

March 18, 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 the Snake River Spring/Summer Chinook Salmon, Snake River Basin Steelhead, and Upper Columbia River Bull Trout Within The Lemhi 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 salmon, steelhead, and bull trout in the Lemhi River watershed.

As explained below, salmon, steelhead, and bull trout are all listed as threatened species under the ESA and continue to struggle in the Lemhi River basin. Your agencies have responsibilities to protect and recover these species and their habitat, yet have failed to fulfill those responsibilities due to inadequate management practices and consultation processes that are not sufficient to prevent jeopardy and take of these fish throughout the watershed.

## **BACKGROUND**

### **Listed Species**

The Lemhi River is a tributary to the Salmon River, and provides habitat for 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. Bull trout are also found in many tributaries to the Lemhi River, and the Hayden Creek sub-watershed contains Chinook salmon and steelhead as well.

The Snake River spring/summer Chinook salmon was listed as threatened in 1992. The Lemhi River and its tributaries serve as designated critical habitat for this species. Chinook spawn in the Lemhi watershed from mid-August through September, and the fry emerge from February through June. The number of Chinook salmon in the Lemhi River watershed remains depressed compared to historic levels, and the recent status review for the species released in 2005 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. The Lemhi River and numerous tributaries, including Texas Creek, Purcell Creek, Big Eightmile Creek, Hayden Creek, Bear Valley Creek, East Fork Hayden Creek, Kadletz Creek, West Fork Hayden Creek, Wright Creek, Kenney Creek, Wimpey Creek, Withington Creek, and Bohannon Creek, serve as designated critical habitat for this population. Steelhead migrate to the watershed in fall, overwinter there, and spawn in spring, with fry emerging in summer. Wild steelhead populations are significantly depressed from historic levels, and again the recent status review from 2006 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.

The Upper Columbia River bull trout was listed as threatened in 1998. The Lemhi River and its tributaries host both fluvial and resident populations of bull trout, but some tributary populations are entirely cut off from the Lemhi River due to dewatering of the stream from irrigation diversions. 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. Bull trout spawn from mid-August to October, and fry emerge in the spring. The 2008 status review for this species ranked the Lemhi River core area as having “substantial, imminent threats,” and categorized it as being “at risk” because of “very limited and/or declining numbers, range, and/or habitat, making the bull trout in this core area vulnerable to extirpation.” The status review

determined that the Upper Columbia River bull trout warranted a continued listing as threatened under the ESA.

### **Consultation History**

The BLM and Forest Service each originally consulted on impacts of management activities, primarily livestock grazing, on Chinook salmon within the Lemhi watershed in 1992 and 1994 respectively. NOAA Fisheries issued letters of concurrence that the ongoing activities in the watershed were not likely to adversely affect the salmon. In 1999, BLM and Forest Service submitted a joint Biological Assessment for the Lemhi watershed covering impacts of ongoing management activities on Snake River steelhead, again with much of that activity consisting of livestock grazing. NOAA Fisheries issued another letter of concurrence that the activities were not likely to adversely affect Snake River steelhead or Chinook salmon, or any designated or proposed critical habitat. This letter stated that the actions had a consultation expiration date of January 15, 2003. Since 1999, no further consultation over steelhead or salmon for the Lemhi River watershed has been completed. The Forest Service and BLM submitted another joint watershed Biological Assessment to NOAA Fisheries in 2003 but NOAA Fisheries did not accept that Assessment because it lacked a significant amount of information necessary for a complete analysis of impacts to the species. Further drafts of the Assessment were also rejected because of insufficient data and analysis. In 2005, the agencies halted the consultation process and NOAA Fisheries sent a letter stating that the expiration date in the 1999 letter of concurrence was eliminated. Thus, the 1999 consultation is still the effective consultation for salmon and steelhead in the Lemhi basin.

The agencies followed a similar path for bull trout. The BLM and Forest Service submitted a joint Biological Assessment to U.S. Fish and Wildlife Service in 1999 for impacts of management activities in the Lemhi River watershed on bull trout, emphasizing livestock grazing. Fish and Wildlife Service concurred that most of the ongoing activities were not likely to adversely affect bull trout, but that livestock grazing on the Hawley Creek allotment was likely to adversely affect the species. Fish and Wildlife Service therefore issued a Biological Opinion covering grazing on the Hawley Creek allotment. In 2003, BLM and Forest Service submitted the same joint Biological Assessment to Fish and Wildlife Service that they submitted to NOAA Fisheries, which covered all of the listed fish species. Contrary to NOAA Fisheries, Fish and Wildlife Service accepted this Biological Assessment, and issued a concurrence letter finding that the activities, all but four of which were grazing allotments, were not likely to adversely affect bull trout, but that the Hawley Creek allotment continued to be governed by the 1999 Biological Opinion. Since then, no further consultation documents for the watershed have been issued.

In addition to these consultations over ongoing management activities in the Lemhi watershed, the Forest Service is also consulting with Fish and Wildlife Service and NOAA Fisheries over water diversions on its land. This consultation stems from a lawsuit brought by Western Watersheds Project that resulted in a 2001 settlement agreement, whereby the Forest Service agreed to initiate consultation over water diversions that occur on Forest Service land. Originally, the agencies contemplated including the water diversions and other ongoing management actions in one new comprehensive consultation, but then decided to separate the

actions and conduct a separate consultation for the water diversions. The Forest Service submitted a Biological Assessment in January 2005 for the water diversions in the Lemhi watershed, but NOAA Fisheries and Fish and Wildlife Service have never completed the consultation.

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

### **I. Consultations Over Ongoing Management Activities**

#### **A. Violations Pertaining to Salmon and Steelhead**

The Forest Service, BLM, and NOAA Fisheries completed a watershed consultation in 1999 for Snake River Chinook salmon and steelhead covering ongoing activities throughout the Lemhi basin to comprehensively assess impacts of management actions across the watershed, as is necessary to fully analyze effects to the Lemhi River populations of Chinook salmon and steelhead. These consultations, however, are now woefully outdated and must be replaced with new analyses that update the existing baseline conditions and consider new information and circumstances that have arisen since the 1999 consultation.

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 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 this requirement because they have failed to reinitiate consultation for the Lemhi watershed.

Reinitiation is required for the Lemhi basin for many reasons. First, NOAA Fisheries designated critical habitat for Snake River steelhead in 2005, and the Lemhi River and several of its tributaries are listed as such. Therefore, the agencies need to reinitiate consultation to consider impacts of the ongoing activities in the basin to this newly designated critical habitat, as stated explicitly in the regulations.

Second, BLM and Forest Service are not conducting the actions as described in the 1999 Biological Assessment and letter of concurrence, and thus the assumptions that NOAA Fisheries relied upon for its concurrence that the actions were not likely to adversely affect the threatened fish are no longer valid. For instance, the Biological Assessment for salmon and steelhead in the Lemhi watershed discusses the monitoring the agencies conduct to assess riparian and instream conditions and thus impacts of livestock on those streams, but the Forest Service and BLM have not consistently completed this monitoring, even for streams that contain listed fish.

Furthermore, NOAA Fisheries' letter of concurrence stated that the agencies' actions comply with the direction in PACFISH and land management plans, but since then many of the requirements in PACFISH and the biological opinions that govern the amendment of land management plans with PACFISH ("LRMP biops") have been ignored, including the

requirement to update the environmental baseline every two years, standards related to livestock grazing, and monitoring requirements. Because BLM and the Forest Service have not updated the environmental baseline, they have not considered changes to the existing conditions in the watershed such as natural occurrences (fires, drought, floods, etc.), or man-induced changes (weed invasions, changes in roads and trails, increased ORV use, water diversions, construction of water developments and pipelines, changes in grazing practices, timber sales, mining projects, etc.). Certainly changes have occurred in the watershed over the past ten years that may impact salmon and steelhead populations, and thus these changes need to be reflected in an updated environmental baseline to accurately determine the effects of ongoing activities. PACFISH and the LRMP biops also call for a variety of monitoring, including implementation, effectiveness, and validation monitoring, which the Forest Service and BLM have not adequately conducted for the streams in this watershed. And the little monitoring the agency has done showed repeated livestock use violations and trespass incidents in streams with salmon and steelhead. PACFISH also prohibits livestock grazing that adversely affects listed fish or that retards attainment of certain Riparian Management Objectives, but the agencies do not even monitor to determine whether conditions are meeting or moving toward most of these Objectives. Because the Forest Service and BLM are not living up to their responsibilities under PACFISH and their own monitoring protocols, as assumed they would in the 1999 Lemhi consultation, the agencies need to reinitiate the consultation to address this change in circumstances.

Third, new information about effects to salmon and steelhead in the Lemhi basin also warrants reinitiation of consultation. Recent scientific information on the continuing precarious status of the species, the effects of global warming and likelihood of increasing drought in the West, and the impacts of livestock water developments on the hydrology of watersheds are among some of the new critical pieces of information that must be considered to reassess impacts of grazing and other activities on the listed salmon and steelhead and their critical habitat. Failure to consider this information also violates the ESA's requirement to rely on the best available scientific information. 16 U.S.C. § 1536(a)(2). Because the 1999 consultation is badly outdated, the agencies need to conduct a new consultation to incorporate and address the changed circumstances in the watershed and new information that exists regarding effects to the species from activities in the watershed.

NOAA Fisheries recognized the need to update these consultations by including an expiration date of January 15, 2003 in its letter of concurrence, but then arbitrarily eliminated this expiration date when the agencies could not agree on an acceptable Biological Assessment. The failure to complete this reinitiation process violates the ESA for all the reasons stated above. Moreover, a comprehensive watershed consultation is necessary to fully address the impacts of all agency activities on the Lemhi populations of salmon and steelhead, including **all** grazing allotments that occur on BLM and Forest Service land within the Lemhi watershed. Individual consultations over site-specific projects cannot substitute for this holistic assessment.

Finally, because the Forest Service and BLM are continuing to rely on a consultation that is now stale and inadequate to consider current impacts to salmon and steelhead from their ongoing activities, they are not insuring that their actions are not likely to jeopardize these species or adversely modify their critical habitat, and therefore are violating section 7(a)(2) of the ESA. 16 U.S.C. § 1536(a)(2). This provision to prevent jeopardy entails insuring that the

agencies' actions are not impairing the survival **or** the recovery of the species. Livestock grazing in the Lemhi watershed on both BLM and Forest Service land continues to degrade stream systems and riparian areas on many grazing allotments, adversely affecting the species and critical habitat. Until the agencies complete a new consultation, they must comply with the requirement to avoid jeopardy to the species and adverse modification to their critical habitat, as well as the requirement under section 7(d) to avoid 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. 16 U.S.C. § 1536(d).

## **B. Violations Pertaining to Bull Trout**

### **1. Hawley Creek Allotment**

The Forest Service Hawley Creek allotment is still managed under the 1999 Biological Opinion from Fish and Wildlife Service. The Forest Service and Fish and Wildlife Service need to reinitiate consultation over this allotment because the Forest Service is not meeting the terms of the Opinion and is allowing livestock grazing to continue to degrade riparian habitat and streams on the allotment that contain bull trout, impairing the survival and recovery of this threatened species.

The 1999 Biological Opinion describes degraded riparian conditions in numerous drainages on the allotment caused by livestock grazing. This degradation consists of streambank instability, channel sloughing, sediment delivery to streams, stream widening, riparian soil compaction and hummocking, damage to woody shrubs, and a shift in riparian species from deep-rooted hydric species that provide bank stability to early seral, shallow rooted species that provide less stability and water retention. Bull trout exist in several drainages on this allotment, but at very low numbers, and the species has not significantly increased its population on the allotment over the last ten years. This population is isolated from the Lemhi River because Hawley Creek no longer connects to the Lemhi due to irrigation diversions. Therefore, this population will recover only if the conditions on the allotment improve substantially.

The Biological Opinion and accompanying Incidental Take Statement set forth numerous requirements, terms, and conditions regarding livestock grazing and monitoring to improve the conditions on the allotment, but the Forest Service has failed to comply with many of those mandates. For instance, the Biological Opinion states that the Forest Service will use a 16-pasture, short-duration, high-intensity grazing system on the allotment with two full-time riders to reduce grazing pressure and prevent overuse, and thereby improve riparian conditions. But the Forest Service has modified this system so that it is using fewer pastures for longer durations.

The Opinion also requires monitoring of key areas for utilization and bank trampling to determine if grazing is meeting standards for these parameters, and protecting sensitive riparian and wetland areas. The Biological Opinion further mandates compliance with PACFISH and INFISH standards and guidelines, including standards to prevent adverse effects to bull trout and prohibit retarding attainment of Riparian Management Objectives. The Forest Service, however, is not satisfying these requirements of the Biological Opinion. It has failed to conduct much of

the necessary monitoring under the Opinion and PACFISH/INFISH, and the monitoring the Forest Service has completed shows numerous violations of utilization standards across the years at many key areas. Furthermore, the agency is not adequately protecting riparian and wetland areas from livestock damage. Many drainages on the allotment, including those with bull trout, continue to receive adverse impacts from livestock to streambanks, riparian vegetation, and instream fish habitat. Because the Forest Service is not meeting the requirements of the Biological Opinion or Terms and Conditions of the Incidental Take Statement, the agencies must reinitiate consultation.

Finally, this Biological Opinion is also stale and outdated like the salmon and steelhead consultation, and must be updated to consider the current environmental baseline, including new water developments and pipelines that have been constructed on the allotment, as well as new information on global warming, the continuing perilous status of bull trout in the sub-watershed, and the failure to meet all utilization standards on a consistent basis. The Forest Service is not relying on the best available science, as required under the ESA. 16 U.S.C. § 1536(a)(2).

In addition, by continuing to rely on a Biological Opinion that is no longer valid given the failure to meet its terms and conditions and its outdated status, the Forest Service is not insuring against jeopardy to the species, in violation of ESA section 7(a)(2). 16 U.S.C. § 1536(a)(2). Indeed, the paltry 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 of the Forest Service to comply with the Terms and Conditions of the Incidental Take Statement, combined with the access of livestock to streams with bull trout, particularly during spawning periods, also violates the ESA's prohibition on take of bull trout. 16 U.S.C. § 1538(a)(1)(B). Until the Forest Service and Fish and Wildlife Service fulfill their duty to complete a new consultation over this allotment, the Forest Service must not take any action that is likely to jeopardize or take this species, or 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. 16 U.S.C. § 1536(d).

## **2. Lemhi Watershed**

The remainder of the Lemhi watershed consultation for bull trout is covered by the 2003 joint BLM and Forest Service Biological Assessment and a letter of concurrence from Fish and Wildlife Service. Although this consultation is more recent than the 1999 salmon and steelhead consultation, it is still inadequate to continue to cover impacts to bull trout in the Lemhi watershed for many of the same reasons. Since 2003, the agencies have never updated the environmental baseline with new actions and natural occurrences in the watershed; they have failed to complete the expected monitoring on a consistent basis and the monitoring they have conducted shows repeated violations of livestock use standards across the watershed; they are not complying with requirements in INFISH or the LRMP biops, as expected; and they need to consider important new scientific information, including the recent status review of the species showing it "at risk" and in danger of "substantial, imminent threats" in this watershed, as well as global warming impacts. For these reasons, the agencies must reinitiate consultation under ESA regulations. 50 C.F.R. § 402.16.

A new consultation is also warranted because the 2003 consultation did not adequately include the information or analysis necessary to determine that the ongoing actions were not likely to adversely affect bull trout. As noted by NOAA Fisheries, the Biological Assessment did not contain an adequate description of the environmental baseline, nor did it contain enough information and analysis to support its conclusions that the actions were not likely to adversely affect threatened bull trout in the individual sub-watersheds or the Lemhi watershed as a whole. Again, the agencies are not using the best available science, contrary to direction in the ESA. 16 U.S.C. § 1536(a)(2).

And as with salmon and steelhead, by relying on an outdated and inadequate Biological Assessment and letter of concurrence, the agencies are violating their duty under the ESA to prevent jeopardy of the species. 16 U.S.C. § 1536(a)(2). Until a new consultation is completed covering ongoing activities in the watershed, including **all** BLM and Forest Service grazing allotments, they must not take any action that would impair the survival or recovery of bull trout populations in this watershed; and must avoid 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. 16 U.S.C. § 1536(d).

## **II. Consultation Over Water Diversions**

Apart from the consultations discussed above over ongoing agency activities, primarily addressing livestock grazing, the Forest Service is also consulting with Fish and Wildlife Service and NOAA Fisheries over water diversions on Forest Service land within the Lemhi watershed. The Forest Service submitted a Biological Assessment to the Services on January 13, 2005, finding that some of the diversions were likely to adversely affect threatened salmon, steelhead, and bull trout, but the Services have never completed consultation by issuing a Biological Opinion. This constitutes a failure to consult, in violation of ESA section 7(a)(2). 16 U.S.C. § 1536(a)(2). Moreover, the use of these water diversions continues, dewatering streams with listed fish and allowing fish to become entrained in ditches. Allowing the use of these diversions to continue prior to completing consultation violates the substantive provision of Section 7(a)(2) because the Forest Service has not insured that its actions are not likely to impair the survival or recovery of listed species or adversely modify their critical habitat. The Forest Service also is not complying with its duty to prevent take of species under Section 9, or its duty to prevent 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 under Section 7(d). 16 U.S.C. §§ 1538, 1536(d).

To properly assess the impacts of the water diversions and the non-diversion activities to the threatened salmon, steelhead, and bull trout, the agencies should include all of these actions in one comprehensive watershed consultation. If the agencies determine to keep the diversion and non-diversion actions separate, however, at a minimum they must discuss all of the water diversion information in the environmental baseline for the non-diversion consultation, and likewise discuss all of the non-diversion activities, including **all** BLM and Forest Service grazing allotments, in the environmental baseline of the diversion consultation. Including all of this

information in each consultation is the only way to conduct a proper, comprehensive assessment of the impacts to the species and their critical habitat, as required by 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,

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Lauren M. Rule  
*Advocates for the West*  
Attorney for Western Watersheds Project

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