



Keeping Northwest California wild since 1977

Sent via electronic and first class mail on date shown below

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May 27, 2016

Dear Chief Tidwell, Regional Supervisor Moore, and Forest Supervisor Grantham,

This letter serves as a sixty day notice of intent to sue the Klamath National Forest (KNF) on behalf of the Karuk Tribe, the Environmental Protection Information Center, the Klamath-Siskiyou Wildlands Center, Klamath Riverkeeper, and the Center for Biological Diversity (collectively “the Tribe”) for ongoing and imminent violations of Section 7 of the Endangered Species Act (ESA), 16 U.S.C. §§ 1536 resulting from the implementation of the Westside Fire Recovery Project. This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of the ESA, to the extent such notice is deemed necessary by a court. *See* 16 U.S.C. § 1540(g).

I. Identity of the Organizations Giving Notice

The name and address of the organizations giving notice of intent to sue under the ESA are:

Karuk Tribe
Environmental Protection Information Center
Klamath-Siskiyou Wildlands Center
Klamath Riverkeeper
Center for Biological Diversity

II. Counsel for the Parties Giving Notice

Thomas Wheeler
Environmental Protection Information Center

III. Factual Background

A. Project Development

In the summer of 2014, wildfires burned on the Happy Camp/Oak Knoll and Salmon/Scott River Ranger Districts of the Klamath National Forest. The Happy Camp Complex fires were ignited by lightning near the town of Happy Camp. Of the 19 fires comprising the complex, three escaped containment, burning separately for several weeks before eventually growing together. In total, the Happy Camp Complex burned approximately 117,000 acres. The Beaver Fire occurred on the north side of the Klamath River about 30 miles east of Happy Camp, and eventually consumed approximately 32,400 acres. The July Complex was comprised of the Log and Whites Fires, and burned approximately 37,000 acres within the Scott and North Fork Salmon River watersheds. Combined, the Beaver Fire, Happy Camp Complex, and Whites Fire burned a total of 183,100 acres, including 162,580 acres of National Forest System lands and 20,910 acres of private land. Together, these fires are known as the Westside Fire Complex. The fires burned with mixed severity, which means that within the Westside Fire Complex, there was a mosaic of none, light, moderate, and severely burned areas within each fire.

Before the Happy Camp Complex was contained, KNF initiated scoping for the Westside Fire Recovery Project. On March 13, 2015, KNF issued a draft environmental impact statement (“DEIS”) to assess the environmental consequences of the Westside Project. The Karuk Tribe, Environmental Protection Information Center, Klamath-Siskiyou Wildlands Center, Klamath Riverkeeper, and the Center for Biological Diversity all submitted comments on the DEIS. On August 7, 2015, the Forest Service released a final environmental impact statement (“FEIS”) for the Westside Project.

Because of the likely impacts to the Southern Oregon/Northern California Coast (SONCC) coho salmon and the northern spotted owl (NSO), both listed under

the ESA, KNF submitted Biological Assessments to the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (USFWS) and requested formal consultation pursuant to Section 7 of the ESA.

On January 15, 2016, NMFS issued its Biological Opinion (BiOp) concluded that the Project would not jeopardize the continued existence of SONCC coho and would not adversely modify SONCC coho habitat. On February 19, 2016, USFWS issued its BiOp that concluded that the Project would not jeopardize the continued existence of NSO and would not adversely modify NSO habitat.

On February 29th 2016, the KNF issued a Record of Decision for the Project. To the best of the Tribes knowledge, have received high bidders and have awarded six sales. Logging has commenced or will imminently begin on all six.

B. Project Design Features Require Retention of “Legacy” Trees and Snags

KNF has committed to implementing numerous “project design features,” actions necessary to meet project objectives, minimize environmental impacts, and/or ensure compliance with applicable laws and regulations. In particular, the Tribe wishes to highlight project design features “Wildlife 11,” “Wildlife 12,” and “Wildlife 13.”

Wildlife 11 states in part that KNF will “[r]etain legacy component trees and snags in treatment units.” While trees or snags may vary, KNF notes that they “are usually disproportionately large diameter trees that are often remnant of the previous stand on a given site” and are likely to contain one or more of the following elements: split or broken tops, heavy decadent branching, large mistletoe brooms, . . . basal fire or lightning scars, or other features that indicate decay or defect.”

Wildlife 12 directs that “snags or dying trees that contain cat faces, broken or forked tops, hollows or cavities” will be “favored for retention.” Further, KNF will “[r]etain all large hardwood snags or live trees where practicable.”

Lastly, Wildlife 13 directs KNF to “[r]etain pre-existing (prior to the wildfire) conifer and hardwood snags (greater than 14 inches in diameter at breast height) and pre-existing coarse woody debris in the salvage units.”

KNF relied upon these project design features in their environmental impact analysis to justify commercial logging in “late-successional reserves,” land set aside by the Northwest Forest Plan chiefly for the retention and development of late-successional forest—a core component of northern spotted owl habitat. *See e.g.*, FEIS at 146 (maintaining that KNF will meet requirements to retain large material

by retaining legacy trees and snags). *See also* FEIS, Appendix E at E-22, E-24, E-30, E-32, E-33, E-44.

KNF further relied upon these project design features in evaluating the effect of salvage logging on northern spotted owls. *See e.g.*, FEIS at 157 (finding the “available research still proclaims the importance [to owls] of legacy features that take a long time to develop such as disproportionately large trees or large coarse woody debris). *See also* FEIS 155, 220.

KNF’s Wildlife Biological Assessment uses these project design features to argue that the project would meet recovery actions identified in the 2011 Northern Spotted Owl Recovery Plan, in particular Recovery Action 12 which concerns the retention of legacy post-fire legacy tree, snags, and other structures. *See* FEIS Appendix G, Wildlife Biological Assessment at G-32. Furthermore, KNF maintained that snags would be maintained throughout salvage and roadside hazard logging sites through the application of these project features. *See id.* at G-85, G-90. In examining whether the project would adversely modify northern spotted owl critical habitat, KNF relied upon these project features to mitigate against project impacts to “nesting and roosting” habitat. *See id.* at G-120.

In turn, USFWS relied upon these project design features and the impact analysis contained in the aforementioned documents. *See* BiOp at 10, 25, 105. USFWS put great stock in KNF’s legacy tree and snag commitments. *See, e.g., id.* at 53 (“KNF has minimized effects where feasible by including design feature suggested by DellaSala et al. 2005 and others, including: . . . Snag retention guidelines to ensure retention of legacy tree features.”). It is no surprise then that when USFWS ultimately concluded that the project would not jeopardize northern spotted owls or adversely modify owl critical habitat, USFWS explicitly recognized that its decision was based on, *inter alia*, a finding:

In most places PDFs will provide for retention of snags and down wood, both green tree and burned legacy features important to NSOs. Retention of snags, down wood and legacy features will be provided at broad scale in the action area, implementing some of the habitat retention concepts described in [Recovery Action] 12.

See id. at 136.

In sum, in reviewing the environmental effects of the project, KNF relied heavily on its project design feature to retain legacy trees, snags, and other legacy components. Correspondingly, USFWS relied on KNF’s commit to implement its project design feature in its review of project effects and its conclusion that the Westside Project will not jeopardize the continued existence of northern spotted owls nor will it adversely modify critical habitat.

C. KNF Failed to Implement Project Design Features

“Groundtruthing” is a routine practice whereby concerned citizens and organizations to fact check findings, assumptions, and conclusions and to monitor project develop and implementation to ensure compliance with environmental laws. On May 19, 2016, Kimberly Baker of the Environmental Protection Information Center and Earl Crosby of the Karuk Tribe visited timber sale units 209, 212, 227, and 265. At all units visited, it was apparent that KNF had failed to mark legacy leave trees, snags, and other leave structure as required by project design features Wildlife 11, Wildlife 12, and Wildlife 13. The Tribe believes that this issue exists across the entire project area.

Below are sample photographs of trees which should be retained per KNF project design features but are not marked for retention. These photographs are representative of other legacy trees and snags which are unmarked within salvage logging units.

Figure 1 shows Mr. Crosby next to a legacy tree with a diameter at breast height (dbh) of 48” within unit 209. This tree should have been marked for retention with orange leaf paint; as it was not, it will likely be logged.



FIGURE 1: LEGACY TREE WITHIN UNIT 209. PHOTOGRAPH BY KIMBERLY BAKER, TAKEN MAY 19, 2016.

Figure 2 shows Ms. Baker next to a legacy tree with a diameter at breast height (dbh) of 55” within unit 209. As is clear from the surrounding trees and snags, this tree is disproportionately larger than the surrounding forest, suggesting it is a remnant from a previous stand. This tree should have been marked for retention with orange leaf paint; as it was not, it will likely be logged.



FIGURE 2: LEGACY TREE WITHIN UNIT 209. PHOTOGRAPH BY EARL CROSBY, TAKEN MAY 19, 2016.

Figure 3 shows Mr. Crosby next to a legacy tree with a diameter at breast height (dbh) of 52" within unit 265. This tree should have been marked for retention with orange leave paint; as it was not, it will likely be logged. The photograph clearly shows the disparity in size between the unmarked legacy tree and others nearby.



FIGURE 3: LEGACY TREE WITHIN UNIT 265. PHOTOGRAPH BY KIMBERLY BAKER, TAKEN MAY 19, 2016.

Figure 4 shows Ms. Baker next to a legacy tree with a diameter at breast height (dbh) of 45” within unit 266. As the photograph shows, this snag is disproportionately larger than the surrounding trees suggesting it predates the rest of the stand. As it is significantly larger than surrounding trees, this large sugar pine should have been marked for retention pursuant with orange leave paint; as it was not, it will likely be logged.



FIGURE 4: LEGACY TREE IN UNIT 266. PHOTOGRAPH BY EARL CROSBY, TAKEN MAY 20, 2016.

Figure 5 shows a legacy snag in unit 212. This tree is clearly significantly older and larger, suggesting it is a remnant of a previous stand and should have been marked per Wildlife – 11.



FIGURE 5: LEGACY TREE IN UNIT 212. PHOTOGRAPH BY KIMBERLY BAKER, TAKEN MAY 20, 2016.

Figure 6 shows a disproportionately large tree in unit 224. Its large size suggests that this tree is a remnant of a previous stand and therefore should be retained per Wildlife – 11. Furthermore, although not visible in this photograph, this tree contained a large cavity near its base which can serve as habitat for cavity-dependent species. As such, this tree should have been marked for retention per Wildlife – 12. As it was unmarked, this tree will likely be logged.



FIGURE 6: LEGACY TREE IN UNIT 224. PHOTOGRAPH BY KIMBERLY BAKER, TAKEN MAY 20, 2016.

Due to the Klamath National Forest's widespread road closure within the project area, it is infeasible and/or illegal to visit other units either slated for future logging or currently being logged. Reviews of timber "cruises" for these units do indicate the existence of large diameter trees and snags that would likely constitute legacy leave trees. Based on these timber cruise documents, it is unclear whether these trees are marked for retention. Based on this evidence, the Tribe has raised a substantial likelihood that other units have not been marked. It is solely within KNF's ability to review these areas for legacy trees.

IV Legal Background

Section 7 of the ESA requires KNF, in consultation with USFWS, to insure that any action authorized, funded, or carried out by KNF 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). This process is known as a "Section 7" consultation. The process is usually initiated by a formal written request by the action agency to the consulting agency, as formalized here in a June 24, 2015 letter by KNF Forest Supervisor Grantham to USFWS requesting formal consultation. After consultation, investigation, and analysis, USFWS then prepares a BiOp.

In a BiOp, USFWS evaluates the effects of the proposed action on the survival of species and any potential destruction or adverse modification of critical habitat, 16 U.S.C. § 1536(b), based on "the best scientific and commercial data available," 16 U.S.C. § 1536(a)(2). The BiOp includes a summary of the information upon which the opinion is based, a discussion of the effects of the action on listed species or critical habitat, and the consulting agency's opinion on "whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat." 50 C.F.R. § 402.14(h)(3). In making its jeopardy determination, the consulting agency evaluates "the current status of the listed species or critical habitat," the "effects of the action," and "cumulative effects." *Id.* § 402.14(g)(2)-(3). "Effects of the action" include both direct and indirect effects of an action "that will be added to the environmental baseline." *Id.* § 402.02. The environmental baseline includes "the past and present impacts of all Federal, State or private actions and other human activities in the action area" and "the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation." *Id.* If the BiOp concludes that jeopardy is not likely and that there will not be adverse modification of critical habitat, or that there is a "reasonable and prudent alternative[]" to the agency action that avoids jeopardy and adverse modification and that the incidental taking of endangered or threatened species will not violate section 7(a)(2), the consulting agency can issue an "Incidental Take Statement" which, if followed, exempts the action agency from the prohibition on takings found in Section 9 of the ESA. 16 U.S.C. § 1536(b)(4); *ALCOA v. BPA*, 175 F.3d 1156, 1159 (9th Cir.1999).

Both the KNF and USFWS remain under continuing duty to reinitiate consultation “[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.” 50 C.F.R. § 402.16(c); *see also Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 525 (9th Cir. 2010). When reinitiation of consultation is required, the original BiOp loses its validity, as does its accompanying incidental take statement, which then no longer shields the action agency from penalties for takings. *Oregon Nat. Res. Council v. Allen*, 476 F.3d 1031, 1037 (9th Cir. 2007) *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1108 (9th Cir. 2012), *see also* U.S. Fish & Wildlife Serv. & Nat. Marine Fisheries Serv., *Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities under Section 7 of the Endangered Species Act*, 4–23 (1998).

V Violations of the ESA

The Tribe realleges all preceding paragraphs. By failing to mark legacy “leave” trees and snags, KNF has failed to adhere to the project as-designed and as-reviewed by USFWS. This failure is substantial as USFWS repeatedly relied on KNF to retain such features and its ultimate conclusion explicitly referenced the retention of legacy trees in finding no jeopardy or adverse modification. Ignoring one of the primary components to mitigate effects of the project on northern spotted owl is therefore a modification of the project “in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion.”

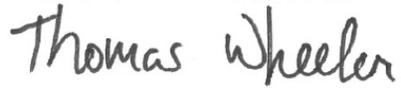
As the party responsible for implementing leave tree retention marking, KNF was aware of its failure to mark leave trees. KNF likely holds all records and contracts which have proof of marking. Therefore, KNF had the obligation to reinitiate consultation when either it first decided it was going to not mark leave trees and/or when it became aware that marking had not been accomplished successfully or as-designed. KNF failed to reinitiate consultation and is in violation of Section 7 and will be until KNF reinitiates consultation.

VI. Conclusion

We request that KNF take immediate action to remedy ongoing violations of the ESA. We are hopeful that KNF will take all necessary measures to avoid continuing violation of Section 7, in particular, re-examining all units for legacy trees and remarking all legacy trees. Priority should be given to units that are currently being logged and marking should take priority over felling. The Tribe will be examining all logged units once roads reopen to examine felled tree diameters. During the pendency of this 60-day notice period, KNF may wish to meet with the Tribe to discuss measures KNF will take to avoid litigation. Should the Tribe be

forced to pursue litigation, the Tribe will seek all reasonable fees including recovery of attorney fees.

Sincerely,

A handwritten signature in black ink that reads "Thomas Wheeler". The script is cursive and fluid.

Thomas Wheeler

*On behalf of the Karuk Tribe, Environmental Protection Information Center,
Klamath-Siskiyou Wildlands Center, Klamath Riverkeeper, and Center for
Biological Diversity*

Cc: Ren Lohofner, USFWS

Jenny Ericson, USFWS

Darrin Thome, USFWS

Paul Henson, USFWS