



COTTONWOOD

ENVIRONMENTAL LAW CENTER

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

Neil Kornze, Director  
U.S. Bureau of Land Management  
1849 C Street NW  
Room 5637  
Washington, D.C. 20240

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

July 10, 2014

**60-Day Notice of Intent to Sue Under §§ 7, 9 of the  
Endangered Species Act**

You are hereby notified that the following organizations intend to file a lawsuit pursuant to the citizen suit provision of the Endangered Species Act (ESA), 16 U.S.C. Section 1540(g) for violations of the ESA, 16 U.S.C. Section 1531 *et seq.* We will file suit after the 60-day period has run unless the violations described in this notice are remedied. The names and addresses of the organizations giving Notice of Intent to Sue are as follows:

Cottonwood Environmental Law Center  
John Meyer, Executive Director  
24 South Willson Ave., Suites 6-7  
Bozeman, MT 59715

WildEarth Guardians  
Sarah Peters, Program Attorney  
P.O. Box 50104  
Eugene, OR 97405

Western Watersheds Project  
Travis Bruner, Executive Director  
P.O. Box 1770  
Hailey, Idaho 83333

Cascadia Wildlands  
Nick Cady, Staff Attorney  
P.O. Box 10455  
Eugene, OR 97440



## Endangered Species Act Section 7 Consultation

The Endangered Species Act prohibits federal agencies “from taking discretionary actions that would ‘jeopardize the continuing existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species....’ ” *Forest Guardians v. Johanns*, 450 F.3d 455, 457 (9th Cir. 2006) (quoting 16 U.S.C. § 1536(a)(2)). To ensure there is no adverse modification, the ESA requires the USDA Forest Service to consult with the appropriate federal agency on actions that “may affect” a listed species or its critical habitat. 16 U.S.C. § 1536(a)(1), (a)(2). The threshold for triggering consultation under the ESA is low: consultation is required whenever a federal action “ may affect listed species or critical habitat.” 50 C.F.R. § 402.14(a). Agency actions requiring consultation are “broadly defined” by regulation “encompassing ‘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.’ ” *Turtle Island Restoration Network v. Nat’l Marine Fisheries Serv.*, 340 F.3d 969, 974 (9th Cir. 2003) (quoting 50 C.F.R. § 402.02). Forest Plans, programmatic amendments and interim management plans all constitute ongoing agency action requiring consultation. *E.g.*, *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1052-53 n.12 (9th Cir. 1994) (holding “consultation on the entirety of [all] the [Forest Plans] is required[.]”); *Lane County Audobon Soc’y v. Jamison*, 958 F.2d 290 (1992).

During the ESA consultation process, if the action agency determines that an action “may affect” a listed species it must develop a Biological Assessment (“BA”). If the 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” (“Bi-Op”) 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 that would avoid such results. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)(5).



Once the consultation is complete, the agencies have a duty to ensure that it remains valid. *See Center for Biological Diversity v. Salazar*, 695 F.3d 893 (9th Cir. 2012). 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 agencies 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).

**The agencies violated the ESA by failing to re-Initiate consultation on the INFISH and PACFISH management strategies, the amendments that adopted the strategies into Forest Plans, and the Forest Plans that contain the strategies. Re-Initiation is required because new critical habitat for bull trout was designated in 2010.**

In 1995, the Land and Resource Management Plans (“LRMPs”) from 24 separate National Forests (as well as management plans for BLM lands) were amended to incorporate the Interim Strategy for Managing Fish-Producing Watersheds (“INFISH”). INFISH constitutes a broad-reaching aquatic habitat conservation strategy for the northwestern United States and was incorporated into multiple Forest Plans in a single Record of Decision. The Forest Service then entered into Section 7 consultation with the U.S. Fish & Wildlife Service (“FWS”). Also in 1995, the Forest Service and the Bureau of Land Management issued a comprehensive management strategy for anadromous fish producing watersheds on additional federal lands in eastern Oregon, Washington, Idaho and portions of California (“PACFISH”).



In August of 1998, FWS issued a Biological Opinion on the Forest Service and BLM LRMPs as amended by INFISH and PACFISH in response to the listing of bull trout. The Biological Opinion analyzed the effects to bull trout from BLM and Forest Service LRMPs in the states of Washington, Oregon, Idaho, Montana, Nevada and portions of California. In the BiOp, the FWS noted that “within the range of the DPSs of bull trout, LRMPs provide direction and standards for broad classes of project activities and land and water management practices that may affect bull trout. LRMPs provide policy guidance for various federal activities carried out on the forest or management area.” The LRMP BiOp also analyzed seven additional commitments to the proposed action and concluded that successful implementation of the additional commitments agreed to by the agencies would sufficiently modify the proposed action to a degree where it is not likely to jeopardize the bull trout in the Columbia River and Klamath Distinct Population Segments. The consultation also included an agreement to streamline future consultations through the use of a framework, including baseline conditions, to use when analyzing the effects of individual or grouped actions on bull trout at the subpopulation watershed scale. “As such, for Section 7 consultation purposes, the Service relies on these baselines for determining current habitat and population conditions and for detecting change to habitat conditions over time from both natural [...] and management activities.” The programmatic BiOp ultimately concluded that continued implementation of the land management plans is not likely to jeopardize the continued existence of bull trout. However, **the 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/BLM consulted with the Fish & Wildlife Service and the National Marine Fisheries Service on the effects of INFISH/PACFISH and determined that the programmatic amendment would not jeopardize the continued existence of bull trout, **the agency never re-initiated consultation to determine whether the amendment would destroy or adversely modify critical habitat.** This consultation should have been re-initiated following designation of critical habitat. Countless site-specific activities are being implemented under the guidance of the programmatic INFISH/PACFISH amendments even though this document has never been subject to the required Section 7 consultation as it relates to designated critical habitat. This is a significant violation of the ESA. See *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994); *Salix v. U.S. Forest Service*, 9:12-cv- 00045-DLC (D. Mont. May 16, 2013).



The above-named organizations intend to file a lawsuit against you for failing to re-initiate consultation on the PACFISH and INFISH documents, the amendments that adopted PACFISH and INFISH into the Forest Plans, and every Forest Plan that adopted PACFISH and INFISH.

In addition, we hereby give notice that we intend to challenge all site-specific activities that “may affect” critical habitat because those activities either:

- 1) rely on PACFISH or INFISH without re-initiating consultation, or
  - 2) rely on amendments that adopted PACFISH and INFISH into the Forest Plans without reinitiating consultation on the amendments, or
  - 3) rely on Forest Plans that adopted PACFISH or INFISH without reinitiating consultation on the amendments, or
- 2) were not approved pursuant to any programmatic management guidelines or documents that have undergone consultation since critical habitat was designated for bull trout.

### **The Agencies’ Failure to Re-Initiate Consultation is a Violation of Section 9**

Section 9 of the ESA states that it is unlawful for any person to “take any [endangered or threatened] species within the United States...” 16 U.S.C. § 1538(a)(1)(B). As defined under the ESA, the term “take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19).

The ongoing and future activities of the Forest Service and BLM will be in violation of 16 U.S.C. § 1538(a)(1)(B) because the ongoing approval of site specific projects without re-initiating consultation on the programmatic management that guides their analysis constitutes a “taking” of listed species. 50 C.F.R. § 17.11(h). Cottonwood et al. alleges that any and all Forest Service activities, operations, management schemes, and projects that result in a “taking” of bull trout are in violation of Sections 7 and 9 of the ESA and must be stopped. 16 U.S.C. § 1536(a)(2) (consultation); 16 U.S.C. § 1538(a)(1)(B) (take prohibition); 50 CFR 402.14(h)(2).

The Forest Service and BLM decisions to implement PACFISH and INFISH or otherwise go forward with projects at the site-specific level



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before adequate and lawful consultation is complete on the strategies, amendments or forest plans constitutes an “irreversible or irretrievable commitment of resources” in violation of Section 7(d) of the ESA and warrants an injunction. 16 U.S.C. § 1536(d).

Unless the Forest Service and BLM re-initiate consultation, the above-named organizations will seek to enjoin further implementation of PACFISH, INFISH, and all other actions that may affect critical habitat for bull trout.

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.

Sincerely,

*/s/John Meyer*

JOHN MEYER

Executive Director

Cottonwood Environmental Law Center

24 S. Willson Ave., Suite 6-7

Bozeman, MT 59715

406-587-5800

John@Cottonwoodlaw.org