



VIA CERTIFIED MAIL; RETURN RECEIPT AND FACSIMILE

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RE: 60 Day Notice of Intent to Sue over Violations of Sections 2, 7 and 9 of the Endangered Species Act; Actions Relating to the Endangered Sierra Nevada Bighorn Sheep and Management of the Humboldt-Toiyabe National Forest and Other Public Lands in Mono County, California.

This letter serves as a sixty-day notice on behalf of the Center for Biological Diversity and Public Employees for Environmental Responsibility (collectively “environmental organizations”) of intent to sue the United States Forest Service (“Forest Service”) and the Bureau of Land Management (“BLM”) over violations of Sections 2, 7, and 9 of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531, 1536, 1538, for actions and inactions related to the endangered Sierra Nevada bighorn sheep (*Ovis candensis sierrae*) in the management of the Humboldt-Toiyabe National Forest (“HTNF”) in Mono County, California and other public lands in this area. This letter is provided pursuant to the sixty-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).

Secretary of Agriculture (“Secretary”), through the Forest Service, has violated the ESA by failing to protect and conserve the endangered Sierra Nevada bighorn sheep and its critical habitat in its management of lands within the Humboldt-Toiyabe National Forest (“HTNF”). Similarly, the Secretary of the Interior, through the BLM, has violated the ESA by failing to protect and conserve the endangered Sierra Nevada bighorn sheep and its critical habitat in its management of nearby public lands. The conservation organizations, their members, and staff, have actively participated in efforts to protect the endangered Sierra Nevada bighorn sheep including, but not limited to, petitioning for listing for the species, seeking critical habitat designation for habitat essential to the species’ recovery, participating in recovery plan development, monitoring grazing approvals, and attending public meetings. The Forest Service and BLM have failed to provide any formal public notice or an opportunity for the public to comment on the actions and inactions challenged by the environmental organizations. Therefore, to the extent required by law, the environmental organizations, their members, and staff, have exhausted all available administrative remedies.

As the agencies are well aware, the purpose of the ESA is to conserve the ecosystems on which endangered and threatened species depend and to conserve and recover those species so that they no longer require the protections of the Act. 16 U.S.C. § 1531(b), ESA § 2(b); 16 U.S.C. § 1532(3), ESA §3(3) (defining “conservation” as “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary”). “[T]he ESA was enacted not merely to forestall the extinction of species (i.e., promote species survival), but to allow a species to recover to the point where it may be delisted.” *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service*, 378 F.3d 1059, 1069 (9th Cir. 2004). To ensure that the statutory purpose will be carried out, the ESA imposes both substantive and procedural requirements on all federal agencies to carry out programs for the conservation of listed species and to insure that their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536. *See NRDC v. Houston*, 146 F.3d 1118, 1127 (9th Cir. 1998) (action agencies have an “affirmative duty” to ensure that their actions do not jeopardize listed species and “independent obligations” to ensure that proposed actions are not likely to adversely affect listed species). The act of issuing annual approvals for grazing or annual operating instructions (“AOI”) is a final agency action that clearly triggers the ESA consultation requirement. *See Oregon Natural Desert Association v. USFS*, 465 F.3d 977, 990 (9th Cir. 2006).

Pursuant to the ESA, before authorizing any domestic sheep grazing that may affect the Sierra Nevada bighorn sheep, the Forest Service and BLM must initiate full formal consultation with the Fish and Wildlife Service on all allotments identified in the Recovery Plan and the Risk Assessment. This notice is specifically focused on the allotments posing the greatest risk to Sierra Nevada bighorn sheep in Mono County, California: Dunderberg (HTNF), Tamarack (HTNF), Cameron Canyon (HTNF), Rickey (south) (HTNF), Green Creek (BLM), and Dog Creek (BLM) allotments.

The conservation organizations are informed and believe that the Forest Service and BLM are now considering whether or not to approve any annual domestic sheep grazing on these allotments in 2009. Unfortunately, in the past, the agencies have failed to manage these publically owned lands to conserve and recover the endangered Sierra Nevada bighorn sheep as

required by the ESA. In particular, the agencies have failed to take all necessary steps to protect the Sierra Nevada bighorn sheep from on-going threats of disease transmission from domestic sheep grazing on public lands. As a result of the Forest Service's and BLM's ongoing management of the HTNF, the endangered Sierra Nevada bighorn sheep are at risk of contracting fatal diseases from domestic sheep grazing on public lands. Because any such disease transmission has the potential to devastate large numbers of endangered Sierra Nevada bighorn sheep, undermine the conservation and recovery of the species, jeopardize the continued existence of the species, and destroy or adversely modify critical habitat, the Forest Service's and BLM's actions and inactions in this regard violate the ESA.

Although the Forest Service took some positive steps in recent years to limit the risk of contact, primarily by prohibiting domestic sheep grazing on the Dunderberg Unit of the Dunderberg S&G Allotment ("Dunderberg Allotment"), the Forest Service's continued approval of grazing on the Cameron Canyon, Tamarack, and Rickey (south) allotments in 2008 presented an unacceptable risk to the survival and recovery of the Sierra Nevada bighorn sheep. Similarly, BLM's past approval of grazing on the Green Creek and Dog Creek allotments has allowed for an unacceptable level of risk that could undermine survival and recovery of the endangered Sierra Nevada bighorn.

The conservation groups urge the Forest Service and BLM to correct their ongoing violations, and, in accordance with their duties to conserve and recover the endangered Sierra Nevada bighorn sheep and to protect its critical habitat, decline to authorize any domestic sheep grazing on the high-risk allotments for the 2009 grazing season.

I. BACKGROUND ON SIERRA NEVADA BIGHORN

A. Listing and Recovery Efforts

The Sierra Nevada bighorn sheep was listed by the Service as an endangered species on January 3, 2000. 65 Fed. Reg. 20-30 (January 3, 2000) ("Final Listing Rule"). Sierra Nevada bighorn sheep are currently found only on the eastern slopes of the Sierra Nevada mountain range. *Id.* at 20. They inhabit the high rock slopes, from 10,000 to 14,000 feet, much of the year, but migrate to lower elevations to find forage. The current and historical habitat for the Sierra Nevada bighorn sheep is almost entirely on lands that are now federal public lands managed by the United States Forest Service, the Bureau of Land Management, and the National Park Service. The Sierra Nevada bighorn sheep population probably began declining with the influx of gold miners to the Sierra Nevada in the mid-1880s and losses continued through the 1900s.

In addition to being killed by predators, Sierra Nevada bighorn sheep died in large numbers from diseases contracted from domestic cattle and sheep. Only two subpopulations of Sierra Nevada bighorn sheep remained in the 1970s. The Sierra Nevada bighorn sheep was listed as threatened by the State of California in 1971 under the California Endangered Species Act ("CESA") and listed as endangered in 1999 under CESA. The State listing led to a reintroduction effort to increase the population of Sierra Nevada bighorn sheep and to reestablish the species throughout its historic habitat.

During the 1980s, the Sierra Nevada bighorn sheep abandoned regular use of high-quality, low-elevation winter ranges. The lack of proper winter forage and hazards of remaining in the high elevations through the winter months (such as avalanches) led to a sharp decline in the population of Sierra Nevada bighorn sheep from a total population of approximately 310 in 1985 to approximately 100 in 1998, with a slight rise in 1999 to approximately 125.

In response to the documented decline and ongoing threats to this species, on February 12, 1999, the Friends of the Inyo, National Parks and Conservation Association, Natural Resources Defense Council, Sierra Nevada Bighorn Sheep Foundation, and The Wilderness Society petitioned to list the Sierra Nevada bighorn sheep as endangered throughout its range, with a special request for an emergency listing under the ESA. On April 20, 1999, the U.S. Fish and Wildlife Service published an emergency rule to list the Sierra Nevada bighorn sheep as endangered (64 Fed. Reg. 19300), as well as a proposed rule (64 Fed. Reg. 19333) to list the species as endangered. On January 3, 2000, the Fish and Wildlife Service published a final rule that continued the protections afforded by the emergency listing. Final Listing Rule, 65 Fed. Reg. 20-30. After the emergency and final listing of the Sierra Nevada bighorn sheep as endangered in 1999 and 2000, the population began to increase. By 2001 the total population estimate was approximately 250 and, as of April 2005, the total population estimate was between 300 and 350.

The primary threats to the survival of Sierra Nevada bighorn sheep include disease, predation by mountain lions, and small population size. Final Listing Rule, 65 Fed. Reg. at 25-26. As the Fish and Wildlife Service stated in the Final Listing Rule:

Based on available information, and given the susceptibility of bighorn sheep to introduced pathogens, disease will continue to pose a significant threat to the survival of Sierra Nevada bighorn sheep until the potential for contact with domestic sheep is eliminated.

Id. at 25. Risk of contact and contagion is greatest where domestic sheep are allowed to graze in or near Sierra Nevada bighorn sheep habitat. *Id.*

B. The Recovery Plan, Critical Habitat, and Risk Assessment

The recovery plan for the Sierra Nevada bighorn sheep was adopted on September 24, 2007. Recovery Plan for the Sierra Nevada Bighorn Sheep (“Recovery Plan”). In 2008, critical habitat was designated for the species. *Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Sierra Nevada Bighorn Sheep (Ovis Canadensis sierrae) and Taxonomic Revision; Final Rule*, 73 Fed. Reg. 45534-45604 (August 5, 2008) (“Final Critical Habitat”). In February 2009, a team of scientists finalized the Risk Assessment to be used as part of the Recovery Plan. Baumer, *et al.*, “A Process for Identifying and Managing Risk of Contact between Sierra Nevada Bighorn Sheep and Domestic Sheep,” February 2009 (“Risk Assessment”).

The recovery actions in the Recovery Plan include the following:

2.3 Minimize probability of bighorn sheep contracting diseases causing mortality and morbidity. Introduced diseases have probably been the primary cause of extirpation of bighorn sheep herds in North America. They represent one of the greatest threats.

2.3.1 Prevent contact between bighorn sheep and domestic sheep or goats.

Prevention of contact between domestic sheep or goats and bighorn sheep will require coordination and cooperation between grazing permittees, land management agencies, and regulatory agencies. We recognize the need to provide specific guidance to land managers regarding allotments and grazing practices that are likely to result in contact between domestic sheep or goats and bighorn sheep. A risk assessment is currently being developed to be used as a tool for analyzing grazing practices on certain allotments. Land management agencies should utilize this risk assessment and coordinate with other agencies to implement measures that will prevent contact between domestic sheep and bighorn sheep. These measures may include seasonal grazing restrictions, implementation of specific herding practices (penning, trailing restrictions, etc.), or removal of bighorn sheep from certain high-risk areas, but *may require the ultimate closure of some allotments that cannot be grazed in a manner that prevents contact.*

Based on current data on bighorn sheep movements, *we are recommending the closure of some high-risk allotments* and seasonal restrictions on other allotments in the interim (See Section E below). In addition, we recognize the need to address the potential for contact between domestic sheep or goats and bighorn sheep on private lands, so we are recommending a strategy of landowner education, conservation easements, and land acquisition (See Section E below). In addition, we are recommending a strategy for incorporation of the risk assessment for analysis of future disease transmission risk on other allotments that may become higher risk as bighorn sheep expand their current distribution (See Section E below).

Recovery Plan at 51 (emphasis added). Section E of the Recovery Plan specifically recommends:

Recommendation 1 (Closures of High-Risk Allotments): We recommend that the Inyo and Humboldt-Toiyabe National Forests and the Bureau of Land Management – Bishop Field Office close domestic sheep grazing allotments that pose a high risk of disease transmission or consider other uses that are not potential threats to Sierra Nevada bighorn sheep. As of this writing, we believe the *Dunderberg, Tamarack, Cameron Canyon, Rickey (south), Green Creek (BLM), and Dog Creek (BLM) allotments pose a relatively high risk to Sierra Nevada bighorn sheep*, with Dunderberg representing the greatest current risk. Therefore, based on the best available information, such as documented bighorn

sheep movement patterns and modeling of areas that bighorn sheep are likely to use, *we recommend closure of these allotments to domestic sheep grazing.*

...
The Jordan Basin, Summer's Meadow, Horse Meadow, Alger's Lake, June Lake (west), and Bloody Canyon allotments should remain vacant or inactive, be closed, or be converted to uses that are not a potential threat to Sierra Nevada bighorn sheep.

Recovery Plan at 64 (emphasis added).

The Risk Assessment released in February 2009 reinforces these conclusions. *See Risk Assessment at 31-33 (showing that these allotments have among the very highest risk values). The Risk Assessment reiterates what the Recovery Plan already determined – that the Dunderberg, Tamarack, Cameron Canyon, Rickey (south), Green Creek (BLM), and Dog Creek (BLM) allotments all pose a severely high risk to the future well being of the Sierra Nevada bighorn. Risk Assessment at 30-36. As stated in the Risk Assessment, it was designed to*

provide[] a means to better understand and assess the likelihood of contact between domestic sheep (and goats) and Sierra Nevada bighorn sheep, a federally endangered species. The likelihood of contact plays a role in the risk of transmitting diseases to Sierra Nevada bighorn sheep from domestic sheep in the Sierra Nevada (Tuolumne, Mono, Fresno, Inyo, and Tulare Counties) California. Contact may result in the possible introduction of new pathogens to Sierra Nevada bighorn sheep that may cause pneumonia. There is concern that this could lead to the loss of entire bighorn sheep herds in the Sierra Nevada.

Risk Assessment at 1 (emphasis added). The Risk Assessment makes clear that it relied on well established published literature to reach its findings:

The possibility of contact between Sierra Nevada bighorn sheep and domestic sheep (and goats) can be determined, in part, by quantitatively estimating the relative likelihood of a bighorn sheep moving into a domestic sheep allotment. This approach uses a Geographic Information System (GIS) to approximate the likelihood of a bighorn sheep moving into or through habitat by incorporating known locations of bighorn sheep, habitat characteristics, and domestic sheep allotments. The techniques used are well established in the literature and include habitat suitability modeling (e.g., Zeigenfuss et al. 2000) and least-cost pathway modeling (e.g., Beazley et al. 2005).

Risk Assessment at 4.

In short, the Recovery Plan and Risk Assessment show that the Forest Service and BLM must immediately take action to prevent disease transmission to the Sierra Nevada bighorn. While the above mentioned allotments should be closed in order to protect the Sierra Nevada bighorn even if it were not endangered, the fact of the matter is that the Sierra Nevada bighorn is

highly endangered. Therefore, the agencies should not hesitate to take immediate action to ensure that the species is protected.

The Risk Assessment explains that in some areas management practices for domestic sheep grazing may be sufficient to protect the Sierra Nevada bighorn sheep populations, however, it is clear that “the only method that ensures that contact can not occur is avoiding the use of overlapping ranges by the two species.” Risk Assessment at 11. For each of the six allotments identified for closure in the Recovery Plan, where the risk of disease transmission is acknowledged to be high and the use of overlapping ranges is manifest, closure of the allotments and elimination of domestic sheep grazing is necessary to ensure the survival and recovery of the Sierra Nevada bighorn as required by the ESA.

In addition, to date, neither the Forest Service nor BLM have obtained a biological opinion from the Fish and Wildlife Service that provides comprehensive consultation regarding each agency’s management of all activities on these public lands that have the potential to significantly effect the endangered Sierra Nevada bighorn sheep and its critical habitat. Such a comprehensive consultation is needed to provide expert direction, over a meaningful time frame, for the agencies’ ongoing management of these publically owned lands to ensure the survival and recovery of this endangered species.

II. VIOLATIONS OF THE ESA

A. Violations of Section 7(a)(2); Failure to Consult Regarding Ongoing Management.

Section 7(a)(2) of the ESA requires federal agencies to “insure 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 adverse modification of habitat of such species . . . determined . . . to be critical . . .” 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). To accomplish this goal, agencies must consult with the Fish and Wildlife Service whenever their actions “may affect” a listed species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Section 7 consultation is required for “any action [that] may affect listed species or critical habitat.” 50 C.F.R. § 402.14. Agency “action” is defined in the ESA’s implementing regulations to “mean all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States.” 50 C.F.R. § 402.02. The Forest Service and BLM have to date failed to consult regarding any domestic sheep grazing on the Dunderberg (HTNF), Tamarack (HTNF), Cameron Canyon (HTNF), Rickey (south) (HTNF), Green Creek (BLM), and Dog Creek (BLM) allotments for 2009. Only if the Forest Service and BLM decide to prohibit all domestic sheep grazing on these allotments would such consultation be unnecessary.

Moreover, section 7(d) of the ESA, 16 U.S.C. § 1536(d), provides that once a federal agency initiates consultation on an action under the ESA, the agency “shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.” The purpose of

Section 7(d) is to maintain the status quo pending the completion of interagency consultation. Section 7(d) prohibitions remain in effect throughout the consultation period and until the federal agency has satisfied its obligations under Section 7(a)(2) that the action will not result in jeopardy to the species or adverse modification of its critical habitat. The Forest Service and BLM must initiate consultation with the Fish and Wildlife Service regarding impacts to the species and its designated critical habitat, when the agencies do so the prohibitions of Section 7(d) will apply.

In addition, the agencies have failed to consult regarding the significant effects of other ongoing management actions on the endangered Sierra Nevada bighorn sheep and its designated critical habitat. The Forest Service and BLM have failed to consult with the Fish and Wildlife Service regarding ongoing management actions that may affect Sierra Nevada bighorn sheep and its designated critical habitat and have not obtained any comprehensive biological opinion regarding its ongoing management. Until and unless Fish and Wildlife Service provides a comprehensive biological opinion regarding the impacts of the Forest Service's and BLM's ongoing management activities on the endangered Sierra Nevada bighorn sheep and its designated critical habitat the agencies remain in violation of the substantive provisions of the ESA.

B. Violation of Section 9; Unlawful Taking of Listed Species.

The ESA prohibits any "person" from "taking" threatened and endangered species. 16 U.S.C. § 1538, 50 C.F.R. § 17.31. The definition of "take," found at 16 U.S.C. § 1532(19), states,

The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

The regulations provide further that:

Harass in the definition of "take" in the Act 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.

Harm in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

50 C.F.R. § 17.3

The Forest Service and BLM are in violation of Section 9 of the ESA because they are in violation of Sections 7(a)(2), and have failed to consult with the Fish and Wildlife Service regarding the impacts of domestic sheep grazing and other management activities on the endangered Sierra Nevada Bighorn sheep and its designated critical habitat. Because the Forest Service and BLM have not obtained a comprehensive biological opinion regarding ongoing management, no take of the endangered Sierra Nevada bighorn sheep is properly authorized

(including take from harassment as well as from exposing the species to a high risk of disease transmission). Moreover, if the Forest Service and/or BLM again authorize domestic sheep grazing in areas where there is a high risk of disease transmission they will be in violation of Section 9 of the ESA for causing both harm and harassment by allowing the risk of disease to undermine the value of habitat for the species in this area and because domestic sheep grazing will disrupt and significantly impair essential behavioral patterns of the endangered Sierra Nevada bighorn in this area.

In the past, the Forest Service and BLM have authorized domestic sheep grazing in areas that present a high risk of disease transmission to the endangered Sierra Nevada bighorn sheep which could result in take of not only individuals but a significant segment of the remaining population. The Forest Service and BLM cannot continue to ignore the risk of harm created by such activities and the take that is likely to occur. Moreover, in the past the Forest Service authorized direct harassment of endangered Sierra Nevada bighorn sheep in violation of Section 9 of the ESA as part of the so-called mitigation measures to reduce contact between domestic sheep and the endangered Sierra Nevada bighorn. The Forest Service and BLM should refrain from engaging in similar violations of the ESA in 2009.

C. Violation of Section 2(c) and 7(a)(1); Failure to Conserve Listed Species.

Section 2(c) of the ESA establishes that it is “. . . the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.” 16 U.S.C. § 1531(c)(1). The ESA defines “conservation” to mean “. . . the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.” 16 U.S.C. § 1532(3). Section 7(a)(1) of the ESA requires that all federal action agencies “shall, in consultation and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species and threatened species . . .” 16 U.S.C. § 1536(a)(1), ESA § 7(a)(1). *See Pyramid Lake Paiute Tribe v. U.S. Dept. of the Navy*, 898 F.2d 1410, 1417 (9th Cir. 1990) (“agencies have affirmative obligations to conserve under section 7(a)(1)”). Accordingly, the Forest Service and BLM, must administer the publically owned lands they manage “in furtherance” of species conservation.

The Forest Service and BLM are violating section 2(c) and 7(a)(1) of the ESA because the agency’s actions have not furthered the purpose of the ESA and conservation of the Sierra Nevada bighorn sheep but, rather, have allowed and authorized ongoing risks to the conservation and recovery of the species. For example, in recent years the Forest Service refused implement the most basic the conservation recommendations of from the Fish and Wildlife Service that would contribute to the conservation and recovery of the Sierra Nevada bighorn sheep such as eliminating grazing on the Dunderberg (HTNF), Tamarack (HTNF), Cameron Canyon (HTNF), Rickey (south) (HTNF), Green Creek (BLM), and Dog Creek (BLM) allotments. Recovery Plan at 51, 64.

By failing to close these allotments to domestic sheep grazing and adopt the specific conservation measures recommended by the Fish and Wildlife Service to protect and conserve

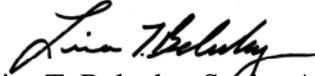
the Sierra Nevada bighorn sheep, protect its critical habitat, and assist in recovery of the species, the Forest Service and BLM have failed to fulfill their duties under the ESA.

III. CONCLUSION

We urge the Forest Service and the BLM to refrain from authorizing any domestic sheep grazing on the Dunderberg (HTNF), Tamarack (HTNF), Cameron Canyon (HTNF), Rickey (south) (HTNF), Green Creek (BLM), and Dog Creek (BLM) allotments in 2009 as recommended in the Recovery Plan and consistent with the Risk Assessment. In addition, we urge the Forest Service and BLM to initiate comprehensive formal consultation with the Fish and Wildlife Service concerning the impacts of all of their ongoing management actions that may affect the endangered Sierra Nevada bighorn sheep and its designated critical habitat pursuant to Section 7(a)(2) of the ESA, and, pursuant to Section 7(d), refrain from authorizing any activities that may affect the species or its critical habitat until such consultation is completed.

If the Forest Service and the BLM do not act within 60 days to correct its ongoing violations of the ESA, the Center for Biological Diversity and Public Employees for Environmental Responsibility will pursue litigation in federal court against the agencies and officials named in this letter. We will seek injunctive and declaratory relief, and legal fees and costs regarding these violations. If you have any questions, wish to meet to discuss this matter, or feel this notice is in error, please contact me.

Sincerely,



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