

April 17, 2009

VIA U.S. CERTIFIED MAIL, RETURN RECEIPT REQUESTED

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Re: **Notice of Intent to Sue For Violations of the Endangered Species Act Regarding Upper Columbia River Bull Trout, Snake River Spring/Summer Chinook Salmon, and Snake River Basin Steelhead Within the Pahsimeroi River Watershed**

Dear Sirs:

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 your agencies’ obligations with respect to threatened bull trout, Chinook salmon, and steelhead in the Pahsimeroi River watershed.

The Pahsimeroi River and its tributaries contain reaches inhabited by bull trout, Chinook salmon, and steelhead listed as threatened under the ESA, as well as being designated critical habitat for Chinook salmon and steelhead. Your agencies have responsibilities to protect and recover these species and their habitat, yet have failed to do so due to inadequate management practices and consultation processes as detailed below.

BACKGROUND

Listed Species

The Pahsimeroi River, a tributary to the Salmon River, is home to populations of Upper Columbia River bull trout, Snake River spring/summer Chinook salmon, and Snake River Basin steelhead, all listed as threatened species under the ESA.

The Upper Columbia River bull trout was listed as threatened in 1998. Bull trout are found in the Pahsimeroi River and many tributaries, including the East and West Forks of the Pahsimeroi River, Mahogany Creek, Burnt Creek, Big Creek, Patterson Creek, Falls Creek, Morse Creek, Morgan Creek, and Cow Creek. A 2008 status review describes the threat rank to the Pahsimeroi core area population as “substantial” and “imminent,” and determined that continued listing as threatened was warranted.

The Snake River spring/summer Chinook salmon was listed as threatened in 1992. Critical habitat was designated in 1993 and revised in 1999. The Pahsimeroi River and many tributaries serve as designated critical habitat for this species. The number of Chinook salmon in the Pahsimeroi River and its tributaries remains significantly depressed compared to historic levels, and a 2005 status review for the species stated that it was still below abundance levels necessary for recovery and remained at risk of becoming endangered in the foreseeable future.

The Snake River Basin steelhead was listed as threatened in 1997, and critical habitat was designated in 2005. The Pahsimeroi River and several tributaries serve as designated critical habitat for this species. Wild steelhead populations are significantly depressed from historic levels, and a 2006 status review determined that the Snake River Basin steelhead remains at risk of becoming endangered in the foreseeable future and population abundance is well below recovery targets.

These species’ populations in the Pahsimeroi watershed are greatly depressed from historical levels due to irrigation withdrawals, habitat degradation, elevated temperatures, and other factors. One common factor contributing to the endangerment of all three listed species is livestock grazing. The species require stable stream channels, clean spawning and rearing gravel, and complex and diverse cover. Livestock grazing degrades habitat in many ways, including by removing riparian vegetation, destabilizing stream banks, widening stream channels, promoting incised channels, lowering water tables, reducing pool frequency, increasing soil erosion, and altering water quality. These effects reduce cover, increase summer water temperatures, promote formation of anchor ice in winter, and increase sedimentation into spawning and rearing habitats. An additional way livestock can harm listed fish is by directly trampling on redds (nests), which contain thousands of eggs. For this reason, livestock should not have direct access to streams, particularly during spawning and incubating periods.

Consultation History

In 1997, BLM and the Forest Service jointly submitted a Biological Assessment (BA) regarding the effects of federal activities in the Pahsimeroi watershed on Chinook salmon and steelhead. NOAA Fisheries, or NMFS, issued a Letter of Concurrence on October 3, 1997. To account for the adoption of PACFISH and INFISH, BLM and the Forest Service submitted a revised watershed BA in 1999. The BA concluded that every grazing allotment was not likely to adversely affect either critical habitats or listed species.

NMFS issued a Letter of Concurrence for all allotments under the revised BA, with an expiration date of January 15, 2003 (later arbitrarily eliminated). The U.S. Fish and Wildlife Service (FWS) issued Letters of Concurrence for all grazing allotments, except for one, on July 19, 1999 and October 27, 1999. FWS determined that grazing on BLM's Upper Pahsimeroi allotment was likely to adversely impact bull trout, and issued a Biological Opinion (BiOp) on May 17, 2000. Since then, the agencies have taken a piecemeal approach to consultation in the Pahsimeroi watershed.

BLM has subsequently completed two allotment-specific bull trout consultations. The first covered the Dry Creek allotment. BLM prepared a BA and an Addendum in 2004 regarding impacts from grazing the allotment, concluding that the action was not likely to adversely affect listed fish. FWS issued a Letter of Concurrence on October 8, 2004.

The second allotment-specific consultation covered the Burnt Creek allotment. A permit reissuance EA was issued in 2002. After numerous trespass problems between 2000 and 2002 within an enclosure designed to keep livestock out of Burnt Creek, consultation was reinitiated. BLM prepared a BA for the Burnt Creek allotment on September 24, 2002, concluding the action was not likely to adversely affect bull trout. The next day, FWS issued a Letter of Concurrence. After additional trespass, BLM again reinitiated consultation in spring 2003, and FWS issued a BiOp on September 5, 2003. Also in 2003, Idaho Chief District Judge Winmill held in *Western Watersheds Project v. Snyder*, CV-03-314-E-BLM, that BLM violated NEPA in issuing its 2002 EA. As part of a new permit reissuance EA, BLM issued another BA on December 18, 2006. FWS issued a Letter of Concurrence on January 16, 2007. BLM asked for concurrence for a slightly modified proposal yet again in January 2008, and FWS issued another Letter of Concurrence in 2008.

A consultation was also completed for a livestock water project—the Squaw Creek pipeline—in BLM's Upper Pahsimeroi allotment. BLM prepared a BA in July 2005. FWS issued a Letter of Concurrence on July 27, 2005.

During all this time, BLM and the Forest Service have authorized grazing throughout the public lands of the Pahsimeroi watershed, with very limited exceptions. This livestock grazing has continued to harm the listed fish and their critical habitat in numerous ways, without any evidence of recovery and in violation of management requirements imposed under the earlier consultation. Such ongoing grazing authorization violates the Endangered Species Act in multiple ways, as explained below.

VIOLATIONS OF THE ENDANGERED SPECIES ACT

1. Violations Relating to 1999 Pahsimeroi Watershed Consultation.

As noted, BLM, the Forest Service, FWS, and NMFS completed a watershed consultation in 1999 for bull trout, Chinook salmon, and steelhead covering federal activities throughout the Pahsimeroi watershed. This consultation, however, is now woefully outdated and must be replaced with new analyses that update the environmental baseline and consider new information and circumstances that have arisen since 1999.

The agencies have an ongoing duty to comply with ESA Section 7's prohibition against jeopardy and adverse modification of critical habitat. To that end, consultation must be reinitiated when (1) the amount or extent of take specified in an incidental take statement is exceeded, (2) new information reveals effects that may affect listed species or critical habitat in a manner or to an extent not previously considered, (3) the action is modified in a manner to cause effects not previously considered, or (4) critical habitat is designated that may be affected. 50 C.F.R. § 402.16. The agencies have not complied with these duties because they have failed to reinitiate consultation for the Pahsimeroi watershed.

Reinitiation is required for the Pahsimeroi watershed for many reasons. First, NMFS designated critical habitat for Snake River Basin steelhead in 2005, and segments of the Pahsimeroi River and several tributary segments are listed as such. Therefore, the agencies need to reinitiate consultation to consider impacts to this newly designated critical habitat, as stated explicitly in the regulations.

Second, BLM and the Forest Service are not substantively conducting the actions as described in the 1999 BA and Letters of Concurrence, and thus the assumptions that FWS and NMFS relied upon for their concurrence are no longer valid. For instance, the BA states that the agencies will comply with PACFISH/INFISH Standards and Guidelines. For livestock grazing, these include Standard GM-1, which requires BLM and the Forest Service to modify grazing practices that retard or prevent attainment of Riparian Management Objectives (RMOs) or are likely to adversely affect relevant fish, and to suspend grazing if adjusting practices is not effective in meeting RMOs. The BA also lists specific use standards and allotment-specific recommendations, and requires that maintenance of range improvements be completed prior to the grazing season.

Available evidence indicates that grazing practices throughout the watershed continue to retard and prevent attainment of RMOs and adversely affect the listed fish, and yet BLM and the Forest Service have not effectively modified grazing practices or suspended grazing. One example is the Forest Service's Upper Pahsimeroi allotment, where severe livestock grazing continues to take place during bull trout spawning without restrictions to keep cattle from trampling bull trout redds or causing significant sedimentation of bull trout spawning gravels from bank trampling and other cattle-caused soil erosion. Additionally, many of the BA's standards and site-specific recommendations are not being followed. For example, the BA contains a mandate to adjust riparian stubble height standards depending on stream condition, but BLM and the Forest Service often impose blanket 4-inch riparian stubble height standards.

Because BLM and the Forest Service are not living up to their own substantive assurances, as assumed they would in the 1999 consultation, the agencies need to reinitiate consultation to address this change in circumstances.

Third, BLM and the Forest Service are not procedurally conducting the actions as described in the 1999 BA and Letters of Concurrence. For example, the BA contains detailed monitoring requirements: all streams discussed in the BA will be visited and photographed at least twice per year; operational grazing use standards will be monitored at least once per year; effectiveness monitoring will be conducted every three to five years; and allotment evaluations will be conducted each year. Additionally, PACFISH/INFISH and the 1998 programmatic PACFISH and INFISH BiOps require multiple types of monitoring, including implementation, effectiveness, and validation monitoring. But BLM and the Forest Service do not consistently complete this monitoring, even for streams that contain listed fish. Because BLM and the Forest Service are not living up to their monitoring duties, as assumed they would in the 1999 consultation, the agencies need to reinitiate consultation. Furthermore, PACFISH/INFISH and the PACFISH/INFISH BiOps also require agencies to update the environmental baseline every two years to include new natural and man-induced activities in the watershed that may impact the species, and this requirement has not been met either.

Fourth, new information since 1999 about effects to bull trout, Chinook salmon, and steelhead in the Pahsimeroi watershed warrants reinitiation of consultation. Available evidence shows that livestock are continuing to cause damage to riparian areas from both authorized and unauthorized grazing. Extensive fencing built in the last decade has changed livestock grazing patterns and increased livestock pressure on tributaries. BLM and the Forest Service have built numerous pipelines and water developments, which have altered the hydrology of the watershed. A 2004 Forest Service report documented startlingly low densities of bull trout in the upper reaches of the watershed. Recent scientific developments include information on the continuing precarious status of the species, impacts of grazing and herbicides on fish, the importance of habitat recovery in restoring Columbia basin salmonids, and the effects of global warming and increasing drought in the West. This new information must be considered in a new consultation.

NMFS recognized the need to update this consultation by including the original 2003 expiration date in its Letter of Concurrence, as did the Forest Service in a 2003 letter to NMFS promising to complete an updated BA before 2007. Moreover, a comprehensive watershed consultation is necessary to fully address the impacts of all activities on these populations of listed fish, including all grazing allotments that occur on BLM and Forest Service land within the Pahsimeroi watershed. Individual consultations over site-specific projects cannot substitute for this holistic assessment.

For these reasons, BLM and the Forest Service are not insuring that their actions are not likely to jeopardize these species or adversely modify their critical habitat, in violation of section 7(a)(2) of the ESA, and are failing to utilize the best available scientific information. 16 U.S.C. § 1536(a)(2). Section 7 requires agencies to insure they are not impairing the survival *or* the recovery of species, yet livestock grazing on many grazing allotments continues to degrade stream systems and riparian areas. This also violates ESA section 7(d), which requires agencies to avoid making irreversible or irretrievable commitments of resources. 16 U.S.C. § 1536(d).

Until the agencies complete a new consultation, they must comply with the requirement to avoid jeopardy and adverse modification, as well as the requirement under section 7(d). Furthermore, livestock access to streams that contain listed fish or their spawning areas causes “take” of these species in the form of harm and harassment to adult fish as well as juvenile fish, larvae, and eggs, in violation of ESA section 9. *Id.* § 1538. There is every indication that these violations will continue in 2009 and future years.

2. Violations Relating to Bull Trout and Chinook Critical Habitat in the Rock Creek Allotment.

BLM’s Rock Creek allotment was one of the allotments considered in the 1999 Pahsimeroi watershed consultation. The 1999 BA noted that this allotment and the adjacent Forest Service Upper Pahsimeroi allotment contained portions of the main Pahsimeroi, West Fork Pahsimeroi, and East Fork Pahsimeroi rivers, which are occupied habitat for bull trout and unoccupied critical habitat for Chinook salmon. BA at 42. Map 4 of the BA identifies that portion of the Pahsimeroi River flowing through the allotment as occupied bull trout habitat. A 2004 report on fishes in the Salmon-Challis National Forest’s Challis Ranger District confirms the same.

But in a 2008 EA that covered renewal of the Rock Creek allotment permit, BLM states that bull trout *do not* occur in the Rock Creek allotment portion of the Upper Pahsimeroi River, citing a 2003 BLM fisheries database. EA at 40, 50. BLM also mischaracterizes the 1999 BA by stating that it determined the action was not likely to adversely affect listed fish “due to the lack of listed salmonids or their habitats within the allotment,” and thus concludes that “federally protected fisheries and associated critical habitat should not be negatively affected.” *Id.* Chinook salmon critical habitat is not discussed, and consultation was not initiated.

BLM’s failure to consult on authorization of grazing on this allotment violates the ESA. The ESA requires land management agencies to consult on actions “authorized, funded, or carried out by such agency.” 16 U.S.C. § 1536(a)(2). BLM’s failure to conduct and complete a new or reinitiated consultation over authorization of livestock grazing on the Rock Creek allotment with respect to bull trout and Chinook salmon critical habitat is a violation of the § 7(a)(2) consultation requirement. Until BLM completes a new consultation, it must comply with the requirement to avoid jeopardy and adverse modification, as well as the requirement under section 7(d). Furthermore, livestock access to streams that contain bull trout or their spawning areas causes “take” of these species in the form of harm and harassment to adult fish as well as juvenile fish, larvae, and eggs, in violation of ESA section 9. *Id.* § 1538. There is every indication that these violations will continue in 2009 and future years.

3. Violations Relating to Bull Trout in the Upper Pahsimeroi Allotment.

As noted, FWS issued a 2000 BiOp for BLM’s Upper Pahsimeroi allotment. The BiOp’s Incidental Take Statement (ITS) states that authorized take would be exceeded if any use standards and objectives from the Challis RMP or PACFISH/INFISH Standards and Guidelines are exceeded. The ITS also sets several binding Terms and Conditions, including the requirement to follow use standards and objectives from the BA and AOPs, and consistent implementation of

PACFISH/INFISH Standards and Guidelines. The Terms and Conditions also include detailed monitoring requirements. Reinitiation is warranted for several reasons.

First, the amount and extent of take specified in the ITS has been exceeded, because use standards and objectives from the Challis RMP and the PACFISH/INFISH Standards and Guidelines are not consistently met, and yet BLM has not effectively modified grazing practices or suspended grazing. For example, BLM monitoring admits several recent instances where riparian stubble heights have exceeded standards; several stream reaches and springs are functioning-at-risk with no trend; and cows trespass into riparian exclosures almost every year. Informal monitoring contain notes such as “heavy damage to banks by cattle,” indicating that damage continues to occur to streambanks, riparian vegetation, and instream fish habitat. Because BLM is not meeting the requirements of the BiOp or ITS, as assumed in the 2000 consultation, it must reinitiate consultation.

Second, as noted for the 1999 watershed consultation, BLM has failed to conduct much of the monitoring required under the BiOp, PACFISH/INFISH, and the 1998 PACFISH/INFISH BiOps. The vast majority of monitoring that BLM has conducted is stubble height, with the occasional qualitative PFC determination. WWP has seen no evidence, for example, of the required quantitative measurements of RMOs, validation monitoring, or effectiveness monitoring. Because BLM is not meeting its monitoring requirements, as assumed in the 2000 consultation, it must reinitiate consultation.

Third, also as noted for the 1999 watershed consultation, changed conditions have occurred in the allotment since 2000, yet BLM has failed to update the environmental baseline in its BA or otherwise consider them. The changes include construction of fencing, water developments, diversions and pipelines, changes in grazing practices, changes in the status of bull trout, and new scientific information on topics such as global warming.

For these reasons, BLM is not insuring against jeopardy to bull trout, in violation of ESA section 7(a)(2), or relying on the best available science, and needs to reconsult. 16 U.S.C. § 1536(a)(2). Indeed, the low number of bull trout detected in recent surveys and continuing degradation to riparian areas on the allotment show that the species is not recovering, and livestock grazing continues to impair its survival and recovery. The failure to comply with the Terms and Conditions of the ITS, combined with the livestock access to streams violates the ESA’s prohibition on take. *Id.* § 1538(a)(1)(B). Until the agencies fulfill their duty to complete a new consultation over this allotment, BLM must not cause 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. *Id.* § 1536(d). There is every indication that these violations will continue in 2009 and future years.

3. Violations Relating to Bull Trout in the Dry Creek Allotment.

As noted, BLM prepared a BA and an Addendum in 2004 regarding impacts from grazing the Dry Creek allotment, concluding that grazing was not likely to adversely impact bull trout. FWS issued a Letter of Concurrence on October 8, 2004. Reinitiation is warranted for several reasons.

First, BLM is not meeting the assumptions set forth in the BA and LOC, because use standards and objectives from the Challis RMP and the PACFISH/INFISH Standards and Guidelines are not consistently met, and trespass continues to occur. For example, WWP documented extreme livestock damage on Short Creek, a bull trout tributary, in summer 2008. Livestock had caused severe bank trampling and hummocking, contributing to a fish kill where fish stranded in a muddy stream reach died. The permittee was cited for trespass on the Dry Creek allotment in both 2005 and 2006. And again, BLM has failed to conduct much of the monitoring required under the BiOp, PACFISH/INFISH, and the 1998 PACFISH/INFISH BiOps.

Second, changed conditions have occurred in the allotment since 2004, yet BLM has failed to update the environmental baseline in its BA or consider any changes to the existing conditions in the watershed that impact fish, such as increased impacts from grazing, repeated trespass, construction of fencing, water developments/diversions and pipelines, changes in the status of bull trout, and new scientific information on topics including global warming.

Third, the 2004 consultation failed to fully consider effects and cumulative effects of livestock grazing on this allotment as well as other allotments that impact these same populations of fish and their critical habitat, and did not contain enough information and analysis to support its conclusions that the actions were not likely to adversely affect threatened bull trout in the allotment.

For these reasons, both BLM and FWS are violating their duty under the ESA to prevent jeopardy of the species and to use the best available science, and BLM needs to reinitiate consultation. 16 U.S.C. § 1536(a)(2). Until a new consultation is completed, BLM must avoid making any irreversible or irretrievable commitment of resources which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures. *Id.* § 1536(d). Furthermore, livestock access to streams that contain listed fish or their spawning areas causes “take” of these species in the form of harm and harassment to adult fish as well as juvenile fish, larvae, and eggs, in violation of ESA section 9. *Id.* § 1538. There is every indication that these violations will continue in 2009 and future years.

4. Violations Relating to Bull Trout in the Burnt Creek Allotment.

The most recent bull trout consultation on this allotment consisted of a 2007 BLM Burnt Creek allotment BA, a 2007 FWS Letter of Concurrence, a 2008 BLM BA “Addendum,” and a 2008 FWS Letter of Concurrence. These documents are inadequate under the ESA because new information has revealed new effects on bull trout; and the agencies failed to adequately consider effects and cumulative effects of the action, utilize the best scientific information, or support their conclusions that the action is not likely to adversely affect threatened bull trout.

For example, the consultation documents fail to consider the impacts of chronic trespass from the Dry Creek allotment into this allotment. Trespass occurred in 2003, 2005, 2006, and 2007.¹ After the particularly severe 2007 trespass incident, BLM issued a decision imposing on the Dry Creek permittee, among other penalties, a significant suspension in active use for five

¹ And WWP has not yet received trespass data from 2008.

years. The permittee appealed and petitioned for a stay of the decision before the Office of Hearings and Appeals. BLM opposed the stay, explaining that the trespass “has kept the neighboring Burnt Creek Allotment from meeting the fundamentals [of] rangeland health, specifically Standard 2 (riparian areas and wetlands) and Standard 3 (stream channel/floodplain).” BLM explained that the required upward trend “has not occurred in the riparian areas/wetlands where Whitworth Ranches has trespassed repeatedly. These areas are still functioning at risk with a static trend due to the intensity of use including forage consumption and livestock hoof damage.” BLM warned that if a stay was granted, “livestock use would be expected to continue without controls and at levels that have resulted in conditions not making significant progress toward meeting the standards for rangeland health.”

But the Office of Hearings and Appeals did issue the Dry Creek permittee a stay, and grazing-as-usual continued in 2008. On October 1, 2008, BLM and the permittee reached a settlement in the trespass case by agreeing to a penalty of a mere one year (2009) suspension of grazing in one pasture of the Dry Creek allotment. FWS’s 2008 Letter of Concurrence not only fails to consider the impacts of the chronic trespass, but assumes that BLM’s permit suspension would take effect. The settlement was thus critical information revealing new impacts to bull trout not considered in the consultation.

The consultation documents failed to consider additional effects and cumulative effects. For example, they fail to consider the history of fence failure, the increased impacts on tributaries resulting from fencing off Burnt Creek, and impacts of sediment entering Burnt Creek from grazing of the tributaries. And they failed to adopt a FWS biologist’s recommendations regarding not grazing in the hot summer months and implementing more restrictive grazing standards. Finally, the agencies did not consider whether the impacts from the authorized grazing would reduce appreciably the likelihood of both survival and recovery of the species, especially when considered with other cumulative effects impacting the same bull trout population.

By producing and relying on such an inadequate consultation, and failing to reinstate following the trespass settlement, BLM and FWS are violating their duty under the ESA to prevent jeopardy of the species, as well as failing to use the best available science. 16 U.S.C. § 1536(a)(2). Until a new consultation is completed, BLM must avoid making any irreversible or irretrievable commitment of resources which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures. *Id.* § 1536(d). There is every indication that these violations will continue in 2009 and future years.

CONCLUSION

As set forth above, WWP intends to pursue litigation in federal court 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. To avoid such litigation, WWP demands that the addressee agencies cease these violations of the ESA.

If you have any questions, wish to discuss this matter further, or believe this notice is in error, please contact WWP's representative listed below, or me.

Sincerely,

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