



**ADVOCATES** for the **West**  
3115 NE Sandy Blvd. #223 | Portland, OR 97232

May 13, 2015

*Via Certified Mail, Return Receipt Requested*

Secretary Sally Jewell  
United States Department of the Interior  
1849 C Street, N.W.  
Washington, D.C. 20240

Secretary Tom Vilsack  
United States Department of Agriculture  
1400 Independence Ave., S.W.  
Washington, D.C. 20250

Director Daniel M. Ashe  
United States Fish and Wildlife Service  
1849 C Street N.W., Room 3331  
Washington, D.C. 20240-0001

Chief Tom Tidwell  
United States Forest Service  
1400 Independence Ave., SW  
Washington, D.C. 20250-1111

Field Supervisor Laurie R. Sada  
Klamath Falls Office  
U.S. Fish and Wildlife Service  
1936 California Avenue  
Klamath Falls, OR 97601

Forest Supervisor Constance Cummins  
Fremont-Winema National Forest  
1301 South G Street  
Lakeview, OR 97630

RE: Notice of Violations of the Endangered Species Act Regarding Impacts of Livestock Grazing on Lost River Suckers and Shortnose Suckers and Their Critical Habitat

Dear Sirs and Madams:

In accordance with the 60-day notice requirement of the Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g), Oregon Wild, Friends of Living Oregon Waters, and Western Watersheds Project (collectively, “the Conservation Organizations”), hereby provide notice that the U.S. Forest Service (“Forest Service”) and U.S. Fish & Wildlife Service (“FWS”) are in violation of Section 7 of the ESA, 16 U.S.C. § 1536, and the ESA’s consultation regulations, 50 C.F.R. Part 402.<sup>1</sup>

Specifically, the Forest Service is violating section 7(a)(2) of the ESA by authorizing livestock grazing on federal grazing allotments with listed Lost River sucker (“LRS”) and shortnose sucker (“SNS”) species and newly designated critical habitat without insuring that the grazing will not destroy or adversely modify that critical habitat. The Forest Service and FWS

---

<sup>1</sup> The agencies’ violations of the ESA are also arbitrary and capricious, an abuse of discretion, and not in accordance with law, in violation of the Administrative Procedure Act, 5 U.S.C. 706(2).



are also violating section 7(a)(2) by failing to reinitiate consultation over the impacts of livestock grazing on allotments within the Lost River watershed in light of new information and changed circumstances that have arisen since formal consultation for the species was completed in 2007.

## LEGAL FRAMEWORK

Section 7 of the ESA imposes a substantive obligation on federal agencies to “insure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of” habitat that has been designated as critical for such species. *See* 16 U.S.C. § 1536(a)(2); *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 924 (9th Cir. 2008). Jeopardy results where an action reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species. 50 C.F.R. § 402.02. Destruction or adverse modification of critical habitat occurs where there is a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. *Id.* The ESA also prohibits “take” of a species, where take is defined to include harassing, harming, wounding, killing, trapping, capturing or collecting a listed species. 16 U.S.C. §§ 1538(a)(1), 1532(19).

To fulfill the substantive mandates of section 7 of the ESA, federal agencies planning to undertake an action that “may affect” ESA-listed species or their critical habitat are required to consult with the relevant federal wildlife service, here FWS, regarding the effects of the proposed action. 50 C.F.R. § 402.14(a). Such consultation concludes with FWS’ issuance of a Letter of Concurrence (“LOC”) or Biological Opinion (“BiOp”) to determine whether the action is likely to jeopardize such species or result in adverse modification of critical habitat. 50 C.F.R. § 402.14(h)(3). A BiOp must contain an Incidental Take Statement to authorize any “take” of a species that might occur incidental to the proposed activity. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(g)(7). An Incidental Take Statement must specify Reasonable and Prudent Measures to minimize impacts of the taking, set forth mandatory Terms and Conditions to implement the Reasonable and Prudent Measures, and contain a monitoring and reporting requirement to report impacts to FWS. 50 C.F.R. § 402.14(i). In carrying out the consultation process, “each agency shall use the best scientific . . . data available.” 16 U.S.C. § 1536(a)(2).

After consultation is completed, federal agencies have a continuing duty under section 7 of the ESA to insure that their actions will not jeopardize the continued existence of listed species or adversely modify designated critical habitat. An agency must re-initiate consultation whenever “the amount or extent of taking specified in the incidental take statement is exceeded,” “new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered,” where the action in question is “subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion,” or where “a new species is listed or critical habitat designated that may be affected by the identified action.” 50 C.F.R. § 402.16(a)-(d). The duty to reinitiate consultation lies with the action agency and the consulting agency. 50 C.F.R. § 402.16;



*Envtl. Protection Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1076 (9th Cir. 2001).

## FACTUAL BACKGROUND

### 1. Affected Species and Critical Habitat.

The LRS and SNS were listed as endangered under the federal ESA in 1988. 53 Fed. Reg. 27,130, 27134 (July 18, 1988). Critical habitat for both species was proposed in 1994 (59 Fed. Reg. 61,744, 61759 (Dec. 1, 1994)) but was not finalized until 2012 (77 Fed. Reg. 73,739 (Dec. 11, 2012)). Designated critical habitat includes several streams on the Fremont-Winema National Forest, including streams in the Gerber Reservoir and Clear Lake Reservoir watersheds. 77 Fed. Reg. 73739, 73768. These streams provide spawning habitat and some host stream-resident populations of SNS. 2007 FWS Lost River BiOp at 15-16.

FWS has identified the following primary constituent elements (“PCE”) for LRS and SNS:

(1) *Water.* Areas with sufficient water quantity and depth within lakes, reservoirs, streams, marshes, springs, groundwater sources, and refugia habitats with minimal physical, biological, or chemical impediments to connectivity. Water must have varied depths to accommodate each life stage: Shallow water (up to 3.28 ft (1.0 m)) for larval life stage, and deeper water (up to 14.8 ft (4.5 m)) for older life stages. The water quality characteristics should include water temperatures of less than 28.0° Celsius (82.4° F); pH less than 9.75; dissolved oxygen levels greater than 4.0 mg per L; low levels of microcystin; and un-ionized ammonia (less than 0.5 mg per L). Elements also include natural flow regimes that provide flows during the appropriate time of year or, if flows are controlled, minimal flow departure from a natural hydrograph.

(2) *Spawning and rearing habitat.* Streams and shoreline springs with gravel and cobble substrate at depths typically less than 4.3 ft (1.3 m) with adequate stream velocity to allow spawning to occur. Areas containing emergent vegetation adjacent to open water, provides habitat for rearing and facilitates growth and survival of suckers, as well as protection from predation and protection from currents and turbulence.

(3) *Food.* Areas that contain an abundant forage base, including a broad array of chironomidae, crustacea, and other aquatic macroinvertebrates.

77 Fed. Reg. 73,739, 73750.

Threats identified in the final listing rule for LRS and SNS include: “(1) Poor water quality; (2) potential entrainment at water diversion structures; (3) lack of access to essential spawning habitat; (4) lack of connectivity to historical habitat (i.e., migratory impediments); (5) degradation of spawning, rearing, and adult habitat; and (6) avian predation and predation by or competition with nonnative fish.” *Id.* Current factors limiting LRS and SNS recovery include



loss or degradation of spawning, rearing, and adult habitats; reductions in habitat quality; and poor water quality, among others. LRS & SNS 2013 Recovery Plan at vi. The 2007 BiOp noted the threat to stream-resident SNS from low water flows, stating that “[a]dults appear to be frequently stranded by receding flows in pools in the tributaries, where a few may survive over the summer.” 2007 FWS Lost River BiOp at 16.

2. Forest Service authorization of livestock grazing in LRS and SNS critical habitat, and consultation with FWS.

In 2007, the Forest Service completed consultation with FWS over livestock grazing in LRS and SNS habitat in the Lost River watershed on the Fremont-Winema National Forest. This consultation covered ten allotments. The Forest Service’s Biological Assessment (“BA”) outlined six actions to implement its grazing authorizations over the ten-year consultation period: (1) updating Allotment Management Plans and Annual Operating Instructions (“AOI”), (2) implementing grazing strategies, (3) conducting stream classification and sensitivity assessments, (4) conducting annual implementation monitoring, (5) conducting regular effectiveness monitoring, and (6) implementing adaptive management strategies. 2007 Forest Service Lost River BA at 10-18. The Forest Service concluded that livestock grazing may affect, but was not likely to adversely affect suckers on five allotments, and FWS issued a LOC for this determination. *Id.* at 67; 2007 FWS Lost River LOC. The Forest Service concluded that grazing was likely to adversely affect suckers on the other five allotments, Yocum Valley, Wildhorse, Arkansas, Pitchlog, and Yainax Butte, because SNS occupied habitat there. 2007 Forest Service Lost River BA at 67.

FWS issued a BiOp on June 1, 2007 covering the five allotments determined likely to adversely affect SNS, incorporating the Forest Service’s six action requirements into its Opinion. 2007 FWS Lost River BiOp at 3, 5-9. FWS noted that adverse water quality and prolonged drought were the major threats to LRS and SNS in the watershed. *Id.* at 19. FWS also described the degraded watershed conditions, including degradation and reduction of habitat from livestock grazing and water management. *Id.* at 30. FWS explained that LRS and SNS could face adverse effects from grazing due to water quality reductions and hydrogeomorphic and ecological changes. *Id.* at 38. FWS concluded that the effects of the proposed grazing would contribute to the problems of the degraded watershed and would therefore adversely affect SNS, but relied on monitoring and adaptive management to identify and correct problems. *Id.* at 42-43. FWS concluded that the authorized grazing was not likely to jeopardize the continued existence of SNS or LRS because only a small number of suckers would be harmed by grazing in occupied habitat, and rangewide there were likely millions of larvae and tens of thousands of adults. *Id.* at 56. FWS issued an Incidental Take Statement for SNS, Reasonable and Prudent Measures (“RPM”) necessary and appropriate to minimize incidental take of SNS from livestock grazing as a result of the proposed action, and Terms and Conditions, including monitoring and reporting requirements, necessary for the Forest Service to implement the mandatory RPM. *Id.* at 58-60. FWS also issued a conference report on the effects of the action on proposed critical habitat for LRS and SNS, concluding that the proposed grazing would likely result in the adverse modification of proposed critical habitat because it would incrementally reduce water quality and



quantity, degrade habitat, and adversely impact the biological environment. *Id.* at 60-61.

In December 2012, FWS finalized its designation of critical habitat for the LRS and SNS. 77 Fed. Reg. 73,739. In May 2014, the Forest Service produced a BA describing the effects of grazing on newly designated critical habitat within six allotments, concluding that grazing would either have no effect on or was not likely to adversely affect critical habitat. 2014 Forest Service Lost River Watershed Sucker Critical Habitat BA. The six allotments covered by the BA are Arkansas, Horsefly, Pitchlog, Yainax Butte, Wildhorse, and Yocum Valley. FWS issued a short LOC in June 2014. 2014 FWS Lost River Watershed Sucker Critical Habitat LOC.

### 3. Prolonged drought in the Klamath Basin.

The Klamath Basin, including the Lost River watershed, has experienced significant, severe, and prolonged drought over the last several years. Drought emergencies have been declared in Klamath County for four years straight – 2012, 2013, 2014, and now 2015. U.S. Geological Survey, Oregon Water Science Center, 2015 Klamath Basin Drought, *available at* [http://or.water.usgs.gov/Klamath\\_drought/index.html](http://or.water.usgs.gov/Klamath_drought/index.html) (last visited April 20, 2015); Office of the Governor, State of Oregon, Exec. Order No. 12-15, *Determination of a State of Drought Emergency in the Lost River Basin Due to Drought and Low Water Conditions* (Aug. 27, 2012), *available at* [http://www.oregon.gov/gov/Documents/executive\\_orders/eo\\_12-15.pdf](http://www.oregon.gov/gov/Documents/executive_orders/eo_12-15.pdf) (last visited April 20, 2015). In 2015, snowpack in the Klamath Basin was at only 10% as of early April, and the National Resources Conservation Service predicts that spring and summer basin streamflows will be 32–46% of average. *Id.* This year's drought qualifies as "extreme," as compared to last year's drought, which was "severe." The Oregonian, *Drought emergency declared by Klamath County Commissioners* (Mar. 19, 2015) *available at* [http://www.oregonlive.com/environment/index.ssf/2015/03/drought\\_emergency\\_declared\\_by.html](http://www.oregonlive.com/environment/index.ssf/2015/03/drought_emergency_declared_by.html) (last visited March 25, 2015).

### 4. Ongoing Forest Service authorization of grazing in sucker habitat on the Fremont-Winema National Forest.

The Forest Service has continued to authorize livestock grazing, via permits and AOIs, on multiple allotments within the Lost River watershed that contain occupied and designated critical habitat for LRS and SNS, despite the already degraded conditions, a lack of compliance with required monitoring and adaptive management, and the severe, prolonged drought. These allotments include but are not limited to Yainax Butte, Horsefly, Pitchlog, Arkansas, Wildhorse, and Yocum Valley.

## **FOREST SERVICE AND FWS VIOLATIONS OF THE ESA**

### 1. Failure to Insure that Livestock Grazing Complies with ESA Section 7(a)(2).

The duty to comply with Section 7(a)(2) remains with the Forest Service even after the completion of consultation via issuance of a BiOp or LOC. After the completion of consultation,



the action agency must determine whether and in what manner to proceed with the action in light of its Section 7 obligations and the completed consultation. 50 C.F.R. § 402.15(a). Where a consultation is legally flawed, such as where it fails to articulate a rational connection between its findings and its conclusions, reliance on that consultation violates the agency's substantive duty to ensure against adverse modification of critical habitat. *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 532 (9th Cir. 2010). Here, the 2014 BA and LOC contain errors of a legal nature and of such gravity that the Forest Service should have known not to rely upon it to fulfill its Section 7 obligations. Furthermore, the BA and LOC failed to rely on the best available science.

Specifically, the BA and LOC failed to address the impacts of prior grazing on SNS habitat and discuss existing monitoring data for the allotments at issue in the consultation, failed to consider the impacts of proposed grazing when added to stream conditions impaired from upstream and surrounding water management, failed to support its conclusions with data and reasoned explanations, and improperly relied on mitigation measures that were uncertain to occur and not proven to be effective to minimize impacts. Furthermore, by failing to address existing monitoring data and the requirements of the recently-completed recovery plan, the BA ignored the best available science. Overall, the BA relied on incomplete analysis and unsupported assumptions to conclude that the prescribed authorized grazing is not likely to adversely affect critical habitat for SNS. In its LOC, FWS relied upon these flawed conclusions and failed to address SNS recovery needs.

Because of these shortcomings and others, the Forest Service cannot rely on the BA and LOC to prevent destruction or adverse modification of critical habitat for SNS. The Forest Service's continued authorization of grazing on the Arkansas, Horsefly, Yainax Butte, Wildhorse, Pitchlog, and Yocum Valley allotments under permits and/or AOIs for 2014, 2015, and future years, in reliance on this faulty consultation, violates its ongoing duty under Section 7(a)(2) to prevent adverse modification of this species' critical habitat. The Forest Service and FWS also violated Section 7(a)(2) by failing to use the best scientific data available in the BA and LOC.

## 2. Failure to Reinitiate Consultation Under the ESA.

The Forest Service and FWS are in violation of the ESA and its implementing regulations, 50 C.F.R. § 402.16, for failing to reinitiate formal consultation on the effects of livestock grazing to sucker species and critical habitat on all allotments covered by the 2007 Lost River BA and BiOp.

The Forest Service and FWS have a duty to reinitiate consultation over the impacts of livestock grazing on suckers in the Lost River watershed because new information has arisen since the 2007 consultation that shows the Forest Service is not conducting and/or not complying with the requirements in the 2007 Lost River BA and BiOp. For instance, (1) implementation monitoring standards have been regularly exceeded and/or unauthorized use has occurred on at least the Yainax Butte, Horsefly, and Wildhorse allotments; (2) ecological conditions have



**ADVOCATES** for the **West**  
3115 NE Sandy Blvd. #223 | Portland, OR 97232

remained poor or have worsened on at least the Yainax Butte, Yocum Valley, and Pitchlog allotments; (3) the Forest Service has failed to complete some of the monitoring and other requirements upon which its and FWS's effects determinations were premised, including on the Arkansas, Horsefly, Pitchlog, Wildhorse, Yainax Butte, Fort Springs, and Yocum Valley allotments; and (4) the Forest Service has failed to comply with all of the Terms and Conditions in the Incidental Take Statement. Moreover, the severe and prolonged drought facing the Klamath Basin has changed conditions, adding significant stress and substantially impairing habitat for the species to an extent not considered in the 2007 BA or BiOp. Each of these factors affect suckers in a manner not previously considered in the 2007 consultation, triggering the need for reinitiation. Failing to reinitiate consultation violates ESA regulation 50 C.F.R. § 402.16.

### **PARTIES GIVING NOTICE**

The full name, address, and telephone number or email address of the parties giving notice are:

Oregon Wild  
Quinn Read, Wildlife Coordinator  
5825 N. Greeley Avenue  
Portland, OR 97217  
Tel: 503-283-6343  
Email: qr@oregonwild.org

Friends of Living Oregon Waters  
Joe Serres  
P.O. Box 2478  
Grants Pass, OR 97528  
jserres@optionsonline.org

Western Watersheds Project  
Travis Bruner, Executive Director  
P.O. Box 1770  
Hailey, ID 83333  
Tel: 208-788-2290  
travis@westernwatersheds.org

### **RELIEF REQUESTED**

As set forth above, the Conservation Organizations may pursue litigation in federal court following sixty days after this notice and may seek injunctive, declaratory, and other relief, including an award of fees and expenses incurred in investigating and prosecuting this action. To avoid such litigation, the Forest Service should cease authorization of grazing in LRS and SNS habitat on the Fremont-Winema National Forest until it reinitiates and completes formal



**ADVOCATES** for the **West**  
3115 NE Sandy Blvd. #223 | Portland, OR 97232

consultation with FWS over the impacts of that livestock grazing on the species and their critical habitat.

### CONCLUSION

This letter provides notice under section 11(g) of the ESA, 16 U.S.C. § 1540(g), of the Conservation Organizations' intent to sue the Forest Service and FWS for violations of the ESA unless the violations described herein are corrected within sixty days. The Conservation Organizations are available to discuss effective remedies and actions that will assure future compliance with the ESA.

Sincerely,

/s/ Lauren M. Rule

Lauren M. Rule

Advocates for the West  
3115 NE Sandy Blvd., Ste. 223  
Portland, OR 97232  
(503) 914-6388  
lrule@advocateswest.org

Attorney for Oregon Wild, Friends of Living Oregon Waters, and  
Western Watersheds Project