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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON**

**OREGON NATURAL DESERT  
ASSOCIATION and CENTER FOR  
BIOLOGICAL DIVERSITY**

Case No. CV-03-381-HA

Plaintiffs,

v.

**UNITED STATES FOREST SERVICE,**  
and **ROGER W. WILLIAMS**, Malheur  
National Forest Supervisor,

**PLAINTIFFS’ REPLY IN SUPPORT OF  
MOTION FOR PRELIMINARY  
INJUNCTIVE RELIEF**

**EXPEDITED RULING REQUESTED**

Defendants,

**DAYVILLE GRAZING ASSOCIATION  
and OREGON CATTLEMENS  
ASSOCIATION,**

Defendant-Intervenors.

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## INTRODUCTION

The Forest Service has made significant admissions that grazing on the Murderers Creek and Blue Mountains Allotments is failing to meet established standards and causing ecological degradation. However, the Forest Service relies upon proposed grazing for 2004 that constitutes too little too late. Moreover, the record does not support the Forest Service's conclusions that its authorization of grazing for 2004 in its Annual Operating Instructions will comply with its grazing management standard in the PACFISH aquatic conservation strategy, which is a Forest Plan standard. The record also demonstrates that the Forest Service's decisions are arbitrary and capricious because they lack relevant monitoring information to meet the National Forest Management Act "viability" duty.

Finally, the balance of the hardships should favor Plaintiffs. Plaintiffs have demonstrated specific and irreparable harm will occur. The Intervenors' evidence is primarily economic in nature. Moreover, Plaintiffs should not be prejudiced by this motion being heard shortly before the commencement of grazing when Plaintiffs have made every effort to have this matter heard on the merits and on this motion well before the start of the grazing season.

### I. THIS COURT HAS JURISDICTION TO ISSUE A PRELIMINARY INJUNCTION

#### A. Plaintiffs' Request for a Preliminary Injunction of the Forest Service's Annual Authorizations of Grazing for Violations of NFMA Is Not Precluded by Section 325.

The Forest Service attempts to sweep Plaintiffs' entire lawsuit under the rug of the Rescissions Act and subsequent appropriations riders concerning the processing of grazing permits for renewal. Section 325 of the 2004 Interior Department Appropriations Act does not foreclose entry of an injunction in this case. FS Memo at 22-23. First, Congress has not expressly restricted this Court's equitable jurisdiction. Second, Section 325 concerns grazing permits, not the annual authorizations

of grazing<sup>1</sup> that Plaintiffs challenge here. Finally, Section 325 does not absolve the Forest Service of complying with its statutory obligations pursuant to the National Forest Management Act (NFMA) and other laws when it annually authorizes grazing.

Federal courts retain equitable powers unless Congress specifically abrogates such powers. The Supreme Court has made clear that it will “not lightly assume that Congress has intended to depart from established principles.” Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982) (citations omitted). “Comprehensiveness of . . . equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court’s jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.” Id. (quoting Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946)); see also United States v. Oakland Cannabis Buyers’ Cooperative, 532 U.S. 483, 496 (2001). The Forest Service cannot demonstrate that Section 325 affirmatively limits this Court’s authority to grant equitable relief any time grazing is involved in the litigation.

Section 325 exclusively concerns the processing of grazing permits. FS Memo Exh. G at 2. Here, Plaintiffs do not challenge the processing of the grazing permits and do not seek “broad-scale modifications of existing terms and conditions of grazing permits” as the Forest Service asserts. FS Memo at 22. Plaintiffs seek a preliminary injunction of the Forest Service’s annual decisions to authorize grazing on the Blue Mountain and Murderers Creek Allotments because the grazing will cause irreparable harm to listed fish, their habitat and Plaintiffs’ members. Because Plaintiffs do not challenge or seek to modify the grazing permits, Section 325 is not relevant to Plaintiffs’ motion for a preliminary injunction.

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<sup>1</sup>The annual authorization decision is documented in an Annual Operating Plan (AOP), which the Forest Service now refers to as the Annual Operating Instructions (AOI).

Grazing permits and AOIs are separate and distinct decisions.<sup>2</sup> As the Forest Service concedes, while Section 325 requires that the terms and conditions of a grazing permit are to remain in effect until the permit is processed in accordance with NEPA and other applicable laws, “the Forest Service nevertheless retains discretion to make adjustments to grazing practices on the allotment from year-to-year through the use of AOIs consistent with the terms and conditions of the permits.” FS Memo at 8, n. 3. As the Regional Forester instructed to all Forest Supervisors, “the way we change term grazing permits is through the NEPA process. Until we achieve Rescissions Act commitments [sic], changes in operations will be implemented through the Annual Operating Instructions. PAR 2270 (including a handwritten note to “Use PACFISH, as modified by consultation”). These changes can include non-use of the allotment for purposes of resource protection, as demonstrated by the Forest Service’s decision not to allow grazing on the Blue Mountains Allotment in 2003. BMAR 959 (AOI for 2003 listing stocking as “RESOURCE PROTECTION NON-USE”); see also FS Memo Exh. D at 1 (2004 AOI “resting” four of the five units). Thus, a grazing permit does not guarantee a right to graze in any year.<sup>3</sup>

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<sup>2</sup>This Court has held that AOPs are “discrete, site-specific actions taken by the agency from which binding obligations flow, as distinct from permits. Oregon Natural Desert Ass’n v. U.S. Forest Svc., Civ. No. 03-213-KI (opinion issued Feb. 11, 2004) at page 9 (attached as Attachment 19).

<sup>3</sup>There have been innumerable cases over the last century where ranchers have tried to establish that they have a “right” to graze public lands. None have been successful; all cases have reaffirmed that the use of public lands for grazing is not a right but a privilege. See, e.g., Osborne v. United States, 145 F.2d 892, 896 (9th Cir.1944) (“It is safe to say that it has always been the intention and policy of the government to regard the use of its public lands for stock grazing . . . as a privilege which is withdrawable at any time for any use by the sovereign without the payment of compensation”); United States v. Fuller, 409 U.S. 488 (1973) (the permit is merely a license that the government can cancel or modify at any time and for any reason without payment of compensation); McKinley v. United States, 828 F. Supp. 888 (D.N.M. 1993) (grazing permit is a revocable license); Diamond Bar Cattle Co. V. United States, 168 F.3d 1209, 1212 (10<sup>th</sup> Cir. 1999)

The District of Idaho’s decision in Western Watershed Project v. Sawtooth Nat’l Forest, No. CIV-01-389-E-BLW, slip op. (D. Id. April 2, 2003) cannot apply to the facts of this case. FS Memo at 23. In Western Watersheds Project, plaintiffs sought “closure of certain allotments, or the modification of grazing permits, based on the Forest Service’s failure to complete the analysis required under NEPA and the Organic Act.” Id. slip op. at 3, FS Memo Exh. H at 3. The court held that the Rescissions Act and the Consolidated Appropriations Resolution of 2003 (CAR) “limit the authority of the Court to void or modify the permits.” Id. at 3-4. Here, Plaintiffs do not rest their challenge on the permits being issued without the appropriate process under NEPA or other laws, nor do they ask this Court to void or modify the permits. Importantly, the Idaho court held that there is nothing in the Rescissions Act or the CAR that affected its authority to continue to enjoin rules concerning wolf control when they prey upon livestock. Id. at 4. Likewise, there is nothing in Section 325, which concerns the processing of grazing permits in accordance with NEPA and other laws, that affects this Court’s authority to enjoin the Forest Service from implementing its 2004 AOIs that authorize grazing inconsistent with Forest Plan standards in violation of NFMA. 16 U.S.C. § 1604(i).

B. Plaintiffs Have Standing and a Right to Judicial Review of their AMP and NEPA Claims Pursuant to the APA.

The Forest Service asserts that Plaintiffs lack standing to pursue their 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. FS Memo at 29-30. According to the Forest Service’s interpretation, 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 30. What the Forest Service ignores, 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 failure to prepare Allotment Management Plans and its annual authorization of grazing via AOPs, without the required environmental analyses and without adhering to the established schedule for such analyses, violates NFMA and NEPA. See Second Amended Complaint at ¶¶ D and E (Prayer for Relief). This Court has held that it retains the authority to grant declaratory relief on similar claims. Oregon Natural Desert Ass'n v. U.S. Forest Svc., Civ. No. 03-213-KI, slip op. at 18 (Opinion issued June 10, 2004) (Attachment 20). Therefore, the Forest Service's argument that Plaintiffs lack standing to pursue the AMP and NEPA claims is untenable.

The Forest Service also argues that Section 325 precludes judicial review of Plaintiffs' claims that the Forest Service has failed to comply with NEPA because "the agency's operations in this context have been 'committed to agency discretion by law.'" FS Memo at 30. The APA and its legislative history favor a broad right of judicial review and remedy. Abbott Labs. v. Gardner, 387 U.S. 136, 140-41 (1967) ("the Administrative Procedure Act's generous review provisions must be given a hospitable interpretation") (internal quotes omitted). The APA applies "except to the extent that agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Section 325 does not provide that the Forest Service has the discretion to fail to comply with NEPA. It only provides that the timing and priority of the allotments is within the sole discretion of the agency. However, in this case, the Forest Service already determined the timing and priority of the allotments in need of analysis, but it has not acted to comply with NEPA or prepare AMPs. Simply because the agency has discretion doesn't mean it can choose not to exercise it. This Court can order the Forest Service to exercise that discretion and comply with NEPA, based on the priority and timing the agency has determined.

II. THE FOREST SERVICE'S PAST AND CURRENT AUTHORIZATIONS OF GRAZING ARE NOT CONSISTENT WITH THE FOREST PLAN PACFISH GRAZING STANDARD AND ARE OTHERWISE ARBITRARY AND CAPRICIOUS.

A. The Forest Service has No Basis in Relevant Fact to Conclude 2004 Grazing Will Not Retard or Prevent Attainment of RMOs or Adversely Affect Anadromous Fish.

The PACFISH grazing standard requires the Forest Service to modify grazing practices that retard or prevent attainment of Riparian Management Objectives (RMOs) or are likely to adversely affect listed anadromous fish, or suspend grazing if adjusting practices is not effective in meeting RMOs. In the face of Plaintiffs' motion for a preliminary injunction, the Forest Service has concluded that this year's grazing will not retard or prevent attainment of RMOs or adversely affect anadromous fish. The Forest Service has not evaluated the relevant factors of RMO measurements in order to reach such a conclusion. This failure renders the 2004 authorizations of grazing arbitrary and capricious.

The Forest Service argues that RMOs are objectives, not standards, and thus, "warrant a different type of construction than does an explicit standard." FS Memo at 25. The PACFISH grazing standard could not be more explicit. It requires that the Forest Service manage grazing in a manner that will not "prevent or retard attainment of Riparian Management Objectives." As a result, the Forest Service has placed RMOs at the center of its grazing management standard. There is simply no manner in which to determine whether the standard is being met without measuring the RMO habitat attributes and determining the effect the grazing is having upon them. Despite RMOs being the measure by which the Forest Service is to determine whether grazing is meeting the standard, nowhere in the record does the Forest Service demonstrate that it has taken the appropriate

measurements to determine how the grazing is affecting the RMO habitat features.<sup>4</sup> This failure to evaluate relevant factors renders the decisions to authorize grazing arbitrary and capricious.

The Forest Service further argues that RMOs were designed to operate at a landscape scale, and, when viewed from this broader scale grazing on the challenged allotments “will maintain all of the constituent habitat elements reflected in the RMOs and is in compliance with PACFISH.” FS Memo at 25. The Ninth Circuit has rejected this approach. Pacific Coast Fed’n of Fishermen’s Ass’n, Inc. v. Nat’l Marine Fisheries Svc (“PCFFA III”), 265 F.3d 1028, 1035-36 (9<sup>th</sup> Cir. 2001). In interpreting the Aquatic Conservation Strategy (ACS) of the Northwest Forest Plan, which is similar to the PACFISH aquatic conservation strategy, the court held that the purpose of restoring ecosystem health at a landscape scale “does not prevent project site degradation and does nothing to restore habitat over broad landscapes if it ignores the cumulative effect of individual projects . . .” Id. at 1036. Thus, the Forest Service cannot ignore the degradation on the Murderers Creek and Blue Mountain allotments by examining the habitat solely at the landscape scale. Id. (“the large spatial scale appears to be calculated to ignore the effects of individual sites and projects”).

Importantly, even if the landscape scale is appropriate, the Forest Service cannot satisfy its duty under the PACFISH grazing standard to manage grazing so that it will not “retard or prevent attainment” of RMOs where it will only “maintain” the RMO constituent elements, in particular, where those elements are functioning at risk or at unacceptable risk. FS Memo at 25 (citing FS Exh.

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<sup>4</sup>The record does not reveal any stream survey information, although Plaintiffs gather that stream surveys occurred on at least some of the riparian areas in these allotments in 1992. See e.g. Exh. C at 6 (“Stream surveys were completed on the South Fork Murderers Creek on June 25, 1992”); Exh. E at 3 (“description of Idaho Creek was done in July of 1992”); Exh. E at 6 (“survey data for Summit Creek was collected during 1992”). Even if the stream surveys measure the RMO habitat attributes, a failure to repeat the measurements over the next twelve years of grazing cannot result in relevant information to make grazing management decisions pursuant to PACFISH.

F at 11-13). None of the fish habitat features in the John Day basin are “functioning appropriately.” FS Exh. 11-12. The effects of the action will not “restore” habitat, and the agency determined all are to “maintain” the existing degraded condition. FS Exh. at 11-12. Maintaining habitat features in a condition where they are functioning at risk or at unacceptable risk is certain to “retard and prevent attainment” of the RMOs, and, thus, violates the PACFISH duty.

B. The Forest Service Has Authorized Grazing for 2004 that is Likely to Result in a Static or Downward Trend.

The Forest Service claims that “grazing that actually is scheduled to occur in 2004 . . . has been significantly modified from that which occurred in 2003 to address resource concerns . . . .” FS Memo at 2.<sup>5</sup> The Forest Service does not have any support in the record to demonstrate that the 2004 grazing will result in compliance with the PACFISH grazing standard.

The Forest Service’s expert, Darel Wayne Elmore declares that “July and August are the critical periods for riparian woody and herbaceous species and excessive use and/or lack of plant rest will generally result in a static or downward trend.” Elmore Declaration ¶ 24. Mr. Elmore explains that “continually grazing the plants during their critical growing period (summer) every year and not allowing regrowth and rest to improve vigor and root mass” can result in converting a stream to poor ecological condition. Elmore Declaration ¶ 9 at page 6. Yet, in the 2004 AOIs, the Forest Service continues to allow grazing nearly the same number of livestock during July and August. FS Exh. A at 1, Exh. B at 1; see also Exh. D at 1 (allowing grazing of the Blue Mountain Allotment West Summit Unit for August and September, 2004). There is no explanation in the AOIs or elsewhere

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<sup>5</sup>As an initial matter, the AOIs submitted as Forest Service Exhibits A, B and D have not been signed by the Forest Service or the grazing permittees.

in the record how continued grazing during the critical regrowth period will result in compliance with the PACFISH grazing standard.

On the Murderers Creek Allotment, the Forest Service's expert, Mr. Elmore, declares that the streams and riparian areas in the Middle Herd and the South Herd pastures are in a "static or downward trend." Elmore Declaration ¶ 26. Yet, for 2004 the Forest Service authorizes grazing of the Middle and South Herds, for a season of use that is nearly identical to the season of use in 2003. Compare FS Exh. A at 1 (season of 7/16 to 10/1) and MCAR at 1394 (2003 AOI showing season of use from 7/16 to 9/30 for the Middle Herd of 180 AUMs and 7/12 to 10/17 for the South Herd of 350 AUMs). Furthermore, the Forest Service authorizes a total of 500 AUMs while running the two herds together, which is only slightly less than the total of 530 AUMs allowed in 2003. These changes are not "significant" nor is there any basis to support the Forest Service's conclusion that they will satisfy the PACFISH duty.

For the North Herd on the Murderers Creek Allotment, the Forest Service has not made any changes to grazing management, except to eliminate reference to the permittee's grazing from mid-May through mid-July. Compare FS Exh. B at 1 (grazing of 275 AUMs on Oregon Mine Unit beginning on 7/16, moving to Dan's Creek, then to RedRocks/Martin Corrals Unit and leaving on 10/15) to MCAR at 1388-1389 (2003 AOP authorizing grazing of 275 AUMs on the "Aldrich Allotment from 5/22 to 7/15) and MCAR at 1067 (2002 AOP authorizing grazing of 275 AUMs of the "Aldrich Unit" from 5/20 to 7/15) and MCAR at 863 (2001 AOP authoring grazing of 275 AUMs from 5/25 to 7/15) and MCAR at 686 (2001 AOP authorizing grazing of 275 AUMs of the "Aldrich Unit" from 5/15 to 7/20).

On the Blue Mountain Allotment, Plaintiffs are relieved that the Forest Service decided not to allow grazing in 2003. The 2004 AOI authorizes rest of four of the units, however, it allows grazing

on the West Summit unit for 61 days in July and September, when that unit has previously been grazed for 25 days mid-June to early July. Compare FS Exh. D at 1 with BMAR at 865 (2002 AOP authorizing 175 AUM on West Summit from 6/19 to 7/04). There is nothing in the record to support the Forest Service's conclusion that two months of grazing will comply with the PACFISH duty.

Finally, in listing the "standards" in each of the AOIs, the Forest Service lists the ESA consultation requirements of 4 inches of residual stubble height of vegetation and the percent of allowable forage use based on weight. FS Exh. A at 3, Exh. B at 3, Exh. D at 3. The Forest Service does not list a standard for woody species. Nowhere in the AOIs, or the record does the Forest Service explain how a stubble height can act as a surrogate for measuring the RMO habitat attributes. Moreover, even if it could, the Forest Service has failed to explain why it has reduced the recommended stubble height of six inches or more to only four inches, before demonstrating that the riparian area is properly functioning. See Plts' Memo in Supp. of PI at 24.

In sum, the Forest Service has not made significant changes, with the exception of resting units on the Blue Mountains Allotment, nor are the changes supported in the record to demonstrate that they will result in compliance with the PACFISH grazing standard.

### III. THE FOREST SERVICE'S PAST AND CURRENT AUTHORIZATIONS OF GRAZING ARE NOT CONSISTENT WITH THE FOREST PLAN MANAGEMENT INDICATOR SPECIES REQUIREMENTS AND ARE OTHERWISE ARBITRARY AND CAPRICIOUS.

The Forest Service misconstrues Plaintiffs' claim to be one that solely attacks failure to monitor for management indicator species (MIS). FS Memo at 26-27. To the contrary, Plaintiffs challenge the Forest Service's decision to authorize grazing on these allotments as arbitrary and capricious because it has failed to consider the relevant facts of what effects the grazing is having on the MIS species, here steelhead. The Forest Service itself decided that monitoring for MIS species and habitat is how it would gather the relevant information to make management decisions.

Because the Forest Service has failed to monitor for steelhead, its authorization of grazing is necessarily arbitrary and capricious and fails to demonstrate that the agency is providing for the viability of steelhead, as required by NFMA and Forest Service regulations.

While a plaintiff cannot bring a broad challenge to an agency's failure to monitor in accordance with a Forest Plan, the Ninth Circuit has consistently concluded that a plaintiff is permitted "to raise claims pertaining to inadequate monitoring by bringing an APA challenge to a final decision." Ecology Center, Inc. v. U.S. Forest Service, 192 F.3d 922, 926, n.6 (9<sup>th</sup> Cir. 1999), citing Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1153 (9<sup>th</sup> Cir. 1998); Neighbors of Cuddy Mountain v. Alexander, 303 F.3d 1059, 1067 (9<sup>th</sup> Cir. 2002). In this case, the Forest Service's decisions and actions authorizing grazing as embodied by its AOPs, are arbitrary, capricious and not in accordance with NFMA because the agency has failed to collect information necessary to conclude that it is meeting its NFMA viability duty.

Plaintiffs have already explained why the Forest Service's approach does not meet the Ninth Circuit's interpretation of the NFMA viability duty. Plts' Memo in Supp. of PI at 27-29. Moreover, even if this Court accepted the Forest Service's interpretation, the Forest Service simply is not collecting any information useful to determining whether it is providing adequate habitat for the MIS steelhead. The Forest Service, in one brief paragraph, explains that it collects fish habitat data when completing Level 2 stream surveys and biological surveys. FS Memo at 28 (without citation to the record). The only reference to stream surveys refer to one-time surveys conducted in 1992. Exh. C at 6 ("Stream surveys were completed on the South Fork Murderers Creek on June 25, 1992"); Exh. E at 3 ("description of Idaho Creek was done in July of 1992"); Exh. E at 6 ("survey data for Summit Creek was collected during 1992"). The Forest Service cannot derive any useful information from stream surveys if it does not repeat the surveys and evaluate the information to

determine what effect, in fact, the ongoing grazing is having on steelhead. The Forest Service's failure to collect relevant information renders the grazing authorizations arbitrary, capricious, and inconsistent with its NFMA duties.

#### IV. THE BALANCE OF HARMS AND THE PUBLIC INTEREST FAVOR AND INJUNCTION

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. FS Memo at 31-32. The Forest Service cites 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." FS Memo at 31. 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, namely, listed steelhead and its habitat.

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 streams on the Murderers Creek and Blue Mountains allotments. 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. Here, Plaintiffs rely upon evidence from the Forest Service, NOAA Fisheries, Oregon Department of Fish & Wildlife, and Plaintiffs' own monitoring information collected by Chris Christie, and the declarations of three well-respected experts – Drs. Beschta and Kauffman and Jonathan Rhodes, all of which is specific to the two allotments at issue in this case.

The Forest Service argues that its expert, Mr. Elmore, concluded that grazing for 2004 will not cause irreparable injury. FS Memo at 32. With all due respect to Mr. Elmore, his conclusion is not well supported in his declaration and appears to contradict his statements that grazing during the critical growth periods in July and August can contribute to ecological degradation. Elmore Declaration ¶¶ 9, 24. In addition, in discussing the Tex Creek exclosure established in 1977, Mr. Elmore found that "even though the apparent trend was up, there are still areas that were in early seral condition and continued plant communities and species that do not possess the root systems necessary to protect and stabilize streambanks during moderately high flows (10-30 year events)." Mr. Elmore's conclusion that grazing on the Murderers Creek Allotment will not cause irreparable harm, in particular, where the trend is down for the Middle and North Herds, is not supported and should be given little weight.

The Forest Service argues further that "[n]ot a single member of plaintiff organizations has provided evidence that grazing on the subject allotments in 2004 will irreparably affect their interests." FS Memo at 32. Chris Christie, a member of plaintiff ONDA, has declared that he photographs wildflowers and butterflies on the allotments, that he is concerned about the ongoing degradation caused by grazing, that he has monitored these allotments, and that because he plans to

spend his retirement surrounded by the Malheur National Forest, it is important to him to be able to experience riparian areas and plant communities that have not been degraded by grazing. Christie Declaration at ¶¶ 4-6. The remainder of Mr. Christie's declaration and the attached photographs detail the monitoring work that he has conducted on the Murderers Creek and Blue Mountain Allotments. As Judge King found, "some of ONDA's members extensively use and recreate in the area, and indeed dedicate a good part of their time trying to protect it," concluding plaintiffs have standing. ONDA v. U.S.F.S., Civ. No. 03-213-KI slip op. at 17, n.3 (Attachment 20).

Finally, the balance of harms should not tip against the Plaintiffs based on the timing and posture of the case. See ONDA v. USFS, Civ. No. 03-213-KI slip op. at 19 (Attachment 20). Plaintiffs have made every effort to resolve this motion well before the eve of grazing. Plaintiffs filed the motion for preliminary injunction on March 19, 2003. Dkt. #48. The Forest Service did not respond to the motion until May 24, 2004. Dkt. #70. As Plaintiffs argued in response to the Forest Service's second request for an extension of time, Plaintiffs were concerned that a delay in briefing would allow insufficient time to hear this motion and prejudice their interests. Response to Second Extn at 2 (Dkt. #61). Moreover, prior to filing the motion, Plaintiffs attempted to resolve this case on the merits well before this grazing season, but could not due to Forest Service delay in producing the administrative record. Response to Second Extn. at 3-8 and Att. 1.

Plaintiffs communicated on numerous occasions beginning in November, 2003 that a preliminary injunction would be necessary if Plaintiffs did not receive a complete administrative record since November, 2003. Response to Second Extn., Att. 1 at pages 23, 25, 26, 33, 34. The permit holders have known since at least March 8, 2004 that Plaintiffs would need to move for a preliminary injunction. Response to Second Extn., Att. 1 at page 33. This Court should not allow the Forest Service to benefit from the delay it has created to avoid a preliminary injunction.

Moreover, the intervenors should not benefit, in a balance of the harms, from their own failure to provide for the contingency of a preliminary injunction.

V. 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).<sup>6</sup>

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

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<sup>6</sup> 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.

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 nonprofit 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 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.

Dates this 21<sup>st</sup> day of June, 2004

Respectfully Submitted,

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