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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

**OREGON NATURAL DESERT ASS’N,
CENTER FOR BIOLOGICAL DIVERSITY,
and WESTERN WATERSHEDS PROJECT,**

Case No. 07-1871-HA
[Related Case No. 03-381-HA]
[Related Case No. 08-151-HA]

Plaintiffs,

v.

**MEMORANDUM IN SUPPORT OF
PLAINTIFFS’ MOTION FOR
SUMMARY JUDGMENT**

TOM TIDWELL, et al.,

Defendants,

v.

HARLEY & SHERRIE ALLEN, et al.,

Defendants-Intervenors.

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GLOSSARY

Terms

BA	Biological Assessment
BiOp	Biological Opinion
ESA	Endangered Species Act
ITS	Incidental Take Statement
MCR	Middle Columbia River
MIS	Management Indicator Species
MNF	Malheur National Forest
NFMA	National Forest Management Act
NMFS	National Marine Fisheries Service
PACFISH	1995 NMFS land management plan and habitat and aquatic conservation strategy for anadromous fish, incorporated by amendment in MNF Forest Plan
USFS	U.S. Forest Service

Allotments

Abbreviation

<u>In Brief</u>	<u>Name</u>	<u>Code used in A/R</u>
-	Bear Creek Allotment	BEAR
BMA	Blue Mountain Allotment	BMtn
CCA	Camp Creek Allotment	CAMP
-	Deadhorse/Hanscomb/Fields Peak Allotment	DHFP
-	Dixie Allotment	DIX
-	Fawn Springs and Williams Allotments	FSAW
FA	Fox Allotment	FOX
HKA	Hamilton/King Allotment	HK
-	Hot Springs Allotment	HS
-	Indian Creek Ridge Allotment	ICR
LCA	Long Creek Allotment	LC
LMFA	Lower Middle Fork Allotment	LMF
-	McClellan Allotment	MCL
MTVA	Mt. Vernon/John Day/Beech Creek Allotment	MTV
MCA	Murderers Creek Allotment	MC
-	Rail Creek Allotment	RAIL
-	Roundtop Allotment	RT
SSA	Seneca/Sugarloaf Allotment	SENE
SCA	Slide Creek Allotment	SC
UMFA	Upper Middle Fork Allotment	UMF
-	York Allotment	YORK

Administrative Record Disks and Abbreviations Cited in Brief

NRAR	NMFS Revised Administrative Record (with citation to documents beginning with MNF07-001 and to individual pages with NMFS 1) – Dkt # 367
FS RP	Forest Service Revised Policy Administrative Record – Dkt # 367
FS R-MC	Forest Service Revised Allotment Administrative Record – Dkt # 367 (each allotment has a separate folder – this example is for Murderers Creek Allotment)
FS SP	Forest Service Supplemental Policy Administrative Record – Dkt # 362
FS S-SC	Forest Service Supplemental Allotment Administrative Record – Dkt # 362 (each allotment has a separate folder – this example is for Slide Creek Allotment)
4S BMtn	USFS Supplemental Record for Blue Mountain Allotment – Dkt # 237 in 03-381

INTRODUCTION

Plaintiffs Oregon Natural Desert Association, Center for Biological Diversity and Western Watersheds Project (jointly, “ONDA”) move for summary judgment on their claims that the National Marine Fisheries Service (“NMFS”) and the United States Forest Service (“Forest Service”) have unlawfully authorized and managed livestock grazing on the Malheur National Forest (“MNF”). NMFS violated the Administrative Procedure Act (“APA”) and the Endangered Species Act (“ESA”) by issuing a 5-year Biological Opinion (“2007–2011 BiOp”) in May 2007 which arbitrarily and capriciously fails to insure against jeopardy to steelhead (*Oncorhynchus mykiss*) and against adverse modification to steelhead critical habitat.

The MNF violated the ESA and the APA by failing to insure against jeopardy and adverse modification to critical habitat in issuing decisions in 2007, 2008 and 2009 regarding the terms and conditions of allowable grazing on the MNF during those years. MNF grazing decisions during those years further violated the National Forest Management Act (“NFMA”) because the decisions were made without monitoring for and evaluating the conditions of Riparian Management Objectives (“RMOs”) and Management Indicator Species (“MIS”) on the subject allotments. The MNF’s ongoing management of grazing also has resulted in violating its continuing obligation under ESA § 7(a)(2) to insure against jeopardy and adverse modification to steelhead critical habitat and the take prohibition in ESA § 9. The MNF has further failed to reinstate formal consultation properly on the 2007–2011 BiOp.

This Court has often criticized and twice enjoined livestock grazing on the MNF for failure to comply with legal and ecological standards designed to protect the threatened steelhead that inhabit over 300 miles of critical habitat within the allotments at issue. Despite the Court’s repeated warnings, and the invalidation of the 2006 steelhead biological opinion for grazing on

the MNF, in 2007 NMFS issued a hastily prepared and badly flawed BiOp intended to cover five years of grazing. During the first two years under the MNF's 2007–2011 grazing program, grazing on 8 of the 13 allotments covered by the 2007–2011 BiOp has failed to comply with the terms of the BiOp, resulting in unlawful take of steelhead by the destruction and adverse modification of steelhead critical habitat. NMFS and the MNF have ignored and contravened the requirements of the ESA and NFMA by issuing unlawful decisions and allowing harm to steelhead and their habitat from livestock grazing in 2007, 2008 and 2009.

BACKGROUND

The background of this case, legal standards for protecting steelhead under the ESA and NFMA, prior cases describing how the MNF and NMFS failed to comply with those obligations, and ONDA's claims in this case are set forth in this Court's Opinion and Order of September 2008. Or. Natural Desert Ass'n v. Kimbell, No. 07-1871-SU, 2008 WL 4186913, at *1–*7 (D. Or. Sept. 5, 2008) (“Kimbell I”). These issues are addressed in this brief only to the extent necessary, together with additional background information since that decision.

I. LITIGATION AND PROCEDURAL HISTORY

This Court is familiar with the history of suits seeking Forest Service and NMFS compliance with applicable laws in administering the MNF grazing program. Kimbell I, 2008 WL 4186913, at *4–*5. The MNF and NMFS have consistently been unable to prevent violations of the law and harm to threatened fish. In 2004, this Court expressed “a dire need for better management of grazing on these public lands” based on evidence of pervasive damage by livestock to steelhead streams on the MNF. Or. Natural Desert Ass'n v. U.S. Forest Serv., No. 03-381-HA, 2004 WL 1592606, at *10 (D. Or. July 15, 2004). The Court observed that “that recent management has fallen short of the legal mandates related to the protection of the land and

water and the endangered species dependent thereon.” Id. In 2007, when it invalidated the 2006 NMFS biological opinion for Malheur National Forest grazing activities that harm steelhead, this Court observed that “[p]ast compliance with grazing management standards is a documented problem” with “poor conditions on almost every allotment.” Or. Natural Desert Ass’n v. Lohn, 485 F. Supp. 2d 1190, 1198–1202 (D. Or. 2007), vacated as moot, 2009 WL 123525, at *1 (9th Cir. Jan. 12, 2009). In May 2008, this Court enjoined grazing on two allotments based on the results of the first year of grazing under the 2007–2011 BiOp. Kimbell I, 2008 WL 4186913, at *8. In June 2009, this Court granted in part ONDA’s motion for further preliminary relief, citing “the Forest Service’s repeated failures to carry out planned mitigation and monitoring measures on the MNF.” Or. Natural Desert Ass’n v. Kimbell, No. 07-1871-HA, 2009 WL 1663037, at *1 (D. Or. June 15, 2009) (“Kimbell II”).

II. LEGAL STANDARDS

The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation,” intended to “halt and reverse the trend towards species extinction, whatever the cost.” TVA v. Hill, 437 U.S. 153, 180, 184 (1978). Under the ESA, the Forest Service prepares a biological assessment (“BA”) to evaluate potential effects of proposed grazing on steelhead if the species may be present within the action area. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(a). If the BA identifies that steelhead are “likely to be adversely affected” by the proposed action, the Forest Service conducts formal consultation with NMFS. 50 C.F.R. § 402.14(a)-(b)(1). In a biological opinion (“BiOp”), NMFS determines whether the proposed grazing, together with its cumulative effects, is likely to jeopardize the continued existence of a listed species or adversely modify the species’s critical habitat. 50 C.F.R. § 402.14(g)(4). If NMFS concludes that grazing might result in take of steelhead, the BiOp must include an

Incidental Take Statement (“ITS”). 16 U.S.C. § 1536(b)(3). An ITS (1) specifies the amount or extent of the impact on steelhead of any incidental taking; (2) specifies Reasonable and Prudent Measures to minimize such impact; and (3) sets forth the Terms and Conditions that must be complied with to implement the Reasonable and Prudent Measures. 50 C.F.R. § 402.14(i)(1)(i), (ii), (iv). If the amount or extent of incidental take specified in the ITS is exceeded, the Forest Service is obligated to reinitiate formal consultation immediately. *Id.* §§ 402.14(i)(4), 402.16(a).

ESA § 7(a)(2) requires all federal agencies to “insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence” of any endangered or threatened species or result in the destruction of critical habitat. 16 U.S.C. § 1536(a)(2). This obligation to insure against jeopardy or adverse habitat modification applies both to consulting agencies such as NMFS and action agencies such as the Forest Service. The obligation is ongoing as an action agency carries out the proposed action. Sierra Club v. Marsh, 816 F.2d 1376, 1385–86 (9th Cir. 1987).

ESA § 9 prohibits “take” of any endangered species. 16 U.S.C. § 1538(a)(1)(B). The definition of “take” includes not only killing or injuring the listed species, but also “harm.” 16 U.S.C. § 1532(9). “Harm” includes “significant 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.

NFMA governs the Forest Service’s planning and management on national forest lands. 16 U.S.C. §§ 1600–14. When a national forest issues permits or otherwise authorizes the use or occupancy of federal lands, those decisions must be consistent with its Forest Plan. *Id.* § 1604(i) (“Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans.”).

III. STEELHEAD & GRAZING EFFECTS

The 13 allotments¹ covered by the 2007–2011 BiOp contain over 300 miles of spawning, rearing and migration habitat which Middle Columbia River (“MCR”) steelhead rely on for their survival. FS RP 29370–73.² MCR steelhead in the John Day River basin “require clear and cool streams for spawning, and rely on streambeds low in fine sediment, high in woody debris, with stable, overhanging banks and large pools.” Kimbell I, 2008 WL 4186913, at *1. However, the steelhead populations in the Middle Fork John Day, South Fork John Day, and Upper Mainstem John Day are currently “not viable” and “the MCR steelhead species remains likely to become endangered.” FS RP 29376–77. Many streams within the MNF are designated as habitat critical to the survival and recovery of steelhead, including the main channels and tributaries of the Upper John Day, Middle Fork John Day, and North Fork John Day Rivers. 70 Fed. Reg. 52,630 (Sept. 2, 2005) (critical habitat designation).

Livestock grazing directly and indirectly harms steelhead by destroying redds, disturbing or harassing juvenile and adult steelhead, and degrading fish habitat. Kimbell I, 2008 WL 4186913, at *1; FS RP 29452. NMFS explained in the 2007–2011 BiOp that livestock grazing is likely to cause streambank damage, increased sedimentation, removal of riparian vegetation leading to increased water temperatures and greater bank instability, loss of large woody debris, overhanging banks and pools, and widening of stream channels, causing direct and long-term adverse modification of steelhead habitat throughout the MNF. FS RP 29428–29, 29452; Ex. 1

¹ These allotments are: Lower Middle Fork, Upper Middle Fork, Dixie, Hamilton/King, Fox, Long Creek, Mt. Vernon/John Day/Beech Creek, Murderers Creek, Roundtop, Seneca/Sugarloaf, Slide Creek, Camp Creek, and Deadhorse/Hanscomb/Fields Peak. FS RP 29313. Please see the Glossary, supra at vii, for the abbreviations of the allotment names used in this brief.

² Please see the Glossary, supra at viii, for the abbreviations used to identify the six disks that constitute the administrative record filed by defendants.

(Rhodes Expert Report) ¶¶ 22, 54–58; Ex. 2 (Beschta Expert Report) ¶¶ 12–15, 20, 24. By adversely modifying steelhead habitat, livestock grazing in riparian areas negatively affects steelhead survival and production in all life stages. FS RP 29452; Ex. 1 ¶¶ 54–55, 57–58; Ex. 3 (Rhodes Rebuttal Report) ¶¶ 21–37. NMFS explains that “grazing can result in a variety of negative riparian impacts. When riparian habitat is negatively affected, listed fish species are also negatively affected.” FS RP 29452.

IV. CONSULTATION AND THE TERMS OF THE 2007–2011 BIOP

The 2007 consultation regarding livestock grazing on the Malheur National Forest was the first to cover five years of proposed grazing, from 2007 through 2011, rather than an annual consultation. Kimbell I, 2008 WL 4186913, at *4. The Forest Service prepared a BA (“2007 BA”) covering 15 allotments,³ concluding that proposed grazing on these 15 allotments is likely to adversely affect steelhead and steelhead critical habitat. NRAR MNF07-026 at NMFS 785.

NMFS issued the 2007–2011 BiOp on May 23, 2007, concluding that proposed grazing on 13 allotments is not likely to jeopardize the continued existence of steelhead or result in destruction or adverse modification of steelhead critical habitat. FS RP 29307. The 2007–2011 BiOp sets three significant numeric standards that must be met to comply with the ESA. First, the ITS provides a limit for indirect take due to damage to habitat which is the same for all allotments: “[t]he maximum extent of take that may occur by the proposed action through habitat effects is a measured 20% bank alteration” on streams within the allotments. E.g. FS RP 29540.

Second, the ITS’s Terms and Conditions include an obligation to strictly comply with

³ These include the 13 allotments ultimately covered by the 2007–2011 BiOp as well as the Donaldson-Deer and Fawn Springs-Williams Allotments. NRAR MNF07-026 at NMFS 785. The MNF found that proposed grazing on six other allotments (Bear, Deardorff, Hot Springs, Rail Creek, Indian Ridge, and McClellan) was not likely to adversely affect steelhead or steelhead critical habitat. FS RP 28134.

move triggers and end-point conditions. These are set at 10% bank alteration for 10 allotments (including HKA, LCA, MTVA, SCA, UMFA, LFMA, and MCA)⁴ and at 20% bank alteration for the others. FS RP 29554. The ITS requires that permittees “must fully comply with conservation measures described as part of the proposed action and the following terms and conditions.” FS RP 29554. Non-compliance with any Term and Condition invalidates the “safe harbor” provision of the ITS and leaves the permittee and the authorizing agency liable for take under ESA § 9. 50 C.F.R. § 402.14(i)(1)(iv).

Third, the 2007–2011 BiOp specifies that the MNF must reinitiate formal consultation if the 20% bank alteration take limit is exceeded or if any Term or Condition of the ITS (including any move trigger and end-point condition) is violated. FS RP 29530. Reinitiation of formal consultation is required if “the amount or extent of taking specified in the [ITS] is exceeded” or “[i]f new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered.” 50 C.F.R. §§ 402.16(a)-(b).

V. GRAZING STANDARDS UNDER THE FOREST PLAN & PACFISH.

The MNF adopted its Forest Plan in 1990. See FS RP 1461. The Plan’s Rangeland Standards require the MNF to conduct grazing management “to promote objectives of [MIS]” and “[m]anage allotments to ensure that resource values other than forage are maintained at or above minimum requirements.” Ex. 4 at IV-53.⁵ In addition, the Forest Plan set a goal of providing “preferential consideration to anadromous fish” in areas suitable for grazing. Id. at IV-

⁴ The reasons for setting the strict, 10% bank alteration end-point condition on 10 of the 13 allotments in the 2007–2011 BiOp included that “past noncompliance, riparian vegetation in early seral status, upward trend is not apparent, and recent riparian impacts associated with trespass have occurred” on those allotments. FS RP 29554–55.

⁵ The administrative record incorporates the Forest Plan by reference. See FS Revised Index Policy at 2. Exhibit 4 includes only pages of the Forest Plan cited in this brief.

62. To meet this goal, the MNF must provide necessary habitat to “maintain or increase management indicator species with special emphasis on steelhead” and improve the recovery rate in riparian areas “by eliminating or reducing the impacts of management activities that may slow riparian recovery.” *Id.* at IV-63–65. Despite these requirements, habitat degradation continued on the MNF, and in 1995 the Forest Plan was amended by an aquatic conservation strategy known as “PACFISH” to protect anadromous fish species. PACFISH was “designed to halt the degradation and begin the restoration of anadromous fish habitat and see that future opportunities are not foregone by management decisions.” FS RP 2435.⁶ Where Forest Plan requirements to protect anadromous fish are stricter than those in PACFISH, the Forest Plan requirements remain intact. FS RP 2445.

PACFISH adopted several “riparian goals” that are characteristics of healthy fish habitat. They include maintenance and restoration of “stream channel integrity, channel processes, and the sediment regime ... under which the riparian and aquatic ecosystems developed,” “riparian vegetation to ... help achieve rates of surface erosion, bank erosion, and channel migration characteristic of those under which the communities developed,” and “riparian and aquatic habitats necessary to foster the unique genetic fish stocks.” FS RP 2527–28. To achieve the goal of healthy fish habitat, PACFISH set RMOs⁷ “describing good habitat for anadromous fish” and

⁶Although PACFISH was designed as an interim, 18-month strategy while long-term regional strategies were developed, the agencies have indefinitely extended it, and the Forest Service’s 2007 BA recognizes that its grazing management decisions must comply with PACFISH. NRAR MNF07-026 at NMFS 815–17.

⁷ RMOs include pool frequency, water temperature (no measurable increase in maximum water temperature, which must be below 64° F in migration and rearing habitats and below 60° F in spawning habitats), bank stability (more than 80% stable), lower bank angle (more than 75% of banks must have an angle of less than 90 degrees (i.e., be overhanging)), and width/depth ratio (the mean wetted width divided by mean depth must be under 10, meaning streams cannot be too wide and shallow). FS RP 2530.

to “provide criteria against which attainment or progress toward attainment of the riparian goals is measured.” FS RP 2528; see also Kimbell I at *3 (describing PACFISH requirements). If the RMOs are not measured, there is no way to know if the goals are being met.

To halt degradation and begin restoration of fish habitat, PACFISH grazing standard GM-1 requires that the MNF “[m]odify grazing practices (e.g. accessibility of riparian areas to livestock, length of grazing season, stocking levels, timing of grazing, etc.) that retard or prevent attainment of [RMOs] or are likely to adversely affect listed anadromous fish” and “[s]uspend grazing if adjusting practices is not effective in meeting [RMOs] or avoiding adverse effects on listed anadromous fish.” FS RP 2459. A “near natural rate of recovery” of degraded riparian features is synonymous with PACFISH’s obligation to not “retard” or “measurably slow” attainment of RMOs. FS RP 2819. In other words, the “do not retard” standard prohibits status quo grazing practices where those practices are degrading, or merely maintaining degraded, ecological conditions. Instead, the Forest Service has an affirmative duty to evaluate RMO trends over time and move toward attainment of RMOs and riparian recovery.

VI. FOREST SERVICE GRAZING MANAGEMENT AND 2007 & 2008 RESULTS.

The MNF manages livestock grazing by issuing term permits and other instruments authorizing grazing on public lands. See Or. Natural Desert Ass’n v. U.S. Forest Serv., 465 F.3d 977, 979–81 (9th Cir. 2006). Until 2006, the MNF issued annual operating instructions (“AOIs”) directing stocking levels, rotation, and other season-specific conditions for grazing. Id. at 980–81, 984–90. In March 2007, the Forest Service issued a directive discontinuing the use of AOIs on national forests in Oregon and Washington and instructing the forests to use official correspondence to instruct permittees on annual grazing actions. FS RP 28739.

In 2007, 2008 and 2009, the MNF made annual decisions on most of the allotments

regarding season-specific conditions for grazing (including allowable use, rotations, turn-out date restrictions, and specific monitoring or management requirements), usually memorializing these in annual instruction letters or annual authorized use request approvals.⁸ Ex. 5 at 2 (listing annual authorizations); see, e.g., FS S-SC 156; FS S-LMF 61; see also Ex. 6 (sample 2009 instructions and authorizations, which also were attached in Attachment 9 to Shinn Declaration (Dkt # 239) and described in the Second Shinn Declaration (Dkt # 266) ¶¶ 3–5). Also in 2007 and 2008, the MNF issued grazing permit modifications in a not-fully-successful attempt to conform grazing permits to the terms of the 2007–2011 BiOp. Ex. 5 at 1 (listing grazing permit modifications).

In 2007, and again in 2008, livestock grazing on the MNF caused extensive damage to riparian areas designated as steelhead critical habitat, despite the purported controls imposed under the 2007–2011 BiOp. See, e.g., FS RP 31175, 31179–81 (2007 End of Year (“EOY”) Report); FS SP 380, 383, 385–86, 392–93, 405, 408 (2008 EOY Report); Christie Decl. (Dkt # 37) ¶¶ 19, 22; FS S-LC 46–88, 91–101, 108–23; FS S-SC 17–92; FS S-UMF 13–47; FS S-HK 7–18. This damage, described in detail below, led the MNF to reinstate formal consultation with respect to six of the allotments covered by the 2007–2011 BiOp on May 7, 2009. FS SP 1139.

ARGUMENT

The federal agencies charged with protecting threatened steelhead from adverse grazing impacts have not complied with the ESA and NFMA. In issuing the 2007–2011 BiOp, NMFS failed to insure against jeopardy to steelhead and adverse modification to steelhead critical

⁸ The decisions reflected in the annual instructions and authorizations are justiciable final agency actions under APA § 706(2)(A) because they represent the consummation of the agency’s decisionmaking process for the level of grazing, rotation, and terms and conditions applicable for that year and have legal consequences for the permittees. See Or. Natural Desert Ass’n, 465 F.3d at 983–87 (holding that AOIs are final agency action). For example, the decision and letter notifying the LCA permittees that they could not graze in 2009 represents a final decision and has a “direct and immediate ... effect on the day-to-day business” of the LCA permittees. Id. at 987 (citations omitted); see FS S-LC 327 (letter advising permittee that LCA would be rested).

habitat, in violation of the ESA, by improperly relying on mitigation measures not certain to occur and—in the absence of any data regarding whether RMOs are being achieved—making no rational connection between the degraded steelhead habitat on the MNF and the BiOp’s no jeopardy and no adverse modification conclusions. The MNF first and foremost violated its organic statute, NFMA, by not satisfying its obligations under the Forest Plan to consider whether RMOs were being met and to evaluate MIS data when it made its grazing decisions during 2007, 2008 and 2009. The MNF’s grazing decisions therefore also violate that agency’s independent duty under the ESA to insure against jeopardy to steelhead and adverse habitat modification. In carrying out those decisions and managing grazing during 2007 and 2008, the MNF further violated the ESA by allowing adverse effects to accumulate and allowing unlawful take of steelhead. Finally, the agencies have failed to reinitiate formal consultation properly by reinitiating consultation on only 6 of the 13 allotments covered by the 2007–2011 BiOp.

I. STANDARD OF REVIEW

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). The substantive law governing a claim determines whether a fact is material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The APA sets forth standards governing judicial review of decisions made by federal administrative agencies. See Dickinson v. Zurko, 527 U.S. 150, 152 (1999); Mtn. Rhythm Res. v. FERC, 302 F.3d 958, 963 (9th Cir. 2002). Pursuant to the APA, this Court shall hold unlawful agency actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in

accordance with law.” 5 U.S.C. § 706(2)(A). The reviewing court must determine whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378 (1989). While the scope of review under APA § 706(2)(A) is narrow, an agency must articulate a rational connection between the facts found and the conclusions made. Marsh, 490 U.S. at 378 (court’s inquiry must be “searching and careful”); N.W. Coalition for Alternatives to Pesticides v. EPA, 544 F.3d 1043, 1052 n.7 (9th Cir. 2008) (“where the agency’s reasoning is irrational, unclear, or not supported by the data it purports to interpret, we must disapprove the agency’s action”) (quoting Ctr. for Auto Safety v. Peck, 751 F.2d 1336, 1373 (D.C. Cir. 1985) (Wright, J., dissenting)). A decision is arbitrary and capricious if the agency “has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision 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.” Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). An agency’s decision can be upheld only on the basis of the reasoning found in that decision. Anaheim Mem’l Hosp. v. Shalala, 130 F.3d 845, 849 (9th Cir. 1997).

II. THE 2007-2011 BIOP VIOLATES THE ENDANGERED SPECIES ACT.

Under ESA § 7(a)(2), NMFS must insure that the grazing will not “jeopardize the continued existence of” steelhead or “result in the destruction or adverse modification” of designated steelhead critical habitat. 16 U.S.C. § 1536(a)(2). In the 2007–2011 BiOp, NMFS concludes that, despite the certainty of adverse effects on steelhead, the proposed grazing is not likely to result in jeopardy to MCR steelhead and not likely to destroy or adversely modify their critical habitat. NMFS asserts that “[t]he proposed management actions, coupled with monitoring

and planned cattle movements will control the level of MCR steelhead and habitat disturbance so that these adverse effects will not diminish or prevent steelhead survival and recovery, or reduce the conservation value of critical habitat.” FS RP 29529.

In 2007, this Court invalidated NMFS’s BiOps for the 2006 grazing season, finding their conclusions arbitrary and capricious for failing adequately to consider grazing impacts on steelhead critical habitat and reliance on mitigation measures that were not reasonably certain to occur. Lohn, 485 F. Supp. 2d at 1198–1202. As in the 2006 BiOps, NMFS again unreasonably relies on MNF’s assurances, despite there being a “history of even some noncompliance with grazing management standards, in combination with vague statements about what, if any administrative corrective action will be taken against noncompliant permittees.” Lohn, 485 F. Supp. 2d at 1202. NMFS’s conclusion in the 2007–2011 BiOp is arbitrary and capricious because it relies entirely on the efficacy of the MNF’s grazing management program, a set of mitigation measures that have not succeeded in the past and which are not reasonably certain to occur in the future. In practice, the management program failed miserably in 2007 and 2008 to meet the 2007–2011 BiOp standards, leading to partial reinitiation of formal consultation, but the unlawfulness of relying on a wholly discretionary, and badly misrepresented, management and monitoring strategy was evident at the time of NMFS’s decision.

A. The Mitigation Measures on Which NMFS Relies are not Reasonably Certain to Occur.

Where an agency relies on mitigation measures for no jeopardy and no adverse modification conclusions, those measures 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.” Ctr. for Biol. Diversity v. Rumsfeld,

198 F. Supp. 2d 1139, 1152 (D. Ariz. 2002); see also Lohn, 485 F. Supp. 2d at 1201 (a BiOp must demonstrate that “swift and necessary actions will be taken when violations are found” to insure against jeopardy and adverse habitat modification). A mere expression of intent to implement mitigation measures is inadequate “absent specific and binding plans” for effectuating that intent. Nat’l Wildlife Fed’n v. NMFS, 524 F.3d 917, 936 (9th Cir. 2008).

In other words, even if NMFS sincerely believes that an action agency is “committed” to carrying out a policy, the ESA requires more: the adoption of measures that actually will mitigate harm to fish. The Ninth Circuit made this clear in invalidating a BiOp in part because NMFS relied on promises of future construction of fish passage on the Columbia River dams that lacked “solid guarantees that they will actually occur.” Id. at 935. The Court of Appeals emphasized that not “even a sincere general commitment to future improvements may be included in the proposed action in order to offset its certain immediate negative effects, *absent specific and binding plans.*” Id. at 935–36 (emphasis added); see also Natural Res. Defense Council v. Kempthorne. 506 F. Supp. 2d 322, 350-57 (E.D. Cal. 2007) (invalidating adaptive management plan that contained “no quantified objectives or required mitigation measures” and failed to provide a reasonable certainty that necessary mitigation measures would be implemented or admitted adverse impacts mitigated); Nat’l Wildlife Fed’n v. NMFS, 254 F. Supp. 2d 1196, 1212–13 (D. Or. 2003) (remanding a Columbia River dams BiOp that relied on off-site mitigation that was not reasonably certain to occur).

i. The 2007–2011 BiOp does not show that actions necessary to avoid jeopardy or adverse habitat modification are certain to occur.

NMFS’s 2007–2011 BiOp recites that “the MNF has full authority to ensure compliance with allotment conservation measures” and that the Forest Service “will hold permittees accountable for compliance with the requirements of their grazing permits and annual

instructions,” apparently expecting that the Forest Service would continue its practice of issuing AOIs. FS RP 29318, 29427. However, the 2007–2011 BiOp ultimately recognizes that the Forest Service has a “range of remedial and disciplinary actions that *may* be taken,” and that “at a minimum” the Forest Service “will document” any non-compliance, “discuss it with the permittee,” and “develop and implement a strategy for the particular unit to ensure move trigger compliance *in the future*.” FS RP 29318 (emphasis added); see also FS RP 29530 (2007–2011 BiOp describing that “[*i*n the long term (years to decades) every critical habitat [primary constituent element] is expected to improve since grazing is being implemented with closely monitored move triggers that will continue allowing riparian vegetation and stream channels to recover from historic degradation” (emphasis added)).

A strategy that leaves protection of a threatened species to an indefinite future is impermissible under the ESA. Pac. Coast Fed’n of Fishermen’s Ass’ns v. U.S. Bureau of Recl., 426 F.3d 1082, 1092–95 (9th Cir. 2005) (holding that a phased approach to improving water flows for fish which provided adequate flows only during the last two years of a ten-year project did not adequately insure against jeopardy to a short-life-cycle species); Lohn, 485 F. Supp. 2d at 1200–01 (holding that NMFS failed to evaluate effects of short-term habitat degradation on steelhead survival and recovery). A vague assurance that jeopardy will be avoided in the future, in reliance on unsubstantiated assumptions that the Forest Service’s grazing management will improve, fails adequately to protect steelhead in the interim. Pac. Coast Fed’n, 426 F.3d at 1094 (noting that agency may not “provide only partial protection for a species for several generations without any analysis of how doing so will affect the species”). The 2007–2011 BiOp exactly replicates the failure this Court identified in the 2006 BiOp: “NMFS has failed to evaluate whether short-term habitat degradation caused each grazing season will reduce the steelhead’s

ability to survive and recover.” Lohn, 485 F. Supp. 2d at 1200. In the current BiOp, NMFS once again has not evaluated grazing’s effects in the context of the steelhead’s short life cycle.

The BiOp’s emphasis on compliance at some unspecified point in the future echoes the MNF’s 2007 BA, which notes that grazing planned for the 5-year period from 2007 to 2011 will simply “maintain” currently-degraded environmental baseline indicators (including temperature, sediment, and streambank condition), none of which are functioning correctly in the rivers of the MNF. NRAR MNF07-026 at NMFS 847, 850, 851. The 2007 BA acknowledges that grazing may be authorized only if it ensures a “near natural rate of recovery” which does not “retard or prevent attainment of Riparian Management Objectives.” Id. at NMFS 815–16. However, the 2007 BA admits that there will not be recovery of riparian habitat within the five years covered by the 2007–2011 BiOp, noting that “[s]ince the proposed grazing activities tend to influence portions of watersheds *and restoration will not occur over the life of this consultation* it is necessary to check the maintain box.” Id. at NMFS 847 (emphasis added).

NMFS’s reliance on the MNF’s enforcement authority also is misplaced because the MNF’s 2007 BA makes clear that its enforcement of standards violations is wholly discretionary. The Forest Service attempts to create an appearance of strict enforcement in the 2007 BA by stating that “[f]ailure to meet move trigger[s]/ move indicators . . . will be rectified through firm, fair administration of the grazing permit.” NRAR MNF07-026 at NMFS 819. However, the MNF concedes that the failure to meet grazing standards merely will lead to a “documented discussion with the permittee(s) and a strategy will be developed.” Id. A stern talking-to is hardly a dire consequence for violation of the ESA. Only if indicators are missed “repeatedly” are documented changes in management required, and even these changes include a variety of ineffectual consequences, such as requiring more monitoring or “bolstered emphasis on riding.”

Id. There is no plan describing how, when, or what specific actions will be taken to stop violations, even chronic violations in riparian areas:

The point is, a documented response will be developed to ensure that standards and end-point indicators are met. These actions will be well documented and their effectiveness will be closely monitored. Repeated failures to meet standards will result in an aggressive and well documented effort to ensure these standards are met. *If necessary*, the Ranger *may* determine that administrative action (to the permit) is warranted.

Id. at NMFS 820 (emphasis added). The 2007 BA includes the conclusory statement that some hypothetical response will “ensure” compliance—the MNF nowhere explains *how*, and includes no specific and binding plans to achieve that insurance. Id.

At best, the 2007–2011 BiOp and 2007 BA describe a process that the Forest Service will follow in responding to standards violations, but include no substantive, specific or binding plan to provide a reasonable certainty that violations will be addressed and prevented. This Court in Lohn rejected the previous BiOp for the same reasons, and NMFS has addressed this Court’s concerns in only a conclusory way. 485 F. Supp. 2d at 1201–02. The set of grazing management measures endorsed by NMFS suffers from the same defects that the court in Natural Resources Defense Council v. Kempthorne found fatal to a management protocol meant to respond to threats to endangered delta smelt from the operation of water diversion projects in central California. 506 F. Supp. 2d at 350–57. Like the process invalidated in that case, the proposed grazing program “does not contain defined action criteria, but instead leaves any response wholly to the discretion of the [action agency].” Id. at 341. The Forest Service’s grazing management program and the associated conservation measures “provide[] no operating criteria or action schedule, specifying when mitigation actions must be taken. It is not possible to predict what, how and when [the program’s management] measures will be implemented.” Id. Simply because an agency has authority to take action does not mean that it is “reasonably certain” that it will do

so, as required by the ESA—particularly here, where the Forest Service has failed to do so in the past. Nat'l Wildlife Fed'n, 524 F.3d at 936 & n.17 (noting that even a sincere commitment to undertake an action within the agency's authority does not satisfy requirement that agency guarantee the action will occur).

Despite the MNF's promises, they are wholly discretionary to the agency, and there is no guarantee that any effective action will be taken, no deadlines, and no enforceable obligations sure to be imposed on permittees for the protection of steelhead when violations occur. This is inadequate to insure against jeopardy or adverse habitat modification under the ESA.

Kempthorne, 506 F. Supp. 2d at 356. In short, “[t]he BiOp asks the court to trust the agency to protect the species and its habitat. Notwithstanding any required deference to expertise, the ESA requires more.” Ctr. for Biol. Diversity, 198 F. Supp. 2d at 1152.

ii. The 2007–2011 BiOp improperly relies on third-party actions which are unlikely to occur.

NMFS's 2007–2011 BiOp acknowledges that implementation of the conservation measures depends on third-party actions by the permittees. See, e.g., FS RP 29318 (“Permittees are responsible for moving cattle out of a unit by the time move triggers are reached. Permittees are also responsible to ensure that end-point indicators are met.”). Historically, these have been less than certain to occur. See Lohn, 485 F. Supp. 2d at 1201 (noting that “[p]ast compliance with grazing management standards is a documented problem”). In addition, NMFS failed to evaluate whether permittees would actually undertake the promised monitoring activities. Shortly after NMFS issued the 2007–2011 BiOp, the MNF aquatic biologist indicated in an email that “[t]wo of my best permittees have dropped out of the Permittee Monitoring program and I'm sure more will drop out too due to Spencer's [Hovekamp, of NMFS] comments about requiring them to report all of their monitoring to him and his threat that they would [lose] their

protection under the incidental take statement if they failed to do it.” FS RP 29594; see also FS RP 29745 (prediction by MNF biologist that *all* permittees would drop out of monitoring program because they were expected to comply with bank alteration standard).

This underscores that NMFS’s reliance on third-party monitoring and compliance by permittees was arbitrary and capricious because the likely participation of permittees in monitoring was, at best, speculative. NMFS failed to consider the likelihood that permittees would refuse to fulfill their monitoring obligations, and articulated no rational basis for expecting that the permittees would discharge their monitoring obligations, rendering reliance on third-party actions arbitrary and capricious. N.W. Envtl. Advocates v. EPA, 268 F. Supp. 2d 1255, 1273 (D. Or. 2003) (because the biological opinion “contains no assurances that the state-based commitments on which it rested its no-jeopardy finding were likely to occur . . . NMFS has failed to demonstrate a rational connection between the facts before it and the no jeopardy finding”); Nat’l Wildlife Fed’n v. NMFS, No. CV 01-6940-RE, 2004 WL 1698050 (D. Or. July 29, 2004) (rejecting as arbitrary and capricious an assumption that water would be released at a uniform rate over 21 days for the protection of salmon populations because “there was no rational basis to conclude that the water would be released in such a manner”); see also State Farm, 463 U.S. at 43 (agency action is unlawful if it fails to consider an important factor).

NMFS’s reliance on a management strategy and third-party monitoring promises that have failed in the past is unreasonable. Nat’l Wildlife Fed’n, 254 F. Supp. 2d at 1213 (agency cannot rely on third-party mitigation measures that are not reasonably certain to occur to avoid a jeopardy finding). For these reasons, the 2007–2011 BiOp’s promise that the MNF “will” enforce the grazing standards is an empty one, and NMFS’s decision to rely on the MNF’s grazing management program in concluding no jeopardy or adverse modification of steelhead

critical habitat is arbitrary and capricious.

B. NMFS Failed to Consider Whether the MNF Monitoring Program it Relied on Could and Would be Implemented.

The 2007–2011 BiOp is arbitrary and capricious for the additional reason that NMFS failed to consider another important aspect of the problem, namely whether the MNF was capable of conducting the monitoring and mitigation measures on which NMFS relied for the “no jeopardy” conclusion. The administrative record shows that at the time that NMFS issued the 2007–2011 BiOp, the MNF lacked the ability to carry out the mitigation measures that its aquatic biologist proposed and which NMFS uncritically endorsed. This provides an additional reason why the MNF’s proposed mitigation was not certain to occur.

When the 2007–2011 BiOp was issued, the MNF was incapable of implementing the measures that it promised NMFS would avoid jeopardy to steelhead. The Forest range staff reviewed the 2007–2011 BiOp on May 30, 2007 and expressed candidly that the Forest had no hope of accomplishing most of the mitigation measures laid out in the BiOp. FS RP 29566–68. Referring to the ITS’s Terms and Conditions related to extensive annual monitoring and formal training for permittees during 2007, and to a year-end report that would contain extensive quantitative data regarding the implementation monitoring conducted that year, FS RP 29555–56, the range staff concluded that the ambitious monitoring requirements NMFS relied on were “[u]nrealistic with current funding, personnel and priorities.” FS RP 29568.

Observing a promise in the 2007–2011 BiOp that “MNF will establish photo points or pace transects in each unit by 2008,” FS RP 29436, the range staff frankly indicated that “MNF will not be able to establish photo points and on transects in each unit by 2008.” FS RP 29567. Likewise, on another allotment where NMFS required that “[p]hoto-points or pace transects will be added to the allotment no later than the 2008 field season,” FS RP 29334, the staff

complained that the Forest Service “[w]ill not be able to accomplish this by 2008—not in every unit.” FS RP 29566. These frank admissions by the MNF staff charged with carrying out the grazing program underscore that there were no “specific and binding plans” and no “solid guarantees that [the proposed mitigation] will actually occur” in the MNF’s 2007–2011 grazing program. Nat’l Wildlife Fed’n, 524 F.3d at 935.

It is clear that Forest Service staff were not even aware of the existence of the “monitoring program” in which NMFS expressed such confidence, demonstrating that the program was little more than a chimera offered by the MNF to persuade NMFS to issue a “no jeopardy” finding. The BiOp discloses that NMFS’s “verification” of the monitoring program was based on a single telephone call on April 26, 2007 with the MNF aquatic biologist. FS RP 29428 & n.14. In the BiOp, NMFS boldly declared that

[m]ove trigger, implementation, and effectiveness monitoring *will* ensure that riparian conditions continue to improve. Move triggers *will* be monitored by permittees and MNF staff at DMAs and representative reaches to determine when cattle need to be moved. Implementation monitoring *will* consist of monitoring end-point indicators at DMAs and representative reaches to ensure that the grazing strategy is appropriate to meet end-point indicators. Every allotment *will* have either a DMA or a representative reach that will be monitored multiple times per season.

FS RP 29428 (emphasis added).

Citing this extensive discussion of the “MNF grazing monitoring program” in the 2007–2011 BiOp, one MNF range staff asked “[w]here is the MNF grazing monitoring program Chance describes in detail in conversation as quoted in the BO[?] It states every allotment will have either a DMA or a representative reach that will be monitored multiple times a season. Not practi[cal]—*I have been here for 1 year and no one has shared this monitoring program with me*

yet.” FS RP 29567 (emphasis added).⁹ Although the MNF promised an elaborate grazing management strategy in that single phone call, the Forest, in reality, had not even shared its monitoring program—if it actually had one—with the very staff charged with implementing it.

The MNF’s frank acknowledgment of inadequate capacity to implement the terms of the 2007–2011 BiOp, and NMFS’s failure to consider this important factor in issuing its “no jeopardy” and “no adverse modification” decisions, render the 2007–2011 BiOp arbitrary and capricious. See State Farm, 436 U.S. at 43 (an agency action is arbitrary and capricious if the agency has “entirely failed to consider an important aspect of the problem”). These process failures and candid admissions by agency staff further demonstrate that, at the time the 2007–2011 BiOp issued, it was arbitrary and capricious for NMFS to rely on an unrealistic monitoring strategy where “mitigation is not ‘reasonably certain’ to occur.” Lohn, 485 F. Supp. 2d at 1203; see also Nat’l Wildlife Fed’n, 524 F.3d at 935–36 (rejecting reliance on mitigation in the absence of guarantees that mitigation would occur); Kempthorne, 506 F. Supp. 2d at 350–57 (invalidating adaptive management plan that failed to provide a reasonable certainty that necessary mitigation measures would be implemented or admitted adverse impacts mitigated).

Moreover, since the 2007–2011 BiOp was issued, the Forest Service itself has declared that it will not enforce the results of its annual monitoring process. In June 2007, after the Forest Service and NMFS finished the consultation process that resulted in the 2007–2011 BiOp, the Forest Service issued a monitoring directive *expressly prohibiting* use of annual monitoring as a basis for taking administrative actions against permittees. FS RP 29584–85. The Regional

⁹ Beyond misrepresenting the robustness of the monitoring program to NMFS, the MNF’s aquatic biologist also frankly acknowledged that the MNF did not take seriously its promise to hold permittees strictly to the standards set for protection of steelhead, commenting in another e-mail that “[t]his whole notion of monitoring bank alteration is kind of smoke and mirrors anyway.” FS RP 29243.

Forester cited the Region’s standing directive on PACFISH/INFISH implementation requirements, underlining that the directive “explains that *[stubble height] and other annual monitoring indicators should not be used as decisionmaking tools for administrative actions on grazing permits.*” FS RP 29585 (emphasis added). Even as NMFS was relying on the MNF’s vague promise of administrative action against permittees in the event of repeated violations of standards, the Regional Forester was interpreting an existing directive to *prohibit* use of stubble height violations, or other violations identified in the annual monitoring, as the basis for administrative action against the permittees. In any event, the enforcement of permit conditions, upon which the grazing management strategy depends in its entirety, is a decision ultimately “committed to an agency’s absolute discretion.” Heckler v. Chaney, 470 U.S. 821, 831 (1985). In short, NMFS failed to consider the MNF’s (in)ability to carry through on the monitoring and enforcement program, rendering the BiOp arbitrary and capricious.

C. The 2007–2011 BiOp Fails to Provide a Rational Connection Between the Degraded Environmental Baseline, the Habitat Effects of the Grazing, and the Conclusion that Grazing Will Not Result in Adverse Habitat Modification.

It also is highly uncertain whether the mitigation measures relied upon in the 2007–2011 BiOp would actually achieve their purpose—compliance with PACFISH and the recovery of steelhead critical habitat—even if they were met. When a BiOp relies on compliance an aquatic conservation strategy for its no jeopardy or no adverse critical habitat modification finding, NMFS must analyze the project’s consistency with the strategy. Pac. Coast Fed’n of Fishermen’s Ass’ns v. U.S. Bureau of Recl., 265 F.3d 1028, 1034–37 (9th Cir. 2001) (rejecting biological opinion that failed accurately to assess the likelihood of compliance with an Aquatic Conservation Strategy (“ACS”), NMFS’s yardstick for jeopardy); Cascadia Wildlands Project v.

FWS, 219 F. Supp. 2d 1142, 1149 (D. Or. 2002) (finding “serious questions” as to whether the FWS acted arbitrarily and capriciously in failing to analyze the project for ACS consistency).

i. The environmental baseline in the MNF is degraded.

NMFS must evaluate the effects and cumulative effects of the proposed action and add these effects to the existing environmental baseline to determine whether, in the aggregate, all of the effects are likely to cause adverse modification to the designated critical habitat. 50 C.F.R. § 402.14(g); § 402.02 (definition of “effects of the action” that must be added to the environmental baseline). The 2007–2011 BiOp and 2007 BA describe the poor condition of steelhead critical habitat. FS RP 29380–83; NRAR MNF07-026 at NMFS 850–53. These conditions include: migratory habitat quality has been “severely degraded” by hydroelectric dams, FS RP 29380–81; water quality impairment including elevated summer temperatures and low stream flows, affects spawning, rearing and migration, FS RP 29831; dissolved oxygen, phosphates, fecal coliform and sediment are a problem on many streams, FS RP 29832.

In addition, as described in more detail below at pp. 29–30, all indicators of healthy steelhead habitat (such as temperature, sediment, and streambank condition) in the Middle Fork John Day River, Upper John Day River, and North Fork John Day River subbasins are at least partially “Functioning at Risk” or “Functioning at Unacceptable Risk.” NRAR MNF07-026 at NMFS 850–51, 853. Strikingly, NMFS omits this information regarding steelhead habitat indicators from the 2007–2011 BiOp, even though it appears in the 2007 BA. Nevertheless, NMFS explains that “[a]n environmental baseline that does not meet the biological requirements of a listed species may increase the likelihood that adverse effects of the proposed action will result in jeopardy to a listed species or in destruction or adverse modification of a designated critical habitat.” FS RP 29383.

Many of these degraded characteristics of critical habitat are directly attributable to the effects of grazing. NMFS states that “[i]mproving riparian conditions was identified as the single most important action needed to address limiting factors within the NFJD River.” FS RP 29382. Important actions would include “limiting grazing impacts within riparian areas.” *Id.* NMFS and the MNF do not dispute that livestock grazing directly and indirectly harms steelhead by destroying redds, disturbing or harassing juvenile and adult steelhead, and degrading fish habitat. See Kimbell I, 2008 WL 4186913, at *1. NMFS acknowledges that grazing is likely to cause streambank damage, increased sedimentation, removal of riparian vegetation that leads to increased water temperatures and greater bank instability, the loss of large woody debris, overhanging banks and pools, and the widening of stream channels, leading to direct and long-term adverse modification of steelhead habitat throughout the MNF. FS RP 29428–29.

ii. NMFS has not evaluated whether RMOs are being achieved nor whether the proposed grazing would comply with PACFISH.

NMFS must evaluate whether the degraded habitat conditions, combined with known detrimental effects of proposed grazing, is consistent with satisfying PACFISH and the obligation that RMOs be attained at a near natural rate of recovery. However, the 2007–2011 BiOp does not contain an evaluation of whether or not the proposed grazing would comply with the PACFISH standards. A fundamental problem with the MNF’s compliance with PACFISH is that the MNF provided no current effectiveness¹⁰ monitoring data to NMFS for preparing the

¹⁰ The MNF explains in the 2007 BA that “[i]mplementation monitoring is utilized to measure and document success at meeting annual criteria for components such as stubble height, percent utilization, bank alteration, and woody shrub utilization and condition.” NRAR MNF07-026 at NMFS 1156. By contrast, “[e]ffectiveness monitoring provides a quantifiable evaluation of the effectiveness of different management activities at improving riparian conditions and in meeting [RMOs],” because “*short-term monitoring alone [implementation monitoring] does not provide the data needed to determine condition and trend.*” *Id.* (emphasis added).

2006 Biological Opinion or the 2007–2011 BiOp. See Lohn, 485 F. Supp. at 1201 n.12 (concluding that “[t]he fact that the Forest Service provided NMFS with no evidence that ‘near natural rate of recovery’ is actually occurring, because the Forest Service provides very little in the way of effectiveness monitoring, is also troubling”). The 2007–2011 BiOp describes only one set of RMO monitoring data, from 2005, on a single allotment. FS RP 29395–96. Neither the 2007–2011 BiOp nor the 2007 BA contain any RMO data from 2006—showing that NMFS again lacked the necessary effectiveness monitoring data to evaluate whether a near natural rate of recovery is occurring. Indeed, the 2007–2011 BiOp does not discuss near natural rate of recovery at all. A single mention of “near natural rates of recovery” in 2007–2011 BiOp does not mention RMO monitoring data or any other objective data. FS RP 29422. NMFS therefore had no data to evaluate RMO trends over time and whether RMOs were being attained.

Even though the MNF acknowledges in the 2007 BA that it “is expected to meet certain riparian conditions that are the components of the [RMOs]) and to meet the ‘near-natural rate of recovery’ (NNRR),” NRAR MNF07-026 at NMFS 815, NMFS fails to consider whether the proposed grazing for 2007 through 2011 would actually do this. A NMFS biologist, commenting on an early draft of part of the 2007 BA in December 2006, asked “what does a near natural rate of recovery mean? After two years I still don’t understand.” NRAR MNF07-148 at NMFS 8287. The NMFS biologist then suggested “that we just delete all references to that term, unless we can specifically define and measure what that means.” Id. Later in the comments, he reiterated that “I again object to the use of NNRR,” explaining that he saw “nothing concrete in this allotment description that would lead me to the conclusion that this proposal will move toward attainment of RMOs.” Id. at NMFS 8287–88. Similarly, he commented that “[i]t is not sufficient to say that 4” stubble height on the greenline will meet NNRR without any monitoring or

information/observations to suggest this is true.” Id. at 8288.

Presciently, the NMFS biologist stressed that “[t]he MNF needs to identify how each allotment proposed action is designed to meet Forest Plan and PACFISH/INFISH standards and assure that conditions will improve under this management proposal.” Id. (all emphases in original). Ultimately, NMFS did not address RMO achievement or near natural rate of recovery in the 2007–2011 BiOp. Rather than evaluate whether the proposed grazing would, in fact, comply with PACFISH and insure that stream conditions were moving towards attainment of RMOs at a near natural rate of recovery, NMFS drops all discussion of these issues from the BiOp. Instead, the BiOp simply asserts—without explaining “how” or “why” and without any support—that it is “confident that the proposed action will allow long-term improvement in habitat conditions on each allotment” and “that the proposed grazing strategy will allow for long-term improvement in habitat conditions given the existing monitoring data which reflects an improving trend.” FS RP 29428. NMFS lacks the requisite RMO effectiveness monitoring data to support that statement: there is no evidence regarding RMO trends in the administrative record. NMFS’s unsubstantiated assertion falls short of the ESA duty to “insure” that the actions do not jeopardize the species. 16 U.S.C. § 1536(a)(2).

NMFS admits in the 2007–2011 BiOp that the proposed grazing will result in adverse effects on designated steelhead critical habitat. However, NMFS completely fails to explain why the adverse effects do not result in destruction or adverse modification of critical habitat. As a result, NMFS’s conclusion has no rational connection to the facts found, and is arbitrary and capricious. See State Farm, 463 U.S. at 52 (“The agency must explain the evidence which is available, and must offer a ‘rational connection between the facts found and the choice made.’”). The 2007–2011 BiOp provides no meaningful or rational explanation for how the admitted

adverse effects to already-degraded critical habitat will not result in “destruction or adverse modification” of critical habitat, particularly when viewed through the lens of the recovery goal of that critical habitat as required by PACFISH. As a result, the 2007–2011 BiOp is arbitrary and capricious. Ctr. for Biol. Diversity, 422 F. Supp. 2d at 1136 (a “no adverse modification conclusion is flawed” when “the service fails to provide a meaningful or rational explanation for its conclusion . . . [when] use will result in ‘continued and expanded habitat degradation’ as well as injury and death to individual [species].); Nat’l Wildlife Fed’n v. NMFS, 235 F. Supp. 2d 1143, 1160 (W.D. Wash. 2002) (failure to explain how admitted adverse impact of dredging on critical habitat would not result in adversely modifying the habitat is arbitrary and capricious).

III. THE FOREST SERVICE VIOLATED NFMA BY AUTHORIZING GRAZING ON SEVEN ALLOTMENTS THAT IS INCONSISTENT WITH THE FOREST PLAN AND PACFISH AQUATIC CONSERVATION STRATEGY.

A similar failure to evaluate obligatory data infects the MNF’s compliance with its organic statute and the terms of its Forest Plan. Recent MNF grazing decisions on seven allotments have violated the NFMA consistency requirement by authorizing grazing that prevented attainment of the applicable RMOs without evaluating data on RMOs and management indicator species (“MIS”) as required in the MNF Forest Plan.¹¹ The MNF has an obligation to allow livestock grazing *only* if stream conditions are *improving* and steelhead habitat is moving towards attainment of the RMOs at a near natural rate of recovery. See supra at 9. Specifically, “[g]razing should be *suspended* if adjusting practices is ineffective in meeting the RMOs or avoiding the adverse effects on the listed fish.” Kimbell I, 2008 WL 4186913, at *3 (citation omitted)

¹¹ The 2005 permit renewal on the BMA, the 2006 grazing agreement renewal on the MCA, and the 2007, 2008 and 2009 grazing permit modifications and annual instructions on the MCA, CCA, LCA, SCA, LMFA, and UMFA are arbitrary and capricious because the decisions were made without properly monitoring and evaluating RMOs and MIS. Third Amended Complaint (Dkt # 341) ¶¶ 107–08, 111; Fifth Amended Complaint (03-381-HA Dkt # 230) ¶¶ 46, 49.

(emphasis added). Yet 15 years after implementation of PACFISH began, grazing continues to retard attainment of RMOs in the watersheds of the MNF.

A. The Forest Service Has Violated NFMA By Authorizing Grazing Without Evaluating RMOs.

The MNF has failed to meet its affirmative and mandatory duty to move toward attaining RMOs. The continued failure to progress toward PACFISH RMOs and the concomitant continued ecological degradation throughout these allotments has been documented by the Forest Service, NMFS and ONDA. Despite the lack of progress towards achieving RMOs, the MNF failed to monitor and evaluate RMO attainment in its grazing decisions on these seven allotments. The MNF's decision to authorize grazing without evaluating RMOs is inconsistent with the requirements of Forest Plan PACFISH standard GM-1, rendering those decisions arbitrary, capricious and in violation of NFMA.

i. Baseline conditions on the MNF are degraded and grazing is further retarding and preventing attainment of RMOs.

The MNF acknowledges that current conditions are degraded and documents that grazing on the MNF is retarding and preventing attainment of RMOs. In the 2007 BA, the MNF offered NMFS a checklist summarizing (1) the baseline conditions of 24 "habitat indicators" (rated as either functioning appropriately, functioning at risk, or functioning at unacceptable risk) and (2) the effects of the proposed grazing on each indicator (rated as either restore, maintain, or degrade). NRAR MNF07-026 at NMFS 850–51. These are the baseline conditions against which NMFS could evaluate the proposed grazing on the 13 allotments in the 2007–2011 BiOp. A number of these habitat indicators correspond to PACFISH RMOs, including stream temperature, streambank stability, pool frequency and width-to-depth ratio. *Id.* None of the 24 environmental indicators in these allotments' watersheds is "functioning appropriately." *Id.* In

the Upper John Day River Sub-basin (where the MCA lies), 15 indicators are “functioning at risk,” and the remainder—including water temperature, sediment, and pool frequency and quality—are “functioning at unacceptable risk.” *Id.* at NMFS 850. In the Middle Fork John Day River Sub-basin (where the remaining six allotments lie), 18 of the indicators are “functioning at risk,” while 6 are “functioning at unacceptable risk,” including water temperature and pool frequency and quality. *Id.* at NMFS 851.

More striking is that the 2007 BA concludes that the effect of the proposed 5-year grazing plan, even if it met standards, would be to “maintain” the environmental conditions in their “functioning at risk” or “functioning at unacceptable risk” condition. *Id.* at NMFS 850–51. This is despite the fact that the 2007 BA expressly recognizes that the MNF must comply with PACFISH standards requiring that “[i]nfluences of grazing must result in riparian *restoration* at a minimum of near natural rates.” *Id.* at NMFS 841 (emphasis added). The MNF has an unequivocal obligation to authorize livestock grazing *only* if it will also allow restoration of steelhead habitat. It cannot authorize grazing that will maintain a degraded condition. Kimbell I, 2008 WL 4186913, at *3. Reviewing the MNF’s analysis in the 2007 BA, NMFS explained that “some of the baseline for these areas [steelhead habitat] is very degraded. To maintain these areas in this state can be construed as adverse modification of critical habitat.” NRAR MNF07-017 at NMFS 535 (noting also that “[s]ince habitat pathways are already degraded in most parameters at the watershed scale ... and the proposed action keeps conditions static ... that could be construed as adverse modification” (ellipses in original)). The poor conditions of steelhead streams in MNF have not changed since at least 2001, when a NMFS biological opinion at that time also showed that “[n]one of the habitat indicators were rated by the MNF as properly functioning” in either sub-basin. FS RP 13929.

The MNF's 2007 BA provides no evidence that a near natural rate of recovery is occurring anywhere in the Forest. See, e.g., NRAR MNF07-026 at NMFS 850–51, 53. In commenting on draft of part of the 2007 BA, a NMFS official expressly requested that the MNF exclude all discussion of “near natural rate of recovery.” The official commented that “[s]ince habitat pathways are already degraded in most parameters at the watershed scale, I need more than it won’t degrade it. If it keeps the condition static that could be construed as adverse modification.” NRAR MNF07-148 at NMFS 8287. Continuing, the NMFS official said, “I again object to the use of NNRR. Sorry, but I see *nothing concrete in this allotment description that would lead me to the conclusion that this proposal will move toward attainment of RMOs.*” Id. at NMFS 8287–88 (emphasis added). No discussion of compliance with a near natural rate of recovery appears in the 2007 BA. As a result, nowhere in the 2007 BA or elsewhere in the administrative record for the 2007, 2008 and 2009 grazing decisions does the MNF evaluate whether RMOs are being achieved and habitat recovered at a near natural rate.

Hydrologists Dr. Robert Beschta and Jonathan Rhodes confirm that improvement and movement towards RMOs at a near natural rate of recovery is not occurring in the MNF due to livestock grazing. They also observe that none of the defendants’ and intervenors’ experts or declarants have offered evidence that the RMO recovery required by the Forest Plan is occurring. Ex. 2 ¶¶ 25–28; Ex. 1 ¶¶ 59–63; Ex. 7 (Beschta Rebuttal Report) ¶¶ 3–10, 18–23; Ex. 3 ¶¶ 6–12. Indeed, Forest Service expert Dr. Brett Roper has testified that, in some places, conditions actually have gotten *worse* over the last eight years. Discussing RMOs on one set of measured reaches in the MNF, “it appears that some stream attributes are improving, some staying the same, and some are declining.” Roper Decl. (Dkt # 235) ¶ 24 & Figure 1. The percentages of undercut banks and pools—RMOs, and essential elements of good steelhead habitat—have

gotten worse. *Id.* at Figure 1. Within the John Day Basin, there is “less pool habitat and higher angle banks,” both “significant changes in the direction opposite of what was expected,” while “there has been no significant change in residual pool depth, median particle size, bank stability, undercut depth, or percent undercut.” *Id.* ¶ 21. As a result, Roper concludes that “there has been little change in stream habitat conditions on federal lands within the John Day Basin.” *Id.* ¶ 22. In presenting year-to-year comparison photographs of monitoring locations in the MNF, Roper offered his opinion that “the sites shown have not changed considerably over time.” *Id.* ¶ 43.

Reflecting the lack of progress towards restoring steelhead habitat, NMFS imposed a requirement in the 2007–2011 BiOp that permittees comply strictly with a 10% end-point condition on six of the seven allotments discussed in this section¹² due to “past noncompliance, riparian vegetation in early seral status, upward trend is not apparent, and recent riparian impacts associated with trespass have occurred” on those allotments. FS RP 29554–55. This Court found in April 2007 that “[p]ast compliance with grazing management standards is a documented problem.” *Lohn*, 485 F. Supp. 2d at 1201; *see also id.* (citing NMFS biologist statement that part of one allotment was in “terrible shape” and noting similar statements on each of the other allotments now covered by the 2007–2011 BiOp). Pervasive noncompliance has continued: over the past four years, the MNF itself has measured bank alteration in excess of standards on the MCA, CCA, LCA, SCA, LMFA and UMFA. FS RP 31175, 31179–81 (2007 EOY Report listing exceedances on MCA and LMFA); FS SP 385–86, 405, 408 (2008 EOY Report listing exceedances on LCA, SCA, and UMFA) ; NRAR MNF07-018 at NMFS 536 (noting on CCA that “it was obvious to NMFS, MNF and BLM staff that the conditions of the permit had not been met” in 2006). The absence of progress towards achieving RMO-compliant bank stability is

¹² The BMA is not covered by the 2007–2001 BiOp.

corroborated by Christie’s documentation of extensive exceedances of the bank alteration standard on those allotments. See generally Christie Decl. (Dkt # 37); Second Christie Decl. (Dkt # 182); Third Christie Decl. (Dkt # 193). Nothing has changed since the 2001 NMFS BiOp found the environmental baseline to be functioning at risk or not properly functioning. FS RP 13929.

ii. Renewal of the BMA and MCA permits and authorization of grazing on the seven allotments in 2007, 2008 and 2009 was not consistent with the Forest Plan because the MNF failed to measure and evaluate RMOs.

When the MNF authorizes grazing, its decisions must be consistent with its Forest Plan. 16 U.S.C. § 1604(i). A failure to comply with the requirements of a Forest Plan is a violation of NFMA. Id.; Native Ecosystems Council v. U.S. Forest Serv., 418 F.3d 953, 961 (9th Cir. 2005). As NMFS has explained, “[w]ithout the benchmark provided by measurable RMOs, habitat suffers a continual erosion.” FS RP 2528. Despite non-functioning habitat indicators and the evident lack of progress towards attainment of RMOs at a near natural rate of recovery, the Forest Service has failed to monitor and evaluate RMOs in deciding the terms and conditions for the 2005 BMA permit renewal, the 2006 MCA permit renewal, and the 2007, 2008 and 2009 permit modifications and annual grazing authorizations.¹³

As described above at pp. 25–26, the MNF provided no 2006 RMO monitoring data to NMFS for preparing the 2007–2011 BiOp, and had provided very little effectiveness monitoring data to NMFS for the preparation of the 2006 BiOp. Lohn, 485 F. Supp.2d at 1201 n.12. The MNF did not collect and evaluate effectiveness monitoring data for RMOs to determine whether RMOs were being met or approached before deciding how much grazing, and on what terms, to

¹³ ONDA does not challenge the lack of monitoring as a “failure to act” under APA § 706(1), but rather challenges the MNF’s actions that arbitrarily and capriciously violate a substantive Forest Plan requirement and fail to consider an important factor that the Forest Plan obligates the MNF to consider. Neighbors of Cuddy Mtn. v. Alexander, 303 F.3d 1059, 1068–69 (9th Cir. 2002).

allow in 2007, 2008 and 2009 on these allotments. Effectiveness monitoring data is critically important because only this type of data can show trends from year to year. See NRAR MNF07-026 at NMFS 1156. The monitoring standards necessary to insure protection of steelhead are precisely those that the Forest Plan *requires* be monitored—the PACFISH GM-1 RMOs.

Remarkably, the entire 2007–2011 BiOp refers to only two instances of monitoring for RMOs, both in 2005, both on the FA. FS RP 29395–96. Nowhere does the BiOp consider whether RMO data shows that proposed grazing would allow attainment of a near natural rate of recovery. The 2007 BA describes no RMO monitoring (except on the FA) later than 2004. See generally NRAR MNF07-026; id. at 961–65 (2005 RMO monitoring on FA). There is no evidence in the administrative record showing that the MNF collected and evaluated RMOs and considered whether streams were achieving a near natural rate of recovery prior to renewing the BMA permit, the MCA permit, or making its grazing decisions during the last three years.

For example, the 2007 BA describes that on the MCA, “[t]here are concerns that past management has retarded attainment of long-term [RMOs] because the allotment failed to meet some standards in recent years.” NRAR MNF07-026 at NMFS 1172. The BA indicates that some RMO data was collected on the MCA during 2004. Id. at NMFS 1150–52. However, there is no corresponding RMO data from 2006 that would have allowed the MNF to evaluate RMO trends and whether grazing in 2006 had allowed progress towards achieving RMOs. Id. at NMFS 1150–52. If the MNF does not measure and evaluate RMOs, it cannot comply with the Forest Plan PACFISH GM-1 obligation to modify or suspend grazing if RMOs are not being attained.

The MNF did not evaluate RMOs on the MCA before renewing the permit in 2006, nor when issuing grazing permit modification decisions in 2007 and 2008, nor when issuing annual grazing authorizations in those years. See, e.g., FS R-MC 3033 (MNF letter to permittees

approving 2007 grazing rotation evidencing no consideration of RMO attainment); FS R-MC 3837 (2008 grazing permit modification with no evaluation of RMOs); FS R-MC 3821 (letter to permittees outlining 2008 grazing strategy with no evaluation of compliance with PACFISH). There is no indication in the administrative record for the other grazing decisions during 2007, 2008 and 2009 that the Forest Service complied with its obligations under PACFISH grazing standard GM-1 when it decided what level of grazing to allow. See Ex. 5; see also, e.g. 4S BMtn 12–24 (2005 permit including no reference to RMO standards); Supp. Index Blue Mountain (no documents from 2004 or 2005 showing compliance with PACFISH GM-1 standard or evaluating RMOs in issuing renewal permit).

Nor is there any indication that the MNF actually evaluated RMOs before deciding to authorize limited renewal of grazing during 2009. For example, despite this Court’s injunction, the MNF met in April 2009 with MCA and LMFA permittees and developed an agreed-upon schedule for grazing in 2009. FS S-MC 521, 523; FS S-LMF 59–62; Second Shinn Decl. (Dkt # 266) ¶¶ 2–17. There is no record that the MNF collected or analyzed RMO data, or considered whether RMOs had been attained or whether the authorized grazing would attain RMOs. E.g. FS S-MC 523 (discussing MNF plan “to run low numbers for reduced season” without evaluating riparian conditions). Similarly, in justifying resumption of grazing on the MCA, the MNF fisheries biologist provided no reasoning tied to actual resource conditions on the MCA. Namitz Decl. (Dkt # 265) ¶¶ 5–8. He merely stated that the proposed strategy, which rested a few units while resuming grazing on others, “reflects compliance with the 2007–2011 BiOp, given that it reflects appropriate refinement of grazing strategy over time” to “avoid recurrence of undesirable effects.” Id. at ¶¶ 6, 8. There is no information regarding the condition of the streams, nor whether RMOs on the units to be grazed were being attained. Id. ¶¶ 1–8.

Despite the importance of RMOs in determining healthy fish habitat, the MNF has failed to measure the RMOs and failed to provide an adequate explanation for not doing so. When it issued grazing permit modifications and set stocking levels, rotations, and other terms and conditions of grazing through the annual instructions and use authorizations in 2007, 2008 and 2009, the MNF had no evidence to show that grazing on these allotments conforms to PACFISH standard GM-1. Thus, these grazing authorizations are not consistent with PACFISH standards and monitoring requirements in the Forest Plan in violation of NFMA. 16 U.S.C. § 1604(i).

B. The Forest Service Has Violated NFMA by Authorizing Grazing Without Obtaining and Analyzing Actual and Trend Data for the Relevant Management Indicator Species.

NFMA also requires the Forest Service “to provide for diversity of plant and animal communities” in the national forests. 16 U.S.C. § 1604(g)(3)(B). To comply with this requirement, the 1990 MNF Forest Plan designated “management indicator species” (“MIS”), including steelhead, consistent with the NFMA regulations in effect at the time. Ex. 4 at IV-32; 36 C.F.R. § 219.19 (1990) (Forest Service has a duty to manage fish and wildlife habitat “to maintain viable populations of existing native ... vertebrate species in the planning area.”).¹⁴ MIS are proxies used to measure the effects of Forest Service management strategies on the forest, species diversity and species population viability. Species were selected as MIS because their population changes were believed to indicate the effects of management activities. See 36 C.F.R. 219.19(a)(1) (1990). By monitoring and analyzing impacts to MIS, the Forest Service can gauge the overall health and trends of other species within the forest, without incurring the time and

¹⁴ The regulations in effect in 1990 have since been superseded by regulations that eliminate the MIS concept. The Lands Council v. McNair, 537 F.3d 981, 989 n.5 (9th Cir. 2008). However, despite the regulatory change, the MNF is still required to comply with its Forest Plan’s requirements regarding species viability and MIS. Id. (citing 16 U.S.C. § 1604(i)).

expense of studying each species individually. Inland Empire Pub. Lands Council v. U.S. Forest Serv., 88 F.3d 754, 762 n.11 (9th Cir. 1996).

Steelhead are a designated MIS for anadromous riparian species on the MNF. Ex. 4 at IV-32. The Forest Plan requires the MNF to “[p]rovide the necessary habitat to maintain or increase populations of [MIS] with special emphasis on steelhead.” Id. at IV-63. To provide this habitat, the Forest Plan requires the MNF to “monitor habitat capability in all subwatersheds that have existing or potential anadromous fish habitat.” Id. at V-13. The Forest Plan also sets a “variability threshold” on steelhead habitat of “more than 10% decrease in habitat capability in a subwatershed” and “[f]orest-wide habitat capability +/- 10% from the projected level.” Id.

Having selected steelhead as a MIS in the Forest Plan and committed to monitoring steelhead habitat capability, the MNF actually must evaluate the condition of the MIS species in undertaking its management actions. The Lands Council v. Powell, 395 F.3d 1019, 1033–34 (9th Cir. 2005). In its 2007, 2008 and 2009 grazing decisions, the MNF did not comply with this obligation. The Forest Service’s own Monitoring and Evaluation (“M&E”) Reports show the agency has failed to monitor habitat to determine whether management activities, including grazing, are causing habitat to decline below the Forest Plan variability threshold.

This failure stretches back at least 15 years. In its 1994 M&E Report, addressing whether viable populations of steelhead were “being maintained,” the Forest Service stated, “[f]ish sampling to date has been limited to species distribution and relative abundance” as “part of the baseline (level 2) stream surveys. No sampling of adequate intensity to estimate fish populations has been completed.” FS RP 2866. The Forest Service admitted to not having conducted population or viability monitoring for any MIS species in its M&E Reports from 1997 to 2002. See, e.g. FS RP 4517–18 (1997 M&E Report expressing that concern over the viability of

steelhead and other species “continues to increase” because the status of the species was “uncertain” and the Forest Service had inadequate data on the species and their habitat needs); FS RP 6422 (1998 M&E Report stating that the MNF currently “does not monitor population viability or conduct distribution studies for any species”); FS RP 9323 (1999 M&E Report reporting same); FS RP 17062–68 (2002 M&E Report entirely missing the “Resident and Anadromous Fish Habitat” section that previous years contained).

The administrative record further shows that the MNF has not prepared an M&E report since 2002. In addition, the 2007 BA shows that the Forest Service has not conducted any stream surveys for steelhead habitat since 2001. See, e.g., NRAR MNF07-026 at NMFS 864, 867, 893, 896, 899, 987, 1237 (1992–95 stream surveys); id. at NMFS 1270 (1997 stream survey); id. at NMFS 1058, 1264 (2001 stream surveys from two streams reporting that stream habitat did not meet Forest Plan standards).¹⁵ There is no evidence in the record showing that the MNF has used any of this data to determine the effect grazing management is having on steelhead diversity and viability. The MNF appears to have given up on its NFMA and Forest Plan obligation to monitor anadromous fish habitat.

The MNF cannot rely upon stale habitat data to satisfy this obligation. Lands Council, 395 F.3d at 1031 (impermissible for Forest Service to use 13-year-old fish habitat survey, even where updated by 6-year-old fish count surveys). Without current data on steelhead habitat capability, the Forest Service has no means to determine the impacts of grazing on the viability of steelhead. In the absence of any systematic effort for at least the past eight years to collect data and determine population trends, the MNF’s authorization of grazing on these seven

¹⁵ The MNF completed some stream surveys between 1991 and 1993, presumably to establish baseline conditions. FS RP 2066, 2075. The most recent evidence of large-scale surveys are limited watershed analyses for Murderers Creek, Upper Middle Fork John Day River, and Deer Creek in 1997–1999, which rely on data from earlier years. FS RP 3586, 6170, 9482.

allotments is inconsistent with the Forest Plan MIS requirements and arbitrary and capricious in violation of NFMA. 16 U.S.C. § 1604(i); see also Lands Council, 395 F.3d at 1035–36 (where habitat trend data flawed, proxy on proxy result equally flawed). Because the MNF failed to take into account an important factor—habitat capability for steelhead, designated as a MIS in the MNF Forest Plan—in issuing its 2007, 2008 and 2009 grazing decisions, those decisions are arbitrary and capricious. Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962) (the agency must consider “relevant factors” and articulate “a rational connection between the facts found and the choices made.”).

IV. THE MNF’S 2007, 2008 AND 2009 GRAZING AUTHORIZATIONS VIOLATE ESA § 7(a)(2).

In addition to violating NFMA, the MNF’s authorizations of grazing through the 2007 and 2008 grazing permit modifications and 2007, 2008 and 2009 annual instructions and use authorizations violate ESA § 7(a)(2). Besides consulting with NMFS on grazing that may affect threatened steelhead, the MNF has an independent duty under ESA § 7(a)(2) to avoid any action that would jeopardize steelhead or adversely modify their critical habitat, regardless of the contents of a biological opinion. 16 U.S.C. § 1536(a)(2); see also Pyramid Lake Paiute Tribe v. U.S. Dep’t of the Navy, 989 F.2d 1410, 1415 (9th Cir. 1990) (action agency “may not rely solely on a FWS biological opinion to establish conclusively its compliance with its substantive obligation under section 7(a)(2)”). An agency cannot satisfy its independent duty by relying on a faulty biological opinion. Res. Ltd. v. Robertson, 35 F.3d 1300, 1304–05 (9th Cir. 1993). This substantive ESA obligation applies both when the Forest Service makes decisions and as it carries out those decisions. Sierra Club, 816 F.3d at 1385–86 (describing agency compliance with ESA § 7(a)(2) at the time of its original decision and violation of ESA § 7(a)(2) when it subsequently failed to carry out the original decision properly).

In 2007 and 2008, the MNF issued grazing permit modifications on 21 allotments. See Ex. 5. In 2007, 2008 and 2009 the agency made annual decisions, usually embodied in annual instruction letters, about authorized use, rotations, and other annual terms and conditions for grazing during that year. See id. The MNF violated ESA § 7(a)(2) by unreasonably relying on the 2007–2011 BiOp’s unsupported assertion that the grazing program would result in long-term improvement to habitat. As described above, NMFS did not evaluate whether the proposed grazing complied with PACFISH and would result in attainment of RMOs at a near natural rate. See supra at 25–28. As a result, the MNF had an independent obligation to evaluate RMO attainment to insure against jeopardy to steelhead and adverse modification to steelhead critical habitat. Pyramid Lake, 898 F.2d at 1415 (“[a] federal agency cannot abrogate its responsibility to ensure that its actions will not jeopardize a listed species”); N.W. Env’tl. Advocates, 268 F. Supp. 2d at 1274 (action agency’s reliance on a facially-invalid biological opinion without determination of the validity of the action under the applicable statute is unreasonable); see also Defenders of Wildlife v. EPA, 420 F.3d 946, 976 (9th Cir. 2005), overruled on other grounds sub. nom. Nat’l Ass’n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007) (finding that EPA violated § 7(a)(2) when it “should have understood the legal errors of the biological opinion’s analysis”). The record demonstrates that the MNF failed to evaluate RMOs in its 2007, 2008 and 2009 grazing decisions, or to commit to taking specific actions to reduce livestock impacts in response to the terms and conditions imposed by the 2007–2011 BiOp and its ITS. See supra at 14–18, 33–36; Ctr. for Biological Diversity, 198 F. Supp. 2d at 1157 (action agency violates § 7(a)(2) where it refuses to commit to specific and binding mitigation measures).

An agency must engage in reasoned decisionmaking that considers appropriate factors, and its decisions must be rationally supported. Irrational, unclear, or unsupported decisions are

arbitrary and capricious. N.W. Coalition, 544 F.3d at 1052 n.7. The record of the MNF's grazing permit modifications and annual instructions in 2007, 2008 and 2009 do not disclose that the MNF made findings and conducted analyses of progress towards attainment of RMOs before determining what level of grazing to allow during the forthcoming season. As a result, the MNF had no valid basis to make decisions properly informed by the underlying ecological conditions on the allotments—specifically, what level of additional pressure the steelhead streams could bear and whether additional grazing would result in jeopardy or adverse modification to steelhead critical habitat. Accordingly, the 2007, 2008 and 2009 decisions violate ESA § 7(a)(2) because they authorize grazing in those years in without considering a relevant factor—the condition of steelhead streams and whether steelhead habitat was recovering.

In addition, where an action agency selectively withholds information from the consulting agency, omits relevant information, or unilaterally alters the basis for the consultation's conclusion, that agency's subsequent actions reliant on the consultation violate § 7(a)(2). See Res. Ltd., 35 F.3d at 1304–05 (Forest Service may not rely on flawed BiOp when agency documents showed serious questions going to the reliability of management standard). Here, the MNF deliberately withheld from NMFS information that showed that it was incapable of carrying out the comprehensive monitoring program the MNF's aquatic biologist represented would be undertaken. See discussion supra at 20–22. The Forest Service's June 2007 directive forbidding administrative action to permits based on annual monitoring also constituted new information which was not presented to NMFS, and which fundamentally undercut the MNF's ability to carry out the corrective actions promised in the 2007–2011 BiOp. See supra at 22–23.

The Forest Service in 2007 also eliminated the AOI, long recognized as “the only instrument that instructs the permit holder how [federal environmental] standards will affect his

grazing operations during the upcoming season.” ONDA, 465 F.3d at 984–86, 987–90. NMFS had expressly relied on permittee compliance with “annual instructions” for its no jeopardy and no adverse habitat modification conclusions. FS RP 29427. Even after partially reinitiating formal consultation, the MNF continues to rely unreasonably on the flawed 2007–2011 BiOp in determining its 2009 grazing schemes. Shinn Decl. (Dkt # 239) ¶ 3 (claiming that “[t]he actions proposed for 2009 for each allotment that exceeded bank alteration standards in 2008 are within the guidelines established in the 2007–2011 [BiOp]”); Namitz Decl. (Dkt # 265) ¶¶ 6, 8.¹⁶ Here the BiOp contains extensive information that livestock grazing will cause damage to steelhead habitat. There is new information in the form of two additional years of extensive damage to steelhead habitat on the eight allotments and clear evidence that the MNF and permittees could not implement, and have not implemented, the monitoring program on which NMFS expressly relied. See Nat’l Wildlife Fed’n v. NMFS, Nos. CV 01-640-RE, CV 05-23-RE, 2005 WL 1398223, at *3 (D. Or. June 10, 2005), *aff’d*, 422 F.3d 782 (9th Cir. 2005) (enjoining action agencies for unreasonable reliance on flawed biological opinion in violation of § 7(a)(2) and finding irreparable harm from implementation of the proposed operation of the Columbia River dams). In these circumstances, it was unreasonable for the MNF to rely on the 2007–2011 BiOp to satisfy its duty under ESA § 7(a)(2), and its failure to independently evaluate compliance with ESA § 7(a)(2) renders its grazing decisions in 2007, 2008 and 2009 arbitrary and capricious.

¹⁶ In addition, the MNF had significant new information since the 2007–2011 BiOp that triggered its independent § 7(a)(2) duty when it made grazing decisions in 2008 and 2009. The MNF documented standards exceedances on at least eight allotments in 2007 and 2008, many of which are corroborated by ONDA’s field surveys and photographs. See, e.g., FS RP 31175, 31179–81 (2007 EOY Report); FS SP 380, 383, 385–86, 392–93, 405, 408 (2008 EOY Report); Christie Decl. (Dkt # 37); Third Christie Decl. (Dkt # 193). Despite these indications that its monitoring and management strategy had failed badly during the first two years of the 5-year grazing program, the MNF continued to rely unreasonably on the 2007–2011 BiOp and allowing grazing at levels comparable to those described in the proposed action for the consultation.

V. THE MNF'S ONGOING MANAGEMENT OF GRAZING IN 2007 AND 2008 VIOLATED ESA §§ 7(a)(2) & 9.

The MNF violated ESA § 9 during 2007 and 2008 by authorizing grazing during those years which resulted in impermissible take of steelhead through harm to steelhead critical habitat. In addition, to comply with ESA § 7(a)(2), the MNF independently must insure that activities it authorizes that are of an on-going nature will not result in jeopardy or adverse habitat modification throughout the course of the project. The MNF violated ESA §§ 7(a)(2) & 9 by allowing livestock grazing which drastically exceeded standards established for protection of steelhead and their critical habitat under the 2007–2011 BiOp.

A. The MNF's Authorized Grazing has Caused Unlawful Take of Steelhead.

The MNF violated ESA § 9, which prohibits unlawful “take” of any endangered species, by authorizing and carrying out a grazing program during 2007 and 2008 which resulted in streambank damage exceeding the permissible take limit in the ITS. 16 U.S.C. § 1538(a)(1)(B). Significant habitat degradation which injures wildlife by impairing essential behavioral patterns constitutes take. See 16 U.S.C. § 1532(9); 50 C.F.R. § 17.3. Degradation of even a small area of habitat “injures” the species if it impairs behavioral patterns. Marbled Murrelet v. Babbitt, 83 F.3d 1060, 1067–68 (9th Cir. 1996) (occupied nesting habitat and likely effect of action on birds’ behavioral patterns due to habitat modification sufficient to show harm).

It is not contested that livestock grazing damages riparian areas and harms fish, resulting in take. As is clear from the 2007–2011 BiOp,

steelhead are reasonably certain to be injured or killed, or the likelihood that they will be injured or killed will be increased by habitat effects of the proposed action in the following ways: (1) Egg-to-fry survival will be reduced by increased fine sediment deposited on spawning gravel; (2) juvenile foraging success will be reduced by loss of terrestrial insects and other aquatic food chain resources due to lost riparian vegetation and nutrient inputs; (3) juvenile predation rates will be increased by loss of hiding cover that would have been provided by riparian

vegetation and banks; and (4) adults and juveniles will be displaced from preferred habitats by the physical presence of livestock and due to increased turbidity in the water column caused by trampling and vegetation removal.

FS RP 29545 (describing effects on MCA; same analysis is repeated for all other allotments).

These “habitat effects are likely to significantly impair essential behavior patterns.” *Id.* The BiOp explains that “livestock grazing can have detrimental effects on stream and riparian habitats” that have been widely documented. FS RP 29428–29. Thus “grazing can result in a variety of negative riparian impacts. When riparian habitat is negatively affected, listed fish species are also negatively affected.” FS RP 29452. By degrading steelhead habitat, livestock grazing reduces the survival and production of steelhead. *Id.*; Ex. 1 ¶¶ 54–58.

“Incidental” take is allowed under some circumstances: “any taking ... that complies with the conditions set forth in the [ITS] is permitted.” Ramsey v. Kantor, 96 F.3d 434, 441 (9th Cir. 1996). But take that exceeds the scope of an ITS is prohibited. *Id.* at 442 (“a party ... can take members of a listed species without violating the ESA, provided the actions in question are contemplated by an [ITS]”); 50 C.F.R. § 402.14(i)(5). Incidental take that exceeds the limits and conditions set in the 2007–2011 BiOp and its ITS abrogates the safe harbor provision in the ITS, leaving the agency¹⁷ that authorized the activity that caused take liable for violating ESA § 9. See Or. Natural Res. Council v. Allen, 476 F.3d 1031, 1040 (9th Cir. 2007) (“take must be in compliance with the terms and conditions of the [ITS]”); Ramsey, 96 F.3d at 442.

¹⁷ Government agencies are liable for violating the ESA § 9 take prohibition by authorizing activities carried out by others that result in take. 16 U.S.C. § 1538(g) (making it “unlawful for *any person* subject to the jurisdiction of the United States to attempt to commit, solicit another to commit, or *cause to be committed*, any offense defined in this section”) (emphasis added); Strahan v. Coxe, 127 F.3d 155, 163 (1st Cir. 1997) (state agency liable for take in managing fishing regulations); Sierra Club v. Yeutter, 926 F.2d 429, 438-39 (5th Cir. 1991) (Forest Service’s management of timber stands violated ESA § 9); Defenders of Wildlife v. EPA, 882 F.2d 1294, 1301 (8th Cir. 1989) (EPA registration of pesticides effected a take); Pac. Rivers Council v. Brown, No. 02-243-BR, 2002 WL 32356431, at *11-*12 (D. Or. Dec. 23, 2002) (government officials authorizing activities of others are liable for resulting take).

NMFS expressly set a condition in the BiOp's ITS that the authorized grazing must not exceed a 10% bank alteration end-point indicator on 10 of the 13 allotments covered by the 2007–2011 BiOp, and set the end-point indicator for the remaining allotments at 20%. FS RP 29554–55. Violation of an ITS condition means that take protection disappears. Therefore, bank alteration beyond the 10% end-point condition in this BiOp is unlawful take in violation of § 9.

On March 10, 2009, the MNF Supervisor acknowledged in a letter to NMFS that five allotments “did exceed the ITS limitation of no more than 20% bank alteration” by the end of 2008 grazing season. FS SP 1120. Two months later—one month after ONDA filed a motion for preliminary injunction, and well after the MNF had agreed with the permittees regarding schedules for the 2009 grazing season—the MNF Supervisor requested reinitiation of formal consultation on those five allotments (FA, LCA, SCA, HKA, and UMFA) as well as the MTVA, on which the 10% end-point condition was violated. Such litigation-driven action hardly instills confidence in the efficacy of the reinitiated consultation, particularly when the MNF belatedly admitted the unlawful take in violation of an ITS condition: “[t]hese allotments had instances in 2008 of exceeding the permissible streambank alteration provided for in the ‘Amount or Extent of Take’ or the second Term and Condition of the [ITS] in the above referenced Biological Opinion as it relates to streambank alteration measurements.” FS SP 1139.

The dramatic failure of the MNF's grazing program is documented in its 2008 EOY Report. FS SP 368. It is uncontested that livestock grazing authorized by the MNF was responsible for significant riparian habitat degradation on at least six allotments in 2008. The MNF documented exceedances of the 10% bank alteration end-point condition in the ITS at no fewer than 18 sites on six allotments. FS SP 380, 383, 385–86, 392–93, 405, 408. On most, the MNF-measured bank alteration far exceeded the 10% end-point condition and the 20% limit on

lawful take from habitat effects. *Id.* (describing bank alteration on five allotments to be 23% or higher on at least one transect, and a total of nine transects where bank alteration ranged between 23% and 51%). The MNF's findings are corroborated by Christie's measurements and photographs showing that every one of the 14 sites on four allotments suffered from at least 15% bank alteration, and at more than half of the sites, bank alteration was greater than 35%. Third Christie Decl. (Dkt # 193) ¶¶ 18–29 & Table 1; Ex. 1 ¶¶ 51–53.

The MNF's 2007 EOY Report similarly documents that grazing during 2007 resulted in significant damage to steelhead habitat on at least five pastures on the MCA. FS RP 31179–81 (noting instances where “[g]razing standards were not met,” there was “unusually high streambank alteration,” or “other areas did not meet stubble height and streambank alteration standards”). The 2007 EOY Report discloses that bank alteration in many places on the MCA exceeded the 10% end-point condition. *Id.* Reviewing the 2007 EOY Report, the MNF's aquatic biologist concluded that take may have occurred on the MCA and HKA, specifically pointing to the 60% bank alteration measured on the HKA in 2007. FS SP 266. Christie's photographs and observations confirm this unlawful take, showing a mean bank alteration of 55% at 17 grazed sites on the MCA. Christie Decl. (Dkt # 37) ¶ 19. On the LMFA in 2007, Christie measured bank alteration in excess of 50% on two reaches on that allotment and Rhodes concurred that bank alteration exceeded 20% in those areas. Christie Decl. (Dkt # 37) ¶ 22. The MNF 2007 EOY Report corroborates Christie's data, reporting “excessive streambank alteration” and areas of “heavy bank alteration” on two units of the LMFA. FS RP 31175. Rhodes's observations in 2007 likewise confirm bank alteration in excess of standards. Ex. 1 ¶¶ 42, 47–48.

Livestock grazing has caused take of steelhead throughout the MNF by degrading steelhead habitat and impairing essential behavioral patterns. On eight allotments in 2007 and

2008, the level of incidental take exceeded the conditions and take limit set in the 2007–2011 BiOp. As a result, the MNF’s grazing program caused impermissible take in violation of ESA § 9. Ariz. Cattle Growers Ass’n v. U.S. Fish & Wildlife Serv., 273 F.3d 1229, 1249 (9th Cir. 2001) (exceeding the level of take specified in an ITS “results in an unacceptable level of incidental take, invalidating the safe harbor provision, and requiring the parties to re-initiate consultation”).

Based on past incidents of take and pervasive failures of the MNF’s monitoring and management, it is inevitable that unlawful take on the MNF will occur in the future. Ex. 1 ¶¶ 65–79. During 2009, for example, the MNF’s efforts to use fencing to protect critical habitat failed on several occasions, and trespass cattle remain a chronic problem. See, e.g., FS S-SC 352 (reporting cows in riparian area because vehicle had flattened electric fence); FS S-SC 366 (electric fence not working); FS S-FOX 478 (portion of fence knocked down); FS-FOX 488 (cattle present on rested pasture); FS S- FS S-SENE 212 (reporting trespass cattle and 18% bank alteration on SSA); FS S-LMF 148 (reporting trespass cattle); FS S-LMF 160 (same), FS S-MTV 107, 111, 113, 122, 167, 208, 212, 288, 302 (same); FS S-LMF 168 (same, also reporting cut fence). As the MNF’s expert Dr. Stringham admitted at the June hearing, “if you have a system that is in bad shape, one cow can keep it that way if you don’t move her out of there.” Ex. 8. The MNF does not dispute that steelhead habitat on the MNF is badly degraded, with all habitat indicators functioning at risk or at unacceptable risk. NRAR MNF07-026 at NMFS 850–53.

B. The Forest Service has Violated ESA § 7(a)(2) in its On-going Management of Grazing on the MNF.

For similar reasons, the MNF violated ESA § 7(a)(2) in its ongoing management of grazing. A federal agency has an affirmative “do no harm obligation” under ESA § 7(a)(2) in carrying out its programs when the agency’s own actions could cause harm to a listed species. Defenders of Wildlife, 420 F.3d at 965; see Sierra Club, 816 F.2d at 1385 (action agency

violated § 7(a)(2) by “allowing the project’s adverse effects to accumulate without implementing the mitigation measures or making certain they occur”); Defenders of Wildlife v. Martin, 454 F. Supp. 2d 1085, 1096–99 (E.D. Wash. 2006) (Forest Service failed to comply with ongoing obligation under ESA § 7(a)(2) to insure against jeopardy). The MNF violated § 7(a)(2) by allowing extensive damage to steelhead and their habitat to occur and accumulate on eight of the allotments covered by the 2007–2011 BiOp during 2007 and 2008. The monitoring systems and mitigation measures that it promised would prevent harm to threatened steelhead, require permittee compliance with conditions set in the BiOp and avoid unlawful take and jeopardy to the species, failed miserably both years. In both years the MNF authorized grazing that resulted in adverse modification to steelhead critical habitat. See supra at 45–46. Most damning is the fact that the MNF has explicitly acknowledged that its monitoring program and grazing strategy failed by reinitiating formal consultation, and acknowledging internally that excessive take occurred during 2007 as well. FS SP 1139; FS SP 266.

Furthermore, the MNF has failed to carry out the program specified in the 2007–2011 BiOp. In the BiOp, NMFS specified indicators, monitoring locations, move triggers and end points. FS RP at 29316–19. NMFS claimed that “[b]y annually meeting end-point indicators, desired riparian objectives are expected to be attained over time.” FS RP 29316. NMFS’s ultimate conclusion that the mitigation measures are likely to be implemented requires “that the various conservation measures described as part of the proposed action, including meeting move triggers, will be carried out as described.” FS RP 29427. However, the MNF failed to implement many of the conservation measures and, as illustrated by documented excessive take, has failed to ensure that annual end-point indicators were met. Indeed, the MNF has acknowledged that it *cannot* implement the monitoring and grazing strategy called for in the 2007–2011 BiOp. FS SP

462 (January 13, 2009 letter from MNF regarding bank alteration standard, stating that “a 10% stand-alone threshold for bank alteration significantly modifies the Proposed Action and leaves us essentially unable to implement”).

In 2007, the MNF failed to apply the terms and conditions in the 2007–2011 BiOp in the 2007 grazing permit modifications, leading to grazing during the 2007 season with standards set too lenient to ensure against jeopardy and adverse habitat modification.¹⁸ Having set the move triggers and end-point indicators too low, it was unsurprising that the MNF found extensive standards exceedances throughout the MCA and LMFA at the end of the 2007 grazing season. FS RP 31175, 31179–8. The MNF’s failure to institute and, in many places, achieve compliance with even the NMFS-specified end-point and bank alteration indicators allowed livestock grazing to destroy or adversely modify steelhead critical habitat in violation of ESA § 7(a)(2).

VI. THE MNF FAILED TO REINITIATE CONSULTATION.

The agencies have an ongoing duty to insure that an ESA consultation remains valid. Specifically, they must reinitiate formal consultation “[i]f the amount or extent of taking specified in the incidental take statement is exceeded” or “[i]f new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered.” 50 C.F.R. §§ 402.16(a)-(b). Formal consultation involves preparation of a BA covering the proposed action and culminates in the issuance of a BiOp. 50 C.F.R. §§ 402.14(c)(6), (g)(4); Mt. Graham Red Squirrel v. Espy, 986 F.2d 1568, 1570 (9th Cir. 1993).

¹⁸ For example, the 2007 grazing permit modifications for the MCA allotment did not impose any of the stubble height or bank alteration standards specified in the BiOp. See, e.g., FS R-MC 3044 (allowing “4-6” Stubble height” and “10-20% alteration” of streambanks as move triggers and “10-20%” alteration as an end-point condition); compare 2007–2011 BiOp, FS RP 29427 (setting move trigger on MCA at 7”), FS RP 29554 (requiring 10% bank alteration end-point condition on MCA). The MNF failed to impose the 2007–2011 BiOp’s mandatory standards in any of the 2007 grazing permit modifications. See, e.g., FS R-SC 474 (permit modification including no bank alteration move trigger or end-point condition); FS R-LC 858 (same).

On May 7, 2009, the MNF reinitiated formal consultation on the six allotments on which grazing in 2008 caused bank alteration in excess of the ITS limits. FS SP 1139. This fails to satisfy the reinitiation requirement because the Forest Service must reinitiate consultation on the complete “agency action” evaluated in the 5-year BiOp, not merely a limited number of grazing allotments as it has done. “Agency action” has been interpreted broadly, consistent with Congress’s intent to extend the ESA’s protections to any action carried out by a federal agency. See Pac. Rivers Council v. Thomas, 30 F.3d 1050, 1054-55 (9th Cir. 1994) (holding that the Forest Service’s land use plans constitute an agency action, in part, because of their long-term, ongoing effects). The ESA requires NMFS to address impacts associated with an entire agency action. See Conner v. Burford, 848 F.2d 1441, 1453–54 (9th Cir. 1988) (holding that agency violated the ESA by choosing not to analyze the effects of all stages of oil and gas activity on federal lands)

The BiOp provides that the scope of the “agency action” is the 5-year grazing plan for a project area in the MNF divided into thirteen grazing allotments. FS RP 29314 (describing that “the proposed action is the MNF authorizing proposed grazing activities for 2007-2011 in [13 named allotments]”). The BiOp indicates that the agencies considered the grazing plan on these allotments as a whole, not each as 13 separate and distinct units. Id. This is consistent with the principle that the BiOp evaluates “the *combined effects* of grazing *on all of the allotments*, and *cumulative effects* in the context of the life cycle of MCR steelhead.” FS RP 29529 (emphasis added). NMFS must evaluate whether, with excessive damage having occurred on more than half of the allotments within the grazing plan area, grazing on *all* of the allotments should be adjusted downwards to compensate during the remaining years of the 5-year BiOp.

The obligation to reinitiate consultation on the entire agency action evaluated in the

2007–2011 BiOp is also triggered by grazing effects on the MCA and LMFA during 2007 which resulted in exceeding the terms of the BiOp. On both the MCA and LMFA, the MNF identified significant bank alteration and other standards exceedances, with serious bank damage corroborated by Christie’s 2007 field studies. See discussion supra at 46. The MNF attributes the exceedances on the MCA to a combination of effects of both livestock and feral horses. See, e.g., FS RP 31180–81. However, the dramatic bank alteration documented after the 2007 grazing season is undisputed. Because the 2007–2011 BiOp does not quantify horse effects as part of the environmental baseline, *any* effect attributable to horses would be “new information” not previously considered, requiring reinitiation of formal consultation on the MCA to quantify horse effects as part of the baseline. 50 C.F.R. § 402.16(b). The MNF’s biologist acknowledged that take had likely occurred on the MCA during the 2007 grazing season and that, although reinitiation of formal consultation is justified, it would be “redundant” because the allotments “are currently under judicial review.” FS SP 268–69.

Finally, the MNF has made an “irreversible or irretrievable commitment of resources” by allowing grazing during 2009 prior to complying with its § 7(d) obligation and completing reinitiated formal consultation on the 5-year grazing plan. FS SP 1178 (MNF § 7(d) determinations); 16 U.S.C. § 1536(d) (prohibiting the Forest Service, during the re-consultation process, from making “any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures”). Courts have consistently stated that the purpose of § 7(d) is to “ensur[e] that the status quo will be maintained during the consultation process.” Conner, 848 F.2d at 1455 n. 34; see also Pac. Rivers Council, 30 F.3d at 1056 (same).

In particular, the MNF’s § 7(d) finding improperly relies on the conclusions in the 2007–

2011 BiOp, notwithstanding that those conclusions had proven incorrect in view of the excessive riparian damage that prompted the reinitiation in the first place. See, e.g., FS SP 1181 (stating that “it is reasonable to conclude that the 2007 conclusions [in the BiOp] will remain the same” without explaining *why* that would be reasonable). The MNF failed to obtain concurrence from NMFS prior to allowing grazing in 2009 regarding the likely effects from grazing. See, e.g. FS SP 1182 (describing MNF conferrals prior to issuing the § 7(d) determinations, but not describing any contact with NMFS). The ESA forbids the MNF, after formal consultation has been reinitiated, from unilaterally making a determination that allowing grazing would not violate § 7(d). Pac. Rivers Council v. Thomas, 936 F. Supp. 738, 750–51 (D. Idaho 1996). By not conferring with and obtaining concurrence from NMFS before allowing grazing this year, including at a minimum on the allotments where formal consultation has been reinitiated, the MNF violated and continues to violate § 7(d).

CONCLUSION

For the reasons stated above, ONDA respectfully requests that this Court enter the relief requested in ONDA’s Motion for Summary Judgment.

Respectfully submitted this 11th day of November 2009.

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