



ADVOCATES for the **West**
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September 28, 2016

VIA U.S. CERTIFIED MAIL

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Barbara Garcia, Stanley Area Ranger
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Re: **Notice of Intent to Sue For Violations of the Endangered Species Act Regarding the Snake River Spring/Summer Chinook Salmon, Snake River Spring/Summer Steelhead, and Columbia River Bull Trout, and Their Designated Critical Habitats Within The Upper and Lower East Fork Allotments.**

To Whom it May Concern:

In accordance with the 60-day notice requirement of the Endangered Species Act (ESA), 16 U.S.C. § 1540(g), Western Watersheds Project (WWP) hereby provides notice

of intent to sue for violations of the ESA relating to management of the Upper and Lower East Fork grazing allotments on the Sawtooth National Forest, which contain threatened salmon, steelhead, and bull trout and their critical habitats.

The Forest Service has violated and is violating the ESA by failing to reinitiate consultation regarding impacts of its grazing management on listed fish and their habitats, and by reissuing the term grazing permits on the Lower East Fork allotment under an outdated consultation. The assumptions underlying the U.S. Fish & Wildlife Service's (FWS) and the National Marine Fisheries Service's (NMFS) concurrences with the Forest Service's finding that grazing on the allotments is not likely to adversely affect listed fish have proven inaccurate due to widespread standards violations, failure to perform required monitoring, and permittee noncompliance with annual operating instructions (AOIs) that have occurred since the prior consultations. These changed circumstances and new information warrant reinitiation of consultation for both allotments. In addition, the Forest Service and FWS have not reinitiated consultation over the Lower East Fork allotment since new bull trout critical habitat was designated in 2010, as the ESA requires.

FACTUAL BACKGROUND

The Upper and Lower East Fork Grazing Allotments are located primarily along the East Fork of the Salmon River (East Fork), within the Salmon River Basin, in central Idaho. The Lower East Fork allotment also contains several streams that flow directly into the Salmon River near Clayton, Idaho. The Sawtooth National Forest manages both allotments.

The allotments contain Snake River spring/summer Chinook salmon, Snake River Basin steelhead, and Upper Columbia River bull trout, and their critical habitats. The Snake River spring/summer Chinook and the Snake River Basin steelhead are anadromous fish that spend the majority of their adult lives in the ocean, but return to the streams where they were born to spawn. Bull trout populations may be local or migratory.

All three fish species are struggling. Production of wild anadromous fish like salmon and steelhead has declined 95% in the Columbia River Basin from historic numbers. The Chinook population crashed from runs of 1.5 million measured at the Granite Dam site in the late 1880s to just 1,882 in 1994. Steelhead have been extirpated from 54% of their historic range and bull trout have been extirpated from 55% of their historic range. The U.S. Fish & Wildlife Service and NMFS have found that all three species still merit listing under the ESA.

Chinook, steelhead, and bull trout populations in the East Fork are equally tenuous. In 1978, Chinook spawned in the upper East Fork, above the Bowery Guard station in the South Fork of the East Fork, and in Germania Creek, from the mouth to the falls. But they were not observed spawning in these reaches again until 2002, which had a particularly strong run. Historically, wild steelhead observations have been

documented in the East Fork, although surveys have not been conducted. The Shoshone-Bannock tribe has supplemented steelhead populations in Big Boulder and West Pass Creeks for several years, but it is unknown whether any wild steelhead still occur in the East Fork. Bull trout inhabit tributaries of the East Fork, including Big Boulder, Little Boulder, Bowery, and Germania Creeks; however, their risk of extinction in the East Fork watershed is still considered moderate.

The Upper and Lower East Fork allotments contain streams, or segments of streams, that are designated critical habitat for these fish because of their importance to these species' survival and recovery. The waterbodies that carry protected fish or their critical habitat on the Lower East Fork Allotment include portions of Big Boulder Creek, Silver Rule Creek, Slate Creek, Wickiup Creek, Little Boulder Creek, and Germania Creek. Streams that carry protected fish or their critical habitat on the Upper East Fork allotment include the East Fork itself, including the South Fork of the East Fork and the West Fork of the East Fork, as well as West Pass, Ibex, Long Tom, and Bowery Creeks.

Grazing can harm fish directly, when cows trample redds, fry, and spawning beds and disturb fish, or indirectly, when cows trample banks or graze along waterways, which in turn decreases water quality and removes riparian vegetation. These effects reduce hiding cover, increase summer water temperatures, promote formation of anchor ice in winter, and increase sedimentation into spawning and rearing habitats.

In 2003, the Forest Service issued an Environmental Impact Statement (EIS) and Record of Decision (ROD) adopting new grazing management for the Upper and Lower East Fork allotments as part of an effort to curb degradation caused by grazing. The EIS recognized that grazing was harming listed fish and their habitats, as well as other resources, and failing to comply with management direction for the Sawtooth National Forest and Sawtooth National Recreation Area. The ROD imposed new utilization standards, limiting utilization of upland forage species to 40 or 50%, requiring a 6-inch stubble height of hydric greenline species, and limiting utilization of woody riparian species to 30% of current year's growth. The ROD also limited streambank alteration to 10% and soil disturbance to 15%, and designated monitoring points (DMAs) at which compliance with these standards would be measured and tracked.

The ROD also imposed long-term closures and seasonal restrictions on grazing, to protect fish. It closed several pastures to grazing until resource conditions had recovered or improved. In addition, it imposed seasonal restrictions such that on the Lower East Fork allotment, cattle would not enter the Slate Creek/Silver Rule pasture or the Boulder Creek pasture (if it was re-opened) until after July 15, and would be removed before August 15, to protect steelhead and bull trout. Also on the Lower East Fork allotment, on the Germania Creek unit of the Boulder Creek pasture, cattle would be removed before August 1 to protect Chinook salmon. On the Upper East Fork allotment, cattle would not enter the West Pass pasture until after July 15 and would be removed before August 1, would be removed before August 1 from the East Fork pasture, and would be removed before August 15 from the Bowery drainage to protect all three listed fish species.

Also in 2003, the Forest Service prepared a Biological Assessment concerning the effects the grazing under the new ROD would have on ESA-listed fish. Relying on the conditions and restrictions imposed by the ROD, the Forest Service determined that grazing was not likely to adversely affect listed fish or their critical habitats. In reaching this determination, the Forest Service emphasized the new livestock use standards, and closure of the Boulder Creek pasture, the Sullivan and Potaman drainages, and the Bowery Creek pasture to grazing. The BA stated that monitoring of use standards would occur right after cattle were removed from the pasture. The Forest Service also relied on seasonal grazing restrictions meant to keep cattle out of protected-fish-bearing stream segments during important seasons for the fishes' life-cycles.

The Forest Service submitted the BA to FWS and NMFS to consult over impacts of the new grazing management. Both agencies concurred with the Forest Service's "not likely to adversely affect" determinations. In its letter of concurrence, NMFS relied on the standards and restrictions highlighted in the BA, with compliance to be tracked through monitoring, and agreed with the Forest Service's determination based on the "best available information and successful implementation of conservation measures described in the BA." Sept. 4, 2003 NOAA Letter of Concurrence p. 2. The FWS also concurred with the "not likely to adversely affect" determination for bull trout because "[g]razing standards, when consistently achieved, would maintain properly functioning habitats, and provide a net annual improvement in degraded habitats within the local populations. The proposed action also includes an 'off date' (August 15) to protect known spawning sites for bull trout." Sept. 24, 2003 FWS Letter of Concurrence p. 2. The two letters of concurrence completed the 2003 ESA consultation for the Upper and Lower East Fork allotments.

In 2010, NMFS designated critical habitat for steelhead. That same year, FWS revised its designation of bull trout critical habitat. The Forest Service consulted with NMFS over impacts to the newly-designated steelhead critical habitat on the Upper and Lower East Fork allotments. NMFS concurred with the Forest Service's determination that grazing was not likely to adversely affect the habitat based upon standards meant to limit grazing impacts, and upon the assumption that riding would occur to minimize cattle impacts in sensitive areas. The Forest Service did not reinitiate consultation, however, over the revised bull trout critical habitat designation.

In the years following the 2003 consultation, monitoring did not occur as envisioned, grazing standards were often not met, and livestock frequently trespassed into closed areas. For instance, on the Upper East Fork allotment, the Forest Service did not conduct all of the required monitoring and did not measure standards right after cattle had been removed from the allotment; and cattle run by the Upper East Fork permittee were frequently found on unauthorized portions of the allotment, including in pastures that had been closed to protect fish.

Similar violations occurred on the Lower East Fork allotment. The Forest Service failed to conduct required monitoring, and monitoring that was completed showed pervasive violations of grazing standards. Violations of stubble height, woody use, and

bank alteration standards occurred in one or more pastures most years between 2005 and 2013—particularly in the French Creek pasture. Cattle run by Lower East Fork allotment permittees were seen in areas closed to cattle grazing almost every year during that timespan as well, particularly at Frog Lake, Little Redfish Lake, and along Red Ridge. After standards and use violations occurred in both 2010 and 2011, the Forest Service issued the permittee at fault a notice of noncompliance, but imposed no consequences and did very little to alter his grazing use despite recognizing that such use was continuing to degrade the streams.

Even though the 2003 EIS and ROD elements that formed the basis for the BA and letters of concurrence were not being met, when the grazing permits for the Upper and Lower East Fork allotments expired in 2011/2012, the Forest Service reissued the permits under the same terms and conditions. The Forest Service completed a new BA in 2013 for the new Upper East Fork allotment permit, and received concurrences for its not likely to adversely affect determination from NMFS and the FWS. It started but did not complete a new consultation for the new Lower East Fork allotment permits.

The 2013 BA and concurrences for the Upper East Fork allotment again largely relied on the assumption that standards for woody use, stubble height and bank alteration would be regularly monitored and met, and that timing restrictions in place to protect listed fish would be observed. They stated that if standards were not met, the permittee would be issued a notice of noncompliance and corrective action taken. They also noted that monitoring was critical and stated that at least one indicator would be monitored on each grazed pasture each year. NMFS specifically remarked that if intended monitoring did not occur, the Forest Service might need to reinstate consultation.

After the 2013 consultation was completed, standards violations continued, and Forest Service staff observed that the permittee seemed to be making no effort to comply with his AOIs. In one pasture on the Upper East Fork allotment monitored in 2013, stubble height was only 1.1-inch and bank alteration was 97%. Cattle were repeatedly seen in unauthorized areas or grazing pastures outside of the restricted dates that were intended to protect fish. The Forest Service issued the permittee a notice of noncompliance threatening to suspend half of his permitted numbers for two years, but this ultimately resulted in only a 10% suspension of his permitted numbers, for one grazing season. The Forest Service sent the permittee another notice of noncompliance in 2015, when he failed to maintain a fence intended to keep cows out of the East Fork, but it imposed no consequences. Also, in 2014 and 2015 the Forest Service only monitored two of the five pastures, and both sites had violations each year. Yet, the Forest Service again authorized grazing in 2016 at similar levels, despite the violations of the last three years.

Meanwhile, on the Lower East Fork allotment, conditions were not much better. Violations of stubble height and bank alteration standards continued to occur in 2013-2015, cattle were frequently observed grazing in unauthorized areas, and Forest Service employees continued to express concerns about trespass cattle and conditions of streams on the allotment. The Forest Service drafted a notice of noncompliance in 2013 but never

sent it. Then, in 2015, the agency re-opened the Big Boulder Creek pasture without assessing whether the streams there had met the recovery requirements. Big Boulder Creek and its tributary Jim Creek contain bull trout and bull trout critical habitat. Again, in 2016, the Forest Service authorized grazing at similar levels, including along Big Boulder Creek, even though it had not completed the required assessment of resource recovery objectives.

Despite repeated violations of livestock use standards, trespass into unauthorized areas, and other noncompliance with permit and AOI conditions, which have continued up to the present and resulted in adverse impacts to habitat for listed fish on both allotments, the Forest Service has not reinitiated consultation with FWS or NMFS over either allotment.

LEGAL BACKGROUND

Section 7 of the ESA imposes a substantive obligation on federal agencies to “insure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of” habitat that has been designated as critical for such species. *See* 16 U.S.C. § 1536(a)(2); *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 924 (9th Cir. 2008). Jeopardy results where an action 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. Destruction or adverse modification of critical habitat occurs where there is a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. *Id.* The ESA also prohibits “take” of a species—take is defined to include harassing, harming, wounding, killing, trapping, capturing or collecting a listed species. 16 U.S.C. §§ 1538(a)(1), 1532(19).

To fulfill the substantive mandates of section 7 of the ESA, federal agencies must consult with an expert agency—FWS or NMFS, depending on the species at issue. The ESA’s implementing regulations allow an agency to enter into informal consultation with the relevant expert agency to determine whether its actions “may affect” threatened or endangered species or their critical habitats. *See* 50 C.F.R. § 402.13. Usually this is done by completing a biological assessment and submitting it for the expert agency’s concurrence. *Id.* § 402.12(j), (k). If the agency determines that the action is “not likely to adversely affect” listed species and their habitats, and the expert agency concurs, no further action is necessary. *Id.* §§ 402.13, 402.14(b). If, through the informal consultation process or otherwise, the agency determines that its action is “may affect” listed species or their critical habitats, formal consultation is required that results in a biological opinion. *Id.* § 402.14(a). In carrying out the consultation process, “each agency shall use the best scientific . . . data available.” 16 U.S.C. § 1536(a)(2).

After consultation is completed, federal agencies have a continuing duty under section 7 of the ESA to insure that their actions will not jeopardize the continued existence of listed species or adversely modify designated critical habitat. An agency

must re-initiate consultation whenever “new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;” if the action is subsequently modified in a manner that causes an effect to the species or critical habitat in a way not considered in the consultation; or if new critical habitat is designated that may be affected by the proposed action. 50 C.F.R. § 402.16(b), (c), (d). The duty to reinitiate consultation lies with the action agency and the consulting agency. 50 C.F.R. § 402.16; *Envtl. Protection Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1076 (9th Cir. 2001).

In addition, once a consultation under 16 U.S.C. § 1536(a)(2) has been initiated, the action agency must not make any irreversible or irretrievable commitment of resources that would foreclose implementation of any reasonable and prudent alternative measures. 16 U.S.C. § 1536(d).

VIOLATIONS OF LAW

I. The Forest Service violated the ESA by failing to consult over the Lower East Fork permits reissued in 2013.

The reissuance of the Lower East Fork grazing permits were actions “authorized, funded, or carried out by the agency” subject to the obligation to avoid jeopardy to listed species and adverse modification of their critical habitats, and therefore subject to the ESA’s Section 7 consultation requirement.

In 2003, the Forest Service completed consultation over the new ROD and EIS for the Upper and Lower East Fork allotments. In 2013, it completed a new consultation when it reissued the permit for the Upper East Fork allotment. The Forest Service started, but failed to complete, a new consultation in 2013 for the reissued Lower East Fork allotment permits.

Because the Forest Service failed to consult over the newly issued Lower East Fork grazing permits, thereby failing to ensure that grazing under those permits would not cause jeopardy to listed fish or adversely modify their critical habitat, it violated the ESA section 7.

II. The agencies violated the ESA by failing to reinitiate consultation on the Lower East Fork allotment in light of failures to meet rangeland standards and comply with permit conditions, as well as the new bull trout critical habitat rule.

The Forest Service, FWS, and NMFS all have a duty to reinitiate consultation when new information shows that an action’s effects may affect a listed species or its critical habitat in a way or to an extent not previously considered. They also must reinitiate consultation if new critical habitat for a species is designated that may be affected by a proposed action.

The Forest Service's 2003 BA and FWS's and NMFS's LOCs found that grazing impacts were not likely to adversely affect listed fish species or critical habitat based on the assumption that the 2003 ROD's grazing closures and restrictions, use standards, and monitoring requirements would be followed. Since 2003, rangeland standards have routinely been violated, grazing has regularly occurred in closed areas, and the Forest Service re-opened one of the closed pastures without determining that riparian recovery requirements had been met. The many standards violations, widespread livestock trespass, and re-opening of the Big Boulder Creek pasture to grazing show that the assumptions underlying the not-likely-to-adversely-affect finding in the 2003 BA and LOCs are no longer valid and have not protected listed fish and critical habitat as expected.

In addition, in 2010 the FWS issued a new critical habitat rule revising its critical habitat designation for bull trout.

In light of this information, the Forest Service, FWS, and NMFS all have an obligation to reinitiate consultation to ensure that grazing on the Lower East Fork allotment is not causing jeopardy or take of listed fish or adverse modification of critical habitat. The Forest Service and FWS must also reinitiate consultation in light of the new bull trout critical habitat designation. Until the agencies reinitiate consultation, they are in violation of the ESA section 7 and 50 C.F.R. § 402.16.

III. The agencies violated the ESA by failing to reinitiate consultation on the Upper East Fork allotment, when permit conditions imposed to protect fish and rangeland standards have not been followed since 2013.

Similarly, the Forest Service, FWS, and NMFS must reinitiate consultation on the Upper East Fork allotment in light of the flagrant trespass and widespread standards violations since the 2013 consultation because grazing is affecting listed fish in ways not considered.

The 2013 BA and LOCs' findings that continued grazing on the Upper East Fork allotment was not likely to adversely affect listed fish or critical habitat relied on the assumptions that each pasture would be monitored each year and livestock use standards would be met, closures and seasonal grazing restrictions would be followed, and any violation would result in a notice of noncompliance to the permittee. Since the LOCs were issued, however, it quickly became clear that these conditions were not occurring. Agency staff observed that the permittee seemed to be making no effort to comply with his AOIs. This recalcitrance caused repeated trespass in pastures with listed fish and severe standards violations each year, with 1.1-inch stubble height and 97% bank alteration in one instance. And the Forest Service did not monitor each pasture each year, as required.

Moreover, the Forest Service did very little to correct the problem. It failed to send a notice of noncompliance one year, and when it did send notices other years, it

failed to take adequate action to remedy the problems, leading to further violations in subsequent years.

Because standards are routinely being violated on the Upper East Fork allotment and the conditions imposed to protect listed fish are not being observed, the assumptions in the BA and LOCs used to justify the not likely to adversely affect determination are invalid, and effects to the protected species and critical habitat from grazing the Upper East Fork allotment are different from what the agencies considered. Thus, the agencies' failure to reinitiate consultation violates the ESA section 7 and 50 C.F.R. § 402.16.

IV. The Forest Service must cease allowing grazing on the Upper and Lower East Fork allotments until adequate consultations have been completed.

Once the necessary consultations have been initiated, the Forest Service must remove all livestock from the allotments to ensure that no irreversible or irretrievable commitment of resources that would foreclose implementation of reasonable and prudent alternative measures occurs. 16 U.S.C. § 1536(d). Because the permittees have established a track record of failing to follow instructions or comply with their grazing permits, authorizing further grazing on these allotments risks an irreversible and irretrievable commitment of resources by harming listed fish, damaging their critical habitats, and causing additional resource damage that may take a very long time to recover, in violation of ESA sections 7(a)(2) and 7(d). *Id.* § 1536(a)(2), (d). Accordingly, the Forest Service must cease allowing grazing on the subject allotments until new consultations have been completed, to comply with the ESA.

CONCLUSION

As set forth above, WWP intends to pursue litigation in federal court for these ESA violations following sixty days after this notice and will seek injunctive, declaratory and other relief, including an award of attorneys' fees, expert witness fees, and other expenses incurred in investigating and prosecuting this action.

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, or my client at the address listed below.

Sincerely,

Talasi B. Brooks
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