



## Western Resources Legal Center

October 11, 2019

**Via Certified Mail**

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**Re: Notice of Violations of the Endangered Species Act in Connection with the National Marine Fisheries Service's June 1, 2018 Biological Opinion for 29 Grazing Allotments for 2018-2022 on the Malheur National Forest, and the Malheur National Forest's Unlawful Reliance on the Legally Deficient Biological Opinion.**

Dear Secretary Ross, Secretary Purdue, and Msrs. Oliver, Thom, Trulock, and Gallaudet:

On behalf of the Western Resources Legal Center ("WRLC"), and pursuant to 16 U.S.C. § 1540(g)(2)(A)(i), I hereby notify you of violations of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531–1544, and its implementing regulations, regarding the National Marine Fisheries Service's ("NMFS") June 1, 2018 Biological Opinion ("2018 BiOp") for the Middle Columbia River ("MCR") steelhead issued to the Malheur National Forest ("MNF") in connection with the MNF's authorizations of grazing on 29 allotments for the 2018–2022 grazing seasons. As explained below, there are several major deficiencies in the 2018 BiOp that, if uncorrected by NMFS and/or MNF, will prompt WRLC to consider all options, including litigation.



## **BACKGROUND**

### **I. STATUTORY AND REGULATORY FRAMEWORK**

Pursuant to Section 7 of the ESA, before undertaking any action that may have direct or indirect effects on any listed species, an action agency must engage in consultation with NMFS in order to evaluate the impact of the proposed action. *See id.* § 1536(a). The purpose of consultation is to ensure that the action at issue “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] habitat of such species.” 16 U.S.C. § 1536(a)(2). As defined by the ESA’s implementing regulations, an action will cause jeopardy to a listed species if it “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. The evaluation of the effects of the proposed action on listed species during consultation must use “the best scientific . . . data available.” 16 U.S.C. § 1536(a)(2).

For actions that “may affect listed species or critical habitat,” the agency undergoes “formal consultation” pursuant to 50 C.F.R. § 402.14(a). During consultation, agencies must use the best scientific and commercial data available. 16 U.S.C. § 1536(a)(2); *see* 50 C.F.R. § 402.14(d). Federal agencies must also “provide any applicant with the opportunity to submit information for consideration during the consultation.” 50 C.F.R. § 402.14(d). NMFS specifically must also review “all relevant information” provided by the Federal agency or otherwise available. *Id.* § 402.14(g)(1). NMFS must also *directly discuss with any applicant*

*the basis for any finding in the biological opinion, and the availability of reasonable and prudent alternatives (if a jeopardy opinion is to be issued) that the agency and the applicant can take to avoid violation of section 7(a)(2). The Service will utilize the expertise of the Federal agency and any applicant in identifying these alternatives.*

*Id.* § 402.14(g)(5).

At the end of the formal consultation process, NMFS must determine whether the proposed action is likely to jeopardize the continued existence of a listed species or destroy or adversely modify any designated critical habitat. If NMFS determines that the proposed action is not likely to jeopardize the continued existence of listed species, but that the proposed action will nevertheless result in the incidental taking of listed species, then NMFS must provide the action agency with a written Incidental Take Statement (“ITS”) specifying the “impact of such incidental taking on the species” and “any reasonable and prudent measures [(“RPMs”)] that the [Service] considers necessary or appropriate to minimize such impact,” and setting forth “the terms and conditions . . . that must be complied with by the [action] agency or applicant (if any), or both, to implement [those] measures.” 16 U.S.C. § 1536(b)(4)(ii), (iv).

Importantly, the RPMs (and the terms and conditions that implement them) identified by NMFS as part of the ITS “cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes.” *See* 50 C.F.R. § 402.14(i)(2).

## II. FACTUAL BACKGROUND

The 2018 BiOp offers an adequate description of the background and general nature of the proposed action. *See* 2018 BiOp at 1–127. In sum, the proposed action authorizes grazing on 29 allotments<sup>1</sup> in the MNF for the 2018–2022 grazing seasons. As operators requiring authorization from MNF to graze livestock on federal lands, each of the grazing permittees were given “applicant” status pursuant to the ESA as part of the consultation for the 2018 BiOp. *Id.* at 4. However, WRLC has identified several significant issues with both the timing of the release of the 2018 BiOp and the final requirements imposed by NMFS on the grazing permittees vis-à-vis the incidental take statement.

In particular, the grazing permittees themselves were given no meaningful opportunity to participate in the development of the 2018 BiOp. Formal consultation officially commenced on January 24, 2018. *See* 2018 BiOp at 1. On May 3, 2018, NMFS provided MNF with a preliminary draft of terms and conditions it believed were necessary to avoid a jeopardization determination. *Id.* at 4. MNF then submitted its comments for the Service to review. On May 15, 2018, permittees received a working draft of the BiOp to review. *Id.* Meanwhile, MNF was in the process of providing more comments to NMFS, and NMFS further revised the terms and conditions while the permittees were reviewing the prior draft. *Id.* On May 23, 2018, permittees received the final draft to review. *Id.* Just one week later, NMFS and MNF terminated all discussions with the permittees on May 30, 2018. *Id.* NMFS issued its final BiOp on June 1, 2018, which spans a total of 316 pages. In total, most permittees were given just five business days to provide information for the agencies to consider. Moreover, WRLC has received information that several permittees were effectively given only a matter of hours to submit information for consideration.

The final BiOp ultimately makes drastic changes to basic design elements of the grazing permits, vis-à-vis the incidental take statement’s imposition of restrictive reasonable and prudent measures (“RPMs”) and terms and conditions. *See generally* 2018 BiOp at 287–97. The RPMs imposed by NMFS alter the duration and timing of the grazing permits by imposing arduous move-triggers, end-of-use indicators, and fence maintenance requirements. *See generally* Section 6.1 of Biological Assessments (“BAs”). *E.g.*, Beech Allotment BA at 80, Table 20. In particular, stubble height requirements have constricted significantly under the 2018 BiOp, NMFS has relied too heavily on short-term stubble height measurements as an indicator of take, and fencing and other maintenance requirements have increased. *Id.*; *see, e.g.*, Beech Allotment

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<sup>1</sup> The grazing allotments include: Aldrich, Beech, Blue Mountain, Camp Creek, Dark Canyon, Deadhorse, Deer Creek, Dixie, Fawn Springs, Field Peak, Fox, Hanscomb, Herberger, Hot Springs, John Day, Long Creek, McClellan, McCullough, Mount Vernon, Murderers Creek, Lower Middle Fork John Day, North Middle Fork John Day, South Middle Fork John Day, Rail, Reynolds Creek, Round Top, Seneca, Slide Creek, and York Grazing Allotments on the Malheur National Forest, North Fork John Day (HUC 17070202) Middle Fork John Day (HUC 17070203), South Fork John Day (HUC 17070201), and Upper John Day (HUC 17070201) Subbasins, Grant County, Oregon.

BA at 86–87 (discussing fence maintenance required before turnout); 2018 BiOp at 289 (discussing use of short-term stubble height near waterways as indicator of take). Another major issue identified by WRLC relates to the MNF’s responsibility to maintain fences in order for permittees to turn out, given the MNF’s poor track record with regard to maintaining fences. Ultimately, these drastic changes go beyond the appropriate use of an incidental take statement by NMFS and erode the practical ability of permittees to utilize their grazing permits. Moreover, the changes are particularly troubling where grazing permittees who are directly affected by this decision were precluded from meaningfully commenting on and/or participating in the decision as ESA applicants.

## **LEGAL VIOLATIONS**

As discussed in detail below, MNF and NMFS denied permittees to the MNF 2018–2022 grazing allotments a meaningful opportunity to submit information for consideration during the consultation process for the 2018 BiOp. *See* 50 C.F.R. § 402.14(d) (requiring action agency to provide applicants with an opportunity to submit information for consideration during consultation process); *id.* § 402.14(g)(1) (requiring review of all relevant information); *id.* § 402(g)(5) (requiring NMFS to utilize expertise of ESA applicants). In addition, NMFS and MNF failed to use the best scientific and commercial data available, as the BiOp is not supported by on-the-ground evidence pertaining to each grazing allotment. *See* 16 U.S.C. § 1536(a)(2) (requiring the agencies to use the best scientific and commercial data available during consultation). Lastly, NMFS failed to evaluate whether its RPMs and the terms and conditions that implement the BiOp altered the basic design, duration, and timing of each grazing permit pursuant to 50 C.F.R. § 402.14(i)(2) and, in fact, did impose conditions in the BiOp which altered aspects the grazing permits in violation of the Section 402.14(i)(2). The 2018 BiOp is thus not in accordance with law, and WRLC may seek to enjoin enforcement of its arbitrary and capricious terms and conditions. *See* 5 U.S.C. § 706(2)(A); 16 U.S.C. § 1540(g)(1)(A).

### **I. NMFS AND MNF FAILED TO PROVIDE PERMITTEES A MEANINGFUL OPPORTUNITY TO SUBMIT INFORMATION FOR CONSIDERATION DURING THE CONSULTATION PROCESS.**

Formal consultation for the 2018–2022 grazing allotments officially commenced on January 24, 2018. *See* BiOp at 1. On May 3, 2018, NMFS provided MNF with a preliminary draft of terms and conditions it believed were necessary to avoid a jeopardization determination. BiOp at 4. MNF then submitted its comments for the Service to review. On May 15, 2018, permittees received a draft of NMFS’s BiOp to review. *Id.* MNF then provided more comments to NMFS, and NMFS revised the terms and conditions again. *Id.* On May 23, 2018, permittees received the final draft to review. *Id.* Just one week later, NMFS and MNF terminated all discussions with the permittees on May 30, 2018. *Id.* NMFS issued its final BiOp on June 1, 2018, which spans a total of 316 pages. In total, some permittees were given five business days by MNF and NMFS to provide information for the agencies to consider. Some permittees were given only a few hours to submit information for consideration.

A mere five days (or less) is an inadequate amount of time for the permittees to analyze the BiOp, gather information, and draft comments for the agencies to consider. The permittees

to the MNF grazing allotments for 2018–2022 were never given a meaningful opportunity to participate in the Section 7 consultation process with MNF or NMFS. Under 50 C.F.R. § 402.02, an “[a]pplicant refers to any person . . . who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action.” The grazing permittees fall within this definition. Applicants have special rights during the consultation process. Such rights include the right to provide MNF with scientific studies and other information discussing the effects of grazing on the MCR steelhead: “[t]he Federal agency shall provide any applicant with the opportunity to submit information for consideration during the consultation.” See 50 C.F.R. § 402.14(d). However, MNF failed to satisfy these requirements as it raced through the consultation process, thereby denying the permittees any meaningful opportunity to comment or submit information for consultation.

Administrative agencies are required to follow their regulatory framework. 5 U.S.C. § 706(2)(A). Moreover, a BiOp may be enjoined where a consultation agency fails to follow its statutory and regulatory framework. 16 U.S.C. § 1540(g)(1)(A). As outlined above, many of the permittees had an extremely limited window to engage with MNF, as little as five business days in most cases, and provide meaningful feedback on the proposed terms and conditions in the BiOp. By contrast, the BiOp represents many months, even years, of work by MNF and NMFS. Consequently, MNF and NMFS denied the permittees a meaningful opportunity to participate in the consultation process, in violation of 50 C.F.R. § 402.14(d) and § 402.14(g)(1), and (g)(5).

## **II. NMFS AND MNF FAILED TO USE THE BEST SCIENTIFIC INFORMATION AVAILABLE DURING THE CONSULTATION PROCESS, AND THE BIOP IS NOT SUPPORTED BY ON-THE-GROUND EVIDENCE.**

NMFS and MNF narrowly focused on the short-term effects of grazing on MCR steelhead and disregarded long-term effects throughout the BiOp. Specifically, NMFS and MNF focused on stubble height near the bank of creeks as an indicator of incidental take. 2018 BiOp at 289. However, such a narrow focus is inconsistent with the scientific community’s consensus that stubble height is not a reliable indicator of the impacts of grazing. Therefore, NMFS violated its requirement to use the best scientific and commercial data available. See 16 U.S.C. § 1536(a)(2) (requiring consultation to be supported by the best scientific and commercial data available).

In 2004, University of Idaho Stubble Height Review Team determined that “[s]tubble height as an annual indicator of grazing use in riparian area[s] should only be used where existing science suggests that it is an appropriate indicator *and in combination with long-term monitoring of vegetation and channel parameters.*” See *Stubble Height Study Report* at 3. Long-term indicators of a stream’s health are indicated by the “vegetation composition of the greenline, streambank stability and regeneration of woody species . . .” *Id.* at 6. Yet, the 2018 BiOp emphasizes stubble height as an accurate indicator of incidental take, and it exaggerates the effects of grazing and stubble height on the presence of woody species and the overall health of the stream. Compare 2018 BiOp at 289–90 (asserting that stubble height is an accurate indicator of incidental take), with *Stubble Height Study Report* at 5 (“It is also inappropriate to use stubble height numeric values as the sole means to manage toward achieving the longterm objectives.”)

In reality, the effects of stubble height on the health of meadow streams is much more complex. An appropriate approach would adjust stubble height based on the specific conditions of the stream:

Clary and Leininger (2000) proposed a 10 cm (4 in) residual stubble height as a “starting point for improved riparian grazing management.” However, they acknowledged that in some instances, 7 cm (2.75 in) may provide adequate riparian protection and in others 15 to 20 cm (6 to 8 in) may be required to limit streambank trampling or to reduce willow browsing. The criteria could vary depending upon local environmental variables, condition and trend of the stream, species composition on the greenline and the season, frequency and duration of livestock use. Thus, stubble height criteria not only can but should be adjusted through adaptive management, based on riparian conditions and trend.

*Stubble Height Study Report* at 7. The BiOp does not assess local environmental variables particular to the MNF and each grazing allotment as described above, instead taking a blanket approach to stubble height for all of the grazing allotments.

Stubble height does not impact a stream’s health until over grazing prevents vegetation from growing back. *Id.* at 11 (explaining that “one year of not meeting the [stubble height] standard may well be relatively benign to stream/riparian recovery. However, a pattern of non-compliance (i.e., 3 or 4 consecutive years of not meeting the numeric value) could very well severely affect the health of . . . [the stream/riparian area]”). That said, excess-use was not a concern in all of the grazing allotments at issue, because each permittee took serious measures to ensure the sustainability of the grazing program during prior seasons. For example, the Beech Creek, Camp Creek, Long Creek, and Lower Middle Fork Allotments’ stubble height was measured at between 8 and 13 inches after use during the previous grazing seasons. *See e.g.*, BiOp at 146, 215–16, 223–25, 227. Thus, the BiOp also overemphasizes potential short-term effects that have not manifested an impact on the MCR steelhead.

NMFS also is over reliant on streambank alteration as a proxy for take. A significant number of streams in the MNF have streambanks made up of rock and rock substrate. These geological features make the streambanks less susceptible to alteration by livestock and others and, to a certain degree, protect MCR steelhead. As a result, reliance on streambank alteration as a measure of take—without additional information on riparian conditions and trends specific to particular stream reaches—does not constitute the best available science. These oversights show that the BiOp’s terms and conditions are not supported by on-the-ground evidence. Due to its narrow focus and ignorance of the historic conditions in the pastures, it is clear NMFS and MNF failed to utilize the best scientific information and data available.

NMFS also ignored each stream’s ability to rebuild the stability of its streambank, thereby discounting another long-term management indicator. Instead of analyzing each streambank’s ability to recover, NMFS conflated the detrimental effects of bank alteration, which is a short-term indicator, and streambank stability, which is a long-term indicator. *Compare* BiOp at 24 (equating the effects of streambank alteration and streambank stability), *with* 270-71 (over-emphasizing the effect of streambank alteration, which is continuously

redressed by streambank recovery, and ignoring streambank stability). NMFS must follow Multiple Indicator Monitoring (“MIM”) protocols and analyze streambank recovery using the proper methods. In BLM’s *Multiple Indicator Monitoring of Stream Channels and Streamside Vegetation* (“MIM Protocol”), BLM emphasized that “[b]ecause streams have the ability to repair a certain amount of streambank alteration after disturbance, it is important that the intensity of disturbance, or streambank alteration, be less than the amount of streambank stability repair.” MIM Protocol at 31. However, the BiOp discounts each streambank’s ability to recover. Because it has failed to follow the MIM Protocol, its analysis suffers from an exaggeration of the short-term effects of grazing. Consequently, NMFS’ move-triggers and non-compliance standards are arbitrary, and not based on the best scientific information and data available.

Finally, streambank alteration criteria, stubble height criteria, and other indicators that NMFS has identified as “surrogates” for identifying “take” of MCR steelhead do not differentiate between alteration of the landscape by cattle, wild horses, wildlife, or other various users of MNF lands (e.g., recreational use). As a result, all bank alteration and stubble height alteration is effectively borne by grazing permittees—as permitted use or seasons of use are restricted when populations of wildlife (deer, elk, etc.), wild horses, or recreational users make significant alterations to these indicators. Because NMFS is essentially equating these indicators with “take” by grazing permittees without directly tying them to livestock grazing (and basing reductions in use and other steps taken pursuant to the BiOp’s incidental take statement on those surrogate indicators), NMFS has failed to meet the best available science requirement.

### **III. NMFS FAILED TO EVALUATE WHETHER THE CONDITIONS IMPOSED IN THE BIOP ALTERED THE BASIC DESIGN, DURATION, AND TIMING OF THE GRAZING PERMITS VIA THE RPMS AND TERMS AND CONDITIONS.**

NMFS has failed to evaluate whether the RPMs and terms and conditions it imposed in the BiOp altered the basic design of the grazing permits it was evaluating or which constitute more than “minor changes.” The ESA’s implementing regulations require NMFS to make such an assessment:

Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes.

50 C.F.R. § 402.14(i)(2). In order to ensure that that RPMs and terms and conditions do not alter the “basic design, location, scope, duration, or timing” of the agency action under consideration, NMFS must at least consider whether it has done so and whether it has imposed conditions that go beyond the “minor changes” referenced in Section 402.14(i)(2).



**IV. NMFS ALTERED THE BASIC DESIGN, DURATION, AND TIMING OF THE GRAZING PERMITS WITH ITS RPMS AND TERMS AND CONDITIONS, AND IT FAILED TO CONSIDER WHETHER IT MADE SUBSTANTIAL CHANGES TO THE GRAZING PERMITS.**

Through its RPMS, the BiOp imposes arduous move-triggers, end-of-use indicators, and fence maintenance requirements upon the permittees. The terms and conditions that implement these RPMS undermine the basic design of the grazing permits and render them economically infeasible. They also alter the duration and timing of the grazing permits. Consequently, NMFS made substantial changes to the grazing program, thereby violating 50 C.F.R. § 402.14(i)(2).

With regards to fencing, permittees “are responsible for maintenance of perimeter allotment fences, interior pasture fences, and for all enclosure fences that are primarily intended to protect CH, springs, and riparian areas from grazing, and are related to livestock management.” BiOp at 22. MNF is responsible for all other fences in the national forest. *Id.* Livestock may not turn-out until all fences have been assessed and maintained, regardless of whether MNF is responsible for the fence. *Id.*

If MNF fails to uphold its end of the bargain by assessing and repairing the fences it is responsible for, the permittees will lose a significant portion of the grazing season. After all, no grazing may occur until all fencing issues have been resolved. Thus, permittees may have to delay their permitted allotment use while MNF addresses each of the fences it is responsible for. Consequently, NMFS altered the timing of the grazing permits with its fencing terms and conditions. Grazing permittees have relied on timely access to MNF at the beginning of each grazing season for years, and the onerous fencing requirements are likely to result in substantial uncertainty regarding turnout dates, making management planning more difficult. Since the timing of the permits has been altered, NMFS rendered the program economically infeasible to many of the permittees. Therefore, a major timing change occurred.

In addition, the BiOp’s MIM move-triggers and end-point indicators are more protective than in the past, which effectively changes the duration and value of the grazing permits. For the 2018-2022 allotments, livestock must be moved if stubble height falls below 7 inches. BiOp at 264. In addition, a permittee exceeds the end-of-use indicator and fails to comply with the terms and conditions if the stubble height falls below 6 inches. *Id.* at 25–26. In prior years, the end-of-use indicator was set at 4 inches for stubble height. *Id.* at 264; *id.* at 270. The change amounts to nearly a 50 percent difference. Additionally, monitoring is now prescribed within 1-2 weeks after grazing, instead of at the end of the growing season, which precludes regrowth/regeneration of forbs and forage. BiOp at 13, Table 3. Together, these terms and conditions both shorten the duration of the grazing permits and make them less flexible and practical. A higher end-of-use stubble height requirement means livestock will meet it sooner. A limit for permit noncompliance that falls within 1 inch of the move trigger is also impractical, effectively depriving permittees from fully utilizing their permitted use. The terms and conditions of the RPMS thus significantly shortened the duration of the grazing season and will render the grazing program economically infeasible for the permittees.

NMFS failed to explain why these terms and conditions did not amount to more than minor changes demonstrates that it trampled all over 50 C.F.R. § 402.14(i)(2). Moreover, the grazing permits *have been* substantially altered by NMFS because the RPMs and terms and conditions in the BiOp impose arduous move-triggers, end-of-use indicators and fence maintenance requirements that affect the timing and duration of livestock turnout and undermine the economic viability of the grazing permits. For those reasons, a major change occurred in violation of § 402.14(i)(2), and the BiOp is not in accordance with the law. A reviewing court will hold it as arbitrary and capricious and enjoin enforcement of its terms and conditions.

## V. REQUIRED ACTIONS.

If the above violations are not corrected within 60 days, WRLC intends to pursue legal action. An appropriate remedy is to contact the permittees to the grazing allotments and allow them to meaningfully participate in the consultation process. The feedback of the permittees is required to ensure the grazing program complies with the ESA and the grazing permits retain meaningful usefulness and value.

Moreover, the permittees understand the BiOp must be tailored to avoid a jeopardy determination. But in its current form, the BiOp is designed to impose an undue burden on the permittees, and it substantially changed the grazing permits by altering their basic design, duration, and timing. Thus, the terms and conditions of the RPMs must be amended.

If you have any questions, or would like to discuss this matter further, please contact me at your earliest convenience.

Sincerely,



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