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THE ENDANGERED SPECIES ACT AND FEDERAL PROGRAMMATIC LAND AND RESOURCE MANAGEMENT; CONSULTATION FACT OR FICTION

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INTRODUCTION

Congress enacted the Endangered Species Act (ESA)[1] in 1973 for various purposes. The ESA calls for the development of recovery plans specifically designed to conserve and recover species listed as either threatened or endangered under the ESA.[2] The ESA also actively protects certain species of animals by placing limits on the taking of species listed under the ESA[3] and by limiting the actions taken by federal agencies to ensure that the actions are not likely to jeopardize the continued existence of listed species.[4]

The ESA employs several mechanisms to achieve these goals. Section 4(f) of the ESA, for example, obligates the Secretary of the Interior or the Secretary of Commerce to develop recovery plans.[5] Such plans set out the framework for the conservation and recovery of species listed under the ESA as either endangered or threatened.[6]

Section 9 of the ESA prohibits, with certain exceptions, the "taking" of endangered species.[7] "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, capture, or collect, or to attempt to engage in any such conduct."[8]

Section 7 of the ESA imposes limitations upon federal agencies to ensure that the actions of such agencies are not likely to jeopardize the continued existence of any species listed under the ESA as either endangered or threatened.[9] To further this goal, Section 7 requires a federal agency to consult with the relevant expert agency prior to engaging

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The views expressed in this article are solely those of the authors and do not purport to reflect the views of the Department of Justice, the Department of Agriculture or any other federal agency.

1. 16 U.S.C. §§ 1531-1543 (1988).
2. 16 U.S.C. § 1533(f).
3. 16 U.S.C. § 1538(a)(1)(B).
4. 16 U.S.C. § 1536(a)(2).
5. 16 U.S.C. § 1533(f)(1).
6. *Id.*
7. 16 U.S.C. § 1538(a)(1)(B).
8. 16 U.S.C. § 1532(19).
9. 16 U.S.C. § 1536(a)(2).

in any action likely to affect any endangered or threatened species.[10]

This article will examine how the Section 7 consultation requirement applies to the federal government's programmatic[11] management of federal land and resources. Part I of this article will outline the ESA consultation procedures. Part II will focus on the judicial construction of these consultation procedures and how the consultation procedures apply to federal agencies and federal agency programmatic planning schemes. Part III will focus on suggested ways in which Congress and federal agencies can avoid making Section 7 an overwhelming obstacle to federal action while simultaneously avoiding jeopardy to listed species. Finally, Part IV will offer a detailed analytical framework for determining the scope of Section 7 consultation on federal programmatic planning documents.[12]

I. SECTION 7 OF THE ESA

Congress enacted the ESA in 1973 for the express goal of conserving endangered and threatened species.[13] In Section 7 of the ESA, Congress entrusted the bulk of the responsibility for achieving this goal to the federal executive agencies.[14]

Section 7 imposes substantive and procedural requirements on all

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10. *Id.*

11. "Programmatic" refers to the nature of a plan of future procedure. *See* Webster's New International Dictionary 1977 (2d ed. 1961). Thus, "programmatic management" refers to the manner in which a future course of conduct is guided. For example, the National Forest Service utilizes Land and Resource Management Plans (LRMPs) to guide future activities on National Forests. Forest and Rangeland Renewable Resources Planning Act, 16 U.S.C. § 1604(f) (1974). While LRMPs do not generally sanction specific on-the-ground projects, all future on-the-ground projects must be consistent with the guidance found in the LRMP. *See e.g.*, City of Tenakee Springs v. Block, 778 F.2d 1402, 1406 (9th Cir. 1985); Intermountain Forest Indus. Assoc. v. Lyng, 683 F. Supp. 1330, 1341 (D. Wyo. 1988); *see also* Forest Service Manual, Ch. 1920, 53 Fed. Reg. 26807, 26809 (1988) ("Planning for units of the National Forest System involves two levels of decision. The first is development of a forest plan that provides direction for all resource management programs, practices, uses, and protection measures. The second level [of] planning involves the analysis and implementation of management practices designed to achieve the goals and objectives of the forest plan.").

12. The authors intend for the analysis used and the conclusions drawn in this article to be fully applicable to all federal agencies which manage lands and other resources through the use of programmatic planning schemes. Examples of federal agencies which utilize programmatic planning documents in the management of land or other resources include the National Forest Service (Land and Natural Resource Management Plans (LRMPs)) and the Bureau of Land Management (BLM) (Resource Management Plan (RMP)).

The Forest Service has been involved in extensive planning efforts at all 122 national forests. *See* 54 Fed. Reg. 7075 (1989). BLM also utilizes RMPs on all of the land over which it has control. *See* 54 Fed. Reg. 7075 (1989); 55 Fed. Reg. 14482 (1990).

13. 16 U.S.C. § 1531(c) (1988).

14. 16 U.S.C. § 1536(a) (1988).

federal agencies.[15] The paramount substantive requirement is that each federal agency "shall ensure 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]

The most important procedural obligation imposed on federal agencies by Section 7 is the duty to consult with federal agencies which have wildlife or marine expertise prior to engaging in any action likely to affect any endangered or threatened species.[17] At the conclusion of this consultation process, the expert agency issues a biological opinion. The biological opinion analyzes whether the proposed action is likely to result in jeopardy to a listed species and thus run afoul of the Section 7(a)(2) prohibition. If the expert agency concludes that the action is likely to jeopardize a listed species, the expert agency then determines if any reasonable and prudent alternatives exist which avoid jeopardy to the species. The federal agency contemplating action ultimately remains responsible for determining the likelihood of jeopardy and ensuring that its actions avoid this result.[18]

II. Judicial Construction of the Scope of Section 7 Consultation on Federal Agency Programmatic Planning Documents

Various courts have reached different conclusions in analyzing the extent to which federal agency programmatic planning schemes are subject to Section 7 review Courts have examined the specific structure and requirements of the law governing the underlying agency action and, in some cases, held that statutory procedural requirements were sufficient to ensure future ESA compliance. In other cases, courts reached the opposite conclusion, holding that further measures were necessary to ensure ESA compliance.

In *Cabinet Mountains Wilderness v Peterson*,[19] the plaintiffs challenged the Forest Service's approval of a four-year mineral exploration project in a Montana wilderness area. The plaintiffs asserted that the Forest Service failed to ensure that its action would not be likely to

15. 16 U.S.C. § 1536(a)-(d) (1988).

16. 16 U.S.C. § 1536(a)(2) (1988).

17. 16 U.S.C. §§ 1536(a)(2), (b)(1)(A) (1988); 50 C.F.R. § 402(10)-(16) (1990).

18. Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978) (hereinafter TVA).

The FWS may authorize the "incidental" taking of listed species if such takings will not violate the "jeopardy" proscription. 16 U.S.C. § 1536(b)(4). If the FWS includes an incidental take authorization in the biological opinion, it must specify reasonable and prudent measures necessary or appropriate to minimize the impact of incidental taking on the species, 16 U.S.C. § 1536(b)(4)(ii), and any "terms and conditions that must be complied with by the Federal agency to implement the measures specified" by the FWS to minimize any impact on the species which will result from incidental takings. 16 U.S.C. § 1536(b)(4)(iv).

19. 685 F.2d 678 (D.C. Cir. 1982).

jeopardize the continued existence of the grizzly bear [20] In upholding the Forest Service's action, the court focused on the scope of the agency action, emphasizing that its "review of the agency's action is limited to the approval of the four-year exploratory drilling proposal" and not actions taken after the results of the exploration were known.[21] The court further stated that any "future proposals by ASARCO to conduct drilling activities in the Cabinet Mountains area will require further scrutiny under NEPA and the ESA."[22]

The statute under which an agency conducts its action also provides an important gauge of the extent to which future actions under a given management scheme must be evaluated in an initial ESA consultation. In *North Slope Borough v Andrus*,[23] for example, the court reviewed offshore oil and gas leases awarded under the Outer Continental Shelf Lands Act (OCSLA). Pursuant to the structure of the federal agency's management scheme, the award of a lease permitted the lessee to engage in preliminary activities if the lessee gave prior notice to the government supervisor These preliminary activities included conducting geological, geophysical and other surveys and constructing test sites to ascertain which structures could best withstand the Arctic winter [24]

The court ruled that the "agency action" in *North Slope* "may signify the lease sale and all subsequent activities, but satisfaction of the ESA mandate that no endangered life be jeopardized must be measured in view of the full contingent of OCSLA checks and balances and all mitigating measures adopted in pursuance thereof."[25] Because OCSLA provides for strict control by the government agency "from lease sale to depleted, run-dry well,"[26] ESA compliance is achieved even if the entire scope of the agency action cannot be addressed in a biological opinion at the initial stage due to inexact information.[27] The court further stated that "[e]valuating an outer continental shelf project in the light of all contemplated and congruous actions merely reflects that 'pumping oil' and not 'leasing tracts' is the aim of congressional policy "[28]

The court in *North Slope*

> wrestled with the apparent tension between the ESA, which requires that the entire agency action be considered in a

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20. *Id.* at 681.
21. *Id.* at 687.
22. *Id.*
23. 642 F.2d 589 (D.C. Cir. 1980).
24. *Id.* at 594.
25. *Id.* at 609 (footnote omitted).
26. *Id.*
27. *Id.* at 607-09.
28. *Id.*

> biological opinion, and OCSLA, which provides for a segmented approach to offshore oil projects. It concluded that the two statutes were ultimately complimentary because the segmented approach of OCSLA, which requires the Secretary to examine the effect of proposed oil leasing, exploration and drilling prior to their separate initiation, ensures "graduated compliance with environmental and endangered life standards." In reaching this conclusion the court explicitly relied on the OCSLA system of "checks and balances."[29]

In *Village of False Pass v Watt*,[30] the court reaffirmed the validity of this incremental step consultation under OCSLA. The court stated that the agency "would be remiss to forego this excellent opportunity to offer guidance in shaping the parameters within which later outer continental shelf activities should occur," yet

> this affirmative duty to consider the full range of outer continental shelf activities must be tempered by the realization that as outer continental shelf activities progress, identification of particular sources of jeopardy to endangered species, and development of mitigation plans will be guided less by abstraction and speculation than by recourse to an expanding base of relevant data. The requirement of further consultation at later stages assures that activity incident to those stages, as well as the entire outer continental shelf plan, are conducted in compliance with section 7(a)(2) and section 7(d) without unnecessarily sacrificing the national goal of oil and gas development.[31]

Conner v Burford dealt with the sale by the Bureau of Land Management (BLM) of two types of onshore oil and gas leases within the Flathead and Gallatin National Forests.[32] The sale was authorized by the Mineral Leasing Act (MLA).[33] The first type of lease contained "no surface occupancy" (NSO) stipulations, which, on their face, prohibited lessees "from occupying or using the surface of the leased land without further specific approval from the BLM."[34] The second type of lease, non-NSO leases, contained "mitigation stipulations" which authorized the government to impose reasonable conditions on drilling, construction, and other surface-disturbing activities. Unlike NSO stipulations, however,

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29. Conner v. Burford, 848 F.2d 1441, 1455-56 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989) (quoting and discussing *North Slope*, 642 F.2d at 609).

30. 565 F.Supp. 1123 (D. Alaska 1983), *aff'd sub nom.* Village of False Pass v. Clark, 733 F.2d 605 (9th Cir. 1984).

31. Village of False Pass v. Watt, 565 F Supp. at 1157.

32. *Conner*, 848 F.2d at 1443-44.

33. 30 U.S.C. §§ 181-287 (1988).

34. *Conner*, 848 F.2d at 1444.

they did not authorize the government to prohibit such surface-disturbing activities altogether [35]

As required by the ESA, the Forest Service consulted with the FWS to determine whether the sale of the leases might jeopardize endangered or threatened species.[36] The Forest Service and the FWS decided that because of the lack of information regarding post-lease activities, the biological opinion would only consider activities taken pursuant to the lease sale itself.[37] For the purpose of fulfilling its ESA duties, the FWS proposed ongoing consultation and future biological opinions at various stages of the post-leasing activities.[38]

The Ninth Circuit held that the federal agencies were required to obtain a biological opinion considering the effects of the lease sale itself as well as of post-leasing oil and gas activities.[39] The court held that the agency action under the MLA "entails not only leasing but leasing and all post-leasing activities through production and abandonment."[40]

Most recently, in *Resources Limited v Robertson* (Flathead I)[41] and *Swan View Coalition v Turner* (Flathead II),[42] the courts were faced with determining the scope of Section 7 consultation in the context of federal programmatic planning documents designed to manage the national forests of the United States. In Flathead I, the court reviewed the Forest Service's approval of the Flathead National Forest Land & Resource Management Plan (Flathead Plan). Plaintiffs asserted, among other things, that the Forest Service failed to ensure that its action — promulgation of the Flathead Plan — was not likely to jeopardize the continued existence of listed species and that the Forest Service's reliance on the FWS' biological opinion was arbitrary and capricious. In Flathead II, the court reviewed the FWS' biological opinion on the Flathead Plan.[43] Plaintiffs asserted that the biological opinion itself was arbitrary and capricious because the FWS "construed the scope of the agency action too narrowly and failed to directly address or analyze the impact of many of the decisions made in "The Flathead Plan."[44]

In its biological opinion, the FWS focused solely upon the actual decisions made in the Flathead Plan and the fact that the statutory and

35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 1462.
40. *Id.* at 1453, 1457-58.
41. 789 F Supp. 1529 (D. Mont. 1991).
42. CV 89-121-H-CCL (D. Mont. Dec. 7, 1992).
43. *Id.*
44. *Id.* at 23-24.

regulatory framework which guides approval and implementation of forest plans dictates that further Section 7 review is required prior to taking any site-specific project level action.[45] Importantly, the FWS did not analyze whether any activity from approval of the Flathead Plan through its implementation was likely to jeopardize listed species. Such a task, concluded the FWS, would entail too much speculation and was unnecessary The FWS reasoned that all proposed project level activities must undergo their own Section 7 review [46]

The court in Flathead I found that "the Forest Service did not arbitrarily rely upon a no jeopardy opinion by" the FWS,[47] recognizing that further ESA consultation would be necessary prior to approval of any site-specific action. The court in Flathead II affirmed the adequacy of the FWS' biological opinion, finding that "NFMA is a 'multiple objective' statute with its own system of checks and balances in place which adequately safeguards endangered species and that future consultations at subsequent stages of forest development [are] necessary and effective safeguards for ESA compliance."[48]

III. Congress and Federal Agencies Can Act to Make Section 7 Compliance Less of an Obstacle to Responsible Resource Management While Retaining Safeguards to Ensure No Jeopardy to Listed Species

In practical application, judicial construction of Section 7 duties has created a problem within the federal agencies which utilize programmatic planning schemes to manage land and resources. Federal agencies are uncertain of the extent of the consultation required by Section 7 of the ESA when the contemplated action involves the first stage or level of agency action.[49] Courts have sometimes sanctioned an approach whereby consultation only encompasses the actual decisions made by the agency[50] or only the first stage or level of a planned course of action.[51] On the other hand, courts have also required the "telescoping" of consultation, requiring review not only of the planning scheme, or first stage, but of all potential

45. *See id.* at 26, 29.

46. *See id.*

47. *Resources Limited,* 789 F Supp. at 1535.

48. *Swan View,* CV 89-121-H-CCL, *slip. op.* at 29.

49. Each agency management scheme is to some degree personalized to fit a particular goal, whether it be oil and gas development under OCSLA or managing national forests to balance various uses as required by the National Forest Management Act (NFMA). Nevertheless, the exact form of the schemes are all variations on the same theme; programmatic planning. *See supra* n. 11.

50. *See e.g., Cabinet Mountains,* 685 F.2d at 678.

51. *North Slope,* 642 F.2d at 589; Village of False Pass v. Clark, 733 F.2d at 605.

actions taken under the scheme.[52]

These cases can only be reconciled by evaluating the scope of the agency action and the statute under which the agency conducts its activity prior to determining the extent of the ESA consultation. For example, due to the nature of the MLA, agency actions taken under the MLA require the FWS to prepare a biological opinion which takes into account "not only leasing but leasing and all post-leasing activities."[53] Due to the controlled and segmented nature of OCSLA, however, agency actions taken under OCSLA allow the action agency and the FWS to take an incremental step approach to Section 7 consultation.[54]

Additionally, rulings in Flathead I and Flathead II suggest much the same approach.[55] The National Forest Management Act (NFMA), unlike the MLA or OCSLA, is a multiple objective statute. NFMA has its own system in place which, like incremental step consultation under OCSLA and unlike the agency action under the MLA in *Conner*, adequately safeguards endangered species yet recognizes the national goal of forest management.[56]

Given this approach to the requirements of Section 7 in relation to programmatic planning by federal agencies, Congress and federal agencies should create a framework for programmatic management schemes which allows for Section 7 review at each level of decision. If Congress and federal agencies provide for Section 7 review at each level of decision, federal agencies would not have to speculate as to the existence and design of possible future actions for the purpose of Section 7 compliance.

Most importantly, the paramount substantive obligation of Section 7 of the ESA, the duty to ensure that federal action is not likely to jeopardize the existence of listed species,[57] remains fulfilled. All federal actions taken as part of a larger programmatic planning scheme — and pursuant to a statute and regulatory framework which provide for Section 7 review at each level of decision — would thus be required to meet the Section 7 duty

To achieve this goal, Congress should amend the statutes which direct federal agencies to prepare programmatic planning documents. For example, Congress could amend the MLA to require different levels of decision, each level representing different tasks to be performed. First, the exploration level could be analyzed for Section 7 concerns. Then, when the

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52. *See e.g., Conner*, 848 F.2d at 1462.

53. The *Conner* court concluded that the MLA did not contain the checks and balances within the statute which "segmented" agency actions. 848 F.2d at 1453.

54. *North Slope*, 642 F.2d at 609; Village of False Pass v. Watt, 565 F Supp. at 1156-57; 733 F.2d at 611-12.

55. *Resources Limited*, 789 F Supp. 1529; CV 89-121-H-LLL. *slip. op.* at 29.

56. *Id.*

57. 16 U.S.C. § 1536(a)(2).

results of exploration are available, and if there is interest in proceeding with production, the production level could be analyzed under Section 7

Federal agencies could also act to achieve the same result. Through the promulgation of regulations, agencies can establish a framework for consultation which would allow for different levels of decisionmaking.

IV AN ANALYTICAL FRAMEWORK FOR DETERMINING THE SCOPE OF SECTION 7 CONSULTATION ON FEDERAL PROGRAMMATIC PLANNING DOCUMENTS

As things stand today, the question remains; how do federal agencies involved in programmatic planning determine the extent of the required Section 7 consultation under a particular statutory and regulatory management scheme? This issue must be confronted by both the federal agency planning a course of conduct — the action agency — and the agency charged with evaluating the effects of such conduct on listed species — the expert agency First, the scope of the agency action must be determined by setting out the actual decisions made by the agency Second, the statute and regulations under which the agency acts must be analyzed to determine the extent of the existing safeguards.

If there are procedures in place which ensure compliance with environmental laws from approval of the management scheme through completion of the final project level activity many years down the road, a court is likely to permit the Section 7 review to encompass an analysis of only the first stage or level of the management scheme.[58] On the other hand, in the absence of a framework to control future site-specific project level activity, and procedures to ensure compliance with environmental safeguards through these activities, a court may require the agency to telescope the analysis of the effects of all potential agency actions taken under the overall management scheme into one Section 7 review [59]

A detailed example of this approach may be helpful in understanding how to apply this approach to a concrete situation. For this example, we look to the development and approval of forest plans under the National Forest Management Act (NFMA).[60]

NFMA directs the Forest Service to prepare a forest plan for each individual unit of the national forest system.[61] This forest plan embodies

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58. *See supra* section II; *North Slope*, 642 F.2d at 609; Village of False Pass v. WAH, 565 F Supp. 1123, *aff'd* 733 F.2d 605; *Resources Limited*, 789 F Supp. 1529.

59. *See Conner*, 848 F.2d at 1462.

60. 16 U.S.C. §§ 1601-1612 (1974). This is the same management scheme which was reviewed in Flathead I, *Resources Limited* 789 F Supp. 1529, and Flathead II. *Swan View*, slip op. at 21-34.

61. A forest plan provides, in one set of documents, the Forest Service's plan for managing multiple uses and resources within a national forest. 16 U.S.C. § 1604(f).

the Forest Service's "programmatic planning scheme," serving as a guide to agency management for the ten to fifteen years following its approval.[62] NFMA expressly delegates to the Secretary of Agriculture the responsibility to regulate the content, development and form of forest plans.[63] Under this regulatory authority, the Secretary issued regulations requiring a forest plan to "provide for multiple use and sustained yield of goods and services from the National Forest in a way that maximizes long term net public benefits in an environmentally sound manner "[64] Determination of net public benefits requires a balancing of costs and benefits, taking into account the many factors of forest management that cannot be quantitatively valued.[65] Specifically, a forest plan contains: (1) forest-wide management goals and objectives; (2) standards and guidelines for managing specific areas of the forest;[66] (3) prescriptions to govern possible activities

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62. 16 U.S.C. § 1604(f)(5). *See* Intermountain Forest Industry Ass'n v. Lyng, 683 F.Supp. 1330, 1341 (D. Wyo. 1988) (discussing timber management plans).

63. 16 U.S.C. § 1604(g)(1)-(3).

64. 36 C.F.R. § 219.1(a) 1982; *see also* 16 U.S.C. § 1604(e)(1) (A forest plan must "provide for multiple use and sustained yield of the products and services obtained" from a national forest in accordance with the Multiple Use Sustained Yield Act. The Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. § 528-531 (1960) ("MUSY") directs the agency to "administer... the national forests for multiple use and sustained yield of the several products and services obtained therefrom." 16 U.S.C. § 529. The statutory purposes for which the National Forest System is administered are broad — outdoor recreation, range, timber, watershed, and wildlife and fish purposes. 16 U.S.C. § 528. In administering the National Forests, the Forest Service must give "consideration... to the relative value of the various resources, [but] not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output." 16 U.S.C. § 531(a) (definition of "multiple use").

65. 36 C.F.R. § 219.3. For example, a forest plan must include the "coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness." 16 U.S.C. § 1604(e)(1). As the court noted in Flathead I, "with the myriad of goals which the Forest Service is compelled to achieve, together with a shrinking land base on which to achieve these goals, the agency has been placed in the nearly impossible situation of serving many masters." *Resources Limited*, 789 F Supp. at 1533.

66. Standards and guidelines work to ensure no jeopardy to species. In subsequent project level activities, the Forest Service compares Forest Plan standards and guidelines to the design parameters of a proposed action. This allows the Forest Service to both review the proposed action for its effects on listed species and, if necessary, tailor the action to fit within the management framework developed during the Forest Plan process. Indeed, the Plan, through its standards and guidelines, plays an essential role in the formulation of project level activities. Ideally, the party planning a project level activity will utilize the standards and guidelines to help define the parameters of the activity, thus making the whole process more efficient.

Specific examples of standards and guidelines for listed species are:

Grizzly Bear:

-Manage access so that open road density does not exceed 1 mile per square mile in Situation 1.

-Clearcuts should be irregular in shape, where feasible. No point within clearcuts can be more than 600 feet from cover.

-Hiding cover will be maintained on approximately 75% of an openings perimeter when harvest units are located adjacent to natural or manmade opening.

-Minimum width of leave strips between clearcuts should be at least 3 sight distances (approximately 600 feet).

-Clearcutting of stands should not occur until adjacent harvested units qualify as summer

in specific areas of the forest; (4) designations of land suitable for timber production and an allowable timber sale quantity; (5) multiple-use allocations for roadless areas; and (6) monitoring and evaluation requirements.[67] Forest plans are not static, but are freely revised or amended to reflect changes in conditions, information, or management practices.[68]

A forest plan neither authorizes the sale of timber nor commits the agency to sell a particular quantity of timber, at any location or under any conditions. Additionally, no party has any right to do anything under a forest plan, no contract obligation exists under a forest plan and no commitment is made to timber sales or any other output.[69] The Forest Service retains all options, including a "no action" alternative.

Forest plans are implemented by way of various site-specific projects, such as the building of a road, development of a campground, or the sale of timber. Decisions on site-specific projects are made during forest plan implementation. During forest plan implementation, forest land use remains subject to compliance with NEPA and the ESA.[70]

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hiding cover.

-Concentrate timber harvesting within the shortest time period possible and avoid repeated entries over short periods.

-Provide security areas immediately adjacent to the influence zone of the timber sale. Security areas should be 5,000 acres or larger in areas that are roadless or where the open road density averages 1 mile/square mile or less.

Flathead National Forest Land and Resource Management Plan pp. 11-15.

67. *See* Citizens for Environmental Quality v. United States, 731 F. Supp. 970, 977-78 (D.Colo. 1989) (paraphrasing requirements of 36 C.F.R. §§ 219 *et seq.*). Each National Forest must embody these factors in their programmatic planning document. Forest plans, of necessity, must be tailor-made to take into account the unique circumstances of each National Forest.

68. 16 U.S.C. §§ 1604(f)(4) and (5). The controversy over the endangered red-cockaded woodpecker in the Texas National Forests illustrates the need for flexibility in LRMPs. New information regarding the woodpecker and its needs became available and the LRMPs for these forests are changing to reflect this information. *See* Sierra Club v. Lyng, 694 F. Supp. 1260 (E.D. Texas 1988); Sierra Club v. Yeutter, 926 F.2d 429 (C.A.5 Tex. 1991).

69. *See* 16 U.S.C. § 1604.

70. *See* City of Tenakee Springs v. Block, 778 F.2d 1402, 1406 (9th Cir. 1985). The structure for the separate and distinct levels of decisionmaking is provided in Forest Service regulations, 36 C.F.R. Part 219; FWS regulations, 50 C.F.R. Part 402; the Forest Service Manual (FSM) and Handbook (FSH), referenced in 36 C.F.R. § 219.13 (parts of which have been made available for public comment and have been published in the Federal Register, 53 Fed. Reg. 26807-42); as well as forest plans themselves, *see e.g.*, Amendment 11 to the Flathead National Forest LRMP *See also* National Wildlife Federation v. Coston, 773 F.2d 1513, 1518 (9th Cir. 1985) (An EIS is prepared at the LRMP level and, "[a]t the site level, environmental analyses are undertaken in conjunction with the planning of individual construction projects."). *See also* 36 C.F.R. § 219.13 (planning direction and reference to the Forest Service Manual); Forest Service Manual (FSM) Ch. 1920, 53 Fed. Reg. 26807, 26809 (July 15, 1988) ("Planning for units of the National Forest System involves *two levels of decision.* The first is development of a forest plan that provides direction for all resource management programs, practices, uses, and protection measures. The second level [of] planning involves the analysis and implementation of management practices designed to achieve the goals and objectives of the forest plan." (emphasis added)); 53 Fed. Reg. 26834-37 (second distinct level of decision—implementation). As noted above, this structure includes procedures to assure compliance with Section 7 of the ESA.

When a site-specific project level activity is contemplated, such as the sale of timber or the building of a recreation site, the agency must evaluate its environmental consequences, including any impact to threatened or endangered species.[71] If the agency determines, usually in the form of a biological evaluation, that a proposed project will have no effect on listed species, no further analysis is required under the ESA.[72]

If the Forest Service determines that a proposed project may affect listed species, the agency consults with the FWS. The FWS, if it agrees with a Forest Service "not likely to adversely affect" determination, concurs in writing.[73] On the other hand, if the Forest Service determines that a contemplated site-specific project level activity may have an adverse effect on listed species, it formally consults with the FWS.[74] The Section 7 consultation will include an evaluation of not only the direct and indirect effects of the particular proposal, but also the direct and indirect effects of actions that are interrelated or interdependent.[75] While the FWS does not consider possible cumulative effects on threatened or endangered species from future federal project level activities which have not yet undergone their own Section 7 analysis, when those subsequent federal project level activities are proposed they will undergo additional, independent, Section 7 review which takes into account all prior actions.[76]

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71. 16 U.S.C. § 1536(a)(2); 50 C.F.R. Part 402; FSM 2670.

72. 50 C.F.R. § 402.14(a); FSM 2672.42. If the agency action is considered a "major construction activity," the Forest Service prepares a biological assessment with which the FWS must concur in writing. If the FWS does not concur with the Forest Service's biological assessment further ESA consultation is required. 50 C.F.R. § 402.12.

73. 50 C.F.R. § 402.14(b).

74. 50 C.F.R. § 402.14; FSM 2671.43.

75. 50 C.F.R. § 402.02; *see also* 51 Fed. Reg. 19926, 19932 (June 3, 1986) (Preamble to Section 7 regulations discussing "effects of the action"). "Effects of the action" are defined as the:

> direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration.

50 C.F.R. § 402.02.

76. 50 C.F.R. § 402.02; *see also* 51 Fed. Reg. 19926, 933 (Jun. 3, 1986) (Preamble to Section 7 regulations). The Preamble to the Section 7 regulations also helps to clarify the distinction between ESA and NEPA requirements. "If the [ESA] jeopardy standard is exceeded, the proposed Federal action cannot proceed without an exemption. This is a substantive prohibition that applies to the Federal action involved in the consultation. In contrast, NEPA is procedural in nature, rather than substantive, which would warrant a more expanded view of cumulative effects. Otherwise, in a

Because of the safeguards embodied in NFMA, its implementing regulations and the forest plans themselves, Section 7 review of forest plans need only entail an analysis of the plan itself, and not all activities which may be implemented and are consistent with the plan. In dealing with management schemes which do not ensure ESA consultation at separate levels, the agency must consult on the entire agency action contemplated by the management scheme; i.e. from the initial planning stages of a proposed project through all actions which could reasonably follow

Federal agency program managers and scientists acting under NFMA and other statutes must develop an intricate understanding of the existing structure of the laws and how they relate to the ESA. In this manner, federal agencies can utilize whatever tools currently exist to frame Section 7 consultation on programmatic planning documents in terms of the decisions actually made, while at the same time avoiding the conjecture inherent under the current process. Most importantly, under this system, the needs of listed species will be satisfied.

Obviously, such an approach will not be possible for all federal agencies absent amendments to statutes or promulgation of regulations. Indeed, if such an approach is not possible, a single consultation is necessary on the programmatic scheme and actions taken consistent with such a scheme, even if the action can logically be viewed as consisting of several distinct segments. The paramount Section 7 duty to avoid jeopardy to listed species cannot be met without assurances at the programmatic level that either 1) the future actions are not likely to jeopardize listed species, or 2) the future actions will undergo separate Section 7 review to ensure that they are not likely to jeopardize listed species.

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particular situation, the jeopardy prohibition could block "nonjeopardy" actions because future, speculative effects occurring after the Federal action is over might, on a cumulative basis, jeopardize a listed species. Congress did not intend that Federal actions be precluded by such speculative actions." 50 Fed. Reg. 19933.

NEPA analysis also emphasizes the Forest Service's distinct levels of decision. NEPA compliance at the project level involves public notification and scoping of issues involved in each proposed project. The format of the public discussion and the NEPA analysis process vary with the proposed project's complexity, estimated effects on the environment and degree of controversy involved. Project NEPA analysis are tiered to the Forest Plan programmatic analysis and decision. The tiered NEPA analysis and decisionmaking process is recognized by the Council on Environmental Quality (CEQ) as an appropriate approach to NEPA compliance for agencies managing large and complex programs. 40 C.F.R. § 1508.20. *See* FSM 1922.4; FSM 1950; FSM 2670; FSH 1909.12; ch. 4.21, 4.25; FSH 1909.50 (Forest Service policy for NEPA compliance).

The site-specific NEPA analysis for each timber sale concludes with public notice of the decision, which is published in a local paper with regional distribution as well as by mail to those who have indicated an interest. Parties dissatisfied with a specific project may appeal the site-specific decision once it is made. 36 C.F.R. § 211.18; 36 C.F.R. § 217; 53 Fed. Reg. 26837.

CONCLUSION

In many cases, Section 7 consultation presents an overwhelming obstacle to many of the agencies which utilize programmatic management schemes. Unfortunately, the benefit from this large-scale consultation is often not apparent. Such consultations involve conjecture as to how actions which are taken consistent with such a programmatic scheme will proceed. Once the action is proposed, it may be necessary for the acting agency to reinitiate consultation in order to ensure that the action is not likely to jeopardize listed species.

In order to rectify this situation, the authors propose that Congress and the federal agencies act to establish a multi-level framework for activities managed in a programmatic manner Such an approach ensures compliance with both the procedural and substantive requirements of Section 7 In the event that no changes occur, however, federal agency personnel must have a solid working knowledge of the statute under which they act in order to efficiently comply with Section 7 With such knowledge it may be possible to avoid the constant speculation, accompanying unreliability of results and waste of resources inherent in an approach which requires the federal agency to consult on all potential, and to a large extent hypothetical, activities taken consistent with a programmatic management scheme.