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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

WESTERN WATERSHEDS PROJECT, Plaintiffs, v. **U.S. FISH AND WILDLIFE SERVICE and U.S. FOREST SERVICE,** Defendants.	**No. 4:13-cv-176-BLW** **BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

This case challenges ongoing violations of the Endangered Species Act ("ESA") relating to livestock grazing in bull trout habitat within the Little Lost River watershed. The Little Lost River watershed supports a genetically unique "core area" of Columbia River bull trout, protected under the ESA.

Livestock grazing has contributed to poor habitat conditions for bull trout on the Forest Service's Pass Creek and Mill Creek allotments and the BLM's Hawley Mountain allotment, including high water temperatures, high sediment levels, and unstable stream banks, that reduce the streams' ability to support bull trout. Livestock also wade in bull trout spawning streams, trampling bull trout redds. These impacts have helped imperil local populations within the Little Lost River core area, several of which are on the brink of extirpation, and one of which was recently extirpated on the Pass Creek allotment.

The original complaint in this action challenged 2010 consultations on the Pass Creek and Mill Creek allotments and a 2012 consultation on BLM's Hawley Creek allotment. Following the filing of this action, the agencies reinitiated consultations on all three allotments, scrambling to complete two of them (Mill Creek and Hawley Mountain) before this case was heard. The new consultations make only superficial improvements, and fail to make the changes necessary for ESA compliance.

All three governing consultations remain flawed for numerous reasons, including because, at bottom, the grazing authorized will not facilitate survival and recovery of bull trout, but rather speed their slide into extinction. Further, evidence from recent years, including 2013, demonstrates that grazing continues to cause unlawful take.

FACTUAL BACKGROUND

I. BULL TROUT IN THE LITTLE LOST RIVER WATERSHED

A. Watershed Overview and Bull Trout Distribution

The Little Lost River watershed is a "high elevation, cool desert valley" bordered by the "extremely steep and rugged" Lost River and Lemhi Ranges. Separate Statement of Undisputed Material Facts ("SSF") ¶ 1. The watershed contains a patchwork of land ownerships, with Forest Service land along the high-elevation edges, BLM land in the lower elevations, and private lands along the major streams. SSF ¶ 2.

Bull trout were historically well distributed in the Little Lost River and many of its tributaries. SSF ¶ 3. However, they have undergone substantial declines in recent decades; for example, in the reach of the Little Lost River (also known as Sawmill Creek) in the Hawley Mountain allotment just below the Mill Creek allotment, they declined 91% between 1984 and 1993. *Id.*

B. Habitat Needs and Life Cycle of Bull Trout and Impact of Livestock Grazing

The habitat needs of bull trout are generally cold temperatures, clean water quality, complex channel characteristics, and large patches of habitat that are well connected. SSF ¶ 4. Increased fine sediments can reduce egg survival, as well as injure gills when suspended. *Id*. They spawn in the fall, with the Salmon-Challis National Forest assuming bull trout may begin spawning on August 15. *Id*

Livestock grazing degrades habitat in many ways, including by removing riparian vegetation and trampling of stream banks, which can result in increased sedimentation, bank instability, and elevated temperatures. SSF ¶ 5. Such grazing impacts "are prevalent factors affecting bull trout habitat in the Little Lost River Recovery Unit." *Id*. One of the

Forest Service's bull trout objectives is at least 90% bank stability. SSF ¶ 6.

C. Status and Recovery Needs

The Columbia River bull trout (including those in the Little Lost River) were protected as threatened under the ESA in 1998, and FWS designated multiple tributaries to the Little Lost River as critical habitat in 2010. SSF ¶ 7. After listing, the Forest Service and BLM jointly prepared a 1998 Little Lost River BA analyzing all their authorized activities in the watershed. SSF ¶ 8.

For recovery planning, FWS divided the coterminous U.S. population of bull trout into five Interim Recovery Units ("IRUs"). SSF ¶ 9. Little Lost watershed bull trout are part of the Columbia River IRU, and form the Little Lost River core area. SSF ¶ 9, 10. The core area contains ten local populations. *Id*. The core area is "greatly depressed" and "vulnerable to extirpation" due to degraded habitat, high temperatures, dewatered streams, and its "very limited and/or declining numbers, range, and/or habitat." *Id*.

Grazing exacerbates higher temperatures, which makes bull trout more vulnerable to competition by brook trout. SSF ¶ 11. Likewise, water diversion impacts include increased susceptibility to disease as well as other problems. *Id*.

FWS's recovery goal is to "**ensure the long-term persistence of self-sustaining, complex, interacting groups of bull trout trout distributed throughout the species' native range so the species can be delisted**." SSF ¶ 13. To achieve this recovery goal in the Little Lost River watershed, FWS developed the following objectives: maintain current distribution and restore distribution in previously occupied areas; maintain stable or increasing trends in abundance; restore and maintain suitable habitat conditions for all bull trout life history stages and strategies; and conserve genetic diversity and provide

opportunities for genetic exchange. *Id*.

All ten local populations are essential for bull trout recovery. SSF ¶ 14. In fact, recovery requires not only maintaining current distribution, but **recovering** distribution in the Pass Creek allotment's Big Creek, where bull trout appear to have been extirpated. *Id*. Migratory (fluvial) bull trout in the watershed migrate to headwater streams to spawn, including in Sawmill Canyon and Wet Creek. *Id*.

II. PASS CREEK ALLOTMENT

A. Allotment Overview and Bull Trout

The Pass Creek allotment straddles the Lost River Range, with the northern portion draining into Wet Creek and the Little Lost River. SSF ¶ 16. The allotment is divided into eleven units, with the northern seven on the Wet Creek side. *Id*. Tributaries to Wet Creek include Big, Sands, Coal, Pine, and Basin Creeks. *Id*. There are several "exclosures" designed to exclude livestock from degraded stream reaches, including on Wet, Big, and Basin Creeks. SSF ¶ 17. There is about 0.76 miles of bull trout spawning habitat in Wet Creek on the allotment, with the upper 0.47 miles inside an exclosure. *Id*. Bull trout in Big Creek appear to have been extirpated. SSF ¶ 18. The Wet Creek local population is on a downward trend with extremely low numbers and density. *Id*.

B. Compliance and Consultation History

The 1999 BO identified severe grazing damage on the allotment, explaining that its headwater areas are very fragile and unstable. SSF ¶ 19. Thus, livestock caused damage even when utilization standards were met, with Wet and Basin Creeks particularly degraded and sensitive. *Id*.

From 2000–2006, many problems occurred, including violations of standards

two-thirds of the time, trespass into exlosures and on units at the wrong time, and failure to conduct promised monitoring. SSF ¶ 22–25. The permittees failed to achieve a goal of improving allotment conditions during this time. SSF ¶ 25. The Forest Service admitted that a 10–15% AUM reduction was warranted, but declined to do so. SSF ¶ 25. Problems continued in 2007 and 2008, including severe bank alteration on Wet Creek and trespass into the Wet Creek exclosure, causing the Forest fisheries biologist to recognize that significant management changes and new standards were needed. SSF ¶ 26. In 2009, the Forest Service reinitiated consultation and tightened standards. SSF ¶ 27.

C. Pass Creek Allotment 2010 Consultation

In July 2010, the Forest Service issued a new BA. SSF ¶ 28. The BA acknowledged that bull trout habitat on the allotment was in "relatively poor condition," and that livestock grazing caused or contributed to the degraded conditions. *Id*. It admitted that the grazing would continue to trample redds and adversely impact stream temperatures, sediment levels, width-to-depth ratios, bank stability, successional status, and woody recruitment, in ways that were not discountable and would likely reduce the ability of streams to support bull trout. *Id*. However, it proposed **reverting back** to the standards from 2000–2008, with no explanation as to why the more protective measures were no longer necessary. SSF ¶ 29. In September 2010, FWS issued a BO and ITS authorizing take in the form of one trampled bull trout redd every other year. SSF ¶ 30.

D. Subsequent Actions

Trespass continued in 2011 and 2012, with cattle accessing the Wet Creek exclosure and reducing the ability of that exclosure to support bull trout. SSF ¶¶ 31–22. On May 16, 2013, WWP filed its PI motion. SSF ¶ 34. The next day, the Forest Service

reinitiated consultation on the allotment. *Id*. On May 30, 2013, the Forest Service issued a 7(d) letter for the 2013 grazing season, proposing to largely rest the two units containing Wet Creek, except for several days of trailing. *Id*. Based in part on these assurances, this Court denied WWP's PI. *Id*. However, extensive trespass occurred throughout the season, including inside the Wet Creek spawning exclosure. SSF ¶ 35–36.

III. MILL CREEK ALLOTMENT

A. Allotment Overview and Bull Trout

The Mill Creek allotment comprises **seven of the ten** local populations and over 95% of the bull trout within the Little Lost River core area. SSF ¶ 39. In the Squaw and Mill Creek drainages, where brook trout have "nearly replaced" bull trout, and bull trout may disappear **within the next decade**. SSF ¶ 40. Brook trout also appear to be expanding in other drainages such as Warm and Iron Creeks, making the Warm Creek local population "at a relatively high risk of extinction." *Id*. Brook trout may completely replace bull trout within the sub-watershed **in the next 50 years** unless management action is taken—namely, preventing expansion of brook trout and improving habitat. *Id*.

In the years 2004–2008, problems included cattle trespass in unauthorized areas and times, riders failing to remove cattle from units, and lack of maintenance on fences; the Forest Service took no enforcement action beyond occasional letters. SSF ¶ 41. In 2009, the Forest Service documented "[h]eavily impacted banks [] on entire length" of Warm Creek. *Id*.

In May 2010, the Forest Service issued a BA for continuing to graze the allotment. Mill PAR 2113. SSF ¶ 43. FWS issued a July 2010 BO. SSF ¶ 44. The BO relied upon a fence to be built along Warm Creek, and contained an ITS, which

authorized trampling of 18 bull trout redds every year. *Id.*

In 2011 and 2012, problems included unauthorized use along several bull trout streams during the spawning period, and cattle disturbance occurred near surveyed redds. SSF ¶ 46. Again, bank stability and alteration data were not collected on all units, but where measured, bank alteration was above 20% at many sites. *Id*. The Warm Creek fence was not built, and in 2012, Warm Creek had severe 7**4% bank alteration and 92% browse use**. ¶¶ 46–47. The Forest's fish biologists concluded "these impacts are substantially limiting the ability of this stream to support bull trout" and "may be resulting in conditions that make it easier for brook trout to expand" in Warm Creek. *Id*.

In 2013, the Forest Service reinitiated consultation with FWS on the Mill Creek allotment. SSF ¶ 49. In June, the Forest Service informed the Mill Creek permittees that grazing could not occur until the new consultation was completed. *Id*.

However, the permittee's cattle trespassed on the allotment multiple times during the summer, while the agencies hurried to complete consultation. SSF ¶¶ 50–51.

B. 2013 Mill Creek Allotment Consultation

On June 26, 2013, the Forest Service issued its new BA. SSF ¶ 52. The BA acknowledged that one of the major limiting factors on the allotment is reduced habitat quality associated with livestock grazing, that stream indicators were below objectives in many portions of the allotment, and that livestock grazing caused or contributed to the degraded conditions. *Id*. It admitted that the grazing would continue to trample redds and adversely impact stream temperatures, sediment levels, width-to-depth ratios, bank stability, and riparian vegetation, in ways that are "not discountable and will likely reduce the ability of streams on this allotment to support bull trout." *Id*.

On August 14, 2013, FWS issued a BO concluding that grazing the allotment would not jeopardize bull trout or adversely modify critical habitat. SSF ¶ 53. The BO contained an ITS allowing the take of 16 redds annually. *Id*. Trespass continued in 2013 after issuance of the BO, many instances of cows being in bull trout units during spawning times. SSF ¶ 54–57.

IV. HAWLEY MOUNTAIN ALLOTMENT

The Hawley Mountain allotment is a large, 50,000+ acre allotment managed by BLM's Upper Snake Field Office of the Idaho Falls District. SSF ¶ 58. The north half of the allotment is immediately downstream from the Mill Creek allotment, along Sawmill Creek. *Id*. Much of the south half of the allotment is within the Wet Creek watershed, just downstream from the Pass Creek allotment; and portions are also within the Horse Creek and Badger Creek drainages further east. *Id*. Thus, the allotment contains the downstream bull trout habitat for almost all of the ten local populations in the Little Lost River core area, and the reaches that bull trout would need to utilize in order for genetic exchange between those local populations to occur. *Id*. For most of the bull trout occupied streams, BLM states the bull trout do not spawn on the BLM allotment, but they travel upstream to spawn on Forest Service land. SSF ¶ 60. In 2012, BLM and FWS consulted on the allotment. SSF ¶ 62. BLM again reinitiated consultation with FWS on the Hawley Mountain allotment in 2013. SSF ¶ 63.

BLM issued its new Hawley Mountain BA on September 10, 2013. SSF ¶ 64–69. FWS concurred with BLM's NLAA conclusions in a Letter of Concurrence ("LOC") dated September 11, 2013. SSF ¶ 70–71.

STANDARD OF REVIEW

WWP challenges[1] the 2010 Pass Creek and 2013 Mill Creek BOs and ITSs issued by FWS, as well as the 2013 Hawley Creek allotment LOC.

The issuance of a BO and ITS is an agency action that the Court reviews under the APA to determine if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 521 (9th Cir. 2010); 5 U.S.C. § 706(2)(a). The Court must "engage in a careful, searching review to ensure that the agency has made a rational analysis and decision on the record before it," and "articulated a rational connection between the facts found and the conclusions made." *Wild Fish Conservancy*, 628 F.3d at 521, 525. The issuance of a LOC is reviewed under the same standard. *See Olenec v. NMFS*, 765 F.Supp.2d 1277, 1285-86 (D. Or. 2011); *Ctr. for Biological Diversity v. U.S. Forest Serv*., No. CV-09-8116-PHX-FJM, 2009 WL 3740732, at *1-3 (D. Ariz. Nov. 5, 2009), aff'd 408 Fed. Appx. 64, 65-66 (9th Cir. 2011); *Conservation Cong. v. U.S. Forest Serv*., No. CIV.S-11-2605 LKK/EFB, 2012 WL 2339765 (E.D. Cal. June 19, 2012), aff'd on other grounds, 720 F.3d 1048 (9th Cir. 2013).

[1] WWP has standing to bring this action, as established by the Declarations of Jon Marvel and Katie Fite filed previously. Dkt. 8, 9.

ARGUMENT[2]

I. FWS's BIOLOGICAL OPINIONS AND LETTER OF CONCURRENCE VIOLATED THE ESA AND APA.

The consultations are arbitrary and capricious for numerous reasons. Rather than taking a comprehensive look at how the proposed grazing on these three allotments, combined with other activities and conditions in the Little Lost River watershed, will affect bull trout, the agencies have put blinders on to avoid looking at all of the collective impacts. Each consultation ignores the impacts of grazing on other allotments within the watershed as well as impacts from other activities such as water withdrawals, instead minimizing impacts by simply determining whether that particular allotment will jeopardize the species. Furthermore, despite admitting that grazing has and will continue to degrade habitat and slow recovery— and that several bull trout local populations are at imminent risk of extirpation—FWS arbitrarily concludes, based on flawed analyses, that grazing each allotment either will not jeopardize or is not likely to adversely affect the species. Because the consultations did not consider necessary information required under the ESA, adequately analyze the effects of livestock grazing on bull trout or its critical habitat, or provide an explanation that rationally connected the facts to their conclusions, they are unlawful under the ESA.

A. The Consultations Did Not Include All Relevant Activities in the Environmental Baseline.

The ESA requires that a BO contain a discussion of the effects of the action on the listed species or critical habitat, utilizing the best scientific and commercial data available. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(h). The "effects of the action" are

[2] The relevant provisions of the ESA are set forth in detail in the Amended Complaint, Dkt. 73 at ¶¶ 18–35.

added to the "environmental baseline," which includes "the past and present impacts of all Federal, State, or private actions and other human activities in the action area." *Id.* The "action area" is defined as "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." 50 C.F.R. § 402.02.

"Action area" is interpreted broadly to cover "'impacts' in the action area, rather than 'activities' in the action area," as a narrow interpretation allowing agencies to ignore actions that impact the area, but are located outside the area, "would permit the service to ignore aspects of the context in which the proposed action will occur." *S. Yuba River Citizens League v. NMFS*, 723 F.Supp.2d 1247, 1271 (E.D. Cal. 2010) ("*S.Yuba*"), citing *NWF v. NMFS*, 524 F.3d 917, 930 (9th Cir. 2008). Thus, the agency must consider "the effects of its actions 'within the context of other existing human activities that impact the listed species,'" and "assess what jeopardy might result from the proposed action '*in the present and future human and natural contexts.*'" *NWF v. NMFS*, 524 F.3d at 930 (citations omitted). Here, the consultations' action area and baseline discussions omitted relevant impacts, ignoring the context in which the grazing is occurring.

First, FWS assessed an improperly narrow action area in each consultation by focusing almost exclusively on each individual allotment and failing to analyze significant impacts occurring in adjacent areas **on the same local populations**.

FWS's recovery plan explains that migratory (fluvial) bull trout migrate to headwater streams to spawn, and that this specifically occurs in Sawmill Canyon and Wet Creek. Pass FWS Doc. 34 at 1710–12. BLM confirms this in its Hawley Mountain BA, which notes that while the allotment's reaches of Sawmill and Wet Creeks are occupied

by bull trout, they spawn elsewhere—*i.e.*, the Mill Creek and Pass Creek allotments. SSF ¶ 60. The local populations' territory also encompasses private land. *See* Pass FWS Doc. 34 at 1728 (recovery plan map). Thus, direct impacts to bull trout (or their redds) on one area necessarily affects the number and health of bull trout on others.

Further, gravity being what it is, water quality impacts such as temperature, high sediment, and nutrient pollution that occur on headwater streams on the Pass Creek and Mill Creek allotments will flow downstream onto the Hawley Mountain allotment. *Id*. The agencies recognized this when they completed their joint 1998–99 Little Lost watershed consultation, in which they assessed impacts in each sub-watershed as a whole, regardless of managing agency. SSF ¶ 8.

However, all three consultations considered baseline effects only on the allotment itself or on very short lengths downstream. The Pass Creek allotment BO only considered "those lands within the Pass Creek Allotment." Pass FWS 8. The Mill Creek and Hawley Mountain consultations only consider very short lengths downstream, claiming impacts do not carry any further. Mill FWS 8 (only considering effects on Sawmill Creek until confluence with Warm Creek, immediately outside of allotment boundary), Hawley FWS 2 (only considering effects 500 feet downstream of allotment boundaries).

These myopic action areas completely ignore the context in which the grazing is occurring: a core area made up of bull trout local populations that travel between allotments—and need to have **more** genetic exchange in order to recover. SSF ¶ 13. FWS's failure to acknowledge these basic facts shows that it did not consider the effects

of the actions "within the context of other existing human activities" that impact Little Lost bull trout. *NWF v. NMFS*, 524 F.3d at 930.

Furthermore, FWS's claim that impacts do not carry any further than immediately downstream on Mill Creek and Hawley Mountain allotments are not supported by the record. The idea that high temperatures somehow cease at an allotment boundary is, frankly, absurd. *See* Hawley FWS 2789 (admitting temperature impacts can flow downstream). The claim that sediment somehow does not travel downstream is contradicted by BLM's Hawley Mountain BA, which specifically blames high sediment deposited in the BLM reach of Wet Creek on the Forest Service's management of the upstream Pass Creek allotment. Hawley FWS 2790. Sediment can also be suspended in the water, where it injures gill function. SSF ¶ 4. And FWS fails to consider a host of downstream effects such as flooding, nutrient loading, and brook trout expansion. Pass PAR 6612 (grazed watersheds with fewer plant roots are more likely to suffer flood damage), 6614 (grazing can cause nutrient loading), SSF ¶ 11 (brook trout expansion).

Second, the consultations' environmental baseline sections did not analyze the existence of numerous water withdrawals that reduce flows in bull trout streams. This is an important omission because reduction in flows is harmful to bull trout in a multitude of ways and exacerbates the admitted "limiting factors" in the area—brook trout and reduced quality of habitat from livestock grazing. Pass PAR 8351 (BA), SSF ¶ 12.

On the Pass Creek allotment, the Idaho Department of Water Resources ("IDWR") database indicates that there are **80** water rights on the Wet Creek portion of the allotment, most of which are stockwater rights. Marvel Decl. (Dkt. 8) at 24–27. FWS was aware of these withdrawals, as many of them are illustrated on a map in the

BA. PAR 8339. However, the BO's environmental baseline contains no mention of these withdrawals on and how they are affecting bull trout. Pass FWS 17–20. *See also* Pass PAR 8350–57 (no analysis in BA).

On the Mill Creek allotment, IDWR indicates that there are **88** water rights that collectively remove 1.78 cfs from streams in the allotment, in addition to a Sawmill Creek diversion that removes 1.6 cfs. Marvel Decl. (Dkt. 8) at 24–27. After WWP raised this issue in its original complaint, FWS touched upon this issue in its new Mill Creek consultation. However, its extremely brief analysis fails to adequately assess the impacts. FWS now admits that the allotment has "several" stockwater rights, which are "typically small" and "generally isolated" "upland spring sources." Mill FWS 34. Despite admitting that isolated stockwater developments may be connected via groundwater to streams, *id*. at 38, FWS does not even acknowledge the total number of diversions, much less the amount of flow they remove, and provides little analysis on what the impact of these withdrawals are on flow. *Id*. at 40. Nor does it mention that it consulted separately on the Sawmill Creek diversion, which the Forest Service admitted "may affect" bull trout due to flow impacts, 3rd SPAR 1744, or any combined impacts. Because it never even sums up the withdrawals on the allotment, much less analyze combined impacts, FWS failed to adequately consider this issue.

FWS's analysis on the Hawley Mountain allotment is the most arbitrary of the three. This allotment is comprised of three unconnected areas. *See* Hawley FWS 2757. Considering the streams that run through this allotment and the private land near and between the separate areas, the IDWR database indicates that there are **well over 100 water rights** removing over **100 cfs**, an amount that dwarfs the withdrawals on the other

two allotments. 2nd Marvel Decl. Despite this massive quantity of withdrawals, FWS barely mentions the issue in its environmental baseline analysis, other than to brush it off:

> The Little Lost River and many of its tributaries are diverted for irrigation purposes between late April and the end of October, which affects water quantity, temperature, and fish migratory patterns. No active diversions occur in the action area, although some occur upstream (BA, p.15).

Hawley FWS 3. In fact, the IDWR database indicates that there are at least nine water withdrawals on the allotment. 2nd Marvel Decl. FWS failed to consider the impacts from these large withdrawals despite its admission that high water temperature is a major problem on this allotment, Hawley FWS 3, and one that is exacerbated by diversions. *Id*., SSF ¶ 12. Thus, water withdrawals are not "so insignificant or discountable" or "slight" that FWS could ignore them. *S. Yuba*, 723 F.Supp.2d at 1272–75. *See also Ctr. for Biol. Diversity v. BLM*, 698 F.3d 1101, 1122–1125 (9th Cir. 2012) ("*CBD v. BLM*") (overturning BO where FWS failed to consider the "relevant factor" of impacts of groundwater withdrawals on fish).

Because the consultations failed to define appropriate action areas and include relevant activities within the environmental baseline, FWS failed to consider the effects of grazing "within the context of other existing human activities that impact the listed species," *NWF v. NMFS*, 524 F.3d at 930, rendering the consultations arbitrary and capricious. *See S. Yuba*, 723 F.Supp.2d at 1269–76 (holding that BO failed to consider relevant activities in baseline, rendering it arbitrary and capricious).

B. The Consultations Did Not Consider the Interdependent Activity of Grazing-Related Water Withdrawals

In addition to considering effects of the proposed action, a BO must consider effects of "interrelated and interdependent" actions. 50 C.F.R. § 402.02(d). Interrelated

actions are part of a larger action and depend on the larger action for their justification, while interdependent actions have no independent utility apart from the larger action. *Id.* The test for both is "'but for' causation: but for the federal project, these activities would not occur." *Sierra Club v. Marsh*, 816 F.2d 1376, 1387 (9th Cir. 1987). All three of the consultations failed to consider the interrelated and/or interdependent activity of grazing-related water withdrawals. Pass FWS 33, Mill FWS 63, Hawley FWS 11–12 (all three consultations stating no interrelated or interdependent activities).

As just noted, there are dozens of water rights either on near the allotments. The IDWR database indicates that the vast majority of these withdrawals are related to livestock grazing: almost all of the water rights on the Pass Creek and Mill Creek allotments, as well as several water rights on the Hawley Mountain allotment, are stockwater rights held by the federal government. Marvel Decl. (Dkt. 8) Attachs. A & B, 2nd Marvel Decl. By definition, these rights provide water for livestock. *See* Idaho Code § 42-113(3)(a)(v) (stockwater rights only issued if "[t]he use of the water diverted is for watering livestock.").

Providing water for livestock is plainly intertwined with the authorization of grazing. The grazing permits explicitly require the permittees to maintain the stockwater developments. *E.g.*, Pass PAR 5806 (Pass Creek permit). Water would not be pumped into tanks or ponds for livestock on public lands "but for" the authorization of grazing. Thus, the water withdrawals meet the test for interrelatedness and interdependentness, and the consultations' failure to analyze it as such violates the ESA.

C. The Biological Opinions Relied on Conservation Measures That Were Not Certain to Address the Threats to the Species.

Mitigation measures relied upon to support a consultation's conclusion "must be reasonably specific, certain to occur, and capable of implementation; they must be subject to deadlines or otherwise enforceable obligations; and most important, they must address the threats to the species in a way that satisfies the jeopardy and adverse modification standards." *Ctr. for Biol. Diversity v. Rumsfeld*, 198 F.Supp.2d 1139, 1152 (D. Ariz. 2002) ("*Rumsfeld*"); *NWF v. NMFS*, 839 F.Supp.2d 1117, 1125 (D. Or. 2011) ("*NWF v. NMFS II*"); *see also NWF v. NMFS*, 524 F.3d at 936 (mitigation measures may be relied on to support no-jeopardy conclusion only where they involve specific, binding plans and clear, definite commitments of resources to implement them).

A very recent case interpreting this line of cases rejected a BO for a hatchery plan that relied upon various measures to reduce hatchery "strays," explaining that given the measures' lack of success in the past, the consulting agency "ignored the challenges facing [the action agency]" and that "the success of those strategies cannot be taken as a given." *Native Fish Socy. v. NMFS*, 3:12-cv-00431-HA, 2014 WL 199093, at *12–*13 (D. Or. Jan. 16, 2014). *See also Ctr. for Biol. Diversity v. Salazar*, 804 F.Supp.2d 987, 1001–04 (D. Ariz. 2011) (similar).

Here, both BAs contained various conservation measures to supposedly protect bull trout. Key measures included fences, "riders" to herd cows, rotation dates to reduce overlap of cows and spawning periods, annual grazing indicators (primarily stubble height and woody browse). *See* 3rd SPAR 2019–21, Pass PAR 8341–44.

For example, the Pass Creek BA promised that exclosures would prevent livestock access on sections of Wet Creek, Basin Creek, and Big Creek. Pass PAR 8346.

The BA also relied on rotation dates, tepid standards for stubble height and woody browse, and a bank standard only on a single unit. Pass PAR 8341, 8344–47. An "adaptive management strategy" relied upon for both allotments is so vague it lacks any meaning, consisting of two simplistic "flow charts" to ostensibly address problems, which provide only unenforceable suggestions (as well as a variety of "escape routes" by which the Forest Service can avoid taking any action at all). Pass PAR 8396–97, 3rd SPAR 2077–78. FWS relied on these conservation measures to dismiss or minimize adverse effects. Pass FWS 24, 29, 31, 32.

The Mill Creek BA relied upon very similar measures, including limitations on when certain pastures can be grazed, exclosure fencing, riders, similar standards for stubble height and woody browse, and an adaptive management strategy. Mill FWS 2019–21, 2077. It relied heavily on a proposed fence along Warm Creek, claiming that the creek "would not be exposed to livestock grazing because it would be fenced to exclude livestock," and no redds will ever be trampled there. Mill FWS 46. It also heavily relied on presence of a single rider on this 51,000-acre allotment, five days per week, claiming that this will limit cattle from entering streams and harassing juvenile bull trout and spawning adults. Mill FWS 45. The prior Mill Creek BA had promised to add a bank alteration standard for creeks with less than 90% bank stability in 2012. Mill PAR 2125. However, despite almost all sites monitored having less than 90% bank stability in 2012, 3rd SPAR 2055, the new BA only imposed a standard on three units. *Id*. at 2021. *See also* 3rd SPAR 2073, 2021 (Squaw and Warm Creeks both having less than 90% bank stability in 2012, but BLM placing no standard on Squaw Creek unit). FWS relied on these measures to dismiss or minimize adverse effects. Mill FWS 53–58.

The record shows that these key conservation measures relied upon were far from certain to be met or to be effective. On the Pass Creek allotment, repeated and serious noncompliance problems occurred from 2000 through 2008. SSF ¶¶ 19–27. These included rampant trespass in various units at unauthorized times, and routine trespass into exclosures intended to be closed to cattle at all times. *Id*. ¶¶ 22–26. Is it clear that riders and fences were not effective at keeping cattle in the proper locations and outside of exclosures.

The 2008 grazing damage was severe: a report prepared by the Forest fish biologist concluded that "significant changes in livestock management are needed on this allotment if we are to protect and restore aquatic and riparian habitats," and that because significant impacts were occurring **even when standards were being met**, "current standards were not adequately protecting aquatic and riparian resources in this allotment and that **new standards are needed that will significantly reduce livestock impacts to these areas**." Pass PAR 6955 (emphasis added). During all of these years, Forest Service enforcement was virtually non-existent, other than doing the permittees' job and finding trespass cows; no consequences ever occurred other than the mildest of warning letters. SSF ¶¶ 22–27.

In 2009, the Forest Service recognized admitted the impacts had been "different from those expected," requiring reinitiation and more stringent standards. SSF ¶ 27. However, in the 2010 BA, the Forest Service **reverted back** to the weaker standards from 2000–2008 in almost all respects, with no explanation as to why the more protective measures were no longer necessary. SSF ¶ 29.

Numerous compliance problems also occurred on the Mill Creek allotment in the years preceding the new BO. From 2004–2008, problems included cattle trespass in unauthorized areas and times, riders failing to follow direction or remove cattle from units, lack of maintenance on fences. SSF ¶ 41. In 2009, the Forest Service documented more damage on Warm Creek. SSF ¶ 41. The Forest Service took no effective action to address these problems. *Id*.

Numerous trespass incidents occurred in 2011 and 2012. SSF ¶ 46. Also during this time, USFS regularly failed to measure several of its indicators. *Id*. In 2012, Warm Creek was badly damaged by grazing, causing "substantial impacts to the stream" and "substantially limiting the ability of this stream to support bull trout." SSF ¶ 48. The fence promised in the 2010 consultation had never been built. SSF ¶ 46. Bank stability and bank alteration were measured on reaches of six creeks—all of which had bank stability below 90% and bank alteration above 20%. SSF ¶ 48.

The trespass even failed to abate in 2013, during this litigation, when the agency was presumably trying to improve its performance. While the allotment was supposed to be closed to grazing during consultation, numerous instances of the permittee's cattle trespassing onto the allotment occurred, with one incident involving 130 cows. SSF ¶ 50.

In sum, the record demonstrates that key conservation measures relied on by FWS in the BOs were neither certain to occur nor effective at protecting bull trout. *Rumsfeld*, 198 F.Supp.2d at 1152. Reliance on exclosures in the Pass Creek allotment is particularly absurd, considering the track record of near-constant trespass into sensitive excluded areas. On Mill Creek, reliance on a fence to prevent all access to Warm Creek is not realistic when cattle are routinely out of place and existing fences are not

maintained. Nor is reliance on a single 5-day-a-week rider to keep over 1,000 cows out of streams on a 51,000-acre allotment realistic, considering the track record of cows frequently being in the wrong places at the wrong time on the allotment.

Reliance on monitoring standards being met is not reasonable when they are frequently not monitored, and when there are **virtually never any consequences** to permittees violating them. *See Or. Natural Desert Ass'n v. Lohn*, 485 F.Supp.2d 1190, 1201–02 (D.Or. 2007), *vacated as moot*, 308 Fed. Appx. 102 (9th Cir. 2009) (grazing BO could not rely on grazing standards where "[p]ast compliance with grazing management standards [was] a documented problem" and the BO contained only "vague statements about what, if any administrative corrective action will be taken against noncompliant permittees."). On this record, "the success of those strategies cannot be taken as a given," and FWS improperly "ignored the challenges facing [the action agency]." *Native Fish Socy. v. NMFS*, 2014 WL 199093, at *12.

Even most troubling is how the agencies admitted that the applicable grazing standards were not substantively sufficient to protect and recover bull trout habitat, and that bull trout would continue to slide into extinction on these allotments. SSF ¶ 26 (report stating significant impacts were occurring even when standards were being met, and new standards needed to significantly reduce impacts), SSF ¶ 40. This means that the measures failed the "most important" test of all—that "they must address the threats to the species in a way that satisfies the jeopardy and adverse modification standards." *Rumsfeld*, 198 F.Supp.2d at 1152. For these reasons, it was unreasonable for FWS to rely on these measures in its effects analyses and conclusions.

D. The Biological Opinions' No Jeopardy Conclusions Fail to Make a Rational Connection Between the Facts and the Conclusions.

The BOs' no-jeopardy conclusions were unlawful for several reasons. In a jeopardy analysis, FWS must conduct an analysis of not only the risks to a species' persistence, but also to its recovery. *NWF v. NMFS*, 524 F.3d at 932–33, 50 C.F.R. § 402.02 (definition of jeopardize). And of course, it is not just a procedural analysis: "where baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm." *NWF v. NMFS*, 524 F.3d at 930.

First, FWS conducted its jeopardy analysis at the wrong scale. FWS concluded that the actions would not jeopardize the "coterminous U.S. population of the bull trout." Pass FWS 33–35, Mill FWS 63. But the correct scale is the Columbia River IRU, not the coterminous U.S. *Wild Fish Conservancy*, 628 F.3d at 519, *Nw. Envtl. Advocates v. EPA*, 855 F.Supp.2d 1199, 1229 (D.Or. 2012). A larger scale serves to mask impacts.

Second, there are serious disconnects between the facts and FWS's conclusions. Despite their flaws, the BAs do candidly admit that grazing is harming and preventing recovery of many riparian features important to bull trout, and that it will continue to do so, in ways that are **not discountable** and **will reduce the ability of streams to support bull trout**. SSF ¶ 28, 52.

The Pass BO's jeopardy conclusion opines that if the grazing happening "alone," it would be "unlikely to be incompatible" with sustaining both populations as viable. Pass FWS 34. However, grazing is **not** happening alone, and FWS quickly admits that the "long-term prospects" for bull trout on the allotment is in fact "not good," with Big Creek's population already apparently extirpated and Wet Creek near extirpation. *Id.* Because grazing is contributing to the bull trout's slide toward extinction in these local

populations, FWS's conclusion that it is compatible with sustaining viable local populations is unsupported. FWS fails to even mention recovery, which obviously is not consistent with a slow slide into extinction. *Wild Fish Conservancy*, 628 F.3d at 527.

FWS attempts to rationalize its Pass Creek no-jeopardy conclusion by implying, astonishingly, that extirpating the entire Little Lost River core area would be inconsequential for the Columbia River IRU or for bull trout nationwide. Pass FWS 34–35.[3] But this rationale contradicts FWS's own science on bull trout recovery, which is that the IRU needs to **maintain and expand** distribution, abundance, and suitable habitat. Pass FWS 13.

In the new Mill Creek BO, FWS resorts to a rather tortured analysis, full of contradictions, to reach its no-jeopardy conclusion. It alternately states that riparian conditions in the allotment are adequate and this action should allow them to be maintained; admits that conditions are poor but claims this action should allow them to improve; admits that the grazing will not allow for substantial improvement of habitat and will in fact slow recovery; and admits that grazing's impacts will be "adverse," but will not "occur evenly." FWS 63–64.

FWS concludes that the level of adverse effects to bull trout and its habitat "are likely to be compatible with sustaining the seven local populations as viable populations of the bull trout." *Id*. at 64. But in the very next sentence, it admits that there are not seven "viable" local populations to "sustain," as brook trout may replace the Mill and

[3] The prior Mill Creek BO made this same argument, Mill PAR 2214, but FWS apparently thought better of it when preparing its new 2013 BO, as it no longer makes this assertion.

Squaw Creek local populations during the 11-year term of this BO, and that over the next 50 years, the remaining five local populations may be extirpated as well. *Id*.

The conclusion next hopes that the allotment may support "persistent" bull trout populations, with no explanation of what a "persistent" population is (presumably, not a recovered one). *Id*. at 65. It ends by stating that the proposed grazing is "not likely to exacerbate the threat caused by brook trout," based on hoped-for "gradual" improvement in habitat and the Forest Service's limited brook trout control program—a statement that is completely unsupported by the record. *Id*. The Forest Service's BA and many other documents in the record make clear that grazing worsens the risk of brook trout competition and will continue to degrade bull trout habitat. SSF ¶¶ 11, 43.

FWS's no-jeopardy conclusions, in addition to being utterly contradictory, have no support given the downward trend and near extirpation of several local populations on both allotments, the currently degraded habitat, and the admitted adverse effects from grazing that will continue. If other impacts are considered, as they must be, grazing will *prevent* survival and recovery of at least several of the local populations—and the core area itself given that all ten local populations are essential for its recovery. SSF ¶ 13. This sinks FWS's analysis, because "where baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm." *NWF v. NMFS*, 624 F.3d at 930.

In *Wild Fish Conservancy*, the Ninth Circuit rejected a similar no-jeopardy analysis, where a BO admitted that an isolated local bull trout population would continue to decline. 628 F.3d at 528–59. The Court explained that a downward trend is, by definition, inconsistent with maintenance or recovery. *Id*. This analysis is precisely on

point. In sum, FWS's no-jeopardy determinations are convoluted, internally inconsistent, not supported by the record, and fail to explain how recovery will be achieved. For these reasons, they fail to "articulate[] a rational connection between the facts found and the conclusions made." *Wild Fish Conservancy*, 628 F.3d at 525.

E. The Mill Creek Biological Opinion's No Adverse Modification Conclusion Was Unsupported.

The Mill Creek BO's conclusion that the action would not adversely modify bull trout critical habitat on that allotment was also flawed and unsupported for similar reasons. An adverse modification analysis likewise must consider both survival and recovery. *NWF v. NMFS*, 524 F.3d at 931–32 (citing *Gifford Pinchot Task Force v. U.S. FWS*, 378 F.3d 1059 (9th Cir. 2004).

FWS's conclusion largely repeats the contradictions of the no-jeopardy conclusion, asserting that: grazing does impact have adverse impacts upon baseline conditions, but the degradation would not occur "evenly" across the allotment, and that grazing would "maintain or slowly improve habitat," with some "natural" limitations. Mill FWS 65. It concludes that "[i]f the adverse effects of the proposed action are not substantial within the Little Lost River Critical Habitat Unit, then they are unlikely to be discernable at the designated critical habitat rangewide scale." *Id.*

Again, these statements are both internally contradictory and not supported by the record. In fact, the BA admitted that much of the critical habitat *lacks* functionality; that the action will in fact degrade habitat elements in creeks where they are already below objectives in a way that is non-discountable, and that most of the critical habitat's limitations are not "natural"—they are from grazing and other human activities. SSF ¶ 52. The statement that impacts will not occur "evenly" is meaningless without an

analysis in the context of bull trout life cycles and migration patterns, *NWF v. NMFS*, 524 F.3d at 934–35; in fact, uneven use is worse for bull trout, as cattle enjoy riparian areas in general, and flatter, spawning reaches in particular. *See* Pass FWS 61–63.

FWS's failure to consider the degraded baseline is problematic, as "[u]nder this approach, a listed species could be gradually destroyed, so long as each step on the path to destruction is sufficiently modest. This type of slow slide into oblivion is one of the very ills the ESA seeks to prevent." *NWF v. NMFS*, 524 F.3d at 930. Indeed, such an approach is contradictory to recovery. FWS does not even attempt to explain the action will lead to recovery.

Thus, the BO's conclusion that grazing will not cause adverse modification of critical habitat is inconsistent with the admitted harmful effects that grazing will continue to cause to bull trout designated critical habitat on the Mill Creek allotment. For these reasons, FWS failed to "articulate[] a rational connection between the facts found and the conclusions made." *Wild Fish Conservancy*, 628 F.3d at 525.

G. The Hawley Mountain Allotment Letter of Concurrence Analysis was Flawed for Additional Reasons.

1. FWS Failed to Consider the Proper Context for its Action – the Little Lost River Core Area

FWS provided no analysis of the bull trout populations on the allotment and how grazing impacts would affect the survival and recovery of those populations. As explained by the Ninth Circuit, an agency must "know roughly at what point survival and recovery will be placed at risk before it may conclude that no harm will result . . . ." *NWF v. NMFS*, 524 F.3d at 936 (stating that NMFS inappropriately evaluated recovery impacts without knowing the in-river survival levels of fish necessary to support

recovery). Furthermore, assessing whether a population will simply survive is not adequate under the ESA; an agency must identify when a population will likely pass the tipping point for recovery, and determine whether the proposed action will cause the population to reach that tipping point. *Id.*, *Wild Fish Conservancy*, 628 F.3d at 527.

As noted, FWS's recovery plan describes the core area, its local populations, and its specific recovery needs. SSF ¶¶ 10–14. It shows that the Hawley Mountain allotment contains portions of at least four local populations: Wet Creek, Williams Creek, Badger Creek, and Warm Creek. Pass FWS Doc. 34 at 1728 (map). The first three are the only three local populations in the core area that do not occur on the Mill Creek allotment, and in order for the different local populations to genetically exchange, they would need to cross the Hawley Mountain allotment. *Id.* As noted, one of the recovery objectives for the Little Lost River core area is more opportunities for genetic exchange. SSF ¶ 13. The recovery plan also states that the Little Lost River from Summit Creek upstream to the National Forest boundary (on the Hawley Mountain allotment), bull trout density **declined 91 percent** between 1984 and 1993. Pass FWS Doc. 34 at 1709.

The Hawley Mountain allotment consultation ignores virtually all of this information in the record. It does not even acknowledge that the affected bull trout are part of the Little Lost River core area, much less list **any** of the local populations, what their status is, or how much they need to recover in order to become viable.

The closest it gets to analysis of population dynamics is to briefly note in passing the inconclusive results of spotty electrofishing surveys. Hawley FWS 2779, 2784, 2786, 2788, 2791. For example, in Warm Creek, FWS stated that bull trout densities "have varied over time" based on multiple variables. Hawley FWS 2788. It does not even

mention, as the Forest Service did, that it is at high risk of extirpation due to grazing and brook trout impacts, SSF ¶ 48, or that **no** bull trout were found in 2013 sampling efforts. SSF ¶ 55. Similarly, in Wet Creek, bull trout densities "vary over time." Hawley FWS 2791. Surveys at two locations in 3 years on that stream found no bull trout on three of the six surveys. *Id*. And in Sawmill Creek, surveys found that "bull trout are present in low densities; the number of fish using the creek likely depends on the water year." Hawley FWS 2779. This level of analysis does not demonstrate that bull trout populations within the allotment are increasing in distribution or abundance—in fact, it does not demonstrate anything meaningful about them.

Nonetheless, FWS opined that bull trout abundance in the Little Lost River watershed as a whole was stable or increasing. Hawley FWS 2835. Yet it bases its assertion on a citation to the BA that provides no population or abundance data of any kind. Hawley FWS 2768. The statement is also unsupported by the record, which explains that several of the local populations are crashing due to factors including competition with brook trout. Pass FWS 1709; Hawley FWS 2238. Ultimately, FWS cannot support its statement with respect to Hawley Mountain allotment in the absence of consideration of population trends or genetic connectivity of local populations, as explained by FWS's own Recovery Plan. SSF ¶ 13.

In contrast, the 1998 BA provided subpopulation characteristics including size, growth and survival, life history diversity and isolation, and persistence and genetic recovery for each subpopulation affected by a proposed action. Hawley FWS 3028–29, 3039, 3042, 3044; *see also* Pass FWS AR 6602–05 (1999 BO included detailed information on subpopulations). Despite their flaws, the Forest Service's Pass Creek and

Mill Creek consultations challenged here at least described the core area and its local populations. Pass FWS 17–18, Mill FWS 38.

Thus, FWS provided no context for what the "tipping point" of any local population in the Hawley Mountain allotment might be, and ignored the best available science in the record including its own recovery plan. In short, its analysis did not assess recovery. *See S. Yuba*, 723 F.Supp.2d at 1266 (holding that considering only abundance of species and ignoring other viability factors of productivity, distribution, and genetic diversity was insufficient to assess survival and recovery). Accordingly, its determination that "static and improving habitat conditions in the allotment are reasonably judged to support and improve the recovery of bull trout populations in the action area" violates the ESA. Hawley FWS 2836–37. *See Ctr. for Biol. Diversity v. Salazar*, 804 F.Supp.2d at 999–1001 (conclusion that action would not affect species' recovery was unlawful where agency did not provide full analysis of the effect of the action on recovery).

2. FWS's Reliance on Simplistic "PFC Trends" Masked the Effects of Grazing on Degraded Bull Trout Habitat on the Allotment

FWS's concurrence is further arbitrary because it failed to consider whether the action was slowing recovery and ignored best available science. FWS based its concurrence on information provided in the BA, including condition of habitat within the allotment and the supposed stable or improving trends observed under the previous grazing regime. Hawley FWS 2837, 2844–45. FWS assumed based on monitoring results that "the proposed action is compatible with maintaining conditions that produce a sufficient quantity and quality of bull trout habitat to support its life history requirements" and that "critical habitat would continue to function to support bull trout

[uses for which it was designated]." Hawley FWS 2844. Because the proposed action is the same as grazing that had taken place under the previous permit, it believed that bull trout habitat was "likely to continue to be stable or improving." Hawley FWS 2843–44. However, FWS draws these conclusions based on very limited data and narrow trends that only thinly veil a highly degraded baseline.

Importantly, environmental conditions in the watershed are gradually improving from a historic rock-bottom. *See* Hawley FWS 2241–45, 2769, 2937–40 (describing long-term effects of heavy grazing, water diversions, channelization, forestry and other detrimental land uses). Thus, FWS's repeated assertion that conditions have improved or remained stable during the last decade of grazing, even if true, do not demonstrate that more of the same grazing will not adversely affect bull trout. *Cf. Native Fish Socy. v. NMFS*, 2014 WL 199093, at *8 (simply because proposed action was expected to decrease negative impacts in comparison to much worse historical practice did not mean that the action would not have a significant negative impact itself).

FWS admits that grazing has potential to harm bull trout habitat in many ways, Hawley FWS 1836, 2838, but notably fails to analyze whether it is **slowing** the recovery that would be occur naturally absent continued grazing. Indeed, FWS in a draft of the BA, admitted that "grazing may slow habitat recovery compared with what would occur in the absence of livestock." Hawley FWS SUP0979. The slowing of habitat recovery is an adverse effect to bull trout, as FWS recognized in the Mill Creek BO. Hawley FWS 3381–83, 3390–92 (Mill Creek BO concluding that grazing was likely to alter aspects of riparian areas, which may maintain below-objective conditions or slow improvement, which was "likely to cause some adverse effects to bull trout"); Hawley FWS 1824

(advising that any further degradation of degraded baseline conditions "clearly" leads to "likely to adversely affect" determination).

Further, FWS's conclusion that habitat was functional and supportive of bull trout is contradicted by other, quantitative data in the record. For one, the trends are based on qualitative Proper Functioning Condition ("PFC") assessments. Hawley FWS 2767. By focusing narrowly on PFC trends, the BA paints a far rosier picture of habitat conditions than is born out in other data. For example, five out of seven allotment streams were not meeting BLM standards for water temperatures for bull trout. Hawley FWS 2770, 2831. In most cases, temperatures exceed recommendations for spawning and migration for months at a time, during most or all of the relevant periods. Hawley FWS 2770, 2774, 2777–78, 2785, 2786–87, 2794. Sawmill Creek, for instance, is too warm to support its critical habitat recovery support function as a bull trout migration corridor until September. Hawley FWS 2783, 2796–98. But bull trout likely need to use it as a migration corridor as early as July. *See* Hawley FWS 2239.

Examples of other data that FWS effectively disregarded are numerous: for sediment, three out of seven streams are not meeting BLM's standard, and two were not measured. Hawley FWS 2832–33. For bank stability, two out of five streams measured did not meet BLM's standard. Hawley FWS 2832. For bank alteration, two out of four streams measured did not meet BLM's standards. Hawley FWS 2832–32. And for stubble height, out of seven streams, one did not meet BLM's standard, but three others were not measured. Hawley FWS 2831. FWS's sole reliance on PFC trends even masks results of individual PFC assessments—10 out of 43 reaches of allotment streams containing bull trout were "functioning at risk" or "not functioning" for at least one

attribute in their most recent assessment. *See* Hawley FWS 2825–29. Thus, contrary to FWS's assurance that its "conclusion is supported by numerous methods of evaluating condition on each stream," this is simply not the case. Hawley FWS 2837.

Thus, FWS ignored the best available science and failed to adequately analyze recovery while focusing on qualitative surveys that painted a more positive view. Again, this renders its conclusion unsupported and in violation of the ESA.

G. The Incidental Take Statements Were Flawed.

Section 9 of the ESA and its implementing regulations prohibit "take" of bull trout. 16 U.S.C. § 1538(a)(1)(B); 50 C.F.R. §§ 17.31, 17.44(w). If a BO concludes that the proposed action is not likely to jeopardize the species, but is likely to result in some take, the Service must provide an ITS that (1) specifies the amount or extent of the impact on the species, (2) specifies reasonable and prudent measures to minimize such impact, and (3) sets forth required terms and conditions. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). *Or. Natural Res. Council v. Allen*, 476 F.3d 1031, 1036 (9th Cir. 2007) ("*ONRC v. Allen*").

An ITS must "set forth a 'trigger' that, when reached, results in an unacceptable level of incidental take, invalidating the safe harbor provision, and requiring the parties to re-initiate consultation." *Az. Cattle Growers Ass'n v. FWS*, 273 F.3d 1229, 1249 (9th Cir. 2001). The trigger cannot be so vague that it does not contain measurable guidelines and fails to provide a clear standard for determining when the authorized level of take has been exceeded, or so broad that it could not adequately trigger reinitiation. *Wild Fish Conservancy*, 628 F.3d at 531 (citations omitted).

The amount or extent of authorized take should ideally be expressed as a numerical value, but a surrogate may be used if FWS explains why it is needed. *ONRC v. Allen*, 476 F.3d at 1037. The ITS must also either specify monitoring and reporting requirements with respect to the numerical cap "or, if appropriate, select a surrogate trigger that *can* be monitored." *Wild Fish Conservancy*, 628 F.3d at 532. Without appropriate monitoring to detect whether take has been exceeded, an ITS fails to "establish a meaningful trigger for renewed consultation after the take exceeded authorized levels." *Id.*

First, the ITSs here are invalid because their associated BOs are invalid. *CBD v. BLM*, 698 F.3d at 1108, *ONRC v. Allen*, 476 F.3d at 1036–37.

Second, both ITSs failed to establish adequate triggers so as to provide a clear standard for determining when the authorized level of take has been exceeded. Both ITSs authorized take in the form of a number of trampled bull trout redds across the allotments, and both included a term and condition that the Forest Service monitor and report the results to FWS. Pass FWS 36–37, Mill FWS 68.

However, FWS in both ITSs admitted that observing all trampled redds was not practical due to the large area and difficulty of access. Pass FWS 37, Mill FWS 66. Because of this difficulty, both ITSs used a sampling approach, only requiring the Forest Service to monitor short stream reaches. Pass FWS 37 (1 reach of Wet Creek), Mill FWS 68 (two "representative" reaches in each pasture grazed more than a week after Aug. 15). The surveys are to be done at unspecified times, when the likelihood of observing redds is the greatest. *Id.*

But a sampling or surrogate approach is only useful "insofar as the action agency is capable of quantifying take to determine when the trigger has been met." *Wild Fish Conservancy*, 628 F.3d at 532. Here, **there is no trigger**. FWS allows the Forest Service to use a sampling approach, but fails to state how many observed redds are too many and require reinitiation. For example, on Mill Creek, how many observed trampled redds in each 1,000-meter reach equates to more than 16 on the entire allotment? FWS claimed in the ITS that it can make that extrapolation, but failed to do so. Mill FWS 68. In fact, earlier in the BO it explained that due to bull trout's selective use of preferred spawning areas, redd "densities cannot be reliably extrapolated to an entire stream length." *Id*. at 45. Thus, there is no guidance for when the Forest Service must reinitiate consultation.

Third, there is no assurance that the surveys would occur before cattle had left the relevant unit and it was too late to meaningfully modify the action. For example, redd surveys can be conducted as late as September 20. Mill PAR 26260. Grazing will be complete on most units by then. 3rd SPAR at 2019 (BA grazing dates). If take was too high, the damage would be done and it would be too late to meaningfully reinitiate consultation, making the amount or extent of take unlawfully "coextensive with the project's own scope." *ONRC v. Allen*, 476 F.3d at 1039.

Fourth, the ITSs do not account for the full extent of incidental take occurring on the allotments. The ESA and its regulations prohibit "take" of bull trout, including harassment or harm, where harm includes both direct injury to the fish as well as "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 16 U.S.C. §§ 1538, 1532(19), 50 C.F.R. § 17.31. The ITS fails to account

for the likely harassment of juvenile and adult bull trout on the allotment. FWS claims that the rider will prevent this. Mill FWS 45. But the idea that one rider will prevent all cattle on this 50,000+ allotment from entering streams is simply not realistic, as FWS acknowledges when it admits that the authorized take via redd trampling is "likely" to occur. Mill FWS 66; Pass FWS 36. And while the rider is only on the allotment five days a week, 3rd SPAR 2019, bull trout perform their life functions every day. The ITSs also fail to acknowledge that incidental take is caused by grazing's degradation of habitat. Here, the record is clear that grazing is degrading habitat in ways that impair bull trout life functions. SSF ¶¶ 10–11, 28, 52. *See ONDA v. Lohn*, 485 F.Supp.2d at 1204 (ITS arbitrary for finding no habitat take, when admitted adverse habitat effects of grazing were occurring). Because the ITSs contained no meaningful trigger and various other flaws, they were arbitrary and capricious.

II. ONGOING GRAZING ON THE PASS CREEK AND MILL CREEK ALLOTMENTS VIOLATES ESA §§ 7(a)(2) AND 9.

A. The Forest Service is Violating its Duty to Prevent Jeopardy.

The ESA imposes a substantive duty on federal agencies to ensure that their actions are not likely to jeopardize the continued existence of listed species or adversely modify its critical habitat. 16 U.S.C. § 1536(a)(2); *Wild Fish Conservancy*, 628 F.3d at 532. Reliance on a legally flawed BO violates the action agency's substantive duty under section 7, such as where the BO failed to articulate a rational connection between its findings and conclusions or included an inadequate ITS. *Wild Fish Conservancy*, 628 F.3d at 532; *Resources Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1304 (9th Cir. 1994). As discussed above, the Pass Creek and Mill Creek BOs had several such legal flaws. Thus, the Forest Service's ongoing grazing on the Pass Creek and Mill Creek allotments

violates its duty under section 7 to ensure that authorizing grazing does not jeopardize the continued existence of bull trout or adversely modify its critical habitat.

B. The Forest Service is Causing Unlawful Take.

The Forest Service is also causing unlawful take. Agencies can be liable for unlawful take by authorizing livestock grazing that harms and harasses bull trout. *See Or. Natural Desert Ass'n v. Tidwell*, 716 F.Supp.2d 982, 1005 (D.Or. 2010) ("*ONDA v. Tidwell*") (Forest Service liable where plaintiff proved by preponderance of the evidence that grazing resulted in take); *Defenders of Wildlife v. Martin*, No. CV-05-248-RHW, 2007 WL 641439, at *8 (E.D. Wash. Feb. 26, 2007) (Forest Service liable for authorizing snowmobiling that caused take of woodland caribou); *Strahan v. Coxe*, 127 F.3d 155, 163-64 (1st Cir. 1997) (government officials liable for take for authorization of third party actions).

Here, the Forest Service is liable for authorizing grazing on the Pass Creek and Mill Creek allotments that has caused and is likely to continue to cause take of bull trout, because the ITS for both allotments is invalid and no longer provides take coverage. *See CBD v. BLM*, 698 F.3d at 1108, 1115; *Defenders of Wildlife v. Martin*, 2007 WL 641439, at *8. Take is occurring on these allotments in the form of redd trampling, harassment of adult and juvenile fish, and habitat degradation that significantly impairs bull trout breeding, feeding, and sheltering.

The record shows that grazing on these allotments is harming bull trout. Indeed, FWS itself admits that the take of bull trout on the Mill Creek allotment "is likely to occur" due to "cattle trampling of up to 16 bull trout redds annually," and trampling of one bull trout redd is likely to occur on the Pass Creek allotment. Mill FWS 66; Pass

FWS 36.

In addition to this admission of likely take by FWS, the record contains substantial evidence that cattle routinely access streams occupied by bull trout and used for spawning, even within exclosures. This access not only likely causes trampling of redds and harassment of adult and juvenile fish, but also damages habitat. The damage regularly includes significant streambank trampling, heavy grazing of riparian vegetation, and trampling of adjacent springs and uplands.

The Pass Creek allotment has a history of cattle badly damaging Wet Creek, which contains the only remaining population of bull trout on the allotment. The record shows significant damage occurring in 2000–2009, leading the Forest Service to admit it needed to significantly reduce livestock impacts. SSF ¶¶ 22–27. The damage continued following the 2010 BO, including extensive trespass in 2011 and 2012 on both Wet Creek units, on a private inholding on Wet Creek, and within the Wet Creek exclosure, with the Forest Service admitting that cattle accessed Wet Creek and reduced the ability of the exclosure to support bull trout. SSF ¶¶ 31–32. WWP likewise documented cattle damage to spawning habitat within Wet Creek in 2012, including within the exclosure. *Id.*

Even in 2013—when the Forest Service and permittees presumably redoubled compliance efforts due to this litigation—pervasive trespass occurred, including early-season trespass in the Pine Creek unit, 50 cows in the "closed" Wet Creek unit, and trespass within the Wet Creek exclosure, allowing extensive access to lower and upper Wet Creek as well as to Coal Creek, a direct tributary to Wet Creek spawning grounds. SSF ¶¶ 35–36. Significant habitat degradation from this grazing was observed by

fisheries biologist Larry Zuckerman in September 2013. 2nd SPAR 56–91. He observed that lower Wet Creek's banks were actively "sloughing" due to cattle impacts, leaving many raw banks. *Id*. *See also* 2nd SPAR 132–140 (Fite 2013 photos of raw lower Wet Creek banks that can best be described as "destroyed"). He also observed extreme impacts from cattle to lower Coal Creek (which flows into Wet Creek spawning grounds), transforming it into a muddy pit. 2nd SPAR 60–67. The Forest Service likewise admitted this creek was "heavily impacted" by grazing in 2013. SPAR 3557. Finally, Zuckerman documented fresh livestock impacts in the "closed" upper Wet Creek unit, including hoof prints and manure in the riparian area, as well as bank damage, proving once again that cattle directly accessed Wet Creek spawning habitat. 2nd SPAR 66–78.

On the Mill Creek allotment, cattle damaged and disturbed spawning habitat in Warm Creek, Squaw Creek, Mill Creek, and Timber Creek in 2011 and 2012, including unauthorized use during the spawning period and disturbance at a redd site. SSF ¶¶ 46 (severe damage to Warm Creek). In May 2013, Zuckerman documented damage from 2012 grazing, including raw, trampled banks and heavy grazing of riparian plants. SSF ¶ 48.

Problems continued during the 2013 season, with repeated trespass in spawning units before and during spawning season. SSF ¶¶ 50, 55–56. Zuckerman observed extensive impacts from cattle in September 2013 on streams in the Timber Creek unit. SSF ¶ 56. He documented cattle hoof prints along Timber Creek and in the streambed itself, confirming that cattle were accessing the stream and thus likely disturbing juvenile and adult fish as well as trampling redds. *Id*. Furthermore, this access had caused

extensive bank damage in this unit (on which the 2013 BA declined to impose a bank alteration standard, 3rd SPAR 2021). 2nd SPAR 26, 38, 40, 42, 43, 46. Such damage was exacerbating heavy silt levels, with many streambeds nearly completely covered with silt, significantly degrading spawning habitat. *Id*. at 26, 29, 34, 40–43. During a rain event, Zuckerman observed sheets of muddy water running off a heavily grazed site into Timber Creek, increasing sediment. 2nd SPAR 25. In fact, Forest Service monitoring indicated that sediment levels soared in 2013. SSF ¶ 55. Fresh manure littered the riparian areas, contributing nutrient pollution. 2nd SPAR at 27, 44.

The record is clear that cattle are accessing streams occupied by bull trout and containing spawning habitat, leading to likely take in the form of redd trampling and harassment of adult and juvenile bull trout. This access is also degrading habitat by increasing sediment, water temperatures, and pollutants in the stream, removing cover in the form of undercut banks, deep pools, and overhanging riparian vegetation, and facilitating expansion of brook trout, all of which impair bull trout feeding, breeding, and sheltering behaviors. Dkt. 10 at 39–42, Dkt. 11 at 23. Such take will set back recovery and increase the risk of extirpation for local bull trout populations. Dkt. 10 at 42, Dkt. 11 at 26–27.

Such damage will continue if grazing is authorized in 2014, as demonstrated by the countless failed attempts and promises made by the Forest Service to reign in impacts and protect bull trout. The impacts continued in 2013, and there is no reason to believe they will not occur again in 2014.

CONCLUSION

For the foregoing reasons, Plaintiff WWP respectfully requests the Court grant its Motion for Summary Judgment.

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Respectfully submitted,

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