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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

FIRST SUPPLEMENTAL COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiffs Concerned Friends of the Winema, Klamath-Siskiyou Wildlands Center, Western Watersheds Project, Oregon Wild, and Center for Biological Diversity challenge the U.S. Forest Service's ("Forest Service") annual authorizations to graze the Antelope Cattle and Horse Allotment ("Antelope Allotment") since 2012 for violating the National Environmental Policy Act ("NEPA") and the National Forest Management Act ("NFMA"). This allotment is found on the Chemult Ranger District of the Fremont-Winema National Forest in south-central Oregon. Plaintiffs also challenge the new biological opinion completed by U.S Fish and Wildlife Service ("FWS") under the Endangered Species Act ("ESA") that analyzes impacts to threatened Oregon spotted frogs from grazing this allotment.

2. This Court previously ruled that the Forest Service had violated NEPA and NFMA by authorizing grazing in 2008-2010 before completing a supplemental NEPA analysis or biological evaluations to assess livestock grazing impacts to newly discovered sensitive species on the Antelope Allotment. *Oregon Natural Desert Ass'n v. Sabo,* 854 F.Supp.2d 889 (D. Or. 2012). As discussed in the prior case, the Antelope Allotment occurs in an area of central Oregon dominated by dry lodgepole pine forests but contains a large complex of fens and wetlands in the midst of these surrounding dry forests. These fens have formed under the specific hydrogeologic conditions that occur in this local area, and thus are a unique and irreplaceable resource. They are also an oasis for many sensitive plants and animals such as rare mosses, sedges, and mollusks that have been discovered on these allotment wetlands since 2005.

3. Despite this Court's prior ruling, the Forest Service has continued to authorize grazing on the Antelope Allotment each year without completing the required supplemental environmental analysis and revised allotment management plan to address the impacts from

grazing to these sensitive species and their habitat, in violation of NEPA. Furthermore, by authorizing grazing that its own experts acknowledge damages these sensitive wetlands and species, the Forest Service is acting inconsistently with direction in the Winema National Forest Land and Resource Management Plan ("Winema Forest Plan"), in violation of NFMA. Thus, Plaintiffs are forced to bring another challenge to the Forest Service's grazing authorizations to curtail the harm to the unique resources in this area.

4. In addition to these sensitive plants and mollusks, the Oregon spotted frog also occurs on the Antelope Allotment in Jack Creek. Jack Creek starts within the Antelope Allotment and flows south into the adjacent North Sheep Allotment. Because of its declining abundance and distribution, Oregon spotted frog was recently listed as a threatened species under the ESA, and Jack Creek is proposed for designation as critical habitat. The Jack Creek population of spotted frogs is currently at critically low numbers, with fewer than twenty known breeding females in the population.

5. Due to the threatened status of Oregon spotted frogs, the Forest Service and FWS consulted over the effects of grazing the Antelope Allotment on the Jack Creek population of spotted frog. Despite the Forest Service's admission that continued livestock grazing is likely to adversely affect the small Jack Creek population, FWS concluded that such effects would be minimal and would not jeopardize the species' survival and recovery or adversely modify its proposed critical habitat. These conclusions were not supported by data or sound scientific analysis, and thus are arbitrary and capricious. Moreover, the biological opinion failed to adequately protect the Jack Creek spotted frogs from harm and harassment caused by livestock, in violation of the ESA.

6. Due to these violations of law, Plaintiffs request that the Court set aside the 2012-

2015 annual operating instructions (AOIs) that authorize grazing on the Antelope Allotment, as well as FWS's new biological opinion for the allotment, and order appropriate injunctive relief to remedy these violations.

JURISDICTION AND VENUE

7. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 because this action arises under the laws of the United States, including NEPA, 42 U.S.C. § 4321 *et seq*., NFMA, 16 U.S.C. § 1600 *et seq*., ESA, 16 U.S.C. § 1531 *et seq.,* the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq*., the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq*., and the Equal Access to Justice Act, 28 U.S.C. § 2412 *et seq*. An actual, justiciable controversy exists between the parties, and the requested relief is therefore proper under 28 U.S.C. §§ 2201-02 and 5 U.S.C. §§ 701-06.

8. Venue is proper in this Court under 28 U.S.C. § 1391 because all or a substantial part of the events or omissions giving rise to the claims herein occurred within this judicial district, Plaintiffs and Defendants reside in this district, and the public lands and resources at issue are located in this district.

9. The federal government waived sovereign immunity in this action pursuant to 5 U.S.C. § 702.

PARTIES

10. Plaintiff CONCERNED FRIENDS OF THE WINEMA ("CFOW") is an Oregon non-profit public interest organization of approximately 13 members. It is headquartered in Chiloquin, Oregon. CFOW's mission is to promote ecologically sustainable management practices on the Fremont-Winema National Forest. CFOW actively participates in Forest Service and Department of Agriculture proceedings and decisions concerning the management of

public lands within the Fremont-Winema National Forest, including the Antelope Allotment, and throughout the surrounding Klamath Basin. CFOW brings this action on its own behalf and on behalf of its members, many of whom regularly enjoy and will continue to enjoy the public lands that are the subject of the agency decisions challenged in this action, for recreational, spiritual, and scientific activities. Members of CFOW regularly use the Antelope Allotment on the Fremont-Winema National Forest for nature observation, hiking and other recreational and aesthetic pursuits. CFOW and its members have researched, studied, observed, and sought protection for sensitive species and ecological systems on the Antelope Allotment, and plan to continue to do so. They derive recreational, conservation, spiritual, and aesthetic benefits from these rare species' existence in the wild. The degraded conditions of the Antelope Allotment and the authorization of grazing without compliance with statutory obligations adversely affect CFOW's goal of ecologically sustainable management, and CFOW's members continue to be injured by the mismanagement of the public lands and waters at issue in this action.

11. Plaintiff KLAMATH-SISKIYOU WILDLANDS CENTER ("KS Wild") is a non-profit public interest conservation organization based in Williams, Oregon and Ashland, Oregon. KS Wild's organizational mission is to conserve the outstanding biological diversity of the Klamath-Siskiyou region in Southern Oregon and Northern California. KS Wild and its members seek to protect the biological health and ecological resources of the region by protecting and preserving the native habitat and hydrologic health of the Klamath-Siskiyou ecoregion, including in the Fremont-Winema National Forest. KS Wild members use and enjoy the Antelope Allotment for recreational, aesthetic, conservation, scientific and educational purposes, and will continue to use this area for these purposes in the future. KS Wild has participated in management decisions concerning the Antelope Allotment and sought protections

for sensitive species located there, and will continue to do so in the future. Livestock grazing on the allotment that degrades the resources and species there and conflicts with recreational, aesthetic, and scientific use impairs the use and enjoyment of the Antelope Allotment by KS Wild members.

12. Plaintiff WESTERN WATERSHEDS PROJECT ("WWP") is a non-profit organization headquartered in Idaho, with offices and staff in Idaho, Arizona, California, Montana, Oregon, Wyoming, and Utah. WWP is dedicated to protecting and conserving the public lands and natural resources of watersheds in the American West. WWP, as an organization and on behalf of its 1,200-plus members, is concerned with and active in seeking to protect and improve the wildlife, riparian areas, water quality, fisheries, and other natural resources and ecological values of watersheds throughout the West, including south-central Oregon. WWP staff and members use the Antelope Allotment for recreation, scientific study, and aesthetic purposes, and will continue to do so in the future. WWP is active – and will continue to be active – in monitoring ecological conditions on the Antelope Allotment, in reviewing and commenting upon agency grazing decisions, including those at issue here, and in publicizing the adverse ecological effects of grazing in this area. Livestock grazing on the Antelope Allotment that degrades the species and habitat there and conflicts with recreational, aesthetic, and scientific use impairs the use and enjoyment of the allotment by WWP members.

13. Plaintiff OREGON WILD is a non-profit organization with approximately 10,000 members and supporters throughout the state of Oregon and the Pacific Northwest. Oregon Wild and its members are dedicated to protecting and restoring Oregon's lands, wildlife, and waters as an enduring legacy. Oregon Wild members use the Antelope Allotment for recreational, educational, enjoyment of wildlife, aesthetic and other purposes, and will continue to visit the

allotment in the future. Oregon Wild has participated in management decisions concerning the Antelope Allotment and sought protections for sensitive species located there, and will continue to do so in the future. Livestock grazing on the allotment that degrades the resources and species there and conflicts with recreational, educational, and aesthetic use impairs the use and enjoyment of the area by Oregon Wild members.

14. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY ("CBD") is a non-profit organization with more than 48,000 active members and with offices in Oregon and elsewhere across the country. CBD and its members are concerned with the conservation of imperiled species, including the Oregon spotted frog, and the effective implementation of laws to protect those species and their habitat. CBD's members use the Antelope Allotment for wildlife observation, educational, recreational, and aesthetic purposes, and plan to continue to use the allotment in the future for those same purposes. CBD has participated in management decisions concerning the Antelope Allotment and sought protections for sensitive species located there, and will continue to do so in the future. Livestock grazing on the allotment that degrades the species and habitat there and conflicts with educational, recreational, and aesthetic use impairs the use and enjoyment of the Antelope Allotment by CBD members.

15. Plaintiffs' interests have been and will continue to be directly harmed by Defendant's actions as challenged herein. Unless the relief prayed for herein is granted, Plaintiffs and the public will continue to suffer irreparable harm and injury to their interests.

16. Defendant U.S. FOREST SERVICE is an agency or instrumentality of the United States, under the U.S. Department of Agriculture, and is statutorily charged with managing the National Forest lands at issue here. The Forest Service issued the grazing authorizations, as well as the biological assessment, that are challenged in this action.

17. Defendant U.S. FISH AND WILDLIFE SERVICE is an agency or instrumentality of the United States, under the U.S. Department of Interior. FWS is responsible for administering the provisions of the ESA with regard to threatened and endangered species, including Oregon spotted frog. FWS issued the biological opinion that is challenged in this action.

STATEMENT OF LAW

National Forest Management Act

18. In 1976, Congress enacted NFMA, 16 U.S.C. § 1600 *et seq*., which governs the Forest Service's management of the National Forests. NFMA establishes a two-step process for forest planning. First, it requires the Forest Service to develop, maintain, and revise Land and Resource Management Plans ("LRMP" or "Forest Plan") for each national forest. 16 U.S.C. § 1604(a). The Forest Plan guides natural resource management activities forest-wide, setting standards, management goals and objectives, and monitoring and evaluation requirements.

19. Second, once a forest plan is in place, site-specific actions are planned and evaluated by the Forest Service. All site-specific decisions must be consistent with the broader Forest Plan. 16 U.S.C. § 1604(i); 36 C.F.R. § 219.15. The Winema National Forest Plan was adopted in 1990.

National Environmental Policy Act

20. Congress enacted NEPA in 1969, directing all federal agencies to assess the environmental impact of proposed actions that significantly affect the quality of the environment. 42 U.S.C. § 4332(2)(C). NEPA's goals are two-fold: (1) to ensure that the agency has carefully and fully contemplated the environmental effects of its action, and (2) to ensure that the public has sufficient information to participate in the decision-making process.

21. NEPA requires federal agencies to prepare, consider, and approve an adequate Environmental Impact Statement ("EIS") for "any major federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4(a)(1). To determine whether an action requires an EIS as required by NEPA, an action agency may prepare an Environmental Assessment ("EA"). 40 C.F.R. § 1501.4(b).

22. NEPA requires that an environmental analysis be supplemented if the action agency makes substantial changes to the proposed action or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. *Id*. § 1502.9(c)(1)(i)-(ii).

23. NEPA and its regulations prohibit agencies from taking any action or making any irreversible or irretrievable commitment of resources before its NEPA analysis is completed that would have an adverse environmental impact or prejudice or limit the choice of reasonable alternatives. 40 C.F.R. §§ 1502.2(f), 1506.1(a).

Endangered Species Act

24. The ESA was enacted to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such [] species." 16 U.S.C. § 1532(b).

25. Under ESA § 7(a)(a), all federal agencies must "insure that any action authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of [designated critical] habitat." 16 U.S.C. § 1536(a)(2). Critical habitat is the area that contains the physical or biological features essential to the "conservation" of the species and which may require special protection or management considerations. *Id.* § 1532(5)(A).

Conservation of a species requires the use of all methods and procedures that are necessary for the species' recovery. *Id.* § 1532(3).

26. To evaluate the potential effects of an action on listed species and critical habitat, an action agency prepares a biological assessment. 50 C.F.R.§ 402.12. If the action agency determines that the action is "likely to adversely affect" a listed species or critical habitat, it must seek formal consultation with FWS. 50 C.F.R. § 402.14. Formal consultation results in FWS issuing a biological opinion to determine whether the action is likely to jeopardize the survival and recovery of the species or adversely modify its critical habitat. *Id.*

27. During consultation, FWS must review all relevant information, evaluate the current status of the species and critical habitat, and evaluate the direct, indirect, and cumulative effects of the action on the species and its critical habitat. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. §§ 402.02, 402.14(g). Throughout its analysis, FWS must utilize the best scientific data available. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d).

28. If the action will cause "take" of a listed species in the form of harm or harassment, the biological opinion must also contain an incidental take statement to permit take that is incidental to the action. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(g)(7). The incidental take statement must specify the amount or extent of the impact on the species of any incidental taking, and contain mandatory terms and conditions to implement measures that are necessary or appropriate to minimize the impact of such taking. 50 C.F.R. § 402.14(i)(1). "Take" includes direct harm or harassment of a listed species as well as habitat degradation that significantly impairs the species' essential behaviors such as breeding, feeding, and sheltering. 16 U.S.C. § 1532(19); 50 C.F.R. § 17.3

STATEMENT OF FACTS

I. Long-Standing Resource Concerns on the Antelope Allotment

29. The Antelope Allotment on the Fremont-Winema National Forest in central Oregon contains a variety of unique resources and imperiled species. These resources are located primarily on the Chemult Pasture of the Antelope Allotment and immediately to the south on the adjacent North Sheep Pasture of the Jack Creek Sheep and Goat Allotment. Because of concerns about livestock grazing damage to these special resources, the Antelope Allotment has been the subject of two prior lawsuits.

30. The unique hydrogeology in this local area has created an extremely unique wetland complex full of groundwater dependent ecosystems that include meadows, fens, bogs, seeps, and springs within the surrounding lodgepole pine forests. While a small number of fens have been found on other near-by Forest Service districts, the Chemult District—and the Chemult Pasture in particular—contains the most by far and the greatest diversity. Due to the unique nature of this groundwater system and the fen complexes it supports, independent scientists have been studying this area since 2010 and submitting reports to the Forest Service on its hydrogeology.

31. These fens provide habitat for a variety of rare plants and animals, including mollusks, vascular plants, and bryophytes (mosses), many of which are designated as Forest Service Sensitive Species in Region 6, which encompasses Washington and Oregon. Through surveys conducted between 2005 and 2009, the Forest Service discovered many new sites of sensitive plants and mollusks on the Chemult Pasture, documenting one sensitive mollusk, seven sensitive vascular plants, and five sensitive bryophytes. Additional surveys in 2010 and 2011 confirmed that the Chemult Pasture is unique in the extent and diversity of the fens and sensitive

species found there compared to other Forest Service lands.

32. The diversity and abundance of these fens and species is the result of the unique hydrogeology of the area. The complex system of groundwater-dependent meadows, fens, and wetlands within the allotment developed due to interactions between pumice, topography, and precipitation patterns specific to this particular area, which led to a groundwater system that contributed to peat accumulation and development of peat-based plant communities. It is the result of millennia of hydrological, geological, and biological changes. However, despite its age, the system is fragile and constantly evolving; thus it is susceptible to irreversible damage.

33. In addition to the unique wetland complexes, the Chemult Pasture also contains a 7.6-mile stretch of Jack Creek, which is habitat for one precariously small population of Oregon spotted frog. Oregon spotted frog was listed as a threatened species under the ESA in August 2014 and Jack Creek is proposed as critical habitat. The Jack Creek population is one of only a few known populations of Oregon spotted frog that occur on the Fremont-Winema National Forest.

34. Since 2000, the Jack Creek spotted frog population has declined markedly. Egg masses numbered 333 in 2000 but have remained below 25 since 2006. The population is currently at critically low numbers and is isolated from all other spotted frog populations due to distance. The longer an isolated population stays at low numbers, the higher the likelihood it will experience genetic inbreeding, which reduces its chance of recovery.

35. The upper portions of Jack Creek flow year-round, while lower portions become intermittent during the summer and into the fall. In drought years, more of the stream dries up and for longer periods of time. In intermittent reaches, spotted frogs occupy remnant pools that persist as water levels drop. These are the same pools at which cattle often congregate to find

water, forage, and shade during the hot summer and early fall.

36. Cattle use along Jack Creek degrades spotted frog habitat by altering the streambank and stream channel, removing riparian vegetation, and compacting riparian soils, all of which impair habitat features for frogs, remove hiding cover, and reduce instream water flows. Cattle degrade water quality by adding excrement to the stream, and dewater intermittent pools by drinking from them. In addition, cattle walking in and along the creek trample and disturb frogs of all life stages. Conflicts between cattle and frogs increase when stream flows are limited and frogs and cattle are using the same remnant pools, which is particularly evident during drought years.

37. Like the impacts to spotted frog habitat, cattle damage fens in numerous ways. They cause significant compaction and hummocking of wet soils, which dries the soil out and alters the hydrology of these wetland areas. They also trample and graze riparian plants, and their excrement alters the natural water chemistry of the wetlands. The cycle of repeated hoof damage that starts the drying process leads to a shift in plant species composition that further exacerbates the drying and destroys the properties of the fen system. The destruction of these fens eliminates habitat for the thirteen sensitive species of plants and mollusks that depend on them for survival. Forest Service botanists have stated that livestock grazing was the most evident detrimental disturbance occurring in those wetland habitats.

38. Concerns about livestock grazing harming Oregon spotted frogs as well as fens and sensitive plant species were the impetus for the two prior lawsuits over the Antelope Allotment. The first lawsuit focused on impacts from cattle to the Jack Creek population of Oregon spotted frog. *Ctr. for Biological Diversity v. Wagner*, No. 1:08-cv-302-CL (D. Or., filed Mar. 11, 2008).

39. In response to that initial lawsuit, the Forest Service built a fence in 2008 along part of Jack Creek and prohibited cows from grazing inside the fence to protect the spotted frog. *Wagner*, No. 08-302-CL, Order and Report and Recommendation at 8 (Docket No. 123). The agency also indicated that it expected to complete a new allotment management plan ("AMP") for the allotment in early 2010. *Id*. at 10.

40. The fence along Jack Creek protected only a few of the fens and sensitive plant sites found throughout the Chemult Pasture. The fence also failed to keep cattle out of Jack Creek, as numerous instances of cattle trespassing inside the fence were documented in 2008-2010. Because of continuing concerns about harm to spotted frogs, concerns about impacts to the newly discovered sensitive plants and mollusks on the allotment, and the Forest Service's failure to complete a new AMP, a second lawsuit was initiated in 2010. *Or. Natural Desert Ass'n v. Sabo*, No. 1:10-cv-1212-CL (D. Or., filed Oct. 4, 2010).

41. In light of the harm to fens and frogs, and the failure to complete a new AMP, the 2010 lawsuit alleged that the Forest Service had violated NEPA and NFMA for failing to analyze and address the impacts of grazing on the sensitive species discovered on the allotment between 2005-2009, and on the Oregon spotted frog, while continuing to authorize grazing that was damaging them and their habitat, contrary to direction in the Winema Forest Plan.

42. This Court held that the Forest Service had violated NFMA by failing to assess the impacts of grazing on these sensitive species in a biological evaluation, as required by the Forest Plan, and had violated NEPA by failing to conduct supplemental NEPA analysis in light of the new information documenting these species on the allotment. *Sabo*, 854 F. Supp. 2d 889, 915-20, 921-24 (D. Or. 2012). The court explained that environmental analyses must be completed before any irreversible and irretrievable commitments of resources occur, and that the

plaintiffs had shown that allowing grazing each season was causing potentially irreversible harm to sensitive species and their habitat. *Id*. at 923.

43. Despite finding these legal violations, the court did not grant injunctive relief requested by the plaintiffs for the 2011 grazing season, noting that 2011 was a particularly wet year, the Forest Service had shortened the grazing season from three to two months, and the permittee had agreed to increase riding of the allotment to five to six days per week to monitor fences and herd cattle away from sensitive resources. *Id*. at 898-900. Although the court denied injunctive relief, it expressed its continued concern for the unique resources on the allotment, and that it expected the Forest Service to complete its NEPA and AMP process for the allotment in a timely manner. *Id*. at 900.

II. Continuing Harm to Resources From Livestock Grazing

44. Since the 2010 lawsuit was resolved, the Forest Service has continued to authorize grazing on the Chemult Pasture each year, but has yet to complete its NEPA analysis and AMP for the allotment. Also since 2010, unauthorized cattle use has continued to occur inside the Jack Creek riparian fence on the Chemult Pasture and along Jack Creek in the North Sheep Pasture to the south, and livestock have continued to graze most of the fens on the Chemult Pasture.

45. In 2011, even though the permittee promised to ride the allotment more often to better control his cattle, numerous instances of unauthorized use were documented that season. This documented trespass led the Forest Service to issue two notices of non-compliance to the Antelope Allotment permittee on October 25, 2011—one for excess use of the allotment past the off-date, and the other for repeated cattle trespass inside the Jack Creek riparian fence.

46. Cattle grazing on the allotment in 2011, including trespass grazing, caused

documented adverse impacts to fens and occupied Oregon spotted frog habitat, such as trampling of wet soils, vegetation, and streambanks, channelization of water from cattle trails, and soil hummocks and pedestalling.

47. Despite the two notices of non-compliance from 2011 and anticipated summer drought conditions, the Forest Service authorized grazing on the Chemult Pasture in 2012 with the same number of cattle for the full three-month period (July 1 – September 30). Again in 2012, the Forest Service received numerous reports of allotment fences in poor condition and livestock grazing in unauthorized areas, including inside the Jack Creek riparian fence. Cattle grazing on the allotment in 2012 in authorized and unauthorized areas caused documented adverse impacts to fens and spotted frog habitat in Jack Creek, including significant trampling of soils and vegetation.

48. On April 18, 2013, a drought emergency was declared for Klamath County, Oregon. Despite this, and still without a final NEPA analysis or decision, the Forest Service authorized the same number of cattle to graze the Chemult Pasture for the full three-month season in 2013. The 2013 AOI again included a reminder that cattle were not authorized to graze inside the Jack Creek riparian fence and that it was the permittee's responsibility to maintain that and other fences.

49. Forest Service employees reported poorly maintained fence conditions on the allotment in May 2013. Throughout the season, the agency received numerous reports of unauthorized cattle use, including inside the Jack Creek riparian fence and to the south on the North Sheep Pasture. On August 26, 2013, the Forest Service issued a warning letter to the Antelope Allotment permittee, and on November 7, 2013, issued a notice of non-compliance for unauthorized use of areas outside the allotment and inside the Jack Creek riparian fence.

50. Cattle grazing both on and off the allotment in 2013 caused harm to fens and sensitive plant species, as well as to Oregon spotted frogs in Jack Creek. Cattle were documented trampling fens and wetland vegetation, trampling streambanks, creating trails that channelize water, dewatering pools in Jack Creek, and adversely impacting water quality in occupied spotted frog habitat. These impacts were compounded by the drought conditions, which further reduced water levels and exacerbated cattle impacts within fen and spotted frog pool habitat.

51. Concerns about cattle from the Antelope Allotment trespassing into the North Sheep Pasture to the south grew when Oregon spotted frogs were found in two pools of Jack Creek that were previously considered unoccupied, both of which occurred in the North Sheep Pasture more than three miles downstream of known occupied habitat. This discovery occurred in July and August 2013; and in April 2014, five Oregon spotted frog egg masses were found in this same area, indicating that breeding had occurred there.

52. The conflicts between cattle and spotted frogs increased in 2013 as summer progressed, with many portions of Jack Creek drying up and remnant pools becoming smaller and smaller. Cattle were frequently observed congregating near the same remnant pools used by spotted frogs, including the dwindling spotted frog pools discovered in the North Sheep Pasture. One Oregon spotted frog was observed to have been trampled by cattle. Due to impacts from trespass cattle, the Fremont-Winema forest wildlife biologist expressed concern in September 2013 about the recently discovered spotted frogs in lower Jack Creek.

53. In 2014, the Forest Service again ignored the previous year's non-compliance and authorized the same grazing on the Chemult Pasture. The drought was predicted to be even worse in 2014, particularly given that water levels had not fully recovered from the 2013

drought. Over the course of the summer, water levels dropped in Jack Creek to below what they were in 2013 and even fewer remnant pools lasted through the summer.

54. During the 2014 grazing season, the Forest Service received reports of numerous occasions in July and August where cattle were found inside the Jack Creek riparian fence or on the North Sheep Pasture. This trespass occurred despite fixing several fences and placing additional water troughs on the Chemult Pasture, which was supposed to reduce the recurrent trespass problems.

55. In light of the repeated trespass of cattle and the decreasing water levels in Jack Creek, Plaintiffs sent a letter to the Forest Service on August 20, 2014 expressing their concerns about the threat to spotted frogs in Jack Creek. The Forest Service responded with a letter dated August 27, 2014 stating that the permittee had been instructed to remove his cattle from the allotment due to the trespass and lack of water on the allotment.

56. On August 29, 2014, the Oregon spotted frog was listed as a threatened species. Around that same time, the Forest Service constructed four ponds on the Chemult Pasture to provide additional open water habitat for spotted frogs.

57. The permittee began removing cattle from the allotment in late August, but small groups of cows remained scattered across the Chemult Pasture through September and into October. Despite the early removal, cattle caused impacts to Jack Creek and many of the fens on the pasture in 2014. Fens that retained water near the surface through the summer suffered the most damage, with cattle extensively churning up the soils and trampling vegetation.

58. After two consecutive years of non-compliance, the Forest Service slightly altered grazing on the Chemult Pasture in 2015 by authorizing the same number of cattle but shortening the end of the grazing season by two weeks (July 1 – Sept. 15). The 2015 AOI was issued

following the release in early June of a new biological opinion by FWS, and included a new riparian utilization standard required by the biological opinion. There were no other changes to grazing management compared to previous years. The AOI also noted the continuing severe drought in the area.

59. Despite the slightly shorter grazing season, cattle caused significant damage to fens during the 2015 season. Several of the most important fens received severe trampling. Due to the drought, groundwater levels were also extremely low, more than 20 centimeters below the surface in many locations, which compounded the detrimental effects of grazing. Spotted frog egg mass numbers were also extremely low in 2015.

60. As noted above, the issuance of the 2012-2015 AOIs occurred without completion of a new NEPA analysis and AMP for the Antelope Allotment. The Forest Service has been working on its NEPA analysis during that time but has repeatedly withdrawn documents and changed course, continually delaying a final decision.

61. The Forest Service issued a draft EA in August 2012 and a final EA and Decision Notice in February 2013, but then withdrew the Decision Notice in April 2013 because the agency had not made the project record available to the public before the decision was signed. In public comments on the draft EA, the Forest Service botanist who had conducted many of the fen surveys on the Chemult Pasture noted that the fen complex there is a "one-of-a-kind biophysical resource" on the forest, and likely within all of Region 6, due to high density of fens as well as the large number of sensitive botanical species sites. He stated that the area warranted special management status, and recommended permanently removing all or most livestock grazing from the area of these groundwater-fed ecosystems because of the damage cattle cause.

62. In December 2013, the Forest Service issued another draft EA for the Antelope

Allotment and accepted another round of public comments. Instead of issuing a final EA and Decision Notice, the Forest Service stated in fall 2014 that it would undertake an EIS. It published a notice of intent to prepare an EIS on November 6, 2014 and issued a draft EIS in December 2014. Plaintiffs again submitted comments on the draft EIS.

63. The agency has not yet released a final EIS. It has indicated that a final EIS is not expected until the end of the year at the earliest, at which point it must undergo the administrative objection process before a final decision can be signed. Thus, not only were the 2012-2015 AOIs issued without any completed NEPA analysis and AMP, but it is not certain that the new analysis and AMP will be in place before the 2016 grazing season.

III. Inconsistency of Grazing with Winema Forest Plan

64. The Winema Forest Plan contains direction to protect various resources such as soils, riparian areas, fish and wildlife, and threatened, endangered, and sensitive species. The Forest Plan includes the following goals, objectives, and standards:

- 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;
- Continue to survey and develop biological evaluations for sensitive species. Develop individual species management guidelines for sensitive species;
- Improve riparian areas to provide enhanced habitat for wildlife and fish;
- The demand for livestock grazing will be met only when it does not conflict with other uses;
- Coordination of grazing with other resource operations shall include threatened,

endangered, and sensitive plant and animal species, riparian areas conflicts, livestock and wildlife conflicts;

- 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;
- Fish and wildlife habitat shall be managed to maintain viable populations of all existing native and desired non-native plant and animal species;
- Manage new-found habitat sites for wildlife or botanical resources individually as part of the environmental analysis process for specific management activities;
- Habitat use of the forest by threatened, endangered, or sensitive species shall be evaluated. Habitat requirements sufficient to maintain the species shall be provided;
- Land management activities shall be planned and conducted to maintain or improve soil productivity and stability;
- In riparian ecosystems, hydrologic conditions and riparian habitat shall be maintained or improved.

65. The Forest Service's grazing authorizations in 2012-2015 were not consistent with this Forest Plan direction. Although the Forest Service completed several specialist reports and biological evaluations that considered grazing impacts to resources on the Antelope

Allotment, these documents do not demonstrate that grazing management of the allotment is maintaining and improving riparian areas, soils, and habitat, and providing for viable populations of threatened and sensitive plant and animal species.

66. The Forest Service's botany, hydrology, and soils reports do not show that the 2012-2015 AOIs were consistent with Forest Plan direction related to riparian areas, soils, and sensitive plants. The botany report contained no information on whether current sensitive plant populations were at viable levels or what constituted a viable population. The report did not explain how it could assess or support its conclusions that grazing would maintain viable populations of all twelve sensitive plant species found on the pasture without such information.

67. The reports' conclusions about impacts to riparian areas and soils relied on the Forest Service's fen assessment. This assessment did not fully follow the chosen protocol, did not include all fens, and was based on data from 2011 that did not reflect drought conditions. The Forest Service still concluded that many of the fens were not in good condition and were not meeting Forest Plan standards for soils or riparian areas, and that cattle had caused and would continue to cause damage to them. Evidence in the record confirms that cattle have damaged many of the fens on the allotment, particularly during drought years of 2013 and 2014.

68. Similarly, the Forest Service's wildlife report did not show that the 2012-2015 AOIs were consistent with Forest Plan direction related to the Oregon spotted frog. The Forest Service concluded that grazing would not cause a loss of viability to the Jack Creek population of spotted frog. This isolated population of Oregon spotted frog has remained at critically low numbers since at least 2006, increasing the likelihood of genetic inbreeding. With the population at a precariously low level, the loss of even one adult decreases the likelihood of restoring a viable frog population. The wildlife report did not explain or provide support to show how

adverse effects from grazing that could admittedly impact individual frogs would not further reduce the viability of this tiny population.

69. The wildlife report also contained inaccurate statements and unsupported assertions about the effects of grazing on this spotted frog population. For instance, the report assumed that cattle would rarely trespass into unauthorized areas along Jack Creek and thus impacts from grazing would be minimal. Yet the record shows that cattle have routinely trespassed inside the Jack Creek riparian fence and into the North Sheep Pasture each year, and have caused adverse effects to spotted frogs, particularly during drought conditions.

70. The Forest Service's flawed reports, and the additional evidence in the record of cattle causing harm to fens, sensitive plants, and the Jack Creek spotted frog population, do not demonstrate that the 2012-2015 AOIs were consistent with the Forest Plan.

IV. Consultation with FWS Over Grazing Impacts to Oregon Spotted Frog

A. Forest Service Biological Assessment

71. Once the Oregon spotted frog was listed as a threatened species, the Forest Service was required to consult with FWS over impacts to the frog from grazing the Antelope Allotment. The Forest Service completed a biological assessment ("BA") in February 2015.

72. The BA described the proposed action as grazing three pastures that contain occupied Oregon spotted frog habitat—the Chemult Pasture, the North Sheep Pasture, and the Jack Creek Riparian Unit (the area inside the Jack Creek riparian fence)[1]—as well as fence construction, fence re-construction, development of 11 off-channel water sources, and maintenance of seven existing ponds and spring structures. It also noted that the permittee would

[1] As noted above, the North Sheep Pasture was part of the adjacent Jack Creek Sheep and Goat Allotment, which has been closed for many years. The proposed action in the BA reopens the North Sheep Pasture and includes it as part of the Antelope Allotment.

turn over management of its intermixed private lands to the Forest Service to be managed as part of the Chemult Pasture.

73. The BA later showed the action includes 15 miles of fence construction, 10 miles of fence reconstruction, 3 new off-channel water developments, and 41 springs, troughs, or ponds to maintain or reconstruct. The BA did not identify the locations of the new water developments or explain the discrepancy with its earlier description of 11 new developments.

74. The BA stated that a two herd grazing system would be used, the Chemult and North Sheep Pastures would use a deferred rotation system that "periodically" incorporated a year of rest between pastures or portions of a pasture, and the Jack Creek Riparian Unit would allow "some level" of grazing under a high intensity/low frequency scheme. The BA did not describe the high intensity/low frequency system that would be used in the riparian pasture, but noted that part of the pasture would not be grazed until restoration objectives for spotted frog habitat were met there.

75. Movement of livestock out of pastures would occur when the utilization standard is met. The BA stated that utilization will be measured at key areas, and the standard is an average of 35% utilization for each pasture. The BA did not identify where the key areas are located within each pasture or describe the protocol for measuring utilization. Appendix A of the BA described additional monitoring that is supposed to occur but did not identify the relevant standards or what would trigger adjustments to grazing management.

76. The BA noted that egg mass data indicated the Jack Creek spotted frog population has been declining since 1996 and currently is very low; and populations across the Klamath Basin are low in general.

77. The BA assessed the effects of the proposed grazing and concluded that it is likely

to adversely affect Oregon spotted frogs and spotted frog critical habitat. It recognized adverse effects from cattle degrading spotted frog habitat, altering the hydrology of Jack Creek, and trampling frogs and egg masses; and that low water during drought conditions exacerbates the threats from grazing. The BA asserted that adverse effects would be minimized due to the grazing systems implemented, use of an average 35% utilization standard, and distribution of cattle away from Jack Creek through fencing, herding, salting, and water structures.

B. FWS Biological Opinion

78. FWS completed its biological opinion ("BiOp") in June 2015, and it is valid for ten years. The FWS BiOp relied upon the BA and incorporated it by reference, including by adopting the BA's description of the proposed action.

79. Like the BA, the BiOp relied on an average 35% utilization standard as the primary mitigation measure to protect spotted frogs. The BA and BiOp both claimed that 35% utilization is the same as 6 inches of stubble height but did not cite any scientific studies to support that assertion. The same level of utilization can result in varying stubble heights depending on the plant communities and plant species that are monitored within riparian areas.

80. Three parcels of private land owned by the permittee occur within the Chemult Pasture, all of which contain occupied habitat for Oregon spotted frog. The BiOp's analysis of effects to Oregon spotted frog relied on two assumptions related to this private land. First, that the permittee would turn over management of these three private land inholdings to the Forest Service. Second, that the permittee and the Forest Service would reach an agreement that defines restoration objectives for frog habitat within two units of the riparian pasture and that achievement of those objectives would meet the conservation needs of Oregon spotted frog.

81. When describing the life history and habitat of Oregon spotted frogs, the BiOp

differentiating between breeding habitat, habitat to survive the dry season, and overwintering habitat. The BiOp recognized that frogs have high fidelity to breeding sites, often using the same egg-laying sites each year, and thus impacts to any one breeding location could significantly reduce an Oregon spotted frog population. A limited number of breeding sites exist in Jack Creek, which make up just a small proportion of the total habitat.

82. The BiOp acknowledged that small, isolated frog populations, such as the Jack Creek population, are vulnerable to extirpation from stochastic events, chronic sources of mortality, and genetic inbreeding. Many spotted frog populations have low genetic variation because of their small size and inability to exchange genes with other populations.

83. FWS's BiOp showed that Oregon spotted frogs in the Williamson River sub-basin, which includes the Jack Creek population, are threatened by human development, grazing, shrub encroachment, loss of beavers, climate change, and their small population size and lack of connection between breeding locations.

84. For the Jack Creek spotted frog population, the BiOp stated that drought conditions coincided with the dramatic decline of the population in the early 2000s. The BiOp admitted that this population of spotted frogs is particularly susceptible to harm from grazing during drought years when frogs may aggregate in isolated pools or small sections of Jack Creek that are used by cows. By 2011, only 1% of historical egg mass numbers were documented in Jack Creek due to drought combined with poor water quality, algal blooms, loss of protective habitat, and alteration of bank condition.

85. The BiOp described adverse effects to spotted frogs from cattle due to: (1) physical alteration of streambanks, stream channels, the water column, and the riparian vegetation community; (2) effects on water quality and quantity; and (3) disturbance to

individual frogs.

86. The BiOp recognized that almost immediately after entering riparian areas, cattle can damage streambanks and stream channels, and use of riparian areas may be highest immediately after cattle enter a pasture. It also stated that vegetation and streambank recovery achieved during long rest periods may quickly be lost if cattle reenter the area.

87. The BiOp claimed that grazing may have beneficial effects if frog breeding habitat occurs in highly altered wetland communities with excessive biomass from reed canarygrass or other invasive species. However, it did not list reed canarygrass as a threat to this population, and acknowledged that it is found at only two small sites in the action area, which are not expanding and are being treated with herbicide.

88. Despite recognizing that past grazing likely degraded the quality of Oregon spotted frog breeding habitat and reduced reproduction, the BiOp claimed the baseline condition of the habitat appears to meet the species' survival and recovery needs. The BiOp did not explain why the spotted frog has remained at a precariously low population level for almost ten years if the habitat is sufficient to recover the population.

89. FWS concluded in the BiOp that the proposed grazing is likely to adversely alter some elements of streambanks, stream channels, the water column, and the riparian vegetation community, but these adverse effects will be minimized due to the average 35% utilization standard and the expected distribution of cows across the allotment. Therefore, the effects to Oregon spotted frog are expected to be minor and not anticipated to impair its ability to survive and successfully reproduce in the action area.

90. In its discussion of effects to water quality, the BiOp concluded that impacts will be minimized because cattle are expected to disperse across the allotment, and thus will have

insignificant effects to the Oregon spotted frog. It also stated that the proposed grazing is likely to improve habitat by removing biomass from breeding areas despite no evidence that breeding areas in Jack Creek have excess biomass. The BiOp failed to address impacts to water quality from cattle congregating at the same pools used by frogs as water levels in Jack Creek drop.

91. With regard to water quantity, the BiOp acknowledged that cattle can adversely affect conditions in Jack Creek, drinking 15 to 20 gallons of water per day, and that effects increase when stream flows are limited. Cattle drinking from Jack Creek can trample or disturb individual frogs, reduce the amount of habitat, and increase susceptibility of frogs to desiccation or stranding. Drought conditions compound the impacts of cattle because even more habitat is lost due to low water levels. The BiOp admitted that conditions during low water years are not likely to fully meet the life history requirements of spotted frogs in Jack Creek. However, the BiOp did not assess the extent to which these requirements are not being met under the current severe drought or likely future drought given climate change conditions.

92. The BiOp recognized that grazing causes adverse impacts on individual spotted frogs because cattle can disturb and/or displace individual frogs, causing them to move away from cover or preferred habitat, experience increased predation risk, expend energy, and lose foraging opportunities. The results of this disturbance may adversely affect individual Oregon spotted frog fitness as well as populations dynamics. Cattle can also trample adult frogs, juveniles, and tadpoles, killing or injuring them, which the BiOp admitted likely occurs when cattle graze in occupied habitat of Jack Creek.

93. The BiOp estimated how many frogs might be killed from trampling in each pasture at issue. Because fewer frogs have been detected in the southern end of the Jack Creek riparian pasture and the North Sheep pasture, FWS assumed that no frogs would be affected by

the proposed grazing in those two units. It made this assumption despite knowing that frogs breeding in the North Sheep pasture were adversely affected by cattle in 2013.

94. FWS next assumed that in the other pastures, only 3% of the total number of frogs that are exposed to grazing cattle are likely to be killed by cattle trampling due to the 35% utilization standard, riparian exclosure fence, alternate water sources, and salt blocks that will draw cows away from Jack Creek. The BiOp did not provide any scientific support for that number or explain what impact an annual 3% mortality rate from cattle trampling would have on the small Jack Creek population. The BiOp failed to analyze the harm to individual frogs in Jack Creek from cattle disturbing and displacing them or reducing water quantity by drinking from the same pools that frogs are using.

95. In its overall conclusion about effects to the species, the BiOp stated that anticipated effects to spotted frog habitat from the proposed action are likely to be short-term and spatially limited. It did not consider whether those spatially limited effects might occur in breeding habitat and what impact that would have on the population.

96. The BiOp admitted that cattle are expected to cause exposure and disturbance to spotted frog tadpoles, metamorphs, juveniles, and adults; and that adverse effects will increase during drought years when spotted frogs aggregate in isolated pools or small sections of Jack Creek. However, the BiOp stated that adverse effects are not likely to occur at such a level that results in extirpation of the frogs in Jack Creek due to previous and ongoing habitat restoration efforts, the 35% utilization standard, and other features of the proposed action such as fences and off-channel water developments. The BiOp did not discuss if these adverse effects would allow for recovery of the population.

97. The BiOp also claimed that because adverse effects to individual frogs from the

proposed action are not believed to be substantial except during drought years, they are unlikely to have measurable adverse impacts that reduce the survival and recovery of Oregon spotted frog at the rangewide scale. The BiOp failed to consider that the last four years have been drought years and analyze the cumulative substantial impacts from those years on the survival and recovery of the species.

98. The BiOp also discussed effects of the proposed grazing on proposed critical habitat in Jack Creek by analyzing impacts to the primary constituent elements ("PCEs") of Oregon spotted frog critical habitat. PCEs are those elements that provide for the species' life history processes and are essential for the conservation of the species. The BiOp noted that where populations have declined, such as here, it is important that critical habitat consistently provide for adequate PCEs for all frog life stages to adequately support conservation of the species.

99. FWS has identified three PCEs for Oregon spotted frog critical habitat: (1) nonbreeding, breeding, rearing, and overwintering habitat with certain characteristics, (2) aquatic movement corridors that allow for movement of frogs between breeding areas, and (3) refugia areas within each of the four habitat types to protect frogs from predators.

100. The BiOp admitted that the proposed grazing is likely to have negative effects to the recovery-support function of PCE 1 due to impacts to vegetation. It did not assess cattle impacts to stream banks or stream channels for this PCE.

101. The BiOp also admitted that cattle are likely to have some negative effects to the recovery-support function of PCE 2 in drought years because they reduce water quantity. Livestock may dry up remnant pools or other portions of Jack Creek, which would prevent frogs from moving between habitat areas.

102. The BiOp claimed that grazing is not likely to have a negative effect on PCE 3. It stated that any loss of overhanging banks due to past grazing is compensated for by abundance of vegetation because of the lack of grazing on Federal and private land in the last six years, and banks may improve under the proposed level of grazing. Two of the three private land parcels in the Chemult Pasture have been grazed the last six years.

103. FWS concluded in the BiOp that the level of adverse effects to proposed critical habitat is not likely to cause further degradation and thus the habitat would likely serve the conservation needs of the species. It assumed that because adverse effects to PCE 1 and 2 would be limited to a small percentage of the total acreage within critical habitat unit 12, these effects are likely to be compatible with sustaining Oregon spotted frog in that unit. It did not consider how they would affect conservation of the Jack Creek population or how important that population is for sustaining spotted frogs in unit 12.

C. Incidental Take Statement

104. FWS included an Incidental Take Statement ("ITS") within the BiOp to authorize take of Oregon spotted frogs caused by the proposed grazing. The ITS used the same estimate of frogs killed by cattle trampling to estimate the amount of "take" that would occur. FWS did not estimate how much take would occur due to cattle disturbing or displacing frogs, or dewatering pools and leaving frogs stranded. FWS concluded that the anticipated level of take would not result in jeopardy to Oregon spotted frog or adverse modification of its proposed critical habitat.

105. Because monitoring impacts to individual frogs is difficult, the ITS relied on the average 35% utilization standard to monitor take. The authorized level of incidental take will be exceeded if the average 35% utilization standard is exceeded by 10% on any two consecutive years within a given pasture, or if the permitted season of use is exceeded on any two

consecutive years within a given pasture.

106. The ITS set forth non-discretionary terms and conditions to minimize the impact of the proposed grazing. These terms and conditions require monitoring livestock use, streambank damage, and cattle impacts to frogs in the normally perennial stretch of Jack Creek—but not the intermittent stretch-as water levels drop. They did not include other riparian monitoring described in the biological assessment, and did not identify triggers for when changes to grazing must occur.

FIRST CLAIM FOR RELIEF

VIOLATIONS OF THE NATIONAL ENVIRONMENTAL POLICY ACT

107. Plaintiffs reallege and incorporate by reference the preceding paragraphs.

108. This first claim for relief challenges the Forest Service's violations of the National Environmental Policy Act, 43 U.S.C. § 4321 et seq., and NEPA's implementing regulations. Plaintiffs bring this claim pursuant to the judicial review provisions of the APA, 5 U.S.C. § 706.

109. An agency must prepare a supplemental NEPA analysis if the agency makes substantial changes to the proposed action or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. *Id*. § 1502.9(c)(1)(i)-(ii).

110. NEPA prohibits agencies from taking any action or making any irreversible or irretrievable commitment of resources before an environmental analysis is completed that would have an adverse environmental impact. 40 C.F.R. § 1506.1(a)(1).

111. The Forest Service violated NEPA by authorizing grazing on the Antelope Allotment in 2012-2015 without first completing an environmental analysis under NEPA and revised allotment management plan to supplement its prior 1995 analysis for the Antelope

Allotment. Such analysis is required to assess significant new information that arose since 2005 documenting thirteen sensitive plant and mollusk species at numerous new sites on the allotment that are accessible to livestock, as well as new information related to the Oregon spotted frog, and the impacts of grazing on those species.

112. Accordingly, the Forest Service's 2012-2015 AOIs are arbitrary, capricious, an abuse of discretion, not in accordance with NEPA, and issued without observance of procedure required by law, and therefore are actionable pursuant to the APA, 5 U.S.C. § 706(2)(A) & (D).

SECOND CLAIM FOR RELIEF

VIOLATIONS OF THE NATIONAL FOREST MANAGEMENT ACT

113. Plaintiffs reallege and incorporate by reference the preceding paragraphs.

114. This second claim for relief challenges the Forest Service's violations of the National Forest Management Act, 16 U.S.C. § 1600 *et seq*., and NFMA's implementing regulations, in authorizing grazing on the Antelope allotment in 2012-2015. Plaintiffs bring this claim pursuant to the judicial review provisions of the APA, 5 U.S.C. § 706.

115. Under NFMA, the Forest Service must act consistently with direction in the applicable land management plan when authorizing any project or activity. 16 U.S.C. § 1604(i); 36 C.F.R. § 219.15. The Forest Service has violated NFMA by acting inconsistently with direction in the Winema Forest Plan regarding protection of soils, riparian areas, fish and wildlife, and imperiled plant and animal species by authorizing grazing that damaged those resources on the Antelope Allotment in 2012-2015.

116. Accordingly, the Forest Service's 2012-2015 AOIs are arbitrary, capricious, an abuse of discretion, and not in accordance with NFMA, and therefore are actionable pursuant to the APA, 5 U.S.C. § 706(2)(A).

THIRD CLAIM FOR RELIEF

VIOLATIONS OF THE ENDANGERED SPECIES ACT

117. Plaintiffs reallege and incorporate by reference the preceding paragraphs.

118. This third claim for relief challenges the U.S. Fish and Wildlife Service's biological opinion covering impacts to Oregon spotted frog from livestock grazing on the Antelope Allotment. Plaintiffs bring this claim pursuant to the judicial review provisions of the APA, 5 U.S.C. § 706.

119. Under the ESA, FWS must evaluate in a biological opinion the direct, indirect, and cumulative effects of an action on a listed species and its critical habitat to assess whether the action is likely to jeopardize a species' survival and recovery or adversely modify its critical habitat. 16 U.S.C. §§ 1536(a)(2), 1536(b)(3)(A); 50 C.F.R. §§ 402.02, 402.14. If the action will cause "take" of a listed species in the form of harm or harassment, the biological opinion must also contain an incidental take statement to permit take that is incidental to the action. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(g)(7).

120. FWS's biological opinion for the Antelope Allotment contained a flawed analysis. First, the BiOp did not fully and accurately describe and analyze the effects of livestock grazing on Oregon spotted frogs in at least the following ways: (1) it relied on a description of the proposed action that contained insufficient detail to fully assess impacts; (2) it failed to assess all of the impacts to individual spotted frogs and spotted frog habitat from the proposed grazing; (3) it assumed grazing would not affect frogs in the North Sheep pasture and lower end of the riparian pasture despite knowing that cattle have adversely affected frogs in those two areas; (4) it did not analyze what impact annual 3% mortality from grazing would have on the Jack Creek population; (5) it failed to adequately account for climate change and increasing occurrence of

drought; (6) it failed to adequately assess impacts of grazing on private property within the Chemult Pasture; (7) it asserted that grazing could benefit Oregon spotted frogs in Jack Creek by reducing excess biomass when no evidence exists that excess biomass is a problem; and (8) it failed to provide scientific support for many of its assumptions.

121. Second, the BiOp relied on uncertain and ineffective measures to assert that effects of the proposed grazing would be minimal: (1) It assumed that the permittee would turn over management of its private land parcels to the Forest Service before that transfer occurred, and that a habitat restoration agreement between the permittee and Forest Service would meet conservation needs of the species before any agreement was reached and without knowing the substance of the agreement; (2) It claimed that the 35% average utilization standard would minimize impacts to Oregon spotted frogs without knowing where or how it would be measured. It also did not explain why an average 35% utilization standard will minimize impacts when cows can damage streambanks immediately upon entry into a riparian zone, and just a few cows can cause localized impacts to breeding areas or remnant pools, which could have a significant effect on the Jack Creek frog population; and (3) It relied on fences, water developments, and salt blocks to distribute cattle away from Jack Creek even though those measures have failed to keep cattle out of Jack Creek for the past six years.

122. Third, the BiOp failed to adequately explain and support its no jeopardy and no adverse modification conclusions. It did not explain why even minor adverse effects to this small, isolated population and its proposed critical habitat would not impair the population's ability to survive and recover, or how the loss of this population would affect the ability of the species as a whole to recover.

123. The incidental take statement within the BiOp was also flawed. It did not account

for all "take" of Oregon spotted frogs caused by livestock grazing, did not adequately analyze the effect to Oregon spotted frog from the amount and extent of incidental take authorized in the opinion, did not contain sufficient terms and conditions to minimize take of spotted frogs, and contained an inadequate trigger for reinitiation of consultation.

124. Due to these flaws, the biological opinion is arbitrary, capricious, and abuse of discretion, and not in accordance with the ESA, and therefore is actionable pursuant to the APA, 5 U.S.C. § 706(2)(A).

PRAYER FOR RELIEF

A. Adjudge and declare that the Forest Service's 2012-2015 grazing authorizations for the Antelope Allotment violated NEPA, NFMA, and/or their implementing regulations, and thus were arbitrary, capricious, an abuse of discretion, contrary to law, and/or issued without observance of procedure required by law under the judicial review standards of the APA, 5 U.S.C. § 706(2)(A) & (D);

B. Adjudge and declare that the U.S. Fish and Wildlife Service's biological opinion for the Antelope Allotment violated the ESA and/or its implementing regulations, and thus was arbitrary, capricious, an abuse of discretion, and/or contrary to law under the judicial review standards of the APA, 5 U.S.C. § 706(2)(A);

C. Order the Forest Service to comply with the requirements of NEPA, NFMA, and the ESA before issuing further grazing authorizations for the Antelope Allotment;

D. Enter such other declaratory relief, and temporary, preliminary, or permanent injunctive relief as may be prayed for hereafter by Plaintiffs;

E. Award Plaintiffs their reasonable costs, litigation expenses, and attorneys' fees associated with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 *et*

seq. and/or all other applicable authorities; and

F. Grant such further relief as the Court deems just and proper in order to provide Plaintiffs with relief and protect the public interest.

Dated: October 27, 2015

Respectfully submitted,

s/Elizabeth H. Zultoski

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