

October 2, 2019

Soda Springs R.D.

OCT 4 2019

*VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED*

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

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

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

Mel Bolling, Supervisor  
Caribou-Targhee National Forest  
1405 Hollipark Drive  
Idaho Falls, ID 83401

Bryan K Fuell, District Ranger  
Soda Springs Ranger District  
Caribou-Targhee National Forest  
410 E. Hooper Ave.  
Soda Springs, ID 83276

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

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

**RE: Notice of Intent to Sue For Violations of the Endangered Species Act  
Regarding Canada Lynx**  
Soda Springs Ranger District; Caribou-Targhee National Forest  
John Wood Forest Management Project

You are hereby notified that the parties listed below 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. The parties listed below will file suit after the 60 day period has run unless the violations described in this notice are remedied.

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

Natalie Ertz, Exec. Dir. WildLands Defense P.O. Box 665 Boise, ID 83701 (208) 867-0185	Mike Garrity, Exec. Dir. Alliance for the Wild Rockies P.O. Box 505 Helena, MT 59624 (406) 459-5926	Sara Jane Johnson Ecosystem Council P.O. Box 125 Willow Creek, MT 59760 (406) 285-3611
Kiesha's Preserve P.O. Box 363 Paris, ID 83261 (208) 918-1663	Dr. John Carter P.O. Box 363 Paris, ID 83261 (208) 918-1663	

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

Brian A. Ertz, Attorney at Law  
Logal Copple P.C.  
P.O. Box 665  
Boise, ID 83701  
Tel: (208) 918-1663

#### **STATEMENT OF LAW**

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

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 holds that "[o]nce an agency is aware that an endangered species may be present in the area of its proposed action, the ESA requires it to prepare a biological assessment ...." *Thomas v. Peterson*. 753 F.2d 754, 763 (9<sup>th</sup> 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)(I), 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 (9<sup>th</sup> 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 754, 764 (9th Cir.1985).

### **STATEMENT OF GENERAL FACTS**

On August 15, 2019, Bryan K. Fuell, District Ranger for the Soda Springs Ranger District of the Caribou-Targhee National Forest (Forest) in Idaho signed a Record of Decision (decision) authorizing implementation of the John Wood Forest Management Project (project). The decision for the John Wood Forest Management Project authorizes "mechanical treatment"

of 850+ acres of forested land, 50+ additional acres subject to broadcast burning or “stand tending”, the construction of approximately 1.2 miles of new roads to facilitate the timber harvest, the “relocation” of 3.2 miles of roads, maintenance activities along 6.1 miles of roads, and development of 3 acres as a gravel source for the roading activities.

The project area is approximately 5,590 acres on the Soda Springs Ranger District of the Caribou-Targhee National Forest located about 6 miles east of Soda Springs, Idaho. The legal description of the project area is: Township 8 South, Range 43 East, Sections 29, 31, 32, 33 and 34; and Township 9 South, Range 43 East, Sections 3, 4, 5, 8, and 9 of the Boise Meridian, Caribou County, Idaho.

The FEIS made a preliminary determination of “no effect” to Canada Lynx for the project, and makes reference to a draft Biological Assessment, which was not disclosed at any time during the NEPA process, but no further analysis is conducted with respect to existing Canada Lynx and its habitat. The Forest Service did not engage in ESA consultation for this project with the USFWS and did not receive a letter of concurrence or a biological opinion, nor did it prepare a biological assessment for the project. Instead the agency issued its decision on the insistence that there would be "no effect" on ESA-listed species.

The project area occurs within an area of the Forest in which the verified presence of species and/or habitat for Canada Lynx has been documented, and within what the 2003 Revised Caribou National Forest Plan FIES identifies as Canada Lynx linkage corridor habitat. (Revised Forest Plan FEIS, Appx. D-7). Project activities include the potential for snag and downed log reduction, habitat loss and fragmentation, harassment or disturbance, and increased roading, all activities the Revised Forest Plan FEIS identifies as potentially affecting Canada Lynx. Revised Forest Plan FEIS, Appx. D-26, D-27. However, the Forest Service refused to complete even informal ESA consultation with the USFWS for the project. This failure to consult with USFWS at all, as well as the failure to use the best available science, violates ESA Section 7.

#### THE AGENCIES MUST CONDUCT ESA CONSULTATION FOR THE THREATENED CANADA LYNX

The Canada lynx is listed as a threatened species under the ESA. Lynx and/or lynx habitat are present within the project analysis area and the project area occurs within a Canada Lynx linkage corridor the Forest and expert agency have identified as having the potential to be utilized by individuals and important to connect subpopulations of Canada lynx as necessary for recovery of the species. Multiple records establish that lynx are present within the Forest generally. Moreover, the evidence appears to show that lynx are present within the project analysis area, or at least very close to it. The Forest Service did no ESA consultation for the threatened Canada lynx for the project.

#### CONCLUSION

The agencies have ignored their duties under the ESA, 16 U.S.C. Section 1531 et seq., to ensure that their actions do not jeopardize threatened and endangered species, that their actions do not result in unauthorized take of these species of wildlife, and that their actions promote 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 above-named organizations and individuals intend to file suit for declaratory and injunctive relief, as well as attorney and expert witness fees and costs.

Sincerely,

A handwritten signature in black ink, appearing to read "Brian Ertz", written over a horizontal line.

Brian Ertz

*Attorney for above-named*