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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON**

**OREGON NATURAL DESERT ASS’N *et al.*,** Case No. 03-CV-213-JO

Plaintiffs,

v.

**UNITED STATES FOREST SERV. *et al.*,**

Defendants,

**[PROPOSED] THIRD AMENDED  
COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

and

**ROBERTSON RANCH *et al.*,**

Intervenor-Defendants,

and

[PROPOSED] THIRD AMENDED COMPLAINT

**OREGON CATTLEMEN’S ASS’N,**

Intervenor-Defendants.

**(Environmental Matter)**

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**INTRODUCTION**

1. Defendants United States Forest Service and Malheur National Forest Supervisor Gary L. Benes are violating the National Wild and Scenic Rivers Act of 1968 (“WSRA”), 16 U.S.C. §§ 1271–1286, the National Forest Management Act (“NFMA”), 16 U.S.C. §§ 1600–1614, and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701–706, by failing to implement the Malheur and North Fork Malheur comprehensive river management plans developed pursuant to the WSRA, by failing to “protect and enhance” the wild and scenic river corridors’ “outstandingly remarkable values,” by failing to insure that annually-authorized livestock grazing practices are consistent with the Forest’s Land and Resource Management Plan as well as each comprehensive river management plan, and by failing to undertake required environmental analyses for the protection of wildlife, fish, and other river corridor values.

2. The Forest Service has violated NFMA’s requirement that authorized grazing must be consistent with the Malheur National Forest’s Land and Resource Management Plan—and specifically the Plan’s INFISH aquatic conservation strategy requirements—by its authorization and management of livestock grazing on the Malheur National Forest’s Dollar Basin/Star Glade, Bluebucket, North Fork, Spring Creek, Flag Prairie and Ott allotments. The Forest Service also has violated NFMA’s consistency and diversity requirements by its authorization and management of livestock grazing on the Malheur National Forest’s Dollar Basin/Star Glade, Bluebucket, North Fork, Spring Creek, Flag Prairie and Ott allotments without appropriate monitoring information or best available science for management indicator species.

3. This action seeks to compel Defendants act consistently with the Forest Plan and the comprehensive river management plans by adhering to the standards and guidelines for livestock grazing established in and adopted by the plans when it authorizes grazing, in order to protect threatened bull trout populations and habitat, and to protect and enhance the outstandingly remarkable values for which the river corridors were designated. Plaintiffs seek an injunction prohibiting livestock grazing within the Malheur and North Fork Malheur wild and scenic river corridors, until such time as the corridors have recovered and reduced grazing levels are set that will satisfy the mandatory standards and guidelines. Finally, Plaintiffs seek a declaration that Defendants shall not allow livestock to graze within the corridor unless and until Defendants have properly implemented the Forest Plan and the comprehensive management plans.

#### **JURISDICTION AND VENUE**

4. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 (federal question) because this action arises under the laws of the United States, including the National Wild and Scenic Rivers Act of 1968, 16 U.S.C. §§ 1271–1287, the National Forest Management Act (“NFMA”), 16 U.S.C. §§ 1600–1614, 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 (“EAJA”), 28 U.S.C. § 2412 et seq. An actual, justiciable controversy exists between the parties, and the requested relief is therefore proper under 28 U.S.C. §§ 2201–2202 and 5 U.S.C. § 701–06.

5. Venue is proper in this Court under 28 U.S.C. § 1391 because all or a substantial part of the events or omissions giving rise to the claims herein occurred within this judicial

district, Defendants reside in this district, and the public lands and resources in question are located in this district.

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

### **PARTIES**

7. Plaintiff OREGON NATURAL DESERT ASSOCIATION (“ONDA”) is a non-profit public interest organization with approximately 1,000 members. It has offices in Bend and Portland, Oregon. Its mission is to promote the preservation, protection, and restoration of Oregon’s native deserts and the native fish and wildlife species that depend on those desert ecosystems, and to educate the general public on the values of preserving natural arid-land environments. ONDA’s members regularly use and enjoy the public lands and waters along the Malheur and North Fork Malheur Rivers for observation, research, aesthetic enjoyment, and other recreational, scientific, and educational activities. Many of ONDA’s members enjoy activities such as hiking, biking, fishing, bird watching, photography, and camping within and adjacent to the Malheur and North Fork Malheur Wild and Scenic River corridors. The aesthetic, recreational, research, conservation, and scientific interests of ONDA and its members and staff have been, are being, and will continue to be adversely affected and irreparably harmed by Defendants’ failure to implement the river management plans and continued authorization of environmentally damaging grazing practices.

8. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY, Inc. (“Center” or “CBD”) is a New Mexico non-profit corporation with offices in Phoenix and Tucson, Arizona; Silver City, New Mexico; and San Diego and Berkeley, California. The Tucson office is its primary office. The Center is actively involved in species and habitat protection issues throughout North

America. The Center has members throughout North America, including in Oregon. The Center's members and staff include area residents with biological health, educational, scientific research, moral, spiritual and aesthetic interests in the species implicated in this suit, and the habitat involved. The Center's members and staff have and hope to continue to utilize the areas for recreational, scientific and spiritual endeavors. CBD members and staff have hiked, bird watched, camped and recreated along the Malheur and North Fork Malheur rivers on numerous occasions and plan to return to do so again. The Center has an active Western Trout campaign that seeks to protect and recover native trout species, including the bull trout. One of the Center's primary missions is to protect and restore trout habitat and populations throughout western North America. The degraded conditions of the Malheur and North Fork Malheur wild and scenic river corridors are a detriment to achieving the Center's goal of protection and restoration, and the Center's members and staff continue to be injured by the mismanagement of these river corridors. The Center also has an active Wild and Scenic Rivers campaign, which seeks to advance protection for rivers designated or eligible to be designated under the Wild and Scenic River Act. The ongoing degradation of the Malheur and North Fork Malheur rivers frustrates the goals of our campaigns, activities, programs and mission.

9. Defendant UNITED STATES FOREST SERVICE (Forest Service or USFS) is an agency or instrumentality of the United States, and is charged with managing the public lands and resources within and surrounding the Malheur and North Fork Malheur wild and scenic river corridors in accordance and compliance with federal laws and regulations.

10. Defendant GARY L. BENES is sued solely in his official capacity as Forest Supervisor for the Malheur National Forest, on which the Malheur and North Fork Malheur wild and scenic river corridors are located. The Forest Supervisor is the Forest Service official

responsible for implementing the Malheur and North Fork Malheur Wild and Scenic River comprehensive management plans and administering federally permitted livestock grazing on the Malheur National Forest, and has principal authority for the actions alleged herein.

## **LEGAL BACKGROUND**

### **National Wild and Scenic Rivers Act**

11. Congress enacted the National Wild and Scenic Rivers Act in 1968 to identify rivers that possess “outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values” and to preserve those rivers in free-flowing condition and protect their immediate environments “for the benefit and enjoyment of present and future generations.” 16 U.S.C. § 1271.

12. River corridors included in the national wild and scenic rivers system are classified as wild, scenic, or recreational. *Id.* § 1273(b). Wild rivers are those rivers or sections of rivers that “are free of impoundments and generally inaccessible except by trail, with watersheds or shorelines essentially primitive and waters unpolluted.” *Id.* § 1273(b)(1). These rivers represent “vestiges of primitive America.” *Id.* Scenic rivers are “free of impoundments, with shorelines or watersheds still largely primitive and shorelines largely undeveloped, but accessible in places by roads.” *Id.* § 1273(b)(2). Finally, recreational rivers are “readily accessible by road or railroad [and] may have some development along their shorelines, and [] may have undergone some impoundment or diversion in the past.” *Id.* § 1273(b)(3).

13. Once a river corridor is designated, the federal agency charged with administration of that corridor “shall prepare a comprehensive management plan for such river segment to provide for the protection of the river values.” *Id.* § 1274(d)(1). These management plans must address resource protection, development, use, and other management practices that

will achieve the purposes of the WSRA. *Id.* Management plans may establish “varying degrees of intensity for [a river’s] protection and development, based on the special attributes of the area.” *Id.* § 1281(a).

14. Each component of the system, regardless of its classification as wild, scenic, or recreational, “shall be administered in such manner as to protect and enhance the values which caused it to be included in said system.” *Id.* (emphasis added). Further, “primary emphasis shall be given to protecting its esthetic, scenic, historic, archeologic, and scientific features.” *Id.*

15. In addition to protection of a river’s free-flowing condition and outstandingly remarkable values, the WSRA specifies that managing agencies must protect the water quality of all rivers added to the National Wild and Scenic Rivers System. 16 U.S.C. §§ 1271, 1283(c).

16. The WSRA emphasizes the mandatory nature of these duties, stating that “the Secretary of Agriculture, and the head of any other Federal department or agency having jurisdiction over any lands which include, border upon, or are adjacent to, any river within the National Wild and Scenic Rivers System . . . shall take such action respecting management policies, regulations, contracts, plans, affecting such lands . . . as may be necessary to protect such rivers in accordance with the purposes of this chapter.” *Id.* § 1283(a).

### **National Forest Management Act**

17. In 1976, Congress enacted the National Forest Management Act, 16 U.S.C. §§ 1600–1614, which governs the Forest Service’s management of the national forests.

18. NFMA establishes a two-step process for forest planning. NFMA first requires the Forest Service to develop, maintain, and revise “land and resource management plans” (LRMPs or “Forest Plans”) for each national forest. *Id.* § 1604(a); see also 36 C.F.R. § 219.10(a), (b).

Forest Plans guide natural resource management activities forest-wide, setting standards, management area goals and objectives, and monitoring and evaluation requirements.

19. Implementation of a Forest Plan occurs at the site-specific level—that is, once an LRMP is in place, site-specific actions, such as development of a wild and scenic river management plan or issuance of a federal grazing permit, are assessed by the Forest Service in the second step of the forest planning process. See 36 C.F.R. § 219.10(e). Site-specific decisions must be consistent with the broader Forest Plan. Id. See also 16 U.S.C. § 1604(i).

20. NFMA also requires the Forest Service to provide animal and plant diversity in the national forests. 16 U.S.C. § 1604(g)(3)(B). Forest Service NFMA regulations adopted in 1982 and in place at the time the Forest Service adopted the Malheur Forest Plan (often referred to as the “1982 Planning Regulations”) require the Forest Service to manage forests for viable populations of native vertebrate and desired non-native species. 36 C.F.R. § 219.19 (2000). To ensure that viable populations are maintained on the national forest, the Forest Service regulations require that the agency identify management indicator species (“MIS”) and that “[p]opulation trends of the management indicator species will be monitored and relationships to habitat change determined.” 36 C.F.R. § 219.19(a)(6) (2000). Further, the regulations state “each Forest Supervisor shall obtain and keep current inventory data appropriate for planning and managing the resources under his or her administrative jurisdiction.” Id. § 219.12(d) (2000). To ensure biological diversity, the regulations specifically require that “[i]nventories shall include quantitative data making possible the evaluation of diversity in terms of its prior and present condition.” Id. § 219.26 (2000).

21. The Forest Service adopted regulations on November 9, 2000 that included a transition provision that required consideration of the best available science in implementing a

Forest Plan. 36 C.F.R. § 219.35(a) (2003). The transition period was to end upon promulgation of a new final rule. 69 Fed. Reg. 58055, 58056 (Sept. 29, 2004). The Forest Service promulgated a new final rule on January 5, 2005. 70 Fed. Reg. 1022 (Jan. 5, 2005). However, implementation of the 2005 rule has been enjoined because it was unlawfully promulgated. Citizens for Better Forestry v. U.S. Dep't of Agric., 481 F.Supp.2d. 1059, 1100 (N.D. Cal. 2007).

22. In general, Forest Plan standards control management of the various resources and actions on a particular national forest, unless a site-specific plan establishes more specific or restrictive standards.

### **FACTS GIVING RISE TO PLAINTIFF'S CAUSE OF ACTION**

#### **Geographic and Biological Information**

23. The Malheur and North Fork Malheur Rivers originate in the volcanic landscapes of the Strawberry Mountain Range in eastern Oregon's Blue Mountains. The Malheur River flows south out of the Strawberry Wilderness from headwaters over 8500 feet in elevation, eventually turning east to join the Snake River near Ontario, Oregon. The wild and scenic reach of the river is characterized by a rugged, steep canyon ranging from 300 to 1000 feet deep and exposing colorful layers of Miocene- and Pliocene-epoch volcanic rock deposited twelve to fifteen million years ago.

24. The North Fork Malheur River also flows south from its headwaters in the Blue Mountains' Monument Rock Wilderness at approximately 7815-feet in elevation on Table Rock. The river is characterized by a broad, glacially-carved valley upstream that grades into a rugged, 250 to 750 feet deep canyon to the south. The North Fork Malheur River also has exposed the twelve to fifteen million year old volcanic deposits in its canyon sections. The North Fork joins the main stem Malheur River near Juntura, Oregon in Malheur County.

25. The columnar andesite and basalt outcroppings provide frequent striking vertical cliff faces in parts of each corridor and provide unique opportunities and potential for solitude and an undisturbed wilderness experience.

26. Both the Malheur and the North Fork Malheur River corridors span a wide range of vegetation, from old-growth ponderosa and lodgepole pine and other mixed conifers, to grassy meadows and hillsides accented by western larch, to riparian areas characterized—under normal, healthy ecosystem conditions—by grasses, sedges, and hardwood species such as willow, dogwood, alder, quaking aspen, and cottonwood. A large majority of the riparian areas, however, have been heavily degraded by livestock grazing, which has reduced grasses to mere stubble and stunted or virtually eliminated the hardwood component of these riparian vegetative communities.

27. The Malheur and North Fork Malheur wild and scenic rivers are particularly unique in that they sit at a physiographic crossroads at the junction of the Blue Mountains and Basin and Range geographic provinces. As such, the rivers and their associated aquatic, riparian, and upland habitats serve as a significant ecosystem link for an incredibly wide variety of plant and animal species.

28. The river corridors have the potential to support nearly all of the wildlife species found on the Malheur National Forest, including over 195 species of birds, 70 species of mammals, and 20 species of amphibians and reptiles known or suspected to spend portions of their lives within the corridor. The rivers and their tributaries provide important spawning, rearing, and migratory habitat for threatened bull trout (Salvelinus confluentus), as well as redband trout and several minnows, suckers, and sculpins. The river corridors also provide habitat for mountain lions, black bear, antelope, Rocky Mountain elk, bald eagles, osprey, sage

grouse, gray wolves, river otters, beaver, spotted frogs and other amphibians, and an astounding number of woodpecker species.

29. A 13.7 mile segment of the Malheur River was designated as a wild and scenic river corridor in the Omnibus Oregon Wild and Scenic Rivers Act of 1988. Pub. L. 100-557, codified at 16 U.S.C. § 1274(a)(83).

30. A 25.5 mile segment of the North Fork Malheur River was designated as a scenic river corridor in the Omnibus Oregon Wild and Scenic Rivers Act of 1988. Pub. L. 100-557, codified at 16 U.S.C. § 1274(a)(89).

31. The Malheur National Forest manages the public lands within and adjacent to the Malheur and North Fork Malheur Wild and Scenic River corridors. See 16 U.S.C. § 1283(a) (Secretary or agency having jurisdiction over lands that include, border upon, or are adjacent to, a designated river shall manage and protect the river corridor).

32. Pursuant to the WSRA requirement that the administering agency prepare a comprehensive river management plan for protection of river values, the Malheur National Forest completed Resource Assessments on each river corridor in January 1992. The Malheur Wild and Scenic River assessment identified geologic, historic, and wildlife habitat as outstandingly remarkable values (ORVs) and verified Congress's finding that scenery was also an ORV. The North Fork Malheur Scenic River assessment identified wildlife habitat and fisheries as ORVs, and verified Congress's finding that scenery and geology were also ORVs.

33. In July (North Fork Malheur) and August (Malheur) 1992, the Malheur National Forest, pursuant to NEPA, issued a "decision notice" and "finding of no significant impact" (DN/FONSI) for its environmental assessments (EAs), amending the Malheur National Forest LRMP and adopting the rivers' final WSRA comprehensive management plans.

34. The Decision Notice for the Malheur Wild and Scenic River states that scenery protection, wildlife habitat, fish habitat, and recreation are the “highest priority resources and uses” and that timber and forage production are lower priority uses within the corridor.

### **The Forest Service’s Livestock Grazing Management**

35. Within the Malheur National Forest boundaries are livestock grazing allotments, established pursuant to the Taylor Grazing Act of 1934, 43 U.S.C. §§ 315–315r, and governed by a permit system under the Federal Land Policy and Management Act of 1976 (“FLPMA”), 43 U.S.C. §§ 1701–1784, and the NFMA implementing regulations. See 36 C.F.R., Part 222. The Malheur Wild and Scenic River corridor includes portions of the Bluebucket, Dollar Basin/Star Glade, and Central Malheur allotments. The North Fork Malheur Scenic River corridor includes portions of the Spring Creek, North Fork, Flag Prairie, and Ott allotments. Each allotment is further divided into units, which allows the Forest Service to authorize (or not) grazing on certain portions of each allotment at different times and levels of use throughout the grazing season and from one season to the next.

36. The Forest Service authorizes and manages livestock grazing on specified allotments by issuing (1) a grazing permit pursuant to 43 U.S.C. § 1752(a) and 36 C.F.R. § 222; (2) an Allotment Management Plan (“AMP”) pursuant to 43 U.S.C. § 1752(d) and 36 C.F.R. § 222.1(b); and, for the past decade, Annual Operating Instructions (“AOIs”).

37. Following the Ninth Circuit’s decision holding that ONDA may properly challenge the Forest Service’s AOI decisions as “final agency action” under the APA, Ore. Natural Desert Ass’n v. U.S. Forest Serv., 465 F.3d 977 (9th Cir. 2006), the Forest Service now discourages use of AOIs. In 2007, it has instead issued “Grazing Permit Modification” decisions for grazing on the Malheur National Forest. The Grazing Permit Modification decisions are

accompanied by grazing authorization letters to the permittees further specifying livestock numbers, unit or pasture rotation schedules, and on- and off-dates for the livestock. Like the AOIs, these Grazing Permit Modification decisions, and the accompanying authorization letters, include specific instructions that the 10-year term permits and long-term AMPs do not address, responding to issues such as drought conditions, timing and duration of rainfall over the grazing season, success or failure of habitat restoration projects, water quality, or degree of risk to threatened or endangered species affected by grazing.

38. The AMPs for the allotments within the wild and scenic river corridors, and their accompanying environmental analyses prepared pursuant to NEPA, are extremely outdated or nonexistent: the Dollar Basin/Star Glade Allotment has no AMP and its last “range allotment analysis” was prepared in 1965; the Bluebucket Allotment AMP was prepared in 1985; the North Fork Allotment AMP was prepared in 1979; the Flag Prairie Allotment has no AMP and its last “range allotment analysis” was prepared in 1980; the Spring Creek Allotment AMP was prepared in 1970; and the Ott Allotment AMP was prepared in 1983.

39. In 1994 and 1995, the Forest Service and the Bureau of Land Management developed the Interim Strategies for Managing Pacific Anadromous Fish-producing Watersheds in Eastern Oregon and Washington, Idaho, and portions of California (“PACFISH”), and Inland Native Strategies for Managing Fish-producing Watersheds in Eastern Oregon and Washington, Idaho, Western Montana, and Portions of Nevada (“INFISH”), to provide interim direction to maintain management options for anadromous and native fish habitat, respectively.

40. The standards and direction within INFISH apply to all bull trout habitat outside of (that is, beyond) the areas covered by PACFISH.

41. In 1995, the Forest Service amended the affected Forest Plans, including the Malheur LRMP, automatically incorporating the PACFISH and INFISH standards and guidelines. Thus, livestock grazing on the Malheur National Forest is subject to the requirements of PACFISH and INFISH.

42. Grazing standard GM-1 in INFISH states that the Forest Service must [m]odify grazing practices (e.g., accessibility of riparian areas to livestock, length of grazing season, stocking levels, timing of grazing, etc.) that retard or prevent attainment of Riparian Management Objectives or are likely to adversely affect inland native fish. Suspend grazing if adjusting practices is not effective in meeting Riparian Management Objectives.  
  
(emphasis added).

43. Riparian Management Objectives (RMOs) are “[q]uantifiable measures of stream and streamside conditions that define good fish habitat, and serve as indicators against which attainment or progress toward attainment of goals will be measured.” INFISH establishes RMOs for quantifiable stream attributes such as water temperature, bank stability, stream width/depth ration, and pool frequency.

44. In addition to the INFISH and other standards, the Forest Plan also provides various fisheries and watershed grazing-related standards for anadromous and non-anadromous riparian areas. These include narrative standards protecting certain habitat requirements of the fish, such as standards for riparian vegetation, water quality, and streambank stability. The Forest Plan also establishes Forest-wide grazing utilization standards, set forth in terms of utilization percentages based on percent vegetation removed by weight. Utilization limitations are sometimes also given as residual vegetative “stubble height” requirements in the Forest Service’s annual grazing decisions or permit modification decisions.

45. Steelhead, bull trout, redband trout and cutthroat trout are management indicator species (“MIS”) under the Malheur LRMP. The Malheur LRMP requires monitoring of resident fish habitat capability in all subwatersheds on the Forest, using identified management indicator species. The LRMP also requires monitoring of habitat capability in all subwatersheds with existing, or potential anadromous fish distribution.

46. As required under the WSRA, the comprehensive river management plans set standards designed to protect and enhance the outstandingly remarkable values for which the Malheur and North Fork wild and scenic river corridors were established, and to protect the free-flowing conditions and water quality of the rivers. The plans set standards for a wide variety of resource elements and land uses, all of which directly and/or indirectly affect the rivers’ designated ORVs, free-flowing nature, and water quality. These resource elements and land uses include recreation, roads and trails, fisheries and watershed, wildlife, fire management, minerals, visual quality, timber harvest, and livestock grazing.

47. Where the comprehensive river management plan does not set a specific standard for a particular resource element or land use, the Forest-wide management standards established in the Forest Plan control.

### **Bull Trout Livestock Grazing Standards**

48. Finally, grazing on these allotments is subject to the protections afforded to threatened bull trout pursuant to the Endangered Species Act of 1973 (“ESA”). 16 U.S.C. §§ 1531–1543.

49. The U.S. Fish and Wildlife Service (FWS) listed bull trout (Salvelinus confluentus) as a threatened species under the ESA, effective July 10, 1998. The Columbia River distinct population segment (DPS) of bull trout, which includes the bull trout in the Malheur and

North Fork Malheur wild and scenic rivers, are threatened by habitat degradation and fragmentation, blockage of migratory corridors, poor water quality, past fisheries management practices, and the introduction of non-native species.

50. Bull trout occupy about 40% of their historic range, and seventy-six percent of the known populations of bull trout are considered depressed in watersheds they occupy. The Upper Malheur River subbasin population of bull trout is considered to be at “high risk” of extinction, and the North Fork Malheur subbasin population is considered to be at “moderate risk” extinction.

51. Because the North Fork Malheur bull trout metapopulation is the only population in the region not considered to be at high risk of extinction, the Forest Service has stated that this “increas[es] the need to conserve this relatively healthy population.”

52. All life history stages of bull trout are associated with complex forms of cover along stream channels, including large woody debris, undercut banks, and pools. Livestock grazing activities directly and indirectly influence and degrade vegetation, bank stability, and channel stability and quality, which are critical to bull trout habitat. Grazing degrades aquatic habitat 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 anchor ice in winter, and increase sediment into spawning and rearing habitats.

53. Bull trout require the coldest water temperatures of the Northwest’s salmonid species. Under the Clean Water Act, 33 U.S.C. §§ 1251–1387, the State of Oregon has set the water quality standard for temperature for bull trout streams at 50 degrees Fahrenheit (10 degrees

C). Or. Admin. R. 340-041-0805(2)(b)(A)(iii). This means that “no measurable surface water temperature increase resulting from anthropogenic activities is allowed” in waters determined to support or to be necessary to maintain the viability of native Oregon bull trout. Id. This includes the Malheur and North Fork Malheur Rivers’ wild and scenic corridor reaches.

54. The effects of high water temperatures on salmonid species such as bull trout are well documented, and include disease and stress, increased susceptibility to predation, and thermal barriers to migration. Temperatures in the mid- to high-70s can cause death in a matter of hours or days by causing the breakdown of vital respiratory and circulatory processes. Temperatures in the mid-60s to lower 70s may cause death in a matter of weeks.

55. Forest Service water temperature monitoring on both the Malheur and the North Fork Malheur rivers, as well as their immediate tributaries, shows that the rivers have exceeded these temperatures anywhere from 10 to 125 or more days per year—with maximum temperatures frequently in the mid- to high-70s—each year since the wild and scenic river management plans were adopted more than a decade ago.

56. After bull trout were listed as threatened species, the Forest Service was required, pursuant to Section 7 of the ESA, to consult with the U.S. Fish and Wildlife Service to determine whether federally permitted grazing activities may affect listed bull trout. 16 U.S.C. § 1536(a)(3). Section 7 of the ESA imposes an affirmative duty to prevent violations of Section 9’s prohibition on “take” of threatened and endangered species. Id. § 1536(a)(2).

57. Up through 2006, the Forest Service consulted annually with FWS regarding the impacts of the Malheur National Forest’s Annual Operating Instructions (“AOIs”) for livestock grazing on allotments containing bull trout (including each of the six allotments at issue in this action).

58. In 2007, the Forest Service consulted with FWS over 2007–2011 grazing for the Dollar Basin/Star Glade, North Fork, Spring Creek, Flag Prairie and Ott allotments.

59. The Forest Service requested informal consultation on 12 allotments, including the Dollar Basin/Star Glade, Flag Prairie, North Fork, Spring Creek and Ott allotments, in a letter dated February 28, 2007, finding that the 2007–2011 Malheur National Forest grazing is “not likely to adversely affect” bull trout on those allotments.

60. This informal consultation resulted in a FWS 2007–2011 Letter of Concurrence, dated May 14, 2007 (# 8330.I0098(07)). The letter concurred that the effects of the action were “not likely to adversely affect” bull trout. No formal consultation was conducted.

61. The Forest Service has stated that the Malheur National Forest would initiate, complete and issue NEPA analyses and AMPs for the Dollar Basin/Star Glade Allotment and the Bluebucket Allotment by 1996; for the Flag Prairie Allotment by 1997; for the North Fork Allotment by 1999; for the Spring Creek Allotment by 2000; and for the Ott Allotment by 2001. To date, none of these analyses have even been initiated.

62. Because AMPs for the allotments at issue are either extremely outdated or have never been developed at all, and because the grazing permits are non-specific documents only issued every ten years with the expectation and understanding that specific grazing management direction will be enumerated either in an AMP, in an AOI, or in a 5-year permit modification decision, the 2007 Grazing Permit Modification decisions and grazing authorization letters now control on-the-ground grazing practices on an annual basis. Issuance of a Grazing Permit Modification decision, including its accompanying grazing authorization letter, is a site-specific action under the two-step forest planning process.

### **Damage to Wild and Scenic River Corridors from Livestock Grazing**

63. Malheur National Forest, U.S. Fish and Wildlife Service, and Oregon Department of Fish and Wildlife biological assessments, biological opinions, environmental assessments, and monitoring data, reports and summaries, as well as outside monitoring and data, demonstrate that the Forest Service has failed, repeatedly and for more than a decade, to implement and comply with the standards established in, or adopted by, the Malheur and North Fork Malheur wild and scenic river comprehensive river management plans, the Forest Plan, and other grazing requirements and authorizations. These shortcomings have resulted in a consistent failure to protect and enhance the outstandingly remarkable values for which the rivers were designated, as well as to ensure grazing is consistent with the terms and requirements of the Forest Plan, including INFISH.

64. Data collected by federal and state agencies, as well as by Plaintiffs, evidences repeated failure to meet riparian vegetation, bank stability, and water quality standards for livestock grazing practices, and indicates a chronic and systemic failure to protect and enhance the outstandingly remarkable values for which these river corridors were designated.

65. Excessive forage utilization and bank damage have caused, are causing, and will continue to cause degradation to habitat of the bull trout, a species designated as threatened under the Endangered Species Act, and a critical, recognized element of the protected values of the river corridors.

66. Excessive forage utilization, bank damage and shrub use have caused, are causing, and will continue to cause impairment of water quality within the Malheur and North Fork Malheur River corridors and their tributaries. High water temperatures are impairing the fisheries and wildlife habitat outstandingly remarkable values on the Malheur and North Fork

Malheur Rivers. Both rivers, as well as a number of their tributaries, are listed on Oregon's "303(d)" list of "water quality limited" waters under the Clean Water Act, for temperature.

Excessive livestock grazing has consistently caused or contributed to water quality temperature standard violations within and immediately adjacent to the river corridors, anywhere from 10 to 125 or more days each grazing season since at least 1994.

67. An April 2000 Forest Service watershed assessment of the Malheur Headwaters watershed indicated that current livestock grazing practices have not allowed restoration of the hardwood shrub component to most riparian habitats; generally do not appear to be providing for a level of recovery of riparian shrubs and overhanging sedge and grass banks that is essential to restore fish habitat and water quality; and have degraded stream channel morphology, including the key PACFISH/INFISH elements of stream bank stability, pools per mile, and wetted width to maximum depth ratios.

**FIRST CLAIM FOR RELIEF:  
VIOLATION OF THE WILD AND SCENIC RIVERS ACT—**

**Failure to Implement Wild and Scenic River Management Plans**

68. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

69. Pursuant to the WSRA, the Forest Service is under a mandatory duty to implement the comprehensive management plans the agency prepared for the Malheur and North Fork Malheur wild and scenic rivers. 16 U.S.C. §§ 1274(d)(1), 1283(a).

70. The Forest Service has failed to do so by authorizing livestock grazing practices on federal public lands, via the 2007 Grazing Permit Modification decisions and accompanying grazing authorization letters for the Dollar Basin/Star Glade, Bluebucket, North Fork, Spring Creek, Flag Prairie and Ott allotments, within these wild and scenic river corridors that cause the

repeated and continuous violation of the specific standards and guidelines enumerated in, and adopted by, the comprehensive management plans.

71. These authorizations constitute final agency actions that are arbitrary, capricious, an abuse of discretion, and not in accordance with the WSRA, 16 U.S.C. §§ 1274(d)(1), 1283(a), and therefore are actionable under the APA. 5 U.S.C. § 702(2)(A).

**SECOND CLAIM FOR RELIEF:  
VIOLATION OF THE WILD AND SCENIC RIVERS ACT—**

**Failure to Protect and Enhance ORVs**

72. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

73. Pursuant to the WSRA, the Forest Service is under a continuing mandatory duty to administer the Malheur and North Fork Malheur wild and scenic river corridors to “protect and enhance” the “outstandingly remarkable values” of those corridors and to manage the rivers “in accordance with the purposes of [the WSRA].” 16 U.S.C. §§ 1281(a), 1283(a).

74. The Forest Service has failed to do so by authorizing livestock grazing practices on federal public lands, via the 2007 Grazing Permit Modification decisions and accompanying grazing authorization letters for the Dollar Basin/Star Glade, Bluebucket, North Fork, Spring Creek, Flag Prairie and Ott allotments, within these wild and scenic river corridors, in repeated and continual violation of the standards and guidelines enumerated in, and adopted by, the comprehensive management plans.

75. These authorizations constitute final agency actions that are arbitrary, capricious, an abuse of discretion, and not in accordance with the WSRA, 16 U.S.C. §§ 1281(a), 1283(a), and therefore are actionable under the APA. 5 U.S.C. § 702(2)(A).

**THIRD CLAIM FOR RELIEF:  
VIOLATION OF THE NATIONAL FOREST MANAGEMENT ACT—**

**Failure to Comply With Forest Plan Standards, Consistency with Forest Plan**

76. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

77. The National Forest Management Act requires that all site-specific decisions “shall be consistent with the [Forest Plan].” 16 U.S.C. § 1604(i). The Forest Service’s regulations implementing the NFMA indicate that land and resource management plans “guide all natural resource management activities and establish management standards and guidelines for the National Forest System. They determine resource management practices, levels of resource production and management, and the availability and suitability of lands for resource management.” 36 C.F.R. § 219.1(b).

78. The Forest Service has violated the NFMA, via the 2007 Grazing Permit Modification decisions and accompanying grazing authorization letters for the Dollar Basin/Star Glade, Bluebucket, North Fork, Spring Creek, Flag Prairie and Ott allotments, because the agency has failed to comply with Forest Plan standards for riparian vegetation, fish and wildlife populations and habitat, and water quality, as well as INFISH grazing standards, on the above-named allotments within and adjacent to the Malheur and North Fork Malheur wild and scenic river corridors.

79. Therefore, the Forest Service’s decisions to issue the 2007 Grazing Permit Modification decisions and accompanying grazing authorization letters for the Dollar Basin/Star Glade, Bluebucket, North Fork, Spring Creek, Flag Prairie and Ott allotments, are arbitrary, capricious, an abuse of discretion, and not in accordance with the National Forest Management Act, 16 U.S.C. § 1604(i), and its implementing regulations, and therefore actionable pursuant to 5 U.S.C. § 706(2)(A).

**FOURTH CLAIM FOR RELIEF:  
VIOLATION OF THE NATIONAL FOREST MANAGEMENT ACT—**

**Failure to Comply With MIS Requirements, Consistency with Forest Plan**

80. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

81. The Forest Service has violated the NFMA because the agency has failed to comply with NFMA's regulations and the Malheur LRMP requirements to monitor population trends of MIS and their relationships to habitat change or, in the alternative, consider best available science.

82. Therefore, the Forest Service's decisions to issue the 2007 Grazing Permit Modification decisions and accompanying grazing authorization letters for the Dollar Basin/Star Glade, Bluebucket, North Fork, Spring Creek, Flag Prairie and Ott allotments without the required monitoring information on steelhead, bull trout, cutthroat trout or redband trout, designated MIS under the Malheur LRMP, renders its decisions in violation of the National Forest Management Act, 16 U.S.C. § 1604(g)(3)(B), and its implementing regulations, and inconsistent with LRMP requirements in violation of the National Forest Management Act, 16 U.S.C. § 1604(i), and its implementing regulations, and renders the decisions arbitrary, capricious, an abuse of discretion, and not in accordance with law, and therefore actionable pursuant to 5 U.S.C. § 706(2)(A).

**PRAYER FOR RELIEF**

Plaintiffs respectfully request that this Court grant the following relief:

A. Order, declare and adjudge that Defendant U.S. Forest Service's failure to implement the nondiscretionary grazing requirements of INFISH, by failing to comply with and enforce mandatory livestock grazing standards and by authorizing grazing that is detrimental to attainment of RMOs on the Dollar Basin/Star Glade, Bluebucket, North Fork, Spring Creek, Flag

Prairie and Ott allotments, violates the National Forest Management Act consistency requirement and is agency action that is arbitrary, capricious, and not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2).

B. Order, declare and adjudge that Defendant U.S. Forest Service's continued authorization of grazing in through its 2007 Grazing Permit Modification decisions for the Dollar Basin/Star Glade, Bluebucket, North Fork, Spring Creek, Flag Prairie and Ott allotments, without appropriate monitoring bull and redband trout, designated MIS, violates the National Forest Management Act and is agency action that is arbitrary, capricious, and not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2).

C. Order, declare, and adjudge that Defendant U.S. Forest Service's failure to implement the Malheur and North Fork Malheur wild and scenic river comprehensive management plans, and failure to manage the Malheur and North Fork Malheur wild and scenic river corridors in a manner that protects and enhances the outstandingly remarkable values for which those corridors were designated, by failing to comply with and enforce mandatory livestock grazing standards and by authorizing grazing that is detrimental to protected wild and scenic river values, by authorizing grazing that is detrimental to attainment of RMOs and other Forest Plan and comprehensive river plan grazing standards on the Dollar Basin/Star Glade, Bluebucket, North Fork, Spring Creek, Flag Prairie and Ott allotments, violates the Wild and Scenic Rivers Act and is arbitrary, capricious, and not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A).

D. Order Defendants to implement immediately the above-referenced comprehensive management plans and comply with all applicable livestock grazing standards in order to protect and enhance the outstandingly remarkable values for which the Malheur and North Fork Malheur

wild and scenic rivers were designated, and otherwise comply with the requirements of the WSRA and NFMA;

E. Issue appropriate injunctive and/or mitigating relief, if any;

F. Award Plaintiffs their reasonable costs, litigation expenses, and attorney's fees associated with this litigation pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412 et seq., and all other applicable authorities; and

G. Grant such further relief as this Court deems just and proper.

DATED this 31st day of December, 2007.

Respectfully Submitted,

s/ Peter M. Lacy

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Peter M. Lacy (OSB # 01322)  
Oregon Natural Desert Association

Of Attorneys for Plaintiffs