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

Oral Argument on April 26, 2016

Memorandum in Support of Motion

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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

Federal Defendants' response brief emphasizes a common pattern of the Fremont-Winema National Forest: reauthorizing the same grazing year after year after year without paying attention to monitoring data or changing climatic conditions, and without ensuring that its authorizations are complying with federal laws. Rather than taking a close look at the impacts of livestock grazing in the Upper Sycan and Upper Sprague River watersheds on a regular basis and making adjustments to protect resources, the Forest Service prefers to ignore the data it collects and then, after litigation is filed, scramble to cobble together an unlawful post hoc rationalization in an attempt to justify its previous decisions. Such an approach not only has prevented necessary restoration of bull trout critical habitat to allow that species to recolonize areas it previously occupied, but also has perpetuated degradation of the Wild and Scenic Sycan River and high water temperatures that exceed water quality standards.

Defendants' responses make excuses and blame other factors for the degraded conditions that occur in these watersheds, but in reality livestock grazing is widespread in these areas and undoubtedly contributes to these conditions. The agencies' decisions to continue the status quo grazing, both through the bull trout critical habitat biological assessment and letter of concurrence and the 2014-2015 annual grazing authorizations, are not supported by data and rational explanations, and the response briefs cannot fill those gaps. Thus, the agencies' "Not Likely to Adversely Affect" determination for bull trout critical habitat is arbitrary, capricious and contrary to the Endangered Species Act, and the Forest Service's failure to ensure compliance with the Clean Water Act and Wild and Scenic Rivers Act before issuing the 2014-2015 AOIs also renders those decisions arbitrary, capricious and contrary to law. Accordingly, this Court should grant Plaintiffs' summary judgment motion and set those decisions aside.

ARGUMENT

I. THE BULL TROUT CRITICAL HABITAT CONSULTATION WAS ARBITRARY, CAPRICIOUS, AND VIOLATED THE ESA.

As an initial matter, Plaintiffs wish to identify a procedural matter raised in Federal Defendants' brief. Federal Defendants suggest that they may request additional briefing, or raise additional arguments in their reply brief, related to the ESA claim. Fed. Resp. at 28-29 (ECF # 59). This tactic is completely improper. Plaintiffs will move to strike any new arguments raised in the agencies' reply, and will vigorously oppose any request for additional briefing. The Ninth Circuit has made clear that "a party may not make new arguments in the reply brief." *United States v. Cox*, 7 F.3d 1458, 1463 (9th Cir. 1993). Plaintiffs raised all of their arguments in their opening brief, and there is no reason Federal Defendants could not raise all of their responses in their 60-page response brief. Furthermore, the parties have agreed to a briefing schedule and hearing date in an effort to allow the Court to rule before the next grazing season begins, and Plaintiffs will not agree to extend that schedule for any supplemental briefing. Any arguments not raised in the response brief are waived. *Id.*

A. The Court Can Review the Forest Service's Biological Assessment.

Federal Defendants claim that this Court cannot review the substance of the Forest Service's bull trout critical habitat biological assessment ("BA") because the BA is not a final agency action, and the contents of the BA are entirely discretionary. Fed. Resp. at 18-20. This very position was soundly rejected by Judge Hernandez in *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 2013 WL 3776305, at *6 (D. Or. July 17, 2013). The Forest Service raised the exact same arguments there, citing the same *Oregon Natural Desert Ass'n v. Tidwell* case. *Id.* The Court held that even though the BA was not a final agency action, and its contents are discretionary, the BA was subject to review because the

U.S. Fish and Wildlife Service's letter of concurrence ("LOC") relied on the BA to concur that the project was "not likely to adversely affect" ("NLAA") bull trout critical habitat. *Id.*

The court distinguished *Tidwell* because in that case the BA was followed by a full biological opinion, which was subject to the court's review, rather than by a short letter of concurrence that relied on information from the BA. *Id.* In *Connaughton,* the court concluded that, "the BA is subject to review because the LOC expressly relied on the BA when determining that bull trout did not exist in the Eagle Creek watershed and that no formal consultation was needed." *Id.* Numerous courts have reviewed BAs containing agencies' NLAA determinations under the APA in similar circumstances. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 901 (9th Cir. 2002); *Souza v. Cal. Dep't of Transp.*, 2014 WL 1760346, at *4-6 (N.D. Cal. May 2, 2014); *Conservation Congress v. U.S. Forest Serv.*, 2012 WL 2339765, at *8-13 (E.D. Cal. June 19, 2012), *aff'd,* 720 F.3d 1048 (9th Cir. 2013); *Wild Fish Conservancy v. EPA*, 2010 WL 1734850, at *3-8 (W.D. Wash. April 28, 2010); *Alliance for the Wild Rockies v. U.S. Forest Serv.*, 2008 WL 8985475, at *4-10 (D. Mont. July 30, 2008).

Here, the 1-1/2 page LOC clearly relied on the BA by stating that, "[b]ased on the Service's review of the biological assessment, we concur with the Forest's determination that the continued cattle grazing in the three Action Areas is not likely to adversely modify bull trout critical habitat. Therefore, further consultation, pursuant to section 7(a)(2) of the Act, is not required." FWS1462-63. The only document cited in the LOC is the BA. *Id*. Even Federal Defendants' response brief admits that "[i]n making its determination, FWS cited the Forest Service's extensive 2011 Biological Assessment" which "specifically analyzed the effects of grazing." Fed. Resp. 17. Moreover, Federal Defendants admit that the BA is an "interim step" to get to the LOC, which itself is a reviewable final agency action, thereby making the BA also

subject to review under APA § 704. 5 U.S.C. § 704 ("A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action."). Just as in *Connaughton,* this Court can review the BA to determine if the LOC's conclusion was arbitrary and capricious.

B. Fundamental Flaws in the BA and LOC.

Federal Defendants' first three arguments as to why Plaintiffs' attacks against the LOC lack merit are unavailing. Fed. Resp. 20-26. Plaintiffs identified several fundamental flaws with the BA and LOC, and Defendants' points do not refute Plaintiffs' claims.

First, Federal Defendants' response as to why the 2011 LOC was not inconsistent with the conclusions from the 1998 and 2000 biological opinions actually supports Plaintiffs' argument. Fed. Resp. 20-22. It is irrelevant that the 1998 and 2000 opinions assessed effects to the species whereas the 2011 LOC assessed effects to designated critical habitat. Listed species *and* designated critical habitat must be protected under ESA § 7(a)(2). 16 U.S.C. § 1536(a)(2) (requiring agencies to avoid jeopardizing listed species and adversely modifying designated critical habitat). What is relevant is where the protected fish or critical habitat are. The response brief admits FWS concluded in 1998 and 2000 that grazing was "likely to adversely affect" ("LAA") bull trout when it believed bull trout were present within the grazed allotments. Fed. Resp. 21. For other allotments without any bull trout, FWS made NLAA determinations. *Id.*

Then, when FWS believed in 2007 that no bull trout or designated critical habitat occurred within any of the allotments, it made a NLAA determination for all allotments. Fed. Resp. 22. The determinative factor in the LAA and NLAA conclusions was whether protected fish and critical habitat were, or were not, within the allotments at issue. Fed Resp. 21-22. After the new 2010 critical habitat designation, there is bull trout critical habitat *now within* many of

the allotments, including within the Foster Butte allotment and the Sprague RIP pasture—the same areas that FWS concluded were LAA areas in 1998 and 2000. Fed. Resp. 21; FWS1452-54. FWS's NLAA conclusion in the 2011 LOC is inconsistent with its conclusions in the 1998 and 2000 biological opinions without a rational explanation to support the change. FWS1462-63. Thus, the 2011 LOC is arbitrary and capricious. *Humane Soc'y of the U.S. v. Locke*, 626 F.3d 1040, 1049 (9th Cir. 2010).

Second, Federal Defendants assert they properly considered bull trout recovery in their analysis simply because the BA assessed impacts to critical habitat primary constituent elements ("PCEs"). Fed. Resp. 22-25. It is true that the purpose of critical habitat is to protect habitat necessary for the recovery of the species, and PCEs are the physical and biological features that define a species' critical habitat. 16 U.S.C. § 1532(3), (5)(A); 50 C.F.R. § 424.12(b); FWS1158-64. Neither the BA nor LOC acknowledge, however, that recovery goals of bull trout include increased abundance and distribution of the species so that bull trout re-occupy habitat in the Upper Sycan and Upper Sprague watersheds, which in turn requires restoration of habitat in those watersheds. *See* FWS4-6, 32, 39, 62, 1422-57, 1462-63, 2420-26, 2430. Simply allowing the status quo to continue will not recover bull trout in the Klamath Recovery Unit.

Federal Defendants ignore all of the cases holding that an agency must consider recovery goals when assessing effects to species or critical habitat, and that the failure to do so renders the consultation arbitrary and capricious. Fed. Resp. 22-25; Pl. Br.17-18 (ECF # 45); *see e.g. Alaska v. Lubchenco*, 723 F.3d 1043, 1054 (9th Cir. 2013); *Nw. Envtl. Advocates v. EPA*, 855 F. Supp. 2d 1199, 1223-24 (D. Or. 2012) ("NWEA"). Even assuming grazing is not causing further degradation to critical habitat, impacts that prevent or slow restoration of habitat, thereby preventing or delaying bull trout from re-populating these streams, are adverse effects that

prevent achievement of recovery goals. FWS2337 (grazing was likely to adversely affect bull trout "by impacting riparian areas and slowing their rate recovery as compared to no grazing."). Regardless of whether other problems exist, such as non-native brook trout, Fed. Resp. 24-25, the agencies must assess whether grazing contributes adverse effects by preventing or delaying restoration of habitat necessary for recovery of bull trout. Without this analysis, the NLAA determination was arbitrary and capricious. *NWEA*, 855 F. Supp. 2d at 1223-24.

Finally, Federal Defendants argue that Plaintiffs' cumulative effects argument fails because informal consultation does not need to include a cumulative effects analysis. Fed. Resp. 25-26. Plaintiffs do not dispute that informal consultation does not need to include such an analysis. The law is clear, however, that informal consultation *may* include such an analysis. *Conservation Congress v. U.S. Forest Serv.*, 720 F.3d 1048, 1055-56 (9th Cir. 2013); 50 C.F.R. § 402.12(f). If the agencies choose to include cumulative effects in informal consultation, they must conduct a full and rational analysis of the cumulative effects of state and private activities.

Here, the BA mentioned a number of activities that will cause cumulative effects, such as livestock grazing and timber harvest on private lands, but simply dismissed them as "localized" and "short-term" rather than fully analyze their impacts combined with the grazing. FWS1447. Grazing along with multiple "short-term" or "localized" impacts from private activities that add sediment, remove shade, or alter stream channels in these watersheds could have an adverse effect on bull trout critical habitat and should have been fully analyzed. *See Pac. Coast Fed'n of Fishermen's Ass'ns v. NMFS*, 265 F.3d 1028, 1037-38 (9th Cir. 2001); *Nat'l Wildlife Fed'n v. NMFS*, 524 F.3d 917, 934-35 (9th Cir. 2007); *see also Miccosukee Tribe of Indians of Fla. v. United States*, 566 F.3d 1257, 1270-71 (11th Cir. 2009); *NWEA*, 855 F. Supp. 2d at 1226.

Moreover, the effects of climate change are anything but speculative and also should

have been considered by the agencies in their analysis. Fed. Resp. 26. The agencies were well aware of the significant effects to bull trout from climate change, particularly in the arid Klamath Basin, and should have considered how grazing impacts, combined with increasing effects of climate change, would affect the critical habitat PCEs—particularly water temperature, water quantity, and presence of competitor species. FWS1164-65, 1722-24, 2435; SUPP POL241-43, 265, 381, 5317-18, 5330. The failure to fully consider climate change, and how grazing will exacerbate those effects on bull trout critical habitat, makes the NLAA determination arbitrary and capricious. *Ctr. for Biol. Diversity v. Salazar*, 804 F. Supp. 2d 987, 1008 (D. Ariz. 2011); *S. Yuba River Citizens League v. NMFS*, 723 F. Supp. 2d 1247, 1273-74 (E.D. Cal. 2010); *Natural Res. Def. Council v. Kempthorne*, 506 F. Supp. 2d 322, 367-70 (E.D. Cal. 2007).

C. The NLAA Determination in the BA Was Unsupported and Unreasonable.

Federal Defendants' attempt to save until later further briefing on the substance of Plaintiffs' BA arguments is completely inappropriate, as noted above. Fed. Resp. 28-29. *Connaughton* clearly rejected Defendants' theory that the BA cannot be reviewed, and there is no reason Federal Defendants should get additional briefing to respond to Plaintiffs' arguments, especially when they already had five extra pages for their response. Order granting excess pages (ECF # 53-54). Nor are they allowed to raise new arguments in their reply brief. *Cox*, 7 F.3d at 1463. Any response arguments not already raised by Federal Defendants are waived.

Regarding the arguments that Federal Defendants put forward in their brief, none is convincing or supported by the record. To refute Plaintiffs' claim about adverse effects of high water temperature, Federal Defendants state that "there are no bull trout in the area," indicating that water temperature is therefore not important. Fed. Resp. 29.[1] Yet, the fifth PCE in the bull

[1] The response brief also claims Plaintiffs did not establish that current grazing has any role in

trout critical habitat rule is "[w]ater temperature ranging from 2 to 15° C," showing that water temperature *is* one of the specific elements of critical habitat and the Forest Service must assess effects to that PCE in its BA. FWS1164. Likewise, the fact that non-native trout must be eradicated before bull trout could re-occupy the area does not negate the need to assess whether grazing is contributing to the presence of these non-native species by creating conditions that favor them over bull trout, given that "sufficiently low levels" of these non-native species is the ninth PCE in the bull trout critical habitat rule. Fed. Resp. 29; FWS1164.

Federal Defendants also take issue with Plaintiffs' use of riparian scorecard data, Fed. Resp. 29, but Federal Defendants arbitrarily ignored that data in their analysis. The 2007 BA, which assessed effects of livestock grazing on suckers, bull trout, and their critical habitat, stated that riparian scorecard monitoring would be "the primary method to determine the trend of riparian vegetation conditions over time." FWS674. In the Forest Service's 2010 report on changes in riparian conditions relative to sucker and bull trout habitat on grazed allotments, the agency assessed the riparian scorecard data for allotments in different watersheds. POL5399-407 (bull trout action areas). It specifically noted that, "[t]o evaluate riparian ecological status in relation to grazing, riparian scorecard transects were established at . . . key areas in the action area in 2003," and would be re-read to inform Allotment Management Plan development. POL5402, 5407. The 2010 report included the data collected to that point and showed none of the sites on bull trout allotments were rated as high ecological status in the most recent reading, and only one site showed an upward trend. POL5400-01, 5404, 5405-06.

The 2011 BA included most (but not all) of that scorecard data in an Appendix, but failed to discuss it in the analysis. FWS1429-47, 1455-57. It is not Plaintiffs' burden to explain what

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high water temperatures that adversely affect bull trout and led to the rise of non-native brown and brook trout. Fed. Resp. 29. This assertion is false, as addressed below. *See infra* § II.D.1.

the Forest Service's own data means, as Federal Defendants suggest; it is the Forest Service's responsibility to consider all of the relevant data and incorporate it into its analysis. *See Wild Fish Conservancy*, 2010 WL 1734850, at *4-7 (holding informal consultation unlawful because agencies ignored best available science). It was unreasonable for the agency to ignore riparian scorecard data in the BA's analysis when the agency itself had deemed scorecards the primary effectiveness monitoring method for assessing effects of grazing on riparian vegetation.

Plaintiffs also explained in their opening brief that the agencies' reliance on mitigation measures to find that grazing was not likely to adversely affect bull trout critical habitat was unreasonable. Pl. Br. 25-27. Plaintiffs pointed to numerous places in the 2011 BA where the Forest Service relied on the six implementation steps from the 2007 BA to support its 2011 NLAA determination. Pl. Br. 25 (citing FWS1424, 1431, 1447, 1448). Three of these six steps consisted of required implementation monitoring and effectiveness monitoring, and then use of that monitoring in an adaptive management strategy. FWS672-76.

Federal Defendants offer no response to Plaintiffs' argument other than to admit that annual implementation monitoring and fish effectiveness monitoring *are not required* on any of the allotments covered under the 2011 consultation. Fed. Resp. 30. That admission fully supports Plaintiffs' argument by acknowledging that key conservation measures on which the Forest Service relied are not reasonably certain to occur or enforceable. *See* Pl. Br. 25-27. Furthermore, without such required monitoring, the conservation measures are not sufficient to address the threats to bull trout critical habitat in a way that satisfies the agency's duty to avoid adverse modification of that habitat. As Plaintiffs explained in their opening brief, this makes reliance on the conservation measures unreasonable. *Id.; see Kempthorne*, 506 F. Supp. 2d at 350-57; *Ctr. for Biol. Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139, 1152 (D. Ariz. 2002); *see*

also Nat'l Wildlife Fed'n v. NMFS, 839 F. Supp. 2d 1117, 1125-28 (D. Or. 2011); *Salazar*, 804 F. Supp. 2d at 1001-04; *Ctr. for Biol. Diversity v. BLM*, 422 F. Supp. 2d 1115, 1133 (N.D. Cal. 2006). Federal Defendants' admissions that key monitoring steps are not mandatory only supports Plaintiffs' argument that reliance on the six implementation steps to support the NLAA determination was arbitrary and capricious.

Finally, Federal Defendants offer little to rebut Plaintiffs' arguments that the BA's conclusions for specific allotments were based on irrational and unsupported assertions. Fed. Resp. 30-31. Simply because the BA addressed the relevant primary constituent elements for bull trout does not mean the analysis was reasonable. Fed. Resp. 30. Plaintiffs pointed out numerous flaws with the analysis, including data the agency failed to consider, effects of grazing the agency failed to consider, and irrational assertions that either had no data to support them or were contradicted by evidence in the record. Pl. Br. 20-25. The failure to articulate a rational connection between the facts in the record and its conclusions and provide a satisfactory explanation for its NLAA determination renders the BA arbitrary and capricious. *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 525 (9th Cir. 2010); *Humane Soc'y*, 626 F.3d at 1048; *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*, 2008 WL 8985475, at *8-10.

The only aspect of Plaintiffs' allotment arguments that Federal Defendants specifically challenge is Plaintiffs' use of certain photos. Fed. Resp. 30-31. Federal Defendants claim that other photos provide more context and better illustrate conditions. *Id.* However, showing other parts of the stream or meadow does not nullify the degradation depicted in the photos that Plaintffs cited, which contribute to warm water temperatures, increased sediment, and lack of hiding cover for fish. Moreover, even the pictures Federal Defendants mention show adverse

effects from grazing. For instance, the photos of the Upper Sycan in the Bear Lakes allotment show very little shade of the stream due to a lack of riparian vegetation; and photos of the Sycan from the Withers Special Use allotment show little shade, no overhanging riparian vegetation or overhanging banks, a wide and shallow stream with obvious sediment, and additional areas of incised channel with bare eroding banks. SUPP POL7630-36, 7678-92, 7703-27, 7378-82.

D. The LOC's Conclusion was Arbitrary and Capricious.

In addition to relying on the flawed BA, the LOC was also arbitrary and capricious because it contained inaccurate and unsupported statements itself, as explained in Plaintiffs' opening brief. Pl. Br. 28. Federal Defendants try to bolster the LOC by citing to notes from meetings and field trips FWS had with the Forest Service in 2009 and 2010. Fed. Resp. 17. Most of the notes have nothing to do with livestock grazing or the allotments at issue here and instead relate to fish passage concerns and other unrelated topics. SUPP POL3416, 3422, 3429. The other two sets of notes were from two field trips. The first was a visit to the Pothole allotment in 2009 and stated that, although the utilization standard was 45% and actual use that year was 52%, somehow standards were met. SUPP POL3432. The second trip was to the Sprague RIP pasture and the Bear Lakes allotment, as well as other non-bull trout allotments. At the Sprague RIP pasture, the group discussed concerns about livestock grazing willows, and noted the need for channel restoration in that reach of the North Fork Sprague River to add wood, stabilize banks, and add complexity to the habitat. SUPP POL7290-91. These meeting notes discussed visits to just three isolated sites among all of the allotments covered by the 2011 consultation, and in fact noted overuse problems occurring at two of three sites—information that does not justify an NLAA determination for all eight allotments considered in the LOC.

As to Plaintiffs' arguments that the LOC contained inaccurate and unsupported

statements, Federal Defendants cite only to the BA to provide additional support—a document that itself was severely flawed. Fed Resp. 27-28. Simply parroting information from the BA does not help support the LOC when the BA ignored relevant data, failed to address effects of grazing tributary streams, and made many unsupported assertions, as discussed above and in Plaintiffs' opening brief. The Appendix to the BA contained some of the relevant data, but FWS chose to ignore this data just as the Forest Service did. FWS1455-57, 1462-63.

Statements about inaccessibility to critical habitat on the Currier Camp and Paradise Creek allotments are also unsupported because Currier Camp Hog Wallow pasture contains about 1.5 miles of critical habitat in low gradient areas accessible to cattle, and the Sprague RIP pasture in the Paradise Creek allotment contains five miles of critical habitat, *upstream* of the steep canyon, that flow through a depositional area of large meadows. Fed. Resp. 27-28; FWS1429, 1430, 1443. Indeed, the Sprague RIP pasture is one of the three sites FWS visited in 2010 and expressed concern about cattle grazing willows along the river. SUPP POL7290-91. FWS is not entitled to deference for its determination in the LOC when that determination was not supported by the record and lacked a rational explanation.

E. Intervenors' Arguments are Unavailing.

JRS Properties argues that Plaintiffs' ESA claim is moot because the Forest Service has begun re-initiation of consultation. JRS Resp. 31-32. A challenge to a consultation becomes moot once a new consultation is *completed* that supersedes the existing consultation. *Grand Canyon Trust v. U.S. FWS*, 691 F.3d 1008, 1017 (9th Cir. 2012). Here, there is no completed consultation yet to replace the 2011 BA and LOC, and the existing consultation does not expire until the end of 2016. Fed. Resp. 6. The 2011 BA and LOC will be in effect for this year's grazing season, negating any mootness argument. Fed. Resp. 6. Moreover, effective relief

would be available to remedy harm in past years caused by grazing under the unlawful consultation if the Court found the BA and LOC arbitrary and capricious, again precluding mootness. *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1094 (9th Cir. 2003).

JRS also argues that Plaintiffs have not shown that the 2011 BA and LOC were unlawful with regard to JRS's four specific allotments. JRS Resp. 33-38. Plaintiffs are challenging the 2011 BA and LOC, which cover fourteen allotments—not individual decisions for each allotment. *See* FWS1448. If the 2011 BA and LOC are unlawful, they must be set aside in their entirety. 5 U.S.C. § 706(a)(2) (the Court must set aside agency action that is arbitrary and capricious); *Or. Natural Desert Ass'n v. Tidwell*, 716 F. Supp. 2d 982, 1007 (D. Or. 2010) (the "agency action" is consultation on *all* allotments). While Plaintiffs did in fact discuss data for JRS's allotments, they do not need to establish particular legal violations for each allotment, but simply need to show the BA and LOC are unlawful, which they have done. *See* Pl. Br. 24-26.

Much of Withers's response confirms Plaintiffs' claim that the 2011 BA and LOC did not contain sufficient analysis by arguing that various other documents and data support the NLAA determination. This argument only goes to show that the BA and LOC themselves did not consider and analyze the information necessary to support that determination.

First, Withers cites to numerous documents that post-date the LOC, which this Court may not consider. *Sw. Ctr. for Biol. Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996) ("post-decision information . . . may not be advanced as a new rationalization either for sustaining or attacking an agency's decision"); *see* Withers Resp. 2 (SUPP POL2362), 5 (Fed. Br. Ex. B), 8 (BL374-76, SUPP BL66-67, BL710), 9 (BL430, CC778, 785, 879, 5019), 10 (PC2621, 2638, 2671, 3998), 11 (PH374-415), 12 (PH875), 14 (PC3998, CC5019), 15 (SUPP

POL2356-436). None of this information can be used to sustain the BA and LOC.[2]

Second, Withers's construction of a post hoc rationalization from information in the 2007 BA is also misplaced and simply underscores the deficiency in the 2011 analysis. Withers repeatedly cites to information from the 2007 BA (found at FWS652-845) to argue that grazing on the allotments at issue in this case will not adversely affect bull trout critical habitat. Withers Resp. 4-7. The 2007 BA, however, only looked at effects of grazing to bull trout and critical habitat *downstream* of the relevant allotments because there were no bull trout or designated critical habitat on the allotments at that time. FWS715. Therefore, the effects analysis looked only at indirect effects of sediment from the allotments potentially traveling downstream to bull trout habitat. FWS762-65. Under the 2010 critical habitat rule, many miles of critical habitat now occur within the allotments covered by the 2011 BA, requiring an analysis of the direct effects of grazing on critical habitat streams that was not conducted in 2007. FWS1452-54.

Furthermore, the 2007 BA relied heavily on Proper Functioning Condition ("PFC") assessments and did not discuss riparian scorecard data. *See* FWS758. Yet it noted that riparian scorecard data would be the primary method going forward to assess trend of riparian conditions on allotments. FWS674. When the 2011 BA was issued, most of the PFC data for the covered allotments was 13 or 14 years old, and most allotments had one or more years of riparian scorecard data that was more recent than PFC data, reaffirming that the 2007 analysis was not sufficient to support the 2011 NLAA determination. FWS1455-57.

Likewise, Withers tries to provide a rationale for the BA and LOC that the agency did not by citing other data in the record (much of which is improperly post-decisional, as noted above). While Plaintiffs cited data showing fish habitat and riparian features on many streams not

[2] JRS likewise improperly cites to post-decision documents. JRS Resp. 19-22.

meeting standards and not improving in condition, as well as grazing non-compliance issues, Pl. Br. 19-25, Withers cites other data and information to argue that grazing is not causing problems to riparian areas. Withers Resp. 8-12. It is not the Court's role to interpret and weigh the data, however; it is the agency's duty to consider all of this information and explain in its analysis what it means and how it supports the final determination. The BA and LOC failed to do this.

Withers makes several statements that data shows conditions are not declining, and some degraded areas show "slight" improvement. As discussed above, grazing that perpetuates degraded conditions or slows their recovery constitutes an adverse effect. That is particularly true here, where bull trout in the Sycan and Upper Sprague core areas are at serious risk of extirpation, and restoration of unoccupied critical habitat to allow bull trout to expand its range in these core areas is necessary for recovery of the species. *See* Pl. Br. 3-4.

Finally, Withers's point about mitigation again supports Plaintiffs' argument. Withers admits that the six implementation steps are "flexible," uncertain, and unenforceable. Withers Resp. 12-13. Withers then tries to show that the Forest Service has been implementing these steps, but the evidence cited is to the contrary. *Id.* 14-15. The Forest Service has not updated AMPs for many allotments, has not collected PFC data since 1997 or 1998 for many allotments, and although it collected riparian scorecard data for most allotments, it did not analyze that data in its 2011 BA. *See* SUPP POL1594, 14929; BL336 (Decision Notices stating the Forest Service would update certain AMPs, but only AMP actually completed was for Bear Lakes allotment); FWS 1455-57. Withers's argument confirms that the six implementation steps were not certain to occur, enforceable, and sufficient to protect bull trout critical habitat. Pl. Br. 25-27.

The 2011 BA and LOC were arbitrary, capricious and contrary to the ESA, and therefore must be set aside by this Court. 5 U.S.C. § 706(a)(2).

II. THE 2014 AND 2015 AOIS FAILED TO ENSURE COMPLIANCE WITH TEMPERATURE STANDARDS.

The Forest Service's defense of its failure to ensure compliance with water quality standards when it issued the 2014 and 2015 AOIs depends on mischaracterizing the nature of Plaintiffs' challenge and on several legal arguments that are contrary to the Clean Water Act ("CWA") and numerous judicial decisions. The agency also relies on post hoc rationalizations that are unsupported by the administrative record, and that fail to show the Forest Service considered and addressed thousands of documented exceedences of Oregon's water temperature standards throughout the CWA allotments before issuing the challenged AOIs. Accordingly, the challenged AOIs are arbitrary and capricious and must be set aside.

A. This Court has Authority to Review Plaintiffs' Clean Water Act Claim.

This Court has the authority to determine, under the APA, whether the Forest Service failed to ensure that grazing in 2014 and 2015 complied with Oregon's water quality standards, as it is obligated to do under CWA section 313. The agency raises two defenses that flout significant federal precedent. First, the agency incorrectly argues that only the State of Oregon may determine and enforce compliance with such standards. Fed. Resp. 42-45. Second, the agency ignores Congress's unequivocal waiver of sovereign immunity under the APA and CWA section 313. Accordingly, the Court should reject the agency's attempt to evade judicial review.

1. Oregon does not have sole authority over temperature standards.

When crafting the CWA, Congress did not confer sole authority upon states to establish and uphold the scientific standards necessary to protect the quality of our nation's waters. The U.S. Environmental Protection Agency ("EPA") must review and approve all proposed state water quality standards and develop and adopt alternative standards if the proposals fall short of federal requirements. 33 U.S.C. § 1313(c). Federal agencies are accountable under section 313

for ensuring compliance with state water quality standards, and aggrieved parties have a right to judicial review of non-compliant activities. *Or. Natural Res. Council v. U.S. Forest Serv*., 834 F.2d 842, 848-52 (9th Cir. 1987) ("*ONRC*") (holding the APA provides for judicial review of a federal agency's failure to ensure compliance with water quality standards on federal land).

Contrary to the Forest Service's argument, federal courts routinely interpret state water quality standards and consider compliance therewith in a variety of CWA, APA, and factual contexts. *See, e.g., Arkansas v. Oklahoma*, 503 U.S. 91, 109-114 (1992) (reviewing Oklahoma's water quality standards and the EPA's interpretation of such state standards); *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 132 F. Supp. 2d 876, 879-880, 895 (D. Or. 2001) ("*NWF*") (holding that it was "a clear error of judgment" for a federal agency not to address compliance with state water quality standards in a final agency action). This federal judicial oversight extends to issues involving state standards on federal lands. *See PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology*, 511 U.S. 700, 704, 708, 713-16 (1994).

The Forest Service relies on *Northwest Environmental Defense Center v. Blue Heron Paper Co.*, but there, the court would not imply a private right of action in federal court against a point source discharger under a state law. Fed. Resp. 42 (citing 2000 WL 1763665 at *1, 3 (D. Or. 2000)). Here, Plaintiffs allege that the AOIs conflict with section 313 of the CWA, a claim arising under the APA, as confirmed by the Ninth Circuit and Judge Papak. Pl. Compl. ¶¶148-157; *ONRC*, 834 F.2d at 850-52; *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); *see also Hells Canyon Pres. Council v. Haines*, 2006 WL 2252554, at *1, 4-6 (D. Or. Aug. 4, 2006) ("*HCPC*"). The CWA is a "comprehensive water quality statute designed 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters,'" *PUD No. 1*.

511 U.S. at 704 (quoting 33 U.S.C. § 1251(a)). Of the numerous provisions in this comprehensive and vital statute, this case implicates just one provision—section 313.[3]

2. The APA and the CWA waive sovereign immunity.

The APA waives the agency's sovereign immunity to be sued for violations of the CWA. *See* 5 U.S.C. § 702; *see also Sackett v. EPA*, 132 S.Ct. 1367, 1369, 1371-74 (2012) (allowing challenge to an EPA CWA compliance order under the APA). Section 313 of the CWA waives "the federal government's sovereign immunity with respect to state regulation of . . . water pollution." *Friends of the Earth v. U.S. Navy*, 841 F.2d 927, 934 (9th Cir. 1988). Courts have repeatedly considered section 313 claims under the APA and never questioned their jurisdiction. *See Idaho Sporting Cong.*, 137 F.3d at 1153; *Marble Mtn. Audubon v. Rice*, 914 F.2d 179, 182-83 (9th Cir. 1990) ("*Marble Mtn.*"); *ONRC*, 834 F.2d at 848-52; *NWF,* 132 F. Supp. 2d at 878-79, 895; *HCPC*, 2006 WL 2252554, at *1, 5; *Ctr. for Native Ecosystems v. Cables*, 509 F.3d 1310, 1320, 1328-33 (10th Cir. 2007) ("*CNE*"); *cf. Orff v. United States*, 358 F.3d 1137, 1142 (9th Cir. 2004) (court lacks jurisdiction without waiver of sovereign immunity).

The plain language of section 313 evinces Congress' unequivocal intent to waive sovereign immunity. Section 313 states that it "shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law." 33 U.S.C. § 1323(a). Further, Congress explained that section 313 "shall apply" to "any process and sanction, whether enforced in Federal, State, or local courts or in any other manner." *Id.* This is far from the clear and convincing language required for a statute to preclude review under the APA. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971). Indeed,

[3] Withers is wrong that Plaintiffs' claim is impermissible because it "is equivalent to allowing a direct citizen suit to enforce those standards against non-point sources." Withers Resp. 18. A section 313 claim arises under the APA and is not a citizen suit. *See ONRC*, 834 F.2d at 848-52.

another court found nearly identical language "clearly and unambiguously waives sovereign immunity." *United States v. S. Coast Air Quality Mgmt. Dist.*, 748 F. Supp. 732, 738 (C.D. Cal. 1990) (discussing nearly identical language from federal facilities provision of Clean Air Act).

Similarly, section 511 of the CWA does not preclude review. The agency relies on *In re: Operation of Missouri River System Litigation,* but that case is inapplicable because it involved section 511's specific "navigation exception" that applies only to the Army. *See* Fed. Resp. 33 (citing 418 F.3d 915 (8th Cir. 2005)). The agency also claims that sovereign immunity is not waived if compliance would "limit[] the authority or functions" of the agency, but never explains how complying with section 313 limits its authority to issue AOIs. Fed. Resp. 33 (citing 33 U.S.C. § 1371(a)). In fact, another case cited by the Forest Service contradicts its own argument, showing that section 313 does not halt the agency's authority to issue AOIs. *See* Fed. Resp. 36 (citing *CNE*, 509 F.3d at 1329-31, 1333). In *CNE*, the plaintiff challenged the Forest Service's AOIs for failing to ensure compliance with water quality standards. 509 F.3d at 1328. There, the agency was mostly successful in meeting state standards by making sharp reductions in the AOIs over two years—nearly 50% less grazing than authorized under the grazing permits during the first year. *Id.* at 1318-19, 33. As the Ninth Circuit recently affirmed, grazing on federal land is a revocable privilege, not a right, and can occur only to the extent it complies with all laws. *United States v. Estate of Hage*, 810 F.3d 712, 717 (9th Cir. 2016); *see HCPC*, 2006 WL 2252554, at *6 ("[T]he Forest Service may not ignore or defer its responsibility to remedy existing water pollution in the project area based on a misguided notion that the right to mine trumps federal and state environmental laws."); *NWF*, 132 F. Supp. 2d at 892 ("While the Corps took action to comply with its legal obligations under the [ESA], it was not free to do so without considering compliance with its legal obligations under the [CWA].").

Colorado Wild v. U.S. Forest Service does not help the agency. *Cf.* Fed. Resp. 32 (citing 122 F. Supp. 2d 1190, 1194-95 (D. Colo. 2000)). There, plaintiffs challenged a Forest Service approval of a development plan for a ski area for failing to comply with CWA section 313. 122 F. Supp. 2d at 1191. In a cursory analysis, the court found that section 313 does not waive sovereign immunity because there was "neither a federal facility, nor a federal activity resulting in the discharge of pollutants which invokes Section 313." *Id.* at 1194-95. This holding ignores the plain language of section 313 that also applies to "any property" under federal jurisdiction and the "runoff of pollutants" and for which it does not provide separate waivers of sovereign immunity. 33 U.S.C. § 1322(a). Further, that interpretation is directly contrary to the Ninth Circuit cases that have affirmed the APA "permits private citizens to sue for alleged state water quality control violations from nonpoint sources." *Marble Mtn.*, 914 F.2d at 182-83 (citing *ONRC*, 834 F.2d at 848-52); *see also CNE*, 509 F.3d at 1329-31.

B. The Forest Service Continues to Ignore its Section 313 Duties.

Section 313 of the CWA demands that the Forest Service ensure compliance with state water quality standards on lands under its jurisdiction. 33 U.S.C. § 1323(a). Nowhere in its brief does the agency acknowledge this duty, or the various Ninth Circuit and District of Oregon cases that confirm this duty. Astonishingly, the agency also fails to address the significant change in law that forecloses its lengthy defense based on best management practices ("BMPs"). Rather, the agency focuses on a case that merely highlights the agency's duty and ability to ensure AOIs meet state water quality standards. Fed. Resp. 36 (citing *CNE*, 509 F.3d at 1310).

"The United States Court of Appeals for the Ninth Circuit has repeatedly concluded that the Clean Water Act requires federal facilities and federal activities to comply with state water quality standards." *NWF*, 132 F. Supp. at 889, 895. Accordingly, "agencies must ensure that

any authorized activity on federal lands complies with all applicable water quality standards." *HCPC*, 2006 WL 2252554, at *1, 4 (emphasis added). This duty applies to approvals of third-party activities involving non-point sources on federal lands. *Marble Mtn.*, 914 F.2d at 182-83. In *ONRC*, the Ninth Circuit explained why plaintiffs may challenge decisions involving non-point source activities based on section 313:

> We conclude that by creating a section of the Act specifically addressing nonpoint sources Congress did not intend to cut off review, but intended to protect the interests of persons aggrieved by nonpoint source violations of state water quality standards. Judicial review under the APA is therefore 'ordinarily inferred' and appropriate.

ONRC, 834 F.2d at 851. Withers's argument to the contrary is baffling. Withers Resp. 16-18.

The Forest Service wrongly argues that the agency need not affirmatively demonstrate CWA compliance when issuing AOIs. *See* Fed. Resp. 36-37. AOIs serve as the "last word" authorizing grazing on the CWA allotments and thus must comply with applicable environmental laws. *See Or. Natural Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 983-90 (9th Cir. 2006) ("*ONDA*"); *Or. Natural Desert Ass'n v. Sabo*, 854 F. Supp. 2d 889, 902, 917 (D. Or. 2012) ("*Sabo*") (AOIs "must be consistent with the Forest Plan"); *Tidwell*, 716 F. Supp. 2d at 1008 (same); *CNE*, 509 F.3d at 1329-31. Section 313 of the CWA is a statute with which the Forest Service must comply when it issues AOIs. *See HCPC*, 2006 WL 2252554, at *1, 3, 6 (finding section 313 applied to a decision analyzing mining projects on federal land).

Contrary to the Forest Service's assertion, section 325 of Public Law 108-108, an appropriations rider, does not absolve the agency of compliance with all substantive federal environmental laws, including CWA section 313, when issuing AOIs. The agency also raises this argument with regard to the Plaintiffs' Wild and Scenic Rivers Act ("WSRA") and NFMA claims. Fed. Resp. 52-53. As this Court explained in *Sabo,* this rider only applies to the agency's obligations under NEPA when renewing grazing permits. 854 F. Supp. 2d at 922-23;

see also Or. Natural Desert Ass'n v. U.S. Forest Serv., 2004 WL 1592606, at *10 (D. Or. July 15, 2004) (rejecting rider argument). The agency again tries to rely on a case from another district that preceded *Sabo*—an argument that this Court already has rejected twice. Fed. Resp. 37 (*citing W. Watersheds Proj. v. BLM*, 629 F. Supp. 2d 951, 971-72 (D. Ariz. 2009) ("*WWP*")); *Sabo*, No. 10-cv-1212-CL, ECF # 76, p. 13 (raising *WWP* in objections brief in *Sabo*); *Concerned Friends of the Winema*, No. 1:14-cv-00737-CL, ECF # 25, p. 23 (raising *WWP* in response to preliminary injunction motion), ECF # 40, p. 9 (rejecting defendant's jurisdictional claims). Here, Plaintiffs' claim is not that the agency has delayed issuing a permit, AMP, or NEPA analysis, but rather that the agency failed to comply with substantive laws when it issues the AOIs. *Sabo*, 854 F. Supp. 2d at 923. The agency advances an interpretation of the rider that would allow it to authorize grazing in perpetuity even if it violates every applicable substantive environmental law, such as the CWA and the WSRA here, or even other laws like the ESA. The Court should reject such an overly broad interpretation of the rider.

Finally, the agency's duty to ensure AOIs comply with water quality standards is permissible and practical. The Ninth Circuit has explained that "[b]ecause an AOI is issued annually, it is responsive to conditions that the Forest Service could not or may not have anticipated and planned for in the AMP or grazing permit, such as . . . water quality . . . ." *ONDA*, 465 F.3d at 980-81. This is what the Forest Service did in *CNE*—altered the number of cattle authorized in AOIs for two years to address fecal coliform water quality problems. 509 F.3d at 1318-19, 33. Indeed, the Forest Service explicitly retains the authority to address such issues under the terms and conditions of its grazing permits. *See, e.g.,* PH83 (providing a grazing permit can be "cancelled, in whole or in part, or otherwise modified, at any time during the term to conform with needed changes brought about by law…"). Thus, the agency's failure

to satisfy its duty in the AOIs was arbitrary and capricious. *HCPC*, 2006 WL 2252554, at *4, 6.

C. BMPs, the WQRP, and Other Plans Are Not a Valid Legal Defense.

The use of BMPs and various plans can no longer fulfill the agency's duty to ensure compliance with water quality standards. *Cf.* Fed. Resp. 34-36. While this defense was successful in *Center for Biological Diversity v. Wagner*, Oregon repealed the regulation relied on in that case, which had allowed the agency to demonstrate compliance with standards through implementation of BMPs and other plans. *See* 2009 WL 2176049, at *16-19 (D. Or. June 29, 2009); Pl. Br. 29-31.[4] Here, the agency ignored this significant change in law and failed to explain how BMPs and other plans constitute compliance. Without such a regulatory exemption, the agency's reliance on *CNE* is also flawed. *See* Fed. Resp. 36; *CNE*, 509 F.3d at 1332-33 (state standards allowed compliance through BMPs that were undisputedly implemented).

NWEA, the case that precipitated the repeal of Oregon's BMP regulation,[5] forecloses the agency's reliance on non-numeric proxies in lieu of the numeric standards. *See* 855 F. Supp. 2d at 1209-10. There, Judge Acosta determined that EPA must review and approve Oregon's nonpoint source regulations allowing agricultural activities on federal lands to comply with water quality standards through BMPs and similar plans because they effectively supplant numeric standards. *Id.* at 1209-13. The court reasoned that the regulations "essentially exempt various nonpoint sources of heat pollution from complying with water quality standards so long as they maintain the status quo." *Id.* at 1210. Accordingly, these exemptions "could present a considerable obstacle to the attainment of water quality standards . . . ." *Id.* Relying on *Wagner,*

[4] The question is not, as Withers claims, whether *Wagner* was "correctly decided" but rather whether it remains good law after Oregon's repeal. *See* Withers Resp. 19; Pl. Br. 28-31.
[5] Oregon DEQ recommended that the Environmental Quality Commission repeal the exemption, which it did. http://www.oregon.gov/deq/EQC/Documents/2013AgendaDocs/I_Nonpoint.pdf; http://www.oregon.gov/deq/EQC/Documents/Minutes/EQCMinutes0613.pdf, pp. 3-4.

the court warned of being "forced to conclude, despite violations of numeric water quality standards, that the Forest Service was in compliance with those water quality standards *vis-à-vis* the implementation of BMPs." *Id.* (*citing Wagner*, 2009 WL 2176049, at *18). Under *NWEA*, EPA must review and approve an allowance for non-point sources to show compliance with numeric standards through non-numeric means, which it has not done. Thus, the Forest Service and the Oregon Department of Environmental Quality ("DEQ") cannot claim BMPs, WQRPs, the Forest Plan, the national grazing handbook, or even sweetheart agreements constitute compliance with numeric standards under the current law. *See id.*; *cf.* Fed. Resp. 7-9, 34-38.

D. The Record Shows the 2014 and 2015 AOIs Violated Section 313.

Rather than identifying evidence in the record that shows the AOIs ensured compliance with temperature standards, the agency's brief wrongly tries to shift its APA burden onto Plaintiffs. The agency must show that the AOIs were "in accordance with law," which it failed to do by ignoring overwhelming evidence in the record that grazing on the CWA allotments contributes to widespread temperature exceedences. 5 U.S.C. § 706(a)(2); *HCPC*, 2006 WL 2252554, at *1, 4. The agency's post hoc defenses do not save the AOIs from being arbitrary, capricious, and not in accordance with the CWA. *Humane Soc'y*, 626 F.3d at 1049-50.

1. Grazing impacts.

The Forest Service's argument that Plaintiffs have not proven current grazing causes exceedences suffers from three major flaws. Fed. Resp. 38-42. First, the agency has the burden, not the Plaintiffs, to "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Humane Soc'y*, 626 F.3d at 1049-50. The lack of this explanation in the record renders the decision arbitrary and capricious. *Id.*

Here, the agency possessed significant evidence that temperature exceedences are a

significant problem in the CWA allotments. The Forest Service's monitoring reveals thousands of exceedences in thirteen waterways across the five CWA allotments over ten years. Pl. Br., Ex. 2. Notably, the record does not include all temperature calculations that are necessary to assess compliance, nor any analysis of whether continued grazing would perpetuate the temperature exceedences, indicating the agency ignored an important aspect of the problem. *See Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 688 (9th Cir. 2007) ("*NEDC*"). Without such an explanation in the record, the agency did not satisfy its obligations under CWA section 313. *See NWF*, 132 F. Supp. at 890, 893-95; *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 963 (9th Cir. 2005) ("*NEC*") (court must be able to ascertain from the record whether the agency is in compliance with the law).

Significant evidence in the record that shows grazing generally and within the CWA allotments in particular leads to increased stream temperatures. *See* Pl. Br. 6-10, 20-25, 31-34; *see also NWEA*, 855 F. Supp. 2d at 1208 (explaining grazing is "of the largest contributors to violations of water quality standards for temperature" in Oregon). For example, the Forest Service admitted that the "[i]ndirect effects of livestock grazing . . . include . . . increased water temperature." SUPP POL1474; *see also* SUPP POL548; FWS1431. The agency identified increased width-to-depth ratios—usually a direct effect of grazing in riparian areas—as "the primary cause of elevated [water] temperatures," and Plaintiffs pointed to numerous streams on the allotments where high width-to-depth ratios occur. Pl. Br. 32-33. In fact, the Sycan River within Currier Camp allotment *increased* in width/depth ratio between 1999 and 2014, meaning the river is now even farther from its target ratio. *Compare* CC343 *with* CC863-74. The record shows that cattle grazing in and along streams contribute to this problem. *See, e.g.,* SUPP POL1474, 15011-12; POL3340; FWS2014. The record also acknowledges that cattle reduce

stream shade by grazing and trampling streamside vegetation, another factor that increases stream temperature. *See, e.g.*, FWS2014, 2050, 2124, 2128, 2137. The record contradicts the agency's assertion cattle browsing on willows is insignificant. *Compare* Fed. Br. 41 (citing FWS 1434, which only addresses one pasture) *with* POL3366 ("[s]tream shade can be significantly affected by the effects of livestock grazing"); *see also* Pl. Br. 7-10, 21-25, 32-33 (identifying evidence of impacts to vegetation and shade). Before issuing the 2015 AOIs, the agency received ample evidence that grazing within the CWA allotments continues to impact riparian areas in ways that perpetuate high stream temperatures.[6] *See* SUPP POL14947-15067.[7]

Furthermore, the record contains evidence that the current grazing scheme perpetuates degraded conditions that warm streams, while elimination or reduction of grazing in riparian areas would improve stream temperatures. SUPP POL1428 (explaining that not authorizing grazing would allow the "most rapid recovery trends" while grazing would prevent marked deterioration of existing conditions and not eliminate impacts related to sediment, bank stability, and riparian vegetation); SUPP POL1437, 1471; FWS 701 (increasing shade and reducing width to depth ratios would reduce temperatures on the North Fork Sprague area); SUPP POL15357-8 (finding maximum stream temperatures after ten years inside an exclosure averaged 12°F lower than outside, with average daily fluctuations inside of 13°F versus 27°F outside); *see* SUPP POL15117-21. Overall, this evidence contradicts arguments the record is barren of evidence that

[6] The Forest Service argues that Plaintiffs waited until the eve of grazing to send the March 10, 2015 hydrologist's report to the agency. Fed. Resp. 43, n. 8. But in previous years, the agency did not issue AOIs until the end of April or May, so Plaintiffs believed the agency would receive the report well before issuing the 2015 AOIs. *See, e.g.*, WSU29-33, 37-41, 46-50, 54-57, 61-64, 67-72; 828-832. Typically, grazing does not begin until mid-May or June. WSU67-72, 828-832; CC880-885, 5022-2; BL457-461, 2491-2500; PH860-64, 869-873; PC2666-2670, 4003-07.

[7] The Forest Service cannot rely on Exhibit B to refute this report or sustain its decisions because the exhibit was created in September 2015, well after the 2015 AOIs were issued. *NEDC*, 477 F.3d at 688.

removing grazing "would meaningfully affect water temperatures…" and that the agency should not act because standards cannot be achieved. *Id*.; Fed. Resp. 39, 41; Withers Resp. 18, 22.

Finally, the agency and Intervenor-Defendants cannot use other contributors to temperature exceedences as a scapegoat. *See* Fed. Resp. 39; Withers Resp. 21-23. This post hoc rationalization is not in the record and thus cannot support the agency's decisions. *See Humane Soc'y*, 626 F.3d at 1049-50. Moreover, this Court need not find grazing is the "sole cause" of exceedences. *See NWF*, 132 F. Supp. 2d at 892. The evidence in the record discussed above and in Plaintiffs' opening brief shows that grazing is perpetuating or worsening conditions that contribute to water temperature exceedences. The failure to even consider whether the 2014 and 2015 AOIs would continue these impacts given the change in the water quality regulations, temperature exceedences from 2004 to 2014, and the continuing drought exacerbated these impacts, shows that the agency failed to ensure that the AOIs complied with section 313.

2. Other inadequate defenses.

The agency briefly mentions purported exemptions in Oregon's water quality standards but fails to meet its burden to show they apply. Fed. Resp. 43-45; *see generally United States v. First City Nat. Bank of Houston*, 386 U.S. 361, 366 (1967) (explaining the general rule that one claiming the "benefits of an exception" has the burden to prove its application); *Landwatch v. Connaughton*, 2014 WL 6893695, at *10 (D. Or. Dec. 5, 2014) (finding in the record an adequate explanation that a water quality exception applied). There is no evidence exceedences are solely a result of a "natural condition", which are: "[d]isturbances from wildlife, floods, earthquakes, volcanic, or geothermal activity, wind, insect infestation and diseased vegetation". *See* OAR 340-041-0002(40). Nor is there evidence that the AOIs ensured grazing controlled its thermal effects or "overall heat contribution." *See* OAR 340-041-0028(12)(a). The agency

mentions "low flow" and "air temperature" exceptions in passing but ignores the former applies to discharge permits, which are not at issue, and the latter requires at least 10 years of air data that is not in the record. Fed. Resp. 44-45 (citing OAR 340-041-0028(12)(c)-(d)).

Additionally, the record does not show that BMPs and various plans, which are not valid as a legal exemption, ensure compliance or are actually implemented. *Cf.,* Fed. Resp. 7-9; *see supra*, § II.C. Indeed, the agency cited to no evidence that the BMPs it relies on apply to many streams. Fed. Resp. 35 (citing only to the WQRP for BMP argument), 40 (claiming many streams are not subject to WQRP). The agency did not demonstrate it is fully implementing or meeting the goals and requirements of the WQRP. *Compare* POL3370 (providing for annual temperature monitoring) *with* Pl. Br. Ex. 2 (missing data for Paradise Creek in 2008-2011); Pl. Br. 32-33 (explaining streams are not meeting width-to-depth targets). These deficient BMPs and the WQRP are the crux of the non-binding agreement with DEQ. *See* POL6691-95, 99. The agency fails to show it follows the grazing handbook, which provides if "monitoring identifies *any circumstance of noncompliance* with State water quality standards, then the Forest Service is obligated to respond to the situation to restore compliance." POL4865 (emphasis added). Further, the agency misrepresents a post-record email that cannot supplant the numeric temperature standards. *See NEDC*, 477 F.3d at 688; 2nd Supp AR42 (dated after the 2015 AOIs); *compare* Fed. Resp. 35-36 (claiming email says implementing the WQRP "comprises compliance with state water quality law") *with* 2nd Supp AR42 ("[i]f the USFS is implementing the restoration goals and protective measures described in the WQRP, it is in compliance with the TMDL requirements").[8] Finally, the public allotment planning documents rely on legally

[8] TMDLs "are primarily informational tools," *Pronsolino v. Nastri*, 291 F.3d 1123, 1129 (9th Cir. 2002). The agency admits that several streams are "not subject to the WQRP" that implements the TMDL, so it does not cover all streams. Fed. Resp. 40; POL3335.

insufficient BMPs and plans, fail to explain or provide supporting evidence to show how grazing ensures compliance with standards, or do not address all exceedences and changes in resource conditions and Oregon law that occurred prior to issuing the 2014 and 2015 AOIs. *See* Fed. Resp. 35, 38 (citing 2nd Supp. AR23-30, 31-40, SUPP POL14929-40, 1594-607, 4820-5051).

Contrary to Withers's impermissible post-hoc arguments and extra-record declarations, the record does not show monitoring and grazing strategies implemented over the past ten years ensured compliance with temperature standards. *Cf.* Withers Resp. 19-21; *see NEDC*, 477 F.3d at 688; *see, e.g.*, FWS785 ("there is no scientifically established cause and effect relationship between a specific stubble height level and long-term riparian conditions"); Pl. Br. Ex. 2.

E. The AOIs Do Not Comply with INFISH and NFMA.

The agency argues it may completely ignore widespread and serious temperature exceedences across numerous streams because the INFISH RMOs only apply at the landscape scale. Fed. Resp. 46. But the temperature exceedences are pervasive across three watersheds, not isolated as the agency suggests. *Id.*; Pl. Br. Ex. 2. Indeed, six different locations on the Upper Sycan River have routinely exceeded standards. Pl. Br. Ex. 2. Exceedences that are dramatically higher than the INFISH temperature RMO have repeatedly occurred on streams within the allotments, and some streams had a maximum 7dAM that generally increased across the years monitored. POL2672; Pl. Br. Ex. 2. Further, these exceedences are traceable to grazing in the CWA allotments, which is preventing or retarding attainment of the standards. Pl. Br. 31-34; *supra*, § II.D.1. Data from the five CWA allotments shows widespread exceedences in three watersheds, indicating that exceedences are also likely occur in other streams. This suggests the INFISH violation is occurring at a landscape scale, and the agency should have assessed its own data to determine compliance. Moreover, the agency wrongly claims it may

ignore the RMOs because only INFISH standards and guidelines apply; INFISH requires the agency to modify grazing practices that retain or prevent attainment of RMOs, and to suspend grazing if adjustments are not effective. *Compare* Fed. Resp. 46 (claiming only requirements at POL2674-81 apply) *with* Pl. Br. 35 (citing to POL2677 that applies to grazing management).

The agency fails to distinguish *Central Oregon Landwatch v. Connaughton*. Pl. Br. at 34 (citing 905 F. Supp. 2d 1192, 1196 (D. Or. 2012)). There, Chief Judge Aiken found that the plaintiff was likely to succeed on an INFISH challenge to a project that was likely to increase summer temperatures that already exceeded the 7dAM. 905 F. Supp. at 1196-7. The court explained, "[i]t is not enough for the Forest Service to simply conclude that there is no or little impact to the water temperature due to the Project without supporting reasoning, analysis, and data." *Id.* Just as in *Landwatch*, the record here does not show that the agency considered and addressed such exceedences in conformance with its NFMA and INFISH duties. If grazing on specific streams was not retarding attainment of RMOs, the agency needed to explain that in the record. The agency's perfunctory INFISH report failed to provide a rational explanation or any factual support for its conclusion about compliance throughout the forest. *See* POL6704-6716. Further, the agency points to "formal INFISH RMO findings," but those findings do not address whether grazing retards temperature RMOs nor the several years of subsequent exceedences, and the agency admits those findings are only for three of the allotments. *See* Fed. Br. 47.

Finally, the agency's argument that it need not consider INFISH RMOs in each AOI is baseless. The agency's regulations require "[e]very project or activity" to be consistent with the applicable Forest Plan and each approval document to "describe how the project or activity is consistent with the applicable plan" requirements, including goals, desired conditions, objectives, standards, and guidelines. 36 C.F.R. § 219.15(d). The plain language of this regulation does not

limit its applicability to the NEPA process, so the agency's assertion to the contrary is not due deference. Fed. Resp. 48; *see NEC*, 418 F.3d at 962. The Forest Service cannot ignore Forest Plan provisions, like INFISH, it may find inconvenient. *See NEC*, 418 F.3d at 962 (explaining that the APA "scope of review does not include attempting to discern which, if any, of a validly enacted Forest Plan's requirements the agency thinks are relevant or meaningful").

Further, in a case that the Forest Service makes no attempt to distinguish, Judge Haggerty ruled the agency was arbitrary and capricious for issuing annual grazing authorizations without evaluating and explaining in the record how the authorizations complied with PACFISH, which is analogous to INFISH. *Tidwell*, 716 F. Supp. 2d at 1008; *see* POL6704. In *Tidwell*, the Court found the AOIs did not comply with NFMA because there was little evidence the agency gathered or actually evaluated data "in an effort to ascertain their compliance. This court 'cannot defer to a void.'" *Id.* at 1008 (quoting *Or. Natural Desert Ass'n v. BLM*, 531 F.3d 1114, 1142 (9th Cir. 2008), *on rehearing*, 625 F.3d 1092, 1121 (9th Cir. 2010)). The same is true here.

III. THE 2014 AND 2015 AOIS IGNORE WSRA AND NFMA REQUIREMENTS.

A. The Forest Service Must Ensure Compliance With WSRA, NFMA, and the River Plan When it Issues AOIs.

The Forest Service inaccurately portrays Plaintiffs' challenge to the 2014 and 2015 AOIs as a categorical attack on grazing within the Upper Sycan River corridor. The agency also wrongly argues it need only consider WSRA issues at the River Plan, grazing permit, or AMP levels and requests the Court defer to this position. Fed. Resp. 51-52, 57-58. The Ninth Circuit has affirmed that AOIs are final agency actions, and as such the Forest Service must comply with the Forest Plan and applicable federal environmental law when it issues them. *ONDA*, 465 F.3d at 980-81; *see also Tidwell*, 716 F. Supp. 2d at 1008 (AOIs must comply with Forest Plan); *Sabo,* 854 F. Supp. 2d at 917 (same). AOIs allow the agency to respond annually to changed

conditions, resource concerns, monitoring, or new data that affect WSRA and River Plan issues, rather than waiting years until the next planning process. *See, e.g., ONDA*, 465 F.3d at 988-989 (explaining how the Forest Service imposed standards in AOIs to protect newly ESA-listed bull trout). Here, the Forest Plan incorporates the River Plan, which prescribes specific requirements for the Wild and Scenic Sycan River. POL2348; SUPP POL6-7. Thus, the WSRA and River Plan requirements apply to site-specific decisions such as AOIs. *Or. Natural Desert Ass'n v. U.S. Forest Serv*., 2004 WL 1293909, at *2-7 (D. Or. June 10, 2004) (plaintiffs were likely to succeed on challenges to AOIs under WSRA, NFMA, and a river plan). The record here does not show the agency considered and explained how grazing authorized in the AOIs complied with the WSRA and River Plan. 36 C.F.R. § 219.15(d) (site-specific decisions must describe how activity complies with Forest Plan); *see NEC*, 418 F.3d at 965.

The language of the River Plan itself also contradicts the agency's legal argument. The River Plan requires the agency to review allotment operating plans[9] or AMPs for compliance with the desired conditions, goals, and standards and guidelines. POL 2361. Here, the AMP for Bear Lakes allotment barely mentions the River Plan, stating only that it permits grazing and omitting all of its other requirements. BL 341, 350. The agency admits that the Currier Camp and Withers Special Use allotments do not have AMPs. Fed. Resp. 58. The 2014 and 2015 AOIs are silent as to the River Plan. WSU67-72, 828-33; CC880-85, 5022-26; BL457-61, 2491-2500. Other provisions support the need to analyze grazing on a regular basis. POL2352 (grazing "would occur only where it would not have destabilizing effect on the streambank" where streams are highly erodible, and must not cause or perpetuate streambank degradation

[9] The agency has used AOI, AOP, or similar language to describe annual authorizations. *See* FWS 2194 ("annual changes may be made . . . in Annual Operating Plans (AOPs)"); SUPP POL 5304; *Sabo*, 854 F. Supp. 2d at 902 ("an AOP or AOI is issued annually" authorizing grazing).

over levels at designation). Ignoring the WSRA and the River Plan when issuing AOIs is contrary to the River Plan's "clear language" and not due deference. *See NEC*, 418 F.3d at 962.

Similarly, the agency could not rely on the Upper Sycan EA to avoid considering the WSRA and River Plan when issuing the AOIs. Importantly, that EA did not cover the Bear Lakes Allotment, which includes the headwaters of the Wild and Scenic Sycan River. SUPP POL1514. Further, the EA merely listed out the River Plan's goals and provided a meager two-paragraph description of the environmental effects of grazing on wild and scenic rivers along with unsupported conclusions about the area, without actually analyzing whether the proposed grazing complied with specific Plan requirements. SUPP POL1514-16. This cursory discussion in the EA does not fulfill the River Plan's requirement that the agency consider compliance with standards in future grazing authorizations.[10] The other planning documents the agency cites suffer from similar flaws. *See* Fed. Rep. 58.

B. The AOIs Authorized Grazing That Substantially Interferes With Outstandingly Remarkable Values and is Inconsistent With the River Plan.

The Forest Service did not meet its burden to show that the 2014 and 2015 AOIs were consistent with the WSRA non-impairment standard and River Plan requirements. The agency cobbles together facts from the record in its brief to try and support the decisions, but the agency cannot rely on these post hoc rationalizations put forth in litigation to fulfill its WSRA duties. *See* Fed. Resp. 53-54; *See Humane Soc'y*, 626 F.3d at 1049-50.

The WSRA prohibits grazing authorizations from substantially impairing the Outstandingly Remarkable Values ("ORVs") identified for the Sycan River. The record does not support the agency's attempt to downplay grazing impacts on ORVs and River Plan requirements in the WSRA allotments. Fed. Br. 53-54. Cattle are attracted to riparian areas,

[10] The agency's argument based on the appropriations rider also fails. *See supra* § II.B.

where they cause "considerable damage to soils, vegetation, and banks, even at relatively low levels of utilization." *See* SUPP POL15019. The agency suggests cattle have little to no access to the river in the Currier Camp pastures, but the 2014 Sycan River stream survey shows that the "riparian zone next to the channel has been heavily grazed" in Reach 8, which is located in the Squaw Flat pasture, and that reach 11 in the Hog Wallow pasture "has been grazed hard." Fed. Resp. 53-54; *compare* BL438, 441 *with* CC5028; *see also* SUPP POL15033-39. In the Withers Special Use allotment, the record contradicts the agency's claim that a fence prevents access to the river. *Compare* Fed. Def. 53 (citing SUPP POL4487 (a fence excludes cattle from river in *East Pasture*)) *with* WSU833 (showing large portion of Sycan in larger West Pasture); WSU80 (monitoring along on river's edge); *see also* Pl. Br., Exs. 28-32 (impacts directly along river).

Other evidence in the record shows riparian damage along the Sycan River. SUPP POL7380-82, 7427, 7452-58, 7702-11, 15033-39; Pl. Br. Exs. 23-32. Extensive unauthorized cattle use after the authorized season has been documented in Withers Special Use. 35-6, 44, 53. Stubble height and utilization standards were exceeded in the Currier Camp allotment as well as in Withers Special Use allotment in 2014, although the agency tried to brush these problems aside by claiming they were not consistent with use across the pasture. WSU825. Grazing impacts along the Upper Sycan have been documented in the Bear Lakes allotment too. BL369-72 (riparian scorecards show low or moderate ecological status at the Head of the Sycan site); Pl. Exs. 4-6 (documenting heavy grazing and little shade along the river); SUPP POL14999-15002 (same). These impacts are inconsistent with ORVs and the River Plan. Pl. Br. 35-40.

The agency failed to respond to the majority of Plaintiffs' specific arguments. Pl. Br. 38-40. For example, the agency asserts it may ignore scenic and recreational issues because Plaintiffs failed to raise them in 1991. Fed. Br. 56. The agency is wrong: the River Plan requires

the agency to consider desired conditions and other issues when making grazing decisions in the future—not once, one time, long ago. *See* 16 U.S.C. § 1283(a) (agency "shall take such action . . . as may be necessary to protect such rivers," and "[p]articular attention shall be given to scheduled timber harvests, road construction, and *similar activities* which might be contrary to the purposes" of the WSRA (emphasis added); *see, e.g.*, POL 2352-55.

Finally, instead of explaining how the AOIs satisfied the River Plan, the agency re-hashes its defense that Plaintiffs did not show current grazing was responsible for riparian degradation. This gets the burden backwards. The record demonstrates that grazing perpetuates degraded riparian conditions, and the agency has the burden to explain how this is consistent with the WSRA and River Plan. *See supra* § II.D.1. For example, the agency argues that there is no evidence of increased levels of streambank degradation, but the record shows worsening width-to-depth ratios on the Upper Sycan. *Compare* CC343 *with* CC863-74. An expert hydrologist documented poor riparian conditions and poor fish habitat due to livestock impacts along the Upper Sycan and the Hanan Trail, such as no shade, incised and widened channels, and unstable and sheared banks. SUPP POL15033-39. The agency had the duty to address, in the record, whether this degradation had worsened since the river designation and whether continued grazing would protect and enhance ORVs and be consistent with River Plan requirements. The agency's failure to address and ensure consistency with the WSRA and River Plan requirements renders the AOIs arbitrary and capricious. *See Tidwell*, 716 F. Supp. 2d at 1008.

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.

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Respectfully submitted,

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