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July 12, 2017

Sent via Certified Mail; Return Receipt Requested

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Re: 60-Day Notice of Intent to Sue for Violations of the Endangered Species Act Regarding Failure to Initiate Consultation with the U.S. Fish & Wildlife Service Before Approving the Ochoco Summit Trail System Project

To Whom It May Concern:

On behalf of Central Oregon LandWatch (“LandWatch”), we hereby provide notice, pursuant to Section 11(g)¹ of the Endangered Species Act² (“ESA”), of LandWatch’s intent to bring suit against the United States Forest Service (“Forest Service”) for violating the ESA’s consultation requirements before signing the final Record of Decision (“ROD”) for the Ochoco Summit Trail System Project in the Ochoco National Forest (“ONF”).

LandWatch is a non-profit conservation organization that has actively participated in planning and projects on federal land in Central Oregon for over 25 years. LandWatch has provided information to the public, encouraging their participation in these projects and planning processes, and has consistently provided input on behalf of its members and supporters, which total over 200. LandWatch’s members and supporters enjoy recreating in the ONF and are dedicated to protecting the species that are native to Central Oregon.

The Forest Service violated the ESA by failing to consult with the U.S. Fish & Wildlife Service (“FWS”) to ensure that any action authorized, funded, or carried out by the Forest Service was not likely to jeopardize the continued existence of any endangered or threatened species.³ Specifically, the Forest Service failed to ensure against jeopardy by failing to initiate consultation with the FWS despite the fact that the Ochoco Summit Trail System Project may affect gray wolves.

LandWatch requests that the Forest Service takes immediate action to remedy this violation of the ESA’s consultation requirements. This letter constitutes notice prior to commencement of legal

¹ 16 U.S.C. § 1540(g)(2)(A)(i) (2016).

² *Id.* §§ 1531–1544.

³ *Id.* § 1536(a)(2).

action, pursuant to Section 11(g) of the ESA.⁴ If the Forest Service does not take corrective action within 60 days to remedy this violation, LandWatch will pursue litigation over this claim.⁵

I. Legal Background

A. Endangered Species Act

A principal purpose of the ESA is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved”⁶ To achieve this purpose, the Secretaries of Commerce and Interior are responsible for administering and enforcing the ESA.⁷ The Secretary of Commerce delegated this responsibility to the National Marine Fisheries Service (“NMFS”), and the Secretary of Interior delegated this responsibility to the FWS (collectively, the “wildlife agencies”).⁸

In addition to the responsibilities of the Secretaries, all federal departments must seek to conserve threatened and endangered species as well.⁹ The ESA defines “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 Act are no longer necessary.”¹⁰ Section 7 provides one of the methods for federal agencies to conserve listed species. It establishes that federal agencies have a substantive obligation 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”¹¹

To achieve this substantive duty, Section 7 imposes procedural requirements on federal agencies, including a duty to engage in consultation (“Section 7 Consultation”) with either or both wildlife agencies before undertaking a discretionary action that may affect a listed species or critical habitat.¹² The purpose of this consultation is to “obtain the expert opinion of wildlife agencies to determine whether an action is likely to jeopardize a listed species or adversely modify its critical habitat and, if so, to identify reasonable and prudent alternatives that will avoid the action’s unfavorable impacts.”¹³ This purpose and the consultation requirement reflect “a conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies.”¹⁴ The wildlife agencies promulgated regulations regarding Section 7 Consultation that reflect the

⁴ *Id.* § 1540(g)(2)(A)(i).

⁵ *Id.* § 1540(g)(1)(A) (providing judicial review to enjoin a governmental agency who is alleged to be in violation of the ESA).

⁶ *Id.* § 1536(b)(2).

⁷ *See id.* § 1532(15) (defining “Secretary” to include the Secretary of the Interior and the Secretary of Commerce); *see generally id.* §§ 1533–1540 (establishing roles and responsibilities for “the Secretary”).

⁸ 50 C.F.R. § 402.02(b) (2016).

⁹ 16 U.S.C. § 1531(c)(1).

¹⁰ *Id.* § 1532(3).

¹¹ *Id.* § 1536(a)(2).

¹² *Id.*; *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1020 (9th Cir. 2012) (en banc) (citing *Turtle Island Restoration Network v. Nat’l Marine Fisheries Serv.*, 340 F.3d 969, 974 (9th Cir. 2003)).

¹³ *Karuk Tribe*, 681 F.3d at 1020 (citing *Turtle Island*, 340 F.3d at 974).

¹⁴ *Id.* at 1020 (citing *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 185 (1978)).

congressional intent to prioritize listed species and established a three-step process to satisfy a federal agency's procedural obligations. First, Section 7 requires an action agency to inquire with the wildlife agencies regarding whether any listed species "may be present" in the area of the proposed action.¹⁵ Second, if an action agency determines that a listed species "may be present," it must prepare a "biological assessment" or "biological evaluation" to determine whether any listed species "is likely to be affected by the action."¹⁶ Finally, if an action agency determines that the action "may affect" a listed species, then the agency must initiate the consultation process with the relevant wildlife agency.¹⁷

Regarding Step 1, a federal agency must contact the relevant wildlife agency to determine if listed species are in the action area.¹⁸ The wildlife agency will respond to that request by providing a list based on the best scientific and commercial data available as to whether any listed or proposed species or critical habitat may be present in the action area.¹⁹ This list must be current for the action agency to properly complete the consultation requirement.²⁰

At Step 2, after determining that listed species are present, the action agency must determine if the action may affect listed species or critical habitat.²¹ This requirement has two components: "action" and "may affect." The regulations broadly defines agency "action" to include "(a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air."²² The "may affect" threshold is low, encompassing "[a]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character."²³ Thus, an agency can avoid the consultation requirement "only if it determines that its action will have 'no effect' on a listed species or critical habitat."²⁴ However, once an agency determines that its action "may affect" a listed species or critical habitat, "the agency must consult, either formally or informally with the appropriate expert wildlife agency."²⁵

After a finding of "may affect," at Step 3 the action agency must engage in either informal or formal consultation. Informal consultation is an optional process to help the action agency determine whether to engage in formal consultation. During informal consultation, the action agency and the

¹⁵ 16 U.S.C. § 1536(c)(1).

¹⁶ *Id.*; 50 C.F.R. § 402.12.

¹⁷ 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14.

¹⁸ 50 C.F.R. § 402.12(c).

¹⁹ *Id.* § 402.12(d); *see also Alliance v. Krueger*, No. 14-35350, 2016 U.S. App. LEXIS 21563, at *5–6 (9th Cir. Dec. 2, 2016) ("Compliance with Section 7 begins by obtaining from the Fish and Wildlife Service 'a list of any listed or proposed species or designated critical habitat that may be present in the action area.'") (citing 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(c)–(d)).

²⁰ *Cf.* 50 C.F.R. § 402.12(e) (requiring an action agency to verify the current accuracy of a species list if the action agency waits more than 30 days before preparing a biological assessment/evaluation).

²¹ *Id.* § 402.14.

²² *Id.* § 402.02(a)–(d).

²³ Interagency Cooperation Under the Endangered Species Act, 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (codified at 50 C.F.R. Pt. 402); *Karuk Tribe*, 681 F.3d at 1027.

²⁴ *Karuk Tribe*, 681 F.3d at 1027 (citing *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1447–48 (9th Cir. 1996)).

²⁵ *Id.*

relevant wildlife agency confer about what species may be present in the area and discuss the effects of the action on those species. From that discussion, the action agency may determine that the proposed action is “not likely to adversely affect any listed species or critical habitat,” and, if the relevant wildlife agency concurs, formal consultation is not required.²⁶ Thus, the Ninth Circuit has explained that “actions that have *any chance* of affecting listed species or critical habitat—even if it is later determined that the actions are ‘not likely’ to do so—require at least some consultation under the ESA.”²⁷

If informal consultation does not result in a finding that the proposed action is “not likely to adversely affect any species or critical habitat,” the action agency must engage in formal consultation. During formal consultation, the relevant wildlife agency must “formulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.”²⁸ If the wildlife agency issues a finding of jeopardy or adverse modification, it may specify “reasonable and prudent alternatives” that will avoid jeopardy, allowing the action to continue.²⁹

Because the Section 7 procedural requirements ensure compliance with the substantive mandate to protect listed species from jeopardy, “ESA’s procedural [Section 7 Consultation] requirements are as important, and are mandatory to the same degree as its substantive requirements.”³⁰ Thus, “strict substantive provisions of the ESA justify more stringent enforcement of its procedural requirements”³¹

B. Administrative Procedure Act

The ESA contains no internal standard of review for its implementation.³² Thus, a court reviews an ESA claim under Section 706 of the Administrative Procedure Act (“APA”)³³ “[i]rrespective of whether an ESA claim is brought under the APA or the citizen-suit provision [of the ESA].”³⁴ “Under the APA, [a court] may set aside an agency decision if it is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’”³⁵ Furthermore, when an agency has taken action without observance of the procedure required by law, that action will be set aside.³⁶ Review

²⁶ 50 C.F.R. § 402.14(b)(1).

²⁷ *Karuk Tribe*, 681 F.3d at 1027 (emphasis added).

²⁸ 50 C.F.R. § 402.14(g)(4).

²⁹ 16 U.S.C. § 1536(b).

³⁰ *Wash. Toxics Coal. v. U.S. DOI*, 457 F. Supp. 2d 1158, 1178 (W.D. Wash. 2006); see *Ctr. for Biological Diversity v. U.S. BLM*, 698 F.3d 1101, 1114 (9th Cir. 2012) (“[I]f a project is allowed to proceed without substantial compliance with [the ESA’s] 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.”) (quoting *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985)).

³¹ *Id.* (quoting *Thomas*, 753 F.2d at 764).

³² *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 496 (9th Cir. 2010).

³³ 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2016).

³⁴ *W. Watersheds Project*, 632 F.3d at 481.

³⁵ *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1238 (9th Cir. 2005) (quoting 5 U.S.C. § 706(2)(A)).

³⁶ *Idaho Sporting Cong., Inc. v. Alexander*, 222 F.3d 562, 567 (9th Cir. 2000); see also 5 U.S.C. § 706(2)(D).

under the APA is “narrow,” but still “searching and careful.”³⁷ Critical to this inquiry is whether the agency “considered the relevant factors and articulated a rational connection between the facts found and the choices made” in support of the agency’s action.³⁸

II. Factual Background

A. Gray Wolves

Historically, gray wolves occurred “in most of the conterminous United States and Mexico.”³⁹ However, by the 1930s, “wolves were nearly erased from the lower 48 States as a result of one of the most effective eradication campaigns in modern history.”⁴⁰ Prior to a species-based listing under the ESA, the federal government addressed the rapidly declining population of gray wolves in a piecemeal manner, listing multiple subspecies of gray wolves from 1966 to 1976.⁴¹ By 1977, the FWS acknowledged that science supported listing gray wolves at a species level, rather than a subspecies level.⁴² In proposing to list the species as a whole, the FWS explained that “widespread habitat destruction and human persecution” left gray wolves occupying only a small part of its original range in the United States and Mexico.⁴³ Consequently, in 1978, the FWS listed gray wolves as threatened in Minnesota and as endangered in the 47 other conterminous states.⁴⁴ However, since then, the FWS has reverted to listing subspecies or distinct population segments of gray wolves, simultaneously proposing that a portion of gray wolves are “recovered,” though courts have vacated most of these listing decisions.⁴⁵ In 2011, though, the FWS successfully listed Northern

³⁷ *Or. Natural Res. Council v. Allen*, 476 F.3d 1031, 1036 (9th Cir. 2007) (citing *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989)).

³⁸ *W. Watersheds Project*, 632 F.3d at 496 (citing *Nat’l Ass’n of Home Builders v. Norton*, 340 F.3d 835, 841 (9th Cir. 2003)).

³⁹ *Reclassification of the Gray Wolf in the United States and Mexico, with Determination of Critical Habitat in Michigan and Minnesota*, 43 Fed. Reg. 9607, 9607 (Mar. 9, 1978).

⁴⁰ *Humane Soc’y of the U.S. v. Jewell*, 76 F. Supp. 3d 69, 81 (D.D.C. 2014) (quoting Hope M. Babcock, *The Sad Story of the Northern Rocky Mountain Gray Wolf Reintroduction Program*, 24 *Fordham Envtl. L. Rev.* 25, 38 (2013)).

⁴¹ The federal government first listed the “timber wolf” as “threatened with extinction” under Endangered Species Preservation Act of 1966. *Endangered Species*, 32 Fed. Reg. 4001, 4001 (Mar. 11, 1967). In 1973, the federal government listed another subspecies of gray wolf, the Northern Rocky Mountain Wolf, under the Endangered Species Conservation Act of 1969. *Amendments to Lists of Endangered Fish and Wildlife*, 38 Fed. Reg. 14,678, 14,678 (June 4, 1973). The FWS subsequently listed two more subspecies under the modern-day ESA. *Endangered Species*, 41 Fed. Reg. 17,736, 17,737 (Apr. 28, 1976); *Endangered Status for 159 Taxa of Animals*, 41 Fed. Reg. 24,062, 24,066 (June 14, 1976).

⁴² *Proposed Reclassification of the Gray Wolf in the United States and Mexico*, 42 Fed. Reg. 29,527, 29,527 (June 9, 1977) (acknowledging the “taxonomy of wolves is out of date”).

⁴³ *Id.*

⁴⁴ *Reclassification of the Gray Wolf in the United States and Mexico*, 43 Fed. Reg. 9607, 9612 (Mar. 9, 1978).

⁴⁵ *See, e.g., Defenders of Wildlife v. Sec’y, U.S. Dep’t of the Interior*, 354 F. Supp. 2d 1156, 1174 (D. Or. 2005) (vacating a rule to list gray wolves as three distinct population segments and listing two of those as threatened); *Nat’l Wildlife Fed’n v. Norton*, 386 F. Supp. 2d 553, 568 (D. Vt. 2005) (same); *Humane Soc’y of U.S. v. Kempthorne*, 579 F. Supp. 2d 7, 9 (D.D.C. 2008) (vacating a rule to designate a

Rocky Mountain gray wolves as a distinct population segment in Montana, Idaho, eastern Washington, eastern Oregon, and north central Utah, simultaneously delisting this distinct population segment.⁴⁶ Still, gray wolves in *western* Oregon, including the entire action area, remain listed as endangered.

Wolves are primarily predators of medium and large mammals, such as deer, elk, caribou, moose, and sheep.⁴⁷ They are social animals and normally live in packs of two to twelve wolves.⁴⁸ Normally the alpha male and female from each pack will breed annually and produce anywhere from one to eleven pups.⁴⁹ Yearling wolves frequently disperse from their natal packs, possibly becoming nomadic or claiming suitable unoccupied habitat with a member of the opposite sex to begin their own territorial pack.⁵⁰ As the FWS acknowledged, “[t]he dispersal of wolves from their natal packs and territories is a normal and important behavioral attribute of the species that facilitates the formation of new packs, the occupancy of vacant territories, and the expansion of occupied range by the ‘colonization’ of vacant habitat.”⁵¹

B. Ochoco Summit Trail System Project and the Forest Service’s Analysis of Gray Wolves

The Forest Service has been developing the Ochoco Summit Trail System Project since 2009.⁵² After withdrawing the Final Environmental Impact Statement and the Record of Decision for the Project in 2014, the Forest Service issued a Supplemental Draft Environmental Impact Statement in April 2016 and a Supplemental Final Environmental Impact Statement (“SFEIS”) and Draft Record of Decision in September 2016. On June 27, 2017, the Forest Service signed the Final ROD for the Project. The Forest Service’s selected alternative for the Project would designate about 137 miles of trails in the Ochoco National Forest for off-highway vehicle use and includes 53 miles of new

distinct population segment in the Midwest and simultaneously delist that segment); *Humane Soc’y of the U.S.*, 76 F. Supp. 3d at 138 (vacating a rule to establish another distinct population segment in the Midwest and simultaneously delist that segment).

⁴⁶ Reissuance of Final Rule to Identify the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and to Revise the List of Endangered and Threatened Wildlife, 76 Fed. Reg. 25,590, 25,591 (May 5, 2011).

⁴⁷ Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened wildlife in Portions of the Conterminous United States, 68 Fed. Reg. 15,804, 15,804 (Apr. 1, 2003) (rule vacated by two courts: *Defenders of Wildlife*, 354 F. Supp. 2d at 1174, and *Nat’l Wildlife Fed’n*, 386 F. Supp. 2d at 568).

⁴⁸ *Id.* at 15,805.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Revising the Listing of the Gray Wolf in the Western Great Lakes, 76 Fed. Reg. 81,665, 81,673 (Dec. 28, 2011) (rule vacated in *Humane Soc’y of the U.S.*, 76 F. Supp. 3d at 138).

⁵² Expert Report from Amy Stuart on Review and Comment of the September 2016 Supplemental Final EIS (SFEIS) and Draft Record of Decision (ROD) for the Ochoco National Forest (ONF) proposed Summit Trail System Project (Project) and Final Plan Amendments to Paul Dewey 1 (Nov. 4, 2016) (on file with the Forest Service as Appendix A to LandWatch’s objections to this Project) (referencing the 2009 Scoping Letter).

construction.⁵³ In the ROD, the Forest Service addressed its obligations under the ESA for gray wolves and ultimately determined that the Project would have “no effect” on gray wolves.⁵⁴ The Forest Service based this determination on a two-page discussion of gray wolves in the action area in the Biological Evaluation, which it mirrored in the SFEIS.⁵⁵ This discussion does not follow the three-step process for Section 7 Consultation, frequently conflating the “may be present” Step 1 determination, and the “may affect” Step 2 determination.

Regarding the presence of gray wolf in the action area, the Forest Service acknowledged that gray wolf habitat is “present,” specifically “dispersal/transient” habitat.⁵⁶ Though the Forest Service acknowledged the presence of dispersal habitat, it then stated that “[w]olves are not suspected or documented to occur in breeding populations or to persist on Ochoco National Forest.”⁵⁷ When further discussing the presence of wolves in the action area, the Forest Service relied on a definition of “occupied wolf range” from a 1994 FEIS without explaining the relevance—if any—of that definition.⁵⁸ It then provided the following discussion regarding gray wolves in the action area:

Confirmation of wolf presence is to be made or corroborated by the U.S. Fish and Wildlife Service. Therefore, until an active pack is identified within the Ochoco National Forest, USFWS would recommend a no effect determination (personal communication Cordova to Ochoco National Forest, 2012). If a pack (i.e., pair) were to be identified in the project area, the only land restriction would include a Limited Operating Period around den sites (when there are five or fewer breeding pairs of wolves in the recovery area) within a 1-mile radius around the active den site from April 1 through June 30 (personal communication Cordova to Ochoco National Forest, 2012).⁵⁹

The Forest Service subsequently acknowledged that district records “list occasional reports of large canine sightings” in the Ochoco National Forest, including in the analysis area.⁶⁰ When discussing USFWS monitoring data, the Forest Service emphasized that “[n]o breeding packs have been detected on Ochoco National Forest and no wolves are known to consistently occupy any portion of the analysis area.”⁶¹

Based on its discussion of the presence of wolves in the action area, the Forest Service briefly

⁵³ U.S. Forest Serv., *Record of Decision: Ochoco Summit Trail System Project and Forest Plan Amendments 9* (June 2017) [hereinafter *Record of Decision*].

⁵⁴ *Record of Decision* at 29.

⁵⁵ U.S. Forest Serv., *Resource Report and Biological Evaluation for Terrestrial Wildlife: Ochoco Summit Trail System Project SFEIS 12–13* (Sept. 2016) [hereinafter *Biological Evaluation*]; U.S. Forest Serv., *Supplemental Final Environmental Impact Statement: Ochoco Summit Trail System 254–55* (Sept. 2016) [hereinafter *SFEIS*].

⁵⁶ *Biological Evaluation* at 16.

⁵⁷ *Id.* at 12.

⁵⁸ *Id.*

⁵⁹ *Id.* at 13.

⁶⁰ *Id.*

⁶¹ *Id.*

discussed effects common to all action alternatives. Despite acknowledging the presence of dispersal habitat, it first noted that “[b]ecause wolves are not known to occupy the Ochoco National Forest in general and the project area in particular, no denning, foraging, or dispersal habitat has been identified.”⁶² The Forest Service then explained that effects from “the potential for disturbance from motorized recreation would not be very different from disturbance associated with the existing open road system”⁶³ The Forest Service concluded that because “wolves are not known to be present in reproductive populations or to persist in the analysis area the determination is ‘No Effect’ (NE) for gray wolves,” thereby articulating an improper Step-1 “may be present” reasoning to support a Step-2 “no effect” determination.⁶⁴

C. Current Science on Gray Wolves in the Ochoco National Forest

Contrary to the Forest Service’s cursory discussion, gray wolves both “may be present” in the action area and the Project “may affect” gray wolves and gray wolf habitat. Considering the “may be present” threshold at Step 1 of the consultation process, monitoring data, reputable reports, and opinions of Oregon Department of Fish & Wildlife (“ODFW”) and the FWS reveal that gray wolves “may be present” in the action area. Current monitoring data confirms the presence of gray wolves occupying portions of the Ochoco National Forest and using it as an important connective corridor.⁶⁵ In fact, ODFW data indicates that “[i]n the four years since [the Forest Service’s 2012 personal communication with the FWS], wolf abundance and distribution in Oregon has changed substantially. According to Department records, from 2012–2015, the wolf population more than doubled and areas occupied by wolves expanded toward the OSTTS project area.”⁶⁶ In addition to monitoring records, a wolf track was observed in the Ochoco National Forest area and there have been reputable reports of observed wolves in a small pack in the action area.⁶⁷ Thus, a wolf biologist at the FWS recently indicated that a pack could become established in the Ochoco National Forest.⁶⁸ These data and reports show that gray wolves clearly “may be present” in the action area, a fact which the Forest Service seemed to acknowledge in the Biological Evaluation by indicating wolf habitat is present and by making a “no effect” determination, which is a determination made *after* determining species’ presence.

Regarding the effects on gray wolves at Step 2 of the consultation process, the Project clearly “may affect” gray wolves and their prey. Due to the abundance of elk and deer in the Ochoco National Forest, elk and deer are likely the primary prey species for grey wolves in the Ochoco National

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*; see also *Record of Decision* at 29 (final “no effect” determination).

⁶⁵ Expert Report from Mike Gerdes on Review and Comment on the 2009 Scoping Letter, 2013 Draft Environmental Impact Statement (DEIS), 2014 Final Environmental Impact Statement (FEIS), April 2016 Supplemental DEIS (SDEIS), September 2016 Supplemental Final EIS (SFEIS) and Draft Record of Decision (ROD) for the Ochoco National Forest (ONF) Proposed Ochoco Summit Trail System Project (Project) and Forest Plan Amendments to Paul Dewey 14–16 (Oct. 27, 2016) (on file with the Forest Service as Appendix C to LandWatch’s objections to this Project) [hereinafter Gerdes Rpt.].

⁶⁶ *SFEIS* app. B at 3.

⁶⁷ Gerdes Rpt. at 15.

⁶⁸ Gerdes Rpt. at 15 (citing Stephenson, pers. communication 2016).

Forest.⁶⁹ ODFW explained that the best available science indicates the Project “will affect elk (a prey species for wolves)” in two ways: through increasing open road and trail densities and by increasing road and trail use rates.⁷⁰ It reported that “[t]here is strong scientific evidence that 1) elk will avoid areas with roads open to motorized vehicle and 2) avoidance is stronger as rates of use increase.”⁷¹ Thus, the Project could reduce elk habitat and increase vulnerability to hunter harvest and poaching, consequently having a negative effect on population size of elk in the area.⁷² In addition to affecting gray wolf prey, the Project “could directly influence [the] probability of [gray wolves] using the area for denning, foraging, or dispersing” because the Project will decrease the suitability of habitat in the action area.⁷³ These effects to gray wolves and their prey clearly meet the low “may affect” threshold, which includes “[a]ny possible effect, whether benign, beneficial, adverse, or of an undetermined character.”⁷⁴

III. ESA Violation

The Forest Service and its officials violated Section 7 of the ESA by failing to initiate consultation—either informal or formal—with the FWS prior to approving the Ochoco Summit Trail System Project. Gray wolves “may be present” in the action area and the Project “may affect” gray wolves, requiring “at least some consultation,” “even if it is later determined that the [Project is] ‘not likely’ to do so”⁷⁵ As noted above, compliance with these procedural consultation requirements “are as important, and are mandatory to the same degree as [Section 7’s] substantive requirement.”⁷⁶ Rather than follow these procedural requirements, the Forest Service provided an incoherent and incomplete analysis of the presence of gray wolves and the Project’s effects on gray wolves.

At Step 1, the Forest Service acknowledged the presence of gray wolves in multiple ways, but its Step 1 determination was incomplete. First, the Forest Service discussed that “dispersal/transient” wolf habitat is “present.”⁷⁷ Second, the Forest Service discussed a “list [of] occasional reports of caning sightings” in the Ochoco National Forest action area.⁷⁸ However, the Forest Service failed to discuss other important facts that indicate gray wolves “may be present.” For example, the Forest Service did not discuss that ODFW data shows an increased presence of gray wolves in the Ochoco National Forest.⁷⁹ Also, the Forest Service failed to discuss that reputable reports, as well as communications with FWS, reveal that a small pack of gray wolves may be in the Ochoco National

⁶⁹ *Id.*

⁷⁰ Objections from Oregon Dep’t of Fish and Wildlife on the Ochoco Summit Trail System Project Supplemental Final Environmental Impact Statement and Record of Decision to U.S. Forest Serv. 16 (Nov. 7, 2016) (on file with the Forest Service) [hereinafter ODFW Objections].

⁷¹ *Id.*

⁷² *Id.*; see also Gerdes Rpt. at 15–16 (discussing current research regarding the effects of high road densities and human disturbance on elk).

⁷³ ODFW Objections at 17; see also Gerdes Rpt. at 16 (further discussing the likely direct effects of the Project on gray wolves).

⁷⁴ Interagency Cooperation Under the Endangered Species Act, 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (codified at 50 C.F.R. Pt. 402); *Karnuk Tribe*, 681 F.3d at 1027.

⁷⁵ *Karnuk Tribe*, 681 F.3d at 1027.

⁷⁶ *Wash. Toxics Coal.*, 457 F. Supp. 2d at 1178; see also 5 U.S.C. § 706(2)(D).

⁷⁷ *Biological Evaluation* at 16.

⁷⁸ *Id.* at 13.

⁷⁹ *SFEIS* app. B at 3.

Forest and may soon become established.⁸⁰ Based on the entire record of the most current and best scientific data regarding gray wolves in the Ochoco National Forest, gray wolves certainly “may be present” in the action area. In fact, based on the limited facts in the Forest Service’s own BE—such as the fact that “dispersal/transient” habitat is “present”—gray wolves clearly “may be present” in the action area.

The Forest Service’s Step 1 analysis was accordingly arbitrary and capricious in two ways. First, the Forest Service failed to discuss all the relevant science from experts, like ODFW and FWS, in the BE before reaching a determination. Second the Forest Service failed to clearly explain its reasoning at Step 1 and to reach an explicit Step 1 conclusion. Thus the Forest Service’s Step 1 determination demonstrates that the Forest Service failed to articulate a rational connection between the facts found and the choices made.⁸¹

Once wolf presence was confirmed at Step 1, the Forest Service had a duty to assess the degree of impacts on the species and make a Step 2 determination as to whether the project “may affect” the species. The Forest Service’s “no effect” determination at Step 2 was arbitrary and capricious, and made without observance of procedure required by law. At Step 2, the Forest Service inappropriately substituted conclusions about the *level* of the species’ presence, rather than assess the *degree of adverse impacts* on the species. The Forest Service ultimately hinged the Step 2 “no effect” determination on wolves not being “known to be present in reproductive populations or to persist in the analysis area.” In deciding the effects on the species (a Step 2 determination) based on the level of the species’ presence (a Step 1 consideration) the Forest Service’s analysis represents an improper application of the Section 7 procedural consultation requirements.

After determining the presence of wolves, the Forest Service had a duty to focus its analysis on the effects of the Project on wolves to determine whether the Project “may affect” wolves. For purposes of ESA consultation, it does not matter whether an action area contains “occupied habitat” or “dispersal habitat”—what matters is whether the project “may affect” a listed species. Here, rather than discussing whether “reproductive populations” persist in the action area, the Forest Service needed to discuss potential effects of the Project, such as loss of available prey and loss of suitable habitat.⁸²

After considering that a Step 2 “may affect” determination is based on “[a]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character,” the potential loss of prey and habitat clearly demonstrate at least a “chance” that the Project “may affect gray wolves,” thus requiring at least some consultation.⁸³ In failing to discuss these facts and reach a “may affect” conclusion based on the possible effects of the Project to gray wolves—notwithstanding the artificial “dispersal habitat” vs. “occupied habitat” distinction—the Forest Service failed to articulate a rational connection between the facts found and the choices made.⁸⁴

As demonstrated above, if the Forest Service considers the most current data regarding gray wolves and properly applies the three-step process for consultation, it will find that it *must* initiate

⁸⁰ Gerdes Rpt. at 15 (citing Stephenson, pers. communication 2016).

⁸¹ *W. Watersheds Project*, 632 F.3d at 496 (citing *Nat’l Ass’n of Home Builders*, 340 F.3d at 841).

⁸² ODFW Objections at 16–17; Gerdes Rpt. at 15–16.

⁸³ *Karnak Tribe*, 681 F.3d at 1027 (citing *Sw. Ctr. for Biological Diversity*, 100 F.3d at 1447–48).

⁸⁴ *W. Watersheds Project*, 632 F.3d at 496 (citing *Nat’l Ass’n of Home Builders*, 340 F.3d at 841).


consultation because gray wolves “may be present in the action area and the Ochoco Summit Trail System Project “may affect” gray wolves. Accordingly, the agency had a duty to proceed with consultation under Step 3. Its failure to do so was arbitrary and capricious and without observance of procedure required by law.

IV. Conclusion

We request that the Forest Service take immediate corrective action to remedy this violation of the ESA regarding the Ochoco Summit Trail System Project. During the pendency of this 60-day notice period, LandWatch is available to meet with the Forest Service to discuss the Forest Service’s duties under the ESA and to help examine the effects of this Project on gray wolves.

Please feel free to contact Oliver Stiefel if the Forest Service is interested in meeting or has any questions or concerns regarding this notice of intent to sue.

Sincerely,



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