



June 15, 2026

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**Re: Sixty-Day Notice of Intent to Sue Pursuant to the Endangered Species Act for Legal Violations Concerning the Wells Draw Road Amendment – Gate Canyon Project (DOI-BLM-UT-G010-2026-0076-EA)**

Secretary Burgum, Director Pearce, and Director Nesvick:

The Center for Biological Diversity (“Center”) hereby notifies the U.S. Bureau of Land Management (“BLM”) and the U.S. Fish and Wildlife Service (“FWS”) of the Center’s intent to sue for ongoing violations of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544, its implementing regulations, regarding BLM’s April 28, 2026 Decision (“2026 Decision”) approving the Wells Draw Road Amendment – Gate Canyon Project, DOI-BLM-UT-G010-2026-0076-EA (“Gate Canyon Project” or “Project”). BLM approved this federal action without first conducting any ESA Section 7 consultation and without requiring any necessary protections for Mexican Spotted Owl (“the Owl”), which is listed as threatened under the ESA. *See* Endangered and Threatened Wildlife and Plants; Final Rule to List the Mexican Spotted Owl as a Threatened Species, 58 Fed. Reg. 14248 (March 16, 1993).

### **I. The ESA and Its Implementing Regulations**

The ESA “represent[s] the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). The ESA’s primary goal is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” 16 U.S.C. § 1531(b). Congress’s “plain intent . . . in enacting the [ESA] was to halt and reverse the trend toward species extinction, whatever the cost.” *Tenn. Valley Auth.*, 437 U.S. at 184.

ESA Section 7(a)(2) “imposes a rigorous duty” requiring each agency, in consultation with FWS, to “insure that any action . . . is not likely to jeopardize the continued existence of any

endangered species . . . or result in the destruction or adverse modification of [designated critical] habitat for such species.” *Sierra Club v. Marsh*, 816 F.2d 1376, 1385 (9th Cir. 1987) (quoting 16 U.S.C. § 1536(a)(2). “The threshold for triggering the [ESA] is relatively low: consultation is required whenever a federal action ‘may affect listed species or critical habitat.’” *California ex rel. Lockyer v. U.S. Dep’t of Agric.*, 575 F.3d 999, 1018 (9th Cir. 2009) (quoting 50 C.F.R. § 402.14(a)). “Any possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the [consultation] requirement.” *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012) (quotations and citations omitted). In adopting regulations on Section 7 consultation, FWS explained that “[t]he threshold for formal consultation must be set sufficiently low to allow Federal agencies to satisfy their duty to ‘insure’” that their actions do not jeopardize listed species or adversely modify critical habitat. 51 Fed. Reg. 19926, 19949 (June 3, 1986).

According to ESA regulations, an action jeopardizes a listed species if it “reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02. Once consultation is initiated, the action agency is prohibited from making “any irreversible or irretrievable commitment of resources . . . which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures.” 16 U.S.C. § 1536(d).

Agencies must use the “best scientific and commercial data available” in the consultation process. *Id.* § 1536(a)(2). This command means the “agency ‘cannot ignore available biological information . . .’ which may indicate potential conflicts between the proposed action and the preservation of endangered species.” *Greenpeace v. Nat’l Marine Fisheries Serv.*, 80 F. Supp. 2d 1137, 1150 (W.D. Wash. 2000) (quoting *Conner v. Buford*, 848 F.2d 1441, 1454 (9th Cir. 1988); see also *Conservation Cong. v. Finley*, 774 F.3d 611, 620 (9th Cir. 2014) (agencies “must support their conclusions with accurate and reliable data,” and “consider[] all relevant data”) (citation & quotation omitted).

If any listed species may be present, the action agency is required to prepare and submit to FWS a “biological assessment” (“BA”) that evaluates the potential effects of the action on listed species and critical habitat. 16 U.S.C. § 1536(c)(1). This is so regardless of the likelihood or significance of the effects of the proposed action. See FWS, *Endangered Species Consultation Handbook* (March 1998) at 3-15.<sup>1</sup>

Agencies prepare BAs to determine whether agencies must undertake *formal* consultation on proposed actions is necessary, or whether the agency may undertake *informal* consultation instead. 50 C.F.R. § 402.12(a). If the action agency determines the proposed action may affect but “is not likely to adversely affect” listed species or critical habitat, and FWS concurs, the informal consultation process ends. 50 C.F.R. § 402.14(b).

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<sup>1</sup> The Consultation Handbook is available at <https://www.fws.gov/sites/default/files/documents/endangered-species-consultation-handbook.pdf>.

A concurrence is “based on review of all potential effects, direct and indirect” of the action. FWS, Endangered Species Consultation Handbook (Mar. 1998) at 3-12, (emphasis added); *see also* *NRDC v. Evans*, 364 F. Supp. 2d 1083, 1129 (N.D. Cal. 2003) (relying on Consultation Handbook); *Conservation Cong. v. United States Forest Serv.*, 720 F.3d 1048, 1052 n.5 (9th Cir. 2013) (same).

During informal consultation, the action agency requests information from FWS as to whether any listed species may be present in the action area. “Action area” is broadly defined under the ESA as “all areas to 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 (emphases added).

FWS’s Consultation Handbook explains that a “not likely to adversely affect” determination “can be made only if ALL of the reasonably expected effects of the proposed action will be [1] beneficial, [2] insignificant, or [3] discountable.” *Evans*, 364 F. Supp. 2d at 1129 (quoting Consultation Handbook at 4-1). The Handbook explains:

Insignificant effects relate to the size of the impact and should never reach the scale where take occurs. Discountable effects are those extremely unlikely to occur. Based on best judgment, a person would not: (1) be able to meaningfully measure, detect, or evaluate insignificant effects; or (2) expect discountable effects to occur ....

*Id.* (quoting Consultation Handbook at xv-xvi). In contrast, a “likely to adversely affect” conclusion, which requires formal consultation, is appropriate “if *any* adverse effect to listed species may occur as a direct or indirect result of the proposed action or its interrelated ... actions.” Consultation Handbook at 3-13 (emphasis added).

If the action agency finds that the proposed action “may affect” listed species or critical habitat, then *formal* consultation is required. 50 C.F.R. § 402.14(a); *see also* FWS, Endangered Species Consultation Handbook at 3-13 (1998) (“Consultation Handbook”). The result of formal consultation is a FWS-prepared Biological Opinion (“BiOp”), which analyzes the best available scientific data on the pre-existing status of the species and evaluates how the proposed action would impact the species’ status compared to its baseline condition. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14.

A BiOp must include a description of the proposed action, a review of the species’ status and critical habitat, an evaluation of the environmental baseline, and an analysis of the direct and indirect effects of the proposed action, along with the cumulative effects of reasonably certain future state, tribal, local, and private actions. *See* 50 C.F.R. § 402.14(g); *see also* Consultation Handbook at 4-14 to 4-31. At the conclusion of formal consultation, FWS determines whether the proposed action—in addition to the pre-existing environmental baseline of the species—is likely to jeopardize the continued existence of a listed species or destroy or adversely modify any designated critical habitat.

## II. BLM Has Violated ESA Section 7 Because the Agency Failed to Consult with FWS Regarding the Gate Canyon Project’s Potential Harm to Mexican Spotted Owl.

For over a decade, Duchesne County, Utah has proposed improving and realigning the portion of the Wells Draw Road (“the Road”) that traverses through Gate Canyon. *See* BLM, Wells Draw Road Amendment – Gate Canyon Environmental Assessment, 1-2 (April 2026) (“2026 EA”), attached as Ex. 1. Approximately 3.4 miles of the Road cross lands managed by the Utah Trust Lands Administration and 2.8 miles traverse BLM-managed land (bookending the TLA segment). In its Decision, BLM’s Vernal Field Office approved Duchesne County’s proposed improvements and realignments. *See generally* BLM, Wells Draw Road Amendment – Gate Canyon Decision Record (April 2026) (“2026 Decision Record”), attached as Ex. 2.

BLM did not consult with FWS prior to approving the Gate Canyon Project because BLM asserted “[t]here were no [threatened and endangered] issues identified.” 2026 EA at 23. BLM reached this conclusion despite the fact that a significant portion of the Gate Canyon Project and the surrounding landscape encompasses modeled habitat for the Owl, indicating that the Owl “may be present” over the life of the Project. *See* Southern Utah Wilderness Alliance, Map, Modeled Mexican Spotted Owl Habitat Wells Draw Road Amendment – Gate Canyon Project (April 2026) (“Owl Map”), attached as Ex. 3.<sup>2</sup>

The Gate Canyon Project is an agency action under the ESA which triggered BLM’s and FWS’s obligations to consult on impacts to the Owl. The Project qualifies as an action under the ESA because it was authorized in part by BLM, as the 2026 EA and 2026 Decision Record demonstrate, and will directly and indirectly cause modifications to the land, water, and air within the Project area. Among other things, the Project calls for the widening, paving, and realigning of 5.3 miles of road between the Gate Canyon summit and the intersection with Nine Mile Canyon Road, in addition to two designated parking areas. *See* 2026 EA at 5-6. A total of

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<sup>2</sup> The Owl habitat model that Southern Utah Wilderness Alliance used to prepare this map is the 1997 Willey-Spotskey Mexican Spotted Owl Habitat Model. BLM regularly uses this model when evaluating Owl impacts in Utah. *See, e.g.*, BLM, West Tavaputs Plateau Natural Gas Full Field Development Plan Final Environmental Impact Statement, DOI-BLM-UT-G020-2005-0055-EIS, at 3-133 (July 2010) (explaining BLM’s use of the Willey-Spotskey model and specifically identifying “good” Owl habitat to be near the confluence of Sheep Canyon and Gate Canyon), available at <https://eplanning.blm.gov/Documents/?id=2649c2c5-a7f2-f011-8406-001dd802fdea&spid=80e0fa78-a8f2-f011-8407-001dd80db62a>; BLM Utah 2025 Third Quarter Competitive Oil and Gas Lease Sale Environmental Assessment, DOI-BLM-UT-0000-2025-0001-EA, at 29 (Sept. 2025) (using this model in BLM’s leasing analysis), available at <https://eplanning.blm.gov/Documents/?id=dac812fd-a7f2-f011-8406-001dd8008d46&spid=271e198f-a8f2-f011-8407-001dd80c29f3>; BLM Utah 2025 Fourth Quarter Competitive Oil and Gas Lease Sale Environmental Assessment, DOI-BLM-UT-0000-2025-00003-EA, at 46 (Aug 2025) (same), available at <https://eplanning.blm.gov/Project-Home/?id=f30babe9-a7f2-f011-8406-001dd802fdea>; BLM Utah 2026 First Quarter Competitive Oil and Gas Lease Sale Environmental Assessment, DOI-BLM-UT-0000-2026-0001-EA, at 124 (Dec. 2025) (same), available at <https://eplanning.blm.gov/Documents/?id=f539daf8-a7f2-f011-8407-001dd80db62a&spid=4f56a896-a8f2-f011-8407-001dd803d7d3>. BLM has never disputed the accuracy of this habitat mapping data.

90.2 acres will be affected by the realignment and improvements to the Road. *Id.* at 7. The proposed realignments involve eliminating several hairpin turns, which will require blasting, cutting, digging, or otherwise altering the canyon walls on either side of the existing road. *See id.* at 8. Under any scenario, BLM’s authorization and the subsequent development and operation of the Gate Canyon Project meets the ESA’s regulatory definition of “action.”

Although the Gate Canyon Project meets the ESA’s regulatory “action” definition, BLM did not initiate the consultation process with FWS regarding the potential impacts to the Owl despite the presence of modeled suitable habitat surrounding portions of the Project. *See* Ex. 3 (Owl Map). This modeled habitat indicates that the Owl may be present in the action area, and thus triggers BLM’s duty to engage in, at a minimum, informal consultation and prepare a biological assessment. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(c). On information and belief, BLM did not engage in informal consultation or prepare the requisite biological assessment. At most, BLM relied on a 2022 survey that found “no suitable habitat nor individuals within 0.5 miles of the project area.” 2026 EA at App. A, at vi. This one-sentence statement does not comply with the ESA. First, it does not state that the Gate Canyon Project will not affect the Owl. Second, previous surveys provide no insight into whether the Owl currently may be present in the action area, or is likely to occur there during construction. Third, the 2026 EA fails to define the “project area,” so there is no explanation of where the surveys were conducted or whether they covered the entire action area for the Gate Canyon Project. *See* 50 C.F.R. § 402.02 (definition of “action area”).

Further, in a previous iteration of this project, BLM acknowledged that its then-proposed action authorizing the widening, improvements, and realignment of the Road through Gate Canyon “may affect” the Owl, thus triggering, at a minimum, informal consultation. *See, e.g.,* BLM, Gate Canyon Road Improvement Project UTU-81573 Draft Environmental Assessment, at 5, 10 (“A list of migratory birds that may potentially occur within the project area” includes “Mexican spotted owl”), 14, 17, 19-20, 25-26, 119 (2015) (“2015 EA”), attached as Ex. 4. The 2015 EA states:

“The proposed project area is located within one-half mile of fair and good Mexican spotted owl habitat units. These units are based on modelling, and were ground-truthed, assessed, and categorized for probability of representing suitable nesting habitat.” *Id.* at 10.

“Due to the proximity of potentially suitable habitat units, *implementation of the proposed action may affect*, but would not likely adversely affect the Mexican spotted owl.” *Id.* at 14 (emphasis added). *See also id.* at 17 & 20 (same).

The 2026 EA makes no mention of these prior conclusions even though the now-approved action varies little from the previously proposed action. *Compare* 2026 EA at 8 *with* 2015 EA, Appx. A, Map 1 (Ex. 4). If anything, the approved action is *more* likely to affect the Owl than that proposed in 2015 because the 2026 EA predicts the current proposal will result in a *larger* right-of-way and more surface disturbance. *Compare* 2026 EA at 7 (proposed right-of way encompasses 90.2 acres, with maximum corridor width of 400 feet) *with* 2015 EA at 5 (proposed right-of way encompasses 65.2 acres, with maximum corridor width of 350 feet).

BLM's approval of the Gate Canyon Project is a federal action under the ESA where the Owl may be present. BLM's one sentence statement that prior surveys did not detect any owls does not equate to a "no effect" determination that the Project will definitively not affect the Owl.<sup>3</sup> Nor are we aware that BLM provided a "not likely to adversely affect" determination to FWS, and that FWS concurred in that conclusion, based on the FWS's use of the best available data. Accordingly, BLM's failure to prepare a biological assessment to determine whether formal consultation is necessary before issuing the Decision, and its failure to enter into and complete informal consultation, violates ESA Section 7, 16 U.S.C. § 1536(a)(2). FWS's failure to consult on the Project with BLM either formally or informally also violates Section 7.

### III. Conclusion

By failing to prepare a biological assessment and initiate the consultation process on the Gate Canyon Project's impacts to the Owl and its habitat, BLM and FWS have acted unlawfully and overlooked significant risks to the Owl. Accordingly, pursuant to the citizen suit provision of the ESA, 16 U.S.C. § 1540(g)(2), this letter provides you notice that, unless within 60 days of receipt of this letter BLM withdraws its approval of the Gate Canyon Project, we intend to challenge these actions in federal court. Please direct all communications regarding this matter to the undersigned counsel.

Sincerely,

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<sup>3</sup> A "no effect" determination is only appropriate if, "after a review of the project and any interrelated or interdependent actions, . . . there is no reasonable likelihood that listed species are in the action area, or . . . there will be no direct or indirect effects to the species in the action area." Manual 6840 § .1F3. Here, given the modeled suitable habitat, and the fact that Gate Canyon is a rocky canyon with the steep walls and desert shrubs that the Owl is known to prefer, it is reasonable to assume that the Owl may be present in the action area, both now and during project implementation. See U.S. Fish and Wildlife Serv., *Mexican Spotted Owl Recovery Plan, First Revision*, 25-26 (Sept. 2012) (describing the Owl's preferred habitat in Utah), available at [https://ecos.fws.gov/docs/recovery\\_plan/MSO\\_Recovery\\_Plan\\_First\\_Revision\\_Dec2012.pdf](https://ecos.fws.gov/docs/recovery_plan/MSO_Recovery_Plan_First_Revision_Dec2012.pdf).

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### **TABLE OF EXHIBITS**

- Exhibit 1. BLM, Wells Draw Road Amendment – Gate Canyon Environmental Assessment (April 2026)
- Exhibit 2. BLM, Wells Draw Road Amendment – Gate Canyon Decision Record (April 2026)
- Exhibit 3. Southern Utah Wilderness Alliance, Map, Modeled Mexican Spotted Owl Habitat Wells Draw Road Amendment – Gate Canyon Project (April 2026)
- Exhibit 4. BLM, Gate Canyon Road Improvement Project UTU-81573 Draft Environmental Assessment (2015)