

August 25, 2017

Chief, USDA Forest Service
201 14th Street SW
Washington, D.C. 20250

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

Secretary, U.S. Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

Director, U.S. Fish and Wildlife Service
1849 C Street, NW
Washington, D.C. 20240

RE: 60 Day Notice of Intent to Sue under the Endangered Species Act, Beaver Creek Project, Flathead National Forest

You are hereby notified that Friends of the Wild Swan (FOWS), Swan View Coalition (SVC), Alliance for the Wild Rockies (AWR) and Native Ecosystems Council (NEC) intend to file citizen suit claims pursuant to the citizen suit provision of the Endangered Species Act (ESA), 16 U.S.C. Section 1540(g) for violations of the ESA, 16 U.S.C. Section 1531 *et seq.* Notifiers will file the claims after the 60 day period has run unless the violations described in this notice are remedied in full. The name, address and phone number of the organizations giving notice of intent to sue are as follows:

Arlene Montgomery, Program Director
Friends of the Wild Swan
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Big Fork, Montana 59911
(406) 886-2011

Michael Garrity, Executive Director
Alliance for the Wild Rockies
P.O. Box 505
Helena, Montana 59624
Tel (406) 459-5936

Keith Hammer, Chair
Swan View Coalition
3165 Foothill Road
Kalispell, MT 59901
Tel: (406) 755-1379

Dr. Sara Jane Johnson, Executive Director
Native Ecosystems Council
P.O. Box 125
Willow Creek, MT 59760
(406) 285-3611

The names, addresses, and phone numbers of counsel for the notifier are as follows:

Rebecca K. Smith, Attorney at Law

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NOTICE OF LEGAL VIOLATIONS

1. THE AGENCIES MUST COMPLETE ESA RECONSULTATION FOR THE NORTHERN ROCKIES LYNX MANAGEMENT DIRECTION REGARDING LYNX CRITICAL HABITAT. IMPLEMENTING THE PROJECT BEFORE RECONSULTATION IS COMPLETE VIOLATES ESA SECTION 7(D).

In 2000, after eight years of litigation by conservation groups, FWS listed the Canada lynx as a threatened species under the ESA. Six years later, FWS designated 1,841 square miles of land as critical habitat for the lynx. The designation did not include any National Forest land as critical habitat. In March 2007, the Forest Service adopted the Northern Rockies Lynx Management Direction (Lynx Amendment). The Lynx Amendment sets management standards and guidelines for certain activities, including logging activities, that occur within designated Lynx Analysis Units on National Forests. The Forest Service amended all of the forest plans for National Forests throughout the Northern Rockies to include the Lynx Amendment.

The Forest Service initiated ESA consultation with FWS on the Lynx Amendment, and FWS issued a Biological Opinion for the Lynx Amendment in 2007. The Biological Opinion concludes that “[n]o critical habitat has been designated for this species on Federal lands within the [areas governed by the Lynx Amendment], therefore none will be affected.” However, citing FWS regulation 50 C.F.R. §402.16, the 2007 Biological Opinion mandates that reinitiation of consultation is “required” if “new . . . critical habitat [is] designated that may be affected by the action.”

Subsequently, FWS announced that its lynx critical habitat designation had been “improperly influenced by then deputy assistant secretary of the Interior Julie MacDonald and, as a result, may not be supported by the record, may not be adequately explained, or may not comport with the best available scientific and commercial information.” 74 Fed.Reg. 8616–01, 8618 (Feb.25, 2009). FWS then revised its lynx critical habitat designation from 1,841 square miles to 39,000 square miles, including critical habitat in National Forests. FWS later revised the designation of lynx critical habitat in 2014. The Forest Service did not reinitiate ESA consultation with FWS on the Lynx Amendment when critical habitat was designated on National Forests.

In *Cottonwood v USFS*, the U.S. Court of Appeals for the Ninth Circuit held that the Forest Service must comply with 50 C.F.R. §402.16 and reinitiate ESA consultation on the Lynx Amendment to address lynx critical habitat. The *Cottonwood* holding is based on the plain language of FWS’s own regulation that mandates reinitiation of consultation under the following circumstances: “(b) If new information reveals effects of the action that may affect . . . critical habitat in a manner or to an extent not previously considered” and “(d) If a new . . . critical habitat [is] designated that may be affected by the identified action.” 50 C.F.R. §402.16. In *Cottonwood*, the Court held that “[t]he 2009 revised critical habitat designation clearly meets the

requirements of subsections (b) and (d) [].” 789 F.3d at 1086. Furthermore, in *Cottonwood*, the Court held: “even though individual projects may trigger additional [ESA] Section 7 scrutiny, that scrutiny is dependent, in large part, on the Lynx Amendments and the 2007 BiOp that were completed before critical habitat was designated on National Forest land. Further, project-specific consultations do not include a unit-wide analysis comparable in scope and scale to consultation at the programmatic level.” 789 F.3d at 1082.

The Supreme Court denied the Forest Service’s petition for a writ of certiorari in *Cottonwood* on October 11, 2016. Consequently, on November 2, 2016, the Forest Service formally reinitiated ESA consultation on the Lynx Amendment. The Forest Service’s letter to FWS states, in part: “On behalf of the U.S. Department of Agriculture, Forest Service, I request reinitiation of Endangered Species Act Section 7 consultation on the Forest Service’s adoption of the Northern Rockies Lynx Management Direction in order to address the impacts of that Direction on the September 12, 2014 revised designation of lynx critical habitat.”

Once the Forest Service reinitiated ESA consultation on the Lynx Amendment on November 2, 2016, ESA Section 7(d) was triggered. ESA Section 7(d) mandates:

(d) Limitation on commitment of resources

After initiation of consultation required under subsection (a) (2) of this section, the Federal agency and the permit or license applicant 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.

16 U.S.C. §1536(d)(emphases added). As the Court held in *Connor v. Burford*, ESA “section 7(d) clarifies the requirements of section 7(a), ensuring that the status quo will be maintained during the consultation process.” 848 F.2d 1441, 1455 (9th Cir. 1988).

In December 2016, the Forest Service signed a Decision Notice approving implementation of a logging project called the Beaver Creek Project (Project) on the Flathead National Forest. All project units are located in lynx critical habitat. The Forest Service and FWS prepared an ESA Section 7 consultation for the Project and concluded that the Project is likely to adversely affect lynx critical habitat.

It is well-established law that “timber sales constitute per se irreversible and irretrievable commitments of resources under [ESA] §7(d) . . .” *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1057 (9th Cir. 1994). Thus, “individual [timber] sales cannot go forward until the consultation process is complete on the underlying plans which [the agency] uses to drive their development.” *Lane Cnty. Audubon Soc. v. Jamison*, 958 F.2d 290, 295 (9th Cir. 1992). In *Jamison*, the Court further held: “Such an injunction is necessary because until consultation is satisfactorily concluded with respect to the Jamison Strategy, or indeed any other conservation strategy intended to establish the criteria under which sites for sales are to

be selected, the sales cannot lawfully go forward. The ESA prohibits the “irreversible or irretrievable commitment of resources” during the consultation period. 16 U.S.C. § 1536(d). The sales are such commitments.” *Id.*

In accordance with this well-established, binding precedent, because the Beaver Creek Project is a series of one or more timber sales, the Project “cannot go forward until the consultation process is complete on the underlying” Lynx Amendment. *See id.*; *Pac. Rivers*, 30 F.3d at 1057; *see also Silver v. Babbitt*, 924 F. Supp. 976, 988-89 (D. Ariz. 1995); *AWR v. Marten*, --- F.3d ---, 2017 WL 2345656 (D. Mont. 2017). The Lynx Amendment is the “conservation strategy intended to establish the criteria under which sites for sales are to be selected,” therefore “until consultation is satisfactorily concluded with respect to the” Lynx Amendment, “the sales cannot lawfully go forward.” *See Jamison*, 958 F.3d at 295.

2. THE AGENCIES MUST INITIATE AND COMPLETE RECONSULTATION ON AMENDMENT 19 TO THE FLATHEAD NATIONAL FOREST PLAN REGARDING THE APPLICATION OF 19/19/68 TO THE GRIZZLY BEAR SUB-UNITS THAT NOW HAVE OVER 75% USFS OWNERSHIP DUE TO THE LEGACY LANDS TRANSFER.

As provided in 50 C.F.R. § 402.16, reinitiation of formal consultation is required where discretionary federal agency involvement or control over the action has been retained or is authorized by law and: (a) if the amount or extent of incidental take anticipated in the first-tier biological opinion is exceeded; (b) if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (c) if the agency action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or (d) if a new species is listed or critical habitat designated that may be affected by the identified action.

On August 5, 2016, USFWS received a letter from USFS disclosing that there are seven grizzly bear subunits in the Swan Valley to which Forest Plan Amendment 19 (A19) numerical objectives now apply (Lion Creek, Piper Creek, Meadow Smith, Cold Jim, Hemlock Elk, Buck Holland, and Glacier Loon subunits). As a result of a land transfer known as the Montana Legacy Project, these seven Swan Valley subunits now have greater than 75 percent Forest Service ownership and thus, the numerical objectives of A19 now apply to these subunits. The existing Biological Opinion for Amendment 19 to the Flathead Forest Plan was issued in 2014, which was before the USFS agreed to apply Amendment 19 “19/19/68” requirements to the seven subunits listed above.

In fact, the 2014 A19 Biological Opinion represents that the 19/19/68 requirements do not apply to these seven units: “Ten of the 11 subunits affected by the SVGBCA were less than 75 percent Forest lands at the time A19 was completed: Porcupine Woodard, Piper Creek, Cold Jim, Hemlock Elk, Glacier Loon, South Fork Lost Soup, Goat Creek, Lion Creek, Meadow Smith, and Buck Holland. These subunits are subject to A19’s management direction of no net gain of access density and no net loss of core on Forest lands. The PCTC lands acquired by the Forest in 2010 resulted in 7 of these 14 subunits having greater than 75 percent Forest ownership (Lion Creek, Meadow Smith, Buck Holland, Piper Creek, Cold Jim, Hemlock Elk, and Glacier Loon). However, these lands have an encumbrance on them until December 31, 2018 and the A19 management direction for those subunits affected by the acquired land will remain as no net increase in OMAD and TMAD and no net decrease in core due to Forest actions.” FWS further represents: “The Forest Service has

acquired private lands in the area covered by the Agreement, known as the Montana Legacy Project. The newly acquired Legacy lands would result in 7 subunits having greater than 75 percent Forest ownership. However, the Legacy property is subject to the terms of an encumbrance known as "the Fiber Supply Agreement" dated December 15, 2008 between The Nature Conservancy and Plum Creek Marketing, Inc. The encumbrance is expected to remain in effect until December 31, 2018, so subunits currently within the SVGBCA and displayed in the Amendment 19 Decision Notice (March 1995)(Figure 1, page 6) will continue to be managed under the management direction of 1) no net increase in OMAD or TMAD due to Forest actions and 2) no net decrease in core due to Forest actions. The former Plum Creek lands will remain under the SVGBCA until the encumbrance expires and the direction for management of those lands is changed in a decision on the Revised Flathead National Forest Plan." USFS corrected these FWS misconceptions in its August 5, 2016 notice to FWS, but FWS nonetheless incorrectly maintains that the A19 2014 Biological Opinion is lawful.

The application of A19 has been modified to cause an effect to grizzly bears within these seven subunits that is different than the effect addressed in the 2014 A19 Biological Opinion. Moreover, the new application of A19 to these seven subunits will affect grizzly bears in these subunits in a manner or to an extent not previously considered. Because 19/19/68 is not applied to these seven subunits in the 2014 A19 Biological Opinion, there is no existing schedule for compliance with 19/19/68 for these seven subunits. Accordingly, the agencies must initiate and complete reconsultation on A19 to address the application of 19/19/68 to these seven subunits and set a schedule for compliance within these seven subunits.

REMEDY REQUESTED

The Forest Service must withdraw the Decision Notice for the Beaver Creek Project, or otherwise formally suspend Project implementation, until such time as reconsultation on the Lynx Amendment and Amendment 19 is complete. Once reconsultation is complete, the agencies must update their project-specific consultation for the Project to ensure compliance with all measures, terms, and conditions in the updated programmatic reconsultation. If the Project decision is not formally withdrawn within sixty (60) days, notifiers intend to file claims for declaratory and injunctive relief, as well as attorney fees and costs.

Sincerely,
/s/ Rebecca K. Smith
Rebecca K. Smith
Counsel for Notifier

cc: U.S. Attorney General
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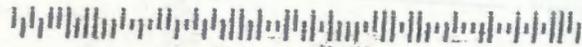
To: **ST3301**

Agency: OES
Stop Code: 3301
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