



ADVOCATES for the **WEST**
Public Interest Environmental Law

January 26, 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

Diane Weaver, District Ranger
Lost River Ranger District
P.O. Box 507
Mackay, ID 83251

Re: **Notice of Intent to Sue For Violations of the Endangered Species Act Regarding Little Lost River Subpopulation of Columbia River Bull Trout from Livestock Grazing on the Pass Creek Allotment**

Dear Supervisor Wood and District Ranger Weaver:

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 Pass Creek allotment.

As explained below, the Pass Creek allotment contains streams that are inhabited by bull trout 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 data showing that the grazing is causing great harm to and ongoing take of bull trout.

BACKGROUND

The Little Lost River Subpopulation of Columbia River bull trout was listed as threatened in 1998. The northern part of the Pass Creek allotment contains several bull trout streams and their tributaries, including Wet, Big, Coal, Pine, and Basin Creeks. Wet Creek flows into the Little Lost River above the hamlet of Clyde. The allotment is inhabited by all life stages of bull trout, and spawning has been documented in Wet Creek between Coal Creek and the falls above Hilts Creek, as well as the upper portion of Big Creek. Bull trout spawn from August to October.

The Little Lost River Subpopulation is extremely imperiled. In its 1999 Little Lost River Bull Trout biological opinion (“BiOp”), the Fish and Wildlife Service (“FWS”) stated that the subpopulation was “greatly depressed” due to highly degraded habitat, excessive sedimentation, excessive water temperatures, and dewatering. BiOp at 19. FWS’s 2008 5-Year Review of bull trout assigns the subpopulation a threat rank of “substantial” and “imminent.”

In particular, FWS has noted that the streams within the Pass Creek allotment are in very poor condition for bull trout. The BiOp notes that “following decades of high intensity season-long grazing,” the Basin/Wet Creek watersheds have “extensive areas of degraded upland and riparian habitat.” BiOp at 25. And Basin Creek’s “stream and riparian area[s] show signs of excessive historic damage” including streambanks that are more than 80 percent unstable. *Id.* The Forest Service’s 2004 Bull Trout Status Report presents electrofishing data showing that bull trout density in Wet Creek plummeted from 12.2 to 0.3 fish per 100 m² between 1999 and 2002. Wet Creek is on the Idaho 303(d) list for sediment and temperature, and DEQ notes in its Little Lost River Subbasin TMDL that the upper reach (within the Pass Creek allotment) has the worst erosion rate and total erosion (producing an astounding 115 tons per year of sediment).

The BiOp explains that livestock grazing is extremely harmful to bull trout and one of the major causes of habitat degradation. The species’ key requirements are clean water, cold water, complex cover, and connected habitats. Livestock grazing degrades these crucial habitat requirements in many ways, including by causing compacted stream substrates, collapse of undercut banks, destabilized streambanks, removal of vegetation, widened streambanks, reduced pool frequency, incised channels, lowered water tables, increased sedimentation, and promotion of anchor ice in winter. *See* BiOp at 23–24. An additional way livestock can harm listed fish is by directly trampling redds (nests), which contain thousands of eggs. A single trampling incident can kill a majority of those eggs, as well as cause non-lethal take. For this reason, biologists strongly caution that livestock should not have direct access to streams, particularly during spawning periods.

The Pass Creek allotment is particularly susceptible to damage from livestock grazing because headwater areas such as Upper Wet Creek “remain moist through the growing season and are vulnerable to physical damage year round” and “are fragile, inherently unstable and more susceptible to livestock trampling and compaction.” BiOp at 22. Likewise, Basin Creek, “a degraded and entrenched stream, is sensitive to any amount of trampling.” *Id.* at 25. Thus, “[l]ivestock, *even when utilization standards are met*, have caused bank shearing, increased width to depth ratios from hoof-caused bank sloughing, and an increase in sediment delivery.” *Id.* at 22 (emphasis added). In short, FWS recognizes “*these areas are not suitable for grazing* and it is difficult, at best, to meet the criteria used to determine turnout dates for grazing.” *Id.* (emphasis added).

Additionally, many miles of bull trout habitat and tributaries in the Pass Creek allotment are unfenced and accessible to livestock, making the banks, streambeds, and any redds acutely vulnerable to direct trampling. For example, livestock access to Upper Wet Creek, Coal, Sands, Big Creek, and Basin Creek is not restricted by fencing or topography. *See* BiOp at 24–25.

The BiOp explains that strong protective measures are necessary to prevent damage in habitats typical of the Little Lost. For example, “[m]ore than six inches of stubble height may be required for protection of critical fisheries or easily eroded streambanks and riparian ecosystem function.” BiOp at 28. A 30-40% utilization standard is needed to merely “*sustain plant community productivity*,” and the standard for ranges in poor condition or those grazed during the active growth season should be the lower level. *Id.* at 29 (emphasis added).

The BiOp's Incidental Take Statement ("ITS") for the Pass Creek allotment is—unfortunately—inconsistent with the protective measures identified by FWS. Specifically, the utilization standards are:

- For occupied or potential bull trout streams, where stream is PNC or late seral, a 4" greenline stubble height.
- For occupied or potential bull trout streams, where stream is mid to early or very early seral, a 6" stubble height.
- For potential bull trout streams with an unknown rating, a 6" stubble height.
- For non-potential habitat streams, a 4" stubble height.
- For streams with a downward trend, a 6" stubble height.
- 30–35% use on woody riparian species.

FWS attempted to further weaken these standards in 2000, upon the Forest Service's completion of an Allotment Management Plan for Pass Creek. The AMP provides that the stubble height standard in *every unit*, save two areas (unnamed Pine Creek tributary and Wet Creek), is *4 inches*. FWS stated in a letter dated July 28, 2000 to the Forest Service that the AMP "will replace existing monitoring and management requirements" in the biological opinion¹. No standards for trampling or bank stability are included. Furthermore, the AMP provides for a season of use of July 15 to October 1—during bull trout spawning season.

Over the past ten years, the Forest Service has repeatedly demonstrated that it is unable to meet even the weak standards set in the ITS and AMP. Numerous instances of stubble height violations and trespass (livestock within pastures at the wrong time and inside exclosures) are documented from 2000 to 2007. In a letter to the Pass Creek allotment permittees dated September 28, 2006, the Forest Service summarized the 2000 through 2006 seasons by stating that "the Association failed to meet end-of-season standards on all of their units 2/3's of the time." Despite thus recognizing that the authorized AUMs exceeded the allotment's carrying capacity and had damaged the environment, the Forest Service stated in the letter that it would continue to authorize the *same number* of AUMs into the future.

The 2008 season provided a catastrophic ending to the decade following the biological opinion. WWP attended a tour with District Ranger Diane Weaver on October 15, 2008 and observed astounding levels of livestock use, hummocking, livestock bank trampling, and livestock in-stream trampling on Basin Creek, Pine Creek, and the unnamed stream also known as Pine Creek. On previous and subsequent visits, WWP and affiliates also documented similar livestock-caused damage on Wet, Coal, Sands, and Big Creeks. These conditions equated to significant violations of the standards in the ITS—meaning that the livestock grazing likely caused illegal "take" under the ESA.

Ranger Weaver admitted on the tour that the conditions were unacceptable. FWS was also concerned that violations of the BiOp may have occurred, and requested that the Forest Service reinitiate consultation to reassess impacts to bull trout and necessary protective measures. The Forest Service has now done so, and a reinitiated consultation is ongoing. Yet the

¹ It is unclear why FWS believed the AMP could weaken the terms of the ITS. Absent completion of a new consultation, the terms of the ITS remain in effect.

Forest Service may continue to authorize grazing on this allotment pending the new consultation, allowing further harm to bull trout and its habitat.

In summary, the past ten years of grazing on the Pass Creek allotment have demonstrated that grazing is impairing the survival and recovery of this highly imperiled subpopulation of bull trout. The standards on the allotment are woefully inadequate to protect bull trout, and the permittee cannot even comply with these weak standards much of the time. To fulfill its ESA duty to insure that grazing on this allotment is not jeopardizing or taking bull trout, the Forest Service must rest this allotment from grazing until it has a new biological opinion in place that adequately protects this imperiled species.

VIOLATIONS OF THE ENDANGERED SPECIES ACT

1. Violation of Prohibition Against Jeopardy

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.” 16 U.S.C. § 1536(a)(2). The Ninth Circuit Court of Appeals recently explained that an agency’s duty to avoid jeopardy requires not only consideration of how an action affects survival, but also how it affects *recovery* of the species. *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 931 (9th Cir. 2008); *see also* 50 C.F.R. § 402.02.

In its decisions authorizing livestock grazing on the Pass 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). There can be no serious factual dispute that the Forest Service’s authorized grazing is retarding bull trout recovery, and the BiOp admits as much. Yet the Forest Service has failed to address, mitigate, or reverse this illegal slowing of recovery. The Forest Service has additionally failed to adequately analyze the baseline and cumulative effects, and does not rely on the best available science. Instead, the Forest Service continues to allow grazing to occur on this allotment despite evidence that the permittees have violated the terms of the ITS virtually every year, allowing cows to repeatedly access and damage bull trout streams and their tributaries. The Forest Service’s reliance on the ITS and the permittees is wholly unfounded and does not insure against jeopardy. 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, 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 Pass Creek allotment.

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 salmonids. *Pacific Rivers Council v. Thomas*, 936 F.Supp. 738 (D. Id. 1996).

If the Forest Services authorizes grazing to occur on the Pass Creek allotment prior to the completion of the newly-reinitiated consultation, this would be a violation of § 7(d). The authorized livestock grazing, and the violations and trespass that result, have well-documented, irreversible adverse impacts on bull trout and their habitat. There is every indication that the authorization of livestock grazing on the Pass Creek allotment before completion of the new consultation would cause 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 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 bull trout, 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 authorized grazing on the Pass Creek allotment over the past ten years, and particularly during 2008, exceeded the standards of the ITS. This means that the damage, by definition, is not exempt and the Forest Service is liable for harm caused to bull trout from its grazing authorizations. In light of the well-documented adverse impacts on bull trout and their habitat associated with livestock grazing and trampling on this allotment, the Forest Service is causing take that results from the authorization, facilitation, and implementation of livestock grazing that raises a reasonably certain threat that take is imminent. There is every indication that the illegal take of bull trout will continue in 2009 and future years, and accordingly WWP intends to bring suit to prevent further unlawful take and irreparable harm.

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 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 Pass Creek allotment to 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 bull trout and their habitat.

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, USDA Forest Service
1400 Independence Avenue, SW
Washington, DC 20250-0003

Secretary Ken Salazar
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

Secretary, U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 20230

Secretary Tom Vilsack
U.S. Department of Agriculture
1400 Independence Avenue, SW
Washington, DC 20250

Ted Koch
U.S. Fish and Wildlife Service
Snake River Fish and Wildlife Office
1387 S. Vinnell Way
Boise, ID 83709

Damien Miller
U.S. Fish and Wildlife Service
4425 Burley Dr., Ste. A
Chubbuck, ID 83202-1923