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January 25, 2017

Penny Pritzker, Secretary of Commerce  
U.S. Department of Commerce  
1401 Constitution Ave., NW  
Washington, D.C. 20230

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Assistant Administrator for Fisheries  
National Marine Fisheries Service  
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Thomas Tidwell, Chief  
U.S. Forest Service  
1400 Independence, S.W.  
Washington, D.C. 20250-0003

Patricia Grantham   
Forest Supervisor  
Klamath National Forest  
1711 South Main Street  
Yreka, California 96097

Re: Endangered Species Act Violations

Dear Sirs/Madams:

The Environmental Protection Information Center ("EPIC"), writes to respectfully request that you take immediate action to remedy ongoing violations of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, by the Forest Service in northern California. The Forest Service and its officials have authorized or approved livestock grazing along rivers, streams, and other

waters that provide habitat for the southern Oregon/northern California Coast (“SONCC”) Evolutionary Significant Unit (“ESU”) of coho salmon, without having first consulted with the National Marine Fisheries Service (“NMFS”) as to the site-specific, connected, and cumulative effects of such grazing under the Endangered Species Act (“ESA”). Conversely, if consultation has occurred, grazing and associated activities have been subsequently modified or altered in ways that were not considered in a biological opinion.

Section 7 of the ESA imposes a duty on federal agencies to ensure that their activities do not cause jeopardy to listed species or adverse modification to designated critical habitat. 16 U.S.C. § 1536(a)(2). The ESA establishes an interagency consultation process to assist federal agencies to comply with this duty. Under the ESA, “agency action” includes “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies.” 50 C.F.R. § 402.02. An agency must initiate consultation under ESA section 7 whenever it takes an action that “may affect” a listed species, subject to limited exceptions. 50 C.F.R. § 402.14(a), (b). The threshold for such a determination is low. 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (stating that “[a]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement . . .”). The duty to consult applies to ongoing agency activities that may affect a listed species or its designated critical habitat. *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1053 (9th Cir. 1994). Further, the Forest Service and NMFS have a duty to re-initiate consultation when ongoing agency activities cause effects not anticipated in an original consultation. *Forest Guardians v. Johanns*, 450 F.3d 455, 463-464 (9th Cir. 2006).

On May 6, 1997, NMFS listed coho salmon within the SONCC ESU as threatened with extinction under the ESA. 62 Fed. Reg. 24,588 (May 6, 1997). NMFS identified livestock grazing as among the major activities responsible for the decline of coho. *Id.* NMFS re-affirmed the listing in 2005. 70 Fed. Reg. 37160 (June 28, 2005).

In 1999, NMFS designated critical habitat for SONCC coho. *See* 64 Fed. Reg. 24049 (May 5, 1999).

The Forest Service has consulted with NMFS on a programmatic basis as to possible effects groups of projects on SONCC coho and its critical habitat. The programmatic consultation anticipates and requires that the Forest Service will consult with NMFS as to the effects, individual and cumulative, of site-specific projects.

In 2014, NMFS issued a Recovery Plan for SONCC coho. The Recovery Plan divides the SONCC coho ESU into “populations,” including the Upper Klamath River population, which extends up to Iron Gate Dam at river mile 190, above which coho cannot pass. Recovery Plan at 34-4.

The SONCC Recovery Plan states that the Upper Klamath coho population is “a core, Functionally Independent population” that historically “had a high likelihood of persisting in isolation over 100-year time scales.” Recovery Plan at 34-9. “Besides its role in achieving demographic goals and objectives for recovery” of the SONCC coho ESU as a whole, “as a core population the Upper Klamath population may serve as a source of spawner strays for nearby

populations.” *Id.* The “Upper Klamath River tributaries, refugia and mainstem habitat function as migratory and rearing habitat for fish from populations located upstream (i.e., Scott and Shasta). Therefore, restoration of the Upper Klamath River is important for recovery of these populations, too.” *Id.*

To contribute to the recovery of the SONCC coho ESU, the Upper Klamath River population “needs to have at least 8,500 spawners.” *Id.* Currently, however, the population “is at high risk of extinction given its low population size and negative population growth rate.” *Id.* at 34-7. Data on run size are lacking (for example, ten years ago, one study estimated the “population to be between 100 and 4000 adults,” *id.*), but even the highest end of that estimate places run size “far lower than needed for the population to achieve a low extinction risk.” *Id.*

Horse Creek is one of the tributaries to the Klamath River that provides habitat for SONCC coho that are part of the Upper Klamath River coho population. *See* Recovery Plan at 34-6. Horse Creek is among the tributaries that is a “high IP,” meaning “Intrinsic Potential” reach of the Klamath as to recovery of SONCC coho. *Id.* at 34-4. Horse Creek is also among the “[p]otential [coho] refugia areas in the Upper Klamath River” identified in the Recovery Plan. *Id.* at 34-14.

The Forest Service has authorized and continues to authorize livestock grazing on livestock allotments along and in Horse Creek including the Horse Creek allotment and the Dry Creek allotment. These livestock allotments include riparian and other areas along and in Horse Creek and tributaries to it where SONCC coho salmon find habitat, spawn, rear, or otherwise inhabit. Livestock grazing affects and otherwise degrades or jeopardizes SONCC coho habitat, including designated critical habitat, and SONCC coho in these areas.

The Forest Service has authorized such grazing without first consulting with NMFS, and obtaining its opinion, as to site-specific and cumulative effects of livestock grazing along and in Horse Creek and its tributaries. The Forest Service has failed to implement measures that would prevent jeopardy to SONCC coho and its critical habitat along and in Horse Creek and its tributaries. If the Biological Opinion performed for SONCC coho at the programmatic level anticipated any of the effects of livestock grazing along Horse Creek and its tributaries, and provided terms or conditions to mitigate for the effects of such grazing, then grazing and other activities (such as monitoring and reporting) have been modified or changed in ways not considered in the Biological Opinion, and require the reinitiation of consultation under the ESA.

EPIC anticipates that during the 60-day period when the Forest Service and NMFS consider this notice, and before EPIC chooses whether to file suit, that the Forest Service or NMFS may wish to meet and confer as to their position on the effects of livestock grazing in and along Horse Creek and its tributaries, and their duties under the ESA and other federal laws to help preserve and restore SONCC coho. EPIC welcomes such an engagement.

Please feel free to contact me if the Forest Service or NMFS is interested in meeting, or if you have any questions or concerns about this notice of intent to sue.

Thank you for your time and consideration.

Sincerely,

Handwritten signature of Thomas Wheeler in blue ink.

Thomas Wheeler  
Attorney for EPIC

Cc: Sally Q. Yates  
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