Lauren M. Rule (ISB # 6863) (lrule@advocateswest.org)
Todd C. Tucci (ISB # 6526) (ttucci@advocateswest.org)
Judith M. Brawer (ISB # 6582) (jbrawer@advocateswest.org)
ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024
(208) 342-8286 (fax)

Laurence ("Laird") J. Lucas (ISB # 4733) (llucas@lairdlucas.org)
P.O. Box 1342
Boise, Idaho 83701
(208) 424-1466 (phone and fax)

Attorneys for Plaintiff Western Watersheds Project

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

WESTERN WATERSHEDS PROJECT, Plaintiff, vs. JOE KRAAYENBRINK, et al. Defendants.	Civ. No. 05-297-E-BLW **OPENING BRIEF IN SUPPORT OF MOTION FOR IMMEDIATE INJUNCTION RE: ENDANGERED SPECIES ACT VIOLATIONS**

INTRODUCTION

This motion seeks immediate injunctive relief to prevent BLM from implementing new grazing regulations in violation of Section 7 of the Endangered Species Act (ESA).

This motion complements the accompanying Motion For Immediate Injunction Re: NEPA Violations and supporting brief (*Docket No. 25*), which discuss in detail the adverse environmental effects the new regulations will have, if not enjoined; and explains how BLM has violated NEPA by flatly misrepresenting the new regulations and their effects. But because the ESA imposes different statutory duties, and alters the traditional injunction standards by

mandating injunctive relief when agencies violate Section 7 – as BLM has done here – these ESA issues are thus being separately addressed here.

FACTUAL BACKGROUND

Plaintiff Western Watersheds Project is presenting the Court with voluminous materials describing in detail the history of BLM's grazing regulations, and how the new regulations will gut the Fundamentals of Rangeland Health and other parts of the "Rangeland Reform" regulations that BLM adopted in 1995 to improve its grazing management and ecological conditions on the public lands. *See* First Amended Complaint *(Docket No. 23)*; Opening Brief In Support Of Motion For Immediate Injunction Re: NEPA Violations *(Docket No. 25)*; Declarations of Jon Marvel *(Docket No. 3)*, Erick Campbell *(Docket No. 27)*, Robert House *(Docket No. 28)*, Kathleen Fite *(Docket No. 29)*, and Dr. John Carter *(Docket No. 30)*. Those materials also describe in detail how the new regulations will cause serious adverse environmental impacts on public lands, fish and wildlife, and other resources. *Id.*

To avoid redundancy, this brief will not repeat those points, but instead will focus on the facts specific to BLM's violations of the ESA.

A. BLM's Prior Consultation Over The 1995 Regulations.

When BLM adopted its existing grazing regulations in 1995, it emphasized that these "Rangeland Reforms" were vitally needed to improve grazing management and ecological health on the public lands. *See Opening Brief In Support Of Motion For Immediate Injunction Re: NEPA Violations, pp. 4-6.* Among other reforms, the 1995 regulations thus increased public involvement in grazing management decisions; and adopted the Fundamentals of Rangeland Health to set minimum ecological standards for grazing, and require "prompt" action to revise grazing if those standards are not met, including by making immediate livestock reductions as

necessary to avoid overgrazing. *See* 43 C.F.R. § 4180 *et seq*.; 60 Fed. Reg. 9893 (Feb. 2, 1995); *Idaho Watersheds Project v. Hahn,* 187 F.2d 1035 (9th Cir. 1999) (upholding BLM duty to promptly change grazing when rangeland health violations are found).

Notably, BLM acknowledged that the 1995 regulations "may affect" endangered and threatened species that are present across the 160 million acres of public lands it manages for grazing; and hence BLM initiated consultation under ESA Section 7 with the U.S. Fish and Wildlife Service and National Marine Fisheries Services to assess likely impacts of the 1995 regulations. *First Amended Complaint, ¶ 45a; 1994 Rangeland Reform FEIS, p. 37.* The Services then prepared a November 2004 Biological Opinion which concluded that the Rangeland Reform proposals were "not likely to jeopardize the continued existence of listed or proposed species" and "not likely to result in the destruction or adverse modification of designated or proposed critical habitat." *See First Amended Complaint, ¶ 45b; 1994 Rangeland Reform FEIS, Appendix T (Biological Opinion), at 31.*

In reaching this determination, the Services emphasized their assumption that "full implementation" of the Rangeland Reforms would occur, particularly the Fundamentals of Rangeland Health requirements of adopting standards and guidelines that "will maintain or achieve healthy rangeland ecosystems," and that: "Management actions that diminish ecosystem function and health will be modified or eliminated, and actions promoting ecosystem function and health will be implemented and maintained. . . Areas may require total rest from use or disturbance until desired resource conditions are reached. . . ." *First Amended Complaint, ¶ 45c, quoting Biological Opinion, at 2-3, 20. See also id. at 4-9 (further discussion).*

Based on these and other assumptions, the Services determined that implementation of the Rangeland Reform regulations "will improve current methods of making rangeland decisions

to better integrate all of the biological, cultural, social, and economic factors needed to maintain or restore ecosystems. . . . Management attention will shift from narrow, short-term resource-specific issues toward broader objectives aimed at restoring or maintaining desired landscape conditions, environmental health, social amenities, and sustained economic well-being, all products of propertly functioning ecosystems." *Biological Opinion, at 9.* The Services further found that the Rangeland Reform regulations would result in both short-term and long-term improvements in uplands and riparian/wetland/aquatic habitats, and thus promote "restoration of some special status species" and "recovery of several listed species," particularly riparian and aquatic species. *Biological Opinion, pp. 20-26.*

The Biological Opinion also required that BLM must reinitiate consultation under various circumstances including if "(2) the agency action is subsequently modified in a manner that causes an effect to listed species or critical habitat that was not considered in this opinion." *First Amended Complaint, ¶ 45f, citing Biological Opinion, p. 33.*

B. BLM's Refusal To Consult Over The New Regulations.

In 2003, under a new Administration, BLM announced that it needed to "improve working relationships" with ranchers, and began the process of revising the 1995 grazing regulations to rollback the Rangeland Reforms, as long sought by the livestock industry. *See Opening Brief In Support Of Motion For Immediate Injunction Re: NEPA Violations, pp. 6-9.*

BLM appointed a 15-member team of agency experts to draft an EIS to assess proposed changes in the grazing regulations; and designated veteran biologist Erick Campbell as the lead wildlife biologist tasked with preparing the terrestrial wildlife and special status species analysis – including assessing effects of the proposed regulations on threatened and endangered birds and wildlife. *See Campbell Decl.*, ¶¶ *8-10.*

By November 2003, this team completed a full draft EIS – known as the "Administrative Review Copy-Draft EIS," or "ARC-DEIS" – which was distributed for internal BLM review. *Id.* In the ARC-DEIS, BLM staff identified numerous adverse environmental impacts from the proposed grazing regulation revisions. *Id., ¶¶ 11-19; see also Carter Decl., Exh. 7* (excerpts of ARC-DEIS). The team was concerned over many proposed regulation changes that would impair BLM's ability to manage grazing and prevent degradation, including the following:

(1) Extending the timeframe to require revised grazing management after finding that current grazing is causing violations of the Fundamentals of Rangeland Health;

(2) Giving livestock operators joint ownership over range improvements and water rights, to promote construction of additional range improvements; and

(3) Phasing in grazing reductions in excess of 10% over a five year period. *Id.*

Based on these and other provisions, BLM's wildlife expert, Erick Campbell, determined that the regulation changes "will result in a long-term, adverse effect on wildlife resources and biological diversity, including threatened and endangered and special status species." *Campbell Decl., ¶¶ 15-19.* Other team members reached similar conclusions. *See Carter Decl., Exh. 7* (ARC-DEIS section on effects).

Campbell thus advised that BLM was required to consult under ESA Section 7 over the impacts of the new regulations on threatened and endangered species. *Id., ¶ 24.* Likewise, BLM's lead fisheries biologist for the ARC-DEIS agreed that ESA consultation was required, because the new regulations were "likely to adversely affect" aquatic species. *Id., ¶ 25.*

But as national media stories have reported, and Campbell confirms in his declaration to this Court, BLM suppressed and altered these views of its own experts. *See Marvel Decl. (Docket No. 3), Exhs. 1-2* (copies of news reports). Just days after the ARC-DEIS was distributed

for internal review in November 2003, BLM abruptly dismissed Campbell and other experts from the EIS team, and convened a new group of range staffers to rewrite the Draft EIS before issuing it for public comment in January 2004. *See Campbell Decl., ¶ 20-23.*

This "sanitized" Draft EIS eliminated many of the scientific references and analysis in the ARC-DEIS about the ecological impacts of livestock grazing, and how the regulation changes would adversely affect fish, wildlife, and public lands. *Id.; Marvel Decl., Exhs. 1-2; Carter Decl., Exh. 7.* BLM even changed Campbell's finding of long-term adverse effects, to assert that the new regulations would be "beneficial to animals." *Campbell Decl., ¶ 22.*

Western Watersheds submitted comments on the Draft EIS, prepared by its Ph.D ecologist, Dr. John Carter. *See Carter Decl., ¶¶ 12-13 & Exh. 1.* Those comments addressed in detail scientific literature on the ecological impacts of grazing; and explained how the proposed regulations would adversely affect fish and wildlife habitats and populations, including listed and sensitive species. *Id.* Many other leading independent scientists, agencies, and conservation groups likewise underscored the harms posed by the regulation changes, citing extensive science and experience with BLM's grazing management. *See Carter Decl., ¶ 15 & Exhs. 2-7.*

But BLM rejected all this scientific input, and released a Final EIS in June 2005 (supplemented with a March 2006 Addendum), to approve the new grazing regulations.[1] These documents assert – falsely – that the new grazing regulations are "administrative" only; will not affect the Fundamentals of Rangeland Health; and will have no long-term adverse effects on the public lands or BLM's grazing management. *See Opening Brief in Support Of Motion For Immediate Injunction Re: NEPA Violations, pp. 10-16* (discussing in detail how the grazing

[1] Both the June 2005 Final EIS and March 2006 Addendum are available on BLM's website at: http://www.blm.gov/grazing/.

regulations will gut the Fundamentals of Rangeland Health and cripple BLM's ability to manage livestock grazing to prevent degradation of public lands and resources).

BLM uses the same rationale to assert that the new regulations will have "no effect" on any ESA listed species. *See Final EIS, p. 5-7* ("[a] determination was made that the regulatory changes would have no effect on candidate, proposed, threatened, or endangered species"); *Addendum, Appendix G* (setting forth BLM's "no effect" determination). Hence, BLM has refused to undertake ESA Section 7 consultation over the new regulations.

On July 12, 2006, BLM published its Final Rule adopting the new grazing regulations, which are scheduled to take effect 30 days later, *i.e.*, on August 11, 2006, unless enjoined by this Court. 71 Fed. Reg. 39402-509 (7/12/06). The Final Rule again asserts that the new regulations are "administrative" in nature, and will not have adverse environmental effects, including on endangered, threatened, or sensitive species. *Id.* Thus, the Final Rule confirms BLM's refusal to undertake ESA Section 7 consultation over the new regulations.

C. Listed Species And Their Habitats Will Be Adversely Affected Under The New Regulations.

As BLM itself acknowledged in conducting ESA consultation over the 1995 grazing regulations, many endangered and threatened species are present on the 160 million acres of public lands in the lower 48 states that BLM manages for livestock grazing. Indeed, BLM's Final EIS here lists dozens of endangered and threatened birds, mammals, fish, reptiles, and other species as being present in the affected Western states. *See Final EIS, Appendix B, pp. B-1 to B-36.* Just a few of the listed species that will be directly and indirectly affected by BLM's livestock grazing management under the new regulations include the following:

(a) Snake River salmon, Snake River steelhead, Columbia basin bull trout, and Jarbidge bull trout, located (partly) in Idaho rivers and streams, *see House Decl.*, ¶¶ *10-12, 22-27*;

(b) Lahontan cutthroat trout, located mostly in Nevada's Great Basin streams, along with many other listed or sensitive native fishes throughout the region, *id.*, ¶ *13-21, 28-33*;

(c) Desert tortoise, found in the Mojave and Sonoran desert areas of California, Nevada and Arizona, *see Fite Decl.*, ¶¶ *22-25, 37*;

(d) Mexican spotted owl, found in dry forests of Arizona, New Mexico, and Utah, *id.*, ¶ *22-25, 38-39*; and

(e) Southwestern willow flycatcher, located mainly in riparian habitats in New Mexico, Arizona, Nevada, and Utah, *id.*, ¶¶ *22-25, 28-30.*

There is extensive science and data establishing that livestock grazing has significant adverse effects on these and other imperiled fish and wildlife, as well as their critical habitats. *See Fite Decl.*, ¶¶ *22-39*; *House Decl.*, ¶¶ *34-53; Carter Decl.*, ¶¶ *20-47* (addressing science and grazing impacts).[2] These harms occur in many ways. For example, cattle congregate in shady riparian areas (around streams and springs), where they trample banks, denude vegetation, foul streams with their waste, and cause erosion that fills pools and widens stream channels – thus harming listed fish (salmon, steelhead, bull trout, Lahontan cutthroat trout, and many others), as well as riparian-dependent species (such as the Southwestern willow flycatcher). *Id.*

Similarly, in upland areas, livestock grazing destroys microbiotic crusts, reduces native vegetation, and causes soil erosion, thus degrading wildlife habitats while also often impacting

[2] Many cases also address grazing's adverse effects on listed species, including prior cases before this Court. *See City of Las Vegas v. Lujan*, 891 F.2d 927 (9th Cir. 1989) (grazing impacts on desert tortoise); *Arizona Cattle Growers v. USFWS*, 276 F.3d 1229 (9th Cir. 2001) (grazing impacts on cactus ferruginous pygmy-owl and desert fishes); *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994) *& PRC v. Thomas*, 936 F. Supp. 738 (D. Id. 1996) (grazing impacts to salmon in Idaho, Oregon and Washington); *WWP v. Bennett, CV-04-181-BLW (D. Idaho)* (grazing impacts on Jarbidge bull trout); *CHD v. Abbey, No. 02-0599-HDM (D. Nev.);* (grazing impacts to Lahontan cutthroat trout and desert dace); *WWP v. Snyder, No. 03-314-E-BLW (D. Idaho)* (BLM grazing on Burnt Creek allotment in Upper Salmon basin impacts bull trout).

species directly (such as by trampling burrows) – and thereby harming listed species like desert tortoise, Mexican spotted owl, and many others. *Id.* Construction of fences, pipelines, spring developments, troughs, and other "range improvements" associated with grazing also directly and indirectly harms listed and sensitive species, including by drying up natural springs, fragmenting uplands and aquatic habitats, increasing predation and wildlife deaths, and promoting livestock concentrations that compact soils, destroy native vegetation, and cause weed invasions. *Id.*

The new grazing regulations, unless enjoined, will result in causing these same adverse harms to listed species and their habitats in multiple ways on allotments across Idaho and other western states. The First Amended Complaint, Plaintiff's Opening Brief In Support Of Motion For Immediate Injunction Re: NEPA Violations, and the accompanying Campbell, House, Fite, Carter, and Marvel Declarations explain these impacts in great detail. To summarize, these adverse effects include the following:

(a) The new regulations impose multi-year monitoring requirements, that BLM lacks the staffing and funding to conduct, before BLM can even determine that grazing is causing ecological harms. This provision alone ensures that livestock degradation will continue for many years on allotments across Idaho and other states, with listed fish and wildlife species that are adversely affected by grazing impacts already, when otherwise BLM would identify and move to the correct the problems under the existing Fundamentals of Rangeland Health – such as on numerous allotments in southern Idaho which are slated for assessments this year.

(b) By extending out several years any deadline for BLM to make new grazing management decisions, even after it finds ecological problems, the new regulations further

ensure that grazing degradation will continue, when otherwise the Fundamentals of Rangeland Health would require prompt corrective action, *i.e.,* before the next grazing season.

(c) Similarly, by now requiring BLM to stretch out livestock grazing reductions over 5 years, the new regulations will further mean that changes needed immediately to protect imperiled species will not be implemented when needed.

(d) In promoting new fences, spring developments, and other infrastructure on the public lands, as BLM claims it intends to do by turning over ownership and control to ranchers, the new regulations will further cause habitat degradation and weed invasions, harming listed species.

(e) By allowing permittees to determine grazing timing and other parameters, including through closed-door deals with BLM, the new regulations will result in adverse impacts on riparian areas and uplands that are home to listed species (such as bull trout in Idaho, where strict grazing timing requirements are in place to prevent these harms).

(f) Finally, by excluding the interested public from many grazing decisions, including permit renewals and temporary grazing authorizations, the new regulations will further result in adverse impacts through BLM's adoption of grazing practices favored by ranchers, irrespective of their direct and indirect adverse impacts – as has been seen on many Idaho allotments previously before this Court. *See Fite Decl,. ¶¶ 40-121* (including citations to Succor Creek, Hardtrigger, Cliffs, Burnt Creek and other prior cases); *Carter Decl., ¶¶ 48-74; House Decl., ¶¶ 9, 41-60; Marvel Decl., ¶¶ 64-72* (all explaining these impacts in detail).

These opinions about the adverse effects that the new regulations will cause are not just from Plaintiff's expert scientists. Again, BLM's own ARC-DEIS team advised that the regulations would adversely affect fish and wildlife, including listed species, based on similar analysis. *Campbell Decl., ¶¶ 24-25; Carter Decl., Exh. 7.* The U.S. Fish and Wildlife Service,

the Nevada Department of Wildlife (NDOW), and a group of leading academic scientists similarly advised BLM of these adverse effects. *See Carter Decl., Exhs. 2-5.*

For example, Fish and Wildlife Service noted that "[e]xtending the deadline for initiating an appropriate course of action to make remedial changes in grazing practices that significantly contribute to an allotment's failure to meet rangeland health standards from 12 to 24 months **could be extremely detrimental to long-term range health and fish and wildlife resources."** *See Carter Decl., Exh. 2, p. 13* (emphasis added). The Service also noted that if "ESA consultation is required, a 2-year hiatus of action following a conclusion of failing standards could result in detrimental consequences for the species in question. . . . Extending the deadline for action to 2 years may result in a required ESA consultation being postponed, with **adverse consequences to federally listed species** or their habitat." *Id.* (emphasis added). The Service concluded that that regulation changes "**could have profound impacts on wildlife resources**." *Id.* (emphasis added).

Yet despite this outpouring of scientific analysis about the adverse effects which the new regulations will have for endangered and threatened species, BLM continues to insist they pose "no effect" whatsoever; and hence refuses to consult under ESA Section 7. Because BLM has violated Section 7 both procedurally and substantively in this course of action, as explained below, an injunction is required pursuant to the ESA.

ARGUMENT

I. ESA SECTION 7's "NO JEOPARDY" AND CONSULTATION MANDATES.

The Supreme Court has described the ESA as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *TVA v. Hill*, 437 U.S. 153, 180 (1978). "The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend

toward species extinction, whatever the cost." *Id.*, at 184. The ESA reflects "a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." *Id.*, at 185.

To serve these goals, ESA Section 7(a)(2) imposes the substantive duty that every federal agency "shall . . . 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 their critical habitat. *See* 16 U.S.C. § 1536(a)(2). *See also Defenders of Wildlife v. EPA*, 420 F.3d 946, 950-52 (9th Cir. 2005), *rehrg en banc denied* (discussing Section 7(a)(2) substantive requirements).

To help satisfy this "no jeopardy" mandate, ESA Section 7 also establishes procedural requirements that agencies must consult with the U.S. Fish and Wildlife Service (or NOAA Fisheries Service, for marine species) on the impacts of any federal action to listed species or their critical habitat, utilizing the "best scientific and commercial data available." *See* 16 U.S.C. § 1536(a)(2)-(c); 50 C.F.R. § 402 et seq. (ESA consultation regulations). *See also Defenders of Wildlife, supra,* 420 F.3d at 950-52; *Thomas v. Peterson,* 753 F.2d 754, 763-64 (9th Cir. 1985) (both discussing ESA consultation process).

This consultation process has three basic steps. First, Section 7(c)(1) requires that an agency must inquire of the Service whether any threatened or endangered species "may be present" in the area of a proposed action. 16 U.S.C. § 1536(c)(1). Second, if the answer is yes, the agency "shall" prepare a Biological Assessment (BA) to determine whether any listed species "is likely to be affected by the action." *Id.*; 50 C.F.R. § 402.12. Third, if the BA determines that the action "may affect" a threatened or endangered species, then the agency must initiate a process of "formal consultation" with the Service, which is concluded (with certain exceptions)

through issuance of a separate Biological Opinion by the Service. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14; *Thomas, supra.*

Under this framework, federal actions that "may affect" a listed species may not proceed unless and until the federal agency ensures – through preparation of a BA and completion of the consultation process – that the action will not cause jeopardy. *See* 16 U.S.C. § 1536(a)(2)-(c); 50 C.F.R. §§ 402.14, 402.13; *Connor v. Burford,* 848 F.2d 1441, 1455 (9th Cir. 1988), *cert. denied,* 489 U.S. 1012 (1989).

II. BLM HAS VIOLATED ESA SECTION 7 BY FAILING TO CONSULT AND ENSURE THE NEW GRAZING REGULATIONS WILL NOT JEOPARDIZE LISTED SPECIES.

BLM has violated both its procedural and substantive duties under Section 7 here. Procedurally, it has violated Section 7 by refusing to consult over the new grazing regulations (or to reinitiate consultation conducted on the 1995 regulations), even though the regulations will adversely affect endangered and threatened species on BLM lands across the American West. Substantively, BLM has also violated Section 7, since it cannot ensure that its regulations will not jeopardize protected species or adversely modify their critical habitat, as required by ESA Section 7(a)(2). These points are explained below.

A. The Regulations Are Agency "Action" Under Section 7.

The term "action" under Section 7(a)(2) expressly includes the promulgation of agency regulations. Hence, the Section 7 "no jeopardy" and consultation duties apply to BLM's issuance of the new grazing regulations. *See* 50 C.F.R. § 402.02 ("action" means "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies. . . . Examples include, but are not limited to . . . (b) the promulgation of regulations").

Indeed, courts have repeatedly held that agency regulations or rulemakings are subject to Section 7's requirements, and enjoined them when an agency has failed to consult. *See Washington Toxics Coalition v. EPA*, 413 F.3d 1024 (9th Cir. 2005) (enjoining EPA rules registering pesticides for failure to conduct Section 7 consultation); *Defenders of Wildlife, supra*, 420 F.3d at 976 (enjoining EPA rule to delegate Clean Water Act permitting authority for failure to consult); *National Wildlife Federation v. FEMA*, 345 F.Supp.2d 1151, 1166 (W.D. Wash. 2005) (holding that FEMA flood insurance regulations require consultation).

B. BLM Is Required To Consult Under Section 7, Because The New Grazing Regulations "May Affect" Listed Species.

Again, ESA Section 7 requires consultation if an action "may affect" an endangered or threatened species. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14; *Thomas, supra.* This "may affect" threshold is a low one indeed: "Any possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the formal consultation requirement." 51 Fed. Reg. 19926, 19949 (June 3, 1986) (emphasis added). *See also* Endangered Species Consultation Handbook, at xvi (defining "may affect" as "the appropriate conclusion when a proposed action may pose **any** effects on listed species").[3]

As the discussion above demonstrates, the new grazing regulations certainly cross the "may affect" threshold, thus requiring Section 7 consultation. The record before the Court is overwhelming in showing that the new regulations will adversely affect endangered and threatened species, and their critical habitats. BLM itself recognized that its grazing regulations "may affect" listed species when conducted consultation over the 1995 regulations. And the changes made in the new regulations – to rollback or eviscerate key parts of the 1995 Rangeland

[3] The Consultation Handbook, which was jointly adopted by the Services, is available at http://www.fws.gov/endangered/consultations/s7hndbk/s7hndbk.htm.

Reforms, exclude the public, and turn over greater ownership and control of public lands resources and grazing management to ranchers – will cause adverse impacts to listed fish and wildlife species – as recognized by BLM's own ARC-DEIS team, as well as other agencies and independent scientists. Even under BLM's analysis – though false – that the new regulations will supposedly improve wildlife and fish habitats on the public lands, the regulations "may affect" listed species, and hence BLM was required was required to consult.

Indeed, many cases confirm that the "may affect" consultation threshold is easily met, including when listed species are present in a project area, as they are here. "Once an agency is aware that an endangered species may be present in the area of its proposed action, the ESA requires it to prepare a [BA] to determine whether the proposed action is likely to affect the species and therefore requires formal consultation." *Thomas v. Peterson,* 753 F.2d 754 (9th Cir. 1985). *See also Pacific Rivers Council v. Thomas,* 30 F.3d 1050 (9th Cir. 1994) (finding that ESA consultation requirement was triggered because Forest Plans governed land management within salmon habitat).

This point is illustrated by a recent district court case rejecting EPA's refusal to consult over its registration of certain pesticides for effects on the threatened California red-legged frog. *See Center for Biological Diversity v. Leavitt,* 2005 WL 2277030 (N.D. Cal. 2005). The court held that plaintiff had the burden only of "demonstrat[ing] that there is <u>at least some question</u> about whether the pesticide registration would affect the frog." *Id., at * 3* (internal quotations omitted, emphasis added). Following *Thomas* and other cases, the court held this threshold is met where "an endangered or threatened species may be present in the area of the proposed action." *Id., at *4.* The court thus ordered EPA to initiate consultation over the impacts of pesticide registration on the frog.

Here, Western Watersheds has demonstrated that Section 7's procedural and substantive requirements apply to BLM's new grazing regulations, since endangered and threatened species (and their critical habitats) are present across the Western lands subject to grazing under the regulations; and the regulations "may affect" – indeed, will adversely affect – those listed species. By refusing to consult (or reinitiate consultation) over the new grazing regulations, BLM has thus violated its procedural and substantive duties under Section 7, warranting the entry of injunctive relief.

III. BLM'S "NO EFFECT" DETERMINATION IS ARBITRARY, CAPRICIOUS, AND CONTRARY TO THE ESA.

BLM will no doubt try to argue that its "no effect" determination excuses it from having to comply with the ESA here. *See Addendum, Appendix G.* But that argument deserves no credence from the Court, because the "no effect" determination misapplies the ESA's legal standards for determining when consultation is required; and is arbitrary and capricious in light of the extensive record showing that new grazing regulations will adversely affect listed species and their habitats.

The ESA regulations require that agencies analyze **all** direct and indirect effects of a proposed action, along with cumulative effects from other interrelated or interconnected actions. *See* 50 C.F.R. § 402.02 (defining "effects"). In doing so, the ESA requires that agencies "shall use the best scientific and commercial data available." *See* 16 U.S.C. § 1536(a)(2). BLM has met neither obligation here.

For one thing, BLM's "no effect" determination never even acknowledges that endangered and threatened species are present across the western public lands that will be governed by its new grazing regulations, much less try to assess what the direct and indirect impacts of the new regulations might be on those species. *See Addendum, Appendix G.* Instead,

the "no effect" determination simply reiterates BLM's mantra that the new regulations make only "administrative" changes that purportedly do not affect the substance of the 1995 regulations in any way. *Id.* BLM's failure to even acknowledge the presence of listed species thus alone reveals that its "no effect" determination violates the ESA.[4]

Moreover, BLM's "no effect" determination flouts the ESA's "best available science" requirement. As the Ninth Circuit has held, this requirement means that agencies cannot ignore relevant information, or refuse to analyze the likely adverse effects of agency actions on listed species. *See Conner, supra,* 848 F.2d at 1454 (in oil and gas leasing case, holding that agency "cannot ignore available biological information or fail to develop projections of oil and gas activities which may indicate potential conflicts between development and the preservation of protected species"). *See also Greenpeace Action v. Franklin,* 14 F.3d 1324, 1336 (9th Cir. 1993).

Yet that is exactly what BLM has done here, in rejecting the science that was presented to it showing that the new grazing regulations will harm fish and wildlife in many different ways, including listed species; and in refusing to candidly explore how the new regulations could affect BLM's grazing management and listed species.

Again, BLM was advised of these adverse effects by its own ARC-DEIS team, including the wildlife and fisheries biologists. *See Campbell Decl.,* ¶¶ *24-26.* It also received the same advice from other agencies – including Fish and Wildlife Service and NDOW – along with extensive comments and information to the same effect from independent scientists and conservation groups, including Western Watersheds. *See Carter Decl., Exhs. 1-7.*

[4] Indeed, courts have upheld "no effect" determinations only when **no** protected species occur within the project area. *See Defenders of Wildlife v. Flowers,* 414 F.3d 1066 (9th Cir. 2005) (upholding "no effect" determination because no threatened or endangered species found within project area); *Habitat Education Center v. Bosworth,* 363 F.Supp.2d 1090 (D. Wis. 2005) (same); *Forest Guardians v. U.S Forest Service,* 370 F.Supp.2d 978 (D. Ariz. 2004) (same).

For BLM to suppress and alter its own scientists' views in the ARC-DEIS, and reject all this scientific information, thus violates the ESA's command that BLM must rely on the "best available scientific information," and shows that the "no effect" determination is arbitrary, capricious, and contrary to law under the ESA. *Conner, supra.*

In summary, the overwhelming weight of the record before the Court demonstrates that the new grazing regulations will have adverse effects on ESA listed species across Idaho and the West; yet BLM has refused to engage in ESA consultation, based on a "no effect" determination that runs counter to the ESA and the record. BLM has thus violated the Section 7 consultation procedural requirements, as well as its substantive "no jeopardy" mandate.

IV. INJUNCTIVE RELIEF IS REQUIRED UNDER THE ESA.

The ESA specifically provides for injunctive relief over federal agency violations of ESA Section 7. *See* 16 U.S.C. § 1540(g)(1) (authorizing courts "to enjoin any person, including the United States . . . who is alleged to be in violation of any provision of this chapter or regulations issued under the authority thereof").

In enacting the ESA, Congress has also altered traditional injunction standards, directing that endangered and threatened species be afforded "the highest of priorities." *TVA v. Hill,* 437 U.S. at 194. Instead of the normal weighing of harms and interests, the ESA thus requires courts "to strike a balance of equities on the side of" protecting endangered and threatened species. *Id.; NWF v. Burlington Northern R.R.,* 23 F.3d 1508, 1511 (9th Cir. 1994) (following *TVA v. Hill* and holding that ESA altered traditional injunction standards).

As the Ninth Circuit ruled in another recent case where an agency failed to consult over a rulemaking, the "remedy for a substantial procedural violation of the ESA – a violation that is not technical or *de minimis* – **must therefore be an injunction** of the project pending

compliance with the ESA." *Washington Toxics Coalition v. EPA*, 413 F.3d 1024, 1034 (9th Cir. 2005) (emphasis added).

An injunction is similarly required here, because BLM's refusal to consult under ESA Section 7 represents a "substantial procedural violations" of the ESA, similar to *Washington Toxics*; and also violates the Section 7(a)(2) substantive mandate that BLM must ensure the new grazing regulations do not jeopardize listed species or adversely modify their critical habitats. Indeed, the Ninth Circuit has emphasized that strict compliance with the ESA's consultation procedures is vital to satisfy the "no jeopardy" mandate:

> The strict substantive provisions of the ESA justify more stringent enforcement of its procedural requirements, because the procedural requirements are designed to ensure compliance with the substantive provisions . . . If a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result. The latter is, of course, impermissible.

Thomas, 753 F.2d at 764.

In other cases, the Ninth Circuit has enjoined federal actions where – as here – the agency has not complied with the consultation requirements of ESA Section 7. *See Sierra Club v. Marsh*, 816 F.2d 1376, 1389 (9th Cir. 1987); *Thomas*, 753 F.2d at 765; *Lane County Audubon Soc'y v. Jamison*, 958 F.2d 290, 295 (9th Cir. 1992); *NRDC v. Houston*, 146 F.3d at 1129; *NWF v. NMFS*, 422 F.3d 782 (9th Cir. 2005); *Defenders of Wildlife*, 420 F.3d at 978-79 (all enjoining federal rules or projects based on ESA Section 7 violations).

In short, an injunction is required because BLM has violated ESA Section 7 both procedurally and substantively, in refusing to consult over the new grazing regulations. The evidence here – including the conclusions of BLM's own ARC-DEIS biologists, the U.S. Fish and Wildlife Service, the Nevada Department of Wildlife, and Plaintiff's experts – demonstrates that the new grazing regulations **will** harm threatened and endangered species and their habitat,

thus compelling issuance of an injunction preventing the regulations from taking effect. *See House, Fite, Campbell, Carter, and Marvel Declarations.*

CONCLUSION

Western Watersheds respectfully prays that the Court enjoin implementation of BLM's new grazing regulations, based on the ESA violations discussed above; as well as the NEPA violations separately addressed.

Dated: July 12, 2006 Respectfully submitted,

_/s/ Laird J. Lucas_____
Laurence ("Laird") J. Lucas (ISB #4733)
Attorney for Plaintiff