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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OREGON NATURAL DESERT ASS’N
and **CENTER FOR BIOLOGICAL**
DIVERSITY

Case No. 06-946-KI

Plaintiffs,

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

v.

D. ROBERT LOHN, Regional Administrator,
Nat’l Marine Fisheries Serv., **NAT’L MARINE**
FISHERIES SERV., **CARLOS M.**
GUTIERREZ, Secretary, U.S. Department of
Commerce, **DAVID R. ALLEN**, Regional
Director, U.S. Fish and Wildlife Service, **GARY**
S. MILLER, Field Supervisor, U.S. Fish and
Wildlife Service, **U.S. FISH AND WILDLIFE**
SERVICE, and **DIRK KEMPTHORNE**,
Secretary, U.S. Department of the Interior,

Defendants.

(Environmental Matter)

INTRODUCTION

1. This is an action for declaratory and injunctive relief challenging the failure of agencies within both the U.S. Department of Commerce and the U.S. Department of the Interior to comply with the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.*, in managing public lands supporting threatened steelhead trout and bull trout in eastern Oregon’s Malheur National Forest. Continuing a long history of violations, the National Marine Fisheries Service and the U.S. Fish and Wildlife Service have failed to comply with the ESA by issuing flawed biological opinions concerning the impacts of domestic livestock grazing within threatened fish habitat.

2. Specifically, Defendants have violated the ESA and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701–706, by issuing three biological opinions in 2006 that are arbitrary, capricious and not in compliance with the ESA. The biological opinions are flawed because they do not properly consider whether the livestock grazing will destroy or adversely modify designated steelhead critical habitat; do not properly consider whether the livestock grazing will jeopardize the continued existence of steelhead and bull trout; and contain Incidental Take Statements that inadequately quantify take amounts and inexplicably raise the amount of take permitted.

3. This action requests that the Court declare that the three challenged biological opinions violate the ESA, its implementing regulations, and the APA; hold unlawful and set aside the biological opinions, as directed by the APA; and order National Marine Fisheries Service and U.S. Fish and Wildlife Service to rescind the biological opinions, including the associated incidental take statements, and consult again to issue valid biological opinions for the Malheur National Forest grazing program.

JURISDICTION AND VENUE

4. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 (federal question) because this action arises under the laws of the United States, including the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*; the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*; the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*; and the Equal Access to Justice Act, 28 U.S.C. § 2412 *et seq.* An actual, justiciable controversy exists between the parties, and the requested relief is therefore proper under 28 U.S.C. §§ 2201–2202 and 5 U.S.C. §§ 701–706.

5. Venue is proper in this Court under 28 U.S.C. § 1391 and 5 U.S.C. § 552(a)(4)(B) because a substantial part of the events or omissions giving rise to the claims herein occurred within this judicial district, some or all of the agency records in question may be located in this district, and Plaintiff’s principal place of business is in this district.

PARTIES

6. Plaintiff OREGON NATURAL DESERT ASSOCIATION (“ONDA”) is an Oregon non-profit public interest organization with approximately 1000 members. It is headquartered in Bend, Oregon and also has offices in Portland, Oregon. ONDA’s mission is to protect, defend, and restore forever the health of Oregon’s native deserts. ONDA actively participates in proceedings and decisions by federal agencies concerning the management and protection of anadromous and non-anadromous native fish species in eastern Oregon. ONDA’s members and staff regularly use lands throughout the Malheur National Forest’s John Day and Malheur river basins for observation, research, aesthetic enjoyment, and other recreational, scientific, and educational activities. ONDA’s members and staff have researched, studied, observed, and sought protection for many federally listed threatened and endangered species that reside in these river basins, including threatened steelhead and bull trout, and plan to continue to

do so. ONDA's members and staff derive scientific, recreational, conservation, and aesthetic benefits from these rare species' existence in the wild. ONDA brings this action on its own behalf and on behalf of its adversely affected members and staff.

7. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY, Inc. ("Center" or "CBD") is a New Mexico non-profit corporation with offices in Portland, Oregon; Phoenix and Tucson, Arizona; Silver City, New Mexico; San Diego, San Francisco, and Joshua Tree, California; and Washington, D.C. The Center is actively involved in species and habitat protection issues throughout North America. The Center has over 22,000 members throughout North America, including in 775 in Oregon. The Center's members and staff include area residents with biological health, educational, scientific research, moral, spiritual and aesthetic interests in the species implicated in this suit and the habitat involved. The Center's members and staff have and plan to continue to utilize the areas for recreational, scientific and spiritual endeavors. CBD members and staff have hiked, bird watched, camped and recreated within and adjacent to the public lands at issue in this lawsuit on numerous occasions and plan to return to do so again. The Center has an active Western Trout campaign that seeks to protect and recover native trout species, including the bull trout. One of the Center's primary missions is to protect and restore trout habitat and populations throughout western North America. The degraded conditions of the streams in the Malheur National Forest are a detriment to achieving the Center's goal of protection and restoration, and the Center's members and staff continue to be injured by the mismanagement of these areas.

8. Defendant D. ROBERT LOHN is sued solely in his official capacity as Regional Administrator of the National Marine Fisheries Service Northwest Regional Office. The Regional Administrator is one of the officials legally responsible for administering the ESA and

has delegated authority for developing regulations and guidelines for carrying out ESA responsibilities. Mr. LOHN signed the two National Marine Fisheries Service biological opinions challenged in this action.

9. Defendant NATIONAL MARINE FISHERIES SERVICE (“NMFS”) is a federal agency within the Department of Commerce, which has the primary responsibility for implementing the ESA for anadromous fish species. NMFS issued two of the biological opinions challenged in this action.

10. Defendant CARLOS M. GUTIERREZ is sued solely in his official capacity as Secretary of the Department of Commerce. The Secretary of Commerce is the one of the officials responsible for overseeing implementation of the ESA.

11. Defendant DAVID R. ALLEN is sued solely in his official capacity as Regional Director of the U.S. Fish and Wildlife Service Pacific Region. The Regional Director is one of the officials legally responsible for administering the ESA and has delegated authorities for developing regulations and guidelines for carrying out ESA responsibilities.

12. Defendant GARY S. MILLER is sued solely in his official capacity as Field Supervisor for the U.S. Fish and Wildlife Service La Grande Field Office. The Field Supervisor is one of the officials responsible for administering the ESA for inland fish species. Mr. MILLER signed the U.S. Fish and Wildlife Service biological opinion challenged in this action.

13. Defendant U.S. FISH AND WILDLIFE SERVICE (“FWS”) is a federal agency within the Department of the Interior, which has the primary responsibility for implementing the ESA for inland fish species. FWS issued one of the biological opinions challenged in this action.

14. Defendant DIRK KEMPTHORNE is sued solely in his official capacity as Secretary of the Interior. The Secretary of the Interior is one of the officials responsible for overseeing implementation of the ESA.

LEGAL BACKGROUND

15. The ESA was enacted to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such [] species.” 16 U.S.C. § 1532(b).

16. The ESA requires the Secretary of the Interior or Commerce (“the Secretary”) to list species either as endangered or threatened based on the present or threatened destruction, modification, or curtailment of a species’ habitat or range; overutilization for commercial, recreational, scientific, or educational purposes; disease or predation; the inadequacy of existing regulatory mechanisms; or other natural or manmade factors affecting the species’ continued existence. 16 U.S.C. § 1533(a)(1). An endangered species is one “in danger of extinction throughout all or a significant portion of its range.” *Id.* § 1532(6). A threatened species is one that is “likely to become an endangered species within the foreseeable future.” *Id.* at § 1532(20). The ESA requires that the Secretary make listing determinations “solely on the basis of the best scientific and commercial data available.” *Id.* § 1533(b)(1)(A).

17. Concurrently with listing a species as threatened or endangered, the Secretary also must designate the species’ “critical habitat.” 16 U.S.C. § 1533(a)(3). Critical habitat is the area that contains the physical or biological features essential to the “conservation” of the species and which may require special protection or management considerations. *Id.* § 1532(5)(A). “Conservation” means “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to

this Act are no longer necessary.” *Id.* at §1532(3). In other words, critical habitat is the habitat essential for the recovery of the species.

18. Section 9 of the ESA prohibits any person from “taking” a threatened or endangered species. 16 U.S.C. § 1538(a)(1); see also 50 C.F.R. § 17.31. “Take” is defined broadly under the ESA and its regulations to include harassing, harming, wounding, killing, trapping, capturing, or collecting a protected species either directly or by degrading its habitat sufficiently to impair essential behavior patterns. 16 U.S.C. § 1532(19).

19. One exception to Section 9’s take prohibition is relevant here. A federal agency may take listed species in accordance with an Incidental Take Statement (“ITS”). 16 U.S.C. § 1536(b)(4). Only if the Terms and Conditions of the ITS are followed is a person exempted from Section 9’s take prohibitions. *Id.* § 1536(o)(2).

20. Under ESA § 7(a)(2), all federal agencies must “insure that any action authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of [designated critical] habitat.” 16 U.S.C. § 1536(a)(2).

21. To fulfill its Section 7(a)(2) mandate, if a species may be present, an action agency must prepare a biological assessment (“BA”) for the purpose of identifying endangered or threatened species which are likely to be affected by an action. 16 U.S.C. § 1536(c)(1). Through BAs, action agencies evaluate potential effects and determine whether a species is “likely to be adversely affected” (“LAA”) or “not likely to be adversely affected” (“NLAA”) by the action. 50 C.F.R. § 402.12. If a proposed action “may affect” a listed species or its critical habitat, the action agency must consult with either NMFS or FWS, depending on which agency has jurisdiction over the species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). For the LAA

actions, the action agency must seek “formal” consultation with NMFS or FWS. 50 C.F.R. § 402.14(a). For the NLAA actions, the agency action may seek “informal” consultation with NMFS or FWS. See id. § 402.14(b). NMFS is responsible for consultations regarding anadromous species such as steelhead trout, while FWS is responsible for inland and terrestrial species such as bull trout. See Id. § 402.01.

22. Authorization of grazing is an action “authorized, funded, or carried out” by the U.S. Forest Service and therefore requires consultation under the ESA. 16 U.S.C. § 1536(a)(2).

23. During consultation, NMFS and FWS must review all relevant information, evaluate the current status of the species or critical habitat, and evaluate the effects and cumulative effects of the proposed action on the listed species and their critical habitat. 50 C.F.R. § 402.14(g)(1)–(3).

24. During the consultation process, the action agency may not make any irreversible or irretrievable commitments of resources, which would have the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures. 16 U.S.C. § 1536(d).

25. Formal consultation under Section 7(a)(2) results in issuance of a biological opinion (“BiOp”) by NMFS or FWS. The BiOp determines whether the proposed action is likely to jeopardize the continued existence of a listed species or adversely modify the species’ critical habitat. If an action’s impact on a species’ habitat threatens *either* the recovery or the survival of a species, the BiOp must conclude that the action adversely modifies critical habitat.

26. The BiOp must include a detailed discussion of the effects of the action on listed species or critical habitat, 16 U.S.C. § 1536(b)(3)(A), 50 C.F.R. § 402.14(h)(2), and the cumulative effects on the listed species or critical habitat. 50 C.F.R. § 402.14(g)(3).

27. “Effects of the action” refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, added to the environmental baseline. 50 C.F.R. § 402.02.

28. Cumulative effects are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation. Id.

29. The BiOp should include an Incidental Take Statement, if such take may occur. 50 C.F.R. § 402.14(g)(7). The ITS (1) specifies the amount or extent of the impact on the species of any incidental taking; (2) specifies Reasonable and Prudent Measures to minimize such impact; and (3) sets forth the Terms and Conditions that must be complied with to implement the Reasonable and Prudent Measures. Id. § 402.14(i)(1)(i), (ii), (iv).

30. If during the course of the action, the amount or extent of incidental taking specified in the incidental take statement is exceeded, the action agency must reinitiate consultation immediately. 50 C.F.R. §§ 402.14(i)(4), 402.16(a).

31. Throughout its analysis, the consulting agencies must utilize the “best scientific and commercial data available.” 16 U.S.C. § 1536(a)(2); 50 C.F.R. §402.14(d).

32. The action agency has an independent duty to comply with Section 7’s prohibition against jeopardy and adverse modification.

FACTUAL BACKGROUND

Biological Information

33. The Malheur National Forest annually consults with both NMFS and the FWS regarding the impacts of the Forest Service’s grazing authorizations on threatened Middle Columbia River steelhead trout (*Oncorhynchus mykiss*) and threatened bull trout (*Salvelinus*

confluentus). The Forest Service's authorized grazing has resulted in, and continues to result in, significant damage to riparian resources and stream habitat throughout the Malheur National Forest.

34. Direct effects of livestock grazing on steelhead and bull trout occur when livestock enter streams to loaf, drink, or cross the stream. Livestock can trample redds (spawning nests), destroy or dislodge young fish that concentrate in large numbers in small areas, and harass the fish.

35. Livestock grazing indirectly degrades steelhead and bull trout habitat by removing riparian vegetation, destabilizing stream banks, widening stream channels, promoting incised channels, lowering water tables, reducing pool frequency, increasing soil erosion, and altering water quality. These effects reduce cover, increase summer water temperatures, promote formation of anchor ice in winter, and increase sedimentation into spawning and rearing habitats.

36. NMFS listed the Middle Columbia River steelhead trout ("MCR steelhead" or "steelhead") as threatened under the ESA on March 25, 1999. The listing rule stated that the John Day River population is substantially lower than historic levels, and the serious declines in abundance "are especially troublesome, because the John Day River has supported the largest populations of naturally spawning summer steelhead in the [Evolutionary Significant Unit¹]."

37. NMFS designated critical habitat for MCR steelhead on September 2, 2005. The designation took effect on January 2, 2005. The designated critical habitat encompasses most occupied MCR steelhead habitat. Many streams within the Malheur National Forest are designated, including the tributaries of the Upper John Day, Middle Fork John Day, and North Fork John Day rivers.

¹ Evolutionary Significant Units of Pacific salmon populations are considered to be Distinct Population Segments, which are species under the ESA. 56 Fed. Reg. 58612 (Nov. 20, 1991); 16 U.S.C. § 1532(16).

38. According to NMFS's critical habitat rule, grazing is one of the activities that threatens the physical and biological features essential to steelhead. The rule identifies the primary constituent elements of salmonid critical habitat as: freshwater spawning sites that support spawning, incubation, and larval development; freshwater rearing sites with features such as shade, aquatic vegetation, and undercut banks; and freshwater migration corridors free of obstruction.

39. The best available science demonstrates that the MCR steelhead population remains imperiled and that grazing poses a significant, ongoing threat that is frustrating MCR steelhead recovery.

40. The FWS listed bull trout as a threatened species, effective July 10, 1998. The Columbia River distinct population segment² of bull trout, which includes the bull trout in the Middle Fork John Day, Upper John Day, Upper Malheur, and North Fork Malheur rivers on the Malheur National Forest, is threatened by habitat degradation and fragmentation, blockage of migratory corridors, poor water quality, past fisheries management practices, and the introduction of non-native species.

41. The FWS designated critical habitat for bull trout on September 26, 2005. The designation did not include habitat on the Malheur National Forest. There is, however, critical habitat adjacent to and downstream of Forest Service lands that are affected by the proposed grazing, and the critical habitat designation is currently under litigation.

42. The best available science demonstrates that the bull trout population remains imperiled and that grazing poses a significant, ongoing threat that is frustrating bull trout recovery.

² Distinct population segments are considered species under the ESA. 16 U.S.C. § 1532(16).

Consultation and Management History

43. NMFS and FWS have consulted annually with the Malheur National Forest regarding livestock grazing impacts for several years. Compliance with the terms in the biological opinions has been poor.

44. Incidental Take Statements in past biological opinions governing Malheur National Forest grazing have included Reasonable and Prudent Measures (“RPMs”) to minimize incidental take by managing the allotments to avoid or minimize both direct effects on fish and indirect effects on fish habitat.

45. To implement these RPMs, the ITSs have included a Term and Condition requiring the Forest to consistently implement quantitative grazing-related standards listed in PACFISH and INFISH.³ The PACFISH and INFISH grazing standards require the Forest Service to “[m]odify grazing practices (e.g., accessibility of riparian areas to livestock, length of grazing season, stocking levels, timing of grazing, etc.) that retard or prevent the attainment of Riparian Management Objectives [(“RMOs”)] or are likely to adversely affect” fish, and “[s]uspend grazing if adjusting practices is not effective in meeting [RMOs].” RMOs are quantitative measurements of critical fish habitat features, including pool frequency, water temperature, bank stability, lower bank angle, and width/depth ratio.

46. The ITSs also have included a Term and Condition requiring the Forest to change its management if the Forest’s “utilization standards” are insufficient to prevent damage. The

³ The Malheur National Forest amended the Malheur Land and Resource Management Plan (or Forest Plan) to adopt the Interim Strategies for Managing Pacific Anadromous Fish-producing Watersheds in Eastern Oregon and Washington, Idaho, and portions of California (“PACFISH”), and Inland Native Strategies for Managing Fish-producing Watersheds in Eastern Oregon and Washington, Idaho, Western Montana, and Portions of Nevada (“INFISH”), to provide interim direction to maintain management options for anadromous and native fish habitat, respectively.

Forest Service “translates” the PACFISH and INFISH standards into utilization standards such as stubble height, bank damage, and level of shrub utilization.

47. Many documents, including the annual biological opinions, detail the chronic failure of the Forest Service to meet the Terms and Conditions requiring compliance with PACFISH, INFISH, and utilization standards.

48. Past and current ITSs also have included a RPM requiring the Forest Service to ensure completion of a monitoring and reporting program to confirm that the BiOps meet their objectives of limiting the extent of take and minimizing take. To implement the monitoring RPM, the BiOps have included, and continue to include, a Term and Condition containing detailed monitoring requirements.

49. Many documents, including the annual biological opinions, detail the chronic failure of the Forest Service to meet the Terms and Conditions requiring monitoring.

50. Another persistent problem has been completing consultation on time—that is, before the start of the grazing season. This year was the first time in many years that the biological opinions were completed prior to grazing turn-out. The Forest Service repeatedly has allowed grazing to commence prior to completion of consultation with NMFS and FWS, in violation of the ESA prohibition on making irreversible or irretrievable commitments of resources after the initiation of consultation. 16 U.S.C. § 1536(d). The Malheur National Forest typically authorizes turn-out of livestock in late-May to early-June each year.

51. For steelhead, the agencies never completed Section 7 consultation for the 2005 grazing season, despite the Forest Service’s finding that the grazing proposed on many allotments was “likely to adversely affect” steelhead. NMFS did not issue its biological opinion regarding the effects of the Forest Service’s proposed grazing until October 12, 2004 for the

2004 grazing season, July 14, 2003 for the 2003 season, and August 26, 2002 for the 2002 season.

52. For bull trout, the agencies never completed Section 7 consultation for the 2005 grazing season, despite the Forest Service's finding that the grazing proposed on of many allotments was "likely to adversely affect" bull trout. FWS did not issue its biological opinion regarding the effects of the Forest Service's proposed grazing until June 10, 2004 for the 2004 grazing season, July 16, 2003 for the 2003 season, July 19, 2002 for the 2002 season, July 30, 2001 for the 2001 season, and July 12, 2000 for the 2000 season.

The 2006 Steelhead Consultation

53. In 2006, the Forest Service produced a steelhead BA dated March 2, 2006. The BA finds that the 2006 Malheur National Forest grazing program is "likely to adversely affect" steelhead on 16 grazing allotments. The BA also determined that the grazing program was "not likely to adversely affect" steelhead critical habitat, but NMFS notified the Malheur National Forest that it disagreed and that the action is "likely to adversely affect" steelhead critical habitat.

54. On May 26, 2006, NMFS produced two BiOps regarding the impacts of the Forest Service's authorized grazing on these 16 allotments. NMFS's 2006 BiOp #2006/01337 covers ten allotments: Beech Creek, Deadhorse, Dixie, Fox, Hanscombe, John Day, Lower Middle Fork, Mt. Vernon, Roundtop, and Slide Creek. NMFS's 2006 BiOp #2005/05693 covers six additional allotments: Camp Creek, Deer, Donaldson, Hamilton, King, and Long Creek. The BiOps define the action area analyzed as the steelhead streams and riparian areas within each allotment.

55. The BiOps conclude that the grazing is not likely to jeopardize the continued existence of MCR steelhead and not likely to destroy or adversely modify their critical habitat.

56. The BiOps include ITSs permitting incidental take. BiOp #2006/01337 provides that three MCR steelhead redds may be trampled by cattle, while BiOp #2005/05693 provides that two MCR steelhead redds may be trampled. This is a departure from past BiOps; the 2004 steelhead BiOp only permitted trampling of two redds across the entire Forest. In another departure from past BiOps, the 2006 BiOps fail to quantify indirect take such as harassment and habitat degradation, despite acknowledging that the grazing will cause such take.

57. The BiOps' ITSs include two RPMs stating that the MNF shall: (1) minimize incidental take by managing livestock grazing to avoid direct effects on steelhead and (2) ensure completion of a monitoring and reporting program. In a departure from past BiOps, the ITSs do not include an RPM to minimize incidental take by managing livestock grazing to avoid indirect effects on steelhead habitat.

58. The ITSs contain two sets of Terms and Conditions to implement the RPMs. The first set, to implement the first RPM, includes primarily procedural tasks: requirements to meet with permittees to discuss actions necessary; meet with MNF staff to discuss actions necessary; meet or discuss redds with a high risk of trampling; report trampled redds; and maintain exclosure structures such as fences. The second set, to implement the second RPM, also includes primarily procedural tasks: requirements to establish monitoring areas; report grazing and monitoring activities; and provide an end-of-year report to NMFS. In a departure from past BiOps, there are no Terms and Conditions requiring compliance with PACFISH or compliance with utilization standards.

The 2006 Bull Trout Consultation

59. In 2006, the Forest Service produced a bull trout BA dated March 2, 2006. In it, the Forest Service states that the 2006 Malheur National Forest grazing program is “likely to adversely affect” steelhead on five grazing allotments. The BA also states that the grazing program is “not likely to adversely affect” bull trout critical habitat.

60. Formal consultation on the five allotments resulted in the 2005–06 bull trout BiOp,⁴ dated May 5, 2006. The allotments are the Deardorff, Hot Springs, Lower Middle Fork, Rail Creek, and Summit Prairie allotments. The BiOp defines the action area analyzed as the allotments and all areas downstream where indirect effects may occur. The BiOp concludes that the grazing is not likely to jeopardize the continued existence of bull trout. It concurs that the grazing program is “not likely to adversely affect” bull trout critical habitat.

61. The BiOp includes an ITS permitting incidental take, quantified as follows: for lethal take, one bull trout redd may be trampled within the action area; for non-lethal take, the incidental take is expressed in terms of the number of days authorized for grazing to occur within the action area where immediate impacts to bull trout are expected.

62. The ITS includes two RPMs: (1) adhere to pasture use guidelines, riparian protections, conservation measures, monitoring, and reporting as stipulated in the Forest’s 2005–06 Grazing Program Assessment and Addendum; and (2) implement a monitoring and reporting program that facilitates adaptive management to minimize the likelihood of incidental take and reduce the potential for adverse effects to bull trout and their habitat.

63. The ITS contains two sets of Terms and Conditions to implement the RPMs. The first set includes requirements to ensure consistent implementation of INFISH; ensure allotment

⁴ Although the Malheur National Forest attempted to consult for the 2005 grazing season after that year’s grazing was completed, the FWS limited the scope of the consultation to 2006 grazing because consultation is a prospective process and FWS lacks authority to retroactively address effects that have already occurred.

use guidelines and management objectives are fully implemented; and work with permittees to make sure those responsible for maintaining exclosures and fences understand their responsibilities. The second set includes requirements to provide training for permittees and range riders; summarize and submit monitoring; form a team to develop monitoring protocols and designated monitoring areas; and provide an end-of-year grazing tour and report.

FIRST CLAIM FOR RELIEF

NMFS Steelhead Biological Opinions: Destruction or Adverse Modification of Designated Critical Habitat.

64. Plaintiff realleges and incorporates by reference all preceding paragraphs.

65. ESA § 7(a)(2) requires NMFS to insure that projects are not likely to “result in the destruction or adverse modification of [designated critical] habitat” of a listed species.

66. The affected critical habitat is for the most part described as “functioning at risk” or “functioning at unacceptable risk.” The proposed grazing will degrade all crucial components of steelhead critical habitat, which are essential to support life history functions. The BiOps also fail to perform the required analysis of how the livestock grazing on which consultation was undertaken would affect steelhead critical habitat’s value for recovery of the species. Thus, the conclusions that the actions are not likely to destroy or adversely modify designated steelhead critical habitat are unsupported.

67. The conclusions in the steelhead biological opinions that the actions are not likely to destroy or adversely modify designated steelhead critical habitat are not based on the best available science, as required by the ESA, 16 U.S.C. § 1536(a)(2).

68. For each of the above reasons, and others, NMFS’s issuance of the steelhead biological opinions is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the ESA and is reviewable under the APA, 5 U.S.C. § 706(2).

SECOND CLAIM FOR RELIEF

NMFS Steelhead Biological Opinions: Jeopardy Finding.

69. Plaintiff realleges and incorporates by reference all preceding paragraphs.

70. The ESA requires NMFS to insure that federal actions are not likely to jeopardize the continued existence of any endangered or threatened species. 16 U.S.C. § 1536(a).

71. The steelhead biological opinions' conclusions are based on assumptions that the Forest Service will comply with future management, monitoring, and mitigation measures that are not reasonably certain to occur.

72. NMFS fails to analyze the proposed grazing's consistency with the Malheur Forest Plan, PACFISH, and related conservation measures, despite relying on their application.

73. The steelhead biological opinions fail to adequately describe an environmental baseline and fail to adequately analyze the effects and cumulative effects of the proposed grazing, including, but not limited to, the effects of grazing on steelhead habitat, as required by the ESA, 50 C.F.R. § 402.14(g)(1)—(4). The steelhead biological opinions fail to adequately define their action areas to include areas indirectly affected by the actions, as required by the ESA, 50 C.F.R. § 402.02.

74. The conclusions in the steelhead biological opinions that the actions are not likely to jeopardize the continued existence of steelhead are not based on the best available science, as required by the ESA, 16 U.S.C. § 1536(a)(2).

75. For each of the above reasons, and others, NMFS's issuance of the steelhead biological opinions is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the ESA and is reviewable under the APA, 5 U.S.C. § 706(2).

THIRD CLAIM FOR RELIEF

FWS Bull Trout Biological Opinion: Jeopardy Finding.

76. Plaintiff realleges and incorporates by reference all preceding paragraphs.
77. The ESA requires FWS to insure that federal actions are not likely to jeopardize the continued existence of any endangered or threatened species. 16 U.S.C. § 1536(a).
78. The bull trout biological opinion's conclusion is based on assumptions that the Forest Service will comply with future management, monitoring, and mitigation measures that are not reasonably certain to occur.
79. The FWS fails to analyze the proposed grazing's consistency with INFISH and related conservation measures, despite relying on their application.
80. The bull trout biological opinion fails to adequately describe an environmental baseline and fail to adequately analyze the effects and cumulative effects of the proposed grazing, as required by the ESA, 50 C.F.R. § 402.14(g)(1)—(4).
81. The conclusion in the bull trout biological opinion that the actions are not likely to jeopardize the continued existence of bull trout is not based on the best available science, as required by the ESA, 16 U.S.C. § 1536(a)(2).
82. For each of the above reasons, and others, FWS's issuance of the bull trout biological opinion is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the ESA and is reviewable under the APA, 5 U.S.C. § 706(2).

FOURTH CLAIM FOR RELIEF

NMFS Steelhead Biological Opinions: Incidental Take Statements.

83. Plaintiff realleges and incorporates by reference all preceding paragraphs.

84. The ESA requires NMFS to issue an ITS whenever a proposed federal agency action will not jeopardize a protected species but will result in incidental take of members of the species. 16 U.S.C. § 1536(b)(4).

85. In the steelhead biological opinion ITSs, NMFS more than doubled the amount of direct take that had been allowed in previous consultations, without explanation.

86. The steelhead biological opinions acknowledge that indirect take of steelhead will occur, but fail to quantify the indirect take in the ITSs, in violation of the ESA requirement to specify the impact on the species of any incidental taking. 16 U.S.C. § 1536(b)(4)(B)(i).

87. The steelhead biological opinions fail to include appropriate Reasonable and Prudent Measures designed to minimize the impact of the incidental take, in violation of the ESA requirement to specify such measures. 16 U.S.C. § 1536(b)(4)(B)(ii).

88. The steelhead biological opinions fail to include appropriate Terms and Conditions, in violation of the ESA requirement to specify such Terms and Conditions. 16 U.S.C. § 1536(b)(4)(B)(iii).

89. The steelhead biological opinions do not explain why they no longer contain a Reasonable and Prudent Measure or Terms and Conditions designed to minimize the impact of indirect take.

90. For each of the above reasons, and others, NMFS's issuance of the steelhead biological opinions and ITSs is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the ESA and is reviewable under the APA, 5 U.S.C. § 706(2).

FIFTH CLAIM FOR RELIEF

FWS Bull Trout Biological Opinion: Incidental Take Statement.

91. Plaintiff realleges and incorporates by reference all preceding paragraphs.

92. The ESA requires FWS to issue an ITS whenever a proposed federal agency action will not jeopardize a protected species but will result in incidental take of members of the species. 16 U.S.C. § 1536(b)(4).

93. The bull trout BiOp acknowledges that non-lethal take will occur and expresses the permitted incidental take in terms of the number of days authorized for grazing to occur within the action area, in violation of the ESA requirement to specify the impact on the species of any incidental taking. 16 U.S.C. § 1536(b)(4)(B)(i).

94. For each of the above reasons, and others, FWS's issuance of the bull trout biological opinion and ITS is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the ESA and is reviewable under the APA, 5 U.S.C. § 706(2).

PRAYER FOR RELIEF

Plaintiffs respectfully request that the Court grant the following relief:

A. Order, declare, and adjudge that NMFS's 2006 steelhead biological opinions and FWS's 2005–06 bull trout biological opinion for the Malheur National Forest grazing program are arbitrary and capricious, an abuse of discretion, and not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2).

B. Hold unlawful and set aside NMFS's 2006 steelhead biological opinions and FWS's 2005–06 bull trout biological opinion for the Malheur National Forest grazing program, under the APA, 5 U.S.C. § 706(2)(A);

C. Order NMFS and FWS to rescind the biological opinions, including the associated Incidental Take Statements, and consult again to issue valid biological opinions for the Malheur National Forest grazing program;

D. Retain jurisdiction over this matter until such time as NMFS and FWS have fully complied with the Court's order;

E. Award Plaintiffs' their reasonable costs, litigation expenses, and attorney fees associated with this litigation pursuant to the EAJA, 28 U.S.C. § 2412 *et seq.*, and all other applicable authorities; and,

F. Grant such further relief as the Court deems just and proper.

DATED this _____ day of July 2006.

Respectfully submitted,

Kristin F. Ruether (OSB # 05368)
Oregon Natural Desert Association

Of Attorneys for Plaintiffs