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Western Environmental Law Center

October 5, 2023

Via certified mail return receipt requested

Katie Farmer
President and Chief Executive Officer
BNSF Railway Company
Burlington Northern Santa Fe, LLC
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Fort Worth, Texas 76131-2830

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Burlington Northern Santa Fe, LLC
c/o Berkshire Hathaway, Inc.
The Corporation Trust Company
Corporation Trust Center
1209 Orange Street
Wilmington, New Castle, Delaware 19801

Re: Supplemental Notice of Intent to Sue for Violating the ESA

Dear Addressees:

On October 19, 2019, WildEarth Guardians and Western Watersheds Project, represented by the Western Environmental Law Center, provided you (or your predecessor) with notice of intent to sue BSNF Railway Company and/or Burlington Northern Santa Fe, LLC ("BNSF") for violating Section 9 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1538, by causing, facilitating, or allowing deaths of grizzly bears along railways in Montana. That notice was provided pursuant to, and in accordance with,

Section 11 (g)(2) of the ESA, 16 U.S.C. § 1540(g)(2). We attach a copy of that notice. Since we provided that notice, BNSF has caused, facilitated, or allowed more deaths of grizzly bears along or near railways in Montana. Accordingly, we respectfully provide you with this supplemental notice of our intent to sue you for your role in all of these mortalities.

WildEarth Guardians and Western Watersheds Project have significant, concrete interests in ensuring the long-term survival and recovery of grizzly bears in the West and the Northern Continental Divide and Cabinet Yaak Ecosystems specifically.

1. Grizzly Bears in the Northern Continental Divide Ecosystem.

In 1975, the U.S. Fish and Wildlife Service listed grizzly bears in the lower forty-eight states as threatened with extinction. 40 Fed. Reg. 31,734 (July 28, 1975). Grizzly bears in the contiguous United States are categorized as part of six ecosystems: Bitterroot, Cabinet-Yaak, Northern Cascades, Selkirk, Greater Yellowstone, and Northern Continental Divide.

The Northern Continental Divide Ecosystem, or Recovery Zone, is situated in northwestern Montana. The Northern Continental Divide Recovery Zone stretches more than 8,900 square miles and is mostly comprised of public land (85 percent). It includes Glacier National Park, parts of the Flathead and Blackfoot Indian reservations, portions of five national forests (Flathead, Helena, Kootenai, Lolo, and Helena-Lewis and Clark), Bureau of Land Management lands, and state and private lands. Also within this region are five federally-designated wilderness areas (Bob Marshall, Mission Mountains, Great Bear, Rattlesnake, and Scapegoat), one Tribal wilderness area designated by the Confederated Salish and Kootenai Tribes, and one federally-designated Wilderness Study Area. This area is contiguous to Canadian grizzly bear populations, and interchange of grizzly bears has been documented.

The 2023 population estimate for grizzly bears in the Northern Continental Divide Ecosystem is 1,163 bears. The survival and recovery of grizzly bears in the Northern Continental Divide Ecosystem depends in part on sufficient connectivity between grizzly bear population source and sink areas, including on lands outside of the ecosystem boundaries. Moreover, the recovery of the grizzly bear as a species in the lower 48 states is contingent in part on the successful movement of grizzlies from the Northern Continental Divide Ecosystem to the Bitterroot Ecosystem, which provides some of the most important habitat for recovery of the species in the lower 48 states.

2. Background on the ESA.

The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *TVA v. Hill*, 437 U.S. 153, 179 (1978). Congress enacted the ESA to prevent the extinction of species, and to allow them to recover so they may be

de-listed. *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059, 1070 (9th Cir. 2004); see 16 U.S.C. § 1532(3) (defining “conservation” as all methods that can be employed to “the point at which measures provided pursuant to [the ESA] are no longer necessary”). Survival and conservation (recovery) of listed species are the “two different (though complimentary) goals of the ESA.” *Id.*

Under Section 9 of the ESA, it is unlawful for any person to “take” a species listed as endangered. 16 U.S.C. § 1538(a)(1)(B). However, the take prohibition in Section 9 applies to threatened species, including grizzly bears, that were listed under the ESA before September 26, 2019. 50 C.F.R. § 17.31; 84 Fed. Reg. 44,753 (Aug. 27, 2019).

“Take is defined in the broadest possible manner to include every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife.” *Defenders of Wildlife v. Administrator, EPA*, 882 F.3d 1294, 1300 (8th Cir. 1989). To “take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.” *Id.* § 1532(19). “Take” includes direct as well as indirect harm, and need not be purposeful. *Babbitt v. Sweet Home Chapter of Comm’s for a Great Oregon*, 515 U.S. 687, 704 (1995). Take liability may exist in the context of accidents. *Nat’l Wildlife Fed. v. Burlington Northern R.R.*, 23 F.3d 1508, 1512 (9th Cir. 1994).

While “harm” flows from “an act which actually kills or injures wildlife,” a listed species is “harassed” by any “intentional or negligent act or omission which creates the likelihood of injury...by annoying it to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering.” 50 C.F.R. § 17.3.

3. Illegal Take of Grizzly Bears By Trains in Montana.

The ESA provides that it is unlawful for any “person” to “commit, solicit another to commit, or cause to be committed, any offense defined” in Section 9. 16 U.S.C. § 1538(g). Under the ESA, “‘person’ means any individual, corporation, trust, association, or any other private entity. . . .” *Id.* § 1532(13).

Parts of the railway in Montana owned, operated, or used by BSNF and/or by its agents, licensees, or assignees, are within or adjacent to the recovery area for grizzly bears in the Northern Continental Divide Ecosystem, and other areas that grizzlies inhabit. Courses of the railway are often physically parallel to adjacent highways, relatively confined to valley bottoms and passes, and bounded by mountains. As such, the railway is located in areas where grizzly bears are; where they feed, forage, or find other habitat; and/or where they may frequent.

It appears approximately 1.2-1.5 trains run per hour on the railways in Montana owned, operated, or used by BSNF, and/or its agents, licensees, or assignees. It appears that

train volume slightly increases at twilight and night-time (low of 1.2 trains/hour at 7 pm and high of 1.75 trains at 2 am). Train speeds along the railway vary but appear to average 35 miles per hour, but can reach higher speeds.

Some of the best available commercial and scientific data show that from 1980-2018, trains owned, operated, leased, or otherwise in the control or authority of BSNF killed or caused to be killed approximately 52 grizzly bears from the Northern Continental Divide Ecosystem. From 1997 to 2013, trains caused 9% of reported grizzly deaths in the Northern Continental Divide and Cabinet Yaak ecosystems.

As to the spatial distribution of where it may be likely that trains will kill grizzlies, for grizzlies within the North Continental Divide Ecosystem, Waller & Servheen (2005) found that between 1980 and 2002, 29 grizzlies were killed by trains in the 109-kilometer (67-mile) stretch between West Glacier, Montana and Browning, Montana.

As to the seasons of train-caused grizzly mortalities, Mattson (2019) found that a peak of grizzly mortalities during May is followed by a decline through the end of summer, after which mortalities rise to a second peak during September and October. The seasons of mortalities differ somewhat from grizzlies' normal foraging cycle, which is a period of peak feeding (hyperphagia) in mid-July that lasts until grizzlies begin to hibernate in late November. The seasonal nature of most train-caused mortalities may be due in part to: (1) exposed, snow-free herbaceous vegetation along railways, compared to surrounding lands, in the spring, (2) carrion on or near railways from ungulates killed by train strikes in the winter, and (3) leaked grain from hopper cars after grain harvests in the fall. Indeed, eight of nine grizzly bear mortalities along the railway between 2010 and 2018 appear to have occurred in September and October, coincident with grain shipments.

As to the timing of the day when grizzlies may be present on railways, and how it may factor into the take of grizzlies by trains, grizzlies may not cross highways adjacent to the railway during the day, because there may be too many vehicles. But they may cross highways at crepuscular (twilight) and night-time hours, when there are fewer vehicles. That may matter because (1) grizzlies feed during twilight hours and (2) along the BSNF railways, train volume slightly increases at twilight and night-time (low of 1.2 trains/hour at 7 pm and high of 1.75 trains at 2 am) compared to the day. It appears train volume may be relatively higher at night in part because track maintenance is done during the day.

As to the audibility of trains and the ability of grizzlies to escape while on tracks or on a trestle, Backs et al. measured audibility of trains compared to background sound along the Canadian Pacific railway in Banff National Park in Alberta, Canada, where train strikes have killed grizzlies. They found higher counts of animal-train collisions associated with lower train audibility, and emphasized that the "approach sound audibility" of the train matters as to the likelihood of a strike. They and others have recommended motion sensor auditory devices to warn of approaching trains, or to keep grizzlies off of trestles.

In 2019, at least nine grizzlies were killed by trains in Montana alone. Certain of these grizzlies were killed by trains or on railways owned, operated, leased, or otherwise in the control or authority of BSNF or its agents, licensees, or assignees. In 2023, at least three more grizzlies have been killed by BNSF trains or on railways owned by BNSF in Montana.

4. Conclusion

The citizen suit provision of the ESA provides: “[A]ny person may commence a civil suit on his own behalf to enjoin any person...who is alleged to be in violation of any provision of [the ESA]. 16 U.S.C. § 1540(g). A plaintiff can seek to enjoin both present activities that constitute ongoing take and future activities that are reasonably likely to result in take. *See Burlington Northern*, 23 F.3d at 1511.

BNSF has violated and remains in ongoing violation of Section 9 of the ESA and its implementing regulations. If fails to cure these violations promptly, WildEarth Guardians and Western Watersheds intend to file legal claims for declaratory and injunctive relief.

If you believe any of the foregoing is in error, have any questions, or would like to discuss this matter, please do not hesitate to contact me.

Sincerely,

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Literature cited:

Backs, J. 2022. Low audibility of trains may contribute to increased collisions with wildlife. *Transportation Research Interdisciplinary Perspectives* 12, Science Direct.

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Waller, J.S., & Servheen, C. 2005. Effects of transportation infrastructure on grizzly bears in northwestern Montana. *Journal of Wildlife Management* 89(3): 985-1000.

cc: Deb Haaland
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