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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.	)	No. 4:13-cv-176-___ **COMPLAINT**

INTRODUCTION

1. This case seeks declaratory and injunctive relief for ongoing violations of the Endangered Species Act ("ESA") relating to livestock grazing in the Little Lost River watershed, on three livestock grazing allotments within the Salmon-Challis National Forest and the Bureau of Land Management's Upper Snake Field Office.

2. The Little Lost River watershed supports an important subpopulation of Columbia River bull trout, protected under the ESA. The subpopulation is genetically unique and therefore particularly important to the survival of the species. The three

grazing allotments at issue in this case comprise the habitat for over 95% of the remaining bull trout in the Little Lost River watershed.

3. The U.S. Forest Service and the Bureau of Land Management ("BLM") authorize livestock grazing on the public lands of the Little Lost River watershed. Livestock wade within the streambeds of the Little Lost River and its tributaries and graze along streambanks, including during fish spawning and incubation periods. This grazing harms bull trout in many ways, including via direct impacts from trampling fish redds (nests), disturbing or displacing juvenile fish, and harassing adult fish during spawning, as well as habitat degradation from trampling streambanks and removing riparian vegetation.

4. The U.S. Fish and Wildlife Service ("FWS") has violated the ESA and the Administrative Procedure Act by issuing two Biological Opinions and Incidental Take Statements, as well as a Letter of Concurrence, concerning the impacts of domestic livestock grazing on bull trout within these three allotments. The decisions are flawed for numerous reasons, including that they rely on incorrect factual assumptions and methods which have repeatedly failed to effectively control livestock in the past, do not address the harm that livestock grazing causes to different life stages of the fish, do not provide reasonable support for their conclusions regarding jeopardy of the species or adverse modification of critical habitat; and fail to meaningfully restrict the amount of "take" the grazing is permitted to cause.

5. On a broader scale, FWS has failed to take the comprehensive look required by the ESA at the impacts from the multiple activities across the watershed that degrade bull trout habitat. Nor has it anywhere taken the required comprehensive look at

the survival and recovery needs of the watershed's bull trout. Instead, like a horse with blinders, it has limited its view in each of the three consultations to the allotment at issue. The ESA does not allow such an approach, which has allowed FWS to authorize harm and habitat degradation on each grazing allotment, relying on a vague hope that recovery takes place "somewhere else" —masking the impacts of the watershed-wide degradation and ensuring that the bull trout never recover.

6. In turn, the U.S. Forest Service has violated the ESA on the Mill Creek and Pass Creek allotments because it has failed to insure that the effects of its authorized grazing activities will not jeopardize the continued existence of bull trout or adversely modify critical habitat, in violation of the ESA. The Forest Service also has failed to reinitiate consultation on these two allotments despite changes to the action and/or violations of the terms and conditions of the respective Biological Opinions' Incidental Take Statements, yet continues to authorize grazing that will result in "take" of the species.

7. This action requests that the Court issue declaratory and injunctive relief to remedy these violations of law.

JURISDICTION AND VENUE

8. Jurisdiction is proper in the Court under 28 U.S.C. § 1331 because this action arises under the laws of the United States, including the 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. § 2214 *et seq*. An actual, justiciable controversy now exists between Plaintiff and Defendants, and the requested relief is therefore proper under 5 U.S.C. §§ 701–06; 28

U.S.C. §§ 2201–02; and 16 U.S.C. § 1540(g).

9. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 and 16 U.S.C. § 1540(g)(3)(A) because all or a substantial part of the events or omissions giving rise to the claims herein occurred within this judicial district, Defendants and Plaintiff reside in this district, and the public lands and resources in question are located within Butte, Custer, and Lemhi Counties in this district.

10. As required under the ESA, Western Watersheds Project provided over 60 days' notice of its intent to bring this action to the U.S. Forest Service, as well as the Secretary of the U.S. Department of the Interior, prior to bringing this action.

11. The Federal Government has waived sovereign immunity in this action pursuant to 5 U.S.C. § 702 and 16 U.S.C. § 1540(g)(1).

PARTIES

12. Plaintiff WESTERN WATERSHEDS PROJECT ("WWP") is a regional, membership, not-for-profit conservation organization with over 1,300 members, dedicated to protecting and conserving the public lands and natural resources of watersheds in the American West. WWP is headquartered in Hailey, Idaho, and also has staff in Boise, as well as in other western states.

13. Through agency proceedings, public education, scientific studies, and legal advocacy conducted by its staff, members, volunteers, and supporters, WWP is actively engaged in protecting and improving riparian areas, water quality, fisheries, wildlife habitat, and other natural resources and ecological values of western watersheds, including the Little Lost River watershed. WWP has extensively participated in decision-making processes for livestock grazing on Forest Service and BLM lands throughout the

west, including the Salmon-Challis National Forest, BLM lands in the Little Lost River watershed, and the specific allotments at issue.

14. WWP staff, members, and supporters regularly use and enjoy the fish and wildlife, public lands, and natural resources on federal lands in the Little Lost River watershed, including the specific allotments at issue, for many recreational, scientific, spiritual, educational, aesthetic, and other purposes. WWP staff and members pursue activities such as hiking, fishing, hunting, wildlife viewing, photography, scientific monitoring, and spiritual renewal on these lands. Livestock grazing degrades the lands, waters, fish habitat, aesthetics, and other natural resources, and impairs WWP's use and enjoyment of the Little Lost River watershed and the specific allotments at issue.

15. Western Watersheds Project staff, members, and supporters intend to continue to visit and use the public lands in the Little Lost River watershed and the specific allotments at issue in the near future, including this summer. WWP's interests, organizationally, and on behalf of its staff, members, and supporters, in the preservation and protection of the Little Lost River watershed and the specific allotments at issue, and its threatened bull trout and other resources, are being directly harmed by Defendants' actions challenged herein. WWP's above-described interests have been, are being, and unless the relief prayed for is granted, will continue to be adversely affected and irreparably injured by Defendants' violations of law.

16. Defendant U.S. FISH AND WILDLIFE SERVICE ("FWS") is an agency or instrumentality of the United States, and is responsible for administering the provisions of the ESA with regard to threatened and endangered terrestrial and freshwater aquatic species, including threatened Columbia River bull trout.

17. Defendant U.S. FOREST SERVICE ("Forest Service") is an agency or instrumentality of the United States, and is charged with managing the public lands and resources of the Salmon-Challis National Forest in accordance and compliance with federal laws and regulations.

ENDANGERED SPECIES ACT

18. 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).

19. Under the ESA, the Secretary of the Interior or Commerce ("the Secretary") lists a species as endangered if it is "in danger of extinction throughout all or a significant portion of its range," or as threatened if it is "likely to become an endangered species within the foreseeable future." 16 U.S.C. §§ 1533(a)(1), 1532(6) & (20).

20. Concurrently with listing a species as threatened or endangered, the Secretary also must designate the species' "critical habitat." 16 U.S.C. § 1533(a)(3). 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" means "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary"—i.e. the species is recovered. *Id*. at §1532(3).

21. Under ESA § 7(a)(2), 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).

22. If a proposed action "may affect" a listed species or its critical habitat, the action agency must consult with NOAA Fisheries or FWS. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). FWS will be used hereafter, as it is the agency responsible for inland fish species such as bull trout. *See id*. § 402.01. To fulfill its Section 7(a)(2) mandate, the action agency prepares a biological assessment ("BA") to evaluate potential effects to listed species and determine whether a species is "likely to be adversely affected" ("LAA") or "not likely to be adversely affected" ("NLAA") by the action. 50 C.F.R. § 402.12.

23. For the LAA actions, the action agency must seek "formal" consultation with FWS. 50 C.F.R. § 402.14(a). For the NLAA actions, the agency action may seek "informal" consultation with FWS. *See id*. § 402.14(b).

24. During consultation, FWS must review all relevant information, evaluate the current status of the species or critical habitat, and evaluate the effects and cumulative effects of the proposed action on the listed species and their critical habitat. 50 C.F.R. § 402.14(g)(1)−(3).

25. Informal consultation concludes with a Letter of Concurrence, and is only appropriate when the BA or other information indicates that the action has no likelihood of adverse effect to or take of the listed species.

26. Formal consultation under Section 7(a)(2) results in issuance of a biological opinion ("BiOp") by FWS. The BiOp determines whether the proposed action is likely to jeopardize the continued existence of a listed species or adversely modify the

species' critical habitat.

27. The BiOp must include a detailed discussion of the current status of the species, the existing environmental conditions (called the environmental baseline), and the effects and cumulative impacts of the action when added to the baseline on listed species or critical habitat. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. §§ 402.14(g)(3), (h)(2). "Effects of the action" refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, added to the environmental baseline. 50 C.F.R. § 402.02. Cumulative effects are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area. *Id*.

28. If FWS makes a jeopardy determination, the BiOp may specify reasonable and prudent alternatives that will avoid jeopardy and will allow the agency to proceed with the action. 16 U.S.C. § 1536(b).

29. During the consultation process, the action agency may not make any irreversible or irretrievable commitments of resources, which would have the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures. 16 U.S.C. § 1536(d).

30. The duty to comply with section 7(a)(2) remains the action agency's even after the issuance of a BiOp. After the completion of consultation, the action agency must determine whether and in what manner to proceed with the action in light of its § 7 obligations and the BiOp. 50 C.F.R. § 402.15(a).

31. Section 9 of the ESA prohibits any person from "taking" a threatened or endangered species. 16 U.S.C. § 1538(a)(1); *see also* 50 C.F.R. § 17.31. "Take" is

defined broadly under the ESA and its regulations to include harassing, harming, wounding, killing, trapping, capturing or collecting a listed species either directly or by degrading its habitat sufficiently to impair essential behavior patterns. 16 U.S.C. § 1532(19).

32. An exception to section 9's take prohibition is that a person may take a listed species in accordance with an Incidental Take Statement ("ITS"). 16 U.S.C. § 1536(b)(4). The exception is only valid if the terms and conditions of the ITS are followed. *Id*. § 1536(o)(2).

33. The BiOp should include an ITS if such take may occur. 50 C.F.R. § 402.14(g)(7). The ITS (1) specifies the amount or extent of the impact on the species of any incidental taking, (2) specifies Reasonable and Prudent Measures to minimize such impact, and (3) sets forth the Terms and Conditions that must be complied with to implement the Reasonable and Prudent Measures. *Id*. § 402.14(i)(1)(i), (ii), (iv).

34. If during the course of the action the amount or extent of incidental taking specified in the ITS is exceeded, the action agency must immediately reinitiate consultation. 50 C.F.R. §§ 402.14(i)(4), 402.16(a).

35. Throughout its analysis, the consulting agency must utilize the "best scientific and commercial data available." 16 U.S.C. § 1536(a)(2); 50 C.F.R. §402.14(d).

STATEMENT OF FACTS

I. BULL TROUT IN THE LITTLE LOST RIVER WATERSHED

A. Watershed Overview and Bull Trout Distribution

36. The Little Lost River watershed is located northwest of Idaho Falls, Idaho, relatively close to the Montana border. It is bordered on the west by the highest range in

Idaho, the Lost River Range (home to Mount Borah), and on the east by the equally rugged Lemhi Range. It is composed largely of public lands administered by the Salmon-Challis National Forest and the BLM, with the Forest Service managing the higher elevation lands on the edges of the watershed and the BLM managing the lower elevation lands. Private land is found along the Little Lost River and primary tributaries.

37. The Little Lost River flows from its headwaters in the high peaks south towards the Snake River Plain. Its major tributaries include Sawmill Creek and Summit Creek, whose confluence forms the Little Lost River in the northern part of the drainage. It derives its name from its "disappearance" into the porous volcanic rock of the Snake River plain near Howe, although its waters continue to percolate towards the Snake River underground, emerging as springs in the Snake River canyon.

38. Bull trout were historically well distributed in the Little Lost River and many of its tributaries. However, they have undergone severe declines in virtually all streams in recent decades, and have even been extirpated from several tributaries and from the lower Little Lost River (which is now completely dewatered at times every year).

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

39. The habitat needs of bull trout are described generally as cold stream temperatures, clean water quality, complex channel characteristics, and large patches of habitat that are well connected. Water having elevated levels of sediment, high temperature, or other pollutants impairs bull trout survival by hindering their biological functions, and sediment also impairs reproduction by covering spawning gravels where the fish lay eggs, suffocating them. Bull trout require cover in the form of undercut

banks and overhanging vegetation, large woody debris, and deep pools that allow them to hide from predators and rest outside of the current.

40. Bull trout spawning habitat consists of low-gradient steam reaches with loose, clean gravel. Bull trout spawn and dig their "redds" (egg nests containing thousands of eggs) from August through November. After incubating over the winter, the eggs hatch into "alevins" (tiny fish with an attached yolk sac), which remain in the substrate (gravel) until emerging as "fry" from early April through May.

41. Livestock grazing degrades habitat in many ways, including by removing riparian vegetation, destabilizing stream banks, widening stream channels, promoting incised channels, lowering water tables, reducing pool frequency, increasing soil erosion, and altering water quality. These effects reduce cover, increase summer water temperatures, promote formation of harmful anchor ice (ice on the bottom of streambeds) in winter, and increase sedimentation into spawning and rearing habitats. Grazing of uplands, areas away from streams, also indirectly degrades bull trout habitat by causing soil compaction and increased erosion, which lead to higher runoff events and more sediment delivery to streams.

42. Cattle are attracted to riparian areas, and will often congregate there to take advantage of the water, shade, and lush vegetation. Livestock are particularly drawn to spawning reaches, since they are flatter and have easier access than other reaches. Livestock that cross or wade in streams additionally stir up sediment and add pollutants by urinating and defecating in the streams.

43. An additional way livestock harm listed fish is by directly trampling on redds. A single trampling incident can kill a majority of the redd's eggs or alevins.

Livestock in and around streams can harass spawning adult fish, causing them to dart or drift from their nests, disrupting their spawning activities, and forcing them to expend vital energy. Livestock also displace juvenile fish from protective streamside cover, altering feeding success, increasing exposure to predators, and/or displacing juveniles into less suitable habitat.

44. To minimize these impacts, land management agencies have a developed a series of widely-accepted protective habitat measures. For example, cattle should not be permitted to trample more than 10 or 20% of streambanks (known as "bank alteration"); and the percentage of the banks rated as "stable" should be 90% or higher.

B. Status and Recovery Needs of Little Lost River Bull Trout

45. The Little Lost River watershed is home to Columbia River bull trout, which was protected as "threatened" under the ESA in 1998. The Little Lost River bull trout are within the Columbia River Distinct Population Segment ("DPS"), which is considered a "species" under the ESA. *See* 16 U.S.C. § 1532(16). FWS's most recent bull trout critical habitat designation was in 2010. 75 Fed. Reg. 63,898 (Oct. 18, 2010). In the Little Lost River watershed, this rule designated Sawmill Creek and many of its tributaries as critical habitat.

46. For purposes of recovery planning, FWS divides the coterminous U.S. population of bull trout into "recovery units." There are five recovery units, each of which are important to ensure the species' recovery and resilience to changing environmental conditions.

47. Recovery units are comprised of "core areas," which in turn are comprised of one or more "local populations." A local population is a group of bull trout that

spawns within a particular stream or portion of a stream and is the smallest interacting reproductive unit of bull trout.

48. The Little Lost River watershed is within the Columbia River Recovery Unit. FWS's draft recovery plan identifies the following survival and recovery needs for this recovery unit: **maintain or expand** the current distribution of the bull trout within core areas; maintain **stable or increasing trends** in bull trout abundance; **maintain/ restore** suitable habitat conditions for all bull trout life history stages and strategies; and **conserve genetic diversity** and provide opportunities for genetic exchange.

49. Within the Columbia River Recovery Unit, the bull trout in the Little Lost River watershed form the Little Lost River Core Area. The core area contains ten local populations, all of which FWS identifies as **essential** for bull trout recovery. Due to the unique geologic history of the Little Lost River watershed, its bull trout populations may contain unique genes that further promote bull trout persistence.

50. The bull trout within the Little Lost River Core Area are extremely imperiled. In a 1999 watershed-wide Little Lost River Subpopulation Columbia River Bull Trout biological opinion ("1999 BiOp"), FWS stated that this core area was "greatly depressed" due to highly degraded habitat, excessive sedimentation, high water temperatures, and dewatering of streams.

51. FWS's draft recovery plan for the Little Lost River Core Area confirms that bull trout distribution and abundance have greatly declined in recent decades, and that livestock grazing is one of the major causes. Another cause is the numerous irrigation diversions in the watershed, primarily to grow feed for livestock, which result in increased water temperatures and reduced habitat quality in streams, and also lead to

entrainment of bull trout in ditches. Some diversions divert a substantial portion or even **all** of the flow in tributaries, disconnecting and isolating them from the Little Lost River. A further cause of bull trout decline is the displacement of bull trout by brook trout. Brook trout can survive better than bull trout in streams with high water temperatures and poor water quality and therefore outcompete bull trout in degraded streams.

52. FWS's 2008 5-Year Review of bull trout further confirms the core area's perilous status, assigning a threat rank of "substantial" and "imminent."

II. MILL CREEK ALLOTMENT

A. Allotment Background and Bull Trout

53. The Mill Creek allotment is on the northern edge of the Little Lost River watershed. The allotment contains numerous occupied bull trout streams, including Hawley, Jackson, Iron, Left Fork Iron, Camp, Redrock, Slide, Timber, Smithie Fork, Firebox, Sawmill, Mill, Squaw, North Fork Squaw, and Warm Creeks, most of which also support bull trout spawning. The bull trout in the allotment comprise **seven of the ten** local populations within the Little Lost River Core Area: Upper Little Lost River, Smithie Fork Creek, Timber Creek, Mill Creek, Iron Creek, Squaw Creek, and Warm Creek. These local populations likely comprise **over 95%** of the core area's bull trout. Maintenance of all seven is vital to maintaining overall production and distribution of bull trout in the core area.

54. Bull trout densities are in a downward trend on the allotment. Absent action to improve habitat for bull trout, brook trout may completely replace bull trout in Squaw Creek and Mill Creek within the next couple of decades, and within the whole sub-watershed in the next 50 years.

55. Reaches of the 15 creeks listed above, as well as an unnamed tributary of Squaw Creek, were designated as bull trout critical habitat in FWS's 2010 final bull trout critical habitat rule. *See* 75 Fed. Reg. 63,898, 64,056.

56. The Forest Service determined that the Mill Creek allotment was "not likely to adversely affect" bull trout in the 1999 Little Lost River watershed-wide consultation, and FWS concurred. However, FWS noted degraded conditions and required the Forest Service to report on efforts to reduce cattle use along Smithie Fork Creek and in high mountain meadows and tributaries. The Mill Creek trailhead on the allotment was deemed "likely to adversely affect" bull trout, and the 1999 BiOp included requirements to close, rehabilitate, and monitor it.

57. For the next decade, the primary standard to assess livestock impacts on the allotment was an allowable use standard of 50%, or 4 inches of remaining stubble height for most of the allotment (except for 6 inches or 35% use on two creeks).[1] Bank damage, bank alteration, and impacts to redds were rarely monitored. During this time, various compliance problems occurred on the allotment, including that the permittee's "riders" (employees charged with ensuring cattle are in the proper place at the proper time) failed to move and remove cattle from numerous pastures on time, trespass or unauthorized use by livestock, and maintenance problems on fences or water troughs. The Forest Service took no effective enforcement action.

58. A water diversion that removes 1.6 cfs of water from Sawmill Creek exists on or near the allotment, and is expected to entrain several bull trout per year in ditches.

[1] Utilization and stubble height standards are used to assess how much vegetation livestock have consumed during the grazing season and are measured after completion of the grazing season.

There are also numerous water developments for cattle on the allotment including ponds, troughs, headboxes, and pipelines, many of which remove water from the streams. The Forest Service has authorized timber sales and built roads throughout the allotment, with several more logging proposals pending; and it manages recreation on the allotment.

B. Mill Creek Allotment Biological Assessment

59. In May 2010, the Forest Service issued a biological assessment for grazing on the allotment. Aquatic Species BA for Livestock Grazing on the Mill Creek Allotment (May 10, 2010).

60. The Forest Service authorizes livestock grazing on the Mill Creek allotment, including through permits and Annual Operating Instructions.

61. The BA discussed the grazing system that occurs on the allotment, including when livestock are present in each of the six units of the allotment (Cub Canyon, Horse Creek, Smithie Fork, Timber Creek, Mill Creek, Squaw Creek). The BA noted that grazing is allowed during bull trout spawning in every unit except one, but claimed it will be limited to specific time periods. The unit rotation dates for livestock use and expected overlap with spawning and incubation periods assumed that cattle are moved by the permittee or its riders on time and remain in their proper location, assumptions that in the past have repeatedly proven false.

62. Because of the overlap of grazing with bull trout spawning and incubation, the BA admitted that trampling of redds will likely occur on the allotment but indicated that this trampling is acceptable. On two creeks in particular (which support two local populations), the BA stated that it allows redd trampling because "brook trout have nearly replaced bull trout in Squaw Creek and Mill Creek. It is likely that brook trout will

completely replace bull trout in these two streams within the next couple of decades whether or not livestock trample bull trout redds." The BA did not explain how allowing and expediting the extirpation of two local subpopulations in the core area is consistent with the ESA's requirement to insure the survival and recovery of bull trout.

63. The BA proposed largely continuing grazing as usual for its proposed action, maintaining the same cattle numbers and stubble height standards as prior years. In fact, it weakened the woody browse standard from 20 to 25%. It removed a prior limitation intended to protect bull trout that prohibited grazing on any specific unit for more than 20 days, relying instead upon compliance with grazing indicators. And despite documented problems with bank damage on the allotment, and an acknowledgement that bank stability standards of between 10 and 20% should apply, no standard for bank alteration or stability was imposed. Rather, the BA simply noted that bank stability and alteration will be monitored for three years beginning in 2010, and "[i]f bank stability is below 90% at any site in 2012, a bank alteration standard will be implemented for that site in the 2013 grazing season that is lower than the average bank alteration observed during 2010, 2011, and 2012."

64. The BA documented the major limiting factors for bull trout on the allotment as brook trout and reduced habitat quality from livestock grazing and roads. It did not explain that livestock grazing creates conditions that lead to the expansion of brook trout.

65. The BA noted that many indicators of healthy streams are below objectives in many portions of the allotment and that livestock grazing caused or contributed to the conditions and reduced the ability of the streams to support bull trout.

For example, water temperatures and sediment levels exceed objectives across the allotment, conditions exacerbated by livestock grazing. The width-to-depth ratios are too high on at least one creek, Mill Creek, and livestock grazing has contributed significantly to that result. Streambank stabilities are also below resource objectives on several creeks, with livestock grazing significantly contributing to those impacts and having an "extreme" impact on at least one creek.

66. The BA did not discuss the impact of grazing in the uplands on the Mill Creek allotment even though such use contributes to impacts on riparian areas and streams by increasing sediment input into the stream and affecting water flows.

67. The BA stated that the Forest Service had not identified any interdependent actions associated with the proposed action. It admitted that there are activities associated with the action that could potentially affect fish and "could be considered" interdependent actions, including livestock grazing on the adjacent BLM allotment, grazing and other agriculture on private property owned by the permittees, and diversion of water from streams on private and national forest land.

68. However, the BA asserted that "we believe that these activities would continue to occur in a manner similar to the way they are currently occurring whether or not livestock graze on this allotment." It did not explain why activities such as diverting water for livestock to drink while they are on the allotment would continue absent use of the allotment, or why grazing or agriculture on the private land (and associated water withdrawals) would be viable without the allotment. In sum, the BA provided no support for its assumptions that these activities were not interdependent.

69. With respect to interrelated actions and cumulative impacts, the BA stated

there are none—failing to mention other Forest Service actions on the allotment affecting bull trout, such as logging, roads, and recreation (including the problematic trailhead) as part of the existing conditions on the allotment.

70. The BA admitted that since the proposed grazing system is similar to the one that has been used over the past ten years, the impacts of the proposed grazing will be similar on six "grazing focus indicators": spawning and incubation; water temperature; sediment; width to depth ratio; streambank condition; and riparian conservation areas. Namely, the grazing will continue to trample redds, kill bull trout eggs, and adversely impact stream temperatures, sediment levels, width-to-depth ratios, bank stability, greenline successional status, and woody recruitment, in ways that are not discountable and will likely reduce the ability of streams to support bull trout. The BA further acknowledged that grazing will cause non-discountable adverse effects to at least 11 other indicators of stream health.

71. However, the BA concluded that, while grazing has and will likely continue to adversely impact the grazing focus indicators, the impacts are not expected to "increase" under the proposed action. It did not explain why continuing the same level of adverse impacts is acceptable or satisfies the ESA's requirement to insure the survival and recovery of bull trout.

72. With respect to impacts to Warm Creek, the BA repeatedly stated that impacts from livestock would be eliminated because, prior to turnout in 2011, an exclosure fence would be constructed along most of the creek. But as of the filing of this Complaint, this fence has not been constructed.

73. The BA also relied on an "adaptive management strategy" depicted as a

flowchart in an appendix. It claimed use of the strategy would cause conditions to remain in desired conditions or achieve positive trends. It did not acknowledge that such a strategy has failed in the past to achieve desired conditions and positive trends.

74. The BA concluded that the proposed grazing "may affect, [and is] likely to adversely affect" both bull trout and its then-proposed critical habitat.

C. Mill Creek Allotment Biological Opinion

75. In turn, FWS issued a biological opinion concluding that the grazing would not jeopardize the species or adversely modify its critical habitat (FWS No. 14420-2010-F-0355) (July 27, 2010).[2]

76. The BiOp relied on the Forest Service's BA to provide the description of the proposed action, and noted that the consultation extends until December 2019.

77. The BiOp briefly noted other bull trout BiOps that FWS had completed for activities within the range of the species, including 37 within Eastern Idaho. However, it did not discuss the amount of take authorized under these opinions, either individually or cumulatively, other than noting that the BiOp for the water diversion in the Little Lost River Core Area authorizes take of 3–8 bull trout (over an unnamed time period).

78. The BiOp did not include within the environmental baseline or as interdependent or interrelated actions various uses that have occurred and continue to occur on or near the allotment, including water diversions, roads, recreation, logging, and grazing of nearby private and BLM lands, and thus did not assess the effects of those

[2] Because the revised bull trout critical habitat designation had not yet been finalized when it was issued, the 2010 Mill Creek Allotment BiOp was known as a "Conference Opinion" on critical habitat impacts. The BiOp stated that if critical habitat was later designated (as it was), that FWS might later "confirm" the opinion. References to the 2010 BiOp, then, include both the BiOp itself and any subsequent FWS "confirmation" of the BiOp on critical habitat impacts.

activities on bull trout habitat.

79. In its analysis of effects, the BiOp first considered the impacts of grazing on bull trout spawning, redds, and incubation. The BiOp noted that the Forest Service had failed to present any redd surveys to help inform the degree of redd trampling expected from the proposed grazing, and that estimates of such trampling are subject to a large number of variables. The BiOp estimated that 11.5 redds per mile would exist in large streams and 2.4 redds per mile would be present in smaller streams based on a study from Oregon. The BiOp did not discuss whether the streams from that study were similar to the streams on the Mill Creek allotment.

80. FWS relied on the Forest Service's estimate of trampling rates, based on monitoring conducted in a heavily timbered, high elevation unit of the allotment (Timber Creek) that is grazed during the first two weeks of spawning. The Forest Service had estimated that 17% of redds are constructed in the first two weeks of spawning, and that 12% of those redds are likely to be trampled in that time. FWS then assumed a 12% trampling rate for all units of the allotment "[b]ecause of the similarity in topography and livestock use in the Timber Creek Unit to other Units." FWS used this assumption to construct a chart of estimated redds trampled in each unit on the allotment. It also multiplied the redds by two to estimate the number of adults that would be harassed by livestock during spawning.

81. FWS failed to acknowledge that, in fact, the Timber Creek Unit is more heavily forested than other units of the Mill Creek allotment, and thus cattle have less access to the stream in that unit compared to the other units where the creeks are more open and accessible to livestock. Nor did FWS explain why the 12% trampling estimate

was used for units that are grazed for up to six weeks during spawning, in contrast to the first two weeks of spawning on Timber Creek.

82. The BiOp also did not explain that livestock use of streams is not random, but rather is often associated with spawning habitat, and whether this association was taken into account when estimating the number of redds expected to be impacted by livestock or the extent of adult disturbance.

83. The BiOp assumed that harassment to spawning adults "will not be substantial enough to preclude spawning, because the disturbance is likely to cause only short avoidance movements and will last only a few minutes." But the BiOp did not explain or support this assumption or discuss the impacts that even brief harassment would cause.

84. The BiOp did not assess at all effects to other life stages of bull trout, such as alevins, fry, or juveniles.

85. The BiOp asserted that "the mortality to eggs from the redd trampling alone on this allotment is unlikely to result in a negative population trend." This assertion was based on assumptions that some eggs may survive in a trampled redd, and that trampling does not occur every year. However, the BiOp did not discuss whether the survival of just some eggs would be sufficient to achieve an upward population trend for these isolated, low, and declining populations of bull trout.

86. With respect to temperature, sediment, and streambanks, the BiOp acknowledged that grazing has contributed to streams on the allotment not meeting objectives for bull trout. And with few changes to the past management, it admitted that grazing would likely continue to adversely affect these stream attributes, thereby

maintaining conditions below objectives and slowing recovery of bull trout. The BiOp concluded that grazing impacts to water temperatures, sediment, and streambanks were likely to be not insignificant, resulting in adverse effects to bull trout.

87. With respect to width to depth ratio and riparian habitat conservation areas, the BiOp admitted that two creeks have inappropriate conditions, and livestock grazing has contributed to those conditions. It assumed that Warm Creek would be fenced in 2011 to eliminate cattle access to the stream, and that continued grazing would cause only insignificant impacts to these two attributes because of the fence, the use of grazing standards, and the adaptive management strategy.

88. For multiple indicators, the BiOp claimed impacts would be mitigated because they are minor or uneven in distribution or intensity, and seasonally temporary. But the BiOp failed to explain why "uneven" impacts might not, in fact, be concentrated in sensitive locations for bull trout such as spawning or rearing habitat, or why seasonally temporary effects would not be significant in light of the bull trout's life cycle and the particular vulnerability of redds and fry during the grazing period.

89. The BiOp failed to acknowledge that past use of grazing standards and adaptive management had not protected riparian areas and streams from livestock damage, and that the proposed action did not include a standard for bank stability despite documented bank trampling problems. The BiOp also did not discuss the impacts from upland grazing on any stream attributes.

90. Despite recognizing the continued harm that grazing would cause to bull trout habitat and continued trampling of bull trout redds—which would lead to admitted "substantial" adverse impacts to the Little Lost River Core Area—the BiOp concluded

that the effects of the proposed grazing, when added to the environmental baseline, are not likely to jeopardize "the coterminous U.S. population of bull trout." The BiOp failed to assess the likelihood of jeopardy to the Columbia River DPS of bull trout—the relevant assessment required under the ESA. Likewise, it concluded that the adverse impacts "are unlikely to be discernable [to] proposed critical habitat at the rangewide scale," also the incorrect scale for assessing impacts to critical habitat.

91. FWS did not explain how its findings that: (1) habitat on the allotment is degraded; (2) local bull trout populations are depressed and trending downward; (3) the proposed action will maintain adverse effects on and slow recovery of the local populations and their critical habitat on the allotment; (4) each of these local populations is essential to survival and recovery of the Little Lost River Core Area; and (5) increasing distribution and abundance of bull trout in all core areas is necessary for recovery of Columbia River bull trout— support its no-jeopardy and no-adverse modification conclusions.

92. The BiOp contained an ITS, which authorized the take of 18 redds every year. The ITS did not authorize any take of spawning adults (despite acknowledging such take occurs) or other life stages of bull trout (*e.g.*, alevins, fry, juveniles, and non-spawning adults), or any take from habitat impacts (*e.g.*, sedimentation) on any life stages. The BiOp concluded that the take of 18 redds each year would not jeopardize the survival or recovery of bull trout.

93. The first Reasonable and Prudent Measure in the ITS was that the "Forest shall report on the number or extent of bull trout redds trampled by livestock on the Allotment." The ITS acknowledged that incidental take of redds resulting from the

action will be difficult to measure, but failed to designate any proxy, such as bank alteration. Rather, the associated Term and Condition requires the Forest Service to monitor a single, unidentified 1,000-meter stream segment in the allotment when the likelihood of observing impacted redds is the greatest, and report the number of redds seen and impacted by grazing. The ITS contained no direction on how many trampled redds on that stream segment would trigger reinitiation of consultation or explanation of why that single segment was sufficient to monitor incidental take across the entire allotment.

94. A second Reasonable and Prudent Measure in the ITS was that the Forest "shall reduce the population effects of redd trampling on the reproductive success of bull trout within the Allotment." The associated Term and Condition requires the Forest Service to "establish a plan for brook trout control or removal" by March 1, 2011, to be implemented that year. To Plaintiff's knowledge, such a brook trout control or removal plan was not completed.

95. In sum, the 2010 Mill Creek Allotment BiOp was flawed for numerous reasons, including that it ignored various impacts to bull trout from grazing and other activities, relied on unsupported assumptions about implementation and effectiveness of conservation measures, failed to provide a rational explanation for why continued adverse effects from the proposed action would not jeopardize the survival and recovery of bull trout or adversely modify critical habitat, and included an unlawful ITS.

D. Subsequent Actions

96. The Forest Service has authorized grazing on the allotment in reliance on the 2010 BiOp every year since it was issued. Livestock grazing violations continued in

2010, 2011, and 2012, and as in prior years, the Forest Service took little to no effective enforcement action.

97. Although the BA and BiOp both assumed a fence would be built to exclude livestock from Warm Creek, the Forest Service **failed to do so** at the permittee's request, noting in a 2011 memo that it would instead "continue to use riding" and monitor for three more years.

98. In 2010, bank stability and alteration data were not collected on all units, despite assurances in the BA and BiOp that this would occur. Bank alteration on at least two sites exceeded 20%, including on Bear and Warm Creeks; and cattle were observed in Bear Creek throughout the season. The Forest Service informed the permittee that a fence on Bear Creek needed "heavy maintenance." There is no record of any enforcement action or change in management pursuant to the adaptive management strategy or otherwise.

99. In 2011, several trespass incidents occurred. Cattle were moved out of the Timber Creek unit on September 5 despite an August 31 off date. Twenty-five cattle were seen along Smithie Creek on September 6 despite an August 15 off date. Cattle were seen on Mill Creek on September 16 and 18 despite a July 27 off date, in Bear Basin on September 18 past their off date, and along Iron Creek on September 20 despite an August 31 off date. And cattle were observed in an administrative pasture (which includes reaches of Mill and Squaw Creeks) despite not being authorized there at all.

100. Again in 2011, bank stability and alteration data were not collected on all units. Bank alteration, where measured, was above 20% on at least five sites, including Squaw, Warm, and Bear Creeks, and two reaches of Smithie Fork Creek. The woody

browse standard was exceeded on Warm Creek and the stubble height standard was exceeded in the Horse Lake unit. The Forest Service again informed the permittee that the fence on Bear Creek needed "heavy maintenance." There is no record of any enforcement action or change in management pursuant to the adaptive management flowchart or otherwise.

101. In 2012, cattle were in Bear Basin and Mill Creek outside of their authorized season of use due to problems with gates and cattle behavior. The Forest Service allowed the permittee to move cattle into the Mill Creek unit early. Forest fisheries biologists observed in October that Warm Creek suffered "substantial vegetation use, bank alteration, and woody browse as a result of livestock grazing during the 2012 season," which "has had substantial impacts to the stream and it appears that these impacts are substantially limiting the ability of this stream to support bull trout." They noted "it is clear that additional action is needed to protect and restore bull trout habitat in Warm Creek."

102. Again in 2012, bank stability and alteration data were not collected on all units. Bank stability and bank alteration were measured on reaches of six creeks—all of which had bank stability below 90% and bank alteration above 20%. Mill Creek had 35% bank alteration and Warm Creek had an astonishing 74% bank alteration as well as 92% browse use. There is no record of any enforcement action or change in management pursuant to the adaptive management strategy or otherwise.

103. On November 26, 2012, Plaintiff sent Defendants a Notice of Intent to Sue letter with respect to this allotment.

III. PASS CREEK ALLOTMENT

A. Allotment Background and Bull Trout

104. The Pass Creek allotment is on the southwest side of the Little Lost River valley. 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, a tributary of the Little Lost River. The allotment contains several formerly or currently occupied bull trout streams and their tributaries, including Wet, Big, Coal, Pine, and Basin Creeks. The allotment is inhabited by all life stages of bull trout, and spawning has been documented in Wet Creek and the upper portion of Big Creek.

105. The bull trout in the allotment form two local populations within the Little Lost River Core Area: Big Creek and Wet Creek. Both of these populations are important to maintaining overall production and distribution of bull trout in the core area.

106. The number of bull trout in the Wet Creek local population has sunk precipitously since the 1990s. The Big Creek local population may have been extirpated.

107. Wet Creek and a tributary were included in a late 2009 proposed bull trout critical habitat rule. However, they were excluded from the 2010 final designation, with no explanation. *See* 75 Fed. Reg. 63,898, 64,056 (Oct. 18, 2010).

108. The 1999 watershed-wide Little Lost River BiOp noted that "following decades of high intensity season-long grazing," the Basin/Wet Creek watersheds have "extensive areas of degraded upland and riparian habitat." The Pass Creek allotment is particularly susceptible to damage from livestock grazing because headwater areas such as Upper Wet Creek "remain moist through the growing season and are vulnerable to

physical damage year round" and thus "are fragile, inherently unstable and more susceptible to livestock trampling and compaction."

109. Likewise, Basin Creek, "a degraded and entrenched stream, is sensitive to any amount of trampling." 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." In short, FWS acknowledged the allotment is not suitable for grazing.

110. 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." A 30–40% utilization standard is needed to merely "sustain" productivity of vegetation. The 1999 BiOp's ITS for the Pass Creek allotment imposed monitoring requirements and specific projects that had to be completed, along with streamside stubble height standards of 4" or 6" (depending upon status and trend of stream) and a 30–35% use standard on woody riparian species.

111. Over the next ten years, the authorized grazing was unable to meet even the minimal standards set in the 1999 ITS. Numerous violations of stubble height standards, trespass (livestock within pastures at the wrong time and inside exclosures), and maintenance problems on fences and water developments occurred from 2000 to 2007. In a September 2006 report on the prior six years, the Forest Service noted that "the [Pass Creek Grazing] Association failed to meet end-of-season standards on all of their units 2/3's of the time." Despite recognizing that the authorized grazing had damaged the allotment, the Forest Service continued to authorize the same level of use.

112. In 2008, further livestock trespass occurred and grazing impacts were particularly severe. A Forest Service end-of-season review of 12 sites found that all had been significantly impacted by livestock grazing, and concluded that "significant changes in livestock management are needed on this allotment if we are to protect and restore aquatic and riparian habitats," including more protective standards and "complete rest for an extended period of time to restore degraded environments" in Basin Creek.

113. The Forest Service admitted that it was out of compliance with the 1999 BiOp and that bull trout recovery was not occurring. Therefore, it reinitiated consultation with FWS over the Pass Creek allotment in late 2008.

114. Because the new consultation was not completed before the 2009 grazing season, the Forest Service prepared a June 12, 2009 "amendment" of the 1998 BA it had prepared in conjunction with the 1999 BiOp. In the amendment, it proposed resting the two units that contain Wet Creek, imposing more protective standards for stubble height and woody browse, adding a 20% bank alteration standard on all units, and constructing two new fences and two new water developments. By letter dated July 1, 2009, FWS concluded that due to the grazing restrictions adopted, the proposed 2009 grazing would be within the range of effects described in the 1999 BiOp.

115. The Forest Service had still not finished the new consultation at the start of the 2010 grazing season. This time, on July 13, 2010, it issued what is known as a 7(d) letter, a letter in which it concluded that 2010 grazing would not cause an irreversible and irretrievable commitment of resources, and thus ostensibly would not violate ESA section 7(d), pending completion of the new consultation.

B. Pass Creek Allotment Biological Assessment

116. In July 2010, the Forest Service issued a biological assessment for grazing on the Pass Creek allotment. Aquatic Species BA for Livestock Grazing on the Pass Creek Allotment (July 13, 2010).

117. The Forest Service authorizes livestock grazing on the Pass Creek allotment, including through permits and Annual Operating Instructions.

118. The Pass Creek BA discussed the grazing system that occurs on the eleven units of the allotment. Seven of those units occur on the Little Lost River side of the allotment, and two contain reaches of Wet Creek that are occupied by bull trout (Pine Creek and Wet Creek units). The BA claimed that bull trout in the Wet Creek unit are protected by an exclosure, and that cattle will graze the Pine Creek unit during bull trout spawning for only two weeks three out of every six years. These statements assumed that the Wet Creek exclosure is effective at keeping cattle out of the stream, and that cattle are moved by the permittee on time and remain in their proper location. As described, these assumptions have been repeatedly proven false in the past.

119. The BA's proposed action removed many of the protections instituted in 2009. For example, it resumed grazing in the two pastures containing reaches of Wet Creek, which were rested in 2009. And despite documented problems with bank damage, it removed the 20% bank alteration standard in all units except one (Wet Creek, which received a 15% bank alteration standard). For the remaining units, the BA noted that bank stability and alteration will be monitored for three years beginning in 2010, and "[i]f bank stability is below 90% in 2012, a bank alteration standard will be implemented in the 2013 grazing season that is lower than the average bank alteration observed during

2010, 2011, and 2012." It emphasized that livestock grazing would not occur within the exclosures present on sections of Wet, Basin, and Big Creeks.

120. The BA acknowledged that "[h]abitat within the allotment is in relatively poor condition," and identified the major limiting factors for bull trout as brook trout and reduced habitat quality from livestock grazing. It did not explain that livestock grazing creates conditions that lead to the expansion of brook trout.

121. It noted that many indicators of healthy streams are below objectives in many portions of the allotment and that livestock grazing caused or contributed to the conditions and reduced the ability of the streams to support bull trout. For example, water temperatures, sediment levels, and bank stabilities exceed objectives across the allotment, all exacerbated by livestock grazing. In particular, bank stabilities "are currently well below resource objectives in Wet Creek and Big Creek." Many other riparian conditions are also far below appropriate levels at numerous sites, including several sites inside exclosures. The BA stated that conditions inside exclosures cannot be attributable to cattle—ignoring the fact that cattle have repeatedly trespassed inside the exclosures.

122. The Pass Creek BA is similar to the Mill Creek BA in many respects. It admitted that there are activities associated with the action that could potentially affect fish and be considered interdependent actions, but again asserted with no explanation or support that these activities would continue to occur in a manner similar to the way they are currently occurring whether or not livestock graze the allotment. The BA also found no interrelated actions or new cumulative impacts.

123. Like the Mill Creek BA, the Pass Creek BA admitted that the grazing will

continue to trample redds, kill bull trout eggs, and adversely impact stream temperatures, sediment levels, width-to-depth ratios, bank stability, greenline successional status, and woody recruitment, in ways that are not discountable and will likely reduce the ability of streams to support bull trout. It concluded that, while grazing has and will likely continue to adversely impact the grazing focus indicators, the impacts are not expected to "increase" under the proposed action. Like the Mill Creek BA, it did not explain why continuing the same level of adverse impacts is acceptable or satisfies the ESA's requirement to insure the survival and recovery of bull trout.

124. The Pass Creek BA also relied on the same "adaptive management strategy" to claim that riparian areas will remain in desired conditions or achieve positive trends by monitoring and making adjustments to grazing use during the grazing season. It did not acknowledge that such a strategy has also failed in the past on this allotment to achieve desired conditions and positive trends, or even comply with the grazing indicators.

125. The BA concluded that the proposed grazing "may affect, [and is] likely to adversely affect" both bull trout and its then-proposed critical habitat.

C. Pass Creek Allotment Biological Opinion

126. In turn, FWS issued a biological opinion for the Pass Creek allotment (FWS No. 144.0200 and 14420-2010-F-0397) (September 9, 2010). The Pass Creek BiOp is similar to the Mill Creek BiOp in many respects.

127. It contained a similar discussion as the Mill Creek BiOp about 42 other bull trout biological opinions completed for activities within the range of the species, again failing to discuss the authorized amount of take from these opinions, either

individually or cumulatively, only noting that two BiOps in the Little Lost River Core Area authorize take of 3–8 bull trout and 18 bull trout redds (over unnamed time periods).

128. As with the Mill Creek BiOp, the Pass Creek BiOp did not include within the environmental baseline or as interdependent or interrelated actions various uses that occur on or near the allotment, including water diversions, logging, roads, recreation, or grazing of other nearby private lands. It did not even include grazing of the BLM lands encompassing the reaches of Wet Creek directly downstream from the Pass Creek allotment, despite the fact that bull trout travel between the two allotments. Thus, the BiOp did not assess the impacts of any of those activities on bull trout or its habitat.

129. In its analysis of effects, the BiOp first considered the impacts of grazing on spawning, redds, and incubation. Like the Mill Creek BiOp, there was no data from redd surveys on the Pass Creek allotment so the BiOp used the same estimates of redd density, and a 12 to 78% trampling rate. It assumed that no redds would be trampled in the Wet Creek unit because all spawning habitat in that unit is within an exclosure (and thus the reach of Wet Creek upstream of the exclosure is supposedly not spawning habitat). It assumed that the lower stretch of Wet Creek in the Pine Creek unit would be exposed to livestock grazing during bull trout spawning for two weeks every other year, that this stretch would contain only one redd, and that the redd would be trampled every other year. It also assumed that two adults associated with that redd would be disturbed by livestock during spawning.

130. The BiOp did not acknowledge the repeated cattle use that has occurred inside the Wet Creek exclosure, explain or support its assumption that the stream reaches upstream of the exclosure are not spawning habitat, or explain why spawning surveys

were not done despite the short length of bull trout occupied streams on the allotment. The BiOp also failed to analyze the overlap between spawning habitat and cattle access when estimating the number of redds and adults expected to be impacted, or even discuss how livestock use of streams is often associated with spawning habitat.

131. Again similar to the Mill Creek BiOp, the Pass Creek BiOp assumed, with no support or explanation, that harassment to spawning adults would not preclude spawning because it would cause only small disturbances of short duration, and failed to assess any effects to other life stages of bull trout such as alevins and juveniles.

132. Using similar reasoning to the Mill Creek BiOp, the Pass Creek BiOp stated that redd trampling "alone" on this allotment is unlikely to result in a negative population trend. This again was based on assumptions on many eggs surviving in a trampled redd, not all redds being trampled, and trampling not occurring every year. However, the BiOp did not discuss whether the survival of just some eggs would be sufficient to achieve an upward population trend in this isolated, declining bull trout local population with extremely low numbers.

133. With respect to temperature and sediment, the BiOp acknowledged that the streams on the allotment do not meet objectives for bull trout, which has been exacerbated by grazing. And with few changes to the past management, it admitted that grazing would be likely to maintain conditions below objectives and slow recovery. It claimed the impacts would be mitigated because they are minor in distribution or intensity and seasonally temporary, but admitted the impacts to temperature and sediment were likely to be not insignificant, resulting in adverse effects to bull trout.

134. With respect to streambanks, the BiOp incorrectly stated that Big Creek

and Wet Creek met bull trout objectives. In fact, the BA had stated that bank stabilities on those creeks were "well below resource objectives." The BiOp also incorrectly stated that grazing management would include limits to bank alteration, which is not the case except for the Wet Creek unit. It claimed that if bank damage occurs, the adaptive management strategy will address the problem, but failed to fully explain the strategy or recognize that such strategy has not been effective in the past. It (wrongly) concluded that because the bank stability baseline condition of all the affected creeks meets objectives, the impacts of the proposed action were likely to be insignificant.

135. With respect to width to depth ratio, the BiOp claimed that most streams have appropriate levels, except for Pine Creek, a tributary to Wet Creek, but that the impact to Pine Creek is likely the result of livestock grazing. It acknowledged that the grazing was likely to alter riparian areas, which can influence width to depth ratios, but claimed the impacts would be insignificant due to grazing standards, use of riders, and because the impacts would be minor in distribution or intensity and seasonally temporary.

136. With respect to riparian habitat conservation areas, the BiOp claimed that conditions for most of the creeks in the allotment were generally considered to be good, and that one area not meeting objectives is inside an exclosure, "so grazing is not the cause." It failed to acknowledge that exclosures on the allotment are frequently breached by cattle. The BiOp acknowledged that the grazing could degrade riparian conditions, but again claimed the damage would be insignificant due to grazing standards and because the impacts would be minor in distribution or intensity and seasonally temporary.

137. As with the Mill Creek BiOp, the Pass Creek BiOp likewise failed to explain why such impacts would not, in fact, be concentrated in sensitive locations for

bull trout, or why seasonally temporary effects would not be significant in light of the bull trout's life cycle. The BiOp failed to acknowledge that past use of grazing standards and adaptive management had not protected riparian areas and streams from livestock damage, and that the proposed action did not include a standard for bank stability on most units despite documented bank trampling problems. The BiOp also failed to discuss the impacts from upland grazing on any stream attributes.

138. Like the Mill Creek BiOp, the Pass Creek BiOp concluded that the effects of the proposed grazing was not likely to jeopardize "the coterminous U.S. population of the bull trout," but failed to assess the likelihood of jeopardy at the required DPS scale. The Pass Creek BiOp did not discuss the grazing on the Mill Creek allotment or how the **combined** grazing of these two allotments, which together encompass almost all of the bull trout local populations within the Little Lost River Core Area, would impact that core area or the Columbia River bull trout DPS.

139. FWS again did not explain how its findings that: (1) habitat on the Pass Creek allotment is extremely degraded; (2) the Wet Creek bull trout local population is extremely depressed, not effectively contributing to the viability of the core area, and on a downward trend, while the Big Creek population may no longer even exist; (3) the proposed action will maintain adverse effects and slow recovery of these local populations; (4) each of the bull trout local populations within the Little Lost River Core Area is essential to survival and recovery of the core area; and (5) increasing distribution and abundance of bull trout in all core areas is necessary for recovery of Columbia River bull trout— support its no-jeopardy conclusion.

140. The BiOp contained an ITS, which authorized take in the form of

disturbance of two adult bull trout and trampling of one bull trout redd every other year. The ITS did not authorize any take on other life stages of bull trout (*e.g.*, alevins, fry, juveniles, and non-spawning adults), or any take from habitat impacts (*e.g.*, sedimentation) on any life stages.

141. The single Reasonable and Prudent Measure in the ITS was that the "Forest shall report on the number or extent of bull trout redds trampled by livestock on the Allotment." The ITS acknowledged that incidental take of redds resulting from the action would be difficult to measure, but failed to designate any proxy, such as bank alteration. Rather, the associated Term and Condition simply required the Forest Service to monitor the lower, exposed 0.3 mile section of Wet Creek when the likelihood of observing impacted redds is the greatest, and report the number of redds seen and impacted by grazing. The ITS contained no direction about what impacts would trigger reinitiation of consultation or explanation of why that single segment was sufficient to monitor incidental take when cattle routinely have entered the upstream exclosure along Wet Creek and subjected that spawning habitat to impacts as well.

142. In sum, the 2010 Pass Creek BiOp was flawed for numerous reasons, including that it ignored various impacts to bull trout from grazing and other activities, relied on unsupported assumptions about implementation and effectiveness of exclosures and adaptive management, failed to provide a rational explanation for why continued adverse effects from the proposed action would not jeopardize the survival and recovery of bull trout, and included an unlawful ITS.

D. Subsequent Actions

143. The Forest Service has authorized grazing in reliance on the 2010 Pass

Creek BiOp every year since it was issued. Grazing violations continued in 2010, 2011, and 2012. As in prior years, the Forest Service took little to no effective enforcement action, pursuant to the adaptive management strategy or otherwise.

144. In 2010, compliance problems included failure to maintain structures and fences (including exclosures), cattle trespass, excessive use, and poor livestock distribution.

145. In 2011, violations were even more extensive. Lengthy trespass occurred in numerous locations, including within exclosures, within units that contain bull trout streams and tributaries, onto private land, and onto a Forest Service administration area. In addition, permittees placed salt in inappropriate locations, grazing standards were violated along Wet Creek and Basin Creek as well as other areas, several range projects were non-functional, and riders failed to move and remove cattle when directed. The Forest Service's only enforcement consisted of warning letters and a notice of non-compliance.

146. In 2012, further violations occurred. These included extensive cattle trespass in both the Wet Creek and Basin Creek exclosures (which resulted in extensive cattle use of the banks and streambed of bull trout spawning habitat in Wet Creek) and excessive use within units that contain bull trout streams and tributaries. Livestock use was particularly severe on the unfenced lower portion of Wet Creek in the Pine Creek Unit. The Forest Service—finally—announced a 30% suspension in livestock numbers for two years based on the repeated violations.

147. However, after being pressured by the grazing permittees, the Forest Service agreed to hold the suspension in abeyance for two years. Thus, the Forest

Service again failed to take any effective enforcement measures.

148. On November 6, 2012, Plaintiff WWP sent a notice letter to the Forest Service with respect to this allotment.

149. By letter dated January 25, 2013, the Forest Service responded to WWP, stating "we do plan to reinitiate consultation due to changed circumstances since the Biological Assessment and Biological Opinion were signed in 2010." The Forest Service subsequently indicated that it would not reinitiate consultation until May 2013 at the earliest, and that it would not close the allotment to grazing during the new consultation.

IV. HAWLEY MOUNTAIN ALLOTMENT

A. Allotment Background and Bull Trout

150. The Hawley Mountain allotment is a large, 50,000+ acre allotment managed by BLM's Upper Snake Field Office of the Idaho Falls District. The north half of the allotment is immediately downstream from the Mill Creek allotment, along Sawmill Creek. 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. 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.

151. Occupied bull trout streams on the allotment include: Sawmill Creek, Summit Creek, Wet Creek, Warm Creek, Badger Creek, and the Little Lost River. In the north half of the allotment, the Upper Sawmill pasture has 4.8 miles of Sawmill Creek and 0.9 miles of Warm Creek that are bull trout designated critical habitat. The Lower

Sawmill pasture has 3.7 miles of bull trout critical habitat in Sawmill Creek. BLM has constructed fences along many of the occupied bull trout streams to create narrow "riparian pastures."

152. For many of the bull trout occupied streams on the allotment, BLM believes the bull trout do not spawn on the BLM allotment due to warm water temperatures. Instead, BLM believes the bull trout travel upstream to spawn on Forest Service land (including the Mill Creek and Pass Creek allotments). BLM acknowledges potential for bull trout spawning on two streams within the Hawley Mountain allotment, Warm Creek and Badger Creek.

153. BLM authorizes hundreds of cattle to graze this allotment from early May through late December every year, including at least several weeks of grazing in most riparian pastures. Many of the occupied bull trout streams are grazed in May or June. 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. Cattle regularly access the occupied bull trout streams, and there have been multiple compliance problems.

B. Hawley Mountain Allotment Biological Assessment

154. In 2012, BLM reinitiated consultation with FWS over continued authorization of grazing on the allotment and prepared a new BA dated March 9, 2012.

155. BLM's proposed action continued the past grazing regime with only minor changes. Under the proposed action, grazing continues to be authorized along almost all occupied bull trout streams. For example, BLM proposed allowing a month of grazing in May or June in the Upper Sawmill pasture (which contains reaches of Sawmill and Warm

Creeks, just downstream of the Mill Creek allotment) three out of every four years; and in November and December in the Horse Creek pasture every other year.

156. The Hawley Mountain BA listed four BAs that BLM previously prepared for activities in the watershed, but did not discuss the impacts or the level of take these activities were causing for bull trout. It also did not analyze any negative impacts from any interrelated, interdependent, or cumulative actions such as water diversions, agriculture, or grazing of other nearby areas, nor explain why it did not do so. For example, the BA did not discuss the 2008 consultation conducted for a water diversion on Sawmill Creek and it ignored harmful impacts from a hydroelectric project on Wet Creek.

157. And remarkably, even though BLM states that most of the bull trout individuals on the Hawley Mountain allotment travel upstream onto the neighboring Forest Service allotments to spawn, and the Hawley Mountain BA was prepared after the completion of the 2010 Mill Creek and Pass Creek BiOps, the BA did not discuss the existence of those BiOps, how much take those BiOps authorize, habitat conditions on those allotments, the effects of grazing on those allotments, or the combined impacts to the Little Lost River Core Area of grazing on both the Forest Service and BLM allotments.

158. The BA admitted bull trout streams have been impacted in the watershed due to water diversions and brook trout. However, it did not acknowledge that water diversions are related to livestock production, or that livestock grazing creates conditions that lead to the expansion of brook trout. It failed to recognize any impacts that livestock grazing has had on the allotments' streams, despite acknowledging in prior documents

that grazing has significantly degraded them.

159. The BA contained two sentences claiming that bull trout trends are "static" allotment-wide, with upward trends in Wet Creek and Sawmill Creek and downward trends in Deer Creek and Summit Creek. However, it did not discuss bull trout population size, distribution, connectivity, or how these trends were determined. Thus, it did not discuss whether any of the populations are viable or at levels and distributions needed for recovery, or how large the increases or decreases were, to assess status of survival and recovery for these populations.

160. The BA stated that all streams other than Warm Creek "probably" do not provide bull trout spawning habitat. However, it admitted that no spawning surveys had been conducted. It did not discuss which life stages of bull trout **do** utilize any stream reaches in the allotment, or when that use occurs, to assess impacts of grazing.

161. The BA presented data indicating that many of the bull trout occupied streams on the allotment are not meeting objectives. For example, at least five stream reaches are not meeting objectives for bank stability, including the Upper and Lower reaches of Sawmill Creek, which both have bank stability ratings of less than 50%. These same reaches also have low levels of desired riparian vegetation, are in "early" (poor) ecological status, and have "fair" wetland ratings. Almost all stream reaches on the allotment have temperatures that do not meet objectives.

162. Some 2008 stream data was presented for Warm Creek, part of which forms the border between the Mill Creek and Hawley Mountain allotments, but the BA did not mention the heavy grazing impacts that have occurred along the stream, as discussed above with respect to the Mill Creek allotment.

163. The BA largely blamed the various poor conditions on "natural" factors. For example, with respect to elevated water temperatures, the BA blamed summer air temperatures and thermal springs. However, it failed to assess whether the impacts of livestock grazing also contribute to and exacerbate the high temperatures, as was recognized and discussed by the Forest Service in the Pass Creek and Mill Creek BAs.

164. The Hawley Mountain BA contained an extremely brief analysis of "effects to key indicators," which stated that "[n]one of the propose[d] activities can be expected to adversely affect riparian and water quality conditions. All grazing in pastures that contain streams occupied by bull trout will be grazed early season or late in the fall. There will be no hot season grazing on bull trout streams so riparian conditions should not be impacted."

165. Thus, BLM did not acknowledge that **any** riparian habitat effects occur from grazing, much less any effects from upland grazing, such as from soil compaction and increased erosion. It did not acknowledge that livestock would drink from the creeks, even outside of the "hot season," or that livestock impacts from early season grazing could carry over into the rest of the year. Unlike the Forest Service, which acknowledged that grazing was causing adverse impacts to streams and riparian areas on the adjacent Forest Service allotments, BLM simply dismissed all impacts with little explanation or support. Furthermore, BLM failed to acknowledge that past use of grazing standards and adaptive management had not protected riparian areas and streams from livestock damage.

166. With respect to effects on redds, the BA stated that livestock impacts "should be nonexistent." It admitted that grazing had occurred in two pastures when redd

disturbance "could have occurred," but claimed that none had been documented. However, it did not support its conclusion with any explanation of how much monitoring, if any, occurred to document such disturbance. The BA claimed that livestock would not access Badger Creek when grazed in the fall, but again did not explain how the livestock will obtain water otherwise. Nor did it explain why, if livestock do not access Badger Creek, that creek's bank stability rating was far below objectives.

167. The BA also did not discuss any direct impacts to bull trout in other life stages, such as harassment of juveniles or migrating adults; or whether those life stages would be present in any stream reaches when grazed.

168. With respect to impacts to critical habitat, the BA claimed grazing would not affect almost all bull trout Primary Constituent Elements. For example, it claimed grazing would have no impact on brook trout predation and hybridization—ignoring grazing's role in creating conditions that favor brook trout, such as warmer temperatures. Nor did the BA discuss whether grazing is slowing recovery of bull trout.

169. The BA determined that the proposed grazing was "not likely to adversely affect" either bull trout or its critical habitat. It supported the determination by claiming that the grazing system "precludes indirect effects from runoff or erosion." It did not explain why or how such indirect effects were entirely precluded. It also claimed that "no grazing would be authorized that would allow access to creeks in the allotment that are known to support bull trout spawning." However, the BA elsewhere acknowledged that grazing would in fact occur in the pastures containing Warm Creek and Badger Creek. And, as noted just above, the BA did not even address whether grazing could adversely affect other life stages of bull trout. Finally, it claimed that impacts would not

change from current impacts without discussing why maintenance of current degraded conditions is consistent with survival and recovery of the relevant local populations of bull trout or the core area.

C. Hawley Mountain Allotment Letter of Concurrence

170. FWS concurred with BLM's NLAA conclusions in a Letter of Concurrence ("LOC") dated March 14, 2012. The LOC relied upon the BA for its description of the proposed action and current conditions. FWS did not contribute any additional information about the status or trend of bull trout on the allotment or in the core area.

171. In contrast to the BA's conclusions, the LOC did admit that grazing had the potential to impact fish and fish habitat; and that grazing may have slowed improvements in bank stability.

172. FWS again failed to note or analyze the impacts of any other activities in the watershed, including water diversions, the Wet Creek hydroelectric facility, or grazing on private land or nearby public land. It did not even note its own BiOps for the Sawmill Creek diversion and the Mill Creek and Pass Creek allotments, much less analyze the **combined** effects of grazing these three allotments.

173. FWS concurred with BLM's NLAA determination for bull trout based on the condition of bull trout habitat, bull trout distribution, project design, and protective measures. It also concurred with BLM's NLAA determination for bull trout critical habitat based on the grazing strategy and protective measures.

174. However, these bases do not support FWS's conclusion. As for the condition of bull trout habitat, the BA acknowledged that many bull trout objectives are

not being met. And the BA failed to discuss bull trout distribution. As for reliance on project design, the grazing strategy, and protective measures, the LOC failed to acknowledge that past reliance on the grazing strategy has **not** protected bull trout or its habitat from grazing damage. FWS failed to discuss the impacts from upland grazing on any stream attributes, and relied on the cursory and unsupported assertions in the BA that habitat conditions were not being adversely affected by grazing.

175. FWS did not explain how the limited information and unsupported assertions in the BA on habitat conditions and status of bull trout on the Hawley Mountain allotment, combined with known information that bull trout in the core area are greatly depressed and grazing is causing adverse effects to bull trout on adjacent allotments, support FWS's concurrence that grazing on this allotment is not likely to adversely affect bull trout survival or recovery.

176. Nor did FWS explain its reliance on BLM's assurance that no direct or indirect take will occur on the allotment, and thus its conclusion that no ITS is needed, in light of: the eight-month long grazing season, the well-known adverse direct and indirect impacts of grazing upon bull trout and its habitat, the lack of information about whether bull trout are in the stream reaches during the grazing periods, and the grazing of Badger Creek during bull trout incubation.

CONCLUSION

177. In sum, FWS has abdicated its duties under the ESA for the Little Lost River Core Area of bull trout. It has failed to take a comprehensive look at the impacts to the core area from the multiple activities across the watershed that continue to degrade bull trout habitat. Nor has it anywhere taken a comprehensive look at the survival and

recovery needs of the core area. Instead, it limited its view in each of the three analyses to the allotment at issue, failing to consider the impacts of neighboring allotments even when individual bull trout travel between them. This constrained view allowed FWS to tolerate and authorize harm and habitat degradation from grazing each specific allotment, relying on a vague hope that recovery takes place "somewhere else" —masking the impacts of the watershed-wide degradation and ensuring that the core area never recovers. The ESA does not allow such an approach.

FIRST CLAIM FOR RELIEF

The FWS Biological Opinion and Incidental Take Statement for the Mill Creek Allotment Violate the ESA and APA

178. Plaintiff realleges and incorporates by reference the preceding paragraphs.

179. ESA section 7(a)(2) requires FWS to insure that agency actions are not likely to jeopardize the continued existence of a listed species or destroy or adversely modify its critical habitat.

180. Including for the reasons described above, the conclusions in FWS's 2010 biological opinion for the Mill Creek allotment that the proposed grazing on this allotment is not likely to jeopardize the continued existence of bull trout or adversely modify its critical habitat are based on inaccurate and incomplete information and invalid assumptions from the BA, an incomplete discussion of the environmental baseline, and an inadequate and flawed analysis assessing the effects of the action on both survival and recovery of the species. The BiOp fails to make a rational connection between its findings and its conclusions. Thus, it violates the APA and ESA section 7(a)(2), and is not based on the best available science, as required by the ESA.

181. The Incidental Take Statement within the 2010 BiOp for the Mill Creek

allotment is invalid, including for the reasons discussed above. It did not address or authorize take of fry, juveniles or adults despite likely harm and harassment to those life forms, failed to adequately analyze the effects of incidental take on the species from either this action alone or when added to the incidental take authorized for other actions in the core area, unlawfully authorized a level of take that is coextensive with the proposed action, and did not contain a valid trigger for reinitiation of consultation.

182. For these reasons and others, the FWS's issuance of the 2010 BiOp for the Mill Creek allotment and accompanying Incidental Take Statement was arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with the ESA and therefore violates the APA, 5 U.S.C. § 706(2).

SECOND CLAIM FOR RELIEF

Forest Service Violations of the ESA for the Mill Creek Allotment

183. Plaintiff realleges and incorporates by reference the preceding paragraphs.

184. ESA Section 7(a)(2) requires the Forest Service to insure that its own actions are not likely to jeopardize the continued existence of a listed species or destroy or adversely modify its critical habitat.

185. The Forest Service has failed to meet this duty by relying on the flawed 2010 BiOp for the Mill Creek allotment and the accompanying Incidental Take Statement to continue to authorize livestock grazing on the Mill Creek allotment that adversely affects the survival and recovery of bull trout.

186. ESA implementing regulations require reinitiation of consultation if the amount or extent of taking specified in the Incidental Take Statement is exceeded or if the action is modified in a manner that has an effect to the listed species or designated

critical habitat that was not considered in the BiOp. 50 C.F.R. § 402.16.

187. To the best of Plaintiff's knowledge, the Forest Service has failed to reinitiate consultation with FWS with respect to the Mill Creek allotment, despite evidence that the action has exceeded the amount or extent of taking specified in the ITS and was modified in a manner that created adverse effects to the bull trout and its critical habitat beyond those considered in the BiOp, including by failing to comply with many of the conservation measures assumed to occur and be effective in the BiOp and ITS.

188. To the extent that the Forest Service has reinitiated or reinitiates consultation on the Mill Creek allotment, but has continued or will continue to authorize livestock grazing on the allotment during the consultation process, the Forest Service has violated its duty under 16 U.S.C. § 1536(d).

189. The Forest Service authorizes livestock grazing on the Mill Creek allotment in a manner that has caused, and will foreseeably continue to cause, unlawful take of various life forms of bull trout without a valid ITS, in violation of ESA Section 9, 16 U.S.C. § 1538, and regulations promulgated under Section 4(d) of the ESA, 16 U.S.C. § 1533(d), including 50 C.F.R. §§ 17.31, 17.44. Ongoing take is also caused by continuing to authorize grazing despite the need to reinitiate consultation and the invalidation of the Mill Creek BiOp.

190. WWP is injured by the Forest Service's ongoing violations of the ESA as herein alleged.

191. WWP is authorized by the citizen suit provision of the ESA to bring this action and obtain injunctive relief to remedy said ongoing violations by the Forest Service. 16 U.S.C. § 1540(g)(1).

192. For these reasons, the Forest Service has violated Sections 7 and 9 of the ESA and their implementing regulations.

THIRD CLAIM FOR RELIEF

The FWS Biological Opinion and Incidental Take Statement for the Pass Creek Allotment Violate the ESA and APA

193. Plaintiff realleges and incorporates by reference the preceding paragraphs.

194. Including for the reasons described above, the conclusions in FWS's 2010 biological opinion for the Pass Creek allotment that the proposed grazing on this allotment is not likely to jeopardize the continued existence of bull trout are based on inaccurate and incomplete information and invalid assumptions from the BA, an incomplete discussion of the environmental baseline, and an inadequate and flawed analysis assessing the effects of the action on both survival and recovery of the species. The BiOp fails to make a rational connection between its findings and its conclusion. Thus, it violates the APA and ESA section 7(a)(2), and is not based on the best available science, as required by the ESA.

195. The Incidental Take Statement within the 2010 BiOp for the Pass Creek allotment is invalid, including for the reasons discussed above. It does not address or authorize take of fry, juveniles or non-spawning adults despite likely harm and harassment to those life forms, failed to adequately analyze the effects of incidental take on the species from either this project alone or when added to the incidental take authorized for other projects in the core area, unlawfully authorized a level of take that is coextensive with the proposed action, and did not contain a valid trigger for reinitiation of consultation.

196. For these reasons and others, the FWS's issuance of the 2010 BiOp for the

Pass Creek allotment and accompanying Incidental Take Statement was arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with the ESA and therefore violates the APA, 5 U.S.C. § 706(2).

FOURTH CLAIM FOR RELIEF

Forest Service Violations of the ESA for the Pass Creek Allotment

197. Plaintiff realleges and incorporates by reference the preceding paragraphs.

198. The Forest Service has failed to meet its duty under ESA Section 7(a)(2) by relying on the flawed 2010 BiOp for the Pass Creek allotment and the accompanying Incidental Take Statement to continue to authorize livestock grazing on the Pass Creek allotment that adversely affects the survival and recovery of bull trout.

199. To the best of Plaintiff's knowledge, the Forest Service has failed to reinitiate consultation with FWS with respect to the Pass Creek allotment, despite evidence that the action has exceeded the amount or extent of taking specified in the ITS and was modified in a manner that caused adverse effects to bull trout beyond those considered in the BiOp, including by failing to comply with many of the conservation measures assumed to occur and be effective in the BiOp and ITS.

200. To the extent that the Forest Service has reinitiated or reinitiates consultation on the Pass Creek allotment, but has continued or will continue to authorize livestock grazing on the allotment during the consultation process, the Forest Service has violated its duty under 16 U.S.C. § 1536(d).

201. The Forest Service authorizes livestock grazing on the Pass Creek allotment in a manner that has caused, and will foreseeably continue to cause, unlawful take of various life forms of bull trout without a valid ITS, in violation of ESA Section 9,

16 U.S.C. § 1538, and regulations promulgated under Section 4(d) of the ESA, 16 U.S.C. § 1533(d), including 50 C.F.R. §§ 17.31, 17.44. Ongoing take is also caused by continuing to authorize grazing despite the need to reinitiate consultation and the invalidation of the BiOp.

202. WWP is injured by the Forest Service's ongoing violations of the ESA as herein alleged.

203. WWP is authorized by the citizen suit provision of the ESA to bring this action and obtain injunctive relief to remedy said ongoing violations by the Forest Service. 16 U.S.C. § 1540(g)(1).

204. For these reasons, the Forest Service has violated sections 7 and 9 of the ESA and their implementing regulations.

FIFTH CLAIM FOR RELIEF

The FWS Concurrence for the Hawley Mountain Allotment Violates the ESA and APA

205. Plaintiff realleges and incorporates by reference the preceding paragraphs.

206. Including for the reasons described above, the conclusions in FWS's Letter of Concurrence for the Hawley Mountain allotment that the proposed grazing on this allotment is not likely to adversely affect bull trout or its critical habitat is based on inaccurate and incomplete information and invalid assumptions from the BA, an incomplete assessment of the environmental baseline, and an inadequate and flawed analysis assessing the effects of the action on both survival and recovery of the species--including the failure to consider the impacts from grazing on this allotment combined with impacts from the Mill Creek and Pass Creek allotments. The LOC fails to make a rational connection between the findings in the BA and its concurrence with BLM's

effect determinations. Thus, it violates ESA section 7(a)(2), and is not based on the best available science, as required by the ESA.

207. For these reasons and others, the FWS's issuance of the LOC for the Hawley Mountain allotment was arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with the ESA and therefore violates the APA, 5 U.S.C. § 706(2).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court:

A. Order, declare, and adjudge that the FWS bull trout biological opinions and Incidental Take Statements for the Mill Creek and Pass Creek allotments and the FWS bull trout Letter of Concurrence for the Hawley Mountain allotment are arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with the ESA, in violation of the APA;

B. Set aside the FWS bull trout biological opinions and Incidental Take Statements for the Mill Creek and Pass Creek allotments and the FWS bull trout Letter of Concurrence for the Hawley Mountain allotment;

C. Order, declare and adjudge that the Forest Service is in violation of the ESA by: (1) not insuring that its authorization of livestock grazing on the Mill Creek and Pass Creek allotments is not likely to jeopardize bull trout (for both allotments) or adversely modify bull trout designated critical habitat (for the Mill Creek allotment); (2) causing unlawful take of bull trout in authorizing livestock grazing on the Mill Creek and Pass Creek allotments; and (3) failing to reinitiate consultation with FWS on the Mill Creek and Pass Creek allotments and/or violating section 7(d) of the ESA by continuing

to authorize grazing on the Mill Creek and Pass Creek allotments pending the completion of new consultations;

D. Order the Forest Service to comply with the requirements of the ESA by promptly reinitiating consultation with FWS over the Mill Creek and Pass Creek allotments, if it has not yet done so;

E. If the Forest Service has reinitiated consultation on the Mill Creek or Pass Creek allotments, order the Forest Service to comply with the requirements of ESA section 7(d) by not authorizing grazing pending the completion of new consultations;

F. Issue such temporary, preliminary, and/or permanent injunctive relief as may specifically be requested hereafter by Plaintiff;

G. Award Plaintiff its reasonable attorney fees, costs, and litigation expenses under the ESA, 16 U.S.C. § 1540(g), the Equal Access to Justice Act, and/or any other applicable provision of law; and

H. Grant such further and additional relief as the Court deems just and proper in order to remedy the violations of law alleged herein and to protect the interests of Plaintiff, the public, and the bull trout.

Dated: April 9, 2013

Respectfully submitted,

s/ Kristin F. Ruether

Kristin F. Ruether
Attorney for Plaintiff