



July 21, 2015

Via Certified Mail Return Receipt Requested

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RE: Sixty-Day Notice of Intent to Sue for Violations of the Endangered Species Act
From the Operation and Maintenance of Crane Prairie and Wickiup Dams and
Reservoirs Affecting Threatened Oregon Spotted Frog

Dear Sir and Madams:

In accordance with the 60-day notice requirement of the Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g), the Center for Biological Diversity hereby provides notice that the U.S. Bureau of Reclamation (“BOR”) is in violation of Section 7 and Section 9 of the ESA, 16 U.S.C. § 1536 and § 1538, and the ESA’s consultation regulations, 50 C.F.R. Part 402.

Specifically, by operating and maintaining the Crane Prairie Dam and Reservoir and the Wickiup Dam and Reservoir in central Oregon to store, release, and divert water, BOR is violating § 7(a)(2) of the ESA by engaging in action that “may affect” the Oregon spotted frog, an ESA-listed species, without consulting under the ESA over the impacts of that action on the spotted frog. 16 U.S.C. § 1536(a)(2). The continued operation and maintenance of the reservoirs and dams before completing such consultation also constitutes a violation of § 7(d) of the ESA, which prohibits the “irretrievable commitment of resources” pending completion of consultation. 16 U.S.C. § 1536(d). Furthermore, BOR’s continued operation and maintenance of the reservoirs and dams harm Oregon spotted frog individuals and egg masses, constituting “take” of a listed species without any authorization under an Incidental Take Statement (“ITS”), in violation of § 9 of the ESA. 16 U.S.C. § 1538(a)(1)(B); 50 C.F.R. § 17.11(h).

LEGAL FRAMEWORK

Under § 7(a)(2) of the ESA, “[e]ach federal agency *shall . . . insure* that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species.” 16 U.S.C. § 1536(a)(2) (emphasis added); *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 924 (9th Cir. 2008).

The ESA imposes a procedural consultation process “to ensure compliance with the [ESA’s] substantive provisions.” *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985). To fulfill these procedural duties, federal agencies must consult with the appropriate federal fish and wildlife agency (U.S. Fish and Wildlife Service (“FWS”) in the case of amphibians) under § 7 whenever it takes an action that “may affect” a listed species. *See* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Regulations implementing § 7 broadly define the scope of agency actions subject to consultation. *See* 50 C.F.R. § 402.02 (definition of “action”). The Ninth Circuit Court of Appeals has construed this term broadly, based on whether a federal agency affirmatively authorized, funded, or carried out the underlying activity and whether it retains some discretion to influence or change the activity for the benefit of a protected species. *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1021 (9th Cir. 2012); *Natural Resources Defense Council v. Jewell*, 749 F.3d 776, 784-85 (9th Cir. 2014).

To fulfill its Section 7(a)(2) mandate, the action agency prepares a biological assessment (“BA”) to evaluate potential effects to listed species and determine whether a species is “likely to be adversely affected” or “not likely to be adversely affected” by the action. 50 C.F.R. § 402.12. If the BA concludes that an action is not likely to adversely affect a listed species or its critical habitat, and FWS concurs, FWS issues a written letter of concurrence (“LOC”). *Id.* § 402.13(a); *id.* § 402.14(b). If the action agency and/or FWS determines that the proposed action is likely to adversely affect a listed species or its critical habitat, FWS prepares a biological opinion (“BiOp”). *Id.* § 402.14(a), (g). In a BiOp, FWS must review all relevant information, evaluate the current status of the species or critical habitat, and evaluate the effects and cumulative effects of the proposed action on the listed species and their critical habitat. *Id.* § 402.14(g)(1)–(3); (h)(1)–(2). A BiOp determines whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. *Id.* § 402.14(g)(4); (h)(3). If a “jeopardy” opinion is issued, FWS shall include reasonable and prudent alternatives that will avoid jeopardy and will allow the agency to proceed with the action. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14(h)(3).

Separately, § 7(d) of the ESA prohibits federal agencies, after the initiation of consultation under § 7(a)(2) of the ESA, from making any irreversible or irretrievable commitment of resources if doing so would foreclose the implementation of reasonable and prudent alternatives. 16 U.S.C. § 1536(d). The duties to comply with § 7(d) and to avoid jeopardy to a species, adverse modification of critical habitat, and take of a species during the consultation process generally require prohibition or restriction of the action until consultation is completed. *See Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1128 (9th Cir. 1998) (§

7(d) was violated where Bureau of Reclamation executed water service contracts prior to completion of formal consultation). *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1056-57 (9th Cir. 1994) (timber sales constituted irreversible and irretrievable commitments of resources under § 7(d), and thus could not go forward during the consultation process); *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 138 F. Supp. 2d 1228, 1250 (N.D. Cal. 2001) (enjoining delivery of Klamath project water to irrigators until a valid consultation was complete); *Washington Toxics Coal. v. U.S.E.P.A.*, 413 F.3d 1024, 1034-36 (9th Cir. 2005) (affirming district court injunction of EPA pending compliance with consultation requirements); *Defenders of Wildlife v. Martin*, 454 F. Supp. 2d 1085, 1098-99 (E.D. Wash. 2006) (enjoining Forest Service authorization of snowmobiling pending completion of consultation regarding impacts to woodland caribou).

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 when “a new species is listed or critical habitat designated that may be affected by the identified action.” 50 C.F.R. § 402.16(d). The duty to reinitiate consultation lies with the action agency and the consulting agency. 50 C.F.R. § 402.16; *Env'tl. Protection Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1076 (9th Cir. 2001).

Section 9 of the ESA prohibits “take” of an endangered species by any person. 16 U.S.C. § 1538(a). This prohibition has generally been applied to species listed as “threatened” through regulations promulgated under section 4(d) of the ESA, 16 U.S.C. § 1533(d). Section 9 of the ESA prohibits violations of those regulations. *Id.* § 1538(a)(1)(G). Section 9 of the ESA also makes it unlawful to “solicit another to commit or cause to be committed” a violation of that section of the statute. *Id.* § 1538(g). “Take” includes actions that harass, harm, pursue, wound, kill, trap, capture, or collect a protected species. *Id.* § 1532(19). “Harm” includes significant habitat modification or degradation that kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. 50 C.F.R. § 17.3.

FWS may issue an incidental take statement (“ITS”) when take incidental to – but not the main purpose of – a federal agency action will not jeopardize the continued existence of listed species or destroy or adversely modify their critical habitat. 16 U.S.C. § 1536(b)(4). An ITS must specify (1) the impact of take on the species, (2) reasonable and prudent measures necessary or appropriate to minimize that impact; (3) terms and conditions required to implement those measures; and (4) procedures to handle “taken” individuals, among other requirements. 50 C.F.R. § 402.14(i). The ITS allows the agency, if in compliance with the terms and conditions of the ITS, to “take” listed species without facing § 9 liability. *Id.* § 402.14 (i)(5); 16 U.S.C. § 1538(a)(1)(B); *id.* §§ 136(b)(4), (o)(2).

FACTUAL BACKGROUND

1. The Oregon Spotted Frog and Its Aquatic Habitat.

The U.S. Fish and Wildlife Service (“FWS”) listed the Oregon spotted frog as threatened under the ESA on August 29, 2014, and the rule went into effect on September 29, 2014. 79 Fed. Reg. 51658 (Aug. 29, 2014); *see also* 50 C.F.R. § 17.11(h). Factors leading to federal listing include continued destruction or elimination of habitat through human activities such as operation of water diversions or other manipulation structures, predation by nonnative species, small and isolated breeding locations, low connectivity, low genetic diversity within occupied sub-basins, and genetic differentiation between sub-basins. *Id.* at 51658. Scientific studies suggest that the species is lost from 70-90% of its historic range. K. A. Cushman and C. A. Pearl, A Conservation Assessment for the Oregon Spotted Frog, U.S.D.A. Forest Service Region 6 and U.S.D.I. Bureau of Land Management, Oregon and Washington, at 3 (Mar. 2007).

Inhabiting emergent wetland habitats in forested landscapes, the Oregon spotted frog is the most aquatic of all native frog species in the Pacific Northwest. *Id.* at 51661. Spotted frogs rely on different water conditions for all life stages: they require “shallow water areas for egg and tadpole survival; perennially deep, moderately vegetated pools for adult and juvenile survival in the dry season; and perennial water for protecting all age classes during cold wet weather.” *Id.* FWS has noted that “[c]hanging water levels at critical periods in the Oregon spotted frog’s life cycle” negatively affects the species due to its heavy reliance upon water. *Id.* at 51669. In the listing rule, FWS stated that lowered water levels can “expose[] individuals to predation by reducing cover and confining them to smaller areas where they are more vulnerable to predators.” *Id.* Furthermore, water level reduction during the breeding season¹ can result “in the loss of the entire reproductive effort for the year due to stranding and desiccation of the egg masses.” *Id.* Conversely, “[e]xcessive seasonal flooding at critical periods” can result in the “loss of shallow wetlands needed for egg-laying and development” or the “flooding of egg masses.” *Id.* at 51669, 51672.

2. Crane Prairie Dam and Reservoir and Wickiup Dam and Reservoir.

The BOR owns the Crane Prairie Dam and Reservoir (“Crane Prairie”) and the Wickiup Dam and Reservoir (“Wickiup”), both of which are located on the upper Deschutes River in the central Oregon Cascades. Crane Prairie and Wickiup are part of the Deschutes Project, which supplies irrigation water to approximately 50,000-98,000 acres of land in central Oregon, and are operated together as a combined system. Crane Prairie Dam, a 36-foot-high earthfill structure, impounds the waters of the upper Deschutes River into Crane Prairie Reservoir, which has a total capacity of 55,300 acre-feet. Crane Prairie Reservoir has approximately 24 miles of shoreline. Water in Crane Prairie Reservoir is released into downstream Wickiup Reservoir, and also

¹ Spotted frog breeding generally occurs in February and March at lower elevations and between early April and early June at higher elevations. *Id.* at 51659.

diverted through privately owned and operated diversion facilities. Wickiup Reservoir, approximately two miles downstream from Crane Prairie, has a total capacity of 200,000 acre-feet, and stores waters of the Deschutes River for irrigation of lands in the North Unit Irrigation District. Wickiup Reservoir, created by the 100-foot-high Wickiup Dam, has approximately 48 miles of shoreline.

Reservoir operations greatly reduce winter stream flows and greatly increase spring, summer and fall stream flows in the Deschutes River. Irrigation releases from Crane Prairie Reservoir typically begin by mid-to-late April and peak in June and July. River levels are then reduced to minimum flows in late October and early November as the reservoir fills. The Wickiup irrigation season extends from April 1 to October 31, with releases typically stopping and the Reservoir beginning to refill by mid-October.

As the owner of Crane Prairie and Wickiup dams and reservoirs, BOR has discretion over water storage and release from those reservoirs. BOR is also responsible for conducting regular inspection, maintenance, and repairs of these facilities. Because of its responsibilities over these facilities, as well as other water storage and diversion facilities in the Deschutes River Basin, BOR consulted with FWS and NOAA Fisheries over the impacts of the continued operation and maintenance of Deschutes River Basin Projects on ESA listed species in 2003-2005. This consultation specifically included within the proposed action the continued operation and maintenance of Crane Prairie Dam and Reservoir and Wickiup Dam and Reservoir for storage and release of water, and diversion of Wickiup Reservoir storage water by North Unit Headworks and Main Canal. *See Biological Assessment on Continued Operation and Maintenance of the Deschutes River Basin Projects and Effects on Essential Fish Habitat under the Magnuson-Stevens Act (Sept. 2003).* The consultation covered several listed fish and wildlife species but did not cover Oregon spotted frog because that species had not yet been listed as threatened. BOR has not reinitiated consultation with FWS since the Oregon spotted frog was listed to assess the impacts to the frog of its continued operation and maintenance of Crane Prairie and Wickiup dams and reservoirs and North Unit Headworks and Main Canal.

3. Effects of Crane Prairie and Wickiup on the Oregon Spotted Frog.

Oregon spotted frog breeding locations occur in the wetland margins of the Crane Prairie and Wickiup Reservoirs. 79 Fed. Reg. at 51666. There are also at least five known breeding locations downstream of Wickiup Reservoir in riverine wetlands along the Deschutes River. *Id.* These multiple breeding locations near and downstream of the reservoirs are significant because there are fewer than twenty known breeding locations throughout the Upper Deschutes basin. *Id.*

It is well-established that water levels in Crane Prairie and Wickiup reservoirs greatly influence the health of the spotted frog populations that live and breed in the near-shore lake environments, and that releases from Wickiup also heavily influence water levels downstream in the Deschutes River, adversely affecting the mainstem spotted frog breeding locations. In the listing rule, FWS acknowledged that the operation of dams, diversions, and water control structures such as Crane Prairie and Wickiup “continues to affect populations of Oregon spotted

frogs due to extreme water fluctuations between and within years. These operations inundate and desiccate Oregon spotted frog habitat, while creating and maintaining habitat suitable for nonnative predaceous species.” *Id.* at 51669. Rising water levels in the reservoirs following the breeding season inundates oviposition (egg-laying) habitat around the reservoir perimeters, which can unmoor egg masses and release them into the open water. Conversely, lowering water levels during the irrigation season leaves reservoir-perimeter habitat desiccated, potentially stranding both frogs and egg masses.

In addition, regulated water releases from Crane Prairie and Wickiup “result in extreme seasonal fluctuations in stream flows” that affect the amount of overwintering and breeding habitat available for Oregon spotted frogs. *Id.* Water storage in the reservoirs during winter results in extremely low winter flows (typically October through March) in the Deschutes below Wickiup, and water releases in the spring and diversions for irrigation also influence downstream flows. *Id.* Because water releases from Wickiup typically occur in early to mid-April, potential breeding habitats downstream of Wickiup Dam on the mainstem Deschutes may not have sufficient water during the breeding season to facilitate frog movement and breeding. *Id.* In addition, for any frogs that have successfully bred, reduced flows at the end of the irrigation season may leave those adult and juvenile frogs stranded. For instance, FWS has noted that releases from the dam affect breeding and dispersal of spotted frogs at the Slough Camp breeding site, where frogs have access to breeding habitat that becomes available when flows are released, but then flows rapidly recede at the onset of the storage season, stranding frogs that have bred and reared in this location. *Id.* at 51670.

4. BOR’s Continued Operation and Maintenance of Crane Prairie and Wickiup.

Since the effective date of the listing of Oregon spotted frogs on September 29, 2014, BOR has operated and maintained and continues to operate and maintain Crane Prairie and Wickiup as part of the Deschutes Project. *See* BOR, Major Storage Reservoirs in the Deschutes River Basin, *available at* <http://www.usbr.gov/pn/hydromet/destea.html> (last visited April 20, 2015). As of April 19, 2015, Crane Prairie Reservoir was 96% full and Wickiup Reservoir was 98% full, as drought conditions make storage of all available water extremely important. *Id.*

BOR’S VIOLATIONS OF THE ESA

1. BOR is Violating ESA Section 7 and Implementing Regulations.

a. BOR has failed to complete or reinstate consultation.

The threshold for a “may affect” determination and required ESA § 7 consultation is low. *See* 51 Fed. Reg. 19,926, 19,494 (June 3, 1986) (“Any possible effect, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement.”). As acknowledged by FWS, fluctuating water levels within Crane Prairie and Wickiup reservoirs can affect Oregon spotted frog habitat around the edges of the reservoirs. When water is stored and reservoirs levels rise, during the breeding season, water can inundate egg masses and flood

them out from emergent near-shore habitat. In addition, lowering levels during irrigation season can dry out habitat on the edges and desiccate vulnerable frogs and/or egg masses, depending on the timing and extent of water releases. The timing and amount of water releases from Wickiup also affect downstream spotted frog breeding locations along the Deschutes River, and can result in flooding of egg masses during irrigation releases or stranding and desiccation of adults during storage periods.

Despite the well-acknowledged effects of the storage and release of water from Crane Prairie and Wickiup on ESA-listed spotted frogs, BOR continues to operate those federal facilities as part of the Deschutes Project without completing a new consultation or reinitiating its existing consultation with FWS. Thus, BOR has not complied with the procedural requirements of the ESA to insure that its actions are not likely to jeopardize this listed species. By operating and maintaining Crane Prairie and Wickiup without either completing a new consultation under ESA Section 7(a)(2) or reinitiating consultation under 50 C.F.R. § 402.16(d) to assess the effects of that action on ESA-listed Oregon spotted frogs, BOR is currently in violation of the ESA, and has been in violation since September 29, 2014.²

b. *BOR's continued operation of Crane Prairie and Wickiup violates Section 7(d).*

BOR's continued storage and release of water from Crane Prairie and Wickiup since September 29, 2014 also constitutes an "irreversible and irretrievable commitment of resources" prohibited under § 7(d) of the Act. BOR's storage of water within the reservoirs, especially increased storage due to drought conditions, results in heightened water levels that inundate frog habitat in near-shore reservoir environments and flood out egg masses laid during this time from their protective enclaves of emergent vegetation. Furthermore, increased flows from release of water into the Deschutes River during the irrigation season, which has already begun, will result in altered habitat for downstream breeding populations. Storing and releasing water, before FWS has had an opportunity to evaluate the impacts of these actions on Oregon spotted frogs and impose alternatives if necessary, limits BOR's ability to alter operations to protect this listed species and causes irreversible harm to frogs and egg masses that do not survive the water manipulation. Thus, BOR's operation of Crane Prairie and Wickiup through storage and release of water is an irreversible and irretrievable commitment of resources, constituting a violation of § 7(d) of the ESA.

² The history of BOR operations of the nearby Klamath Project is a story of repeated violations of this type, including operating the Project without engaging in or completing consultation under ESA § 7(a)(2). See, e.g., *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 138 F. Supp. 2d 1228 (N.D. Cal. 2001); *Pac. Coast Fed of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082 (9th Cir. 2005); *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 2006 WL 798920 (N.D. Cal. 2006).

2. BOR is Violating Section 9 of the ESA.

The current storage and release of water from Crane Prairie and Wickiup is killing and harming Oregon spotted frog eggs and individuals at other life stages. As FWS described in the listing rule, water fluctuations due to operation of Crane Prairie and Wickiup inundate spotted frog breeding habitat, flooding egg masses, and also desiccate reservoir and downstream breeding habitats such that breeding adults lack sufficient water to facilitate movement and breeding. These types of effects fall within the definition of “take” prohibited by the ESA. *See* 50 C.F.R. § 17.3.

BOR has a duty to avoid “taking” Oregon spotted frogs. Without the shield of compliance with an ITS, BOR is liable for all “take” of Oregon spotted frogs that occurs as a result of its continuing operation and maintenance Crane Prairie and Wickiup. 16 U.S.C. § 1538(a)(1)(B); *id.* § 1536(o)(2). In the absence of completed consultation, BOR lacks an ITS covering these actions. BOR is violating § 9 of the ESA by taking listed species without having completed consultation and having any ITS for continued operation and maintenance of Crane Prairie and Wickiup dams and reservoirs.

PARTIES GIVING NOTICE

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RELIEF REQUESTED

As set forth above, the Center for Biological Diversity 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, BOR should cease or restrict operation of the Crane Prairie Dam and Reservoir and Wickiup Dam and Reservoir to ensure protection of Oregon spotted frogs until it completes consultation with FWS over the impacts of its actions on this species.

CONCLUSION

This letter provides notice under section 11(g) of the ESA, 16 U.S.C. § 1540(g), of the Center for Biological Diversity’s intent to sue BOR for violations of the ESA unless the violations described herein are corrected within sixty days. The Center for Biological Diversity’s contact, Noah Greenwald, and their attorneys Laurie Rule and Elizabeth Zultoski are available to discuss effective remedies and actions that will assure future compliance with the ESA.



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Sincerely,

/s Elizabeth H. Zultoski

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