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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 CENTRAL OREGON  
BITTERBRUSH BROADS of the  
GREAT OLD BROADS FOR  
WILDERNESS,**

Plaintiffs,

v.

**DOUGLAS C. McKAY**, District Ranger,  
Paisley & Silver Lake Ranger Districts,  
Fremont-Winema National Forests, **BARRY  
L. IMLER**, Forest Supervisor, Fremont-  
Winema National Forests, **U.S. FOREST  
SERVICE**, **LAURIE SADA**, Field  
Supervisor, Klamath Falls Fish and Wildlife  
Office, and **U.S. FISH AND WILDLIFE  
SERVICE**,

Defendants.

Case No. 19-516

COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF

## INTRODUCTION

1. Plaintiffs Concerned Friends of the Winema, Klamath-Siskiyou Wildlands Center, Western Watersheds Project, Oregon Wild, and Central Oregon Bitterbrush Broads of the Great Old Broads for Wilderness challenge the U.S. Forest Service’s decision to expand cattle grazing in riparian habitat for imperiled species in south-central Oregon on the Antelope Allotment within the Fremont-Winema National Forest. These conservation groups also challenge the U.S. Fish and Wildlife Service’s (“FWS”) biological opinion that analyzed the impacts of grazing on a critically small population of Oregon spotted frogs, which are protected under the Endangered Species Act (“ESA”). The challenged decisions are arbitrary, and allow one private company to cause irreparable harm to irreplaceable natural resources on federal public lands.

2. For more than a decade, Plaintiffs, their members, and countless others have advocated for the Forest Service to protect imperiled species from the adverse effects of cattle grazing on the Antelope Allotment. An unprecedented concentration of unique and fragile wetlands, called fens, and almost the entire length of Jack Creek occur on the Antelope Allotment. These fens support an extraordinary diversity of sensitive plants and mollusks, while Jack Creek is habitat for a small and isolated population of Oregon spotted frog. Rather than protect these special resources, the Forest Service has continued to authorize livestock grazing on the allotment that its own monitoring and experts acknowledge is causing chronic damage and unacceptable impacts to these riparian areas and species. Mitigation measures—such as fences and water troughs—have not been effective at preventing cattle from harming the sensitive species and their habitat.

3. These long-standing resource conflicts and management problems were the basis of several prior lawsuits over the past ten years, with this Court holding twice that the Forest

Service's grazing authorizations for the allotment violated the National Forest Management Act ("NFMA") and the National Environmental Policy Act ("NEPA") due to the impacts to these sensitive resources. This Court also ruled FWS's biological opinion analyzing the impacts of grazing on Oregon spotted frogs was arbitrary and capricious. Despite these rulings and an injunction on grazing in 2017 and 2018, the Forest Service issued a new ten-year grazing permit and an Allotment Management Plan ("AMP") that exacerbate conflicts instead of solving them.

4. The new grazing plan expands grazing on the Antelope Allotment into exponentially more sensitive riparian areas and critical habitat for frogs, much of which had been closed to grazing for years. The Forest Service's Environmental Impact Statement ("EIS") and FWS's Biological Opinion supporting the new decision did not fully and adequately analyze the environmental impacts of the new grazing scheme, and continue to rely unreasonably on uncertain and unproven mitigation measures. The new decision also did not rectify the prior NFMA violations because the expanded grazing fails to ensure the viability of sensitive fen species and Oregon spotted frog.

5. These and other problems render the challenged decisions arbitrary and unlawful. Accordingly, Plaintiffs request that the Court set aside the ten-year grazing permit, AMP, EIS, ROD, and biological opinion, and order appropriate injunctive relief to remedy these violations.

#### **JURISDICTION AND VENUE**

6. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 because this action arises under the laws of the United States, including NEPA, 42 U.S.C. § 4321 *et seq.*, NFMA, 16 U.S.C. § 1600 *et seq.*, ESA, 16 U.S.C. § 1531 *et seq.*, the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, and the

Equal Access to Justice Act, 28 U.S.C. § 2412 *et seq.* An actual, justiciable controversy exists between the parties, so the requested relief is proper. 28 U.S.C. § 2201-02; 5 U.S.C. § 701-06.

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

8. The federal government waived sovereign immunity in this action pursuant to 16 U.S.C. § 1540(g)(1) and 5 U.S.C. § 702.

9. As required by the ESA, Plaintiffs provided FWS and the Forest Service notice of their intent to bring this action more than 60 days prior to filing this lawsuit.

#### **PARTIES**

10. Plaintiff CONCERNED FRIENDS OF THE WINEMA (“CFOW”) is an Oregon non-profit public interest organization that is based in Chiloquin. CFOW’s mission is to promote ecologically sustainable management practices on the Fremont-Winema National Forest. CFOW, on its own behalf and on behalf of its approximately 13 members, actively participates in Forest Service decisions concerning the management of public lands within the Fremont-Winema National Forest, including the Antelope Allotment.

11. Plaintiff KLAMATH-SISKIYOU WILDLANDS CENTER (“KS Wild”) is a non-profit public interest conservation organization based in Williams and Ashland, Oregon. KS Wild, on behalf of the organization and its members, works to conserve the outstanding biological diversity, ecological resources, native habitat, and hydrologic health of the Klamath-Siskiyou region in Southern Oregon and Northern California, including in the Fremont-Winema National Forest. KS Wild has participated in allotment management decisions and sought protections for sensitive species located there, and will continue to do so.

12. Plaintiff WESTERN WATERSHEDS PROJECT (“WWP”) is a non-profit organization based in Idaho, with staff and members in Oregon. WWP, as an organization and on behalf of its 9,500 members and supporters is dedicated to protecting and conserving the public lands and natural resources of watersheds in the American West. WWP actively monitors ecological conditions on the Fremont-Winema National Forest, participates in federal management decisions about grazing, and educates the public about grazing’s adverse effects.

13. Plaintiff OREGON WILD is a non-profit organization with thousands of members and supporters in Oregon and the Pacific Northwest. Oregon Wild and its members are dedicated to protecting and restoring Oregon’s lands, wildlife, and waters as an enduring legacy. Oregon Wild participates in management decisions concerning the Antelope Allotment and sought protections for sensitive species located there, and will continue to do so in the future.

14. Plaintiff CENTRAL OREGON BITTERBRUSH BROADS, GREAT OLD BROADS FOR WILDERNESS (“Great Old Broads”) is a broadband—a local chapter—of the non-profit conservation organization Great Old Broads for Wilderness. Great Old Broads is a national grassroots organization that is headquartered in Colorado, led by women, and engages and inspires activism to preserve and protect wilderness and wild lands. The local broadband is based in Bend, Oregon, and focuses on issues such as wild lands and wildlife protection, and engages its members and the public in outdoor activities and education in Central Oregon.

15. Plaintiffs and their members enjoy and will continue to enjoy the Antelope Allotment and surrounding area for recreational, spiritual, scientific, conservation, educational, and aesthetic purposes, in large part due to the plants, wildlife and other natural resources therein. Plaintiffs and their members have researched, studied, observed, and sought protection for sensitive species and habitat on the allotment, and will continue to do so.

16. Plaintiffs' and their members' interests have been and will continue to be directly harmed by Defendants' actions as challenged herein. Livestock grazing on the allotment degrades and adversely affects public lands, wildlife, and natural resources in the area, including Oregon spotted frogs and sensitive plant species, and thus impairs Plaintiffs' and their members' use and enjoyment of the area. The degraded conditions on the allotment and the Defendants' decisions that allow grazing to continue and expand in the area harm the Plaintiffs and their members. Defendants' unlawful decisions also adversely affect Plaintiffs and their members by denying them accurate and sound science, environmental analyses that fully disclose effects of the grazing, and other information that they seek to further their missions and interests in the area. Unless the relief prayed for herein is granted, Plaintiffs and their members will continue to suffer irreparable harm and injury to their interests.

17. Defendant DOUGLAS C. McKAY is sued solely in his official capacity as District Ranger, Paisley & Silver Lake Ranger Districts, Fremont-Winema National Forests. Mr. McKay signed and authorized the Forest Service's decisions to authorize grazing on the Antelope Allotment that are challenged herein.

18. Defendant BARRY L. IMLER is sued solely in his official capacity as the Forest Supervisor, Fremont-Winema National Forests. The Forest Supervisor is one of the officials legally responsible for administering NEPA and NFMA and has delegated authorized for carrying out the Secretary's responsibilities under those statutes.

19. Defendant U.S. FOREST SERVICE is an agency or instrumentality of the United States, under the U.S. Department of Agriculture, and is statutorily charged with managing the National Forest lands at issue here. The Forest Service issued the decisions that allow grazing on the Antelope Allotment that are challenged in this action. Defendants McKAY, IMLER, and the

U.S. FOREST SERVICE are collectively referred to as “Forest Service” herein.

20. Defendant LAURIE SADA is sued solely in her official capacity as the Field Supervisor, Klamath Falls Fish and Wildlife Office, which issued the Biological Opinion for the Antelope Allotment that is challenged herein.

21. Defendant U.S. FISH AND WILDLIFE SERVICE is an agency or instrumentality of the United States, under the U.S. Department of Interior. FWS is responsible for administering the provisions of the ESA with regard to threatened and endangered species, including Oregon spotted frog. FWS issued the biological opinion that is challenged herein. Defendants SADA and U.S. FISH AND WILDLIFE SERVICE are collectively referred to as “FWS” herein.

### **LEGAL BACKGROUND**

#### National Forest Management Act

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

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

24. The Winema National Forest Plan was adopted in 1990.<sup>1</sup> It established goals, objectives, standards, and guidelines for Forest Service actions, including range management.

25. For the range program, the Forest Plan set a goal of meeting the demand for livestock grazing “only when it does not conflict with other uses,” and an objective to enhance and improve the condition of riparian areas. The agency may only allocate forage for livestock after ensuring adequate forage exists for vegetation health and wildlife management needs.

26. For areas where grazing is permitted—known as allotments—the Forest Plan requires the Forest Service to prepare allotment management plans (“AMPs”) to meet Forest Plan objectives and specific resource goals. An AMP “[p]rescribes the manner in and extent to which livestock operations will be conducted in order to meet the multiple-use, sustained yield, economic, and other needs and objectives.” 36 C.F.R. § 222.1(b)(2)(i).

27. Through the AMP, the agency must consider factors such as the forage condition, suitability, and availability; resource needs; the permittee’s ability to self-monitor management and maintenance; economic factors, including development and maintenance of facilities; and wildlife needs. AMPs must include: a schedule for improvement of less than desired riparian conditions; actions needed to meet riparian objectives within a certain time; and monitoring.

28. The Forest Plan requires an annual operating plan to implement yearly management decisions for each allotment, including plans for salting, water use, and bedgrounds, and schedules for maintenance and monitoring of structural improvements. Maintenance must be completed before livestock are turned out on the range. The agency must “periodically”

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<sup>1</sup> The Fremont and Winema National Forests were administratively combined into a single National Forest, but are governed by separate Forest Plans issued before the merger. Although the Antelope Allotment includes lands on both the Winema and Fremont sections, the pastures at issue here fall within the Winema boundaries, so are governed by the Winema Forest Plan only.



conduct and document inspections “through the grazing season” for each allotment.

29. In addition to range management, the Forest Plan set goals, objectives, and standards to protect wildlife and improve riparian areas to enhance habitat. For threatened or sensitive species, the Plan set a goal of managing habitat to perpetuate and/or recover species. The Forest Plan requires the Forest Service to also “maintain viable populations of all existing native ...plant and animal species.” To do so, “[d]istribution of habitat shall provide for species viability and maintenance of populations throughout their existing range on the Forest.”

30. For soil and water management, the Forest Plan set a goal to maintain or improve riparian/wetland habitat for dependent wildlife and aquatic species. It also set objectives to meet that goal, including maintaining or improving riparian and wetland resources; monitoring Forest Plan implementation to determine if management practices alter key ecological features of riparian areas; and protecting habitat and hydrologic values of wetlands and riparian areas.

31. The Forest Plan set additional goals, standards, and guidelines for riparian management areas, which include parts of the Antelope Allotment. The purpose of this designation is to protect the soil, water, wetland, floodplain, wildlife, and fish resource values associated with the riparian areas, and to maintain or enhance existing conditions. During low water periods in Class II streams water use “shall be limited to emergency fire suppression situations only.” Livestock must not cause or perpetuate degradation of more than 5 percent of the banks in a stream reach.

#### National Environmental Policy Act

32. Congress enacted NEPA in 1969, directing all federal agencies to assess the environmental impact of proposed actions that significantly affect the quality of the environment. 42 U.S.C. § 4332(2)(C). NEPA’s goals are twofold: (1) to ensure that the agency has carefully

and fully contemplated the environmental effects of its action, and (2) to ensure that the public has sufficient information to participate in the decision-making process.

33. NEPA requires federal agencies to prepare, consider, and approve an adequate Environmental Impact Statement (“EIS”) for any major “Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C).

34. An EIS must rigorously explore a reasonable range of alternative actions and assess site specific, direct, indirect, and cumulative impacts. 42 U.S.C. § 4332(2)(C)(iii); 40 C.F.R. §§ 1502.14, 1502.16. It must include appropriate mitigation measures, and identify means to mitigate adverse impacts. 40 C.F.R. §§ 1502.14(f), 1502.16(h). Agencies must rely on high quality information and accurate scientific analysis, and ensure the professional and scientific integrity of the discussions and analyses in an EIS. 40 C.F.R. § 1500.1(b), 1502.24.

#### Endangered Species Act

35. Under ESA § 7(a)(2), all federal agencies must “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of [designated critical] habitat.” 16 U.S.C. § 1536(a)(2). Critical habitat contains the physical or biological features essential to the “conservation” of the species, where conservation means the point at which species no longer need the Act’s protection, *i.e.* recovery. *Id.* § 1532(5)(A), (3).

36. To evaluate the potential effects of an action on listed species and critical habitat, an action agency prepares a biological assessment. 50 C.F.R. § 402.12. If the action agency determines that the action is “likely to adversely affect” a listed species or critical habitat, it must seek formal consultation with FWS to obtain a biological opinion that determines whether the action is likely to jeopardize the survival and recovery of the species or adversely modify its

critical habitat. 50 C.F.R. § 402.14. During consultation, FWS must review all relevant information, evaluate the status of the species and critical habitat, evaluate the direct, indirect, and cumulative effects of the action on the species and its critical habitat, and use the best scientific data available. 16 U.S.C. § 1536(a)(2), (b)(3)(A); 50 C.F.R. §§ 402.02, 402.14(d), (g).

37. ESA § 9 prohibits “take” of endangered species, and FWS regulations expand that prohibition to threatened species. 16 U.S.C. § 1536(o)(2); 50 C.F.R. § 402.14(i)(5). “Take” includes direct harm or harassment of a listed species as well as habitat degradation that significantly impairs the species’ essential behaviors such as breeding, feeding, and sheltering. 16 U.S.C. § 1532(19); 50 C.F.R. § 17.3. If an agency action is likely to cause “take” of a listed species through harm or harassment, the biological opinion must include an incidental take statement (“ITS”) to permit take that is incidental to the action but will not jeopardize the species. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(g)(7). The ITS must specify the amount or extent of the impact on the species of any incidental taking, and contain mandatory terms and conditions to implement measures that are necessary or appropriate to minimize the impact of such taking. 50 C.F.R. § 402.14(i)(1).

## **FACTUAL BACKGROUND**

### **Rare Biodiversity Within the Antelope Allotment**

38. The Antelope Allotment is located on the eastern slopes of the Cascade Mountains on the Fremont-Winema National Forest in south-central Oregon. Lodgepole pine forests dominate the area, but unique wetlands are found on the west side of the allotment. These wetlands developed due to the particular geology, topography, and climate in the area.

39. Mount Mazama erupted about 7,000 years ago and left deep pumice deposits across the gentle slopes, which formed the bed of a shallow aquifer as soils built up over the

pumice. This aquifer is recharged each year with snowmelt that infiltrates the soil. Over millennia, these conditions produced an extensive complex of groundwater-dependent ecosystems comprised of wet meadows, riparian zones, wetlands, seeps, springs, bogs, and fens.

40. The climate of this part of Central Oregon typically includes warm, dry summers and wet, cool winters. Aquatic resources are scarce and thus serve as a valuable oasis for the species that depend on them. Snowmelt in springtime drives streamflow and controls groundwater recharge and storage, serving as the main source of water for soil and vegetation in the area. This makes water, soil, and vegetation resources particularly susceptible to drought and climate change, which is likely to reduce snow pack and shift snowmelt earlier in spring time.

41. The Antelope Allotment is nearly 170,000 acres, but contains only one perennial stream—Jack Creek—that flows through the west side pastures on the allotment—the Chemult Pasture and the North Sheep pasture. As it meanders south, its flows become intermittent in summer and fall, disappearing underground and reducing to pools in downstream reaches. The remaining streams on the allotment are intermittent or ephemeral and so only flow on a seasonal basis or shortly after precipitation events.

#### *Oregon Spotted Frog*

42. Jack Creek supports an imperiled population of Oregon spotted frog—the most aquatic of all native frog species in the Pacific Northwest that relies on aquatic habitat all year.

43. After disappearing from up to 90 percent of its range from Canada to the Klamath Basin, FWS listed the species as threatened under the ESA in 2014. Threats that contributed to its listing include wetland loss, drought-induced hydrologic changes, and livestock grazing.

44. Oregon spotted frogs have precise habitat requirements, making them particularly vulnerable to habitat degradation, especially at critical life cycle phases. Frogs breed in shallow

pools near flowing water and in wetlands at the edges of meadows, where they lay egg masses. Frogs show high fidelity to breeding areas and cannot travel far distances to find new sites, so the loss of a breeding site may harm reproduction. After emerging in shallow areas, tadpoles move to deeper water to rear and develop into juvenile frogs during summer, and then overwinter as adults in deep, well-oxygenated water. As water levels drop during summer, mortality increases, as frogs cannot survive outside of water for long or travel far to find new habitat. Low water leads to shallow pools that freeze overwinter, killing frogs that remain.

45. Nearly all of the aquatic habitat for the Jack Creek population of Oregon spotted frog is found on the Antelope Allotment. This includes approximately 500 of the 619 acres of ESA-designated critical habitat for the species that is found on the Forest. In the short time since the population was discovered in 1996, it has declined dramatically. In 2011, egg masses—a common gauge of population numbers—had fallen to just one percent of historical numbers. FWS found this decline coincided with years of drought conditions that were exacerbated by algal blooms, poor water quality, loss of protective habitat, and alteration of bank condition.

46. The Jack Creek population remains at critically low numbers, and is isolated from other populations in the Klamath Basin. The longer it remains so small, the more it is likely to experience genetic inbreeding, which reduces its chance of recovery. Small populations are also at elevated risk of extirpation from events such as extreme drought, floods, or predation.

47. The Jack Creek population has unique genes, inhabits the highest elevation and likely harshest habitat of all Oregon spotted frog populations. Many populations of the species were extirpated and most of the remaining ones are in decline, so the loss of the Jack Creek population would be a significant loss to the genetic diversity of the species.

*Fens and sensitive plants*

48. Due to the unique hydrogeology of the area described above, the Antelope Allotment contains a rare 500-acre wetland complex, comprised largely of fens. Fens are wetlands with groundwater tables near the surface, which slows the decomposition of plant material and produces high peat levels. The high concentration of fens on the Antelope Allotment is found nowhere else on Forest Service lands in the Pacific Northwest.

49. These groundwater dependent ecosystems are particularly vulnerable to drought or other conditions that lower water table levels and dry out soils. When groundwater drops—even by a few centimeters—fens can dry out and lose nutrients, which can lower peat levels, alter plant species diversity, and destroy their unique hydrological properties.

50. Soil disturbance—such as bare soil, compaction, pedestals, and channel erosion—can also dry out soils, destroy vegetation, and otherwise harm these fragile ecosystems. Fens take thousands of years to develop, so such damage or destruction is often irreversible.

51. Fens on the allotment provide habitat for several imperiled species—including mollusks (snails), vascular plants, and bryophytes (mosses and lichens)—that are protected as Forest Service Sensitive Species. Two of the mollusk species are found nowhere else in the world. These species depend on the unique characteristics of the fens, and thus destruction of the fens leads to loss of these species.

52. Most of the fens, including those with the greatest diversity of species, are found on the west side of the allotment in the Chemult Pasture. Fens and their sensitive species are disproportionately found in this area compared to the rest of the Forest.

53. Since 2010, the Forest Service has monitored certain fen sites on the allotment. Numerous sites, including high value fens, are in poor or fair condition, with extensive soil disturbance. The agency has also monitored water table levels at many fens, finding that water table levels dropped significantly as drought conditions worsened during 2012 to 2015, with many dropping below a crucial threshold—20 cm below the ground surface—which is known to lead to peat degradation.

### **The Past Decade of Resource Damage, Management Problems, and Litigation**

54. The Forest Service has historically authorized cattle grazing from July through September within the west side of the Antelope Allotment on the Chemult Pasture. This 63,000-acre pasture contains the northern portion of Jack Creek and its imperiled population of Oregon spotted frog, the highest concentration of fen habitat on the Forest, and numerous sensitive species.

55. For years, the Forest Service and others have documented that cattle grazing degrades riparian areas and adversely affects frogs, fens, and sensitive species within the Antelope Allotment. During the dry summer grazing season, cattle concentrate in riparian areas because the lodgepole forests that dominate the allotment contain little forage or water for cattle.

56. When cattle enter fens and riparian areas, they can quickly damage resources. Cattle increase soil compaction and disturbance by walking through wet soils, remove riparian and emergent vegetation, trample stream banks, reduce water quality through defecation or sedimentation, and lower stream levels and groundwater tables. These impacts degrade or destroy key habitat properties for frogs, fens, and sensitive species.

57. Cattle can also directly harm frogs when they wade in portions of Jack Creek that the species use for habitat. Cattle can trample, kill, or disturb frogs of all life stages. Dropping

water levels during the grazing season confine frogs to smaller and fewer pools, where cattle congregate to drink and loaf, displacing frogs and degrading their remaining habitat.

58. Over the years, the Forest Service attempted to manage cattle and reduce impacts through mitigation measures such as fencing, water troughs, cattle herding or removal, and notices of non-compliance. But these strategies largely failed to address the problems or prevent further harm. These resource conflicts spurred three previous lawsuits in this Court.

59. The first case, filed in 2008, challenged the Forest Service's authorization of livestock grazing and its adverse impacts to the Jack Creek population of Oregon spotted frog. *Ctr. for Biological Diversity v. Wagner*, No. 1:08-cv-302-CL (D. Or., filed Mar. 11, 2008).

60. That case led the Forest Service to construct a new fence to exclude cattle from part of Jack Creek to protect frogs, and to promise the Court it would update its AMP for the allotment by early 2010. This Court found these steps addressed the plaintiff's legal concerns. *Id.*, 2009 WL 2176049 (D. Or. June 29, 2009).

61. The new fence did not prevent access to the creek, however. In 2009 and 2010, cattle trespassed behind the Jack Creek fence where they grazed as often as 2-4 times per week, and grazed within sensitive fen habitat. Cattle were also degrading fens and recently discovered sensitive plants on other parts of the Chemult pasture.

62. When the agency failed to complete a new AMP and continued to allow grazing that was harming sensitive species, conservationists brought a second lawsuit in late 2010 challenging the agency's annual authorizations of grazing. *Or. Natural Desert Ass'n v. Sabo*, No. 1:10-cv-1212-CL (D. Or., filed Oct. 4, 2010).

63. In that case, this Court ruled that the Forest Service violated NEPA and NFMA when authorizing grazing in 2008-2010 without analyzing the impacts of livestock grazing on



the newly discovered sensitive fen species and Oregon spotted frogs. *Or. Natural Desert Ass'n v. Sabo*, 854 F. Supp. 2d 889, 915-24 (D. Or. 2012). This Court stated that plaintiffs had shown grazing each season was causing potentially irreversible harm to sensitive species and their habitat, and expected the agency to complete a NEPA and NFMA analysis that seriously considered these issues in a timely manner to prevent further harm. During this case, the permittee promised to increase its inspection of fences and herding of cattle to reduce cattle trespass through fences and use of unauthorized areas along Jack Creek.

64. Despite the ruling in *Sabo*, the Forest Service authorized grazing on the Antelope Allotment from 2012 to 2016 without completing a new AMP or NEPA analysis, and without making meaningful changes to its management. During that time, grazing impacts to sensitive species and management problems continued, compounded by several years of drought.

65. In 2013, a drought year, cattle trespass behind fences was frequent, and unauthorized use occurred repeatedly along Jack Creek. Cattle were found in this drought year using the same pools as frogs, drinking the limited water, trampling frogs, degrading water quality, destabilizing streambanks, and creating a high likelihood of frog mortality.

66. Installation of new fencing and water troughs in 2014 did not keep cattle out of Jack Creek, and further harm to frogs occurred during this second consecutive drought year. When FWS listed the frog as threatened under the ESA in August of that year, the Forest Service ordered the permittee to remove his cattle a month early, but cattle were still found throughout the allotment and in fens more than a month after the agency's order. Frog biologists expressed concerns these two years about frog mortality due to drought and low water conditions combined with the documented damage by cattle at occupied frog habitat.

67. Fens also suffered during the 2013-2014 period due to drought conditions and continued grazing pressure. Soil monitoring of fens revealed detrimental conditions that exceeded the desired condition of 10% or less soil disturbance at many sites. Some fens exhibited long-term cattle damage with deep postholes and pedestals from grazing on wet soils. Riparian areas with lesser impacts were largely those that were inaccessible to cattle. Water tables dropped below the 20 cm threshold earlier in the summer, exacerbating the drying effects of cattle disturbance to soils.

68. During this time, the agency made some progress with its NEPA process. However, it withdrew a final environmental assessment in April 2013, and announced in July 2014 that it would prepare a lengthier EIS instead. It finally issued a Draft Environmental Impact Statement (“DEIS”) in December 2014.

69. When the agency still had no new NEPA analysis or AMP done by spring 2014, a larger coalition of environmental groups filed suit again, raising similar resource concerns under NEPA, NFMA, and the ESA. *Concerned Friends of the Winema v. U.S. Forest Serv.*, No. 1:14-CV-737-CL (D. Or. May 2, 2014).

70. Subsequently, the parties stayed the case for a short period to allow FWS to finish analyzing the impacts of grazing on the newly listed Oregon spotted frogs in a Biological Opinion under the ESA. FWS issued a Biological Opinion in 2015 that concluded grazing would not jeopardize the continued existence of the species.

71. The Forest Service continued to authorize grazing that harmed frogs, sensitive plants and mollusks, and their habitats in 2015 and 2016. Monitoring of fens in 2015 and 2016 found problematic soil disturbance in several of the high value fens, downward trends at many sites, livestock trampling, and less than desired conditions in several wet meadows where

livestock grazed. The continuing drought in 2015 and cattle use of intermittent pools in lower Jack Creek caused further harm to frogs as well.

72. After the 2015 Biological Opinion came out, Plaintiffs supplemented their Complaint to challenge that Opinion in addition to the 2012-2015 grazing authorizations. This Court ruled for Plaintiffs, holding that the Forest Service violated NFMA by authorizing grazing in 2012-2015 without measuring accurately the current levels of grazing and its impacts on sensitive species populations to ensure that grazing was not impairing the viability of any populations. *Concerned Friends of the Winema v. U.S. Forest Serv.*, No. 1:14-CV-737-CL, 2016 WL 10637010, at \*16 (D. Or. Sept. 12, 2016), *report and recommendation adopted sub nom.*, 2017 WL 5957811 (D. Or. Jan. 18, 2017).

73. This Court also held that FWS's 2015 Biological Opinion violated the ESA. It found that FWS lacked scientific support for its reliance on the 35% utilization standard to protect frog habitat and as a surrogate for measuring take, and that FWS arbitrarily omitted estimates for non-lethal take—such as disturbing frogs and forcing them to flee key habitat—when assessing effects of the action. It held that the jeopardy conclusion was flawed due to the inadequate effects analysis and because it failed to discuss how the loss of the Jack Creek population would affect the species as a whole.

74. Given these serious legal violations and the irreparable harm that continued grazing would likely cause, this Court enjoined the Forest Service from authorizing grazing on the Chemult Pasture until it complied with NFMA, remanded the Biological Opinion to FWS, and ordered the agencies to re-initiate consultation under the ESA. *Id.* As a result, the Chemult Pasture was closed in 2017.

75. The Forest Service finally issued a Final EIS and draft Record of Decision (“ROD”) in November 2017. Although members of the public and the Plaintiffs objected, the agency refused to hold a resolution meeting to resolve their concerns.

76. In May 2018, the Forest Service issued its final ROD, and FWS issued a new Biological Opinion. Shortly thereafter, on the eve of the grazing season, the Forest Service issued new grazing decisions—an AMP and a term grazing permit.

77. The Forest Service asserted these new decisions unilaterally dissolved the existing injunction and allowed grazing in 2018, a position this Court promptly rejected. *Id.* ECF No. 140 (June 19, 2018). In December 2018, after another season of no grazing on the Chemult pasture, Judge Clarke issued a Report and Recommendation that recommended lifting the injunction. *Id.* ECF No. 148. The District Court agreed and lifted the injunction earlier this year. ECF No. 149.

### **The New Management Plan for the Antelope Allotment**

78. The new AMP and ten-year grazing permit substantially expand grazing in fragile habitat for imperiled species on the Antelope Allotment. The new grazing scheme includes new acreage on the west side of the allotment by adding the long-closed North Sheep pasture, which is just south of the Chemult pasture. By adding the North Sheep pasture, grazing will occur along several miles of the intermittent portion of Jack Creek, as well as within several additional fens, for the first time in fifteen years. The new decision also opens up Jack Creek and five riparian enclosures on the Chemult Pasture that were protected from grazing for at least 10 years, and assumes management of approximately 3,000 acres of the permittee’s private land inholdings on the Chemult pasture. With these new areas, the allotment increased from 147,114 to 168,565 acres.

79. Indeed, grazing of Oregon spotted frog habitat will increase nearly twentyfold, from 27 to 525 acres. This includes all 7 miles of Jack Creek, compared to just one mile under the prior AMP. The AMP directs the agency to “discourage” late season grazing in occupied Oregon spotted frog habitat, but fails to explain what it means to “discourage” grazing. Grazing in fen habitat will increase from 372 to 555 acres, which includes several fragile areas that have been excluded from cattle grazing for years.

80. The AMP and term permit authorize 275 cow/calf pairs on the Forest Service lands within the Chemult Pasture, and 494 cow/calf pairs on the North Sheep pasture. 219 cow/calf pairs are permitted on the private land inholdings within the Chemult Pasture. The land within the Chemult pasture that was behind the Jack Creek fence is now the Jack Creek unit, which has a limit of 75 cow/calf pairs. The grazing season is July 1 through September 30, although the AMP states actual on/off dates may vary up to two weeks.<sup>2</sup> This is the same season of use under the old management scheme.

81. The AMP explains that the new scheme will improve dispersal of livestock and management flexibility by increasing the amount of land grazed, using a deferred rotation system that alternates use of the Chemult and North Sheep pastures, and allowing periodic rest of areas. The AMP claims that this, in turn, will “minimize impacts” on riparian areas. Neither the AMP nor term permit provide additional details about when, where or how grazing strategies will be implemented each year. Instead, for the Chemult and North Sheep pastures, the AMP states that herd number and size, and permitted dates for each pasture, meadow, or unit will vary each year.

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<sup>2</sup> The AMP and permit also authorize grazing on more than 80,000 acres across several east side pastures—Antelope Flat 1-4, Halfway, North Willow, and Tobin Cabin. Grazing on those pastures is not at issue in this lawsuit.

82. Long-closed riparian exclosures on the Chemult Pasture that contain fens and sensitive species—Dry Meadow, Squirrel Camp, Rider’s Camp, Cannon Well, and Round Meadow—will have a “variable” number of cattle each year. For the Jack Creek Unit, grazing is authorized for the entire season, but the AMP claims it will “likely” be grazed for no more than one month. This unit includes four pastures, two of which are closed until unspecified resource objectives are met over 3-5 years, after which the agency may authorize late summer grazing there. The other two Jack Creek pastures will be grazed immediately, but may be later suspended.

83. The AMP states future decisions about grazing details will depend on completion of fencing, water developments, restoration actions, monitoring, and adaptive management, and will be made through annual authorizations. But in the ROD, the agency abandoned annual authorizations in favor of simple grazing bills that identify only the number and cost of cattle permitted for the entire allotment.

84. The new grazing scheme relies on mitigation measures to minimize impacts of livestock to fen and frog habitat. The new grazing scheme requires construction, reconstruction, or removal of more than forty miles of fences, and maintenance, reconstruction, or construction of 23 water developments. This infrastructure is intended to help control cattle and keep them out of riparian areas.

85. The AMP also includes a monitoring and adaptive management program as an additional measure to minimize impacts. It provides for annual monitoring of compliance with standards such as vegetation utilization (no more than 35% of forage can be grazed on key portions of the Chemult, North Sheep, and Jack Creek pastures), woody species use (no more than 40% use along Jack Creek), stubble height (6” of forage must remain along Jack Creek and

in fenced fens), and bank or soil alteration (cattle can cause no more than 20% bank alteration on Jack Creek and no more than 20% soil alteration in high priority fens and fenced areas).

Multiple years of violations must occur before the Forest Service would act—the AMP provides for excluding cattle after four years of utilization violations within meadows, three years of utilization violations within fens, and two years of utilization violations on Jack Creek.

86. The AMP also requires monitoring of water levels in Jack Creek, but relies on a vague and undefined standard of “effective water levels to support” frogs. The adaptive management strategy includes a low water management plan that requires cattle be fenced out if the perennial portion of Jack Creek becomes intermittent, if a key pool within the intermittent portion of Jack Creek drops below 1.5 feet in depth, or if grazing exceeds 35% utilization around the open water frog ponds on the Chemult pasture. The AMP does not specify who will do the monitoring of water levels or how often it will occur during the grazing season, noting only that action will be taken if field visits find low water conditions.

87. The AMP makes the permittee ultimately responsible for ensuring compliance with annual monitoring requirements and these various standards. The agency only plans to make informal inspections “as the opportunity arises” and formal inspections only “as possible.”

88. Finally, the AMP provides for monitoring of long-term ecological trends (e.g., streambank stability, plant composition, and stream width-to-depth ratios) and desired conditions in Jack Creek and high priority fens (less than 10% bare soil). Jack Creek must be monitored every 5-10 years, while high priority fens must be monitored every 1-5 years. The goal is to achieve desired conditions for all riparian areas, but the AMP does not include a schedule for improving those areas already in less than desired condition.

### **The Forest Service's EIS/ROD For the New Grazing Scheme**

89. To reach its decision about how to manage the Antelope Allotment, the Forest Service prepared an EIS that analyzed the environmental impacts of five alternative grazing management options. Two alternatives proposed to eliminate grazing on the allotment or just on the Chemult Pasture, while a third alternative proposed maintaining current management. The other two alternatives—one of which was the agency's preferred alternative—proposed to expand grazing into the North Sheep Pasture and the Jack Creek and fen riparian exclosures, and to put the private inholdings under Forest Service management.

90. In the ROD, the Forest Service combined elements from the two expanded grazing alternatives for its final grazing plan, which added a longer grazing season to the preferred alternative.

91. In rejecting the no grazing and reduced grazing alternatives, the agency claimed these alternatives were inconsistent with the Forest Plan and Congressional intent that grazing occur on lands identified in the Forest Plan as suitable for livestock grazing. The 1990 Winema Forest Plan found reliable data about the range condition of the Antelope Allotment was lacking, and required the Forest Service to determine whether forage was suitable for grazing when updating an AMP. The Forest Service failed to conduct a suitability determination for the 2018 AMP. The EIS and ROD also failed to acknowledge that the agency is not mandated by law to authorize grazing on all suitable lands

92. In dismissing other alternatives, the agency admitted that existing management of the allotment was not adequately protecting resource values. The EIS found season-long grazing on the Chemult pasture was causing chronic, long-term impacts to riparian areas and soil conditions in a way that was inconsistent with Forest Plan standards. The EIS also admitted the



no grazing or reduced grazing alternatives would significantly reduce impacts on imperiled species and resources and allow them to recover faster than the grazing alternatives.

93. The EIS and ROD concluded that increasing the allotment size and using a deferred rotation system will better distribute cattle across a larger area and thereby reduce impacts on riparian areas. The agency expected short-term concentrated impacts in some areas, but relied on longer periods of rest for recovery.

94. The EIS failed to include information from agency specialist reports that acknowledged adverse impacts would continue to occur under the new grazing system. The wildlife report admitted that under the new scheme, cattle will continue to concentrate in riparian areas where they may cause major impacts to riparian vegetation, streambanks, and soils. The botany report explained that even light grazing levels can degrade fens and cause exceedances of Forest Plan standards. The range report explained that under the permitted conditions—cow-calf pairs using unfenced riparian areas in summer—cattle resist herding and are attracted to wet riparian areas, which leads to poor distribution that can degrade resources quickly.

95. The EIS stated that new and repaired fences and water troughs and herding will be used to implement the deferred rotation system and ensure better distribution of cattle, thereby reducing impacts to sensitive resources. But the EIS reveals the agency must spend around \$32,000 on fencing, which it admits exceeds the agency's typical budget and may be unavailable. In addition, the permittee must spend about \$400,000 on fences, and more for herding, water hauling, and other work each year. The annual grazing value of the allotment is only about \$150,000. The agency did not explain how these numbers are consistent with the Forest Plan direction that range administration be "cost-effective" and the AMP be based on "economic factors."

96. When commenting on the draft EIS, the permittee stated that adding more fences is time and cost prohibitive, and a deferred rotation system is unattainable on the Chemult pasture. He admitted that it is a struggle to control and keep cows within authorized areas on the allotment.

97. The EIS did not fully and accurately disclose the repeated problems with cattle trespass behind fences in past years or explain why similar fencing to control cows would now be more effective, especially when the agency admits it will take several years to complete all of the fence and water trough work.

98. Likewise, the EIS did not disclose uncertainties about implementation of the monitoring or the effectiveness of the adaptive management plan. Similar monitoring and adaptive management strategies have been in place for years but have failed to protect and restore fen and frog habitat.

99. When discussing the viability of the Oregon spotted frog and the sensitive plants and mollusks found on the Chemult and North Sheep pastures, the EIS and ROD never identified what population sizes or amount of habitat is needed to maintain viable populations of these species. The agency did not identify whether those populations were currently at viable levels, even though reports and their status as sensitive species indicate they are not. These populations represent most found within the Forest, but the agency did not explain how the loss or injury of individuals within already imperiled populations would maintain their viability across the Forest.

100. Similarly, the EIS and ROD failed to explain why the new grazing plan would not adversely affect riparian areas, soils and sensitive plants when monitoring and expert reports reveal that: grazing in fens has caused significant soil disturbance and damage to sensitive plants for years; conditions need to improve to comply with Forest Plan standards; the new grazing

scheme will authorize grazing in eight high-value fens, five of which are currently not in good condition; five additional fens or meadows will be open to grazing that have not been authorized for use in many years; cattle are attracted to and concentrate in fens; and that even low levels of grazing can degrade these areas. The Forest Service's botany expert previously recommended that these fens be permanently closed to grazing because fences and other management techniques have failed to limit damage and disturbance within fens, but the agency has ignored that recommendation.

101. The EIS failed to identify many of the relevant Forest Plan provisions regarding riparian areas, soils, wildlife, sensitive species, range standards and AMP requirements, or to provide a rational explanation as to how the new grazing scheme will ensure compliance with them.

102. The EIS also lacks key information and analysis in its discussion of climate change. It disclosed precipitation trends from 2000-2010 that showed overall decreasing temperatures and increasing precipitation, but excluded more recent years of data that include significant and prolonged drought. The EIS considered the impact grazing may have on global climate change, but did not discuss how climate change and increased drought is likely to exacerbate the impacts of grazing on aquatic resources and species on the allotment that are vulnerable to impacts of drought.

### **ESA Consultation Over the Forest Service's New Grazing Decision**

103. Pursuant to this Court's order in *Concerned Friends of the Winema v. U.S. Forest Serv.*, FWS and the Forest Service reinitiated consultation over the new grazing scheme. The Forest Service submitted a new Biological Assessment ("BA") to FWS in December 2017, and FWS issued its Biological Opinion in May 2018.

104. In the BA, the Forest Service proposed the new grazing scheme as the action over which it was seeking consultation. As in the AMP, ROD, EIS and their accompanying documents, the Biological Assessment did not include key details about the proposed action. The Biological Assessment did not reveal how many and when cattle will graze each pasture, when that grazing would occur, or when all of the fencing and water troughs would be built, important information for assessing the impacts that could occur to key frog habitat on Jack Creek.

105. The Biological Opinion recognized the precarious state of the Oregon spotted frog and the Jack Creek population, finding that such small populations are particularly vulnerable to extirpation from stochastic events and that this population is particularly susceptible to harm from grazing during drought years when cattle congregate in pools that frogs inhabit. It also described a litany of adverse effects that cattle can cause to frogs and their habitat, including physically altering streams and riparian vegetation, degrading water quality and quantity, and disturbing individual frogs. It admitted that these effects can happen almost immediately after cattle enter riparian areas, and that riparian recovery after rest periods may be lost quickly if cattle reenter the area.

106. Despite the Jack Creek population's precipitous decline since its discovery in 1996 and its current critically low numbers, the Biological Opinion stated the population was relatively stable, with some potential for an upward trend, and the area meets the species' survival and recovery needs.

107. When assessing the effects of the proposed action, the Biological Opinion relied on the same assumptions the Forest Service made that fencing and distribution of cattle, compliance with standards, and the adaptive management plan would minimize the effects of grazing on Oregon spotted frogs and their habitat. The Opinion did not discuss the repeated

cattle trespass despite fences in prior years and why fencing would suddenly be effective at controlling cattle in the future. It also failed to discuss whether the monitoring and adaptive management plan laid out in the BA was certain to occur and to be effective given the lack of requirements about when and where the monitoring would occur and putting the responsibility on the permittee.

108. Similarly, the Biological Opinion continued to rely on the 35% utilization standard that the Court previously found lacked support. The new Opinion cited to additional studies that support the utilization standard as well as the bank alteration standard as indicators of general riparian health but it still lacked a rational explanation or support for why these standards will protect Oregon spotted frogs from the impacts of grazing, which are largely due to direct trampling and harassment that can occur quickly before 35% utilization and 20% bank alteration standards are exceeded.

109. The Biological Opinion also lacked site-specific information about the existing spotted frog habitat on the allotment and the documented impacts that have occurred to frogs from past livestock use. Instead, it relied on general assertions or studies that are inapplicable to the species and the landscape at issue.

110. With regard to direct impacts to individual frogs, FWS estimated the amount of lethal and non-lethal take that cattle will cause to Oregon spotted frogs. FWS found that up to 95 adult or subadult frogs and 273 juveniles or metamorphs would be killed each year, and that 169 adults or subadults and 484 juveniles or metamorphs would be harmed by non-lethal take each year. This equates to lethal take of 13.5% of the Jack Creek population and non-lethal take of 24% of the population each year. The Biological Opinion failed to explain how this persistent

level of yearly lethal and non-lethal take would allow the population to persist given its small size and susceptibility to increasing drought conditions and other stochastic events.

111. Despite these omissions in the effects analysis, the Biological Opinion agreed with the Forest Service that grazing is likely to adversely affect the Jack Creek frog population. It determined that these adverse effects would not jeopardize the survival and recovery of the species as whole, but as in the 2015 Biological Opinion, FWS did not discuss how the loss of the Jack Creek population would affect the species as a whole.

112. FWS disagreed with the Forest Service's conclusion that the new grazing scheme is likely to adversely affect critical habitat for Oregon spotted frog because the utilization and bank alteration standards would protect that habitat.

113. Finally, the Biological Opinion included an Incidental Take Statement ("ITS") that authorized take of Oregon spotted frogs caused by the proposed grazing. To determine when the authorized level of take is exceeded, the ITS relied on utilization and bank alteration standards, and >13.5% of frogs trampled as surrogates. No surrogate was provided to address non-lethal disturbance and displacement of individuals. The ITS Terms and Conditions relied on the water level monitoring of Jack Creek from the Forest Service's adaptive management plan, but did not impose monitoring requirements to ensure compliance with the trampling surrogate.

### **FIRST CLAIM FOR RELIEF**

#### **VIOLATIONS OF THE NATIONAL FOREST MANAGEMENT ACT**

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

115. This first claim for relief challenges the Forest Service's 2018 ROD, AMP and grazing permit that authorize livestock grazing on the Antelope Allotment in violation of NFMA, 16 U.S.C. § 1600 *et seq.*, and NFMA's implementing regulations. This claim for relief is

brought under the APA's provisions for judicial review of final agency actions, 5 U.S.C. § 706(2)(A).

116. NFMA requires the Forest Service to act consistently with direction in the applicable forest plan when authorizing any project or activity. 16 U.S.C. § 1604(i); 36 C.F.R. § 219.15. The Forest Service violated NFMA by issuing a ten-year grazing permit, an AMP, and a ROD that collectively authorize livestock grazing on the Antelope Allotment that is inconsistent with the Winema Forest Plan, including direction to:

- a. Maintain viable populations of Oregon spotted frogs and sensitive plants that depend upon fens, and manage habitat to perpetuate and recover these species;
- b. Meet the demand for grazing only where it does not conflict with other uses;
- c. Maintain or improve riparian and wetland habitat for dependent species;
- d. Ensure AMPs are consistent with Forest Plan objectives, enhance or improve riparian areas, include a schedule for improving less than desired riparian conditions, provide sufficient forage for wildlife, identify a permittee's ability to self-monitor management and maintenance, and consider economic factors; and
- e. Issue annual operating plans to implement annual management decisions.

117. Accordingly, the Forest Service's issuance of these final agency actions was arbitrary, capricious, an abuse of discretion, and not in accordance with NFMA, and is therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)(A). These NFMA violations harm Plaintiffs and their members and will continue to do so absent judicial review.

## SECOND CLAIM FOR RELIEF

### VIOLATIONS OF THE NATIONAL ENVIRONMENTAL POLICY ACT

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

119. This second claim for relief challenges the Forest Service's EIS and ROD for violating NEPA, 42 U.S.C. §§ 4321 *et seq.*, and NEPA's implementing regulations, 40 C.F.R. §§ 1500 *et seq.* This claim for relief is brought under the APA's provisions for judicial review of final agency actions, 5 U.S.C. § 706(2)(A).

120. NEPA required the Forest Service to take a hard look at the environmental consequences of authorizing livestock grazing on the Antelope Allotment before issuing a new ten-year grazing permit and AMP. The Forest Service violated NEPA in many ways.

121. First, the Forest Service arbitrarily assessed and dismissed the no grazing and reduced grazing alternatives by relying on an incorrect interpretation of the Winema Forest Plan and NFMA, and old and outdated information about the suitability of the Allotment for grazing. Further, the Forest Service created and selected a new alternative action in the ROD without disclosing the impacts of this new alternative or submitting it for public comment.

122. Next, the agency failed to take a "hard look" at all direct, indirect, and cumulative impacts from the action in the following ways:

- a. It failed to provide key details about the proposed action and the mitigation measures relied upon to minimize impacts;
- b. It failed to include accurate and adequate data about the environmental baseline conditions;
- c. It failed to accurately disclose and assess all impacts of the proposed grazing;



- d. It failed to include important scientific and factual information relevant to assessing the effects of the proposed action;
- e. It failed to provide an accurate assessment of whether the new grazing scheme is consistent with the Forest Plan.

123. These flaws violate NEPA and its implementing regulations. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1500.1(b), 1502.14(f), 1502.16(h), 1502.24, 1508.25.

124. Accordingly, the Forest Service's issuance of these final agency actions was arbitrary, capricious, an abuse of discretion, and not in accordance with NEPA, and is therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)(A). These NEPA violations harm Plaintiffs and their members and will continue to do so absent judicial review.

### **THIRD CLAIM FOR RELIEF**

#### **VIOLATIONS OF THE ENDANGERED SPECIES ACT**

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

126. This third claim for relief challenges the U.S. Fish and Wildlife Service's biological opinion covering impacts to Oregon spotted frog from livestock grazing on the Antelope Allotment for violating the ESA, 16 U.S.C. § 1531 *et seq.*, and its implementing regulations, 50 C.F.R. § 402 *et seq.* This claim for relief is brought under the APA's provisions for judicial review of final agency actions, 5 U.S.C. § 706(2)(A).

127. This third claim for relief also challenges the Forest Service's failure to fulfill its duties under the ESA to ensure against jeopardy and take of Oregon spotted frog by relying on that biological opinion. 16 U.S.C. §§ 1536(a)(2), 1538. This claim for relief is brought under the ESA's provision for judicial relief. 16 U.S.C. § 1540.

128. The 2018 Biological Opinion is arbitrary and capricious for the following reasons;

- a. It failed to fully and adequately describe the proposed action;
- b. It failed to adequately and accurately describe the environmental baseline conditions of Oregon spotted frog habitat on the allotment;
- c. It failed to adequately and accurately assess all direct and indirect effects of the proposed action;
- d. It relied on mitigation measures that are uncertain to occur, uncertain to be effective at protecting Oregon spotted frogs and their habitat, and unenforceable;
- e. It failed to assess adequately the impacts that grazing will have on the survival and recovery of the species for the jeopardy determination;
- f. It failed to rely on the best available science.

129. The ITS is also arbitrary and capricious because it relied on the Biological Opinion's unsupported and inadequate jeopardy analysis, inadequate surrogates, and inadequate terms and conditions to address the significant levels of take that will occur each year.

130. These and other flaws prevented FWS from accurately assessing the direct and indirect effects of the action on the species and its critical habitat, and determining whether the new grazing scheme will jeopardize the survival and recovery of the species.

131. These flaws violate the ESA and its implementing regulations. 16 U.S.C. § 1536(a)(2), 1536(b)(3)(A), 1536(b)(4); 50 C.F.R. §§ 402.02, 402.14. As a result, the Biological Opinion is arbitrary, capricious, and an abuse of discretion, and not in accordance with the ESA, and therefore is actionable pursuant to the APA, 5 U.S.C. § 706(2)(A).

132. By relying on a Biological Opinion that suffers from several legal flaws, some of which are due to inaccurate and inadequate information that the Forest Service provided in the Biological Assessment, the Forest Service has not ensured that grazing is not likely to jeopardize

the survival and recovery of the species, in violation of section 7 of the ESA. Because the Biological Opinion is invalid, the Forest Service also is liable for take of Oregon spotted frogs caused by its authorization of livestock grazing, in violation of section 9 of the ESA.

133. These ESA violations harm Plaintiffs and their members and will continue to do so absent judicial review.

### **PRAYER FOR RELIEF**

134. Adjudge and declare that the Forest Service's ten-year grazing permit, AMP, EIS, and ROD violated NFMA, NEPA, and/or their implementing regulations, and thus were arbitrary, capricious, an abuse of discretion, and/or contrary to law under the judicial review standards of the APA, 5 U.S.C. § 706(2);

135. Adjudge and declare that FWS's biological opinion violated the ESA and/or its implementing regulations, and thus was arbitrary, capricious, an abuse of discretion, and/or contrary to law under the judicial review standards of the APA, 5 U.S.C. § 706(2);

136. Adjudge and declare that the Forest Service is violating its duties under the ESA, 16 U.S.C. §§ 1536(a)(2), 1538, by authorizing livestock grazing without ensuring such grazing is not likely to jeopardize the continued existence of the Oregon spotted frog or adversely modify its critical habitat, and/or without causing unlawful take of Oregon spotted frog;

137. Vacate and set aside the agencies' decisions challenged herein—the ten-year grazing permit, AMP, EIS, ROD, and Biological Opinion;

138. Enjoin the Forest Service from authorizing livestock grazing on the Antelope Allotment until it has complied with NFMA, NEPA, ESA, and all other applicable laws;

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

140. Award Plaintiffs their reasonable costs, litigation expenses, and attorneys' fees associated with this litigation under the Equal Access to Justice Act, 28 U.S.C. § 2412 *et seq.*, the ESA, 16 U.S.C. § 1540(g), and all other applicable authorities; and

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

Dated: April 9, 2019

Respectfully submitted,

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