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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.

**PLAINTIFFS’ RESPONSE TO
MOTIONS TO STRIKE**

UNITED STATES FOREST SERV. et al.,

Defendants,

and

ROBERTSON RANCH et al.,

Intervenor-Defendants,

and

OREGON CATTLEMEN’S ASS’N,

Intervenor-Defendants.

INTRODUCTION

Federal Defendants and Intervenors Oregon Cattlemen’s Association (“OCA”) have moved this court to strike the Second Declaration of Robert L. Beschta (Dkt # 141), Third Declaration of Jonathan J. Rhodes (Dkt # 142), and Third Declaration of Christopher Christie (Dkt # 143), as well as all references to those documents in Plaintiffs’ memorandum in support of their motion for summary judgment. Federal Defendants also have moved this court to strike from that memorandum “all references to or reliance on” the First Beschta Declaration (Dkt # 82), Declaration of J. Boone Kauffman (Dkt # 83), First Rhodes Declaration (Dkt # 84), First Christie Declaration (Dkt # 85), Declaration of Linda Driskill (Dkt # 86), and Second Rhodes Declaration (Dkt # 105). See Def. Br. at 2, n.1. Because the declarations either fit within one or more of the exceptions to the general rule concerning extra-record evidence, should have been in the administrative record to begin with, are properly before the court because relief is at issue, and are admissible under the Federal Rules of Evidence, Plaintiffs respectfully request the court to deny both motions.

ARGUMENT

I. THE DECLARATIONS ARE PROPERLY BEFORE THE COURT BECAUSE THEY FIT WITHIN ONE OR MORE OF THE RECORD-REVIEW EXCEPTIONS.

Judicial review of an agency action “typically focuses on the administrative record in existence at the time of the decision and does not encompass any part of the record that is made initially in the reviewing court.” Southwest Ctr. for Biol. Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1450 (9th Cir. 1996). The Ninth Circuit has, however, crafted narrow exceptions to this general rule. Thus, district courts may admit extra-record evidence:

(1) if admission is necessary to determine “whether the agency has considered all relevant factors and has explained its decision,” (2) if “the agency has relied on

documents not in the record,” (3) “when supplementing the record is necessary to explain technical terms or complex subject matter,” or (4) “when plaintiffs make a showing of agency bad faith.”

Lands Council v. Powell, 379 F.3d 738, 747 (9th Cir. 2004) (quoting Southwest Ctr., 100 F.3d at 1450). These exceptions “operate to identify and plug holes in the administrative record.” Id.

Each of the three declarations submitted with Plaintiffs’ summary judgment papers are properly before the court because they fit the first and third exceptions enumerated above, and each of the declarations submitted with Plaintiffs’ preliminary injunction papers are properly before the court because they either fit exceptions one, two and/or three, and should have been in the administrative record in the first place.

A. The Declarations Fit Within the Exceptions Because They Show the Forest Service Did Not Consider All Relevant Factors and Adequately Explain its Decisions.

Although Defendants assert that Plaintiffs submitted the declarations “with nary a mention as to how they ostensibly fit within an exception” to the extra-record evidence rule, Def. Br. at 5, this simply is not true. Each of the Beschta, Kauffman and Rhodes declarations explicitly state that their purposes are multi-fold, and include: explaining how livestock grazing in the watersheds at issue is affecting ecological values, including bull trout and their habitat; discussing whether Forest Service-authorized grazing practices are resulting in compliance or non-compliance with relevant ecological standards; refuting assertions made by the Forest Service; and discussing relevant scientific literature. See First Beschta Decl. at ¶ 12, Second Beschta Decl. at 3, Kauffman Decl. at ¶ 13, First Rhodes Decl. at ¶ 12, Second Rhodes Decl. at ¶ 3, Third Rhodes Decl. at ¶¶ 3–4. In Plaintiffs’ summary judgment brief, they explained the relevance of these declarations under each of their Wild and Scenic Rivers Act and National Forest Management Act claims. For example, Plaintiffs describe how Forest Service and U.S.

Fish & Wildlife Service evidence shows the Forest Service’s annually authorized grazing is causing severe and ongoing ecological damage, which in turn is retarding and preventing attainment of INFISH Riparian Management Objectives (“RMOs”). Pl. Memo in Support at 19–20. Plaintiffs point out that the Forest Service has done little to even monitor that damage, let alone address it via meaningful, effective changes to grazing management in the annual operating instructions. See id. As explained in Rhodes’ Third Declaration, 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. Id. at 20 (citing Third Rhodes Decl. at ¶ 31).

Similarly, Dr. Kauffman’s declaration explains in detail how the Forest Service did not examine all relevant factors or adequately explain its decisions, with respect to consideration of the shrub component of these riparian systems. In its Forest Plan, wild and scenic river management plans, and AOIs, the Forest Service has adopted mandatory woody shrub vegetation use standards. See Pl. Memo in Support at 9–15 (describing all relevant grazing standards). However, the agency continually has failed to adequately monitor shrub use, as noted by the Fish & Wildlife Service and NOAA Fisheries. See PAR 5693–94 (complaining to Malheur National Forest Supervisor that 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,” and a “[l]ack of a standard shrub and bank damage monitoring protocol”). Dr. Kauffman’s declaration explains the significance of this gap in the Forest Service’s data and analyses, and concludes that “[g]iven the levels of shrub use throughout the Malheur National Forest and in the wild and scenic river corridors in particular,” the Forest Service has not satisfied its various shrub use-related standards and in fact “current

livestock grazing management is resulting in the continued degradation of the riparian shrub and tree communities.” See Pl. Memo in Support at 33 (citing Kauffman Decl. at ¶¶ 32–24; also citing Forest Plan requirements at AR Supp. 0001, at IV-56 to IV-58).

Finally, the Christie and Driskill declarations provide monitoring information and photographic evidence that do not appear in the administrative record. The Christie monitoring data in particular provide a comprehensive look at the ecological damage Forest Service-authorized grazing has caused in these river corridors and their watersheds. Because the Forest Service has no comparably comprehensive data, Christie’s declaration and monitoring is evidence that the Forest Service did not consider all relevant factors and did not adequately explain its decisions in the challenged AOIs. See, e.g., First Rhodes Decl. at ¶ 15 (Christie monitoring data provide “considerably more detailed information” than Forest Service’s own monitoring and monitoring reports). Plaintiffs’ opening summary judgment brief describes in several sections how the Christie monitoring data refute Defendants’ arguments that Forest Service-authorized grazing practices are not resulting in continued violations of INFISH, bank stability, shrub use, stubble height and other standards. See Pl. Memo in Support at 20–23, 27–32, 36–37.

Christie’s third declaration also is directly relevant to the Forest Service’s argument that the changes made in the 2004 AOIs were “significant” and would result in no further violations of standards. See Def. Mem. in Resp. to Plaintiffs’ Mot. for Preliminary Injunction (Dkt # 97), at 9, 11–12, 22–23 (all asserting Forest Service made “meaningful modifications” and “significant changes” that would “further improve management”). Although Defendants have not yet filed their brief and cross-motion responding to Plaintiffs’ motion for summary judgment, one would assume Defendants will continue to assert the grazing management changes made prior to the

2004 grazing season satisfied INFISH’s requirement to modify grazing practices that retard attainment of riparian management objectives. Plaintiffs’ argument, as supported by the challenged declarations, is that these and all previous management changes have continued to result in failures to meet standards, and only permanent injunctive relief can at this point satisfy INFISH and begin the long process of ecological recovery these watersheds will require. Pl. Memo in Support at 40–42. A court may consider post-decisional evidence when that evidence confirms or, as in this case, disproves the assumptions upon which the challenged decision relies. See Ass’n of Pacific Fisheries v. EPA, 615 F.2d 794, 811–12 (9th Cir. 1980) (“If the post decisional studies showed that the Agency proceeded upon assumptions that were entirely fictional or utterly without scientific support, then post decisional data might be utilized by the party challenging the regulation.”).

It therefore is difficult to grasp how Federal Defendants can accuse Plaintiffs of “nary a mention” of why the court should consider these expert declarations. The declarations are directly relevant to the question of whether the Forest Service considered all relevant factors and has explained its decisions in the annual operating instructions. Thus, they fit the first extra-record evidence exception.

B. The Declarations Fit Within the Exceptions Because They Help Explain Complex Subject Matter.

The declarations also explain “complex subject matter” in that they provide discussions that do not appear anywhere else in the administrative record concerning complex riparian and hydrological processes and the ecological implications of the Forest Service’s failure to meet basic grazing standards. The AOIs, which are the decisions challenged in this litigation, certainly do not contain any explanation of riparian and hydrological processes. See BAR 733–47, DBAR 583–88, FPAR 1075–85, OTTAR 770–75, SCAR 1468–84, NFAR 686–690 (2004 AOIs). The

Forest Service’s most detailed look at these processes and factors occurs in its biological assessments. See PAR 6627–71 (2004 BAs). However, these documents do not provide the level of detail that Beschta, Kauffman and Rhodes provide; nor do they acknowledge or discuss in any detail the ecological degradation described by these experts. In fact, each BA’s “Analysis of Potential Effects” section, see, e.g., PAR at 6633 (Bluebucket Allotment 2004 BA), simply refers back to a non-specific “associated document” titled “Information and Effects Common to All Grazing Allotments on the Malheur National Forest.” PAR 6602–11. In particular, Beschta, Kauffman and Rhodes highlight the long-term effects of continued grazing combined with the past damage these river corridors and watersheds have suffered. See, e.g., Second Beschta Decl. at ¶¶ 11–17 (comparing allotments at issue with relevant exclusions to inform short- and long-term impacts, degradation and potential for recovery). Because the Forest Service failed to collect, present or discuss information specific to the allotments and watersheds at issue in this litigation, and in particular failed to consider the long-term effects of continued grazing combined with past and present ecological damage, the information contained in the Beschta, Kauffman and Rhodes declarations, as well as the Christie monitoring data, is critically important to helping explain this complex technical subject matter. Therefore, the declarations are properly before the court under the third extra-record evidence exception and should not be stricken.

C. The Declarations Filed With Plaintiffs’ Preliminary Injunction Motion Should Be in the Administrative Record.

While the First Beschta Declaration, Kauffman Declaration, First and Second Rhodes Declarations and First Christie Declaration each fit within one or more of the extra-record exceptions as discussed above, they also should not be stricken because they should already be in the administrative record. Defendants acknowledge that the most recent agency decisions

challenged in this action are the Forest Service's 2004 annual operating instructions for the six allotments at issue. Def. Br. at 3. Those AOIs were finalized in late-May 2004. See Dkt # 111 (Defendants' Notice of Filing Final, Executed Versions of Certain Exhibits in Support of Response). Plaintiffs filed the First Beschta Declaration, First and Second Rhodes Declarations, First and Second Christie Declarations, and Driskill Declaration on March 31, 2004 and May 17, 2004. Dkt # 82, 83, 84, 85, 86, 104, 105. Therefore, Defendants cannot complain that the Forest Service did not have these declarations and their supporting materials before it when the agency made its 2004 grazing authorization decisions. Because those materials were in the agency's possession prior to its final decisions, they are properly before the court and should in fact be in the administrative record.

That Plaintiffs did not specifically request Defendants to add those materials to the administrative record after Defendants lodged the record should not prejudice Plaintiffs. By providing those materials to Defendants in March, well before turn-out for the 2004 grazing season, and by requesting multiple times in the two months prior to filing the preliminary injunction motion that Defendants consider resting the wild and scenic river corridors pending the court's decision on the merits, Plaintiffs made a good-faith effort to ensure the Forest Service would consider Plaintiffs' data and findings showing extreme ecological damage to the areas in question. Therefore, examination of these declarations clearly would not thwart the "long-standing rule that 'the focal point for judicial review should be the administrative record already in existence'" at the time the decision was made. Inland Empire Public Lands Council v. Glickman, 88 F.3d 697, 703 (9th Cir. 1996) (citing Camp v. Pitts, 411 U.S. 138, 142 (1973)). Thus, they are properly before the court and should not be stricken.¹

¹ Note also that these documents alternatively could be admitted via the second extra-record

II. THE DECLARATIONS ARE PROPERLY BEFORE THE COURT BECAUSE RELIEF IS AT ISSUE IN PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT.

Apart from their admissibility on the merits, Plaintiffs' declaration testimony is admissible to support their request for injunctive relief. See, e.g., Idaho Watersheds Project v. Hahn, 307 F.3d 815, 833-34 (9th Cir. 2002) (reviewing agency extra-record declaration filed to inform permanent injunction); see also Leboeuf, Lamb, Greene & Macrae, LLP v. Abraham, 215 F.Supp.2d 73, 82 (D.D.C. 2002) (supplemental extra-record evidence allowed "in cases where relief is at issue") (citing Esch v. Yeutter, 876 F.2d 976, 991 (D.C. Cir. 1989)). As this court is aware, Plaintiffs have requested the court to enjoin livestock grazing on portions of the allotments at issue "unless and until Defendants have properly implemented new AMPs so that these allotments, including all non-wild and scenic river corridor pastures, meet and continue to be in compliance with INFISH, the Malheur LRMP, the comprehensive river management plans, and all other applicable grazing standards." See Mot. for Summary Judgment at ¶ F (Dkt # 138). Plaintiffs support that request in part by the declarations of Beschta, Kauffman, Rhodes, Christie and Driskill, who provide evidence that the Forest Service's annual grazing authorizations have caused, and will continue to cause, significant ecological degradation within the Malheur and North Fork Malheur wild and scenic river corridors and their watersheds. See, e.g., Pl. Memo in Support at 40-42 (discussing why injunctive relief is necessary and relying on monitoring data

exception, which allows the court to admit extra-record materials where "the agency has relied on documents not in the record." Lands Council v. Powell, 379 F.3d at 747. As noted above, because the Forest Service did not complete its 2004 grazing authorizations until at least May 26, 2004, the agency had Plaintiffs' monitoring data and expert findings and recommendations in its possession for two months prior to making final decisions on its 2004 AOIs. Moreover, there is no question the Forest Service reviewed Plaintiffs' expert and other evidence prior to issuing its annual grazing authorizations for the 2004 grazing season. See, e.g., "OSU Trip Report" (attached to Defendants' Memorandum in Opposition to Motion for Preliminary Injunction, Dkt # 96) (discussing expert declarations and Christie monitoring data); Wiley Decl. (Dkt # 98); Phelps Decl. (Dkt # 100).

and expert conclusions and recommendations). Thus, because permanent injunctive relief is at issue in Plaintiffs' motion for summary judgment, the challenged declarations are properly before the court and should not be stricken.

III. DEFENDANTS FAIL TO PROVIDE ANY CONVINCING SUPPORT FOR THEIR ARGUMENT THAT CHRIS CHRISTIE IS NOT QUALIFIED TO COLLECT OR PRESENT THE MONITORING DATA ATTACHED TO HIS DECLARATION.

Defendants argue that the Christie monitoring data “is not sufficiently reliable” and must be stricken because Plaintiffs have not established “that he is qualified to accurately collect such data and to follow accepted data-gathering methods.” Def. Br. at 8. Defendants claim that “[n]owhere” do Plaintiffs provide information on Christie’s experience, training, or methods. *Id.* This claim is inexplicable because Christie sets out in detail his long-time monitoring of ecological conditions on public lands, First Christie Decl. at ¶¶ 2–7, his monitoring efforts on the Malheur National Forest, including his use of the Forest Service’s own monitoring protocols, *id.* at ¶¶ 10–15, Third Christie Decl. at ¶¶ 4–7, and how his photographs and monitoring information document his observations of ecological conditions throughout the Malheur and North Fork Malheur wild and scenic river corridors, First Christie Decl. at ¶ 22, Third Christie Decl. at ¶¶ 14, 18–19.

As Plaintiffs pointed out previously, Dr. Kauffman assessed Christie’s data and photos and compared them to his own observations and experience, finding Christie’s work to be completely competent and professional. *See* Kauffman Decl. at ¶¶ 9, 17–19, 21, 26, 28, and 15 (stating he “found Christie’s work to be more thorough and definitive than the qualitative/observational data present in the Agency Compliance Monitoring cards of the Malheur National Forest” and that Christie’s measurements “are based on the Forest Service’s own protocols for measurement and analysis, and provide detailed information on the

measurements, including raw data, monitoring data, thorough information on monitoring locations, and photo annotations with detailed observations from the areas monitored”). In addition, the court already has observed that although “[b]oth the federal defendants and the intervenors criticize the usefulness of the Christie data, [] it appears to have been collected using the Forest Service’s own protocol and is considered sound by plaintiffs’ experts.” Ore. Natural Desert Ass’n v. U.S. Forest Serv., No. 03-213, slip op. at 12 (D. Or. June 10, 2004) (Dkt # 114). In short, Defendants cannot reasonably question that Christie’s monitoring is of professional quality and serves to fill in significant gaps left by inadequate or nonexistent Forest Service data.

Defendants also seek to strike the Christie declarations and monitoring data based on the proposition in Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999), that the court must assess “whether the witness is qualified to offer an opinion of scientific knowledge on the subject matter of his testimony.” Def. Br. at 8. By focusing on “scientific” knowledge, academic credentials, and professional training or experience, Defendants miss the central holding of Kumho. In that case, the Supreme Court dealt explicitly with the issue how its holding in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), applies to the testimony of experts who are not scientists. See 526 U.S. at 141. The Court held that Federal Rule of Evidence 702 “grants the district judge the discretionary authority, reviewable for its abuse, to determine reliability in light of the particular facts and circumstances of the particular case.” Id. at 158. The Court also made clear that Daubert’s general holding setting forth the district judge’s “gatekeeping” obligation allows the court to consider “one or more” of the Daubert factors and that “the test for reliability is ‘flexible’.” Id. at 141. Thus, “the law grants a district court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination.” Id.

In this case, the information collected and presented by Christie certainly conforms to the strictures of Rule 702, which states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Fed. R. Evid. 702 (emphasis added). As the Court observed in Kumho, “[t]his language makes no relevant distinction between ‘scientific’ knowledge and ‘technical’ or ‘other specialized’ knowledge.” 526 U.S. at 147. Applying the relevant Daubert reliability factors to the Christie data, it is clear that Christie relied upon tested monitoring methodologies (the Forest Service’s own monitoring protocols) which have standards controlling the techniques (see, e.g., Third Christie Decl. at ¶¶ 4–6, explaining Forest Service protocol for stubble height, bank damage and shrub use standards), and which are “generally accepted” (in that the agency itself states this is its standard monitoring protocol for these riparian attributes). See Daubert, 509 U.S. at 592–94. Moreover, Christie’s ability to perform this monitoring cannot reasonably be questioned. In fact, Dr. Kauffman stated not only that he found Christie’s work “to be more thorough and definitive” than the Forest Service’s own data, but also that “had the USFS hired a seasonal technician with the proper training to collect greenline stubble heights, shrub use, and bank damage, I have no doubt the technician would have arrived at the same conclusion [as Christie].” Kauffman Decl. at ¶ 15. In short, Defendants have provided no convincing reasons why the Christie declarations and monitoring information are not professionally competent and accurate.

IV. THE RECORD DOES NOT SUPPORT DEFENDANTS’ ARGUMENT THAT PLAINTIFFS FAILED TO SUBMIT THIS INFORMATION TO THE FOREST SERVICE IN A TIMELY MANNER.

Defendants also argue that Plaintiffs failed to submit the Second Beschta (Dkt # 141), Third Rhodes (Dkt # 142), and Third Christie (Dkt # 143) declarations, to the Forest Service in a

timely manner and that allowing Plaintiffs to rely on those documents “would run roughshod over the principle that post-decision information generally may not be advanced as a new rationalization either for sustaining or attacking an agency’s decision.” Def. Br. at 10. To support this argument, Defendants rely on the Supreme Court’s statement that “[p]ersons challenging an agency’s compliance with NEPA must ‘structure their participation so that it . . . alerts the agency to the [parties’] position and contentions,’ in order to allow the agency to give the issue meaningful consideration.” Dept. of Transp. v. Pub. Citizen, 124 S.Ct. 2204, 2213 (2004) (citing Vermont Yankee Nuclear Pwr. Corp. v. Natural Res. Def. Council, 435 U.S. 519, 553 (1978)). That statement is irrelevant to this case, though, because Plaintiffs are not challenging a NEPA decision, but rather are challenging the Forest Service’s annual grazing authorizations in its AOIs. In Public Citizen, the Court found that because the respondents did not during the NEPA process raise the issues they later complained about in court, the agency “was not given the opportunity to examine” those issues. Id. at 2213–14. In this case, there is no NEPA process accompanying the Forest Service’s issuance of annual operating instructions and therefore no opportunity for Plaintiffs to comment on or otherwise participate in that agency decision. See, e.g., Riverhawks v. Zepeda, 228 F.Supp.2d 1173, 1181 (D. Or. 2002) (“defendants cannot assail plaintiffs’ failure to submit their expert reports when the Forest Service did not provide public notice or an opportunity for comment regarding the proposal”).²

More important, though, is the fact that the declarations do not introduce “new rationalization[s]” to attack the Forest Service’s decision. Rather, they further explain the injuries to Plaintiffs’ organizational (and individual members’) interests and the ecosystems they seek to

² Furthermore, as alleged in Plaintiffs’ Fourth Claim, the allotment management plans for the six allotments at issue, and their accompanying environmental analyses prepared pursuant to NEPA, are extremely outdated or nonexistent. See Pl. Memo in Support at 37–40. Thus, there also has been no opportunity to present this information via the AMP process.

conserve, the significant factors the Forest Service failed to consider when it issued the challenged AOIs, and the threats these ecosystems face and how the AOIs' management schemes do not adequately address those threats. Furthermore, Beschta and Rhodes expressly state in their most recent declarations that they stand by the findings and conclusions in their previous declarations and they incorporate those findings into their new declarations. See, e.g., Third Rhodes Decl. at ¶ 5; Second Beschta Decl. at ¶ 4. In other words, their November 2004 declarations further document the same comprehensive array of ecological damage resulting from past and current livestock grazing throughout these wild and scenic river corridors and their watersheds. There are no new rationalizations introduced and the only post-decision evidence presented (by Christie) confirms previous findings and conclusions and goes directly to Plaintiffs' request for relief. Again, that evidence disproves the validity of the assumptions the Forest Service relied upon when it issued its 2004 AOIs. Therefore, Defendants' "independent ground" for striking these declarations also is without support.

V. DEFENDANTS' ARGUMENT THAT PLAINTIFFS' DECLARANTS MAKE INADMISSIBLE LEGAL CONCLUSIONS IS WITHOUT MERIT.

Finally, Defendants argue that Plaintiffs' declarants draw "inadmissible legal conclusions" and make arguments that should be in the briefing. Def. Br. at 9. Not only do Defendants fail to cite a single specific instance from the declarations to support this assertion, but they also provide case support inapplicable to the situation at issue in this case. The ONRC slip opinion attached to Defendants' brief is inapposite because the court rejects a declarants' discussion of inadequacies in an agency environmental assessment prepared pursuant to NEPA. See Ore. Natural Res. Council Fund v. Bureau of Land Mgmt., No. 03-478, slip op. at 3 (D. Or. Feb. 17, 2004). As described in detail above, however, this case involves the Forest Service's annual operating instructions for livestock grazing rather than a challenge to a NEPA document,

and the declarations in this case, including the comprehensive ecological monitoring performed by Chris Christie, serve to highlight relevant factors not adequately considered by the Forest Service and to explain complex riparian and hydrological issues. Moreover, the experts' assessments regarding whether key ecological standards have been violated are entirely appropriate because they are scientific, not legal, standards. In any event, Federal Rule of Evidence 704 expressly allows experts to testify on "ultimate issues." Fed. R. Evid. 704(a).

CONCLUSION

In short, Defendants ask this court to review the merits and remedies of this action in a vacuum secure from potentially damaging information. But this information helps explain key factors the Forest Service failed to consider and complex subject matter concerning the impacts continued grazing is having on these wild and scenic river corridors and their watersheds. As the Ninth Circuit has stated previously:

[I]t is both unrealistic and unwise to "straightjacket" the reviewing court with the administrative record. It will often be impossible, especially when highly technical matters are involved, for the court to determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not. The court cannot adequately discharge its duty to engage in a "substantial inquiry" if it is required to take the agency's word that it considered all relevant matters.

Asarco Inc. v. EPA, 616 F.2d 1153, 1160 (9th Cir. 1980). Therefore, for the above-stated reasons, Plaintiffs respectfully request the court to deny Defendants' motions to strike.

DATED this 3rd day of January, 2005

Respectfully Submitted,

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