



January 16, 2009

VIA U.S. CERTIFIED MAIL, RETURN RECEIPT REQUESTED

William A. Wood, Forest Supervisor  
Salmon-Challis National Forest  
1206 So. Challis Street  
Salmon, ID 83467

Jack Whitworth  
Whitworth Ranches, Inc.  
HC 62 Box 2120  
May, ID 83253

**Re: Notice of Intent to Sue For Violations of the Endangered Species Act Regarding the Snake River Spring/Summer Chinook Salmon, Upper Snake River Steelhead, and Upper Columbia River Bull Trout from Livestock Grazing on the Camas Creek Allotment**

Dear Supervisor Wood and Mr. Whitworth:

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 the Forest Service’s authorization of livestock grazing on the Salmon-Challis National Forest’s Camas Creek allotment and Mr. Whitworth’s livestock operations on that allotment.

As explained below, the Camas Creek allotment contains streams that are inhabited by three species of fish listed as threatened under the ESA. The Forest Service has wholly failed to meet its obligations under the ESA by repeatedly authorizing livestock grazing on this allotment despite over ten years’ worth of data finding that the grazing is causing great harm to and ongoing take of these threatened fish species, as well as adverse modification to their critical habitat. The Forest Service has also failed to complete its required ESA consultation on the allotment. Jack Whitworth of Whitworth Ranches, Inc., permittee for the Camas Creek allotment, has also caused unlawful “take” of these threatened fish.

### **BACKGROUND**

Camas Creek is a tributary to the Middle Fork Salmon River, and is home to populations of Snake River spring/summer Chinook salmon, Snake River Basin steelhead, and Upper Columbia River bull trout, all listed as threatened species under the ESA. A large portion of the drainage is located within the Frank Church-River of No Return Wilderness.

The Snake River spring/summer Chinook salmon was listed as threatened in 1992. Camas Creek and its tributaries serve as designated critical habitat for this species. The Camas

Creek population remains depressed compared to historic levels, but the National Marine Fisheries Service (“NMFS”) considers this population exceedingly important for recovery of the species because it is wild and indigenous without any direct influences of hatchery fish that would alter the genetic make-up of this population. Chinook spawn in the Camas Creek watershed from late July through September, and the fry emerge from February through April.

The Snake River Basin steelhead was listed as threatened in 1997. Camas Creek and its tributaries serve as designated critical habitat for this population as well. Wild populations are significantly depressed from historic levels, and the Camas Creek population is again particularly important for recovery because it is part of a genetically unique population with no indication of hatchery influence. Steelhead migrate to the watershed in February and spawn from mid-March through mid-June. Fry emerge by mid-July.

The Upper Columbia River bull trout was listed as threatened in 1998. Camas Creek and its tributaries host both fluvial and resident populations of bull trout. Fluvial bull trout from the Camas Creek watershed are wide ranging, migrating downstream from small tributaries to larger rivers and then back during the course of the year. Compared to other salmonids, bull trout have more specific habitat requirements that appear to influence their distribution and abundance: they need colder water to survive, so they are seldom found in waters where temperatures exceed 59-64° F. The Camas Creek watershed is considered a core conservation area for bull trout and vital for the species’ recovery. Bull trout spawn from September to October, and fry emerge from April to May.

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. A single trampling incident can kill a majority of those eggs, as well as causing non-lethal take. For this reason, biologists strongly caution that livestock should not have direct access to streams, particularly during spawning periods.

The Camas Creek allotment straddles Camas Creek and encompasses portions of the Wilderness. Livestock grazing on the allotment is inherently risky because of the presence of all three listed fish species in Camas Creek and its tributaries. Due to the different, overlapping life cycles of the fish, Forest Service biologists have noted that there is essentially *no time* when salmonids are not spawning or eggs are not incubating in the gravels of Camas Creek. Furthermore, the vast majority of the creek is unfenced and accessible to livestock, making the redds vulnerable to trampling. A single 23-acre enclosure on mainstem Camas Creek, known as the Meyer’s Cove enclosure, was erected to protect critical spawning grounds; however, livestock trespass within it so regularly that NMFS personnel have stated that the Forest Service has essentially unlawfully converted the spawning grounds enclosure to a riparian pasture.

For the past ten years, the available evidence has demonstrated conclusively that grazing the Camas Creek allotment is incompatible with recovery of the listed fish species and protection of their habitat; and that the Forest Service is wholly unable to manage grazing in the Camas Creek allotment to avoid adverse impacts to the listed fish and their habitats. The permittee is required to keep livestock out of the streams, particularly during spawning. However, violations of standards and/or livestock trespass in the Camas Creek streambed, the streambeds of its tributaries, and the Meyer's Cove enclosure during spawning periods have occurred *every year*, despite knowledge of the problem by Forest Service and outside biologists, repeated warnings to the permittee, construction of various fences, and alterations to the livestock rotation schedule.

In 1999, the Forest Service documented that livestock trespassed within Camas Creek numerous times in the spawning months of August, September, and October. The violations included evidence that the permittee's riders did not move the livestock in accordance with the annual instructions, including by driving a large group of livestock across Camas Creek without using a hardened ford site. Records for 2000 indicate numerous instances of livestock trespassing within the Meyer's Cove enclosure and in Camas Creek during spawning. At the end of the 2000 season, the Forest Service sent a letter to Whitworth threatening a partial permit suspension because stubble height standards were violated along main Camas Creek, meaning that livestock had excessively grazed the riparian area; because excess use occurred in the West Fork Unit; and because "cattle continue to breach the enclosure at Meyer's Cove." The Forest Service subsequently decided against the suspension. Records for 2001 indicate that livestock trespassed in Camas Creek several times again.

From 2002 to 2005, Forest Service researchers from the Rocky Mountain Research Station were present on Camas Creek for much of the Chinook spawning period conducting research on redds. In all four years, they extensively documented livestock trespass in the streambed of Camas Creek during spawning. In particular, trespass was severe in upper Camas Creek. Records indicate they repeatedly reported trespass incidents to the Forest Service, but that the livestock often remained in trespass for days to weeks. In 2005, livestock trespassed in spawning grounds in upper Camas Creek at least five times, and a field technician witnessed and photographed livestock crossing Camas Creek directly over a Chinook salmon redd, prompting NMFS to threaten criminal prosecution against the Forest Service and Whitworth.

The violations continued despite a new strategy proposed in winter 2006, consisting of minor adjustments to pasture dates, which the Forest Service admitted would still allow livestock-redd conflicts to occur. In 2006, there were numerous reports of livestock inside the Meyer's Cove enclosure, including one report of over 30 pair, and many other trespass incidents in Camas Creek and Castle Creek. In 2007, livestock were again reported to be inside the Meyer's Cove enclosure; there were several other instances of livestock being in a unit at an unauthorized time; and grazing caused several violations of stubble height standards. In 2008, trespass occurred again, including trespass inside the Meyer's Cove enclosure during spawning season, as well as in Camas Creek and Lower Silver Creek.

In summary, the Forest Service has a pattern of authorizing livestock grazing that yearly results in violations and/or trespass in Camas Creek, its tributaries, and the Meyer's Cove enclosure during spawning and at other times when eggs are incubating and fish are present.

Agency documents indicate that these violations and trespass incidents cause harm to and take of the listed fish and their critical habitat. Yet neither the Forest Service nor the permittee has ever taken any effective action to halt the violations and trespass.

The Forest Service has unlawfully failed to use the required ESA consultation process to rectify the problems on the Camas Creek allotment. A badly-outdated Chinook salmon consultation occurred in 1998. No consultation has ever been completed for steelhead and bull trout in the more than ten years that they have been listed under the ESA.

The Forest Service did consult with NMFS and the Fish and Wildlife Service (jointly, “the Services”) on a Camas Creek Watershed consultation that was to consider all ongoing Forest Service activities within the watershed. This consultation originally encompassed the Camas Creek allotment. Consultation records make clear the highly controversial nature of the Camas Creek allotment, with biologists noting that it causes unacceptable levels of take of listed fish, and identifying the allotment as the most harmful action for listed fish in the watershed.

However, the Camas Creek allotment was removed from that consultation process in 2005, based on a reassurance from the Forest Service that grazing would not occur on the allotment that year—a reassurance that turned out to be false. In 2006, the watershed consultation was completed, without consideration of the Camas Creek allotment. The Camas Creek allotment consultation has never been completed. Incredibly, the Forest Service has continued to authorize grazing on the allotment every year, despite the controversial nature of the allotment and the annual, well-documented harm to the listed fish and their habitat. The permittee has likewise continued to graze livestock on the allotment every year, causing unlawful take of the listed fish.

## **VIOLATIONS OF THE ENDANGERED SPECIES ACT**

### **1. Violation of Consultation Requirement**

The ESA requires land management agencies to consult with the Services on actions “authorized, funded, or carried out by such agency.” 16 U.S.C. § 1536(a)(2). The Forest Service’s authorization of livestock grazing is such an action. *See Forest Guardians v. Johanns*, 450 F.3d 455 (9th Cir. 2006). If the land management agency determines that an action is likely to adversely affect a listed species, the Services must issue a biological opinion to determine whether the action is likely to jeopardize the continued existence of the species or impair its recovery, or adversely modify its critical habitat. *See* 50 C.F.R. § 402.14. In addition, if “take” of the species may occur that is incidental to the action and will not violate § 7(a)(2), the Services shall provide an incidental take statement (“ITS”). *See* 16 U.S.C. § 1536(b)(1)(4); 50 C.F.R. §§ 402.14(g)(7), 402.14(i). The agencies have an ongoing duty to insure that their consultation requirements remain satisfied, and consultation must be reinitiated when (1) the amount or extent of take specified in the ITS 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 Forest Service has acknowledged that consultation is required for the Camas Creek allotment, including by initially including the allotment as part of the watershed consultation. However, as noted, the agencies ultimately completed the watershed consultation without addressing the allotment. The Forest Service's failure to conduct and complete consultation over authorization of livestock grazing on the Camas Creek allotment with respect to steelhead and bull trout is a violation of the § 7(a)(2) consultation requirement. The Forest Service's failure to conduct and complete a reinitiated consultation on the badly-outdated Chinook salmon consultation is a violation of both the § 7(a)(2) consultation requirement and the reinitiation requirements of 50 C.F.R. § 402.16, due to factors including but not limited to: new information regarding the status of the species and its critical habitat, failure to consider recovery, likely exceedance of the take authorized in the prior consultation, and not meeting legal requirements for consultations and ITSs (including specifying take limits and ensuring recovery). There is every indication that the Forest Service will again violate § 7(a)(2) in 2009 and future years by continuing to authorize livestock grazing on the Camas Creek allotment without completion of adequate consultation for any of the three listed fish species, causing irreparable harm. Accordingly, WWP intends to bring suit and seek injunctive, declaratory and/or other relief to prevent further unlawful actions and irreparable harm from occurring this year and future years.

## **2. Violation of Prohibition on Commitment of Resources**

The ESA 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). Courts have consistently stated that 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 particular, the District Court of Idaho has interpreted § 7(d) to mean the 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. *Pacific Rivers Council v. Thomas*, 936 F.Supp. 738 (D. Id. 1996).

To the extent the Forest Service has initiated consultation, its decisions to authorize livestock grazing on the Camas Creek allotment over the past ten years, and its anticipated decision to do so in 2009 and future years before completion of consultation, is a violation of § 7(d). The authorized livestock grazing, and the violations and trespass that result, have well-documented, irreversible adverse impacts on the listed fish species and their habitat. There is every indication that the Forest Service will again violate § 7(d) in 2009 and future years by authorizing livestock grazing on the Camas Creek allotment before completion of adequate consultation for any of the three listed fish species, causing irreparable harm. Accordingly, WWP intends to bring suit and seek injunctive, declaratory and/or other relief to prevent further unlawful actions and irreparable harm from occurring this year and future years.

### **3. Violation of Prohibition Against Jeopardy and Adverse Modification of Critical Habitat**

The ESA requires the Forest Service to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [designated critical] habitat.” 16 U.S.C. § 1536(a)(2). In its decisions authorizing livestock grazing on the Camas Creek allotment over the past ten years, and its expected continuing authorizations in 2009 and future years, the Forest Service has failed to meet this duty, in violation of ESA § 7(a)(2). The Forest Service continues to allow grazing to occur on this allotment despite evidence from every year since 1999 that the permittee has violated the terms of his grazing authorization, allowing cows to access and damage streams with listed fish on a repeated basis. The Forest Service’s reliance on the permittee to protect these fish is wholly unfounded and does not insure against jeopardy of the species or adverse modification of their critical habitat.

Moreover, the Forest Service has never considered whether the impacts from the authorized grazing would reduce appreciably the likelihood of both survival and recovery of the species, as is required to insure that the activity will not jeopardize the species or adversely modify its habitat. 50 C.F.R. § 402.02. In doing so, the Forest Service has failed to rely on the best available science. 16 U.S.C. § 1536(a)(2). The Forest Service has also failed to consider the impacts to critical habitat in the context of the life cycles of the listed fish species. In light of the Forest Service’s failure to analyze these factors and others, combined with the extensive evidence that grazing is harming these fish populations and their critical habitat, the Forest Service has repeatedly violated § 7(a)(2) over the past ten years, and there is every indication that the Forest Service will again do so in 2009 and future years by authorizing livestock grazing on the Camas Creek allotment.

### **4. Violation of Prohibition Against Take**

Under § 9 of the ESA, it is unlawful for any person to “take” an endangered species. 16 U.S.C. § 1538(a)(1)(B). Take is defined by statute 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. *Id.* § 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.* The Services have adopted regulations pursuant to ESA § 4(d) which prohibit unlawful “take” of the listed fish species in Camas Creek, as defined above; and hence any take in violation of these definitions is a violation of ESA §§ 4(d) and 9, and their implementing regulations.

Records indicate that biologists from NMFS, FWS, and the Forest Service agree that livestock grazing in the Camas Creek allotment has a pattern of causing take of listed Chinook salmon, steelhead, and bull trout, and that both the Forest Service and Whitworth have been well

aware of this for years. There can be no serious scientific or factual dispute that, in fact, the livestock grazing in Camas Creek is causing, and will continue to cause, unlawful take of the listed fish species in many different ways, including direct impacts causing mortality or injury of the listed fish (such as trampling of redds which kills eggs and fry, as noted above), and through adverse habitat modification that likewise causes mortality or injury of the listed fish (including the adverse habitat impacts described above).

By authorizing livestock grazing to occur on the Camas Creek allotment, the Forest Service is responsible for causing take of listed species to recur every year, in violation of the ESA. Furthermore, by grazing livestock on the Camas Creek allotment, Jack Whitworth and Whitworth Ranches, Inc. are also causing unlawful take of the listed species. None of the ongoing take is authorized by a valid ITS. In light of the well-documented adverse impacts on listed fish associated with livestock grazing and trampling on this allotment, the Forest Service, Jack Whitworth, and Whitworth Ranches, Inc. are liable for the take of the listed fish that results from the authorization, facilitation, and implementation of the livestock grazing that raises a reasonably certain threat that take is imminent. There is every indication that the pattern of take to the three listed fish species will continue in 2009 and future years, and accordingly WWP intends to bring suit to prevent further unlawful take and irreparable harm to the listed fish.

#### **PARTY GIVING NOTICE**

The address and phone number of the party giving notice is as follows:

Western Watersheds Project  
Jon Marvel, Executive Director  
P.O. Box 1770  
Hailey, ID 83333  
(208) 788-2290

#### **RELIEF DEMANDED**

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 Forest Service immediately close the Camas Creek allotment to any further livestock grazing, until such time as ESA consultation may have been completed and the agency can ensure – beyond any reasonable doubt – that no further harm will occur to the listed fish species and their habitat. In addition, Mr. Whitworth and Whitworth Ranches, Inc. must agree not to graze the Camas Creek allotment in 2009 or future years, including by ensuring there will be no trespass of livestock whatsoever in the allotment.

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,



Kristin F. Ruether

*Advocates for the West*

Attorney for Western Watersheds Project

cc:

Chief Abigail Kimbell  
USDA Forest Service  
1400 Independence Avenue, SW  
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Secretary Dirk Kempthorne  
U.S. Department of the Interior  
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Secretary Carlos Gutierrez  
U.S. Department of Commerce  
1401 Constitution Avenue, NW  
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Secretary Ed Schafer  
U.S. Department of Agriculture  
1400 Independence Avenue, SW  
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