

Oliver J. Stiefel, OSB No. 135436
oliver@crag.org – (503) 227-2212
Ralph O. Bloemers, OSB No. 984172
ralph@crag.org – (503) 525-2727
Christopher G. Winter, OSB No. 984355
chris@crag.org – (503) 525-2725
Crag Law Center
917 SW Oak Street, Suit 417
Portland, OR 97205
Fax: (503) 296-5454

Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION**

BARK, an Oregon non-profit corporation,
FRIENDS OF MOUNT HOOD, an Oregon
non-profit corporation, **NORTHWEST
ENVIRONMENTAL DEFENSE CENTER**,
an Oregon non-profit corporation, **THE SIERRA
CLUB**, a California non-profit corporation,

Plaintiffs,

v.

LISA NORTHROP, Forest Supervisor
of the Mt. Hood National Forest, **BILL
WESTBROOK**, Zigzag District Ranger, **KENT
CONNAUGHTON**, Regional Forester for
Region 6, and the **UNITED STATES FOREST
SERVICE**, a federal agency; **WILLIAM
STELLE**, Regional Administrator of the West
Coast Region, and the **NATIONAL MARINE
FISHERIES SERVICE**, a federal agency.

Defendants,

RLK AND COMPANY, an Oregon corporation,

Defendant-Intervenor.

Case No. 3:13-cv-00828-AA

**PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND
MEMORANDUM IN SUPPORT**

ORAL ARGUMENT REQUESTED

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Crag Law Center
917 SW Oak St., Suite 417
Portland, OR 97205
Tel. (503) 525-2727

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TABLE OF ACRONYMS

APA	Administrative Procedure Act, 5 U.S.C. §§ 701 <i>et seq.</i>
BiOp	Biological Opinion
DN	Decision Notice
EA	Environmental Assessment
EIS	Environmental Impact Statement
ESA	Endangered Species Act, 16 U.S.C. §§ 1531 <i>et seq.</i>
FONSI	Finding of No Significant Impact
Forest Service	United States Forest Service
ITS	Incidental Take Statement
LCR	Lower Columbia River
LAA	Likely to Adversely Affect
LRMP	Land and Resource Management Plan
LWD	Large Woody Debris
NEPA	National Environmental Policy Act, 42 U.S.C. §§ 4321 <i>et seq.</i>
NFMA	National Forest Management Act, 16 U.S.C. §§ 1600 <i>et seq.</i>
NLAA	Not Likely to Adversely Affect
NMFS	National Marine Fisheries Service
NWFP	Northwest Forest Plan
PDC	Project Design Criteria
Plaintiffs	Bark, Friends of Mount Hood, Northwest Environmental Defense Center, and the Sierra Club
RLK	RLK and Company, Inc.
SUP	Special Use Permit

MOTION FOR SUMMARY JUDGMENT

Plaintiffs Bark, Friends of Mount Hood, Northwest Environmental Defense Center, and the Sierra Club (collectively, “Plaintiffs”) hereby submit their Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56-1. Pursuant to Local Rule 7-1, Plaintiffs certify that the parties have made a good faith effort to resolve the dispute and have been unable to do so.

This Administrative Procedure Act case challenges the Environmental Assessment (“EA”), Decision Notice (“DN”) and Finding of No Significant Impact (“FONSI”) issued by Defendants Lisa Northrop, Bill Westbrook, Kent Connaughton, and the U.S. Forest Service (collectively, “Forest Service”) that approves a proposal to develop 17 miles of downhill mountain biking trails within watersheds providing critical habitat for aquatic and other sensitive species (the “Project”). This case also challenges the Biological Opinion (“BiOp”) and Incidental Take Statement (“ITS”) issued by Defendants William Stelle and the National Marine Fisheries Service (collectively, “NMFS”) that authorizes the Project’s “take” of threatened Lower Columbia River (“LCR”) steelhead.

Plaintiffs respectfully request that this Court grant the declaratory and injunctive relief specified in their Second Amended Complaint (Dkt. 104), including:

1. Declare that the Forest Service has violated the National Environmental Policy Act, 42 U.S.C. § 4331 *et seq.* by issuing an EA, DN and FONSI that is arbitrary, capricious, not in accordance with, or otherwise without observance or procedure required by law;
2. Declare that the Forest Service has violated the National Forest Management Act, 16 U.S.C. §§ 1600 *et seq.*, by issuing a final decision in conflict with applicable standards and

guidelines as required by the Northwest Forest Plan and Mt. Hood Land and Resource Management Plan;

3. Vacate and set aside the EA, DN, and FONSI, and enjoin the Forest Service from proceeding with the Project unless and until it prepares a legally adequate Environmental Impact Statement (“EIS”) for the Project and the acceptance of R.L.K. and Company’s Master Development Plan (“MDP”) and amendment of its Special Use Permit (“SUP”);

4. Compel the Forest Service to prepare supplemental NEPA analysis on the basis of significant new information and to prepare a NEPA analysis for acceptance of RLK’s MDP and amendment of RLK’s SUP;

5. Declare that NMFS has violated the Endangered Species Act, 16 U.S.C. §§ 1521 *et seq.*, by issuing a Biological Opinion that fails to ensure that actions will not jeopardize the continued existence of LCR steelhead or destroy or adversely modify its critical habitat;

6. Vacate and set aside the August 5, 2014 Biological Opinion and Incidental Take Statement for the Project and enjoin NMFS to reinitiate formal consultation;

7. Grant Plaintiffs permanent injunctive relief preventing the Forest Service and NMFS from implementing the Project until the agencies comply with all applicable laws and regulations;

8. Award to plaintiff its costs, expenses, expert witness fees, and reasonable attorney fees under applicable law; and,

9. Grant plaintiff such further relief as may be just, proper, and equitable.

In support of this motion, Plaintiffs respectfully refer the Court to the following Memorandum in Support of Plaintiffs’ Motion for Summary Judgment.

INTRODUCTION

This APA case challenges the Forest Service’s approval of a proposal to develop 17 miles of downhill mountain bike trails (the “Project”) in the high-elevation, subalpine environment around Timberline Lodge on Mt. Hood. This area includes volcanic soils and fragile watersheds providing critical habitat for threatened LCR steelhead and other sensitive species. Plaintiffs also challenge the BiOp issued by NMFS that authorizes “take” of LCR steelhead.

It is undisputed that the construction of new bike trails in this sensitive part of Mt. Hood would cause severe erosion, degradation of aquatic habitat, and harm to a threatened, native fish. Nevertheless, the agency approved the project using an EA, instead of a more searching and thorough EIS, and concluded that the Project was “not likely to adversely affect” LCR steelhead. In doing so, the agency relied on unsupported, unenforceable, and speculative mitigation measures to “offset” the Project’s certain adverse impacts. The agency, however, ignored empirical evidence of past restoration failures in the exact same area and refused to fully disclose substantial disparities between projected restoration benefits and actual conditions on the ground.

While NMFS initially concurred with the Forest Service’s NLAA determination, NMFS changed course after Plaintiffs challenged the concurrence. NMFS subsequently decided that the Project was “likely to adversely affect” LCR steelhead and issued the BiOp that authorizes take of listed species. But it similarly ignored critical information on whether restoration could possibly offset sedimentation impacts, and so limited its analysis accordingly. Despite NMFS’s change of position, the Forest Service refused to supplement the EA to disclose that the Project would cause take. Thus, to this day, the public has never been made aware of the extent of Project impacts, or been allowed to weigh in based on the opinion of the expert agency.

Plaintiffs respectfully request that the Court hold unlawful and vacate the EA, DN, and FONSI issued by the Forest Service and the BiOp and ITS issued by NMFS.

Plaintiffs’ Opening Brief - 1

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Crag Law Center
917 SW Oak St., Suite 417
Portland, OR 97205
Tel. (503) 525-2727

FACTUAL BACKGROUND

I. The Project area lies within a fragile subalpine ecosystem that is historically, culturally, and ecologically significant.

Mt. Hood is the crown jewel of Oregon. Oregon's highest peak, Mt. Hood provides key habitat for a diverse array of species, from pollinators like the Western bumblebee, to iconic fish like the steelhead, to rare macroinvertebrates like *Scott's apatanian caddisfly*. Thousands of people visit the mountain every year to ski, hike, climb, and take in the magnificent scenery.

Intervenor-Defendant RLK operates and manages year-round ski facilities at Timberline Lodge in accordance with a 30-year SUP issued by the Forest Service. AR_27736.¹ Built by the Works Progress Administration, Timberline Lodge—a National Historic Landmark—sits at 6,000 feet on Mt. Hood's southern flank. AR_27912. President Roosevelt dedicated the Lodge on September 28, 1937, declaring: "I look forward to the day when many, many people from this region of the Nation are going to come here for skiing and tobogganing and various other forms of winter sports." AR_2.

Pursuant to the LRMP, the Forest Service manages the lands surrounding Timberline Lodge ("Timberline") for developed winter recreation, but also for ecological characteristics. AR_27743–44. Under the NWFP, the agency must emphasize protections for riparian resources in areas along streams and wetlands, i.e., "Riparian Reserves." SUPP_1314. The West Fork Salmon River in the Project area is designated a "Tier 1" watershed, AR_27821–22, and Still Creek is a "Special Emphasis" watershed. AR_27822–23. The objective of these land allocations is to maintain or improve watershed health and contribute to the conservation of at-risk anadromous salmonids. AR_27787. In these areas, the Forest Service is not permitted to substitute mitigation or planned restoration for preventing habitat degradation. SUPP_1373.

¹ A Table of Citations is appended to this brief, with a crosswalk between all cited documents and their location in the four iterations of the Administrative Record for this case.

Overlaying land-use designations are special management protections for sensitive,² and ESA-listed species. “The habitat provided by the rivers and tributaries within the Sandy River basin is of great importance to efforts to recover listed fish populations in the Lower Columbia region.” Dkt. 17, at ¶ 18.³ Still Creek contains designated critical habitat for winter runs of LCR steelhead. *See* 70 Fed. Reg. 52630, 52706 (Sept. 2, 2005).⁴ Subalpine meadows in the Project area provide key habitat for the Western bumblebee, a sensitive species. *See* FS2ndSUPP_4465. In all, Timberline provides fragile, but ecologically critical habitat for a diversity of species.

Despite its ecological value, much of the Timberline habitat exists in a degraded state. Past ski area development—logging, road building, and construction—has significantly altered watersheds, resulting in a loss of function of natural processes. NMFS_758. Riparian Reserves within the ski area are fragmented; approximately 19 acres have been lost due to ski runs, lifts, and access roads. NMFS_759. In Still Creek, sixteen of nineteen habitat elements are in a “not properly functioning” condition, or are “functioning at risk.” AR_27667. Baseline levels of sediment are significantly higher than background levels: fine sediment accumulations “are among the highest observed in clear-water tributaries on the Zigzag Ranger District.” AR_27670. Elevated fine sediment levels present a host of consequences for aquatic species, including reduced spawning ground quality, and limiting egg and fry success. NMFS_768.

II. The Project would degrade another 12 acres of land into bare mineral soil, and the bike trails would hydrologically function as roads.

RLK seeks to develop a lift-assisted mountain bike facility at Timberline, consisting of a

² “Sensitive Species” are those for which viability is a concern, as evidenced by (a) downward trends in population and (b) downward trends in habitat capability. SUPP_1451.

³ Historically, the Sandy River Basin supported sizeable runs of native wild steelhead, with as many as 20,000 winter steelhead. *See Native Fish Soc’y v. NMFS*, 992 F. Supp. 2d 1095, 1104 (D. Or. 2014). In 2010, there were an estimated 969 winter steelhead spawners. *Id.*

⁴ Critical habitat is designated for species listed under the ESA and comprises those areas that are essential for conservation of the species. *See* 16 U.S.C. § 1532(5)(A).

17-mile trail network and separate 0.2-acre skills park. AR_27736. It would permanently disturb 12 acres, approximately two of which are in Riparian Reserves. NMFS_737. “Downhill riding generally has greater potential for trail impacts than cross-country riding, due to more aggressive riding styles, steep slopes, heavy bikes and high spectator numbers” AR_27430.⁵

There are three elements of the Project: (1) construction (2) long-term maintenance and operation, and (3) watershed restoration activities. NMFS_734. Bike trails would be cut by machine excavator. NMFS_737. Trails would cross perennial and ephemeral stream channels, NMFS_737, with 22 new stream crossings associated with the Project. AR_24000. At every intersection with a stream, bike trails would increase the stream drainage network. AR_27634. “[A]ll of the trails come together directly adjacent to a stream that is listed a [sic] critical habitat for steelhead in that spot.” AR_24000. Trees would be removed in Riparian Reserves during trail construction and when they fall on bike trails. NMFS_737. Bike trails—many nearly six feet wide—would function like roads in terms of increasing runoff and sediment delivery to streams. *See* AR 27799. Sediment delivery to Project area streams each year would be measured in tons. *See* NMFS_763–64.⁶

The capacity of the bike facility would be about 338 bikers at one time, with a series of race events each year increasing rider and spectator numbers. NMFS_737. Operations each year would begin once snowmelt is sufficient to allow for trail maintenance (expected around mid-July), and would close in the fall “or when soil moisture and the resulting impacts to trail

⁵ As the Forest Service fisheries specialist remarked to the other specialists, after watching videos of downhill riding, “[h]ang onto your hats these kids catch some serious air!” AR_23404 (citing <http://www.mtbfmovies.com/movies.php?id=929>).

⁶ Modeled sediment yields from use in “dry” conditions are substantial: 37.2 tons per year for the first two years and 20.3 tons per year after that. AR_27805. However, as explained in more detail, *infra*, the agency failed to explain critical modeling assumptions that likely led the agency to vastly *underestimate* sediment delivery. *See also* Dkt. 19, at 54.

conditions are determined to be sufficient” to warrant closure. AR 27765. Construction or operation would be suspended if there is more than one inch of rain in a 24-hour period, and/or the Bull Run River above the reservoirs exceeds 200 cubic feet per second. AR 27771. These criteria were ostensibly added to prevent any activities during wet conditions, but the Forest Service never explained the one-inch threshold, why it chose a streamflow gauge remote from the Project area, or who would monitor and enforce these conditions.

The Project also includes 2.1 miles of restoration projects, calculated at 5.9 acres, involving decommissioning service roads and re-vegetating sites that were disturbed by prior ski area projects. NMFS_738. The best available science emphasizes challenges with high-elevation restoration, including: (1) high rates of failure; (2) time lags between restoration and any benefits; and (3) heavy impacts associated with the restoration itself. *See* AR_21070–71.

III. The Forest Service locked the public out of long-term planning for Timberline, while treating approval of the bike facility as a foreordained conclusion.

A. The Forest Service signed off on RLK’s Master Development Plan, proposing a suite of future projects, without NEPA analysis.

In 2009, RLK submitted a Master Development Plan (“MDP”) to the agency, outlining its plan for new developments over the next 10 years. *See* AR 10857–80. Submission of an MDP is a required obligation of RLK’s SUP. *See* AR 9884. On May 27, 2009, the agency accepted the MDP and amended RLK’s SUP (to incorporate the new MDP) without undertaking a NEPA process and involving the public. AR 10882. The agency has previously taken public comment and conducted NEPA on the impacts of MDPs for Timberline and other ski area development on Mt. Hood. *See* AR_5909 (Timberline), AR_5652 (Mt. Hood Meadows). Here, however, the agency changed course and accepted the MDP without any public involvement.

RLK’s 2009 MDP details plans for a new 15,000 square foot day lodge, an 800-car parking lot, and a tubing hill. AR_10861. On December 3, 2009, RLK sought to amend its

MDP to include the bike facility. AR_11215. On February 5, 2010, the agency accepted the MDP update, and amended the SUP, again without a NEPA process. AR_11333.

B. The Forest Service intended to approve the Project as quickly as possible.

RLK segmented the bike facility from the other projects in the MDP for immediate implementation, AR_11215, and the Forest Service began evaluating the Project pursuant to NEPA in 2010. AR_11334–39. The original proposal did not include a restoration component. *Id.* The Forest Supervisor “strongly advocated for fast-tracking the project under a CE and for the team to focus on making the project a success.” AR_28195.⁷ The description of the Project on the agency’s Schedule of Proposed Actions called for a CE. AR_11364.

When specialists assigned to work on the Project were asked to weigh in, however, they immediately expressed concerns about the use of a CE. *See* AR_28198. The public also urged the agency to revise its plans for authorizing the Project under a CE. AR_11847. Thereafter, the agency sent a preliminary scoping letter to members of the public stating that an Environmental Assessment (“EA”) would be prepared pursuant to NEPA, instead of a CE. AR_11869.⁸

Nevertheless, the decision to approve the Project still appeared foreordained. The agency initiated the NEPA process by sending a Project Initiation Letter to the specialists assigned to the Project, explaining that they would be funded through a “Cost Recovery Agreement” with RLK. AR_11338. In the letter, the Acting District Ranger emphasized that this was a “high priority” project. *Id.* An aggressive timeline was set, with expected implementation to take place within about 12 to 15 months of scoping. *Id.* at 11338–39. Notably, in putting together the timeline,

⁷ A “CE” or Categorical Exclusion under NEPA means “a category of actions which do not individually or cumulatively have a significant effect on the human environment” 40 C.F.R. § 1508.4. The Forest Service reserves CEs for actions such as ministerial changes to SUPs, general repair and maintenance, and land acquisition. *See generally* 36 C.F.R. § 220.6(d).

⁸ An EA briefly provides evidence and analysis for determining whether to prepare a full EIS or a FONSI. 40 C.F.R. § 1508.9.

the Forest Service presumed that the EA would find no significant impacts. *See id.*

C. A restoration component was belatedly added to “offset” significant impacts.

On June 29, 2010, the Forest Service issued a preliminary scoping letter to members of the public, which did not mention any restoration activities. *See* AR_11869–73. Scoping comments from the public, including Plaintiffs, raised significant concerns about the bike facility, ranging from impacts on the Timberline Lodge experience and potential violations of substantive LRMP standards, to a lack of public input on the MDP and the risk and scale of soil erosion and potential damage to streams and/or fish habitat. AR_11879–81, 11883, 11898.

After opening up the Project to public comment, the agency realized it could not reasonably arrive at a NEPA “no significant effects” determination without finding a way to “offset” the impacts from the bike facility. The agency decided to add a restoration component to the Project—in other words, to “mitigate” the Project’s effects, particularly the increased sedimentation from the bike trails. *See* AR_12030. The agency did not involve the public in developing restoration measures, *see* AR_22081, and relied on spreadsheet modeling as opposed to testing on-the-ground conditions. *See, e.g.,* AR_23060. Although the agency was never explicit about how it developed the restoration measures, it appears that the agency simply tweaked its modeling to arrive at desired results. *See, e.g.,* AR_23062 (“If we cannot use the road model to get the sediment numbers we can use [another model]”).⁹

By adding the restoration component to the project, the agency decided it had found a way to avoid a significant effects determination—even before the specialists had completed their analyses. On November 19, 2010, the Project coordinator wrote the specialists to organize a working session “to get everyone a little closer to the finish line in the analysis process and in the

⁹ *See also* AR 12118 (“I suggest we move forward with surfacing the roads in the WF Salmon, as it works in the model—does it reduce sediment 2:1 or 1:1?”).

spirit of getting BEs completed with a ‘No Effect’ Determination.” AR_29111. She wrote again on December 12, 2010 to propose a conference call to “discuss the idea regarding adding mitigation into the proposed action to try to reduce the ‘effects’ call.” AR_29110.¹⁰

D. The Forest Service issued an EA, DN, and FONSI.

On November 19, 2012, the Forest Service released its EA, DN and FONSI for the Project. AR_27731–28084, 28085–108. The NEPA process, however, had been revealing, and raised serious questions about the decision to forgo an EIS. The agency had discovered, for instance, a host of unmitigated impacts from previous projects. The EA itself notes that the “construction of the Jeff Flood lift resulted in approximately 77 acres of ground disturbance for new ski runs. To date, portions of those runs remain poorly vegetated and contribute sediment to intersecting road and ditch lines which transport the sediment to Still Creek.” AR_27855–86.¹¹ The agency was forced to acknowledge these failed restoration efforts, and conceded that the current restoration was designed in part to address previous impacts. *See* AR_27740.¹²

The agency was also informed explicitly about the complexity of high-elevation restoration projects, which confirmed the agency’s own empirical evidence of restoration failures in the exact same area. Plaintiffs provided the agency with the report of an expert hydrologist explaining that the best available science—including numerous Forest Service studies—raised significant questions about the proposed restoration’s timing and effectiveness. For example, studies have consistently shown that (1) road obliteration and decommissioning does not rapidly

¹⁰ Moreover, the Project coordinator encouraged staff to delete emails to limit public access to information about the agency’s process. *See* AR_28229 (Project coordinator encouraging specialists to “clean out” their inboxes prior to any FOIA requests).

¹¹ As a specialist explained, “it appears that we have issues with Not [sic] completing required monitoring activities and associated monitoring reports of revegetation . . . Not insuring that revegetation was successful on disturbed areas . . . drainage issues at the bottom of the lift where the area is being drained directly into one of the forks of Still Creek.” AR_28199.

¹² *See also* Dkt. 19-2 (photos showing degraded conditions and failed re-vegetation efforts around the Jeff Flood lift seven years after the project was implemented, *see* AR_8875).

eliminate disturbance effects; (2) restoration efforts in areas at higher elevations exhibit extremely high rates of failure; and (3) restoration effects of surfacing roads with gravel are transient because “[r]oad traffic and runoff removes gravel from road surfaces fairly rapidly, displacing it from travelways and pushing it in[to] the native surface. *See* AR 21070–71. All of these elements are critical components of the restoration proposal. *See* AR_27762–63.

The agency, however, stood by its assumption that restoration would immediately offset impacts. AR_27784 (“[T]he restoration actions are scheduled to occur either slightly before, or concurrently with, the proposed trail construction, thereby offsetting potential impacts in both time and space.”). While restoration efforts would occur at the same time, the agency did not support its assumption that the benefits would accrue at the same time—if at all. In sum, despite discovering alarming evidence of degraded baseline conditions,¹³ unmitigated impacts from previous projects,¹⁴ substantial sediment increases from 17 miles of road-like bike trails¹⁵—and considerable opposition¹⁶—the agency stuck to its goal of finding no significant impacts.

IV. New information arose after the agency issued the EA/DN/FONSI.

Two significant developments occurred after the agency completed its environmental review of the Project. Under NEPA, agencies have a continuing duty under NEPA to evaluate whether new information is “significant” so as to require supplementation of its original analysis.

¹³ *E.g.*, AR 27666 (noting that ski area development has resulted in “loss of function of natural processes such as large wood recruitment and movement, connectivity of habitat, reduction of stream shading, alteration in riparian vegetation and function, and increased sedimentation and stream drainage networks”).

¹⁴ *E.g.*, AR_28040 (discussing unsuccessful re-vegetation efforts for the Jeff Flood lift).

¹⁵ *E.g.*, AR_24245.

¹⁶ *See, e.g.*, AR_21106; *see also* AR_21158 (Sandy Basin Watershed Council stating “in the interest of watershed health and in view of the extensive work and investment that the Forest Service and other Sandy River Basin Partners are making to otherwise protect critical designated habitat in the Still Creek basin, we recommend you adopt the ‘No Action’ alternative . . .”).

A. NMFS issued a full Biological Opinion.

One significant development to occur after the Forest Service issued its EA/DN/FONSI relates to a new determination by NMFS about the Project's effects on LCR steelhead. NMFS had originally concurred with the Forest Service's determination that the Project was not likely to adversely affect LCR steelhead. *See* AR_23464–85. But upon further review, and after issuance of the EA/DN/FONSI, NMFS retracted its concurrence.

On April 7, 2011, the Forest Service requested informal consultation from NMFS regarding the Project's effects on LCR steelhead.¹⁷ The Forest Service had determined that the proposed action "May Affect, but is Not Likely to Adversely Affect" ("NLAA") listed steelhead and its designated critical habitat. AR_27706. NMFS concurred with the Forest Service's NLAA determination. AR_23474. Plaintiffs, however, were concerned with the limited scope of the effects analysis, and NMFS's summary concurrence. "The Sandy River population of LCR steelhead shows very low abundance" and the overall risk classification for the population is "high risk of extinction." NMFS_771. Within the Sandy Basin, Still Creek is considered primary habitat for LCR winter steelhead, and plays a critical role for the recovery of the species. NMFS_760. To achieve recovery goals, NMFS has identified a strategy of protecting favorable tributary habitat and recovering degraded but potentially productive habitat. NMFS_5930. On December 23, 2013, Plaintiffs challenged NMFS's concurrence by sending the Forest Service and NMFS a Notice of Intent to Sue for Violations of Section 7 of the ESA. NMFS_133–43.

In light of this development, NMFS determined it was appropriate to revisit the NLAA concurrence. *See* NMFS_731. The agencies reinitiated consultation on March 27, 2014, and NMFS issued a BiOp on August 5, 2014. *See* NMFS_727–99. The BiOp catalogued a host of

¹⁷ The presence of listed species or critical habitat obligates a federal agency to consult with NMFS on the impacts of the project. *See* 16 U.S.C. §1536(a)(2).

Project-related impacts, *e.g.*, NMFS_770, but ultimately concluded that the Project was not likely to jeopardize the continued existence of the LCR steelhead species or destroy or adversely modify its critical habitat. NMFS_773. Because NMFS documented adverse impacts to individual LCR steelhead and critical habitat, NMFS issued an Incidental Take Statement (“ITS”) authorizing the “take” of LCR steelhead incidental to the Project. *See id.*

The Forest Service on September 18, 2014 reviewed the BiOp. Despite NMFS’s conclusion that the Project would rise to the level of “take” of LCR steelhead, and would adversely affect critical habitat, the Forest Service determined that these effects were within the range of effects considered in the EA/DN/FONSI. FS2ndSUPP_4244.

B. The Western bumblebee was discovered in the Project area.

In July and August 2013, the Xerces Society for Invertebrate Conservation (“Xerces”), a nonprofit conservation and science organization, surveyed meadows on Mt. Hood for the Western bumblebee (“bee”), and located the species within the Project area. FS2dSUPP_272, 282. The agency had added the bee to the Sensitive Species list in December 2011. FS2dSUPP_887. Under the LRMP, the agency must assess a project’s impacts on and risks to sensitive species. AR_363. “Habitat for threatened, endangered and sensitive plants and animals shall be protected and/or improved.” *Id.* During the NEPA analysis for the Project, the agency relied on the 2008 Sensitive Species list, and so the EA/DN/FONSI do not discuss the bee.

Although the bee was historically distributed throughout Oregon, all western Oregon sightings in recent years have been only at high elevations and near the Pacific Crest—despite considerable efforts to find it elsewhere. FS2dSUPP_275–6. The Forest Service admits that the population of this species has declined drastically throughout part of its former range.

FS2dSUPP_891; *see also* FS2dSUPP_274–5 (explaining reports that chronicle precipitous declines). In Oregon, extant populations of the species are likely small and are currently

vulnerable to a variety of different land management practices. FS2dSUPP_275.¹⁸

Given the bee sightings in the Project area, and in light of the alarming recent decline of the species, Xerces biologists sent a letter to the agency expressing concern over the Project's potential impacts on the bee, including (1) trampling and destruction of nest sites, overwintering queens, and foraging habitat during construction and operation and (2) impacts on nest site availability. FS2dSUPP_4465.¹⁹ To minimize these impacts to the bee and its habitat, Xerces explained that avoiding nesting areas during park construction and operation "will be crucial to the survival of this animal on Mt. Hood." *Id.* Xerces recommended a thorough survey for nests within the entire project area before construction begins, and a buffer of at least 25 meters (82 feet) around all nests. FS2dSUPP_4466. It also recommended surveys to identify when queen bees emerge from hibernation to determine when to commence construction and operation. *Id.*

The agency reviewed the Xerces survey, and "consider[ed] this information as it concerns the analysis and decision made for the mountain bike project" in a non-NEPA document. FS2dSUPP_887. The agency did not evaluate whether the new information was "significant" so as to require a supplemental EA or an EIS. Citing the proportion of foraging habitat potentially impacted by the Project, the agency determined that the Project "may impact individuals or habitat, but will not likely contribute to a trend towards Federal listing or loss of viability of the population or species." *Id.* The agency developed additional PDC that apply only to construction, are based on surveys conterminous with construction (not pre-construction), and

¹⁸ "[H]igh elevation remnant populations will be needed to serve as source populations should this species stand a chance of repopulating its former range, and any potential threat should be avoided to protect this animal." FS2dSUPP_4465.

¹⁹ Because bee reproduction occurs at a colony level, disrupting even a few nests during construction or operation of the bike facility could have a significant impact on a population of this species. FS2dSUPP_4465. Also, "[k]illing just one queen can have dramatic consequences on bumble bee populations, since queens initiate colonies." FS2dSUPP_4466.

propose nesting buffers one-fifth the size of Xerces' recommendation. *See* FS2dSUPP_888.

STANDARD OF REVIEW

The Ninth Circuit endorses the use of Rule 56 summary judgment motions to resolve claims brought pursuant to the APA, 5 U.S.C. §§ 701–706. *See Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471–72 (9th Cir. 1994). Plaintiffs' NEPA and NFMA claims are brought under the APA, *Or. Nat. Res. Council Fund v. Goodman*, 505 F.3d 884, 889 (9th Cir. 2007), as are Plaintiffs' claims against NMFS's BiOp and ITS. *See Am. Rivers v. NMFS*, 126 F.3d 1118, 1124–25 (9th Cir. 1997).

Under the APA, a court must “hold unlawful and set aside agency action, findings, and conclusions” which are “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law,” or “without observance of procedure required by law.” 5 U.S.C. § 706(2)(A), (D). The agency must “articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Mtr. Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citations omitted). Agency action normally is arbitrary and capricious where it relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect or a problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Id.*

While its application is deferential, the standard does not shield agency decisions from a “thorough, probing, in depth review.” *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). Moreover, a court “cannot defer to the agency when there is an absence of evidence supporting the agency's decision.” *League of Wild. Def./Blue Mts. Biodiversity Proj. v. Connaughton*, No. 3:12-cv-02271, 2014 U.S. Dist. LEXIS 170072, at *25 (D. Or. Dec. 9 2014).

ARGUMENT

I. Plaintiffs have standing to bring this case.

Plaintiffs are Bark, Friends of Mount Hood, Northwest Environmental Defense Center, and the Sierra Club. To establish standing, a plaintiff must allege actual or imminent harm to a “legally protected interest,” *i.e.*, injury in fact; “there must be a causal connection between the injury and the conduct complained of”; and it must be likely that a favorable decision will redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

Plaintiffs’ declarants use the Timberline Project area and the Project would harm their cognizable interests. Members of the Plaintiff organizations frequently visit Timberline Lodge and the surrounding area to hike the trails, view the magnificent wildflowers, observe rare insect species like the Western bumblebee, fish the streams for trout and steelhead, camp in the woods, and engage in other vocational, scientific, recreational, and spiritual activities and intend to continue these activities in the future. *See* Dkt. 20 (Decl. of Karl Anuta), Dkt. 21 (Decl. of Marla Nelson); Dkt. 22 (Decl. of Dennis Chaney); Dkt. 23 (Decl. of Rhett Lawrence); Dkt. 118-1 (2nd Decl. of Lori Ann Burd). “[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.” *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 180–81 (2000). Plaintiffs’ injuries would be redressed by the remedy sought because the EA/DN/FONSI and BiOp would be vacated, and the Project remanded to renew environmental review consistent with NEPA, NFMA, and the ESA. *See Lujan*, 504 U.S. at 572–73 n.7 (1992); *Lemon v. Geren*, 514 F.3d 1312, 1315 (D.C. Cir. 2008).²⁰

II. NEPA Violation: The Forest Service failed to prepare an EIS for the Project.

The agency acknowledged that the bike trails would contribute substantial sediment

²⁰ Because Plaintiffs’ members have standing, Plaintiffs themselves have organizational standing to bring this case. *See Friends of the Earth*, 528 U.S. at 181.

inputs while increasing the drainage network—further exacerbating degraded baseline conditions. Elevated levels of fine sediments result in severe and irreversible consequences for aquatic species, including LCR steelhead. *See* Dkt. 19, at ¶¶ 91–93. Rather than prepare an EIS to address these significant consequences, the agency fell back on mitigation measures, concluding they would *completely* and *immediately* offset Project impacts. *See* AR_27784. In doing so, the agency failed to support the critical assumptions it made about the timing and efficacy of difficult high-elevation restoration, while erroneously assuming that impacts would be limited to “dry” conditions. Relying on speculative mitigation measures to “offset” known, significant impacts was an unlawful approach to avoiding preparation of an EIS. This was especially true because the agency failed to rationally explain its conclusions, and overlooked critical aspects of the problem. *See In Def. of Animals v. U.S. DOI*, 751 F.3d 1054, 1072 (9th Cir. 2014) (EA invalid where it “fail[s] to address certain crucial factors, consideration of which is essential to a truly informed decision whether or not to prepare an EIS”).

A. NEPA requires an EIS when a project may cause significant impacts.

NEPA requires federal agencies to prepare a detailed EIS for “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). To determine whether the environmental impact of a proposed project is significant enough to warrant preparation of an EIS, the agency will often prepare an EA. 40 C.F.R. § 1508.9. The EA must address all relevant issues, including direct, indirect, and cumulative effects. *See Id.*

If the EA reveals that the proposed action may have significant environmental impacts, the agency must prepare an EIS. *W. Watersheds Proj. v. Abbey*, 719 F.3d 1035, 1050–51 (9th Cir. 2013).²¹ Accordingly, should the agency decide not to prepare an EIS, it must supply a

²¹ “Significance” is determined by evaluating a project’s context and intensity. 40 C.F.R. § 1508.27(a), (b). Factors to be addressed include whether the action is controversial or involves

“convincing statement of reasons” to explain why a project’s impacts are insignificant. *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988). “The statement of reasons is crucial to determining whether the agency took a ‘hard look’ at the potential environmental impact of a project.” *Blue Mts. Biodiversity Proj. v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998) (quoting *Save the Yaak*, 840 F.2d at 717). In reaching its decision, the agency must make a “fully informed and well considered” decision, supported by detailed information. *Blue Mtns.*, 161 F.3d at 1211; *Neighbors of Cuddy Mtn. v. U.S. Forest Serv.*, 137 F.3d 1372 (9th Cir. 1998).

In some cases, an agency’s decision to forego issuing an EIS may be justified by the adoption of mitigation measures. *See Nat’l Parks & Conserv. Ass’n v. Babbitt*, 241 F.3d 722, 733–34 (9th Cir. 2001).²² In evaluating the sufficiency of mitigation measures under NEPA, a court will consider “whether they constitute an adequate buffer,” examining whether the mitigation measures will render such impacts so minor so as not to warrant an EIS. *Id.* at 734.

In this case, the Project site is adjacent to the historic Timberline Lodge, and is situated within the headwaters of watersheds protected for their critical ecological functions. Within this context, the Project implicates a series of intensity factors, due to the agency’s reliance on uncertain mitigation measures, controversy over the scope of impacts to aquatic species, and threatened violations of federal law in place for the protection of the environment.

B. The agency arbitrarily relied on mitigation measures to lower the Project’s impacts below the level of significance.

According to the Ninth Circuit, an “agency must generally prepare an EIS if the environmental effects of a proposed agency action are highly uncertain.” *Nat’l Parks*, 241 F.3d

uncertain risks, and whether the project may adversely affect threatened species or critical habitat. A court may find risk of significant effects based on just one of the intensity factors. *See Ocean Advocates v. U.S. Army Corps*, 402 F.3d 846, 865 (9th Cir. 2004).

²² NEPA regulations define “mitigation” as a limitation on the proposed action, such as “limiting the degree of magnitude of the action and its implementation,” or “repairing, rehabilitating, or restoring the affected environment.” 40 C.F.R. § 1508.20(b), (c).

at 731; *see also* 40 C.F.R. § 1508.27(b)(5). “Preparation of an EIS is mandated . . . where the collection of data may prevent speculation on potential effects.” *Id.* at 732. In addition, a controversy sufficient to require preparation of an EIS occurs “when substantial questions are raised as to whether a project may cause significant degradation of some human environmental factor, or there is a substantial dispute about the size, nature, or effect of the major Federal action.” *Nat’l Parks*, 241 F.3d at 736; *see also* 40 C.F.R. § 1508.27(b)(4).

Here, the agency underestimated Project impacts while overestimating restoration benefits by relying on speculative and controversial mitigation measures. The agency admitted that the Project would cause substantial sediment inputs, which can have severe and wide-ranging consequences for aquatic species including LCR steelhead. AR_27802 (“Road-related landslides, surface erosion, and stream channel diversions often deliver large quantities of sediment to streams, both catastrophically during large storms and chronically during smaller runoff events.”). But the agency minimized or otherwise dismissed these impacts by claiming that (1) the Project’s restoration component would fully “offset” impacts; and (2) Project Design Criteria (“PDC”) will limit use to “dry” conditions, thereby dramatically reducing the magnitude of impacts (use during “wet” conditions increases sediment input exponentially). *See* AR_28086. The agency, however, was well aware that its assumptions were not adequately supported and were controversial, based on input from an expert hydrologist, members of the public, and from the agency’s own specialists. By uncritically placing faith in its mitigation measures, the agency failed to consider important aspects of the problem and did not provide a rational explanation for its conclusions, in violation of NEPA.

1. The agency failed to account for potential restoration failures.

There is no dispute that construction and operation of the bike trails would result in pervasive sediment-related impacts, due to the conversion of 12 acres of land to bare compacted

soils directly above critical headwater streams. *See* AR_27782. The number of stream crossings in the area would nearly double. *See* AR 27672. Trails would significantly expand the drainage network. *See* AR 27690 (1,934 lineal feet); *but see* Dkt. 19, ¶ 70–80 (explaining that the agency likely underestimated the drainage network extension by more than three times). As such, trails would be a “chronic sediment source” to streams, similar to roads. AR_27803. Trail-related sediment impacts would further exacerbate degraded baseline conditions, which exhibit highly elevated fine sediment levels. *See* AR_27671 (habitat indicator for suspended sediment/turbidity in Still Creek and West Fork Salmon River is “not properly functioning”).²³

Rather than fully and fairly account for these impacts in an EIS, *see* 40 C.F.R. § 1502.1, the agency disregarded them on account of the Project’s restoration component. *See* AR_28086 (DN, concluding that “any adverse environmental effects of the mountain bike proposal would be fully offset through project design measures”). But the agency failed to consider important aspects of the problem related to the efficacy and timing of restoration—rendering its conclusions on significant impacts arbitrary. First, the agency made critical assumptions about the efficacy of restoration—in direct contrast to the best available science and empirical evidence highlighting persistent complications with high-elevation restoration. For example, the agency maintained that the “planned restoration activities would completely restore 1.54 acres . . . within the riparian reserves.” AR 29314. However, restoration “efforts have an extremely high rate of failure in areas at higher elevation with thin topsoil, short growing seasons, and low soil

²³ The agency used modeling to quantify sediment impacts. *See* AR_27805 (37.2 tons of sediment a year for two years, and 20.3 tons per year annually after that). Although these figures are substantial, the agency failed to explain critical assumptions it used in its modeling—which likely masked the true scope of impacts. For example, the agency assumed that the stream network would only be expanded by 50 feet at each trail / stream intersection. AR_28017; *but see* Dkt. 19, at ¶¶ 50–69; 70–80 (explaining that assumption’s conflict with the best available science). Based on its unsupported assumptions, there is a high risk the agency underestimated negative impacts—allowing it to unjustifiably prop up the benefits of restoration.

productivity, as is the case over much of the project area.” AR_21071. Indeed, the agency has direct experience with failed restoration in the exact same area, from its new lift construction in 2007. *See, e.g.*, AR 14958 (“An issue that has just arisen revolves around the bottom terminal, where the prescribed reveg has not been effective.”).²⁴

Second, even assuming the restoration measures would achieve a degree of success, the agency neglected to account for significant time lags between a restoration project and accrual of any benefits. *See* AR 27784 (concluding that potential impacts would be offset in both time and space). “[T]here is total agreement in the scientific literature that road decommissioning does *not* result in the rapid elimination of road impacts on erosion, sediment delivery to streams, and runoff.” Dkt. 19, ¶ 10 (citing sources). Assuming immediate restoration success stands in direct contrast with the work of the Forest Service’s own researchers. *See id.* at ¶¶ 20–21.²⁵ As the District Ranger acknowledged in the record for this case, “[r]estoration work for these projects is not a one year project and then you walk away from it, [sic] It can take several years of continued monitoring and restoration activities.” FS2ndSUPP_3672.²⁶

In order to rely on mitigation measures to reduce impacts below the level of significance, the agency must present an objective account of mitigation effectiveness. *See S. Fork Band Council of W. Shoshone v. U.S. DOI*, 588 F.3d 718, 727 (9th Cir. 2009). While the agency here summarily touted the restoration component’s benefits, it entirely failed to address critical aspects of the problem related to effectiveness and timing. This failure was fatal to its decision.

²⁴ *See also* AR_27415 (“Many areas in the Timberline Express ski runs cleared in 2006–2007 remain sparsely vegetated with only wood strand (wood fiber mulch) atop the ground.”).

²⁵ One study co-authored by Forest Service scientists found that “four years was not sufficient time for obliterated roads to return to pre-road (forest floor) conditions.” AR_9864.

²⁶ And the agency compounded its failure to address the timing of restoration effectiveness by failing to acknowledge the many negative impacts that can attend restoration itself, including elevated erosion and sediment delivery. *See, e.g.*, Dkt. 19, ¶ 17.

See Native Fish Soc’y v. NMFS, 992 F. Supp. 2d 1095, 1110–1111 (D. Or. 2014) (given uncertainty with respect to efficacy of mitigation measures, it was arbitrary to conclude no significant impact without first producing an EIS).

2. Even if restoration achieves some modicum of success, the agency’s conclusions about sediment impacts are unsupportable.

The agency admitted that trail use outside of “dry” conditions would significantly elevate sediment inputs—beyond that which the restoration measures could offset, even if fully effective. “If bike park operations are allowed outside of dry conditions sediment yield would increase by a factor of 7.5 times.” AR_27672. Yet the Forest Service restricted its analysis of impacts on grounds that PDC “ensure that the Bike Park operate[s] only under ‘dry’ conditions.” AR_27705. The agency, however, failed to provide a rational basis for its conclusion that impacts would be limited to dry conditions. *See State Farm*, 463 U.S. at 43.

The applicable PDC provide that construction and operation would be suspended if (1) there is more than one inch of rain a 24-hour period and/or (2) the Bull Run River above the reservoirs exceeds 200 cubic feet per second (“cfs”). AR_27771 (Soil-11). And operations must remain suspended until (a) there is less than one inch of rain in a 24-hour period; (b) the Bull Run River drops below 200 cfs; *or* onsite conditions are dry enough to allow operation. *Id.* The agency, however, never articulated how these criteria sufficiently protect from wet conditions.

Critically, the agency did not explain how it arrived at the one-inch-of-rain figure. *See State Farm*, 463 U.S. at 43. As Plaintiffs’ expert clarified, “trail surfaces can become extremely wet with far less than 1 inch of rain in a 24 hour period.” AR 21077. Moreover, the agency never justified its decision to use a stream flow gauge—let alone one remote from the Project area—as a surrogate for assessing on-site soil conditions. *See id.* (explaining that “summer rainfall can be highly localized, resulting in wet trails within the project area without

significantly increasing streamflows in relatively remote streams.”). Even agency specialists raised concerns over the rain and stream flow gauges. *See* AR 17620 (“I though[t] we were going to add that soil moisture was going to be monitored and if appropriate standards may be developed for suspending operations based on soil moisture that would replace the precipitation and streamflow standards”). But the EA is devoid of any explanation as to why the agency chose to forgo soil moisture standards and instead rely on rain and flow data.

The record documents the dramatically escalating impacts of use during wet conditions: “the amount of annual sediment generated by the Bike Park increase by orders of magnitude if the operation/construction occurs during saturated soil conditions, at which point, the watershed restoration actions will no longer offset the sediment generated from the project.” AR_12809; *see also* AR 17638 (“If the park is open during even moderate to heavy rain events, the sediment loads skyrocket and the watershed restoration measures will not mitigate that level of sediment input (100’s of tons annually).”). Yet the Forest Service never explained how the relevant PDC ensure that the bike park would only be used in “dry” conditions—especially in light of the highly subjective provision allowing RLK to re-open operations if conditions are “dry enough.” *See Nat’l Parks*, 241 F.3d at 736 (EIS warranted where evidence casts serious doubt on reasonableness of agency’s conclusions).

C. The Project may affect threatened LCR steelhead.

Given the Project’s substantial uncertainties about the effectiveness of mitigation measures and the magnitude of impacts, there remain significant questions as to the “degree to which [an action] may adversely affect a[] . . . threatened species or its habitat.” 40 C.F.R. § 1508.27(b)(9). There is no dispute that LCR steelhead and critical habitat are present in the Project area in Still Creek, AR_27631, and that elevated fine sediment levels sharply reduce the species’ survival and production. *See* AR_27803.

Baseline conditions in LCR steelhead critical habitat (Still Creek) are uniformly poor, AR_27667, especially with regard to the sediment/substrate embeddedness habitat indicators. See AR_27670 (“Current sediment loads are significant enough to impact threatened . . . fish species.”). And construction and operation of the bike trails will trigger substantial sediment increases. Yet the agency concluded that the Project was “Not Likely to Adversely Affect” (“NLAA”) the species on account of the mitigation measures. See AR_17638 (“[T]he way we got from an LAA to and [sic] NLAA for steelhead was to fully offset the sediment issue . . .”).²⁷

The agency thus discounted the Project’s impacts on LCR steelhead. See AR_27698 (“All indicators had a summary determination of Insignificant or Discountable. No direct effects were identified to listed fish or critical habitat.”). But given the uncertainty and scientific controversy, it was arbitrary for the agency to circumvent a more robust analysis of Project impacts. Because the agency did not take a hard look at the *degree* to which the Project *may* adversely affect LCR steelhead, *Blue Mts.*, 161 F.3d at 1212, it must prepare an EIS to remedy the problem. Cf. *Native Fish Soc’y*, 992 F. Supp. 2d at 1109 (uncertainty over efficacy of mitigation as it related to adverse effects on listed species should have been addressed in an EIS).

III. NFMA Violation: The Forest Service failed to ensure forest plan consistency.

Forest planning documents require the Forest Service to prioritize watershed health and protections for aquatic species. One way this is accomplished is by regulating activities in riparian areas, including a prohibition on approving projects that degrade habitat, while using restoration to offset the impacts. The agency here has done just that, and accordingly, has not ensured consistency with the governing forest plan, in violation of NFMA.

²⁷ NMFS originally concurred in this result, see AR_23464–85, but later retracted its informal concurrence after Plaintiffs notified both agencies of their intent to sue for a legally flawed concurrence. See FS2ndSUPP_317–27; see also *infra* Argument V.

A. NFMA requires site-specific consistency with the forest plan.

NFMA establishes a two-step process for forest planning. First, it requires the agency to develop, maintain, and revise forest resource management plans. 16 U.S.C. § 1604(a). Second, the agency implements a forest plan through site-specific projects, which in turn must comply with NFMA and the forest plan. *Id.* § 1604(i); *Or. Nat. Res. Council (“ONRC”) v. Goodman*, 505 F.3d 884, 889 (9th Cir. 2007).

Here, agency adopted the Mt. Hood LRMP (or “forest plan”), AR_244–871, which it developed to “guide all resource management activities and establish standards and guidelines for the Mt. Hood National Forest.” AR_246. LRMP standards and guidelines protect aquatic ecosystems, riparian resources, and water quality. FW-097/098 provides that spawning habitat shall maintain less than 20 percent fine sediments. AR_354. FW-084 provides: “[a]ctivities within and adjacent to riparian areas should not accelerate sediment delivery to streams, lakes, wetlands, seeps, and springs.” AR_353

The Northwest Forest Plan (“NWFP”) amended the LRMP by providing additional management protections. *See Pac. Coast Fed’n of Fishermen’s Ass’ns v. NMFS*, 265 F.3d 1028, 1031 (9th Cir. 2001); SUPP_1297. The NWFP’s Aquatic Conservation Strategy (“ACS”) was designed to maintain and restore the health of watersheds and the aquatic ecosystems contained within them. SUPP_1311. The added protections of the ACS apply to riparian reserves and key watersheds, both of which are present in the Project area. AR_27744. “Riparian reserves” are those “portions of watersheds where riparian-dependent resources receive primary emphasis and where special standards and guidelines apply.” SUPP_1314. “Key watersheds” comprise a system of large refugia that are crucial to at-risk fish species and provide high quality water. SUPP_1314. The aquatic ecosystems of the Project area provide habitat for LCR steelhead and sensitive macroinvertebrates like the *Scott’s apatanian caddisfly*. *See* AR_27834–37; 27843–44.

Objectives of the ACS include maintenance and restoration of water quality, sediment regimes, instream flows, and habitat for riparian dependent species. SUPP_1313. These objectives are safeguarded by specific standards and guidelines that “prohibit or regulate activities in Riparian Reserves that retard or prevent attainment of the ACS objectives.” SUPP_1367. Central to this case, standard WR-3 provides: “[d]o not use mitigation or planned restoration as a substitute for preventing habitat degradation.” SUPP_1373.

B. The Forest Service never explained how the Project is consistent with forest plan standards on fine sediment levels.

The Forest Service acknowledges that Still Creek and the West Fork Salmon River currently do not meet the LRMP requirement for maintenance of less than 20% fine sediment. AR_27670 (52% Still Creek, 44% West Fork Salmon River). Recent on-site evaluation found evidence of surface fines in Still Creek significantly higher. FS2ndSUPP_296–97; *see also* Dkt. 18, ¶¶ 24 (describing fine sediment conditions in Still Creek as the likely reason for extirpation of *Scott’s apatanian caddisfly*, a sensitive species, in that drainage).

The Project would substantially elevate sediment delivery to those two watersheds. AR_27672. The increases in fine sediment above high baseline levels would have significant and long-term effects on aquatic species. Dkt. 19, ¶¶ 88–92. Yet nowhere in its analysis did the agency explain how the sediment-related impacts of an additional 17 miles of bike trails is consistent with the 20% fine sediment standard of FW-097/098, AR_354, or FW-084’s provision against increasing sediment delivery to streams, wetlands, seeps, and springs. AR_353. This failure to demonstrate, let alone explain, consistency with forest plan standards was a violation of NFMA. *See Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 965 (9th Cir. 2005).

C. By substituting restoration projects for degradation of Project area watersheds, the agency violated the Northwest Forest Plan.

Likewise, the Forest Service has not demonstrated consistency with ACS objectives

requiring the agency to maintain and restore water quality, the sediment regime, in-stream flows, and quality habitat. SUPP_1313 (## 4, 5, 6, 9). Instead of prioritizing management *protections* for riparian ecosystems, the Forest Service fell back on the uncertain and speculative benefits of the Project's mitigation measures. This approach, however, stands in direct conflict with the ACS prohibition on substituting mitigation for avoidance of habitat degradation, and thus violates NFMA. *See Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 729–30 (1998) (before proceeding with a site-specific project, the agency must ensure forest plan consistency).

The Project impacts about 2 acres of Riparian Reserves. In particular, the 17 miles of trails within and adjacent to Riparian Reserves would disturb vegetation and soils. Impacts from construction, operation, and maintenance of the trails would increase surface runoff, and trails would be a source of persistent and significantly elevated levels of fine sediment, with cascading impacts to Riparian Reserves. AR 21073–75. The agency in the EA did not dispute the impacts of the bike trails on Riparian Reserves. And it did not explain how construction and operation of a 17-mile trail network that crisscrosses Riparian Reserves accords with the duty to give riparian resources primary management emphasis. SUPP_1300.²⁸ Instead, the agency relied entirely on the restoration component of the Project. *See, e.g.*, AR_21824 (“The Proposed Action, with the incorporation of watershed restoration projects is designed to minimize disruption of natural, hydrologic flow paths and minimize sediment delivery.”); *see also* AR_27829 (restoration activities would offset sediment impacts and reduce drainage network).

The agency's approach here is flatly inconsistent with WR-3: “Do not use mitigation or planned restoration as a substitute for preventing habitat degradation.” *Accord ONRC*, 505 F.3d at 894 (“Pursuant to the NWFP, [WR-3] further prohibits the Forest Service from using

²⁸ Indeed, one of the Forest Service specialists specifically questioned why the Project was designed so that trails are routed directly through the headwaters of Still Creek. AR_14967.

mitigation or planned restoration as a substitute for preventing habitat degradation within Riparian Reserves”) (internal quotation marks omitted). Instead of reducing the number of trails or re-routing them outside of Riparian Reserves to minimize impacts, the Forest Service substituted unrelated road decommissioning projects—to “offset” the impacts of sedimentation caused by the bike facility. The NWFP does not permit this approach. WR-3 was adopted because of the risky and controversial nature of mitigation and thus expressly provides that it cannot serve as a substitute for avoidance of habitat degradation. This case serves as a clear example why. The agency claimed that its restoration projects would “completely restore” 1.54 acres within Riparian Reserves, AR_27823, and would completely “offset” the bike trails’ sediment delivery into headwater streams. AR_27806. But as explained in detail above, the agency’s assumptions about the timing and effectiveness of restoration were scientifically controversial and not adequately supported in the record. *See supra* Argument II.

For example, during the administrative process, Plaintiffs’ expert scrutinized the agency’s conclusion that restoration on 5.9 acres of land would offset the permanent degradation of 12 acres of land. *See* Dkt. 19, ¶ 50. Mr. Rhodes found that the agency had grossly *overestimated* the connectivity of existing roads to the stream network that were slated for decommissioning, while significantly *underestimating* the stream connectivity of the bike trails. *See* AR_21079–80.²⁹ Mr. Rhodes also highlighted the ineffectiveness of re-surfacing roads and attempts to disconnect roads from the drainage network, *see* AR_21071, while the agency simply assumed significant benefits. AR_27783. These assumptions had real consequences for its conclusions about the Project reducing the drainage network, and reducing sediment delivery. AR_21080.

²⁹ On-site route-stream connectivity measurements revealed that the average length of connectivity of the segments to be decommissioned or otherwise restored was 175.8 feet—vastly lower than any figure assumed by the agency. FS2ndSUPP_298.

This approach of substituting controversial and uncertain restoration benefits for known degradation of habitat does not accord with the NWFP. Indeed, the ACS intentionally prioritized protection of existing habitat within riparian areas, and prohibited the substitution of restoration for avoidable degradation. *See ONRC*, 505 F.3d at 894. Here, the agency never explained how the Project is consistent with WR-3, despite Plaintiffs repeatedly raising the issue. *See* AR_21115, 21122.³⁰ The agency's failure to ensure consistency with WR-3 violated NMFA. *ONRC*, 505 F.3d at 894.³¹

IV. NEPA Violation: The Forest Service failed to prepare NEPA on RLK's MDP.

Degraded baseline conditions in Project area watersheds are directly attributable to the cumulative impacts of ski area development and the repeated failures of past restoration efforts. AR_27666; AR_27855–56. RLK's new MDP specifically outlines plans for a new parking lot, day lodge, tubing area, and the bike facility. AR_10861; AR_11215. The agency accepted the MDP, and amended RLK's SUP to incorporate the new planning direction. AR_10882; AR_11333. But the agency never prepared NEPA on the MDP to comprehensively evaluate the impacts of past, present, and future development; instead, it signed off on a segmented review process. Using this approach, the agency myopically evaluated the impacts of one new development—the bike facility—as opposed to a programmatic evaluation of all the projects outlined in the MDP with opportunity for public involvement. The agency's new approach defeats the purpose of the SUP planning process, is contrary to precedent, and violates NEPA.

³⁰ Plaintiffs again raised the issue in their administrative appeal. AR_28159, 28160. The agency addressed the issue for the first time in its appeal response, setting forth a vague response about the restoration activities not being planned to “offset any potential impacts to habitat.” AR_29304. This response is puzzling, given the fact that the bike trails' widespread impacts to LCR steelhead critical habitat, and habitat for other sensitive aquatic species are not in dispute. *See, e.g.*, AR_12832 (“To mitigate for these adverse effects to habitat, a suite of watershed restoration actions were identified as part of the project action.”).

³¹ This NFMA violation also implicates the agency's NEPA duty to prepare an EIS to disclose and consider a project's *threatened* violations of the law. 40 C.F.R. § 1508.27(b)(10).

A. MDP acceptance and SUP amendment constitute final agency action.

The agency's acceptance and amendment of RLK's MDP/SUP constituted a final agency action within the meaning of the APA because it (1) marked the consummation of the agency's decisionmaking, and (2) determined rights or obligations. *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). Ski areas operate in accordance with SUPs issued under the Ski Area Permit Act. *See* 16 U.S.C. § 497b. The agency approves or denies applications for ski area SUPs through its Special Use Authorization Approval Process. *See* 36 C.F.R. § 251. RLK's SUP authorizes it to use National Forest System lands for the purposes of constructing, operating, and maintaining the Timberline Lodge and Ski Area Complex. AR_9881. The MDP is a required component of the SUP, *see* AR_9884, and it defines the allowable scope of development at the ski area. AR_9885; *see also Friends of Mt. Hood v. U.S. Forest Service*, NO. CV 97-1787-KI, 2000 U.S. Dist. LEXIS 18309, at *3 (D. Or. Dec. 15, 2000) (“Ski areas within the National Forest System may be operated under [SUPs] obtained under SAPA. To obtain the permit, the ski area must submit a proposed ski area master plan which is subject to the terms of the forest plan.”).

Acceptance of the MDP and amendment of the SUP marked the consummation of the agency's decisionmaking process. *See* 36 C.F.R. § 251.61(a); AR_9885 (SUP Clause II.D. providing that the agency will approve or deny amendments). When it accepted RLK's MDP and amended the SUP, the agency expanded the scope of facilities RLK may build or maintain. AR_9885. Without acceptance of the MDP in 2010, AR_11333, RLK could not have proceeded with the proposal to implement the bike facility. By doing so, the agency determined legal rights and obligations because it changed the scope of the uses allowed within the permit area. *See* AR_9985 (SUP Clause II.A.: “[n]othing in this permit shall be construed to imply permission to build or maintain any improvement not specifically named in the [MDP] . . .”).

B. The agency’s acceptance/amendment required a NEPA process.

Courts review a decision not to prepare NEPA under the “reasonableness” standard. *Northcoast Envtl. Ctr. v. Glickman*, 136 F.3d 660, 667 (9th Cir. 1998); *see also Forest Serv. Emps. for Envtl. Ethics (“FSEEE”) v. U.S. Forest Serv.*, 397 F. Supp. 2d 1241 (D. Mont. 2005). NEPA requires the preparation of an EA or EIS for major federal actions significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C). “Major federal actions” include “[a]doption of formal plans, such as official documents . . . approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.” 40 C.F.R. § 1508.18(b)(2). The Forest Service’s decision here not to prepare a NEPA document when it accepted the MDP and amended the SUP—which together constitute a plan, and define the allowable scope of future development at Timberline—was not reasonable.³²

The agency’s decision to forgo a NEPA process for acceptance of the MDP deprived the agency of an opportunity to carefully evaluate the proper scope of development at Timberline, while depriving the public of an opportunity to weigh in on the use of public resources. The agency’s approach represents a distinct departure from prior practice on Mt. Hood. Indeed, the agency has a long history of engaging the public through NEPA when considering ski area master plans, in concert with agency practice on approving other forest planning documents.

Previously, the agency has reviewed amendments to RLK’s MDP pursuant to NEPA. *See, e.g., AR_5909*. And, as the *Friends of Mt. Hood* case demonstrates, the agency reviewed

³² In *FSEEE*, the Court reviewed a challenge to the Forest Service’s refusal to prepare a NEPA document for a programmatic decision under both prongs of the APA judicial review provision, sections 706(1) and (2). After finding that the agency’s decision constituted a final agency action, the court held that the agency’s decision not to prepare NEPA was unreasonable, and ordered the agency to comply with NEPA. 397 F. Supp. 2d at 1255, 1257. Plaintiffs here challenge the agency’s decision to not prepare NEPA after taking the final agency action of acceptance/amendment as arbitrary or capricious or without observance of required procedure. 5 U.S.C. § 706(2)(a), (d). In the alternative Plaintiffs maintain that the agency failed to prepare legally required NEPA analysis, which failure is subject to compulsion under 5 U.S.C. § 706(1).

Mt. Hood Meadows' Master Plan pursuant to NEPA. In that case, the court concluded that MDP acceptance is a final agency action, reviewable for NEPA adequacy. The ski area permittee had presented the Forest Service a conceptual Master Plan for ski area expansion over the next 15–20 years, and the Forest Service prepared an EIS, and eventually approved the new Master Plan. 2000 U.S. Dist. LEXIS 18309, at *3–6. The sufficiency of the EIS was litigated in the District of Oregon. The court expressly reviewed the EIS for compliance with NEPA. *See id.* at *25–44. The court held that the agency's EIS violated NEPA because it failed to consider a reasonable range of alternatives with respect to parking when it approved the Master Plan. *Id.* at *33.

Here, the agency offered no reasoned explanation as to why it now believes that the public should be locked out of long-term planning for the development of public resources. Instead, it merely noted that the other projects in the MDP are conceptual and as such, “there are no effects that can be meaningfully evaluated.” AR_27749. But that argument stands in direct contrast to prior practice where the agency conducted detailed studies of the impacts of developments outline in Mt. Hood Meadows' Master Plan, evaluated alternatives, and developed mitigation measures. AR_5653. The agency's contrary approach here should be rejected, as the agency has offered no viable explanation for its departure from its established practice.

Departure from environmental review of MDPs also stands in contrast to agency practice at all levels of forest planning. The agency conducts a NEPA analysis for:

- Forest plans, *see* 36 C.F.R. §§ 219.4, 219.16, including the Mt. Hood's, *see* SUPP_1–1259;
- The NWFP, *see* AR_2954–4594;
- Forest Service directives, *see* 36 C.F.R. § 216;
- SUP acceptance, 36 C.F.R. § 251.54(g)(2)(ii);
- Development of NEPA categorical exclusions, *see* 40 C.F.R. § 1507.3, 36 C.F.R. § 220.6.

Where the agency chooses to remove an element of forest planning from NEPA review, it does so via rulemaking, or through categorical exclusion. It stands contrary to law and precedent to single-out one layer of forest planning from NEPA analysis.

C. MDP review ensures impacts are evaluated early in the planning process.

Plaintiffs' challenge to the agency's failure to consult NEPA for acceptance/amendment of the MDP and SUP is not simply a procedural claim. Rather, there are serious direct, indirect, and cumulative impacts issues that would escape meaningful review if NEPA were not prepared early in the planning process. *See Kern v. U.S. BLM*, 284 F.3d 1062, 1075 (9th Cir. 2002).

The projects in the MDP would have an acute, collective impact—affecting the same resources and the same watersheds. Of particular relevance here are the cumulative effects of a new 800-car parking lot and the bike facility. Timberline currently operates at only half of the approved carrying capacity of its facilities and lifts—primarily due to parking limitations. *See AR_27941*. “On above-capacity summer days, the parking lots at Timberline become parked out and additional visitors to Timberline . . . must be turned away.” *AR_27942*. RLK plans to address the situation by constructing a new parking lot and day lodge. *See AR_10868, 10875*. The bike facility will further exacerbate parking issues, *see AR_27748* (“The proposal may further contribute to parking issues near Timberline, particularly during busy periods when the parking reaches capacity.”), thereby hastening the need to implement the new parking proposal (and justifying its development). Where the agency has taken the final agency action of acceptance/amendment—approving a plan for future ski area development—it is unreasonable for the agency to refuse to consider interconnected projects with significant additive impacts.

V. ESA Violation: The BiOp and ITS are arbitrary and capricious.

After Plaintiffs challenged the Forest Service and NMFS' NLAA determination on the Project's impacts to threatened LCR steelhead, *see supra* Factual Background IV.B., NMFS withdrew its concurrence and prepared a full BiOp. In reaching its conclusions about species jeopardy and adverse modification of critical habitat, and issuing an ITS, NMFS violated the ESA because it (1) relied on speculative mitigation measures; (2) failed to ensure compliance

with the ACS; and (3) did not explain the basis for the surrogates it chose to set and limit the allowable level of take.

A. Section 7 of the ESA imposes procedural and substantive duties.

Congress enacted the ESA to “provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species” 16 U.S.C. § 1531(b). Section 9 of the ESA prohibits the “take” of listed species.³³ In addition, the ESA protects listed species’ critical habitat, which are the areas that are essential for conservation of the species. 16 U.S.C. §§ 1532(5)(A)(i), (ii). Section 7 of the ESA imposes procedural and substantive duties on federal agencies. Procedurally, federal agencies (“action agencies”) must engage in consultation with NMFS if a proposed action may affect listed species or critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Substantively, federal agencies must ensure that their actions are “not likely to jeopardize the continued existence of any [listed] species or result in the destruction or adverse modification of [critical habitat].” 16 U.S.C. § 1536(a)(2).

When evaluating a proposed project, the action agency must make a preliminary effects determination. 50 C.F.R. § 402.14(a)–(b). If the action agency decides that the proposed action may affect, but is not likely to adversely affect (“NLAA”) listed species, it may engage in informal consultation with NMFS. *Id.* §§ 402.13; 402.14(b). If, during informal consultation, NMFS concurs with the action agency, the consultation process is concluded. *Id.* §§ 402.13, 402.14(b)(1). Formal consultation is required when the action agency determines that its action is likely to adversely affect a listed species, or if NMFS does not concur in the NLAA

³³ Section 9’s take provisions apply to LCR steelhead. *See* 65 Fed. Reg. 42,422 (July 10, 2000). “Take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in such conduct.” 16 U.S.C. § 1532(19). “Harm” includes “habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R. § 17.3.

determination. *Id.* § 402.14. Formal consultation requires NMFS to formulate a BiOp determining whether the proposed action is likely to jeopardize the continued existence of a listed species or adversely modify its critical habitat. 50 C.F.R. § 402.14(g); *id.* § 402.02.

B. NMFS failed to account for mitigation delays or failures.

When preparing a BiOp, NMFS may not rely on uncertain mitigation actions. *See Nat'l Wildlife Fed'n v. NMFS*, 839 F. Supp. 2d 1117, 1125 (D. Or. 2011) (citing 50 C.F.R. § 402.02). Indeed, “[m]itigation measures supporting a biological opinion’s no jeopardy conclusion must be ‘reasonably specific, certain to occur, and capable of implementation; they must be subject to deadlines or otherwise-enforceable obligations; and most important, they must address the threats to the species in a way that satisfies the jeopardy and adverse modification standards.’” *Id.* (citing *Ctr. for Bio. Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139, 1152 (D. Ariz. 2002)).

Here, NMFS simply relied on the Forest Service’s assumptions about the scope and effectiveness of restoration without engaging in an independent assessment based on ESA requirements. For example, NMFS accepted at face value the Forest Service’s modeling assumptions on road-stream connectivity, leading NMFS to conclude that the Project would decrease the stream drainage network over the Project area. *See* NMFS_766.³⁴ But NMFS never squared these assumptions with available information directly rebutting (1) the plausibility of the modeling estimates and (2) the logistical realities of disconnecting routes from the drainage network. *See* Dkt 119, ¶¶ 10–16. In essence, NMFS never adequately explained—let alone proved—that the mitigation measure of reducing the drainage network by 6% in the Still Creek watershed was capable of implementation. *Cf. Rumsfeld*, 198 F. Supp. 2d at 1152.

Moreover, NMFS ignored the best available science³⁵ regarding restoration effectiveness.

³⁴ And NMFS seized on the benefits of a “reduced” drainage network. *See id.*

³⁵ When NMFS prepared its BiOp, it was under a duty to “use the best scientific and

For instance, in assessing impacts on critical habitat, NMFS simply parroted the Forest Service's conclusion that restoration would fully offset the impacts of the bike trails. *See* NMFS_770.³⁶ But NMFS never addressed the best available science on the long-term duration of sediment impacts from obliterated roads, *see* Dkt. 119, at ¶ 29, or on high-elevation restoration failures. *See* Dkt. 119, at ¶ 27. By adopting the Forest Service's unsupported assumptions about the timing and effectiveness of restoration, without independently ensuring their validity under the ESA's mitigation standards, NMFS was unable to provide an accurate projection of the level of harm to the species and critical habitat. This approach does not comport with the ESA. *Cf. S. Yuba River Citizens League v. NMFS*, 723 F. Supp. 2d 1247, 1278–79 (E.D. Cal. 2010) (BiOp invalid where “the precise benefits to be conveyed by the[] mitigation measures [were] uncertain and . . . many of the[] mitigation measures would not take effect for a number of years”).

C. NMFS failed to ensure consistency with the ACS.

Compounding NMFS's failure to ensure the efficacy of mitigation measures was its failure to take a required procedural step: assess the Project's consistency with the ACS. The duty to assess ACS consistency derives from NMFS's programmatic BiOp on the effects on LCR steelhead from implementation of the Mt. Hood LRMP, as amended by the NWFP (“1998 BiOP”). *See* NMFS_8783. The 1998 BiOp concluded: “[m]anagement of the administrative units under the NFP ACS for the benefit of listed salmonids . . . is expected to allow for the survival and recovery of affected Pacific salmonid species.” NMFS_8793. To attain this result,

commercial data available.” 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d). The duty to use the best available scientific information is a rigid one: “[T]o the extent that there is any uncertainty as to what constitutes the best available scientific information, Congress intended to give the benefit of the doubt to the species.” *Ctr. for Biological Diversity v. U.S. BLM*, 422 F. Supp. 2d 1115, 1127 (N.D. Cal. 2006).

³⁶ Although NMFS hedged on actual sediment reduction figures, unlike the Forest Service, *see* NMFS_764, NMFS nevertheless asserted that “it is reasonable to conclude that the restoration work called for in the project will offer considerable benefits.” *Id.*

NMFS included a requirement “to ensure that proposed actions are fully consistent with applicable standards and guidelines and ACS objectives.” NMFS_8815; *see also Pac. Coast Fed’n of Fishermen’s Ass’ns v. NMFS (“PCFFA”)*, 265 F.3d 1028, 1036 (9th Cir. 2001) (ACS compliance must be assessed at the project level).

Here, however, the BiOp does not assess consistency with the ACS. In fact, the BiOp does not even mention the ACS. This failure erodes NMFS programmatic “no jeopardy” determination for implementation of the Mt. Hood LRMP, and violates the mandatory terms and conditions of its programmatic BiOp. As the Ninth Circuit has expressly held, where NMFS based its programmatic no jeopardy conclusion on site-specific projects being implemented consistent with the ACS, NMFS may not now simply ignore the ACS. *See PCFFA*, 265 F.3d at 1035 (“Therefore, because NMFS is allowed to equate ACS consistency with a no jeopardy finding, NMFS chooses to inquire into ACS consistency.”); *Cascadia Wildlands Proj. v. U.S. FWS*, 219 F. Supp. 2d 1142, 1149–50 (D. Or. 2002). This is not simply an academic dispute. As discussed *supra* Argument III, the Project violates ACS standard and guideline WR-3, which provides: “Do not use mitigation or planned restoration as a substitute for preventing habitat degradation.” SUPP-1373. But here, NMFS expressly concluded, “[t]he proposed restoration activities will restore 1.54 acres within riparian reserves over the long term.” NMFS_767.³⁷ Accordingly, because NMFS has failed to ensure consistency with the ACS at the project level, the BiOp must be invalidated under controlling Ninth Circuit precedent. *PCFFA*, 265 F.3d at 1036–37; *see also Cascadia Wildlands*, 219 F. Supp. at 1149–50.

D. The ITS failed to properly account for take exceedences.

Where, as here, NMFS issues a “no jeopardy” opinion for a proposed action that

³⁷ This conclusion illustrates the precise reason for WR-3 in the first instance: the nature and scope of restoration benefits is highly debatable. *See* Dkt. 119, at ¶¶ 22–26.

nevertheless may result in “take,” NMFS must include an ITS. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). The ITS exempts any take that is incidental to the permitted project, and in compliance with the ITS’s terms and conditions. *Id.* § 1536(o)(2). An ITS must set forth a “trigger” that, when reached, results in an unacceptable level of incidental take, invalidating the “safe harbor” provision, and requiring the parties to reinitiate consultation. *Ariz. Cattle Growers’ Ass’n v. U.S. FWS*, 273 F.3d 1229, 1249 (9th Cir. 2001); *see also*, 50 C.F.R. §§ 402.14(i)(4); 402.16(a). The trigger is therefore critical, because NMFS must reinitiate Section 7 consultation “immediately” if the trigger is exceeded. 50 C.F.R. § 402.14(i)(4).

An ITS may use a surrogate to specify take levels where no numerical number of “take” may be practically obtained, but the chosen surrogate must be able to perform the functions of a numerical limitation. *Or. Nat. Res. Council v. Allen*, 476 F.3d 1031, 1037 (9th Cir. 2007). Here, NMFS determined that the extent of take could not be accurately quantified as to the number of fish that would be harmed, NMFS_774, and so NMFS identified take surrogates:

(1) the area of disturbance from restoration within riparian reserves, (2) the area of disturbance from construction within riparian reserves, (3) the elevation of turbidity from restoration and construction, and (4) the effectiveness of sediment control measures to route sediment away from streams during operations.

NMFS_775. Each of these take surrogates suffer from significant flaws, which compromised their ability to perform the functions of a numerical limitation.

1. The pre-disturbance area offers no meaningful chance for reinitiation.

NMFS’s first two surrogates relate to the acreage of Riparian Reserves that would be disturbed by the Project. Prior to ground disturbance—i.e., construction and restoration—the Forest Service must ensure the proposed riparian disturbance areas are “flagged.” NMFS_777.³⁸ The intent is to ensure that no more than an allocated area of ground disturbance occurs within

³⁸ That is, the Project’s boundaries must be delineated with markers.

the Riparian Reserves (1.54 acres for restoration; 2.01 acres for construction). But these surrogates fail to meet that intent because they are pre-disturbance measurements, rather than measurements of the area of actual disturbance. *See* Dkt. 119, at ¶ 44. In other words, while the areas of *proposed* disturbance could be effectively flagged prior to ground disturbance, these surrogates do not measure the critical figure: *actual* ground disturbance. If actual ground disturbance in fact falls outside of the flagged boundaries, the time for reinitiation under these triggers will have already lapsed—the trigger only pertains to pre-disturbance flagging. Thus the reinitiation surrogates are meaningless at the time when the impacts occur. *Cf. Ctr. for Bio. Diversity v. Provencio*, No. CV 10-330 TUC AWT, 2012 U.S. Dist LEXIS 50457, at *55–56 (D. Ariz. Jan. 23, 2012) (ITS must provide a meaningful opportunity for revived consultation).

Moreover, even if ground-disturbing activities do only occur within the flagged acreage, these surrogates offer no opportunity for reinitiation based on unforeseen impacts. The Project calls for 3.55 acres of Riparian Reserve disturbance, and the surrogates allow disturbance of up to 3.55 acres—but there is no required monitoring of the impacts of 3.55 acres of disturbance. While NMFS simply equated a greater area disturbed with greater impacts, NMFS_775, that position misses the point. The critical measurement is not simply amount of disturbed acreage, but also, the magnitude of impacts (i.e., sediment delivery, drainage network extension, vegetation disturbance)—which could be much greater even *within* the allocated acreage.³⁹ Here, NMFS simply set the level of take as the scope of the Project. *Cf. Allen*, 476 F.3d at 1039 (ITS invalid where it defined the level of take using the parameters of the project).

2. The turbidity monitoring surrogate is unsupported.

NMFS's third surrogate focuses on turbidity monitoring: the allowable level of take

³⁹ *Cf.* 50 C.F.R. § 402.16(b) (reinitiation required if new information reveals project that may affect listed species or critical habitat to an extent not previously considered).

would be surpassed based on exceedences of certain turbidity thresholds during the construction season. The level of take is exceeded upon (a) five incidents in which turbidity exceeds 10 NTUs for more than 30 minutes per incident at any five portable turbidimeter points, or (b) turbidity of 100 NTU at an in-stream turbidimeter during or immediately following precipitation.⁴⁰ NMFS_775. These triggers are defective for a host of reasons. First and most importantly, NMFS never explained how it derived the particular thresholds. For instance, it never articulated why five measurements of 15 NTU for 20 minutes, or eight NTU for 45 minutes fall under threshold. NMFS simply offered no basis for how it developed the turbidity surrogates and courts do not defer to NMFS's choice of surrogate without some explanation. *See Native Fish Soc'y v. NMFS*, 992 F. Supp. 2d 1095, 1115 (D. Or. 2014).

The second reason the turbidity surrogates are arbitrary is the discretionary condition allowing high turbidity readings to be dismissed after agency conference. That is, even if turbidity thresholds are exceeded under (b), they may be authorized without reinitiation if NMFS and the Forest Service agree that Project impacts were not "a principal cause of the exceedence." NMFS_775. NMFS, however, specifically acknowledged that distinguishing:

sediment generated from the proposed action from that generated by other sources or that is part of natural background levels is quite difficult to accomplish with a meaningful degree of precision or reliability; *therefore, most data gathered through such monitoring would not be a very useful measure of the proposed action's effects in any event*

NMFS_774 (emphasis added). But then NMFS went ahead and not only authorized a sediment-monitoring surrogate, but it also specifically permitted wide latitude for finding that Project impacts were not "a principal cause of the exceedence." NMFS_775. *Cf. Ariz. Cattle*, 273 F.3d at 1250 (ITS invalid where, inter alia, agency had "unfettered discretion"). In other words, the

⁴⁰ It is assumed that NMFS intended that take exceedences would occur *over* 100 NTU. As (b) is currently written, an exceedence would occur at 1 NTU. *See* Dkt. 119, at ¶ 36.

take surrogate permits invocation of a condition that NMFS has already deemed to be arbitrary.

In addition to this critical infirmity, there are a series of practical limitations on the effectiveness of the surrogate, including (1) the fact that it does not measure periods of high turbidity *outside* of the construction season;⁴¹ (2) the fact that it fails to account for the timing of storm events,⁴² and (3) the fact that significant impacts to the species could escape detection because they are not captured by *turbidity* measurements.⁴³ All of these reasons make turbidity monitoring limited solely to the construction season a particularly ineffective surrogate.

3. NMFS failed to explain how measurement of sediment traps during the dry season functions as an adequate take surrogate.

NMFS's final surrogate is based on observation of the amount of sediment collected in sediment traps during the operation season. *See* NMFS_775. This surrogate is deficient because NMFS failed to explain how a surrogate based on measurements taken during the dry summer months would be an effective trigger in light of the Project's most intense period of impacts: periods of high runoff and rainfall that occur in the spring, early summer, and fall. As the record reveals, the late summer and early fall months are the period of lowest runoff, as evidenced by historical precipitation and streamflow levels. *See* AR_5223, AR_27792. This is the time when the Project would operate, and when NMFS's surrogate applies. However, the highest amount of sediment delivered from the Project would occur outside of the operation season, and thus evade detection. *See* Dkt. 119, at ¶ 33. The trail network would not stop delivering sediment when it is

⁴¹ *See* Dkt. 119, at ¶ 37 (explaining that “the Project could cause huge spikes in turbidity from elevated sediment delivery during the spring snowmelt or fall runoff events that result in severe degradation of critical habitat without any detection of even major impacts or the triggering of consultation re-initiation”); *see also* NMFS_763 (BiOp, noting that “at the end of the season and the beginning of the fall rains, potentially considerable amounts of sediment are likely to enter the stream system where there is hydrologic connection”).

⁴² *See* Dkt. 119, at ¶ 40.

⁴³ *See* Dkt. 119, at ¶ 38–40; *see also* NMFS_769 (“Increased fine sediments in substrate also can smother eggs and reduce survival of fry, reducing spawning successes . . .”).

not in use; in fact, it would likely deliver more. As the BiOp explains, “sediment increases in Still Creek are most likely expected to occur while juvenile steelhead are rearing in October and November during the first storm events when stream flows increase, and may also occur the following spring when steelhead adults are spawning.” NMFS_768.

NMFS’s premise for the take surrogate is that “[a]n increase in park use would result in greater soil destabilization and more sediment mobilized and transferred to streams.” NMFS_776. But by limiting monitoring to the operation season, NMFS’s surrogate fails to take into account the timing of greatest sediment mobilization: spring (snowmelt) and fall (rain-on-snow events). *See* Dkt. 119, at ¶ 33. As such: “Trail and sediment trap inspections during summer operations will be ineffective at: a) detecting how much sediment is being trapped; and, b) stemming the bulk of sediment delivery from trails to streams.” Dkt. 119, at ¶ 34. Thus the surrogate fails to function as a meaningful reinitiation trigger. *See Wild Fish Conserv. v. Salazar*, 628 F.3d 513, 531 (9th Cir. 2010) (where NMFS uses a non-numerical surrogate, it must “articulate a rational connection between the surrogate and the taking of the species”).

VI. NEPA Compliance: The Forest Service failed to prepare supplemental NEPA.

NEPA imposes a continuing duty on federal agencies to supplement their analyses when there are “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c)(1)(ii); *see also Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989) (agency must make a “reasoned decision based on . . . the significance-or lack of significance-of the new information”); 40 C.F.R. § 1508.27. Two significant developments occurred after issuance of the EA/DN/FONSI for the Project: (1) a change of position by NMFS that the project is likely to cause “take” of LCR steelhead as a result of sedimentation and other impacts to habitat in and around the Project area; and (2) the designation of the Western bumblebee as a sensitive species and the discovery of individual

species and likely nesting habitat within the Project area. Neither of these developments was disclosed in compliance with NEPA's action-forcing procedures.

A. The Forest Service failed to comply with NEPA in responding to new information about impacts on LCR steelhead.

As detailed above, *see supra* Argument II.C., the EA/DN/FONSI concludes that the project is “not likely to adversely affect” (“NLAA”) threatened LCR steelhead. AR 27849, 28092.⁴⁴ Subsequently, after Plaintiffs challenged the informal concurrence, NMFS reversed course, reinitiated consultation, and prepared a full BiOp. NMFS concluded that sediment generated from the Project's 17 miles of bike trails directly above LCR steelhead critical habitat would have measureable adverse consequences.⁴⁵ Indeed, NMFS concluded that the Project would “take” LCR steelhead, and therefore issued the ITS. NMFS_774–76. The discrepancy between the two agency's effects determinations triggered the need to prepare supplemental NEPA to explain to the public the full effects of the Project on LCR steelhead. *See Marsh*, 490 U.S. at 374 (supplemental NEPA required where new information shows a project will affect the environment to a significant extent not already considered).

Upon receiving NMFS's BiOp, the Forest Service (in a non-NEPA document) concluded that the new information contained in the BiOp was “within the scope and range of effects considered in the original analysis.” FS2dSUPP_4244. This position is deeply flawed for two reasons. First, the Forest Service has offered no analysis in support of its conclusion. *See Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000). It did not locate where in the original NEPA analysis the agency acknowledged the “take” of listed species. It

⁴⁴ NMFS originally concurred with this determination. AR 23464.

⁴⁵ NMFS ultimately concluded that the Project would not jeopardize the continued existence of the entire LCR steelhead species. But “a project need not jeopardize the continued existence of a threatened . . . species to have a ‘significant’ effect on the environment” under NEPA. *Cascadia Wildlands v. U.S. Forest Serv.*, 937 F. Supp. 2d 1271, 1282 (D. Or. 2013).

did not point to any EA sections where the agency informed the public of the extent of consequences to LCR steelhead and critical habitat. Nor did it explain the ways in which it factored *likely* adverse effects into its overall decision.

Second, even had the Forest Service attempted to justify its decision, the record lends its position no support. Indeed, the Forest Service’s entire premise with regard to LCR steelhead impacts was that *there were not likely to be adverse effects*. See, e.g., AR 29304 (“neutral” impact on aquatic habitat); *id.* at 29305 (PDC would minimize “if not eliminate” effects to habitat or individuals); *id.* at 29307 (“very small potential” for project to contribute sediment). Significantly, the Forest Service pointed to NMFS’s original concurrence with the NLAA determination: “NOAA Fisheries concurred with this determination . . . and stated that they concluded that ‘all effects of the action, as proposed are insignificant or discountable.’”). AR 29320. Now, however, NMFS has retracted its initial concurrence and has presented information that contradicts the Forest Service’s conclusions: NMFS’s full BiOp and ITS, prepared under 50 C.F.R. § 402.14, are based on a likely to adversely affect (“LAA”) conclusion.

Where new information presents “a seriously different picture of the likely environmental harms stemming from the proposed action,” a supplemental NEPA document is indicated. *Airport Cmty. Coal v. Graves*, 280 F. Supp. 2d 1207, 1219 (W.D. Wash. 2003) (citation omitted). A closer look at the differences between the Forest Service’s EA, and NMFS’ BiOp, reveals the “seriously different picture” here. For example, the EA noted that all habitat indicators “had a summary determination of Insignificant⁴⁶ or Discountable.”⁴⁷ AR_28024. On the other hand, the BiOp found a host of not-insignificant impacts, including:

⁴⁶ “Insignificant” effects “relate to the size of the impact and should never reach the scale where take occurs.” ESA Section 7 Consultation Handbook (Mar. 1998), at 3-12.

⁴⁷ “Discountable” effects are those extremely unlikely to occur. ESA Handbook, at 3-12.

- Fine sediment increases enough to reduce pool volume, impact critical habitat, reduce spawning ground quality, limit egg and fry success, and reduce prey availability;
- Potential for gill abrasion; smothered eggs; and abandonment of preferred spawning grounds by adults, which increases losses to competition, disease, and predation; and
- Metabolic costs that will be sufficient to impair rearing, migrating, feeding, and sheltering behaviors, and thereby increase the likelihood of injury or death.

NMFS_764, 767, 768, 772, 774. Of particular salience are the respective conclusions:

EA	BiOp
“For this reason, the proposed action May Affect, <i>Not Likely to Adversely Affect</i> LCR Steelhead trout and designated critical habitat” AR_27849 (emphasis added).	“The [Project] <i>will negatively affect</i> LCR steelhead through increased fine sediment inputs to an already degraded habitat.” NMFS_769 (emphasis added).

It is inaccurate and misleading to equate an NLAA and an LAA determination—the two are incongruent. *Compare* 50 C.F.R. § 402.14(b)(1) *with id.* § 402.14(a). The “Is not likely to adversely affect” determination is the “appropriate conclusion when effects on listed species are expected to be discountable, or insignificant, or completely beneficial.” ESA Handbook at 3-12. Conversely, “Is likely to adversely affect” is the “appropriate conclusion if any adverse effect to listed species may occur as a direct or indirect result of the proposed action” *Id.* at 3-13.

Indeed, a court in this district has already resolved this issue—in favor of supplemental NEPA. *See Wildlands v. U.S. Forest Serv.*, 791 F. Supp. 2d 979 (D. Or. 2011). In *Wildlands*, the Forest Service had approved a timber project in part based on an NLAA determination in an EA/DN/FONSI. *See id.* at 988 (quoting the EA as stating, “Consultation with the USFWS has resulted in a ‘*may affect, but not likely to adversely affect*’ determination.”). Subsequent to the agency’s decision, but before project implementation, the agency revisited its analysis and conceded that the project was in fact “likely to adversely affect” the listed species. *Id.* at 985.⁴⁸ The court concluded, “the public evaluation process of the proposed agency action and its impact on the environment was skewed by the inaccurate and misleading ‘not likely to adversely

⁴⁸ Although the agency attempted to argue that it had disclosed and considered likely adverse impacts in the original NEPA analysis, the court rejected this position. *Id.* at 990.

impact’ the northern spotted owl determination in the EA.” *Id.* at 991.

Similarly here, the Forest Service’s original NLAA determination, when viewed in light of the subsequent LAA finding, robbed the public of an accurate and complete picture of the Project’s impacts. The EA/DN/FONSI’s conclusion, and original NMFS concurrence, is premised on “insignificant” effects, *see* AR 28024 (EA)—which means no take of listed species. ESA Handbook, at E-36. NMFS’s subsequent LAA determination cannot reasonably be said to fit “within the range” of the NLAA determination. Because the Forest Service based its decision at least in part on the flawed assumption that the Project’s impacts on LCR steelhead would be insignificant, the agency must now reopen the NEPA process to fully evaluate—and disclose to the public—new information revealing adverse effects to listed LCR steelhead. *Cf. Wildlands*, 791 F. Supp. 2d, at 991 (“Central decisions affecting the analysis and approval of the [project] were based on a factual inaccuracy and the public has yet to be informed of the actual findings (LAA as opposed to NLAA) so it can engage in meaningful input.”).

B. The Forest Service failed to comply with its supplemental NEPA duties regarding potential impacts on the Western bumblebee.

The agency must take a “hard look at the environmental effects of [its] planned action, even after a proposal has received initial approval.” *Marsh*, 490 U.S. at 374. Here, the Forest Service did not take a “hard look” at whether the new designation and discovery of the Western bumblebee was significant so as to trigger the agency’s supplemental NEPA duties.

An agency has a duty to timely consider whether a new sensitive species designation is sufficiently significant to require supplemental NEPA analysis. *Dombeck*, 222 F.3d at 559. And an agency fails to comply with NEPA where it does not address new information related to sensitive species. *See, e.g., Cascadia Wildlands v. BLM*, No. 6:12-CV-00095-AA, 2012 WL 6738275, at *10–11 (D. Or. Dec. 21, 2012) (NEPA violation where agency failed to supplement

an EA based on new information on a sensitive species); *Or. Nat. Des. Ass'n v. Sabo*, 854 F. Supp. 2d 889, 922–24 (D. Or. 2012) (agency failed to address a new sensitive species designation, and new documentation of habitat damage). Courts have also set aside an agency's decision not to supplement its original NEPA review even where the agency has reviewed the new information. *See, e.g., Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 935, 937–38 (9th Cir. 2010) (supplemental information report (“SIR”) did not adequately address discovery of nesting habitat in the project area). This is especially true where an agency failed to sufficiently explain its reasoning for not undertaking a supplemental NEPA review. *See, e.g., Or. Nat. Res. Council Action v. U.S. Forest Serv.*, 445 F. Supp. 2d 1211, 1229 (D. Or. 2006) (agency did not include the “degree of care or the analysis and explanation necessary for a decision not to supplement to be judged reasonable”).⁴⁹

The agency here failed to properly evaluate whether new information on the bees' sensitive species designation, the bee's discovery in the Project area, and warnings from invertebrate biologists was “significant” under NEPA. “The central concern of the Court's analysis is not whether the new information supports the Forest Service's original conclusions, or whether the effect of the project on the fisher is more likely to lead toward listing, but whether there are ‘significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.’” *Sierra Club v. Bosworth* (“*Sierra Club I*”), No. C 05-00397 CRB, 2005 U.S. Dist. LEXIS 27573, at *27 (N.D. Cal. Nov. 14, 2005) (quoting *Dombeck*, 222 F.3d at 557).⁵⁰ The agency reviewed the new information on the bee in a non-NEPA “Consistency Review,” but it never determined whether the new information on the bee

⁴⁹ *See also Sierra Club v. Bosworth* (“*Sierra Club II*”), 465 F. Supp. 2d 931, 939–42 (N.D. Cal. 2006) (holding that the Forest Service failed to take a hard look at new information and supplement the initial NEPA review where new information emerged).

⁵⁰ *Summary judgment granted*, 465 F. Supp. 2d 931, 939–42 (N.D. Cal. 2006).

was “significant” within the meaning of 40 C.F.R. § 1508.27. Indeed, the agency’s analysis does not even mention the term “significant.” Because the agency did not apply the required test to determine the new information’s significance, its decision should be accorded no deference. *See Or. Nat. Desert Ass’n v. BLM*, 625 F.3d 1092, 1121 (9th Cir. 2010) (“We cannot defer to a void.”); *see also Price Rd. Neighborhood Ass’n, Inc. v. U.S. Dep’t of Transp.*, 113 F.3d 1505, 1509–10 (9th Cir. 1997) (agency must determine whether impacts are significant or uncertain).⁵¹

Instead, the agency simply skipped any “significance” determination based on the regulatory factors, and attempted to satisfy its NFMA sensitive species management obligations. *See* FS2dSUPP_887 (“As such, the effects determination for this project on the western bumble bee is *may impact individuals or habitat, but will not likely contribute to a trend towards Federal listing or loss of viability of the population or species . . .*”). But a non-NEPA document is plainly the wrong vehicle for making a determination of the Project’s effects on a sensitive species. *See Idaho Sporting Cong. Inc. v. Alexander*, 222 F.3d 562, 566 (9th Cir. 2000) (re-evaluation documents are used to make the initial significance determination—not to supplant any document that would be required if the threshold were met). Presenting new analysis and making a NFMA effects determination in a “Consistency Review” does not comport with NEPA. *See* 40 C.F.R. § 1502.9(c)(4) (supplemental analysis must comply with NEPA procedures); FSH 1909.15, § 18 (“A SIR is not a NEPA document and therefore cannot be used to fulfill the requirements for a revised or supplemental EA or EIS.”); *Idaho Sporting*, 222 F.3d at 566.

Even if the Consistency Review was the appropriate vehicle for making substantive

⁵¹ Had the agency invoked the correct standard, at least two significance factors would have militated strongly in favor of supplementation: degree of controversy and uncertainty of effects. *See* 40 C.F.R. § 1508.27(b)(4), (5); *see also Sierra Club II*, 2005 U.S. Dist. LEXIS 27573, at *28–32. The agency decided to move forward with Project implementation before it has gathered critical data on nesting sites and overwintering queen hibernation patterns, and has simply disregarded many of the recommendations offered by expert invertebrate biologists.

determinations about the Project's impacts on the bee (which it was not), the agency failed to take the requisite hard look at the new information. Inexplicably, the agency's analysis of potential effects focuses almost entirely on impacts to foraging habitat.⁵² Xerces, however, had explained that potential impacts on nest sites and overwintering queens are the central concerns. *See* FS2ndSUPP_4465 (noting that destruction of just a few nests could have significant adverse impacts to the species); *id.* at 4466 (explaining that killing just one queen bee can have severe consequences on an entire population). The agency's cursory explanation of why no supplementation was required—based on foraging habitat impacts—falls well short of the required hard look. *See Or. Nat. Res. Council Action*, 445 F. Supp. 2d at 1229 (new information “must be analyzed in a careful and thorough manner to determine whether it rises to the level of significance warranting supplemental analysis in a formal NEPA document”).⁵³ The agency's truncated review of new information on a sensitive species, where the agency failed to evaluate the new information's significance and failed to square the analysis with concerns raised by expert invertebrate biologists, did not comply with 40 C.F.R. § 1502.9(c)(1)(ii).

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request this Court vacate the EA/DN/FONSI, BiOp and ITS, and order the agencies to comply with NEPA, NFMA, and the ESA.

⁵² *See, e.g.*, FS2ndSUPP_887 (the low level of “habitat disturbance is unlikely to impact foraging habitat for the western bumblebee to such a degree as to negatively affect populations”).

⁵³ *See also Sierra Club II*, 2005 U.S. Dist. LEXIS, at *22 (SIR's “lack of thoroughness, and reasoning does not satisfy this Circuit's precedent, as it does not amount to a proper level of review that has been approved in other cases”).

Respectfully submitted this 13th day of February 2015.

/s/ Oliver Stiefel

Oliver J. Stiefel, OSB No. 135436
oliver@crag.org – (503) 227-2212
Ralph O. Bloemers, OSB No. 984172
ralph@crag.org - (503) 525-2727
Christopher G. Winter, OSB No. 984355
chris@crag.org - (503) 525-2725
Crag Law Center
917 SW Oak Street, Suite 417
Portland, OR 97205
Fax: (503) 296-5454

Attorneys for Plaintiffs

TABLE OF CITATIONS

<u>Administrative Record (“AR”)</u>		
AR #	DATE	<i>Author / TITLE</i>
1–2	9/28/1937	<i>Franklin D. Roosevelt, Address at Timberline Lodge</i>
244–871	1990	<i>U.S. Forest Service, Land and Resource Management Plan – Mt. Hood National Forest</i>
2954–4594	2/1/1994	<i>U.S. Forest Service, Final Environmental Impact Statement on Management of Habitat for Late-Successional and Old-Growth Forest Related Species Within the Range of the Northern Spotted Owl</i>
5116–5462	1/1/1995	<i>U.S. Forest Service, Zigzag River Watershed Analysis</i>
5649–5795	12/1996	<i>U.S. Forest Service, Mt. Hood Meadows Ski Area Master Plan/Access Road – Final Supplemental Environmental Impact Statement</i>
5909–5916	11/4/1998	<i>U.S. Forest Service, Decision Notice and Finding of No Significant Impact – Timberline Lodge Master Development Plan Amendment and Forest Plan Amendment #12</i>
8872–8904	11/2005	<i>U.S. Forest Service, The Timberline Express Proposal – Final Environmental Impact Statement and Record of Decision</i>
9864–9871	1/1/2007	<i>R.B. Foltz, et al., Infiltration, Erosion, and Vegetation Recovery Following Road Obliteration</i>
9881–9905	1/28/2008	<i>U.S. Forest Service, Special Use Permit for Timberline Lodge and Ski Area Complex</i>
10857–10880	1/2009	<i>R.L.K. and Company, Timberline Conceptual Master Plan</i>
11215	12/3/2009	<i>R.L.K. and Company, Letter to Forest Service requesting the Master Development Plan be amended to include a lift-assisted downhill mountain bike trail system</i>
11333	2/5/2010	<i>U.S. Forest Service, Letter accepting RLK’s request to amend the Conceptual Master Plan to include mountain biking</i>
11334–11339	5/25/2010	<i>U.S. Forest Service, Project Initiation Letter – Timberline Mountain Bike Trails Interdisciplinary Team</i>
11354–11365	4/1/2010	<i>U.S. Forest Service, Schedule of Proposed Action (SOPA) – 04/01/2010 to 06/30/2010</i>
11846–11848	4/29/2010	<i>Restore Mt. Hood Coalition, Scoping Comments – Timberline Mountain Bike Trails and Skills Park</i>
11869–11873	6/29/2010	<i>U.S. Forest Service, Preliminary Proposed Action Scoping Letter</i>
11879–11882	7/28/2010	<i>Friends of Mount Hood, Scoping Comments – Timberline Mountain Bike Proposal</i>
11883	7/30/2010	<i>Crag Law Center, Scoping Comments - Timberline Mountain Bike Proposal</i>
11897–11898	7/30/2010	<i>Sierra Club, Scoping Comments - Timberline Mountain Bike</i>

		Proposal
12027–12054	11/24/2010	<i>U.S. Forest Service</i> , Proposed Action
12295–12856	3/3/2011	<i>U.S. Forest Service</i> , Timberline Mountain Bike Trails and Skills Park – Preliminary Assessment
14955–16483	3/31/2011	<i>Various</i> , Electronic copies of documents reviewed/attached to response to FOIA request from Ralph Bloemers (Crag Law Center) dated 3/6/2011 (Part 2)
16484–18016	3/31/2011	<i>Various</i> , Electronic copies of documents reviewed/attached to response to FOIA request from Ralph Bloemers (Crag Law Center) dated 3/6/2011 (Part 3)
21069–21091	3/31/2011	<i>Jonathan J. Rhodes</i> , Review comments on the adequacy of the analysis of the effects on watershed and aquatic resources in the Timberline Ski Area Mountain Bike Trails and Skills Park Preliminary Assessment (PA), Mt. Hood National Forest, dated March 2011
21106–21149	4/4/2011	<i>Friends of Mt. Hood, Bark, the Mazamas, Northwest Environmental Defense Center, the Sierra Club, the Native Fish Society, the Portland Chapter of the Native Plant Society, and the Federation of Western Outdoor Clubs</i> , Comments on the Timberline Ski Area Mountain Bike Trails and Skills Park Preliminary Assessment
21158–21166	4/4/2011	<i>Sandy River Basin Watershed Council</i> , Comments on the Timberline Ski Area Mountain Bike Trails and Skills Park Preliminary Assessment
21167–22658	4/4/2011	<i>Public</i> , All timely public comments on the Timberline Ski Area Mountain Bike Trails and Skills Park proposal, #1-965
22760–23414	5/26/2011	<i>Various</i> , Mt. Hood National Forest’s response letter to FOIA request from Ralph Bloemers (Crag Law Center) dated 4/29/2011 (includes enclosures)
23464–23485	6/13/2011	<i>William Stelle</i> , Endangered Species Act Section 7 Consultation – Letter of Concurrence from NMFS
23998–24000	6/17/2011	<i>Tom Black / Todd Parker</i> , Emails discussing modeling
24082–25540	7/11/2011	<i>Various</i> , Mt. Hood National Forest’s response letter to FOIA request from Chris Winter (Crag Law Center) dated 6/9/2011 (includes enclosures)
27409–27526	5/21/2012	<i>David Lebo</i> , Botany Specialist Report – Proposed Timberline Downhill Mountain Bike Park
27628–27720	7/11/2012	<i>Katheryn Arendt</i> , Fisheries Biological Evaluation – Timberline Downhill Bike Park
27731–28084	11/2012	<i>U.S. Forest Service</i> , Timberline Ski Area Mountain Bike Trails and Skills Park: Environmental Assessment
28085–28108	11/19/2012	<i>Christopher Worth</i> , Timberline Ski Area Mountain Bike Trails and Skills Park – Decision Notice and Finding of No Significant Impact
28153–28174	1/11/2013	<i>Crag Law Center on behalf of Friends of Mt. Hood, Bark, Mazamas Federation of Western Outdoor Clubs, Native Fish</i>

Plaintiffs’ Opening Brief - iii

Bark, et al. v. Northrop et al.,
Case No. 3:13-cv-828-AA

Crag Law Center
917 SW Oak St., Suite 417
Portland, OR 97205
Tel. (503) 525-2727

		<i>Society, Northwest Environmental Defense Center, and Oregon Chapter of the Sierra Club, In Re: Appeal of the Environmental Assessment, FONSI, and Decision Notice for the Timberline Ski Area Mountain Bike Trails and Skills Park</i>
28175–29253	1/11/2013	<i>Various, Documents attached to the Crag Law Center Administrative Appeal</i>
29291–29322	2/2013	<i>U.S. Forest Service, Timberline Ski Area Mountain Bike Trails and Skills Park Environmental Assessment – Appeal Statements and Responses</i>

Supplemental Record (“SUPP”)

SUPP #	DATE	Author / TITLE
1–1259	1990	<i>U.S. Forest Service, Final Environmental Impact Statement – Mt. Hood Land and Resource Management Plan</i>
1287–1439	1994	<i>U.S. Forest Service / U.S. Bureau of Land Management, Standards and Guidelines for Management of Habitat for Late-Successional and Old-Growth Forest Related Species Within the Range of the Northern Spotted Owl</i>
1440–1461	9/23/2005	<i>U.S. Forest Service, Forest Service Manual – Chapter 2670 – Threatened, Endangered, and Sensitive Plants and Animals</i>

Forest Service Second Supplemental Record (“FS2ndSUPP”)

FS2ndSUPP #	DATE	Author / TITLE
272–290	9/1/2013	<i>Rich Hatfield, et al., Surveys on the Mount Hood National Forest for the western bumblebee (<i>Bombus occidentalis</i> (Greene 1858))</i>
291–310	9/1/2013	<i>Jonathan J. Rhodes, An Assessment of the Potential Effectiveness of the Proposed Restoration Activities – Timberline Proposed Bike Park, Mt. Hood National Forest, OR</i>
317–327	11/14/2013	<i>Crag Law Center on behalf of Bark, Friends of Mount Hood, Northwest Environmental Defense Center, and the Sierra Club, 60-day Notice of Intent to Sue for Violations of Section 7 of the Endangered Species Act Relating to the Timberline Ski Area Mountain Bike Trails and Skills Park Decision Notice and Finding of No Significant Impact</i>
886–922	12/19/2013	<i>U.S. Forest Service, Consistency Review Letter titled, “Timberline Ski Area Mountain Bike Trails and Skills Park – New Information Review</i>
2925–3859	3/14/2013	<i>Various, Responsive Documents to FOIA Request #14-01 (Resend Release 2) (Enclosures for AR 2924)</i>

Plaintiffs’ Opening Brief - iv

Bark, et al. v. Northrop et al.,
Case No. 3:13-cv-828-AA

Crag Law Center
917 SW Oak St., Suite 417
Portland, OR 97205
Tel. (503) 525-2727

4242–4253	9/18/2014	<i>U.S. Forest Service</i> , New information review of the NMFS Biological Opinion and partial completion of restoration activities
4465–4468	11/2013	<i>Rich Hatfield</i> , Feedback on the Timberline Mountain Bike Trails and Skills Park proposal as it relates to populations of the western bumble bee (<i>Bombus occidentalis</i> (Greene 1858))

NMFS Record (“NMFS”)

NMFS #	DATE	<i>Author / TITLE</i>
133–143	11/14/2013	<i>Crag Law Center on behalf of Bark, Friends of Mount Hood, Northwest Environmental Defense Center, and the Sierra Club</i> , 60-day Notice of Intent to Sue for Violations of Section 7 of the Endangered Species Act Relating to the Timberline Ski Area Mountain Bike Trails and Skills Park Decision Notice and Finding of No Significant Impact
727–799	8/4/2014	<i>National Marine Fisheries Service</i> , Endangered Species Act Biological Opinion for the Timberline Downhill Bike Park, Still Creek, Sand Canyon, Glade and West Fork Salmon River Sub-Watersheds (HUCs 170800010201, 170800010202, 170800010101), Mount Hood National Forest, Clackamas County, Oregon (signed)
5519–6021	6/2013	<i>National Marine Fisheries Service</i> , ESA Recovery Plan for Lower Columbia River Coho Salmon, Lower Columbia River Chinook Salmon, Columbia River Chum Salmon, and Lower Columbia River Steelhead
8777–8816	3/19/2013	<i>National Marine Fisheries Service</i> , Endangered Species Act Section 7 Conference Opinion on Continued Implementation of U.S. Forest Service Land and Resource Management Plans and Bureau of Land Management Resource Management Plan Affecting the Lower Columbia River Steelhead Evolutionarily Significant Unit

Plaintiffs’ Opening Brief - v

Bark, et al. v. Northrop et al.,
Case No. 3:13-cv-828-AA

Crag Law Center
917 SW Oak St., Suite 417
Portland, OR 97205
Tel. (503) 525-2727

CERTIFICATE OF SERVICE

I, Oliver J. Stiefel, hereby certify that I electronically transmitted the foregoing via ECF to all parties named below:

STEPHEN J. ODELL, OSB #903530

steve.odell@usdoj.gov

SEAN E. MARTIN, OSB # 054338

sean.martin@usdoj.gov

Assistant United States Attorneys

1000 SW Third Avenue, Suite 600

Portland, OR 97204

Telephone: (503) 727-1010

Facsimile: (503) 727-1117

Of Attorneys for Federal Defendants

SARAH J. CROOKS, OSB NO. 971512

scrooks@perkinscoie.com

PERKINS COIE LLP

1120 N.W. Couch Street, Tenth Floor

Portland, OR 97209-4128

Telephone: (503) 727-2000

Facsimile: (503) 727-2222

ROBERT A. MAYNARD, ISB NO. 5537, PRO HAC VICE

rmaynard@perkinscoie.com

ERIKA E. MALMEN, ISB NO. 6185, PRO HAC VICE

emalmen@perkinscoie.com

PERKINS COIE LLP

1111 West Jefferson Street, Suite 500

Boise, ID 83702

Telephone: (208) 343-3434

Facsimile: (208) 343-3232

Attorneys for Defendant-Intervenor RLK and Company

/s/ Oliver Stiefel
Oliver J. Stiefel, OSB No. 135436