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Transmitted via electronic mail, facsimile and U.S. Post, Return Receipt Requested

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RE: 60-day Notice of Intent to Sue over the Violation of Section 7(d) of the Endangered Species Act; Actions Threatening the Northern Spotted Owl on the Klamath National Forest

Dear Responsible Official,

I am writing on behalf of the Environmental Protection Information Center, Klamath Forest Alliance and Klamath Siskiyou Wildlands Center (“Noticing Parties”). This letter serves as a sixty-day notice of the Noticing Parties’ intent to sue the United States Forest Service (“Forest Service”) over violations of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 *et seq.*, threatening the Northern Spotted Owl on the Klamath National Forest.

Noticing Parties

Environmental Protection Information Center
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Klamath Forest Alliance
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Klamath Siskiyou Wildlands Center
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Environmental Protection Information Center

145 G Street, Suite A, Arcata, CA 95521

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Requirements of the Endangered Species Act

The purpose of the ESA is to conserve the ecosystems on which endangered and threatened species depend and to conserve and recover those species so that they no longer require the protections of the Act. 16 U.S.C. § 1531(b). To ensure that the statutory purpose will be carried out, the ESA imposes both substantive and procedural requirements on all federal agencies, including the Forest Service.

Section 7 of the ESA requires the Forest Service, in consultation with the U.S. Fish and Wildlife Service (“FWS”), 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 critical habitat of such species. 16 U.S.C. § 1536(a)(2). In fulfilling this requirement, agencies must use “the best scientific and commercial data available.” *Id.*

If the Forest Service determines that an action “may affect” a listed species or its critical habitat, the agency must initiate formal consultation with FWS. 50 C.F.R. § 402.14. If FWS concludes that the proposed action “will jeopardize the continued existence” of a listed species, or result in the destruction or “adverse modification” of designated critical habitat, the FWS biological opinion must outline “reasonable and prudent alternatives.” 16 U.S.C. § 1536(b)(3)(A). If the biological opinion concludes that the action is not likely to jeopardize the continued existence of a listed species, and will not result in the destruction or adverse modification of critical habitat, FWS must provide an “incidental take statement,” specifying the amount or extent of such incidental taking of the listed species, any “reasonable and prudent measures” that FWS considers necessary or appropriate to minimize such impact, and setting forth the “terms and conditions” that must be complied with by the Forest Service to implement those measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

Alternatively, the Forest Service may enter into “informal consultation” to determine if formal consultation is required. 50 C.F.R. § 402.13. If, during informal consultation, it is determined by the Forest Service, with the written concurrence of the FWS, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated. *Id.* However, without a biological opinion and an incidental take statement from FWS, the Forest Service is not authorized to “take” any listed species, nor may it jeopardize the species or adversely modify critical habitat.

The re-initiation of formal consultation is required and must be requested by the Forest Service or FWS if (1) the amount or extent of taking specified in the incidental take statement is exceeded; (2) 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; (3) the action is modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or (4) a new species is listed or critical habitat designated that may be affected by the identified action. 50 C.F.R. § 402.16.

After the initiation consultation, the Forest Service is prohibited from making any irreversible or irretrievable commitment of resources with respect to the agency action which may foreclose the formulation or implementation of any reasonable and prudent alternative measures. 16 U.S.C. § 1536(d).

The Little Cronan Thin Project

On July 27, 2011, District Ranger Russell D. Hays signed the Decision Memo authorizing the Little Cronan Thin Project on the Salmon River Ranger District.¹ The Decision Memo states that “a determination has been made that the Project may affect, but is not likely to adversely affect the NSO.” Decision Memo at 9. However, the FWS has not issued a letter of concurrence with this determination and ESA consultation is still ongoing.

Violation of Section 7(d)

Section 7(d) of the ESA prohibits the Forest Service from making “any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures” during the consultation process. 16 U.S.C. § 1536(d). By approving the Little Cronan Thin Project without completing ESA consultation with FWS, the Forest Service is violating Section 7(d) of the ESA. This provision specifically bars the Forest Service from approving or implementing the Little Cronan Thin Project before the completion of ESA consultation. As the Decision Memo makes clear: “Implementation of this proposal may take place immediately.” Decision Memo at 13. Because ESA consultation is not completed, the Forest Service is in clear violation of ESA Section 7(d).

Conclusion

The Noticing Parties have satisfied their obligations under the ESA for providing the responsible agencies with notice of violations as required by 16 U.S.C. § 1540(g). I request that the officials responsible for the violations contact me immediately at the number below.

Sincerely,



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Cc:

Erin Williams, Field Supervisor, Yreka Field Office, U.S. Fish and Wildlife Service
Ken Salazar, Secretary of the Interior, U.S. Department of the Interior
Eric Holder, Attorney General, U.S. Department of Justice

¹ Little Cronan Thin Project Decision Memo, Salmon River Ranger District, Klamath National Forest, available at: http://www.fs.fed.us/nepa/nepa_project_exp.php?project=33517