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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

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

Case No. 07-1871-KI

Plaintiffs,

v.

ABIGAIL KIMBELL, Chief, U.S. Forest Service,
GARY L. BENES, Supervisor, Malheur National
Forest, **UNITED STATES FOREST SERV.**,
D. ROBERT LOHN, Regional Administrator,
Nat’l Marine Fisheries Serv., **NAT’L MARINE
FISHERIES SERV.**, **DAVID R. ALLEN**,
Regional Director, U.S. Fish & Wildlife Service,
GARY S. MILLER, Field Supervisor, U.S. Fish
& Wildlife Service, **U.S. FISH & WILDLIFE**

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

SERV.,

Defendants,

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INTRODUCTION

Livestock grazing authorized by the U.S. Forest Service (“Forest Service”) on the Malheur National Forest has caused significant damage to stream habitat on the Middle Fork John Day River and its tributaries. Plaintiffs seek to enjoin grazing on two allotments where plaintiffs have documented serious degradation of habitat essential to the survival of threatened steelhead (*Oncorhynchus mykiss*) in violation of the Endangered Species Act (“ESA”).

This Court has confronted the pernicious effects of grazing in the Malheur National Forest on threatened fish before. 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. 03-318-HA, 2004 WL 1592606, at *10 (D. Or. July 15, 2004). The Court warned that, to achieve the necessary balance between land use interests and environmental concerns, “the entry of an injunction before the next grazing season remains a viable consideration for this court.” Id. Last year, this Court held invalid and set aside NMFS’s 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). This case addresses another set of Forest Service and NMFS decisions that, once again, are likely to harm steelhead.

Prior to 2007, the Forest Service consulted annually with the National Marine Fisheries Service’s (“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 Endangered Species Act (“ESA”) to cover not one, but five years of proposed grazing on the Malheur National Forest. It is stunning, in the wake of this Court’s rulings, that the 2007 grazing decisions allow more grazing on several allotments than in the 2003 season which prompted this court to express the “dire need” for better management. It is equally astonishing that the 2007 decisions are based on a grazing management scheme that weakens, rather than enhances, the Forest Service’s ability to obligate grazing permit holders to meet the standards necessary to avoid harm to steelhead. Predictably, this has perpetuated the significant damage that livestock cause to the streams on which steelhead depend. Plaintiffs have documented damage to streams on the Murderers Creek and Lower Middle Fork allotments that, on the average, exceeds by three times the amount which NMFS established as the maximum limit of allowable take due to habitat effects in the new biological opinion (“2007–2011 BiOp”).

This motion addresses substantive violations of the ESA. First, NMFS has violated Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), by failing to insure that grazing on the Malheur National Forest will not jeopardize the continued existence of listed steelhead or adversely modify its critical habitat because NMFS relied on grazing management measures that are not reasonably certain to occur. Second, the Forest Service has violated ESA § 7(a)(2) by failing independently to insure against jeopardy from grazing because the agency’s grazing authorization decisions provided for less protective standards than specified by NMFS’s 2007–2011 BiOp and allowed grazing that resulted in take in excess of the level allowed in the incidental take statement (“ITS”). Third, because NMFS has specified in the ITS that stream bank alteration greater than 20% is the maximum allowable take, the Forest Service has violated

the take prohibition in Section 9 of the ESA, 16 U.S.C. § 1538, by permitting grazing that caused bank alteration far greater than 20% on the Murderers Creek and Lower Middle Fork allotments.

The violations of the ESA, and the resulting harm to steelhead from grazing, are likely to occur in the future and have caused and are likely to continue to cause irreparable harm to public resources. Because grazing these allotments has contributed to jeopardizing protected steelhead and destroying or adversely modifying steelhead critical habitat, plaintiffs Oregon Natural Desert Association, Center for Biological Diversity and Western Watersheds Project (collectively, “ONDA”) respectfully ask this Court to enter an order enjoining grazing on the Murderers Creek and Lower Middle Fork allotments pending a determination of ONDA’s claims on the merits.

BACKGROUND

Since steelhead that spawn on the Malheur National Forest were listed as threatened under the Endangered Species Act in 1999, the Forest Service and NMFS have struggled to comply with their legal obligations to protect the streams and habitat upon which these threatened fish depend from the detrimental effects of livestock grazing. Despite consultation between the Forest Service and NMFS regarding an ostensibly new and improved grazing management program in 2007, conditions of riparian habitat on the Murderers Creek and Lower Middle Fork allotments were badly degraded at the end of the 2007 grazing season were degraded far past the point NMFS authorized as the maximum take of steelhead.

I. STEELHEAD AND LIVESTOCK GRAZING IN THE JOHN DAY RIVER BASIN AND THE MALHEUR NATIONAL FOREST

The steelhead population in the John Day River “probably represents the largest naturally spawning, native stock of steelhead” in the Columbia River basin. Ex. 1 at 63.¹ Running through

¹ NMFS, “Endangered Species Act Section 7 Formal Consultation and Magnuson-Stevens Fishery Conservation Management Act Essential Fish Habitat Consultation for Administration of

the Malheur National Forest is the Middle Fork John Day River, which, along with many of its tributary streams, provides spawning, rearing, and migratory habitat for adult, juvenile, and embryonic life stages of Mid-Columbia River (“MCR”) summer steelhead.² *Id.* at 64–65, 68. NMFS listed the MCR steelhead evolutionary significant unit as threatened under the ESA on March 25, 1999. 64 Fed. Reg. 14,517. NMFS designated critical habitat for MCR steelhead on September 2, 2005. 70 Fed. Reg. 52,630. Many streams within the Malheur National Forest are designated, including the tributaries of the Upper John Day, Middle Fork John Day, and North Fork John Day rivers. NMFS has identified destruction and modification of habitat, overutilization for recreational purposes, and natural and human-made factors as the primary reasons for the decline of steelhead. *See* 64 Fed. Reg. at 14,522. In its 1999 listing decision, NMFS indicated that it “remains concerned about the widespread declines in abundance in steelhead populations in this ESU,” noting that “serious declines in abundance in the John Day River Basin are especially troublesome, because the John Day River has supported the largest populations of naturally spawning summer steelhead in the ESU.” *Id.* at 14,525.

In the 2007–2011 BiOp, NMFS acknowledges that the Middle Fork John Day, South Fork John Day, and Upper Mainstem John Day steelhead populations³ are currently “not viable,” and that the agency’s West Coast Salmon Biological Review Team “has determined that the MCR steelhead species remains likely to become endangered.” Ex.1 at 64–65. Damage to riparian areas from livestock grazing harms steelhead and their habitat. Harm to steelhead results

Thirteen Grazing Allotments for 2007–2011 on the Malheur National Forest, North Fork John Day (HUC 17070202), Middle Fork John Day (HUC 17070203), Upper John Day (HUC 17070201) Subbasins, Grant County, Oregon (May 23, 2007) (“2007–2011 BiOp”).

² MCR summer steelhead are referred to simply as “steelhead” in this brief. The “Mid-Columbia River” designation refers to the “evolutionarily significant unit” (“ESU”) of the species.

³ The Murderers Creek allotment lies on the Upper John Day, while the Lower Middle Fork allotment lies on the Middle Fork John Day. Ex. 1 at 10–11.

from cattle directly disturbing fish or by causing damage to the steelhead's riparian habitat. NMFS recognizes that "[d]irect disturbance includes cattle trampling on MCR steelhead redds; disturbing holding or spawning adults, forcing them to alter their behavior and seek cover; or disturbing rearing juveniles, forcing them to alter their behavior and seek cover." *Id.* at 140. Indirect harm to steelhead from habitat damage includes elimination of streamside vegetation that provides shade to streams, leading to increased water temperatures; trampling of stream banks, resulting in loss of cover from overhanging banks and vegetation, leading to increased predation of juveniles; streams becoming wider and shallower, reducing pools available to steelhead; and more fine sediment in streams which increases turbidity, alters steelhead behavior, and covers spawning gravels, decreasing steelhead survival from eggs to fry. *Id.* at 116-17, 140. See also Lohn, 485 F.Supp.2d at 1192-93 (summarizing grazing's impacts on salmonid habitat).

On the Malheur National Forest, the Forest Service's authorization of grazing has adversely impacted steelhead and their riparian habitat. As hydrologist Jonathan Rhodes explains, grazing management "makes significant bank alteration to streams inevitable because cattle are grazing the allotment during the hot summer season." Rhodes Decl. at ¶ 20. Cattle congregating in streams during the summer "increases the duration, extent, and severity of grazing damage to banks, streams and riparian areas. . . . The USFS and BLM's own publications on grazing management have repeatedly indicated that grazing during the summer season is incompatible with the recovery of stream banks, riparian and stream conditions amenable to fish survival." *Id.* (citation omitted).

II. CONSULTATION HISTORY AND THE 2007-2011 GRAZING DECISIONS

In 2007, NMFS and the Forest Service altered their long-established practice of conducting annual consultation under ESA § 7(d) on proposed grazing activity in the Malheur

National Forest. Ex. 1 at 1–2. Prior to 2007, the agencies engaged annually in ESA consultation regarding grazing for that particular year.⁴ In 2007, as this Court was considering the validity of NMFS’s 2006 BiOps, the Forest Service and NMFS agreed to conduct a five-year consultation to cover grazing activities proposed on the Malheur National Forest from 2007 to 2011. Ex. 1 at 2. The Forest Service produced a BA that covered effects common to all allotments and a specific assessment of each of the allotments where steelhead may be present in February, 2007. Exs. 2–4.⁵ The Forest Service concluded that proposed grazing on 13 allotments was “likely to adversely affect” threatened steelhead and steelhead critical habitat, but “not likely to adversely affect” the fish on nine other allotments. See Ex. 1 at 2. On May 23, 2007, NMFS produced the 2007–2011 BiOp, covering the “likely to adversely affect” allotments.⁶ The 2007–2011 BiOp concludes that

⁴ Under the ESA, the Forest Service prepares a biological assessment (“BA”) to evaluate potential effects of proposed grazing on steelhead if the species may be present within the action area. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(a). If the BA identifies that steelhead are “likely to be adversely affected” by the proposed action, the Forest Service conducts formal consultation with NMFS, 50 C.F.R. § 402.14(a)(A). In the BiOp, NMFS determines whether the proposed grazing, together with its cumulative effects, is likely to jeopardize the continued existence of a listed species or adversely modify the species’s critical habitat. 50 C.F.R. § 402.14(g)(4). If NMFS concludes that grazing might result in take of steelhead, the BiOp must include an Incidental Take Statement (“ITS”). 16 U.S.C. § 1536(b)(3). An ITS (1) specifies the amount or extent of the impact on steelhead of any incidental taking; (2) specifies Reasonable and Prudent Measures to minimize such impact; and (3) sets forth the Terms and Conditions that must be complied with to implement the Reasonable and Prudent Measures. 50 C.F.R. § 402.14(i)(1)(i), (ii), (iv). If the amount or extent of incidental taking of steelhead specified in the ITS is exceeded, the Forest Service is obligated to reinitiate consultation immediately. Id. §§ 402.14(i)(4), 402.16(a).

⁵ Throughout this brief, the BA section entitled “Information and Potential Effects from Grazing on Allotments under Consultation on the Malheur National Forest,” Ex. 2, is referred to as the “2007–2011 BA,” while the individual allotment BAs are referred to as the “Murderers Creek BA,” Ex. 3, or “Lower Middle Fork BA,” Ex. 4.

⁶ These 13 allotments are Lower Middle Fork, Upper Middle Fork, Dixie, Hamilton/King, Fox, Long Creek, Mt. Vernon/John Day/Beech Creek, Murderers Creek, Roundtop, Seneca/Sugarloaf, Slide Creek, Camp Creek, and Deadhorse/Hanscombe/Fields Peak. Ex. 1 at 1.

the grazing is not likely to jeopardize the continued existence of MCR steelhead and not likely to destroy or adversely modify their critical habitat. Id. at 216.

For each allotment, the 2007–2011 BiOp specifies move triggers and annual end-point indicators. In an ideal world, according to the 2007–2011 BiOp, “cattle will be moved if any of the move triggers are met.” Ex. 1 at 239. One end-point indicator is the minimum stubble height for herbaceous hydrophytic species (leafy plants that thrive in wet conditions) along the greenline of streams, set at 4” or 6” depending on the allotment. Ex. 1 at 4-5. In the 2007–2011 BiOp, the greenline stubble height end-point indicator for the Murderers Creek allotment is 6”, while for the Lower Middle Fork allotment it is 4.” Id. at 41, 33. Another important end-point indicator is the maximum amount of stream bank alteration allowed, set for these two allotments at 20%. Id. at 33, 41. However, in some circumstances, NMFS set more-restrictive bank alteration standards: the Forest Service must “ensure that ... Bank alteration move trigger and endpoint indicator” on certain allotments, including Lower Middle Fork and Murderers Creek, “are 10% alteration for various reasons, including past noncompliance, riparian vegetation in early seral status, upward trend is not apparent, and recent riparian impacts associated with trespass have occurred.” Id. at 242. According to NMFS, “[b]y annually meeting end-point indicators, desired riparian objectives are expected to be attained over time.” Id. at 4.

On the merits of this case (although not an issue in this motion), ONDA contends that the end-point and move indicators—which measure only the conditions above the water, not those of the fishes’ aquatic habitat—are arbitrary because they are not proven to protect steelhead, even if they were fully complied with. End-point indicators are inherently unlikely to protect steelhead because they cannot be monitored until the season is over, at which point a violation has harmed steelhead, yet cannot be rectified. But regardless of the ultimate adequacy of the standards, the

authorized grazing—as discussed below at 11–14, 28–29, 31–32—has not even come close to complying with what NMFS has mandated for the Murderers Creek and Lower Middle Fork allotments.

The Incidental Take Statement (“ITS”) in the 2007–2011 BiOp now includes a maximum amount of allowable take 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” on streams within the allotments.⁷ Ex. 1 at 220–39, 230 (Lower Middle Fork allotment), 233 (Murderers Creek allotment). The 2007–2011 BiOp also lists a set of Conservation Measures that are to be implemented on each allotment. *Id.* at 8–10. 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, 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 242. NMFS claims that “the [Malheur National Forest] has full authority to ensure compliance with allotment conservation measures” and “will hold permittees accountable for compliance with the requirements of their grazing permits and annual instructions.” *Id.* at 6, 115.

On March 9, 2007, in a dramatic change from its prior grazing management, the Forest Service’s Pacific Northwest Office issued a memorandum eliminating its long-standing practice of issuing annual operating instructions (“AOIs”) to permittees. Ex. 5. The memorandum specified that the use of AOIs was to be limited to specifying annual actions needed to

⁷ 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. 1 at 219-39.

implement the management direction set forth in a project's NEPA-based decision. Id. at 1. Instead, the Forest Service could "use official Forest Service correspondence to instruct the permittee on annual grazing management actions such as pasture rotations or monitoring targets," or, alternatively, issue a term permit modification. Id. at 1. However, if an AOI were used, the memorandum indicated to "be sure that it does not contain any language that the AOI is part of the terms and conditions of the term grazing permit." Id. The memorandum also noted that "[a]dverse action against a grazing permit cannot be based specifically on non-compliance with an AOI. Adverse actions must refer to a violation of the permit's terms and conditions or the NEPA-supported Allotment Management Plan." Id. at 2 (emphasis added). Before they were abruptly withdrawn, AOIs annually provided the Forest Service with enforceable terms and conditions, specific to the next grazing season, which attached to the permit. ONDA, 465 F.3d at 984–86, 987–90 (finding that AOIs are final agency action because AOIs were "the only instrument that instructs the permit holder how [federal environmental] standards will affect his grazing operations during the upcoming season" and because "failure to comply with the AOI's substantive terms can result in administrative sanctions against the permit holder").

In conjunction with the 2007–2011 consultation on grazing on the Malheur National Forest, the Forest Service issued Grazing Permit Modifications to most Malheur National Forest permittees. See, e.g., Exs. 6, 7. These Grazing Permit Modifications include tables listing maximum utilization and end-point triggers (and, in some cases, move triggers) based on ecological conditions such as stubble height or bank alteration. However, unlike AOIs, the Grazing Permit Modifications no longer include planned pasture rotation schedules, nor do they provide for allotment-wide reductions in stocking numbers based on annual conditions. See, e.g., Ex. 8 (AOI for 2004 grazing season on Murderers Creek allotment); cf. Ore. Natural Desert

Ass'n v. U.S. Forest Serv., 312 F. Supp. 2d 1337, 1343 (D. Or. 2004) (describing use of AOIs to set annual stocking levels and planned pasture rotations).

III. THE MURDERERS CREEK AND LOWER MIDDLE FORK ALLOTMENTS

The Murderers Creek allotment encompasses 62,656 acres within the John Day River watershed, specifically within the Upper John Day sub-basin. Ex. 3 at 1, Ex. 9 (allotment maps). Murderers Creek is the largest of five tributaries within the allotment used by steelhead for spawning and rearing, which also include South Fork Murderers Creek, Dan's Creek, Deer Creek and Corral Creek. Ex. 3 at 1–2. Other smaller tributaries also provide steelhead rearing habitat. Id. The proposed action for each of the five years evaluated in the 2007–2011 BA was grazing by 675 cow/calf pairs to graze the Murderers Creek allotment on different schedules between May 16 and October 15th, for a total of 3,729 animal unit months (“AUMs”).⁸ Id. at 20.

Three herds graze the 12 units in the Murderers Creek allotment. Ex. 3 at 3–11. Seven of these units contain steelhead spawning and/or rearing habitat. Id. at 7. However, stream segments in most pastures are currently “functioning at risk.” Ex. 1 at 101–04. The Forest Service concluded that its proposed grazing program for 2007–2011 on the Murderers Creek allotment is “likely to adversely affect” steelhead—yet usage that had been gradually reduced after 2003 will be more than doubled for each of the five years from 2007 to 2011, as shown in the chart on the next page. Ex. 3 at 34; see id. at 9, 20 (showing prior and proposed grazing use).

The Malheur National Forest's Lower Middle Fork Allotment lies along the Middle Fork John Day River and includes about 58,161 acres of public land. Ex. 5 at 1; Ex. 10 (allotment maps). The Forest Service currently permits 549 cow/calf pairs to graze the allotment between June 1st and October 31st, for a total of 3,623 AUMs. Ex. 4 at 19. The proposed action for each

⁸ An AUM is the amount of forage necessary to sustain one cow or its equivalent for one month. See 43 C.F.R. § 4100.0-5.

of the five years evaluated in the 2007–2011 BA was grazing at levels equal to the maximum permitted 3,623 AUMs. *Id.* The allotment currently is divided into three “Areas,” each further divided into three units (also referred to as pastures). *Id.* at 31. Steelhead are present in streams on all but one of the nine pastures. *Id.* at 4–12. Creeks on the allotment provide nearly 46 miles of steelhead habitat, and also support threatened bull trout. *Id.* at 1–2. Since full grazing resumed in 2003 (following the Summit Fire in 1996), grazing on the Lower Middle Fork allotment has increased in most years, and the proposed action evaluated in the Lower Middle Fork BA set the use for each year from 2007 to 2011 at the highest level since the 1996 fire. *See id.* at 13–14, 19.

The following chart summarizes the recent and proposed grazing (total AUMs for all units combined) on the Murderers Creek and Lower Middle Fork allotments:

Grazing Year(s)	Murderers Creek Total AUMs (all units)	Lower Middle Fork Total AUMs (all units)
2003	3,187	2,226
2004	2,739	2,568
2005	1,650	3,267
2006	1,650	2,953
2007–2011 (each year)	3,729	3,623

See Ex. 3 at 9, 20; Ex. 4 at 14, 19.

Jonathan Rhodes and Christopher Christie documented the condition of many stream segments on the Murderers Creek and Lower Middle Fork allotments near the end of the grazing season in 2007. Their observations and photographs are set out in the attached Declarations.⁹ Christie, who has been collecting data on Malheur National Forest grazing since 2001, has documented that “[t]he Murderer’s Creek and Lower Middle Fork Allotments, as well as others ... have been severely and chronically impacted by livestock grazing.” Christie Decl. at ¶ 10.

⁹ The photographs of Christie’s 2006 and 2007 field measurements in the Murderers Creek and Lower Middle Fork allotments are voluminous and are being supplied to the Court and parties on a DVD. Representative samples appear as Christie Declaration Attachments 2 and 4.

Specifically, he noted that, in some parts of the Murderers Creek allotment, “such as along Dan’s Creek itself (a tributary to Murderers Creek), and upper Beaver Dam Creek (a tributary to South Fork Murderers Creek), conditions were well below standards and as bad or worse in 2007 than in any previous year in which I made observations.” Id. at ¶ 18. He reached the same conclusion about “areas along the South Fork Murderers Creek on the Horse Mountain and John Young Meadows units, as well as South Fork Deer Creek on the Deer Creek Unit.” Id.

Christie measured bank alteration and bank instability¹⁰ on 18 stream segments in the Murderers Creek allotment, and found bank alteration greater than 30% on all but one ungrazed segment. Id. at ¶ 19. On 12 of the 18 segments, he found bank alteration greater than 50%, far beyond the 20% bank alteration which constitutes take of threatened steelhead in the 2007–2011 BiOp’s ITS. He found that the mean of bank alteration measurements on the 17 grazed segments was 55%. Id. On virtually all of the segments he found stubble height at 3.0” or less, with a median of greenline stubble heights of 2.5”, well below the minimum 6” NMFS specified for this allotment. Id. at ¶ 20; Ex. 1 at 41. Rhodes’s October 2007 field review corroborated Christie’s measurements, concluding that “livestock grazing in the [Murderers Creek allotment] has consistently caused more than 20% bank alteration on affected streams.” Rhodes Decl. at ¶ 15.

Christie’s photographs show vividly the extent of damage present in important riparian areas at the end of the 2007 grazing season. See Christie Decl. Attachment 2. For example, on

¹⁰ Bank alteration occurs “when cattle walk on the streambank and their hoof prints expose at least 12 [mm] of bare soil, their hooves break vegetation and leave a hoof print at least 12 mm deep, or they compact soil by walking over the same area repeatedly even if their hooves displace or sink into the soil less than 12 mm.” Bank stability (or its reciprocal, bank instability) “looks at portions of the bank immediately contributing sediment to the channel, regardless of the cause of the disturbance.” Ex. 1 at 5–6 & 6 n.8. There is a strong correlation between the two measurements: according to Jonathan Rhodes, “it is well-documented that bank alteration strongly contributes to bank instability and resulting damage to aquatic habitats, streams, and water quality.” Rhodes Decl. at ¶¶ 17-18.

Beaver Dam Creek (Dan's Creek Unit) on September 28, 2007, he measured massive bank alteration of 83% and greenline stubble height of 3.0", well below the 6" greenline stubble height end-point indicator specified in the 2007–2011 BiOp for this allotment. Christie Decl.

Attachment 2 at 1. Another photograph of Beaver Dam Creek show similar livestock damage to the riparian area. Christie Decl. Attachment 2 at 5. Similar devastation of stream banks was evident on many other stream segments, including Dan's Creek (Dan's Creek Unit—52% bank alteration, 3.0" stubble height), Deer Creek (Deer Creek Unit—52% bank alteration, 2.5" stubble height), South Fork Murderers Creek (in the John Young Meadows Unit—58% to 69% bank alteration, 1.5" stubble height; in the Horse Mountain Unit—30% to 66% bank alteration, 2.5" to 3.0" stubble height; in the Blue Ridge Unit—56% bank alteration 2.5" stubble height). See id. at 4, 10, 14–15, 17–19, 22–24, 26–30. Many of these photographs and summaries show that bank damage or stubble height conditions were worse in 2007 than in previous years that Christie took measurements along the same stream segments.¹¹ See, e.g., id. at 1, 3–4, 7–8, 18, 20, 22–25.¹²

Christie and Rhodes confirmed extensive damage to riparian habitat on the Lower Middle Fork allotment as well. On two transects along Coyote Creek (Coyote pasture) and Dry Creek (Big Boulder pasture) on that allotment, Christie measured bank alteration of 59% and 53% respectively, along with low stubble heights on those pastures and other units he surveyed.

Christie Decl. at ¶ 22. His photographs of these and other units on the Lower Middle Fork

¹¹ By contrast, units that have experienced significant rest over the past several years display low levels of bank alteration and riparian conditions that are near-normal. See Rhodes Decl. at ¶¶ 21–22; Christie Decl. at ¶¶ 18–19. The Oregon Mine unit of Murderers Creek allotment was rested in 2005, 2006, and 2007 (and possibly in 2003 and 2004). Rhodes Decl. at ¶ 21. As illustrated in Christie's photographs, this frequently-rested unit exhibits healthy riparian conditions and no bank alteration. Christie Decl. Attachment 1.

¹² As described below at 29, 31–32, the Forest Service also documented serious violations on the Murderers Creek and Lower Middle Fork allotments in 2007.

Allotment graphically show the effects of grazing on riparian areas. Christie Decl. Attachment 4. Rhodes concurs that bank alteration on Coyote Creek exceeded the 20% ITS limit for take and observed that “[b]ank alteration and other effects of cattle grazing are preventing the recovery of bank stability and overhanging banks in the [Lower Middle Fork allotment]” Rhodes Decl. at ¶¶ 29, 33. Rhodes also notes that it is well-documented that “bank alteration and bank instability in the [Lower Middle Fork allotment] degrade steelhead habitat, water quality and streams in several ways that reduce the survival and production of steelhead.” *Id.* at ¶ 34.

ARGUMENT

I. STANDARD OF REVIEW

The ESA authorizes this Court to enter the requested injunctive relief to protect threatened steelhead, based on NMFS’s and the Forest Service’s violations of ESA §§ 7 and 9. 16 U.S.C. § 1540(g)(1) (authorizing citizen suits “to enjoin any person, including the United States ... who is alleged to be in violation of any provision of this chapter”). The traditional basis for injunctive relief under Federal Rule of Civil Procedure 65 is irreparable injury and the inadequacy of legal remedies. Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 542 (1987). In the Ninth Circuit, this usually involves balancing (1) the plaintiff’s likelihood of success on the merits, (2) whether the balance of irreparable harm favors plaintiff, and (3) whether the public interest favors issuance of the injunction. Caribbean Marine Servs. Co. v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988). However, by enacting the ESA, Congress altered the normal injunction standards under Rule 65 to ensure protection of endangered and threatened species, and “the balance has been struck [by the ESA] in favor of affording endangered species the highest of priorities.” TVA v. Hill, 437 U.S. 153, 194 (1978). Thus “[i]n cases involving the ESA, Congress removed from courts their traditional equitable discretion in injunction proceedings of balancing the parties’ interests.” Nat’l Wildlife

Fed'n v. Burlington N. R.R., Inc., 23 F.3d 1508, 1510–11 (9th Cir. 1994) (noting also that the “traditional test for preliminary injunctions ... is not the test for injunctions under the [ESA]”); see also Nat'l Wildlife Fed'n v. NMFS, 422 F.3d 782, 794 (9th Cir. 2005) (holding that traditional analysis involving weighing of economic harm “does not apply in ESA cases because Congress has already struck the balance”).

Accordingly, where plaintiffs show either actual success on the merits or the probability of success on the merits of a claim under the ESA, a court's inquiry is largely at an end. TVA, 437 U.S. at 194; Sierra Club v. Marsh, 816 F.3d 1376, 1383 (9th Cir. 1987); Thomas v. Peterson, 753 F.2d 754, 765 (9th Cir. 1985). To obtain injunctive relief under the ESA, a plaintiff must show only that “a violation of the ESA is at least likely in the future.” Nat'l Wildlife Fed'n, 23 at 1510. Applying this standard, the Ninth Circuit has held repeatedly that failure to comply with the substantive provisions of ESA §§ 7(a)(2) and 9 warrants an injunction to protect listed species. See, e.g., Nat'l Wildlife Fed'n, 422 F.3d at 796 (upholding injunction imposing conditions on dam operation based on finding that continuing the status quo would result in irreparable harm to Columbia River salmonids); Marbled Murrelet v. Babbitt, 83 F.3d 1060, 1066 (9th Cir. 1996) (enjoining logging to prevent take of marbled murrelet); Palila v. Hawaii Dep't of Land & Natural Res., 852 F.2d 1106, 1109–10 (9th Cir. 1988) (enjoining stocking of goats and sheep to prevent take of palila bird). Thus an injunction should issue once ONDA establishes the probability of a substantive ESA violation.

This Court reviews the decisions of NMFS and the Forest Service under the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.* (“APA”). Pursuant to the APA, a court shall set aside agency action found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); Marsh v. Ore. Natural Res.

Council, 490 U.S. 360, 377 (1989). In determining whether an agency decision is arbitrary and capricious, courts consider “whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” Marsh, 490 U.S. at 378. A decision is arbitrary and capricious if the agency “has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Although a court may not substitute its judgment for the agency’s, it “must engage in a careful, searching review to ensure that the agency has made a rational analysis and decision on the record before it.” Nat’l Wildlife Fed’n v. NMFS, 481 F.3d 1224, 1233 (9th Cir. 2007).

II. ENDANGERED SPECIES ACT VIOLATIONS

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, 437 U.S. at 180, 184. The Forest Service and NMFS have failed to comply with their obligations under sections 7 and 9 of the ESA in issuing the 2007–2011 BiOp for steelhead and authorizing grazing on the Murderers Creek and Lower Middle Fork allotments.

A. NMFS has Failed to Insure That the 2007–2011 BiOp is not Likely to Jeopardize the Continued Existence of Steelhead or Result in the Destruction or Adverse Modification of Critical Habitat in Violation of ESA § 7(a)(2).

Under ESA § 7(a)(2), NMFS must analyze the proposed grazing project and insure that the grazing will not “jeopardize the continued existence of” steelhead or “result in the destruction or adverse modification” of designated steelhead critical habitat. 16 U.S.C. § 1536(a)(2). In the

2007–2011 BiOp, NMFS concluded that, despite the certainty of adverse effects on steelhead, the proposed grazing is not likely to result in jeopardy to MCR steelhead and not likely to destroy or adversely modify their critical habitat because “[t]he proposed management actions, coupled with monitoring and planned cattle movements will control the level of MCR steelhead and habitat disturbance so that these adverse effects will not diminish or prevent steelhead survival and recovery, or reduce the conservation value of critical habitat.” Ex. 1 at 216.

NMFS’s conclusion is arbitrary and capricious because it relies entirely on the efficacy of the Forest Service’s grazing management program, a set of mitigation measures that have not succeeded in the past and which are not reasonably certain to occur in the future. Indeed, the Forest Service has deliberately removed its most effective tool, the annual operating instruction, from its management kit. What is left is a bald promise to enforce standards without a specific plan for achieving compliance or taking swift and binding action to rectify and prevent violations—only a process to create the appearance of responding to threats to steelhead, without making substantive changes. There is overwhelming evidence that—at a minimum on these two allotments—the management program failed miserably to achieve the standards NMFS set in the 2007–2011 BiOp. Just as in the 2006 BiOp, NMFS may not rely on the Forest Service’s proposed grazing management program for concluding no jeopardy or adverse modification of critical habitat where there is a “history of even some noncompliance with grazing management standards, in combination with vague statements about what, if any administrative corrective action will be taken against noncompliant permittees.” Lohn, 485 F. Supp. 2d at 1202.

- i. The mitigation measures NMFS relies on in the 2007–2011 BiOp are not reasonably certain to occur.

Where an agency relies on mitigation measures for a no-jeopardy conclusion, those measures must be “reasonably specific, certain to occur, and capable of implementation; they

must be subject to deadlines or otherwise-enforceable obligations; and most important, they must address the threats to the species in a way that satisfies the jeopardy and adverse modification standards.” Ctr. for Biol. Diversity v. Rumsfeld, 198 F. Supp. 2d 1139, 1152 (D. Ariz. 2002). 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, 481 F.3d at 1241. A BiOp must demonstrate that “swift and necessary actions will be taken when violations are found” to insure against jeopardy. Lohn, 485 F. Supp. 2d at 1201.

This Court and others have applied these principles to biological opinions that relied on mitigation measures that were uncertain or unlikely to occur. Nat’l Wildlife Fed’n, 481 F.3d at 1241 (rejecting reliance on the future installation of fish passage infrastructure in the absence of guarantees that the installation would occur); Natural Res. Defense Council v. Kempthorne, 506 F. Supp. 2d 322, 350-57 (E.D. Cal. 2007) (invalidating adaptive management plan that contained “no quantified objectives or required mitigation measures” and failed to provide a reasonable certainty that necessary mitigation measures would be implemented or admitted adverse impacts mitigated); Northwest Env’t Advocates v. EPA, 268 F. Supp. 2d 1255, 1273 (D. Or. 2003) (because the BiOp “contains no assurances that the state-based commitments on which it rested were likely to occur . . . NMFS has failed to demonstrate a rational connection between the facts before it and the no jeopardy finding”); Nat’l Wildlife Fed’n v. NMFS, 254 F. Supp. 2d 1196, 1212–13 (D. Or. 2003) (remanding a Columbia River dams BiOp that unlawfully relied on off-site mitigation actions that were not reasonably certain to occur).

Taking a cue from this Court’s decision in Lohn, NMFS’s 2007–2011 BiOp recites that “the [Malheur National Forest] has full authority to ensure compliance with allotment conservation measures” and that the Forest Service “will hold permittees accountable for

compliance with the requirements of their grazing permits and annual instructions”—apparently expecting that the Forest Service would continue its practice of issuing AOIs. Ex.1 at 6, 115; cf. Lohn, 485 F. Supp. 2d at 1203 (finding that a statement in the U.S. Fish & Wildlife Service’s 2006 BiOp that “[t]he permittee can and will be held accountable for being in compliance with all Terms and Conditions of the Grazing Permit AOIs” was “sufficiently strong to constitute a measure that is ‘reasonably specific, certain to occur, and capable of implementation.’” (emphasis in original)). However, NMFS ultimately recognizes only that the Forest Service has a “range of remedial and disciplinary actions that may be taken,” and that “at a minimum” the Forest Service “will document any non-compliance, discuss it with the permittee, and develop and implement a strategy for the particular unit to ensure move trigger compliance in the future.” Ex. 1 at 6 (emphasis added).

A strategy that leaves protection of a threatened species to an indefinite future is impermissible under the ESA. Pac. Coast Fed’n of Fishermen’s Ass’ns v. U.S. Bureau of Recl., 426 F.3d 1082, 1092–95 (9th Cir. 2005) (holding that a phased approach to improving water flows on the Klamath River, which provided water flows necessary for fish only during the last two years of a ten-year project, did not adequately insure against jeopardy to a short-life-cycle species during the first eight years of the project). A vague assurance that jeopardy will be avoided in the future, in reliance on unsubstantiated assumptions that the Forest Service’s grazing management will improve, fails adequately to protect steelhead in the interim. Id. at 1094 (noting that agency may not “provide only partial protection for a species for several generations without any analysis of how doing so will affect the species”). As described above at 11–14, end-point limits for bank alteration and stubble height have consistently been violated on these allotments. The Forest Service’s grazing management has been notoriously unreliable, and

its new process is focused solely on putting off hard decisions—such as suspending grazing on degraded allotments—that will ensure against jeopardy to fish. NMFS’s conclusion that jeopardy will eventually be avoided makes no provision for the interim period until the Forest Service actually (if ever) enforces grazing standards that are genuinely protective of steelhead.

NMFS’s reliance on the Forest Service’s enforcement authority is also misplaced because the Forest Service’s 2007–2011 BA makes clear that its enforcement of standards violations is wholly discretionary. The Forest Service attempts to create an appearance of strict enforcement in the BA by stating that “[f]ailure to meet move trigger[s]/ move indicators . . . will be rectified through firm, fair administration of the grazing permit.” Ex. 2 at 5. However, this statement is followed by the admission that the failure to meet the indicators for a year will result in a “documented discussion with the permittee(s) and a strategy will be developed”—hardly dire consequences for violation of the ESA. Id. Only if indicators are missed “repeatedly” are documented changes in management required, and even these changes include a variety of ineffectual consequences, such as requiring more monitoring or “bolstered emphasis on riding.” Id. There is no plan describing how, when, or what specific actions will be taken stop violations, even chronic violations in riparian areas:

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

Id. at 6 (emphasis added).

At best, the 2007–2011 BiOp and 2007–2011 BA describe a process that the Forest Service will follow in responding to standards violations, but include no substantive, specific or binding plan to provide a reasonable certainty that violations will be addressed and prevented.

The set of grazing management measures endorsed by NMFS suffers from the same defects that the court in Natural Resources Defense Council v. Kempthorne found fatal to a management protocol meant to respond to threats to endangered delta smelt from the operation of water diversion projects in central California. 506 F. Supp. 2d at 350–57. Like the process invalidated in that case, the proposed grazing program “does not contain defined action criteria, but instead leaves any response wholly to the discretion of the [agency administering the program].” Id. at 341. The Forest Service’s grazing management program and the associated conservation measures “provide[] no operating criteria or action schedule, specifying when mitigation actions must be taken. It is not possible to predict what, how and when [the program’s management] measures will be implemented.” Id. Despite the process the Forest Service promises, there is ultimately no guarantee that any effective action will be taken, no deadlines, and no enforceable obligations sure to be imposed on permittees for the protection of steelhead when violations occur. This is inadequate to insure against jeopardy or adverse modification under the ESA. Id. at 356. In short, “[t]he BiOp asks the court to trust the agency to protect the species and its habitat. Notwithstanding any required deference to expertise, the ESA requires more.” Ctr. for Biol. Diversity, 198 F. Supp. 2d at 1152.

Finally, NMFS’s BiOp acknowledges that implementation of the conservation measures depends on third-party actions by the permittees, which, historically, have been less than certain to occur. Ex. 1 at 6 (“Permittees are responsible for moving cattle out of a unit by the time move triggers are reached. Permittees are also responsible to ensure that end-point indicators are met.”); see Lohn, 485 F. Supp. 2d at 1201 (noting that “[p]ast compliance with grazing management standards is a documented problem”). NMFS’s reliance on management that has not worked in the past is unreasonable. Nat’l Wildlife Fed’n, 254 F. Supp. 2d at 1213 (agency

cannot rely on third-party mitigation measures that are not reasonably certain to occur to avoid a jeopardy finding). For these reasons, the 2007–2011 BiOp’s promise that the Forest Service “will” enforce the grazing standards is an empty one, and NMFS’s decision to rely on the Forest Service’s grazing management program in concluding no jeopardy or adverse modification of steelhead critical habitat is arbitrary and capricious.

- ii. Elimination of Annual Operating Instructions to permittees makes the mitigation measures less likely to occur.

In reaching its no-jeopardy conclusion, NMFS expressly relies on its belief that that the Forest Service “will hold permittees accountable for compliance with the requirements of their grazing permits and annual instructions.” Ex. 1 at 6, 115 (emphasis added). Prior to 2007, the Forest Service included move and end-point indicators and other standards in annual operating instructions, imposing binding legal obligations on the permittees and making violations of AOIs enforceable against the permits. ONDA, 465 F.3d at 987; see generally id. at 979–81, 984–90 (describing AOIs); Lohn, 485 F. Supp. 2d at 1200. In 2007, after the directive to cease using AOIs as a grazing management tool, the Forest Service changed the method by which it made the move and end-point indicators part of the permit by issuing Grazing Permit Modifications for the Malheur National Forest allotments. See, e.g., Exs. 6, 7. However, the Grazing Permit Modifications eliminate two important aspects of the AOIs: the permit modifications do not include a date-certain pasture rotation schedule, nor do they provide a formal, annual opportunity to set binding, enforceable stocking levels or on- and off- dates that are more restrictive than the permitted amounts, as AOIs previously did. Compare Ex. 6 (Grazing Permit Modification for Murderers Creek allotment) with Ex. 8 (2004 AOI); see also ONDA, 465 F.3d at 984.

As courts have repeatedly observed, AOIs were the principal tool the Forest Service has used to try to manage annual grazing and impose clear, detailed, and binding obligations on

permittees to reflect and respond to allotment conditions for each season. ONDA, 465 F.3d at 984–86; Lohn, 485 F. Supp. 2d at 1200; Ore. Natural Desert Ass’n, 312 F. Supp. 2d at 1342-43. Prior BiOps relied on the Forest Service’s ability to use AOIs to impose necessary restrictions on grazing to respond to annual conditions or to permittee violations of a previous year’s standards. See, e.g. Lohn, 485 F. Supp. 2d at 1201 (describing NMFS’s reliance on the Forest Service’s ability to have violations “reflected in the next year’s annual operating instructions.”); ONDA, 465 F.3d at 984 (an “AOI sets forth the Forest Service’s annual determinations regarding how much grazing particular units (pastures) within a given allotment can sustain in the upcoming season”). The Ninth Circuit recognized that “[t]he AOI is a critical instrument in the Forest Service’s regulation of grazing on national forest lands.” ONDA, 465 F.3d at 984.

And now AOIs are gone. In their place is a discretionary management process with no guarantees that violations will result in swift, binding actions to protect threatened species. Under the new process there are fewer enforceable standards, and fewer ways to enforce those that are left. The Forest Service’s decision to eliminate AOIs undercuts a fundamental rationale on which NMFS’s 2007–2011 BiOp decision depends: the issuance of “annual instructions.” Ex. 1 at 6, 115. With the AOIs is gone the practice and commitment of updating annually the obligatory conditions that attach to the permit for the following grazing season. AOIs have been replaced with a grazing management program that depends upon informal correspondence for communicating with permittees. Ex. 5 at 1. The memorandum that made this change also specifies that “[a]dverse actions must refer to a violation of the permit’s terms and conditions or the NEPA-supported Allotment Management Plan.” Id. at 2. The Forest Service has expressly foreclosed the use of its traditional tool for annually imposing binding conditions as “part of the permit.” The informal correspondence that replaced the legally binding AOIs significantly

reduces the Forest Service’s ability to enforce environmental standards on which steelhead survival depends.

To be clear, ONDA is not asserting that the Forest Service is required by statute or regulation to issue AOIs. Rather, it is NMFS that specifically contemplates in the 2007–2011 BiOp is that the Forest Service “will” make permittees accountable for compliance with the “annual instructions,” as well as enforcing “planned” cattle movement which—prior to 2007—were established by a schedule in the AOIs. Ex. 1 at 6, 115, 201, 205; see Ore. Natural Desert Ass’n, 312 F. Supp. 2d at 1343. In view of the difficulties the Forest Service has had in the past in compliance with grazing management standards, there is no justification for NMFS to express confidence that new conservation measures, which are administered less formally with permittees, with far fewer obligatory and enforceable conditions, will somehow make the Forest Service *more* likely to comply with grazing management standards. The effect of the elimination of AOIs is to decrease drastically the likelihood that the mitigation measures NMFS relied on will be “reasonably specific, certain to occur and capable of implementation.” Ctr. for Biol. Diversity, 198 F. Supp. 2d at 1152. Whether through an AOI or some similar, predictable, enforceable—and actually enforced—mechanism, the Forest Service must impose binding obligations on permittees and require strict compliance with those obligations to satisfy the ESA.

Contrary to NMFS’s confident expectation in the 2007–2011 BiOp, there no longer are binding annual instructions to which permittees will be held accountable, nor a formal, annual, predictable process for developing AOIs with specific terms and conditions to prevent violations. Because the 2007–2011 BiOp lasts for five years, there is no annual consultation over the Forest Service’s progress in insuring that the grazing does not cause jeopardy to steelhead. The 2007–2011 BiOp does not explain its conclusion that grazing management will improve by loosening

the permittees' formal legal obligations. As a result, NMFS's reliance on an untested, discretionary and less-enforceable process that provides no specific, binding instructions to permittees is arbitrary and capricious, and NMFS has failed to insure against jeopardy and destruction or adverse modification of critical habitat in violation of ESA § 7(a)(2).

B. The Forest Service has Failed to Insure that Grazing is not Likely to Jeopardize the Continued Existence of Steelhead or Result in the Destruction or Adverse Modification of Critical Habitat in Violation of ESA § 7(a)(2).

In addition to seeking consultation with NMFS on grazing that may affect threatened steelhead, the Forest Service has an independent and continuing legal duty under ESA § 7(a)(2) to avoid any action that would jeopardize steelhead or adversely modify its critical habitat, regardless of the contents of a biological opinion. 16 U.S.C. § 1536(a)(2); see also Pyramid Lake Paiute Tribe v. U.S. Dep't of the Navy, 989 F.2d 1410, 1415 (9th Cir. 1990) (“the Navy may not rely solely on a FWS biological opinion to establish conclusively its compliance with its substantive obligation under section 7(a)(2)”). Furthermore, an agency cannot satisfy its independent duty by relying on a faulty biological opinion. Resources Ltd. v. Robertson, 35 F.3d 1300, 1304–05 (9th Cir. 1993). The Forest Service here may not rely only on NMFS's conclusion that its grazing management program would not result in jeopardy to steelhead or the destruction or adverse modification of steelhead critical habitat—the Forest Service must independently insure that activities it authorizes that are of an on-going nature will not result in jeopardy or adverse modification throughout the course of the project.

- i. The Forest Service failed to insure against jeopardy by inserting standards in the Grazing Permit Modifications that are less stringent than those evaluated in the 2007–2011 BiOp.

For each of the allotments evaluated in the 2007–2011 BiOp, NMFS specified indicators, monitoring locations, move triggers and end points. Ex. 1 at 4–7. These are essential to the

BiOp's conclusions, because NMFS insists that "[b]y annually meeting end-point indicators, desired riparian objectives are expected to be attained over time." *Id.* at 4. Likewise, NMFS's ultimate conclusion that the mitigation measures are likely to be implemented depends squarely on its confidence "that the various conservation measures described as part of the proposed action, including meeting move triggers, will be carried out as described." *Id.* at 115.

NMFS describes a series of steps it expects the Forest Service to implement:

- "In order to ensure that 4- and 6-inch stubble height end-point indicators will be met, the [Malheur National Forest] is implementing move triggers of 5-inch stubble height when the end-point indicator is a 4-inch stubble height and 7-inch stubble height when the end-point indicator is a 6-inch stubble height." *Id.* at 5.
- "[a]ll of the allotments contain a bank alteration move trigger and end-point indicator of 20%." *Id.* at 5.
- "The [Malheur National Forest] also increased the stubble height move trigger from 4 inches to 7 inches for the Murderers Creek Allotment which will address impacts from past noncompliance in this allotment." *Id.* at 115.
- Conservation Measure #10 specifies that "[s]tandards that are required of the permittee (*e.g.*, turn on dates, move triggers, end point standards) will be outlined in an addendum to Part III of the grazing permit." *Id.* at 9.
- "To implement reasonable and prudent measure # 2 (habitat effects), the [Malheur National Forest] shall ensure that ... Bank alteration move trigger and endpoint indicator on the ... Lower Middle Fork [and] Murderers Creek ... allotments are 10% alteration for various reasons, including past noncompliance, riparian vegetation in early seral status, upward trend is not apparent, and recent riparian impacts associated with trespass have occurred." *Id.* at 242.

In fact, the Forest Service implemented not a single one of these standards or conditions in issuing the Grazing Permit Modifications for the Murderers Creek and Lower Middle Fork allotments. The monitoring standards charts in the Grazing Permit Modifications for these two allotments show that the standards NMFS believed would be carried out have not been imposed on the permittees through the permit modifications. Exhibit 11 consists of alternating pages from the 2007–2011 BiOp and from the sample Grazing Permit Modifications for the Murderers

Creek and Lower Middle Fork allotments. On the Murderers Creek allotment, whereas NMFS expected and relied on a move trigger at the greenline of the riparian corridors of “30-35% use, OR 7” stubble height”—and specified that “[c]attle will be moved as soon as any one of the move triggers is met,” the permit modification calls for move triggers of “35-45% use or 4-6” Stubble height.” Ex. 11 at 1–2. In other words, both of the standards imposed in the Forest Service’s permit modifications allow more grazing than NMFS anticipated.¹³ Similarly, on the Lower Middle Fork allotment, NMFS expected a greenline move trigger of “40-45% use, OR 5” stubble height,” while the permit modification contains no move trigger whatever. *Id.* at 3–4.¹⁴

Thus the Forest Service is holding permittees, who are “responsible for moving cattle out of a unit by the time move triggers are reached [and] to ensure that end-point indicators are met,” Ex. 1 at 6, to more lenient standards than NMFS considered necessary in arriving at its “no jeopardy” conclusion. And, as described in the Declarations of Jonathan Rhodes and Christopher Christie, the stubble-height end-point indicators and bank alteration standards were dramatically violated on both allotments at the end of the 2007 grazing season. Rhodes Decl. at ¶¶ 15-16, 19, 28-30, 36; Christie Decl. at ¶¶ 18-23. The Forest Service’s failure to institute and achieve compliance with even the NMFS-specified end-point and bank alteration indicators on the

¹³ A lower use percentage trigger is more protective because it requires cattle be moved when only 35% of the vegetation has been eaten, instead of allowing them to remain until 45% has been consumed. By contrast, a higher stubble height trigger is more protective, because it requires that cattle be moved when they have eaten the vegetation down to 7”, instead of allowing them to remain until only 4” remain.

¹⁴ In addition, NMFS requires a more stringent 10% bank alteration end-point indicator in some instances on both allotments. Ex. 1 at 242. However, the Forest Service failed to translate this into an enforceable condition in the permit modifications. On the Lower Middle Fork allotment, there is no specified move or end-point indicator for bank alteration at all. On the Murderers Creek allotment, the move trigger and end-point indicator for bank alteration is “10-20%” without specifying where the 20% bank alteration limit applies and where (if at all) the more stringent 10% end-point standard applies. Ex. 11 at 4, 2.

Murderers Creek and Lower Middle Fork allotments violates its obligation under ESA § 7(a)(2) to insure against jeopardy and destruction or adverse modification of steelhead critical habitat.

- ii. The Forest Service has failed to insure against jeopardy by allowing grazing that resulted in significant violations of standards established in the 2007–2011 BiOp.

An agency also violates ESA § 7(a)(2) when it allows a project’s adverse effects to accumulate and relies on the actions of third parties to insure that the agency’s decision does not result in jeopardy or destruction or adverse modification to steelhead habitat. Sierra Club, 816 F.2d at 1385–86. In Sierra Club, 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. Id. Even assuming for the sake of argument that the Forest Service initially complied with its duties under ESA § 7(a)(2) in proposing the grazing program for the 2007–2011 period on the Malheur National Forest, the grazing in 2007 caused extensive damage to steelhead habitat in the Murderers Creek and Lower Middle Fork allotments, 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. And the same harm is sure to continue during the coming season.

As described in the Rhodes and Christie Declarations, and as illustrated in the photographs and data summary captions attached to those Declarations, the conditions of riparian habit upon which steelhead depend in the Murderers Creek and Lower Middle Fork allotments were dismal at the end of the 2007 grazing season. Christie found that in several parts of the Murderers Creek allotment, “conditions were well below standards and as bad or worse in 2007 than in any previous year in which I made observations.” Christie Decl. at ¶ 18. Christie found bank alteration greater than 30% on all 17 grazed stream segments he measured, with a mean

bank alteration of 55% , nearly three times the maximum level allowed under the 2007–2011 BiOp’s ITS. *Id.* at ¶ 19. In virtually every instance during or after the 2007 grazing season, Christie measured stubble height on the Murderers Creek allotment at 3” or less, far below the 6” end-point indicator NMFS specified in the 2007–2011 BiOp as necessary to assure the improvement in riparian areas and avoid adverse modification of steelhead critical habitat. *Id.* at ¶ 20; Ex.1 at 41. Yet, perversely, the Forest Service has *increased* the authorized AUMs for this battered allotment far beyond the level authorized in 2006. Ex. 3 at 9, 20; Chart, supra p. 11; see Ore. Natural Desert Ass’n v. Singleton, 75 F. Supp. 2d 1139, 1150 (D. Or. 1999) (court enjoined grazing on degraded BLM allotments, “troubled” by increased grazing authorization where greater than anticipated rainfall had yielded greater vegetation because of “indication that the BLM regards beneficial natural events as justifications for increased grazing, rather than as opportunities for recovery and enhancement of natural resources”).

The Forest Service itself documented significant and widespread violations in its 2007 End of Year Grazing Report (“2007 EOY Report”), including violations of bank alteration standards or stubble height end-point standards on eight different units on the Murderers Creek Allotment and Lower Middle Fork allotments, as described in more detail in the following section. Ex. 12 at 23–24, 27–30. The 2007–2011 BA expressly specifies that, as part of the process, “all management recommendations will be presented in the EOY report.” Ex. 2 at 6 (emphasis added). However, the 2007 EOY Report makes no substantive recommendation for any response, much less an enforceable response, on six of the eight units where the Forest Service itself acknowledges that standards were violated during the 2007 grazing season. Ex. 12 at 23–24, 27–30. There is no indication that the Forest Service’s management strategy will be effective in preventing the recurrence of the same disastrous habitat effects present on these

allotments at the end of the 2006 and 2007 grazing seasons. By allowing the harmful effects of grazing on steelhead habitat to accumulate, the Forest Service has failed to insure against jeopardy and adverse modification of critical habitat.

C. The Forest Service’s Authorized Grazing has Resulted in the Take of Steelhead Beyond the Limit Authorized in the 2007–2011 BiOp’s Incidental Take Statement in Violation of Section 9 of the ESA.

In addition to the violations of ESA § 7(a)(2), injunctive relief is warranted here under ESA § 9, which prohibits unlawful “take” of any endangered species. 16 U.S.C. § 1538(a)(1)(B).¹⁵ However, “incidental” take is allowed under some circumstances. The incidental take provision of the ESA “indicates that any taking ... that complies with the conditions set forth in the incidental take statement is permitted.” Ramsey v. Kantor, 96 F.3d 434, 441 (9th Cir. 1996). But take that exceeds the scope of an incidental take statement is flatly prohibited. Id. at 442 (“a party ... can take members of a listed species without violating the ESA, provided the actions in question are contemplated by an incidental take statement) (emphasis added); 50 C.F.R. § 402.14(i)(5). The Court’s authority to issue an injunction under the ESA extends to enjoining all or part of an action that would take listed species in violation of ESA § 9. Nat’l Wildlife Fed’n, 23 F.3d at 1511–12.

NMFS acknowledged that grazing on the Malheur National Forest will cause take of steelhead due to habitat modification, and issued the ITS to immunize the proposed grazing, allowing take to occur, up to a point: “[t]he maximum extent of take that may occur by the proposed action through habitat effects is a measured 20% bank alteration.” Ex. 1 at 219, 230, 233. Although ONDA does not, on the merits, concede that NMFS adequately evaluated habitat

¹⁵ The definition of “take” includes not only killing or injuring the listed species, but also “harm.” 16 U.S.C. § 1532(9). The ESA regulations define “harm” to 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.

effects in the 2007–2011 BiOp, or that a 20% bank alteration standard is sufficiently protective of steelhead, NMFS has defined both what constitutes take and what constitutes unlawful take in the 2007–2011 BiOp and ITS. Proof of a violation of ESA § 9 requires a showing that the Forest Service’s actions have resulted in unlawful take. Defenders of Wildlife v. Bernal, 204 F.3d 920, 925 (9th Cir. 2000). When the limit set in the ITS is reached, take beyond that level “results in an unacceptable level of incidental take, invalidating the safe harbor provision, and requiring the parties to re-initiate consultation.” Ariz. Cattle Growers Ass’n v. U.S. Fish & Wildlife Serv., 273 F.3d 1229, 1249 (9th Cir. 2001). A showing that the Forest Service-authorized grazing has caused bank alteration in excess of the 20% limit in the ITS demonstrates a violation of ESA § 9.

As explained above and in the Declarations of Jonathan Rhodes and Christopher Christie, the Forest Service has violated the ESA § 9 take prohibition by authorizing grazing on the Murderers Creek and Lower Middle Fork allotments that have exceeded the scope of the incidental take statement in the 2007–2011 BiOp. On the Murderers Creek allotment, Christie measured bank alteration far in excess of 20% on 17 stream segments. The photographs and summaries attached to his declaration show that he measured 83% bank alteration on Beaver Dam Creek (Dan’s Creek Unit), 52% on Dan’s Creek (Dan’s Creek Unit), 52% bank alteration on Deer Creek (Deer Creek Unit), and, on South Fork Murderers Creek, 58% to 69% bank alteration in the John Young Meadows Unit, 30% to 66% in the Horse Mountain Unit, and 56% in the Blue Ridge Unit. Christie Decl. Attachment 2 at 1, 4, 10, 14–15, 17–19, 22–24, 26–30.

The Forest Service’s own 2007 EOY Report confirms, with somewhat less specificity and candor, that, on the Dan’s Creek Unit, “[g]razing standards were not met at key areas (e.g. Beaver Dam and Dan’s Creek,” that “several other areas [on the Frenchy Butte Unit] did not meet stubble height and streambank alteration standards,” that “smaller streams and their

drainages [on the Deer Creek Unit] did not meet stubble height and streambank alteration standards,” that there was “unusually high streambank alteration” on the John Young Meadows Unit, that the Blue Ridge/Lucera Unit “showed heavy utilization levels,” and that, within the Horse Mountain Unit, a 700-foot section of South Fork Murderers Creek “did not meet streambank and stubble height standards.” Ex. 12 at 27-28. The Forest Service’s response was to meet with the permittee and “develop a grazing strategy for the 2008 season that will ensure all standards are met across the allotment,” including reducing time in the Dan’s Creek and Horse Mountain Units, by an amount unspecified in the Report. *Id.* at 29. There is no mention of any sort of action to address the acknowledged bank alteration—which constitutes “take” by the terms of the 2007–2011 BiOp—on the Frenchy Butte, Deer Creek, John Young Meadows, or Blue Ridge/Lucera units. *Id.* And there certainly is no contemplation of any administrative action or specific, certain-to-occur actions to prevent the recurrence of take. *See id.* at 27-30.

A similar story is repeated on the Lower Middle Fork allotment. Christie measured bank alteration of 59% on Coyote Creek (Coyote pasture) and 53% on Dry Creek (Big Boulder pasture), and Rhodes’s observations concurred that bank alteration exceeded 20% in those areas. Christie Decl. at ¶ 22; Rhodes Decl. at ¶¶ 29-30. The Forest Service’s 2007 EOY Report does not even address the Big Boulder Unit, but does report “excessive streambank alteration” on Balance Creek and Balance Lake on the Balance Lake Unit, as well as areas of “heavy bank alteration” on the Sunshine Unit. Ex. 12 at 23-24. On the Lower Middle Fork allotment, bank alteration occurred in 2007 that constituted take of steelhead by the terms of the 2007–2011 BiOp. However, the 2007 EOY Report recommends no specific and certain-to-occur action whatsoever in response to these violations. The egregious exceedances of the bank alteration standards on the two allotments, coupled with the absence of specific and enforceable remedial

action on most, if not all, of the affected streams, shows both that take of steelhead has occurred and is likely to continue to occur on the Murderers Creek and Lower Middle Fork allotments.¹⁶

III. AN INJUNCTION IS NECESSARY TO PREVENT IRREPARABLE HARM TO STELHEAD ON THE MURDERERS CREEK AND LOWER MIDDLE FORK ALLOTMENTS

Preliminary injunctive relief is necessary to forestall the irreparable harm to protected steelhead that will result if the Forest Service allows turnout of livestock on the Murderers Creek and Lower Middle Fork allotments. If “a violation of the ESA is at least likely in the future,” an injunction should issue. Nat’l Wildlife Fed’n, 23 F.3d at 1510; see Defenders of Wildlife, 204 F.3d at 925 (holding that “a reasonably certain threat of imminent harm to a protected species is sufficient for issuance of an injunction under section 9 of the ESA”). ONDA has established that violations of ESA §§ 7 and 9 have occurred and are likely to continue occurring on these allotments because of the flaws in the Forest Service’s grazing management program. ONDA seeks this injunction because the documented conditions of these two allotments are in such gross violation of the grazing standards NMFS relied on for its “no jeopardy” conclusion that continued grazing, pending a decision on the merits of ONDA’s claims, would irreparably harm steelhead. If the Forest Service permits turn-out and continues the process that failed so badly on these two allotments in 2007, without enforceable AOIs and without including necessary management recommendations in the 2007 EOY Report, it is virtually certain that the same devastation of steelhead streams will occur in the 2008 grazing season.

¹⁶ By drastically exceeding the 20% bank alteration limit that constitutes allowable take, and failing to implement key assumptions on which NMFS based the 2007-2011 BiOp, the Forest Service has also violated ESA regulations by failing to reinitiate consultation. 50 C.F.R. §§ 402.14(i)(4), 402.16(a)-(b); see Ex. 1 at 218, 230, 232 (2007–2011 BiOp describing reinitiation triggers). Where 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 Coalition v. EPA, 413 F.3d 1024, 1034 (9th Cir. 2005).

The dramatic bank alteration standard exceedances documented by Christie, Rhodes, and the Forest Service's 2007 EOY Report establish conclusively that the Forest Service is taking listed steelhead in excess of the permitted take under the ITS in the 2007–2011 BiOp, in violation of ESA § 9. 16 U.S.C. § 1538(a)(1)(B); 50 C.F.R. § 402.14(i)(5). Neither NMFS nor the Forest Service has insured that the proposed action will avoid jeopardy or adverse modification of steelhead critical habitat.¹⁷ ONDA has provided extensive documentation that the Forest Service's grazing on the Murderers Creek and Lower Middle Fork allotments has indeed caused, and will continue to cause, harm to steelhead and steelhead critical habitat. See Rhodes Decl. at ¶¶ 23-27, 31-38; Christie Decl. at ¶¶ 17-23. The Forest Service has noted serious violations of the bank alteration standards in its 2007 EOY Report, yet has taken no meaningful steps to prevent violations this year. Ex. 12 at 23-24, 27-30. If the Forest Service continues its unlawful grazing on these two allotments, the harm to protected steelhead and their habitat is almost certain to continue. The cause of take remains: grazing on these allotments with no reasonable expectation that degradation of streams will be avoided in the future when the Forest Service failed so badly to prevent it in 2007. This reasonably certain threat of imminent harm to a listed species warrants an injunction under established Ninth Circuit law. Defenders of Wildlife, 204 F.3d 920 at 925; Marbled Murrelet, 83 F.3d at 1066; Sierra Club v. Babbitt, 65 F.3d 1502, 1512 (9th Cir. 1996); Forest Conserv. Council v. Rosboro Lumber Co., 50 F.3d 781, 783 (9th Cir. 1995).

ONDA has demonstrated actual or probable success on the merits of its claims that the federal defendants are in violation of sections 7 and 9 of the ESA, and that imminent harm to a listed species and its critical habitat is likely to occur absent an injunction. Because the ESA alters a court's traditional equitable discretion, the balance of harms and the public interest favor granting

¹⁷ The Forest Service has also failed to reinitiate consultation with NMFS as required under the terms of the ITS and ESA regulations. 50 C.F.R. § 402.14(i)(4).

relief, and this Court should enjoin the Forest Service from allowing grazing on the Murderers Creek and Lower Middle Fork allotments. Nat'l Wildlife Fed'n, 422 F.3d at 794 (holding that traditional analysis involving weighing of economic harm “does not apply in ESA cases because Congress has already struck the balance”); Sierra Club, 816 F.2d at 1383.

IV. THE COURT SHOULD WAIVE THE BOND REQUIREMENT IN THIS CASE

ONDA respectfully requests that if the court grants ONDA's motion for injunctive relief, the court waive the bond requirement of Rule 65(c). The court has discretion to waive this requirement, or to set nominal security. See, e.g., People v. Tahoe Reg'l Planning Ag'y, 766 F.2d 1319, 1325 (9th Cir. 1985), amended on other grounds, 775 F.2d 998 (9th Cir. 1985); Friends of the Earth v. Brinegar, 518 F.2d 322, 323 (9th Cir. 1975). A waiver is particularly appropriate “where requiring security would effectively deny access to judicial review.” Tahoe Reg'l Planning Agency, 766 F.2d at 1325 (noting potential chilling effect bond requirements pose on litigation to protect environment and on public interest. Nonprofit organizations generally, and ONDA specifically, are unable to afford substantial bonds. In such circumstances, federal courts routinely waive the bond requirement in public interest environmental litigation. See e.g., id. (no bond). Moreover, this case is in a Rule 65 position only because of NMFS and the Forest Service have refused to cure violations of law brought to their attention more than 60 days ago pursuant to the pre-suit notification requirement of the ESA. ONDA sent its notice letters to the agencies on October 17 and 31, 2007. Ex. 13. As a result, the court should waive the bond requirements of Rule 65(c).

CONCLUSION

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

DATED this 31st day of March, 2008.

Respectfully submitted,

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