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

CONCERNED FRIENDS OF THE WINEMA, **KLAMATH-SISKIYOU WILDLANDS CENTER**, **WESTERN WATERSHEDS PROJECT**, **OREGON WILD**, and **CENTER FOR BIOLOGICAL DIVERSITY**,

Plaintiffs,

v.

U.S. FOREST SERVICE, and **U.S. FISH AND WILDLIFE SERVICE,**

Defendants,

and

IVERSON MANAGEMENT LIMITED PARTNERSHIP,

Defendant-Intervenor.

Case No. 1:14-cv-737-CL

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT

Oral Argument Requested

Local Rule 7-1 Certification

Pursuant to Local Rule 7-1, the undersigned certifies that the parties have conferred and have been unable to reach an agreement regarding the subject matter of this motion.

Motion

Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56.1, Plaintiffs Concerned Friends of the Winema, Klamath-Siskiyou Wildlands Center, Western Watersheds Project, Oregon Wild, and Center for Biological Diversity hereby move the Court to enter Summary Judgment in their favor on all of the Claims for Relief in their First Supplemental Complaint. Summary Judgment is appropriate as these claims involve no genuine dispute of material fact, and Plaintiffs are entitled to judgment as a matter of law.

This motion is supported by the accompanying memorandum in support; Declarations of Theresa Simpson, Chuck Wells, Richard Nawa, Jayne Goodwin, and George Weurthner; the First Supplemental Complaint in this matter; and such other and further material as may be presented to the Court before decision hereon. Plaintiffs request oral argument on this motion as soon as is convenient for the Court after briefing is complete on May 6, 2016.

WHEREFORE, Plaintiffs request that this Court grant their Motion for Summary Judgment.

Dated: March 3, 2016

Respectfully submitted,

s/Lauren M. Rule

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Memorandum in Support of Motion

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INTRODUCTION

Plaintiffs Concerned Friends of the Winema *et al.* have previously litigated over the Chemult Ranger District's Antelope Allotment to try and protect the unique and sensitive resources on the allotment from livestock grazing impacts. Plaintiffs bring further challenges to the Forest Service's management of that allotment because of continuing harm to Oregon spotted frog and the unique fens and sensitive plants found on the allotment. Livestock grazing has continued virtually unchanged since the last round of litigation despite the listing of Oregon spotted frog as a threatened species under the Endangered Species Act, continued research showing just how unique and fragile the groundwater-dependent fens are, and four straight years of drought that exacerbated cattle impacts to fens and spotted frogs—all still without the new environmental analysis and allotment management plan promised to this Court back in 2009.

In fact, the record shows that since 2011, cattle grazing the Chemult Pasture have continued to access spotted frog habitat and fens, causing significant ecological damage and harm to spotted frogs as well as to sensitive plants. Because this continued grazing violates the National Environment Policy Act ("NEPA") and National Forest Management Act ("NFMA"), Plaintiffs challenge the 2012-2015 annual grazing authorizations for the Chemult Pasture.

Plaintiffs also challenge the new biological opinion issued by U.S. Fish and Wildlife Service for livestock grazing management of the Antelope Allotment. This opinion is arbitrary and capricious because it fails to protect the Jack Creek population of Oregon spotted frog and instead contains unsupported conclusions based on a flawed analysis about the impacts of the assessed grazing management. Based on these violations of law, this Court should grant Plaintiffs' motion for summary judgment and close the Chemult Pasture until a new and legally valid environmental analysis, allotment management plan, and biological opinion are completed.

FACTUAL BACKGROUND

This Court has presided over two previous cases related to the Antelope Allotment concerning livestock grazing impacts to the Jack Creek population of Oregon spotted frog and the unique fens and sensitive plants found on the Chemult Pasture of that allotment. *Ctr. for Biological Diversity v. Wagner,* No. 1:08-cv-302-CL (D. Or. filed Mar. 11, 2008); *Or. Natural Desert Ass'n v. Sabo,* No. 1:10-cv-1212-CL (D. Or. filed Oct. 4, 2010). The 2008 case resulted in construction of a fence to keep cattle away from a large portion of Jack Creek within the Chemult Pasture to protect spotted frog habitat, and the expectation that the Forest Service would complete a new environmental analysis and allotment management plan ("AMP") for the allotment in early 2010. *Wagner,* 2009 WL 2176049, at *4, 12-13 (D. Or. June 29, 2009).

The second lawsuit arose when the Forest Service continued to authorize grazing without a new AMP in place, even after discovering numerous sensitive plants on the Chemult Pasture as well as numerous instances of unauthorized cattle use inside the Jack Creek riparian fence. This Court held that the Forest Service's 2008-2010 grazing authorizations violated NEPA and NFMA due to the harm that grazing was causing to these sensitive species without conducting the appropriate environmental analysis of the impacts. *Sabo*, 854 F. Supp. 2d 889, 915-24 (D. Or. 2010). The Court did not grant injunctive relief but noted that it "remains concerned about the unique environmental resources on the Allotment" and "expects the defendants to complete the NEPA and AMP processes on the Allotment in a timely manner . . . ." *Id.* at 900.

We are now in 2016, and the Forest Service still has not completed a new AMP for the Antelope Allotment. Additional research and monitoring demonstrates not only the unique and fragile nature of the resources on the Chemult Pasture, but also the damage that livestock grazing is causing to those resources. Yet the Forest Service has continued authorize grazing each year.

I. Research and Monitoring of Fens and Oregon Spotted Frogs Since 2010.

In recent years, more information has emerged about the groundwater system and fens on the Chemult Pasture. Scientists studying the hydrogeology of the area have determined that the groundwater system here developed as a result of the eruption of Mt. Mazama 7,700 years ago, which blanketed the area with a thick layer of pumice, as well as the high elevation and gentle topography of the area, which allow for adequate snowpack and certain erosive processes to occur. Declaration of Dr. Michael Cummings ¶¶ 38-48 (ECF # 12). These factors led to a groundwater system that contributed to peat accumulation in highly saturated areas and peat-based plant communities that gradually formed "the extraordinary system of fens and wetlands we see today on the Antelope Allotment." *Id.* ¶ 49. The lead researcher for this study stated:

> [T]he massive diversity of groundwater dependent meadows, fens, and wetlands that form the Walker Rim GDE [groundwater dependent ecosystems] are the result of millennia of complex hydrological, geological, and biological change. The unique system that results from the specific interactions of the pumice, slope, and precipitation patterns of this area is unprecedented in this region. In my professional experience, I have never before encountered such a unique and extensive system.

Id. ¶ 50. This unique groundwater system supports an "amazing biotic diversity" that is "unprecedented in the Pacific Northwest." *Id.* ¶ 67.

This system continues to evolve, however. Thus, the current system of wetlands and fens are "an extremely finite and fragile resource that took millennia to develop" and if they are damaged, they do not just "grow back" overnight. *Id.* ¶ 55. "Once disrupted, the fen system is very unlikely to return due to the ongoing hydrogeologic evolution of the area and the time it takes to re-develop these complex wetland environments." *Id.* ¶ 68. Because "such a rare confluence of hydrological, geological, and biological factors deserves significant multidisciplinary exploration and study," several reports from these studies have already been

issued and additional research is being conducted. *Id.* ¶¶ 33-35, 56-58, 70; AR 211-344; 5718-803; 8870-90.[1] However, "[a]ctivities that disrupt those ecosystems alter the natural integrity of the overall system, and make it less valuable for scientific research." Cummings Decl. ¶ 70.

The Forest Service's own fen expert has conducted further research as well. After Dr. Dewey's 2010 report, which noted the remarkable number of rare plant sites and sensitive plant communities on the Chemult Pasture, he and others surveyed nearby districts for fens and sensitive plants. AR 1644, 2344-65. They found few fens on other districts because these areas did not have the necessary characteristics to support the same "exceptionally numerous fens" and "unexpected, remarkably rich, regionally-significant sensitive species flora" found on the Chemult Pasture. AR 2345, 2347-48, 9850-51. Dr. Dewey noted again last May that "I know of no other, even roughly similar concentration of fens anywhere else in USFS [Region] 6." Ex. A (attached hereto); *see also* Declaration of Lauren M. Rule Ex. 34 (ECF # 11) (discussing unique nature of area because of density of fens and large number of sensitive plant sites).

Dr. Dewey also established plots in many fens on the Chemult Pasture to assess water table levels and the impact of drought on those levels. Fens depend on groundwater saturation of peat, and once water tables drop more than 20 cm below the surface of the ground, peat begins to oxidize and degrade. AR4145, 4147, 6337-38; Declaration of Theresa L. Simpson ¶¶ 24, 55 (ECF # 13); Second Declaration of Theresa L. Simpson ¶ 3 (filed herewith). Water table data from 2010-2015 at Dr. Dewey's 35 plots show that water tables at most plots dropped substantially faster and substantially more as drought conditions worsened from 2012 to 2015, dropping below the -20 cm threshold earlier in the summer. AR 2318-41; 6437-84, 9853-59;

[1] The Forest Service record is designated as "AR XXXX" and the U.S. Fish and Wildlife Service record is designated as "FWS XXXX."

Simpson Decl. ¶¶ 56-57; Second Simpson Decl. ¶¶ 3-4 & Exs. 1-2. Dr. Dewey noted this data suggests that water tables of these fens "are particularly impacted by successive, drier than "normal" water years." Ex. A. Dr. Cummings similarly noted in 2014 that "the supply of groundwater that sustains this system is currently at a precarious tipping point due to a long-term drought." Cummings Decl. ¶ 69. His study also showed water tables dropping at several fens earlier in the season in 2014 and 2015. AR 5947-55, 9604, 10358-67.

The Forest Service conducted an assessment of conditions at 39 of the fens on the Chemult Pasture in 2010-2011, prior to the four-year drought, and rated them as poor, fair, or good condition. AR 4118-4121. Based on soil disturbance, which includes bare soil, compaction, pedestals, and channel erosion, the Forest Service found that 14 of 39 sites had more than 10% soil disturbance and thus were rated as fair or poor condition. *Id.* Of the fens visited, 59% had pedestaling, 25% had more than 10% bare ground, 19% had soil compaction, and 9% had channel erosion. AR 3925-26. Notably, seven of the eight fens in poor condition were in grazed areas while ten of eleven fens inside fenced exclosures were in good condition. AR 3927.

The Forest Service revisited nineteen transects at eight "high value" fens in 2014 and found more bare soil compared to the prior survey at twelve of the transects. AR 118-121. Fifteen of the nineteen transects exceeded 10% soil disturbance (i.e. bare soil, pedestals, postholes, trails, etc.), which showed they were in "fair" or "poor," rather than "good," condition. *See id*; AR 4121; Second Simpson Decl. ¶ 10. In fact, ten transects had 25% or more soil disturbance. AR 119-21. Notes from the survey documented that many transects had more trampling and were drier than in 2011. *Id.*

Observations by Plaintiffs' expert in 2013 and 2014 confirmed degraded conditions at many fens on the Chemult Pasture due to cattle, including bare soil, pedestals, postholes, trails,

and other impacts. Simpson Decl. ¶¶ 43-53 & Ex. 5; Second Simpson Decl. ¶¶ 11-12, 14. Impacts were worse at fens that retained water later into the summer because cattle congregated there when other areas dried out. Simpson Decl. ¶ 63. Plaintiffs provided photos of degraded fens to the Forest Service in 2011 and 2012 as well. AR 2153-55, 3333-42. Forest Service notes and photos from 2014 likewise showed degraded fens, particularly Little Parker fen. AR 7323-37, 8000-07; Second Simpson Decl. ¶¶ 3, 7 & Ex. 3. Because of the damage cattle were causing to this unique "one-of-a-kind biophysical resource," Dr. Dewey recommended in a 2012 comment letter permanently removing, entirely or to a very substantive degree, livestock and grazing from within the area of these groundwater-fed ecosystems. Rule Decl. Ex. 34.

More information about the Jack Creek spotted frog population has also arisen during the past few years. In 2013, Plaintiffs' expert discovered additional occupied habitat more than three miles downstream of all other known occupied habitat in an area just south of the Chemult Pasture known as Davis Flat, which was confirmed by USGS spotted frog expert Chris Pearl. Simpson Decl. ¶ 81, Ex. 20 (emails about new frog sites)[2]; AR 5084. The two experts found egg masses there the following spring. AR 5091-92. Despite the new spotted frog sites discovered in 2013, the Jack Creek population remains precariously small, and egg mass counts in 2013, 2014 and 2015 found only 24, 24, and 18 egg masses respectively. AR 3569-70, 8918-19, 10339, 10382 (noting small size and precarious status of population), 7516, 10060-61 (egg mass data). The 2015 egg mass count was the lowest since USGS surveys began. AR 10339.

The lower part of Jack Creek, including the Davis Flat area, is intermittent and does not

[2] Plaintiffs rely on exhibits submitted in support of their Motion for a Preliminary Injunction because some of those exhibits are not in the administrative record. For example, not all of the thirteen emails sent to Forest Service personnel found in Exhibit 20 to the Declaration of Theresa Simpson are in the record. Plaintiffs found emails at AR 4379, 4285, 4252, 4238-39, 4236-37, 4235, 4230, 4218-19, 4010-4011 but were unable to locate emails 2, 3, 4, and 12 in the record.

have consistent streamflow during the summer, particularly in drought years. Simpson Decl. ¶¶ 87-88, Ex. 20; AR 5561, 6800. Because Oregon spotted frogs are the most aquatic of all native frog species in the Pacific Northwest and are almost always found in water, they concentrate in remnant pools as the creek dries out. FWS 2222, 2225; Simpson Decl. ¶¶ 84, 87-90. Low water conditions result in frogs using fewer and smaller pools as the summer progresses, which are the same pools cattle use for watering. FWS 50-51, 54-55, 2235-36, 4700-19; AR 7507-10.

In 2013, cattle congregated at the few pools that remained after other parts of lower Jack Creek went dry, causing significant harm to spotted frogs and their habitat. Simpson Decl. ¶¶ 118-125, Ex. 7, Ex. 20; AR 4286-87, 4288, 4333-35, 4396. Drought conditions in 2014 were even worse and water levels in Jack Creek decreased even faster than in 2013, raising serious concerns about mortality of frogs. AR 5561, 6105-06, 6183, 6800, 6895, 7130, 7145-49, 7225. Cattle impacts were again documented in or near occupied spotted frog habitat as water levels declined in lower Jack Creek. AR 6832-52, 7034-125. Biologists even considered rescuing spotted frogs if they became stranded when pools dried out. AR 6105-06, 7145-49. Conditions in early 2015 were equally as dry, with expectations of similar danger for frogs that summer. AR 9093, 9304, 9631-32, 9638, 10339. Mr. Pearl stated in spring 2015 that water levels in Jack Creek were quite concerning and conditions were the worst he had seen in his twenty-five years working with the frog. AR 9304, 9638. The Jamison site of Jack Creek was his biggest concern because it "took a big hit last summer and has not fully recovered." AR 10339.

Oregon spotted frog was listed as a threatened species under the ESA on August 29, 2014. FWS 2218-71. The listing rule identified livestock grazing as a threat to the Jack Creek population, noting in particular the increased threat during low water conditions. FWS 2236.

II. Management of the Antelope Allotment Since 2010.

The Forest Service has continued to authorize grazing on the Chemult Pasture each year without a new AMP, and despite chronic unauthorized use problems. The repeated trespass of cattle behind the Jack Creek riparian fence that was documented in 2008-2010 continued to occur in 2011-2014, as well as unauthorized use south of the pasture in the Davis Flat area and after the permitted season of use was over. *See* Second Declaration of Jayne Goodwin ¶¶ 13, 17-24, Exs. 1-5 (filed herewith); Simpson Decl. ¶¶ 94-96, 102-103, Ex. 20; Rule Decl. Exs. 22, 23; AR 2149, 2488-89, 2507-08, 3192, 3196, 3211, 3213, 3230, 3254, 3258, 3344, 3354, 3361-63, 4333-35, 4396-97, 4496-99, 6778-95, 7314-15, 8012-14, 8995-9001.

The Forest Service issued two notices of noncompliance in 2011, the grazing season immediately following this Court's decision in *Sabo,* due to unauthorized use inside the Jack Creek riparian fence as well as unauthorized use past the permitted season. AR 2488-89, 2507-08. This unauthorized use occurred despite promises by the permittee to this Court to increase efforts to ride the allotment, check fences, and prevent trespass of cattle. *Sabo,* 854 F. Supp. 2d at 899-900. The Forest Service noted repeated unauthorized use again in 2012 in its end of season report but did not issue a noncompliance notice that year. AR 3361-63.

When problems continued in 2013, the Forest Service issued a warning letter in August and a notice of noncompliance in November due to numerous observations of cattle in unauthorized areas, including inside the Jack Creek riparian fence and in the Davis Flat area. Rule Decl. Ex 26; AR 4496-99, 4544-46. Yet, regardless of these violations and the increasing drought that was occurring, the Forest Service authorized the same grazing in 2012, 2013, and 2014 that it had authorized in 2010. Rule Decl. Ex. 2 (2010 AOI); AR 2904-10, 3704-3710, 5150-5157 (2012-2014 AOIs), 2666, 3718, 4981 (2012-2014 drought letters).

Problems continued in 2014. Despite signing a decision notice in May 2014 to fix several fences that would supposedly prevent unauthorized use along Jack Creek, the Forest Service received numerous reports about cattle in the Davis Flat area and inside the Jack Creek riparian fence in July and August. AR 5291-97, 6151-58, 6375-79, 6771-73, 6816-19, 6905-06, 8995-9001. Plaintiffs were highly concerned about this ongoing trespass problem given the extensive evidence from 2013 of conflicts between trespass cattle and frogs and the continuing drought in 2014, and sent a letter to the Forest Service expressing those concerns. AR 6771-73. In response, the Forest Service ordered the permittee to begin removing his cattle from the Chemult Pasture a month early. AR 6904; *see also* Ex. B (attached) (Forest Service response to Plaintiffs' letter). The timing of this action corresponded with the listing of the Oregon spotted frog as a threatened species. FWS 2218. Cattle were still scattered on and around the Chemult Pasture, however, including in numerous fens, at the end of September, more than a month after the Forest Service's order to remove them. AR 7314-15.

Due to the violations in 2014, the Forest Service initially issued a notice of permit violation that reduced the number of cattle that could graze the Chemult Pasture by 42 cow/calf pairs for two years. AR 8438-42, 8995-9001. After Iverson appealed, the Forest Service changed its penalty and reduced the grazing by two weeks in 2015 but allowed the same number of cattle as previous years during the ongoing drought. AR 8922, 9226-28, 10417-22.

Over the last five years, the Forest Service has completed and then withdrawn several versions of its NEPA analysis for the allotment, and thus has yet to issue a final decision and new AMP. It issued a final environmental assessment in February 2013 but then withdrew it in April 2013 because of a "procedural error" that was identified during the administrative appeal process. Rule Decl. Ex. 18. Plaintiffs had submitted comments on the draft EA and appeals of

the final EA identifying their concerns with the analysis and the adverse impacts that would continue to occur to spotted frogs and fens from grazing the Chemult Pasture. AR 3274-82, 3285-325, 3326-27, 3329-43, 3574-608. The agency issued another final EA in June 2014, but again withdrew it in July 2014, deciding to complete an environmental impact statement ("EIS") instead. AR 6203. Plaintiffs had again submitted comments on the draft EA and objections to the final EA relaying their concerns about grazing impacts coupled with the ongoing drought. AR 4550-80, 4584-792, 5322-47, 5957-6021. In November 2014, the Forest Service published a notice of intent to prepare an EIS. The draft EIS came out in December 2014 and Plaintiffs submitted another set of comments in January 2015. AR 8582, 8945-94, 9002-38, 9040-66. The Forest Service has yet to issue the final EIS. Once it does, the EIS will go through the public objection process, which will take several months. 36 C.F.R. § 218.26.

After the Oregon spotted frog was listed as a threatened species, the Forest Service also began consulting with U.S. Fish and Wildlife Service ("FWS") over the impacts to that species from grazing the Antelope Allotment. Plaintiffs sent a notice letter to the Forest Service alleging violations of the ESA if the Forest Service authorized grazing on the Chemult Pasture prior to completion of ESA consultation. FWS 1204. The Forest Service stated that no grazing would occur on the Chemult Pasture until completion of consultation. Plaintiffs' Motion for Stay Ex. 2 (ECF # 50); Order on Motion to Stay at 2 (ECF #54). FWS issued a biological opinion on June 4, 2015, which completed consultation, and shortly after the Forest Service issued an AOI to authorize grazing on the Chemult Pasture beginning July 1, 2015. FWS 2011-76; AR 10417-22.

III. Procedural Posture of this Case.

Plaintiffs filed this case on May 2, 2014, challenging the Antelope Allotment 2012-2014 AOIs for violating NEPA and NFMA, and followed that with a preliminary injunction motion on

May 9, 2014 to protect the resources on the Chemult Pasture from harm in the 2014 grazing season (ECF # 1, 10). The motion was assigned to Judge Panner, who denied it on June 11, 2014 (ECF # 40). Rather than move forward with summary judgment on the existing claims in the Complaint, the parties requested a short delay of the case during an August 25, 2014 status conference, which the Court granted, in light of the impending listing of the Oregon spotted frog as a threatened species (ECF # 46). On a November 3, 2014 status conference call, the Court set a deadline for Plaintiffs to amend their Complaint to add ESA claims regarding the newly listed Oregon spotted frog (ECF # 49).

After the Forest Service stated no grazing would occur on the Chemult Pasture until ESA consultation over the Oregon spotted frog was complete, Plaintiffs moved to stay the case rather than file an amended complaint (ECF # 50). The Court recognized the changing circumstances of the case due to the ESA consultation as well as the Forest Service's announcement that it would prepare an EIS, and granted the stay (ECF # 54). The Court ordered the parties to submit monthly reports about the status of the case and when the 2015 AOI would be issued (ECF # 54). The parties filed joint status reports through August 2015, and then Plaintiffs filed an additional status report on September 10, 2015 to notify the Court of its intent to seek leave to file a supplemental complaint (ECF # 56, 58, 60, 62, 65, 66, 67). Plaintiffs filed a motion on September 30, 2015 asking to file a supplemental complaint that would add challenges to the 2015 AOI and the new biological opinion, which the Court granted on October 27, 2015 (ECF # 70, 72). The parties are now briefing summary judgment on the Supplement Complaint claims.

ARGUMENT

Plaintiffs challenge the 2012-2015 AOIs for violating NEPA and NFMA, as they did in their 2010 case, and also challenge the new biological opinion for the Antelope Allotment.

Although Judge Panner ruled that Plaintiffs were not likely to succeed on similar claims against the 2012-2014 AOIs, his preliminary injunction order contained a cursory and incomplete legal analysis and did not have the benefit of the full administrative record (ECF # 40 at 8-10). The evidence in this case shows that the Forest Service's and U.S. Fish and Wildlife Service's decisions were arbitrary, capricious and in violation of NEPA, NFMA, and the ESA.

I. THE 2012-2015 AOIs VIOLATED NEPA.

Plaintiffs challenge the 2012-2015 AOIs for violating NEPA because the Forest Service *still* had not issued a final NEPA analysis and new AMP for the Antelope Allotment prior to those AOIs even though the Court ruled for Plaintiffs on a similar claim almost five years ago. *Sabo,* 854 F. Supp. 2d at 922-24. The Forest Service continued to authorize the same number of cattle for almost the same season of use in 2012-2015 despite evidence of harm from cattle to many fens on the Chemult Pasture and to spotted frogs in Jack Creek, and worsening drought conditions that amplified adverse impacts to fens and spotted frogs.

As discussed in the 2010 case, the Forest Service is preparing a new NEPA analysis that will address new information about the unique fens, sensitive plants, and threatened Oregon spotted frogs on the Chemult Pasture and impacts to those resources from cattle grazing. That analysis must be completed before any irreversible and irretrievable commitment of resources occurs. *Id.* at 922-23 (citing *Conner v. Burford,* 848 F.2d 1441, 1446 (9th Cir. 1988); *Metcalf v. Daley,* 214 F.3d 1135, 1143 (9th Cir. 2000); *W. Watersheds Project v. BLM,* 2009 WL 3335365, at * 6 (D. Idaho, Oct. 14, 2009)). This Court found that authorizing continued grazing under the same numbers for virtually the same season was causing harm to sensitive plant and animal species and their habitat which could be irreversible, therefore nullifying any alternatives in the pending AMP aimed at protecting these plants, animals, and resources. *Id.* Thus, the Forest

Service violated NEPA by failing to undertake supplemental environmental analysis before authorizing grazing on the allotment and committing its resources irreversibly pending completion of the revised AMP. *Id.* at 923-24. *See also* 40 C.F.R. § 1506.1(a) (prohibiting action that would have adverse environmental impact pending completion of EIS); *Blue Mountains Biodiversity Project v. Blackwood,* 161 F.3d 1208, 1216 (9th Cir. 1998) (discussing need to conduct environmental analysis before taking action so agency does not "regret its decision after it is too late to correct.").

The Forest Service has again violated NEPA in 2012, 2013, 2014, and 2015 by authorizing grazing before completing the revised AMP. As noted above, the agency released two EAs but immediately withdrew each of them, and issued a draft EIS in December 2014 but has yet to issue a final EIS. *See supra* pp. 9-10. Accordingly, there was no completed NEPA analysis and revised AMP in place prior to any of the challenged AOIs.

The District Ranger issued letters in 2012, 2014, and 2015 stating that grazing for the upcoming season is consistent with the Antelope Allotment 1995 EA and Decision Notice and no NEPA supplementation is necessary, but these letters do not satisfy the agency's NEPA responsibilities. AR 2895-96, 5298-99, 10332-33. The 1995 EA is woefully outdated and was prepared before the Forest Service had even discovered the numerous sensitive plant species on the allotment or the Jack Creek population of spotted frog. AR 1640 (discovery of sensitive plants in 2009); AR 7511 (discovery of Jack Creek spotted frog population in 1996). There is no question the discovery of these species on the allotment was significant new information requiring supplemental NEPA analysis. *Sabo,* 854 F. Supp. 2d at 922, 923.

Nor do the biological evaluations ("BEs"), AOIs, biological assessment and biological opinion cited in the District Ranger's letters satisfy NEPA. *See* AR 2895-96, 5298-99, 10332-

33. These documents are not a substitute for NEPA analysis as they do not provide for public participation—a key purpose of NEPA—or comply with the many other requirements of NEPA. 40 C.F.R. §§ 1500-1508 (NEPA regulations); *Dep't of Transp. v. Pub. Citizen,* 541 U.S. 752, 768 (2004) (recognizing importance of public participation in NEPA); *Idaho Sporting Congress, Inc. v. Alexander,* 222 F.3d 562, 567 (9th Cir. 2000) (rejecting use of supplemental report as substitute for formal NEPA document). The 1995 EA must be supplemented with an appropriate NEPA analysis given all of the significant new information that has arisen since then.

Moreover, the Forest Service had already begun a new NEPA analysis for the allotment, and the BEs, AOIs, and biological opinion did not establish that grazing would not cause any irreversible harm while the agency completed that long-awaited analysis. Not only did the BEs and biological opinion contain unsupported conclusions, as discussed below, but the record shows that the authorized grazing was in fact causing harm to sensitive and unique resources.

With regard to fens and sensitive plants, the agency collected data in 2011 showing that more than one-third of the fens surveyed had more than 10% detrimental soil disturbance and thus were not in good condition, with fens accessible to cattle having much more damage. AR 4118-4121, 3925-27. Surveys in 2014 at eight of those fens documented even more soil disturbance, more trampling, and drier conditions for the majority of transects compared to 2011. AR 119-21; Second Simpson Decl. ¶ 10. Other evidence also showed adverse impacts from cattle to numerous fens in 2011-2014. AR 2153-55, 3333-42, 7323-37, 8000-07; Simpson Decl. ¶¶ 43-53, 63, Ex. 5; Second Simpson Decl. ¶ 5, Ex. 3. Water table data demonstrated that many fens were drying out faster as the drought worsened. AR 2318-41; 6437-6484, 9853-59; Ex. A; Second Simpson Decl. ¶¶ 3-4; Cummings Decl. ¶ 69; AR 5947-55, 9604, 10358-67.

These fens are a unique but fragile and finite resource that are unlikely to return if they

are destroyed. Cummings Decl. ¶¶ 49-50, 55, 67-68. Because they support the diverse array of sensitive plant species on the allotment, loss of fens will cause the loss of these imperiled plants. *Id.* ¶ 67; AR 1639-55, 2345, 2347-48. In light of the damage that cattle have caused to this "one-of-a-kind biophysical resource," Dr. Dewey recommended in 2012 permanently removing all or most livestock from these fen ecosystems. Rule Decl. Ex. 34. Yet, despite evidence that grazing, combined with drought, was causing increasing damage to fens and sensitive plant species that was likely irreversible, the Forest Service continued to authorize the same grazing in 2012-2014, and only reduced grazing by two weeks in 2015, without imposing any additional protective measures for the fens on the allotment. AR 2904-10, 3704-10, 5150-57, 10417-22.

Continuing harm to the Jack Creek population of spotted frog also occurred. An emphasis on fixing fences and adding water troughs to the Chemult Pasture did not prevent cattle from repeatedly accessing Jack Creek from 2011 through 2014. AR 2507-08, 3361-63, 4496-99, 6151-58, 6375-79, 6771-73, 6832-52, 6904, 7034-125, 8995-9001; Simpson Decl. Ex. 20; Second Goodwin Decl. Exs. 1-5. Harm to frogs in Jack Creek increased as drought conditions worsened because cattle and frogs used the same dwindling pools. AR 4286-87, 4333-35, 4396-97; Simpson Decl. Ex. 20. Low water conditions were an even greater concern for frogs in 2014 and 2015. AR 5561, 6105-06, 6183, 6800, 6895, 7130, 7145-49, 7225, 9093, 9304, 9631-32, 9638, 10339. Egg mass surveys from the past three years show declining numbers despite the new Davis Flat sites discovered in 2013. AR 7516, 10060-61.

This small and isolated population is in a precarious state and has a high risk of extirpation. AR 3569-70, 8918-19, 10339, 10382, 6955-57. Loss of this population would be very detrimental because of its unique status and distinct genetics. FWS 7, 17, 30. The Forest Service's authorization of grazing in 2012-2015 caused increasing harm to this small, isolated

spotted frog population that could be irreversible.

The Forest Service's 2012-2015 AOIs violated NEPA because the agency is authorizing continued grazing that could cause irreversible harm to fens, sensitive plants, and the Jack Creek population of spotted frog before completing its NEPA analysis and AMP, just as this Court found in the prior case. *Sabo*, 854 F. Supp. 2d at 923-24.

II. THE 2012-2015 AOIs VIOLATED NFMA.

In addition to complying with NEPA, the 2012-2015 AOIs must be consistent with the Winema Forest Plan. 16 U.S.C. § 1604(i); *Buckingham v. Sec'y of the U.S. Dep't of Agric.,* 603 F.3d 1073, 1077 (9th Cir. 2010). To document compliance with that statutory requirement, each Forest Service "project or activity approval document must describe how the project or activity is consistent with applicable plan components." 36 C.F.R. § 219.15(d).

This Court previously set forth the relevant Forest Plan goals, objectives, standards, and guidelines with which the AOIs must be consistent. *Sabo,* 854 F. Supp. 2d at 915-17. These consist of Fish and Wildlife goals, objectives, and standards and guidelines:

- Maintain or enhance the characteristics of riparian areas, wildlife habitat, and fish habitat near or within riparian ecosystems.
- 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.
- Improve riparian areas to provide enhanced habitat for wildlife and fish.
- Continue to survey and develop biological evaluations for sensitive species. Develop individual species management guidelines for sensitive 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.
- 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 Winema National Forest by these species shall be evaluated. Habitat requirements sufficient to maintain the species shall be provided.

Soil and Water goals, objectives, and standards and guidelines:

- 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.
- Long-term soil productivity will be maintained.
- Protect habitat and hydrologic values of wetlands and riparian areas and improve fish habitat in streams.
- Land management activities shall be planned and conducted to maintain or to improve soil productivity and stability.
- In riparian ecosystems, hydrologic conditions and riparian habitat shall be maintained or improved.

And the Range goal that the demand for livestock grazing will be met only when it does not conflict with other uses. Rule Decl. Ex. 37 at 4, 6, 7, 11, 13, 14 (Forest Plan excerpt).

The Forest Service has not shown that the 2012-2015 AOIs are consistent with this Forest Plan direction because, as discussed above, the grazing occurring under these AOIs has degraded riparian areas and habitat for threatened and sensitive species, and is not maintaining viable populations of native plants and animals throughout the Forest. Although the Forest Service prepared biological evaluations and specialist reports for wildlife, botany, hydrology, and soil resources, these reports do not show that the 2012-2015 AOIs are consistent with the Forest Plan.

A. Viability Direction

As described in the wildlife and botany reports, Forest Plan direction requires that the agency must manage habitat to maintain viable populations of all existing plant and animal species throughout their existing range on the Forest, and provide for perpetuation and/or recovery of plants and animals listed as threatened or sensitive. AR 7626-28, 4013; Rule Decl. Ex. 37 at 4, 11. A viable population is one that "has the estimated numbers and distribution of

reproductive individuals to ensure the continued existence of the species throughout its existing range within the planning area." AR 4013. The Forest Service's reports do not establish that the grazing authorized in the 2012-2015 AOIs is consistent with that direction because their conclusions about species viability are unsupported.

Where the agency has not supported a scientific conclusion with accurate data and reliable methodology, or where its reasoning is irrational or unclear, courts must disapprove the agency's action. *Nw. Coal. for Alternatives to Pesticides v. U.S. Envtl. Prot. Agency,* 544 F.3d 1043, 1052 & n.7 (9th Cir. 2008) (internal citation omitted); *W. Watersheds Project v. Kraayenbrink,* 632 F.3d 472, 493 (9th Cir. 2011); *Sierra Club v. Bosworth,* 510 F.3d 2016, 1028-29 (9th Cir. 2007); *Navickas v. Conroy,* 575 Fed. Appx. 758, 759 (9th Cir. 2014). When determining viability of a species using habitat as a proxy, the agency must describe the quantity and quality of habitat that is necessary to sustain the viability of the species and use reliable and accurate methods to assess the existing habitat. *Native Ecosystems Council v. Tidwell,* 599 F.3d 926, 932-36 (9th Cir. 2010); *Lands Council v. McNair,* 537 F.3d 981, 997-98 (9th Cir. 2008); *Or. Natural Res. Council Fund v. Goodman,* 505 F.3d 884, 891 (9th Cir. 2007); *Native Ecosystems Council v. U.S. Forest Serv.,* 428 F.3d 1233, 1250 (9th Cir. 2005).

The Wildlife Report stated that: (1) livestock grazing can have negative effects on Oregon spotted frogs, such as trampling of frogs, reduced water quality, and reduced vegetation; (2) localized drought and low water conditions add to the threat from grazing, particularly in isolated populations that occupy fragmented habitat, and multiple year droughts expose populations to negative long-term impacts, including decreased populations numbers and potential extirpation; (3) current grazing on the Antelope Allotment may cause some negative effects to a small portion of spotted frog habitat; and (4) the Jack Creek population is at critically

low numbers. AR 7506-11, 7516, 7525, 7532-38.[3] The report concluded that continued grazing would maintain current conditions and may impact individual frogs or habitat, but not cause a loss of viability to the population or species. AR 7535-38, 7575-76. This conclusion was arbitrary and capricious because the agency's analysis was based on a key unsupported assumption, and did not explain how any negative impacts from grazing would not cause a further loss of viability to this already severely imperiled population.

First, the report assumed that current grazing will have minor effects to spotted frogs because just a small portion of habitat is authorized for grazing, and impacts from unauthorized use will be "negligible." AR 7532-38. This assumption is contradicted by evidence of unauthorized cattle use inside the Jack Creek riparian fence and in the Davis Flat area numerous times every year. *See supra* pp. 8-9. The record also shows degradation of frog habitat and harm to frogs from both authorized and unauthorized cattle use, particularly during the 2013 and 2014 drought. AR 3254, 4333-35, 4396, 6832-52, 7034-125; Simpson Decl. ¶¶ 114-124, Exs. 7, 20. The assumption that effects from the current grazing will be minimal was unsupported.

Second, the conclusion that grazing would not lead to a loss of viability of the population was unreasonable given the status of the Jack Creek population. This population is at critically low numbers of breeding females and egg masses, and is at risk of extirpation due to its small size and isolation from other populations on the Forest. AR 7511, 7516, 7523, 7525, 6955-57, 8918; *see also* AR 10339, 10382. Given that this population is already below a viable level, the Wildlife Report does not explain why further loss of individual frogs would maintain viability of this population, and thus how the authorized grazing will maintain viable populations of Oregon spotted frogs throughout their existing range on the Forest. AR 7575-76.

[3] Alternative 2 discussed in the Wildlife Report was the current grazing management scheme, which was what was authorized in the 2012-2015 AOIs.

The Botany Report likewise did not demonstrate that current grazing is consistent with direction to maintain viable populations of sensitive plants throughout their existing range on the Forest. For many of the sensitive plant species, the Forest Service admitted that the grazing may impact individual plants or habitat but concluded that it would not cause a loss of viability of the population or the species as a whole. AR 4084-95, 4134-44. The report did not, however, discuss the habitat or population objectives for viable populations or the size of the current populations. AR 4019-22, 4084-95. Instead, it simply listed the number of sites and acres where each species has been found on the forest and the Chemult Pasture. *Id.* For instance, *Ultricularia minor* has been found at sixteen sites on the forest where it occupies approximately 7.4 acres of fen habitats, and twelve of the known sites occur in the Chemult Pasture. AR 4021.

This information was not sufficient to support a viability determination. The report did not explain what quality *and quantity* of habitat is necessary to support viable populations of each species. *Tidwell,* 599 F.3d at 933. It simply assumed that maintaining the known sites that were in good condition would maintain viability, without any data or analysis to show that the amount of habitat at those sites is sufficient to support viable populations of the plants. AR 4084-95. Because for many of these sensitive plants, the vast majority of sites on the forest occur within the Chemult Pasture, impacts to those sites would have a significant effect on the species' viability within the Forest. AR 2345, 4024, 9850. Without information about whether the number of sites and occupied acres in good condition were actually sufficient to support a viable population, the agency's viability determinations for these species were arbitrary and capricious. Moreover, data from 2014 showed more damage to fens and fewer sites in "good" condition, further undercutting reliance on the BE to support grazing in 2015. AR 118-21. The Forest Service has not shown the AOIs were consistent with the Forest Plan viability direction.

B. Riparian Area Direction

The botany, hydrology, and soils reports contained the Forest Plan direction noted above that is relevant for the fens on the Chemult Pasture. AR 4013-14, 3935-36, 2925-26. These reports did not show, however, that grazing in 2012-2015 was consistent with that direction. Instead, the reports showed that grazing has damaged many of the fens on the Chemult Pasture, and the Forest Service did not even consider the implications of dropping water tables during drought years that further dry out and degrade fens.

The reports described conditions of fens based on data from 2010-2011. They found many fens that had more than 10% soil disturbance, including pedestaling, bare soil, and soil compaction, and thus were ranked as fair or poor condition and not within Forest Plan standards and guidelines. AR 3921, 3925-26, 4025, 4118-21, 2932-34, 2942, 2952. Almost all fens in poor condition were outside of grazing exclosures while all but one fen inside exclosures were in good condition. AR 3927, 2933-34. The reports concluded that current grazing would maintain the current conditions of fens and soils. AR 4053, 3957, 2942. They did not explain why maintaining 36% fens in fair or poor condition is consistent with Forest Plan "desired future conditions" to have 90% of riparian areas in good condition. AR 2926, 4118-21.

These reports did not discuss the water table data that fen expert Dr. Dewey was collecting on the Chemult Pasture, even though both the botany report and the protocol upon which the Forest Service relied for its fen assessments used the -20 cm threshold for water table desired conditions to protect the peat in fens from degrading. AR 4145, 4147, 6337-38. The data from 2010-2014 showed that water tables dropped more during the summer, and below the -20 cm threshold earlier, in many fens on the Chemult Pasture as the drought worsened. AR 2318-41; 6437-6484, 9853-59; Ex. A; Second Simpson Decl. ¶¶ 3-4. The specialist reports did

not consider how dropping water tables during the drought would exacerbate the impacts from grazing to these fens. AR 2914-56, 3916-71, 4012-158.

In 2014, the Forest Service found even more soil disturbance, trampling, and drier conditions compared to 2011 in the eight fens re-surveyed. AR 118-121; Second Simpson Decl. ¶ 10. Fifteen of nineteen transects exceeded the 10% detrimental soil disturbance standard, and many of those exceeded the standard by a large margin. *Id.* Water table data showed many fens drying out faster in 2014 than previous years, and 2015 was expected to be equally bad. AR 2318-41, 6437-84, 8922, 9093, 9304, 9604. Yet the agency authorized grazing in 2015 without any additional measures to protect fens. AR 10417-22.

The Forest Service's specialist reports did not establish that the 2012-2015 AOIs were consistent with Forest Plan direction for species viability or riparian areas. In fact, the record shows that cattle increasingly damaged fens and habitat for sensitive plants and the Oregon spotted frog in 2013 and 2014 as the drought worsened. The Forest Service has not shown that the 2012-2015 AOIs were consistent with the Winema Forest Plan, in violation of NFMA.

III. THE BIOLOGICAL OPINION IS ARBITRARY AND CAPRICIOUS.

Courts review biological opinions under the APA, and will set them aside if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Wild Fish Conservancy v. Salazar,* 628 F.3d 513, 521 (9th Cir. 2010). A court must ensure that the agency has articulated a rational connection between the facts found and the conclusions made. *Id.* at 525. U.S. Fish and Wildlife Service's Antelope Allotment Biological Opinion ("BiOp") is arbitrary and capricious, and contrary to the ESA, for many reasons and thus must be set aside.

A. The BiOp did not Adequately Describe the Proposed Action.

The ESA requires that a biological opinion assess the direct and indirect effects of the

agency action on a listed species. 50 C.F.R. §§ 402.14(h)(2), 402.02; FWS 2031. To determine the effects of the action, the BiOp must adequately describe the proposed action. *See e.g. Wild Fish Conservancy,* 628 F.3d at 522 (agency action that is defined too narrowly does not allow for full analysis of the impacts of the action); *Greenpeace v. NMFS,* 80 F. Supp. 2d 1137, 1144-48 (W.D. Wash. 2000) (all relevant portions of agency action must be identified and described in detail to analyze the impacts). The BiOp did not contain sufficient detail about the proposed grazing management to adequately assess the effects of that management on spotted frogs.

The BiOp stated that the proposed action consisted of several components: allotment management, fence construction and reconstruction, and installation and maintenance of water structures. FWS 2021. The allotment management called for opening up more area to grazing by re-opening the North Sheep Pasture, which is just south of the Chemult Pasture and has been closed for more than fifteen years, and opening the Jack Creek Riparian Unit, which has been closed since 2008. FWS 2020, 2023. The new management is supposed to "minimize impacts" to Oregon spotted frog habitat, but the details of the management contained too many unknown variables to determine its true effects. FWS 2023.

For instance, the Chemult and North Sheep pastures would "periodically" incorporate a year of rest between pastures or portions of a pasture with no explanation of how often or when that would occur, and the Jack Creek Riparian Unit would use a "high-intensity/low frequency" rotation scheme with no explanation of what that means. FWS 2021-23, 2026, 2030. Late season grazing in spotted frog occupied habitat would be "discouraged" when conditions "suggest" this limitation is necessary, but the BiOp did not explain what it means to discourage grazing or what conditions would suggest this limitation is necessary. FWS 2029.

The BiOp also stated that utilization would be monitored at key areas, and the standard

would be an average of 35% utilization within all areas identified as spotted frog habitat. FWS 2022, 2024, 2029. But the BiOp did not describe the number or location of key areas, the frequency of monitoring, or how it would determine when "an average of 35% utilization for areas identified as spotted frog habitat" was met for any or all of the pastures. *Id.* It also listed other monitoring that would occur without identifying the standards that would apply or actions the Forest would take if standards were violated. FWS 2030. Even though comments on drafts of the BiOp raised many of these same questions, FWS did not provide any additional detail in the final BiOp. *See* FWS 1519-20, 1397, 1402. Without more details about the grazing that would be occurring on each pasture and the monitoring that would supposedly minimize impacts, FWS could not accurately assess the effects of the action.

B. The BiOp's Analysis of the Effects of the Proposed Action was Flawed.

The analysis of effects of the proposed action was flawed because it relied on uncertain and ineffective mitigation measures, and made assertions that were not supported by the facts.

1. Improper reliance on mitigation measures

Mitigation measures relied upon to support an ESA determination must be reasonably specific, certain to occur, and capable of implementation; subject to enforceable obligations; and most importantly, address the threats to the species in a way that satisfies the ESA's substantive standards. *Ctr. for Biological Diversity v. Rumsfeld,* 198 F. Supp. 2d 1139, 1152 (D. Ariz. 2002). Courts have rejected reliance on uncertain or ineffective mitigation to support a conclusion that an activity would not cause jeopardy to a species or adverse modification of critical habitat. *Natural Res. Def. Council v. Kempthorne,* 506 F. Supp. 2d 322, 350-57 (E.D. Cal. 2007); *Nat'l Wildlife Fed'n v. NMFS,* 839 F. Supp. 2d 1117, 1125-28 (D. Or. 2011); *Native Fish Soc'y v. NMFS,* 992 F. Supp. 2d 1095, 1113-14 (D. Or. 2014). FWS unlawfully relies on

multiple uncertain or unproven measures to support its effects determination in the BiOp.

First, the proposed action included the permittee of the Chemult Pasture turning over management of his private inholdings to the Forest Service to become part of the Jack Creek Riparian Unit. FWS 2018. The permittee and Forest Service were "working on" an agreement to define restoration objectives for the Riparian Unit pastures and when those objectives would be met. FWS 2026, 2049. FWS "anticipated" that the Forest Service and permittee would reach agreement, and assumed that achievement of those objectives would meet the conservation needs of Oregon spotted frog. *Id*. Once habitat conditions were restored, grazing would occur in those pastures. FWS 2026, 2059. FWS wrongly relied on these restoration objectives because there was no certainty that the Forest Service and permittee would reach agreement or that the negotiated objectives would actually meet the conservation needs of spotted frogs. There also was no requirement to reinitiate consultation if an agreement with appropriate objectives did not occur, in contrast to the requirement to reinitiate if the private lands were not turned over to the Forest Service for management. FWS 2018, 2026.[4] Thus, the restoration measures for the Jack Creek Riparian Unit were not reasonably specific, certain to occur, or enforceable.

Second, the BiOp relied on fencing and water troughs to help distribute cattle across the pastures and away from spotted frog habitat in Jack Creek. FWS 2026-29, 2054, 2055, 2056, 2059, 2060. Yet fences and water troughs have not proven to be effective management tools in the past. The Antelope Allotment has a long history of cattle going through or around fences and congregating along Jack Creek despite the presence of numerous water troughs on the Chemult Pasture. *See* Second Goodwin Decl. ¶¶ 13, 17-24, Exs. 1-5; Simpson Decl. ¶¶ 94-96, 102-103, Ex. 20; AR 2149, 2507-08, 3192, 3196, 3211, 3213, 3228, 3230, 3254, 3361-63, 4230, 4396-97,

[4] The permittee has not turned over management of his private lands to the Forest Service but the Forest Service authorized grazing in 2015 that supposedly complied with the BiOp. AR 10417.

4496-99, 4544-46, 6771-73, 6778-95, 6832-52, 7034-125, 8012-14, 8995-9001 (cattle trespass); FWS 2028, 2044 (existing water sources on Chemult Pasture).

After significant problems occurred in 2013 with cattle congregating in frog habitat at Davis Flat and inside the Jack Creek fence, the Forest Service required new fencing to prevent such use, as well as additional water troughs, in 2014. *See* Simpson Decl Ex. 20; AR 4396-97, 4496-99 (2013 problems), 5291-97 (fence decision), 6490-91 (need to add troughs). Yet cattle use occurred again in 2014 in those same areas regardless of the new fences and water troughs. AR 6778-95, 6832-52, 6904, 8995-9001; Ex. B. In fact, cattle were documented heavily using an occupied spotted frog site in lower Jack Creek despite a near-by water trough. AR 7034-125; Second Simpson Decl. ¶ 15. Given these facts, it was unreasonable to rely on fences and water troughs as measures that would minimize impacts to spotted frogs.

Finally, the BiOp relied heavily on the average 35% utilization standard to protect spotted frogs, noting that it would allow for only light to moderate grazing along Jack Creek. FWS 2024, 2029, 2050-51, 2054, 2057, 2058-59, 2063, 2065. This reliance was unreasonable because it does not adequately address the threats to the species.

Reliance on an average utilization standard does not take into account the localized impacts even a few cattle can have on Oregon spotted frog habitat. The BiOp recognized that spotted frog breeding sites have specific characteristics, which makes the availability of these unique sites limited, and adults may have limited flexibility to switch sites. FWS 2034. High fidelity to limited breeding sites means that Oregon spotted frogs are "particularly vulnerable to modification of egg-laying sites (Hayes 1994)." FWS 2034, 2037. Thus, an event that impacts one breeding site could significantly reduce that spotted frog population. FWS 2038.

The BiOp also acknowledged that cattle can impact riparian areas quickly. "Damage can

begin to occur almost immediately upon entry of the cattle onto the streambanks, and use of riparian zones may be highest immediately following entry of cattle into a pasture . . . . Vegetation and streambank recovery from long rest periods may be lost within a short period following grazing reentry." FWS 2051. These impacts negatively affect spotted frog habitat in various ways, as explained in the BiOp. FWS 2052; *see also* FWS 49-61, 4702-11, 4719-21.

Cattle impacts are particularly detrimental during low water conditions. The BiOp admitted that drought contributed to the decline of the Jack Creek spotted frog population, and that cattle congregate at the same remnant pools that spotted frogs use as Jack Creek dries out, compounding the impacts of drought. FWS 2044, 2055; *see also* FWS 7, 50-51, 54-55, 62. Such damage occurred in 2013 when just a handful of cattle near Davis Flat caused severe impacts to intermittent pools occupied by spotted frogs. Simpson Decl. Ex. 20; AR 4333-35, 4396-97. The BiOp did not explain how an average utilization standard applied over a large area will prevent localized damage to critically important breeding sites or intermittent pools occupied by frogs when such damage can occur quickly from just a few cattle. *See* FWS 63-64 (grazing management and monitoring must consider specific habitat needs of frogs); 55 (noting heavy impacts to pools even when overall use was light); Second Simpson Decl. ¶ 21.

The support for the 35% utilization standard comes from general studies that are not site-specific or tailored to Oregon spotted frog needs. FWS 2051, 2057, 1234; Second Simpson Decl. ¶¶ 16-17, 22. As noted above, because of the specific habitat needs of spotted frogs, localized impacts to small areas can have a significant effect on spotted frogs even if overall cattle use of riparian vegetation is light. FWS 55; Second Simpson Decl. ¶ 21. Furthermore, the BiOp claimed that 35% utilization is equivalent to a 6-inch stubble height along Jack Creek, FWS 2026, but this is an over-simplification that is not accurate. Different plant communities

along Jack Creek have different vegetation species and heights, and 35% utilization results in very different stubble heights at the end of the season. Second Simpson Decl ¶ 19. Some communities may end up with vegetation much taller than 6 inches while others will be shorter than 6 inches using the same 35% utilization standard. *Id.* The amount of time it takes to graze 35% of the vegetation also varies by plant community, with cattle spending significantly more time in riparian areas that have taller vegetation before they reach the 35% standard, leading to more damage to streambanks and channels. Second Simpson Decl. ¶ 20.

More importantly, even if 35% utilization did result in 6-inch stubble height everywhere, there is no biological basis for the assumption that a 6-inch stubble height will protect spotted frog habitat. Second Simpson Decl. ¶ 21. Spotted frog habitat needs vary by season, and a one-size-fits-all stubble height standard does not account for the differences in spotted frog habitat needs. Second Simpson Decl. ¶ 21; FWS 63-64, 2034-35. The BiOp failed to consider any of these points when relying on the Forest Service's 35% utilization standard. In sum, the mitigation measures are not certain to minimize the threats to Oregon spotted frogs.

2. Other flawed assumptions about effects of the grazing

The BiOp contained other assertions that were flawed and unsupported. It repeatedly stated that grazing can be beneficial to Oregon spotted frog where there is excess biomass in breeding habitat. FWS 2051, 2052, 2053-54, 2056, 2057. But no evidence exists showing the need to reduce biomass in breeding habitat along Jack Creek. Reed canary grass is the primary invasive species that threatens breeding habitat, and the reason that grazing has occasionally been recommended as a management tool. FWS 2235-36, 4875. The BiOp stated that only two small sites of reed canary grass occur in the action area. FWS 2048. Both have been treated with herbicide and do not appear to be expanding. *Id.; see also* FWS 70 (noting low risk to

spotted frogs from invasive plants). Therefore, no support existed for the statement that grazing would be beneficial for spotted frog habitat along Jack Creek.

The BiOp also made unsupported assumptions regarding disturbance to individual frogs. FWS 2056-60. The BiOp admitted that cattle can trample individual frogs or egg masses, or cause disturbance and/or displacement of frogs when grazing occurs in occupied spotted frog habitat. FWS 2056. Cattle may cause frogs to "move away from cover and other preferred microhabitats, experience increased predation risks, expend energy, and lose foraging opportunities," which "may collectively adversely affect individual Oregon spotted frog fitness and population dynamics." *Id.* Cattle also reduce the quantity of available water by drinking from the creek—15 to 20 gallons of water per day per cow, which increases conflicts between cattle and spotted frogs. FWS 2055, 2057. Susceptibility of frogs to trampling and desiccation increases in low water years when livestock and frogs are using the same remnant pools. *Id.* Drought combined with grazing has caused remnant pools in Jack Creek to become very dry, which may have resulted in frogs being stranded and desiccated. FWS 2057.

The BiOp then estimated the number of frogs that might be affected by the proposed grazing. This estimate was flawed for several reasons. First, it assumed that *no* frogs would be affected by grazing in the North Sheep Pasture or Jack Creek Riparian Unit Pasture 4 because a low proportion of the overall Jack Creek frog population occurs in those areas. FWS 2058. This assumption is directly contradicted by evidence from 2013 and 2014 documenting frogs (and cattle) in several pools at Davis Flat in the North Sheep Pasture and in the lower Jamison portion of Jack Creek—which is now within Jack Creek Pasture 4. Simpson Decl. Ex. 20; Second Simpson Decl. ¶ 15; AR 4396-97, 5084, 5091-92, 7034-125, 7220, 7225; FWS 1167-71; Ex. C (attached). Indeed, data from 2015 documented that five of the 18 egg masses discovered in Jack

Creek that year were at Davis Flat. FWS 1688. It was unreasonable to assume that no frogs would occur in those two pastures and thus none would be affected by grazing. FWS 2058.

Second, the BiOp estimated that 3% of frogs in the other pastures are likely to be killed by cattle trampling but provided no support for that figure. FWS 2059. The BiOp simply stated that the various mitigation measures will limit the amount of grazing in spotted frog habitat, and frogs can escape by moving away, and thus a small percent of frogs may be trampled. FWS 2058-59. It was unreasonable for the BiOp to estimate that 3% of frogs are likely to die from trampling without any scientific basis for that figure. Second Simpson Decl. ¶¶ 23-24.

Third, the BiOp did not even consider how many frogs may be affected by cattle-caused disturbance or displacement even though it admitted that such effects likely occur. FWS 2056-60. The definition of "take" under the ESA includes harm and harassment, which consist of activities that degrade habitat or annoy wildlife to the extent that it significantly disrupts normal behavioral patterns such as breeding, feeding, or sheltering. 16 U.S.C. § 1532(19); 50 C.F.R. § 17.3. An activity that causes frogs to abandon cover, expend additional energy, and lose foraging opportunities, adversely affecting fitness and population dynamics, would qualify as harm or harassment. FWS 2056. Disturbance and displacement is particularly detrimental to spotted frogs because of their specific habitat needs and inability to survive out of water or make long movements. FWS 2034-36. FWS originally assessed this impact, estimating the number of adult, juvenile, and metamorph frogs that would be affected by non-lethal take in the form of harm or harassment, which far exceeded the amount of lethal take estimated. FWS 1607, 1686. By excluding this non-lethal take from the final BiOp, FWS ignored a substantial adverse effect to individual spotted frogs from cattle disturbance. FWS 2060; Second Simpson Decl. ¶ 25.

Due to all of the unsupported assumptions and omissions in the effects analysis, the BiOp

significantly underestimated the adverse effects of the proposed grazing to Jack Creek spotted frogs and their habitat. FWS 2054, 2056, 2060.

C. The BiOp's Jeopardy Conclusion was Unsupported.

Although the BiOp underestimated the full impacts to spotted frogs from the proposed grazing, it still admitted that grazing was likely to adversely affect spotted frog habitat and individual spotted frogs, particularly during drought conditions. FWS 2054, 2056, 2060-62. Yet it concluded that these adverse effects would not jeopardize the continued existence of Oregon spotted frog. FWS 2063. The BiOp claimed that effects to habitat would be "short-term" and "spatially limited," *id.,* but as explained above, localized impacts at breeding sites or short-term impacts that occur during low water conditions could have significant effects to spotted frogs.

The BiOp also claimed that effects to individual frogs are not likely to occur at a level that will result in extirpation of the frogs in Jack Creek. *Id.* This assertion was likewise unreasonable. The Jack Creek population is already at risk of extirpation due to its small size, isolation, and lack of genetic diversity. FWS 2037, 2038; AR 6955-57, 8918, 10339, 10382. The BiOp did not explain why continued mortality caused by grazing, even at the 3% level, would not lead to extirpation of the population. Second Simpson Decl. ¶ 26. Moreover, the BiOp admitted that adverse effects to frogs from the proposed grazing would be substantial during drought conditions. FWS 2063. Severe drought conditions occurred in Jack Creek in 2013-2015, and will occur frequently in the future due to climate change. The substantial adverse effects from grazing combined with frequent drought conditions will accelerate this population's slide toward extinction. Second Simpson Decl. ¶¶ 27-28. In fact, egg mass numbers dropped from 2013 to 2015 despite the new Davis Flat frog sites. FWS 2045, 1688-89.

The BiOp then stated that adverse effects are unlikely to be discernible at the rangewide

scale, which consists of about 20,565 adults, and thus will not reduce the survival and recovery of the species at the rangewide scale. FWS 2063. This statement failed to consider the importance of this particular population. Even if the loss of adult frogs from Jack Creek would only minimally reduce the total number of adult frogs in the species, the loss of this population would be very detrimental because of its unique status and distinct genetics. FWS 7, 17, 30; Second Simpson Decl. ¶ 30. The species' range has already shrunk 76-90% and each spotted frog population has unique genes. FWS 2220, 2224, 2379; Second Simpson Decl. ¶ 30. The BiOp did not explain why grazing impacts that perpetuate or accelerate the risk of extirpation for this population are not jeopardizing the species' recovery, and thus its no-jeopardy conclusion was arbitrary and capricious. *Wild Fish Conservancy,* 628 F.3d at 526-29.

D. The Incidental Take Statement was Arbitrary and Capricious.

The incidental take statement ("ITS") in the BiOp authorized "take" of Oregon spotted frogs caused by the proposed grazing that would otherwise be prohibited under the ESA. FWS 2064-65. The ITS estimated the amount of take that would occur from the proposed grazing, how it would monitor whether that level of take was exceeded, and concluded that this level of take is not likely to jeopardize Oregon spotted frog. FWS 2065.

The ITS suffers from the same problems discussed above with regard to the analysis of take of individual frogs. First, it relied on the same underestimate of take that ignored affects to frogs in the North Sheep Pasture and Jack Creek Pasture 4, and ignored non-lethal take in the form of harm and harassment. FWS 2059, 2065 (using same number of frogs killed by trampling); *supra* p. 30. Second, it claimed there was a causal link between the amount of take estimated to occur (3% of frogs) and the 35% utilization standard when there was no scientific support for the 3% mortality estimate or to link that figure to the 35% utilization standard. FWS

2065; *supra* p. 30. Third, it stated the same conclusion that this level of take would not result in jeopardy, which was not supported by an adequate explanation or facts. FWS 2065; *supra* pp. 31-32. This same flawed reasoning renders the ITS arbitrary and capricious.

Additionally, the Terms and Conditions in the ITS will not minimize impacts of incidental take on spotted frogs, as required by the ESA. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)(1)(ii), (iv). Term one orders removal of cattle from a pasture if agency monitoring indicates that frogs in intermittent pools are susceptible to adverse effects of grazing. FWS 2066. However, it does not require that such monitoring occur, describe when it must occur, or specify what conditions would trigger removal of cattle even. *Id.* These specifics are necessary to minimize impacts considering that the conflict between cattle and frogs in low water conditions is one of the biggest threats to spotted frogs.

Term three requires monitoring of riparian vegetation utilization and streambank damage to assess aquatic and riparian conditions and monitor activities that may result in take. FWS 2066-67. However, this term does not specify how often or where this monitoring must occur. Not all of Jack Creek is occupied by spotted frogs, and an even smaller portion contains breeding sites, yet the ITS does not specify that monitoring must occur in the areas that are important to spotted frogs. Without these additional requirements in the Terms and Conditions, they do not ensure that grazing impacts will be minimized.

Finally, the ITS must include a trigger to identify when the level of authorized take is exceeded, thereby requiring reinitiation of consultation. 50 C.F.R. § 402.14(i)(4). FWS can use a surrogate instead of a numerical value to identify when take is exceeded, but must articulate a rational connection between the surrogate and the taking of the species. *Or. Natural Res. Council v. Allen,* 476 F.3d 1031, 1037-38 (9th Cir. 2007). The trigger for reinitiation here is if

the average 35% utilization standard is exceeded by 10% two years in a row in a given pasture, or the season of use is exceeded two years in a row within a given pasture. FWS 2068. As explained above, no rational connection exists between 35% utilization and the 3% mortality authorized in the ITS. Furthermore, the trigger actually allows for 45% utilization two years in a row before requiring reinitiation. If FWS believes that the 35% utilization standard will limit mortality to 3%, it did not explain why it allowed up to 45% utilization in two consecutive years before take would be exceeded. FWS 2068. For all of these reasons, the ITS is invalid.

IV. AN INJUNCTION IS NECESSARY TO REMEDY THE LEGAL VIOLATIONS.

If the Court finds for Plaintiffs on any of their legal claims, the appropriate remedy is to close the Chemult Pasture to allow damaged resources to recover and prevent additional harm until the agency demonstrates it is in compliance with all legal requirements.[5] Grazing has already caused significant harm to fens, sensitive plants, and Oregon spotted frogs on the Chemult Pasture, and will continue to cause harm that is likely irreparable.

For NFMA and NEPA violations, plaintiffs must establish that they have suffered irreparable injury, and that the balance of hardships and public interest weigh in their favor. *Sierra Forest Legacy v. Sherman,* 646 F.3d 1161, 1184 (9th Cir. 2011). For ESA violations, plaintiffs need just establish irreparable injury because "the equities and public interest factors always tip in favor of the protected species." *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.,* 789 F.3d 1075, 1091 (9th Cir. 2015).

As described earlier in this brief, the complex of fens on the Chemult Pasture is unique in the Pacific Northwest, and provides habitat for an unprecedented diversity of sensitive plants.

[5] Because of the short time until the next grazing season, Plaintiffs are asking the Court to incorporate remedy into its Findings and Recommendations if it agrees with Plaintiffs on any legal claim. If the Court chooses not to include remedy but recommends ruling for Plaintiffs on the merits, Plaintiffs will immediately seek a TRO to quickly address the remedy issue.

These fens are fragile, however, and if destroyed will not come back, eliminating habitat for these imperiled plants. *See supra* pp. 3-4. The Forest Service and Plaintiffs' expert documented increasing damage to fens from livestock in 2011-2014, as well as water tables that more quickly dropped below the -20 cm threshold during the summer. *See supra* pp. 4-6. Problems continued in 2015, with even lower water tables and heavy trampling at fens, particularly those that retained water throughout the summer. Second Simpson Decl. ¶¶ 3-4, 6-7, 14, Exs. 1-2, 4.

The Jack Creek population of Oregon spotted frog is also unique and very fragile given its small size, isolation, and lack of genetic diversity. Drought conditions in 2013-2015, combined with grazing, had a significant adverse effect on spotted frogs in Jack Creek, and egg mass numbers dropped even further during that time. *See supra* pp. 6-8. Because of the precarious status of both the fens and the frogs on the Chemult Pasture, the harm that occurred over the past few years is long-term and may be irreversible. Second Simpson Decl. ¶¶ 31-34. Removal of livestock from this pasture is necessary if there is any chance of restoring the damaged fens and recovering this spotted frog population. *Id.*

The balance of hardships and public interest weigh in favor of protecting and preserving these unique resources. The fens and Jack Creek population of spotted frog are being studied by numerous scientists because of their unique qualities and value to the natural world as well as to the public. Given the importance of these resources, not only to Plaintiffs but to the public at large, weighed against the hardship to a single grazing permittee, the balance tips strongly in favor of closing the Chemult Pasture until the Forest Service fully complies with all laws.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court issue Findings and Recommendations in favor of Plaintiffs on all of their claims and include the requested relief.

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Respectfully submitted,

s/Lauren M. Rule

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