

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

**WILDEARTH GUARDIANS,**

**Plaintiff-Petitioner,**

v.

**Civ. No. 14-828 MV/KK**

**UNITED STATES FOREST SERVICE,**

**Defendant-Respondent.**

**PROPOSED FINDINGS OF FACT AND RECOMMENDED DISPOSITION**

The Jemez Mountains within the Santa Fe National Forest is home to the Jemez Mountains salamander. In 2013, the United States Fish and Wildlife Service (“FWS”) listed this salamander species as “endangered” under the Endangered Species Act (ESA), 16 U.S.C. Section 1531, finding that it “faces numerous threats of high magnitude” including from roads, trails and off-road vehicles. 78 Fed. Reg. 55600 (September 10, 2013); (Administrative Record (“AR”) 40274). FWS also designated critical habitat for the species, including 56,897 acres within the Santa Fe National Forest. (AR 40428). Before the Jemez Mountains salamander was listed as endangered, Defendant, the United States Forest Service (“Forest Service”), issued a “Travel Management Decision” that designated certain roads, trails and other areas of the Santa Fe National Forest permissible for off-road vehicle use. (Doc. 20 at 11, 13-14.) **THIS MATTER** is before the Court on Plaintiff WildEarth Guardians’ (“Guardians”) *Complaint for Declaratory and Injunctive Relief* (Doc. 1), filed on September 10, 2014 and its *Corrected Opening Brief* (Doc. 20), filed on June 23, 2015, wherein Guardians seeks to compel the Forest Service to consult with FWS on the effects of that Travel Management Decision on the Jemez Mountains

salamander and its critical habitat pursuant to Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2). (Doc. 20 at 23-24, 35.) Defendant the United States Forest Service filed a Response to the Complaint on November 17, 2014 (Doc. 4) and a Response Brief on August 7, 2015 (Doc. 21) arguing that for a variety of reasons it is not obligated to so consult. Guardians filed its Reply Brief on September 21, 2015. (Doc. 25.) Guardians' standing to bring this lawsuit is unchallenged.

Having considered the parties' arguments, pleadings, the record, and the relevant law, and for the reasons set forth below, I find that the Forest Service is required to reinstate consultation with FWS under 50 C.F.R. § 402.16 on the effects of the Travel Management Decision on the Jemez Mountains salamander and its critical habitat and that its failure to do so is a violation of the law.<sup>1</sup> I therefore recommend that the Court enter an order compelling the Forest Service to immediately initiate Section 7(a)(2) consultation in accordance with its obligations under the implementing regulations regarding the Travel Management Decision's effects on the endangered Jemez Mountains salamander and its critical habitat.<sup>2</sup>

#### **I. Standard of Review**

Guardians' action is brought pursuant to the "Citizen suits" provision of the ESA, 16 U.S.C. Section 1540(g)(1)(A), which allows any person to commence a civil suit on her own behalf to enjoin a federal agency who is alleged to be in violation of any statutory or regulatory provision of the ESA. (Doc. 1 at ¶¶ 11, 13.) Judicial review of agency action through the citizen-suit provision is governed by the Administrative Procedures Act (APA), 5 U.S.C. Section

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<sup>1</sup>Pursuant to an *Order of Reference* issued on March 1, 2018, by United States District Judge Martha Vazquez, the undersigned United States Magistrate Judge Kirtan Khalsa submits an analysis and recommended disposition of this Matter to United States District Judge Vazquez. (Doc. 32.)

<sup>2</sup> Although Guardians initially sought injunctive relief, Guardians now concedes that the Travel Management Decision should be left in place pending consultation. (Doc. 1 at 20; Doc. 21 at 43; Doc. 25 at 27.)

706. *Coal. for Sustainable Res., Inc. v. U.S. Forest Serv.*, 259 F.3d 1244, 1248-49 (10th Cir. 2001); *see Ill. Commercial Fishing Ass'n v. Salazar*, 867 F. Supp. 2d 108, 112-13 (D. D.C. 2012) (holding that motions for summary judgment on a complaint alleging violations of the ESA must be reviewed under the APA standard of review because “[t]he APA sets forth the full extent of judicial authority to review executive agency action for procedural correctness” (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009)).

The APA provides that “[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” 5 U.S.C. § 706. While the APA enumerates several standards of review, courts that have considered the issue of what standard governs review of citizen-suits brought under the ESA have adopted standards of review that are appropriate to the issue in the case presented. *Water Keeper All. v. U.S. Dep't of Def.*, 271 F.3d 21, 31 (1st Cir. 2001) (listing cases to exemplify this practice). Here, because Guardians’ Complaint is centered upon the contention that the Forest Service failed to comply with “mandatory procedural and substantive requirements of the ESA,” the Court’s review is governed by the review provision listed in part 706(1) of the APA, which provides that “[t]he reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. Section 706(1); *see Biodiversity Legal Foundation v. Babbitt*, 146 F.3d 1249, 1251 (10th Cir. 1998) (applying the Section 706(1) standard to determine whether FWS “unlawfully withheld” action in violation of a provision of the ESA when it failed to make a preliminary finding related to a petition to list a species as endangered).

## II. Overview of the Governing Law

### A. The Endangered Species Act and Governing Regulations

The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation,” intended to “halt and reverse the trend toward species extinction, whatever the cost.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180, 184 (1978). “Congress intended endangered species to be afforded the highest of priorities,” *Id.* at 174, by providing “a means whereby the ecosystems upon which endangered species . . . depend may be conserved, [and] to provide a program for the conservation of such endangered species[.]” 16 U.S.C. § 1531(b). The ESA authorizes FWS to designate a species as “threatened” or “endangered,” and to also designate its “critical habitat.” *See* 16 U.S.C. §§ 1532(5)(A)(i), (6), (15) and (16), 1533(a)(1) and (b)(6)(C). When FWS designates a species as threatened or endangered, other federal departments and agencies are required to follow certain methods and procedures necessary to protect that species and its habitat, including a duty under “Section 7” to consult with FWS, the agency charged with recovering the species. *See* 16 U.S.C. §§ 1531, 1532, 1536, 1538.

Specifically at issue here is ESA Section 7(a)(2) which requires all federal agencies, in consultation with and with the assistance of FWS, 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 result in the destruction or adverse modification of [its] habitat[.]” 16 U.S.C. § 1536(a)(2) (emphasis added); *see Tenn. Valley Auth.*, 437 U.S. at 173 (“One would be hard pressed to find a statutory provision whose terms were any plainer . . . . [i]ts very words affirmatively command all federal agencies to *insure* that actions *authorized, funded, or carried out* by them do not jeopardize the continued existence of an endangered species or result in the

destruction or modification of [its] habitat”; and “[t]his language admits of no exception”). Agency “action” in this context means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies” including, but not limited to “the granting of licenses, contracts, easements, rights-of-way, [or] permits”; or “actions directly or indirectly causing modifications to the land[.]” 50 C.F.R. § 402.02(c), (d); *see also* 40 C.F.R. §1508.18(a) (“Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures[.]”). Section 7 and the regulatory requirements enumerated in Part 402 of Title 50 of the Code of Federal Regulations “apply to all actions in which there is discretionary Federal involvement or control.” 50 C.F.R. § 402.03. “[T]he discretionary control retained by the federal agency must [include] the ability to inure to the benefit of a protected species.” *Turtle Island Restoration Network v. Nat’l Marine Fisheries Serv.*, 340 F.3d 969, 974 (9th Cir. 2003) (“Stated another way, where there is no agency discretion to act, the ESA does not apply.” (citations omitted)).

“Section 7(a)(2) imposes both a procedural and a substantive obligation” on the agency proposing the action (the “action agency”). *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1105 (10th Cir. 2010). “The procedural obligation ensures that the . . . action agency. . . consults with the FWS to determine the effects of its action on endangered species and their critical habitat.” *Id.* (citation omitted). To meet its procedural obligation, the action agency must “at the earliest possible time” determine whether its proposed discretionary action may affect a listed species or a critical habitat. 50 C.F.R. § 402.14(a); *Rio Grande Silvery Minnow*, 601 F.3d at 1105. If so, the agency must engage in formal consultation with FWS, except where (1) alternative regulatory processes lead a federal agency to determine with the

written concurrence of FWS that the proposed action is not likely to adversely affect any listed species or critical habitat or (2) a preliminary biological opinion, issued after early consultation is confirmed as the final biological opinion. *See* 50 C.F.R. § 402.14; *see also* 50 C.F.R. §§ 402.11, 402.12, and 402.13. An agency also has a duty to “reinitiate” consultation with FWS when certain triggers occur including, of relevance here, where discretionary federal involvement or control over an action has been retained or is authorized by law and “a new species is listed or critical habitat designated that may be affected by the identified action.” 50 C.F.R. § 402.16. An action agency that must reinitiate consultation must engage in formal consultation with FWS, except where it is able to gain exemption under 402.14’s limited circumstances. *See* 50 C.F.R. § 402.14(b).

To comply with its Section 7 procedural requirement, the action agency generally prepares a document called a “biological assessment.” 16 U.S.C. § 1536(c)(1); 50 C.F.R. 402.12. This biological assessment process often begins with a request from the action agency to FWS for information concerning whether any listed or proposed listed species “may be present in the area of . . . proposed action.” 16 U.S.C. § 1536(c)(1); 50 C.F.R. 402.12(c). If listed species or critical habitat may be present in the action area, the action agency then evaluates in the biological assessment whether or not its action may affect that species or critical habitat. *See* 16 U.S.C. § 1526; 50 C.F.R. 402.12. If as a result of the biological assessment the action agency “determines, with the written concurrence of the [FWS] Director, that the proposed action is not likely to adversely affect any listed species or critical habitat”, the action agency “need not initiate formal consultation,” and is exempted from that process. 50 C.F.R. 402.14(b)(1); *see* 50 C.F.R. § 402.02 (“Director,” as that term is used in Title 50, Chapter IV of the C.F.R. refers to FWS’ regional director).

After the biological assessment has been prepared but before engaging in the formal consultation process, the action agency may also optionally engage in discussions and/or correspondence with FWS' regional director in a process of "informal consultation," that may also result in the action agency being exempted from the more onerous formal consultation requirement. *Id.*; 50 C.F.R. § 402.13 ("Informal consultation is an optional process that includes all discussions [and] correspondence . . . between the Fish and Wildlife Service and the Federal agency . . . designed to assist the [f]ederal agency in determining whether formal consultation or a conference is required."). Specifically, if the informal consultation process between the action agency and the FWS leads the federal agency to determine, with the written concurrence of the FWS Director, "that the proposed action is not likely to adversely affect any listed species or critical habitat," the consultation process is terminated, and no further action is required at that point. 50 C.F.R. § 402.13(a) ("If during informal consultation it is determined by the [f]ederal agency, with the written concurrence of the Director, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated and no further action is necessary."); *see also* 50 C.F.R. § 402.14(b) ("A [f]ederal agency need not initiate formal consultation if . . . the . . . agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat.").

Where an action agency has not obtained exemption from the formal consultation requirement, formal consultation is initiated by a written request submitted by the agency to FWS describing: the action to be considered; the area that may be affected by the action; any listed species or critical habitat that may be affected; the manner in which the action may affect them and an analysis of any cumulative effects; and all relevant reports, and any other relevant

available information related to the action, the affected listed species, and the critical habitat. 50 C.F.R. § 402.14(c). The foregoing information must be based upon the best scientific and commercial data available. 50 C.F.R. § 402.14(d).

FWS' responsibilities in the formal consultation process are numerous. 50 C.F.R. § 402.14(g). Among other things, it is responsible for reviewing all relevant information provided by the federal agency, evaluating the current status of the listed species or critical habitat, evaluating the effects of the action and cumulative effects on the listed species or critical habitat, and formulating a "biological opinion"<sup>3</sup> as to whether the action, including its cumulative effects, is likely to jeopardize the continued existence of the listed species or result in the destruction or adverse modification of its critical habitat. 50 C.F.R. § 402.14(g)(1) through (g)(4). FWS is also required to discuss the results of its review and evaluation and the basis of any finding in its biological opinion with the federal agency and, if a listed species or its critical habitat will be jeopardized by the proposed action, to also discuss reasonable and prudent alternatives that the agency can take to avoid violating Section 7(a)(2). 50 C.F.R. § 402.14(g)(5). It is required, further, to formulate discretionary conservation recommendations, if any, that will assist the agency to reduce or eliminate the impacts of the proposed action on an endangered species or a critical habitat, and to formulate a statement concerning "incidental take"<sup>4</sup> if it is "reasonably

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<sup>3</sup> A biological opinion may be a "jeopardy opinion" which includes a detailed discussion of the effects of a proposed action on a listed species or a critical habitat and the Fish and Wildlife Service's opinion as to whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of a critical habitat and a discussion of reasonable and prudent alternatives, if any; or a "no jeopardy opinion indicating that the proposed action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of a critical habitat. 50 C.F.R. § 402.14(h).

<sup>4</sup> "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." 16 U.S.C. § 1532(19); *see also* 50 C.F.R. § 17.3 ("Harass in the definition of 'take' . . . 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."); *id.* ("Harm in the definition of 'take' . . . 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 behavior patterns, including breeding, feeding or sheltering.").



certain to occur.” 50 C.F.R. § 402.14(g)(6), (7); *see* 50 C.F.R. § 402.14(i) (governing the requirements of an “incidental take” statement). “An incidental take statement constitutes a permit authorizing the action agency to take the endangered . . . species [provided that] it respects the . . . terms and conditions” set forth by FWS. *Rio Grande Silvery Minnow*, 601 F.3d at 1106 (10th Cir. 2010).

The formal consultation process is terminated upon the issuance of the biological opinion. 50 C.F.R. § 402.14(l)(1). However, as stated above, under some circumstances formal consultation must be reinitiated by the federal agency or by FWS. Specifically, and central to the issues raised in this case is 50 C.F.R. Section 402.16, titled “Reinitiation of formal consultation,” which provides that:

Reinitiation of formal consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:

- (a) If the amount or extent of taking specified in the incidental take statement 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 identified 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.

50 C.F.R. § 402.16.

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“Incidental take refers to takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the [f]ederal agency.” 50 C.F.R. § 402.02.

**B. The Travel Management Rule**

In 2005, the Forest Service promulgated a nationwide Travel Management Rule (the Travel Rule) to address the growing impact of unmanaged motor vehicle use on National Forest lands. *Travel Management; Designated Routes and Areas for Motor Vehicle Use*, 70 Fed. Reg. 68,264 (Nov. 9, 2005) (codified at 36 C.F.R. pt. 212). The Travel Rule requires the designation of specific roads, trails, and areas on forest lands that are open to motor vehicle use and prohibits driving on routes not listed on maps published by the agency. 36 C.F.R. 212.50(a); 36 C.F.R. § 212.56, 36 C.F.R. 261.13. In designating which routes remain open, the Forest Service must consider, among other things, “[d]amage to soil, watershed, vegetation, and other forest resources”; and “[h]arassment of wildlife and significant disruption of wildlife habitats[.]” 36 C.F.R. § 212.55(b)(1), (2). Motor vehicle use maps must also “specify the classes of vehicles and, if appropriate, the times of year for which use is designated.” 36 C.F.R. § 212.56. The “responsible [forest service] official” is required to monitor the effects of motor vehicle use on designated roads and trails and in designated areas . . . as appropriate and feasible.” 36 C.F.R. § 212.57. Road designations may be revised, as needed to meet changing conditions, and any changes must accord with the criteria listed in 36 C.F.R. Section 212.55, among others. 36 C.F.R. § 212.54. The public is allowed to participate in the designation of roads, trails, and other areas and in any revisions thereto. 36 C.F.R. § 212.52(a); 36 C.F.R. § 212.54.

If the responsible forest service official “determines that motor vehicle use on a designated road, trail, or area is directly causing or will cause considerable adverse effects on . . . wildlife [or] wildlife habitat,” he or she is required to “immediately close that road, trail, or area to motor vehicle use until [he or she] determines that such adverse effects have been mitigated or eliminated and the measures have been implemented to prevent future recurrence. 36 C.F.R. §

212.52(b)(2). This “[t]emporary, emergency closure based on a determination of considerable adverse side effects” does not require public involvement. *Id.*

### **III. Relevant Factual and Procedural Background**

#### **A. Travel Management on the Santa Fe National Forest**

In accordance with the Travel Rule, the Forest Service began the process of developing a travel plan for the Santa Fe National Forest complying with its obligation to issue an Environmental Impact Statement providing “a detailed statement” of the “environmental impact of the proposed action” and “alternatives to the proposed action.” 42 U.S.C. § 4332(c); *see also* 36 C.F.R. § 212.55. Ultimately, in June 2012, the Forest Service issued a “Record of Decision for Travel Management on the Santa Fe National Forest” (the Travel Management Decision) and a “Final Environmental Impact Statement for Travel Management on the Santa Fe National Forest Service” (“FEIS”) containing a detailed comparison of a number of alternative route systems each highlighting different regulatory goals. (AR. 36926-36965 (Record of Decision); AR. 36507-36878 (Final EIS).) The Travel Management Decision reflected the Forest Service’s decision to select and implement from these various alternatives, “Alternative 2M” described in the FEIS. (AR. 36511; AR. 36928; Doc. 20 at 11; Doc. 21 at 18.)

A year before issuing its Travel Management Decision, the Forest Service issued a “Travel Management Rule on the Santa Fe National Forest Biological Assessment” addressing the effects of Alternative 2M on federally-listed threatened and endangered species in the Santa Fe National Forest. (AR. 24394-95.) During this time, the Jemez Mountains Salamander was a “sensitive species” but had not yet been listed endangered or its critical habitat designated. Thus, having identified the Mexican spotted owl as the only threatened and endangered species on the Santa Fe National Forest that could be affected by the proposed action, the Forest Service’s June 2011

Biological Assessment exclusively addressed the Mexican spotted owl and concluded that Alternative 2M “may affect, [but was] not likely to adversely affect” the owl species. (AR. 24395; AR. 24392; AR. 24444.) The “may affect” assessment reflected in the Biological Assessment prompted the Forest Service on June 10, 2011 to request informal consultation with FWS under Section 7 of the ESA. (AR. 24444; AR 24392.) The consultation ended promptly thereafter with a June 27, 2011 letter reflecting FWS’s concurrence with the Biological Assessment’s determination that the proposed action in Alternative 2M “may affect, [but is] not likely to adversely affect” the Mexican spotted owl and its critical habitat. (AR 24444.) FWS’s letter also instructed the Forest Service to “[p]lease contact the Fish and Wildlife Service if . . . a new species is listed or critical habitat designated that may be affected by the action.” (*Id.*) With this letter, and in accordance with the regulations discussed above, the Forest Service’s informal consultation terminated and it gained exemption from the formal consultation requirement as to Alternative 2M which the Forest Service adopted in June 2012 in its Travel Management Decision.

The Travel Management Decision variously designated roads open to all vehicles, roads open to vehicles legal on paved highways, trails open to vehicles less than or equal to 50” wide, and trails open to motorcycles only. (AR. 36930.) In total, the Travel Management Decision designated 2,463 miles of the Santa Fe National Forest for motor vehicle use, and resulted in a number of changes to the existing routes, added previously unauthorized routes to the system, changed motorized access to dispersed camping or big game retrieval, changed the permissible classes of vehicles on routes, and modified the seasonal availability of certain routes. (*Id.*, AR. 36928-29.) Pursuant to the FEIS, the Forest Service placed “on hold” certain routes and corridors designated for motor vehicle use, and for various reasons, omitted these “on hold”

routes from the first motor vehicle use map. (AR. 36801 (listing roads that “may not” appear on the first motor vehicle use map).) In consideration of the Jemez Mountains Salamander that remained a “sensitive species” during this time frame, the Forest Service placed 3.4 miles of roads, .3 miles of roads with fixed-distance corridors, 53.8 miles of motorized trails, and 12.7 miles of fixed-distance corridors “on hold” pending a Jemez Mountain Salamander Survey. (AR. 36801; AR. 26959-32609 (addressing the effects of the travel management alternatives proposed in the FEIS on sensitive species, including the salamander); AR. 36716-17; Doc. 20 at 18; Doc. 21 at 11.) In regard to these particular “on hold” routes, the FEIS stated:

The roads and trails in this category contain some unauthorized and closed forest system routes proposed for designation. Pursuant to the conservation management plan, surveys for Jemez Mountain salamander in occupied, potential, and survey habitat must be completed prior to routes and areas being published on the motor vehicle use map.

*To appear on the motor vehicle use map:*

Forest staff will conduct surveys for Jemez Mountain salamander pursuant to the conservation management plan. The Forest Service will discuss the survey results with the Endemic Salamander Team, and strategies for mitigating impacts to the salamander would be developed in order to list the route on the motor vehicle use map. If the team determines that adverse impacts to the salamander or its habitat can't be avoided, the route won't appear on the motor vehicle use map.

(AR. 36802.) Based on the foregoing, the Forest Service concluded that “[e]ffects to the Jemez Mountain salamander . . . would be minimized because habitat surveys and subsequent mitigations are required prior to unauthorized trails or areas being published on the motor vehicle use map.” (AR. 36717.) Notably, the measures to protect the Jemez Mountains salamander addressed in the FEIS arose from a January 2000 “Cooperative Management Plan for the Jemez Mountains Salamander on Lands Administered by the Forest Service,” (AR. 510, 515), which preceded both the Travel Management Rule and the Jemez Mountains salamander's endangered species and critical habitat designations. (Doc. 20 at 12 n.4). Therefore, the limitations, and the

conclusions regarding the effects of the Travel Management Decision related to these limitations, did not apply to all routes within the salamander's later-established critical habitat. (Doc. 20 n.12; AR. 40427-28; AR. 39608 (map of survey zones); AR. 40435 (map of critical habitat for the Jemez Mountains salamander).)

**B. The Jemez Mountains Salamander Designations**

In September 2012, during the administrative appeal process for the Travel Management Decision,<sup>5</sup> FWS published a proposed rule in the Federal Register effectively changing the status of the Jemez Mountains salamander to “proposed endangered” and designating its habitat a “proposed critical habitat.” (AR. 40228-40260.) The proposed rule discussed the Travel Management Decision, and stated, in part, that “[t]he Santa Fe National Forest is attempting to minimize the amount of authorized roads or trails in known occupied salamander habitat and will likely prohibit the majority of motorized cross-country travel within the range of the species.” (AR. 40241.) While FWS acknowledged that “some individual salamanders may be killed or injured by vehicles” and their habitat affected, “we believe the Santa Fe National Forest is attempting to minimize impacts to the salamander and its habitat”; and “with the implementation of the forthcoming management of motorized trails on the Santa Fe National Forest, the threat [caused by unmanaged motor vehicle use] will be greatly reduced.” (AR. 40241.) FWS observed, further, that

new roads may also be constructed through Federal lands within the salamander's range, but such construction is unlikely because the Santa Fe National Forest is attempting to reduce roads and road usage in the Jemez Mountains. Roads and trails have significantly fragmented habitat and likely reduced persistence of existing salamander localities. Therefore, we consider roads, trails, and the resulting habitat fragmentation to be a threat to the Jemez Mountains salamander and its habitat now and in the future.

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<sup>5</sup> The appeal-filing period ran from July 7 through August 21, 2012; and the appeal review period ran from August 22 through October 5, 2012. (AR. 40446.)

(AR. 40241.)

FWS formally designated the Jemez Mountains salamander an endangered species in September 2013, and designated its critical habitat in November 2013. *Endangered and Threatened Wildlife and Plants; Determination of Endangered Species Status for Jemez Mountains Salamander (Plethodon neomexicanus) Throughout Its Range*, 78 Fed. Reg. 55599 (Sept. 10, 2013) (AR 040274-040302); *Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Jemez Mountains Salamander*, 78 Fed. Reg. 69568 (Nov. 20, 2013) (AR 40414-40437). Upon these designations, the Jemez Mountains salamander became entitled to the protections of the ESA. *Tenn. Valley Auth.*, 437 U.S. at 160 (stating that when a species is designated as endangered and its critical habitat is identified, 16 U.S.C. 1536 “becomes effective”).

In the final rule designating the Jemez Mountains salamander an endangered species, FWS discussed the FEIS and the Travel Management Decision as follows:

On November 9, 2005 . . . the USFS issued the Travel Management Rule that requires designation of a system of roads, trails, and areas for motor vehicle use by vehicle class and, if appropriate, by time of year. As part of this effort, the USFS inventoried and mapped roads and motorized trails, and is currently completing<sup>6</sup> a Final Environmental Impact Statement to change the usage of some of the current system within the range of the salamander. The Santa Fe National Forest is attempting to minimize the amount of authorized roads or trails in known occupied salamander habitat and will likely prohibit the majority of motorized cross-country travel within the range of the species. . . . [W]e believe the Santa Fe National Forest is attempting to minimize impacts to the salamander and its habitat. Furthermore, we believe that the revised travel management regulations will reduce the impact of motorized vehicles on the salamander and its habitat by providing a consistent policy that can be applied to all classes of motor vehicles, including [off highway vehicles]. We consider unmanaged [off highway vehicle] and motorcycle use to be a threat to the salamander, but with the implementation of the forthcoming management of motorized trails on the Santa Fe National Forest, the threat will be greatly reduced.

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<sup>6</sup> The Fish and Wildlife Service’s statements about the timing of the FEIS and of the Travel Management Decision were erroneous, but the parties agree that these errors have no impact on the issues presented in this case. (Doc. 41, 42.)

In summary, the extensive roads that currently exist in the Jemez Mountains have significantly impacted the salamander and its habitat due to the possible death and injury of salamanders; fragmentation and population isolation; habitat loss; habitat modification near road edges; and in some cases, increased exposure to chemicals, salts, and pollution. . . . [N]ew roads may . . . be constructed through Federal lands within the salamander’s range, but such construction is unlikely because the Santa Fe National Forest is attempting to reduce roads and road usage in the Jemez Mountains. Roads and trails have significantly fragmented habitat and likely reduced persistence of existing salamander localities. Therefore, we consider roads, trails, and the resulting habitat fragmentation to be a threat to the Jemez Mountains salamander now and in the future.

(AR 40293-94.)

**C. Final Administrative Decision Regarding the FEIS and the Travel Management Decision and Subsequent Events**

Guardians, in conjunction with other organizations, administratively appealed the Travel Management Decision which was submitted to Gilbert Zepeda, the Appeal Deciding Officer, Deputy Regional Forester. (AR. 38184-38201.) Mr. Zepeda affirmed the Travel Management Decision in October 2012 “with instructions” including, in relevant part, the following instruction:

In light of the September 12, 2012, Federal Register notice . . . proposing the listing of the Jemez Mountain salamander as endangered under the Endangered Species act (ESA) and proposing to designate critical habitat, the forest service is instructed to initiate conferencing with the U.S. Fish and Wildlife Service to satisfy the requirements of the ESA, Section 7(a)(4)<sup>7</sup>.

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<sup>7</sup> Distinct from the *consultation* requirement of Section 7(a)(2), which applies to species that are listed as endangered, is a duty to “confer” or to “conference,” arising under 16 U.S.C. Section 1536(a)(4) (commonly referred to as “Section 7(a)(4)”), which applies to species that have been proposed to be listed as endangered or threatened, but have yet to be formally designated as such. *See* 16 U.S.C. § 1536(a)(4). Section 7(a)(4) requires “[e]ach [f]ederal agency [to] confer with the Secretary [of the Interior] on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of [the ESA] or result in the destruction or adverse modification of a critical habitat proposed to be designated for such species.” *See* 50 C.F.R. § 402.10 (governing the “conference” on proposed species or proposed critical habitat); *see N.M. ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 700 (10th Cir. 2009) (recognizing a distinction between “the § 7(a)(2) formal consultation process” and the § 7(a)(4) conference requirement and observing that the term the latter requires “only an informal discussion process rather than formal § 7 consultation”).



(AR. 38184.) Mr. Zepeda's decision constituted the final administrative determination regarding the FEIS and the Travel Management Decision.<sup>8</sup> (AR. 38185.)

Despite Mr. Zepeda's instruction, the Forest Service concluded that it was "not necessary" to engage in conferencing as directed.<sup>9</sup> (AR. 40446.) The Forest Service's conclusion in that regard is not at issue. (Doc. 21 at 22-23.) Instead, at issue here is the Forest Service's separate conclusion that consultation under Section 7(a)(2) of the ESA was not required following the listing of the Jemez Mountains salamander as an endangered species, because in its opinion the Travel Management Decision "does not constitute an ongoing agency action." (AR. 40447.)

#### IV. Analysis

The ESA's implementing regulations require the Forest Service to Reinitiate consultation on the effects of the Travel Management Decision on the Jemez Mountains salamander and its critical habitat because "discretionary Federal involvement or control over the action has been

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<sup>8</sup> On April 1, 2013, the Forest Service issued the first motor vehicle use map. (AR. 40451.) The map is re-issued annually, with each version indicating which roads, trails, and areas are permitted for motor vehicle use that year. (AR. 36511.) Regardless of the designations published on the map, the forest supervisor has the ability to "temporarily close roads, trails, or areas to motorized use based on a determination of considerable adverse effects." (AR. 36511.)

<sup>9</sup> In a memorandum by William Amy, Santa Fe National Forest Wildlife Program Manager, the Forest Service provided its "rationale for not conferencing on the Jemez Mountains salamander." (AR. 40446-49.) The memorandum, dated September 24, 2014, was issued approximately one year after the Jemez Mountain salamander was listed as an endangered species. Mr. Amy summarized the rationale for not conferencing as follows:

1. Provisions within the TM decision prevent adverse effects to the [Jemez Mountains salamander].
2. The species was not listed at the time of the TM decision, but was proposed during the appeal review period.
3. The Forest's obligation under ESA for a proposed species was met as the decision was not likely to jeopardize the continued existence of the species, or adversely modify or destroy proposed critical habitat.
4. The Forest Plan was amended to incorporate the TM decision and the Forest requested reinitiation of consultation on the Forest Plan (November 20, 2013) after the [Jemez Mountains salamander] was listed. This consultation is still pending due to U.S. Fish and Wildlife Service's backlog of work.

(AR. 40448-49.)

retained or is authorized by law” and “a new species is listed or critical habitat designated that may be affected by the identified action.” 50 C.F.R. 402.16(d).

**A. The Reinitiation Requirement Applies to prior Formal and Informal Consultation**

Because the title and the text of 50 C.F.R. Section 402.16 refer to the reinitiation of *formal* consultation, on its face, and read out of context, the regulation could appear to pertain exclusively to circumstances in which there has been a previous formal consultation. However, Courts that have considered the issue have properly also construed Section 402.16 to apply in circumstances such as here, in which there has been a prior *informal* consultation. *See Conservation Congress v. Finley*, 774 F.3d 611, 619 (9th Cir. 2014) (holding that the reinitiation of consultation requirement in 50 C.F.R. Section 402.16 “applies to both formal and informal consultation”); *Forest Guardians v. Johanns*, 450 F.3d 455, 458 (9th Cir. 2006) (“Informal consultation must be re-initiated when” the Section 402.16 factors are present.); *Wild Equity Inst. v. United States Env'tl. Prot. Agency*, 147 F. Supp. 3d 853, 862 n.4 (N.D. Cal. 2015), *aff'd*, 696 F. App'x 843 (9th Cir. 2017) (“Although § 402.16 is entitled ‘Reinitiation of Formal Consultation,’ the reinitiation requirement applies to both formal and informal consultation.”). Although our Tenth Circuit has not directly addressed this issue, it has implied that the reinitiation requirement applies both to formal and to informal consultation. *See Ctr. for Native Ecosystems v. Cables*, 509 F.3d 1310, 1324-25 (10th Cir. 2007) (agreeing with the notion that informal consultation must be reinitiated if the Section 402.16 factors are satisfied, and citing *Johanns* in recognition of that principle).

This interpretation accords with the fundamental principle of statutory construction that a statute (or in this instance a regulation) must be read in its context and with a view to its place in the overall statutory scheme, as part of a symmetrical and coherent regulatory scheme, all parts

of which fit into a “harmonious whole[.]” *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). As noted by our Supreme Court, “examination of the language, history, and structure of the [ESA] indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities.” *Hill*, 437 U.S. at 174. This principle is reflected in the affirmative statutory commandments rendering it imperative that federal agencies ensure that their actions do not jeopardize the continued existence of an endangered species or result in the destruction or modification of its habitat, and commanding federal agencies to use all methods and procedures necessary to conserve endangered species and their critical habitats. 16 U.S.C. § 1536(a)(2); 16 U.S.C. § 1531(c); 16 U.S.C. § 1532(3)); *see Hill*, 437 U.S. at 173, 180 (analyzing Congress’s intent in enacting the ESA). Accordingly, the implementing regulations require each federal agency to review its actions “at the earliest possible time to determine whether any action may affect listed species or critical habitat,” and where such a determination is made “formal consultation is required” except where (1) alternative regulatory processes lead a federal agency to determine with the written concurrence of FWS that the proposed action is not likely to adversely affect any listed species or critical habitat or (2) a preliminary biological opinion, issued after early consultation is confirmed as the final biological opinion. *See* 50 C.F.R. § 402.14; *see also* 50 C.F.R. §§ 402.11, 402.12, and 402.13. Likewise, where discretionary federal involvement or control over an action is retained or is authorized by law and “a new species is listed or critical habitat designated that may be affected by the identified action,” 50 C.F.R. § 402.16, the federal agency must engage in formal consultation with FWS, except where it is able to gain exemption under 402.14’s limited circumstances.<sup>10</sup> *See* 50 C.F.R. § 402.14.

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<sup>10</sup> Indeed, on remand, the Forest Service may choose to engage in the optional informal consultation process, and such process may well lead to an exemption from the formal consultation process if the regulatory criteria for such

While the ESA's implementing regulations permit a federal agency to voluntarily engage in discussions and correspondence with FWS to determine whether it may obtain concurrence in a finding that qualifies it for exemption from formal consultation, this "informal consultation" process cannot provide a shield from agency compliance with the broader Section 7 consultation requirement where a newly listed species or its critical habitat may be adversely affected by ongoing discretionary agency action. As indicated by the governing regulations, a federal agency may satisfy its Section 7(a)(2) consultation requirement by obtaining the concurrence of FWS that an agency action is not likely to adversely affect a listed species or its critical habitat in the process of *optional* informal consultation; or it may pursue the formal consultation process immediately. *See* 50 C.F.R. § 402.13(a) ("If during informal consultation it is determined by the [f]ederal agency, with the written concurrence of the Director, that the action is not likely to adversely affect listed species or critical habitat, *the consultation process is terminated* and no further action is necessary." (emphasis added)); 50 C.F.R. § 402.14(g) (describing the formal consultation process). Thus, the process of informal consultation provides a mechanism by which agencies may eliminate the costs and time associated with formal consultation in circumstances where a listed species and its critical habitat are not in jeopardy from a particular action. In light of the overarching goals and scheme of the ESA and its implementing regulations, optional informal consultation which culminates in an action agency's qualification for exemption from the otherwise mandated formal consultation requirement does not, and cannot, lead to the illogical conclusion that an agency's ongoing actions are forever exempted from reinitiation of consultation where 50 C.F.R. Section 402.16's triggering criteria are otherwise met.

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exemption are met.

In seeking to avoid its consultation obligations on the effects of the Travel Management Decision on the Jemez Mountains salamander and its critical habitat, the Forest Service cites the concurring opinion in *Cables*. See 509 F.3d at 1334 (Briscoe, J. concurring) (“Both the title and body of [50 C.F.R. Section 402.16] make abundantly clear that it applies only in circumstances where formal consultation has already occurred.”). (Doc. 21.) The concurring opinion in *Cables* focused on subsections (a) and (c) of Section 402.16—both of which are satisfied by conditions that are present only where there has been a previous formal consultation. *Cables*, 509 F.3d at 1334 (noting that “[t]he references in subsections (a) and (c) of the regulation to ‘incidental take statements’ and ‘biological opinions,’ both of which are products of the formal consultation process, clearly imply that formal consultation has previously occurred.”). While this observation could be persuasive justification for concluding that reinitiation of consultation *under subsection (a) or subsection (c)* requires a previous formal consultation to have occurred, it simply does not stand to reason that subsection (d), which requires reinitiation of consultation when a new species is listed that may be affected by the action, is triggered only where there has been a previous *formal* consultation.

Construing subsection (d) to require reinitiation of consultation where the action agency and FWS’s consultation was terminated following informal consultation aligns with the overarching intent of the ESA to afford endangered species the highest of priorities. Furthermore, the *Cables* majority, having agreed with the proposition that the reinitiation requirement could apply in circumstances in which there has been a previous *informal* consultation, expressly declined to address the opposing position expressed in the concurrence. See *id.* at 1324-25 n.2 (“We express no view on the merits of the ground relied on by Judge

Briscoe's concurrence in disposing of [the] issue" of whether informal consultation should have been reinitiated.). The Court likewise declines to further engage that non-binding analysis here.

The Forest Service was able to secure concurrence from FWS in the 2011 Biological Assessment's conclusion that Alternative 2M may affect but was not likely to adversely affect the threatened Mexican spotted owl through the optional informal consultation mechanism available to it, (AR. 24444), thus terminating the consultation process and exempting the Forest Service from the more intensive (and presumably costlier and more time consuming) formal consultation requirement. *See* 50 C.F.R. § 402.13(a) ("If during informal consultation it is determined by the [f]ederal agency, with the written concurrence of the Director, that the action is not likely to adversely affect listed species or critical habitat, *the consultation process is terminated* and no further action is necessary." (emphasis added)); 50 C.F.R. § 402.14(g) (describing the formal consultation process). The termination of this consultation process preceded the designation of the Jemez Mountains salamander as an endangered species by over one year, and the effects of the Travel Management Decision on the salamander were not addressed in that informal consultation process. (AR. 40228; AR. 24395.) The Court would be unfaithful to Congressional intent and the overall statutory scheme of the ESA if it adopted the Forest Service's position that it is relieved from its duty to reinitiate consultation on the effects of its discretionary action on the newly listed endangered Jemez Mountains salamander on the ground that it previously through optional informal consultation obtained exemption from formal consultation because the Travel Management Decision was not likely to adversely affect the threatened Mexican spotted owl. Stated more broadly, to construe Section 402.16 to limit an acting agency's reinitiation requirement to circumstances in which there has been a previous *formal* consultation would allow the agency to circumvent its obligation to insure that its actions

do not jeopardize the continued existence of an endangered species based on a determination that an entirely distinct species or its unique critical habitat would not be affected by an action. Such an interpretation would run contrary to the mandates that the ESA places on federal agencies, and cannot have been intended by the drafters of the implementing regulations. The Court declines to adopt such a strained view and instead finds that the reinitiation requirement of 50 C.F.R. § 402.16 applies to both formal and informal consultation.

**B. The Travel Management Decision Triggers the Reinitiation Requirement of 50 C.F.R. Section 402.16**

As previously stated, reinitiation of consultation is required where (1) discretionary Federal involvement or control over the action is retained or is authorized by law and, in relevant part, (2) if a new species is listed or critical habitat designated that may be affected by the identified action. 50 C.F.R. Section 402.16(d). As to the latter, the record reflects that in September 2012 FWS published a proposed rule in the Federal Register effectively changing the status of the Jemez Mountains salamander to “proposed endangered” and designating its habitat a “proposed critical habitat.” (AR. 40228-40260.) That the newly designated species and its critical habitat “may be affected” by the Travel Management Decision is evident from the Federal Register publication designating the salamander’s critical habitat and listing the species as endangered which, among other things, states that new roads may be constructed within the salamander’s range; and roads, trails, and the habitat fragmentation that results therefrom threaten the Jemez Mountains salamander. (AR 40293-94.) While the construction of new roads was found to be “unlikely,” in the context of Section 7, the phrase “may affect” is to be broadly interpreted. *See Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012) (stating that the phrase “‘may affect’ is a relatively low threshold for triggering consultation”); *Interagency Cooperation—Endangered Species Act of 1973, As Amended; Final Rule*, 51 Fed.

Reg. 19926-01, 19949 (June 3, 1986) (explaining that as used in Section 7, the phrase “may affect” includes “[a]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character”); *Colo. Envtl. Coal. v. Office of Legacy Mgmt.*, 819 F. Supp. 2d 1193, 1222 (D. Colo. 2011) (holding that the “may affect” provision in Section 7 was triggered by a determination that effects of an action on a listed species would be “highly unlikely”).

Additionally, FWS found that the salamander’s habitat could be “severely impact[ed]” by off highway vehicles and motorcycles. (AR. 40293.) Specifically in that regard, FWS observed that insofar as the Travel Management Decision prohibits the use of off highway vehicles in some areas of the forest, “the magnitude of impacts in areas open to [off highway vehicle] use in salamander habitat will be greater” resulting in some salamanders being killed by these vehicles, and resulting in impacts to the salamander habitat. (*Id.*) The Travel Management Decision designated roads within the salamander’s habitat, which are presently “on hold,” but which may later be listed on the motor vehicle use maps. (AR. 36929.) In the event that the Forest Service decides to open these on-hold routes, the salamander could be adversely affected and “severely impacted” by their use. Additionally, the salamander’s “habitat” as contemplated at the time that the Travel Management Decision was issued, did not encompass the entire area of its later-designated “critical habitat.” (AR. 40427-28; AR. 39608; AR. 40435.) To the extent that any roads or trails were designated for motor vehicles use in the broader area of the salamander’s critical habitat, the use of such roads or trails could adversely affect the species.

In sum, the record reflects that the salamander—a newly listed species, and its newly listed critical habitat *could be* affected by the Travel Management Decision by new road construction and by the opening of on-hold routes in the salamander’s habitat. Further, to the extent that the Forest Service designated roads in the broader area of the salamander’s later-



designated “critical habitat” the use of such roads could adversely affect the species. As such the undersigned finds that the condition listed in subpart (d) of 50 C.F.R. Section 402.16 is satisfied. Defendant does not attempt to argue otherwise.

Notwithstanding its effective concession that subpart (d) is satisfied here, Defendant argues that the reinitiation requirement in Section 402.16 is not triggered by the Travel Management Decision because the Forest Service has not proposed to exercise its authorized or retained discretion. (Doc. 21 at 32-33.) In support of this argument, Defendant notes that: (1) Guardians has not alleged that the Forest Service “has formally proposed” to reconsider the route designations in the Travel Management Decision or to close routes on the ground that are adversely affecting wildlife; (2) to the extent that the forest service is permitted to revise route designations, it may only do so pursuant to a new decision-making process in accordance with 36 C.F.R. Sections 212.54 and 212.55(b); (3) although it has the discretion to do so, the forest service has not proposed to revise a route designation or issue an emergency closure of any route; and (4) substantive changes to the motor vehicle use maps require an environmental analysis, and therefore, the annual publication of the motor vehicle use map does not effectively alter the Travel Management Decision. (Doc. 21 at 32-35.) These circumstances do not support a conclusion that the Forest Service is exempt from the reinitiation requirement of Section 402.16.

Section 402.16 applies “where discretionary Federal involvement or control over the action *has been retained* or is *authorized by law*.” *Id.* (emphasis added). Thus, the operative language calls not for a determination of whether the agency has exercised, or intends to exercise, its discretion. It calls, instead, for a determination of whether, in the context of a particular action, the agency is empowered to take some action for the benefit of an endangered

species. *See Nat. Res. Def. Council v. Jewell*, 749 F.3d 776, 784 (9th Cir. 2014) (“Whether an agency must consult does not turn on the *degree* of discretion that the agency exercises regarding the action in question, but on whether the agency has any discretion to act in a manner beneficial to a protected species or its habitat.”); *Turtle Island Restoration Network*, 340 F.3d at 974 (indicating that where an agency has the ability to act to inure to the benefit of a protected species, it has discretionary control over the at-issue action); *see also Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 668 (2007) (holding that the consultation requirement in Section 7(a)(2) does not apply to every action authorized, funded or carried out by the agency; it applies only to actions in which an agency retains discretionary involvement—meaning those actions in which an “agency can exercise ‘judgment’ in connection with a particular action” ); *c.f. Sierra Club v. Babbitt*, 65 F.3d 1502, 1508-09 (9th Cir. 1995) (holding that the ESA consultation requirement does not apply to an action over which the federal agency lacks authority to influence an activity for the benefit of a protected species or to implement measures that would benefit a protected species because under those circumstances, the agency lacks the requisite discretionary control).

The record reflects that the Forest Service has discretion to act in a manner beneficial to the salamander in a number of ways. As discussed earlier, it is within the Forest Service’s authority to close designated roads, trails, or areas if it determines that the use of these roads or trails is directly causing or will cause adverse effects on wildlife or wildlife habitat. 36 C.F.R. § 212.52(b)(2). Temporary closures are made pursuant to the judgment of the “responsible forest service official” and do not require public involvement. *Id.* Whether to open the “on-hold” routes in the salamander’s habitat” is also within the Forest Service’s discretion. (AR. 35802, 36802.) Additionally, the Forest Service has the discretion to close 2,298 miles of routes during

wet seasons. (AR. 36551.) As explained in the FEIS, “roads and trails would be closed as needed in wet weather, allowing for the most flexibility in access while balancing resource protection.” (*Id.*) This is significant because the Jemez Mountains salamander is believed to mate above ground during the rainy season in July and August. (AR. 40276.) Thus, the Forest Service, in its discretion, could act for the benefit of the salamander by closing roads and trails within the salamander’s breeding area during the rainy season.

The fact that the Forest Service is empowered to exercise its judgment in taking these measures, which could benefit or otherwise affect the endangered salamander, satisfies the “discretionary involvement or control” condition of Section 402.16. *Nat'l Ass'n of Home Builders*, 551 U.S. at 668; *Turtle Island Restoration Network*, 340 F.3d at 974. That the Forest Service has not exercised its discretion or announced intentions to do so in the future does not, as a matter of law, render Section 402.16 inapplicable. *Jewell*, 749 F.3d at 784. Furthermore, insofar as the Forest Service’s discretion to act for the benefit of the salamander is subject, in some circumstances, to unpredictable and immediate considerations such as wet weather or emergency conditions, as a matter of practical consideration it is of little significance that the Forest Service has not expressed an intention to exercise its discretion.

In summary, the circumstances of this case satisfy the elements of Section 402.16(d) because (1) the Forest Service has discretion to act for the benefit of the Jemez Mountains salamander pursuant to the Travel Rule, and as a matter of retained authority under the Travel Management Decision; and (2) the newly listed Jemez Mountains salamander and its critical habitat could be adversely affected or benefitted by the Forest Service’s method of implementing the Travel Management Decision. Accordingly, pursuant to the dictates of 50 C.F.R. Section 402.16(d), the Forest Service is required to reinstate informal consultation on the effects of the

Travel Management Decision on the Jemez Mountains salamander. This conclusion accords with the requirement in 16 U.S.C. Sections 1531(c) that the Forest Service, like all federal agencies, must “seek to conserve endangered species,” and with Congress’s intent, in enacting the ESA, that “endangered species [are] to be afforded the highest of priorities.” *Hill*, 437 U.S. at 174.

**C. The Travel Management Decision is Not a Past Completed Action Exempt from the Dictates of the ESA and Governing Regulations**

Having concluded that the Forest Service is required to reinstate informal consultation pursuant to 50 C.F.R. Section 402.16, the Court turns to Defendant’s argument that the Travel Management Decision is not subject to Section 7’s consultation requirement (and, by extension, Section 402.16’s reinstatement requirement) because it is a past completed action rather than an ongoing action. (Doc. 21 at 15.) In support of this argument, Defendant relies, primarily, on our Tenth Circuit’s decision in *Forsgren* in which the court held that Section 7(a)(2) applies exclusively to “ongoing, self-implementing” actions as opposed to past completed actions. *Forsgren*, 478 F.3d at 1154-55. Defendant maintains that the action at issue here—the issuance of Travel Management Decision was “completed” in October 2012 when the Appeal Deciding Officer, Deputy Regional Forester Gilbert Zepeda, issued a decision affirming the decision. (Doc. 21 at 27.) The Court does not agree.

In *Forsgren*, our Tenth Circuit was called upon to consider “the narrow issue” whether the United States Forest Service was required to consult, pursuant to Section 7(a)(2), with FWS about the effects of the land resource management plans for the Carson and Santa Fe National Forests upon a newly listed endangered species of lynx. *Forsgren*, 478 F.3d at 1151, 1153. Land resource management plans “are designed to guide and control future management actions and the development of subsequent, more detailed and limited scope plans for resources and

uses.” 43 C.F.R. § 1601.0-2. They are tools by which present and future land use is projected, and they do not ordinarily prescribe or implement specific land use projects or actions. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 71 (2004) (“[A] land use plan is generally a statement of priorities; it guides and constrains actions but does not (at least in the usual case) prescribe them”). The land resource management plans at issue in *Forsgren* had been finalized before the lynx was listed endangered. *Forsgren*, 478 F.3d at 1154.

The *Forsgren* plaintiffs argued that the land resource management plans constituted “action” as that term is used in Section 7(a)(2). *Forsgren*, 478 F.3d at 1152. As such, the plaintiffs argued, the Forest Service had a duty to insure, through consultation, that the land resource management plans were not likely to jeopardize the continued existence of the endangered lynx. *Id.* As discussed next, the *Forsgren* court rejected the plaintiffs’ argument.

While the court acknowledged that “the act of approving, amending, or revising a” land resource management plan constitutes an “action,” the court reasoned that, once they are finalized, land resource management plans are comparable to a governing regulation. *Id.* at 1154. To that end, the *Forsgren* court observed that unlike projects or ongoing agency actions, land resource management plans “typically do not approve or execute projects and activities”; instead, the court reasoned, “[o]nce [a land resource management plan] is in place, ‘agency action’” with potential effects on endangered species, “takes place at the project level.” *Id.* at 1155-56. This is because land resource management plans are merely “a framework for making later project decisions[,]” “akin to road maps on which the Forest Service relies to chart various courses of action.” *Forsgren*, 478 F.3d at 1153, 1155. The plans do not authorize an irreversible commitment of forest resources, and they do not, of themselves, create a prospective threat to endangered species. *Id.* at 1156.

Defendant argues that the Travel Management Decision is comparable to a governing land resource management plan and as such, pursuant to *Forsgren*, it is not subject to the consultation (or reinitiation) requirements of the ESA. (Doc. 21 at 1, 26-30.) Guardian argues that unlike a land resource management plan, the Travel Management Decision affirmatively authorizes the Forest Service to take actions that could threaten the Jemez Mountains salamander and its habitat. (Doc. 20 at 27.) Thus, Guardian argues, unlike a land resource management plan, the Travel Management Decision is an ongoing activity with tangible consequences for the salamander, as distinct from a mere “road map” pursuant to which future activities or projects may be approved. (Doc. 20 at 27.) Noting that the *Forsgren* court rejected the plaintiffs’ argument that the land resource management plans for the Carson and Santa Fe National Forests constituted “action” based, in part, on the fact they had failed to identify an activity or program that constituted a threat to the lynx, Guardian argues that the fact that the Forest Service has the discretion to open roads, trails, areas, and corridors within the salamander’s habitat to motor vehicles, sets the Travel Management Decision apart from the land resource management plans examined in *Forsgren*. *Id.* at 1156. (Doc. 20 at 33-34.) Based on this distinction Guardian argues, that under the principles applied in *Forsgren*, the Travel Management Decision constitutes an “ongoing agency action.” (*Id.*)

The Court recognizes that the Travel Management Decision is comparable to a land resource management plan or a regulation insofar as it designated a discrete set of roads, trails, and corridors available for motor vehicle use, and that these designations are not subject to revision absent a regulated process that requires public involvement and coordination with other governmental entities. 36 C.F.R. § 212.54. However, to conclude on this basis that the Travel Management Decision is not an ongoing agency action would require the Court to ignore the

discretionary authority retained by the Forest Service in managing and implementing the Travel Management Decision as discussed in the preceding section. As reflected in the court's earlier discussion, the Travel Management Decision empowers the Forest Service to use its judgment to take affirmative and specific actions for the benefit of endangered species. *See W. Watersheds Project v. Matejko*, 468 F.3d 1099, 1109 (9th Cir. 2006) (recognizing that "there is no 'ongoing agency action' where the agency has acted earlier but specifically did not *retain* authority or was otherwise constrained by statute, rule, or contract"; but "where the challenged action comes within the agency's decision making authority *and remains so*, it falls within section 7(a)(2)'s scope" (alteration omitted). In that regard it is factually and legally distinct from the land resource management plans in *Forsgren* which set forth general policies governing forest management, but did not authorize actions that could affect the welfare of an endangered species.

In sum, the Court is not persuaded that the *Forsgren* court's narrow holding that the land resource management plans at issue in that case did not constitute "ongoing agency action"<sup>11</sup> compels a conclusion that the Forest Service is exempt from the dictates of 50 C.F.R. Section 402.16.<sup>12</sup> Owing to the Forest Service's authority in implementing the Travel Management

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<sup>11</sup> Notably, the *Forsgren* Court recognized that under some circumstances, a land resource management plan could constitute an action within the meaning of Section 7(a)(2) giving rise to a duty to consult where, for example, the plan authorized an activity or program, or demanded the Forest Service fund or carry out an activity or program. *Forsgren*, 478 F.3d at 1156.

<sup>12</sup> Nor is the Court persuaded that the Travel Management Decision is comparable to the issuance of a permit. In that regard, the Court notes that in addition to *Forsgren*, Defendant cites *Greater Yellowstone Coalition v. Tidwell*, 572 F.3d 1115, 1123 (10th Cir. 2009) and *California Sportfishing Protection Alliance v. F.E.R.C.*, 472 F.3d 593, 598 (9th Cir. 2006) in support of the proposition that the Travel Management Decision falls outside the purview of Section 7 and the governing regulations. In both *Tidwell* and in *California Sportfishing*, federal agencies issued permits allowing particular activities, and thereafter remained uninvolved in the operations undertaken pursuant to those permits. *See Tidwell*, 572 F.3d at 1122-23 (indicating that Forest Service issued a permit that allowed elk feeding activities on federal land, but after the permit was issued, the management and control elk feeding operation was entirely within the purview of the state of Wyoming); *California Sportfishing All.*, 472 F.3d at 594-95 (indicating that the Federal Energy Regulatory Commission (FERC) issued a permit to a gas and electric company for the operation of a hydroelectric project, and thereafter remained wholly uninvolved in the operation of the project). While the respective courts concluded that the issuance of a permit constitutes an "action," the subsequent absence of federal agency involvement precluded a finding of "ongoing" agency action. *Tidwell*, 572 F.3d at 1123; *California Sportfishing All.*, 472 F.3d at 598-99. As discussed throughout the Court's analysis, the Forest Service

Decision to take action that could affect the Jemez Mountains salamander, the undersigned recommends finding that the Travel Management Decision constitutes ongoing agency action subject to the dictates of Section 7 and the governing regulations, including 50 C.F.R. Section 402.16(d).

**V. Conclusion**

For the reasons stated herein, the undersigned recommends **GRANTING** the request in *Plaintiff WildEarth Guardians' Corrected Opening Brief* (Doc. 20) to remand this matter to the Forest Service for immediate reinitiation of consultation on the effects of the Travel Management Decision on the Jemez Mountains salamander.

**THE PARTIES ARE NOTIFIED THAT WITHIN 14 DAYS OF SERVICE** of a copy of these Proposed Findings and Recommended Disposition they may file written objections with the Clerk of the District Court pursuant to 28 U.S.C. § 636(b)(1). **A party must file any objections with the Clerk of the District Court within the fourteen-day period if that party wants to have appellate review of the proposed findings and recommended disposition. If no objections are filed, no appellate review will be allowed.**



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KIRTAN KHALSA  
United States Magistrate Judge

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itself, as opposed to a private entity or a state, is charged with implementing and managing the Travel Management Decision.