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LEGAL AID FOR THE ENVIRONMENT SINCE 2001

October 2, 2020

*Via certified mail*

Jennifer Norris  
Field Supervisor  
U.S. Fish and Wildlife Service  
2800 Cottage Way  
Room W-2605  
Sacramento, CA 95825

Jason Kuiken  
Forest Supervisor  
U.S. Forest Service  
19777 Greenley Road  
Sonora, CA 95370

Janice Waddell  
Section Chief  
CA Department of Housing and Community Development  
2020 West El Camino Avenue Ste. 200  
Sacramento, CA 95833

RE: 60-day Notice of Intent to Sue for Failure to Reinitiate Consultation for Rim Fire Projects

Dear Supervisor Norris, Supervisor Kuiken, and Chief Waddell,

This office represents the John Muir Project of Earth Island Institute, Greenpeace Inc., and Sequoia ForestKeeper (collectively, the “Plaintiffs”) in connection with the logging and vegetation management activities in the Rim Fire area of the Stanislaus National Forest, including but not limited to the work being funded by the HUD National Disaster Resilience Competition (“NDRC”) funding (“Rim Fire Projects”). This letter serves as notice, pursuant to Section 11(g) of the Endangered Species Act (“ESA”), 16 U.S.C. § 1540(G)(2)(A)(i), that if the Department of Housing and Community Development (“HCD”), the Forest Service (“Forest Service”) and the U.S. Fish and Wildlife Service (“USFWS”) (collectively, the “agencies”) do not reinitiate consultation on the Rim Fire Projects within sixty (60) days of the date of this letter, my clients intend to file a lawsuit in Federal Court and/or amend their complaint in the pending lawsuit before Judge Drozd.<sup>1</sup>

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<sup>1</sup> Earth Island Institute v. Nash, Case No. 1:19-CV-01420-DAD-SAB (Eastern District of California).

As set forth below, 50 C.F.R. § 402.16(a)(2) requires reinitiation of consultation where “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.” Included herewith is new information that indicates that the proposed Rim Fire Projects may affect the Pacific fisher, a newly listed species, in a manner not previously considered by the agencies. Further, 50 C.F.R. § 402.16(a)(4) requires reinitiation of consultation where “a new species is listed or critical habitat designated...may be affected by the identified action.” Earlier this year, the Pacific fisher became a listed species in the southern Sierra Nevada (“SSN subpopulation”).<sup>2</sup> Included herewith is information indicating that the proposed Rim Fire Projects may affect the newly listed species, thus requiring reinitiation of consultation.

Further, as set forth below, the information included in and with this letter qualifies as significant new information requiring a supplemental National Environmental Policy Act (“NEPA”) analysis.

## I. LEGAL REQUIREMENTS

### A. Endangered Species Act

Section 7 of the ESA imposes both procedural and substantive duties on federal agencies. Procedurally, federal agencies (“action agencies”) must engage in consultation with USFWS (the “consulting agency”) if a proposed action may affect listed species or critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Substantively, both the action agency and the consulting agency must ensure that the action is “not likely to jeopardize the continued existence of any [listed] species or result in the destruction or adverse modification of [critical habitat].” 16 U.S.C. § 1536(a)(2).

If a species is listed after initial consultation is performed and/or during the course of a project, the action agency has an obligation to reinitiate under Section 7. *See Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1055 (9th Cir. 1994) (citing *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 186 (1978) and stating, “Congress foresaw that §7 would, on occasion, require agencies to alter ongoing projects in order to fulfill the goals of the [Endangered Species] Act”). If the wildlife service determines that a listed species may be present in the area of the proposed action, the acting agency must produce a biological assessment to determine if the proposed action “may affect” or “is likely to affect” a listed species. 16 U.S.C. § 1536(c)(1); 50 C.F.R. §§ 402.12(f), 402.14(a), (b)(1); *see also Forest Guardians v. Johanns*, 450 F.3d 455, 457 (9th Cir. 2006) (quoting 16 U.S.C. § 1536(c)(1)). Once the acting agency has determined the action “may affect” a listed species or critical habitat, the agency must consult, either formally or informally, with the appropriate expert wildlife agency. *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012).

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<sup>2</sup> *See* 50 C.F.R. § 17.11(h) (listing the Southern Sierra Nevada distinct population segment of Pacific fisher as endangered on May 15, 2020).

The “may affect” standard is a relatively low threshold triggering agency consultation; “any possible affect, whether beneficial, benign, or adverse or of undetermined character” triggers the requirement. *Id.*; *Nat’l Family Farm Coal. v. U.S. EPA*, 966 F.3d 893, 924 (9th Cir. 2020). An agency may avoid the consultation requirement *only* if it is determined that the action will have “no affect” on a listed species or critical habitat. *Karuk Tribe of Cal.*, 681 F.3d at 1027 (emphasis added).

USFWS’s regulations “mandate the reinitiation of consultation if circumstances change or new facts are discovered.” *Arizona Cattle Growers’ Ass’n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1245 (9th Cir. 2001) (citing 50 C.F.R. § 402.16). The duty to reinitiate consultation lies with both the action agency and the consulting agency. *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1229 (9th Cir. 2008) (citing 50 C.F.R. § 402.16). The requirement that an agency must reinitiate consultation when the factors in 50 C.F.R. § 402.16 are met “insure[s]” that the agency action “is not likely to jeopardize” listed species or critical habitat after the initial consultation. 16 U.S.C. § 1536(a)(2).

#### B. National Environmental Policy Act

HCD and the Forest Service must prepare supplemental NEPA analyses to evaluate the “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c)(1)(ii); 24 C.F.R. Part 58. If there is remaining federal action that has yet to occur and the new information is sufficient to show the remaining action will “affect[t] the quality of the human environment” in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 374 (1989).

Determining whether the information is “significant,” thus requiring a supplemental EIS, relies on considerations of both the “context and intensity” of the action. 40 C.F.R. § 1508.27; *see also Sierra Club v. Bosworth*, 2005 U.S. Dist. LEXIS 27573, at \*27–\*32 (N. D. Cal. Nov. 14, 2005). Context means the “significance of an action must be analyzed in several contexts,” including site-specific, regional, and national. *Id.* at \*27. Intensity means “the severity of the impact” and should consider, among other things, both the degree to which the effects of the action are highly controversial and highly uncertain. *Id.* at \*27–\*28. Significance can further be determined by how the new information “appears to have significantly altered the picture considered” in the original environmental analyses. *See Sierra Club v. Bosworth*, 2005 U.S. Dist. LEXIS 21289, at \*15 (N. D. Cal. Sept. 9, 2005) (discussing the significance of new information regarding the Pacific fisher).

HCD and the Forest Service have an ongoing duty to take a “hard look” at any significant new information and circumstances, in a timely manner, to determine whether its projects, individually or cumulatively, could result in significant adverse effects on the Pacific fisher. *See Friends of Clearwater v. Dombeck*, 222 F.3d 552, 559 (9th Cir. 2000) (“[T]he Forest Service’s failure to evaluate in a timely manner the need to supplement the original EIS in light of . . . new information violate[s] NEPA.”).

## II. VIOLATION OF THE ENDANGERED SPECIES ACT

New information showing the presence of Pacific fisher within one home range of Rim Fire units, combined with agency admissions in the 2014 Recovery FEIS of the project’s impact on the Pacific fisher demonstrate that the Pacific fisher “may be affected” and is likely to be adversely affected by the Rim Fire Projects, including but not limited to logging and other activities implemented through the NDRC funding and environmental analyses.

### A. The Forest Service and U.S. Fish and Wildlife Service Documents Previously Admitted the Project “May Affect” Pacific Fishers.

In both the 2014 Recovery Final Environmental Impact Statement (“2014 Recovery FEIS”) and the 2014 Recovery Biological Assessment (“2014 Recovery BA”), the agencies admitted that the activities taking place for Rim Fire Recovery “may affect” individual Pacific fishers. 2014 Recovery FEIS at 391, 404–05; 2014 Recovery BA at 122–23. Not only did the 2014 Recovery FEIS dedicate an entire section of the document to the potential impacts on the Pacific fisher, but it also stated “the activities *may have direct and indirect effects on the [Pacific] fisher* through the following: Project related death, injury, or disturbance.” 2014 Recovery FEIS at 391 (emphasis added). At the time these documents were prepared, the Pacific fisher was only a “sensitive,” “candidate species.” *Id.* at 322; *see also* 2014 Recovery BA at 122–23 (stating the action “may affect individuals, but is not likely to contribute to the need for Federal listing or result in loss of viability for the Pacific fisher in the analysis area”). This analysis used by the agencies is outdated and in need of updating.

Not only has the status of the Pacific fisher changed since this consultation six years ago, but also the impacts of the project could be more severe given the Pacific fisher’s listed status and, as discussed below, its confirmed presence in or near logging and vegetation management units. Even without the new detections, the plain language of the both the 2014 Recovery FEIS and 2014 Recovery BA clearly state the activities “may affect” the Pacific fisher; thus, the agencies are required to reinitiate consultation or risk being in violation of Section 7.

### B. FOIA Documents Confirm Pacific Fisher Sightings in the Action Area and This New Information Requires Reinitiation of Consultation.

Although the 2014 Recovery FEIS states that the surveys conducted in earlier years on the Stanislaus have not resulted in detections of Pacific fishers in the forest,<sup>3</sup> that statement now runs contrary to the National Park Service’s data of Pacific fisher in the Forest. Documents received

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<sup>3</sup> *See* 2014 Recovery EIS at 387 (“While surveys have been conducted on the Stanislaus, they have not resulted in detections of Pacific fishers in the Forest. Additional carnivore camera stations were employed within suitable habitat in and near the analysis area in 2005 and 2013 . . . No Pacific fisher detections were made as a result of these survey efforts.”) (internal citations omitted).

from a 2020 FOIA request from the National Park Service shows Pacific fisher detections nearly adjacent to the Rim Fire Project boundaries. The northern most of these detections are approximately 1.5 miles from the nearest Rim Fire logging units. *See* Attachment A. The Pacific fisher’s home range radius is about 4 miles;<sup>4</sup> thus, the detections near the logging are well within the Pacific fisher’s home range, making it likely that Pacific fisher are utilizing the Rim Fire area.

Pacific fishers are known to inhabit and actively forage in post-fire areas and they greatly benefit from the structural complexity of these post-fire habitats. Hanson (2013) at 28. These areas of moderate to higher-severity fires often have higher overall biomass than unburned old forests, which is important to suitable habitat for Pacific fishers. *Id.* at 27–28. Thinning and post-fire logging only degrade and remove suitable Pacific fisher foraging habitat and unnecessarily degrade existing denning and resting habitat. Hanson (2015) at 501.

The presence of Pacific fisher in the action area could result in “take,” including but not limited to harm and impairment of behavioral patterns such as feeding, breeding, and sheltering. As discussed in the Federal Register’s listing, “the major threats for the SSN subpopulation are loss and fragmentation of habitat resulting from . . . wildfire suppression activities, vegetation management, and . . . direct impacts that include high mortality rates from predation, exposure to toxicants, and potential effects associated with small population size.” Endangered and Threatened Wildlife and Plants; Threatened Species Status for West Coast Distinct Population Segment of Fisher With Section 4(d) Rule, 84 Fed. Reg. 60,278, 60,286 (Nov. 7, 2019) (codified in 50 C.F.R. Part 17). Further, much of the Rim Fire action area activities involve the spraying of herbicides which could greatly diminish the Pacific fisher’s viable habitat, contribute to an increase in area flammability,<sup>5</sup> and could have unknown direct health impacts on the species itself.

### C. Plaintiffs’ Biologists Previously Detected Pacific Fisher in the Action Area

In May 2020, Plaintiffs’ biologist Craig Swolgaard observed a Pacific fisher on Aspen Valley Road, south of the Ackerson Meadow area within the Rim Fire. Mr. Swolgaard’s description of the siting is attached hereto as Attachment B. This detection also demonstrates the likelihood of Pacific fisher presence in the area of the Rim Fire Projects, as this location is within 1 to 2 miles of project units.

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<sup>4</sup> *See generally* William J. Zielinski et al., *The Home Range Characteristics of Fishers in California*, 85 J. OF MAMMALOGY 649 (2004) (discussing the various size breakdowns of Pacific fisher home ranges based on factors like biological sex and geographical location).

<sup>5</sup> For example, glyphosate-based herbicides—suggested for use in the project area—are crop desiccants. This means they impede a plant’s ability to uptake water, thus increasing dryness of the plant itself along with flammability of the area.

### III. VIOLATION OF NATIONAL ENVIRONMENTAL POLICY ACT

In addition to triggering reinitiation of consultation under the ESA, the information discussed above and included herewith is significant new information under NEPA and requires HCD and the Forest Service to supplement their NEPA analysis of the Rim Fire Projects. Although the 2014 Recovery EIS and the 2014 Recovery BA do discuss the potential impacts of the action on Pacific fisher to some degree, that analysis took place at a time where there were no current detections of Pacific fisher in or adjacent to the project area and prior to the Pacific fisher's ESA listing. *See* 2014 Recovery EIS at 322; 2014 Recovery BA at 122–23. The new information and detections of Pacific fishers near the project area significantly alter the picture; this is the first time in decades the Pacific fisher has been spotted this far north. The Rim Fire Project's impacts on the Pacific fisher are currently unknown and the effects it could have on species viability are highly speculative. HCD and the Forest Service have a duty to thoroughly detail the impacts of the Rim Fire Project on the Pacific fisher beyond the current “may affect” analysis. The Ninth Circuit has repeatedly warned that “general statements about possible effects” do not constitute the required “hard look” requirement absent a justification of why more definitive information was not provided. *See Sierra Club, 2005 U.S. Dist. LEXIS 27573 at \*32 (quoting Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1213 (9th Cir. 1998).*

The recent listing of the Pacific fisher, the National Park Service's 2020 FOIA document confirming Pacific fishers in the action area,<sup>6</sup> and the personal sightings by Plaintiffs' biologists show the remaining agency actions will affect the environment to a significant extent not already considered. Therefore, HCD and the Forest Service have a duty to supplement their NEPA analyses to adequately address the impacts on Pacific fishers or risk being in violation of NEPA.

### IV. CONCLUSION

We request that, in response to this notice, HCD and the Forest Service immediately cease all Rim Fire project activities until Section 7 consultation is complete and the NEPA analyses for these Projects have been updated and supplemented. The agencies should reinitiate the consultation necessary to comply with the requirements of the ESA and establish biological parameters that ensure the survival and recovery of listed species.

If this reinitiation does not timely occur, our clients intend to pursue litigation in Federal Court for these ESA and NEPA violations and will seek injunctive, declaratory, and other relief, including an award of attorneys' fees, expert witness fees, and other expenses incurred in investigating and prosecuting this action.

If you have any questions, wish to discuss this matter further, or believe this notice is in error, please feel free to contact me. Thank you for your prompt attention to this matter.

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<sup>6</sup> *See* Attachment A.

Letter to USFWS/USFS – Reinitiation of Consultation

October 2, 2020

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Sincerely,

/s/ Meriel L. Darzen

Meriel L. Darzen

Crag Law Center

3141 E Burnside St.

Portland, OR 97214

meriel@crag.org

Tel. (503) 525-2725

*Attorney for the John Muir Project of Earth Island Institute, Greenpeace Inc., and Sequoia ForestKeeper*

CC: Dustin Weisman/Tyler Burgess, USDOJ (via email only)

Awbrey Yost/Kim Gosling, CA DOJ (via email only)

## **SCIENTIFIC REFERENCES**

Chad T. Hanson, *Habitat Use of Pacific Fishers in a Heterogeneous Post-Fire and Unburned Forest Landscape on the Kern Plateau, Sierra Nevada, California*, 6 OPEN FOREST SCI. J. 24 (2013).

Chad T. Hanson, *Use of Higher Severity Fire Areas by Female Pacific Fishers on the Kern Plateau, Sierra Nevada, California, USA*, 39 WILDLIFE SOC'Y. BULLETIN 497 (2015).

William J. Zielinski et al., *The Home Range Characteristics of Fishers in California*, 85 J. OF MAMMALOGY 649 (2004).



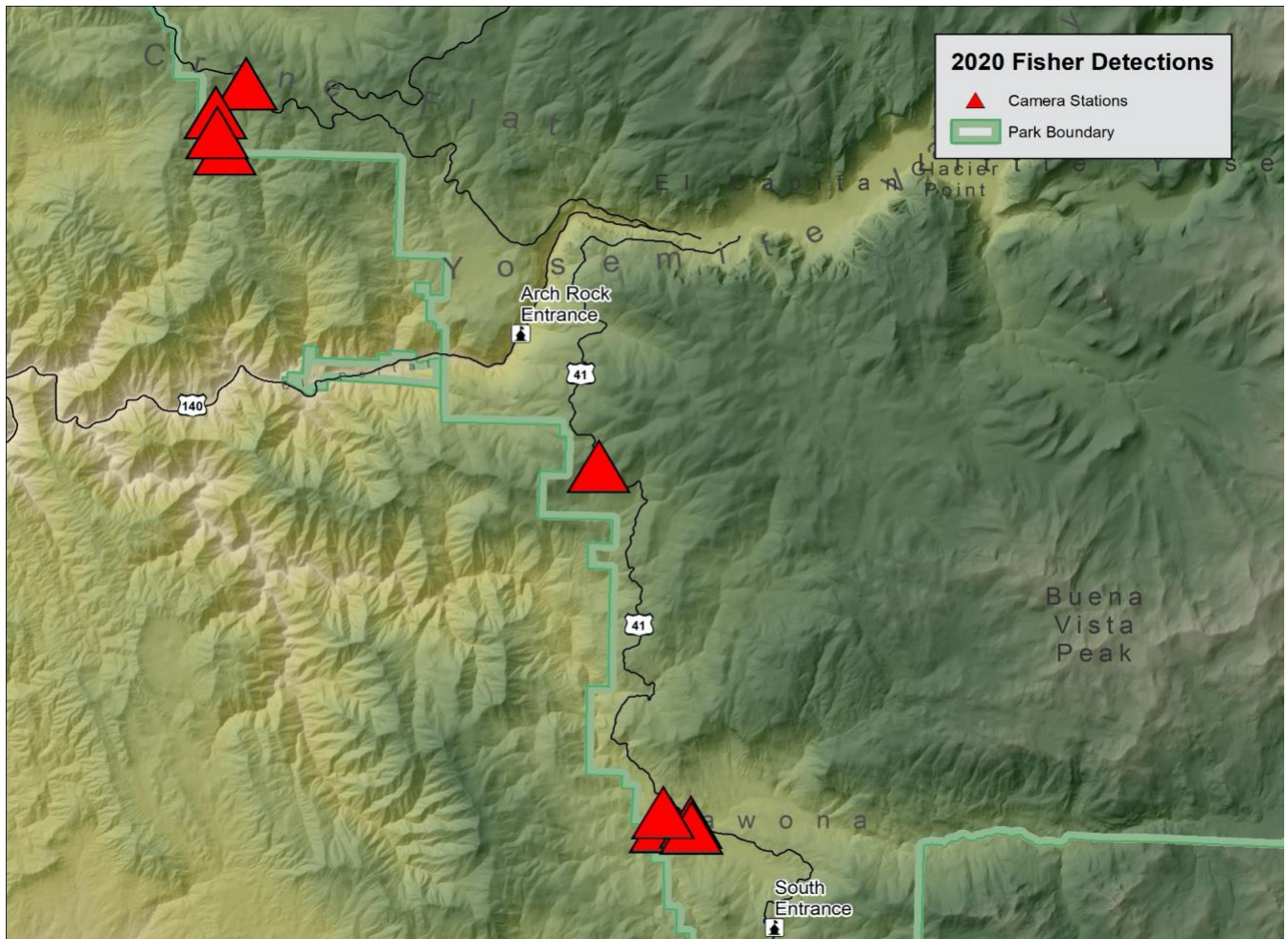
## **Attachment A**

2020 FOIA Request Documents  
from the National Park Service

## Fisher Detection Summary for 2020 (current as of August 18, 2020)

### CAMERAS

- North of the Merced River: Detections on 3/4/20, 3/21/20, 3/29/20, and 4/15/20.
- North of the Merced River: Detections on 3/28/20 and 3/31/20
- North of the Merced River: Detections on 3/28/20, 3/29/20, 3/31/20, and 4/02/20.
- North of the Merced River: Detections on 3/02/20, 3/21/20, 3/24/20, 3/28/20, and 3/29/20.
- South of the Merced River: Detections on 3/01/2020
- South of the Merced River: Detections on 1/16/20
- South of the Merced River: Detections on 2/03/20
- South of the Merced River: Detections on 1/19/20, 2/19/20 and 2/27/20
- South of the Merced River: Detections on 4/10/20
- South of the Merced River: Detections on 6/06/20



## **Attachment B**

Statement of Craig Swolgaard

9/30/20

To Whom It May Concern ,

In late May 2020, Maya Khosla and I were walking up Aspen Valley Road, located to the west of Yosemite National Park. We were talking and looking at the road immediately in front of us when I glanced up about fifty yards from us. An animal was crossing the road rather quickly. By the time I focused on it I saw it dip down the small gutter on the right and disappear up into the brush on the road cut. What I did see was a medium sized mammal, around 30" long. It was brown in color and had a long brushy tail that was a lighter, frosty brown. My look was maybe two or three seconds worth but I did get a good feeling for its size, color, and the shape of the tail. It was much larger than a weasel or a squirrel, much smaller than a canid, moving rather low to the ground. It was slim and agile, almost cat-like in the way it moved, but definitely not a cat of any kind.

I am a retired biologist, having 15 years of professional background with field biology and monitoring techniques that I used in my California State Parks position, where I worked in the Natural Resources Division state headquarters. Apart from professional work I have spent my entire life in the Sierra Nevada and am familiar with the diversity of animal species occurring there, including mammals. My first impression of this mammal was that it was a fisher. This was more as a result of a process of elimination than anything else, since I never had a clear view of the details of the animal's head. I have been lucky enough to see one fisher in my life, in September 1988. Its color was very dark brown, almost black, unlike the color of what I saw last May. Having gone through photographs of fishers and seeing the range of color they have, it is reasonable to accept what I saw as a fisher. And I am not mistaken in my estimation of the size of this mammal, seeing it in the context of the road and the branches of the bush it disappeared into.

Regards,

Craig Swolgaard, M.S.  
Georgetown, CA