



April 1, 2020

Via Certified Mail, Electronic Return Receipt Requested

Secretary David Bernhardt
U.S. Department of the Interior
1849 C Street NW
Washington, D.C. 20240

Director Aurelia Skipwith
U.S. Fish and Wildlife Service
1849 C Street NW, Room 3331
Washington, D.C. 20240

Chief Vicki Christiansen
U.S. Forest Service
1400 Independence Ave.,
Washington, D.C. 20250

Supervisor Rodney Smoldon
Colville National Forest
SW 765 South Main Street
Colville, WA 99114-2507

Regional Forester Glenn Casamassa
Pacific Northwest Region, Forest Service
1220 SW 3rd Avenue
Portland, Oregon 97204-3440

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

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

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.

Cc:

Joshua White, District Ranger
Three Rivers Ranger District
255 W. 11th Avenue
Kettle Falls, WA 99141-9526
Joshua.white@usda.gov

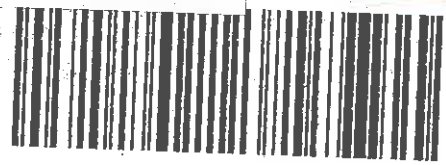
Travis Fletcher, District Ranger
Republic Ranger District
650 East Delaware Ave.
Republic, WA 99166-9701
Travis.fletcher@usda.gov



**WildEarth
GUARDIANS**
A FORCE FOR NATURE

301 N. Guadalupe St., Suite 201
Santa Fe, NM 87501

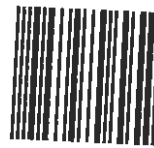
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U.S. Forest Service, PNW Headquarters
Attn: Regional Forester Casamassa
1220 SW 3rd Ave.
Portland, OR 97204-3440