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

OREGON WILD, an Oregon non-profit corporation, **FRIENDS OF LIVING OREGON WATERS**, an Oregon non-profit corporation, and **WESTERN WATERSHEDS PROJECT**, an Idaho non-profit corporation,

Plaintiffs,

v.

CONSTANCE CUMMINS, Forest Supervisor, Fremont-Winema National Forests, **U.S. FOREST SERVICE**, a federal agency, **LAURIE R. SADA**, Field Supervisor, Klamath Falls Office, U.S. Fish & Wildlife Service, and **U.S. FISH & WILDLIFE SERVICE**, a federal agency,

Defendants.

Case No. 1:15-cv-1360

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(Environmental Matter – Endangered Species Act, National Environmental Policy Act, National Forest Management Act, Administrative Procedure Act)

INTRODUCTION

1. Oregon Wild, Friends of Living Oregon Waters, and Western Watersheds Project challenge the U.S. Forest Service ("Forest Service") and U.S. Fish and Wildlife Service ("FWS") for continuing to approve livestock grazing that impairs habitat for the endangered Lost River suckers (*Deltistes luxatus*) and shortnose suckers (*Chasmistes brevirostris*) on the Fremont-Winema National Forest. Shortnose suckers live in Gerber Reservoir and both species live in Clear Lake Reservoir within the Klamath Basin. These fish are endemic to this area and adapted to the naturally low and intermittent stream flows that provide water to these reservoirs. Adult suckers move from the lakes into tributary streams during high flow events in winter and spring to access spawning habitat, and adults and juveniles make their way back into the lakes before stream flows dry up.

2. The Fremont-Winema National Forest authorizes livestock grazing on allotments that contain designated critical habitat for shortnose suckers and/or are upstream of habitat for both species. The Forest also contains numerous water diversions and impoundments that reduce and alter timing of stream flows into Gerber and Clear Lake reservoirs. The combination of livestock grazing and water manipulation in these watersheds has a significant effect on suckers, degrading their instream habitat and reducing water levels in the reservoirs. These effects are compounded by climate change and recent and continuing severe drought in the Klamath Basin.

3. The Forest Service consulted under the Endangered Species Act ("ESA") with FWS in 2007 over effects to the endangered suckers of grazing on ten allotments; and consulted again in 2014 over grazing effects to newly designated critical habitat. Each of these consultations admitted that grazing has degraded sucker habitat, but allowed such grazing to continue based on their conclusions that grazing effects are smaller than those caused by

upstream water diversions and impoundments, and that grazing effects would be minimized by a monitoring plan first outlined in the 2007 consultation.

4. Plaintiffs challenge the 2014 consultation and assert that the agencies must reinitiate consultation over grazing effects on the species and critical habitat in light of evidence that: (1) the Forest Service has not fully implemented the monitoring set forth in the 2007 consultation; (2) monitoring it has conducted shows poor riparian conditions and repeated noncompliance with grazing terms; and (3) grazing—combined with upstream water diversions and continuing drought—has an adverse affect on suckers and their habitat.

5. This same evidence shows that the Forest Service is violating the National Forest Management Act ("NFMA") by continuing to authorize grazing without showing how such grazing is meeting riparian management objectives, as required under the Forest Plan.

6. The Forest Service completed an environmental assessment ("EA") under the National Environmental Policy Act ("NEPA") in 2009 to analyze impacts of grazing on six allotments in the Lost River Basin. Although acknowledging in the 2009 EA that water diversions and impoundments occur in these watersheds, the Forest Service did not analyze the impacts to fish habitat of federally-authorized grazing combined with the impacts of this water management.

7. Plaintiffs thus challenge the 2009 EA for lacking an adequate cumulative effects analysis. Plaintiffs also assert that the Forest Service must conduct supplemental NEPA analysis to account for new information and changed circumstances since 2009, including the failure to conduct all expected monitoring, data showing poor riparian conditions and lack of compliance with grazing terms, and prolonged and increasingly severe drought in the Klamath Basin over the past several years.

8. Accordingly, Plaintiffs challenge the 2014 sucker critical habitat consultation, the 2009 EA, and 2013, 2014, and 2015 grazing authorizations as being arbitrary, capricious, and contrary to law under the Administrative Procedure Act. In addition, the Forest Service is violating the ESA by failing to reinitiate consultation over grazing on the allotments covered by the 2007 consultation and continuing to authorize grazing in reliance on the flawed 2014 consultation, and is violating NEPA by failing to conduct supplemental NEPA analysis of grazing in the Lost River Basin. Plaintiffs request that the Court issue declaratory and injunctive relief to remedy these violations of law.

JURISDICTION

9. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 because Plaintiffs' claims arise under the laws of the United States, including the ESA, 16 U.S.C. § 1531 *et seq*., NFMA, 16 U.S.C. § 1600 *et seq*., NEPA, 42 U.S.C. § 4321 *et seq*., APA, 5 U.S.C. § 701 *et seq*., the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq*., and the Equal Access to Justice Act, 28 U.S.C. § 2412 *et seq*. An actual, justiciable controversy exists between the parties, and the requested relief is therefore proper under 28 U.S.C. §§ 2201-02, 5 U.S.C. §§ 701-06, and 16 U.S.C. § 1540(g).

10. Venue is proper in this Court under 28 U.S.C. § 1391 and 16 U.S.C. § 1540(g)(3)(A) because all or a substantial part of the events or omissions giving rise to the claims herein occurred within this judicial district, two of the Plaintiffs and both Defendants reside in this district, and the public lands and resources at issue are located in this district.

11. As required under the ESA, Plaintiffs provided 60 days' notice of its intent to bring this action to the Forest Service, FWS, and the Secretary of Interior.

12. The federal government waived sovereign immunity in this action pursuant to 5

U.S.C. § 702 and 16 U.S.C. § 1540(g)(1).

PARTIES

13. Plaintiff OREGON WILD is an Oregon non-profit organization with approximately 10,000 members and supporters throughout the state of Oregon and the Pacific Northwest. Oregon Wild and its members are dedicated to protecting and restoring Oregon's lands, wildlife, and waters as an enduring legacy. Oregon Wild staff and members regularly use the Lost River watershed, particularly the Gerber and Willow Creek sub-watersheds, on the Fremont-Winema National Forest for recreational, scientific, aesthetic and other purposes, and will continue to visit these areas in the future. Oregon Wild has participated in management decisions concerning livestock grazing allotments in these watersheds and sought protections for species and habitat there, and will continue to do so in the future. Livestock grazing in these watersheds that impairs species, degrades habitat, and conflicts with recreational, scientific, and aesthetic use impairs the use and enjoyment of the area by Oregon Wild staff and members.

14. Plaintiff FRIENDS OF LIVING OREGON WATERS ("FLOW") is an Oregon non-profit public interest organization advocating for the protection and restoration of Oregon's waters. FLOW's mission is to help protect Oregon's rivers, watersheds, lakes, wetlands, and groundwater from the impacts of pollution and development, including the water quality degradation associated with livestock grazing. Headquartered in Grants Pass, Oregon, FLOW provides legal oversight of land uses affecting waters throughout the state, and educates the public on these issues. FLOW members use and enjoy the waters of the Lost River watershed, particularly the Gerber and Willow Creek sub-watersheds, for recreational, aesthetic, and education purposes, and will continue to visit these areas in the future. FLOW has participated in management decisions concerning livestock grazing allotments in these watersheds and sought

protections for species, habitat, and water quality, and will continue to do so in the future. Livestock grazing in these watersheds that degrades water quality and habitat and conflicts with recreational, aesthetic, and educational use impairs the use and enjoyment of the area by FLOW members.

15. Plaintiff WESTERN WATERSHEDS PROJECT ("WWP") is a non-profit organization headquartered in Idaho, with offices and staff in Idaho, Arizona, California, Oregon, and Wyoming. WWP is dedicated to protecting and conserving the public lands and natural resources of watersheds in the American West. WWP, as an organization and on behalf of its 1,200-plus members, is concerned with and active in seeking to protect and improve the wildlife, riparian areas, water quality, fisheries, and other natural resources and ecological values of watersheds throughout the West, including south-central Oregon. WWP staff and members use the Lost River watershed, particularly the Gerber and Willow Creek sub-watersheds, for recreation, scientific study, and aesthetic purposes, and will continue to do so in the future. WWP is active – and will continue to be active – in monitoring ecological conditions within these watersheds, and in publicizing the adverse ecological effects of grazing in this area. Livestock grazing in these watersheds that impairs species, degrades habitat, and conflicts with recreational, aesthetic, and scientific use impairs the use and enjoyment of the area by WWP staff and members.

16. Plaintiffs' interests have been and will continue to be directly harmed by Defendants' actions as challenged herein. Plaintiffs and their members have participated in relevant administrative actions and the public processes authorizing livestock grazing in these watersheds. Plaintiffs' members and supporters also visit these watersheds, and will continue to do so in the future; and their use and enjoyment of these areas has been impaired by livestock

grazing authorized by the Forest Service. Unless the relief prayed for herein is granted, Plaintiffs and the public will continue to suffer adverse and irreparable injury to their interests.

17. Defendant CONSTANCE CUMMINS is sued solely in her official capacity as Forest Supervisor of the Fremont-Winema National Forests. The Forest Supervisor is one of the officials legally responsible for administering NEPA, NMFA, and the ESA and for ensuring activities authorized by the U.S. Forest Service on the Fremont-Winema National Forests comply with NEPA, NFMA, and the ESA.

18. 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 grazing authorizations, ESA biological assessment, and NEPA environmental assessment that are challenged in this action.

19. Defendant LAURIE R. SADA is sued solely in her official capacity as Field Supervisor of the Klamath Falls Office of the U.S. Fish and Wildlife Service. The Field Supervisor is one of the officials legally responsible for administering the ESA and for ensuring decisions made by the Klamath Falls Office of the U.S. Fish and Wildlife Service comply with the ESA.

20. Defendant U.S. FISH AND WILDLIFE SERVICE is an agency or instrumentality of the United States, under the U.S. Department of the Interior. FWS is responsible for administering the provisions of the ESA with regard to threatened and endangered species, including bull trout. FWS issued the letter of concurrence that is challenged in this action.

STATEMENT OF LAW

Endangered Species Act

21. The ESA was enacted to "provide a means whereby the ecosystems upon which

endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such [] species." 16 U.S.C. § 1532(b).

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

23. Concurrently with listing a species as threatened or endangered, the Secretary also must designate the species' "critical habitat." 16 U.S.C. § 1533(a)(3). Critical habitat is the area that contains the physical or biological features essential to the conservation of the species and which may require special protection or management considerations. *Id*. § 1532(5)(A). "Conservation" means "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary"—i.e. the species is recovered. *Id*. at §1532(3). The essential physical and biological features, called primary constituent elements, include but are not limited to physical space; food, water, air, light, and minerals; cover or shelter; sites for breeding, reproduction, and rearing of offspring; and protected habitats. *Id*. § 1532(5)(A); 50 C.F.R. § 424.12(b).

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

25. If a proposed action "may affect" a listed species or its critical habitat, the action agency must consult with NOAA Fisheries or FWS – the "consulting agencies." 16 U.S.C. §

1536(a)(2); 50 C.F.R. § 402.14(a). FWS will be used hereafter, as it is the agency responsible for inland fish species such as Lost River and shortnose suckers. *See* 50 C.F.R. § 402.01. To fulfill its Section 7(a)(2) mandate, the action agency prepares a biological assessment ("BA") to evaluate the potential "effects of the action" on listed species and critical habitat and determine whether a species or its habitat is "likely to be adversely affected" ("LAA") or "not likely to be adversely affected" ("NLAA") by the action. *Id*. § 402.12.

26. Effects of the action refers to "the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline." 50 C.F.R. § 402.02. The environmental baseline "includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone [] section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process." *Id*. Cumulative effects are the effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area. *Id*.

27. For NLAA actions, the action agency may seek "informal" consultation with FWS. *See* 50 C.F.R. § 402.14(b). Informal consultation concludes with a Letter of Concurrence from FWS and is only appropriate when the BA or other information indicates that the action has no likelihood of adverse effect to the listed species or designated critical habitat. *See id*. § 402.13(a).

28. For LAA actions, the action agency must seek "formal" consultation with FWS, which concludes with the FWS issuing a Biological Opinion ("BiOp"). 50 C.F.R. § 402.14(a).

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

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

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

32. Throughout the consultation process, consulting agencies must utilize the "best scientific and commercial data available." 16 U.S.C. § 1536(a)(2).

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

34. An agency must re-initiate consultation whenever the amount or extent of taking specified in an ITS is exceeded, new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered, where the action in question is subsequently modified in a manner that causes an effect to the listed species

or critical habitat that was not considered in the BiOp, or where a new species is listed or critical habitat designated that may be affected by the identified action. 50 C.F.R. § 402.16(a)-(d).

National Forest Management Act

35. Congress enacted NFMA, 16 U.S.C. § 1600 *et seq*., in 1976 to govern the Forest Service's management of the National Forests. NFMA establishes a two-step process for forest planning and management. 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.

36. 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. *Id*. § 1604(i); 36 C.F.R. § 219.15. Each project or activity approval document must describe how the project or activity is consistent with applicable plan components. 36 C.F.R. § 219.15(d).

37. The Fremont Forest Plan was adopted in 1989. The Forest Plan established goals, objectives, standards, and guidelines for Forest Service actions and authorizations.

38. The Plan was amended in 1995 to incorporate the Inland Native Fish Strategy ("INFISH") standards and guidance with respect to riparian resource and fisheries protections. INFISH sets goals to maintain and restore water quality to the degree necessary to provide stable and productive riparian and aquatic ecosystems, stream channel integrity, and riparian and aquatic habitats to support native fish populations. INFISH standards and guidelines apply to all watersheds that contain "inland native fish."

39. INFISH establishes quantitative riparian management objectives ("RMO") for

pool frequency, large woody debris, bank stability, lower bank angle, width-to-depth ratio, and water temperature. Under INFISH standards and guidelines for grazing, the Forest Service must modify grazing practices that retard or prevent attainment of RMOs or are likely to adversely affect inland native fish. Grazing must be suspended altogether if streams still fail to meet RMOs after altering grazing practices.

National Environmental Policy Act

40. NEPA is our nation's "basic charter for protection of the environment." 40 C.F.R. § 1500.1(a). NEPA's primary purposes are to insure fully informed decision-making and to provide for environmental analyses and decision-making. *See id*. § 1500.1(b), (c).

41. NEPA requires that the decision-maker, as well as the public, be fully informed so that "environmental information is available to public officials and citizens before decisions are made and before action is taken." 40 C.F.R. § 1500.1(b).

42. An agency shall prepare an Environmental Impact Statement ("EIS") if a proposed action may have a significant impact on the environment. 40 C.F.R § 1501.4(a)(1). An agency may prepare an environmental assessment ("EA") to determine whether it needs to prepare an EIS. *Id*. § 1501. In the EA, the agency must disclose to the public sufficient information and analysis to determine whether the agency must prepare an EIS, or, in the alternative, may issue a Finding of No Significant Impact ("FONSI").

43. NEPA requires adequate disclosure of all environmental impacts, and specifically requires federal agencies to discuss the direct, indirect, and cumulative impacts of their proposed actions during the environmental review process. 40 C.F.R. §§ 1501.2(b), 1508.7.

44. The agency must disclose to the public "[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts." 40 C.F.R. §

1508.27(b)(7). A cumulative impact results from the incremental impact of the proposed action when added to other past, present and reasonably foreseeable future actions. *Id*. § 1508.7. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. *Id*. The agency cannot avoid significance by breaking down a proposed project into small component parts. *Id*. § 1508.27(b)(7).

45. The NEPA documentation must provide the decision maker and the public with adequate information, evidence and analysis to fully assess the potential impacts of the proposed actions. 40 C.F.R. § 1508.9. Environmental information of high quality must be made available to public officials and citizens before decisions are made. *Id*. § 1500.1(b). Accurate scientific analysis and public scrutiny are essential to implementing NEPA. *Id*.

46. An agency must prepare a supplement to a NEPA analysis if: (i) the agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. 40 C.F.R. § 1502.9(c)(1).

Administrative Procedure Act

47. The APA confers a right of judicial review on any person that is adversely affected by a federal agency action. 5 U.S.C. § 702. Upon review, the court shall "hold unlawful and set aside agency actions . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id*. § 706(2)(A). A reviewing court also shall "compel agency action unlawfully withheld or unreasonably delayed." *Id*. § 706(1).

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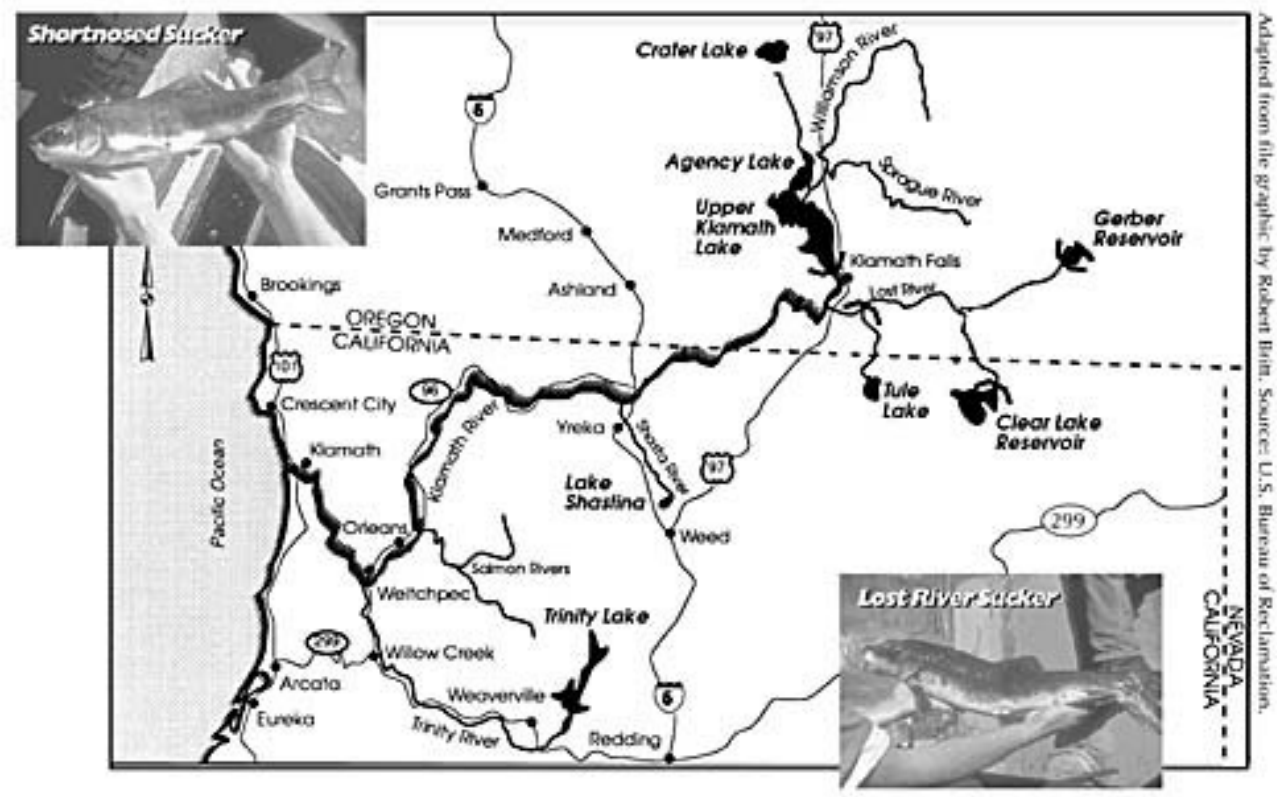
STATEMENT OF FACTS

I. Area of Interest and Listed Fish

A. General Description of the Area

48. The Lost River watershed is a closed basin within south-central Oregon and north-central California's Klamath Basin, and includes the subbasins of Gerber Reservoir in Oregon and Clear Lake Reservoir in California, as well as the Lost River itself. This watershed occurs east of the Cascade Mountains, and typically receives less than 30 inches of precipitation in a normal year.



49. The Gerber and Clear Lake subbasins contain a mix of National Forest, Bureau of Land Management, and private lands. With little land area above 6,000 feet elevation, the headwaters of Gerber and Clear Lake reservoirs accumulate little snowpack, and therefore most precipitation falls as rain during winter and spring months.

50. Several streams supply Gerber Reservoir with water, including Barnes Valley Creek, Lapham Creek, Long Branch Creek, Pitchlog Creek, Ben Hall Creek, Horse Canyon Creek and Dry Prairie. Streams within Oregon that supply water to Clear Lake Reservoir include East Willow Creek, North Fork Willow Creek, and Wildhorse Creek. Sections of all of these streams occur on the Fremont-Winema National Forest.

51. Some of those streams on the Forest, such as Lapham Creek, are perennial. Others, such as Barnes Valley, Long Branch, and Pitchlog creeks, are "interrupted perennial" – that is, some sections of the stream run subsurface during dry periods. Because of the dry climate and normal lack of snowpack, these and other streams on the Forest may dry out entirely during the summer or only retain remnant pools in certain sections.

52. Due to the dry climate, these two subbasins also contain numerous water diversions, dams, impoundments, and other water management facilities to irrigate lands and provide water for livestock. For example, there are numerous small reservoirs scattered on the Fremont-Winema National Forest and private inholdings throughout the Gerber Reservoir-Miller Creek and North Fork Willow Creek-Willow Creek watersheds that impound water in the headwater reaches of streams. These reservoirs capture and store water from spring runoff or spring rains, which alters the timing and velocity of flow in downstream reaches, and overall reduces downstream flows. Other smaller impoundments, check dams, and diversions also occur on streams and springs on both the Forest and private land within the Gerber Reservoir-Miller Creek and North Fork Willow Creek-Willow Creek watersheds that likewise capture and store water or divert water for irrigation or stockwatering.

53. The Klamath Basin, including the Lost River watershed, has experienced significant, severe, and prolonged drought over the last four years. The severe drought in 2013

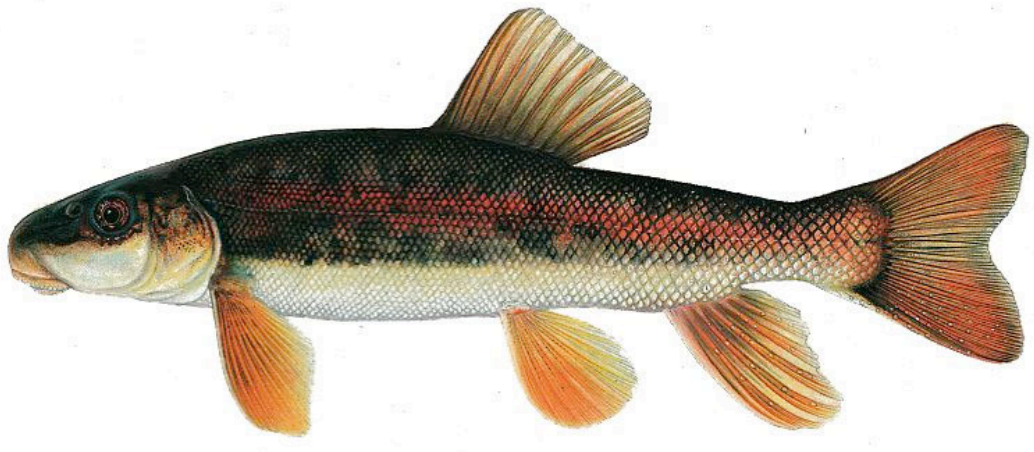
and 2014 created extremely dry conditions. At the end of 2014, Gerber Reservoir was just 1% full. Such low lake elevations have occurred only four years out of eighty-eight on record. These water levels were so low that irrigators received very limited water deliveries from the reservoir that year. Similarly, irrigators received no water deliveries from Clear Lake Reservoir in 2014 because it dropped to 6% full.

54. In early April 2015, snowpack in the Klamath Basin was at only 10%, and the National Resources Conservation Service predicts that spring and summer basin streamflows in 2015 will be 32–46% of average.

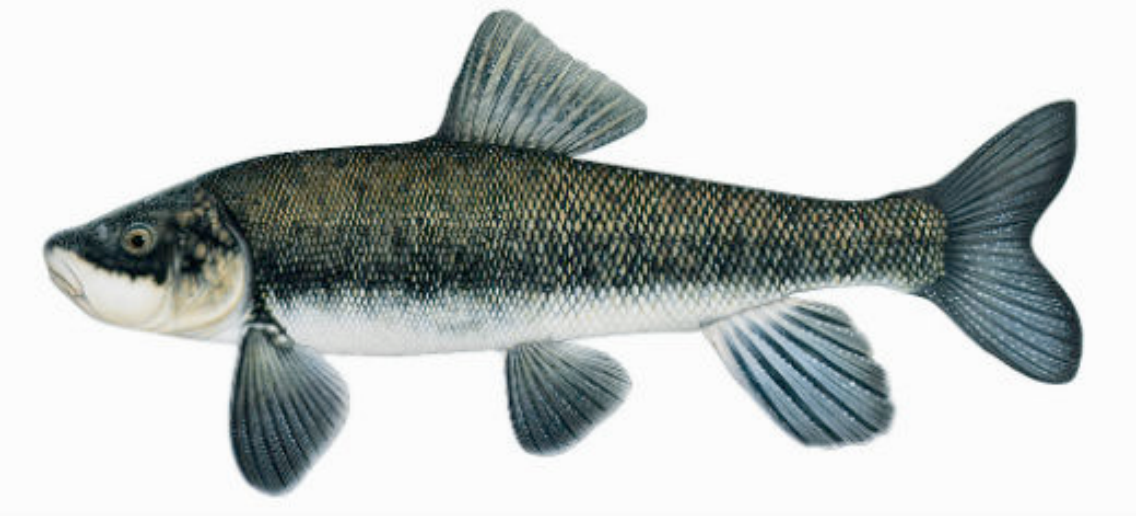
B. Suckers in the Gerber and Willow Watersheds

Status, Life History, and Distribution

55. Lost River and shortnose suckers are both large, long-lived, lake-dwelling fish endemic to the Klamath Basin. Lost River and shortnose suckers were federally listed as endangered on July 18, 1988 after dams, diversions, and dredging had reduced their range and numbers by 95%. 53 Fed. Reg. 27,130.



Lost River sucker (*Deltistes luxatus*)



Shortnose sucker (*Chasmistes brevirostris*)

56. The main factors contributing to population decline prior to listing included loss or degradation of spawning, rearing, and adult habitats, restricted access to spawning habitat, overharvest, and increased rates of mortality from entrainment in water management structures and severely impaired water quality.

57. Adult Lost River and shortnose suckers primarily occupy lake habitats, but use tributary streams for spawning. Spawning occurs from February through May, peaking between mid-April and early May. Females broadcast large numbers of eggs into gravel substrates at depths of less than four feet, where eggs hatch after one week. Larvae emerge from the substrate approximately ten days after hatching, and most quickly drift downstream into lake habitat unless low water flows prevent out-migration. This larval movement away from spawning grounds generally occurs between April and July.

58. Currently, the only remaining populations of Lost River and shortnose suckers occur in Upper Klamath Lake, Clear Lake, Gerber Reservoir, Tule Lake, the Lost River, and the Klamath River below Keno Dam. However, the populations in Tule Lake, Lost River, and Klamath River do not have sufficient access to spawning habitat to be self-sustaining and

therefore are considered "sink" populations.

59. The Upper Klamath Lake Lost River and shortnose sucker populations have had low recruitment for years, with no substantial recruitment to the spawning population since the late 1990's. Therefore, these populations continue to get older with fewer and fewer fish in younger age-classes and overall population sizes going down.

60. Less is known about sucker populations in Gerber and Clear Lake reservoirs, although some documented age class diversity indicates that these populations may be recruiting more successfully. Clear Lake contains both Lost River and shortnose suckers while Gerber Reservoir contains only shortnose suckers.

61. In the Gerber Reservoir-Miller Creek watershed, shortnose suckers primarily spawn in Barnes Valley Creek, which is the only tributary available during low water years, but spawning has also occurred in other streams such as Long Branch, Pitchlog, Wildhorse, and Ben Hall creeks. Clear Lake Reservoir suckers spawn in Willow Creek and its tributaries (including East Willow Creek and North Fork Willow Creek), and have been observed spawning at least twenty-nine miles upstream of the reservoir.

62. In addition to these lake-dwelling populations, there is evidence that stream-resident shortnose suckers occupy tributary streams to Gerber and Clear Lake reservoirs, including streams on the Fremont-Winema National Forest such as Ben Hall, Long Branch, Lapham, Barnes Valley, North Fork Willow, Horse Canyon, and Dry Prairie creeks. FWS has theorized that these stream-resident populations may become established when adult suckers become stranded in isolated pools after spawning, unable to return to the reservoirs due to rapidly decreasing water flows. There is very little information available regarding these stream-resident populations.

63. In 2013, FWS estimated that the total range-wide adult population of Lost River suckers is 65,000–115,000 individuals, and less than 60,000 individuals for shortnose suckers.

64. FWS has identified two recovery units for Lost River and shortnose suckers: Upper Klamath Lake and the Lost River. The Clear Lake and Gerber Reservoir sucker populations account for two of four management units within the Lost River Recovery Unit; the other two are "sink" populations in Tule Lake and Lost River. FWS's recovery plan states that recovery cannot occur without viable populations in each recovery unit. To achieve recovery, FWS has prioritized restoring and enhancing spawning and nursery habitat, improving water quality, and increasing connectivity between populations.

Habitat

65. FWS proposed critical habitat for Lost River and shortnose suckers on December 1, 1994 but that proposal was never finalized. 59 Fed. Reg. 61,744. FWS finally published a revised proposed critical habitat designation on December 7, 2011, 76 Fed. Reg. 76,337, and finalized that rule on December 11, 2012. 77 Fed. Reg. 73,740. Although the final rule designated far fewer acres of critical habitat in the Lost River Basin than the 1994 proposed rule, it still designated 1,881 acres of critical habitat in the streams on the Fremont-Winema National Forest.

66. FWS has identified a number of habitat features important for sucker survival and recovery. Water quantity and adequate flows are a key element of sucker habitat – both in spawning tributaries and in lakes.

67. In the 2012 final designation of critical habitat, FWS determined the primary constituent elements ("PCEs") that are essential for Lost River and shortnose sucker conservation:

a. *Water*. Areas with sufficient water quantity and depth within lakes, reservoirs, streams, marshes, springs, groundwater sources, and refugia habitats with minimal physical, biological, or chemical impediments to connectivity. Water must have varied depths to accommodate each life stage: Shallow water (up to 3.28 ft (1.0 m)) for larval life stage, and deeper water (up to 14.8 ft (4.5 m)) for older life stages. The water quality characteristics should include water temperatures of less than 28°C (82.4°F); pH less than 9.75; dissolved oxygen levels greater than 4.0 mg per L; low levels of microcystin; and un-ionized ammonia (less than 0.5 mg per L). Elements also include natural flow regimes that provide flows during the appropriate time of year or, if flows are controlled, minimal flow departure from a natural hydrograph.

b. *Spawning and rearing habitat*. Streams and shoreline springs with gravel and cobble substrate at depths typically less than 4.3 ft (1.3 m) with adequate stream velocity to allow spawning to occur. Areas containing emergent vegetation adjacent to open water, provides habitat for rearing and facilitates growth and survival of suckers, as well as protection from predation and protection from currents and turbulence.

c. *Food*. Areas that contain an abundant forage base, including a broad array of chironomidae, crustacea, and other aquatic macroinvertebrates.

68. FWS has noted that adequate water flows during spawning months are critical to provide adequate spawning habitat and to reduce the probability of dewatering sucker eggs and stranding post-spawned adults in isolated pools. Higher tributary flows increase the magnitude of spawning, while inadequate flows reduce connectivity between reservoirs and spawning streams and increase vulnerability of the fish to drought.

69. Water depth in the reservoirs affects the amount of adult habitat available, and the

water quality within that habitat. In 1992, when Gerber Reservoir reached a minimum elevation due to drought (4,796.4 feet, less than 1% of its maximum capacity), federal biologists found that suckers within the reservoir showed significant signs of stress due to deteriorated water quality and reduced availability of habitat.

70. Reduced water flows also adversely affect cover for suckers. In lake environments, sufficient depths of open water provide needed cover. In streams, deep pools, undercut banks, and overhanging vegetation provide cover, all of which are dependent upon adequate water flows. In addition, inadequate flows or fluctuations in water levels may affect the ability of suckers to access refugia during periods of poor water quality.

71. In the 2012 final critical habitat rule, FWS noted that special management considerations or protections are needed to address water management in sucker habitat that causes fluctuations in water levels in both streams and lakes. These considerations included restoring degraded habitats to improve flow quantity and water quality in refugia, and maintaining or establishing riparian buffers around refugia to improve water quality.

Threats

72. As noted above, primary threats to Lost River and shortnose suckers include degradation of spawning, rearing, and adult habitat, poor water quality, and reduced water flows, which increase stresses such as disease, predation and competition by exotic species.

73. Nearly all streams in the upper Klamath Basin, including the Lost River watershed, have been degraded by the loss of riparian vegetation, geomorphic changes, introduction of nutrient-rich return flows from agriculture or drained wetlands, stream channelization, dams, and flow reductions from water diversions.

74. Water diversions and impoundments such as those found in the Lost River

watershed restrict or eliminate the ability of lake suckers to access spawning or rearing habitats. During low flow years, impoundments and diversions store or divert limited water so that downstream channels have very low stream flow or no flow at all. Low stream flows can also preclude movement of stream-resident fish and restrict them to isolated ephemeral pools.

75. Livestock grazing poses other threats to suckers and their habitat. In the 2012 designation of critical habitat, FWS noted that cattle have heavily grazed habitats such as floodplains, wetlands, rangelands and riparian areas throughout the Lost River watershed, resulting in the degradation of those areas. Such degradation includes removing riparian vegetation, destabilizing streambanks, widening stream channels and promoting incised channels, compacting soils and decreasing water infiltration rates, lowering water tables, and increasing erosion. These effects impair fish habitat by reducing hiding cover for fish, increasing water temperatures, increasing sediment, and reducing groundwater input to stream flows. Livestock that cross or wade in streams also add nutrients and pollutants by urinating and defecating in or adjacent to streams, further impairing water quality.

76. Poor water quality in the Upper Klamath Basin from livestock grazing and other activities is particularly associated with high abundance of blue-green alga, increased sediment, and increased nutrient loads. Also, nearly all streams within the Gerber Reservoir-Miller Creek and North Fork Willow Creek-Willow Creek watersheds have appeared on the State of Oregon's list of water quality impaired streams due to elevated stream temperatures.

77. Drought compounds the adverse effects of reductions in water quantity and quality on Lost River and shortnose sucker populations and habitat. In fact, FWS specifically noted that the primary threat to shortnose suckers in Gerber Reservoir is an extended multi-year drought that would result in low lake levels.

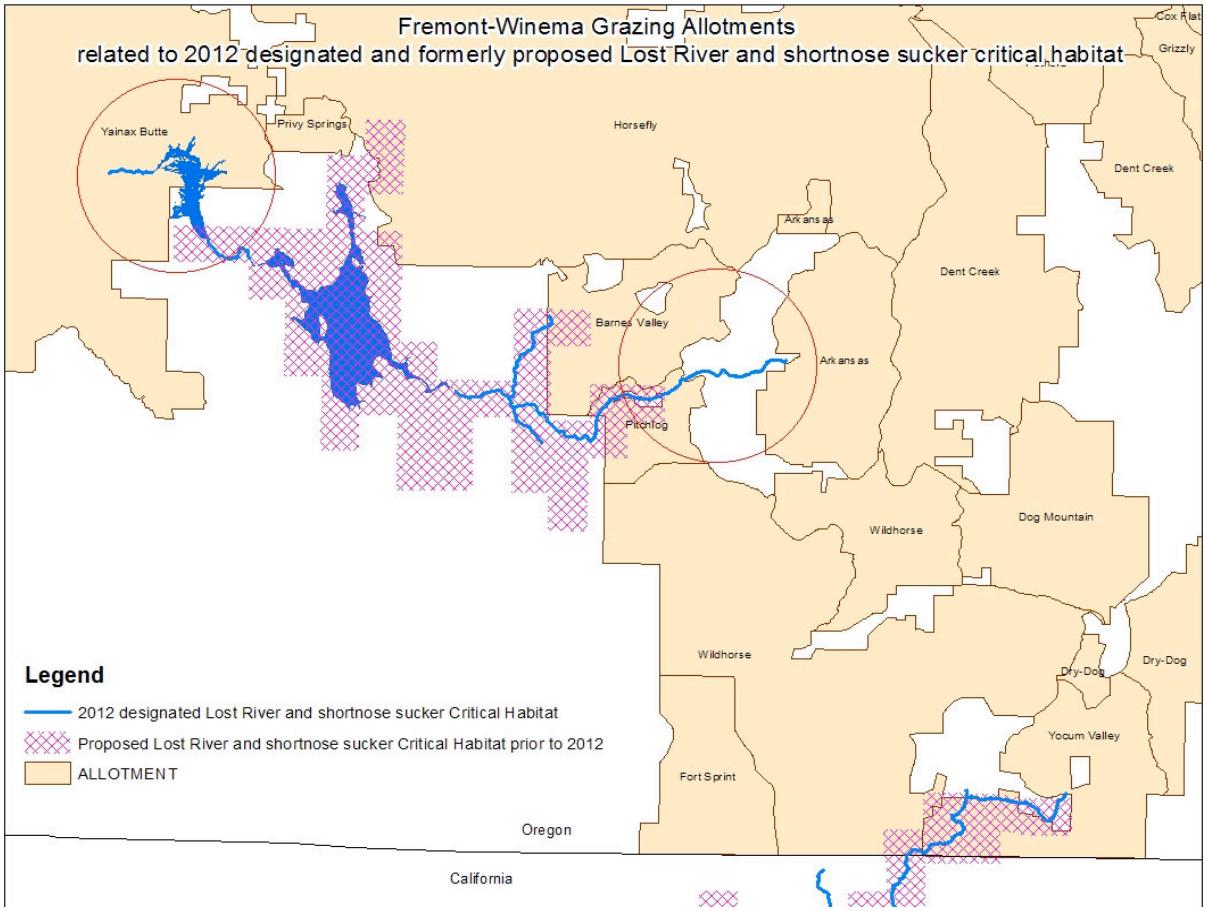
78. Such low water levels not only prevent access to spawning habitat, they also reduce fitness of suckers in the lakes. When previous low water years have reduced reservoirs to minimum levels, suckers within the lakes showed signs of stress, including low body weight, poor gonadal development, reduced juvenile growth rates, and high incidence of external parasites and lamprey wounds.

79. Climate change has a negative influence on suckers and their habitat due to altered precipitation patterns. Decreased snowfall, earlier snowmelt, and earlier peak spring runoff associated with climate change threatens sucker populations by reducing the amount of spring runoff and changing its timing, leading to reductions in water quantity and quality, the spread of disease and parasites, proliferation of invasive and nonnative species that could prey on or compete with suckers, loss of riparian vegetation, and loss of refugia habitat. FWS has stated that Lost River and shortnose suckers are highly vulnerable to these negative impacts from climate change, especially increased drought, due to the current lack of recruitment into the adult population of each species, the absence of population connectivity, poor habitat conditions, and diminished abundance.

II. Livestock Grazing Management and Impacts

A. Federal Grazing Allotments Containing Occupied and Designated Critical Sucker Habitat

80. The Fremont-Winema National Forest manages several federal livestock grazing allotments within the Gerber and North Fork Willow watersheds. Arkansas, Horsefly, Pitchlog, Yainax Butte, Wildhorse, and Yocum Valley allotments within these watersheds contain occupied and/or designated critical habitat for shortnose suckers.



81. Arkansas allotment contains Lapham Creek, which has occupied and designated critical habitat for shortnose suckers.

82. Horsefly allotment contains Long Branch Creek, which has occupied and designated critical habitat for shortnose suckers.[1]

83. Pitchlog allotment contains Barnes Valley Creek, which is occupied and designated critical habitat for shortnose suckers.

84. Yainax Butte allotment contains occupied and/or designated critical habitat for shortnose suckers within Dry Prairie and Horse Canyon Creek.

85. Wildhorse allotment contains North Fork Willow Creek, which has occupied and

[1] Horsefly allotment was administratively combined with Barnes Valley allotment following a 2009 NEPA analysis.

designated critical habitat for shortnose suckers. Designated critical habitat for shortnose suckers also occurs .5 miles downstream of the boundary of this allotment in Wildhorse Creek.

86. Yocum Valley allotment contains occupied and designated critical habitat for shortnose suckers in North Fork Willow and East Willow creeks.

87. The Forest Service generally authorizes grazing or trailing annually on the six allotments mentioned in ¶¶ 78-84, including through permits and Annual Operating Instructions ("AOIs"). Livestock grazing or trailing has been authorized annually on Arkansas, Horsefly, Wildhorse, Pitchlog, and Yocum Valley allotments since 2007. Livestock grazing was authorized on Yainax Butte allotment in 2007–2011, then again in 2013–2015. Permitted or authorized numbers of cattle vary by allotment, but generally range from 47 to 550 cow/calf pairs per allotment. Season of use also varies by allotment, but generally grazing occurs between mid-May or early-June to late-September.

B. 2007 Consultation Over Livestock Grazing

88. In 2007, the Forest Service and FWS completed consultation over the impacts of livestock grazing on listed suckers and their proposed critical habitat in the Lost River Watershed. On March 21, 2007, the Forest Service issued a BA describing the effects of its grazing program on sucker species and proposed critical habitat within ten allotments: Arkansas, Barnes Valley, Bly Ridge, Fort Springs, Horsefly, Pitchlog, Privy Springs, Wildhorse, Yainax Butte, and Yocum Valley allotments.

89. The 2007 BA outlined six steps for the Forest Service to take when implementing its grazing program in the Lost River watershed. The first step was updating allotment management plans and allotment operating instructions. The second step was assigning grazing strategies to be implemented at proper use levels.

90. The third step was assessing stream classification and sensitivity by conducting qualitative Proper Functioning Condition ("PFC") assessments. The BA stated that within five years, the Forest Service would re-assess eight stream reaches that had been rated as either "functioning at risk" or "functioning inappropriately" in 2005. For stream reaches rated as properly functioning in 2005, the Forest Service would re-assess a minimum of 10% of those reaches within ten years. This classification was to help determine proper use levels on the assessed streams.

91. The fourth step required annual implementation monitoring of utilization and stubble height. Implementation monitoring measures how much vegetation cattle have eaten during the grazing season, with utilization measuring upland forage use and stubble height measuring the remaining vegetation height post-grazing in riparian areas. For allotments with a LAA determination, monitoring would be conducted annually. For NLAA allotments, a minimum of 20% of the allotment's pastures would be monitored annually. The BA also outlined schedules for pasture checks, expectations for removal of excess livestock, and criteria for measuring annual compliance with standards. The BA committed the Forest Service to conducting an annual management review with FWS, and to submitting annual implementation monitoring reports to FWS.

92. The fifth step directed the Forest Service to conduct effectiveness monitoring to determine trends in riparian and adjacent upland areas' ecological condition. The BA stated that riparian scorecards would be the primary method used by the Forest Service to determine the trend of riparian vegetation conditions over time. Most pastures already had a riparian scorecard plot established, but pastures without plots would have them established. Trend would be determined every five to ten years on all allotments. The BA also stated that channel cross-

sections, photo points, and bank stability transects would be monitored at a series of existing fish habitat effectiveness monitoring sites. Allotments with ESA-listed species present in pastures would have fish habitat effectiveness monitoring sites created if a site did not already exist. The Forest Service was required to include this data in a grazing effectiveness monitoring report completed every five years.

93. The sixth step outlined in the 2007 BA was implementation of a system of adaptive management to ensure livestock grazing resulted in desired conditions.

94. In the 2007 BA, the Forest Service relied on compliance with these six steps to reach its conclusions regarding the effects of its grazing program on listed suckers and their proposed critical habitat. The Forest Service concluded that its grazing program was not likely to adversely affect Lost River suckers on three of the ten allotments (Fort Springs, Yocum Valley, and Wildhorse), and that it would have no effect on the remaining seven due to the distance between grazing and occupied habitat. The Forest Service concluded that grazing was not likely to adversely affect shortnose suckers on five of the allotments (Bly Ridge, Fort Springs, Privy Springs, Barnes Valley, and Horsefly) for the same reason. Conversely, the Forest Service concluded that grazing was likely to adversely affect shortnose suckers on the remaining five allotments: Arkansas, Pitchlog, Wildhorse, Yainax Butte, and Yocum Valley, because shortnose suckers occupied habitat there.[2]

95. The Forest Service concluded that grazing was not likely to result in destruction or adverse modification of proposed critical habitat for shortnose suckers on all ten allotments based on implementation of the six steps outlined above.

96. On May 8, 2007, FWS issued a LOC ("2007 LOC") concurring with the Forest

[2] Shortnose suckers also occupy a reach of Long Branch Creek which was, at the time of consultation, within the Barnes Valley allotment. The Forest Service concluded that an exclosure of the full .4 miles of the creek on the Forest would prevent adverse effects to shortnose suckers from grazing.

Service's determinations in the 2007 BA for the Bly Ridge, Fort Springs, Privy Springs, Barnes Valley, and Horsefly allotments. FWS incorporated the Forest Service's six-step management plan into its 2007 LOC, including management review and required coordination in the event of permit noncompliance. Relying on this, FWS agreed with the Forest Service's determination that grazing would have no effect on or was not likely to adversely affect Lost River or shortnose suckers and their proposed critical habitat. FWS reasoned that effects to water quality and instream sediment deposition were expected to be negligible, the amount of sediment transported downstream to occupied habitat would be immeasurable, and, according to PFC surveys, conditions of streams within the allotments were in an upward trend. The 2007 LOC covers livestock grazing on these five allotments for ten years, through the 2016 grazing season.

97. On June 1, 2007, FWS issued a Biological Opinion ("2007 BiOp") and conference report for the five allotments for which the Forest Service had concluded grazing was likely to adversely affect suckers: Arkansas, Pitchlog, Wildhorse, Yainax Butte, and Yocum Valley. The 2007 BiOp covers livestock grazing on these five allotments for ten years, through the 2016 grazing season.

98. In the 2007 BiOp, FWS described the "degraded watershed conditions" for the streams on these five allotments. In particular, FWS stated that: (1) grazing and other activities had led to degraded streams with highly variable flows and increased water temperatures; (2) elevated levels of bare soil and soil compaction had contributed to increased storm run-off and reduced infiltration; (3) small reservoirs on the tributaries had reduced total flow in streams and into Gerber Reservoir and Clear Lake; (4) loss of riparian vegetation had contributed to greater sediment input and elevated stream temperatures; (5) cover for fish was minimal throughout the watershed; (6) reservoir management coupled with drought lowered water levels and caused

substantial reductions in habitats for adult suckers; and (7) degraded habitats were occupied by exotic fish and bull frogs that prey on or compete with suckers for food and space.

99. Nevertheless, FWS incorporated the Forest Service's six action requirements into its 2007 BiOp, and concluded that the authorized grazing was not likely to jeopardize the continued existence of shortnose or Lost River suckers. FWS reasoned that, although some harm to individual suckers was likely with grazing occurring in occupied habitat, the action would not appreciably reduce the likelihood of survival and recovery of the species as a whole in the Lost River watershed.

100. In conjunction with the 2007 BiOp, FWS issued an ITS with reasonable and prudent measures ("RPM") and non-discretionary terms and conditions ("T&C") to minimize incidental take of shortnose suckers from livestock grazing. Of the 500 shortnose suckers deemed likely present on the allotments over the summer, FWS estimated that 5% would be harmed directly by trampling or adverse water quality in isolated pools. Therefore, FWS anticipated take of no more than 50 shortnose sucker juveniles and/or adults per year, or 500 shortnose suckers over the ten-year consultation. FWS determined that such level of anticipated take was not likely to jeopardize the continued existence of shortnose suckers because the numbers taken were so small in comparison to the population sizes, which contained tens of thousands of adults in total. FWS also reasoned that take may not substantially increase rates of natural mortality due to drying of pools and decreased water quality.

101. FWS's T&C required the Forest Service to develop a plan to minimize take of suckers, with implementation to begin May 2010, and annual reports to FWS describing implementation of this plan and the results. The Forest Service was required to provide explanations of any take discovered on the Forest and review with FWS the need for reinitiation

of consultation.

102. Finally, FWS's 2007 BiOp included a conference report on effects of the action to proposed critical habitat for Lost River and shortnose suckers. FWS concluded that the action would likely result in the adverse modification of proposed critical habitat because "it likely incrementally reduces the amount of water of sufficient quantity and suitable quality; degrades physical habitat for spawning, feeding, rearing, and travel corridors; and adversely impact[s] the biological environment, including adequate food levels, and natural patterns of predation, parasitism, and competition."

C. 2009 NEPA Analysis of Livestock Grazing on Lost River Watershed Allotments

103. On July 29, 2009, the Forest Service issued a Decision Notice and Finding of No Significant Impact ("DN/FONSI") for Lost River and Sprague River Watersheds Grazing Allotments. The DN/FONSI is supported by an EA that assessed the consequences of reauthorizing grazing in conformance with the 2007 sucker consultation. The EA described alternatives for grazing in the Barnes Valley, Arkansas, Pitchlog, Horsefly, Wildhorse, and Yocum Valley allotments. In the DN/FONSI, the Forest Service decided to authorize grazing on those allotments, with certain administrative changes. [3]

104. The DN/FONSI made several findings about the chosen alternative, including: (1) it was not related to other actions with individually insignificant but cumulatively significant impacts; (2) it was not likely to significantly affect any endangered, threatened, or sensitive species; and (3) it was consistent with standards in the Forest Plan and the 2007 sucker grazing consultation. This decision was to provide guidance for management of grazing on the six

[3] This decision altered boundaries for Horsefly and Barnes Valley allotments and slightly decreased animal unit months grazed, created a new pasture within Horsefly allotment, and authorized construction of a new fence and development of water sources within Wildhorse allotment.

allotments for the next twenty years.

105. The EA's analysis considered three alternatives: a no action (no grazing) alternative, and two grazing alternatives. The EA discussed the affected environment, and assessed the environmental effects of the alternatives on several resources, including "upland and riparian health" and "water quality / fish habitat."

106. In the EA, the Forest Service acknowledged the presence of reservoirs in headwaters of streams within the Lost River watershed, which store water for irrigation, and mentioned by name six of the largest reservoirs. The EA even included Tull Reservoir in its catalogue of cumulative effects. But the EA did not discuss the effects of any reservoirs on downstream water flows, water quality, riparian vegetation, or other aspects of fish habitat, nor assess the effects of grazing when combined with the effects of these reservoirs.

107. The EA also mentioned presence of "check dams," diversions, spring developments and stock ponds on the allotments, but did not quantify the number of such structures, describe their exact locations, or discuss the cumulative water withdrawals caused by these water control structures. Although the EA generally described beneficial effects of such structures on upstream water quality and fish habitat, it did not describe detrimental impacts to downstream riparian vegetation, water quantity, water quality, or other aspects of fish habitat, nor the effects of grazing when combined with the effects of this water management.

D. Forest Service 2007–2014 Monitoring

108. Since 2007, the Forest Service has conducted a portion of the monitoring it committed to within the 2007 sucker grazing BA.

109. Regarding the required PFC monitoring, the Forest Service has not reassessed at least six PFC sites that were rated as "nonfunctional" or "functioning at risk" in 2005 or 2006

and which occur on streams that contain occupied and/or designated critical habitat for suckers. These streams include Long Branch Creek, Horse Canyon Creek, Barnes Valley Creek, and North Fork Willow Creek. The PFC site on Wildhorse Creek was also rated as "functioning at risk" in 2005, but has not been re-read. This site is just upstream of sucker critical habitat. Under the 2007 consultation, sites rated as nonfunctional or functioning at risk were to be reassessed within five years.

110. The Forest Service has conducted annual implementation monitoring at designated sites on certain pastures within the Arkansas, Pitchlog, Yocum Valley, Wildhorse, Horsefly, Yainax Butte, Privy Springs, and Fort Springs allotments, measuring stubble height in riparian areas and utilization in uplands as monitoring parameters. Forest Service monitoring data and notes documented exceedances of utilization and/or stubble height standards on the Wildhorse allotment in multiple years since 2007. In 2009 the Forest Service issued a notice of noncompliance warning to the permittee for violating standards, but exceedances occurred in multiple years after that. Most recently, in 2014, the Forest Service documented exceedances of utilization standards in the Wildhorse Creek and North Fork Willow Creek floodplains. Implementation standards have also been exceeded at least once on the Pitchlog, Yocum Valley, Horsefly, Privy Springs, Fort Springs, and Yainax Butte allotments since 2007.

111. The Forest Service failed to conduct some of the required implementation monitoring. For instance, it did not measure stubble height on the Horsefly allotment from 2010–2013. No implementation monitoring data was collected at all on the Fort Springs allotment for at least four years between 2007 and 2013, and 2014 monitoring indicated exceedance of the utilization standard.

112. Forest Service annual monitoring has also documented multiple, often repeated

instances of trespass cattle or unauthorized use – *i.e.*, cattle present at times or in places they are not authorized under the permits or AOIs – on these allotments. Reports of unauthorized use in multiple years since 2007 have occurred for the Arkansas, Pitchlog, Horsefly, Yainex Butte and Wildhorse allotments, including several instances of unauthorized use in the Wildhorse allotment and the North Pasture of the Pitchlog allotment in 2014. These reports often documented unauthorized use along streams occupied by shortnose suckers, such as Lapham Creek and Barnes Valley Creek. Some of this use occurred within the Lapham Creek exclosure that contains sucker critical habitat.

113. In Yainax Butte, unauthorized use was such a problem starting in 2008 that the Forest Service suspended the grazing permit for the 2012 and 2013 seasons. Monitoring notes from 2008 describe Horse Canyon Creek, a documented sucker site, as overgrazed, with significant hoof shearing of banks. In 2013 and 2014 the Forest Service reauthorized grazing on the allotment to a different permittee but noted heavy use occurred again in some pastures those years.

114. For its effectiveness monitoring, the Forest Service has conducted riparian scorecards documenting ecological conditions and functions on several allotments. The Forest Service conducted scorecards in 2002, 2006, and 2013 on Wildhorse Creek (Wildhorse allotment), and reported a downward trend in ecological condition from "moderate" in 2002 to "low" in 2006 and 2013. The Forest Service also conducted scorecards in 2002, 2006, and 2009 on Horse Canyon Creek (Yainax Butte allotment) and North Fork Willow Creek (Yocum Valley allotment), rating these streams as "low" ecological status for floodplain and terrace for all years monitored. Barnes Valley Creek on the Pitchlog allotment, scored in 2002 and 2006, dropped from "moderate" to "low" status on the terrace, and was rated at "low" both years on the

floodplain.

115. The Forest Service has not conducted any riparian scorecards on multiple other pastures within these same four allotments, nor on pastures within other allotments covered by the 2007 grazing BA.

116. The 2007 BA also required fish habitat effectiveness monitoring every five years on allotments with ESA-listed fish. The Forest Service has designated five sites on allotments within the Lost River watershed, including on Wildhorse Creek (Wildhorse allotment), North Fork Willow Creek (Yocum Valley allotment), Lapham Creek (Arkansas allotment), Barnes Valley Creek (Pitchlog allotment), and Horse Canyon Creek (Yainax Butte allotment). This monitoring consists of bank stability transects, channel cross sections, and photo points.

117. The Forest Service has not assessed bank stability on any of those sites since 2008, and the 2008 data shows that four of the five sites were not meeting the 80% bank stability standard. Banks along North Fork Willow Creek (Yocum Valley allotment) and Barnes Valley Creek (Pitchlog allotment) were in particularly bad shape, at just 52% and 39% stable, respectively. The Forest Service has not conducted all of the required channel cross section and photo point monitoring at five year intervals either. The Forest Service has not established any fish habitat effectiveness monitoring site on Horsefly allotment.

118. The Forest Service conducted limited stream surveys during or before 2007 on several of the Lost River watershed allotments. Stream surveys monitored parameters like substrate, bank stability, pool frequency, large woody debris, and width-to-depth ratio but not lower bank angle or riparian shade. Several surveys showed measurements of pool frequency, bank stability, and/or width-to-depth ratio below INFISH standards. For example, surveys showed problems with pool frequency in Lapham Creek (Arkansas allotment), North Fork

Willow Creek (Yocum Valley allotment), Barnes Valley Creek (Pitchlog allotment), and Wildhorse Creek (Wildhorse allotment). Bank stability was documented under 80% in at least one reach of North Fork Willow Creek and Barnes Valley Creek. Width-to-depth ratio on North Fork Willow Creek was also below INFISH objectives.

119. Finally, the Forest Service has conducted semi-regular monitoring of stream temperatures on multiple streams within the relevant allotments, including Lapham, North Fork Willow, Horse Canyon, Barnes Valley, and Wildhorse creeks. Data shows that seven-day average daily maximum summer water temperatures in all of these sucker-occupied creeks have exceeded the INFISH standard every year since 2007.[4] Summer water temperatures since 2007 have also exceeded the 28°C sucker PCE on multiple creeks, including Barnes Valley, Lapham, and North Fork Willow.

120. Forest Service implementation, effectiveness, and stream monitoring data indicates that livestock grazing is contributing to increased water temperatures in at least the Pitchlog, Yainax Butte, Wildhorse, and Yocum Valley allotments by removing riparian vegetation, increasing width-to-depth ratio, contributing to bank instability, and increasing sediment in streams.

121. The Forest Service did not develop a plan to minimize take of suckers, as required under the T&C of the 2007 BiOp. Accordingly, the agency did not provide annual reports to FWS describing implementation of that plan and the results, another T&C of the 2007 BiOp. Nor has the Forest Service consistently provided FWS with an annual report of all required information such as implementation monitoring results and/or documentation of take occurring on the allotments.

[4] The seven-day moving average of daily maximum temperature is measured as the average of the maximum daily temperature of the warmest consecutive seven-day period.

E. 2014 Consultation Over Livestock Grazing in Sucker Critical Habitat

122. In 2014, the Fremont-Winema National Forest consulted with FWS over the effects of livestock grazing in the Lost River Basin on the newly designated 2012 critical habitat for Lost River and shortnose suckers. On May 21, 2014, the Forest Service issued a final BA describing the effects of grazing on critical habitat in the Arkansas, Horsefly, Pitchlog, Yainax Butte, Wildhorse, and Yocum Valley allotments.

123. The final BA stated that grazing authorized under this new consultation would proceed under the following terms and conditions: (1) Allotment Management Plans; (2) Annual Operating Permits; (3) annual implementation monitoring; and (4) effectiveness monitoring to determine trends in riparian and adjacent upland area conditions.

124. The BA explained that critical habitat streams on the Forest play a primary role in providing seasonal access to shortnose sucker spawning sites for lake-resident fish as well as year-round habitat for a small number of stream-resident shortnose suckers that occupy permanent pools. These pools are isolated from each other when the remainder of the stream goes dry, and are maintained by shallow aquifers when hydrologic conditions permit.

125. In its description of the action area and environmental baseline, the BA mentioned that many streams within the assessed allotments are degraded, featuring headcuts, incised channels, lowered water tables, and a lack of bank-stabilizing riparian vegetation. The BA also stated that the natural timing of the hydrologic cycle had been altered on many streams due to water management, "removing water from streams and creating artificial stream paths that lack habitat complexity."

126. The BA went on to explain that impoundments and diversions on streams within the Lost River Basin affect stream flows and thereby impair movement of suckers from lakes

into streams as well as within streams. For instance, low or non-existent flows resulting from the impoundment of water can retard or prevent adult lake suckers from accessing spawning areas, and can strand stream-resident fish in isolated ephemeral pools.

127. The BA also described the effects of climate change on stream habitat in the Klamath region: (1) declines in water quality due to increasing water temperatures, more widely fluctuating dissolved-oxygen levels, and earlier, longer, and more intense algae blooms; (2) increased fine sediment in streams due to more intensive storm events and higher likelihood of winter precipitation as rain; (3) increases in stream flow in winter and decreases during the rest of the year; (4) rising air temperatures; and (5) declining or disappearing flow from springs fed by groundwater.

128. The BA stated that past livestock grazing, water diversion and impoundment, and climate change have all incrementally affected critical habitat within the assessed allotments. With regard to grazing, it asserted that any adverse effects to critical habitat "are likely tied to reductions in water yield or changes in timing of hydrologic flow resulting from soil compaction and reduced infiltration, streambank alterations, and loss and reduction of riparian and upland vegetation that stabilize streambanks."

129. The BA also noted that upstream water diversions or impoundments adversely affect water quantity and water quality in sucker critical habitat streams on several allotments, including Pitchlog, Yainax Butte, and Yocum Valley. The BA stated that generally, stream channels in the allotments were in a degraded condition due to past land management activities, and that summer water temperatures exceeded the 28°C sucker PCE in at least two allotments.

130. Despite these acknowledgements, the BA concluded that grazing was not likely to adversely affect sucker critical habitat on these allotments. To make this conclusion, the BA

assumed that if shortnose suckers occupied stream reaches or isolated pools, all PCEs were present and functioning appropriately and grazing was not "substantially" impacting critical habitat. The BA repeatedly asserted that the impacts to critical habitat from livestock grazing were "small" or "minimal" relative to impacts from water impoundments and irrigation diversions. The BA also relied on the presence of exclosures, grazing season of use, and monitoring to mitigate adverse effects to critical habitat.

131. The BA provided little data documenting the current conditions of critical habitat streams or their tributaries, or the effects of livestock grazing on critical habitat. For example, the BA did not contain the data or fully describe the results of annual implementation monitoring, long-term effectiveness monitoring, PFC assessments, stream surveys, and other monitoring of water quality, water quantity, and fish habitat. It also failed to discuss the history of livestock trespass or unauthorized use, including in exclosures, and other noncompliance issues that have occurred on these allotments and could affect sucker critical habitat. Nor did the 2014 BA discuss the frequency of Forest Service monitoring and whether the agency had complied with all monitoring required under the 2007 consultation.

132. The BA also did not describe the impacts of grazing on critical habitat when combined with the adverse effects of upstream water management, including diversions and impoundments used to support federally-authorized grazing. The BA excluded a full description of sucker habitat features and their current condition, including spawning and rearing habitat, refugia, and isolated permanent pools; a full description of the water diversions and impoundments in these watersheds and their impacts on these habitat features; and an analysis of the effect of grazing on sucker critical habitat when added to the effects of water diversions and impoundments, as well as climate change and ongoing drought.

133. The final BA omitted this necessary data and discussion despite including at least some of it in draft versions of the document.

134. On June 13, 2014, FWS issued a letter concurring with the Forest Service's NLAA determination (the "2014 LOC"). The 2014 LOC covers livestock grazing on these six allotments for three years, through the 2016 grazing season.

135. This letter of concurrence stated that water quantity is naturally limiting, and that the additional incremental effects from grazing on critical habitat are not significant and would not result in any take. The 2014 LOC relied on the presence of riparian exclosures to mitigate effects to critical habitat on three allotments, and did not mention the results of any monitoring, history of trespass, or assessments of stream health. The 2014 LOC also did not address the effects of livestock grazing on stream condition when combined with the effects of upstream water manipulation and the ongoing drought.

FIRST CLAIM FOR RELIEF

The Forest Service's Biological Assessment and FWS's Letter of Concurrence for the 2014 Sucker Critical Habitat Consultation were Arbitrary and Capricious in Violation of the ESA and APA.

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

137. This first claim for relief challenges the Forest Service's and FWS's NLAA determination in the 2014 BA and 2014 LOC for being arbitrary, capricious, and contrary to the ESA. Plaintiffs bring this claim pursuant to the judicial review provisions of the APA, 5 U.S.C. § 706.

138. An action agency prepares a BA to evaluate the potential "effects of the action" on listed species and critical habitat and determine whether either is likely to be adversely affected. 50 C.F.R. § 402.12. The effects of the action are the direct and indirect effects added

to the environmental baseline. *See id*. § 402.02. If the action agency determines that the action is not likely to adversely affect listed species or critical habitat, FWS can concur with that determination in an LOC to conclude consultation. *See id*. §§ 402.13(a), 402.14(b). An LOC is only appropriate when the BA or other information indicates that the action has no likelihood of adverse effect to the listed species or designated critical habitat. *Id.* § 402.13(a).

139. Under the APA, an LOC is a final agency action that will not be upheld if it is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

140. FWS's LOC for the 2014 sucker critical habitat consultation relied on the Forest Service's 2014 BA. The BA discussed the impacts of livestock grazing on designated critical habitat within the allotments considered. As described above, FWS's 2014 LOC violated the ESA and APA for various reasons, including but not limited to the following:

a. The 2014 LOC relied on a flawed BA that drew conclusions and made assumptions about the effects of grazing on PCEs that were not supported by data or a rational explanation;

b. The 2014 LOC relied upon a flawed BA that failed to consider and discuss important aspects of and impacts to sucker habitat;

c. The 2014 LOC relied on a flawed BA that failed to adequately assess or address the effects of the action, interrelated or interdependent activities, cumulative effects, and environmental baseline features and conditions;

d. The 2014 LOC relied on a flawed BA that failed to use best available science;

e. The 2014 LOC relied on a monitoring scheme that is not certain to occur

and that does not adequately address the threats from grazing to critical habitat;

f. The 2014 LOC failed to support its own conclusions, assumptions, and rationale with data or rational explanations.

141. Accordingly, the Forest Service's and FWS's NLAA determination in the 2014 BA and 2014 LOC was arbitrary, capricious, an abuse of discretion, and not in accordance with the ESA, and therefore should be set aside under the APA, 5 U.S.C. § 706(2)(A).

SECOND CLAIM FOR RELIEF

The Forest Service Has Failed to Ensure Against Adverse Modification of Sucker Critical Habitat in Violation of the ESA.

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

143. This second claim for relief challenges the Forest Service's failure to ensure against adverse modification of critical habitat as required by ESA § 7(a)(2). Plaintiffs bring this claim pursuant to the citizen suit provision of the ESA. 16 U.S.C. § 1540(g).

144. Section 7(a)(2) of the ESA creates an independent substantive duty on federal agencies to ensure that their actions are not likely to destroy or adversely modify critical habitat. Arbitrarily and capriciously relying on a legally flawed consultation violates an agency's compliance with this duty.

145. For the reasons described above, the Forest Service's 2014 critical habitat BA and FWS's 2014 LOC were flawed in numerous ways. The Forest Service's reliance on this flawed consultation to continue to authorize livestock grazing on the Arkansas, Horsefly, Yainax Butte, Wildhorse, Pitchlog, and Yocum Valley allotments in 2014 and 2015 violates its substantive duty to ensure that its grazing program is not likely to adversely modify critical habitat, in violation of § 7(a)(2) of the ESA.

146. Accordingly, Plaintiffs challenge the Forest Service's violation of ESA § 7(a)(2),

as provided for under the ESA citizen suit provision. 16 U.S.C. § 1540(g).

THIRD CLAIM FOR RELIEF

The Forest Service and FWS Have Failed to Reinitiate Consultation Over the Impacts of Livestock Grazing on Occupied and Designated Critical Habitat for Suckers in the Lost River Basin, in Violation of the ESA.

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

148. This third claim for relief challenges the Forest Service's and FWS's failure to reinitiate consultation under Section 7 of the ESA. Plaintiffs bring this claim pursuant to the citizen suit provision of the ESA. 16 U.S.C. § 1540(g).

149. The ESA's implementing regulations require federal agencies to reinitiate consultation if the action agency retains discretionary federal involvement or control over a proposed action and if the amount or extent of taking specified in an incidental take statement is exceeded, new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered, where the action in question is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the BiOp, or where a new species is listed or critical habitat designated that may be affected by the identified action. 50 C.F.R. § 402.16(a)-(d).

150. The Forest Service and FWS have a duty to reinitiate consultation over the impacts of livestock grazing on suckers in the Lost River Basin because the Forest Service retains substantial federal control over the authorization of grazing, new information and new circumstances have arisen since the 2007 consultation that relate to effects of grazing on the species, and the Forest Service has not complied with the required Terms and Conditions from the ITS. The triggers for reinitiation of consultation include the following:

a. Stubble height and utilization standards have been regularly exceeded and/or unauthorized use has occurred on at least five allotments since 2007;

b. Ecological conditions in riparian areas and streams have remained poor or have worsened on at least four allotments since 2007;

c. The Forest Service has failed to meet multiple monitoring and other requirements upon which its and FWS's effects determination were premised in the 2007 BA, 2007 LOC and 2007 BiOp, including implementation and effectiveness monitoring, riparian scorecard and PFC assessments, and monitoring and reporting required under the 2007 BiOp and ITS Terms and Conditions; and

d. Severe and prolonged recent drought has increased effects to sucker species in a manner not previously considered.

151. Despite this information and lack of compliance with requirements of the 2007 LOC and BiOp, the Forest Service and FWS have failed to reinitiate consultation over the effects of the Forest Service's grazing program on listed sucker species and its critical habitat. This violates the ESA's implementing regulations at 50 C.F.R. § 402.16.

152. Accordingly, Plaintiffs challenge the Forest Service's and FWS's violation of the ESA and its implementing regulations, as provided for under the ESA citizen suit provision. 16 U.S.C. § 1540(g).

FOURTH CLAIM FOR RELIEF

The Forest Service's 2013, 2014 and 2015 Grazing Authorizations for the Horsefly, Yainax Butte, Wildhorse, Pitchlog, and Yocum Valley Allotments Violate NFMA.

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

154. Under NFMA, the Forest Service must comply with the Forest Plan in all site-specific management decisions and explain its compliance. 16 U.S.C. § 1604(i); 36 C.F.R. § 219.15. INFISH grazing standards, which are part of the Fremont Forest Plan, require the Forest Service to modify or suspend grazing practices if such practices are retarding or preventing

attainment of RMOs.

155. The Forest Service's 2013, 2014 and 2015 annual grazing authorizations for the Horsefly, Yainex Butte, Wildhorse, Pitchlog, and Yocum Valley allotments violate NFMA because the Forest Service failed to evaluate and explain their compliance with INFISH before issuing the authorizations.

156. Forest Service data shows that streams on these allotments were not meeting all of the INFISH RMOs in past years, including water temperature, bank stability, pool frequency, and width-to-depth ratio; and there is no subsequent data to show that conditions have improved. The agency has no data on lower bank angle to assess compliance with that RMO.

157. Other monitoring information showed that riparian conditions were poor on these allotments when last assessed, with no evidence that conditions have improved. Trespass cattle are a common management problem on the Horsefly, Pitchlog, and Yainex Butte allotments, and have caused damage to riparian areas along Barnes Valley Creek and Horse Canyon Creek.

158. The Forest Service has violated NFMA by issuing grazing authorizations without documenting how the grazing will comply with INFISH standards when the only data that exists shows RMOs are not being met in many areas, riparian areas are in poor ecological condition, and trespass cattle continue to damage riparian areas.

159. For these reasons, the Forest Service's 2013, 2014 and 2015 annual grazing authorizations for the Horsefly, Yainex Butte, Wildhorse, Pitchlog, and Yocum Valley allotments are arbitrary, capricious, an abuse of discretion, and not in accordance with NFMA. Therefore, they must be set aside under the APA, 5 U.S.C. § 706(2).

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FIFTH CLAIM FOR RELIEF

The Forest Service's EA and Decision Notice / Finding of No Significant Impact for Lost River Grazing Allotments Violate NEPA.

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

161. NEPA requires disclosure of all environmental impacts of a proposed action, including direct, indirect, and cumulative impacts. 40 C.F.R. §§ 1501.2(b), 1508.7, 1508.27(b)(7). A cumulative impact results from the incremental impact of the proposed action when added to other past, present and reasonably foreseeable future actions. *Id*. § 1508.7. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. *Id*. A "hard look" at cumulative impacts requires some detailed or quantified information to accurately show the "big picture" of the effects of the proposed action on the environment.

162. An agency's choice regarding the physical scope of a cumulative impacts analysis must be reasoned and supported by a rational explanation.

163. As described above, the 2009 Lost River and Sprague River Watersheds Grazing Allotments DN/FONSI was deficient because it relied on a flawed EA that failed to consider the cumulative impacts of grazing when added to the impacts of water diversions, reservoirs, and other impoundments on water quantity and quality in fish habitat, including diversions, reservoirs, and other impoundments that are interrelated and interconnected activities.

164. The EA did not quantify total water withdrawals on streams that provide fish habitat, did not describe the extent of diversions, impoundments, or other water manipulations on public land or private land, and did not explain the actual effect of those water manipulations on water quantity and quality.

165. Without an adequate and accurate description of the extent of water diversions

and impoundments in the watersheds at issue, and the impacts of those activities on water quantity and water quality for fish, the EA's cumulative effects analysis was deficient under NEPA. Therefore, the Forest Service's EA and DN/FONSI were arbitrary, capricious, an abuse of discretion, and not otherwise in accordance with NEPA, and therefore should be set aside under the APA, 5 U.S.C. § 706(2)(A).

SIXTH CLAIM FOR RELIEF

The Forest Service Has Failed to Complete a Supplemental NEPA Analysis Over the Impacts of Livestock Grazing on Lost River Watershed Allotments, in Violation of NEPA.

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

167. NEPA requires that an environmental analysis be supplemented if the action agency makes substantial changes to the proposed action or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. 40 C.F.R. § 1502.9(c)(1).

168. Since 2009, significant new information or circumstances have arisen that are relevant to environmental concerns and the impacts of the proposed grazing, including:

a. Stubble height and utilization standards have been exceeded and/or unauthorized use has occurred on at least four allotments since 2009;

b. The Forest Service has failed to meet multiple monitoring and other requirements meant to protect endangered suckers from livestock grazing, including implementation monitoring, effectiveness monitoring, riparian scorecard assessments, and PFC assessments, as set forth in the 2007 BiOp and ITS; and

c. Severe and prolonged recent drought has increased effects to sucker species and habitat, which exacerbates the impacts of grazing on these fish.

169. By failing to complete a supplemental NEPA analysis describing the effects of

these changed circumstances and new information, the Forest Service has acted arbitrarily, capriciously, and not in accordance with NEPA. The Court shall compel the Forest Service to prepare a supplemental NEPA analysis unlawfully withheld or unreasonably delayed under the APA, 5 U.S.C. § 706(1).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Declare that the Forest Service's BA and FWS's LOC for the 2014 sucker critical habitat consultation were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the ESA, in violation of the APA;

B. Vacate and set aside the BA and LOC for the 2014 sucker critical habitat consultation;

C. Declare that the Forest Service has failed to ensure against adverse modification of shortnose sucker critical habitat in its authorization of livestock grazing on the Arkansas, Horsefly, Yainax Butte, Wildhorse, Pitchlog, and Yocum Valley allotments in 2014 and 2015, in violation of the ESA;

D. Order the Forest Service and FWS to re-initiate and complete a new consultation addressing federally-authorized livestock grazing in sucker occupied and critical habitat in the Lost River basin on the Fremont-Winema National Forest, addressing the new circumstances that have arisen since 2007 and remedying the flaws in the 2014 consultation;

E. Declare that the 2013, 2014 and 2015 annual grazing authorizations for the Horsefly, Yainex Butte, Wildhorse, Pitchlog, and Yocum Valley allotments were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with NFMA, in violation of the APA;

F. Vacate and set aside the 2013, 2014 and 2015 annual grazing authorizations for the Horsefly, Yainex Butte, Wildhorse, Pitchlog, and Yocum Valley allotments;

G. Declare that the 2009 Lost River and Sprague River Watersheds Livestock Grazing EA was deficient under NEPA;

H. Vacate and set aside the DN/FONSI that relied upon the flawed EA;

I. Declare that the Forest Service violated NEPA by failing to complete a supplemental NEPA analysis addressing significant new circumstances or information relevant to environmental concerns and bearing on the proposed action;

J. Order the Forest Service to complete a revised NEPA analysis for livestock grazing in the Lost River and Sprague River Watersheds, with proper consideration of cumulative impacts and taking into account new circumstances and information;

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

L. Award Plaintiffs their reasonable costs, litigation expenses, and attorneys' fees associated with this litigation pursuant to the Endangered Species Act, 16 U.S.C. § 1540(g)(4), Equal Access to Justice Act, 28 U.S.C. § 2412 *et seq*., and/or all other applicable authorities; and

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

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Dated: July 22, 2015

Respectfully submitted,

/s/ Lauren M. Rule
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/s/ Elizabeth H. Zultoski
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