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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
MEDFORD DIVISION

CONCERNED FRIENDS OF THE WINEMA, **KLAMATH-SISKIYOU WILDLANDS CENTER**, **WESTERN WATERSHEDS PROJECT**, **OREGON WILD**, and **CENTER FOR BIOLOGICAL DIVERSITY**,

Plaintiffs,

v.

U.S. FOREST SERVICE, and **U.S. FISH AND WILDLIFE SERVICE,**

Defendants,

and

IVERSON MANAGEMENT LIMITED PARTNERSHIP,

Defendant-Intervenor.

Case No. 1:14-cv-737-CL

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT AND REPLY IN SUPPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Oral Argument Requested

Table of Contents

Pages

Table of Authorities

Cases

Regulations

INTRODUCTION

The Forest Service has known for years that the Chemult Pasture within the Antelope Allotment contains remarkable resources, including unique fens, numerous sensitive plants, and the threatened Oregon spotted frog. The record in this case shows that livestock have damaged these resources by trampling many fens that support the sensitive plants as well as portions of Jack Creek that are occupied by spotted frogs. Rather than changing grazing management to protect these resources, the agency has continuously relied on methods, such as fencing and water troughs, that have been unsuccessful at reducing impacts. Furthermore, the Forest Service has continued to delay completion of a new allotment management plan ("AMP") for almost ten years because it cannot seem to finish its environmental analysis, repeatedly starting and stopping the process and using various excuses to try and justify why it refuses to complete an analysis that it began in 2007.

The Forest Service and Intervenor Iverson focus in their briefs on the addition of fences and water troughs within the Chemult Pasture to attempt to defend the 2012-2015 AOIs, but fail to acknowledge that those measures have not been successful at reducing impacts to fens and spotted frogs. Unauthorized use behind fences was extensive in 2013 and 2014, causing damage to occupied spotted frog pools within lower Jack Creek. Trampling of fens was also extensive those years, and sites surveyed by the Forest Service in 2014 showed a downward trend compared to 2011. In contrast to Defendants' assertions, the record shows that much of that trampling was caused by cattle.

Defendants' briefs ignore other critical information in the record cited by Plaintiffs, including information about the uniqueness and fragility of the fen system here, the Forest Service's own water table data showing that fens dried out faster and more extensively in

droughts years of 2013-2014, photos and notes discussing heavy damage at fens in 2013 and 2014, comments by the Forest Service's own fen expert recommending permanent removal of cows from the Chemult Pasture, concerns by frog biologists of harm from cattle to spotted frog pools in Jack Creek as those pools dwindled during the 2013-2015 drought, and dropping spotted frog egg mass numbers in recent years. Thus, Defendants have not refuted Plaintiffs' claims that the 2012-2015 AOIs violated the National Environmental Policy Act ("NEPA") because they caused likely irreversible harm to resources before a new NEPA analysis was completed, and violated the National Forest Management Act ("NFMA") because they were not consistent with direction in the Winema Forest Plan.

Finally, Defendants have not countered many of Plaintiffs' arguments that the 2015 biological opinion was arbitrary and capricious. They simply restate information in the biological assessment and biological opinion rather than providing the support or explanations that are missing, and therefore fail to show a rational connection between the facts in the record and the biological opinion's conclusions that are needed for this Court to uphold the opinion. Because the 2012-2015 AOIs and 2015 biological opinion are unlawful, they must be set aside and the Court should order relief to remedy the harm that has already occurred and will continue to occur to the fragile resources on the Chemult Pasture due to livestock grazing.

ARGUMENT

I. THE 2012-2015 AOIs VIOLATED NEPA.

Federal Defendants try to confuse the Court as to what Plaintiffs' NEPA claim is about, asserting that Plaintiffs are challenging the timing of the NEPA process and/or demanding individual NEPA analysis for each AOI. Fed. Def. Br. at 21-24 (ECF # 92). As this court previously recognized, those arguments misrepresent Plaintiffs' claim. *Or. Natural Desert Ass'n*

v. Sabo, 854 F. Supp. 2d 889, 923 (D. Or. 2012). Instead, as the Court noted in *Sabo,* "plaintiffs do not make a specific claim based on the delay by the Forest Service in completing its revised AMP and/or EA. While plaintiffs refer to the Forest Service's delay in completing its AMP and EA in their briefs in support of summary judgment, the references are in the context of plaintiffs' contention that the Forest Service may not commit its resources pending new NEPA analysis, as defendants have advised the court the Forest Service is in the process of completing." *Id.* Four years later, the Forest Service is *still* in the process of competing this new NEPA analysis and AMP, and has authorized grazing during those four years that has continued to cause harm to the sensitive resources on the Chemult Pasture that could be irreversible, in violation of NEPA as this Court held in *Sabo*. *Id.* at 923-24.

The Forest Service's duty to avoid irreversible harm pending completion of its EIS is well-established in the caselaw as well as NEPA regulations. *Connor v. Burford*, 848 F.2d 1441, 1446 (9th Cir. 1988); *Metcalf v. Daley*, 214 F.3d 1135, 1143 (9th Cir. 2000); *W. Watersheds Project v. BLM*, 2009 WL 3335365, at *6 (D. Idaho Oct. 14, 2009); 40 C.F.R. § 1506.1(a) (prohibiting action that would have adverse environmental impact pending completion of EIS); 40 C.F.R. § 1502.2(f) (agency shall not commit resources prejudicing selection of alternatives before making a final decision). The only counter the Forest Service makes to this argument is that it has in fact prepared NEPA documents for a new AMP, citing to two EAs and a draft EIS. Fed. Def. Br. at 24-25. The problem with this defense, of course, is that none of those NEPA documents are final decisions. The Forest Service withdrew each of the EAs, and has not yet issued a final EIS. Declaration of Lauren M. Rule Ex. 18 (ECF # 11); AR 6203. The Forest Service admits that it is still working on the final EIS, which then must go through the administrative objection process before a final decision and new AMP are in place—a process

that will take several months. Fed. Def. Br. at 5-6; 36 C.F.R. § 218.26. Until this EIS is completed and a final decision is issued, the duty to avoid irreversible harm remains in place.

The Forest Service's final argument is that the agency's "NEPA sufficiency" reviews refute Plaintiffs' claim because the agency determined that "further NEPA procedures were not required" before issuing the 2012-2015 AOIs. Fed. Def. Br. at 25-28 (citing 2012, 2014, 2015 NEPA sufficiency reviews at AR 2895-96, 5298-99, 10332-33). The Forest Service cites a number of cases upholding agency decisions not to undertake supplemental NEPA analysis. Fed. Def. Br. at 26-27. This is a curious argument because the Forest Service has already begun a new NEPA analysis for the allotment, and in fact has recognized for years that it needs to update the outdated EA and AMP from 1995. *See Sabo,* 854 F. Supp. 2d at 923 (noting the Defendants did not dispute need for supplemental NEPA). Plaintiffs are not asserting that the agency must complete additional NEPA analysis beyond the one on which it is already working. They simply assert that until that ongoing analysis is completed and a final decision issued, the agency cannot continue to cause harm to resources that may be irreversible. Thus, the 2012-2015 NEPA sufficiency determinations that further NEPA is not required are entirely irrelevant.[1]

Intervenor correctly acknowledges the basis of Plaintiffs' NEPA claim, but asserts that the NEPA sufficiency determinations show the AOIs would not cause any harm to resources. Int. Br. at 8-9 (ECF # 94). These determinations relied on the Forest Service's specialist reports and the 2015 biological opinion, but as discussed in Plaintiffs' opening brief and below, those documents fail to establish that grazing under the 2012-2015 AOIs would not cause adverse effects. The record contains substantial information, largely ignored by Defendants, confirming

[1] To the extent the Forest Service is arguing that the NEPA sufficiency reviews supplant the need for *any* new NEPA analysis, that argument is baseless as Plaintiffs explained in their opening brief. Pl. Br. at 13-14 (ECF # 88).

livestock have been causing harm to fens, sensitive plants, and frogs. *See* Pl. Br. at 5-9, 14-15. Drought exacerbated this harm in 2013-2015, increasing concerns about impacts to fens due to dropping groundwater tables and impacts to frogs due to dropping water levels in Jack Creek. *See* Pl. Br. at 4-7, 14-15. More information also evolved about the unique and fragile nature of the fens on the Chemult Pasture, which will not return if destroyed. *See* Pl. Br. at 3-4.

Yet the Forest Service made no changes to grazing management in 2012-2014, other than authorizing a few additional fences in 2014, despite continuing evidence that fences were not adequately protecting spotted frog habitat or fens. AR 2904-10, 3704-10, 5150-57, 5169-71 (2012-2014 AOIs and 2014 fencing decision); AR 2507-08, 3361-63, 4496-99, 4544-46 (discussing unauthorized use 2011-2013); AR 2153-55, 3333-42, 4118-121, Rule Decl. Ex. 34 (2011-2013 documents noting damage to fens, rating numerous fens as poor or fair condition due to detrimental soil disturbance, and recommending removal of cattle from fen complex); AR 4286-87, 4288, 4333-35, 4396, Declaration of Theresa L. Simpson Ex. 20 (ECF # 13) (documenting conflicts between cows and frogs in lower Jack Creek in 2013).

Further problems and harm from livestock were documented in 2014. Even after new fencing and water troughs were added to the Chemult Pasture in 2014, repeated cattle trespass behind fences occurred, and cattle impacts near occupied spotted frog habitat were again documented as water levels dropped in Jack Creek. AR 5291-97, 6151-58, 6375-79, 6771-73, 6816-19, 6905-06, 7314-15, 8995-9001 (discussing trespass), AR 6832-52, 7034-125 (cattle impacts). Frog biologists had severe concerns about frog mortality due to the low water conditions—concerns that continued into early 2015 as the drought persisted. AR 5561, 6105-06, 6183, 6800, 6895, 7130, 7145-49, 7225, 9093, 9304, 9631-32, 9638, 10339.

Cattle also caused significant damage to many fens on the Chemult Pasture. The Forest

Service re-visited eight "high value" fens in 2014 and most transects showed increased bare soil, drier conditions and more trampling compared to 2011 as well as total soil disturbance much greater than 10%. AR 118-121, 7323-37, 8000-07; Second Declaration of Theresa L. Simpson ¶ 10, Ex. 3 (ECF # 89). These high value fens contain a large number of sensitive plant species. AR 4118-121. Although other fens were not re-surveyed by the Forest Service, Plaintiffs' expert documented widespread impacts to fens in 2013, particularly those that retained water later into the summer. Simpson Decl. ¶¶ 43-53, 63, Ex. 5.[2] And contrary to Defendants' assertions that trampling of fens was primarily caused by elk, the record shows that cattle were responsible for much of the damage. *See* AR 118-121 (noting elk use at only one of eight fens surveyed and that elk wallows no longer visible at another fen), AR 9000 (remote cameras showed that cattle impacts were greater than deer or elk impacts at 3 of 4 fens photographed); AR 4024 (Botany report, stating that trampling of fens by elk was typically less intensive than by cattle, with hoof prints shallower and less concentrated and trails more dispersed); AR 1644 (2010 fen report, stating that livestock grazing is generally the most evident detrimental disturbance in fens); Simpson Decl. ¶¶ 52-53 (explaining that elk impacts to fens are less severe than cattle impacts).

Despite all of this information, the Forest Service made minimal changes to grazing in 2015. It authorized the same number of cattle and only reduced the season of use by two weeks. AR 5152, 10418. It incorporated a 35% utilization standard for the greenline of Jack Creek, but much of Jack Creek was not authorized for use anyway because it was behind the riparian fence and thus a 35% utilization standard that applied to authorized grazing areas was largely irrelevant. AR 10418-19. The permit modification in 2015 that Defendants cite related to

[2] The Forest Service claims that expert declarations filed with Plaintiffs' preliminary injunction motion are extra-record evidence. Fed. Def. Br. at 31. However, these declarations were filed in May 2014, and thus were before the agency prior to issuance of the 2015 AOI.

monitoring water levels only in the perennial portion of Jack Creek. Fed. Def. Br. at 13, Ex. B at 1. The record shows, however, that cattle use along the *intermittent* portion of Jack Creek in 2013 and 2014—such as the lower Jamison and Davis Flat areas—was of great concern and caused damage to occupied frog habitat, concerns that continued into spring 2015 due to the ongoing drought. AR 4286-87, 4288, 4333-35, 4396, 6105-06, 6832-52, 7034-125, 7145-49, 9180-81, 9093, 9304, 9631-32, 10339; Simpson Decl. ¶¶ 87-88, 118-125, Ex. 7, Ex. 20. Finally, the new fence in the upper Moffit area also noted by Defendants excluded cattle from just a small area that is not even occupied by spotted frogs. Fed. Def. Br. at 13; FWS 1281, 2020, 2046 (maps of fenced area and spotted frog detections). Thus, the "protective" measures implemented in 2015 were not sufficient to avoid harm to spotted frogs given the evidence of conflicts between cattle and frogs in lower Jack Creek in 2013 and 2014 and the continuing drought in 2015, and also did nothing to prevent harm to the many unfenced fens on the pasture.

Given the uniqueness and fragility of the fens on the Chemult Pasture, which are unlikely to re-grow if destroyed, the dependence of many sensitive plants on the health of these fens, as well as the very small and declining population size, isolation, and distinct genes of the Jack Creek spotted frog population, grazing on the Chemult Pasture is still "causing harm to sensitive plant and animal species and their habitat which could be irreversible, thereby nullifying any alternatives which might be determined in the pending revised AMP aimed at protecting these plants, animals, and resources." *Sabo*, 854 F. Supp. 2d at 923; *See* Pl. Br. at 14-15. Accordingly, the Forest Service's 2012-2015 AOIs once again violated NEPA. *Id.* at 923-24.

II. THE 2012-2015 AOIs VIOLATED NFMA.

A. Defendants Have Not Shown Grazing under the AOIs Was Consistent with the Forest Plan Species Viability Requirement.

The Forest Service first asserts that Plaintiffs could not rely on the October 2014 wildlife

report to support its claim that the 2012-2014 AOIs were inconsistent with ensuring viable populations of spotted frogs across the forest because the report was post-decision. Fed. Def. Br. at 32. That argument fails because the October 2014 report was simply the latest version of the report, and prior versions contained almost identical language that impacts from trespass cattle would be negligible as well as identical viability conclusions. *See* Pl. Br. at 19; AR 7532-38, 7575-76 (October 2014 report), 2011-12, 2023 (July 2011 report), Simpson Decl. Ex. 24 at 63-67, 93-94 (ECF # 13) (Nov. 2013 report). Thus, Plaintiffs' argument applies to all of the AOIs.

The agency then argues that the 2015 AOI was not arbitrary and capricious because the agency was also guided by other key developments when issuing that AOI. Fed. Def. Br. at 32-33. This argument also fails, for two reasons. First, this explanation is a post-hoc rationalization that is not found in the record. The Forest Service does not cite to any document in the record that discusses these measures in the context of how they would ensure a viable population of spotted frogs in Jack Creek. *Id.* The only documents in the record that discuss viability are the wildlife reports cited by Plaintiffs. The Forest Service cannot rely on a post-hoc explanation that is not found in the record. *Humane Soc'y of United States v. Locke*, 626 F.3d 1040, 1049-50 (9th Cir. 2010); *Ctr. for Biological Diversity v. BLM*, 698 F.3d 1101, 1124 (9th Cir. 2012).

Second, these measures do not ensure that the Forest Service's grazing management will provide for a viable spotted frog population in Jack Creek. The population is currently very small and at risk of extirpation, which means it is currently below a viable population size. AR 7511, 7516, 7523, 7525, 6955-57, 8918, 10382. In fact, egg mass numbers in Jack Creek declined from 24 in 2014 to 18 in 2015, which was the lowest count since USGS began surveys. AR 7516, 10060, 10339. The record does not show that the 2015 measures are sufficient to improve conditions needed to increase the Jack Creek frog population to a viable level. As

explained above, the 35% utilization standard and new upper Moffit fence had little impact. The transfer of management of the private Moffit inholding again concerned just a small portion of frog habitat that has few recent egg mass detections. AR 5283, 10060. More egg masses have been detected in portions of lower Jack Creek where conflicts between cows and frogs were documented in 2013 and 2014. *Id.* The four new frog ponds will hopefully be a benefit to the species, but it is not known if or how successful they will be. *See* AR 10885 (noting that surveys found tadpoles but later surveys did not document any metamorphs, indicating there little or no reproductive success in 2015). And significant unauthorized use in 2014 resulted in just a two-week cut to the grazing season and promises by the permittee to better maintain fences and keep cows in authorized areas—the same promises that have not worked in the past. AR 9226-27.

Intervenor argues that the Court must give the agency's viability conclusion in the wildlife report deference, but that conclusion was not supported by the data or a reasoned explanation and therefore does not deserve deference. Int. Br. at 15; *Nw. Coal. for Alternatives to Pesticides v. EPA*, 544 F.3d 1043, 1052 & n.7 (9th Cir. 2008); *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 493 (9th Cir. 2011); *Sierra Club v. EPA,* 346 F.3d 955, 961 (9th Cir. 2003); *Earth Island Inst. v. Hogarth*, 494 F.3d 757, 766 (9th Cir. 2007). As discussed in Plaintiffs' opening brief, the report failed to explain how grazing would not impair viability of a population already below a viable level despite maintaining existing conditions and impacting individual frogs. Pl. Br. at 18-19; AR 7575-76. The Forest Service's point that the wildlife report concluded "the existing grazing system 'will not contribute to a negative trend in viability' for the Oregon spotted frog" fares no better because avoiding further loss of viability is not enough when the population is already below a viable size. Fed. Def. Br. at 30 (citing AR 4906). Without a viable population in Jack Creek, the agency is not "ensur[ing] the continued existence

of the species throughout its existing range within the planning area." AR 4013.

Given the track record of grazing management problems on the Chemult Pasture and impacts to spotted frog habitat—particularly in 2013 and 2014—the continuing drought in 2015 that made conflicts between cattle and frogs highly likely again, and the further decline of egg mass numbers between 2014 and 2015, it was not reasonable to conclude that the minimal changes to grazing management in 2015 would be sufficient to improve conditions to lead toward a viable population of spotted frogs in Jack Creek.

With regard to sensitive plant species, the Forest Service's brief focuses mostly on vascular plant species that are not found on the Chemult Pasture or are not affected by grazing and ignores species of bryophytes that the botany report admitted are on the pasture and may be impacted by grazing, such as *Helodium blandowii, Pseudocalliergon trifarium, Tomentypnum nitens,* and *Tritomaria exsectiformis*. Fed. Def. Br. at 34-35; AR 4021-22, 4087-93, 4118-120, 4142-43. The Botany Report concluded for these species, plus *Ulticularia minor,* that grazing may cause adverse effects but would not cause a loss of viability of the population. AR 4086-93.

The botany report reiterated that management actions "must not result in loss of species viability," and that a viable population "has the estimated numbers and distribution of reproductive individuals to ensure the continued existence of the species throughout its existing range within the planning area." AR 4013. The agency argues that it did not use a "proxy-on-proxy" approach to assess viability and thus the methodology for assessing population viability using habitat as a proxy discussed in *Native Ecosystems Council v. Tidwell* does not apply. Fed. Def. Br. at 35-36; 599 F.3d 926, 933 (9th Cir. 2010). The Forest Service's brief attempts to distinguish *Tidwell* based on the specific facts of that case, but the approach explained in *Tidwell* has been discussed in other cases as well. *Lands Council v. McNair*, 537 F.3d 981, 997-98 (9th

Cir. 2008) (when agency is using habitat assessment to determine viability of a species, it must both "describe the quantity and quality of habitat that is necessary to sustain the viability of the species in question and explain its methodology for measuring this habitat."); *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1250 (9th Cir. 2005) (Forest Service viability requirement may only be met where "both the Forest Service's knowledge of what quality and quantity of habitat is necessary to support the species and the Forest Service's method for measuring the existing amount of that habitat are reasonably reliable and accurate").

Here, while the agency surveyed for sensitive plants on the Chemult Pasture and other parts of the forest and discussed the condition of the habitat in areas where the plants were found, there was no discussion about the size of the existing plant populations and whether those populations were currently at a viable level. Instead, the Botany report just listed the number of sites and acres where each species was found on the forest and the Chemult Pasture. AR 4021-22. The report assumed that maintaining fens in good condition would maintain viable populations of plants. AR 4087-93. The Forest Service clearly used habitat—the number of fen sites and their condition—as a proxy for actual population counts to assess viability. Yet, it never identified what quantity of habitat was necessary to support a viable population for each sensitive plant species. Without knowing how many sites or acres of occupied habitat are necessary to have a viable population, there is no context to determine if maintaining the existing sites in good condition will support a viable population. The Forest Service's assertion that *Tidwell* is inapplicable is incorrect, and the viability assessment in the botany report did not comport with the requirements outlined by the Ninth Circuit.

Finally, Defendants try to downplay the 2014 data showing that condition of the eight high value fens had declined since 2011 and most would not be considered good condition—

information the Forest Service knew before issuing the 2015 AOI. Intervenors simply ignore the 2014 data, discussing only the botany report that relied on 2010 and 2011 data. Int. Br. at 13. The Forest Service claims that the damage to fens may not have been from cattle, and there is no data that grazing has impacted sensitive plants.[3] Fed. Def. Br. at 37. As explained above, the record shows that cattle cause most of the damage to fens. *Supra* p. 6. Moreover, because the sensitive plants on the Chemult Pasture primarily depend on fens for habitat, damage to fens from cattle would also harm the sensitive plants that rely on those fens. AR 1644, 2345, 4024-25, 4118-21; Rule Decl. Ex. 34. Indeed, the Forest Service's botany report calls for monitoring the condition of "high value" fens as its method for protecting sensitive plants. AR 4145-47.

In sum, Defendants have not refuted Plaintiffs' argument that the wildlife and botany reports and other evidence in the record do not support the conclusions that grazing the Chemult Pasture will maintain viable populations of all sensitive plants and Oregon spotted frog.

B. Defendants Ignore Significant Evidence About Impacts to Riparian Areas.

The Forest Service admits that the existing grazing system "would maintain, but generally not improve the current hydrologic conditions" on the Chemult Pasture, and is "expected to maintain fen habitats in a condition similar to the existing condition." Fed. Def. Br. at 29-30 (citing AR 3957, 4053, 4097). To attempt to show compliance with Forest Plan riparian and soil standards, the agency focuses on only one standard: the requirement not to exceed a total of 10% detrimental soil conditions in riparian areas. Fed. Def. Br. at 29, 37-39. The agency claims that the Forest Plan does not contain any provisions specific to fens or water tables and thus no other Plan directives apply here. *Id.* This interpretation of the Plan put forth in its brief

[3] The Forest Service also cites to 2015 data in its brief, Fed. Def. Br. at 37, but that data was not collected until October 2015, after the 2015 AOI was issued, and therefore is not part of the record for Plaintiffs' NFMA challenge. AR 10417, 11049.

is inconsistent with the agency's prior interpretation.

The botany, hydrology, and soils reports, which primarily analyzed effects of grazing to fens, each listed numerous Forest Plan directives related to riparian areas and soils, indicating that the agency believed all of those directives applied to fens. AR 4013-14, 4145, 3935-36, 2925-26. Indeed, fens are a type of wetland, and the Forest Plan specifically includes protection of "wetlands" in Soil and Water direction. The Forest Plan requires the agency to: manage wetlands and their riparian vegetation to prevent soil erosion and to maintain or improve riparian/wetland habitat for dependent aquatic species; protect habitat and hydrologic values of wetlands; and maintain or improve hydrologic conditions and riparian habitat in riparian ecosystems. 2008 AR 82, 140. The botany report notes that the Forest Plan also requires protection of "moist and wet meadows." AR 4013, 4145. The agency's narrow reading of the Forest Plan in its brief is contrary to the agency's prior interpretation and the plain language of the Forest Plan and thus deserves no deference. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 N.30 (1987); *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 962 (9th Cir. 2005).

Defendants attempt to downplay the information in the record about degraded conditions at many fens discussed by Plaintiffs but this data is critical information the agency failed to consider. Pl. Br. at 21-22; Int. Br. at 17-18; Fed. Def. Br. at 38-39. Even though fens may make up a small percentage of the total pasture acreage, they are important resources that provide habitat for numerous sensitive species that depend on this particular type of wetland.

The botany report stated that meeting proper functioning condition (PFC), or trending toward PFC, is consistent with the goal to maintain/protect or improve fen habitats. AR 4145. The agency's objective for fen management is to maintain high value fens at PFC and improve those below PFC, with areas in "continued fair to poor conditions" needing improvement. AR

4145-46. Desired conditions for fens include water tables that do not drop below -20 cm for most of the year and less than 10% of the fen with detrimental soil disturbance. AR 4145. Although the botany report called for an assessment after five years of monitoring, it stated that "[p]rior to the 5 year assessment, administrative adjustments may be used to manage grazing to maintain or improve fen condition." AR 4146.

The 2010/2011 data showed that 14 fens were below PFC due to >10% detrimental soil disturbance and had significant bare soil, pedestaling, and soil compaction; and 2014 data showed that bare ground and trampling *increased* at most high value fens and total detrimental soil disturbance was well above 10%. AR 3921, 3925-26, 4025, 4118-121 (2010/2011 assessments), 118-121 (2014 data). Thus, there was a downward trend at almost all of the high value fens. Moreover, water table data showed that water tables at most fens monitored dropped more in 2013 and 2014 compared to 2011 and 2012 due to the drought, with many going below the -20 cm threshold early in the summer. *See* Pl. Br. at 21-22. This meant fens were beginning to oxidize and degrade and were no longer suitable habitat for most groundwater-dependent sensitive plants. AR 4145, 4147, 6337-38, 5104-05. The combined impacts of dropping water tables and trampling of soils by cattle lead to accelerated drying of fens. Plaintiffs' experts provided more evidence in 2014 of widespread damage to fens from cattle and drought. Simpson Decl. ¶¶ 43-53, Ex. 5; Cummings Decl. ¶ 69; AR 5947-55, 9604, 10358-67.

The agency has not provided a rational explanation for not making any "administrative adjustments" to grazing in 2015 to protect fens given the highly concerning results of the 2014 monitoring and continuing drought, or even shown that it considered that data before issuing the 2015 AOI. The agency's assertion that its AOIs were consistent with Forest Plan direction for riparian areas and soils was not supported by the facts or a reasonable explanation.

III. THE 2015 BIOLOGICAL OPINION IS ARBITRARY AND CAPRICIOUS.

Throughout their ESA discussion, Defendants repeatedly assert the mantra that courts must give Fish and Wildlife Service the highest deference for its technical determinations. Nevertheless, "the deference accorded an agency's scientific or technical expertise is not unlimited. Deference is not owed when the agency has completely failed to address some factor consideration of which was essential to making an informed decision." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 799 (9th Cir. 2005). Furthermore, courts must ensure that there is a rational connection between the facts in the record and the agency's conclusions. *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 525 (9th Cir. 2010). Defendants have not shown the biological opinion here satisfies those standards.

A. Defendants Have Not Cited to Additional Information in the Record Necessary to Fully Explain the Proposed Action.

Defendants' brief addresses Plaintiffs' claim about information missing from the description of the proposed action by citing to various pages in the biological opinion and biological assessment, but those pages do not contain the necessary information either. Pl. Br. at 23-24; Fed. Def. Br. at 40-41. Although the assessment stated that the Chemult and North Sheep pastures would follow a deferred rotation system on a two-year schedule, it said nothing about the "periodic" rest relied on in the biological opinion. AR 1330. Further, the assessment discussed potential benefits of a "high-intensity/low frequency" grazing system without describing what the system entails or how it would be implemented. AR 1331. Although these may be "commonly understood" terms to the Forest Service and permittee, they are not necessarily common terms to Fish and Wildlife Service biologists, the Court, or the public. *See* Int. Br. at 20. Indeed, FWS internal comments raised these same questions. AR 1519-20.

Nor was a further explanation provided for what it means to "discourage" grazing or what

conditions would "suggest" such an action is necessary because FWS's citation to the assessment mirrored the ambiguous language in the opinion. Fed. Def. Br. at 41 (citing AR 2029, 1303); *see* AR 1519 (FWS questioning meaning of this provision). It is also not clear that this item within the proposed action is the same as the water level monitoring to which FWS's brief refers; and even if it was, the description of the water level monitoring is equally as vague regarding when or what changes to grazing would occur based on the monitoring. Fed. Def. Br. at 41; AR 1361.[4]

FWS similarly did not provide any additional useful information about key monitoring information. Stating that key areas would be in riparian areas, meadows, and fens does not provide the detail needed to assess whether the utilization monitoring would sufficiently protect Oregon spotted frog habitat given the species' varying habitat needs, the varying conditions within riparian areas along Jack Creek, and the confusion even within FWS about what an "average 35% utilization standard" means. Fed. Def. Br. at 41; AR 1397, 1402; *see infra* p. 26 & n.6. Given the agencies' heavy reliance on the 35% utilization standard to protect spotted frogs, more detail is needed to assess whether that reliance is reasonable. For instance, spotted frog habitat occurs along the length of Jack Creek in both the Chemult and North Sheep pastures, but there is no information about how many key areas will occur along Jack Creek or where they would be. *See* AR 2020 (map of habitat). Having just one or two key areas along the entire creek would provide substantially less information and less protection to frogs than having multiple key areas that are related to occupied frog habitat.

Regarding other monitoring mentioned in the proposed action, specifying the frequency of surveys does not answer the questions of what standards the Forest Service plans to apply and

[4] The citation to FWS 2066 is inapplicable because that monitoring requirement was imposed as a term and condition by FWS in the incidental take statement and was not part of the proposed action analyzed in the opinion.

what actions, if any, it would take if standards are not met. Pl. Br. at 24; Fed. Def. Br. at 41. The "flexibility" in grazing management touted by Intervenor is only reasonable if that flexibility has some constraints identified in the monitoring strategies. Int. Br. at 21-22; *W. Watersheds Project v. U.S. Forest Serv.,* 2006 WL 292010, at *9-10 (D. Idaho Feb. 7, 2006) (overturning reliance on adaptive management strategy to ensure compliance with Forest Plan standards because agency did not adequately explain strategy and its protocols). Without this missing information, FWS could not accurately and fully assess the effects of the proposed action.

B. Mitigation Measures are Uncertain and Ineffective to Protect Spotted Frogs.

Defendants have not shown that the mitigation measures on which the biological opinion relied were reasonably certain to be effective at protecting spotted frogs in Jack Creek. First, in order to graze the Jack Creek Riparian pastures, those pastures must meet certain habitat objectives that the Forest Service and permittee were negotiating. FWS 2026, 2059. FWS relied on this provision despite not knowing what the objectives would be, and therefore whether those objectives would meet the conservation needs of the frog. FWS 2026, 2049. FWS claims that it need not be *certain* that mitigation measures will be effective, but here FWS could not make any kind of assessment about the effectiveness of the restoration objectives because it did not even know what the objectives would be. Fed. Def. Br. at 43 (citing *Greenpeace Action v. Franklin,* 14 F.3d 1324, 1336-37 (9th Cir. 1992)). FWS could not rationally rely on the restoration objectives to protect the frog when those objectives were unknown.

Second, Defendants have not shown that reliance on fences to minimize impacts to frogs was reasonable. To try and refute Plaintiffs' argument, FWS asserts that fences have improved habitat conditions along Jack Creek. Fed. Def. Br. at 43-44. Plaintiffs do not deny that fences have reduced the extent of grazing along Jack Creek and improved riparian habitat conditions,

which is a benefit to spotted frogs. However, despite the overall improvement to habitat, harm to frogs has continued to occur due to cattle repeatedly getting behind fences and congregating at frog pools, as shown in 2013 and 2014. Simpson Decl. ¶¶ 94-96, 102-103, Ex. 20; AR 4396-97, 4496-99, 6832-52. Intervenor claims that livestock trespass has decreased because of efforts to improve fences, Int. Br. at 23-25, but the record contradicts that claim with numerous instances of documented trespass in 2013 and 2014. *See* Pl. Br. at 25-26 (citing trespass records, including numerous violations in 2013 and 2014). The history of trespass behind fences on this pasture is long and well-documented in the record.

Similarly, Defendants assert that water troughs will help distribute cattle away from Jack Creek, citing to similar assumptions in the record but no evidence that this tactic has actually been successful. Fed. Def. Br. at 45; Int. Br. at 25. The only relevant evidence in the record shows that it has not been successful. *See* AR 6490-91; Pl. Br. Ex. B (ECF # 88) (repeated trespass behind Jack Creek riparian fence occurred in 2014 despite new troughs); AR 7034-125 (report from Plaintiffs' expert showing extensive cattle use of frog pool in lower Jack Creek despite near-by water trough). Given the repeated trespass of cattle behind fences—including in 2013 and 2014, and evidence that water troughs were not effective at distributing cows away from Jack Creek in 2014, FWS was unreasonable in relying on these management tools.

Finally, Defendants cite two articles by Holecheck and the Jack Creek Site Management Plan to justify reliance on the 35% utilization standard. Fed. Def. Br. at 45, Int. Br. at 26. But these citations do not answer the questions raised in Plaintiffs' brief about the appropriateness of heavily relying on this single standard given that harm to frogs can occur even with light to moderate grazing use, and frog habitat needs and riparian conditions along Jack Creek vary. Pl. Br. at 26-28; FWS 2051, 2057, 384. The Holecheck articles are not tied to Oregon spotted frogs

at all, and the Jack Creek Site Management Plan contains a very short explanation for the 35% utilization standard that does not address Plaintiffs' points. FWS 3422, 3427, 384.[5]

Most of the documented harm to frogs in recent years has occurred due to a few cattle congregating at frog pools in the intermittent portion of Jack Creek. The biological opinion and other documents in the record specifically identified cows congregating at the same remnant pools as frogs during low water conditions as one of the biggest threats to frogs in Jack Creek, and also recognized that cattle can impact riparian areas almost immediately upon entry into a pasture. FWS 7, 50-51, 54-55, 62, 2044, 2051, 2055. Given the large impact a small number of cows can have on spotted frogs, and the quick damage cows can cause to riparian areas once they enter a pasture, FWS still has not explained how an "average" utilization standard that will allow light to moderate grazing throughout the pasture will protect Jack Creek spotted frogs.

C. Defendants Have Not Refuted Other Flaws in FWS's Effects Analysis.

FWS and Intervenor both claim that allowing some grazing in spotted frog habitat can benefit the frog by reducing biomass and opening up breeding habitat where vegetation is too dense. Fed. Def. Br. at 46, Int. Br. at 27. They cite to general statements in the record about this potential beneficial effect but do not cite to any evidence that this condition exists in Jack Creek. The biological opinion noted two small sites of reed canarygrass in the action area, which had been treated with herbicide and do not appear to be expanding, while the biological assessment noted just one site. FWS 2048, 1317. There is no evidence that these sites occur in breeding habitat. *Id.* In fact, the biological opinion showed that reed canarygrass was not considered a threat at all in the Williamson sub-basin, where the Jack Creek population occurs, whereas

[5] New explanations for the 35% utilization standard offered in the Declarations of Laurie Sada and Benjamin Goodin (ECF # 96, 97) are improper post hoc rationalizations and thus cannot support the biological opinion. *See* Pl. Opposition to Motion to Strike at 7 (filed herewith).

grazing was one of the primary threats. FWS 2040-42. Moreover, the new site of reed canarygrass mentioned in FWS's brief is on the permittee's private lower Jamison inholding, which has already been subjected to heavy grazing for years. AR 5713. Defendants do not cite to any information in the record showing that reed canarygrass or other plants are causing excess biomass at spotted frog breeding sites that needs to be treated through grazing.

One of the biggest problems with the biological opinion's analysis of grazing effects is its discussion about "disturbance" of frogs. The biological opinion admitted that cattle can trample, disturb, and displace frogs, metamorphs, tadpoles, and frog eggs, particularly during low water conditions when cattle and frogs congregate at the same pools. FWS 2056-57. Yet, when estimating "the number of individual Oregon spotted frogs that may be affected by the proposed grazing," FWS made several crucial errors that undermine its analysis. FWS 2057-60.

When estimating the number of frogs that would likely be killed by trampling, FWS assumed that no frogs would occur in the lower Jamison and North Sheep pastures. FWS 2058-59. FWS claims in its brief that this assumption was irrelevant to the analysis. Fed Def. Br. at 47. Yet the biological opinion clearly divided up its analysis by pasture. The opinion stated that it converted the data from frog surveys "into a number of individuals that would be expected to occupy *each pasture* within the allotment. . . . The Service used the range of detections from [2010-2014] for adult, juvenile, and metamorph life histories and assumed that the proportion of detections from *each pasture* (Table 9) was representative across years." FWS 2058 (emphasis added). The opinion then provided Table 10, which showed "Estimated maximum number of individual adult, juvenile, metamorph, and tadpole life stages of the Oregon spotted frog likely to be exposed to cattle grazing within *each pasture* of the Antelope allotment based on data from Table 6 for the years 2012-2014; 2010-2011 data were not available." *Id.* FWS does not explain

in its brief why it included this information in the biological opinion if it was irrelevant. Further, if the pasture analysis was truly irrelevant, then it was misleading to include it in the analysis.

Additionally, FWS's analysis undoubtedly underestimated the percentage of detections from the North Sheep pasture because it based that percentage on data from 2012-2014, but it was not known that frogs occupied North Sheep pasture until Plaintiffs' expert discovered them there in 2013. AR 4010-11, 5084. Accordingly, there would have been no detections from the North Sheep pasture in 2012, skewing the percentage of total detections that came from that pasture compared to other pastures that had data for all three years. As discussed in Plaintiffs' opening brief, assuming that no frogs would be exposed to cattle grazing in the lower Jack Creek and North Sheep pastures was unreasonable given the information in the record documenting frogs in those pastures and actual harm to them from grazing in 2013 and 2014. Pl. Br. at 29-30. In fact, 20-25% of the egg masses discovered in 2014 and 2015 were in Davis Flat within the North Sheep pasture. AR 5283, 10060. FWS's analysis is not entitled to deference, as Intervenor claims, when it is not supported by the data or a rational explanation. Int. Br. at 29; *Nat'l Wildlife Fed'n,* 422 F.3d at 799; *Wild Fish Conservancy,* 628 F.3d at 525.

The next problem with FWS's analysis is the determination about how many frogs would be killed or injured by grazing. FWS assumed that 3% of the frogs exposed to cattle in each pasture would be killed by trampling. FWS and Intervenor argue that the biological opinion provided support for that figure even though the opinion essentially admitted it is a guess because there is no data to support it. Fed. Def. Br. at 47-48; Int. Br. at 29; FWS 2058-59. Even more troubling than the lack of scientific support for the estimate of frogs killed by trampling is the lack of any estimate of how many frogs would be disturbed or displaced due to cattle harassing them or harming their habitat. The biological opinion discussed these types of impacts

but then failed to estimate how many frogs on the allotment would be affected by that type of non-lethal take. FWS 2056, 2059, 2060. Certainly the likelihood of disturbance or displacement from cattle is much higher than actual death by trampling, which would result in a much higher estimate of total frogs affected by grazing. In fact, the record shows that FWS originally included non-lethal take when estimating the effects of grazing on individual frogs, and indeed the estimate of non-lethal take was much higher than lethal take. FWS 1607, 1686. Lethal take was estimated at 2 adults, 4 juveniles, 2 metamorphs, and 237 tadpoles while non-lethal take was estimated at 59 adults, 124 juveniles, 77 metamorphs, and 7663 tadpoles. *Id.*

FWS offers several excuses in its brief to refute Plaintiffs' argument but none of them directly addresses Plaintiffs' point that the final biological opinion failed to estimate the amount of non-lethal take that would occur from the proposed action. Fed. Def. Br. at 48-49. Nor does FWS explain why it abandoned non-lethal take in its analysis when it clearly recognized the potential for those effects, and the much higher likelihood of them occurring compared to lethal take. FWS 1607, 2056, 2059. In fact, biologists in 2013 observed direct conflicts between cattle and frogs at intermittent pools that resulted in habitat degradation and almost certainly led to disturbance and displacement of frogs at Davis Flat. AR 4396; Simpson Decl. Ex. 20. The biological opinion admitted that its estimate of 3% lethal take was speculative and not based on data, so the speculative nature of estimating non-lethal take is not a reasonable excuse for omitted that factor from the analysis. FWS's failure to include non-lethal take in its assessment of how many frogs would be affected by grazing was a significant omission that drastically underestimated the impacts of the proposed action, and entirely undercuts the biological opinion's conclusion about effects. FWS 2059-60, 2063.

D. Defendants' Explanations for the Jeopardy Conclusion were Missing from the Biological Opinion.

Plaintiffs pointed out numerous omissions and irrational statements in the biological opinion's jeopardy analysis in relation to conclusions about the Jack Creek frog population and the species as a whole. Pl. Br. at 31-32. Defendants try to offer additional support for the jeopardy conclusion, but the necessary explanation must be in the opinion itself, and it was not.

Defendants primarily argue that effects to the Jack Creek population are irrelevant because the loss of that population would not affect the survival and recovery of the species rangewide. Fed. Def. Br. at 49-50; Int. Br. at 31. However, the biological opinion did not discuss what the loss of this particular population would mean to the recovery of the species, and Defendants' post hoc litigation explanations cannot substitute for a reasoned analysis in the biological opinion. *Humane Soc'y,* 626 F.3d at 1049-50.

This situation is similar to that in *Wild Fish Conservancy v. Salazar*, where the Ninth Circuit ruled the jeopardy analysis was arbitrary and capricious. There, the court found continued impacts to a small local bull trout population did not support a finding that the action would not reduce the likelihood of survival *and recovery* of the population. 628 F.3d at 527. The court explained, "the fact that the local population has survived since 1940 does not provide any information about how much longer it can hold on. . . . Moreover, even before a population is extinguished, it may reach a point at which it is no longer recoverable: 'a species can often cling to survival even when recovery is far out of reach.'" *Id.* (internal quotations omitted).

The biological opinion here likewise did not explain how the proposed grazing would not reduce the likelihood of the population's recovery when it admitted the grazing would continue to have adverse effects and cause take of frogs, which would increase in drought years, and the population is already at a very small size. FWS 2063. The fact that the effects of grazing "are not likely to occur at such a level that results in extirpation of the frogs in the Jack Creek area"

ignores the requirement to also analyze effects on recovery, as the Ninth Circuit explained in *Wild Fish Conservancy* and *National Wildlife Federation.* 628 F.3d at 527; 524 F.3d at 931-33.

Additionally, *Wild Fish Conservancy* held that the jeopardy conclusion was arbitrary and capricious because the biological opinion did not discuss the importance of a particular population to the species, or how the loss of that population would affect the survival and recovery of the species as a whole. 628 F.3d at 528-29. The biological opinion here lacks a similar analysis, considering only the number of frogs that might be lost compared to the total number of frogs in the species, and ignoring other issues that could be vital for the recovery of the species. FWS 2063; Pl. Br. at 32. The biological opinion did not make a rational connection between the facts and its conclusions and omitted important considerations from its jeopardy analysis, rendering it arbitrary and capricious. *Wild Fish Conservancy,* 628 F.3d at 527-29.

E. The Incidental Take Statement is Flawed.

FWS offers no rebuttal to Plaintiffs' arguments that the Incidental Take Statement ("ITS") grossly underestimated the level of expected take by ignoring non-lethal take, and thus the ITS's conclusion that the estimated level of take would not cause jeopardy was also unreasonable. Pl. Br. at 32-33; Fed. Def. Br. at 51.

In response to Plaintiffs' argument that the 35% utilization standard was an improper surrogate to measure take, FWS simply states that the 35% standard has published scientific support. *Id.* But as explained above, none of the cited science discussed the various habitat needs of spotted frogs or explained how an average 35% utilization standard would avoid trampling and disturbance of frogs that can occur from just a few cows shortly after they enter a pasture. *Supra* pp. 19-20. Even assuming light to moderate grazing use generally allows for an appropriate amount of vegetation along the greenline of Jack Creek in relation to spotted frog

needs, the biggest threat to frogs is localized trampling, disturbance, and displacement that can occur with just a few cows congregated at frog pools. There is no explanation as to how the average 35% utilization standard will prevent or limit those localized impacts. Accordingly, the agency has not articulated a rational connection between the surrogate and the taking of the species. *Or. Natural Res. Council v. Allen,* 476 F.3d 1031, 1037-38 (9th Cir. 2007).

FWS then fails to provide a rational explanation for why reinitiation of consultation would occur only if utilization reached 45% two years in a row in the same pasture. FWS 2068. FWS asserts that the 35% utilization average applies over the entire ten-year span of the biological opinion. Fed. Def. Br. at 52. It appears FWS is arguing in its brief that each pasture can exceed 35% utilization in numerous years, as long as the average utilization over the course of the entire ten years does not exceed 35% utilization. This interpretation of the "average 35% utilization" standard is clearly at odds with general grazing management practices and other assumptions in the biological assessment and opinion, and in fact seriously undercuts FWS's reliance on the 35% utilization standard to protect spotted frogs. Moreover, FWS's brief refers to an "outer limit for annual grazing utilization" and "annual utilization caps" for the first time, without explaining how they relate to the "average 35% utilization over this [ten-year] span."

Utilization standards apply on a yearly basis, and the assessment and opinion note that cattle will be removed from a pasture once the standard is reached. FWS 1359, 2023-24, 2029. The biological opinion states that "[t]he use levels shown are the maximum utilization allowed on desirable grass and sedges for the *planned season of use*. For Oregon spotted frog habitat within the Jack Creek watershed (on each of the three pastures), utilization standards will be set to an average of 35%." FWS 2024 (emphasis added). Later it states, "[t]he Forest's proposed action allows cattle to graze within occupied Oregon spotted frog habitat for a period or until an

average 35% utilization standard has been met, at which time cattle would be moved to a different pasture." FWS 2056-57. These statements contradict FWS's new assertion that the utilization standard only has to be achieved as an average over ten years. Overall, this post hoc explanation only creates more confusion about what an "average 35% utilization standard" means, underscoring the arbitrariness of the agency's reliance on this standard. *See supra,* p. 17.

Given FWS's unreasonable assertion in its brief, it has not provided a rational explanation for why take would only be exceeded if there was 45% use in two consecutive years when it had stated previously that the surrogate for estimating take was a 35% use standard and that "[i]f the average utilization rate exceeds 35%, additional frogs are likely to be killed by cattle trampling." FWS 2059, 2065, 2068. FWS did not provide a rational explanation or support for its method of measuring the exceedence of take in the ITS.

IV. AN INJUNCTION IS NECESSARY TO PROTECT FROGS AND FENS FROM IRREPARABLE HARM.

A. The Court Has The Authority to Rule on Plaintiffs' Remedy Request.

Plaintiffs properly asked the Court to include remedial relief in its Order if it finds Federal Defendants violated the ESA, NEPA, or NFMA. Pl. Br. at 34-35. In environmental cases such as this, courts routinely rule on motions for summary judgment and the appropriate remedies in the same order. *Ctr. for Biological Diversity v. Otter*, 2016 WL 233193, at *1, 4, 7-9, 11 (D. Idaho Jan. 8, 2016); *Oregon Wild v. BLM*, 2015 WL 1190131, at *1, 13 (D. Or. March 14, 2015); *Native Ecosystems Council v. U.S. Forest Serv.*, 866 F. Supp. 2d 1209, 1213, 1221, 1233-4 (D. Idaho 2012); *W. Watersheds Project v. Rosenkrance*, 2011 WL 39651, at *13-15 (D. Idaho Jan. 5, 2011); *Native Ecosystems Council v. Krueger*, 946 F. Supp. 2d 1060, 1076-7, 1101 (D. Mont. 2013); *W. Watersheds Project v. Bennett*, 392 F. Supp. 2d 1217, 1221, 1228-9 (D. Idaho 2005).

Concurrent summary judgment and remedy rulings are particularly warranted in cases like this, where the agencies' legal violations are causing irreparable harm to sensitive and threatened species. *See Otter*, 2016 WL 233193, *8-9 (finding that the likelihood of future take of a threatened species "satisfied the irreparable harm prong of the injunction test"). For example, a judge in the District of Idaho found that "the decline in the population of a sensitive species" warranted "the immediate issuance of an injunction" to stop livestock grazing on 28 allotments. *Bennett*, 392 F. Supp. 2d at 1229. Similar circumstances are present here: an injunction is needed to address the precipitous decline of the threatened frog population and increasing damage to unique and fragile fens. *See Second Simpson Decl*., ¶¶ 31-34. Delaying a remedy ruling will likely prevent Plaintiffs from obtaining relief before the agency authorizes grazing in 2016. Because Plaintiffs may appropriately seek relief against impending irreparable harm for the violations alleged here, the Court should consider Plaintiffs' request for relief when ruling on the cross-motions for summary judgment.

B. Defendants' ESA Violations Warrant an Order Preventing the Forest Service From Issuing Future AOIs on the Chemult Pasture.

If Plaintiffs prevail on their ESA claim, the APA commands that the BiOp be set aside. *See* 5 U.S.C. § 706(2)(A) (Under the APA, courts "*shall* …hold unlawful and *set aside* agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.") (emphasis added); *Ctr. for Biological Diversity v. BLM*, 698 F.3d 1101, 1127-28 (9th Cir. 2012) (vacating legally flawed and inadequate BiOp) ("CBD"); *Pac. Rivers Council v. Shepard*, 2012 WL 950032, at *4-5 (D. Or. Mar. 20, 2012). No "rare circumstances" are present that warrant departure from this presumptive remedy under the APA. *See Humane Soc'y*, 626 F.3d at 1053 n.7. Accordingly, the Court should vacate and remand the BiOp.

In the absence of a lawful and effective BiOp, the Forest Service cannot fulfill its legal

duties under sections 7 and 9 of the ESA, which require the agency to ensure against jeopardy and adverse modification of critical habitat and to avoid unlawful take of listed species. *See CBD*, 698 F.3d at 1108, 1127-28 (explaining "an agency cannot meet its section 7 obligations by relying on a Biological Opinion that is legally flawed" and that once Biological Opinion loses its validity, ITS is no longer valid to authorize take of species); *Wild Fish Conservancy*, 628 F.3d at 532 (agency cannot rely on an invalid BiOp to meet its duty to ensure against jeopardy). Indeed, in December 2014, after the frog was listed as threatened under the ESA, the agency represented to this Court that it would not authorize grazing "until ESA consultation is complete." Dkt. 50-2; Dkt. 54, p. 2. Likewise, if the Court overturns the biological opinion here, it should prevent the Forest Service from issuing new AOIs for future grazing on the Chemult Pasture until a new ESA consultation is completed because any AOI issued without a biological opinion would violate the agency's substantive ESA duties. *See* Pl. Br. at 34-35; *see also Krueger*, 946 F. Supp. 2d at 1076 (holding that a project "cannot go forward" until consultation is complete because the project "would constitute an irretrievable commitment of resources that might be contrary to the result of the consultation process and could lead to irreparable harm").

An injunction is also necessary to prevent the irreparable harm that grazing has caused and is causing to resources and Plaintiffs. Plaintiffs have been and will continue to be irreparably harmed by livestock grazing that impairs the frog and its habitat in Jack Creek. *See generally* Second Declaration of Jayne Goodwin (ECF # 90); Second Declaration of Charles H. Wells, Jr. (ECF # 91); Declaration of George Wuerthner (ECF # 18); *see also League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 764-65 (9th Cir. 2014) ("LOWD"). Importantly, the Defendants deserve no deference on issues of irreparable harm. *Sierra Forest Legacy v. Sherman,* 646 F.3d 1161, 1185-86 (9th Cir. 2011).

The record is replete with evidence that cattle grazing on the Chemult Pasture has harmed spotted frogs and their habitat during multiple grazing seasons. *See, e.g.,* Pl. Br. at 6-7. For example, in 2013, cattle congregated at the limited pools in lower Jack Creek that remained during the drought, which caused significant harm to spotted frogs and their habitat. Simpson Decl. ¶¶ 118-125, Ex. 7, Ex. 20; AR 4286-87, 4288, 4333-35, 4396. In 2014, drought conditions worsened and cattle were documented in or near occupied frog habitat, which raised serious concerns about frog mortality. AR 5561, 6105-06, 6183, 6800, 6895, 7130, 7145-49, 7225. For example, a Forest Service biologist documented cattle impacts to frog habitat in lower Jack Creek as water levels dwindled. AR 6832-52. Ms. Simpson also photographed cattle within occupied frog habitat on Jack Creek in the Lower Jamison area during five days between August 24 and 31, 2014. AR 7034-7125. Her photographs reveal cattle perpetuating degraded conditions, trailing in the creek, climbing and grazing on creek banks, trampling and destabilizing banks, and removing vegetation. AR 7036.

Drought conditions persisted into 2015, and that year was the worst year on record for the Jack Creek frogs and their habitat. AR 9093, 9304, 9631-32, 9638, 10339. USGS documented the lowest number of egg masses found (18) since their surveys began, declining from 24 in 2014, despite the recent discovery of new frog locations at Davis Flat. AR 10060, 10339; Second Simpson Decl. ¶ 32. In spring 2015, USGS expert Mr. Pearl found that water levels in Jack Creek were the worst he had seen in his twenty-five years working with frog. AR 9304, 9638. With such low breeding numbers and inhospitable conditions in 2015, the Jack Creek population "has dropped to a very low, unstable level, making the population highly susceptible to extirpation." Second Simpson Decl. ¶ 32. Grazing exacerbates these risks to the frog. *Id.* Thus, any additional harm from grazing, even to a single frog or small portion of frog habitat,

could lead to extirpation.

Despite this ongoing and significant harm from grazing combined with drought, the Forest Service has continued authorizing livestock use on the Chemult Pasture without adequate protections for the frog. Pl. Br. at 8-9, 25-26 (describing the ineffective management tools the agency has relied on in the past). Most troubling, cattle have repeatedly trespassed behind fences and outside of authorized areas to access Jack Creek. *Id.*; AR 2507-08, 3361-63, 4496-99, 4544-46, 6778-95, 8995-9001. In 2015, trespass and fence problems continued to be a problem with other exclosures throughout the Chemult Pasture, highlighting the unreliability of the agency's fences and exclosure management. *See* AR 10617, 10620 (identifying "some of the most glaring fence issues (but not all of them)"), 10724-25, 10762-64, 10824, 10827-29, 10841 (explaining "fences are NOT to Forest Specification"), AR 10835, 10858-9, 10913-4, 10932-3, 10938, 10943, 10946, 10950, 11225-27, 11319, 11373. Collectively, this long history of trespass shows the Forest Service cannot ensure that fences and limitations in AOIs will be effective at excluding cattle from spotted frog habitat. A similar history of non-compliance with mitigation measures led Judge Haggerty to enjoin grazing on seven allotments until a "legally adequate" biological opinion was issued. *See Oregon Nat. Desert Ass'n v. Tidwell*, 2010 WL 5464269, at *3 (D. Or. Dec. 30, 2010).

Other mitigation measures will not prevent harm to frogs in 2016. As explained above, water troughs were not effective at keeping cows out of Jack Creek in 2014, the new Moffit exclosure protects only a small, unoccupied portion of Jack Creek, and the new frog ponds were not successful for reproduction in 2015. *Supra* pp. 5, 7-9; AR 6904, 7036, 2020, 10885, 10910. Authorized grazing on 23 acres of frog habitat open to livestock, plus the habitual trespass of cows into unauthorized areas of Jack Creek, has caused degradation of habitat and disturbance of

frogs on a yearly basis, and will cause further harm this year absent an injunction. *See* AR 7467, 7532 (approximately 23 acres of frog habitat are grazed under current grazing management, resulting in negative effects to spotted frogs); AR 4396-97 (explaining "agency biologists are concerned with continued trampling" and "continued loss of water from cattle" in lower Jack Creek during 2013), 6832-6852 (finding evidence of recent cow use when documenting the lowest water levels a Forest Service biologist had ever seen in occupied frog habitat within lower Jack Creek in 2014), 7034-7125 (cattle caused numerous problems in Jack Creek pool in 2014). Additional harm in 2016 is almost certainly irreparable given the population's precarious status. *See Tidwell*, 2010 WL 5464269, at *3 ("habitat modification that is reasonably certain to injure an endangered species establishes irreparable injury"); Second Simpson Decl, ¶¶ 32-33. Moreover, irreparable harm is likely to increase if grazing is authorized in more frog habitat under the new EIS, which the agency anticipates implementing in June 2016.[6] *See* FWS 2026.

The Jack Creek frog population desperately needs a reprieve from grazing in the Chemult Pasture to allow the population and the degraded riparian conditions in Jack Creek to recover. The Court has the power to issue this injunction to redress the harm that flowed from years of trespass within exclosures. In rejecting an argument that past ESA violations cannot justify prospective injunctive relief, Judge Haggerty explained, "[d]epriving the court of authority to remedy past injuries to threatened species by preventing future violations makes irreparable harm not just likely, but certain." *Tidwell*, 2010 WL 5464269, at *5; *see also Forest Guardians v. U.S. Forest Serv*., 329 F.3d 1089, 1094 (9th Cir. 2003) (explaining "the district court could order the Service to develop tactics to mitigate the damage caused by the violation, such as moving or removing livestock from the allotments so the land can repair itself"). Thus, an injunction is

[6] *See* http://www.fs.fed.us/sopa/components/reports/sopa-110602-2016-01.html.

necessary to remedy irreparable harm from past seasons and prevent harm from future grazing.

Finally, Ninth Circuit recently confirmed that, "the equities and public interest factors *always* tip in favor of the protected species" in ESA cases. *Cottonwood Envt'l Law Center v. U.S. Forest Serv.*, 789 F.3d 1075, 1091 (9th Circ. 2015) (emphasis added). Accordingly, contrary to Intervenor's argument, the Court may not balance the equities and public interest when determining whether to issue an injunction to remedy ESA violations. Int. Br. at 35-36.

C. Defendants' NEPA and NFMA Violations Warrant an Order Preventing the Forest Service From Issuing Future AOIs on the Chemult Pasture.

Should the Court find that Defendants violated NEPA or NFMA, an injunction is warranted because vacatur of the challenged decisions will not redress Plaintiffs' injuries. *Cf., Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165-66 (2010) (explaining if vacatur will redress all of a party's injuries, an injunction is not needed). Vacatur of the challenged 2012-2015 AOIs will not affect grazing or management of the Chemult Pasture in 2016 and beyond, thereby providing no relief to Plaintiffs. Instead, an injunction is necessary to remedy the harm caused by the unlawful AOIs.

"Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987). "In the NEPA context, irreparable injury flows from the failure to evaluate the environmental impact of a major federal action." *High Sierra Hikers Assoc. v. Blackwell*, 390 F.3d 630, 642 (9th Cir. 2014). To address such harm, courts have issued injunctions pending completion of a valid NEPA process or compliance with Forest Plan requirements. *See, e.g., Native Ecosystems Council*, 866 F. Supp. 2d at 1213, 1233-34 (enjoining project due to irreparable injury from NEPA violation); *Bennett*, 392 F. Supp. 2d at 1228-9 (enjoining grazing on 28 allotments until completion of an EIS); *W. Watersheds Project*

v. U.S. Forest Serv., 2006 WL 1697181, at *5 (D. Idaho June 12, 2006) (enjoining grazing after finding NEPA and NFMA violations). Similarly, this Court should prohibit the Forest Service from issuing future AOIs for the Chemult Pasture until it complies with NEPA and NFMA.

Grazing on the Chemult Pasture has caused and will continue to cause irreparable harm to frogs, fens, and sensitive plant species in the absence of the requested injunction. In turn, harm to these resources irreparably injures Plaintiffs' aesthetic, scientific, and recreational interests in observing, protecting and enhancing these resources. *See generally* Second Goodwin Decl.; Second Wells Decl.; Wuerthner Decl.; *see also LOWD*, 752 F.3d at 764-65.

In addition to the harm to spotted frogs, grazing on the Chemult Pasture irreparably harms fens and sensitive plants, which have experienced extreme degradation in recent years. Pl. Br. at 4-6, 14-16, 34-36. In 2012, Dr. Dewey, a Forest Service fen expert, urged the Fremont-Winema National Forest to remove livestock from the complex of fens on the Chemult Pasture. Rule Decl. Ex. 34. However, the agency authorized grazing in 2012-2015 without any additional protections for fens, which led to increased damage to these unique wetlands as drought conditions worsened. Pl. Br. at 14-15, 21-22; Second Simpson Decl., ¶¶ 4, 5-6, 8-10, 12, 14-15.

From 2012 to 2015, the agency found dramatically dropping water tables in fens, which is a primary indicator of fen health. AR 2318-41, 6437-84, 9853-59; Simpson Decl. ¶¶ 56-57; Second Simpson Decl. ¶¶ 3-4 & Exs. 1-2. In 2014, Dr. Cummings similarly found groundwater reached "a precarious tipping point" due to long-term drought, which continued into 2015. Cummings Decl. ¶ 69; Pl. Br. at 4-5. These dropping water tables, combined with impacts to soils from cattle, accelerate the drying and destruction of fens. Conditions at "high value" fens deteriorated from 2011 to 2014, with increased trampling and far more than 10% soil disturbance, and the agency found Little Parker Fen had "only partially recovered from damage

received last year" before grazing began in 2015. AR 118-121, 8000-07, 10512. 2015 monitoring reveals continued problems with low water, bare soil, and damage to fens. *See, e.g.,* AR 10607-08 (bare peat "still not within proposed compliance level"), 11350-1 ("lots of bare peat" in Jack Creek T2 fen), 11091-92, 11093-94; Second Simpson Decl. ¶¶ 3-4, 6-7, 11, 14; *see also* AR10962-10985, 11089-90, 11000-23, 11051-86, 11208-11221.

The harm to these fens is irreversible because once a fen is destroyed, it is unlikely to grow back. Cummings Decl. ¶¶ 55, 68. The existing complex of fens on the Chemult Pasture is extremely unique and fragile, and provides habitat for a unique diversity of sensitive plant species. Cummings Decl. ¶¶ 49-50, 55, 67; AR 1644, 2345; Rule Decl. Ex. 34. Damage to these fens is thus irreparable, which in turn results in irreparable harm to sensitive plants.

As with spotted frogs, fencing and other management tools are inadequate to prevent irreparable harm to fens and sensitive plants. First, most fens on the Chemult Pasture are not fenced and therefore are fully accessible to cattle. *See* 4118-121 (identifying fens inside exclosures). Second, fences are not effective at keeping cows out of fens that are inside exclosures. For instance, the record shows numerous instances of trespass throughout 2015 into exclosures where fens are located, along with chronic fence quality and maintenance problems. AR 10617, 10620, 10724-25, 10762-64, 10824, 10827-29, 10835, 10841, 10858-9, 10913-4, 10932-3, 10938, 10943, 10946, 10950, 11225-27, 11319, 11373. Collectively, this evidence shows that drought conditions and grazing have caused irreparable harm to fens both outside and inside exclosures. Accordingly, an injunction is necessary to provide these fens with a much-needed break from cattle impacts until the agency complies with NEPA and NFMA to remedy the past harm that cattle have caused and prevent further degradation of this unique resource.

Finally, Plaintiffs have also shown that the balance of the hardships and public interest tips

sharply in favor of preventing the agency from issuing future AOIs on the Chemult Pasture. Pl. Br. at 34-35. The public interest includes preservation of the environment. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138-39 (9th Cir. 2011). Here, that public interest will be furthered by an order that the agency must complete a meaningful environmental analysis and comply with the Forest Plan before issuing future AOIs for the Chemult Pasture. The Forest Service cannot claim any harm from being required to do what Congress has required under NEPA and NFMA.

Further, the economic interests of a single permittee do not outweigh the public interest in a small, isolated population of a threatened species, and rare and important fens and sensitive plants. *See Id.* at 1138-39; *Idaho Sporting Cong. Inc. v. Alexander*, 222 F.3d 562, 569 (9th Cir. 2000). Harm from another season of grazing is likely to cause irreversible damage to the tiny Jack Creek spotted frog population as well as fens that are "unprecedented in the Pacific Northwest" and took millennia to establish, which sharply outweighs the temporary, isolated hardship to a single permittee. *Compare* Cummings Decl. ¶¶ 49-50, 55, 67-68 *with Idaho Sporting Congress*, 222 F.3d at 569 (finding financial hardship to intervenors and communities "is outweighed by the fact the old growth forests plaintiffs seek to protect would, if cut, take hundreds of years to reproduce") (citation omitted); *see also* Pl. Br. at 3-4. Indeed, the Ninth Circuit has "held time and again that the public interest in preserving nature and avoiding irreparable injury outweighs economic concerns." *Lands Council v. McNair*, 494 F.3d 771, 780 (9th Cir. 2007), *vacated on other grounds*, 537 F.3d 981 (9th Cir. 2008); *see also LOWD*, 752 F.3d at 766-67. Accordingly, the Court should find that the public interest and balance of the hardships tips sharply in favor of an injunction.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court issue Findings and Recommendations in favor of Plaintiffs on all of their claims and include the requested relief.

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Respectfully submitted,

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