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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

**OREGON NATURAL DESERT ASS’N and
CENTER FOR BIOLOGICAL DIVERSITY**

Case No. 06-946-KI

Plaintiffs,

V.

**NOTICE OF SUPPLEMENTAL
AUTHORITY**

D. ROBERT LOHN, Regional Administrator,
Nat’l Marine Fisheries Serv., *et al.*

Defendants.

Plaintiffs Oregon Natural Desert Association and Center for Biological Diversity (hereinafter “ONDA”) hereby give notice of filing the attached opinion by the Ninth Circuit Court of Appeals, Oregon Natural Resources Council v. Allen, __F.3d __, 2007 WL 490890 (9th Cir. 2007) (“ONRC”) (Attachment 1), as supplemental authority.

NOTICE OF SUPPLEMENTAL AUTHORITY

This Court held oral argument and took the case under advisement on February 2, 2007. The attached opinion was issued on February 16, 2007. The Ninth Circuit’s analysis and ruling in ONRC v. Allen is directly relevant to Claim Five in this case, ONDA’s challenge to the Fish and Wildlife Service’s Incidental Take Statement.

The attached decision is relevant because it provides new, binding guidance on the manner with which FWS, through its Incidental Taking Statement (“ITS”), must specify the impact of an incidental taking on a species. The decision involved a challenge to an ITS which authorized the “incidental take of all spotted owls associated with the removal and downgrading of 22,227 acres of suitable spotted owl habitat.” ONRC at *3. The Court of Appeals concluded the ITS was unlawful under the Endangered Species Act, and one of its rationales applies to this case.

As explained in ONDA’s briefing in this case, an ITS must “[s]pecific[y] the impact, i.e., the amount or extent, of such incidental taking on the species.” 50 C.F.R. § 402.14(i)(1); ONDA Opening Br. at 34-35; ONDA Reply/Resp. at 31. The function of this description is to “set forth a ‘trigger’ that, when reached, results in an unacceptable level of incidental take . . . requiring the parties to re-initiate consultation.” Arizona Cattle Growers’ Ass’n v. U.S. Fish and Wildlife Serv., 272 F.3d 1229, 1249 (9th Cir. 2001); see 50 C.F.R. § 402.14(i)(3), (4) (action agency must report on the action’s progress and its impact on the species “[i]n order to monitor the impacts of incidental take” and reinitiate consultation immediately if the amount or extent of incidental take is exceeded.) In ONRC, the Ninth Circuit found that the spotted owl take description, which was “coextensive with the project’s own scope,” did not provide for reinitiation of consultation. Id. at *7. The ITS’s description of take “fails to set forth a trigger that would invalidate the safe harbor

provision and reinitiate the consultation process” because the authorized level of take “cannot be reached until the project itself is complete.” Id. The court continued:

Even if the actual number of takings of spotted owls that occurred during the project was considerably higher than anticipated, the [ITS] would not permit the FWS to halt the project and reinitiate consultation. Instead, the permissive level of take is coextensive with the project’s own scope. The [ITS] and BiOp are rendered tautological, they both define and limit the level of take using the parameters of the project.

Id. The effect of this take description is to “prevent[] the action agencies from fulfilling the monitoring function the ESA and its implementing regulations clearly contemplate” and render “the monitoring and reinitiation provisions of the regulations meaningless.” Id. at *9.

The FWS ITS challenged in this case likewise describes its non-lethal take in a circular fashion: “in terms of the *number of days authorized for grazing to occur* within the action area, where immediate impacts to bull trout are expected.” FAR 1 at 0046 (emphasis added). As in ONRC, this quantification is nothing but a restatement of the project’s scope, which “cannot be reached until the project itself is complete.” ONRC at *7. Because there is no way to exceed “the number of days authorized for grazing to occur” until the very end of the grazing season, the quantification does not allow for the Forest Service to reinitiate consultation if “during the course of the action the amount or extent of incidental taking . . . is exceeded.” 50 C.F.R. § 402.14(i)(4). Thus, the Ninth Circuit’s ITS ruling in ONRC is on point here.

DATED this 20th day of February, 2007.

Respectfully Submitted,

s/ Kristin F. Ruether

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