management would be most beneficial in threatened populations, in areas where roads occur in the highest quality habitats, within and adjacent to identified linkage areas between population units, and in areas that are expected to exceed motorized route thresholds as a result of resource extraction activities. Evidence suggests benefits of motorized access management are more likely to be realized if habitat quality is integrated and is best if managed at scales that optimize the benefit of distribution, survival, reproduction, and density of female grizzly bears. (emphasis provided).

The analysis area violates the Plan Amendments.

The Soldier-Butler Analysis Area is just 8.7% of the DCA, in violation of the Plan Amendments.

The FS response to Notifier’s Objection states:

Objector: Flathead-Lolo-Bitterroot Citizen Task Force

Contention: The road density analysis in the EA was not performed at the correct scale.

Response: The NCDE amendment defines the scale of road density analysis as the entire Ninemile DCA. This is a connectivity area needed to support some lower level of bears to facilitate population growth into the Bitterroot Ecosystem. Density calculations were made at this scale. (emphasis provided).

The claim that road density calculations were made on a DCA-wide basis is false. The EA reported OMRD in the DCA as 2mi/mi², but did not include Flathead Indian Reservation and private lands within the DCA. The detailed analysis in the EA covered just 8.7% of the DCA and obscured the cumulative effects of the road situation throughout the DCA. Actual open road density in the DCA is 3.9mi/mi² (2.4km/km²), four times the level identified as necessary to support females with cubs on the “continual occupancy” basis in Zone 1.

The road density calculations were manipulated.

The FS and FWS cooperated to manipulate road density calculations, mitigation and offsets that don't change conditions on the ground. An email regarding the Project from the FWS to the FS (1/25/17) states:

When I was there, I seem to remember a lot of old roads (probably grown in and not usable) on a map that switch-backed up some steep areas. If they are still on the books as open roads, they may provide some opportunity for additional closures if not needed. I'll start bugging Shane and Scott!

The Project adds 35 miles of non-system roads to the system. Moreover, part of the Decision rescinds the previous commitment to decommission 37 miles of roads under the Frenchtown Face Decision and these roads remain open to administrative use and are subject to illegal use. The FS also excluded roads open to the public on FS lands from June 15-October 15 from the baseline condition (Project File 12.9.19), further compromising the credibility and honesty of the analysis.

The EA and Biological Opinion did not use the scientifically accepted moving windows methodology and arbitrarily excluded private lands.

The Conservation Strategy at page 66 states:

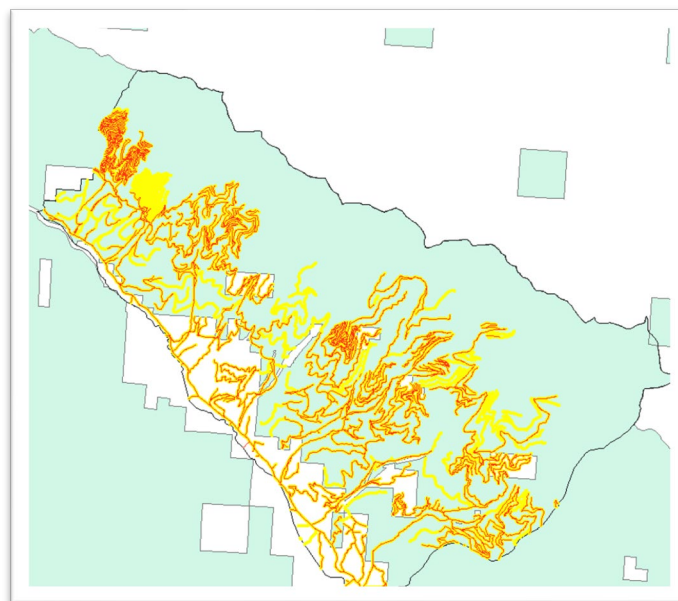
The IGBC chartered a Task Force to evaluate State and Federal procedures for analyzing the effects of motorized access management on grizzly bears. The Task Force recommended that for each recovery zone, IGBC should determine acceptable levels of: (1) open motorized route densities (OMRD, see Glossary); (2) total motorized route densities (TMRD, see Glossary); and (3) core habitat areas (IGBC 1998). These levels were to be based on habitat use patterns for female grizzly bears monitored in that recovery zone, other research results, and social or other management considerations (IGBC 1998). OMRD is reported as the percentage of each BMU subunit that has more than 1 mi/mi² of open routes and TMRD is reported as the percentage of each BMU subunit that has more than 2 mi/mi² of total routes using a moving window GIS analysis procedure. (emphasis provided).

The Conservation Strategy at page 96 states the moving window GIS analysis procedure is “infeasible” in Zone 1 due to areas of private land where road information is incomplete or unavailable and the EA

repeats this claim. This is arbitrary and capricious. In fact, a professional GIS geospatial analyst performed a moving window analysis of the Project Area and the Ninemile DCA using data provided by the FS and the Confederated Salish and Kootenai Tribes and using the methodology prescribed by the Conservation Strategy (Sieracki and Bader 2020, attached). The necessary information was available and the FS had a duty to obtain it for the analysis. Even incomplete information is required to be used when it represents “the best available scientific and commercial data.”

The FS acted in an arbitrary and capricious manner by excluding open roads on private lands within the Project Area from the analysis, as did the FWS in the Biological Opinion. The Project Area includes large areas of privately owned lands shown in white in the map below. The FS simply assumed most private lands within the Project Area are under conservation easements and therefore all roads on private lands were excluded from open road density calculations. This is arbitrary and without scientific basis. Many of these roads lead to residences and others have administrative and unauthorized use. A significant number of miles are FS roads that cross private inholdings and provide access to clusters of spur roads and high road density. Moreover, the FS does not patrol these lands and did not present any information on the extent of unauthorized motorized use of these roads or the efficacy of closure devices or the extent of off-road motorized activity.

Moreover, the FS actively negotiated with private landowners to get road access across their properties as part of Project Implementation and knew the FS would be using these roads for heavy administrative use during the life of the Project. The EA concedes Project-related administrative use of roads has the same level of impacts on grizzly bears as roads open to the public and therefore the FS knew these roads on private lands would be effectively “open.”



The Soldier-Butler Project Area, Private Lands in White

Failure to analyze the nexus between the Ninemile DCA and strategic level grizzly bear recovery contained in the Grizzly Bear Recovery Plan and the Conservation Strategy.

The FWS has adopted a natural recovery strategy for the Bitterroot Recovery Area based on natural immigration (FWS letter 1/21/20). The Ninemile DCA is the only area to link the NCDE, Cabinet-Yaak and Bitterroot Grizzly Bear Recovery Areas, which would greatly decrease the risk of extinction to the species by providing demographic and genetic aid. On page 47 the Conservation Strategy states:

Population Connectivity

Connectivity among grizzly bear populations mitigates genetic erosion and increases resiliency to demographic and environmental variation. One way to mitigate potential impacts from climate change is through well-connected populations of grizzly bears in the lower-48 States and Canada. This Conservation Strategy envisions the NCDE serving as a “source population” for grizzly bear populations in the CYE, BE, and GYE. Attaining habitat connectivity between these areas would benefit multiple wildlife species and would be consistent with the USFWS Grizzly Bear Recovery Plan (USFWS 1993), the Grizzly Bear Management Plan for Western Montana (Dood et al. 2006), the Grizzly Bear Management Plan for Southwestern Montana (MFWP 2013), the interagency statement of support for the concept of linkage zones signed by the State wildlife agencies in Montana, Washington, Idaho, and Wyoming and the USFS, USFWS, USGS, NPS, and BLM (IGBC 2001), the Western Governors’ Association Resolution 07-01 (2007), and Tribal forest management plans.

However, there is scant information in the EA regarding the critical geographic location and function of the Ninemile DCA and the location of the Project Area’s location in the very center. There was no analysis or discussion on the Project’s impacts on the Ninemile DCA’s ability to provide natural immigrants to the CYE and BEs. The EA simply states the Project Area is within the Ninemile DCA. A statement is not an analysis.

The FS and FWS did not take illegal access into consideration for road density analysis as required by the federal court decision *Alliance for the Wild Rockies v. Probert*, 412 F.Supp.3d 1188 (D. Mont. 2019).

“...a few segments of temporary road would only be closed by signage or order, which may or may not keep the public from accessing those roads during project implementation.” Wildlife Report p. 81 (3/6/19).

“Some illegal use occurs on restricted roads across the project area,” and “Some illegal use may also occur on restricted roads. The Forest monitors and enforces closures to the extent practicable given the resources available.” (Consultation Files).

Based on the history of road closure violations and destruction of closure devices on the Ninemile Ranger District (Law Enforcement Records, Region 1, FS), some of these roads are not effectively closed to illegal motorized use and must be counted in road impact assessments for grizzly bears. In this instance, the FS admits it has never done a closure device effectiveness and closure compliance analysis (FOIA reply letter 3/26/20) and therefore does not know what level of illegal use is occurring in the Project Area and the DCA.

The EA makes other unjustified assumptions and makes faulty calculations.

The assumption that displaced females can simply move to another area during the ten years of the Project is contrary to the best available scientific information. Secure core may already be occupied by more dominant bears. Moreover, grizzly bears who are displaced from the Project Area will also be displaced into habitats with even higher road density and less secure areas $\geq 10\text{km}^2$ than in the Project Area, as shown above. Just 12.8% of the DCA is secure core of this size and competition amongst grizzly bears for these spaces may be considerable.

No analysis of impacts on grizzly bear denning habitat

The EA contains no discussion of the potential impacts on grizzly bear denning habitat and den site selection even though the Project will include winter activity. Moreover, snowmobile use may increase above baseline levels. Linnell, et al. (2002) reported that bears generally select dens 1-2km from human activity such as roads, habitations and industrial activity. Ciarniello, et al. (2005) found grizzly bears avoid roads when selecting den sites. Pigeon, et al. (2014) found den selection dropped by 30% at road density $1\text{mi}/\text{mi}^2$ ($0.6\text{km}/\text{km}^2$); reduced by 70% at $\approx 2\text{mi}/\text{mi}^2$ ($1.2\text{km}/\text{km}^2$) and reduced to \approx zero at $3.2\text{mi}/\text{mi}^2$ ($2\text{km}/\text{km}^2$).

Activity within 200m can cause den abandonment leading to increased cub mortality. Impacts short of den abandonment include physiological changes such as increased heart and breathing rate and wakefulness (Fortin, et al. 2016).

In the Response to Notifier's Comments on the EA the FS wrote at page 71:

It is a valid point that more discussion could have been provided on denning habitat.

In the Response to the Objections Issue 7.22, the FS wrote:

Objector: Flathead-Lolo-Bitterroot Citizen Task Force

Contention: The EA contains no discussion of the potential impacts on grizzly bear denning habitat and den site selection even though the Project will include winter activity. The Response to Comments acknowledges this and attempts to back-fill on this issue, without amending the EA.

Response: Please see response to Issue 7.5. The EA contains minimal discussion of denning habitat because no denning has been observed and minimal to no impacts to denning habitat are anticipated.

Again, the standard for Zone 1 is continual occupancy and for the Ninemile DCA, continual occupancy by females with cubs. Thus, any loss of available denning habitat would be a limiting factor on the ability of the area to support residential occupancy by grizzly bears, including females with cubs. The standard for impact analysis is not whether grizzly bear den sites have been discovered but rather a detailed analysis of projected impacts on denning habitat as discussed above

CONCLUSION

The agencies have ignored their duties under the ESA, 16 U.S.C. §1531 et seq., to ensure that their actions do not jeopardize threatened and endangered species, that their actions do not result in unauthorized take of these species of wildlife, and that their actions promote conservation and recovery of these species. The agencies' actions in this matter represent an unlawful departure from their legally binding mandate to protect and recover threatened species and their habitats. If the violations of law described above are not cured within 60 days, Notifier intends to file suit for declaratory and injunctive relief, as well as attorney and expert witness fees and costs.

Sincerely,

/s/ Timothy M. Bechtold
Counsel for Notifier

cc:

US Attorney General
Department of Justice
950 Pennsylvania Ave, NW
Washington, DC 20530-0001

Attachments (via email only):

Sieracki, P. and M. Bader. 2020. Analysis of Road Density and Grizzly Bears in the Ninemile Connectivity Area, Montana. Flathead-Lolo-Bitterroot Citizen Task Force Technical Report 01-20. 18p.

Proctor, M.F., B.N. McLellan, G.B. Stenhouse, G. Mowat, C.T. Lamb and M.S. Boyce. 2019. Effects of roads and motorized human access on grizzly bear populations in British Columbia and Alberta, Canada. *Ursus* (30e2):16-39.