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**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, and U.S. FISH AND
WILDLIFE SERVICE,**

Defendants,

and

**IVERSON MANAGEMENT LIMITED
PARTNERSHIP,**

Defendant-Intervenor.

Case No. 1:14-cv-737-CL

**PLAINTIFFS' RESPONSE TO
DEFENDANTS' AND
DEFENDANT-INTERVENOR'S
OBJECTIONS TO REPORT
AND RECOMMENDATION**

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INTRODUCTION

Defendant Forest Service and Defendant-Intervenor Iverson object to Magistrate Judge Clarke's Report and Recommendation in this matter, but their objections do not establish that Judge Clarke made any legal or factual errors.¹ Indeed, Judge Clarke thoroughly examined the extensive record in this case and issued a well-reasoned report that favored Plaintiffs on some claims and Defendants on other claims. He cited to numerous documents in the record for his analysis of the claims, and where those documents did not support the agency's decision, he appropriately found that decision was arbitrary and capricious.

Judge Clarke is very familiar with the relevant issues and facts here because he has now presided over three cases related to livestock grazing on the Chemult Pasture. His rulings show that he has become increasingly concerned about the management of this pasture over the course of these cases due to further knowledge about the unique resources there and the continuing harm from livestock to those resources. Judge Clarke has been very careful in each of his reports, deferring to the agencies in many instances but refusing to defer when the record did not contain the required rational explanation and factual support for the agency's decision. Judge Clarke appropriately rejected the arguments raised by Defendants and Intervenor in their objections because the law and the facts in the record did not support those arguments. This Court should therefore adopt Judge Clarke's careful and thorough analysis in a final order.

¹ Defendants and Defendant-Intervenor filed objections to Judge Clarke's R&R, to which Plaintiffs now respond, as allowed under the Federal Rules of Civil Procedure and Judge Clarke's R&R. R&R p. 32; Fed. R. Civ. P. 72, 6; Local R. 7-2(b)(1). No further briefing is provided for under the Rules or the R&R and thus this Court can now review the R&R. *Id.*

FACTUAL BACKGROUND

I. **Grazing Impacts To Oregon Spotted Frogs Spurred The Initial Lawsuit Over The Chemult Pasture.**

The Chemult Pasture is one of several pastures on the Antelope Allotment, located on the Fremont-Winema National Forest in central Oregon. Jack Creek runs through this pasture and continues south through the North Sheep Pasture, which has been closed to grazing for more than fifteen years. An isolated and unique population of Oregon spotted frog (OSF) was discovered in Jack Creek in 1996, one of only five populations in the Klamath Basin. Sept. 2008 AR 738, 1960, 2337, 2352, 2861.² This population underwent a severe decline, beginning in 2001, and has remained at very low numbers since then. FWS 2045. OSF populations are often monitored by counting egg masses in spring, and the Jack Creek population fell to just 17 egg masses in 2006 and 11 egg masses in 2007, down from 333 egg masses in 2000. *Id.* Scientists have expressed concern about the high risk of extirpation of this small and isolated population, which would be very detrimental to the species because of the Jack Creek population's unique status and distinct genetics. AR 3569-70, 6955-57, 8918-19, 10382; FWS 7, 17, 30.

Concerns about the precipitous decline in the population and adverse impacts from livestock grazing caused environmental groups to sue the Forest Service over its management of grazing on the Chemult Pasture in early 2008. *Ctr. for Biological Diversity v. Wagner*, No. 1:08-cv-302-CL, 2009 WL 2176049 (D. Or. June 29, 2009) (R&R by Judge Clarke), *adopted*, 2009 WL 2208023 (D. Or. July 22, 2009). After the Forest Service decided to build a fence to exclude cattle from much of Jack Creek to protect OSF ("Frog Fence"), the court dismissed the plaintiffs'

² The AR designated as "Sept. 2008 AR" is from *Ctr. for Biological Diversity v. Wagner*, No. 1:08-cv-302-CL; the "Feb. 2011 AR" is from *Or. Natural Desert Ass'n v. Sabo*, No. 1:10-cv-1212-CL; and "AR" is the Forest Service record for this case while "FWS" is the U.S. Fish and Wildlife Service record for this case. All of these were filed with the court in this case.

National Forest Management Act (NFMA) claim as moot and ruled against plaintiffs on their National Environmental Policy Act (NEPA) and Clean Water Act claims. *Id.* The court, however, noted its expectation that the Forest Service would complete a new environmental analysis and allotment management plan (AMP) in early 2010 to update the existing AMP from 1995, a process the agency had begun in 2007 but not completed. *Id.* at *12-13.

II. Subsequent Discoveries On The Pasture And Continuing Harm From Grazing Resulted In A Second Lawsuit.

Shortly after the *Wagner* suit, the Forest Service discovered numerous sensitive plant species on the Chemult Pasture that lived in wetlands known as fens, which were in high concentration on this pasture. Feb. 2011 AR 3683, 4217, 4733, 4877, 5135. The Forest Service's fen expert, Dr. Dewey, noted the remarkable number of rare plant sites and sensitive plant communities on the Chemult Pasture and that livestock grazing was generally the most evident detrimental disturbance in those particular wetland habitats. AR 1644. He also stated that "managers are required to ensure continued viability of these species throughout their ranges on National Forest System Lands." AR 1643.

In addition, cattle repeatedly trespassed behind the Frog Fence beginning immediately after construction of the fence. Regular sightings of cattle behind the Frog Fence occurred in 2008, 2009, and 2010 despite warnings to the permittee that it must maintain the fence and keep cattle outside of it. Feb. 2011 AR 2948-52, 2669-70, 3457, 3491, 3492, 3679, 4251, 4415, 4770, 4978, 4985, 4990, 4994-97, 5000, 5035, 5060, 5063, 5064, 5095. In light of the repeated trespass behind the Frog Fence, damage to rare fens and plants, and the Forest Service's continued failure to complete the NEPA analysis and AMP, Plaintiffs filed a new lawsuit against the Forest Service over management of the Chemult Pasture in late 2010. *Or. Natural Desert Ass'n v. Sabo*, 854 F. Supp. 2d 889 (D. Or. 2012).

In his Report and Recommendation in *Sabo*, which was adopted in full, Judge Clarke assessed claims under NFMA and NEPA similar to the claims here. *Id.* at 893, 901-24. His decision contained a lengthy discussion of the facts about administration of this grazing allotment, the Jack Creek population of OSF, the new sensitive plants and mollusks found on the allotment, and impacts of cattle on those resources. *Id.* at 901-09. He ruled for plaintiffs on three of their four claims. *Id.* at 915-25.

Judge Clarke stated that the Forest Service had violated NFMA because it had issued annual operating instructions (AOIs) for the allotment in 2008-2010 without completing biological evaluations to assess impacts of the grazing on sensitive species, as required by the Winema Forest Plan. *Id.* at 915-920. He also found that the Forest Service had violated NEPA by issuing AOIs that could cause irreversible damage to OSF and sensitive plants without completing the required supplemental NEPA analysis and revised AMP. *Id.* at 921-24.³ However, Judge Clarke denied injunctive relief, in part because the Forest Service had by that time completed the required biological evaluations and cut grazing from three months to two months for that season. *Id.* at 900. Nevertheless, he stated that he remained concerned about the unique environmental resources on the allotment, and expected the Forest Service to complete the NEPA and AMP process in a timely manner. *Id.*

III. Further Decline Of Resources And ESA Listing Of OSF Led To A Third Lawsuit.

Since the 2010 lawsuit, much more information has come to light about the special resources on the Chemult Pasture as well as damage to them from livestock. Scientists have learned more about the unique groundwater system that supports the fens and sensitive plants on the Chemult Pasture, and how fragile the fens are. Declaration of Dr. Michael Cummings ¶¶ 38-

³ Plaintiffs also won one of two claims related to a specific meadow within the Chemult Pasture that the Forest Service wanted to re-open to grazing. *Sabo*, 854 F. Supp. 2d at 920-21, 924-25.

50, 55, 67 (ECF # 12). Because these particular wetlands took millennia to develop, if they are destroyed, they are unlikely to return. *Id.* ¶¶ 55, 68. Dr. Dewey also conducted further research, finding that the Chemult Pasture contains a much higher density of fens and rare plants than any other place on the forest or even in Region 6 (Oregon and Washington). AR 2345, 2347-48, 9850-51. He stated that “I know of no other, even roughly similar concentration of fens anywhere else in USFS [Region] 6.” Pl. Ex. A (ECF # 88-1). Dr. Dewey also discovered that the water table below many of these fens dropped earlier and more significantly as drought conditions worsened from 2012 to 2015, suggesting that these fens “are particularly impacted by successive, drier than “normal” water years.” *Id.*; AR 2318-41, 6437-84, 9853-59.

The Forest Service’s assessment of fen conditions in 2010/2011 found that 14 of the 39 fens surveyed were not in good condition due to >10% soil disturbance, and that seven of eight fens in poor condition were in grazed areas while ten of eleven fens inside fenced exclosures were in good condition. AR 3927, 4118-121. Surveys in 2014 of the eight fens identified as “high value” showed conditions had deteriorated since 2011 at twelve of nineteen transects, and fifteen transects had >10% soil disturbance. AR 118-121. These fens are high value because they are the largest, wettest, and contain the most sensitive plant species. AR 4121. Plaintiffs’ expert also found degraded conditions at many fens on the Chemult Pasture due to cattle impacts in 2013 and 2014. Declaration of Theresa Simpson ¶¶ 43-53, Ex. 5 (ECF # 89)⁴; *see also* AR 2153-55, 3333-42, 7323-37, 8000-07 (photos and notes of degraded fens from 2011, 2012, 2014). Because of the damage cattle were causing to this unique “one-of-a-kind biophysical

⁴ Judge Clarke struck the Second Declaration of Theresa Simpson except for purposes of remedy because it was post-record evidence. R&R pp. 29-30. However, the first Simpson Declaration was filed in May 2014 and thus information in that declaration is part of the record for the 2015 AOI. Furthermore, Ex. 20 to that declaration consists of emails sent to the Forest Service in 2013 which were part of the record for the 2014 and 2015 AOIs.

resource,” Dr. Dewey recommended in 2012 that the agency permanently remove, entirely or to a very substantive degree, livestock and grazing from within the area of these groundwater-fed ecosystems. Declaration of Lauren Rule Ex. 34 (ECF # 11-34).

Furthermore, new OSF sites in Jack Creek were discovered in 2013. Simpson Decl. ¶ 81, Ex. 20; AR 5084. These sites were on the North Sheep Pasture south of the Chemult Pasture, more than three miles downstream of all other known occupied habitat, in an area called Davis Flat. *Id.* Egg masses were discovered in this area in 2014. AR 5091-92. But despite the newly discovered occupied habitat, the Jack Creek population of OSF remained very small, with just 24 egg masses found in 2013 and 2014 and only 18 found in 2015. FWS 2045; AR 10060-61.

OSF was listed as a threatened species under the Endangered Species Act (ESA) in August 2014, and the listing rule identified livestock grazing as a threat to the Jack Creek population, especially during low water conditions. FWS 2218, 2236. The lower part of Jack Creek is intermittent and does not have consistent streamflow during the summer, particularly in drought years. Simpson Decl. ¶¶ 87-88, Ex. 20; AR 5561, 6800. Because OSF are very aquatic and are almost always found in water, they concentrate in remnant pools as the creek dries out. FWS 2222, 2225. Low water conditions in Jack Creek results in frogs using fewer and smaller pools as the summer progresses, which are the same pools at which cattle congregate to drink and loaf. FWS 50-51, 54-55, 2235-36, 4700-19; AR 7507-10.

Cattle congregating at and damaging pools occupied by OSF was documented in 2013 and 2014 in lower Jack Creek, including the newly discovered site in Davis Flat. Simpson Decl. ¶¶ 118-125, Ex. 7, Ex. 20; AR 4286-87, 4288, 4333-35, 4396, 6832-52, 7034-125. Biologists were very concerned about low water levels in 2014 and 2015 and impacts to OSF in Jack Creek. AR 5561, 6105-06, 6183, 6800, 6895, 7130, 7145-49, 7225, 9093, 9304, 9631-32, 9638, 10339.

Cattle use at these intermittent pools in lower Jack Creek was mostly the result of trespass onto the North Sheep Pasture or trespass behind the Frog Fence. Simpson Decl. Ex. 20; AR 4333-35, 6832-52. The record shows that trespass did not abate after the prior case, with numerous sightings of cattle behind the Frog Fence and in Davis Flat, or grazing after the permitted season, from 2011 through 2014. Second Declaration of Jayne Goodwin Exs. 1-5 (ECF # 90); Simpson Decl. ¶¶ 94-96, 102-103, Ex. 20; Rule Decl. Exs. 22, 23; AR 2149, 2488-89, 2507-08, 3192, 3196, 3211, 3213, 3230, 3254, 3258, 3344, 3354, 3361-63, 4333-35, 4396-97, 4496-99, 6778-95, 7314-15, 8012-14, 8995-9001. The Forest Service issued two notices of noncompliance in 2011 due to unauthorized use behind the Frog Fence and after the permitted season was over, and noted repeated unauthorized use again in 2012 but failed to issue a notice of noncompliance that year. AR 2488-89, 2507-08, 3361-63. In 2013, the agency issued a warning letter in August and a notice of noncompliance in November due to numerous observations of cattle in unauthorized areas, including behind the Frog Fence and in Davis Flat. Rule Decl. Ex. 26; AR 4496-99, 4544-46. None of these notices resulted in changes to grazing use in the 2012-2014 AOIs. AR 2904-10, 3704-10, 5150-57.

More trespass occurred in 2014 in Davis Flat and behind the Frog Fence. AR 5291-97, 6151-58, 6375-79, 6771-73, 6816-19, 6905-06, 8995-9001. The Forest Service ordered the permittee to remove his cattle a month early, starting in late August, but cattle were still scattered around the pasture at the end of September. AR 6904, 7314-15. The agency issued a notice of permit violation at the end of the 2014 season that reduced the number of cattle that could graze the pasture by 42 cow/calf pairs for two years, but later softened the penalty to allow the normal number of cattle to graze and just shortened the season by two weeks in 2015. AR 8438-42, 10417-22.

The Forest Service still failed to complete the new NEPA analysis and AMP for the allotment. It issued a draft environmental impact statement (EIS) in December 2014 but has not issued a final EIS or record of decision. AR 8582. It did, however, complete consultation with U.S. Fish and Wildlife Service (FWS) on June 4, 2015 over impacts of grazing on the Jack Creek population of OSF and then issued the 2015 AOI. FWS 2011; AR 10417.

Plaintiffs now challenge the 2012-2015 AOIs under NEPA and NFMA claims similar to the prior case, and also challenge the new biological opinion by FWS. Judge Clarke, well familiar by now with the unique resources on the Chemult Pasture and the history of grazing problems there, issued a well-reasoned report recommending that Plaintiffs' claims be granted in part and denied in part. R&R p. 32. The report contained a thorough discussion of the facts in the record, including facts about the management of this allotment, the Jack Creek population of OSF and unique fens and sensitive plants found on the allotment, his prior cases concerning this allotment, and the repeated cattle trespass that has occurred since the last case. R&R pp. 2-7.

In his discussion of the legal claims, Judge Clarke first ruled in favor of Defendants on the NEPA claim, noting the agency's discretion in when to perform environmental analyses in the context of AMPs and its continued efforts to produce such NEPA documents. R&R pp. 9-13. He stated, however, that he recommended "a date of completion for the AMP and accompanying NEPA analysis commensurate with the current 'NEPA Planning Period' provided by the Forest Service in its response, which is 2016." R&R p. 13.

For the NFMA claim, Judge Clarke identified the Forest Plan provisions at issue and the relevant scope of review, and then discussed whether the Forest Service's decisions lacked rational support in the record. R&R pp. 13-19. Despite "genuine concerns as to whether the Forest Service has taken the degradation of fens into account, and the conditions of fens appear

to be demonstrably compromised,” Judge Clarke deferred to the Forest Service on Plaintiffs’ NFMA claim concerning the Forest Plan riparian directive. R&R p. 18. In contrast, he found that the Forest Service had not provided rational support for ignoring the impacts on sensitive species populations from cattle trespass, additional unauthorized grazing, and changing conditions in the relevant areas that were documented in the record, and thus did not defer to the agency on the NFMA viability claim. R&R pp. 15-19.

For the ESA claim, Judge Clarke found that some of Plaintiffs’ arguments lacked merit, but ruled for Plaintiffs on other arguments where the record did not support the biological opinion. R&R pp. 19-29. For these claims, Judge Clarke looked carefully at the biological opinion and the record to determine if there was scientific support for the conclusions in the opinion. Where there was, he ruled for Defendants and where there was not, he ruled for Plaintiffs, as appropriate under the standards of the Administrative Procedure Act (APA).

Finally, Judge Clarke recommended narrowly tailored injunctive relief for the NFMA viability claim. R&R pp. 30-31. He did not recommend unconditionally closing the Chemult Pasture, as Plaintiffs had requested. Instead, he recommended enjoining grazing there unless and until the AOIs reflect the actual grazing occurring and the impacts of that grazing on sensitive species, and until the Forest Service demonstrates that grazing will not impair viability of sensitive species populations on the forest. *Id.* He further recommended the Court retain jurisdiction to oversee compliance with those requirements. R&R p. 31. For the ESA claim, he recommended vacating the biological opinion and remanding to the agencies to re-initiate consultation. R&R p. 31.

Although Plaintiffs do not agree with some of Judge Clarke’s recommended rulings, they have not objected to those parts of his report. Instead, Plaintiffs recognize that Judge Clarke is

very familiar with the issues regarding the Chemult Pasture, thoroughly reviewed the record in this case, and wrote a well-reasoned decision supported by the facts. This Court should reject the objections raised by Defendants, and adopt Judge Clarke's report and recommendation in full.

ARGUMENT

I. JUDGE CLARKE MADE NO LEGAL OR FACTUAL ERRORS ON THE NFMA VIABILITY CLAIM.

A. AOIs Are Final Agency Actions That Must Not Impair The Viability Of Populations On the Forest.

The Forest Service's first objection under the NFMA claim is that Judge Clarke incorrectly applied the Forest Plan viability requirement at the project level rather than at the Forest-planning level. Def. Obj. at 12-15. This objection confuses the *geographic area* over which the agency considers viability of populations with *when* the agency must assess impacts to viability. The agency's post hoc explanation here that it did not need to consider impacts to population viability when authorizing grazing on the Antelope Allotment is contradicted by the documents in the record. These documents show that the agency *did* assess whether grazing on the Antelope Allotment would allow for viable populations of fish, wildlife, and sensitive plants to exist across the Forest.⁵ The Court must disregard the agency's post hoc rationalization offered in this litigation that contradicts the agency's own interpretation of the Forest Plan.

Humane Soc'y of the U.S. v. Locke, 626 F.3d 1040, 1049-50 (9th Cir. 2010).

As Judge Clarke explained, "[t]he Forest Plan provides that habitat *at the forest level* shall be managed to maintain viable populations of existing plants and wildlife." R&R p. 3, citing Sept. 2008 AR 113 (emphasis added). This same Forest Plan Standard states that

⁵ Plaintiffs have never argued, and Judge Clarke did not rule, that the project area for a particular agency action, such as a grazing allotment, must itself contain viable populations of species. Instead, the agency action cannot impair the viability of Forest-wide populations.

“[d]istribution of habitat shall provide for species viability and maintenance of populations throughout their existing range on the Forest.” Sept. 2008 AR 113.⁶ In describing “Forestwide Standards and Guidelines” such as the one here, the Forest Plan states that these standards apply to all management areas on the forest, and they state the bounds or constraints within which *all practices* will be carried out in achieving Forest Plan objectives. *Id.* at 104. Standards and guidelines are intended to mitigate effects, “to cause *an action* to become less harsh or severe. Mitigation is extremely important in the design and implementation of *all projects*. . . . The standards and guidelines describe what will and will not occur *in a particular area* to achieve the desired goal.” *Id.* (emphasis added). Thus, the viability Standard and Guideline is used to ensure that individual actions achieve the broader Fish and Wildlife Goals. Sept. 2008 AR 72, 113. Activities that degrade habitat and reduce key populations of species are not consistent with the Standard and Guideline to manage habitat to maintain viable populations of species throughout their existing range on the Forest, and therefore violate NFMA. 16 U.S.C. § 1604(i) (site-specific actions must be consistent with Forest Plans).

The Forest Service itself interpreted the viability standard to apply at the project level, not just at the Forest-planning level, by assessing viability in the botany and wildlife biological evaluations (BEs) prepared for the Antelope Allotment. The botany and wildlife BEs assessed impacts of grazing the Antelope Allotment, and included conclusions about whether that grazing would result in a loss of viability of sensitive plant populations or OSF. AR 4085-93, (impact determinations in Botany BE for sensitive plant species as to whether grazing was likely “to

⁶ Intervenor claims these provisions were just a “goal” of the Forest Plan, Int. Obj. at 16, but that is incorrect. The Plan includes this direction as Forestwide Standard and Guideline 4-1 for Fish, Wildlife, and Sensitive Plants. Sept. 2008 AR 104, 113. The Plan contains separate Goals for Fish and Wildlife that include managing habitat for the perpetuation and/or recovery of threatened, endangered, or sensitive plant and animal species, and providing habitat for viable populations of all existing native and desired non-native vertebrate species. *Id.* at 72.

cause a loss of viability of the population, or the species as whole”); AR 4906-07 (Wildlife BE conclusion that grazing the allotment would not cause loss of viability of OSF); *see also* AR 1643 (Forest Service’s fien expert stated that “managers are required to ensure continued viability of these species throughout their ranges on National Forest System Lands.”). If the agency did not believe it had to assess impacts to species’ viability at the project level, it would not have included these viability conclusions in the Antelope Allotment BEs.

The Forest Service’s post hoc explanation that it needs to consider impacts to species’ viability only during Forest planning is not supported by the cases it cites. In *Landwatch v. Connaughton*, this court held the Forest Service did consider the particular Forest Plan provision at issue “prior to issuing the [permit], as NFMA mandates,” but the Plan did not require the particular remedy Plaintiffs sought. 2014 WL 6893695, at *7-8 (D. Or. Dec. 5, 2014).

The two *Earth Island Institute* cases held that under the specific Plans at issue, monitoring for management indicator species (MIS) occurred only at the Sierra Nevada level, not the project level, to assess population viability or habitat distribution across the planning area. *Earth Island Institute v. U.S. Forest Serv.*, 697 F.3d 1010, 1014-18 (9th Cir. 2012); *Earth Island Institute v. Carlton*, 626 F.3d 462, 470-72 (9th Cir. 2010). The Plans in those cases specifically directed that MIS monitoring would occur only at the Sierra Nevada level, and thus the plaintiffs’ argument that monitoring should have occurred within the project area failed. *Id.* In contrast, where the Forest Plan did not specifically limit MIS monitoring to the planning level, the agency had to do that monitoring within the project area. *Earth Island Institute v. U.S. Forest Serv.*, 697 F.3d at 1013 (distinguishing *Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 932-33 (9th Cir. 2010)). The case here does not involve MIS monitoring, nor does the Winema Forest Plan specifically disavow the need to assess impacts of projects on species

viability, and thus the *Earth Island Institute* cases are unavailing.

The Forest Plan EIS provisions cited by Defendant also do not support its objection. Def. Obj. at 13. They simply note the geographic scope relevant to species viability—i.e., the Forest, or “planning area,” must contain viable populations. In other words, each project area does not need to contain a viable population. These provisions do not stand for the proposition the agency makes here: that there is no need to assess whether individual projects will reduce the viability of a species. As noted above, the standards and guidelines in the Winema Forest Plan are intended to ensure that individual projects achieve the goals and objectives of the Plan, and the BEs for the Antelope Allotment included such a viability assessment.

Indeed, the Forest Service’s post hoc explanation is not even supported by common sense. If the agency assesses impacts to viability of species only when it revises a Forest Plan, that assessment would occur only once every fifteen or more years. In the situation here, the Forest Service has not updated the Winema Forest Plan since 1990—more than twenty-five years ago. It is absurd to think that the agency is required to consider how to maintain habitat for viable populations of species at such an infrequent interval. Many sensitive species could be eliminated from the Forest entirely in that time. The documents in the record and common sense demonstrate that the Forest Service must assess whether individual agency actions will impair the viability of forest-wide populations. Judge Clarke correctly rejected the Government’s post hoc argument and interpreted the Forest Plan in line with the documents in the record.

Here, the particular agency actions at issue are the AOIs. The law is clear that each AOI is a grazing authorization and thus is a final agency action, which must be consistent with the Forest Plan. *Or. Natural Desert Ass’n v. U.S. Forest Serv.*, 465 F.3d 977, 979 (9th Cir. 2006); *Buckingham v. U.S. Dep’t of Agric.*, 603 F.3d 1073, 1077 (9th Cir. 2010); *Tidwell*, 599 F.3d at

934. Accordingly, the Forest Service had a duty to ensure that each AOI was consistent with the Forest Plan viability directive, as Judge Clarke correctly explained. R&R pp. 3-4, 14 & n.4.

B. The Record Does Not Support The Forest Service's Viability Conclusions.

The Forest Service and Intervenor take issue with Judge Clarke's ruling that there was no rational support for the agency's viability conclusions, but the record supports his decision.

First, Judge Clarke articulated the correct APA standard and scope of review for this claim, noting that an agency action is arbitrary and capricious if the agency fails to consider an important aspect of a problem or offers an explanation for the decision that is contrary to the evidence, or if it fails to articulate a rational connection between the facts found and the choice made. R&R pp. 8-9 (citing *Or. Natural Res. Council Fund v. Goodman*, 505 F.3d 884, 888-89 (9th Cir. 2007); *Friends of the Wild Swan, Inc. v. U.S. Fish & Wildlife Serv.*, 12 F. Supp. 2d 1121, 1131 (D. Or. 1997) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983))). With regard to the NFMA claim in particular, Judge Clarke acknowledged the *Lands Council v. McNair* case, contrary to what the Forest Service asserts, and in fact ruled against Plaintiffs on their riparian-directive claim based on *Lands Council*. R&R p. 18 (citing *Lands Council v. McNair*, 537 F.3d 987, 992 (9th Cir. 2008)). But he determined that for the viability-directive claim, the Forest Service's reasoning could not be sustained because it was irrational and not supported by the data, as explained in *Northwest Coalition for Alternatives to Pesticides v. EPA*, 544 F.3d 1043, 1052 n.7 (9th Cir. 2008). R&R pp. 15-19. *Lands Council* did not change the basic APA principle that an agency decision must be supported by a rational explanation and the facts in the record.

Judge Clarke noted that the AOIs were predicated on the findings in the BEs, which the Forest Service confirms in its objections. R&R p. 18; Def. Obj. at 16-21 (citing Wildlife BE and

Botany BE for viability analyses). The Botany and Wildlife BEs assessed the impacts of the current grazing management (Alternative 2) as well as several alternatives to that current grazing (Alternatives 3-5). AR 4030-37, 4798-4806. The AOIs at issue here continued the current management that was assessed under Alternative 2 in the BEs. *See* Def. SJ Br. at 28-29 & n. 10 (ECF # 92). Judge Clarke determined that the BEs' viability conclusions for the current grazing did not support the AOIs because they failed to account for the facts in the record showing significant cattle trespass, unauthorized use, and harm to habitat under the current management. Judge Clarke was not mandating a particular methodology for assessing current grazing, he simply determined that the agency's conclusions were not supported by the facts in the record.

With regard to OSF, the Wildlife BE explained that livestock grazing can have negative effects on OSF, particularly in low water conditions. AR 4838-41, 4851. It stated that the Jack Creek population is at "critically low numbers" and is isolated from the few other OSF populations on the Forest. AR 4842, 4854, 4856, 4906. It claimed that cattle trespass behind the Frog Fence was possible, but it would be of short duration, the chance of trampling frogs was slim, and therefore effects from it would be "negligible." AR 4863, 4866-68. Overall, the BE stated that the current grazing would maintain current conditions and may impact individual frogs, but would not likely cause a loss of viability of the Jack Creek population or the species. AR 4866-68, 4906-07.

The conclusions about effects to OSF were not supported by the facts in the record. As discussed above, cattle trespass behind the Frog Fence or into the Davis Flat/Yellowjacket area on the North Sheep Pasture was a repeated occurrence every year and biologists had documented impacts to OSF from these trespass cattle—impacts that were not "negligible." Feb. 2011 AR 2948-52, 2669-70, 3457, 3491, 3492, 3679, 4251, 4415, 4770, 4978, 4985, 4990, 4994-97, 5000,

5035, 5060, 5063, 5064, 5095; Second Goodwin Decl. Exs. 1-5; Simpson Decl. ¶¶ 94-96, 102-103, 114-125, Ex. 7, Ex. 20; Rule Decl. Exs. 22, 23; AR 2149, 2488-89, 2507-08, 3192, 3196, 3211, 3213, 3230, 3254, 3258, 3344, 3354, 3361-63, 4286-88, 4333-35, 4396-97, 4496-99, 6778-95, 6832-52, 7035-125, 7314-15, 8012-14, 8995-9001. Conflicts between cattle and frogs were particularly concerning during drought years of 2013, 2014, and 2015. Simpson Decl. Ex. 20; AR 4333-35, 5561, 6105-06, 6183, 6800, 6832, 6895, 7130, 7145-49, 7225, 9093, 9304, 9631-32, 9638, 10339. Ignoring the prevalence of and impacts from the extensive unauthorized use that was documented in the record meant the Forest Service did not accurately assess the impacts of its current management and therefore did not properly indicate the adverse effects of such grazing on the OSF population, as Judge Clarke stated. R&R pp. 18-19.

Furthermore, as Judge Clarke noted, the Jack Creek OSF population is already below a viable level. R&R pp. 16, 19; AR 4842, 4856. The BE did not explain why additional impacts to individual frogs will not further reduce the viability of the population when it is already at risk of extirpation due to its “critically low numbers” and isolation. R&R p. 16; AR 4842, 4854, 4906-07, 6955-57, 8918, 10382. Due to the small size of the population, ignoring the known adverse effects of trespass grazing, particularly during low water years, was particularly irrational. The Forest Service claims it has policies in place to deal with unauthorized grazing and has taken appropriate actions, Def. Obj. at 18, but the record shows that regardless of any such policies or actions, cattle trespass into OSF habitat continued to occur to each year. Loss of the Jack Creek OSF population would not maintain OSF populations throughout their existing range on the Forest. Sept. 2008 AR 113.

With regard to sensitive plant species, the Botany BE likewise concluded that grazing might impact individuals but would not cause a loss of viability of the population for a number

of species found on the Chemult Pasture. AR 4086-93. The BE listed the number of sites and acres where each species was found on the Pasture and on the Forest as a whole. AR 4021-22. As noted above, the Chemult Pasture contained a much higher concentration of these plants than anywhere else on the Forest or even in the Region. AR 2345, 4024, 9850; Pl. Ex. A. Impacts to the populations on the Pasture could certainly affect the viability at the Forest level.

The problem with the BE analysis is that, as Judge Clarke explained, it did not identify the current population sizes of the sensitive plant species or the habitat or population objectives that would maintain a viable population. R&R p. 16. The BE assumed that maintaining sites in good condition would maintain viable populations, without any information showing what quantity of habitat was necessary to support viable populations of each species. AR 4021-22, 4087-93. Simply knowing the number of sites or acres in good condition says nothing about whether those sites or acres are sufficient to maintain a viable population. For instance, *Ultricularia minor* has been found at twelve sites on the Chemult Pasture, and another four sites elsewhere on the Forest, and occupies a total of 7.4 acres of habitat. AR 4021. No information is provided about whether the population is currently at a viable level, or how much habitat is needed to sustain a viable population. *Id.* And the agency points to no further information in its objections, simply asserting that it considered effects and made rational conclusions for these species. Def. Obj. at 21.⁷ Thus, there is a lack of information to support the conclusions that maintaining the existing sites will provide enough habitat for viable populations. *Tidwell*, 599 F.3d at 933 (stating that agency must identify the quality *and quantity* of habitat necessary to support viable populations of each species). Accordingly, the agency's viability conclusions in the Botany BE lacked rational support.

⁷ The fact that two of the species were removed from the sensitive species list in July 2015 is irrelevant because that is not part of the record for the June 2015 AOI or any prior AOI.

Furthermore, the record shows that conditions of many fens, which is where these sensitive plants are found, declined during drought years. For instance, soil disturbance at the “high value” fens increased between 2011 and 2014, with fifteen of nineteen transects below “good” condition in 2014 due to >10% soil disturbance. AR 118-121. Because these high value fens contain many sensitive plants, damage to the fens would also damage the plant populations. AR 4118-4121 (showing sensitive plant species within fens). Indeed, monitoring the condition of high value fens is the Forest Service’s method for protecting sensitive plants and maintaining viability of populations. AR 4145-47. Other information in the record shows livestock damaged fens on the Pasture, particularly in 2013 and 2014 when drought was worse and fens were already compromised by dropping water tables. Simpson Decl. ¶¶ 43-53, Ex. 5; AR 2153-55, 3333-42, 7323-37, 8000-07; Pl. Ex. A. This data, which was not discussed in the Botany BE, further undercuts the Forest Service’s conclusion that the current grazing would not impair viability of sensitive plant species. In sum, the record supports Judge Clarke’s conclusion that failing to account for cattle trespass, additional unauthorized grazing, and changing conditions rendered the viability conclusions irrational and unsupported. R&R pp. 18-19.

C. The Record Shows That Each Of The AOIs Was Arbitrary And Capricious.

The Forest Service’s final argument regarding the NFMA claim is that the R&R did not establish that each of the 2012-2015 AOIs was unlawful. Def. Obj. at 22-25. Again, the record supports Judge Clarke’s ruling and contradicts the Forest Service’s argument.

First, the records of trespass behind the Frog Fence predate any of the challenged AOIs, going back to 2008, and continue through 2014. *See supra* pp. 3, 7 (listing AR cites of 2008-2010 and 2011-2014 trespass). In 2011, the Forest Service issued two notices of noncompliance for repeated instances of cattle trespass behind the Frog Fence and staying on the allotment past

the permitted season. AR 2488-89, 2507-08. In 2012, more trespass occurred but the Forest Service neglected to issue a noncompliance notice that year. AR 3361-63. In 2013, the agency issued a warning letter and a notice of noncompliance due to numerous observations of cattle in unauthorized areas, including behind the Frog Fence and in Davis Flat. Rule Decl. Ex. 26; AR 4496-99, 4544-46. These violations supported challenges to the 2012-2014 AOIs, which authorized the same grazing use each year. AR 2904-10, 3704-10, 5150-57.

More trespass occurred in 2014 in Davis Flat and behind the Frog Fence. AR 5291-97, 6151-58, 6375-79, 6771-73, 6816-19, 6905-06, 8995-9001. The agency claims that significant changes to grazing occurred in the 2015 AOI, but those changes did little to protect OSF. Def. Obj. at 24-25. The AOI shortened the season of use by two weeks, but still allowed the same number of cattle to graze. AR 10417-22. In 2014, the season of use was shortened by one month, but significant trespass and damage to OSF habitat had already occurred. AR 6904, 5291-97, 6151-58, 6375-79, 6771-73, 6816-19, 6832-52, 6905-06, 7034-125, 8995-9001. The other measures noted in Defendant's objections did not minimize trespass grazing behind the Frog Fence or into Davis Flat, which was the main cause of problems for OSF. Transfer of the Moffit private parcel and construction of the Moffit fence pertained to just a small part of Jack Creek, and was upstream of the areas in Lower Jack Creek and south that saw damage from trespass grazing. AR 4980. In fact, egg mass surveys from spring 2015, before the 2015 AOI was issued, showed that the number of egg masses had declined to just 18 in 2015, and none were found in the Moffit parcel that year. AR 5283, 10060.

Information about damage to fens spanned from 2010 through 2014 as well but none of the 2012-2015 AOIs contained any measures to protect fens. AR 1644, 2153-55, 3333-42, 4118-121, 118-121, 7323-37, 8000-07; Simpson Decl. ¶¶ 43-53, 63, Ex. 5; Rule Decl. Ex. 34 (damage

to fens); AR 2904-10, 3704-10, 5150-57, 10417-22 (AOIs).

Finally, the Forest Service relied on flawed viability conclusions from the Botany and Wildlife BEs to support each of the AOIs. The first BEs came out in 2011, and the Forest Service continued to rely on them until new versions came out in 2013, but they all contained the same flawed conclusions discussed above. AR 2011-12, 2023 (July 2011 Wildlife BE), Simpson Decl. Ex. 24 at 63-67, 93-94 (2013 Wildlife BE), 2042-43, 2058-65 (July 2011 Botany BE), AR 4021-22, 4086-93 (2013 Botany BE).

Accordingly, the information in the record supports Judge Clarke's conclusion that each of the 2012-2015 AOIs was arbitrary, capricious and in violation of NFMA.

D. Intervenor's Arguments Do Not Establish Any Errors By Judge Clarke.

Plaintiffs' responses to the Forest Service's objections address most of Intervenor's objections as well. Plaintiffs have shown: (1) the record lacked support for the agency's assertion that impacts from trespass grazing are "negligible," (2) the Wildlife BEs dating back to 2011 contained the same flawed assertion and viability conclusion, and (3) Judge Clarke did not create some new method for measuring "current grazing" but simply determined the agency did not accurately assess the impacts of that grazing. Int. Obj. at 13-16. As noted above, the viability directive was based on a Standard and Guideline, not just Forest Plan Goals, *see supra* p. 11 n.6, and Plaintiffs have pointed to ample evidence in the record demonstrating the Forest Service's conclusions that the AOIs were consistent with the direction to maintain viable populations of plants and animals throughout their existing range on the Forest lacked rational support. Int. Obj. at 16-19.

The only evidence to which Intervenor points to counter all of the evidence in the record about impacts to OSF from trespass grazing is the slightly increasing trend in the Jack Creek

population since 2008. Int. Obj. at 18-19. What Intervenor fails to recognize is that the population remained very small, much below a viable level, and thus any impacts from trespass cattle would further contribute to a decline in viability. The trampling of pools occupied by OSF in the Lower Jamison and Davis Flat areas in 2013 and 2014 are prime examples of impacts that would impair the viability of this population. Simpson Decl. Ex. 20; AR 4286-88, 4333-35, 4396, 6832-52, 7034-125. Finally, as explained above, *Lands Council v. McNair* does not excuse the Forest Service from providing rational support for its conclusions. Int. Obj. at 19-20. Judge Clarke used the appropriate standard under the APA, and correctly found that the record here lacked the necessary rational support for the agency's viability conclusions.

II. JUDGE CLARKE APPROPRIATELY FOUND THE BIOLOGICAL OPINION WAS FLAWED AND UNSUPPORTED IN SEVERAL WAYS.

Defendants filed no objections to Judge Clarke's ESA ruling. Plaintiffs therefore respond just to Intervenor's objections. As with the NFMA claim, Judge Clarke's decision ruled in favor of Plaintiffs on some issues and in favor of Defendants on other issues, overturning the portions of the biological opinion (BiOp) that did not have rational support.

A. Reliance On The Average 35% Utilization Standard Was Unsupported.

Intervenor attacks two of Judge Clarke's findings regarding the use of the average 35% utilization standard. First, Intervenor claims that the term was not vague because it is a term of art in grazing authorizations. Int. Obj. at 22-23. It is true that forage utilization standards are common in grazing authorizations to limit the amount of grazing allowed over the course of a grazing season. However, the normal Forest Service practice is to monitor an identified "key area" within a particular pasture at the end of the season to see whether livestock ate more forage during the season than what was allowed by the specific numeric utilization standard. *See* AR 3709, 4544. The problem with the BiOp is that the standard is an "average of 35% utilization

within all areas identified as Oregon spotted frog habitat.” FWS 2029. The BiOp did not explain where or how many key areas will be monitored other than stating generally they will be in riparian areas, meadows, and fens, nor did it explain how it will determine when an average of 35% utilization for all OSF habitat is met. FWS 2024.

There is an extensive amount of OSF habitat on the allotment, divided into various pastures, some of which is occupied by frogs and some of which is not. FWS 2020, 2046. Knowing the number and location of key areas and method of determining “an average of 35% utilization” is important for determining how effective the utilization monitoring would be at protecting OSF. Even reviewers of the draft BiOp questioned the meaning of the standard, but it was not clarified in the final. FWS 1397, 1402, 2024, 2029. Judge Clarke did not err in finding the term lacked sufficient detail to assess its effectiveness as a mitigation measure.

Second, Intervenor argues that Judge Clarke improperly found reliance on the 35% utilization standard was not supported by the record. Int. Obj. at 24-26. As Judge Clarke noted, the BiOp relied heavily on the average 35% utilization standard to protect OSF. R&R p. 20; FWS 2024, 2029, 2050-51, 2054, 2057, 2058-59, 2063, 2065. Yet, the BiOp provided “little explanation of . . . how the number was reached . . .” R&R p. 20. The 35% utilization standard is “rife with assumptions about potential OSF impacts, not a measure of grazing impact on OSF.” R&R p. 25. This is because, as support for use of the standard, the BiOp only cited two published studies that are completely unrelated to OSF, and an unpublished site management plan for Jack Creek that mentions the 35% standard with no scientific support. R&R pp. 20, 29; FWS 2051, 3422, 3427, 384. As Judge Clarke noted, the two studies used to support the standard were not conducted in ranges with OSF or dwindling OSF populations, and FWS did not explain how the ranges in the studies were similar to the range at issue here in order to

extrapolate the results of those studies to Jack Creek. R&R p. 29.

Instead, the record shows that OSF have different and specific habitat needs in different seasons, and a one-size-fits-all utilization standard does not account for the differences in those habitat needs. FWS 63-64, 2034-35. Nor does an average utilization standard adequately address the threats to this population. Even a few cattle can cause localized impacts that are significant for OSF. The BiOp recognized that OSF breeding sites have specific characteristics, which makes the availability of these unique sites limited, and adults may have limited flexibility to switch sites. FWS 2034. High fidelity to limited breeding sites means that OSF are “particularly vulnerable to modification of egg-laying sites (Hayes 1994).” FWS 2034, 2037. A cow that tramples a single egg-laying site could significantly reduce the population. FWS 2038. Such a risk is high because damage to a riparian area can begin to occur almost immediately upon entry of cattle onto a streambank, and use of riparian zones may be highest immediately following entry of cattle into a pasture. FWS 2051. Therefore, allowing “moderate to light” grazing by the entire herd over the course of a season would not prevent localized damage to breeding sites that could occur by just a few cows soon after they enter a pasture.

Nor would an average utilization standard that allowed overall moderate to light grazing by the herd prevent the adverse impacts from a small number of cows congregating at intermittent pools during low water conditions. This is a known and significant threat to the Jack Creek OSF population. FWS 7, 50-51, 54-55, 62, 2044, 2055; AR 4333-35, 4396-97, 7034-125; Simpson Decl. Ex. 20. The BiOp did not explain how an average utilization standard applied over a large area would prevent harm caused by just a few cows congregating at intermittent pools occupied by frogs in Jack Creek. The three documents cited in the BiOp to support the standard did not address these specific threats or how a utilization standard would minimize

them. FWS 3422, 3427, 384. Judge Clarke properly determined that the record did not support FWS's heavy reliance on the average 35% utilization standard to minimize threats to the Jack Creek population of OSF from the proposed grazing.

B. Private Land Conservation Measures Were Uncertain.

Intervenor also takes issue with Judge Clarke's finding that the private land conservation measures were not certain to occur. Int. Obj. at 26-27. Intervenor confuses two issues related to the private land inholdings. The BiOp first discussed the agreement between Intervenor and the Forest Service to turn over management of the private inholdings to the Forest Service. FWS 2018. If the private lands were not turned over to the agency to manage, the BiOp required that reinitiation of consultation occur. *Id.*

Separately, the BiOp also discussed an agreement that Intervenor and the Forest Service were "working on," which would define restoration objectives for the Riparian Unit pastures and when those objectives would be met. FWS 2026, 2049. FWS "anticipated" that the Forest Service and Intervenor would reach an agreement, and assumed that achievement of those objectives would meet the conservation needs of OSF. *Id.* Once habitat conditions were restored, grazing would occur in those pastures. FWS 2026, 2059. FWS improperly relied on these restoration objectives to minimize effects of grazing in the Riparian Unit pastures when there was no certainty the Forest Service and Intervenor would reach agreement or that the negotiated objectives would actually meet the conservation needs of OSF. Further, there was no requirement to reinitiate consultation if an agreement with appropriate objectives did not occur. FWS 2026. Judge Clarke was correct in finding that this particular mitigation measure was not reasonably specific, certain to occur, and enforceable. R&R pp. 20-21 (citing *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 807 F.3d 1031, 1045 (9th Cir. 2015)).

C. The Flawed Estimate Of Take Undercut The BiOp and ITS Conclusions.

Intervenor's last argument is that the BiOp provided a reasonable conclusion about how many OSF might be directly affected by grazing. Int. Obj. at 28-31. Judge Clarke properly rejected the BiOp's conclusions regarding the estimate of both lethal and non-lethal take, which drastically underestimated the effects of the grazing and thereby undermined the no-jeopardy and incidental take statement (ITS) conclusions. R&R pp. 24-29.

Intervenor's argument is incorrect because it merges the effects analysis in the BiOp with the incidental take monitoring requirement in the ITS. The main purpose of a BiOp is to determine whether the effects of a proposed action will jeopardize the survival and recovery of a species. 16 U.S.C. § 1536(a)(2). The effects of an action include both the direct and indirect effects to a species. 50 C.F.R. § 402.02. The BiOp evaluated indirect effects by assessing effects of grazing on OSF habitat, and then evaluated direct effects of livestock on individual OSF. FWS 2050-60. It used this analysis of indirect and direct effects as the basis of its no-jeopardy conclusion. FWS 2063. With regard to direct effects, the BiOp stated that "the effects to individual frogs are not likely to occur at such a level that results in extirpation of the frogs in the Jack Creek area" and "the take estimate likely overstates the number of affected Oregon spotted frogs. . . . Except during drought conditions, adverse effects to individual frogs from the proposed action are not believed to be substantial in the Jack Creek area." *Id.* Clearly, the estimated number of individual frogs affected by the action played a significant part in the no-jeopardy conclusion.

Next, the ITS adopted the number of frogs directly affected by the action as the estimated incidental "take" of OSF from the grazing, where "take" is defined as harm or harassment of OSF that likely injures it by significantly impairing or disrupting essential behaviors such as

breeding, feeding, or sheltering. FWS 2064-65. The ITS then identified a method to monitor whether the grazing exceeded the level of estimated take. FWS 2065. Because monitoring the number of frogs actually harmed or harassed by cattle is impractical, the ITS used the 35% utilization standard as a surrogate for monitoring take. *Id.* If the average 35% utilization standard was exceeded, the amount of incidental take authorized by the ITS would be exceeded and reinitiation of consultation would be required. *Id.*⁸ Due to the BiOp's flawed estimate of direct effects to frogs, the no-jeopardy and ITS conclusions were arbitrary and capricious.

In discussing the direct effects to OSF, the BiOp admitted that cattle can trample individual frogs or egg masses, or cause disturbance and/or displacement of frogs when grazing occurs in occupied OSF habitat. FWS 2056. Cattle may cause frogs to “move away from cover and other preferred microhabitats, experience increased predation risks, expend energy, and lose foraging opportunities,” which “may collectively adversely affect individual Oregon spotted frog fitness and population dynamics.” *Id.* Cattle also reduce the quantity of available water by drinking from the creek—15 to 20 gallons of water per day per cow, which increases conflicts between cattle and OSF. FWS 2055, 2057. Susceptibility of frogs to trampling and desiccation increases in low water years when livestock and frogs are using the same remnant pools. *Id.*

The BiOp then estimated the number of frogs that might be affected by the proposed grazing. It estimated that 3% of the population is likely to be killed by cattle trampling (lethal take) and used that figure as the total direct effect of the action. FWS 2059. The first problem is that there was no scientific basis for the 3% figure. FWS asserted that “a small percent” of frogs may be trampled and picked 3% out of the air to use as its estimate. FWS 2058-59. As Judge

⁸ The BiOp also noted in the effects analysis, that for the purpose of monitoring whether actual impacts exceeded the expected level of impacts, it would also use the 35% utilization standard. FWS 2059.

Clarke stated, the 3% trampling estimate “appears to be little more than a guess for which the record provides no scientific support” and therefore was arbitrary and capricious. R&R p. 24. Given the small size of the Jack Creek population, the difference between a 1%, 3%, or 5% trampling rate would be significant, yet each could be considered “a small percent” of frogs. Judge Clarke was correct in finding the 3% number arbitrary and capricious.

Second, by considering only frogs killed by trampling, the BiOp eliminated the direct effects to individual frogs in the form of disturbance or displacement explained above (non-lethal take). The likelihood of disturbance or displacement by cattle is much greater than actual death by trampling and omitting this direct effect seriously underestimated the total impact of the grazing on OSF. In fact, as Judge Clarke noted, draft versions of the BiOp included estimates of non-lethal take, which were much greater than the estimate of lethal take. R&R p. 25; FWS 1607, 1686. Whereas lethal take was estimated at 2 adults, 4 juveniles, 2 metamorphs, and 237 tadpoles, non-lethal take was estimated at 59 adults, 124 juveniles, 77 metamorphs, and 7663 tadpoles. FWS 1607, 1686. As Judge Clarke stated, the “unexplained omission of non-lethal take from the ultimate BiOp” was a “glaring flaw” that “arbitrarily hides the likelihood and amount of non-lethal take,” which results in less apparent loss of OSF due to the proposed grazing. R&R p. 25. Intervenor’s claim that the 35% utilization standard was a reasonable monitoring method has nothing to do with the flawed estimate of effects. *Id.*

The exclusion of non-lethal take undermined the no-jeopardy conclusion, which was heavily based on the flawed analysis of direct effects to frogs, as well as the conclusion in the ITS that “this level of anticipated take is not likely to result in jeopardy to [OSF].” FWS 2063, 2065. Judge Clarke determined that the severe underestimate of effects due to the omission of non-lethal take demanded revision of the jeopardy conclusion and re-assessment of the impacts

of grazing on the survival and recovery of the Jack Creek population and OSF as a whole. R&R pp. 27, 29; *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 527-29 (9th Cir. 2010).

Finally, Judge Clarke also correctly determined that use of the 35% utilization standard as the surrogate for monitoring take was unreasonable due to the lack of scientific support showing that the standard is related to the take of individual of frogs. R&R p. 29. As explained above, an average forage utilization standard applied to a large area is not sufficient for monitoring localized effects to individual frogs caused by a small number of cows congregating at pools and trampling or disturbing frogs. *Supra* pp. 22-24. Judge Clarke's findings that there was no rational support for many of the BiOp's assertions and conclusions were correct and well-reasoned, and should be adopted by this Court.

III. JUDGE CLARKE'S RECOMMENDED REMEDIES ARE APPROPRIATE.

A. Courts May Include Remedy In Summary Judgment Orders.

The Forest Service and Intervenor take issue with Judge Clarke including remedy in his R&R, but this was entirely appropriate and reasonable. Plaintiffs included a request for remedy in their opening summary judgment brief, as recognized by Judge Clarke, and provided argument and citations to evidence supporting that request in their opening and response/reply briefs. R&R p. 30 n.6; ECF # 88 at 34-35; ECF # 98 at 26-35. Defendants and Intervenor each had two briefs in which to respond to the remedy issue, and an opportunity to answer Judge Clarke's specific questions about remedy at oral argument. ECF # 92, 94, 101, 103, 104. Plaintiffs should not be penalized for Defendants' and Intervenor's failure to adequately address remedy.

There is no requirement under the Rules that Plaintiffs must separately move for injunctive relief to remedy legal violations found on summary judgment, and courts often include remedy in their summary judgment orders to most efficiently provide such relief. *See e.g. Or.*

Wild v. BLM, 2015 WL 1190131, at *1, 13 (D. Or. March 14, 2015); *Native Ecosystems Council v. Krueger*, 946 F. Supp. 2d 1060, 1101 (D. Mont. 2013); *Native Ecosystems Council v. U.S. Forest Serv.*, 866 F. Supp. 2d 1209, 1213, 1233-35 (D. Idaho 2012); *W. Watersheds Project v. Rosenkrance*, 2011 WL 39651, at *13-15 (D. Idaho Jan. 5, 2011) (all including remedy in summary judgment rulings). Indeed, a “district court has broad latitude in fashioning equitable relief when necessary to remedy an established wrong.” *High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d 630, 641 (9th Cir. 2004) (internal quotation omitted). Here, based on a plethora of information in the record and submitted by the parties as well as his experience with the issues concerning the Chemult Pasture, Judge Clarke recommended appropriate equitable relief to remedy the legal wrongs he determined had occurred. R&R pp. 19, 30-32.

B. No Further Facts Were Needed To Rule On Remedial Relief.

The record for this case contained ample information for Judge Clarke to rule on remedy. He noted the legal standards for injunctive relief with regard to the NFMA and ESA claims, and then determined the appropriate relief. R&R pp. 30-31. Although Judge Clarke did not include another lengthy recitation of the facts in his remedy section, he is familiar with the record and filings in this case as well as the prior two cases, all of which certainly informed his decision. Notably, for the NFMA claim, Judge Clarke did not agree to Plaintiffs’ request to close the Chemult Pasture unconditionally until the proper legal analyses are completed, but instead provided for grazing to occur if the Forest Service can show that the grazing will not impair viability of OSF or sensitive plant species. R&R p. 30.

The record contained plenty of information for Judge Clarke to determine that irreparable harm is likely in the absence of his recommended relief, and to balance the hardships and public interest. The Forest Service administrative record for this case is 11,826 pages and contained

extensive information about the Jack Creek population of OSF, the sensitive plant populations, and grazing impacts to those species, which were discussed in Plaintiffs' opening summary judgment brief. ECF # 88 at 2-10. In addition, all parties have filed numerous declarations in this case that discussed Plaintiffs' interests in the special resources on the Chemult Pasture, the harm to OSF and fens from livestock, the Forest Service's management of the Pasture, and Intervenor's interest in preserving grazing on the Pasture. Declaration of Dr. Michael Cummings (ECF # 12); Simpson Decl. (ECF # 13); Declaration of Dr. James Litts (ECF # 14); Declaration of Richard Nawa (ECF # 15); Declaration of Jayne Goodwin (ECF # 16); Declaration of Charles Wells (ECF # 17); Declaration of George Wuerthner (ECF # 18); Second Declaration of Theresa Simpson (ECF # 89); Second Declaration of Jayne Goodwin (ECF # 90); Second Declaration of Charles Wells (ECF # 91) (Plaintiffs' declarations); Declaration of Mike Lawrence (ECF # 26); Declaration of Jessica Dhaemers (ECF # 27); Declaration of David Weixelman (ECF # 28); Declaration of Benjamin Goodin (ECF # 97) (Forest Service declarations); Declaration of Keith Little (ECF # 20); Second Declaration of Keith Little (ECF # 32) (Intervenor declarations). The declarations of Keith Little specifically discussed the economic interests of Intervenor and the local Lakeview community in continuing grazing on the Chemult Pasture, which Intervenor pointed to in its summary judgment briefing. ECF # 103 at 25-26. Thus, Judge Clarke was aware of the facts related to both irreparable harm and the balance of hardships.

The Forest Service and Intervenor claim that Judge Panner's ruling on Plaintiffs' preliminary injunction motion in June 2014 should determine the outcome of this remedy, but that ruling did not consider subsequent information showing further decline of OSF and fens with sensitive plants, as well as more cattle trespass, not to mention the listing of OSF as a threatened species under the ESA. *See* AR 118-121, 8000-07 (fall 2014 fen monitoring showing

conditions had declined at high value fens), 10607-08, 11350-51, 11091-92, 11093-94 (2015 data showing poor conditions at fens), 10060, 10339 (OSF egg masses had declined to 18 in 2015), 9853-59 & Pl. Ex. A (water tables under fens dropped more quickly during drought in 2014, 2015), 5561, 6105-06, 6895, 7145-49, 9093, 9304, 9631-32, 9638 (water levels in Jack Creek very low in 2014 and 2015, causing concern for OSF); 6832-52, 7034-125 (cattle impacts at OSF pools in 2014), 6778-95, 8995-9001 (repeated cattle trespass behind Frog Fence and in Davis Flat in 2014); Second Simpson Decl. ¶¶ 3-15, 31-34, Exs. 3-4 (2016 declaration discussing water table data, fen degradation, harm to OSF); FWS 2218 (listing of OSF as threatened). This evidence added to the evidence provided by Plaintiffs' experts in May 2014, which Judge Panner largely ignored, about irreparable harm to fens and frogs from grazing the Chemult Pasture. Simpson Decl, Cummings Decl., Nawa Decl. In light of all the information provided by the parties, no further evidence is needed to rule on remedy here.

Moreover, if the Forest Service cannot demonstrate to the court that its future grazing authorizations consider the actual livestock use that will occur and the impacts of that use on sensitive species, and that such impacts will not impair the viability of OSF and sensitive plant populations, then the grazing *is* likely to cause irreparable harm. Activities that will not maintain viable populations of threatened and sensitive species are contributing to a loss of these populations, which harms Plaintiffs' interest in seeing and protecting them. *See W. Watersheds Project v. Bennett*, 392 F. Supp. 2d 1217, 1228-29 (D. Idaho 2005) (decline in population of sensitive species warranted injunction to stop grazing on 28 allotments). In other words, authorizing grazing that would not meet the requirements of the injunction would necessarily constitute likely irreparable harm. The recommended injunction is warranted to ensure such irreparable harm does not occur.

C. Judge Clarke Recommended Narrowly Tailored Relief For Each Claim.

The relief ordered here is not an extraordinary or draconian remedy. Judge Clarke narrowly tailored the remedy for the NFMA claim such that he simply requires the Forest Service to demonstrate that future grazing complies with the law before it can occur. And the remedy for the ESA claim is standard relief under the APA to vacate and remand an unlawful decision. This Court should adopt Judge Clarke's carefully crafted remedies given the wide discretion courts have to fashion equitable relief that will remedy the particular legal violations found. *High Sierra Hikers*, 390 F.3d at 641.

In addition to the fact that the record already contains ample evidence on irreparable harm and balance of hardships, the specific requirements of the NFMA remedy negate the need for submission of further evidence. Any evidence Defendants would submit to argue against irreparable harm from future grazing is the same evidence they can use to fulfill the injunction requirement. It is far more efficient to proceed forward and use any new evidence to try and establish that future grazing meets the remedy requirement rather than to have a whole new round of litigation that produces the same result. Judge Clarke's ruling simply requires the agency to show to the court that it is complying with the law before it can authorize grazing. Given the Forest Service's lack of compliance that has caused damage to resources over many years, it is not unreasonable to have oversight by the court to ensure such compliance occurs in the future. Plaintiffs suggest this Court assign Judge Clarke the task of supervising this remedy due to his familiarity with the issues and the allotment.

Finally, the ESA remedy is also appropriate because it is the standard remedy under the APA when a final decision is ruled unlawful. The APA states that a decision that is arbitrary and capricious and contrary to law "shall" be "set aside." 5 U.S.C. § 706(2)(A). Biological opinions that are found to be unlawful are normally vacated and remanded to the agency for reinitiation of consultation, as explained by Judge Clarke. R&R p. 31 (citing *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 839

F. Supp. 2d 1117, 1128 (D. Or. 2011), *Fla. Power & Light v. Lorion*, 470 U.S. 729, 744 (1985)). Judge Clarke noted that sometimes courts leave invalid decisions in place while the agency revisits the action, but determined that was not appropriate here because of the significant flaws in the BiOp. R&R p. 31. Again, this recommendation is appropriate because the BiOp severely underestimated the effects of the proposed grazing on OSF and heavily relied on invalid mitigation measures to protect OSF, each of which completely undercut the no-jeopardy and ITS conclusions.

In sum, Judge Clarke's recommended remedy is reasonable and narrowly tailored to address the particular legal violations at issue here, and no further evidence or litigation is warranted. This Court should adopt this remedy and assign Judge Clarke the role of supervising compliance with it.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court adopt Magistrate Judge Clarke's Report and Recommendation in a final order.

Dated: October 28, 2016

Respectfully submitted,

s/Lauren M. Rule

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