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Attorneys for Plaintiffs

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

**OREGON NATURAL DESERT ASS’N**  
*et al.*,

Plaintiffs,

v.

**TOM TIDWELL, et al.**,

Defendants,

v.

**HARLEY & SHERRIE ALLEN, et al.**,

Defendants-Intervenors.

Case No. 2:07-cv-1871-HA  
[Related Case No. 3:03-cv-381-HA]  
[Related Case No. 2:08-cv-151-HA]

**SECOND DECLARATION OF**  
**DANIEL J. ROHLF**

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I, DANIEL J. ROHLF, hereby declare:

**INTRODUCTION**

1. I am an attorney licensed to practice law in Oregon since 1999. I was originally licensed to practice in Colorado in 1987. I am a member of the bars of the State of Oregon, the United States District Court for the District of Oregon, the United States Court of Appeals for the Ninth Circuit, and the United States Supreme Court. I described my qualifications in detail in my first declaration, dated February 2, 2012 (07-1871-HA Dkt # 623). I continue to serve as a Professor of Law at Lewis and Clark Law School.

2. I file this second declaration to further attest to the excellence of the results obtained by the plaintiffs in this important Endangered Species Act (“ESA”) case. In particular, I will discuss the importance of this Court’s June 2010 merits decision and the post-merits relief and final judgment obtained by the plaintiffs. In order to render the opinions in the discussion that follows, I reviewed the major pleadings and decisions in this case, and the attorney time and expense records filed by plaintiffs’ counsel in support of their global fee motion.

**DISCUSSION**

3. The Oregon Natural Desert Association and its co-plaintiffs, Center for Biological Diversity and Western Watersheds Project (collectively referred to hereafter as “ONDA”), have achieved significant success through this litigation. After winning two important preliminary injunctions, which I discussed in my earlier declaration, ONDA then went on to win on the merits and to obtain significant remedial orders from this Court.

4. In addition to the two preliminary injunctions it earned in 2008 and 2009, ONDA also achieved a substantial and direct benefit that gave relief to ONDA and protected threatened

steelhead trout and its critical habitat, by then achieving court-ordered, stipulated restrictions on cattle grazing in 2010, a merits decision largely in its favor in 2010, a modified injunction in 2011 that prohibited grazing on several allotments and pastures and imposed strict oversight on grazing on the remaining allotments, and then issuance of a 2012–2016 biological opinion (“BiOp”) that imposes far more quantitative triggers and restrictions on grazing than the previous (challenged) BiOp.

5. The grazing restrictions and injunctions dramatically reduced the harmful effects of cattle grazing in steelhead critical habitat. On May 24, 2010, the Court issued an order (Dkt # 485) advising the parties that an ESA § 7(d) letter was required for each allotment where the Forest Service proposed to allow grazing in 2010. The Court expressed its expectation that “the Forest Service will conduct weekly monitoring of all critical habitat pastures when livestock are present; will conduct all monitoring, conservation, and enforcement measures discussed in the 2007-2011 BiOp; will conduct mid-rotation MIM monitoring on each pasture; will provide the parties with bi-weekly field monitoring status reports; and will provide the court with a comprehensive mid-season status report.” Dkt # 485.

6. The 2010 stipulated restrictions (Dkt ## 495–96) imposed a series of very specific mitigation and monitoring measures intended to ensure against further damage to steelhead habitat. *See* Dkt # 495, ¶ 9. The protective measures applied to 13 grazing allotments covering approximately 486,221 acres of public land which contained over 306 miles of steelhead-bearing streams on the Malheur National Forest. Because these restrictions were made enforceable through a court order, it increased the likelihood of compliance by the agency. That was reflected in the improved grazing management and monitoring results during 2010.

7. In 2011, the Court's modified injunction (Dkt # 570) barred grazing on pastures and allotments where livestock had caused bank alteration exceedences, required the Forest Service to submit proposed actions for certain allotments well before the grazing period was scheduled to begin, and retained all of the grazing restrictions from the previous years. The order kept in place the outright prohibition of grazing on at least 130 miles of steelhead streams, mostly on the Upper Middle Fork, Lower Middle Fork, and Murderers Creek Allotments. Following on the prior injunctions and stipulated restrictions, the order was the most protective grazing injunction ever issued on the Malheur National Forest's steelhead-bearing streams.

8. In its 2011 modified injunction order, the Court also took the Forest Service to task for its mismanagement and delays. For example, the Court rejected the agency's attempt to "excuse a percentage of the violations as noncattle hoof action." Mar. 16, 2011 Order Modifying Injunction, at 7. As the Court noted, "Federal defendants' rationalization would render bank alteration standards meaningless. Presumably, the Forest Service could allow almost ten percent of non-cattle-caused bank alteration and ten percent of cattle-caused bank alteration. This cannot be a result that the agencies and the ESA intended." *Id.* at 8; *see also id.* (observing that "Federal defendants have greatly delayed this process" and noting agency promises to prepare a new BiOp dating back to late-2009).

9. After the federal defendants and the permittees appealed the modified injunction order to the U.S. Court of Appeals for the Ninth Circuit, ONDA also succeeded in preserving the result of the injunction by navigating a complicated set of jurisdictional issues. The federal defendants dismissed their appeal, but stood to benefit from any relief granted by the Court of Appeals, and filed an extraordinary "Suggestion of Mootness" (App. Dkt. # 43-1) in the permittees' appeal in April 2012 based on the issuance of the 2012–2016 BiOp. The subsequent

briefing responding to the federal defendants' suggestion, and parallel proceedings in this Court, resulted in the dismissal of the permittees' appeal in August 2012.

10. ONDA also achieved a complex, unusually rapid, and very successful resolution of the outstanding question of how its pending motion for interim attorney fees should be decided. ONDA accomplished this result by obtaining a stipulation not to appeal from all parties that allowed the Court to enter judgment and consider all attorney fee issues in a single global petition, and which guarantees that this Court's judgment will be the last word on nearly ten years of litigation in three consolidated cases.

11. As I explained in my prior declaration, this case is one of the few instances in which plaintiffs have successfully demonstrated the disconnect between protections to which these resources are nominally entitled and actual grazing practices. The acreage of land protected by the injunctions issued in this case, including the 2010 stipulated restrictions and the 2011 permanent injunction, as well as the Court's requirement that the Forest Service use actual monitoring data to adaptively adjust grazing practices to ensure implementation of meaningful protections, are truly remarkable. I stand by my prior statement that very few other cases have resulted in such extensive and demonstrable on-the-ground protections for fish and streams in Oregon's high desert. It also is one of the most significant instances of multiple-year restrictions on livestock grazing and permanent new protection for fish-bearing streams anywhere in the West.

12. Also as I noted in my prior declaration, the case law explains that an award of attorney fees is appropriate under the ESA citizen suit provision when a plaintiff has "substantially contributed to the goals of the statute" and has "served the public interest" by

assisting the interpretation or implementation of the Endangered Species Act. *See* Rohlf Decl. ¶ 15.

13. What I stated in my first declaration bears repeating here: ONDA served the public interest by proving that the Forest Service authorized livestock grazing along hundreds of miles of streams critical to the survival and recovery of threatened steelhead without ensuring against jeopardy or adverse modification of critical habitat, without ensuring the grazing would not jeopardize the continued existence of the steelhead, and that resulted in unlawful take of steelhead. ONDA's success in protecting these resources served the public interest by ensuring that uses of public land for private economic gain do not come at the expense of the wildlife and water quality that is part of the heritage of all Oregonians and all Americans. The State of Oregon and the federal government have spent millions, if not billions, of dollars in an effort to protect and restore salmon and their habitat in Oregon. ONDA's work through this litigation helps protect that investment of public funds, as well as helps to ensure that our descendants will still be able to enjoy salmon and steelhead runs that have been invaluable to humans since time immemorial.

14. ONDA also achieved an excellent result through the eventual issuance of a stronger 2012–2016 BiOp. The new BiOp puts far more quantitative triggers and restrictions on grazing than the previous BiOp. Although ONDA did not win a summary judgment on its ESA claims against defendant NFMS, it is clear that (1) there was better interim control on grazing during 2009, 2010, and 2011 because ONDA proved that *both* agencies failed to reinstate consultation properly, (2) this Court carefully enforced the terms of the existing (2007–2011) BiOp until the new one issued, and (3) the new BiOp was more stringent than the previous one.

15. Related, ONDA also achieved an “excellent result” via the unprecedented requirement that NMFS release a draft BiOp to the parties for prior review. This appears to have influenced the quality of the ultimately more stringent 2012–2016 BiOp because NMFS knew that the draft was going to be disclosed to the public, and not only to the permittees, and the agency responded to public comments in issuing the final opinion.

### **CONCLUSIONS**

16. I believe that ONDA achieved a direct and substantial benefit to the steelhead; that ONDA achieved its stated interests in obtaining federal court decisions reducing ongoing damage by livestock in key migratory, spawning and rearing habitat for threatened steelhead; and that ONDA served the public interest by waging a successful, nearly decade-long battle against two federal agencies charged with protecting the steelhead but whose management of key stream and riparian habitat throughout the Malheur National Forest had ceased to properly take into account the needs of the steelhead and the requirements of the law. In short, ONDA achieved excellent success in this litigation.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 19th day of December, 2012, at Portland, Oregon,

s/ Daniel J. Rohlf

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Daniel J. Rohlf