Lauren M. Rule (ISB # 6863)
Kristin F. Ruether (ISB # 7914)
ADVOCATES FOR THE WEST
PO Box 1612
Boise ID 83701
(208) 342-7024
(208) 342-8286 (fax)
lrule@advocateswest.org
kruether@advocateswest.org

Attorneys for Plaintiff Western Watersheds Project

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

WESTERN WATERSHEDS PROJECT, Plaintiff, v. WILLIAM WOOD, Salmon-Challis National Forest Supervisor, and UNITED STATES FOREST SERVICE; STEVE HARTMANN, BLM Salmon Field Office Manager, and BUREAU OF LAND MANAGEMENT; JEFFERY FOSS, 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. 09-cv-368 **COMPLAINT**

INTRODUCTION

1. The Lemhi watershed in eastern Idaho historically was an important and productive watershed for salmon, steelhead, and bull trout; but these species have declined dramatically in this watershed and throughout the Upper Salmon River basin. Plaintiff Western

Watersheds Project brings this case to challenge Defendants' violations of the Endangered Species Act ("ESA") in not properly managing for and recovering these species of fish in the Lemhi drainage.

2. Much of the land in the Lemhi watershed is federal land managed by either the Forest Service or Bureau of Land Management ("BLM"). The predominant use of these lands is for livestock grazing, and water diverted from these public lands is used to grow winter feed on private land for livestock that graze the federal allotments in the summer.

3. The Forest Service and BLM consulted under the ESA with NOAA Fisheries and U.S. Fish and Wildlife Service over the impacts to salmon, steelhead, and bull trout from livestock grazing and other public land management activities throughout the watershed (other than water diversions), but these consultations are now between six and ten years old. The agencies have not updated these watershed consultations despite newly designated critical habitat for steelhead, changed circumstances such as the failure to conduct required monitoring or comply with grazing standards, and new information about the activities in the watershed, the status of the fish species, and impacts to those species, all of which warrant reinitiation of consultation for salmon, steelhead, and bull trout.

4. Fish and Wildlife Service had particular concerns over the Forest Service's Hawley Creek allotment during the original consultation because of livestock grazing impacts to bull trout, and thus required a more thorough analysis and more stringent requirements on future grazing for that allotment. Like the watershed consultations, this analysis is now ten years old and needs to be updated with new information. Furthermore, many of the requirements set forth for the allotment are not being followed, which likewise mandates reinitiation of consultation.

5. With regard to water diversions, Western Watersheds Project previously sued the

Forest Service for failing to consult over diversions on the Salmon-Challis National Forest and the parties settled that lawsuit, with the Forest Service agreeing to initiate consultation for all water diversions on that forest by submitting biological assessments on a watershed basis. *See Western Watersheds Project v. Matejko*, No. 01-cv-259-BLW (D. Idaho, filed June 7, 2001) (Docket No. 18). Pursuant to that settlement, the Forest Service submitted a biological assessment to NOAA Fisheries and Fish and Wildlife Service ("the Services") in 2005, assessing impacts to ESA-listed fish from water diversions on its land in the Lemhi watershed, but the Services have never issued biological opinions to complete consultation over those diversions.

6. Meanwhile, the Forest Service and BLM continue to authorize livestock grazing and water diversions that adversely affect salmon, steelhead, and bull trout and their habitat in the Lemhi watershed. Grazing in riparian areas and trampling of spawning gravels harms the listed fish and degrades their habitat. Until the agencies complete new consultations, they must prevent adverse effects and injury to salmon, steelhead, bull trout, and designated critical habitat.

7. Western Watersheds Project thus seeks judicial review and relief ordering Defendants to reinitiate consultation for activities in the Lemhi watershed, including livestock grazing on the Hawley Creek allotment as well as all other allotments that may affect listed fish species; and further declaratory and injunctive relief to prevent the Forest Service and BLM from violating the ESA's substantive requirements to protect and recover these species of fish.

JURISDICTION AND VENUE

8. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 because this action arises under the laws of the United States, including the ESA, 16 U.S.C. § 1531 et seq. and the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq. An actual, justiciable controversy now exists between Plaintiff and Defendants, and the requested relief is therefore proper under 28

U.S.C. §§ 2201-02 and 16 U.S.C. § 1540(g).

9. Venue is properly vested in this Court under 16 U.S.C. § 1540(g)(3)(A) because the violations occurred in this judicial district.

10. As required by the ESA, Western Watersheds Project provided sixty days' notice of its intent to bring this action.

11. The federal government has waived sovereign immunity in this action pursuant to 16 U.S.C. § 1540(g)(1).

PARTIES

12. Plaintiff WESTERN WATERSHEDS PROJECT is a regional, membership, not-for-profit conservation organization, dedicated to protecting and conserving the public lands and natural resources of watersheds in the American West. WWP is headquartered at the Greenfire Preserve in Custer County, Idaho, and also has staff or offices in Salmon, Hailey, Boise, and McCall, as well as in other western states. Through agency proceedings, public education, scientific studies, and legal advocacy conducted by its staff, members, volunteers, and supporters, WWP is actively engaged in protecting and improving riparian areas, water quality, fisheries, wildlife habitat, and other natural resources and ecological values of western watersheds, including the Lemhi watershed.

13. Western Watersheds Project has participated in decision-making processes for livestock grazing on Forest Service and BLM lands throughout the west, including in the Lemhi watershed. WWP staff, members, and supporters use and enjoy the fish and wildlife, public lands, and natural resources on federal lands in the Lemhi watershed for many health, recreational, scientific, spiritual, educational, aesthetic, and other purposes. WWP staff, members, and supporters pursue activities such as hiking, fishing, hunting, photography,

scientific study, wildlife viewing, and spiritual renewal on Forest Service and BLM lands in the Lemhi watershed. Livestock grazing, water diversions, and other activities that degrade these lands, waters, fish, and other natural resources impair the use and enjoyment of these lands by WWP staff, members, and supporters.

14. WWP staff, members, and supporters plan to continue to visit and use these public lands in the Lemhi watershed in the near future. WWP's interests, both organizationally and on behalf of its staff, members, and supporters, in the preservation and protection of the Lemhi watershed and its resources are being directly harmed by Defendants' actions challenged herein. WWP's above-described aesthetic, conservation, recreational, scientific, and other interests have been, are being, and unless the relief prayed for is granted, will continue to be adversely affected and irreparably injured by Defendants' violations of law. WWP has no adequate remedy at law, and thus the requested relief is appropriate.

15. Defendant WILLIAM WOOD is an employee of the U.S. Forest Service, who currently serves as Supervisor for the Salmon-Challis National Forest, based in Salmon, Idaho. As Forest Supervisor, Defendant Wood has management and supervisory authority over livestock grazing and water diversion authorizations as well as other activities on the Salmon-Challis National Forest, including in the Lemhi River watershed; and is responsible for ensuring that those activities comply with all federal laws and regulations, including the ESA. Defendant Wood is sued solely in his official capacity.

16. Defendant U.S. FOREST SERVICE is an agency or instrumentality of the United States, and is charged with managing the public lands and resources of the Salmon-Challis National Forest, in accordance and compliance with federal laws and regulations.

17. Defendant STEVE HARTMANN is an employee of the BLM, who currently

serves as Field Office Manager for the BLM's Salmon Field Office, based in Salmon, Idaho. As the Salmon Field Office Manager, Defendant Hartmann has management and supervisory authority over livestock grazing authorizations as well as other activities on lands managed by the BLM's Salmon Field Office, including in the Lemhi River watershed; and is responsible for ensuring that those activities comply with all federal laws and regulations, including the ESA. Defendant Hartmann is sued solely in his official capacity.

18. Defendant BUREAU OF LAND MANAGEMENT is an agency or instrumentality of the United States, and is charged with managing the public lands and resources of the Salmon Field Office, in accordance and compliance with federal laws and regulations.

19. Defendant JEFFERY FOSS is an employee of the U.S. Fish and Wildlife Service, who currently serves as Field Supervisor of the Snake River Field Office, based in Boise, Idaho. As the Snake River Field Office Supervisor, Defendant Foss is responsible for administering the provisions of the ESA for the Snake River region, which encompasses the Salmon-Challis National Forest and BLM Salmon Field Office. Defendant Foss is sued solely in his official capacity.

20. Defendant U.S. FISH AND WILDLIFE SERVICE is an agency or instrumentality of the United States, and is responsible for administering the provisions of the ESA with regard to threatened and endangered terrestrial and freshwater aquatic species, including threatened Upper Columbia River bull trout.

21. Defendant DAVID MABE is an employee of NOAA Fisheries, who currently serves as Supervisor of the Idaho State Habitat Office, based in Boise, Idaho. As the Idaho Habitat Office Supervisor, Defendant Mabe is responsible for administering the provisions of the

ESA for the State of Idaho, which encompasses the Salmon-Challis National Forest and BLM Salmon Field Office. Defendant Mabe is sued solely in his official capacity.

22. Defendant NOAA FISHERIES is an agency or instrumentality of the United States, and is responsible for administering the provisions of the ESA with regard to threatened and endangered marine species, including Snake River Chinook salmon, Snake River sockeye salmon, and Snake River steelhead.

ENDANGERED SPECIES ACT

23. Under the ESA, Fish and Wildlife Service or NOAA Fisheries must list a species as endangered if it is in danger of going extinct throughout all or a significant portion of its range, and must list it as threatened if it is likely to become endangered in the foreseeable future. 16 U.S.C. §§ 1532(6),(20); 1533(a)(1).[1] The Services may also list sub-species or distinct populations of fish or wildlife as threatened or endangered under the ESA. *Id.* § 1532(16).

24. Once species are listed as threatened or endangered, the Services must designate their critical habitat, which is occupied or unoccupied habitat that contains physical or biological features essential to the conservation of the species and which may require special management considerations or protection. *Id.* §§ 1532(5); 1533(a)(3). The intent of the ESA is to conserve ecosystems upon which threatened and endangered species depend, and recover listed species to the point at which they no longer need the protections of the Act. *Id.* §§ 1531(b); 1532(3).

25. A federal agency that authorizes an activity that may affect a listed species or critical habitat must consult with the Services over the impacts of that activity to ensure that it does not jeopardize the continued existence of the species or result in the destruction or adverse

[1] U.S. Fish and Wildlife Service is responsible for consultations involving freshwater aquatic species, such as bull trout, while NOAA Fisheries is responsible for consultations involving marine species, such as salmon and steelhead.

modification of critical habitat. 16 U.S.C. § 1536(a)(2). Jeopardize means to reduce appreciably the likelihood of both the survival and recovery of the species in the wild by reducing the reproduction, numbers, or distribution of the species. 50 C.F.R. § 402.02. Destruction or adverse modification is a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. *Id.*

26. During the ESA consultation process, if the action agency concludes in a "biological assessment" that the activity is "not likely to adversely affect" the listed species or adversely modify its critical habitat, and the Service concurs with that conclusion, then the consultation is complete. *Id*. §§ 402.12, 402.14(b). If, however, the action agency or the Service determines that the activity is "likely to adversely affect" the listed species or its critical habitat, then the Service completes a "biological opinion" to determine whether the activity will jeopardize the species or result in destruction or adverse modification of critical habitat. *Id.* § 402.14. If the Service determines that the action will jeopardize the species or adversely modify critical habitat, it may propose one or more reasonable and prudent alternative actions that would avoid such results. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)(5).

27. In addition to the substantive duty under ESA Section 7(a)(2) to avoid jeopardizing a species or adversely modifying critical habitat, the action agencies also have a duty, while the consultation process is occurring, to avoid making any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures that would avoid jeopardizing the species or adversely modifying critical habitat. 16 U.S.C. § 1536(d).

28. The ESA and its regulations also prohibit "take" of listed species, where take

includes harassing, harming, wounding, or killing the species. 16 U.S.C. §§ 1538; 1533(d); 1532(19). Harm is further defined to include significant habitat modification or degradation that injures a listed species by significantly impairing its breeding, feeding, or sheltering behaviors, while harassment is an act that creates the likelihood of injury by annoying a species to the extent that it significantly disrupts breeding, feeding, or sheltering behaviors. 50 C.F.R. § 17.3.

29. The Services, however, can authorize take of a listed species through an "Incidental Take Statement" that accompanies a biological opinion if the taking is incidental to an otherwise lawful activity and does not cause jeopardy to the species or adverse modification of critical habitat. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). Any taking that conforms to the terms and conditions within an Incidental Take Statement is not prohibited under Section 9 of the ESA. 16 U.S.C. § 1536(o)(2); 50 C.F.R. § 402.14(i)(5).

30. Once the consultation is complete, the agencies have a duty to insure that it remains valid. Reinitiation of consultation is required and shall be requested by the action agency or the Services if: (a) the amount or extent of taking specified in the incidental take statement is exceeded; (b) 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) 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) a new species is listed or critical habitat designated that may be affected by the identified action. 50 C.F.R. § 402.16.

STATEMENT OF FACTS

I. ESA Listed Fish in the Lemhi Watershed

31. The Services have listed numerous populations of salmon, steelhead, and bull trout as threatened or endangered under the ESA because of significantly declining populations,

which often result from habitat destruction and degradation. These fish require clean, cold water to survive and reproduce. Water that has elevated levels of sediment, temperature, or other pollutants impairs the survival of the fish by hindering their biological functions, and also impairs reproduction by covering spawning gravels where the fish lay eggs with sediment that suffocates the eggs and young fry that emerge. The fish also require cover in the form of undercut banks and overhanging vegetation, large woody debris, and deep pools that allow them to hide from predators and rest outside of the current.

32. Salmon and steelhead are anadromous species, meaning they are born in inland streams, migrate out to the ocean as juveniles, and then return to their natal streams several years later as adult fish to spawn. Bull trout are not anadromous and thus do not migrate to the ocean. Some bull trout, however, migrate from smaller streams to larger rivers or lakes to overwinter before returning to the smaller streams to spawn, while others remain within individual streams.

33. The Lemhi River in central/eastern Idaho drains the Lemhi, Bitterroot and other mountains; and enters the Salmon River just north of the town of Salmon, Idaho. The Lemhi watershed provides habitat for three species of threatened fish: Snake River spring/summer Chinook salmon, Snake River steelhead, and Upper Columbia River bull trout. Endangered sockeye salmon migrate past the mouth of the Lemhi River in the Salmon River on their way between their spawning grounds in headwater lakes of the Salmon River and the ocean.

34. Snake River spring/summer Chinook salmon was listed as threatened in 1992. Historically, the Lemhi River and its tributaries was the second most significant Chinook salmon production area in the Upper Salmon River basin for natural populations of spring/summer Chinook salmon. Its numbers and range within the Lemhi drainage have declined significantly, however, and now the species is found only in the Lemhi River itself and tributaries within one

sub-watershed—the Hayden Creek sub-watershed. However, many other tributaries to the Lemhi serve as designated critical habitat for Chinook.

35. Chinook salmon spawn in the Lemhi watershed from mid-August through September, and fry emerge from January through June. A 2005 status review for the species concluded that it was still below abundance levels necessary for recovery and remained at risk of becoming endangered in the foreseeable future.

36. Snake River steelhead was listed as threatened in 1997 and is also currently found only in the Lemhi River and Hayden Creek sub-watershed, a vastly reduced range compared to its historic distribution. Steelhead critical habitat was designated in 2005 and includes many of the tributaries to the Lemhi River such as Texas Creek, Purcell Creek, Big Eightmile Creek, Hayden Creek, Bear Valley Creek, East Fork Hayden Creek, Kadletz Creek, West Fork Hayden Creek, Wright Creek, Kenney Creek, Wimpey Creek, Withington Creek, and Bohannon Creek.

37. Steelhead migrate to the watershed in fall, overwinter there, and spawn from mid-March to mid-June, with fry emerging from June through October. Wild steelhead populations are significantly depressed compared to historic levels and a 2006 status review concluded that the species remains at risk of becoming endangered in the foreseeable future, with population abundance well below recovery targets.

38. Upper Columbia River bull trout was listed as threatened in 1998. Bull trout are still found in the Lemhi River and many of its tributaries but at significantly reduced numbers. Some populations are fluvial, meaning they migrate between smaller streams and larger rivers, while others remain within individual streams. Many streams in this watershed are cut off from the main Lemhi River due to water diversions that obstruct and/or dewater the streams, cutting off migration paths that used to occur. No critical habitat for bull trout was designated in the

Lemhi watershed in the final bull trout critical habitat rule, but Fish and Wildlife Service is currently redoing its bull trout critical habitat designation due to political interference with the final rule (the proposed rule had designated significantly more critical habitat, the majority of which was removed in the final rule).

39. Bull trout require colder water than salmon or steelhead, rarely occurring in water above 59-64 degrees Fahrenheit. These fish spawn from mid-August through October and fry emerge in the spring. The 2008 status review ranked the Lemhi River core area as having "substantial, imminent threats," and categorized it as being "at risk" because of "very limited and/or declining numbers, range, and/or habitat, making the bull trout in this core area vulnerable to extirpation." Due to continuing depressed populations, the species remained listed as threatened.

40. Snake River sockeye salmon was listed as an endangered species under the ESA in 1991, and its critical habitat was designated in 1993. The entire Salmon River is critical habitat for sockeye and the species migrates past the mouth of the Lemhi. Adults migrate upstream to their spawning grounds in May to August, and young smolts migrate to the ocean from March to June. Therefore, activities in the Lemhi watershed can impact habitat of sockeye salmon as well.

II. PACFISH and INFISH

41. Beginning in the mid-1990's, the Forest Service and BLM developed strategies designed to protect salmon, steelhead, and bull trout habitat on federal land when it became clear that these species had substantially declined across their ranges and significant changes to habitat management were necessary. PACFISH was a strategy aimed to protect salmon and steelhead habitat on federal land in Eastern Oregon and Washington, Idaho, and portions of California,

while INFISH was adopted to protect native resident fish like bull trout in those same areas.

42. These strategies applied to all Forest Service and BLM lands in the areas they covered. These agencies modified their land management plans with PACFISH and INFISH direction. The Forest Service formally amended their land and resource management plans with the strategies, while BLM applied the strategies to their land management plans through agency instructional memoranda.

43. PACFISH and INFISH were intended to be interim strategies until the agencies could develop long-term habitat protection plans that were incorporated into revised land management plans. However, few forests or BLM districts have completed land management plan revisions, and thus many still must comply with PACFISH and INFISH, including the Salmon-Challis National Forest and BLM Salmon Field Office.

44. PACFISH contains numerous provisions to protect and restore salmon and steelhead habitat, including: (a) setting riparian management goals; (b) establishing riparian management objectives (RMOs), which are quantitative targets for important fish habitat components of water temperature, pool frequency, large woody debris, bank stability, lower bank angle, and width to depth ratio; (c) requiring delineation of riparian habitat conservation areas (RHCAs); (d) setting standards and guidelines for activities occurring within RHCAs, such as grazing, mining, timber harvest, roads, and fire management; (e) designating key watersheds; (f) encouraging watershed analyses and watershed restoration projects; and (g) requiring monitoring for implementation of standards and guidelines and their effectiveness at meeting RMOs.

45. The PACFISH standards that apply to livestock grazing require the Forest Service and BLM to modify grazing practices that retard or prevent attainment of RMOs or are likely to adversely affect anadromous fish, and to suspend grazing if modifications are not effective in

meeting RMOs or avoiding adverse effects to the fish. The standards also limit livestock trailing, bedding, and watering to those areas and times that would not retard or prevent attainment of RMOs or adversely affect anadromous fish.

46. INFISH contains almost identical provisions to PACFISH, including the same grazing standards. It also includes the same RMOs except that the target for water temperature is slightly lower in INFISH due to bull trout needing colder water.

47. The Forest Service and BLM consulted with the Services over the implementation of PACFISH and INFISH direction, resulting in several biological opinions. The earliest opinions from NOAA Fisheries considered the short-term use of PACFISH and its impacts on listed salmon species. A subsequent opinion in 1998, however, assessed the long-term use of PACFISH within existing land management plans and its impacts on salmon and steelhead once steelhead were listed and it became apparent that revision of most plans was not imminent.

48. The PACFISH biological opinions contained additional requirements beyond those in PACFISH itself. These requirements included adding sediment as an RMO and increasing the streambank stability RMO to 90%; annually conducting implementation, effectiveness, validation, and photopoint monitoring to assess compliance with RMOs and continuing impacts to listed fish; developing stream restoration plans and projects; conducting subbasin or watershed analyses; and conducting programmatic biannual reviews of projects to update the environmental baseline conditions in the watershed and assess impacts of new events and activities on a watershed basis.

49. A separate 1998 biological opinion by Fish and Wildlife Service considered the impacts to bull trout from long-term use of INFISH and PACFISH in land management plans. Like the 1998 NOAA Fisheries biological opinion, this opinion incorporated additional

requirements beyond those in INFISH and PACFISH, including commitments for watershed analyses and restoration projects that emphasize recovery of bull trout, improved monitoring that is commensurate with on-the-ground activities, and developing grazing plans in areas of known or suspected spawning to minimize trampling of redds (nests) and other forms of take of bull trout. It also required completion of consultation over federal projects at a watershed scale to facilitate evaluation of individual and cumulative effects of projects and accurately assess the impacts to bull trout populations, and updating the environmental baseline at the watershed scale to include proposed actions once the original consultation was concluded.

50. These 1998 biological opinions, referred to as the "LRMP biops," still apply to lands within the Salmon-Challis National Forest and BLM Salmon Field Office.

III. ESA Consultation History For The Lemhi Watershed

51. Authorization of livestock grazing on federal land is a federal action that requires ESA consultation because it poses significant adverse effects to listed fish. Livestock prefer grazing in riparian areas because of the water, shade, and rich vegetation present there. This heavy use causes overgrazing of riparian vegetation as well as trampling and shearing of streambanks, which in turn reduces stream shading, increases sediment input into streams, and alters the floodplain and stream channel. These effects lead to warmer waters with higher levels of sediment and fewer protected areas for fish in the form of undercut banks and deep pools. Warmer water temperatures and sediment affect not only the streams in the immediate vicinity of the livestock but also downstream fish habitat.

52. Livestock also walk in the streams, trampling spawning gravels and destroying redds of salmon, steelhead, or bull trout, as well as contributing further sedimentation and pollution with their excretions.

53. Grazing in the uplands affects fish habitat too. Livestock trample soils and destroy biological soil crusts, causing soil erosion that leads to more overland transport of sediment that is deposited in streams and degrades fish habitat. Cattle also compact soil, which reduces water infiltration and lowers the water table. In order to remove cattle away from riparian areas, the agencies often "develop" upland seeps and springs by piping water from these wetland areas into troughs for cattle to drink. But such water developments remove water from these natural sources, altering the hydrology of the watershed and reducing groundwater that contributes to streamflows later in the summer.

54. The Lemhi watershed is a large watershed that is divided into 28 sub-watersheds and contains hundreds of miles of perennial streams. This drainage extends in length for 65 miles, and is 25 miles wide, extending from the Lemhi range on the western edge to the Continental Divide on the eastern edge.

55. The watershed contains private land that occurs mostly along the floodplain in the valley bottom, BLM land in the upper parts of the valley and lower elevation foothills, and Forest Service land in the higher elevations. Most of the private land is used for agriculture to grow feed for livestock and is irrigated from water diverted from the Lemhi River and its tributaries. Various activities occur on BLM and Forest Service land, including recreation, mining, and timber sales, but the dominant activity by far is livestock grazing.

A. Salmon and Steelhead Consultations

56. After sockeye and Chinook salmon were listed as endangered and threatened, Defendants Forest Service and BLM consulted with NOAA Fisheries over impacts of ongoing activities in the Lemhi watershed on these species and their critical habitat. One of the primary activities covered in the consultations was livestock grazing on numerous Forest Service and

BLM grazing allotments in the watershed. The Forest Service also discussed in some detail the extensive number of stream diversions in the watershed and their impact on the salmon.

57. The biological assessments for Chinook and sockeye salmon asserted that conditions in riparian areas had improved compared to the heavy degradation that occurred over the last several decades, and that the agencies were conducting thorough riparian monitoring on streams that contained current and historic salmon habitat. The Forest Service and BLM concluded that the federal activities in the Lemhi watershed were not likely to adversely affect the salmon or their critical habitat, and NOAA Fisheries agreed with those conclusions in a 1995 letter of concurrence.

58. Several years later when steelhead was listed as threatened, the Forest Service and BLM completed a joint biological assessment for the Lemhi watershed addressing impacts to steelhead from ongoing activities. This 1999 biological assessment again covered various activities that the agencies determined might affect the listed salmon and steelhead, the majority of which were livestock grazing allotments in the watershed. The assessment listed but did not analyze individual or cumulative impacts of activities that the agencies considered to have "no effect" on the salmon or steelhead, including numerous additional grazing allotments with perennial streams that flow into other streams inhabited by listed fish.

59. For the grazing allotments analyzed, the joint biological assessment included a description of the grazing that occurred on the allotments, the monitoring the agencies conducted to determine whether grazing was degrading riparian areas or uplands, and the standards that applied to evaluate ecological conditions.

60. For instance, the assessment stated the number of livestock, season of use, and management systems used on 26 allotments as well as applicable grazing utilization standards. It

also described the Forest Service's monitoring protocols by noting the various types of monitoring done, including forage utilization, streambank stability, riparian vegetation and woody shrub conditions, water temperature, and fish habitat. The assessment similarly listed the types of variables BLM monitored. And it discussed the different standards for water temperature, sediment, fish habitat elements, stream channel conditions, and other parameters used to indicate good or poor ecological conditions.

61. The Forest Service and BLM concluded in the biological assessment that the activities in the watershed were not likely to adversely affect steelhead. Despite acknowledging that grazing impacts the listed fish, the action agencies determined that these impacts were not likely to degrade habitat in the long-term and that best management practices and mitigation measures would reduce any measurable effects on the species and their habitat. The mitigation measures discussed in the biological assessment were livestock utilization standards and changes in grazing management based on monitoring conducted to determine conditions and trends of riparian areas and whether livestock were having adverse effects to fish habitat.

62. NOAA Fisheries again concurred with the assessment's conclusion, stating that based on the best available information and successful implementation of mitigation measures described in the biological assessment, the activities would have no more than a negligible potential to adversely effect Snake River salmon and steelhead or their critical habitat. The concurrence letter also stated that the activities conformed with direction in land management plans as well as PACFISH.

63. NOAA Fisheries' letter of concurrence contained an expiration date for the consultation of January 15, 2003. It also explained that the action agencies must reinitiate consultation if new information became available or if circumstances occurred that may affect

listed species or their critical habitat in a manner or to an extant not previously considered.

64. In light of the January 15, 2003 expiration date in the NOAA Fisheries concurrence letter, the Forest Service and BLM submitted a new biological assessment to the Services in 2002 that updated information on activities in the watershed and impacts to salmon, steelhead, and bull trout, and again came to a "not likely to adversely affect" determination for all activities. NOAA Fisheries, however, did not accept this assessment because it did not contain sufficient information to adequately assess impacts to the fish from all ongoing activities.

65. The action agencies conferred about the biological assessment numerous times and submitted amended versions of it in 2003, but never included all of the required information and thus NOAA Fisheries did not concur in the determination. In particular, the biological assessment did not include enough information about natural and man-induced activities in the watershed such as drought, wildfires, water diversions, grazing allotments, or activities on private land to adequately update the environmental baseline, did not discuss the current status of salmon and steelhead populations in the Lemhi drainage, and did not include enough monitoring data or information to support its conclusion that the individual and cumulative effects of all the activities in the watershed—including "no effect" activities—were not likely to adversely affect salmon and steelhead or critical habitat. Nor did it demonstrate how all of the activities were meeting PACFISH, INFISH, and the LRMP biop requirements.

66. In 2004, BLM again asked to reinitiate consultation using substantially the same assessment.[2] NOAA Fisheries stated that it still could not concur in the "not likely to adversely affect" determination because of a lack of information and therefore was initiating formal

[2] The Forest Service decided at this time to split from BLM and do a separate biological assessment that covered ongoing activities as well as water diversions on the forest. Thus, it did not join BLM in the 2004 request for reinitiation.

consultation.

67. During this process, NOAA Fisheries extended the deadline from the prior 1999 consultation to give the agencies more time to complete the reinitiated consultation. Then, in January 2005, NOAA Fisheries simply eliminated the expiration date altogether and the agencies abandoned the consultation process, never to resume. Therefore, the 1999 consultation was never updated.

B. Bull Trout Consultations

68. Also in 1999, the Forest Service and BLM submitted a joint biological assessment to Fish and Wildlife Service over impacts of ongoing federal activities in the Lemhi watershed on bull trout. This assessment was almost identical to the steelhead assessment, and also concluded that these activities were not likely to adversely affect bull trout for the same reasons.[3]

69. Fish and Wildlife Service concurred with that conclusion for most activities in the watershed after considering information in the biological assessment as well as in PACFISH, INFISH and the LRMP biop. The Service determined that based on the descriptions of the proposed activities in the biological assessment, including livestock utilization standards, monitoring, and adjustments to grazing management, as well as current landscape conditions, all but one activity was not likely to adversely affect bull trout.

70. The one activity with which the Service did not concur was grazing on the Forest Service Hawley Creek allotment. Instead, after visiting the allotment, the Service concluded that grazing was likely to adversely affect bull trout. Therefore, the Service issued a biological opinion for that allotment.

[3] Like the steelhead assessment, the bull trout biological assessment also excluded analysis of many grazing allotments that Forest Service and BLM considered to have "no effect" on bull trout even though these allotments contain perennial streams that flow into other streams containing listed fish.

71. In the opinion, Fish and Wildlife Service noted that bull trout populations in the Lemhi River are depressed, and that many of the tributaries no longer support migratory forms of the fish because they are cut off from the mainstem river due to water diversions and withdrawals. This creates isolated subpopulations of resident fish that cannot interbreed and exchange genetic material with other subpopulations. Hawley Creek is one such creek because it is completely dewatered before it reaches the Lemhi River due to water diversions used for irrigation.

72. The Service stated that bull trout occupy Hawley Creek and its tributaries but in low numbers, and reproduction appeared to be diminished. Sediment produced during the grazing season does not have a chance to flush out of the system.

73. When describing the conditions of the allotment, the opinion stated that mobilization of sediment into the stream, exposed bare ground, streambank hummocking and compaction, and bank shearing were occurring and adversely affecting fish habitat, particularly in the headwaters of Little Bear Creek, Wheetip Creek, Meadow Creek, Quaking Aspen Creek, and Bog Creek. Streambanks showed excessive signs of physical damage from trampling. Several areas showed moderate to heavy signs of livestock trailing in the stream corridor and excessive use of the stream channel and riparian area. The effects of sedimentation caused by this damage occurred in areas occupied by bull trout as well as downstream.

74. The Service noted that efforts to keep cattle from trailing and spending excessive time in riparian areas and thereby damaging them had not been successful. It explained that cattle were maintaining degraded conditions along several streams, including Reservoir Creek, Bog Creek, and Wheetip Creek, by overgrazing the riparian vegetation and causing a shift from deep rooted hydric species like sedges, rushes, and willows that provide streambank stability, to

early seral shallow rooted plants like Kentucky bluegrass that allow for more erosion and sedimentation into streams. These plants do not maintain soil moisture along the streambank.

75. Excessive use of herbaceous vegetation in riparian areas also led to overgrazing of woody shrubs, which livestock will graze once herbaceous vegetation is no longer available. This suppresses growth and reproduction of woody shrubs, which are key components of riparian areas for both fish and wildlife habitat.

76. To attempt to alleviate these problems caused by livestock grazing, the Forest Service implemented a multiple pasture, short-duration grazing system where the allotment was divided into 16 pastures with each pasture grazed for less than three weeks. It also required two full-time range riders who would keep livestock out of sensitive areas, and close monitoring for overuse of vegetation and bank damage from trampling. It limited utilization along Bog Creek, Reservoir Creek, and Poison Creek to 35% and the remainder of riparian areas to 40%. And it required construction of a new fence around the sensitive spruce bog headwaters of Little Bear Creek, which had received significant damage from livestock use, and close monitoring of this fence with immediate removal of any cows observed inside the exclosure. All of these measures were described in the biological opinion.

77. The opinion noted that exclusion of cattle may be required to recover some streams, and rest should be incorporated into the grazing system to convert early seral conditions to mid to late seral plant communities. To assess whether objectives are being met and recovery is occurring, the Forest Service must monitor various parameters such as bank stability and woody species use; stubble height measurements alone are not enough.

78. The biological opinion further required that the actual number of days livestock spent in each pasture matched the allowed use in the annual operating instructions and that all

livestock be completely moved to new pastures by the date specified in the annual operating instructions. It also stated that grazing had to comply with grazing standards and guidelines in PACFISH and INFISH.

79. Fish and Wildlife Service concluded that grazing on the allotment would not jeopardize bull trout if the Forest Service implemented the grazing strategies discussed in the opinion and adequately monitored conditions, grazing met utilization standards, sensitive riparian areas were protected, proper movement of cattle occurred, and results were reported to the agency.

80. Along with the biological opinion, Fish and Wildlife Service issued an Incidental Take Statement that applied to the Hawley Creek allotment.

81. The Incidental Take Statement for the allotment stated that livestock grazing in the riparian areas of the allotment was likely to result in incidental take of bull trout due to the adverse effects on water temperature, stream substrate quality, bank stability, sediment levels, food supply, and spawning success. Furthermore, the authorized level of take would be exceeded if the proper use standards and other objectives from the Forest Plan as well as the standards and guidelines from PACFISH and INFISH were not followed.

82. In order to minimize take, the Statement set forth reasonable and prudent measures. These measures were to minimize adverse impacts of grazing to aquatic and riparian habitats and implement actions that provide for the essential habitat features to recover bull trout and their habitats; and to revise the allotment management plan to reflect the new grazing strategy designed to protect bull trout.

83. The Statement also contained nondiscretionary terms and conditions with which the Forest Service “must ensure compliance” to implement the reasonable and prudent measures.

The terms and conditions included the following:

- Implement grazing standards from INFISH and PACFISH.
- Update the allotment management plan for the allotment to incorporate measures from the biological assessment, biological opinion, and annual instructions.
- Ensure the grazing management prescriptions from the biological opinion and annual operating instructions are adhered to and successfully met.
- Provide for better livestock distribution throughout the allotment and away from riparian areas by using off-channel water developments. Monitor pastures, with an emphasis on streambank condition, by establishing photo points and taking comparison photos during utilization monitoring, and provide the results to the Service at the end of the year.
- Monitor use at key areas within pastures approximately every two weeks during the grazing season, and annually monitor end of growing season utilization to ensure compliance with the annual instructions.
- Ensure that cattle do not congregate in riparian areas or other sensitive areas for excessive periods of time to avoid impacts to habitat quality.
- Move livestock away from riparian areas and sensitive wet meadows if excessive use is occurring, including impacts to streambanks and vegetation.
- Annually review streams and wetlands on the allotment to assess problem areas, and assign specific requirements or mitigation measures to reduce impacts to those areas.
- Ensure trailing occurs outside of riparian areas and wet meadows to the extent possible.

84. The Incidental Take Statement concluded that if the Forest Service could not meet the general and site-specific resource objectives described in the reasonable and prudent measures and terms and conditions, it must reinitiate consultation.

85. The agencies updated the 1999 watershed consultation for bull trout in 2003 except for the Hawley Creek allotment. The Forest Service and BLM submitted the same joint biological assessment to Fish and Wildlife Service that NOAA Fisheries rejected as inadequate, as discussed above. Fish and Wildlife Service, however, accepted the assessment and issued a letter of concurrence agreeing that the ongoing activities in the Lemhi watershed were not likely to adversely affect bull trout. But it stated that the assessment did not adequately analyze effects to bull trout proposed critical habitat.[4]

86. This concurrence letter specifically did not cover the Hawley Creek allotment, which continued to be governed by the 1999 biological opinion until the agencies could "consult on a new management plan outlining desired future conditions." The Forest Service has never completed such a management plan and thus the 1999 biological opinion still applies to this allotment.

C. Water Diversions Consultation

87. In addition to the consultations over ongoing activities on federal land in the Lemhi watershed described above, the Forest Service is also consulting with the Services over water diversions on its land. The Lemhi drainage contains numerous water diversions on private and federal land, most of which are used to irrigate agricultural land. These diversions impact fish by removing water from streams and diverting it to private land through ditches, thereby

[4] The proposed critical habitat for bull trout on federal land in the Lemhi drainage was later removed in the final critical habitat rule. This final rule has subsequently been withdrawn because of political interference with the scientific analysis and a new rule is currently being developed.

reducing streams flows and often completely dewatering the stream before it reaches the Lemhi River. The diversions can also block instream fish passage or direct fish into ditches, which are inhospitable as habitat.

88. The water diversions consultation stems from the *WWP v. Matejko* lawsuit brought by Western Watersheds Project in 2001, which, as noted above, resulted in a settlement agreement whereby the Forest Service agreed to initiate ESA consultation with the Services over impacts of water diversions across the Salmon-Challis National Forest to salmon, steelhead, and bull trout. The parties agreed that the Forest Service would submit separate biological assessments on a watershed basis over the course of six years.

89. Originally, the Forest Service contemplated including water diversions and other ongoing activities such as livestock grazing in comprehensive biological assessments for each watershed on the forest. Later, the agency changed course and decided to issue separate biological assessments that covered only the water diversions.

90. The Forest Service submitted a biological assessment to the Services in January 2005 that covered water diversions on forest land in the Lemhi watershed. This assessment concluded that many of the diversions were likely to adversely affect threatened salmon, steelhead, and bull trout or adversely modify Chinook salmon critical habitat.

91. More than four years later, neither Fish and Wildlife Service nor NOAA Fisheries has issued a biological opinion to complete the consultation process. Yet the Forest Service continues to authorize use of water diversions and ditches on forest land in the Lemhi drainage that continue to reduce streamflows, impair fish passage, and entrain fish in ditches.

IV. Events Subsequent to these Consultations

92. Since the 1999 and 2003 consultations over ongoing federal activities (other than

water diversions) in the Lemhi watershed, circumstances have changed and new information has arisen that impact the listed fish here.

93. In 2005, NOAA Fisheries designated critical habitat for Snake River steelhead, and the Lemhi River and several of its tributaries are listed as such. Some of these tributaries occur in sub-watersheds that were excluded from the analysis in the 1999 consultation because they supposedly had "no effect" on steelhead. The agencies have never reinitiated consultation to assess the impacts of activities on the newly designated steelhead critical habitat.

94. Over the last decade, several wildfires and multiple years of drought have occurred in the drainage, each of which can impact fish habitat and alter livestock grazing pressure. Global warming is becoming an increasing threat in the West, and new science on climate change shows that it is creating higher temperatures and drier conditions as well as altering the hydrology of watersheds and timing of peak streamflows, all of which impact fish.

95. Numerous man-induced changes in the watershed have occurred over the last five to ten years as well. For instance, more water developments have been built, removing water from seeps and springs as well as streams and piping it to upland troughs, but the agencies have never comprehensively assessed the impact of all these developments on groundwater and surface water flows.

96. Other changes in the watershed have occurred on private and federal land, such as changes to water diversions and irrigation systems; road and culvert work; changes to livestock grazing allotments or management, including allowing more grazing in several riparian exclosures that had been built for fish habitat restoration; increased development in floodplains; increased off-road vehicle ("ORV") use as well as new ORV roads, trails, and stream crossings; stream channelization and bank armoring; logging projects; mining projects; increased use of

herbicides on weeds; threats from whirling disease and aquatic exotic species; and stream restoration projects.

97. All of these changes to the watershed impact fish, whether in a positive or negative way, but the agencies have not updated their watershed consultations in the past six to ten years. Thus, they have not considered these new events and activities and reassessed the cumulative impacts of all ongoing activities to the entire Lemhi watershed and the listed fish that inhabit this watershed, as required by the ESA and the PACFISH/INFISH LRMP biops.

98. As noted, the 1999 and 2003 biological assessments listed the different types of monitoring each agency supposedly conducted to assess riparian conditions and impacts to fish habitat. For the Forest Service, it included forage utilization (which consisted of clipping and weighing vegetation from grazed and ungrazed areas), streambank stability both prior to and during the grazing season, evaluation of plant seral states and community types along the greenline and riparian cross-sections, woody shrub regeneration, stream temperature, and aquatic habitat data using the Overton inventory protocol.

99. BLM monitoring consisted of upland forage utilization using the height-weight stubble height method, monitoring of key riparian areas both on the greenline and the adjacent floodplain for plant community composition and stubble height, riparian shrub use, proper functioning condition assessments, photopoints, water temperature, aquatic habitat data, and runoff event monitoring.

100. PACFISH, INFISH, and the LRMP biops further require monitoring to determine if the agencies are implementing management actions that prevent adverse effects to listed fish, whether those actions are effective at attaining the riparian management objectives for bank stability, lower bank angle, pool frequency, temperature, sediment, and width/depth ratios, and

whether attainment of those objectives is improving fish habitat and fish populations.

101. The agencies, however, have not performed this monitoring on a regular basis in the Lemhi watershed, even for allotments that have streams with salmon, steelhead, or bull trout. Since the prior consultations, the only yearly monitoring the agencies have conducted is stubble height or forage utilization monitoring, usually conducted once at the end of the growing season; and even this simple monitoring is done on less than half the grazing pastures on an annual basis.

102. Other riparian monitoring, including for streambank stability, woody species use, or plant composition, has been conducted sparingly across the watershed, with few repeat visits to the same sites to assess trend of conditions. And little monitoring for instream aquatic habitat conditions or riparian management objectives has occurred, with entire sub-watersheds having only one or two individual monitoring sites among the many miles of streams with listed fish.

103. Moreover, the limited monitoring that has been conducted shows grazing has violated standards on many allotments, and riparian conditions are not functioning appropriately, especially with regard to plant composition.

104. For instance, several allotments in the watershed that have listed fish on them did not meet utilization standards at least three times since 2000. Other riparian monitoring documented sites with high bank alteration, excess instream sediment, heavy shrub use, plant communities that are dominated by early or mid seral plants rather than late seral, and too few hydric plant species. Hydric species are important because they have deeper root systems that stabilize the banks, filter overland sediment better, and promote better water infiltration in the floodplain compared to species found in uplands.

105. Monitoring documents also noted instances of unauthorized use where cattle were on pastures outside of the authorized season, and failure to maintain fences or water

developments prior to turn-out of cattle.

106. The small amount of data on instream conditions shows that every site monitored violates one or more of the Riparian Management Objectives from PACFISH and INFISH and often shows that conditions are static or getting worse rather than improving. Of particular concern are the objectives for stream width/depth ratios and undercut banks, indicating that streams are too wide and shallow and have few undercut banks to offer protection for fish. Other objectives with numerous violations across the watershed include bank stability, sediment levels, and water temperature. The data also shows that in many instances, riparian areas are losing wetland species and becoming dominated by upland species.

107. The Hawley Creek allotment in particular was supposed to undergo thorough monitoring and rigorous efforts to meet standards and protect riparian areas under the 1999 biological opinion due to the degraded conditions on that allotment. Yet even there, the Forest Service has failed to conduct adequate monitoring to comply with the biological opinion or INFISH; and the monitoring information that has been collected shows that cattle have not been properly managed, causing continued damage to riparian areas and fish habitat.

108. The Forest Service's utilization monitoring on the Hawley Creek allotment has occurred only after the grazing season has ended rather than every two weeks during the season, as required in the biological opinion to ensure that standards are never exceeded. The end-of-year results have shown that utilization standards for two or more key areas were violated in eight of the past eleven years. Furthermore, key areas that barely met standards a month after the grazing season ended likely were below standards during the grazing season, as demonstrated by monitoring conducted in 2007 that showed heavy use and significant stubble height violations in August but no violations in October after more than a month of vegetation regrowth.

109. Although the Forest Service temporarily reduced grazing use on that allotment for several years due to violations that occurred in 1998-2000, it did not reduce use again as a result of violations that occurred in 2001, 2002, 2003, 2004, and 2006. And the agencies never reinitiated consultation following these violations, which directly contradicted the requirements of the biological opinion and incidental take statement.

110. The Forest Service has also failed to conduct monitoring for many key parameters on a regular basis on the Hawley Creek allotment to assess riparian conditions and impacts from grazing. For instance, very limited monitoring of bank alteration/bank stability or woody shrub use has occurred even though scientists agree that it is often just as important, and sometimes more important, to monitor these parameters as it is to monitor utilization to assess impacts from cattle. Monitoring the composition of riparian vegetation has also been scarce, making it impossible to determine if vegetation conditions are improving, remain static, or worsening.

111. Over the past six years, the Forest Service has conducted intensive riparian monitoring at just three of the fourteen key areas on the allotment: one area in 2004, a second area in 2007, and a third area in 2008. The Forest Service visited seven key areas back in 2002, but since then has revisited only one of those sites a second time. Thus, the Forest Service has no information about current riparian conditions and trend of conditions for the vast majority of the key areas on the Hawley Creek allotment.

112. Likewise, monitoring of instream fish habitat, such as pools, undercut banks, width/depth ratios, and woody debris, is very limited on the allotment, occurring at just two sites in the entire sub-watershed. Considering that the few bull trout found on the allotment were associated with deep pools and woody debris or overhead willow cover, monitoring for these

attributes is critical. And like the rest of the Lemhi watershed, the Forest Service has not assessed the impacts to stream flows from building more water developments on the allotment even though reduction of stream flow can be extremely detrimental to bull trout by creating shallower streams with fewer deep pools and higher water temperatures.

113. The information the Forest Service has collected on the Hawley Creek allotment, either anecdotally or through its infrequent inventories, shows that grazing is still causing damage to riparian areas. Agency documents admit concerns about streambank trampling, even in the riparian exclosure along Big Bear Creek that was built to protect important bull trout habitat; stream widening and high width/depth ratios; soil compaction and hummocking around springs and wetlands adjacent to streams; excessive sedimentation in streams; high water temperatures; and lack of good riparian plant species and woody shrubs necessary for proper hydrologic function and streambank stability and cover.

114. Forest Service and other reports also document poor management of livestock on the Hawley Creek allotment, noting cattle camping out or trailing in riparian areas and causing heavy use and degradation to streambanks, soils, and riparian plants and shrubs; failure to comply with the 16 pasture/short-duration grazing scheme required under the biological opinion; heavy cattle use on unfenced springs and failure to maintain fences and water developments on other springs, leading to damage of these sensitive areas; and signs of cattle trespass in the wetland exclosure at the head of Little Bear Creek.

115. Much of the heavy use that has damaged riparian areas on the Hawley Creek allotment occurs late in the grazing season when weather becomes hotter and drier and cattle tend to congregate in riparian areas. This damage coincides with the bull trout spawning period, but the Forest Service continues to authorize grazing on the allotment during this time despite

acknowledging that this conflict "could significantly reduce viability" of the Hawley Creek bull trout population.

116. Bull trout in the Hawley Creek sub-watershed are at particular risk of extinction due to their extremely low numbers and isolation from other bull trout populations in the Lemhi watershed.[5] Although fish surveys in the Hawley Creek sub-watershed documented a slight increase in the number of bull trout found, from 7 in 1999 to 13 in 2006, such a small number of bull trout in the entire sub-watershed after seven years of effort under the 1999 biological opinion does not offer much hope of recovery for this isolated population without further significant efforts at habitat restoration.

117. Bull trout also have not seen substantial increases in other parts of the Lemhi watershed during the last ten years. Surveys in the Hayden Creek sub-watershed show a slight increase in the number of bull trout redds from 2002 to 2007 but still at low numbers compared to historic levels, and other sub-watersheds in the drainage have even fewer bull trout in them. For this reason, the 2008 Fish and Wildlife Service status review of the species determined that this drainage had "substantial, imminent threats," and categorized it as being "at risk" because of "very limited and/or declining numbers, range, and/or habitat, making the bull trout in this core area vulnerable to extirpation."

118. Likewise, there has been no recovery of Chinook salmon in the Lemhi watershed since the prior consultation. Spawning surveys for Chinook salmon show the number of redds in the Lemhi River watershed declining significantly since 2001, going from 316 that year to just 37 in 2005 and 25 in 2008. Back in the 1960's, prior to the dams on the Snake River, the number of redds in the watershed was often above 1,400.

[5] Hawley Creek remains disconnected from the Lemhi, creating a genetically isolated population of bull trout in Hawley Creek that is more prone to extirpation.

119. By not complying with the monitoring and other requirements from the watershed biological assessments and Hawley Creek allotment biological opinion as well as PACFISH, INFISH, and the LMRP biops, the Forest Service and BLM are not fulfilling their responsibilities as NOAA Fisheries and Fish and Wildlife Service assumed they would, and thus the Services' conclusions in the watershed consultation letters of concurrence and the Hawley Creek allotment biological opinion concerning effects to the species are no longer valid, requiring reinitiation of consultation.

120. Meanwhile, the Forest Service and BLM continue to authorize grazing throughout the Lemhi watershed that allows cattle to access riparian areas, causing direct adverse impacts to streams that contain bull trout, steelhead or critical habitat for Chinook and indirect adverse impacts to downstream habitat for the fish. In many instances, this authorized grazing occurs during spawning periods, when the fish and their eggs are extremely vulnerable to the effects from grazing.

121. The Forest Service also continues to authorize use of water diversions and ditches on forest land in the Lemhi watershed, diverting water into ditches and reducing streamflows on many streams that contain habitat for the listed fish or contribute flows to downstream habitat.

122. By failing to reinitiate consultation for salmon, steelhead, and bull trout over ongoing activities throughout the entire Lemhi watershed, as well as failing to complete the water diversions consultation for Forest Service lands in the watershed, Defendants have violated the consultation requirements of the ESA. Further, by continuing to authorize activities that adversely impact listed fish species and their habitat, the agencies are violating their substantive duties under the ESA to prevent jeopardy, adverse modification of critical habitat, and take of these species and promote their recovery. Plaintiff therefore requests declaratory and injunctive

relief from this Court to remedy these violations of law.

FIRST CLAIM FOR RELIEF
LEMHI WATERSHED SALMON AND STEELHEAD CONSULTATION CLAIMS

123. Plaintiff realleges and incorporates by reference the preceding paragraphs.

124. Defendants have violated Sections 7 and 9 of the ESA and their implementing regulations with regard to their responsibilities over Snake River Chinook salmon, sockeye salmon, and steelhead in the Lemhi River watershed. These violations include, but are not limited to, the following:

A. Defendants' violation of their duty to reinitiate consultation over ongoing activities on federal land in the Lemhi watershed in light of newly designated steelhead critical habitat, new information concerning impacts to salmon and steelhead, and changed circumstances in the watershed, including new events and activities that have occurred since the prior consultation as well as the failure to comply with the prior biological assessment and letter of concurrence, in violation of 50 C.F.R. § 402.16;

B. Forest Service's and BLM's violation of their ESA duty to insure that their actions, including authorization of livestock grazing, are not likely to jeopardize the continued existence of Snake River Chinook salmon, sockeye salmon, or steelhead or adversely modify their critical habitat, in violation of 16 U.S.C. § 1536(a)(2);

C. Forest Service's and BLM's violation of the ESA prohibition of unlawful "take" of Snake River steelhead and Chinook salmon by authorizing activities, including livestock grazing, that harm or harass threatened steelhead and salmon without any valid incidental take statement, in violation of 16 U.S.C. § 1538.

125. This claim is brought pursuant to the judicial review provision of the ESA, 16 U.S.C. 1540(g).

126. These violations of the ESA have caused substantial prejudice to Plaintiff's interests and allowed further harm to threatened and endangered salmon and steelhead and their critical habitat.

WHEREFORE, Plaintiff prays for relief as set forth below.

SECOND CLAIM FOR RELIEF
LEMHI WATERSHED BULL TROUT CONSULTATION CLAIMS

127. Plaintiff realleges and incorporates by reference the preceding paragraphs.

128. Defendants have violated Sections 7 and 9 of the ESA and their implementing regulations with regard to their responsibilities over Upper Columbia River bull trout in the Lemhi River watershed. These violations include, but are not limited to, the following:

A. Defendants' violation of their duty to reinitiate consultation over ongoing activities on federal land in the Lemhi watershed in light of new information concerning impacts to bull trout and changed circumstances in the watershed, including new events and activities that have occurred since the prior consultation as well as the failure to comply with the prior biological assessment and letter of concurrence, in violation of 50 C.F.R. § 402.16;

B. Forest Service's and BLM's violation of their ESA duty to insure that their actions, including authorization of livestock grazing, are not likely to jeopardize the continued existence of bull trout, in violation of 16 U.S.C. § 1536(a)(2);

C. Forest Service's and BLM's violation of the ESA's prohibition of unlawful "take" of Upper Columbia River bull trout by authorizing activities, including livestock grazing, that harm or harass threatened bull trout without any valid incidental take statement, in violation of 16 U.S.C. § 1538.

129. This claim is brought pursuant to the judicial review provision of the ESA, 16 U.S.C. 1540(g).

130. These violations of the ESA have caused substantial prejudice to Plaintiff's interests and allowed further harm to threatened bull trout.

WHEREFORE, Plaintiff prays for relief as set forth below.

THIRD CLAIM FOR RELIEF
HAWLEY CREEK ALLOTMENT CONSULTATION CLAIMS

131. Plaintiff realleges and incorporates by reference the preceding paragraphs.

132. Defendants have violated Sections 7 and 9 of the ESA and their implementing regulations with regard to their responsibilities over Upper Columbia River bull trout on the Forest Service Hawley Creek allotment. These violations include, but are not limited to, the following:

A. Forest Service and Fish and Wildlife Service's violation of their duty to reinitiate consultation over grazing on the Hawley Creek allotment in light of noncompliance with the requirements of the existing biological opinion and terms and conditions of the incidental take statement, as well as new information and changed circumstances concerning impacts to bull trout on the allotment that have arisen since issuance of the 1999 biological opinion, in violation of 50 C.F.R. § 402.16;

B. Forest Service's violation of its ESA duty to insure that the authorization of livestock grazing on the Hawley Creek allotment is not likely to jeopardize the continued existence of bull trout, in violation of 16 U.S.C. § 1536(a)(2);

C. Forest Service's violation of the ESA's prohibition of unlawful "take" of Upper Columbia River bull trout by authorizing livestock grazing on the Hawley Creek allotment that violates the terms and conditions of the incidental take statement and harms and harasses threatened bull trout, in violation of 16 U.S.C. § 1538.

133. This claim is brought pursuant to the judicial review provision of the ESA, 16

U.S.C. 1540(g).

134. These violations of the ESA have caused substantial prejudice to Plaintiff's interests and allowed further harm to threatened bull trout.

WHEREFORE, Plaintiff prays for relief as set forth below.

FOURTH CLAIM FOR RELIEF
WATER DIVERSIONS CONSULTATION CLAIMS

135. Plaintiff realleges and incorporates by reference the preceding paragraphs.

136. Defendants have violated Sections 7 and 9 of the ESA and their implementing regulations with regard to their responsibilities over Snake River Chinook salmon, Snake River Sockeye salmon, Snake River steelhead, and Upper Columbia River bull trout in the Lemhi River watershed. These violations include, but are not limited to, the following:

A. NOAA Fisheries' and Fish and Wildlife Service's failure to complete consultation over authorization of water diversions and rights-of-way on Forest Service land after the Forest Service initiated consultation over these actions in January 2005, in violation of 16 U.S.C. § 1536(a)(2);

B. Forest Service's violation of its ESA duty to insure that the authorization of water diversions and rights-of-way in the Lemhi watershed is not likely to jeopardize the continued existence of salmon, steelhead, or bull trout or adversely modify critical habitat, in violation of 16 U.S.C. § 1536(a)(2);

C. Forest Service's violation of the ESA's prohibition of unlawful "take" of Snake River Chinook salmon, Snake River steelhead, or Upper Columbia River bull trout by authorizing water diversions and rights-of-way in the Lemhi watershed that harm threatened salmon, steelhead, and bull trout without any incidental take statement, in violation of 16 U.S.C. § 1538.

D. Forest Service's violation of its ESA duty to insure that, during the consultation process, it is not making any irreversible or irretrievable commitments of resources that would foreclose any reasonable and prudent alternatives, in violation of 16 U.S.C. § 1536(d).

137. This claim is brought pursuant to the judicial review provision of the ESA, 16 U.S.C. 1540(g).

138. In addition, or in the alternative, Plaintiff brings this claim against the Services pursuant to the Administrative Procedure Act, 5 U.S.C. § 706(a)(1), based on their unreasonable delay and/or unlawful failure to act in completing consultation over the Lemhi watershed diversions.

139. These violations of law have caused substantial prejudice to Plaintiff's interests and allowed further harm to threatened salmon, steelhead, and bull trout.

WHERFORE, Plaintiff prays for relief as set forth below.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court:

A. Adjudge and declare that Defendants are in violation of law, including by: (1) not reinitiating ESA consultation over impacts to Chinook salmon, sockeye salmon, steelhead, and bull trout from ongoing activities in the Lemhi River watershed, including authorization of livestock grazing on the Forest Service Hawley Creek allotment; (2) not completing consultation over water diversions and rights-of-way on Forest Service land in the Lemhi River watershed; (3) not insuring that their actions are not likely to jeopardize Chinook salmon, sockeye salmon, steelhead, or bull trout or adversely modify their designated critical habitat; (4) causing unlawful take of Chinook salmon, steelhead, or bull trout; and (5) not preventing irreversible and irretrievable commitments of resources during the water diversions consultation process;

B. Order Defendants to comply with the requirements of the ESA by promptly completing new, lawful consultation(s) and fulfilling their substantive duties under ESA Sections 7 and 9 to protect and recover threatened and endangered species;

C. Issue such temporary, preliminary, and/or permanent injunctive relief as may specifically be requested hereafter by Plaintiff;

D. Award Plaintiff its reasonable attorney fees, costs, and litigation expenses under the ESA, 16 U.S.C. § 1540(g), the Equal Access to Justice Act, and/or any other applicable provision of law; and

E. Grant such further and additional relief as the Court deems just and proper in order to remedy the violations of law alleged herein and to protect the interests of Plaintiff, the public, and the affected fish species.

Dated: July 29, 2009

Respectfully submitted,

s/Lauren M. Rule
Lauren M. Rule
Attorney for Plaintiff