



EARTHJUSTICE

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December 31, 2008

Via Overnight Mail

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Re: Notice of Violation of the Endangered Species Act: Failure to Consult Regarding
Impacts of Western Oregon Plan Revisions on Threatened and Endangered
Species

Greetings:

On behalf of Environmental Protection Information Center, Center for Biological
Diversity, Siskiyou Project, Pacific Coast Federation of Fishermen's Associations, Institute for
Fisheries Resources, Umpqua Watersheds, Klamath-Siskiyou Wildlands Center, American

Lands Alliance, Oregon Wild, and The Wilderness Society,¹ we ask that you take immediate action to remedy ongoing violations of the Endangered Species Act (“ESA”) by the United States Bureau of Land Management (“BLM”). By issuing final decisions on the Western Oregon Plan Revisions (“WOPR”), see <http://www.blm.gov/or/plans/wopr/rod/index.php> (Dec. 31, 2008), BLM is violating Section 7(a)(2) of the ESA by engaging in action that “may affect” ESA-listed species without having first initiated and completed consultation under the ESA. 16 U.S.C. § 1536(a)(2). Moreover, implementation of the WOPR during consultation constitutes a violation of Section 7(d) of the Act, which prohibits the “irretrievable commitment of resources” pending completion of consultation. 16 U.S.C. § 1536(d). This letter constitutes notice required by Section 11(g) of the ESA, 16 U.S.C. § 1540(g), prior to commencement of legal action.

BACKGROUND

The WOPR covers approximately 2.6 million acres of BLM land, within a planning area of approximately 22 million acres in western Oregon. Resource Management Plans define the management direction for individual BLM districts or BLM resource areas. The WOPR Final Environmental Impact Statement (“FEIS”) describes a Proposed Resource Management Plan (“PRMP”) for five districts – Coos Bay, Eugene, Medford, Roseburg, and Salem – and a portion of the Klamath Falls Resource Area of the Lakeview.

On December 31, 2008, BLM finalized the Resource Management Plans (“RMPs”) for WOPR that amend the plans for each of the above districts. See <http://www.blm.gov/or/plans/wopr/rod/index.php>. The RMPs significantly increase destructive logging, road construction, and off-road vehicle use in forests administered by BLM in western Oregon. BLM did not consult with NMFS and FWS under the ESA about the impacts of the WOPR on threatened and endangered species and their designated critical habitat.

BLM VIOLATED ESA § 7(A)(2) BY FAILING TO CONSULT ON WOPR.

A. Legal Framework

Under ESA § 7, every federal agency “shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species.” 16 U.S.C. § 1536(a)(2). The obligation to “insure” against a likelihood of jeopardy or adverse modification requires the agencies to give the benefit of the doubt to endangered species and to place the burden of risk and uncertainty on the proposed action. See Sierra Club v. Marsh, 816 F.2d 1376, 1386 (9th Cir. 1987). The substantive duty imposed by § 7(a)(2) is constant, relieved

¹ A list of these organizations’ business addresses is appended.

only by an exemption from the Endangered Species Committee. 16 U.S.C. § 1536(h); Conner v. Burford, 848 F.2d 1441, 1452 n.26 (9th Cir. 1988).

Section 7 establishes an interagency consultation process to assist federal agencies in complying with their duty to ensure against jeopardy to listed species or destruction or adverse modification of critical habitat. An agency must initiate consultation with NMFS or FWS under Section 7 whenever it takes an action that “may affect” a listed species. See 50 C.F.R. § 402.14(a). Regulations implementing section 7 broadly define the scope of agency actions subject to consultation. See 50 C.F.R. § 402.02 (definition of action). The Ninth Circuit Court of Appeals has construed the term “action” broadly. See Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1054-55 (9th Cir. 1994); Connor v. Burford, 868 F.2d 1441, 1453 (9th Cir. 1988); see also National Wildlife Fed’n v. FEMA, 345 F. Supp. 2d 1151, 1169 (W.D. Wash. 2004).

As a result of consultation, the federal agency will obtain either a written concurrence letter from NMFS or FWS that the proposed action is “not likely to adversely affect” listed species or their habitat, 50 C.F.R. §§ 402.13, 402.14(b)(1), or a biological opinion evaluating the effects of the federal action on listed species and their critical habitat. 50 C.F.R. § 402.14(a); see generally Thomas v. Peterson, 753 F.2d 754, 763 (9th Cir. 1985). If NMFS or FWS concludes that a proposed action is likely to jeopardize a listed species or result in adverse modification of its critical habitat, NMFS or FWS must propose a reasonable and prudent alternative, if available, that will mitigate the proposed action so as to avoid jeopardy and/or adverse modification of critical habitat. 16 U.S.C. § 1536(b)(3).

B. WOPR “May Affect” Threatened and Endangered Species and Adversely Modify Their Designated Critical Habitat.

The threshold for a “may affect” determination and required ESA § 7 consultation is low. See 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (“Any possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the formal consultation requirement.”). Forest management plans, and significant amendments to them, are actions that “may affect” threatened and endangered species and their designated critical habitat. See Pacific Rivers Council, 30 F.3d at 1055 (Forest Service must reinitiate consultation on forest plans upon listing of salmon); Lane County Audubon Soc’y v. Jamison, 958 F.2d 290, 294 (9th Cir. 1992) (BLM must consult on multi-year logging plan). See also National Wildlife Fed’n v. FEMA, 345 F. Supp. 2d at 1176 (responding to FEMA argument that the flood insurance program itself did not affect salmon by noting “[t]he regulations implementing Section 7(a)(2) of the ESA require an action agency to consider ‘the effects of the action as a whole.’”).

A number of endangered or threatened species occur in the WOPR planning area.

There are eight anadromous fish populations and four resident fish population segments that occur on BLM-administered lands within the [WOPR] planning

area that are listed as threatened or endangered under the [ESA]. Habitat degradation is a factor of decline for most of these populations, and is a major risk factor that continues to threaten all of the population segments.

FEIS at 3-362. Threatened terrestrial species include the Northern Spotted Owl, listed as threatened since 1990 due to loss and adverse modification of its habitat, see FEIS at 3-283, and the Marbled Murrelet, listed as threatened since 1992, see FEIS at 3-299. WOPR, with its substantial increases in timber harvest and decreases of protections for riparian reserves, easily trips the “may affect” trigger for ESA § 7(a)(2) consultation.

Indeed, BLM itself admitted the requirement to consult in the draft EIS, stating that “[t]he revision of the Resource Management Plans with management action for western Oregon BLM’s resource programs constitutes a federal action that is subject to Endangered Species Act consultation.” DEIS at 5-829 (emphasis added). Moreover, in response to comments on the WOPR draft Environmental Impact Statement (“EIS”), BLM acknowledges that § 7(a)(2) applies to WOPR. “Because BLM has discretion in the management of these lands – regardless of the limits of that discretion – this plan revision is a discretionary action and is therefore subject to section 7(a)(2) of the Endangered Species Act.” FEIS App. T at 766 (Oct. 2008).

BLM and the U.S. Forest Service regularly engage in ESA § 7 consultations on broad agency actions as well as site-specific consultations for actions authorized under those actions. See Pacific Rivers Council, 30 F.3d at 1056 (“little doubt” that forest plans are ongoing agency actions subject to ESA § 7 consultation); PCFFA v. NMFS, 265 F.3d 1028, 1032 (9th Cir. 2001) (programmatic and site-specific salmon consultation on Forest Service and BLM timber sales under the Northwest Forest Plan); Gifford-Pinchot Task Force v. U.S. Fish and Wildlife Serv., 378 F.3d 1059, 1064 (9th Cir. 2004) (broad consultation on Northwest Forest Plan for spotted owls, with future biological opinions to consider specific impacts). BLM and the Forest Service consulted on the original adoption of the Northwest Forest Plan, consulted on the Northwest Forest Plan when new species, such as salmon and steelhead, were listed, and consulted on the attempted amendments to the Aquatic Conservation Strategy of the Northwest Forest Plan – amendments which were found to violate the law.

In August 2000, BLM, the Forest Service, FWS, and NMFS signed a Memorandum of Agreement regarding Section 7 consultation on land management plans, concluding that because “[t]he term ‘action’ as used in Section 7 of the ESA includes land use plans under the Federal Land Policy and Management Act (43 U.S.C. 1701 *et seq.*) and resource management plans under the Forest and Rangeland Renewable Resources Planning Act (16 U.S.C. 1600 *et seq.*) as amended by the Forest Management Act (16 U.S.C. 1600 *et seq.*):”

The BLM and FS (action agencies) will consult and confer, as outlined in the following sections, on land management plans, both during development of a new, amended, or revised plan, and on an existing plan if a new species is listed

or critical habitat designated, or significant new information becomes available, and, where appropriate, consult on other programmatic level proposals (e.g., recreation program, grazing program, riparian strategy), habitat management plans, multi-year projects aggregated as a program, grouped permits or activities, or plan objectives, standards and guidelines, such as the Pacific Anadromous Fish Strategy (PACFISH) interim standards and guidelines.

Memorandum of Agreement, Endangered Species Act: Section 7 Programmatic Consultations and Coordination at 2 (Aug. 30, 2000).

C. BLM Did Not Consult On WOPR.

BLM stated in the FEIS that it would not consult on WOPR. BLM was advised, through written protests, that this failure to consult would violate ESA § 7. See Director's Protest Resolution Report, Western Oregon Resource Plan Management Revisions at 114-19 (Dec. 29, 2008), available at http://www.blm.gov/pgdata/etc/medialib/blm/wo/Planning_and_Renewable_Resources/oregon.P ar.57250.File.pdf/Western_Oregon_Plan_Revisions_Directors_Protest_Resolution_Report.pdf. BLM issued the final RMPs without first consulting with FWS and NMFS regarding the effects of the revisions on listed species and habitat. The failure to consult on this action that "may affect" listed species violates the Endangered Species Act.

BLM WILL ALSO VIOLATE ESA § 7(D) IF WOPR BECOMES
OPERATIVE BEFORE IT COMPLETES CONSULTATION

ESA § 7(d) prohibits federal agencies, after the initiation of consultation under ESA § 7(a)(2), from making any irreversible or irretrievable commitment of resources if doing so would foreclose the implementation of reasonable and prudent alternatives. 16 U.S.C. § 1536(d); Natural Resources Defense Council v. Houston, 146 F.3d 1118, 1128 (9th Cir. 1998) (section 7(d) violated where Bureau of Reclamation executed water service contracts prior to completion of formal consultation); Marsh, 816 F.2d at 1389 (construction of highway outside species habitat barred by § 7(d) pending completion of consultation). As the regulations makes clear, "[t]his prohibition . . . continues until the requirements of section 7(a)(2) are satisfied." 50 C.F.R. § 402.09. This prohibition is not an exception to the requirements of § 7(a)(2) – it is in addition to the requirements of § 7(a)(2), and it ensures that § 7(a)(2)'s substantive mandate is met. See, e.g., Pacific Rivers Council, 30 F.3d 1050; Greenpeace v. National Marine Fisheries Serv., 80 F. Supp. 2d 1137 (W.D. Wash. 2000).

The prohibition against the irreversible and irretrievable commitment of resources in § 7(d) applies to the ongoing implementation of the WOPR RMPs pending completion of a valid consultation. BLM will violate this prohibition by taking actions that could potentially foreclose implementation of measures required to avoid jeopardy, including but not limited to committing

to allow substantial increases in timber harvest levels in sensitive riparian areas and old-growth forest areas throughout the WOPR planning area. These and other actions that make irreversible or irretrievable commitments of resources are contrary to law. See Pacific Rivers Council v. Thomas, 936 F. Supp. 738, 745 (D. Id. 1996) (preservation of “status quo” as required by Conner means enjoining the action under consultation); Pacific Coast Fed’n of Fishermen’s Ass’ns v. BOR, 138 F. Supp. 2d at 1249 & n.19; Pacific Rivers Council, 30 F.3d at 1057.

* * *

If you believe any of the foregoing is in error, have any questions, or would like to discuss this matter, please do not hesitate to call me at (206) 343-7340 x33.

Sincerely,

Kristen L. Boyles
Earthjustice

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