Lauren M. Rule (ISB # 6863)
ADVOCATES FOR THE WEST
PO Box 1612
Boise ID 83701
(208) 342-7024
(208) 342-8286 (fax)
lrule@advocateswest.org

Laurence ("Laird") J. Lucas (ISB # 4733)
P.O. Box 1342
Boise, ID 83701
(208) 424-1466 (phone and fax)
llucas@lairdlucas.org

Attorneys for Plaintiff Western Watersheds Project

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF IDAHO**

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| WESTERN WATERSHEDS PROJECT;<br><br>Plaintiff,<br><br>v.<br><br>UNITED STATES FOREST SERVICE;<br><br>Defendant. | CIV. No. 09-629-BLW<br><br>**OPENING BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** |

## INTRODUCTION

Plaintiff Western Watersheds Project ("WWP") seeks summary judgment against Defendant U.S. Forest Service over the supplemental analysis and decisions pertaining to livestock grazing on the Fisher Creek, Smiley Creek, North Fork-Boulder and Baker Creek domestic sheep allotments ("North Sheep allotments"), which continue to violate the National Environmental Policy Act ("NEPA"), National Forest Management Act ("NFMA"), and Sawtooth National Recreation Area Organic Act "(SNRA Act").

This Court previously found that the Forest Service's original environmental analysis for the four allotments had violated these statutes by failing to analyze the capability of the North Sheep allotments to sustain livestock grazing, failing to demonstrate that the adaptive management strategy for the allotments would curtail adverse impacts to resources and be consistent with direction in the Forest Plan and SNRA values, and failing to conduct an analysis in the Forest Plan of the capability of rangelands to provide habitat for management indicator species sage-grouse and pileated woodpecker. This Court ordered the Forest Service to prepare supplemental analyses to remedy these violations of law.

The Forest Service completed new analyses but did not alter grazing management on the North Sheep allotments at all in the new decisions. Instead, the North Sheep supplemental environmental impact statement ("SEIS") continued to ignore the fact that the majority of each allotment is not capable of sustaining livestock grazing and failed to analyze the impacts of trailing across such non-capable land to access capable areas. The SEIS also did not demonstrate where on the allotments capable sage-grouse habitat was in unsatisfactory condition and how grazing management would contribute to restoring such habitat.

Furthermore, the SEIS again failed to demonstrate that the adaptive management

strategy would insure compliance with Forest Plan direction and protection of SNRA values. The Forest Service still did not explain how its monitoring would insure that grazing was meeting all Forest Plan direction and SNRA values, when in fact the protocols did not even require monitoring for key fish and wildlife habitat parameters. Finally, the North Sheep SEIS contained new information on watershed conditions and incorporated new monitoring data, but ignored new information about noxious weed infestations and climate change even though this information is also relevant for assessing impacts to resources from grazing. These deficiencies in the North Sheep SEIS continue to violate NEPA, NFMA, and the SNRA Act.

The Forest Service also violated the Endangered Species Act ("ESA") by failing to reinitiate consultation with U.S. Fish and Wildlife Service and NOAA Fisheries over impacts to threatened salmon, steelhead, and bull trout from grazing the Smiley Creek and Fisher Creek allotments. The new information in the North Sheep SEIS on livestock capability and the monitoring protocols, as well as new information on climate change that has arisen since the 2004 North Sheep EIS, warrants reinitiation of consultation under the ESA.

Because of these legal violations, the Court should grant WWP's summary judgment motion and reverse and remand the North Sheep SEIS and supplemental Records of Decision.

## FACTUAL BACKGROUND

### Litigation Background

In 2004, the Forest Service issued an Environmental Impact Statement for the North Sheep allotments and authorized continued grazing on the four allotments with only minor adjustments. *AR NS06823, NS07191, NS07206.* WWP challenged the North Sheep Final EIS and Records of Decision for violating NEPA, NFMA, and the SNRA Act on various grounds. *Statement of Facts ("SOF") ¶¶ 1-2; Western Watersheds Project et al. v. U.S. Forest Service,*

Case No. 05-189-BLW (D. Idaho, filed May 13, 2005).

This Court upheld four of WWP's legal claims, ruling that the Forest Service had: (1) violated NFMA and NEPA by failing to incorporate or even consider in the North Sheep FEIS the analysis from the Sawtooth National Forest Land and Resource Management Plan ("Forest Plan") assessing the capability of forest rangelands to sustain livestock grazing; (2) violated NFMA by failing to conduct an analysis in the Forest Plan of the capability of rangelands to provide habitat for management indicator species pileated woodpecker and sage-grouse; (3) violated NFMA by failing to demonstrate that the proposed adaptive management strategy for grazing would curtail adverse impacts to resources and be consistent with direction in the Forest Plan; and (4) violated the SNRA Act by failing to demonstrate that grazing under the proposed adaptive management strategy would not substantially impair the primary values of the area. *SOF ¶ 3; Id. Dckt. No. 47* (February 7, 2006 Memorandum Decision and Order). The Court ordered the Forest Service to complete supplemental analyses to rectify these violations by March 2008. *SOF ¶ 4; Id. Dckt No. 81* (January 12, 2007 Memorandum Decision and Order).

The Forest Service issued a supplement to the Forest Plan in January 2008 that contained a capability analysis for Management Indicator Species pileated woodpecker and sage-grouse, and then issued a Supplement to the North Sheep Final EIS and supplemental Records of Decision in March 2008 to address the remaining legal violations. *SOF ¶ 5; AR MIS002151* (Forest Plan supplement), *SA009955* (North Sheep SEIS), *SA010373, SA010380* (Supplements to Records of Decision ("SRODs")). The Forest Service made **no changes** to grazing management on the North Sheep allotments in the supplemental decisions. *AR SA010373, SA010380.*

**North Sheep SEIS**

The North Sheep SEIS contained new analyses on livestock grazing capability, sage-

grouse habitat capability, and the adaptive management strategy, and also provided new information on watershed conditions, recent projects and wildfires that had occurred on the allotments, and monitoring data collected since the prior EIS. *SOF ¶ 7; SEIS at 2-7.*

**1. Livestock Capability Analysis**

Pursuant to requirements in NFMA and its regulations, the Forest Service completed an analysis assessing what areas of the forest were capable of sustaining livestock grazing based on the physical characteristics of the landscape when it revised the Forest Plan for the Sawtooth National Forest in 2003. *SOF ¶ 10; see SEIS at 33-39; 36 C.F.R. § 219.29 (2000).* These characteristics were accessibility to livestock, forage production, slope, soil stability, and distance to water. *SOF ¶ 10; SEIS at 34-39.* Based on the Forest Plan model, the vast majority of each of the North Sheep allotments was not capable of sustaining livestock grazing. *SOF ¶ 11; see SEIS at 40-42.* The 2004 North Sheep EIS did not incorporate or even discuss the Forest Plan capability analysis, and this Court ruled that such an omission violated both NEPA and NFMA. *SOF ¶ 10; February 7, 2006 Order at 7-16.* The Court ordered the Forest Service to include a livestock capability analysis for the North Sheep allotments in a supplemental EIS. *Id.*

The North Sheep SEIS contained such an analysis, first describing the Forest Plan capability model and then describing the model used for the North Sheep allotment-specific analysis, which relied more heavily on data that had been collected on-the-ground over the years. *SOF ¶¶ 11-12; SEIS at 33-44.* The acres of capable land differed for each of the North Sheep allotments when comparing the Forest Plan analysis and allotment-specific analysis, with the Smiley Creek allotment containing slightly fewer capable acres under the allotment-specific analysis and the remainder of the allotments having more capable acres under that analysis. *SOF ¶¶ 11, 14; SEIS at 44.* Nevertheless, the allotment-specific analysis still showed that the capable

areas were patches of land intermixed with non-capable lands, and that overall, most of the land in each allotment was not capable of sustaining livestock grazing, with the Fisher Creek allotment being 26% capable, the Smiley Creek allotment 13% capable, the Baker Creek allotment 21% capable, and the North Fork-Boulder allotment 21% capable. *SOF ¶ 14; SEIS at 44-46.* The North Sheep SEIS did not explain why some areas were considered capable under one analysis but not the other. *Id.*

The North Sheep SEIS used the acres of capable land from the allotment-specific analysis to determine the grazing capacity on each allotment—i.e. the stocking level of domestic sheep. *SOF ¶ 15; SEIS at 47-50; AR SA001110-1115* (memos documenting grazing capacity calculations for each allotment). The SEIS had no further discussion of the capability analysis and thus did not describe why certain areas were not capable (which physical characteristic was not met), which of these non-capable areas domestic sheep would cross to access capable areas, or the impacts of trailing across such non-capable land. *SOF ¶ 15; SEIS at 43-50.*

**2. Sage-grouse Habitat Capability Analysis**

The North Sheep SEIS also contained a capability analysis for sage-grouse habitat. *SOF ¶ 16; SEIS at 84-91, 115-116.* The foundation for the North Sheep SEIS discussion was the sage-grouse habitat capability analysis the Forest Service prepared as the supplement to the Forest Plan pursuant to this Court's Order. *SOF ¶ 16; SEIS at 84-89*.

The Forest Plan analysis assessed which areas of the forest were capable of developing conditions necessary to meet habitat needs of sage-grouse and were within the bird's range, and compared the amount of current capable habitat within each watershed with the historic level of capable habitat there. *SOF ¶ 17; AR MIS002159-60, 2174-75* (Forest Plan MIS Supplement). Watersheds that had a decrease of greater than 20% between historic capable habitat and current

capable habitat were considered to be in unsatisfactory condition. *SOF ¶ 17; AR MIS002160-61.* The Supplement concluded that restoration of lands in unsatisfactory condition would occur if the Forest Service implemented the standards and guidelines from the Forest Plan to address conservation strategies for sage-grouse. *SOF ¶ 18; AR MIS002180-2182, MIS002148.*

Based on the Forest Plan analysis, the North Sheep SEIS noted that each of the four North Sheep allotments falls within a watershed that has less than 25% of its acres as current capable sage-grouse habitat, and also has experienced a greater than 60% decrease in capable sage-grouse habitat compared to historic levels. *SOF ¶ 19; SEIS at 84-87.* Thus, each of the North Sheep allotments falls within watersheds that are deemed to be in less than satisfactory condition for sage-grouse. *SOF ¶ 19; SEIS at 86-87.* The SEIS explained that this modeled decrease in habitat corresponded with information showing that sage-grouse habitat has declined on the allotments at least in part due to livestock grazing that has caused adverse impacts to shrubs, reduced forb cover, excessive bare ground, and terraced slopes. *SOF ¶ 20; SEIS at 87.*

Each of the North Sheep allotments contains at least some habitat for sage-grouse, but the North Sheep SEIS did not have any maps showing specifically where capable sage-grouse habitat occurs on the allotments, where that habitat overlaps with grazing, or what habitat is in less than satisfactory condition. *SOF ¶ 21; SEIS at 85-89; AR SA001166* (map in administrative record showing sage-grouse source habitat). The SEIS set forth the Forest Plan direction that supposedly would allow livestock grazing to "maintain or minimally impact" sagebrush communities, and concluded that this direction, combined with the closure of some high elevation areas and use of the adaptive management approach, would contribute to restoration of sage-grouse habitat that is in unsatisfactory condition. *SOF ¶ 22; SEIS at 89-91, 116.*

### 3. Adaptive Management Strategy

This Court previously held that the Forest Service had violated NFMA and the SNRA Act by not explaining how its adaptive management approach would insure that livestock grazing complied with Forest Plan direction and did not substantially impair primary values of the SNRA. *SOF ¶ 23; February 7, 2006 Order at 20-23.* The North Sheep SEIS attempted to address this deficiency by more fully explaining the adaptive management strategy. *SOF ¶ 24; see SEIS at 2.*

The SEIS noted that the strategy relies on monitoring of annual grazing use and long-term resource objectives, and then adjustments to grazing based on that monitoring. *SOF ¶ 24; SEIS at 12-17.* The SEIS described the numerous types of actions the Forest Service could take if monitoring showed that grazing was preventing achievement of desired conditions and Forest Plan objectives, but the SEIS itself did not contain the monitoring protocols. *SOF ¶ 24-25; SEIS at 12-23.* Nor did it explain how much or what type of damage must occur to trigger changes to grazing use. *SOF ¶ 25; SEIS 12-23.*

The Allotment Management Plans for each allotment were attached to the SEIS as Appendix C and contained the monitoring protocols. *SOF ¶ 26; SEIS App. C.* The protocols specified the type, location, and frequency of monitoring that would occur for riparian, upland, and aspen communities on each allotment. *SEIS App. C Baker Creek AMP at 25-29, North Fork-Boulder AMP at 23-27, Smiley and Fisher Creek AMP at 39-44.* The SEIS stated that changes to the AMPs, including the monitoring protocols and sites, could be made without any additional NEPA analysis. *SOF ¶ 26; SEIS at 13.*

The riparian monitoring on each allotment called for collection of data on grazing use, riparian vegetation, and bank stability. *SOF ¶ 28; Baker Creek AMP at 25-27, North Fork-*

*Boulder AMP at 24-25, Smiley and Fisher Creek AMP at 39-41*. None of these protocols required monitoring of instream fish habitat, such as pools, width/depth ratio, undercut banks, sediment, or water temperature, even though the Forest Service had no up-to-date data on many of these indicators and some of them were not functioning appropriately in streams on the allotments in the past. *SOF ¶ 28; Baker Creek AMP at 25-27, North Fork-Boulder AMP at 24-25, Smiley and Fisher Creek AMP at 39-41; SEIS at 54-80*.

Upland monitoring protocols called for data on frequency of plant species, canopy cover of sagebrush, and overall ground cover but did not require measuring height of grasses, forbs, and sagebrush, key components of sage-grouse habitat. *SOF ¶ 29; Baker Creek AMP at 27-28, North Fork-Boulder AMP at 26-27, Smiley and Fisher Creek AMP at 41-42.* Also important for sage-grouse brood-rearing are seeps, springs, and other wetland areas, but only the Baker Creek and North Fork-Boulder AMPs mentioned monitoring of wetland areas, which would begin in 2008, and neither contained protocols or sites for this monitoring. *SOF ¶ 29; Baker Creek AMP at 27, North Fork-Boulder AMP at 26, Smiley and Fisher Creek AMP at 39-44.* Finally, none of the AMPs included protocols to measure and monitor soil erosion or located plots on steeper slopes on the allotments to assess impacts of trailing across these slopes. *Baker Creek AMP at 25-29, North Fork-Boulder AMP at 23-27, Smiley and Fisher Creek AMP at 39-44.*

**4. New Information**

The North Sheep SEIS incorporated some new information into its analysis but excluded other relevant new information on noxious weeds and climate change. *SOF ¶¶ 30, 32; SEIS at 5-7*. The Forest Service decided to use different baseline standards for assessing whether watershed condition indicators were functioning properly, and thus updated the analysis of watershed and stream conditions in the SEIS based on these new standards. *SOF ¶ 31; SEIS at*

*5, 51-67, 104-113.* The SEIS also included information on new projects and wildfires that had occurred since 2004, and updated the analysis for watershed and fisheries resources to incorporate monitoring data that was collected since the North Sheep EIS analysis was completed. *SOF ¶ 31; SEIS at 52-80.*

The Forest Service, however, did not include new information in the North Sheep SEIS on new or expanding noxious weed infestations even after WWP informed it of invasive toadflax sightings in 2006 and 2007 in areas that sheep graze on the Smiley Creek allotment. *SOF ¶ 32; AR SA010435-440, SA010459-462, SA010476-478* (WWP letters), *SA006460-463* (WWP comments on draft SEIS). The North Sheep SEIS stated that this topic was beyond the scope of the supplemental analysis. *SOF ¶ 32; SEIS at App. D 135-140.*

The SEIS also failed to include climate change in its supplemental analysis despite requests by WWP and the Environmental Protection Agency to include this topic given its impacts to watersheds and fish and wildlife habitat that should be assessed in conjunction with grazing impacts. *SOF ¶ 33; AR SA009447 & SA006451-6506* (WWP comments), *SA006444* (EPA comments). The Forest Service declined to incorporate climate change into the SEIS analysis because its effects are "too uncertain and speculative." *SOF ¶ 33; SEIS at App. D 3*.

Based on the analysis in the North Sheep SEIS, the Forest Service determined that it did not need to make any changes to grazing management in new Records of Decision, and that the authorized grazing would not substantially impair any of the primary values of the SNRA. *SOF ¶¶ 7-8; AR SA010374, SA010381, SA009949-56.* Thus, the supplemental analysis led to no changes in grazing on these allotments.

**Endangered Species Act Consultations**

Prior to issuance of the 2004 North Sheep EIS, the Forest Service had consulted with

U.S. Fish and Wildlife Service and NOAA Fisheries over impacts to threatened salmon, steelhead, and bull trout from grazing the Smiley Creek and Fisher Creek allotments. *SOF ¶ 34; AR NS05866.* This consultation consisted of a biological assessment prepared by the Forest Service that concluded the grazing "may affect" but was "not likely to adversely affect" the listed fish species, and Letters of Concurrence from the Service agreeing with that conclusion. *SOF ¶ 34; AR NS05938-5957, SA001237-1242.*

The Forest Service did not reinitiate consultation before issuing the North Sheep SEIS despite the new information in the SEIS showing that the Smiley Creek and Fisher Creek allotments are largely not capable of sustaining livestock grazing, the inclusion of the monitoring protocols with the SEIS, and new information on impacts of climate change to stream flows and fish habitat. *SOF ¶ 35.* After WWP sent a letter to the Forest Service notifying it of its failure to reinitiate consultation in violation of the ESA, the Forest Service consulted with NOAA Fisheries over impacts to newly designated critical habitat for steelhead, but did not reinitiate over impacts to any of the listed species themselves. *SOF ¶ 36; AR SA011198* (WWP notice letter); *AR SA011186* (steelhead consultation).

Accordingly, as discussed below, the Forest Service has failed to rectify the violations of law found by this Court previously under NEPA, NFMA, and the SNRA Act, and has caused further violations of these statutes as well as the ESA in issuing the North Sheep SEIS and SRODs, requiring that they be reversed and remanded.

## ARGUMENT

The North Sheep SEIS fails to remedy the legal violations that this Court previously found because it still does not sufficiently disclose information about livestock capability on the allotments or fully analyze the impacts of grazing these allotments that are largely not capable of

sustaining that use, nor does it sufficiently demonstrate that the adaptive management strategy will allow grazing to comply with Forest Plan direction and the primary values of the SNRA. Furthermore, the SEIS does not address how grazing management will restore capable sage-grouse habitat that is in unsatisfactory condition, and ignores key new information that must be assessed in conjunction with livestock grazing to properly analyze impacts to resources. In addition, the Forest Service has failed to reinitiate ESA consultation over impacts to listed fish species given new information in the North Sheep SEIS that the Services were not aware of for their previous consultation. These flaws constitute violations of NEPA, NFMA, the SNRA Act, and the ESA and thus require reversal of the North Sheep SEIS.

## I. THE NORTH SHEEP SEIS VIOLATES NEPA, NFMA, AND THE SNRA ACT.

### A. The North Sheep SEIS Did Not Adequately Analyze Livestock Capability.

As discussed in the prior North Sheep litigation, these allotments occur in the Idaho batholith, which is composed of loose, granitic soils that are highly erosive. *AR NS06878; Madden Decl. ¶ 8* (Case No. 05-189, Dckt. No. 54). Because of the high degree of soil erosion and damage to resources that can occur when domestic sheep trail across steep slopes with erosive soils like this, Forest Service managers suggested closing allotments in the Idaho batholith to domestic sheep grazing more than ten years ago. *AR P000218-221; P000238-242; see Madden Decl. ¶¶ 8-18.* Yet here, the Forest Service again is allowing grazing to continue unchanged on these allotments without even assessing in the North Sheep SEIS the impacts of trailing across lands that are not capable of sustaining livestock grazing.

The Court's prior ruling on the North Sheep EIS held that the Forest Service had violated both NEPA and NFMA by ignoring the livestock capability analysis from the Forest Plan, and that the agency must conduct a site-specific analysis for the North Sheep allotments. *February*

*7, 2006 Memorandum Decision and Order at 7-16.* The Court noted that capable and incapable lands must be managed in accordance with direction in the Forest Plan and thus the capable/incapable designations play a continuing role in management decisions. *Id. at 14.* It explained that, "[i]f land is found incapable at the forest plan level, it may still be grazed if site-specific studies show actual conditions support grazing," while "land found capable may become off-limits if warranted by later site-specific studies." *Id. at 15-16*.

The Court also held that the Forest Service failed to take a "hard look" at the environmental consequences of livestock grazing on these allotments by ignoring the capability analysis. *Id. at 14-16.* The Court's Order stated that the agency must disclose the data it relied upon and how it analyzed that data so the public can make an informed comparison of the alternative actions. *Id. at 14*. If the results from the site-specific capability analysis are different from the Forest Plan analysis, the EIS must explain why and how. *Id. at 16*.

Pursuant to this Court's Order, the North Sheep SEIS included an allotment-specific capability analysis and compared the total acres of capable land per allotment under that analysis to the results of the Forest Plan capability analysis. *SEIS at 44.* The acres differed for each allotment under the two analyses. The Baker Creek, North Fork-Boulder, and Fisher Creek allotments each had more acres of capable land under the allotment-specific analysis while the Smiley Creek allotment had slightly fewer acres under that analysis. *Id.* And when comparing the maps of capable land for each allotment, the location of capable lands differed somewhat for each allotment under the two models. *Compare SEIS p. 41 with p. 45 and p. 42 with p. 46.*

Yet no where did the SEIS explain those differences. In other words, the SEIS did not explain which of the physical characteristics of the landscape changed between the two analyses such that some lands were not capable under the Forest Plan model but were capable under the

allotment-specific model, and visa versa. *SEIS at 32-50.* As the Court stated, the Forest Plan capability analysis acted as the baseline information, and while a site-specific analysis could show a different result, those differences must be explained. *February 7, 2006 Order at 16.* The SEIS failed to include that explanation.

The SEIS also did not explain which of the physical characteristics of the landscape caused areas on the allotments to be deemed not capable of sustaining grazing. *Id.* Such an explanation is critical to adequately analyze impacts of the authorized grazing on these allotments. The majority of each allotment was shown to be not capable of sustaining grazing, and the capable areas are disjointed patches of land surrounded by non-capable land. *SEIS at 45-46.* Thus, on each allotment, sheep must cross non-capable land to graze capable land.

The North Sheep SEIS, however, did not include any maps or discussion about where trailing across non-capable lands would occur, why those lands were deemed not capable of sustaining grazing, and what the impacts of trailing across those non-capable lands would be. *SEIS at 32-50, 98-104.* As noted in the prior litigation and the North Sheep SEIS, the criteria used to assess when areas are not capable are: (1) inaccessibility to livestock, (2) production of less than 200 pounds of forage per acre, (3) distance of more than 1.2 miles to water, (4) unstable, highly erosive soils, or (5) steep slopes. *See February 7, 2006 Order at 8* (setting forth capability criteria, citing *AR P001922)*; *SEIS at 35-36, 43-44*.

The map created by WWP from the Forest Plan data, which was accepted as evidence in the prior litigation, showed the specific capability limitations for all the non-capable lands. *See Mitchell Decl. Ex. 5* (Case No. 05-189, Dckt. No. 26). This map showed that a significant portion of the allotments are not capable because they have slopes that are too steep and/or erosive soils. *Id.* The Forest Service did not include a similar map in the North Sheep SEIS to

show the capability limitations under the allotment-specific capability model.

Such information is important because trailing across lands that are too steep or erosive to graze could lead to significant impacts. As discussed in the prior litigation, when domestic sheep trail across erosive soils on steep slopes, such as occurs in the Idaho batholith, they can create extensive loose soil and soil erosion. *AR NS07000-7001, NS07011, NS06899-6904, P000218-221, P000238-242; Madden Decl. ¶¶ 10-18*. This soil then washes downhill into valleys and streams, increasing sedimentation in streams and degrading water quality and fish habitat. *Id.*

Yet the North Sheep SEIS did not disclose or analyze the impacts of trailing across non-capable land or even acknowledge where this occurs on the allotments. *SEIS at 32-50, 98-104.* As stated by EPA in their comments on the draft SEIS:

> The capable and suitable lands are dispersed and discontinuous within the allotments. Consequently, it is likely necessary that bands of sheep must traverse substantial areas of incapable and unsuitable lands to access the various suitable lands. We are concerned about potential impacts to the environment that could be caused by disturbing these unsuitable lands. There is no information included about the amount, type, condition, and vulnerabilities of the incapable and unsuitable lands that would be traveled and potentially grazed and/or damaged by the sheep bands.

*AR SA006444.* Instead, the Forest Service used the acres of capable land only to calculate the stocking level for each allotment. *SEIS at 47-50, 98-102; AR SA001110-1115* (capacity memos).

As noted above, trailing across steep erosive slopes can have impacts to soils, vegetation, and fish and wildlife, and the Forest Service must reveal to the public the potential for that to occur and take a "hard look" at the impacts from it in the North Sheep SEIS. *Oregon Natural Desert Ass'n v. BLM*, 531 F.3d 1114, 1120 (9th Cir. 2008); *Earth Island Institute v. U.S. Forest Service*, 351 F.3d 1291, 1300 (9th Cir. 2003). If information in an EIS is misleading or incomplete, preventing the decision-maker and the public from making informed comparisons of alternatives, the EIS is deficient. *Natural Resources Defense Council v. U.S .Forest Service*, 421

F.3d 797, 811-813 (9th Cir. 2005); *Native Ecosystems Council v. U.S. Forest Service*, 418 F.3d 953, 964-65 (9th Cir. 2005). By excluding this analysis, the North Sheep SEIS did not foster the informed decision-making and informed public participation required by NEPA. *Native Ecosystems Council,* 418 F.3d at 960.

Moreover, the Forest Service must insure that the authorized grazing on these allotments is consistent with Forest Plan direction. 16 U.S.C. § 1604(i). The Sawtooth Forest Plan contains numerous directives to protect soils, watersheds, and habitat for fish. *See AR SP000128-446* (Sawtooth Forest Plan Chpt. III). The Forest Service attempted to show that it complies with this direction by stating that it reviews grazing routes through annual inspections, but did not offer any discussion of those evaluations—i.e. how often or where they occur, or their results—in the North Sheep SEIS. *SEIS at 49*-50.

The Forest Service must disclose its methodology and support its conclusions with at least some study or analysis. *ONRC v. Goodman*, 505 F.3d 884, 892 (9th Cir. 2007); *see also Idaho Sporting Congress v. Thomas,* 137 F.3d 1146, 1150 (9th Cir. 1998), *rev'd on other grounds by Lands Council v. McNair,* 537 F.3d 981, 997 (9th Cir. 2008) (conclusory assertions without the underlying data are not sufficient to satisfy NEPA's hard look requirement). It must also show that its methodology is reasonably reliable and accurate. *Native Ecosystems Council v. U.S. Forest Service,* 428 F. 3d 1233, 1250 (9th Cir. 2005). Here, the Forest Service has failed to provide details in the SEIS about how and where it monitors the impacts of trailing across non-capable land and the results of that monitoring, and thus has not demonstrated that it is complying with the direction in the Forest Plan, in violation of both NEPA and NFMA.

### B. The Forest Service Has Not Demonstrated That Grazing Management Will Restore Sage-grouse Habitat.

To comply with this Court's prior ruling, the Forest Service also conducted a capability

analysis for sage-grouse habitat that was issued as a supplement to the Forest Plan. *AR MIS002151* (MIS Supp.). The analysis was completed to be consistent with direction in NFMA regulations, which required the Forest Service to determine the potential capability of forest lands to provide habitat for management indicator species in the form of suitable food and cover, and to identify lands in less than satisfactory condition and appropriate actions for their restoration. *MIS Supp. at 1* (citing 36 C.F.R. § 219.20 (1999)).

The Forest Service conducted this analysis and discussed the results in the Forest Plan Supplement, showing which watersheds on the Sawtooth National Forest had habitat that could develop the conditions necessary to meet the needs of sage-grouse and were within the range of the species. *MIS Supp. at 3, 14*. It determined the percent of each watershed that has current capable sage-grouse habitat and compared that to the historic level of capable habitat, and identified watersheds that had a decrease of at least 20% capable habitat as in less than satisfactory condition. *MIS Supp. at 4-5, 18-19.* The Forest Plan supplement stated that Forest Plan direction can provide for the restoration of capable sage-grouse habitat that is in less than satisfactory condition if the direction is implemented in a manner that addresses sage-grouse conservation strategies. *MIS Supp. at 24-26.*

It noted that these conservation strategies came from various sage-grouse assessments and included direction to:

> Maintain or restore the representation (quantity and quality) and redundancy (distribution) of sage-grouse habitats. As part of a short-term strategy, identify and conserve large areas of remaining native sagebrush steppe and riparian herblands where ecological integrity is still relatively high, and manage to promote their long-term sustainability. Maintaining and restoring spatial habitat links for sage-grouse is of particular importance in the short-term.
>
> Focus long-term strategies on restoration of the native grass and forb components of sagebrush habitat, as well as other upland woodland, shrubland, riparian and grassland community groups toward extents more typical of historical levels. Restoration measures will likely require concurrent actions to be

> effective, such as seedings and plantings in combination with effective methods of site preparation, effective management of grazing by domestic livestock, and control of human activities such as off road motor vehicle usage and other ground-disturbing factors.
>
> Prioritize the restoration of cryptobiotic crusts within the shrub-steppe where potential for redevelopment is high; that is, in areas near propagule sources that have suitable soil, vegetation, and climatic characteristics and existing uses are compatible with restoration goals.
>
> Within the range of sage-grouse, maintain a mosaic of inter-connected patches of sagebrush with height and cover class characteristics believed to have occurred historically. Specifically, within sage-grouse winter range, strive to maintain or restore patches of sagebrush source habitat with canopy covers of 10 to 25 percent and heights of 25 to 30 cm.
>
> Restore vegetation around springs, seeps, streams, meadows, and other riparian areas. In the short-term, prioritize restoration treatments within areas known to be occupied by sage-grouse flocks.

*MIS Supp. at 24-26.*

The North Sheep SEIS then incorporated the results of the Forest Plan capability analysis for sage-grouse. *SEIS at 85-89.* The SEIS noted that all four of the North Sheep allotments were in less than satisfactory condition because they had declined in capable habitat by **at least 60%** compared to historic levels. *Id. at 88.* The SEIS also included a table of the acres of sage-grouse source habitat on each of the North Sheep allotments, but did not have a map of that habitat despite the fact that the agency had created a map. *SEIS at 87; AR SA001166* (map). The table and map show that each of the allotments contains current sage-grouse habitat. *Id.* Although there may not be a substantial amount of current sage-grouse habitat on the allotments, "these lands are important as sage grouse capable habitat," and "sage grouse numbers are too depleted to sustain further habitat losses and degradation." *AR SA006445* (EPA comments on draft SEIS).

Although the SEIS acknowledged that each of the allotments contains sage-grouse habitat, it did not describe where the capable habitat overlaps with livestock grazing, the condition of the current capable habitat, or compare the current capable habitat to historic habitat to determine where the habitat has decreased on the allotments. *Id.* Thus, the SEIS did not

demonstrate where the Forest Service needs to focus management actions to restore sage-grouse habitat on the allotments. *SEIS at 85-89.*

The Forest Service also did not demonstrate how grazing management on the North Sheep allotments will help restore lands in less than satisfactory condition. Aside from not assessing in the North Sheep SEIS which areas of the allotments need restoration of sage-grouse habitat, the Forest Service has not shown that it will implement Forest Plan direction on the allotments in a manner that will address conservation strategies for sage-grouse, as the Forest Plan Supplement directed. *MIS Supp. at 24-26.*

Numerous conservation assessments discuss the habitat needs of sage-grouse. Each of these assessments recognizes the importance not only of sagebrush cover, but also the herbaceous understory composed of grasses and forbs. *See e.g. AR MIS003180-3194* (Connelly Guidelines to manage sage grouse populations and their habitats); *MIS002629-2643* (2004 Conservation Assessment of Greater Sage-Grouse and Sagebrush Habitats); *MIS006882-6884* (2006 Conservation Plan for the Greater Sage-Grouse in Idaho). An understory beneath large sagebrush of grasses and forbs of sufficient cover and height to hide nests and young sage-grouse and also provide insects for food is important for nesting habitat and early brood-rearing. Late brood-rearing habitat often consists of wetter sites such as seeps, springs, or wetlands that have a high component of forbs rich in nutrients. In winter, sage-grouse generally require taller sagebrush so they can access the leaves for food above snow level. *AR MIS003183-3185; MIS002632-2643; MIS006882-6883.* Because of these habitat requirements, guidelines for managing sage-grouse habitat include requirements to manage for a certain percent cover, density, and height of sagebrush, grasses, and forbs within the various types of habitat. *AR MIS 003190-3194; MIS007100-7103; MIS003136-3147* (2003 Monitoring of Greater Sage-Grouse

Habitats and Populations).

As set forth above, the conservation strategies discussed in the Forest Plan MIS Supplement also noted the need to restore native grasses and forbs, soil crusts, a mosaic of inter-connected patches of sagebrush with proper height and cover characteristics, vegetation around springs, seeps, streams, and meadows, and spatial habitat links. *MIS Supp. at 25-26.* The Forest Plan direction identified in the North Sheep SEIS that will allow for restoration of sage-grouse habitat included provisions to use conservation strategies in managing sensitive species habitat, and restoring desired plant community components and distribution and abundance of habitats that contribute to viable populations of existing native wildlife species. *SEIS at 90.* For the Management Areas at issue here, it required that actions restore sagebrush communities to improve and restore habitat for sage-grouse and other sagebrush-obligate species. *Id. at 91*.

Although the sage-grouse conservation strategies and Forest Plan direct the Forest Service to **restore** sagebrush communities and sage-grouse habitat, the Forest Service made **no** adjustments to grazing in the North Sheep SEIS to protect or restore sagebrush habitat and did not even require monitoring for key sage-grouse habitat components. The SEIS relies only on the limited closure of alpine areas and the adaptive management strategy to show that grazing management will help restore sage-grouse habitat that is in less than satisfactory condition. *SEIS at 116*. These closures, however, affect only a small portion of the allotment area. *See AR NS06868-6872.* A significant amount of sagebrush habitat remains open to grazing. *See NS06953* (North Sheep EIS stating that Mountain Big Sagebrush is found on terraces and slopes above Big Wood River in Baker and North Fork-Boulder allotments, flats along Salmon River and along south facing slopes on Smiley Creek allotment, and in several locations on Fisher Creek allotment; and low sagebrush is found in minor distribution on allotments as well).

The adaptive management approach alone is not sufficient to restore sage-grouse habitat in these sagebrush communities because the Forest Service is not monitoring to insure that livestock grazing avoids impairing upland grass, forb, and shrub components that are important for sage-grouse, and is using desired condition standards that will not achieve restoration.

The AMPs list the upland monitoring for the four allotments, and none calls for measuring grass, forb, or sagebrush height to see if they are meeting sage-grouse needs or if livestock grazing is preventing those objectives for the various types of habitat. *Baker Creek AMP at 25-27; North Fork-Boulder AMP at 23-26; Smiley and Fisher Creek AMP at 39-42.* Neither the SEIS or AMPs even discuss whether the upland monitoring sites are in current or historic sage-grouse capable habitat. In order to restore habitat, the Forest Service must be monitoring and adjusting grazing to maintain grasses, forbs, and sagebrush at a sufficient density and height to provide the food and cover necessary for sage-grouse.

The Forest Service also must monitor conditions of seeps, springs, and other wet areas that provide late brood-rearing habitat for sage-grouse. Baker Creek and North Fork-Boulder AMPs mention future monitoring of lentic sites and other wetlands but do not contain a protocol, and the record shows that no such monitoring has occurred yet. *AR SA011658-61*. The Smiley Creek and Fisher Creek AMP does not even mention monitoring of seeps and springs or other wetlands. *Smiley Creek and Fisher Creek AMP at 39-44.* Thus, there is no required monitoring to assess conditions of these areas or impacts of grazing to determine whether changes need to occur to restore them for sage-grouse habitat.

The only upland desired conditions listed for the Baker Creek and North Fork-Boulder allotments pertain to sagebrush cover and soil cover, with nothing listed for grasses or forbs. *Baker Creek AMP at 27; North Fork-Boulder AMP at 26.* On the Smiley Creek and Fisher

Creek allotments, the desired condition for uplands is just stated as "fair or better," meaning that the several sites rated as currently "fair" in the SEIS do not even need to improve to meet the desired condition. *Smiley Creek and Fisher Creek AMP at 42.* Furthermore, the North Sheep SEIS states that "with proper management, livestock grazing should **maintain** or **minimally impact** sagebrush communities." *SEIS at* 89.

As discussed in the North Sheep SEIS and EIS, sagebrush communities and sage-grouse habitat on these allotments are already degraded from past overgrazing, with reduced forb cover, pedestaling of shrubs, terraced slopes, and excessive bare ground. *SEIS at 87; AR NS06884, NS06965-6966, NS06977-6978; see also NS05988-5989* (Biological Evaluation for North Sheep EIS discussing degradation of sage-grouse habitat from grazing). The Forest Plan capability analysis shows that the allotments fall within watersheds where there has been more than a 60% decrease in sage-grouse capable habitat. Maintaining or minimally impacting currently degraded habitat surely does not promote its restoration.

The SEIS also does not discuss how to spatially link habitat that has been fragmented to create corridors for sage-grouse, as the conservation strategies emphasize. *MIS Supp. at 002181.* Providing corridors of good habitat to allow for movement of sage-grouse between larger habitat patches and between sub-populations is an important part of restoring sage-grouse habitat and populations. Nothing in the adaptive management strategy monitors or adjusts grazing practices to account for this component of sage-grouse habitat restoration.

If the Forest Service is going to rely on monitoring and adaptive management to insure compliance with Forest Plan direction and conservation strategies to restore sage-grouse habitat, it must demonstrate that this method is reasonably reliable and accurate. *Native Ecosystems Council*, 599 F.3d 926, 933 (9th Cir. 2010). Where the Forest Service's "method of measuring

the sagebrush habitat is neither reasonably reliable or accurate" to determine whether livestock grazing is impairing that habitat, it undermines the use of that information to establish compliance with the Forest Plan. *Id. at 935* (discussing Forest Service failure to adhere to Connelly Sage-Grouse Monitoring Guidelines). Here, the Forest Service's monitoring protocols and standards are not reliable and accurate to assess impacts to sage-grouse habitat and the need for management changes to restore habitat.

By failing to assess which areas of the allotments need restoration of sage-grouse habitat, and to demonstrate that its adaptive management strategy will address sage-grouse conservation strategies and restore sage-grouse habitat, the Forest Service has violated NEPA and NFMA.

### C. The Forest Service Still Has Not Shown That The Adaptive Management Approach Will Insure Compliance With Forest Plan Direction And SNRA Primary Values.

The third component of the North Sheep SEIS was a new analysis of the adaptive management strategy to address the Court's prior ruling that the Forest Service had not demonstrated this strategy would insure compliance with Forest Plan directives and avoid substantial impairment to primary values of the SNRA. *February 7, 2006 Order at 20-23.* As the Court previously stated, "[t]here is no doubt that past grazing caused serious problems in the [Sawtooth National Forest]" and that the existing grazing program did not comply with management direction in the Sawtooth Forest Plan. *Id. at 20* (citing *AR NS06825*).

The Court noted the conclusion in the North Sheep EIS that "if no action was taken to reduce grazing impacts, soil conditions would continue to degrade in sensitive areas, stream sediment levels would increase, fish habitat would be reduced, among other detrimental effects," which would result in violation of numerous Forest Plan standards. *Id. at 20-21.* The Court also recognized that the Forest Service did not reduce grazing on the allotments in the North Sheep decisions to address these problems but instead relied primarily on an adaptive management

strategy. *Id. at 21.* Yet the Forest Service did not sufficiently explain this strategy to show that the North Sheep decisions were consistent with the Forest Plan, as required by NFMA, or that grazing would not substantially impair the SNRA primary values. *Id. at 23.*

Once again, the Forest Service refused to make any changes to grazing levels in the North Sheep SEIS and continued to rely on the adaptive management strategy to show consistency with Forest Plan direction and SNRA values. However, this strategy, including its monitoring protocols, remains inadequate to demonstrate compliance with the required directives.

The Forest Service did not include the monitoring protocols in the North Sheep SEIS itself, instead incorporating them into AMPs that were attached as an appendix to the SEIS. *SEIS App. C.* The SEIS simply explained what types of actions the Forest Service could take to adjust grazing if monitoring showed that such adjustments were necessary. *SEIS at 14-23.*

The SEIS stated that modifications to the AMPs, including to monitoring sites and protocols, could occur without additional environmental analysis as long as the modifications were consistent with the existing decisions. *SEIS at 13*. Thus, the monitoring protocols are moving targets and the Forest Service can change the locations, frequency, indicators to be evaluated, desired conditions, or methods of its monitoring at any time. *Id.* If there is no assurance that these particular protocols will be implemented then it is unreasonable to rely on these protocols to establish consistency with the Forest Plan and the SNRA Act.

Furthermore, the Forest Service failed to identify any trigger for when adjustments to grazing must occur if monitoring shows continued or new problems caused by grazing. The AMPs do not describe how much damage can occur and for how long before the Forest Service will make adaptive changes to grazing. *SEIS App. C.* The North Sheep SEIS contains a vague statement that the trigger for taking management actions "will depend upon the significance of

the deviation from meeting annual management requirements and long-term desired conditions." *SEIS at 93.* Minor management changes "may" be needed where monitoring indicates conditions are close to desired conditions while more significant adjustments "may" be needed where conditions are farther away from or trending away from desired conditions. *Id.*

This vague language does not provide any substantive thresholds that would trigger changes in management. Indeed, there is no way to judge how much damage or how long damage would occur before the Forest Service adjusted grazing and thus no way to judge the extent that grazing could continue to impair resources and whether that would be inconsistent with Forest Plan standards.

The ability to alter the monitoring at any time and the lack of any standard for when management changes must occur in response to problems creates uncertainty in implementation of the adaptive management strategy. Such uncertainty makes it unreasonable for the Forest Service, or the Court, to rely on this strategy as the basis for insuring consistency with the Forest Plan. Courts have repeatedly found in the context of the ESA that uncertain mitigation measures are not sufficient to show compliance with the ESA, and the same principle applies here. *See Nat'l Wildlife Fed. v. NMFS,* 524 F.3d 917, 935-36 (9th Cir. 2008) (even sincere commitment to future mitigation to offset negative effects not enough absent specific and binding plans); *Nat'l Wildlife Fed. v. NMFS,* 254 F. Supp.2d 1196, 1213 (D. Or. 2003) (agency cannot rely on mitigation measures that are not reasonably certain to occur to avoid a jeopardy finding); *Center for Biological Diversity v. Rumsfeld,* 198 F. Supp.2d 1139, 1152 (D. Az. 1998) (mitigation measures must be reasonably specific, certain to occur, and capable of implementation); *Oregon Natural Desert Ass'n v. Lohn,* 485 F. Supp.2d 1190, 1201-02 (D. Or. 2007) *vacated as moot* 308 Fed. Appx. 102 (9th Cir. 2009) (could not rely on grazing management program to protect fish

habitat when there was uncertainty about corrective actions for noncompliance with standards); *Native Ecosystems Council*, 418 F.3d at 963 (court must be able reasonably to ascertain from record that the Forest Service is in compliance with Forest Plan standards).

The third problem with the adaptive management strategy is that the monitoring protocols do not monitor for various key resources, such as impacts to fish and wildlife habitat, and thus the Forest Service cannot show that grazing is meeting Forest Plan standards to protect those resources or that it is not substantially impairing that primary value of the SNRA. *See 16 U.S.C. § 460aa* (includes fish and wildlife as primary value of SNRA).

For instance, the monitoring protocols do not adequately monitor to protect sage-grouse and other sagebrush obligate species. See s*upra part I.B.* The Forest Plan requires that the Forest Service use Conservation Strategies in managing sensitive species habitat, and sage-grouse is a sensitive species (and in fact is now warranted for listing as threatened). *AR SP000155.* It also includes direction to provide habitat capable of supporting viable populations of all native species, provide habitat that will keep sensitive species from becoming listed, provide well-distributed habitat and connective corridors for management indicator species, and survey for presence of management indicator species and sensitive species that have suitable habitat in the project area. *AR SP000154-156.* For the Smiley Creek and Fisher Creek allotments, the Plan calls for the agency to restore sagebrush vegetation groups to desired range of composition and structure to improve sagebrush-obligate species habitat; and for the Baker Creek and North Fork-Boulder allotments, to restore habitat for sage grouse in lower elevation sagebrush communities. *AR SP000243, SP000284-85.*

In order to insure compliance with these Forest Plan directives, the Forest Service must understand the habitat needs of sagebrush obligate species and adequately monitor that habitat.

*Native Ecosystems Council*, 599 F.3d at 933. Courts have repeatedly ruled that actions are inconsistent with direction to protect wildlife populations when the agency did not accurately identify and measure the relevant habitat. *Id.* (holding that Forest Service did not adequately monitor sage-grouse habitat to meet Forest Plan viability requirement); *Native Ecosystems Council*, 428 F.3d at 1250 (Forest Service must have knowledge of what quality and quantity of habitat is necessary to support the species, and its method for measuring the existing habitat must be reasonably reliable and accurate); *Lands Council v. Powell*, 395 F.3d 1019, 1036 (9th Cir. 2003) (inadequate monitoring of MIS habitat); *Earth Island Institute v. U.S. Forest Service*, 442 F.3d 1137, 1175-76 (9th Cir. 2006) (same).

As discussed above, the Forest Service's protocols do not call for monitoring grass, forb, or shrub height in uplands even though these are important characteristics to monitor for sage-grouse nesting, early brood-rearing, and winter habitat. *See Baker Creek AMP at 25-27; North Fork-Boulder AMP at 23-26; Smiley and Fisher Creek AMP at 39-42; AR MIS003136-3147* (Connelly Guidelines*).* The upland monitoring forms in the record show data on percent cover for various species and overall ground cover but no data measuring height of any species. *See e.g. AR SA011274-88, SA011419, SA011492, SA011526, SA011924, SA011926, SA011941.* The AMPs also do not include protocols to monitor upland seeps, springs, and other wet areas critical for sage-grouse late brood-rearing habitat. *Id.* Thus, the Forest Service is not reliably monitoring sage-grouse habitat to demonstrate compliance with Forest Plan direction.

The Ninth Circuit also recently held that where the species is not present in the project area, monitoring habitat alone to determine whether the forest is meeting wildlife population and habitat goals is not sufficient and the agency must also monitor population trends for the species. *Native Ecosystems Council*, 599 F.3d at 932-35. Here, the Forest Plan contains direction to

survey for presence of management indicator species that have suitable habitat in the project area. *AR SA000156.* There is sage-grouse habitat on the allotments, but the record contains no evidence that the Forest Service is monitoring for sage-grouse population trends. *AR NS001166* (map of sage-grouse habitat on North Sheep allotments). This lack of population monitoring is inconsistent with Forest Plan direction, regardless of whether sage-grouse are generally present on the allotments or not. *Native Ecosystems Council,* 599 F.3d at 932-35.

The AMP protocols also do not reliably monitor fish habitat. The Forest Plan contains numerous provision aimed at protecting fish, fish habitat, aquatic conditions, and water quality from grazing and other activities. [1] These directives make particular mention of protecting water quality and reducing sediment delivery to streams in the Fisher Creek and Smiley Creek allotments, which have habitat for threatened fish species. *See n. 1 Standards and Objectives SWST01, RAGU05, Objective 0248.* Yet the Forest Service is not monitoring for sediment, water temperature or other important instream fish habitat parameters.

The AMP riparian monitoring protocols include monitoring of stubble height, riparian vegetation, bank stability, and woody species regeneration, and list desired conditions related to

[1] Some of the applicable Standards, Guidelines, and Objectives from the Sawtooth Forest Plan include: Management actions are designed to avoid or minimize adverse effects to listed species and their habitats (standard TEST06); Management actions shall be designed in a manner that maintains or restores water quality to fully support beneficial uses and native and desired non-native fish species and their habitat (standards SWST01); Management actions will neither degrade nor retard attainment of properly functioning soil, water, riparian, and aquatic desired conditions (standard SWST04); Livestock trailing, bedding, watering, and other handling efforts shall be limited to those areas and times that maintain or allow for restoration of beneficial uses and native and desired non-native fish habitat (standard RAST02); Where rangeland practices potentially contribute to degradation of water quality or aquatic species, practices causing degradation should be considered for relocation, closure, or changes in management strategy, alteration, or discontinuance (standard RAGU05); Reduce grazing-related sediment delivery in Fisher Creek, Frenchman Creek, Smiley Creek, and Beaver Creek (Management Area 2 Objective 0248); Reduce grazing impacts to soil, water, and aquatic resources through more intensive grazing management practices and emphasize restoration in Frenchman Creek and Smiley Creek (Management Area 2 Objective 02142).

these parameters. *Baker Creek AMP at 25-27, North Fork-Boulder AMP at 24-25, Smiley Creek and Fisher Creek AMP at 39-41*. No requirements to monitor sediment and instream characters such as pools, undercut banks, or width/depth ratios are included. *Id.* And the riparian monitoring in the record shows that the agency is not collecting that data. *See e.g. AR SA011385, SA011609, SA012201, SA012211*. The only information in the North Sheep SEIS and EIS on sediment and fish habitat such as pools, width/depth, and undercut banks is old data, from 2002 or before. *SEIS at 56-65, 72, 79* (Smiley Creek and Fisher Creek allotments)*; AR06915-6918, 6931-6934* (Baker Creek and North Fork-Boulder allotments).

Collecting such data is especially important for these allotments because of the risk of soil erosion from steep, erosive slopes resulting in sediment delivery to streams and impaired fish habitat. Excess sediment in streams leads to shallower water depths, reduced pool quality, and higher water temperatures. The North Sheep SEIS acknowledged that many streams on the allotments are functioning at risk because sediment levels and water temperatures are too high. *SEIS at 56-65, 74-79.* The SEIS also acknowledged that sediment from upland slopes contributes to the excess stream sediment levels, and that livestock use of those slopes can accelerate such erosion. *SEIS at 66, 109; see also Madden Decl. ¶ 10.* Yet the Forest Service did not even include in the AMPs sediment monitoring or monitoring of fish habitat variables that are influenced by sediment levels. The Forest Service is not using reliable and accurate monitoring methods to demonstrate that grazing management is consistent with Forest Plan directives to protect and restore fish habitat and water quality and to reduce sediment delivery to streams, particularly streams on the Smiley Creek and Fisher Creek allotments.

Finally, the protocols also do not monitor conditions on the steep slopes of the allotments to assess soil erosion and other impacts from trailing across these slopes. As noted above, sheep

trailing across steep, erosive slopes can adversely impact aquatic conditions and thus implicates Forest Plan directives aimed at protecting aquatic resources. Other Forest Plan provisions include standards and objectives requiring sheep to avoid slopes with loose soil conditions, active gullies, and low productivity; to maintain or restore soil and vegetation conditions in alpine and subalpine communities where sheep trailing or bedding occurs in the Smiley Creek and Fisher Creek allotments; and to minimize surface soil loss in the Baker Creek drainage. *AR SP000176, 000249, 000283.*

The AMPs do not require formal monitoring of upland soil conditions other than assessing the amount of bare ground in upland plots. *Baker Creek AMP at 27, North Fork-Boulder AMP at 26, Smiley Creek and Fisher Creek AMP at 41-42.* These plots, however, are not located on steep slopes but, rather, are closer to valley bottoms. *See North Fork-Boulder AMP at 23* (map of monitoring sites on North Fork-Boulder and Baker Creek allotments); *Smiley Creek and Fisher Creek AMP at 49-50* (maps of sites on Smiley Creek and Fisher Creek allotments); *AR SA011679* (stating that upland monitoring plots on Smiley Creek allotment were not on slopes of more than 30 degrees).

Because the Forest Service is not using reliable, accurate methods to monitor fish and wildlife habitat or soil erosion on the North Sheep allotments, it has not demonstrated that its adaptive management strategy will insure compliance with Forest Plan direction and avoid substantial impairment to fish and wildlife values in the SNRA, in violation of NFMA and the SNRA Act. *Native Ecosystems Council,* 599 F.3d at 933.

**D. The North Sheep SEIS Ignored Relevant New Information.**

The Forest Service included within the North Sheep SEIS new information relevant to its analysis of livestock impacts, but ignored other relevant information raised by WWP and other

parties. By selectively including only certain new information and ignoring other information, the Forest Service has not fully assessed and taken another hard look at the direct and cumulative impacts of grazing on these allotments, in violation of NEPA.

The North Sheep SEIS states up front that it contains new information. *SEIS at 4-7.* This information includes the Forest Plan MIS capability analysis, new watershed condition indicators that are based on local data, monitoring data collected since the 2004 EIS, and facts about projects and wildfires that have occurred on the allotments since September 2004. *Id.* This new information was incorporated into the analysis assessing grazing impacts to watersheds, fisheries, and sage-grouse. *SEIS at 51-89.* The Forest Service, however, refused to include in the SEIS new information on noxious weeds and climate change even though both of these topics are relevant to analyzing impacts of livestock grazing and were put before the agency.

WWP notified the Forest Service in several letters about noxious weed infestations on the Smiley Creek allotment that WWP documented in 2006 and 2007. *AR SA 010437, SA010459, SA010476, SA006451*. These infestations occurred in areas where sheep had grazed, and WWP asked that this information be included and incorporated into the analysis of the North Sheep SEIS. *Id.* WWP explained that continued grazing in areas with invasive toadflax would cause this weed to spread and expand the infestation further, which in turn often results in increased use of herbicides on public lands. *AR SA 010437-439, SA010476, SA006460-6463.*

The original North Sheep EIS included a discussion of noxious weeds, explaining that livestock can act as vectors of weeds and noting that yellow toadflax is one of the weeds of concern on the North Sheep allotments. *AR NS06962*. The Forest Service recognized in the 2004 EIS "a growing concern with the spread and effects of noxious weeds." The Forest Plan requires that projects that may contribute to the spread or establishment of noxious weeds shall

include measures to reduce the potential for spread and establishment of noxious weed infestations. *AR NS06964, SP000166.*

Yet the agency refused to include the new information about expansion of toadflax on the Smiley Creek allotment in the North Sheep SEIS and analyze it in conjunction with livestock grazing. Instead, it asserted that this information was beyond the scope of the supplemental analysis. *SEIS at App. D 135-140*.

The Court never held that the supplemental analysis can include only the three topics it found violated the law. The purpose of a supplemental EIS is to address any significant new information relevant to environmental concerns that bear on the proposed action. 40 C.F.R. § 1502.9(C)(1)(ii). By excluding the information on expanding weed infestations despite including other new information relevant to analyzing impacts of livestock grazing, the Forest Service acted arbitrarily and capriciously and in violation of NEPA. *ONDA v. BLM,* 531 F.3d 1114 (9th Cir. 2008) (BLM violated NEPA by excluding consideration of wilderness character in EIS); *Motor Vehicles Manufacturing Ass'n v. State Farm,* 463 U.S. 29, 43 (1983) (decision is arbitrary and capricious when agency has failed to consider an important aspect of the problem).

Second, the Forest Service also refused to include a discussion of climate change in the North Sheep SEIS despite the fact that it received several comments stating that it should analyze climate change in the SEIS to assess its effects in combination with livestock grazing. *AR SA006444* (EPA comments recommending SEIS include discussion of effects of climate change on resources affected by grazing); *AR SA009447* (WWP comments stating that SEIS needs to consider climate change); *AR NS006452* (same).

The Forest Service responded that the effects of climate change are "too uncertain and speculative" to include in the analysis. *SEIS at App. D 3*. It is well-known, however, that

climate change is leading to overall warmer temperatures in the West, drought, and reduced stream flows, which when combined with the impacts of livestock grazing can cause greater cumulative effects to streams, vegetation, and fish and wildlife. *See AR SA006504* (WWP comments), *citing 2006 United Nations Report "Livestock's Long Shadow" found at http://www.fao.org/docrep/010/a0701e/a0701e00.HTM.* The agency's own guidance stresses the importance of responding to climate change and addressing it in planning, policies, and programs. *AR SA006025*.

Other cases show that agencies must incorporate climate change into environmental analyses. *See Center for Biological Diversity v. National Highway Traffic Safety Administration,* 538 F.3d 1172 (9th Cir. 2008) (holding that agency must include impacts to climate change in 2006 EA); *Center for Biological Diversity v. Kempthorne,* 588 F.3d 701, 711 (9th Cir. 2009) (noting that agency included discussion of climate change effects on polar bears in 2006 EA); *Conservation Northwest v. Rey,* 674 F. Supp.2d 1232, 1253 (W.D Wash. 2009) (stating that comments and studies on climate change cited by Plaintiffs undoubtedly presented information at which agencies were bound to take a hard look in 2007 EIS); *Pacific Coast Federation of Fishermen's Ass'n v. Gutierrez,* 606 F. Supp.2d 1122, 1183-84 (E.D. Cal. 2008) (agency violated ESA by failing to discuss global climate change in 2004 biological opinion); *Natural Resources Defense Council v. Kempthorne,* 506 F .Supp.2d 322, 367-70 (E.D. Cal. 2007) (failure to address climate change in 2004 biological opinion even though effects are uncertain was arbitrary and capricious); *see also Massachusetts v. EPA,* 549 U.S. 497, 521 (2007) (noting that harms from climate change are serious and well-recognized). As these cases demonstrate, the Forest Service excluded an important aspect of the problem and violated NEPA by failing to incorporate climate change into the SEIS's analysis of the impacts of livestock grazing.

Because the North Sheep SEIS violation NEPA, NFMA, and the SNRA Act in various ways, the Court should grant WWP's motion and reverse and remand the SEIS and SRODs.

## II. THE FOREST SERVICE ALSO VIOLATED THE ESA BY FAILING TO REINITIATE CONSULTATION BEFORE ISSUING THE NORTH SHEEP SEIS.

The Forest Service consulted with U.S. Fish and Wildlife Service and NOAA Fisheries over impacts to threatened fish species from livestock grazing on the Smiley Creek and Fisher Creek allotments before it issued the 2004 North Sheep EIS. *AR NS05866.* It did not reinitiate consultation, however, before issuing the North Sheep SEIS despite the new information in the SEIS that related to impacts to the listed fish species and their habitat.

Under the ESA, an agency must consult with the Services over any action it authorizes that may affect a listed species to insure that such action does not jeopardize the continued existence of that species or destroy or adversely modify critical habitat. 16 U.S.C. § 1536(a)(2). Once consultation is completed, the agency has a duty to insure that the consultation remains valid for any action over which it continues to have discretion. It must reinitiate consultation:

> (a) If the amount or extent of taking specified in the incidental take statement is exceeded; (b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or (d) If a new species is listed or critical habitat designated that may affected by the identified action.

50 C.F.R. § 402.16.

Courts have recognized the duty to reinitiate consultation when there is new information or changed circumstances that affect the listed species, and that the failure to fulfill that duty violates the ESA. *Sierra Club v. Marsh,* 816 F.2d 1376 (9th Cir. 1987); *Forest Guardians v. Johanns,* 450 F.3d 455 (9th Cir. 2006); *Oregon Natural Desert Ass'n v. Tidwell*, 2010 WL 2246419 (D. Or. June 4, 2010). In these cases, new information arose that changed how the

project would impact the species, triggering reinitiation of consultation.

In the case of *Marsh*, the mitigation measures that the agencies had relied upon to mitigate damage to the species were not conducted, and thus the impacts to the species from the project were different than assumed in the consultation. *Marsh*, 816 F.2d at 1388. Likewise, in *Forest Guardians*, monitoring that was required under grazing plans was either not conducted or showed violations of standards, and thus was new information that functioned to affect the species in a manner not considered previously. *Forest Guardians*, 450 F.3d at 465-66; *see also ONDA v. Tidwell*, 2010 WL 2246419 at *21 (violation of grazing standards imposed in biological opinion was new information that warranted reinitiation of consultation).

Here, there is new information presented in the North Sheep SEIS that affects the threatened fish species and should be considered by the Services. The original North Sheep EIS did not contain a livestock capability analysis, and thus the Services did not have information showing that there is little capable habitat on the Smiley Creek and Fisher Creek allotments and that sheep must cross non-capable land to access the disjointed patches of capable land. *SEIS at 46.* The SEIS identified slope and soil stability as two of the factors that define non-capable land, and evidence from the prior litigation showed that much of the non-capable land in the Smiley Creek allotment is too steep and/or has unstable soils. *SEIS at 35-36, Mitchell Decl. Ex. 5* (Case No. 05-189, Dckt. No. 26). Sheep trailing across steep, erosive slopes adversely affects downslope streams with habitat for listed fish. *See supra p. 14.* The capability results are new information the Services must evaluate and consider in making conclusions about impacts of grazing on salmon, steelhead, and bull trout.

The other critical piece of new information in the North Sheep SEIS is the monitoring protocols used in the adaptive management strategy. The prior EIS did not fully explain the

adaptive management strategy or set forth the monitoring, and the Services commented that they were "uncertain how the adaptive management approach, that was central to the proposed action, would be implemented." *AR SA000612.* The North Sheep SEIS contained the protocols the Forest Service is using for riparian monitoring. *Smiley-Fisher AMP at 39-41.* Because the Forest Service is relying on adaptive management to protect and restore fish habitat, the monitoring conducted for that strategy is important information that addresses impacts to the species. The Services must assess these protocols and determine whether this monitoring, which does not include sediment, water temperature, or instream habitat components, is sufficient to insure that grazing is not jeopardizing the survival and recovery of these species.

Finally, new information on climate change that has arisen since the prior consultation demonstrates significant cumulative effects to hydrology, stream flows, and fish from livestock grazing combined with global warming. *See e.g. report "Livestock's Long Shadow" found at http://www.fao.org/docrep/010/a0701e/a0701e00.HTM.* The information in the North Sheep SEIS on livestock capability and the adaptive management strategy, combined with new information on cumulative effects from climate change, warrants reinitiation of consultation under the ESA.

## CONCLUSION

For the foregoing reasons, WWP respectfully requests this Court grant summary judgment in its favor on its First, Second, Third, and/or Fourth Claims for Relief; and reverse and remand the North Sheep SEIS and SRODs,

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Respectfully submitted,

s/Lauren M. Rule
Lauren M. Rule
Attorney for Plaintiff