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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

WESTERN WATERSHEDS PROJECT,)	
)	No. 4:12-cv-197
Plaintiff,)	
)	
v.)	COMPLAINT
)	
U.S. FISH AND WILDLIFE SERVICE,)	
NOAA FISHERIES, U.S. FOREST SERVICE,)	
JACK WHITWORTH, and WHITWORTH)	
RANCHES, INC.)	
)	
Defendants.)	
_____)	

INTRODUCTION

1. This case seeks declaratory and injunctive relief for ongoing violations of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531–43, relating to livestock grazing on the Salmon-Challis National Forest’s Camas Creek allotment.

2. Camas Creek supports important populations of Chinook salmon, steelhead trout, and bull trout, all protected under the ESA. Both the Chinook and steelhead populations are considered genetically unique and particularly important to the survival of the species because of

a lack of hatchery influence. Due to the different, overlapping life cycles of the three protected fish, there is essentially no time when salmonids are not spawning or eggs are not incubating in the gravels of Camas Creek.

3. Jack Whitworth and Whitworth Ranches, Inc. graze livestock on the Camas Creek allotment, under the authorization of the U.S. Forest Service. The livestock trample and wade within the streambeds of Camas Creek and its tributaries on the allotment, including during fish spawning and incubation periods. This livestock grazing has caused, and continues to cause, ongoing “take” and harm to all three protected fish species. This ongoing take includes: direct livestock trampling of fish redds (nests), which causes significant mortality and non-lethal take; wading livestock harming fish by crushing or dislodging vulnerable young fish, which remain in gravels near the redd for weeks after hatching; wading livestock displacing larger juvenile fish from protective streamside cover, increasing the risk of predation; and livestock disruption and harassment of spawning adult fish.

4. Pursuant to the ESA citizen suit provision, 16 U.S.C. § 1540(g), Western Watersheds Project thus seeks injunctive and declaratory relief against Jack Whitworth and Whitworth Ranches, Inc. to halt their ongoing and unlawful “take” of Chinook salmon, steelhead, and bull trout, in violation of ESA Sections 4(d) and 9 and regulations thereunder.

5. Plaintiffs further seek relief under the ESA citizen suit provision against the U.S. Forest Service for continuing to authorize such grazing, in violation of ESA Sections 4(d) and 9.

6. For their part, the U.S. Fish and Wildlife Service (“FWS”) and NOAA Fisheries have violated the ESA and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701–706, by issuing Biological Opinions and Incidental Take Statements concerning the impacts of domestic livestock grazing on the listed fish species of the Camas Creek allotment, which are arbitrary,

capricious and not in accordance with the ESA's Section 7. The decisions are flawed for reasons including they do not properly consider whether the livestock grazing will destroy or adversely modify the species' critical habitat or jeopardize the continued existence of the species, rely on incorrect factual assumptions and methods which have repeatedly failed to effectively control livestock in the past, do not address the harm that livestock grazing causes to different life stages of the fish, and fail to meaningfully restrict the amount of take the grazing is permitted to cause.

7. The U.S. Forest Service has further violated the ESA because it has failed to insure that the effects of its authorized grazing activities will not adversely modify critical habitat and will not jeopardize the continued existence of the three species, in violation of ESA Section 7. The Forest Service also has failed to reinitiate consultation despite violations of the terms and conditions of the Biological Opinions' Incidental Take Statements.

8. This action requests that the Court issue declaratory and injunctive relief concerning these violations of law, including holding unlawful and setting aside the challenged decisions as directed by the APA and ordering the agencies to reinitiate consultation for the Camas Creek allotment.

JURISDICTION AND VENUE

9. Jurisdiction is proper in the Court under 28 U.S.C. § 1331 because this action arises under the laws of the United States, including the ESA, 16 U.S.C. § 1531 et seq.; the APA, 5 U.S.C. § 701 et seq.; the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq.; and the Equal Access to Justice Act, 28 U.S.C. § 2214 et seq. An actual, justiciable controversy now exists between Plaintiff and Defendants, and the requested relief is therefore proper under 5 U.S.C. §§ 701-06; 28 U.S.C. §§ 2201-02; and 16 U.S.C. § 1540(g).

10. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 and 16 U.S.C. §

1540(g)(3)(A) because all or a substantial part of the events or omissions giving rise to the claims herein occurred within this judicial district, Defendants and Plaintiff reside in this district, and the public lands and resources in question are located within Lemhi County in this district.

11. As required under the ESA, Western Watersheds Project provided over 60 days' notice of its intent to bring this action to Jack Whitworth, Whitworth Ranches, Inc., the U.S. Forest Service, and the Secretaries of the U.S. Departments of Interior and Commerce prior to bringing this action.

12. The Federal Government has waived sovereign immunity in this action pursuant to 5 U.S.C. § 702 and 16 U.S.C. § 1540(g)(1).

PARTIES

13. Plaintiff WESTERN WATERSHEDS PROJECT (WWP) is a regional, membership, not-for-profit conservation organization with over 1,300 members, dedicated to protecting and conserving the public lands and natural resources of watersheds in the American West. WWP is headquartered in Hailey, Idaho, and also has staff in Boise, as well as other western states.

14. Through agency proceedings, public education, scientific studies, and legal advocacy conducted by its staff, members, volunteers, and supporters, WWP is actively engaged in protecting and improving riparian areas, water quality, fisheries, wildlife habitat, and other natural resources and ecological values of western watersheds, including the Camas Creek watershed. WWP has participated in decision-making processes for livestock grazing on Forest Service and BLM lands throughout the west, including the Salmon-Challis National Forest and Camas Creek allotment.

15. WWP staff, members, and supporters use and enjoy the fish and wildlife, public lands, and natural resources on federal lands in the Salmon-Challis National Forest, including the Camas Creek allotment, for many health, recreational, scientific, spiritual, educational, aesthetic, and other purposes. WWP staff and members pursue activities such as hiking, fishing, hunting, wildlife viewing, photography, and spiritual renewal in the Salmon-Challis National Forest and the Camas Creek allotment. Livestock grazing degrades the lands, waters, fish, aesthetics, and other natural resources, and impairs WWP's use and enjoyment of the Camas Creek allotment.

16. Western Watersheds Project staff, members, and supporters intend to continue to visit and use the public lands in the Camas Creek watershed and allotment in the near future. WWP's interests, organizationally, and on behalf of its staff, members, and supporters, in the preservation and protection of the Camas Creek watershed and allotment and its threatened fish and other resources are being directly harmed by Defendants' actions challenged herein. WWP's above-described interests have been, are being, and unless the relief prayed for is granted, will continue to be adversely affected and irreparably injured by Defendants' violations of law.

17. Defendant U.S. FISH AND WILDLIFE SERVICE ("FWS") is an agency or instrumentality of the United States, and is responsible for administering the provisions of the ESA with regard to threatened and endangered terrestrial and freshwater aquatic species, including threatened Columbia River bull trout.

18. Defendant NOAA FISHERIES (sometimes also referred to as NOAA Fisheries Service, National Marine Fisheries Service, or NMFS) is an agency or instrumentality of the United States, and is responsible for administering the provisions of the ESA with regard to threatened marine species, including Snake River spring/summer Chinook salmon and Snake River Basin steelhead.

19. Defendant U.S. FOREST SERVICE (“Forest Service”) is an agency or instrumentality of the United States, and is charged with managing the public lands and resources of the Salmon-Challis National Forest in accordance and compliance with federal laws and regulations.

20. Defendants JACK WHITWORTH and WHITWORTH RANCHES, INC. (“Whitworth Defendants”) hold a Forest Service permit to graze cattle on the Camas Creek allotment. Mr. Whitworth is a livestock producer in May, Idaho. Whitworth Ranches, Inc. is an Idaho corporation based in May, Idaho. Jack Whitworth is Secretary of Whitworth Ranches, Inc. As permittees of the Salmon-Challis National Forest, the Whitworth Defendants are required to comply with the ESA and its federal implementing regulations as they relate to livestock operations on the Camas Creek allotment.

ENDANGERED SPECIES ACT

21. The ESA was enacted to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such [] species.” 16 U.S.C. § 1532(b).

22. Under the ESA, the Secretary of the Interior or Commerce (“the Secretary”) lists a species as endangered if it is “in danger of extinction throughout all or a significant portion of its range,” or as threatened if it is “likely to become an endangered species within the foreseeable future.” 16 U.S.C. §§ 1533(a)(1), 1532(6) & (20).

23. Concurrently with listing a species as threatened or endangered, the Secretary also must designate the species’ “critical habitat.” 16 U.S.C. § 1533(a)(3). Critical habitat is the area that contains the physical or biological features essential to the “conservation” of the species and which may require special protection or management considerations. *Id.* § 1532(5)(A).

“Conservation” means “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary”—i.e. the species is recovered. *Id.* at §1532(3).

24. Under ESA § 7(a)(2), all federal agencies must “insure that any action authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of [designated critical] habitat.” 16 U.S.C. § 1536(a)(2).

25. If a proposed action “may affect” a listed species or its critical habitat, the action agency must consult with NOAA Fisheries or FWS. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). To fulfill its Section 7(a)(2) mandate, the action agency prepares a biological assessment (“BA”) to evaluate potential effects to listed species and determine whether a species is “likely to be adversely affected” (“LAA”) or “not likely to be adversely affected” (“NLAA”) by the action. 50 C.F.R. § 402.12.

26. For the LAA actions, the action agency must seek “formal” consultation with NOAA Fisheries or FWS. 50 C.F.R. § 402.14(a). For the NLAA actions, the agency action may seek “informal” consultation with NOAA Fisheries or FWS. *See id.* § 402.14(b). NOAA Fisheries is responsible for consultations regarding anadromous fish species such as salmon and steelhead trout, while FWS is responsible for inland fish species such as bull trout. *See id.* § 402.01.

27. During consultation, NOAA Fisheries or FWS must review all relevant information, evaluate the current status of the species or critical habitat, and evaluate the effects and cumulative effects of the proposed action on the listed species and their critical habitat. 50 C.F.R. § 402.14(g)(1)–(3).

28. Informal consultation concludes with a Letter of Concurrence, and is only appropriate when the BA or other information indicates that the action has no likelihood of adverse effect to the listed species.

29. Formal consultation under Section 7(a)(2) results in issuance of a biological opinion (“BO”) by NOAA Fisheries or FWS. The BO determines whether the proposed action is likely to jeopardize the continued existence of a listed species or adversely modify the species’ critical habitat.

30. The BO must include a detailed discussion of the current status of the species, the existing environmental conditions (called the environmental baseline), and the effects and cumulative impacts of the action when added to the baseline on listed species or critical habitat. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. §§ 402.14(g)(3), (h)(2). “Effects of the action” refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, added to the environmental baseline. 50 C.F.R. § 402.02. Cumulative effects are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area. *Id.*

31. If NOAA Fisheries or FWS makes a jeopardy determination, the BO may specify reasonable and prudent alternatives that will avoid jeopardy and will allow the agency to proceed with the action. 16 U.S.C. § 1536(b).

32. During the consultation process, the action agency may not make any irreversible or irretrievable commitments of resources, which would have the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures. 16 U.S.C. § 1536(d).

33. The duty to comply with § 7(a)(2) remains the action agency's even after the issuance of a BO. After the completion of consultation, the action agency must determine whether and in what manner to proceed with the action in light of its § 7 obligations and the BO. 50 C.F.R. § 402.15(a).

34. Section 9 of the ESA prohibits any person from "taking" a threatened or endangered species. 16 U.S.C. § 1538(a)(1); *see also* 50 C.F.R. § 17.31. "Take" is defined broadly under the ESA and its regulations to include harassing, harming, wounding, killing, trapping, capturing or collecting a listed species either directly or by degrading its habitat sufficiently to impair essential behavior patterns. 16 U.S.C. § 1532(19).

35. An exception to § 9's take prohibition is that a person may take a listed species in accordance with an Incidental Take Statement ("ITS"). 16 U.S.C. § 1536(b)(4). Only if the terms and conditions of the ITS are followed is the person exempted from § 9's take prohibition. *Id.* § 1536(o)(2).

36. The BO should include an ITS if such take may occur. 50 C.F.R. § 402.14(g)(7). The ITS (1) specifies the amount or extent of the impact on the species of any incidental taking, (2) specifies Reasonable and Prudent Measures to minimize such impact, and (3) sets forth the Terms and Conditions that must be complied with to implement the Reasonable and Prudent Measures. *Id.* § 402.14(i)(1)(i), (ii), (iv).

37. If during the course of the action the amount or extent of incidental taking specified in the ITS is exceeded, the action agency must immediately reinstate consultation. 50 C.F.R. §§ 402.14(i)(4), 402.16(a).

38. Throughout its analysis, the consulting agency must utilize the "best scientific and commercial data available." 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d).

STATEMENT OF FACTS

I. ESA-Listed Fish in Camas Creek Allotment

39. The Camas Creek allotment is located north of Challis, Idaho in remote Lemhi County. It is composed almost entirely of federal public lands administered by the Salmon-Challis National Forest and lies partly within Idaho's largest wilderness area, the Frank Church-River of No Return Wilderness.

40. Streams in the allotment are part of the Camas Creek watershed. Camas Creek flows 38 miles from its headwaters to its confluence with the Wild and Scenic Middle Fork of the Salmon River. A large portion of Camas Creek either flows through the wilderness, or, as within the Camas Creek allotment, forms the wilderness boundary. Its major tributaries include Furnace Creek, Castle Creek, Silver Creek, and West Fork Camas Creek, which are all within the allotment.

41. Camas Creek and its tributaries are home to three species of fish that are federally protected under the Endangered Species Act: Snake River spring/summer Chinook salmon, Snake River Basin steelhead, and Columbia River bull trout.

42. These fish require clean, cold water to survive and reproduce. Water having elevated levels of sediment, high temperature, or other pollutants impairs fish survival by hindering their biological functions, and sediment also impairs reproduction by covering spawning gravels where the fish lay eggs, which suffocates the eggs and young fry that emerge. The fish also require cover in the form of undercut banks and overhanging vegetation, large woody debris, and deep pools that allow them to hide from predators and rest outside of the current.

43. Livestock grazing degrades habitat in many ways, including by removing riparian

vegetation, destabilizing stream banks, widening stream channels, promoting incised channels, lowering water tables, reducing pool frequency, increasing soil erosion, and altering water quality. These effects reduce cover, increase summer water temperatures, promote formation of anchor ice in winter, and increase sedimentation into spawning and rearing habitats.

44. An additional way livestock can harm listed fish is by directly trampling on redds (nests), which contain thousands of eggs. A single trampling incident can kill a majority of those eggs. Further, wading livestock can harm these fish by crushing or dislodging vulnerable alevins and fry (young fish), which remain in the gravels near the redd for weeks after hatching. Livestock may also displace larger juvenile fish from protective streamside cover, increasing the risk of predation. Finally, livestock in and around streams can harass spawning adult fish, causing them to dart or drift from their nests, disrupting their spawning activities, and forcing them to expend vital energy.

45. Cattle are attracted to riparian areas, and will often congregate there to take advantage of the water, shade, and lush vegetation. Livestock that cross or wade in streams additionally stir up sediment and add pollutants by urinating and defecating in the streams.

46. Salmon and steelhead are anadromous species, meaning they are born in inland streams, migrate to the ocean as juveniles, and return to their natal streams several years later as adult fish to spawn. Bull trout are not anadromous and do not migrate to the ocean. Some bull trout, called fluvial bull trout, migrate from smaller streams to larger rivers or lakes to overwinter before returning to the smaller streams to spawn. Others remain residents in individual streams.

47. Due to the different, overlapping life cycles of the listed fish, there is essentially no time when salmonids are not spawning or eggs are not incubating in the gravels of Camas Creek.

A. Chinook Salmon

48. The Snake River spring/summer Chinook salmon (“Chinook salmon” or “Chinook”) was protected as threatened in 1992. Historically, 1.5 million Chinook returned to spawn in the Snake River Basin, but these returns have declined by as much as 97% since the late 1800s. Chinook salmon have been extirpated in over half of their pre-European spawning range within the Snake River Basin. Today, hatchery-reared fish comprise up to 80% of the Snake River spring/summer Chinook salmon run and the fish remains likely to become endangered.

49. Critical habitat for Snake River spring/summer Chinook salmon was designated in 1993 and revised in 1999. Camas Creek and its four main tributaries are designated as critical habitat.

50. Chinook are present within the allotment in mainstem Camas Creek, West Fork Camas Creek, Castle Creek, and Silver Creek. Potential spawning habitat on the allotment includes 9.71 miles on mainstem Camas Creek, 4.68 miles on West Fork Camas Creek, and 2.35 miles on Castle Creek. However, Silver Creek is too warm to currently support Chinook spawning. Spawning on the allotment generally occurs between August 15 and late September, but Forest Service biologists have observed Chinook spawning as early as July 24 in upper reaches of mainstem Camas Creek.

51. Eggs incubate in the redds through fall and winter and alevins emerge in early spring. Juvenile fish migrate out of their rearing areas in May through July, but remain in the streams for another year and actively move between optimal feeding and sheltering reaches as their size and mobility increases. The fish migrate to the ocean during May to July of their second year and spend two to three years in the ocean. Adults re-enter the Columbia River in

February and March and migrate to Camas Creek, where they arrive in April to July as four- or five-year-old fish. They hold in cool, deep pools through the heat of the summer and as they initiate spawning, move to shallow gravel riffles where they dig redds and deposit eggs. Thus, individuals rely on a variety of stream reaches depending on the habitat needs of their life stage and the season.

52. NOAA Fisheries describes listed Pacific salmon runs in terms of discrete individual populations that make up Major Population Groups (MPGs), which share genetic, geographic, and habitat characteristics. Camas Creek is one of nine populations that falls within the Middle Fork Salmon River MPG for Chinook salmon.

53. Chinook populations in the Middle Fork Salmon River MPG are unique because they have never received hatchery supplementation, and hatchery-origin Chinook have never been documented spawning in the MPG. Thus, the MPG is essentially free from hatchery influence, and, consequently, its genetic integrity is very high. The MPG is therefore important to the recovery of the species as a whole because it preserves a reservoir of genetically pure wild Chinook salmon.

54. These populations have evolved over millennia to select only the strongest individuals: those capable of making the 800-mile upstream journey to the Middle Fork of the Salmon River and its tributaries. The conservation of these genetic traits increases the entire species' likelihood of persistence.

55. NOAA Fisheries determines the status of a listed salmonid species by measuring four criteria that characterize a "viable salmonid population" (VSP): abundance, productivity, spatial structure, and genetic diversity. For the Middle Fork Salmon River MPG to be considered viable, five of its nine populations must meet or exceed these VSP criteria (in other

words, be viable). However, *none* of the nine populations in the Middle Fork Salmon River MPG—including the Camas Creek population—currently does.

56. The Camas Creek population is well below viability levels. It sits at only 6% of its minimum threshold abundance of 500 adults. In the past decade, an average of only 28 adult Chinook salmon have returned to Camas Creek each year. Productivity risk to the Camas Creek population is also high. Over the past 20 years, recruitment for the population has not even met replacement and is well below viability. Based on these data, NOAA Fisheries believes that the population has more than a 25% risk of extinction within the next 100 years.

57. Primary limiting factors identified by NOAA Fisheries include reduced stream flow and grazing impacts.

B. Steelhead

58. Snake River Basin steelhead trout (“steelhead”) was protected under the ESA as threatened in 1997. NOAA Fisheries designated critical habitat for steelhead in 2005. Much of the Camas Creek watershed is designated critical habitat, including Camas Creek and its four main tributaries.

59. Almost all designated critical habitat is occupied and used for spawning. Steelhead migrate to the watershed in fall, overwinter there, and spawn from mid-March to mid-June, with egg incubation generally occurring through the second week of July but potentially extending as late as the third week of August.

60. Available data suggest that naturally reproducing steelhead populations have been declining in abundance over the past several decades and currently exist at severely depressed levels. Snake River steelhead remains likely to become endangered. As with Chinook, the majority of the species is hatchery produced, but steelhead within the Camas Creek watershed

are part of a genetically unique population with no indication of hatchery influence.

61. The steelhead in Camas Creek are part of the Salmon River MPG and the Lower Middle Fork population. For the Salmon River MPG to be considered viable, six of the 12 populations in the MPG must be viable. Currently none is.

62. The Lower Middle Fork population's abundance risk is high. Productivity risk is moderate, with return spawner recruitment less than replacement. Accordingly, NOAA Fisheries believes there is a high (>25%) risk of extinction for the population over the next 100 years.

63. According to NOAA Fisheries, livestock grazing threatens the physical and biological features essential to steelhead, such as: freshwater spawning sites that support spawning, incubation, and larval development; freshwater rearing sites with features such as shade, aquatic vegetation, and undercut banks; and freshwater migration corridors free of obstruction.

C. Bull Trout

64. Columbia River bull trout was protected as threatened under the Endangered Species Act in 1998. FWS designated critical habitat in 2010. Much of the Camas Creek watershed is designated critical habitat, including Camas Creek, its four main tributaries, and several smaller tributaries. Bull trout are present and spawn in almost all of the allotment's designated critical habitat, except for the upper portion of Silver Creek and its tributaries.

65. Bull trout spawning habitat consists of low-gradient stream reaches with loose, clean gravel. Bull trout need very cold water for spawning (<48° F) and incubation (35–39° F) and slightly warmer water for rearing (46-50° F). They spawn from mid-August through October. After the incubation period and hatching, juveniles remain in the substrate and may not emerge for another fifty days or more, usually in early April through May.

66. For purposes of recovery planning, FWS divides the coterminous U.S. population of bull trout into recovery units. In turn, core areas are geographic areas within a recovery unit that are occupied by one or more local populations of bull trout. A local population is a group of bull trout that spawn within a particular stream or portion of a stream and is the smallest interacting reproductive unit of bull trout.

67. Each recovery unit is important to maintaining the distribution of bull trout throughout its overall range. Likewise, core areas are critical to the persistence of recovery units.

68. The Camas and Silver Creek bull trout local populations inhabit the streams in Camas Creek allotment. These local populations are part of the Middle Fork Salmon River (MFSR) core area, which is within the Columbia River recovery unit. The MFSR core area contains 28 local populations. Maintaining the Camas and Silver Creek local populations is important to maintaining the productivity and distribution of bull trout within the MFSR core area.

69. Bull trout are threatened by various factors, including livestock grazing, road construction and maintenance, and water diversions that dewater streams, block migratory corridors, and entrain fish into ditches.

II. Camas Creek Allotment

70. The Forest Service permits the Whitworth Defendants to run 132 cow/calf pairs in Camas Creek allotment from June 1 to October 15 each year. The current permit expires 12/31/2014.

71. The grazing plan for the Camas Creek allotment is a deferred rotation system, whereby livestock are moved between the allotment's four units. The Whitworth Defendants are responsible for determining when the prescribed amount of utilization has been reached, and for

moving the livestock to the next unit. Many of the streams on the allotment are accessible to livestock and used for watering sites, and livestock must cross Camas Creek several times when moving between units on the allotment. Thus, the redds and incubating young are vulnerable to livestock trampling.

72. In addition to the livestock grazing that occurs on the Camas Creek allotment, at least a dozen water diversions are present on both federal and private land in the allotment. These include diversions on Castle Creek and its tributaries and Silver Creek and its tributaries. Water diversions are detrimental to fish habitat because they reduce stream flows and increase water temperatures. Six vehicle fords also cross Camas Creek and one ford crosses Furnace Creek. Vehicle fords are detrimental to fish habitat because they increase sediment in the water.

73. Private lands on the nearby Hidden Valley Ranch are grazed in conjunction with the Camas Creek allotment about once every ten years.

74. Near the center of the Camas Creek allotment is Meyer's Cove, a meadow area where Silver Creek and West Fork Camas Creek meet mainstem Camas Creek. This 23-acre area was fenced off in 1988 in hopes of excluding livestock to prevent access to an important Chinook spawning area on Camas Creek and to facilitate habitat recovery.

75. Livestock grazing has long had adverse impacts to the listed fish species and their habitat in the Camas Creek allotment due to livestock repeatedly entering streambeds of Camas Creek and its tributaries, including within the Meyer's Cove enclosure. This has occurred *every year* the allotment has been grazed for at least the past thirteen years, despite concerns raised by agency biologists, repeated warnings to the permittee that he is required to keep livestock out of the streams, construction of various fences, alterations to the livestock rotation schedule, and the use of riders to control livestock. Livestock have trespassed within the Meyer's Cove enclosure

so regularly that agency biologists have accused the Forest Service of essentially unlawfully converting this spawning grounds enclosure into a riparian pasture.

76. In 1999–2001, livestock were documented within Camas Creek numerous times during the fall spawning months each of those years, including repeated incidents of cattle trespassing into the Meyer’s Cove enclosure and wading into spawning beds. Other violations were noted during these years such as herding livestock across Camas Creek without using a hardened ford.

77. From 2002–2005, Forest Service researchers studying Chinook redds in Camas Creek extensively documented livestock in the streambed of Camas Creek during the fall spawning period all four years. Trespass was especially severe in upper Camas Creek within the allotment. Despite reporting these incidents to the Salmon-Challis National Forest, the cattle often remained in trespass for days to weeks. In one instance, a researcher actually observed and photographed a cow crossing upper Camas Creek directly on top of a Chinook salmon redd, prompting NOAA Fisheries to threaten criminal prosecution against the Forest Service and Mr. Whitworth for unlawful take.

78. In 2004, the Forest Service installed fences across the mouths of Furnace and Castle Creeks to prevent cattle from accessing upper Camas Creek, but cattle continued to get around the fences. In 2006, the Forest Service instituted further measures to try and address the problem by adjusting the grazing rotation dates and requiring more frequent riders to herd the cattle away from streams. However, these measures did not prevent cattle from entering streambeds. During 2006–2008 there were numerous reports of livestock getting inside the Meyer’s Cove enclosure, entering Camas Creek, Castle Creek, and Lower Silver Creek, and causing other grazing violations on the allotment.

79. In January 2009, Plaintiff WWP sent a notice letter to the Forest Service and Mr. Whitworth asserting violations of the ESA from the adverse impacts grazing was causing to these listed fish species and for failing to consult over those impacts with FWS and NOAA Fisheries, as required by the ESA. The agencies had previously removed the allotment from a watershed consultation they were conducting for the entire Camas Creek watershed, but never completed a separate consultation for the Camas Creek allotment.

80. In response to the notice letter, the Forest Service initiated consultation with FWS and NOAA Fisheries, and did not authorize grazing on the Camas Creek allotment in 2009. The Forest Service completed its BA in March 2010, which concluded that grazing was “likely to adversely affect” the listed fish species but “not likely to adversely affect” their critical habitat. FWS and NOAA Fisheries issued BOs in June 2010 concluding that grazing was not likely to jeopardize the survival and recovery of the listed fish, and (as the cover letters to the BOs) issued Letters of Concurrence agreeing that grazing was not likely to adversely modify critical habitat.

81. The Forest Service allowed grazing on the allotment in 2010. The violations continued. An immediate violation of the BO terms occurred when the Forest Service authorized turn-out of livestock onto the allotment before ensuring that all existing fences and enclosures were properly maintained and functioning. Instead, cattle entered the allotment while the Meyer’s Cove enclosure fence was still in disrepair and non-functional in numerous places, allowing cattle to once again trespass into the enclosure and access Camas Creek.

82. In March 2011, Western Watersheds Project sent a new notice letter to the Forest Service and Mr. Whitworth asserting violations of the ESA due to reliance on flawed BA and BOs, as well as the failure to comply with the terms of the BOs in 2010. Grazing was not authorized on the Camas Creek allotment in 2011.

IV. ESA Section 7 Consultation for Camas Creek Allotment

83. The 2010 Camas Creek allotment BA, BOs, and Letters of Concurrence are flawed and unlawful for various reasons, including that they do not contain sufficient information to adequately assess all the effects of grazing, do not properly and fully analyze the impact of grazing on the listed fish and their habitat, and do not lawfully provide for incidental take of the three species of fish. Therefore, FWS and NOAA Fisheries are violating the ESA and the APA for issuing BOs and Letters of Concurrence that are arbitrary and capricious and contrary to the ESA; the Forest Service is violating the ESA for authorizing livestock grazing that does not insure against jeopardy to these listed fish species and adverse modification of critical habitat; and the Forest Service and Mr. Whitworth are violating the ESA for authorizing and conducting livestock grazing that is likely to “take” listed fish species without valid incidental take authorization.

A. SCNF Biological Assessment

84. The Camas Creek allotment BA described the proposed action, the action area, the listed fish species and critical habitat present in the action area, the environmental baseline, the effects of the action, and the determination for each species as to whether the effects of the action are likely or not likely to adversely affect the species and their critical habitat.

85. For the proposed action, the BA discussed the grazing system that occurs on the Camas Creek allotment, including when livestock are present in each of the four units on the allotment (Upper Silver Creek Unit, Lower Silver Creek Unit, West Fork Unit, and Camas Creek Unit, which is divided into the Camas Creek Area and the Furnace/Castle Creek Area), the overlap of livestock with spawning and incubation periods for each of the listed fish in each unit, and the trailing that occurs to move between units.

86. In both the Upper Silver Creek and Lower Silver Creek Units, livestock overlap with steelhead and bull trout spawning and incubation for up to four weeks every other year. In the West Fork Unit, livestock are present for up to four weeks during steelhead spawning and incubation and during early Chinook spawning (between July 24 and August 15). In the Camas Creek Area of the Camas Creek Unit, livestock could overlap with steelhead incubation and, while most cattle will be moved to the Castle/Furnace Area by July 26, up to 12 cow/calf pairs could remain in the Camas Creek Area until August 15 and overlap with Chinook spawning. In the Castle/Furnace Area, livestock will overlap with bull trout spawning and incubation for up to four weeks. During the moves between units, livestock will cross Camas Creek several times using road fords.

87. The unit rotation dates and expected overlap with spawning and incubation periods assumes that cattle are moved by the permittee on time and remain in their proper location, assumptions that in the past have been proven false with repeated trespass into Camas Creek during the late summer and fall Chinook and bull trout spawning periods.

88. The proposed action section also included a description of the monitoring, grazing standards, and other measures that would be used to reduce potential impacts of grazing to Chinook, steelhead, and bull trout. Most of the measures described are those already being used prior to the BA. The only changes to management were the addition of woody browse utilization and bank alteration standards on several streams, and adjustments to stubble height standards on two streams. Measures intended to reduce direct impacts from cattle entering streams during spawning include grazing rotation dates, fencing, and the use of riders to distribute cattle—measures that had been used since 2006.

89. The proposed action did not include grazing on the Hidden Valley Ranch as an

interdependent or interrelated action.

90. The environmental baseline discussion in the BA attempted to summarize baseline conditions for the area. The BA first provided a general description of the listed fish populations on the allotment. It acknowledged the importance of the Chinook population because it is a genetically pure wild population free of hatchery influence, and that its numbers are on a downward trend.

91. The BA discussed the extent of potential Chinook spawning habitat on the allotment but does not identify actual or likely spawning areas that contain suitable conditions.

92. The majority of Chinook spawning habitat occurs in Camas Creek and West Fork Camas Creek. Only the lower portion of Castle Creek is believed to have Chinook spawning, and it is unlikely that spawning occurs at all in Silver Creek due to elevated water temperatures. The BA asserted that some spawning habitat on Camas Creek and West Fork Camas Creek is within the Meyer's Cove enclosure and thus is excluded from livestock access, and that fences in lower Furnace and Castle Creeks additionally limit livestock access to Camas Creek. The BA, however, failed to report that cattle have repeatedly trespassed into the streambed of Camas Creek despite these fences.

93. For steelhead, the BA acknowledged that this population was an important stronghold of genetically unique steelhead essentially free of hatchery influence, and that it also appeared to be in a downward trend.

94. The BA identified potential spawning habitat in the allotment, but it did not identify actual or likely spawning areas within these streams based on suitable conditions. Like with Chinook, the BA stated that access to Camas Creek, West Fork Camas Creek, and lower Castle Creek is limited by fencing without noting that cattle have repeatedly trespassed behind

these fences.

95. For bull trout, the BA noted that this species occurs in many of the streams on the allotment, but they are not found in Upper Silver Creek and are rarely found in Lower Silver Creek due to high water temperatures. The BA identifies potential spawning habitat, but does not identify actual spawning areas that have suitable conditions.

96. The BA described conditions on the allotment for five habitat indicators: water temperature, sediment, stream channel width to depth ratio, streambank condition, and condition of Riparian Habitat Conservation Areas.

97. The BA noted that stream sediment and water temperature are likely the major factors limiting fisheries from achieving full carrying capacity. Elevated sediment and temperatures occur in mainstem Camas Creek and Silver Creek, which may currently be limiting egg-to-fry emergence success. In Silver Creek, this was attributed to a series of beaver dams as well as some small shallow private reservoirs.

98. In Camas Creek, high sediment levels were attributed to high runoff flows, with sediment settling out in flatter depositional reaches. The BA did not state from where the sediment getting into upstream reaches of Camas Creek was coming.

99. Streambank stability was considered to be functioning at risk because the 90% stability objective was achieved only during about 25% of all measurements, but conditions were improving at most sites. However, streambank conditions remained below standards at the Meyer's Cove monitoring site. The BA claimed that this was due to factors other than livestock but did not explain what those factors were, or note that livestock had repeatedly trespassed into the enclosure.

100. The BA also noted that riparian conservation areas were functioning at risk or in a

downward trend for several sites. It again claimed that livestock were excluded from Meyer's Cove so the monitoring site there acts as a control or baseline of natural conditions, without noting that livestock have often been inside the enclosure.

101. When describing the environmental baseline conditions and activities influencing those conditions, the BA did not discuss use of road fords or water diversions. The BA also did not discuss upland conditions and whether grazing on steep slopes of the allotment where soils are highly erosive was contributing to the high sediment levels or water temperatures in Camas and Silver Creeks.

102. The next section of the BA discussed the effects of the proposed action. The BA pointed to several measures designed to reduce effects to listed fish. It claimed the grazing rotation schedule has been refined to avoid direct impact to spawning fish and incubating redds; the existing fences around Meyer's Cove and on Castle and Furnace Creeks exclude livestock from spawning reaches of Camas Creek and West Fork Camas Creek; salting in the Camas Unit and a water trough in the West Fork Unit will help keep livestock out of streams; riders keep livestock in uplands and away from Camas Creek, Castle and Furnace Creeks during Chinook and bull trout spawning and incubation periods; and utilization standards promote attainment of riparian objectives.

103. The BA stated these measures would minimize potential for direct or indirect impacts to spawning and incubation for all three species as well as to habitat. The BA did not discuss effects of grazing to other life stages of the fish, such as alevins, juveniles, or adults. Nor did it admit that the fencing around Meyer's Cove and on Castle and Furnace Creeks had been breached numerous times by cattle in the past.

104. The BA also did not discuss the effectiveness of riders at keeping cattle out of

Camas, Castle, and Furnace Creeks when they are only required to check the livestock twice per week, nor what the impacts could be of the “incidental use” by up to 24 cows for three weeks in the Camas Creek Area. And the BA failed to identify where cattle water when they are not in the vicinity of the one water trough on the allotment, where exactly trailing and stream crossings occur, where likely fish spawning and rearing areas are located based on suitable conditions, or the likelihood of cattle accessing those spawning and rearing areas.

105. The BA incorrectly stated in its effects analysis that livestock would overlap with bull trout spawning for two weeks—from August 15 to August 31—in the Castle and Furnace Creek drainages, despite previously acknowledging that the overlap was up to four weeks.

106. In discussing the effects of grazing to water temperature and sediment—the two limiting factors influencing fish habitat quality—the BA did not add the effects of grazing to other existing conditions that impact the listed fish, such as water diversions, use of road fords by vehicles, or recreation. Nor did it discuss the effects of grazing in uplands and along tributary streams, and how that could contribute to high sediment loads in Camas and Silver Creeks. And the discussion of habitat factors again incorrectly assumed that the Meyer’s Cove exclosure has been effective in excluding cattle.

107. The BA summarized the effects by stating that grazing could have a “non-discountable” potential for direct impacts on spawning Chinook salmon, steelhead, and bull trout and their incubating eggs, but that impacts to aquatic and riparian habitat factors are insignificant or discountable. The conclusion was that the proposed action was likely to adversely affect each of the species, but not likely to adversely affect their critical habitats.

B. FWS Biological Opinion and Letter of Concurrence

108. The FWS Biological Opinion (BO) and accompanying Letter of Concurrence for

the Camas Creek allotment (FWS No. 14420-2010-F-0307) (June 7, 2010) addressed the effects of the proposed grazing on bull trout and its critical habitat.

109. The FWS BO relied on the BA to provide the description of the proposed action. It noted that the consultation extends until December 2019.

110. The FWS BO discussed other bull trout BOs completed for activities within the entire range of the species as well as specifically within Eastern Idaho. Of 24 BOs issued for Eastern Idaho since 2003, 21 authorized varying amounts of incidental take for bull trout. Two of those BOs were for water diversions within the Middle Fork Salmon River core area, and anticipated take from impacts like stranding or entrainment. However, the BO did not discuss what any of those take amounts were, individually or cumulatively.

111. In the environmental baseline discussion, FWS approved of the indicators used in the BA to assess baseline conditions and impacts of the action on the survival and recovery of bull trout (spawning and incubation plus the five habitat indicators noted above). It then relied on the discussion in the BA to describe the existing baseline condition for each indicator.

112. In the effects analysis, the BO described effects of grazing on fish and fish habitat by referring to an Appendix A. Appendix A explained that livestock wading and loafing in streams can lead to trampling of redds. Livestock wading into streams or occupying streamside habitat are also likely to displace juvenile bull trout from protective streamside cover and other preferred habitat, increasing their predation risks. These effects result in decreased juvenile survival and lower bull trout populations.

113. Appendix A further explained that during incubation, livestock presence in streams can have significant effects on the survival of eggs and pre-emergent fry that are still immobile. In one study, during a 14–21 day grazing period, 12–78% of redds were affected by

trampling. In another study, a single wading event was responsible for 43% mortality and twice-daily wading events caused mortality of 96% of pre-hatching embryos. And in yet another study, even though the time cattle spent in close proximity to salmon redds was minimal in relation to the total time spent grazing the allotment, two out of fourteen redds observed over the two-year project were trampled by cattle.

114. With regard to effects from grazing outside of the riparian area, Appendix A also discussed how grazing compacts the soil, increasing surface runoff and soil erosion, which elevates the amount of sediment getting into streams and increases water flows and channel incision. Soil compaction also reduces infiltration of water into the soil, which decreases the water table and reduces stream flows, resulting in warmer water temperatures and shallower water depths. Steep slopes with erosive soils can exacerbate runoff and soil erosion.

115. To assess the effects of grazing on spawning, the BO determined which streams would have overlap of livestock with the bull trout spawning period and estimated the number of redds that would be in those streams based on redd density studies in Oregon. Then it gave a range of the number of redds expected to be impacted by livestock. The BO did not explain how it arrived at that prediction other than to note whether the overlap of livestock with the spawning period was substantial or not, and that in some cases riders would be used.

116. The BO did not explain whether the expected number of redds impacted was based on a percentage of total redds exposed to cattle, what that percent was for each stream, or why FWS chose that percentage. In other words, there was no explanation for how FWS arrived at the number of redds expected to be impacted by livestock in each stream.

117. Based on the number of redds impacted, the BO also predicted the number of adults that would be disturbed during spawning but stated that such disturbance would not be

substantial enough to preclude spawning because it was likely to cause only short avoidance movements and last only a few minutes. The BO did not explain the basis for those assumptions.

118. This discussion of effects failed to note that riders were only required to check livestock twice per week, assess their actual effectiveness at reducing presence of cattle in streams, or note the failure of riders to be effective in the past.

119. The BO also did not explain that livestock use of streams is not random but, rather, is often associated with spawning habitat, as shown in Appendix B to the FWS BO. This is because spawning habitat occurs in flatter areas with shallower water and lower water flows, areas also accessible to cattle and preferred for watering, loafing, and crossing. The BO does not explain whether this association was taken into account when estimating the number of redds expected to be impacted by livestock or the extent of adult disturbance.

120. The BO failed to assess effects to other life stages of bull trout, such as alevins, fry, or juveniles.

121. For the habitat indicators, the BO reiterated the discussion of effects from the BA and again ignored impacts of upland grazing on sediment and water temperatures; did not discuss where cattle water on the allotment when they are not in the vicinity of the single trough, and the impacts of that; or how use of road fords and water diversions add to sediment and water temperature impacts.

122. The BO inaccurately stated that each of the five habitat indicators is meeting bull trout objectives for the affected creeks when the BA acknowledged high water temperatures and sediment in Silver Creek and mainstem Camas Creek, as well as other monitoring sites that were below standards or in a downward trend for streambank stability and Riparian Habitat Conservation Areas.

123. Based on the analysis of effects, the FWS BO concluded that the effects of the proposed grazing, when added to the environmental baseline, are not likely to jeopardize the bull trout. In making this conclusion, the BO did not include various activities, such as the use of road fords and water diversions, in the environmental baseline. It also based the conclusion on an effects analysis that did not adequately consider all impacts of the proposed grazing, as described above. Finally, it provided no analysis of the overall effect to the bull trout population from the total estimated number of redds (29–48) and adults (58–96) impacted by livestock and how that relates to survival and recovery of bull trout.

124. In its accompanying Letter of Concurrence, FWS concurred with the Forest Service’s “not likely to adversely affect” determination for critical habitat, thus concluding that the proposed grazing would not destroy or adversely modify bull trout critical habitat. In doing so, it relied on inaccurate assumptions in the BA and failed to assess all impacts to habitat.

125. The FWS BO contained an ITS, which anticipated take of redds but not any other life form of bull trout. The ITS ignored harm and take to alevins, fry, and juveniles, and discounted harm to adults with assertions that disturbance would be minor. These assertions are contradicted by evidence that cattle have repeatedly entered Camas Creek and others on the allotment during the bull trout spawning period, often remaining there for days.

126. The FWS BO concluded that the level of anticipated take is not likely to jeopardize bull trout. However, it lacked any analysis of how the level of take relates to the size of the existing populations, or how the take authorized here, when added to the take authorized for other activities, impacts the Middle Fork Salmon River core area. FWS failed to account for and analyze the effects of all authorized incidental take of bull trout on the survival and recovery of the species.

127. The ITS required the Forest Service to monitor at least one representative stream reach to document impacted bull trout redds. The survey stream is to have the highest likelihood of having bull trout redds or be one known to have had redds in the past. FWS failed to explain how monitoring a single stream segment, out of the miles of bull trout spawning habitat on the allotment, would represent or predict the level of take occurring on the entire allotment.

128. The ITS does not contain a trigger for reinitiation of consultation. Rather, the incidental take authorized is the same as the level of take expected to occur from the proposed action.

C. NOAA Fisheries Biological Opinion and Letter of Concurrence

129. The NOAA Fisheries BO and accompanying Letter of Concurrence for the Camas Creek allotment (NMFS No. 2010/00849) (June 3, 2010) assessed whether the proposed grazing would jeopardize the survival and recovery or adversely modify critical habitat for Chinook salmon and steelhead. The NOAA Fisheries BO reiterated the information from the BA to describe the proposed action.

130. The BO acknowledged that numbers of wild Snake River spring/summer Chinook salmon are significantly below historic levels, that the species remains likely to become endangered, and that the Camas Creek population in particular is far below a viable level, yet very important to recovery.

131. For steelhead, the NOAA Fisheries BO likewise acknowledged that this population was not currently viable and that survival rate increases that lead to increases in abundance and productivity will need to occur before the population can be considered viable.

132. The environmental baseline discussion in the NOAA Fisheries BO noted the road fords in the action area, and water diversions on private inholdings within the allotment

boundary. However, it did not discuss the water diversions on Forest Service land that occur within the allotment.

133. When discussing the five habitat indicators, the BO reiterated the findings from the BA that water temperature and sediment are functioning at risk in the area, most notably in Silver Creek and mainstem Camas Creek. It recognized that the soils in the watershed are predominantly volcanic, which are moderate to highly erosive, but like the BA and FWS BO, did not discuss conditions in the uplands and whether grazing on steep slopes with erosive soils was contributing sediment to the streams.

134. Like the BA, the NOAA Fisheries BO described potential spawning habitat for Chinook on the Camas Creek allotment, but did not identify the likely spawning areas. The BO likewise assumed that the Meyer's Cove enclosure and drift fences on Castle and Furnace Creeks limit livestock access, without discussing the repeated trespass that has occurred.

135. The BO contained a map from 1982 of known steelhead spawning sites on Camas Creek, but did not contain information on other likely spawning sites on the allotment.

136. The discussion on disturbance to juvenile or adult fish acknowledged that cattle grazing adjacent to streams, or when crossing, drinking, or loafing near streams, can disturb adult fish that are spawning. Such reactions could rise to the level of take in the form of harassment.

137. The BO claimed that such disturbance was discountable because of conservation measures like fencing, riders, off-channel salting, and rotation dates. However, the BO did not discuss how those same conservation measures have failed to prevent livestock access to creeks on the allotment in past years. Nor did the BO recognize or discuss the impacts from the "incidental use" of up to 24 cows that could occur in the Camas Creek Area from late July through August 15.

138. The BO acknowledged that cattle trailing along streambanks and/or wading into streams can startle juvenile salmon rearing in streams. Juveniles of both Chinook salmon and steelhead are present in the Camas Creek allotment year-round and will likely be exposed to disturbance from cattle in all four units of the allotment. This disturbance can alter feeding success, increase exposure to predators, or displace juveniles into less suitable habitat.

139. The BO assumed this disturbance would be short and infrequent and that cattle would have little access to streams due to topography and conservation measures. However, the BO failed to discuss how accessible the juvenile rearing sites in particular are to livestock, what the impacts would be from cattle watering or loafing at these sites, or where the livestock tend to water. It again ignored the “incidental use” of up to 24 cows in the Camas Creek Area for three weeks and the fact that the conservation measures have failed in the past.

140. In the discussion on effects of redd trampling, the NOAA Fisheries BO acknowledged that cattle can trample redds and incubating eggs/embryos. The BO noted potential for trampling steelhead redds between June 1 and July 6, but ignored its previous statement that steelhead incubation is presumed to occur on the allotment until August 7.

141. The discussion on redd trampling for both steelhead and Chinook again ignored the “incidental use” of up to 24 cattle in the Camas Creek Area during Chinook spawning and steelhead incubation, the full impacts of cattle watering instream on most of the allotment, and the lack of effectiveness of conservation measures like the Meyer’s Cove enclosure, fencing on Castle and Furnace Creeks, and riders to keep cattle out of Camas and Castle Creeks.

142. When assessing steelhead redd trampling, the NOAA Fisheries BO recognized that its estimate of redd density was unreliable and almost certainly underestimated the number of redds in the allotment streams because it is difficult to conduct redd surveys during high

spring water flows. Yet it used this estimate as the basis for its impact analysis.

143. The BO also reduced the rate of trampling by 75% because cattle are not as likely to access streams in spring when water flows are high and upland forage is still palatable. Yet it stated that cattle will still water and cross streams during the spawning period. The BO did not analyze whether the areas likely selected by cattle to water and cross, which would be flatter, shallower areas, are also likely spawning areas for steelhead and thus there could still be significant overlap of cattle use in spawning areas during spring. The BO admitted that spawning does not occur evenly throughout streams but is concentrated in high quality habitat, such as shallow riffles in low gradient areas. Yet there was no discussion about where that high quality habitat occurs on the allotment or whether livestock use of streams coincides with that habitat.

144. The BO also ignored that steelhead incubation is presumed to occur until August 7 when streamflows would be lower and cattle use of streams would be higher.

145. Based on the flawed estimates of redd density and trampling rate, the NOAA Fisheries BO estimated how many fewer steelhead adults would survive to assess the effect of redd trampling on the population. It stated that the loss of five adult steelhead every other year would not reduce the viability or recovery potential of the population. The BO failed to explain how this can be the case when the population is already below a viable level and must increase in size to achieve viability and recovery.

146. In the impacts analysis for Chinook salmon, the BO stated that there would be no potential for livestock interaction with spawning or incubating Chinook salmon, despite repeated documented instances of cattle entering Camas Creek and other creeks during the Chinook spawning period, including a documented instance of a cow directly trampling a Chinook redd.

147. The BO incorrectly assumed that up to 12 stray cows may remain in the Camas Creek Area until August 15 only one in ten years, when the BA stated that 24 such strays (12 cow/calf pairs) could occur *each year* during trailing from the West Fork Unit to the Furnace/Castle Area.

148. The BO also incorrectly stated that cattle stay in the Furnace/Castle Area only until August 31, when the BA stated that they could remain until September 15, creating two more weeks of potential overlap with Chinook spawning in Camas and Castle Creeks at a time when cattle are particularly attracted to riparian areas for water and forage.

149. The NOAA Fisheries BO concluded that likelihood of cattle trampling of Chinook redds was discountable due to grazing rotation dates, riders, fences, and salting, despite the fact that these same measures have failed in the past.

150. The BO did not discuss what was necessary for recovery of this population given that an average of only 28 adults were returning the past ten years compared to a viable population level of 500 adults, and redd counts had dropped from 94 to 12.

151. In assessing impacts to habitat, the NOAA Fisheries BO again incorrectly assumed that fences, riders, and salting would be effective at protecting riparian habitat, especially in the Camas Creek Unit. When discussing impacts to water quality and substrate, such as water temperature and sediment, the BO did not acknowledge high water temperatures in mainstem Camas Creek nor high sediment levels in Silver and Camas Creeks.

152. The BO stated that cattle would cause “minor” instances of sediment input when watering, crossing, or foraging in and along streams but failed to add impacts from upland grazing as well as from use of water diversions and road fords to the analysis to adequately assess effects of the proposed grazing on sediment as well as water temperature.

153. In its accompanying Letter of Concurrence, FWS concurred with the Forest Service's "not likely to adversely affect" determination for critical habitat for both species. In doing so, it relied on inaccurate assumptions in the BA and failed to assess all impacts to habitat.

154. The NOAA Fisheries BO and accompanying Letter of Concurrence thus concluded, based on the flawed analysis discussed above, that the proposed grazing is not likely to jeopardize the continued existence of Chinook salmon or steelhead, or adversely affect critical habitat for either species.

155. The NOAA Fisheries BO contained an ITS for steelhead, but not for Chinook salmon. The ITS did not exempt take of Chinook salmon redds because it deemed redd trampling discountable due to rotation dates and conservation measures. Any take of Chinook redds caused by the incidental use of up to 24 cows in the Camas Creek Area in late July and early August or from cows trespassing into Camas Creek during spawning would thus be unlawful. The ITS also did not authorize take of adult or juvenile Chinook salmon or steelhead.

V. Ongoing Take and Failure to Reinitiate Consultation

156. Available evidence, including from the agencies' own scientists, indicates that both authorized and trespass grazing in the Camas Creek allotment has a pattern of causing, and continues to cause, take of listed Chinook salmon, steelhead, and bull trout. The authorized livestock grazing in Camas Creek is causing, and will continue to cause, unlawful take of the three listed fish species in many different ways, including but not limited to direct impacts causing mortality or injury of the listed fish (such as trampling of redds which kills eggs and fry), through injury and harassment of adults and juveniles, and through adverse habitat modification that likewise causes mortality or injury of the listed fish. As described above, the ITSs associated with both the FWS BO and NOAA Fisheries BO are invalid.

157. In light of the well-documented adverse impacts on listed fish associated with livestock grazing and trampling on this allotment, the Forest Service and the Whitworth Defendants are liable for the take that results from the authorization, facilitation, and implementation of livestock grazing on the Camas Creek allotment, which raises a foreseeable and reasonably certain threat of harassment and harm to bull trout, steelhead, and Chinook salmon. There is every indication that this unlawful take will continue in 2012 and future years, in violation of ESA Section 9.

158. The Forest Service has already violated the Terms and Conditions of the ITSs in both the FWS BO and NOAA Fisheries BO.

159. For example, the FWS BO's ITS directs the Forest Service to survey a representative reach of "the stream with the highest likelihood of having bull trout redds or one that is known to have had such redds in the past." In 2010, the Forest Service performed this survey on Silver Creek, despite having documented in the BA that no bull trout redds have been conclusively identified there. Forest Service and FWS documents consistently note that high water temperatures make Silver Creek poor spawning habitat for bull trout. Therefore, the Forest Service failed to survey either a stream that was known to have bull trout redds in the past, or the stream with the highest likelihood of having bull trout redds.

160. Additionally, NOAA Fisheries BO's ITS requires the Forest Service to ensure that all exclosures are properly maintained and functioning as intended. However, the Meyer's Cove exclosure remained in extensive disrepair, and was non-functional, for portions of the 2010 grazing season. Because cattle were able to freely enter the exclosure—and did so—the Forest Service failed to ensure that the exclosure served its intended purpose of keeping cattle out of this vitally important spawning area.

161. Despite these violations, the Forest Service has failed to reinstate consultation with respect to the Camas Creek allotment with either FWS or NOAA Fisheries.

FIRST CLAIM FOR RELIEF
The Fish and Wildlife Service Biological Opinion, Letter of Concurrence, and Incidental Take Statement Violated the ESA and APA

162. Plaintiff realleges and incorporates by reference the preceding paragraphs.

163. ESA section 7(a)(2) requires FWS to insure that projects are not likely to jeopardize the continued existence of a listed species or destroy or adversely modify its critical habitat.

164. As described above, the conclusions in the FWS bull trout BO and accompanying Letter of Concurrence (FWS No. 14420-2010-F-0307) (June 7, 2010) that the proposed grazing on the Camas Creek allotment is not likely to jeopardize the continued existence of bull trout or adversely affect critical habitat is based on inaccurate or incomplete information and invalid assumptions from the BA, an incomplete discussion of the environmental baseline, and an inadequate and flawed analysis assessing the effects of the action on both survival and recovery of the species. Thus, it is not based on the best available science, as required by the ESA, 16 U.S.C. § 1536(a)(2).

165. The ESA also requires FWS to issue an Incidental Take Statement whenever a proposed federal action will not jeopardize a protected species but will result in incidental take of a listed species. 16 U.S.C. § 1536(b)(4).

166. Including for the reasons discussed above, the Incidental Take Statement within the FWS bull trout BO is invalid. It did not address or authorize take of fry, juveniles or adults despite likely harm and harassment to those life forms, failed to adequately analyze the effects of incidental take on the species from either this project alone or when added to the incidental take

authorized for other projects in the Middle Fork Salmon River core area, unlawfully authorized a level of take that is coextensive with the proposed action, and did not contain a trigger for reinitiation of consultation.

167. For these reasons, the FWS's issuance of the bull trout BO, accompanying Letter of Concurrence, and Incidental Take Statement is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with the ESA and therefore violates the APA, 5 U.S.C. § 706(2).

SECOND CLAIM FOR RELIEF

The NOAA Fisheries Biological Opinion, Letter of Concurrence, and Incidental Take Statement Violated the ESA and APA

168. Plaintiff realleges and incorporates by reference the preceding paragraphs.

169. Including for the reasons described above, the conclusions in the NOAA Fisheries Chinook salmon and steelhead BO and accompanying Letter of Concurrence (NMFS No. 2010/00849) (June 3, 2010) that the proposed grazing on the Camas Creek allotment is not likely to jeopardize the continued existence of Chinook salmon or steelhead or adversely affect critical habitat is based on inaccurate or incomplete information and invalid assumptions from the BA, an incomplete discussion of the environmental baseline, and an inadequate and flawed analysis assessing the effects of the action on both survival and recovery of the species. Thus, it is not based on the best available science, as required by the ESA, 16 U.S.C. § 1536(a)(2).

170. The Incidental Take Statement within the NOAA Fisheries BO is invalid because it did not authorize take of any Chinook salmon nor steelhead fry, juveniles or adults despite likely harm and harassment to those life forms.

171. For these reasons, NOAA Fisheries' issuance of the BO, accompanying Letter of Concurrence, and Incidental Take Statement for the Camas Creek allotment is arbitrary and

capricious, an abuse of discretion, and otherwise not in accordance with the ESA and therefore violates the APA, 5 U.S.C. § 706(2).

THIRD CLAIM FOR RELIEF
Forest Service Violations of the ESA

172. Plaintiff realleges and incorporates by reference the preceding paragraphs.

173. The Forest Service authorizes livestock grazing on the Camas Creek allotment in a manner that has caused, and will foreseeably continue to cause, unlawful take of various life forms of bull trout, Chinook salmon, and steelhead without valid Incidental Take Statements, in violation of ESA Section 9, 16 U.S.C. § 1538, and regulations promulgated under Section 4(d) of the ESA, 16 U.S.C. § 1533(d), including 50 C.F.R. §§ 17.31, 17.44, 223.

174. WWP is injured by the Forest Service's ongoing violations of the ESA as herein alleged.

175. WWP is authorized by the citizen suit provision of the ESA to bring this action and obtain injunctive relief to remedy said ongoing violations by the Forest Service. 16 U.S.C. § 1540(g)(1).

176. ESA Section 7(a)(2) requires the Salmon-Challis National Forest to insure that its own actions are not likely to jeopardize the continued existence of a listed species or destroy or adversely modify its critical habitat.

177. The Forest Service has failed to meet this duty by relying on the flawed FWS BO and NOAA Fisheries BO to continue to authorize livestock grazing on the Camas Creek allotment that adversely affects the survival and recovery of bull trout, Chinook salmon, and steelhead.

178. ESA implementing regulations require reinitiation of consultation if the amount or extent of taking specified in the Incidental Take Statement is exceeded or if the action is

modified in a manner that has an effect to the listed species or designated critical habitat that was not considered in the BO. 50 C.F.R. § 402.16. The action agency must reinstate consultation if it does not follow the terms and conditions in an Incidental Take Statement.

179. The Forest Service has failed to reinstate consultation with FWS and NOAA Fisheries, despite failing to comply with all term and conditions in the FWS BO and NOAA Fisheries BO.

180. For these reasons, the Forest Service has violated Sections 7 and 9 of the ESA and their implementing regulations.

FOURTH CLAIM FOR RELIEF
The Whitworth Defendants' Violation of the ESA

181. Plaintiff realleges and incorporates by reference the preceding paragraphs.

182. The Whitworth Defendants conduct livestock grazing operations on the Camas Creek allotment in a manner that has caused, and will foreseeably continue to cause, take of Chinook salmon, steelhead trout, and bull trout in violation of ESA Section 9, 16 U.S.C. § 1538, and regulations promulgated under Section 4(d) of the ESA, 16 U.S.C. § 1533(d), including 50 C.F.R. §§ 17.31, 17.44, 223.

183. WWP is injured by the Whitworth Defendants' ongoing violations of the ESA as herein alleged.

184. WWP is authorized by the citizen suit provision of the ESA to bring this action and obtain injunctive relief to remedy said ongoing violations by the Whitworth Defendants. 16 U.S.C. § 1540(g)(1).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court:

A. Order, declare, and adjudge that the FWS bull trout BO, Letter of Concurrence,

and Incidental Take Statement and the NOAA Fisheries Chinook salmon and steelhead BO, Letter of Concurrence, and Incidental Take Statement for the Camas Creek allotment are arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with the ESA, in violation of the APA;

B. Set aside the FWS bull trout BO, Letter of Concurrence, and Incidental Take Statement and the NOAA Fisheries Chinook salmon and steelhead BO, Letter of Concurrence, and Incidental Take Statement for the Camas Creek allotment and order the agencies to conduct new consultations for the Camas Creek allotment;

C. Order, declare and adjudge that the Forest Service is in violation of the ESA by: (1) not insuring that its authorization of livestock grazing on the Camas Creek allotment is not likely to jeopardize Chinook salmon, steelhead, or bull trout or adversely modify their designated critical habitat; (2) causing unlawful take of Chinook salmon, steelhead, and bull trout in authorizing livestock grazing on the Camas Creek allotment; and (3) failing to reinitiate consultation with FWS and NOAA Fisheries despite failing to comply with the terms and conditions of the Incidental Take Statements for bull trout and steelhead on the Camas Creek allotment;

D. Order the Forest Service to comply with the requirements of the ESA by promptly reinitiating consultation with FWS and NOAA Fisheries over the Camas Creek allotment;

E. Order, declare, and adjudge that the Whitworth Defendants are violating ESA Sections 9 and 4(d), and regulations thereunder, by causing unlawful take of Chinook salmon, steelhead, and bull trout in conducting livestock grazing on the Camas Creek allotment.

F. Order the Whitworth Defendants to comply with their legal duty under Section 9 and 4(d) of the ESA to avoid take of Chinook salmon, steelhead, and bull trout unless and until

they receive valid Incidental Take Statements.

G. Issue such temporary, preliminary, and/or permanent injunctive relief as may specifically be requested hereafter by Plaintiff;

H. Award Plaintiff its reasonable attorney fees, costs, and litigation expenses under the ESA, 16 U.S.C. § 1540(g), the Equal Access to Justice Act, and/or any other applicable provision of law; and

I. Grant such further and additional relief as the Court deems just and proper in order to remedy the violations of law alleged herein and to protect the interests of Plaintiff, the public, and the affected fish species.

Dated: April 18, 2012

Respectfully submitted,

s/ Kristin F. Ruether

Kristin F. Ruether
Lauren M. Rule
Attorneys for Plaintiff