



ADVOCATES for the **West**
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October 2, 2014

VIA U.S. CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Constance Cummins, Forest Supervisor
Fremont-Winema National Forest
1301 South G Street
Lakeview, OR 97630

Marjorie Iverson
Iverson Management LP
P.O. Box 97
Silver Lake, OR 97638

Re: Notice of Intent to Sue For Violations of the Endangered Species Act Regarding the Oregon Spotted Frog from Livestock Grazing on the Antelope Allotment

Dear Supervisor Cummins and Ms. Iverson, dba Iverson Management LP:

In accordance with the 60-day notice requirement of the Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g), Concerned Friends of the Winema, Klamath-Siskiyou Wildlands Center, Western Watersheds Project, Oregon Wild, and Center for Biological Diversity (“Plaintiffs”) hereby provide notice of intent to sue for violations of the ESA relating to the U.S. Forest Service’s (“Forest Service”) authorization of livestock grazing on the Fremont-Winema National Forest’s Antelope Allotment and Iverson Management Limited Partnership’s (“Iverson”) livestock operations on and around that allotment. Plaintiffs will not commence any legal claims related to this notice until 60 days after the date of this letter.

As explained below, the Antelope Allotment contains habitat for the Oregon spotted frog, which was just listed as threatened under the ESA. The Forest Service has failed to meet its obligations under the ESA to consult with U.S. Fish and Wildlife Service (“FWS”) over the impacts of its continued authorization of livestock grazing to the Oregon spotted frog. By not consulting, the Forest Service is failing to insure that its authorization of grazing is not causing jeopardy to the Oregon spotted frog. Furthermore, the Forest Service’s authorization of grazing and Iverson’s livestock operations are causing ongoing harm to and take of Oregon spotted frogs on and around the Antelope Allotment, in violation of the ESA.¹

¹ U.S. Fish and Wildlife Service has stated that it will also publish a final critical habitat designation for Oregon spotted frog this fall. Based on the proposed designation, it is likely that the Service will designate a large portion of Jack Creek within the Antelope Allotment and the Jack Creek Sheep Allotment just to the south of the Antelope



BACKGROUND

The Chemult Pasture of the Antelope Allotment contains about seven miles of Jack Creek, much of which is inhabited by the Jack Creek population of Oregon spotted frog. Spotted frogs have also recently been documented in several miles of Jack Creek south of the Antelope Allotment. Various life stages, including egg masses, metamorphs, juveniles, and adult spotted frogs have been observed in Jack Creek both in and south of the Antelope Allotment. Oregon spotted frogs are the most aquatic of all frog species in the Pacific Northwest and thus spend very little time out of water. Jack Creek is perennial for only part of its length, with the rest becoming intermittent in summer. In this intermittent portion, deeper pools retain water longer but are separated by dry stretches of creek; and even most of the pools dry up in low water years. Frogs are relegated to the remaining pools as water levels drop and lower Jack Creek dries up.

This population of spotted frog is isolated from other spotted frog populations in the Klamath Basin. Its numbers have declined dramatically since spotted frog presence was confirmed in Jack Creek in 1996. The number of egg masses in Jack Creek has dropped from 335 in 1999 to fewer than 25 currently. Because many populations of Oregon spotted frog are in decline, the U.S. Fish and Wildlife Service just listed the species as threatened under the ESA. 79 Fed. Reg. 51,658 (August 29, 2014). This rule went into effect on September 29, 2014.

Livestock grazing has been harming the Jack Creek spotted frog population and its habitat for years. Cattle pollute the stream with their waste, trample the streambanks and create flattened stream channels with no hiding cover or overwinter habitat, and remove streamside vegetation that provides cover from predators and insects for spotted frogs to eat. They also wade in the stream, trampling or disturbing young and adult frogs. Finally, they contribute to lower water levels by drinking water from intermittent pools when Jack Creek begins to dry up, creating incised stream channels that lower water tables, and trampling and drying out adjacent seeps and springs that would otherwise contribute water to streamflow. As water levels drop, frog mortality increases because Oregon spotted frogs cannot survive outside of water for long or travel far overland to find other water sources. Egg masses and tadpoles are especially vulnerable to stranding and desiccation if water levels drop too low. In addition, low water levels in the stream result in shallow pools freezing in winter, killing any frogs that remained in those pools. Moreover, as water levels drop, frogs are confined to fewer and fewer pools, which are also where cattle congregate to drink and loaf, causing even more degradation to the little remaining habitat for frogs in late summer and fall. All of these impacts have been observed in Jack Creek both on and south of the Antelope Allotment, and were particularly harmful in 2013 and again this year due to the serious drought conditions.

Allotment as critical habitat. Thus, Plaintiffs will likely send another notice letter to add claims against the Forest Service alleging violations of the ESA for failing to consult over livestock grazing impacts to designated critical habitat as well as failing to insure that its grazing authorization is not causing destruction or adverse modification of critical habitat.



The Forest Service authorizes grazing on the Chemult Pasture of the Antelope Allotment through two ten-year grazing permits and annual operating instructions (“AOI”) issued to Iverson. One permit authorizes 275 cow/calf pairs to graze the Chemult portion of the allotment from July 1 to September 30 each year and the second permit is a Term Private Land Grazing Permit that authorizes grazing of 104 cow/calf pairs on the pasture from July 1 through September 30 each year. These permits are valid until December 31, 2015. The AOIs provide additional direction for grazing each year, generally authorizing grazing on the Chemult Pasture from early July through the end of September but allowing extra time in October to clear out any remaining cattle. The AOIs also contain direction for the permittee to maintain fences on the allotment, including the Jack Creek riparian fence that excludes cattle from part of Jack Creek on the Chemult Pasture. Jack Creek runs through several private inholdings within the Chemult Pasture and south of the Antelope Allotment that also are grazed by Iverson. For instance, Iverson grazed the Moffit, lower Jamison, and O’Connor Meadow private parcels during the 2014 grazing season.² These private inholdings contain known habitat for spotted frogs.

Livestock grazing has adversely affected Oregon spotted frogs and their habitat both within the Antelope Allotment and south of the allotment. Livestock access all frog habitat in Jack Creek either within areas the Forest Service has permitted for grazing, private parcels grazed by Iverson (including public land fenced into such parcels), or through routine trespass behind fences. Every year since construction of the Jack Creek riparian fence in 2008, the Forest Service has received numerous reports of cattle inside the enclosure. Cattle have also been documented trespassing in other areas along Jack Creek, particularly in the lower Jamison area and south of the allotment near Davis Flat, Yellowjacket Springs, and O’Connor Meadow. These cattle trespass from the Chemult Pasture as well as from the adjacent Tobin Cabin pasture. Cattle trespass so frequently because many of the fences on the allotment are ineffective, either because they are poorly maintained or constructed in a way that does not prevent cattle from going around them. The Forest Service has repeatedly notified Iverson of these violations and warned of sanctions if they do not cease. The agency issued notices of noncompliance to Iverson in 2011 and 2013 due to repeated instances of trespass, including trespass inside the Jack Creek riparian fence, along Jack Creek in the lower Jamison area, and along Jack Creek near Davis Flat and Yellowjacket Springs.

Cattle repeatedly trespassed behind the Jack Creek riparian fence and into areas south of the allotment again this summer, and the Forest Service ordered Iverson to start removing its cows a month early due to these violations and the continuing drought that was impairing frog habitat. However, cows have been observed scattered throughout the Chemult Pasture through at least September 29, with access to miles of frog habitat. Cattle trespass also occurred through late summer south of the allotment, allowing access to Jack Creek down to O’Connor Meadow.

The access to and use of Jack Creek by Iverson’s cattle has adversely impacted the Oregon spotted frog. Experts have documented trampled streambanks, crushed and overgrazed

² O’Connor Meadow private parcel is owned by someone else but leased to Iverson to graze.



riparian vegetation, incised stream channels that are cut off from their floodplain, degraded seeps and springs adjacent to Jack Creek, cattle wading and loafing in or near the stream, excrement in the stream, and trampled frogs. In 2013 and 2014, impacts were particularly serious due to low water conditions from the severe drought. Intermittent portions of Jack Creek dried up earlier than normal, relegating frogs to isolated pools earlier in the summer. Over the course of the summers, more and more pools dried up, leaving frogs with just a few pools that retained water or were fed by groundwater inputs. These same pools were used by cattle for watering. For instance, in 2013, cattle were observed on at least fifteen occasions along Jack Creek either within the riparian fence enclosure, in the lower Jamison area along Jack Creek, and/or in areas south of the allotment, drinking from the pools, trampling streambanks, crushing and grazing streamside vegetation, and adding excrement to the pools. Similarly, in 2014, trespass cattle were observed on at least twelve occasions either within the riparian fence enclosure or south of the allotment, with access to Jack Creek. Cattle were also observed on permitted portions of the Chemult Pasture at least through September 29, providing season-long access to miles of frog habitat, including on and above the Moffit private parcel.

Due to a very low snowpack this winter, water levels dropped lower earlier in the season. Even much of the perennial stretch of Jack Creek dried up and just shallow pools remained in the deeper holes of the creek. The stream gage in the perennial reach of Jack Creek at the 9418 road stayed at or below 0.6 feet from July to the present. Many pools in the lower Jamison stretch of Jack Creek dried up quickly and the number of adult frogs in one remnant pool dropped severely between late August and mid-September. South of the allotment, the pools at Yellowjacket Springs and Davis Flat were also low like they were last year. The livestock water developments on the Chemult Pasture have even gone dry. Like in 2013, cattle on the allotment congregated at the remaining water in Jack Creek, which is where the frogs were also concentrated, leading to harassment or trampling of frogs that were using these same pools, pollution of the water, and lowering of the water level as one cow can drink many gallons of water per day. Despite efforts to fix fences, cattle still found numerous places to access Jack Creek in authorized and unauthorized areas and caused damage to frog habitat both on National Forest land and the private inholdings. Although the Forest Service ordered Iverson to remove its cows early this season, cattle use occurred on the Chemult Pasture and as part of private parcels grazed by Iverson through at least September 29.

The Forest Service has not completed consultation with FWS over the impacts of the grazing authorized on the Antelope Allotment under the grazing permits and AOIs even though the Oregon spotted frog has now been listed as threatened, in violation of the ESA.



VIOLATIONS OF THE ENDANGERED SPECIES ACT

1. Violation of Consultation Requirement

The ESA requires land management agencies to consult with FWS to insure that any action “authorized, funded, or carried out by such agency” is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(a)(2). The Forest Service’s authorization of livestock grazing is an action that requires consultation. *See Forest Guardians v. Johanns*, 450 F.3d 455 (9th Cir. 2006). If the land management agency determines that the action is likely to adversely affect a listed species, FWS must issue a biological opinion to determine whether the action is likely to jeopardize the species or adversely modify its critical habitat. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14. This analysis requires assessing impacts to both the survival and recovery of the species. *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv.*, 378 F.3d 1059 (9th Cir. 2004); *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 481 F.3d 1224 (9th Cir. 2007). If the land management agency determines that the action is not likely to adversely affect a listed species or critical habitat, and FWS concurs in that determination, then consultation is complete. 50 C.F.R. § 402.13.

In addition, the ESA prohibits “take” of listed species. 16 U.S.C. § 1538(a)(1)(B). If “take” of the species may occur that is incidental to the action and would not jeopardize the species, FWS must include an incidental take statement (“ITS”) within a biological opinion. *See* 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(g)(7). An ITS (1) specifies the amount or extent of the impact on the species of any incidental taking; (2) specifies Reasonable and Prudent Measures to minimize such impact; and (3) sets forth the Terms and Conditions that must be complied with to implement the Reasonable and Prudent Measures. 16 U.S.C. § 1536(b)(4)(C); 50 C.F.R. § 402.14(i)(1)(i), (ii), (iv).

The Forest Service’s failure to conduct and complete consultation over the impacts of livestock grazing authorized on the Antelope Allotment with respect to threatened Oregon spotted frogs in Jack Creek is a violation of the § 7(a)(2) consultation requirement. As noted above, the Forest Service authorizes grazing on the Antelope Allotment via two grazing permits that are valid until December 31, 2015 as well as AOIs, and this grazing has caused adverse effects to the Oregon spotted frog and is likely to cause similar adverse effects in the future. Furthermore, this authorized grazing has and will likely continue to cause “take” of Oregon spotted frogs by cattle harassing, killing, or injuring frogs when they trample or disturb them, and by causing harm in the form of habitat degradation. Yet the Forest Service has no incidental take statement from FWS permitting such take. The Forest Service is violating ESA § 7(a)(2) by continuing to authorize livestock grazing under term grazing permits and AOIs for the Antelope Allotment without completion of adequate consultation for the threatened Oregon spotted frog.



2. Violation of Prohibition Against Jeopardy to the Oregon Spotted Frog

By failing to consult, the Forest Service has violated its substantive duty to insure that its authorization of livestock grazing on the Antelope Allotment is not likely to jeopardize the continued existence of any endangered species or threatened species. 16 U.S.C. § 1536(a)(2). “Jeopardize the continued existence” of a species means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species. 50 C.F.R. § 402.02. The consultation process is the method agencies use to fulfill their duty to insure against jeopardy. *Sierra Club v. Marsh*, 816 F.2d 1376, 1389 (9th Cir. 1987); *Wash. Toxics Coalition v. EPA*, 413 F.3d 1024, 1035 (9th Cir. 2005). Furthermore, even after consultation is initiated, the Forest Service’s ongoing actions cannot violate the substantive standards of the ESA, including the duties to avoid jeopardizing the species and causing “take.” *Wash. Toxics Coalition*, 413 F.3d at 1035; *Defenders of Wildlife v. Martin*, 454 F.Supp.2d 1085, 1095-97 (E.D. Wash. 2006); *Defenders of Wildlife v. Jackson*, 791 F.Supp.2d 96, 113-14 (D.D.C. 2011).

By failing to consult over its authorization of livestock grazing on the Antelope Allotment, which is impairing the survival and recovery of the Oregon spotted frog, the Forest Service has violated its substantive duty under § 7(a)(2) to insure against jeopardy. The Forest Service’s grazing permits issued to Iverson continue to authorize grazing on the Antelope Allotment through December 31, 2015. The evidence shows that cattle have routinely accessed and damaged Oregon spotted frog habitat in Jack Creek and harmed frogs by trampling or disturbing them. Fences and water developments on the allotment and the permittee’s management of its livestock do not insure against jeopardy to the species because cattle regularly access Jack Creek in many areas, causing damage to spotted frog habitat. Cattle use of Jack Creek regularly occurs in authorized and unauthorized areas of the Antelope Allotment, including on private land and federal land fenced in with private, as well as south of the allotment in the Davis Flat and O’Connor Meadow areas, causing significant harm to spotted frog habitat that exacerbates the harmful effects of the drought conditions. Regular trespass occurred again in 2014 despite instructions in the AOI and promises by the permittee to fix fences to better control its cattle. Even after the Forest Service ordered removal of cattle from the Chemult Pasture starting in late August, cows were still seen on and south of the pasture at least through the end of September, when water levels were extremely low and much of Jack Creek was dry.

The impacts caused by cattle are likely to impair the survival and recovery of Oregon spotted frog. The Jack Creek population of spotted frogs is at a precariously low level, at high risk of extirpation, and is isolated from other populations. Further harm to this population from livestock grazing would likely lead to its permanent loss, reducing the size, distribution, and genetic diversity of the species and thereby jeopardizing its continued existence. By failing to consult with FWS over the adverse impacts from grazing the Antelope Allotment, the Forest



Service has not insured that the grazing authorized for this allotment is not likely to jeopardize the continued existence of the species, in violation of § 7(a)(2).

3. Violation of Prohibition on Commitment of Resources

Even after initiating consultation, the ESA also prohibits the Forest Service from making “any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures” during the consultation process. 16 U.S.C. § 1536(d). The purpose of § 7(d) is to “ensur[e] that the status quo will be maintained during the consultation process.” *Conner v. Burford*, 848 F.2d 1441, 1455 n. 34 (9th Cir. 1988); *see also Lane County Audubon Soc’y v. Jamison*, 958 F.2d 290, 294 (9th Cir. 1992) (same); *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1056 (9th Cir. 1994) (same). In other words, activities cannot go forward pending completion of consultation if they may have an adverse effect on the species. *See Pacific Rivers Council v. Thomas*, 936 F. Supp. 738, 748-51 (D. Idaho 1996) (holding that Forest Service must complete consultation prior to turning out livestock on an allotment where the grazing might have an adverse effect on ESA-listed salmon).

The Forest Service has not completed consultation over its authorization of livestock grazing on the Antelope Allotment with regard to impacts to the threatened Oregon spotted frog. This grazing has resulted in documented adverse impacts to the Oregon spotted frog and its habitat in Jack Creek, which have impaired the survival and recovery of the Oregon spotted frog. Even if the Forest Service initiates consultation, continued harm to the frog and its habitat from this grazing prior to completion of consultation violates § 7(d).

4. Violation of Prohibition Against Take

As noted above, under § 9 of the ESA, it is unlawful for any person to “take” an endangered species. Take is defined to include engaging or attempting to engage in conduct that will “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” members of a listed species. 16 U.S.C. § 1532(19). The term “harass” is further defined as “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” 50 C.F.R. § 17.3. “Harm” includes any “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” *Id.* FWS has adopted regulations pursuant to ESA § 4(d) which prohibit unlawful “take” of threatened species, as defined above; and hence any take of Oregon spotted frogs in violation of these definitions is a violation of ESA § 9. *See* 79 Fed. Reg. 51,709.

Observations by biologists show that livestock grazing on and south of the Antelope Allotment has caused take of Oregon spotted frogs and will continue to cause take. Such take includes direct impacts causing mortality, injury, or harassment of spotted frogs through



trampling or disturbing adult and juvenile frogs and lowering water levels by drinking from remnant pools, which strands and desiccates frogs and egg masses and causes pools to freeze in winter, killing any remaining frogs. Take of Oregon spotted frogs also occurs in the form of habitat degradation that injures frogs by impairing their breeding, feeding and sheltering, such as by trampling streambanks, trampling or removing streamside vegetation, degrading water quality through input of cattle waste, and lowering water levels by drinking from remnant pools, drying out adjacent seeps and springs, and creating incised stream channels that lower the water table. These impacts create more severe harm to Oregon spotted frogs during drought conditions, such as what occurred last summer and this summer.

By authorizing livestock grazing to occur on the Antelope Allotment via grazing permits and AOIs, the Forest Service is responsible for causing take of Oregon spotted frogs unless and until the Forest Service receives a valid ITS, in violation of the ESA. Furthermore, Iverson is causing take of Oregon spotted frogs by grazing livestock on and south of the Antelope Allotment as well as on private land inholdings, specifically on the Moffit, Upper Jamison, Lower Jamison, and O'Connor Meadow private parcels, without a valid ITS or incidental take permit. In light of the well-documented adverse impacts on Oregon spotted frogs associated with livestock grazing on and south of this allotment, as of September 29, 2014, the Forest Service and Iverson are liable for the take of Oregon spotted frogs that results from the authorization, facilitation, and implementation of livestock grazing on National Forest land within and south of the Antelope Allotment and private inholdings within and south of the allotment that contain Jack Creek because such grazing raises a reasonably certain threat that take is imminent. Impacts constituting take occurred in the 2013 and 2014 grazing seasons and it is very likely that take of Oregon spotted frogs will occur in the future due to continued livestock grazing, and such take without lawful authorization violates ESA § 9.

PARTIES GIVING NOTICE

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RELIEF DEMANDED

As set forth above, Plaintiffs intend to pursue litigation in federal court following sixty days after the date of this letter, and will seek declaratory, injunctive, and other relief, including an award of attorneys fees, expert witness fees, and other expenses incurred in investigating and prosecuting these claims. To avoid such litigation, Plaintiffs demand that the Forest Service immediately close the Chemult Pasture of the Antelope Allotment to any further livestock grazing, until such time as ESA consultation is completed and the Forest Service can insure that no further harm will occur to the Oregon spotted frog and its habitat. In addition, Iverson must agree not to graze the Chemult Pasture of the Antelope Allotment or any private inholdings that contain Jack Creek until it has a valid ITS or incidental take permit authorizing take of Oregon spotted frogs.

If you have any questions, wish to discuss this matter further, or believe this notice is in error, please feel free to contact me at the address on the letterhead.

Sincerely,

Lauren Rule
Attorney for Plaintiffs

cc:

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