

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 17-36042

WESTERN WATERSHEDS PROJECT, INC.,

Plaintiff-Appellant

v.

UNITED STATES FOREST SERVICE,

Defendant-Appellee

and

CHALLIS CREEK CATTLE CO., LLC, et al.,

Defendants-Intervenors-Appellees

On Appeal from the
United States District Court for the District of Idaho
No. 1:15-cv-00218-REB

OPENING BRIEF OF APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Plaintiff-Appellant Western Watersheds Project states that it is a non-profit corporation that has not issued shares to the public and has no affiliates, parent companies, or subsidiaries that have issued shares to the public.

Dated this 30th day of April, 2018.

s/ Kristin F. Ruether

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STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction under 28 U.S.C. §§ 1331 (federal question) & 1346 (United States as defendant), and because the action sought judicial review of final agency actions pursuant to the Administrative Procedure Act, 5 U.S.C. § 706.

This is an appeal from a summary judgment order and final judgment disposing of all claims (ER 1, 46), so this Court has jurisdiction under 28 U.S.C. § 1291. Western Watersheds Project (“WWP”) is a conservation organization whose members use and enjoy the public lands and wildlife within the public lands allotments grazed pursuant to the challenged decisions. The record demonstrates that WWP has standing, which no other party has challenged. ER 125–77 (member declarations).

The district court entered its judgment on October 31, 2017. ER 46. WWP timely filed its notice of appeal on December 22, 2017. ER 50. *See* 28 U.S.C. § 2107(b), Fed. R. App. P. 4(a)(1)(B).

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ISSUES PRESENTED FOR REVIEW

1. Whether the Forest Service violated the National Forest Management Act by issuing decisions allowing livestock to graze in sensitive fish habitat without considering whether the grazing was consistent with the Forest Plan's requirement to modify or suspend grazing that is retarding or preventing attainment of specified quantitative Riparian Management Objectives that define good fish habitat. Issue raised and ruled on at ER 32–42.

2. Whether the Forest Service violated the National Forest Management Act by issuing decisions allowing livestock to graze in sensitive fish habitat without conducting any evaluation of sediment or identifying any action to mitigate sediment, where the Forest Plan's sediment standard required an evaluation and appropriate action to reduce sediment. Issue raised and ruled on at ER 42–44.

3. Whether the district court abused its discretion in denying a motion to strike post hoc, extra-record declarations of Forest Service employees offering explanations as to how the Annual Operating Instructions were consistent with the Forest Plan which not found in, or supported by, the administrative record. Issue raised and ruled on at ER 29–32.

STATEMENT OF THE CASE

In 1995, the Forest Service, faced with badly damaged habitat conditions in fish-bearing streams throughout the West, including Idaho's Salmon-Challis National Forest, adopted the INFISH inland native fish strategy into relevant Forest Plans to allow streams to recover. Livestock grazing is one of the activities that contributed most to the degraded conditions that led to the adoption of INFISH. Livestock damage fish habitat by trampling stream banks and wading in streams, leading in turn to decreased streamside vegetation and cover, increased erosion, widened stream channels, higher water temperatures, and an inability of stream conditions to recover from year after year of chronic degradation.

The goal of INFISH is to restore streams to good fish habitat conditions at a "near natural" rate of recovery. To achieve this goal, INFISH sets quantifiable objectives—Riparian Management Objectives, which are indicators of good fish habitat, such as water temperature and bank angle—and establishes standards that require the Forest Service to restrict activities that degrade fish habitat. Under Grazing Standard GM-1, the Forest Service must modify grazing practices—including reducing the length of time grazing is allowed or reducing the number of cattle allowed—that retard or prevent attainment of the Riparian Management Objectives. The standard requires the agency to suspend grazing if modifying practices is not effective in meeting the Riparian Management Objectives.

The Forest Plan also contains Sediment Standard 5(f), intended to limit excessive fine sediment in streams, which harms fish. Standard 5(f) requires the Forest Service to evaluate activities that contribute sediment—such as livestock grazing—and take appropriate action to reduce sediment when it reaches 30% or more. The National Forest Management Act (“NFMA”) requires that site-specific actions, including the Forest Service’s annual authorization of livestock grazing, be consistent with the Forest Plan.

In 2015—twenty years after INFISH mandated stream recovery at a near natural rate, and almost thirty after the sediment standard required action to reduce sediments—the Forest Service issued Annual Operating Instructions authorizing grazing on four allotments (Antelope, Boone Creek, Copper Basin, and Wildhorse) in the Copper Basin area of Central Idaho’s Big Lost River watershed (“Copper Basin allotments”). The Big Lost River watershed supports important populations of native fish, including a unique form of mountain whitefish, which have declined significantly from their historical numbers.

The Forest Service’s own data showed that, for the decade prior to 2015, riparian habitat conditions were holding steady in a degraded state on all four Copper Basin allotments, rather than recovering at a near natural rate as required under INFISH. Forest Service data also showed that at least five streams had fine sediment levels greater than 30%.

Yet neither the Annual Operating Instructions nor any other contemporaneous documentation in the record show that the Forest Service evaluated the grazing it authorized in 2015 for consistency with the Forest Plan's Grazing Standard GM-1 or Sediment Standard 5(f). Rather than measuring and considering whether its authorized grazing was retarding or preventing attainment of the Riparian Management Objectives, and evaluating and taking action to reduce fine sediments, the agency simply authorized grazing at levels similar to prior years. By failing to ensure that its 2015 grazing authorizations were consistent with these Forest Plan requirements, the Forest Service violated NFMA, and further delayed the recovery of the streams and fish habitat in Copper Basin.

WWP filed suit challenging the 2015 Annual Operating Instructions on June 22, 2015. ER 69. In response to WWP's motion for summary judgment, the Forest Service filed three extra-record declarations with its cross-motion. Declarations of Erik K. Archer, Bart L. Gammett, and Diane L. Weaver, ER 88–124 (ECF Nos. 46-6, 46-5, 46-4). WWP moved to strike these declarations. *See* Pl.'s Mot. to Strike, ER 873 (ECF No. 50). After the District Court permitted WWP to supplement its complaint with allegations related to Sediment Standard 5(f), it struck the majority of the extra-record declarations as post hoc rationalizations. Order on Pl.'s Mot. to Strike, ER 47 (ECF No. 81).

The District Court then granted summary judgment in favor of the Forest Service and Intervenors on October 31, 2017, and in the process reversed its decision on the extra-record declarations, admitting them in full. Mem. Decision & Order on Cross-Mots. For Summ. J., ER 29–32. WWP timely appealed. Pl.’s Notice of Appeal, ER 50 (ECF No. 100).

STATEMENT OF THE RELEVANT FACTS

I. THE INFISH INLAND FISH STRATEGY

A. INFISH’s Purpose is to Stop Degradation of Fish Habitat and Promote Habitat Recovery.

The Forest Service adopted the Inland Native Fish Strategy, or INFISH, in 1995 to reduce the risk of losing populations of important native fish on 22 national forests across several western states. ER 620, 623 (INFISH decision notice). INFISH amended the relevant Forest Plans by adding management objectives, standards, and guidelines designed to promote fish habitat recovery. ER 610 (adoption into Challis Forest Plan, which governs the Copper Basin allotments); ER 719. The strategy applies to all “watersheds occupied by inland native fish,” ER 642, including a unique mountain whitefish (*Prosopium williamsoni*) found in the streams of the Copper Basin allotments.

The Forest Service developed INFISH because many watersheds were in poor condition—“below Forest Plan standards, or exceed[ing] thresholds of concern.” ER 665. Livestock grazing was among the causes of this habitat loss.

ER 722.

INFISH was adopted “to arrest habitat degradation and initiate recovery” of inland fish habitat. ER 719. “Where grazing has contributed to unstable stream banks, loss of vegetative cover and shade, and increased sedimentation, the trend toward such habitat degradation would be reversed.” *Id.* Implementation of INFISH objectives, standards, and guidelines on streams degraded by livestock grazing “would provide improved soil stability, additional stream shading, and continuing supplies of large woody debris.” *Id.*

At the same time the Forest Service adopted INFISH, it adopted a similar interim strategy to protect and recover habitat for anadromous fish—PACFISH—that contains standards virtually identical to INFISH. ER 797, 805. INFISH and PACFISH were originally intended to be 18-month interim strategies while long-term management direction was developed. *See* ER 623. However, the Forest Service never developed long-term direction to replace them, and they continue to apply to activities on forests into whose Forest Plans they were incorporated. *See* ER 445; *Friends of the Wild Swan, Inc. v. U.S. Forest Serv.*, 966 F. Supp. 1002, 1010 (D. Or. 1997) (noting INFISH “was extended administratively” and thus “remain[s] in effect”).

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B. INFISH Riparian Management Objectives and Standard GM-1.

To achieve its goals of healthy, functioning watersheds, riparian areas, and fish habitats, INFISH adopts “Riparian Management Objectives.” ER 640–41. The objectives are measurable habitat parameters describing good fish habitat that serve as indicators against which attainment or progress toward achievement of the goals can be measured. ER 707. Riparian Management Objectives are “quantifiable[] and are subject to accurate, repeatable measurements.” ER 642. The Riparian Management Objectives for non-forested stream systems—such as those in Copper Basin—provide quantitative values for: pool frequency, water temperature, bank stability, lower bank angle, and width/depth ratio. ER 643. Together, these define good fish habitat, which generally consists of narrow, deep streams with cool water, frequent pools, and stable banks that hang over the water. *See* ER 641–43.¹

To achieve the Riparian Management Objectives, INFISH establishes a series of “standards and guidelines” that apply to projects. ER 645. These “provide management direction believed necessary to meet Riparian Goals and

¹ At the same time, INFISH acknowledges “the components of good habitat can vary across specific geographic areas.” ER 641. It thus provides for two methods by which a National Forest could refine the default Riparian Management Objectives to better reflect local conditions: watershed analysis or site-specific analysis. *Id.*, ER 609.

[Riparian Management Objectives] for stream channels, riparian areas, and watersheds.” ER 707.

Grazing Standard GM-1 requires the Forest Service to:

Modify grazing practices (e.g., accessibility of riparian areas to livestock, length of grazing season, stocking levels, timing of grazing, etc.) that retard or prevent the attainment of Riparian Management Objectives or are likely to adversely affect inland native fish. Suspend grazing if adjusting practices is not effective in meeting Riparian Management Objectives.

ER 648. “Retard” means to “slow the rate of recovery below the near natural rate of recovery if no additional human caused disturbance was placed on the system.”

ER 645. Thus, the standard prohibits continuation of previous grazing practices where those practices damage riparian conditions or even *maintain* damaged conditions. If modifications to grazing management do not lead to habitat recovery, the agency must suspend grazing. ER 648.

C. INFISH Monitoring and Application to Grazing.

Monitoring is an important component of INFISH. “Implementation” monitoring assesses whether the INFISH standards and guidelines are applied during project implementation. ER 654. “Effectiveness” monitoring assesses whether those measures are *effective* at achieving the Riparian Management Objectives. *Id.*

To provide for consistent effectiveness monitoring, the Forest Service created the regional PACFISH/INFISH Biological Opinion (“PIBO”) Effectiveness

Monitoring Program. ER 413. PIBO teams measure Riparian Management Objectives and related data on national forests across the Columbia Basin and provide this information to the national forests subject to INFISH and PACFISH. *See, e.g.*, ER 385 (2012 Annual Summary Report), 425 (data available on Forest Service website). The PIBO program monitors on a rotating cycle such that sites are monitored approximately once every five years. ER 418. This monitoring informs agencies as to whether habitat is recovering and whether Riparian Management Objectives are being attained.

Because the PIBO team only monitors Riparian Management Objectives every five years, the Forest Service created guidance to help its managers conduct implementation monitoring to assess, on an annual basis, whether grazing was providing for a near natural rate of recovery. The primary guidance, issued in 1995, is “Enclosure B: Recommended Livestock Grazing Guidelines.” ER 613.

This guidance provides specific annual indicators (environmental conditions that grazing must not exceed) that managers should apply on an annual basis. *See* ER 616–17. These include limits on new bank alteration (damage to banks caused by cattle) of 5%, and woody vegetation utilization (the percentage of branches of riparian shrubs that have been eaten by cattle) of 30%. ER 617. It also identifies “stubble height” indicators (referring to the height of vegetation remaining after grazing occurs along streambanks), with the value dependent upon the area’s

“ecological status.” ER 616, 619. Ecological status is a measure of how close an area’s vegetation and stream banks are to its natural, or potential, condition. ER 617–18. This is typically measured along the “greenline,” or the water’s edge of a streambank. *See* ER 618–19.

Enclosure B also provides different values for the stubble height indicator depending on vegetation conditions. ER 616. In areas where ecological status is “late seral” (*i.e.*, good condition), the stubble height indicator should be 4 to 6 inches, meaning the remaining vegetation after grazing must be at least that tall. *Id.* For areas in “mid-seral” (fair) condition, the stubble height indicator should be 6 inches. *Id.* And for areas in “early seral” (poor) condition, the agency should consider resting or substantially limiting the area from grazing. *Id.* These indicators should be monitored and reported annually, with appropriate adjustments to grazing practices to be made in the annual operating plans (another term for Annual Operating Instructions). ER 616–17.

The Salmon-Challis National Forest prepared a similar guidance document in 2008, though not specific to INFISH, titled “A Strategy for Managing Livestock Grazing Within Stream Riparian Communities on the Salmon-Challis National Forest.” ER 536. It provides similar default indicators, along with worksheets and forms for the agency to use in evaluating whether grazing is allowing desired conditions to be met. *Id.*

II. THE CHALLIS FOREST PLAN'S SEDIMENT STANDARD AND SEDIMENT LEVELS IN COPPER BASIN

The 1987 Challis Forest Plan as originally written also contains a series of standards to protect soil, water, and air. ER 857–58. Standard 5(f) provides that “[i]mpacts of activities may not increase fine sediment by depth (within critical reaches) of perennial streams by more than 2 percent over existing levels.” ER 858. And “[w]here existing levels are at 30% or above new activities that would create additional stream sedimentation would not be allowed.” *Id.* If 30% is “reached or exceeded, activities that are contributing sediment will be evaluated and appropriate action will be taken to bring fine sediment within threshold levels.” *Id.* This standard is vital for fish because too much sediment in a stream smothers eggs and young fish living in stream gravels and damages gills. ER 463.

The Forest Service periodically measures fine sediment levels in Copper Basin streams at its selected representative monitoring sites, and the agency’s data indicate that several streams had over 30% fine sediment levels in the last measurements taken prior to the challenged 2015 Annual Operating Instructions. For example, on the Antelope allotment’s Antelope Creek, the mean fine sediment level was 40.8%. ER 366. On the same allotment’s Bear Creek, the mean fine sediment level was 34.0% at one site and 44.1% at another. ER 384, 367. On the Wildhorse allotment’s Wildhorse Creek, the mean fine sediment level was 34.6%. ER 383. And on the Boone Creek allotment’s East Fork Big Lost River, the mean

fine sediment level was 31.8%. ER 496.

III. INLAND NATIVE FISH IN THE BIG LOST RIVER WATERSHED AND THE IMPACT OF LIVESTOCK GRAZING

The Big Lost River is an isolated stream system in south-central Idaho. ER 513, 524 (map). Instead of flowing into another river, the river naturally sinks underground into the lava rock of the Snake River Plain. ER 514. The Big Lost River watershed is home to a unique, native population of mountain whitefish, *Prosopium williamsoni*, with a “long, complex, and unusual history” due to its isolated desert environment. ER 499–500; *see* ER 509, 400 (images).

In recent times, however, Big Lost River mountain whitefish have substantially declined from their historical range and abundance. ER 517–18, 403. Abundance fluctuates based on water flows, but remains well below historical levels. *See* ER 345. Two other kinds of native fish, Paiute sculpin (*Cottus beldingi*) and Shorthead sculpin (*C. confusus*), are also present in the Big Lost River watershed. ER 405, 408. Both sculpin and mountain whitefish are found in streams throughout the Copper Basin allotments. ER 340–45, 185.

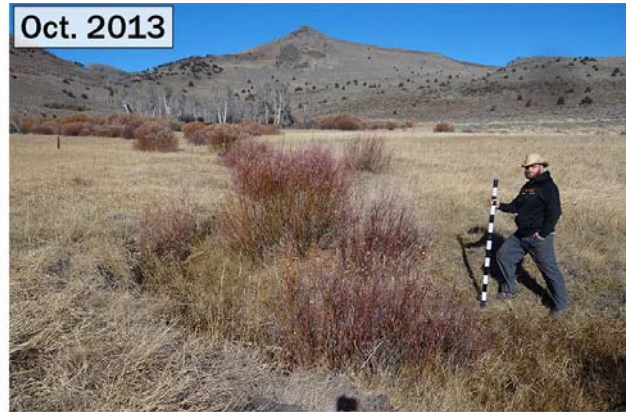
One of the documented causes of the decline of Big Lost River mountain whitefish is habitat degradation from livestock grazing, which has had “significant impacts on stream and riparian habitat in some areas.” ER 521. The Copper Basin allotments are managed for “intensive” livestock grazing. ER 820. The damage that livestock grazing causes to fish habitat is well-documented in INFISH, other

Forest Service reports, and outside scientific literature.

For example, INFISH identifies livestock grazing as a problem for riparian habitat. It notes that grazing has “destabilized stream banks resulting in bank erosion, loss of cover and shading, widening and filling of channels, and accelerated lateral migration.” ER 715. Compaction and bank damage from cattle cause similar problems, as well as excess sedimentation. *Id.* Grazing in and around riparian areas (streamside areas) “can alter the vigor, composition, and amount of the natural vegetation.” *Id.* In fact, “[m]ost negative effects to riparian vegetation have been caused by excessive grazing.” ER 730 (emphasis added). In turn, that “can affect the site’s ability to control erosion, provide stability to stream banks, and provide shade and cover to the stream.” ER 715. Removing vegetative cover also causes water temperatures to increase. ER 457 (graphic illustrating how these factors are related). All of these factors cause harmful consequences to fish. *Id.* Many scientific studies in the record confirm these effects. *See, e.g.*, ER 859, 585.

Many studies in the record conclude that rest or closure to grazing is the strategy most compatible with riparian recovery. Few studies illustrate the capacity of riparian systems to recover as well as a 2015 study in southeastern Oregon that documented the recovery of riparian systems at the Hart Mountain National Antelope Refuge after cessation of livestock grazing in 1991. ER 232.

The study documented that in the absence of grazing—and without replanting or other active restoration efforts—erosion was reduced and stream channels narrowed significantly. *Id.* Several before-and-after photographic comparisons from that study dramatically illustrate of the appearance of streams after 23 years of a *natural* rate of recovery in the absence of grazing:



ER 242. Several other studies in the record document significant riparian habitat recovery in streams rested from livestock grazing. ER 574, 578, 585, 806, 816, 822, 839, 851.

IV. FOREST SERVICE GRAZING MANAGEMENT AND RIPARIAN MANAGEMENT OBJECTIVE MONITORING IN COPPER BASIN

A. Grazing Administration.

The Forest Service authorizes and manages grazing on specified allotments by issuing (1) a grazing permit pursuant to 43 U.S.C. § 1752(a) and 36 C.F.R. § 222; (2) an Allotment Management Plan pursuant to 43 U.S.C. § 1752(d) and 36 C.F.R. § 222.1(b); and (3) annual grazing decisions called Annual Operating Instructions. The decisions serve different purposes.

Grazing permits are revocable licenses that convey no right in the land or resources, and are typically issued for terms of ten years. 43 U.S.C. § 1752(a); 36 C.F.R. § 222.3(b). The permits set the maximum number of cattle a permittee may place on an allotment, known as “permitted use” or “permitted livestock.” 36 C.F.R. § 222.1(b)(17). *See* ER 245, 435, 426, 525 (permits).

Allotment Management Plans specify the manner and extent of grazing and other provisions. 36 C.F.R. § 222.1(b)(2). The Copper Basin Allotment Management Plans have not been updated in decades, and all predate INFISH. ER 375 (listing dates of 1970 (Wildhorse), 1980 (Antelope), and 1992 (Boone Creek and Copper Basin)).

Finally, prior to each grazing season, the Forest Service issues Annual Operating Instruction that set out “instructions to the permittee for annual operations.” *Or. Natural Desert Ass’n v. U.S. Forest Serv.* (“*ONDA v. USFS*”), 465 F.3d 977, 980 (9th Cir. 2006). “Whereas the [Allotment Management Plan] relates the directives of the applicable forest plan to the individual grazing allotment, and the grazing permit sets grazing parameters through a ten-year period, the [Annual Operating Instructions] annually convey[] these more long-term directives into instructions to the permittee for annual operations.” *Id.*

The Annual Operating Instructions set the numbers of cattle a permittee is allowed to release that year, and for what time periods, together known as “authorized use.” *E.g.*, ER 217.² The Annual Operating Instructions also list the applicable annual indicators for that year. *E.g.*, ER 218. For the Copper Basin allotments, the riparian annual indicators used are 4-inch stubble height and 50% woody browse use. *See id.* These are weaker (less protective) than the indicators provided for in the INFISH Enclosure B guidance (5% bank alteration, stubble height from 4 to 6 inches depending on ecological status, and 30% woody browse use). *See supra* pp. 10–11.

At the end of each grazing season, the Forest Service prepares a brief End of

²The Forest Service reports numbers of cows in “head months,” which represents one month’s use and occupancy of an allotted area by one cow.

Season report for each allotment, which summarizes the “actual use” for the year (*i.e.*, how many cows grazed, and for how long), whether the annual indicators were exceeded, and any major management problems. *E.g.*, ER 294, 263, 255.

B. Riparian Management Objectives are Not Being Met, Conditions are Worse than at Ungrazed Reference Sites, and Conditions are Not Improving in the Copper Basin Allotments.

As noted, the Forest Service PIBO team monitors Riparian Management Objectives on national forests across the Columbia Basin. This includes the Copper Basin allotments, for which the Forest Service provided 15 years of PIBO data in the administrative record for this case. ER 299–34 (PIBO data from 1999–2014); ER 178–84.³

Twenty years after INFISH was added to the Forest Plan to promote a near natural rate of riparian recovery, the Forest Service PIBO data show widespread non-attainment of Riparian Management Objectives in the Copper Basin allotments. ER 178–84. For example, only about half of measured sites are meeting the pool frequency objective. ER 178. Almost none of the sites are meeting the temperature objective, and most sites do not appear to have been monitored for temperature in over ten years. ER 179. Although most sites meet the bank stability objective, three do not. ER 180–81. No sites are meeting the

³ The 36 pages of data in the record at ER 299–34 were bisected into multiple, non-sequential pages. ER 178–84 assembles the data into the seven intended pages.

lower bank angle objective. ER 182. Almost no sites are meeting the width-to-depth ratio objective. ER 183.

The data also indicate that many sites in Copper Basin are getting worse. For example, the measured lower bank angle on six different streams deteriorated between the last two measurements. ER 182 (East Fork Big Lost River, Lake Creek, Cabin Creek, Star Hope Creek, Muldoon Creek, and the North Fork Big Lost River, at PIBO sites 548, 550, 555, 557, 558, and 1379, respectively). Additional sites are static in their damaged state. *Id.*

The Forest Service included in the administrative record a PIBO report that summarized thirteen years of PIBO data for Copper Basin and statistically compared it to other managed sites in the Salmon-Challis National Forest, local reference sites (meaning sites that are not grazed by livestock or otherwise heavily managed), and reference sites across the Columbia Basin. ER 189, 197. The data showed that the Copper Basin scores “were significantly lower than all three populations where comparisons were evaluated.” ER 197. In other words, the Copper Basin allotments were in statistically more damaged condition than other areas in the region not grazed by livestock.

More importantly, the data also showed that “[t]here were no significant trends positive or negative for the sites within the Copper Basin Allotment[s].” ER 198. In other words, the Copper Basin allotments are remaining static in their

degraded states—and are not recovering at any statistically significant rate, much less at the near natural rate required under INFISH and illustrated in the Hart Mountain photo sets. *See* ER 645; *supra* p. 19.

C. Grazing on the Copper Basin Allotments has Resulted in Chronic Violations of the Annual Use Indicators.

Despite the Forest Service’s use of riparian annual indicators in the Copper Basin allotments that are significantly weaker than those recommended in the Enclosure B guidance, the record demonstrates that grazing has caused chronic violations of the indicators over the last 15 years. The Forest Service also frequently fails to measure the indicators, meaning the number of violations is likely higher.

For example, on the Antelope allotment, the permittees’ “consistent failures to comply with the required actions stated in the 2013 [Annual Operating Instructions]” led to violations of the annual indicators on two units. ER 376, 382. In 2014, grazing violated the standards in another unit. ER 294, 297.

On the Boone Creek allotment, in 2007, grazing caused violations of the stubble height and/or woody browse indicators on four of seven units, and no indicators were measured on two other units. ER 571. In 2010, grazing on two units violated the woody browse indicator, another had high bank alteration, and no indicators were measured on three grazed units. ER 452. Grazing on at least three units failed to meet stubble height indicators in 2012 and one in 2013, with

no data on two units in 2012 and three in 2013. ER 394, 378. Grazing on two more units violated indicators in 2014, with no data on three units. ER 263.

Grazing on the Copper Basin allotment failed to meet stubble height indicators on two units in 2001 and four in 2002. ER 584, 575. In 2007, grazing caused violations of indicators on at least four units, and the Forest Service failed to collect any data on three other grazed units. ER 567. In 2008, the Forest Service noted multiple management problems, including one unit's riparian areas being unacceptably "trampled to dirt and denuded of vegetation," with use in some places "in excess of 70%." ER 534. In 2014, grazing on two units violated the woody browse indicator, with no data measured on multiple other sites. ER 258.

And on the Wildhorse allotment, in 2007, grazing violated stubble height and/or woody browse indicators on at least three units, and the Forest Service failed to measure indicators measured on several other units. ER 564. In 2010, two units violated the woody browse indicator, a third unit showed heavy bank alteration on three streams, and the Forest Service did not measure data on several sites. ER 448. In 2011, grazing on at least three units violated the stubble height or woody browse indicator, and the Forest Service did not collect data on several other units. ER 410. In 2012, violations occurred in at least one unit, with no monitoring on two others. ER 391. Grazing caused violations of the stubble height indicator in at least one unit in 2014, with no monitoring in another grazed

unit. ER 255.

D. The Challenged 2015 Copper Basin Annual Operating Instructions.

Aware of these chronic violations, WWP sent the Forest Service a letter in April 2015, expressing its observations and concerns about grazing damaging streams on the Copper Basin allotments. ER 221. WWP specifically asked the Forest Service to modify or suspend grazing levels in accordance with INFISH Standard GM-1, apply more robust riparian indicators, and increase monitoring on the allotments in 2015. ER 222.

WWP provided the Forest Service with a report prepared by two experts in riparian ecology, assessing stream conditions in fall 2014 at five Forest Service monitoring sites on the Copper Basin allotments using the Forest Service's own methodology. ER 346. While limited in scope, the report concluded that there was "widespread overgrazing within the area in 2014," based on the facts that none of the sites met the 4-inch stubble height indicator, and bank alteration ranged from 22 to 25% (far in excess of Enclosure B's recommended limit of 5% bank alteration). ER 363, 617. It noted that rest from grazing, or at the least intensive seasonal monitoring, was needed on the Wildhorse allotment's Summit Creek, where stubble height was only 2.4 inches and streambank alteration was 25%. ER 362. WWP also attached published scientific literature stressing the importance of light grazing and grazing rest for improving fish habitat. *See* ER 222.

On May 20, 2015, the Salmon-Challis Forest Supervisor responded to WWP's letter, rejecting all of WWP's concerns. ER 216.

Soon after, the Forest Service issued its 2015 Annual Operating Instructions for the Copper Basin allotments. The Annual Operating Instructions authorize thousands of cattle to graze on the allotments for the maximum potential period of use specified in the grazing permits. ER 217 (Antelope Annual Operating Instructions authorizing 821 cattle to graze between July 1 and October 15), ER 227 (Boone Creek Annual Operating Instructions authorizing 881 cattle to graze between June 6 and October 15), ER 223 (Copper Basin Annual Operating Instructions authorizing 2,583 cattle to graze between June 6 and October 15), ER 210 (Wildhorse Annual Operating Instructions authorizing 1,453 cattle between June 9 and September 30).

Despite the violations of annual indicators on all four allotments in 2014, the static Riparian Management Objectives data, and the sediment data showing several exceedances of the 30% fine sediment standard, the 2015 Annual Operating Instructions contained the identical riparian annual indicators they had included for many years: 4-inch stubble height and 50% woody browse. ER 218, 229, 225, 214; *see* ER 567 (identical riparian indicators in 2007). They contain no mention of INFISH, Riparian Management Objectives, fish, or sediment. Nor are there any contemporaneous documents in the record demonstrating that the Forest

Service evaluated compliance with Grazing Standard GM-1 or Sediment Standard 5(f) before authorizing grazing for 2015. *See* ER 217, 227, 223, 210.

SUMMARY OF ARGUMENT

The Forest Service violated NFMA by not evaluating whether the grazing it authorized in 2015 was consistent with INFISH Grazing Standard GM-1 that requires the agency to modify or suspend grazing practices that retard or prevent attainment of Riparian Management Objectives. To establish consistency, *some* explanation of whether grazing practices were retarding or preventing the attainment of Riparian Management Objectives needed to have been in the record of the 2015 Annual Operating Instructions. There is none.

Instead, the record contains extensive data indicating that grazing is retarding and preventing the attainment of Riparian Management Objectives—including data collected by the Forest Service in its regional PIBO Effectiveness Monitoring Program showing that most Riparian Management Objectives in Copper Basin are not being met, and that the that Copper Basin allotments are significantly more damaged than “reference” sites not subject to livestock grazing. Further, the trend over the last 15 years is *static*, rather than recovering at the near natural rate mandated by INFISH.

The District Court excused the Forest Service’s failure to conduct any consistency analysis by holding that it would defer to the Forest Service on its

(implicit) determination of causation. The court noted that the Forest Service claimed it had implemented GM-1 by using a monitoring methodology, which was entitled to deference. But no deference was due because the District Court did not identify any place in the record where the Forest Service actually *applied* that methodology. In fact, the Forest Service failed to even follow it.

The District Court further held that there was no reason for the Forest Service to conduct a causation analysis because there was no information suggesting one was needed. This contradicts case law that all agency decisions must demonstrate consistency with Forest Plan standards. And it is factually incorrect because data collected by PIBO showed that Copper Basin streams were not meeting Riparian Management Objectives, and there was no improving trend.

The District Court also found that no consistency analysis was required when issuing Annual Operating Instructions, as it believed a requirement to engage in an “elaborate consistency analysis” would be burdensome. But the analysis need not be “elaborate”—and need not even be in the Annual Operating Instructions themselves. It could be in a brief worksheet, so long as it actually considers the impacts of grazing on riparian recovery. Further, excusing Annual Operating Instructions from consistency would eviscerate Grazing Standard GM-1, as they are the most readily available stage in the grazing management program at which the agency can quickly modify grazing practices that harm fish.

The 2015 Annual Operating Instructions also violated the Forest Plan's Sediment Standard 5(f), which provides that, if fine sediment levels of 30% are reached or exceeded, "activities that are contributing sediment will be evaluated and appropriate action will be taken to bring fine sediment within threshold levels." ER 858. At least five streams in the Copper Basin allotments had levels exceeding 30%, and there is no dispute that livestock grazing contributes sediment to streams.

However, the record contains no evidence that the Forest Service "evaluated" grazing in any way with respect to sediment, or determined any "appropriate action" to take to reduce sedimentation for the otherwise unchanged livestock grazing the agency authorized through its 2015 Annual Operating Instructions. The District Court credited various excuses offered by the Forest Service in its litigation filings: that sediment is "difficult to accurately measure" and caused by various complex factors. But Sediment Standard 5(f) contains no such exceptions, so the court's interpretation must be rejected as "plainly inconsistent" with the standard.

The Forest Service submitted three extra-record declarations to bolster its arguments in the District Court. The declarations consist of excuses to justify the agency's failure to evaluate whether grazing was retarding or preventing attainment of INFISH Riparian Management Objectives when it issued the 2015

Annual Operating Instructions. Because the declarations represent a post hoc attempt at the type of analysis that the agency should have conducted *before* issuing the Annual Operating Instructions, and are not supported by the record, they violate the record review rule against providing a new rationalization for agency decisions during litigation.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews a district court’s grant of summary judgment de novo. *Native Ecosystems Council v. Tidwell* (“*NEC v. Tidwell*”), 599 F.3d 926, 932 (9th Cir. 2010). This action is brought under the National Forest Management Act, and thus is reviewed under the Administrative Procedure Act (“APA”). *Id.* The APA provides that reviewing courts “shall [] hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

A decision is arbitrary and capricious if the agency “entirely failed to consider an important aspect of the problem” or “offered an explanation for its decision that runs counter to the evidence before the agency.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). “[I]f the agency itself did not provide reasons to satisfy [that] standard, we will not use our own line of reasoning to bolster the agency decision on grounds that it did not include in

its reasoning.” *Natural Res. Def. Council v. Pritzker*, 828 F.3d 1125, 1132–33 (9th Cir. 2016). Review under the APA is narrow; “[t]he [agency] has an obligation, however, to state a rational connection between the facts found and the decision made.” *NEC v. Tidwell*, 599 F.3d at 932 (second alteration in original) (internal quotes omitted).

Courts afford deference to agency decisions that are well-reasoned, adequately explained, “fully informed and well-considered,” and supported by the facts and science before the agency, but act as a crucial corrective for poorly reasoned or factually unsupported agency actions. *Sierra Club v. Bosworth*, 510 F.3d 1016, 1023 (9th Cir. 2007). No deference is due to agency conclusions or decisions where they are not supported by the facts in the record. *Ariz. Cattle Growers’ Ass’n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1236 (9th Cir. 2001). Neither is deference due if an agency decision is not complete, reasoned, and adequately explained, because the “keystone” of the Court’s review “is to ensure that the [agency] engaged in reasoned decisionmaking.” *Nw. Coal. for Alternatives to Pesticides v. EPA*, 544 F.3d 1043, 1052 n.7 (9th Cir. 2008).

II. THE NATIONAL FOREST MANAGEMENT ACT’S CONSISTENCY MANDATE AND ITS APPLICATION TO ANNUAL OPERATING INSTRUCTIONS

NFMA, 16 U.S.C. §§ 1600–14, governs the U.S. Forest Service’s management of the national forests. Once a Forest has developed a land and

resource management plan (“Forest Plan”), *see id.* § 1604(a), all “[r]esource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans.” 16 U.S.C. § 1604(i).

This Court has explained that “[a]fter a Forest Plan has been developed and implemented, the NFMA prohibits site-specific activities that are inconsistent with the governing Forest Plan.” *Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836, 850 (9th Cir. 2013); *see also Native Ecosystems Council v. U.S. Forest Serv.* (“*NEC v. USFS*”), 418 F.3d 953, 961 (9th Cir. 2005) (“It is well-settled that the Forest Service’s failure to comply with the provisions of a Forest Plan is a violation of NFMA.”).

This consistency mandate applies to grazing decisions made by the Forest Service, including Annual Operating Instructions. *Buckingham v. Sec’y of U.S. Dep’t of Agric.*, 603 F.3d 1073, 1077 (9th Cir. 2010) (permits, Allotment Management Plans, and Annual Operating Instructions are all site-specific actions to permit grazing, “all of which must be consistent with the applicable Forest Plan”).

While NFMA does not mandate any particular means that the Forest Service must take to demonstrate Forest Plan consistency, the agency “must support its conclusions that a project meets the requirements of the NFMA and relevant Forest

Plan with studies that the agency, in its expertise, deems reliable.” *Lands Council v. McNair*, 537 F.3d 981, 994 (9th Cir. 2008). It also “must explain the conclusions it has drawn from its chosen methodology, and the reasons it considers the underlying evidence to be reliable.” *Id.*; see also *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1062 (9th Cir. 2002) (“Specific projects . . . must be analyzed by the Forest Service and the analysis must show that each project is consistent with the plan.”). The question for a court, then, is whether it “can reasonably discern from the record that the Forest Service complied” with the relevant standard. *NEC v. USFS*, 418 F.3d at 961–62.

III. THE COPPER BASIN ANNUAL OPERATING INSTRUCTIONS VIOLATED NFMA BECAUSE THEY WERE NOT CONSISTENT WITH INFISH GRAZING STANDARD GM-1

A. The Forest Service Failed to Evaluate Whether the Authorized Grazing was Consistent with Grazing Standard GM-1, Despite the Data Showing Extensive Non-Attainment of Riparian Management Objectives and no Recovery at a Near Natural Rate.

The Forest Service violated NFMA by not evaluating consistency with INFISH Grazing Standard GM-1 before authorizing grazing in 2015. Neither the 2015 Copper Basin Annual Operating Instructions nor the record contain evidence that the Forest Service considered INFISH Riparian Management Objectives or consistency with Grazing Standard GM-1 before authorizing livestock grazing that year.

As described, INFISH Standard GM-1 requires the Forest Service to “modify grazing practices . . . that retard or prevent the attainment of Riparian Management Objectives or are likely to adversely affect inland native fish.” ER 648. This necessarily requires the Forest Service to determine whether grazing practices are retarding or preventing the attainment of Riparian Management Objectives or are likely to adversely affect inland native fish, as the District Court agreed. ER 32.

It is a fundamental principle of administrative law that an agency’s explanation of its compliance with its legal obligations be articulated somewhere in the record, as “an agency’s action must be upheld, if at all, on the basis articulated by the agency itself.” *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 50. And “[i]f the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable.” *SEC v. Chenery Corp.*, 332 U.S. 194, 196–97 (1947); *see also Anaheim Mem’l Hosp. v. Shalala*, 130 F.3d 845, 849 (9th Cir. 1997) (“An agency’s decision can be upheld only on the basis of the reasoning in that decision.”)

This Court has applied this principle to NFMA cases in particular. In *Lands Council*, the Court explained that “the Forest Service must support its conclusions that a project meets the requirements of the NFMA and relevant Forest Plan” with “reliable” studies and “must explain the conclusions it has drawn from its chosen methodology, and the reasons it considers the underlying evidence to be reliable.”

537 F.3d at 994.

So in this case, for consistency with Grazing Standard GM-1, *some* explanation of whether grazing practices were retarding or preventing the attainment of Riparian Management Objectives, or adversely affecting fish, needed to have been in the record of the 2015 Annual Operating Instructions.

But it is not. The challenged Annual Operating Instructions themselves are largely boilerplate documents that contain no discussion of how the authorized grazing would comply with Standard GM-1. ER 217, 227, 223, 210. Indeed they do not even contain the words INFISH, Riparian Management Objectives, or fish. *See id.*

In fact, with only one exception, the Annual Operating Instructions provide no information about conditions on the allotments' monitoring sites at all. ER 217, 227, 223, 210. And the single Annual Operating Instruction that mentioned monitoring results failed to take the action required by GM-1. The Boone Creek allotment Annual Operating Instructions described "ecological condition" data taken during 2014, and reported that one stream *degraded* from late seral (good) condition to mid-seral (fair) condition. ER 230.

The decision admitted that "[m]anagement should address ensuring that the Right Fork Boone Creek riparian area has adequate management to bring the riparian area back to late seral ecological condition"—but failed to make any

modifications. *Id.* Instead, it stated that the site “should be monitored again in three years (2017),” and “[i]f the site is still below late seral at that time[,] then a change of some sort may be warranted (i.e. greater stubble height requirement or an alteration indicator).” *Id.* In fact, it slightly *increased* the amount of grazing authorized from the prior year. *Compare id.* (881 head months authorized in 2015) *with* ER 370 (872 head months authorized in 2014).

Such inaction in the face of degradation—and the counterintuitive increase in authorized grazing—is contrary to the language of GM-1, which requires the Forest Service not only to evaluate progress towards attaining Riparian Management Objectives, but also to take the action needed to achieve a near natural rate of recovery by modifying or suspending grazing. ER 648. This duty applies each time the Forest Service makes a decision to authorize grazing, 16 U.S.C. § 1604(*i*), and cannot be ignored or punted into the indefinite future. *See Buckingham*, 603 F.3d at 1077 (Annual Operating Instructions “must be consistent with the applicable Forest Plan”).

Nor does the record contain evidence of any other contemporaneous analysis whereby the Forest Service determined whether its grazing authorizations were consistent with INFISH Standard GM-1. Indeed, that is why the agency was forced to prepared extra-record declarations in order to create a post hoc rationalization for its decisions. ER 88–124.

Instead, the record contains extensive evidence suggesting that the authorizations were not consistent with INFISH Standard GM-1. The Forest Service's own PIBO data shows that Riparian Management Objectives in Copper Basin have remained static, in a degraded state, over the past 15 years. ER 197–98. In other words, *no* significant recovery trend is occurring, much less at a “near natural” rate. Also telling is the PIBO finding that Riparian Management Objectives in Copper Basin are significantly more degraded than ungrazed, reference sites in the same region. ER 197. This is a strong indication that the “intensive” livestock grazing in Copper Basin, which places thousands of cattle in the allotments between June and October, is indeed causing the lack of recovery.

This is confirmed by the numerous scientific articles and Forest Service documents in the record establishing how cattle damage stream and riparian habitat that is essential to the survival of native fish like the mountain whitefish. *See supra* pp. 13–14. And grazing in the Copper Basin allotments even routinely violates the Forest Service's own annual indicators (which are weaker than recommended). *See supra* pp. 20–21.

With no explanation evident in the record to support its determinations to allow more grazing at the same levels, this is a case in which an agency has failed “to state a rational connection between the facts found and the decision made.” *NEC v. Tidwell*, 599 F.3d at 932. As in *NEC v. USFS*, “we cannot tell from the

administrative record whether or not the Forest Service complied with the . . . standard.” 418 F.3d at 963–64 (project was inconsistent with Forest Plan, given the Forest Service’s “contradictory calculations and the otherwise opaque nature of the record on the factual basis for the Forest Service’s analysis of its compliance with [an elk] hiding cover standard”).

The District Court of Oregon also so held on very similar facts, where Annual Operating Instructions were issued with no analysis of how grazing was complying with PACFISH. *Or. Natural Desert Ass’n v. Tidwell*, 716 F. Supp. 2d 982, 1007–08 (D. Or. 2010). Although the court deferred to the Forest Service as to *how* to evaluate whether it had complied with Standard GM-1, it found the Annual Operating Instructions in violation of NFMA because “there is little in the record to suggest that the Forest Service has gathered enough data to effectively determine whether it is in compliance with PACFISH or the [Forest Plan], and there is even less evidence to suggest that it has actually evaluated that data in an effort to ascertain their compliance.” *Id.* at 1008. It concluded that “[t]his court ‘cannot defer to a void.’” *Id.* (quoting *Or. Natural Desert Ass’n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1121 (9th Cir. 2010)).

In sum, because the Forest Service failed to analyze or explain in any way the consistency of its authorized grazing with INFISH Grazing Standard GM-1—despite evidence that there has been no riparian recovery (let alone a “near natural”

rate of recovery) in the Riparian Management Objectives—the Forest Service violated the requirement in NFMA that its grazing authorizations be consistent with the Forest Plan.

B. The District Court Erred in Deferring to the Forest Service’s Methodology Because the Forest Service Failed to Follow It.

1. The District Court Deferred to the Forest Service’s “Methodology” of Determining Causation.

The District Court excused the Forest Service’s failure to conduct any consistency analysis, holding that it would defer to the Forest Service on its (implicit) determination of causation because of the technical nature of its monitoring methodology. The court reviewed INFISH Standard GM-1 and agreed that implicit in the language is a requirement to consider causation. ER 32. It reasoned that, because the Riparian Management Objectives serve as “benchmarks,” the Forest Service “must focus not on whether, in absolute terms, a particular stream fails to meet the [Riparian Management Objectives], but rather on *why* the stream does not meet them”—*i.e.*, whether grazing is the cause of the non-attainment. ER 33.

The court noted that the Forest Service claimed it had implemented GM-1 by using a monitoring “methodology,” “that is, by coming up with a set of standards that could measure the effect of grazing on riparian habitat.” *Id.* (mentioning the indicators set up in the guidance documents: greenline ecological status, bank stability, and the condition of riparian vegetation). It then stated that

“[i]n that context, the Forest Service’s methodology for determining causation is a matter of scientific judgment that is entitled to deference.” *Id.* (citing *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 658–59 (9th Cir. 2009)).

But the District Court did not identify any place in the record where the Forest Service actually applied that methodology to determine that grazing was not causing the widespread Riparian Management Objective non-attainments and lack of riparian recovery in the Copper Basin streams. In essence, the court found that the Forest Service had engaged in some sort of implicit, unwritten causation analysis, which had found grazing not to be the cause of the Riparian Management Objective non-attainment, and which was worthy of deference.

2. Deference is Only Appropriate When an Agency Utilizes its Expertise in an Analysis.

Administrative agencies receive deference on technical issues—up to a point. Courts defer to “an agency’s determination in an area involving a high level of technical expertise,” and are “most deferential when the agency is making predictions, within its area of special expertise, at the frontiers of science.” *Lands Council*, 537 F.3d at 993 (alterations and internal quotation marks omitted).

However, “[t]he deference accorded an agency’s scientific or technical expertise is not unlimited.” *Brower v. Evans*, 257 F.3d 1058, 1067 (9th Cir. 2001) (citing *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 679 (D.D.C. 1997)).

“Although the Court must defer to an agency’s expertise, it must do so only to the extent that the agency utilizes, rather than ignores, the analysis of its experts.”

Defenders of Wildlife, 958 F. Supp. at 685. In other words, if an agency has not actually *applied* its scientific expertise or methodology in an analysis, this Court “cannot defer to a void.” *Or. Natural Desert Ass’n*, 625 F.3d at 1121.

Further, an agency’s interpretation of regulations or its Forest Plan “does not control, where . . . it is plainly inconsistent with the regulation at issue.” *NEC v. USFS*, 418 F.3d at 960 (quoting *Friends of Southeast’s Future v. Morrison*, 153 F.3d 1059, 1069 (9th Cir. 1998)); *see also Meister v. U.S. Dep’t of Agric.*, 623 F.3d 363, 367 (6th Cir. 2010) (“[a]n agency is not entitled to deference simply because it is an agency. . . . for courts to defer to them, agencies must do more than announce the fact of their comparative advantage; they must actually use it. And that means, among many other things, that the agency must apply—rather than disregard—the relevant statutory and regulatory criteria.”).

3. The District Court Erred in Deferring to the Forest Service Because there Was Nothing to Defer To.

Here, as described, the Forest Service completed no consistency analysis. Neither the Annual Operating Instructions nor any other document in the agency’s administrative record contain evidence that the Forest Service considered Riparian Management Objective conditions on the Copper Basin allotments, reviewed grazing

practices, and determined whether its 2015 annual authorization of grazing with indicators identical to previous years would retard or prevent attainment of Riparian Management Objectives.

Thus, there is nothing to defer *to*. In that way, this case is analogous to *Oregon Natural Desert Ass'n*, where plaintiffs challenged a BLM resource management plan (similar to a Forest Plan) for failing to conduct any evaluation of wilderness resources. 625 F.3d at 1121. Plaintiffs had requested that BLM analyze the issue in its NEPA document, but BLM declined to do so. *Id.* at 1102–03. Thus, no question of methodology was at issue because “the BLM used *no* method to analyze or plan for the management of such values.” *Id.* at 1121. As in that case, the Court “cannot defer to a void.” *Id.*

Furthermore, courts “defer to agency expertise on methodology issues, unless the agency has completely failed to address some factor consideration of which was essential to [making an] informed decision.” *Brower*, 257 F.3d at 1067 (citation and internal quotation marks omitted). In this case, the Forest Service ignored the essential factors of the long-term PIBO data showing that Riparian Management Objectives were not being attained in Copper Basin, that the allotments were significantly more damaged than ungrazed reference sites, and that no recovery, much less a near natural rate of recovery, was occurring under the same grazing regime. *See supra* pp. 18–19.

4. The District Court Also Erred in Deferring to the Forest Service Because the Agency did not Apply its Methodology to the 2015 Annual Operating Instructions.

Even if one were to accept the District Court's proposition that the Forest Service somehow implicitly evaluated consistency by means of the implementation monitoring methodology set forth in its guidance documents, the court still erred because the Forest Service *failed to follow* that methodology.

The primary guidance document governing the Forest Service's application of INFISH to grazing management—Enclosure B—was invoked by the District Court as providing that the Forest Service could monitor greenline ecological status, woody species regeneration, and bank stability to measure the effects of grazing. ER 30. But the District Court overlooked that Enclosure B does not just list those three indicators, but actually provides *quantitative values* for them (and others) that grazing should meet to prevent harming recovery. ER 616–17. And again, those values are *much more protective* than those the Forest Service imposed in Copper Basin.

For example, Enclosure B provides for indicators of no more than 5% new bank alteration and 30% woody vegetation utilization. *Id.* But in its Copper Basin Annual Operating Instructions, the Forest Service included (without explanation) *no* bank alteration indicator, and only a weaker 50% woody vegetation indicator. ER 217, 227, 223, 210. The decisions also imposed a blanket 4-inch stubble height

indicator, without regard to Enclosure B's direction to adjust this indicator based upon ecological status. *Id.*, ER 616. Thus, the Forest Service in fact failed to follow the methodology set forth in Enclosure B.

The same is true for the Salmon-Challis National Forest's 2008 Riparian Strategy. ER 536. The Riparian Strategy sets out a multi-step process to ensure grazing allows for the attainment of desired conditions. The steps include: (1) defining a desired condition; (2) developing and implementing a livestock management plan and completing an implementation evaluation at the end of each season; and (3) conducting monitoring (including effectiveness monitoring and evaluation every five years). ER 540.

But the Forest Service did not actually implement this strategy. For example, in step (1), the agency is to set standards (for greenline successional status, bank stability, and woody species regeneration) needed to achieve the riparian goals (here, INFISH Riparian Management Objectives), based on site-specific information for each unit, using a provided form. ER 541–46. Importantly, the selected standards are to be “*reevaluated every five years or as needed*”—presumably to check if they are actually achieving or moving towards the goals. ER 541. Here, there is no evidence this was done in 2015, or at any time during the seven years the Riparian Strategy had been in place, even while the Riparian Management Objectives data showed no improvement.

For step (2), in developing a livestock management plan, the agency is to evaluate current conditions on the unit and determine which of three characteristics are the most sensitive to livestock grazing. ER 547. It must then select annual indicators—such as stubble height, bank alteration, and browse use—and their values based on that characteristic, and document the rationale in a form. ER 547, 552.

But there are no such forms describing the rationale for the selected Copper Basin indicators in the record. As with Enclosure B, the Riparian Strategy provides default values for the indicators that are *stricter* than those imposed by the Forest Service, including bank alteration standards of between 5–20%. ER 553. There is no rationale in the record as to why the Forest Service adopted weaker indicators for Copper Basin, instead rubber-stamping identical indicators from years prior.

Also in step (2), the agency should conduct an “implementation evaluation” at the end of every season, “to determine whether the livestock management plan was implemented as planned,” via preparation of two worksheets and two forms. ER 548–549. The forms ask such questions as why indicators were not achieved, what will be done to ensure they are achieved the next year, whether the violation(s) affected achieving the desired conditions, and what adaptive actions are needed. ER 557. None of these forms appear in the record, despite several violations of indicators in 2014. *See supra* pp. 20–21.

Step (3) includes the requirement that the agency conduct an “effectiveness evaluation” at least every five years. ER 559. The purpose is to document whether the desired conditions on each unit are actually being met—and if not, whether grazing is a contributing factor. ER 562. A worksheet and form are provided. ER 561–62. The Forest Service failed undertake this evaluation, or any evaluation that resembled it, in the Annual Operating Instructions or anywhere else in the record. *See* ER 217, 227, 223, 210.

For this reason, even assuming *arguendo* that the Forest Service implicitly adopted the methodology from its guidance documents into its Annual Operating Instructions, deference is not appropriate because the agency did not follow that methodology. Indeed, as this Court put it in another NFMA case, “the very guidelines used by the Forest Service militate against the Forest Service’s assertion that [the agency’s decision] meets its obligation under the NFMA” *NEC v. Tidwell*, 599 F.3d at 934–35.

The INFISH guidance documents were written by experts. ER 613, 536. But in issuing the 2015 Annual Operating Instructions, the Forest Service contradicted the key procedural and substantive provisions of that guidance. It never applied its fisheries and grazing expertise in any documented rationale that violations of indicators were not retarding attainment of Riparian Management Objectives, or that grazing was not a contributing factor to not meeting INFISH

Riparian Management Objectives. It never explained why weaker indicators than set forth in its guidance documents were appropriate. In this manner, the Forest Service ignored, rather than utilized, the expertise of its experts, and thus deserves no deference. *Defenders of Wildlife*, 958 F. Supp. at 685.

C. The District Court Erred in Finding the Forest Service Had No Reason to Evaluate Consistency, Because the Agency Ignored the Riparian Management Objectives Data and Other Problems.

The District Court further held that there was no reason to conduct a consistency analysis because there was no information suggesting one was needed. It stated that while the Forest Service “clearly has an obligation to adjust grazing practices based on the success or failure of habitat restoration projects such as INFISH, there is no practical reason to do so unless information is available as to whether a particular project has succeeded or failed.” ER 41. The court stated the agency “need not anticipate questions unnecessary to its analysis, nor respond to uncertainties that are ‘not reasonably supported by any scientific authority.’” *Id.* (quoting *Lands Council*, 537 F.3d at 1002); *see also* ER 33 (“nothing in the record suggests that the Forest Service had reason to question whether its methodology for assessing the effect of grazing was inadequate when the grazing Annual Operating Instructions were issued in the spring of 2015.”).

First, this contradicts consistent case law in this Circuit that all decisions, including Annual Operating Instructions, must demonstrate consistency with

Forest Plan standards. *See, e.g., Buckingham*, 603 F.3d at 1077. There is no exception for projects where the Forest Service has failed to collect any relevant information. The idea does not find support in *Lands Council*, as implied by the District Court, because the quoted section of *Lands Council* is a discussion of the National Environmental Policy Act, not NFMA. 537 F.3d at 1002.

Second, this holding is factually incorrect. It ignores that *the Riparian Management Objectives data itself*, provided to the Forest Service by its PIBO experts on a rolling basis, showed that Copper Basin streams were not meeting the vast majority of Riparian Management Objectives, were more damaged than ungrazed reference sites, and had no improving trend. ER 197–98. If that data was not a sign that a consistency analysis was needed—for a Forest Plan standard requiring attainment of those Riparian Management Objectives at a near natural rate of recovery—it is hard to imagine what would be.

And as noted, there were additional signs of problems. Livestock grazing caused violations of several annual indicators in 2014, and had done so on a chronic basis over the past decade. *See supra* pp. 20–21. In sum, the District Court erred because the record indicated the need for an analysis whether the 2015 grazing authorizations would be consistent with Grazing Standard GM-1.

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D. The District Court Erred in Finding That Consistency Need Not Be Evaluated When Issuing Annual Operating Instructions, Because it is not Supported by Case Law and Would Nullify INFISH.

While the District Court correctly understood that the Annual Operating Instructions had to be “consistent with” the Forest Plan and INFISH, it suggested the Forest Service need not “engage in an elaborate ‘consistency analysis’ in the context of routine decisions such as [Annual Operating Instructions].” ER 40. It noted Annual Operating Instructions’ relative brevity. *Id.* (citing *ONDA v. USFS*, 465 F.3d at 980). Instead, the court decided, the Forest Service need only evaluate whether grazing is consistent with Forest Plan requirements at the time the agency issues a 10-year permit or long-term Allotment Management Plan. ER 41 (citing *ONDA v. USFS*, 465 F.3d at 983). The court implied that an analysis in Annual Operating Instructions would be overly burdensome to the agency. *Id.*

But if—as the District Court conceded—the Annual Operating Instructions must be consistent with the Forest Plan, then a finding of consistency must be supported somehow, somewhere, in the record. *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 50. The excuse that Annual Operating Instructions are brief fails because the analysis need not be “elaborate”—and need not even be in the Annual Operating Instructions themselves. It could even be a brief worksheet, if it meaningfully addressed the impacts of grazing on riparian recovery. Indeed, that is what the agency’s own Riparian Strategy provides for. ER 557, 562. But there

is simply nothing in the record demonstrating that the Forest Service evaluated the consistency of the 2015 authorized grazing with Standard GM-1.

Further, excusing Annual Operating Instructions from INFISH GM-1 consistency would eviscerate the standard. The crux of Standard GM-1 is *modifying* grazing practices that are harming fish habitat. ER 648. Annual Operating Instructions are the most important stage at which to do so because they can respond quickly to annual conditions and prevent degradation the following year, whereas grazing permits are renewed every ten years. 43 U.S.C. § 1752(a). And the Forest Service has not updated its Copper Basin Allotment Management Plans for decades, since before INFISH was adopted in 1995. ER 375. In other words, if INFISH GM-1 is not applied at the Annual Operating Instructions stage, annual modifications will fail to happen—which is indeed what happened here.

The Forest Service’s own INFISH guidance makes clear that grazing modifications need to be able to occur on an annual basis. INFISH Enclosure B states that “condition thresholds” should be monitored in all pastures/allotments, reported on an annual basis, and “appropriate adjustments made to the annual operating plans” (another term for Annual Operating Instructions). ER 616-17; *see also* ER 557 (Riparian Strategy, providing form for yearly “implementation evaluation” to determine whether violations of annual indicators affected achieving the desired conditions). Thus, the holding that no consistency analysis is required when

issuing Annual Operating Instructions must be rejected as “plainly inconsistent” with the Forest Plan’s INFISH Standard GM-1. *NEC v. USFS*, 418 F.3d at 960.

For these reasons, the District Court erred in holding that the Forest Service was not required, each time it decided to allow further grazing through its Annual Operating Instructions, to ensure that each of those decisions was consistent with Forest Plan INFISH Standard GM-1.

IV. THE COPPER BASIN ANNUAL OPERATING INSTRUCTIONS VIOLATED NFMA BECAUSE THEY WERE NOT CONSISTENT WITH THE SEDIMENT STANDARD

A. Several Streams in the Copper Basin Allotments Have Over 30% Fine Sediment Levels, to Which Grazing Contributes.

Forest Plan Standard 5(f) provides that, if the fine sediment level of 30% is reached or exceeded, “activities that are contributing sediment will be evaluated and appropriate action will be taken to bring fine sediment within threshold levels.” ER 858 (emphasis added). According to the Forest Service’s own monitoring, at least five streams in the Copper Basin allotments had fine sediment levels exceeding 30% in the most recent year of recorded data. *See supra* p. 12.

There is no dispute that livestock grazing is an activity that contributes sediment to streams. Livestock use of streambanks leads to decreased bank stability, which increases sediments both in the streambed and in the water. ER 457, 461. Grazing compacts the soil, which in turn causes increased surface runoff and soil erosion. ER 466–67.

B. The Forest Service Failed to Evaluate Whether its 2015 Grazing Authorizations were Consistent With Standard 5(f) or to Take the Required Action to Reduce Sediment Contribution from Grazing.

Despite these triggering factors for Standard 5(f), the record contains no evidence that the Forest Service “evaluated” grazing in any way with respect to sediment, or determined what “appropriate action” to take to reduce sedimentation prior to issuing its 2015 Annual Operating Instructions. If the fine sediment level of 30% is reached or exceeded, as it has been on the Copper Basin streams described, Standard 5(f) unambiguously requires that activities, such as grazing, that contribute sediment will be “evaluated,” and that the Forest Service will take action to reduce sediments. ER 858.

The Annual Operating Instructions do not discuss the agency’s fine sediment monitoring results or how the 2015 authorized grazing would bring sediment levels below the 30% limit in Standard 5(f), where necessary. ER 217, 227, 223, 210. Indeed, they do not even include the word “sediment.” *Id.* Rather, they simply authorize grazing at levels similar to prior years—the same levels that led to the excessive sedimentation in the streams in the first place. *Id.*

Nor does the record contain evidence of any other reasoned analysis whereby the Forest Service determined whether its 2015 grazing authorizations were consistent with Standard 5(f). Late in the District Court litigation, the Forest Service submitted a record supplement on sediment issues, largely consisting of

sediment reference documents. *See* ER 876 (ECF No. 92). However, nothing in the record demonstrates that the Forest Service *applied* the principles in those references to its own monitoring results showing that several streams had over 30% fine sediment levels, in any sort of evaluation of the likely effects of the grazing proposed in the 2015 Annual Operating Instructions. Nor was there any other evidence apparent of the agency evaluating, or taking, any other “appropriate action” related to grazing to “bring fine sediment within threshold levels” in the worse-than-threshold streams on the Copper Basin allotments. ER 858. The agency essentially filed away its monitoring results and ignored them.

NFMA requires the Forest Service to evaluate its proposed site-specific actions, including Annual Operating Instructions, for consistency with the Forest Plan, and to place its explanation in the record. 16 U.S.C. § 1604(i); *Buckingham*, 603 F.3d at 1077; *Lands Council*, 537 F.3d at 994; *NEC v. USFS*, 418 F.3d at 962. As with INFISH GM-1, the agency ignored the sediment standard, and thus violated NFMA when it issued the 2015 Annual Operating Instructions.

C. The District Court Erred in Deferring to the Forest Service Because Again there was Nothing to Defer To, and its Interpretation is Plainly Inconsistent with the Standard.

The District Court acknowledged that “[t]here seems to be no argument over the fact that, because of the possibility for bank erosion and an impact upon natural vegetation, cattle grazing can increase fine sediment levels in a stream.” ER 43.

However, it credited various excuses proffered by the Forest Service: that sediment data is “difficult to accurately measure”; that “such measurements must be made over a long period of time, in different locations, before conclusions can be drawn about overall trends and causation issues”; and that other activities besides grazing contribute to sediment levels. *Id.* The court concluded that “issues such as the cause of sediment levels, the long-term significance of sediment level trends from year to year, and questions of how best to minimize the levels of sediment in streams are best left to the expertise, when properly employed, of the Forest Service.” ER 44.

But the “questions” that the court found are best left to the expertise of the Forest Service are not the “questions” asked by Standard 5(f). That standard provides that if sediment levels rise above a certain level, “activities that are contributing sediment will be evaluated and appropriate action will be taken to bring fine sediment within threshold levels.” ER 858. The District Court read exceptions into this straightforward standard that simply do not exist.

The District Court created an exception that the standard does not apply if the authorized activity is not the only cause. ER 43–44. This is plainly inconsistent with the standard, which broadly applies to *all* activities that “are *contributing* sediment.” ER 858 (emphasis added).

The District Court created an exception for when the Forest Service claims sediment is “difficult to accurately measure.” ER 43. But this does not even make sense, as the Forest Service did monitor the exact metric discussed in the standard—fine sediment levels—at locations it deemed representative on the Copper Basin allotments. *See supra* p. 12. The Forest Service itself apparently did not find it difficult.

More broadly, invoking the complexities of sediment analysis as an excuse for inaction turns the standard on its head. The complexities of sediment analysis are entirely *consistent* with the standard, which requires an *evaluation* of sediment-contributing activities. That is exactly the place for the agency to evaluate the complexities, which will always be present. For these reasons, the District Court’s holding that no consistency analysis is needed when complexities are present eviscerates the standard, and must be rejected as “plainly inconsistent” with Standard 5(f). *NEC v. USFS*, 418 F.3d at 960. The Forest Service violated NFMA by not insuring that the grazing authorized in the 2015 Annual Operating Instructions was consistent with Standard 5(f).

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V. THE DISTRICT COURT ABUSED ITS DISCRETION IN ADMITTING POST HOC DECLARATIONS FROM FOREST SERVICE OFFICIALS

A. The Record Rule and its Exceptions.

“It is well established that an agency’s action must be upheld, if at all, on the basis articulated by the agency itself” in the course of its making its decisions.

Motor Vehicle Mfrs. Ass’n., 463 U.S. at 50. Litigation affidavits are “merely ‘post hoc’ rationalizations . . . which have traditionally been found to be an inadequate basis for review.” *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977) (citation omitted). Fundamental administrative law requires that “the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.” *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

In cases involving judicial review under the APA, the Ninth Circuit has made clear that it “will not allow the agency to supply post-hoc rationalizations for its actions.” *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 603 (9th Cir. 2014). Where an agency does not advance a rationale in its own decision and supporting documentation, “the [agency]’s argument is simply a *post hoc* rationalization advanced . . . to defend past agency action against attack.” *Or. Natural Desert Ass’n*, 625 F.3d at 1120 (internal quotes omitted).

The Ninth Circuit recognizes four limited circumstances under which courts may consider material outside the administrative record:

(1) if admission is necessary to determine “whether the agency has considered all relevant factors and has explained its decision,” (2) if “the agency has relied on documents not in the record,” (3) “when supplementing the record is necessary to explain technical terms or complex subject matter,” or (4) “when plaintiffs make a showing of agency bad faith.”

Lands Council v. Powell, 395 F.3d 1019, 1030 (9th Cir. 2005) (quoting *S.W. Ctr. for Biol. Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996)).

“Though widely recognized, these exceptions are narrowly construed and applied.”

Id. This Court reviews a district court’s denial of a motion to strike for abuse of discretion. *S.W. Ctr.*, 100 F.3d at 1447.

B. The Forest Service’s Extra-Record Declarations Do Not Fit into Any Exceptions, as the District Court Originally Held.

The Forest Service submitted three extra-record declarations: from District Ranger Diane Weaver, fisheries biologist Bart Gamett, and PIBO project leader Eric Archer. ER 88–124. The declarations consist of various excuses to justify the agency’s failure to evaluate whether grazing was retarding or preventing attainment of INFISH Riparian Management Objectives when it issued the 2015 Annual Operating Instructions, and hence the agency’s failure to ensure that the decisions were consistent with the Forest Plan—classic examples of post hoc rationalizations for agency action unsupported by the record.

The District Court originally agreed, in part. It issued an opinion on WWP's motion to strike "agree[ing] that some of the information in these declarations can be argued to constitute post-hoc rationalizations, and thus improper for the Court to consider." ER 48. It thus struck "the majority of the declarations." *Id.*

However, it reversed course in its memorandum decision issued several months later, stating that the declarations "inform[] the Court of the Forest Service's reliance on the quality of riparian vegetation, greenline ecological status, and bank stability to measure the effect of grazing on stream health," and "explain and condense" that information. ER 29–30. It thus held that "they are helpful and necessary to explain a complex scientific subject." ER 31 (citing *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1130 (9th Cir. 2012)).

Ironically, in this very section of its opinion, the District Court summarized the various guidance documents on INFISH application and the Forest Service's monitoring with nary a citation to the declarations. ER 30–31 (summarizing Enclosure B, the Riparian Strategy, the End of Season reports, and the like). The District Court's very summary showed that no "explanation" from the declarations was necessary.

Further, it is simply not a fair characterization of the declarations to state that they "explain and condense" the Forest Service's reliance on monitoring methods "to measure the effect of grazing on stream health." ER 29. A review of

each declaration shows that, in fact, they provide post hoc excuses for failing to conduct any analysis of INFISH GM-1 compliance prior to issuing the 2015 Annual Operating Instructions.

For example, the primary purposes of the Archer and Gamett declarations seem to be to collaterally attack the Forest Plan. They both argue that certain Riparian Management Objectives are not met at reference sites—apparently to imply that Riparian Management Objectives values are inappropriate. ER 96–98, ER 90–91. This attack is irrelevant and inaccurate.

It is irrelevant because, under the APA, the Court’s “scope of review does not include attempting to discern which, if any, of a validly enacted Forest Plan’s requirements the agency thinks are relevant or meaningful.” *NEC v. USFS*, 418 F.3d at 961. “If the Forest Service thinks any provision of the [relevant Forest Plan] is no longer relevant, the agency should propose amendments to the [Forest Plan] altering its standards . . . rather than discount its importance in environmental compliance documents.” *Id.* Indeed, the Forest Service could have changed the Riparian Management Objective values at any time, as INFISH provided for. ER 641, 609. It never did.

The attack is inaccurate insofar as it tries to imply that there is no difference between Riparian Management Objectives at grazed and ungrazed reference sites. The Archer declaration cites a 2010 study, focusing on the entire Interior Columbia

Basin, that found no significant differences between reference and managed sites for four Riparian Management Objectives. ER 91–92. But, in contrast, the PIBO summary of data in this record—focused specifically on the Copper Basin allotments—found the opposite: that for the Copper Basin allotments, the scores for physical habitat attributes were significantly lower (more damaged) than unmanaged reference sites. ER 197. Thus, the argument is not even supported by the record, much less serving to explain the record.

The Gamett and Weaver declarations also attempt to create a proxy for INFISH Standard GM-1 in the Riparian Strategy’s desired conditions for greenline successional status, bank stability, and woody species. ER 99–102, 104–106, 111. The Weaver declaration summarizes monitoring data on the allotments and asserts that those objectives are largely met, albeit with many exceptions. ER 103–124. Both declarations then assert, with no support or explanation, that if the desired conditions are met, then grazing must not be preventing attainment of Riparian Management Objectives. ER 101–02, 111 ¶ 28.

First, even if true, this post hoc explanation fails to establish that the 2015 Annual Operating Instructions were consistent with Standard GM-1. The Weaver Declaration admits that many sites are in fact *not* meeting the objectives. *E.g.*, ER 120 ¶ 48 (2009 data from Wildhorse allotment found that only six of eleven sites were meeting the greenline standard, with no indication of changed management

since that time). And while the declarations assert that if desired conditions are met, grazing somehow is not *preventing* attainment of Riparian Management Objectives, the declarations do not assert that, if desired conditions are met, grazing is not *retarding* the attainment of Riparian Management Objectives. INFISH Standard GM-1 requires both. ER 648. And the declarations do not assert that a near natural rate of recovery is being achieved at sites where the Forest Service's desired conditions are being met.

Second, the assertions are not supported in the record. As noted, the Forest Service is not even implementing the Riparian Strategy as designed. For example, the Strategy provided that the standards must be reevaluated every five years, which the Forest Service has never done, and the Strategy provided for much stricter annual indicators than used in Copper Basin. *See supra* pp. 41–43. The agency cannot seek cover from a methodology it is not implementing. Further, the declarations fail to grapple at all with the fact that the Riparian Management Objectives data itself shows a lack of improvement. They fail to explain, if the dominant land use in Copper Basin—livestock grazing—is not impacting Riparian Management Objectives, why the Riparian Management Objectives are not improving. And there is no evidence in the record or in these declarations that the Forest Service actually evaluated desired conditions and the relationship to

Riparian Management Objectives before issuing the 2015 Annual Operating Instructions.

In sum, the declarations present a tepid post hoc attempt at the type of analysis of the impacts of grazing on Riparian Management Objectives that should have conducted *before* issuing the 2015 Annual Operating Instructions. They therefore violate this Court’s injunction that “additional information should be explanatory in nature, rather than a new rationalization of the agency’s decision, and must be sustained by the record.” *Kunaknana v. Clark*, 742 F.2d 1145, 1149 (9th Cir.1984). This Court, then, “cannot gloss over the absence of a cogent explanation by the agency by relying on the post hoc rationalizations offered by defendants” in their briefs and extra-record declarations. *Humane Soc’y v. Locke*, 626 F.3d 1040, 1049 (9th Cir. 2010).

For these reasons, the district court abused its discretion in admitting the declarations.

CONCLUSION

For the reasons stated, WWP requests that the Court reverse the District Court, grant summary judgment to WWP, and remand for further proceedings.

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Dated: April 30, 2018

Respectfully submitted,

s/ Kristin F. Ruether
Kristin F. Ruether (ISB # 7914)

s/ David H. Becker
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STATEMENT OF RELATED CASES

WWP is not aware of any related cases pending before this Court.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains 13,261 words excluding the cover, corporate disclosure statement, table of contents, table of authorities, statement of related cases, certificates of compliance and service, signature blocks, and addendum.

s/ Kristin F. Ruether
Kristin F. Ruether (ISB # 7914)
Of Attorneys for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2018, I electronically filed the foregoing Opening Brief of Appellant with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

I further certify that I filed true and correct copies of Petitioners' Excerpts of Record (Volumes I-IV) simultaneously using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. There are no unregistered users participating in this case.

/s/ David H. Becker

ADDENDUM OF PERTINENT STATUTES AND REGULATIONS

16 U.S.C. § 1604(a)

DEVELOPMENT, MAINTENANCE, AND REVISION BY SECRETARY OF AGRICULTURE AS PART OF PROGRAM; COORDINATION

As a part of the Program provided for by section 1602 of this title, the Secretary of Agriculture shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, coordinated with the land and resource management planning processes of State and local governments and other Federal agencies.

16 U.S.C. § 1604(i)

CONSISTENCY OF RESOURCE PLANS, PERMITS, CONTRACTS, AND OTHER INSTRUMENTS WITH LAND MANAGEMENT PLANS; REVISION

Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans. Those resource plans and permits, contracts, and other such instruments currently in existence shall be revised as soon as practicable to be made consistent with such plans. When land management plans are revised, resource plans and permits, contracts, and other instruments, when necessary, shall be revised as soon as practicable. Any revision in present or future permits, contracts, and other instruments made pursuant to this section shall be subject to valid existing rights.

43 U.S.C. § 1752 - Grazing leases and permits

(a) Terms and conditions

Except as provided in subsection (b) of this section, permits and leases for domestic livestock grazing on public lands issued by the Secretary under the Act of June 28, 1934 (48 Stat. 1269, as amended; 43 U.S.C. 315 et seq.) or the Act of August 28, 1937 (50 Stat. 874, as amended; 43 U.S.C. 1181a–1181j), [1] or by the Secretary of Agriculture, with respect to lands within National Forests in the sixteen contiguous Western States, shall be for a term of ten years subject to such terms and conditions the Secretary concerned deems appropriate and consistent with the governing law, including, but not limited to, the authority of the Secretary

concerned to cancel, suspend, or modify a grazing permit or lease, in whole or in part, pursuant to the terms and conditions thereof, or to cancel or suspend a grazing permit or lease for any violation of a grazing regulation or of any term or condition of such grazing permit or lease.

36 C.F.R. 222.1(b) - Definitions

(1) An **allotment** is a designated area of land available for livestock grazing.

(2) An **allotment management plan** is a document that specifies the program of action designated to reach a given set of objectives. It is prepared in consultation with the permittee(s) involved and:

(i) Prescribes the manner in and extent to which livestock operations will be conducted in order to meet the multiple-use, sustained yield, economic, and other needs and objectives as determined for the lands, involved; and

(ii) Describes the type, location, ownership, and general specifications for the range improvements in place or to be installed and maintained on the lands to meet the livestock grazing and other objectives of land management; and

(iii) Contains such other provisions relating to livestock grazing and other objectives as may be prescribed by the Chief, Forest Service, consistent with applicable law.

* * *

(17) **Permitted livestock** is livestock authorized by a written permit.

36 C.F.R. 222.3(b)

(b) Grazing permits and livestock use permits convey no right, title, or interest held by the United States in any lands or resources.