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IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

WINNEMEM WINTU TRIBE, in their tribal and individual capacities; CALEEN SISK, et al.,

Plaintiffs,

v.

UNITED STATES FOREST SERVICE,

Defendant.

Case No. 2:09-cv-01072 KJM KJN

UNITED STATES FOREST SERVICE'S BRIEF ON THE ISSUE OF THE APPROPRIATE REMEDY ON CLAIM THREE (COONROD FLAT)

I. INTRODUCTION

The Court has ruled for plaintiffs on claim three of the complaint, concerning the Coonrod Flat traditional cultural property, under the National Historic Preservation Act ("NHPA"). The Court found that "WWT had a demonstrated interest [in Coonrod Flat] and [the Forest Service] did not consult with it." ECF 147 at 2. The Court ruled that "[t]his is a 'failure to act' claim in that [the Forest Service] 'failed to take a discrete action that it is required to take' . . . making injunctive relief available and appropriate." *Id.* (citing *Norton v. S. Utah Wilderness Alliance,* 542 U.S. 55, 64 (2004) (emphasis omitted)). As a remedy, the Court stated that it "may consider enjoining the Coonrod Flat permit and require the [United States Forest Service] to engage in consultation with the WWT before further or continued grazing based on the permit." *Id*. at 28. The Court cannot compel the Forest Service to consult with plaintiffs under section 706(1) of the Administrative Procedure Act ("APA"), and the Court should not enjoin the permit because plaintiffs have failed to prove that such relief is warranted.

Under section 706(1) of the APA, which is the basis for the Court's decision, the Court can only compel the Forest Service to take discrete acts that it is legally required to take. The Court cannot compel the Forest Service to consult with plaintiffs as persons with a demonstrated interest in Coonrod Flat under 36 C.F.R. § 800.2(c)(5) because whether to grant consulting party status to anyone who first requests such status in writing (which plaintiffs did not do) is a discretionary decision by the Forest Service under 36 C.F.R. § 800.3(f)(3). Nor does section 706(1) authorize the Court to set aside or enjoin the grazing permit.

Since the Forest Service is not legally required to grant consulting party status to plaintiffs under section 800.2(c)(5), the Court's ruling that the Forest Service violated the NHPA on that basis is contrary to the NHPA regulations, and an order compelling the Forest Service to consult with plaintiffs is not an authorized remedy under section 706(1). The Forest Service respectfully requests that the Court, in its inherent power, revisit its ruling that the Forest Service violated the NHPA by not consulting plaintiffs.

Additionally, plaintiffs have not met their burden of proving that a permanent injunction is warranted. They have failed to show that they will be irreparably harmed in the absence of an injunction. Moreover, the equities of enjoining the permit weigh heavily against an injunction because: Coonrod Flat (and the part of Coonrod Flat that is culturally significant to plaintiffs) represents only a tiny fraction of the total area covered by the Bartle Allotment grazing permit, and enjoining the permit would result in severe financial harm and other hardships to the permittee, Truax Cattle, a family business whose cattle have grazed on the Bartle Allotment for many decades. Thus, the Court should deny injunctive relief.

II. ARGUMENT

A. The Court Lacks Authority To Enjoin The Permit Under APA Section 706(1).

Under section 706(1) of the APA, courts are authorized to "compel agency action unlawfully withheld or unreasonably delayed." *Pinnacle Armor, Inc. v. United States*, 2012 WL 2994111, *10 n.3 (E.D. Cal. July 20, 2012) (citing 5 U.S.C. § 706(1); *Slockish v. U.S. Fed. Highway Admin*., 682 F. Supp. 2d 1178, 1198 (D. Or. 2010)). The Supreme Court has stressed the limits of district court authority under section 706(1), explaining that courts may only order action where an agency has "failed to take a *discrete* agency action that it is *required to take*." *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (emphases in original) (describing such actions as ministerial or non-discretionary).

"[T]he purportedly withheld action must not only be 'discrete,' but also 'legally *required*'—in the sense that the agency's legal obligation is so clearly set forth that it could traditionally have been enforced through a writ of mandamus." *Hells Canyon Preservation Council v. United States Forest Serv.*, 593 F.3d 923, 932 (9th Cir. 2010) (emphasis in original). The Supreme Court emphasized that, under the APA, courts are not "empowered to enter general orders compelling compliance with broad statutory mandates." *Southern Utah Wilderness Alliance*, 542 U.S. at 66.

Thus, as the Ninth Circuit has repeatedly observed, "[e]ven if a court believes that the agency is withholding or delaying an action the court believes it should take, the 'ability to compel agency action is carefully circumscribed to situations where an agency has ignored a specific legislative command.'" *Gardner v. United States Bureau of Land Management*, 638 F.3d 1217, 1221-22 (9th Cir. 2011) (quoting *Hells Canyon*, 593 F.3d at 932); *see also Zixiang Li v. Kerry*, 710 F.3d 995, 1004 (9th Cir. 2013) (explaining that there is no judicial authority to compel agency action "merely because the agency is not doing something [the plaintiff or the court] may think it should do"); *Our Children's Earth Found. v. United States Envt'l Protection Agency*, 527 F.3d 842, 851 (9th Cir. 2008) ("To compel agency action . . . , [plaintiff] must point to a nondiscretionary duty that is readily-ascertainable, and not only . . . the product of a set of inferences based on the overall statutory scheme.") (internal quotation marks omitted).

Applying these standards here, section 706(1) of the APA does not give the Court authority to set aside or enjoin the Bartle Allotment grazing permit; it may only compel the Forest Service to perform discrete, legally required acts. 5 U.S.C. § 706(1). The Court may only set aside a final agency action, such as the granting of a grazing permit, under section 706(2) of the APA upon a finding that the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). The Court made no such finding under section 706(2).[1] *See generally* ECF 147.

[1] Even if it did, affirmative injunctive relief is not an appropriate remedy under section 706(2). *Pinnacle Armor*, 2012 WL 2994111 at *10 n.3 (citing 5 U.S.C. § 706(2); *Slockish*, 682 F. Supp. 2d at 1198). Instead, remand is usually the appropriate remedy in section 706(2) cases. *See id.* (citing *Defenders of Wildlife v. United States Envt'l Protection Agency*, 420 F.3d 946, 978 (9th Cir. 2005), *rev'd on other grounds, Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007)). Neither *Muckleshoot Indian Tribe v. United States Forest Serv.*, 177 F.3d 800 (9th Cir. 1999) nor *Confederated Tribes and Bands of the Yakama Nation v. United States Fish and Wildlife Serv.*, 2015 WL 1276811 (E.D. Wash. March 20, 2015) support injunctive relief because, unlike here, both cases involved federally-recognized Indian tribes, and application of the arbitrary and capricious standard under section 706(2), not failure to act under section 706(1).

B. The Court Cannot Compel The Forest Service To Consult With Plaintiffs.

The summary judgment order contains a comprehensive discussion about the NHPA's consultation requirements, which are set forth in 36 C.F.R § 800.2. The Court explained that, under 36 C.F.R. § 800.2, certain individuals or organizations are entitled to participate in the NHPA process as consulting parties as a matter of right, namely, the State Historic Preservation Officer (SHPO), federally recognized Indian tribes (including their tribal historic preservation officers), representatives of local governments with jurisdiction over the area at issue, and the project applicant. ECF No. 147 at 24; *see* 36 C.F.R. § 800.2(c)(1)-(4) (identifying persons entitled to consulting party status).

Additionally, the Court explained that other interested parties "*may* participate as consulting parties due to the nature of their legal or economic relation to the undertaking . . . or their concern with the undertaking's effects on historic properties." *Id.* (citing 36 C.F.R. § 800.2(c)(5)) (emphasis added). An individual or organization may participate in the NHPA process as a consulting party under section 800.2(c)(5), "*if* they request participation in writing *and* the agency determines they should be granted consulting party status." *Id.* (citing 36 C.F.R. § 800.3(f)(3)) (emphases added).

Finally, regarding consultation, the Court correctly explained that "[t]he obligation to consult with Indian tribes extends only to federally recognized Indian tribes" and "[n]on-federally recognized tribes such as the WWT are entitled to only notice and information, as interested members of the public" under 36 C.F.R. § 800.2(d). *Id.* at 15.

Contrary to its explanation of these regulations in the order, in granting summary judgment for plaintiffs on the Coonrod Flat claim, the Court found that:

> Even though the WWT is not federally recognized, it still has a sufficiently demonstrated and documented interest in Coonrod Flat, of which the USFS had knowledge, AR 336,[2] to give it consulting status as to this property under either 36 C.F.R. § 800.2(c)(5) (demonstrated interest) or § [800.2(d)] (the public). Thus, even though a Section 106 analysis was conducted in 2007, the requirements of NHPA were still not satisfied, as a consulting party defined under 36 C.F.R. § 800.2 was not in fact consulted.

[2] AR 336 does not relate to Coonrod Flat. Instead, it is part of the Forest Service's Decision Memo on the Clikapudi Trail Loop Addition Project that was the subject of the Buck Saddle Claim.

Id. at 23. The Court erred in finding that the plaintiffs were entitled to consulting party status under sections 800.2(c)(5) and 800.2(d), and that the Forest Service violated the NHPA, for two reasons.[3]

First, regarding section 800.2(d), as the Court explained in its order, non-federally recognized tribes are only entitled to receive notice and information as members of the public. *Id.* at 15. The public is not an NHPA consulting party under the plain language of the regulations. *Compare* 36 C.F.R. § 800.2(c) (identifying consulting parties) *with id.* § 800.2(d) (requiring notice and information to the public). Therefore, plaintiffs were not entitled to consulting party status as members of the public, and the Forest Service did not violate the NHPA by not consulting with them under section 800.2(d).

Second, plaintiffs were not entitled to consulting party status under section 800.2(c)(5). To be considered a consulting party for the grazing permit based on their demonstrated interest in Coonrod Flat, plaintiffs had to submit a written request to the Forest Service to participate as consulting parties under section 800.2(c)(5). 36 C.F.R. § 800.3(f)(3) ("The agency official *shall consider all written requests* of individuals and organizations to participate as consulting parties") (emphasis added); ECF 147 at 24 (stating that interested persons may participate "if they request participation in writing and the agency determines they should be granted consulting party status").

Plaintiffs cited no evidence in the record, and none exists, to prove that they met this procedural requirement for obtaining consulting party status under the NHPA. Because they failed to follow this process, plaintiffs "have no standing as 'additional consulting parties' and cannot state a claim against [the Forest Service] for failing to consult with them on that basis." *Slockish v. United States Federal Highway Administration*, No. 3:08–cv–1169–ST, 2012 WL3637465, at *6 (D. Or. June 19, 2012); *see Mid States Coalition for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 553 (8th Cir. 2003) (stating that interested persons may participate under section 800.2(c)(5) "if they request participation in writing and the agency determines that they should be granted consulting party status") (citing section 800.3(f)(3)).

[3] The Forest Service believes that the Court also erred because the sufficiency of the 2007 section 106 analysis for the 2010 Bartle Allotment permit, and the issuance of the 2010 permit, were not properly before the Court. The operative complaint did not allege such violations, which were raised for the first time on summary judgment. *See Demarest v. Ocwen Loan Servicing, LLC*, 481 Fed. App'x 352, 353 (9th Cir. 2012); *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999); *Gonzalez v. City of Fed. Way*, 299 Fed. App'x 708, 710 (9th Cir. 2008).

Even if plaintiffs had made a written request to participate as consulting parties for the grazing permit, whether to grant consulting party status lies solely in the Forest Service's discretion. 36 C.F.R. § 800.3(f)(3); *see* ECF 147 at 24; *Mid States*, 345 F.3d at 553; *La Cuna de Azatlan Sacred Sites Protection Circle Advisory Committee v. United States Department of the Interior*, No. CV 11-00400 DMG (DTBx), 2013 WL 4500572, at *8 (C.D. Cal. Aug. 16, 2013) (stating that the participation of individuals and organizations with a demonstrated interest in the undertaking "is subject to the discretion of the agency.") (citing 36 C.F.R. §§ 800.2(c)(5) & 800.3(f)(3)).

Not only have plaintiffs failed to show that they made a written request to participate in the NHPA process for the Bartle Allotment grazing permit, but they also have not proved that the Forest Service granted their request for consulting party status. Therefore, plaintiffs were neither entitled to, nor were they granted, consulting party status under section 800.2(c)(5), and the Forest Service was not legally required to consult with them.

Although the Court acknowledged that it "does not have the authority to circumvent federal tribal recognition processes and allow for de facto federal recognition of the WWT in any grant of relief," the effect of the Court's ruling that the Forest Service was required to consult with plaintiffs about the Bartle Allotment grazing permit is to elevate plaintiffs above their status as members of the public entitled only to notice and information under section 800.2(d). The Court's ruling grants plaintiffs consulting party status under section 800.2(c)(5), even though they did not comply with the NHPA's requirements for seeking that status, and the Forest Service did not agree to grant plaintiffs that status in its sole discretion.

The Court may only compel the Forest Service to "take a *discrete* agency action that it is *required to take*." *Norton*, 542 U.S. at 64 (emphases in original); *Hells Canyon*, 593 F.3d at 932. Because plaintiffs did not have consulting party status under section 800.2(c)(5), the Forest Service was not required to consult with them. And, even if plaintiffs had submitted a written request for such status, the Forest Service has discretion to grant or deny the request. 36 C.F.R. § 800.3(f)(3). Therefore, the Court is not authorized by section 706(1) of the APA to compel the Forest Service to grant that status to plaintiffs, or to consult with plaintiffs about the Bartle Allotment grazing permit, and the Forest Service respectfully requests that the Court revisit its ruling that it violated the NHPA on that basis.

C. Plaintiffs Have Not Met Their Burden Of Proving That An Injunction Is Warranted.

As the Court explained in its summary judgment order, "under NEPA and NHPA, a grant of injunctive relief is an extraordinary remedy that involves the balancing of the equities and requires a fact-specific analysis of the circumstances of an individual case." ECF 147 at 28 (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982)). "Injunctions are equitable remedies; they do not issue 'as a matter of course.'" *Id.* (quoting *Weinberger* at 311). Moreover, "a violation of NEPA or the NHPA alone does not compel the issuance of an injunction." *Id.* (citing *Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1496 (9th Cir. 1995), *abrogated on other grounds by Wilderness Soc'y v. United States Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011)).

"[A] plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-58 (2010) (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). "The traditional four-factor test applies when a plaintiff seeks a permanent injunction to remedy a NEPA violation." *Id.* (citing *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008)).

Courts may consider extra-record evidence in determining whether a party will suffer irreparable harm in the absence of injunctive relief. *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 738 (9th Cir. 2001) (considering extra-record evidence on request for injunctive relief), *abrogated on other grounds by Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010)).

1. Plaintiffs Have Not Proved Irreparable Harm.

The Court should not grant the extraordinary remedy of injunctive relief because plaintiffs have not shown that they will suffer irreparable harm if the Bartle Allotment grazing permit is not enjoined. The only evidence that plaintiffs cited from the record is a memorandum that includes photographs taken by the Forest Service in 2010 regarding a search for house pits that plaintiffs had alleged in their Second Amended Complaint. *See* AR 235. In that memorandum, there are references to "evidence of

cow usage" at Coonrod Flat, as well as old cow pies and areas of disturbance from cows and all-terrain vehicles at the site. *See* AR 235-238. Plaintiffs' meager evidence of harm fails to rise to the level of irreparable harm required to warrant enjoining the Bartle Allotment grazing permit.

Indeed, the evidence in the record is to the contrary. The section 106 analysis for the Bartle Allotment permit, including Coonrod Flat, "revealed very little to no impact from grazing on sites within key grazing areas" and found, instead, that impacts observed "were due to past road maintenance and dispersed recreation vehicle impacts." AR 959. To limit impacts from cattle on archaeological sites, the Forest Service archaeologist recommended "mak[ing] sure that developed water sources are located away from recorded sites" and "to use salting sites to lure cattle away from site locations." *Id.* "Using these two methods will keep cattle away from sites and from concentrating on them." *Id.* He concluded "[g]iven these measures . . . this undertaking will have no effect on National Register Properties." *Id.* These no adverse effect findings demonstrate that plaintiffs have not suffered irreparable harm from cattle grazing that would support enjoining the permit.

Finally, the Coonrod Flat area is not limited to cattle grazing use under the Bartle Allotment permit. For example, campers, mushroom gatherers, hikers, mountain bikers, cross-country skiers, and other recreational users such as all-terrain vehicle and snowmobile users (using designated routes) – all unrelated to the Winnemem – also use the Bartle Allotment area, including Coonrod Flat, all year round. Napper Decl., ¶ 7. Thus, the Bartle Allotment has multiple authorized uses, all of which are consistent with the range management objectives in the Forest Service Manual, including: providing for livestock forage, wildlife food and habitat, outdoor recreation, and other resource values dependent on range vegetation; and contributing to the economic and social well-being of people by providing opportunities for economic diversity and by promoting stability for communities that depend on range resources for their livelihood. *See* Napper Decl., ¶ 8 and Ex. B (Forest Service Manual, Section 2202.1).

Plaintiffs have not shown that the grazing permit alone is responsible for the alleged harm to Coonrod Flat, and the evidence in the record is to the contrary. In conducting the section 106 analysis for Bartle Allotment, the Forest Service archaeologist specifically attributed the "very little to no" impact he observed to "past road maintenance and dispersed recreation vehicle impacts," not to cattle grazing. AR 959. Even plaintiffs attribute some of the alleged harm to Coonrod Flat to recreational

vehicles. *See* ECF 133-1 at 13 ("Cows are grazing within Coonrod Flat, and, *along with ATVs and other vehicles*, have damaged the site. AR 237-38.") (emphasis added). Because plaintiffs have not shown that the grazing permit is the cause of alleged harm, enjoining the permit is not an appropriate remedy.

2. The Equities Weigh Strongly Against The Grant Of Injunctive Relief.

a) Coonrod Flat Covers Only A Tiny Fraction Of The Entire Permit Area.

Enjoining the grazing permit would be inequitable and an inappropriate remedy because Coonrod Flat covers only a tiny fraction of the entire permit area. There is no "Coonrod Flat permit."[4] Rather, the permit issued in 2010 is known as the Bartle Allotment permit, which authorizes cattle grazing on the approximately 40,000 acre allotment comprised of both private and Forest Service land. *See* Napper Decl., ¶¶ 3-5 and Ex. A (Bartle Allotment map); *see* AR 962 (permit).

The Coonrod Flat area covers only approximately 312 acres of Forest Service land. *See* Napper Decl., ¶ 5 and Ex. A. Furthermore, the area of Coonrod Flat that is culturally significant to plaintiffs covers only about 27 acres.[5] *See id.* Therefore, Coonrod Flat represents only approximately 0.8% of the Bartle Allotment, and the culturally significant portion of Coonrod Flat represents a tiny fraction – only 0.07% – of the total area covered by the Bartle Allotment permit. Since Coonrod Flat represents a miniscule portion of the Bartle Allotment, enjoining the entire grazing permit is neither an equitable nor an appropriate remedy and the Court should not grant injunctive relief.

[4] The Forest Service did not brief factual details concerning the 2010 grazing permit because that permit was not the basis for any claim alleged by plaintiffs in the Fourth Amended Complaint, and was only raised by plaintiffs for the first time on summary judgment. Therefore, in the Forest Service's view, the grazing permit and section 106 analysis for that permit were not properly before the Court. *See supra* n.3. Rather than preparing an entire administrative record for the 2010 permit, the Forest Service only included copies of the permit itself and the section 106 analysis to support its argument that plaintiffs' claim in the Fourth Amended Complaint based on the 2003 grazing permit was moot.

[5] The permittee estimates that Coonrod Flat covers 640 acres of a total 45,000 acres, and that the culturally significant area of Coonrod Flat covers approximately 20 to 25 acres of the total grazing area under the Bartle Allotment permit. Truax Decl., ¶ 3. Although these figures vary somewhat from the Forest Service's estimates, the minor differences between the two estimates is not material.

b) The Permittee Will Suffer Severe Harm If The Court Enjoins The Permit.

The Court should not enjoin the Bartle Allotment permit because an injunction would have a ruinous effect on the business, livelihood, and lives of permittee Wesley Truax and his family, who have been grazing cattle on the Bartle Allotment since the 1980s. Truax Decl., ¶ 3.

Truax Cattle is an exclusively family-run business operated by Mr. Truax, his wife, and two adult children, and the business supports his entire immediate and extended family. *Id.*, ¶¶ 6, 8. Truax Cattle's herd consists of approximately 250 mother cows and eight bulls, which is the maximum number permitted on the allotment. *Id.*, ¶ 16. Most of the mother cows are rearing a calf. *Id.*, ¶¶ 16, 28. Every year, the Truax family drives the herd on horseback the approximately 40 to 50 miles from their home in Macdoel, California, to the Bartle Allotment. *Id.*, ¶¶ 15-17. They begin their cattle drive around May 1 each year and reach the Bartle Allotment by June 1st. *Id.*, ¶¶ 18-20. The permit allows the Truaxes' cattle to graze on the Bartle Allotment from June through October each year. AR 962. Grazing is not permitted at any other time of the year, and the Forest Service has not issued any other grazing permits for the Bartle Allotment. Napper Decl., ¶ 6.

The Truaxes' cattle "thrive on the Bartle Allotment because of the abundance and quality of the grass and other vegetation there" and grazing on that allotment is "an ideal setup" for the family and business. *Id.*, ¶ 21. Because of the ideal grazing conditions and low stocking rate for grazing on the Bartle Allotment, the Truax cattle gain weight well, and the calves develop into strong yearlings, which the Truaxes eventually sell as grass-fed beef in the fall. *Id.*, ¶ 23.

The Truaxes' home ranch in Macdoel does not have sufficient grass to feed 250 mother cows and their calves year around. *Id.*, ¶ 25. Because of lack of snowfall there, they "winter" the cattle at Macdoel and supplement their feed with hay during the winter. *Id.* If the grazing permit were enjoined, and the Truaxes could not graze their herd at the Bartle Allotment, their only option would be to keep the cattle at their home ranch. *Id.*, ¶ 32. Under those circumstances, they would have to purchase hay to feed the cattle at a cost of between $70,000-$100,000. *Id.*, ¶ 33. Because they cannot bear such an expense, the Truaxes most likely would be forced to sell nearly all of their cows and calves at a loss, and they would not be able to make a profit that otherwise would support their family. *Id.*, ¶¶ 33-34. Cattle do not gain weight and thrive eating hay and would likely require veterinary care and medication if they

were fed hay all year round. *Id.*, ¶¶ 37, 40. The Truaxes sell their cattle as natural grass-fed beef, free of antibiotics, growth hormones, and other drugs, which commands a higher price. *Id.*, ¶¶ 38-40.

Additionally, because the existing Truax cattle are so familiar with the Bartle Allotment and are imprinted on the land, any new cattle that they might purchase – if they could graze there in the future – would not have the knowledge of the range or the skill to migrate from the home ranch to and from the Bartle Allotment. *Id.*, ¶¶ 29, 36. New cattle would not have the "homing instinct" and would stand a much greater risk of "winter kill" by being trapped in snow and dying of starvation. *Id.*, ¶ 36. It is not possible to quantify the man hours, risk of winter kill, and overall stress that would result if the Truaxes were required to obtain replacement cattle. *Id.*

The Truax family has made substantial investments in their business in reliance on the Bartle Allotment permit, which has been in place since 2010 and will not expire until the end of 2019. AR 962, 963. The Truax declaration describes these financial investments, and the reasons for them. By way of summary, investments made and expenses incurred by the family include:

• 2003 purchase of cattle from previous permittee	$135,000 (*Id.*, ¶ 54)
• Land and construction of a cabin in the allotment	$225,000 (*Id.*, ¶¶ 44-47)
• A Snowcat vehicle	$8,000 (*Id.*, ¶ 48)
• Four herding dogs	$10,000 (*Id.*, ¶ 49)
• Two additional horses	$6,000 (*Id.*, ¶ 50)
• A pickup truck	$45,000 (*Id.*, ¶ 52)
• Website development for marking purposes	$500 (*Id.*, ¶ 53)
• Development of property and ranching equipment	$43,000 (*Id.*)

The family also pays grazing fees to the Forest Service and two private timber companies who have private land in the Bartle Allotment, and they pay taxes to Siskiyou County for the allotment. *Id.*, ¶ 56. The timber companies benefit in various ways from having the Truax cattle graze their properties. *Id.*, ¶ 61. Because the private land is not fenced, it would be impossible to graze the Truax cattle on private land if the Forest Service permit were enjoined. *Id.*, ¶ 60. Additionally, there is a strong tradition of grazing in Siskiyou County, which is an "open-range" county due to the importance of grazing to the local economy. *Id.*, ¶ 62 and Ex. A.

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Mr. Truax states that enjoining the permit "would have a devastating impact on our livelihood, our way of life, and our family tradition. It would completely destroy the succession planning we have been implementing since 2009" and, "[i]f we were forced to sell most of our herd because the permit was enjoined, we most likely would not have a business to pass on to our children and their children," which "upsets us greatly." *Id.*, ¶¶ 65, 66. For all of these reasons, the Court should not enjoin the permit.

III. CONCLUSION

For all of the reasons argued herein the Court should deny plaintiffs' request for injunctive relief in its entirety. Additionally, the Forest Service respectfully requests that the Court revisit its ruling that the Forest Service violated the NHPA based on its finding that the plaintiffs have consulting party status under section 800.2(c)(5) or 800.2(d). Since consultation was not required under these regulations, the Forest Service did not violate the NHPA.

DATED: May 6, 2016

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