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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

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

Plaintiffs,

v.

ABIGAIL KIMBELL, et al.,

Defendants,

v.

HARLEY & SHERRIE ALLEN, et al.,

Defendants-Intervenors.

Case No. 07-1871-SU

PLAINTIFFS’ MEMORANDUM
IN SUPPORT OF MOTION
REGARDING SCOPE OF REVIEW

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INTRODUCTION

On the afternoon of May 16, 2008, following a hearing that morning, this Court issued an order preliminarily enjoining livestock grazing on two Malheur National Forest allotments pending a decision on the merits of the claims in this case. At the time of the hearing, the defendant government agencies had produced not a single document from the administrative record. Nevertheless, the Court stated it was compelled to issue the injunction based on substantial evidence presented by plaintiffs that livestock grazing had degraded habitat of threatened steelhead (*Oncorhynchus mykiss*) to such an extent that the habitat damage was reasonably certain to injure steelhead, that the United States Forest Service (“Forest Service”) had failed in its duties under the Endangered Species Act (“ESA”) to insure against jeopardy and destruction of steelhead critical habitat, that the Forest Service had failed to reinstate consultation required under the ESA, and that the initial decisions by the National Marine Fisheries Service (“NMFS”) and Forest Service regarding—respectively—the 2007–2011 Biological Opinion (“2007–2011 BiOP”) and grazing permit modifications related to the 2007–11 proposed grazing program on the Malheur National Forest were arbitrary and capricious. Ore. Natural Desert Ass’n v. Kimbell, No. 07-1871 (order filed May 16, 2008) (Dkt. # 87). The Court ordered plaintiffs to submit a proposed opinion and order, which they did on May 23, 2008 (Dkt. # 90), and to which the other parties responded (Dkt. #s 98, 99). The Court has not yet issued its opinion and order on the preliminary injunction.

Unlike many environmental law cases, which involve solely the review of administrative agency decisions under the Administrative Procedure Act (“APA”), *not* all of the claims in this case involve judicial review of *specific final decisions* by the agencies. Rather, several of the claims here relate to mandatory substantive and procedural obligations under the ESA that the

Forest Service has violated in the course of implementing the 2007–11 grazing program or by its *failure* to take an action required under the ESA. Settled law in the Ninth Circuit dictates that some of the ESA claims in this case are not governed by the “administrative record review” restrictions of the APA. The claims that the Forest Service’s grazing management resulted in violations of the ESA § 9 prohibition against “take” of threatened species, and that the Forest Service failed to comply with its on-going duty under ESA § 7 to insure against jeopardy and failed to re-initiate consultation with NMFS, arise directly under the citizen suit provision of the ESA. Because these claims do not arise under the APA, plaintiffs are obligated to produce evidence to prove their claims, and they are not limited to using evidence from the administrative record in doing so.

No matter what evidence ONDA ultimately decides to present in support of its claims under the ESA citizen suit provision, there is no basis in the law to allow defendants to create an arbitrary “record” on these claims. There is no reason to justify limiting the relevant evidence to a “record” created by defendants when these claims do not challenge a specific final agency action, where judicial review arises directly under the ESA and not the APA, and where the plaintiffs bear the burden of proof that the Forest Service violated its substantive and procedural obligations under the ESA. Fairness and due process dictate that ONDA is entitled to prove its case with any relevant evidence it can put before this Court.

Other claims in this suit do relate to specific final agency actions: the decisions by NMFS to issue the 2007–2011 BiOp and a Letter of Concurrence, and by the Forest Service to issue grazing permit modifications and annual instruction letters. Plaintiffs allege that these decisions violate the ESA, and that the Forest Service’s grazing permit modification decisions also violate the National Forest Management Act (“NFMA”). Under the APA, 5 U.S.C. § 706(2), which

pertains to final agency actions, these claims are reviewed on the administrative record, subject to well-recognized exceptions to record review. These exceptions include the submission of extra-record documents to explain whether the agency considered all relevant factors, relied on documents not in the administrative record, or to explain complex subject matter.

As requested by the Court in its June 30, 2008 order, plaintiffs Oregon Natural Desert Association, Center for Biological Diversity and Western Watersheds Project (collectively, “ONDA”) respectfully move this Court to issue an order that its review of ONDA’s causes of action will not be limited to the as-yet-incomplete administrative record. It is manifestly unfair that the government agencies in this case delayed nearly seven months in beginning to produce the administrative record. By refusing to agree to a reasonable schedule for pre-summary-judgment proceedings, defendants have forced this Court to rule prematurely on issues of admissibility of evidence—before the government has finished producing the administrative record, before plaintiffs have been able adequately to review the record produced, and before the government has given any explanation whatsoever for its untenable position that *all* of the claims in this matter are subject to the “administrative record review” limitation.

Also pursuant to this Court’s June 30, 2008 order, NMFS produced the administrative record for its 2007–2011 BiOp and Letter of Concurrence on July 3, 2008. The Forest Service produced documents related to eight allotments that same day, additional documents related to six other allotments on July 15, 2008, and further documents related to eight more allotments on July 28, 2008. Although the agencies had produced nearly 16,000 pages of materials by July 15, and produced another 7,300 pages on July 28—over 23,000 pages in all—the important “record

common to all allotments”¹ from the Forest Service is not due until August 8, 2008. With respect to the claims that arise under the APA, issues related to extra-record evidence ordinarily would arise, if at all, only *after* the production of the administrative record is complete, and only *after* a plaintiff has sought to introduce extra-record evidence. To the extent the government has stated a blanket position that this Court’s review of *all* the claims in this action is limited to the administrative record the government will eventually produce, that position is frivolous in light of controlling law in this Circuit.

The Court’s request for briefing on this issue raises three issues which are addressed in this memorandum:

- Which claims in this case arise directly under the citizen suit provision of the ESA, and therefore are not limited at all by the principle that judicial review should be based primarily on the administrative record?
- Under what circumstances should ONDA or other parties be able to introduce extra-record evidence on the remaining claims governed by the APA, based on the recognized Ninth Circuit exceptions to APA record review?
- Under what circumstances could ONDA or other parties file a separate motion or seek discovery to compel the government to complete or supplement the administrative record to cure “gaps” in the record?

BACKGROUND

This case is the latest in a series of actions in which ONDA has sought review of various aspects of the Forest Service’s grazing management on the Malheur National Forest and the

¹ It appears that the Forest Service has referred to the record common to all allotments as the “Forest Service Policy Administrative Record” in its earlier productions.

related consultations with NMFS and the United States Fish & Wildlife Service (“FWS”) regarding the effect of livestock grazing on threatened steelhead and bull trout. These protected fish depend on the rivers and streams in the forest for spawning and rearing habitat. Exhibit 1 provides a short summary of the cases, important decisions, and current status of the actions involving grazing on the Malheur National Forest, including the decisions and management activities challenged in this case.

I. COURSE OF PROCEEDINGS AND FACTS GIVING RISE TO THE CLAIMS IN THIS CASE

NMFS listed steelhead that spawn on the Malheur National Forest as “threatened” under the ESA in 1999. 64 Fed. Reg. 14,517. Since 1999, the Forest Service and NMFS have struggled to comply with their legal obligations to protect the streams and habitat upon which threatened steelhead depend from the detrimental effects of livestock grazing. In 2004, faced with evidence of heavily-damaged riparian fish habitat, this Court recognized “what amounts to a dire need for better management of grazing on these public lands, and that recent management has fallen short of the legal mandates related to the protection of the land and water and the endangered species dependent thereon.” Ore. Natural Desert Ass’n v. U.S. Forest Serv., No. 03-381-HA, 2004 WL 1592606, at *10 (D. Or. July 15, 2004) (“ONDA 03-381”); see also Ore. Natural Desert Ass’n v. U.S. Forest Serv., No. 03-213-KI, 2004 WL 1293909, at *9 (D. Or. June 10, 2004) (“ONDA 03-213”) (noting that “the way in which grazing has been managed on these lands is clearly at odds with the statutory mandates related to the protection of the river corridors and the species that depend on them” and concluding that “[i]n order for the Forest Service to comply with its duties, I suggest the agency begin to examine more drastic changes”).

Last year, this Court held invalid and set aside the NMFS biological opinions for the 2006 grazing season, finding its conclusions arbitrary and capricious for failing adequately to

consider grazing impacts on steelhead critical habitat and reliance on mitigation measures that were not reasonably certain to occur. Ore. Natural Desert Ass'n v. Lohn, 485 F. Supp. 2d 1190, 1198–1202 (D. Or. 2007), judgment vacated as moot, 2007 WL 2377011, at *1 (D. Or. June 11, 2007). In May 2008, the Court issued an injunction prohibiting livestock turnout on two allotments where ONDA documented serious degradation of habitat essential to the survival of threatened steelhead in violation of the ESA, as well as other ESA violations. Kimbell, No. 07-1871 (order filed May 16, 2008) (Dkt. # 87); see also id. (order filed May 29, 2008) (Dkt. # 97) (indicating that the injunction imposed by the May 16, 2008 order “remains in place and in full effect”).

Prior to 2007, the Forest Service consulted annually with NMFS regarding the effect of the Malheur National Forest’s grazing program on steelhead in the John Day River Basin. See, e.g., Ore. Natural Desert Ass'n v. U.S. Forest Serv., 465 F.3d 977, 980–81, 989 (9th Cir. 2006) (“ONDA”). In 2007, however, the Forest Service and NMFS prepared a consultation under the ESA to cover not one, but five years of proposed grazing on the Malheur National Forest. NMFS issued the 2007–2011 BiOp to cover grazing on 13 allotments in the forest, and issued a Letter of Concurrence on nine other allotments. After NMFS issued these decisions, the Forest Service issued grazing permit modifications and grazing authorization letters intended to incorporate the standards derived from the consultation into individual permittees’ permits. See, e.g., Ex. 2 (2007 grazing permit modification for Murderers Creek allotment). However, on at least two allotments, the Forest Service issued grazing permit modifications that incorporated weaker standards than required by NMFS in the 2007–2011 BiOp. See, e.g., Ex. 3 (alternating pages from the 2007–2011 BiOp and grazing permit modifications for Murderers Creek and Lower Middle Fork allotments showing standards set by NMFS and standards actually communicated

by Forest Service to permittees).

The legal validity of NMFS's action in issuing the 2007–2011 BiOp, and of the Forest Service's actions in issuing the grazing permit modifications and authorization letters, are not the only issues in this case. After grazing on the Malheur National Forest took place during the June–October 2007 season, ONDA documented bank alteration on streams on the Murderers Creek and Lower Middle Fork allotments that, on the average, exceeded by three times the amount which NMFS established as the maximum limit of allowable take due to habitat effects in the 2007–2011 BiOp. See Exs. 4–9 (declarations of Christopher Christie and Jonathan Rhodes and related attachments documenting 2007 conditions filed with motion for preliminary injunctions). ONDA introduced this documentation of severe degradation of steelhead habitat in support of its successful motion for a preliminary injunction and will introduce similar evidence, supported by expert testimony, to prove its claims that the Forest Service's actions have violated the prohibition against take in ESA § 9, that the Forest Service has violated its on-going obligation to insure against jeopardy and adverse modification of critical habitat under ESA § 7(a)(2), and that the agency has failed to reinitiate consultation with NMFS as required under ESA § 7 and the implementing regulations.

II. APPLICABLE LEGAL STANDARDS

ONDA's claims in this case are based on the ESA and NFMA. Under the ESA, federal agencies, in consultation with the appropriate wildlife management agency, must “insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat.” 16 U.S.C. § 1536(a)(2) (“ESA § 7(a)(2)”). To comply with its obligation to avoid jeopardy at the time it issues a grazing management decision,

the Forest Service prepares a biological assessment (“BA”) to evaluate potential effects of proposed grazing on steelhead if the species may be present within the action area. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(a). If the BA identifies that steelhead are “not likely to be adversely affected” by the proposed action, NMFS may indicate its agreement with this finding by issuing a Letter of Concurrence. 50 C.F.R. § 402.14(b)(1). If, on the other hand, the BA identifies that steelhead are “likely to be adversely affected” by the proposed action, the Forest Service conducts formal consultation with NMFS, 50 C.F.R. § 402.14(a). In the BiOp, NMFS determines whether the proposed grazing, together with its cumulative effects, is likely to jeopardize the continued existence of steelhead or adversely modify steelhead critical habitat. 50 C.F.R. § 402.14(g)(4). If NMFS concludes that grazing might result in take of steelhead, the BiOp must include an Incidental Take Statement (“ITS”). 16 U.S.C. § 1536(b)(3).

An ITS (1) specifies the amount or extent of the impact on steelhead of any allowable incidental take; (2) specifies Reasonable and Prudent Measures to minimize such impact; and (3) sets forth the Terms and Conditions that must be complied with to implement the Reasonable and Prudent Measures. 50 C.F.R. § 402.14(i)(1)(i), (ii) & (iv). If the amount or extent of incidental taking of steelhead specified in the ITS is exceeded, the Forest Service must reinitiate consultation immediately. *Id.* §§ 402.14(i)(4), 402.16(a). Reinitiation of consultation is also required, after the initial agency decisions, “if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered” or “if the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion.” *Id.* §§ 402.16(b)-(c).

Section 9 of the ESA also provides that “it is unlawful for any person subject to the jurisdiction of the United States to ... take any such species within the United States or the

territorial sea of the United States.” 16 U.S.C. § 1538(a)(1)(B). The term “‘take’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). The ESA regulations provide that

Harass in the definition of ‘take’ in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering,

and that

Harm in the definition of ‘take’ in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

50 C.F.R. § 17.3. Government agencies are liable for violating the take prohibition in ESA § 9 by authorizing activities carried out by others that result in take. Pac. Rivers Council v. Brown, No. 02-243-BR, 2002 WL 32356431, at *11-*12 (D. Or. 2002) (citing Strahan v. Coxe, 127 F.3d 155, 163 (1st Cir. 1997) and Defenders of Wildlife v. EPA, 882 F.2d 1294, 1301 (8th Cir. 1989)).

The ITS in the 2007–2011 BiOp includes a maximum amount of allowable take of steelhead expressed in terms of the maximum amount of damage to steelhead habitat permitted, as well as the number of steelhead redds that may be directly trampled by livestock. The former figure is consistent across all allotments: “[t]he maximum extent of take that may occur by the proposed action through habitat effects is a measured 20% bank alteration”² on streams within the allotments. See, e.g., Ex. 10 at 3 (NMFS000247) (excerpts from 2007–2011 BiOp from NMFS administrative record). The Terms and Conditions of the ITS state that, “[t]o be exempt from the prohibitions of section 9 of the ESA, the [Malheur National Forest] and its cooperators,

² The maximum level of direct take permitted is one trampled steelhead redd per allotment, but no more than three trampled redds for all 13 allotments combined. Ex. 10 at 2 (NMFS000246).

including the applicant, if any, must fully comply with conservation measures described as part of the proposed action and the following terms and conditions that implement the reasonable and prudent measures described above.” Id. at 4 (NMFS000248).

The Ninth Circuit has recognized that, even after an agency issues a decision, the agency has an on-going obligation to insure against jeopardy in managing projects, and that the agency violates ESA § 7(a)(2) when it allows a project’s adverse effects to accumulate and relies on third parties’ actions to prevent jeopardy or destruction or adverse modification to steelhead habitat. Sierra Club v. Marsh, 816 F.2d 1376, 1385–86 (9th Cir. 1987).

ONDA’s claims under NFMA relate to the Forest Service’s actions in issuing the grazing permit modifications and grazing authorization letters. NFMA, 16 U.S.C. §§ 1600–1614, governs the Forest Service’s management of the national forests. NFMA establishes a two-step process for forest planning. NFMA first requires the Forest Service to develop, maintain, and revise “land and resource management plans” (“LRMPs” or “Forest Plans”) for each national forest. Id. § 1604(a); see also 36 C.F.R. § 219.7. Implementation of a Forest Plan occurs at the site-specific level. Once a Forest Plan is in place, the Forest Service assesses site-specific actions, such as the modification of a grazing permit or the issuance of annual instructions to permittees, in the second step of the forest planning process. Site-specific decisions must be consistent with the broader Forest Plan. 16 U.S.C. § 1604(i); 36 C.F.R. § 219.10. See also ONDA, 465 F.3d at 979–81 & 980 n.4 (describing the forest planning process and the management of livestock grazing under that process); Citizens for Better Forestry v. U.S. Dep’t of Agric., 341 F.3d 961, 966 (9th Cir. 2003) (noting that site-specific plans and “on-the-ground actions” must be consistent with forest plans).

The Malheur National Forest’s Forest Plan incorporates the PACFISH aquatic conservation strategy that sets management objectives and standards for national forests, including the Malheur National Forest, intended to protect anadromous fish present on those forest. Ex. 11 at 1–2 (NMFS007822–23) (excerpts from 1995 environmental assessment and record of decision amending forest plans to include PACFISH); see ONDA 03-381, 2004 WL 1592606, at *3–*5 (describing the requirements of the PACFISH aquatic conservation strategy, its Riparian Management Objectives (“RMOs”), and PACFISH grazing standard GM-1). Under PACFISH, “[t]he applicable RMOs include pool frequency, water temperature, large woody debris, bank stability, lower bank angle, and width to depth ratio”—indicators of good, healthy habitat for steelhead and other fish. *Id.* at *4. PACFISH grazing standard GM-1, which is binding on the Malheur National Forest through the Forest Plan, states that the Forest Service must:

Modify grazing practices (e.g., accessibility of riparian areas to livestock, length of grazing season, stocking levels, timing of grazing, etc.) that retard or prevent attainment of Riparian Management Objectives or are likely to adversely affect inland native fish. Suspend grazing if adjusting practices is not effective in meeting Riparian Management Objectives and avoiding adverse effects on listed anadromous fish.

Ex. 11 at 3 (NMFS007953) (emphasis added).

ONDA’s claims in this case are that the Forest Service decisions to issue grazing permit modifications and grazing authorization letters violate NFMA because the Forest Service has not complied with the Forest Plan’s monitoring requirements. For example, the Forest Service has not complied with PACFISH requirements for monitoring for RMOs and has not modified or suspended grazing that retards the attainment of RMOs. The record will show that little or no monitoring for RMOs has occurred. The record will also show that the Forest Service’s 2007 grazing permit modifications and grazing authorization letters are arbitrary and not consistent

with the Forest Plan—in violation of NFMA—because the decisions set grazing levels in the absence of information on whether or not RMOs are, or are not, being attained.

III. CATEGORIES OF CLAIMS IN ONDA’S COMPLAINT

On December 21, 2007, ONDA filed this lawsuit, alleging causes of action under both the ESA and NFMA. After two amendments to the complaint, nine causes of action remain. Second Amended Complaint (Dkt. # 45). At the status conference on June 30, 2008, the parties noted their disagreement as to the scope of review for a number of ONDA’s claims. For purposes of the issues to be addressed in the instant motion, the claims that ONDA alleges in its Second Amended Complaint can be grouped into two categories: first, claims that arise under the citizen suit provision of the ESA, which—as detailed below—are therefore not subject to the APA restriction on administrative record review; and, second, claims under the ESA and NFMA related to specific agency decisions, and for which the starting point of judicial review is the administrative record compiled by the agency.

First Category—Claims Arising Under ESA Citizen Suit Provision

- Eighth Claim: Forest Service violation of ESA § 9 by allowing grazing that resulted in the take of steelhead in violation of the Incidental Take Statement in the 2007–2011 BiOp;
- Fourth Claim: Forest Service violation of on-going ESA § 7 duty to insure that grazing it authorizes does not jeopardize the continued existence of threatened steelhead or result in destruction or adverse modification of steelhead critical habitat;³

³ As described more fully below, ONDA introduced evidence on the motion for preliminary injunction showing that the Forest Service failed to properly implement the terms and conditions from the 2007–2011 BiOp and allowed grazing during the 2007 season that exceeded standards

- Ninth Claim: Forest Service violation of ESA § 7 duty to insure against jeopardy and adverse modification of critical habitat by failure to reinitiate consultation with NMFS.

Second Category—Claims Arising Under APA

- First Claim: NMFS violation of the ESA by arbitrary and capricious conclusion regarding destruction or adverse modification of critical habitat in 2007–2011 BiOp;
- Second Claim: NMFS violation of the ESA by arbitrary and capricious conclusion regarding jeopardy in 2007–2011 BiOp;
- Third Claim: NMFS violation of the ESA by arbitrary and capricious conclusions regarding destruction or adverse modification of critical habitat and jeopardy in Steelhead Letter of Concurrence;
- Fourth Claim: Forest Service violation of the ESA in its decisions embodied in the 2007 grazing permit modifications and grazing authorization letters;⁴
- Fifth Claim: NMFS violation of the ESA by issuing an Incidental Take Statement in the 2007–2011 BiOp that fails to include appropriate terms and conditions;

and the allowable take limit in the ITS—events that occurred after the 2007 grazing permit modification decisions, but which violated the Forest Service’s on-going obligation to insure against jeopardy. This Fourth Cause of Action also addresses the separate question of whether the Forest Service, *at the time it made the 2007 grazing permit modification decisions and issued the grazing authorization letters*, acted arbitrarily and capriciously and violated the ESA by failing properly to include the correct standards from the 2007–2011 BiOp in those decision documents. The latter question, focused on the specific final agency actions at the time in May and June 2007 when those actions took place, is reviewed on the administrative record as described under the “second category” heading below).

⁴ See discussion in note 3 above.

- Sixth Claim: Forest Service violation of NFMA in its 2007 grazing permit modification decisions and grazing authorization letters by failing to comply with Forest Plan's standards for riparian vegetation, fish and wildlife populations, and water quality;
- Seventh Claim: Forest Service violation of NFMA in its 2007 grazing permit modification decisions and grazing authorization letters by failing to comply with requirements for monitoring Management Indicator Species.

For the claims in the first category arising under the ESA citizen suit provision, there is no restriction on the evidence that may be admitted and considered by this Court. ONDA's motion asks the Court to rule that these claims are not limited to the administrative record because they arise under the ESA's citizen suit provision rather than the APA, do not challenge any specific final agency action, and require proof concerning incidents of take and the failure to reinstate consultation that would not be contained in any administrative record. For the claims in the second category that arise under the APA, this Court's review is based on the administrative record, unless the proffered extra-record evidence falls within one of four exceptions. ONDA's preliminary inspection of the partial administrative record that has been produced so far reveals that ONDA may seek to submit evidence that will fall within the exceptions to the APA's general prohibition of extra-record evidence. Accordingly, as the parties and the Court discussed during the June 30, 2008 scheduling conference, ONDA requests that the Court defer ruling on any specific extra-record evidence, and rule that parties may submit extra-record evidence, if any, related to claims arising under the APA, at the time the parties submit their opening briefs on motions for summary judgment—subject to objection by other parties or motions to strike if appropriate.

ARGUMENT

ONDA requests that this Court rule that ONDA may submit expert reports and other evidence relevant to ONDA's first category of claims: that Forest Service grazing management resulted in illegal take of steelhead in violation of ESA § 9 and that take is reasonably certain to occur in the future under the grazing management program; that the Forest Service violated ESA §7(a)(2) by failing to implement the terms and conditions in the 2007–2011 BiOp and allowing grazing in 2007 that violated those terms and conditions, thereby failing to insure, on an on-going basis, that grazing on the Malheur National Forest would not result in jeopardy to steelhead or adverse modification of steelhead critical habitat; and by failing to reinitiate consultation when the allowable take limits in the 2007–2011 BiOp were exceeded and when it became evident that the scope of grazing in 2007 was beyond the level contemplated by NMFS in issuing the 2007–2011 BiOp.

Under Ninth Circuit precedent, these claims arise directly under the ESA and are not governed by the APA. For the remaining claims that arise under the APA, the Court should acknowledge the Ninth Circuit rule regarding exceptions to pure record administrative review, but defer ruling on specific proffers of extra-record evidence until the parties have had time to review and evaluate the administrative record and determine what extra-record evidence, if any, is necessary and appropriate. Finally, the Court should order the parties to confer regarding gaps in the administrative record, an issue distinct from the issue of potential extra-record evidence, and set a deadline for filing motions to complete or supplement the record if the parties cannot agree that the administrative record is complete.

I. CLAIMS WHICH ARISE UNDER THE ESA CITIZEN SUIT PROVISION ARE NOT LIMITED TO REVIEW ON THE ADMINISTRATIVE RECORD

The Endangered Species Act is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation,” intended to “halt and reverse the trend towards species extinction, whatever the cost.” TVA v. Hill, 437 U.S. 153, 180, 184 (1978). To further the purposes of the ESA, Congress empowered citizens to bring suit to enforce its provisions. 16 U.S.C. § 1540(g). It is settled law in the Ninth Circuit that evidence must be permitted without restriction for claims which arise under the citizen suit provision of the ESA. Wash. Toxics Coalition v. EPA, 413 F.3d 1024, 1029, 1034 (9th Cir. 2005) (allowing parties to introduce evidence on the effects of the use of challenged pesticides to support ESA claims). Such evidence is not considered “extra-record” because there is no agency record for such claims; therefore, such evidence need not satisfy any exceptions to administrative record review. The Court must follow this established precedent and hold that ONDA may develop and introduce expert reports and other evidence to support its first category of claims—which may include, but may not be limited to, evidence from the administrative record.

Notably, these claims do not arise under the APA. The APA provides an avenue for review of “final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. § 704. By its plain terms, APA review is inapplicable if it would duplicate established statutory procedures authorizing judicial review of agency actions. See Bowen v. Massachusetts, 487 U.S. 879, 903 (1988). The ESA citizen suit provision is such a statute. Wash. Toxics, 413 F.3d at 1034. Where the ESA citizen suit provision governs judicial review, the APA limitation on the scope of review⁵ cannot be invoked. Such is the case here. As the Ninth Circuit has emphatically

⁵ The government defendants’ likely arguments, which they have advanced unsuccessfully in several other jurisdictions, may conflate two analytically distinct concepts: the *standard of*

confirmed, because the ESA is a “substantive statute [that] independently authorizes a private right of action, the APA does not govern the plaintiffs’ claims,” and claims such as those discussed in this section that are meant “to compel agencies to comply with the substantive provisions of the ESA arise under the ESA citizen suit provision, and not the APA.” *Id.*

A. This Court Must Allow ONDA to Introduce Evidence Regarding its Claims Under ESA § 9.

The case law draws a clear distinction between ESA claims that arise directly under the ESA citizen suit provision and ESA claims that are governed by the APA, based on which agency’s actions, and what type of activity, is challenged. In Bennett v. Spear, a unanimous Supreme Court held that the expert wildlife agencies—NMFS and FWS—could not be sued under the ESA citizen suit provision for “failure to perform [their] duties as administrator[s] of the ESA,” except under an express citizen suit authorization pertaining to the ESA’s listing and critical habitat designation provisions. 520 U.S. 154, 173–74 (1997). In contrast to the wildlife agencies’ “maladministration of the ESA,” *id.* at 174, other federal agencies may be sued under the ESA citizen suit provision for violating the ESA’s mandates. As the Supreme Court explained, “§ 1540(g)(1)(A) is a means by which private parties may enforce the substantive provisions of the ESA against regulated parties—both private parties and Governmental

review and the *scope of review*. A standard of review, which dictates the applicable burden of proof plaintiffs must meet, is distinct from a scope of review, which describes the evidence a court may consider during judicial review. Franklin Sav. Ass’n v. Office of Thrift Supervision, 934 F.2d 1127, 1136 (10th Cir. 1991). Many ESA cases adopt the APA’s “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” standard of review because the ESA does not itself provide an internal standard of review. *See, e.g., Nat’l Wildlife Fed’n v. FEMA*, 345 F. Supp. 2d 1151, 1159 (W.D. Wash. 2004). However, there is no need to borrow the “record review” restriction in the APA scope of review because the ESA provides a scope of review for these claims. The ESA authorizes a “civil suit,” which means Congress provided a “specific statutory authorization” for plaintiffs to have discovery rights and proceed through a trial de novo. Chandler v. Roudebush, 425 U.S. 840, 862 (1976); Nabors v. United States, 568 F.2d 657, 660 (9th Cir. 1978).

agencies— but is not an alternative avenue for judicial review of the [FWS’s] implementation of the statute.” Id. at 173. Therefore, in Bennett, claims directed at the sufficiency of the wildlife agency’s actions in issuing biological opinions were governed by the APA. Id. at 174, 179.

By contrast, ONDA’s ESA § 9 claim, its claim that the Forest Service has violated the ESA § 7(a)(2) duty to ensure against jeopardy and adverse habitat modification in its on-going management of grazing on the Malheur National Forest, and its claim that the Forest Service has failed to reinstate consultation as required by the ESA arise under the citizen suit provision of the ESA and are not governed by the APA. ONDA brings these claims pursuant to 16 U.S.C. § 1540(g), which allows for a person to commence suit on their own behalf to “enjoin . . . the United States and any other governmental instrumentality or agency, who is alleged to be in violation of any provision of this chapter or regulation [of the ESA]” 16 U.S.C. § 1540(g)(1)(A). The Ninth Circuit has held that review of claims brought under 16 U.S.C. § 1540(g)(1)(A) is not limited solely to the administrative record and that the “APA and its limited provision for judicial review of final agency action” does not control a suit pursuant to the citizen suit provision of the ESA. Wash. Toxics, 413 F.3d at 1034; see also Wash. Toxics Coalition v. EPA, No. C01-132C, 2002 WL 34213031, at *3 (W.D. Wash. July 2, 2002) (noting that, because plaintiffs’ ESA claims arose under the citizen suit provision, “the APA, including its peculiar doctrines, does not govern plaintiffs’ claims”).

Section 9 of the ESA prohibits the “take of endangered species of fish or wildlife.” To obtain relief on this claim, ONDA has the burden to prove by a preponderance of evidence that the Forest Service’s actions result in an unlawful take of steelhead and that take is reasonably certain to occur under the Malheur National Forest’s 2007–2011 grazing management program. Folding in the definitions of “harass” and “harm” in the ESA regulations, ONDA must prove that

the Forest Service's actions or omissions in its grazing management harmed protected species by killing or injuring its members, or resulted in significant habitat modification or degradation which injured steelhead by significantly impairing essential behavioral patterns, and that these effects are reasonably certain to continue in the future. See Defenders of Wildlife v. Bernal, 204 F.3d 920, 925 (9th Cir. 1999); Marbled Murrelet v. Babbitt, 83 F.3d 1060, 1067–68 (9th Cir. 1996); Pac. Rivers Council, 2002 WL 32356431 at *11–*12 (D. Or. 2002). Whether the Forest Service's management of grazing resulted in a violation of the ESA § 9 take prohibition involves the actual effects of the decision in practice, and the harm that resulted after the decision was made, rather than the quality of the original decision itself. In this way, § 9 take claims are very different from claims challenging an administrative decision that constitutes final agency action.

Claims that challenge an administrative decision arise under the APA. 5 U.S.C. § 704. In the ESA context, such decisions include, for example, whether or not to list a species or designate a critical habitat, or the final agency action embodied in a biological opinion predicting whether an action is likely to jeopardize the continued existence of a listed species. A plaintiff challenging such an administrative action must demonstrate the decision was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;” contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority or limitations, or short statutory right; or without observance of procedure required by law. 5 U.S.C. § 706(2) . “In these cases, the agency must justify its final action by reference to the reasons it considered at the time it acted.” Friends of Clearwater v. Dombek, 222 F.3d 552, 560 (9th Cir. 2000). Courts generally limit their consideration of this type of claim to the record before the agency at the time it made its decision. See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971); Camp v. Pitts, 411 U.S. 138, 142–43 (1973).

In contrast, ONDA's ESA § 9 claims do not challenge an administrative decision. They are instead enforcement actions requiring proof of harm and causation. Evidence of the probable presence of members of a species in the affected habitat area, together with a likelihood that the proposed action will harm the species if habitat is affected, is necessary to prove take from harm to a species's habitat. Marbled Murrelet, 83 F.3d at 1067–68. Such evidence inevitably requires evidence beyond any conceivable administrative record, and a review of ESA § 9 cases reveals that this type of claim is not limited to review of an administrative record. Instead, courts undertake fact finding through discovery, including expert testimony, and, if necessary, trial. See, e.g., Bernal, 204 F.3d at 922 (district court conducted three-day trial on plaintiff's ESA § 9 claim); Marbeled Murrelet, 83 F.3d at 1067 (at trial, experts testified about endangered marbled murrelet's nesting behavior and the likelihood of defendant's harvesting plan negatively impacting the bird's patterns and susceptibility to predators); Sierra Club v. Yuetter, 926 F.2d 429, 432–33, 438–39 & n. 13 (5th Cir. 1991) (evidence admissible for Section 9 takings claims as expertise of the Fish & Wildlife Service is not implicated), clarified in Sierra Club v. Glickman, 67 F.3d 90, 95 (5th Cir. 1995); San Carlos Apache Tribe v. United States, 272 F. Supp. 2d 860, 876 n.11, 877–79 (D. Ariz. 2003) (parties presented expert testimony on ESA § 9 claims); United States v. Town of Plymouth, Massachusetts, 6 F. Supp. 2d 81, 83–84, 91–92 (D. Mass. 1998) (court considered scientists' affidavits when deciding whether take violation occurred); Loggerhead Turtle v. County Council of Volusia County, Florida, 896 F. Supp. 1170, 1175, 1181–82 (M.D. Fla. 1995) (same); Palila v. Haw. Dep't of Land & Natural Res., 649 F. Supp. 1070, 1072 n.3 (D. Haw. 1986), aff'd, 852 F.2d 1106 (9th Cir. 1988) (numerous experts on trees, sheep, and birds, testified at trial); Palila v. Haw. Dep't of Land & Natural Res., 471 F. Supp. 985, 988 & n.2 (D. Haw 1979), aff'd, 639 F.2d 495 (9th Cir. 1981) (court received

testimony of expert witnesses on summary judgment motion); see also Hawksbill Sea Turtle v. FEMA, 126 F.3d 461, 478 (3d Cir. 1997) (distinguishing between claims based on FEMA's planning and ESA § 9 claims based on its execution of agency action and citing as error the district court's failure to examine the evidence developed before it).

Under Section 9 of the ESA, expert reports and other evidence of take must be permitted without restriction. The administrative record will reveal only how NMFS and the Forest Service arrived at specific policies and the nature of those policies. However, a take does not occur until *after* the agency implements its policies, when the results of that implementation adversely affect a listed species. In effect, there can be no administrative record for incidents of take. Given this lack of information, it is impossible to demonstrate a take based solely on information contained in an administrative record. Thus, this Court must permit ONDA to introduce evidence to show that take of steelhead has occurred and is reasonably certain to occur under the Malheur National Forest's 2007–2011 grazing management program.

To prove the elements necessary to show an ESA § 9 violation, ONDA will rely on evidence similar to what it submitted in support of its motion for a preliminary injunction. See, e.g., Exs. 4–9. As described above, Christie and Rhodes confirmed extensive damage to riparian habitat at the end of the 2007 grazing season. Christie's photographs and measurements demonstrating bank alteration will enable the court to determine the extent to which the Forest Service's implementation of grazing management during 2007 resulted in take of steelhead in excess of the permissible limit in the incidental take statement, and whether such take is reasonably certain to recur. Expert reports by Rhodes and potentially other experts explaining and establishing the causal connection between bank alteration, stream conditions, and harm to steelhead further are critical in proving the ESA § 9 take claim.

B. This Court Must Allow ONDA to Introduce Evidence Regarding its Claims Under ESA § 7 That the Forest Service Failed to Insure Against Jeopardy and Adverse Modification of Critical Habitat in its Grazing Management and That the Forest Service Failed to Reinitiate Consultation.

This Court also must permit ONDA's evidence to evaluate the Forest Service's violation of its on-going, independent obligation to insure against jeopardy in the course of its grazing management under ESA § 7(a)(2). The propriety of evidence related to on-going federal agency management was discussed in detail in the Eastern District of Washington's thoughtful opinion in Defenders of Wildlife v. Martin, which held that in "a pure ESA claim, the APA's arbitrary and capricious standard of review and its limitations to the executive record do not apply." 454 F. Supp. 2d 1085, 1094–98 (E.D. Wash. 2006) (wildlife organization made a sufficient showing to be entitled to injunction prohibiting Forest Service from authorizing snowmobiling which was likely to cause jeopardy to endangered woodland caribou). Even if—for the sake of argument—an agency's initial decision satisfies the duty to insure against jeopardy, the obligation of an action agency to insure against jeopardy continues beyond the initial decision. See id. at 1097–98.

This is emphatically true where, as here, the initial decision involved a *five year* consultation over the effects of five years' worth of grazing on fish that, at most, live for three or four years. Without the on-going obligation to insure against jeopardy, the entire species could be wiped out of the Malheur National Forest before the next scheduled consultation over the effects of grazing on the species. As the Ninth Circuit has noted, when an agency has responsibility for managing an on-going action, insurance against jeopardy can disappear if the premises that led to the initial "no jeopardy determination" disappear. Sierra Club v. Marsh, 816 F.2d at 1385–86. It is essential that this Court allow ONDA to introduce evidence to this effect.

For example, livestock trample stream banks and dramatically reduce the height of

overhanging grasses and shrubs. See generally Exs. 4, 6–9 (describing and illustrating effects of livestock grazing on riparian areas and fish habitat). Bank alteration and the lack of protective shrubs and grass, in turn, cause turbidity and eliminate crucial shade, increasing stream temperatures to levels that are harmful to steelhead and reducing the survival and production of the protected fish. See generally Ex. 8 (declaration of hydrologist Jonathan Rhodes describing effects of bank alteration and other grazing effects on fish habitat). On-going grazing, initially authorized by the Forest Service’s 2007 decisions, has resulted in violations of the standards set in those decisions. Grazing that vitiates the Forest Service’s guarantee that standards would be met has resulted in take through the adverse modification of steelhead habitat. By definition, the administrative record related to those 2007 decisions will not include post-decisional evidence of damage to the forest from grazing that is necessary to carry the burden of showing that the Forest Service violated its on-going duties to ensure against jeopardy. See Wash. Toxics Coalition, 2002 WL 34213031, at *3 n.8 (noting that “in the context of section 7(a)(2) and ongoing agency actions, [intervenor’s] demand for an administrative ‘agency record’ is misplaced”).

In Sierra Club v. Marsh, the Ninth Circuit held that the action agency initially insured that its project was not likely to cause jeopardy by entering into an agreement to acquire mitigation lands, but that the insurance lapsed when the agency allowed adverse modification to listed species’ habitat without first insuring that the mitigation lands were actually acquired. 816 F.2d at 1386. Even assuming for the sake of argument that the Forest Service initially complied with its duties under ESA § 7(a)(2) in issuing the grazing permit modifications and authorization letters, grazing during 2007 caused extensive damage to steelhead habitat in at several allotments on the Malheur National Forest, and the Forest Service has allowed harmful effects of grazing to accumulate in derogation of its duty to insure against adverse modification to steelhead critical

habitat. If, in Sierra Club v. Marsh, the court had prohibited plaintiffs from introducing post-decisional evidence, it would have prevented the plaintiffs there from introducing the conclusive evidence that the Corps failed to purchase the mitigation wetlands in derogation of its on-going obligation to insure against jeopardy. If the plaintiffs had not been permitted introduced this evidence the court would not have been able to reach the decision that it did.

Likewise, this Court must permit evidence regarding the Forest Service's failure to reinitiate consultation under Section 7(a)(2) of the ESA. Wash. Toxics, 413 F.3d at 1029, 1034. Section 7(a)(2) and the ESA implementing regulations require the Forest Service to reinitiate consultation with NMFS when an action is modified in ways not previously considered, or new information reveals effects of the action that were not previously considered. 50 C.F.R. §§ 402.16(b)-(c) . In this case, the Forest Service violated the ESA by failing to reinitiate consultation with NMFS about the 2007-2011 BiOp once the Forest Service had identified and been presented with evidence of violations of the bank alteration standards and discovered that it erroneously allowed more grazing on several allotments in 2007 than contemplated in the 2007–2011 BiOp by including the incorrect standards in the 2007 grazing permit modifications.

ONDA's evidence will help the court determine the extent of the Forest Service's failure to reinitiate consultation under the ESA. Christie's photographs and measurements demonstrating bank alteration, and Rhodes's observations regarding stream conditions after the 2007 grazing season will enable the court to assess the impact of the Forest Service's failure to reinitiate consultation. Exs. 4–9. Evidence that post-dates the Forest Service's decisions to issue the 2007–2011 grazing permit modifications will show, for example, that the impact of grazing practices has changed to a degree not previously expected, that the extent of the action was different than NMFS evaluated in its consultation, and that bank alteration exceedances were

significantly greater than the Forest Service found in its own, limited monitoring. This information will allow this Court to effectively evaluate ONDA's claim that the Forest Service unlawfully failed to reinitiate consultation.

Accordingly, evidence arising *subsequent to* the administrative decisions reflected in the administrative record is relevant and potentially critical to prove that grazing on the Malheur National Forest has resulted in take in violation of ESA § 9, that the Forest Service has failed in its duty to insure against jeopardy and adverse habitat modification, and that the Forest Service unlawfully failed to reinitiate consultation with NMFS. Such evidence includes documentation and expert evidence, such as the Christie and Rhodes declarations and supporting exhibits submitted with the preliminary injunction motion, which show that the Malheur National Forest has not complied with the conservation measures contemplated in the proposed 2007–2011 grazing program, and that livestock grazing resulted in damage to steelhead habitat exceeding the take limit set in the ITS during the 2007 grazing season.

Other evidence will show, for example, that certain types of insurance against jeopardy that the agencies relied on when they developed their 2007 decisions have since disappeared—such as strong promises by the Forest Service to impose binding conditions on permittees, since undermined by directives from the Forest Service regional office eliminating the use of Annual Operating Instructions (“AOIs”) and prohibiting the national forests from taking any administrative action against permittees based on current monitoring. See Ex. 12 at 1–2 (eliminating use of AOIs), 6 (noting that “annual monitoring indicators should not be used as decisionmaking tools for administrative actions on grazing permits”);⁶ see also ONDA, 465 F.3d

⁶ ONDA was unable to locate these directives in its preliminary review of the administrative record produced thus far. The directives were issued after the specific final agency actions

at 984 (describing the now-eliminated AOIs as “a critical instrument in the Forest Service's regulation of grazing on national forest lands”); see generally ONDA, 465 F.3d at 979–81, 984–90 (describing AOIs). Continuing authorization of current grazing management practices has led to the adverse modification of critical habitat and a “take” of steelhead in violation of ESA §§ 7(a)(2) and 9. ONDA must be able to introduce evidence to show that effects of the Forest Service’s inaction and management failures and to carry the burden of proof on its ESA claims which arise under the ESA citizen suit provision.

Finally, regardless of what evidence ONDA ultimately presents, there is no basis in the law to allow defendants to create an arbitrary “record” regarding the three claims discussed in this section, and thereby dictate what evidence ONDA can use to present its case. There is simply no practical or other reason that justifies limiting the available evidence to “a record” created by defendants without ONDA’s (or anyone else’s) participation. Limiting a case to administrative record review makes sense when the court is determining whether final agency action is arbitrary, capricious, or otherwise contrary to the law based on the information before the agency at the time of decision. Such a limitation is inappropriate where, for the claims discussed in this section, there is no specific final agency action being reviewed, where judicial review arises from a statute other than the APA, and where such a limitation would amount to limiting judicial review to defendants’ evidence. When the plaintiffs bear the burden of proof, basic principles of fairness and due process dictate that they are entitled to prove their case on the evidence they can adduce, not solely on the evidence the defendants assemble.

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challenged in this case. However, it is possible that they will be produced as part of the “record common to all allotments” on August 8th.

II. FOR CLAIMS BASED ON THE APA, EXTRA-RECORD EVIDENCE MAY BE PERMITTED IF THE PROFFERED EVIDENCE COMES WITHIN AN EXCEPTION TO ADMINISTRATIVE RECORD REVIEW

For the claims brought under the APA, this Court’s review is limited to the administrative record, unless the proffered evidence falls within one of four exceptions. The initial examination of the administrative record indicates that it may be necessary for ONDA to submit evidence that falls within the exceptions to the general prohibition of extra-record evidence. However, because the parties have only recently begun to receive and review portions of the administrative record—and over 23,000 pages of documents have been produced in the still-incomplete record over the past three weeks—it is premature to identify precisely what evidence ONDA may seek to introduce within the recognized exceptions. Some potential examples are described below.

Under the APA, when reviewing an agency decision, “the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.” Camp v. Pitts, 411 U.S. 138, 142 (1973); see also Southwestern Ctr. For Biological Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1450 (9th Cir. 1996). For claims that specific decisions were arbitrary and capricious, parties generally may not use “post-decision information as a new rationalization either for sustaining or attacking the Agency’s decision.” Ass’n of Pac. Fisheries v. EPA, 615 F.2d 794, 811-12 (9th Cir. 1980). However, the Ninth Circuit recognizes four exceptions to the rule, allowing extra-record materials

- (1) if necessary to determine whether the agency has considered all relevant factors and has explained its decision,
- (2) when the agency has relied on documents not in the record, []
- (3) when supplementing the record is necessary to explain technical terms or complex subject matter, [or]
- (4) when plaintiffs make a showing of agency bad faith.

Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv. 450 F.3d 930, 943 (9th Cir. 2006) (citing Southwestern Ctr. for Biological Diversity, 100 F.3d at 450) (internal quotation marks omitted). In addition, the Ninth Circuit has recognized that a court may and should consider materials outside the administrative record to test agency assumptions and to determine if agency predictions have been borne out. Ass'n of Pac. Fisheries, 615 F.2d at 811–812 (if the post decisional studies showed that the agency proceeded upon assumptions that were entirely fictional or utterly without scientific support, then post-decisional data might be utilized by the party challenging the regulation.); see also Am. Petroleum Inst. v. EPA, 540 F.2d 1023, 1034 (10th Cir. 1976) (after an agency decision, events indicating the truth or falsity of agency predictions should not be ignored); Stephen Stark & Sarah Wald, Setting No Records: The Failed Attempt to Limit the Record in Review of Administrative Action, 36 Admin. L. Rev. 333, 344 (1984) (court may consider extra-record evidence in cases where evidence arising after the agency action shows whether the decision was correct or not).

For claims that arise under the APA where the administrative record is the focal point for judicial review, “[t]he burden is on the part seeking to introduce the extra-record materials [to establish their admissibility].” Sierra Club v. Dombeck, 161 F. Supp. 2d 1052, 1063 (D. Ariz. 2001) (citing Animal Defense Council v. Hodel, 840 F.2d 1432, 1436 (9th Cir. 1988)). Following the holding in Bennett, 520 U.S. at 173–74, review of decisions by NMFS in issuing a biological opinion or a letter of concurrence is reviewed under the APA, focusing on the administrative record. NMFS is charged with administering the ESA, much as the Forest Service administers NFMA. Agencies are afforded deference in interpreting statutes they administer, and their administration is generally subject to judicial review under the APA. See Am. Forest &

Paper Ass'n v. EPA, 137 F.3d 291, 297 (5th Cir. 1998) (EPA not entitled to deference in interpretation of ESA because the ESA is not a statute EPA is charged with administering).

In contrast, the Forest Service, like other federal agencies, is regulated by the substantive and procedural requirements of the ESA and is subject to suit in the same manner as other regulated parties. As outlined above, an action agency such as the Forest Service may be sued under the ESA citizen suit provision for failing to consult or avoid jeopardy in its on-going management of an activity, as mandated by ESA § 7(a)(2), or for violation of the take prohibition in ESA § 9. See Bennett, 520 U.S. at 173–74; Sierra Club v. Glickman, 156 F.3d 606, 616–17 (5th Cir. 1998) (claims challenging failure to comply with § 7 can be brought as ESA citizen suit); Martin, 454 F. Supp. 2d at 1094–98. In contrast, NMFS or the Forest Service's actions in issuing the 2007–2011 BiOp and the 2007 grazing permit modifications and authorization letters are reviewable under the APA arbitrary and capricious standard, but evaluated also against substantive obligation in ESA § 7(a)(2) to insure against jeopardy. See Bennett, 520 U.S. at 177–78; Pacific Coast Fed'n of Fishermen's Ass'ns v. NMFS, 265 F.3d 1028, 1034, 1038 (9th Cir. 2001) (reviewing the adequacy of NMFS' biological opinions under the APA).

NMFS's issuance of the 2007–2011 BiOp and Letter of Concurrence were discrete final agency actions. Thus, whether NMFS's BiOp and Letter of Concurrence were arbitrary and capricious in the no-jeopardy and no adverse habitat modification conclusions is reviewed under the APA, based, in the first instance, on the administrative record produced by NMFS. Likewise, claims that the Forest Service's grazing permit modifications and authorization letters were discrete final agency actions. The claims that those decisions were arbitrary and capricious *at the time they were issued* for failing to include the proper standards mandated by the 2007–2011 BiOp, and because the Forest Service failed to comply with the PACFISH grazing standards and

other requirements of NFMA and the Forest Plan, are reviewed on the administrative record. However, extra-record evidence may be necessary to help the court evaluate whether the agencies considered all relevant factors and explained its decision, whether supplementing the administrative record is necessary to explain complex subject matter, and whether the agencies relied on documents not in the administrative record.

For example, once the administrative record is complete, there may still be insufficient information in the administrative record to explain whether or not the agency is complying with the requirement of PACFISH grazing standard GM-1 in modifying or suspending grazing where RMOs are not being attained. It may not be clear even after the administrative record is produced whether the monitoring that has been conducted is sufficient to establish a “trend” and therefore to make a non-arbitrary decision regarding the appropriate level of grazing, or whether certain standards for which the Forest Service actually is monitoring are adequate proxies for the RMOs. ONDA may have to proffer declarations or other evidence “to explain technical terms or complex subject matter” and to help this Court “determine whether the agency has considered all relevant factors and has explained its decision.” Ctr. for Biological Diversity, 450 F.3d at 943. In the absence of the complete administrative record and adequate time to review the portions produced thus far, the precise form of such proffers cannot be defined at this time.

To facilitate briefing, and to set an expeditious schedule for further proceedings in this case, ONDA requests that the Court rule that, for claims involving review based on the administrative record, the parties may proffer extra-record evidence, if any, at the time they submit their motions for summary judgment, together with an explanation of how such evidence meets the recognized exceptions to record review, and that the other parties may object to such

proffered evidence in their responsive briefs or file motions to strike. This corresponds to the process followed by the parties in ONDA 03-381, most of whom are also parties to this case.

III. AFTER THE AGENCIES HAVE PRODUCED THEIR ADMINISTRATIVE RECORDS, THE COURT SHOULD ALLOW TIME FOR THE PARTIES TO CONFER ON COMPLETING THE ADMINISTRATIVE RECORD AND SET A DEADLINE FOR ONDA OR OTHER PARTIES TO MOVE TO COMPLETE OR SUPPLEMENT THE ADMINISTRATIVE RECORD, IF NECESSARY

Based on the limited review of the still-incomplete administrative record that has been possible so far, it appears that there may be gaps in the record—material the agency considered, but has not included in the administrative record produced for this Court’s review. Although the whole administrative record related to an agency’s decision consists only of documents in existence at the time the decision was made, Camp, 411 U.S. at 142, the record must include “*everything* that was before the agency pertaining to the merits of its decision.” Portland Audubon Soc’y v. Endangered Species Comm., 984 F.2d 1534, 1548 (9th Cir. 1993) (emphasis added). Accordingly, the administrative record must contain all materials the agency considered either directly or indirectly, including evidence that is contrary to the final decision. Thompson v. U.S. Dept. of Labor, 885 F.2d 551, 555 (9th Cir. 1989). An “incomplete record” provides only a “fictional account of the actual decision-making process” and makes the requirement that the agency decision be supported by the administrative record “almost meaningless.” Portland Audubon, 984 F.2d at 1548 (internal quotations omitted); Exxon Corp. v. Dep’t of Energy, 91 F.R.D. 26, 33 (N.D. Tex. 1981) (“Thus, a record may be ‘adequate’ because it fully articulates the agency’s reasoning, yet at the same time be ‘inadequate’ because it fails to provide the court all documents, memoranda and other evidence which were considered directly or indirectly by the agency.”).

At this point in the proceedings, seven months after the case was filed but only three weeks after the government began producing segments of the administrative record (and more than a week before the government expects to produce the “complete” record), it is premature for the parties to provide a full list of the items that are missing from the record. Rather, this Court should afford the parties a period of time to consult informally regarding gaps in the administrative record, and the government an opportunity to complete or supplement its record, and set a reasonable deadline thereafter for parties to file a formal motion to complete or supplement the record.

ONDA’s preliminary review of the administrative record indicates that the record may have significant gaps. For example, in the NMFS record, there appear to be no records or notes of meetings or telephone conferences by NMFS officials regarding the 2007–2011 BiOp and Letter of Concurrence. Several documents in the NMFS record reference conference calls or meetings for which no notes are included in the record. See, e.g., Ex. 13. There are also a surprisingly small number of emails in the record, considering how common the use of email is to exchange information. See Ex. 14 (an example of one of the few emails included in the NMFS administrative record). Even emails that are included are not always complete, as in the case of a NMFS email which references three “attachments” of which only one appears in the record produced thus far. Ex. 15. A critical omission also is the absence in the administrative record of the joint NMFS and FWS ESA Consultation Handbook, a document which NMFS undoubtedly considered in preparing the 2007–2011 BiOp.

Similarly, because the agencies have not yet completed production of the administrative record, it is premature to decide the issue of whether discovery is warranted to fill the gaps in the record. If the parties are unable to resolve disagreements regarding alleged gaps, the rule in the

Ninth Circuit is that limited discovery is appropriate even in a record review case “when it appears the agency has relied on documents or materials not included in the record.” Animal Def. Council, 840 F.2d at 1436 (quotation omitted); Public Power Council v. Johnson, 674 F.2d 791, 794 (9th Cir. 1982). Where there are gaps in the record, plaintiffs must conduct discovery to determine “all documents and materials directly or indirectly considered by agency decisionmakers.” Public Power Council, 674 F.2d at 794; see also Bar MK Ranches v. Yuetter, 994 F.2d 735, 739 (10th Cir. 1993) (“When a showing is made that the record may not be complete, limited discovery is appropriate to resolve that question.”).

In Public Power Council, the Ninth Circuit allowed plaintiffs to go outside the proffered administrative record to obtain the testimony of agency officials who negotiated the disputed contracts because plaintiffs’ made a showing that the agency “relied on various memoranda and notes of negotiating meetings which are not now part of the record.” 674 F.2d at 794. The missing notes and attachments described above and in Exhibits 13 and 15 are precisely the same sort of information, and must be included in the administrative record in this case. Conferral among the parties should fill these gaps, but, if it does not, ONDA respectfully requests that the Court set a deadline by which the parties may move for an order to complete the record or for limited discovery, pursuant to Public Power Council, to address any remaining gaps.

CONCLUSION

For the foregoing reasons, ONDA respectfully requests that this court rule that: (1) evidence, including expert reports and evidence obtained through discovery, is admissible without restriction in support of ONDA’s claims that the Forest Service (a) has authorized grazing that resulted in a violation of the ESA § 9 take prohibition, (b) violated its on-going duty to insure against jeopardy under ESA § 7(a)(2) by failing to implement the terms and conditions

in the 2007–2011 BiOp and allowing grazing that violated those terms and conditions, and (c) violated the ESA by failing to reinitiate consultation with NMFS; (2) that a reasonable period of time be allowed for the review of the record and development of necessary expert testimony and exchange of expert reports, and conducting any other necessary discovery; (3) that extra-record evidence related to ONDA’s remaining claims, which are reviewed under the APA, if any, may be proffered at the time that opening briefs on motions for summary judgment are due, together with an explanation of how the proffered evidence fits one of the exceptions to extra-record evidence, subject to objection or motion to strike by other parties; and (4) that the parties should be allowed a reasonable time, following the August 8 deadline for production of the administrative record, to review the record and informally consult regarding gaps in the record, setting a reasonable deadline for motions to complete or supplement the record in the event that informal consultation fails to satisfy all parties that the administrative record is, in fact, complete.

Respectfully submitted this 30th day of July, 2008.

s/ David H. Becker

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Oregon Natural Desert Association

Of Attorneys for Plaintiffs