

AKLAND

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October 21, 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 Commerce
1401 Constitution Ave, NW
Washington, DC 20230

Administrator for Fisheries
National Marine Fisheries Service
1315 East West highway, SSMC3
Silver Spring, MD 20910

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

Director, U.S. Fish and Wildlife Service
1849 C Street, NW
Washington, DC 20240

**RE: Second 60-Day Notice of Intent to Sue under the Endangered Species Act:
Mission Restoration Project- Okanogan National Forest¹**

You are hereby notified that Alliance for the Wild Rockies intends 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

¹ Alliance sent its first 60-Day Notice of Intent to sue under the ESA (NOI) for the Mission Restoration Project on the Okanogan National Forest on October 14, 2019. It now sends this Second NOI but does not waive any claims raised in the October 14, 2019 NOI.

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
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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 ensure 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 National Marine and Fisheries Service (NMFS) and the Fish and Wildlife Service (FWS), 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). A biological assessment “shall evaluate the potential effects of the action” on listed and proposed species to determine whether any such species are likely to be adversely affected by the action. 50 C.F.R. § 402.12(a). 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 ESA’s regulations further define “effects of an action” as:

[T]he direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification.

50 C.F.R. § 402.02

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 Forest Service determined that the Mission Project “non -ARBO II activities” “may affect, not likely to adversely affect” for the Columbia River Bull Trout, Upper Columbia River steelhead DPS, Upper Columbia River Spring-Run Chinook ESU, Columbia River Bull Trout Designated Critical Habitat, Upper Columbia River Spring-Run Chinook and Upper Columbia River Steelhead Designated Critical Habitat. The Forest Service did not analyze road and trail erosion control and decommissioning, LW placement, fish passage restoration, riparian vegetation treatment (control burning) and beaver habitat restoration in the Project Biological Assessment because “design and implementation would be consistent with design criteria in

ARBO II and therefore, the effects to fisheries would be the same (May Affect, Likely to Adversely Affect) as described in ARBO II.” The NMFS concurred with the Forest Service’s determination. The Forest Service’s analysis in the Biological Assessment and the NMFS’s concurrence is arbitrary and capricious and an abuse of its discretion.

The agencies fail to adequately and fully address all relevant habitat standards for Columbia River Bull Trout, Upper Columbia River steelhead DPS, Upper Columbia River Spring-Run Chinook ESU, Columbia River Bull Trout Designated Critical Habitat, Upper Columbia River Spring-Run Chinook and Upper Columbia River Steelhead Designated Critical Habitat, fail to adequately address the primary constituent elements, fail to adequately address the individual significance of the Project, and fails to adequately address cumulative effects. Particularly, the Biological Assessment fail to adequately address the impact of road construction and maintenance on the above reference species. Additionally, the Forest Service and NMFS must consider *all* Project activities, including those analyzed in the ARBO II on bull trout and bull trout critical habitat. These activities include but are not limited to instream wood, road decommissioning and closure, fish pipes, upsizing stream pipes, beaver release, rock armoring, ford construction, road and trail erosion control and decommissioning, LW placement, fish passage restoration, riparian vegetation treatment (control burning) and beaver habitat restoration. The Biological Assessment fails to do so.

The conclusions drawn from the agencies’ inadequate analyses are arbitrary and capricious and an abuse of discretion. This is especially true in light of the Forest Service’s determination in the Project Environmental Assessment that the selected alternative (Alternative 3) “may affect, and would likely adversely affect, steelhead, and bull trout species and their critical habitat.” The NMFS is therefore required to draft a Biological Opinion and ITS for Columbia River Bull Trout, Upper Columbia River steelhead DPS, Upper Columbia River Spring-Run Chinook ESU, and their critical habitat.

The agencies further failed to adequately and fully address all the Project impacts on lynx and lynx critical habitat. The Project Biological Assessment fails to adequately analyze the impacts of 2,132 acres of silviculture and fuels reduction treatments within lynx critical habitat. The Biological Assessment fails to utilize the best available science regarding conservation measure for lynx and lynx critical habitat and further fails to disclose the reason for Forest Service’s departure from the best available science. The analysis of the Project’ impacts on lynx and lynx critical habitat is inadequate and the conclusions drawn from this inadequate analysis are arbitrary and capricious and an abuse of discretion. The FWS Biological Opinion is therefore also arbitrary and capricious and an abuse of discretion for the same reasons. The FWS is required to draft a Biological Opinion and ITS for Lynx and Lynx critical habitat because the Project will likely adversely impact lynx and lynx critical habitat.

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

