



April 1, 2020

Via Certified Mail, Electronic Return Receipt Requested

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Washington, D.C. 20240

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Sixty-Day Notice of Intent to Sue Under § 7 of the Endangered Species Act

Dear Secretary Bernhardt, Chief Christiansen, Director Skipwith, and Supervisor Smoldon and Regional Forester Cassamassa:

In accordance with the sixty-day notice requirement of the Endangered Species Act (ESA), 16 U.S.C. § 1540(g), you are hereby notified that the following organizations intend to bring a civil action against the U.S. Forest Service and the officers and supervisors to whom this letter is directed (collectively, the Forest Service) for violating Section 7 of the ESA, 16 U.S.C. § 1536.

WildEarth Guardians ("Guardians") is a non-profit, public interest, environmental advocacy and conservation organization. Guardians' mission is to

protect and restore the wildlife, wild rivers, wild places, and health of the American West. Guardians has approximately 275,000 members and supporters nationally, including those who live in Washington state and recreate on the Colville National Forest, and many who seek to observe the federally protected and proposed species addressed herein in their native habitats.

Western Watersheds Project ("WWP") is a nonprofit membership organization with over 12,000 members and supporters, dedicated to protecting and conserving the public lands and natural resources of watersheds in the American West. WWP, as an organization and on behalf of its members, is concerned with and active in seeking to protect and improve the wildlife, riparian areas, water quality, fisheries, and other natural resources and ecological values of watersheds throughout the West, and including on the Colville National Forest.

As described herein, the Forest Service has violated the ESA by failing to prepare a Biological Assessment and consult the U.S. Fish & Wildlife Service (FWS) over impacts to threatened, endangered, proposed, and candidate species from ongoing livestock grazing on the Copper-Mires, Lambert, and C.C. Mountain allotments, three contiguous allotments that collectively span over 51,700 acres of federal forest lands in the Kettle River range of the Colville National Forest in Washington state. Accordingly, the Forest Service is failing to ensure that its actions are not likely to jeopardize the continued existence of listed and/or candidate species that may utilize the action area. See 16 U.S.C. § 1536(a)(2). We will file suit after the 60-day period has run unless the violations described in this notice are remedied.

Legal Background: Section 7 Consultation

Section 2(c) of the ESA establishes that it is "the policy of Congress that all Federal . . . agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of" the ESA. 16 U.S.C. § 1531(c)(1). The purpose of the ESA is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered and threatened species . . ." 16 U.S.C. § 1531(b).

To implement this policy, Section 7(a)(2) of the ESA requires that each federal agency consult with FWS (and the National Marine Fisheries Service "NMFS" for anadromous fish) to ensure that any action authorized, funded, or carried out by such agency is not likely to (1) jeopardize the continued existence of any threatened or endangered species or (2) result in the destruction or adverse modification of the critical habitat of such species. See 16 U.S.C. § 1536(a)(2). Federal agencies must use the best scientific and commercial data available to comply with their obligations under Section 7. *Id.* § 1536(b); *Res. Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1304 (9th Cir. 1994).

The ESA's consultation requirement applies "to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. Agency actions requiring consultation are broadly defined by regulation to mean "all activities or

programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies” and include “actions directly or indirectly causing modifications to the land, water, or air.” 50 C.F.R. § 402.02.

If listed species may be present in the area of agency action, the action agency must prepare a Biological Assessment (BA) to determine whether the listed species may be affected by the proposed action. See 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. If the agency determines that its proposed action “may affect” any listed species, the agency must engage in “formal consultation” with FWS or NMFS (collectively, the Services). 50 C.F.R. § 402.14; see also *Cal. ex rel. Lockyer v. U.S. Dep’t of Agric.*, 575 F.3d 99, 1018 (9th Cir. 2009) (“any possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the requirement.” (quoting 51 Fed. Reg. 19,926, 19,949 (June 3, 1986))).

The threshold for a “may affect” determination is very low, and ensures “actions that have any chance of affecting listed species or critical habitat—even if it is later determined that the actions are not likely to do so—require at least some consultation under the ESA.” *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1028 (9th Cir. 2012). Under the Fish and Wildlife Service Consultation handbook, the “may affect” threshold is met if “a proposed action may pose any effects on listed species or designated critical habitat.” U.S. Fish and Wildlife Serv. & Nat’l Marine Fisheries Serv., *Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act* at xvi (1998) (emphasis in original). The regulations implementing the ESA require an examination of both the direct effects of the action as well as the indirect effects of the action, which are defined as “those effects that are caused by or will result from the proposed action and are later in time, but are still reasonably certain to occur.” 50 C.F.R. § 402.02. Therefore, an agency must consult in every situation except when a proposed action will have “no effect” on a listed species or critical habitat.

If the action agency concludes in a BA that the activity is not likely to adversely affect the listed species or adversely modify its critical habitat, and the Services concur with that conclusion in a Letter of Concurrence, then the consultation is complete. 50 C.F.R. §§ 402.12, 402.14(b). If, however, the action agency determines that the activity is likely to adversely affect the listed species or its critical habitat, then the Services complete a “biological opinion” (BiOp) to determine whether the activity will jeopardize the species or result in destruction or adverse modification of critical habitat. *Id.* § 402.14. If the Services determine that an action will jeopardize the species or adversely modify critical habitat, they may propose reasonable and prudent alternative actions intended to avoid such results. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)(5).

In addition to considering the direct effects of a proposed agency action, the Forest Service must also consider the species’ “environmental baseline,” the “effect of actions,” and the “cumulative effects upon a species.” 50 C.F.R. § 402.14(g). An environmental baseline must include (1) the past and present impact on the species of all federal, state, or private actions; (2) the anticipated impacts of all federal projects in the action area that have already undergone section 7 consultation; and (3) the impact of

state or private actions that are contemporaneous with the consultation in process. *Id.* § 402.02. Cumulative effects are defined as “those effects of future State or private activities not involving federal activities that are reasonably certain to occur within the action area of the Federal action subject to consultation.” Thus, cumulative effects describe only *nonfederal* and *future* activities. Past and present impacts of nonfederal activity should be a part of the environmental baseline. See, e.g., *Nat'l Wildlife Fed'n v. Norton*, 332 F. Supp 2d 179 (D.D.C. 2004).

Further, once the consultation is complete, the agencies have a duty to ensure that it remains valid. To this end, an action agency must re-initiate consultation if certain “triggers” occur. 50 C.F.R. § 402.16. The ESA’s implementing regulations thus require the Forest Service to re-initiate consultation 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.

After consultation is initiated or reinitiated, ESA Section 7(d) prohibits the agency or any permittee from “mak[ing] any irreversible or irretrievable commitment of resources” toward a project that would “foreclos[e] the formulation or implementation of any reasonable and prudent alternative measures . . . ” 16 U.S.C. § 1536(d). The 7(d) prohibition “is in force during the consultation process and continues until the requirements of section 7(a)(2) are satisfied.” 50 C.F.R. § 402.09.

Section 7(a)(4) of the ESA requires a Federal action agency to conference with the Services if the proposed action is likely to jeopardize a species proposed for listing or destroy or adversely modify proposed critical habitat. 16 U.S.C. § 1536(a)(4); 50 C.F.R. § 402.10(a). See also 50 C.F.R. § 402.02 (defining “[c]onference” as “a process which involves informal discussions between a Federal agency and the Service under section 7(a)(4) of the [ESA] regarding the impact of an action on proposed species or proposed critical habitat and recommendations to minimize or avoid the adverse effects.”). The agencies must record any results of a conference. *Id.* at § 401.10(e) (“The conclusions reached during a conference and any recommendations shall be documented by the Service and provided to the Federal agency”).

FACTUAL BACKGROUND

The following four listed species and two designated critical habitats are known to occur on the Colville National Forest: bull trout and its critical habitat, woodland caribou and its critical habitat, grizzly bear, and Canada lynx. There is also suitable habitat for yellow-billed cuckoo (listed threatened species) and both wolverine and whitebark pine are present (candidate species).

For roughly the past 75 years, the Forest Service has issued term grazing permits to Diamond M Ranch, reportedly the largest cattle producer in the state of Washington, to graze its cattle on allotments in the western portion of the Colville National Forest. Most recently, in 2013, the Forest Service issued a 10-year term grazing permit authorizing Diamond M to annually graze cattle on the Churchill, Lambert, C.C. Mountain, Hope Mountain, and Copper-Mires allotments. These federal grazing allotments are managed under the direction of Allotment Management Plans (AMPs) dating back to the 1970s and 1980s, and annual grazing instructions.

In 2000, FWS listed the contiguous United States population of the Canada lynx (*Lynx canadensis*) as threatened under the ESA. 65 Fed. Reg. 16, 052 (Mar. 24, 2000). Portions of the Kettle-Wedge "core area" that is important for the recovery of Canada lynx in Washington overlap these allotments. Core areas are defined by FWS as areas with the strongest long-term evidence of the persistence of lynx populations over time within the contiguous United States. Among other potential effects to lynx, livestock grazing can indirectly affect this threatened species by adversely affecting riparian areas that provide habitat for snowshoe hare, a primary food resource for lynx. Lynx are also sensitive to human disturbance, so livestock grazing and associated activities can impair the lynx's need for seclusion.

Further, though these allotments do not appear to overlap designated recovery areas for the threatened grizzly bear, individual grizzly bears have been documented on adjacent lands and thus may also be present on the Copper-Mires, Lambert, and C.C. Mountain allotments. Among other potential effects, livestock grazing may adversely affect this listed species through direct and indirect competition for forage, and the potential for disturbance and/or mortality when grizzly bears come into contact with people and/or livestock.

ESA VIOLATIONS

Based on records obtained through a Freedom of Information Act (FOIA) request, it appears that the Forest Service has never prepared, or submitted to FWS for concurrence, a Biological Assessment that addresses the site-specific impacts of livestock grazing on the Copper-Mires, Lambert, and C.C. Mountain allotments to listed and/or proposed species, at least not since the lynx was listed as threatened in 2000. Any future BA must also address the potential presence of and effects to other listed, proposed and/or candidate species that may be present on the Copper-Mires, Lambert, and C.C. Mountain allotments.

In sum, the Forest Service is violating the ESA by authorizing livestock grazing on the Copper-Mires, Lambert, and C.C. Mountain allotments without proper consultation, thereby failing to ensure this ongoing activity does not jeopardize the continued existence of listed, proposed and/or candidate species in violation of the ESA. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.16. It should be noted that violations of procedural obligations under the ESA also constitute substantive violations of the statute. See *Thomas v. Peterson*, 753 F.2d 754, 763 (9th Cir. 1985).

Because these actions contravene the ESA, and present unreasonable and unnecessary risks to listed and/or proposed species, it is our intention to bring suit to remedy these violations and prevent the Forest Service from establishing precedent for future illegal actions. History demonstrates that many federal agencies sought to avoid their responsibilities under the ESA, only to face court injunctions or other consequences resulting in difficulties far in excess of the effort necessary to comply with the ESA early in their processes.

If you have any questions about the issues raised in this letter, please do not hesitate to contact me.

Sincerely,



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