



November 20, 2013

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

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

Maria Garcia  
Forest Supervisor  
Santa Fe National Forest  
11 Forest Lane  
Santa Fe, NM 87508

**RE: 60-Day Notice of Intent to Sue in Regards to the Land and Resource Management Plan and Travel Management Plan Decisions and the SW Jemez Mountains Landscape Restoration Project and the Listing as Endangered of the Jemez Mountains Salamander in the Santa Fe National Forest**

Dear Secretary Vilsack, Secretary Jewel, and Forest Supervisor Garcia:

In accordance with the 60-day notice requirement of the Endangered Species Act (ESA), 16 U.S.C. § 1540(g), you are hereby notified that WildEarth Guardians (“Guardians”) intends to bring a civil action against the U.S. Forest Service (“Forest Service”) for violating Section 7 and 9 of the ESA, 16 U.S.C. §§ 1536 and 1538, by failing to consult with the U.S. Fish and Wildlife Service (“FWS”) concerning the effects of its actions on the Jemez Mountains salamander (*Plethodon neomexicanus*) and its critical habitat (CH), which was listed as endangered by FWS on October 10, 2013 and critical habitat designated on November 20, 2013, by failing to ensure that its actions are not likely to jeopardize the continued existence of the Jemez Mountains salamander or result in the destruction or adverse modification of this species’ critical habitat, and by illegally “taking” Jemez Mountains salamanders. See 16 U.S.C. §§ 1536(a)(2) and 1538(g). In particular, the Forest Service failed to initiate or reinstate consultation on the following agency actions: the Land and Resource Management Plan (Forest Plan or Plan) for the Santa Fe National Forest; the Jemez National Recreation Area Management Plan (Jemez NRA Plan); the Travel Management Plan (TMP) for the Santa Fe National Forest; the Southwest Jemez Mountains Landscape Restoration Project (SW Jemez Project) in the Santa Fe National Forest; and any other ongoing agency action requiring consultation in the Santa Fe National Forest which

may affect the Jemez Mountains salamander or result in the destruction or adverse modification of this species' critical habitat. See 16 U.S.C. § 1536(a)(2).

## **1. Noticing Party**

Guardians is a non-profit, public interest, environmental advocacy and conservation organization. Guardians' mission is to protect and restore wildlife, wild rivers and wild places in the American West. Guardians has over 35,000 members and activists, many of whom live, work, and recreate in areas affected by the ESA violations described herein. Guardians and its members have a substantial interest in the conservation and recovery of the Jemez Mountains salamander and are adversely affected by the Agencies' failure to protect this species and its habitat in compliance with the ESA.

## **2. The Endangered Species Act and the Agencies' Consultation Obligations**

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 ..." Id. § 1531(b).

To implement this policy, Section 7(a)(2) of the ESA requires that each federal agency consult with FWS<sup>1</sup> to insure that any action authorized, funded, or carried out by the 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. 16 U.S.C. § 1536(a)(2). "Action" is broadly defined 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.

For federal actions, the federal agency must request from FWS a determination of whether any listed or proposed species may be present in the area of the agency action. 16 U.S.C. § 1536(c)(1). If listed or proposed species may be present, the federal agency must prepare a "biological assessment" to determine whether the listed species may be affected by the proposed action. See id.; 50 C.F.R. § 402.12. If the agency determines that its proposed action "may affect" any listed species or its critical habitat, the agency must engage in "formal consultation" with FWS. 50 C.F.R. § 402.14; see also 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (explaining that "may affect" broadly includes "[a]ny possible effect, whether

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<sup>1</sup> The Jemez Mountains salamander is a species under FWS' jurisdiction, was listed subject to that jurisdiction, and any consultation will thus take place with FWS. See, e.g., 78 Fed. Reg. at 55,600.

beneficial, benign, adverse or of an undetermined character”).

After formal consultation, FWS issues a biological opinion to explain whether the agency action is likely to “jeopardize” any species’ existence. 16 U.S.C. § 1536(a)(2). The biological opinion must include a summary of the information on which it is based and must adequately detail and assess how the proposed action affects listed species. 50 C.F.R. § 402.14(h). The biological opinion must also include an evaluation of the “cumulative effects on the listed species . . .” 50 C.F.R. § 402.14(g)(3). If the action is likely to cause jeopardy, then the biological opinion shall specify reasonable and prudent alternatives (“RPAs”) that avoid jeopardy. See 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. 402.14(h)(3). If FWS concludes that the action or the RPAs will not cause jeopardy, FWS will issue an incidental take statement (“ITS”) that specifies “the impact, i.e., the amount or extent, of . . . incidental taking” that may occur. See 50 C.F.R. § 402.14(i)(1). The ESA requires agencies to use the best available science when conducting their analysis. See 16 U.S.C. § 1536(a)(2).

However, an agency’s consultation duties do not end with the issuance of a biological opinion. Instead, an agency must reinitiate consultation when: (1) the amount of take specified in the ITS is exceeded, (2) new information reveals that the action may have effects not previously considered, (3) the action is modified in a way not previously considered, or (4) “[i]f a new species is listed or critical habitat designated that may be affected by the identified action.” See 50 C.F.R. § 402.16.

After consultation is initiated (or reinitiated pursuant to one of the triggers set forth in the paragraph immediately preceding), 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.

Additionally, Section 9 of the ESA prohibits the “take” of endangered species. 16 U.S.C. § 1538(a)(1)(B). “Take” means “to harass, harm, . . . wound, kill, trap, [or] capture” an endangered species. Id. § 1532(19).<sup>2</sup> It is also unlawful for any person to “cause [an ESA violation] to be committed,” and thus the ESA prohibits a governmental agency from authorizing any activity resulting in take. See 16 U.S.C. § 1538(g); see also, e.g., Strahan v.

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<sup>2</sup> The terms “harass” and “harm” are further defined in the ESA’s implementing regulations. “Harass” means “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” 50 C.F.R. § 17.3. “Harm” means “an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” Id.

Coxe, 127 F.3d 155, 163 (1st Cir. 1997). Without a biological opinion and an ITS from FWS covering the endangered species, an action agency is not authorized to “take” or jeopardize any members of that species.

### **3. Factual Background**

#### **a. Jemez Mountain Salamander**

FWS listed the Jemez Mountains salamander (*Plethodon neomexicanus*) as endangered throughout its range on September 10, 2013 and critical habitat was designated on November 20, 2013. 78 Fed. Reg. 55,600 and 69,569. This determination grants the species the full protections available under the ESA.

As FWS explained in the listing rule, “the Jemez Mountains salamander and its habitat experience threats from historical and current fire management practices; severe wildland fire; forest composition and structure conversions; post-fire rehabilitation; forest management (including silvicultural practices); roads, trails, and habitat fragmentation; and recreation.” Id. at 55,620. FWS “determine[d] that the present or threatened destruction, modification, or curtailment of habitat and range represents a current significant threat to the salamander, and will continue to do so in the future.” Id.

#### **b. Santa Fe National Forest Land and Resource Management Plan**

From 1985 to 1988, each of the 11 National Forests in the Southwestern Region developed and approved Land and Resource management Plans (“Forest Plans”) pursuant to the National Forest Management Act (“NFMA”). The FWS issued a non-jeopardy/no adverse critical habitat (“CH”) modification opinion on each of the Forest Service Plans for all federally listed species at the time. The Santa Fe National Forest Land and Resource Management Plan was signed September 4, 1987 and amended in 2010. ([http://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/stelprdb5419626.pdf](http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5419626.pdf). Accessed November 8, 2013). In 1996, the Forest Service amended all Forest Plans in the Southwest Region. In November 1996, FWS issued a biological opinion on the 1996 Forest Plan Amendment.

In 2004, the Forest Service requested that consultation with FWS be reinitiated regarding the continued implementation of the Forest Plans in the Southwest Region and in June 2005, FWS issued a biological opinion.

On October 11, 2011, the Forest Service was held to be in violation of the ESA for failing to monitor for Mexican Spotted owl (“MSO”) as required by the 2005 biological opinion. *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 2011 U.S. Dist. LEXIS 123320 (D. Ariz. 2011). In March through May of 2012, FWS issued individual biological opinions for each of the eleven national forests in the Southwest Region for MSO as well as several other species, not including the Jemez mountain salamander, as it was not listed at that time. The FWS issued a biological opinion for the Santa Fe Forest plan on March 30, 2012.

Since the FWS prepared the 2005 Programmatic Biological Opinion, the Jemez Mountains salamander has been listed and recognized as present in the Santa Fe National Forest.

The Santa Fe National Forest Plan is an ongoing agency action, and the listing of the Jemez Mountain salamander requires reinitiation of consultation with FWS with respect to the that species. However, the Forest Service has failed to consult with FWS on the Jemez Mountain salamander and impacts from the Santa Fe National Forest Plan.

The Forest Service is therefore in violation of Section 7 of the ESA by: (1) failing to timely reinitiate and complete consultation with the FWS regarding the impacts of this Forest Plan and its continued implementation on the Jemez Mountains salamander and its critical habitat; (2) failing to insure that the Forest Plan for the Santa Fe National Forest and its continued implementation, including projects and activities that are authorized pursuant to or allowed by this Forest Plan, are not likely to jeopardize the continued existence of the Jemez Mountains salamander, or result in the destruction or adverse modification of the critical habitat of the salamander; and (3) approving, authorizing, and implementing projects and activities in the Santa Fe National Forest that may irreversibly and irretrievably commit resources and may foreclose the formulation or implementation of reasonable and prudent alternatives, prior to completing consultation regarding the impacts of the Forest Plan on this listed species and its designated critical habitat. Moreover, the Forest Service's continued approval of projects and activities on the Santa Fe National Forest, without a Biological Opinion and ITS, is likely to result in the taking of the Jemez Mountains salamander, in violation of Section 9 of the ESA.

**c. Santa Fe National Forest Travel Management Plan**

On November 9, 2005 (70 Fed. Reg. 68,264), the Forest Service issued the Travel Management Rule that requires designation of a system of roads, trails, and areas for motor vehicle use by vehicle class and, if appropriate, by time of year. The Santa Fe National Forest inventoried and mapped roads and motorized trails, and completed a Final Environmental Impact Statement ("EIS") to change the usage of some of the current system within the range of the salamander. The Santa Fe National Forest issued a Record of Decision ("ROD") signed on June 12, 2012 by Forest Supervisor Maria Garcia (Supervisor). The ROD was signed on the basis of the August 2010 EIS.

The Santa Fe National Forest Travel Management Plan is an ongoing agency action, , and the listing of the Jemez Mountain salamander requires reinitiation of consultation with FWS with respect to the that species.

The Santa Fe National Forest in response to appeal #12-03-00-0031-A215 stated:

In light of the September 12, 2012, Federal Register notice (Vol. 77, No. 177, pp. 56482-56513) proposing the listing of the Jemez Mountain salamander as endangered under the Endangered Species Act (ESA) and proposing to designate critical habitat, the Forest is instructed to initiate conferencing

with the U.S. Fish and Wildlife Service to satisfy requirements of the ESA, Section 7(a)(4). (October 2, 2012).

However, the Forest Service has thus far failed to initiate consultation on the Jemez Mountain salamander and impacts from the Santa Fe National Forest Travel Management Plan.

The Forest Service is therefore in violation of Section 7 of the ESA by: (1) failing to timely reinitiate and complete consultation with the FWS regarding the impacts of the Santa Fe National Forest Travel Management Plan and its continued implementation on the Jemez Mountains salamander and its critical habitat; (2) failing to insure that this Travel Plan and its continued implementation, including projects and activities that are authorized pursuant to or allowed by this Travel Plan, are not likely to jeopardize the continued existence of the Jemez Mountains salamander, or result in the destruction or adverse modification of the critical habitat of the salamander; and (3) approving, authorizing, and implementing projects and activities in the Santa Fe National Forest that may irreversibly and irretrievably commit resources and may foreclose the formulation or implementation of reasonable and prudent alternatives, prior to completing consultation regarding the impacts of the Travel Plan on this listed species and its designated critical habitat. Moreover, the Forest Service's continued implementation of the Travel Plan, without a Biological Opinion and ITS, is likely to result in the taking of the Jemez Mountains salamander, in violation of Section 9 of the ESA.

#### **d. Jemez National Recreation Area Management Plan**

The Santa Fe National Forest approved a management plan for the Jemez National Recreation Area in 2002 establishing management direction for the Jemez NRA in accordance with the 1993 Jemez National Recreation Area Act. (Public Law 103-104 107 Stat. 1025). The Jemez NRA Plan includes an associated Implementation Plan, outlining the project-level activities anticipated to be planned and implemented in the Jemez National Recreation Area. The Jemez NRA Plan is an ongoing agency action, , and the listing of the Jemez Mountain salamander requires reinitiation of consultation with FWS with respect to the that species. However, the Forest Service has failed to consult with FWS on the Jemez Mountain salamander and impacts from the Jemez NRA Plan.

The Forest Service is therefore in violation of Section 7 of the ESA by: (1) failing to timely reinitiate and complete consultation with the FWS regarding the impacts of the Jemez NRA Plan and its continued implementation on the Jemez Mountains salamander and its critical habitat; (2) failing to insure that the Jemez NRA Plan and its continued implementation, including projects and activities that are authorized pursuant to or allowed by this plan, are not likely to jeopardize the continued existence of the Jemez Mountains salamander, or result in the destruction or adverse modification of the critical habitat of the salamander; and (3) approving, authorizing, and implementing projects and activities in the Santa Fe National Forest that may irreversibly and irretrievably commit resources and may foreclose the formulation or implementation of reasonable and prudent alternatives, prior to completing consultation regarding the impacts of the Jemez NRA Plan on this listed species and its designated critical habitat. Moreover, the Forest Service's continued

approval of projects and activities on the Santa Fe National Forest in accordance with the Jemez NRA Plan, without a Biological Opinion and ITS, is likely to result in the taking of the Jemez Mountains salamander, in violation of Section 9 of the ESA.

#### **4. Other Ongoing and Approved Projects Affecting Listed Species, Critical Habitat on the Forest**

Despite the addition of a listed species and the pending designation of critical habitat since the 2005 Programmatic Biological Opinion, the Forest Service continues to approve and allow projects and ongoing activities on the Santa Fe National Forest that may affect the Jemez Mountains salamander and its critical habitat without further programmatic analysis. There are numerous activities authorized by the Forest Service that threaten the salamander and require initiation or reinitiation of formal consultation with the FWS, including: historical and current fire management practices; severe wildland fire; forest composition and structure conversions; post-fire rehabilitation; forest management (including silvicultural practices); roads, trails, and habitat fragmentation; and recreation.

Off-road vehicle management is another agency action requiring consultation or reinitiation of consultation pursuant to Section 7 of the ESA. The Forest Service must consult with FWS to ensure that the use of off-road vehicles in the Santa Fe National Forest, including the use of Forest Service roads and unauthorized user-created roads, are not likely to jeopardize the continued existence of the Jemez Mountains salamander, or result in the destruction or adverse modification of the salamander's critical habitat. For all ongoing agency actions, including allowing, authorizing, or implementing plans and policies that permit off-road vehicles in Jemez Mountains salamander habitat, the Forest Service must consult with FWS regarding impacts to the salamander.

For example, **Forest Road 188 (FR 188) complex** is an interconnected system of unauthorized user-created motorized routes and old logging roads in upper Medio Dia Canyon. The complex includes **Forest Roads 188, 188B, 188BB, 188D, 188E, 188F, 188FA, 188FB, 188JA** and four unauthorized user-created motorcycle routes totaling 3.8 miles. The FR 188 complex is within an area marked on the SFNF recreation map as prohibiting all motorized use off forest development roads (Circle A). The FR 188 complex is also in Management Area "N", which bans motorized cross-country travel. According to data provided by the Forest Service, the FR 188 complex of routes crosses streams and their tributaries in Bland and Medio Dia Canyons 40 times, significantly impairing water quality and degrading aquatic habitat, including habitat for a small population of Rio Grande cutthroat trout in Medio Dia Canyon. The FR 188 complex also occurs in Essential and Occupied Jemez Mountain salamander habitat that is crucial for the long-term persistence (i.e. survival) of viable salamander populations. According to the New Mexico Endemic Salamander Team (NMEST), the FR 188 complex fragments terrestrial salamander habitat and contributes to degradation of habitat from erosion and soil compaction (NMEST 2008:2).

**Forest Road 282** from Forest Road 188D to end. FR 282 enters and provides motorized access to the Bearhead Peak IRA from the north. Motorized vehicles on FR 282 are causing

severe soil erosion. According to the Forest Service's Terrestrial Ecosystem Survey, FR 282 is located on unstable soils and wheeled off-road vehicles are causing severe erosion and significant loss of site productivity. FR 282 is also in Essential and Occupied Jemez Mountain salamander habitat that is crucial for the long-term persistence of viable salamander populations. According to the New Mexico Endemic Salamander Team, FR 282 (routes in the "Ridge Trail" complex) fragments terrestrial salamander habitat, contributing to degradation from soil erosion and compaction (NMEST 2008:2).

The Forest Service has failed to consult with FWS regarding use of these and other roads in the Santa Fe National Forest.

The Forest Service is therefore in violation of Section 7 of the ESA by: (1) failing to timely consult or reinitiate and complete consultation with the FWS regarding the impacts of the aforementioned agency actions, including historical and current fire management practices, severe wildland fire, forest composition and structure conversions, post-fire rehabilitation, forest management (including silvicultural practices), roads, trails, and habitat fragmentation, recreation, the use of roads and off-road vehicles, and off-road vehicle management on the Jemez Mountains salamander and its critical habitat in the Santa Fe National Forest; (2) failing to insure that the authorization and/or continued implementation of these actions, projects, and activities in the Santa Fe National Forest are not likely to jeopardize the continued existence of the Jemez Mountains salamander, or result in the destruction or adverse modification of the critical habitat of the salamander; and (3) by approving, authorizing, and implementing actions, projects, and activities in the Santa Fe National Forest that may irreversibly and irretrievably commit resources and may foreclose the formulation or implementation of reasonable and prudent alternatives, prior to completing consultation regarding the impacts of agency action on the Jemez Mountains salamander and its designated critical habitat.

## **5. Violations of the ESA**

The Forest Service is currently in violation of Section 7 of the ESA for failing to initiate consultation and/or reinitiate consultation on all agency action in the Santa Fe National Forest regarding the Jemez Mountains and by failing to insure that such action is not likely to jeopardize the continued existence of the Jemez Mountains salamander, or result in the destruction or adverse modification of its critical habitat. See 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.16. The Forest Service is also in violation of the ESA by allowing, authorizing, and approving actions, projects, and activities under the Forest Plan, the Travel Management Plan and Jemez NRA Plan that may affect the Jemez Mountains salamander, prior to the completion of the required consultation with FWS. See 16 U.S.C. § 1536(a)(2); 16 U.S.C. § 1536(d) (stating that after the initiation of consultation, the Forest Service shall not make any irreversible or irretrievable commitment of resources). Finally, the Forest Service's continued implementation of the Forest Plan, the Travel Management Plan and Jemez NRA Plan in the Santa Fe National Forest, without an updated Biological Opinion and Incidental Take Statement, is likely to result in take of the Jemez Mountains salamander, in violation of Section 9 of the ESA. See 16 U.S.C. § 1538(a)(1); 50 C.F.R. § 17.31.



If the aforementioned violations of the ESA are not remedied within 60 days of the date of this letter, we intend to file a citizen's suit in federal court seeking preliminary and permanent injunctive relief, declaratory relief, and legal fees and costs regarding these violations. Thank you for your attention. Please contact us should you have any questions regarding this matter.

Sincerely,



Bryan Bird  
Wild Places Program Director  
[bbird@wildearthguardians.org](mailto:bbird@wildearthguardians.org)

**Reference:**

New Mexico Endemic Salamander Team. 2008. Comment letter to SFNF Travel Management Planning and Jemez Mountain Salamander Conservation, February 6. 4 pp.