

PACIFIC ENVIRONMENTAL ADVOCACY CENTER

10015 S.W. Terwilliger Boulevard

Portland, Oregon 97219

phone: 503-768-6736 fax: 503-768-6671

September 23, 1999

**Dan Glickman, Secretary
Department of Agriculture
1400 Independence Ave, SW
Washington, D.C. 20250**

**Dale Bosworth, Regional Forester
Region One, United States Forest Service
P.O. Box 7669
Missoula, Montana 59807**

**Cathy Barbouletos, Forest Supervisor
Flathead National Forest
1935 Third Ave. East
Kalispell, Montana 59901**

**Bruce Babbitt
Secretary of Interior
1849 "C" St., N.W.
Washington, D.C. 20240**

**Re: 60-Day Notice of Intent to File Citizen Suit for Violations of the Endangered
Species Act in Connection with Failure to Reinitiate Consultation on Amendment
Number 19 to the Forest Plan for the Flathead National Forest and Failure to
Develop a Comprehensive Program for the Conservation of Grizzly Bears and Bull
Trout**

Dear Secretary Glickman, Secretary Babbitt, Mr. Bosworth, and Ms. Barbouletos,

**On behalf of the Swan View Coalition and Friends of the Wild Swan, we hereby provide
notice, pursuant to section 11(g) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g),
that the United States Forest Service ("Forest Service") is violating its duty under 50 C.F.R. §
402.16(c) to reinitiate ESA section 7 consultation with the U.S. Fish and Wildlife Service (FWS)
on Amendment 19 to the Forest Plan for the Flathead National Forest, and its duty under 16
U.S.C. § 1536(a)(1) to develop conservation programs for grizzly bears and bull trout.
Additionally, Forest Service actions are resulting in illegal takings of these species.**

BACKGROUND

**On January 22, 1986, Regional Forester James Overbay approved a Forest Plan for the
Flathead National Forest. Any change to the Forest Plan is subject to the procedural and
substantive mandates of the Endangered Species Act of 1973 (ESA), the Forest and Rangeland
Renewable Resources Planning Act of 1974, the National Forest Management Act of 1976, and
the National Environmental Policy Act of 1969, as well as these statutes' implementing
regulations.**

**On February 22, 1989, plaintiffs and other concerned environmental groups filed a
lawsuit challenging the Flathead Forest Plan and accompanying environmental impact statement.**

The end result of that litigation was a Ninth Circuit opinion setting aside the Forest Service's determination that implementation of the Forest Plan would not jeopardize the continued existence of listed species. *Resources Limited, Inc. v. Robertson*, 35 F.3d 1300, 1308 (9th Cir. 1994). The Ninth Circuit required the Forest Service to formally consult with FWS on the proposed amended plan and required the district court to retain jurisdiction over the case to ensure the completion of the consultation process within six months. *Id.*

The Forest Service complied with the Ninth Circuit's order by preparing a biological assessment on a newly proposed amendment and obtaining a biological opinion from FWS addressing both jeopardy and incidental take of listed species. The Forest Service officially proposed the new amendment, known as Amendment #19, in February 1995, and Joel D. Holtrop, Forest Supervisor of the Flathead National Forest, incorporated Amendment #19 into the Forest Plan in a March 1, 1995 Decision Notice. Amendment #19 is now part of the Forest Plan, and is therefore a controlling forest planning document that must be followed during all subsequent actions. See *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1376-77 (9th Cir. 1998).

To ensure that implementation of the Forest Plan would not jeopardize listed species, Amendment #19 updated objectives and standards for management of grizzly bears (*Ursus arctos horribilis*) and amended projected timber sale outputs for the period of 1995 to 1999. Specific measures included reduction of total motorized access density and open motorized access density, as well as establishment of security core areas for grizzly bears.

Achievement of the amended desired levels of motorized access density necessarily entailed reclaiming hundreds of miles of roads. The first requirement listed in Amendment #19 for "minimum treatment" for any particular road to be considered "reclaimed" within the meaning of the Forest Plan is as follows:

- (a) The entire road will receive treatment such that maintenance or entries to maintain "road drainage" is not needed. This will require removal of culverts or other water passage structures that are aligned with stream channels. In most cases this will also require that road related sediment sources be repaired and the road reworked to eliminate ditch water flow without the aid of cross drain culverts.

Amendment #19, Appendix D at 2 (added to the Flathead Plan as Appendix TT) (emphasis added).

Additionally, Plan Appendix TT also included within its definition of a "reclaimed" road treatment standards for both the "first portion" of a road (defined as "typically 200 to 600 feet"), as well as the remainder of the road. See *id.* Under the Appendix, a road fell within the definition of a "reclaimed" road after application of these specified treatments to both the first portion of the road and to the remainder of the road.

These treatment standards for roads, notably that relating to culverts, have particular importance for another species which occurs on the Flathead and is also protected by the ESA.

On June 10, 1998, the Fish and Wildlife Service listed the Columbia River distinct population segment of bull trout (*Salvelinus confluentus*) as threatened. See 63 Fed. Reg. 31,647. Bull trout inhabit clear, cold streams, and are particularly sensitive to sedimentation of their habitat. Habitat degradation caused by sedimentation, much of it due to roads, was one of the primary threats that led FWS to list these fish. See *id.*

Two months after FWS listed bull trout, FWS issued a biological opinion pursuant to section 7 of the ESA which addressed effects on these fish caused collectively by continued implementation of Forest Service and Bureau of Land Management (BLM) plans for individual administrative units. In describing the "environmental baseline," for its analysis, the opinion noted that several national forests had management direction specific to aquatic resources that was more stringent than the protections required by the generic Forest Service and BLM protections for inland fish species, known as INFISH. The biological opinion noted that these more specific measures had come about through actions to benefit other listed species such as grizzly bears and salmon. The Flathead's standards for road closures clearly fall into this category. FWS ultimately concluded that continued implementation of Forest Service and BLM management plans would not likely jeopardize the continued existence of listed species.

Recently, without consulting with FWS pursuant to section 7, the Forest Service modified the Flathead Forest Plan again by significantly altering Forest Plan Appendix TT. On May 6, 1999, the Forest Service issued a document entitled Implementation Note #13. This document significantly altered the Plan's minimum treatment requirements for reclaiming roads in two significant ways. First, Flathead Forest officials abandoned the requirement that culverts be removed from roads considered "reclaimed". In addition, recent alteration of Appendix TT eliminated the requirements that treatments be applied beyond the "first portion" of a road, and that treatments be effective, in order for a road to fall into the "reclaimed" category.

DISCUSSION

I. The Forest Service is violating its duty to reinitiate consultation on Amendment 19.

The Forest Service has violated the ESA by failing to reinitiate section 7 consultation with FWS on the Flathead Forest Plan. Pursuant to 50 C.F.R. § 402.16(c), federal agencies must reinitiate consultation "where discretionary Federal involvement or control over the action has been retained or is authorized by law and . . . [i]f 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." This regulation applies to the section 7 consultations on the Flathead Forest Plan, specifically regarding modifications to the Plan resulting from the Forest Service's changed implementation of Amendment 19.

The Forest Service explicitly and unconditionally included removal of culverts in Amendment 19's standards for "minimum treatment" of roads necessary to effect legal reclamation. A major reason for including this requirement was to improve the habitat of sensitive fish species. Amendment #19 EA at 118-19. In February 1995, Fisheries Biologist Donald Hair performed a Biological Evaluation on the potential effects of implementing

Alternative 3 (the adopted alternative) of Amendment #19 and concluded that

[i]n the short term implementing the preferred alternative of Amendment 19 . . . may impact individual bull trout, westslope cutthroat trout and/or sculpin, but not viability of the population or trend toward Federal listing. In the long term implementing the preferred alternative should be beneficial to these species. . . . This assumes incorporation of the proposed definitions and minimum treatment requirements for reclaimed and restricted roads.

Biological Evaluation for Bull Trout, Cutthroat Trout, & Shorthead Sculpin: Potential Effects from Implementing Amendment #19, Alternative 3 to the Forest Plan (February 4, 1995).

Under Implementation Note #13, however, the Forest Service has once again significantly altered the Flathead Forest Plan. Amendment #19 and its accompanying Biological Evaluation clearly indicate that removal of culverts and road management generally affect bull trout. These documents also establish that significant modifications in the minimum standards for road reclamation, such as those brought about by Implementation Note #13, cause effects to bull trout and their habitat that were not considered in previous section 7 consultations on the Flathead Plan. As a result, the Forest Service is required to reinitiate consultation on the Plan, and by failing to do so, it is violating the ESA.

The Forest Service's change in implementation of Forest Plan Appendix TT also affects grizzly bears in a manner not previously analyzed in previous consultations on the Flathead Forest Plan. Retaining culverts affects grizzlies by reducing the effectiveness of road closures and increases the need for maintenance activities, thus undermining a fundamental objective of Amendment 19. Additionally, eliminating treatment requirements beyond the first portion of roads considered "reclaimed," as well as eliminating the requirement that treatments be effective, substantially reduce the effectiveness of road closures and results in impacts to grizzlies beyond those considered in the previous consultations on the Plan. Again, by failing to reinitiate consultation on continuing implementation of the Flathead Plan, the Forest Service is violating section 7(a)(2) of the ESA.

The changes to Amendment 19 and its implementation on the Flathead is evident in at least two examples of site-specific projects. In the Paint Emery Project, culverts may be left at the Forest Service's discretion in 116 miles of roads to be considered "reclaimed" by the Project. In stark contrast to the plain language of Amendment 19 requiring the removal of all "culverts or other water passage structures aligned with stream channels," the May 27, 1999, Paint Emery Decision Notice signed by Supervisor Barbouletos, at Appendix A, page 2, provides that reclamation of the 116 miles of roads "would commonly include removing culverts at *some* stream crossings" (emphasis added). The Decision Notice in Appendix C, page 5, reasons that "Since we have a commitment to meet Amendment 19 grizzly bear security objectives, roads are being restricted at such a rate where we do not have the funding to do all the necessary culvert removals in order to address water and fisheries concerns."

In a second project-level decision, the Flathead's Swan Lake District Ranger Chuck Harris

decided to leave two culverts in the reportedly "reclaimed" North Lost Creek Road #5206 (Harris letter dated July 26, 1999), after determining that "one culvert is plugged with sediment and about to 'wash out' and another is also at high risk. . . Should these culverts fail, it is estimated that over 700 tons of sediment could travel downstream to the cutthroat spawning habitat and this would have a serious, negative impact to the fish" (Harris letter dated March 29, 1999). This cutthroat spawning stream is upstream and tributary to bull trout spawning areas in North Lost Creek. The Forest Service has elsewhere already determined that the Lost Creek watershed is "Functioning at Risk" for bull trout in terms of road density and location, Riparian Conservation Areas, and Integration of Species and Habitat Conditions. Rather than follow Amendment 19's initial directive to remove all stream-aligned culverts from reclaimed roads, Ranger Harris instead has opted to follow the changes provided by Implementation Note #13 and monitor the culverts instead, even though Friends of the Wild Swan has offered to finance removal of the culverts.

II. The Forest Service is Violating Section 9

In addition to violating section 7 of the ESA, the Flathead National Forest is also violating section 9 of the statute. Section 9(a)(1)(G) makes it illegal for any entity, including federal agencies, to violate regulations pertaining to threatened species. Here, such regulations include a prohibition on taking grizzly bears and bull trout. However, the Forest Service's substantial modifications to Forest Plan Appendix TT will result in takings of both grizzlies and bull trout. Flathead officials developed Appendix TT specifically to avoid takings of bears by eliminating roads. However, the recent decision to substantially weaken treatment requirements for road reclamation, reflected in site-specific decisions such as those discussed above, will decrease the effectiveness of reclamation actions, and thus increase injury and death to grizzlies. Similarly, these weakened treatment standards, particularly those applicable to culverts, will increase incidences of culvert failure and thus result in increased sedimentation of streams and rivers inhabited by bull trout. Sedimentation results in death or injury to bull trout. The Forest Service has not obtained authority to increase the number of incidental takings of grizzly bears and bull trout that will result from its modifications of Forest Plan Appendix TT.

III. The Forest Service is violating its duty to develop a comprehensive plan for the conservation of grizzly bears and bull trout.

The ESA imposes an affirmative duty on federal agencies to develop programs to use their authorities for the conservation of each listed species. Sierra Club v. Glickman, 156 F.3d 606, 616 (5th Cir. 1998); 16 U.S.C. § 1536(a)(1). In order to develop such a program, a federal agency must first consult with FWS. Sierra Club v. Glickman, 156 F.3d at 616; 16 U.S.C. § 1536(a)(1). Congressional testimony explaining this requirement could not be any more clear or germane:

"Another example . . . [has] to do with the continental population of grizzly bears which may or may not be endangered, but which is surely threatened. . . . Once this bill is enacted, the appropriate Secretary, whether of Interior, Agriculture or whatever, will have to take action to see that this situation is not

permitted to worsen, and that these bears are not driven to extinction. The purposes of the bill included the conservation of the species and of the ecosystems upon which they depend, and every agency of government is committed to see that those purposes are carried out. . . . [T]he agencies of Government can no longer plead that they can do nothing about it. They can, and they must. The law is clear."

Tennessee Valley Auth. v. Hill, 437 U.S. 153, 183-84 (1975) (quoting 119 Cong. Rec. 42,913 (1973)).

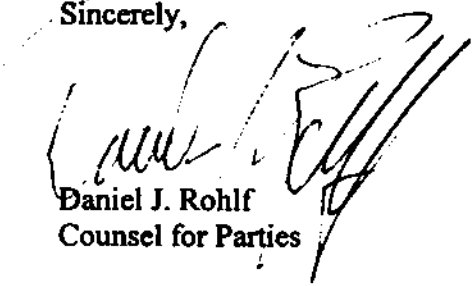
The Forest Service has failed to comply with this affirmative duty with respect to grizzlies and bull trout. The agency has no overall plan for using its authority to conserve these species, nor has the agency made substantial progress toward developing such a plan. Such inaction is plainly illegal.

CONCLUSION

In failing to reinstate consultation the Flathead Forest Plan regarding its modification of Amendment 19, and failing to develop a comprehensive plan for the conservation of the grizzly bears and bull trout, the Forest Service is violating the ESA. Unless the Forest Service provides a substantive response to this petition within 60 days, along with an assurance that the Forest Service will correct these legal deficiencies, we will have no alternative but to seek a judicial remedy in federal court.

We look forward to your response.

Sincerely,



Daniel J. Rohlf
Counsel for Parties