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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,**

Plaintiffs,

v.

ABIGAIL KIMBELL, et al.,

Defendants,

v.

HARLEY & SHERRIE ALLEN, et al.,

Defendants-Intervenors.

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

MEMORANDUM IN SUPPORT OF
PLAINTIFFS’ MOTION FOR
TEMPORARY RESTRAINING ORDER
and/or PRELIMINARY INJUNCTION

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INTRODUCTION

“Confidence” is the prevailing sentiment in the 2007–2011 Biological Opinion (“2007–2011 BiOp”), which the National Marine Fisheries Service (“NMFS”) issued in May 2007 to guide livestock grazing on 13 allotments on the Malheur National Forest. NMFS declared that it was “confident that the various conservation measures described as part of the proposed action, including meeting move triggers, will be carried out as described.” Ex. 1 at 115.¹ The fish management agency had “a high degree of confidence that the grazing management strategy will be implemented for the 2007-11 seasons.” *Id.* at 116. Two seasons of livestock grazing under this strategy has shown that NMFS’s confidence was misplaced. Over these two years, grazing on 8 of these 13 allotments has failed to comply with the terms of the 2007–2011 BiOp, caused unlawful take of steelhead (*Oncorhynchus mykiss*), and destroyed and adversely modified steelhead critical habitat, in violation of the Endangered Species Act (“ESA”).

The rosy language of the 2007–2011 BiOp disguises a Forest Service grazing program that has proved repeatedly incapable of preventing harm to threatened steelhead. The actual conditions on the forest following the 2007 grazing season painted a picture very different from NMFS’s predictions. After plaintiffs (collectively, “ONDA”) and the Forest Service itself documented extensive violations of bank alteration and stubble height standards that year, this Court enjoined grazing on two allotments pending a decision on the merits of ONDA’s claims.

Despite the injunction, and despite this Court’s repeated warnings over the past six years of the need for better grazing management, harm to steelhead and their habitat was even more widespread during the 2008 grazing season. Grazing on 6 of the 10 allotments actually grazed in

¹ Exhibit 1 contains only the pages from the 2007–2011 BiOp cited in this memorandum. The complete BiOp is included as Exhibit 1 to ONDA’s March 2008 Memorandum in Support of Plaintiffs’ Motion for Temporary Restraining Order and/or Preliminary Injunction (Dkt # 35).

2008 resulted in violations of the 2007–2011 BiOp’s Terms and Conditions and in unlawful take of steelhead. The photographic and quantitative monitoring data from 2008 show that the conditions of the streams upon which steelhead depend for survival remain seriously degraded by livestock grazing in riparian areas. The Malheur National Forest’s solemn promises to protect steelhead and to “hold permittees accountable for compliance with the requirements of their grazing permits and annual instructions,” Ex. 1 at 6, 115, have proven illusory. The Forest Service is unprepared, unwilling, and unable in practice to fulfill its obligations under the ESA.

After two seasons of mismanaged grazing under the 2007–2011 BiOp and pervasive damage to steelhead habitat, it is painfully evident that the Malheur National Forest has played a confidence game, with the fish agency a hapless mark. In the present case, the agencies have strung out the proceedings, taking over seven months to lodge a still-incomplete administrative record, taking a near-frivolous position on the scope of evidence admissible to prove ESA violations, and taking ten weeks to respond to requests for production of documents that plaintiffs served the day after this Court overruled the government’s objections on the scope of allowable evidence in early January 2009. As a result of these delays, it will be impossible to resolve this case on the merits prior to the beginning of the 2009 grazing season, scheduled to start in May or early June 2009. To protect threatened steelhead, ONDA has no choice but to seek an order from this Court temporarily restraining turnout of livestock on six additional allotments where the most egregious ESA violations occurred in 2008 and a preliminary injunction against grazing on those allotments until the merits of this case can be resolved.

BACKGROUND

The background of this case, the federal agencies’ legal obligations for managing livestock grazing that may affect species protected under the ESA, prior cases describing how

the agencies failed to comply with those obligations, and ONDA's claims in the instant case under the ESA and National Forest Management Act ("NFMA") are set forth in this Court's September 5, 2008 Opinion and Order. Ore. Natural Desert Ass'n v. Kimbell, No. 07-1871-SU, 2008 WL 4186913, at *1-*7 (D. Or. Sept. 5, 2008). These issues are addressed in this memorandum only to the extent necessary.

I. LITIGATION AND PROCEDURAL HISTORY

This Court is familiar with the six-year history of suits seeking federal agency compliance with applicable law in administering the Malheur National Forest grazing program. Kimbell, 2008 WL 4186913, at *4-*5. The Court has often noted the Malheur National Forest's inability to prevent violations of the law and harm to threatened fish. After reviewing evidence of steelhead streams badly degraded by livestock grazing during 2003, this Court expressed "a dire need for better management of grazing on these public lands." Ore. Natural Desert Ass'n v. U.S. Forest Serv., No. 03-381-HA, 2004 WL 1592606, at *10 (D. Or. July 15, 2004) ("ONDA 03-381"). In 2007, when it invalidated the 2006 NMFS biological opinion for Malheur National Forest grazing activities that harm steelhead, this Court noted that "[p]ast compliance with grazing management standards is a documented problem." Ore. 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, after observing the results of the first year of grazing under the 2007-2011 BiOp, this Court enjoined grazing on two allotments pending a decision on the merits. Kimbell, 2008 WL 4186913, at *8.

As described below, widespread violations of the ESA, including non-compliance with grazing management standards and the terms of the 2007-2011 BiOp and unlawful take of steelhead, continued on at least six additional allotments in the Malheur National Forest during

the summer and fall of 2008. Since this Court granted the preliminary injunction on May 16, 2008, defendants lodged an administrative record on July 28, 2008 and August 8, 2008 (Dkt ## 111, 120). While the parties attempted to agree to a schedule for further proceedings during the summer of 2008, the federal defendants objected to including any period for discovery, leading Magistrate Judge Sullivan to order briefing on the scope of allowable evidence. Dkt # 109. The Magistrate Judge granted ONDA's Motion Regarding Scope of Review, ordering that ONDA is entitled to discovery on its claims arising under the ESA's citizen suit provisions. Ore. Natural Desert Ass'n v. Kimbell, 593 F. Supp. 2d 1213, 1216 (D. Or. 2008). Federal defendants filed Amended Objections, which this Court overruled on January 9, 2009. Ore. Natural Desert Ass'n v. Kimbell, 593 F. Supp. 2d 1217, 1221 (D. Or. 2009).

ONDA served its first requests for production of documents on defendants and intervenors on January 12, 2009. Defendants produced their responses to those requests on March 23, 2009 and March 24, 2009. The parties filed a joint proposed discovery plan with the Court on March 25, 2009 (Dkt # 188), proposing deadlines by which the defendants would respond to the other parties' requests to complete the administrative record and for fact and expert discovery through the summer and early fall of 2009.

II. STEELHEAD & GRAZING EFFECTS

The 13 allotments 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. Ex. 1 at 59–61; Ex. 2 (overview map showing allotments covered by BiOp). MCR steelhead in the John Day River and its tributaries “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, 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.” Ex.1 at 64–65. Many streams within the Malheur National Forest 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); Ex. 2.

There is no serious dispute that livestock grazing directly and indirectly harms steelhead by destroying redds, disturbing or harassing juvenile and adult steelhead, and degrading fish habitat. Kimbell, 2008 WL 4186913, at *1. As NMFS also has acknowledged in the 2007–2011 BiOp, livestock 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 Malheur National Forest.² Ex. 1 at 116–17, 140; Second Beschta Decl (filed herewith) ¶¶ 6–7, 9, 13–14, 16; Beschta Decl. (Dkt # 185) ¶¶ 11–25; Second McCullough Decl. (filed herewith) ¶¶ 4–5; McCullough Decl. (Dkt # 186) ¶¶ 3, 5–8, 11–18; Fourth Rhodes Decl. (filed herewith) ¶¶ 13, 18–21; Third Rhodes Decl. (Dkt # 184) ¶¶ 15–16. By adversely modifying steelhead habitat,

² Livestock grazing’s pernicious effects on any steelhead habitat is likely to irreparably harm steelhead, and the Forest Service’s obligations to protect steelhead under the ESA extend to all steelhead habitat. Moreover, many stream segments on these allotments are designated critical habitat for steelhead. Exs. 2–3, 8, 10, 14, 17, 20. Adverse modification to designated critical habitat will likely result not only from livestock impacts on those stream reaches, but also indirectly from livestock damage to contributing streams that flow into critical habitat. McCullough Decl. (Dkt # 186) ¶¶ 6–8. Banks denuded and trampled by livestock cause higher water temperature and sediment load, and the warmer temperatures and fine sediments moving downstream from contributing streams into critical habitat also are likely to result in adverse modification to critical habitat and irreparable harm to steelhead. Id. ¶ 5–6.

livestock grazing in riparian areas is likely to cause increased mortality and other irreparable harm to steelhead in all life stages. Second McCullough Decl. ¶¶ 4–5; McCullough Decl. (Dkt # 186) ¶¶ 5–6, 8, 11–18; Beschta Decl. (Dkt # 185) ¶¶ 11, 16, 18, 22. NMFS succinctly 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.” Ex. 1 at 140.

The increased bank erosion, loss of shading vegetation, and over-widening of channels due to livestock grazing cause these stream systems to be unable to stabilize and recover narrow, deep and sinuous channels indicative of high quality steelhead habitat. Second Beschta Decl. ¶¶ 7–9; Beschta Decl. (Dkt # 185) ¶¶ 11–24. Riparian habitat recovery requires many successive years without livestock grazing. Second Beschta Decl. ¶¶ 10, 15; Beschta Decl. (Dkt # 185) ¶¶ 22–26; Fourth Rhodes Decl. ¶¶ 22–24. Allowing continued grazing on these allotments annually and continuously renews and compounds the cycle of habitat destruction. Second Beschta Decl. ¶¶ 6–16; Beschta Decl. (Dkt # 185); ¶¶ 11–26; McCullough Decl. (Dkt # 186) ¶¶ 3, 11–12, 18. In fish-bearing systems as badly degraded as those in the Malheur National Forest, complete rest of the allotments for several years is necessary for steelhead habitat to recover.³ Second Beschta Decl. ¶¶ 10, 15; Beschta Decl. (Dkt # 185) ¶¶ 17, 22–23, 26; Fourth Rhodes Decl. ¶¶ 17, 22–25. Continued grazing on these stream systems, without several years of rest to allow streambanks to stabilize, overhanging banks to reform, and woody plants such as willows and cottonwoods to grow to heights above the browse levels of cattle, is likely to continue to harm steelhead by degrading riparian conditions. Second Beschta Decl. ¶¶ 9–15; Fourth Rhodes Decl. ¶¶ 22–25, 29.

³ As ONDA will argue on the merits, how many years of rest will be needed can only be determined after the Forest Service begins properly monitoring Riparian Management Objectives (“RMOs”) and making grazing management decisions based on whether RMOs are being attained, as required by the Malheur National Forest Land and Resources Management Plan and NFMA. ONDA Reply (Dkt # 77) at 1–7; see Kimbell, 2008 WL 4186913, at *2–*3.

III. 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, 2008 WL 4186913, at *4. The 2007–2011 BiOp sets three significant numeric standards that must be met to comply with the ESA. First, the Incidental Take Statement (“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. Ex. 1 at 228.

Second, to avoid liability for unlawful take, a permittee “must *fully* comply with conservation measures described as part of the proposed action and the following terms and conditions that implement the reasonable and prudent measures described above.” Id. at 242 (emphasis added). 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) (the ITS “[s]ets forth the terms and conditions ... that must be complied with by the Federal agency or any applicant to implement” the reasonable and prudent measures included in the ITS to minimize impact to the listed species). Among the Terms and Conditions is that permittees must strictly comply with move triggers and end-point standards, which are set at 10% bank alteration for (among others) Hamilton/King (“HKA”), Long Creek (“LCA”), Mt. Vernon/John Day/Beech Creek (“MVJDBCA”), Slide Creek (“SCA”), Upper Middle Fork (“UMFA”), Murderers Creek, and Lower Middle Fork Allotments,⁴ and at 20% bank alteration for (among others) the Fox Allotment (“FA”). Ex. 1 at 242.

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

Third, the 2007–2011 BiOp specifies that the agencies must reinitiate formal consultation if the 20% bank alteration take limit is exceeded. *Id.* at 218. The ESA regulations provide that

[r]einitiation of formal consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:

- (a) If the amount or extent of taking specified in the incidental take statement is exceeded; [or]
- (b) If 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) . The ITS defines the “triggers for reinitiation” as equivalent to the ITS take limits. *See, e.g.*, Ex. 1 at 228 (on the Long Creek Allotment, specifying that “[t]hese indicators are triggers for reinitiation: one redd per year in the Long Creek Allotment, and no more than 20% of the streambank being altered by cattle hoof action in the portions of Big Rock, Camp, Charlie, Cottonwood, Cougar, Coxie, Eagle, Lick, Little Trail, South Fork Long, Long, Trail, and West Fork Lick creeks in the Long Creek Allotment. Exceeding any of these limits will trigger the reinitiation provisions of this Opinion.”)

IV. THE SIX ALLOTMENTS

On April 3, 2009, pursuant to an agreement of the parties and this Court’s order (Dkt # 189), ONDA advised the other parties that six allotments—Long Creek, Slide Creek, Upper Middle Fork, Fox, Mt. Vernon/John Day/Beech Creek, and Hamilton/King⁵—would be subject to this request for further injunctive relief prohibiting grazing until this Court can issue a decision on the merits of ONDA’s claims. Field monitoring evidence collected by Christopher Christie, Linda Driskill, and the Forest Service itself show that extensive, excessive damage to

early seral status, upward trend is not apparent, and recent riparian impacts associated with trespass have occurred” on those allotments. Ex. 1 at 242–43.

⁵ “Mt. Vernon/John Day/Beech Creek” and “Hamilton/King” are groups of two or three allotments which the Forest Service manages together. Ex. 1 at 2 n.2. The agencies describe and analyze each of these groups as a single allotment in the 2007–2011 BiOp. *Id.*

riparian areas occurred throughout these allotments during the 2008 grazing season. That damage resulted in unlawful take and adverse modification of steelhead habitat in violation of the ESA.

A. Long Creek Allotment.

The Long Creek Allotment covers 49,628 acres within the North Fork John Day and Middle Fork John Day River watersheds. Ex. 1 at 26; Ex. 2 (regional map); Ex. 3 (allotment map). The LCA contains over 41 miles of steelhead habitat. Ex. 1 at 27. Significant steelhead-bearing streams include Camp Creek, Long Creek, and Lick Creek, each with over five miles of spawning and rearing habitat. *Id.* The proposed action for each of the years evaluated in the 2007–2011 biological assessment (“BA”) was grazing by 967 cow/calf pairs in rotation among units between May 16 and October 29, for a total of 5,723 animal unit months (“AUMs”). Ex. 1 at 26. Three of the allotment’s ten units (Flat Camp, Lick Creek and Hiyu) make up the vast majority of the area, collectively accounting for approximately 47,500 acres. Ex. 1 at 28–31. Steelhead spawning and/or rearing habitat occurs in all ten units. *Id.* As illustrated in the table below at p. 18, the proposed grazing in each of the five years from 2007 to 2011 represents a 17% increase over grazing on the LCA compared with 2006, despite the Forest Service’s conclusion that grazing on LCA is likely to adversely affect steelhead. Ex. 4 at 10.⁶

Livestock grazing caused extensive damage to riparian areas throughout all three of the major units on the LCA in 2008. In October 2008, Christopher Christie and Dr. Robert Beschta conducted monitoring at several locations on the LCA.⁷ Third Christie Decl. (filed herewith) ¶¶ 20–23 & Attach. 4–7; Second Beschta Decl. ¶ 3; Beschta Decl. (Dkt # 185) ¶ 7 & Attach. B.

⁶ Exhibit 4 contains excerpts from the 2007–2011 BA which the Forest Service sent to NMFS on February 28, 2007 (located in the NMFS administrative record at NMFS000785).

⁷ Christie attended a joint Forest Service/Bureau of Land Management Multiple Indicator Monitoring (“MIM”) training session in August 2008, and used the agencies’ MIM monitoring guidelines (published in April 2008) in his fall 2008 monitoring. Third Christie Decl. ¶¶ 13–14.

Christie monitored and photographed four stream segments in the LCA, measuring a mean bank alteration of 32%. Id. ¶ 18. At a Designated Monitoring Area (“DMA”) established pursuant to the PACFISH/INFISH biological opinion (“PIBO”) on Long Creek in the Hiyu Unit, Christie observed 45% bank alteration, excessive trampling of banks, and little or no riparian shrub regeneration. Id. ¶ 20 & Attach. 4.

A second location a half-mile downstream from the PIBO DMA showed the dramatic difference between grazed and ungrazed areas. At this location, several wire cages have protected riparian trees and shrubs. Third Christie Decl. ¶ 21 & Attach. 5; Beschta Decl. (Dkt # 185) ¶ 13 & Attach. B. Bank alteration at this site measured 39%, with high levels of silt in the creek due to bank alteration, shearing and sloughing. Third Christie Decl. ¶ 21 & Attach. 5 at 2–6, 9–13. The difference between vegetation conditions within the cages and the condition of the streambanks outside is remarkable. Id. ¶ 21 & Attach. 5 at 7–10; Beschta Decl. (Dkt # 185) ¶ 13 & Attach. B. Within the wire cages, willows and cottonwoods had grown to between five and six feet tall, but outside the cages livestock grazing has limited these woody shrubs to an average height of less than 17 inches. Second Beschta Decl. ¶¶ 11–12. Grazing on this allotment is heavily damaging woody species, preventing their recovery, and consequently allowing negative impacts to water quality, stream channels, and fish habitat to continue unabated. Id. ¶ 12. Similar, stark differences between healthy, ungrazed vegetation within enclosures and overgrazed plants without are also visible in Driskill’s photographs of this allotment. Second Driskill Decl. (filed herewith) Attach. 1 at 3, 9.

Christie also monitored at another Forest Service DMA marked “LC 2” on West Fork Lick Creek in the Lick Creek Unit, observing 36% bank alteration, heavily overgrazed vegetation, and low stubble height. Id. ¶ 24 & Attach. 8. At this location, enclosure cages also

provide a stark contrast between flourishing vegetation within the cages and the putting green-like conditions of the surrounding riparian area. Id. Attach. 8 at 2, 4–7, 10. Christie also observed 15% bank alteration along Camp Creek within the Lick Unit, and 26% bank alteration along Long Creek in the Ladd Unit. Id. ¶¶ 22–23 & Attach. 6–7. Driskill’s photographs show similar, badly degraded riparian conditions throughout the LCA. Second Driskill Decl. Attach. 1.

Beschta measured the condition of stream channels at four of the locations that Christie monitored, specifically the width to depth ratios. Second Beschta Decl. ¶¶ 8–9. A stream that provides high quality fish habitat in the form of a narrow and deep channel typically will have a width to depth ratio of less than 10. Id.; see also Ex. 4 at 4 (showing Riparian Management Objective (“RMO”) for width to depth ratio as less than 10). Beschta measured width to depth ratios of ranging from 7 to 46. Second Beschta Decl. ¶¶ 8–9. At these locations, Beschta noted the excessively wide, “dished-out” channel cross-sections and the lack of overhanging banks and streamside vegetation cover characteristic of overgrazed systems. Id. Continued degradation of stream channel conditions is likely if grazing continues on these streams. Id.

The Forest Service also monitored streambank alteration at seven locations on the Long Creek Allotment during 2008. Ex. 5 at 17–18. At each of those locations, the Forest Service documented exceedances of the BiOp’s 10% end-point condition. Id.; see Ex. 1 at 242. At four of those locations, bank alteration exceeded the 20% limit for lawful take and reinitiation of formal consultation on the proposed action, ranging from 23% on Lick Creek in the Lick Creek Unit to 51% on Keeney Creek in the Flat Camp Unit. Ex. 5 at 17–18. Forest Service photographs of these locations show degraded habitat similar to that observed by Christie and Beschta, with dished-out channels, loss of fish cover near the stream banks, shallower water depth, and loss of pool habitat. Ex. 6; see Second Beschta Decl. ¶ 9. The Forest Service has not taken or proposed

any enforcement action. Ex. 5 at 17–19. The agency had previously documented 15% streambank alteration on Pepper Creek in the Flat Camp Unit in 2007, but took no administrative action to correct this noncompliance with the 10% end-point condition. Ex. 7 at 2.

B. Slide Creek Allotment.

The Slide Creek Allotment covers 25,699 acres within the Middle Fork John Day watershed. Ex. 1 at 50; Ex. 2; Ex. 8 (allotment map). There are 10.8 miles of steelhead habitat in the SCA, including approximately three miles each on Slide Creek and Whiskey Creek. Id. at 51. The Forest Service proposed that 777 cow/calf pairs be allowed to graze between May 18 and October 29 in each of the five years evaluated in the 2007–2011 BA, for a total of 4,595 AUMs. Id. Three units (East, West, and Sale) are grazed regularly in rotation. Id. All three of these units contain steelhead spawning and rearing habitat, and Slide Creek has been determined to be “functioning at risk.” Ex. 1 at 136; Ex. 4 at 12, 14–15.

During October 2008, Christie monitored riparian conditions at the Forest Service’s DMA on Slide Creek within the SCA’s Sale Unit. Third Christie Decl. ¶ 25 & Attach. 9. He observed 45% bank alteration and greenline stubble height of 3 inches, both well beyond the 10% bank alteration end-point standard and 7 inch residual stubble height standard established for the SCA in the 2007–2011 BiOp. Id.; see Ex. 1 at 52, 136, 242 (2007–2011 BiOp establishing 7 inch stubble height and 10% bank alteration standards for SCA). Livestock had sheared and trampled the banks of Slide Creek in many places, and the rotting carcass of a cow lay partially in the streambed, a lingering source of pollution to this steelhead stream. Third Christie Decl. ¶ 25 & Attach. 9 at 3–10.

Christie monitored four other riparian and two uplands sites in the East Unit of the SCA. Id. ¶ 26 & Attach. 10–14. He measured and photographed extensive bank alteration, greenline

stubble heights of 2.8 to 3.7 inches, and chronically over-browsed woody shrubs in the riparian areas, with uplands areas mown to a stubble height of only 1.7 inches. Id. Attach. 10–14. Streambank alteration ranged from 19% to 47%. Id. ¶ 26 & Attach. 10–13. Christie observed 43% bank alteration on Upper Whiskey Creek in the East Unit, noting that the “stream reach looks about the same as it did back in 2001, with very short stubble heights, excessive bank alteration, and over-utilized riparian shrubs.” Id. ¶ 26. The Forest Service also conducted monitoring at one location on the SCA, in November 2008, at a location on Whiskey Creek. Ex. 5 at 37. The agency documented 27% bank alteration and a 4 inch stubble height, both in excess of the BiOp’s end-point standard and the limit for lawful take. Id.; Ex. 9 (monitoring form). The Forest Service has not taken or proposed any enforcement action. Ex. 5 at 37–38.

C. Upper Middle Fork Allotment.

The Upper Middle Fork Allotment contains approximately 55,000 acres, of which 38,150 are considered suitable for livestock grazing. Ex. 1 at 53; Ex. 2; Ex. 10 (allotment map). Approximately 51 miles of stream on the UMFA provide steelhead habitat within the Middle Fork John Day River watershed, including over five miles in the Middle Fork John Day River and over eight miles on Vinegar Creek. Id. at 55. This unit was rested from grazing in 2004, 2005, and 2006. Ex. 4 at 17. The Forest Service proposed to graze the UMFA for each of the five years between 2007 and 2011, allowing 485 cow/calf pairs between May 18 and October 29, for a total of 2,868 AUMs. Ex. 1 at 53. Livestock graze six major units (Austin, Lower Vinegar, Upper Vinegar, Caribou, Deerhorn, and Butte) in rotation. Id. Several smaller units and riparian pastures also remain (in name only) from a range evaluation project, but “the interior fences between those units have not been maintained.” Id. Steelhead spawning and rearing habitat exists on all six of the major units and most of the smaller units and riparian pastures. Id. at 56–57.

NMFS relates that “livestock distribution has been a problem in the past and may continue to be a problem in the future. Livestock have tended to concentrate in the lower reaches of nearly all streams on the allotment resulting in heavy utilization in riparian zones.” Id. at 54. Over 45 miles of fence have been built on the public lands in the UMFA. Id. However, “[s]teep and rugged topography, poor condition of fences, and seasonally limited upland water sources create management challenges. The steep slopes result in uneven livestock distribution and livestock tend to concentrate in the lower reaches of nearly all the streams in the allotment.” Id.

In 2008, Christie observed 37% bank alteration near the Forest Service’s DMA on Vinegar Creek in the Lower Vinegar Unit, photographing sloughed, eroding and sheared banks and badly stunted willow and currant. Third Christie Decl. ¶ 27 & Attach. 15. Overhanging banks that had begun to re-form during the three years of rest in 2004–2006 had been trampled or sheared off into the stream. Id. Attach. 15 at 1, 8. At the PIBO DMA site downstream from the Forest Service DMA on Vinegar Creek, Christie measured 18% bank alteration, in excess of the end-point condition in the ITS, and photographed slumped and trampled banks where overhanging banks had been knocked down. Id. ¶ 28 & Attach. 16. Christie also measured 18% bank alteration on the Middle Fork John Day River in the Deerhorn Unit. Id. ¶ 29 & Attach. 17.

The Forest Service also measured bank alteration in excess of 2007–2011 BiOp limits on the Lower Vinegar and Caribou Units. Ex. 5 at 40. On the Caribou Unit, monitoring locations on Windlass Creek and at Cow Camp Meadows showed 26% and 23% bank alteration. Id.; see also Ex. 11. Monitoring on Vinegar Creek showed 18% bank alteration, in violation of the 10% end-point condition in the ITS. Ex. 5 at 40. The Forest Service also documented fences in disrepair, cut fences, and open gates at the boundary of the Butte and Deerhorn Units. Ex. 12 at 2–3. In September 2008, the Forest Service received a report of problems on the UMFA along the

Middle Fork John Day River, indicating that the permittee's cattle "had used the river too hard and the holding pasture at Sunshine was hammered" and that another allotment along the river used by the same permittee (the Bear Allotment) "had cattle all year and no apparent rotation was taking place." Ex. 13. The Forest Service replied that it was "aware there were some problems with fences." *Id.* The Forest Service also noted in its 2008 End of Year Grazing Report that cattle from the UMFA strayed repeatedly onto the neighboring Lower Middle Fork Allotment—despite this Court's injunction against grazing on the latter allotment during 2008. Ex. 5 at 20, 39 (noting that "[c]attle from the Upper Middle Fork were moving into the Lower Middle Fork by simply walking around the end of the existing fence."). The Forest Service has not taken or proposed any enforcement action on the UMFA. *Id.* at 40–41.

D. Fox Allotment.

The Fox Allotment covers approximately 26,509 acres in the Middle Fork John Day River and North Fork John Day watersheds. Ex. 1 at 10, 21; Ex. 2; Ex. 14 (allotment map). The allotment contains approximately 14 miles of streams containing steelhead habitat, including 4.5 miles on Fox Creek and approximately two miles on Cottonwood Creek. Ex. 1 at 59; Ex. 14. The Forest Service's authorization for this allotment involves grazing 293 cow/calf pairs between May 28 and October 14 for each of the five years included in the 2007–2011 BiOp, a total of 1,354 AUMs. Ex. 1 at 21. The allotment contains three units (South Fork, Wiley Creek, Fox Creek), with steelhead habitat present on all three units. *Id.* at 22–23. The 2007–2011 BiOp's end-point standard for the FA is set at 20%. *Id.* at 242.

In 2008, the Forest Service monitored at a site within steelhead critical habitat on Fox Creek at Fox Meadow (in the Fox Unit), measuring 49% bank alteration, far in excess of the 20% end-point standard and limit for take. Ex. 5 at 12. The agency's photographs show extensive

bank damage and low stubble heights. Ex. 15 at 3–4. No enforcement action was taken or recommended. Ex. 5 at 12–13. Linda Driskill photographed the same overgrazed and compacted headwaters meadow just two days after the Forest Service staff. Second Driskill Decl. Attach. 2 at 3. Driskill observed similar standards exceedances, overgrazing, and heavily compacted riparian areas at other locations on Fox Creek, Cottonwood Creek (in the Wiley Creek Unit, near the confluence with Beech Creek), and the headwaters of Cottonwood Creek near Bear Springs. Id. at 1, 5, 7. The Forest Service conducted no monitoring in 2008 on stream reaches accessible to steelhead within the South Fork or Wiley Units. Ex. 5 at 12, 13 n.8. The Forest Service also conducted no quantitative monitoring of bank alteration end-point compliance on the FA in 2007. This is despite the clear requirement in the 2007–2011 BiOp that it do so. Ex. 16 (administrative record index for FA showing only stubble height data collected in 2007); Ex. 1 at 243 (ITS Term and Condition requiring that the end-of-year report include “[s]pecific MNF implementation monitoring data,” including “bank alteration”).

E. Mt. Vernon/John Day/Beech Creek Allotment.

The Mt. Vernon/John Day/Beech Creek Allotment covers approximately 49,583 acres in the Upper Mainstem John Day River watershed. Ex. 1 at 11, 35; Ex. 2; Ex. 17 (allotment map). There are approximately 21 miles of steelhead habitat on this allotment, including 3.69 miles in Belshaw Creek, 5.76 miles in Clear Creek, and 4.3 miles in McClellan Creek. Ex. 1 at 35. The proposed action on this allotment for each of the five years covered by the 2007–2011 BiOp is to graze between May and November for a total of 2,932 AUMs, involving the grazing of 319 cow/calf pairs on Mt. Vernon, 177 cow/calf pairs on John Day, and 35 cow/calf pairs on Beech Creek. Id. at 36, 38, 40. The allotment is divided into eight units, with steelhead spawning and rearing habitat present on all but the Coho and Belshaw Meadows Units. Id. at 37–40.

This allotment has a history of serious failure to meet grazing standards combined with repeatedly increased pressure from grazing. As this Court has noted, a NMFS biologist reported poor conditions on almost every allotment in the Malheur National Forest in September 2005, including the MVJDBCA. Lohn, 485 F. Supp. 2d at 1201. At that time, NMFS recognized that at least one unit on the MVJDBCA was in “‘terrible shape,’ but that the Forest Service increased [AUMs] by 84 from 2004,” and that although “all desired attributes except one were below desired values, the Forest Service response was to increase use by 97 AUMs.” Id. The NMFS’s biologist expressed the “[n]eed to substantially modify the action to address the impacts at the allotment scale rather than to simply fence or move monitoring areas.” Id. Instead, the Forest Service has maintained AUMs at the same, higher level every year since. Ex. 1 at 36, 38, 40; Ex. 4 at 11. In 2007, the Forest Service took no quantitative measurements of bank alteration on this allotment, despite the 2007–2011 BiOp’s requirement that such data be collected. Ex. 18.

In 2008, violations of the conditions of the ITS were rife on the MVJDBCA. Four of the five steelhead-bearing units that were grazed in 2008 sustained excessive bank damage. Ex. 5 at 23–24. The Forest Service measured 18% bank alteration and 3 inch stubble height (below the 4 inch end-point standard) in the Belshaw Creek Riparian Unit, 17% bank alteration on the Bear Creek Unit, 15% on the Ennis Creek Unit, and 15% on the McClelland Creek Unit, all in violation of the 10% end-point standard. Id. Photographs of several of these locations show unstable banks, dished-out channel cross-sections, lack of cover from overhanging banks and streamside vegetation, shallow depths and absence of pools, all characteristic of overgrazed riparian areas. Second Driskill Decl. Attach. 3; Ex. 19 (Forest Service photographs); see Second Beschta Decl. ¶¶ 7–9. The Forest Service neither took nor recommended any enforcement action. Ex. 5 at 23 (concluding that “it is unnecessary to initiate management changes”).

F. Hamilton/King Allotment.

The Hamilton/King Allotment includes approximately 4,856 acres of public land (3,406 in Hamilton, 1,450 in King) in the North Fork John Day River watershed. Ex. 1 at 10, 24; Ex. 2; Ex. 20 (allotment map). The Hamilton Allotment consists of two units (West and North East Units). Approximately 1.2 miles of steelhead spawning habitat exists in East Fork Deer Creek on the West Unit of the HKA. The Forest Service’s proposal for the HKA is to graze 99 cow/calf pairs on Hamilton from May 28 to September 29, for a total of 518 AUMs, and 6 cow/calf pairs on King between May 18 and September 29, for a total of 28 AUMs. Ex. 1 at 24.

A PIBO DMA site is located on East Fork Deer Creek in the HKA. Ex. 21. In September 2007, after the BiOp was issued, the Forest Service documented 60% bank alteration at this location, including photographs showing extensive trampling and shearing of banks. Ex. 22. Despite the dramatic exceedance of the ITS take limit and the 10% end-point condition, the Forest Service took no action with respect to grazing on this allotment prior to the 2008 grazing season. The results were predictable. Ex. 5 at 19. In October 2008, Christie measured 42% bank alteration at the same PIBO DMA site, with photographs showing bank trampling and shearing, excessive riparian shrub use, and low stubble heights. Third Christie Decl. ¶ 19 & Attach. 3.

The following chart summarizes the recent and proposed grazing on the six allotments:

TOTAL ANNUAL AUMs PER ALLOTMENT

Grazing Year(s)	Long Creek	Slide Creek	Upper M. Fork	Fox	MVJDBC	Hamilton/King
2003	4,842	4,595	264	1,354	2,543	546
2004	4,873	4,595	0	1,354	2,932	546
2005	4,895	4,595	0	1,354	2,932	546
2006	4,873	4,595	0	1,354	2,932	546
2007–2011 (each year)	5,723	4,595	2,868	1,354	2,932	546

Ex. 1 at 21, 24, 26, 36, 38, 40, 51, 53; Ex. 4 at 5–8, 11, 16–17.

ARGUMENT

I. STANDARD OF REVIEW

This Court may enjoin the Forest Service from allowing grazing based on the agencies' violations of ESA §§ 7 and 9. 16 U.S.C. § 1540(g)(1). By enacting the ESA, Congress altered the traditional injunction standard under Federal Rule of Civil Procedure 65 to ensure protection of endangered and threatened species, and "the balance has been struck [by the ESA] in favor of affording endangered species the highest of priorities." TVA v. Hill, 437 U.S. 153, 194 (1978).⁸ Thus "[i]n cases involving the ESA, Congress removed from courts their traditional equitable discretion in injunction proceedings of balancing the parties' interests." Nat'l Wildlife Fed'n v. Burlington N. R.R., Inc., 23 F.3d 1508, 1510–11 (9th Cir. 1994) (noting also that the "traditional test for preliminary injunctions ... is not the test for injunctions under the [ESA]"); see also Nat'l Wildlife Fed'n v. NMFS, 422 F.3d 782, 794 (9th Cir. 2005) (holding that traditional analysis involving weighing of economic harm "does not apply in ESA cases because Congress has already struck the balance").

To obtain injunctive relief under the ESA, a plaintiff must show a likelihood of success on the merits, irreparable injury to a listed species, and—only for claims involving unlawful take in violation of ESA § 9—that a future ESA violation "is at least likely." Nat'l Wildlife Fed'n, 23 F.3d at 1510–11; Kimbell, 2008 WL 4186913, at *7. These factors are evaluated along a sliding scale, where, if a plaintiff has "demonstrated a strong likelihood of success on the merits," it needs "only to make a minimal showing of harm to justify the preliminary injunction." Kootenai

⁸ As explained in ONDA's Response to Motion to Vacate the Preliminary Injunction (Dkt # 181) at 4–10, the United States Supreme Court's recent decision in Winter v. Natural Resources Defense Council, Inc., 129 S. Ct. 365 (2008), does not alter this standard because Winter involved an injunction issued under the National Environmental Policy Act, rather than the Endangered Species Act at issue here. TVA and the Ninth Circuit cases applying it to injunctions under the ESA control the standard for injunctive relief here. ONDA Response (Dkt # 181) at 7.

Tribe v. Veneman, 313 F.3d 1094, 1124 (9th Cir. 2002); see Winter v. Natural Res. Def. Council, 129 S. Ct. 365, 392 (2008) (Ginsburg, J., dissenting) (noting, without objection from the Court, that a court in equity may award “relief based on a lower likelihood of harm when the likelihood of success is very high” and that “[t]his Court has never rejected that formulation, and I do not believe it does so today.

For all claims under ESA § 7, whether arising from final agency action or under the ESA’s citizen suit provision, an injunction should issue once ONDA establishes the likelihood of a substantive or procedural ESA violation. Sierra Club v. Marsh, 816 F.2d 1376, 1384 (9th Cir. 1987) (holding that plaintiff was “entitled to injunctive relief if the [action agency] violated a substantive or procedural provision of the ESA” related to ESA § 7); Greenpeace v. NMFS, 106 F. Supp. 2d 1066, 1074 (W.D. Wash. 2000) (“where an agency has not fulfilled its substantive duty to ‘insure’ against jeopardy or adverse modification, injunctive relief is mandatory under section 7”). For procedural violations, “[i]rreparable damage is presumed to flow from a failure properly to evaluate the environmental impact of a major federal action” under the ESA. Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985). Accordingly, where the ESA violation is procedural, including failure to reinitiate formal consultation, plaintiffs need only “show that the circumstances triggering the procedural requirement exist, and that the required procedures have not been followed.” Thomas, 753 F.2d at 765.

II. NMFS AND THE FOREST SERVICE HAVE VIOLATED THE ESA

ONDA is likely to succeed on the merits of its ESA claims in this litigation because NMFS and the Forest Service have violated ESA §§ 7(a)(2) and 9 and implementing regulations in issuing decisions related to and subsequently managing livestock grazing on the Malheur National Forest.

A. NMFS has Violated ESA § 7(a)(2).

As described in ONDA's memorandum in support of its 2008 motion for a preliminary injunction, NMFS violated ESA § 7(a)(2) by issuing the 2007–2011 BiOp which is arbitrary and capricious and contrary to the ESA. ONDA Memo (Dkt # 35) at 16–25. ONDA renews these arguments here. The defects in the 2007–2011 BiOp, including NMFS's unjustifiable reliance on mitigation measures that are not reasonably certain to occur, fully justify an injunction pending resolution of ONDA's claims on the merits. Id.

To be valid, mitigation measures in a biological opinion 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). The 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, 481 F.3d 1224, 1241 (9th Cir. 2007). A BiOp must demonstrate that “swift and necessary actions *will* be taken when violations are found” to insure against jeopardy. Lohn, 485 F. Supp. 2d at 1201 (emphasis added).

As explained in ONDA's 2008 memorandum and reply, the 2007–2011 BiOp improperly relies on Forest Service management actions that are not specific and are not certain to occur, and also unjustifiably relies on mitigation measures that are delegated to third parties. ONDA Memo (Dkt # 35) at 16–25; ONDA Reply (Dkt # 77) at 14–17, 20–21. Nothing has altered these reasons for declaring the 2007–2011 BiOp invalid. However, documents recently produced by the Forest Service show that, *at the time that NMFS issued the 2007–2011 BiOp*, the Forest Service was well aware that it would not be able to carry out the mitigation measures that it

proposed and which NMFS endorsed. This provides an additional reason why the Forest Service's proposed mitigation was not certain to occur, and why the 2007–2011 BiOp's reliance on the proposed mitigation was arbitrary and capricious.

Even as the 2007–2011 BiOp was being issued, the Malheur National Forest was aware that it could not implement the measures that it had 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. Ex. 23. 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, Ex. 1 at 243–44, the range staff concluded that the ambitious monitoring requirements NMFS relied on were “[u]nrealistic with current funding, personnel and priorities.” Ex. 23 at 3. Observing a promise in the 2007–2011 BiOp that “MNF will establish photo points or pace transects in each unit by 2008,” Ex. 1 at 124, the range staff frankly indicated that “MNF will not be able to establish photo points and on transects in each unit by 2008.” Ex. 23 at 2. 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,” Ex. 1 at 22, the staff noted that the Forest Service “[w]ill not be able to accomplish this by 2008—not in every unit.” Ex. 23 at 1.

It also is clear that Forest Service staff were not even aware of the existence of the vaunted “monitoring program” in which NMFS expressed such confidence. Citing the extensive discussion of monitoring and a footnote referencing the “MNF grazing monitoring program” in

the 2007–2011 BiOp, Ex. 1 at 116 & n.14,⁹ one staffer 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.*” Ex. 23 at 2 (emphasis added). Although on paper the Malheur National Forest promised an elaborate (and guaranteed-to-succeed) grazing management strategy, the Forest, in reality, had not even shared its monitoring program—if it actually had one—with the very staff that would have been charged with implementing it.¹⁰

As a result, at the time NMFS issued the 2007–2011 BiOp in May 2007, the Forest Service knew very well that the mitigation measures it had proposed were not reasonably certain to occur. The Forest Service’s frank acknowledgment of inadequate capacity to implement the terms of the 2007–2011 BiOp and withholding of key information about the process by which it tossed together its biological assessments, and NMFS’s subsequent failure to evaluate these

⁹ On this page of the 2007–2011 BiOp, NMFS 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.” Ex. 1 at 116 (emphasis added). The footnote indicates that this description relied on a “Conversation with Chance Gowan, MNF Senior Aquatic Biologist and Riparian Ecologist (April 26, 2007) (Describing MNF grazing monitoring program in detail).” *Id.* at 116 n.14.

¹⁰ The Forest Service’s decisionmaking process for developing the 2007–2011 BiOp was also hopelessly flawed. The Malheur National Forest’s aquatic biologist, Chance Gowan, acknowledged that the 2007–2011 biological assessments were hurriedly tossed together as the agencies scrambled to moot the 2006 biological opinion before this Court could rule on its validity. Ex. 24; see Ore. Natural Desert Ass’n v. Lohn, No. CIV 06-946-KI, 2007 WL 2377011, at 1 (D. Or. June 11, 2007) (vacating Court’s April 16, 2007 judgment as moot based on May 23, 2007 promulgation of 2007–2011 BiOp). In explaining an error in one of the documents, Gowan noted to the District Ranger that “I developed many, many BA’s—all under a terrible time constraint—so, I cut and pasted some of the common language.” Ex. 24.

important factors in issuing its “no jeopardy” decision, render the 2007–2011 BiOp arbitrary and capricious. Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co., 436 U.S. 29, 43 (1983) (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, 481 F.3d at 1241 (rejecting reliance on mitigation in the absence of guarantees that mitigation would occur); Natural Res. Def. Council v. Kempthorne, 506 F. Supp. 2d 322, 350–57 (E.D. Cal. 2007) (invalidating adaptive management plan that failed to provide a reasonable certainty that necessary mitigation measures would be implemented or admitted adverse impacts mitigated).

B. The Forest Service Has Violated ESA § 7(a)(2).

Under ESA § 7(a)(2), the Forest Service must independently insure that its ongoing management activities do not result in jeopardy or adverse modification of critical habitat throughout the course of the project. Sierra Club, 816 F.3d at 1385–86 (agency violated § 7(a)(2) by allowing insurance against jeopardy to lapse by failing to carry out the mitigation on which a “no jeopardy” finding was based); see also id. at 1386 (describing the difference between the action agency’s compliance with ESA § 7(a)(2) at the time of its original decision and the agency’s violation of ESA § 7(a)(2) when it subsequently failed to carry out the original decision properly); Defenders of Wildlife v. Martin, 454 F. Supp. 2d 1085, 1096–99 (E.D. Wash. 2006) (holding that Forest Service failed to comply with ongoing obligation under ESA § 7(a)(2) to insure against jeopardy). The Forest Service has violated § 7(a)(2) in its grazing management in 2007 and 2008 by allowing extensive damage to steelhead and their habitat to occur and

accumulate on 8 of the 13 allotments covered by the 2007–2011 BiOp. 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 2007, ONDA documented dramatic bank alteration exceedances and widespread damage from livestock grazing on Murderers Creek and Lower Middle Fork Allotments. See Christie Decl. (Dkt # 37) & Attach. 2, 4. The results of the 2008 grazing season were even more grim: ONDA and the Forest Service documented exceedances of the bank alteration end-point condition in the ITS at no fewer than 32 measured transects on the six allotments subject to this motion. Every one of the 14 sites that Christie monitored suffered from at least 15% bank alteration. At more than half of the sites, bank alteration was greater than 35%. Third Christie Decl. ¶ 18 & Table 1. The mean bank alteration at the five sites Christie measured on Long Creek Allotment was 32%; it was 36% on the five riparian sites monitored on Slide Creek Allotment; it was 24% on the three sites on Upper Middle Fork Allotment; it was 42% at the single site measured on Hamilton/King Allotment. Id. ¶¶ 18–19. The Forest Service’s own measurements of streambank damage ranged as high as 49% along Fox Creek on the Fox Allotment. Ex. 5 at 12. Five of the six sites the Forest Service monitored on Mt. Vernon/John Day/Beech Creek Allotment showed bank alteration above the 10% end-point condition. Id. at 23–24. The Forest Service has neither taken nor recommended any enforcement action in response to these widespread violations on the six allotments. Id. at 12–19, 23–25, 37–42.

Field observations by Dr. Bechta and a review by Jon Rhodes of the monitoring data and photographs collected during 2008 confirm that livestock grazing caused significant, negative impacts to steelhead habitat throughout these six allotments. Third Christie Decl. Attach. 3–13,

15–17; Second Beschta Decl. ¶¶ 5–7, 9–14; Fourth Rhodes Decl. ¶¶ 10–21, 26–28; Second Driskill Decl. Attach. 1–3. The end-of-season photographs show virtually no place on these allotments where anything remotely like the “narrow, deep, and typically sinuous streams that provide high quality fish habitat” can be found where livestock have grazed. See Second Beschta Decl. ¶ 8; see generally Third Christie Decl. Attach. 3–13, 15–17; Second Driskill Decl. Attach. 1–3; Exs. 6, 11, 15, 19 (Forest Service inspection reports).

Three years ago, this Court noted that a NMFS biologist “reported poor conditions on almost every allotment” covered by that year’s steelhead biological opinions. Lohn, 485 F. Supp. 2d at 1201. Yet the Forest Service set the permissible grazing for 2007–2011 at *higher annual levels* than in 2006 on two of the six allotments at issue here, and maintained the same levels on the other four. Table supra at 18; cf. Ore. Natural Desert Ass’n v. Singleton, 75 F. Supp. 2d 1139, 1150 (D. Or. 1999) (enjoining grazing where agency used greater-than-average rainfall to increase grazing rather than provide for recovery and enhancement of natural resources). Despite the violations identified in 2007 and 2008, the administrative record and discovery to date in this case indicate that the Forest Service has not taken a single administrative action against any permittee. Nor has the Forest Service issued a formal permit modification or Annual Operating Instruction that would drastically reduce or suspend grazing to allow these riparian systems to begin recovery. The Forest Service has candidly acknowledged that it cannot implement the monitoring and grazing strategy called for in the 2007–2011 BiOp. Ex 23; Ex. 25 at 4 (January 13, 2009 letter from Malheur National Forest regarding bank alteration standard, stating in a heading that “a 10% stand-alone threshold for bank alteration significantly modifies the Proposed Action and leaves us essentially unable to implement”).

In these circumstances, the wretched results of the 2008 grazing season documented and photographed by Christie, Beschta, Driskill and the Forest Service are—sadly—unsurprising. Despite this Court’s warning five years ago of a “dire need” for better management, despite this Court’s invalidation of the 2006 biological opinion, and despite the 2008 injunction on two other allotments upon a showing of major damage from livestock grazing to the riparian areas, the Malheur National Forest was unable to prevent ESA violations on six more allotments during 2008. That the Forest was unable to prevent damage to steelhead habitat throughout more than half of the allotments grazed last year shows that the Forest’s grazing management system is fundamentally broken, to the detriment of steelhead which depend on over 300 miles of heavily-grazed streams in the Forest for their species’s survival. Ex. 1 at 59–61. The extensive damage to the streams on these six allotments and the omnipresent and recurrent violations of the 2007–2011 BiOp’s take limit and the end-point condition make it once again likely that ONDA will succeed on the merits of its claim that the Forest Service has violated ESA § 7(a)(2) by failing to insure against jeopardy to steelhead or destruction or adverse modification of steelhead habitat in its ongoing grazing management. Sierra Club, 816 F.2d at 1385–86.

C. The Forest Service Has Violated ESA § 9.

Injunctive relief is warranted here under ESA § 9, which prohibits unlawful “take” of any endangered species. 16 U.S.C. § 1538(a)(1)(B). “Incidental” take is allowed under some circumstances: “taking ... that complies with the conditions set forth in the incidental take statement is permitted.” Ramsey v. Kantor, 96 F.3d 434, 441 (9th Cir. 1996). But take that exceeds the scope of an incidental take statement is prohibited. Id. at 442; see also Ore. Natural Resources Council v. Allen, 476 F.3d 1031, 1040 (9th Cir. 2007) (“Incidental take” must be truly incidental and may not be the purpose of the action. . . . The take must be in compliance with the

terms and conditions of the Incidental Take Statement.) (citations omitted). Significantly, the ESA regulations provide that any taking which is subject to an ITS and “*which is in compliance with the terms and conditions of that statement* is not a prohibited taking under the Act.” 50 C.F.R. § 402.14(i)(5) (emphasis added). The Court may enjoin all or part of an action that would take listed species in violation of ESA § 9. Nat’l Wildlife Fed’n, 23 F.3d at 1511–12.

Grazing during 2008 on Long Creek, Slide Creek, Upper Middle Fork, Fox, Mt. Vernon/John Day/Beech Creek, and Hamilton/King Allotments caused the unlawful take of steelhead. There is no serious question that livestock grazing on the Malheur National Forest is harming, and therefore taking, steelhead by adversely affecting their habitat in a way that results in impairing steelhead behavioral patterns and increasing steelhead mortality. Ex. 1 at 140 (“grazing can result in a variety of negative riparian impacts. When riparian habitat is negatively affected, listed fish species are also negatively affected.”); Second Beschta Decl. ¶¶ 5–7, 9–13, 16; Beschta Decl. (Dkt # 185) ¶¶ 11–25; Second McCullough Decl. ¶¶ 4–5; McCullough Decl. (Dkt # 186) ¶¶ 3, 5–8, 11–18; Fourth Rhodes Decl. ¶¶ 13–21, 26–28; Third Rhodes Decl. (Dkt # 184) ¶¶ 15–16. 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. This leaves the agency¹¹ that authorized the activity that caused take liable for violating ESA § 9. Ore. Natural Resources Council, 476 F.3d at 1040; Ramsey, 96 F.3d at 442.

On all six allotments, livestock grazing authorized by the Forest Service caused more than 10% bank alteration during 2008, in violation of the ITS’s end-point condition. Third Christie Decl. ¶¶ 18–29; Fourth Rhodes Decl. ¶¶ 11–12, 26; Ex. 5 at 12, 15, 17–18, 23–24, 37,

¹¹ Government agencies are liable for violating the take prohibition in ESA § 9 by authorizing activities carried out by others that result in take. Pac. Rivers Council v. Brown, No. 02-243-BR, 2002 WL 32356431, at *11-*12 (D. Or. Dec. 23, 2002) (citing Strahan v. Coxe, 127 F.3d 155, 163 (1st Cir. 1997) and Defenders of Wildlife v. EPA, 882 F.2d 1294, 1301 (8th Cir. 1989)).

40. On most, the measured bank alteration on some transects far exceeded the 20% limit on lawful take from habitat effects. Third Christie Decl. ¶ 18 (describing mean bank alteration at measured transects on four allotments at between 24% and 42%); Ex. 5 at 12, 15, 17–18, 37, 40 (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%). Based on these violations of the conditions and take limit set in the 2007–2011 BiOp, unlawful take in violation of ESA § 9 occurred on all six allotments last year.

D. The Forest Service and NMFS Have Failed to Reinitiate Formal Consultation.

Because livestock grazing in 2007 and 2008 has resulted in take beyond the limit allowed in the ITS, the Forest Service has violated the ESA by failing to reinitiate formal consultation on the 13 allotments covered by the 2007–2011 BiOp. The ESA regulations provide that “[r]einitiation of formal consultation is required and shall be requested by the Federal agency or by the Service” if the amount of take exceeds the limit specified in the ITS or if new information reveals effects not previously considered. 50 C.F.R. §402.16(a)-(b). Evidence presented to this Court in 2007 and 2008 shows that the trigger for reinitiation of formal consultation has been hit repeatedly throughout the 13-allotment project area. The 20% streambank alteration trigger for reinitiation has been exceeded on streams on Murderers Creek, Lower Middle Fork, Long Creek, Slide Creek, Upper Middle Fork, Fox, and Hamilton/King Allotments during 2007 and 2008. See, e.g., ONDA Memo (Dkt # 35) at 33 n.16; Third Christie Decl. ¶¶ 18–29, Ex. 5 at 12, 15, 17–18, 37, 40.

Forest Supervisor Doug Gochnour acknowledged in a March 10, 2009 letter to NMFS that the trigger for reinitiation of formal consultation had occurred. Ex. 26 at 1 (noting that “five allotments . . . did exceed the ITS limitation of no more than 20% bank alteration thus triggering

re-initiation of consultation.”). Accordingly, both agencies have a regulatory obligation to reinitiate formal consultation on the proposed action covered by the 2007–2011 BiOp.¹² Formal consultation involves preparation of a biological assessment covering the proposed action and culminates in the issuance of a biological opinion.¹³ 50 C.F.R. §§ 402.14(c)(6), (g)(4); see Mount Graham Red Squirrel v. Espy, 986 F.2d 1568, 1570 (9th Cir. 1993).

Gochmour’s March 10, 2009 letter does not include a request for formal consultation, nor is there any indication that the Forest has issued a new biological assessment or that NMFS has issued a new biological opinion. Ex. 26 at 1. Because the facts that trigger the reinitiation requirement—20% bank alteration exceedances within the project area in multiple years—exist, and because the required procedures—reinitiation of formal consultation—have not been followed, an injunction must issue. Thomas, 753 F.2d at 765.

III. AN INJUNCTION IS NECESSARY TO PREVENT IRREPARABLE HARM TO STEELHEAD

It is clear from the evidence adduced above that livestock grazing in 2008 on the six allotments subject to this motion resulted in irreparable harm to steelhead and steelhead habitat. On all six allotments, and on almost every one of the major units on these allotments, livestock grazing caused degraded stream conditions, resulting in violations of the end-point standards in the ITS and in unlawful take of steelhead. The Forest Service comprehensively failed to discharge its obligation

¹² The BiOp provides that “[f]or purposes of this consultation, the proposed action is the MNF authorizing proposed grazing activities for 2007-2011 in the Camp Creek, Deadhorse/Hanscombe/Fields Peak, Dixie, Fox, Hamilton/King, Long Creek, Lower Middle Fork, Mount Vernon/John Day/Beech Creek, Murderers Creek, Roundtop, Seneca/Sugarloaf, Slide Creek, and Upper Middle Fork allotments.” Ex. 1 at 2.

¹³ Until a biological opinion is completed, the Forest Service may not make irreversible or irretrievable commitment of resources that would foreclose the formulation of reasonable and prudent alternatives that do not violate the ESA. 16 U.S.C. § 1536(d); see Wash. Toxics Coalition v. EPA, 413 F.3d 1024, 1034 (9th Cir. 2005).

to insure against jeopardy to steelhead and to prevent destruction or adverse modification to steelhead critical habitat in its management of grazing during 2008 and 2007. In view of the historical inability of the Malheur National Forest to prevent the degradation of steelhead streams so evident these past two years, and the resulting take of steelhead in violation of ESA § 9, similar harm to steelhead and their aquatic habitat is likely to occur if turnout is allowed on these allotments prior to an adjudication of ONDA's claims on the merits.

ONDA has demonstrated a strong likelihood of success on the merits of its claims under ESA § 7(a)(2) and the consultation regulations. Based on these showings, an injunction should issue under the ESA. Sierra Club, 816 F.2d at 1384. Furthermore, “[i]rreparable damage is presumed to flow from a failure properly to evaluate the environmental impact of a major federal action” under the ESA. Thomas, 753 F.2d at 764. The Forest Service has acknowledged that the triggers for reinitiation of formal consultation have been exceeded, but the agencies have not reinitiated formal consultation. Ex. 26 at 1. This is sufficient to warrant an injunction. Thomas, 753 F.2d at 765.

In addition, ONDA has demonstrated a strong likelihood of success on the merits of its claim under ESA § 9 because livestock grazing caused unlawful take of steelhead on eight allotments in Malheur National Forest during 2007 and 2008. To obtain injunctive relief for the violation of ESA § 9, it must be “at least likely” that livestock grazing will result in harm to steelhead in the future. Nat'l Wildlife Fed'n, 23 F.3d at 1510–11; Kimbell, 2008 WL 4186913, at *7. In determining whether harm to steelhead is “at least likely” in the future, “[p]ast takings are indeed instructive, especially if there is evidence that future similar takings are likely.” Nat'l Wildlife Fed'n, 23 F.3d at 1512.

The Malheur National Forest's dismal history of preventing violations of permit terms, conditions, and standards meant to prevent ecological degradation demonstrates beyond question

that further grazing on these allotments will result in continued degradation of steelhead habitat. In turn, this will increase steelhead mortality and cause other sub-lethal harm to the fish. McCullough Decl. (Dkt # 186) ¶¶ 5–8, 11–18. The circumstances are strikingly similar to several other instances where the Malheur National Forest has appeared as a defendant before this Court on charges that it cannot properly manage livestock grazing. Twice in 2004 this Court declared “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.” ONDA 03-381, 2004 WL 1592606, at *10 (D. Or. July 15, 2004); Ore. Natural Desert Ass’n v. U.S. Forest Serv., No. 03-213-KI, 2004 WL 1293909, at *9 (D. Or. June 10, 2004) (“ONDA 03-213”) (“the way in which grazing has been managed on these lands is clearly at odds with the statutory mandates related to the protection of the river corridors and the species that depend on them. In order for the Forest Service to comply with its duties, I suggest the agency begin to examine more drastic changes.”). In both instances, the Court warned of the possibility of an injunction before the 2005 grazing season. ONDA 03-381, 2004 WL 1592606, at *10); ONDA 03-213, 2004 WL 1293909, at *9.

In 2006, this Court again observed that in 2005 there were “poor conditions on almost every allotment” in the Malheur National Forest where grazing was likely to adversely affect threatened steelhead. Lohn, 485 F. Supp. 2d at 1201. Last year, this Court enjoined grazing on two allotments in the Malheur National Forest during the first year of the implementation of the 2007–2011 BiOp. Kimbell, 2008 WL 4186913, at *8. The Malheur National Forest has willfully ignored these warnings. The Forest Service could not even comply with this Court’s injunction, allowing cattle to trespass onto the Lower Middle Fork Allotment from literally every direction. Ex. 5 at 20 (detailing “several instances of unauthorized use in the Balance, Pizer, Susanville, and Granite Boulder units”). The extensive and excessive damage that the Malheur National Forest

allowed livestock to cause to steelhead streams in 2008, despite five years of this Court’s close scrutiny of its grazing management, repudiates any notion that any action this Forest might undertake, short of full allotment rest, can prevent harm to steelhead and their habitat.

Unless these stream systems are completely rested, it is likely that harm to steelhead will occur if livestock are allowed to graze this year. Fourth Rhodes Decl. ¶¶ 22–25, 29; Second Beschta Decl. ¶¶ 10, 15. Livestock grazing “makes significant bank alteration to streams *inevitable* because cattle are grazing these six allotments during the hot summer season.” Fourth Rhodes Decl. at ¶ 16 (emphasis added). Cattle concentration in streams during the summer “increases the grazing damage to banks, streams and riparian areas. . . . USFS and BLM’s own publications on grazing management have repeatedly indicated that grazing during the summer season is not compatible with the recovery of stream banks, riparian and stream conditions amenable to fish survival.” *Id.* (citation omitted). As a result, the inherent nature of summer livestock grazing in a dry climate makes it likely that continued grazing on these steelhead streams will cause harm to the riparian areas and consequently likely harm to steelhead. *Id.* ¶¶ 16, 29. Because the damage to these steelhead streams has built up over many decades, many years of rest likely will be needed for steelhead habitat to recover. Fourth Rhodes Decl. ¶¶ 22–25, 29; Second Beschta Decl. ¶¶ 10, 14–15 (citing 1936 Malheur National Forest report that “most of the range in deplorable condition”).

The Forest Service has not taken the necessary step of suspending grazing based on the gross violations of the ESA that occurred in 2008. Instead, the agency apparently has proposed a few cosmetic changes, including building dozens of miles of additional fences and moving monitoring locations that have shown inconvenient data, which would still allow essentially the same amount of grazing on these six allotments in 2009 as caused such extensive damage in 2008. Ex. 26 at 3–6; Ex. 27 at 2–4. This Court has seen such “remedial” efforts before. See, e.g., ONDA

03-381, 2004 WL 1592606, at * 8; ONDA 03-213, 2004 WL 1293909, at *6. The poor conditions of these allotments and further ESA violations in the subsequent five years conclusively show that such efforts do not and cannot work. And, at this point, none of the actions proposed by the Forest Service can even be said to be likely to occur, much less actually be effective: construction of 40 miles of new fence and development of over 15 springs will require preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act (“NEPA”), and the significant, negative effects on wildlife and stream flows from such projects may preclude their implementation. It is also far from clear that the Malheur National Forest holds the necessary Oregon water rights to develop the springs.

If the Forest Service allows grazing on these six allotments, without completely resting them, the harm to protected steelhead and their habitat is almost certain to continue. Fourth Rhodes Decl. ¶¶ 16, 22–25, 29; Second Beschta Decl. ¶¶ 10, 15. The cause of take will remain: summertime livestock grazing with no reasonable expectation that steelhead stream degradation will be avoided in the future when the Forest Service failed so badly to prevent it in 2008. Preliminary injunctive relief is necessary to forestall the irreparable harm to protected steelhead that will result if the Forest Service allows grazing on these allotments before this case is adjudicated on its merits. Because “a violation of the ESA is at least likely in the future” an injunction should issue under ESA § 9. Nat’l Wildlife Fed’n, 23 F.3d at 1510; Marbled Murrelet v. Babbitt, 83 F.3d 1060, 1066–68 (9th Cir. 1996); Forest Conserv. Council v. Rosboro Lumber Co., 50 F.3d 781, 783 (9th Cir. 1995).

ONDA has demonstrated actual or probable success on the merits of its claims that the federal defendants are in violation of sections 7 and 9 of the ESA, and that irreparable harm to a listed species and its critical habitat is likely to occur absent an injunction. Because the ESA alters a

court's traditional equitable discretion, the balance of harms and the public interest favor granting relief. Accordingly, this Court should temporarily restrain the turnout of livestock on the Long Creek, Slide Creek, Upper Middle Fork, Fox, Mt. Vernon/John Day/Beech Creek, and Hamilton/King Allotments, and enjoin the Forest Service from allowing grazing on those six allotments, pending this Court's decision on the merits. Nat'l Wildlife Fed'n, 422 F.3d at 794 (holding that traditional analysis involving weighing of economic harm "does not apply in ESA cases because Congress has already struck the balance"); Sierra Club, 816 F.2d at 1383. The repeated failures of the Forest Service's management strategy demonstrate that it cannot be effective in preventing the recurrence of the same disastrous habitat effects present on these allotments at the end of the 2007 and 2008 grazing seasons.

IV. THE COURT SHOULD WAIVE THE BOND REQUIREMENT

The Court should waive the bond requirement in Federal Rule of Civil Procedure 65(c) because requiring security would effectively deny access to judicial review to the non-profit environmental plaintiffs in this case. People ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency, 766 F.2d 1319, 1325-26 (9th Cir. 1985); Kimbell, 2008 WL 4186913, at *9.

CONCLUSION

For the reasons stated above, ONDA respectfully requests that this Court enter the relief requested in ONDA's Motion for Temporary Restraining Order and/or Preliminary Injunction.

Respectfully submitted this 10th day of April, 2009.

s/ David H. Becker
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