



***Via Facsimile and Certified Mail with Return Receipt Requested***

May 10, 2012

Jerri Marr, Forest Supervisor  
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City of Colorado Springs  
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**Re: Notice of Intent to Sue for Violations of the Endangered Species Act Related to Off-Road Vehicle Use in the Bear Creek Watershed**

This letter serves as official notice by the Center for Biological Diversity of its intent to sue Jerri Marr in her official capacity as the Supervisor of the Pike and San Isabel National

Forests (“the Forest”) for violations of the Endangered Species Act (“ESA”) (16 U.S.C. §§ 1531-1544), resulting from Forest actions related to off-road vehicle (“ORV”) use in the Bear Creek watershed. Bear Creek contains a unique population of the greenback cutthroat trout, which is protected as a threatened species under the ESA. Trails designated by the Forest for motorcycle use are causing widespread erosion and are damaging this unique population and its habitat. According to the Colorado Division of Wildlife, the Bear Creek cutthroat population declined an astonishing 30 percent from 2008 to 2011. If this rate of population decline continues, greenback cutthroat in Bear Creek could soon be completely destroyed.

The erosion in Bear Creek that is harming the greenback cutthroat results from the Forest’s authorization of motorized recreation of this trail system through 1) the inclusion of Bear Creek trails on the Forest’s Motor Vehicle Use Map, 2) the placement of signage identifying routes appropriate for motorcycle use, and 3) the Forest’s repeated and on-going motorcycle trail maintenance projects. *See* Motor Vehicle Use Map, Pike National Forest, Pikes Peak Ranger District (2010) (“MVUM”); Biological Evaluation of Cap’n Jack’s Motorized Trail Reroute, Pikes Peak Ranger District (“Cap’n Jack’s BE”). To date, the Forest Service has failed to consult with the U.S. Fish and Wildlife Service to ensure these actions do not jeopardize the continued existence of the greenback cutthroat trout. 16 U.S.C. § 1536(a)(2). These actions are also resulting in the harm, harassment, and death of protected fish without any authorization for the “take” of listed species, as required by the ESA under Section 9. 16 U.S.C. § 1638(a)(1)(A); 16 U.S.C. § 1532(19).

By this letter the Center puts the Forest and Supervisor Marr on official notice that their actions permitting and facilitating motorcycle use in the Bear Creek watershed are in violation of ESA Section 7 consultation requirements and are resulting in unlawful take under ESA Section 9. 16 U.S.C. §§ 1536 and 1538. This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of the ESA to the extent such notice is deemed necessary by a court. *See* 16 U.S.C. § 1540(g). We may commence this action sooner than 60-days as allowed by the Act to prevent “an emergency posing a significant risk to the well-being” of greenback cutthroat trout. 16 U.S.C. § 1540(g)(2)(C).

## **I. Legal and Factual 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, plants and their natural habitats. 16 U.S.C. §§ 1531, 1532. The ESA requires the Secretaries of the Interior and Commerce (for terrestrial and marine species, respectively) to add species to the lists of endangered and threatened species. *Id.* § 1533(a). The ESA imposes substantive and procedural obligations on all federal agencies and persons with regard to listed species and their critical habitats. *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 or Destruction or Adverse Modification of Critical Habitat**

Where most terrestrial species are concerned, 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). The definition of agency “action” is broad and includes “all activities or programs of any kind authorized, funded, or carried out, in whole or in part” including “the granting of licenses, contracts, leases, easements, rights-of-way, [or] permits” and any “actions directly or indirectly causing modifications to the land, water, or air.” 50 C.F.R. § 402.02.

Each federal agency must review its actions at “the earliest possible time” to determine whether any action “may affect” listed species or their critical habitat in the “action area.” 50 C.F.R. § 402.14(a). The “action area” encompasses all areas that would be “affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.” 50 C.F.R. § 402.02. The term “may affect” is broadly construed by FWS to include “[a]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character,” and thus is easily triggered. *Interagency Cooperation – Endangered Species Act of 1973, As Amended*, 51 Fed. Reg. 19,926 (June 3, 1986). If a “may affect” determination is made, “consultation” is required.

Where an agency retains discretion to act on behalf of listed species and continues to act pursuant to that discretion on an ongoing basis, such ongoing agency action triggers consultation. Examples of agency actions with an ongoing duty to consult include: forest management plans, because an agency has discretion to amend such plans, *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1055 (9th Cir. 1994); pesticide registrations, because an agency has discretion to alter or cancel such registrations, *Washington Toxics Coalition v. Env’tl Prot. Agency*, 413 F.3d 1024, 1032 (9th Cir. 2005); and fishing permits, because an agency has discretion to condition such permits to benefit species, *Turtle Island Restoration Network v. Nat’l Marine Fisheries Serv.*, 340 F.3d 969, 977 (9th Cir. 2003). Therefore, wherever an agency retains and exercises ongoing discretion under a plan or program to act on behalf of listed species, the duty to consult is also ongoing.

Consultation is a process involving the federal agency proposing to take an action, labeled the “action agency,” and, for activities affecting terrestrial species, FWS. During consultation agencies must “use the best scientific and commercial data available.” 16 U.S.C. § 1536(a)(2).

If the action agency concludes that the proposed action is “not likely to adversely affect” the species, then FWS must concur in writing with this determination in order to avoid formal consultation. 50 C.F.R. §§ 402.13(a) & 402.14(b). If FWS concurs in this determination, then consultation is complete. *Id.* § 402.13(a). If FWS’s concurrence in a “not likely to adversely affect” finding is inconsistent with the best available science, however, FWS’s concurrence must be set aside. *See* 5 U.S.C. § 706(2).

If an action agency concludes that the action is “likely to adversely affect” listed species or critical habitat, it must then enter into “formal consultation” with FWS. 50 C.F.R. §§ 402.12(k), 402.14(a). The threshold for triggering the formal consultation requirement is “very low;” “any possible effect . . . triggers formal consultation requirements.” 51 Fed. Reg. 19,926. “Formal consultation” commences with the action agency’s written request for consultation and concludes with FWS’s issuance of a “biological opinion.” 50 C.F.R. § 402.02.

The biological opinion issued at the conclusion of formal consultation states the opinion of FWS as to whether the effects of the action are “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). To “jeopardize the continued existence of” means “to engage in an action that

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.” *Id.* § 402.02.

The “effects of the action” include all direct and indirect effects of the proposed action, plus the effects of actions that are interrelated or interdependent, added to all existing environmental conditions, that is, added to the environmental baseline. “The environmental baseline includes the past and present impacts of all Federal, state, and private actions and other human activities in the action area ....” “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.” The effects of the action must be considered together with “cumulative effects,” which 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.* § 402.02.

If jeopardy is likely to occur, FWS must prescribe in the biological opinion “reasonable and prudent alternatives” to avoid “take” of listed species. *Id.* § 402.14(g). If FWS concludes that a project is not likely to jeopardize listed species, it must provide an “incidental take” statement with the biological opinion, specifying the amount or extent of incidental take, “reasonable and prudent measures” necessary or appropriate to minimize such take, and the “terms and conditions” that must be complied with by the action agency to implement any reasonable and prudent measures. 16 U.S.C. § 1536(b)(4), 50 C.F.R. § 402.14(i).

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

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

Any person who knowingly commits these acts is liable for take and subject to substantial civil and criminal penalties, including imprisonment. 16 U.S.C. §§ 1540(a), (b); *Bennett v. Spear*, 520 U.S. 154, 170 (1997). “Person” is defined in the ESA to include “any officer, employee, agent, department, or instrumentality of the Federal Government . . . .” 16 U.S.C. § 1532(13).

In addition, courts have repeatedly held that government actions authorizing third parties to engage in harmful activities can constitute illegal take under Section 9. For example, a state agency committed take of endangered right whale when it licensed commercial fishing operations in a manner that was likely to result in harm to those whales. *Strahan v. Cox*, 127 F.3d 155, 164 (1st Cir. 1997), *cert. denied*, 525 U.S. 830 (1998). A federal agency caused take of endangered black-footed ferret when it registered pesticides even though other persons

actually distributed or used the pesticides. *Defenders of Wildlife v. Admin'r, Env'tl. Prot. Agency*, 882 F.2d 1294, 1301 (8th Cir. 1989). A state agency was liable for take for its licensing and regulation of trapping that resulted in third-party incidental take of Canada lynx. *Animal Prot. Inst. v. Holsten*, 541 F. Supp. 2d 1073, 1080 (D. Minn. 2008). And a county's inadequate regulation of beachfront artificial light sources was held to constitute take of listed turtles in violation of Section 9. *Loggerhead Turtle v. City Council of Volusia County*, 148 F.3d 1231, 1253 (11th Cir. 1998).

## **B. Greenback Cutthroat Trout**

The greenback cutthroat trout (*Oncorhynchus clarki ssp. stomias*) is a coldwater fish that lives only in clear, well-oxygenated mountain streams above 5,900 feet on the east-slope of the Rocky Mountains in Colorado. Jones Park BA at 8. The fish has dark spots on a green body and tail and turns a brilliant crimson on its belly when spawning. The greenback cutthroat trout is the State Fish of Colorado.

Greenback are widely outcompeted by brook and brown trout and hybridized by rainbow trout and therefore are generally extirpated from streams that have been stocked above or below with any of these fish. Greenback Cutthroat Trout: Five-Year Review Summary and Evaluation, U.S. Fish and Wildlife Service (May 2009) ("2009 Five-Year Review") at 27. In 1937, greenback cutthroat were declared extinct. Subsequently, remnant populations were discovered in the upper reaches of the Arkansas and South Platte River watersheds. Greenback were listed as "endangered" range-wide in 1967 and the subspecies was down-listed to "threatened" range-wide in 1978 due to what was then thought to be successful restocking efforts.

Fish managers, for decades, however, have accidentally mixed-bred Colorado cutthroat trout and greenback, and then restocked otherwise pure greenback streams with the hybridized fish, leaving pure greenback streams exceedingly rare. Biological Evaluation of Cap'n Jack's BE at 8. As a result, relatively pure greenback may now be limited to four native streams totaling only a dozen kilometers of functioning habitat. Jessica L. Metcalf, et. al, *Across the great divide: genetic forensics reveals misidentification of endangered cutthroat trout populations*, Molecular Ecology (2007) 16(21):4445 at 4452.

In addition to competition from and hybridization with other trout, greenback face other significant threats. Erosion into greenback streams is well documented to threaten the fish. 2009 Five-Year Review at 17. Erosion and the resulting sedimentation can smother fish eggs, cutting off oxygen necessary for eggs to survive. *Id.* at 20. Sediments can also form a layer on the streambed inconsistent with spawning. *Id.* And sediments can fill in deepwater areas necessary for overwintering in frozen mountain climates, critical for refuge in drought, and important as protection from predators..

New threats to recovery of greenback have also been recently identified, including fire and firefighting with chemical retardants. Along with direct affects, like increased stream temperature, fire threatens greenback indirectly in several ways. First, fire can result in post-disturbance debris torrents that can kill fish and damage habitat. Second, fire retardants introduced into the small streams occupied by greenback cutthroat could extirpate them from an entire stream in a single episode. 2009 Five-Year Review at 21. Finally, airplane and helicopter water drops during firefighting activities have the potential to introduce whirling disease. *Id.* at 22.

Whirling disease is a parasitic infection that severely impacts trout. The parasite was accidentally introduced into Colorado in the 1980s. “Whirling Disease and Colorado’s Trout,” Colorado Division of Wildlife (2005). Young greenback are highly susceptible to whirling disease. 2009 Five Year Review at 25. The parasite’s spores can survive in mud for at least 20 years. *Id.* The Colorado Division of Wildlife suggests that vehicles possibly exposed to diseased water bodies be washed of mud to prevent the spread of the disease. Transport of diseased mud on a motorcycle’s tires or undercarriage could potentially wipe out this rare population of fish. As noted above, introduction of fire-fighting drop water to disease-free Bear Creek could also do considerable damage, possibly extirpating greenback from the stream.

The greenback population in Bear Creek is important not just because it is one of only four remaining pure populations of the subspecies, but also because recent genetic studies have found that it harbors unique genetic markers found in no other population. Jones Park BA at 8. Indeed, genetic evidence suggests the population may belong to the long-believed extinct subspecies, yellowfin cutthroat (*O. c. maconaldi*), which were last documented in the Twin Lakes of the upper Arkansas River basin in the late 1800s. *See e.g.*, email from Thomas P. Nesler, Colorado Division of Wildlife to Bruce Rosenlund, U.S. Fish and Wildlife Service (Sept. 29, 2008). Regardless of whether trout in Bear Creek are a pure and genetically distinct population of greenback cutthroat trout, or the last surviving population of yellowfin cutthroat trout, they are an irreplaceable component of the biodiversity of this nation that are protected under the Endangered Species Act. That the Forest and its managers have long known about the presence of greenback on Forest land is not in question.

### **C. Motorcycle Use in the Bear Creek Watershed**

Bear Creek is a small, headwater tributary in the Arkansas River watershed, located on the east slope of Pikes Peak, near Colorado Springs, Colorado. The upper portion of the creek, where the unique population of greenback cutthroat trout is found, flows through a combination of the Pike National Forest and lands owned by the Colorado Springs Utility (“Utility”).

The Bear Creek motorcycle trail system centers on Trail #667, which runs from High Drive in the east, to the top of the watershed in the west, passing through both Forest and Utility land. Much of the trail runs very near to the creek, crossing it frequently. In addition to High Drive, Trail #667 is accessed from the south via the Frosty Park trailhead and Trail #s 668, 701, and their spur 720. All of these trails are designated for motorcycle use. Along with these numbered trails, several unnumbered trails on Utility land are effectively part of this trail system and are shown on the MVUM as linking the numbered trails listed above.

Numerous non-designated user-created motorcycle trails connect to these trails throughout the Bear Creek watershed, especially adjacent to the lower reaches of the creek still on Forest land. Bear Creek Aquatic Habitat Assessment, prepared by FIN-UP, Habitat Consultants, Inc. for the U.S. Forest Service (December 2011) (“Habitat Assessment”) at 2, 15, 29. This illegal network of trails has been growing over the last two decades. *Id.* at 28. Trail #666, which runs along the creek downstream of #667, is not designated for motorcycle use, but it too is illegally used by motorcycle riders. *Id.* at 30.

Trail #667 is a highly disturbed corridor and severely eroded along most of its length. Jones Park BA at 2; Habitat Assessment at 2. The trail often runs immediately adjacent to the creek and includes areas of obvious sediment delivery to the creek. Jones Park BA at 8. This is due to considerable motorcycle traffic over the weathered, decomposing granitic soils of the

area. Habitat Assessment at 2; *see also* 2009 Five-Year Review at 19-20. The Pikes Peak District Ranger recently referred to the larger Bear Creek trail system and attempts to address erosion problems as “challenging because of the high volume of motorcycle and mountain bike use, decomposed granite soils, steep grades and sensitivity to the watershed.” Letter from U.S.F.S. Pikes Peak District Ranger Brent Botts to Tom Mesta, OHV Program Manager, Colorado Division of Wildlife (Nov. 28, 2011).

As a result of erosion, some segments of the creek show a high sediment load. Along with smothering cutthroat eggs and altering the stream bottom to prevent spawning, this high sediment load degrades aquatic habitat by filling the highly limited numbers of natural pools that serve as winter, drought, and predator refugia for the cutthroat trout. Habitat Assessment at 10, 12-13, 17; 2009 Five-Year Review at 17. The amount of available pool habitat in Bear Creek has decreased significantly since the last aquatic habitat assessment was completed in 1994. Habitat Assessment at 26.

Along with direct use, Trail # 667 is also the main conduit for users of illegal trails that run immediately adjacent to and through the creek. These trails are largely responsible for hundreds of feet of unstable and actively eroding stream banks. *Id.* at 21. In addition to erosion, motorcycle use negatively impacts vegetation and tramples terrestrial insects which comprise half of the cutthroat trout’s diet. 2009 Five-Year Review at 20. Motorcycles can also be responsible for toxic accidental fuel spills. Finally, motorcycle use increases the chance of igniting a forest fire which could lead to devastating direct and indirect affects to Bear Creek’s cutthroat. These significant impacts from motorized recreation are occurring from motorcycle use on both Forest and Utility land. *See id.* at 29.

In addition to, and at least in part as a result of, the motorcycle trail system, informal campsites have been developed near and adjacent to the creek. More than a dozen such campsites were recently observed, with other less obvious sites possible. Habitat Assessment at 10, 15, 20. Campers are affecting the stream in numerous ways. In addition to obvious erosion and sanitation problems, campers appear to be creating artificial dams and pools which may serve as barriers to cutthroat mobility. *Id.* at 12, 14, 22. Campers may also be destroying limited streamside cover vegetation. *Id.* at 12. Significant impacts are occurring from camping on both Forest and Utility land. *See id.* at 29.

## **II. Violations of the ESA**

### **A. The Pike and San Isabel National Forests Have Failed to Comply with ESA Section 7.**

The Pike and San Isabel National Forests have a duty to ensure that agency actions are not likely to jeopardize the continued existence of threatened greenback cutthroat trout. Concerning the requirement to consult, the inclusion of Bear Creek trails on the MVUM, placement of signage facilitating motorcycle use in the Bear Creek watershed, and maintenance projects for the Bear Creek motorcycle trail system are all agency actions. To fulfill its legal obligations, the Forest was required, at the earliest time, to determine whether these actions were likely to adversely affect the cutthroat trout. If so, the Forest was required to enter formal consultation with FWS.

Given the erosion from motorcycle use and the rapid decline in population numbers, the Forest should have found that each of the above-described actions was likely to adversely affect

greenback cutthroat trout. Therefore, the Forest was required to consult formally with FWS and to wait for the outcome of a biological opinion before the agency actions could proceed. The Forest has never formally consulted with FWS on affects to cutthroat trout in Bear Creek as a result of proposed agency activities promoting the Bear Creek motorcycle trail system, and therefore, has violated section 7(a)(2) of the ESA.

The Forest also has ongoing discretion over the Bear Creek motorcycle trail system. The Forest has discretion over which trails are designated for motorcycle use in the MVUM, a map that the Forest continues to publish on its website and in printed form. The Forest also has discretion over an ongoing series of maintenance projects of the trail system. The Forest has ongoing discretion to act on behalf of threatened greenback cutthroat in Bear Creek. Therefore, the Forest is required now to request formal consultation with FWS over whether the trails in the Bear Creek watershed should continue to be designated and maintained for motorcycle use.

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

The Pike and San Isabel National Forest and certain Forest employees including Forest Supervisor Jerri Marr are in violation of Section 9 of the ESA for the unauthorized take of threatened greenback cutthroat trout. As discussed above, both harm and harassment constitute take under Section 9. The Forest has engaged in acts that have harmed and harassed and continue to harm and to harass Bear Creek cutthroat trout through delivery of significant and destructive amounts of sediment into Bear Creek as a result of continued promotion of legal and unchallenged tolerance of illegal motorcycle use in the watershed.

The Forest continues to publish a motor vehicle use map which identifies an extensive motorcycle trail system in the Bear Creek watershed, including trails that run immediately adjacent to and through Bear Creek. The Forest trail system provides the only access to a connected trail system on Colorado Springs Utility land, which also includes trails that run immediately adjacent to and through Bear Creek. The Forest has approved a number of projects to maintain these motorcycle trails. The Forest has approved and placed signage on these trails to facilitate motorcycle use. The Forest has failed to take enforcement actions adequate to prevent the creation and use of numerous illegal Bear Creek trails used by motorcycle riders. The Forest has failed to take enforcement actions adequate to prevent the use of Trail #666 by motorcycle riders.

Many of these motorcycle trails are highly eroded and are responsible for a high sediment load in Bear Creek. These trails are also causing bank failures and unstable stream banks. The high sediment load in Bear Creek smothers cutthroat eggs, negatively impacts the creek bottom, and continues to fill the relatively small number of important pools in the creek. Cutthroat trout rely on these pools as habitat for overwintering, as protection from predators, and as a refuge during drought. All of these impacts are contributing to an observed 30% decline in the greenback cutthroat trout population in Bear Creek in just the last three years.

Thus, by its actions, the Forest has taken and continues to take threatened greenback cutthroat trout from Bear Creek in the absence of an incidental take permit under section 7.

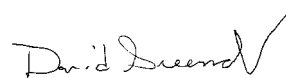


### **III. Conclusion**

The Pike and San Isabel National Forest is violating ESA Sections 7 and 9 as a result of actions related to the motorcycle trail system in the Bear Creek watershed. 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 in 60 days from receipt of this notice. The Center will seek injunctive and declaratory relief, and legal fees and costs regarding these violations. An appropriate remedy that would prevent litigation would be for the Forest to close all trails in the Bear Creek watershed to motorcycle use and immediately begin the process of restoring eroding trails.

If you have any questions, wish to discuss this matter, or feel this notice is in error; please contact me at 503-283-5474.

Sincerely,

A handwritten signature in dark ink, appearing to read "David Greenwald", with a large checkmark-like flourish at the end.

D. Noah Greenwald, Director  
Endangered Species Program  
Center for Biological Diversity  
P.O. Box 11374  
Portland, OR 97211-0374



***Via Facsimile and Certified Mail with Return Receipt Requested***

May 10, 2012

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**Re: Notice of Intent to Sue for Violation of the Endangered Species Act Related to Off-Road Vehicle Use in the Bear Creek Watershed**

This letter serves as official notice by the Center for Biological Diversity (“Center”) of its intent to sue Jerry Forte, Chief Executive Officer of the Colorado Springs Utility (“Utility”), Mayor Steve Bach, Chair of the Utility Board, and the Utility itself for violations of the Endangered Species Act (“ESA”) (16 U.S.C. §§ 1531-1544), resulting from Utility actions related to off-road vehicle (“ORV”) use in the Bear Creek watershed. Bear Creek contains a

unique population of the greenback cutthroat trout, which is protected as a threatened species under the ESA. Trails created and maintained for, and opened to motorcycle use by, the Utility are causing widespread erosion and are damaging this unique population and its habitat. According to the Colorado Division of Wildlife, the Bear Creek cutthroat population declined an astonishing 30 percent from 2008 to 2011. If this rate of population decline continues, greenback cutthroat in Bear Creek could soon be completely destroyed.

The erosion in Bear Creek results from the Utility's authorization and facilitation of motorized recreation of this trail system through the opening of Utility land to motorcycle use in the Bear Creek watershed, and the Utility's repeated and on-going motorcycle trail maintenance projects to facilitate continued motorcycle use in the watershed. *See Colorado Springs Utility Board Agenda Packet (March 21, 2012) at 19.*

With this letter, the Center puts the Utility, its Chief Executive Officer, and its Board Chair on official notice that the Utility's actions allowing and facilitating motorcycle use in the Bear Creek watershed are resulting in "take" of the listed greenback cutthroat trout through harm, harassment, and death in violation of the Endangered Species Act. 16 U.S.C. § 1538(a)(1)(A); 16 U.S.C. § 1532(19). This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of the ESA to the extent such notice is deemed necessary by a court. *See* 16 U.S.C. § 1540(g). We may commence this action sooner than 60-days as allowed by the Act to prevent "an emergency posing a significant risk to the well-being" of greenback cutthroat trout. 16 U.S.C. § 1540(g)(2)(C).

## **I. Legal and Factual Background**

### **A. The Endangered Species Act and the Section 9 Prohibition on Take of Listed Species**

Congress enacted the Endangered Species Act in 1973 to provide for the conservation of endangered and threatened fish, wildlife, plants and their natural habitats. 16 U.S.C. §§ 1531, 1532. The ESA requires the Secretaries of the Interior and Commerce (for terrestrial and marine species, respectively) to add species to the lists of endangered and threatened species. *Id.* § 1533(a). The ESA imposes substantive obligations on all persons with regard to listed species and their critical habitats. *See id.* §§ 1536(a)(1), (a)(2) & 1538(a); 50 C.F.R. § 402.10.

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

Any person who knowingly commits these acts is liable for take and subject to substantial civil and criminal penalties, including imprisonment. 16 U.S.C. §§ 1540(a), (b); *Bennett v. Spear*, 520 U.S. 154, 170 (1997). The definition of “person” includes any “individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State.” 16 U.S.C. § 1532(13).

In addition, courts have repeatedly held that government actions authorizing third parties to engage in harmful activities can constitute illegal take under Section 9. For example, a state agency committed take of endangered right whale when it licensed commercial fishing operations in a manner that was likely to result in harm to those whales. *Strahan v. Cox*, 127 F.3d 155, 164 (1st Cir. 1997), *cert. denied*, 525 U.S. 830 (1998). A federal agency caused take of endangered black-footed ferret when it registered pesticides even though other persons actually distributed or used the pesticides. *Defenders of Wildlife v. Admin’r, Env’tl. Prot. Agency*, 882 F.2d 1294, 1301 (8th Cir. 1989). A state agency was liable for take for its licensing and regulation of trapping that resulted in third-party incidental take of Canada lynx. *Animal Prot. Inst. v. Holsten*, 541 F. Supp. 2d 1073, 1080 (D. Minn. 2008). And a county’s inadequate regulation of beachfront artificial light sources was held to constitute take of listed turtles in violation of Section 9. *Loggerhead Turtle v. City Council of Volusia County*, 148 F.3d 1231, 1253 (11th Cir. 1998).

Section 10 of the ESA allows the Secretary to authorize take under specific circumstances. 16 U.S.C. § 1539(a)(1). Permission to take is only granted after application to the Secretary and after specific published findings by the Secretary. *Id.* § 1539(a)(2).

## **B. Greenback Cutthroat Trout**

The greenback cutthroat trout (*Oncorhynchus clarki ssp. stomias*) is a coldwater fish that lives only in clear, well-oxygenated mountain streams above 5,900 feet on the east-slope of the Rocky Mountains in Colorado. Jones Park Motorized Trail Maintenance Biological Assessment, Pikes Peak Ranger District (2010) (“Jones Park BA”) at 8. The fish has dark spots on a green body and tail and turns a brilliant crimson on its belly when spawning. The greenback cutthroat trout is the State Fish of Colorado.

Greenback are widely outcompeted by or hybridized by brook, brown, and rainbow trout and therefore are generally extirpated from streams that have been stocked above or below with any of these fish. Greenback Cutthroat Trout: Five-Year Review Summary and Evaluation, U.S. Fish and Wildlife Service (May 2009) (“2009 Five-Year Review”) at 27. In 1937, greenback cutthroat were declared extinct. Subsequently, remnant populations were discovered in the upper reaches of the Arkansas and South Platte River watersheds. Greenback were listed as “endangered” range-wide in 1967 and the subspecies was down-listed to “threatened” range-wide in 1978 due to what was then thought to be successful restocking efforts.

Fish managers, for decades, however, have accidentally mixed-bred Colorado cutthroat trout and greenback, and then restocked otherwise pure greenback streams with the hybridized fish, leaving pure greenback streams exceedingly rare. Biological Evaluation of Cap’n Jack’s Motorized Trail Reroute, Pikes Peak Ranger District (“Cap’n Jack’s BE”) at 8. As a result, relatively pure greenback may now be limited to four native streams totaling only a dozen kilometers of functioning habitat. Jessica L. Metcalf, et. al, *Across the great divide: genetic*

*forensics reveals misidentification of endangered cutthroat trout populations*, Molecular Ecology (2007) 16(21):4445 at 4452.

In addition to competition from and hybridization with other trout, greenback face other significant threats. Erosion into greenback streams has long been understood to threaten the fish. 2009 Five-Year Review at 17. Erosion and the resulting sedimentation can smother fish eggs, cutting off oxygen necessary for eggs to survive. *Id.* at 20. Sediments can also form a layer on the streambed inconsistent with spawning. *Id.* And sediments can fill in deepwater areas necessary for overwintering in frozen mountain climates, critical for refuge in drought, and important as protection from predators.

New threats to recovery of greenback have also been recently identified, including fire and firefighting with chemical retardants. Along with direct affects, like increased stream temperature, fire threatens greenback indirectly in several ways. First, fire can result in post-disturbance debris torrents that can kill fish and damage habitat. Second, fire retardants introduced into the small streams occupied by greenback cutthroat could extirpate them from an entire stream in a single episode. 2009 Five-Year Review at 21. Finally, airplane and helicopter water drops during firefighting activities have the potential to introduce whirling disease. *Id.* at 22.

Whirling disease is a parasitic infection that severely impacts trout. The parasite was accidentally introduced into Colorado in the 1980s. “Whirling Disease and Colorado’s Trout,” Colorado Division of Wildlife (2005). Young greenback are highly susceptible to whirling disease. 2009 Five Year Review at 25. The parasite’s spores can survive in mud for at least 20 years. *Id.* The Colorado Division of Wildlife suggests that vehicles possibly exposed to diseased water bodies be washed of mud to prevent the spread of the disease. Transport of diseased mud on a motorcycle’s tires or undercarriage could potentially wipe out this rare population of fish. As noted above, introduction of fire-fighting drop water to disease-free Bear Creek could also do considerable damage, possibly extirpating greenback from the stream.

The greenback population in Bear Creek is important not just because it is one of only four remaining pure populations of the subspecies, but also because recent genetic studies have found that it harbors unique genetic markers found in no other population. Jones Park BA at 8. Indeed, genetic evidence suggests the population may belong to the long-believed extinct subspecies, yellowfin cutthroat (*O. c. macdonaldi*), which were last documented in the Twin Lakes of the upper Arkansas River basin in the late 1800s. *See e.g.*, email from Thomas P. Nesler, Colorado Division of Wildlife to Bruce Rosenlund, U.S. Fish and Wildlife Service (Sept. 29, 2008). Regardless of whether trout in Bear Creek are a pure and genetically distinct population of greenback cutthroat trout, or the last surviving population of yellowfin cutthroat trout, they are an irreplaceable component of the biodiversity of this nation that are protected under the Endangered Species Act. That the Utility and its managers have long known about the presence of greenback on Utility land is not in question.

### **C. Motorcycle Use in the Bear Creek Watershed**

Bear Creek is a small, headwater tributary in the Arkansas River watershed, located on the east slope of Pikes Peak, near Colorado Springs, Colorado. The upper portion of the creek, where the unique population of greenback cutthroat trout is found, flows through a combination of the Pike National Forest (“Forest”) and lands owned by the Utility.

The Bear Creek motorcycle trail system centers on Trail #667, which runs from High Drive in the east, to the top of the watershed in the west, passing through both Forest and Utility land. Much of the trail runs very near to the creek, crossing it frequently. In addition to High Drive, Trail #667 is accessed from the south via the Frosty Park trailhead and Trail #s 668, 701, and their spurs 720 and 720A. These trails are all used frequently by motorcycle riders and cross Utility land. The Bear Creek Forest and Utility motorcycle trails operate, effectively, as an integrated motorcycle trail system, as shown on the MVUM. The only through-routes on any Forest Bear Creek motorcycle trails all pass through Utility land.

Numerous non-designated, user-created motorcycle trails connect to these trails throughout the Bear Creek watershed. Bear Creek Aquatic Habitat Assessment, prepared by FIN-UP, Habitat Consultants, Inc. for the U.S. Forest Service (December 2011) (“Habitat Assessment”) at 2, 15, 29. This illegal network of trails has been growing over the last two decades. *Id.* at 28. Trail #666, which runs along the creek downstream of #667, is not designated for motorcycle use, but it too is illegally used by motorcycle riders. *Id.* at 30.

Trail #667 is a highly disturbed corridor and severely eroded along most of its length. Jones Park BA at 2; Habitat Assessment at 2. The trail often runs immediately adjacent to the creek and includes areas of obvious sediment delivery to the creek. Jones Park BA at 8. This is due to considerable motorcycle traffic over the weathered, decomposing granitic soils of the area. Habitat Assessment at 2; *see also* 2009 Five-Year Review at 19-20. The Pikes Peak District Ranger recently referred to the larger Bear Creek trail system and attempts to address erosion problems as “challenging because of the high volume of motorcycle and mountain bike use, decomposed granite soils, steep grades and sensitivity to the watershed.” Letter from U.S.F.S. Pikes Peak District Ranger Brent Botts to Tom Mesta, OHV Program Manager, Colorado Division of Wildlife (Nov. 28, 2011).

As a result of erosion, some segments of the creek show a high sediment load. Along with smothering cutthroat eggs and altering the stream bottom to prevent spawning, this high sediment load degrades aquatic habitat by filling the highly limited numbers of natural pools that serve as winter, drought, and predator refugia for the cutthroat trout. Habitat Assessment at 10, 12-13, 17; 2009 Five-Year Review at 17. The amount of available pool habitat in Bear Creek has decreased significantly since the last aquatic habitat assessment was completed in 1994. Habitat Assessment at 26.

Along with direct use, Trail # 667 is also the main conduit for users of illegal trails that run immediately adjacent to and through the creek. These trails are largely responsible for hundreds of feet of unstable and actively eroding stream banks. *Id.* at 21. In addition to erosion, motorcycle use negatively impacts vegetation and tramples terrestrial insects which comprise half of the cutthroat trout’s diet. 2009 Five-Year Review at 20. Motorcycles can also be responsible for toxic accidental fuel spills. Finally, motorcycle use increases the chance of igniting a forest fire which could lead to devastating direct and indirect affects to Bear Creek’s cutthroat. These significant impacts from motorized recreation are occurring from motorcycle use on both Forest and Utility land. *See id.* at 29.

In addition to, and at least in part as a result of, the motorcycle trail system, informal campsites have been developed near and adjacent to the creek. More than a dozen such campsites were recently observed, with other less obvious sites possible. Habitat Assessment at 10, 15, 20. Campers are affecting the stream in numerous ways. In addition to obvious erosion and sanitation problems, campers appear to be creating artificial dams and pools which may serve as barriers to cutthroat mobility. *Id.* at 12, 14, 22. Campers may also be destroying limited

streamside cover vegetation. *Id.* at 12. Significant impacts are occurring from camping on both Forest and Utility land. *See id.* at 29.

## **II. Violation of the ESA: the Utility and its Officers Are Liable for Take Under Section 9 of the ESA.**

The Colorado Springs Utility, its CEO Jerry Forte, and its Board President Steve Bach are in violation of Section 9 of the ESA for the unauthorized take of threatened greenback cutthroat trout. As discussed above, both harm and harassment constitute take under section 9. The Utility has engaged in acts that have harmed and harassed and continue to harm and harass Bear Creek cutthroat trout through delivery of significant and destructive amounts of sediment into Bear Creek as a result of continued promotion of legal and resulting illegal motorcycle use in the watershed.

The Utility has opened its land to motorcycle use and provides the only interconnections to the Bear Creek Forest trail system on the Pikes Peak Ranger District. Those trails also run immediately adjacent to and through Bear Creek. The Utility has approved a number of projects to maintain its motorcycle trails. The Utility trail system has also led to the creation and use of numerous additional illegal Bear Creek trails used by motorcycle riders.

Many of these motorcycle trails are highly eroded and are responsible for a high sediment load in Bear Creek. These trails are also causing bank failures and unstable stream banks. The high sediment load in Bear Creek smothers cutthroat eggs, negatively impacts the creek bottom, and continues to fill the relatively small number of important pools in the creek. Cutthroat trout rely on these pools as habitat for overwintering, protection from predators, and as a critical refuge in times of drought. All of these impacts are contributing to an observed 30% decline in the greenback cutthroat trout population in Bear Creek in just the last three years.


Thus, the Utility has taken and continues to take threatened greenback cutthroat trout from Bear Creek. The Utility has not applied for and does not have permission to take greenback under Section 10 of the ESA. Therefore, this harm is a continuing violation of the take provision under Section 9.

## **III. Conclusion**

The Colorado Springs Utility and its officers are violating ESA Section 9 as a result of actions related to the motorcycle trail system in the Bear Creek watershed. While we hope to avoid litigation on this issue, if the Utility does not act to correct the violations described in this letter, the Center will pursue litigation against it in U.S. District Court in 60 days from receipt of this notice. An appropriate remedy that would prevent litigation would be for the Utility to close all its trails in the Bear Creek watershed to motorcycle use and immediately begin the process of restoring eroding trails.

If you have any questions, wish to discuss this matter, or feel this notice is in error, please contact me at 503-283-5474.

Sincerely,

A handwritten signature in black ink, appearing to read "David Greenwald". The signature is fluid and cursive, with a prominent checkmark-like flourish at the end.

D. Noah Greenwald, Director  
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Center for Biological Diversity  
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