

# AKLAND

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**October 14, 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 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 Forest**

You are hereby notified that Alliance for the Wild Rockies intend 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

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  
Tel: (406) 544-9863

## 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 insure 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 U.S. Fish & Wildlife Service (USFWS), 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 “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, Gray Wolf, Grizzly Bear, Northern Spotted Owl, Canada Lynx and Canada Lynx Designated Critical Habitat. FWS concurred with the Forest Service’s determination. The Forest Service’s analysis in the Biological Assessment and the FWS’s concurrence is arbitrary and capricious and an abuse of its discretion.

The Biological Assessment fails to adequately and fully address all relevant habitat standards for grizzly bears and fails to adequately address cumulative effects. It fails to adequately assess the impact of the Project area road and road density on grizzly bears, fails to adequately assess the Project impact on the North Cascades Recovery Zone, fails to adequately address disturbance, displacement and habitat degradation and fails to comply with applicable standards. Moreover, the analysis fails to account for diminished food sources for bears in the region and escalating dispersal of bears seeking food and habitat and fails to apply the best available science regarding grizzly bears. The Forest Service’s “not likely to adversely affect grizzly bears” conclusion is

arbitrary and capricious because it fails to take into account the above factors. The Project will adversely impact grizzly bears and therefore the FWS must produce a biological opinion and incidental take statement (ITS) for the Project.

The Biological Assessment also fails to adequately and fully address the Project's impact on the Northern Spotted Owl and the "not likely to adversely affect" determination is arbitrary and capricious. The Biological Assessment fails to disclose and address the most recent annual monitoring data of the Northern Spotted Owl (NSO) which clearly documents a continued decline of the species. The March 31, 2017 Annual Progress Report admits the NSO population is in significant decline over the last five years. The Project will have a negative impact on this already declining species because it will remove and/or degrade and/or downgrade important nesting, roosting and foraging habitat as well as dispersal habitat. The Biological Assessment fails to adequately consider the 2011 NSO Recovery Plan. The FWS's concurrence is arbitrary and capricious for the same reasons. The FWS must produce a biological opinion and ITS for the Project.

Additionally, the agencies fail to adequately and fully address all the relevant habitat standards for lynx, fail to adequately address cumulative effects, to adequately address the primary constituent elements, fail to adequately address the individual significance of the Project area on lynx and lynx critical habitat.

Moreover, 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, fails 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 fails to adequately address the impact of road construction and maintenance on the above reference species. The conclusions drawn from the agencies' inadequate analysis 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 FWS 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.

Finally, the Forest Service must reinitiate/initiate consultation on the Okanagon Forest Plan on its impacts to grizzly bears and northern spotted owls. Since the drafting of the Forest Plan, grizzly bears have been found to be present on the Forest. The Forest and the Project Area includes habitat capable of supporting a grizzly bear population. In fact, the North Cascades Recovery Zone is located within the Okanagon Forest Plan. The failure to consult on the Forest Plan's impact on grizzly bears is a violation of the ESA. The best available science concludes that roads and road density is an important factor in grizzly bear recovery, thus consultation must discuss the impact of roads on grizzly bears and the Forest Plan. The failure of the Forest Service and the FWS to do so is arbitrary and capricious and an abuse of discretion. Additionally, the NSO monitoring results document a statistically significant decline in NSO populations over the last 5 years. The Forest Service has acknowledged that the sparse scientific evidence on cause-and-effect relationships between habitat management and NSO vital rates shows a negative correlation between "landscape restoration" projects and NSO occupancy. Therefore, the consultation documents must discuss the impacts of habitat management on NSO populations.

## 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