



DEPARTMENT OF THE INTERIOR
TASKING PROFILE

Parks

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To (Recipient): Bernhardt, David
From (Author): Akland, Kristine M.

Akland Law Firm, PLLC
P.O. Box 7274
Missoula, MT 59807

Subject Text: Notice of intent to sue under ESA North Bridger's Forest Health Project in Custer Gallatin National Forest

Req. Surnames:

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Comments:

Signed:

AKLAND

LAW FIRM, PLLC

317 E. Spruce Street • PO Box 7274 • Missoula MT 59807 • 406 544-9863 • aklandlawfirm@gmail.com

June 5, 2019

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

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

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

**RE: 60-Day Notice of Intent to Sue under the Endangered Species Act:
North Bridger's Forest Health Project on the Bozeman Ranger District in the
Custer Gallatin National Forest**

You are hereby notified that Alliance for the Wild Rockies and Native Ecosystems Council (collectively Alliance) intend to file a citizen suit pursuant to the citizen suit provision of the Endangered Species Act (ESA), 16 U.S.C. § 1540(g) for violations of the ESA, 16 U.S.C. § 1531 et seq. Alliance will file the suit after the 60 day period has run unless the violations described in this notice are remedied. The names, addresses, and phone numbers of the organizations giving notice of intent to sue are as follows:

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

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

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

Kristine M. Akland, Attorney at Law
Akland Law Firm, PLLC
P.O. Box 7472
Missoula, MT 59807
Tel: (406) 544-9863

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STATEMENT OF LAW

ESA § 7 requires that all federal agencies work toward recovery of listed species, and it contains both a procedural requirement and a substantive requirement for that purpose. Substantively, it requires that federal agencies insure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any threatened or endangered species, or result in the adverse modification of critical habitat for such species. 16 U.S.C. § 1536(a)(2). To carry out the duty to avoid jeopardy and adverse modification of critical habitat, ESA § 7 sets forth a procedural requirement that directs an agency proposing an action (action agency) to consult with an expert agency, in this case, the U.S. Fish & Wildlife Service (USFWS), to evaluate the consequences of a proposed action on a listed species. 16 U.S.C. § 1536(a)(2).

The U.S. Court of Appeals for the Ninth Circuit has held that “[o]nce an agency is aware that an endangered species may be present in the area of its proposed action, the ESA requires it to prepare a biological assessment” *Thomas v. Peterson*, 753 F. 2d 754, 763 (9th Cir. 1985). If the biological assessment concludes that the proposed action “may affect” but will “not adversely affect” a threatened or endangered species, the action agency must consult informally with the appropriate expert agency. 50 C.F.R. §§ 402.14 (b)(1), 402.12(k)(1). If the action “is likely to adversely affect” a listed species, the action agency must formally consult with the expert agency, and the expert agency must provide the action agency with a Biological Opinion explaining how the proposed action will affect the species or its habitat. 16 U.S.C. § 1536(a-c); 50 C.F.R. § 402.14. If the Biological Opinion concludes that the proposed action will jeopardize the continued existence of a listed species, it must outline “reasonable and prudent alternatives,” if any are available, that would allow an action agency to carry out the purpose of its proposed activity without jeopardizing the existence of listed species. 16 U.S.C. § 1536(b)(3)(A).

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

As defined in the ESA’s regulations, an “action” subject to consultation includes all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to: (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. 50 C.F.R. § 402.02. The U.S. Court of Appeals for the Ninth Circuit holds that this regulatory language “admit[s] of no limitations” and that “there is little doubt that Congress intended to enact a broad definition of agency action in the ESA” *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054 (9th Cir. 1994). Thus, ESA consultation is required for individual projects as well as for the promulgation of land management plans and standards. *Id.* “Only after the Forest Service complies with § 7(a)(2) can any activity that may affect the protected [species] go forward.” *Pacific Rivers*, 30 F.3d at 1056-57.

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

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

Thomas v. Peterson, 753 F.2d at 764.

LEGAL VIOLATIONS

The agencies' approval of the North Bridger's Project on the Custer Gallatin National Forest violates the ESA for the following reasons:

- The wolverine is proposed for listing under the ESA. The Forest Service did not evaluate the potential effects of the North Bridger's Project's impacts in the Biological Assessment for the Project.
- The Forest Service's determination of "not likely to jeopardize the continued existence of the DPS of the North American wolverine" is arbitrary and capricious and an abuse of discretion. The Forest Service failed to adequately assess the impact of the Project including but not limited to road construction and densities, cumulative effects and failed to adequately address disturbance, displacement and habitat degradation.
- The Fish and Wildlife Service did not prepare a letter of concurrence with a Biological Assessment conclusion or biological opinion for wolverine.

CONCLUSION

The agencies have ignored their duties under the ESA, 16 U.S.C. § 1531 et seq., to ensure that their actions do not jeopardize threatened and endangered species, that their actions do not result in unauthorized take of these species of wildlife, and that their actions promote conservation and recovery of these species. The agencies' actions in this matter represent an unlawful departure from their legally binding mandate to protect and recover imperiled species and their habitats. If the violations of law described above are not cured within 60 days, the Alliance intends to file suit for declaratory and injunctive relief, as well as attorney and expert witness fees and costs.

Sincerely,

/s/ Kristine M. Akland

Kristine M. Akland, Counsel for Notifier

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