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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OREGON NATURAL DESERT ASS’N,
CENTER FOR BIOLOGICAL DIVERSITY,
and **WESTERN WATERSHEDS PROJECT,**

Plaintiffs,

v.

ABIGAIL KIMBELL, et al.,

Defendants,

v.

HARLEY & SHERRIE ALLEN, et al.,

Defendants-Intervenors.

Case No. 07-1871-SU
[Related Case No. 08-151-SU]

PLAINTIFFS’ RESPONSE TO
MOTION TO VACATE
PRELIMINARY INJUNCTION

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INTRODUCTION

On May 16, 2008, this Court enjoined livestock grazing on two allotments in the Malheur National Forest, finding that plaintiffs (“ONDA”) had shown that they were likely to prevail on the merits and had shown the likelihood of irreparable harm to steelhead. Intervenor, some of whom hold permits to graze on those allotments, now move to vacate this Court’s injunction. Intervenor raise several arguments, none of which disturb the legal or factual bases for the injunction. First, their argument that the Supreme Court’s decision in Winter v. Natural Resources Defense Council, 129 S. Ct. 365 (2008), alters the standard for a preliminary injunction is incorrect because, unlike the injunction issued by this Court under the Endangered Species Act (“ESA”), Winter involved application of the National Environmental Policy Act (“NEPA”). The Supreme Court has long recognized that relief under the ESA is subject to different standards than other statutes because Congress declared a policy in favor of the protection of listed species when it enacted that statute. Winter does not disturb ESA jurisprudence, and does not alter the analysis this Court conducted in issuing the injunction.

Second, the new factual evidence Intervenor submit does not affect the conclusion that livestock were responsible for the overwhelming majority of damage to steelhead streams documented in 2007. A comparison of the conditions after a year of rest in 2008 to conditions after grazing in 2007 demonstrates significant improvements throughout both allotments. Only in a few, isolated places are horses affecting riparian areas. Moreover, Intervenor’s new evidence is, on many fundamental points, factually incorrect and scientifically unreliable. It does not justify vacating the injunction.

Finally, the Ninth Circuit’s vacatur of the opinion in Oregon Natural Desert Association v. Lohn, 485 F. Supp. 2d 1190 (D. Or. 2007), vacated as moot, 2009 WL 123525 (9th Cir. Jan

12, 2009), is not a “new circumstance” affecting this Court’s injunction. The Ninth Circuit’s action does not change Lohn’s value as persuasive authority for use by courts and litigants.

STANDARD OF REVIEW

Intervenors’ motion is incorrectly filed under Federal Rule of Civil Procedure 60(b). Rule 60(b) governs “final” orders, not interlocutory orders such as this Court’s September 5, 2008 Opinion and Order (Dkt # 129) (“Injunction Opinion”). Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc., 204 F.3d 867, 880 (9th Cir. 2000) (stating that “a preliminary injunction is not a ‘final judgment, order, or proceeding’ that may be addressed by a motion under Rule 60(b)” and citing 28 U.S.C. § 1292(a)(1) which provides that orders granting preliminary injunctions are interlocutory orders). This Court should deny the Intervenors’ motion for this reason alone.

However, ONDA recognizes that this Court could entertain a motion re-filed properly under Federal Rule of Civil Procedure 54 to revise the injunction upon an allegation of changed circumstances. Credit Suisse First Boston Corp. v. Grunwald, 400 F.3d 1119, 1123–25 (9th Cir. 2000). Because a court would look to the substance of a motion properly filed under Rule 54, it must consider whether changed circumstances exist. Id. at 1124; see also Winterland Concessions Co. v. Trela, 735 F.2d 257, 260 (7th Cir. 1984) (to modify a preliminary injunction, movant must show “changed circumstances which make the continuation of the injunction inequitable” by presenting “new facts to the district court which would justify modification”).

PROCEDURAL BACKGROUND

The legal framework and factual and procedural background of this case is outlined in the Court’s Injunction Opinion. Injunction Opinion at 2–13. The Injunction Opinion plainly sets out that the Court’s analysis was premised on its understanding that “a plaintiff must show likely success on the merits” to obtain an injunction under the ESA. Id. at 13 (citing Nat’l Wildlife

Fed'n v. Burlington N.R.R., Inc., 23 F.3d 1508, 1511 (9th Cir. 1994)). The Court also understood that “[i]n addition to a likelihood of success on the merits, a plaintiff seeking injunctive relief must also show ‘irreparable injury’ to the species.” Id. at 14 (citing Nat’l Wildlife Fed’n, 23 F.3d at 1511). After applying these standards, this Court determined “that plaintiffs are likely to succeed on the merits of at least one of its claims.” Id. at 15. The Court also determined that “plaintiffs have made a sufficient showing that irreparable injury would occur on the Murderers Creek Allotment and the Lower Middle Fork Allotment during the 2008 grazing season.” Id. Based on these conclusions this Court granted a preliminary injunction.

ARGUMENT

This Court should deny the Intervenor’s motion to vacate because it presents no changed circumstances to justify any modification of the Court’s preliminary injunction. Winter effected no change in the law of preliminary injunctions under the Endangered Species Act, a statute by which Congress drastically limited the courts’ equitable discretion in issuing injunctions. The standard this Court applied in issuing its injunction was not a “more lenient” standard proscribed by Winter. Rather, the Court properly required, and found, that ONDA had showed a likelihood of success on the merits and a likelihood of irreparable harm to steelhead if grazing were allowed to continue. Nothing in Winter alters the long-established rule for an injunction under the ESA.

Intervenor’s also present what they argue are new facts controverting either the likelihood of ONDA’s success on the merits or of irreparable injury to steelhead from livestock grazing. However, ONDA also presents new evidence with this Opposition, comparing the conditions of the two allotments at issue here in 2007 after livestock grazing and in 2008 after a year of rest from grazing. This evidence demonstrates that the effects observed and documented by Christopher Christie and Jonathan Rhodes in 2007, upon which this Court based its injunction,

were overwhelmingly caused by cattle rather than feral horses or other wildlife. The evidence presented to this Court last year, along with the evidence in the attached Declarations of Christie (Second Declaration), Linda Driskill, Rhodes (Third Declaration), Dr. Robert Beschta, and Dr. Dale McCullough, show once again that ONDA is likely to prevail on the merits of its claims and that irreparable harm to steelhead is likely in the absence of the injunction. Intervenors' evidence submitted by Loren Stout focuses on a few, short stretches along five of the nineteen stream segments ONDA monitored, presenting, at best, evidence of highly localized effects from feral horses on one of the two allotments. Evidence presented by Pat Larson is unreliable and does not support modification of the injunction. Because there are no legal or factual changed circumstances, this Court should deny Intervenors' motion.

I. WINTER DOES NOT AFFECT THIS COURT'S ANALYSIS OF THE INJUNCTION

The Supreme Court's decision in Winter does not represent "changed circumstances" with respect to injunctions under the Endangered Species Act. Intervenors' argument misses the mark because Winter involved an injunction issued under NEPA, rather than the ESA. Winter does not discuss or implicate the Supreme Court's standard for granting an injunction under the ESA, and therefore does not affect this Court's analysis, findings, and conclusions in its Injunction Opinion. The Supreme Court repeatedly has recognized that Congress may foreclose the courts' equitable discretion by specific statutory enactments, and that Congress did so through the ESA. Accordingly, Winter does not disturb existing jurisprudence on ESA-based injunctive relief.

A. Winter Does Not Alter the Standard for an Injunction Under the ESA.

Intervenors read Winter for sweeping propositions that the opinion does not contain and for principles wholly inapplicable to injunctive relief sought for violations of the ESA. Although

Intervenors note that the plaintiffs in Winter filed claims under the ESA, Intervenors fail to mention that NEPA was the *sole* remaining basis for the injunction when that case reached the Supreme Court. Natural Res. Defense Council, Inc. v. Winter, 518 F.3d 658, 661 (9th Cir. 2008) (noting that although the district court evaluated the plaintiffs’ claims under NEPA and the Coastal Zone Management Act (“CZMA”)—but not the ESA—the Ninth Circuit declined to reach the CZMA issue), rev’d sub nom. Winter, 129 S. Ct. at 374. Winter’s discussion of injunctive relief standards under NEPA has no bearing on injunctions sought under the ESA.

The Supreme Court has long recognized that Congress limited the courts’ equitable discretion in issuing injunctions when it enacted the ESA. TVA v. Hill, 437 U.S. 153, 193–95 (1978); see Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) (Congress has the power to restrict a federal court’s equitable jurisdiction “in so many words, or by a necessary and inescapable inference”). Congress restricted the scope of analysis for injunctions based on the ESA to ensure protection of listed species and their critical habitat. In TVA, the Court explained that “[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.” 437 U.S. at 184. The Court held that the balancing of equities and hardships did not apply where Congress, in legislation, “has decided the order of priorities in a given area.” Id. at 194.

Congress in the ESA made “it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities.”¹ Id. Subsequent Supreme Court decisions have reaffirmed that Congress foreclosed courts’ traditional equitable discretion in

¹ Intervenors mischaracterize the provenance of the term “institutionalized caution” in the TVA decision, suggesting that it was the Court that “first recognized the need for ‘institutionalized caution.’” Intv. Memo at 7. In fact, the Court was citing the decision by *Congress* to impose the principle of institutionalized caution by enacting the ESA. TVA, 437 U.S. at 178 (quoting H.R. Rep. No. 93-412, pp. 4-5 (1973)).

injunctions involving the ESA. Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 543 n.9 (1987) (distinguishing the ESA from the statute at issue and confirming that Congress “had foreclosed the traditional discretion possessed by an equity court” when it enacted the ESA); Weinberger v. Romero-Barcelo, 456 U.S. 305, 313–14 (1982) (noting that “Congress may intervene and guide or control the exercise of the courts’ discretion” and that “Congress had foreclosed the exercise of the usual discretion possessed by a court of equity” under the ESA).²

Winter itself makes no reference to the ESA, and none of the cases cited in Winter involved the ESA, but Winter does rely heavily on both Amoco Production and Weinberger in its analysis. 129 S. Ct. at 374, 376–77, 381. As noted above, those cases both carefully distinguish the standard for an injunction under the ESA from the “traditional” four-prong standard discussed in Winter. The Supreme Court recognized in TVA that fundamental separation of powers principles do not permit the Court to “pre-empt congressional action” by altering the balance that Congress had struck. 437 U.S. at 195. Winter therefore cannot be read to impose the traditional four-prong test for injunctive relief on ESA cases because the Supreme Court lacks the power to do so. Only Congress could expand the courts’ equitable discretion under the ESA and reverse its policy of “institutionalized caution” favoring listed species. Congress has not done so in the thirty years since the TVA decision.

As a result, Intervenor’s tortured treatment of Winter in an effort to extract principles that the opinion simply does not contain is ultimately futile. Congress intended the ESA “to halt and reverse the trend toward species extinction, *whatever the cost.*” TVA, 437 U.S. at 184 (emphasis

² Intervenor also cite Weinberger. Intv. Memo at 7–8. However, Weinberger, a case involving the Clean Water Act (“CWA”), cannot be read to support Intervenor’s position regarding injunctions under the ESA because the Supreme Court carefully distinguished TVA as being inapplicable to its analysis of injunctive relief under the CWA. Weinberger, 456 U.S. at 313–14.

added); see also Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, ___, 127 S. Ct. 2518, 2537 (2007) (noting that the ESA applies to discretionary agency actions, such as authorizing livestock grazing, “regardless of the expense or burden its application might impose”); see also id. at 2541 (describing the “unequivocal holding in [TVA] that the ESA has ‘first priority’ over all other federal action”). Winter does not disturb TVA, nor the Ninth Circuit’s standard precluding courts from using “equity’s scales to strike a different balance” than affording listed species the highest protection. Sierra Club v. Marsh, 816 F.2d 1376, 1383 (9th Cir. 1987). Accordingly, this Court properly declined to evaluate Intervenor’s arguments regarding the balance of equities, and must continue to do so, because Congress long ago struck that balance in favor of endangered and threatened species. TVA, 437 U.S. at 194; Injunction Opinion at 13. Winter does not change that analysis.³

B. *Winter* Does Not Alter the Standards This Court Applied and Does Not Eliminate the Sliding Scale for Injunctive Relief Based on Success on the Merits and Likelihood of Irreparable Harm.

Winter is significant more for what it does not do than for what it does. Winter expressly declines to “address the lower courts’ holding that plaintiffs have also established a likelihood of success on the merits.” 129 S. Ct. at 376. As a result, Winter contains no holding relevant to the

³ Contrary to Intervenor’s argument, this Court did mention the “balance of equities” and “public interest” prongs of the traditional test, but properly acknowledged that Congress has foreclosed the courts from striking any balance other than the protection of the listed species and its critical habitat. Injunction Opinion at 13; see Intv. Memo at 10. If this Court were to consider these issues, Intervenor has shown only private economic interests to weigh in the balance against the protection of a listed species. Second Stout Decl. ¶¶ 29–31; Second Burnette Decl. ¶¶ 5–6. “[E]conomic injury alone does not support a finding of irreparable harm.” Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc., 944 F.2d 597, 603 (9th Cir. 1991); see also Nat’l Parks & Conservation Ass’n v. Babbitt, 241 F.3d 722, 738 (9th Cir. 2000) (“the loss of anticipated revenues, however, does not outweigh the potential irreparable damage to the environment”). Because Intervenor has offered no argument that there is a *public* interest in vacating the injunction, the public interest here weighs exclusively in favor of an injunction to protect listed steelhead and their habitat.

continuing validity of the Ninth Circuit’s interpretation of the “likelihood of success” prong of the preliminary injunction test. Id. And, although the Supreme Court found the Ninth Circuit’s “possibility” of imminent harm standard too lenient in the traditional injunction analysis, the Court ultimately did not hold that the Ninth Circuit’s determination regarding imminent harm was erroneous. 129 S. Ct. at 376. Winter acknowledges that “articulating the incorrect standard” does not necessarily affect a court’s analysis, where the Ninth Circuit held that there was a “‘near certainty’ of irreparable harm” despite articulating the “possibility” of irreparable harm standard. 129 S. Ct. at 376. Rather, the crux of the decision was that “*even if plaintiffs have shown irreparable injury from the Navy’s training exercises, any such injury is outweighed by the public interest and the Navy’s interest in effective, realistic training of its sailors. A proper consideration of these factors alone requires denial of the requested injunctive relief.*” Id. (emphasis added). The holding in Winter thus goes narrowly and exclusively to the lower courts’ abuse of discretion in incorrectly balancing the Navy’s interest and the equities against any harm to the marine environment. By contrast, in this case, the ESA has already struck the balance of equities in favor of the steelhead. Winter cannot be read to change any of the standards or analysis which this Court set forth in its Injunction Opinion.

Because Winter contains no analysis of the “likelihood of success” prong, and declined to address the Ninth Circuit’s conclusion on that issue, Winter does not change the Ninth Circuit’s interpretation of that prong. Intervenor’s contention that Winter somehow altered the “fair chance” formulation is therefore misplaced. Intv. Memo at 8–9. Moreover, it is apparent from this Court’s Injunction Opinion that this Court required that ONDA “show likely success on the merits” and properly concluded “that plaintiffs are likely to succeed on the merits of at least one of its claims.” Id. at 13, 15. To the extent that Winter finds fault with the Ninth Circuit’s

“possibility” of imminent harm standard on the facts of that case, 129 S. Ct. at 375, it does not alter this Court’s analysis. This is because this Court required, and found, that ONDA had demonstrated that irreparable harm to the steelhead would result in the absence of an injunction. Injunction Opinion at 14–15. This Court applied the standard for the second prong set out in National Wildlife Federation, where the Ninth Circuit noted that a court must “look at the *likelihood* of future harm” to the listed species and that a “plaintiff must make a showing that a violation of the ESA is at least *likely* in the future.” 23 F.3d at 1511 (emphasis added); see Injunction Opinion at 14.

The standard this Court applied is indistinguishable from the standard set forth in Winter. 129 S. Ct. at 375 (a plaintiff seeking a preliminary injunction must show “that irreparable injury is *likely*”) (emphasis in original). ONDA demonstrated that livestock grazing under the 2007–2011 BiOp and the Malheur National Forest’s grazing management program likely would result in irreparable harm to steelhead and violations of the ESA. Injunction Opinion at 15. As a result, Winter does not change this Court’s analysis, and does not oblige this Court now to apply a different standard for irreparable harm than set forth in the Ninth Circuit’s ESA jurisprudence.

Significantly, Winter does not change the continued vitality of the “sliding scale” whereby a court in equity may sometimes award “relief based on a lower likelihood of harm when the likelihood of success is very high.” Winter, 129 S. Ct. at 392 (Ginsburg, J., dissenting) (noting, in a statement not contradicted by the Court, that “[t]his Court has never rejected that formulation, and I do not believe it does so today”).⁴ The Ninth Circuit’s characterization of the

⁴ Several courts that have addressed preliminary injunctions since Winter have attested to this validity by applying a sliding scale to their determination of the propriety of injunctive relief. FTC v. Whole Foods Market, Inc., 548 F.3d 1028, 1035, 1041 (D.C. Cir. 2008); Addington v. US Airline Pilots Ass’n, 588 F. Supp. 2d 1051, 1068 (D. Ariz. 2008); Aerisa, Inc. v. Plasma-Air Int’l, No. CV 08-227-PHX-NVW, 2008 WL 5210847, at *1 (D. Ariz. Dec. 11, 2008).

sliding scale, “in which the required degree of irreparable harm increases as the probability of success decreases” and vice-versa, remains good law. Roe v. Anderson, 134 F.3d 1400, 1402 (9th Cir. 1998) (citation omitted). Where a plaintiff has “demonstrated a strong likelihood of success on the merits” it needs “only to make a minimal showing of harm to justify the preliminary injunction.” Kootenai Tribe v. Veneman, 313 F.3d 1094, 1124 (9th Cir. 2002). Because Congress afforded endangered and threatened species “the highest priority” under the ESA, it is still appropriate that injunctions issue under the ESA upon a finding of strong likelihood of success on the merits and a lesser likelihood of irreparable harm. Thus even if this Court were to find that the likelihood of irreparable harm is somewhat less based on new evidence, it would still be required to continue the injunction based on the strong showing ONDA has made of likely success on the merits.

II. IRREPARABLE HARM TO STEELHEAD IS LIKELY IN THE ABSENCE OF AN INJUNCTION

The “new facts” which Intervenors present to the Court do not justify modifying the injunction. A comprehensive comparison of improved riparian conditions between 2007 and 2008 on the Murderers Creek and Lower Middle Fork allotments confirms the conclusion that livestock grazing was responsible for the vast majority of damage to steelhead habitat documented in 2007. Intervenors’ evidence, focused on narrow sections of only a few monitored stretches and lacking in scientific validity, does not change that conclusion. Consequently, injunctive relief was, and remains, warranted to prevent irreparable injury to steelhead.

A. Grazing on These Allotments Causes Adverse Modification to Steelhead Habitat That is Likely to Result in Increased Steelhead Mortality and Other Harm to Steelhead, and These Effects are Likely to Continue in the Future.

ONDA demonstrated in the briefing, declarations and exhibits submitted to this Court in 2008 that livestock grazing is likely to cause irreparable injury to steelhead on the Murderers

Creek and Lower Middle Fork allotments. The declarations of Dr. Beschta and Dr. McCullough further demonstrate how livestock grazing on these allotments adversely affects riparian vegetation, streambank stability, water temperature, overhanging banks, and other key elements of good steelhead habitat that would allow the continued existence and recovery of the species.

It is not seriously disputed that livestock grazing adversely affects steelhead and steelhead habitat, both directly and indirectly. Injunction Opinion at 3. As McCullough explains, livestock grazing is likely to cause streambank damage, increased sedimentation, removal of riparian vegetation that leads to increased water temperatures and greater bank instability, the loss of large woody debris, overhanging banks and pools, and the widening of stream channels. McCullough Decl. ¶¶ 3, 5–6, 8, 11–13, 16, 18; see also Beschta Decl. ¶¶ 11–25. Livestock grazing causes and is likely to cause direct and long-term adverse modification to steelhead habitat on the Malheur National Forest, and specifically on the Murderers Creek allotment.⁵ Beschta Decl. ¶¶ 11–25; McCullough Decl. ¶¶ 3, 5–8, 11–18; Third Rhodes Decl. ¶¶ 15–16. By adversely modifying steelhead habitat, livestock grazing in riparian areas causes increased mortality and other harm to steelhead in all life stages. McCullough Decl. ¶¶ 5–6, 8, 11–18; Beschta Decl. ¶¶ 11, 16, 18, 22. Steelhead are present in the streams of the Malheur National Forest during all months of the year. They spawn from mid-March to May, emerge as fry during

⁵ Livestock grazing's deleterious effects on any steelhead habitat is likely to irreparably harm steelhead, and the Forest Service's obligations to protect steelhead under the ESA extend to all steelhead habitat. Moreover, many stream segments on these allotments are designated critical habitat for steelhead. ONDA Memo (Dkt # 35) Exh. 1 (2007–2011 BiOp) at 58–61, Exhs. 9–10. Adverse modification to designated critical habitat will likely result from direct livestock impacts and indirectly from livestock damage to contributing streams that flow into critical habitat. McCullough Decl. ¶¶ 6–8. Banks denuded and trampled by livestock cause higher water temperature and sediment load, and the warmer temperatures and fine sediments moving downstream from contributing streams into critical habitat also are likely to result in adverse modification to critical habitat and irreparable harm to steelhead. Id. ¶ 5–6.

the spring up through early July, rear as juveniles for two to three years in their natal streams before migrating to the ocean, and then may be present as adults (“kelts”) which have spawned but could recover to return to the ocean. Steelhead therefore will be irreparable harmed, directly or indirectly, by livestock grazing even when they are not spawning. McCullough Decl. ¶ 5.

Allowing grazing to resume on these allotments would renew the cycle of habitat destruction which Beschta and McCullough describe. Beschta Decl. ¶¶ 11–24, 26; McCullough Decl. ¶¶ 3, 11–12, 18. Livestock grazing year after year creates, over time, the widespread occurrence of eroding banks, loss of shade- and refuge-providing overhanging banks, overwidened channels susceptible to increased stream temperatures, loss of shading vegetation, and the inability for streambanks to stabilize and recover narrow and sinuous channels indicative of good steelhead habitat. Beschta Decl. ¶¶ 11–24. Riparian habitat recovery requires multiple successive years without livestock grazing; renewed grazing is likely to undo any nascent vegetation and bank recovery that has occurred from one year’s plant growth. *Id.* ¶¶ 22–23, 26.

As an example, a segment of Beaver Dam Creek that was ungrazed in 2006 and beginning a process of recovery suffered tremendous damage in 2007 from livestock overgrazing. Second Christie Decl. Attach. 12 at 1–2. In 2008, this stream showed substantial improvement after a year of rest. But it has not yet recovered even to the condition it was in at the end of 2006, much less to a condition that would represent the cold, clear, deep and stable stream habitat necessary for steelhead survival. Compare *id.* Attach. 12 at 3 with *id.* Attach. 1 at 1–4; see Beschta Decl. ¶¶ 11–12, 14–16, 18–19, 21–22, 26; McCullough Decl. ¶¶ 5, 11–14, 18. As discussed in the following sections, the damage documented by Christie and Rhodes in 2007 was attributable to livestock grazing on the Lower Middle Fork allotment, and overwhelmingly to livestock grazing on the Murderers Creek allotment.

B. Livestock Grazing is Overwhelmingly Responsible for Damage to Steelhead Habitat Observed on These two Allotments.

The overwhelming majority of damage to riparian areas on the Murderers Creek and Lower Middle Fork allotments has resulted from livestock grazing, not from feral horses or native wildlife. Although Intervenors have introduced evidence of highly localized impacts from feral horses on the Murderers Creek allotment, this evidence (as discussed in more detail below) is dubious and unrepresentative of the overall conditions on these two allotments. Photographs comparing conditions in 2007 and 2008 throughout the Lower Middle Fork and Murderers Creek allotments confirm that, at all locations on the former and nearly all locations on the latter, there has been significant improvement in riparian conditions after a year without cattle grazing. See Second Christie Decl. Attach. 3 & 4; Driskill Decl. Attach. Even where feral horses are present, their effects on stream habitat are minor and localized, compared to the pervasive damage caused by herds of livestock. One of the Forest Service's own biologists has noted that livestock cause more harm to riparian areas and steelhead habitat than feral horses or other ungulates, confirming that livestock were the primary cause of the damage to riparian areas documented in 2007.

i. Lower Middle Fork Allotment.

The Lower Middle Fork allotment serves as a control for evaluating the differential level of impacts from livestock and horses because there are no horses present on that allotment. Second Christie Decl. Attach. 15 (Murderers Creek Wild Horse Territory Management Plan) at 4. As a result, any damage in 2007 is attributable to livestock, while any improvement in conditions in 2008 is the result of the elimination of livestock impacts. Near the end of the grazing season in October 2007, Christie monitored two stream segments in the Lower Middle Fork allotment, measuring bank alteration of 53% and 59% at these two sites. Christie Decl. (Dkt # 37) ¶ 22, Table 2, & Attach. 4 at 1–8. Christie photographed significant damage from

livestock, including silty sediment in creeks, at several other locations. Id. Attach. 4 at 9–13.

Photographs of the same sites from October 2008, after a year without livestock impacts, show striking improvements in riparian conditions. Second Christie Decl. Attach. 4 at 1–16.

Vegetation has grown up along the banks and begun the process of banks stabilization, reforming overhanging banks, and providing cover and shade to the streams. Although elimination of grazing 2007 has allowed riparian recovery to begin, multiple years of non-use will be necessary to recovery these badly degraded steelhead streams. See Beschta Decl. ¶¶ 22–23, 26.

A good example is the stream segment along Coyote Creek where cattle caused extensive bank alteration in 2007. Second Christie Decl. Attach. 4 at 5, 7, 10. In October 2008, the area below the dead hawthorne tree—heavily trampled in 2007, see id. at 7—showed high streamside vegetation and a more clearly-defined channel. Id. at 8–9. Other locations along the same transect showed similar improvement.⁶ Id. at 5–6, 10–11. On Beaver Creek, the 2008 photograph shows an alder on the right bank that experienced substantial growth and retained its leaves later in the year in the absence of cattle. Id. at 16. By comparison, in 2007, cattle grazing had stunted this alder and reduced streambank vegetation to low stubble. Id. at 15; see Beschta Decl. ¶ 11–14. The improvements in riparian conditions on the Lower Middle Fork allotment after livestock did not graze in 2008 demonstrate that the conditions Christie observed and documented on this allotment during 2007 were the result of livestock grazing and not extraneous factors.

⁶ The improvements described above on Coyote Creek came despite sporadic livestock entry into the Lower Middle Fork allotment during the fall of 2008 in violation of this Court’s injunction. The Forest Service’s 2008 End of Year Report noted “several instances” of unauthorized use on the Lower Middle Fork allotment. Exh. 1 at 2. Christie also observed cattle trespass and photographed fresh cow pies in the Coyote Creek riparian area on October 22, 2008. Second Christie Decl. ¶ 21 & Attach. 4 at 12. The unauthorized use of the Lower Middle Fork allotment, in violation of this Court’s clear instructions, underscores the fundamental inability of the Forest Service and permittees to manage grazing in the Malheur National Forest to avoid the destruction and adverse modification of steelhead critical habitat, even when subject to a judicial injunction.

ii. Murderers Creek Allotment.

At almost all of Christie's monitoring locations on the Murderers Creek allotment, photographs in 2008 show vegetation growth and incipient stream recovery similar to that observed on the Lower Middle Fork allotment. Second Christie Decl. Attach. 3–6, 8, 10–13, 16. The improvements in riparian conditions at these sites demonstrate that the vast majority of damage Christie documented in 2007 on the Murderers Creek allotment was the result of livestock, rather than horse, impacts. Christie's photographs show comparisons between 2007 and 2008 at 15 of the 17 transect locations, as well as other sites. Id. Attach. 3, 5–6, 8, 10–13, 16. Stout provides evidence for only five of the 17 monitored transects. Id. ¶ 25. At all but a few, isolated locations documented in Christie's monitoring, conditions have shown marked improvement. These photographs also confirm that impacts from feral horses, when they are present, are confined to short stretches of stream, often no more than 15 or 20 feet long. Id. ¶¶ 27, 29, 34–36, 39, 41, 43, 45; Driskill Decl. Attach. at 1, 3, 5, 9, 13, 17, 21; Beschta Decl. ¶ 25.

Comparisons of stream stretches where horses were present for each of the last three years, but where cows were absent for at least two of those years, show that cows, and not horses, were responsible for the riparian habitat damage in 2007. Beaver Dam Creek in the Dan's Creek unit is a quintessential example. Second Christie Decl. ¶ 34 & Attach. 12. The Dan's Creek unit was not grazed in 2006; cattle did graze the unit in 2007; but cattle were enjoined from grazing in 2008. Exh. 2. Horses apparently use the transect of Beaver Dam Creek shown in Christie's Attachment 12, as all parties have acknowledged that horses use a spring area about 20 yards from Beaver Dam Creek. Second Stout Decl. ¶ 16; Second Christie Decl. ¶¶ 33–34; see also Driskill Decl. Attach. at 1 (noting isolated horse use along Beaver Dam Creek). Despite the apparent presence of horses in 2006, 2007 and 2008, the photographic evidence of effects on

Beaver Dam Creek itself is incontrovertible: when only horses were present (2006 and 2008), riparian conditions show high vegetation along the greenline, a defined channel, and incipient bank stabilization. Second Christie Decl. ¶ 34 & Attach. 12 at 1, 3. But in 2007, when cattle also were present, the streambanks were denuded and trampled to a morass, exhibiting 83% bank alteration. *Id.* ¶ 34 & Attach. 12 at 2; Driskill Decl. Attach. at 1.

A year of rest from grazing in 2008 allowed some recovery to begin along Beaver Dam Creek, despite notably drier conditions in 2008 than in 2007. In his declaration, Stout makes one of many false statements about weather conditions in 2008 in an apparent effort to claim that horses and elk would not have used this stretch of stream during the summer of 2008. Stout states that “the water table was so high” during one of his visits and that “[t]he area dried out much earlier in the summer of 2007.” Second Stout Decl. ¶ 18. Stout claims, incorrectly, that 2007 was “drier” than 2008, apparently implying that cattle could access the stream (to cause the horrendous damage Christie documented) in 2007, but that it was too wet in 2008 for the remaining horses to access the same stream segment. This is simply untrue.

Precipitation data and comparison photographs showing stream flows show conclusively that 2008 was actually drier than 2007, and the summer of 2008 much drier, notwithstanding Stout’s unsupported claims to the contrary. Second Christie Decl. ¶¶ 30, 42 & Attach. 7, 14 (explaining, with supporting data, that rainfall was about 10% lower in 2008 than 2007 and that, during the months of June through September, rainfall in 2008 was *less than half* of that recorded in 2007). This is evident also from the lower stream flow in Beaver Dam Creek on September 29, 2008, compared with September 28, 2007.⁷ *Id.* Attach. 1 at 2–3. The Intervenor carry

⁷ Many other streams in the Murderers Creek allotment had lower flows in 2008 than on a comparable date in 2007. *See, e.g.*, Second Christie Decl. Attach. 3 at 3–4 (Dan’s Creek, photographed September 28, 2007 and September 28, 2008), 7–8 (Orange Creek, photographed

Stout's false statements forward in their memorandum. E.g. Intv. Memo. at 18, 20. Logically, because of the drier conditions in 2008 and the absence of livestock, *if* horses were responsible for the effects documented in 2007, then conditions should be worse everywhere in 2008.⁸ The fact that the conditions are significantly better in 2008 than in 2007 (and in 2006 than in 2007) shows that the damage Christie documented on Beaver Dam Creek in 2007 was overwhelmingly related to cattle grazing that year. See also Second Christie Decl. ¶ 24 & Attach. 5 (showing similar dramatic improvement in the absence of cattle on another stretch of Beaver Dam Creek and nearby wet meadow).

The Oregon Mine unit is another area of the Murderers Creek allotment which has experienced significant amounts of rest from livestock grazing over the past several years. Rhodes Decl. (Dkt # 36) ¶ 21–22 & Fig. 2; Third Rhodes Decl. at 9 Fig. 2. Conditions documented along Murderers Creek in late October 2007 on this well-rested unit make a remarkable contrast to the rest of the allotment: streams showed high grass and tall woody shrubs providing shade, long sections of overhanging bank, 96% bank stability, and no bank alteration by ungulates. Second Christie Decl. Attach. 1 at 1–3. And, yet, feral horses and elk have unfettered access to the Oregon Mines unit and to Murderers Creek within that unit. The Forest Service's wild horse area map shows that there are several areas designated as containing "more horses" on this unit, including two that reach nearly to Murderers Creek itself. Exh. 3 at 2; Third Rhodes Decl. Fig. 2 (describing elk access). Despite the presence of feral horses and native elk,

September 29, 2007 and September 28, 2008), 17–18 (Deer Creek, photographed September 27, 2007 and September 29, 2008); 33–34 (South Fork Murderers Creek, photographed September 27, 2007 and September 30, 2008).

⁸ Christie did measure 13% bank alteration at this site in 2008 when only horses and other wildlife could have been present, compared to 83% in 2007, again confirming that the 2007 damage was overwhelmingly caused by livestock. Second Christie Decl. ¶ 19 & Table 1.

Murderers Creek in the Oregon Mines unit is a stream that is moving towards natural recovery of the cold water, deep pools, overhanging banks, and large woody debris essential for steelhead reproduction and survival. Beschta Decl. ¶¶ 15–19, 22; McCullough Decl. ¶¶ 5, 11–12, 18; see Second Christie Decl. Attach. 1 at 1–3. The species that has been absent from the Oregon Mine unit in recent years as the fish habitat has recovered is the one that is causing most of the extensive damage to riparian areas elsewhere on the Murderers Creek allotment: domestic cows.

Photographs of the John Young Meadows unit in 2007 and 2008 also dramatically illustrate the difference in conditions along the South Fork Murderers Creek when cattle were present in 2007 but absent in 2008. Second Christie Decl. Attach. 6, 8, 10. Christie has historically monitored three transects along the creek within this unit. Id. ¶¶ 27–32 & Attach. 9 (aerial photograph showing Christie transects JYM-784-735, JYM-550-968, and JYM-603-371). Significantly, an official Forest Service Designated Monitoring Area (“DMA”) lies along the same stretch of South Fork Murderers Creek, overlapping with Christie’s transect JYM-784-735, where Christie measured 46% bank alteration in 2007. Id. ¶ 32 & 10 at 2, 4. This belies any suggestion that Christie has not been monitoring at representative areas that will accurately capture data regarding livestock use.⁹ Interestingly, the Forest Service does not show the John Young Meadows unit as being a “highly concentrated” horse area or area with “more horses,” indicating that the fence surrounding the unit may deter horses from entering in significant

⁹ Intervenor’s renew objections to various aspects of Christie’s and Rhodes’s monitoring, which are identical to the objections raised in their 2008 briefing and implicitly rejected by this Court in granting the injunction. Interv. Memo at 18–21. These objections remain meritless. Forest Service protocols specify that areas of actual livestock use, *including* cattle trails and crossings, should be properly included in monitoring transects. Howard Decl. Exh. 2 at 3; Second Christie Decl. Attach. 2 at 6, 12; Third Rhodes Decl. Attach. 1 at 1. Intervenor’s claim that areas with horse impacts must be excluded from monitoring. Interv. Memo. at 14, 16. However, horses are present throughout the entire allotment, see Exh. 3 at 1, 2, and use the same trails and crossings that livestock do. See, e.g., Second Christie Decl. ¶ 32; Interv. Memo at 16, 18. Intervenor’s argument would make the entire allotment effectively exempt from monitoring, an impermissible result.

numbers. But it is indisputable that cows were on this unit in 2007. See, e.g., id. ¶¶ 28–32 & Attach. 6, 8, 10.

Even the 15-foot crossing near the center of the unit, which Stout focuses on, showed improved conditions between 2007 and 2008. Id. ¶ 27 & Attach. 6 at 3–4. Contrary to Stout’s claim, there is no evidence that horses “trampled” this crossing during the summer of 2008. See id. at 4 (photograph taken September 30, 2008) & ¶ 28 (describing the absence of apparent hoof prints in Stout’s photographs at this site on June 16, 2008 and September 2, 2008). Christie’s photograph in 2008 shows substantial vegetation regrowth on both sides of the narrow trail leading to the crossing. Id. at 29 & Attach. 6 at 4. And photographs taken in 2008 along the whole transect show remarkable improvement in riparian conditions on South Fork Murderers Creek compared to 2006 and 2007. Compare id. Attach. 6 at 5–6 with id. Attach. 6 at 7–8.

Christie measured 58% bank alteration along this transect (JYM-550-968) in 2007. Id. Table 1. Horse use at this site is confined to a narrow, defined trail and crossing, which constitutes no more than 8% of the transect that Christie monitors. Id. ¶ 27. Christie’s 2007 photograph shows significantly more churned earth and lower stubble heights at this crossing, after livestock grazing, than in any of the photographs taken in 2008, indicating that this crossing and trail is primarily a livestock trail. Id. ¶ 29 & Attach. 6 at 3. Intervenors’ argument that Christie and Rhodes have inappropriately chosen this site to monitor ignores the fact that the Forest Service’s monitoring protocol specifically endorses including such livestock trails and crossings in monitoring transects. See, e.g., Second Christie Decl. Attach. 2 at 6 (monitoring protocol providing “[c]ompacted livestock trails *on or crossing* the greenline that are the obvious result of the current season’s impacts *are counted as trampling*) (emphasis added); id. at 12 (protocol appendix showing inclusion of livestock trail in Forest Service monitoring transect);

Rhodes Decl. Attach. at 1 (protocol appendix showing inclusion of livestock trail and transect and noting that livestock trails “*are* considered for streambank alteration”) (emphasis added). Because horses are impacting, at most, about 8% of the transect which Christie monitored, and comparisons of photographs from 2007 and 2008 show that, even at the crossing, substantially more damage is evident during the year when cows were present, the vast majority of the ecological damage documented at that location was due to livestock. Id. ¶ 29.

Further north, near the fence that separates John Young Meadows unit from a state enclosure, the improvement is even more dramatic. For several hundred feet below the enclosure fence line, livestock badly abused the South Fork Murderers Creek at monitoring transect JYM-603-371 during 2007. Second Christie Decl. ¶ 31–32 & Attach. 8 at 1–2. On September 30, 2008, although there was less water flowing in the stream than the year before, riparian conditions showed lush grass in place of trampled, bare and muddy banks. Id. Attach. 8 at 3. Here, Stout again relies on mistaken statements about the weather conditions in 2008. See Second Stout Decl. Attach. 1 at 6; compare Second Christie Decl. Attach. 7 (AgriMet data showing cumulative year-to-date precipitation). Stout also misrepresents the facts when he describes “dense willows” at this site, a contention discussed further below.

At all of the stream segments and other sites illustrated in the Christie and Driskill comparison photographs, there has been improvement—often dramatic—in the overall riparian conditions after a year without pressure from cattle. Second Christie Decl. Attach. 3, 4–6, 8, 10–13, 16; Driskill Decl. Attach. at 1, 5, 7, 9, 11, 13, 19, 21. Some areas, where there are localized effects from feral horses, do not display as much improvement. Even at those locations, though, the portions of the streams subject to cattle grazing in 2007 but not in 2008 do show the beginning stages of recovery along most of the transect. See, e.g., Second Christie Decl. ¶¶ 39–

44 & Attach. 16 (describing localized impacts of horses at transect HM-321-478 and improved conditions along the upper half of the transect in 2008, when livestock did not graze).

As Beschta explains, recovery of steelhead-bearing streams which have suffered years of overgrazing is a multiple-year process. Beschta Decl. ¶ 22–23, 26. One year’s improvement, although significant, is only a start to a process of habitat recovery that may take many years. *Id.* ¶ 22, 26. What is clear from examining the photographic sequences of grazed and ungrazed years is that cattle, and not horses, have caused the destruction or adverse modification of steelhead critical habitat on both the Murderers Creek and Lower Middle Fork allotments. The failure of the Forest Service’s management program to prevent this damage to riparian areas in 2007, and the stark contrast between years when grazing occurred and when it did not, show that, absent an injunction, this irreparable harm to steelhead and their habitat is likely to occur if livestock are allowed to resume grazing on the Murderers Creek and Lower Middle Fork allotments.

iii. Less damage to riparian habitat is apparent in 2008 than 2007 because livestock have substantially greater impacts on riparian areas than horses.

Differences in the habits of livestock and horses, their relative distribution within the allotment, and their relative numbers all account for why livestock were far more culpable for the degraded riparian conditions observed in 2007 than horses. Beschta concludes that foraging cattle represented the primary cause of altered plant communities and damaged streambanks. Beschta Decl ¶ 25. Malheur National Forest aquatic biologist Chance Gowan has acknowledged that cows are far more likely to cause damage to riparian areas and fish habitat than horses are.¹⁰

¹⁰ Gowan expressed his opinion in an October 5, 2007 internet post. Exh. 4 (<http://en.allexperts.com/q/Environmental-Science-1471/livestock-horses-water-quality.htm>, last visited Mar. 16, 2009). Comparing the Experience, Publications, and Education listed for the post’s author (“Chance”) with Chance Gowan’s description of his credentials from his April 24, 2008 Declaration shows that the opinion is Gowan’s. *Id.*; Gowan Decl. (Dkt # 72) ¶¶ 1–2.

Exh. 4. Last spring, Gowan reported that “the endpoint indicator for bank alteration appeared to exceed 20%” on parts of the Murderers Creek allotment, but suggested that “that may have been due in part to the wild horse population of this Allotment.” Gowan Decl. (Dkt # 72) ¶ 44.

In October 2007, Gowan offered his opinion that “[o]f all the large hooved animals, cows are most likely to impact water quality.” Exh. 4. This is because “[l]ivestock (cows specifically) tend to congregate in riparian areas—particularly in the arid west. It’s a comfortable place for them and that is what causes them to linger there.” *Id.* Gowan explained that “[h]orses, particularly wild horses ... do not linger in riparian areas. These areas are not inherently safe—from predators.” *Id.* Because dense vegetation, inhibited escape pathways, and insects characterize riparian areas, “horses get a drink and leave.” *Id.* Gowan’s observations about how cows and feral horses behave match Christie’s observations. Second Christie Decl. ¶ 32. The Forest Service’s declarant recognizes that the natural instincts of cows and feral horses leads to cows lingering in streams, damaging the streams’ water quality, while feral horses will not linger and hence will have far less impact on riparian areas. Exh. 4. Stout’s photos of horse trails during the winter confirm that horses will trail down to a stream and cross it at a narrow, 10–15 foot crossing, rather than causing the extensive damage along long stretches of streams documented in Christie’s monitoring. Second Stout Decl. Attach. 1 at 4, 34; compare, e.g., Second Christie Decl. Attach. 5 at 1; Attach. 6 at 5–6; Attach. 8 at 1–2; Attach. 12 at 2.

The distribution of horses within the Murderers Creek allotment also shows that they do not impact riparian areas to as great an extent as livestock. Horses avoid riparian areas, and the Forest Service’s map of the Murderers Creek Wild Horse Territory confirms that the “highly concentrated areas” and areas with “more horses” lie in the uplands, away from the steelhead-bearing streams. Exh. 3 at 2 (overlay of the Forest Service’s map with a map showing stream

locations). Horses do not concentrate near South Fork Murderers Creek in the Timber Mountain, Blue Ridge, Horse Mountain, or John Young Meadows units, nor along Deer Creek in the Frenchy Butte unit. *Id.* Also, the Forest Service estimated that the entire horse range, which covers 180,000 acres (of which the Murderers Creek allotment is only a subset), contained between 436 and 523 feral horses in 2007. Second Christie Decl. Attach. 15 at 4, 20, 35–36. Six of approximately 20 areas of high horse concentration fall outside that allotment. *See id.* at 36. By contrast, at least 480 cows grazed on eight of the 11 units—less than 45,000 acres—of the 62,656 acre Murderers Creek allotment in 2007.¹¹ Exh. 5. These numbers show that, when cows are present during the hot summer months, when they are most likely to trample in the steelhead-bearing streams, the concentration of cows on the Murderers Creek allotment is likely to be at least three times as great as the concentration of horses. Given their propensity to congregate in riparian areas, the concentration of cows in those sensitive spots would be even higher.

Contrary to the suggestions in Intervenors' new filings, livestock were responsible for the damage to the streams of the Lower Middle Fork allotment and the vast majority of damage on the Murderers Creek allotment documented in 2007, demonstrating that further livestock grazing is likely to result in irreparable harm to steelhead. The pervasive damage to riparian areas seen in Christie's and Driskill's 2007 photographs of the Murderers Creek and Lower Middle Fork allotments, which is largely absent in their 2008 photographs when cattle did not graze, is exactly the sort of damage that livestock grazing causes to riparian areas and steelhead habitat and which McCullough and Beschta describe in their declarations. Second Christie Decl. Attach. 3, 4; Driskill Decl. Attach.; McCullough Decl. ¶¶ 5–6, 8, 11–13, 16, 18; Beschta Decl. ¶¶ 11–25.

¹¹ The Oregon Mine, Red Rocks, and Martin Corral units were not grazed in 2007. ONDA Memo (Dkt # 35) Exh. 12 at 27 (2007 End of Year Grazing Report).

III. THE NEW EVIDENCE PRESENTED BY PERMITTEES IS NOT RELIABLE AND DOES NOT DISTURB THIS COURT’S CONCLUSION THAT ONDA HAS SHOWED SUFFICIENT IRREPARABLE HARM TO WARRANT AN INJUNCTION

The evidence submitted with the Second Stout Declaration and Third Larson Declaration does not undermine the conclusions that livestock grazing caused the great majority of damage to riparian areas on the Murderers Creek allotment in 2007 and that irreparable harm to steelhead and their habitat from grazing is likely in the absence of an injunction.

A. Stout’s Evidence is Unreliable and Unrepresentative.

Stout’s second Declaration and attached photographs are riddled with factual errors, including fundamental misstatements of the meteorological conditions during 2008 and demonstrably inaccurate assertions about several locations where Christie and Rhodes monitored and photographed. Stout also photographed only a small fraction of the sites where Christie documented tremendous riparian damage in 2007, and focused only on short sections of those few sites where he made observations.

i. Stout’s statements that 2008 was a wetter year than 2007 are demonstrably false and lead to faulty characterizations of conditions during 2008.

Stout’s claims regarding conditions on the few sites he photographed founder on one fundamental fact: the amount of rainfall during 2008. Stout makes several statements in his declaration and attachment regarding a “high water table” in 2008 and that “fortunately, 2008 was a wetter summer than 2007.” E.g., Second Stout Decl. ¶ 18 & Attach. 1 at 6, 9, 12–13. These statements are not only unsupported by any evidence, but are demonstrably false. Less rain fell in 2008 in the Malheur National Forest than in 2007. Less than half as much rain fell during the four summer months (June to September) in 2008, compared with 2007. Second Christie Decl. ¶¶ 30, 38, 42 (describing that the water year ending in September 2007 received 12.88 inches of

rain, while the same period in 2008 received only 11.48 inches, and that June-September 2007 received 2.97 inches of rain compared to 1.29 inches in June-September 2008).¹²

Stout's statements based on these erroneous observations are similarly misplaced. For example, Stout states that the South Fork Murderers Creek on John Young Meadows (Christie transect JYM-603-371) had to "dr[y] up enough to allow ungulates to access the stream" when he took his photograph on October 23, 2008. Second Stout Decl. Attach. 1 at 9. However, it is clear from photographs taken in early and late September 2008 that there was already little water in this stretch of the South Fork Murderers Creek, and that Stout and Christie could access the stream to photograph it without difficulty. Compare id. at 6, 8 with Second Christie Decl. Attach. 3 at 26. Stout's erroneous claim that the water table was lower in 2007, and his subsequent claim that "cattle could access the area earlier in the season" than in 2008, is apparently meant to justify the damage that livestock caused at this site in 2007. Second Christie Decl. Attach. 8 at 1–2. However, even when dry conditions exist, they cannot justify overgrazing: the Forest Service, and the permittees, must remove cattle, or even prevent the turnout of cattle in the first place, if riparian conditions are already so dire because of weather or other natural conditions whereby grazing would cause additional damage. Second Christie Decl. ¶¶ 35–36; Beschta Decl. ¶ 25.

ii. Stout focuses exclusively on short segments within Christie's transects where there are localized impacts from horses.

Another fundamental problem with Stout's evidence is his almost exclusive focus on very short segments of long stream transects that Christie monitored. Stout's observations are limited to only five of the 17 transects on which Christie measured at least 30% bank alteration in 2007.

¹² The precipitation data attached to Christie's second Declaration comes from the Bureau of Reclamation's AgriMet weather station near Prairie City, Oregon, about 35 miles east of the Murderers Creek allotment. Second Christie Decl. Attach. 7, 14. This is the same source of meteorological data which Intervenor's declarant Pat Larson relies on her third Declaration. Third Larson Decl. Exh. A at 28; Second Christie Decl. Attach. 7, 14.

Second Christie Decl. ¶ 25 & Table 1.¹³ Stout further limited his observations to only very short stretches of those five segments, focusing on narrow points where horses cross the streams.

Second Christie Decl. ¶¶ 27, 29, 38, 39; see Driskill Decl. Attach. at at 1, 3, 5, 9, 13, 17, 21 (noting that effects from horses were isolated); Beschta Decl. ¶ 25 (noting that Stout’s photographs show mostly localized impacts). The mean bank alteration Christie measured at the 17 grazed transects was 55%. Second Christie Decl. at 14 Table 1.

Because Christie measured transects approximately 365 feet in length, even discounting the 15- to 20-foot sections of the few transects that contain both horse and cow impacts would still show the vast majority of damage along the full transects resulted from livestock use. Even excluding all bank alteration measured at the short crossings (used primarily by cattle), bank alteration over the entire length of each transect would still be well beyond allowable standards. Id. ¶ 27 & Table 1. Also, in the few places where Stout states that he measured bank alteration, he fails to provide any evidence of the length of the transects he measured, nor any field notes or data forms. Second Stout Decl. ¶ 15 (noting only that he used the “required protocols” without further explanation of how, or whether, he applied the Forest Service protocols in practice).¹⁴ Finally, Intervenor supply no new monitoring evidence on the Lower Middle Fork allotment.

¹³ Of the 11 entries in the Intervenor’s summary of Stout’s observations, Intv. Memo. at 17, only five of them relate to actual stream transects where Christie measured bank alteration in 2007. Second Christie Decl. ¶ 25 & Table 1 at 14. The other six entries take issue with Christie photographs that are not on monitored transects (such as the third entry regarding the “Wet Meadow Near Beaver Dam Creek”) or relate to photographs of areas Christie monitored in 2004 that he has not monitored since that year and which are unrelated to the transects he did monitor in 2007, documented in the first Christie Declaration (Dkt # 37). Id. ¶¶ 25, 33–34, 45–46.

¹⁴ It is also notable that Intervenor’s position on appropriate monitoring is utterly inconsistent. Intervenor assert that “bank alteration monitoring must be done in accord with reliable method such as the Cowley and Burton method” used by the Forest Service, which Stout also claims to have used. Intv. Memo at 15. Yet their other declarant, Pat Larson expressly rejects the Forest Service’s protocols in favor of a “random” method. Third Larson Decl. Exh. A at 6–7.

iii. Stout’s declaration contains many factually-incorrect statements.

In addition to his pervasive mischaracterization of weather conditions, many other statements in Stout’s declaration are factually incorrect. See Second Christie Decl. ¶¶ 26–46; Third Rhodes Decl. ¶ 19–20, 23; Beschta Decl. ¶ 25. For example, Stout states incorrectly that the crossing on the JYM-550-968 transect on South Fork Murderers Creek in the John Young Meadows unit is “inside an enclosure.” Stout Decl. Attach. 1 at 1. John Young Meadows unit is a separate, approximately 400-acre grazing pasture within the Murderers Creek allotment, which contains no internal “enclosure” encompassing the crossing. Second Christie Decl. ¶ 27 & Attach. 9.¹⁵ The Forest Service authorizes livestock to graze freely within the entire two square mile unit. Id. ¶ 32 & Attach. 6 at 1–2 (showing cattle on unit); Exh. 3 at 2, 3 (showing size of John Young Meadows unit); Exh. 6 at 1 (2007 authorization letter). In 2007, the Forest Service authorized eight days of grazing on this unit, and livestock were present for at least ten days. Exh. 6 at 1; Exh. 5 (“actual use” form). Stout’s error in claiming that Christie’s photographs at transect JYM-500-968 are within an “enclosure” eliminates the premise for the objection to this site. Intv. Memo at 18; see Second Christie Decl. ¶ 27 & Attach. 6. Intervenors also argue, based on Stout’s erroneous claim, that John Young Meadows is inappropriate for monitoring livestock use. Intv. Memo at 18–19. This argument fails because the Forest Service maintains a DMA in the same unit near two of the sites Christie monitors. Second Christie Decl. ¶ 32 & Attach. 9.

Next, Stout incorrectly describes a second site in John Young Meadows (JYM-603-371). See Intv. Memo. at 18 (describing “dense willows” along the South Fork Murderers Creek at this

¹⁵ The lack of an enclosure is evident in an aerial photograph of John Young Meadows unit. Second Christie Decl. Attach. 9. The aerial photograph shows a stretch of South Fork Murderers Creek about 2,500 feet long, identifying the three sites Christie monitored on this unit and the location of the Forest Service DMA. The crossing that Stout and Christie describe lies near the mid-point of that half-mile long stretch. Second Stout Decl. Attach. 1 at 1–5; Second Christie Decl. ¶¶ 27–29 & Attach. 6 at 1–4. The aerial photograph shows no fencing within the unit.

location). Intervenors' criticism of Christie and Rhodes based on this error is therefore completely misplaced. Christie's and Rhodes's photographs, taken at the streamside in both directions, show that, for at least 600 feet below the state exclosure fence (a fence shown in many photographs, including Stout's), there are no "dense willows" growing along the creek. Second Christie Decl. Attach. 8 at 1-2; Third Rhodes Decl. ¶¶ 19-20 & Attach. 1 at 2-3. Stout's photograph, Second Stout Decl. Attach. 1 at 8, is misleading because it was taken from the upland area and does not show the location of the stream clearly. The stream is actually located where Christie is shown standing in Stout's photograph, while Christie was taking his September 30, 2008 photo of lush revegetation and absence of evident 2008 bank damage. Second Christie Decl. Attach. 8 at 3. Stout's statement about the presence of "dense willows" restricting animals from crossing South Fork Murderers Creek is also contradicted by photographs by Intervenors' other declarant, Pat Larson, taken at the same location. Third Larson Decl. Exh. A at 33.

Rhodes notes that Stout's misrepresentation regarding willows along this stretch of the stream is based on Stout's failure to present photographs taken upstream in the opposite direction from which Christie is facing in Stout's photograph. Third Rhodes Decl. ¶ 19-20. Stout's failure to present photographs taken at the stream itself invalidates Intervenors' objection to Christie's and Rhodes's photographs, which were taken while standing at the actual stream. Intv. Memo at 18-19. The Christie and Rhodes photographs accurately show a several-hundred-yard long stream segment, mostly devoid of willows, that has suffered brutal damage along its full length from livestock in various years, most recently in 2007. Second Christie Decl. Attach. 8 at 1-2; Third Rhodes Decl. Attach. 1 at 2-3. Stout's October 23, 2008 photograph (which is strangely discolored) shows nothing more than a very small area possibly impacted by wildlife at the end of October 2008, after a drier year than 2007. Second Stout Decl. Attach. 1 at 9. But even Stout's

October 23, 2008 photograph shows significantly better conditions at this transect than were evident at the end of the 2007 grazing season, when cattle were out in force on these lands.

Compare *id.* Attach. 1 at 9 with Second Christie Decl. Attach. 8 at 2.

Stout is also wrong in stating that “Christie *claimed* that a picture was of Beaver Dam Creek,” then purporting to “correct” Christie that the picture was “of a separate wet area” about “20 yards” from Beaver Dam Creek. Intv. Memo at 19 (emphasis added); Second Stout Decl. ¶ 16. In fact, Christie made no such claim, correctly identifying in the caption to his photograph that it showed a “spring area above the transect.” Second Christie Decl. ¶ 33. Christie has supplied the Court with many photographs that accurately distinguish between the stream transect he monitored for bank alteration, shown in Attachment 12 to his second Declaration, and the spring area *above* the transect, monitored for general conditions, shown in Attachment 11. The error that Stout and Intervenors make about what Christie was, or was not, photographing, reflected in the third box on Table 1 of Intervenors’ Memo, invalidates their objection to that site. In fact, all photographs of Beaver Dam Creek *and* the spring area above Christie’s transect show that livestock had far greater impacts on this area when they grazed in 2007 than when they were absent in 2006 and 2008. Second Christie Decl. ¶¶ 33–34 & Attach. 11–12.

Finally, much of Stout’s new evidence is not responsive to the evidence Christie and Rhodes presented. For example, the last 12 pages of Stout’s Attachment 1 show sites where Christie did not collect bank alteration data in 2007. Christie has not monitored the sites on the Blue Ridge unit shown in Stout’s declaration since 2004. Second Christie Decl. ¶ 46. However, Stout does not address the site that Christie did monitor in 2007 on the Blue Ridge unit, on South Fork Murderers Creek, where Christie measured 56% bank alteration in 2007. *Id.* Attach. 3 at 35. This site has shown improvement in 2008. *Id.* Attach. 3 at 36. Stout’s evidence is ultimately so

unreliable and unrepresentative of conditions on the allotment as a whole that it does not constitute changed circumstances justifying a modification of the injunction.

B. Larson’s Evidence is Unreliable.

Larson’s new evidence lacks scientific validity and is unreliable. See Third Rhodes Decl. ¶¶ 5–18; 21–22; Beschta Decl. ¶¶ 20–24. Two points illustrate this. First, she claims that, having sampled riparian sediment at 26 locations on the Murderers Creek allotment, drying and segregating the samples into various sizes, she found 0% “fine” particles in the streams on the Murderers Creek allotment at any of those sites. Larson Decl. Exh. A at 7–8, 12 & Table 2. Rhodes documents that no other study has ever reported zero percent fine sediment in streams in Oregon or Washington. Third Rhodes Decl. ¶¶ 5–6. A 2004 study of habitat conditions that included streams in Central Oregon found that fine sediment levels in streams averaged 25.5% in stream riffles and 26.1% in stream pools. Id. at 6. Larson also arbitrarily focuses on “silts and clays”—defined in scientific literature (but nowhere specified by Larson) as particles under 0.002 mm—despite the fact that other fine sediments, up to 6.4 mm in size, are recognized as being harmful to fish. Id. ¶ 12. Larson’s sedimentation data are literally incredible, as are the conclusions she derives from them, and scientifically invalid. Id. ¶ 13; Beschta Decl. ¶ 24. In reality, the streams in the Murderers Creek and Lower Middle Fork allotments contain considerable amounts of fine sediment due to chronic overgrazing of riparian areas. See, e.g., ONDA Memo (Dkt # 35) Exh. 1 (2007–2011 BiOp) at 65 (discussing sediment load as a limiting factor for steelhead recovery), 84 (measuring 33% fine sediment on a stream in the Fox allotment); Beschta Decl. ¶¶ 14, 20–21, 24; Third Rhodes Decl. ¶¶ 8–9; McCullough Decl. ¶¶ 3, 5–6, 8, 11–12, 13, 18; Second Christie Decl. Attach. 8 at 1 (showing silt in stream); Christie Decl. (Dkt # 37) Attach. 2 at 10, Attach. 4 at 9 (same).

Second, Larson’s statement that “[n]one of the plots in any of the multiple sites contained carry-over hoof prints (‘bank alteration’)” is a fundamental misrepresentation of the effects of livestock grazing on riparian systems. Beschta Decl. ¶¶ 20–21; Third Rhodes Decl. ¶¶ 14–18. Larson’s focus on “hoof prints” misses the essential problem with damage from livestock to riparian systems and steelhead habitat: the *effects* of damage that livestock grazing causes to stream banks and associated fish habitat linger, often for years, after individual hoof prints are no longer visible. Beschta Decl. ¶ 20–22, 24; Third Rhodes Decl. ¶ 14–18. Cows’ hooves shear away stream banks, leading to bank instability, erosion, the collapse of overhanging banks, elevated sediment stream loads, and enduring effects on channel conditions and water temperatures that adversely affect steelhead. Beschta Decl. ¶ 20–21; Third Rhodes Decl. ¶ 17. Larson’s statement that she observed no “carryover” of “hoof prints” thus has no probative value regarding the effects of livestock grazing on riparian conditions and steelhead habitat. Based on the fundamental errors in Larson’s third Declaration regarding sedimentation and bank alteration, including the absence of a reliable monitoring protocol, Rhodes and Beschta conclude that her evidence is not reliable. Third Rhodes Decl. ¶ 5–18, 21–22; Beschta Decl. ¶¶ 20–24.

In addition, Larson’s photographic data is not probative of the differences in conditions between 2007 and 2008. Third Larson Decl. Exh. A at 21–54. Most of the photographic sequences in the attachments to Christie’s declarations are taken from identical vantage points in 2007 and 2008 (and sometimes 2006); others are photographs taken on the same, approximately 365-foot-long, transects in 2007 and 2008, showing the difference in conditions from year to year. See Second Christie Decl. Attach. 3, 4–6, 8, 10–13, 16. By contrast, Intervenor’s supply *no* photographs taken by their declarants that show conditions *at the same site in both 2007 and 2008 at the same relevant time of the year* (near or at the end of the grazing season in September-

October). Stout offers no photographs prior to 2008, and none of Larson's photographs show the same riparian area in both late 2007 and late 2008. Larson's June and July photographs have no probative value regarding the impact of grazing to steelhead habitat because they represent conditions before grazing begins. Beschta Decl. ¶ 22. Vegetation regrowth will only contribute to the long-term stability of stream banks and the recovery of steelhead habitat to functioning condition if the vegetation persists over a series of years. *Id.* ¶¶ 22–23. Riparian recovery will not occur if vegetation that has regrown in the spring is again grazed, and streambanks again sheared away and trampled down, during the summer and early fall. *Id.* ¶¶ 11–19, 20–23, 26.

IV. EVIDENCE OF SOME DAMAGE BY HORSES IN RIPARIAN AREAS REQUIRES THE INJUNCTION BE SUSTAINED

Because livestock, and not horses, were responsible for the vast majority of damage on the two allotments at issue here, ONDA remains likely to prevail on all of its claims. However, a critical, but unstated, issue raised by the Intervenor's motion is the legal significance of any damage to steelhead habitat that feral horses may be causing. Although livestock were responsible for the overwhelming majority of the damage documented in 2007, the 2008 evidence shows that feral horses have contributed isolated damage to steelhead streams on the Murderers Creek allotment at a few crossings. *See, e.g.*, Second Christie Decl. ¶¶ 39–44; Beschta Decl. ¶ 25. This, however, strengthens the likelihood that ONDA will be successful on several of its claims. This Court has noted that ONDA has claims justiciable under both the Administrative Procedure Act ("APA") and the ESA citizens suit provision. Injunction Opinion at 14–15. None of the new evidence contradicts ONDA's claims under the APA regarding the validity of the 2007–2011 BiOp, nor that the Forest Service acted arbitrarily and capriciously in implementing the BiOp through its permit modifications and authorization letters. *See* ONDA Memo (Dkt # 35) at 16–27; ONDA Reply (Dkt # 77) at 11–21; *see also* Ore. Natural Desert Ass'n v. Kimbell,

593 F. Supp. 2d. 1217, 1219 (D. Or. 2009) (listing ONDA's APA claims). ONDA remains likely to succeed on the merits of these claims.

Any effects on the Murderers Creek allotment from feral horses render NMFS's 2007–2011 BiOp arbitrary. Neither the BiOp nor the underlying Forest Service Biological Assessment quantify the level of impact that feral horses were having on steelhead streams before the agencies determined the level of *additional* impact from livestock that could be allowed without resulting in jeopardy or the destruction or adverse modification of steelhead critical habitat. NMFS may not omit an important factor in calculating the environmental baseline on top of which the proposed action—livestock grazing—is then evaluated for jeopardy. Nat'l Wildlife Fed'n v. NMFS, 524 F.3d 917, 930 (9th Cir. 2008) (NMFS must consider “what jeopardy might result from the agency's proposed actions in the present and future human and natural contexts”) (emphasis in original, citation omitted); see Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co., 436 U.S. 29, 43 (1983) (an agency action is arbitrary and capricious if the agency has “entirely failed to consider an important aspect of the problem”). Thus, even if this Court were to find that most of the damage to steelhead habitat on the Murderers Creek allotment was due to feral horses (which it is not), this would compel the conclusion that ONDA will likely prevail on the merits of its claim that NMFS determinations regarding jeopardy and critical habitat modification in the 2007–2011 BiOp are arbitrary and capricious.

Similarly, if this Court finds that most of the damage to steelhead habitat resulted from feral horses, ONDA will prevail on its claim that the Forest Service has failed to reinstate consultation. Reinstatement of formal consultation must occur if “new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered.” 50 C.F.R. § 402.16(b). Also, if horse damage to the Murderers Creek

allotment's streams were truly so widespread, and the "Horse Grazed Heights" truly so far below the 6" and 7" minimum stubble height standards even before cattle were released to graze gingerly on the allotment in 2007, Larson Decl. Exh. A at 12 Table 1, the Forest Service violated its ongoing obligation under ESA § 7(a)(2) to insure against adverse modification to steelhead critical habitat by allowing any turn out of cattle at all in 2007. Sierra Club, 816 F.2d at 1385–86 (an agency violates its on-going obligation to insure against jeopardy under ESA § 7(a)(2) when it allows a project's adverse effects to accumulate and relies on third parties' actions to prevent jeopardy or destruction or adverse modification to steelhead habitat).

V. THE NINTH CIRCUIT'S VACATUR OF THE *LOHN* OPINION DOES NOT CHANGE THE ANALYSIS OF THIS COURT'S INJUNCTION

Intervenors also argue that the preliminary injunction should be vacated "to the extent this Court also relied on any part of the Lohn opinion." Intv. Memo at 28, citing Lohn, 485 F. Supp. 2d 1190. This argument evinces basic confusion over the difference between precedential and persuasive authority. Even after a district court opinion is vacated as moot, any party or court remains entitled to cite and rely on the opinion's sound reasoning. The Ninth Court recently explained that, even after vacatur, a district court opinion "will still be available and will still be citable for its persuasive weight." NASD Dispute Resolution v. Judicial Council, 488 F.3d 1065, 1069 (9th Cir. 2007) (noting also that "[n]o matter what we conclude [regarding vacatur], the opinion of the district court will not be ripped from Federal Supplement 2d"). The case that Intervenors cite, Durning v. Citibank, N.A., 950 F.2d 1419, 1425 n. 2 (9th Cir. 1991), stands for the proposition that an *appellate* court decision that has been vacated has no "precedential" authority, a proposition not relevant here. Lohn, as a district court opinion, was not precedential to begin with. NASD, 488 F.3d at 1069. Its vacatur, as moot, does not change that.

As the Ninth Circuit has recognized, vacated opinions by trial and appellate courts remain available for citation as persuasive authority—particularly where, as in Lohn, the reason for vacatur was mootness, and not any invalidation of this Court’s reasoning. NASD, 488 F.3d at 1069; Spears v. Stewart, 283 F.3d 992, 1017 n.16 (9th Cir. 2002) (“Vacated opinions remain persuasive, although not binding, authority.”); United States v. Clark, 617 F.2d 180, 184 n.4 (9th Cir. 1980) (illustrating the difference between precedential and persuasive authority by adopting the reasoning from a vacated opinion). As a result, Lohn remains persuasive authority for its cogent analysis of the biological opinion which immediately preceded the one at issue in this litigation, and for its discussion of the detrimental effects of grazing in the Malheur National Forest on threatened fish species.

CONCLUSION

For the foregoing reasons, this Court should deny Intervenors’ motion to vacate the preliminary injunction.

Respectfully submitted this 17th day of March 2009.

s/ David H. Becker_____

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