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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.

PLAINTIFFS’ REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AND
SUR-REPLY ON MOTION TO VACATE INJUNCTION

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

**PLAINTIFFS’ REPLY IN SUPPORT
OF MOTION FOR TEMPORARY
RESTRAINING ORDER AND/OR
PRELIMINARY INJUNCTION AND
SUR-REPLY ON MOTION TO
VACATE INJUNCTION**

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INTRODUCTION

The Forest Service has proven unable or unwilling to control chronic and flagrant violations of the terms of its public lands grazing permits intended to protect imperiled native trout. Yet the agency asks this Court to allow grazing to continue during 2009 under an illegal biological opinion (“2007–2011 BiOp”) and in the face of other widespread violations of the Endangered Species Act (“ESA”). Plaintiffs (“ONDA”) respectfully submit this combined reply and sur-reply to defendants’ and intervenors’ responses. Those parties’ submissions recycle the themes they have advanced for six years: that grazing has caused little to no ecological damage on the MNF and that, in any event, the strategies proposed for next year will cure all past management problems. By reinitiating formal consultation on six allotments, the agencies effectively admit that grazing on the Malheur National Forest (“MNF”) has caused ecological degradation and violated the ESA. The Forest Service and intervenors misrepresent ecological conditions, rely on incorrect legal interpretations and speculative salves for grazing damage that has been ongoing for years, and offer inapposite refutations of the demonstrated likelihood, absent an injunction, of continued irreparable damage to steelhead habitat on the streams in units where grazing would occur. For these reasons, they have failed to overcome ONDA’s showing that further injunctive relief is necessary and that the current injunction should be continued.

Déjà vu. To avoid injunctions in 2004, the MNF came before this Court in two cases with last-minute adjusted stocking levels and pledges to do better. The Forest Service vowed that the same livestock control strategies that had repeatedly caused pervasive damage to steelhead streams in the past would miraculously work the following year. The 2009 proposals are even more egregious. They hardly, if at all, reduce the intensity of grazing on the steelhead streams within the units proposed for grazing. Instead, they rely on management techniques that the

current BiOp promised would work, but which instead led to extensive damage to steelhead habitat. The Forest Service asks this Court to suspend disbelief and ignore the history of mismanagement, and trust it to insure against adverse modification to steelhead habitat from livestock damage in 2009 when it failed to protect that habitat in 2007 and 2008. Conspicuously absent from the Forest Service's presentation is any explanation of *why* the management practices that have failed in the past will work this season, or any evidence that the 2009 grazing proposals considered whether the grazing will allow attainment of the Riparian Management Objectives ("RMOs") that correspond to high-quality fish habitat. The agency also has not carried its burden of showing that grazing can continue during consultation without jeopardy to steelhead or adverse modification of steelhead critical habitat.

In view of the failure of the MNF's management over the past decade, and its failure to consider appropriate factors in its 2009 grazing proposal, the Forest Service has lost all credibility. Sadly, this Court's words still ring true five years later: "recent management has fallen short of the legal mandates related to the protection of the land and water and the endangered species dependent thereon." Ore. Natural Desert Ass'n v. U.S. Forest Serv., No. 03-318-HA, 2004 WL 1592606, at *10 (D. Or. July 15, 2004) ("ONDA 03-381"). Now, as then, the alleged "crisis that would ensue for the affected ranchers if grazing were enjoined ... is largely a consequence of defendants' making." Id. For five years the MNF has been on notice that it cannot continue to allow livestock grazing to damage steelhead habitat, and yet has allowed such damage in both years of grazing under the new biological opinion. By proposing essentially unchanged grazing intensity and repeating the same ineffective management techniques, irreparable harm to steelhead from habitat destruction and adverse modification is virtually certain to occur again within the units where grazing will occur.

LEGAL STANDARDS

Defendants acknowledge that Winter v. Natural Resources Defense Council, Inc., 129 S. Ct. 365 (2008), does not alter the settled principle that injunctions under the ESA do not involve a balancing of harms under the “traditional” injunction test. Def. Resp. at 19; Def. Sur-reply at 3, 16; see TVA v. Hill, 437 U.S. 153, 193–95 (1978).¹ Courts may not alter the balance that Congress “struck in favor of affording endangered species the highest of priorities.” TVA, 437 U.S. at 194; see ONDA Response (Dkt # 181) at 4–7. The traditional equitable analysis involving weighing of economic harm “does not apply in ESA cases because Congress has already struck the balance.” Nat’l Wildlife Fed’n v. NMFS, 422 F.3d 782, 794 (9th Cir. 2005). Because the Supreme Court cannot change the balance Congress struck under the ESA, Winter does not change existing ESA jurisprudence. See ONDA Response at 5–6.²

The common requirement for injunctive relief under any section of the ESA is a showing of likely success on the merits. Nat’l Wildlife Fed’n v. Burlington N. R.R., Inc., 23 F.3d 1508, 1511 (9th Cir. 1994) ; Sierra Club v. Marsh, 816 F.2d 1376, 1384 (9th Cir. 1987). To obtain

¹ Intervenor’s make no coherent argument otherwise, relying on straw-man arguments that misunderstand or mischaracterize the law and ONDA’s position. Intv. Resp. at 10–15.

² Congress’s plain intent in the ESA is “to halt and reverse the trend toward species extinction, whatever the cost.” TVA, 437 U.S. at 184 (emphasis added). Accordingly, private interests and private economic harm are not considered when irreparable harm to ESA-listed species is involved. Even if the other prongs of the traditional test were to apply here, they would not change the balance in favor of preventing irreparable harm to steelhead because “economic injury alone does not support a finding of irreparable harm.” Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc., 944 F.2d 597, 603 (9th Cir. 1991). Despite Intervenor’s allegations, see Rimbey Decl., their only true cost is foregoing subsidized forage on public lands for several months this year. The effect—approximately \$8,400 to \$14,500 per private ranch, see id. ¶ 3 & Ex. B at 3—is not remotely comparable to the “public interest in national defense” that tipped the scales in Winter. 129 S. Ct. at 377. Having been on notice for five years that grazing permit violations might warrant an injunction, the Forest Service and permittees cannot complain that the public lands grazing privileges could be restricted for having abused those privileges.

injunctive relief for a violation of ESA § 9, the requirement of showing “irreparable injury” is met by “showing that a violation of the ESA is at least likely in the future.” Nat’l Wildlife Fed’n, 23 F.3d at 1511 (emphasis added). Winter also does not alter the principle that a substantive or procedural violation of ESA § 7 requires a mandatory injunction. Sierra Club, 816 F.2d at 1384 (plaintiff “entitled to injunctive relief if [action agency] violated a substantive or procedural provision” of ESA § 7).³ A Ninth Circuit panel recently confirmed that Winter does not change the “sliding scale” for preliminary injunctions in this circuit. Greater Yellowstone Coalition v. Timchak, No. 08-36018, 2009 WL 971474, at *1 & n.1 (9th Cir. Apr. 10, 2009) (“Winter did not reject the sliding scale we employ in the alternative”); see ONDA Response at 7–10.

Irreparable harm warranting an injunction under ESA § 9 can be shown by likelihood of injury to even a single member of a species, or to a single, localized area of habitat. Defenders of Wildlife v. Bernal, 204 F.3d 920, 925 (9th Cir. 2000) (irreparable harm could be based on showing that a listed pygmy-owl occupied a construction site, and that “construction and operation of the site result[ed] in a § 9 ‘take’ through the ‘harm’ or ‘harassment’ of a pygmy-owl”). The “actual injury” requirement in the “harm” definition is satisfied by showing a likelihood of “habitat modification that is reasonably certain to injure an endangered species by impairing their essential behavioral patterns.” Id.; Forest Conserv. Council v. Roseboro Lumber Co., 50 F.3d 781, 783 (9th Cir. 1995); Westlands Water District v. U.S. Dep’t of Interior, 275 F. Supp. 2d 1157, 1225 (E.D. Cal. 2002), aff’d in part and rev’d in part on other grounds, 376 F.3d 853 (9th

³ Winter involved the National Environmental Policy Act (“NEPA”), a procedural statute meant to ensure informed decisionmaking. 129 S. Ct. at 376. Because Congress placed such importance on protecting listed species, “the strict substantive provisions of the ESA justify more stringent enforcement of its procedural requirements, because the procedural requirements are designed to ensure compliance with the substantive provisions.” Thomas v. Peterson, 753 F.2d 754, 765 (9th Cir. 1985) (emphasis in original); see also 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”).

Cir. 2004) (“‘Take’ is concerned with the effect on individual species members, not necessarily on the survival of the species as a whole.”). Any harm to a member of the species or a particular area of habitat is irreparable injury. Marbled Murrelet v. Babbitt, 83 F.3d 1060, 1067–68 (9th Cir. 1996) (evidence of occupied nesting habitat and likely effect of proposed action on birds’ behavioral patterns due to habitat modification sufficient to show likely harm, without showing direct effect on any specific bird); Forest Conserv. Council, 50 F.3d at 787–88 (logging of habitat that would harm behavioral patterns of two birds sufficient to show irreparable harm).

Reinitiation of formal consultation triggers ESA § 7(d). When reinitiation of formal consultation is required, as here, NMFS must “issue a new Biological Opinion before the agency action may continue.” Envtl. Prot. Info. Ctr. v. The Simpson Timber Co., 255 F.3d 1073, 1076 (9th Cir. 2001) (citing Mt. Graham Red Squirrel v. Madigan, 954 F.2d 1441, 1451 (9th Cir. 1992)). ESA § 7(d) provides that an agency may take no action that constitutes an irreversible or irretrievable commitment of resources which has the effect of foreclosing the formulation or implementation of reasonable and prudent alternatives that would not violate the ESA § 7(a)(2) obligations. 16 U.S.C. § 1536(d); Sierra Club, 816 F.2d at 1389. The prohibition is effective upon reinitiation of formal consultation and continues until consultation is concluded. 16 U.S.C. § 1536(d); 50 C.F.R. § 402.09. This necessarily includes a reasonable alternative that entirely suspends grazing, consistent with the PACFISH GM-1 standard. Any grazing in 2009 would foreclose this alternative.

The Forest Service now bears the burden of showing that proposed grazing will not jeopardize steelhead or destroy or adversely affect steelhead critical habitat. When reinitiation is required, as here, “[i]t is the action agency’s burden to show the absence of likely adverse effects on listed species.” Forest Guardians v. Johanns, 450 F.3d 455, 463 (9th Cir. 2006). “Placing the

burden on the acting agency to prove the action is non-jeopardizing is consistent with the purpose of the ESA and what we have termed its ‘institutionalized caution mandate[.]’” Wash. Toxics Coalition v. EPA, 413 F.3d 1024, 1035 (9th Cir. 2005) (quoting Sierra Club, 816 F.2d at 1389); see also Thomas v. Peterson, 753 F.2d 754, 765 (9th Cir. 1985) (“It is not the responsibility of the plaintiffs to prove, nor the function of the courts to judge, the effect of a proposed action on an endangered species when proper procedures have not been followed.”). On Murderers Creek and Lower Middle Fork Allotments, the Forest Service also has the burden of showing that its proposed resumption of grazing in 2009 actually will prevent jeopardy or damage to steelhead habitat, and thus represents “new circumstances” justifying vacatur of the current injunction. See, e.g., Winterland Concessions Co. v. Trela, 735 F.2d 257, 260 (7th Cir. 1984) (movant must show “changed circumstances which make the continuation of the injunction inequitable” by presenting new facts “which would justify modification”).

Finally, “informal” consultation is not applicable in this case. The term “informal consultation” describes communications between the Forest Service and NMFS to determine whether the proposed action is likely to impact listed species or critical habitat. 50 C.F.R. § 402.13. However, that determination was already made in 2007 when the Forest Service advised NMFS that grazing on the 13 allotments in the 2007–2011 BiOp is “likely to adversely affect” steelhead. BiOp at 1.⁴ Once a “likely to adversely affect” determination is made, formal consultation is required. Final ESA § 7 Consultation Handbook, March 1998 at 3-13. Thus the Forest Service had no discretion to engage in “informal” consultation in January 2009 after the triggers for reinitiation of formal consultation occurred on the eight allotments involved here.

⁴ For the Court’s convenience and to avoid another large filing, citations to the “BiOp” refer to the 2007–2011 Biological Opinion, several copies of which have been submitted to the Court. E.g. ONDA Memo on 2008 TRO/PI (Dkt # 35), Ex. 1.

ARGUMENT

Why does the Malheur National Forest only adjust its grazing management and promise spectacular improvements in the coming year when faced with a potential injunction? Beginning in 1995, the MNF has been constrained to allow livestock grazing only if it does not retard attainment of RMOs and allow the recovery of steelhead habitat at a near-natural rate. Specifically, “[g]razing should be suspended if adjusting practices is ineffective in meeting the RMOs or avoiding the adverse effects on the listed fish.” Ore. Natural Desert Ass’n v. Kimbell, No. 07-1871-SU, 2008 WL 4186913, at *3 (D. Or. Sept. 5, 2008) (citation omitted). For eight years, biological assessments on the MNF have documented that there is not a single environmental indicator in the two major sub-basins that is functioning appropriately. Water temperature and sediment level in these watersheds, two factors undeniably affected by livestock grazing, are functioning at unacceptable risk. The Forest Service admits that limited RMO monitoring since 2001 shows that “there has been little change in stream habitat conditions on federal lands within the John Day River Basin.” Roper Decl. ¶ 22. This violates the fundamental premise of the existing steelhead conservation strategy and the Forest Service’s obligations under the ESA: steelhead habitat must *recover*, it may not stay in the same degraded condition because of agency-authorized livestock grazing.

Notwithstanding these facts, the MNF proposes grazing in 2009 on eight⁵ allotments with literally no idea whether previous grazing has prevented recovery of steelhead habitat, and with no idea of whether the proposed grazing will, or will not, adversely modify critical habitat. Instead, on nearly 150 miles of steelhead critical habitat, the agency has proposed essentially the

⁵ This includes the two allotments currently under injunction, five allotments in the new motion proposed for grazing in 2009, and the Long Creek Allotment. Although the Forest Service now claims Long Creek Allotment will be rested in 2009, it nevertheless remains at risk of another arbitrary decision by the Forest Service that could allow grazing to resume. See *infra* at 51–52.

same grazing levels and techniques that resulted in dramatic damage to steelhead habitat in 2007 and 2008. This is a sure harbinger of further harm to steelhead through habitat destruction if grazing is allowed in 2009. ONDA has also demonstrated that it is likely to succeed on the merits of its claims. The belated reinitiation of formal consultation on six allotments does not preclude an injunction because the Forest Service has not demonstrated that allowing grazing before consultation is complete will avoid jeopardy or adverse modification of steelhead critical habitat. Finally, the Forest Service raises several unfounded jurisdictional arguments, none of which alter this Court's power to issue an injunction.

I. THE FOREST SERVICE MISREPRESENTS ECOLOGICAL CONDITIONS AND CANNOT SHOW THAT STEELHEAD HABITAT IS IMPROVING.

The government's brief and supporting declarations, and those of intervenors, present a fictitious picture of the conditions of steelhead habitat on the Malheur National Forest, which contrasts sharply with the MNF's own biological assessment. The agency's claim that it makes rational management decisions is belied by its persistent failure to evaluate fish habitat conditions and achievement of RMOs in determining whether to modify or suspend grazing. There is no objective basis for the agency's claims that fish habitat conditions are improving. But since NMFS adopted the PACFISH strategy in 1995, the Forest Service has had 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. The adoption of PACFISH guidelines directly targeted at grazing illustrates the concern for the effects of grazing on fish habitat. Third Beschta Decl. ¶ 3; 2007–2011 BiOp at 3 & n.3. On the eight allotments here, no evidence whatsoever shows that the MNF considered the conditions of steelhead habitat, as defined by the RMOs, in making any of its decisions regarding whether and how much to graze in 2009. The Forest Service attempts to justify this failure by providing a post hoc rationalization

in the form of declarations that discuss “Proper Functioning Condition,” a methodology this Court has already twice rejected as subjective and qualitative in comparison to the quantitative RMOs which PACFISH requires. See *infra* at 33–34. Moreover, there is no indication that the MNF actually considered such evaluations in proposing grazing for 2009.

A. Steelhead Habitat on the Malheur National Forest is in Degraded Condition.

The government and intervenors generally argue that the MNF’s streams are in good condition. That is not true. The Forest Service’s own 2007–2011 Biological Assessment (“2007–2011 BA”), the foundation of the 2007–2011 grazing program, offered NMFS a checklist of the existing environmental conditions in the Upper John Day River and Middle Fork John Day River Sub-basins. These are the baseline conditions against which NMFS could evaluate the proposed grazing on the 13 allotments in the 2007–2011 BiOp. Ex. 1 at 5–6. These environmental baseline indicators include species subpopulation size, growth and survival, water temperature and sediment, large woody debris and pool frequency, width-to-depth ratio and streambank condition. None of the 24 environmental indicators in either sub-basin is “functioning appropriately.” Id. In the Upper John Day River Sub-basin (where Murderers Creek Allotment 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 5. In the Middle Fork John Day River Sub-basin (where the remaining allotments at issue here 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 6.

More striking is that the 2007–2011 BA concludes that the effect of the five years of proposed grazing, even if it met standards (which evidently it has not), would be to “maintain” the environmental conditions in their “functioning at risk” or “functioning at unacceptable risk”

condition. Ex. 1 at 5–6. This is despite the fact that the 2007–2011 BA expressly recognizes, as it must, that the MNF must comply with PACFISH standards which require that “[i]nfluences of grazing must result in riparian restoration at a minimum of near natural rates.” *Id.* at 2 (emphasis added). The MNF has an unequivocal obligation to insure that it authorize livestock grazing *only* if it will also allow restoration of steelhead habitat. It cannot authorize grazing that will maintain a degraded condition. Kimbell, 2008 WL 4186913, at *3. In the attached declaration, Dr. Beschta explains further that livestock grazing on the MNF is continuing to prevent improvement in steelhead habitat conditions, and that a near-natural rate of recovery is impossible if grazing impacts recur each year. Third Beschta Decl. ¶¶ 4, 6–7, 11, 13–16, 20. This is important because the effects of annual grazing carry over from one year to the next, with streambank trampling compounding existing erosion and promoting erosion during high water events, leading to widened channels, and preventing streamside woody shrubs from ever reaching a mature height that would afford shade to streams. Beschta Decl. ¶¶ 20–22, 24; Third Rhodes Decl. ¶¶ 14–18 (same). By contrast, areas from which cattle are excluded display the stable, overhanging banks and riparian vegetation indicative of healthy fish habitat. Third Beschta Decl. ¶ 6.

The significance of the Forest Service’s 2007 conclusion that no component of the environmental baseline is functioning properly cannot be overstated. The MNF made no further determination whether steelhead stream conditions have improved in issuing its 2008 and 2009 grazing authorizations. See generally Shinn Decl.; Second Shinn Decl.; Namitz Decl. By contrast, the Forest Service’s own documentation, as well as that of ONDA’s declarants, demonstrates that on most allotments conditions actually got worse in 2007 and 2008 due to livestock grazing. ONDA Memo on 2008 TRO/PI (Dkt # 35) at 28–33; ONDA Memo on 2009 TRO/PI (Dkt # 192) (hereinafter “ONDA Memo”) at 9–18. To support its 2009 grazing

proposal, the Forest Service offers only impermissible post hoc rationalizations by declarants unconnected with the MNF's decisionmaking process, arguments regarding steelhead habitat conditions which the MNF did not consider in proposing grazing for 2009. See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988) (declining to defer to a post hoc rationalization "advanced by an agency seeking to defend past agency action against attack").

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. Ex. 2 at 3 (showing 13 of the environmental indicators "functioning at risk" and the remaining 6 indicators "not properly functioning"). In 2001, NMFS optimistically concluded that "because of improvements in riparian vegetation, stream shading, and streambank stability, aquatic habitat indicators such as water temperature, sediment, substrate embeddedness, width/depth ratio, and stream bank condition are expected to be improved and restored over the long term on the John Day River tributary streams." Id. at 4. (emphasis added). That prediction has proven incorrect on the Malheur National Forest.

Despite its obligation to insure the recovery of steelhead habitat, the Forest Service's National Aquatic Monitoring Program Leader, Dr. Roper, explains 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. ¶ 24 & Figure 1. The percentages of undercut banks and pools—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. On another set of reaches in the John Day Basin, “there has been no significant change in any of the measured attributes.” Id. ¶ 23. Even in presenting year-to-year comparison photographs of monitoring locations in the MNF, Roper offers his opinion that “the sites shown have not changed considerably over time.” Id. ¶ 43. Nothing has changed in eight years, since the 2001 NMFS BiOp found the entire environmental baseline to be functioning at risk or not properly functioning. See Ex. 2. Roper sidesteps the critical issue that livestock grazing is, in fact, retarding attainment of RMOs. Fifth Rhodes Decl. ¶¶ 7–14. The Forest Service is not meeting its ESA § 7(a)(2) obligation to insure against jeopardy and adverse modification of steelhead critical habitat when it is allowing that habitat to remain degraded and continuing to authorize annual livestock grazing which ensures annual destruction and damage to steelhead streams.

Curiously, the Forest Service does not introduce even a single photograph showing any stream on the eight allotments that contains healthy steelhead habitat which actually meets the RMOs. The Forest Service surely must be aware of exclosures (such as the state exclosure on the John Young Meadows Unit of the Murderers Creek Allotment) and areas that have had long periods of rest (such as the Oregon Mine Unit on that allotment) which show stable, overhanging banks, heavy and tall streamside vegetation, and well-shaded, deep channels. See, e.g. Third Christie Decl. Attach. 1, Attach. 8 at 3–4. If fish habitat conditions are so good on these allotments, why are there no pictures of grazed steelhead habitat in good condition?

The Forest Service (and the 2007–2011 BiOp) also flatly misrepresents the factual record, claiming that the permittees on these allotments have “a consistent record of having met

established standards.”⁶ See, e.g., Def. Resp. at 12. At least three of the allotments violated standards in 2005 or 2006. Ex. 3 at 2 (3” stubble height and 50% utilization in violation of standards on Mt. Vernon/John Day/Beech Creek in 2006); 3–4 (2.43” stubble height and 32% bank alteration on Hamilton/King in 2006); Ex. 12 (46% bank alteration on Slide Creek in 2005). Also, the statements defendants cite from the BiOp were written in April 2007, immediately *after* this Court invalidated the 2006 NMFS biological opinion for Malheur National Forest grazing activities that harm steelhead, noting 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); see also id. at 1201 (citing NMFS biologist statement that part of one allotment was in “terrible shape” and noting similar statements on each of the other allotments that are now covered by the 2007–2011 BiOp). Further belying the agencies’ glowing picture of conditions on the MNF is NMFS’s requirement in the 2007–2011 BiOp that permittees comply strictly with a 10% end-point condition on seven of the eight allotments 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. BiOp at 242–43; see ONDA Memo at 7–8 & n.4.

B. There is No Evidence of an Upward Trend in the Riparian Management Objectives That Define Good Steelhead Habitat on These Allotments.

The government argues that there is an “upward trend” in many places on the MNF. Def. Resp. 11–12, 44. This statement is incorrect and lacking in any relevant data that would support that conclusion. To insure steelhead protection and recovery, the only relevant trend is in the conditions of steelhead habitat: the RMOs which represent good fish habitat. The Forest Service

⁶ Because measurement of RMOs is necessary to evaluate the condition of fish habitat, ONDA does not concede that permit standards, as currently set, are sufficient to protect steelhead habitat. Nevertheless, the permittees are legally obligated to comply with those standards.

acknowledges as much in the 2007–2011 BA. Ex. 1 at 2–3. As this Court noted, “PACFISH establishes goals for watershed, riparian and stream channel conditions to protect and restore habitat,” including RMOs such as pool frequency, water temperature, bank stability, and width to depth ratio. Kimbell, 2008 WL 4186913, at * 3. These “RMOs establish measurable habitat parameters that define good fish habitat and provide criteria against which progress toward attainment of the riparian goals is measured.” Id. NMFS and the MNF recognize that not to “retard” attainment of RMOs means the same as a “near natural rate of recovery” of riparian systems. Ex. 4 at 7; Ex. 1 at 2. This means that grazing may only be allowed if doing so results in steelhead habitat recovery near-natural rates. Beschta and Rhodes describe that a near natural rate of recovery is not occurring in the MNF because of livestock grazing, and observe that none of the defendants’ and intervenors’ declarants offer any evidence that the necessary recovery is occurring. Third Beschta Decl. ¶¶ 4–8, 12–16, 20; Fifth Rhodes Decl. ¶¶ 7–14, 20–23, 36–40.

One of the fundamental flaws of the MNF’s grazing program continues to be that it simply is not collecting the information about steelhead habitat necessary to make non-arbitrary decisions about how much grazing can be authorized and still avoid harm to steelhead habitat. The MNF’s 2007–2011 BA expressly promises that “[r]iparian areas within the allotment(s) will be monitored for implementation (short term) compliance and effectiveness (long term) at meeting management goals (RMO’s) over time.” Ex. 1 at 3 (emphasis added). However, the 2007–2011 BiOp discloses RMO monitoring only in 2005, and only on the Fox Allotment, where “[t]he measured reach did not meet PACFISH/INFISH RMOs for pools per mile, average wetted width:depth, or undercut banks.” BiOp at 83. The Forest Service’s statement that it submitted a “litany of detailed information” about each allotment in their BA is misleading because it included almost no new information on stream habitat conditions post-dating the

invalid 2006 biological opinion. NMFS AR 785–1298. In 2007, just as in 2006 and previous years, “the Forest Service provided NMFS with no evidence that “near natural rate of recovery” is actually occurring, because the Forest Service provide[d] very little in the way of effectiveness monitoring,” supporting the “conclusion that the grazing management program is not ‘certain’ to provide long-term improvement of critical habitat.” Lohn, 485 F. Supp. 2d at 1201 n.12.

Furthermore, the MNF staff’s declarations, and the scant documentation reflecting their decisionmaking process on the proposed 2009 grazing levels, do not provide any indication that the agency evaluated or took into account the condition of fish habitat on the eight allotments before setting the 2009 grazing levels. There is no indication that the MNF considered any riparian monitoring data (not even the short-term monitoring which showed excessive bank alteration from livestock grazing in 2007 and 2008) in deciding whether to allow grazing, and how much, following the permit standards violations in 2007 and 2008. See Shinn Decl.; Second Shinn Decl.; Smith Decl.; Namitz Decl. ¶¶ 6, 8; Def. Resp. Ex. 1 at 3–8 (notes from agency meetings discussing proposed grazing levels). This means the Forest Service’s promise in the 2007–2011 BA to conduct effectiveness monitoring was a hollow one. According to the MNF,

[e]ffectiveness monitoring provides a quantifiable evaluation of the effectiveness of different management activities at improving riparian conditions and in meeting RMO’s. This information is expressed primarily as trend data, and provides feedback as to whether annual management activities are moving the riparian communities in the desired direction for condition and trend.

Id. at 1 at 4. No such RMO trend information appears in the MNF’s own justifications for the 2009 grazing.

Even the MNF’s fisheries biologist provides no reasoning tied to actual resource conditions on the Murderers Creek and Lower Middle Fork Allotments he discusses in his declaration. Namitz Decl. ¶¶ 5–8. He merely states that the proposed strategy, which involves

resting 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. He does not explain why or how the levels proposed will avoid the same type of riparian habitat damage on the individual units as occurred in the past. He includes no information regarding the condition of the streams, and provides no data or other information regarding whether steelhead stream conditions on the units proposed for grazing have improved. The biologist did not submit a declaration regarding effects of grazing on fish habitat on the other allotments. Nothing in the declarations reflects reasoned decisionmaking based on the actual conditions of the steelhead streams which the Forest Service is obligated to protect. Any discussion of habitat conditions appears in the post hoc declarations of Roper, Elmore and Stringham, which cannot justify the 2009 grazing decisions. Ariz. Cattle Growers’ Ass’n v. U.S. Fish & Wildlife Serv., 273 F.3d 1229, 1245 (9th Cir. 2001) (excluding post-decision evidence submitted by the agency, stating that such evidence would render the complex decision-making process “meaningless” and would allow the agency to produce “unsupported” decisions).

C. The Forest Service Has Proposed an Increase in Grazing Intensity on Streams Where Grazing is Proposed in 2009.

Despite having literally no idea whether grazing on these eight allotments is preventing the recovery of steelhead habitat, the MNF continues to make arbitrary decisions about “appropriate” levels of grazing, including for 2009. Exhibit 5 shows that, on the 29 units where the Forest Service proposes to allow grazing, there actually will be an overall *increase* of about 3% in AUMs in 2009. See also Third Beschta Decl. ¶ 9; Fifth Rhodes Decl. ¶¶ 30–31. On Upper Middle Fork, Slide Creek, and Hamilton/King Allotments, grazing would increase from 2008; on one allotment—Fox—there appears to be no change in grazing from 2008; on Mt. Vernon/John

Day/Beech Creek, the grazing levels would be the same for four units, increased in the Ennis Unit, and decreased in two others; for the two allotments currently under injunction, the proposed grazing is comparable to the 2007 levels on most of the units that would be grazed.⁷

Ex. 5. Beschta observes that increasing AUMs does not afford an opportunity for recovery of fish habitat. Third Beschta Decl. ¶ 9. Even one year of rest is insufficient: full habitat restoration requires many years without grazing. Id.

On some allotments, streams that were badly damaged in 2008 would be subject to *increased* grazing in 2009. For example, on the Slide Creek Allotment, the same number of livestock would graze for 13 more days on the West Unit and 21 more days on the Sale Unit, an increase of about 46% in the AUMs on these 2 units. Ex. 5 at 2; Shinn Decl. ¶ 17 & Attach. 9 at 8. Christie measured 45% bank alteration on the Sale Unit in 2008. Third Christie Decl. ¶ 25 & Attach. 9.

All units where grazing levels would be similar or increase in 2009 contain steelhead critical habitat. BiOp at 59–61. This means that the stretches of steelhead habitat within each of these units and allotments will be subject to the same, or nearly the same, intensity of grazing that resulted in documented habitat damage in 2007 and 2008. The agency buries the figures regarding grazing levels deep in its declarations, and avoids presenting it clearly in its briefs. Exhibit 5 is an effort to synthesize the figures from the Forest Service’s submissions. The effect of the 2009 proposals is to expose nearly 150 miles of steelhead critical habitat to the same number of cows for the same, nearly same, or greater length of time as in the most recent year in which livestock damaged it. The following chart summarizes the numbers at the allotment level:

⁷ After changing direction several times, the Forest Service decided to rest the Long Creek Allotment in 2009. Shinn Decl. ¶ 32. Non-use would continue on several units on Murderers Creek and Lower Middle Fork Allotments. Second Shinn Decl. ¶¶ 3, 11.

COMPARISON OF 2007/2008 AUMs TO 2009 PROPOSAL

Allotment	2007-2011 Authorized AUMs	Most Recently Grazed AUMs*	2009 AUMs (Proposed)	Critical Habitat (mi.)
Slide	4,595	3,838	4,581	10.8
Upper Middle Fork	2,868	2,785	2,870	51
Fox	1,354	1,418	1,418	14
Mt. Vernon/JD/Beech	2,932	2,992	2,802	21
Hamilton/King	546	422	540	1.2
Murderers Creek (3 units)	--	776	429	14
Lower Middle Fk (2 units)	--	*	713	35
TOTAL AUMS ON UNITS TO BE GRAZED IN 2009		12,232	12,641	147

* The most recently grazed year was 2008 for first five allotments, and was 2007 for Murderers Creek and Lower Middle Fork. No accurate rotation information is available for Lower Middle Fork from 2007, so no direct comparison is possible to proposed 2009 levels. Therefore the “total” omits Lower Middle Fork Allotment. Ex. 5 (based on Forest Service submissions).

The Forest Service complains that ONDA did not address the 2009 proposed grazing in its opening brief. E.g. Def. Resp. at 38. This is because the Forest Service did not provide details of its 2009 proposals to ONDA until the evening before ONDA’s opening brief was due on April 10, 2009. Ex. 6. ONDA served a request for production of documents on January 12, 2009, but when the Forest Service produced documents on March 23, 2009, it produced no documents created after early February, omitting the February and March letters attached to the Shinn Declaration. Shinn Decl. Attach. 2–11; Second Shinn Decl. ¶¶ 4, 12; Ex. 7 (last page of production index for each of the eight allotments). In addition, the Forest Service has since further changed its 2009 grazing proposals, for example by making a further change on April 20, 2009 from a modest reduction on the Long Creek Allotment to complete rest.⁸ Shinn Decl. ¶ 32. The Forest Service provided no details on its proposed fence projects until May 21, 2009. Ex. 8.

⁸ The Forest Service delivered a supplemental production of documents to ONDA on May 28, 2009, which included additional modifications related to the timing of the preliminary injunction hearing, but they are not addressed here because the adjustments appear insignificant.

Instead, based on decades of ecological degradation and mismanagement of grazing on the Malheur National Forest, including further stream and riparian habitat damage in 2007 and 2008, ONDA's experts Beschta and Rhodes submitted evidence that recovery will be impossible without complete rest from grazing, and that any grazing will continue to harm steelhead and their habitat. Second Beschta Decl. ¶¶ 10, 14–15; Fourth Rhodes Decl. ¶¶ 22–25, 29. After reviewing the 2009 proposals, their opinions remain unchanged. Third Beschta Decl. ¶¶ 9, 20; Fifth Rhodes Decl. ¶¶ 10–14, 32–33, 41, 44. The Forest Service's own 2007–2011 BA supports these opinions, when it explains that the proposed grazing would “maintain” all of environmental baseline conditions either “functioning at risk” or “functioning at unacceptable risk” in the two John Day River sub-basins. Ex. 1 at 5–6; see supra Sec. I.A. Given the past damage and failure to begin recovery of steelhead habitat throughout the Malheur National Forest, and the inefficacy of the control measures involved, future harm to steelhead from habitat modification on these specific streams is almost certain.

II. THE FOREST SERVICE FAILS TO PROVIDE ANY CONVINCING SUPPORT TO REFUTE ONDA'S EVIDENCE THAT GRAZING IS CAUSING, AND WILL CONTINUE TO CAUSE, IRREPARABLE HARM TO STEELHEAD HABITAT.

The Forest Service almost completely declines to address the years of chronic degradation from grazing in the Malheur National Forest and violations documented in its own monitoring in 2007 and 2008. Instead, the agency focuses myopically on the proposed grazing for 2009, arguing that it has made changes that will be a cure-all for past and present ecological damage. The Forest Service also attempts to discredit the credentials, experience and field work of ONDA's declarants, while at the same time offering no pertinent evidence of its own to rebut those detailed data and observations. Defendants have failed to sustain their burden of proving that the proposed grazing during reinitiation of consultation will avoid jeopardy or adverse

modification of steelhead critical habitat, and their arguments fail to overcome ONDA's showing of the likelihood of irreparable harm that will result from continued grazing on the steelhead streams in the MNF. ONDA's declarants and experts are highly reliable, the Forest Service's outside declarants provide no evidence that stream conditions are improving, the MNF provides no meaningful discussion as to whether its actions will continue to cause irreparable harm to steelhead habitat on the units where grazing is proposed for 2009, and the agency improperly relies on speculative future grazing management actions.

A. The Forest Service Misrepresents the Standard for Irreparable Harm.

The Forest Service incorrectly suggests that "irreparable harm" under the ESA must involve an effect at the species level or subpopulation level. Def. Resp. at 37, 44; Roper Decl. ¶¶ 49–51; Namitz Decl. ¶¶ 6, 8. However, irreparable harm under ESA § 9 can be shown by likelihood of injury to a specific area of habitat that the species inhabits. Bernal, 204 F.3d at 925; Marbled Murrelet, 83 F.3d at 1067–68. Courts also presume irreparable harm to flow from substantive or procedural violations of ESA § 7. Sierra Club, 816 F.2d at 1384. To show irreparable harm under ESA § 9, it suffices that an area of habitat is occupied by a listed species, that an action is likely to result in modification of that habitat, and that the habitat modification is of a nature that is reasonably certain to injure any member of the species by impairing essential behavioral functions. Bernal, 204 F.3d at 925; Marbled Murrelet, 83 F.3d at 1067–68; Forest Conserv. Council, 50 F.3d at 783. No showing of direct effect on a specific member of the species is necessary. Marbled Murrelet, 83 F.3d at 1067–68.

ONDA's evidence demonstrates all of the elements of this showing by demonstrating that steelhead are present on the grazed units, that livestock grazing is likely to damage riparian habitat because it has rarely *not* done so on the MNF, and that damage to riparian habitat injures

steelhead by increasing their mortality and otherwise affecting steelhead behavior. ONDA Memo at 5–6, 9–18, 28–29, 31–34; ONDA Response at 10–23. None of the information introduced by the Forest Service or intervenors refutes these showings.

B. The Forest Service Proposes to Rely in 2009 on Management Techniques That Have Consistently Failed to Protect Steelhead Habitat.

As in 2004, the Forest Service offers “optimistic assessments” regarding the efficacy of the proposed grazing strategy. ONDA 03-381, 2008 WL 1592606, at *8. However, the Forest Service’s “‘trust us’ approach is not warranted given its belated actions” to address the damage from two years of grazing mismanagement. Nat’l Wildlife Fed’n v. Cosgriffe, 21 F. Supp. 2d 1211, 1219–20 (D. Or. 1998). NMFS acknowledges that “[p]oorly-managed, late-season livestock grazing” causes exactly the sort of chronic damage to steelhead streams and harm to steelhead which ONDA’s declarants and the Forest Service itself have observed and recorded over the past decade. BiOp at 116. The MNF implicitly acknowledges just how poor its management of grazing is, both in partially reinitiating formal consultation on the proposed action covered by the 2007-2011 BiOp and now running through a fire drill akin to its 2004 efforts to “reform” grazing to stave off an injunction. Even the Forest Service’s own declarant, Wayne Elmore, appears to presume that the MNF lacks the “serious commitment” necessary to prevent “[e]xcess herbivory and/or lack of plant rest to recover” that leads to a “static or downward trend in plant health and riparian condition.” Elmore Decl. ¶ 11.

The Forest Service argues that the mitigation measures it plans for 2009 will prevent irreparable harm to steelhead habitat. E.g. Def. Resp. at 42; Roper Decl. ¶¶ 49–51; Def. Sur-reply at 19; Namitz Decl. ¶¶ 6, 8. But these mitigation measures have consistently failed before. Every grazing control that the Forest Service proposes for 2009 was, according to the 2007–2011 BiOp, already supposed to have been in place during 2007 and 2008: fencing, riders, monitoring,

guaranteed enforcement of move triggers and end-point triggers all were supposed to protect steelhead habitat in those years. All of these measures failed in 2007 or 2008 on the eight allotments.

The only grazing control the agency has *not* proposed for 2009 is a reduction in the intensity of grazing on the streams within the units to be grazed by significantly reducing AUMs. Instead of resting or significantly reducing grazing levels that will impact steelhead streams at the individual unit level, it has resorted mainly to proposing to fence about 15 miles of riparian habitat.⁹ NMFS harshly criticized this tactic in the consultation over the last BiOp as being inadequate to address resource damage. Lohn, 485 F. Supp. 2d at 1201 (citing the “[n]eed to substantially modify the action to address the impacts at the allotment scale rather than to simply fence and move monitoring areas”). Relying primarily on fencing is also highly problematic because the poor condition and repeated failure of fencing throughout the MNF is a perennial reason contributing to the Forest Service’s inability to meet grazing permit standards.

i. Fencing has consistently failed in the past to prevent riparian damage.

Exhibit 9 is a sample of recent documents illustrating how truly empty the Forest Service’s promise to engage in “good” grazing management really is, with relevant passages highlighted. Examples abound of dreadful fence conditions, rampant unauthorized use, failures to respond to Forest Service letters and instructions, and a lack of concern about monitoring that

⁹ Construction of these new fences is wholly speculative because the MNF has not issued any final decisions that would allow construction. It has only issued a “scoping” letter seeking public comment. Ex. 8. Further, the proposals set out in the scoping letter violate NEPA on their face. The MNF proposes to categorically exclude these fencing projects from environmental analysis under NEPA. This violates NEPA regulations and the Forest Service Handbook, which allows categorical exclusions only for rebuilding fences, not for construction of new fences. FSH 1909.15 Chapter 31.2(9). The fences thus require preparation of an environmental assessment under NEPA to determine whether they significantly affect the environment. The agency’s reliance on fences for protecting resources in 2009 is therefore unreasonable.

believe the promise that all will be well in 2009. All of the failures to meet standards are blamed on factors other than the obvious one—livestock trampling in streams—including poorly-maintained or vandalized fences, open gates, trespassing cattle from private lands (or other allotments), silted-up cattle guards, or simply lost cattle. A few examples include:

- Confusion over responsibility for fence maintenance led to cattle from one unit straying onto another, resulting in 49% bank alteration on the Fox Unit in the Fox Allotment. Ex. 9 at 7. Because of this confusion, “the permittees were not aware cattle had strayed into Fox until they began gathering to move to the South Fork unit. They immediately began searching for the missing cattle and within a weeks time all cattle were moved out of Fox and into the South Fork unit.” *Id.* (emphasis added).
- Fences were down between the Fox and Long Creek Allotments, and a gate was left open which allowed cattle to stray unauthorized onto the Mt. Vernon/John Day/Beech Creek Allotment. *Id.* at 56.
- On the Mt. Vernon/John Day/Beech Creek Allotment, “[a]n abundance of down trees in the McClellan unit makes it difficult to manage cattle, and chronic problems with the public leaving gates open between the upper and lower McClellan units allowed cattle to access the lower unit earlier than scheduled.” *Id.* at 72. “There was documented use by unauthorized cattle in the Belshaw Creek unit.” *Id.*
- The Forest Service acknowledges that “many fences are very, very old—at this point, they really should be replace[d].” Ex. 10 at 3. “Wildlife, snow and tree windfall damage boundary fences yearly.” Ex. 9 at 85.
- On the Hamilton/King allotment, a range staffer noted that “after the Wilburn’s vacate the allotment neighboring private cows come on to the allotment [and] head straight for the riparian areas and take what is left of the vegetation.” Ex. 9 at 10.
- Fence damage, open gates, trespass cattle, and permittee inattentiveness to move triggers and move dates are pervasive throughout the Forest. *See, e.g.*, Ex. 9 at 98 (cattle entering an adjoining allotment “through an open gate and breaks in the fence caused by toppled trees from a wind storm.”), 100 (“Unauthorized and excess use were a problem following the move date” and “unauthorized use from a neighboring allotment” because “[a] series of gates leading into the unit had been left open”).

Furthermore, riparian fences of the sort proposed here already exist on many allotments.

E.g. BiOp at 26 (describing riparian pastures on Lick Creek and Flood Meadows on Long Creek Allotment). Despite the riparian fencing on Lick Creek and Flood Meadows, livestock caused

from 14 to 45% bank alteration in 2008. 2008 EOY Report at 17–18;¹⁰ Third Christie Decl. ¶ 20–21. Even beyond breaches due to downed trees, open gates, or vandalism, fences frequently fail. A federally-funded study by Jonathan Rhodes documented that 25% of riparian fences fail to prevent livestock access to riparian areas. Fifth Rhodes Decl. ¶ 27. The Forest Service itself has documented that, even if riparian fences were effective, fencing without reducing stocking levels inevitably puts more pressure on unfenced streams, resulting in damage to fish habitat. See Fifth Rhodes Decl. ¶ 28 & Attach. 1 at 2 (Forest Service study concluding that by fencing 1.2 miles of a creek “more pressure would be placed on the riparian areas not protected by fencing”). The MNF now proposes to fence about 15 miles of riparian habitat on the 8 allotments, leaving nearly 135 miles exposed to more grazing pressure. Ex. 8 (May 21, 2009 fence project proposal); see supra Chart at 18. Electric fencing is even more ineffective at preventing livestock from entering riparian areas, with one study showing that such fencing fails 86% of the time to exclude cattle from fenced areas. Fifth Rhodes Decl. ¶ 26. Fencing, without reducing AUMs, is therefore likely to be ineffective in preventing damage to riparian areas. Id. ¶¶ 30–33. Also, cows often are found within exclosures, further demonstrating that fencing is unlikely to prevent livestock access to, and damage to, critical steelhead habitat. See, e.g., Ex. 9 at 18, 20, 40.

ii. Unauthorized use by trespassing cattle has consistently been blamed for riparian damage.

Unauthorized use, either by permittees’ own livestock or by cattle trespassing from other allotments, is another favorite, and apparently uncontrollable, explanation for the Forest Service’s failure to meet its own standards. On the Fox Allotment, for example, the permittee complained in 2008 of “trespass cattle on the Belshaw unit. He said it’s been an ongoing

¹⁰ Citations to “2008 EOY Report” refer to the 2008 End of Year Grazing Report for the Blue Mountain Ranger District, attached as Exhibit 5 to ONDA’s Memo (Dkt # 192).

problem with Tirico for years, and that Frank Burns also had cattle getting onto the Forest as well as Rowdy Nash.” Ex. 9 at 3 (emphasis added). The Forest Service’s response was that it was “working to correct the problem but it’s a slow process.” *Id.* Stragglers cows are also a regular problem: for example, on the Murderers Creek Allotment, in 2007, a permittee reported that “Mr. Rodgers has moved out of the unit but was short 20 cows.” Ex. 9 at 78 (noting also that “gates on Frenchy Butte were knocked down earlier in the year”). The MNF District Ranger has explained that “even a small number of cattle lingering in a pasture beyond the scheduled season increases the risk of exceeding the end of year standards.” Shinn Decl. Attach. 1. The Forest Service has concluded in a nearby forest that “[i]t does not take excessive utilization of the forage to heavily damage a sensitive stream bank. Because cattle concentrate near streams much damage can occur within a short time period.” Fifth Rhodes Decl. Attach. 1 at 7. Even a few livestock in riparian areas are likely to adversely modify riparian habitat.

This Court ordered two allotments closed to livestock in 2008 to protect steelhead habitat. However, on both of the allotments, there was unauthorized entry and use by livestock on multiple occasions during 2008, in violation of this Court’s injunction. See ONDA Memo at 32 (extensive trespass on Lower Middle Fork Allotment); 2008 EOY Report at 20 (same); Ex. 9 at 82–83 (July 2008 “straying” from other allotments onto Murderers Creek Allotment); Ex. 9 at 86 (August 2008 trespass on Murderers Creek Allotment by permittee’s cattle and those of another party). If the Forest Service and permittees could not comply with this Court’s injunction, there is no reason to believe their new promises that grazing in 2009 will not harm steelhead streams.

iii. Monitoring has failed to prevent riparian damage.

Another “additional” mitigation measure the Forest Service describes is more monitoring, including an “independent” consultant hired by Grant County. Smith Decl. ¶ 11. However, it is

difficult to see how “more” monitoring will succeed when the Forest Service and permittees were supposed to have extensive monitoring already in place during 2007 and 2008. BiOp at 116 (declaring that “[m]ove 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.”) (emphasis added); see also ONDA Memo at 21–24. Permittees already had a consultant, Pat Larson, monitoring these allotments during 2007 and 2008. See Larson Decl.; Fifth Larson Decl. The BiOp also makes it clear that the permittees have been responsible for monitoring their move and end-point triggers, and that the Forest Service is also responsible for mid-season monitoring. BiOp at 116. They evidently failed.

Monitoring failed miserably in the first two years of the current BiOp in part because the Forest Service’s monitoring program is in shambles. See also ONDA Memo at 21–24 (describing how Forest Service staff were not even aware they had a monitoring program). This is illustrated by the shuffling of designated monitoring areas (“DMAs”) on the MNF. One particularly ironic charge leveled at Christie’s monitoring is that of monitoring at inappropriate locations because “DMAs should only be selected by an interdisciplinary team of qualified personnel” of up to five or more personnel applying seven criteria. See, e.g., Krueger Decl. (Dkt # 230) ¶¶ 7, 10 (quoting 2008 Burton, Smith & Crowley Multiple Indicator Monitoring (“MIM”) manual).¹¹ However, there is no evidence showing that the Forest Service selected any of its DMAs using

¹¹ Copies of relevant portions of the 2008 MIM Manual appear as Attachment 2 to the Second Christie Declaration and Third Christie Declaration.

an interdisciplinary team, much less one containing five or more specialists, or showing how it applied the seven criteria to select a particular location.¹²

Forest Service DMA selection appears predicated on avoiding repeating inconvenient findings that livestock are destroying steelhead habitat. An email from the Forest Service's biologist to the District Ranger starkly illustrates the arbitrariness of the Malheur National Forest's DMA selection process. Ex. 11. The 2007–2011 BA shows that the DMA on the Slide Allotment was established in 2005 as part of the PACFISH monitoring program. Ex. 12. The Forest Service monitored this DMA in 2005, 2007, and 2008, finding significant standards exceedances. Ex. 13 at 2 (bank alteration of 46% in 2005). Despite the long-established DMA, the agency biologist unilaterally declared in 2008 that “I could not find a single site on the Slide Creek Allotment that was appropriate for a DMA location.” Ex. 11; see 2008 EOY Report at 37. This is the same site in the Sale Unit which Christie monitored in 2008, documenting 45% bank alteration. Third Christie Decl. ¶ 25 & Attach. 9. This is also where Christie photographed a dead cow polluting steelhead critical habitat in Slide Creek. Id. Attach. 9 at 5–6.¹³ The Sale Unit is scheduled for a 55% increase in AUMs compared to last year. Ex. 5 at 2. Similar damage to critical habitat is inevitable.¹⁴

¹² Nor is there any evidence that Intervenor's declarant Pat Larson uses an interdisciplinary approach to locate her monitoring sites. See generally Larson's five declarations.

¹³ The vacuousness of intervenors' argument that Christie's monitoring is “problematic” is evident from their attack on Christie for monitoring at the Slide Creek DMA, which NMFS and the Forest Service have monitored for years, but which the Forest Service biologist singlehandedly and arbitrarily declared “inadequate” in late 2008. Intv. Resp. at 22–23; see Ex. 11. Ironically, the Slide Creek DMA appears on a list of DMAs which the intervenors attached to their motion to vacate. Ex. 14 (same document as Howard Decl. (Dkt # 164), Ex. 5).

¹⁴ The Slide Creek Allotment is one of several allotments (also including Mt. Vernon/John Day/Beech Creek), that was supposed to have a full-time rider last year and yet suffered serious resource damage, illustrating that riding is inadequate to prevent damage to steelhead critical

The Forest Service’s method of unilaterally establishing or disestablishing DMAs to avoid evidence of excessive livestock grazing echoes observations by a NMFS biologist in 2005 that, on each allotment involved in this litigation, there is a “[n]eed to substantially modify the action to address the impacts at the allotment scale rather than to simply fence and move monitoring areas.” Lohn, 485 F. Supp. 2d at 1201 (internal quotation omitted) (emphasis added). “Fencing and moving monitoring areas,” rather than reducing the intensity of impacts on individual streams, effectively sums up the Forest Service’s proposal for 2009.¹⁵ More remarkably, the District Ranger informed all the MNF permittees in January 2009 of the “need to be sure the DMA’s are suitable. We need your assistance in locating DMA’s that will show a trend.” Ex. 10 at 2 (emphasis added). It is apparent that the Forest Service’s and permittees’ monitoring promises are bound to be broken because the Forest Service’s monitoring program is purely ad hoc, subject to changing locations at the whims of individual MNF staff or of the permittees themselves.¹⁶

iv. Stern warnings to permittees have failed to prevent riparian damage.

The Forest Service relies on its resolute intention to enforce the terms of the grazing permits *next time*—maybe. Shinn Decl. Attach. 2, 4, 6, 8, 10 (warning letters to permittees). This illustrates how far from the obligation to *insure* against jeopardy or adverse modification of

habitat. BiOp at 28, 37, 51, 199; 212 (promising on p. 212 that “a full-time rider will prevent cattle from congregating in stream bottoms” on Slide Creek Allotment), 236.

¹⁵ The agency apparently has lost track of how many DMAs it actually has on the MNF. The supposedly “comprehensive” list of DMAs released in October 2008 shows 13 DMA sites. Ex. 14. Yet, according to the 2008 End of Year Grazing Report, the Forest Service actually monitored over 55 riparian locations that year, of which 22 are specifically designated with a DMA number. See 2008 EOY Grazing Report (ONDA Memo Ex. 5).

¹⁶ The permittees’ lack of knowledge of monitoring protocols disclosed at the January 2009 meeting and the disarray of DMA locations underscore that the Forest Service misrepresented its monitoring program to NMFS in 2007. BiOp at 116; see ONDA Memo at 21–24.

critical habitat the agency has strayed. Faced with widespread non-compliance with permit standards in 2008 and a historical inability of the MNF permittees to comply with their permits, the Forest Service sent letters that, instead of citing the permittees for non-compliance, merely stated that “[n]ot meeting standards a second time will result in a Notice of Non-compliance,” which, however, only “may lead to action being taken against your permit, which may include suspending portions of your term grazing permit.” E.g. id. Attach. 2 (emphasis added). There is no guarantee, even if there are further permit violations, that enforcement is reasonably certain to occur. See Lohn, 485 F. Supp. 2d at 1201 (biological opinion was invalid because it did “not imply that swift and necessary action will be taken when violations are found”).

Also, when the Forest Service tries to actually engage permittees in the required monitoring process, they refuse to participate. For example, when the Forest Service tried to arrange with one of the Fox Allotment permittees to conduct year end allotment monitoring in 2008, the permittee replied “that he was very busy and would not be able to meet.” Ex. 9 at 4. Similar recalcitrance is evident in Forest Service efforts to get permittees to comply with move triggers and endpoint conditions. For example, on Long Creek Allotment, the Forest Service called permittees on September 15, 2008 and September 25, 2008, warning them that cattle had to be moved from Keeney Creek and Pepper Creek because of impending standards exceedances. Shinn Decl. Attach. 12–13. MNF sent formal warning letters in October 2008 giving permittees 72 hours to remove their livestock due to impending standards violations. Id. Attach. 15. These warnings proved ineffectual, as bank alteration reached 51% on Keeney Creek before cattle were finally removed. 2008 EOY Report at 18. The Forest Service has provided no explanation for why the permittees will comply with the February 2009 warning letters when they did not comply last year.

C. The Forest Service’s Declarations Do Not Undermine ONDA’s Evidence Nor Provide Evidence That Proposed Grazing Will Prevent Jeopardy or Adverse Modification of Critical Habitat.

The Forest Service’s and intervenors’ declarants take issue with the opinions provided by Beschta, Rhodes and McCullough, suggesting that their opinions lack sufficient rigor. See, e.g., Def. Resp. at 44–45. It is difficult to understand how they question the scientific methods and conclusions of these declarants. Beschta has been a professional hydrologist studying riparian systems for nearly 30 years and has authored or co-authored more than 50 publications related to the hydrology of forest and rangeland watersheds, riparian areas, and related topics. Beschta Decl. (Dkt # 185) ¶¶ 1–6 & Attach. A (Resume). Beschta is particularly qualified to offer his expert opinion in this case because of his extensive research on Oregon stream and riparian systems, including the John Day River basin within the MNF. See id. ¶¶ 6–7. Rhodes is a hydrologist with over 20 years’ experience researching the effects of livestock grazing and other land uses on streams and native fish species, including extensive experience developing stream condition monitoring programs and helping develop the watershed protection measures ultimately adopted in PACFISH. Rhodes Decl. (Dkt # 36) ¶¶ 1–6. McCullough is a fisheries biologist with more than 38 years of work in the field of aquatic ecology and fisheries, including 18 years of evaluating habitat quality for salmonids. McCullough Decl. (Dkt # 186) ¶¶ 1–2. He has published several articles and reports on the effects of water temperature and sediments on salmonids and fish habitat, including the John Day River, and has specifically monitored recovery of fish habitat from livestock grazing in the John Day Basin. Id. The credentials of Beschta, Rhodes and McCullough are outstanding and their bases for their opinions are solid.

In the attached declarations, Beschta and Rhodes review some of the more salient declarations submitted by defendants and intervenors with their responses, and respond to

criticisms of their work in those declarations. Beschta emphasizes that Roper's evaluation does not show streams in the MNF in a state of near-natural rate of recovery, nor do any of the other declarants, whose views range from contradictory to non-committal. Third Beschta Decl. ¶ 3, 7–8, 12. Beschta lists his experience in monitoring and publishing data regarding shrub conditions, and confirms that his field data show that livestock grazing on the MNF is perennially stunting riparian shrubs and preventing them from reaching the diverse age structure required for riparian recovery under PACFISH. *Id.* ¶¶ 14–15. Rhodes demonstrates that Roper's evaluation shows that there has been no statistically significant improvement in stream conditions. Fifth Rhodes Decl. ¶¶ 7–14. The non-significant 5% improvement in bank stability over a 7-year period in grazed allotments that Roper cites is substantially less than a 35% improvement in bank stability over a 7-year period measured in a naturally-recovering exclosure on the same forest, illustrating that grazing is preventing recovery at a near-natural rate. *Id.* ¶¶ 10–11. Rhodes also notes Roper's observation that bank stability recovers quickly in the absence of grazing impacts. *Id.* ¶ 10 (citing Roper Decl. ¶ 46).

Rhodes and Beschta have demonstrated that Larson's work is thoroughly unscientific and unreliable. Third Rhodes Decl. ¶¶ 5–19; Beschta Decl. ¶¶ 20–24; Third Beschta Decl. ¶ 19. Her finding of *zero percent* fine sediment in any of the streams in the MNF illustrates the fundamental incredibility of her data, since such absence of fine sediment has never been observed in any other riparian system. ONDA Response at 30–32. The Forest Service's declarant Brett Roper further confirms that fine sediment detrimental to fish is not only prevalent in these streams, but has become more of a problem in livestock-grazed allotments: “[a]t the scale of the Interior Columbia River Basin, percent fines (in this case defined as less than 6mm)

increased in managed watersheds. This change is opposite the direction that would be expected if conditions were improving.” Roper Decl. ¶ 16 (emphasis added).¹⁷

The Christie, Driskill and Forest Service photographs are the best illustration of the degraded condition of steelhead habitat on the MNF described in the 2007–2011 BA and confirmed by Dr. Roper. See supra at 11–12. Dr. Beschta notes that criticism of the use of photographs as evaluation tools is unfounded because “photographs are able to quickly convey qualitative perspectives regarding a particular issue.” Third Beschta Decl. ¶ 19. In particular, “a photograph of an over-widened channel with eroding banks and an absence of riparian vegetation quickly conveys the message of degraded fish habitat.” Id. Beschta concludes that “photographs are a legitimate and important means of demonstrating cattle-caused impacts to riparian areas, channel morphology, and fish habitat.” Id. Rhodes confirms that photographs are a method of systematically collecting sound evidence, and are an important “reality check” for quantitative measurements. Fifth Rhodes Decl. ¶ 15–19. Despite the litany of post-hoc challenges to the validity of using photographs as evidence, the Forest Service itself acknowledges the value of photographic evidence: Roper submits 20 pages of photographs with his declaration, highlighting the use of photographs among experts, and the District Ranger explained to the permittees in January 2009 that “[l]awyers and judges don’t necessarily know what 20% actually looks like on the ground. Photographs help give you a better indication of bank alteration.” Ex. 10 at 5 (emphasis added).

In addition, Christie’s 2008 monitoring is identical to the Forest Service’s current methodology: one of intervenors’ declarants, Krueger, notes that Christie “appeared to follow the

¹⁷ In addition, Larson appears unqualified to offer opinions rebutting the Beschta declarations. She holds a Bachelor’s degree in Forestry from an unspecified college and provides no indication that she has any academic training or professional experience in stream hydrology or riparian ecology. See Larson Decl. (Dkt. # 67) ¶¶ 1–8.

2008 version of the MIM protocol correctly” except for the interdisciplinary team provision—which, as described above, is sporadically followed on the MNF. *Id.* ¶ 10. Oddly, the Forest Service has several declarants offer “armchair” opinions regarding Christie’s monitoring efforts, but then attacks Rhodes, an expert hydrologist who has worked with Christie in the field, for offering an opinion after reviewing Christie’s 2008 field work. Def. Resp. at 40. Suffice it to say that the evidence shows that the Forest Service itself found bank alteration levels in violation of permit standards and conditions on each of the four allotments where Christie monitored in 2008. ONDA Memo at 9–18. The agency’s recent reinitiation of formal consultation on those allotments further confirms the validity of Christie’s monitoring.

Besides failing to measure RMOs or evaluate whether grazing is ensuring a near natural rate of recovery, the Forest Service also improperly attempts to justify its proposed 2009 grazing with information that the MNF did not actually consider when it made the decisions regarding 2009 grazing levels. The Elmore declarations and the Stringham Declaration and related attachments rely on a Proper Functioning Condition (“PFC”) methodology which has been rejected as insubstantial evidence twice by this Court. Ore. Natural Desert Ass’n v. U.S. Forest Serv., No. 03-213-KI, 2004 WL 1293909, at *6 (D. Or. June 10, 2004) (“ONDA 03-213”); Ore. Natural Desert Ass’n v. Singleton, 47 F. Supp. 2d 1182, 1190 (D. Or. 1998). As Rhodes describes, the PFC method is a highly subjective method prone to error and abuse, whose reliability is questioned by most sources. ¶¶ 36–40. As a purely qualitative method, PFC does not provide reliable information on the actual conditions of streams and riparian areas or the trends in those conditions. *Id.* ¶ 39–40.

The Forest Service has issued guidance entitled “PFC (Proper Functioning Condition) What it is – What it Isn’t” which explicitly states that PFC “isn’t [d]esigned to provide

monitoring answers about attainment of desired conditions” and “isn’t [a] replacement for quantitative inventory and monitoring protocols.” Ex. 15 at 2. Likewise, the Stringham Declaration relies on a 2004 trip report which she and Krueger (one of intervenors’ declarants) authored. Stringham Decl. Attach. B. This Court has already reviewed this exact document, and has “question[ed] the weight it should be afforded” because it relies on the highly subjective PFC method. ONDA 03-213, 2004 WL 1293909, at * 7. The defendants’ and intervenors’ declarations accordingly do not disturb the opinions of Beschta and Rhodes that conditions remain badly degraded on the steelhead streams on these allotments, that rest is needed to allow riparian recovery to begin, and that grazing is likely to result in damage to riparian habitat on the MNF. Third Beschta Decl. ¶¶ 9, 20; Fifth Rhodes Decl. ¶¶ 10–14, 32–33, 41, 44.

Finally, there is no evidence in the declarations of MNF staff, or in any documents produced by the MNF, that the MNF actually evaluated the condition of streams in issuing decisions on proposed 2009 grazing. The additional information submitted by the Forest Service’s declarants therefore cannot be used to justify the agency’s decisions. Alvarado Cmty. Hosp. v. Shalala, 155 F.3d 1115, 1124 (9th Cir. 1998) (“explanatory materials cannot be used to offer new rationalizations for agency action”). No deference is due to the Forest Service’s discussion of PFC, both because it is post hoc and because the Forest Service has no discretion to use a discredited qualitative methodology when, under PACFISH, it is must measure quantitative RMOs and base its grazing management on achieving a near natural rate of recovery. Cf. Lands Council v. McNair, 537 F.3d 981, 993–94 (9th Cir. 2008) (en banc) (agency entitled to choose scientific methodology in a case where there was no existing limitation on its discretion).

In short, ONDA has demonstrated that livestock grazing has caused extensive damage to riparian areas of streams in the MNF. Such damage has been documented on all eight of the

allotments at issue here. Damage to riparian areas causes harm to steelhead by disrupting their behavioral patterns. Steelhead are present on these eight allotments, in designated critical habitat as well as in other stream reaches. Livestock grazing has been extensively documented by the Forest Service, NMFS, and ONDA's volunteers and experts to have caused damage to steelhead habitat in these allotments. The likelihood of irreparable harm is clear here because "[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. Because the level of grazing remains essentially unchanged on nearly 150 miles of critical habitat, and because the promised mitigation measures have not succeeded before, harm to steelhead from habitat effects due to livestock grazing is likely to occur again in 2009.

III. DEFENDANTS HAVE NOT REBUTTED THE LIKELIHOOD THAT ONDA WILL SUCCEED ON THE MERITS OF ITS CLAIMS.

Defendants also fail to rebut ONDA's showing that the 2007–2011 BiOp is invalid, that the Forest Service has failed to insure against jeopardy and adverse habitat modification in its ongoing management of grazing, and that the Forest Service has permitted illegal take to occur. ONDA also is likely to succeed on its claim that the Forest Service has not followed proper procedures in reinitiating formal consultation because the agency has not demonstrated that continuing the action during consultation will avoid jeopardy and adverse habitat modification.

A. ONDA is Likely to Succeed on the Merits of its Claims under ESA § 7(a)(2).

i. Defendants have not refuted the argument that the 2007–2011 BiOp is invalid.

Defendants argue that the 2007–2011 BiOp is not arbitrary and capricious because it contains "appropriately resolute terms" and "statements [that] are sufficiently specific and binding, and describe a level of commitment expected by the Forest Service in carrying out the

action.” Def. Resp. at 29–31. Defendants’ arguments are unavailing because, as ONDA has demonstrated, the 2007–2011 BiOp does not contain sufficiently certain-to-occur mitigation measures and relies on historically unreliable third parties (the permittees) to carry out the mitigation. ONDA Memo at 21–24. Stunningly, the Forest Service dismisses its apparent misrepresentation to NMFS of the robustness and very existence of a monitoring program as merely “internal communications among Forest Service staff.” Def. Resp. at 31; see ONDA Memo at 22–24 (NMFS telephone conversation with the Forest Service biologist, BiOp at 116 n.14, dramatically overstating the capability of the MNF to undertake the promised monitoring program). 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).

ii. ONDA is likely to prevail on its claim that the Forest Service’s grazing decisions, including the 2009 authorizations, violate ESA § 7(a)(2).

The Forest Service has not refuted ONDA’s claim that, when it has made decisions that are challengeable as final agency actions (including permit modifications and annual instructions), the agency has violated ESA § 7(a)(2). The Forest Service argues that it has made new decisions regarding 2009 grazing that, it claims, will insure against harm to steelhead. See, e.g., Def. Resp. at 42; Def. Sur-reply at 19. The agency further argues that the final decisions are valid and subject to deference. They are not. The Ninth Circuit has made it very clear that an agency must engage in *reasoned* decisionmaking that considers appropriate factors. A court cannot endorse an agency decision if it “cannot determine that the [agency’s] conclusions are rationally supported.” N.W. Coalition for Alternatives to Pesticides v. EPA, 544 F.3d 1043, 1052 n.7 (9th Cir. 2008); see also Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983) (agency action is arbitrary and capricious if the agency has “entirely failed to

consider an important aspect of the problem” or “relied on factors which Congress has not intended it to consider”). “The mere fact that an agency is operating in a field of its expertise does not excuse us from our customary review responsibilities.” N.W. Coalition, 544 F.3d at 1052 n.7 (quoting Ctr. for Auto Safety v. Peck, 751 F.2d 1336, 1373 (D.C. Cir. 1985) (Wright, J., dissenting)). And, “where the agency’s reasoning is irrational, unclear, or not supported by the data it purports to interpret, [a court] must disapprove the agency’s action.” Id.

To withstand the arbitrary and capricious standard of review, the agency must “articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made” and show that the decision was based on “consideration of the relevant factors.” State Farm, 463 U.S. at 43 (citations and quotations omitted). In language fully applicable here, the Supreme Court noted “[t]here are no findings and no analysis here to justify the choice made, no indication of the basis on which the agency exercised its expert discretion.” Id. In justifying its 2009 grazing proposals, the MNF neither engaged in reasoned decisionmaking, nor did it make a decision 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 retard the attainment of RMOs. As noted above, the Forest Service has no data on the RMOs for these eight allotments to inform its decisions about what levels of grazing could be allowed and yet protect steelhead by allowing a near-natural rate of recovery of steelhead habitat. A court “cannot defer to a void.” Ore. Natural Desert Ass’n v. BLM, 531 F.3d 1114, 1142 (9th Cir. 2008). Accordingly, the 2009 decisions violate ESA § 7(a)(2) because they propose grazing in 2009 without considering a relevant factor—the condition of steelhead streams and whether steelhead habitat is recovering—and thus arbitrarily fail to ensure against jeopardy or adverse modification to steelhead critical habitat.

Instead, the MNF clearly articulated the guiding principle of its grazing management program when it told permittees in January 2009 that “the last thing we want to do is cut numbers or time.”¹⁸ Ex. 10 at 7. At no point in this process did the Forest Service make any reasoned decision by evaluating the ecological conditions of the steelhead habitat on these allotments, and whether the proposed grazing would avoid adverse modification to steelhead habitat. Neither the notes from the Level 1 meeting in January, nor the February and April meetings with permittees to develop the 2009 grazing proposal, contain explanations of *why* the MNF believes that, this year, strategies that have failed consistently in the past will suddenly prevent livestock from adversely modifying steelhead critical habitat on the nearly 150 miles of steelhead streams that would receive nearly the same or greater grazing pressure as in the previously-grazed season.

The Forest Service’s consideration of an improper factor—putting the agency’s express desire not to “cut numbers or time” before the agency’s statutory obligation to make steelhead protection the highest priority—and its failure to articulate any rational connection between the facts (repeated and widespread failures of every aspect of its grazing management) and the decision render the 2009 grazing proposal arbitrary. See State Farm, 463 U.S. at 43. As a result, the agency’s assertions that the proposed grazing will prevent harm to steelhead are due no deference. The 2009 grazing proposal also is arbitrary because it fails to consider another important factor: the repeated and chronic failures, in the past, of fencing, riding and monitoring

¹⁸ Defendants fail to acknowledge that the ESA pre-empts the multiple-use mandates described in their briefs. Def. Resp. at 7–9; Def. Sur-reply at 6–9. Protection of listed species must be the dominant priority of all federal agencies; other actions, even livestock grazing, are secondary. Congress has ordered that the Malheur National Forest’s priority must be protection of steelhead, rather than facilitation of an activity that damages steelhead habitat. This is the “unequivocal holding in [TVA,] that the ESA has ‘first priority’ over all other federal action.” Nat’l Ass’n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, ___, 127 S. Ct. 2518, 2541 (2007).

(by the Forest, the permittees, and permittees' consultants) to prevent livestock damage to steelhead streams when the same intensity of grazing is maintained.

In addition, the government provides no declaration from anyone at NMFS attesting to having evaluated the February, March and April 2009 MNF grazing proposals and agreeing that they would avoid jeopardy to steelhead or adverse modification of steelhead critical habitat. Defendants' reference to NMFS having allegedly agreed in "informal" consultation in January 2009 misses the point. Def. Resp. at 4, 15–16. Because the current biological assessment defines grazing on these allotments as "likely to adversely affect" steelhead, informal consultation was never available. See supra at 6. Also, the single NMFS participant at the January 2009 meeting later *expressly denied* that he gave an opinion at that meeting that the proposed Forest Service actions would "put the 5 above mentioned allotments ... back within the scope and intent of the [2007–2011 BiOp]." Def. Resp. Ex. 1 at 14 (statement of NMFS biologist, adding "[I]et's strive to capture more accurate meeting notes in the future").

iii. Defendants have not refuted the argument that the Forest Service's ongoing grazing management violates ESA § 7(a)(2).

The Forest Service has separately violated ESA § 7(a)(2) by failing to insure against jeopardy and adverse modification of habitat in its ongoing grazing management. Both in making decisions and in carrying out the 5-year grazing plan thus far, the Forest Service has unreasonably relied on the faulty 2007–2011 BiOp, with its facially arbitrary no-jeopardy/no adverse modification determination, reliance on third-party mitigation not reasonably certain to occur, and the extensive evidence the BiOp contains that grazing would harm steelhead. See N.W. Env'tl. Advocates v. EPA, 268 F. Supp. 2d 1255, 1274 (D. Or. 2003) (action agency's reliance on a facially-invalid biological opinion without determination of the validity of the action under the applicable statute is unreasonable). An action agency "may not rely solely on a

[consulting agency] biological opinion to establish conclusively its compliance with its substantive obligations under section 7(a)(2).” Pyramid Lake Paiute Tribe v. U.S. Dep’t of the Navy, 898 F.2d 1410, 1415 (9th Cir. 1990) (emphasis in original). The action agency retains an independent duty under § 7(a)(2) to ensure its projects do not jeopardize species. “A federal agency cannot abrogate its responsibility to ensure that its actions will not jeopardize a listed species; its decision to rely on a [consulting agency] biological opinion must not have been arbitrary or capricious.” Id.; see also Defenders of Wildlife v. EPA, 420 F.3d 946, 976 (9th Cir. 2005) (finding that EPA violated § 7(a)(2) when it “should have understood the legal errors of the biological opinion’s analysis”).

The Forest Service has never articulated an analysis independent of the 2007–2011 BiOp for how it is complying with its substantive duties under § 7(a)(2)—and it continues not to do so. See, e.g., Shinn Decl. ¶ 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]”). Here the biological opinion 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 significant evidence that the Forest Service 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).

Furthermore, in the 2007 and 2008 grazing seasons, the Forest Service allowed the insurance against adverse modification of critical habitat to lapse by allowing livestock to damage steelhead streams throughout the eight allotments. ONDA Memo at 24–27; ONDA Memo on 2008 TRO/PI at 28–30. The Forest Service ignores that its own staff documented pervasive damage to steelhead habitat on these allotments during 2007 and 2008. ONDA Memo at 11–18; ONDA Memo on 2008 TRO/PI at 29, 31–32. Despite partially reinitiating formal consultation, the Forest Service continues to rely unreasonably on the flawed 2007–2011 BiOp in determining the 2009 grazing schemes for the eight allotments. Shinn Decl. ¶ 3; Namitz Decl. ¶¶ 6, 8. ONDA therefore is likely to prevail on this aspect of its ESA § 7(a)(2) claim against the Forest Service.

B. ONDA is Likely to Succeed on the Merits of its Claim that the Forest Service Has Not Adequately Reinitiated Consultation.

The Forest Service now argues that ONDA’s claim regarding reinitiation of formal consultation is moot following the agency’s May 7, 2009 decision to reinitiate formal consultation. Def. Resp. at 38. This is wrong because the consultation has not been completed and the Forest Service retains the affirmative obligation under ESA § 7(a)(2), while formal consultation is ongoing, to insure against jeopardy to steelhead or adverse modification to steelhead critical habitat. The Forest Service now has the burden of proof to show that the proposed 2009 grazing will not result in adverse modification to critical habitat. Wash. Toxics, 413 F.3d at 1034–35. The Forest Service has not sustained its burden of showing that allowing grazing this year while consultation is proceeding will avoid jeopardy or adverse modification to critical habitat.

Defendants concede that where formal consultation is required, as here, the action agency must first prepare a biological assessment, upon which the consulting agency prepares a

biological opinion. Def. Resp. at 4–5. The May 7, 2009 request for formal consultation does not include a proposed action, much less a biological assessment.¹⁹ Def. Resp. Ex. 2. Instead, the Forest Service admits that completion of consultation, and issuance of a new biological opinion, will not occur until 2010. *Id.* Thus the invalid 2007–2011 BiOp remains in place during the 2009 grazing season. *See* Shinn Decl. ¶ 3; Namitz Decl. ¶¶ 6, 8. Under these circumstances, reinitiation of consultation does not moot ONDA’s claim. *Greenpeace v. NMFS*, 80 F. Supp. 2d 1137, 1151–52 (W.D. Wash. 2000). The “claim is not moot because the Court retains the ability to provide effective relief,” namely “until such time as a comprehensive opinion is in place, this Court retains the authority to determine whether any continuing action violates the ESA and can provide effective relief by enjoining it or remedying its effects.” *Id.* at 1152.

Moreover, the Forest Service has not carried its burden of proving that the proposed mitigation measures will be any more effective in 2009 than they were in 2007 and 2008, when the same measures were supposed to be in place, and during which livestock caused extensive damage to steelhead streams on the eight allotments. In fact, it has not even tried to do so, simply pointing out that it “disputes” ONDA’s “allegation that the 2008 statistics represent a good predictor of what the 2009 statistics will be, particularly given the additional mitigation measures that have been put in place.” Def. Resp. at 37. Nowhere has the Forest Service explained why the ineffectual mitigation measures will succeed this year where they have failed in the past. Because the Forest Service has not considered, much less demonstrated, whether adverse habitat

¹⁹ The Forest Service’s decision to reinitiate formal consultation and its impropriety are subject to review under the Administrative Procedure Act (“APA”). Also, “failure to reinitiate § 7 consultation is a final agency action subject to judicial review” under the APA. *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1229–30 (9th Cir. 2008). Failure to reinitiate consultation also is cognizable under the ESA citizen suit provision. *Forest Guardians v. Johanns*, 450 F.3d 455, 459–60 (9th Cir. 2006).

modification will occur, and because repetition of the same grazing levels and the same failed management techniques is virtually certain to result in continued damage to steelhead habitat, injunctive relief is still available to prevent grazing in 2009. In these circumstances, “[w]here a violation of the consultation requirements in ESA § 7(d) is involved, ‘the remedy for a substantial procedural violation of the ESA—a violation that is not technical or de minimis—must therefore be an injunction of the project pending compliance with the ESA.’” Wash. Toxics, 413 F.3d at 1034; Pacific Rivers Council v. Thomas, 936 F. Supp. 738, 751 (D. Idaho 1996) (preventing resumption of grazing while consultation proceeded where Forest Service failed to sustain its burden under § 7(d)).

ONDA’s claims regarding reinitiation are also not moot because the Forest Service must reinitiate consultation on all thirteen grazing allotments that constitute the “agency action,” not merely a limited number of grazing allotments as it has done. See Def. Resp. at 38. “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 Pacific 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); see also Lane County Audubon Soc’y v. Jamison, 958 F.2d 290, 294 (9th Cir. 1992). The BiOp itself provides that the scope of the agency action extends to all thirteen consulted-upon grazing allotments in the MNF, indicating both agencies considered the grazing program on these allotments as a whole, not each as a separate and distinct unit, to constitute the agency action. BiOp at 2. 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.” Id. at 216 (emphasis added). NMFS must evaluate whether, with excessive damage having occurred on eight of the

allotments, grazing over the next three years on the other allotments in the five-year BiOp should be adjusted downwards to compensate. Thus until the Forest Service reinitiates consultation as to all 13 allotments, the failure to reinitiate claim remains live. The Forest Service's failure to show that continuing *any* grazing on the 13 allotments satisfies ESA § 7(d) would justify this Court enjoining all grazing on all 13 allotments until the completion of a new biological opinion. ONDA Memo at 30 n.12. ONDA instead requests narrowly-tailored injunctive relief and rest on the eight allotments where the greatest amount of damage to steelhead habitat occurred in 2007 and 2008.

C. ONDA is Likely to Succeed on the Merits of its ESA § 9 Claim.

ONDA also has demonstrated that it is likely to succeed on the merits of its ESA § 9 take claims. ONDA Memo at 27–29. By reinitiating formal consultation, the Forest Service has conceded that the grazing in 2008 on these allotments violated the terms and conditions of the 2007–2011 BiOp, resulting in illegal take. Defendants protest the significance of the 10% end-point condition. Def. Resp. at 15 n.4. Yet NMFS expressly set a condition in the BiOp's Incidental Take Statement (“ITS”) that the authorized grazing must not exceed a 10% bank alteration end-point indicator on the allotments at issue here (except for a 20% end-point indicator on the Fox Allotment). BiOp at 242–43. Violation of an ITS condition means that take protection disappears; therefore, bank alteration beyond the 10% end-point condition in this BiOp is unauthorized take in violation of § 9. Ramsey v. Kantor, 96 F.3d 434, 442 (9th Cir. 1996); see also Ore. Natural Resources Council v. Allen, 476 F.3d 1031, 1040 (9th Cir. 2007) (“take must be in compliance with the terms and conditions of the [ITS]”).

Defendants misunderstand ONDA's reliance on Ramsey and Allen, which ONDA cites only for the principle that exceeding the 10% end-point condition in the ITS violates ESA § 9.

Def. Resp. at 36. They offer no authority contrary to the persuasive precedent holding that an agency is liable under ESA § 9 for take resulting from actions it authorizes; indeed, a contrary holding would eviscerate the precautionary principle embodied in the ESA. ONDA Memo at 28 n.11. ONDA is likely to succeed on the claim that the Forest Service violated ESA § 9 by authorizing grazing in 2007 and 2008 which resulted in violations of the terms of the BiOp.

IV. NEW EVIDENCE AND A PROPOSED SCHEDULE ON MURDERERS CREEK AND LOWER MIDDLE FORK ALLOTMENTS DO NOT DISTURB THIS COURT’S CONCLUSION THAT ONDA HAS SHOWN SUFFICIENT IRREPARABLE HARM TO WARRANT AN INJUNCTION.

The Forest Service’s comparison of its 2009 proposed grazing for Murderers Creek and Lower Middle Fork Allotments with the 2007 grazing that left many streams in sorry shape is highly misleading. An accurate comparison of the likely effects of their 2009 proposal to the 2007 grazing on the units proposed for grazing shows that there is relatively modest change in proposed intensity of grazing on most of the units compared to what actually occurred in 2007 with devastating effect.²⁰ Ex. 5 at 3–4. Furthermore, it is clear that the Forest Service has not evaluated the current conditions of steelhead habitat on these allotments, nor accounted for any ecological impact from feral horses in its decision of what levels of livestock grazing could be allowed. Second Shinn Decl., Namitz Decl. ¶¶ 6, 8. The 2009 proposed grazing is arbitrary for failing to consider these important factors, as discussed above at 36–38. Because the Forest Service (and intervenors) bear the burden of showing “new circumstances” justifying modification of the injunction, they must demonstrate that proposed grazing would not result in adverse modification to steelhead habitat. They have failed to make that showing, making it likely that steelhead habitat damage would recur if the proposed grazing were allowed.

²⁰ ONDA agrees that resting individual units will continue to have a beneficial effect for steelhead habitat recovery in those units. However, that does not change the likely impacts on steelhead critical habitat in the units where grazing is proposed.

In contrast to its description for the six new allotments, the MNF does not compare the actual use of units in the previously-grazed year on the two enjoined allotments to the proposed use. Compare Shinn Decl. ¶¶ 4, 9, 13, 17, 21 with Second Shinn Decl. ¶¶ 3, 9. Instead it describes reductions from the “authorized” 2007 levels. However, actual grazing was well below the authorized levels in 2007—yet even those lower levels caused significant damage to steelhead streams. See ONDA Memo on 2008 TRO/PI at 11 (authorized use); id. Ex. 12 at 23–24, 27–29 (Forest Service 2007 documentation of standards exceedances on the two allotments); Ex. 5. In fact, the proposed grazing on two units of Lower Middle Fork Allotment involves fewer livestock (150 cow/calf pairs v. 209 cow/calf pairs in 2007), but appears to include more time on the Sunshine and Balance Units since more units were grazed in 2007 for about the same period of time. Ex. 5 at 4. On one of the units proposed for grazing on the Murderers Creek Allotment, nearly the same number of livestock (250 pairs v. 280 pairs in 2007) would graze for two days more, leaving AUMs essentially unchanged. Ex. 5 at 3. The Lower Middle Fork Allotment’s permittee’s promise to conduct daily riding as mitigation rings hollow, because the 2007–2011 BiOp indicates that he was going to do the same in 2007 and 2008. BiOp at 33, 54 (describing how permittee “actively manages” the livestock).

The Forest Service has not evaluated current steelhead habitat conditions on these allotments to determine whether any grazing could resume without further impermissible damage to steelhead habitat. On both enjoined allotments, there was extensive unauthorized use by livestock while the injunction was in place; on Lower Middle Fork, the MNF believed that “Long Creek cattle have been all summer in the Balance Unit” during 2008—one of the units now proposed to be grazed. Ex. 9 at 24. Despite intervenors’ allegation of significant riparian damage from horses on Murderers Creek Allotment, and the continued presence of horses there,

the Forest Service has not evaluated existing stream conditions and damage from horses (if any) before determining that *any* livestock grazing there is appropriate. The Forest Service already has canceled one horse gather this year, and has not yet performed any NEPA analysis of the proposed June 2009 horse gather. The proposed horse control measures must be seen, at this point, as highly speculative. Because the 2009 grazing authorizations do not consider the current condition of steelhead streams within the two enjoined allotments, they are arbitrary and capricious. Nat'l Wildlife Fed'n v. NMFS, 524 F.3d 917, 930 (9th Cir. 2008) (agency must consider “what jeopardy might result from the agency’s proposed actions in the present and future human and natural contexts” to satisfy ESA § 7(a)(2)) (emphasis in original, citation omitted); see State Farm, 463 U.S. at 43 (1983) (an agency action is arbitrary and capricious if the agency has “entirely failed to consider an important aspect of the problem”).

The new evidence submitted by Stout and Larson is also unreliable. Stout apparently measured transects that were about half as long, and collected half as many measurements, as Christie did in 2007, making it unlikely that Stout’s monitoring would produce results as accurate as Christie’s. Fifth Rhodes Decl. ¶¶ 34–35. Stout claims to have monitored using the 2007 Forest Service monitoring protocol, Third Stout Decl. ¶ 5, but the limitation of his work may be due to practicing monitoring with Larson, who rejects the validity of the Forest Service’s monitoring protocol. Fifth Larson Decl. ¶ 12 (“in contrast to the method used by the [MNF], I took samples on the greenline using a random selection”). Dr. Beschta, a 30-year distinguished hydrologist, also describes that Larson’s declarations “discussions and use of citations typically misrepresent the fundamental science.” Third Beschta Decl. ¶ 19; see Beschta Decl. ¶¶ 20–24; Third Rhodes Decl. ¶¶ 5–19. Because of the deficiencies in intervenors’ new evidence, and the likelihood that ONDA will prevail on its failure to reinstate consultation claim even if there had

been significant horse damage, see ONDA Response at 32–34, the new evidence does not disturb the conclusion that the injunction should be continued pending a decision on the merits.

V. THERE IS NO JURISDICTIONAL BAR TO ISSUING AN INJUNCTION.

Defendants argue that this Court lacks jurisdiction to review certain *allegations* against the Forest Service, because, according to defendants, ONDA’s notice letters do not discuss the potential impacts of grazing in 2008. Def. Resp. at 24. Defendants are incorrect, because the clear language of the 2007 notice letters shows that they were sufficient to bestow jurisdiction over all *claims* here under relevant Ninth Circuit precedent. Under the ESA, “[n]o action may be commenced . . . prior to sixty days after written notice has been given to the Secretary.” 16 U.S.C. § 1540(g)(2)(C) (emphasis added). “In practical terms, the notice must be sufficiently specific to inform the alleged violator about what it is doing wrong, so that it will know what corrective actions will avert a lawsuit.” NRDC v. Southwest Marine, Inc., 236 F.3d 985, 996 (9th Cir. 2000) (quotation omitted).²¹ ONDA’s 2007 notice letters properly identified ESA violations likely to recur throughout the 5-year grazing plan reviewed under the 2007–2011 consultation.

ONDA submitted notice letters to federal defendants on April 24, 2007, October 17, 2007, and October 31, 2007. ONDA sent the second and third letters following the release of consultation documents covering the 2007–2011 livestock grazing on the MNF, near the end of the 2007 grazing season. The consultation documents clearly set out a 5-year plan: the “proposed action” analyzed in the BiOp is “the MNF authorizing proposed grazing activities for 2007-2011 in the [13 named allotments].” BiOp at 2. In turn, ONDA’s notice letters addressed ESA violations that the 5-year plan would cause throughout the entire period. ONDA explicitly did

²¹ Southwest Marine involved notice provisions of the Clean Water Act, which defendants acknowledge to be essentially identical to the ESA, and its holding is on point here. Def. Resp. at 22 n.5 (noting that “[t]he Ninth Circuit routinely looks to case law interpreting the notice provisions of one statute when resolving a jurisdictional dispute under another”).

not limit the notice letters' scope to violations during 2007, although it provided examples of violations from that season. See, e.g., Def. Resp. Ex. 5 at 2, 4–5. The letters specifically fault the Forest Service for unreasonably relying upon a faulty NMFS consultation document, a violation that continues to this day and is evident in the results of the past two grazing seasons and in the Forest Service's 2009 grazing proposal. Id. at 2 (alleging that “in relying upon the 2007–2011 consultation documents prepared by [NMFS], the Forest Service has failed to insure that its 2007–2011 authorized proposed grazing is (1) not likely to destroy or adversely modify steelhead critical habitat, and (2) not likely to jeopardize the continued existence of [steelhead]”). ONDA provided similar notice of other violations that would recur throughout the five year grazing program. E.g. id. at 7 (“ONDA has reason to believe that 2007–20[1]1 authorized livestock grazing has caused take to occur, and continues to cause[] take to occur, on the allotments that may affect steelhead”). ONDA's other notice letters contain similar, broad language. E.g. Def. Resp. Ex. 4 (April 2007 NOI) at 7, 8.

The notice letters were tailored “to provide sufficient information of a violation so that the [action agency] could identify and attempt to abate the violation.” S.W. Ctr. for Biol. Diversity v. Bureau of Reclamation, 143 F.3d 515, 522 (9th Cir. 1998). Notice of recurring and likely future violations is adequate where a defendant “obviously understood at least some of the alleged violations” and has acted to “attempt to remedy some of the inadequacies of which Plaintiffs had complained.” Southwest Marine, 236 F.3d at 997. Here, the Forest Service has known that ONDA is concerned about ESA violations that authorizing grazing in reliance on a flawed BiOp would cause during the life of the agency's 5-year grazing plan. The Forest Service itself informed the permittees on January 29, 2009 that “ONDA will likely ask the court for an injunction on some of the grazing.” Ex. 10 at 1. The Forest Service has scrambled to make last-

minute changes to try to remedy inadequacies identified in ONDA's notice letters, including by reinitiating consultation in May 2009—which ONDA expressly requested in its October 31, 2007 notice letter. Def. Resp. Ex. 6.

Similarly, claims that logically flow from the actions described in the notice letter do not require new notice. New notice was not required even where a notice letter requested reinitiation of consultation, and plaintiffs later challenged the outcome of that consultation; these were not “new claims” requiring new notice, because they were “based on the process of consultation, and the Forest Service’s alleged errors in completing this process.” S.W. Ctr. for Biol. Diversity v. U.S. Forest Serv., 307 F.3d 964, 975 (9th Cir. 2002), dismissed as moot, 355 F.3d 1203. Here also “the Forest Service would not have reasonably interpreted the initial complaint” as one that sought only compliance with the ESA during 2007, because the same actions—and violations—were noticed to recur over all five years. Id. Rather, the letters provided notice that the entire 5-year plan had to be “carried out in accordance with the relevant statutes and regulations and would not be flawed,” thereby requiring no new notice of post-commencement violations. Id.

The cases defendants cite generally involve the *commencement* of an *action*, which defendants did not challenge when ONDA filed this action in 2007, and which is not at issue here.²² Def. Resp. at 22–23. This “case presents a different problem.” Southwest Marine, 236 F.3d at 998. The notice requirement is designed to ensure that “[s]ubject matter jurisdiction is established by providing a notice that is adequate on the date it is given to the defendant.” Id. at

²² The Ninth Circuit’s decision in Southwest Center abrogates the holding in the only case cited that is even close to on point, this Court’s 1994 decision that notice of failure to consult did not comprehend a challenge to the biological opinion after it was issued, and that new notice was required to challenge the biological opinion. Lone Rock Timber Co. v. U.S. Dep’t of Interior, 842 F. Supp. 433, 440 (D. Or 1994). Lone Rock’s limited analysis is also suspect because the Supreme Court has since ruled that no notice is required under the ESA to challenge a biological opinion because it is a final agency action. Bennett v. Spear, 520 U.S. 154, 177–78 (1997).

997 (emphasis added). In these circumstances, a court could even exercise “jurisdiction over particular issues that were not raised in the notice letters” where the defendants were on notice of the invalidity of a plan, but after-arising issues regarding the implementation of the plan were not specifically set forth. *Id.* For the same reasons, this Court’s jurisdiction properly attached in December 2007 when the action was commenced, the Court has jurisdiction over all claims and allegations in this matter, and has the power to enjoin the 2009 proposed grazing based on all of the Forest Service’s ESA violations in implementing the 2007–2011 grazing program.²³

Defendants also argue that ONDA “cannot rely on the APA to avoid the 60-day notice requirement.” Def. Resp. at 25. The Court already has held that ONDA’s first, second, third, fourth, fifth, sixth, and seventh claims arise under the APA. Ore. Natural Desert Ass’n v. Kimbell, 593 F. Supp. 2d 1217, 1219 (D. Or. 2009). Even if this Court were to find a jurisdictional defect in the ESA citizen suit claims, it retains authority to enter the necessary injunction based on the APA claims.

The issue of enjoining grazing on Long Creek Allotment also is not moot. The MNF has voluntarily ceased grazing, but without action by the Court, the Forest Service would be free to authorize grazing later this summer, changing direction again as it has already done at least once this year. See Def. Resp. Ex. 1 at 5 (January 2009 proposal for 15% reduction); Shinn Decl. ¶ 32 (rest for entire season). When there has been voluntary cessation, the Court retains the “power to determine the legality of the practice.” Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs., Inc., 528 U.S. 167, 189 (2000). The Forest Service has not even attempted to carry its “heavy burden”

²³ This situation is properly addressed under Federal Rule of Civil Procedure 15(d). Rule 15(d) allows, upon motion of a party, the supplementation of pleadings “setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.” Fed. R. Civ. P. 15(d) . See Keith v. Volpe, 858 F.2d 467 (9th Cir. 1988). This will occur once discovery is complete and before motions for summary judgment.

of demonstrating that grazing on Long Creek cannot “reasonably be expected to start up again.” Id. Furthermore, the unauthorized use of Lower Middle Fork and Murderers Creek Allotments in 2008 in violation of this Court’s injunction illustrates that Long Creek Allotment is subject to potential trespass from other allotments. Absent an injunction, even assuming the Forest Service carries through with its promise to rest the allotment, there is nothing to prevent cattle from “inadvertently” straying onto Long Creek Allotment. Given the MNF’s management history, the Court should include Long Creek Allotment in the injunction order.

CONCLUSION

For the foregoing reasons, this Court should deny intervenors’ motion to vacate the preliminary injunction and grant ONDA’s motion for a preliminary injunction.

Respectfully submitted this 3rd day of June 2009.

s/ David H. Becker

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