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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,

and

**ROBERTSON RANCH et al.,**

Intervenor-Defendants,

and

**OREGON CATTLEMEN’S ASS’N,**

Intervenor-Defendants.

**PLAINTIFFS’ REPLY IN SUPPORT  
OF MOTION FOR SUMMARY  
JUDGMENT AND RESPONSE TO  
DEFENDANTS’ CROSS-MOTIONS  
FOR SUMMARY JUDGMENT AND  
MOTION TO DISMISS**

**TABLE OF CONTENTS**

**INTRODUCTION**..... - 1 -

**ARGUMENT**..... - 1 -

**I. PLAINTIFFS’ CLAIMS ARE JUSTICIABLE.** ..... - 1 -

**A. Plaintiffs’ Challenges to the Forest Service’s Annual Operating Instructions are Judicially Reviewable Under the APA.** ..... - 1 -

**B. The Forest Service Fails to Carry Its Heavy Burden to Show Plaintiffs’ Claims are Moot.**..... - 4 -

**II. THE FOREST SERVICE FAILS TO DEMONSTRATE IT HAS SATISFIED ITS NFMA DUTY TO MANAGE GRAZING CONSISTENTLY WITH FOREST PLAN REQUIREMENTS, INCLUDING THE *INFISH* AQUATIC CONSERVATION STRATEGY.**..... - 7 -

**A. *INFISH* Is An Enforceable Aquatic Conservation Strategy With A Well-Defined Grazing Standard That Is Tied To Measurable Stream and Riparian Habitat Attributes.**..... - 8 -

**1. *INFISH* has not “expired” and the Forest Service admits that *INFISH* standards apply to the grazing authorizations at issue in this case.**..... - 8 -

**2. The Forest Service’s interpretation of *INFISH* is flawed because it ignores the part of the GM-1 standard that requires the agency to suspend grazing where modifications have not been effective in meeting RMOs.**..... - 9 -

**3. The Forest Service’s argument that RMOs apply only at a “landscape scale” is not supported by the plain language of *INFISH* or by the record.** . - 11 -

**4. The Forest Service’s diluted interpretation of *INFISH* GM-1 contributes to the agency’s inability to meet the standard, and is entitled to no deference.** - 13 -

**B. The 2000–2004 AOIs Are Arbitrary and Capricious Because They Lack a Rational Basis or Explanation for the Ultimate Decision and How It Would Meet the Forest Plan’s *INFISH* Requirements.** ..... - 14 -

**1. The Forest Service concedes that its decisions in the 2000–2003 AOIs failed to comply with *INFISH* and the Forest Plan, and its arguments attempting to limit the court’s review to post-2004 facts fail overcome the showing that the 2004 AOIs also were arbitrary and capricious.** ..... - 15 -

2. The administrative record does not support the grazing authorized in the Forest Service’s AOI decisions. .... - 16 -

3. The expert declarations must be given the appropriate weight. .... - 24 -

**III. THE FOREST SERVICE FAILS TO DEMONSTRATE IT HAS SATISFIED ITS WSRA DUTY TO “PROTECT AND ENHANCE” THE MALHEUR AND NORTH FORK MALHEUR WILD AND SCENIC RIVER CORRIDORS. .... - 26 -**

**IV. THE FOREST SERVICE HAS FAILED TO PREPARE AND UPDATE ITS ALLOTMENT MANAGEMENT PLANS AND HAS ANNUALLY AUTHORIZED GRAZING PRACTICES WITHOUT UPDATED AND INFORMED ENVIRONMENTAL ANALYSES..... - 30 -**

**V. PLAINTIFFS ARE ENTITLED TO INJUNCTIVE RELIEF. .... - 32 -**

**CONCLUSION ..... - 35 -**

**TABLE OF AUTHORITIES**

**CASES**

American Rivers v. Nat’l Marine Fisheries Serv., 126 F.3d 1118 (9th Cir. 1997)..... - 4 -

Biodiversity Legal Fdn. v. Badgley, 309 F.3d 1166 (9th Cir. 2002) ..... - 5 -

Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988) ..... - 14 -

Cantrell v. City of Long Beach, 241 F.3d 674 (9th Cir. 2001) ..... - 4 -

Christensen v. Harris County, 529 U.S. 576 (2000) ..... - 14 -

County of Los Angeles v. Davis, 440 U.S. 625 (1979) ..... - 4 -

Ecology Ctr. v. U.S. Forest Serv., 192 F.3d 922 (9th Cir. 1999)..... - 3 -

Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976)..... - 14 -

Forest Guardians v. U.S. Forest Serv., 329 F.3d 1089 (9th Cir. 2003) ..... - 5 -

Greenpeace Action v. Franklin, 14 F.3d 1324 (9th Cir. 1992) ..... - 6 -

Hells Canyon Alliance v. U.S. Forest Serv., 227 F.3d 1170 (9th Cir. 2000)..... - 26 -

Hewitt v. Helms, 459 U.S. 460 (1983) ..... - 32 -

Idaho Dept. of Fish & Game v. Nat’l Marine Fisheries Serv., 56 F.3d 1071 (9th Cir. 1995) .... - 6 -

Lujan v. Nat’l Wildlife Fed’n, 497 U.S. 871 (1990)..... - 3 -

Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983)..... - 15 -

Nat’l Wildlife Fed’n v. Cosgriffe, 21 F.Supp.2d 1211 (D. Or. 1998) ..... - 16 -

Natural Res. Def. Council v. EPA, 966 F.2d 1292 (9th Cir. 1992) ..... - 4 -

Neighbors of Cuddy Mtn. v. Alexander, 303 F.3d 1059 (9th Cir. 2002) ..... - 4 -, - 5 -

Northern Spotted Owl v. Hodel, 716 F.Supp. 479 (W.D. Wash. 1988) ..... - 17 -

Northwest Env’tl. Def. Ctr. v. Gordon, 849 F.2d 1241 (9th Cir. 1988)..... - 4 -

Norton v. Southern Utah Wilderness Alliance, 124 S.Ct. 2373 (2004)..... - 2 -

ONDA v. USFS, No. 03-213-KI (D. Or. June 10, 2004)..... - 10 -, - 21 -, - 25 -, - 31 -, - 33 -

Ore. Natural Desert Ass’n v. Singleton, 47 F. Supp. 2d 1182 (D. Or. 1998) ..... - 21 -, - 27 -

Ore. Natural Desert Ass’n v. U.S. Forest Serv., 312 F.Supp.2d 1337  
(D. Or. 2004)..... - 2 -, - 3 -, - 6 -, - 7 -, - 28 -

Pacific Coast Fed’n of Fishermen’s Ass’ns v. Nat’l Marine Fisheries Serv.,  
265 F.3d 1028 (9th Cir. 2001) ..... - 12 -

Ringgold Corp. v. Worrall, 880 F.2d 1138 (9th Cir. 1989) ..... - 25 -

Roe v. Wade, 410 U.S. 113 (1973) ..... - 6 -

SEC v. Chenery Corp., 332 U.S. 194 (1947)..... - 15 -

Southwest Ctr. for Biol. Diversity v. U.S. Forest Serv., 100 F.3d 1443 (9th Cir. 1996)..... - 19 -

**STATUTES**

16 U.S.C. § 1283(a) ..... - 28 -

16 U.S.C. § 1536(a)(2)..... - 18 -

16 U.S.C. §§ 1281(a) ..... - 27 -

2004 Interior Department Appropriations Act, P.L. 108-108, 117 Stat. 1241 ..... - 31 -

43 U.S.C. § 1752(d) ..... - 32 -

5 U.S.C. § 551(13) ..... - 3 -

5 U.S.C. § 706(2) ..... - 2 -

**RULES**

Fed. R. Civ. P. 56(c) .....- 32 -  
Fed. R. Civ. P. 56(e) .....- 33 -

**REGULATIONS**

36 C.F.R. § 222.2(b) .....- 32 -

## **INTRODUCTION**

In this action, Plaintiffs argue the U.S. Forest Service has acted arbitrarily and capriciously and not in accordance with the law by annually authorizing livestock grazing practices within the Malheur and North Fork Malheur wild and scenic river corridors and their watersheds, which have caused and continue to cause violations of applicable ecological standards the agency is charged with satisfying. In response, Defendants raise weak jurisdictional arguments, gloss over or mischaracterize the requirements of INFISH, produce vast amounts of information of questionable relevance created for the first time nearly two years into this litigation, and ask this court to extend to the Forest Service an unusual degree of deference. Very often, Defendants fail to respond to Plaintiffs' specific allegations and arguments and are unable to point to any support in the record for their own arguments and assertions. For the reasons discussed below and in their opening brief, Plaintiffs again respectfully ask the court to enter the declaratory and injunctive relief requested in Plaintiffs' Motion for Summary Judgment.

## **ARGUMENT**

### **I. PLAINTIFFS' CLAIMS ARE JUSTICIABLE.**

#### **A. Plaintiffs' Challenges to the Forest Service's Annual Operating Instructions are Judicially Reviewable Under the APA.**

As has been briefed a number of times already in this action, Plaintiffs' claims challenge the Forest Service's annual operating instructions ("AOIs"), under which the agency authorizes grazing on an allotment-specific basis each year. Federal Defendants argue this court lacks subject matter jurisdiction to "entertain such amorphous, free-floating claims that are not framed as a direct challenge to a final, discrete agency action." USFS Memo at 26. However, this court already ruled that Plaintiffs have sufficiently pleaded challenges to final agency actions in the

form of the Forest Service’s AOIs. Ore. Natural Desert Ass’n v. U.S. Forest Serv. (“ONDA v. USFS”), 312 F.Supp.2d 1337, 1343 (D. Or. 2004) (denying Defendants’ motions to dismiss).

The Forest Service relies on the Supreme Court’s decision in Norton v. Southern Utah Wilderness Alliance (“SUWA”), 124 S.Ct. 2373 (2004), to support a renewed jurisdictional argument. At issue in SUWA was whether a plaintiff could bring a “failure to act” claim challenging an agency failure to satisfy a broad statutory mandate that did not necessarily require discrete agency action. The Court held that “a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*.” Id. at 2379 (emphasis in original). However, Defendants’ SUWA arguments are inapposite because Plaintiffs rely upon section 706(2)(A) to provide a cause of action for their First, Second, Third and Fourth claims for relief. See Second Amended Compl. at ¶¶ 84–101.<sup>1</sup> In this case, Plaintiffs challenge the discrete final agency actions embodied in the Forest Service’s issuance of AOIs as arbitrary and capricious and not in accordance with law for failing to comply with Forest Plan requirements, the National Forest Management Act (NFMA), the Wild and Scenic Rivers Act (WSRA), NEPA, and applicable regulations.

Nothing in SUWA precludes claims challenging site-specific, final agency action under APA Section 706(2). See, e.g., 124 S.Ct. at 2382 (“The statutory directive that BLM manage ‘in accordance with’ land use plans, and the regulatory requirement that authorizations and actions ‘conform to’ those plans, prevent BLM from taking actions inconsistent with the provisions of a land use plan. Unless and until the plan is amended, such actions can be set aside as contrary to law pursuant to 5 U.S.C. § 706(2).”). Moreover, the Forest Service’s discussion of the definition

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<sup>1</sup> The Fourth Claim has elements that fit under both 706(1) and 706(2), and Plaintiffs discuss this in more detail below in section IV. As explained in this section, the first three claims plainly challenge final agency action and therefore are reviewable under APA § 706(2).

of “agency action” supports the fact that AOIs are properly considered to be final agency actions. USFS Memo at 26. Under the APA, “agency action” includes “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” 5 U.S.C. § 551(13); see also 124 S.Ct. at 2378. A grazing permit clearly falls within this definition.

Similarly, Plaintiffs do not seek “wholesale” improvements to the Malheur National Forest grazing program, as Defendants suggest. USFS Memo at 26–27 (citing Lujan v. Nat’l Wildlife Fed’n, 497 U.S. 871 (1990)). Again, Plaintiffs specifically challenge the Forest Service’s grazing decisions embodied in the AOIs for six particular allotments, for the years 2000 to 2004. As the court noted earlier in this case, “Unlike ongoing monitoring or trail maintenance discussed in [Ecology Ctr. v. U.S. Forest Serv., 192 F.3d 922 (9th Cir. 1999), and other cases offered by Defendants], the AOPs in this case are discrete, site-specific actions taken by the agency from which binding obligations flow.” 312 F.Supp.2d at 1343.<sup>2</sup> Subsequent AOIs on these allotments will suffer from the same legal flaws from which the challenged AOIs suffer. Plaintiffs seek to remedy violations of law and the resulting ecological degradation that has occurred, and continues to occur, within these specific allotments and wild and scenic river corridors. Plaintiffs are not attempting to address the Forest Service’s grazing program at a system-wide level in this action.

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<sup>2</sup> The Forest Service also argues “the Court will search in vain” to find references to “actual content of the AOIs” in Plaintiffs’ opening brief. USFS Memo at 25. In reality, Plaintiffs discuss in detail the grazing authorized by each AOI and the fact that any modifications from one year to the next continue to fail to satisfy INFISH and other applicable grazing standards. Pl. Memo at 24–25, 27–32. Beyond that, the AOIs do not warrant extensive discussion because they are so conclusory that they provide very little insight into the agency’s basis for making the decisions.

**B. The Forest Service Fails to Carry Its Heavy Burden to Show Plaintiffs' Claims are Moot.**

The “burden of demonstrating mootness is a heavy one.” Northwest Env'tl. Def. Ctr. v. Gordon, 849 F.2d 1241, 1244 (9th Cir. 1988) (citing County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979)). Moot cases are those that have lost their character as present, live controversies. Id. The Ninth Circuit has made clear that “a case is moot only where no effective relief for the alleged violation can be given.” Neighbors of Cuddy Mtn. v. Alexander, 303 F.3d 1059, 1065 (9th Cir. 2002); see also Cantrell v. City of Long Beach, 241 F.3d 674, 678–79 (9th Cir. 2001) (challenge to plan to develop naval station not mooted by destruction of buildings on site because defendants could consider alternatives to current reuse plan and develop ways to mitigate damage to bird habitat); 849 F.2d at 1245 (challenge to regulations governing 1986 salmon fishing season not mooted by close of season because damage could be mitigated “by allowing more fish to spawn in 1989”). The Forest Service has not met its heavy burden of demonstrating that Plaintiffs’ challenges to the pre-2004 AOIs are moot because: (1) the court can grant effective declaratory and injunctive relief; (2) the 2004 AOIs do not supercede the 2000 to 2003 AOIs; and (3) even if they were moot, the AOIs would fall within the exception to the mootness doctrine for actions that are capable of repetition yet evading judicial review.

A case is not moot where effective relief can be granted, American Rivers v. Nat'l Marine Fisheries Serv., 126 F.3d 1118, 1123 (9th Cir. 1997), and in this case the court can grant both declaratory and injunctive relief. Declaratory relief will clarify and settle the Forest Service’s legal duties and will be significant to future grazing decisions. A court’s grant of declaratory judgment “delineates important rights and responsibilities and can be a message not only to the parties but also to the public and has significant educational and lasting importance.” Natural Res. Def. Council v. EPA, 966 F.2d 1292, 1299 (9th Cir. 1992); see also Biodiversity

Legal Fdn. v. Badgley, 309 F.3d 1166, 1174–75 (9th Cir. 2002) (agency decisions on petitions to list species pursuant to ESA did not moot case because a substantial controversy remained where agency was likely to engage in same unlawful conduct on other listing petitions).

This court also can grant injunctive relief to help mitigate the damage caused by grazing from 2000 to 2004. In the only the Forest Service cites in support of its mootness argument, the Ninth Circuit held that a plaintiff’s allegation that a “phased-in reduction scheme” on two grazing allotments violated NFMA was not moot even though the scheme’s three-year period had ended. Forest Guardians v. U.S. Forest Serv., 329 F.3d 1089, 1094 (9th Cir. 2003). If the scheme was found to have violated NFMA, the court held it could “order the Service to develop tactics to mitigate the damage caused by the violation, such as moving or removing livestock from the allotments so the land can repair itself.” Id. Similarly, in the context of a challenge to a timber sale decision for failing to comply with forest plan requirements, the Ninth Circuit held that the plaintiff’s claims were not moot even though “the logged trees cannot be brought back” because the court “might order other measures to help mitigate the damage caused by the [logging].” Neighbors of Cuddy Mtn., 303 F.3d at 1066.

Citing Forest Guardians, the Forest Service asserts without explanation that the pre-2004 AOIs are moot because the 2004 AOIs “superceded” them. USFS Memo at 29. In Forest Guardians, only the plaintiff’s ESA claims were moot because the claims challenged a biological opinion that had been superceded during the pendency of the litigation. 329 F.3d at 1096. But the AOIs in this case are more akin to the “phased-in reduction scheme” in Forest Guardians, which had a finite period for implementation that had ended. Whereas a biological opinion remains in effect until consultation is reinitiated and a new biological opinion is issued, an AOI does not “supercede” the AOI from the preceding grazing season. Rather, AOIs are annual decisions that

are applicable only to livestock grazing for that year, but operate within the more general—and continuing—limits established in the permits. See, e.g., ONDA v. USFS, 312 F.Supp.2d at 1340–41 (discussing nature of AOI decisions and their role vis-à-vis permits and AMPs). The 2004 AOIs have expired, just as the AOIs from prior years have. Cf. Greenpeace Action v. Franklin, 14 F.3d 1324, 1329 (9th Cir. 1992) (challenge to annual fishing quota not moot because regulation in effect for less than a year). As such, there is no basis to distinguish the 2004 AOIs from the pre-2004 AOIs for mootness purposes.

Finally, even if the mootness doctrine applied, the challenged AOI decisions are a classic case of actions “capable of repetition, yet likely to evade review.” Idaho Dept. of Fish & Game v. Nat’l Marine Fisheries Serv., 56 F.3d 1071, 1074–75 (9th Cir. 1995). This exception applies where “(1) the duration of the challenged action is too short to allow full litigation before it ceases, and (2) there is a reasonable expectation that the plaintiffs will be subjected to it again.” Id. Here, the Forest Service issues its AOIs immediately prior to livestock turnout. See BAR 733–47, DBAR 583–88, FPAR 1075–85, OTTAR 770–75, SCAR 1468–84, NFAR 686–690<sup>3</sup> (2004 AOIs signed by Forest Service on May 24, 2004).<sup>4</sup> The grazing season concludes by mid-October. Id. This time period does not allow for full litigation of an AOI decision before grazing ceases, much less before it begins. Cf. Roe v. Wade, 410 U.S. 113, 125 (1973) (nine months insufficient time to fully litigate). There is also a reasonable expectation Plaintiffs will be subjected to AOIs with similar legal flaws in 2005, as they have been for each year’s AOIs since

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<sup>3</sup> The administrative record in this case is in several parts: Policy (“PAR”) (Dkt # 121); Supplemental Policy (“SPAR”) (Dkt # 132–134); Second Supplemental Policy (“SSPAR”) (Dkt # 171–182); allotment-specific records (“BAR,” etc.) (Dkt # 122–127); and “Second Supplemental” allotment-specific records (“SSBAR,” etc.) (Dkt # 183–188).

<sup>4</sup> Note that the permittees must also sign the AOIs, but that the administrative record does not show when this happened, if at all. In fact, the copies of 2004 AOIs provided at Appendix N of the 2004 End-of-Year Report are not signed at all. SSPAR 2751–2943.

this litigation commenced in March 2003. The Forest Service continues to authorize grazing that maintains riparian areas in a degraded condition or even further degrades those areas, refusing to suspend grazing in all but the most extreme circumstances.<sup>5</sup> The unlawful actions complained of in this action therefore are capable of repetition, yet will evade judicial review. In short, just as this court correctly anticipated over a year ago, Plaintiffs' claims are not moot, see 312 F.Supp.2d at 1341, and Defendants have failed to carry their heavy burden in supporting their argument.

**II. THE FOREST SERVICE FAILS TO DEMONSTRATE IT HAS SATISFIED ITS NFMA DUTY TO MANAGE GRAZING CONSISTENTLY WITH FOREST PLAN REQUIREMENTS, INCLUDING THE *INFISH* AQUATIC CONSERVATION STRATEGY.**

As Plaintiffs described in detail in their opening brief, the Forest Service has a mandatory duty under NFMA to manage the public lands within and adjacent to the Malheur and North Fork Malheur wild and scenic river corridors consistently with the Forest Plan. See Pl. Memo at 4–5, 8; see also 312 F.Supp.2d at 1344–46 (mandatory, non-discretionary duty). In this case, the Forest Service's AOI decisions are arbitrary and capricious and not in accordance with NFMA, and are therefore actionable under the APA. Defendants' responses fail to controvert these unambiguous violations of law. Instead, Defendants gloss over or mischaracterize INFISH's requirements, cite to vast amounts of information of questionable relevance produced for the first time nearly two years into this litigation, and continue to demonstrate the Forest Service is unable to address Plaintiffs' specific, allotment-by-allotment and unit-by-unit allegations.

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<sup>5</sup> For example, even where one of the Forest Service's own experts recommends in the 2004 End-of-Year ("EOY") Report ten years' (if not permanent) non-use on the Bluebucket Allotment's Cougar Unit, see SSPAR 0714, the agency appears set to do no more than reduce the permittee's AUMs by 25% for the 2005 grazing season. SSBAR 154 (January 26, 2005 notice of permit action for non-compliance).

- A. INFISH Is An Enforceable Aquatic Conservation Strategy With A Well-Defined Grazing Standard That Is Tied To Measurable Stream and Riparian Habitat Attributes.**
- 1. INFISH has not “expired” and the Forest Service admits that INFISH standards apply to the grazing authorizations at issue in this case.**

Both Federal Defendants and Intervenor OCA raise arguments questioning the validity of INFISH as an enforceable set of requirements on the Forest Service’s grazing authorizations, and mischaracterize the strategy’s requirements. As an initial matter, OCA’s argument that INFISH has “expired” and is not legally enforceable, OCA Memo at 26–28, is simply untenable. As explained in Plaintiffs’ opening brief, Pl. Memo at 10–13, the Forest Service developed the INFISH aquatic conservation strategy in 1995 in order to protect resident native fish “by reducing the loss of populations and reducing potential negative impacts to aquatic habitat.” See SPAR 0004, 0006. INFISH adopted riparian management objectives (“RMOs”) as “[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.” SPAR 0141. In this action, the Forest Service itself already has admitted that: (1) the Forest Service amended the Malheur National Forest Plan in 1995, automatically incorporating INFISH standards and guidelines; (2) INFISH remains in effect today; (3) the standards and direction within INFISH apply to all bull trout habitat beyond the areas covered by PACFISH, including the Malheur and North Fork Malheur wild and scenic river corridors; and (4) the INFISH standards are applicable livestock grazing standards within these two wild and scenic river corridors. USFS Answer to First Amended Compl. (Dkt # 74) at ¶¶ 44–46.<sup>6</sup>

Thus, a decade ago the Forest Service placed attainment of RMOs at the center of its grazing management standard GM-1. There simply is no manner in which to determine whether

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<sup>6</sup> Federal Defendants failed to file an Answer to Plaintiffs’ Second Amended Complaint.

the standard is being met without measuring RMO habitat attributes and determining the effect grazing is having upon them. Despite RMOs being the measure by which the Forest Service is to determine whether its authorized grazing is meeting the standard, nowhere in the record—including in the agency’s “most extensive monitoring yet,” USFS Memo at 19, produced by the Forest Service on February 4, 2005 (Dkt # 169)—does the agency demonstrate that it has taken the appropriate measurements to determine how grazing is affecting RMOs. This failure to evaluate relevant factors renders the agency’s grazing authorization decisions arbitrary and capricious.

**2. The Forest Service’s interpretation of INFISH is flawed because it ignores the part of the GM-1 standard that requires the agency to suspend grazing where modifications have not been effective in meeting RMOs.**

The Forest Service requests the court to extend to the agency an unusual degree of deference with respect to the agency’s interpretation and application of INFISH’s GM-1 standard. USFS Memo at 31. That deference is unwarranted because of the fundamentally flawed way in which the agency interprets INFISH in the litigation. The GM-1 standard requires that the Forest Service:

Modify 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.

SPAR 0147 (emphasis added). Rather than take the integrated approach that the modify-suspend dynamic establishes, the Forest Service completely reads out of the standard the second part, which requires the agency to suspend grazing if adjustments are not effective in meeting RMOs. See, e.g., USFS Memo at 32 (“even if it were conclusively established that the grazing authorized by pre-2004 AOIs has retarded or prevented attainment of RMOs . . . , the record

demonstrates that, consistent with the explicit language of GM-1, the Forest Service has clearly complied with the standard by making meaningful modifications specifically designed to mitigate any such effects in its 2004 AOIs for the challenged allotments”). The Forest Service appears to argue that so long as it “modifies” grazing each year, no matter how insignificantly or no matter how effectively or ineffectively, it need never suspend grazing. However, the standard is quite clear that suspension is mandatory “if adjusting practices is not effective in meeting [RMOs].” SPAR 0147.<sup>7</sup>

In this case, Plaintiffs demonstrated in their opening brief how each and every allotment and river corridor unit at issue in this action has failed, chronically and repeatedly, to meet INFISH RMOs. The record does not indicate the Forest Service’s modifications have been effective in meeting RMOs; in fact, it shows the authorized grazing has and continues to result in retardation or prevention of attainment of RMOs. See Pl. Memo at 16–25. Even the Forest Service’s most recently produced information in the 2004 End-of-Year Report shows the 2004 AOIs—which this court stated it expected “full compliance” with, ONDA v. USFS, No. 03-213-KI, at 20 (D. Or. June 10, 2004) (Dkt # 114), and which the Forest Service promised represented “‘meaningful’ modifications,” id. at 13—failed once again to achieve even basic annual grazing standards such as stubble height and bank stability.<sup>8</sup>

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<sup>7</sup> Plaintiffs acknowledge that the Forest Service did schedule the Dollar Basin/Star Glade Allotment’s South Star Glade Unit to be rested in 2004, but submit that the agency essentially had no choice but to do so after Plaintiffs showed photographs in court of a hillside almost completely devoid of vegetation and with raw soil eroding directly into the Malheur Wild and Scenic River. See First Rhodes Decl. (Dkt # 84) at ¶ 48 and Attach. 18 (photograph of severe runoff over slope largely devoid of groundcover).

<sup>8</sup> See, e.g., SSPAR 1638, 1645–46, 1697, SSBAR 028–29, 154–56 (*Bluebucket Allotment*: most Cougar Unit tributaries exceeded riparian standards and “significant amount of the uplands have also been over utilized [sic]”; “appears to be a downward trend of the riparian areas and [it] will take some period of rest to improve range conditions”; utilization 60–73% after 52 days of re-growth, where Forest Plan only allows 0–35% utilization); SSPAR 1675–76, 1757, SSOTTAR

INFISH is now in its tenth year of implementation, meaning the Malheur National Forest has had a decade to make modifications that would result in achievement of RMOs. The fact that INFISH originally was designed as an interim 18-month strategy to begin restoration of native fish habitat shows that its authors envisioned suspension of grazing within a few years if modifications were unsuccessful. SPAR 0006. Moreover, suspension is required “if adjusting practices is not effective in meeting [RMOs].” SPAR 0031. At this point, only multi-year suspension of grazing can allow these highly degraded systems to move toward attainment of RMOs and satisfy INFISH’s GM-1 standard and purposes.

**3. The Forest Service’s argument that RMOs apply only at a “landscape scale” is not supported by the plain language of INFISH or by the record.**

In an attempt to avoid the impact of applying a strong standard to its grazing authorizations, and perhaps in recognition of the lack of support for its claims of compliance with the “do not retard” standard, the Forest Service argues that INFISH RMOs apply only at a “landscape scale,” implying that compliance with RMOs is not necessary at the stream or allotment level. USFS Memo at 6–7. Defendants cite INFISH’s statement that “[a]ll of the described features may not occur in a specific segment of stream within a watershed, but all generally should occur at the watershed scale for stream systems of moderate to large size.”

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011 (*Ott Allotment*: excess use along Cottonwood Creek and lower portion of Alder Creek); SSPAR 1536, 1539, 1757 (*Spring Creek Allotment*: excess use and excess bank damage along tributaries to Little Crane Creek; excess use in Little Crane Unit uplands); SSPAR 1375–76, 1404, 1482–92, 1679–80, 1714, SSNFAR 007, 013, 125 (*North Fork Allotment*: standards exceeded on Mountain, Squaw Creek, Anderson units; “We could not do stubble height [on Squaw Creek Unit] with [sic] because sedges were not found in enough abundance in the area. However we did determine that stream bank alteration was around 50%.’”); SSPAR 1424, SSFPAR 023 (*Flag Prairie Allotment*: River Unit “[n]ot in compliance with AOI because cows are in an allotment/pasture that they are not supposed to be on and they are near a campground”). See also SSPAR 1758 (Forest Service in October 2004 asked permittees during end-of-season allotment review to identify areas meeting standards and “Permittees did not identify any areas in their allotments meeting standards”).

SPAR at 24. The Ninth Circuit already has rejected this cramped interpretation in a case involving the Northwest Forest Plan's Aquatic Conservation Strategy, the analogous fisheries strategy on the west side of the Cascade Range. Pacific Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv., 265 F.3d 1028 (9th Cir. 2001). The court held that the purpose of restoring ecosystem health at a landscape scale "does not prevent project site degradation and does nothing to restore habitat over broad landscapes if it ignores the cumulative effect of individual projects." Id. at 1036.

This reasoning is consistent with INFISH because the Forest Service very specifically states that it considers the INFISH RMOs "to be the best watershed scale information available" and that forest managers are "encouraged to establish site-specific RMO's [sic] through watershed analysis or site-specific analysis." SPAR 0024. The Malheur National Forest has not done so. In 1994, however, just prior to the adoption of INFISH, the Malheur National Forest adopted Amendment 29 to its Forest Plan. Amendment 29 includes a number of quantitative aquatic standards relating to sediment and substrate, water quality, channel morphology, and riparian vegetation. PAR 0870–0884. The standards are nearly identical to the INFISH RMOs, and in some cases, such as bank stability, are more stringent (and therefore controlling). See PAR 0883 (Amendment 29 requires banks to be at least 90% stable, and permits no decrease in bank stability if banks currently above 90% stable); SPAR 0026 (INFISH requires >80% stable banks); see also SSPAR 2374–76 (comparison chart of PAC/INFISH RMOs to Amendment 29 standards).

In any event, it is one thing for a given stream reach to fail to satisfy an RMO here and there; it is a completely different matter when, as here, nearly the entirety of these two protected river corridors are failing to satisfy most or all of the INFISH RMOs and Amendment 29

standards.<sup>9</sup> See, e.g., First Rhodes Decl. at ¶¶ 50–62 (bank stability failures), 63–67 (overhanging banks), 71–79 (pool frequency), 80–86 (width-to-depth ratios), 96–97 (water temperature). In short, the Forest Service cannot ignore degradation within the river corridors and watersheds at issue in this action by examining habitat solely at a landscape scale. See also 265 F.3d at 1036 (“The large spatial scale appears to be calculated to ignore the effects of individual sites and projects”).<sup>10</sup>

**4. The Forest Service’s diluted interpretation of INFISH GM-1 contributes to the agency’s inability to meet the standard, and is entitled to no deference.**

In INFISH, the Forest Service states that “‘near natural’ rates of recovery can be provided if we limit environmental effects to those that do not carry through to the next year.” SPAR 0208 (emphasis in original). INFISH is very clear that “[a]ny effect that carries [sic] over to the next years [sic] is likely to result in cumulative negative effects, and measurably slow recovery of degraded riparian features.” SPAR 0212. In this litigation, however, the Forest Service now analyzes the impacts of its authorized grazing under a subtle, but significant, alteration of this formula: The focus “in evaluating the effects of 2004 grazing and recommending any modifications for 2005 grazing is on avoiding negative effects, the influence of which is likely to still be existent at the beginning of the next grazing season to a degree that would meaningfully

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<sup>9</sup> Notably, neither the Forest Service nor intervenors even mention Amendment 29 a single time in their briefs.

<sup>10</sup> In fact, the evidence show that the Forest Service is not satisfying INFISH even at the landscape scale. In its 2004 biological assessment, the Forest Service determined that ten of twenty-four habitat indicators were “functioning at unacceptable risk” in these rivers’ watersheds, that twelve were functioning “at risk,” and that only two were “properly functioning.” PAR 6814. Then the agency determined the grazing proposed for 2004 would merely “maintain” (rather than “restore”) these at-risk and functioning-at-unacceptable-risk conditions, with the Forest Service unable to conclude that even a single indicator would be restored under its authorized grazing. Id; see also USFS Memo at 36. Unless conditions are moving toward attainment of RMOs at a near natural rate, the Forest Service’s grazing decisions violate the INFISH standard and are inconsistent with the Forest Plan, in violation of NFMA.

impede recovery (additionally, riparian ecological conditions and site potential are considered when making management recommendations).” SSPAR 0329 (emphasis added). Thus, the Forest Service has taken the clear modify-suspend standard and diluted it with wholly vague phrases such as “meaningfully impede recovery” and “consider[ation]” of “site potential.” This diluted version of GM-1 is a litigation position and accordingly receives no deference. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212–13 (1988). Moreover, this litigation position is based on an internal memo, which also receives little deference. Christensen v. Harris County, 529 U.S. 576, 587 (2000). There simply is no basis in the administrative record to support such a significant reinterpretation of the GM-1 standard—a standard which was adopted with public notice and participation. Moreover, where, as here, the record and other evidence comprehensively demonstrate repeated and chronic prevention and retardation of INFISH RMOs, no amount of reinterpretation can get around the fact that the Forest Service’s “modifications” (even those made in 2004) have failed to provide for attainment of RMOs—and the only option left under GM-1 is to suspend grazing in these areas.

**B. The 2000–2004 AOIs Are Arbitrary and Capricious Because They Lack a Rational Basis or Explanation for the Ultimate Decision and How It Would Meet the Forest Plan’s INFISH Requirements.**

Although the APA’s “arbitrary and capricious” standard is deferential, “the reviewing court must assure itself that the agency decision was ‘based on a consideration of the relevant factors . . . .’ Moreover, it must engage in a ‘substantial inquiry’ into the facts, one that it ‘searching and careful.’ This is particularly true in highly technical cases.” Ethyl Corp. v. EPA, 541 F.2d 1, 34–35 (D.C. Cir. 1976) (citations and footnotes omitted). The Forest Service has a duty to support its decisions and there must be a rational connection between the facts found and the choices made. Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43

(1983). Courts cannot “supply a reasoned basis for the agency’s action that the agency itself has not given.” *Id.* (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

In this case, the Forest Service fails to articulate and support a satisfactory explanation for the decisions it made in its AOIs. Plaintiffs have demonstrated, via monitoring data and observations within and outside of the record, including Forest Service, U.S. Fish & Wildlife Service and Plaintiffs’ own information, that the Forest Service does not have a rational basis for issuing the challenged AOIs.<sup>11</sup> Those decisions continue to authorize grazing that will maintain degraded riparian conditions in violation of INFISH and other Forest Plan requirements.

- 1. The Forest Service concedes that its decisions in the 2000–2003 AOIs failed to comply with INFISH and the Forest Plan, and its arguments attempting to limit the court’s review to post-2004 facts fail overcome the showing that the 2004 AOIs also were arbitrary and capricious.**

The Forest Service declines in its response to address Plaintiffs’ claims that the agency’s pre-2004 AOIs were arbitrary and capricious and not in accordance with INFISH and Forest Plan requirements, other than to argue those claims are moot. USFS Memo at 28–29. Instead, Defendants try to convince the court that it need only review the agency’s “current grazing practices” (i.e., the 2004 AOIs) and only then with the benefit of considerable post-hoc rationalization in the 2004 EOY Report. *See, e.g., id.* at 33–35. However, an informed assessment of the agency’s current ability to satisfy its obligations under NFMA and WSRA necessarily requires consideration of the agency’s grazing practices in the context of several years or more of repeated failures to ensure that authorized grazing satisfies mandatory

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<sup>11</sup> Note too that the Forest Service cannot abdicate its legal duty to ensure its authorized grazing complies with all applicable laws and regulations, by asserting that “it is the permittees, and not the Forest Service, who implement and have a duty to comply with the AOIs.” USFS Memo at 25. It is the Forest Service’s duty to ensure compliance with INFISH in its AOIs and to oversee the permittees’ use of the public lands to ensure that they comply with the AOIs and the law. In this case, the 2004 EOY Report alone contains innumerable examples of permittees not following the unit rotation and stocking numbers authorized in the 2004 AOIs. *See infra* n.13.

standards. Moreover, because the central grazing standard at issue, INFISH’s GM-1, deals with making modifications based on measurable stream and riparian attributes in order to achieve near natural rates of recovery—i.e., because it deals with quantification of a trend—it is impossible to make an informed determination whether those modifications have been effective without looking at the grazing changes and trend over time. The Forest Service asks the court to take a “trust us” approach, *cf. Nat’l Wildlife Fed’n v. Cosgriffe*, 21 F.Supp.2d 1211, 1219–20 (D. Or. 1998) (rejecting such approach), asking the court to buy into the theory that the revisions proposed in the 2004 AOIs, and the first-time extensive qualitative monitoring in the 2004 EOY Report, will simply reverse the decade of chronic, repeated grazing damage just since INFISH was adopted in 1995. Based on the evidence before the court, this is an unreasonable request.

**2. The administrative record does not support the grazing authorized in the Forest Service’s AOI decisions.**

The AOIs themselves do not contain any explanation or connection between facts found and choices made. Rather, they are extremely brief documents merely consisting of the proposed livestock numbers, season of use and other grazing management terms and conditions to which permittees must adhere. *See, e.g.*, BAR 733–47, DBAR 583–88, FPAR 1075–85, OTTAR 770–75, SCAR 1468–84, NFAR 686–690 (2004 AOIs). If the Forest Service had a rational explanation for these decisions, that explanation should have appeared in the actual decision document. Instead, its discussion appears primarily in the agency’s biological assessments (“BAs”). PAR 6599–6671. Yet that discussion is largely conclusory. For example, the Forest Service concludes without support in the 2004 BA that effects to bull trout from increased stream temperatures will be “minimal” and that the authorized grazing “will not significantly affect stream temperatures” and “will likely meet [INFISH] standards in the short term and will allow for recovery of streamside shrubs in the long term to provide adequate thermal refugia where

possible.” PAR 6608. This is interesting in light of the fact that the Forest already admitted that its own stream temperature monitoring on the Malheur and the North Fork Malheur rivers and their immediate tributaries, shows the rivers have exceeded the state water quality standard for temperature (50°F for bull trout streams) 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. See Answer to First Amended Compl. at ¶ 60.

The 2004 BA claims the effects of authorized grazing on width-to-depth ratios will be “minimal” because “[t]here is no evidence of width to depth ratios increasing on streams in this allotment.” PAR 6609 (not even specifying by allotment or stream reach). The Forest Service also describes as minimal effects to stream bank conditions, with the unsupported statement that “the proposed management will not significantly affect stream bank stability.” PAR 6610. Similarly unsupported statements appear for pool frequency, large woody material and others—each of which are equivalent to INFISH RMOs. PAR 6608–6610. “Judicial deference to agency expertise is proper, but the Court will not do so blindly.” Northern Spotted Owl v. Hodel, 716 F.Supp. 479, 482–83 (W.D. Wash. 1988) (court will “reject conclusory assertions of agency ‘expertise’ where the agency spurns un rebutted expert opinions without itself offering a credible alternative explanation”). Moreover, even conclusory statements that the effects of the authorized grazing are minimal, not significant, or not getting worse, do not satisfy INFISH’s requirement of progress toward attainment of RMOs at a near natural rate.

The Forest Service also argues that the U.S. Fish & Wildlife Service’s (“FWS”) 2004 ESA consultation concurrences are conclusive evidence that Forest Service-authorized grazing complies with INFISH. USFS Memo at 18 (“This consistency of opinion across experts provides

assurance of great robustness and reliability to the finding”). The FWS’s conclusion that the proposed action would not jeopardize bull trout is not dispositive of whether the Forest Service is acting consistently with the INFISH grazing standard. “Jeopardy” under the ESA is a relatively low standard and a “no jeopardy” decision simply means the authorized activity will not cause the listed species to go extinct. See 16 U.S.C. § 1536(a)(2) (agencies shall insure authorized actions are “not likely to jeopardize the continued existence of any endangered species or threatened species”). GM-1, on the other hand, requires modification or suspension of grazing practices that (1) retard or prevent attainment of RMOs or (2) are likely to adversely affect native fish. The latter trigger is a higher standard than the ESA’s “jeopardy” standard, and the former is even more stringent because the definition of “retard” includes any recovery that is slower than natural rates. SPAR 0025.

While FWS concurred with the Forest Service’s determination that bull trout would not be adversely affected by the proposed grazing, that concurrence did not address whether that grazing would prevent or retard attainment of RMOs. In fact, the record suggests very strongly that the Forest Service’s “not likely to adversely affect” determinations for 2004 were little more than a litigation position based on advice from the agency’s attorneys. See SSPAR 1590 (Forest Service explained to permittee in June 2004 that “we needed to keep the effects determination for T&E fish to a NLAA and that it was the lawyer’s opinion that if the effects determination was a LAA that there was a high likelihood that the judge would impose an injunction. We are trying to keep them grazing this year. . . . he [Forest Service Rangeland Management Specialist, Brian Hoefling] was directed to keep the effect determination to a NLAA”). Even so, although the Forest Service seems to have adopted the litigation position that none of its 2004 grazing authorizations were likely to adversely affect bull trout, the agency’s determinations that its

authorized grazing was “likely to adversely affect” (“LAA”) bull trout in past years is a per se violation of GM-1 for those years and allotments: Bluebucket Allotment LAA in 2000 (PAR 3985); Dollar Basin/Star Glade Allotment LAA in 2003, 2001, 2000 (PAR 6004, 4565, 3987); Ott Allotment LAA in 2001, 2000 (PAR 4445, 4019); Flag Prairie Allotment LAA in 2003, 2001, 2000 (PAR 6004, 4445, 4015); Spring Creek Allotment LAA in 2001, 2000 (PAR 4445, 4004); and North Fork Allotment LAA in 2003, 2001, 2000 (PAR 6004, 4445, 4010).

Finally, the 2004 End-of-Year Report is irrelevant to determining whether the 2004 AOIs are arbitrary and capricious. The Forest Service produced the 2004 EOY Report on February 4, 2005 (Dkt # 169) based on information collected after the 2004 AOI decisions. In evaluating whether the 2004 AOI decisions are arbitrary and capricious, the court considers whether those decisions were supported by the record in the agency’s possession at the time it made its decision. Southwest Ctr. for Biol. Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1450 (9th Cir. 1996) (judicial review of agency action “typically focuses on the administrative record in existence at the time of the decision and does not encompass any part of the record that is made initially in the reviewing court”). The Forest Service admits that its 2004 grazing season monitoring was “its most extensive monitoring yet.” USFS Memo at 19–20. In fact, the 2004 EOY candidly acknowledges the Forest Service “lacked sufficient information to defend their current grazing management activities in these [Malheur and North Fork Malheur river] tributaries.” SSPAR 0606. If the Forest Service was going to go to such unprecedented lengths to collect vast amounts of monitoring information during and after the 2004 grazing season, Plaintiffs question why the agency did not expend even a modest amount of that effort and expense on monitoring quantitative, measurable stream and riparian attributes—i.e., actual RMOs. Instead, the Forest Service has produced massive amounts of almost exclusively

qualitative information that at best serve as questionable proxies for the actual quantifiable RMOs the agency must measure to determine compliance with INFISH standard GM-1. For example:

- “Multiple Indicator Monitoring”: This 230-page section consists of only twelve data sheets, accompanied by photos with no captions other than locations—and only five of those twelve data sheets are for allotments at issue in this litigation. SSPAR 0370–0600 (App. A). The data sheets are difficult to decipher and most of the data lack units. See, e.g., SSPAR 0551–53. Neither do the data appear to be measurements of RMOs, with the exception of bank stability. Id. In addition, the five relevant data sheets show that none of those allotments are meeting the bank stability RMO (>80% stable). SSPAR 0552 (mean bank stability 35%), 0556 (8%), 0560 (52%), 0570 (72%), 0576 (13%). Many state that stubble height, bank stability and/or woody shrub use standards were not met, that the effects of the damage would “carry through to the next year,” and that a change in management strategy is needed. See, e.g., id. 0552 (Bluebucket Allotment, Cougar Unit), 0570 (North Fork Allotment, Mountain Unit), 0576 (North Fork Allotment, Squaw Creek Unit). Even if these data were part of the record for the 2004 AOIs, they do not support the Forest Service’s decisions.
- Proper Functioning Condition (“PFC”) Assessments: As has been briefed at length in this case already, PFC is a qualitative method widely acknowledged to be highly subjective and lacking in scientific rigor. See Pl. PI Reply Memo at 22–24 (Dkt # 103). The PFC method involves no measurement of any stream or riparian attribute and even the National Riparian Service Team, which developed the method, has stated that PFC is a “checklist” method that is “an appropriate starting point for determining and prioritizing the type and location of quantitative inventory or monitoring necessary.” Id. (citing Second Rhodes Decl.). And in

fact, this court already discredited the Forest Service's primary pre-2004 grazing season evidence proffered to support the 2004 AOI decisions:

The Trip Report, as well as the intervenors' expert reports, rely on PFC methodology to support the conclusions that grazing is not causing ecological harm to the river corridors. As explained by the second declaration of plaintiffs' expert Rhodes, the PFC method is a *qualitative* method. Rhodes cites to numerous sources which question the usefulness of the methodology because it is considered highly subjective. See also Ore. Natural Desert Ass'n v. Singleton, 47 F. Supp. 2d 1182, 1189 (D. Or. 1998) (noting that PFC analysis does not equate to finding that the WSRA requirements are being met).

ONDA v. USFS, No. 03-213-KI, at 14–15 (D. Or. June 10, 2004) (Dkt # 114) (emphasis in original). Again, PFC assessments are not a good substitute for measuring RMOs to determine whether the riparian areas are progressing toward attainment of RMOs.

- Winward Greenlines: The EOY Report contains eight data sheets for “greenline” plant surveys conducted during the fall of 2004 on four of the six allotments at issue. SSPAR 0701–0708. Defendants try to argue these eight data sheets “provide an overall picture of vegetation trend as compared to expected potential vegetation communities in the areas sampled.” USFS Memo at 21. While Plaintiffs are pleased the Forest Service's botanists were directed to survey plants last fall, a single years' worth of data from an extraordinarily small handful of sites reveals nothing about whether grazing is retarding or preventing attainment of RMOs.
- Photo Points: The EOY Report contains many pages of photos ostensibly taken at the same location for several different years. Most of the photos are of poor quality, making any comparisons difficult. Many were not taken during the same season and a large proportion of the photos simply do not state the month or date in which they were taken. SSPAR 0728–0813. The Forest Service's notes are extremely qualitative, dominated by vague comments such as “cut bank is healing and being colonized by ponderosa pine” and “ground is well

covered by vegetation” and “little apparent change in vegetation cover.” See, e.g., SSPAR 0739. There is no explanation of how these photo comparisons constitute an adequate proxy for measurement of RMOs and the report’s author admits, “I am not sure what ‘near natural rate recovery’ is.” SSPAR 0713–15.

- Land EKG Reports: The Forest Service contracted with a private firm to develop new monitoring sites, but admits the report only provides “a qualitative functional rating” for various “ecological indicators.” USFS Memo at 22. This qualitative method uses photography and “ocular estimates” of plant community, soil, and riparian conditions. SSPAR 0322. The Forest Service asserts that this eyeball method, although “based on a qualitative scoring matrix,” “is intended to be repeatable, comprehensive, and accurately reflect ecological function at each site.” Id. The report is irrelevant to determining stream and riparian trend and attainment of RMOs, as its authors explicitly note that it only “serves as a one-point-in-time, qualitative evaluation” and “cannot, and is not intended to, replace long-term quantitative monitoring, data, or analysis.” See SSPAR 1002, 1005, 1007.
- Spawning Surveys: The EOY Report includes spawning surveys, where bull trout spawning redds were counted and spawning habitat was rated. It is not clear whether these surveys were conducted on the allotments at issue. SSPAR 2337–38. In any event, the surveys are of limited relevance to riparian habitat condition if their objective is to minimize direct take from livestock trampling by avoiding grazing the streams when redds are present.

The pervasive problem with the 2004 monitoring is that it cannot stand on its own because the Forest Service cannot demonstrate a trend based on it. At INFISH’s core is the requirement to maintain a trend toward attainment of RMOs at a near natural rate of recovery. One year of monitoring cannot establish whether stream and riparian conditions are moving

toward RMOs and what role grazing management has in any trend. Moreover, stubble height, the quantitative measurement the Forest Service most frequently records in its Allotment Inspection Reports, and the measure the agency uses to “predict whether grazing will ultimately degrade or prevent the attainment of RMOs,” USFS Memo at 8, is by the agency’s own admission completely inappropriate as a performance standard and is not a substitute for long-term monitoring of vegetative composition, streambank stability and regeneration of woody species. See SSPAR 3383, 3385 (Univ. of Idaho Stubble Height Study Report in 2004 EOY).<sup>12</sup>

Finally, to the extent Defendants can point to any very initial stages of recovery or progress toward attainment of RMOs following the 2004 grazing season, it is because the Forest Service and permittees actually declined to put out livestock where and when they were authorized under the 2004 AOIs.<sup>13</sup> Thus, while Defendants argue that the 2004 AOIs represented

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<sup>12</sup> Moreover, as noted in Plaintiffs’ opening brief, the FWS and NOAA Fisheries complained to the Malheur National Forest Supervisor in 2002 that the Forest’s monitoring data and methods were at times poorly documented, inconsistent, non-existent or incorrectly implemented. See Pl. Memo at 19–20 (citing PAR 5693–94). In February 2004, the wildlife agencies again criticized the Forest Service’s 2003 EOY Report on thirteen points, including chastising the Forest Service for determinations that several allotments were in compliance, but without any monitoring data. See Attach. 1 at 3 (item #10 – without monitoring data, it is “unclear what led the Forest to determine these allotments were compliant with standards”). Other deficiencies in the 2003 EOY Report include missing monitoring data, failures to report unauthorized use, and locating “designated monitoring areas” (DMAs) on private lands, outside allotment boundaries and/or not on streams. Id. at 2. Insufficient monitoring in 2003 means the Forest Service had insufficient support for its 2004 AOI decisions. Although this document clearly should be in the administrative record, it is not. Plaintiffs obtained it via a Freedom of Information Act request.

<sup>13</sup> See e.g., SSPAR 1656–57 (Forest Service could not find any of permittee’s livestock where they were supposed to be on Flag Prairie Allotment); 1658 (North Fork Allotment, stating “Forest Service had already told [permittees] they would not be going into the river pastures this grazing year” even though AOI scheduled North and South River units for grazing, see SSPAR 2797); 1821 (same for Flag Prairie Allotment’s River Unit and North Fork Allotment’s North and South River units); 1469–71, 1618 (noting, “In all of the pastures I went to (Merit, North Starvation, South Starvation, Rocking Chair, Dollar Basin, Dollar, McCoy, South Star Glade, Dollar) I did not find cows anywhere in the Dollar Basin[Star Glade] Allotment which is not in accordance with the AOI”). See also Third Christie Decl. at ¶¶ 8, 11 (noting that most wild and scenic river corridor units were rested in 2004); Second Beschta Decl. at ¶ B (same). This

“meaningful modifications” in compliance with GM-1, their decision to not graze most areas scheduled to be grazed in 2004 proves Plaintiffs’ argument that only suspension of grazing can result in progress toward attainment of RMOs at this point. This is also evident from the fact that the Forest Service apparently allowed at least some permittees to shift their use away from litigated allotments and units to non-litigated areas in order to show that the 2004 AOIs had resulted in progress toward attainment of RMOs and satisfaction of other grazing standards. See, e.g., SSDBAR 007 (Dollar Basin/Star Glade Allotment permittee asked to move authorized numbers over to McCoy Creek Allotment for 2004 “to help relieve pressure off the Malheur River”). Moreover, the administrative record demonstrates that where livestock did graze in 2004, these areas continued to fail to meet standards and experienced significant ecological degradation. See supra n.8. This includes units on every allotment at issue in this lawsuit except for the Dollar Basin/Star Glade Allotment, on which the permittee apparently did not place any livestock in 2004. See supra n.13.

**3. The expert declarations must be given the appropriate weight.**

The Forest Service argues that the court must defer to the agency’s experts over Plaintiffs’ and impugns the credibility of Plaintiffs’ expert declarations. USFS Memo at 36–37; SSPAR at 0323–24. It also argues the agency did not need to rely upon the expert declarations Plaintiffs provided to support their preliminary injunctive motion. USFS Memo at 37. The reliability and qualifications of Plaintiffs’ experts already has been detailed in this case. See Pl. PI Reply Memo at 19–21 (Dkt # 103) (reciting experts’ academic, professional and experiential

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violates the terms of the AOIs, which require that permittees must put at least 90% of the authorized livestock numbers of the allotment. See, e.g., SSPAR 2801 (North Fork Allotment 2004 AOI).

qualifications). In June 2004, this court cast doubt on the expert information the Forest Service offered to support its 2004 AOI decisions:

[T]he agency contends that it has, in contrast to plaintiffs, submitted evidence in the form of the Trip Report that properly addresses the issues before the court. Remarkably, though, the Forest Service presents no data to counter the plaintiffs' data, nor does it make any effort to point to aspects of the Trip Report or other evidence that it believes actually rebuts plaintiffs' arguments. [ ] I have reviewed the Trip Report and question the weight it should be afforded.

ONDA v. USFS, No. 03-213-KI, at 14–15 (D. Or. June 10, 2004) (Dkt # 114) (also questioning relevance of qualitative PFC data, as discussed above). The court also confirmed the usefulness of the extensive monitoring data collected and presented by Christopher Christie. Id. at 12 (“Both the federal defendants and the intervenors criticize the usefulness of the Christie data, but it appears to have been collected using the Forest Service’s own protocol and is considered sound by plaintiffs’ experts”). And again, the volumes of information the Forest Service has produced in the 2004 EOY Report were not before the agency when it made its 2004 AOI decisions and are irrelevant to determining whether those decisions were arbitrary and capricious.<sup>14</sup> Plaintiffs’ declarations, on the other hand, show that the Forest Service has failed to consider relevant factual information describing riparian conditions and the effects of livestock grazing on the riparian areas at issue in this action.

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<sup>14</sup> The Forest Service also argues Plaintiffs’ preliminary injunction expert declarations cannot be relied upon because they are not in the administrative record. USFS Memo at 37. Plaintiffs briefed this issue in response to the Forest Service’s motion to strike. See Pl. Resp. to Mot. to Strike (Dkt # 159) at 7–8. Those declarations should be in the administrative record because they were filed well before the agency’s June 2004 AOI decisions. See id. In any event, clients are “considered to have notice of all facts known to their lawyer-agent.” Ringgold Corp. v. Worrall, 880 F.2d 1138, 1141–42 (9th Cir. 1989). To the extent those declarations do not appear in the administrative record, this is further evidence that the Forest Service acted arbitrarily and capriciously by not considering directly relevant information in making its 2004 AOI decisions.

### **III. THE FOREST SERVICE FAILS TO DEMONSTRATE IT HAS SATISFIED ITS WSRA DUTY TO “PROTECT AND ENHANCE” THE MALHEUR AND NORTH FORK MALHEUR WILD AND SCENIC RIVER CORRIDORS.**

As Plaintiffs demonstrated in their opening brief, the Forest Service’s annual authorization of grazing that prevents attainment of RMOs and continues to violate stubble height, bank stability and shrub use standards violates the WSRA duty to “protect and enhance” river values. Pl. Memo at 34–37. The Forest Service relies on Hells Canyon Alliance v. U.S. Forest Serv. (“HCA”), 227 F.3d 1170 (9th Cir. 2000), and continues to argue that so long as a use does not “substantially interfere” with river values, it is permissible under the WSRA. USFS Memo at 38–39. Plaintiffs already described in their opening brief why this is incorrect: the Forest Service must first “protect and enhance” river values, and if it has done so, it may then determine what uses in the watersheds may “interfere” with the public’s use and enjoyment of those values, and consider appropriate actions related to those uses. See Pl. Memo at 34–37.

The Forest Service asserts that the comprehensive river management plans “expressly provide that grazing will be allowed to continue in the corridor[s] and discuss how the Forest Service will manage such practices to ensure consistency with the WSRA.” USFS Memo at 39. The plans do allow grazing to be authorized, but only if it does not adversely impact or degrade those values. See also 47 Fed. Reg. 39,454, 39,458–59 (Sept. 7, 1982) (Secretarial Guidelines, stating that “protect and enhance” is “a nondegradation standard and enhancement policy” under which rivers are managed to protect and enhance values “while providing for public recreation and resource uses which do not adversely impact or degrade those values”); 227 F.3d at 1177–78 (as predicate for considering resource uses affecting river corridors, agency must first ensure actions are “consistent with the protection and enhancement” of river values). Each plan explicitly noted in 1992 that current grazing levels were “routinely” exceeding riparian

standards. PAR 0164, 0369. Moreover, the decision notice for the Malheur Wild and Scenic River’s plan states very clearly that scenery protection, wildlife habitat, fish habitat, and recreation are the “highest priority resources and uses” and that timber and “forage production are considered to be lower priority [uses] within the corridor.” PAR 0508 (emphasis added). See also PAR 0257 (where there are conflicts between grazing and recreation on North Fork Scenic River, “recreation will take priority” and future grazing capacity to be determined via AMPs). Thus, if, as is the case here, there is a conflict between a higher priority use and a lower priority use, the lower priority use must be adjusted or eliminated in order to satisfy the WSRA’s “protect and enhance” mandate.

The Forest Service also raises a largely incomprehensible argument to the effect that an AOI that violates INFISH cannot implicate the agency’s “protect and enhance” duty. USFS Memo at 40. The argument is without merit because the Forest Service’s annual grazing authorizations, which result in repeated and chronic violations of INFISH and other relevant ecological standards, violate the WSRA “protect and enhance” duty by causing damage to the “outstandingly remarkable values” of the Malheur and North Fork Malheur wild and scenic rivers. This court already has interpreted the protect and enhance standard in the context of agency-authorized livestock grazing to mean that

[t]he language of the WSRA itself is unambiguous . . . . Regardless of whether cattle grazing was a permitted use when the rivers were first designated, if grazing proves to be detrimental to soil, vegetation, wildlife, or other values, or is inconsistent with the ‘wild’ designation, then clearly the BLM has the right—indeed, the duty—not only to restrict it, but to eliminate it entirely.

Ore. Natural Desert Ass’n v. Singleton, 47 F.Supp.2d 1182 (D. Or. 1998) (emphasis added).

Contrary to the Forest Service’s interpretation, both the river management plans and subsequent site-specific actions are subject to the “protect and enhance” standard. See 16 U.S.C. §§ 1281(a)

(administration of river corridors), 1283(a) (management policies, contracts, plans “affecting such lands”).<sup>15</sup> Therefore, the Forest Service’s annual authorizations of grazing practices that fail to “protect and enhance” these river corridors because they cause continued violations of standards is arbitrary and capricious and not in accordance with the WSRA.

Moreover, the “protect and enhance” duty applies beyond the boundaries of the wild and scenic river corridors themselves. Forest Service-authorized activities such as livestock grazing that occur partially or even entirely outside of corridor boundaries still must conform with the duty to the extent that they may impact the river corridors. WSRA Section 12(a) explicitly recognizes this obvious proposition when it directs any agency with “jurisdiction over any lands which include, border upon, or are adjacent to, any [designated] river” to “take such action respecting management policies, regulations, contracts, plans, affecting such lands . . . as may be necessary to protect such rivers.” *Id.* § 1283(a) (emphasis added).

Thus, Intervenor Robertson Ranch’s assertion that Plaintiffs’ claims do not apply to the Ott Allotment is incorrect. *See* RR Memo at 3–5. Robertson Ranch argues that because it agreed to construct a fence along the North Fork Malheur River canyon rim prior to last grazing season, it is immune from Plaintiffs’ claims. *Id.* This is incorrect because: (1) as explained above, grazing outside the corridor that impacts corridor values is subject to the “protect and enhance” standard; (2) INFISH’s requirements apply to all bull trout spawning, rearing and migratory habitat regardless of whether that habitat occurs within or outside of a designated wild and scenic

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<sup>15</sup> The Forest Service’s authorized grazing also violates the agency’s duty to implement the comprehensive river management plans and manage grazing within the wild and scenic river corridors consistently with Forest Plan standards, which are mandatory duties. *See ONDA v. USFS*, 312 F.Supp.2d at 1344–46. As Plaintiffs explained previously, the river management plans adopt the Forest Plan’s fisheries and watershed standards, as amended by INFISH. PAR 0496 (“non-anadromous riparian area” fisheries standards); PAR 0246 (same fisheries standards).

river corridor; and (3) the Stipulation was designed only to “resolve[] the issues raised by Plaintiffs’ motion for preliminary injunction in the Rattlesnake Pasture and Ott Allotment.” Stipulation Resolving Motion for Preliminary Injunction As Applied to Robertson Ranch (Dkt # 94) at ¶ 8. Plaintiffs have shown that the Forest Service’s annual grazing authorizations have resulted in ecological degradation both within and outside of the Rattlesnake Unit. See Pl. Memo at 32; see also supra n.8. In addition, the Forest Service’s duty to comply with INFISH applies everywhere there is bull trout migratory, spawning or rearing habitat; on the Ott Allotment, this means over five stream miles of bull trout habitat along the North Fork Malheur River and Crane Creek, both within and outside of the designated river corridor. See PAR 6658–59 (2004 BA), 6768 (2004 BiOp).

The parties entered into the Stipulation to resolve Plaintiffs’ motion for preliminary injunctive relief prior to the 2004 grazing season—not to address Plaintiffs’ claims in the Complaint. Plaintiffs sought a more temporally and geographically limited injunction last spring because the requested relief was intended to stave off immediate, direct degradation within the corridors (and in particular, in the riparian areas) themselves. See Pl. PI Memo in Support (Dkt # 81) at 33–35. The fact that Plaintiffs agreed to the fencing described in the Stipulation to remedy potential harm during the 2004 grazing season does not mean Plaintiffs believe this is the best long-term solution to protect and enhance the North Fork Malheur Scenic River and provide for attainment of RMOs on the Ott Allotment. While Plaintiffs appreciate Robertson Ranch’s efforts to take positive steps to address potential grazing-induced damage on the Rattlesnake Unit in 2004, and agree that the fence was effective in keeping livestock out of the river corridor in 2004, they still believe the Forest Service’s annual authorizations on the allotment as a whole are not in compliance with applicable law and regulations. Moreover, there is a real threat that the

extraordinarily dry conditions persisting so far in 2005 will place the Rattlesnake Unit, the corridor fence, and the Ott Allotment as a whole under extreme pressure this year unless authorized AUMs are reduced significantly on the allotment.<sup>16</sup>

Finally, Defendants fail to respond to Plaintiffs' argument that scenic values are being impaired by the agency's last ditch attempts to produce massive amounts of monitoring information. But see SSPAR 1823 (2004 EOY agreeing that "when these [willow] cages are not removed at the appropriate time the plants do become shaped as the cages shape [sic]," i.e., misshapen). Similarly, Land EKG's placement of 100-plus monitoring points permanently marked with orange stakes, SSPAR 1005-06, certainly does not comply with the river management plans' goals regarding achieving "natural or near natural appearance" by the year 2002. See PAR 0239, 0491.

**IV. THE FOREST SERVICE HAS FAILED TO PREPARE AND UPDATE ITS ALLOTMENT MANAGEMENT PLANS AND HAS ANNUALLY AUTHORIZED GRAZING PRACTICES WITHOUT UPDATED AND INFORMED ENVIRONMENTAL ANALYSES.**

In response to Plaintiffs' Fourth Claim for Relief, the Forest Service does not deny it has not prepared or updated AMPs and has not supported its annual grazing authorizations with updated and informed NEPA analyses. The agency instead limits its argument solely to the assertion that Congress has "foreclosed" this court's authority to order injunctive relief and the court therefore does not have jurisdiction to address this claim. USFS Memo at 29-30. In fact, this court has broad authority to grant effective relief to address Plaintiffs' NEPA and other claims.

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<sup>16</sup> Between 2000 and 2004 the Forest Service's annual grazing authorizations have actually increased AUMs on the allotment by over 30%. See PAR 6657.

Section 325 of the 2004 Interior Department Appropriations Act, P.L. 108-108, 117 Stat. 1241, does not foreclose entry of an injunction on this or any other of Plaintiffs' claims because: (1) Congress has not expressly restricted this court's equitable jurisdiction; (2) Section 325 concerns the processing of grazing permits, not allotment management plans or annual grazing authorizations; and (3) Section 325 does not preclude Plaintiffs' request for injunctive relief based on the Forest Service's violations of the WSRA and NFMA. In fact, as the Forest Service acknowledges, this court already held that Section 325 does not prevent it from declaring that the Forest Service violated NEPA by issuing permits and annually authorizing grazing via AOIs without the required environmental analyses:

I do not believe the amendments affect my ability to consider injunctive relief on any of plaintiffs' other claims. Congress's action appears to prevent courts from vacating permits, but that is not what the plaintiffs are seeking here. I conclude that plaintiffs are likely to succeed at least in part on their NEPA/Rescissions Act claim.

ONDA v. USFS, No. 03-213-KI, at 18 (D. Or. June 10, 2004) (Dkt # 114).

Defendants highlight Section 325's provision that "the Secretaries in their sole discretion determine the priority and timing for completing required environmental analysis of grazing allotments" to argue the Forest Service cannot be compelled to develop or revise AMPs or support its annual grazing authorizations with appropriate environmental analyses. USFS Memo at 14-15, 30. However, even if this court could not order the Forest Service to complete AMPs or NEPA analyses by a date certain, it certainly could enjoin grazing and issue an order requiring preparation of AMPs and NEPA as a prerequisite for modifying the injunction—thus leaving the Secretary total discretion to determine the priority and timing of those projects. But Defendants

can point to nothing in Section 325 that restricts this court's ability to order injunctive relief for violations of NFMA or WSRA.<sup>17</sup>

#### **V. PLAINTIFFS ARE ENTITLED TO INJUNCTIVE RELIEF.**

Rather than contest Plaintiffs' demonstration that the likelihood of prevailing on the merits, the respective harm to the parties, and the public interest all weigh in favor of permanent injunctive relief, see Pl. Memo at 40–42, the Forest Service elects to argue, without support, that cross-motions for summary judgment “clearly are not an appropriate vehicle by which to seek injunctive relief.” USFS Memo at 40. Because the Forest Service fails to refute Plaintiffs' showing that continued grazing in these degraded systems will cause irreparable harm absent injunctive relief, Plaintiffs are entitled to such relief.

The Forest Service argues that entry of an injunction “would be manifestly unfair” and that they “should be provided a right to present additional evidence on the relevant issues of irreparable injury and the public interest.” Id. In fact, this briefing is exactly that opportunity and the Forest Service passes on responding to Plaintiffs' argument in support of injunctive relief at its own peril. See Fed. R. Civ. P. 56(c) (providing that “judgment shall be rendered” if evidence shows “that there is no genuine issue as to any material fact and that the moving party is entitled

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<sup>17</sup> OCA also argues the Forest Service is under no obligation to prepare or update an AMP. OCA Memo at 39. However, the Forest Service's grazing regulations state that “[e]ach allotment will be analyzed and with careful and considered consultation and cooperation with [various affected parties] an allotment management plan will be developed.” 36 C.F.R. § 222.2(b). The Supreme Court has described language using “shall,” “will,” or “must” as “language of an unmistakably mandatory character.” Hewitt v. Helms, 459 U.S. 460, 471 (1983). As well, the Forest Service suggests that its use of “will” (and “must”) elsewhere in the Part 222 grazing regulations constitutes mandatory regulatory direction. USFS Memo at 11. Where AMPs already exist (Bluebucket, North Fork and Spring Creek allotments, see Pl. Memo at 38–39), the Federal Land Policy and Management Act (FLPMA) is quite clear: “Allotment management plans shall be tailored the specific range condition of the area to be covered by such plan, and shall be reviewed on a periodic basis to determine whether they have been effective in improving the range condition of the lands involved.” 43 U.S.C. § 1752(d) (emphasis added). Here, the AMPs that exist have become outdated and ineffective. See Pl. Memo at 37–39.

to a judgment as a matter of law”). Because Rule 56 provides that a court may rule on the issue of liability alone and grant a trial if necessary to rule on requested relief, it unmistakably anticipates that a court can grant all relief requested on a motion for summary judgment where material facts are not controverted. The adverse party has the obligation to “set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e).

In any event, the Forest Service’s complaints about “manifest unfairness” and not being provided a “right” to present additional evidence cannot be taken seriously. Under the briefing schedule the parties agreed to over six months ago, see Dkt # 130, Plaintiffs filed their motion for summary judgment, opening brief and all supporting expert declarations on November 12, 2004. See Dkt # 138–144. Plaintiffs’ motion and brief specifically described the permanent injunctive relief requested. Pl. Memo at 41–42; Pl. Mot. for Summary Judgment at ¶¶ E, F, G. This means Defendants have had four months to consider how to respond to Plaintiffs’ request for injunctive relief.<sup>18</sup> Further, this court indicated last summer that the evidence presented prior to the 2004 grazing season decisions was very convincing with respect to violations of standards and irreparable harm. See ONDA v. USFS, No. 03-213-KI, at 12, 13 (D. Or. June 10, 2004) (Dkt # 114) (stating “Plaintiffs have submitted fairly convincing evidence that the Forest Service’s management of livestock grazing has caused ecological damage to the riparian habitats of the Malheur and North Fork Malheur river corridors and their watersheds” and noting “the substantial evidence suggesting that full resting may be needed in many of the areas”). The court also indicated that its decision not to grant preliminary injunctive relief turned almost exclusively on balancing the hardships to the parties because its decision came “on the eve” of the grazing season. But it cautioned Defendants that an injunction prior to the 2005 grazing season was a

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<sup>18</sup> During that period, Defendants also sought, and were granted, extensions of time on three separate occasions. See Dkt # 145, 155, 190.

distinct possibility: “For the reasons I have already stated, I choose not to impose an injunction so close to the grazing season, but I have concluded that the plaintiffs have made a strong showing on the merits, and therefore the entry of an injunction before the start of the next grazing season may ultimately be the way in which this case is resolved.” Id. at 19. Similarly, the court warned Defendants again in December 2004 that they could not count on timing to avoid injunctive relief in 2005:

But what I do want to tell you is we’re running up against the early turn-out date. Last year was May 28th. A lot of that is because the Forest Service has asked for extensions. And I am not going to make a decision this time based upon the fact that we’re right on the grazing season, if we’re not able to make a decision until we’re right up to it. So intervenors should be aware of that in the event that the case goes against them, in the event that there is an injunction. I just don’t want you to rely upon the fact that we’re running up against this grazing season to get you through another year.

Telephone Conference, Transcript of Proceedings at 14–15, Ore. Natural Desert Ass’n v. U.S. Forest Serv., No. 03-213-JO (D. Or. Dec. 14, 2004).<sup>19</sup>

In short, the clear expectation of this court and of the parties since last summer has been that permanent injunctive relief is at issue under the present cross-dispositive motions. The summary judgment briefing schedule was specifically extended so that each party would have the opportunity to send their experts out into the field at the close of the 2004 grazing season, gather any monitoring and other data they wished, and submit that information to the Forest Service and to the court as part of the summary judgment briefing. See Pl. Resp. in Opp. to Def. Mot. for Extension, at 5–7 (Dkt # 149). With the exception of Robertson Ranch, each party availed itself of that opportunity. Therefore, there is nothing manifestly unfair about having four months during a two-plus year long lawsuit to think about how to respond to a plaintiff’s request

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<sup>19</sup> Attached to Plaintiffs’ Response to Intervenor Motion to File a Reply in Support of Motion to Strike (Dkt # 167).

for permanent injunctive relief. Finally, the INFISH grazing standard itself provides for suspension of grazing “if adjusting practices is not effective in meeting [RMOs].” SPAR 0031.

**CONCLUSION**

For the above-stated reasons, Plaintiffs respectfully request this court to enter the declaratory and injunctive relief requested in Plaintiffs’ Motion for Summary Judgment.

DATED this 15th day of March, 2005.

Respectfully Submitted,

s/ Peter M. Lacy

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Of Attorneys for Plaintiffs