

Joel Strong

June 26, 2017

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, DC 20240

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

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

Attorney General, U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

**RE: 60 Day Notice of Intent to Sue under the Endangered Species Act:
North & South Pioneer Fire Salvage and Restoration Projects, Boise NF**

You are hereby notified that the parties listed below intend to file a citizen suit claim pursuant to the citizen suit provision of the Endangered Species Act (ESA), 16 U.S.C. § 1540(g), for violations of the ESA, 16 U.S.C. § 1531 et seq.

The name, address, and phone numbers of the organizations giving notice of intent to sue are as follows:

Natalie Ertz, Exec. Dir.	Mike Garrity, Exec. Dir.	Sara Jane Johnson
WildLands Defense	Alliance for the Wild Rockies	Ecosystem Council
P.O. Box 665	P.O. Box 505	P.O. Box 125
Boise, ID 83701	Helena, MT 59624	Willow Creek, MT 59760
(208) 867-0185	(406) 459-5926	(406) 285-3611

The name, address, and phone number of counsel is as follows:

Brian Ertz
WildLands Defense, Inc.
P.O. Box 665
Boise, ID 83701
Tel: (208) 918-1663

STATEMENT OF LAW

The Endangered Species Act (“ESA” or the “Act”) Section 7 requires that all federal agencies work toward recovery of listed species, and it contains both a procedural requirement and a substantive requirement for that purpose. Substantively, it requires that federal agencies insure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any threatened or endangered species, or result in the adverse modification of critical habitat for such species. 16 U.S.C. § 1536(a)(2). The Act’s implementing regulations define “jeopardize the continued existence of” to mean 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 . . .” 50 C.F.R. § 402.02 (emphasis added).

To carry out the duty to avoid jeopardy and adverse modification of critical habitat, ESA Section 7 sets forth a procedural requirement that directs an agency proposing an action (action agency) to consult with an expert agency, in this case, the U.S. Fish & Wildlife Service (“USFWS”), to evaluate the consequences of a proposed action on a listed species. 16 U.S.C. § 1536(a)(2).

The U.S. Court of Appeals for the Ninth Circuit holds that “[o]nce an agency is aware that an endangered species may be present in the area of its proposed action, the ESA requires it to prepare a biological assessment...” *Thomas v. Peterson*, 753 F.2d 754, 763 (1985). If the biological assessment (“BA”) concludes that the proposed action may affect but will not adversely affect a threatened or endangered species, the action agency must consult informally with the appropriate expert agency. 50 C.F.R. §§ 402.14 (b)(1), 402.12(k)(1). Section 7(b)(3)(A) of ESA requires that the Secretary of Interior issue biological opinions (“BO”) on Federal agency actions that “may affect” listed species or critical habitat. Biological opinions determine if the action proposed by the action agency is likely to jeopardize the continued existence of listed species or destroy or adversely modify critical habitat. Section 7(b)(3)(A) of the Act also requires the Secretary to suggest reasonable and prudent alternatives to any action that is found likely to jeopardize the continued existence of listed species or result in an adverse modification of critical habitat, if any has been designated. If the Secretary determines “no jeopardy,” then regulations implementing the Act (50 C.F.R. § 402.14) further require the Director to specify “reasonable and prudent measures” and “terms and conditions” necessary or appropriate to minimize the impact of any “incidental take” resulting from the action(s).

If the BO concludes that the action will not result in jeopardy but may incidentally take or harm a protected species, the expert agency has authority to provide the action agency with an incidental take statement. This statement must specify the impact of such incidental taking on the species, set forth reasonable and prudent measures that the expert agency considers necessary to minimize such impact, and include the terms and conditions that the action agency must comply with to implement those measures. 16 U.S.C. § 1536(b)(4). If the action agency adopts such measures and implements their terms and conditions, the resulting level of incidental take authorized in the incidental take statement is exempted from the ESA’s ban on take. Throughout this assessment process, the agencies must use the best available science. 16 U.S.C. § 1536(a)(2)

(requiring that “[i]n fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available”).

ESA consultation is required for individual projects as well as for the promulgation of land management plans and standards. The requirements apply for a candidate species, proposed for listing, as well as listed species. See, e.g., *Swan View Coalition v. Weber*, 52 F.Supp.3d 1133 (D. Montana, 2014) (applied to wolverine). Only after the Forest Service complies with §7(a)(2) can any activity that may affect the protected [species] go forward. *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, at 1054, 1056-57 (9th Cir. 1994).

On October 11, 2016, the Supreme Court denied the Forest Service’s petition for a writ of certiorari in Cottonwood. *U.S. Forest Service v. Cottonwood Environmental Law Center*, 2016 WL 2840129 (Oct. 11, 2016). During the appellate proceedings in Cottonwood, the Ninth Circuit had stayed its order for re-consultation on the Lynx Amendment to address critical habitat. Now that the certiorari petition in Cottonwood has been denied, 2016 WL 2840129, that stay is no longer in place, and the agencies must now consult on the Lynx Amendment.

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). The purpose of section 7(d) is to “maintain the status quo” during the section 7 consultation process, *Lane County, Audubon Soc’y v. Jamison*, 958 F.2d 290, 294 (9th Cir. 1997), and to “prevent federal agencies from steamrolling activities in order to secure completion of projects regardless of the impacts on endangered species.” *Fla Key Deer v. Brown*, 386 F. Supp. 2d 1281, 1284 (S.D. Fla. 2005), *aff’d sub nom.*, *Fla. Key Deer v. Paulison*, 522 F.3d 1133 (11th Cir. 2008).

It is well-established law that “timber sales constitute per se irreversible and irretrievable commitments of resources under [ESA] §7(d) . . .” *Pacific 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 County Audubon Soc. v. Jamison*, 958 F.2d 290, 295 (9th Cir. 1992).

These procedural consultation requirements in the ESA are judicially enforceable and strictly construed:

If anything, the strict substantive provisions of the ESA justify more stringent enforcement of its procedural requirements [than the provisions of the National Environmental Policy Act], because the procedural requirements are designed to ensure compliance with the substantive provisions. The ESA's procedural requirements call for a systematic determination of the effects of a federal project on endangered species. If a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result. The latter, of course, is impermissible.

Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir.1985).

LEGAL VIOLATIONS

On April 21, 2017 the biological assessments for the North Pioneer Fire Salvage and Reforestation Project was completed and the biological assessment for the Pioneer South Fire Salvage and Reforestation Project was completed on April 24, 2017. On May 31, 2017 U.S. Forest Service Chief Thomas Tidwell signed two separate Decision Memorandums approving the Emergency Situation Determination ("ESD") requests for the North Pioneer Fire Salvage and Reforestation Project and the Pioneer South Fire Salvage and Reforestation Project. The parties to this NOI have exhausted the thus abbreviated administrative remedies for the projects.

The Forest Service and USFWS administration of the North Pioneer Fire Salvage and Reforestation Project and South Pioneer Fire Salvage and Reforestation Project have violated the ESA's procedural and substantive mandates including the Forest Service's failure to rely upon best available science in the informal consultation, 16 U.S.C. § 1536(a)(2); as well as the agencies' failure to initiate formal consultation and the completion of a BO for both projects despite the effects of the actions to protected species and critical habitat being consistent with a *likely to adversely affect* determination. The parties to this NOI have raised a number of issues contributing to the ESA violations caused by the agencies' review and decisions, including the following:

Lynx:

In its October 25, 2016 Canada Lynx Conservation Agreement ("Lynx Agreement"), the U.S. Forest Service and the U.S. Fish and Wildlife Service agreed to, among other things, "Use the Science Report, other relevant science, and LCAS, together with locally specific information as appropriate, as the basis for streamlining section 7 consultation between the FS and FWS." Lynx Agreement at 2.

The Lynx Conservation Assessment and Strategy identifies 17 lynx risk factors in 4 different categories—factors affecting lynx productivity, lynx mortality, lynx movements, and large-scale risk factors Risk factors

identified activities or existing conditions that could adversely affect either individual or groups of lynx.

Id. at 4. (emphasis added). Areas subject to the agreement include “Linkage areas and shrub-steppe habitats adjacent to lynx habitat.” *Id.* at 4.

The North & South Pioneer Fire Salvage and Reforestation Projects occur within a large block of habitat designated as “Secondary Area” situated between the Northwestern Montana/Northeastern Idaho core area, the Greater Yellowstone core area, and part of the Northern Rocky Mountains geographic area. Secondary Area habitats facilitate support of lynx dispersal between core areas in what is identified as Linkage Areas.

North Pioneer Fire Salvage and Reforestation Project

The North Pioneer Fire Salvage and Reforestation Project Area encompasses a most direct habitat corridor between the Pilot-Sunset and the Clear Creek Lynx Analysis Units (“LAU”). The Project effectively bifurcates potential and suitable habitat blocks between the Pilot-Sunset and the Clear Creek LAUs, imposing the Project’s management activities, disturbances, and consequent direct and cumulative activities/impacts on a tract of Project Area within which lynx have been recently sighted utilizing habitat. The Project will result in a decrease of at least 328 acres of habitat due to logging in potential or suitable lynx habitat, potential disturbances associated with reforestation activities in 623 acres, along with direct and cumulative impacts of over 8-miles of roading and/or road maintenance activities; for at least 20 years immediately occurring along and within the margins of two facing habitat blocks, aggravating spatial isolation between the LAU’s while exacerbating existing and Project-related disturbance activities and impacts discouraging utilization and transport between the areas.

South Pioneer Fire Salvage and Reforestation Project

The South Pioneer Fire Salvage and Reforestation Project Area encompasses a most direct habitat corridor between the Pilot-Sunset and Jackson Peek Lynx Analysis Units, effectively bifurcating suitable habitat blocks between the LAUs and imposing the Project’s management activities, disturbances, and consequent direct and cumulative activities/impacts on a tract of Project Area within which lynx have been recently sighted utilizing habitat. The Project will result in a decrease of at least 135 acres of habitat due to logging in suitable lynx habitat, potential disturbances associated with reforestation activities in 503 acres, along with direct and cumulative impacts of over 2-miles of roading and/or road maintenance activities, for at least 20 years immediately occurring along and within the margins of two facing habitat blocks, aggravating spatial isolation between the LAU’s while exacerbating existing and Project-related disturbance activities and impacts discouraging utilization and transport between the areas.

Now that ESA Section 7(d) has been triggered, and re-consultation has been ordered, the North and South Pioneer Fire Salvage and Reforestation Projects cannot go

forward until the consultation process is complete on the underlying Lynx Amendment. See, e.g.: Jamison, *supra.*, at 295; Pac. Rivers, *supra.*, at 1057. While it is true that the Boise National Forest consulted with the U.S. Fish and Wildlife Service on habitat for the Project, the standards, guidelines and objectives in the Northern Rockies Lynx Management Direction have yet to be sanctioned by ESA consultation to determine whether they are adequate to protect lynx. Accordingly, the Projects' Decision Notices cannot issue pending consultation in compliance with the ESA.

Bull Trout:

The modeling and designation of Riparian Conservation Areas ("RCAs") are principally relied upon in the U.S. Forest Service's respective BAs for the projects. RCAs incorporate riparian areas along streams as well as wetlands and floodplains associated with stream systems and ponds, lakes, and reservoirs. RCAs provide both a linkage and transitional habitat between hillslopes and upland terrestrial habitats and the aquatic habitats within the stream channels. The designation of "RCA buffers" for project activities are heavily relied upon to justify the Forest Service's inclusion of overly subjective, simplistic, and dismissive qualifiers minimizing the significance of the impacts to bull trout and critical habitat in the Forest Service's 'Discussion of Effects,' which in the aggregate inform the BAs' ultimate *may affect, but not likely to adversely affect* calls on bull trout and critical habitat. For example:

The buffer widths identified as RCA distances will protect fish and their habitat from proposed actions outside of the RCA. As a result, **proposed actions outside of the RCA** are not expected to result in measurable effects to ESA-listed fish or USFWS designated bull trout critical habitat and **are not further analyzed**.

North Pioneer Fire Salvage and Reforestation Project Biological Assessment at 40 (emphasis added). The underlying geology of the project area consists of Idaho batholith granitics producing highly erosive soils. The project activities will be occurring amidst a recent burn, amplifying the impacts and disturbances to soils and exacerbating potential for erosion associated with proposed actions. Modeling the FS relies upon to assume contained sediment transport does not support the FS's decision to preclude analysis of actions outside of the RCAs. This is particularly true where FS uncertainty exists and where FS admits project impacts will result in exceeding Forest Plan soil standards. For example:

Sediment delivery to streams is difficult to predict in terms of absolute quantities due to the stochastic nature of precipitation events that drive runoff and erosion. Designated RCA buffers for project activities have been designed to minimize the potential for sediment delivery where possible. Observed and modeled sediment transport distances from similar post-fire salvage harvest projects on the Boise National Forest suggest that the designated RCA buffers provide reasonable protection to streams from sediment delivery. Where sediment producing activities are proposed to

occur within RCAs, such as road maintenance, sediment delivery would be minimized through application of design features and BMPs to reduce both sediment production and delivery to streams.

North Pioneer Fire Salvage and Reforestation Project Biological Assessment at 63; South Pioneer Fire Salvage and Reforestation Project Biological Assessment at 75 (emphasis added). This difficulty predicting soil sediment delivery is exacerbated by both Projects' activities resulting in soil conditions that exceed Forest Plan soil standard SWST02 for detrimental soil disturbance, a function of the Forest Service's apparent approach to altering operative definitions throughout its analysis such as to minimize disclosure of actual impact of project activities.

The Designation of Critical Habitat identified Clear Creek and Long Creek as critical habitat for bull trout (USDI FWS 2010) within the North Pioneer Fire Salvage and Reforestation Project area. Within RCAs, hazard trees would be felled and removed on 179 acres and felled and left on-site across 1,216 acres.¹ Roving activities would occur on roughly 115 miles of existing Forest Service roads.²

The Designation of Critical Habitat identified Crooked River, Pikes Fork of the Crooked River and Banner Creek as critical habitat for bull trout (USDI FWS 2010) within the South Pioneer Fire Salvage and Reforestation Project area. Within RCAs, hazard trees would be felled and removed on 747 acres and felled and left on-site across 2,205 acres.³ Roving activities would occur on roughly 175 miles of existing Forest Service roads.⁴

The Pathways and Watershed Condition Indicators ("WCIs") measures and surveys demonstrate that existing disparities between desired habitat conditions and population objectives supporting patches and local populations of bull trout are particularly vulnerable. Current conditions on a variety of reaches and habitats are functioning at risk, functioning at unacceptable risk, and worse. Given the existing condition of populations and habitats and the disparity that exists between desired condition and the current condition, glossing over impacts associated with project activities by narrowing consideration of impacts to those exclusively occurring within RCAs, and even cursory dismissal of consideration to those impacts occurring within RCAs, unlawfully gave rise to the Forest Service's *may affect, but not likely to adversely affect* call in its respective BAs.

¹ North Pioneer Fire Salvage and Reforestation Project Biological Assessment at p. 7.

² "To support large trucks and equipment used to implement the proposed action, road maintenance is proposed on approximately 115 miles of existing NFS roads." North Pioneer Fire Salvage and

² "To support large trucks and equipment used to implement the proposed action, road maintenance is proposed on approximately 115 miles of existing NFS roads." North Pioneer Fire Salvage and Reforestation Project Biological Assessment at p. 8.

³ South Pioneer Fire Salvage and Reforestation Project Biological Assessment at p. 7.

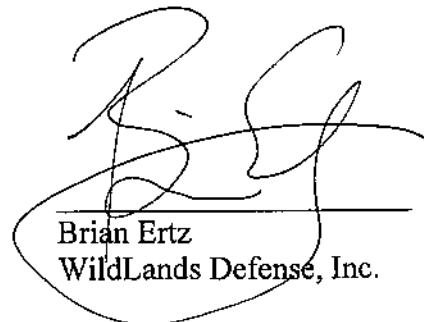
⁴ "To support large trucks and equipment used to implement the proposed action, road maintenance is proposed on approximately 175 miles of existing NFS roads." South Pioneer Fire Salvage and Reforestation Project Biological Assessment at p. 12.

Additionally, On April 27, 2017 the USFWS issued a Biological Opinion on the Effects of the Cold Jim Fuels Reduction and Forest Health Project on Bull Trout and Bull Trout Critical Habitat. The BO was initiated following an in-depth review of a previous concurrence determination following the USFWS's receipt of a 60-Day Notice of Intent to sue on November 29, 2016. The USFWS had previously concurred with the Flathead National Forest's 2015 biological assessment of the Cold Jim Fuels Reduction and Forest Health Project ("Flathead BA"). The Flathead BA was remarkably analogous to that of the North & South Pioneer Fire Salvage and Restoration Projects in its reliance on mechanisms and consequent analysis supporting the Forest Service's *may affect, but not likely to adversely affect* the threatened bull trout, or designated bull trout critical habitat determination on the Cold Jim Project (i.e. the Flathead, in fact promised that "No harvest activity will occur within Riparian Habitat Conservation Areas ("RHCAs")). Following the USFWS's review of its previous concurrence on the Flathead BA, the USFWS determined that the effects of the Cold Jim project to bull trout and bull trout critical habitat were consistent with a *likely to adversely affect* determination requiring formal consultation and a biological opinion, rather than a *not likely to adversely affect* determination and concurrence letter. Like in the Flathead, where the Forest Service attempted to minimize perceived impact in its BA through utilization of RHCAs, BMPs, and alteration of operational definitions that papered over the very real threats on-the-ground, here project impacts associated with the North and South Pioneer Projects are consistent with a *likely to adversely affect* determination and formal consultation is necessary to comply with Section 7 of the ESA.

CONCLUSION

The agencies have ignored their duties under the ESA, 16 U.S.C. Section 1531 et seq., to ensure that their actions do not jeopardize threatened and endangered species and adversely modify critical habitat, that their actions do not result in unauthorized take of these species of wildlife, and that their actions promote conservation and recovery of these species. The agencies actions in this matter represent an unlawful departure from their legally binding mandate to protect and recover imperiled species and their habitats. Within 60 days, the above-named intends to file for declaratory and injunctive relief, as well as attorney and expert witness fees and costs.

Sincerely,



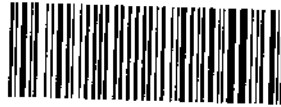
Brian Ertz
WildLands Defense, Inc.

USDA & MRMD & MSB

8/30/2017 7:44:25 AM

To: **ST1144**

Agency: FS
Stop Code: 1144
Location: Yates Bldg.
Room: rm4NW



70170530000107151280



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

PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT
OF THE RETURN ADDRESS. FOLD AT DOTTED LINE
CERTIFIED MAIL®



7017 0530 0001 0715 1280

Brian Ertz
Ertz Law, PLLC
PO Box 665
Boise, ID 83701

**RETURN RECEIPT
REQUESTED**

RECEIVED JUN 30 2017