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

WESTERN WATERSHEDS PROJECT, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 U.S. FISH AND WILDLIFE SERVICE, )  
 NOAA FISHERIES, U.S. FOREST SERVICE, )  
 JACK WHITWORTH, and WHITWORTH )  
 RANCHES, INC. )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

No. 4:12-cv-197

**PLAINTIFF’S SEPARATE  
STATEMENT OF UNDISPUTED  
FACTS IN SUPPORT OF ITS  
MOTION FOR SUMMARY  
JUDGMENT**

**I. Overview of the Camas Creek Allotment**

1. The Camas Creek allotment is located northeast of Challis, Idaho in remote Lemhi County. *See* FS AR 5053 (vicinity map). It contains 63,375 acres of public lands administered by the Salmon-Challis National Forest. FS AR at 5052.

2. The allotment is within the Camas Creek watershed, much of which is within the Frank Church-River of No Return Wilderness and is in “excellent condition.” FS AR 5052, 5106. However, within the allotment, the creek is “historically overgrazed,” and “[s]ignificant

reaches of streambanks are less stable than desired.” *Id.* The major tributaries to Camas Creek within the allotment include Furnace Creek, Castle Creek, Silver Creek, and West Fork Camas Creek. FS AR 5062 (map).

3. The Camas Creek allotment is 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. FS AR 5064 (BA).

4. The area near the center of the allotment, encompassing the confluences of both Silver Creek and West Fork Camas Creek with main Camas Creek, is known as Meyer’s Cove. *See* FS AR 5688 (map). Meyer’s Cove is also where three of the four units of the allotment—the West Fork, Camas Creek, and Lower Silver Creek units—all meet. *Id.*

5. Meyer’s Cove is an important spawning area for both Chinook salmon and steelhead. NOAA AR 1460.

6. In 1990, the Forest Service constructed a large enclosure along Camas Creek at Meyer’s Cove, funded with \$200,000 from the Bonneville Power Administration, in hopes of excluding livestock from this important spawning area. FS AR 3492.

7. In or around 2004, the Forest Service expanded the enclosure 660 feet further upstream, moving the upstream boundary of the enclosure to just below a hardened crossing of Camas Creek. *See* Declaration of Kristin Ruether Ex. B (filed herewith) (scoping letter for expansion project). It proposed an “over water” or “hanging” suspension fence over the creek. *Id.* The Forest Service explained at the time that the expansion “will help to improve/maintain riparian conditions and eliminate impacts from livestock . . . within the riparian area.” *Id.* *See* FS AR 5062 (BA map showing current enclosure boundary in red).

8. Also in 2004, the Forest Service constructed two permanent “drift fences” (i.e.,

fences that run perpendicular to the creek) across Castle and Furnace Creeks. FS AR 3493 (meeting notes). The Castle Creek drift fence is approximately one mile upstream from the confluence with Camas Creek, while the Furnace Creek drift fence is very close to the mouth. *See* FS AR 5062 (BA map showing drift fences as red dots along both creeks).

9. A rough road snakes along Camas Creek from Meyer's Cove several miles upstream to a private inholding known as Hidden Valley Ranch. *See* FS AR 5062 (BA map showing Hidden Valley Ranch at bottom of page). Whitworth Ranches leases this private land for grazing in conjunction with the allotment once every several years. FS AR 5055. Since the private land is not fenced, the cows grazing on the ranch have often strayed along Camas Creek downstream of the ranch. FS AR 3495.

10. This road crosses Camas Creek six times, and Furnace Creek once, at a series of fords. *See* FS AR 5055; Ruether Decl. Ex. A at 73 (map of fords). The cattle are trailed across the fords several times during the grazing season. *Id.* Some of the fords are "hardened" with cement pavers; some used to be hardened, but the pavers have been partially or largely swept downstream; and some are unhardened, with the road crossing the natural streambed. FS AR 3540, 3689-92.

11. 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. FS AR 3558, 3646-49, 3699-3704. Other activities in the watershed include outfitting and guiding camps. FS AR 5052.

## **II. ESA-Listed Fish in the Camas Creek Allotment**

### **A. Chinook Salmon**

12. The Snake River spring/summer Chinook salmon was protected as threatened in

1992. 57 Fed. Reg. 14,653. Critical habitat was designated in 1993. 58 Fed. Reg. 68,543.

Designated critical habitat on the allotment includes main Camas Creek, West Fork Camas Creek, Silver Creek, Castle Creek, and Furnace Creek. FS AR 5064, 5065 (BA map). Spawning habitat on the allotment includes 9.71 miles on mainstem Camas Creek, 4.68 miles on West Fork Camas Creek, and the lower 2.35 miles of Castle Creek. FS AR 5072 (BA), 5065 (map showing spawning areas); NOAA AR 704 (map showing redds on Camas Creek).

13. Chinook migrate into Camas Creek from the ocean from April through July. FS AR 5071–72. Spawning is generally assumed to begin around August 15 for this area, but has been documented beginning as early as July 24 on the upper reaches of Camas Creek near Hidden Valley Ranch. FS AR 5072; NOAA AR 1440. Researchers believe that the upper Camas Creek Chinook may represent a genetically distinct population since they enter and spawn so much earlier. Ruether Decl. Ex. A at 7.

14. Spawning continues through September, and the eggs incubate in the redds through the end of April. FS AR 5072. Juveniles migrate out of rearing areas starting in early May through July and will remain in the stream for 1 year before migrating out to the ocean in the spring of their second year. NOAA AR 1426.

15. Snake River spring/summer Chinook have declined significantly from historic numbers, and hatchery fish often make up almost 75% of the adults. NOAA AR 1426. NOAA Fisheries describes listed Pacific salmon runs in terms of discrete individual populations that make up Major Population Groups (MPGs). NOAA AR 1426. Camas Creek is one of nine populations that falls within the Middle Fork Salmon River MPG for Chinook salmon. *Id.*

16. 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. *Id.* The genetic integrity of the Camas Creek Chinook salmon is considered “very high.” FS AR 5068. “This genetically pure wild population of Chinook was historically very strong, as it has evolved over thousands of years to select individuals capable of making the 800 mile journey to Camas Creek.” *Id.* The Camas Creek population is considered important because it possesses genetic traits that increase the species’ likelihood of survival in the wild. *Id.*

17. 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. NOAA AR 1425. 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). NOAA AR 1426. However, *none* of the nine populations in the Middle Fork Salmon River MPG—including the Camas Creek population—currently does. *Id.*

18. The Chinook salmon population in Camas Creek is well below a viable population level. NOAA AR 1427. The minimum abundance threshold for this to be a viable population is 500 adults, and the current population’s mean abundance level is 28 adults, representing only 6% of the minimum threshold abundance. *Id.* Thus, the population’s abundance/productivity risk is considered high. *Id.* The spawning recruitment numbers from the last twenty years show recruitment at .83, which is less than replacement—i.e. the population is going down—and far less than the 2.21 value required for minimum threshold abundance. *Id.* Redd surveys also show a significant downward trend in redd counts from 2001 to 2009, falling from 94 redds to just 12 redds, and compared to 100-250 redds found in the early 1960’s. FS AR 5138, 5102; NOAA AR 3120. “Substantial improvements in abundance/productivity status are required for the population to be considered viable.” NOAA AR 1427.

**B. Steelhead**

19. Snake River Basin steelhead trout (“steelhead”) was protected under the ESA as threatened in 1997. 62 Fed. Reg. 43,937. NOAA Fisheries designated critical habitat for steelhead in 2005. 70 Fed. Reg. 52,630. Much of the Camas Creek watershed is designated critical habitat, including Camas Creek, West Fork Camas Creek, Castle Creek, and Furnace Creek. FS AR 5064 (BA). Almost all of that designated critical habitat is occupied and used for spawning. FS AR 5072 (BA), 5066 (BA map).

20. Steelhead spawn in the Camas Creek drainage from the third week of March to mid-June, with egg incubation generally occurring at least through mid-July but potentially extending through early August. NOAA AR 1442. NOAA presumes incubation will be complete by August 7. *Id.*

21. The steelhead in Camas Creek are part of the Salmon River MPG and the Lower Middle Fork population. NOAA AR 1428. For the Salmon River MPG to be considered viable, six of the 12 populations in the MPG must be viable but currently none is. *Id.* The Lower Middle Fork population’s abundance risk is high and NOAA has determined that survival rate increases that lead to increases in abundance and productivity will need to occur before the population can be considered viable. *Id.*

22. Camas Creek’s steelhead population is “essentially free of hatchery influence” and NOAA considers it a “high priority,” as it “supports one of only five populations within the ESU that are important strongholds of genetically unique steelhead.” FS AR 5069. The available data indicates that the population is in a “fluctuating downward trend.” *Id.*

**C. Bull Trout**

23. Columbia River bull trout was protected as threatened under the Endangered

Species Act in 1998. 63 Fed. Reg. 31,647. FWS designated critical habitat in 2010. 75 Fed. Reg. 63,898. Much of the Camas Creek watershed is designated critical habitat, and bull trout are present and believed to spawn in almost all of the allotment's main creeks, except for the upper portion of Silver Creek and its tributaries. 75 Fed. Reg. 64,044-054; FS AR 5069, 5073 (BA), 5067 (BA map).

24. Bull trout spawn in the allotment from mid-August through October. FS AR 5073 (BA). For spawning, bull trout need very cold water in low-gradient stream reaches that have loose, clean gravel. FWS AR 12-13. The eggs incubate into late April. *Id.* After hatching, juveniles remain in the substrate and may not emerge for another fifty days or more, usually in early April through May. FWS AR 13.

25. For purposes of recovery planning, FWS divides the coterminous U.S. population of bull trout into recovery units. FWS AR 9. In turn, core areas are geographic areas within a recovery unit that are occupied by one or more local populations of bull trout. *Id.* Viable core areas are critical to the persistence of recovery units. *Id.* 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. *Id.*

26. The Camas and Silver Creek bull trout local populations inhabit the streams in Camas Creek allotment. FWS AR 16. These local populations are part of the Middle Fork Salmon River (MFSR) core area, which is within the Columbia River recovery unit. *Id.* The MFSR core area contains 28 local populations. *Id.* Maintaining the Camas and Silver Creek local populations is important to maintaining the productivity and distribution of bull trout within the MFSR core area. *Id.*

27. Due to the different, overlapping life cycles of the three listed fish, there is

essentially no time when salmonids are not spawning or eggs are not incubating in the gravels of Camas Creek. Ruether Decl. Ex. A at 7 (“[T]he only time window that fish would not be spawning or eggs would not be incubating in the gravel would be the time after steelhead emerge and before Chinook begin spawning. Based on my experience . . . , in many years, the steelhead might not all be emerged until about the same time Chinook begin spawning.”).

“Steelhead spawn from late March to early June . . . in many years, the steelhead fry emerge until about the time Chinook begin spawning. Chinook spawn from late July – early August to early September and the fry likely emerge until late March. Bull trout spawn from late August to October. As a result, from April of one year to March of the following year, there is likely no time window that salmonids would not be spawning or eggs would not be incubating in the gravel.”

Ruether Decl. Ex. A at 20; *see also* Ex. A at 65 (noting steelhead likely incubate until late July around same time Chinook begin constructing redds so no time is acceptable for gravel disturbing activity).

28. Livestock can harm fish by directly trampling on redds (nests), and destroying or dislodging embryos and alevins. FS AR 5081; NOAA AR 1450. Livestock may also displace larger juvenile fish from protective streamside cover, increasing the risk of predation. NOAA AR 1379, 1448; FWS AR 52, 71-72. 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. NOAA AR 1447.

29. Livestock grazing also degrades habitat in many ways, including by removing riparian vegetation, trampling stream banks and causing erosion, widening stream channels, lowering water tables, and altering riparian plant communities. NOAA AR 1456. The resulting instability in water volume, increased water temperatures, loss of pools, and increased substrate fine sediment can adversely affect fish habitat. *Id.* Cattle are attracted to riparian areas in summer, and will often congregate there to take advantage of the water, shade, and lush



vegetation. NOAA AR 1393-94, 4686, 5401.

### **III. Camas Creek Allotment Compliance History**

30. Whitworth Ranches, Inc. holds a Forest Service grazing permit to run up to 132 cow/calf pairs in the Camas Creek allotment between June 1 and October 15. FS AR 5054 (BA).

31. The Camas Creek allotment has four units, Upper Silver Creek unit, Lower Silver Creek unit, West Fork unit, and Camas unit—which is made of the Camas Creek area and the Castle/Furnace area. FS AR 5054-55. The grazing plan for the Camas Creek allotment is a “deferred rotation system,” whereby livestock are moved between the allotment’s four units. *Id.* The permittee is responsible for moving the livestock to meet the relevant indicators. *Id.* Those indicators include a variety of annual grazing use indicators (stubble height, percentage of browse on woody riparian vegetation, and bank stability), as well as longer-term Riparian Management Objectives (e.g., bank stability, water temperature, width to depth ratio, sediment). FS AR 5057–59 (BA).

32. Up until 1997, grazing was not allowed in the Camas Creek Unit after August 15, to prevent conflict with Chinook spawning. FS AR 3492. In 1998, Mr. Whitworth complained that he could not “make adequate use of the Camas Creek Unit by being required to be off the unit by August 15.” FS AR 3303. NOAA agreed to allow Mr. Whitworth to graze for several more weeks after that date, so long as a rider camped out along Camas Creek after August 15 “to make sure cattle don’t reach Camas Creek,” and cows were kept on the hardened fords when crossing Camas Creek, in small groups. *Id.*

33. **1999.** Problems began when Mr. Whitworth refused to set up a rider camp at the mouth of Furnace or Castle Creeks, as had been agreed. FS AR 5633. As a result, “[c]attle were found along main Camas Creek five different times after August 15th.” *Id.* Additional

violations included Whitworth not moving the cows on the correct route, resulting in half his herd crossing Camas Creek without using a hardened ford; cows being at least 13 days late leaving the allotment, and others. FS AR 2323–27, 5634. The Forest Service admitted that the strategy to keep cows out of Camas Creek “was not successful.” FS AR 3493. The agency warned Mr. Whitworth that “[r]epeated failure to meet management requirements in 2000” would risk suspension of cattle numbers or a reduction of the grazing season in 2001. FS AR 5634.

34. **2000.** In 2000, Whitworth exceeded stubble height standards along Camas Creek and West Fork unit and “cattle continued to breach the enclosure at Meyer’s Cove,” which the Forest Service noted had occurred “annually within the enclosure since it was first established.” FS AR 5635, 5637. Other violations included finding cows and “areas with heavy use” along Camas Creek above Hidden Valley Ranch during spawning season. AR 2333. The Forest Service issued a “show cause” letter as to why it should not suspend 25% of Whitworth’s use. FS AR 5635. However, the agency quickly backed down following a meeting, even agreeing to ask NOAA to weaken standards on the allotment, and only warning that consequences might occur if standards were not met at key areas the following year. FS AR 5637–38.

35. **2001.** In 2001, cows were again found along Camas Creek during spawning season, and Whitworth’s rider did not follow the unit rotation required by the Forest Service. FS AR 2339–40, 5640. The Forest Service expressed concern that Mr. Whitworth “may not be able to meet NOAA’s goal to keep cattle off of Camas Creek with the current rider,” but Mr. Whitworth indicated he would re-hire the same rider anyway. FS AR 5640–41. No record of any consequences or penalties is in the record.

36. From 2002–2005, Forest Service researchers from Boise’s Rocky Mountain

Research Station (RMRS), led by highly respected Chinook expert Russ Thurow, conducted a series of on-the-ground Chinook redd surveys in Camas Creek during spawning season, in order to validate the accuracy of aerial redd surveys. *See* Ruether Decl. Ex. A at 1 (memo announcing project). As described in detail below, the researchers documented extensive livestock trespass in the streambed of Camas Creek during the spawning period for all four years; and despite regularly reporting these incidents to the Salmon-Challis National Forest, the cattle often remained in trespass for days to weeks, with no consequences.

37. **2002.** In 2002, RMRS reported finding “many cows were camped in the riparian zone on top of the spawning fish. Cattle were crossing areas that had redds in progress, breaking down banks near redds, and fine sediment was being added to the stream. From the appearance of the banks, condition of trails, and the smell, in my opinion the cattle have been camped in the riparian area for several weeks.” Ruether Decl. Ex. A at 7. Twelve days later, RMRS found that the cattle were “back on Camas Creek upstream from Furnace Creek directly on top of spawning Chinook salmon,” and told the Forest Service and NOAA “[i]t is imperative that these cattle be moved out of the area immediately.” Ruether Decl. Ex. A at 9. RMRS was troubled at witnessing “the ‘Take’ of a listed species via redd trampling and influx of sediment over redds.” Ruether Decl. Ex. A at 15. For its part, the Forest Service was upset at RMRS for providing NOAA with a code for a gate on the Camas Creek road, and responded by refusing to provide RMRS with a new combination, impeding the ability of researchers to access the creek. *Id.*, Ruether Decl. Ex. A at 17.

38. The Forest Service’s monitoring log contains records of numerous additional trespass incidents, including cows inside the Meyer’s Cove enclosure during spawning season at least three times; upon being informed of the final incident, when 10 cows were found inside,

Whitworth “said it was not worth his time to get 5 pair” and he “would get them when more showed up.” FS AR 2349–53. End-of-season monitoring showed that Whitworth violated riparian stubble height standards in at least four of the allotment’s five units, and stream stability was only 52% *within* the Meyer’s Cove exclosure. FS AR 2355.

39. After the end of the season, the Forest Service sent Mr. Whitworth a Notice of Non-Compliance. Ruether Decl. Ex. C. The reasons given were: the violation of stubble height standards in two units, excessive cattle use around the corrals at the mouth of Silver Creek, the fact that at least 19 pairs (38 cows) were still on the allotment after the September 15 turn-off date, and the delay of over a week in removing cows from the Hidden Valley Ranch after being ordered to move due to conflicts with spawning salmon. *Id.* No sanctions were imposed, but the letter warned Mr. Whitworth if he again did not follow the terms and conditions of his permit in 2003, it would send another notice and a part of his permitted numbers or season would be suspended for at least two years. *Id.* at 2.

40. **2003.** At some point before the 2003 season, the Forest Service realized that its own Forest Plan prohibited livestock grazing above Furnace Creek. FS AR 2356. It therefore informed Mr. Whitworth he could not graze there, and could only graze the Hidden Valley private land if it were fenced off. FS AR 5650–01 (letter to Whitworth). The Forest Service constructed an electric fence across Camas Creek, a half a mile above Furnace Creek, in an attempt to prevent access. *Id.* However, Mr. Whitworth “threatened to put cows up above this fence one last time,” regardless of the legality, and cows were found above the new fence in July 2003. *Id.* The Forest Service allowed Whitworth to place cows in a tributary, but the cattle returned to main Camas Creek, which “look[ed] like a putting green.” *Id.* According to the District Ranger, the situation was a “wreck waiting to happen.” *Id.*

41. Sure enough, RMRS researchers returned to Camas Creek later that month and found that the lower spawning reach of Camas Creek, from Hammer to Silver Creeks, “has been heavily grazed by livestock as evidenced by: extremely closely cropped perennial grasses, exposed topsoil, degraded riparian vegetation, and trampling of streambanks. . . . incubating steelhead eggs and alevins would have been susceptible to increased mortality as a result of trampling and intrusion of fine sediments.” Ruether Decl. Ex. A at 35-36. Mr. Thurow noted that in the 23 years (since 1980) I have spent time in Camas Creek, this is the most degraded I have seen the Meyers Cove area.” *Id.*

42. En route to the upper spawning reach, RMRS observed 20–25 cows grazing and resting in the Camas Creek riparian areas. *Id.* The new Furnace Creek fence gate was open, and upstream of the fence they “observed about 15 head of livestock grazing and resting in the riparian area along mainstem Camas Creek.” *Id.* RMRS warned that “[m]any Chinook salmon in Camas Creek will be spawning during the next few week[s]” where the cows were. *Id.*

43. The Forest Service forwarded Mr. Thurow’s memo to the Level 1 consultation team, but implored them to “not go-off half cocked over this.” Ruether Decl. Ex. A at 40. RMRS reported cattle trespass along Camas Creek spawning reaches **nine** additional times throughout that spawning season, including incidents of 15 cows in the upper spawning reach, 15–20 cows in the lower spawning reach, and 10 cows inside the Meyers Cove enclosure. Ruether Decl. Ex. A at 49. The Forest Service’s monitoring log contains records of additional trespass and noncompliance incidents. FS AR 2361. No evidence of any consequences or penalties is in the record, despite the prior year’s warning letter.

44. **2004.** In 2004, as noted above, the Forest Service decided to expand the Meyer’s Cove enclosure and construct drift fences across lower Castle and Furnace creeks. Ruether Decl.

Ex. B (scoping), FS AR 5653 (allotment meeting notes summarizing same). Based on the hope that these new drift fences would prevent cattle in Castle and Furnace creeks from getting into Camas Creek, Mr. Whitworth was allowed to keep cattle in the Camas Creek unit after August 15 (during Chinook spawning season). AR 3493 (internal meeting notes).

45. The RMRS redd researcher “reported seeing cattle on EVERY survey he did on the upper Camas reach” during spawning season, starting on July 24 and occurring every four days until the first week of September, “[d]espite regular reporting and the attempts at new gates and fences, range riders etc.” Ruether Decl. Ex. A at 58. An additional aerial survey on September 10 found more cattle in both the upper and lower spawning areas (including inside the Meyers Cove enclosure). “So, these cattle were on mainstem Camas from at least July 24–Sept 10.” *Id.* See also FS AR 2372, 5656 (FS monitoring notes confirming trespass). The Forest Service’s monitoring log for 2004 confirms the violations, and consists of nine pages of documentation of near-constant trespass and other violations. FS AR 2372.

46. Mr. Thurow concluded that the take home message from 2002-2004 is two fold: “the Camas Cr grazing allotment is NOT manageable if the goal is to keep cattle out of the riparian areas of Camas Cr,” and “if cattle are allowed in the allotment, they WILL trample ESA listed Chinook salmon and bull trout redds which will (based on your graduate research) cons[titute] Take.” Ruether Decl. Ex. A at 58.

47. The Forest Service blamed the problems on: Hidden Valley Ranch personnel leaving the fence gate open, a youth crew constructing the fence improperly, and Mr. Whitworth’s rider not following instructions. FS AR 5655. The Forest Service imposed no sanctions on Whitworth for this lengthy trespass, despite the 2002 warning letter and continued violations in 2003, other than a mild warning that “[d]uring the 2005 grazing season, you must

make sure that your cattle do not graze” in the upper spawning area and can only graze the Hidden Valley private land if fenced. FS AR 5656. That fall, NOAA stepped in by starting a criminal investigation into the ESA violations. Ruether Decl. Ex. A at 55.

48. Thurow noted that “[r]egardless of the timing of spawning, the issues in Camas remain the unmanageable grazing allotments.” Ruether Decl. Ex. A at 63. “Finally, I urge the agencies to use a cumulative approach for assessing within Camas Cr impacts to aquatic resources. If we did a triage, I fear that the effects of livestock grazing in recent years would far outweigh the effects of vehicles using fords. My point is that we need to address all of the important impacts.” Ruether Decl. Ex. A at 88.

49. **2005.** In 2005, very low Chinook returns were expected as a result of poor flow conditions. Ruether Decl. Ex. A at 93. At the beginning of the 2005 season, the Forest Service optimistically informed Mr. Whitworth that “[s]ince we now have drift fences across Furnace Creek and Camas Creek at Furnace Creek, and the fence across Castle Creek, you should be able to keep cattle out of the area above Hidden Valley and along Camas Creek once they are put up Furnace Creek.” FS AR 5658. Unfortunately this was not the case.

50. On July 22, RMRS researchers discovered cattle “grazing in the off-limits reach of Camas Cr upstream from Furnace Cr.” and immediately notified the Forest Service. Ruether Decl. Ex. A at 103. RMRS noted to the agency that “it was particularly critical to remove the cattle asap since the returns of wild salmon were projected to be extremely low.” *Id.* The cattle remained despite regular reporting from RMRS, and the researcher “saw no evidence that any actions had been taken to remove the cattle.” *Id.* On August 6, the researcher “observed **approximately 20 cattle cross Camas Cr directly over and trample a newly constructed salmon redd.**” *Id.* (emphasis added). The Rocky Mountain Research Station appeared baffled

that the Forest Service took so little remedial action in a lengthy letter detailing this incident, as well as the prior years' trespass witnessed, sent to the Forest Service and the Services. Ruether Decl. Ex. A at 105-06.

51. A NOAA law enforcement officer commented to Mr. Thurow that "this problem is ridiculous with the existing chronology of events and needs to be addressed by our agency." Ruether Decl. Ex. A at 107. Later that month, the officer showed the Forest Service the photographs of cattle crossing on the redd, and explained that "a possible 'take' had occurred." FS AR 3733. He "requested that the Forest Service develop a solution to the problem of Jack Whitworth's cattle being in the Hidden Valley area during Chinook salmon spawning," and that if it did not, "he would proceed with criminal action against the Forest Service and Jack Whitworth." *Id.*

52. For its part, the Forest Service defended Mr. Whitworth in a letter to RMRS, stating that his efforts "have been compromised by gates left open, fences cut without reason, new riders, an enclosure needing constant maintenance attention, and livestock that are missed during gathering in the rugged, forested terrain that characterizes the allotment." Ruether Decl. Ex. A at 116. It admitted "the limited success all short term management actions have had in keeping livestock from unauthorized grazing along reaches of Camas Creek occupied by spawning salmon," but stated "we are presently considering long term management solutions to address this livestock-salmon conflict." *Id.*

53. Even after the trampling incident, the Forest Service monitoring log indicates that cattle remained in the upper spawning area throughout the rest of the season, with trespass reports occurring approximately weekly. FS AR 2410-13. No evidence of any consequences or penalties to Mr. Whitworth is in the record.



54. **2006.** In March 2006, the Forest Service prepared a “white paper” to propose solutions to the allotment’s conflicts. FS AR 3725. The paper lists nine different options to adjust grazing in the hopes of reducing cattle-redd conflicts. *Id.* at 3733–36.

55. The Forest Service ultimately selected the option proposed by Mr. Whitworth, known as option 9. It proposed a new fence across Camas Creek at the Wilderness boundary; continued grazing of Hidden Valley Ranch up until July 24 (the first day of Chinook spawning); grazing in Furnace and Castle Creeks next, relying on the drift fences to keep cattle out of Camas Creek during Chinook spawning season; allowing “some cattle” to remain along Camas Creek below Furnace Creek until August 15; and trailing cattle out along Camas Creek at the end of August. *Id.* at 3735–36.

56. The upshot of the plan is heavy reliance on the Castle and Furnace creek drift fences to keep cattle out of the Camas Creek during Chinook salmon spawning. The Forest Service admitted that under this plan, “there is still a risk of cattle-Chinook salmon redd interactions and take.” Ruether Decl. Ex. H at 4.

57. The RMRS team did not survey redds after 2005, resulting in much less intensive monitoring of the area. Nonetheless, the Forest Service documented cattle in trespass numerous times on the allotment, including along Camas Creek and inside Meyer’s Cove enclosure, on the following dates: July 1 (inside Meyer’s Cove and along Camas Creek outside of enclosure), July 7 and 10 (inside Meyer’s Cove), July 12 (three places along Camas Creek above Meyer’s Cove), July 19 (along Camas Creek below Furnace Creek), July 25 (20 pairs had gone down Camas Creek from Furnace Creek to Meyer’s Cove), July 28 (30 pair inside Meyer’s Cove), August 16 (at mouth of Furnace Creek below drift fence), August 23 (inside Meyer’s Cove), September 12 (various trespass locations), September 28-October 4 (cattle on allotment past off-date). FS AR

2419-23. Additionally, the gate in the Castle Creek drift fence was left open several times. FS AR 2428.

58. **2007.** In 2007, the Forest Service conducted less monitoring than 2006, making only three visits to upper Camas Creek during the season (August 2, August 22, September 18). FS AR 2429-31. During those visits, 14 cattle were documented along Camas Creek just above Meyer's Cove on August 2, in trespass in Lower and Upper Silver Creek units on August 22, and again in trespass in Upper Silver Creek on September 18. *Id.* Cattle were also seen in Meyer's Cove on June 19. FS AR 2429. The Forest Service did not monitor upper Camas Creek in July, but Whitworth's rider stated that he had trouble keeping cattle at Hidden Valley, they kept going down Camas Creek to Furnace Creek. FS AR 2429. Thus, cattle use along upper Camas Creek occurred in July. The Forest Service also noted the gate in the Castle Creek drift fence was open on August 22. FS AR 2430.

59. **2008.** In 2008, monitoring was extremely sparse, with the Forest Service only recording one trip to upper Camas Creek the entire summer, on August 21. FS AR 2438-39. However, trespass into Meyer's Cove was reported on August 6-11 and September 10, and a violation of the stubble height requirement occurred in the Lower Silver Creek unit. FS AR 2438, 2440.

60. In late 2008, WWP realized that consultation had never been completed on the Camas Creek allotment, and sent a letter to the Forest Service asking it to confirm this and what steps it had taken to eliminate the take associated with the allotment. Ruether Decl. Ex. D.

61. **2009.** In January 2009, Plaintiff WWP sent a notice letter to the Forest Service and Mr. Whitworth explaining that grazing on the allotment was in violation of the ESA due to the lack of completed consultation and high degree of conflict. FS AR 5750.

62. The Forest Service rested the allotment from grazing in 2009 while it scrambled to complete consultation. FS AR 2441 (letter to Mr. Whitworth explaining same), 3233 (another letter to Mr. Whitworth explaining “it was not legal to authorize you to graze during the 2009 grazing season.”).

63. In November 2009, WWP sent the Forest Service a series of photos from a site visit, showing that stretches of the Meyer’s Cove enclosure were in shambles, especially the “hanging fence” crossing Camas Creek at the upstream end of the enclosure. Ruether Decl. Ex. E.

64. **2010.** In May 2010, WWP inquired as to whether the consultation was completed, whether the allotment would be grazed that year, and whether the livestock enclosure fences had been fixed yet. FS AR 5697. On May 28, 2010, the Forest Service responded that the consultation was not yet completed, that it expected the allotment would be grazed by Mr. Whitworth following the completion of consultation, and that “[t]he enclosure fence at Meyer’s Cove has not been repaired as of the current date,” but that “[i]t will be completed prior to the time that livestock will be in units of the Camas Creek Allotment that are adjacent to the enclosure.” FS AR 5701.

65. The NOAA and FWS biological opinions were completed on June 3 and June 7, 2010, respectively. NOAA AR 1405; FWS AR 1. On June 9, 2010, the Forest Service sent a letter to Mr. Whitworth authorizing livestock turnout as of that date. FS AR 5709.

66. On July 13, 2010, WWP again inquired as to whether the Meyer’s Cove enclosure fence had ever been repaired. FS AR 5713. On July 19, the Forest Service responded that “[a]s of this date only minor repairs have been made” to the enclosure fence, as “[w]e have had delays in our contracting and have not yet completed the larger scope of repairs that are still planned for

later this summer.” FS AR 5714. The Forest Service acknowledged that cattle had been authorized on the allotment since June 9, that they had grazed the West Fork unit (which is adjacent to the enclosure), and that “[d]ue to the condition of the fence, some minor livestock instruction (approximately 10 head) into the enclosure did occur.” *Id.* See also FS AR 5688 (map).

67. WWP was alarmed that the Forest Service had allowed cattle into the allotment without fixing the enclosure fence, allowing livestock to again trespass inside the enclosure, and replied to the Forest Service on the same day that it must “fix the enclosure immediately or pull cows off.” FS AR 5718. WWP also forwarded the Forest Service’s statement to the Services, because having the fences in good condition was required under the consultations. FS AR 5716.

68. A few weeks later, on July 29, WWP again visited Meyer’s Cove and discovered the enclosure in significant disrepair, with at least a dozen gaps in the buck and pole fence that cattle could wander through, and some orange plastic fencing—apparently installed to replace the broken “hanging fences” along the two road fords—uselessly crumpled on the ground.

Ruether Decl. Ex. F.

69. The Forest Service finally finalized a contract to fix the enclosure fence, under which the work was to be completed by September 10, 2010. FS AR 3262. By that time, cattle had completed grazing in two units adjacent to the enclosure (West Fork and Camas Creek), and there was only one unit remaining in the grazing rotation, the Lower Silver Creek unit. FS AR 5711 (grazing schedule).

70. Also during the 2010 season, Forest Service employees discovered 40 Whitworth cattle trespassing in the neighboring Morgan Creek allotment. FS AR 5748. The Forest Service sent a Notice of Non-Compliance to Mr. Whitworth, stating that he needed to comply with his

permit, and that failure to do so for the next two years “may result” in further action. *Id.* at 5749.

71. In a 2010 End of Year report submitted to the Services, the Forest Service asserted that all conservation measures laid out in the consultation had been followed. FS AR 3278. The report included the results of stream monitoring done at several sites, but did not include a log of trespass checks, as the Forest Service had done in previous years, or acknowledge the disrepair of or admitted trespass event in Meyer’s Cove. FS AR 3276–87.

72. **2011.** In March 2011, WWP sent the Forest Service and the Services the notice letter for this action. FS AR 5750. The allotment was rested in 2011.

73. **2012.** The allotment was grazed again in 2012. A WWP summer intern visiting in July 2012 documented at least 33 cattle inside the Meyer’s Cove enclosure, all three reaches of the hanging fences along the road fords in the enclosure lying on the ground, and both the Castle and Furnace creeks’ drift fences in disrepair above the creeks. Declaration of Alex Brott ¶¶ 5-29 (filed herewith). WWP reported these problems to the Forest Service to prevent further harm from occurring. Declaration of Jon Marvel Ex. A (filed herewith).

74. A fisheries biologist visited the allotment six times between August 2 and September 19, documenting pervasive fresh cattle sign along spawning reaches of Camas Creek, and that the drift fences remained in disrepair the entire season despite WWP’s reporting. Declaration of Laurence Zuckerman ¶¶ 8-37 (filed herewith). And another fisheries biologist visiting in September found cattle access and fresh sign on the riverbanks near almost every Chinook redd he observed in the allotment. Declaration of Robert House ¶¶ 15-34 (filed herewith).

#### **IV. Camas Creek Consultation History**

75. Following the listing of Chinook salmon in 1994, ESA consultations occurred for

the Camas Creek allotment in 1994 and 1998, with NOAA issuing Letters of Concurrence. FS AR 4703.

76. Following the listings of steelhead and bull trout, the Forest Service drafted a 2004 BA for an all-species consultation covering all activities in the watershed. *See* NOAA AR 96. However, “[b]oth NOAA and USFWS expressed concerns over the structure and adequacy of content of the 2004 BA, and the Forest subsequently agreed to requests by the [Services] to reformat and strengthen the document for resubmission.” FS AR 4703.

77. The Forest Service prepared an amended Watershed BA in 2005. FS AR 3503. During the revision, a potential opportunity to close the Camas Creek allotment arose, whereby Mr. Whitworth would move his cattle to an allotment in the Pahsimeroi Valley purchased by The Nature Conservancy, and the Camas Creek allotment would only be used for “emergency use.” FS AR 3496. The agencies were hopeful about the chance to close the “long-problematic Camas Allotment.” *See* FS AR 4703.

78. “With expectations that resource conflicts associated with cattle grazing in the Camas Creek drainage could be resolved through this relocation, a decision was made to **remove consideration of grazing activities** on the Camas Creek Allotment from the revised watershed level BA.” FS AR 5683 (letter to Mr. Whitworth) (emphasis added).

79. The proposed allotment swap did not come to fruition. FS AR 2447. However, the Forest Service continued to authorize grazing on the Camas Creek allotment despite the lack of any grazing consultation for steelhead and bull trout, and the outdated Chinook consultation. *See generally* FS AR 2385–2438 (2005–2008 grazing authorization and monitoring documents).

80. In 2007, NOAA prepared a draft BO on water diversions in the Camas Creek watershed; however it has never been completed. Ruether Decl. Ex. G. That same year, FWS

issued a BO on the Camas Creek water diversions. *See* FWS AR 101.

81. Following a WWP notice letter in January 2009, FS AR 5672, the Forest Service rested the allotment in 2009 while the agencies scrambled to complete the grazing consultation. FS AR 5685.

82. In March 2010, the Forest Service issued a BA in which it determined that the proposed grazing was “likely to adversely affect” Chinook salmon, steelhead, and bull trout on Camas Creek allotment; but “not likely to adversely affect” their critical habitats. FS AR 5048. The NOAA and FWS biological opinions were completed on June 3 and June 7, 2010, respectively. NOAA AR 1405, FWS AR 1. The Services concluded that the grazing would not jeopardize the three species and concurred with the Forest Service’s determination that grazing was “not likely to adversely affect” critical habitat for the three species. FWS AR 1, 33-34; NOAA AR 1405, 1465.

Dated: September 28, 2012

Respectfully submitted,

/s/Lauren M. Rule

Lauren M. Rule

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