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**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF OREGON**

**MEDFORD DIVISION**

OREGON NATURAL DESERT ASSOCIATION, and KLAMATH SISKIYOU WILDLANDS CENTER,

Plaintiffs,

v.

DAVID SABO, District Ranger, Chemult Ranger District, Fremont-Winema National Forests, and U.S. FOREST SERVICE,

Defendants.

Case No. 10-CV-1212-CL

**PLAINTIFF'S OPENING BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

Plaintiffs Oregon Natural Desert Association and Klamath Siskiyou Wildlands Center seek summary judgment against Defendants David Sabo and U.S. Forest Service ("Forest Service") over their authorizations of livestock grazing on the Antelope Cattle and Horse Allotment ("Antelope Allotment") in violation of the National Forest Management Act ("NFMA") and the National Environmental Policy Act ("NEPA").

The Antelope Allotment is part of the Chemult Ranger District of the Fremont-Winema National Forest in south-central Oregon. This part of Oregon is dominated by dry lodgepole pine forests, but amidst this forested landscape, a unique complex of wetlands and fens exists on the Antelope Allotment which contains habitat for a multitude of rare plant and animal species. Many of these species are designated as Forest Service Sensitive Species. Within the past several years, the Forest Service has conducted surveys on the allotment for Sensitive Species, and has discovered many new sites with rare mosses, sedges, and mollusks. The Oregon spotted frog, another Sensitive Species, also occurs on the allotment, but is in severe decline there.

Forest Service biologists recognize that livestock grazing and trampling damages these species and their habitat, and that such damage is occurring on the Antelope Allotment. Yet, despite the new information about the presence of many Sensitive Species in these fens, the agency continues to authorize livestock grazing on the allotment every year without evaluating the impacts to these species or altering grazing to avoid damaging them, contrary to direction in the Forest Plan and NEPA.

Round Meadow is one of the unique wetlands within the boundary of the Antelope Allotment. The Forest Service excluded livestock grazing from this meadow for six years (2004-2009) in order to rehabilitate the meadow and restore its natural hydrologic function. Like the

rest of the allotment, Round Meadow contains several fens and wetlands with habitat for sensitive plants and mollusks. In 2010, the Forest Service decided to authorize grazing of Round Meadow for the first time in seven years without conducting any environmental analysis under NEPA to assess the impacts of grazing on the restoration efforts or Sensitive Species.

Plaintiffs challenge the Forest Service's grazing authorizations on the Antelope Allotment in 2008, 2009 and 2010 and on Round Meadow in 2010. By authorizing grazing on the Antelope Allotment and in Round Meadow without conducting the necessary evaluations of the impacts to the environment and Sensitive Species, and without protecting these species and riparian areas from damage, the Forest Service is violating NEPA and is acting contrary to direction in its Forest Plan in violation of NFMA. Because of these legal violations, the Court should grant Plaintiffs' summary judgment motion.

## FACTUAL BACKGROUND

### A. Special Resources on the Antelope Allotment

#### 1. Fens and wetlands with rare mollusks and plants

The Antelope Allotment lies within the Central Oregon Pumice Zone, much of which is dominated by dry lodgepole and ponderosa pine forests due to the porous pumice soils. *See AR 311-526* (describing plant associations of the Central Oregon Pumice Zone). But within these forests occur communities such as meadows, fens, and springs that arise where groundwater reaches or is close to the surface of the ground. Many of these groundwater dependent communities exist on the District, and on the Antelope Allotment in particular. *See AR 2193* (discussing unique complex of springs on Chemult Ranger District), *4447-4448* (maps from groundwater dependent ecosystem surveys), *4217* (map of fen habitat on Antelope Allotment).

The fens on the allotment are important riparian areas and provide habitat for a diversity

of plant and animal species. As noted in one Forest Service report:

> Fens are an important and unique wetland type. Fens are peat-forming wetlands that rely on groundwater input and require thousands of years to develop and cannot easily be restored once destroyed. Fens are also hotspots of biodiversity. They often are home to rare plants, insects, and small mammals. Larger animals like deer and livestock graze in this type of wetland. Fens are valuable to humans as well. They are important as sites of groundwater discharge and indicators of shallow aquifers. Vegetation in all wetlands plays an important role in recycling nutrients, trapping eroding soil, and filtering out polluting chemicals such as nitrates. In addition, fens figure prominently in nearly all scenarios of CO2-induced global climate change because they are a major sink for atmospheric carbon.

*See www.fs.fed.us/r4/projects/gwde/resources/r5_fen_proper_functioning_condition_protocol_weixelman_cooper.pdf at page ii* (excerpt attached as Exhibit A).

This report goes on to explain that because fens are groundwater reliant, "any disturbance that significantly impacts water quantity or quality is a threat." *Id. at 6.* Livestock grazing is one such threat to fens because it "can impact peatlands by trampling, compacting peat, creating bare areas in the fen or in adjacent uplands, altering hydrologic conditions, and initiating erosion and gully formation (headcutting)." *Id. at 6-7.* Cattle trails can also have detrimental effects by forming headcuts or channelization "that alters fen hydrologic regimes, lowering the water table, and drying out areas of the fen. As areas dry out or are overgrazed, plant species composition often changes to non peat-forming species." *Id; see also AR 2202* (draft report on fens).

Several years ago, the Chemult Ranger District initiated surveys of the fens and other groundwater dependent communities on the District in response to the new designation of multiple plants and animals as Forest Service Sensitive Species. *AR 2223-2227* (white paper on mollusk surveys); *3682-3698* (report on Bryophyte and Sedge Inventory). These surveys documented numerous fens and wetland sites spread across the Antelope Allotment with sensitive mollusk and plant species.

For instance, during mollusk surveys in 2005, 2006, 2008, and 2009, agency biologists documented the Sensitive Species *Deroceras hesperium* (evening fieldslug) ("Dehe") at 16 sites on or near the allotment. *AR 1989-2030, 2096-2107* (2005 survey forms showing 3 sites with Dehe), *2615-2667* (2008 survey forms showing 5 sites with Dehe), *3510-3554, 3627-3630* (2009 survey forms and verification spreadsheet showing 8 sites with Dehe); *see also AR 3223* (email noting 8 sites found in 2005 and 2008 surveys). The District wildlife biologist noted in 2007 that the results of the mollusk surveys conducted in 2005 and 2006 were "startling because of the number of new species and field slug range extension found." *Sept. 2008 AR 3272*.[1] Other mollusk species found may represent new undescribed species or species that have rarely been found in this part of Oregon. *See AR 5212* (email noting potential new species); *Declaration of Jayne Goodwin ¶ 11* (attached hereto).

In addition to the mollusk surveys, botanists also recently surveyed the fens on the District for sensitive plant species and discovered eight sensitive plant species at ninety sites found within twenty six fens on the Antelope Allotment.[2] *See AR 3682-3698* (report from 2009 Bryophyte and Sedge Inventory), *4975-4976, 5058-5059, 5135* (spreadsheets summarizing sensitive plant locations on allotment), *3100-3215, 4276-4393* (field notes from 2009 and 2010 botany surveys). A summary of the data shows that the Antelope Allotment contains a large proportion of the known sites for these species compared to the rest of the forest and even the

[1] Defendants have provided the administrative record from a prior lawsuit, *Center for Biological Diversity v. Wagner*, No. 08-302-CL, as part of the record for this case, designated as the September 2008 record *(Sept. 2008 AR)* and the January 2009 Supplemental record *(Jan. 2009 Supp. AR)*.

[2] The sensitive plants found are bryophytes (mosses and liverworts) and sedges of the species *Helodium blandowi, Pseudocalliergon trifarium, Splachnum ampullaceum, Tomentypnum nitens, Tritomaria exsectiformis, Carex capitata, Carex lasiocarpa* var. *americana,* and *Utricularia minor.*

entire Forest Service Region 6 (Region 6 covers the states of Washington and Oregon). *AR 5135.* Specifically, more than 70% of the sites on the Fremont-Winema National Forest occur on the Antelope Allotment for six of these species, and for three species at least 70% of the sites in the entire Region occur on the allotment. *Id.* The report written after the 2009 inventory likewise stated that much of the suitable habitat on the Chemult District for these plants is located in the Antelope Allotment. *AR 3683.*

This report also noted the uniqueness of these communities, stating "[i]t is appropriate to regard the peatlands/wet meadows occurring on the Chemult Ranger District as both communities including a remarkable number of rare plant sites, as well as uncommon and sensitive plant communities unto themselves." *Id. at 3687.* One of the sensitive mosses detected at numerous sites on the allotment has a limited habitat range, and the local density of this species is far higher than anywhere else in Oregon or Washington. *Id. at 3688-3689.* Another species detected is a globally imperiled species and was an exciting find on the District. *AR 4925-26; Goodwin Declaration ¶ 10.* The Chemult District wildlife biologist, whose career has spanned more than 30 years, declared "[w]here else on this earth could I ever have the possibility of going and seeing such rare, and in some cases, undescribed species. It's a career best for me." *AR 4073.*

A map of the many sensitive plant and mollusk sites shows that they are distributed over a large part of the allotment, significantly coinciding with the fen habitat on the allotment. *AR 4733* (map of sensitive species sites) *compare to AR 4223* (map of Antelope Allotment showing private land parcels) and *4217* (fen habitat map); *see also AR 4447-48* (map of groundwater dependent communities where sensitive species were found (EO sites) and map of fen habitat); *Goodwin Decl. Ex. A* (maps of sensitive species habitat on allotment). Many of the fens contain

multiple sensitive species occupying an acre or more, and much of the Jack Creek riparian area also contains fens and springs. *AR 3686, 4975, 3681*. As stated by one long-time District employee, "[t]he Antelope Allotment is an ecological hotspot containing the greatest amount and diversity of extremely rare and fragile fen habitat in the Pacific Northwest." *AR 4877*.

**2. Jack Creek and the Oregon spotted frog**

Jack Creek runs through the Antelope Allotment and provides habitat for numerous riparian species. This riparian system contains perennial water in the main channel, intermittent and ephemeral flow in the headwaters and tributaries, and numerous seeps, springs, and fens along the channels. *AR 3053-3055* (paper on Oregon Spotted Frog Habitat in Jack Creek). In addition to the sensitive plants and mollusks found in some of the fens surrounding Jack Creek, this riparian system also provides habitat for the Oregon spotted frog, a Forest Service Sensitive Species that is also a Candidate for listing under the Endangered Species Act. *See AR 4925, 4975, 5182-5187* (sensitive species sitings along Jack Creek); *AR 2512* (noting status of Oregon spotted frog).

The Jack Creek population of spotted frog was discovered in 1996, and monitoring since then has documented a sharp decline of this population. *AR 2512, 3581, 3997-3998, 4138, 4145, 4147* (noting decline of population). Egg mass numbers dropped significantly between 1999 and 2008, and remained low in 2009 and 2010. *AR 3581* (graph showing egg mass counts dropping from 335 to 22 between 1999 and 2008), *3423 & 3447* (2009 count of 16 egg masses), *4206* (2010 count of 18 egg masses). Because of the small number of adult frogs and egg masses found in the last two years, as well as its isolation from other populations, biologists consider this population to be in a precarious situation and at risk of extinction. *AR 3928* (noting isolation), *4145, 4147, 4154* (discussing low number of adults and egg masses and risk of extirpation).

Biologists recognize the importance of this population of spotted frog to the species as a whole. As noted by one spotted frog expert, this population "is likely to be of great significance from a genetic standpoint, and it occupies the highest elevation, potentially harshest environment (combination of long cold winters, and short, potentially very droughty summers) of all extant populations. There is thus potential for local adaptation that is not seen in other sites." *Sept. 2008 AR 3149; see also AR 4145* (email noting that this is unique population). Furthermore, the neighboring populations may also be declining or lost, which adds to the importance of retaining the Jack Creek frogs. *Sept. 2008 AR 3149.*

All of the Jack Creek spotted frog habitat occurs within the Antelope Allotment. *AR 3059.* Some of the habitat occurs on Forest Service land while the rest is on the Moffit and Jamison private land inholdings within the allotment boundary. *AR 3216* (map of habitat). Spotted frogs breed in shallow pools of waters, at the edge of meadows, or in wetlands, and often use the same breeding sites year after year. *AR 3921, 3069.* There are four known breeding areas on Jack Creek, which consist of multiple pools and oviposition sites where the frogs lay their egg masses. *AR 3070.* These sites occur on both Forest Service and private land. *AR 3217* (map of breeding sites and adult locations). Tadpoles move from these shallow breeding sites to deeper, persistent off-channel water to rear before eventually moving to the creek to find deep water and overwinter habitat. *AR 3069, 3923-3924.* Given the distance between breeding clusters and data showing that spotted frogs usually do not travel long distances, it is unlikely that frogs move between these breeding areas. *Id. at 3073, 3924.*

Spotted frogs use deep open water or other areas that do not freeze, such as springs, for overwintering. *AR 3068, 3924-3925.* Monitoring of the Jack Creek frogs showed that they primarily used deep pools for overwinter habitat but also used undercut banks and beaver runs.

*AR 3068, 3544-3545.* The selected overwintering sites were near the summer ranges of the individual frogs. *Id.* At other times of the year, deep, open water also provides feeding and basking conditions important to growth, as well as protection from predators and refugia during low water conditions. *AR 3073.*

**B. Livestock Grazing on the Antelope Allotment**

The Antelope Allotment spans two Ranger Districts: the Chemult District and the Silver Lake District. *See AR 4270* (2010 annual authorization for entire Antelope Allotment), *4673* (map of allotment). There are two term grazing permits for the Chemult portion of the allotment and the Forest Service renewed each of them in July 2006, with the new permits expiring at the end of 2015. *Sept. 2008 AR 2705-2721*. The regular term permit allows 315 cow/calf pairs to graze from July 1 to September 30, and the private land term permit allows 104 cow/calf pairs to graze during that same period, for a total of 419 cow/calf pairs. *Id.* The most recent NEPA analysis for the allotment occurred in 1995. *Sept. 2008 AR 0399-0434* (1995 EA).

The Forest Service issues annual operating instructions ("AOIs") each year to authorize the specific grazing that may occur on the allotment that year. *See e.g. AR 2560-2565, 3225-3230, 4270-4275* (AOIs for 2008, 2009, 2010). These AOIs contain the authorized number of cattle, season of use, and specific instructions and restrictions that apply for that season of grazing. *Id.* As discussed further below, the Forest Service made some adjustments to grazing management in 2008-2010 in light of the need to protect Oregon spotted frogs in Jack Creek, but has made no adjustments to protect the majority of the fens and new Sensitive Species sites on the allotment since discovery of these sites.

**1. Impacts to fens and sensitive plants and mollusks**

Livestock impacts to fens and wetlands can impair habitat for the plants and animals that

live in those fens, including the Sensitive Species found on the Antelope Allotment. Conservation Assessments and Fact Sheets for these species note that livestock grazing can be a threat when it causes trampling of plants and small organisms, changes in hydrology, compaction of soils, removal of vegetation, or alteration of plant communities. *See www.fs.fed.us/r6/sfpnw /issssp/species-index/* (Fact Sheets or Conservation Assessments for *Derocerus hesperium, Helodium blandowi, Pseudocalliergon trifarium, Splachnum ampullaceum, Tomentypnum nitens, Tritomaria exsectiformis).*

The surveyors who conducted the fen inventories on the District for sensitive mollusks and plants often noted impacts from cattle grazing at these sites. *AR 1990, 1995, 1999, 2007, 2014, 2018, 2021-22, 2028, 2620, 2633, 2638, 2646, 3549* (mollusk survey forms noting cattle signs at sites); *AR 3126, 3141, 3152, 3154, 3157-61, 3176, 3178, 3180, 3183-84, 3189-96, 3199, 3202, 3204-09, 3211-12, 3214, 3771, 3774,4279, 4283, 4286, 4291-92, 4296, 4314, 4316, 4319, 4321, 4323, 4332, 4334, 4335, 4347-48, 4352, 4365, 4367-70, 4372, 4375, 4377, 4379* (botany survey notes recording cow manure, cow trails, grazing of vegetation, trampling, pedestals, hoof prints, etc. at various sites). Numerous other Forest Service documents and reports discuss degraded conditions at seeps, springs, and fens on the allotment, causing damage to these sensitive communities and species.

For instance, the District wildlife biologist noted the high degree of disturbance to springs found during the mollusk surveys that, combined with the impacts of climate change, are likely to cause significant harm to these very sensitive spring habitats and associated species. *Sept. 2008 AR 3272.* Similarly, the report written after the 2009 plant surveys noted that much of the potential and occupied habitat for the sensitive plants and many of the newly detected sites are within the Antelope cattle allotment. *AR 3686.* The report states that "livestock grazing is

generally the most evident detrimental disturbance in these particular wetland habitats. Evidence exists in the common incidence of peat pedestals, bare peat, exotic plants, and native increasors." *Id. at 3687.* It goes on to state that integrity of these peat ecosystems is tied to hydrologic conditions and that activities, like grazing, that alter the hydrology of the area through extensive pedestaling or creation of channels or trails through the peat should be avoided. *See id. at 3688.*

Other documents also describe cattle damage to these wet areas in the allotment. The 2009 Wildlife End of Season Report discusses dead cattle repeatedly mired in the spring/fen complex in the Jack Creek headwaters area, creating water quality concerns that could impact mollusks and the Oregon spotted frog. *AR 3678; see also Goodwin Decl. at 15* (photograph of dead cow in Sproats Meadow). In addition to this fen system, there are more than four dozen smaller springs/fens with habitat for sensitive mollusks, and cattle are grazing and drinking freely at these sites. *Id. at 3681*. The report states that "[m]anure and urine are in the water, lowering water quality. Hoof action/postholing is creating long lasting pedestals that denude vegetation and dry out sites. Habitat is being degraded/destroyed." *Id.* It recommends completing biological evaluations to assess impacts to these species and taking appropriate action to control livestock and protect the spring/fen habitat. *Id.*[3] No biological evaluations assessing impacts of grazing on any of the sensitive plant or mollusk species are in the administrative record for this case and there have been no adjustments to grazing in the AOIs to

[3] S*ee also Sept. 2008 AR 2582, 2678* (noting nearly all springs surveyed for mollusks were impacted by livestock and many are destroyed with no potential habitat left; and no biological evaluation has been done to address impacts of grazing to sensitive species), *AR 4263* (discussing cattle getting mired and dying in springs over series of years, creating poor water quality; and high risk of extirpation for spotted frogs, sedges and bryophytes, and mollusks due to habitat alteration/fragmentation and low population numbers), *AR 5058* (spreadsheet showing more than half of fens on Antelope Allotment that are not excluded from grazing are considered in poor or fair condition); *AR 5227-5243* (comments and photos from long-time District employee describing livestock impacts to groundwater dependent communities on allotment).

protect these species. *See AR index, AR 2560-2565, 3225-3230, 4270-4275* (2008-2010 AOIs).

**2. Impacts to Oregon spotted frog**

Livestock grazing can have adverse impacts to Oregon spotted frogs caused by (1) direct trampling of frogs; (2) impacts on vegetation and stream channels; and (3) water quality changes. *See e.g. AR 2454-2455, 3059, 3932-3933* (reports discussing grazing impacts to Oregon spotted frogs). Grazing can be particularly harmful during dry years when water levels are lower than normal and cattle congregate at remaining water sources that also provide refugia habitat for spotted frogs. *AR 3059, 3933.*

Damage to spotted frog habitat from livestock grazing has occurred on Jack Creek. As stated in one report, "[i]t is well documented that livestock directly interact with [Oregon spotted frog] in the tadpole and adult life stages along Jack Creek." *AR 3059.* Numerous Forest Service documents describe the adverse impacts to the Jack Creek frogs and frog habitat caused by livestock. These impacts include trampling of tadpoles and adult frogs, degraded water quality, consumption and alteration of emergent vegetation, livestock trails that go through breeding pools and also channelize water into these pools, and altered stream channel conditions that impair frog habitat. *AR 0003, 2304-2306, 2446-50, 2485, 3059-3063; 3932-3933.*

A U.S. Fish and Wildlife Service report likewise noted "[l]ivestock grazing is cited as a specific concern for Oregon spotted frogs at Jack Creek, Klamath County, Oregon." *AR 3933.* "Heavy grazing use by livestock occurs on Jack Creek" and "it is likely this amount of grazing is degrading the quality of the Oregon spotted frog breeding habitat and reducing reproduction." *Id.* Spotted frog habitat on Jack Creek frequently experiences drought, and cattle congregate in the habitat because other water sources are dry, compounding the drought effects to the frog with trampling by cattle and alterations in water quality, bank structure, and loss of protective

vegetation. *Id.; see also Sept. 2008 AR 3462* (Nov. 2007 email from U.S. Fish and Wildlife biologist stating "[i]t is pretty clear to all of us that grazing (the way it has occurred in recent years) is having an adverse effect on the frogs.").

Due to the threat posed by livestock to the spotted frog, the Forest Service decided to build a fence along a portion of Jack Creek to protect the frog's habitat. The Forest Service began plans for this fence in 2005, but it was not until several environmental groups sued in 2008 that the agency actually built the fence and excluded livestock from grazing along the creek. *See AR 2306* (email noting plans began in 2005), *2510* (April 2008 proposal for Jack Creek fence), *2562* (August 2008 AOI discussing newly created Jack Creek fence and requiring permittee to insure there is no breach of cattle into the no-graze area behind the new fence); *Ctr. for Biological Diversity v. Wagner*, No. 08-302-CL, Order and Report and Recommendation at 8 (Docket. No. 123) (discussing fence construction during litigation).

The Forest Service prohibited grazing behind the Jack Creek fence in 2009 and 2010 as well, and has stated that it will continue to do so at least until a new allotment management plan ("AMP") is completed for the Antelope Allotment. *AR 3226, 4271* (2009 and 2010 AOIs). The agency likewise prohibited grazing on the Forest Service parcels of land encompassed within the upper and lower Jamison private pastures in 2008 and 2009, again stating that no grazing will occur on these parcels until completion of a new AMP. *AR 2561, 3226* (2008 and 2009 AOIs). However, the 2010 AOI did not contain this restriction. *AR 4271.* Because the Jack Creek exclosure reduced the amount of available forage, the Forest Service reduced the stocking level of cattle authorized on the Chemult portion of the allotment by 40 cow/calf pairs in 2009 and 2010. *AR 2507, 3225, 4270* (memo discussing reduction and 2009, 2010 AOIs).

Despite the Jack Creek fence, livestock grazing continues to threaten the spotted frog.

For one, the fence does not protect all of the frog's habitat on Forest Service land within the Antelope Allotment. The original location of the fence was adjusted to the west, closer to the main channel of the creek, and thus some frog habitat fell outside of the fence's protection. *AR 2504-2505.* As noted by the Chemult District wildlife biologist, several areas of frog habitat fall just outside of the fence, and cattle trailing along the fence will go right through these areas. *Id.* In addition, the fence runs along the creek between the Moffit and Jamison private parcels, but a section of the creek below the Jamison property and a large section above the Moffit property are also frog habitat and are unprotected from grazing. *Compare AR 2516* (map of fence location) *with AR 3216* (map of frog habitat); *see also AR 3678-3679* (2009 wildlife report noting that frog fence does not include headwaters area (above Moffit) and need to protect that habitat from further livestock degradation).

Furthermore, fences have not been effective at excluding cattle from Jack Creek. Cattle have been documented breaching or getting around fences and getting to the creek on numerous occasions each of the past three years. *See AR 2948, 2669-70* (noting breaches in 2008), *3457, 3491, 3492, 3679, 4251, 4415* (2009 breaches), *4770, 4978, 4985, 4990, 4994-4997, 5000, 5035, 5060, 5063, 5064, 5095* (2010 breaches). These breaches occurred despite warnings to the permittees that they must maintain the fences prior to turn-out and keep cows out of the creek.

The Forest Service discussed the need for fence repair and maintenance with the permittee in August 2008. *Sept. 2008 AR 3871-3872* (concerns about fences down or in poor shape after turn-out of cows). Shortly after that, the District Ranger noted the need to maintain the Jamison pasture fences to keep cows out of the Jamison no-graze areas as well. *AR 2670.* In a February 2009 letter to the permittee, the Forest Service noted the lack of fence maintenance in 2008 and that cattle had accessed Jack Creek; and mandated that repairs to fences occur before

turn-out in 2009. *AR 2948-2952*. The letter also stated that the Forest Service would recommend canceling the term permit for the adjacent pasture if fences were not maintained and it caused problems meeting desired conditions on the Antelope Allotment. *Id. at 2949.*

After turn-out in 2009, however, cattle continued to get around or through the Jack Creek fence, and cattle were observed weekly all along the excluded area of the creek. *AR 3679, 4415*. The permittee installed a temporary electric fence to address some concerns a month into the grazing season but cows were still seen inside the exclosure all season long. *Id.* In a June 2010 letter, the Forest Service again noted reports of cattle inside the Jack Creek exclosure in 2009 and the need to control access points but did not modify or cancel the permit to address these concerns. *AR 4251*. As noted above, further breaches of fences occurred many times in 2010.

**3. Delay of Antelope Allotment AMP**

The Forest Service is currently in the process of developing a new AMP for the allotment, but is unlikely to finish this process before the 2011 grazing season begins. The District has been working on this AMP for several years and continues to delay its completion. *AR 4076* (noting analysis was scheduled for 2007 but has been postponed due to various delays). During the prior litigation over this allotment, the agency told this Court it expected to have the AMP done in early 2010. *Ctr. for Biological Diversity v. Wagner*, Order at 10. Yet, not only is it still not completed, the Forest Service has not even issued a draft environmental analysis for public comment. The agency has continually postponed the schedule for this process, stating at the beginning of 2010 that it would have a draft Environmental Assessment released to the public in June 2010 and a decision notice signed in August 2010. *AR 3761-3765.* However, by July 2010 the dates had slipped to February 2011 for releasing the EA and June 2011 for a decision notice. *AR 4670.* And we are now in mid-March 2011 and no draft EA has been

released to the public. Thus, according to their latest schedule, the Forest Service will not be able to complete this AMP process before the normal turn-out date of July 1. *Id.*

**C. Round Meadow and its Special Resources**

One of the meadows within the Antelope Allotment is called Round Meadow. This meadow was obtained by the Forest Service in 1998 as part of a larger land exchange with Crown Pacific Timber Company. *AR 0729-1151* (Crown Pacific ROD and FEIS). The meadow is a seasonally flooded 300 acre inland wetland that was ditched and drained in the 1970's. *Sept. 2008 AR 1837-41* (Decision Memo for Round Meadow Rehabilitation Project), *AR 1201* (aerial photos of Round Meadow in 1961 and 2000). In 2003, the Forest Service decided to conduct a rehabilitation project on Round Meadow to restore wetland wildlife habitat, restore the natural water storage and release characteristics of the meadow, increase the abundance and extent of wetland vegetation, and reduce encroachment of lodgepole pine. *Sept. 2008 AR 1837.* The restoration process entailed filling the network of drainage ditches throughout the meadow and plugging the main outlet ditch as well as building a perimeter fence around the meadow to control livestock grazing. *Id.* This decision notice stated that the environmental analysis for the land exchange documented that the AMP for the Antelope Allotment would be updated prior to any change in grazing capacity resulting from the land acquisition. The AMP update would address grazing practices (capacity, timing, and duration) in Round Meadow. *Id.*

Grazing was excluded from Round Meadow to allow for restoration of the meadow, and the rehabilitation efforts resulted in more water storage, creating a small lake that lasts into the summer season, more native sedges, and a larger variety of wildlife using the meadow. *AR 1747-1752* (2004 post-restoration review), *4073* (2010 email discussing effects of restoration), *4838* (wildlife report for Round Meadow grazing). In 2009, the Oregon Watershed

Enhancement Board ("OWEB") visited Round Meadow and was supportive of the restoration efforts there, and recommended further actions for the meadow. *AR 3258.* They expressed an interest in providing funding for additional work if cattle continued to be excluded from the meadow. *AR 4669, 5214-5215* (emails discussing OWEB visit). The Forest Service is working on a plan to install additional ditch plugs to mimic historic hydrologic function. *AR 4073*. It has $15,000 from Rocky Mountain Elk Foundation to put toward this project and is soliciting money from other partners, including OWEB. *AR 4073, 5214, 3899.*

The center of Round Meadow is a wet meadow dominated by sedge (*carex*) species, grading into moist meadow and then a drier grass community toward the edges. *AR 4894* (general botany report for Round Meadow grazing). The wettest part of the meadow is in the southeast quadrant, where soils remain wet through the summer. *AR 4927* (September 2010 observation of extensive wet soils in southeast quadrant of meadow), *4872-75, 4878* (observation in August 2010 that soil conditions in center of meadow were moist and became wetter toward southeast part of meadow with some standing water present in lowest part of meadow) The meadow contains a pond as well as numerous springs and fens. *AR 4073* (noting series of springs that fill the meadow), *4894* (noting perennial water sources of springs, swales, ponds, fens, etc. in meadow), *4877* (noting there are numerous springs, seeps, and fens distributed throughout the meadow).

Round Meadow provides habitat for a variety of plants and animals, including several Sensitive Species. In addition to mule deer, elk, waterfowl, Canada geese, Pacific treefrogs, and numerous birds, a sensitive mollusk species is found in the meadow and potential habitat for Oregon spotted frog exists there as well. *AR 4838-4840* (wildlife report), *4218* (map of mollusk sites in Round Meadow). In fact, biologists have discussed relocating Oregon spotted frogs to

Round Meadow in efforts to help the Jack Creek population. *AR 3258, 3400, 4878.*

Sensitive plants also occur in the fens of Round Meadow. The moss *Tomentypnum nitens* has been documented in Round Meadow as well as the sedge *Carex capitata*¸ both of which are Forest Service Sensitive Species. *AR 4895, 4878* (sitings of *Tomentypnum nitens), 4927* (siting of *Carex capitata* in fens in northwest part of meadow.

**D. The Decision to Graze Round Meadow in 2010**

After six years of no grazing in the meadow, the Antelope Allotment permittee requested use of Round Meadow for the 2010 grazing season. *AR 3807.* A number of concerns were raised by District personnel, including that no site-specific analysis had ever been done to assess the suitability of Round Meadow for grazing or the impacts of grazing on the resources there and the restoration efforts, despite the commitment to conduct environmental review made at the time of the land exchange. *AR 3819* (memo from District Wildlife Biologist), *AR 4076-77* (memo from acting District Ranger), *AR 4669* (email recollecting that Forest Supervisor had stated that grazing on Round Meadow would only occur after a NEPA process looked at the issues and resources). The District Wildlife Biologist stated that grazing should occur in the meadow only if it would meet the restoration objectives for the meadow and would not hurt sensitive fen habitats or species. *AR 3819, 3904-05.* She and the District Botanist recommended completing more species surveys to determine the level of impacts and appropriate mitigation to protect each species. *AR 4652, 4667-68.*

Due to the resource concerns with Sensitive Species, including mollusks and bryophyte plants, the Forest Service originally denied the request to graze Round Meadow in 2010. *AR 4204.* The letter denying the request noted that if potential Sensitive Species habitat is present, the Forest Service must complete a Biological Evaluation before authorizing use, such as

grazing, that may adversely affect those species; and it was not feasible to conduct the required surveys and Biological Evaluations before the grazing season. *Id.* The permittee subsequently appealed this decision under the Forest Service's appeal regulations. *AR 4423.*

In response to this appeal, the Forest Service reversed course and decided to authorize grazing in Round Meadow. Agency biologists conducted Sensitive Species surveys in springs in the northern part of the meadow and discovered a sensitive mollusk and moss. *AR 4782, 4885.* In light of these discoveries, the Forest Service proposed building a temporary electric fence to exclude cows from the northwest corner of the meadow and protect the spring and Sensitive Species sites there. *AR 4796-99* (scoping notice and map for temporary fence). Forest Service specialists prepared formal Biological Evaluations to assess impacts of constructing this temporary fence on various resources. *AR 4776-84, 4885-93, 4785-95* (Wildlife, Botany, and Fisheries Biological Evaluations for Electric Fence Construction). These evaluations described the project as constructing a temporary fence around a spring in one corner of the meadow, discussed the habitat and species present, and assessed effects to those species from installing the fence. *Id.* The evaluations did not consider any proposal to graze livestock. *Id.*

The Forest Service issued a scoping notice for the proposed fence and accepted public comment on the project. *AR 4796.* The notice stated that this project was being excluded from NEPA analysis because it fell within the category of activities "Implementation or modification of minor management practices to improve allotment condition or animal distribution." *Id.* The agency received numerous comments, including those from Oregon Natural Desert Association, Klamath Siskiyou Wildlands Center, other environmental groups, and interested individuals such as Jayne Goodwin. *AR 4865-70, 4841, 4856, 4881-82, 4872-80* (scoping comments). These comments expressed concerns that the Forest Service was authorizing grazing in the remainder

of the meadow outside of the proposed fence without conducting any site-specific NEPA analysis of the impacts from that grazing, and about the harm that grazing would cause to sensitive wetlands, species, and the restoration efforts occurring in Round Meadow. *Id.*

On September 3, 2010, the Forest Service issued a Decision Memo approving installation of the electric fence. *AR 4899-4902.* The map accompanying the Memo showed a different location for the fence from what was shown in the scoping notice. *Compare AR 4902 with 4799.* The Forest Service again stated that this activity was categorically excluded from NEPA analysis but used a different categorical exclusion, one for "Prohibitions to provide short-term resource protection or to protect public health and safety." *Id. at 4899.* The Memo stated that this category was appropriate because it allowed for short-term closures for resource protection. *Id. at 4900.* The memo concluded that the installation of the fence would cause only minor effects to habitat for sensitive wildlife species, the fence would encompass occupied habitat for sensitive plants and have no impact on the species, and the fence would enclose the fen and springs in Round Meadow to protect them from livestock grazing. *Id. at 4900-01*.

At the same time he issued the Decision Memo for the fence, the District Ranger also issued a memo directing an amendment of the Antelope Allotment AOI to authorize grazing in Round Meadow from September 4 through September 30, 2010 for up to 80 head of livestock. *AR 4897-98* (direction for grazing Round Meadow in 2010), *4918* (amended 2010 Operating Instructions). The amended AOI also stated that a 30% utilization standard would apply, livestock would access the meadow through the southeast portion of the perimeter fence, and monitoring would occur during the grazing season and afterwards. *Id.*

No scoping notice, Decision Memo, or formal Biological Evaluations were completed for the decision to graze Round Meadow in 2010 and thus no public comment was solicited. Forest

Service specialists wrote general reports discussing the grazing that would occur and the sensitive resources in the meadow, but no NEPA analysis was conducted. *AR 4831, 4835, 4838, 4862, 4894* (specialist reports on Round Meadow grazing). The wildlife and botany reports noted that there was potential habitat for sensitive species outside of the temporary fence but that the whole meadow had not been surveyed for those species. *AR 4838* (wildlife report), *4218* (map of mollusk sites in Round Meadow), *4894* (botany report). Indeed, additional sites of sensitive moss and sedges were discovered outside of the temporary fence in August and September 2010. *AR 4920, 4927* (sensitive sedge siting), *4875, 4878* (sensitive moss). In the end, the permittee grazed 30 livestock for one week and 67 livestock for two weeks from September 8 to September 29, 2010. *AR 5100* (grazing summary).

## ARGUMENT

### I. STANDARD OF REVIEW

Summary Judgment is appropriate if there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56*; Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Review of agency decision-making is governed by the judicial review provision of the Administrative Procedure Act ("APA"), which requires a Court to hold unlawful and set aside an agency decision that was "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law," or was adopted "without observance of procedure required by law." 5 U.S.C. § 706(2); *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 960 (9th Cir. 2005).

A decision is arbitrary and capricious if the agency has "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is

so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983). A court's inquiry must be "searching and careful," and an agency must articulate a rational connection between the facts found and the conclusions made. *Marsh v. Or. Natural Res. Council,* 490 U.S. 360, 378 (1989).

## II. THE FOREST SERVICE'S AUTHORIZATIONS OF GRAZING ON THE ANTELOPE ALLOTMENT SINCE 2008 VIOLATED NFMA AND NEPA.

### A. The Forest Service Violated NFMA by Authorizing Grazing that is Inconsistent with Forest Plan Direction to Protect Riparian Areas and Sensitive Species.

Plaintiffs challenge the Forest Service's annual authorizations of grazing from 2008-2010, issued as AOIs.[4] These authorizations are final agency actions that set forth the specific grazing instructions to be implemented that year. *Or. Natural Desert Ass'n v. U.S. Forest Serv.,* 465 F.3d 977, 979-80 (9th Cir. 2006) (holding AOIs to be final agency actions challengeable under APA review); *Buckingham v. Secretary of the U.S. Dep't of Agric.,* 603 F.3d 1073, 1077 (9th Cir. 2010) (noting that grazing permits, AMPs, and AOIs are all site-specific actions to permit grazing).

Under NFMA, the Forest Service must act consistently with its Forest Plan when making decisions and authorizing activities, such as grazing. 16 U.S.C. § 1604(i); 36 C.F.R. § 219.10; *Buckingham,* 603 F.3d at 1077 (noting that grazing permits, AMPs, and AOIs all must be

[4] Plaintiffs claims are not moot even though these AOIs have expired because they fall within the capable of repetition yet evading review exception to mootness given that the AOIs are of very short duration and there is a reasonable expectation the Forest Service will issue an AOI in 2011 for the Antelope Allotment. *Johnson v. Rancho Santiago Community College Dist.,* 623 F.3d 1011, 1019 (9th Cir. 2010). Furthermore, effective relief is still available that could remedy these violations of law, and thus these challenges are not moot. *Cantrell v. City of Long Beach,* 241 F.3d 674, 678 (9th Cir. 2001); *Or. Natural Desert Ass'n v. Tidwell,* 716 F. Supp. 2d 982, 993–95 (D. Or. 2010).

consistent with the applicable Forest Plan); *Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 934 (9th Cir. 2010) (stating that Forest Service is bound to assess proposed actions on a "site-specific" basis for compliance with the Forest Plan); *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1062 (9th Cir. 2002) (Forest Service must show that each project is consistent with Forest Plan).

The Winema Forest Plan contains direction to protect various resources on the forest, including riparian areas, soils, fish and wildlife habitat, and sensitive species, when the Forest Service authorizes activities. The Forest Plan contains goals, objectives, and standards that require the following:

- Maintain or enhance the characteristics of riparian areas, wildlife habitat, and fish habitat near or within riparian ecosystems;
- Improve riparian areas to provide enhanced habitat for wildlife and fish;
- Water bodies, stream courses, and wetlands, their riparian vegetation, and the immediately adjacent upland areas will be managed to stabilize stream channels; prevent soil erosion; and maintain or improve water quality, fish habitat, recreation opportunities, and riparian/wetland habitat for dependent fish and wildlife species and dependent aquatic species;
- In riparian ecosystems, hydrologic conditions and riparian habitat shall be maintained or improved;
- Long-term soil productivity will be maintained;
- Land management activities shall be planned and conducted to maintain or improve soil productivity and stability;
- Protect habitat and hydrologic values of wetlands to maintain viable populations of all existing native and desired non-native plant and animal species;
- At the forest level, fish and wildlife habitat shall be managed to maintain viable populations of all existing native and desired non-native plant and animal species. Distribution of habitat shall provide for species viability and maintenance of populations throughout their existing range on the Forest;
- Manage habitat for the perpetuation and/or recovery of plants and animals listed as threatened, endangered, or sensitive;
- Provide habitat for viable populations of all existing native and desired non-native vertebrate species;
- Continue to survey and develop biological evaluations for sensitive species. Develop individual species management guidelines for sensitive species;
- Manage new-found habitat sites for wildlife or botanical resources individually as part of the environmental analysis process for specific management activities;
- All Forest Service projects, programs, and activities conducted, funded, or

permitted shall be reviewed for possible effects on threatened, endangered, or sensitive species of animals and plants. Biological evaluations shall be prepared for each project authorized, funded, or conducted on National Forest system land to determine the possible effects the proposed activity will have on endangered, threatened, proposed, or sensitive species;

- Habitat use of the forest by threatened, endangered, or sensitive species shall be evaluated. Habitat requirements sufficient to maintain the species shall be provided;
- The demand for livestock grazing will be met only when it does not conflict with other uses.

*Sept. 2008 AR 0072, 0078, 0082, 0113, 0139, 0140* (Forest Plan).

This direction in the Forest Plan is further emphasized in the Forest Service Manual, which directs the Forest Service to review programs and activities through a biological evaluation, to determine their potential effect on sensitive species; avoid or minimize impacts to species whose viability has been identified as a concern; ensure compliance with procedural and biological requirements for sensitive species; and identify, protect, and manage habitat necessary to meet sensitive species objectives. FSM 2670.32, 2670.46. The Manual also directs the agency to review in biological evaluations all Forest Service planned, funded, executed, or permitted programs and activities for possible effects on sensitive species. FSM 2672.4. Such evaluations provide a process and standard by which to ensure that threatened, endangered, proposed, and sensitive species receive full consideration in the decisionmaking process. FSM 2672.41. In January 2008, the Regional Forester noted that the "effects of any action authorized, funded, or carried out by the FS on a Federal listed, Federal Proposed, or Sensitive species will be analyzed in a Biological Evaluation." *AR 2459.*

The Forest Service has failed to comply with the direction in the Forest Plan and Manual by authorizing grazing on the Antelope Allotment after discovering many sensitive species in the unique fens on the allotment that are being impacted by grazing. As noted above, agency biologists documented nine new mollusk and plant sensitive species, as well as other riparian

dependent species, at numerous sites in twenty-six fens spread across the allotment since 2005, with the majority discovered since 2008. *Supra pp.4-6.* For some of these species, the sites on the allotment make up the majority of sites on the Forest and even in the entire Region and, thus, impacts to the local populations on the allotment could have large ramifications to the viability of the species as a whole, and certainly to its viability on the Fremont-Winema National Forest. *Supra pp. 5-6, AR 5135.* The uniqueness of this fen complex and the abundance of the rare plants here also make these communities themselves very unusual and special. *AR 2193, 3687.*

Many of these sites have been degraded by cattle due to trampling and compaction of soils, pedestals that dry out the soil, cattle trails through wetlands, and removal of vegetation, all of which alter the hydrology of the system and degrade the fen communities and habitat for sensitive species. *See supra pp. 4, 9-11* (discussing adverse impacts to fens and sensitive species sites). Indeed, the District Wildlife Biologist and Assistant Forest Botanist both discussed the extensive damage from cattle to these sensitive springs and fens, noting the high degree of disturbance at nearly all of the springs surveyed for mollusks and that livestock grazing is generally the most evident detrimental disturbance in the fens surveyed for sensitive plants. *Supra pp. 10-11 and n.3.* The District Wildlife Biologist also expressed the need to complete biological evaluations for these species to assess impacts of grazing and to take appropriate action to control livestock and protect the spring/fen habitat, but no evaluations are in the record and no changes occurred in the 2008-2010 AOIs to protect these sites. *Supra p. 11.*

The Jack Creek spotted frog population is also continuing to experience impacts from grazing due to repeated trespass of cattle behind fences that allows access to key frog habitat as well as impacts to unfenced portions of frog habitat. *Supra pp. 13-15.* This population is in dire straits and on the brink of extirpation; any further losses of individuals could lead to its demise.

*Supra p. 7.* Because of the importance of this local population, its loss could have a detrimental impact on the viability of the species as a whole and an even greater impact on the viability and distribution of the species on the forest. *Supra pp. 7-8.* Again, there is no biological evaluation in the record assessing the impacts of grazing on the Jack Creek frog population, and the Forest Service has not taken action to adequately address these impacts and protect the frogs.

The adverse impacts from grazing to the riparian communities and habitat as well as to sensitive species that exist on the Antelope Allotment are contrary to direction in the Forest Plan. The documented degradation to springs and fens from cattle trampling, soil compaction and pedestals, trails, manure, and removal of vegetation, which alter the hydrology of the community and impair wildlife habitat, does not comply with direction to maintain or enhance riparian areas, hydrology, and wildlife habitat within riparian ecosystems. *Sept. 2008 AR 0072, 0082, 0140.* Nor do the adverse impacts from grazing to the sensitive plants and mollusks and the Oregon spotted frog on the Antelope Allotment comply with direction to manage habitat to protect sensitive species and maintain viable populations and distribution of native plant and animal species throughout the forest. *Id. at 0072, 0113.* Finally, the failure to complete biological evaluations for these sensitive species before authorizing further grazing also contradicts direction in the Forest Plan and Forest Service Manual to complete such evaluations to assess the effects of this activity. *Id. at 0072, 0113; FSM 2672.4.*

Courts have frequently held unlawful agency actions, including grazing authorizations, that are inconsistent with similar direction. *See e.g. Native Ecosystems Council,* 599 F.3d at 932-36 (holding grazing AMP unlawful because Forest Service did not comply with requirement to maintain viability of species); *Or. Natural Desert Ass'n v. Tidwell,* 716 F. Supp. 2d 982, 1008 (D. Or. 2010) (overturning annual grazing authorizations because Forest Service failed to

ascertain compliance with Forest Plan standards); *Idaho Watersheds Project v. Bennett*, 392 F. Supp.2d 1217, 1227-28 (D. Idaho 2005) (renewal of BLM grazing permits inconsistent with direction in land use plan to protect wildlife resources and habitat for sensitive species); *see also W. Watersheds Project v U.S. Forest Serv.*, No. 07-151, 2007 WL 1729734, 2007 WL 3407679 (D. Idaho 2007) (Orders upholding Forest Service decisions to prohibit annual grazing of allotments to protect viability of bighorn sheep). Because the Forest Service's 2008-2010 grazing authorizations were inconsistent with the Winema Forest Plan, they violated NFMA.

Finally, the Forest Service also violated NFMA by failing to consider the best available science when authorizing grazing in 2008-2010, as required under NFMA regulations. 36 C.F.R. § 219.35(a). There is no evidence the Forest Service considered the new scientific information showing presence of sensitive species on the allotment and cattle damage to these species and their habitat when issuing these AOIs. *See Utah Envt'l Cong. v. Richmond*, 483 F.3d 1127, 1136 (10th Cir. 2007) (agency violated NFMA where there was no evidence it considered the best available science when approving project); *Bark v. U.S. Forest Serv.*, 2007 WL 756746 at * 6 (D. Or. 2007) (same); *see also Ecology Ctr. v. Castaneda*, 574 F.3d 652, 656 (9th Cir. 2009) (responsible officials must consider best available science when implementing Forest Plans). By ignoring and refusing to evaluate this information prior to issuing the 2008-2010 AOIs, the Forest Service failed to consider the best available science, in violation of NFMA.

### B. The Forest Service Violated NEPA By Authorizing Grazing Without First Completing a Supplemental Environmental Analysis Considering New Information About Sensitive Species on the Allotment.

NEPA requires agencies to take a "hard look" at environmental impacts of proposed actions by completing a thorough and public analysis of the environmental consequences of those actions in an Environmental Assessment ("EA") or Environmental Impact Statement

("EIS"). 43 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.9. Once an agency has completed such an analysis, it must supplement that analysis if the action is ongoing and there is significant new information relevant to environmental concerns and bearing on the action or its impacts. 40 C.F.R. § 1502.9(c)(1)(ii); *Or. Natural Res. Council Action v. U.S. Forest Serv.*, 445 F. Supp. 2d 1211,1219 (D. Or. 2006) (citing *Marsh,* 490 U.S. at 374).

The designation of new sensitive species that occur in the action area is new information that warrants supplemental environmental analysis. In *Friends of the Clearwater v. Dombeck,* the designation of seven new sensitive species was new information relevant to the proposed action and its impacts. 222 F.3d 552. 556-58 (9th Cir. 2000). The Forest Service argued that because there would be sufficient habitat left for some species after the project, and other species were largely absent from the action area, the new information was not significant and thus no supplementation was required. *Id.* at 558. The Court, however, held that the agency violated NEPA because it had not even evaluated whether the new sensitive species designations were sufficiently significant to require supplemental analysis. *Id.* "When confronted with this important new information, it was incumbent on the Forest Service to evaluate the existing EIS to determine whether it required supplementation." *Id.; see also Or. Natural Res. Council Action,* 445 F. Supp. 2d at 1225-29 (agency did not adequately evaluate whether new information on spotted owls required supplementation of eight-year old EAs).

Here, not only are there many new sensitive species designations since the prior 1995 Antelope Allotment EA, which alone qualifies as new information, but nine of the new sensitive species were discovered on the allotment within the last few years. *Supra pp. 4-5.* Furthermore, many of the sites with these new sensitive species are being damaged by livestock grazing. *Supra pp. 10-11.* This new information about sensitive species presence on the allotment and

effects of grazing on these species and their habitat is sufficiently significant to require supplemental analysis under NEPA. *See Sierra Club v. Bosworth*, 465 F. Supp. 2d 931, 940 (N.D. Cal. 2006) (new information about status of pacific fisher and effects of project on fisher required NEPA supplementation).

The Forest Service has indicated that it is in the process of preparing a new AMP and accompanying EA for the Antelope Allotment that presumably will take into consideration this new information. *Supra p. 15.* NEPA, however, requires that an agency not make any commitment of resources pending the NEPA analysis that would prejudice the decision-making process, such as taking action that would cause environmental harm or limit the choice of reasonable alternatives available to the agency. 40 C.F.R. §§ 1502.2(f), 1506.1(a).

The Ninth Circuit has affirmed that NEPA and its regulations prohibit an agency from making any "irreversible or irretrievable commitment of resources" before its analysis is completed so that the agency does not impair the decision making process and prejudice consideration of alternative actions. *Connor v. Burford*, 848 F.2d 1441, 1446 (9th Cir. 1988); *Metcalf v. Daley*, 214 F.3d 1135, 1142-43 (9th Cir. 2000); *Anderson v. Evans*, 371 F.3d 475, 501 n.24 (9th Cir. 2004). These cases have held that an agency cannot take actions that could irreversibly impair the environment before assessing the impacts of those actions and any reasonable alternatives. *Connor*, 848 F.2d at 1446-51 (sale of oil and gas leases); *Metcalf*, 214 F.3d at 1143 (contract for whale hunt); *Anderson*, 371 F.3d at 501 n.25 (permit to kill whale). NEPA emphasizes up-front environmental analysis so that an agency does not "regret its decision after it is too late to correct." *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1216 (9th Cir. 1998) (quoting *Marsh*, 490 U.S. at 371).

The Forest Service continues to authorize grazing on the Antelope Allotment each year,

which continues to damage sensitive fen communities, plants and mollusks, while it works on its new NEPA analysis. The authorization of grazing before completing this analysis violates NEPA and contradicts Ninth Circuit law. The Forest Service must not take any action before it completes its analysis that could cause irreversible effects to the environment or preclude any alternative actions. Continuing to authorize grazing on the Antelope Allotment could cause irreversible damage to the rare plants, animals and fens there, nullifying any alternative aimed at protecting those resources. *See supra pp. 10-11* (discussing destruction of habitat by grazing). The Oregon spotted frog population on the allotment is also in a dire situation. Any further losses of frogs from this population could lead to its demise, rendering the Forest Service's analysis meaningless. *Supra p.7.*

Given the importance of these local populations, as discussed above, if any of the populations of sensitive species on the allotment is extirpated, it could impact the species as a whole and certainly its viability on the forest. *Supra pp. 5-8.* The Forest Service must protect these sensitive species rather than continue to endanger them while it conducts its analysis so that these populations are not permanently impaired in the meantime. *See W. Watersheds Project v. BLM*, 2009 WL 3335365 (D. Idaho 2009) (enjoining grazing to protect bighorn sheep pending new EIS); *W. Watersheds Project v. U.S. Forest Serv.* No. 07-151, 2007 WL 1729734, 2007 WL 3407679 (D. Idaho 2007) (upholding Forest Service decisions to prohibit grazing to protect bighorn sheep pending supplemental NEPA analyses); *see also Exhibits B-D* (Forest Service and BLM orders closing grazing allotments pending supplemental NEPA to protect bighorn sheep populations). By continuing to authorize grazing on the Antelope Allotment prior to completing a new analysis, the Forest Service is violating NEPA.

## III. THE FOREST SERVICE'S DECISION TO AUTHORIZE GRAZING ON ROUND MEADOW IN 2010 VIOLATED NEPA AND NFMA.

### A. The Forest Service Violated NEPA by Authorizing Grazing on Round Meadow Without Conducting any Site-Specific Environmental Analysis.

In 2010, the Forest Service amended the Antelope Allotment AOI to authorize grazing of Round Meadow for the first time in seven years. *AR 4918.* The Forest Service made this decision without conducting any site-specific analysis to assess impacts of grazing on the sensitive resources in the meadow or on the restoration efforts occurring in the meadow, in violation of NEPA.

The decision to grazing Round Meadow in 2010 was an agency action that required NEPA analysis. As noted above, AOIs are agency actions to permit livestock grazing and here the Forest Service amended the 2010 AOI to permit grazing in Round Meadow. *Or. Natural Desert Ass'n,* 465 F.3d at 979-80; *Buckingham,* 603 F.3d at 1077; *AR 4918.* It is well established law that the decision to permit grazing in a particular area is a decision that requires site-specific NEPA analysis. *See NRDC v. Morton,* 388 F. Supp. 829, 834, 841 (D.D.C. 1974), *aff'd* 527 F.2d 1386 (D.C. Cir. 1976) (holding that "grazing clearly may have a severe impact on local environments," which agencies must study on a site-specific basis under NEPA); *Idaho Watersheds Project v. Hahn,* 307 F.3d 815 (9th Cir. 2002) (affirming injunction limiting grazing after BLM renewed grazing permits without new NEPA analysis); *W. Watersheds Project v. Bennett,* 392 F. Supp. 2d at 1223-26 (enjoining grazing where BLM failed to prepare EIS before issuing grazing permits); Forest Service Handbook 2209.13, Chpt. 90, Section 92.3 ("a site-specific analysis of environmental effects of livestock grazing projects on affected National Forest System lands and resources must be completed pursuant to NEPA before the grazing activity can be authorized). The decision to permit grazing in Round Meadow after six years of

closure aimed at protecting restoration efforts and sensitive wetlands was a federal action that could have significant effects on the human environment, triggering NEPA. 42 U.S.C. § 4332(2)(C); 40 C.F.R. §1508.9; *Sept. 2008 AR 1837* (2003 Decision Memo for restoration project)*; AR 1747* (noting fence around Round Meadow constructed in 2004 to exclude grazing).

Indeed, Round Meadow has never been included in any site-specific NEPA analysis for grazing. It was acquired in a land exchange in 1998 and thus was not included in the 1995 NEPA analysis for the Antelope Allotment. *AR 4797.* The land exchange EIS also did not assess particular activities that could occur on these parcels, stating specifically that the land exchange "would not authorize any site-specific management activities by either party." *AR 0762.* The meadow is within the boundary of the allotment and falls within a management area of the forest that "allows" grazing. *Id.* However, the fact that grazing is "allowed" here does not mean that grazing is automatically *authorized* nor that the Forest Service can forego a site-specific analysis to determine whether the area is suitable for grazing, the impacts to resources, and the proper management if grazing is to occur. *See Morton*, 388 F. Supp. at 834 (noting that term "action" under NEPA includes decisions by agencies that allow another party to take an action affecting the environment, and that grazing may clearly have severe impact on the local environment). The decision to graze Round Meadow is certainly a decision that allows another party to take an action that affects the environment and thus requires NEPA analysis.

In fact, the record fully demonstrates that authorization to graze Round Meadow in 2010 was a "decision" that required a site-specific analysis. For instance, the permittee for the Antelope Allotment requested use of Round Meadow in a March 2010 letter, and the District Ranger originally denied that request. *AR 3807, 4202.* The permittee then appealed the decision denying the request to graze Round Meadow. *AR 4423, 4622.* If the denial of that request is a

decision that could be appealed, certainly the grant of that request is also an agency decision.

In response to the appeal, the District Ranger admitted that the "proposed action" was to allow an unspecified amount of grazing within Round Meadow for this season, and that Biological Evaluations ("BEs") should be prepared for that proposed action in light of sensitive resources in the meadow. *AR 4731.* The Forest Environmental Coordinator also recommended preparing BEs for a "decision to graze round meadow." *AR 4710.* The cultural resources specialist for the forest noted that releasing livestock into Round Meadow was an "undertaking" for purposes of compliance with the National Historic Preservation Act. *AR 4740.* The District Wildlife Biologist noted that a site-specific analysis was needed to allow grazing. *AR 3819; see also AR 4876-77* (comments from retired long-time Chemult District NEPA planner). Several general specialist reports were completed to assess resources on Round Meadow for the proposed project of "Round Meadow Time-Controlled Grazing September 2010." *AR 4894, 4838, 4862.*

Yet despite the recognition that authorization to graze Round Meadow in 2010 was a proposed project that required a specific decision by the Forest Service, no comprehensive analysis under NEPA was conducted for this project. Such an analysis was necessary to address the various sensitive resources in the meadow, such as fens and wetlands that are part of the unique complex of groundwater dependent communities, sensitive species habitat, and cultural resources, as well as the investment and progress in the restoration efforts occurring in the meadow. *See supra pp. 16-17; AR 3819, 3904.* Forest Service documents show that Round Meadow falls within the ecological unit inventory category of 2000 (moist meadow Chinchallo), which means it is "questionable if capable of being rangeland (only certain areas or during certain time periods)." *AR 5219-21* (showing Round Meadow as TEUI 2000); *3663 & 3666*

(data showing that TEUI 2000 falls within questionable capability). Even the 2003 Decision Memo for the restoration project stated that the AMP update would address grazing practices (capacity, timing, and duration) in Round Meadow, indicating that a formal analysis was needed to determine the proper grazing management for the meadow. *Sept. 2008 AR 1837.* A comprehensive site-specific NEPA analysis was required prior to authorizing grazing on Round Meadow to fulfill NEPA's twin goals of informed decision making and informed public participation. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1113 (9th Cir. 2008) (en banc).

In contrast to the decision to graze Round Meadow, the Forest Service issued a scoping notice, accepted public comment, and issued a Decision Memo to put a temporary fence on Round Meadow while the meadow was being grazed, without describing the grazing proposed. *AR 4796, 4899.* The Forest Service acknowledged that the decision to install a fence was subject to NEPA, but that the activity fell within a categorical exclusion and therefore an EA or EIS was not necessary. *AR 4899.* The Forest Service also completed several Biological Evaluations for the fence project, which, like the Decision Memo, only addressed the installation of the fence and its impacts and did not address grazing of the meadow. *AR 4776, 4885, 4785.*

The decision to graze the meadow and the decision to install the fence were connected actions that the agency was required to consider together in one analysis. 40 C.F.R. § 1508.25(a)(1). Actions are "connected" if they cannot or will not proceed unless other actions are taken previously or simultaneously, or are interdependent parts of a large action and depend on the larger action for their justification. *Id.*; *Thomas v. Peterson,* 753 F.2d 754, 758 (9th Cir. 1985) (logging road and timber sale were connected actions); *Barnes v. Babbitt,* 329 F. Supp. 2d 1141,1162 (D. Ariz. 2004) (range improvement plan and decision to reauthorize grazing were connected actions). The fence project and livestock grazing authorization for Round Meadow

were connected actions. The only reason the Forest Service was installing this fence was because of the grazing it authorized on the meadow and the need to protect sensitive resources from that grazing. *AR 4899.* The sole justification for the fence was the larger action of grazing the meadow. However, the Forest Service did not include an analysis of the grazing in its Decision Memo for the fence. Instead, the Forest Service simply ignored its duty to analyze the grazing of Round Meadow during 2010, in violation of NEPA.

### B. The Forest Service Violated NFMA by Authorizing Grazing on Round Meadow that was Inconsistent with Direction in the Forest Plan.

Finally, the Forest Service's authorization of grazing in Round Meadow also violated NFMA because it was not consistent with Forest Plan direction in light of sensitive fens, plants, and mollusks there. As discussed above, the Winema Forest Plan contains numerous directives to protect riparian areas and soils, wildlife and plant populations, and sensitive species. *Supra p. 23.* Round Meadow contains extensive wetlands with wet or moist soils and habitat for sensitive plants and mollusks. *Supra p. 17.* One mollusk and two sensitive plant species were recently discovered in Round Meadow, and the meadow is potential habitat for the struggling Jack Creek spotted frog population. *Id.* Grazing has damaged these resources on other parts of the Antelope Allotment via trampling, compaction of soils and creation of pedestals that dry out the fens, cattle trails, manure, and removal of vegetation. *Supra pp. 9-11.* Similar damage to riparian areas, plants, and wildlife will result from grazing Round Meadow, contrary to the Forest Plan.

Furthermore, the Forest Service did not survey all of the potential habitat in the meadow to determine presence of sensitive species before authorizing grazing. Only a portion of the meadow was recently surveyed for mollusks and plants, and no surveys were conducted for Oregon spotted frogs since 2002, before the restoration efforts began in the meadow that improved wetland habitat for the frog. *See AR 4781-82* (wildlife BE for fence project); *4885*

(Botany BE for fence project).

The Decision Memo for the fence stated that only one sensitive plant was present in the meadow and that the fence would encompass occupied habitat for that plant. *AR 4901*. It also stated that the fence would enclose the fen and springs in Round Meadow to protect them from grazing. *Id.* However, both of these statements were false. A second sensitive plant species was found in the meadow, sites for both sensitive plants occurred outside of the fence, and fens and springs also occurred outside of the fence throughout the meadow. *Supra pp. 17, 21*. In addition, at least one mollusk site was outside of the fence as well. *Compare AR 4903* (map of fence) *with AR 4218* (mollusk sites). If the Forest Service had completed proper surveys, Biological Evaluations, and NEPA analysis prior to its decision to authorize grazing of the meadow, it would have been able to properly assess impacts to these resources and determine whether grazing would be consistent with the Forest Plan. Without this information, the Forest Service could not ascertain its compliance with the Forest Plan, in violation of NFMA. *See Or. Natural Desert Ass'n v. Tidwell*, 716 F. Supp. 2d at 1008.

## CONCLUSION

The Forest Service violated its duties under NEPA and NFMA when issuing the 2008-2010 AOIs for the Antelope Allotment and when issuing the 2010 amended AOI authorizing grazing on Round Meadow in light of the sensitive resources in these areas and the damage that grazing causes to those resources. The Court should therefore grant Plaintiffs' Motion for Summary Judgment.

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Respectfully submitted,

s/Lauren M. Rule
Lauren M. Rule

Of Attorneys for Plaintiffs