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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Center for Biological Diversity,

10 Plaintiff,

11 v.

12 United States Forest Service, et al.,

13 Defendants.  
14

No. CV-20-00020-TUC-DCB

**ORDER**

15 Plaintiff, Center for Biological Diversity, sues the Defendants, the U.S. Forest  
16 Service (“USFS”) and U.S. Fish and Wildlife Service (“FWS”), for allegedly violating the  
17 Endangered Species Act (“ESA”), Section 7, provisions which according to the Plaintiffs  
18 require consultation on more than 30 grazing allotments on the Apache-Sitgreaves and Gila  
19 National Forests within the upper Gila River watershed. The Plaintiffs allege that there has  
20 been widespread unauthorized cattle grazing within streamside and riparian areas that  
21 provide essential habitat for several threatened and endangered species.

22 On March 12, 2020, the Court granted an unopposed motion to extend the deadline  
23 for the Defendants’ answer or responsive pleading to April 16, 2020. (Order (Doc. 14)).  
24 Also unopposed, a Motion to Intervene is pending by Spur Ranch Cattle Company, Arizona  
25 Cattle Growers Association, Grant County Cattle Growers, and Arizona/New Mexico  
26 Counties for Stable Economic Growth. For all the reasons stated in the Intervenor’s motion,  
27 the Court grants intervention as a right, pursuant to Rule 24(a)(2).  
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1 On April 16, the Defendants filed a Motion to Dismiss Defendant FWS from Count  
2 I. (Doc. 18)). The Defendants also seek confirmation that allegations in Count II are  
3 brought only against USFS. The Plaintiff confirms the latter but objects to the former. For  
4 clarity, the Court notes the Plaintiff’s confirmation that Count II claims are not made  
5 against FWS. It denies the Motion to Dismiss Count I against FWS for the reasons that  
6 follow.

7 Motion to Dismiss

8 Defendants challenge this Court’s jurisdiction to order the FWS to initiate Section  
9 7 consultation because the ESA places this duty only on the USFS, not on FWS.

10 ESA provides “a means whereby the ecosystems upon which endangered species  
11 and threatened species depend may be conserved” and brought “to the point at which the  
12 measures provided pursuant to [the ESA] are no longer necessary.” 16 U.S.C. §§ 1531(b),  
13 1532(3). Under ESA Section 4, species are “listed” as “endangered,” if “in danger of  
14 extinction throughout all or a significant portion of its range,” *id.* § 1532(6), or  
15 “threatened,” if it is “likely to become an endangered species within the foreseeable future  
16 throughout all or a significant portion of its range,” *id.* § 1532(20). “Any habitat of such  
17 species which is then considered to be critical habitat” is designated. *Id.* § 1533(a). “Critical  
18 habitat” includes occupied areas that contain the “physical or biological features essential  
19 to the conservation of the species and that may require special management considerations  
20 or protection,” as well as unoccupied areas that themselves are essential to the species’  
21 conservation. *Id.* § 1532(5)(A)(i)-(ii).

22 FWS is responsible for administering ESA for terrestrial and freshwater species. 50  
23 C.F.R. § 222.23(a).<sup>1</sup> Section 7(a)(2) of ESA directs each federal agency, in consultation  
24 with FWS, to “insure” that agency actions are not likely to jeopardize the continued  
25 existence of any listed species or destroy or adversely modify designated critical habitat.

26 \_\_\_\_\_  
27 <sup>1</sup> The National Marine Fisheries Service (“NMFS”) administers ESA for marine  
28 species.

1 16 U.S.C. § 1536(a)(2). “Jeopardize” means an action that “reasonably would be expected,  
2 directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery  
3 of a listed species in the wild by reducing the reproduction, numbers, or distribution of that  
4 species.” 50 C.F.R. § 402.02. “Destruction or adverse modification” means “a direct or  
5 indirect alteration that appreciably diminishes the value of critical habitat as a whole for  
6 the conservation of a listed species.” *Id.*

7 Consultation is required if an action agency, like USFS, determines that its proposed  
8 action “may affect” listed species or critical habitat. 50 C.F.R. § 402.14(a). If the action  
9 agency determines, with FWS’s written concurrence, that the action “is not likely to  
10 adversely affect” listed species or critical habitat, the consultation is terminated. *Id.* §§  
11 402.13(c), 402.14(b)(1). If the action agency or FWS determines that the proposed action  
12 is “likely to adversely affect” listed species or designated critical habitat, the agencies must  
13 engage in formal consultation. *Id.* §§ 402.13(a), 402.14(a)-(b). During formal consultation,  
14 FWS analyzes the agency’s proposed action to identify, among other things, the current  
15 status of the species or critical habitat, the environmental baseline, and the direct and  
16 indirect effects of the action. *Id.* §§ 402.14(g), 402.02. At the conclusion of formal  
17 consultation, FWS issues a Biological Opinion (“BiOp”) determining whether the  
18 proposed action is likely to jeopardize the continued existence of any listed species or  
19 destroy or adversely modify critical habitat. *Id.* § 402.14(g)(4); 16 U.S.C. § 1536(b)(3)(A).

20 “Reinitiation of consultation is required and shall be requested by the Federal  
21 agency [USFS] or by the Service [FWS], where discretionary Federal involvement or  
22 control over the action has been retained or is authorized by law” if enumerated triggers  
23 occur as follows: (1) the amount or extent of taking specified in the incidental take  
24 statement is exceeded; (2) new information reveals effects of the action to an extent not  
25 previously considered; (3) the identified action is subsequently modified or (4) a new  
26 species is listed or critical habitat designated. 50 C.F.R. § 402.16(a).

27 The Defendants’ Motion to Dismiss argues that the express provisions of this  
28 regulation require only the USFS to initiate consultation because “[t]he ESA places the

1 authority and, hence, any duty to reinitiate consultation solely on the action agency.”  
2 (Motion (Doc. 18) at 9.) By motion, the Defendants argue that because there is no duty on  
3 FWS under ESA to initiate consultation, the Plaintiff’s allegations cannot support a claim  
4 that FWS has violated a duty under ESA therefor, the Complaint fails to invoke a waiver  
5 of sovereign immunity, and the Plaintiff cannot state a claim against FWS.

### 6 Background

7 “Livestock grazing is a leading contributor to riparian habitat loss and degradation  
8 within the western United States, causing widespread and significant adverse impacts to  
9 watershed hydrology, stream channel morphology, soils, vegetation, water quality, and  
10 fish and wildlife habitat.” (Ps’ Response (Doc. 19) (citing Complaint (Doc. 1) ¶¶ 41-45.)  
11 These riparian ecosystems comprise less than 1% of the surface area within the eleven  
12 western states but are highly desirable to both imperiled native species and domestic  
13 livestock. These riparian areas support native fish, a higher diversity of breeding songbirds  
14 than any other habitat, and many species of small mammals, amphibians, and reptiles. They  
15 have also been prime areas for providing food and water for domestic livestock. This land-  
16 use dichotomy is not new.

17 In the late 1990s, through litigation USFS and FWS were compelled to conduct ESA  
18 Section 7 consultation with respect to USFS’s authorization of grazing on 158 grazing  
19 allotments providing habitat for listed species including Southwestern willow flycatcher,  
20 spikedace, and loach minnow. (Response (Doc. 19) (citing *Sw. Ctr. For Biological*  
21 *Diversity v. United States Forest Serv.*, CV-97-666-TUC-JMR, consolidated with CV-97-  
22 2562-PHX-SMM; 2001 U.S. Dist. LEXIS 25027, at \*4-6 (D. Ariz. Mar. 30, 2001)).  
23 Subsequently, USFS and FWS, pursuant to ESA Section 7, acted with respect to all 962  
24 grazing allotments within the USFS Southwestern Region. *Id.* (citations omitted).

25 “Of the 962 grazing allotments in the southwestern region, USFS concluded that  
26 there would be no effect to listed species or their critical habitat on nearly two-thirds, or  
27 619 allotments. *Sw. Ctr. for Biological Diversity*, 2001 U.S. Dist. LEXIS 25027, at \*9-  
28 11)). An additional 321 allotments concluded with ‘may affect, not likely to adversely

1 affect' determinations." (Response (Doc. 19) at 4.) "USFS made 'likely to adversely affect'  
2 findings for only 22 allotments (comprising just over 2 percent of all allotments in USFS  
3 R3)." *Id.* (citing *Sw. Ctr. for Biological Diversity*, 2001 U.S. Dist. LEXIS 25027, at \*10)).  
4 "FWS prepared a final Biological Opinion for these 22 allotments in February 1999," with  
5 "only one of the Region's 962 individual grazing allotments violat[ing] Section 7's  
6 substantive jeopardy and critical habitat requirements. *Id.* at \*11. "Importantly, these no  
7 jeopardy and not likely to adversely affect determinations depended heavily on USFS  
8 commitments to exclude cattle from hundreds of miles of riparian areas. *Id.* at \*12 (finding  
9 USFS undertaking numerous mitigation measures "to ensure that cattle grazing will have  
10 little, if any, impact on the loach minnow and spikedace while formal consultation is taking  
11 place," including "exclusion of livestock from watersheds and frequent monitoring and  
12 enforcement of these livestock exclusions. Exclusion of livestock from [streams] in the  
13 national forests has eliminated any direct adverse effects to the loach minnow and/or  
14 spikedace and minimized any indirect adverse impacts to these species.")

15 "For more than two decades since that initial consultation, grazing riparian  
16 exclusions, as well as regular monitoring to ensure the effectiveness of those exclusions,  
17 have continued to serve as a cornerstone for ESA compliance in relation to the USFS  
18 grazing program and site-specific decisions authorizing grazing on individual grazing  
19 allotments." (Response (Doc. 19) at 5) (citing *see Forest Guardians v. Veneman*, 392 F.  
20 Supp. 2d 1082, 1090, 1092 (D. Ariz. 2005) (in reaching no jeopardy decision, FWS relied  
21 on implementation of mitigation measures to exclude livestock from areas of critical  
22 habitat, loach minnow habitat, and riparian areas of tributaries" because "FWS recognized  
23 that one of the most effective methods for eliminating the effects of grazing on aquatic  
24 habitat is to keep livestock out of riparian areas, which the Forest Service has done on the  
25 critical habitat along the Blue and San Francisco Rivers.") *See also* Final Rule "Uplisting"  
26 Spikedace and Loach Minnow from Threatened to Endangered and Designating Critical  
27 Habitat, 77 Fed. Reg. 10,810 (Feb. 13, 2012) (noting that livestock grazing "is one of the  
28 few threats where adverse effects to species such as spikedace and loach minnow are

1 decreasing, due to improved management on Federal lands. This improvement occurred  
2 primarily by discontinuing grazing in the riparian and stream corridors.”)

3 “Concerned that USFS was failing to monitor and maintain riparian grazing  
4 exclusions, in 2017 Plaintiff Center for Biological Diversity conducted on-the-ground  
5 assessments in order to verify whether cattle continue to be excluded on allotments  
6 within Apache-Sitgreaves and Gila National Forest lands within the upper Gila River  
7 watershed.” (Response (Doc. 19) at 5-6 (citing Complaint (Doc. 1) ¶¶ 51-53.) These  
8 surveys allegedly documented the allegations in the Complaint of extensive, widespread,  
9 and egregious streamside and riparian degradation in the Blue River, San Francisco River,  
10 Tularosa River, Gila River, Eagle Creek, and numerous tributary streams. “Plaintiff  
11 compiled these survey results into detailed reports and provided the reports to USFS, but  
12 USFS did not take responsive action.” *Id.* at 6. Plaintiff gave notice to both agencies that it  
13 intended to sue under the citizen suit provisions of ESA unless they met their legal duties  
14 to reinitiate consultation on approximately 30 allotments; Plaintiff asked USFS to take  
15 immediate action to remove cattle from riparian areas, to remediate damage caused by the  
16 unauthorized grazing, and to conduct more frequent monitoring of riparian and streamside  
17 areas.

18 The Plaintiff sued the agencies for failing to act. USFS generally denies Plaintiff’s  
19 allegations about the extent and nature of unauthorized livestock intrusion into these  
20 riparian areas. (Motion (Doc. 18) at 7 n.4.) “FWS provided no response at all.” *Id.*  
21 (Response (Doc. 19) at 6.)

## 22 Conclusion

23 After reading all the briefs, especially the Defendants’ Reply, it is clear they are  
24 swimming upstream with their argument that a consulting agency, here FWS, “lacks the  
25 authority to require the initiation of consultation under the ESA,” (Motion (Doc. 18) at 10  
26 (quoting *Defenders of Wildlife v. Flowers*, 414 F.3d 1066, 1070 (9<sup>th</sup> Cir. 2005)), and “[t]his  
27 is true with regard to initiating consultation in the first instance as well as reinitiating a  
28 prior consultation.” (Motion (Doc. 18) at 10.) Equally, challenging is the argument that

1 “the plain language of the reinitiation regulations ‘require *an action agency* to reinitiate  
2 formal consultation with the consulting agency’ when the enumerated triggers are met.”  
3 *Id.* at 11 (quoting *Def. of Wildlife v. Zinke*, 856 F.3d 1248, 1264 (9th Cir. 2017) (so  
4 construing 50 C.F.R. § 402.16(b) (renumbered § 402.16(a)(2)) (emphasis added)); *see also*:  
5 *Or. Nat. Res. Council v. Allen*, 476 F.3d 1031, 1040 (9th Cir. 2007) (noting that “the *action*  
6 *agency* must reinitiate consultation with the FWS”) (emphasis added); *Ctr. for Biological*  
7 *Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1108 (9th Cir. 2012) (observing  
8 that, pursuant to 50 C.F.R. § 402.16(a) and (c) (renumbered § 402.16(a)(1) and (3)), “the  
9 *action agency* must . . . reinitiate consultation”) (emphasis added); *accord Native Fish*  
10 *Soc’y v. NMFS*, 992 F. Supp. 2d 1095, 1103 (Or. 2014) (same); *Greenpeace Found. v.*  
11 *Mineta*, 122 F. Supp. 2d 1123, 1130 (Hawaii 2000) (same); 50 C.F.R. § 402.14(i)(v)(4)  
12 (ESA consultation regulation stating that, “[i]f during the course of the action the amount  
13 or extent of incidental taking . . . is exceeded, the Federal [action] agency must reinitiate  
14 consultation immediately”); 51 Fed. Reg. at 19,954 (explaining that “Paragraph (i)(4)  
15 requires the Federal [action] agency or the applicant to immediately request reinitiation of  
16 formal consultation if the specified amount or extent of incidental take is exceeded”).

17 The cases relied on by the Defendants say what Defendants say they say, but the  
18 law in the Ninth Circuit also makes it clear that ESA establishes a coterminous authority  
19 for both the action agency (USFS) and the consulting agency (FWS) to reinitiate  
20 consultation when one of the triggering events occur under 50 C.F.R. § 402.16(a). Then,  
21 “[r]einitiation of consultation is required and shall be requested by the Federal agency  
22 [USFS] or by the Service [FWS].” 50 C.F.R. § 402.16(a).

23 The Plaintiff criticizes the Defendant’s reliance on *Flowers* because it addresses the  
24 duty to consult in the first instance, which is governed by a different regulation, which  
25 focuses on the duties of the action agency, 50 C.F.R. 402.14: “Each Federal agency shall  
26 review its actions at the earliest possible time to determine whether any action may affect  
27 listed species or critical habitat.” *Wildearth Guardians v. United States*, 2020 WL 2239975  
28 \*5 (May 7, 2020 (citing *Alliance for Wild Rockies v. Probert*, 412 F.Supp.3d 1188, 1201

1 (Mont. 2019) (expressly rejecting reliance on *Flowers* (citing *Pacificans for a Scenic Coast*  
2 *v. California DOT*, 204 F. Supp.3d 1075, 1093 (Calif. 2016)). “In contrast, the plain  
3 language of 402.16, the reinitiation regulation . . ., ‘describes the Fish and Wildlife  
4 Services’ obligation in the same terms as the action agency’s obligation” (Response (Doc.  
5 19) at 8 (quoting *Pacificans for a Scenic Coast*, 204 F. Supp.3d at 1094).

6 The Court agrees with the Plaintiff that the Defendants are splitting hairs that do not  
7 exist under the ESA regulation. “Consistent with the plain text of the regulation, the Ninth  
8 Circuit has stated that ‘[t]he duty to reinitiate consultation lies with both the action agency  
9 and the consulting agency.’” *Pacificans for a Scenic Coast*, 204 F. Supp.3d at 1093  
10 (quoting *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1229 (9th  
11 Cir. 2008)); *see also Wild Fish Conservancy v. United States EPA*, 331 F. Supp. 3d 1210,  
12 1226 (Wash. 2018) (denying motion to dismiss, finding question amply settled in Ninth  
13 Circuit that plain language of ESA obligation to reinitiate consultation applies equally to  
14 NMFS and EPA); *Hoopa Valley Tribe v. Nat’l Marine Fisheries Serv.*, 230 F. Supp. 3d  
15 1106, 1117 (N.D. Cal. 2017) (finding “the Ninth Circuit has already addressed this precise  
16 issue multiple times and confirmed that both the action agency and the consulting agency  
17 have a duty to reinitiate consultation”); *Wild Fish Conservancy*, 331 F. Supp. 3d at 1226  
18 (citing overwhelming weight of authority finding the consulting agency’s duty to reinitiate  
19 consultation is coterminous with that of the action agency); *Alliance for the Wild*  
20 *Rockies*, 412 F. Supp. 3d. at 1201 (rejecting argument that reinitiation claim cannot be made  
21 against the FWS because it lacks the authority to require an action agency to reinitiate  
22 consultation as inconsistent with the Ninth Circuit’s view).

23 Put another way, when one of the triggering events occur under 50 C.F.R. §  
24 402.16(a), either agency shall request reinitiation of consultation which is required. Like  
25 these other district courts, this Court rejects the notion that FWS must sit by when a  
26 triggering event occurs, unless or until the action agency chooses to reinitiate consultation.  
27 Under such circumstances, FWS has the dual responsibility to reinitiate consultation by  
28 requesting it.

1           The difficulty with the Defendants’ argument becomes clear in the Reply where  
2 Defendants urge “[t]his Court must not make the same error as Plaintiff and other courts in  
3 asserting that the “plain language’ of ‘[r]einitiation of consultation is required’ imposes a  
4 duty on FWS, when that provision does not expressly impose the requirement for  
5 reinitiation of consultation on FWS, and when FWS’s decades-long interpretation of that  
6 clause and the operation of the ESA both indicate that any duty to reinitiate consultation  
7 rests with the action agency, not FWS.” (Reply (Doc. 21) at 3) (emphasis added). This  
8 Court is, however, bound, just like the “other courts” to which Defendants refer, to follow  
9 clearly established Ninth Circuit law, *Salmon Spawning & Recovery Alliance*, 545 F.3d at  
10 1229. *Wild Fish Conservancy*, 331 F. Supp. 3d at 1226–27 (following also: *Gifford Pinchot*  
11 *Task Force v. USFWS*, 378 F.3d 1059, 1076–77 (9th Cir. 2004) (holding that discovery of  
12 new facts “mandates reinitiating formal consultations” and that “[the consulting agency]  
13 was obligated to reinitiate consultation”), *amended for another reason*; *EPIC v. Simpson*  
14 *Timber Co.*, 255 F.3d 1073, 1076 (9<sup>th</sup> Cir. 2001) (“The duty to reinitiate consultation lies  
15 with both the action agency and the consultation agency.”))

16           The Defendants’ reliance on *Flowers* is distinguishable because it involved a  
17 different regulation, which as noted above, focuses on the action agency and is  
18 distinguishable from 50 CFR 402.16(a) which treats action agencies and consulting  
19 agencies the same. The Defendants also rely on *Sierra Club v. March*, 816 F.2d 1376, 1386  
20 (9<sup>th</sup> Cir. 1987), which according to the Defendants recognized that the action agency had  
21 “declined the FWS’s request to reinitiate the consultation process” and “held, however,  
22 that “[t]he ESA does not give the FWS the power to order other agencies to comply with  
23 its requests or to veto their decision.”” (Reply (Doc. 21) at 6.) The Defendants argue that  
24 the *Marsh* court “reviewed whether *the Corps* [the action agency] violated the ESA “by  
25 refusing to reinitiate consultation” under the regulation, not FWS’s request.” *Id.* (quoting  
26 *Marsh*, 816 F.2d at 1386-87). This is true, but it also held that the Section 7 duty to consult  
27 required the court to determine whether the Corps abused its discretion or acted arbitrarily,  
28 capriciously, or otherwise not in accordance with law by refusing to reinitiate consultation.

1 *Marsh*, 816 F.2d at 1386-87. In other words, the court in *Marsh* deferred to the FWS request  
2 for reinitiation of consultation as being determinative to trigger the required consultation  
3 under 402.16(a) because “it is primarily responsible for protecting endangered species and  
4 it drafted the regulations at issue here.” *Id.* at 1388

5 As Plaintiff points out, the Defendants ignore *Bennett v. Spear*, 520 U.S. 154, 169  
6 (1997), describing the theoretical advisory function of FWS’s BiOp as in reality having a  
7 powerful coercive effect on the action agency. While the “‘action agency is technically  
8 free to disregard the Biological Opinion and proceed with its proposed action . . . it does  
9 so at its own peril,’ because ‘of the virtually determinative effect of [FWS’s] biological  
10 opinion.’” (Response (Doc. 19) at 11 (quoting *Bennett*, 520 U.S. at 170).

11 The Plaintiff notes the equally coercive provisions in Section 7, explained in the  
12 Consultation Handbook relied on by the Defendants: “[w]hen consultation needs to be  
13 reinitiated but the action agency neither agrees nor responds, [FWS] should send a letter  
14 clearly outlining the change of circumstances supporting the need for reinitiation,’ and  
15 ‘present[ing] a clear case for why [FWS has] determined that one or more of the four  
16 general conditions for reinitiating consultation have been triggered.’” (Response (Doc. 19)  
17 at 11 (quoting “Endangered Species Consultation Handbook, Procedures for Conducting  
18 Consultation and Conference Activities Under Section 7 of Endangered Species Act”<sup>2</sup> at  
19 2-11). “If the action agency ‘still refuses to consult, the issue should be elevated to . . .  
20 [FWS’s Regional Office] and may ultimately be referred to . . . the FWS Law Enforcement  
21 Division and the Office of the Solicitor.’” *Id.* (citing Consultation Handbook at 2-10 and  
22 2-11). So as noted by the Court in *Bennett* in the context of an FWS BiOp, it is equally true  
23 in the context of reinitiating consultation under 402.16(a) that the “action agency is  
24 technically free to disregard the [FWS request] and proceed with its proposed action . . . it  
25 does so at its own peril,” because “of the virtually determinative effect of the [FWS  
26 request].” *Supra above*. In short, the regulatory scheme involves procedures for  
27 interagency cooperation rather than solely placing the duties of consultation on either the

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<sup>2</sup> [https://www.fws.gov/endangered/esa\\_library/pdf/esa\\_Section7\\_handbook.pdf](https://www.fws.gov/endangered/esa_library/pdf/esa_Section7_handbook.pdf).

1 action agency or consulting agency. (Response (Doc. 19) at 10 (citing *Hoopa Valley Tribe*,  
2 230 F. Supp. 3d at 1117 (both have clear obligation to participate in and complete required  
3 consultation process)).

4 Defendants argue that, notably, the Ninth Circuit has never addressed whether a  
5 consulting agency is a proper party to a failure to reinitiate claim because in *Salmon*  
6 *Spawning & Recovery*, the consulting agency never argued that it was not a proper  
7 defendant because it lacked the authority to compel the action agency to reinitiate  
8 consultation. Instead, the two agencies jointly argued their defense. (Reply (Doc. 22) at 7.)  
9 The Court finds that while the precise argument made by Defendants here may not have  
10 previously been presented, this is not a matter of first impression because unlike *Flowers*,  
11 which did not even address the regulation at issue in this case, the Ninth Circuit cases relied  
12 on by the Plaintiff have answered the precise question which is at the heart of the argument  
13 made by the Defendants. In the Ninth Circuit, 50 C.F.R. 402.16 places a coterminous duty  
14 on both the acting agency and consulting agency to consult, if any of the enumerated  
15 criteria are met.

16 More notably, the Court finds that Defendants' challenge to the applicability of  
17 *Salmon Spawning* calls into question the Defendants' argument that the Court should defer  
18 to the agency's assertedly 30-year consistent interpretation that "the regulation 'does not  
19 impose an affirmative obligation on the Service to reinitiate consultation if any of the  
20 criteria have been met,' but that '[i]t is ultimately the responsibility of the Federal action  
21 agency to reinitiate consultation with the relevant Service when warranted.'" (Reply (Doc.  
22 21) at 8) (citing 84 Fed. Reg. 44,976, 44,980 (August 27, 2019)). The Court compares the  
23 arguments in the *Salmon Spawning* genre of cases with the recently adjudicated district  
24 court cases, *Pacificans*, *Wild Fish Conservancy*, *Hoopa Valley Tribe*, *Alliance for the Wild*  
25 *Rockies*, and *Wildearth Guardians v. USFS*, 2020 WL 2239975 (Idaho May 7, 2020).  
26 These recent cases reflect that FWS is making an argument based on a new regulatory-  
27 interpretation.

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1           This conclusion is supported by a comparison of the 1986 and 2019 Final Rules.  
2           The agency interpretation from 1986 reflects only that “reinitiation of formal consultation  
3           is required in certain instances as specified in § 402.16” and in a comment to the proposed  
4           rule, the Service [FWS] noted “its lack of authority to require Federal agencies to reinitiate  
5           consultation if they choose not to do so. Nevertheless, the Service shall request reinitiation  
6           when it believes that any condition described in this section applies.” 51 Fed. Reg. 29,926,  
7           19,956 (June 3, 1986). The argument made by Defendants now is based on the Final Rule,  
8           Endangered and Threatened Wildlife and Plants: Regulations for Interagency Cooperation,  
9           “revisions to the regulations to clarify, interpret, and implement portions of the Act  
10          concerning the interagency cooperation procedures,” effective September 26, 2019. 84  
11          Fed. Reg. 44,976 (Summary). The regulation remains the same.

12          The FWS’s interpretation of its regulation governing reinitiation of Section 7  
13          consultation is entitled to deference because it represents the agency’s official position,  
14          after having been published in the Federal Register and subjected to public review and  
15          comment, and implicates the agency’s substantive expertise and fair and considered  
16          judgment. (Motion (Doc. 17 n. 7 (citing *Kisor v. Wilkie*, 139 S. Ct. 240, 2416-17 (2019))).  
17          The Plaintiff, however, points out that there is no need for and agencies are not afforded  
18          deference “unless the language of the regulation is genuinely ambiguous.” *Id.* at 2415.  
19          (reinforcing limits inherent to doctrine of deference, *Auer v. Robbins*, 519 U.S. 452 (1997);  
20          first, court must find that the regulation is genuinely ambiguous). The lack of any  
21          ambiguity in the regulation for over 20 years advises against the need for interpretive  
22          deference.

23          The FWS’s new take on the regulation is not persuasive because it flies in the face  
24          of the clear language of the regulation as established under the law of this circuit. Plaintiff  
25          has properly alleged a legal duty under ESA against FWS for its failure to reinitiate and  
26          complete Section 7 consultation. The Administrative Procedures Act (APA) provides a  
27          cause of action for enforcing a legal duty, and the FWS has waived its sovereign immunity  
28          from suit. *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1096 (9<sup>th</sup> Cir 2005)

1 *see also* (Motion (Doc. 18) at 16-17 (explaining jurisdictional waiver of sovereign  
2 immunity)). The Court finds that the Plaintiff has carried its burden to establish subject  
3 matter jurisdiction over the Count I claim against FWS.

4 **Accordingly,**

5 **IT IS ORDERED** that the Motion to Dismiss (Doc. 18) is DENIED.

6 **IT IS FURTHER ORDERED** that the Application for Intervention (Doc. 16) is  
7 GRANTED, and the Intervenors shall file their Answer within 7 days of the filing date of  
8 this Order.

9 **IT IS FURTHER ORDERED** that, within 21 days of the filing date of this Order,  
10 the Defendants shall file an Answer.

11 Dated this 13th day of November, 2020.

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David C. Bury  
United States District Judge