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

OREGON WILD, **FRIENDS OF LIVING OREGON WATERS**, and **WESTERN WATERSHEDS PROJECT**,

Plaintiffs,

v.

U.S. FOREST SERVICE, and
U.S. FISH & WILDLIFE SERVICE,

Defendants,

JRS PROPERTIES III, LP,

Defendant-Intervenor,

and

WITHERS RANCH, INC. *et al.*

Defendant-Intervenors.

CASE NO. 1:15-cv-00895-CL

PLAINTIFFS' POST-HEARING REBUTTAL BRIEF

Oral Argument on April 26, 2016

GLOSSARY OF ACRONYMS

AOI	Annual Operating Instructions
AMP	Allotment Management Plan
APA	Administrative Procedure Act
BA	Biological Assessment
BMP	Best Management Practices
BO	Biological Opinion
CWA	Clean Water Act
EPA	Environmental Protection Agency
ESA	Endangered Species Act
FWS	U.S. Fish & Wildlife Service
INFISH	Inland Native Fish Strategy
LOC	Letter of Concurrence
NFMA	National Forest Management Act
NLAA	Not Likely to Adversely Affect
ORV	Outstandingly Remarkable Value
PCE	Primary Constituent Element
RMO	Riparian Management Objective
TMDL	Total Maximum Daily Load
WQRP	Water Quality Restoration Plan
WQS	Water Quality Standards
WSRA	Wild and Scenic Rivers Act

Plaintiffs submit this rebuttal brief in accordance with the Court's Order (ECF # 66).

Overall, the record contradicts one of Defendants' overarching arguments related to all three claims: that cattle have little access to, and thus have not impaired, riparian areas along the Sycan River and North Fork Sprague River. Photographs in the record show that cattle have easy access to most of the Upper Sycan River, starting in Hog Wallow pasture of Currier Camp and running through Withers Special Use and Bald Butte pastures, and portions of the North Fork Sprague River in the Sprague RIP and Bald Butte pastures. SUPP POL7378-82, 7441-49, 7453-58, 7678-92, 7704-11, 7991-95, 14610-673, 15034-41; CC869-877; Pl. Exs. 4-7, 28-31 (Upper Sycan); SUPP POL7691-7700, 7718-27, 8009-39, 15027-29 (North Fork Sprague).

1. ESA Rebuttal Points

Plaintiffs address four points raised by Federal Defendants at the hearing. First, the Government argued that the 2011 BA[1] considered recovery needs of bull trout merely because it discussed critical habitat PCEs. That discussion, however, failed to put the PCEs into context regarding the recovery needs of Klamath River Basin bull trout. *Nw. Envtl. Advocates v. EPA*, 855 F. Supp. 2d 1199, 1229 (D. Or. 2012) (holding that FWS must consider precarious condition of Klamath River bull trout for purposes of consultation and recovery). The BA failed to acknowledge the highly imperiled status of bull trout in the Klamath Basin and Sycan and Upper Sprague core areas, the need to expand its distribution into this unoccupied habitat for recovery, that conditions in these streams *cannot currently support bull trout*, and thus the need to improve PCEs to meet recovery objectives. *See* FWS 4-6, 32, 2430. The BA focused only on whether grazing would further degrade the current condition of PCEs, but the effect of continuing the currently impaired conditions will not achieve recovery. Indeed, the Sycan Core Area is down to

[1] Plaintiffs respectfully refer to the Glossary of Acronyms located at the start of this brief.

just one local population and continuation of the status quo will surely lead to extinction of this entire core area, which is essential for recovery of Klamath River bull trout. FWS 2446.

The ESA "is concerned with protecting the future of the species, not merely the preservation of existing [members of the species]." *Alaska Oil and Gas Ass'n v. Jewell,* 815 F.3d 544, 555 (9th Cir. 2016). The ESA Handbook states that, "Service biologists must be well informed about species' status, distribution, threats, *and recovery objectives* to carry out the informal consultation process effectively." ESA Handbook at 3-6 (Pl. Ex. 3 at ECF # 45) (emphasis added). The Government cited the Tenth Circuit *Cables* case, but that case is distinguishable because there the critical habitat was occupied by the species and the Forest Service made adjustments to grazing, such as reduced stocking, increased herding, and pasture rotation changes, that provided additional measures for the conservation of the species. *Ctr. for Native Ecosystems v. Cables*, 509 F.3d 1310, 1323 (10th Cir. 2007). Here, the BA never considered what was actually needed for recovery of bull trout—improvement of PCE conditions to allow for re-occupation by bull trout—and whether continuing the same grazing would hinder restoration of habitat necessary to achieve recovery objectives. *Cf.* FWS 2337 (LAA conclusion because grazing would slow the rate of recovery of riparian areas compared to no grazing); *Wild Fish Conservancy v. EPA*, 2010 WL 1734850, at *6-8 (W.D. Wash. Apr. 28, 2010) (overturning NLAA conclusion because agencies did not consider recovery plans).

Second, the Government argued that Plaintiffs are improperly importing requirements from BO cases, and that the contents of BAs are discretionary, so Plaintiffs' arguments fail. This position ignores the fact that even in informal consultation, agencies must provide a rational connection between the facts and their NLAA conclusion, and must consider the best available science. *See* cases cited in Pl. Opening Br. at 19 (ECF # 45). Furthermore, a BA must assess the "effects" of the proposed action on critical habitat just like in a BO, and thus court decisions addressing whether agencies have properly analyzed the effects of the action in a BO and supported their conclusions with rational explanations are relevant here. 50 C.F.R. §§ 402.02, 402.12(a), 402.14(g)(3) (requirements for BA and BO, and definition of "effects of the action").

Third, the Government argued that reliance on the mitigation measures was reasonable because the Forest Service is following the measures set out in the 2007 BA. In the 2007 consultation, the agencies believed no bull trout or critical habitat occurred within the allotments at issue here and thus these allotments had less stringent monitoring requirements compared to allotments that had listed species present. For instance, for allotments with LAA determinations due to the presence of listed species (short-nosed suckers), implementation monitoring was required every year on all pastures. FWS 673, 676, 609, 611-12. For all other allotments, including the ten allotments at issue here, implementation monitoring had to occur on only 20% of the pastures each year. FWS 673; Fed. Def. Reply at 15 (ECF # 62). Similarly, only allotments with listed species present were required to have fish habitat effectiveness monitoring sites. FWS 674. The 2007 BA required all pastures to have riparian scorecard sites. *Id.*

Despite the new designation of more than 75 miles of critical habitat within the action area, the Forest Service still relied on the 2007 implementation and effectiveness monitoring to claim in the 2011 BA that adverse effects from grazing would be minimized. FWS 1424, 1431, 1447, 1448. Rather than adding monitoring requirements to protect the designated critical habitat that was now present within the allotments, the Forest Service continued to rely on the less stringent monitoring requirements. Fed. Def. Opening Br. at 30 (ECF # 58); Fed. Def. Reply at 15. In light of these less stringent requirements, many implementation monitoring sites do not have annual data, and just two of the ten allotments have fish habitat effectiveness monitoring sites.[2] FWS 1455-57; Pl. Opening Br. at 26. Furthermore, despite the requirement that all pastures have riparian scorecard monitoring sites, the 2011 BA Appendix did not have the resulting ecological status data for all pastures. FWS 1455-57. And when the limited monitoring showed compliance problems, the Forest Service did not make adjustments pursuant to the adaptive management strategy. *See* Pl. Opening Br. at 26-27. It was unreasonable to conclude that the 2007 measures would minimize adverse effects to critical habitat newly designated within these allotments when those measures were designed for allotments without listed species or critical habitat present, and the Forest Service was not even fully implementing those less stringent measures.

Fourth, the Government argued that the analysis of effects to PCEs was sufficient and showed minimal effects from grazing. The key problem with this argument is that the BA's analysis failed to consider relevant factors and data. The BA recognized that livestock grazing can have numerous impacts to bull trout habitat, including reducing riparian vegetation, widening or incision of steam channels, lowering water tables, reducing pool frequency, and increasing soil erosion. FWS 1431-32. It explained that these impacts can reduce habitat complexity and food sources for fish and lead to increased water temperature and sediment. *Id.* Yet, when analyzing the effects of grazing to the PCEs, the BA ignored data the agency had collected on riparian vegetation and soils via the riparian scorecard monitoring, which was intended to be the "*primary* method to determine the trend of riparian vegetation conditions over time." FWS 674, 1432-47 (emphasis added). The BA mentioned information from a few stream surveys, but failed to discuss width/depth ratios, pool frequency, and sediment levels from these

[2] Fish habitat effectiveness monitoring sites were established in 1997 when the agencies believed bull trout were present in Coyote Creek within the Foster Butte allotment and in the North Fork Sprague River within the Sprague RIP pasture of Paradise Creek allotment. POL 5401, 5406.

and other stream surveys after admitting those features could be affected by grazing. FWS 1431-47. And it failed to consider whether grazing had contributed to incised stream channels and lowered water tables, which again it had admitted livestock could affect. *Id*. Because the BA's analysis, and therefore also the LOC (explicitly and in relying on the BA), failed to consider relevant factors and data, they are arbitrary and capricious. *Ctr. for Biological Diversity v. BLM*, 698 F.3d 1101, 1121-24 (9th Cir. 2012).

Plaintiffs next rebut several points made by Intervenor Withers. Withers cited to several documents that post-date the BA and LOC to sustain the NLAA determination. But the Court cannot consider any post-decision documents when reviewing that determination under the APA, and thus nothing in the record dated after May 2011 may be used to sustain that decision.

Withers also tried to argue that a LAA determination requires showing the action will adversely modify critical habitat or cause take of the species. This confuses different standards under the ESA. Agencies must first make the threshold determination of whether an action is likely to "adversely affect" critical habitat. 50 C.F.R. § 402.12(a). If so, then FWS prepares a BO to determine if those adverse effects are enough to cause adverse modification of critical habitat. *Id.* § 402.14(h); *Ctr. for Biological Diversity*, 698 F.3d at 1107. This two-tiered scheme shows that an adverse effect is a lower threshold than adverse modification. *See* ESA Handbook at 3-3, 4-6. Similarly, the threshold to show a likely adverse effect is lower than the threshold to show "take." An adverse effect would be any habitat degradation that can be meaningfully detected, measured, or evaluated, while take occurs only if habitat degradation injures a species by impairing its essential behaviors. *Id.* at 3-12, 3-13; 50 C.F.R. § 17.3.

Withers cited to implementation monitoring reports and the 2007 BA to try and show that grazing was not causing adverse effects, but these documents cannot remedy the lack of discussion in the 2011 BA about other relevant monitoring data. Implementation monitoring cannot substitute for long-term rangeland ecological monitoring—i.e. riparian scorecards. FWS 785. The 2007 BA also did not discuss riparian scorecard or stream survey data for individual allotments and assessed effects only to downstream habitat because none of the allotments contained bull trout or critical habitat at that time. FWS 723-53. In addition, it covered 21 allotments, and the statement highlighted by Withers that fifteen sites had stable or improving channel cross sections applied to just two sites in this case—one that had "slight" improvement in the channel but also a large downward trend in late seral riparian species, and the other site did not have enough data to assess. FWS 723; POL5400-01 (NF Sprague River), 5406 (Coyote Creek). The failure of the 2011 BA to examine relevant data and articulate a rational connection between the facts in the record and its conclusions means the BA, and the LOC that relied on it, are arbitrary and capricious. *Ctr. for Biological Diversity,* 698 F.3d at 1124-25.

Withers also tried to downplay the inaccurate statements in the LOC, but those statements were key mistakes contradicted by the record. Topography may limit access to some of the critical habitat within Currier Camp allotment, but cattle can still access 1.5 miles of the Sycan River plus the entire length of Rifle Creek within that allotment. FWS 1430, 1443. Paradise Creek allotment contains seven miles of critical habitat, not just intermittent tributaries. FWS 1432. Reliance on deferred rotation and/or early season strategies for Bear Lakes and Withers Special Use allotments is not effective when cattle are present well outside the permitted season of use, as occurred in both the Bald Butte and Withers pastures. BL 375; WSU 36, 44. Reliance on these statements to support the conclusion that grazing effects would be minimized was unreasonable, another reason the LOC was arbitrary and capricious. FWS 1462.

Finally, with regard to JRS's arguments, the APA allows Plaintiffs to challenge a "final agency action," which the court must hold unlawful if it is arbitrary and capricious for any reason. 5 U.S.C. §§ 704, 706(2)(a). Nothing in the APA allows a court to hold unlawful only part of an agency action. JRS's argument may be relevant as to a proper remedy, but not the merits of this claim. Moreover, Plaintiffs did challenge the BA and LOC as to JRS's allotments. Pl. Opening Br. at 24-26 (discussing Sycan, Riverbeds, Foster Butte, Meryl Creek and Yaden Flat allotments). And this claim is not moot because the 2011 BA and LOC will govern grazing for the 2016 season. The Government has not disputed that nor raised mootness as an argument.

2. CWA Rebuttal Points

Plaintiffs rebut six arguments raised by the Government during the hearing. First, the agency argued grazing's contribution to elevated stream temperatures is speculative. This argument underscores the agency's failure to assess, let alone control, the thermal impacts of grazing, as required under OAR 340-041-0028(12)(a) (requiring "each anthropogenic point and nonpoint source" to control the thermal effects of activities). Under the APA, the record must show that the agency considered and complied with this regulation *before* issuing the AOIs. *Cf. Cent. Or. Landwatch v. Connaughton*, 2014 WL 6893695, at * 10 (D. Or. Dec. 5, 2014) (agreeing with the Forest Service's explanation *in the record* that an exception to an Oregon WQS applied). Moreover, the agency must ensure compliance with WQS, regardless of whether grazing is the "sole cause" of exceedences. *See* Pl. Reply at 20-21, 27 (ECF # 61).

Second, the agency asserted it need not reduce temperatures below their natural condition. However, the agency did not make a determination *in the record* that any streams are currently at natural conditions. To the contrary, the record shows many stream temperatures far exceed the standard and reductions are attainable, exceedences are attributable to current activities not just natural conditions, and excluding livestock can reduce temperatures. POL6579 (lower temperatures in Sycan possible); POL3332-33 (exceedences "can be linked directly to past and *present* management activities" in Sprague sub-basin (emphasis added)); SUPP POL15357-8 (stream temperature inside exclosure 12 °F lower than outside); POL3367; *see also* SUPP POL1437 (eliminating livestock may allow "most significant improvement to riparian habitat" and recovery of habitat in 4 to 8 years). Blaming natural conditions without trying to make any meaningful changes to grazing falls short of the agency's duty to ensure compliance.

Third, the agency reiterated an issue that it had impermissibly raised in its reply brief: that Oregon law provides an adequate remedy in a court, which defeats jurisdiction under the APA. Fed. Def. Reply at 18-19; *United States v. Cox*, 7 F.3d 1458, 1463 (9th Cir. 1993). The agency is wrong, as *NEDC v. Blue Heron* found that, in Oregon, there is "no provision that allows for private parties to sue to enforce such [water pollution] statutes." 2000 WL 1763665, at *1, 3 (D. Or. Nov. 30, 2000). The agency cites nothing that contradicts this ruling or would allow Plaintiffs to sue a federal agency in a state court for violating section 313. Moreover, the agency ignores binding Ninth Circuit case law and a decision by this Court that the APA provides federal court jurisdiction over section 313 claims. Pl. Reply at 16-18. No speculative state process can overrule these cases or the agency's independent duty under section 313.

Fourth, the agency claimed that it may rely on BMPs or other similar plans to comply with WQS. But Oregon repealed the regulation that equated BMPs with WQS compliance in 2013, and, as a matter of law, these other materials cannot supplant State temperature standards without running afoul of this Court's ruling in *NWEA* and 40 C.F.R. § 131.13, which require the EPA to review and approve a state decision that deems compliance with BMPs as compliance with WQS. Pl. Reply at 23-24. And even if the agency could rely solely on these materials, it has not demonstrated compliance with them. For example, the agency's grazing handbook commands that, "[a] key concept of BMPs is that if monitoring identifies any circumstance of noncompliance with State water quality standards, then *the Forest Service is obligated to respond* to the situation to restore compliance." POL4865 (emphasis added). The record does not show the agency responded to temperature exceedences to restore compliance with WQS but, rather, that the agency did not implement BMPs, undermining this defense. Pl. Reply at 28-29.

Fourth, the agency misconstrued Plaintiffs' comment that the agency will likely not need to reduce grazing by as much as it did in *Cables* to remedy the legal violations in this case. *See* 509 F.3d at 1318-19. Here, the temporary closure of just the small Withers Special Use allotment and four other individual pastures —Bald Butte in Bear Lakes, Hog Wallow in Currier Camp, Mitten in Pothole, and the Sprague RIP in Paradise Creek—would protect degraded areas of bull trout critical habitat that are the most accessible to livestock. This would allow 80%-85% of grazing on these allotments to continue—not an "across-the-board" cut, as the agency argued.

Finally, the agency pointed to various documents to try and show it ensured compliance with WQS but none fulfills the agency's duty. For example, the 2011 BA ignored relevant data and had unsupported conclusions, as Plaintiffs have explained. Data collected after the 2011 BA shows a widening channel in the Upper Sycan and continued temperature exceedences throughout most streams. *See* Pl. Opening Br., Ex. 2; *compare* CC343 and SUPP POL14610-673 *with* CC863-877 (comparing 1999 and 2014 Sycan stream surveys). Overall, the record is full of admissions and evidence that grazing exacerbates degraded conditions and high water temperatures. Pl. Reply at 24-27.

Withers raised two arguments that conflate unique portions of the CWA and misinterpret section 313. First, Withers claimed that section 303 and the mere existence of a TMDL absolve the agency of its obligations under section 313. This is false, as neither supplant Oregon's WQS.

Section 303 requires states to establish TMDLs with pollutant loads for impaired waters "at a level necessary to *implement* the applicable WQS". 33 U.S.C. 1313(d)(1)(C) (emphasis added). As such, TMDLs are "primarily informational tools" and "serve as a link in an implementation chain." *Pronsolino v. Nastri*, 291 F.3d 1123, 1127-29 (9th Cir. 2002). A "TMDL merely provides for the manner in which [an impaired waterbody] *could* meet the [WQS] if all of the load allocations in the TMDL were met…." *Friends of Pinto Creek v. EPA*, 504 F.3d 1007, 1012 (9th Cir. 2007) (emphasis in original). Thus, TMDLs do not replace water quality standards as the applicable regulation, nor ensure that sources meet WQS as conditions change. The mere existence of a TMDL cannot absolve the Forest Service of section 313 duties.

Further, Withers relied on a TMDL that falls short of fulfilling the agency's duty in several respects. Importantly, it does not cover all streams within the CWA allotments. *See* Pl. Reply at 28, n. 8. Next, it was issued more than a decade ago, before Oregon issued its current temperature standard[3] and repealed its BMP compliance provision. *Compare* POL3322, 3330-33 *with* Pl. Opening Br., Ex. 2; Pl. Reply at 23. The agency has since documented a decade of temperature exceedences and worsening or stagnant riparian conditions in many areas. Pl. Reply at 24-27; Pl. Opening Br. at 2, 8, Ex. 2. Moreover, the TMDL is not in any of the administrative records for this case, demonstrating the agency failed to consider it, directly or indirectly, before issuing the AOIs. *See Thompson v. U.S. Dept. of Labor*, 885 F.2d 551, 555 (9th Cir. 1989).

Finally, Withers developed a new argument at the hearing: that section 313 only requires the agency to do what private landowners must. *Cf.*, Withers Opening Br. at 16-23; *see Cox*, 7 F.3d at 1463. This argument cannot be squared with decisions that federal agencies must ensure compliance with WQS when acting in a unique governmental capacity, such as when authorizing

[3] http://www.deq.state.or.us/wq/standards/temperature.htm ("Oregon's current temperature standard was adopted … in December 2003"); POL 3312 (WQRP issued in February 2003).

activities such as timber sales on federal lands in Oregon, which are non-point sources. Pl. Reply at 21. In enacting section 313, Congress was concerned with reining in government pollution, not limiting agencies' liability. *See* 1972 U.S.C.C.A.N. 3668, 3733-34 (explaining section 313 "would require every Federal agency with control over any activity or real property, to provide national leadership in the control of water pollution in such operations"). Moreover, OAR 340-041-0028(12)(a) broadly requires all anthropogenic sources to reduce thermal impacts, demonstrating Plaintiffs *are* only asking the Forest Service to act as other sources must.

3. INFISH Rebuttal Points.

Withers argued that the INFISH RMOs are only aspirational and need not be achieved immediately. This is wrong. INFISH has been a part of the Forest Plan since 1995, and standard GM-1 obligates the Forest Service to modify or suspend grazing practices that retard the attainment of RMOs. POL2655, 2677. NFMA requires the agency to show it complied with this standard when issuing AOIs. 16 U.S.C. § 1604(i); *Or. Natural Desert Ass'n v. Tidwell*, 716 F. Supp. 2d 982, 1007-08 (D. Or. 2010). Here, the agency failed to modify grazing after finding it slows the rate of recovery beyond the near natural rate of recovery, which constitutes retarding attainment of RMOs. *Compare* POL2671 *with* SUPP POL1428. The record does not show the agency considered recent data to comply with INFISH when issuing the 2014-2015 AOIs. *See, e.g.,* SUPP POL1459-1481 (conclusory discussion from 2005 that ignores nearly ten years of subsequent temperature data and evidence at SUPP POL1428 that grazing slows recovery of riparian areas); POL5402-07 (data from assessments mostly more than a decade or more old). The failure to analyze all available data relevant to the temperature RMO before issuing the 2014 and 2015 AOIs falls short of INFISH's command. *See Tidwell*, 716 F. Supp. 2d at 1008 (AOIs failed to comply with analogous PACFISH provision).

4. WSRA Rebuttal Points.

The Forest Service wrongly claimed that Plaintiffs cannot challenge AOIs for compliance with the WSRA. The agency provided no legal support for its argument that the agency need only consider compliance with substantive environmental laws when preparing an environmental analysis under the National Environmental Policy Act. *Oregon Natural Desert Ass'n v. U.S. Forest Service*—a case involving WSRA claims—conclusively determined that AOIs are new agency actions subject to challenge under the APA for compliance with substantive environmental laws, including WSRA. 465 F.3d 977, 981, 990 (9th Cir. 2006). And, as Plaintiffs explained at the hearing, the 1992 River Plan was not a blank check for future grazing. *See* POL2348, 2352, 2361. The agency cannot claim that a one-time analysis precludes it from ever again having to follow Congress's commands when authorizing grazing year after year.

The agency also misrepresented its duty under the WSRA by claiming it only must make sure conditions do not get worse. To the contrary, the WSRA mandates that the agency "enhance" the Upper Sycan River Corridor, which requires more than just maintenance of a degraded status quo. 16 U.S.C. § 1281(a); *see Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1035-36, n.5 (9th Cir. 2008); *Or. Natural Desert Ass'n v. Singleton*, 47 F. Supp. 2d 1182, 1191-92 (D. Or. 1998). The record shows grazing is slowing recovery of riparian areas and some conditions are worsening, illustrating the agency is failing to protect, let alone enhance, the River Corridor. *See* SUPP POL1428, Pl. Opening Br. at 32-34. The record also shows that grazing is substantially interfering with the Outstandingly Remarkable Values of the Upper Sycan and violating River Plan requirements for Fisheries and Scenic values. Pl. Br. at 36-40, Pl. Reply at 33-35; POL 6577 (admitting grazing was a cause of extinction of bull trout in the Upper Sycan). Thus, the 2014-2015 AOIs were arbitrary and capricious.

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Respectfully submitted,

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