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

WESTERN WATERSHEDS)
PROJECT,)
)
Plaintiff,)
)
v.)
)
UNITED STATES FISH AND)
WILDLIFE SERVICE,)
)
Defendant,)
)
MICHAEL BYRNE, et al.,)
)
Defendant-Intervenors.)
_____)

Case No.: 1:17-cv-00069-CL (lead)
Case No.: 1:17-cv-00098-CL (trailing)
Case No.: 1:17-cv-000468-CL (trailing)
Case No.: 1:17-cv-000531-CL (trailing)

**PLAINTIFF WESTERN
WATERSHEDS PROJECT'S
OBJECTIONS TO MAGISTRATE'S
REPORT AND RECOMMENDATIONS**

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

GLOSSARY OF ACRONYMS vi

INTRODUCTION..... 1

OBJECTIONS..... 3

ADDITIONAL FACTUAL BACKGROUND..... 5

I. THE CLEAR LAKE NATIONAL WILDLIFE REFUGE......5

II. SAGE-GROUSE AND IMPACTS FROM LIVESTOCK GRAZING......6

A. Sage-Grouse Biology and Life Cycle Needs......6

B. Livestock Grazing Harms Sage-Grouse and Their Habitat......7

III. SAGE-GROUSE AND LIVESTOCK GRAZING ON THE CLEAR LAKE REFUGE......9

A. The Decline and Current Status of the Sage-Grouse Population on the Refuge.9

B. Livestock Grazing on and Surrounding the Clear Lake Refuge.10

IV. HARM TO ENDANGERED SUCKERS FROM LIVESTOCK GRAZING......11

STANDARD OF REVIEW AND RELATED ERRORS IN THE R&R 12

ARGUMENT..... 13

I. THE R&R ERRS IN DETERMINING THAT FWS COULD EXCLUDE FEASIBLE ALTERNATIVES THAT REDUCE OR ELIMINATE LIVESTOCK GRAZING......13

A. NEPA Requires Consideration of Alternatives That Reduce or Eliminate Grazing Because They Are Reasonable and More Consistent with the Purpose of the Refuge as a Sanctuary for the Imperiled Local Sage-Grouse Population......14

1. Reducing or removing grazing are reasonable, feasible, and viable alternatives...... 15

2. FWS ignored the purpose of the CCP process in rejecting alternatives that would reduce or eliminate grazing. 17

3. **Informed public comparison requires reduced and no-grazing alternatives..** 18

4. **The rationales provided by FWS, or for the first time in the R&Rs, are inadequate to justify rejecting alternatives to reduce or eliminate grazing.**..... 19

B. **FWS Should Have Considered Eliminating Grazing on the West Side of the Refuge by Prohibiting Use by Livestock from the Modoc National Forest.**.....21

II. **FWS VIOLATED NEPA BY NOT TAKING A “HARD LOOK” AT HOW GRAZING HARMS SAGE-GROUSE AND THEIR HABITAT, PARTICULARLY IN SPRING.**.....23

A. **The R&R Errs in Deferring to FWS’s Conclusion That Spring Grazing Would Not Affect Sage-Grouse, Which Lacked Factual Support and Is Contradicted by Facts Showing That Sage-Grouse Do Use the “U” for Spring Nesting.**.....23

B. **FWS Ignored the Carryover Effects of Fall Grazing on Nesting Sage-Grouse.**.....25

III. **FWS VIOLATED NEPA BY NOT EVALUATING CUMULATIVE IMPACTS TO SAGE-GROUSE FROM GRAZING ON THE MODOC NATIONAL FOREST.**.....26

A. **FWS did not Consider the Cumulative Impacts of Grazing on the National Forest.**.....26

B. **The R&R’s Reliance on Stray Statements in the Record is Legally Inadequate.**.....27

IV. **FWS VIOLATED NEPA BY FAILING TO TAKE A “HARD LOOK” AT GRAZING IMPACTS TO SUCKERS AND THEIR HABITAT.**28

V. **FWS VIOLATED NEPA BY NOT EVALUATING CUMULATIVE IMPACTS TO SUCKERS FROM GRAZING ON THE MODOC NATIONAL FOREST.**.....31

VI. **THE COURT SHOULD CONSIDER WWP’S EXTRA-RECORD FILINGS.**.....32

VII. **FWS’S FAILURE TO CONSIDER CUMULATIVE IMPACTS AND ITS CD FOR GRAZING AT CLEAR LAKE REFUGE VIOLATES THE REFUGE ACT.**32

CONCLUSION 35

TABLE OF AUTHORITIES

Cases

<i>Ariz. Cattle Growers’ Ass’n v. FWS</i> , 273 F.3d 1229 (9th Cir. 2001)	13
<i>Asarco, Inc. v. EPA</i> , 616 F.2d 1153 (9th Cir. 1980).....	32
<i>Cal. v. Block</i> , 690 F.2d 753 (9th Cir. 1982).....	18
<i>Del. Audubon Soc’y v. Salazar</i> , 829 F. Supp. 2d 273 (D. Del. 2011).....	33
<i>Ditto v. McCurdy</i> , 510 F.3d 1070 (9th Cir. 2007)	12
<i>Klamath Siskiyou Wildlands Ctr. v. Grantham</i> , 642 F. App’x 742 (9th Cir. 2016)	30
<i>Klamath-Siskiyou Wildlands Ctr. v. BLM</i> , 387 F.3d 989 (9th Cir. 2004).....	4, 13, 21, 28
<i>Lands Council v. McNair</i> , 537 F.3d 981 (9th Cir. 2008).....	13, 35
<i>Lands Council v. Powell</i> , 395 F.3d 1019 (9th Cir. 2005)	16, 32
<i>League of Wilderness Defenders v. U.S. Forest Serv.</i> , 549 F.3d 1211 (9th Cir. 2008)	28
<i>League of Wilderness Defenders v. U.S. Forest Serv.</i> , 689 F.3d 1060 (9th Cir. 2012)	17
<i>Marsh v. Or. Nat. Res. Council</i> , 490 U.S. 360 (1989).....	12, 14
<i>Miller v. Fed. Land Bank</i> , 587 F.2d 415 (9th Cir. 1978)	24
<i>Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983) ...	12, 19, 30, 34
<i>Muckleshoot Indian Tribe v. U.S. Forest Serv.</i> , 177 F.3d 800 (9th Cir. 1999).....	15, 16, 27
<i>Nat. Res. Def. Council v. U.S. Forest Serv.</i> , 421 F.3d 797 (9th Cir. 2005)	19
<i>Nat’l Wildlife Fed’n v. NMFS</i> , 422 F.3d 782 (9th Cir. 2005).....	26
<i>Native Fish Soc’y v. NMFS</i> , 992 F. Supp. 2d 1095 (D. Or. 2014).....	13, 34
<i>Nw. Coal. for Alts. to Pesticides v. EPA</i> , 544 F.3d 1043 (9th Cir. 2008)	13
<i>Nw. Ecosystem All. v. FWS</i> , 475 F.3d 1136 (9th Cir. 2007).....	30
<i>Or. Natural Desert Ass’n v. BLM</i> , 625 F.3d 1092 (9th Cir. 2010)	14, 18, 26
<i>Salve Regina College v. Russell</i> , 499 U.S. 225 (1991).....	12
<i>San Luis & Delta-Mendota Water Auth. v. Jewell</i> , 747 F.3d 581 (9th Cir. 2014).....	4, 31
<i>Shannon v. United States</i> , 160 F. 870 (9th Cir. 1908)	22
<i>TeMoak Tribe v. U.S. Dep’t of Interior</i> , 608 F.3d 592 (9th Cir. 2010)	28, 32
<i>W. Watersheds Proj. v. Abbey</i> , 719 F.3d 1035 (9th Cir. 2013).....	3, 15, 16, 17, 20
<i>W. Watersheds Proj. v. Bennett</i> , 392 F. Supp. 2d 1217 (D. Idaho 2005)	28
<i>W. Watersheds Proj. v. Bernhardt</i> , 392 F. Supp. 3d 1225 (D. Or. 2019)	2, 7, 8, 16, 26, 35
<i>W. Watersheds Proj. v. Dyer</i> , Nos. CV–04–181–S–BLW, CV–02–521–S–BLW, 2009 WL 484438 (D. Idaho Feb. 26, 2009).....	7
<i>W. Watersheds Proj. v. Jewell</i> , 56 F. Supp. 3d 1182 (D. Idaho 2014)	16, 28
<i>W. Watersheds Proj. v. Kraayenbrink</i> , 632 F.3d 472 (9th Cir. 2011)	23, 25
<i>W. Watersheds Proj. v. Rosenkrance</i> , No. 4:09-cv-298-EJL, 2011 WL 39651 (D. Idaho Jan. 15, 2011)	17
<i>W. Watersheds Proj. v. Salazar</i> , 843 F. Supp. 2d 1105 (D. Idaho 2012)	8, 28
<i>W. Watersheds Proj. v. Salazar</i> , No. 4:08-cv-516-BLW, 2011 WL 4526746 (D. Idaho Sept. 28, 2011).....	16

Statutes

5 U.S.C. § 706(2)(A).....	12
5 U.S.C. § 706(2)(D).....	12
16 U.S.C. § 668dd(a)(4)(D)	33
16 U.S.C. § 668dd(d)(1)(A).....	33
16 U.S.C. § 668dd(d)(3)(A).....	33

16 U.S.C. § 668ee(1)..... 33
 16 U.S.C. § 668ee(3)..... 32, 33, 35
 16 U.S.C. § 695l..... 16
 28 U.S.C. § 636(b)(1)(C) 1, 12
 42 U.S.C. § 4332(C)(iii) 14

Regulations

40 C.F.R. § 1500.2(e)..... 18
 40 C.F.R. § 1502.1 16, 18
 40 C.F.R. § 1502.13 17
 40 C.F.R. § 1502.14 14, 19
 40 C.F.R. § 1502.14(a)..... 20
 40 C.F.R. § 1502.14(b) 18
 40 C.F.R. § 1502.2(g) 14
 40 C.F.R. § 1502.22(a)..... 30
 40 C.F.R. § 1502.9(b) 16
 40 C.F.R. § 1508.7 27, 31
 50 C.F.R. § 25.12 32, 33, 35
 50 C.F.R. § 25.12(a)..... 33
 50 C.F.R. §§ 25.41–45 22
 50 C.F.R. § 26.41(a)(8)..... 33
 50 C.F.R. § 28.21 22
 50 C.F.R. § 28.31 22
 50 C.F.R. § 28.42 22
 50 C.F.R. § 29.1 22, 33
 50 C.F.R. § 402.02 31

Rules

Fed. R. Civ. P. 72(b) 1
 Fed. R. Civ. P. 72(b)(3)..... 12

Other Authorities

Argument Transcript (January 8, 2019)..... 24
 FWS Comprehensive Conservation Planning Process Guidance 602 FW 3.4C(4)(f)..... 33
 FWS Comprehensive Conservation Planning Process Guidance 603 FW 2.12A(12)..... 33

GLOSSARY OF ACRONYMS

APA	Administrative Procedure Act
AUM	Animal Unit Month
BA	Biological Assessment
BO	Biological Opinion
BLM	Bureau of Land Management
CCP	Comprehensive Conservation Plan
CD	Compatibility Determination
EA	Environmental Assessment
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FWS	U.S. Fish & Wildlife Service
NEPA	National Environmental Policy Act
Refuge Act	National Wildlife Refuge System Administration Act, as amended by the Refuge Improvement Act
ROD	Record of Decision
WWP	Western Watersheds Project

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Federal Rule of Civil Procedure 72(b), plaintiff Western Watersheds Project (WWP) respectfully objects to the November 18, 2019, Report and Recommendation (R&R). ECF No. 215. The Court should decline to adopt the R&R and instead enter summary judgment in favor of WWP on *de novo* review. WWP respectfully submits that oral argument would be helpful in resolving these Objections, given the complexity of the issues.

INTRODUCTION

WWP's suit challenges one narrow aspect of the U.S. Fish & Wildlife Service's (FWS) combined Comprehensive Conservation Plan (CCP) and Environmental Impact Statement (EIS): FWS's decision to authorize a new spring livestock grazing period, and reauthorize existing summer grazing, on the Clear Lake National Wildlife Refuge. FWS's decision to increase grazing, despite the harm that grazing causes to greater sage-grouse and their habitat, appears pre-determined, and only subsequently justified with a sham EIS—reflected by FWS's refusal to even consider any alternative that would reduce or eliminate grazing on the Clear Lake Refuge.

Clear Lake Refuge was established in 1911 as a preserve and breeding ground for native birds, including greater sage-grouse. The Refuge now hosts the last remaining “lek”—breeding area—for the Devil's Garden/Clear Lake population of sage-grouse which is struggling for its very survival. In 1970, this population numbered at least 14,000 birds, using 56 leks, across over 1.1 million acres on and around the Clear Lake Refuge. By 2009, the population had shrunk to only 50 birds, using that single lek and living on the Refuge and nearby lands in the Modoc National Forest. Translocation of birds from Oregon's Hart Mountain Refuge and elsewhere has brought the population up to about 150 birds, but it still teeters on the brink of extinction.

While the population of sage-grouse on and around the Clear Lake Refuge dwindled, livestock grazing on the Refuge has continued. Tragically, as Judge Simon recently explained in

a preliminary injunction order, “grazing is likely to cause destruction of sage-grouse habitat.” *W. Watersheds Proj. v. Bernhardt*, 392 F. Supp. 3d 1225, 1255 (D. Or. 2019); *see id.* at 1242–45 (findings of fact listing a dozen ways in which grazing harms sage-grouse and their habitat).

Despite the harmful effects of grazing and the perilous state of the local sage-grouse population, FWS refused to evaluate reduced commercial livestock use of the Refuge as an alternative in the CCP/EIS. Its refusal to analyze a reduced-grazing alternative, or a no-grazing alternative, on Clear Lake Refuge violated NEPA. FWS significantly increased grazing at Clear Lake Refuge through the CCP/EIS, adding the new spring grazing period on the “U”—a roughly 5,000-acre peninsula that extends into Clear Lake Reservoir on the south side of the Refuge—which overlaps the sage-grouse mating and nesting period at and near the local population’s single remaining lek. FWS did so without taking a “hard look” at the harmful effects of springtime grazing on the birds’ breeding activities or nesting efforts. The R&R errs in approving FWS’s unlawful evaluation of alternatives and grazing impacts to sage-grouse, improperly deferring to conclusory, unsupported, and demonstrably false statements by FWS.

While the “U” and other habitat along the Refuge’s shoreline are critical for sage-grouse, the 13,500 acres of land in the Refuge cannot provide for all of the population’s needs. Sage-grouse therefore also use habitat on the surrounding Modoc National Forest throughout the year. Grazing, and related infrastructure such as fences, on the Forest also harms sage-grouse and their habitat when they leave the Refuge. The R&R errs by deferring to FWS without citing a single page in the CCP/EIS or elsewhere in the record where FWS evaluated cumulative impacts from grazing on the Modoc National Forest to sage-grouse that use the Refuge, in violation of NEPA.

Clear Lake Reservoir and its tributaries are designated critical habitat for Lost River sucker and shortnose sucker, both listed as “endangered” under the Endangered Species Act

(ESA). The R&R errs by deferring to FWS’s conclusory statement that grazing impacts to suckers would be minor. FWS had no “empirical” data to support its conclusion, and ignored qualitative evidence, such as its own prior biological opinion (BO), that grazing harms suckers. Suckers also depend on streams on the Modoc National Forest to spawn. The R&R also errs in finding that FWS considered cumulative impacts to suckers based solely on an ESA cumulative effects analysis that did not consider *federal* actions, like grazing on the Modoc National Forest.

Under the Refuge Act, FWS cannot authorize grazing unless it demonstrates that livestock will actually help achieve the purposes of the refuge. Here, FWS’s assertions that increased livestock grazing will heal degraded uplands on the “U” and help recover the imperiled sage-grouse population are contrary to evidence in the record. The R&R errs by ignoring the contrary evidence, declining to engage in the “searching review” required by the Administrative Procedure Act (APA) to ensure the agency took a “hard look” at all relevant factors.

OBJECTIONS

The R&R errs in recommending denial of WWP’s summary judgment motion by:

(1) incorrectly finding that FWS’s CCP/EIS considered an adequate range of alternatives for grazing on the Clear Lake Refuge when it evaluates only two alternatives: continuing grazing at past levels, or increasing grazing by adding a spring grazing period during sage-grouse nesting season. The R&R fails to address controlling Ninth Circuit precedent that requires analysis of a reduced-grazing or no-grazing alternative on specially-protected federal lands like the Refuge.

W. Watersheds Proj. v. Abbey, 719 F.3d 1035, 1050–53 (9th Cir. 2013). R&R at 46–50;

(2) incorrectly finding that FWS took a “hard look” at grazing impacts to sage-grouse from new spring grazing by adopting the false statement from the CCP/EIS that sage-grouse do not nest in the “U” and ignoring ample evidence that sage-grouse *do* nest in the “U,” such as

telemetry data and evidence of nesting habits and habitat availability. R&R at 50–51;

(3) incorrectly finding that FWS evaluated cumulative impacts from livestock grazing on the surrounding Modoc National Forest on the sage-grouse that are affected by the grazing authorized by FWS on the Refuge, when nothing in the CCP/EIS, or the record, includes such a cumulative impacts analysis—not even the two record pages the R&R cites. R&R at 52–53;

(4) incorrectly finding that FWS took a “hard look” at grazing impacts to suckers based on FWS’s claim that it had no “empirical” data showing harm. But FWS ignored qualitative and documentary evidence of harm to suckers on the Refuge, despite the NEPA requirement that an agency either explain why objective data cannot be provided, or to evaluate qualitative data. *See Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 994 & n.1 (9th Cir. 2004). R&R at 51;

(5) incorrectly finding that FWS, in its NEPA documents, evaluated cumulative impacts from livestock grazing on the surrounding Modoc National Forest to suckers that also are affected by the grazing authorized by FWS on the Refuge. The R&R errs in relying on analyses of cumulative effects in ESA consultation documents which, under FWS’s ESA regulations, do not consider cumulative effects of *federal* actions, such as grazing on the Modoc National Forest. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 650 (9th Cir. 2014). R&R at 53;

(6) not considering extra-record evidence showing that FWS failed to consider several important factors, despite denying the Agricultural Plaintiffs’ motions to strike. R&R at 75;

(7) incorrectly finding that FWS complied with the Refuge Act, despite failing to consider cumulative impacts and wrongly finding that *more* grazing will help achieve Refuge purposes when that conclusion is unsupported and contradicted by the record. R&R at 54–56.

These errors flow directly from three fundamental legal misconceptions in the R&R, to which WWP also objects: (1) misapprehending the purpose of APA review to ensure an agency

has not ignored important factors or aspects of the problem and articulated a rational connection between the facts and its conclusions; (2) improperly deferring to FWS statements that are conclusory, unsupported, or demonstrably false; and (3) accepting FWS's pre-determined decision that grazing would be beneficial to retroactively justify FWS's failure to follow procedures required by NEPA, such as analysis of reasonable alternatives and cumulative effects.

ADDITIONAL FACTUAL BACKGROUND

WWP generally does not object to the R&R's summary of relevant facts regarding the Klamath Basin Refuges, the process that led to the CCP/EIS and Record of Decision, and its basic description of the Clear Lake Refuge. R&R at 5–8, 41–42. WWP does, however, object to the mischaracterization or omission of many important facts regarding the Refuge, sage-grouse, suckers, and the effects of grazing, *see* R&R at 42–44, that are important for the Court's review.

I. THE CLEAR LAKE NATIONAL WILDLIFE REFUGE.

As described in the R&R, only about 13,400 acres of Clear Lake Refuge is land, with about 20,000 acres of open water in the Clear Lake Reservoir. R&R at 41; *see* Declaration of David H. Becker, Ex. 1 (filed herewith) (collection of overview maps from AR).¹ The Modoc National Forest entirely surrounds the Refuge, which contains sagebrush steppe uplands composed of sagebrush and other shrubs, as well as grasslands. Becker Decl. Ex. 1 at 4, 3, 5; Ex. 2 (AR 3392–94).² Juniper occurs on the Refuge only in very small areas in the far southern and far northwestern corners. *Id.* Ex. 1 at 3 (map showing juniper in dark brown).

¹ For the Court's convenience in reviewing these Objections, WWP respectfully submits the Becker Declaration, to which are attached a selection of key documents from the record, along with extra record materials demonstrating that FWS failed to consider several significant factors. All "AR" citations herein are to the Second Corrected Administrative Record. ECF No. 82. To facilitate review, not all AR pages cited in the Objections are attached to the Becker Declaration.

² Becker Declaration Exhibit 2 contains all pages cited in this brief from the CCP/EIS's text (AR 3096–3731). Citations herein to these pages refer to the AR pages, not the Exhibit page numbers.

The R&R downplays the purposes of the Clear Lake Refuge. R&R at 41–42. Established “as a preserve and breeding ground for native birds,” one of Refuge’s primary purposes is to provide habitat for sagebrush obligate wildlife, including sage-grouse. *See* Becker Decl. Ex. 3 at 1 (AR 502),³ AR 3104, 3147–49. Consequently, “sage-grouse habitat restoration is the major habitat-related issue on the refuge.” AR 3190. Another Refuge objective is to protect habitat for endemic species such as the endangered Lost River and shortnose suckers. AR 99, 3103.

II. SAGE-GROUSE AND IMPACTS FROM LIVESTOCK GRAZING.

The R&R includes no information about why the sagebrush ecosystem is critical for sage-grouse and barely addresses how grazing harms sage-grouse. *See* R&R at 43–44.

A. Sage-Grouse Biology and Life Cycle Needs.

In 2010, FWS determined that greater sage-grouse were warranted for listing under the ESA, but that listing was precluded by other priorities. Becker Decl. Ex. 4 (AR 2362).⁴ Greater sage-grouse were once widely distributed throughout the sagebrush biome, with populations numbering in the millions. AR 2369, 2372–73. There may now be as few as 100,000 sage-grouse left range-wide. *Id.* Destruction, fragmentation, and degradation of sagebrush habitats over past decades have caused the substantial declines in sage-grouse populations. AR 2376–94.

Sage-grouse have specific seasonal habitat needs, including breeding, nesting, brood-rearing, and wintering areas. AR 2367–68, 3831. Although sage-grouse are present at the Clear Lake Refuge in all seasons, AR 61684, the Refuge is not large enough to provide completely for the needs of the population, which must use Modoc National Forest lands year-round as well.

³ Becker Declaration Exhibit 3 is the Compatibility Determination (CD) for grazing on the Clear Lake Refuge (AR 502–14). Citations herein refer to the AR pages, not the Exhibit page numbers.

⁴ Becker Declaration Exhibit 4 contains pages from FWS’s 2010 “Warranted But Precluded” finding (AR 2361–2466). Citations herein refer to the AR pages, not the Exhibit page numbers.

AR 2621, 3397, 82724. The Clear Lake Hills west of the Refuge are an important area for spring nesting and other seasonal use. Becker Decl. Ex. 5 (maps showing locations of sage-grouse on the Forest's Tucker allotment year round); AR 26243–44. Together the Refuge and surrounding National Forest lands form the current range of the Clear Lake sage-grouse population.

Each year, by early March, sage-grouse move to areas known as leks, where males perform breeding displays. AR 2367, 55151. The nesting season lasts from April through June. AR 51851–52. The nest is a shallow depression on the ground, often under brush and taller grasses, which provide scent, visual, and physical barriers against predators. AR 51852, 68418, 72342. The CCP creates a new, additional spring grazing period on the “U” that overlaps with sage-grouse mating and nesting seasons on Clear Lake Refuge. AR 503, 3242.

Sage-grouse require forbs—herbaceous flowering plants other than grasses—to provide nutrition for the hen, increasing her chances of successfully giving birth to, and raising, her chicks. AR 2367. During summer brood-rearing, sage-grouse move to wetter habitats like springs, wet meadows, and shorelines because these areas have abundant forb cover. AR 1703, 2368, 3832. The CCP allows grazing to continue during summer on the Refuge. AR 502–03.

B. Livestock Grazing Harms Sage-Grouse and Their Habitat.

Federal courts have repeatedly recognized the harm that livestock grazing causes to sage-grouse and their essential habitats. *See, e.g., Bernhardt*, 392 F. Supp. 3d at 1242–45, 1255 (findings of fact as to ways grazing harms sage-grouse and issuing an injunction based on the likelihood of irreparable harm to sage-grouse from grazing); *W. Watersheds Proj. v. Dyer*, Nos. CV-04-181-S-BLW, CV-02-521-S-BLW, 2009 WL 484438, at *11, *13 (D. Idaho Feb. 26, 2009) (describing how livestock grazing harms sage-grouse habitat). The single sentence in the R&R at 43–44 describing negative effects of grazing on nesting sage-grouse understates the

seriousness of this harm and the abundant evidence in the record. *See* AR 25964, 69477–80.

Livestock compete directly with sage-grouse for resources, including grasses and forbs. AR 2391–92. Livestock eliminate the hiding cover required by sage-grouse by consuming and trampling vegetation, both over the long term and seasonally. AR 2391–92, 2680. Livestock also trample and degrade springs, shorelines, and other riparian areas that are important brood-rearing habitat for sage-grouse. AR 2393, 85726–27. Livestock preferentially graze down the larger native bunchgrasses that provide the best hiding cover for sage-grouse, limiting nest success and reducing these desirable grasses over time. AR 2391, 2683, 24091–95, 26781, 26790.

Sage-grouse experts recommend managing breeding and nesting habitat to ensure an average of 7 inches of herbaceous vegetation height, AR 2391, 19154–55, 72348, avoiding twice-over grazing (two grazing periods in one year), and avoiding grazing between March 1 and June 20 or between August 1 and November 15. AR 16678–79; *see W. Watersheds Proj. v. Salazar*, 843 F. Supp. 2d 1105, 1115 (D. Idaho 2012) (echoing these recommendations). Livestock also harm nesting sage-grouse in several ways, including trampling and disturbance that may cause flushing or nest abandonment. AR 2392; R&R at 43–44.

Exotic annual invasive grasses, such as cheatgrass, reduce sagebrush habitat quality. AR 2387. Livestock introduce and spread such invasive plants by transporting seeds, and cheatgrass thrives in disturbed soils churned-up by livestock. AR 2392, 3238, 26790–93; Becker Decl. Ex. 6 (AR 1895–904). Near Clear Lake, cheatgrass—now pervasive—first appeared in sheep pastures. AR 51885; Becker Decl. Ex. 1 at 6 (map). This Court has found that grazing makes sagebrush habitat more susceptible “to cheatgrass invasion as livestock trample biological soil crusts, suppress native bunchgrasses, and shorten fire-return.” *Bernhardt*, 392 F. Supp. 3d at 1243.

Most of the harmful effects of grazing to sage-grouse are summarized for the

convenience of the Court in a declaration submitted by Dr. Clait Braun, a sage-grouse expert. Becker Decl. Ex. 7 ¶¶ 6–23 (Braun Decl., ECF. No. 99).⁵ Dr. Braun explains that “the removal of livestock is the most effective means of initiating ecological recovery.” *Id.* Ex. 7 ¶ 18 (citing Beschta *et al.* article at AR 2482); *see* Ex. 8 (Beschta article). The significant recovery of degraded landscapes when grazing is eliminated is well-documented. *Id.* Exs. 9 (study of sagebrush ecosystem recovery at Hart Mountain Refuge twenty years after grazing was eliminated), 10 (selection of photographs from AR 19796–860 showing recovery at Hart Mountain Refuge). The Compatibility Determination (CD) and CCP/EIS do not address any of the potential benefits from reducing or eliminating grazing. *See* AR 502–14, 3096–3731.

Grazing-related infrastructure—such as fencing, water troughs, pipelines, and corrals—is largely absent from Clear Lake Refuge, AR 57973, 57977, but such infrastructure in the adjacent National Forest threatens the Refuge’s sage-grouse population when birds move onto the Forest. *See, e.g.*, AR 28361; Becker Decl. Ex. 11 at 4–6 (2008 Modoc National Forest NEPA analysis describing grazing infrastructure and likely disturbance to sage-grouse from grazing on the Forest). Sage-grouse can die from fence collisions during flight, and fences offer perches for raptors and ravens that prey on sage-grouse and their nests. AR 2379–81, 2393, 72345.

III. SAGE-GROUSE AND LIVESTOCK GRAZING ON THE CLEAR LAKE REFUGE.

A. The Decline and Current Status of the Sage-Grouse Population on the Refuge.

The Refuge’s “U” is a 5,000 acre peninsula used by sage-grouse year round which hosts the last lek for the Clear Lake sage-grouse population. AR 3392. In 1970, this population had at

⁵ WWP asked Judge Clarke to consider the Braun Declaration. ECF No. 98 at 8 n.5. As explained below at p. 32, this Court should consider the Braun Declaration because it explains that FWS omitted consideration of important factors in authorizing grazing at Clear Lake and concisely summarizes more than 300 pages of comments and scientific materials Dr. Braun submitted, which FWS had before it when it made its decision. AR 2620–924.

least 14,000 sage-grouse, using 56 leks—concentrated near Clear Lake—throughout an area of about 1,140,000 acres. AR 51841, 51863. By 2009, this population had shrunk to only about 50 birds, using that single lek, and living on the Refuge and surrounding National Forest lands. AR 51842, 51846–47. In 2009, only 5 males appeared at the “U” lek, but, after translocations from Oregon’s Hart Mountain Refuge, 33 males were counted at that lek in 2016. AR 2617–18.

Hens nested on the “U” every year between 2007 and 2012. Becker Decl. Ex. 12 (maps and other pages from AR). The shoreline habitat surrounding Clear Lake provide important brood-rearing habitat in summer and fall because of the abundance of forbs available there. AR 3397. FWS’s management “is focused on shoreline and upland habitat.” AR 3189. Providing proper “habitat (particularly for sage grouse) is the overarching priority for the U.” AR 57973.

B. Livestock Grazing on and Surrounding the Clear Lake Refuge.

In recent years, FWS has authorized about 600 animal unit months (AUMs)⁶ of grazing on the “U” annually from mid-August to mid-November. R&R at 43; AR 3554. The “U” contains no interior fencing, watering sites, or other grazing infrastructure. AR 57973, 57977.

In addition to continuing this summer and fall use, the CCP/EIS’s Selected Alternative creates a new, additional spring grazing period somewhere on east side of the “U.” AR 503, 3242, 3556. FWS would build two 1,500-acre pastures with new fencing, which would be open at the lake. AR 503, 3242. It would authorize 300–500 cattle to graze in the pastures from March 1 to mid-April—about 450 to 750 AUMs—ostensibly to “control exotic annual grasses and assist with restoration of habitat.” AR 3242. Thus, the “U” would be grazed two times each year, spring and fall. The spring grazing period would overlap the sage-grouse breeding and nesting season on the “U.” Becker Decl. Ex. 12 (maps and AR pages showing hens nest on the “U”).

⁶ An AUM is the amount of forage required to feed a 1,000-pound cow for one month. AR 3733.

The Modoc National Forest authorizes grazing on the four allotments that surround the Refuge. AR 51879, 51885–88; Becker Decl. Ex. 1 at 4 (map). This annual grazing occurs during periods when sage-grouse use the allotments for nesting and other purposes. *See* Becker Decl. Ex. 5 (maps); AR 26401–12, 29014–18. There is no fence on the west side of the Refuge, and, under an agreement between FWS and the National Forest, approximately 300 cattle authorized to graze on the Forest Service’s Tucker allotment access the western shoreline of Clear Lake for around three weeks beginning July 15—approximately another 225 AUMs. AR 503, 28365.

IV. HARM TO ENDANGERED SUCKERS FROM LIVESTOCK GRAZING.

Livestock grazing on Clear Lake Refuge and the surrounding National Forest also affects endemic Lost River and shortnose suckers, which FWS listed as endangered in 1988. AR 131, 52002, 109519–23. Water diversions and removal of riparian vegetation by livestock grazing threaten harm to suckers. AR 110238, 110265–67.

Lost River and shortnose suckers inhabit Clear Lake Reservoir on the Refuge, which is designated critical habitat for both fish. AR 3573. Clear Lake and its tributaries that flow through the Modoc National Forest—Willow Creek and Boles Creek—provide spawning habitat. AR 3396, 86325. Both species leave Clear Lake to spawn in these streams from February to May each year. After hatching, sucker larvae drift downstream to Clear Lake, where they inhabit shoreline areas in water 4 to 20 inches deep. AR 3321. Larvae and juveniles remain in shallow water, near-shore habitat during spring and summer. *Id.*; AR 110253.

Cattle grazing damages sucker habitat and degrades water quality at Clear Lake. AR 56116, 70181. Disturbance from livestock accessing shoreline and surface water at Clear Lake creates turbidity. AR 3560. Grazing along spawning streams removes vegetation, leading to loss of cover, bank destabilization, and sedimentation that buries spawning areas. AR 86326. FWS

itself has found that removing grazing from the “U” would benefit suckers. Becker Decl. Ex. 13 (AR 64793, 65108–10, 65114).⁷ Forest Service-authorized grazing causes harm to Willow Creek and Boles Creek. AR 52002, 70181. The 1997 BO for livestock grazing on Modoc National Forest allotments within sucker habitat, including the allotments surrounding Clear Lake Refuge, describes the harmful effects of grazing in those areas in detail. Becker Decl. Ex. 14 at 2–8.

STANDARD OF REVIEW AND RELATED ERRORS IN THE R&R

This Court reviews a magistrate judge’s Report and Recommendation *de novo*.⁸ 28 U.S.C. § 636(b)(1)(C). This Court “may accept, reject, or modify, in whole or part the findings and recommendations made by the magistrate judge” and “may also receive further evidence or recommit the matter to the magistrate judge with instructions.” *Id.*; see Fed. R. Civ. P. 72(b)(3).

WWP’s claims are reviewed under the APA, which directs courts to hold unlawful and set aside agency actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or adopted “without observance of procedure required by law.” 5 U.S.C. §§ 706(2)(A), (D). Agency action is unlawful if it “entirely failed to consider an important aspect of the problem, offered an explanation that runs counter to the evidence before it, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Although narrow, the court’s inquiry must be “searching and careful” to determine if the agency based its decisions on consideration of relevant factors and articulated a rational connection between the facts found and the conclusions made. *Marsh v. Or. Nat. Res. Council*,

⁷ Becker Declaration Exhibit 13 contains pages from FWS’s 1995 and 1994 NEPA analyses for grazing at the Refuge (AR 64788–803, 65107–116). Citations herein are to the AR pages.

⁸ *De novo* review means that no deference is shown to the R&R’s conclusions. See *Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991) (“When *de novo* review is compelled, no form of appellate deference is acceptable.”); *Ditto v. McCurdy*, 510 F.3d 1070, 1075 (9th Cir. 2007).

490 U.S. 360, 377–78 (1989). Under NEPA, the Court’s “task is to ensure that the agency has taken a ‘hard look’ at the potential environmental consequences of the proposed action.”

Klamath-Siskiyou, 387 F.3d at 993 (citation omitted). This includes identifying where an agency has failed to consider important *scientific* factors, without substituting the court’s judgment for the agency’s—a necessary inquiry under the APA that the R&R inappropriately declined to undertake. *See Native Fish Soc’y v. NMFS*, 992 F. Supp. 2d 1095, 1111–14 (D. Or. 2014) (holding that the agency ignored four important scientific aspects of the problem); R&R at 56.

A court must not rubber-stamp an agency’s decision: “[w]here the agency’s reasoning is irrational, unclear, or not supported by the data it purports to interpret, [the court] must disapprove the agency’s action.” *Nw. Coal. for Alts. to Pesticides v. EPA*, 544 F.3d 1043, 1052 n.7 (9th Cir. 2008). A court may not defer to agency “conclusions that do not have a basis in fact” in the record. *Ariz. Cattle Growers’ Ass’n v. FWS*, 273 F.3d 1229, 1236 (9th Cir. 2001). No deference is due to NEPA analyses that “contain only narratives of expert opinions.” *Klamath-Siskiyou*, 387 F.3d at 996. And an agency gets no deference when it cites one scientific document but ignores contradictory science, without explaining its reasoning and why it deems the study it cites to be reliable. *See Lands Council v. McNair*, 537 F.3d 981, 994 (9th Cir. 2008) (en banc). In short, an agency must actually *apply* its expertise, not merely assert it, to warrant deference.

ARGUMENT

I. THE R&R ERRS IN DETERMINING THAT FWS COULD EXCLUDE FEASIBLE ALTERNATIVES THAT REDUCE OR ELIMINATE LIVESTOCK GRAZING.

One of the key issues before FWS in developing the CCP was whether to continue agricultural uses such as grazing. AR 3110, 3175. FWS’s refusal to consider alternatives that would reduce or eliminate grazing at Clear Lake Refuge violates NEPA because it prevented the agency from making a fully informed decision about whether grazing should be continued on

this critically important sage-grouse refuge. To meet the Refuge’s purposes and to inform the public, and FWS itself, about different ways the agency might protect the Refuge’s wildlife, the CCP/EIS process required disclosure and study of alternative strategies, as well as evaluation of the pros and cons of each alternative. FWS did neither. Instead, the rationalizations FWS offered for not evaluating reduced-grazing alternatives bear the hallmarks of a pre-determined decision to continue or increase grazing, followed by a paper exercise to justify that decision.

But NEPA requires evaluation of alternatives *first*, to inform the ultimate decision. FWS justified not evaluating potential benefits of reduced grazing by touting the benefits of continuing grazing—flipping the NEPA process on its head. FWS’s subversion of the NEPA process deprived the public, and the agency, of the comparison NEPA mandates between the pros and cons of reducing or removing cows against FWS’s claimed benefits from increasing grazing.

A. NEPA Requires Consideration of Alternatives That Reduce or Eliminate Grazing Because They Are Reasonable and More Consistent with the Purpose of the Refuge as a Sanctuary for the Imperiled Local Sage-Grouse Population.

NEPA imposes procedural requirements, not substantive outcomes, on an agency. *Marsh*, 490 U.S. at 371. However, this requires strict compliance with the procedures mandated by NEPA, including that an EIS “shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.” 40 C.F.R. § 1502.2(g). The EIS must study, develop, and describe alternatives to the proposed action. 42 U.S.C. § 4332(C)(iii); 40 C.F.R. § 1502.14. The alternatives analysis is “the heart of the [EIS],” and must “rigorously explore and objectively evaluate all reasonable alternatives.” 40 C.F.R. § 1502.14.

“The touchstone for courts reviewing challenges to an EIS under NEPA is whether an EIS’s selection and discussion of alternatives fosters informed decision-making and informed public participation.” *Or. Natural Desert Ass’n v. BLM*, 625 F.3d 1092, 1122 (9th Cir. 2010)

(quotations and citations omitted). The “existence of a viable but unexamined alternative renders an [EIS] inadequate.” *Id.* (quotations and citations omitted); *see Abbey*, 719 F.3d at 1050–53 (failure to consider reduced and no-grazing alternatives violated NEPA). Consistent with *Abbey*, WWP asked FWS to consider reduced-grazing alternatives, including ending grazing on the Refuge by cows from the National Forest, and a no-grazing alternative. AR 766–67, 817–19.

1. Reducing or removing grazing are reasonable, feasible, and viable alternatives.

The R&R incorrectly finds that FWS’s refusal to analyze a reduced or no-grazing alternative for Clear Lake Refuge was reasonable because such alternatives would have been ineffective or inconsistent with the basic policy goals of the Refuge. R&R at 48. The Court should not adopt this conclusion because it conflicts with the controlling precedent in *Abbey* (which the R&R fails to cite) and because reducing or ending grazing is reasonable and feasible.

The excuses offered by FWS and the R&R for rejecting these alternatives lack factual support in the record or involve FWS (or the R&R) citing a potential *conclusion* of a fully-informed NEPA analysis—the alleged benefits of grazing, and why it is necessary and should continue. NEPA, however, requires consideration of alternatives *before* reaching conclusions.

In this case, FWS studied only a single action alternative for grazing at Clear Lake—increasing grazing by adding a new spring period—and continuing existing grazing (which it deemed the “no action” alternative). AR 3234–45. But reduced and no-grazing alternatives are feasible and viable strategies for protecting critically-imperiled sage-grouse and suckers that depend on the habitat on this wildlife refuge for their survival. *See Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999) (NEPA requires alternatives to be feasible or viable to warrant full examination). According to the CCP, a reasonable alternative is one that could be “reasonably undertaken to achieve refuge goals and refuge purposes.” AR 3171; *see*

also AR 3831–32 (describing objectives for upland and shoreline habitats at Clear Lake).

Extensive evidence in the record shows that grazing harms sage-grouse and sucker habitat, and that removing livestock promotes habitat recovery. Becker Decl. Exs. 6, 7 ¶ 18, 8–10; see AR 507, 826–27, 2379–81, 2391–94, 3571, 56116, 64793, 65106–18, 70181. Grazing thus conflicts, in many ways, with the purpose of Clear Lake Refuge as a “preserve and breeding ground for native birds” and as a landscape “dedicated to wildlife”—and reducing or eliminating grazing would promote these purposes. AR 3147; 16 U.S.C. § 695l; see *Bernhardt*, 392 F. Supp. 3d at 1255 (“grazing is likely to cause destruction of sage-grouse habitat”). Because of these harms and conflicts, reducing or eliminating grazing is in many ways more consistent with the Refuge’s purpose of protecting native birds and wildlife, and FWS should have explored those options. *Abbey*, 719 F.3d at 1052; *Muckleshoot*, 177 F.3d at 813. But the CCP/EIS does not even address these “responsible opposing views,” despite its duty under NEPA. 40 C.F.R. § 1502.9(b).

Another purpose of NEPA’s alternatives requirement is to identify “reasonable alternatives which would avoid or minimize adverse impacts,” 40 C.F.R. § 1502.1, or that “might be pursued with less environmental harm.” *Lands Council v. Powell*, 395 F.3d 1019, 1027 (9th Cir. 2005). Even assuming grazing might offer some benefit to sage-grouse habitat, FWS had to disclose whether less grazing would have fewer negative impacts than continuing or increasing grazing, and *better* protect sage-grouse and endangered suckers. *Abbey*, 719 F.3d at 1052 (less grazing “could still reasonably meet the purpose of [the action], but it might operate in a more friendly way toward the protected objects”). Courts have repeatedly held that agencies must consider reduced or no-grazing alternatives in their NEPA analyses. *Id.*; *W. Watersheds Proj. v. Jewell*, 56 F. Supp. 3d 1182, 1190–91 (D. Idaho 2014); *W. Watersheds Proj. v. Salazar*, No. 4:08-cv-516-BLW, 2011 WL 4526746, at *13–*15 (D. Idaho Sept. 28, 2011); *W. Watersheds*

Proj. v. Rosenkrance, No. 4:09-cv-298-EJL, 2011 WL 39651, at *8–9 (D. Idaho Jan. 15, 2011).

Abbey considers the same issue as here: whether grazing practices should continue under a protected area’s objectives. The Ninth Circuit held that the agency was required to consider reduced-grazing alternatives” in its planning for a national monument. 719 F.3d at 1050–53. Its “decision not to consider such an alternative, without adequate explanation, shows that it did not take the hard and careful look at impacts of the [action] that is required by NEPA.” *Id.* at 1053. FWS made the same mistake in its planning for Clear Lake Refuge. Considering a reduced and a no-grazing alternative is hardly an “infinite range of alternatives” alluded to in the R&R at p. 46.

2. FWS ignored the purpose of the CCP process in rejecting alternatives that would reduce or eliminate grazing.

The R&R also errs because FWS ignored its own defined purpose for the CCP, instead of properly letting that purpose guide its choice of alternatives. *See* R&R at 47–49. FWS’s actual purpose and need for the Klamath CCP included “evaluat[ing] existing and proposed uses of each refuge to ensure they are compatible with the refuge purpose(s),” AR 7, 3100, 3132, and “[d]iscuss[ing] the pros and cons of continuing existing agriculture, and the compatibility of agriculture on the refuges.” AR 3110, 3175. FWS claimed that the pros and cons of continuing agriculture were among the issues “addressed in the appropriate sections of the draft CCP/EIS, including as part of alternatives and/or analysis.” AR 3174. Under NEPA, an agency must set forth a purpose and need for the proposal, and then choose a range of alternatives that would meet that purpose—not select and justify a proposed alternative as beneficial, and thereby refuse to consider others. *See League of Wilderness Defenders v. U.S. Forest Serv.*, 689 F.3d 1060, 1069 (9th Cir. 2012); 40 C.F.R. § 1502.13 (alternatives respond to underlying purpose of action).

The CCP’s purpose contemplates an objective analysis not only of *how* grazing might continue, but *whether it should continue at all*. Although these planning issues were specifically

selected to “guide[] the development of alternatives” for the CCP/EIS, AR 3109, FWS cast them aside, not fully disclosing the “cons” of continuing commercial livestock grazing at Clear Lake, and failing entirely to disclose the “pros” of reduced or no-grazing. FWS violated NEPA because its “decisional process end[ed] its inquiry at the beginning.” *Cal. v. Block*, 690 F.2d 753, 767 (9th Cir. 1982) (while an EIS “pose[d] the question whether development should occur at all, it uncritically assume[d] that a substantial portion of the [roadless] areas should be developed and consider[ed] only those alternatives with that end result,” in violation of NEPA).

3. Informed public comparison requires reduced and no-grazing alternatives.

NEPA requires an informed, *public*, democratic decision-making process. *Or. Natural Desert*, 625 F.3d at 1099–1100. The agency must provide “full and fair discussion” of impacts and “shall inform” the public of reasonable alternatives to allow it to consider the “comparative merits” of competing proposals. 40 C.F.R. §§ 1502.1, 1502.14(b). This is echoed in the CCP/EIS’s commitment to fully and fairly evaluate the “pros and cons” of current management.

Here, FWS short-circuited the NEPA process by reciting in the CCP/EIS that grazing was “beneficial” and should continue (or increase), without first informing itself or the public of the environmental effects of reduced-grazing alternatives. *See* AR 3558, 3560, 3565, 3567, 3569–71; *see* 4918–19 (response to comments touting benefits of grazing and dismissing reduced grazing without evaluation of potential benefits therefrom).⁹ FWS never actually measured the “pros and cons” of continuing (or increasing) grazing. NEPA cannot serve its core purpose of informing the public and the agency, and weighing the costs and benefits of doing something one way, without robust consideration of doing it another. 40 C.F.R. §§ 1500.2(e) (NEPA alternatives policy); 1502.1 (“full and fair discussion”); 1502.14(b) (“comparative merits” of alternatives).

⁹ Becker Declaration Exhibit 15 contains excerpts of the Responses to Comments.

The public was deprived of the ability to make an “informed comparison” of the impacts from differing levels of livestock use of the Refuge. *Nat. Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 813 (9th Cir. 2005). The agency did not allow the public to consider an analysis of whether reducing grazing might *better* foster recovery of native grasses and sagebrush habitat on the “U,” *see* AR 2358, Becker Decl. Ex. 8, or present an objective discussion of the dramatic recovery of degraded sage-grouse habitat possible when livestock are removed. Becker Decl. Exs. 9 (Hart Mountain recovery study), 10 (related photographs). It is undisputed that livestock compete with native wildlife at the Refuge for resources, including food and shelter. AR 506–07, 3570–71. Yet FWS openly admits it is “uncertain as to the level of effect between cattle and other species.” AR 3570. A robust analysis of a range of strategies for managing livestock was necessary for FWS to make an informed decision whether to authorize grazing (and, if so, how much), both for the public and the agency itself. 40 C.F.R. § 1502.14. The agency’s cart-before-horse approach did not satisfy its NEPA obligation to select and analyze reasonable alternatives.

4. The rationales provided by FWS, or for the first time in the R&Rs, are inadequate to justify rejecting alternatives to reduce or eliminate grazing.

The R&R offers three reasons it was allegedly reasonable for FWS to reject reduced or no-grazing alternatives, none of which are plausible. First, it relies on a 1996 CD for the Refuge that did evaluate a no-grazing—but not a reduced-grazing—alternative. R&R at 47 (quoting AR 64793–94). The old CD thus cannot justify rejection of a *reduced*-grazing alternative.

And the CCP/EIS does not actually rely on the 1996 CD to reject a no-grazing alternative; this rationale was offered for the first time by FWS as a post hoc rationalization in litigation. *See* ECF No. 146 at 13. “[A]n agency’s action must be upheld, if at all, on the basis articulated by the agency itself.” *State Farm*, 463 U.S. at 50. The Alternatives section for Clear Lake Refuge provides no reasons for rejecting other grazing alternatives. AR 3234–45. The

regulation specifying what an Alternatives section must contain provides that “[i]n this section agencies shall . . . rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.” 40 C.F.R. § 1502.14(a) (emphasis added). Elsewhere, the CCP/EIS does precisely that. *See* AR 3233–34, 3270–71, 3285, 3293; R&R at 30–31.

Thus, as a matter of law, the R&R is incorrect that FWS can justify its decision to not consider reduced and no-grazing alternatives in response to comments. R&R at 48. But even the sections of the responses to comments the R&R cites do not mention the 1996 CD. *Id.* at 48–49 (citing AR 4918–19). The R&R errs by providing a justification that FWS itself did not provide—thereby allowing a post hoc rationalization to substitute for the selection of alternatives NEPA requires be made *before* evaluating the relative pros and cons of potential alternatives.¹⁰

Second, the responses to comments illustrate that FWS desperately tried to justify not considering alternatives to grazing by listing a series of supposed benefits from grazing. R&R at 48 (quoting AR 4918–19). But the benefits of the proposed action are irrelevant to whether another alternative is viable, and FWS’s emphasis on the benefits of continued grazing reads like the conclusion of a decision already made, before any alternatives were considered. The only reference in this response to reduced grazing is a conclusory statement that “reduced grazing would have the opposite overall effect.” AR 4919. This statement is fundamentally dishonest: how could FWS know this, without fully and fairly disclosing the environmental effects of reducing or eliminating grazing, as NEPA requires? This conclusory, unsupported, and

¹⁰ The R&R’s reliance on the old CD’s rejection of the no-grazing alternative also unreasonably focuses on a narrow issue—close-cropped vegetation—which is not a Refuge purpose, AR 3103, and ignores the significant environmental changes since 1996—notably the crash of Clear Lake sage-grouse population and the 2001 Clear Fire. It is error to rely “on old data without showing that the data remain accurate.” *Abbey*, 719 F.3d at 1052 (quotation and citation omitted).

uninformed statement is inadequate to justify not performing the comparative analysis of pros and cons that NEPA and the CCP/EIS itself demand. *Klamath-Siskiyou*, 387 F.3d at 996.

Third, the R&R's reliance on the idea that livestock grazing is *required* because it helps manage juniper trees on the Refuge is, frankly, bizarre. R&R at 48–49. The rationale falls apart because the R&R admits that herbicides could be used if there were any juniper on the Refuge, thus making livestock unnecessary for this task. *Id.* at 49 (citing AR 3239). The R&R's references to invasive grasses, mowing, and fire fuel reduction are all non sequiturs unrelated to management of juniper. *Id.* Hand-cutting juniper is an option FWS has used before. AR 3554. And there are virtually no junipers left on the Refuge. *See id.* (“Between 2006 and 2010, over 90% of the refuge was cleared of western junipers including all of the ‘U.’”); Becker Decl. Ex 1 at 3 (map). The R&R itself acknowledges the absence of junipers. R&R at 43. For these reasons, the R&R errs in finding the agency's deficient range of alternatives to be adequate.

B. FWS Should Have Considered Eliminating Grazing on the West Side of the Refuge by Prohibiting Use by Livestock from the Modoc National Forest.

This Court also should not adopt the R&R's finding that FWS's decision to not consider an alternative prohibiting livestock from the Modoc National Forest to graze on the Refuge was reasonable, because the reasons provided by FWS (and echoed in the R&R) do not address FWS's *regulatory authority* to prohibit livestock from the National Forest on the Refuge. R&R at 49. Rather than recognize FWS's authority to cancel the agreement with the Forest Service allowing cows from the Forest to use the west side of the Refuge, *see* AR 3554, 26362–67, the R&R erroneously accepts the FWS's specious rationales for rejecting this alternative.

The R&R acknowledges that the alternative WWP proposed was for FWS to cancel the agreement with the National Forest, but then makes a non sequitur pivot to FWS's assertion that fencing the Refuge boundary would be detrimental to wildlife. R&R at 49. FWS's rationale for

rejecting *fencing*—not part of the proposed alternative—is irrelevant to the actual proposal of ending the agreement and then, under FWS’s regulatory authority, stopping livestock from the Forest entering the Refuge. The R&R’s conclusion that relies on fencing must be rejected. *See id.*

The R&R ignores that grazing on the Refuge is allowed only by permit—not any time livestock happen to wander in. 50 C.F.R. §§ 25.41–45, 29.1. FWS’s regulations fully empower it to prohibit unauthorized livestock on the Refuge—even without a fence—and to penalize owners of trespassing cows and impound their livestock. AR 4789; *see* 50 C.F.R. §§ 28.21 (general enforcement authority), 28.31 (general penalty provisions), 28.42 (procedures for impoundment of trespass domestic livestock). Cancelling the agreement, and enforcing FWS regulations to prohibit trespass cattle from the Forest, is a feasible alternative that would not require fencing.

WWP also objects to the R&R’s allusion to California’s status as an “open range” state “encumbering the land owner to keep undesired livestock off their property” to justify FWS’s failure to consider an alternative cancelling permission for cows from the Tucker allotment to use the Refuge. R&R at 43. FWS cited this justification in the CCP/EIS and Clear Lake CD. AR 503, 3560. However, these statements are legally incorrect. It is long-settled that federal law preempts state open range laws on federal land, and that a federal agency has no duty to physically block livestock from the land it administers so as to exclude them. *Shannon v. United States*, 160 F. 870, 875 (9th Cir. 1908) (“[t]he United States have the unlimited right to control the occupation of public lands, and no obligation to fence [them]”). Given that this justification also does not apply, FWS’s regulatory authority is sufficient to exclude Forest Service livestock from the Refuge, and thus a viable alternative. 50 C.F.R. §§ 25.41–45, 28.21, 28.31, 28.42, 29.1.

The R&R also cites supposed benefits from grazing for fire reduction as a reason for not considering an alternative to end grazing by cows from the National Forest on the Refuge. R&R

at 49. Yet, this justification is as spurious as the others: although the R&R cites AR 503 for FWS’s unsupported assertion that livestock from the Forest offer a benefit by reducing fire, FWS has made clear that it “*is not using or proposing to use grazing for the purpose of preventing fires or reducing fuels on the Klamath Basin Refuges*” in the CCP/EIS. Becker Decl. Ex. 15 (AR 5231) (emphasis added). “Fuel reduction” therefore is not a legitimate rationale for refusing to consider an alternative that ends the use of the Refuge by livestock from the National Forest.

II. FWS VIOLATED NEPA BY NOT TAKING A “HARD LOOK” AT HOW GRAZING HARMS SAGE-GROUSE AND THEIR HABITAT, PARTICULARLY IN SPRING.

An agency “has an obligation under NEPA to prepare an EIS that in form, content and preparation foster[s] both informed decision-making and informed public participation.” *W. Watersheds Proj. v. Kraayenbrink*, 632 F.3d 472, 491 (9th Cir. 2011) (citation and quotation omitted). A “hard look” “must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made.” *Id.* (quotation and citation omitted). FWS’s EIS, which touts the supposed benefits of livestock grazing without any detailed analysis of the likely harm grazing will do to sage-grouse “improperly minimize[s] negative side effects” and evades taking a hard look at the likely effects of the existing, and new, grazing FWS authorized on the Refuge. *Id.* (citation omitted).

A. The R&R Errs in Deferring to FWS’s Conclusion That Spring Grazing Would Not Affect Sage-Grouse, Which Lacked Factual Support and Is Contradicted by Facts Showing That Sage-Grouse Do Use the “U” for Spring Nesting.

The R&R errs in finding FWS took a “hard look” at the new spring grazing period on the “U” because the statement it accepts to justify no analysis of springtime impacts—that “Radio-marked sage-grouse have been monitored since 2005 and no hens are known to nest in that area due to the lack of sage brush cover”—is false, for four reasons. R&R at 50 (quoting AR 3575).

First, the claim that “no hens are known to nest” on the “U” is flatly contradicted by the

record. Hens do nest on the “U,” where the new spring grazing period would be permitted: radio telemetry data show that sage-grouse nested in the “U” every year between 2007 and 2012.

Becker Decl. Ex 12 (maps showing season locations of sage-grouse and nests). This includes nests on the east side of the “U” where the spring grazing would occur. *Id.* at 1, 3.

Second, FWS refers to “that area,” without explanation, or a map, of what “that area” is. AR 3575. The CCP/EIS does say the new spring grazing would occur “on the east side of the ‘U’ that was damaged by the Clear Fire in 2001” on “[t]wo pastures of approximately 1,500 acres each.” AR 3242. At oral argument, WWP proffered maps from the AR overlaid with two red boxes drawn from the maps’ scales to encompass 1,500 acres each—the size of the new pastures. Arg. Tr. at 30–33, 148 (ECF No. 213). One map shows that it would be impossible to build two spring grazing pastures without overlapping areas where sage hens have nested recently on the east side of the “U,” many years after the 2001 Clear Fire. Becker Decl. Ex. 16 (AR 28802).¹¹

Third, FWS’s “explanation” for why “no hens nest” where they actually do—“the lack of sage-brush cover”—also is belied by the record. Sagebrush is present throughout the “U,” and remains in dozens of patches “that range from less than 1 acre to roughly 100 acres within the area of the Clear Fire” on east side of the “U.” AR 3394; Becker Decl. Ex. 1 at 3, 5–6. The map of sagebrush habitat, when overlaid with boxes encompassing 1,500 acres to represent the two new spring grazing pastures, shows that it would be impossible to enclose 3,000 acres on the east side of the “U” without overlapping areas of sagebrush habitat. Becker Decl. Ex. 17 (AR 3393).

Fourth, sage-grouse on the Refuge also nest under vegetation other than sagebrush. AR 938, 952, 3831 (describing nests under rabbitbrush, bunchgrasses, and juniper). Hens likely nest

¹¹ The Court may take notice of the calculations used to draw the boxes. *Miller v. Fed. Land Bank*, 587 F.2d 415, 422 (9th Cir. 1978) (taking judicial notice of mathematical calculations).

even in non-sagebrush habitat within the burned area. Because FWS's justification for finding no impacts to sage-grouse from grazing during sage-grouse nesting season in sage-grouse nesting habitat does not rationally follow from the facts in the record, the R&R errs by deferring to FWS.

The R&R asserts that FWS considered "negative effects of grazing on sage grouse, generally." R&R at 50–51. But "general statements about possible effects and some risk do not constitute a hard look," and an "EIS must include a discussion of adverse impacts that does not improperly minimize negative side effects." *Kraayenbrink*, 632 F.3d at 491 (citation and quotation omitted). The CCP/EIS contains no objective, detailed, and "good faith" hard look at the likely harm to sage-grouse from the new spring grazing authorized atop their mating and nesting ground—despite abundant evidence that livestock "prevent nesting attempts; cause nest abandonment; trample nests, eggs, and young; and otherwise disturb ground-nesting birds." R&R at 43–44 (citing AR 506); *see supra* at pp. 7–9 (describing other ways livestock harm nesting sage-grouse). FWS's bad faith refusal to disclose and analyze in detail the negative impacts its new spring grazing period will have on the sage-grouse that use and nest near the Clear Lake population's very last lek does not constitute the "hard look" NEPA requires.

B. FWS Ignored the Carryover Effects of Fall Grazing on Nesting Sage-Grouse.

The R&R does not address WWP's argument that the FWS also failed to disclose and evaluate the effects of fall grazing, which occurs throughout the "U" in areas where there is no question that sage-grouse nest, on the tall grass cover sage-grouse need for successful nesting the following spring. *See* ECF No. 98 at 25; *supra* at pp. 8–9 (describing sage-grouse nesting needs and how annual grazing in nesting areas reduces grass heights, thereby limiting nesting success). FWS did not take a hard look at this important aspect of grazing's effect on sage-grouse, and no deference is owed when "the agency has completely failed to address some factor consideration

of which was essential to making an informed decision.” *Nat’l Wildlife Fed’n v. NMFS*, 422 F.3d 782, 799 (9th Cir. 2005) (internal citations and quotations omitted). FWS’s failure to consider carryover effects to sage-grouse nesting from fall grazing violates NEPA.

Finally, the R&R repeats FWS’s characterization that grazing on the Refuge is limited and “strictly” managed, despite no evidence of what that means or whether it is true. R&R at 51. In reality, grazing on the Refuge is neither limited nor strictly managed. FWS authorizes three separate grazing periods: in summer, by cows from the National Forest on the west side of the Refuge; in fall, on the whole “U”; and the new spring grazing period on the east side of the “U.” *Supra* at pp. 10–11. Grazing is not “limited” in terms of intensity, either: FWS’s decision nearly doubles livestock use from about 825 AUMs to between 1,275 and 1,575 AUMs annually—more AUMs than at issue in Judge Simon’s recent grazing injunction. *Id.*; *see Bernhardt*, 392 F. Supp. 3d at 1237. And the grazing is in fact barely “managed”: there are no rest or rotation cycles, utilization standards, herding, or monitoring, which are all standard grazing management practices absent at the Refuge. *See* AR 502–14, 3239, 3242 (describing grazing program).

III. FWS VIOLATED NEPA BY NOT EVALUATING CUMULATIVE IMPACTS TO SAGE-GROUSE FROM GRAZING ON THE MODOC NATIONAL FOREST.

A. FWS did not Consider the Cumulative Impacts of Grazing on the National Forest.

The R&R errs in finding that FWS adequately considered cumulative impacts of grazing on the Modoc National Forest on sage-grouse when combined with the impacts of grazing authorized by FWS on the Refuge because nothing in the CD or CCP/EIS shows that FWS conducted the mandatory cumulative impacts analysis. R&R at 52–53; *see* AR 502–14 (CD), 3705–30 (CCP/EIS “Cumulative Impacts” section with no discussion of cumulative impacts related to grazing on the Refuge or effects of grazing on the Forest to the Clear Lake sage-grouse population)). The Court cannot defer to a void. *Or. Natural Desert*, 625 F.3d at 1121.

A cumulative impact “is the impact on the environment which results from the *incremental* impact of the action when added to other past, present, and reasonably foreseeable future actions.” 40 C.F.R. § 1508.7 (emphasis added). Because the same sage-grouse population uses both the Refuge and the adjacent Modoc National Forest, the grazing authorized by FWS and by the Forest Service have harmful, cumulative, and synergistic effects on these birds.

The Modoc National Forest authorizes grazing on the four allotments that surround the Refuge, including during times when sage-grouse use them for nesting and other life cycle needs. *See* AR 26401–12, 29014–18; Becker Decl. Ex. 1 at 4, Ex. 5 (maps). Sage-grouse moving from the lek on the “U” to nest, raise broods, and forage on National Forest lands are subject to the harms from grazing there described above at pp. 8–9. Grazing on the Forest presents other, unique threats to sage-grouse not present on the Refuge, like livestock fences that can kill low-flying sage-grouse and offer perches for predators that prey on sage-grouse and their eggs. *Supra* at p. 9; Becker Decl. Ex. 11 at 4–6. The CCP/EIS does not address these harms.

B. The R&R’s Reliance on Stray Statements in the Record is Legally Inadequate.

It is telling that the R&R does not cite a single page from the CD or CCP/EIS containing an analysis of the cumulative effects of grazing on the Modoc National Forest on the Clear Lake sage-grouse population. R&R at 52–53. Instead, in another non sequitur, it points to supposed benefits from the FWS-authorized grazing on the Refuge (from the CD at AR 505). *Id.* at 52.

A “general and one-sided” cumulative impacts analysis violates NEPA. *Muckleshoot*, 177 F.3d at 811. An agency may not “focus[] solely on the beneficial impact” of a proposed action, with “no evaluation whatsoever” of the possible harmful impacts from related actions in “surrounding areas.” *Id.* A NEPA-compliant analysis would show how much harm grazing on the Forest does to sage-grouse that use the Refuge, allowing FWS to adjust its proposed action.

The R&R’s reliance on FWS’s allusion to a 2010 recovery plan by the Clear Lake Sage Grouse Working Group is wrong as a matter of law, because that study is not a NEPA document. R&R at 52–53 (citing AR 505 and AR 80008); *League of Wilderness Defenders v. U.S. Forest Serv.*, 549 F.3d 1211, 1219 (9th Cir. 2008) (“tiering to a document that has not itself been subject to NEPA is not permitted”); *Klamath-Siskiyou*, 387 F.3d at 998 (a non-NEPA document cannot satisfy an agency’s obligations under NEPA). And nothing in FWS’s statement at AR 505 in fact describes how grazing on the National Forest harms sage-grouse that also use the Refuge. With no detailed information about these effects, the CCP/EIS is inadequate because, “[w]ithout such information, neither the courts nor the public . . . can be assured the agency provided the hard look it is required to provide.” *TeMoak Tribe v. U.S. Dep’t of Interior*, 608 F.3d 592, 603 (9th Cir. 2010) (quotation omitted); *Klamath-Siskiyou*, 387 F.3d at 994 (analysis “must be more than perfunctory; it must provide a useful analysis of the cumulative impacts” (quotation omitted)).

This lack of any analysis of the cumulative impacts of grazing on the Clear Lake sage-grouse population violates NEPA. *W. Watersheds Proj. v. Jewell*, 56 F. Supp. 3d 1182, 1190 (D. Idaho 2014) (cumulative impacts discussion did not satisfy NEPA where agency did not discuss impacts of authorized grazing on sage-grouse within the larger population); *Salazar*, 843 F. Supp. 2d at 1126–28 (same); *W. Watersheds Proj. v. Bennett*, 392 F. Supp. 2d 1217, 1223 (D. Idaho 2005) (agency violated NEPA and acted “like a horse with blinders” by not considering impacts to a declining sage-grouse population from management in adjacent areas). The R&R errs in grasping at an inapposite, legally inadequate pretext to conclude that FWS’s alleged cumulative effects analysis was adequate, when the record shows *there was none* conducted.

IV. FWS VIOLATED NEPA BY FAILING TO TAKE A “HARD LOOK” AT GRAZING IMPACTS TO SUCKERS AND THEIR HABITAT.

WWP objects to the R&R’s finding that FWS took a “hard look” at impacts to

endangered suckers and their critical habitat from grazing along the Clear Lake shoreline. R&R at 51. FWS recognized in previous NEPA analyses that grazing on the Refuge harms suckers and their critical habitat, and that removal of grazing at the Refuge would benefit suckers. Becker Decl. Ex. 13 (AR 64793, 65108–10, 65114). Livestock have unimpeded access to, and tend to stay near, the Clear Lake Reservoir shoreline during all six months of grazing authorized—new spring grazing, summer grazing by cows from the National Forest, and mid-August to mid-November grazing—and the shallow water habitat along that shoreline is a “primary constituent element” of the endangered suckers’ designated critical habitat. AR 506–07, 3322, 57977.

Larval and young suckers rely on shallow 4 to 20-inch deep water, where they rear in flooded grasses during a significant part of the year. AR 3321. Disturbance to these areas through sedimentation and removal of vegetation from grazing and wading livestock is a potential threat to listed suckers during a vulnerable part of their life cycle. *Supra* at pp. 11–12.

Clear Lake is the only source of water for livestock at all times they are on the Refuge, and, in at least from August to November, “most of the cattle use is on the shoreline.” AR 506–07, 57977. FWS’s 2017 biological assessment (BA) found that grazing at Clear Lake may impact suckers and their critical habitat. AR 126, 132. Inexplicably, the CCP/EIS asserts that “there is no management action for [FWS] to implement related to sucker populations,” and therefore does not address likely impacts to suckers from grazing on their shoreline habitat. AR 3245.

The R&R offers three rationales for how FWS supposedly took a “hard look” at grazing impacts to suckers, none of which withstands scrutiny. First, FWS justified the CCP/EIS’s decision to not even evaluate impacts to suckers by claiming to have “no empirical data that shows current grazing practices adversely affect the primary constituent elements (PCEs) of critical habitat for suckers in Clear Lake.” R&R at 51 (citing AR 508, 5154); AR 3571. Not true:

FWS had extensive evidence that grazing along the shoreline harms sucker habitat.

For example, the livestock utilization standard required by FWS's own BO to protect suckers from cows that access the Refuge from the Forest has been exceeded in most years. AR 825, 28918, 28920; *see* Becker Decl. Ex. 14 at 9–10. FWS also had photographs of severe livestock trampling impacts along the Clear Lake shoreline. AR 826–27. Whatever FWS meant by the slippery modifier “empirical,” it must consider even qualitative and anecdotal data if that is the “best scientific . . . data available,” and failed to do so here. *Nw. Ecosystem All. v. FWS*, 475 F.3d 1136, 1147 (9th Cir. 2007); *Klamath Siskiyou Wildlands Ctr. v. Grantham*, 642 F. App'x 742, 744 (9th Cir. 2016) (requiring discussion of qualitative evidence in NEPA analysis).

Second, FWS asserted that “[b]ecause grazing to help control invasive species at the refuge is localized and seasonal, these impacts are likely to be only occasional, of short duration and no more than minor.” R&R at 51 (quoting AR 3558). This unsupported statement is contradicted by the facts that cattle have access to the shoreline for all six months they use the Refuge, have no other source of water, and that, from August to November, “most of the cattle use is on the shoreline.” AR 506–07. Because FWS “offered an explanation that runs counter to the evidence before” it, the Court cannot adopt the R&R's finding. *State Farm*, 463 U.S. at 43.

Third, the R&R's claim that FWS “is under no obligation to conduct new studies” or research “to determine if suckers are adversely affected by grazing” on the Refuge is incorrect. NEPA regulations expressly require that when there is incomplete or unavailable information, FWS must “make clear that such information is lacking,” and, if the information is “relevant to reasonably foreseeable significant adverse impacts” and the cost “of obtaining it are not exorbitant, the agency *shall include the information* in the [EIS].” 40 C.F.R. § 1502.22(a) (emphasis added). It is not enough for FWS to simply say “we have no data.” The Court should

not adopt the R&R's conclusion that FWS took a "hard look" at grazing impacts to suckers.

V. FWS VIOLATED NEPA BY NOT EVALUATING CUMULATIVE IMPACTS TO SUCKERS FROM GRAZING ON THE MODOC NATIONAL FOREST.

The R&R errs by concluding that FWS considered cumulative impacts to suckers from grazing on the Modoc National Forest. R&R at 53. Each spring, endangered suckers ascend streams subject to harm from grazing on the Forest to spawn, after which sucker larvae hatch and drift downstream back to the Refuge. *Supra* at pp. 11–12. FWS itself has described the harmful effects of grazing on sucker habitat in the Forest in detail. Becker Decl. Ex. 14 at 2–8. Yet the CD and the CCP/EIS's "Cumulative Impacts" section do not address these issues at all—FWS wholly failed to consider the factor of how grazing *outside* the Refuge potentially harms suckers also subject to harm from the FWS-authorized grazing. *See* AR 502–14, 3705–30.

The R&R incorrectly relies on a statement in the CCP/EIS that "[c]umulative effects to both species of sucker are enumerated in the biological opinion for these and three other species." R&R at 53 (citing AR 3718–19). As a settled matter of law, a cumulative effects analysis in an ESA consultation document, such as a BO or BA, cannot satisfy the *NEPA* cumulative effects analysis requirement, because ESA cumulative effects analyses include *only state and private actions*—not other *federal* actions like Forest Service-authorized grazing. *San Luis*, 747 F.3d at 650 ("the ESA only requires agencies to consider the cumulative impacts of non-federal actions, while NEPA requires agencies to consider the cumulative impacts of all actions," citing 50 C.F.R. § 402.02 and 40 C.F.R. § 1508.7) (quotation omitted).¹² Therefore, FWS violated NEPA by not "fully address[ing]" cumulative impacts of grazing on the Modoc

¹² Likewise, the 2017 BA, another ESA consultation document on which the R&R also relies, cannot satisfy the requirement that FWS consider the cumulative impacts of *all* related actions, including federally-authorized livestock grazing on the National Forest, because it does not consider Forest Service-authorized grazing. *See* R&R at 53 (citing AR 126–27).

National Forest on suckers that also use the Refuge. *TeMoak*, 608 F.3d at 602.

VI. THE COURT SHOULD CONSIDER WWP'S EXTRA-RECORD FILINGS.

WWP respectfully asks the Court to consider two documents outside the administrative record: the Declaration of Dr. Clait Braun (ECF No. 99) and the 1997 BO for livestock grazing on the Modoc National Forest allotments affecting the Lost River and Shortnose suckers (ECF No. 100-1).¹³ Becker Decl. Exs. 7, 14. WWP submitted these documents to assist the Court's review of whether FWS considered all relevant factors, and, in the case of the Braun Declaration, to explain complex subject matter. *See Lands Council*, 395 F.3d at 1029–30 (describing exceptions to the general rule that APA review is based on the administrative record).

The Braun Declaration summarizes important aspects of harm to sage-grouse from FWS's authorized livestock grazing that FWS failed to consider in the CCP/EIS and explains complex subject matter. *See id.* at 1030. The 1997 BO for grazing on the Modoc National Forest describes the harmful effects of grazing in those areas in detail. Becker Decl. Ex. 14. Harm to suckers from grazing on the Forest is a cumulative impact FWS failed to consider, *see supra* at pp. 11–12, and therefore the BO—FWS's own consultation document—shows that FWS wholly failed to consider an important aspect of the problem, warranting its review by this Court under the exception to the rule against extra-record evidence. *See Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980) (it is “unwise to straightjacket” the court with the administrative record).

VII. FWS'S FAILURE TO CONSIDER CUMULATIVE IMPACTS AND ITS CD FOR GRAZING AT CLEAR LAKE REFUGE VIOLATES THE REFUGE ACT.

The Refuge Act requires FWS to comply with applicable laws, including NEPA. 16 U.S.C. § 668ee(3); 50 C.F.R. § 25.12. FWS's regulations and refuge planning policy also direct

¹³ The R&R does not address these documents, but recommends denying motions by the Agricultural Plaintiffs to strike them. R&R at 75. WWP agrees they should not be stricken.

the agency to “[a]ssess the environmental consequences (direct, indirect, and cumulative) of implementing each alternative as required by NEPA.” 602 FW 3.4C(4)(f) (AR 64545); *see* 50 C.F.R. § 26.41(a)(8). A compatibility determination must address “[t]he anticipated impact of the use on the national wildlife refuge’s purposes.” 50 C.F.R. § 26.41(a)(8). Thus, FWS’s violations of NEPA, described above, also violate the Refuge Act.

Under the Refuge Act, FWS must manage the Refuge to ensure the Refuge’s purposes are carried out, and FWS “shall not” renew a use unless it determines the use is compatible—meaning that it “will not materially interfere with or detract from the fulfillment” of the refuge purposes.” 16 U.S.C. §§ 668dd(a)(4)(D), (d)(1)(A), (d)(3)(A); 668ee(1). Beyond determining compatibility, FWS must also show that any grazing it authorizes *contributes* to the achievement of the Refuge’s purposes. *See* 50 C.F.R. § 29.1. As an economic activity, 50 C.F.R. § 25.12(a), grazing is subject to a heightened standard, and must affirmatively benefit wildlife, not just avoid harming it. *See Del. Audubon Soc’y v. Salazar*, 829 F. Supp. 2d 273, 289 (D. Del. 2011).

FWS must make the required determinations using “sound professional judgment.” 16 U.S.C. § 668ee(3); 50 C.F.R. § 25.12. This requires that FWS’s determinations be consistent with “principles of sound fish and wildlife management, available science and resources, and adherence to the [Refuge Act] and other applicable laws.” *Id.* § 668ee(3); 50 C.F.R. § 25.12; *see also* AR 64526 (FWS policy guidance specifying that, in the exercise of sound professional judgment, a refuge manager “will use available information”). “The justification for the determination . . . must provide a logical explanation.” 603 FW 2.12A(12) (AR 64534).

The R&R concludes that FWS exercised sound professional judgment consistent with the Refuge Act. R&R at 54–56. The R&R states that “WWP is asking this Court to perform its own scientific review of the studies in the record to conclude that [FWS] ignored important scientific

evidence, but that is not the Court's role.” *Id.* at 56. But it emphatically *is* the Court’s role to evaluate whether the agency considered relevant available information and provided logical, fact-supported rationales for its actions, consistent with the laws and policies that govern its approval of grazing on Clear Lake Refuge. This is the very essence of judicial review under the APA. *State Farm*, 463 U.S. at 43; *Native Fish Soc’y*, 992 F. Supp. 2d at 1111–14.

The R&R errs in finding FWS’s new spring grazing—ostensibly meant to restore degraded sagebrush habitat—to be a compatible use, because FWS arbitrarily relied on findings from a small-scale grazing experiment to justify the program, while ignoring peer-reviewed scientific studies showing grazing *increases* spread of invasive grasses, contradicting the experiment’s findings.

First, the R&R simply ignores the rationale that FWS actually provided in the CD and CCP/EIS for its conclusion that spring grazing would target invasive grasses. *See* R&R at 54–55; AR 505, 3240, 3402, 3565. The Court cannot adopt the R&R on this point because “an agency’s action must be upheld, if at all, on the basis articulated by the agency itself.” *State Farm*, 463 U.S. at 50. FWS’s actual rationale in the CD and CCP/EIS for the new spring “restoration” grazing—the “Final Research Update”—was unreasonable and implausible because the spring grazing FWS authorized was significantly different than the experimental study.

The Final Research Update experiment used an 80-acre enclosure, and cautioned that the results were not transferable to an area larger than 160 acres. AR 52072. However, FWS used this study as the basis for approving grazing in two 1,500-acre pastures, without explaining why it was disregarding the investigator’s warning that targeted grazing would not work in an area of that size. AR 505, 3240, 3402, 3565. Nowhere in the CD or CCP/EIS does FWS explain why it deems the Final Research Update to be reliable, and an agency decision is unlawful if it fails to

“explain the conclusions it has drawn from its chosen methodology, and the *reasons it considers the underlying evidence to be reliable.*” *Lands Council*, 537 F.3d at 994 (emphasis added).

Second, FWS refused to discuss scientific information in the record that contradicts its claim that grazing is an appropriate or effective tool to reduce invasive annual grasses. This includes a 2013 study by Michael Reisner and others, titled “*Conditions favouring Bromus tectorum [cheatgrass] dominance of endangered sagebrush steppe ecosystems,*” that found “no evidence” that cattle grazing reduced cheatgrass, but “strong evidence” that increasing cattle grazing intensity promoted it. *Becker Ex. 6* (AR 1895, 1904). This Court relied on the Reisner study in finding that grazing makes sage-grouse habitat more susceptible to cheatgrass invasion and that cows disperse seeds of exotic grasses “at about two orders of magnitude greater than do native ungulates, further increasing cheatgrass spread.” *Bernhardt*, 392 F. Supp. 3d at 1243. But FWS in this case chose to utterly ignore, rather than grapple with, the Reisner study’s findings.

The question for the Court is not which study is “right.” Rather, it is whether FWS can *wholly ignore* the published, peer-reviewed Reisner study—which FWS cannot deny is relevant—and justify its decision instead with the Final Research Update whose own author warned against applying it in the way FWS did. The answer is no. FWS must consider “available science and resources,” including the Reisner study, to exercise sound professional judgment. 16 U.S.C. § 668ee(3); 50 C.F.R. § 25.12. Its explanation must be “logical,” not contrived to reach a predetermined conclusion. AR 64534. The Court therefore cannot adopt the R&R.

CONCLUSION

For the foregoing reasons, WWP respectfully objects to the R&R. The Court should decline to adopt the R&R and enter summary judgment for WWP on all claims.

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