

The value of R represents the relative odds of daytime target crashes involvements between DRL-equipped vehicles and non-DRL vehicles. The agency believes the ratio of odds ratio is the optimal method because it has a strong confounding-factor-control ability. With regard to the previous example, the ratio of odds ratios would factor in a higher expected crash rate for the vehicle driven 25 miles per day than the vehicle driven five.

The ratio of odds ratios avoids using crash rates because the true exposure data generally do not exist. In GM's case, with regard to the portion of the study that utilized the ratio of crash rates method, vehicle registrations were used as the exposure data. However, registration data do not differentiate driving between DRL and non-DRL vehicles. They do not separate daytime and nighttime driving. Consequently, vehicle registrations are not considered to be an appropriate exposure measure for a DRL study. The contradicting results from the GM study demonstrate this. In contrast, the ratio of odds ratios method compares the ratio of target crashes (DRL-relevant) to control crashes (non DRL-relevant) in the daytime.

The Steffey *et al.* study incorporated both of the methodologies in arriving at its conclusions. Using the ratio of crash rates method, the study found an overall decrease in crash rates of 4.61 percent, which was noted as statistically significant.<sup>12</sup> However, using the ratio of odds ratios method, the same report found a non-significant decrease in the crash rates of 1.36 percent.<sup>13</sup> Given the significant divergence in results from the different methodologies, we feel that the results from the ratio of crash rates methodology should be assigned less weight in NHTSA's analysis of the safety effect of DRLs.

## V. Conclusion

The agency's 2008 DRL study is a more robust study than previous attempts by the agency to quantify the effectiveness of DRLs. This newest study was unable to find solid evidence of overall safety benefits associated with DRLs installed on passenger vehicles using the ratio of odds ratio statistical technique. While DRLs may be beneficial for certain scenarios, the agency has been unable to document overall safety benefits due to DRL installation which could serve as a basis for mandating them. NHTSA is therefore denying this petition from GM. However, the agency is willing to re-

examine the DRL issue if additional data is presented demonstrating overall safety benefits. Any such study should consider using the ratio of odds ratios technique as used in the latest NHTSA study, or provide compelling evidence that an alternative technique is superior at predicting the effectiveness of DRLs. In the meantime, the agency remains neutral with respect to a policy regarding the inclusion of DRLs in vehicles. Although we do not find data that provides a definitive safety benefit that justifies Federal regulation, we are not making recommendations that vehicle manufacturers should change their policies regarding DRLs. Manufacturers should continue to make individual decisions regarding DRLs in their vehicles.

**Authority:** 49 U.S.C. 322, 30111, 30115, 30117 and 30166; delegation of authority at 49 CFR 1.50.

Issued: June 23, 2009.

**Nathaniel Beuse,**

*Director, Office of Crash Avoidance Standards.*

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

[FWS-R8-ES-2009-0040; 92220-1113-0000-C5]

#### **Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To Delist the Lost River Sucker (*Deltistes luxatus*) and the Shortnose Sucker (*Chasmistes brevirostris*)**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of 90-day petition finding.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to remove the Lost River sucker (*Deltistes luxatus*) and the shortnose sucker (*Chasmistes brevirostris*) from the Federal List of Threatened and Endangered Wildlife (List) under the Endangered Species Act of 1973, as amended (Act). We find that the petition does not present substantial scientific or commercial information indicating that removing the Lost River sucker or shortnose sucker from the List may be warranted. Therefore, we will not initiate a status review for either species in response to this petition. We ask the public to submit to us any new

information that becomes available concerning the status of, or threats to, the Lost River and shortnose suckers or their habitat at any time.

**DATES:** The finding announced in this document was made on June 29, 2009. You may submit new information concerning this species for our consideration at any time.

**ADDRESSES:** This finding is available on the Internet at <http://www.regulations.gov> and <http://www.fws.gov/klamathfallsfwo>. Supporting documentation we used in preparing this finding is available for public inspection, by appointment, during normal business hours at the Klamath Falls Fish and Wildlife Office, U.S. Fish and Wildlife Service, 1936 California Avenue, Klamath Falls, OR 97601; telephone (541) 885-8481; facsimile (541) 885-7837. Please send any new information, materials, comments, or questions concerning this finding to the above street address.

**FOR FURTHER INFORMATION CONTACT:** Laurie Sada, Field Supervisor, U.S. Fish and Wildlife Service, Klamath Falls Fish and Wildlife Office (*see ADDRESSES*). Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at (800) 877-8339, 24 hours a day, 7 days a week.

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

Section 4(b)(3)(A) of the Act (16 U.S.C. 1531 *et seq.*) requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. We are to base this finding on information provided in the petition, supporting information submitted with the petition, and information otherwise available in our files at the time we make the determination. To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition, and publish our notice of the finding promptly in the **Federal Register**.

This finding is based on the information included in and with the petition and information available in our files at the time of the petition review. Under section 4(b)(3)(A) of the Act and our regulations at 50 CFR 424.14(b), our review is limited to a determination of whether the information in the petition meets the "substantial scientific or commercial information" threshold. Our standard for substantial information with regard to a 90-day petition finding is "that

<sup>12</sup> Steffey *et al.*, p. 34.

<sup>13</sup> Steffey *et al.*, p. 38.

amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted" (50 CFR 424.14(b)). In making this finding, we consider whether the petition: (1) Clearly indicates the administrative action recommended; (2) contains a detailed narrative justification for the recommended measure, describing, based on available information, past and present numbers and distribution of the species and any threats faced by the species; (3) provides information regarding the status of the species over all or a significant portion of its range; and (4) is accompanied by appropriate supporting documentation in the form of bibliographic references, reprints of pertinent publications, copies of reports or letters from authorities, and maps (50 CFR 424.14(b)(2)). If we find that substantial information was presented, we are required to promptly commence a review of the status of the species and publish the results of that status review in a 12-month finding.

The factors for listing, delisting, or reclassifying species are provided at 50 CFR 424.11. We may delist a species only if the best scientific and commercial data available substantiate that it is neither endangered nor threatened. Delisting may be warranted as a result of: (1) Extinction; (2) recovery; or (3) a determination that the original data used for classification of the species as endangered or threatened were in error.

We received a petition dated January 13, 2009, from Mr. James L. Buchal requesting that the Lost River sucker and the shortnose sucker be removed from the List. The submission clearly identified itself as a petition and included the requisite identification information of the petitioner, as required in 50 CFR 424.14(a). This notice constitutes our 90-day finding on the petition.

#### Previous Federal Action

On July 18, 1988, we listed the Lost River sucker and shortnose sucker as endangered under the Act (53 FR 27130). On December 1, 1994, we proposed critical habitat for Lost River sucker and shortnose sucker (59 FR 61744); that proposal was never finalized.

A previous petition to delist the Lost River sucker and the shortnose sucker, dated September 12, 2001, was submitted by Mr. Richard A. Gierak, representing Interactive Citizens United. Three other similar petitions were treated as comments on Mr. Gierak's petition because they were considered equivalent to Mr. Gierak's petition.

These three petitions were from Mr. Leo Bergeron, Mr. James L. Buchal, and Ms. Naomi Fletcher. On May 14, 2002, the Service published a 90-day finding stating that the petitions to delist the Lost River and shortnose suckers did not present substantial scientific or commercial information indicating that delisting the suckers may be warranted (67 FR 34422). On June 12, 2002, Walt Moden, Merle Carpenter, Charles Whitlatch, John Blair, Tiffany Bladock, and Dale Cross filed a complaint in Federal District Court alleging that our initial finding on the petition to delist the Lost River and shortnose suckers was arbitrary and capricious and violated the Act (*Moden v. U.S. Fish and Wildlife Service*, 281 F. Supp 2d 1193 (D. Or 2003)). On September 3, 2003, the court ruled that our finding was arbitrary and capricious because it reached unexplained conclusions not supported by the administrative record. The court remanded the 90-day finding and ordered us to either reissue the finding with further explanation or proceed to a status review. Consistent with the court's order, the Service made a new finding, clarifying our analysis as well as addressing additional comments made by the court and the petitioners. The new 90-day finding was published on July 21, 2004, stating again that we found that the petition did not present substantial information that delisting the Lost River and shortnose suckers may be warranted (69 FR 43554). That **Federal Register** notice also initiated 5-year status reviews of the Lost River and shortnose suckers under section 4(c)(2)(A) of the Act to consider any new information that had become available. The 5-year reviews for the two suckers were completed and signed on July 19, 2007. The review for the Lost River sucker recommended downlisting the species from endangered to threatened, and the review for the shortnose sucker recommended that the species remain classified as endangered.

Shortly before the 5-year reviews for the two suckers were published in July, 2007, Walt Moden, Merle Carpenter, Charles Whitlatch, and John Blair filed suit in Federal District Court seeking to have the reviews completed "by a date certain" (*Moden et al. v. U.S. Fish and Wildlife Service*, Case No. 07-799, D. Or.). The court dismissed that case after publication of the reviews. In a lawsuit filed on February 21, 2008, the same plaintiffs challenged the adequacy of the two sucker reviews (*Moden et al. v. U.S. Fish and Wildlife Service*, Case No. 08-214, D. Or.), and sought to have them set aside. The Service moved to dismiss the complaint. On October 27, 2008, the

court dismissed the plaintiffs' complaint, holding that 5-year reviews do not constitute final agency action subject to judicial review.

#### Species Information

##### General Biology

*Lost River sucker.* Lost River suckers are large fish (up to 1 meter (m) long and 4.5 kilograms (kg) in weight) that are distinguished by their elongate body and sub-terminal mouth with a deeply notched lower lip. They have dark brown to black backs and brassy sides that fade to yellow or white on the belly. They are native to the Lost River and upper Klamath River systems in Oregon and California where they have adapted to lake living (Moyle 2002, p. 199).

Adult and juvenile Lost River suckers live in lakes where they feed on benthic organisms and material. While the fish can be found throughout the reservoirs they inhabit, they appear to prefer shorelines with emergent vegetation that can provide cover from predators and invertebrate food (Moyle 2002, pp. 199–200).

Lost River suckers grow rapidly in their first 5 to 6 years, reaching sexual maturity sometime between 5 and 14 years of age, with most maturing at 9 years (Buettner and Scopettone 1990, p. 35). The majority of Lost River sucker spawning occurs from late February to early May in the larger tributaries of inhabited lakes. River spawning habitat is riffles or runs with gravel or cobble substrate, moderate flows, and depths of 21–128 centimeters (cm). Some Lost River suckers have been noted to spawn in lakes, particularly at springs occurring along the shorelines. Females are highly fecund (102,000–235,000 eggs each) and spawn with numerous males. A Lost River sucker can spawn multiple times during its life. It is unknown whether an individual fish will spawn multiple times in a single year or an individual will spawn every year (NRC 2004, p. 196).

*Shortnose sucker.* Shortnose suckers are distinguished by their large heads with oblique, terminal mouths with thin but fleshy lips. The lower lips are deeply notched. They are dark on their back and sides and silvery or white on the belly. They can grow to about 50 cm, but growth is variable among individuals. Shortnose suckers have been recorded to live as long as 33 years (Moyle 2002, p. 203).

Adult and juvenile shortnose suckers prefer shallow, turbid, and highly productive lakes that are cool, but not cold, in summer (generally 15 to 25 °C), have adequate dissolved oxygen (DO) (above 4 milligrams per liter (mg/l)), and

are moderately alkaline (Moyle 2002, p. 203).

Shortnose suckers grow rapidly in their first 5 years, reaching sexual maturity sometime between years 4 and 6. The majority of shortnose sucker spawning occurs from early April to early May in the larger tributaries of inhabited lakes. River spawning habitat is riffles or runs with gravel or cobble substrate, moderate flows, and depths of 11 to 130 cm. Historically, shortnose suckers have been noted to spawn in lakes, particularly at springs occurring along the shorelines (Moyle 2002, p. 204), although currently few shortnose suckers spawn along shorelines (NRC 2004, p. 194). A shortnose sucker can spawn multiple times during its life. It is unknown whether an individual fish will spawn multiple times in a single year or an individual will spawn every year (NRC 2004, p. 196).

#### Distribution

At the time of listing, the Lost River sucker and the shortnose sucker were reported from Upper Klamath Lake and its tributaries (Klamath County, Oregon); from the Lost River (Klamath County, Oregon, and Modoc and Siskiyou Counties, California) and Clear Lake (Modoc County, California); from the Klamath River above Keno (Klamath County, Oregon); and in one or more of the Klamath River reservoirs below Keno (Klamath County, Oregon, and Siskiyou County, California) (53 FR 27130). The known geographic range of these suckers has not substantially changed since listing.

Only one previously unreported Lost River sucker population has been found since listing. This population of a few hundred adults occurs in the Tule Lake sumps at the terminus of the Lost River (Siskiyou County, California) (Scopettone *et al.* 1995, p. 37). Two previously unreported shortnose sucker populations have been found since listing. First, a population of a few hundred adults occurs in the Tule Lake sumps at the terminus of the Lost River (Siskiyou County, California) (Scopettone *et al.* 1995, p. 37). Second, shortnose suckers are now known to occur in Gerber Reservoir (Klamath County Oregon), an area which was proposed as critical habitat in 1994 (59 FR 61744). New genetics information casts some doubt on whether these fish in Gerber Reservoir and Clear Lake are actually shortnose suckers (ISRP *in litt.* 2005, pp. 19–21; Tranah and May 2006, p. 312). Until that information can be further evaluated, we continue to assume that these fish are shortnose suckers.

#### Evaluation of the Petition

Section 4 of the Act and its implementing regulations (50 CFR part 424) set forth the procedures for adding species to or removing species from the Federal Lists of Endangered and Threatened Wildlife and Plants. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act: (A) Present or threatened destruction, modification, or curtailment of habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. In making this finding, we evaluated information presented in the petition, its supporting information, and other information available in our files in the context of the five factors listed above to determine whether the petition presented substantial information indicating that delisting the species under the Act may be warranted.

The petitioner requests that we remove the Lost River and shortnose suckers from the List. The information the petitioner cites to support his claim included: (1) The completed 5-year reviews (incorporated by reference); (2) comments of Dave Vogel, Natural Resource Scientists, Inc., for the 5-Year Status Review on the Endangered Lost River and Shortnose Suckers Independent Scientific Review Panel (incorporated by reference and included with the petition); (3) the administrative records for the status reviews (incorporated by reference); (4) the biological opinions on the Klamath Project operations (incorporated by reference); and (5) 2003 court proceedings and administrative records (incorporated by reference). Documents included in items 2–5 listed above were available in Service files at the time we conducted the 5-year reviews.

The petition relies on Mr. Vogel's document and other information available in Service files at the time we conducted the 5-year reviews. We considered this information in the course of the 5-year review analysis. The petition also relies on the 5-year reviews themselves, which recommend that neither the Lost River nor the shortnose sucker be delisted at this time. The 5-year review did recommend that the Lost River sucker be downlisted from endangered to threatened. However, the petition at issue here sought only complete delisting. It did not request downlisting, therefore the petitioned action for the purposes of

section 4(b)(3)(A) of the Act is limited to the delisting of the two species. The recommendations contained in the 5-year reviews are based on an analysis of the five factors described in section 4(a)(1) of the Act. The petition does not include any discussion of how the 5-year reviews may be in error, nor does the petition provide any new information regarding the status of either species over all or a significant portion of their respective ranges.

The 2008 biological opinion for the effects of the Klamath Project on Lost River and shortnose suckers incorporated some new information regarding water quality and habitat conditions in Upper Klamath Lake that has become available since the 5-year reviews were completed in 2007. In that biological opinion, the Service concluded that lake levels in Upper Klamath Lake, as affected by Klamath Project operations, did not have a measurable effect on water quality. The Service found that the habitat conditions in Upper Klamath Lake had improved as a result of restoration efforts in the Upper Klamath Lake watershed, especially at the mouth of the Williamson River. However, the Service's analysis concluded that the Lost River and shortnose suckers in Upper Klamath Lake were still experiencing limited recruitment and adult survival rates. Therefore, the new information incorporated in the 2008 biological opinion does not present substantial information or analyses that are contrary to the conclusions reached in the 5-year reviews for each species (*e.g.*, a recommendation to downlist to threatened the Lost River sucker and no status change for the shortnose sucker).

Therefore, we find the petition and information readily available in our files does not present substantial information indicating that delisting the Lost River sucker or shortnose sucker across all or a significant portion of their ranges may be warranted at this time due to one or more of the five factors described in section 4(a)(1) of the Act.

#### Finding

We have reviewed the petition and supporting information provided with the petition under 50 CFR 424.14(b)(2) and the Act. Our review indicates that the fundamental argument for delisting presented in the petition is based on: (1) The completed 5-year reviews (incorporated by --Year Status Review on the Endangered Lost River and Shortnose Suckers Independent Scientific Review Panel (incorporated by reference and included with the petition); (3) the administrative records for the status reviews (incorporated by

reference); (4) the biological opinions on the Klamath Project operations (incorporated by reference); and (5) 2003 court proceedings and administrative records (incorporated by reference).

The 5-year review for each species analyzed all scientific and commercial information available at the time, including the documents listed in items 2–5 above. The recommendations of the Service based on these analyses was that the Lost River sucker be downlisted from endangered to threatened and that the shortnose sucker remain listed as endangered. The petitioner claims that “the original listing was a mistake, and these fish are not experiencing any risk of extinction sufficient to invoke the Endangered Species Act” (Buchal 2009, p. 2). However, the petitioner does not provide any additional substantive discussion, data, citation, or other information or rationale to explain how the documents provided and incorporated by reference suggest that the listing was in error or that the Lost River sucker or shortnose sucker no longer meets the definition of endangered or the definition of

threatened and therefore, should be removed from the List. The 2008 biological opinion on the Klamath Project operations incorporated new information regarding improved habitat conditions in Upper Klamath Lake. However, the biological opinion concluded that the Lost River and shortnose suckers were still experiencing limited recruitment and adult survival rates. This new information does not present substantial information or analyses that are contrary to the conclusions reached in the 5-year review for each species (*e.g.*, recommending downlisting to threatened for the Lost River sucker and no status change for the shortnose sucker).

Therefore, we find that the petition and available information readily available in our files do not present substantial information indicating that delisting the Lost River sucker or the shortnose sucker across all or a significant portion of their ranges may be warranted at this time. We do, however, intend to develop a proposed rule to downlist the Lost River sucker to threatened, pursuant to the

recommendation in the 5-year review, once our limited resources and competing priorities allow. We encourage interested parties to continue to gather and provide data that will assist with the conservation of the Lost River sucker and shortnose sucker.

#### References Cited

A complete list of all references cited in this document is available, upon request, from the Klamath Falls Fish and Wildlife Office (*see ADDRESSES*).

#### Author

The primary authors of this notice are staff members of Klamath Falls Fish and Wildlife Office (*see ADDRESSES*).

#### Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: June 18, 2009.

**Marvin E. Moriarty,**

*Acting Director, Fish and Wildlife Service.*

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