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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-KI

Plaintiffs,

v.

UNITED STATES FOREST SERV. et al.,

Defendants,

**MEMORANDUM IN SUPPORT
OF PLAINTIFFS’ MOTION FOR
SUMMARY JUDGMENT**

and

ROBERTSON RANCH et al.,

Intervenor-Defendants,

and

OREGON CATTLEMEN’S ASS’N,

Intervenor-Defendants.

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INTRODUCTION

The U.S. Forest Service has acted arbitrarily and capriciously 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 nearly every applicable ecological standard the agency is charged with satisfying in these areas. These failures have resulted in continuing environmental degradation from Forest Service-authorized grazing practices along over thirty-nine miles and more than 10,000 acres of congressionally-designated wild and scenic river corridors—and well beyond those administrative boundaries throughout the rivers’ watersheds. This chronic and continued degradation is in direct violation of the Forest Service’s duties under the National Wild and Scenic Rivers Act to “protect and enhance” designated river values and to implement the two rivers’ comprehensive river management plans. It also violates the National Forest Management Act’s requirement that the agency manage activities within and affecting these wild and scenic river corridors consistently with all Forest Plan requirements.

Plaintiffs bring this action for declaratory and injunctive relief under the National Wild and Scenic Rivers Act of 1968 (WSRA), 16 U.S.C. §§ 1271–1287, the National Forest Management Act (NFMA), 16 U.S.C. §§ 1600–1614, the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–4370d, and pursuant to the judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 et seq. For the reasons that follow, ONDA and the Center for Biological Diversity respectfully request that this court enter the declaratory and injunctive relief requested in Plaintiffs’ Motion for Summary Judgment, in order to protect, and to forestall further damage to, the terrestrial and aquatic wildlife habitat, native vegetative communities, outstandingly remarkable wild and scenic river values, and other significant ecological qualities of these rivers and their watersheds.

LEGAL AND FACTUAL BACKGROUND

I. STATEMENT OF THE RELEVANT FACTS

A. Designation and Management of the Malheur and North Fork Malheur Wild and Scenic Rivers

The Malheur and North Fork Malheur rivers lie within the Malheur National Forest, in eastern Oregon's Blue Mountains. In 1988, Congress designated a 13.7 mile segment of the Malheur River as a wild and scenic river corridor and a 25.5 mile segment of the North Fork Malheur River as a scenic river corridor. Pub. L. 100-557, codified at 16 U.S.C. § 1274(a)(83), (89). The Forest Service manages the public lands within and adjacent to the Malheur and North Fork Malheur wild and scenic river corridors and therefore has jurisdiction over management and protection of the designated corridors. See 16 U.S.C. § 1283(a). Pursuant to the WSRA, the Malheur National Forest performed resource assessments and prepared a comprehensive river management plan for each river in 1993. See PAR 0235–486, 487–683. On the Malheur Wild and Scenic River, the Forest Service identified geology, history, and wildlife habitat as “outstandingly remarkable values” (ORVs) and verified Congress’s finding that scenery is also an ORV. PAR 0490. On the North Fork Malheur Scenic River, the agency identified wildlife habitat and fisheries as ORVs, and verified Congress’s finding that scenery and geology are also ORVs. PAR 0238. The Forest Service’s NEPA “decision notices” adopted the final river management plans and formally amended the Malheur National Forest’s Land and Resource Management Plan. PAR 0255, 0506. The decision notice for the Malheur Wild and Scenic River also states 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.

B. Livestock Grazing on the Malheur National Forest

Within the Malheur National Forest boundaries are livestock grazing allotments, which are governed by a permit system under the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1784, and Forest Service grazing regulations. See 36 C.F.R., Part 222. The Malheur Wild and Scenic River corridor includes portions of the Bluebucket, Dollar Basin/Star Glade, and Central Malheur allotments. The North Fork Malheur Scenic River corridor includes portions of the Spring Creek, North Fork, Flag Prairie, and Ott allotments. Each allotment is further divided into units, which allows the Forest Service to authorize (or not authorize) grazing on certain portions of each allotment at different times and levels of use throughout the grazing season and from one season to the next. The Forest Service manages grazing practices via a three-part process involving allotment management plans (AMPs), federally-issued grazing permits, and annual operating instructions (AOIs). These three separate decisionmaking processes are described in detail in Plaintiffs’ prior memoranda in this action, and summarized by the court in its previous opinions. See, e.g., Ore. Natural Desert Ass’n v. U.S. Forest Serv. (“ONDA v. USFS”), 312 F.Supp.2d 1337, 1339–41 (D. Or. 2004). The AOIs control on-the-ground grazing practices on an annual basis. See Stmt. of Material Facts at ¶¶ 6–9.

II. BRIEF LEGAL BACKGROUND

A. Wild and Scenic Rivers Act

Congress enacted the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271–1287, in 1968 to identify rivers that possess “outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values” and to preserve those rivers in free-flowing condition and protect their immediate environments “for the benefit and enjoyment of present and future generations.” Id. § 1271. Once a river corridor is designated, the federal agency

charged with administration of that corridor must prepare a comprehensive management plan for the river segment “to provide for the protection of the river values”; to “address resource protection, development of lands and facilities, user capacities, and other management practices necessary or desirable to achieve the purposes” of the Act; and to coordinate the river plan with resource management planning. *Id.* § 1274(d)(1).

Each component of the system, regardless of its classification as wild, scenic, or recreational, “shall be administered in such manner as to protect and enhance the values which caused it to be included in said system.” *Id.* (emphasis added). Further, “primary emphasis shall be given to protecting its esthetic, scenic, historic, archeologic, and scientific features.” *Id.* In addition to protection of a river’s free-flowing condition and outstandingly remarkable values, the WSRA specifies that managing agencies must protect the water quality of all rivers added to the system. *Id.* §§ 1271, 1283(c). The Forest Service’s obligations to implement the comprehensive river management plans, protect and enhance river values, and manage grazing within the wild and scenic river corridors consistently with Forest Plan standards, are mandatory duties. *ONDA v. USFS*, 312 F.Supp.2d at 1344–46.

B. National Forest Management Act

The National Forest Management Act (NFMA), 16 U.S.C. §§ 1600–1614, governs the Forest Service’s management of the national forests. NFMA establishes a two-step process for forest planning. NFMA first requires the Forest Service to develop, maintain, and revise “land and resource management plans” (LRMPs or “Forest Plans”) for each national forest. *Id.* § 1604(a); see also 36 C.F.R. 219.7. Forest Plans guide natural resource management activities forest-wide, setting standards, management area goals and objectives, and monitoring and evaluation requirements. Implementation of a Forest Plan occurs at the site-specific level. Once

an LRMP is in place, site-specific actions such as development of a wild and scenic river management plan, issuance of a federal grazing permit or annual grazing authorizations via issuance of AOIs, are assessed by the Forest Service in the second step of the forest planning process. Site-specific decisions must be consistent with the broader Forest Plan. 16 U.S.C. § 1604(i); 36 C.F.R. § 219.10. See also Citizens for Better Forestry v. U.S. Dep't of Agric., 341 F.3d 961, 966 (9th Cir. 2003) (noting that site-specific plans and “on-the-ground actions” must be consistent with forest plans). In general, Forest Plan standards control management of the various resources and actions on a particular national forest, unless a site-specific plan establishes more specific or restrictive standards.

C. National Environmental Policy Act

The National Environmental Policy Act (NEPA) is our “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). NEPA’s primary purposes are to insure fully informed decision-making and to provide for public participation in environmental analyses and decision-making. See id. § 1500.1(b), (c). NEPA requires that federal agencies prepare an environmental impact statement for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). NEPA requires that the decisionmaker, as well as the public, be fully informed—i.e., “that environmental information is available to public officials and citizens before decisions are made and before action is taken.” 40 C.F.R. § 1500.1(b). NEPA also requires federal agencies to prepare supplemental environmental analyses where there are “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c)(1)(ii).

D. Rescissions Act

In 1995, Congress enacted the Rescissions Act, Pub. L. No. 104-19, 109 Stat. 194 (1995), which required the Forest Service to “establish and adhere to” a schedule for completing NEPA reviews on grazing allotments. *Id.* at § 504(a). Under the Act, if a permit expired prior to the scheduled completion for NEPA review of the allotment, it would be reissued under the same terms and conditions as the expiring permit. *Id.* § 504(b). Permits would be reissued for the full term of the expired permit and modified or re-issued if necessary to conform to the subsequent NEPA analysis. *Id.* In 2003, Congress passed two additional appropriations bills containing provisions, which, taken together, allow the terms and conditions of a grazing permit renewed prior to or during 2003 to remain in effect until NEPA analysis is completed. Pub. L. No. 108-7, 117 Stat. 11, § 328 (Feb. 20, 2003); Pub. L. No. 108-11, § 2401 (Apr. 7, 2003).

JURISDICTION AND STANDING

The court has jurisdiction over this action because it raises a federal question, 28 U.S.C. § 1331, seeks declaratory relief, *id.* § 2201, and seeks injunctive relief, *id.* § 2202. Pursuant to the APA, Plaintiffs challenge “final agency action” that is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law, and therefore actionable pursuant to 5 U.S.C. § 706(2)(A).¹ Plaintiffs also challenge agency action unlawfully withheld or unreasonably delayed, and therefore actionable pursuant to 5 U.S.C. § 706(1).

The court already has concluded that Plaintiffs have standing in this action. ONDA v. USFS, No. 03-213-KI, slip op. at 17 (D. Or. June 10, 2004). The Forest Service’s annual authorizations of grazing practices that repeatedly and chronically result in violations of

¹ The court has already ruled that Plaintiffs have sufficiently pleaded challenges to final agency actions, in the form of the Forest Service’s annual operating instructions. ONDA v. USFS, 312 F.Supp.2d at 1343 (Dkt # 67). Therefore, Plaintiffs need not rely on APA § 706(1), for Claims 1, 2 and 3.

ecological standards and degradation of ecological conditions in the areas at issue, have injured the interests of the plaintiff organizations and their individual members. These injuries can be remedied by the relief sought in this action. See First Christie Decl. at ¶¶ 6–11, 16–21, 23–26; Second Christie Decl. at ¶¶ 3–6.

ARGUMENT

The record in this case, including evidence, monitoring data and observations from the Forest Service, the U.S. Fish & Wildlife Service, and Plaintiffs, demonstrates that the Forest Service has failed, repeatedly and for more than a decade, to implement and comply with the standards established in, or adopted by, the Malheur and North Fork Malheur wild and scenic river comprehensive river management plans, the Forest Plan, and the annual grazing authorizations. These shortcomings have resulted in a consistent failure to protect and enhance the outstandingly remarkable values for which the rivers were designated. In addition, the Forest Service has unlawfully withheld or unreasonably delayed development or revision of allotment management plans, and acted arbitrarily and capriciously by continuing to annually authorize grazing practices that result in repeated violations of ecological standards.

I. STANDARD OF REVIEW

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). See also Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). The substantive law governing a claim determines whether a fact is material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see also T.W. Elec. Serv. v. Pacific Elec. Contractors, 809 F.2d 626, 630 (9th Cir. 1987).

The APA sets forth standards governing judicial review of decisions made by federal administrative agencies. See Dickinson v. Zurko, 527 U.S. 150, 152 (1999); Mtn. Rhythm Res. v. FERC, 302 F.3d 958, 963 (9th Cir. 2002). Pursuant to the APA, this court shall “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1); Ctr. for Biol. Diversity v. Veneman, 335 F.3d 849, 854 (9th Cir. 2003). This Court also shall hold unlawful agency actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); 335 F.3d at 853. Under the arbitrary and capricious standard, the reviewing court must determine whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Marsh v. Ore. Natural Res. Council, 490 U.S. 360, 378 (1989); Forest Guardians v. U.S. Forest Serv., 329 F.3d 1089, 1097 (9th Cir. 2003). While the scope of review under the “arbitrary and capricious” standard is narrow, an agency must articulate a rational connection between the facts found and the conclusions made. See Envtl. Def. Ctr. v. EPA, 319 F.3d 398, 428 n.46 (9th Cir. 2003). See also 490 U.S. at 378 (court’s inquiry, though narrow, must be “searching and careful”). Finally, an agency’s decision can be upheld only on the basis of the reasoning found in that decision. Anaheim Mem’l Hosp. v. Shalala, 130 F.3d 845, 849 (9th Cir. 1997).

II. THE FOREST SERVICE HAS ACTED IN A MANNER THAT IS ARBITRARY, CAPRICIOUS AND NOT IN ACCORDANCE WITH LAW, BY ISSUING ANNUAL GRAZING AUTHORIZATIONS THAT RESULT IN CHRONIC AND CONTINUED VIOLATIONS OF MANDATORY ECOLOGICAL STANDARDS.

A. The Forest Service Must Ensure that its Authorized Livestock Grazing Satisfies its Legal Duties under the Wild and Scenic Rivers Act and the National Forest Management Act.

Plaintiffs are entitled to summary judgment in their favor on Claims One, Two and Three because the Forest Service has violated duties under the WSRA to “protect and enhance” the Malheur and North Fork Malheur wild and scenic rivers’ designated values and to implement the

comprehensive river management plans, as well as the duty under NFMA to manage these public lands consistently with the Forest Plan. Each of these duties is a mandatory, non-discretionary duty. ONDA v. USFS, 312 F.Supp.2d at 1344–46 (order denying Defendants’ motions to dismiss and for judgment on the pleadings). In this case, the Forest Service’s decisions and final agency actions, as embodied in its AOIs, are not in accordance with the WSRA or NFMA and are therefore unlawful under the APA.

B. The Forest Service Has Developed or Adopted Livestock Grazing Standards in the River Management Plans, the Forest Plan, the Aquatic Conservation Strategy, and the Bull Trout Biological Opinions.

In order to satisfy its duties under the WSRA and NFMA to protect and properly manage these wild and scenic rivers and their watersheds, the Forest Service has developed and adopted a number of ecological standards to manage livestock grazing in these areas. These standards derive from the wild and scenic river management plans, the Forest Plan, the INFISH aquatic conservation strategy, and bull trout biological opinions issued by the U.S. Fish & Wildlife Service (“FWS”). Each of these duties is incorporated, specifically or by reference, into the Forest Service-issued annual operating instructions.

1. Livestock grazing standards under the comprehensive river management plans and the Forest Plan

The Forest Service finalized management plans for the Malheur and North Fork Malheur wild and scenic rivers in 1993. Those plans incorporate specific standards for grazing practices, intended to protect and enhance the values for which the rivers were designated and to protect the free-flowing conditions and water quality of the rivers. PAR 0496 (“non-anadromous riparian area” fisheries standards); PAR 0246, 0248 (same fisheries standards, plus specific timing and trailing limitations). Each plan also states that where the comprehensive river management plan

does not set a specific standard for a particular resource element or land use, Forest-wide management standards established or adopted in the Forest Plan control. PAR 0245, 0495.

The Malheur National Forest adopted its Forest Plan in 1990. AR Supp. 0001. The Forest Plan establishes forest-wide goals and objectives, management area direction, standards and guidelines that apply to future management activities, and monitoring and evaluation requirements. See PAR 0112. Both river plans specifically adopt the Forest Plan’s fisheries and watershed standards for “non-anadromous riparian areas,” which include a number of grazing-related standards regulating riparian vegetation composition and production, forage utilization, and stream channel morphology. PAR 0246, 0496. These standards include requirements: to provide necessary habitat to maintain or increase populations of “management indicator species,” including bull trout; to manage riparian vegetation to emphasize reestablishment of hardwood shrub and tree communities; to improve the rate of recovery in poor condition riparian areas; to eliminate or reduce the impacts of management activities that may slow riparian recovery; to enhance water quality and fish habitat; to manage grazing allotments to protect or enhance riparian-dependent resources; to manage grazing so that water quality meets Oregon state water quality standards and fish populations are maintained or in an upward trend; and to maintain sufficient streamside vegetation to maintain streambank stability and fish habitat capability. See AR Supp. 0001 at IV-56 to IV-58. In 1994, the Malheur National Forest adopted Amendment 29 to the Forest Plan, which includes a number of quantitative aquatic standards relating to sediment and substrate, water quality, channel morphology, and riparian vegetation. PAR 0870–0884.

2. Livestock grazing standards under the INFISH aquatic conservation strategy

In 1995, the Forest Service developed the Inland Native Fish Strategy (“INFISH”), an aquatic conservation strategy that set management objectives and standards for twenty-two

national forests within the range of (non-anadromous) bull trout habitat. See AR Supp. 0004.²

This includes the Malheur and North Fork Malheur wild and scenic river corridors and their watersheds. The Forest Service in 1995 amended the affected forest plans, including the Malheur LRMP, and INFISH standards thus apply to the Malheur and North Fork Malheur rivers and their watersheds. AR Supp. 0007. Because the river management plans defer to the grazing standards in the Forest Plan, and because those grazing standards were amended by the INFISH standards, the INFISH standards therefore became the applicable grazing standards within these two wild and scenic river corridors. Importantly, though: (1) any original Forest Plan standard not superceded by a new INFISH standard remains in force; and (2) INFISH standards apply beyond the wild and scenic river corridors in the Malheur and North Fork Malheur river watersheds where there is bull trout habitat.

INFISH grazing standard GM-1 states that the Forest Service must:

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.

AR Supp. 0147 (emphasis added). Modifications may include reducing numbers of livestock or “season of use, changes in handling practices or the complete removal of livestock from [Riparian Habitat Conservation Areas].”³ AR Supp. 0098. Riparian Management Objectives

² INFISH applies in all such areas beyond the range of the Pacific Anadromous Fish Strategy (“PACFISH”), an equivalent strategy developed to protect habitat in watersheds throughout the range of anadromous fish east of the Cascade Range. AR Supp. 0004.

³ Riparian Habitat Conservation Areas (“RHCA”) are “portions of watersheds where riparian-dependant resources receive primary emphasis, and management activities are subject to specific standards and guidelines.” AR Supp. 0143. Designated RHCA occur in each allotment at issue in this lawsuit in standard widths that vary according to whether a stream is a fish-bearing stream, a perennially flowing non-fish bearing stream or a seasonally flowing or intermittent stream. AR Supp. 0143–0144.

(“RMOs”) are “[q]uantifiable measures of stream and streamside conditions that define good fish habitat, and serve as indicators against which attainment or progress toward attainment of goals will be measured.” AR Supp. 0141.

INFISH establishes RMOs for measurable stream attributes such as bank stability, bank angle, stream width-to-depth ratio, pool frequency, and water temperature. AR Supp. 0141. The bank stability standard requires banks to be greater than 80% stable. AR Supp. 0026.⁴ The lower bank angle standard requires more than 75% of stream banks to have less than a 90 degree angle (i.e., undercut). Id. The width-to-depth ratio must be less than ten, meaning streams cannot be too wide and shallow. Id. The pool frequency RMO varies according to the mean width-to-depth ratio. Id. The water temperature RMO requires no measurable increase in maximum water temperature and sets maximum temperatures at 59 degrees in adult holding habitat and 48 degrees in spawning and rearing habitat. Id.

The Forest Service defines “retard attainment of RMOs” as the “measurably slow recovery of any identified RMO feature (e.g., pool frequency, water temperature, etc.) that is worse than the objective level.”⁵ Degradation of the physical and biological processes or conditions that determine RMOs is also considered to retard attainment of RMOs. See n.5. This standard therefore requires the Forest Service to move toward attainment of RMOs at a specified rate and either modify or suspend grazing when necessary to satisfy that duty. In particular, the “do not retard” standard does not permit status quo grazing practices because this language goes

⁴ Note, however, that Forest Plan Amendment 29 requires banks to be at least 90% stable, and permits no decrease in bank stability if banks are currently above 90% stable. PAR 0883.

⁵ See Attach. 18 to Plaintiffs’ Memo in Support of Motion for Preliminary Injunction, at 6 (PACFISH EA Glossary). It appears Defendants did not produce this document as part of the administrative record, although it clearly should be in the record.

beyond simply preventing attainment and imposes an affirmative duty on the Forest Service to move toward achievement of RMOs and riparian recovery.

In order to ensure the standards established by INFISH are being implemented and that RMOs are sufficiently protective of fish, the Forest Service must monitor the on-the-ground impacts of its authorized grazing. AR Supp. 0153. In 1999, the Forest Service developed and adopted a Grazing Implementation Monitoring Module (“Module”) in an attempt to meet its monitoring responsibility. PAR 2692–2727. The Module was revised in 2000 and again slightly in 2002. PAR 3359–3442, 5533–5600. While the INFISH RMOs consist of physical features of non-anadromous fish habitat the Forest Service believes are “necessary to address the effects of livestock on both the physical and vegetation components of riparian areas,” PAR 3416, monitoring under the Module essentially consists of approximating vegetative components rather than measuring actual RMOs. These proxies include mean residual stubble height (the height of grasses at the end of the grazing season), forage utilization, and shrub utilization (the amount of new season’s growth on woody species consumed by livestock); plus one physical component, bank damage. PAR 3376, 5549. These are considered “move triggers,” indicators of when livestock should be moved off a given unit. *Id.* The triggers are “designed to maintain livestock effects to stream channels and riparian vegetation at acceptable levels.” PAR 3376.

3. Livestock grazing standards under the bull trout biological opinions

Finally, the listing of bull trout under the Endangered Species Act, 16 U.S.C. §§ 1531–1544, led to the most recent set of standards that apply to livestock grazing in these river corridors and their watersheds. On June 10, 1998, the FWS issued a final rule listing bull trout as a threatened species under the ESA. 63 Fed. Reg. 31,647). The Columbia River “distinct population segment” of bull trout, which includes the bull trout in the Malheur and North Fork

Malheur river watersheds, is threatened by a host of problems and has been severely limited in its historic range. See Stmt. of Material Facts at ¶ 11. The Upper Malheur River subbasin population of bull trout is considered to be at “high risk” of extinction, and the North Fork Malheur subbasin population is considered to be at “moderate risk” extinction. PAR 6167–68. Because the North Fork Malheur bull trout metapopulation is the only population in the region not considered to be at high risk of extinction, the Forest Service has recognized that this “increas[es] the need to conserve this relatively healthy population.” PAR 1512 (Forest Service’s 1997 Monitoring and Evaluation Report).

Since the bull trout listing, the Forest Service, pursuant to ESA Section 7, has consulted with the FWS to determine whether federally permitted grazing activities may affect bull trout. 16 U.S.C. § 1536(a)(3). Such consultation has occurred on an annual basis since 1999. See PAR 6155 (2003 biological opinion or “BiOp”); 6731–6733 (2004 BiOp). Each year during this period, the FWS has issued a biological opinion stating whether or not the proposed action—livestock grazing—is likely to jeopardize the continued existence of bull trout. 16 U.S.C. § 1535(b). The biological opinions list the “reasonable and prudent measures” and “terms and conditions” that, if followed, would allow the proposed action to occur without jeopardizing the continued existence of the species. Id. § 1536(b)(3)(A); 50 C.F.R. § 402.14. See, e.g., PAR 6776–6781 (2004 BiOp).

Consultation between the Malheur National Forest and the FWS established standards that dictate when livestock must be moved off a particular allotment or unit, including those at issue in this case, by adopting the “triggers” established under the INFISH Grazing Modules. These triggers include forage utilization (measured in residual vegetative stubble height), stream bank stability, and shrub use. See, e.g., PAR 6157 (2003 BiOp); 6737 (2004 BiOp). Once any of

these three trigger thresholds is reached, livestock must be moved immediately off the allotment or unit at issue. PAR 3376. The relevant standards for each allotment's wild and scenic river corridor pastures are as follows:

Forage Utilization: Livestock must be moved off the unit at or before the point at which there is only a seven-inch stubble height of vegetation remaining along the riparian areas adjacent to a stream.

Stream Bank Stability: Livestock must be moved off the unit before more than ten percent bank damage occurs along bull trout habitat streams.

Shrub Use: Livestock must be moved off the unit before more than one-third of the current season's leaders are browsed on woody shrubs (e.g., willows, alders).

See PAR 6157 (2003 BiOp); PAR 6737, 6806–10 (2004 BiOp) (listing move triggers by allotment and unit).⁶

C. Forest Service-Authorized Livestock Grazing on the Allotments Within the Malheur and North Fork Malheur River Corridors Has Caused, and Continues to Cause, Severe Ecological Damage in Violation of Applicable Standards.

From the time the Forest Service prepared its initial resource assessments as part of its wild and scenic river management planning process over a decade ago, and continuing to the present, livestock grazing has caused serious ecological damage to the fragile riparian habitats within the Malheur and North Fork Malheur river corridors and their watersheds. The damage throughout these corridors and their watersheds is widespread and the range of stream and riparian attributes that have been—and continue to be—degraded as a result of livestock grazing is all-encompassing. This includes: continued retardation of critical INFISH RMOs; violations of stubble height, bank stability and shrub use standards; repeated unauthorized use (grazing trespass); water temperatures well in excess of state water quality standards; listed fish

⁶ While the standard had been 6-inches in every previous biological opinion, the 2004 BiOp now uses a 7-inch stubble height standard for “allotments along the North Fork and Malheur Rivers.” PAR 6737.

populations in serious decline and at risk of extinction; and a litany of bull trout population and habitat parameters “functioning at risk” or “functioning at unacceptable risk.”

1. Violations of the INFISH aquatic conservation strategy standards

The Forest Service’s annual grazing authorizations, including the 2004 authorizations, have failed to satisfy the INFISH duty to move toward attaining RMOs. For years, Forest Service-authorized grazing within these two wild and scenic river corridors has been in violation of relevant ecological standards at an alarming rate.⁷ The continued failure to achieve INFISH RMOs and the concomitant continued ecological degradation throughout these river corridors and their watersheds, has been documented by the Forest Service, the U.S. Fish & Wildlife Service, and by Plaintiffs’ own data and observations.

a. Forest Service and U.S. Fish & Wildlife Service evidence demonstrates that grazing is retarding and preventing attainment of INFISH RMOs.

The Forest Service’s own documents show that grazing in each of the allotments at issue in this action is retarding and preventing attainment of RMOs. In 1999, the Forest Service acknowledged in its Malheur Headwaters Watershed Analysis that “[g]razing by livestock continues as a predominant impact to stream habitat” and that “[g]enerally, more than 70 percent of parameters on a surveyed stream reach do not meet standards.” PAR 3854. The Analysis provides a candid and stark assessment of current ecological conditions and the effect current grazing is having in this area:

⁷ Note that the allotments at issue in this case have been in violation of various applicable standards at least since the adoption of the wild and scenic river management plans in 1993. See, e.g., PAR 0592 (statement in Malheur Wild and Scenic River plan that “[c]urrent grazing utilization levels routinely exceed Forest Plan standards in some riparian areas within the corridor. Plant composition and vigor have been impaired to various degrees. Soil instability and compaction may be increasing with current grazing practices.”); PAR 0369 (identical statement in North Fork Malheur Scenic River plan).

Although riparian conditions have improved markedly since the 1920s, current Forest Service standards for grazing may not fully provide for the re-establishment of hardwoods or lush grass and sedges along streambanks. The stubble height standard maintains grass on streambanks, but does not appear to allow for a thick growth of overhanging sedges and grasses and may not allow re-establishment of young shrubby vegetation. . . . Thick sedge and grass vegetation along streambanks was only observed in the [Summit Creek] enclosure. The lack of grasses and sedges along stream banks is a [sic] probably a causal factor in the bank instability, low channel width to depth ratios, and high stream temperatures documented for many stream reaches in the grassland environment. In summary, the current grazing standards may be maintaining riparian zones in an at-risk condition for water quality and fish habitat.

PAR 3855–56 (emphasis added). The Watershed Analysis indicates that in 1999 the current standards had only been in place for two years and “careful monitoring should be conducted to get a better idea of the long-term results.” PAR 3856. As described in detail below, however, it is clear five years later that the Forest Service’s authorized grazing practices continue to prevent attainment of INFISH RMOs.

For example, each year, as part of the bull trout consultation process, the Forest Service prepares biological assessments (“BAs”) for the allotments to be grazed. These BAs include checklists in which the Forest Service summarizes (1) the baseline conditions of 24 bull trout “habitat indicators” (rated as either functioning appropriately, functioning at risk, or functioning at unacceptable risk) and (2) the effects of the proposed grazing on each indicator (rated as either restore, maintain, or degrade). See, e.g., PAR 6814 (checklist for Upper Malheur River Subbasin, included as appendix to 2004 BiOp). A number of these habitat indicators correspond to INFISH RMOs, including stream temperature, large woody debris, streambank stability, pool frequency and width-to-depth ratio. Id.

In 1999, the Forest Service’s assessment of these critical bull trout habitat indicators on the Malheur and North Fork Malheur rivers indicated that seven habitat indicators were functioning appropriately on the North Fork Malheur and five habitat indicators were functioning

appropriately on the Malheur River. PAR 2768, 2929. Meanwhile, five indicators were functioning at unacceptable risk on the North Fork Malheur River, PAR 2768, and seven indicators were functioning at unacceptable risk on the Malheur River. PAR 2929. By 2003, however, the Forest Service indicated that only two of 24 indicators were “functioning appropriately.” PAR 6169–70. Meanwhile, ten were “functioning at risk” and twelve were “functioning at unacceptable risk.” *Id.* In its 2003 BiOp on the effects of the Malheur National Forest’s grazing program in the Upper Malheur and North Fork Malheur subbasins, the FWS refers not only to grazing management failures in 2002, but also to the number of allotments that have “consistently failed to meet standards over time (1998–2002).” PAR 6159–60.

Despite the Forest Service’s recognition that these habitat indicator ratings are getting worse rather than better, conditions remained dismal by the end of 2003. According to the 2004 BiOp, “by the end of the 2003 grazing season, the Forest again had problems with livestock trespass, unauthorized use of various pastures, utilization standards not met in several allotments, and lack of fence maintenance.” PAR 6732. This is borne out by the Forest Service’s determination once again in 2004 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. Moreover, the agency determined the grazing proposed for 2004 would merely “maintain” (rather than “restore”) these at-risk and functioning-at-unacceptable-risk conditions. *Id.*

The FWS further acknowledged in its 2004 biological opinion that “baseline conditions and future cumulative effects in the subbasins where Forest grazing activities occur are of continuing concern to the Service, as these effects are likely to restrict bull trout range expansion, or at least slow recovery efforts substantially.” PAR 6774 (emphasis added). The

BiOp concluded that “[a]ll effects to the PCEs [primary constituent elements, which are similar to RMOs] resulting from the Forest’s proposed 2004 grazing management program will be neutral over the long-term.” *Id.* (emphasis added). In other words, based on the Forest Service’s own assessment, the FWS determined current grazing practices will either maintain the degraded status quo or substantially slow recovery efforts—both of which constitute illegal retardation or prevention of attainment of INFISH RMOs.

Finally, despite continued ecological degradation after year after year of failures to meet standards, the Forest Service has done very little monitoring within the Malheur and North Fork Malheur wild and scenic river corridor watersheds, in order to assess the agency’s success or failure in meeting INFISH RMOs. *See, e.g.*, PAR 4706 (in response to ONDA Freedom of Information Act request, PAR 4109–10, for information regarding measurement and/or monitoring of RMOs on the Malheur National Forest, Forest Service stated, “We have not done specific measurements or monitoring of [RMOs].”). This is troubling because the Forest Service itself describes monitoring as an “important component” of INFISH, AR Supp. 0037, and has stated, “Without this [monitoring] information it is impossible to intelligently modify management in an attempt to affect the rate and direction of trend.” PAR 5546 (emphasis added). In fact, FWS and NOAA Fisheries complained to the Malheur National Forest Supervisor in December 2002 that the Forest suffered from a “[l]ack of interdisciplinary teamwork for collecting monitoring data,” a lack of documentation showing where monitoring data was collected, monitoring data “not representative of site conditions,” a “[l]ack of consistency between the proposed action and implementation of the proposed action, including conservation measures,” a “[l]ack of understanding and/or disagreement on how move triggers and end-of-season monitoring should be completed,” and a “[l]ack of a standard shrub and bank damage

monitoring protocol.” PAR 5693–94. Without collecting critical monitoring information, the Forest Service simply “has no basis or mechanism for ascertaining the degree to which any significant grazing is retarding” attainment of RMOs. Third Rhodes Decl. at ¶ 31.

b. Plaintiffs’ evidence and expert declarations demonstrate that grazing is retarding and preventing attainment of INFISH RMOs.

Plaintiffs’ own monitoring and data provide yet further evidence that Forest Service-authorized grazing continues to retard or prevent attainment of INFISH RMOs. As described in detail in Plaintiffs’ memorandum in support of their motion for preliminary injunctive relief (Dkt # 81), Plaintiffs observed severe damage from livestock grazing in the Malheur and North Fork Malheur wild and scenic river corridors in 2001. See First Christie Decl. at ¶¶ 16–30, Attach. 1. Plaintiffs observed severely degraded conditions again in 2003, with these river corridors having shown no improvement since 2001. See First Beschta Decl. at 28; Kauffman Decl. at ¶¶ 31–37; First Rhodes Decl. at ¶¶ 98–101. Prior to the 2004 grazing season, Rhodes concluded that every allotment and unit at issue in this case is consistently failing to satisfy quantitative INFISH RMOs for bank stability, overhanging banks, pool development and quality, width-to-depth ratio, and water temperature. See First Rhodes Decl. at ¶¶ 50–62 (violations of bank stability standard), 63–67 (violations of lower bank angle standard), 68–79 (violations of pool frequency standards), 80–86 (violations of stream width-to-depth ratio standards), 87–97 (violations of water temperature standards). See also First Beschta Decl. at ¶¶ 23–24 (linking effects from grazing to increased water temperatures and stating that current practices are preventing recovery of this RMO); 25 (current grazing practices preventing recovery of stream bank conditions); 26 (describing grazing-caused incised and over-widened channels). In fact, in noting that the damage from grazing in these areas is “as bad as anything I have seen in my twenty-five year career as a rangeland riparian ecologist,” Dr. Kauffman noted:

Current livestock management and levels of use are resulting in the continued degradation of riparian zones within the Malheur National Forest, including the Malheur and North Fork Malheur wild and scenic rivers and their tributaries. The current management goes far beyond simply retarding attainment of RMOs. The grazing management within these allotments is resulting in the degradation of among the most productive and biologically diverse riparian zones in Oregon.

Kauffman Decl. at ¶ 35 (emphasis in original). These observations, combined with the Forest Service's own documentation of failed standards, caused this court to "conclude based on the evidence before me that plaintiffs have made a strong showing on the merits and I conclude that grazing is likely causing ecological damage in the areas at issue." ONDA v. USFS, No. 03-213-KI, slip op. at 18 (D. Or. June 10, 2004) (also noting evidence shows "numerous failures" and expressing doubt that Forest Service's 2004 changes "will fully remedy the harms at issue").

This degradation has continued in 2004, even after the Forest Service apparently elected to not graze—or to graze very lightly—many areas subject to this litigation. According to monitoring data collected and submitted by Christopher Christie, while most units were grazed very lightly this summer, they still failed to satisfy RMOs for bank stability and bank angle, and continued to show evidence of highly suppressed or eliminated woody deciduous vegetation. See Third Christie Decl. at ¶¶ 8–10, 12, Attach. 1 (monitoring data summaries and photos). On other units that were grazed this year, Christie once again observed continuing bank damage well in excess of standards and extreme over-utilization. Id. ¶ 13, Attach. 1 at pp. 65–127 (Cougar, Rock Springs and Lake Camp units on Bluebucket Allotment).

The findings of Dr. Beschta and Jonathan Rhodes corroborate this data. For example, Dr. Beschta observes that areas that were grazed during 2004 continued to be adversely affected with respect to riparian functions, water quality and fisheries habitat—and that "current grazing practices are not only preventing attainment of critical RMOs, but they are causing continued degradation." Second Beschta Decl. at ¶¶ 4, 18 (emphasis added). Even the areas rested or

grazed very lightly by the Forest Service, while showing re-growth of grasses, sedges, forbs and some deciduous woody species (e.g., willows), remain “in a highly degraded state” and will require continued, multi-year complete rest from grazing in order to begin to move toward attainment of RMOs. Id. ¶¶ 5–10.

Rhodes’ observations are similar. He states the degraded conditions he observed in October 2004 are consistent with his observations and conclusions in October 2003. Third Rhodes Decl. at ¶ 5. Rhodes observed that despite rest or minimal use in many areas, stream conditions remain degraded and re-initiation of grazing would impede recovery of riparian areas, streams, and bull trout habitat, and would prevent attainment of INFISH RMOs. Id. ¶ 6. For example, even after a season of complete rest from grazing, the Malheur River within the Dollar Basin/Star Glade Allotment’s South Star Glade Unit remains wide and shallow in excess of the RMO for width-to-depth ratio. Id. ¶ 8. The still unstable banks on this unit continue to contribute sediment to the river, retarding attainment of RMOs for width-to-depth ratio as well as pool frequency. Id. Even after a year of rest from grazing, overhanging banks remain “largely absent” on this portion of the wild and scenic river corridor and there has been no significant increase in woody deciduous vegetation. Id. ¶ 9–11. Similarly, on the North Fork Malheur River, even with only slight grazing this year, there remains a high degree of bank instability and width-to-depth ratios remain well in excess of standards. Id. ¶¶ 18–19. For example, Rhodes compares photos from his October 2003 field visit to the Flag Prairie Allotment to photos from his October 2004 field visit. See id. at Attach. 1, pp. 4–5. Despite the Forest Service’s decision to graze this area only very lightly this year, recovery has been “nominal” at best, and resumption of any grazing would subject this recovery to “rapid negation or reversal.” Id. ¶ 18.

As noted above, INFISH defines “retard attainment of RMOs” as the “measurably slow recovery of any identified RMO feature . . . that is worse than the objective level”—meaning that it goes beyond simply preventing attainment and imposes on the Forest Service an affirmative duty to move toward achievement of RMOs and riparian recovery. According to Dr. Beschta, Dr. Kauffman and Jonathan Rhodes, however, the grazing occurring within these wild and scenic river corridors and their watersheds is not only “retarding” attainment of RMOs, but in fact it is often times causing continued damage. See, e.g., First Beschta Decl. at ¶ 28 (“observed practices are maintaining the degraded condition of riparian and aquatic systems, maintaining degraded water quality (temperature and sediment), or causing additional ecological impacts to a variety of public resources”); Second Beschta Decl. at ¶¶ 4, 7–8, 10, 18 (on allotments grazed in 2004, “current grazing practices are continuing to adversely impact riparian functions, water quality, and fisheries habitat” and on allotments rested or grazed lightly, the “high proportion” of eroding banks, high width-to-depth ratios, and lack of young deciduous species “indicate that the degraded condition of riparian and aquatic systems continues” to prevent attainment of RMOs); Third Rhodes Decl. at ¶ 29 (“the re-introduction of any significant livestock grazing will retard the recovery of these conditions and the processes that influence them [and] . . . is likely to prevent the recovery of stream conditions, RMOs, and habitat attributes necessary for bull trout survival.”).

c. The Forest Service has failed to effectively modify and suspend its authorized grazing practices, as required under INFISH.

INFISH grazing standard GM-1 requires the Forest Service to take one of two actions in response to damaging grazing practices. The Forest Service must: (1) modify practices that retard or prevent attainment of RMOs; and (2) if those modifications are not effective in meeting RMOs, the Forest Service must suspend grazing. AR Supp. 0147. Because the Forest Service has

failed to take either action to any degree necessary to attain RMOs, the agency is in violation of mandatory Forest Plan and wild and scenic river management plan requirements to comply with the INFISH aquatic conservation strategy.

At best, the Forest Service has from time to time made minor modifications to grazing management on the allotments at issue. The modifications largely consist of slight reductions in the number of days grazing is authorized and various permutations on unit rotations.⁸ These modifications do not bring the Forest Service into compliance with INFISH because current grazing practices are continuing to prevent attainment of RMOs throughout these wild and scenic river corridors. At this point, only suspension of grazing can satisfy INFISH requirements. Despite this fact, the Forest Service generally has kept grazing numbers the same. With only one exception (the Dollar Basin/Star Glade Allotment's South Star Glade and Dollar Basin units), the Forest Service in 2004 refused to suspend grazing where it is continuing to prevent attainment of RMOs. See BAR 733–47, DBAR 583–88, FPAR 1075–85, OTTAR 770–75, SCAR 1468–84, NFAR 686–690 (2004 AOIs); see also PAR 6634, 6640, 6650, 6656 (2004 BAs, noting for several allotments that “[t]here are concerns that previous range management could be retarding attainment of [RMOs]” because of failures to meet standards).

Moreover, a review of permitted cattle numbers shows that they have remained substantially stable in recent years. On the Bluebucket Allotment, the Forest Service has authorized between 1,865 and 2,333 AUMs each year since 2001, with essentially the same season of use each year. PAR 6628. On the Dollar Basin/Star Glade Allotment, the Forest Service authorized about 1,150 AUMs each year until this year, when it finally rested the Star Glade and Dollar Basin units, thereby reducing overall AUMs to 842. PAR 6635. On the Flag

⁸ These modifications—or lack thereof—are discussed in greater detail, on an allotment by allotment basis, in the following section, II.C.2.

Prairie Allotment, the agency authorized between 2,022 and 2,210 AUMs from 2001 to 2003, and reduced that number slightly to 1,774 AUMs in 2004. PAR 6641. On the North Fork Allotment, the agency authorized 2,297 AUMs from 2000 to 2002, and reduced that number to 1,742 AUMs in 2003 and 1,316 AUMs in 2004. PAR 6651. On the Ott Allotment, the agency actually increased AUMs each year from 2000 to 2004, starting from 1,394 AUMs in 2000 and ending up at 2,024 AUMs in 2004. PAR 6657. Finally, on the Spring Creek Allotment, the Forest Service has authorized essentially the same numbers of AUMs and season of use each year since 2000, ranging from 3,300 to 3,692 AUMs. PAR 6663–64.

At this point, however, the areas at issue in this action are so thoroughly degraded from historic and current grazing practices, that nothing short of multi-year, total suspension of grazing will begin to recover RMOs—and thereby comply with the requirements of INFISH. See Second Beschta Decl. at ¶¶ 8, 16, 18 (“many years of total exclusion will be required to establish a pattern of recovery”); Third Rhodes Decl. at ¶¶ 13, 27 (citing research suggesting 20 years or more of rest may be required to allow significant recovery); First Rhodes Decl. ¶ 102 (“only livestock management strategy compatible with the unimpeded recovery of these highly damaged streams is multi-annual suspension of grazing”). Continuous suspension of grazing is necessary until the process of recovery of RMOs is well enough established that these systems no longer hover on a threshold of collapse under any level of grazing. Thus, the Forest Service’s continued grazing authorizations that cause failures to meet INFISH standard GM-1 are inconsistent with Forest Plan requirements and are otherwise arbitrary and capricious.

2. Violations of the stubble height, bank stability and shrub use standards

Similarly, monitoring data and analyses from the Forest Service, the U.S. Fish & Wildlife Service and Plaintiffs show that authorized grazing within these wild and scenic river corridors

and their watersheds has caused a chronic failure to comply with stubble height, bank stability and shrub use standards. The FWS's biological opinions for the last several years consistently note that Forest Service grazing management repeatedly fails to meet these standards. See, e.g., PAR 6159–60 (2003 BiOp), 6732 (2004 BiOp). Prior to this litigation, the Forest Service had provided relatively candid assessments of the gravity of the situation. At the end of the 2001 grazing season, Prairie City District Ranger Richard Haines “observed what appears to be a higher number of pastures within specific allotments in which use has significantly exceeded riparian forage and browse utilization standards.” PAR 4878.⁹ Haines expressed concern over the “exceptional stress on riparian vegetation in conjunction with the severity of the [ongoing] drought and the compounding factor of heavy utilization of the herbaceous woody plants.” Id.

A year later, in December 2002, Haines' assessment was even more critical. PAR 5729–5803. After undertaking a field tour of a number of wild and scenic river corridor and other allotments earlier that month, Haines reported his “findings revealed that some of the heaviest utilization I have observed on the District occurred this year.” PAR 5730. He noted:

It is a disappointment in knowing that some of these areas have exceeded standards in the past few years and the emphasis of the strategy for this year was intended to alleviate the problem. I think a case can be made in a few instances that wildfire complicated permittee access to certain pastures to maintain effective monitoring. However, the pattern of heavy utilization extends beyond those areas.

Id. (emphasis added). In the site-specific portion of Haines' report, he documents site upon site of heavy utilization and severely damaged ecological conditions. Observing what he termed a “record amount of heavy utilization,” Haines determined that a number of pastures “must be rested in 2003 to allow vegetative recovery.” Id. Unfortunately, and as detailed below, Plaintiffs observed severely degraded ecological conditions once again in 2003 and 2004.

⁹ The Malheur National Forest's Prairie City Ranger District contains all six of the allotments at issue in this litigation.

Malheur Wild and Scenic River. On the Bluebucket Allotment, the Forest Service’s own records show that the allotment’s Cougar and Rock Springs units failed to meet stubble height standards in 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, and 2003. PAR 6619, 6629 (2004 BA), 6072–73 (2003 BA), 5430–31 (2002 BA). This is corroborated by Plaintiffs’ observations and monitoring data, which demonstrate that the allotment was again in deplorable condition in 2002, 2003, and 2004. See, e.g., First Rhodes Decl. at ¶¶ 26, 41, 43 (stubble heights well below 6-inches, severe bank damage, and little groundcover in Oct. 2003); First Beschta Decl. at ¶ 15 (extirpation of woody species); Third Christie Decl. at ¶¶ 12–13 (stubble height and bank damage violations in 2004), Attach.1, pp. 65–87 (Cougar Unit), 88–109 (newly-created Lake Camp Unit), 110–27 (Rock Springs Unit); Third Rhodes Decl. at ¶¶ 21–22 (2004 grazing season again impeding recovery); Second Beschta Decl. at ¶ 4 (continuing impacts from 2004 grazing). In its 2000 BA, the Forest Service admitted the “[o]verall feeling is that the total AUMs [animal unit months] of use presently exceed the capability of this allotment.” PAR 3982. The agency authorized 2,217 AUMs that year. Id. Nevertheless, the agency actually authorized an increase in AUMs for the 2001 grazing season, including on both units bordering the Malheur Wild and Scenic River. Compare PAR 3982–83 with PAR 4508 (2001 BA). The Forest Service authorized slightly lower numbers in 2002 (1,865 AUMs). PAR 6628. But even under these slightly reduced numbers, District Ranger Haines noted at the end of that grazing year that even though he did not visit the Bluebucket Allotment during his field inspections, he was aware of reports of “excessive use” in riparian areas. PAR 5732. Haines indicated that the permittees “should anticipate the potential for rest in [2003].” Id. The allotment was not rested in 2003, see BAR 538–49 (AOI), and the Forest Service actually authorized increased livestock numbers (2,186 AUMs) once again. PAR 6628. There was no appreciable change in the season of use for

any of those years. Id. As noted above, the repeated failure to attain standards continues to the present and despite the fact the Forest Service slightly decreased the authorization once again in 2004 (1,873 AUMs). See PAR 6628. In short, the Forest Service simply has not been able to find any grazing system that avoids serious ecological damage on the Bluebucket Allotment.

On the Dollar Basin/Star Glade Allotment, Forest Service records show that the allotment's Dollar and South Star Glade units failed to meet one or more of the BiOp standards in 2000, 2001, 2002, and 2003. PAR 6619, 6636 (2004 BiOp); PAR 6005–07 (2003 BA); PAR 6203 (2003 BiOp); PAR 5443 (2002 BA). Again, this is corroborated by Plaintiffs' data and observations from 2001 through 2004. In 2001, Christie consistently measured stubble heights well below the 6-inch standard. See First Christie Decl., Attach. 1 at pp. 1, 8, 13, 16, 18, 24, 36, 52, 64–66. In 2003, stubble heights were once again far below the standard. See First Rhodes Decl. at ¶ 26 and Table 1. In fact, conditions were so bad on the allotment in April 2003 that a small rain event caused significant amounts of soil runoff across an entire hillside directly into the Malheur River. Id. ¶ 48 and Attach. 18 (photograph of severe runoff over slope largely devoid of groundcover). Rhodes found that “bank damage ranged from more than 20% to greater than 45%” on this allotment in 2003. Id. ¶ 39. Even absent grazing on the Dollar Basin and South Star Glade units in 2004, this trend of failed standards and degraded conditions continues. See Third Christie Decl. at Attach. 1, pp. 1–38 (South Star Glade Unit), 39–64 (Dollar Unit). See also Second Beschta Decl. at ¶ 7, 17 (lack of willows on both units & inadequacy of small wire cages around the few remaining willows); Third Rhodes Decl. at ¶¶ 5, 8–11 (same degraded conditions in Oct. 2004), Attach. 1, pp. 1–2 (showing unstable banks, lack of overhanging banks, lack of woody vegetation, wide and shallow stream channel).

North Fork Malheur Scenic River. On the Flag Prairie Allotment, grazing on the River Unit has failed to meet one or more of the bull trout BiOp standards each year since at least 1998. See PAR 6619, 6642–43 (2004 BA); First Rhodes Decl. at ¶¶ 22, 26, Table 1 (stubble heights well below standards after 2003 grazing season), ¶¶ 41, 51, 55 (severe bank damage); PAR 5731 (2002 Haines Report), PAR 5734–40, 5742–55, 5787–98 (Haines Report photos showing grazing damage); PAR 5299–5300 (2002 BA); PAR 4106 (Oct. 2000 field notes from FWS staff). The River Unit, along with the Crane Creek Riparian and Crane Holding units, was supposed to be rested in 2002, but the permittee failed to maintain fences on the latter units and grazed his livestock on the River Unit “well above the [number of] days intended to simply move stock from the Mountain unit to other pastures.” PAR 6026–27 (2003 BA). The Forest Service concluded that “[i]t appears that stock remained on the lower portion of the North Fork Malheur River well into the fall.” PAR 6027. Haines noted in December 2002 that the allotment showed “[o]verall heavily grazed riparian conditions, 1[-inch] stubble height regardless of the pasture.” PAR 5731. He also noted that 2002 was the second year in a row the River Unit was to be rested, and stated that “[r]esource protection is the norm in 2003 on this allotment.” Id. However, heavily degraded conditions persisted once again in 2003, see First Rhodes Decl. at ¶ 26 and Table 1 (pp. 11–12) (stubble heights of 2.5 inches), ¶¶ 41, 51 and 55 (documenting severe bank damage), and in 2004. See Third Christie Decl. at ¶¶ 12–13 (stubble height and bank damage violations along Station Creek and Little Crane Creek, a major North Fork River tributary and important bull trout migratory, rearing and spawning habitat), Attach. 1, pp. 167–73 (Flag Unit), 174–79 (Mountain Unit), 180 (River Unit); Third Rhodes Decl. at ¶ 5 (same degraded conditions observed prior to 2004 grazing season), Attach. 1, pp. 4–5 (showing little change in conditions from 2003 to 2004, other than slight re-growth of riparian grasses).

On the Spring Creek Allotment, Forest Service records show that one or more of the allotment's South River, North River, Elk Flat, Bucktrough/Mahogany, Horseshoe, and River Holding units failed to meet standards in at least 1998, 1999, and 2002. PAR 6149 (July 2, 2003 letter from Roger Williams, Malheur Forest Supervisor to Gary Miller, FWS); 6108-09 (2003 BA); PAR 5799-5803 (2002 Haines Report photos); PAR 5339-40 (2002 BA); PAR 3998-99 (2000 BA). Plaintiffs' data show failures to meet one or more of the standards in 2001, 2002, 2003, and 2004. See, e.g., First Christie Decl. at ¶ 17 and Attach. 1 at pp. 150-62 (2001 violations); Rhodes Decl. at ¶¶ 41, 51, 55 (severe bank damage in Oct. 2003); Third Christie Decl. at ¶¶ 12 (stubble height violations on several river corridor tributaries, including Little Crane Creek), Attach. 1, pp. 135-36 (Elk Flat Unit), 135-42 (Horseshoe Unit), 143-56 (Little Crane Unit), 157 (North River Unit), 158-59 (River Holding Unit), 160-66 (South River Unit); Third Rhodes Decl. at ¶ 5 (same degraded conditions observed prior to 2004 grazing season).

On the North Fork Allotment, Forest Service records show that the North River and South River units have failed to meet one or more of the standards in at least 2001 and 2002. PAR 6651 (2004 BA); PAR 6046, 6048 (2003 BA); PAR 5731, 5741, 5756-86 (2002 Haines Report and photos); NFAR 472 (Oct. 2001 "Allotment Inspection Report"). The Mountain Unit also failed to meet standards in at least 2003. PAR 6619, 6652 (2004 BA). This is confirmed by Plaintiffs' observations in 2001, 2002, 2003 and 2004. See, e.g., First Christie Decl. at ¶ 17 and Attach. 1 at pp. 86-149 (2001 violations); Driskill Decl. at Attach. 1, pp. 7-12. Well after the close of the 2002 grazing season, Haines observed extremely poor conditions on all three of the allotment's wild and scenic river corridor units:

Overall heavily grazed riparian conditions in both scenic river pastures, 1" stubble height the average. Bank damage >30% in North River Pasture, moderate to heavy shrub use by livestock. . . . Utilization [in the South River Unit] was quite

extensive across the riparian area regardless of proximity to the river for water. . .
. Mountain Pasture riparian stubble height did not meet.

PAR 5731. Haines also indicated he intended to convert a Forest Service water right in the North Fork Malheur Scenic River to an instream right and “cease using water for intensive grazing in the same scenic river pasture with listed bull trout. It is a very small part of the allotment acres and forage base and has not displayed compatibility with [Forest Plan] riparian goals and objectives.” PAR 5732. Despite this and despite the fact the Forest Service decreased both AUMs and season of use for the 2003 grazing season, the allotment again suffered extreme over utilization and severe bank damage in 2003. See PAR 6619, 6651–52 (2004 BA); First Rhodes Decl. at ¶¶ 26, 27, 29, and Table 1 (stubble height violations and 1.6-inch mean stubble height measured in Oct. 2003); ¶¶ 41, 51, 55, Table 2 (severe bank damage, including measurements on North River and South River units of 33% and 31% bank stability, respectively). Thus, a year after the Forest Service observed bank damage greater than 30% along the North Fork Malheur River in this allotment, PAR 6048 (2003 BA), that extreme level of damage continued, despite a supposedly renewed vow to protect and enhance these riparian areas. Even though the Forest Service again reduced authorized AUMs in 2004 to 1,316 (from 1,742 in 2003 and 2,297 previous three seasons), PAR 6651, conditions following the 2004 grazing season remain highly degraded. See Third Christie Decl. at ¶¶ 12–13 (stubble height and bank damage violations along Fopian Creek, the main perennial stream in the Mountain Unit, and key bull trout migratory, rearing and spawning habitat), Attach. 1, pp. 181–91 (Mountain Unit), 192–96 (North River Unit), 197–213 (South River Unit); Third Rhodes Decl. at ¶ 5 (observed same degraded conditions in 2004); Second Beschta Decl. at ¶ 17 (deciduous woody plants largely absent in allotment in Oct. 2004, in contrast to areas exclosed from grazing).

Finally, on the Ott Allotment, Forest Service records show that the Rattlesnake Unit has failed to meet standards in at least 2001 and 2002 (although Forest Service BAs note grazing problems throughout this allotment). See PAR 5732 (2002 Haines Report). See also Driskill Decl., Attach. 1 at pp. 13–14 (showing overgrazing and bank damage in Oct. 2002). In December 2002, Haines noted “[o]verall heavily grazed riparian areas that include Cottonwood [and] Alder Creeks. . . . This was the 2nd year riparian standards were exceeded significantly, thus the strategy did not work. Want more data for other riparian areas.” PAR 5732. Haines called for resource protection in 2003 “in all pastures in which riparian standards were exceeded as extensively as observed in the above stream areas.” Id. Nevertheless, the Forest Service actually authorized increased AUMs in 2003 with no change in season of use. PAR 6657 (2004 BA). As a result, stubble heights and bank stability again failed to meet standards by the close of the 2003 grazing season. See PAR 6657 (2004 BiOp); First Rhodes Decl. at ¶¶ 26 (stubble height); 41, 51, 54 (severe bank damage). By 2004, the Forest Service authorized an increase in AUMs for the fourth year in a row, having increased authorized numbers by over 30% since the year 2000. Even though the permittees fenced much of the canyon rim along the corridor on the Rattlesnake Unit prior to the 2004 grazing season, see Stipulation (Dkt # 94), the Ott Allotment again failed to meet standards in 2004 on portions of the unit outside the corridor. See Third Christie Decl. at ¶¶ 12–13 (stubble height and bank damage violations), Attach. 1, pp. 128–33. In addition, the fence constructed pursuant to the Stipulation to keep livestock out of the corridor was down by the end of the grazing season. See id. p. 134.

3. Violations of the river management plan and Forest Plan standards

Aside from the readily quantitative failures discussed in the preceding sections, the Forest Service has continually violated additional narrative standards found in the Forest Plan and river

management plans. For example, the Forest Plan requires the agency to “[m]anage the composition and productivity of key riparian vegetation to protect or enhance riparian-dependent resources” with “emphasis [] on the reestablishment of remnant hardwood shrub and tree communities.” AR Supp. 0001 at IV-56 (emphasis added). However, Dr. Kauffman has concluded that “[g]iven the levels of shrub use throughout the Malheur National Forest and in the wild and scenic river corridors in particular, this requirement is not being met. Rather, current livestock grazing management is resulting in the continued degradation of the riparian shrub and tree communities.” Kauffman Decl. at ¶ 32 (emphasis added). Kauffman also notes the Forest Service has failed to meet the Forest Plan requirements to “upgrade riparian areas that are not in a condition to meet management objectives or desired future conditions,” to “improve the rate of recovery in riparian areas,” and to maintain “sufficient streamside vegetation to maintain bank stability and fish habitat capability.” *Id.* ¶¶ 33–34. See also AR Supp. 0001, at IV-56 to IV-58.

That the Forest Service has utterly failed in its implementation of the river management plans is evident from simply reading the agency’s stated “Desired Future Condition” section in each plan. This section describes “what the future river corridor should be like if the management direction contained in this management plan is implemented.” PAR 0491 (emphasis added). For example, the Malheur River’s plan states that after ten years (which would have been in 2003), the “appearance of the wild segment of the river corridor will be natural [and a]lterations in the landscape from management activities are not evident;” that [i]ncreased streamside vegetation, both grasses and grass-like plants and hardwoods, has improved both streambank stability and shading”; and that “[r]iparian habitats are in satisfactory condition. . . . [and g]enerally, hardwood species are more dominant; trees and shrubs provide additional

canopies in the riparian zones.” PAR 0491–93. Clearly these desired conditions have not been achieved, as a result of the Forest Service’s failure to implement the river management plans.

D. The Forest Service’s Authorization of Grazing Practices That Prevent Attainment of RMOs and Continue to Violate Stubble Height, Bank Stability and Shrub Use Standards Also Violates the WSRA Duty to “Protect and Enhance” River Values.

Besides violating the NFMA requirement to manage livestock grazing consistently with the Forest Plan and the WSRA requirement to implement the wild and scenic river management plans by satisfying applicable grazing standards, the Forest Service’s annual grazing authorizations also violate the WSRA duty to “protect and enhance” the “outstandingly remarkable values” of the Malheur and North Fork Malheur wild and scenic rivers. Section 10(a) of the WSRA states that each component of the wild and scenic rivers system “shall be administered in such manner as to protect and enhance the values which caused it to be included in said system without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values.” 16 U.S.C. § 1281(a). Citing Hells Canyon Alliance v. U.S. Forest Serv., 227 F.3d 1170 (9th Cir. 2000) (hereinafter “HCA”), Defendants previously argued in this case that so long as a use does not “substantially interfere” with river values, it is permissible under the WSRA—in other words, that the “substantially interfere” clause takes precedence over the “protect and enhance” clause. Def. PI Resp. at 20–21. 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. The Forest Service’s interpretation ignores the plain language of section 10(a), the Secretarial Guidelines interpreting section 10(a), and the court cases interpreting section 10(a) in the context of livestock grazing.

The Secretaries of Agriculture and the Interior adopted guidelines for the four federal agencies that administer wild and scenic rivers. 47 Fed. Reg. 39,454 (Sept. 7, 1982). These guidelines are the “official agency interpretations” of the WSRA, Wilderness Soc’y v. Tyrrell, 918 F.2d 813, 820 n.5 (9th Cir. 1990), and were adopted in order to avoid what the Forest Service does here: one agency taking a litigation position that contradicts WSRA. See also Friends of the Yosemite Valley v. Norton, 348 F.3d 789, 796–97 (9th Cir. 2003) (stating Guidelines are “crafted to facilitate greater consistency in the agencies’ interpretation of the WSRA” and “[w]e defer to the Secretarial Guidelines as an exercise of the administering agencies’ authority to resolve ambiguities in the statute they must administer”). The Guidelines are clear that section 10(a) means the Forest Service must protect and enhance river values and that it can allow resource uses such as livestock grazing only if they do not adversely impact or degrade those values:

This section is interpreted as stating a nondegradation standard and enhancement policy for all designated river areas, regardless of classification. Each component will be managed to protect and enhance the values for which the river was designated, while providing for public recreation and resource uses which do not adversely impact or degrade those values.

47 Fed. Reg. at 39,458–59 (emphasis added). This interpretation is consistent with the Ninth Circuit’s opinion in HCA. In that case, the court made clear that as a predicate for considering actions related to resource uses along a river corridor, an agency must first ensure that its actions are “consistent with the protection and enhancement” of river values. 227 F.3d at 1177–78.

The Secretaries’ interpretation is also consistent with the court decisions that interpret and confirm the mandatory nature of this WSRA duty in the context of livestock grazing as a resource use. Ore. Natural Desert Ass’n v. Singleton, 47 F.Supp.2d 1182 (D. Or. 1998) (“The 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”) (emphasis added); Ore. Natural Desert Ass’n v. Green, 953 F.Supp. 1133, 1144 (D. Or. 1997) (“The court agrees with ONDA and the BLM that the BLM had authority to exclude cattle grazing from the river area. The plain language of the statute mandates that the federal agency administer the river in such a manner as ‘to protect and enhance the values which caused it to be included in said system’”) (emphasis added).

In Green, the court held that a BLM wild and scenic river management plan violated the WSRA, relying on a record that “reflect[ed] that cattle grazing has damaged native plants and plant communities” and agency surveys finding that “nearly half of the surveyed aquatic habitat remains in a ‘poor’ or ‘fair’ condition due to poor water quality and riparian vegetation.” 953 F.Supp. at 1145. The same type of evidence is present in this case. Grazing within these river corridors and their watersheds is plainly failing to protect and enhance the fisheries and wildlife habitat ORVs at issue. The river management plans each 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). Therefore, the Forest Service’s annual authorizations of grazing practices that cause continued violations of these standards is necessarily a failure to “protect and enhance” these river corridors, and as such is not in accordance with the WSRA in violation of 5 U.S.C. § 706(2)(A).

Moreover, the Forest Service’s desperate, last ditch attempts to protect the few remaining willows in portions of the corridors by placing them in small wire cages has resulted in what Christie describes as a “very unnatural look to the scenic corridor” that results in a collection of

“grotesquely misshapen . . . bottle brush bonsai shrubs.” Third Christie Decl. at ¶ 10, Attach. 1, pp. 2–4, 23–25, 27–28, 30 (examples of cages and “stands” of cages with suppressed willows inside, on Dollar Basin/Star Glade Allotment); see also Second Beschta Decl. at Attach. 1 (photo of caged willow). This certainly does not satisfy the Forest Service’s “desired future condition” that by 2003, the Malheur Wild and Scenic River’s scenic segment (which includes the Dollar Basin/Star Glade Allotment) would have “a natural or near natural appearance.” PAR 0491.

III. THE FOREST SERVICE HAS UNLAWFULLY WITHHELD OR UNREASONABLY DELAYED DEVELOPMENT OR REVISION OF ALLOTMENT MANAGEMENT PLANS, AND HAS ACTED ARBITRARILY AND CAPRICIOUSLY BY ANNUALLY AUTHORIZING GRAZING PRACTICES THAT VIOLATE STANDARDS, IN THE ABSENCE OF UPDATED AND INFORMED ENVIRONMENTAL ANALYSES.

Much of the grazing mismanagement and failure to comply with grazing standards in these areas could likely have been avoided if the Forest Service would comply with its duties to plan for grazing management on each allotment. Forest Service regulations impose a duty on the agency to develop an allotment management plan for each grazing allotment that is consistent with the Forest Plan. 36 C.F.R. § 222.2(c). AMPs specify the extent and manner of grazing that may occur on an allotment in order to meet a specific set of objectives. *Id.* § 222.1(b)(2). The Forest Service is required to develop AMPs through analyses of each allotment, and AMPs must be “updated as needed.” *Id.* § 222.2(b).

The Forest Service has acknowledged that reissuance of a permit to graze livestock on the public lands requires compliance with NEPA. AR Supp. 0233. Due to the number of permits it reissues each year, however, the agency fell behind in its ability to complete NEPA review on each grazing allotment in time to reissue expiring permits. In 1995, Congress responded to the threat that many permits would not be reissued due to the Forest Service’s failure to undertake

NEPA analyses, by passing the Rescissions Act. Pub. L. No. 104-19, 109 Stat. 194. See also AR Supp. 0233 (background information).

The Rescissions Act directed each national forest to “establish and adhere to” a schedule for completing NEPA reviews on grazing allotments. Id. at § 504(a). Under the Act, if a permit expired prior to the scheduled completion for NEPA review of the allotment, it would be reissued under the same terms and conditions as the expiring permit. Id. § 504(b). Permits would be reissued for the full term of the expired permit and modified or re-issued if necessary to conform to the subsequent NEPA analysis. Id. In 2003, Congress passed two additional appropriations bills containing provisions, which, taken together, allow the terms and conditions of a grazing permit renewed prior to or during 2003 to remain in effect until NEPA analysis is completed. Pub. L. No. 108-7, 117 Stat. 11, § 328 (Feb. 20, 2003); Pub. L. No. 108-11, § 2401 (Apr. 7, 2003). Importantly, these riders do “not exempt the Forest Service from completing the environmental analysis of grazing allotments on the 1996 schedule” and do “not prevent the Forest Service from taking appropriate action consistent with agency policies and procedures to address violations of permit terms and conditions.” H.R. Conf. Rep. No. 108-76, Ch. 4, § 2401 (available at 2003 WL 1876184). In short, these appropriations provisions do not absolve the Forest Service of its duty to develop or revise AMPs and conduct NEPA analyses.

In this case, the AMPs for the six allotments at issue, and their accompanying environmental analyses prepared pursuant to NEPA, are extremely outdated or nonexistent: the Dollar Basin/Star Glade Allotment has no AMP and its last “range allotment analysis” was prepared in 1965; the Bluebucket Allotment AMP was prepared in 1985; the North Fork Allotment AMP was prepared in 1979; the Flag Prairie Allotment has no AMP and its last “range allotment analysis” was prepared in 1980; the Spring Creek Allotment AMP was prepared in

1983; and the Ott Allotment has no AMP and its “last range allotment analysis” was completed in 1989. See PAR 6008, 6074, 2789, 6029, 6109, 6092. In the 1990 Forest Plan schedule for completing AMPs, which was prioritized by allotment condition, the allotments were scheduled to have AMPs either completed or updated as follows: Ott and Bluebucket by 1990; North Fork and Flag Prairie by 1991; Spring Creek by 1992; and Dollar Basin/Star Glade by 1994. AR Supp. 0001, at Table A-10. See also id. at IV-57 (“Grazing allotments in less than desirable condition will be identified and updated according to the schedule shown in Appendix A (Activity Schedule A-10)”). In its 1995 schedule to complete analyses of grazing allotments to comply with the Rescissions Act and NEPA, the Forest Service stated that the Malheur National Forest would initiate, complete and issue NEPA analyses and AMPs for the Dollar Basin/Star Glade and Bluebucket allotments by 1996; for the Flag Prairie Allotment by 1997; for the North Fork Allotment by 1999; for the Spring Creek Allotment by 2000; and for the Ott Allotment by 2001. PAR 5954–5959. Subsequent Malheur National Forest documents have continually bumped these dates back, scheduling the allotments at issue for completion of NEPA analysis as late as the year 2008. See PAR 1108–1110 (“AMP Analysis Required by the Rescissions Bill,” Jan. 23, 1996); PAR 2471–2474 (“Malheur NF Allotment Groupings for NEPA,” dated Jan. 26, 1999).

To date, none of these analyses have even been initiated. This failure to comply with a nondiscretionary duty is agency action unlawfully withheld. 5 U.S.C. § 706(1). The failure to complete any of the new or updated AMP processes, along with the associated NEPA analyses, on these allotments for nearly 15 years since the Forest Plan was adopted (let alone twenty years or more since the last AMPs were prepared) also constitutes unreasonable delay. When a discretionary duty is involved, courts review claims brought pursuant to the APA alleging unreasonable delay or unlawful withholding under a rule of reason test. See Independence

Mining Co. v. Babbitt, 105 F.3d 502, 507 (9th Cir. 1997); R.T. Vanderbilt Co. v. Babbitt, 113 F.3d 1061, 1065 (9th Cir. 1997). A court must consider a number of factors in determining whether a given delay is unreasonable, including the length of the delay, the interests prejudiced and injuries threatened by the delay, the amount of discretion vested in the agency by statute, the effect of delay on the statutory or regulatory scheme, and the complexity of the issues addressed. 105 F.3d at 507 (adopting Telecomm. Research & Action Ctr. v. FCC (“TRAC”), 750 F.2d 70, 80 (D.C. Cir. 1984)). Bad faith, though potentially relevant, is not required: “[T]he court need not ‘find any impropriety lurking behind agency lassitude in order to hold that agency action is ‘unreasonably delayed.’” TRAC, 750 F.2d at 80 (quoting Pub. Citizen Health Research Group v. Comm’r, 740 F.2d 21, 34 (D.C. Cir. 1984)). An examination of these factors clearly leads to the conclusion that the Forest Service has unreasonably delayed its grazing management planning for the Bluebucket, Dollar Basin/Star Glade, Flag Prairie, Spring Creek, North Fork and Ott allotments. This delay has resulted in continued mismanagement of grazing on these allotments, which has degraded wild and scenic river values and riparian and stream habitat. Accordingly, Plaintiffs are entitled to summary judgment in their favor on Claim Four.

IV. INJUNCTIVE RELIEF SUSPENDING GRAZING UNTIL RIPARIAN MANAGEMENT OBJECTIVES ARE ACHIEVED IS NECESSARY TO FORESTALL FURTHER CONTINUED ECOLOGICAL DEGRADATION.

It is clear that historic and current grazing practices, as authorized year after year by the Forest Service within and adjacent to the Malheur and North Fork Malheur wild and scenic river corridors, are causing continued ecological degradation. This court recognized in June 2004 that: (1) grazing is “likely causing ecological damage in the areas at issue”; and (2) “the way in which grazing has been managed on these lands is clearly at odds with the statutory mandates related to the protection of the river corridors and the species that depend on them.” ONDA v. USFS, No.

03-213-KI, slip op. at 18, 19 (D. Or. June 10, 2004). The ecological degradation apparent at that point has not abated over the course of the 2004 grazing season. This is in spite of the court's June 10, 2004 findings and admonition to Defendants that "I hope it goes without saying that the court is expecting full compliance with the terms of the 2004 AOIs." Id. at 20.

Because these wild and scenic river corridors and their watersheds continue to be degraded, nothing short of multi-year, complete rest from grazing can begin the long process of recovery needed. Dr. Beschta aptly summarizes why recovery will require many years: "Such changes did not happen during a single grazing season but instead resulted from the cumulative effects of grazing over a period of many years. Thus, any expectation of immediately recovering ORVs or achieving RMOs after resting an allotment for a growing season or two would be naiveté." Second Beschta Decl. at ¶ 8. The recovery of the Malheur and North Fork Malheur river systems "first requires a full recovery of diverse riparian plant communities, including key deciduous woody species." Id. ¶¶ 9–10.

Moreover, according to Dr. Beschta, exclosures on the forest, including the Summit Creek Exclosure on a tributary to the Malheur Wild and Scenic River, "continue to confirm that deciduous woody species have thrived and can continue to thrive along streams of the Malheur National Forest." Second Beschta Decl. at ¶ 11. See also id. ¶ 13 (same is true of beaver, which require willows and other woody species as food, and whose dams are vitally important mechanisms for increasing water availability and connecting streams to floodplains and meadows). However, recovery will take substantial time. Dr. Beschta concludes that each of the allotments in the Malheur and North Fork Malheur wild and scenic river corridors and their watersheds needs "multiple years of complete rest from grazing in order to initiate and move toward recovery of RMOs." Id. ¶¶ 16, 18 (also noting "many years of total exclusion will be

required to establish a pattern of recovery”). Jonathan Rhodes concurs and cites published studies indicating as many as twenty years or more may be required to recover riparian and stream system attributes such as channel width-to-depth ratio, pool frequency, woody deciduous vegetation, bank stability and overhanging banks. Third Rhodes Decl. at ¶¶ 13, 27. Even the Summit Creek Enclosure, which has been enclosed from livestock grazing for 26 years, still shows vestiges of unstable banks that are continuing to recover. Third Rhodes Decl. at ¶ 14; Second Beschta Decl. at ¶ 7. Dr. Kauffman also concluded that while these rivers and their watersheds have a very high recovery potential and degree of resiliency, they nevertheless will require many years of complete rest from grazing to recover from the extreme overgrazing they have suffered both historically and currently. Kauffman Decl. at ¶¶ 31, 37 (also predicting “dramatic increases in riparian/aquatic habitat structure and function with a rest of 20 to 30 years or more”). In short, nothing less than complete rest for multiple years will allow these areas to begin recovery toward attainment of riparian management objectives.

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 12th day of November, 2004.

Respectfully Submitted,

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