



**ADVOCATES** for the **WEST**  
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July 17, 2019

VIA U.S. CERTIFIED MAIL

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U.S. Department of the Interior  
1849 C Street, NW  
Washington, D.C. 20240

Greg Sheehan, Acting Director  
Fish and Wildlife Service  
1849 C Street, NW  
Washington, D.C. 20240

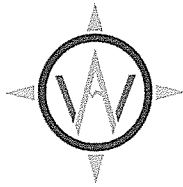
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Chris Christofferson, District Ranger  
Doublehead Ranger District  
49870 State Hwy 139  
Tulelake, CA 96134

**Re: Notice of Intent to Sue For Violations of the Endangered Species Act Regarding the Shortnose Sucker and Lost River Sucker, and Their Designated Critical Habitats Within Grazing Allotments in the Modoc National Forest.**



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To Sirs and Madams:

In accordance with the 60-day notice requirement of the Endangered Species Act (ESA), 16 U.S.C. § 1540(g), Western Watersheds Project hereby provides notice of intent to sue for violations of the ESA relating to management of fourteen grazing allotments on the Modoc National Forest, which contain two endangered suckers and their critical habitats.

The Forest Service has violated and is violating the ESA by failing to reinstate consultation regarding impacts of its grazing management on listed fish and their habitats, and by continuing to authorize grazing activities in the Devil's Garden and Doublehead Ranger Districts in the Modoc National Forest under an outdated consultation.

The assumptions underlying the U.S. Fish & Wildlife Service's (FWS) 1996 Biological Opinion (1996 BiOp) finding that grazing on the allotments will not jeopardize the endangered fish or adversely modify their critical habitat are no longer valid due to widespread standards violations and failure to perform required monitoring that have occurred since the prior consultation over twenty years ago. These changed circumstances and new information that has arisen in the intervening twenty-three years warrant reinstatement of consultation for the allotments. In addition, the Forest Service and FWS have not reinstated consultation over the allotments since new sucker critical habitat was designated in 2012, as the ESA requires.

## **FACTUAL BACKGROUND**

### **I. Endangered sucker species in the Modoc National Forest.**

The Modoc National Forest is located in the northern part of California and supports a large grazing program with 89 total allotments designated for grazing. Some of these allotments contain important habitat for endangered aquatic species. Specifically, fourteen allotments within the Devil's Garden and Doublehead Ranger Districts host two endangered sucker species: the Lost River sucker (*Deltistes luxatus*, known to the indigenous Klamath Tribes as *c'waam*) and the shortnose sucker (*Chamistes brevirostris*, known to the indigenous Klamath Tribes as *qapdo*) (hereafter referred to as the listed suckers).<sup>1</sup>

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<sup>1</sup> The original 1996 BiOp covered grazing on eighteen allotments in the Modoc National Forest and considered three listed sucker species. Since the 1996 BiOp, the Modoc suckers (*Catostomus microps*) have been delisted. Fourteen allotments continue to provide habitat for the two suckers that remain endangered.



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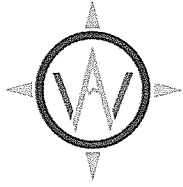
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Endemic to the upper Klamath Basin in Oregon and California, the listed suckers used to be an abundant and essential food source for the Klamath Tribes and other residents of the region. However, severe declines in sucker abundance resulted in the tribes having to close their fishery in the 1980s. The suckers were federally listed as endangered species throughout their entire ranges in 1988 and critical habitat was finally designated for both species under the ESA in 2012. They are also listed as endangered under California and Oregon state law. Contributing to the listed suckers' decline was habitat loss of roughly 75% of its historic range, degradation to and loss of spawning habitat, over harvest, and other factors that increased mortality rates. Today, habitat loss is the main threat to the listed suckers. Only roughly 25 percent of the suckers' original habitat remains. While the Klamath Tribes are no longer able to rely on the suckers as a food source, the fish continue to have important spiritual significance to the tribes.

The largest sucker populations today are located in upper Klamath Lake and Clear Lake Reservoirs and their tributaries. The Clear Lake populations are considered to be geographically isolated from the Klamath Lake populations. Less information is known about the Clear Lake populations, because most monitoring of the two species has been for the Klamath Lake populations. Clear Lake suckers spend the majority of their life in the reservoir but move upstream into tributaries to spawn. A single stream system—the Willow Creek drainage—provides the sole spawning habitat for the suckers and serves as the migratory corridor to the lake. Spawning in Willow Creek occurs every year for most suckers from February through May. Larvae move from spawning habitat to Clear Lake habitat starting in April through July, completing their transformation into juveniles by mid-July. The suckers use shallower lake habitat during their larval stages, but move to deeper water for older life stages. Emergent vegetation adjacent to open water is important for sucker habitat to facilitate growth and survival as well as provide protection from predation and natural elements. For food, suckers rely on a wide variety of chironomidae, crustacea, and other aquatic macroinvertebrates. Clear Lake Reservoir is a modified natural lake that is relatively shallow. Due to its size, low precipitation, minimal groundwater input, and high evaporation rates, Clear Lake is particularly sensitive to drought. When lake levels are low, suckers' access to spawning habitat is limited.

The status of the Lost River and shortnose suckers has not markedly improved since the species were listed. In the Upper Klamath, spawning individuals of both species are only about 50 percent of 2001 abundances. According to the 2013 status review for the shortnose sucker, although there is recruitment to the Clear Lake population, “the minimal monitoring efforts completed for these populations imply very low numbers of individuals.” Shortnose Sucker, 2013 5-Year Review, p. 8. Additionally, the 2007 status review for the Lost River sucker recommended that it be downlisted to threatened, but the 2013 review subsequently eliminated that recommendation and reaffirmed the species' endangered status. This recent information



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suggests that the listed suckers' populations have not improved since the 1996 BiOp and in fact are likely further declining as a result of persistent threats.

The Modoc National Forest contains valuable water sources for the endangered Lost River and shortnose suckers as well as their critical habitats, most notably Clear Lake reservoir and its tributaries. Water sources in fourteen grazing allotments in the Modoc National Forest either directly support the listed suckers and/or are seasonally or permanently connected to water sources supporting listed suckers. The Tucker, Clear Lake, Mammoth, and Carr allotments border critical habitat associated with Clear Lake; the Surveyor allotment borders another portion of critical habitat; and the Warm Springs, Blue Mountain, Triangle, Avanzino, and Timbered Mountain allotments contain critical habitat that occurs in tributaries to Clear Lake. Additionally, the Willow Creek, West Grizzlie, East Grizzlie, and Beaver Dam allotments all are within the range of the species and contain streams connected to critical habitat.

The detrimental effects of livestock grazing on streams and riparian habitats, as well as upland areas, are well documented. Grazing can harm fish directly, when cows trample redds, fry, and spawning beds and disturb fish, or indirectly, when cows trample streambanks or graze along waterways, which in turn decreases water quality and removes riparian vegetation. These effects reduce hiding cover, increase summer water temperatures,<sup>2</sup> promote formation of anchor ice in winter, and increase sedimentation into spawning and rearing habitats. All of the allotments considered in the 1996 BiOp were previously degraded by grazing practices.

## **II. ESA consultation over grazing in the Modoc National Forest.**

In 1995 the Forest Service began consultation with the FWS over the effects of grazing authorizations in the Modoc National Forest on the listed suckers. The consultation resulted in a BiOp in 1996. The BiOp concluded that authorizing grazing on these allotments would not jeopardize the listed suckers. It also concluded that there would be no destruction or adverse modification of the proposed critical habitat for the Lost River and shortnose suckers.<sup>3</sup> The FWS' analysis and determination was predicated on various requirements and assumptions regarding monitoring and grazing utilization levels.

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<sup>2</sup> While the listed sucker species are less directly impacted by warmer water temperatures than some fish species, there are indirect effects associated with warm water that pose a threat to the suckers. These include effects such as changing the environment for competitors and food sources, and degraded water quality levels.

<sup>3</sup> Critical habitat was proposed for these two suckers in 1994, but was never finalized. In 2011 critical habitat was proposed again and was finalized in 2012.



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The BiOp specified that short term or “implementation monitoring” of four features would occur annually to assess grazing practices, and long term or “effectiveness monitoring” would occur periodically to identify long-term ecological trends, which would ensure grazing was not harming suckers or their habitat. According to the BiOp, short term monitoring would occur once every two weeks during the grazing season and when livestock were moved from a pasture. It would focus on four utilization-related factors: herbaceous forage utilization, woody vegetation utilization, riparian vegetation stubble height, and stream bank alteration. Long term monitoring would focus on identifying long term trends of ecological health to determine whether pasture conditions have improved. Utilization thresholds were specified at levels corresponding to an allotment’s condition (i.e. lower utilization thresholds were required for pastures in poor condition) to ensure a positive trend toward recovery, but could be adjusted as allotment conditions changed. Monitoring would confirm whether the corresponding utilization levels were effectively improving pasture conditions.

The BiOp also included an Incidental Take Statement, which stated that take of suckers would likely occur as a result of habitat loss. The FWS directed the Forest Service to define the amount of incidental take authorized in a given year through its annual grazing strategy. It also specified six terms and conditions that were necessary to minimize incidental take. The terms and conditions included specific utilization levels and reporting requirements. The utilization standards limit utilization of herbaceous species to 50%, require 3–6” of stubble height along streams, and limit utilization of woody riparian species to 20% of current year’s growth. The BiOp also limits stream bank alteration to 20% and in more degraded allotments to 10%, unless additional mitigation measures are taken.

In 2001, the Forest Service and the FWS communicated about reinitiating consultation. In a memo from the Forest Service in February 2001, the Forest Service proposed to continue authorizing grazing under the 1996 BiOp, but with modified reporting requirements because the original requirements were “cumbersome.” In response, the FWS stated that the Forest Service should continue to operate under the 1996 BiOp without any modifications until a new consultation was completed. However, no new consultation occurred to replace the 1996 BiOp. The only other consultation related activity since then was in 2008 when the Doublehead Ranger District prepared a biological assessment (BA) for the Tucker allotment in response to a change in use from sheep grazing to cattle grazing. The 2008 BA concluded that the change may affect, but would not likely adversely affect the listed suckers.

Finally, in 2012 the FWS designated critical habitat for the Lost River and shortnose suckers. The final critical habitat rule discussed livestock grazing as an action that would



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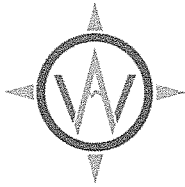
significantly increase sediment deposition within stream channels, thus potentially affecting critical habitat. The agencies had no discussions regarding reinitiating consultation following this designation.

As discussed below, the Forest Service has failed to comply with the monitoring requirements and utilization standards identified in the 1996 BiOp, with pervasive violations occurring repeatedly up until present. For instance, short term monitoring did not occur at all for many of the utilization-related standards and/or did not occur at the frequency specified by the BiOp. Long term monitoring was also infrequent or did not occur at all. When monitoring did occur, utilization standards were regularly exceeded and there was little action by the Forest Service to remedy the violations. Furthermore, the Forest Service does not appear to have sent the results of their monitoring to the Fish and Wildlife Service's Sacramento Field Office, as required by the BiOp.

Despite subsequent designation of critical habitat, repeated violations of livestock use standards and monitoring requirements—which have continued up to the present, and significant new information arising in the past twenty-three years, the Forest Service has not reinitiated consultation with the FWS over the fourteen allotments in the Modoc National Forest concerning their effects to Lost River and shortnose suckers and their critical habitat. The Forest Service continues to authorize grazing, via permits and AOIs, on the allotments.

### **LEGAL BACKGROUND**

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—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).



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To fulfill the substantive mandates of section 7 of the ESA, federal agencies must consult with an expert agency—FWS or the National Marine Fisheries Service, depending on the species at issue. The ESA’s implementing regulations allow an agency to enter into informal consultation with the relevant expert agency to determine whether its actions “may affect” threatened or endangered species or their critical habitats. *See* 50 C.F.R. § 402.13. Usually this is done by completing a biological assessment and submitting it for the expert agency’s concurrence. *Id.* § 402.12(j), (k). If the agency determines that the action is “not likely to adversely affect” listed species and their habitats, and the expert agency concurs, no further action is necessary. *Id.* §§ 402.13, 402.14(b). If, through the informal consultation process or otherwise, the agency determines that its action “is likely to adversely affect” listed species or their critical habitats, formal consultation is required that results in a Biological Opinion (“BiOp”). *Id.* § 402.14(a). The purpose of the BiOp is to determine whether the action will jeopardize the listed species or destroy or adversely modify critical habitat, in violation of section 7. If the BiOp concludes that the action will not violate section 7’s prohibitions, then the proposed action may go forth. A BiOp must also 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 ensure 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: (1) the amount or extent of incidental take is exceeded; (2) 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; (3) if the action is subsequently modified in a manner that causes an effect to the species or critical habitat in a way not considered in the consultation; or (4) if new critical habitat is designated that may be affected by the proposed action. 50 C.F.R. § 402.16. 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).

In addition, once a consultation under 16 U.S.C. § 1536(a)(2) has been initiated, the action agency must not make any irreversible or irretrievable commitment of resources that would foreclose implementation of any reasonable and prudent alternative measures. 16 U.S.C. § 1536(d).



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## **VIOLATIONS OF LAW**

### **I. The agencies violated and continue to violate the ESA by failing to reinitiate consultation on the allotments after critical habitat was designated in 2012.**

The Forest Service and FWS have a duty to reinitiate consultation if new critical habitat for a species is designated that may be affected by a proposed action. 50 C.F.R. § 402.16(d).

In 2012 the FWS issued a critical habitat rule designating critical habitat for the Lost River and shortnose suckers. Various portions of the designated critical habitat are located in, or border, grazing allotments within the Modoc National Forest Devil's Garden and Doublehead Ranger Districts. In fact, ten of the fourteen allotments which provide habitat for the suckers contain or border designated critical habitat.

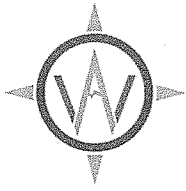
In light of this new rule, the Forest Service and FWS must reinitiate consultation to ensure that grazing in the Devil's Garden and Doublehead Ranger Districts does not adversely modify critical habitat of the listed suckers. Until the agencies reinitiate consultation, they are in violation of the ESA section 7 and 50 C.F.R. § 402.16(d).

### **II. The agencies violated and continue to violate the ESA by failing to reinitiate consultation on the allotments in light of failures to meet rangeland standards and comply with the terms and conditions of the 1996 biological opinion.**

The Forest Service and FWS also have a duty to reinitiate consultation when new information shows that an action's effects may affect a listed species or its critical habitat in a way or to an extent not previously considered or if an action is subsequently modified such that it causes effects that were not previously considered. 50 C.F.R. § 402.16(b), (c). The widespread standards violations and monitoring deficiencies since at least 2013 require reinitiation of consultation because grazing is affecting the listed suckers in ways not considered in the 1996 BiOp.

The 1996 BiOp specified that short term monitoring of four features—herbaceous forage utilization, woody vegetation utilization, stubble height, and stream bank alteration—and long term monitoring of ecological conditions to identify long-term trends were necessary to ensure utilization standards were effectively improving pasture conditions and aiding recovery of the suckers. Monitoring would also determine whether utilization levels needed to be adjusted. The Incidental Take Statement was also predicated on specific non-discretionary terms and conditions





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including specific numeric rangeland standards for herbaceous utilization, stream bank alteration, and woody vegetation utilization, and specific reporting requirements.

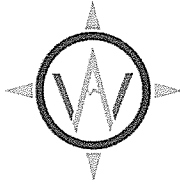
Monitoring did not occur as planned throughout the allotments. In the past five years, where short term monitoring has occurred at all, it has typically been solely for herbaceous utilization. Of the fourteen allotments at issue, at least six do not have any monitoring information for stubble height and stream bank alteration. And for many of the allotments that do have such information, monitoring only occurred once in the past five years. There were similar glaring absences with respect to woody vegetation (browse) utilization and long term monitoring.

Even when monitoring did occur, utilization frequently exceeded the specified standards on numerous allotments. The 1996 BiOp was insistent that compliance with utilization standards would help ensure pasture and riparian conditions were meeting desired objectives. If utilization levels did not meet standards, the BiOp instructed that cattle would be removed from a pasture or allotment and utilization levels may be adjusted for future grazing. The allotments, which had previously been adversely impacted by grazing practices, were meant to improve with the proposed action. These patterns of over-utilization undercut the assumptions and conclusions relied upon in the 1996 BiOp.

Furthermore, it does not appear that the Forest Service has acted consistently to prevent future violations from occurring. In the past five years the Forest Service only sent one notice regarding over-utilization to a permittee, despite over-utilization occurring in nearly all of the allotments. Additionally, it is unclear whether cattle were removed after utilization levels were violated, or whether utilization levels were typically measured once cattle were already off a pasture for the season. Utilization levels cannot serve their intended function—as a check on riparian area degradation warranting removal of cattle—if utilization is only monitored post-grazing season. The 1996 BiOp specified that utilization monitoring would occur every two weeks during the grazing season but Forest Service data does not reflect such a frequency of monitoring.

The Incidental Take Statement also required that the Forest Service report the results of any monitoring conducted to the Fish & Wildlife Service every year. However, the Forest Service does not seem to have reported any of the monitoring that has occurred in the past few years. This is a further violation of the terms and conditions of the BiOp.

Because standards are routinely being violated on most of the fourteen allotments and the conditions imposed to protect the listed suckers are not being observed, the assumptions in the



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BiOp used to justify its no-jeopardy determination are invalid, and effects to the protected species and critical habitat from grazing in the Modoc National Forest allotments are different from what the agencies considered. Thus, the agencies' failure to reinitiate consultation violates section 7 of the ESA and 50 C.F.R. § 402.16.

### **III. Given the repeated violations of terms and conditions in the incidental take statement, the agencies can no longer ensure compliance with the section 9 take prohibition.**

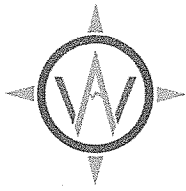
The Forest Service and FWS also have a duty to reinitiate consultation whenever the amount or extent of incidental take is exceeded. 50 C.F.R. § 402.16(a). The incidental take statement in the 1996 BiOp provided that the Forest Service must carry out its terms and conditions in order to be exempt from the take prohibition in section 9 of the ESA. 16 U.S.C. § 1538(a)(1). But the Forest Service has not consistently carried out the terms and conditions of the BiOp, and thus it cannot ensure that grazing still complies with the ESA.

Although the BiOp did not quantify the allowable amount of incidental take, incidental take was anticipated to occur as a result of habitat degradation. The terms and conditions of the incidental take statement included utilization standards and monitoring requirements to minimize this degradation. Violations of the utilization standards indicate that habitat is being degraded to a greater degree than anticipated or allowed by the BiOp. The Forest Service has frequently failed to conduct the short-term monitoring for stubble height and stream bank alteration. Furthermore, the BiOp indicated that take "may only be measurable by long-term effects on the species' habitat or population levels." BiOp at 24. Long term monitoring of habitat conditions has not occurred at all in many of the allotments, and in others it has been infrequent. Without fulfilling the required monitoring and meeting the required standards from the incidental take statement, there is no way to ensure that the incidental take that is actually occurring complies with that anticipated by the BiOp.

It is thus likely that there is more incidental take of the listed species than envisioned by the 1996 BiOp, triggering the need for reinitiation of consultation. 50 C.F.R. § 402.16(a).

### **IV. The agencies must reinitiate consultation to consider new information and update the analysis from the 1996 biological opinion.**

While the 1996 BiOp specified that it should be reevaluated after five years, over twenty-three years have now gone by. New information has arisen with respect to the listed suckers and the ecological conditions of the area. In 2013 an updated Recovery Plan was issued for the suckers in response to the substantial amount of new information available about the species, and



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updated 5-year reviews were also published for each species. In addition, much more is known about how climate change will affect ecological conditions. Climate change related impacts relevant to the Clear Lake Reservoir area include shifts in patterns of snowmelt and increased drought. The area has already dealt with such environmental stressors in recent years—there has been a severe and prolonged drought over the past ten years, and in 2017 a wildfire burned through the sucker’s spawning habitat in the Willow Creek area. As discussed above, the sucker populations in Clear Lake are especially susceptible to the impacts of drought. Each of these factors and more indicate that there is new information regarding the effects of grazing on the listed suckers and their critical habitat that was not previously considered, triggering the duty to reinstate consultation. 50 C.F.R. § 402.16(b).

### **V. The Forest Service must cease allowing grazing on the relevant allotments in the Modoc National Forest until a new consultation has been completed.**

Once consultation has been reinstated, the Forest Service must remove all livestock from the allotments to ensure that no irreversible or irretrievable commitment of resources that would foreclose implementation of reasonable and prudent alternative measures occurs, and to prevent any jeopardy to the species, adverse modification of critical habitat, or take of suckers during the consultation process. 16 U.S.C. §§ 1536(a),(d), 1538. Because of the patterns of over-utilization and severe lack of other monitoring, authorizing further grazing on these allotments risks harming listed fish, damaging their critical habitats, and causing additional resource damage that may take a very long time to recover, in violation of ESA sections 7(a)(2), 7(d), and 9. *Id.* §§ 1536(a)(2), (d), 1538. Accordingly, the Forest Service must cease authorizing grazing on the subject allotments until a new consultation has been completed, to comply with the ESA.

### **CONCLUSION**

As set forth above, Western Watersheds Project intends to pursue litigation in federal court for these ESA violations following sixty days after this notice 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.

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, or my client at the address listed below.



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Sincerely,

/s/ Lauren M. Rule

Lauren M. Rule

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