

Lauren M. Rule (OSB #015174)
Elizabeth H. Zultoski (OSB #105482)
ADVOCATES FOR THE WEST
3115 NE Sandy Blvd., Ste. 223
Portland, OR 97232
(503) 914-6388
lrule@advocateswest.org
ezultoski@advocateswest.org

David H. Becker (OSB # 081507)
Law Office of David H. Becker, LLC
833 SE Main Street, #302
Portland, OR 97214
(503) 388-9160
davebeckerlaw@gmail.com

Attorneys for Plaintiffs

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

**OREGON WILD, FRIENDS OF LIVING
OREGON WATERS, and WESTERN
WATERSHEDS PROJECT,**

Plaintiffs,

v.

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

Defendants,

JRS PROPERTIES III, LP,

Defendant-Intervenor,

and

WITHERS RANCH, INC. et al.

Defendant-Intervenors.

CASE NO. 1:15-cv-00895-CL

**PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT AND
MEMORANDUM IN SUPPORT**

Oral Argument on April 26, 2016

MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56-1, Plaintiffs Oregon Wild, Friends of Living Oregon Waters, and Western Watersheds Project hereby move the Court to enter Summary Judgment in their favor on all of the Claims for Relief in their Complaint. Summary Judgment is appropriate as these claims involve no genuine dispute of material fact, and Plaintiffs are entitled to judgment as a matter of law.¹ Pursuant to Local Rule 7-1, the undersigned certifies that the parties have conferred and have been unable to resolve the motion.

¹ This motion is supported by the accompanying memorandum in support; Declarations of Steve Pedery, Crystal McMahon, Joseph Serres, Travis Bruner, and George Weurthner; the Complaint; and such other and further material as may be presented to the Court before decision hereon.

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

MOTION FOR SUMMARY JUDGMENT i
 MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ii
 TABLE OF CONTENTS..... ii
 TABLE OF AUTHORITIES iii
 GLOSSARY OF ACRONYMS..... v

INTRODUCTION 1

FACTUAL BACKGROUND..... 2
 I. Upper Sycan River and Upper Sprague River Watersheds2
 II. Bull Trout in the Upper Sycan and Upper Sprague Watersheds.....3
 III. Livestock Grazing in the Upper Sycan and Upper Sprague Watersheds.....6
 IV. ESA Consultations on Livestock Impacts to Bull Trout.10

ARGUMENT 15
 I. THE 2011 ESA CONSULTATION WAS ARBITRARY AND CAPRICIOUS.15
 A. The Agencies Failed to Consider Important Factors in their Analysis.....16
 B. The Agencies’ Conclusions were Irrational and Unsupported by the
 Record.....19
 C. The Agencies’ Reliance on Mitigation was Unreasonable.25
 D. FWS’s Letter of Concurrence was Flawed and Inadequate.....28
 II. THE FOREST SERVICE DID NOT ENSURE THAT 2014 AND 2015 AOIs
 COMPLIED WITH WATER QUALITY STANDARDS.....28
 A. Non-Compliance With Oregon’s Water Quality Standards and the
 CWA.....29
 B. Non-Compliance With INFISH and NFMA.....34
 III. THE FOREST SERVICE DID NOT ENSURE THAT 2014 AND 2015 AOIs
 COMPLIED WITH THE WSRA AND NFMA.35
 A. Degradation of ORVs.36
 B. Violations of Specific River Plan Standards.....38

CONCLUSION..... 40

TABLE OF AUTHORITIES

Cases

<i>Alaska v. Lubchenco</i> , 723 F.3d 1043 (9 th Cir. 2013)	17
<i>Alliance for the Wild Rockies v. U.S. Forest Serv.</i> , 2008 WL 8985475 (D. Mont. July 30, 2008)	19
<i>Cent. Or. Landwatch v. Connaughton</i> , 905 F. Supp. 2d 1192 (D. Or. 2012).....	34, 35
<i>Conservation Congress v. George</i> , 2015 WL 2157274 (N.D. Cal. May 7, 2015)	18
<i>Ctr. for Biol. Diversity v. Rumsfeld</i> , 198 F. Supp. 2d 1139 (D. Ariz. 2002)	25
<i>Ctr. for Biol. Diversity v. Salazar</i> , 804 F. Supp. 2d 987 (D. Ariz. 2011).....	25
<i>Ctr. for Biol. Diversity v. Wagner</i> , 2009 WL 2176049 (June 29, 2009)	28-29, 30
<i>Friends of Yosemite Valley v. Kempthorne</i> , 520 F.3d 1024 (9 th Cir. 2008)	38
<i>Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.</i> , 378 F.3d 1059 (9 th Cir. 2004)	17
<i>Grand Canyon Trust v. BOR</i> , 691 F.3d 1008 (9 th Cir. 2012)	17
<i>Great Basin Mine Watch v. Hankins</i> , 456 F.3d 955 (9 th Cir. 2006)	29
<i>Hells Canyon Alliance v. U.S. Forest Serv.</i> , 227 F.3d 1170 (9 th Cir. 2000).....	35, 40
<i>Hells Canyon Pres. Council v. Haines</i> , 2006 WL 2252554 (D. Or. Aug. 4, 2006)	29, 34
<i>Humane Soc’y v. Locke</i> , 626 F.3d 1040 (9 th Cir. 2012).....	19
<i>Idaho Sporting Cong. v. Thomas</i> , 137 F.3d 1146 (9 th Cir. 1998)	29
<i>Lands Council v. McNair</i> , 537 F.3d 981 (9 th Cir. 2008)	29
<i>League of Wilderness Defenders/Blue Mountains Biodiversity Proj.</i> <i>v. Connaughton</i> , 752 F.3d 755 (9 th Cir. 2014)	15
<i>League of Wilderness Defenders/Blue Mountains Biodiversity Proj.</i> <i>v. Connaughton</i> , 2013 WL 3776305 (D. Or. July 17, 2013)	15
<i>Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983).....	29
<i>Nat’l Wildlife Fed’n v. NMFS</i> , 839 F. Supp. 2d 1117 (D. Or. 2011)	25
<i>Natural Res. Def. Council v. Kempthorne</i> , 506 F. Supp. 2d 322 (E.D. Cal. 2007)	25
<i>Nw. Envtl. Advocates v. EPA</i> , 855 F. Supp. 2d 1199 (D. Or. 2012).....	17, 18
<i>Or. Natural Desert Ass’n v. Singleton</i> , 47 F. Supp. 2d 1182 (D. Or. 1998).....	35, 37, 38
<i>Or. Natural Desert Ass’n v. Tidwell</i> , 716 F. Supp. 2d 982 (D. Or. 2010).....	35
<i>Or. Natural Desert Ass’n v. U. S. Forest Serv.</i> , 2004 WL 1293909 (D. Or. June 10, 2004)	38
<i>Or. Natural Desert Ass’n v. Green</i> , 953 F. Supp. 1133 (D. Or. 1997).....	38
<i>Or. Natural Res. Council v. U.S. Forest Serv.</i> , 834 F.2d 842 (9 th Cir. 1987)	29
<i>Pac. Coast Fed’n of Fishermen’s Ass’ns v. NMFS</i> , 265 F.3d 1028 (9 th Cir. 2001)	18
<i>Preserve Our Island v. U.S. Army Corps of Eng’rs</i> , 2009 WL 2511953 (W.D. Wash. Aug. 13, 2009).....	19
<i>S. Yuba River Citizens League v. NMFS</i> , 723 F. Supp. 2d 1247 (E.D. Cal. 2010)	18
<i>Souza v. Cal. Dep’t of Transp.</i> , 2014 WL 1760346 (N.D. Cal. May 2, 2014)	19
<i>Sw. Ctr. for Biol. Diversity v. Bartel</i> , 470 F. Supp. 2d 1118 (S.D. Cal. 2006).....	17-18
<i>Wild Fish Conservancy v. EPA</i> , 2010 WL 1734850 (W.D. Wash. Apr. 28, 2010).....	18
<i>Wild Fish Conservancy v. Salazar</i> , 628 F.3d 513 (9 th Cir. 2010).....	15, 19

Statutes

5 U.S.C. § 702	29
5 U.S.C. § 706	29

16 U.S.C. § 1271	35
16 U.S.C. § 1274(a)(103)(A)	35
16 U.S.C. § 1274(a)(103)	2
16 U.S.C. § 1274(d)	36
16 U.S.C. § 1281(a)	35
16 U.S.C. § 1283(a)	35
16 U.S.C. § 1536(a)(2)	10
16 U.S.C. § 1536(b)(4)	11
16 U.S.C. § 1604(i)	34, 40
33 U.S.C. § 1313(c)	29
33 U.S.C. § 1323(a)	29, 34
Other Authorities	
47 Fed. Reg. 39454 (Sept. 7, 1982)	35
Regulations	
36 C.F.R. § 219.15(d)	34
50 C.F.R. § 402.02	16
50 C.F.R. § 402.12	11
50 C.F.R. § 402.12(a)	16
50 C.F.R. § 402.12(f)(4)	16
50 C.F.R. § 402.14	11
50 C.F.R. § 402.14(b)	11
50 C.F.R. § 402.14(i)	11
OAR 340-041-0002(56)	30
OAR 340-041-0028(4)	30
OAR 340-041-0028(4)(e), (f)	30
OAR 340-041-0061(13)	30
OAR 340-041-0061(13) (2015)	30

GLOSSARY OF ACRONYMS

AOI	Annual Operating Instructions
AMP	Allotment Management Plan
APA	Administrative Procedure Act
BA	Biological Assessment
BMP	Best Management Practices
CWA	Clean Water Act
ESA	Endangered Species Act
FWS	U.S. Fish & Wildlife Service
INFISH	Inland Native Fish Strategy
LOC	Letter of Concurrence
NFMA	National Forest Management Act
NLAA	Not Likely to Adversely Affect
ORV	Outstandingly Remarkable Value
PCE	Primary Constituent Element
PFC	Proper Functioning Condition
RMO	Riparian Management Objective
WQRP	Water Quality Restoration Plan
WSRA	Wild and Scenic Rivers Act
7dAM	Seven Day Average Maximum

INTRODUCTION

Plaintiffs bring this case to challenge Federal Defendants' authorization of livestock grazing that continues to impair the recovery of threatened bull trout and degrade values of the Wild and Scenic Sycan River. Bull trout in the Upper Sycan River and Upper Sprague River watersheds of south-central Oregon are extremely imperiled and at high risk of extinction. Habitat essential for recovery of these bull trout populations does not meet the needs of the fish due to high water temperatures, high sediment levels, lack of cover, and degraded stream channels. These same impaired conditions cause exceedances of state water quality standards and are inconsistent with management direction for the Wild and Scenic Sycan River.

Yet the Forest Service continues to authorize livestock grazing that contributes to and perpetuates these degraded stream conditions. Rather than carefully monitoring and analyzing the impacts that livestock are having on these resources, the Forest Service has brushed aside evidence that cattle are causing problems in some riparian areas, and is not even looking at other streams or habitat features that are critically important to bull trout. Nor is the agency taking any steps to analyze and adjust grazing to come into compliance with water quality standards and Wild and Scenic River requirements despite grazing-related exceedances of water temperature standards in many streams and adverse impacts to wild and scenic values of the Sycan River.

In 2011, the Forest Service and U.S. Fish & Wildlife Service ("FWS") completed Endangered Species Act ("ESA") consultation over livestock grazing impacts to bull trout critical habitat in the Upper Sycan and Upper Sprague River watersheds that allowed the same grazing to continue. Because the agencies' analysis and conclusions were inadequate and unsupported, the consultation was arbitrary and capricious and contrary to the ESA. The Forest Service also authorized grazing in 2014 and 2015 without assessing whether those authorizations

would continue to contribute to exceedances of water temperature standards or comply with the requirements of the Wild and Scenic Sycan River Plan. Thus, those authorizations were arbitrary and capricious and contrary to the Clean Water Act (“CWA”), the Wild and Scenic Rivers Act (“WSRA”), and the National Forest Management Act (“NFMA”). Plaintiffs request that the Court grant their motion for summary judgment and set aside the challenged decisions.

FACTUAL BACKGROUND

I. Upper Sycan River and Upper Sprague River Watersheds.

The Sycan River and Sprague River occur in the Upper Klamath Basin of south-central Oregon. *See* FWS 14.² The North Fork Sprague River and South Fork Sprague River join to form the Sprague River, and the Sycan River flows into the Sprague a little below that confluence. FWS 14. These rivers originate on the eastern edge of the Klamath Basin in high elevation forests and meadows near Gearhart Mountain, and flow through the Fremont-Winema National Forest before entering private lands in the valley. FWS 15-17. Like in other eastern Oregon landscapes, the soils in this area are moderate to highly erodible and precipitation falls mainly as snow, with little rainfall in summer months. FWS 17, 18; *see also* FWS 1513, 1707 (noting that soils in area are highly erodible). Since 2013, this area has experienced increasingly severe drought conditions. *See* http://or.water.usgs.gov/Klamath_drought/index.html.

In 1988, Congress designated the Sycan River as a Wild and Scenic River to protect its outstanding scenic, geologic, fisheries, and wildlife values. 16 U.S.C. § 1274(a)(103); POL2344.³ The Forest Service specifically recognized the outstandingly remarkable scenic and fisheries values in the upper segment of the Sycan River. SUPP POL132. This upper segment is

² The U.S. Fish & Wildlife Service administrative record will be designated as FWS.

³ The Forest Service administrative record will be designated by the prefixes used by the agency—i.e. POL for policy folder, BL for bear lakes folder, CC for currier camp folder, etc.

a noted recreation destination, with the popular Hanan Trail running along the river for several miles to its headwaters. SUPP POL29, 14962, 14995; POL1328, 2021-22. The Forest Service completed the Sycan River Management Plan in 1992, which guides management of the Wild and Scenic Sycan corridor on the Fremont-Winema National Forest. POL2343.

II. Bull Trout in the Upper Sycan and Upper Sprague Watersheds.

Klamath River bull trout were listed as a threatened species in 1998. POL3233. This distinct population segment of bull trout is found in three core areas of the Klamath Basin: Upper Klamath Lake, Sycan River, and Upper Sprague River. FWS 2387. Klamath River bull trout are highly imperiled because “the current abundance, distribution, and range of bull trout in the upper Klamath River basin are greatly reduced from historic levels.” FWS 27. A number of local populations have already been extirpated, and just seven local populations remain in all three core areas combined. FWS 1498, 1506-07, 2445-46. These sub-populations are small and fragmented, creating a Klamath Basin population that has little genetic interchange and an overall abundance below what is needed for long-term viability. FWS 1507, 1674. The Upper Klamath Basin Bull Trout Conservation Strategy noted that “Klamath bull trout face an imminent threat to their persistence.” FWS 1674.

The Sycan core area is down to just *one* local bull trout population, and thus this core area is rated at high risk of extirpation. FWS 1083, 2387, 2446. The Upper Sprague core area has five local populations that are small and fragmented, and is rated at intermediate risk of extirpation. FWS 1083, 2387, 2446. The loss of either core area would be highly detrimental because FWS has stated that each is essential for recovery of Klamath Basin bull trout. FWS 2387, 2445-46. Furthermore, the Klamath Basin bull trout population is essential for recovery of the species as a whole because it is found at the southern edge of the species’ range and has

important ecological and genetic differences. FWS 1671, 2433. Loss of this population would result in a significant gap in the range and genetic diversity of bull trout. FWS 1671, 2433.

To recover Klamath Basin bull trout, the range and abundance of the species must expand within each of the three core areas. FWS 5-6, 1667-68. Recovery criteria consist of four objectives: distribution, abundance, trend, and connectivity. FWS 2435. For Klamath Basin bull trout, distribution must increase in each core area, with *three to five* additional local populations needed in both the Sycan and Upper Sprague core areas. FWS 6. In addition, abundance of bull trout in all core areas must increase, population trends must stay stable or increase in each core area, and connectivity between local populations must improve. FWS 6-7.

In 2010, FWS issued a new critical habitat rule that designated the habitat essential for bull trout recovery. FWS 1129.⁴ The rule explained that where bull trout habitat and population loss has occurred over time, reestablishing bull trout in currently unoccupied habitat is necessary to achieve recovery. FWS 1165. It noted that, in the Klamath basin, “where threats to bull trout are greatest,” all occupied habitat as well as a substantial proportion of unoccupied habitat was deemed essential for bull trout recovery and designated as critical habitat, which included many unoccupied streams in the Sycan and Upper Sprague core areas. FWS 1165-66, 2420-26, 2430.

The critical habitat rule also described the habitat requirements that support bull trout spawning, rearing and migration. FWS 1161-64. These requirements include cold water temperatures; low levels of fine sediment; instream cover in the form of large woody debris, undercut banks, deep pools, side-channels, and overhanging riparian vegetation; an abundant food base (insects and small fish); adequate water quantity and quality; and low levels of competing species such as brook trout and brown trout. *Id.*; *see also* FWS 1486; SUPP

⁴ FWS had withdrawn the 2005 critical habitat rule as a result of litigation. FWS 1131.

POL15005-07 (discussing importance to bull trout of low water temperatures, low sediment levels, pools, undercut banks, large woody debris, low levels of bank erosion, riparian vegetation and shade, and healthy riparian soils). Invasion by brook trout and brown trout in many of the streams in the Sycan and Upper Sprague core areas is recognized as a significant threat to bull trout. FWS 27, 1489, 1512, 1667, 1715-16; POL6574, 6578.

In light of these habitat needs, federal agencies have developed standards to assess impacts to bull trout. The Forest Service adopted the Inland Native Fish Strategy (“INFISH”) to achieve desired conditions for bull trout habitat. POL2669-83. INFISH contains “Riparian Management Objectives” (“RMOs”) that set standards for water temperature (<15°C in holding habitat, <8.9°C in spawning and rearing habitat), pool frequency (varies by channel width), bank stability (>80% stable), lower bank angle (>75% of banks are undercut), and width/depth ratio (<10). POL2672. INFISH Standard GM-1 requires the agency to modify or suspend grazing if it is retarding or preventing attainment of these RMOs. POL2677.⁵

In its Upper Sycan Watershed Analysis, the Forest Service likewise described riparian conditions that were or were not functioning appropriately. Desired conditions for riparian vegetation and bank stability occur when riparian communities have late-seral species composition and structure that are highly similar to natural conditions, and bank stability is >90%. FWS 2066-67. With regard to stream channels, streams are not at desired condition if they have width-to-depth ratios that are larger than expected, >20% fine sediment, and low pool frequency. FWS 2077-79. Streams that are not meeting the desired conditions outlined by these agencies are not providing healthy bull trout habitat.

⁵ FWS developed a matrix to assess whether bull trout habitat is functioning appropriately, using similar standards for water temperature, pool frequency, bank stability, and width/depth ratio, as well as criteria of <20% fine sediment, no excess nutrients, abundant off-channel habitat, high floodplain connectivity, and low risk of displacement by competitor species. FWS 2273-77.

III. Livestock Grazing in the Upper Sycan and Upper Sprague Watersheds.

Bull trout critical habitat within the headwater reaches of the Sycan, North Fork Sprague, and South Fork Sprague watersheds occurs largely on the Fremont-Winema National Forest, and the Forest Service authorizes livestock grazing across the majority of this area. *See* FWS 1452-54; Ex. 1 (attached hereto). In the Sycan core area, more than half of the designated critical habitat occurs within six Forest Service allotments: Bear Lakes, Currier Camp, Withers Special Use, Sycan, Riverbeds, and Foster Butte. FWS 1454. In the Upper Sprague core area, most critical habitat in the North Fork Sprague watershed falls within four allotments—Bear Lakes, Paradise Creek, Meryl Creek, and Yaden Flat—while a significant portion of critical habitat in the South Fork Sprague watershed occurs within the Pothole allotment. FWS 1452-53. The allotments in the Upper Sycan and North Fork Sprague watersheds are adjacent to each other, creating a large contiguous area of livestock grazing that contains much of the bull trout critical habitat for these two core areas. *See* Ex. 1. Additionally, the Wild and Scenic Sycan River starts in the Bear Lakes allotment and then flows through the Withers Special Use, Currier Camp, Sycan, and Riverbeds allotments before entering the Sycan Marsh. FWS 1454.

Livestock grazing can cause significant harm to riparian areas and native fish habitat. “Livestock grazing damages more public land than fire, logging, and roads combined in the western United States,” and much of that damage occurs in riparian areas because “livestock tend to aggregate in riparian zones.” SUPP POL16342; *see also* SUPP POL15010, 15017 (noting cattle attraction to riparian areas). “Those livestock aggregations remove riparian vegetation, trample stream banks, initiate incision or widening depending on channel slope and substrate, reduce groundwater and stream flow, elevate water temperature, increase turbidity and sedimentation, and lead to eutrophication.” SUPP POL16342.

Cattle compact moist soils in meadows and riparian areas, which decreases their ability to store water and later release it to streams as flows drop in summer, and also decreases the ability of the soil to support riparian vegetation. SUPP POL15009-10. The cumulative compaction of riparian soils over years can dramatically reduce summer streamflows compared to ungrazed areas. *Id.* It also increases surface runoff and sediment delivery to streams because water cannot infiltrate the soil. *Id.* Grazing and trampling of vegetation leads to loss of groundcover and increased topsoil erosion that likewise contributes to less storage of water in the soil and loss of soil productivity. SUPP POL15010. The lowering of the water table in meadows and riparian areas due to water storage loss in soils contributes to incised stream channels, lower stream flows, and a shift of plants from riparian species to upland species. *Id.*

The loss of riparian vegetation from cattle grazing and trampling riparian plants, such as sedges and willows, reduces stream shade, stream cover, and deep root systems that stabilize banks. SUPP POL15010-11. Reduced shade increases water temperature while lack of cover makes fish more vulnerable to predators. Loss of deep-rooted plants combined with cattle trampling of streambanks results in significant bank damage and erosion. SUPP POL15011-12. Cattle shearing of banks causes overhanging banks to break and collapse into the stream, leaving straight bare banks that erode and contribute sediment to the stream, and provide no cover for fish. *Id.* Over time, continued bank trampling and shearing often causes streams to widen and become shallower, increasing solar radiation and water temperatures. *Id.* In areas where grazing has caused lowered water tables, stream channels often become incised and cannot receive cold groundwater inputs nor provide flood flows that re-saturate the floodplain soils. *Id.*; *see also* FWS 716-19, 722, 1431-32, 2313-14 (ESA consultation documents discussing grazing impacts).

These same impacts occurring to tributary streams can adversely affect downstream bull

trout habitat by adding sediment and warm water, or by failing to contribute as much streamflow. SUPP POL15019-20. Finally, even if grazing does not cause further degradation, it prevents or impedes recovery of these areas compared to exclusion of cattle. SUPP POL15013-18, 15113-14, 15119 (including photos comparing sites before and after exclusion of cattle); FWS 2337. This is particularly true given that grazing exacerbates drought and climate change effects, which are increasingly impairing riparian areas and bull trout habitat. SUPP POL15012, 15054, 16343.

In the Klamath Basin, cattle have degraded riparian areas, resulting in decreased bank stability and fewer undercut banks, overwidened or incised channels, increased sediment, lack of pools, lack of riparian plants and shade, and increased water temperatures—particularly in meadow reaches. FWS 32, 1513, 1707-08, 1712. The recovery plan for Klamath bull trout noted that grazing impacts continue to occur upstream of occupied bull trout habitat, in historically occupied and potentially restorable drainages. “In the professional judgment of the recovery unit team, the success of bull trout recovery in the Klamath River basin will be significantly impaired without curtailing or strictly managing livestock grazing in unoccupied and restorable habitat.” FWS 32. It noted the need to restore native riparian vegetation to reestablish canopy and shade in the North and South Forks of the Sprague River, improve grazing practices in Paradise Creek and Watson Creek, the Sycan River above the marsh where sedimentation is a problem, and many streams in the North Fork Sprague and upper Sycan River drainages that are deficient in pool habitat, and reduce fine sediment to <20% fines. FWS 62.

Aquatic restoration plans for the Upper Sycan and North Fork Sprague Rivers in 2011 and 2010 described concerns about more than nine miles of unstable, actively eroding streambanks, six headcuts, lack of appropriate riparian vegetation, and prevalence of brook trout in the Upper Sycan River, South Fork Sycan, and several other Sycan tributaries, as well as

unstable and eroding banks along the portion of the North Fork Sprague River in the Paradise Creek allotment. POL6573-74; SUPP POL1609, 1627, 1634. Grazing contributed to these problems, yet the Upper Sycan Plan's "Essential Projects" to conduct streambank stabilization and then fence 10 miles of stream in meadow habitats along the Upper Sycan River, South Fork Sycan, and other tributaries, and the North Fork Sprague decision to stabilize 1.9 miles of streambank, have not yet occurred. POL6577, 6584, 6586; SUPP POL1626-27.

Forest Service monitoring of the allotments in this case also establishes that riparian and stream channel parameters are not meeting desired conditions. None of the sites monitored for riparian vegetation and soil conditions were rated as high ecological status and none showed a clear upward trend over time. POL5399-5407; BL369-72; CC470-79; WSU1-2; PC1942-43, 1948, 2508-09, 2591-96; PH53-55; FB81-83, 89; SY1-2. Browsing of willows is a problem on several allotments, particularly Paradise Creek. POL5401; PC2125, 2599-2600, 2612-13; PH125, 853; SUPP POL7302-03, 7712, 7718-19; Exs. 7-14. Bank stability for the North Fork Sprague River in the Paradise Creek allotment has remained below 80% since at least 1997, and many streams within these allotments have width-to-depth ratios that are >10, low pool frequency, and fine sediment (<6mm) >20%. FWS 1455; CC332, 343, 399-413, 634-35, 793, 817, 858, 863-77; PH388, 404, 857; PC2161-65, 2605-17. Water temperature data shows that almost every monitored stream has exceeded temperature standards in multiple years. Ex. 2. As a result, brook trout have displaced bull trout in most of these streams. FWS 1512-13; POL6578.

Recent observations by third parties documented these and other problems that have degraded fish habitat in the Upper Sycan and North Fork Sprague watersheds. SUPP POL14955-15063. In October 2014, an expert hydrologist documented bank damage and a lack of undercut banks, channels that are overwidened and shallow, lack of riparian vegetation and

stream shade, high levels of fine sediment, poor pool frequency and quality, and high levels of algae due to excess nutrients in almost all streams visited, as well as some streams with severely incised channels. SUPP POL15020-63; *see also* SUPP POL14962-94 (another party's observed impacts to banks, vegetation, and stream channels).⁶ The hydrologist noted that many riparian areas and meadows he visited had compacted soils and were dominated by dry-site species like sagebrush rather than riparian plants. SUPP POL15020-63. He concluded that, "[a]ll of the streams and associated riparian areas that I evaluated had been significantly degraded by the combined impacts of livestock grazing on banks, soils, hydrology, and riparian vegetation." SUPP POL15062. Livestock impacts along the upper end of the Sycan River also detract from the scenic value of the Wild and Scenic Sycan River. SUPP POL14947-15002.

Even when the Forest Service has documented unauthorized or overuse by livestock, it usually brushes these violations aside rather than adjusting grazing to reduce impacts and allow for recovery of the areas. *See e.g.* SY32-33; PH103, 416, 847, 853; BL374-75, 2483-84; PC2152, 2599-2600, 2622, 3998-99; WSU36, 44-45, 51-53, 824-26; CC779. This pattern was particularly prevalent in 2014, when the agency found numerous violations but made few or no changes to use the following year to address the problems. PH860-64, 866-68, 869-73, 874-85; BL457-61, 2483-84, 2491-95; CC880-85, 5018-20, 5022-26; PC2666-70, 3998-99, 4003-07.

IV. ESA Consultations on Livestock Impacts to Bull Trout.

Under the ESA, an agency must consult with FWS if it proposes an action that may affect a listed species or critical habitat. 16 U.S.C. § 1536(a)(2). If the agency determines in a biological assessment ("BA") that the action is "not likely to adversely affect" a listed species or critical habitat, and FWS agrees with that determination in a letter of concurrence ("LOC"), then

⁶ These reports were submitted to the Forest Service in March 2015. SUPP POL14947.

consultation is complete. 50 C.F.R. §§ 402.12, 402.14(b). If the BA concludes the action is “likely to adversely affect” a listed species or critical habitat, then FWS writes a biological opinion to assess whether the adverse effects will jeopardize the survival and recovery of the species or adversely modify its critical habitat. *Id.* § 402.14. A biological opinion can also authorize “take” of a species that is incidental to the action, but must specify terms and conditions to minimize the harm. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

The Forest Service has conducted several ESA consultations with FWS over impacts to bull trout from authorizing grazing on the Upper Sycan and Upper Sprague allotments. The first consultation occurred in 1998, when Klamath River bull trout were listed as a threatened species but before any critical habitat had been designated. *See* FWS 2300. At that time, all streams that were occupied by bull trout, except the North Fork Sprague River, were outside active grazing allotments. FWS 2315. FWS used the matrix discussed above, *supra* n.5, to assess effects, and determined that grazing the Sprague RIP pasture was “likely to adversely affect” bull trout in the North Fork Sprague River. FWS 2300, 2303, 2313. However, grazing that and other pastures was not likely to jeopardize the continued existence of the entire Klamath Basin population because of restoration and monitoring activities that were expected to improve riparian conditions and reduce water temperatures and sediment levels. FWS 2302, 2314-16.

The 1998 biological opinion did state that FWS expected grazing to “take”—i.e. harm—individual bull trout by causing “degraded habitat conditions, habitat fragmentation, and additional environmental disturbance such as reduction of water quantity or quality, aquatic and streamside vegetation, cover, and stream roughness.” FWS 2317. To minimize such harm, FWS required strict adherence to livestock use standards, monitoring for use in unauthorized pastures or enclosures, excluding cattle from riparian areas where possible, and annual monitoring of

sediment levels. FWS 2318-19. When the requirements of the biological opinion were not met in 1998 and 1999 due to grazing of unauthorized pastures and violations of use standards, the agencies reinitiated consultation in May 2000 to address the non-compliance. FWS 2328-31.

In July 2000, FWS issued a separate biological opinion for grazing on the Silver Creek pasture of the Foster Butte allotment because bull trout had recently been found in Coyote Creek, which flows through that pasture. FWS 2337, 2347. The agencies determined that grazing the pasture was likely to adversely affect bull trout “by impacting riparian areas and slowing their rate of recovery as compared to no grazing.” FWS 2337. To reduce impacts and avoid “take” of bull trout, the agencies imposed significant restrictions on grazing, including a July 31st end date, limitation of grazing to light use, regular monitoring of Coyote Creek by a rider and prompt removal of cattle from the creek, weekly inspections by the Forest Service, removal of cattle when use of willows was detected, and extensive riparian and stream channel monitoring. FWS 2339, 2353-54. Violations would result first in a 20% reduction of grazing on the pasture, and thereafter in construction of a fence to protect Coyote Creek or cancellation of grazing in the pasture. FWS 2341, 2355. If the new scheme did not allow for movement toward measurable objectives, including >90% streambank stability and >60% of riparian vegetation in a high ecological status, then grazing would be further modified. FWS 2355.

When the 1998 consultation expired at the end of 2006, the agencies conducted a new consultation in 2007 for bull trout and two species of suckers in the Sprague watershed. *See* FWS 535, 652. The Forest Service completed a BA where the proposed action was to authorize grazing on 21 allotments in the Sprague watershed and conduct six implementation items: (1) update allotment management plans (“AMPs”); (2) assign one of seven grazing strategies, varying in amount and season of use, to each allotment; (3) conduct new Proper Functioning

Condition (“PFC”) assessments; (4) conduct annual implementation monitoring at the end of the growing season to determine compliance with livestock utilization and stubble height standards;⁷ (5) conduct riparian scorecard and fish habitat effectiveness monitoring to determine trends in riparian and stream conditions, with the Forest to rely primarily on this information when considering changes in grazing management; and (6) use adaptive management to make changes in grazing practices if monitoring shows that desired conditions are not being met. FWS 665-77.

The 2007 BA admitted that the North Fork Sprague, South Fork Sprague, and upper Sycan watersheds had streams with high water temperatures, high sediment, and poor pool quality and thus were rated as functioning inappropriately or functioning at risk as a water source for bull trout. FWS 701, 708-09, 714-15. The BA concluded, however, that the authorized grazing would have only “negligible and insignificant” effects to bull trout because all bull trout occupied habitat was downstream of the allotments or inaccessible to cattle, any sediment from the allotments would settle out before reaching the downstream habitat, and monitoring and adaptive management would prevent significant effects from grazing.⁸ FWS 761-66.

FWS concurred that the authorized grazing, which included the six implementation items described above, would have no effect or was not likely to adversely affect bull trout. FWS 1043-46. The short rationale in FWS’s LOC relied on the Forest Service’s reasoning about sediment deposition between the allotments and downstream occupied habitat, as well as the most recent PFC surveys supposedly showing streams on the allotments in an upward trend. FWS 1046-47. FWS stated that any pasture that received excessive utilization for two

⁷ Utilization monitoring is conducted in the floodplain or a dry meadow and measures the percentage of annual growth consumed by livestock by comparing grazed and ungrazed grasses. Stubble height monitoring occurs in the riparian area along a creek and measures the height of sedges or rushes after grazing has occurred.

⁸ The Forest Service no longer considered Coyote Creek occupied by bull trout because recent surveys indicated that population was now extinct. FWS 752.

consecutive years would not be deemed consistent with the action described in the BA and would not be covered by the consultation. FWS 1047. The LOC did not say anything about “take” of bull trout or provide any terms and conditions to minimize take as the agency had in the 1998 and 2000 biological opinions. *Id.*

After the new bull trout critical habitat designation was issued in 2010, the agencies reinitiated consultation in 2011. FWS 1422-23. Because the 2010 designation greatly expanded critical habitat compared to the prior designation, Klamath River Basin critical habitat increased from 50 to 277 stream miles. FWS 1427. Critical habitat on allotments in the Sycan and Upper Sprague core areas increased exponentially, and now included much more of the North Fork Sprague River, South Fork Sprague River, Sycan River, and tributaries to each of those rivers. FWS 1452-54; *also compare* POL5184 *with* Ex. 1. The proposed action was grazing authorizations for fifteen allotments under the same conditions described in the 2007 BA. FWS 1424. The 2011 BA did not describe additional monitoring sites or any changes to grazing even though many miles of designated critical habitat now occurred *within* the allotments. *Id.*

The 2011 BA described the “primary constituent elements” (“PCEs”) of bull trout critical habitat that need protection. FWS 1428. After discussing general livestock grazing effects to riparian areas, the BA divided its analysis by pasture and briefly assessed effects to the critical habitat PCEs from grazing each individual pasture in the action area. FWS 1431-47. The Forest Service concluded that grazing on five allotments would have no effect on bull trout and grazing on the remaining ten allotments was not likely to adversely affect the species. FWS 1448. The BA stated that “[a]ll effects identified in the allotments are insignificant” because cattle have limited access to some of the critical habitat, some allotments have mainly intermittent hydrology with minimal impact on downstream waters, and the six implementation items

continued from the 2007 BA will facilitate changes to management when warranted. *Id.*

FWS again concurred with this determination in a two-page LOC. FWS 1462-63. The letter stated that the Riverbeds, Sycan, and Currier Camp allotments have rugged topography and cattle have limited access to critical habitat; the Paradise Creek allotment has intermittent hydrology and thus little impact to downstream waters; and the Bear Lakes, Pothole, Withers Special Use, and Foster Butte allotments use deferred rotation or early season grazing strategies that are designed to minimize negative effects. FWS 1462. These three reasons were the extent of FWS's rationale in the LOC. *Id.*

ARGUMENT

I. THE 2011 ESA CONSULTATION WAS ARBITRARY AND CAPRICIOUS.

Courts review ESA consultations under the Administrative Procedure Act (“APA”), and will set them aside if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 521 (9th Cir. 2010). A court must ensure that the agency has articulated a rational connection between the facts found and the conclusions made. *Id.* at 525. Where an LOC relies on information in a BA, a court reviews both the BA and LOC. *League of Wilderness Defenders/Blue Mountains Biodiversity Proj. v. Connaughton*, 2013 WL 3776305, at *6-9 (D. Or. July 17, 2013), *reversed on other grounds*, 752 F.3d 755 (9th Cir. 2014). The decision is arbitrary and capricious if the agency has failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence in the record or is highly implausible. *Connaughton*, 2013 WL 3776305, at *2.

The facts in the record here establish that the 2011 BA and LOC are arbitrary and capricious. The agencies failed to consider important aspects of the problem, made irrational conclusions that were not supported by the record, and relied on uncertain and inadequate

mitigation measures to find that grazing is not likely to adversely affect bull trout critical habitat.

A. The Agencies Failed to Consider Important Factors in their Analysis.

In the 2011 BA, the Forest Service described the environmental baseline, the direct and indirect effects of the proposed action, and cumulative effects to determine whether the proposed action was likely to adversely affect bull trout critical habitat. FWS 1428-47; *see* 50 C.F.R. §§ 402.02, 402.12(a) & (f)(4) (discussing requirement to evaluate direct and indirect effects added to environmental baseline, and discretion to also include cumulative effects). An action is “not likely to adversely affect” (“NLAA”) critical habitat when effects are expected to be “discountable” or “insignificant,” where insignificant effects pertain “to the size of the impact and should never reach the scale where take occurs,” and discountable effects are “extremely unlikely to occur.” *See* Exhibit 3 (ESA Consultation Handbook). Because the BA’s analysis of effects omitted several important considerations, the NLAA determination was unreasonable.

First, the 2011 BA and LOC did not explain why all impacts from grazing are now “insignificant” when FWS previously found that those same impacts were “likely to adversely affect” bull trout. In 1998 and 2000, FWS concluded that grazing in pastures with occupied bull trout habitat was likely to adversely affect the species because of habitat degradation, despite implementation and effectiveness monitoring requirements. FWS 2300, 2303, 2313-15, 2337, 2339-41.⁹ FWS also found that the grazing was expected to cause take of bull trout, again due to habitat degradation and fragmentation. FWS 2317, 2352.

FWS has not explained why it came to the opposite conclusion in the 2011 consultation and found that the same grazing impacts, conducted under very similar monitoring requirements,

⁹ The 2007 BA asserted that there was no longer any occupied habitat within the allotments. Thus, it only looked at effects to downstream habitat and is not as relevant as the 1998 and 2000 biological opinions when looking at effects determinations for streams within grazing pastures.

are not likely to adversely affect newly-designated bull trout critical habitat within grazing pastures. FWS 1462-63. As described above and in more detail below, evidence in the record shows that riparian and stream conditions remain degraded in areas being grazed by cattle and do not meet bull trout needs. FWS previously found that such degradation equates to take, showing that the grazing is likely to adversely affect the species' habitat according to FWS's own ESA Consultation Handbook. Exhibit 3 at 3-12, 3-13. The record does not support changing the effects determination from what FWS found in 1998 and 2000.

Second, the BA and LOC failed to discuss the recovery purpose of critical habitat, a key flaw in the analysis. *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1072-75 (9th Cir. 2004); *Nw. Env'tl. Advocates v. EPA*, 855 F. Supp. 2d 1199, 1223-24 (D. Or. 2012). Streams designated as critical habitat are essential for recovery of the species, including the unoccupied critical habitat in the Sycan and Upper Sprague core areas. FWS 1165-66, 2420-26, 2430. In order to achieve recovery of Klamath River bull trout, three to five new populations must be established in the Sycan and Upper Sprague core areas, which requires restoration of currently unoccupied habitat. FWS 4-6, 32, 39, 62. Impacts that prevent or slow that restoration process are adverse effects, as FWS itself acknowledged when it stated that grazing was likely to adversely affect bull trout "by impacting riparian areas and *slowing their rate of recovery as compared to no grazing.*" FWS 2337 (emphasis added); *see also* SUPP POL15013-18.

Yet the 2011 consultation fails to consider that fact or even discuss the recovery needs of Klamath River bull trout. FWS 1422-51, 1462-63. Recovery goals are important information that must be considered when assessing effects to species or critical habitat, and failure to do so renders the consultation arbitrary and capricious. *See Alaska v. Lubchenco*, 723 F.3d 1043, 1054 (9th Cir. 2013); *Grand Canyon Trust v. BOR*, 691 F.3d 1008, 1023 (9th Cir. 2012); *Sw. Ctr. for*

Biol. Diversity v. Bartel, 470 F. Supp. 2d 1118, 1136-37 (S.D. Cal. 2006); *Conservation Congress v. George*, 2015 WL 2157274, at *4 (N.D. Cal. May 7, 2015). Because the BA and LOC failed to discuss the recovery needs of bull trout, and whether continued grazing would prevent or delay restoration of habitat needed to increase distribution of the species, their NLAA conclusion was arbitrary and capricious. *Nw. Env'tl. Advocates*, 855 F. Supp. 2d at 1223-24; *Wild Fish Conservancy v. EPA*, 2010 WL 1734850, at *6-7 (W.D. Wash. Apr. 28, 2010).

Third, the BA and LOC failed to discuss how the effects of other activities in the watersheds, as well as climate change, would impact bull trout when combined with grazing. The BA acknowledged in its cumulative effects section that other land management activities will occur on private and National Forest lands in the action area. FWS 1447. However, simply stating that the effects from all of these activities will be “localized and short term” is not adequate to analyze the impact of those activities combined with the public land grazing. *Id.*; *Pac. Coast Fed'n of Fishermen's Ass'ns v. NMFS*, 265 F.3d 1028, 1037-38 (9th Cir. 2001). Likewise, the BA and LOC did not consider the effects of climate change when combined with grazing impacts. FWS 1422-51, 1462-63. The agencies were well aware of the significant effects to bull trout from climate change—warmer water temperatures, lower water quantity, and invasion by competitor species—and should have considered how grazing would exacerbate those effects. *See* FWS 1164-65, 1722-23, 2435; SUPP POL241-43, 265, 381, 5317-18, 5330; *see also* SUPP POL15009, 15012, 15054, 15058, 16343. The failure to fully analyze cumulative effects and climate change, combined with the effects of grazing, on bull trout critical habitat renders the consultation arbitrary and capricious. *Nw. Env'tl. Advocates*, 855 F.Supp.2d at 1226; *S. Yuba River Citizens League v. NMFS*, 723 F. Supp. 2d 1247, 1273-74 (E.D. Cal. 2010).

B. The Agencies' Conclusions were Irrational and Unsupported by the Record.

An agency must always articulate a rational connection between the facts and its conclusions and provide a satisfactory explanation for its actions. *Wild Fish Conservancy*, 628 F.3d at 525; *Humane Soc'y v. Locke*, 626 F.3d 1040, 1048 (9th Cir. 2012). Courts have found a BA and LOC arbitrary and capricious where they were not supported by the record or a reasonable explanation. *See e.g. Souza v. Cal. Dep't of Transp.*, 2014 WL 1760346, at *6 (N.D. Cal. May 2, 2014); *Preserve Our Island v. U.S. Army Corps of Eng'rs*, 2009 WL 2511953, at *6-14 (W.D. Wash. Aug. 13, 2009); *Alliance for the Wild Rockies v. U.S. Forest Serv.*, 2008 WL 8985475, at *8-10 (D. Mont. July 30, 2008). Here, many of the Forest Service's and FWS's conclusions are irrational and unsupported by the data.

Some flaws in the BA analysis pertained to multiple allotments. For one, the BA downplayed high water temperatures in the North Fork Sprague and Sycan Rivers above the 15°C limit identified in critical habitat PCE 5 by citing to a study that found bull trout in areas with higher temperatures. FWS 1434, 1440. Yet the critical habitat rule specifically explained that, although adult bull trout have been observed in water temperatures up to 20°C, “steady and substantial declines in abundance have been documented in stream reaches where water temperatures ranged from 15 to 20°C.” FWS 1162. Thus, impacts that cause water temperatures above 15°C in migratory habitat are an adverse effect to bull trout.

Another flaw found throughout the BA effects analysis concerned the discussion about brown and brook trout. The critical habitat rule states under PCE 9 that there should be low levels of nonnative species like brook and brown trout in bull trout critical habitat. FWS 1164. The BA repeatedly asserted that there are “healthy, self-sustaining” populations of these nonnative species in many of the critical habitat streams, and that grazing has no effect on the

distribution of these species. FWS 1433-46. It is true that there are numerous populations of brook and brown trout in these watersheds because they have displaced bull trout from many streams. FWS 27, 1489-90, 1512, 1667, 1715-16; POL6574, 6578. However, grazing has contributed to this displacement by creating conditions that allow brown trout and brook trout to outcompete bull trout: warm water temperatures and lower water quality. FWS 1163, 1165, 1490, 1514. Thus, grazing has promoted “healthy” populations of brook and brown trout to the detriment of bull trout, yet the BA and LOC do not acknowledge this effect.

The BA also contains numerous conclusions with respect to specific allotments that are contradicted by the data or irrational. Although the 2007 BA noted that riparian scorecards would be the “primary method to determine the trend of riparian vegetation conditions over time,” FWS 674, the 2011 BA rarely discussed the riparian scorecard data, which showed that no sites were at high ecological status.¹⁰ Nor did the 2011 BA acknowledge that stream surveys showed many streams with high fine sediment levels, high width to depth ratios, and low pool frequency. Moreover, lack of good riparian vegetation and high width to depth ratios contribute to high water temperatures, which are seen throughout the action area. POL3335-36, 3339-43; Exs. 4-6. Although cattle can affect each of these parameters, the BA concluded that grazing was having insignificant effects to all PCEs without even discussing the relevant data.

Bear Lakes Allotment. The Bald Butte pasture of this allotment contains six critical habitat streams covering eighteen river miles—Dead Cow, Gold, and School Creeks that empty into the North Fork Sprague, and Upper Sycan, South Fork Sycan and Boulder Creek at the headwaters of the Sycan River. Ex. 1; FWS 1429-30. A fundamental problem with the BA is that it includes very little information on grazing effects to these streams. FWS 1436-37, 1439-

¹⁰ High ecological status means highly similar to the potential natural conditions. POL5379.

40, 1455-56. The BA admits that Dead Cow, Gold and School Creeks have high sediment levels that are a limiting factor for bull trout, as well as warm water temperatures, but it contains no effectiveness or implementation monitoring data for these streams to analyze grazing impacts on them. FWS 1436-37, 1455. The BA simply states that effects from grazing on these streams will be insignificant without any data to support that conclusion. FWS 1436-37.

Likewise, there is no effectiveness or implementation data for the South Fork Sycan or Boulder Creek. FWS 1439-40, 1456. The BA did state that stream surveys showed these streams were small, sinuous, and highly stable, but failed to acknowledge that those same surveys showed fine sediment levels above 20% and pool frequency that was too low. FWS 1440; POL2672, 7104, 7111. And water temperatures in the South Fork Sycan and Upper Sycan were above 15°C. FWS 1439-40; Ex. 2. The BA concluded that grazing effects on this critical habitat were insignificant because of the low frequency of livestock use combined with the low proportion of the total allotment within this pasture. FWS 1440. Again, this conclusion is irrational. Although the Bald Butte pasture may be a small proportion of the total allotment, it is still very large in size, grazed by more than 1,000 cows for the entire month of August, and contains eighteen miles of critical habitat. BL2523; FWS 667, 1429-30.

In addition, data from the upper Sycan River site within this pasture did not prove a “low frequency of livestock use.” No monitoring occurred at all in 2008 and 2009, and in 2010 use was 5% over the standard with some cows on the pasture more than a month too long. BL326, 333, 374-75. Riparian scorecard monitoring at the Head of Sycan site showed low or moderate ecological status for all three transects, with a decline in soil infiltration and rooting depth at the moderate transect between 2003 and 2010. BL369-72. Photos of the upper Sycan also show heavy grazing use and little shade of the stream. BL364-65; Exs. 4-6; SUPP POL14999-15002,

15034-35. This data does not support the conclusion that grazing effects are insignificant.

Paradise Creek Allotment. Five miles of North Fork Sprague River critical habitat flow through the Sprague RIP pasture. FWS 1429. The BA admitted that water temperatures in the North Fork Sprague are well above 15°C in summer and early fall, but dismissed any impacts from grazing on water temperature because the extent of cattle use “seems to be confined to a relatively small area . . . indicating that effect of grazing on shade provided by willows” is insignificant. FWS 1434. Yet, on the next page, the BA admitted there are problems with streambank stability, width to depth, number of pools, instream cover, and riparian vegetation, which can cause increased water temperature. FWS 1435; *see also* PC2604-05, 2610-14 (stream survey showing reaches 9-15 with low pool frequency and high width/depth ratios). The record also shows that willow browse in this pasture had been a concern for several years and there is little stream shade. POL5401-02; PC2125, 2511, 2584-90, 2599-2600, 2612-13; Exs. 7-14.

The BA excuses these problems by stating that riparian vegetation and bank stability have slightly improved since 1997, yet the data shows that bank stability remains below the 80% standard, late seral riparian species declined from 88% in 1997 to 65% in 2005, and stream terrace riparian scorecard status declined from high to moderate. POL5400-01, PC2541, 2591-96. Plus, “slight” improvement in conditions does not indicate that grazing effects are “negligible” if grazing is slowing recovery of riparian vegetation and stream channel morphology. FWS 1435, 2337; POL2677.

For the South pasture of this allotment, the 2011 BA noted that Cold Creek is a perennial tributary to North Fork Sprague River critical habitat. FWS 1433-34. It dismissed effects from grazing along Cold Creek because this part of the stream was too far away from the North Fork Sprague, plus implementation monitoring met standards. *Id.* The BA did not mention that

riparian scorecard data showed Cold Creek at just moderate ecological status, and stream survey results showed all five reaches with fine sediment much greater than 20% and two of five reaches with width/depth ratios well over the standard of 10. PC1948, 2161, 2164-65; *see also* Exs. 15-18 (2010 photos of heavy trampling along this stream and little shade). These conditions contribute to water temperatures in Cold Creek exceeding 15°C for much of the summer. FWS 1434. Moreover, the 2011 BA later admitted that only 0.1 river mile of Cold Creek occurs between South pasture and the North Fork Sprague, and that section is also grazed. FWS 1434. Sediment and warm water from Cold Creek would certainly impact critical habitat in the North Fork Sprague. Thus, the BA's discussion of the South pasture was irrational and incomplete.

Currier Camp and Withers Special Use Allotments. These allotments contain several miles of Sycan River critical habitat, and Currier Camp also contains critical habitat in Rifle Creek. Water temperatures in this portion of the Sycan River are above 15°C, but the BA claimed that grazing is not having an effect on stream shade. FWS 1443-45. Yet photos show this portion of the Sycan River with little shade from riparian vegetation, a wide channel that is incised in places and cut-off from its floodplain, and upland grasses and sagebrush right at the edge of the channel. Exs. 23-32; SUPP POL7380-82, 7427, 7456-58, 7709-11, 15036-41. Tributary Skull Creek also had significant damage from cattle, contributing sediment and warm water to the Sycan River. Exs. 19-22. Furthermore, the BA ignored riparian scorecard data from both allotments that showed all six sites were at moderate ecological status, and both allotments had problems with extensive cattle use outside the authorized season of use in 2009 and 2010. CC470-79, 647-48; WSU1-2, 36, 44.

The BA discussed information from Sycan River and Rifle Creek stream surveys, but omitted facts about high sediment levels in both streams, and high width to depth ratios and low

pools in the Sycan River. CC332, 343, 399-409 (reaches 5-12 on allotments), 634. This portion of the Sycan River has many areas of bare and trampled stream banks that contribute sediment and provide no cover for fish, and soil compaction that prevents growth of riparian vegetation. SUPP POL7446, 7458, 7709-11, 14973, 15036-41; Exs. 23-32. The BA did not discuss any of these conditions. FWS 1443-45. Thus, its assertions about insignificant effects from grazing are not supported by the data or a satisfactory explanation.

Pothole, Sycan, Foster Butte, Riverbeds, Meryl Creek, and Yaden Flat Allotments. For Pothole, Sycan, and Foster Butte allotments, the BA omitted discussion of relevant monitoring data. In the Pothole allotment section, the BA cited to a 1994 assessment to assert that riparian conditions on the South Fork Sprague River were healthy but ignored riparian scorecard data showing ecological conditions remained at moderate status between 1999 and 2007. FWS 1437, 1439; PH53-55. In addition, the BA asserted that grazing effects were insignificant due to the low level of use in the allotment's pastures, yet monitoring data showed overuse in Drews pasture in 2007 and 2008 and in Mitten pasture in 2010. FWS 1437-39; PH75, 80, 416.

The BA also did not discuss riparian scorecard data for two sites on the Sycan allotment, which showed one at moderate ecological status and the other at low status. SY1-2. The low status site was on Long Creek, a tributary to the Sycan River. SY2; FWS 1442. Implementation monitoring showed high utilization at both sites in 2008. SY32. The BA similarly failed to discuss riparian scorecard data for Coyote Creek in the Foster Butte allotment, which is critical habitat. The data showed low ecological status in 2003, 2006 and 2010, with increasing bare soil and decreasing rooting depth between 2006 and 2010. FWS 1445-46; FB81-85, 89.

Finally, many of the pastures in these allotments contain tributaries that flow into North Fork Sprague and Sycan River critical habitat, but the BA dismissed effects from most of these

tributaries as insignificant with little discussion. FWS 1424, 1432-34, 1437-39, 1440-45, 1447. Tributary streams can have effects to downstream critical habitat by adding sediment or warm water, but the BA provided no discussion about whether cattle were causing streambank erosion, widening channels, and removing riparian vegetation that would contribute sediment and lead to higher water temperatures in tributary flows. SUPP POL15019-20. Nor did the BA discuss the fact that grazing can reduce water quantity in tributaries through soil compaction, removal of riparian vegetation, and alteration of the stream channel, thereby reducing the amount of water these tributaries can contribute. *Id.* These were key omissions about the indirect effects from grazing, particularly in light of the potential combined impacts on all tributaries to the North Fork Sprague and Sycan Rivers. *See* Ex. 1 (map of entire allotment area).

C. The Agencies' Reliance on Mitigation was Unreasonable.

Mitigation measures relied upon by an agency to support an ESA determination must be reasonably specific, certain to occur, and capable of implementation; subject to enforceable obligations; and most importantly, address the threats to the species in a way that satisfies the ESA's substantive standards. *Ctr. for Biol. Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139, 1152 (D. Ariz. 2002). Courts have rejected reliance on uncertain or unproven mitigation to support a conclusion that an activity would not cause jeopardy to a species or adverse modification of critical habitat. *Natural Resources Defense Council v. Kempthorne*, 506 F. Supp. 2d 322, 350-57 (E.D. Cal. 2007); *Nat'l Wildlife Fed'n v. NMFS*, 839 F. Supp. 2d 1117, 1125-28 (D. Or. 2011); *Ctr. for Biol. Diversity v. Salazar*, 804 F. Supp. 2d 987, 1001-04 (D. Ariz. 2011).

The same principle would apply when relying on mitigation to support a finding that an activity is not likely to adversely affect critical habitat. The 2011 BA relied on the six implementation items that were continued from the proposed action of the 2007 BA—

particularly the adaptive management approach based on implementation and effectiveness monitoring—to support its NLAA conclusion. FWS 1424, 1431, 1447, 1448. The reliance on these measures was unreasonable because they are uncertain to occur, unenforced, and insufficient to protect critical habitat from adverse effects.

There was no certainty the Forest Service would fully implement these six items given its failure to do so after the 2007 BA was issued. The Forest Service was supposed to update AMPs for each allotment, but only plans for Paradise Creek and Bear Lakes allotments were completed. FWS 669 (2007 BA showing AMPs were in development or pending final review); PC2514, BL336 (only AMPs in administrative record). Likewise, the Forest Service did not conduct required annual implementation monitoring of stubble height and floodplain utilization at numerous sites between 2008 and 2010. FWS 672-73; BL326, 333 (Head of Sycan site on Bear Lakes), WSU28, 35, 44 (Withers Special Use); FB68-69, 74-75, *compare to* 122-23 (Coyote Creek site on Foster Butte), RB78-79, 84-85, 92 (Riverbeds); SY38-39, 46 (Sycan); MC28-29, 34-35, 42-43 (Meryl Creek); YF25 (Yaden Flat).

For long-term effectiveness monitoring, the 2007 BA required that a riparian scorecard plot be established in all pastures, but the 2011 BA showed several pastures with no ecological status data. FWS 674, 1455-57. The 2007 BA also required that all allotments with ESA listed species present must have a fish habitat effectiveness monitoring site, yet the 2011 BA showed only two allotments with bank stability data. FWS 674, 1455, 1457. Although the other allotments do not have listed fish present, they have designated critical habitat present and thus the same monitoring requirement should apply to minimize effects to that habitat.

Finally, the Forest Service did not apply “adaptive management” to adjust grazing based on monitoring results, *see* FWS 675-76, but instead ignored the results and authorized the same

grazing. Annual monitoring from 2008-2010 showed numerous compliance problems but no actions to remedy the problems. PC2152-53, 2599-2600; Exs. 8-13, 15-18 (use violations in 2008, willow browse and steam trampling in 2009 and 2010 on Paradise Creek allotment); BL374-75 (utilization 5% over standard and cows on Bear Lakes allotment well past off-date in 2010); CC647-48 (cattle on Currier Camp allotment a month past off-date in 2009); WSU35-36, 44-45 (substantial cattle use outside authorized season on Withers Special Use allotment in 2009 and 2010); PH416 (utilization 6% over standard on Pothole allotment in 2010); SY32-33 (utilization above standard on Sycan allotment in 2008). The Forest Service also did not adjust grazing despite long-term effectiveness monitoring and stream surveys showing many streams were not at high ecological status and not meeting fish habitat objectives, as discussed above.

Moreover, the Forest Service's monitoring did not assess all of the designated critical habitat or monitor a key habitat parameter for bull trout. Because the agency relied on the same monitoring from the 2007 BA despite the ten-fold increase in critical habitat, it added no annual utilization, riparian scorecard, or fish habitat effectiveness monitoring on critical habitat in School Creek, Dead Cow Creek, Gold Creek, South Fork Sycan, or Boulder Creek. FWS 1424, 1427. Furthermore, the Forest Service did not monitor undercut banks even though INFISH contains a separate standard for that feature. POL2672 (INFISH standards); PC2161 (stream survey summary). Undercut banks are highly important as cover for bull trout, and cattle have degraded this habitat parameter. FWS 1162-64, 1431, 1486, 1490, 1513, 1707, 2313; SUPP POL15006-08, 15011-13, 15019-63. These omissions in the agency's monitoring undercuts the reliability of that monitoring to ensure against adverse effects of grazing. It was unreasonable to rely on the same monitoring that the Forest Service has failed to implement properly and that has failed to restore bull trout habitat and increase distribution of the fish in these streams.

D. FWS's Letter of Concurrence was Flawed and Inadequate.

In addition to its unlawful reliance on a flawed BA, FWS's LOC was arbitrary and capricious because it contained inaccurate and insufficient information. The LOC stated that effects from grazing Riverbeds, Sycan, and Currier Camp allotments were minimized because topography limited cattle access to critical habitat. FWS 1462. Yet cattle have access to at least 1.5 miles of Sycan River as well as Rifle Creek critical habitat on the Currier Camp allotment, and grazing impacts to tributaries can also affect critical habitat. FWS 1430, 1443.

The LOC further stated that Paradise Creek allotment has only intermittent hydrology, which is inaccurate because it also contains five river miles of North Fork Sprague critical habitat. FWS 1429, 1462. The LOC then dismissed any impacts from grazing the Bear Lakes, Pothole, Withers Special Use, and Foster Butte allotments because of the early season or deferred rotation grazing strategies used, which ignored the monitoring data described above showing compliance problems and worse-than desired riparian and stream conditions on these allotments. FWS 1462. For all of these reasons, the LOC was arbitrary and capricious.

II. THE FOREST SERVICE DID NOT ENSURE THAT 2014 AND 2015 AOIs COMPLIED WITH WATER QUALITY STANDARDS.

Plaintiffs challenge the Forest Service's 2014 and 2015 annual authorizations, or AOIs, for livestock grazing on five allotments—Paradise Creek, Currier Camp, Withers Special Use, Bear Lakes, and Pothole (“CWA allotments”)—because the Forest Service did not ensure that the authorized grazing complied with Oregon's water quality standards, as required by section 313 of the CWA, 33 U.S.C. § 1323(a). *See* WSU 67-72, 828-32; CC880-85, 5022-26; BL457-61, 2491-2500; SUPP POL66-67; PH860-64, 869-73; PC2666-70, 4003-07. Due to a change in Oregon's water quality regulations, the agency can no longer rely on Best Management Practices to show compliance with water quality standards, as it did previously. *See Ctr. for Biol.*

Diversity v. Wagner, 2009 WL 2176049, at *14-18 (June 29, 2009). The record shows grazing on these allotments contributes to exceedances of temperature standards in many streams, but the agency ignored this evidence and its statutory duty when authorizing grazing in 2014 and 2015. Thus, those authorizations were arbitrary and capricious and contrary to the CWA and NFMA.

A. Non-Compliance with Oregon’s Water Quality Standards and the CWA.

The CWA requires states to establish water quality standards that specify the conditions necessary to protect the designated uses of surface waters. 33 U.S.C. § 1313(c); *see Plfs.’ Compl.*, ECF 1, ¶¶ 25-29. Federal agencies with “jurisdiction over any property” must comply with such standards. 33 U.S.C. § 1323(a). Accordingly, “[f]ederal agencies must ensure that any authorized activity on federal lands complies with all applicable water quality standards.” *Hells Canyon Pres. Council v. Haines*, 2006 WL 2252554, at *1, 4 (D. Or. Aug. 4, 2006); *see Or. Natural Res. Council v. U.S. Forest Serv.*, 834 F.2d 842, 842-43, 848, 852 (9th Cir. 1987); *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1153 (9th Cir. 1998), *overruled on other grounds by Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008).

The APA provides for judicial review of a claim alleging an agency’s non-compliance with section 313 of the CWA. 5 U.S.C. § 706; *Or. Natural Res. Council*, 834 F.2d at 848, 852.¹¹ An agency action is arbitrary and capricious under the APA where it “entirely failed to consider an important aspect of the problem....” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Oregon’s water quality standards set maximum water temperatures based on the

¹¹ The APA also waives the government’s sovereign immunity to be sued under such claims. 5 U.S.C. § 702. *See Idaho Sporting Cong*, 137 F.3d at 1153; *Or. Natural Res. Council*, 834 F.2d at 850; *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 961-62 (9th Cir. 2006); *Hells Canyon Pres. Council*, 2006 WL 2252554, at *1, 4 (all using APA to review federal government actions for failing to comply with CWA section 313).

designated beneficial uses of surface waters. OAR 340-041-0028(4). The seven-day-average maximum temperature¹² (“7dAM”) of streams designated as Lahontan cutthroat trout or redband trout use may not exceed 20.0°C. OAR 340-041-0028(4)(e). The 7dAM of streams designated as bull trout spawning or juvenile rearing use may not exceed 12.0°C. OAR 340-041-0028(4)(f).

Within the CWA allotments, numerous streams are subject to Oregon’s 12°C standard for bull trout spawning and rearing uses or 20°C standard for Lahontan/redband trout use.

POL3426; Ex. 34. The Forest Service admits that many of these streams do not meet the applicable standard and have been listed on Oregon’s 303(d) list of streams impaired by temperature. FWS 2014; SUPP POL462-5, 1396, 1461-62, 1466-67; POL3333-35. The agency also recognizes that grazing contributes to higher water temperatures by removing riparian vegetation that provides shade and trampling streambanks that causes streams to become wider and shallower. POL3335-36, 3340, 3343, 3361, 3366. Due to these impacts, the agency’s 2003 Water Quality Restoration Plan (“WQRP”) required monitoring and set targets for riparian vegetation, shade, and width-to-depth ratios. *See* POL3312-74; *see also* SUPP POL39.

Until 2013, Oregon’s water quality regulations allowed a federal agency to show compliance with water quality standards by implementing best management practices or the WQRP, as this Court ruled in *Wagner*, 2009 WL 2176049, at *14-18 (citing OAR 340-041-0061(13)). Since that ruling, however, Oregon repealed this loophole for federal agencies. *See* OAR 340-041-0061(13) (2015) (excluding such an exemption);¹³ POL6685 (explaining a repeal

¹² The seven-day average maximum temperature is defined in Oregon’s water quality standards as “a calculation of the average of the daily maximum temperatures from seven consecutive days made on a rolling basis.” OAR 340-041-0002(56). Oregon’s temperature standard implementation guidance explains that the seven-day average maximum temperature is calculated by “averaging the daily maximum instream water temperatures for 7 consecutive days.” Ex. 35 at 21.

¹³ Available at http://arcweb.sos.state.or.us/pages/rules/oars_300/oar_340/340_041.html

of the exemption would “increase[] vulnerability to litigation for management activities on [National Forest] lands”). Thus, the agency must now strictly comply with state water quality standards when authorizing activities on the Fremont-Winema National Forest.

Over the past decade, the Forest Service monitored stream temperatures at twenty sites in the CWA allotments, which documented staggering exceedances of Oregon’s temperature standards. *See* WSU503-823; CC720-768, 890-1108, 1110-1386, 1540-85, 3390-3786, 4026-4345, 4917-5017; PH141-255, 260-373, 602-840; BL561-703, 970-1420, 1461-1878, 2030-2460; PC2025-77, 2226-2507, 2684-2896, 3261-3692, 3750-3997. Seventeen of the twenty monitoring locations exceeded the applicable standard during every year monitored between 2004 and 2014. *See* Ex. 2;¹⁴ BL710, PH256, PC4008. The water temperature exceedances occurred in numerous streams on the CWA allotments: Currier Camp (Skull Creek, Rifle Creek (2 sites), Crazy Creek, Sycan River), Withers Special Use (Sycan River), Bear Lakes (Sycan River (2 sites), South Fork Sycan, Boulder Creek), Pothole (South Fork Sprague, Corral Creek, Camp Creek), and Paradise Creek (North Fork Sprague (2 sites), Cold Creek, Watson Creek). Ex. 2. Most streams exceeded the standard for one to three months during the summer and early fall, with the highest 7dAM temperatures above the applicable standard by 5°C or more. Ex. 2.

The Forest Service admits that grazing in riparian areas increases stream temperatures, which contributes to exceedances of temperature standards. The agency explained that grazing caused “extensive” impacts to riparian areas that are “far-reaching in space and time” and “may directly influence stream temperatures ... for decades....” POL3336. Impacts that raise

¹⁴ Exhibit 2 documents and summarizes 7dAM calculations based on raw data in the record because the agency failed to include the 7dAM for all data collected between 2004 and 2014. *See First Declaration of Elizabeth H. Zultoski* ¶ 2 (“Zultoski Decl.,” filed herewith); Ex. 36. The Forest Service did not include raw data for every year at any monitoring location. The record includes only a few years of data for most monitoring locations.

temperatures include wider, shallower stream channels, decreased riparian vegetation, and lowered floodplains. *See supra*, pp. 6-8; SUPP POL423, 548, 15009-13; FWS2012; POL3339, 6578-79.

Within the CWA allotments, the Forest Service documented degraded riparian and stream conditions that increase temperatures and are attributable to grazing. *See supra*, pp. 8-10, 20-25; POL6573-74; FWS2109-10; Exs. 4-33. For example, the agency documented grazing impacts to willows and other riparian vegetation along the North Fork Sprague River and in numerous places in the Upper Sycan watershed, and the most recent riparian scorecard monitoring shows no sites are at desired condition of high ecological status for vegetation and soils. SUPP POL7314-15 (portions of North Fork Sprague River are deficient in willows and have altered riparian vegetation as a result of grazing), CC869-73 (banks along 3.2 mile reach of Upper Sycan “grazed hard”); POL6574 (lack of riparian vegetation on numerous streams in Upper Sycan watershed due to grazing); POL5405-06; BL369-72; CC470-79; WSU1-2; PC1942-43, 1948, 2508-09, 2591-96; PH53-55. Overgrazing and unauthorized grazing, which reduces riparian vegetation, are problematic throughout the allotments. PH103, 125, 847, 853, 866-88; BL374-75, 2483-87; PC2125, 2599-2600, 2612-13, 2622, 2639, 3998-99; CC779; WSU35-36, 44-45, 51-53, 824-27; POL5401; SUPP POL4437, 4696, 7302-03, 7387, 7712, 7718-19, 7327, 7701.

The Forest Service has also documented high width-to-depth ratios on many streams within the CWA allotments, which the agency asserts is “the primary cause of elevated [water] temperatures” and is attributable to grazing. FWS2014; POL3339-40; SUPP POL1463, 15012. Stream surveys show that many stream reaches on the CWA allotments fail to meet the WQRP

targets for width-to-depth ratio.¹⁵ See PH390 (reach 3 of Corral Creek within Pothole allotment), CC863-67, 872-74 (reaches 5-9 & 12 of Upper Sycan River within Currier Camp, Withers Special Use, and Bear Lakes allotments¹⁶); PC2164-66, 2609-11, 2662 (reaches 3 & 4 of Cold Creek, reaches 10-11 of the North Fork Sprague, and reach 7 of Paradise Creek in the Paradise Creek allotment); see also POL5040 and SUPP POL7269 (stating that North Fork Sprague is overly wide and shallow). Furthermore, reaches 5-10 of the Upper Sycan within Currier Camp allotment did not meet the width/depth target in 1999 *and then worsened* between 1999 and 2014. Compare CC343 with CC863-74. It is likely that other stream reaches within the CWA allotments may not meet the target ratios.¹⁷ See, e.g., CC868-69; BL389; PC2609-10. Although the Forest Service collected width-to-depth data, it never assessed whether streams were meeting the WQRP targets or whether to change grazing practices to restore narrower channels that would lead to lower water temperatures.

Observations by an expert hydrologist, which were forwarded to the Forest Service before the 2015 AOIs were issued, also showed a severe lack of riparian vegetation and shade, as well as overwidened stream channels, throughout the CWA allotments. SUPP POL 15020-15063. Collectively, the record shows grazing has degraded riparian conditions in the CWA allotments that increases stream temperatures and causes exceedances of temperature standards. Despite this compelling evidence, the agency authorized grazing in 2014 and 2015 aware that the grazing would perpetuate these conditions and thereby continue to contribute to water

¹⁵ The WQRP provides target width-to-depth ratios based on the stream type. POL3362. Many of the streams here have a target width-to-depth of 7.1 or 7.9.

¹⁶ Currier Camp allotment begins in reach 5 of the Upper Sycan stream survey. Compare BL435 with CC5027. The remaining reaches to the headwaters of the Upper Sycan fall within Currier Camp, Withers Special Use, and Bear Lakes allotments. See CC5027, WSU833, BL2523.

¹⁷ The Forest Service has failed to identify the applicable stream type for some reaches, preventing a determination of compliance with the target ratios.

temperature exceedances. Accordingly, issuance of these AOIs was arbitrary and capricious because it violated the agency's duty to "ensure that any authorized activity on federal lands complies with all applicable water quality standards." *Hells Canyon Pres. Council*, 2006 WL 2252554, at *4-5 (decision authorizing a project on federal land that would violate state water quality standards was arbitrary and capricious, citing 33 U.S.C. § 1323(a)).

B. Non-Compliance with INFISH and NFMA.

Under NFMA, all activities authorized by the Forest Service must be consistent with the governing Forest Plan. 16 U.S.C. § 1604(i). Each "project or activity approval document must describe how the project or activity is consistent with applicable plan components," and specifically how "[t]he project or activity complies with applicable [Forest Plan] standards." 36 C.F.R. § 219.15(d). The Fremont Forest Plan requires compliance with all applicable state water quality standards and the temperature RMOs in INFISH. POL1926, 2655, 2669-2674, 2677; *see Cent. Or. Landwatch v. Connaughton*, 905 F. Supp. 2d 1192, 1196 (D. Or. 2012).

The AOIs violated NFMA because they are inconsistent with these Forest Plan commands.¹⁸ In addition to the exceedances of the state water temperature standards, the authorized grazing contributes to violations of the 48°F (8.9°C) RMO for bull trout spawning and rearing habitat and the 59°F (15°C) RMO for bull trout holding habitat. POL2672; Ex. 2. As explained above, the record shows that grazing is preventing or retarding attainment of the temperature objectives, and the agency is aware that eliminating grazing or erecting riparian enclosures would reduce temperatures in these waters. *See* SUPP POL549, 1428, 1437-38, 1471, 4498, 15013-18. By failing to evaluate whether grazing was retarding or preventing attainment

¹⁸ Maximum water temperature was defined in INFISH as "7-day moving average of daily maximum temperature measured as the average of the maximum daily temperature of the warmest consecutive 7-day period." POL2672.

of the INFISH temperature RMOs, and thus whether it needed to modify grazing practices in the 2014 or 2015 AOIs to move toward those objectives, the agency did not act consistent with INFISH. POL2677. Accordingly, the issuance of the 2014 and 2015 AOIs was arbitrary and capricious. *See Cent. Or. Landwatch*, 905 F. Supp. 2d at 1196-97; *Or. Natural Desert Ass'n v. Tidwell*, 716 F. Supp. 2d 982, 1007-08 (D. Or. 2010).

III. THE FOREST SERVICE DID NOT ENSURE THAT 2014 AND 2015 AOIs COMPLIED WITH THE WSRA AND NFMA.

The WSRA provides for protection of rivers with “outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values” (“ORVs”) for the benefit and enjoyment of present and future generations. 16 U.S.C. § 1271. Such rivers must be managed to protect *and enhance* their ORVs. 16 U.S.C. § 1281(a). Agencies must act “as may be necessary to protect such rivers in accordance with the purposes of this Act.” 16 U.S.C. §§ 1281(a), 1283(a). Where grazing is “detrimental to soil, vegetation, wildlife, or other values” or inconsistent with a WSRA designation, then an agency “clearly ... has ...the duty...to eliminate it entirely.” *Or. Natural Desert Ass'n v. Singleton*, 47 F. Supp. 2d 1182, 1191-92 (D. Or. 1998); 47 Fed. Reg. 39454, 39,458-59 (allowing actions only if they do not adversely impact or degrade ORVs). The APA provides for judicial review of agency action under the WSRA. *Hells Canyon Alliance v. U.S. Forest Serv.*, 227 F.3d 1170, 1176-77 (9th Cir. 2000).

The headwaters and approximately seventeen miles of the Upper Sycan River are designated as scenic under the WSRA and run through Bear Lakes, Withers Special Use, and Currier Camp allotments (“WSRA allotments”). *See* 16 U.S.C. § 1274(a)(103)(A); POL2344; SUPP POL131; CC5027; WSU833; BL2523. To protect and enhance the scenic, fisheries, and wildlife ORVs in this section of the Sycan River, the Forest Service adopted a River Plan with goals, desired conditions, and mandatory standards, which was incorporated into the Fremont

Forest Plan. *See* 16 U.S.C. § 1274(d); POL2343-61; SUPP POL6-7. Within the River Corridor¹⁹ that is subject to the WSRA and River Plan requirements, livestock grazing is allowed only where consistent with ORVs and River Plan standards. POL2348, 2351-52, 2355-56, 2361. Further, grazing may not receive preferential consideration in cases of unresolved conflict with soil, fish, water, and wildlife values. POL2351. The agency disregarded these requirements by authorizing grazing in 2014 and 2015 that is inconsistent with ORVs and River Plan standards. Thus, those authorizations are arbitrary and capricious and contrary to the WSRA and NFMA.

A. Degradation of ORVs.

As discussed throughout this brief, the Forest Service has documented degraded riparian conditions in the River Corridor of the WSRA allotments, which have been caused and perpetuated by grazing. *See e.g. supra*, pp. 20-21, 23; POL6573-74, 6577, 6586 (describing need for restoration of degraded areas caused by grazing); BL2501-22 (showing livestock fecal matter in Sycan River, headwater meadow, and spring). The deplorable conditions of the Upper Sycan River were also recently documented by an expert hydrologist and members of the public, who forwarded their observations to the agency in early 2015. *See* SUPP POL14947-16352. They noted unstable and eroding streambanks, lack of riparian vegetation, overwidened and incised stream channels, and poor water quality. SUPP POL14955-58, 14962-973, 14993-15002, 15033-61. Notably, the agency concedes that grazing is a cause of the extinction of bull trout in the Upper Sycan, demonstrating that grazing substantially degrades fisheries values in the River Corridor. *See* POL6577. The agency also admits that not authorizing grazing would most rapidly recover riparian conditions. *See, e.g.*, SUPP POL1428, 1437, 1471, 4498.

¹⁹ The River Corridor is delineated on a map issued with the River Plan based on geographic features of ORVs and is roughly a quarter mile on each side of the river in some areas. SUPP POL65, 170, 213. Activities outside the corridor must also protect the values for which the river was designated. SUPP POL26.

Livestock have also degraded the scenic ORVs and associated recreational opportunities, which include fishing, swimming, camping, sightseeing, wildlife observation, and winter activities. *See* FWS 2021-22, 2060. Members of the public have told the agency that grazing has marred the historic Hanan Trail and the River Corridor with cattle excrement, pocked soils, and damaged streambanks and riparian areas. SUPP POL14962, 14969-70, 14995-15002, 15034-35, 15039, 15041-42, 15062; *see also* Ex 37; Ex. 38 (reports from mountain bikers that biking along the Hanan trail would be good “if it weren't for all the cows” and the “constant dodging of fresh cow pies”). Such deplorable conditions are inconsistent with the River Plan, which desires a “pleasant viewing experience for visitors” and a “largely undisturbed” shoreline with a “natural appearance” to enhance recreation. POL2354.

Further, the Forest Service does not conduct the monitoring needed to ensure that grazing is consistent with ORVs and the River Plan. To “ensure effective and timely implementation” of the River Plan, the agency committed to reporting vegetation composition and condition every five years, and conducting a habitat inventory of all fish-bearing streams every five years. POL2363, 2366-67. Yet riparian scorecard monitoring has not occurred on the Sycan River in Currier Camp and Withers Special Use allotments since 2003, and there was a fifteen-year gap in stream surveys on the Upper Sycan River. CC199, 470-79, 856; WSU1-2. Utilization, stubble height, and PFC monitoring does not address degradation of riparian and scenic values. *See* SUPP POL1463, 15019; FWS 784-85; *Singleton*, 47 F. Supp. 2d at 1189.

Even when the agency documented riparian stubble height violations and other problems in 2014 on all three allotments, it made only nominal or no reductions in use for 2015. PH860-64, 866-68, 869-73, 874-85; BL457-61, 2483-84, 2491-95; CC880-85, 5018-20, 5022-26; PC2666-70, 3998-99, 4003-07. The heavy use reported in 2014 was attributed to the prolonged

drought, which the agency asserted would require reductions should conditions continue, but few or no changes occurred in the 2015 authorizations despite continuing drought. CC5018-20.

There is no evidence that the Forest Service evaluated its 2014 and 2015 AOIs for whether they would “protect and enhance” the ORVs of the Sycan Wild and Scenic River. Rather than taking action that would protect *and enhance* riparian areas, the agency authorized grazing that only ensures conditions will “not deteriorate markedly.” See SUPP POL1428, 1437, 1471, 4498. Maintaining the status quo of the severely degraded conditions of the Upper Sycan River does not meet the agency’s obligation to “enhance” ORVs. See *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1035 (9th Cir. 2008). Given the extensive evidence that grazing is inconsistent with ORVs, the agency’s decision to authorize status quo grazing in 2014 and 2015 was arbitrary and capricious and contrary to the WSRA. *Or. Natural Desert Ass’n v. U. S. Forest Serv.*, 2004 WL 1293909, at *5-7 (D. Or. June 10, 2004); *Singleton*, 47 F. Supp. 2d at 1191-92; *Or. Natural Desert Ass’n v. Green*, 953 F. Supp. 1133, 1143-46 (D. Or. 1997) (finding WSRA violations where grazing degraded ORVs).

B. Violations of Specific River Plan Standards.

The 2014 and 2015 AOIs were also arbitrary and capricious because they did not comply with multiple River Plan standards set for livestock grazing and riparian and fisheries conditions. First, the agency must review AOIs or AMPs to assess compliance with the River Plan and the effects of grazing on ORVs. POL2361. The record does not include such an assessment for the 2014 and 2015 AOIs. See WSU67-72, 828-32; CC880-85, 5022-26; BL457-61, 2491-2500. Similarly, no assessment for all River Plan requirements was completed for the Bear Lakes allotment AMP. BL341 (explaining only that River Plan permits grazing). The Currier Camp and Withers Special Use allotments do not even have AMPs and thus violate the Plan’s standard

to include best management practices in an AMP. *See* WSU Index; CC Index; POL2361.

To protect fisheries, the River Plan sets fisheries standards and guidelines for stream temperature, bankfull width/depth ratios, stream cover, and pool habitat. POL2357-59. Stream temperatures should be 58°F (14.4°C) or lower in the Upper Sycan, yet between 2004 and 2014, temperatures in the river within the WSRA allotments routinely exceeded this standard. POL2358; BL429; Ex. 2. Bankfull width/depth ratio should be 10 to 1 or lower, but nearly every reach of the Upper Sycan in these allotments had a grossly higher ratio, and many reaches worsened between 1999 and 2014. POL2358; CC863-69; *compare* CC343 with CC863-74. Pool habitat should constitute at least 50% or 40% of the river based on the river gradient, but again the Forest Service documented lower conditions in multiple reaches. POL2358; BL193, 60-61 (for reaches 5, 7, 9, 10 in 1999), 430 (for reaches 5, 7, 10 in 2014). The River Plan also requires 80% stream cover or 100% of the site potential. POL2358. The agency has never measured stream cover, but the record demonstrates a lack of willows and other stream cover in the River Corridor, and ecological status of low or moderate for riparian conditions. *See* SUPP POL14999-15002, 15034-41; BL369-72, WSU1-2, CC470-73.

Further, grazing may only occur where it does not destabilize highly erodible streambanks and does not cause or perpetuate increased streambank degradation over natural levels at designation, but the record shows extensive unstable and eroding banks along the Sycan River in the WSRA allotments. POL2352, 6573-74; SUPP POL15034-40; WSU74-86; CC869-72. Grazing within the WSRA allotments contributes to and perpetuates violations of these standards by elevating stream temperatures, increasing width-to-depth ratios, reducing stream cover, reducing pools, and trampling streambanks. SUPP PO15009-18, 15033-41, 15062-63; POL6573-74, 6578, 6586; FWS 2012, 2066.

Finally, the River Plan requires that scenic diversity be maintained by minimizing management actions that reduce diversity of vegetation and emphasizing maintenance of riparian vegetation. POL2353-54. The agency has documented poor and moderate riparian vegetation and soil conditions and heavy grazing in the WSRA allotments. CC470-79, 865-66; WSU1-2; BL369-72; FWS2101. The agency admits that grazing significantly reduces the diversity and prevalence of riparian vegetation in the Upper Sycan, and that the best way to restore that vegetation is to stop grazing. FWS2012; SUPP POL1396, 1428, 1437. Continuing to authorize grazing that reduces riparian vegetation violates this standard.

In sum, the record demonstrates River Plan standards are not being met in the WSRA allotments and that grazing contributes to such violations. The agency's decision to ignore this evidence and its mandatory duties under the WSRA by authorizing grazing in 2014 and 2015 was arbitrary and capricious. *See Hells Canyon Alliance*, 227 F.3d at 1177-79. Because the River Plan and its standards were adopted into the Fremont Forest Plan, the agency also violated NFMA by authorizing site-specific activities that are inconsistent with Forest Plan standards. *See* 16 U.S.C. § 1604(i); SUPP POL6-7.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court grant their motion for summary judgment, and hold unlawful and set aside the 2011 BA/LOC, and 2014-2015 AOIs for the Bear Lakes, Withers Special Use, Currier Camp, Paradise Creek and Pothole allotments.

DATED this December 22, 2015.

Respectfully submitted,

/s/ Lauren M. Rule

Lauren M. Rule (OSB #015174)
ADVOCATES FOR THE WEST
3115 NE Sandy Blvd., Ste. 223
Portland, OR 97232
(503) 914-6388
lrule@advocateswest.org

/s/ Elizabeth H. Zultoski

Elizabeth H. Zultoski (OSB #105482)
ADVOCATES FOR THE WEST
3115 NE Sandy Blvd., Ste. 223
Portland, OR 97232
(503) 914-6388
ezultoski@advocateswest.org

/s/ David H. Becker

David H. Becker (OSB # 081507)
Law Office of David H. Becker, LLC
833 SE Main Street, #302
Portland, OR 97214
davebeckerlaw@gmail.com

*Attorneys for Plaintiffs Oregon Wild, Friends of
Living Oregon Waters, and Western Watersheds
Project*