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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-SU

Plaintiffs,

v.

ABIGAIL KIMBELL, et al.,

Defendants,

v.

HARLEY & SHERRIE ALLEN, et al.,

Defendants-Intervenors.

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

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INTRODUCTION

“Insanity,” begins a quotation often misattributed to Benjamin Franklin, “is doing the same thing over and over again and expecting different results.” Rita Mae Brown, Sudden Death 68 (1983). The 2007–2011 BiOp and 2007 Forest Service grazing management decisions on the Malheur National Forest were not made in a vacuum. Rather, they are an outgrowth of—and must be judged in the context of—years of mismanagement of grazing on the forest, documented in litigation before this Court, that has left steelhead habitat badly degraded at the end of each grazing season. The devastated condition of grazed steelhead streams on the Malheur National Forest was apparent in 2004, when this Court recognized the “dire need for better management of grazing.” 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”). Extensive bank damage and steelhead habitat degradation were evident during the 2005 grazing season and at the end of the 2006 grazing season, as documented in the attachments to the Declaration of Christopher L. Christie. Yet, in early 2007, the National Marine Fisheries Service (“NMFS”) and the U.S. Forest Service (“Forest Service”) issued a new set of five-year decisions to manage Malheur National Forest grazing that perpetuated the prior management system so roundly panned by this Court in 2004.

Five years ago, ONDA filed suit over Forest Service grazing decisions on the Malheur National Forest, alleging that the Forest Service’s grazing decisions on allotments where steelhead are present are fundamentally flawed because they are not based on measurements of *aquatic* conditions. The Malheur National Forest’s Land and Resources Management Plan (“Forest Plan”) contains an unambiguous requirement that the Forest Service monitor, over time, whether Riparian Management Objectives (“RMOs”)—measurements of the good health of the aquatic environment in which fish actually live—actually are being achieved. Although the

government insists that conditions on these allotments are satisfactory, the Forest Service's lack of any effectiveness monitoring data since 2004 and its own documentation that significant exceedances of standards occurred in 2007 belie that position.

The government defendants and the intervenors go to great pains in their responses to argue that the new decisions changed nothing as far as the Forest Service's authority and obligations to manage grazing for resource protection. Indeed, the "new" management program changed nothing. Objective measurements and photographs taken by Christopher Christie, and the Forest Service's own monitoring of these allotments, showed that the conditions at the end of the 2007 grazing season far exceeded the standards that the agencies set as the bare minimums for protection of threatened steelhead. And the government's brief all but ignores the most striking aspect of these findings: that the amount of bank alteration which NMFS itself defined as the limit of allowable take, and as the trigger for reinitiation of consultation under the ESA, was dramatically exceeded on both of these allotments in 2007.

Injunctive relief under the Endangered Species Act ("ESA") requires a showing of likelihood of success on the merits for claims under ESA §7, and, for an injunction for a violation of ESA § 9, an additional showing that a future violation of the ESA is at least likely. ONDA is likely to succeed on its claims because the Forest Service's grazing management strategy lacks predictable mitigation measures that are reasonably certain to occur and because ONDA's evidence and the Forest Service's own end-of-year report show that the take limit from effects to steelhead habitat were seriously and repeatedly exceeded in 2007 on the Murderers Creek and Lower Middle Fork allotments. Accordingly, this Court should enjoin grazing on these allotments pending a decision on the merits of ONDA's complaint.

ARGUMENT

I. THIS COURT SHOULD ENJOIN GRAZING ON THE SUBJECT ALLOTMENTS PENDING RESOLUTION OF ONDA'S CLAIMS ON THE MERITS

Forest Service grazing decisions on the Lower Middle Fork and Murderers Creek allotments resulted in serious violations of the ESA in 2007. ONDA Br. at 16–35. Allowing grazing to continue prior to a decision on the merits would both irreparably harm threatened steelhead during the 2008 grazing season and reward the very actions that resulted in ESA violations in 2007.

In addition to NFMS and Forest Service compliance with the ESA, a central issue on the merits is whether the Forest Service is taking the right measurements to satisfy its obligation to protect threatened steelhead under the National Forest Management Act (“NFMA”). ONDA 03-381, 2004 WL 1592606, at *3–*5 (describing the requirements of the PACFISH aquatic conservation strategy, its RMOs, and PACFISH grazing standard GM-1); *see also Ore. Natural Desert Ass’n v. U.S. Forest Serv.*, No. 03-213-KI, 2004 WL 1293909, at *4–*7 (D. Or. June 10, 2004) (“ONDA 03-213”) (describing the INFISH aquatic conservation strategy applicable to bull trout and repeated failures to meet the INFISH RMOs). Although there has not yet been a decision on the merits of this claim in either matter, in both cases this Court found that ONDA was likely to prevail because the Forest Service did not comply with NFMA when it authorized grazing that prevented attainment of the applicable RMOs without collecting required monitoring data. ONDA 03-381, 2004 WL 1592606, at *8, ONDA 03-213, 2004 WL 1293909, at *7. Under both PACFISH and INFISH, “[t]he applicable RMOs include pool frequency, water temperature, large woody debris, bank stability, lower bank angle, and width to depth ratio.” ONDA 03-381, 2004 WL 1592606, at *4.

Although this specific issue is not before the Court on this motion for injunctive relief,¹ both the government and intervenors contend that current grazing on the two allotments should be allowed to proceed because the grazing is supposedly meeting standards. Gov't Resp. at 11; Intv. Resp. at 24-25. An ultimate question in this case is whether the government has even collected and evaluated the appropriate data on which to base its grazing management decisions. Leaving aside that the Forest Service's 2007 End of Year Report ("2007 EOY Report") and the Christie and Rhodes field surveys show that, in fact, these allotments did *not* meet standards in the 2007 grazing season, ONDA Br. at 11-14, 29-34 and ONDA Ex. 12 at 23-24, 27-30,² the question remains whether the standards being monitored for are, indeed, those required by PACFISH, NFMA and the ESA.

This is a critical question, because where fish listed as threatened under the ESA are present any actions authorized by a federal agency must ensure against jeopardy and the destruction or adverse modification of critical fish habitat. 16 U.S.C. § 1536(a)(2). On the Malheur National Forest, under the PACFISH standard in the Forest Plan, this requires achievement of the RMOs "to arrest the degradation and begin the restoration of habitat," and also that "[g]razing should be suspended if adjusting practices is ineffective in meeting the

¹ As ONDA noted in its opening brief, ONDA Br. at 7, 9, 30-31, the reasonableness of using move and end-point indicators for management where steelhead are present, while ignoring the obligation to use RMOs, will be an issue addressed on the merits of this case. ONDA has not moved for a preliminary injunction based on this claim because NMFS and the Forest Service have not yet produced the administrative records in this case. Review of the records will be necessary to evaluate fully the vague and often contradictory descriptions of monitoring efforts in the 2007-2011 BiOp and underlying biological assessments, and how those efforts relate to achieving RMOs as required under PACFISH.

² Citations to exhibits throughout this Reply brief will be the attachments to the Reply itself ("Reply Ex."), to ONDA's opening brief ("ONDA Ex."), to the government's response brief ("Gov't Ex."), to intervenors' response brief ("Intv. Ex."), or to the individual declarations previously filed and attachments thereto.

RMOs or avoiding the adverse effects on the listed fish.” ONDA 03-381, 2004 WL 1592606, at *4 (citing Friends of Wild Swan, Inc. v. U.S. Forest Serv., 966 F. Supp. 1002, 1010–1019 (D. Or. 1997)). Regrettably, the Forest Service still has not conducted effectiveness monitoring³ for RMOs to determine whether RMOs are being met or approached on these two allotments, and therefore lacks the data to draw any conclusions about trends in steelhead habitat conditions.

An ongoing, fundamental problem with any Forest Service or NMFS statement regarding trends or rates of recovery is that the Forest Service has provided virtually no effectiveness monitoring data to NMFS for preparing the Biological Opinions in the last two years. See Ore. Natural Desert Ass’n v. Lohn, 485 F. Supp. 2d 1190, 1201 n.12 (D. Or. 2007), judgment vacated as moot, 2007 WL 2377011, at *1 (D. Or. June 11, 2007) (concluding after reviewing the record that “[t]he fact that the Forest Service provided NMFS with no evidence that ‘near natural rate of recovery’ is actually occurring, because the Forest Service provides very little in the way of effectiveness monitoring, is also troubling”). Effectiveness monitoring data is critically important because only effectiveness monitoring data can show trends from year to year. See ONDA Ex. 3 at 20; supra n.3; Second Rhodes Decl. ¶ 32. On the merits, ONDA argues, as it did in 2004, that the monitoring standards necessary to assure protection of steelhead are precisely those that the Forest Plan requires be monitored—the PACFISH GM-1 RMOs. However, the Forest Service

³ The Forest Service explains in the Murderers Creek BA that “[i]mplementation monitoring is utilized to measure and document success at meeting annual criteria for components such as stubble height, percent utilization, bank alteration, and woody shrub utilization and condition.” ONDA Ex. 3 at 20. By contrast, “[e]ffectiveness monitoring provides a quantifiable evaluation of the effectiveness of different management activities at improving riparian conditions and in meeting RMO’s [sic],” information that “is expressed primarily as trend data, and provides feedback as to whether annual management activities are moving the riparian communities and channel conditions in the desired direction for condition and trend,” because “short-term monitoring alone [the standards measured in implementation monitoring] does not provide the data needed to determine condition and trend.” ONDA Ex. 3 at 20 (emphasis added).

has not been measuring these quantitative stream and riparian standards adequately before making its grazing decisions. In fact, it has hardly measured them at all.

Remarkably, the entire 2007–2011 BiOp refers to only two instances of monitoring for RMOs, both in 2005, neither of which occurred on the Murderers Creek or Lower Middle Fork allotments. ONDA Ex. 1 at 83–84. Nor do the BAs or 2007 EOY Report for the two allotments at issue in this motion demonstrate that the Forest Service conducted any effectiveness monitoring for RMOs on either allotment in the last four years.⁴ In short, the principal documentation of conditions on the Murderers Creek and Lower Middle Fork allotments contain no evidence more recent than that collected in 2004 to support the suggestions in the BiOp and in the government’s brief that streams on these allotments are in an “upward trend.” Yet the government bootstraps this stale data into an argument that “[t]he BiOp reflects the improving trend in many riparian areas across these two allotments.” ONDA Ex. 1 at 102–03; Gov’t Resp. at 9. A statement based on three-year old data is meaningless for judging the effects of grazing in 2007–2011, and such conclusory statements that the riparian condition is improving, without objective evidence to back them up, cannot support NMFS’s BiOp. Ore. Natural Desert Ass’n v. Singleton, 75 F. Supp. 2d 1139, 1150 (D. Or. 1999) (BLM’s statements that riparian areas of grazing allotments had improved had no objective basis and were not supported by objective evidence).

As in the cases before this Court in 2004, federal defendants, in the 2007–2011 BiOp and related biological assessments (“BAs”), “offer optimistic assessments that [the management

⁴ For example, the Murderers Creek BA explains the *need* for effectiveness monitoring, ONDA Ex. 3 at 20, but only provides tables showing what the RMOs are and measurements from five monitoring locations taken in 2004. See also ONDA Ex. 12 at 24, 27-29 (2007 EOY Report indicating that only implementation monitoring occurred on Murderers Creek and Lower Middle Fork allotments in 2007).

strategy] will improve the static or degrading conditions in the damaged areas on the Murderers Creek Allotment” ONDA 03-381, 2004 WL 1592606, at * 8. However, the violations of the bank alteration and stubble height standards documented in the Christie and Rhodes declaration, and identified in the Forest Service’s own 2007 EOY Report, along with the continued failure of the Forest Service to conduct necessary monitoring for RMOs or measure the effectiveness of the grazing management in attaining RMOs, mean that the optimism is misplaced. See ONDA Br. at 11–14, 29–34.

In 2004, this Court concluded that there was “substantial evidence suggesting that full resting may be needed in many of the areas.” ONDA 03-213, 2004 WL 1293909, at *6. In that case, the Court relied on and cited with approval the field observations collected and presented by Christie and the expert opinion presented by Jonathan Rhodes. Id. at *5–7. Rhodes’s evaluation of the Lower Middle Fork and Murderers Creek allotments after the 2007 grazing season reached the same conclusion: that both allotments will require at least several years of rest from grazing to arrest and reverse the damaged bank conditions in steelhead habitat. Rhodes Decl. ¶¶ 26–27, 35. Rhodes’s conclusion rests on his own observations and his review of Christie’s monitoring data showing substantial and pervasive violations of the bank alteration standard set in the 2007–2011 BiOp as the limit of allowable take under ESA § 9. ONDA Br. at 11–14, 29–34. Rhodes’s and Christie’s findings, coupled with the failure of the 2007–2011 BiOp and the Forest Service’s management strategy to ensure against jeopardy or adverse modification of critical habitat under ESA § 7(a)(2) and the Forest Service’s failure to reinitiate consultation despite itself documenting exceedances of the bank alteration threshold for reinitiation, require an injunction prohibiting the agency from authorizing further grazing on these two allotments pending a resolution of the merits of this case.

II. THE RESPONDENTS INCORRECTLY STATE THE NINTH CIRCUIT'S STANDARDS FOR INJUNCTIVE RELIEF UNDER THE ESA

Both the government and intervenors' responses misstate the applicable legal standards. Gov't Resp. at 12–13, 30–31; Intv. Resp. at 6. The government's response to ONDA's motion for injunctive relief is almost bereft of reference to the claim that the Forest Service has violated the prohibition against take in ESA § 9. Thus the government incorrectly frames ONDA's argument and evidence on this issue. Gov't Resp. at 27–34. ONDA's motion and opening brief raise several distinct issues regarding ESA violations, which have both substantive and procedural aspects under two separate sections of ESA. Motion for Temporary Restraining Order and/or Preliminary Injunction at B-D (Dkt # 34); ONDA Br. at 2-3, 33 n.16.

Under ESA § 7(a)(2), NMFS has substantively violated its duties by arbitrarily and capriciously relying on mitigation measures that are not reasonably certain to occur in reaching its “no jeopardy” conclusion. The Forest Service's failure to comply with its independent obligation to insure against jeopardy to steelhead in its grazing authorization decisions is also a substantive violation of § 7(a)(2). The Forest Service also has violated ESA § 9 by permitting grazing that caused bank alteration far in excess of the 20% threshold that NMFS declared to be the limit of allowable take in the incidental take statement (“ITS”) in the 2007–2011 BiOp. Procedurally, NMFS and the Forest Service have failed to reinitiate consultation based on bank alteration exceedances beyond the level permitted in the ITS, as specifically required by the 2007–2011 BiOp. The standard for injunctive relief for substantive and procedural violations of ESA §§ 7 and 9 in the Ninth Circuit are similar, but not identical. See, e.g., Greenpeace v. NMFS, 106 F. Supp. 2d 1066, 1072-75 (W.D. Wash. 2000) (discussing different Ninth Circuit standards for injunctive relief under ESA §§ 7 and 9). The ESA violations in this case easily satisfy both standards.

Most of the cases that the government cites for the standard for injunctive relief do not involve claims under the ESA, and are therefore inapplicable here. The government apparently concedes this when it cites Friends of the Earth v. U.S. Navy, 841 F.2d 927, 933 (9th Cir. 1988). Friends of the Earth follows the Ninth Circuit’s decision in Sierra Club in recognizing that the standard for injunctive relief under the ESA is not the traditional standard. See Friends of the Earth, 841 F.2d at 933); Sierra Club v. Marsh, 816 F.3d 1376, 1383 (9th Cir. 1987); Gov’t Resp. at 11–12. However, in further citing the proposition that plaintiffs “must demonstrate a ‘reasonable likelihood’ of irreparable harm because there is no presumption of irreparable harm,” the government recites a requirement applicable in the Ninth Circuit only to ESA § 9 claims, not to claims for injunctive relief under ESA § 7. Nat’l Wildlife Fed’n v. Burlington N. R.R., Inc., 23 F.3d 1508, 1510–11 (9th Cir. 1994).⁵ National Wildlife Federation v. Burlington Northern did not involve a federal action, and therefore raised no ESA § 7 issues.

The common requirement for obtaining injunctive relief under any section of the ESA is a showing of likely success on the merits. Nat’l Wildlife Fed’n, 23 F.3d at 1511; Sierra Club, 816 F.2d at 1384. However, where the claim involves a substantive violation of ESA § 7, as “where an agency has not fulfilled its substantive duty to ‘insure’ against jeopardy or adverse modification, injunctive relief is mandatory under section 7.” Greenpeace, 106 F. Supp. 2d at 1074 (emphasis added); see Sierra Club, 816 F.2d at 1384 (holding that plaintiff was “entitled to injunctive relief if the [action agency] violated a substantive or procedural provision of the ESA”). Likewise, “[i]rreparable damage is presumed to flow from a failure properly to evaluate the environmental impact of a major federal action” under the ESA. Thomas v. Peterson, 753

⁵ The other two cases that the government cites for this proposition involved injunctions based on statutes other than the ESA, and therefore have no bearing on the standards for ESA injunctive relief. Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 544-45 (1987); Save the Yaak Comm. v. Block, 840 F.2d 714, 721-22 (9th Cir. 1988); see Gov’t Resp. at 31.

F.2d 754, 764 (9th Cir. 1985). When the ESA violation is procedural, including a failure to consult or reinitiate consultation, the only burden on the plaintiffs “is to show that the circumstances triggering the procedural requirement exist, and that the required procedures have not been followed.” Thomas, 753 F.2d at 765. Thus, in cases involving substantive violations of the ESA § 7(a)(2) obligation to ensure against jeopardy, or procedural violation of the consultation obligations in ESA § 7(d), harm to species is *presumed* to flow from the violation, and no further showing of harm to the species or individual members is required. Greenpeace, 106 F. Supp. 2d at 1075-76 (concluding that, under Thomas, a failure by NMFS to ensure against jeopardy mandated an injunction pending compliance with the agency’s substantive obligations under the ESA).

The government’s broad statement that “there is no presumption of irreparable harm” under the ESA applies *only* to injunctions against impermissible take under ESA § 9. Gov’t Resp. at 12. To obtain injunctive relief for a violation of ESA § 9, the requirement of showing “irreparable injury” is met by “showing that a violation of the ESA is at least likely in the future.” Nat’l Wildlife Fed’n, 23 F.3d at 1511 (emphasis added). In claims under ESA § 9, the Ninth Circuit has made it clear that a showing of “habitat modification that is reasonably certain to injure [members of the listed species] by impairing their essential behavioral patterns” justifies injunctive relief, if such harm is also imminent. Forest Conserv. Council v. Roseboro Lumber Co., 50 F.3d 781, 784-85, 788 (9th Cir. 1995) (emphasis added).⁶ Applying these standards to the claims here, ONDA is entitled to injunctive relief from the agencies’ ESA violations.

⁶ The First Circuit cases cited by the government, Gov’t Resp. at 31, conflict with the Ninth Circuit’s reading of the injunction requirement under ESA § 9 in Forest Conservation Council, and are therefore inapposite here. Furthermore, the First Circuit in Water Keeper Alliance v. U.S. Department of Defense specifically found that there was no procedural violation under ESA § 7 for failure to prepare a biological assessment, and applied the traditional four-part injunction test,

III. ONDA IS LIKELY TO SUCCEED ON THE MERITS OF ITS ESA § 7 CLAIMS

ONDA is likely to succeed on the merits of its claims under ESA § 7 because the Forest Service's grazing management strategy does not contain mitigation measures that are predictable, specific, and reasonably certain to occur, because the implementation of the strategy is wholly discretionary, and because the historic pattern of management, including the results of the 2007 grazing season, show that the strategy will not prevent violations of the ESA.

A. NMFS Has an Obligation to Evaluate the Likelihood that the Forest Service's Grazing Management Strategy Will Be Effective In Avoiding Jeopardy to Steelhead.

Contrary to the government's statement that NMFS "is not required to question the Forest Service's commitment to its proposed grazing strategy," Gov't Resp. at 18, courts throughout the Ninth Circuit have concluded repeatedly that a consulting agency has an affirmative obligation to do just that.⁷ The cases the government cites are ones rejecting any obligation for the consulting agency to analyze alternatives to the proposed action. See, e.g., Forest Conserv. Council v. Espy, 835 F. Supp. 1202, 1217 (D. Idaho 1993) (NMFS is not "required to develop and evaluate alternatives to the action proposed by the Forest Service; it must simply evaluate the effects of the proposed action"). ONDA does not argue that NMFS has an obligation to develop alternatives to the proposed action. Rather, in cases involving biological opinions that assumed that the impacts of a project will be ameliorated by promised mitigation measures, courts have made clear that a biological opinion may not rely on an agency's or third party's compliance with mitigation measures if compliance with those measures is uncertain or unlikely. In Sierra

rather than the test for injunctive relief under the ESA applied in the Ninth Circuit. 271 F.3d 21, 30, 34 (1st Cir. 2001); see also id. at 31 (noting that "[t]his circuit has little discussion in caselaw on the standard of review of various issues which may arise under the ESA. This case, an expedited preliminary injunction appeal, does not require us to resolve those issues.").

⁷ The government acknowledges as much, claiming that "NMFS, therefore, properly analyzed the Forest Service's ability to carry out its grazing management strategy." Gov't Resp. at 23.

Club, for example, the U.S. Fish & Wildlife Service’s no-jeopardy biological opinion relied on the Army Corps of Engineers’s purchase of wetlands to replace those that would be lost as a result of a proposed flood control channel. Sierra Club, 816 F.2d at 1379–80. Because it assumed the purchase of the replacement wetlands, the biological opinion concluded that the project would not jeopardize listed species. Id. However, when it became clear that the Corps might not purchase the replacement wetlands, the Ninth Circuit held that the biological opinion was no longer valid. Id. at 1388–89. See also Ctr. for Biol. Diversity v. Rumsfeld, 198 F. Supp.2d 1139, 1152 (D. Ariz. 2002) (biological opinion may only rely upon mitigation measures that are “reasonably specific, certain to occur, and capable of implementation”).

Likewise, in 2003, this Court remanded a biological opinion in which NMFS had evaluated the likelihood that off-site mitigation measures would be implemented and “provide solid and predictable biological effects.” Nat’l Wildlife Fed’n v. NMFS, 254 F. Supp. 2d 1196, 1213 (D. Or. 2003). This Court found that NMFS unlawfully relied on off-site mitigation actions that were not reasonably certain to occur when the agency concluded that, if implemented, state and tribal actions would mitigate the impacts of the proposed project. Id. at 1212–13 (citing 50 C.F.R. § 402.02). If there is no rational basis for NMFS’s conclusion that effective protection of steelhead under the new grazing management strategy is reasonably certain to occur, the no-jeopardy finding is arbitrary and capricious. Nat’l Wildlife Fed’n v. NMFS, No. CV 01-6940-RE, 2004 WL 1698050 (D. Or. July 29, 2004) (rejecting as arbitrary and capricious an assumption that water would be released at a uniform rate over 21 days for the protection of salmon populations because “there was no rational basis to conclude that the water would be released in such a manner”); Am. Rivers v. U.S. Army Corps of Eng’rs, 271 F. Supp. 2d 230, 257 (D.D.C. 2003) (biological opinion was arbitrary and capricious because the no-jeopardy

conclusion assumed the implementation of water management changes that were virtually certain not to occur); Northwest Env'tl. Advocates v. EPA, 268 F. Supp. 2d 1255, 1273 (D. Or. 2003) (because the biological opinion “contains no assurances that the state-based commitments on which it rested its no-jeopardy finding were likely to occur . . . NMFS has failed to demonstrate a rational connection between the facts before it and the no jeopardy finding”); see also Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Recl., 265 F.3d 1028, 1034–37 (9th Cir. 2001) (rejecting biological opinion that failed accurately to assess the likelihood of compliance with an Aquatic Conservation Strategy, NMFS's yardstick for jeopardy).

Like the foregoing cases, the 2007–2011 BiOp at issue here relies on Forest Service actions that are uncertain, to say the least. The new BiOp assumes that the Forest Service will carry out all of the steps and monitoring in the grazing strategy and, ultimately, assure compliance with grazing standards. This is despite the fact that the Forest Service has failed for years to ensure compliance with standards throughout the Malheur National Forest, including on the two allotments at issue in this motion. Thus, *non*-compliance is certain in this case, a fact borne out by the Forest Service's failure again to assure compliance with standards during the 2007 grazing season, as documented in its own 2007 EOY Report for the first year of the “new” strategy. ONDA Ex. 12 at 23–24, 27–29 (citing exceedances of stubble height and bank alteration standards on eight pastures on the Murderers Creek and Lower Middle Fork allotments). The arbitrariness of NMFS's decision to rely on the Forest Service's commitment to using the strategy to protect steelhead is underscored by the complete discretion the strategy vests in the Forest Service to respond to ESA violations.

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B. The Mitigation Measures Described in the 2007–2011 BiOp are not Reasonably Certain to Occur Because They are Wholly Discretionary.

The government argues that the new grazing strategy will be equivalent to the former strategy which relied on the use of annual operating instructions (“AOIs”) to evaluate each year’s pasture conditions, the results of the previous year’s grazing, and make adjustments prior to the next year’s grazing. Gov’t Resp. at 16–19; compare Ore. Natural Desert Ass’n v. U.S. Forest Serv., 465 F.3d 977, 980–81, 984–89 (9th Cir. 2006) (describing how the AOI process responds to annual conditions and the results of the prior year’s grazing, and how the Forest Service used AOIs to make adjustments to the stocking levels and pasture rotations for the coming year). The government also argues that the new grazing management program gives the Forest Service the same authority to manage grazing as it had when it used AOIs to convey standards and seasonal modifications to permittees. Gov’t Resp. at 23–26. The theme of the government’s argument is that the implementation of a management *strategy* is all that is mandatory under the ESA, regardless of the efficacy of that strategy. See, e.g., Gov’t Resp. at 16 (quoting 2007–2011 BiOp regarding NMFS’s “high degree of confidence that the grazing management strategy will be implemented”), 18 (“NMFS is not required to question the Forest Service’s commitment to its proposed grazing strategy”); 21 (“the Forest Service management strategy is complete and is part of the proposed action”).

The ESA demands more than this: it requires the adoption of measures that will actually mitigate harm to fish. The Ninth Circuit made this clear when it invalidated a biological opinion in part because NMFS relied on the future construction of fish passage on the Columbia River dams that lacked “solid guarantees that they will actually occur,” pointing out that not “even a sincere general commitment to future improvements may be included in the proposed action in order to offset its certain immediate negative effects, absent specific and binding plans.” Nat’l

Wildlife Fed'n v. NMFS, Nos. 06-35011, 06-35019, 2008 WL 1821470, at *13 (9th Cir. Apr. 24, 2008); amending and superceding 481 F.3d 1224 (9th Cir. 2007) (emphasis added). Having a management strategy in place that depends on ambiguous and discretionary future actions is not a substitute for outlining concrete plans that directly address the jeopardy and adverse modification standards that are “reasonably specific, certain to occur, and capable of implementation [and] subject to deadlines or otherwise-enforceable obligations.” Ctr. for Biol. Diversity, 198 F. Supp. 2d at 1152. Ironically, the government argues that the “BiOp’s conclusions do not rest on the future *development* of a plan,” only to cite immediately to the BiOp’s conclusion that “[i]f changes are necessary to ensure compliance with permit conditions and resource management objectives, a plan of action will be developed for the following season.” Gov’t Resp. at 21 (italics in original; underline added). The lack of concrete, predictable plans for addressing harm to species is precisely the same defect identified in Natural Resources Defense Council v. Kempthorne and Center for Biological Diversity. 506 F. Supp. 2d 322, 341 (E.D. Cal. 2007); 198 F. Supp. 2d at 1151.

Ultimately, the government’s argument for why the 2007–2011 BiOp is valid hinges on a single word: the statement in the BiOp that the Forest Service “will hold permittees accountable for compliance with the requirements of their grazing permits and annual instructions.” Gov’t Resp. at 10 (citing Gov’t Ex. 1 at 115) (emphasis added). But the government nowhere explains how the Forest Service has turned a corner and suddenly become able to achieve what it has consistently and chronically failed to achieve before—that is, ensuring on an annual basis that the permittees on these allotments comply with the standards set in their permits, AOIs, or instruction letters. The government’s position relies on a laundry list of authority the Forest Service has—but not necessarily that it will exercise effectively to protect steelhead—and a

series of steps the agency undertakes on paper to take to set standards and triggers, consider past permittee performance, conduct monitoring, “determine if desired results have been obtained,” and take whatever action it deems necessary at its discretion. Gov’t Resp. at 7–8. But because the ultimate action, if any, lies in the discretion of the Forest Service, “[i]t is not possible to predict what, how and when [the program’s management] measures will be implemented.” Natural Res. Defense Council, 506 F. Supp. 2d at 341. Simply because an agency has authority to take action does not mean that it is “reasonably certain” that it will do so, as required by the ESA, particularly here, where the Forest Service has failed to do so in the past. Nat’l Wildlife Fed’n, 2008 WL 1821470, at *13 & 13 n.17 (noting that even a sincere commitment to undertake an action within the agency’s authority does not satisfy requirement that agency guarantee the action will occur).

Moreover, since the 2007–2011 BiOp was issued, the Forest Service itself has declared that it will not enforce the results of its annual monitoring process. In June 2007, after the Forest Service and NMFS finished the consultation process that resulted in the 2007–2011 BiOp, the Forest Service issued a directive on monitoring, which government declarant Gowan attached to his declaration. The directive *expressly disclaims* using annual monitoring for standards such as stubble height as a basis for taking administrative actions against permittees. Gowan Decl. Attachment 4 at 2–3. Under the heading “Adaptive Management,” the Regional Forester directed the national forests in Oregon and Washington to the Region’s standing directive on PACFISH/INFISH implementation requirements, but specifically noted that the directive “explains that [stubble height] and other annual monitoring indicators should not be used as decisionmaking tools for administrative actions on grazing permits.” *Id.* at 3 (emphasis added). Thus, contrary to even the vague promise of administrative action against permittees in the event

of repeated violations of standards, which NMFS took as an iron-clad commitment to hold permittees accountable, the Regional Forester has directed that the Forest Service *may not* use stubble height violations, or other violations identified in the annual monitoring, as the basis for administrative action against the permittees. In any event, the enforcement of permit conditions, upon which the grazing management strategy depends in its entirety, is a decision ultimately “committed to an agency’s absolute discretion.” Heckler v. Chaney, 470 U.S. 821, 831 (1985). In short, the Forest Service’s “commitment” to hold permittees truly accountable for standards violations, which NMFS made the cornerstone of its 2007–2011 BiOp, is a toothless and empty one. As shown by allotment conditions after the 2007 grazing season, the strategy has already proved to be a failure.

C. The Condition of Riparian Areas on the Murderers Creek and Lower Middle Fork Allotments Have Remained Badly Degraded Under Forest Service Grazing Management from 2004 to 2007.

Notwithstanding the unsubstantiated arguments in the responses to the contrary, the bank alteration standard exceedances documented by Christie and the Forest Service 2007 EOY Report show that riparian conditions on these two allotments were badly degraded at the end of the 2007 grazing season. Christie Decl. ¶¶ 17–23; ONDA Ex. 12 at 23–24, 27–29. In many instances, conditions were actually worse after the 2007 grazing season than in 2004. The attached Reply Exhibit 1 juxtaposes photographs Christie took on the Murderers Creek Allotment in 2004 (from Christie Decl. Attachment 3 and the Second Christie Declaration filed in No. 03-381-HA, Dkt # 115) and 2007 (from Christie Decl. Attachment 2 and the CD-Rom attachment) at monitoring locations on Beaver Dam Creek, Dan’s Creek, South Fork Murderers Creek and Thorpe Creek. The locations Christie monitored were the same in 2007 as in 2004 (although all photographs do not necessarily show the same perspectives). The photographs in

Reply Exhibit 1, and the following table, show that riparian damage increased significantly at these locations between 2004 and 2007:

Creek / Unit	2007 (% bank alteration)	2004 (% bank damage)⁸
Beaver Dam Creek / Dan's Creek Unit	83%	28%
Dan's Creek / Dan's Creek Unit	52%	37%
S. Fork Murderers Creek / Horse Mountain Unit (HM-321)	66%	39%
S. Fork Murderers Creek / Horse Mountain Unit (HM-041)	50%	26%
Thorpe Creek / Deer Creek Unit	53%	not measured

Reply Ex. 1 at 1–3 (Beaver Dam Creek), 4–6 (Dan's Creek), 7–10 (South Fork Murderers Creek), 11–12 (Thorpe Creek).

Contrary to the suggestions in the government and intervenors' briefs, riparian conditions on these streams have not, in fact, improved. Christie, who has been making observations on these allotments since 1999, observed last year that conditions on the Murderers Creek allotment were "as bad or worse in 2007 than in any previous year in which I made observations." Christie Decl. ¶¶ 17–18. The last grazing season, 2007, which was the first of the "new" grazing management, should have resulted in improved conditions if the Forest Service truly had been holding the permittees to the standards in their permits, permit modifications, and instruction letters. But, as Christie's photographs and measurements on the allotments at the end of the 2007 grazing season show, the actual condition of steelhead streams at the end of the first year of the Forest Service's new and improved "adaptive" management program remained badly degraded. Christie Decl. Attachment 2 and CD-Rom attachment.

⁸ Christie changed methodology in 2006 and specifically measured bank alteration, as well as bank instability, in 2007. Christie Decl. ¶¶ 14–17, 19; see also ONDA Br. at 12 n.10 (describing 2007–2011 BiOp definitions of bank alteration and bank instability).

D. NMFS's Reliance on the Forest Service's Management Strategy is Misplaced Because Actual Grazing on the Murderers Creek and Lower Middle Fork Allotments Does Not Correctly Reflect the Action Approved by NMFS.

Further clouding the picture of an effective, efficient Forest Service grazing strategy that will actually protect steelhead are the inaccuracies and errors that permeate the Forest Service's permits and BAs. The government acknowledges that, as a result of ONDA's motion for injunctive relief, the 2007 permit modifications have now yielded to 2008 permit modifications which modify and correct the previous year's modifications. Gov't Resp. at 28. The conflicting modifications and instruction letters make it almost impossible to determine either what action NMFS actually was approving when it issued the 2007–11 BiOp or what action is actually being carried out. For example, even intervenors note that statements about use and standards on the Murderers Creek allotment are confusing. Intv. Resp. at 18-19. They allege that, in 2007, cattle were on the allotment for a shorter period than specified in the proposed action described in the 2007 Murderers Creek BA. Id. at 18. Yet even such reduced grazing resulted in the degradation that Christie measured and photographed at the end of the 2007 grazing season, and which the Forest Service itself documented in the 2007 EOY Report as involving exceedances of the bank alteration standard. Christie Decl. ¶¶ 17–23; ONDA Ex. 12 at 27–29. Also, in the notes attached to the April 14, 2008 letter to the permittee, the Forest Service stated that “[n]ormally turn-out is 1st of June, but in recent years it has been delayed till around July 15th on Deer Creek and Lower Murderers Creek.” Gowan Decl. Attachment 5 at 3 (emphasis added). Yet the 2007–2011 BiOp consulted on a “proposed action” that specified a season for the North herd beginning May 15th, the Middle Herd beginning June 1st, and the South Herd beginning July 1st. ONDA Ex. 3 at 20. Did NMFS have any idea what action it was being asked to evaluate? The inability of the Forest Service itself to keep anything straight on these allotments indicates that the answer is “no.”

Despite its insistence that everything is fine on these allotments, the Forest Service has taken steps—evocative again of its actions in 2004—to reduce grazing on the Murderers Creek allotment at the eleventh hour, after the instant motion was filed. Gov’t Exs. 4–5; Gowan Decl. ¶ 45; see ONDA 03-381, 2004 WL 1592606, at *6 (describing Forest Service decision to rest the Blue Mountain Allotment after the lawsuit was filed). However, it is not even possible to tell from the April 14, 2008 letter updating the grazing schedule whether or not the pressure on the steelhead habitat on this allotment will actually be reduced. Gowan Decl. Attachment 5.

Although the schedule indicates a shorter season than was (apparently) involved in the proposed action, the number of cattle or cow/calf pairs is not specified in the letter. Since the terms of the annual instruction letter already alter the terms stated in the permit, there is nothing to prohibit the permittee from grazing more cattle during the shorter season allowed, ending up with the same number of AUMs allowed by the proposed action, and the same (or worse) impact on steelhead habitat. This is yet another example of the haphazard, ad hoc, unenforceable, and ultimately unenforced “management” that is certain to be repeated by the wholly discretionary nature of responses to threats to steelhead and standards violations under the grazing strategy.

E. NMFS’s Reliance on the Forest Service’s Management Strategy is Arbitrary Because it Relies Entirely on the Permittees to Satisfy Grazing Standards.

Finally, like the biological opinions invalidated in National Wildlife Federation (254 F. Supp. 2d 1196) and Northwest Environmental Advocates, NMFS’s no jeopardy/no adverse modification conclusion expressly rests on the fact that third parties—the permittees—will have the responsibility for compliance with the standards which NMFS is relying on to protect steelhead.⁹ Nat’l Wildlife Fed’n, 254 F. Supp. 2d at 1213–14; Northwest Envtl. Advocates, 268

⁹ As noted previously, ONDA strenuously disagrees that setting and monitoring for standards that do not measure the conditions of the fishes’ aquatic habitat satisfies the Forest Service’s and

F. Supp. 2d at 1273. NMFS itself acknowledges this in the 2007–2011 BiOp when it states that “[p]ermittees 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.” ONDA Ex. 1 at 6. Historically, the regular failure of compliance with these standards has been a well-documented. Lohn, 485 F. Supp. 2d at 1201 (noting that “[p]ast compliance with grazing management standards is a documented problem”); ONDA Ex. 12 at 24, 27–29 (2007 EOY Report describing exceedance of stubble height and bank alteration standards). Because the Forest Service’s grazing management strategy ultimately devolves the mitigation obligations onto third parties who have consistently shown an inability to meet those obligations, and the agency’s enforcement of those obligations is purely discretionary, NMFS’s reliance on the reasonable certainty that the mitigation measures will be effective is arbitrary and capricious.

IV. ONDA IS LIKELY TO SUCCEED ON THE MERITS OF ITS ESA § 9 CLAIMS

ONDA is likely to succeed on the merits of its claims under ESA § 9 because the unrebutted data in the Christie and Rhodes declarations show that the take limitation from effects to steelhead habitat were seriously and repeatedly exceeded in 2007, and ONDA has made the necessary showing of irreparable harm to steelhead based on habitat damage.

A. Take in Excess of the Terms of the Incidental Take Statement Has Occurred on the Murderers Creek and Lower Middle Fork Allotments in Violation of ESA § 9.

The 2007–2011 BiOp set a clear threshold for the limit of allowable take of steelhead based on the effects of livestock grazing on steelhead habitat: “[t]he maximum extent of take that may occur by the proposed action through habitat effects is a measured 20% bank alteration” on

NMFS’s obligations under the ESA and NFMA. See supra at 3–7; ONDA Br. at 7, 9, 30-31. Nevertheless, even the land-focused standards adopted by the Forest Service and endorsed by NMFS are being violated routinely by permittees. ONDA Ex. 12 at 24, 27-29; see generally Christie Decl., Rhodes Decl. (describing stubble height and bank alteration exceedances).

the 36 streams or creeks on these allotments. ONDA Ex. 1 at 219, 230, 233. Field observations by Christie and Rhodes unambiguously show that the bank alteration after the 2007 grazing season on both the Murderers Creek and Lower Middle Fork allotments exceeded the limit for permissible take set in the BiOp. Christie Decl. ¶¶ 19, 22; Rhodes Decl. ¶¶ 15–16, 28–29; ONDA Br. at 12–14, 30–32. Christie documented a mean bank alteration of 55% on grazed sites on the Murderers Creek allotment and of 53% on the Lower Middle Fork allotment, well in excess of the 20% incidental take limit. Christie Decl. ¶¶ 19, 22. Neither the government nor intervenors present data directly contradicting Christie’s bank alteration data for the locations he measured, nor data contradicting Rhodes’s declaration. Instead, defendants rely solely on criticizing the usefulness of their evidence, criticism that is entirely misplaced. ONDA 03-213, 2004 WL 1293909, at *6 (noting that the Forest Service presented no data in that case to counter plaintiffs’ data, but rather relied exclusively on criticizing Christie and Rhodes). Absent countervailing evidence, the record before this Court demonstrates violations of ESA § 9.

B. The Data Presented in the Christie Declaration and Attachments is More Reliable Than the Government and Intervenors’ Submissions Because Christie Used a Reliable Methodology and Took Measurements at Appropriate Locations.

A careful and meticulous observer who has been taking observations and working in coordination with a trained hydrologist intimately familiar with the relevant guidance and literature will produce accurate, reliable and repeatable data, as Christie has here. Second Rhodes Decl. ¶¶ 5–17, 24–30, 40–41. Indeed, among the actual field data submitted with the declarations in this case, Christie’s set of data is most reliable. See generally id. (describing validity of Christie monitoring and serious shortcomings in Larson and Gowan declarations). Christie’s photographs and data summaries provide the date he took his measurements, the GPS coordinates of the monitoring sites (essential for accurate replication of measurements),

photographs of the sites monitored, a summary of findings on the two specific criteria of interest (bank alteration and greenline stubble height), and a general description of the sites. Christie Decl. Attachment 2; see Second Rhodes Decl. ¶ 22.

Rhodes notes that Christie’s criteria for measuring what is or is not “bank alteration” are identical to those used by the Forest Service. Second Rhodes Decl. ¶ 6. In addition, the methodology to obtain data, like the Forest Service’s, is based on obtaining point measurements of bank alteration at regularly spaced intervals. Id. ¶ 7. The difference is that the Forest Service uses a set of clumped measurements taken at regular intervals, whereas Christie takes single point measurements at regular intervals. Id. ¶ 8; see id. at Exhibit A (illustrating the difference). Contrary to the suggestions in the government’s response, Christie’s point measurement methodology is comparable to the Forest Service’s methodology and to methods used widely in monitoring and research, and produces roughly comparable results. Id. ¶ 7–11. Because Christie provides precise information about the places and dates he monitored, his observations are readily repeatable. Id. ¶¶ 24–25. As a result, Christie’s methodology and data are reliable. Id. ¶¶ 11–12, 25, 30, 40–41. This Court has previously evaluated Christie’s work, as well as Rhodes’s expert opinions, and found them reliable in determining “substantial evidence” of resource damage and the need to rest degraded allotments on the Malheur National Forest. ONDA 03-213, 2004 WL 1293909, at *5–*7. And, as in that case, the Forest Service here “presents no data to counter the plaintiffs’ data.” Id. at *6; see generally Gov’t Resp., Gowan Decl. and Attachments.

In contrast to Christie’s careful work, Larson’s declaration and exhibits are unreliable. Second Rhodes Decl. ¶ 35. Her purported findings and photographs provide no dates on which she conducted monitoring, no descriptions or GPS coordinates for the locations or stream segments monitored, no information on the spacing of her measurements or whether they were

taken at the greenline, and no description of the criteria used to identify bank alteration. Id. ¶ 31–32; see Larson Decl. Ex. B. She reports no trend data, yet claims that “near natural rates of recovery” are occurring—a wholly unsubstantiated statement. Second Rhodes Decl. ¶¶ 32–34.

Likewise, Gowan’s declaration is troubling because he merely restates conclusory information provided in the 2007 EOY Report, rather than including any actual evidence of monitoring to support his statements and which the Court and the other parties could evaluate. Gowan Decl. ¶¶ 38, 40, 43–44; see ONDA 03-213, 2004 WL 1293909, at *6 (noting that the Forest Service in that case presented no data to counter plaintiffs’ data). Because the Gowan declaration does not include the hard data necessary to evaluate his conclusory statements, the government cannot rely on his declaration to show the conditions of the resources on these allotments. Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1150 (9th Cir. 1998) (rejecting the Forest Service’s attempt to rely on an expert report that contained no hard data); Leigh v. Warner Bros., Inc., 212 F.3d 1210, 1217 (11th Cir. 2000) (holding that affidavits that contain “conclusory allegations without specific supporting facts have no probative value”); Singleton, 75 F. Supp. 2d at 1150 (rejecting BLM’s assertions regarding improvements in riparian areas of grazing allotments because they lacked an objective basis and were not supported by objective evidence).¹⁰

¹⁰ Although intervenors, Gowan, and the 2007 EOY Report blame all of the damage on these allotments on wild horses, the government’s brief is completely silent on wild horse effects—for good reason. The 2007–2011 BiOp, and the underlying Murderers Creek and Lower Middle Fork BAs, do not quantify the effects from wild horses on steelhead and steelhead habitat. ONDA Exhs. 1–4. If wild horses were truly having the vast and widespread effects on riparian conditions that intervenors and Gowan allege, then the BiOp would necessarily be arbitrary and capricious for failing to take into account an important factor in evaluating the environmental baseline on top of which the proposed action—livestock grazing—must be evaluated for jeopardy. Nat’l Wildlife Fed’n, 2008 WL 1821470, at *8 (NMFS must consider “what jeopardy might result from the agency’s proposed actions in the present and future human and natural contexts”) (emphasis in original, citation omitted); see Motor Vehicle Mfrs. Ass’n v. State Farm

The Gowan declaration also includes no evidence that the Forest Service actually evaluated the stream segments where Christie measured bank alteration, nor any credible information as to why the eight “designated monitoring areas” (“DMAs”) on these allotments are more representative of conditions on these allotments than the 18 locations and eight pastures on which Christie and the Forest Service’s 2007 EOY report documented bank alteration standard exceedances. Second Rhodes Decl. ¶¶ 19–23. Gowan also implies that—contrary to his agency’s guidance—bank alteration data should not be collected in areas with livestock trails, raising the possibility that the DMAs Gowan has monitored do not reflect allotment-wide bank alteration because they are purposefully located away from areas of actual livestock use. *Id.* ¶¶ 21–22; *see* Reply Ex. 2 at 61 (Forest Service guidance stating that “while livestock trails are not considered part of the greenline; they are considered for streambank alteration”). Thus the Gowan declaration provides no compelling support for the contention that Christie’s data is not representative of conditions on these allotments. *Id.* ¶¶ 18–23.

Mutual Auto Ins. Co., 436 U.S. 29, 43 (1983) (an agency action is arbitrary and capricious if the agency has “entirely failed to consider an important aspect of the problem”). Because the ESA focuses all attention on the protection of the threatened steelhead, if wild horses truly were causing such devastation to riparian habitat, the Forest Service could not authorize *any* grazing because the baseline conditions themselves would be causing jeopardy. Furthermore, massive and pervasive damage from wild horses would evidently be “new information” that was not considered by NMFS, triggering the obligation to reinitiate consultation under 50 C.F.R. § 402.16.

The truth is that wild horses are not the problem on these steelhead streams: summer cattle grazing is. Rhodes Decl. ¶¶ 20–21, 30–32, 36. Intervenor and the Gowan Declaration present only unsubstantiated allegations of damage due to wild horses, which must be accorded no weight. Singleton, 75 F. Supp. 2d at 1150. But, as outlined above, wild horses are a Catch-22 for the government: if horses are to be scapegoats here, then the Forest Service and NMFS have failed to take wild horse effects into account when authorizing cattle grazing, which would equally justify an injunction until sufficient information has been collected about wild horse effects to set livestock stocking levels that are protective of steelhead.

There is no question that Christie took photographs and measurements at proper locations. The Forest Service's own monitoring guidance emphasizes that DMAs should be chosen precisely because they are areas of higher use by cattle:

[a] DMA should not reflect an "average" amount of use in all riparian areas of the stream reaches in the pasture but rather reflect livestock use in only those stream reaches where livestock are actually using riparian areas. ***A reach with relatively high use may be chosen to more easily detect change and assure compliance pasture-wide.***

Reply Ex. 2, at 46 (bold and italics in original). The premise for choosing a high-use area to monitor is that "[i]f proper management occurs on the area, the remainder of the pasture or use area will also be managed within requirements." *Id.* The locations Christie monitored are clearly areas of high livestock use, because livestock will naturally head straight for water in the summer heat. Rhodes Decl. ¶ 20. The Forest Service's own guidance expressly specifies that areas of high use *should* be used for monitoring livestock effects on riparian areas. By contrast, Larson describes monitoring at "random" (and undisclosed) locations, while Gowan describes monitoring at a single DMA on the Lower Middle Fork allotment and seven DMAs on the Murderers Creek allotment. Larson Decl. ¶ 43; Gowan Decl. ¶ 13. There is no indication why the Forest Service selected the DMAs that it is monitoring, as opposed to other locations on the allotment where higher livestock use is evidently occurring in important riparian areas, as described in the 2007 EOY Report. Second Rhodes Decl. ¶¶ 19–23 (discussing selection and representativeness of DMAs); ONDA Ex. 12 at 24, 27–29 (describing eight pastures where streambank alteration and stubble height standards were exceeded in 2007). Overall, Christie took more than twice as many measurements on these allotments than the Forest Service relying on its DMAs. Second Rhodes Decl. ¶¶ 12–15. In short, the criticism of Christie's methodology and monitoring location are misplaced, and the photographs and summaries supplied by Christie

are the most reliable evidence of bank alteration and end-of-season riparian habitat conditions now before the Court.

C. The Bank Alteration Exceedances Documented in the Christie and Rhodes Declarations and in the 2007 EOY Report Demonstrate Illegal Take in Excess of the Amount Allowed Under the Incidental Take Statement.

The incidental take statement in the 2007–2011 BiOp is clear that illegal take from grazing effects on steelhead habitat is defined by the percentage of bank alteration. See, e.g., ONDA Ex. 1 at 229–30, 232–33 (describing effects of livestock grazing on steelhead habitat and habitat effects on the Lower Middle Fork and Murderers Creek allotments and setting the maximum extent of allowable take measured by habitat effects at 20% bank alteration). The 20% bank alteration standard was exceeded throughout the Murderers Creek and Lower Middle Fork allotments at the end of the 2007 grazing season. As a result, impermissible take in violation of ESA § 9 has occurred on these allotments. Ariz. Cattle Growers Ass’n v. U.S. Fish & Wildlife Serv., 273 F.3d 1229, 1249 (9th Cir. 2001) (exceeding the level of take specified in an ITS “results in an unacceptable level of incidental take, invalidating the safe harbor provision, and requiring the parties to re-initiate consultation”).

Bank alteration at 12 of the 17 grazed sites Christie measured in 2007 on the Murderers Creek allotment exceeded 50%, and *all* of the grazed sites had more than 30% bank alteration. Christie Decl. ¶ 19 & Table 1. On the Lower Middle Fork allotment, both of the grazed sites Christie monitored had more than 50% bank alteration. Id. ¶ 22 & Table 2. On both allotments, the Forest Service itself documented widespread streambank alteration standards exceedances after the 2007 season. On the Murderers Creek allotment, the Forest Service recorded that bank alteration standards were exceeded in 2007 on Dan’s Creek Unit, Frenchy Butte Unit, Deer Creek Unit, John Young Meadows Unit, and Horse Mountain Unit—the same pastures where

Christie documented substantial bank alteration exceedances. ONDA Ex. 12 at 27–29; compare Christie Decl. Table 1. On the Lower Middle Fork allotment, the 2007 EOY Report indicates that the Forest Service monitored only one DMA on the entire allotment, and did not even monitor the Coyote Creek and Big Boulder Units which Christie did; however, the Forest Service documented bank alteration exceedances on two other units (Balance Lake and Sunshine) on the allotment. ONDA Ex. 12 at 23–24. This evidence shows that unlawful take, as defined by and in excess of the allowable limit set in the 2007–2011 BiOp’s ITS, occurred on the Murderers Creek and Lower Middle Fork allotments in 2007. Defenders of Wildlife v. Bernal, 204 F.3d 920, 925 (9th Cir. 2000) (proof of a violation of ESA § 9 requires a showing that the actions undertaken by the action agency result in an unlawful take of a listed species).

D. Irreparable Injury to Steelhead has Resulted From the Bank Alteration Exceedances and is Likely to Continue on These Allotments.

The Ninth Circuit held in Forest Conservation Council and affirmed in Bernal that “habitat modification that is reasonably certain to injure an endangered species by impairing their essential behavioral patterns satisfie[s] the actual injury requirement and [is] sufficient to justify a permanent injunction.” Bernal, 204 F.3d at 925; see Forest Conserv. Council, 50 F.3d at 783. Here, the reasonable certainty that excessive bank alteration will injure steelhead by impairing their essential behavioral patterns is supplied by the habitat effects documented in the 2007–2011 BiOp and in the declaration of Jonathan Rhodes.

For each allotment covered by the 2007–2011 BiOp, NMFS describes the likelihood that habitat effects in excess of the incidental take threshold will injure steelhead. The 2007–2011 BiOp describes that

The MCR steelhead are reasonably certain to be injured or killed, or the likelihood that they will be injured or killed will be increased by habitat effects of the proposed action in the following ways: (1) Egg-to-fry survival will be reduced

by increased fine sediment deposited on spawning gravel; (2) juvenile foraging success will be reduced by loss of terrestrial insects and other aquatic food chain resources due to lost riparian vegetation and nutrient inputs; (3) juvenile predation rates will be increased by loss of hiding cover that would have been provided by riparian vegetation and banks; and (4) adults and juveniles will be displaced from preferred habitats by the physical presence of livestock and due to increased turbidity in the water column caused by trampling and vegetation removal.

ONDA Ex. 1 at 233 (effects on Murderers Creek allotment) (emphasis added); see id. at 229 (repeating same analysis for Lower Middle Fork allotment). These “habitat effects” are “likely to significantly impair essential behavior patterns,” and will be manifest “when up to 20% of the streambank on [the allotment’s creeks] is altered by cattle hoof action.” Id. at 229, 233. NMFS admits that it cannot “precisely predict the number of fish that are reasonably certain to be injured or killed if their habitat is modified or degraded by the proposed action.” Id. at 229, 232.

Rhodes’s survey of available scientific literature regarding the relationship between streambank instability and harm to steelhead behavior patterns confirms NMFS’s conclusion. He explains that “[i]t is well-documented that bank alteration strongly contributes to bank instability and resulting damage to aquatic habitats, streams, and water quality,” Rhodes Decl. ¶ 17, and that “[t]hese impacts significantly reduce the survival and production of steelhead.” Id. ¶ 23. Citing extensive scientific literature, he concludes, as did NMFS, that “[t]here is no doubt that levels of bank alteration and bank instability in grazed streams in the [Murderers Creek allotment] is contributing to the degradation of steelhead habitats in ways that reduce the survival and production of steelhead.” Id. Thus, “bank alteration and bank instability . . . degrade steelhead habitat, water quality, and streams in several ways that reduce the survival and production of steelhead. . . . It is extremely well-documented that all of these impacts degrade salmonid habitats and separately, and in concert, reduce salmonid survival.” Id. ¶ 34.

When NMFS itself has defined and explained the reasonably certain harm to steelhead that will occur when bank alteration in excess of 20% on these allotments impairs essential steelhead behavior patterns, it is illogical for the government to argue that that a showing of greater than 20% bank alteration has not caused reasonably certain harm to the species. Because NMFS itself set the numerical threshold for what constitutes illegal take, and described the reasonable certainty that harm to steelhead will result from that threshold being exceeded, it cannot now complain that a showing that the bank alteration standard has been exceeded does not constitute unlawful take based on habitat effects. Cf. Forest Guardians v. Johanns, 465 F.3d 455, 465 (9th Cir. 2006) (holding that agencies that defined the standards and conditions for permissible grazing were not entitled to argue later that those conditions were unreasonable).

In addition, because the Forest Service has issued permits and instruction letters authorizing grazing during the spring and summer of 2008, and livestock grazing is scheduled to begin within the next two months on each of these allotments, the threat presented is necessarily “imminent.” Forest Conserv. Council, 50 F.3d at 783 (noting that, although logging had not yet begun, the logging company had applied for a permit to clearcut the forest and planned to clearcut timber “as soon as possible”). As Rhodes describes, and as shown by the ineffectiveness of the Forest Service’s management strategy in 2007 to achieve compliance with bank alteration limits, continued grazing on these allotments is likely to continue to result in the damage to habitat that detrimentally affects the survival and production of steelhead. Rhodes Decl. ¶¶ 17, 23, 25–27, 31–38. Consequently, unless these pastures are rested, it is reasonably certain that ESA violations will again occur during the 2008 grazing season, justifying an injunction under ESA § 9. Defenders of Wildlife, 204 F.3d at 925 (“a reasonably certain threat of imminent harm to a protected species is sufficient for issuance of an injunction under section 9 of the ESA”)

V. ONDA IS LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIM THAT THE AGENCIES HAVE FAILED TO REINITIATE CONSULTATION

The 2007–2011 BiOp specifically provides that “[r]einitiation of formal consultation is required” when “the amount or extent of taking specified in the incidental take statement is exceeded” or “if new information reveals effects of the action that may affect listed species or designated critical habitat in a manner or to an extent not previously considered.” ONDA Ex. 1 at 218. The BiOp further explicitly states a reinitiation trigger for each allotment. For the allotments at issue in this motion, the triggers for reinitiation of consultation include “no more than 20% of the streambank being altered by cattle hoof action in the portions of [the 21 streams and creeks] in the Lower Middle Fork Allotment” and “no more than 20% of the streambank being altered by cattle hoof action in the portions of [the 15 streams and creeks] in the Murderers Creek Allotment” ONDA Ex. 1 at 230, 233. The BiOp emphatically states that “[e]xceeding any of these limits will trigger the reinitiation provisions of this Opinion.” *Id.* As described above, the Forest Service’s own evidence, substantiated by Christie’s more meticulous data and photographs, show that the explicit threshold for reinitiation of consultation set in the 2007–2011 BiOp—“[i]f the amount or extent of taking specified in the incidental take statement is exceeded”—has been reached throughout these allotments. *See supra* at 27–28.

In addition to violating the explicit reinitiation requirements in the 2007–2011 BiOp, the documented bank alteration exceedances constitute new information that reveals effects of the action that may affect steelhead to an extent not previously considered. The BiOp’s no-jeopardy finding is premised on the conclusion “that the various conservation measures described as part of the proposed action, including meeting move triggers, will be carried out as described.” ONDA Ex. 1 at 115. Information in the 2007 EOY Report and the Christie and Rhodes observations show that the conservation measures and standards have, in fact, not been carried

out, resulting in excessive bank alteration on these two allotments. This is new information that NMFS did not previously consider, requiring reinitiation of consultation pursuant to 50 C.F.R. § 402.16(b). Having secured a “no jeopardy” decision from NMFS based on agreeing to monitor the allotments and comply with the terms set in the 2007–2011 BiOp, including the reinitiation trigger based on exceedance of the 20% bank alteration incidental take threshold, the Forest Service cannot now avoid the obligation by ignoring its own observations of exceedances and the new evidence supplied in the Christie declaration. Forest Guardians, 450 F.3d at 465 (holding that “the Forest Service may not secure a ‘not likely to adversely affect’ finding contingent upon its agreeing to certain critical conditions, ignore them most of the time, and then assert that the conditions are unreasonable”). In view of the substantial procedural violation of the ESA consultation requirements and the terms of the ITS, “the remedy must be an injunction of the project pending compliance with the ESA.” Thomas, 753 F.2d at 764.

VI. AN INJUNCTION IS NECESSARY TO PREVENT ESA VIOLATIONS ON THE MURDERERS CREEK AND LOWER MIDDLE FORK ALLOTMENTS

Without a decision on the merits before grazing is allowed again on these allotments, protection of steelhead will again become a game of “kick the can down the road,” deferring to another day the question of whether the agencies are complying with the law while cattle are, for yet another year, allowed to overgraze these already badly-degraded allotments. All the while, threatened steelhead will continue to suffer. This Court should enjoin grazing on both of these allotments until the merits of this case can be heard.

Injunctive relief for violations of the ESA is “necessary to effectuate Congress’s clear intent by requiring compliance with the substantive and procedural provisions of the ESA.” Nat’l Wildlife Fed’n v. NMFS, 422 F.3d 782, 796 (9th Cir. 2005). Where an agency has “violated a substantive or procedural provision of the ESA,” a plaintiff is entitled to injunctive relief. Sierra

Club, 816 F.2d at 1384. The government has represented that, since ONDA filed its motion on March 31st, the Forest Service has taken action to address ESA violations that, simultaneously, it argues have not occurred. Gov't Resp. at 21 n.4, 22, Gov't Ex. 3-5; compare id. at 11, 22. However, even where a party has modified or ceased an illegal action, a court retains the power to enjoin behavior that is likely to result in future violations of the law. United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953) (in deciding whether to issue an injunction, “[t]he necessary determination is that there exists some cognizable danger of recurrent violation,” and the equity court must consider “the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations”).

Only in “rare or unusual circumstances” should an injunction not issue for an ESA violation. Sierra Club, 816 F.2d at 1384 n.11 (citing as an illustration of “unusual circumstances” cases where “an injunction would interfere with a long-term contractual relationship” or “would result in irreparable harm to the environment”) (emphasis in original). No unusual circumstances are present in this case, where an injunction would result in preventing further harm to the environment and, in particular, to the critical habitat of threatened steelhead.¹¹

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

Contrary to the request in the intervenors’ response, the Court should waive the bond requirement in this case. ONDA seeks to enforce the ESA, which expressly contemplates and

¹¹ In addition, as the Ninth Circuit noted in Sierra Club, the ESA “does not permit courts to consider the hardship an injunction may impose on the project if endangered species’ habitat is likely to be destroyed.” Sierra Club, 816 F.3d at 1387; see also Nat’l Ass’n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2537 (2007) (noting that the “ESA’s no-jeopardy mandate applies to every discretionary agency action—regardless of the expense or burden its application might impose” (emphasis in original)); Nat’l Wildlife Fed’n, 422 F.3d at 794 (a court weighing injunctive relief under the ESA does not “weigh economic harm to the public in reaching its conclusion”). Intervenors’ arguments to the contrary are therefore not germane to the Court’s evaluation of this motion. Intv. Resp. at 31–36.

promotes private enforcement by citizens. See 16 U.S.C. § 1540(g)(4). As the Supreme Court has noted, Congress, in enacting such provisions, “opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation.” Alyeska Pipeline Serv. Co. v. Wilderness Soc’y, 421 U.S. 240, 263 (1975). A bond order that exposes citizen plaintiffs to crippling financial liability destroys the incentive to litigate created by Congress. The Ninth Circuit has made clear that “special precautions to ensure access to the courts must be taken where Congress has provided for private enforcement of a statute” such as the ESA. Cal. v. Tahoe Reg’l Planning Agency, 766 F.2d 1319, 1325-26 (9th Cir. 1985). Where, as here, “the purposes of the security bond conflict with those of the statute,” the district court must ensure that imposition of a “bond will not defeat the plaintiff’s right to injunctive relief.” Division 1, Detroit Bhd. of Locomotive Eng’rs v. CONRAIL, 844 F.2d 1218, 1227 (6th Cir. 1988). For this reason, courts have long declined to impose more than the occasional token bond in order to avoid frustrating “public-interest” litigation. See, e.g., Tahoe Reg’l Planning Agency, 766 F.2d at 1325–26; Friends of the Earth v. Brinegar, 518 F.2d 322, 323 (9th Cir. 1975); Natural Res. Def. Council v. Morton, 337 F. Supp. 167, 168–69 (D.D.C. 1971).

The public-interest exception is not based on the indigence of the plaintiff but on the congressionally-established policy of promoting private enforcement of public rights. Some of the earliest cases to apply the exception involved large national environmental organizations seeking to enforce the public’s right to environmental compliance. See Natural Res. Def. Council, 337 F. Supp. 167; Envntl. Def. Fund v. U.S. Army Corps of Eng’rs, 331 F. Supp. 925 (D.D.C. 1971).¹² In cases where public interest groups, like plaintiffs here, bring suit to enforce

¹² Indeed, even in cases involving the Sierra Club, perhaps the largest group involved in public interest litigation, courts have routinely waived the bond requirement or required only a nominal bond. See, e.g., Sierra Club v. U.S. Army Corps of Eng’rs, 399 F. Supp. 2d 1335, 1349 (M.D.

environmental laws, “Congress made clear that citizen groups are not to be treated as nuisances or troublemakers, but rather as welcomed participants in the vindication of environmental interests.” Friends of the Earth v. Carey, 535 F.2d 172 (2d Cir. 1976). Finally, the fact that plaintiffs are seeking an injunction that will burden private parties does not render the public-interest exception inapplicable. The Ninth Circuit has expressly approved waiver of the bond requirement even in connection with an injunction that restricted a private party’s use of its own private property, much less public lands. Tahoe Reg’l Planning Agency, 766 F.2d at 1325-26. Accordingly, this Court should waive the bond requirement.

CONCLUSION

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

DATED this 7th day of May, 2008.

Respectfully submitted,

s/ David H. Becker

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Fla. 2005) (no bond), vacated on other grounds, 464 F. Supp. 2d 1171 (M.D. Fla. 2006); Sierra Club v. Norton, 207 F. Supp. 2d 1342 (S.D. Ala. 2002) (\$1,000 bond); Wilderness Soc’y v. Tyrrel, 701 F. Supp. 1473, 1492 (E.D. Cal. 1988) (\$100 bond); Sierra Club v. Block, 614 F. Supp. 488, 494 (D.D.C. 1985) (\$20 bond); Sierra Club v. Block, 614 F. Supp. 134, 141 (E.D. Tex. 1985) (\$1 bond).