

Lauren M. Rule (OSB #015174)
Olivia M. Brumfield (OSB #136388)
ADVOCATES FOR THE WEST
3115 NE Sandy Blvd., Ste. 223
Portland, OR 97232
(503) 914-6388
lrule@advocateswest.org
lbrumfield@advocateswest.org

Attorneys for Plaintiffs

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

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

Plaintiffs,

v.

U.S. FOREST SERVICE,

Defendant.

Case No. 1:14-cv-737

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiffs Concerned Friends of the Winema, Klamath-Siskiyou Wildlands Center, Western Watersheds Project, Oregon Wild, and Center for Biological Diversity challenge the U.S. Forest Service's ("Forest Service") annual authorizations to graze the Antelope Cattle and Horse Allotment ("Antelope Allotment") on the Chemult Ranger District of the Fremont-Winema National Forests since 2012 for violating the National Environmental Policy Act ("NEPA") and the National Forest Management Act ("NFMA").

2. This Court previously ruled that the Forest Service had violated these same laws by authorizing grazing in 2008-2010 without conducting a supplemental NEPA analysis or biological evaluations to assess livestock grazing impacts to newly discovered sensitive species on the Antelope Allotment. *Oregon Natural Desert Ass'n v. Sabo*, 854 F.Supp.2d 889 (D. Or. 2012). Despite this ruling, the Forest Service has continued to authorize grazing each year without the required NEPA analysis, and this grazing continues to harm riparian areas and sensitive plants and wildlife on the allotment, contrary to direction in the Forest Plan. Thus, Plaintiffs are forced to bring another challenge to the Forest Service's grazing authorizations to curtail the harm to the unique resources in this area.

3. As discussed in the prior case, the Antelope Allotment occurs in an area of central Oregon dominated by dry lodgepole pine forests but contains a large complex of fens and wetlands in the midst of these surrounding dry forests. These fens have formed under the specific hydrogeologic conditions that occur in this local area, and thus are a unique and irreplaceable resource. They are also an oasis for many sensitive plants and animals such as rare mosses, sedges, and mollusks. Many of these sensitive plant and mollusk species have been discovered on these allotment wetlands since 2005. Biologists have documented at least thirteen

different sensitive species at numerous sites on the allotment, with only a portion of the potential habitat surveyed.

4. In addition to these sensitive plants and mollusks, the Oregon spotted frog also occurs on the Antelope Allotment in Jack Creek. Jack Creek starts within the Antelope Allotment and flows south into the adjacent Jack Creek Sheep and Goat Allotment. Oregon spotted frog is a sensitive species on the forest, and was recently proposed for listing as threatened under the Endangered Species Act (“ESA”). The Jack Creek population of spotted frogs is currently at critically low numbers, with fewer than twenty known breeding females in the population.

5. Since the Court’s prior ruling, the Forest Service has continued to authorize grazing on the Antelope Allotment each year without completing the required supplemental environmental analysis and revised allotment management plan to address the impacts from grazing to these sensitive species and their habitat, in violation of NEPA. Furthermore, by authorizing grazing that its own experts acknowledge damages these sensitive wetlands and species, the Forest Service is acting inconsistently with direction in the Winema National Forest Land and Resource Management Plan (“Winema Forest Plan”), in violation of NFMA.

6. Plaintiffs challenge the 2012, 2013, and 2014 annual operating instructions (AOIs) that authorize grazing on the Antelope Allotment in violation of NEPA and NFMA. Because this grazing is causing harm to sensitive species and resources that require restoration, Plaintiffs seek declaratory and injunctive relief from this Court.

JURISDICTION AND VENUE

7. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 because this action arises under the laws of the United States, including NEPA, 42 U.S.C. § 4321 *et seq.*, NFMA, 16

U.S.C. § 1600 *et seq.*, the Administrative Procedure Act (“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. § 2412 *et seq.* An actual, justiciable controversy exists between the parties, and the requested relief is therefore proper under 28 U.S.C. §§ 2201-02 and 5 U.S.C. §§ 701-06.

8. Venue is proper in this Court under 28 U.S.C. § 1391 because all or a substantial part of the events or omissions giving rise to the claims herein occurred within this judicial district, Plaintiffs and Defendant reside in this district, and the public lands and resources at issue are located in this district.

9. The federal government waived sovereign immunity in this action pursuant to 5 U.S.C. § 702.

PARTIES

10. Plaintiff CONCERNED FRIENDS OF THE WINEMA (“CFOW”) is an Oregon non-profit public interest organization of approximately 13 members. It is headquartered in Chiloquin, Oregon. CFOW’s mission is to promote ecologically sustainable management practices on the Fremont-Winema National Forest. CFOW actively participates in Forest Service and Department of Agriculture proceedings and decisions concerning the management of public lands within the Fremont-Winema National Forest, including the Antelope Allotment, and throughout the surrounding Klamath Basin. CFOW brings this action on its own behalf and on behalf of its members, many of whom regularly enjoy and will continue to enjoy the public lands that are the subject of the agency decisions challenged in this action, for recreational, spiritual, and scientific activities. Members of CFOW regularly use the Antelope Allotment on the Fremont-Winema National Forest for nature observation, hiking and other recreational and aesthetic pursuits. CFOW and its members have researched, studied, observed, and sought

protection for sensitive species and ecological systems on the Antelope Allotment, and plan to continue to do so. They derive recreational, conservation, spiritual, and aesthetic benefits from these rare species' existence in the wild. The degraded conditions of the Antelope Allotment and the authorization of grazing without compliance with statutory obligations adversely affect CFOW's goal of ecologically sustainable management, and CFOW's members continue to be injured by the mismanagement of the public lands and waters at issue in this action.

11. Plaintiff KLAMATH-SISKIYOU WILDLANDS CENTER ("KS Wild") is a non-profit public interest conservation organization based in Williams, Oregon and Ashland, Oregon. KS Wild's organizational mission is to conserve the outstanding biological diversity of the Klamath-Siskiyou region in Southern Oregon and Northern California. KS Wild and its members seek to protect the biological health and ecological resources of the region by protecting and preserving the native habitat and hydrologic health of the Klamath-Siskiyou ecoregion, including in the Fremont-Winema National Forest. KS Wild members use and enjoy the Antelope Allotment for recreational, aesthetic, conservation, scientific and educational purposes, and will continue to use this area for these purposes in the future. KS Wild has participated in management decisions concerning the Antelope Allotment and sought protections for sensitive species located there, and will continue to do so in the future. Livestock grazing on the allotment that degrades the resources and species there and conflicts with recreational, aesthetic, and scientific use impairs the use and enjoyment of the Antelope Allotment by KS Wild members.

12. Plaintiff WESTERN WATERSHEDS PROJECT ("WWP") is a non-profit organization headquartered in Idaho, with offices and staff in Idaho, Arizona, California, Montana, Oregon, Wyoming, and Utah. WWP is dedicated to protecting and conserving the

public lands and natural resources of watersheds in the American West. WWP, as an organization and on behalf of its 1,200-plus members, is concerned with and active in seeking to protect and improve the wildlife, riparian areas, water quality, fisheries, and other natural resources and ecological values of watersheds throughout the West, including south-central Oregon. WWP staff and members use the Antelope Allotment for recreation, scientific study, and aesthetic purposes, and will continue to do so in the future. WWP is active – and will continue to be active – in monitoring ecological conditions on the Antelope Allotment, in reviewing and commenting upon agency grazing decisions, including those at issue here, and in publicizing the adverse ecological effects of grazing in this area. Livestock grazing on the allotment(s) that degrades the species and habitat there and conflicts with recreational, aesthetic, and scientific use impairs the use and enjoyment of the allotment by WWP members.

13. Plaintiff OREGON WILD is a non-profit organization with approximately 10,000 members and supporters throughout the state of Oregon and the Pacific Northwest. Oregon Wild and its members are dedicated to protecting and restoring Oregon’s lands, wildlife, and waters as an enduring legacy. Oregon Wild members use the Antelope Allotment for recreational, educational, enjoyment of wildlife, aesthetic and other purposes, and will continue to visit the allotment in the future. Oregon Wild has participated in management decisions concerning the Antelope Allotment and sought protections for sensitive species located there, and will continue to do so in the future. Livestock grazing on the allotment that degrades the resources and species there and conflicts with recreational, educational, and aesthetic use impairs the use and enjoyment of the area by Oregon Wild members.

14. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (“CBD”) is a non-profit organization with more than 48,000 active members and with offices in Oregon and elsewhere

across the country. CBD and its members are concerned with the conservation of imperiled species, including the Oregon spotted frog, and the effective implementation of laws to protect those species and their habitat. CBD's members use the Antelope Allotment for wildlife observation, educational, recreational, and aesthetic purposes, and plan to continue to use the allotment in the future for those same purposes. CBD has participated in management decisions concerning the Antelope Allotment and sought protections for sensitive species located there, and will continue to do so in the future. Livestock grazing on the allotment that degrades the species and habitat there and conflicts with educational, recreational, and aesthetic use impairs the use and enjoyment of the Antelope Allotment by CBD members.

15. Plaintiffs' interests have been and will continue to be directly harmed by Defendant's actions as challenged herein. Unless the relief prayed for herein is granted, Plaintiffs and the public will continue to suffer irreparable harm and injury to their interests.

16. Defendant U.S. FOREST SERVICE is an agency or instrumentality of the United States, under the U.S. Department of Agriculture, and is statutorily charged with managing the National Forest lands at issue here.

STATEMENT OF LAW

National Forest Management Act

17. In 1976, Congress enacted NFMA, 16 U.S.C. § 1600 *et seq.*, which governs the Forest Service's management of the National Forests. NFMA establishes a two-step process for forest planning. First, it requires the Forest Service to develop, maintain, and revise Land and Resource Management Plans ("LRMP" or "Forest Plan") for each national forest. 16 U.S.C. § 1604(a). The Forest Plan guides natural resource management activities forest-wide, setting standards, management goals and objectives, and monitoring and evaluation requirements.

18. Second, once a forest plan is in place, site-specific actions are planned and evaluated by the Forest Service. All site-specific decisions must be consistent with the broader Forest Plan. 16 U.S.C. § 1604(i); 36 C.F.R. § 219.15. The Winema National Forest Plan was adopted in 1990.

National Environmental Policy Act

19. Congress enacted NEPA in 1969, directing all federal agencies to assess the environmental impact of proposed actions that significantly affect the quality of the environment. 42 U.S.C. § 4332(2)(C). NEPA's disclosure goals are two-fold: (1) to ensure that the agency has carefully and fully contemplated the environmental effects of its action, and (2) to ensure that the public has sufficient information to challenge the agency's action.

20. The Council on Environmental Quality ("CEQ") promulgated uniform regulations implementing NEPA that are binding on all federal agencies. 42 U.S.C. § 4342, 40 C.F.R. § 1500 *et seq.*

21. NEPA requires federal agencies to prepare, consider, and approve an adequate Environmental Impact Statement ("EIS") for "any major federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4(a)(1).

22. To determine whether an action requires an EIS as required by NEPA, an action agency may prepare an Environmental Assessment ("EA"). 40 C.F.R. § 1501.4(b). If the agency decides that an EIS is not needed, it must undertake a thorough environmental analysis and supply a convincing statement of reasons that explains why a project's impacts are not significant.

23. To make a determination of non-significance, NEPA documents must consider the direct, indirect, and cumulative environmental impacts of a proposed action. 40 C.F.R. §

1508.8. Direct effects are caused by the action and occur at the same time and place as the proposed project. *Id.* § 1508.8(a). Indirect effects are caused by the action and are later in time or farther removed in distances, but are still reasonably foreseeable. *Id.* § 1508.8(b). Both types of impacts include “effects on natural resources and on the components, structures, and functioning of affected ecosystems.” *Id.* § 1508.8. Cumulative impact results when the “incremental impact of the action [is] added to other past, present, and reasonably foreseeable future actions” undertaken by any person or agency. *Id.* § 1508.7.

24. NEPA requires that an action agency must ensure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements, and identify the methodology and scientific sources relied upon for the agency’s conclusions. *Id.* § 1502.24. The information released in any NEPA analysis must be high quality, and must be sufficient to allow the public to question the agency rationale and understand the agency’s decision-making process. 40 C.F.R. 1500.1(b).

25. NEPA requires that an environmental analysis be supplemented if the action agency makes substantial changes to the proposed action or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. *Id.* § 1502.9(c)(1)(i)-(ii).

26. NEPA and its regulations prohibit agencies from making any irreversible or irretrievable commitment of resources before its NEPA analysis is completed.

Administrative Procedure Act

27. The APA confers a right of judicial review on any person that is adversely affected by a federal agency action. 5 U.S.C. § 702. Upon review, the court shall “hold unlawful and set aside agency actions . . . found to be arbitrary, capricious, an abuse of

discretion, or otherwise not in accordance with law.” *Id.* § 706(2)(A).

STATEMENT OF FACTS

The Biological Resources on the Antelope Allotment

28. The Antelope Allotment occurs on the Fremont-Winema National Forest in central Oregon, on the eastern slopes of the Cascade Mountains. The Chemult Pasture of the allotment falls within the Chemult Ranger District; the remaining pastures fall within the Silver Lake Ranger District. The north end of the Chemult Ranger District is dominated by lodgepole pine forests, and the majority of the Chemult Pasture consists of forested uplands that have limited forage for livestock.

29. However, within this dry forest on the District is an extremely unique wetland complex full of groundwater dependent ecosystems (meadows, fens, bogs, seeps, and springs). Nearly this entire unique groundwater dependent ecosystem is within the Antelope Allotment. In total, the allotment provides over 400 acres of this wetland habitat. While a small number of fens have been found on other Forest Service districts, the Chemult District contains the most by far and the greatest diversity.

30. Because of the scarcity of riparian areas in the dry central Oregon ecosystem, these areas are particularly valuable to many wildlife and plant species. They contain surface water and wet soils that provide habitat for a variety of rare plants and animals, including insects, mollusks, vascular plants, and bryophytes (mosses). Many of these species are designated as sensitive species under the Interagency Special Status/Sensitive Species Program (“ISSSSP”) and are listed on the Region 6 Forest Service sensitive species list.

31. The Forest Service conducted ISSSSP surveys for these sensitive species on the allotment in 2005-2006, and then again in 2008-2009. Additional reports on fens and sensitive

species were completed in 2010 and 2011. As a result of these surveys, the Forest Service has documented one sensitive mollusk, seven sensitive vascular plants, and five sensitive bryophytes within the current allotment boundaries. Many of these sensitive species are found in the unique groundwater dependent ecosystems on the Chemult Pasture. In addition, two new species of mollusk found nowhere else in the world have been documented here. Only portions of the allotment have been surveyed. One sensitive vascular plant species has also been found on the Jack Creek Sheep and Goat Allotment, just to the south of the Antelope Allotment.

32. The diversity and abundance of these fens and species is the result of the unique hydrogeology of the area. The complex system of groundwater-dependent meadows, fens, and wetlands within the allotment developed due to interactions between pumice, slope, and precipitation patterns specific to this particular area, which led to a ground-water system that contributed to peat accumulation in highly saturated areas and development of peat-based plant communities. It is the result of millennia of hydrological, geological, and biological change. However, despite its age, the system is fragile and constantly evolving; thus it is susceptible to irreversible damage.

33. The Chemult Pasture of the Antelope Allotment also contains a 7.6-mile stretch of Jack Creek, which is habitat for one precariously small population of the sensitive species Oregon spotted frog. The Jack Creek population of spotted frogs was discovered in 1996. The upper portions of Jack Creek are perennial year-round, while lower portions become intermittent. In intermittent reaches, spotted frogs occupy remnant pools that persist as water levels drop.

34. Since 1999, the Jack Creek spotted frog population has declined markedly, with egg mass numbers decreasing from 335 in 1999 to 24 in 2013. The population is currently at critically low numbers with fewer than twenty known breeding females. In light of population

declines and the frog's isolated distribution, on August 29, 2013, the U.S. Fish & Wildlife Service ("FWS") proposed to list the Oregon spotted frog as "threatened" under the ESA and designate its critical habitat. The proposed listing notes that livestock grazing is a specific concern for Oregon spotted frogs at Jack Creek, and that the intensity of grazing within spotted frog habitat in this area is expected to have degraded the quality of breeding habitat and reduced reproduction there.

Livestock Grazing on the Antelope Allotment

35. Livestock grazing has been permitted on the Antelope Allotment for over fifty years. Currently, one permittee is permitted to graze 419 cow/calf pairs on the allotment from July 1 to September 30. This permittee also owns private inholdings within the allotment, some of which the permittee grazes in addition to the National Forest portions of the allotment.

36. Because lodgepole pine forests contain little ground vegetation, much of the grazing on the allotment occurs in the grassy meadows, wetlands, and riparian areas. Grazing on wet soils has caused significant damage to soils and vegetation and altered the hydrology of many fen and other wetland areas. Cattle walking on wet soils create depressions in the soil with their hooves. These depressions create an area of hummocks, where deep compacted depressions alternate with elevated pedestals of soil. This situation dries out the soil and creates less permeability for water infiltration, altering the hydrology of the entire wetland.

37. In addition to damaging soils and diminishing the water table, cattle grazing and trampling these unique areas also damages the riparian plants and vegetation that exist there, as well as the wildlife that depends on this vegetation and water. The cycle of repeated hoof damage that starts the drying process leads to a shift in plant species composition that further exacerbates the drying process. This cycle of damage destroys the properties of the fen system.

Cattle excrement in these areas alters natural water chemistry, which further stresses fen species.

38. The scarcity and uniqueness of these groundwater dependent ecosystems and the resource damage that has occurred to them is why many dependent species are in decline and listed as Forest Service sensitive species. Forest Service biologists and botanists have raised concerns about damage from livestock grazing to these unique wetlands and the species inhabiting them on the allotment. Because the Forest Service has completed surveys on only a portion of the potential habitat, there are likely more sensitive species on the allotment that are subjected to damage from yearly grazing.

39. Grazing has also adversely affected riparian habitat for the Oregon spotted frog. Cattle wading in, grazing, and dewatering riparian areas have trampled frogs. They have also knocked down stream banks and removed protective riparian vegetation, which increases sedimentation and water temperatures. These impacts as well as cattle excrement in the water have reduced water quality in spotted frog habitat.

40. Conflicts between cattle and frogs increase when stream flows are limited and frogs habitat is reduced to remnant pools, which are the same remnant pools cattle use for watering. Frog trampling by cattle, as well as cattle-caused alterations in water quality and bank structure and loss of protective vegetation, compound the impacts of low water conditions, especially during drought, such as the drought that coincided with the Jack Creek spotted frog population decline since 2001.

Prior Litigation

41. The Antelope Allotment has been the subject of two prior lawsuits due to its unique biological resources and the Forest Service's continued authorization of grazing that impacts these resources. In 2008, several environmental groups sued the Forest Service,

challenging its management of the allotment because permitted livestock grazing was adversely impacting the Oregon spotted frog population in Jack Creek. *Ctr. for Biological Diversity v. Wagner*, No. 1:08-cv-302-CL (D. Or., filed Mar. 11, 2008). When the groups filed suit, the Jack Creek spotted frog population was at a near all-time low, with egg mass numbers at just 22 (down from 335 in 1999). In response to the lawsuit, the Forest Service built a fence in 2008 along part of Jack Creek to protect the spotted frog and prohibited cows from grazing inside the fence. *Wagner*, No. 08-302-CL, Order and Report and Recommendation at 8 (Docket No. 123). The agency also indicated that it expected to complete a new allotment management plan (“AMP”) for the allotment in early 2010. *Id.* at 10. In light of these developments, the Court found no violations of law. *Id.* at 35.

42. In 2010, environmental groups again filed suit over the Forest Service’s management of the allotment, this time because permitted cattle grazing was adversely impacting numerous sensitive fen species as well as the Oregon spotted frog, and the Forest Service had neither changed its grazing management to protect them nor completed a new AMP, as promised to the court in *Wagner*. *Or. Natural Desert Ass’n v. Sabo*, No. 1:10-cv-1212-CL (D. Or., filed Oct. 4, 2010).

43. Despite construction of the Jack Creek riparian fence and the prohibition of grazing behind the fence, cattle had continued to access spotted frog habitat on the allotment by breaching this and other fences between 2008-2010. The north end of the Jack Creek riparian fence was constructed in a way that allowed cattle to walk around the end of the fence onto the Jack Creek riparian area excluded from authorized grazing. Forest Service employees and others reported trespass cattle on numerous occasions during this period, including behind the Jack Creek fence. Even after the Forest Service discussed these instances of trespass with the

permittee and the need to maintain the fences in 2009, the trespass continued in 2010.

44. Also since the *Wagner* lawsuit, the Forest Service had documented the presence of additional sensitive species on the fens and wetlands within the allotment in its ISSSSP surveys. Forest Service botanists documented the unique diversity of the fens in terms of both rare plant sites and also uncommon and sensitive plant communities. They also stated that livestock grazing was the most evident detrimental disturbance occurring in those wetland habitats, describing cattle impacts such as peat pedestals, bare peat, and exotic plant growth.

45. Additionally, the agency had failed to meet its promise of completing a new AMP by 2010. In fact, the agency had not conducted an environmental analysis on the allotment since 1995, despite the discoveries of new sensitive species and the decline of the Oregon spotted frog. Meanwhile, the agency continued to authorize the same grazing each year that harmed those species and other potential habitat.

46. In light of these developments, the plaintiffs in the 2010 lawsuit alleged that the Forest Service had violated NEPA and NFMA for failing to analyze and address the impacts of grazing on the sensitive species discovered on the allotment between 2005-2009, and on the Oregon spotted frog, while continuing to authorize grazing that was damaging them and their habitat, contrary to direction in the Winema Forest Plan. The court held that the Forest Service had violated NFMA by failing to assess the impacts of grazing on these sensitive species in a biological evaluation, as required by the Forest Plan, and had violated NEPA by failing to conduct supplemental NEPA analysis in light of the new information documenting these species on the allotment. *Sabo*, 854 F. Supp. 2d 889, 915-20, 921-24 (D. Or. 2012).

47. Specifically, the Court held that the grazing authorized by the AOI must be evaluated for its effects on sensitive species, and that the Forest Service could not rely on its

ongoing AMP revision to satisfy the necessary biological evaluation when that plan was not yet complete, and in fact was delayed. *Id.* at 917-19. The Court found that the record showed that the allotment contains unique soils and provides potential and occupied habitat for several sensitive species, and by failing to address the impacts of grazing on these newly documented species before authorizing the same number of cattle and the same season of use, the Forest Service's AOIs were not consistent with the Forest Plan, in violation of NFMA. *Id.* at 920.

48. The court also held that the Forest Service had violated NEPA by failing to undertake a supplemental NEPA analysis in light of the sensitive species found on the allotment before authorizing grazing and committing its resources irreversibly pending completion of the revised AMP. *Id.* at 923-24. The court explained that environmental analyses must be completed before any irreversible and irretrievable commitments of resources, and that the plaintiffs had shown that allowing grazing each season in the same numbers was causing potentially irreversible harm to sensitive species and their habitat. *Id.* at 923. The court held that the Forest Service had violated NEPA by authorizing this continued harmful grazing before completing a new NEPA analysis and AMP. *Id.* at 923-24.

49. Despite finding these legal violations, the court did not grant injunctive relief requested by the plaintiffs for the 2011 grazing season. *Id.* at 900. Although the court noted that cattle grazing had caused unquestionable harm to fens, mollusks, Oregon spotted frogs, and habitat, the plaintiffs had failed to provide expert declarations showing that harm from grazing in 2011 was irreparable. *Id.* at 897. The Court noted that the Forest Service had shortened the grazing season from three to two months, and the permittee had agreed to increase riding of the allotment to five to six days per week to monitor fences and herd cattle away from sensitive resources. *Id.* at 898-900. Also, by that time the Forest Service had completed biological

evaluations that stated that grazing in 2011, which was a wet year, would not cause a loss of viability to sensitive species populations. *Id.* at 898. Although the court denied injunctive relief, it noted its continued concern for the unique resources on the allotment, and that it expected the Forest Service to complete its NEPA and AMP processes on the allotment in a timely manner. *Id.* at 900.

Subsequent Events

50. Despite this command, the Forest Service did not complete a NEPA analysis in 2011, although it authorized grazing on the Chemult Pasture for a two-month season. And despite the permittee's pledge to ride the allotment one to two additional days per week to check fences and monitor trespass cattle, the Forest Service received numerous reports in 2011 of allotment fences in poor condition, including the Jack Creek riparian fence, as well as trespass cattle, both off the allotment and behind the Jack Creek riparian fence.

51. This documented trespass led the Forest Service to issue two notices of non-compliance to the Antelope Allotment permittee on October 25, 2011. One notice of non-compliance was for excess use of the allotment past the off-date in the AOI and permit, and the other was for repeated cattle trespass behind the Jack Creek riparian fence. Cattle grazing on the allotment in 2011, including trespass grazing, also caused documented adverse impacts to fens and occupied Oregon spotted frog habitat, such as trampling of banks, wet soils, and vegetation, channelization of water from cattle trails, bare soil, and soil hummocks and pedestalling.

52. In 2012, the Forest Service authorized grazing for 379 cow/calf pairs on the Chemult Pasture without completing a NEPA analysis, and returned to the three-month (July – September) season of use despite anticipated summer drought conditions. Again in 2012, the Forest Service received numerous reports of allotment fences in poor conditions, including

boundary fences and the Jack Creek riparian fence. Also, despite reminders in the AOI and the notices of non-compliance from the prior year, the Forest Service received reports that livestock were repeatedly found in unauthorized areas throughout the season, including behind the Jack Creek riparian fence. Cattle grazing on the allotment in 2012 in authorized and unauthorized areas caused documented adverse impacts to riparian areas and sensitive species habitat, including significant trampling of soils and vegetation.

53. Towards the end of the grazing season on August 22, 2012, the Forest Service issued a draft EA for the Antelope Allotment and the adjacent Jack Creek Sheep & Goat Allotment. The Forest Service allowed a thirty-day public comment period on the EA, during which plaintiffs CFOW, KS Wild, WWP, and Oregon Wild submitted timely comments. The Forest Service botanist who had studied the fens and wetlands on the allotment also commented. He noted that the complex of groundwater dependent ecosystem on the District was a one-of-a-kind resource and that promised monitoring and fence maintenance were unrealistic in light of budget constraints. He advocated for permanent removal of livestock grazing from the area with fens and wetlands.

54. Following this, the Forest Service issued a final EA, Decision Notice (“DN”), and Finding of No Significant Impact (“FONSI”) on February 11, 2013. That decision authorized grazing on the Antelope Allotment (including within the Chemult Pasture) and on the North Sheep Pasture of the Jack Creek Sheep & Goat Allotment., which had been closed to grazing for many years. Plaintiffs CFOW, KS Wild, WWP, and Oregon Wild submitted timely administrative appeals of the agency’s decision. On April 18, 2013 the Forest Supervisor withdrew the DN and FONSI, citing a procedural error in not making the project record available to the public when the decision was signed.

55. On April 18, 2013, a drought emergency was declared for Klamath County, Oregon, where the Antelope Allotment is located. Despite this, and without a final NEPA analysis or decision, the Forest Service again authorized grazing on the Chemult Pasture for 379 cow/calf pairs for the full three-month season July-September. The 2013 AOI again included a reminder that cattle were not authorized to graze behind the Jack Creek riparian fence and that it was the permittee's responsibility to maintain that and other fences.

56. Forest Service employees reported poorly maintained fence conditions on the allotment in May 2013, and throughout the season the agency received numerous reports of unauthorized cattle use, including behind the Jack Creek riparian fence and to the south of the Antelope Allotment. On August 26, 2013, the Forest Service issued a warning letter to the permittee, and on November 7, 2013 issued a notice of non-compliance to the permittee for unauthorized use on areas outside of the allotment and behind the Jack Creek riparian fence. In that notice of non-compliance, the Forest Service did not reduce the level of livestock use or impose measures different from the permittee's required compliance with the forthcoming AOI.

57. In July and August 2013, Oregon spotted frogs were found in two pools of Jack Creek that were previously considered unoccupied, both of which occurred in the Jack Creek Sheep & Goat Allotment more than three miles downstream of known occupied habitat. In April 2014, five spotted frog egg masses were found in this same area, indicating that breeding had occurred there in 2013.

58. Cattle grazing both on and off the allotment in 2013 caused harm to fen and riparian habitat for sensitive species, including the Oregon spotted frog. One Oregon spotted frog was observed to have been trampled by cattle. Cattle were also documented trampling streambanks and wetland and riparian vegetation, creating channels, dewatering pools, and

adversely impacting water quality in occupied spotted frog habitat. These impacts were compounded by the drought conditions, which further reduced water levels and concentrated cattle impacts within fen and spotted frog pool habitat. Due to the threats posed by trespass cattle, the Fremont-Winema forest wildlife biologist expressed concern about the spotted frogs in lower Jack Creek discovered in 2013.

59. Throughout 2013, the Forest Service repeatedly discussed the need to adjust the north end of the Jack Creek riparian fence to prevent cattle from accessing Jack Creek, but to date that adjustment has not been made. Likewise, frog habitat restoration projects on public land that have been the subject of discussion since 2007 still have not been completed.

60. After the 2013 grazing season, on December 13, 2013 the Forest Service issued another draft EA for management of the Antelope Allotment. The draft EA put out for public comment did not include important information relevant to the decision, including but not limited to the proposed listing of the Oregon spotted frog as threatened under the ESA, its proposed critical habitat, and the new spotted frog sightings that occurred during summer 2013 in the North Sheep Pasture south of the Antelope Allotment, as well as information about the effects of grazing on the groundwater hydrology of the area and fens and sensitive plants. Plaintiffs CFOW, KS Wild, WWP, Oregon Wild, and CBD submitted timely comments on the draft EA.

61. The agency has not yet issued a final EA or DN describing future management of the allotment for the 2014 grazing season and beyond, nor assessing information such as the poor fence conditions, recurrent trespass, documented harm to fen, wetland, and riparian habitats, impacts to sensitive species including the Oregon spotted frog, and information about new egg masses and the proposed listing of the frog under the ESA.

62. Based on conversations with the Forest Service, it is Plaintiffs' understanding and belief that the Forest Service intends to authorize livestock grazing on the Chemult Pasture of the Antelope Allotment in 2014 and that the agency is in the process of completing the AOI letter. Plaintiffs have requested a copy of the AOI once it is completed.

63. The Winema Forest Plan contains direction to protect various resources such as soils, riparian areas, fish and wildlife, and sensitive species. The Forest Plan includes the following goals, objectives, and standards:

- Maintain or enhance the characteristics of riparian areas, wildlife habitat, and fish habitat near or within riparian ecosystems;
- Manage habitat for the perpetuation and/or recovery of plants and animals listed as threatened, endangered, or sensitive;
- Continue to survey and develop biological evaluations for sensitive species. Develop individual species management guidelines for sensitive species;
- Improve riparian areas to provide enhanced habitat for wildlife and fish;
- The demand for livestock grazing will be met only when it does not conflict with other uses;
- Livestock stocking levels shall be determined by range analysis considerations, including forage condition, suitability, and availability;
- Coordination of grazing with other resource operations shall include threatened, endangered, and sensitive plant and animal species, riparian areas conflicts, livestock and wildlife conflicts;
- Water bodies, stream courses, and wetlands, their riparian vegetation, and the immediately adjacent upland areas will be managed to stabilize stream channels; prevent

soil erosion; and maintain or improve water quality, fish habitat, recreation opportunities, and riparian/wetland habitat for dependent fish and wildlife species and dependent aquatic species;

- Long-term soil productivity will be maintained;
- Protect habitat and hydrologic values of wetlands and riparian areas and improve fish habitat in streams;
- Fish and wildlife habitat shall be managed to maintain viable populations of all existing native and desired non-native plant and animal species;
- Manage new-found habitat sites for wildlife or botanical resources individually as part of the environmental analysis process for specific management activities;
- All Forest Service projects, programs, and activities conducted, funded, or permitted shall be reviewed for possible effects on threatened, endangered, or sensitive species of animals and plants;
- Habitat use of the forest by threatened, endangered, or sensitive species shall be evaluated. Habitat requirements sufficient to maintain the species shall be provided;
- Land management activities shall be planned and conducted to maintain or improve soil productivity and stability;
- In riparian ecosystems, hydrologic conditions and riparian habitat shall be maintained or improved.

64. The Forest Service's grazing authorizations in 2012-2014 are not consistent with this Forest Plan direction. Although the Forest Service has completed several specialist reports and biological evaluations, these documents do not demonstrate that grazing management of the allotment is maintaining and improving riparian areas, soils, and habitat, and providing for viable

populations of sensitive plant and animal species.

65. Instead, the Forest Service has continued to authorize grazing throughout the Antelope Allotment, including within the many fens and other wetlands, that does not protect these unique habitats and their dependent species. Despite documented harm to those habitats, including in Forest Service reports, and continuing threats to sensitive species, the Forest Service issued annual authorizations to graze the allotment every year since 2011 without instituting any change to protect these areas or species.

66. The Jack Creek population of Oregon spotted frogs has remained at a critically low level since the population decline began in 2001. Despite the alarming downward spiral of this frog population, the Forest Service has failed to protect this species and maintain a viable population. The agency continues to authorize grazing that harms individual frogs and negatively impacts occupied habitat on portions of Jack Creek both inside and outside of the Jack Creek riparian fence. With the population containing such a low number of breeding females, the loss of even one female decreases the likelihood of restoring a viable frog population.

67. All of these impacts from grazing have continued to occur without completion of supplemental NEPA analysis and a new allotment management plan. Because of drought conditions in 2014 that significantly increases the threat of harm from grazing, Plaintiffs are seeking declaratory relief that the 2012-2014 AOIs violate NEPA and NFMA, as well as injunctive relief to prohibit grazing on the Chemult Pasture in 2014.

FIRST CLAIM FOR RELIEF

VIOLATIONS OF THE NATIONAL ENVIRONMENTAL POLICY ACT

68. Plaintiffs reallege and incorporate by reference the preceding paragraphs.

69. This first claim for relief challenges the Forest Service's violations of the National

Environmental Policy Act, 43 U.S.C. § 4321 et seq., and NEPA's implementing regulations.

Plaintiffs bring this claim pursuant to the judicial review provisions of the APA, 5 U.S.C. § 706.

70. An agency must prepare supplemental NEPA analysis if the agency makes substantial changes to the proposed action or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. *Id.* § 1502.9(c)(1)(i)-(ii).

71. NEPA prohibits agencies from making any irreversible or irretrievable commitment of resources before an environmental analysis is completed.

72. The Forest Service violated NEPA by authorizing grazing on the Antelope Allotment in 2012-2013 and continuing to authorize such grazing in 2014 without first completing an environmental analysis under NEPA and revised allotment management plan to supplement its prior 1995 analysis for the Antelope Allotment. Such analysis is required to assess significant new information that arose since 2005 documenting thirteen sensitive plant and mollusk species at numerous new sites on the allotment that are accessible to livestock, as well as new information related to the Oregon spotted frog, and the impacts of grazing on those species.

73. As discussed above, NEPA also requires that federal agencies undertake a thorough and public analysis of the environmental consequences of proposed federal actions. An agency must prepare an EIS for all major federal actions significantly affecting "the quality of the human environment." 42 U.S.C. § 4332(2)(C).

74. To satisfy NEPA's procedural requirements, an agency must demonstrate that it has taken a "hard look" at the environmental consequences of the proposed action. An agency may issue a FONSI only when the proposed action will not have a significant effect on the

human environment and for which an EIS is therefore not required. *Id.* § 1508.13.

75. The Forest Service's forthcoming final EA, FONSI, and DN for the Antelope Allotment violate NEPA and its regulations in multiple respects, including but not limited to:

a. Preparing an EA and FONSI rather than an EIS when substantial questions have been raised showing there may be significant effects to the environment;

b. Failing to take the requisite "hard look" at, and disclosing to the public, all the significant and potential environmental impacts of the proposed actions, including impacts to sensitive species and Oregon spotted frogs and their habitat.

c. Failing to include high quality scientific information and accurate scientific analysis about impacts and threats to sensitive species and their habitat, and without ensuring the professional integrity, including scientific integrity, of the discussions and analyses within its environmental analysis;

76. Accordingly, Defendant's final decisions are arbitrary, capricious, an abuse of discretion, and not in accordance with the National Environmental Policy Act, and therefore are actionable pursuant to the APA, 5 U.S.C. § 706(2)(A).

77. These violations have caused or threaten serious prejudice and injury to Plaintiffs' rights and interests. Absent judicial relief, such violations of NEPA will continue to occur when the Forest Service authorizes grazing on the Antelope Allotment in 2014 and future years.

SECOND CLAIM FOR RELIEF

VIOLATIONS OF THE NATIONAL FOREST MANAGEMENT ACT

78. Plaintiffs reallege and incorporate by reference the preceding paragraphs.

79. This second claim for relief challenges the Forest Service's violations of the National Forest Management Act, 16 U.S.C. § 1600 *et seq.*, and NFMA's implementing

regulations, in authorizing grazing on the Antelope allotment in 2012-2014 and in future years. Plaintiffs bring this claim pursuant to the judicial review provisions of the APA, 5 U.S.C. § 706

80. Under NFMA, the Forest Service must act consistently with direction in the applicable land management plan when authorizing any project or activity. 16 U.S.C. § 1604(i); 36 C.F.R. § 219.15. The Forest Service has violated NFMA by acting inconsistently with direction in the Winema Forest Plan regarding protection of soils, riparian areas, fish and wildlife, and sensitive species by authorizing grazing that damaged and will damage those resources on the Antelope Allotment in 2012-2014.

81. Accordingly, Defendant's final decisions are arbitrary, capricious, an abuse of discretion, and not in accordance with the National Forest Management Act, and therefore are actionable pursuant to the APA, 5 U.S.C. § 706(2)(A).

82. These violations have caused or threaten serious prejudice and injury to Plaintiffs' rights and interests. Absent judicial relief, such violations of NFMA will continue to occur when the Forest Service authorizes grazing on the Antelope Allotment in 2014 and future years.

PRAYER FOR RELIEF

A. Adjudge and declare that the Forest Service's 2012-2014 grazing authorizations for the Antelope Allotment violated NEPA, NFMA, and/or their implementing regulations, and thus were arbitrary, capricious, an abuse of discretion, and/or contrary to law under the judicial review standards of the APA, 5 U.S.C. § 706(2);

B. Enjoin the Forest Service from authorizing livestock grazing on the Chemult Pasture of the Antelope Allotment in 2014;

C. Order the Forest Service to comply with the requirements of NEPA and NFMA before issuing further grazing authorizations for the Antelope Allotment;

D. Enter such other declaratory relief, and temporary, preliminary, or permanent injunctive relief as may be prayed for hereafter by Plaintiffs;

E. Award Plaintiffs their reasonable costs, litigation expenses, and attorneys' fees associated with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 *et seq.* and/or all other applicable authorities; and

F. Grant such further relief as the Court deems just and proper in order to provide Plaintiffs with relief and protect the public interest.

Dated: May 02, 2014

Respectfully submitted,

s/Lauren M. Rule
Lauren M. Rule (OSB #015174)

s/Olivia M. Brumfield
Olivia M. Brumfield (OSB #136388)

ADVOCATES FOR THE WEST
3115 NE Sandy Blvd., Ste. 223
Portland, OR 97232
Tel: (503) 914-6388
lrule@advocateswest.org
lbrumfield@advocateswest.org

Attorneys for Plaintiffs