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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.

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**, a federal agency,

Defendants,

ED GARRETT RANCH, INC., an Oregon Corporation, **PHILIP GROHS**, dba Grohs Ranch, **MATT OWENS**, an individual, **ADAM OWENS**, an individual, **KNESS CATTLE, INC**., and Oregon Corporation, **CAIN RANCH LLC**, an Oregon Limited Liability Company, **STEVE SIMMONS**, an individual, **HOLIDAY RANCHES, INC**., a California Corporation, and **C&A VOGT COMMUNITY PROPERTY TRUST**, a California Trust,

Defendant-Intervenors.

CASE NO. 1:15-cv-1360-CL

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

ORAL ARGUMENT REQUESTED

MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56-1, Plaintiffs Oregon Wild, Friends of Living Oregon Waters, and Western Watersheds Project hereby move the Court to enter Summary Judgment in their favor on all of the Claims for Relief in their Complaint. Summary Judgment is appropriate as these claims involve no genuine dispute of material fact, and Plaintiffs are entitled to judgment as a matter of law.[1] Pursuant to Local Rule 7-1, the undersigned certifies that the parties have conferred and have been unable to resolve the motion.

[1] This motion is supported by the accompanying memorandum in support; the attached exhibits; the Complaint; and such other and further material as may be presented to the Court before decision hereon. The attached Declarations of Paul Ruprecht, Joe Serres, and George Wuerthner also support Plaintiffs' motion and demonstrate their standing. *See W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 484-486 (9th Cir. 2011).

MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT

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GLOSSARY OF ACRONYMS

AOI	Annual Operating Instructions
AMP	Allotment Management Plan
APA	Administrative Procedure Act
BA	Biological Assessment
BiOp	Biological Opinion
DN	Decision Notice
EA	Environmental Assessment
ESA	Endangered Species Act
FONSI	Finding of No Significant Impact
FWS	U.S. Fish & Wildlife Service
INFISH	Inland Native Fish Strategy
LAA	Likely to Adversely Affect
LOC	Letter of Concurrence
NEPA	National Environmental Policy Act
NF	North Fork
NFMA	National Forest Management Act
NLAA	Not Likely to Adversely Affect
PCE	Primary Constituent Element
PCH	Proposed Critical Habitat
PFC	Proper Functioning Condition
RMO	Riparian Management Objective

INTRODUCTION

Lost River and shortnose suckers are highly endangered fish species endemic to the Klamath Basin. These species suffer from poor reproduction due largely to low water quality and quantity that degrades their habitat and impedes their access to spawning tributaries. Key populations of these species are found in Gerber and Clear Lake reservoirs as well as tributaries to those reservoirs, and 1,881 acres along these tributary streams within the Fremont National Forest are designated as sucker critical habitat. However, many of these streams suffer from highly degraded and worsening riparian conditions that fail to meet the needs of suckers.

Despite data showing that, for decades, cattle have caused and perpetuated degraded riparian conditions and low water flows in and upstream of sucker habitat, the Forest Service continues to authorize livestock grazing along these degraded tributary streams. Agency records from the last several years document chronic problems with unauthorized use, violations of grazing standards, and stagnant or worsening riparian conditions. Further, the agency has ignored many key components of riparian health by failing to complete all monitoring required.

The Forest Service and the U.S. Fish & Wildlife Service ("FWS") brushed these problems aside during a 2014 Endangered Species Act ("ESA") consultation, which determined cattle grazing on ten allotments would have no effect or not adversely affect critical habitat for suckers. This determination contradicted the agencies' conclusions in 1997 and 2007 that grazing would adversely affect suckers due to habitat degradation and FWS's conclusion that grazing would likely adversely modify proposed critical habitat. The agencies' change in position was only possible by ignoring important factors, such as the combined effects of grazing and water impoundments, as well as data showing poor ecological conditions in the allotments. Indeed, the Forest Service initially disclosed incriminating data and conclusions to FWS in draft

assessments and emails, but then removed this essential information from the final assessment to support its desired outcome. Thus, the consultation was arbitrary and must be set aside.

Similar problems give rise to legal violations under the National Forest Management Act ("NFMA") and National Environmental Policy Act ("NEPA"). Data shows that livestock grazing is preventing attainment of Inland Native Fish Strategy ("INFISH") standards, in violation of NFMA. In addition, the Forest Service is relying on a twenty-year environmental assessment ("EA") from 2009 for these allotments that failed to address the cumulative effects on suckers of low stream flows due to numerous water impoundments combined with impacts of livestock grazing, in violation of NEPA. Collectively, the agency has made numerous unlawful decisions that allow livestock grazing to push endangered suckers further toward extinction. Thus, the Court should grant Plaintiffs' motion for summary judgment.

FACTUAL BACKGROUND

I. Lost River Watershed.

The Lost River watershed encompasses nearly 282,000 acres within the Klamath Basin, and includes both Gerber Reservoir and Clear Lake Reservoir. P 5442; FWS 1710.[2] The Fremont-Winema National Forest manages 71,000 acres of land within this watershed. P 5442. Warm, dry summers and cold, wet winters, with annual precipitation ranging from 13 to 30 inches that mostly falls as rain, are typical; thus, tributary streams can dry out or retain only isolated pools in the summer. P 5443; FWS 2265. Due to the scarcity of water in summer, the watershed contains numerous water impoundments and diversions used for irrigation and stockwatering that alter the timing, velocity, and quantities of water flows. P 304; FWS 1736-7, 1742, 1773-74, 5232.

[2] The administrative records are designated by prefixes used by the agencies—*e.g.*, P for the policy folder from Forest Service and FWS for documents from U.S. Fish and Wildlife Service.

Extreme drought conditions have plagued the area for years. Leading up to the summer of 2014, Gerber and Clear Lake Reservoirs were well below their average and usable capacities; summer streamflow forecasts in the basin ranged from 6% to 47% of average; and the federal government declared the basin was in a severe or extreme drought. Ex. 1. Before summer 2015, reservoir levels were even lower and "significant water shortages" were expected during the summer. P 8304-05. Drought will be more frequent due to climate change, which is expected to transform the Klamath Basin and reduce water quality and flows throughout summers. P 7210.

II. Endangered Lost River and Shortnose Suckers.

Lost River and shortnose suckers are two large and long-living fish species endemic to the Klamath Basin of south-central Oregon and north-central California. P 304-05. In 1988, FWS listed both species as "endangered" under the ESA after dams, diversions, dredging, and other forms of water manipulation reduced their range and numbers by more than 95%. *Id*. The primary factors that drove suckers to the brink of extinction include the loss and degradation of habitat, restricted access to spawning habitat, and severely impaired water quality. P 6969. These remarkable species were staples in the diet of the Klamath Tribe for millennia, and supported a local cannery in the 1800s and a major sport fishery in the 1900s. P 305. Thus, the precipitous decline of both species was so alarming to the Tribe and local biologists that the state of Oregon closed the fishery and placed suckers on the state's protected species list. *Id.*

Suckers are unique species that spend the majority of the year in open-water habitat such as lakes or reservoirs, but migrate annually to tributary streams to spawn in late winter and early spring. P 6967-8; FWS 6773. After hatching, larvae drift downstream from spawning tributaries to lakes between April and mid-summer and use deeper habitat as they grow. P 6968, FWS 6748, 6932. Thus, migratory corridors with adequate water flow between spawning tributaries

and downstream reservoirs are a physical or biological feature essential for the conservation of these species. P 6968-69. Inadequate flows in tributaries used for spawning can prevent access to spawning habitat, dewater eggs, strand post-spawned adults in isolated pools, and increase the vulnerability of fish to drought. FWS 2266-69. Low water levels in reservoirs that serve as habitat for adult suckers reduce available habitat and degrade water quality, which threatens suckers. *See, e.g.*, FWS 2267-69, 2271, 4310. For example, suckers in Clear Lake and Gerber Reservoirs showed signs of stress from extremely low water levels in 1992. P 6970, FWS 2267.

Shortnose suckers within Upper Klamath Lake and Gerber and Clear Lake Reservoirs are the only populations that "achieve even marginal reproduction." FWS 6943. But, only "very low numbers of individuals" exist outside Upper Klamath Lake. FWS 6936. The Clear Lake Reservoir population is very vulnerable to drought because the primary spawning tributary, Willow Creek, suffers from poor connectivity and limited passage for spawning when reservoir water levels or creek flows are low. FWS 2267, 2432. The Gerber Reservoir population spawns mainly in Barnes Valley Creek, which generally provides the only available habitat during low water years, although spawning may occur in Long Branch, Pitchlog, Wildhorse, and Ben Hall Creeks. FWS 2268. Although these fish generally access tributaries just to spawn, some shortnose suckers reside year-round in tributaries such as Long Branch, Barnes Valley, and North Fork ("NF") Willow Creeks—likely because rapidly drying streams strand fish in isolated pools after spawning. FWS 1617-18, 2265-66 (describing 62 shortnose suckers found in pools).

Poor recruitment is a major problem, and populations continue to age as few juveniles survive to reproductive age. P 304-5; FWS 6932. Suckers thus remain at "significant risk of catastrophic events, such as die-offs," far from meeting recovery criteria. FWS 6943, 6954, 6956. FWS's 2013 status review found that the species faces "a high degree of threat of

extinction and a low recovery potential." FWS 6931. Because the Clear Lake and Gerber populations are the only ones in the Lost River Recovery Unit that successfully reproduce, they are essential for recovery; a threat to those populations is "a threat to the entire species." FWS 6799, 6747, 6801-02. Loss and alteration of spawning habitat and limited hydrologic connection to spawning habitat remain major threats. FWS 6785-86. To recover even to "threatened" status, "threats to the species due to degraded or limited habitat must be reduced." FWS 6806.

On December 11, 2012, FWS finalized a critical habitat rule that included 1,881 acres on streams within the Fremont-Winema National Forest. P 6959; FWS 2737. FWS designated critical habitat in Clear Lake Reservoir and tributaries for both species, and in Gerber Reservoir and tributaries for shortnose suckers. P 6972, 6984, 6987. The rule identified the primary constituent elements ("PCE") as: (1) sufficient water quality and quantity, including temperatures of less than 28°C and flows during appropriate times of the year; (2) spawning and rearing habitat with adequate stream velocity for spawning; and (3) an abundant forage base for food. P 6969. The rule identified federal actions that may affect critical habitat as those that would significantly alter reservoir levels, such as water diversions and withdrawals; significantly alter channel morphology, such as channelization and loss of riparian vegetation; and significantly increase sediment deposition within streams, such as livestock grazing. P 6976.

III. Degraded Riparian Conditions in the Lost River Basin.

"Nearly all" streams and rivers within the Lost River Basin are degraded, some seriously, due to factors including the loss of riparian vegetation, grazing, and low flows from water diversions. FWS 2271. Many streams are dry by early summer due to altered hydrologic cycles and reduced water in streams. P 7203. Within the Gerber Reservoir sub-basin, streams are becoming increasingly wide, straight, and shallow. FWS 2278. Gerber Reservoir water levels

are "highly manipulated for irrigation purposes" and combined with multi-year droughts "can result in substantially reduced amounts of sucker habitats." FWS 2269.

There are "numerous" reservoirs, impoundments, and water diversions in the Gerber Reservoir sub-basin, mostly to "provide stock water or for irrigation purposes," that alter the timing and reduce the quantity of natural tributary flows, especially within Barnes Valley Creek. FWS 2277, 2298, 2306. Such flow manipulation can alter hydrologic connections to spawning or rearing habitats and "retard or prevent the ability of adult migrants to access spawning areas." FWS 7206. Low water years, which have recently occurred frequently, cause "very low stream flow or no flow at all" and maximum stream temperature spikes. *Id.*; FWS 2279.

Grazing significantly harms riparian areas, fish, and fish habitat. *E.g.*, FWS 1631-1640, 5366. By congregating in riparian areas, especially during hot summer months, livestock reduce riparian vegetation, thereby reducing shade and cover for fish, change stream morphology, and increase water temperature, sediment, and other pollutants. FWS 1632-1640, 2281-88. Livestock can alter frequency of pools and width to depth ratios. FWS 2284. Such degraded streams allow for exotic fish and bull frogs to prey on and compete with suckers. FWS 2280.

Cattle can also impact water quantity in streams by compacting soils, which decreases infiltration and increases runoff of precipitation, causing higher peak flows during rain events and lower base flows in summer. FWS 2273-74, 2281-83, 5366. Higher peak flows increase erosion and down-cutting, which makes channels wider and shallower, separates the channel from its floodplain, and lowers water tables. FWS 2273-74, 2282-83. Eroded and compacted soils do not recover quickly in semi-arid areas like the Klamath Basin. FWS 2277-78.

Livestock have heavily grazed and degraded riparian areas and floodplains within the Klamath Basin. P 6970. In tributaries of Gerber Reservoir and Clear Lake, badly-managed and

excessive livestock grazing has reduced riparian vegetation that stabilizes streambanks and shades streams. FWS 1621, 1627. Degradation of many streams has led to "headcuts that cause the stream channel to incise, which lowers the water table and results in the loss of riparian vegetation that would normally provide bank-stabilizing root mass to prevent erosion." P 7203.

IV. Grazing Impacts on the Lost River Allotments.

The Forest Service authorizes livestock grazing on six allotments in the Fremont Forest that include, or are within one mile of, shortnose sucker critical habitat: Arkansas, Pitchlog, Wildhorse, Yainax Butte, Yocum Valley, and Horsefly allotments. P 7198, 7201-02; *see also* P 7227-28; Ex. 2. Shortnose suckers occupy habitat in five of these allotments. FWS 2294 (1.7 miles in Lapham Creek/Arkansas allotment), 2297 (3.7 miles in Barnes Valley Creek/Pitchlog allotment), 2300 (1.1 miles in NF Willow Creek/Wildhorse allotment), 2301 (4 miles in Yainax Butte allotment), 2303 (NF Willow Creek /Yocum Valley allotment).[3]

The Forest Service has documented that riparian and ecological conditions within the allotments largely remained stagnant or on a downward trend for years and are not meeting desired conditions. PL 178-85, 212-14, 432, 436; WH 127, 130-32, 155, 59, 649, 652-53; YV 43-44, 47-48, 54-57, 175, 179, 1027, 1030-31; YB 77-84, 199-202, 244-245; P 10514-18; AR 44-47, 119-120, 874-76. Streams suffer from high width-to-depth ratios, poor bank stability, low pools per mile, and high water temperatures, all of which impair sucker habitat. P 6889-6901, 7531; WH 173, 174, 279-82; PL 473; YV 257, 273; YB 124; FWS 1626, 1630, 1638-9. Reaches in Barnes Valley Creek and NF Willow Creek are "non-functional." FWS 1625, 1630.

[3] The agency also authorizes grazing on allotments upstream of Lost River sucker habitat—the six allotments listed above plus Barnes Valley, Fort Springs, Privy Springs, and Bly Ridge allotments. FWS 1631, 1660.

The Forest Service's monitoring also reveals regular violations of grazing requirements. Trespass into unauthorized areas has been a frequent problem. PL 319, 374-77, 378-87, 397-400, 409, 1142-43; YB 161-64, 197-98, 206-09, 258; AR 168, 867; WH 186, 309-10, 685, 698, 700-02, 716; HF 44, 53-57, 76-81, 88, 276, 301-02, 325-27, 334; YV 108. The agency has repeatedly found stubble height and utilization standards violations, which it often fails to even acknowledge or ignores based on re-growth of vegetation. WH 283, 309-10, 634-36, 672, 704, 716; YV 167-68; YB 153-155, 197-98, 249, 279; HF 276; PL 1142. Photos and notes show that cattle have easy access to streams on the allotments and as such have degraded streams through bank damage, hoof shear, trampling within channels, and lowered water tables. *See, e.g.*, PL 44-55, 369-73, 378-387, 451-462, 1069-79, 1153-63; WH 251, 273-76, 305, 610-11, 659-68, 673, 683-84, 690-91, 705-10; P 15058-15069; HF 1-9; YV 49-51, 123-133, 181-85, 216-25, 238-241, 987-92, 1042-45; YB 24-43, 47-66, 67-76, 108-10, 118, 130-32, 133-152, 165-75; AR 16-33, 196-212. Yet the agency has turned a blind eye to this data, continuing to authorize grazing without meaningful changes to protect riparian areas and sucker critical habitat.

V. ESA Consultations on Livestock Grazing Impacts to Suckers.

In 1997, the agencies conducted an ESA consultation over impacts to suckers from livestock grazing within the Lost River watershed. FWS 5985. FWS issued a Biological Opinion ("BiOp") that determined grazing was "likely to adversely affect" ("LAA") suckers in eleven pastures in the Yocum Valley, Wildhorse, Fort Springs, Pitchlog, Barnes Valley, and Arkansas allotments. FWS 6032-33. The BiOp explained grazing "is likely to result in incidental take of listed suckers" due to "detrimental effects on parameters such as water temperature, substrate quality, bank stability, food supply, spawning success, and suspended sediment levels…." FWS 6022-23. To minimize harm, FWS required, "[s]trict adherence" to

livestock use standards, completion of Proper Functioning Condition ("PFC") assessments by 1998, and monitoring and limits on unauthorized use. FWS 6024. But, a 2003 compliance report found utilization standard exceedences, unauthorized use, and fence problems, illustrating grazing failed to adhere to these "[s]trict" requirements. FWS 569, 573-76, 6024.

The 1997 BiOp covered grazing through 2007, when the agencies conducted a new ESA consultation. *See* FWS 1588. In a 2007 Biological Assessment ("BA"), the Forest Service described its proposed action as authorizing grazing on 10 allotments in the Lost River watershed and following six implementation steps to minimize effects of grazing to suckers. FWS 1602-11, 1644, 1647, 1649, 1652. The 2007 BA determined that grazing was likely to adversely affect shortnose suckers in Yocum Valley, Wildhorse, Arkansas, Pitchlog, and Yainax Butte allotments, so FWS prepared a BiOp for these allotments. FWS 1660, 2250. The 2007 BiOp identified three categories of potential adverse effects to suckers: (1) water quality reductions such as higher temperatures; (2) hydrogeomorphic changes such as reductions in summer base flows and "reduction/loss of critical fish habitats such as spawning and rearing areas"; and (3) ecological changes such as increases in predators, competitors, and pathogens. FWS 2288. FWS explained: "[a]ll of the allotments are likely to have some direct and indirect adverse effects to [shortnose suckers]," but that monitoring and adaptive management would address any "substantial" problems and thus grazing would not appreciably reduce the likelihood of survival and recovery—i.e. jeopardize—the Lost River watershed populations. FWS 2293-2306.

FWS anticipated in the 2007 BiOp that grazing in the five LAA allotments would "take" shortnose suckers by trampling adult and juvenile fish, and reducing water quality in isolated pools occupied by suckers and used by cattle when flows are low or absent. FWS 2307 (explaining that when water temperatures are high and dissolved oxygen levels low, "even if

suckers are not trampled they could be harmed by poor water quality as a result of cattle using the pools"). The agency estimated that grazing would harm 5% of the approximately 500 shortnose suckers present in the allotments during the summer. FWS 2308.

The Forest Service determined in the 2007 BA that grazing on the remaining allotments was "not likely to adversely affect" ("NLAA") or would have no effect on suckers, and FWS agreed with that conclusion in a "letter of concurrence" ("LOC"). FWS 1660, 2021. The Forest Service also determined that grazing would not adversely modify proposed critical habitat, but FWS disagreed. FWS 1660, 2310-11. FWS instead included a "conference report" in the 2007 BiOp addressing proposed critical habitat ("PCH")[4] that concluded grazing "will likely result in the adverse modification of PCH 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 impacts the biological environment, including adequate food levels, and natural patterns of predation, parasitism, and competition." FWS 2310-11.

In 2013, the Forest Service began "re-consultation" with FWS over the effects of grazing on designated critical habitat for suckers. P 7196; *see* FWS 2401. In 2014, the Forest Service prepared a BA explaining that critical habitat on the Forest "plays a primary role in providing seasonal access to [shortnose sucker ("SNS")] spawning sites in the analysis area and is able to provide year-round rearing habitat for the small number of stream-resident SNS that occupy permanent pools." P 7203. The agency excluded from its analysis effects to Lost River sucker critical habitat because all allotments were more than one mile upstream of that habitat. P 7201.

The 2014 BA generally acknowledged the degraded conditions on the allotments and the many ways that grazing negatively affects riparian areas and water quality and quantity. P 7207-

[4] Because the critical habitat designation was not final at that time, FWS issued an advisory conference report for impacts to critical habitat rather than including it within the formal BiOp.

11. In also noted that climate change will "transform the natural systems of the Klamath Basin" by, *inter alia*, causing water quality to decline, stream flow to decrease in non-winter months, and water temperatures to increase. P 7210-11. The 2014 BA admitted that past grazing has incrementally affected critical habitat within the assessment allotments. P 7204-7211. Nevertheless, it concluded that the proposed grazing would have no effect on pastures where critical habitat was one mile or more downstream, and was not likely to adversely affect critical habitat on the nine pastures where it occurs directly or within one mile downstream. P 7222-23; FWS 2731. For the nine NLAA pastures, the Forest assessed the effects of grazing on the three PCEs and concluded that grazing would not adversely affect critical habitat in six of those nine pastures because "[w]ater quantity/quality are limiting source." P 7211-7223. It failed to explain why grazing would not add adverse effects to streams that already had poor water quantity and quality. The rationale for the remaining NLAA determinations was that the presence of exclosures would supposedly keep cattle out of critical habitat streams. *Id.*

Notably, the Forest Service's final ESA determination for the Pitchlog allotment represented an abrupt change of course. The agency had initially made a LAA determination for that allotment, requiring a BiOp. *See, e.g.*, FWS 2542. FWS's draft BiOp also admitted the proposed grazing could have "several adverse effects to critical habitat, especially to PCE1-water" that would be "most pronounced in summer when there is no flow in the streams, water levels in pools are likely declining, and air temperatures … can exacerbate any pre-existing water quantity and quality problems." FWS 2509-10. In the waning weeks of consultation, the LAA call was changed without a rational explanation. P 13297; FWS 2657. Moreover, drafts of the BA disclosed monitoring that indicated grazing impairs critical habitat; the final BA omitted such information. *Compare* FWS 2479-2484, 2537-41, 2578, 2585, 2581 *with* P 7192-7229.

In 2014, FWS issued a letter concurring with the Forest Service's NLAA determinations ("2014 LOC"). Remarkably, FWS decided to issue an LOC before reviewing the final BA, which was significantly different from previous versions. FWS 2659 (FWS employee needed to complete the LOC before his last day); *compare* FWS 2663 *and* 2733 *with* 2599-2600. This pre-determined concurrence allowed FWS to produce a draft LOC in mere hours. FWS 2663, 2704.

VI. 2009 NEPA ANALYSIS.

The Forest Service prepared an Environmental Assessment ("EA") in 2009 that analyzed the environmental impacts of grazing on Barnes Valley, Arkansas, Pitchlog, Horsefly, Wildhorse, and Yocum Valley allotments. P 5510-5694. The agency issued a Decision Notice ("DN") and Finding of No Significant Impact ("FONSI") on July 29, 2009. P 5666-5691. The proposed action, to reauthorize livestock grazing on those allotments and update allotment management plans ("AMPs"), "would provide guidance for the six grazing allotments in the project area over the next 20 years." P 5536. The EA failed to analyze the impacts of numerous water impoundments and diversions on stream flows in the project area, and how the cumulative effect of the diversions, combined with the impact of grazing, would affect suckers. Nor has the agency supplemented its EA to incorporate significant new information about the dire status of shortnose suckers and threats to the species, including prolonged drought and climate change.

ARGUMENT

I. THE 2014 ESA CONSULTATION WAS ARBITRARY AND CAPRICIOUS.

Courts review ESA consultations under the Administrative Procedure Act ("APA") and set aside such decisions if they are arbitrary, capricious, or otherwise not in accordance with the law. *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 521 (9th Cir. 2010); *League of Wilderness Defenders/Blue Mountains Biodiversity Proj. v. Connaughton*, No. 3:12–cv–02271–

HZ, 2013 WL 3776305, at *2 (D. Or. July 17, 2013), *rev'd on other grounds*, 752 F.3d 755 (9th Cir. 2014). This standard is not satisfied if the agency ignored an important aspect of the problem, offered an explanation that was counter to the evidence before it, or was so implausible that it could not be ascribed to a difference in view or the product of agency expertise, or failed to articulate a rational connection between the facts found and the conclusions made. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An agency "shall use the best scientific … data available" in a consultation. 16 U.S.C. § 1536(a)(2). Where an LOC relies on a BA, a court reviews both documents in a challenge to the LOC. *Or. Wild v. U.S. Forest Serv.*, No. 15-cv-895-CL, ECF No. 77 at 9-10 (D. Or. June 17, 2016)

The 2014 LOC, which explicitly and exclusively relied on the 2014 BA, is arbitrary and capricious and must be set aside. FWS 2771 (LOC); *see* P 7192 (BA). This consultation ignored significant data and other key factors when assessing the environmental baseline and the direct and indirect effects of grazing on critical habitat, resulting in NLAA determinations[5] that are irrational and unlawful. *See* 50 C.F.R. §§ 402.02, 402.12(a) & (f)(4). Specifically, the agencies failed to evaluate properly the "effects of the action" by ignoring the combined effects of grazing and water impoundments. *See* 50 C.F.R. § 402.12(a) (explaining that a BA must evaluate "the potential effects of the action on …proposed critical habitat"); *id.* at § 402.02 (defining "[e]ffects of the action" to be the "direct and indirect effects of an action …that will be added to the environmental baseline"). The record here shows the Forest Service sanitized the 2014 BA by deleting evidence that grazing would have more than a "discountable" or "insignificant" effect on critical habitat. Further, the 2014 BA and LOC are littered with unsupported conclusions

[5] An NLAA determination means the agency concluded that the action's effects to critical habitat are "discountable" or "insignificant," with insignificant effects applying "to the size of the impact and should never reach the scale where take occurs," and discountable effects meaning "extremely unlikely to occur." Ex. 3 (ESA Consultation Handbook) at xv-xvi.

about the impacts of grazing and the environmental baseline that contradict evidence in the record and the agencies' prior conclusions during consultations in 1997 and 2007. Thus, the 2014 ESA consultation should be set aside under the APA. *See, e.g.*, *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 901-903 (9th Cir. 2002); *Pres. Our Island v. U.S. Army Corps of Eng'rs*, No. C08-1353RSM, 2009 WL 2511953, at *7-10, 14 (W.D. Wash. Aug. 13, 2009); *All. for the Wild Rockies v. U.S. Forest Serv.*, No. CV 07-150-M-DWM, 2008 WL 8985475, at *8-10 (D. Mont. July 30, 2008).

A. The Agencies Failed to Analyze the Effects of Grazing When Added to a Degraded Baseline of Poor Water Quantity and Quality.

The 2014 BA/LOC unlawfully ignored the effects of grazing when "added to" the degraded environmental baseline resulting from poor water quantity and quality. *See* 50 C.F.R. § 402.02 (explaining the effects of the action are those "that will be added to the environmental baseline") (emphasis added); *see also* 50 C.F.R. § 402.12(a). The sucker critical habitat streams normally have peak flows in spring and low water flows in summer, with most becoming intermittent streams with just remnant pools by mid summer. Water flow manipulations throughout the Lost River watershed impact these tributary flows further. Evidence throughout the record shows that water impoundments have altered the timing and quantity of natural stream flows throughout the basin, degrading the environmental baseline and threatening suckers and their habitat. *E.g.,* FWS 1736-37, 2268, 2271, 2277, 2280, 2306 ("existing diversions of water for irrigation and livestock watering [on private land] are expected to continue contributing to habitat degradation for listed suckers"), 5232-33, 5366-67. Low flows and remnant pools concentrate sediment and pollutants in the remaining water in the streams, contributing to low water quantity and poor water quality.

Rather than adding the impacts of grazing to this degraded environmental baseline, the 2014 BA compared the effects of grazing to the degraded baseline caused by low water flows. *See*, *e.g.*, P 7218 ("Effects from livestock grazing are small compared to [] other factors" such as impoundments and irrigation diversions.). The agency explained that baseline conditions are substantially altered by flow manipulations, but found the effects of grazing would be "small" or "minimal" relative to these baseline effects. P 7211 ("continued grazing … would have minimal effect to PCE 1 relative to the effect caused by the natural conditions") (emphasis added), 7218, 7221-23 (rationale for six pastures was water quantity/quality "are limiting source"). Thus, the 2014 BA failed to assess the effects of grazing added to the effects of the severely altered flows. The 2014 LOC accepted the 2014 BA's assumption that the "additional incremental effects" of grazing would be insignificant due to naturally limited water quantity and PCEs. FWS 2772.

The Ninth Circuit has held such reasoning is flawed: "[t]he proper baseline analysis is not the proportional share of responsibility the federal agency bears for the decline in the species…." *Nat'l Wildlife Fed'n v. NMFS*, 524 F.3d 917, 929-31 (9th Cir. 2008) ("*NWF*") (internal citation omitted). In *NWF*, the court noted that the existence of the dams on the Columbia River were part of the environmental baseline, and were already endangering the salmons' survival and recovery. *Id.* The court held that the agency could not just compare the effects of the dam operations on the species to the risk posed by baseline conditions to determine if the effects are worse than the baseline. *Id.* This approach allows a species to be "gradually destroyed, so long as each step on the path to destruction is sufficiently modest. This type of slow slide into oblivion is one of the very ills the ESA seeks to prevent." *Id.* "[E]ven where baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm." *Id*. Thus, the agency must consider the impact to the species when it adds the

effects of the action to the degraded baseline to determine if the action will cause additional adverse effects. Here, the failure to add grazing impacts to the degraded baseline was arbitrary and violated the ESA. *See id*.; *see also ALCOA v. BPA*, 175 F.3d 1156, 1162 n.6 (9th Cir. 1999); *Mayo v. Jarvis*, —F. Supp. 3d—, 2016 WL 1254213, at *31-33 (D.D.C. March 29, 2016).

The agencies' approach here masked the actual impact of grazing on PCE 1, water quality and quantity. *See* P 6969. Grazing that further degrades or removes PCE 1 in streams already suffering from inadequate water quality and quantity constitutes an adverse effect, not a "discountable" or "insignificant one." *See* Ex. 3 at xv. Indeed, additional degradation, even if incremental, may be the final straw for suckers clinging to survival in streams with inadequate PCE 1 conditions. *Cf*., *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 994 (9th Cir. 2004) (explaining that "the addition of a small amount here, a small amount there, and still more at another point could add up to something with a much greater impact, until there comes a point where even a marginal increase will mean that *no* salmon survive").

The agencies' conclusions about the incremental impact of grazing on water quantity-limited streams was particularly unreasonable given statements in the 2007 BiOp and Conference Report. The BiOp stated that grazing on the allotments would likely reduce water quality and summer base flows, adversely affecting habitat and harming suckers using the same isolated pools as cattle. FWS 2288, 2293, 2304-06. The Conference Report concluded that grazing was likely to adversely modify the proposed critical habitat because grazing "incrementally reduces the amount of water of sufficient quantity and suitable quality" and degrades physical habitat for spawning, feeding, rearing, and travel corridors. FWS 2310-11, 2772 (emphasis added). Yet the 2014 consultation failed to explain why grazing's incremental effects on water quantity and quality were significant in 2007 but not in 2014, particularly when the record shows that cattle

continued to cause problems to critical habitat streams and riparian conditions remained poor in most areas in the intervening years. *See infra* pp. 21-22, 26-27.

Early in the consultation process, an agency employee explained, "if the FWS conclusion for the designated critical habitat is different than the Conference Report conclusion for [proposed critical habitat], then FWS will need to provide an explanation of the differences and why their conclusions are different …" but the agency failed to provide that explanation. Ex. 4. The lack of a rational explanation for departing from the 2007 conclusions about adverse effects renders the 2014 ESA consultation arbitrary. *See Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 968-69 (9th Cir. 2015) ("unexplained conflicting findings about the environmental impacts of a proposed agency action violate the APA"). Thus, the 2014 BA's analysis of impacts to PCE 1 is flawed. *See* P 7211-23.

B. The Agencies Ignored Monitoring Data and the Effects of Past Grazing that Demonstrate the NLAA Determinations Are Arbitrary and Unsupported.

A second significant flaw with the 2014 LOC/BA is that they failed to use the implementation and ecological monitoring data the Forest Service collected to analyze effects of the proposed grazing and assess compliance with the 2007 BA and BiOp standards and requirements. Without this data, the agencies could not accurately describe the environmental baseline, such as the current conditions of the critical habitat streams and surrounding riparian areas, nor accurately assess the effects of the grazing. *See Pres. Our Island*, 2009 WL 2511953, at *7 (ignoring scientific evidence rendered NLAA determination arbitrary and capricious); *NWF*, 524 F.3d at 929-31 (holding BiOp unlawful because its analysis "failed to incorporate degraded baseline conditions"). This monitoring data constituted the best available science about the impacts of grazing to ecological conditions on the allotments, and the agencies' decision to ignore it rendered the ESA consultation arbitrary and contrary to the ESA. *See* 16

U.S.C. § 1536(a)(2) (agency shall use the best scientific data available in consultations); *Wild Fish Conservancy v. EPA*, No. C08-0156-JCC, 2010 WL 1734850, at *3-8 (W.D. Wash. Apr. 28, 2010) (explaining the ESA "unambiguously declares that [] agencies must use the best scientific and commercial data available" and holding NLAA determination unlawful that ignored the best available science) (internal quotations omitted); *Pres. Our Island*, 2009 WL 2511953, at *7; *see also Nw. Ecosystem All. v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1147 (9th Cir. 2007) (the "best scientific ... data *available* … cannot be ignored") (emphasis in original).

The omission of monitoring information from the BA is particularly blatant because the Forest Service included some of that information in draft versions of the BA, which it shared with FWS, but then deleted it from the final BA. Only by willfully ignoring this "best available science" could the Forest Service change course and reach a NLAA determination. Although the contents of a BA are discretionary, the agencies must still follow APA standards by providing a rational connection between the facts in the record and their NLAA conclusion, and showing that their explanations are supported by, not contradicted by, the evidence before them. 50 C.F.R. § 402.12(f); *see Souza v. Cal. Dep't of Transp*., No. 13-cv-04407, 2014 WL 1760346, *6 (N.D. Cal. May 2, 2014) (explaining a court "cannot rubber-stamp a haphazard [informal] consultation process" because "[t]he agencies must do more than just go through the motions"); *All. for the Wild Rockies v. U.S. Forest Serv*., 2008 WL 8985475, at *10 (finding NLAA determination was arbitrary and capricious because it was not supported by the record and lacked a rational connection to the facts). The agencies' path to the NLAA determination here did not satisfy that standard but instead was irrational and unsupported.

An egregious omission from the 2014 LOC/BA was evidence that cattle have trespassed outside of authorized areas and grazed on allotments outside of authorized seasons during

multiple years. Unauthorized use by cattle has been a particularly severe problem on the north pasture in Pitchlog allotment that has impacted occupied, critical habitat on Barnes Valley Creek, despite the agency's requirement that the pasture be rested and used only for trailing. *Compare* PL 276, 350-51 *with* PL 319 (2007), 378-87 (explaining cattle walked along stream banks and stood in creek with photos showing resulting damage), 397-400 (describing "consistent presence of unauthorized cattle in the area from mid July through October"). In draft BAs, the agency admitted this problem harms key stream habitat features: "[a]lthough authorized use is two days annually, chronic, unauthorized trespass retards development of riparian vegetation." FWS 2538, 2580, 2626. These draft BAs disclosed that such use changed the baseline conditions and significantly affected critical habitat: "observations and data collected show extreme impacts to the stream channel associated with unauthorized livestock use. Continued unauthorized use within the North Riparian pasture is lik[ely] to be significant to this PCE [1]." *E.g.*, FWS 2627 (emphasis added). By deleting this from the final 2014 BA, the agency unreasonably ignored the effects on PCE 1 of the actual grazing and damage that have occurred and will likely occur in the future. *See Pres. Our Island*, 2009 WL 2511953, at *7. Further, this data undermines the key rationale for the NLAA determination for this allotment, that grazing only occurs two days each year, rendering that determination unsupported by the record.[6] *See* P 7217.

The Forest Service's deletion of this data is suspicious because it facilitated a reversal of the agencies' original decision that a LAA determination was necessary. *Compare* FWS 2491 (agency employees "agreed at [a] meeting that one of the pasture determinations would be [May Affect,] LAA"), FWS 2542 ("justification" for original LAA determination was "[u]nauthorized use in pasture"), FWS 2631 ("inability to control unauthorized trespass" required LAA

[6] Indeed, after the agency completed consultation in June 2014, trespass occurred and resulted in 70-80% utilization when only less than 5% utilization was authorized. PL 1141, 1152-64.

determination), P 13118 (explaining during a meeting it became "obvious" that the pasture "needed to be a LAA"), P 13297 (change to determination), Ex. 5 *with* P 7215-17 (final NLAA rationale in BA). The record suggests this change from an LAA to NLAA determination was not based on the best available science but rather convenience. *See* P 13118 (employee "started pushing back hard" on FWS's opinion an LAA determination was needed "because of [the] timeline" to finish the consultation); FWS 2491 (Fishery Program Manager would "feel comfortable" with a NLAA determination only if BA changed analysis to look at effects at the allotment level rather than the pasture level), 2645. The record contains no rational explanation for suddenly ignoring unauthorized use that caused resource impacts and reversing course on the LAA determination for Pitchlog, rendering the 2014 LOC/BA arbitrary. *See Humane Soc'y of the U.S. v. Locke*, 626 F.3d 1040, 1049 (9th Cir. 2010).

Similarly, the agencies arbitrarily ignored evidence of problems with unauthorized use on the Yainax Butte, Wildhorse, Horsefly, and Arkansas allotments. YB 161-64 (finding 60 pair of cattle on pasture with critical habitat that should have been fully rested in 2008), 197-98, 206-09; AR 866-67; WH 186, 700-02; HF 43-45, 76-81, 88, 276, 301-302, 325-27 ("cattle seem to be everywhere except … where they are supposed to be"); *compare* FWS 2624 (noting trespass within Lapham Creek exclosure on the Arkansas allotment) *with* 7212 (excluding such evidence); P 12107-111 (evidence of cattle in exclosure on multiple occasions). These compliance problems showed the difficulty controlling livestock on these allotments, which should have been revealed in the BA. In fact, an agency employee stated that the BA should include a discussion of past compliance, "[s]uch as not maintaining fences in some places like Barnes Valley" and disclosure that such problems caused "uncontrolled grazing" as "a fact of the environmental baseline and cumulative effects." P 13009, 13019.

The 2014 LOC/BA also failed to discuss other problems the Forest Service's implementation monitoring revealed. For example, on the Wildhorse allotment, the agency reported utilization or stubble height exceedences in 2008, 2009, 2012, and 2013. WH 283, 309-10, 634-36, 672-73 (failing to acknowledge exceedences of utilization standards but admitting continued "signs of excessive trampling along some sections of the stream"). The agency also found problems on the Yocum Valley and Yainax Butte allotments in multiple years. YV 108, 167-68; YB 153-155, 197-98, 249-250. The 2014 BA admitted the agency collects this data to determine the extent of livestock use and compliance with permitting requirements but then did not discuss whether that compliance was successful. P 7197. By ignoring this data, the agency failed to consider the impacts that had actually occurred on the ground, and whether it could reasonably rely on implementation monitoring in the future to limit the effects of grazing in support of its analysis of impacts to PCEs. *Cf.*, P 7211-23. The routine failure of the permittees to abide by these limitations demonstrates the agency's reliance was flawed.

The 2014 LOC/BA also ignored existing data that showed poor ecological conditions throughout critical habitat streams and resource concerns caused by livestock use. Nearly two decades of monitoring for Barnes Valley Creek—the primary spawning stream for suckers that reside in Gerber Reservoir—within Pitchlog allotment revealed highly degraded and problematic conditions. A PFC assessment found that the upper reach is "severely degraded" and non-functional. PL 5, 194. Other monitoring revealed the creek had problems with hydrological function, channel widening, a lack of riparian vegetation, and erosion, and cattle were a primary risk factor. *Id*. Monitoring and photos showed "low" ecological status, problems with bank damage from hoof trampling, high stream temperatures, and extremely poor bank stability. *See, e.g.*, P 6697; PL 7-26, 44-55, 369-73, 378-82, 432, 436, 451-62, 473, 1069.

NF Willow Creek, which is within the Wildhorse and Yocum Valley allotments and the primary spawning stream for shortnose suckers in Clear Lake Reservoir, was also highly degraded. Riparian scorecards available before the 2014 BA/LOC was issued revealed "low" ecological status in 2002, 2006, and 2009; high stream temperatures were documented in multiple years; width-to-depth ratios and trampling have been a problem; and bank stability data showed poor and worsening conditions between 1997 and 2008. P 6693; YV 43-44, 47, 51, 54, 57, 175, 179, 257; WH 280-1 (26.5 and 21.4 width to depth ratios), 659-60, 668. Other data and photos depict bank erosion, heavy cattle use of the stream, "heavily hedged" willows, trampling, a lack of riparian vegetation, "extreme algal growth," a dead sucker when cattle were present, and suckers stranded by low water. YV 19-40, 50-51, 62-63, 116-22, 123-133, 220-23, 987-91.

For Horse Canyon Creek[7] within the Yainax Butte allotment, riparian scorecards documented low ecological status that worsened for some parameters; monitoring photos and notes revealed little riparian vegetation, bank trampling, hoof damage, moderate to heavy use of the riparian areas, and a shortnose sucker present in October, long after spawning (indicating they are resident fish); and other data showed high stream temperatures, poor bank stability, and worsening PFC ratings. P 6899; YB 78, 108-10, 118-19, 130-152, 165-75 (overgrazing, "bottom grazed hard", and lots of hoof shear), 195, 244-245.

Rather than ensuring this information was included in its analysis, the Forest Service eliminated data that existed in various drafts of the BA to sanitize the final 2014 BA and cover up livestock-induced degraded conditions. For example, the agency ultimately rejected an employee comment to "tell it like it is" and include 2008 data that showed only 45% bank stability on the Pitchlog allotment when the standard is 80% stability. P 13019. Others

[7] The Forest Service represents that "tributary to Dry Prairie" and "Horse Canyon Creek" are the same waterbody. P 7217.

acknowledged the 2014 BA should include the results of ecological and implementation monitoring, as well as additional background data about seasonal conditions and the baseline, but these comments were ignored. *E.g.*, FWS 2491-92; P 13279 (asking for ecological data in the BA "to show what the trends have been in the analysis area …[which] is important because it is not clear at this point exactly how these areas are functioning per critical habitat PCEs"), 15149.

This monitoring data was excluded from the 2014 LOC/BA, which resulted in a failure to use the best available science and an inaccurate disclosure of baseline conditions and impacts of actual grazing. This renders the agencies' conclusions that grazing would have minimal effects on PCEs arbitrary and unsupported. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 ("the agency must examine the relevant data and … include[e] a rational connection between the facts found and the choice made") (emphasis added); *Wild Fish Conservancy*, 2010 WL 1734850, at *4-7 (holding informal consultation unlawful because agencies ignored the best available science).

C. The Agencies Arbitrarily Concluded Grazing Would Not Adversely Affect Critical Habitat Due to the Presence of Suckers.

Finally, the third critical flaw with the 2014 LOC/BA was that they concluded grazing was not likely to adversely affect shortnose sucker critical habitat based simply on the fact that suckers were present in the streams. P 7213-14, 7216, 7218, 7220-22. Again, this conclusion was contrary to the agency's previous conclusion in 2007 that grazing would likely adversely impact suckers and their habitat, including occupied streams. The 2007 BiOp determined that grazing could cause "many adverse effects," including take of the suckers present in these streams, due to three categories of impacts: water quality reductions, hydrogeomorphic changes, and ecological changes. FWS 2288, 2306. The 1997 BiOp also found incidental take of suckers was "likely because of detrimental effects on parameters such as water temperature, substrate quality, bank stability, food supply, spawning success, and suspended sediment levels …." FWS

5958. These habitat needs mirror the critical habitat PCEs. *See* P 6969. It is irrational to conclude during two consultations that grazing will adversely impact or "take" suckers due to habitat degradation, but later conclude that the impacts of the same grazing on the same streams is benign because those suckers are present. The agencies' failure to acknowledge, let alone explain, this change of direction is a fatal flaw. *See Organized Vill. of Kake*, 795 F.3d at 968.

Further, the presence of suckers does not necessarily mean cattle are not causing degradation and that the stream actually provides adequate spawning and rearing habitat for survival and recovery. Individuals of a species can often survive even when there are adverse effects to its habitat. *See NWF,* 524 F.3d at 923, 934-36 (noting that salmon live in the Columbia River despite significant adverse effects to its habitat from operation of dams). Indeed, the Ninth Circuit has explained, "a species can often cling to survival even when recovery is far out of reach." *Salazar*, 628 F.3d at 527. This is particularly true for suckers, which are a long-living fish and adults may return to tributary streams annually, which can mask a lack of adequate recruitment necessary to recover the species. *See* FWS 6748-49, 6772-73, 6779-80, 6932. Further, adults may only be present in critical habitat because they are trapped in isolated pools without adequate flow to return to Clear Lake and Gerber Reservoirs. *See* FWS 1617-18, 2265-55. Assuming that the presence of suckers meant grazing was not causing any adverse effects to habitat was unsupported by the record and unlawfully ignored the need to consider recovery of the species, not just its survival. *See, e.g., Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1072-75 (9th Cir. 2004); *see also NWF,* 524 F.3d at 936.

D. The Forest Service Failed to Ensure Against Adverse Modification of Critical Habitat.

The Forest Service violated its independent substantive duty to ensure that grazing it authorizes is not likely to destroy or adversely modify critical habitat. *See* 16 U.S.C. §

1536(a)(2); *see also Salazar*, 628 F.3d at 532. An agency violates that duty when it relies on an ESA consultation that suffers from legal flaws, such as a failure to articulate a rational connection between its findings and its conclusions. *Salazar*, 628 F.3d at 532. As discussed above, the 2014 ESA consultation was riddled with legal flaws. The Forest Service's reliance on the unlawful consultation to fulfill its substantive duty is particularly unreasonable because FWS concluded in 2007 that continued grazing within the Lost River watershed "will likely result in the adverse modification of [proposed critical habitat] for the suckers." FWS 2310-11 (explaining adverse effects of grazing). Accordingly, the agency's unreasonable reliance on this flawed consultation to continue to authorize grazing violated its substantive duty to ensure against any adverse modification of critical habitat. *Salazar*, 628 F.3d at 532

II. THE FOREST SERVICE VIOLATED NFMA WHEN ISSUING AOIs IN 2013, 2014, AND 2015.

The Forest Service violated its duty under NFMA to comply with INFISH grazing standards by ignoring widespread evidence of riparian problems when rubber stamping AOIs for the Horsefly, Yainax Butte, Wildhorse, Pitchlog, and Yocum Valley allotments in 2013, 2014, and 2015.[8] *See* 16 U.S.C. § 1604(i) (requiring all projects to comply with Forest Plans); *Great Old Broads for Wilderness v. Kimbell,* 709 F.3d 836, 850 (9th Cir. 2013); P 2826-28 (INFISH amended Forest Plans). The Forest Service adopted INFISH standards to restore inland fish habitat by applying riparian management objectives ("RMOs"), standards and guidelines, and monitoring requirements to activities that damage streams. P 2826-27, 2842-2856. INFISH standards apply to all inland native fish species such as suckers. *See* P 2618, 5555-56.

[8] Plaintiffs only challenge the 2013 and 2014 AOIs for the Yocum Valley allotment because the Forest Service did not issue a 2015 AOI at the request of the permittee for "personal convenience." *See* YV 1039-40.

INFISH Standard GM-1 requires the Forest Service to "[m]odify grazing practices (e.g., accessibility of riparian areas to livestock, length of grazing season, stocking levels, timing of grazing, etc.) that retard or prevent the attainment of [RMOs] or are likely to adversely affect inland native fish" and to "[s]uspend grazing if adjusting practices is not effective in meeting [RMOs]." P 2850. Because INFISH's goal is the recovery of degraded habitat to promote the recovery of inland fish, "[r]etard" means to "slow the rate of recovery below the near natural rate of recovery if no additional human caused disturbance was placed on the system." P 2844. RMOs require: bank stability to be greater than 80% stable; a minimum number of pools per mile depending on the wetted width of the channel; maximum water temperatures to remain below 48°F (8.9°C) within spawning and rearing habitats; and width to depth ratios to remain less than 10. P 2845. The Forest Service ignored evidence of riparian conditions that are far below RMO attainment, with stagnant or worsening trends due to grazing, and therefore its duty to adjust grazing before issuing the challenged AOIs, rendering those decisions unlawful.

The agency's monitoring shows that streams within these geographically widespread allotments have not attained multiple RMOs and are not recovering at a near-natural rate, demonstrating that non-compliance with INFISH is a landscape scale problem that occurs across multiple watersheds. *See* Ex. 2 (allotments maps). For instance, failure to attain the 80% bank stability RMO has remained a chronic problem in Barnes Valley Creek, NF Willow Creek, Horse Canyon Creek, and Wildhorse Creek. P 6891, 6893, 6897, 6899; *see also* YB 126. Bank stability declined in NF Willow Creek between 1997 and 2008, from 78% stable to just 52%. P 6893; *see also* WH 282 (explaining "Reach 2 has an abundance of unstable bank").

The agency has routinely documented severe exceedences of the 8.9°C water temperature RMO for Wildhorse Creek, NF Willow Creek, Barnes Valley Creek, Lapham Creek, and Horse

Canyon Creek in multiple years. P 6891, 6893, 6895, 6897, 6899; WH 193-249, 318-566; PL 473; *see also* HF 89-275. Although the agency has collected little data on width to depth ratios and pool frequency, available data shows both are problems. WH 173 (18.5 ratio in Reach 1 of Wildhorse Creek), 171, 174 (43.5 pools/mile on reach of Wildhorse Creek with average wetted width of 6.8 feet), 279 (37 pools/mile and 17 pools/mile on reaches of NF Willow with 7.8 and 6.9 average wetted width respectively), 280-1 (26.5 and 21.4 ratios on NF Willow Creek); YB 121, 124 (62.2 pools/mile on Dry Prairie tributary with width of 2.8 feet); AR 91.

Moreover, the Forest Service previously explained that it assesses compliance with INFISH RMOs on these allotments via its implementation and effectiveness monitoring. P 5555-56, 5647, 5677; *see also* FWS 1606-09. But, the record shows that grazing failed to comply with utilization standards in many years and that riparian scorecard monitoring showed generally poor and worsening conditions that continued—the two primary methods of implementation and effectiveness monitoring. *See supra* pp. 8, 18-22; *e.g.*, P 6691-99 (showing ecological conditions generally remained poor or worsened within all five allotments); PL436. In addition to the problems described above, monitoring in 2014 revealed further problems with implementation and effectiveness monitoring. *See, e.g.*, YB 279-80 (ignoring monitoring results that were higher than utilization standards). That year, for the Wildhorse Allotment, the agency documented that utilization standards were not met, there were "several instances" of unauthorized use," and "[t]here is a downward trend in ecological condition." WH 704-717. In the Pitchlog allotment, the agency documented 75-77% utilization where the standard was only 5% because the pasture was supposed to be rested. PL 1140-41, 1152-1164.

Additional record evidence shows grazing contributes to degraded riparian conditions. For example, along NF Willow Creek, the Forest Service found,"[g]razing is contributing to the

condition of this reach, preventing it from restoring itself to the extent possible …" and "quite a bit of trampling by cattle" along the greenline of the creek. P 5715; WH 667-668; *see also* YV 117-120 (noting heavy grazing in dry channel with isolated pools), 167 ("There are several resource concerns in the Stateline Pasture that are directly related to the use on the North Fork of Willow Creek and surrounding areas."), 1045-46, 1050 (noting "significant instability along the channel" and a static trend in riparian conditions after 2014). Further, in July 2007, the agency found a dead shortnose sucker on NF Willow Creek at the same time cows were present on the allotment. YV 62-63. In Wildhorse Creek, the agency noted "[l]ots of hoof shear in channel bottom" that was "way overgrazed" and in 2013, its ecologist recommended a "very conservative grazing strategy." WH 251, 669; *see also* P 15072-73. Yet the agency made minor changes to grazing in 2014 at the request of the permittee, but unauthorized and over use and riparian damage occurred again. *Compare* WH 638 *with* WH 675 and 678-79; P 7219 (map); WH 683-85, 690-91, 696-698, 700-70. The agency issued a notice of noncompliance for 2014 violations and concluded that ecological conditions were in a downward trend, warranting "re-evaluation of the current management", but then authorized more cattle overall for the 2015 season. WH 700-02, 718; *compare* WH 719-720, *and* Ex. 6 *with* WH 678-79. Other allotments had similar evidence of stream damage. *See, e.g.,* YB 46 (moderate to heavy use on floodplain); PL 1084-85 (hoof action on greenline); HF 2-3, 5-9 (hoof damage, browed willows); YV 117 (heavy grazing in dry channel with isolated pools in NF Willow Creek).

All of this information shows that numerous streams on these allotments are not attaining the INFISH RMOs, and grazing is retarding the attainment of those objectives. The only evidence in the record that the agency considered its INFISH duties prior to issuing the 2013-2015 AOIs are outdated or unsupported assertions about compliance that are contradicted by the

actual evidence, discussed above. P 5561-62, 5598, 7179-91. The challenged AOIs failed to address INFISH standards or RMOs, and continued to allow grazing despite a lack of recovery of riparian conditions. WH 637-642, 674-677, Ex. 6; HF 303-308, 328-332, 336-338; YB 238-43, 251-255, 281-286; PL 467-472, 1132-39, 1144-51; YV 245-250, 995-1000; *cf*, P 5508 ("INFISH requires riparian conditions to be stable or trending upwards."). Accordingly, the AOIs are inconsistent with INFISH standard GM-1, and thereby the Forest Plan, in violation of NFMA. *See Or. Natural Desert Ass'n v. Tidwell*, 716 F. Supp. 2d 982, 1008 (D. Or. 2010).

III. THE FOREST SERVICE VIOLATED NEPA.

A. The 2009 Grazing EA and Decision Notice Violated NEPA.

As noted above, one of the primary threats to the Gerber and Clear Lake populations of shortnose suckers is alteration of hydrology and water quantity. Low water flows in tributaries can adversely affect sucker spawning, leave fish stranded in small pools with poor water quality, and impair habitat in the reservoirs. Although tributary flows are influenced by both livestock grazing and numerous reservoirs, impoundments, and diversions used for irrigation and stockwatering, the Forest Service did not assess the combined effects of grazing and water storage activities on shortnose suckers in its 2009 EA, in violation of NEPA.

An EA must assess the direct, indirect, *and* cumulative effects of a proposed action. *Kern v. BLM*, 284 F.3d 1062, 1075-78 (9th Cir. 2002); *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 602-08 (9th Cir. 2010). A cumulative effect is:

> the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7. Where the agency fails to give sufficient details about past, present, and

future activities and provide adequate analysis about how these projects impact the environment, the cumulative effects analysis is inadequate. *Te-Moak Tribe*, 608 F.3d at 603. When that happens, the agency has failed to take the required "hard look" at the cumulative environmental consequences of the proposed action and provide a clear explanation of its analysis to enable informed public comment on the project and possible alternatives. *Id*.; *Lands Council v. Powell*, 395 F.3d 1019, 1027 (9th Cir. 2005). The 2009 EA failed to take the required hard look at the cumulative environmental consequences to suckers of the proposed grazing combined with the numerous water diversions, reservoirs, and impoundments in the project area.

Water quantity and quality have long been known as primary concerns for suckers. Low water levels in Gerber and Clear Lake Reservoirs can harm suckers by reducing the amount of available habitat and creating poor water quality conditions. FWS 1733, 2267, 2268-69, 2271, 2280, 2289, 4308, 4310, 4693-95. Low flows in tributaries create poor water quality and can prevent access to spawning habitat or strand fish in small isolated pools. FWS 2268, 2269, 2289, 2292, 4307. The 2007 BiOp noted that two of the three recovery criteria most relevant to the action area are: (1) Ensure water quantities are adequate to support stable populations; (2) Ensure water quality is adequate to support stable populations. FWS 2264, 2269.

The 2007 BiOp contained a thorough explanation of the effects of livestock grazing on hydrology due to reduced vegetation, soil compaction, and changes to stream channel morphology—all of which decrease stream base flows. FWS 2273-74, 2281-92; *see also* FWS 5366 (Gerber-Willow Valley Watershed Analysis). Specifically, the BiOP stated:

> [T]he primary hydrologic impacts of grazing are related to alteration of infiltration and runoff components of the basin water budget, as a result of reductions of plant cover and by soil compaction resulting from the physical action of animal hooves . . . . These effects may, in turn, decrease water infiltration rates which results in increased flood flows and reduced base flows that occur in summer. Changes in the timing and amount of flow can have

> multiple adverse effects on a stream by not only affecting the quantity of water but can affect stream morphology and water quality.

FWS 2281-82; *see also* FWS 2291-92. Hydrogeomorphic changes caused by livestock, "such as reductions in summer base flows, increases in flood-flows, and alterations of stream morphology, including reduction/loss of critical fish habitats such as spawning and rearing areas could occur and adversely affect suckers." FWS 2288. Reductions in stream flows caused by livestock can also lead to degraded water quality. FWS 2289. These reduced base flows "could have adverse effects to [shortnose suckers], especially if flows are so low as to isolate suckers in pools where they would be particularly affected by adverse water quality, possible trampling by livestock, increased rates of predation, lack of food, and other factors." FWS 2292.

In addition, the hydrology of these watersheds is altered by numerous reservoirs, dams, and water diversions. The 2007 BA and BiOp explained that reservoirs, water diversions, and small impoundments upstream of sucker habitat have altered the natural flow regime of some streams above Gerber and Clear Lake Reservoirs, with potentially both detrimental and beneficial effects. FWS 1736-37 (2007 BA), 2268, 2271, 2277, 2278, 2280, 2306 (2007 BiOp). Other agency documents similarly acknowledge that these watersheds contain many reservoirs, impoundments, and diversions, particularly in the Barnes Valley Creek, Dry Prairie, and Willow Creek drainages, which affect natural flow regimes and sucker habitat. FWS 5232-33, 5366-67; P 7206, 7215, 7218, 7221, 7222.

The Forest Service failed to assess in the 2009 EA the combined impacts to hydrology and stream flows from livestock grazing and the numerous dams and diversions in these watersheds, and how those combined impacts affect suckers. The 2009 EA included an excerpt from the 2007 BiOp stating that suckers are harmed when adults are stranded upstream in tributaries during spawning or juveniles that rear in streams are trapped in pools during summer

due to low water flows. P 5598. The EA recognized that the proposed grazing could affect vegetation and soils, but when assessing impacts to fish habitat, the EA did not explain that grazing also would affect hydrology and stream flows. P 5570-82, 5606-07, 5594-99.

Nor did the EA assess the impact of dams and diversions on sucker habitat in Gerber and Clear Lake tributaries. The EA noted as part of the "Affected Environment" for Water Quality/Fish Habitat that "[w]ater is stored for irrigation in the upper watersheds in reservoirs on private land. Construction of low dams has altered the timing, depth and duration of flooding in meadows, and converted some former emergent wetlands to open water habitat types." P 5585. It then listed the six "largest" reservoirs in the watersheds. *Id.* Simply mentioning these facts provides no analysis of impacts of these reservoirs, or the many other smaller diversions and dams, on downstream hydrology and flow regimes to assess the impacts on suckers. P 5585-99.

In the "Cumulative Effects" discussion for Water Quality/Fish Habitat, the only reservoir or diversion the EA listed as an ongoing and future activity was Tull Reservoir (which was not one of the six previously mentioned reservoirs). P 5599; *see also* P 5518. The EA acknowledged that fire suppression and roads can affect base stream flows and adversely affect fish habitat, but did not discuss the effect of reservoirs, dams, or diversions on base stream flows and fish habitat. P 5599-5600. This omission is particularly egregious because the cumulative effects discussion for sensitive plants noted that water impoundments, diversions, spring developments, and check dams exist in these watersheds and may have changed the hydrology of meadow, stream, and wetland habitats. P 5616-17.

Given that water quantity is one of the primary concerns for shortnose suckers, the failure of the 2009 EA to analyze effects of livestock grazing, combined with the effects of reservoirs, impoundments, and diversions, on hydrology, stream flows, and sucker habitat means the Forest

Service did not take the required hard look at the cumulative environmental consequences of the proposed action, in violation of NEPA. *Lands Council*, 395 F.3d at 1027-28.

B. The Forest Service Must Supplement its 2009 EA.

Since the 2009 EA, new information has emerged showing the dire status of shortnose suckers, the importance of the Gerber and Clear Lake populations to the species, the increasing threat to water quantity due to long-term drought and climate change impacts, and the lack of improvement in habitat conditions on National Forest lands. The Forest Service must supplement its 2009 EA to account for this significant new information, particularly given the failure to account for impacts to hydrology and stream flows in the original EA.

An agency must supplement a NEPA analysis when, "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" emerges. 40 C.F.R. § 1502.9(c)(1)(ii). Supplementation is thus required if major federal action remains to occur and new information shows that the remaining action will affect the environment in a significant manner or to a significant extent not already considered. *Or. Natural Res. Council Action v. U.S. Forest Serv.*, 445 F. Supp. 2d 1211, 1219, 1222 (D. Or. 2006) (citing *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989)). The EA states that it will guide grazing for twenty years, P 5536, and the agency's oversight, including issuance of AOIs, "remains to occur" such that further NEPA analysis would inform future management.

In 2012, FWS designated critical habitat for suckers in Gerber and Clear Lake reservoirs and several of their tributaries. P 6984, 6987. The 2012 rule identified water quantity and natural flow regimes with minimal departure from the natural hydrograph as a key habitat element. P 6969. It noted that special management considerations for critical habitat include managing water bodies to minimize changes to flow; maintaining, improving, or reestablishing

flows to improve available water quantity; and managing groundwater use. P 6970.

A 2013 status review for shortnose suckers concluded that this species faces a high threat of extinction and a low recovery potential. FWS 6931, 6956. Because only the populations in Upper Klamath Lake, Gerber Reservoir, and Clear Lake Reservoir have even marginal reproduction, the species is at significant risk of catastrophic events because there are few other fish that could replenish these populations if a die-off occurred. FWS 6943. Climate change and drought further increase the danger of extinction for this species. FWS 6956.

The 2014 revised recovery plan and 2014 BA likewise noted the threat to shortnose suckers from climate change and prolonged drought, particularly given the "current reduced state" of the species. P 7049, 7056, 7210-11. The Gerber and Clear Lake populations are particularly important to achieve recovery of the species because they are the only populations within the Lost River Recovery Unit that have successful reproduction. P 7009, 7062-64.

The Klamath basin experienced increasingly severe drought conditions from 2012-2015, with Gerber and Clear Lake Reservoirs hitting record low water levels. P 6862, 8141, 8304-05; Ex. 7. Low reservoir levels are a significant threat to shortnose suckers, as are low water flows in tributaries that provide spawning habitat or support year-round resident fish. FWS 1733, 2267, 2268-69, 2271, 2280, 2289, 2292, 4307-08, 4310, 4693-95. The Forest Service must address information about the increasing threat to shortnose suckers from prolonged drought and climate change in a supplemental NEPA analysis, particularly in light of its failure to analyze impacts to stream flows from grazing and existing dams and diversions in the 2009 EA.

Furthermore, new information shows that riparian conditions on most allotments are not improving as required. The 2009 EA described Forest Plan direction and desired future conditions for the allotments, which included riparian areas and stream channels functioning

properly or improving at a near natural rate. P 5530-31, 5533-35. It also stated that effectiveness monitoring would verify vegetation conditions are improving. P 5556. The 2009 DN stated that grazing on the six allotments would not have a significant effect based on assumptions that trespass grazing was at a minimal level and would not affect resources, stream channels are in good condition and trending upward, grazing would not retard attainment of RMOs, and changes in species composition, cover and rooting depth would continue toward potential. P 5682-84. Recent data shows that these assumptions have proven false.

As discussed above, trespass grazing has been a repeated problem since 2009 on the Wildhorse, Horsefly and Pitchlog allotments, causing various resource concerns, including to sucker habitat in Barnes Valley Creek. *Supra* pp. 8, 18-20. Effectiveness monitoring from the Wildhorse, Yocum Valley, Yainex Butte, and Pitchlog allotments shows that riparian conditions are highly degraded with little or no improvement since 2009. *Supra* pp. 8, 21-22, 26-27. Other data shows that many streams are not meeting or moving toward RMOs and cattle have caused damage to streambanks, stream channels, and riparian vegetation. *Id.* This data contradicts the assumptions in the 2009 DN that trespass grazing was minimal and riparian conditions were good or improving, further supporting the need for a supplemental NEPA analysis.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court grant their motion for summary judgment, and hold unlawful and set aside the BA/LOC, 2013-2015 AOIs for Horsefly, Yainax Butte, Wildhorse, Pitchlog, and Yocum Valley allotments, and the 2009 EA/DN.

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Respectfully submitted,

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