Kristin F. Ruether (ISB #7914)
Lauren M. Rule (ISB #6863)
ADVOCATES FOR THE WEST
PO Box 1612
Boise ID 83701
(208) 342-7024
(208) 342-8286 (fax)
kruether@advocateswest.org
lrule@advocateswest.org

Attorneys for Plaintiff Western Watersheds Project

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

WESTERN WATERSHEDS PROJECT, Plaintiff, v. U.S. FISH AND WILDLIFE SERVICE and U.S. FOREST SERVICE, Defendants, ROCKY & CAROL ROSS, DONALD & BILLIE PHILLIPS, Defendant-Intervenors.	No. 4:13-cv-176-BLW **SEPARATE STATEMENT OF FACTS**

I. BULL TROUT IN THE LITTLE LOST RIVER WATERSHED

A. Watershed Overview and Bull Trout Distribution

1. The Little Lost River watershed is a "high elevation, cool desert valley" bordered by the "extremely steep and rugged" Lost River and Lemhi Ranges. Pass PAR 6605–06 (1999 BO). *See* Pass PAR 8338 (map). The Little Lost River flows southeast from its headwaters. *See id*.

2. The watershed contains a patchwork of land ownerships, with Forest Service land along the high-elevation edges, BLM land in the lower elevations, and private lands along the major streams. *See* Mill PAR 2340 (map).

3. Bull trout were historically well distributed in the Little Lost River and many of its tributaries. Pass FWS Doc. 34 at 1708–12 (draft recovery plan). However, they have undergone substantial declines in recent decades; for example, in the reach of the Little Lost River (also known as Sawmill Creek) in the Hawley Mountain allotment just below the Mill Creek allotment, they declined 91% between 1984 and 1993. *Id*. at 1709. They have even been extirpated from the lower Little Lost River (which is dewatered at times every year) and some tributaries. *Id*. at 1709–10.

B. Habitat Needs and Life Cycle of Bull Trout and Impact of Livestock Grazing

4. The habitat needs of bull trout are generally cold temperatures, clean water quality, complex channel characteristics, and large patches of habitat that are well connected. Mill FWS 31. Increased fine sediments can reduce egg survival, as well as injure gills when suspended. *Id*. at 17, Hawley FWS 2804. Spawning habitat consists of low-gradient stream reaches with loose, clean gravel. Mill FWS at 17. They spawn from August through November. *Id*. The Salmon-Challis National Forest assumes bull trout

may begin spawning on August 15. 3rd SPAR 2030 (Mill BA). The eggs incubate over the winter, emerging as "fry" from early April through May. Mill FWS at 17.

5. Livestock grazing degrades habitat in many ways, including by removing riparian vegetation and trampling of stream banks, which can result in increased sedimentation, bank instability, and elevated temperatures, all of which harm bull trout. Pass FWS Doc. 34 at 1715 (recovery plan), Pass PAR 6607–14 (1999 BO summarizing watershed harms from grazing), Mill FWS 75 (Mill BO appendix summarizing same). Such grazing impacts "are prevalent factors affecting bull trout habitat in the Little Lost River Recovery Unit." Pass FWS Doc. 34 at 1716. Livestock can also trample redds, killing a majority of the eggs. 3rd SPAR 2938 (Mill BA).

6. After bull trout were protected under the ESA, the land management agencies adopted a plan known as INFISH, which set objectives including: bank stability of at least 90%, no measurable increase in temperature, maximum temperatures below 15°C in "holding" habitat and 8.9°C in spawning and rearing habitats, and less than 20% of fine sediments on the surface of streambeds in spawning habitat or 30% cobble embeddedness (a sediment measurement) in rearing habitat. 3rd SPAR 2019–20.

B. Status and Recovery Needs

7. The Columbia River bull trout (including those in the Little Lost River) were protected as threatened under the ESA in 1998. 63 Fed. Reg. 31,647 (June 10, 1998). FWS designated multiple tributaries to the Little Lost River as critical habitat in 2010. 75 Fed. Reg. 63,898, 64,057 (Oct. 18, 2010).

8. After listing, the Forest Service and BLM jointly prepared a 1998 Little Lost River BA analyzing all their authorized activities in the watershed. Pass PAR 6363.

The BA assessed impacts in each sub-watershed as a whole, regardless of managing agency. *Id*. at 6364 (table of contents, organized by sub-watershed). FWS concurred that most activities were not likely to adversely affect bull trout, with the notable exception of the Pass Creek allotment, for which it issued a 1999 BO. Pass PAR 6585.

9. For recovery planning, FWS divided the coterminous U.S. population of bull trout into five Interim Recovery Units ("IRUs"). Mill FWS 12 (Mill BO). Little Lost watershed bull trout are part of the Columbia River IRU. *Id*. at 15. Recovery units are comprised of "core areas," which in turn are comprised of one or more "local populations." *Id*. at 12. A local population is a group of bull trout that spawns within a particular stream and is the smallest interacting reproductive unit of bull trout. *Id*.

10. Within the Columbia River IRU, the bull trout in the Little Lost River watershed form the Little Lost River core area. Mill FWS 1. The core area contains ten local populations. Pass FWS Doc. 34 at 1728 (recovery plan map). The core area is "greatly depressed" due to highly degraded habitat, excessive sedimentation, high water temperatures, and dewatered streams, caused by factors including livestock grazing, agricultural water diversions, and the out-competition of bull trout by introduced brook trout. *Id*. at 1713–23, Pass AR 6603 (1999 BO). A 2005 status report found the core area "at risk" due to "very limited and/or declining numbers, range, and/or habitat, making the bull trout in this area vulnerable to extirpation." Mill FWS 29.

11. Grazing exacerbates brook trout expansion, as it exacerbates higher temperatures. 3rd SPAR 2039 (Mill BA). In turn, high temperatures increase bull trout stress and susceptibility to disease, making them more vulnerable to competition by brook trout. Mill PAR 2305 (1999 BO); Hawley FWS 2770 (Hawley BA). Brook trout

outcompete bull trout in degraded streams. Pass FWS 1718–21.

12. Water diversion impacts include: low flows, reduced stream widths and depths, increased temperatures, reduced depth or even no water over redds, isolated individual fish, physical barriers to fish movement, and reduced food for fish. 3rd SPAR 1778. In turn, those lead to harms including: increased stress and susceptibility to disease, reduced ability to breathe, reduced access to food and protection from predators, reduced ability to move to cooler areas or to spawning areas, and reduced growth. *Id*.

13. FWS's recovery goal is to "**ensure the long-term persistence of self-sustaining, complex, interacting groups of bull trout trout distributed throughout the species' native range so the species can be delisted**." Pass FWS Doc. 34 at 1729 (recovery plan). To achieve this recovery goal in the Little Lost River watershed, FWS developed the following objectives: maintain current distribution and restore distribution in previously occupied areas; maintain stable or increasing trends in abundance; restore and maintain suitable habitat conditions for all bull trout life history stages and strategies; and conserve genetic diversity and provide opportunities for genetic exchange. *Id*.

14. FWS identifies all ten local populations as essential for bull trout recovery. Pass FWS 17 (Pass BO), Mill PAR 2194, Pass FWS Doc. 34 at 1729. Maintaining all local populations is important to maintaining overall production and distribution of bull trout in the core area. Pass FWS 18 (Pass BO). In fact, recovery requires not only maintaining current distribution, but **recovering** distribution in the Pass Creek allotment's Big Creek, where bull trout appear to have been extirpated. Pass FWS Doc. 34 at 1733. Migratory (fluvial) bull trout in the watershed migrate to headwater streams to spawn, including in Sawmill Canyon and Wet Creek. *Id*. at 1710–12.

15. The Little Lost River bull trout are naturally isolated and have not been directly connected to habitats in other basins for thousands of years. Pass FWS Doc. 34 at 1703 (recovery plan). Due to this unique history, the bull trout may contain unique genes that further promote bull trout persistence. Hawley FWS 2984.

III. PASS CREEK ALLOTMENT

A. Allotment Overview and Bull Trout

16. The Pass Creek allotment is on the southwest side of the watershed. Pass PAR at 8338, 8349 (BA maps). This high elevation allotment straddles the Lost River Range, with the southern portion draining south into the Big Lost River watershed and the northern portion draining into Wet Creek and the Little Lost River. *See id*. The allotment is divided into eleven units, with the northern seven on the Wet Creek side. *See id*. at 8339 (BA map). Tributaries to Wet Creek include Big, Sands, Coal, Pine, and Basin Creeks. *Id*. at 8349 (BA).

17. There are several "exclosures" designed to exclude livestock from degraded stream reaches, including on Wet, Big, and Basin Creeks. *Id*., Pass PAR 8341. There is about 0.76 miles of bull trout spawning habitat in Wet Creek on the allotment. Pass PAR 8358. An exclosure is intended to exclude the upper 0.47 miles of this habitat in the Wet Creek unit, with the 0.29 mile lower reach not exclosed. *Id*.

18. Until recently, bull trout occupied both Wet and Big Creeks on the allotment. Pass PAR 8350 (BA). However, under Forest Service management, bull trout in Big Creek appear to have been extirpated, as they have not been observed since 1998. *Id*. The Wet Creek local population is on a downward trend with extremely low numbers and density, Pass PAR 8350, meaning it is almost certainly subject to inbreeding

depression. Pass FWS Doc. 34 at 1731 (recovery plan) (at least 50–100 spawners per year needed to minimize such effects).

B. Compliance and Consultation History

19. The 1999 BO identified severe grazing damage on the allotment, explaining that it is particularly susceptible to damage because headwater areas "remain moist through the growing season and are vulnerable to physical damage year round" and thus "are fragile, inherently unstable[,] more susceptible to livestock trampling and compaction," and "not suitable for grazing." Pass PAR 6606. Thus, "[l]ivestock, even when utilization standards are met, have caused bank shearing, increased width to depth ratios from hoof-caused bank sloughing, and an increase in sediment delivery." *Id*. Wet and Basin Creeks were particularly degraded and sensitive to further damage. *Id*. at 6609.

20. FWS explained that strong protective measures are necessary to prevent damage. For example, "[m]ore than six inches of stubble height may be required for protection of critical fisheries or easily eroded streambanks and riparian ecosystem function." *Id*. at 6612. The ITS attempted to improve conditions by imposing monitoring requirements and standards for stubble height and woody riparian use. *Id*. at 6622–23.

21. In 2000, the Forest Service and the permittees signed a "Six year Agreement" that set up monitoring areas and adopted an adaptive management strategy, among other things. SPAR 3586. The parties agreed to conduct an analysis of the "ecological conditions and grazing performance" at the end of the 2005 season and modify the permits "to reflect the demonstrated capacity of the allotment." *Id*.

22. Violations began immediately. In 2000, permittees violated the stubble height standard on four units, with the agency admitting "significant" damage caused in

three units. SPAR 679, 684–85. In 2001, "serious and unacceptable" violations, SPAR 3615, included: violations of stubble height standards in six of nine units monitored, SPAR 746, cattle trespass in two Big Creek units intended to be rested, SPAR 3615, failure to maintain exclosure fences resulting in trespass, *id*., including into the Wet Creek exclosure, SPAR 747.

23. In 2002, violations included 20 cattle on the allotment in June, far before the July turnout date, SPAR 3625. The 2002 monitoring report appears to be missing from the record. *See* SPAR 1009 (version missing monitoring results). In 2004, **50–100 cows** trespassed into the Wet Creek exclosure for an undetermined amount of time, with excessive use both inside and outside the exclosure, causing "significant bank damage" and heavy browse on woody species. SPAR 3651, 9651. Fourteen trespassing cows remained on Upper Big Creek "season long." SPAR 1072. Woody use was not reported in **any of these years'** monitoring reports, despite being required by the BO. SPAR 679 (2000), 746 (2001), 1009 (2002), 1046 (2003), 1071 (2004), 1323 (2005).

24. The Forest Service took virtually no enforcement action during these years, only once sending a notice of non-compliance in 2001, mildly reminding permittees of their obligations, but not imposing any consequences. SPAR 3619.

25. In 2006, the Forest Service reviewed compliance under the agreement and concluded that the permittees failed to achieve the goal of improving allotment conditions. Pass PAR 9652. Big Creek became more degraded over the six years, and permittees failed to meet end-of-season standards **two-thirds of the time**. *Id*., SPAR 3670. The Forest Service admitted that a 10–15% AUM reduction was warranted, but declined to do so based on the grazing association's "good faith effort." *Id*. at 3671.

26. More violations occurred in 2007 and 2008, including violations of standards in the Wet Creek and Pine Creek units and further trespass inside the Wet Creek exclosure. SPAR 1421–23. 2007 grazing caused **40–45% bank alteration in the lower Wet Creek spawning reach**, as well as many other violations such as riders failing to move cattle when directed. SPAR 3694. In 2008, further trespass and severe grazing impacts occurred; a report prepared by the Forest fish biologist illustrated severe livestock impacts at twelve riparian sites, including tributaries to Wet Creek, with 37 sobering photos with explanations of the grazing damage depicted. *Id*. The report concluded that "significant changes in livestock management are needed on this allotment if we are to protect and restore aquatic and riparian habitats." Pass PAR 6955. Importantly, the biologist noted that significant impacts were occurring **even when standards were being met**, meaning "current standards were not adequately protecting aquatic and riparian resources in this allotment and that new standards are needed that will significantly reduce livestock impacts to these areas." Pass PAR 6955.

27. In 2009, the Forest Service admitted the impacts of grazing had been "different from those expected," requiring reinitiation. Pass PAR 6994, 9656. A 2009 BA amendment rested the two Wet Creek units, imposed more protective standards for stubble height and woody browse, and imposed a 20% bank alteration standard on all units. Pass PAR 7003. Grazing in 2009 violated the bank standard in two units, one badly (45% bank alteration in the North Wet Creek Basin unit). SPAR 1807. The agency responded by stating it would remove the standard on that unit. *Id*. at 1810. No enforcement action occurred. *See* Pass PAR 5711 (2010 AOI).

B. Pass Creek Allotment 2010 Consultation

28. In July 2010, the Forest Service issued a new BA. Pass PAR 8332. The BA acknowledged that bull trout habitat on the allotment was in "relatively poor condition," and that livestock grazing caused or contributed to the degraded conditions. *Id*. at 8351–54. It admitted that the grazing would continue to trample redds and adversely impact stream temperatures, sediment levels, width-to-depth ratios, bank stability, successional status, and woody recruitment, in ways that were not discountable and would likely reduce the ability of streams to support bull trout. *Id*. at 8358–64.

29. However, the Forest Service proposed **reverting back** to the standards from 2000–2008 in almost all respects, with no explanation as to why the more protective measures were no longer necessary. *Id*. at 8344–45 (4-inch stubble height standards on all but two units; no bank alteration standard on all but one unit; 50% woody browse standard at on all but two units; use of Wet Creek units).

30. In September 2010, FWS issued a BO, concluding that the proposed grazing was not likely to jeopardize "the coterminous U.S. population of the bull trout." Pass FWS 33–35. The BO contained an ITS, which authorized take in the form of one trampled bull trout redd every other year. *Id*. at 36.

C. Subsequent Actions

31. In 2011, trespass occurred in numerous locations after August 15 (during spawning season), including within exclosures, on both Wet Creek units, on private land, and in an administration area, causing violations on several units including the Wet Creek unit. SPAR 3876–77, 3881, SPAR 1861, Pass PAR 9703. The Forest Service's only enforcement consisted of a warning letter, SPAR 3876, and notice of non-compliance reminding permittees of their duties, imposing no consequences. SPAR 3883.

32. Violations in 2012 included **32% bank alteration along Wet Creek in the Wet Creek unit**, Pass PAR 6338, extensive trespass (130 cows) in the private land inholding along Wet Creek, SPAR 3931, and nine cows in trespass in the Wet Creek exclosure during September (spawning season), Pass PAR 9717. Inside the exclosure, a hoofprint and cow pie were within **1 meter of a bull trout redd**, Pass PAR 9346, with biologists stating that "**Livestock use within the exclosure in 2012 has likely impacted the ability of habitat within the exclosure to support bull trout**" and "may have resulted in bull trout redds being trampl[ed]." Pass PAR 9719 (emphasis in original). In October, WWP's Katie Fite documented extensive use of the exclosure and above. Dkt. 9 at 10–17 & Attach. A. Livestock were "repeatedly" in units outside authorized times "throughout the summer," Pass PAR 9718, with extensive use in the Basin Creek exclosure, Pass PAR 6338 (in which "[l]ivestock have regularly been within . . .since it was built, 3rd SPAR 14469), and along Big Creek, Pass PAR 6338.

33. The Forest Service finally imposed a 30% suspension in livestock numbers for two years based on the repeated violations. Pass PAR 9729–31. However, after a single permittee appealed the decision, the Forest Service agreed to hold the suspension "in abeyance" for two years for **all** permittees, as long as terms and conditions were met; if not, the suspension would be reinstated. SPAR 3992, 4032.

34. On May 16, 2013, WWP filed its PI motion. Dkt. 7. The next day, the Forest Service reinitiated consultation on the allotment. Dkt. 37-1. On May 30, 2013, the Forest Service issued a 7(d) letter for the 2013 grazing season, proposing to largely rest the two units containing Wet Creek, except for several days of trailing. Dkt. 38-1. Based in part on these assurances, this Court denied WWP's PI. Dkt. 56.

35. However, over 100 cattle trespassed in the Pine Creek unit for various lengths of time throughout June. SPAR 415, 2084. Dozens more trespassed in Big Creek thorough late June and early July (before the on-date), including 40–50 viewed by air. SPAR 415, 2nd SPAR 94, 95. WWP observed extensive trespass use in the Sands/Coal unit in early July, as well as extensive bank damage on Wet Creek from the trailing. 2nd SPAR 96, 103, 128–40. In July, the Forest Service reinstated the 30% suspension for certain permittees, only for the 2014 season (not 2013). SPAR 4058.

36. In July, over 50 cows were in the "closed" Wet Creek unit. SPAR 3505, 3457. Cattle sign was observed **inside the Wet Creek exclosure** in early August, in part because a rider thought it would be "an appropriate holding area." SPAR 3506, 2nd SPAR 18. Cattle trespassed inside the Basin Creek exclosure throughout August. SPAR 3549, 3550, 3554, 3556–57, 1980–82. Coal Creek was "heavily impacted" by grazing. SPAR 3557. Cattle trespassed throughout the year in other units. SPAR 1960–84.Fisheries biologist Larry Zuckerman visited Wet Creek in September 2013 and observed that grazing had caused significant degradation on lower Wet Creek, lower Coal Creek, and the "closed" upper Wet Creek unit. 2nd SPAR 56–91. *See also* 2nd SPAR 132–140 (Fite 2013 photos of same).

II. MILL CREEK ALLOTMENT

A. Allotment Overview and Bull Trout

37. The Mill Creek allotment is on the northern edge of the Little Lost River watershed, in the Lemhi Range. *See* 3rd SPAR 2016 (BA area map). The allotment contains numerous occupied bull trout streams, including Iron, Redrock, Timber, Smithie Fork, Sawmill, Mill, Squaw, and Warm Creeks, most of which also support spawning.

3rd SPAR 2028 (BA stream map). Reaches of 16 creeks were designated as critical habitat in FWS's 2010 final bull trout critical habitat rule. 75 Fed. Reg. 63,898, 64,056.

38. The allotment is comprised of six units (Cub Canyon, Horse Creek, Smithie Fork, Timber Creek, Mill Creek, and Squaw Creek). 3rd SPAR 2017 (BA map). Bull trout occur in all units and likely spawn in all units except Cub Canyon and Horse Creek. *Id*. at 2028. The Forest Service authorizes grazing on the allotment through permits and AOIs. Mill PAR 12007 (permit), PAR 1149–1203, SPAR 1 (AOIs).

39. The bull trout in the allotment comprise **seven of the ten** local populations within the Little Lost River core area. 3rd SPAR 2027 (BA). "It is likely that over 95% of all bull trout in the Little Lost River basin occur within this allotment." *Id*.

40. Bull trout may be holding steady at their depressed levels in some drainages, but are suffering long-term declines in others, particularly the Squaw and Mill Creek drainages, where brook trout have "nearly replaced" bull trout. 3rd SPAR 2027–29 (BA). "If this trend continues, bull trout may disappear from these two drainages **within the next decade**." *Id*. at 2029 (emphasis added). Brook trout also appear to be expanding in other drainages such as Warm and Iron Creeks, making the Warm Creek local population "at a relatively high risk of extinction." *Id*., Mill PAR 4271. "Available data indicate that brook trout may completely replace bull trout within the sub-watershed **in the next 50 years** unless management action is taken"—namely, preventing further expansion of brook trout and improving habitat. 3rd SPAR 2029 (emphasis added).

41. In the years 2004–2008, problems included cattle trespass in unauthorized areas and times, riders failing to follow directions or remove cattle from units, lack of maintenance on fences, and inconsistent actual use reporting by the permittees; the Forest

Service took no enforcement action beyond occasional letters. Mill PAR 4243, 4245, 4247, 1400. In 2009, the Forest Service documented "[h]eavily impacted banks [] on entire length" of Warm Creek, and "moderate" cattle impacts on Mill and Timber Creeks. Mill PAR 2610, 2560–2606.

42. A water diversion within the allotment removes 1.6 cfs of water from Sawmill Creek, and is expected to entrain several bull trout per year in ditches. 3rd SPAR 1759 (diversion BO).

43. In May 2010, the Forest Service issued a BA for continuing to graze the allotment. Mill PAR 2113. The BA admitted that many stream indicators are below bull trout objectives in many portions of the allotment, that grazing caused or contributed to the conditions, and would continue to do so. *Id*. at 2142–47. The BA concluded that the grazing was likely to adversely affect bull trout and its critical habitat. *Id*. at 2147.

44. FWS issued a July 2010 BO concluding that grazing the allotment would not jeopardize the species or adversely modify critical habitat, despite substantial effects to the entire core area. Mill PAR 2180, 2201–14. The BO relied upon a fence to be built along Warm Creek. *Id*. at 2212. The BO contained an ITS, which authorized trampling of 18 bull trout redds every year. *Id*. at 2216.

45. In 2010, bank stability and alteration data were not collected on all units, despite assurances in the BA and BO that this would occur. Mill PAR 1404–07. Bank alteration exceeded 20% on two sites, cattle were in Bear Creek throughout the season, and a fence there needed "heavy maintenance." *Id*.

46. In 2011 and 2012, problems included unauthorized use along several bull trout streams during the spawning period, and cattle disturbance occurred near surveyed

redds, including fresh disturbance right next to a redd in 2012. Mill PAR 2620, 2627, 2628. Again, bank stability and alteration data were not collected on all units, but where measured, bank alteration was above 20% at many sites, including on Squaw Creek (both years), Mill Creek (2012), Bear Creek (both years), and Warm Creek (both years); and browse standards were exceeded on Mill Creek in 2012 and on Warm Creek both years. PAR 1408, 1411. The Warm Creek fence was not built. Mill PAR 4249.

47. In 2012, bank alteration was over 20% on over six sites (everywhere measured), with Mill Creek at 35% bank alteration and Warm Creek at severe 7**4% bank alteration and 92% browse use**. Mill PAR 1411. The Forest's fish biologists concluded "these impacts are substantially limiting the ability of this stream to support bull trout" and "may be resulting in conditions that make it easier for brook trout to expand" in Warm Creek. Mill PAR 4202–11 (report including photos), 4271.

48. In May 2012, Zuckerman observed extensive impacts from cattle on Warm Creek, Squaw Creek, Mill Creek, and lower Timber Creek. Dkt. 10 at 4–17. Cattle had accessed spawning reaches of those creeks in numerous places, damaging banks and creating risk of redd trampling and disturbance of juveniles and adult fish. *Id*.

49. By letter dated May 17, 2013, the Forest Service reinitiated consultation with FWS on the Mill Creek allotment. Dkt. 37-2. In June, the Forest Service informed the Mill Creek permittees that grazing could not occur until the new consultation was completed. 3rd SPAR 3171.

50. However, the permittee's cattle trespassed on the allotment multiple times during the summer. On August 7, 10 cows were in Bull Creek and at least 12 near Bear Creek in the Mill Creek Unit. More than 34 cows were actually in trespass, as the

permittee removed them over the next two days. 3rd SPAR 2429 (NONC). On August 9, there were 20–30 cows near the confluence of Sawmill and Bull Creeks, and 20 near the confluence of Sawmill and Horse Lake Creeks. 3rd SPAR 1973. On August 12, 40 remained at the same place, 15 were near the Sawmill and Bull Creeks' confluence, and 5 were along Bull Creek. *Id*. On August 14, 130 cows were near the confluence of Iron and Sawmill Creeks in the Timber Creek unit, as well as 10 on Bull Creek and 4 on Sawmill Creek nearby. 3rd SPAR 2430 (NONC). On September 5, an unnamed number of cows were in the unit near Bear Creek. 3rd SPAR 1974. *See also* 3rd SPAR 201–03 (inspection notes, reviewing same).

51. The agencies hurried to complete consultation, with the Forest Service apparently prodding the permittee to contact Congress to put political pressure on the agencies. 3rd SPAR 202 ("I told [the permittee] that the calls to congressional members has helped move things along and hopefully we can get this done and get cattle out on the allotment.").

B. 2013 Mill Creek Allotment Consultation

52. On June 26, 2013, the Forest Service issued its BA. 3rd SPAR 2011. The BA acknowledged that one of the major limiting factors on the allotment is reduced habitat quality associated with livestock grazing, that stream indicators were below objectives in many portions of the allotment, and that livestock grazing caused or contributed to the degraded conditions. 3rd SPAR 2029–37. It admitted that the grazing would continue to trample redds and adversely impact stream temperatures, sediment levels, width-to-depth ratios, bank stability, and riparian vegetation, in ways that are "not discountable and will likely reduce the ability of streams on this allotment to support bull

trout." *Id*. at 2038–32, 30.

53. On August 14, 2013, FWS issued a BO concluding that grazing the allotment would not jeopardize bull trout or adversely modify critical habitat. Mill FWS 63–65. The BO contained an ITS, stating that incidental take "is likely to occur in the form of kill caused by cattle trampling of up to 16 bull trout redds annually." *Id*. at 66.

C. Subsequent Actions

54. On August 15, 2013, the Forest Service issued an AOI authorizing turn-out that day. 3rd SPAR 1. The authorized rotation was 17 days in the Timber Creek unit (until Aug. 31), followed by 12 and 13 days in the Horse Lake and Cub Canyon units, respectively. *Id*. at 2. Trespass continued, with many instances of cows being in bull trout units **during spawning times**. This included, in the Mill Creek unit: 12 cows on August 19, a bull on August 26, 17 on Sept. 3, 16 on Sept. 5, 6 on Sept. 10; in the Timber Creek unit: 50 on Sept. 3, 22 on Sept. 5, 20 on Sept. 9, and 16 on Sept. 10. 3rd SPAR 2430. *See also* 3rd SPAR 201, 2nd SPAR 1 (similar).

55. In fall 2013, high sediment levels were monitored on the allotment, including Mill Creek (from 25.4% in 2012 to 40.7% in 2013), Smithie Fork (from 14.2% in 2012 to 24.8%), and Timber Creek (29.2% in 2012 to 42.8%). 3rd SPAR 2432. No bull trout were caught in the 2013 Warm Creek electroshock survey. 3rd SPAR 2079.

56. On September 18, 2013, Zuckerman observed extensive livestock-caused impacts to bull trout habitat in the Timber Creek unit, including: fresh cattle prints and waste near streambanks, active erosion, heavily silted streambeds, and bare, raw banks with severe bank alteration. 2nd SPAR 21–55.

57. In November 2013, the Forest Service issued the permittees a notice of

non-compliance due to their failure to keep cattle within scheduled units during scheduled time periods, not imposing any consequences. 3rd SPAR 2429.

IV. HAWLEY MOUNTAIN ALLOTMENT

A. Allotment Overview and Bull Trout

58. The Hawley Mountain allotment is a large, 50,000+ acre allotment managed by BLM's Upper Snake Field Office of the Idaho Falls District. Hawley FWS 2754–55. The north half of the allotment is immediately downstream from the Mill Creek allotment, along Sawmill Creek. Hawley FWS 2757 (vicinity map), 2762–63. Much of the south half of the allotment is within the Wet Creek watershed, just downstream from the Pass Creek allotment; and portions are also within the Horse Creek and Badger Creek drainages further east. Hawley FWS 2761, 2764. Thus, the allotment contains the downstream bull trout habitat for almost all of the ten local populations in the Little Lost River core area, and the reaches that bull trout would need to utilize in order for genetic exchange between those local populations to occur. *See* Hawley FWS 2238–40, 2255–56.

59. Occupied bull trout streams on the allotment include: Sawmill Creek, Summit Creek, Wet Creek, Warm Creek, Badger Creek, and the Little Lost River. Hawley FWS 2765. In the north half of the allotment, the Upper Sawmill pasture contains 4.8 miles of Sawmill Creek and 0.9 miles of Warm Creek that are bull trout designated critical habitat. Hawley FWS 2762, 2998–99. The Lower Sawmill pasture has 3.7 miles of bull trout critical habitat in Sawmill Creek. Hawley FWS 2762, 2798. In between the north and south halves of the allotment, the Little Lost River flows through several miles of private and BLM lands where it is subject to major dewatering for

agriculture. Hawley FWS 2776; Second Marvel Declaration.

60. For most of the bull trout occupied streams, BLM states the bull trout do not spawn on the BLM allotment due to warm water temperatures. *See, e.g.*, Hawley FWS 2805 (Little Lost River), 2808 (Sawmill Creek), 2814 (Wet Creek). Instead, they travel upstream to spawn on Forest Service land (including the Mill Creek and Pass Creek allotments). *See* Hawley FWS 2238–40. BLM acknowledges potential for spawning on two allotment streams, Warm and Badger Creeks. Hawley FWS 2765, 2774.

61. BLM authorizes two permittees to graze hundreds of cattle on this allotment from early May through December every year. Hawley FWS 2758–60. Many of the bull trout streams are grazed in May or June. *Id*. However, others are grazed in the fall or winter when bull trout redds would be incubating, such as the Horse Creek pasture, which contains Badger Creek. FWS Hawley 2803. Cattle regularly access the occupied bull trout streams. Hawley FWS 2766.

62. In 2012, BLM reinitiated consultation with FWS over continued authorization of grazing on the allotment and prepared a new BA dated March 9, 2012. Hawley FWS 2755, 2978–3008. FWS concurred with BLM's NLAA conclusions in a 2012 Letter of Concurrence ("LOC"). Hawley FWS 2755, 2721–24.

63. WWP's original complaint in this action challenged the FWS's LOC. Dkt. 1. Following the filing of that complaint, BLM again reinitiated consultation with FWS on the Hawley Mountain allotment. Hawley FWS 2754–2833.

B. 2013 Hawley Mountain Allotment Consultation

64. BLM issued its new Hawley Mountain BA on September 10, 2013. Hawley FWS 2754. BLM's proposed action is the same as has been practiced on the

allotment for the past 11 years with grazing continued to be authorized along almost all reaches of occupied bull trout streams. Hawley FWS 2758, 2760–65.

65. The BA reviewed baseline conditions in the allotment, acknowledging that many of the occupied bull trout streams are accessible to livestock, Hawley FWS 2766, that the watershed has been impacted by water diversions, agricultural practices and channelization during the past century, *id*. at 2769; and that temperatures are above objectives throughout the watershed, *id*. at 2770. BLM acknowledged that almost all stream reaches on the allotment have temperatures that do not meet objectives, but for most streams claimed that grazing was not responsible. Hawley FWS 2773–2799, 2803, 2805, 2808, 2810, 2813.

66. BLM repeatedly states that conditions have improved over the past 11 years, *e.g.*, Hawley FWS 2769, 2774, 2776, 2783–84, 2786, 2786, but for many streams, little recent data has been collected. *See e.g.* Hawley FWS 2775 (no MIM or PIBO data sites for Badger Creek), 2778 (no yearly stubble height and bank alteration data, nor MIM or PIBO monitoring sites for Little Lost River).

67. No spawning surveys were conducted on any streams in the allotment. Hawley FWS 2765. The BA does not discuss any population information, such as the status or trend of relevant local populations. Hawley FWS 2765. The little electrofishing data presented indicates that there are very few bull trout on the allotment and does not indicate that recovery is occurring. Hawley FWS 2773, 2786, 2788, 2791.

68. The BA reviewed effects of the action for the bull trout streams in the watershed and the two streams designated as critical habitat. Hawley FWS 2801–18. BLM concluded for most streams that grazing will not impact any habitat attributes. *Id.*

BLM failed to acknowledge that past use of grazing standards and adaptive management had not protected riparian areas and streams from livestock damage. *Id*.

69. The BA concluded that the proposed action is not likely to adversely affect bull trout on any stream in the action area or adversely affect the PCEs of designated critical habitat for bull trout in the action area. Hawley FWS 2818. BLM did not discuss recovery. *Id*.

70. FWS concurred with BLM's NLAA conclusions in a Letter of Concurrence ("LOC") dated September 11, 2013. Hawley FWS 2834. FWS summarized the BA's discussion of the baseline, failing to add any additional information about the status or trend of bull trout at any scale or discuss other activities in the watershed, including water diversions or grazing on nearby private land or public land. Hawley FWS 2835–38.

71. FWS summarized the BA's discussion of effects, repeating BLM's assertions that the proposed grazing would maintain or improve conditions. Hawley FWS 2838–44. FWS did not consider the effects of any interrelated or interdependent activities such as water diversions. Hawley FWS 2844–45. FWS concurred with BLM's NLAA determination for bull trout and its critical habitat. Hawley FWS 2843–45.

Dated: February 3, 2014

Respectfully submitted,

s/ Kristin F. Ruether

Kristin F. Ruether
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of February, 2014, I caused the foregoing UNDISPUTED STATEMENT OF MATERIAL FACTS to be electronically filed with the Clerk of the Court using the CM/ECF system, which sent a Notice of Electronic Filing to the opposing counsel of record listed below:

- Rickey Turner Rickey.Turner@usdoj.gov
- Brett Grosko Brett.Grosko@usdoj.gov
- Joshua David Hurwit joshua.hurwit@usdoj.gov
- John Richard Hammond jrh@fisherpusch.com
- Karen Budd-Falen main@buddfalen.com
- Kathryn Brack Morrow kathryn@buddfalen.com

s/ Kristin F. Ruether

Kristin F. Ruether
Advocates for the West
kruether@advocateswest.org

Attorney for Plaintiff WWP