



January 26, 2009

VIA U.S. CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Sara Baldwin, Area Ranger  
Sawtooth National Recreation Area  
5 North Fork Canyon Road  
Ketchum, ID 83340

Jane Kollmeyer, Forest Supervisor  
Sawtooth National Forest  
2647 Kimberly Road East  
Twin Falls, ID 83301

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

Dear Ms. Baldwin and Ms. Kollmeyer:

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 Sawtooth National Forest’s Smiley Creek and Fisher Creek allotments.

As explained below, the Smiley Creek and Fisher Creek allotments contain streams that provide habitat for four species of fish listed as threatened or endangered under the ESA. The Forest Service has failed to meet its obligations under the ESA by not reinitiating consultation with U.S. Fish and Wildlife Service and NOAA Fisheries over impacts of livestock grazing on these species and their habitat when it issued its supplemental analysis for these grazing allotments, and by violating the prohibition against jeopardizing the species and adversely modifying critical habitat. The Forest Service must reinitiate consultation to consider new information, changed circumstances, and recently designated critical habitat, and insure that its actions are not harming or retarding recovery of these species or its habitat.

### **BACKGROUND**

In September 2004, the Forest Service issued a Final Environmental Impact Statement (“FEIS”) assessing impacts of its authorizations for livestock grazing on the Fisher Creek, Smiley Creek, North Fork-Boulder, and Baker Creek allotments. Prior to issuing this FEIS, the agency had consulted with U.S. Fish and Wildlife Service and NOAA Fisheries over the impacts

of the grazing authorizations on threatened and endangered species of fish and designated critical habitat. This consultation was limited to the Smiley Creek and Fisher Creek allotments, which are the two allotments that contain streams with habitat for Snake River Spring/Summer Chinook Salmon, Snake River Sockeye Salmon, Snake River Steelhead, and Upper Columbia River Bull Trout.

On the Fisher Creek allotment, steelhead have been found in Fisher Creek and may occur in tributaries to Fisher Creek. On the Smiley Creek allotment, one or more of these listed fish occur in Alturas Lake Creek, Alpine Creek, Beaver Creek, Frenchman Creek, Smiley Creek, Cabin Creek, Pettit Lake Creek, and Alturas and Pettit Lakes. These streams also provide critical habitat for Snake River spring/summer Chinook salmon; and Alturas and Pettit Lakes are critical habitat for Snake River Sockeye salmon. Since the North Sheep FEIS was issued, critical habitat for steelhead was also designated and occurs in Fisher Creek, Beaver Creek, Frenchman Creek, Smiley Creek, Alturas Lake Creek, Alpine Creek, Cabin Creek, Pettit Lake Creek, Vat Creek, and Yellowbelly Creek. The spawning period for these species overlaps such that at least one of the species may be spawning from April through early February.

Each of these species is in decline and the number of individuals has dropped significantly in the streams on these two allotments, in some cases disappearing altogether. The endangered Snake River Sockeye is in particular trouble due to very low numbers of individuals, and an intensive recovery program is in place to try and save the population found on the Smiley Creek allotment.

The North Sheep FEIS and biological assessment admitted that the streams on these allotments were degraded and not functioning properly for several key fish habitat parameters, particularly sediment and temperature. Excess sediment was due in part to sheep trampling of streambanks as well as erosion from upland areas. The upland erosion is a major concern on the Smiley Creek allotment because of the steep slopes and erosive soils that are found on much of this allotment. As sheep trail across these slopes, they loosen the soil, which then washes into intermittent tributaries during rain or snowmelt events and down into the valley bottom streams and lakes that provide the habitat for listed fish. Sediment is very detrimental to salmon, steelhead, and bull trout as it causes poor water quality; fills in pools and streambeds, creating shallower streams that have warmer water temperatures; and covers spawning and rearing gravels, smothering the fish eggs and fry that need oxygen amongst the gravels to survive. These documents also noted damage to riparian vegetation due to sheep grazing, reducing streamside cover and shade. Certain areas used as sheep watering or crossing sites receive especially severe impacts to the banks and streambeds, contributing high levels of sediment at these sites and disrupting the streambed. Access to these streams provides opportunity for sheep to trample spawning gravels that may be harboring eggs or fry. Despite requirements to keep sheep out of streams on the Smiley Creek allotment during spawning periods, this restriction was violated in the past, creating a danger of direct trampling of fish eggs. A single trampling incident can kill or injure a majority of those eggs.

Despite these acknowledged impacts from sheep grazing to habitat for threatened and endangered fish, the Forest Service concluded that the grazing authorizations for Smiley Creek and Fisher Creek allotments was not likely to adversely affect the fish or any critical habitat.

The U.S. Fish and Wildlife Service and NOAA Fisheries concurred in this conclusion. The agencies based their conclusion on the fact that mitigation measures and the adaptive management strategy proposed in the FEIS would have the potential for only insignificant adverse effects to the species.

In 2005, Western Watersheds Project filed litigation challenging the adequacy of the North Sheep FEIS under the National Forest Management Act, National Environmental Policy Act, and Sawtooth National Recreation Area Organic Act. Western Watersheds prevailed on several of their legal claims, resulting in an order requiring the Forest Service to complete a supplemental EIS for the North Sheep allotments. The Forest Service issued this new analysis in March 2008, but did not reinitiate consultation with the Services. As explained below, this failure to reinitiate consultation violated the ESA. Furthermore, by continuing to authorize grazing on these allotments, the Forest Service is failing to prevent jeopardy of the species and adverse modification of critical habitat, also in violation of the ESA.

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

### **1. Failure to Reinitiate Consultation**

The ESA requires land management agencies to consult with the Services on actions “authorized, funded, or carried out by such agency” to insure that such actions are “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). If the land management agency determines that an action is not likely to adversely affect a listed species and the Services concur in that determination, then the consultation is complete. If an action is likely to adversely affect a 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. 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 Forest Service must reinitiate consultation over the North Sheep grazing authorizations to comply with the regulations. First, since the original consultation took place, NOAA Fisheries has designated critical habitat for steelhead, and many of the streams on the Fisher Creek and Smiley Creek allotments fall within that designation, thus requiring reinitiation of consultation.

Second, new information has arisen that requires further consultation. Much has been learned about climate change since the North Sheep FEIS, and subsequent studies and reports on global warming and its impacts on western watersheds and fish habitat constitute new information that must be considered in conjunction with the impacts of sheep grazing to fully assess effects to listed fish and critical habitat in a new consultation. Furthermore, the North

Sheep SEIS contained a new site-specific capability analysis that shows that much of the Smiley Creek and Fisher Creek allotments are not capable of sustaining livestock grazing, but yet trailing must occur across significant portions of non-capable land to graze these allotments. The Services should consider this new information to reassess the impacts of grazing these allotments, especially when much of the non-capable land is designated as such because it is very steep and has erosive soils, factors that contribute to sedimentation of the streams. The Forest Service also revealed with the SEIS the monitoring protocols and monitoring sites it proposes to use, which had not been included in the previous North Sheep FEIS or biological assessment. The Services must consider whether this monitoring will insure that the adaptive management strategy is sufficient to protect the listed fish and their habitat.

Finally, new legal direction requires the Forest Service to assess not just whether the activity will impact the survival of listed species but also whether it will impair recovery of the species and their habitat. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 931 (9th Cir. 2008). The existing BA and letters of concurrence did not discuss what the species need to be able to recover to the point at which they no longer need to be listed and whether grazing will allow those needs to be met. It simply looked at whether the already depressed populations would be harmed further. Thus, the agencies need to reconsult to consider the recovery of the species.

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

As noted above, 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). The grazing authorization for the Smiley Creek and Fisher Creek allotments fail to meet this duty, in violation of ESA § 7(a)(2). The Forest Service continues to allow grazing to occur on these allotments despite evidence that it is impairing habitat for listed fish, which have been in decline and even extirpated from some streams on the allotments, and thus is not insuring 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. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 931 (9th Cir. 2008); 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). In light of the Forest Service’s failure to analyze these factors, combined with the extensive evidence that grazing is harming these fish populations and their critical habitat, the Forest Service has violated § 7(a)(2) by authorizing livestock grazing on the Smiley Creek and Fisher Creek allotments.

## CONCLUSION

The Forest Service has violated the ESA by failing to reinitiate consultation over livestock grazing on the Smiley Creek and Fisher Creek allotments and by failing to insure that grazing will not jeopardize listed fish species or adversely modify critical habitat on those allotments. Western Watersheds urges the Forest Service to remedy these violations of the ESA. If, however, these violations are not remedied within 60 days, we intend to raise these claims in federal court. Western Watersheds remains more than willing to discuss these issues further with you, as it genuinely desires to avoid litigation through a mutually acceptable solution. Thus, please feel free to contact Western Watershed's representative listed below, or myself at the address listed on the letterhead.

Thank you in advance for your consideration of these matters.

Very truly yours,

Lauren M. Rule  
Attorney for Plaintiff

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