

Peter M. Lacy (“Mac”) (OSB # 01322)
Oregon Natural Desert Association
917 SW Oak Street, Suite 408
Portland, OR 97205
(503) 525-0193
lacy@onda.org

Stephanie M. Parent (OSB # 92590)
Pacific Environmental Advocacy Center
10015 SW Terwilliger Blvd.
Portland, OR 97219
(503) 768-6736
(503) 768-6642 (fax)
parent@lclark.edu

Attorneys for Plaintiffs

**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,

and

ROBERTSON RANCH et al.,

Intervenor-Defendants,

and

OREGON CATTLEMEN’S ASS’N,

Intervenor-Defendants.

**PLAINTIFFS’ REPLY TO
DEFENDANTS’ RESPONSE TO
MOTION FOR PRELIMINARY
INJUNCTION**

TABLE OF CONTENTS

INTRODUCTION..... - 1 -

ARGUMENT..... - 1 -

I. PLAINTIFFS HAVE STANDING TO RAISE THEIR WSRA, NFMA AND RESCISSIONS ACT/NEPA CLAIMS..... - 1 -

II. THE FORST SERVICE MISCHARACTERIZES PLAINTIFFS’ DESCRIPTIONS OF THE MALHEUR AND NORTH FORK MALHEUR WILD AND SCENIC RIVER CORRIDORS - 3 -

III. CONGRESS HAS NOT FORECLOSED ENTRY OF AN INJUNCTION PROHIBITING LIVESTOCK GRAZING IN THE MALHEUR AND NORTH FORK MALHEUR WILD AND SCENIC RIVER CORRIDORS - 6 -

A. Neither the Rescissions Act nor Subsequent Appropriations Bill Riders Prohibit this Court from Enjoining Grazing Within the River Corridors..... - 6 -

B. The Administrative Procedure Act Does Not Prohibit This Court from Enjoining Grazing Within the Wild and Scenic River Corridors..... - 8 -

IV. DEFENDANTS’ ARGUMENTS ON THE MERITS OF PLAINTIFFS’ CLAIMS FAIL TO REBUT THE LIKELIHOOD THAT PLAINTIFFS WILL PREVAIL - 9 -

A. Defendants’ Interpretation of WSRA’s “Protect and Enhance” Standard is Inconsistent with the Plain Language of the Statute and the Case Law..... - 10 -

B. The Forest Service Relies Heavily on the 2004 AOIs as a Salve for Past and Present Degradation from Livestock Grazing in the Wild and Scenic River Corridors and as Evidence that Plaintiffs Will Not Succeed on the Merits. - 14 -

C. The Forest Service Argues Incorrectly That the Only Standard Relevant to Plaintiffs’ WSRA and NFMA Claims is INFISH Standard GM-1..... - 16 -

V. THE FOREST SERVICE HAS PRODUCED NO CREDIBLE EVIDENCE TO REFUTE PLAINTIFFS’ SHOWING THAT IRREPARABLE HARM WILL RESULT FROM CONTINUED GRAZING IN THESE RIVER CORRIDORS..... - 18 -

A. Beschta, Kauffman and Rhodes are Highly Qualified to Offer Expert Opinions on Ecological Conditions in these Wild and Scenic River Corridors, While the Forest Service’s Proffered Experts Simply Do Not Possess the Training or Qualifications to Speak Definitively to the Issues At Stake..... - 19 -

B. The Forest Service Fails to Provide Any Convincing Support to Refute Plaintiffs’ Evidence Showing that Grazing is Causing, and Will Continue to Cause, Irreparable Harm to the Malheur and North Fork Malheur Wild and Scenic Rivers.	21 -
1. The Trip Report erroneously relies on the PFC methodology and the Rosgen stream classification system to support its conclusions.	22 -
2. The Trip Report completely fails to address the Christie monitoring data. ...	25 -
3. The Trip Report fails to provide any empirical monitoring data of its own. ..	25 -
4. The Trip Report fails to provide any meaningful discussion with respect to compliance or non-compliance with the INFISH aquatic conservation strategy standards.	27 -
C. The Forest Service and the OCA Would Have the Court Assess the Likelihood of Continued Irreparable Harm from Grazing in a Vacuum, Speculating that the Proposed 2004 Grazing Plans Will Cure the Corridors’ Continued Ecological Degradation.	30 -
D. Economic Harm Does Not Factor Into the Test for a Preliminary Injunction. ..	32 -
VI. THE COURT SHOULD WAIVE THE RULE 65 BOND REQUIREMENT IN THIS CASE	33 -
CONCLUSION	35 -

TABLE OF AUTHORITIES

CASES

Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531 (1987)..... - 33 -

Anchustegui v. Dep’t of Agric., 257 F.3d 1124 (9th Cir. 2001)..... - 8 -, - 9 -

Friends of the Earth v. Brinegar, 518 F.2d 322 (9th Cir. 1975)..... - 34 -

Friends of the Yosemite Valley v. Norton, 348 F.3d 789 (9th Cir. 2003)..... - 11 -

Hells Canyon Alliance v. U.S. Forest Serv., 227 F.3d 1170 (9th Cir. 2000)..... - 10 -, - 11 -

Nat’l Parks Cons. Assn. v. Babbitt, 241 F.3d 722, 738 (9th Cir. 2000) - 7 -

Nat’l Wildlife Fed’n v. Cosgriffe, 21 F.Supp.2d 1211 (D. Or. 1998) - 30 -, - 31 -

Natural Res. Def. Council v. Morton, 337 F. Supp. 167 (D.D.C. 1971) - 34 -

Ore. Natural Desert Ass’n v. Green, 953 F.Supp. 1133 (D. Or. 1997)..... - 12 -, - 31 -

Ore. Natural Desert Ass’n v. Singleton, 47 F.Supp.2d 1182 (D. Or. 1998) - 11 -, - 24 -

Ore. Natural Desert Ass’n v. U.S. Forest Serv., 2004 WL 737022 (D. Or. 2004) - 17 -

Ore. Natural Desert Ass’n v. U.S. Forest Serv., No. 03-381-HA (D. Or. filed Mar. 24, 2003)- 25 -

People of the State of Cal. v. Tahoe Reg’l Planning Agency, 766 F.2d 1319 (9th Cir. 1985) . - 33 -, - 34 -

Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, 944 F.2d 597 (9th Cir. 1991) - 33 -

Riverhawks v. Zapeda, 228 F.Supp.2d 1173 (D. Or. 2002) - 12 -

Sampson v. Murray, 415 U.S. 61 (1974) - 32 -

United States v. Oakland Cannabis Buyers’ Co-op, 532 U.S. 483 (2001) - 9 -

Va. Petroleum Jobbers Ass’n v. FPC, 259 F.2d 921 (D.C. Cir. 1958) - 32 -

Valdez v. Applegate, 616 F.2d 570 (10th Cir. 1980)..... - 33 -

Western Watersheds Project v. Sawtooth Nat’l Forest, No. CIV-01-389-E-BLW, slip op. (D. Id. Apr. 2, 2003)..... - 6 -

Wilderness Soc’y v. Terrel, 701 F. Supp. 1473 (E.D. Cal. 1988)..... - 33 -

Wilderness Soc’y v. Tyrrell, 918 F.2d 813 (9th Cir. 1990)..... - 10 -

Wisc. Heritages v. Harris, 476 F. Supp. 300 (E.D. Wis. 1979) - 34 -

STATUTES

16 U.S.C. § 1278(s)..... - 4 -

16 U.S.C. § 1281(a) - 10 -

16 U.S.C. § 1283(a) - 4 -

16 U.S.C. § 1604(i)..... - 18 -

16 U.S.C. §§ 1274(d)(1) - 18 -, - 31 -

2004 Department of Interior and Related Agencies Appropriations Act, P.L. 108-108, 117 Stat. 1241..... - 2 -, - 6 -

5 U.S.C. § 558(c) - 8 -, - 9 -

5 U.S.C. § 706(1) - 9 -

5 U.S.C. § 706(2)(A)..... - 9 -, - 17 -

Pub. L. No. 108-7, 117 Stat. 11, § 328 (Feb. 20, 2003)..... - 7 -

OTHER AUTHORITIES

47 Fed. Reg. 39,454 (Sept. 7, 1982) - 10 -

RULES

Fed. R. Civ. P. 65(c) - 33 -, - 34 -
Fed. R. Evid. 902 - 22 -
Local Rule 100.11(a)(2)..... - 13 -

REGULATIONS

36 C.F.R. § 222.4(a)..... - 8 -

INTRODUCTION

Plaintiffs respectfully submit this Reply to the response briefs filed by the Forest Service (hereinafter “Defendants” or “Forest Service”) and intervenors Oregon Cattlemen’s Association (“OCA”) in opposition to Plaintiffs’ Motion for Preliminary Injunctive Relief. The general theme of both responses is that grazing has caused little to no ecological damage in the river corridors and that, in any event, the grazing proposed for 2004 will cure any and all past management problems. Because the Forest Service and the OCA rely upon cramped or incorrect interpretations of the law, speculative salves for the grazing damage that has been on-going for years, and unsupported, irrelevant refutations of the demonstrated certainty, absent an injunction, of continued irreparable damage to ecological conditions in the Malheur and North Fork Malheur wild and scenic river corridors, they have failed to overcome Plaintiffs’ showing that preliminary injunctive relief is necessary and appropriate in this case. Because the grazing and concomitant damage in the these wild and scenic river corridors has already continued for one full grazing season since this action was initiated in February 2003, Plaintiffs hereby respectfully request this court to issue an order proving preliminary injunctive relief, as described in Plaintiffs’ motion (Dkt # 79).

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO RAISE THEIR WSRA, NFMA AND RESCISSIONS ACT/NEPA CLAIMS

In two separate sections of its brief, the Forest Service argues that Plaintiffs lack standing to raise the claims at issue in this action. In their discussion of irreparable harm, Defendants assert that “not a single member” of ONDA or the Center for Biological Diversity has provided evidence of irreparable harm to their interests. Def. Resp. at 29. This is incorrect. In Christopher Christie’s declaration, for example, he provides a detailed summary of his many visits to the

Malheur National Forest and the Malheur and North Fork Malheur wild and scenic rivers, his recreational and other purposes for visiting the forest, and his ever-increasing monitoring of grazing on the forest as it became clear to him that “conditions on the ground indicated that the Forest Service was not doing enough to improve conditions so as to meet the standards they were required to meet.” See Christie Declaration at ¶¶ 6–11 (purposes of visits to forest), 16–21 (observed grazing damage), 23–26 (concomitant resource problems resulting from grazing damage). Christie indicated that he would like to spend his retirement surrounded by the Malheur National Forest, and that it is important to him to experience these riparian areas and plant communities in a condition that has not been severely or permanently destroyed by grazing. Id. at ¶ 9. Christie also has submitted a second declaration to clarify further that he has visited the rivers since his 2001 monitoring visits, that he does intend to visit the rivers in the future as he has in the past, that he will consider fishing in the wild and scenic river corridors if aquatic conditions improve, and that he plans to visit the rivers this summer to monitor any grazing activities authorized in the area. See Second Christie Declaration at ¶¶ 3–6.

The Forest Service also alleges Plaintiffs lack standing to pursue their Rescissions Act/NEPA claim, arguing that Section 325 of the 2004 Appropriations Act commits the priority and timing of completion of environmental analyses for Forest Service grazing allotments to the “sole discretion” of the agency. Def. Resp. at 24–25. According to Defendants’ interpretation of the series of appropriations bill riders following the original 1995 Rescissions Act, Congress has “divested the federal courts of the jurisdiction to schedule such analysis as a remedy for the Forest Service’s failure to complete the analysis in a timely manner.” Id. at 25. What Defendants ignore, however, is that, even if this court cannot order the Forest Service to set and adhere to a specific schedule for completion of grazing NEPA analyses, Plaintiffs also have asked the court

for a declaration that the Forest Service's issuance of the permits in question, and its annual authorization of grazing via AOPs, without the required environmental analyses and without adhering to the established schedule for such analyses, violates NEPA and the Rescissions Act. See Second Amended Complaint (Dkt # 76) at ¶ D (Prayer for Relief). Therefore, neither of the Forest Service's arguments regarding Plaintiffs' standing to pursue the claims raised in this lawsuit is tenable. Plaintiffs have standing to pursue each of the four claims set forth in the Second Amended Complaint.

II. THE FOREST SERVICE MISCHARACTERIZES PLAINTIFFS' DESCRIPTIONS OF THE MALHEUR AND NORTH FORK MALHEUR WILD AND SCENIC RIVER CORRIDORS

The Forest Service's allotment-by-allotment response to Plaintiffs' descriptions of the wild and scenic river corridors and relevant grazing allotments not so subtly suggests that Plaintiffs have attempted to deceive the court by implying that there are more miles of stream habitat, longer seasons of grazing use, and more acres protected in the river corridors than there really are. See Def. Resp. at 8–14 (stating, e.g., that "Plaintiffs regularly refer to tributaries that are not within a designated WSRA corridor"; providing percentages of allotments that lie within designated corridor boundaries; referring to a "pattern" of referencing general grazing seasons instead of corridor unit authorized dates; stating that Plaintiffs "do not disclose" certain facts). Plaintiffs' descriptions of the river corridors, allotments and units could not be more clear with respect to where and what habitat parameters, acreages, stream miles and other physical and biological attributes were being described and are at stake in this action.

What is troubling is that Defendants' mischaracterizations completely miss the point that management activities and ecological conditions occurring outside of designated corridor boundaries necessarily affect ecological conditions within those boundaries. In fact, WSRA

section 12(a) explicitly recognizes this obvious proposition when it directs any agency with “jurisdiction over any lands which include, border upon, or are adjacent to, any [designated] river” to “take such action respecting management policies, regulations, contracts, plans, affecting such lands . . . as may be necessary to protect such rivers.” 16 U.S.C. § 1283(a) (emphasis added). In other words, the duty to protect and enhance river values means that actions outside of corridor boundaries that would adversely affect designated river corridors must be altered or eliminated in order to comply with the statute. See also, e.g., id. § 1278(s) (Federal Power Commission shall not license construction of water projects “on or directly affecting” designated rivers, and no agency shall assist in construction of water projects that “would have a direct and adverse effect on the values for which such river was established”).

Even so, Plaintiffs have taken a very reasonable approach in their request for preliminary injunctive relief by asking the court only to enjoin grazing on portions of the allotments at issue that lie within, or are not securely and permanently fenced from, the wild and scenic river corridors. See Motion for Preliminary Injunctive Relief (Dkt # 79) at ¶ 1. Grazing throughout these allotments’ watersheds is most assuredly affecting riparian conditions on the main rivers and tributaries within the designated corridors. See, e.g., Rhodes Declaration at ¶ 35 (effects of grazing on erosion and sediment delivery throughout wild and scenic rivers’ watersheds—not just stream corridors—having an effect on bull trout habitat and survival), ¶ 36 (Forest Service’s 1999 Watershed Analysis concluded increased sediment delivery to streams in upper Malheur watershed has contributed to low pool frequency in tributaries and Malheur River). Despite that fact, Plaintiffs recognize that the most critical first step to recovering these streams is to address the fragile riparian areas that have been, and continue to be, vastly over utilized by livestock. In fact, the Forest Service’s calculations showing that the percentages of each allotment within the

designated corridors are generally between 3% and 8.4% (with the exception of the Spring Creek Allotment, of which about 17% lies within the North Fork Malheur Scenic River corridor) actually further demonstrates the reasonableness of Plaintiffs' request, given the watershed scale of these problems. Also significant regarding the Forest Service's criticism of references to tributaries outside the designated river corridors is the fact that INFISH applies to all of the native fish-bearing streams on these allotments, regardless of whether portions of those streams lie within or outside of the corridor boundaries.

Similarly, the Forest Service criticizes Plaintiffs for citing only the grazing season of use as it appears on these allotments' signed permits and past AOPs. Def. Resp. at 8–14. The court should question how Defendants expected Plaintiffs to have cited to the 2004 seasons of use for each of the wild and scenic river corridor units when Defendants, despite repeated requests from Plaintiffs, refused to provide the 2004 use dates and/or AOPs to Plaintiffs until the date Plaintiffs received Defendants' response to this motion. See, e.g., Plaintiffs' Response to Defendants' Motion for Extension of Time to Respond to Plaintiffs' Motion for Preliminary Injunctive Relief (Dkt. # 91) (describing Defendants' refusal to produce an administrative record and Plaintiffs' efforts to obtain documents necessary to prosecute their case, including the 2004 turn-out and rotation dates).¹

In fact, Defendants' arguments often are at odds with established facts or statements by the Forest Service in other documents. For example, in their response, Defendants describe Plaintiffs' statement that the Ott Allotment's Rattlesnake Unit has been a "problem area over the years" (with respect to livestock access to the river) as a "charge" for which Plaintiffs have only

¹ Moreover, even the AOIs Defendants filed with their Response are, apparently, not the final AOIs the Forest Service intends to issue this season's grazing. See Lacy Declaration (filed herewith) (attaching email from Defendants' counsel Steve Odell).

provided “ostensible support” and claim that the agency’s records “say no such thing.” Def. Resp. at 13. Yet, the Forest Service, only one day prior to making this statement in its Response brief, stated in the Stipulation Resolving Motion for Preliminary Injunction as Applied to Robertson Ranch (Dkt # 94) that despite the permittees’ best efforts as herding, “the existing status of the Rattlesnake Pasture allows livestock to travel along the North Fork Malheur Scenic River via a route known as the Skagway Creek trail, as well as along various unnamed routes along the river’s canyon rim.” Stipulation at ¶ 2. This type of equivocation seems indicative of a willingness on the part of Defendants to adopt contrary litigation positions as circumstances require. In short, Defendants’ contradictory statements and mischaracterizations of Plaintiffs’ factual descriptions serve only to undermine the credibility of the remainder of the Forest Service’s arguments.

III. CONGRESS HAS NOT FORECLOSED ENTRY OF AN INJUNCTION PROHIBITING LIVESTOCK GRAZING IN THE MALHEUR AND NORTH FORK MALHEUR WILD AND SCENIC RIVER CORRIDORS

A. Neither the Rescissions Act nor Subsequent Appropriations Bill Riders Prohibit this Court from Enjoining Grazing Within the River Corridors.

Defendants argue that Section 325 of the 2004 Interior Appropriations Act prohibits this court from entering an order preliminarily enjoining grazing from the portions of the allotments at issue in this case that lie within the Malheur and North Fork Malheur wild and scenic river corridors. Def. Resp. at 18. This argument is without merit. Not only is Defendants’ reading of the law incorrect, but the authority Defendants cite to, Def. Ex. 122, does not support the statement that that court is “without power to grant the injunctive relief plaintiffs sought in that case.” Id. (citing Western Watersheds Project v. Sawtooth Nat’l Forest, No. CIV-01-389-E-BLW, slip op. (D. Id. Apr. 2, 2003)). In Western Watersheds, the court had already (in a previous order) enjoined the Forest Service from enforcing certain wolf “control” actions within

the Sawtooth National Recreation Area. Def. Ex. 122 at p.4. Although the court stated that the Rescissions Act and Section 328 of the 2003 Appropriations Act limited its authority to void or modify the grazing permits at issue, the court recognized that “[t]here is nothing in the Rescissions Act or [Section 328 of the 2003 Appropriations Act], however, that would affect the authority of the Court to once again enjoin the enforcement of a portion of the Wolf Control Rules.” *Id.* at pp. 3–4. The court thus extended its previously entered injunctive relief, which affected livestock grazing in the SNRA, to apply during the 2003 grazing season. *Id.* at 7. Therefore, although the court found that it could not, according to the Rescissions Act and subsequent appropriations bills, void or modify the actual permits, Congress has never indicated that courts are without the authority to enjoin agency actions where they are in violation of other substantive and procedural provisions of law, including, for example, the Sawtooth National Recreation Area Organic Act, *id.* at 4, the WSRA or NFMA.

Section 328 does not affect Plaintiffs’ claim for a declaratory judgment that the Forest Service violated NEPA by issuing the permits without a required analysis, and violated the Rescissions Act by failing to adhere to its schedule for such analyses. At most, Section 328 may preclude this Court from vacating the permits. However, nothing in section 328 otherwise eliminates this Court’s authority to grant necessary or proper relief. For example, nothing in section 328 alters this Court’s authority to (1) establish a deadline for the Forest Service to prepare its NEPA analyses, or (2) order that authorized grazing be modified to protect wild and scenic rivers. *See, e.g., Nat’l Parks Cons. Assn. v. Babbitt*, 241 F.3d 722, 738 (9th Cir. 2000) (ordering limits on ongoing cruise ship uses pending NEPA compliance). Indeed, section 328 explicitly provides that the “terms and conditions” of the permits shall remain in effect until the permits are processed legally, or expire. The terms and conditions in these federal grazing

permits are consistent with the Forest Service’s regulatory authority to modify permits at any time to conform to “changes in law,” such as a court relief order. See, e.g., 36 C.F.R. § 222.4(a). Grazing under an existing permit certainly may be modified to take appropriate actions to comply with substantive laws, such as NFMA or the WSRA. Section 328 preserves the existing permits, but it does not alter this Court’s authority to order a deadline for NEPA analyses or changes in grazing before they are done. Importantly, Plaintiffs have not in this action asked for a cancellation or modification of the actual grazing permits; rather, the challenge is to the Forest Service’s annual grazing authorizations as described in the AOPs/AOIs, and Plaintiffs’ Rescissions Act claim is but one of four claims in this lawsuit and is not central to the key issues of whether the Forest Service is complying with the WSRA and the NFMA.

B. The Administrative Procedure Act Does Not Prohibit This Court from Enjoining Grazing Within the Wild and Scenic River Corridors.

Both the Forest Service and the OCA argue that 5 U.S.C. § 558(c) somehow limits this court’s ability to enjoin grazing on portions of the allotments within the Malheur and North Fork Malheur wild and scenic river corridors. See Def. Resp. at 5; OCA Resp. at 31–32. This is simply incorrect. APA section 558(c) requires federal agencies, before withdrawing, suspending, revoking or annulling a federally-issued license, to give notice to the licensee and provide the licensee an opportunity to demonstrate or achieve compliance with the requirements of the license—except “in cases of willfulness or those in which public health, interest, or safety requires otherwise.” 5 U.S.C. § 558(c). To support their argument, both parties rely upon Anchustegui v. Dep’t of Agric., 257 F.3d 1124 (9th Cir. 2001), for the proposition that § 558(c) applies to federal grazing permits. See Def. Resp. at 5; OCA Resp. at 32. While that may be true, Anchustegui is not on point here because there has been no agency action to terminate a permit—nor will there be in the context of court-ordered injunctive relief.

In Anchustegui, the Forest Service revoked a permittee's grazing permit following repeated permit violations. The Ninth Circuit, treating the grazing permit as a "license" for purposes of § 558(c), held the revocation was invalid because the Forest Service failed to follow the procedures set out in § 558. 257 F.3d at 1129. Unlike Anchustegui, in this case there is no conflict between the agency and permittees. The Forest Service could not have violated § 558(c) because it did not revoke any of the grazing permits at issue in this case. Further, the district court's exercise of its equitable discretion is not limited by section 558(c), because "when district courts are properly acting as courts of equity, they have discretion unless a statute clearly provides otherwise." United States v. Oakland Cannabis Buyers' Co-op, 532 U.S. 483, 496 (2001). Section 558(c) makes no mention of restricting courts' equitable discretion. In fact, the Forest Service's and the OCA's argument would render meaningless APA § 706(2), which authorizes courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), as well as APA § 706(1), which provides that federal courts "shall" "compel agency action unlawfully withheld or unreasonably delayed." Id. § 706(1). In short, the Forest Service's and OCA's arguments with respect to § 558(c) and Anchustegui are inapposite in the present case.

IV. DEFENDANTS' ARGUMENTS ON THE MERITS OF PLAINTIFFS' CLAIMS FAIL TO REBUT THE LIKELIHOOD THAT PLAINTIFFS WILL PREVAIL

The Forest Service argues that Plaintiffs have not shown a likelihood of success on their WSRA and NFMA claims. Defendants' arguments suffer from a flawed reading of the WSRA's "protect and enhance" requirement, a heavy reliance on the yet-to-be-finalized 2004 AOIs, and an unsupported argument that the INFISH and other applicable grazing standards either are

satisfied by the Forest Service or do not apply to the grazing that is authorized in the Malheur and North Fork Malheur wild and scenic river corridors.

A. Defendants' Interpretation of WSRA's "Protect and Enhance" Standard is Inconsistent with the Plain Language of the Statute and the Case Law.

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 argue 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. 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.

As already briefed earlier in this litigation, see Plaintiff's Response to Defendants Motion for Judgment on the Pleadings (Dkt # 55), at pp. 15–16, 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 of the WSRA is consistent with the Ninth Circuit’s opinion in HCA. In that case, the Ninth Circuit 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. Id. 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)²; 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). See also Riverhawks v. Zapeda, 228 F.Supp.2d 1173, 1183–84 (D. Or. 2002) (analyzing whether Forest Service management of motorized boating on Rogue Wild and Scenic River failed to protect and enhance recreational value of the river, vis-à-vis non-motorized recreational boating).

There is no question that grazing damage is and has been pervasive in these wild and scenic river corridors. The Forest Service itself consistently has documented adverse ecological impacts from grazing in the Malheur River and North Fork Malheur River watersheds, and particularly within the wild and scenic river corridors. See, e.g., Pl. Attach. 1 at I-5 (1992 environmental assessment for Malheur Wild and Scenic River plan, noting grazing utilization levels “routinely exceed” Forest Plan standards in corridor riparian areas; plant composition and vigor impaired; soil instability and compaction increasing with current grazing practices; indirect effects include sedimentation in river, reduction in potential for riparian vegetation); Pl. Attach. 37 at 187 (2000 Malheur Headwaters Watershed Assessment, admitting, “In any case, the current grazing standards and level of compliance generally do not appear to be providing for a level of recovery of riparian shrubs and overhanging sedge and grass banks that is essential to restore fish habitat and water quality.”). The Forest Service itself acknowledged in 2000 that:

Although riparian conditions have improved markedly since the 1920s, current Forest Service standards for grazing may not fully provide for the re-

² Note also that this case directly negates the OCA’s argument that “the fact that grazing was prominent on both the [Malheur] and North Fork Malheur Rivers at the time of designation is significant.” See OCA Resp. at 8.

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. . . . 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.

Pl. Attach. 37 at 186–187.³ The agency then cautioned that the current standards had only been in effect for two years at that time (i.e., since the 1998 listing of bull trout and development of the bull trout biological opinion standards), and that “careful monitoring” would be required to continue to assess riparian and stream health trends. *Id.* at 187. Now, four years later, it is clear these wild and scenic river corridors still suffer from significant overgrazing, as evidenced by the agency’s continued acknowledgment of failed standards and poor ecological conditions. *See* Pl. Memo in Support at pp. 19–23 (summarizing Forest Service and other documentation of standards violations). Moreover, the degradation currently occurring is not only retarding attainment of INFISH riparian management objectives (RMOs)—but is preventing attainment of RMOs. *See, e.g.,* Kauffman Declaration (concluding that “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.”).

Despite these indisputable facts—or perhaps because of them—the Forest Service turns its discussion to claims that Plaintiffs did not raise (a challenge to the river management plans themselves) and the fact that Plaintiffs did not discuss the terms of the only-recently-disclosed, as-yet-final 2004 AOIs. Def. Resp. at 21. It is the latter that is a particularly troublesome

³ Re-attached to this brief per Local Rule 100.11(a)(2), which allows filing additional portions of previously excerpted, electronically-filed exhibits.

argument in the Forest Service's response.

B. The Forest Service Relies Heavily on the 2004 AOIs as a Salve for Past and Present Degradation from Livestock Grazing in the Wild and Scenic River Corridors and as Evidence that Plaintiffs Will Not Succeed on the Merits.

The Forest Service almost completely declines to address the years of repeated and chronic grazing degradation in the Malheur and North Fork Malheur wild and scenic river corridors described in detail in Plaintiffs' memo in support of this motion. Instead the agency has chosen to focus on the grazing proposed in the 2004 AOIs, suggesting that "meaningful modifications" made in this year's AOIs are a cure-all for past and present ecological damage in the corridors.

Defendants argue that "Plaintiffs have failed to show that the balance reflected in the limitations on grazing the Forest Service is employing in the 2004 AOIs for the allotments at issue in this case are arbitrary or capricious or are going to result in substantial interference with the public's use or enjoyment of [designated] values." Def. Resp. at 21. Again, Plaintiffs question how they would have been able to make any statements or arguments regarding the 2004 AOIs, given that the Forest Service refused to provide Plaintiffs with those documents (or even preliminary turn-out dates the agency was using in its consultation discussions with the U.S. Fish & Wildlife Service), despite repeated attempts by Plaintiffs to obtain that information.

Of particular note with respect to the Forest Service's 2004 draft AOIs is the amount of obviously careful editing they have undergone from the 2003 AOPs and all previous versions, which were virtually carbon copies of one another each and every year for as long as Plaintiffs had been requesting and reviewing those documents. See, e.g., Pl. Attach. 26 (2003 Bluebucket AOP), 39 (2002, 2001, 2000, 1998 AOPs for Bluebucket Allotment).⁴ The 2004 AOIs include

⁴ Note that Plaintiffs do not have a copy of the 1999 AOP for this allotment.

for the first time statements that permittees “should begin moving livestock from a pasture when a 7-inch residual stubble height is reached”; statements that it is the permittees’ responsibility to “keep a close awareness of use levels” and to either plan on moving early or requesting extended grazing periods; and additional details on salting and herding practices. See Def. Ex. 104, 105, 108, 110, 111, 114, 117, 120 (2004 AOIs). These changes, however, are a classic case of “too little, too late” because conditions on these allotments and the wild and scenic river corridor units have reached a point at which only extended rest from grazing can give these areas a chance to recover. See, e.g., Kauffman Declaration at ¶ 37 (although recovery potential in many of these riparian areas is high, this “ability will not last, and perhaps has been lost for some reaches); Rhodes Declaration at ¶ 100 (stating that even “incremental and relatively ‘light’ grazing would significantly retard the rate of recovery of channel attributes”); Second Rhodes Declaration at ¶¶ 31–33 (discussing Forest Service’s own aquatic experts’ opinions on rest from grazing). Further, despite proposed reductions in animal unit months (AUMs) on some of the units at issue, the fact remains that the Forest Service intends to authorize livestock grazing on one or more of the river units—i.e., within the wild and scenic river corridors—on the Bluebucket Allotment from June 1 to September 15; on the Spring Creek Allotment from June 1 to October 20; on the North Fork Allotment from June 1 to June 21; and on the Flag Prairie Allotment from June 1 to July 1. See Def. Ex. 104, 105, 108, 110, 111, 114, 117.⁵ The only river corridor units the Forest Service proposes to rest for the 2004 grazing season are the Dollar Basin/Star Glade Allotment’s South Star Glade and Dollar units. See Def. Ex. 108. Even there, it is questionable whether those units are securely fenced from the rest of the allotment to protect from the threat of livestock drifting

⁵ The Forest Service also intends to authorize grazing on the Ott Allotment’s Rattlesnake Unit from July 11 to August 11, but river corridor grazing on that unit has been resolved for purposes of this motion by the parties’ Stipulation Resolving Motion for Preliminary Injunction as Applied to Robertson Ranch (Dkt # 94).

down to the river corridor. See, e.g., Pl. Attach. 40 (FWS 2001 biological opinion noting unauthorized use on allotment and drift onto Dollar Unit from neighboring Central Malheur Allotment).

These new, allegedly “meaningful modifications” are intended to satisfy the INFISH grazing standard that requires the Forest Service to “[m]odify grazing practices . . . that retard or prevent attainment of [RMOs] or are likely to adversely affect inland native fish.” Importantly, Defendants do not discuss the critical second part of the standard, which requires the Forest Service to “[s]uspend grazing if adjusting practices is not effective in meeting [RMOs].” As Plaintiffs demonstrated in great detail in their memo in support of the motion for preliminary injunctive relief, as well as in the declarations of Dr. Beschta, Dr. Kauffman and Jonathan Rhodes, the Forest Service’s grazing practices, including the “modifications” that have been made over the past several years, are continuing to retard and prevent attainment of RMOs. See, e.g., Beschta Declaration 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”); Rhodes Declaration at ¶ 100 (even “incremental and relatively ‘light’ grazing would significantly retard the rate of recovery of channel attributes . . . and would continue to degrade significantly the rivers’ designated outstandingly remarkable values”). At this point, the only option left for the Forest Service under INFISH standard GM-1 is to suspend grazing.

C. The Forest Service Argues Incorrectly That the Only Standard Relevant to Plaintiffs’ WSRA and NFMA Claims is INFISH Standard GM-1.

The Forest Service argues that the “only [standard] that apparently is relevant to” Plaintiffs’ WSRA and NFMA claims is INFISH’s requirement to modify grazing practices that retard or prevent attainment of RMOs and to suspend grazing if such modifications are not

effective in meeting RMOs. Def. Resp. at 22. Defendants provide no explanation why the standards that appear in the Forest Plan, the wild and scenic river comprehensive management plans, and the AOPs/AOIs are not relevant.⁶ In fact, Plaintiffs provide an entire section of their memorandum in support of this motion explaining the applicable grazing standards at issue in this case, where each standard is derived from, and why each is relevant. See Pl. Memo in Support at pp. 11–17 (discussing standards under the river management plans and Forest Plan, INFISH, and the bull trout BiOp standards). What is particularly interesting about Defendants’ argument that only the INFISH “retard or prevent attainment of RMOs” standard is applicable in this case, is that the agency has already admitted in its pleadings that the standards set in the river management plans, the Forest Plan, and INFISH are in fact controlling standards for grazing management in these wild and scenic river corridors. See Def. Answer at ¶¶ 37–39, 42, 44, 46, 49. Moreover, despite the fact that the Forest Service asserts that INFISH provides the only relevant grazing standard in this case, its expert witnesses virtually ignore INFISH. See discussion infra V.B.4.

As explained in detail in Plaintiffs’ opening brief, each of these duties—including the bull trout BiOp standards (stubble height, shrub utilization, and bank damage), which were

⁶ Also confusing is the argument by both the Forest Service and the OCA that Plaintiffs have, or should have, raised claims under the Endangered Species Act (ESA), 16 U.S.C. §§ 1531–43, because Plaintiffs are challenging the agency’s compliance with grazing standards derived from the bull trout biological opinions. See Def. Resp. at 22, n.4; OCA Resp. at 22–26. Both the Forest Service and the OCA argue that compliance with these stubble height, bank damage and shrub use standards can only be challenged as an ESA claim. This is incorrect because: (1) these standards have been incorporated directly into the AOPs, which are final agency actions challengeable under APA 706(2)(A), see Ore. Natural Desert Ass’n v. U.S. Forest Serv., 2004 WL 737022, at *3–*4 (D. Or. 2004) (this court’s Feb. 11, 2004 ruling denying Defendants’ motions for judgment on the pleadings and to dismiss); and (2) these standards are derived from the PACFISH/INFISH implementation monitoring module, see Pl. Attach. 21 at 65 (2002 Module).

derived from INFISH—is incorporated, specifically or by reference, into the Forest Service-issued AOPs/AOIs, which guide grazing on an allotment-by-allotment, annual basis. See Pl. Memo in Support at 11–12. See also, e.g., Def. Ex. 104 (2004 Bluebucket Allotment AOI, detailing “Allowable Use Standards”); Def. Ex. 102 (2004 Bluebucket Allotment BA, detailing stubble height, shrub utilization and bank damage standards, as well as Forest Plan standards). Under the WSRA, the Forest Service must “protect and enhance” the designated values of the Malheur and North Fork Malheur wild and scenic rivers and must implement the comprehensive river management plans. 16 U.S.C. §§ 1274(d)(1), 1281(a), 1283(a). Under NFMA, the Forest Service must manage these river corridors consistently with the Forest Plan, including all grazing and riparian area standards in the Plan. Id. § 1604(i) In order to satisfy these duties, the Forest Service must therefore insure that all livestock grazing it authorizes on the public lands satisfies each and every standard it has adopted.

V. THE FOREST SERVICE HAS PRODUCED NO CREDIBLE EVIDENCE TO REFUTE PLAINTIFFS’ SHOWING THAT IRREPARABLE HARM WILL RESULT FROM CONTINUED GRAZING IN THESE RIVER CORRIDORS

The Forest Service attempts to discredit the credentials, experience and field work of Drs. Beschta and Kauffman, and Jonathan Rhodes, while at the same time offering no credible evidence of its own to rebut the data and observations of extreme over-grazing that Plaintiffs have detailed in their briefing and declarations. Defendants’ arguments fail to overcome Plaintiffs’ showing of the likelihood of irreparable harm that will result from continued grazing in these designated river corridors, because the credentials of Plaintiffs’ experts are beyond question, the Forest Service’s proffered experts lack the relevant experience and training to speak definitively to the ecological questions at issue, the Forest provides almost no meaningful discussion whether or not its actions will continue to cause irreparable harm to the river

corridors, and the agency improperly focuses on speculative future grazing management actions.

A. Beschta, Kauffman and Rhodes are Highly Qualified to Offer Expert Opinions on Ecological Conditions in these Wild and Scenic River Corridors, While the Forest Service’s Proffered Experts Simply Do Not Possess the Training or Qualifications to Speak Definitively to the Issues At Stake.

It is almost beyond belief that the Forest Service questions the professional and academic credentials, and the scientific methods and abilities, of Beschta, Kauffman and Rhodes. Dr. Beschta has been researching hydrology and riparian systems for nearly 30 thirty years as a professional, is a Certified Professional Hydrologist, has served on the Board of Registration and as Academic Vice President for the American Institute of Hydrology, has served on two separate panels at the invitation of the prestigious National Academy of Sciences convened to address riparian and fisheries issues, and has authored or co-authored over 70 publications over the last fifteen years, over 50 of which are related to the hydrology of forest and rangeland watersheds, riparian areas, and related topics. See Beschta Declaration at ¶¶ 1–5, CV at 2 (Biography). Dr. Beschta is particularly qualified to offer his expert opinion in this case because of his extensive research on Oregon stream and riparian systems, including the John Day, Malheur and Grande Ronde river basins within the Malheur National Forest. See id. at ¶¶ 6–8. Dr. Kauffman is a research ecologist with more than 25 years’ experience in studies of riparian ecology and management, has authored or co-authored well over 100 publications, and has professional expertise in the influences of natural and human disturbance on ecosystem structure and function. See Kauffman Declaration at ¶¶ 1–5, CV at 1. Like Dr. Beschta, Dr. Kauffman also is particularly well-qualified to offer his expert opinion on the effects of grazing on the river corridors at issue in this case: Dr. Kauffman has conducted the “vast majority” of his riparian research in eastern Oregon’s Blue Mountains, including extensive work in the Malheur National Forest beginning in 1987. See Kauffman Declaration at ¶¶ 6–8. His interdisciplinary research has

focused on an examination of how grazing affects riparian zones and native fish habitats, the requirements of establishment of native riparian plant species, and the patterns of riparian and stream recovery when areas are rested from livestock grazing. Id. Finally, Jonathan Rhodes is a hydrologist with over 20 years' experience researching the effects of land uses, including livestock grazing, on streams and native fish species. See Rhodes Declaration at ¶¶ 1–7, CV at 1–2. Rhodes also has extensive experience in developing and implementing stream condition and water quality monitoring programs throughout the West, and, during his time with the Columbia River Inter-Tribal Fish Commission, worked with the Forest Service to help develop the watershed protection measures ultimately adopted in PACFISH and INFISH. Id.

Conversely, it is critically important to note that the Forest Service's proffered experts do not have any degrees or training in stream hydrology other than "Proper Functioning Condition" ("PFC")⁷ training and other non-university, one-time training courses. See Phelps Declaration (attached CVs of Borman, Stringham, Krueger). In fact, all three of these individuals' degrees are in fields such as range ecology, rangeland resources, rangeland science, agriculture and resource economics, and wildlife and range management. See id. The inherent biases of these experts' academic training and professional work are immediately apparent upon reading their "Trip Report." See id. at Attachment 1. As a result, the Trip Report's criticisms of Plaintiffs' assertions with respect to stream hydrology and riparian ecosystems, and its conclusions regarding the effects of livestock on ecological conditions in these wild and scenic river corridors, must be afforded considerably less weight. Similarly, Ron Wiley, the leader of the National Riparian Service Team, has biology training and must be considered a biased source due to his role as a "livestock producer on my private property." See Wiley Declaration at ¶ 1,

⁷ See discussion infra section V.B.1 (qualitative nature and shortcomings of PFC method).

Ex. A. Wiley provides no indication that he has any expertise in stream hydrology or riparian ecology, and relies heavily on very general assertions supported by no empirical data. See id. at ¶¶ 9–23.⁸

B. The Forest Service Fails to Provide Any Convincing Support to Refute Plaintiffs’ Evidence Showing that Grazing is Causing, and Will Continue to Cause, Irreparable Harm to the Malheur and North Fork Malheur Wild and Scenic Rivers.

The Forest Service is surprisingly ambiguous in its discussion addressing the irreparable harm likely to result from continued livestock grazing in these wild and scenic river corridors. See Def. Resp. at 14–15, 27–30. The agency characterizes Plaintiffs’ carefully detailed and organized presentation of the evidence of damage from grazing in these areas—which is garnered from a variety of sources, including Forest Service, U.S. Fish & Wildlife Service and NOAA Fisheries monitoring and reports, extensive photo and quantitative monitoring by Chris Christie and Linda Driskill, and the monitoring, research and professional opinions provided by Beschta, Kauffman and Rhodes—as a “flurry of averments” that have “grossly overstated or mischaracterized the condition” of the corridors. Def. Resp. at 27–28. The agency calls Plaintiffs’ discussion a “barrage of rhetoric” and “puffery” that “irrelevantly focuses on the past

⁸ The OCA’s proffered experts appear to be even less qualified to offer opinions rebutting the Beschta, Kauffman and Rhodes declarations. Pat Larson holds a Bachelor’s degree (college not specified) in Forestry and provides no indication that she has any academic training or professional experience in stream hydrology or riparian ecology. See Pat Larson Declaration at ¶¶ 1–8, Ex. A (CV). The closest thing Larson offers with respect to relevant training is “several training programs for the Proper Functioning Condition (PFC) process.” Id. at ¶ 5. Larry Larson’s degrees are in range ecology, his experience is limited to range ecology, and he does not claim to have any expertise or training in stream hydrology or riparian ecology. See Larry Larson Declaration at ¶¶ 1–3, Ex. A (CV). Larson provides no quantitative data to support his assertions, aside from extraneous measurements of turbidity and streambed material sizes, and relies upon the flawed PFC method. See, e.g., id. at ¶¶ 33–35. Finally, there is no indication of the qualifications of Anderson and Leonard to offer expert opinions on the issues raised on this motion, other than the fact that they are a “watershed and aquatic resource specialist” and an “ecologist and grazing management specialist,” respectively. See OCA Ex. 4, at 1.

or landscape of a scale much broader than the lands at issue.” *Id.* at 2, 28. Yet, the Forest Service then offers a completely non-specific, one-paragraph dismissal of Plaintiffs’ descriptions of on-the-ground conditions, apparently leaving it to the court and the parties to determine what, if anything, from Defendants’ exhibits supports the assertion that grazing will not cause irreparable ecological harm in these river corridors. *See id.* at 28–29.

The primary document provided by the Forest Service in an attempt to refute Plaintiffs’ showing of irreparable harm from grazing is the “Trip Report: Malheur National Forest” produced by Borman, Krueger and Stringham. *See* Phelps Declaration, Attach. 1.⁹ This report is rife with problems, including its reliance on the PFC methodology and the Rosgen stream classification system as indicators of stream health, its complete failure to address the Christie monitoring data, its failure to present any empirical monitoring data of its own, and its failure to provide any detailed or meaningful discussion of the quantitative INFISH aquatic conservation standards that are critical to proper management and protection of these river corridors.¹⁰

1. The Trip Report erroneously relies on the PFC methodology and the Rosgen stream classification system to support its conclusions.

The Trip Report relies almost exclusively on PFC ratings in order to support the authors’ conclusion that grazing is not causing, and will not cause, irreparable harm to these river

⁹ The report will hereinafter be referred to as the “Trip Report” and, for clarity of citation, will be cited as such, rather than as the “Phelps Declaration, Attachment 1.” Importantly, the Trip Report is not a self-authenticating Forest Service document. *See* Fed. R. Evid. 902. While Phelps states that she asked Borman *et al.* to “conduct a review of the declarations received from the plaintiffs and inspect the specific allotments named in this lawsuit,” Phelps Declaration at ¶ 3, it is telling that none of the three authors of the report have sworn to stand by it under penalty of perjury, by supplying their own declaration.

¹⁰ Note also that it is highly questionable whether the Oregon State University authorized permission to produce this Trip Report on OSU letterhead. The authors never state that they have undertaken the report as part of any official OSU-sanctioned study. Yet, Defendants not so subtly suggest that the Report and its conclusions are just that: the official opinion of the Oregon State University (via the use of letterhead, Defendants’ reference to the Report in their brief as the “OSU Report,” and the Report’s reference to its photos as “OSU photo [x]”).

corridors, and that the rivers are in fact in an “upward trend.” See Trip Report at 1–2; Def. Resp. at 15 (claiming that Trip Report “bolsters substantially [the Forest Service’s] position that grazing as contemplated pursuant to the present set of 2004 AOIs will not push either riparian system at issue into irreversible collapse”). See also OCA Ex. 4, 5 (river assessments relying exclusively on PFC). The authors of the Trip Report admit that they relied on PFC methodology and the Rosgen stream classification system in making their assessments of corridor conditions. Trip Report at 1. This is extremely problematic because the PFC method is a qualitative method that is widely known to be highly subjective and lacking in scientific rigor. See Second Rhodes Declaration at ¶¶ 18–21 (citing National Research Council findings, as well as those of Forest Service and BLM aquatic experts and independent reviewers). The PFC method involves no measurement of any stream or riparian attribute and even the National Riparian Service Team (NRST), which developed the method, stated in a publication co-authored by Borman that PFC is a “checklist” method that is “an appropriate starting point for determining and prioritizing the type and location of quantitative inventory or monitoring necessary.” Id. at ¶¶ 19–20. See also OCA Ex. 4 at App. I & 5 at App. I (examples of PFC checklists). Perhaps most critically important with respect to undermining the credibility of the Trip Report’s conclusions based on the PFC methodology, the NRST has stated that riparian areas classified as “proper functioning” nevertheless do not represent the desired future condition of those areas. See id. at ¶ 20.

In fact, this court previously has rejected the suggestion that PFC is even relevant to the issue of whether an agency is complying with the WSRA requirement to “protect and enhance” river values. In the Owyhee Wild Rivers case, the BLM documented the attainment of “Properly Functioning Condition” of riparian areas on over 146 miles (93%) of designated rivers, with only 6.8 miles (4.4%) classified as “Functioning at risk.” Ore. Natural Desert Ass’n v. Singleton, 47

F.Supp.2d at 1189. The court responded flatly that “[t]he evidence does not reveal how ‘properly functioning riparian areas’ or ‘at risk’ areas correspond to the requirements of the WSRA.” *Id.* at 1190. Likewise, this case is about failed statutory duties based on the objective, measurable INFISH standards, the stubble height, bank damage and shrub use standards, and the standards contained in the river plans and Forest Plan—there is no “PFC standard” at issue, and there is no support cited by any party to suggest that PFC is a valid proxy for any of the actual standards that are at issue.

Similarly, the Trip Report’s reliance on the Rosgen stream classification system as an indicator of riparian health and potential is also flawed. In particular, the Trip Report attempts to use the system to support its assertion that the Summit Creek exclosure does not provide a valid comparison for what conditions would be like within the wild and scenic river corridors if they were not grazed by livestock. Trip Report at 2–3. The Rosgen stream classification system is actually intended to allow for comparison among similar channel types for particular channel attributes. *See* Second Rhodes Declaration at ¶ 16. Because Summit Creek within and below the exclosure is the same Rosgen type as the Malheur Wild and Scenic River and many reaches of the North Fork Malheur Scenic River, it is entirely appropriate to draw comparisons between conditions in these various areas. *Id.* *See also* Beschta Declaration at ¶¶ 19–22 (discussing importance of exclosures); Second Rhodes Declaration at ¶¶ 13–17 (discussing importance of exclosures, citing Forest Service’s own watershed analysis statement that “the [Summit Creek] exclosure is extremely valuable as an example of grassland riparian habitat potential without the influence of livestock grazing”). Moreover, Rosgen notes that reference reaches free from the influence of grazing, such as the Summit Creek exclosure, are critical to determining the impacts of land use on stream conditions. *See id.* at ¶ 17 (citing Rosgen).

2. The Trip Report completely fails to address the Christie monitoring data.

The authors of the Trip Report state that Christopher Christie’s observations were not substantiated by the attachments provided in his declaration, stating that his photos and monitoring were from the Murderer’s Creek and Blue Mountain allotments, which are elsewhere on the Malheur National Forest. See Trip Report at 2, 3 (“Nothing was provided for the allotments associated with the Malheur or North Fork Malheur Wild and Scenic River corridors”). This statement is simply incorrect, as the monitoring attached to Christie’s declaration quite clearly is from the allotments at issue in this case. See Christie Declaration at ¶ 22 & Attach. 1. Plaintiffs can only surmise that the authors of the Trip Report must have reviewed Christie’s monitoring data and photos associated with a separate lawsuit involving the Murderer’s Creek and Blue Mountain allotments. See Ore. Natural Desert Ass’n v. U.S. Forest Serv., No. 03-381-HA (D. Or. filed Mar. 24, 2003). As a result of this significant error, any conclusions in the Trip Report regarding Christie’s monitoring of the wild and scenic river corridors—including the assertion that “[p]resumably his statements about allotments noted in paragraphs 16 through 19 were observational and not based on scientific or Forest Service prescribed methods,” Trip Report at 2—should be discounted by the court. This error undermines considerably the relevance and credibility of the Trip Report.

3. The Trip Report fails to provide any empirical monitoring data of its own.

The authors of the Trip Report assert that Drs. Beschta and Kauffman and Jonathan Rhodes employed methods that were “observational and not based on scientific method” and they discussed grazing only in a “generic sense.” Trip Report at 1. This is a surprising assertion, given that: (1) Drs. Beschta and Kauffman have spent a collective several decades specifically researching hydrologic and riparian conditions throughout the Malheur National Forest’s stream

basins, see supra Sec. V.A.; (2) Jonathan Rhodes provided tables of quantitative data regarding vegetative stubble height and bank stability, in addition to detailed analyses of the Christie data, see Rhodes Declaration at Table 1 at p.12, Table 2 at p.23; ¶¶ 13–15, 22–24, 39, 51, 56, 90; (3) Rhodes assessed available Forest Service monitoring data and reports for the allotments at issue, see, e.g., id. at ¶¶ 22–23, 27; and (4) Dr. Kauffman also assessed Christie’s data and photos and compared them to his own observations and experience, see Kauffman Declaration 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”). Moreover, a fundamental aspect of the scientific method is to make observations and then interpret those observations “within the context of documented findings from salient scientific research”—which is precisely what Beschta, Kauffman and Rhodes did. See Second Rhodes Declaration at ¶¶ 5–6. As Rhodes points out, the Trip Report provides “no new data or measurements, but instead opt[s] for very selective refuting of some specific issues we raised based on their observations” and that it is “almost completely devoid of any discussions of salient scientific studies to support [its] general contentions.” Id. at ¶ 5. See also id. at ¶¶ 6–7 (pointing out that Trip Report ignores much of the data produced and discussed in the Beschta, Kauffman and Rhodes Declarations, dismissing those data without any independent measurements of its own). See, e.g., Trip Report at p. 4 (stating “Our observations within [the] South River Unit of the North Fork allotment, and the North River Unit of the North Fork

Allotment suggest that the bank stability percentages reported in Table 2, page 23 of the Rhodes declaration are erroneous”—but providing no data of their own).

Moreover, the authors of the Trip Report visited only three of the six allotments at issue in this case and an even smaller percentage of the river corridor units at issue. See id. at pp. 6–15 (indicating they visited the Dollar Basin/Star Glade Allotment (Dollar Basin Unit), Flag Prairie Allotment (River Unit), North Fork Allotment (South River and North River units), and Spring Creek Allotment (South River and River Holding units), plus the Summit Creek enclosure). Nevertheless, the Trip Report makes the sweeping conclusions that, on the North Fork Malheur Scenic River, “[c]urrent management strategies are appropriate for conditions experienced in the recent history” and—amazingly—“[w]e saw no indication of degradation of riparian or stream conditions throughout the allotments on the North Fork.” Id. at p. 15 (emphasis added). The authors’ acknowledgement of the level of degradation that has occurred on the Malheur Wild and Scenic River’s Dollar Basin/Star Glade Allotment is more candid, see id. at 7 (overgrazed willows), 10 (excessive width-to-depth ratios), 12 (listing management changes needed), and this is borne out in the Forest Service’s decision to rest the South Star Glade and Dollar Basin units this summer. Def. Ex. 108 at 1.

4. The Trip Report fails to provide any meaningful discussion with respect to compliance or non-compliance with the INFISH aquatic conservation strategy standards.

Finally, the Trip Report is tellingly silent with respect to any direct and quantitative assessment of the key stream and riparian health standards the Forest Service must satisfy pursuant to INFISH. See Second Rhodes Declaration at ¶¶ 9–12. The Report’s almost complete reliance on the PFC method and Rosgen channel classifications, to the detriment of any assessment of compliance or non-compliance with INFISH standards, is a significant short-

coming. References to actual INFISH standards are few and far between. See, e.g., Trip Report at 5 (“We did not evaluate pool frequencies within the reaches we visited” and discounting Rhodes’ conclusions with respect to pool density without offering any refuting evidence of their own) (irrelevant statement that RMO for width-to-depth ratio “should be reevaluated”) (arguing, without support, that “All statements . . . attempting to tie current grazing management to stream temperatures are conjectural”), 10 (blaming Malheur River’s excessive width-to-depth ratios on Dollar Basin/Star Glade Allotment on “non-USFS[] sources” without any further support), 13 (documenting excessive width-to-depth ratio on North Fork Malheur River on Flag Prairie Allotment, and stating ratio “is now stable” without any further support). Similarly, the OCA’s response contains no discussion of compliance or non-compliance with INFISH standards, acknowledging only that the Forest Service’s “duty to apply the terms, conditions, standards and guidelines in the [river management plans], INFISH and the land use plan is mandatory.” OCA Resp. at 10–11. Perhaps the coup de grâce for the Forest Service’s Trip Report is its incredible assertion that, “In every area we visited, livestock grazing if managed according to recent past grazing plans of the Forest Service, posed no risk of irreparable damage to channel morphology and no risk of irreparable ecological damage to the ecologic health of the riparian zones or uplands.” Trip Report at 6. This statement simply is incongruous with the past several years’ monitoring and assessments of these river corridors by the Forest Service itself, by the U.S. Fish and Wildlife Service, and by the Christie monitoring data, as well as the analyses provided by Beschta, Kauffman and Rhodes.

With the Trip Report largely silent as to compliance with INFISH, the Forest Service is left to argue that various management changes made over the last several years on the six allotments at issue in this case satisfy the requirement to “[m]odify grazing practices” that retard

or prevent attainment of RMOs. See Def. Resp. at 22–23. Rather than cite any specifics, Defendants largely rely upon statements in the 2004 AOIs to the effect that “[s]ignificant changes in the proposed action for 2004 have been made compared to the proposed action for 2003.” See id. at 23 (making similar statements or less for the Bluebucket, Dollar Basin/Star Glade, and North Fork allotments). Where the Forest Service does provide specific examples of these “meaningful modifications,” those examples include switching “classes” of livestock (i.e., from cattle to sheep), and speculation over the completion of a fence on the Ott Allotment that had been known to be necessary since adoption of the North Fork Malheur Scenic River Plan over a decade ago. Id. The latter project will, of course, finally be completed prior to turnout on the Rattlesnake Unit this summer because of the Stipulation entered into by the Forest Service, the Robertson Ranch and Plaintiffs. In fact, the changes the Forest Service and the permittees, see Hussey Declaration (attached notes from OCA’s attorney regarding proposed 2004 grazing season changes), argue will be sufficient to reverse the ecological damage that is occurring in these river corridors is no different from the types of changes attempted in the past. See, e.g., Pl. Attach 3 at 3 (describing water developments, fencing, resting pastures for one year, and earlier off-dates on Bluebucket Allotment); Pl. Attach. 10 at 2 (describing operating/ maintenance plan for a water diversion and completion of fencing on Spring Creek Allotment); Pl. Attach. 11 at 3 (additional monitoring required on North Fork Allotment). In short, the “meaningful modifications” proposed by the Forest Service this year are no different than the ineffective changes made the past several years. The only change that Plaintiffs agree will begin to satisfy INFISH’s requirement to manage grazing so as not to retard or prevent attainment of RMOs, is the agency’s proposed decision to rest the Dollar Basin/Star Glade Allotment’s South Star Glade and Dollar units. On that allotment, though, the ecological damage from grazing is extreme and

far more than a single season of rest will be required to begin to recover the river corridor. See, e.g., Rhodes Declaration at ¶¶ 39, 51–53, 100–102.

Perhaps in recognition of the weakness of its claims that the Forest Service has, and will, comply with the INFISH requirement of insuring grazing does not retard or prevent attainment of RMOs, the agency eventually resorts to the argument that the RMOs are designed to “operate at the landscape scale as opposed to the scale of an individual allotment.” Def. Resp. at 24.

Defendants cite INFISH’s statement that “[a]ll of the described features may not occur in a specific segment of stream within a watershed, but all generally should occur at the watershed scale for stream systems of moderate to large size.” See Pl. Attach. 15 at E-3. Defendants apparently urge the court to accept an interpretation of this statement that INFISH standards are simply inapplicable at the stream reach level. Obviously, this would render the INFISH RMOs completely useless. In any event, it is one thing for a given stream reach to fail to satisfy an RMO here and there; it is a completely different matter when, as here, nearly the entirety of these two protected river corridors are failing to satisfy most or all of the INFISH RMOs. See, e.g., Rhodes Declaration at ¶¶ 50–62 (bank stability failures), 63–67 (overhanging banks), 71–79 (pool frequency), 80–86 (width-to-depth ratios), 96–97 (water temperature).

C. The Forest Service and the OCA Would Have the Court Assess the Likelihood of Continued Irreparable Harm from Grazing in a Vacuum, Speculating that the Proposed 2004 Grazing Plans Will Cure the Corridors’ Continued Ecological Degradation.

The Forest Service argues, with little or no support, that Plaintiffs’ evidence does not address an appropriate temporal or geographic scope necessary to support the requested relief. Def. Resp. at 27. Both the Forest Service and the OCA cite Nat’l Wildlife Fed’n v. Cosgriffe, 21 F.Supp.2d 1211 (D. Or. 1998), for the proposition that Plaintiffs must “link the agency’s current grazing practices to extant resource conditions.” Def. Resp. at 27 (citing 21 F.Supp.2d at 1222);

OCA Resp. at 7. Cosgriffe involved a challenge to the BLM’s failure to prepare a comprehensive river management plan for the John Day and South Fork John Day wild and scenic rivers, pursuant to WSRA section 3(d)(1). 16 U.S.C. § 1274(d)(1). The plaintiffs in that case alleged that the agency’s authorization of site-specific grazing activities had caused cumulative harm to the rivers’ ORVs and therefore violated the “protect and enhance” duty. 21 F.Supp.2d at 1216. Importantly—and the reason Cosgriffe is readily distinguishable from the present action—the injunction requested by the plaintiffs in Cosgriffe was to remedy the BLM’s procedural failure to prepare a comprehensive river management plan. See id. The court determined that eliminating grazing from certain areas was not an appropriate remedy for a failure to develop a management plan. Id.

In this case, Plaintiffs are requesting a limited injunction prohibiting grazing in order to remedy failures to comply with a number of substantive provisions intended to protect the very values being degraded by grazing. These substantive provisions are the Forest Service’s duty to “protect and enhance” designated river values, the duty to implement the already-adopted river management plan and Forest Plan grazing standards, and the duty to manage grazing in these corridors consistently with the provisions of the Forest Plan. Moreover, in this case, Plaintiffs have provided extensive evidence that does in fact link the Forest Service’s “current grazing practices” to the ecological degradation of the Malheur and North Fork Malheur wild and scenic rivers.¹¹ See also Beschta Declaration at §§ A, B, C, D, E (discussing damage by historic grazing

¹¹ In addition, the evidence offered is distinguishable because the plaintiffs’ evidence in Cosgriffe consisted of very general facts, such as the listing of steelhead under the ESA and the fact that parts of the wild and scenic rivers were “water quality limited” (under the Clean Water Act) for temperature. 21 F.Supp.2d at 1222. The court in Cosgriffe took particular note of the fact that the plaintiffs did not point to any specific evidence of grazing damage such as the agency report regarding sensitive plants and areas in the Donner und Blitzen Wild and Scenic River case. Id. at 1221–22 (referring to ONDA v. Green, 953 F.Supp. 1133 (D. Or. 1997)).

and explaining how such damage has continued with current grazing practices). Although the Forest Service asserts that this court should only consider the agency's "current grazing practices" from June 1, 2004 forward, Plaintiffs submit that an informed assessment of the agency's ability to satisfy its various obligations under WSRA and NFMA necessarily requires consideration of the agency's grazing practices in the context of several years or more of repeated failures to ensure that grazing satisfies mandatory standards. The Forest Service asks the court to take a "trust us" approach, *cf.* 21 F.Supp.2d at 1219–20 (rejecting such approach), asking the court to buy into the theory that the generally status quo revisions proposed in the 2004 AOIs will simply reverse a decade of chronic, repeated grazing damage. Based on the evidence before the court, this is an unreasonable request by the Forest Service.

D. Economic Harm Does Not Factor Into the Test for a Preliminary Injunction.

The OCA asserts that its members and local communities will be irreparably harmed by an injunction. OCA Resp. at 3, 32–33. The OCA members' economic harm does not factor into the test for a preliminary injunction because that test focuses on "irreparable" harm, and loss of money is not irreparable. The Supreme Court has stated that it is "clear that the temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury." Sampson v. Murray, 415 U.S. 61, 90 (1974). As the Court noted in Sampson:

The key word in this consideration is irreparable. Mere injuries, however, substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Id. (quoting Va. Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958)). The Ninth Circuit has reiterated that "economic injury alone does not support a finding of irreparable harm." Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, 944 F.2d 597, 603 (9th

Cir. 1991).

The OCA relies upon a Tenth Circuit opinion for the principle that the public has an interest in an area's economic stability and preservation of the status quo. OCA Resp. at 33 (citing Valdez v. Applegate, 616 F.2d 570 (10th Cir. 1980)). First, it is extremely unlikely that enjoining the small percentage of acres on the six individual grazing allotments at stake in this action will undermine Grant and Malheur counties' economic stability. The fill-in-the-blanks economic surveys cited by the OCA in its Exhibit 1, and attached to the Declaration of Karen Budd-Falen (Ex. 14), are vague and largely consist of opinion. It is not clear that the survey respondents understood how many public lands allotments, acres, AUMs, or permittees are involved in this lawsuit when they reported their economic reliance on ranching. Even if these "stability" and "status quo" interests were compelling in the Tenth Circuit, there has been subsequent Supreme Court guidance on how to balance those harms against environmental harm. In Amoco Prod. Co. v. Village of Gambell, the Court stated that the "balance of harms usually favors issuance of an injunction to protect the environment." 480 U.S. 531, 545 (1987). In short, potential economic effects on ranchers and businesses should not be a key consideration at the preliminary injunctive relief stage.

VI. THE COURT SHOULD WAIVE THE RULE 65 BOND REQUIREMENT IN THIS CASE

Plaintiffs respectfully request that, if the Court grants Plaintiffs' motion for preliminary injunctive relief, the Court waive the bond requirement of Rule 65(c). It is settled law that the court has discretion to waive the bond requirement, or to set nominal security in certain circumstances. See, e.g., Wilderness Soc'y v. Terrel, 701 F. Supp. 1473, 1492 (E.D. Cal. 1988); People of the State of Cal. v. Tahoe Reg'l Planning Agency, 766 F.2d 1319, 1325 (9th Cir. 1985), amended on other grounds, 775 F.2d 998 (9th Cir. 1985); Friends of the Earth v. Brinegar, 518 F.2d 322, 323 (9th Cir.

1975). The Ninth Circuit has held that a waiver is particularly appropriate “where requiring security would effectively deny access to judicial review.” 766 F.2d at 1325. Moreover, it is well-established that public interest environmental plaintiffs need not post such bonds, because of the potential chilling effect bond requirements pose on plaintiff litigation to protect the environment and the public interest. See 766 F.2d at 1325. Federal courts have consistently waived the bond requirement in public interest environmental litigation, or required only a nominal bond. See e.g., id. (no bond).¹²

The courts have articulated at least two main reasons for this rule, both of which apply in this case. First, Plaintiffs’ lack of financial interest in the outcome warrants a waiver of the bond requirement. Rule 65(c) is based on the theory of unjust enrichment—i.e., that plaintiffs should not benefit financially from the wrongful granting of preliminary relief against defendants. Where, as here, plaintiffs gain no pecuniary interest from the injunction, the purpose of Rule 65(c) is not served and no bond should be required. See, e.g., Wisc. Heritages v. Harris, 476 F. Supp. 300, 302 (E.D. Wis. 1979) (no bond required where plaintiff “is a nonprofit organization with no apparent financial stake in the outcome of this suit”). Second, requiring Plaintiffs to post a substantial bond would effectively deny them access to the courts and discourage litigation brought to protect the environment. See, e.g., Natural Res. Def. Council v. Morton, 337 F. Supp. 167, 169 (D.D.C. 1971); Tahoe Reg’l Planning Agency, 766 F.2d at 1325 (court has discretion to dispense with the security requirement where requiring security would effectively deny access to judicial review for a non-profit environmental group); Wisc. Heritages, 476 F. Supp. at 302; Wilderness Soc’y v. Tyrrel, 701 F. Supp. at 1492; Friends of the Earth v. Brinegar, 518 F.2d 323 (9th Cir. 1975). The general inability of nonprofit organizations to afford substantial bonds

¹² Plaintiffs can provide an extensive citation list of opinions from federal courts around the country (rulings of nominal or no bonds required), upon request from the court.

underscores this concern. Plaintiffs here are unable to post a substantial bond. Moreover, this case is in a Rule 65 position only because of the Forest Service's delay in producing the administrative record, timely production of which would likely have allowed the case to proceed on the merits rather than in the context of a preliminary injunction motion. As a result, the court should waive the bond requirements of Rule 65(c) in order to insure that government agencies may be held accountable when they fail to discharge statutory obligations.

CONCLUSION

In short, the relative harm to the parties, Plaintiffs' likelihood of success on the merits, the extraordinary likelihood of continued irreparable harm to these wild and scenic river corridors, and the public interest all weigh heavily in favor of this court granting injunctive relief, before June 1, 2004, barring Defendants and Intervenors from authorizing, allowing or conducting livestock grazing on any portion of the Bluebucket, Dollar Basin/Star Glade, Flag Prairie, Spring Creek, or North Fork allotments that lies within, or is not securely and permanently fenced from, the Malheur and North Fork Malheur wild and scenic river corridors, until Plaintiffs' claims can be heard on the merits.

DATED this 17th day of May, 2004.

Respectfully submitted,

s/ Peter M. Lacy

Peter M. Lacy ("Mac") (OSB # 01322)
Oregon Natural Desert Association

Of Attorneys for Plaintiffs