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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

WESTERN WATERSHEDS PROJECT, Plaintiff, v. DAVID ROSENKRANCE, BLM Challis Field Office Manager, and BUREAU OF LAND MANAGEMENT; FRANK GUZMAN, Salmon-Challis National Forest Supervisor, and UNITED STATES FOREST SERVICE; GARY BURTON, U.S. Fish and Wildlife Service Snake River Office Field Supervisor, and U.S. FISH AND WILDLIFE SERVICE; and DAVID MABE, NOAA Fisheries Idaho State Habitat Office Supervisor, and NOAA FISHERIES, Defendants.	No. CV-09-532-E-BLW **MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Plaintiff Western Watersheds Project brought this lawsuit to force the Bureau of Land Management ("BLM") and other agencies to take action to protect several species of fish listed as threatened under the Endangered Species Act ("ESA") in the Pahsimeroi watershed of eastern Idaho. This watershed is home to important populations of Snake River steelhead, Chinook

salmon, and bull trout, which have been listed under the ESA for more than ten years. Despite their imperiled status, these species and their habitat continue to be threatened by activities in the watershed, including widespread livestock grazing on public land.

Federal agencies first assessed the impacts on these fish species of their ongoing activities in the Pahsimeroi watershed in 1999. They conducted a single consultation to analyze the cumulative effects of the different activities occurring within the watershed on the Pahsimeroi River fish populations. Since then, however, BLM has never taken another look at the impacts of many of its activities, including ongoing livestock grazing on numerous allotments, despite new information and changed circumstances that have arisen since the prior consultation.[1]

For instance, critical habitat for steelhead has been designated within the Pahsimeroi watershed, but BLM has not assessed the impacts of grazing on this critical habitat. Furthermore, BLM has repeatedly failed to comply with many of the monitoring requirements set forth in the 1999 consultation, and its compliance with grazing standards has been inconsistent.

The Endangered Species Act requires BLM to reinitiate consultation if any one of these types of new information, or triggers, occurs. However, BLM has refused to reinitiate consultation as required, and thus has failed to insure that its ongoing authorization of livestock grazing on numerous allotments is not jeopardizing the survival and recovery of these imperiled fish or adversely modifying their critical habitat, in violation of the ESA.

[1] Plaintiff sued the U.S. Forest Service, U.S. Fish and Wildlife Service, and NOAA Fisheries in addition to BLM, but has reached a settlement agreement in principle. Plaintiff is also in talks with BLM but has not yet reached such an agreement.

FACTUAL BACKGROUND

I. Overview of the Pahsimeroi Watershed

The Pahsimeroi River watershed is located in rugged central Idaho, with the headwaters of the Pahsimeroi River near Mt. Borah (the highest point in Idaho at 12,662 feet). AR 91. The river then flows northwest for about 50 miles and joins the Salmon River at Ellis, Idaho. *Id*. The Pahsimeroi River valley is bounded by the Lost River Range to the southwest and the Lemhi Range to the northeast. *Id*. The watershed contains about 537,210 acres, with about 42% of those acres administered by BLM's Challis Field Office and 46% administered by the Forest Service. AR 90. Private lands are generally found in the valley bottom, with BLM land lying adjacent to the private land and extending into the foothills, and Forest Service land lying in the highest elevations. AR 90–91.

Livestock grazing is the primary land use in the watershed. AR 112. "[M]ost of the accessible parts of the valley have been used extensively for grazing." AR 106. Surveys on BLM streams conducted in the mid-1990s found "degraded bank and aquatic conditions for all streams surveyed," except those in livestock exclosures. AR 93. Compounding problems, diversions for agricultural use dewater most tributary streams from May through October. AR 106. The agricultural purposes are for grazing, livestock feedlots, and hay, oats and alfalfa production (for livestock winter feed). *Id*. These water diversions are very harmful to fish, by drying up habitat, preventing connectivity and migration between streams, increasing water temperatures, and stranding fish in irrigation ditches, among other problems. AR 127–28.

II. ESA Listed Fish in the Pahsimeroi Watershed

The U.S. Fish and Wildlife Service ("FWS") and NOAA Fisheries (collectively, the "Services") have protected chinook salmon, steelhead trout, and bull trout under the Endangered

Species Act, and each of these species occurs in the Pahsimeroi watershed. *See* AR 78. Desired habitat conditions include cool water free of sediment, deep stream pools, large woody debris in the stream, stable streambanks, undercut banks, overhanging vegetation, and streams with a low width to depth ratio (i.e., not too wide and shallow). AR 81, 108–09. Successful fish egg incubation requires the free flow of well oxygenated water, and sediments can "cap" or suffocate the eggs. AR 109.

Livestock grazing harms these habitat conditions in many ways. AR 120. Trampling by livestock alters vegetative communities and the physical condition of the stream, which can cause "elimination of riparian habitats through channel widening or lowering of the water table, which in turn may lead to extensive alteration of stream channel characteristics." *Id*. For instance, effects include reduction in the number and quality of pools, widened channels, more sedimentation, unstable streambanks, and greater temperature fluctuation (higher in summer, lower in winter). *Id*. Further, wading livestock can directly disturb and trample fish redds (nests). AR 1740.

Snake River spring/summer chinook salmon was listed as threatened in 1992. 57 Fed. Reg. 14,653 (April 22, 1992). Critical habitat was designated the next year. AR 79. Historically, anadromous fish (such as chinook) are thought to have occupied the "Pahsimeroi River to its headwaters [and] all major tributaries along the northeast side and their drainage basins." AR 80. Now, however the species is only present in the main Pahsimeroi River, AR 100, with recent expansions into Patterson/ Big Springs Creek. AR 1771–72. NOAA Fisheries reaffirmed the threatened status of the species in 2005, noting "long-term productivity trends remain below replacement for all natural production areas, reflecting the severe declines since the 1960s" and moderately high risk to abundance and productivity. 70 Fed. Reg. 37,160,

37,186 (June 28, 2005).

Snake River Basin steelhead was listed as threatened in 1997. 62 Fed. Reg. 43,937 (Aug. 18, 1997). This species, too, is currently limited to the lower Pahsimeroi River, AR 100, with possible recent expansion into Patterson/ Big Springs Creek. AR 1771–72. Steelhead critical habitat was designated in 2005 and includes only the lowest reach of the Pahsimeroi River and portions of Patterson Creek. 70 Fed. Reg. 52,630 (Sept. 2, 2005); AR 1711 (map). NOAA Fisheries also reaffirmed the threatened status of this species in 2006, noting moderate risks to abundance, productivity, and diversity. 71 Fed. Reg. 834, 855 (Jan. 5, 2006).

Finally, Columbia River bull trout was listed as threatened in 1998. 63 Fed. Reg. 31,647 (June 10, 1998). This species has more specific habitat requirements than other salmonids, meaning it requires colder and cleaner water. AR 1743–44. A 2008 FWS bull trout status review ranked the Pahsimeroi River core area as having "substantial, imminent" threats, and thus "at risk," meaning "very limited and/or declining numbers, range, and/or habitat, making the bull trout in this core area vulnerable to extirpation."[2]

After several years of litigation, based in part on political interference with the prior bull trout critical habitat designation, a revised designation rule was issued this month. 75 Fed. Reg. 63,898, 63,899 (Oct. 18, 2010). Many of the tributaries in the Pahsimeroi watershed as well as the upper reaches of the Pahsimeroi River itself are now designated as bull trout critical habitat. *Id. at* 64,054 (map of designated streams in Salmon River basin (East Half)).

III. Consultation History

In 1999, to comply with the ESA's consultation requirement, BLM and the Forest Service prepared a Pahsimeroi watershed biological assessment ("BA") that analyzed impacts

[2] U.S. Fish and Wildlife Service, *Bull Trout 5-Year Review: Summary and Evaluation* (2008), at 34, 29, *at* http://ecos.fws.gov/docs/five_year_review/doc1907.pdf.

from multiple ongoing activities in the watershed on the three listed fish species. AR 75.

BLM and the Forest Service first listed all ongoing actions on their lands in a table, and for each, indicated the expected impact on listed fish as either "no effect," "not likely to adversely affect," or "likely to adversely affect." AR 85–90. For activities in the latter two categories, the BA then analyzed the activities in more detail and listed mitigation measures and monitoring requirements. AR 130–35. Finally, the BA made a final determination as to whether each activity was "likely" or "not likely" to adversely affect critical habitat or listed species. AR 136–40.

The majority of activities analyzed in the BA were ongoing authorizations of livestock grazing, including 24 BLM grazing allotments.[3] The BA concluded that all of the BLM grazing allotments were "not likely to adversely affect" critical habitat or listed fish. AR 136–39.

The BA explained that streams accessible to livestock usually require grazing mitigation measures such as the following standards: a certain level of stubble height of riparian plants remaining after cattle use; 10–20% bank shearing; <50% of woody plants nipped by cattle; and 40–60% use of upland vegetation by cattle. AR 130. A subsequent chart listed allotment-specific standards for every allotment. AR 131–33.

In addition to livestock use standards, the BA required that "PACFISH/INFISH Standards and Guidelines" be applied to all actions. AR 130. PACFISH and INFISH are shorthand for federal strategies adopted in 1995 to protect anadromous and inland native fish. AR 81. *See Ore. Natural Desert Ass'n v. Tidwell*, 2010 WL 2246419, at *5 (D.Or. 2010). To

[3] Other activities included Forest Service grazing allotments, road rights-of-way, wildfire suppression, road maintenance, wood cutting, and water pipeline or irrigation rights-of-way. AR 85–90. Many non-grazing actions have been the subject of subsequent programmatic consultations. AR 1725 (summary of programmatic consultations). While the First Amended Complaint did address a handful of non-grazing actions, upon reviewing the record, Western Watersheds has decided not to pursue them.

promote fish recovery, PACFISH and INFISH

> establish[] goals for watershed, riparian and stream channel conditions to protect and restore habitat. Riparian management objectives (RMOs), delineation of Riparian Habitat Conservation Areas (RHCAs), and establishment of standards and guidelines to govern management actions that will impact fish habitat are the means of achieving these goals. The RMOs establish measurable habitat parameters that define good fish habitat and provide criteria against which progress toward attainment of the riparian goals is measured.

Id. at *6 (quotation omitted). RMOs include pool frequency, water temperature, large woody debris, bank stability, lower bank angle, and stream width to depth ratio. AR 81. The PACFISH/INFISH grazing standard "GM-1" requires BLM to:

> Modify grazing practices (e.g., accessibility of riparian areas to livestock, length of grazing season, stocking levels, timing of grazing, etc.) that retard or prevent the attainment of [RMOs] or are likely to adversely affect listed [] fish. Suspend grazing if adjusting practices is not effective in meeting [RMOs] and avoiding adverse effects on listed [] fish.

Tidwell, 2010 WL 2246419, at *6 (quotation omitted). Thus, the BA required compliance with this standard.

The BA also emphasized regular monitoring of these grazing standards. It required visits and photographs of each stream at least twice per year, monitoring of "[o]perational grazing use standards (bank shearing, stubble heights)" at least once per year, and completion of "allotment evaluations" each year. AR 135. Further, "effectiveness monitoring" of greenline (streamside) attributes, woody vegetation age structure, and aquatic habitat indicators was typically to be done on a three to five year cycle. *Id*. This type of monitoring determines "whether current livestock grazing management is resulting in desired resource conditions," AR 1752, or in other words, whether current management and standards are being "effective" in achieving recovery and attainment of RMOs. Finally, BLM was to submit a "yearly consultation compliance report" to the Services. AR 135.

FWS subsequently issued two letters of concurrence, concurring with BLM's determination for the activities in the 1999 BA affecting bull trout, except for one BLM grazing allotment (the Upper Pahsimeroi allotment). AR 1223 (1st letter), AR 1275 (2nd letter).[4] FWS based its concurrence on several assumptions, including that "[m]anagement and use standards will be evaluated annually by BLM [] staff for compliance and effectiveness." AR 1227. FWS also required BLM to submit an "effectiveness monitoring report" annually "as part of the annual consultation compliance report." *Id*. That report was to be submitted by December 31 annually. AR 1226, 1277. The FWS letters also included charts with allotment-specific mitigation measures. AR 1228–33, 1276–77.

NOAA Fisheries also issued a letter of concurrence, concluding that the ongoing actions assessed in the BA, including all BLM grazing allotments, were not likely to adversely affect listed fish or critical habitat. AR 1239–41. The conclusion was similarly based upon "successful implementation of mitigation measures described in the BA." *Id*. at 1240. The letter contained an express expiration date of January 15, 2003. *Id*.

BLM continues to authorize livestock grazing on the allotments at issue in this case. *See* Answ. ¶ 4 (Dkt. No. 6). It does so using both term permits and annual turnout or billing statements.[5] Over the years, BLM has reinitiated consultation on half of these allotments in a piecemeal fashion. AR 1723–24 (indicating some form of updated consultation for 10 allotments: Bear Creek, Burnt Creek, Grouse Creek, Hamilton, Meadow Creek, Trail Creek,

[4] FWS found that the Upper Pahsimeroi allotment was likely to adversely affect bull trout and thus issued a separate biological opinion for that allotment in 2000. AR 9558.

[5] The permits for each allotment are in the record as the first items under each allotment's Tab heading. The record does not contain the allotments' annual billing statements; however, Western Watersheds has received them through Freedom of Information Act requests and can present them if any question is raised as to their existence.

Upper Pahsimeroi, Dry Creek, Summit Creek, and Lawson Creek allotments). *See also* AR 7636, 7638, 8609 (updated consultation documents for Goldburg and Rock Creek allotments).

However, despite the occurrence of several of the reinitiation triggers, BLM had failed to reinitiate consultation on the other twelve allotments in the watershed when this action was filed.[6] Following the filing of this action, BLM reinitiated consultation for three of these allotments, but to Plaintiff's knowledge that consultation has not been completed. AR 1703 (April 2010 BA for Patterson Creek, Falls Creek, and County Line allotments). These twelve allotments are at issue in this case. Because BLM has failed to reinitiate consultation, and continues to authorize grazing that degrades habitat and impairs the survival and recovery of listed fish prior to completing new consultations, it is violating the ESA.

STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

Western Watersheds' claims against BLM arise solely under the citizen suit provision of the ESA. FAC ¶¶ 5, 8, 92–93, 96–97; 16 U.S.C. § 1540(g)(1)(A). *See Forest Guardians v. Johanns*, 450 F.3d 455, 459 (9th Cir. 2006) (failure to reinititiate consultation suit brought under ESA citizen suit provision). Judicial review of such claims is not limited to an administrative record, although for purposes of this motion, the parties have agreed to utilize evidence based on

[6] The allotments are: Big Creek, County Line, Donkey Hills, Falls Creek, Highway, Little Morgan Creek, Lower Goldburg, Mahogany Creek, Mill Creek, Patterson Creek, Pines/Elkhorn, and Spud Creek allotments.

the record and the Ninth Circuit's exceptions. Case Mgt. Order at 2 n.2 (Dkt. No. 18).[7]

Although the Administrative Procedure Act's *scope* of review does not apply, the APA's *standard* of review does apply because the ESA does not have an internal standard of review. *Western Watersheds Proj. v. Kraayenbrink*, -- F.3d --, 2010 WL 3420012, at *20 (9th Cir. 2010). Under that standard, this Court shall hold unlawful agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Court must determine whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Marsh v. Ore. Natural Res. Council*, 490 U.S. 360, 378 (1989). While the standard of review is narrow, an agency must articulate a rational connection between the facts found and the conclusions made. *Id.* at 378.

ARGUMENT: BLM IS VIOLATING THE ENDANGERED SPECIES ACT.

I. THE ENDANGERED SPECIES ACT

The Endangered Species Act was enacted to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such [] species." 16 U.S.C. § 1532(b). An "examination of the language, history, and structure [of the ESA] indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities." *TVA v. Hill*, 437 U.S. 153, 174 (1978).

NOAA Fisheries or FWS[8] determines whether species are endangered or threatened, with endangered meaning "in danger of extinction throughout all or a significant portion of its range,"

[7] Additionally, Plaintiff has standing, as supported by the Marvel, Zuckerman, and Fite declarations filed herewith.

[8] NOAA Fisheries is responsible for anadromous species such as salmon and steelhead, while FWS is responsible for inland species such as bull trout. *See* 50 C.F.R. § 402.01.

16 U.S.C. § 1532(6), and threatened meaning "likely to become an endangered species within the foreseeable future." *Id*. at § 1532(20). Concurrently with listing a species, the agency must designate "critical habitat," which are areas that contain the physical or biological features essential to the "conservation" of the species and which may require special protection or management considerations. *Id*. §§ 1533(a)(3), 1532(5)(A). "Conservation" is defined as actions "necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary." *Id*. § 1532(3). In other words, critical habitat is the habitat essential for the recovery of the species. *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service,* 378 F.3d 1059, 1070–71 (9th Cir. 2004).

Under ESA § 7(a)(2), federal agencies must "insure that any action authorized, funded, or carried out by" such agency will not "jeopardize the continued existence" of any listed species or "result in the destruction or adverse modification of [critical] habitat." 16 U.S.C. § 1536(a)(2). In order to fulfill these substantive mandates, the ESA imposes procedural consultation requirements. *Id.* Authorization of grazing on public land is an action "authorized, funded, or carried out" by BLM and therefore requires consultation. *See Forest Guardians v. Johanns,* 450 F.3d 455 (9th Cir. 2006).

To begin consultation, an action agency (such as BLM) must prepare a biological assessment ("BA") for the purpose of evaluating potential effects and identifying whether listed species are "likely to be adversely affected" or "not likely to be adversely affected" by the action. *Id*. § 1536(c)(1); 50 C.F.R. § 402.12(a). For the latter, if the Services concur with that conclusion in a letter of concurrence, the consultation is complete ("informal consultation"). *Id.* §§ 402.12, 402.14(b). For actions likely to adversely affect species, the action agency must seek "formal" consultation with the Services, in which the Services issue a biological opinion and

Incidental Take Statement. 16 U.S.C. § 1536(b)(3)(A), 50 C.F.R. § 402.14. These "procedural requirements are designed to ensure compliance with the substantive provisions." *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985).

The Section 7(a)(2) duties are ongoing. Once the initial consultation is complete, the agency must reinitiate consultation if certain "triggers" occur. These triggers—at the heart of this case—are set forth in the regulations:

> Reinitiation of consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and: (a) If the amount or extent of taking specified in the incidental take statement is exceeded; (b) If 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; (c) If the identified action 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 (d) If a new species is listed or critical habitat designated that may be affected by the identified action.

50 C.F.R. § 402.16. "It is the action agency's burden to show the absence of likely adverse effects on listed species." *Johanns*, 450 F.3d at 463 (citing 16 U.S.C. § 1536(a)(2)).

During the consultation process, the action agency may not make any irreversible or irretrievable commitments of resources which would have the effect of foreclosing the formulation or implementation of any Reasonable and Prudent Alternative measures that might be necessary to avoid jeopardy. 16 U.S.C. § 1536(d).

II. NATURE OF THE REINITIATION DUTY.

BLM's failure to reinitiate consultation over its ongoing grazing authorizations for the twelve enumerated allotments violates the ESA. Again, when an agency retains discretionary control over an ongoing action, as of course BLM does over its grazing authorizations, it must reinitiate consultation if any of the triggers in the regulations occur. 50 C.F.R. § 402.16. The nature of a reinitiation claim is a challenge to an agency's failure to do so despite one or more of

the triggers occurring.

For example, in the textbook reinitiation case *Sierra Club v. Marsh*, a completed consultation for a highway relied upon the Army Corps of Engineers acquiring and preserving 188 acres of wetlands as mitigation for the project. 816 F.2d 1376, 1379–80 (9th Cir. 1987). The wetland purchase was "the most important of many modifications" the FWS considered necessary to insure the project would not jeopardize listed species. *Id*. at 1388. After several years passed and the wetlands were not acquired, the Sierra Club charged that the Corps "violated the [ESA] by refusing to reinitiate consultation with the FWS." *Id*. at 1381. The Ninth Circuit held that the Corps violated the reinitiation regulation "by failing to reinitiate consultation after learning ('new information reveals') that the destruction and modification of marshland by the project ('effects of the action') could harm the clapper rail and the least term ('may affect the listed species') because the anticipated mitigation efforts have been delayed and may not take place at all ('in a manner or to an extent not previously considered')." *Id*. at 1388. Thus, because one of the standards for reinitiation was triggered, the Corps violated the ESA by not reinitiating over that same highway activity.

In a case with very similar facts as here, the Ninth Circuit specifically applied the reinitiation duty to grazing authorizations. In *Forest Guardian v. Johanns*, the Forest Service consulted over a large number of grazing permits on national forests in Arizona and New Mexico. 450 F.3d at 458–59. The "not likely to adversely affect" conclusion of the consultations hinged upon certain "guidance criteria" being met on the allotments. *Id*. Several years later, the plaintiff alleged that the Forest Service violated the ESA by "not re-initiating consultation after the agency failed over several years to meet the guidance criteria" (such as performing required monitoring) on 30 allotments. *Id*. at 459. After the district court found that

the Forest Service was required to reinitiate on certain allotments, but not others (including the Water Canyon allotment), the plaintiff appealed the ruling with respect to that allotment. *Id*. at 460–61. The Ninth Circuit held that "the Forest Service's failure to re-initiate consultation violated the ESA," because the inadequacy of promised monitoring, as well as results of the measurements that were taken, functioned to "affect[] listed species in a manner and to an extent not previously considered." *Id*. at 465–66 (citing 50 C.F.R. § 402.16(c)).

The District of Oregon similarly held that the Forest Service violated the ESA by failing to timely reinitiate consultation on a group of grazing allotments. *Or. Natural Desert Ass'n v. Tidwell*, 2010 WL 2246419, *21 (D. Or. June 4, 2010). There, the Forest Service had conducted formal consultation over grazing activities on thirteen allotments. *Id*. at *6. The grazing violated the standards set in the Incidental Take Statement on multiple allotments in 2007, 2008, and 2009. *Id*. at *21. The Forest Service reinitiated consultation on six of the 13 allotments in May 2009 and on the remaining allotments in 2010, but the Court ruled that the agency had still violated the law by failing to reinitiate in the prior years. *Id*. at *6. The court held that by "failing to reinitiate consultation following the exceedances of the ITS during the 2007 and 2008 seasons, the Forest Service violated the ESA." *Id*. at *21. It further admonished the agency's disparate treatment of the allotments, noting that "the entire agency action includes grazing on all thirteen allotments, and reinitiation of formal consultation necessarily includes all thirteen allotments." *Id*. at *22.

Thus, in all three cases, the courts found that the action agency violated the ESA when the agency had not performed or met the relied-upon mitigation measures included in the consultation. This deficiency constituted a reinitiation trigger, yet the agency failed to reinitiate on the previously-consulted-upon action. As described in detail below, the same has occurred

here, where BLM has not performed the mitigation measures required by the consultation, and thus is required to reinitiate consultation for these 12 allotments.

III. NEW INFORMATION HAS TRIGGERED BLM'S DUTY TO REINITIATE CONSULTATION ON THE TWELVE ALLOTMENTS.

BLM is violating or has violated the ESA by failing to reinitiate consultation on the twelve allotments because two reinitiation triggers have occurred since 1999. First, critical habitat for steelhead has been designated. Second, BLM has failed to comply with its monitoring requirements and grazing use standards.

A. New Designations of Critical Habitat Warrant Reinitiation.

BLM is violating the ESA by failing to reinitiate consultation on allotments containing newly-designated critical habitat. Steelhead critical habitat was designated in 2005 on Patterson Creek, which runs through three BLM allotments at issue. *See* AR 1711 (map showing steelhead critical habitat occurring on County Line, Falls Creek, and Patterson Creek allotments). The designation of critical habitat is a clear trigger for reinitiation of consultation: reinitiation is required if "critical habitat [is] designated that may be affected by the identified action." 50 C.F.R. § 402.16(d).

The record clearly demonstrates that grazing "may affect" critical habitat for steelhead, triggering the need for reinitiation. The 1999 BA states that "[r]iparian and aquatic habitats are generally adversely affected by livestock use," and explains how. AR 120. The rule designating critical habitat for steelhead plainly states the same. It states that grazing is one of the "activities that threaten the physical and biological features essential to listed salmon and steelhead." 70 Fed. Reg. at 52,665. These documents recognize that livestock grazing may affect habitat of these listed species, yet BLM is continuing to authorize grazing. AR 5636, 7435–7443, 8340 (permits). Thus, BLM cannot "show the absence of likely adverse effects on listed species," and

must reinitiate consultation to assess the impacts of this grazing on the newly designated critical habitat. *Johanns,* 450 F.3d at 463.

In apparent recognition of its vulnerability on this claim, following the filing of this case, BLM finally reinitiated consultation on the three allotments that contain steelhead critical habitat designated in 2005. AR 1703 (April 2010 BA on these three allotments). However, to Plaintiff's knowledge, consultation has not been completed; and the claim is not moot due to the existence of effective relief.

BLM's actions are similar to the Forest Service's in *Johanns*, where the agency likewise reinitiated consultation on a grazing allotment during the pendency of the case—and additionally received concurrence from FWS. 450 F.3d at 461. The Ninth Circuit first noted that the claim involved a "continuing practice," in that the grazing permit had a ten-year term, and "the Forest Service's practice of not complying with the monitoring requirements is likely to persist despite the recent re-consultation." *Id*. at 462. It thus concluded that declaratory judgment would "provide effective relief by governing the Forest Service's actions for the remainder of the allotment's permit term and by prohibiting it from continuing to violate the law." *Id*. at 462–63. Thus, judgment would "resolve a dispute with present and future consequences." *Id*. (quotation omitted). *See also Tidwell,* 2010 WL 2246419, at *8–9 (holding that reinitiating consultation in 2009 did not moot claim over failure to reinitiate in 2007 and 2008 because effective relief was still available to remedy prior violations).

In addition, the reinitiation process is not yet complete here, and until such time as it is, "this Court retains the authority to determine whether any continuing action violates the ESA and can provide effective relief by enjoining it or remedying its effects." *Greenpeace v. NMFS*, 80 F. Supp. 2d 1137, 1151–52 (W.D. Wash. 2000) (similar claim held not moot because the Court

retained the ability to provide effective relief). During the consultation process, the agency's ongoing actions cannot violate the substantive standards of the ESA, such as the duties to avoid jeopardizing the species, adversely modifying critical habitat, and creating irreversible or irretrievable commitments of resources. 16 U.S.C. §§ 1536(a)(2), 1536(d). *Washington Toxics Coalition v. EPA,* 413 F.3d 1024, 1035 (9th Cir. 2005); *Defenders of Wildlife v. Martin,* 454 F. Supp.2d 1085, 1095-97 (E.D. Wash. 2006). The agency has the burden of demonstrating that its ongoing actions are non-jeopardizing to the species, and the Court can enjoin the actions pending the new consultation if the agency has not met that burden. *Washington Toxics Coalition,* 413 F.3d at, 1035.[9]

Here, the grazing permits are multi-year, BLM waited more than five years to reinitiate after the trigger occurred, and the monitoring failures described below are more severe than those discussed in *Johanns*. Thus, judgment would allow for effective relief to remedy the five years of ESA violations for failing to reinitiate over steelhead critical habitat, as well as to insure that continued grazing does not violate the ESA pending completion of the new consultations.

B. Failure to Perform Required Monitoring and Inconsistent Compliance with Grazing Use Standards Requires Reinitiation.

BLM is further violating the ESA by failing to reinitiate consultation on all twelve allotments due to its failure to comply with the required mitigation measures in the 1999 BA and letters of concurrence. These documents set forth monitoring requirements and grazing use standards, but the eleven grazing seasons that have elapsed since the adoption of the BA and letters of concurrence (1999–2009) have been marked by widespread failures to monitor and inconsistent compliance with grazing use standards. As explained in *Johanns*, this lack of

[9] If the Court finds that the agency violated the law by failing to reinitiate consultation for any of the allotments at issue, Western Watersheds will seek injunctive relief to remedy that violation, as well as insure against continuing violations of the law pending new consultations, in a separate motion.

conformance with monitoring and standards required by the BA mandates reinitiation of consultation. *Johanns,* 450 F.3d at 464-65.

1. BLM's Monitoring Does Not Comply With The 1999 BA.

As discussed above, the 1999 BA set a number of allotment-specific quantitative grazing use standards, such as stubble height, bank shearing, woody use, and upland use. AR 131–33. The BA also imposed the requirement to comply with standards from PACFISH/INFISH, which emphasizes attainment of riparian management objectives (RMOs). *Tidwell,* 2010 WL 2246419, at *6. Again, the RMOs include pool frequency, water temperature, large woody debris, bank stability, lower bank angle, and stream width to depth ratio; and under grazing standard GM-1, BLM must modify or suspend grazing practices that retard or prevent attainment of RMOs or are likely to adversely affect listed fish. *Id.*

And the BA emphasized regular monitoring of these grazing standards. It required visits to and photographs of all streams twice per year, monitoring of grazing use standards at least once per year, and completion of allotment evaluations each year. AR 135. Effectiveness monitoring of greenline attributes, woody age structure, and aquatic habitat indicators was to occur, typically on a three to five year cycle. *Id*. To demonstrate its compliance with these requirements, the BA directed BLM to submit a "yearly consultation compliance report" to the Services. *Id.*

The record in this case shows a systematic failure to comply with these monitoring requirements. On a broad scale, the Challis BLM apparently only submitted an annual compliance report to the Services three times in the eleven years since 1999, and not once in the

past six years. *See* AR 1297, 1319, 1362 (reports re: 2000, 2001, 2003 grazing seasons).[10] Thus, it has miserably failed to comply with the requirement to keep the Services informed of BLM's monitoring results and the impacts to listed fish.

On an allotment-specific scale, the failures are also widespread. The monitoring in the record is summarized alphabetically by allotment below. [11]

1. On the Big Creek allotment, the BA imposed: annual evaluation of photo points along Big Creek, 40% early-season upland use/50% late-season upland use, 10% bank shearing, and 50% woody use. AR 132. The record contains no evidence of photos of Big Creek for seven years (1999, 2002, 2004–06, 2008–09); no evidence of upland use monitoring for nine years (1999, 2002–09); and no evidence of bank shearing or woody use monitoring for eight years (2002–09). Effectiveness monitoring was limited to temperature and one measurement of woody riparian trend; there is no evidence of monitoring of aquatic habitat indicators. *See* AR 2611–2744.[12]

2. On the County Line allotment, the BA imposed: annual evaluation of photo points along the Pahsimeroi River, 40% upland use, and 10% bank shearing. AR 132. The record contains no evidence of photos of the Pahsimeroi River for seven years (2000, 2002–03, 2006–

[10] A 2-page chart appears to have been submitted in 2006, but it only includes monitoring results for one of the 12 allotments at issue, so cannot be considered a complete report. AR 7512–13. Also, the 2000 report was submitted seven months late, in July 2001. AR 1297.

[11] In summarizing monitoring data, Plaintiff has attempted to err in BLM's favor when the data were unclear or borderline-compliant. For example, if photos were unlabeled, Plaintiff assumed they were taken at the photo point required by the BA. If monitoring was qualitative (such as "light use"), Plaintiff counted it as compliant, although the use standards are quantitative. Plaintiff did not assess 2010 compliance, as the record was filed in August, before the end of the field season. For many allotments, the record contains types of monitoring other than those discussed (such as fish surveys), but this analysis focuses only on whether BLM has complied with the monitoring mandated by the BA.

[12] Upland use in 2001 was only estimated, not measured. AR 2685.

09), no evidence of upland use monitoring for nine years (1999–2000, 2002–2008), and no evidence of bank shearing monitoring for eight years (1999–2000, 2002–03, 2006–09). Effectiveness monitoring was limited to temperature, AR 5683; there is no evidence of monitoring of aquatic habitat indicators. *See* AR 5639–5706.[13]

3. On the Donkey Hills allotment, the BA imposed: annual evaluation of photo points along the Pahsimeroi River and Donkey Creek, 40–50% upland use, 10% bank shearing on the Pahsimeroi River, and 4" stubble height and 20% bank shearing on Donkey Creek. AR 132. The record contains no evidence of photos of the Pahsimeroi River for three years (2003, 2006, 2008), no evidence of photos of Donkey Creek for three years (2005–06, 2009), no evidence of bank shearing monitoring on the Pahsimeroi River for seven years (1999–2000, 2003, 2006–09), and no evidence of either stubble height or bank shearing monitoring on Donkey Creek for four years (2002–03, 2006, 2009). Effectiveness monitoring was limited to temperature, AR 5943, Multiple Indicator Monitoring in 2008, AR 5986, and a handful of other measurements. *See* AR 5716–6025.

4. On the Falls Creek allotment, the BA imposed a 40% upland use standard. AR 131. The record contains no evidence of photos for six years (2001, 2004–05, 2007–09) and no evidence of upland use monitoring for nine years (1999–2002, 2004, 2006–09).[14] Effectiveness monitoring was limited to temperature, AR 7524; there is no evidence of monitoring of aquatic habitat indicators. *See* AR 7444–7541.

5. On the Highway allotment, the BA imposed a 40% upland use standard. AR 131. The record only contains one monitoring document, a 2010 fish survey. AR 7773–74. Thus, the

[13] Both upland use incidents were estimated, not measured. AR 5653 (2001), AR 5697 (2009).

[14] The 2003 use monitoring was estimated. AR 7493 ("v. little use").

record contains no evidence of upland use monitoring, photos, allotment evaluations, or effectiveness monitoring for any years between 1999–2009.

6. On the Little Morgan Creek allotment, the BA imposed: annual evaluation of photo points along Little Morgan Creek, 10% bank shearing, and 40–50% upland use. AR 131. The record contains no evidence of photos for five years (2000, 2004, 2007–09), no evidence of bank shearing monitoring for six years (1999–2000, 2004, 2006–07, 2009), and no evidence of upland use monitoring for any years. Effectiveness monitoring was limited to temperature, AR 8115, and one session of Multiple Indicator Monitoring in 2008, AR 8110. *See* AR 8034–8131.

7. On the Lower Goldburg allotment, which has no access to riparian habitat, the BA imposed a 40% upland use standard. AR 132. The record only contains one monitoring document, a 2010 fish survey on nearby Goldburg Creek. AR 8139–40. Thus, the record contains no evidence of upland use monitoring or allotment evaluations for any years between 1999–2009.

8. On the Mahogany Creek allotment, the BA imposed: annual evaluation of photo points along Falls Creek, 40% upland use, 3" stubble height, and 10% bank shearing. AR 131. The record contains no evidence of photos for four years (1999, 2000, 2004, 2007), and no evidence of any of the three use standards for seven years (1999, 2002, 2004, 2005–07, 2009).[15] Effectiveness monitoring was limited to temperature and one session of Multiple Indicator Monitoring in 2008. *See* AR 8146–8215.

9. On the Mill Creek allotment, the BA imposed: annual evaluation of photo points on Mill Creek, 40% upland use, 20% bank shearing, and 4" stubble height. AR 132. The record contains no evidence of photos for the past ten years (2000–09); no evidence of upland use, bank

[15] BLM asserted standards were met in 2000 and 2001, so they were counted as compliant, but no data is present. AR 8166, 8170.

shearing, or stubble height for the past nine years (2001–09); and one measurement of a single criterion (woody riparian vegetation) for effectiveness monitoring in 2007. *See* AR 8291–8337.

10. On the Patterson Creek allotment, the BA imposed: annual evaluation of photo points along Patterson Creek, 10% bank shearing, and 40% upland use. AR 131. The record contains no evidence of photos for seven years (2001–02, 2004, 2006–09), and no evidence of bank shearing or upland use monitoring for eight years (1999, 2001–02, 2004–09). Effectiveness monitoring was limited to temperature, AR 8440, and one measurement of width to depth ratio in 2001, AR 8411. *See* AR 8343–8448.

11. On the Pines/Elkhorn allotment, the BA imposed: annual evaluation of photo points on Burnt and Elkhorn Creeks; 50% upland use; and along Elkhorn Creek, 20% bank shearing and 6" stubble height. AR 132. However, the record contains no evidence of photos on the relevant creeks for seven years (2000–2006); no evidence of upland use monitoring for ten years (1999–2008); no evidence of bank shearing or stubble height monitoring along Elkhorn Creek for nine years (1999–2007); and no evidence of effectiveness monitoring other than a single measurement of bank stability in 2008. *See* AR 8461–8548.[16]

12. On the Spud Creek allotment, the BA imposed: annual evaluation of photo points along Tater Creek, 40% upland use, and 10% bank shearing. AR 131. The record contains no evidence of photos for four years (2003, 2005-06, 2009), and no evidence of upland use or bank shearing monitoring for eight years (1999, 2002–07, 2009). Effectiveness monitoring was limited to temperature, 2000–04, AR 8829, and one session of Multiple Indicator Monitoring in 2008, AR 8842. *See* AR 8772–8870.

[16] Photos are present from 2001, but they are of a lentic (pond) area, not of the creeks as required by the BA. AR 8493. It was unclear whether 2009 use monitoring was taken at an upland or riparian site, so it was counted as both. AR 8546.

This summary of BLM's monitoring shows not just sporadic failures on one or two allotments, but a widespread failure for every allotment with regard to virtually every requirement. BLM has routinely failed to comply with the requirements to make annual visits, photograph streams, and monitor the enumerated use standards. Even worse is the failure to conduct effectiveness monitoring. The importance of effectiveness monitoring cannot be overstated, as it is needed to determine whether the management regime is sufficient to protect fish habitat and allow for recovery of degraded habitat. In terms of effectiveness monitoring, temperature was the only RMO regularly monitored on any of the allotments. Many allotments had no monitoring at all of the remaining five RMOs that measure aquatic habitat indicators, and those allotments that did have data had only been monitored once for these indicators. Monitoring only once in eleven years does not meet the BA's requirement to conduct such monitoring every three to five years in order to assess trends in conditions. Furthermore, for no allotment is it apparent that BLM actually *compared* the results of RMO monitoring over the years to determine whether RMOs are being attained—making it impossible for BLM to comply with GM-1, which requires the modification or suspension of grazing if progress towards attainment is not occurring.[17] Thus, BLM has not come close to conducting the thorough monitoring described in the BA to insure that grazing is not causing any adverse effects to the listed fish species.

Furthermore, the results from the limited amount of monitoring that BLM has conducted shows that BLM's compliance with the grazing use standards has been inconsistent. On the Big Creek allotment, woody use was 80% in 2001, AR 2688, a violation of the 50% woody use

[17] The record contains a handful of documents that the index states "summarize[] PACFISH compliance." However, this is a misnomer, as the documents are simplistic yes/no checklists, with no analysis of data. *E.g*. 8185 (Mahogany allotment), 8421 (Patterson Creek allotment).

standard. BLM attempted to blame the violation on elk, yet admitted heavy livestock use. *Id*. Despite this violation, the record contains no evidence of woody use ever being monitored again on that allotment.[18] On the Mill Creek allotment, the stubble height was 2" in 1999, AR 8302, a violation of the 4" standard. Despite this violation, the record contains no evidence of stubble height ever being monitored again on that allotment. Rather than taking a close look at those allotments in the future to insure no further violations, BLM apparently chose instead to look the other way.

2. Failure To Comply With The BA Monitoring Requirements Triggers Reinitiation.

BLM's systematic failure to complete the promised monitoring, as well as inconsistent compliance with grazing use standards, equates to a "subsequent[] modif[ication]" of the action "in a manner that causes an effect to the listed species or critical habitat that was not considered" in the consultation, triggering the requirement to reinitiate. 50 C.F.R. § 402.16(c).

As in *Johanns*, the Services here deemed the monitoring set forth in the BA to be a *necessary* factor for their concurrence. AR 1227, 1228–33 (FWS 1st letter of concurrence, basing conclusion upon assumption that "[m]anagement and use standards will be evaluated annually by BLM [] staff for compliance and effectiveness," and restating monitoring requirements); AR 1275 (FWS 2nd letter of concurrence, noting that annual report shall contain monitoring data, "review of management and compliance successes and failures," and the like); AR 1240 (NOAA Fisheries letter of concurrence, basing conclusion upon "successful implementation of mitigation measures described in the BA").

Also as in *Johanns*, the BLM's own BA "acknowledged the vital nature of utilization monitoring." *Johanns*, 450 F.3d at 464. The BA contains a section on monitoring that explicitly

[18] The Big Creek record contains "woody riparian trend transect" data from 2007, AR 2697, but that only goes to species composition, and does not address usage by cows.

states that grazing use standards "will be monitored at least once during the year," that effectiveness monitoring should be done every 3–5 years, and that this information should be submitted to the Services in a yearly consultation compliance report. AR 135. Further, in the BA's final "determination and rationale" for each allotment, the rationale for why almost every allotment was not likely to adversely affect the listed fish mentions that BLM relied upon current management and monitoring results, as well as "grazing use standards" or "recommendations" indicated in the BA, AR 136–139, and the keystone of those standards and recommendations was monitoring. AR 130.

Thus, as in *Johanns*, "[t]he material inadequacy of [BLM's] utilization monitoring and the results of the limited measurements that were taken constituted modifications to the allotment's land management plan that affected listed species in a manner and to an extent not previously considered." *Johanns*, 450 F.3d at 465.

The Court in *Sierra Club v. Marsh* noted that reinitiation should not be required for every minor modification in a complex and lengthy project. 816 F.2d at 1388. However, the widespread failure to comply with the required monitoring, standards, and reporting can in no way be characterized as minor. The required monitoring and standards were not a footnote or afterthought in the consultation process; rather, they were the most important mitigation measures relied upon in the BA and letters of concurrence. *See id*. (creation of refuge was the "most important of many modifications" necessary to insure no jeopardy).

Further, as in *Johanns*, BLM's failures to monitor and meet standards are "not comprised of infrequent and insignificant deviations." *Johanns*, 450 F.3d at 465. Rather, as documented above, the failures are remarkably widespread: BLM has failed to conduct *any* monitoring on some allotments for years on end. These failures are much more widespread than in *Johanns*,

where the Forest Service had been required to monitor each of three pastures in an allotment every year, *id*. at 459, but instead "monitored only one of three grazed pastures . . . during three of the years and two of the three grazed pastures in the fourth year." *Id*. at 465. Thus, if the noncompliance in *Johanns* constituted a modification to the action that triggered reinitiation, certainly the much more egregious noncompliance here likewise triggers reinitiation.

In sum, BLM has a duty to reinitiate consultation over its ongoing authorizations for 12 grazing allotments due to the 2005 designation of critical habitat for steelhead and the massive failures to comply with the grazing mitigation measures required by the 1999 BA and letters of concurrence. Because BLM has failed to comply with this duty, it is violating the ESA.

CONCLUSION

For the reasons discussed above, Plaintiff Western Watersheds Project respectfully requests that the Court grant its Motion for Summary Judgment.

Dated: October 29, 2010

Respectfully submitted,

/s/ Kristin F. Ruether
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