



December 18, 2015

Via Certified Mail, Return Receipt Requested

Secretary Sally Jewell
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Secretary Tom Vilsack
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, D.C. 20250

Chief Tom Tidwell
U.S. Forest Service
1400 Independence Ave., S.W.
Washington, D.C. 20250

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

Supervisor Keith Lannom
Payette National Forest
500 North Mission St.
McCall, Idaho 83638

Supervisor Kit Mullen
Sawtooth National Forest
2647 Kimberly Road East
Twin Falls, ID 83301

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

Dear Secretary Salazar, Secretary Vilsack, Chief Tidwell, and Supervisors Smoldon, Lannom, and Mullen:

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 organization intends 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.

The name and address of the organization giving Notice of Intent to Sue:

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Portland, OR 97206

Counsel for the party giving notice:

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As described herein, the Forest Service has violated the ESA by failing to reinitiate Section 7 consultation with the U.S. Fish and Wildlife Service (“FWS”) concerning the effects of its actions on the bull trout (*Salvelinus confluentus*) and its critical habitat and by failing to ensure that its actions are not likely to jeopardize the continued existence of the bull trout or result in the destruction or adverse modification of this species’ critical habitat. *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 FWS¹ 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).

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 includes “actions directly or indirectly causing modifications to the land, water, or air.” 50 C.F.R. § 402.02. Forest Plans, programmatic amendments and interim management plans all constitute ongoing agency action requiring consultation. *E.g., Cottonwood Environmental Law Center v. U.S. Forest Service*, 789 F.3d 1075 (9th Cir. 2015); *Lane County Audobon Soc’y v. Jamison*, 958 F.2d 290 (9th Cir. 1992).

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 the FWS. 50 C.F.R. § 402.14; *see also*

¹ The bull trout is a species under FWS’s jurisdiction and was listed under the ESA subject to that jurisdiction.

51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (explaining that “may affect” broadly includes “[a]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character”).

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 FWS concurs 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 FWS completes 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 agencies 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).

However, an agency’s Section 7 duties do not end with the issuance of a BiOp. The action agency “cannot abrogate its responsibility to ensure that its actions will not jeopardize a listed species; its decision to rely on a FWS biological opinion must not have been arbitrary or capricious.” *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep’t of Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990). *See also Defenders of Wildlife v. EPA*, 420 F.3d 946, 976 (9th Cir. 2005) (rev’d on other grounds).

Further, once the consultation is complete, the agencies have a duty to ensure that it remains valid. *See Cottonwood Environmental Law Center v. U.S. Forest Service*, 789 F.3d 1075, 1084-88 (9th Cir. 2015). To this end, an agency must re-initiate consultation if certain “triggers” occur. 50 C.F.R. § 402.16. The ESA’s implementing regulations 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 (emphasis added).

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.

FACTUAL BACKGROUND

The Interim Strategy for Managing Fish-Producing Watersheds (“INFISH”) constitutes a broad-reaching aquatic habitat conservation strategy for the northwestern United States and was incorporated into the Forest Plans in a single Record of Decision. In 1995, the Forest Service Regions 1, 4 and 6 adopted INFISH to provide interim direction to protect habitat and population of resident native fish. The Forest Service amended the Land and Resource Management Plans (“LMPs”) for the Colville (Washington), Payette (Idaho), and Sawtooth (Idaho) National Forests, among others, to incorporate INFISH.

In August of 1998, FWS issued a Biological Opinion on the Forest Service LMPs as amended by INFISH in response to the listing of bull trout (“1998 BiOp”). The 1998 BiOp analyzed the effects to bull trout from the Colville, Payette, Sawtooth, and other National Forest LMPs. In the 1998 BiOp, FWS noted, “within the range of the DPSs of bull trout, LMPs provide direction and standards for broad classes of project activities and land and water management practices that may affect bull trout. LMPs provide policy guidance for various federal activities carried out on the forest or management area.” The programmatic 1998 BiOp ultimately concluded that continued implementation of the LMPs is not likely to jeopardize the continued existence of bull trout. However, **the 1998 BiOp also concluded that because “[n]o critical habitat has been designated for the species [...] none will be affected.”**

After years of legal and political wrangling, critical habitat for bull trout was finally designated on October 18, 2010. 75 Fed. Reg. 63898 (Oct. 18, 2010). The rule designated a total of 19,729 miles of stream and 488,251.7 acres of reservoirs and lakes in the States of Washington, Oregon, Nevada, Idaho, and Montana as critical habitat for the bull trout. Although the Forest Service consulted with the FWS on the effects of INFISH/PACFISH and determined that the programmatic amendment would not jeopardize the continued existence of bull trout, **the agencies never re-initiated consultation on INFISH or the Colville, Payette, or Sawtooth National Forests to determine whether their implementation would destroy or adversely modify bull trout critical habitat.** This consultation should have been re-initiated following designation of critical habitat. 50 C.F.R. § 402.16(d).

COLVILLE NATIONAL FOREST

On April 10, 2008, the Colville National Forest issued Forest Plan Amendment #31 along with a decision notice and finding of no significant impact. The Forest Service prepared a BA for the Forest Plan Amendment that determined implementation of Amendment #31 would not adversely modify critical habitat for bull trout. The FWS’s

Letter of Concurrence concluded by stating the Forest Service must re-analyze the Amendment if new critical habitat is designated that may be affected by the Amendment. LOC at 1-2.

In 2010, the FWS identified streams in the Colville National Forest in the bull trout critical habitat rule, including the Pend Oreille River, LeClerc Creek, Slate Creek, Sullivan Creek, and Mill Creek. 75 Fed. Reg. 63898, 64061-64067 (Oct. 18, 2010) (Unit 31). The Forest Service has violated Section 7 of the ESA by failing to reinitiate and timely complete consultation with FWS regarding the continued implementation and impacts of the Colville LMP as amended by Amendment #31 on bull trout and bull trout critical habitat after critical habitat was designated in 2010.

PAYETTE NATIONAL FOREST

The Payette National Forest completed a Final Environmental Impact Statement to assess its forest-wide Travel Management Plan in 2008. The Forest Service then made separate travel management decisions for each watershed within the Payette National Forest.

Weiser River Watershed

The Forest Service issued its record of decision for snow-free travel on the Weiser River Ranger District, which includes the Weiser River and its tributaries, in January 2008. See 2008 McCall and Krassel Ranger Districts Snow-free Season TMP at ROD-3. The agency prepared a 2007 BA that determined implementation of the Travel Management Plan was likely to adversely affect bull trout in the Weiser River watershed. The FWS completed a 2009 BiOp to assess the potential effects of managing the Payette National Forest in the Weiser River Watershed, and determined the travel plan was likely to adversely affect bull trout. 2009 FWS Weiser Ongoing BiOp at 1. It concluded by stating the Forest Service must reinitiate formal consultation if new critical habitat is designated that may be affected by the action. *Id.* at 89-90.

In 2010, FWS identified streams in the Weiser River Ranger District as bull trout critical habitat, including Olive Creek and Hornet Creek. 75 Fed. Reg. at 64037-64043 (Unit 26 – West Half). The Forest Service violated the ESA by failing to reinitiate consultation with the FWS after critical habitat for bull trout was designated within the Weiser River watershed that may be impacted by the Travel Management Plan.

Brownlee Reservoir Watershed

The Forest Service prepared a 2007 BA that determined implementation of the Travel Management Plan in the Brownlee Reservoir watershed is likely to adversely affect bull trout. 2007 Brownlee Ongoing BA at 99. The FWS's 2009 BiOp concluded implementation of the Travel Management Plan was likely to adversely affect bull trout in the Brownlee Reservoir watershed. 2009 Brownlee Ongoing FWS BO at 2. It concluded by stating the Forest Service must reinitiate formal consultation if new critical habitat is designated that may be affected by the action. *Id.* at 85-86.

In 2010, FWS identified streams in the Brownlee Reservoir watershed in the Bull Trout critical habitat rule, including Indian Creek, Bear Creek, Crooked River and Wildhorse River. 75 Fed. Reg. at 64020-64022 (Unit 19). The Forest Service violated the ESA by failing to reinitiate consultation with the FWS on the effects of the Travel Management Plan in the Brownlee Reservoir watershed after critical habitat for bull trout was designated that may be impacted by the Travel Plan.

Deep Creek Watershed

The Forest Service prepared a 2007 BA that determined implementation of the Travel Management Plan within the Deep Creek watershed is likely to adversely affect bull trout. 2007 Deep Creek Ongoing BA at 85. The FWS's 2009 BiOp concluded implementation of the Travel Management Plan was likely to adversely affect bull trout in the Deep Creek watershed. 2009 Deep Creek Ongoing FWS BO at 1. It concluded by stating the Forest Service must reinitiate formal consultation if new critical habitat is designated that may be affected by the action. *Id.* at 60.

In 2010, FWS identified streams in the Deep Creek watershed in the Bull Trout critical habitat rule, including Granite Creek. 75 Fed. Reg. at 64018-64020 (Unit 18). The Forest Service violated the ESA by failing to reinitiate consultation with the FWS on the effects of the Travel Management Plan in the Deep Creek watershed after critical habitat for bull trout was designated that may be impacted by the Travel Plan.

Little Salmon River Watershed

The Forest Service prepared a 2007 BA that determined implementation of the Travel Management Plan within the Little Salmon watershed was likely to adversely affect bull trout. 2007 Little Salmon River Ongoing BA at 144. FWS's 2009 BiOp concluded implementation of the Travel Management Plan was likely to adversely affect bull trout in the Little Salmon River watershed. 2009 LSR Ongoing BO FWS at 2. It stated that the Forest Service must reinitiate formal consultation if new critical habitat is designated within the Little Salmon River watershed that may be affected by the action. *Id.* at 79.

In 2010, FWS identified streams in the Little Salmon River watershed in its Bull Trout critical habitat rule, including the Little Salmon River, Boulder Creek, and Ant Basin Creek. 75 Fed. Reg. at 64044-64055 (Unit 27). The Forest Service violated the ESA by failing to reinitiate consultation with the FWS on the effects of the Travel Management Plan in the Little Salmon River watershed after critical habitat for bull trout was designated that may be impacted by the Travel Plan.

Middle Fork Salmon River Tributaries NW and Main Salmon River Tributaries SE Watersheds

The Forest Service prepared a 2007 BA that determined implementation of the Travel Management Plan within the Middle Fork Salmon River Tributaries NW and

Main Salmon River Tributaries SE watersheds was likely to adversely affect bull trout. 2007 MFSR Ongoing BA at 110. FWS's 2009 BiOp concluded implementation of the Travel Management Plan was likely to adversely affect bull trout in the Middle Fork Salmon River watershed. 2009 MFT MSSE Ongoing BO FWS (2009-F-0063) at 2. It stated that the Forest Service must reinitiate formal consultation if new critical habitat is designated within the Middle Fork Salmon River watershed that may be affected by the actions, including the Travel Plan. *Id.* at 80.

In 2010, FWS identified streams within the Middle Fork Salmon River watershed in its Bull Trout critical habitat rule, including the Secesh River, Lick Creek, Hida Creek, Sappo Creek, and Raven Creek. 75 Fed. Reg. at 64044-64055 (Unit 27). The Forest Service violated the ESA by failing to reinitiate consultation with the FWS on the effects of the Travel Management Plan in the Middle Fork Salmon River watershed after critical habitat for bull trout was designated that may be impacted by the Travel Plan.

Main Salmon SW Watershed

The Forest Service prepared a 2007 BA that determined implementation of the Travel Management Plan within the Main Salmon SW watershed was likely to adversely affect bull trout. 2007 MSR Ongoing BA at 97. FWS's 2009 BiOp concluded implementation of the Travel Management Plan was likely to adversely affect bull trout in the Main Salmon SW watershed. 2009 MSR Ongoing BO FWS (2009-F-0062) at 1. It stated that the Forest Service must reinitiate formal consultation if new critical habitat is designated within the Main Salmon SW watershed that may be affected by the actions, including the Travel Plan. *Id.* at 63.

In 2010, FWS identified streams within the Main Salmon SW watershed in its Bull Trout critical habitat rule, including the Lake Creek, Partridge Creek and Fall Creek. 75 Fed. Reg. at 64044-64055 (Unit 27). The Forest Service violated the ESA by failing to reinitiate consultation with the FWS on the effects of the Travel Management Plan in the Main Salmon SW watershed after critical habitat for bull trout was designated that may be impacted by the Travel Plan.

South Fork Salmon River Watershed

The Forest Service prepared a 2007 BA that determined implementation of the Travel Management Plan was likely to adversely affect bull trout within the South Fork Salmon River watershed. 2007 South Fork Salmon River Ongoing BA at 131. The FWS prepared a 2009 BiOp that concluded implementation of the Travel Management Plan was likely to adversely affect bull trout in the South Fork Salmon River watershed. 2009 Deep Creek Ongoing FWS BO at 2. It stated the Forest Service must reinitiate formal consultation if new critical habitat is designated that may be affected by the action. *Id.* at 75.

In 2010, FWS identified streams within the South Fork Salmon River watershed as bull trout critical habitat, including Monumental Creek, Lick Creek and the Secesh River. 75 Fed. Reg. at 64044-64055 (Unit 27). The Forest Service violated the ESA by

failing to reinitiate consultation with the FWS on the effects of the Travel Plan in the South Fork Salmon River watershed after critical habitat for bull trout was designated that may be impacted by the Travel Plan.

SAWTOOTH NATIONAL FOREST

Fairfield Ranger District

In 2007 the Fairfield Ranger District prepared a BA for its Travel Plan revision, which restricted motor vehicle use to designated roads and trails, eliminated user created non-system routes, and made changes to the system. The BA determined implementation of the Travel Plan revision was not likely to adversely affect bull trout. Several culvert barriers occurred in close proximity to migratory bull trout or near tributaries that supported local populations in the South Fork Boise River. *See* 2007 Fairfield Ranger District Travel Plan BA, Appendix 1, page 22. In 2008, FWS concurred with the not likely to adversely affect determination. *See* 2008 FWS Concurrence Letter. FWS noted, however, that if environmental conditions change or there is new information about the potential effects, the Forest Service should verify with FWS that the conclusions are still valid.

In 2010, FWS included streams within the Fairfield Ranger District in the bull trout critical habitat rule, including the South Fork Boise River, Boardman Creek, Deadwood Creek, and Little Smoky Creek. 75 Fed. Reg. at 64037-64043 (Unit 26). The Forest Service violated the ESA by failing to reinitiate consultation with the FWS on the Travel Plan revision after critical habitat was designated in the Fairfield Ranger District that may be affected by the Travel Plan Revision. *See generally, Conservation Congress v. Finley*, 774 F.3d 611, 619 (9th Cir. 2014) (holding 50 C.F.R. § 402.16 applies to formal and informal consultation).

ESA VIOLATIONS

1. The Forest Service has violated the ESA by failing to reinitiate Section 7 consultation with FWS regarding the continued implementation and impacts of the Colville Forest Plan Amendment #31 on bull trout. Section 7(a)(2) of the ESA requires that each federal agency consult with FWS 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). The Forest Service's failure to reinitiate Section 7 consultation on the Colville National Forest Plan Amendment # 31 after critical habitat was designated is a significant violation of the ESA. 50 C.F.R. § 402.16(b) & (d); *Cottonwood Environmental Law Center v. U.S. Forest Serv.*, 789 F.3d 1075 (9th Cir. 2015).
2. The Forest Service's failure to reinitiate Section 7 consultation with FWS regarding the continued implementation and impacts of the Payette National Forest's Travel Management Plan in the Weiser River, Brownlee Reservoir, Deep

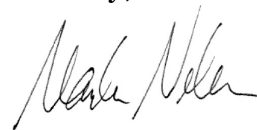
Creek, Little Salmon River, Middle Fork Salmon River Tributaries NW and Main Salmon River Tributaries SE, Main Salmon SW, and South Fork Salmon River watersheds on bull trout after critical habitat was designated is a significant violation of the ESA. 50 C.F.R. § 402.16(b) & (d); *Cottonwood Environmental Law Center v. U.S. Forest Serv.*, 789 F.3d 1075 (9th Cir. 2015).

3. The Forest Service's failure to reinitiate Section 7 consultation with FWS regarding the continued implementation and impacts of the Fairfield Ranger District Travel Plan revision on bull trout after critical habitat was designated is a significant violation of the ESA. 50 C.F.R. § 402.16(b) & (d); *Cottonwood Environmental Law Center v. U.S. Forest Serv.*, 789 F.3d 1075 (9th Cir. 2015); *Conservation Congress v. Finley*, 774 F.3d 611, 619 (9th Cir. 2014).
4. The Forest Service is in violation of Section 7(d) of the ESA by implementing the Colville Forest Plan Amendment # 31, the Payette National Forest Travel Management Plan, and the Fairfield Ranger District Travel Plan revision before adequate and lawful consultation is complete. Such actions constitute an "irreversible and irretrievable commitment of resources" and warrant an injunction. See 16 U.S.C. §1536(d).

WildEarth Guardians will seek to enjoin implementation of the Colville Forest Plan Amendment #31, the Payette National Forest Travel Management Plan, and the Fairfield Ranger District Travel Plan Revision, unless the Forest Service reinitiates consultation on these actions.

For the above stated reasons, the Forest Service has violated and remains in ongoing violation of the ESA. The 60-day notice requirement is intended to provide you an opportunity to correct the actions in violation of the ESA. We appreciate your consideration of the violations outlined in this notice and hope that you will take action to resolve these issues. Please contact me if the Forest Service is interested in meeting, or if you have any questions or concerns regarding this notice of intent to sue.

Sincerely,



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cc: Loretta E. Lynch, U.S. Attorney General