



VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

January 30, 2012

Tom Tidwell, Chief
USDA Forest Service
1400 Independence Ave., SW
Washington D.C. 20250-0003

Ken Salazar, Secretary of the Interior
U.S. Dept. of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Allen Nicholas, Forest Supervisor
Shawnee National Forest
50 Highway 145 South
Harrisburg, Illinois 62946

**Sixty-Day Notice of Intent to Sue the U.S. Forest Service Pursuant to the
ESA Re: Failure to Reinitiate Consultation on the Shawnee Forest Plan**

Dear Chief Tidwell, Secretary Salazar, and Supervisor Nicholas,

The United States Forest Service and the Secretary of the Interior are hereby notified that the Sierra Club and the Center for Biological Diversity intend to file suit, pursuant to the citizen suit provision of the Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g), to challenge the Forest Service’s failure to reinitiate and complete consultation in a timely manner concerning the impacts of the Shawnee Forest Plan on threatened and endangered species.

I. Identity of the Organizations Giving Notice: The name and address of the organizations giving notice of intent to sue under the ESA are:

Sierra Club
85 Second Street
San Francisco, CA 94105

Center for Biological Diversity
P.O. Box 710
Tucson, Arizona 85702-0710

II. Counsel for the Parties Giving Notice:

Marc D. Fink, Attorney
Center for Biological Diversity
209 East 7th St.
Duluth, Minnesota 55805
Tel: 218-464-0539
mfink@biologicaldiversity.org

III. Requirements of the ESA

Section 7 of the ESA requires the Forest Service, in consultation with the United States Fish and Wildlife Service (“FWS”), to insure that any action authorized, funded, or carried out by the Forest Service 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 include all activities or programs of any kind authorized, funded, or carried out by federal agencies, including actions directly or indirectly causing modifications to the land, water, or air; and actions intended to conserve listed species or their habitat. 50 C.F.R. § 402.02. Forest plans are ongoing agency actions pursuant to Section 7 of the ESA. *Center for Biological Diversity v. U.S. Fish and Wildlife Service*, 623 F. Supp. 2d 1044, 1054 (N.D. Cal. 2009), citing *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1053-54 (9th Cir. 1994).

For each federal action, the Forest Service must request from FWS whether any listed or proposed species may be present in the area of the agency action. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. If listed or proposed species may be present, the Forest Service must prepare a “biological assessment” to determine whether the listed species may be affected by the proposed action. *Id.* The biological assessment must generally be completed within 180 days. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(i).

If the Forest Service determines that its proposed action may affect any listed species or critical habitat, the agency must engage in formal consultation with FWS. 50 C.F.R. § 402.14. To complete formal consultation, FWS must provide the Forest Service with a “biological opinion” explaining how the proposed action will affect the listed species or habitat. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14. The biological opinion “is required to address both the ‘no jeopardy’ and ‘no adverse modification’ prongs of Section 7.” *Center for Biological Diversity v. Bureau of Land Management*, 422 F. Supp. 2d 1115, 1127 (N.D. Cal. 2006), citing 50 C.F.R. § 402.14(g)(4). Consultation must generally be completed within 90 days from the date on which consultation is initiated. 16 U.S.C. § 1536(b)(1)(A); 50 C.F.R. § 402.14(e).

If FWS concludes that the proposed action “will jeopardize the continued existence” of a listed species, the 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 on 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).

In order to monitor the impacts of incidental take, the Forest Service must monitor and report the impact of its action on the listed species to FWS as specified in the incidental take statement. 16 U.S.C. § 1536(b)(4); 50 C.F.R. §§ 402.14(i)(1)(iv), 402.14(i)(3). If during the course of the action the amount or extent of incidental taking is exceeded, the Forest Service must reinitiate consultation with FWS immediately. 50 C.F.R. § 401.14(i)(4).

The reinitiation 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 or reinitiation of consultation, the Forest Service is prohibited from making “any irreversible or irretrievable commitment of resources with respect to the agency action which” may “foreclos[e] the formulation or implementation of any reasonable and prudent alternative measures.” 16 U.S.C. § 1536(d).

Section 9 of the ESA and its implementing regulations prohibit the unauthorized “take” of threatened and endangered species. 16 U.S.C. §§ 1538(a)(1); 1533(d); 50 C.F.R. § 17.31. “Take” is defined broadly to include harming, harassing, trapping, capturing, wounding or killing a protected species either directly or by degrading its habitat. *See* 16 U.S.C. § 1532(19); *Center for Biological Diversity v. Bureau of Land Management*, 422 F. Supp. 2d at 1127 n. 7. Taking that is in compliance with the terms and conditions specified in a biological opinion is not considered a prohibited taking under Section 9 of the ESA. 16 U.S.C. § 1536(o)(2).

IV. Consultation on the Shawnee Forest Plan

In 2005, the Forest Service prepared a Biological Assessment on the Revised Land and Resource Management Plan (“Forest Plan”) for the Shawnee National Forest, which documented the potential effects of implementation of the Shawnee Forest Plan on threatened and endangered species and their habitats. The Forest Service determined that implementation of the Forest Plan may affect and is likely to adversely affect the endangered Indiana bat, and may affect but is not likely to adversely affect the endangered gray bat. For the gray bat, the Forest Service determined that the Forest Plan would not have any direct effects on the species “since the species does not currently roost or hibernate on the Forest.” The Forest Service did not consider the potential impacts of white-nose syndrome on endangered bat populations in the 2005 Biological Assessment, as the syndrome had not been discovered at that time.

On December 3, 2005, FWS provided its Biological Opinion on the Shawnee Forest Plan. In its transmittal letter, FWS concurred with the Forest Service’s assessment that the Forest Plan is not likely to adversely affect the gray bat. As a result, the gray bat is not considered or addressed in the Biological Opinion. FWS determined in the Biological Opinion that the Forest Plan is not likely to jeopardize the continued existence of the Indiana bat. FWS did not consider the potential impacts of white-nose syndrome on endangered bat populations in the 2005 Biological Opinion, as the syndrome had not been discovered at that time.

V. New Information Since the 2005 Consultation on the Shawnee Forest Plan

Subsequent to the 2005 Biological Assessment and 2005 Biological Opinion on the Shawnee Forest Plan, there has been significant new information concerning the potential effects

of the continued implementation of the Shawnee Forest Plan on endangered bats and their habitat. This information includes the discovery and spread of the deadly white-nose syndrome, and a recent survey that establishes the presence of the endangered gray bat on the Forest, as well as previously unknown Indiana bat maternity roosts.

First, and most importantly, white-nose syndrome (“WNS”) was discovered in northeastern North America in 2006 and has since spread and had devastating effects on numerous bat species. Since being discovered, WNS has been identified as a dire threat to bat species. For example, Indiana Bat Recovery Team member Dr. Virgil Brack wrote:

The White Nose Syndrome (“WNS;” aka “White Death”) scares the hell out of us. It has the potential to be the single most devastating impact on bats in North America that we have seen in recorded history, with the possible exception of the settling of this land by Europeans and subsequent habitat destruction. It is possible that this could be to bats what the chestnut blight and Dutch elm disease were to well chestnut trees and elm trees.

The most recent population data for Indiana bats shows that 70% of the Indiana bat population in the Northeast (the 3 states hardest hit by WNS) has been lost to WNS since 2007.¹ More alarmingly, 99% of the Indiana bat population in New Jersey was lost between 2009 and 2011. Vermont lost over 95% of its Indiana bat population in this period. Pennsylvania, which WNS hit more recently, lost 50% of its Indiana bat population between 2009 and 2011.

On January 17, 2012, FWS issued a press release that stated:

On the verge of another season of winter hibernating bat surveys, U.S. Fish and Wildlife Service biologists and partners estimate that at least 5.7 million to 6.7 million bats have now died from white-nose syndrome. Biologists expect the disease to continue to spread.

White-nose syndrome (WNS) is decimating bat populations across eastern North America, with mortality rates reaching up to 100 percent at many sites. First documented in New York in 2006, the disease has spread quickly into 16 states and four Canadian provinces.

“This startling new information illustrates the severity of the threat that white-nose syndrome poses for bats, as well as the scope of the problem facing our nation. Bats provide tremendous value to the U.S. economy as natural pest control for American farms and forests every year, while playing an essential role in helping to control insects that can spread disease to people,” said Fish and Wildlife Service Director Dan Ashe. “We are working closely with our partners to understand the spread of this deadly disease and minimize its impacts to affected bat species.”

¹<http://www.fws.gov/midwest/endangered/mammals/inba/pdf/2011inbaPopEstimate04Jan12.pdf>

“White-nose syndrome has spread quickly through bat populations in eastern North America, and has caused significant mortality in many colonies,” said National WNS Coordinator, Dr. Jeremy Coleman, “Many bats were lost before we were able to establish pre-white-nose syndrome population estimates.”

http://www.fws.gov/WhiteNoseSyndrome/pdf/WNS_Mortality_2012_NR_FINAL.pdf

The National Plan for Assisting States, Federal Agencies, and Tribes in Managing White-Nose Syndrome in Bats, May 2011,² states:

White-nose syndrome (WNS) is a disease responsible for unprecedented mortality in hibernating bats in the northeastern U.S. This previously unrecognized disease has spread very rapidly since its discovery in January 2007, and poses a considerable threat to hibernating bats throughout North America.

More than half of the 45 species of bats that occur in the U.S. rely on hibernation as a primary strategy for surviving the winter, when insect prey are not available. All four endangered species and subspecies of hibernating bats in the continental U.S. rely on undisturbed caves or mines for successful hibernation, and are at potential risk from WNS. Three of these species (Indiana, gray, and Virginia big-eared bat [*Corynorhinus townsendii virginianus*]) are currently within the affected area, and the remaining subspecies (Ozark big-eared bat [*C. t. ingens*]) will likely be at risk soon. Although the potential for WNS to continue to spread is currently unknown, the implications of its undermining the survival strategy of so many bat species are considerable.

WNS, which has been spreading rapidly from its epicenter in upstate New York since 2006, was first documented last winter at hibernacula in Indiana and Kentucky. The western Kentucky WNS site and the southern Indiana WNS sites are all within 200 miles or less of the Shawnee National Forest. This distance is certainly within the known migratory range of Indiana bats (documented at 325 miles from hibernacula) (Gardner and Cook 2002), as well as gray bats (documented traveling over 300 miles from summer to winter sites) (Tuttle 1976). Indeed, bats summering on the Shawnee National Forest may very well hibernate in areas already affected by WNS, and this winter those bat populations are possibly already beginning to suffer the effects of this devastating disease. Given the proximity to WNS-affected sites in neighboring states, it is unfortunately reasonably foreseeable that WNS will soon be documented in Illinois.

Clearly, WNS constitutes significant new information concerning threats to the survival of the Indiana bat and gray bat, and triggers the need for the immediate reinitiation of consultation on the Shawnee Forest Plan. For the gray bat, as mentioned, impacts are not even considered in the Forest Plan Biological Opinion. And for the Indiana bat, the Forest Plan Biological Opinion is based on the assumption that Indiana bat populations are increasing and are not facing a dire threat to the survival of the species. WNS presents significant new

²<http://www.fws.gov/WhiteNoseSyndrome/pdf/WNSnationalplanMay2011.pdf>

information concerning how much additional harm the Indiana bat and gray bat can absorb and still recover.

In addition to WNS, the recent survey results documented in the August, 2011 “Mist Net and Acoustic Survey of Federal-Listed and Regional Forester Sensitive Bat Species for the Proposed American Land Holdings of Illinois Landswap,” provide additional new information that again triggers the need to reinitiate consultation on the Shawnee Forest Plan. During this June 2011 survey of a Shawnee National Forest parcel that is being considered for a land exchange with Peabody Energy, both endangered Indiana bats and endangered gray bats were documented. This survey provides significant new information for the gray bat, as during consultation on the Forest Plan in 2005, the Forest Service had assumed that this species was not present on the Shawnee National Forest and thus dismissed the possibility of forest management having any direct effects on the species.

The same survey also provides significant new information for the Indiana bat, as maternity roosts were discovered in an upland forest. By contrast, the 2005 Biological Assessment found that “Riparian and bottomland forests are the only habitats where Indiana bat maternity colonies have been located on the Shawnee National Forest to date (Gardner *et al.* 1991 and Carter 2003).” The Biological Assessment also states that “Summering bats are known to roost in shagbark hickory, white oak (*Quercus alba*), red oak (*Q. rubra*), pin oak (*Q. palustris*), post oak (*Q. stellata*), slippery elm (*Ulmus rubra*), bitternut hickory (*C. cordiformis*), sassafras (*Sassafras albidum*), and sugar maple (*Acer saccharum*), among others (Gardner *et al.* 1991, Carter 2003).” Therefore, a roost in a cherrybark oak, as documented in the recent bat survey, is also significant new information that is relevant to potential impacts on this species. Additionally, this was the first maternity colony discovered in the Eastern Shawnee.

VI. The Proposed Land Exchange with Peabody Energy

Despite the need to immediately reinitiate consultation on the Shawnee Forest Plan, and despite the discovery of the endangered Indiana bat and the endangered gray bat on the Forest Service parcel that would be exchanged, the Forest Service continues to move forward with a proposed land exchange with Peabody Energy that would facilitate a strip coal mine on these occupied lands. As set forth in our scoping comments provided to the Forest Service, the agency’s approval of this land exchange would violate the ESA by failing to conserve endangered species, by jeopardizing the continued existence of the endangered Indiana bat and gray bat, by failing to enter into formal consultation with FWS, by taking endangered bats, and by authorizing the irreversible and irretrievable commitment of resources prior to the completion of the reinitiated consultation on the Shawnee Forest Plan.

VII. Forest Service Violations of the ESA

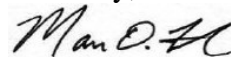
The Forest Service has failed to reinitiate and timely complete the reinitiated consultation with FWS regarding the continued implementation and impacts of the Shawnee Forest Plan on endangered species, in violation of the ESA. 16 U.S.C. § 1536(a)(2), 50 C.F.R. § 402.16. In addition, by allowing, authorizing, and approving projects and activities to proceed on the Shawnee National Forest that may affect endangered species, prior to the completion of the

required reinitiation of consultation with FWS, the Forest Service is violating the ESA. 16 U.S.C. § 1536(a)(2); *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1056 (9th Cir. 1994) (holding that Section 7(d) of the ESA “does not serve as a basis for any governmental action unless and until consultation has been initiated”); 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). Moreover, the Forest Service’s continued approval of projects and activities on the Shawnee National Forest, without an updated Biological Opinion and Incidental Take Statement, is likely to result in the taking of endangered species, in violation of Section 9 of the ESA. 16 U.S.C. § 1538(a)(1); 50 C.F.R. § 17.31.

VIII. Conclusion

For the above stated reasons, the Forest Service has violated and remains in ongoing violation of Sections 7 and 9 of the ESA. If these violations of law are not cured within sixty days, the Sierra Club and the Center for Biological Diversity intend to file suit for declaratory and injunctive relief, as well as attorney and expert witness fees and costs. 16 U.S.C. § 1540(g). This notice letter was prepared based on good faith information and belief after reasonably diligent investigation. If you believe that any of the foregoing is factually erroneous or inaccurate, please notify us promptly.

Sincerely,



Marc D. Fink
Center for Biological Diversity
209 East 7th St.
Duluth, Minnesota 55805
Tel: 218-464-0539
mfink@biologicaldiversity.org

cc: Eric H. Holder, Jr., U.S. Attorney General