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Working to protect and restore Western Watersheds and Wildlife

RECEIVED
OCT 30 2017
SAWTOOTH NATIONAL FOREST

Kirk Flannigan, Area Ranger
Sawtooth National Recreation Area
5 North Fork Canyon Rd.
Ketchum, ID 83340

Kit Mullen, Forest Supervisor
Sawtooth National Forest
2647 Kimberly Road East
Twin Falls, ID 83301-7976

VIA U.S. CERTIFIED MAIL

October 26, 2017

**Re: Notice of Intent to Sue for Violations of the Endangered Species Act
Regarding Williams Creek C&H allotment (#46800)**

Dear Mr. Flannigan and Ms. Mullen:

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 Endangered Species Act (ESA) relating to the Forest Service's authorization of livestock grazing on the Williams Creek allotment.

This allotment contains habitat for Snake River sockeye salmon, spring/summer Chinook salmon, Snake River Basin steelhead, and bull trout, all protected as threatened under the ESA. The Forest Service has failed to meet its obligations under the ESA by continuing to authorize status quo livestock grazing on this allotment despite failing to meet all the conditions of its 2010 consultation, and despite changed conditions since that time.

BACKGROUND

Livestock Grazing Impacts on Salmonids and its Habitat

Livestock grazing harms salmonids in many different ways. Salmonids require stable stream channels, clean spawning and rearing gravel, cold water, and complex cover. Livestock grazing degrades these conditions, including by removing riparian vegetation, destabilizing stream banks, widening stream channels, promoting incised channels, lowering water tables, reducing pool frequency, increasing soil erosion, and degrading water quality. These effects reduce cover, increase summer water temperatures, promote formation of anchor ice in winter, and increase sediment into spawning and rearing habitats, which suffocates redds and irritates fish gills. Grazing harms salmonids via these adverse habitat effects and/or prevents recovery and recolonization of salmonids in streams where their populations are now depressed, such as on this allotment.

Livestock also harm salmonids by directly trampling on redds (nests), which contain thousands of eggs. A single trampling incident can kill a majority of those eggs. Wading livestock, which favor flatter stream reaches where spawning areas are generally located, also crush and dislodge vulnerable alevins and fry, which remain in the gravels near the redd for weeks after hatching. Livestock also displace larger juvenile fish or adults from protective streamside cover, increasing the risk of predation. And livestock in and around streams can harass spawning adult fish, causing them to move from their nests, disrupting spawning activities and forcing them to expend vital energy.

NEPA and Consultation History

The Forest Service prepared an Environmental Assessment (EA) on the Williams allotment, with a Decision Notice and FONSI issued on September 30, 2010. As part of that process, an aquatic Biological Assessment (BA) was prepared.

The EA and BA described some poor stream conditions on the allotment. Upper Huckleberry Creek was degraded from livestock, with bank stability as low as 65% on a reach near Decker Flat, with excessive trampling impacts and a high width to depth ratio. Reaches of Williams Creek also suffered from low bank stability.

In the BA, the Forest Service promised a number of actions to improve these conditions. It promised to defer grazing in the Upper Huckleberry pasture until riparian areas met or exceeded natural condition as outlined for mean bank stability in the natural condition database, and upland range sites currently in early seral status showed an upward trend in species composition. The BA explained that this rest period was expected to last *at least five years*, because measurable shifts in species composition are rarely measurable in less than five years.

The BA promised to close 150 acres in the Upper/Lower Huckleberry pastures to grazing protect the Bull Moose and Huckleberry fens, using electric fences the first two

years, followed by “wildlife-friendly” barbed wire. No grazing was to be allowed in adjacent pastures until stock-tight fencing was completed.

The BA promised extensive monitoring. Annual implementation monitoring would include field observations (reported annually to the level 1 team) and Multiple Indicator Monitoring to determine progress towards Forest Plan desired conditions conducted at a Designated Monitoring Area (DMA) (at least one per pasture). Annual utilization standards of stubble height (4” or 6”, depending on whether riparian goals and objectives were being met) and browse utilization would be imposed. If violations occurred, changes would be made during the next season.

Effectiveness monitoring at DMAs and key areas was promised to ensure riparian goals/objectives are met: namely, a greenline successional status rating of 51 or greater and streambank stability at or above natural conditions. The BA promised that results for these resource goals/strategies would be reported to the Level 1 team every two years.

The National Marine Fisheries Service and U.S. Fish and Wildlife Service concurred with the Forest Service’s determinations in the BA in October 2010, based on these promised actions. For example, the NMFS letter of concurrence relied upon the estimated five years deferral of grazing in the Upper Huckleberry pasture, until desired riparian and upland conditions are met; livestock exclosure fences around the fens; annual indicator monitoring with changes made based upon results; and long-term monitoring (Greenline successional status and streambank stability) reported to the Level 1 Team every 2 years. The FWS letter of concurrence likewise mention the estimated five years deferral of grazing in the Upper Huckleberry pasture, the exclosure fences around the fens, monitoring, and other measures.

New information

WWP’s review of available information indicates that important components of the promised actions have not been carried out as described.

The Upper Huckleberry pasture was reopened in 2014, after only three years of rest (2011, 2012, and 2013). However, after a review of Forest Service records on this allotment, WWP cannot find any assessment of whether the recovery standards were met: namely, whether riparian areas met or exceeded their natural condition for bank stability, and whether upland range sites in early seral status showed an upward trend in species composition. WWP can find no explanation as to why less than five years rest was required after the BA explained it takes at least five years for measureable shifts in species composition to occur. Thus, the Forest Service appeared to lack justification to reopen the pasture after only three seasons of rest.

WWP visited the Huckleberry fen in late September 2017, and discovered that the exclosure fencing was not functioning as intended, as there were recent cattle impacts on the fen and Upper Huckleberry Creek. Inside the “exclosure,” the creek suffered from

recent bank trampling, the creek was widened, there was excessive bare ground, and areas were covered with cow pies. It was clear the fen had been grazed since 2010.

Finally, the promised monitoring does not seem to be occurring as promised. For example, in the Williams pasture, WWP could find only one completed quantitative monitoring report since 2010, from 2015.¹ That monitoring found exceedances for stubble height (under 4"), woody use (over 50%), and streambank alteration (36%). WWP visited the Williams pasture in late September 2017 and confirmed poor conditions from grazing still exist.

In the Lower Huckleberry pasture, WWP could find no quantitative monitoring reports since 2010 beyond a single utilization sheet in 2014. In the Upper Huckleberry pasture, there is only one monitoring report since 2010 (an incomplete spreadsheet with no summary), and a 2014 forage production calculation.

In other words, most of the promised implementation monitoring has not been done. There is no evidence of DMAs in every pasture being monitored every year. There is no evidence of the data being summarized at the end of each year, reported to the level 1 team and determining whether on-the-ground management practices met the specified guidelines, as required by the BA. And when violations have occurred, as in 2015 in the Williams pasture, there is no evidence of the Forest Service switching to different indicators such as streambank alteration the next year, as promised in the BA. Rather, the 2016 AOI maintained the same 4" stubble height standard.

Nor could we find evidence of effectiveness monitoring being completed as promised, *i.e.*, greenline ecological status and streambank stability being monitored every two years and reported to the Level 1 team.

VIOLATIONS OF THE ENDANGERED SPECIES ACT

The agencies have an ongoing duty to comply with ESA Section 7's prohibition against jeopardy and adverse modification of critical habitat. To that end, 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 has not complied with these duties because it has failed to reinitiate consultation for the allotments discussed herein.

First, the Forest Service is not substantively or procedurally conducting the actions as described in the 2010 BA and letters of concurrence, and thus the assumptions that NMFS and FWS relied upon in their letters of concurrence are no longer valid. As

¹ 2011 and 2014 MIM forms are largely blank and have not been summarized, and a 2012 stubble height data sheet had no calculation/average.

detailed above, the promised actions have not occurred, and the compliance and effectiveness monitoring assurances have not been kept. Thus, NMFS's and FWS's determinations, and their assumptions that the grazing system employed would not adversely affect salmonid habitats are no longer valid, if they ever were. Because the Forest Service is not living up to its own substantive and procedural assurances, as promised and assumed in the 2010 consultation, it needs to reinitiate consultation to address these changes in circumstances.

Second, new information since 2010 about the listed fish species may warrant reinitiation of consultation. While the consultation assumed the habitat was unoccupied, fish may now be present on some allotment streams. Specifically, data on StreamNet, which partners with the Idaho Department of Fish and Game, shows lower Williams Creek as occupied rearing and migration habitat for Chinook salmon, and Huckleberry Creek as occupied bull trout habitat. Is the Forest Service aware of any change in fish presence?

For these reasons, the Forest Service is failing to insure that its actions in authorizing grazing on the Williams allotment is not likely to jeopardize Snake River sockeye salmon, spring/summer Chinook salmon, Snake River Basin steelhead, and bull trout, in violation of section 7(a)(2) of the ESA, and are failing to utilize the best available scientific information. 16 U.S.C. § 1536(a)(2).

If the Forest Service reinitiates consultation but continues to authorize grazing, such action would also violate ESA section 7(d), which requires agencies to avoid making irreversible or irretrievable commitments of resources. 16 U.S.C. § 1536(d). Furthermore, livestock access to streams that contain listed fish or their spawning areas could cause "take" in the form of habitat destruction and harm and harassment to adult fish as well as juvenile fish, larvae, and eggs, in violation of ESA section 9. *Id.* § 1538. There is every indication that these violations will continue in 2018 and future years via Forest Service issuance of status quo annual operating instructions and/or other means.

PARTY GIVING NOTICE

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

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

CONCLUSION

As set forth above, WWP may pursue litigation in federal court sixty days after this notice, seeking injunctive, declaratory and other relief. To avoid such litigation, WWP requests that the Forest Service promptly reinitiate consultation on the

aforementioned allotments, with increased monitoring and interim riparian protections consistent with the BA. Alternatively, WWP may be amenable to discussing ways that grazing on this allotment could be conducted in strict compliance with the applicable requirements. If you have any questions, wish to discuss this matter further, or believe this notice or any facts within it are in error, please contact us.

Sincerely,



Kristin F. Ruether

Senior Attorney, Western Watersheds Project

cc:

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