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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PENDLETON DIVISION

CENTRAL OREGON LANDWATCH, an
Oregon non-profit corporation;
Plaintiff,

v.

SHANE JEFFRIES, in her official capacity as
Ochoco National Forest Supervisor; **JAMES M.**
PEÑA, in his official capacity as Regional
Forester for Region 6 of the United States Forest
Service; and the **UNITED STATES FOREST**
SERVICE, a federal agency of the United States
Department of Agriculture,

Defendants,

OCHOCO TRAIL RIDERS, OREGON
MOTORCYCLE RIDERS ASSOCIATION;
PACIFIC NORTHWEST 4 WHEEL
DRIVE ASSOCIATION, DESCHUTES
COUNTY 4 WHEELERS; and **THE**
BLUERIBBON COALITION,

Defendants-Intervenors.

Case No. 2:17-cv-01004-SU (Lead)
Case No. 2:17-cv-01091 (Trailing)
Case No. 2:17-cv-01366 (Trailing)

CENTRAL OREGON LANDWATCH'S
MOTION FOR SUMMARY JUDGMENT
AND MEMORANDUM IN SUPPORT

Oral Argument Requested

MOTION

Plaintiff Central Oregon LandWatch (“LandWatch”) hereby submits its *Motion for Summary Judgment and Memorandum in Support*. Pursuant to LR 7.1, the undersigned certifies that the Parties have made a good faith effort to resolve the dispute but were unable to do so.

LandWatch challenges the final administrative actions by Federal Defendants Shane Jeffries, James Peña, and the United States Forest Service (“Forest Service” or “agency”) that approve a major new Off-Highway Vehicle (“OHV”) trail system on the Ochoco National Forest (“Ochoco” or “ONF”) in Central Oregon near Prineville (the “OHV Project”).¹ LandWatch’s claims against the Forest Service’s Record of Decision (“ROD”) and Supplemental Final Environmental Impact Statement (“SFEIS”) arise under the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 *et seq.*, the National Forest Management Act (“NFMA”), 16 U.S.C. §§ 1600 *et seq.*, and the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 *et seq.* LandWatch respectfully moves the Court for an order granting summary judgment in favor of LandWatch on Claims One, Two, Three, and Four of its First Amended Complaint, ECF23.²

The construction of the OHV routes and their ongoing motorized use would degrade aquatic and upland habitats, posing significant impacts to fish and wildlife, including Rocky Mountain elk, Redband trout, and Gray wolves.

The 301,580-acre Project Area contains important habitats for elk, including summer range, calving areas, and elk wallows (used by bull elk during the fall rutting season), but the current population is below management objectives. OHV routes fragment elk habitat and OHV use

¹ OHVs include any motor vehicle designed for or capable of cross-country travel on land, water, sand, snow, ice, marsh, swampland, or other natural terrain. AR25721.

Citations are to the Administrative Record (“AR”) and the Supplemental Administrative Record (“SUPP”). A Table of Citations is appended to this brief, with a crosswalk between all cited documents and their location in the AR or SUPP.

² Unless otherwise noted, citations to the docket (ECF) are to the lead case, No. 2:17-cv-01004-SU.

displaces elk, thereby affecting important behavioral cycles and threatening to reduce population levels even further. The Forest Service brushed aside the significant impacts to elk by relying on stale data and using analytical approaches the Oregon Department of Fish and Wildlife (“ODFW”) found lack a “basis in logic or science.” AR26742. Throughout the Project Area, data on aquatic habitat conditions—although outdated—show that habitat is in poor condition and Redband Trout population numbers are depressed. By increasing route densities in riparian areas and adding new stream crossings, the OHV Project would further degrade aquatic habitat in the short- and long-term. The Forest Service speculated that the OHV Project would be consistent with its legal obligation to promote recovery of aquatic habitat, but failed to substantiate this empty claim. Gray wolves, listed as Endangered in the Project Area, increasingly are using the Ochoco and Project Area as a dispersal corridor. Verified sightings are on the rise, and ODFW has tracked dispersing radio-collared individuals. Despite the presence of dispersing wolves and wolf habitat in the Project Area, the Forest Service arbitrarily concluded that the OHV Project would result in “no effect” to wolves.

The agency’s conclusions about the OHV Project’s impacts lack a rational basis, and the decisionmaking process was contrary to (1) NEPA’s requirement to take a hard look at the direct, indirect, and cumulative impacts of the OHV Project when added to existing conditions; (2) NFMA’s requirement to demonstrate consistency with the Standards and Guidelines of the Ochoco Land and Resource Management Plan (“Ochoco Forest Plan”), which set protections for fish and wildlife resources; and (3) the ESA’s requirement to “consult” with the U.S. Fish and Wildlife Service (“FWS”) under Section 7 over the OHV Project’s impacts on endangered wolves.

Because the agency has approved a project in a manner that is inconsistent with its legal obligations, LandWatch respectfully requests that the Court hold unlawful and set aside the approval of the OHV Project. Specifically, LandWatch respectfully requests that this Court grants LandWatch declaratory and injunctive relief:

1. Declare that the Forest Service has violated NEPA and its implementing regulations by issuing the SFEIS and ROD without satisfying its legal obligations to take a hard look at the impacts of the Ochoco Summit Trail System Project and its legal obligation to meaningfully involve the public in the decisionmaking process;
2. Declare the Forest Service has violated NFMA and its implementing regulations by authorizing a project that is inconsistent with the governing forest plan;
3. Declare that the Forest Service has violated the ESA and its implementing regulations by issuing the SFEIS and ROD without satisfying Section 7 Consultation requirements;
4. Declare that the Forest Service's issuance of the SFEIS and ROD is arbitrary, capricious, an abuse of discretion, not in accordance with, and/or without observance of procedure required by law under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), (D);
5. Set aside and vacate the Ochoco Summit Trail System Project SFEIS and ROD and remand to the Forest Service for additional consideration;
6. Issue preliminary and permanent injunctive relief prohibiting the Forest Service from authorizing implementation of the OHV Project until such time as the Forest Service can demonstrate compliance with the requirements of NFMA, NEPA, the ESA, and the APA;
7. Award LandWatch its reasonable fees, costs, expenses and disbursements, including reasonable attorneys' fees associated with this litigation pursuant to the Equal Access to Justice Act, the ESA, or other applicable statutes; and
8. Grant such additional relief as the Court deems just and proper.

In support of this Motion, LandWatch respectfully refers the Court to the following *Memorandum in Support*.

MEMORANDUM

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GLOSSARY OF TERMS

Agency	United States Forest Service
APA	Administrative Procedure Act
AR	Administrative Record
DEIS	Draft Environmental Impact Statement
CEQ	Council on Environmental Quality
CWA	Clean Water Act
EIS	Environmental Impact Statement
ESA	Endangered Species Act
Ex.	Exhibit
FEIS	Final Environmental Impact Statement
FWS	United States Fish and Wildlife Service
INFISH	Inland Native Fish Strategy
LandWatch	Central Oregon LandWatch
LWD	Large Woody Debris
NEPA	National Environmental Policy Act
NFMA	National Forest Management Act
NMFS	National Marine Fisheries Service
m	Meters
mi	Miles
mi/mi ²	Miles per Square Mile (a unit of measure used to calculate route density)
MIS	Management Indicator Species
ODFW	Oregon Department of Fish and Wildlife
OHV	Off-highway Vehicle
OHV Project	Ochoco Summit Trail System Project
ONF or Ochoco	Ochoco National Forest
RHCA	Riparian Habitat Conservation Area
RMO	Riparian Management Objective
ROD	Record of Decision
Route	Road or OHV Trail
SDEIS	Supplemental Draft Environmental Impact Statement
SFEIS	Supplemental Final Environmental Impact Statement
SUPP	Supplemental Administrative Record
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INTRODUCTION

The Forest Service has approved a 137-mile OHV trail system through old-growth forests, irreplaceable shrub-steppe habitat, and sensitive watersheds in the heart of the Ochoco. In this less-traveled area in Central Oregon, people enjoy countless recreational opportunities, including hiking, fishing, hunting, horseback riding, wildlife and wildflower viewing, and winter snowshoeing. These opportunities attract residents and visitors alike, contributing millions of dollars each year to the local economies of Prineville, Mitchell, and surrounding communities.

The OHV Project, however, would cause irreversible damage to the fish and wildlife habitat that drives these recreational activities. The new OHV routes would fragment habitat, reduce hiding cover, and inhibit movement for species like Rocky Mountain elk, a prized hunting species, and endangered Gray wolves. By adding a number of new stream crossings, the OHV Project would contribute significant amounts of fine sediment to Project Area streams, adversely affecting aquatic habitat for native Redband trout. The impacts of the new OHV trail system would be additive to impacts from past, ongoing, and future logging projects, grazing, and unauthorized OHV use.

The OHV Project is opposed by nearly every Ochoco user-group, ODFW, and community and conservation organizations. The broad opposition to the OHV Project is founded in part on large gaps in basic baseline data, including the location of key elk habitat, current stream conditions, and present patterns of unauthorized OHV use. The agency made vague promises to conduct further studies on habitat conditions and test a speculative hypothesis that unauthorized OHV use would cease upon implementation of a designated OHV trail system. But this “act first, study later” approach cannot be reconciled with the duty to take a careful and searching hard look at the OHV Project’s impacts *before* implementation. Given the known, quantifiable impacts of OHVs on elk, Redband trout, and wolves, the Forest Service’s approval of the OHV Project is arbitrary, capricious, and contrary to the agency’s duties under NEPA, NFMA, and the ESA.

FACTUAL AND ADMINISTRATIVE BACKGROUND

I. OHV Users Currently Have Access to A Significant Number of Motorized Routes, Yet The OHV Project Would Impact Thousands of Additional Acres.

OHV users currently have access to a wealth of routes for riding. Across the 845,598-acre Ochoco, 1,388 miles of road are open to OHVs, with an additional 26 miles of OHV trails. AR25301–02. In the 301,580-acre Project Area, about 659 out of a total 1,820 miles of roads are open to OHV use. AR25472 (t. 130); 25280, 25283 (t. 8). Additionally, there are more than 700 miles of unauthorized OHV routes, some of which are user-created trails, and others of which are on administratively “closed” roads. AR25303. Although use of unauthorized routes is unlawful under the Ochoco Travel Management Plan, AR12689, many closed roads and user-created trails receive motorized use—regardless of their administrative designation. AR26746. In Central Oregon, there are approximately 1,000 miles of specially designated OHV routes, AR12124, on top of many more thousands of miles of road open to OHV use. AR26452.

Although there are considerable opportunities for OHV users in and around the Project Area, these users comprise a very small subset of Ochoco users. Most visitors to the Ochoco cite wildlife viewing, camping, fishing, and hunting, as their top picks for recreation. AR25659–60; *see also* AR26496 (chart showing primary uses of the Ochoco). Indeed, “most visitors participate in non-motorized activities.” AR25659. In contrast, OHV users comprise only about 3% of users on the Ochoco. AR25660. The impacts of OHV users, however, are disproportionately large. Motorized use of OHV routes substantially increases movement rates by elk, causing a series of cascading effects including higher stress levels, increased energetic costs, and reduced productivity. *See* AR26930. Construction and use of OHV routes create a host of disturbances to aquatic habitat—including increased sediment deposition and water temperature. AR26853. Given the noise and disturbance impacts from OHV use on roads and trails, the Forest Service identified a “road effects zone”—a high disturbance corridor of 200m on each side of a road or motorized trail. AR25473.

Despite the abundance of OHV routes in central Oregon, the relatively low volume of OHV users, and their disproportionate impacts, the Forest Service authorized an OHV trail system that “effectively occupies half of the Ochoco and will likely negatively impact non-motorized recreation activities throughout the area.” AR24343. The selected alternative (Alternative 5 plus one route from Alternative 2) designates 137 miles of motorized trails for OHV use, and involves new construction, re-opening roads currently designated as “closed,” and opening roads previously planned for decommissioning. *See* AR28735–37.³ After implementation, nearly half of the Project Area falls within the road effects zone—just from administratively “open” roads and trails. *See* AR25474. According to ODFW: the OHV Project would “compromise the [Project Area’s] long-term quiet non-motorized recreational activities which include fishing and wildlife viewing.” AR15226.

II. The OHV Project Increases Route Densities and Motorized Use Within Elk Habitat.

A. The Project Area provides calving, rutting, and security habitat, but despite management protections for these habitats, the elk population is declining.

Rocky Mountain elk (*Cervus canadensis nelsoni*) are a big game species designated as an Ochoco Management Indicator Species (“MIS”) because their well-being can indicate the well-being of other species that use similar habitat. AR25498; AR1841. Many different habitats are crucial to elk survival, including calving grounds to give birth, open foraging areas to find food, wallow areas to attract mates, and concealed security habitat to provide hiding cover. ECF23, 27 ¶ 120. According to ODFW, “almost 2/3 of the project area is classified as summer range which provides important fawning and calving habitat.” AR24341. The Project Area also contains elk wallows—low-disturbance areas used by bull elk during the fall rutting season. AR26928.

³ The agency also described “concealment, rehabilitation, or restoration of unauthorized and unwanted routes” as a feature of the OHV Project, AR25252, but did not identify the location or quantity of routes, a plan for carrying out these activities, or a dedicated funding source for doing so.

The Ochoco Forest Plan provides important management protections for elk habitat, including a restriction on disturbance activities during elk calving and rutting seasons. *See* AR1418; *see also* AR1621 (requiring the Forest Service to minimize the effects of management activities on elk wallows). The Ochoco Forest Plan also requires the Forest Service to provide sufficient cover and concealment habitat, sufficient forage, and low road-densities. AR1670. The overall goal is to meet ODFW’s elk population management objectives. AR1459. The current population management objective for the Ochoco management unit is 4,600 elk, but this objective has not been met since 2005. AR25511. The agency acknowledges that elk populations are “limited by habitat capability, which changes over time in response to vegetation manipulation and open road density.” AR1459.

B. The OHV Project would reduce the amount of elk security habitat and increase motorized use during calving and rutting seasons.

The presence of motorized routes (roads and OHV trails) on the landscape fragments elk habitat, and the use of these routes impacts elk movement. Studies consistently show that motorized recreational activities have a substantial effect on elk behavior. SUPP429. Elk are highly susceptible to noise impacts—especially from OHV use—and elk may respond by moving long distances, leaving areas that lack sufficient security cover. AR25515; AR25512; *see also* AR5709 (in areas of higher route densities, elk exhibit higher levels of stress and increased movement rates). Flight responses as a reaction to OHV use cause a reduction in feeding time, depleting fat reserves needed for over-winter survival. AR25516. The increase of roads and trails on public lands fragments and eliminates habitat, displacing elk to private lands, AR26742, which can result in a need to cull the population to prevent agricultural damage. AR26743; AR26934.

To quantify the OHV Project’s impacts on elk, the Forest Service measured the amount of elk “security” habitat, which the agency defined as forested stands greater than 250 acres in size and greater than ½ mile from an open route, relying on Hillis (1991). AR25513; AR26751. For its

baseline, the agency only accounted for “administratively open” roads—862 miles. AR25518.⁴ Adding the 107 miles of new OHV routes⁵ to the baseline, (862+107=969mi), the agency disclosed that there would be 42,431 acres of elk security habitat post-implementation. AR25520 (t. 144). Elsewhere in the SFEIS, the agency disclosed that there are far more motorized routes on the landscape at baseline. AR25280 (1,820mi road), 25303 (700mi user-created trails). Adding the new OHV routes to this baseline results in a figure nearly *three times* what the agency used for its analysis of elk impacts (1,820+700+107=2,627). The agency did not disclose the amount of security habitat when accounting for all of these motorized routes, even though it admitted that many closed roads are receiving motorized use, AR25532, and the network of user-created trails is growing. AR25303.

The OHV trail system would be open to motorized use from June 1 through September 30 each year. AR28734. There are timing restrictions on construction activities within “known” elk calving habitat and wallows during the calving (May 15 to June 30) and fall rutting seasons (September 1 to October 15). AR28759–60; AR1670. The SFEIS and ROD do not identify any known calving habitat and wallows to which the timing restrictions apply, however, because the agency does not know where elk are using the Ochoco for these important life cycle functions. Nor is there a timing restriction that applies to motorized use of the OHV trails, meaning that elk have only 15 days during the calving and rutting seasons that are free from motorized disturbance. According to ODFW “[t]he disturbance associated with this project will impact calving * * * time periods as well as critical summering habitat for * * * big game species.” AR20853.

III. The OHV Project Adds New Routes And Crossings In Redband Trout Habitat.

Redband trout (*Onchorhynchus mykiss gairneri*) are a subspecies of Rainbow trout native to the Columbia Basin east of the Cascade Crest. AR26856. Redband trout are designated both as an

⁴ This figure is derived from the SFEIS road density analysis, which calculates current open road density at 1.83 mi/mi² in the 301,580-acre (471.14 mi²) Project Area (1.83*471.14 = 862).

⁵ The remaining ~30 miles of the system would be on existing open roads. AR28734.

Ochoco MIS and a “Sensitive Species.” *See* ECF23, 27 ¶ 179.⁶ Redband trout populations “are generally healthy in streams with year around flow, instream cover, suitable water temperatures, clean spawning gravel, and an intact riparian zone. In streams where these habitat components are lacking, trout populations are significantly reduced * * *.” AR18257; *see also* AR25465. LandWatch’s expert Amy Stuart was the principal author of a comprehensive inventory of fish populations in the Crooked River Basin (of which the Project Area is a part), which found that “the current conditions of most streams in the Crooked River basin are degraded, and fish habitat and production are substantially diminished from historical times.” SUPP1649–50. Crooked River Redband trout populations are considered depressed to less than 10% of historical numbers. AR25465.

A. Project Area streams are subject to INFISH, but suffer from degraded conditions and show no signs of improvement.

To reduce the risk of loss of native fish populations like Redband trout, and reduce potential negative impacts to habitat, the Forest Service adopted the Inland Native Fish Strategy (“INFISH”) in 1995. *See* AR2546. INFISH amends the forest plans of 22 forests throughout the inland west, including the Ochoco Forest Plan, ECF23, 27 ¶ 184, to add substantive standards for inland native fish habitat condition and function. AR2549. INFISH provides “quantifiable measures of stream and streamside conditions that define good fish habitat,” called “Riparian Management Objectives” (“RMOs”). AR2679. INFISH sets RMOs for the following habitat “indicators”: (1) pool frequency; (2) water temperature; (3) large woody debris (“LWD”); (4) bank stability; (5) lower bank angle; and (6) width/depth ratio. AR2564.⁷ RMOs are considered the best watershed scale information

⁶ “Sensitive Species” are those “[p]lant or animal species which are susceptible or vulnerable to activity impacts or habitat alterations * * * that are recognized by the Regional Forester as needing special management to prevent placement on Federal or State lists.” AR1850; *see also* AR1750.

⁷ While there is no specific RMO for fine sediment, sediment delivery impacts nearly all habitat features. AR26905 (RMOs for pool frequency, width/depth ratio, and temperature are particularly susceptible to increased sediment delivery).

available, and “provide the criteria against which attainment or progress toward attainment of [INFISH] goals is measured.” AR2564.

INFISH also establishes Riparian Habitat Conservation Areas (“RHCAs”), or those portions of watersheds where riparian dependent resources receive primary emphasis and where management activities are subject to specific Standards and Guidelines. AR2549, 2566. These areas include traditional riparian corridors, wetlands, intermittent streams, springs and seeps, and other areas that help maintain the integrity of aquatic ecosystems. AR25229. INFISH Standards and Guidelines apply to activities within RHCAs, such as recreation management projects. Applicable to the OHV Project, INFISH RM-1 requires the Forest Service to:

Design, construct and operate recreation facilities, including trails and dispersed sites, in a manner that does not retard or prevent attainment of the [RMOs] and avoids adverse effects on inland native fish. Complete watershed analysis prior to construction of new recreation facilities inside [RHCAs] within priority watersheds.

AR2571.⁸ “Watershed analysis” is a procedure for gathering critical baseline information on how a watershed functions. AR2637; AR2683 (a “systematic procedure for characterizing watershed and ecological processes to meet specific management and social objectives.”).

The Project Area contains about 138 miles of fish bearing streams within nine watersheds. AR25365. For its analysis of the OHV Project’s impacts on aquatic habitat, the Forest Service measured the “existing” condition of these nine watersheds by evaluating nine habitat indicators. To determine if each habitat indicator was properly functioning, the agency used various criteria, including some of the INFISH RMOs. *See* AR25355–56.⁹ Relying on data from stream surveys that

⁸ To “retard” means to slow the rate of recovery below the near natural rate of recovery if no additional human caused disturbance was placed on the system.” AR2565. “Adverse effects” include short- or long-term management-related impacts of an individual or cumulative nature, such as mortality, reduced growth, or other adverse physiological or behavioral changes. AR2672.

⁹ The habitat indicators measured were: shade, temperature, bank stability, pool frequency, pool quality, bank width/depth ratios, physical barriers, fine sediment, and LWD. *Id.* The [con’]t]

in many cases was more than 15 to 20 years old, the agency rated aquatic habitat as “fair/poor in the majority of the project subwatersheds * * *.” AR25353.¹⁰ 13 Project Area streams are listed as water quality impaired under Section 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d), due to high temperatures. AR25402. In many streams, fine sediment levels are above 20%, AR20842, the level above which severe consequences for Redband trout are expected to occur. AR26863; AR26865. In most cases, INFISH RMOs are not being met, and are showing no signs of improvement. *See* AR15228–30. As ODFW summarized, “significant water quality impacts are currently occurring,” and conditions are likely worse than presented in the SFEIS given the stale data. AR15228.

B. The OHV Project is a new, permanent source of aquatic habitat impacts.

The OHV Project adds 17.3 miles of new routes within 300 feet of streams—including 12.4 miles within RHCAs. AR25273, 25444. OHVs driving on gravel and dirt routes create a disturbance to route surfaces that causes sedimentation in streams. AR25352. Increases in stream temperatures are strongly correlated with route construction next to stream channels. AR26837. The OHV Project also involves 79 stream crossings—where routes cross streams by fords or bridges, or where routes are constructed over streams by use of culverts—bringing the total number of Project Area stream crossings to 571. AR25445; AR25433. Stream crossings are a major vector for degradation of a host of riparian and stream conditions, including LWD, pools, fine sediment, water temperature, runoff regimes, and noxious weed spread in riparian areas. AR26902; *see also* AR26854–55.

Within the Project Area, the Forest Service identified Deep Creek and its tributaries as providing some of the few remaining “premier trout fishing opportunities in the region due to its

agency used some of the INFISH RMOs, but others were modified. AR25355. The agency did not rely on or cite to any watershed analysis to support the modifications.

¹⁰ The agency somehow rated the Howard Creek subwatershed as exhibiting overall “fair” conditions where data on shade, pool frequency, physical barriers, and temperature are rated “poor,” and the agency had no data on fine sediment, pool quality or width/depth ratios. AR25375–76. Only two of the nine habitat indicators were rated “good.” *See id.*

diverse, relatively intact nature and abundant cold water and spring creeks throughout the watershed.” AR16902–03; *see also* AR26732 (ODFW recognizing Deep Creek as harboring “one of the more robust redband trout populations in the Crooked River subbasin”). The OHV Project adds 5.1 miles of new trail within 300 feet of streams and 15 stream crossings in the Deep Creek Watershed, AR25445,¹¹ bringing the total number of stream crossings to 183. AR25443.

The agency acknowledged that the OHV Project “would result in more effects to the streams and watersheds within the [Project Area]” as compared to the “no action” alternative, AR25440, and further acknowledged that “[s]hort-term sediment inputs from trail construction, especially at stream crossings may have negative effects during construction when turbidity is high.” AR25446. According to ODFW: “Every subwatershed is degraded and adding 137 miles of permanent OHV trails including 39 new stream crossings as proposed in Alternative 5 (SFEIS p49) will not improve the condition of the Project Area.” AR26731.

IV. Known To Be Dispersing Through the Project Area, Endangered Wolves May Be Affected By the OHV Project’s Increased Route Densities and Vehicle Traffic.

Gray wolves (*Canis lupus*) are a species of carnivore native to Oregon. *See* AR28540. Wolves occurring in the Project Area are listed as “Endangered” under the ESA. *See* ECF23, 27 ¶ 104; AR28524. Wolves primarily prey on medium and large mammals, including deer, caribou, moose, and elk. ECF23, 27 ¶ 104; 68 Fed. Reg. at 15,804, 15,804 (Apr. 1, 2003). Elk are a particularly important prey species; research conducted in Oregon showed elk remains at over 60% at wolf prey acquisition sites. AR28533–34; *see also* AR28591 (“elk are typically the primary prey of wolves”).

Wolves are social animals, normally living in packs of two to twelve animals. ECF23, 27 ¶ 104; *see also* 68 Fed. Reg. at 15,805. Yearling wolves frequently disperse from their natal packs, possibly becoming nomadic or claiming suitable unoccupied habitat with a member of the opposite

¹¹ The subwatersheds in Deep Creek are Jackson (2 new miles, 8 crossings), Little Summit Prairie (0.7 new miles and 2 crossings), and Lower Deep Creek (2.0 miles and 5 crossings).

sex to begin their own territorial pack. *Id.* According to the FWS, “[t]he dispersal of wolves from their natal packs and territories is a normal and important behavioral attribute of the species that facilitates the formation of new packs, the occupancy of vacant territories, and the expansion of occupied range by the ‘colonization’ of vacant habitat.” 76 Fed. Reg. 81,665, 81,673 (Dec. 28, 2011). ODFW views the ability of wolves to disperse from their natal territory as critical to the success of wolf management in Oregon. AR28547.

The Forest Service acknowledges that dispersal/transient habitat is present in the Project Area. AR25477. Important predictors of wolf habitat include (1) forested areas, (2) public ownership; and (3) prey availability. AR28559; AR26744. In 2015, ODFW mapped potential habitat in Oregon for wolves based on habitat predictors, revealing that much of the Project Area comprises suitable wolf habitat. AR28677–78. In fact, wolves are increasingly using the Ochoco and Project Area. A Forest Service biologist in December 2016 remarked that “[w]e have had numerous collared wolves within the last two years in and around the Forest * * *. In addition, our number of unconfirmed public sighting reports have increased over that time as well * * *.”). AR27937. These reports are corroborated by ODFW’s map of radio-collared wolf activity, showing activity in the Ochoco and the Project Area. AR23788; *see also* AR27930. The record evidence demonstrates that the Ochoco and Project Area is becoming an important connective corridor between occupied habitat in the Blue Mountains of Northeast Oregon and the Southern Oregon Cascades. AR26941.

Despite acknowledging suitable wolf habitat in the Project Area and verifiable wolf sightings in recent years, the Forest Service determined that the OHV Project would have “no effect” on wolves. AR25479. According to ODFW and the best available science, however, the OHV Project threatens to impact wolves in two ways. AR26743. For one, the OHV Project would affect the distribution and population of elk, the wolf’s primary prey. According to ODFW, elk avoid areas open to motorized vehicles, and avoidance is stronger as motorized use increases. *Id.* The OHV

Project would increase both open route densities and traffic rates, which would cause shifts in distribution, increase vulnerability to harvest, and increase stress levels and energetic costs—ultimately threatening population-level impacts to elk. AR26743–44. Second, the OHV Project would negatively influence suitable wolf habitat. Wolf persistence is strongly correlated with public ownership; by shifting prey to private lands, wolves are less likely to persist due to increased human conflicts. AR27644; AR26942 (wolves will follow their prey down to private lands). Moreover, areas of suitable wolf habitat are associated with low road densities and human presence; by increasing route densities and human use, the OHV Project would decrease the habitat suitability. *Id.*

V. The Forest Service Authorized the OHV Project Despite Unprecedented Opposition.

The OHV Project went through two rounds of administrative review over a seven-year period, facing opposition from the public and experts at every turn. The Forest Service began the scoping process for the OHV Project in 2009. AR8578; 36 C.F.R. § 220.4(e). The agency identified four significant issues for study during the NEPA process, including (1) impacts on water quality and degradation of fish habitat and (2) impacts on big game habitat. AR25232–34. The agency’s DEIS received 234 separate comments. ECF23, 27 ¶ 77. The FEIS and draft ROD received 24 administrative “objections.” *Id.*; *see also* 36 C.F.R. Part 218. LandWatch, ODFW, and others told the Forest Service that the OHV Project should not move forward until the agency collects baseline data on existing conditions, including the miles of roads and user-created trails receiving motorized use. *See, e.g.*, AR17725 (picture of road marked as administratively “closed” that is clearly open to motorized use). In July 2014, the agency withdrew the draft ROD. ECF23, 27 ¶ 78.

Despite the significant opposition to the OHV Project during the first administrative process, the agency returned to the public with essentially the same OHV Project in an SDEIS in February 2016. The agency did not update its analysis of baseline conditions, relying on the same outdated information as the first round for road densities, elk special habitats, and aquatic habitat

indicators. This time, the agency received over 1,100 comments. AR25728. The agency released its SFEIS and draft ROD in September 2016 and received 28 separate objections—the most ever received by the Ochoco for a site-specific project. ECF23, 27 ¶ 80.

LandWatch timely filed comments and objections during the NEPA processes. *See* AR15280, 17670, 24187, 26760. In 2014 and again in 2016, LandWatch provided the Forest Service with the expert reports of three scientists who provided key information on the OHV Project's impacts. Ms. Amy Stuart is a fisheries biologist with over 34 years of experience, including 30 years with ODFW. AR26833–95. Mr. Jonathan Rhodes is a hydrologist with over 30 years of experience as an expert consultant. AR26897–925. Mr. Mike Gerdes is a wildlife biologist with over 34 years experience, including 25 with the Forest Service. AR26927–76. ODFW also “participated in every phase and consistently recommended Ochoco select Alternative 1 or No Action Alternative.” AR26728; *see also* AR15225; AR20836; AR24340. ODFW cited “serious concerns” about negative impacts to fish and wildlife resources that were not adequately addressed by the Forest Service's NEPA documents. *See id.* ODFW told the agency that the project is “premature,” and that there was a need to first undertake “a comprehensive assessment to address impacts and identify strategies for mitigating impacts to fish and wildlife resources from the entire system of roads and trails and the associated motorized use by the public.” AR8940; *see also* AR12780 (ODFW memo requesting agency to drop the OHV Project, based on the “extensive OHV system already in existence”).

Although it acknowledged various gaps in the underlying analysis, the agency moved forward without reconciling the substance of the 28 objections, AR28093–94, instead pledging future monitoring and mitigation during implementation. AR28782–83. The agency signed the final ROD on July 27, 2017. AR28733. LandWatch, whose members include local community members, former Forest Service employees who worked on the initial phases of the OHV Project, hunters, and fishers, timely filed suit on July 13, 2017. ECF1 [01091].

LEGAL BACKGROUND

I. National Environmental Policy Act

NEPA is our nation’s charter for protecting the environment. *N. Idaho Cmty. Action Network v. U.S. DOT*, 545 F.3d 1147, 1153 (9th Cir. 2008). NEPA and CEQ regulations set forth “action-forcing” procedures designed to ensure that an agency takes a “hard look” at detailed information concerning significant environmental impacts, while guaranteeing that the relevant information will be made available to the public so it may play a role in both the decisionmaking process and the implementation of the decision. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349–51 (1989); *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004).

In particular, NEPA requires federal agencies to prepare a detailed EIS for “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). The environmental consequences section of the EIS “forms the scientific and analytic basis” for the evaluation of a project, and requires an agency to fully and fairly discuss direct and indirect environmental impacts as well as any means to mitigate adverse impacts. 40 C.F.R. § 1502.16.¹² In carrying out this obligation, the agency must ensure scientific integrity, 40 C.F.R. § 1502.24, and disseminate high quality information to the public. *Id.* § 1500.1(b); *WildEarth Guardians v. Mont. Snowmobile Ass’n*, 790 F.3d 920, 925 (9th Cir. 2015).

To properly account for a project’s impacts, the agency must first “describe the environment of the areas to be affected or created by the alternatives under consideration.” 40 C.F.R. § 1502.15. In particular, an agency must maintain and disclose adequate baseline data about resources it manages to allow for evaluation of a project’s impacts. *Neighbors of Cuddy Mtn v. U.S. Forest Serv.*, 137 F.3d 1372, 1379–80 (9th Cir. 1998). If the data is incomplete, the agency must disclose this fact. 40

¹² “Direct effects” are those effects “which are caused by the action and occur at the same time and place.” 40 C.F.R. § 1508.8. “Indirect effects” are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” *Id.*

C.F.R. § 1502.22. The agency also has a duty to consider the “cumulative effects” of a project. 40 C.F.R. § 1508.25.¹³ According to the Ninth Circuit: “To ‘consider’ cumulative effects, some quantified or detailed information is required. * * * General statements about ‘possible’ effects and ‘some risk’ does not constitute a ‘hard look’ absent a justification regarding why more definitive information could not be provided.” *Cuddy Mtn.*, 137 F.3d at 1379–80 (citations omitted).

II. National Forest Management Act

“NFMA sets forth the statutory framework and specifies the procedural and substantive requirements under which the Forest Service is to manage National Forest System lands.” *Lands Council v. McNair*, 537 F.3d 981, 988 (9th Cir. 2008). NFMA requires the Forest Service to develop, maintain, and revise a forest plan for each National Forest. 16 U.S.C. § 1604(a). “In order to ensure compliance with the forest plan and [NFMA], the Forest Service must conduct an analysis of each ‘site specific’ action * * * to ensure that the action is consistent with the forest plan.” *Idaho Sporting Cong. v. Rittenhouse*, 305 F.3d 957, 962 (9th Cir. 2002); *see also* 16 U.S.C. § 1604(i). To comply with NFMA, the agency here had a duty to demonstrate that the OHV Project is consistent with the Ochoco Forest Plan, as amended by INFISH. *See id.*

III. Endangered Species Act

Congress enacted the ESA to “provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered and threatened species * * *.” 16 U.S.C. § 1531(b). The heart of the ESA is Section 7, which prescribes substantive and procedural duties. Substantively, a federal agency must “insure that any action authorized, funded, or carried out” by the agency “is not likely to jeopardize the continued existence of any endangered species or threatened species or result in

¹³ “Cumulative effects” are the “impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions * * *.” 40 C.F.R. § 1508.7.

the destruction or adverse modification of habitat of such species.” 16 U.S.C. § 1536(a)(2). To carry out this substantive mandate, a federal agency must consult with the FWS if an action “may affect” any listed species. *Id.* § 1536(a)(2)–(c); 50 C.F.R. § 402.14(a); *see also Cal. ex rel. Lockyer v. U.S. Dep’t of Agric.*, 575 F.3d 999, 1018 (9th Cir. 2009). An agency may avoid the consultation requirement only where no effect is found. 50 C.F.R. § 402.14; *Cal ex rel. Lockyer*, 575 F.3d at 1019.

STANDARD OF REVIEW

The Ninth Circuit endorses the use of Rule 56 summary judgment motions to resolve claims brought pursuant to the APA. *See Nw. Motorcycle Ass’n v. U.S. Dep’t of Agric.*, 18 F.3d 1468, 1471–72 (9th Cir. 1994). LandWatch’s claims are reviewed pursuant to the arbitrary and capricious standard of the APA, 5 U.S.C. § 706(2). *Or. Natural Res. Council Fund v. Goodman*, 505 F.3d 884, 889 (9th Cir. 2007); *W. Watersheds Proj. v. Kraayenbrink*, 632 F.3d 472, 481, 496 (9th Cir. 2011). The agency must “articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Mtr. Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Agency action is arbitrary and capricious where the agency:

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.

Id. In applying this standard of review, courts are to conduct a “thorough, probing, in depth review.” *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971).

ARGUMENT

A diverse group of interests has challenged approval of the OHV Project and the underlying analysis on account of the significant impacts of OHV routes to fish and wildlife habitat. The Forest Service has tried to minimize the significant impacts by stating that the selected alternative is environmentally preferable to the status quo, based on a hypothesis that the new trail system would mitigate impacts from unauthorized OHV use. The agency, however, failed to cite any record

evidence showing that building a destination OHV trail system is a viable way to control unauthorized use, and failed to identify specific mitigation and monitoring plans or secure funding sources. Nor does the agency have baseline data on current conditions—the necessary foundation for testing the hypothesis.¹⁴ As shown below, the agency failed to take a careful and searching hard look at the significant direct, indirect, and cumulative impacts of construction and use of 137 miles of OHV routes. The agency’s speculative hypothesis and vague plans for during-implementation mitigation and monitoring do not save the legally deficient analysis.

I. LandWatch Has Standing to Bring This Case.

LandWatch is a non-profit organization whose organizational mission and members’ interests are harmed by the Forest Service’s decision. LandWatch’s members are long-time Central Oregon residents who use and enjoy the Ochoco and Project Area for a variety of recreational, scientific, and spiritual purposes and have firm plans to return. Mr. Robert Rock worked in a variety of roles for the Forest Service and has plans to hunt, hike, fish, and camp in the Ochoco in 2018. *See* Ex. 4 at ¶¶ 4, 8. Ms. Barbara Franano was the lead Fishery Biologist during the initial phases of the OHV Project, and is particularly concerned about the OHV Project’s degradation of fish habitat, lessening her chances of taking her grandchildren fishing. Ex. 1 at ¶¶ 6, 22. Mr. Dean Grover also worked for the agency, and is concerned that the reliance on monitoring will not effectively address significant impacts to fish habitat—thereby jeopardizing future family camping and fishing trips. Ex. 2 at ¶¶ 4, 20. Ms. Marilyn Miller, who enjoys birding and wildlife photography in the ONF, worries about the new trail system increasing access for illegal OHV riding. Ex. 3 at ¶¶ 9–11, 14.

“[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be

¹⁴ Tellingly, while the ROD posits that the Alternative 5 is environmentally preferable, the SFEIS contains many contradictory statements—underscoring the need for baseline data on existing conditions. *See, e.g.*, AR25405 (No Action Alternative poses least adverse impacts to streambanks).

lessened by the challenged activity.” *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 180–81 (2000).

Opportunities to engage in hunting, fishing, camping, and wildlife photography for LandWatch’s members would be irreparably damaged by the OHV Project, but redressed by the remedy of vacating the SFEIS and ROD. *See Lujan v. Def. of Wildlife*, 504 U.S. 555, 560–61, 572–73 n.7 (1992).

II. The Forest Service Failed to Disclose and Consider the OHV Project’s Impacts on Elk Habitat in a Manner Consistent With Its Duties under NEPA and NFMA.

A. The presentation of the environmental baseline for elk special habitats was arbitrary and contrary to NEPA.

There is no information in the SFEIS and project record about the current location and distribution of elk calving and rutting habitat in the Project Area. Despite repeated requests from the public and ODFW to collect this important data prior to approval, the agency moved forward, pledging to conduct monitoring during implementation. The Ninth Circuit, however, prohibits this type of “act first, study later” approach for gathering key baseline data. *See N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1084–85 (9th Cir. 2011).

The Forest Service recognizes elk rutting habitat, or “wallows” as “[f]ragile areas * * * which exhibit sensitivities that require special care.” AR25334. The agency admits there are elk wallows in the Project Area, ECF23, 27 ¶ 127, but the SFEIS and project record do not identify the location, quantity, or quality of any wallows. Despite the importance of this special habitat, the agency provided the public with zero baseline data on elk wallows.¹⁵

Regarding elk calving habitat, the agency relied on telemetry data from 1989–94. *See* AR25529, 25260.¹⁶ The agency claimed to have located trails away from “[a]reas with high concentrations of elk during the calving period based on telemetry data collected by [ODFW].” *See*

¹⁵ The agency made no claim that the cost of obtaining this relevant information was too exorbitant. *See* 40 C.F.R. § 1502.22(b).

¹⁶ The agency also assessed what it termed “potential” elk calving habitat, AR25528–29, but admitted that these “potential” elk calving areas “are not necessarily areas of use.” AR25826.

AR28742; *id.* (relying on telemetry data to describe areas of high elk use). Since 1994, however, there have been dozens of habitat-disturbing activities in the Project Area. *See* AR25277–79 (t. 7) (listing vegetation management and other projects); *see also* AR26928 (disturbance by humans during calving season decreases reproductive success); SUPP20119 (“If elk are left inadequate calving-season habitat and can no longer escape disturbance * * * then population levels may decline). But the agency never addressed whether past and ongoing projects from the past 25 years have affected the quality, quantity, and location of elk calving habitat.

After the NEPA process, in response to public opposition over the reliance on the stale data and lack of an adequate baseline *e.g.*, AR26811, AR27966, AR28689, the Forest Service fell back on future monitoring. The agency acknowledged that “[e]lk calving sites are a particular concern,” and stated that new telemetry data would help facilitate implementation. AR27961; *see also* AR27962 (agency would like to have a dialogue over getting data on elk calving sites). The agency admitted to “the lack of data,” AR27962, and pledged to tweak implementation if monitoring “indicates that potential habitat is actually being used as calving habitat * * *.” AR28128. The agency also proposed mitigation measures “should any elk wallows be identified along the trail system * * *.” AR28760.¹⁷

Circuit precedent forecloses this “act first, study later” approach for gathering critical baseline information. *See N. Plains*, 668 F.3d at 1084 (NEPA requires a determination of “the projected extent of the environmental harm to enumerated resources *before* a project is approved”). Mitigation and monitoring measures “may help alleviate impact *after* construction, but do not help to evaluate and understand the impact *before* construction.” *Id.*; *see also Or. Natural Des. Ass’n v. Jewell*, 840 F.3d 562, 571 (9th Cir. 2016) (“Mitigation measures, however, while relevant to the adequacy of

¹⁷ The agency did not address the practical limitations of trying to collect baseline data on how elk are using various habitats (absent new disturbances) during implementation of a habitat-disturbing project—when effects are already occurring. *Cf. Idaho Conserv. League v. U.S. Forest Serv.*, No. 1:16-cv-0025-EJL, 2016 U.S. Dist LEXIS 90371, at *29 (D. Idaho July 11, 2016) (approach of gathering baseline data after project approval “puts the cart before the horse”).

an environmental analysis, are not a panacea for inadequate data collection and analysis.”). In *Northern Plains*, the agency proposed that surveys of sensitive plants and wildlife would be conducted after project approval, and mitigation efforts would be implemented to minimize the impact of the project. 668 F.3d at 1084. The Circuit Court pointed out that a deferred analysis of environmental impacts is inconsistent with the core purposes of NEPA. Without baseline data the agency “cannot carefully consider information about significant environmental impacts,” and even if data is to be “collected at some time in the future, the data is not available during the EIS process and is not available to the public for comment.” *Id.* at 1085. Here, by deferring the gathering of baseline data, the agency was unable to take a hard look at the OHV Project’s impacts, in violation of NEPA.

B. The Forest Service has not demonstrated that the OHV Project is consistent with the Ochoco Forest Plan and NFMA duty to protect elk special habitats.

Forest-Wide Standards and Guidelines require the agency to “Protect the character of elk calving sites. Minimize disturbance from human activity during calving season (approximately May 15 to June 30).” AR1670. The agency also must “Protect wallows during rutting season (September 1 to October 15).” *Id.* It is not clear from the record that the Forest Service is in compliance with these Standards and Guidelines, for two reasons.

1. Timing restrictions are meaningless if the agency does not know where they must apply.

The Forest Service placed timing restrictions on “project construction, re-construction, decommissioning, and maintenance activities from May 15 through June 30 within elk calving areas.” AR25260; AR28759 (making clear that the timing restrictions only apply to “known” elk calving areas). These same restrictions would apply between September 1 through October 15 within “known” elk wallows. AR25260; AR28760. As described above, however, the agency does not have an accurate inventory of existing wallows and calving sites.

There is no indication that the agency mapped or otherwise located specific elk wallows to which the Forest Plan timing restriction would apply. Nor does the SFEIS contain any maps or descriptions of “known” elk calving habitat. Although the agency stated that calving habitat was “avoided” based on 25+ year-old telemetry data, AR25529, the agency never explained which, if any, calving areas would be subject to the timing restriction. Accordingly, the Forest Plan timing restrictions do not apply to *any* locations in the Project Area—despite the acknowledgement that both elk wallows and calving habitat are present. The agency has therefore failed to explain how the OHV Project is consistent with the Ochoco Forest Plan. *Cf. Goodman*, 505 F.3d at 894–95 (where forest plan required agency to designate potentially unstable lands as “Riparian Reserves,” the failure to designate certain hazardous lands violated the forest plan and NFMA); *Cuddy Mtn*, 137 F.3d at 1377 (NFMA violation where agency provided no information on woodpecker home ranges, despite forest plan requirement to protect a certain amount of old growth within home ranges).

The agency’s yet-to-be prepared and unfunded monitoring and mitigation plan does not remedy the NFMA violation. *See* AR28782–83 (identifying “determine a wildlife effects monitoring plan” and “apply for grant funding for wildlife monitoring” as future action items). The duty to demonstrate forest plan consistency attaches at the time of the decision—not at some speculative future date. As the Supreme Court has made expressly clear, “*Before* the Forest Service can permit [a site-specific project], it must * * * ensure that the project is consistent with the [forest plan * * *.” *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 729–30 (1998) (emphasis added).

2. The timing restrictions do not apply to OHV use of the trail system.

The plain language of the Ochoco Forest Plan requires the agency to “protect the character” of elk calving sites and wallows by “minimiz[ing] disturbance from human activity” during the calving and rutting seasons. AR1670. Although the Forest Plan seasonal timing restrictions run from May 15 to June 30 for elk calving season, and from September 1 to October 15 for the rutting

season, the “season of use for motorized vehicles on the designated trail system will be from June 1 to September 30.” AR28736. The season of use thus conflicts with the Forest Plan timing restrictions by 30 days for both the elk calving and rutting seasons.

There is no dispute that motorized *use* of OHV trails disturbs elk. *See, e.g.*, AR25512 (elk disturbed by motor vehicles will leave areas that lack sufficient hiding cover); AR26927 (the noise of motor vehicles is a disturbance that affects the functional quality of habitat). Elk are particularly vulnerable during reproductive and breeding periods. AR 26928. One study showed that during the calving season, only 10 human-disturbance periods above ambient noise levels yielded no recruitment. SUPP20112. Reduced productivity of the population is a likely result of displacement of elk from high quality birthing sites to less functional sites. AR26965.

Nevertheless, the OHV Project contains no provision restricting OHV use within or near elk calving sites or wallows during the calving or rutting seasons. LandWatch specifically and repeatedly brought this issue to the agency’s attention during the administrative process. *See* AR24203; AR26965; *see also* AR26743 (ODFW: allowing motorized use during the proposed timeframe would not avoid disturbance to elk and their newly born calves). In response, the agency merely reiterated that seasonal restrictions would apply to “trail construction and maintenance activities,” AR25805—thereby skirting the issue of motorized *use* of the OHV trails. By failing to apply seasonal restrictions to motorized use of the OHV trails, the agency has failed to explain how the OHV Project is consistent with the Ochoco Forest Plan, in violation of NMFA. *See Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 961 (9th Cir. 2005) (“It is well-settled that the Forest Service’s failure to comply with the provisions of a Forest Plan is a violation of NFMA.”).

C. The agency failed to adequately disclose and consider the direct, indirect, and cumulative impacts to elk security habitat.

By increasing route densities in the Project Area, the OHV Project would impact the amount and distribution of elk security habitat. The Forest Service acknowledged that providing security

habitat is a “key element” of elk habitat management. AR25512. The agency also admitted, “there are relatively small percentages of the project area in elk security habitat.” AR25532. But the agency failed to accurately disclose and consider the scope and extent of impacts to security habitat—including when combined with past, present, and future activities impacting the same habitat.

Purporting to rely on the Hillis definition of security habitat, the agency disclosed that post-implementation, there would be 42,431 acres of elk security habitat greater than 250 acres in size and greater than ½ mile from an open route. AR25520 (t. 144). This bare statistic fails to tell the full picture of the quantity, quality, and distribution of elk security habitat. *See Guardians*, 790 F.3d at 927 (“NEPA emphasizes the importance of coherent and comprehensive up-front environmental analysis to ensure informed decisionmaking to the end that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.”).¹⁸

The key aspect of managing elk security habitat simply is providing enough of it to support the species. Hillis and others report on the significance of maintaining at least 30% of an analysis area as security habitat; below this threshold, elk vulnerability increases. AR26753; *see also* AR26734. The Forest Service did not disclose this fact. After implementation, only 14% of the Project Area would provide security habitat. AR25520 (42,431÷301,580). Eight of the nine watersheds would provide less than 30% elk security habitat, and one of them—Deep Creek—would provide only 1.8% elk security habitat. *See id.*; *see also* AR26931. And due to unexplained analytical flaws, the actual amount of security habitat is likely much less than disclosed, as the agency itself admitted. AR28119.

For one, the agency only included administratively open roads into its distance banding analysis, despite acknowledging that many closed roads and user-created routes are receiving

¹⁸ Although the agency cited Rowland (2005) for the proposition that the ½ mile distance is a “threshold” for security, AR25516, that study does not address security “thresholds,” but instead cites a distance of 1,800 meters (1.12mi) as the distance at which elk response to open roads diminishes markedly. AR5712. After implementation, a mere 3.5% of the Project Area would be more than 1 mile from an administratively open motorized route. AR25474.

motorized use. *See* AR25532. “Careful assessment of how roads are being used, rather than their official status, is important to credibly evaluate effects of roads on elk and other wildlife.” AR5714; *cf.* AR26950 (roads and trails biologically impact wildlife species through habitat fragmentation, behavioral changes, access for predators, noise, and physical alteration of habitat). The agency provided no justification as to its decision to limit the analysis to administratively open roads. *See* AR26738–39 (map prepared by ODFW showing that “at least some portion of every elk security area [is] traversed by roads”); *see also* AR26947 (a closer analysis of all Project Area roads would reveal reductions in elk habitat, and confirm why elk are increasingly moving onto private lands).

Second, the agency never assessed actual habitat conditions of the alleged security habitat. Hillis defined elk security habitat as *forested stands* greater than ½ mile from an open route—as the agency itself acknowledged. AR25513. Here, however, the agency counted all acres of land greater than ½ mile from an open route as “security” habitat—regardless of habitat type. Much of the Project Area is comprised of scablands or other non-forested areas that do not provide cover for elk, as shown in the map at ECF53-3. The agency never explained why it counted all habitat types as “security” habitat. *See* 40 C.F.R. § 1502.24 (requiring agency to utilize scientific integrity).

Third, the agency failed to consider the “combined and synergistic” impacts of past, present, and reasonably foreseeable future activities. *See Kraayenbrink*, 620 F.3d at 1207. The SFEIS disclosed that approximately 130,000 to 150,000 acres of vegetation and fuels management are ongoing or proposed in the Project Area. AR25613; *see also* AR26947.¹⁹ The agency disclosed an additional 25,000+ acres of past logging operations. AR25343. Vegetation management projects increase road densities and remove vegetation—reducing the amount of elk security habitat. *See* AR26752 (security habitat is impacted by poor cover); SUPP19582 (logging activities reduce valuable cover and render

¹⁹ This estimate does not account for the Blue Mountains Forest Resiliency Project, with a project area encompassing more than 200,000 acres on the Ochoco. AR25454.

areas unusable by continued or increased human disturbance). The agency admitted that these activities will “result in a reduction in the amount of big game hiding cover,” AR25531, and that the effects from these activities “may” limit the amount or effectiveness of security habitat in the short term. *Id.*²⁰ But the SFEIS contains no quantified or detailed information about impacts to the amount, location, or quality of the alleged 42,431 acres of elk security habitat remaining after implementation. As the map at ECF53-2 shows, eight past, present, and future vegetation management projects affect nearly every acre of security habitat—a fact that the SFEIS does not disclose. *See Or. Nat. Res. Council Fund v. Brong*, 492 F.3d 1120, 1133 (9th Cir. 2007) (agency “must consider the interaction of multiple activities”).

Fourth, in addition to the *amount* of elk security habitat, the *connectivity* between security patches is critical for elk movement. *See* ECF23, 27 ¶ 153 (the “distributional pattern of open roads and motorized routes are important for determining the value of elk security habitat”). The agency never analyzed connectivity between security patches; the SFEIS contains no maps or other information showing the location of elk security habitat and the connectivity between it. *See Guardians*, 790 F.3d at 926 (“Here, the Wildlife Habitat section of the EIS lists the percentage of big game winter range protected in each landscape area, but provides virtually no information about where big game winter range is actually located, nor the concentration of game in each area. In other words, the EIS does not make [available to] the public the underlying environmental data.”).

III. The Forest Service Failed to Disclose and Consider the OHV Project’s Impacts on Redband Trout Habitat in a Manner Consistent With Its NEPA and NFMA Duties.

A. The agency failed to take a hard look at the OHV Project’s direct, indirect, and cumulative sediment impacts when added to the environmental baseline.

Degradation of aquatic habitat is the sum of its parts: all sources of sediment delivery, added to natural background conditions, affect the quality of aquatic habitat. *See, e.g.*, AR15229 (ODFW:

²⁰ In addition, recent Project Area fires may affect forest vegetation for 40+ years. AR25447.

“Redband trout populations currently are vulnerable due to impacts from livestock grazing. Trout productivity is limited by excessive sediment load in streams from unstable banks reducing spawning success and limiting macroinvertebrate production. This condition will be exacerbated by additional sediment resulting from construction and use of trails in each of the action alternatives”). Here, the agency concluded that the OHV Project’s impacts—additive to the “existing condition”—were not likely to adversely affect Redband trout. *See* AR25465–66 (finding that aquatic species would be unaffected in the long term).²¹ The agency lacked a rational basis for its conclusions because it failed to (1) properly account for baseline conditions; and (2) consider cumulative sediment delivery.

1. The agency failed to adequately address baseline conditions.

For the aquatic habitat baseline, the agency relied on data from stream surveys measuring nine habitat indicators in the nine Project Area watersheds. *See* AR25355. These surveys fail to accurately depict current conditions because they are either missing key data, or the data is stale. *See Gr. Basin Res. Watch v. U.S. BLM*, 844 F.3d 1095, 1101 (9th Cir. 2016) (“Establishing appropriate baseline conditions is critical to any NEPA analysis. Without establishing baseline conditions which exist before a project begins, there is simply no way to determine what effect the project will have on the environment and, consequently, no way to comply with NEPA.”).

For example, for the Howard Creek subwatershed, the agency lacked any data for pool quality or width/depth ratios. AR25375. For the Elliot Creek subwatershed, the agency only had one data point for width/depth ratios, three for fine sediment, and three for pool quality. AR25371–72. Moreover, as ODFW pointed out, the “Elliot Creek Subwatershed includes 7 named and other unnamed stream channels, yet the overall condition of the subwatershed was assessed using data * * * from one stream.” AR15228. For the data the Forest Service did rely on, the significant majority of data represent “historical” rather than “current” conditions. *See* AR26900; AR20839

²¹ *See also* AR25409, 411, 413, 416, 417, 419, 421, 422, 424 (same).

(comment of ODFW: “Using data up to 23 years old does not describe the current condition”); Analysis of the data on stream conditions in the SFEIS shows that 88% of the data on non-temperature habitat indicators and 97% of the temperature data is more than 10 years old, and 69% of the data on non-temperature habitat indicators and 62% of the temperature data is more than 17 years old (*i.e.*, *pre*-2000).²² *Cf. LandWatch v. U.S. Forest Serv.*, 905 F. Supp. 2d 1192, 1197 (D. Or. 2012) (agency failed to take a hard look at project’s impacts where baseline data was 25+ years old).

Use of this historical data could not properly serve as a surrogate for current conditions, because the Project Area has been subject to a host of management activities in the past 15–20 years that are known to impact aquatic habitat. The SFEIS lists a series of wildfires, logging projects that include new road construction, grazing, and other activities that have occurred in this timeframe. *See* AR25277–79. These types of activities can rapidly degrade aquatic habitat. *See* AR26900. For instance, “a single season of grazing can greatly reduce bank stability and increase width/depth ratio.” *Id.* Moreover, the stale baseline data does not capture significant impacts from recent unauthorized OHV use, *see* AR26899–90, AR26909–10, despite the agency’s acknowledgment that this use is having a detrimental impact on aquatic habitat. *See, e.g.*, AR25405 (sediment impacts from existing user-created trails). By relying on data that was in most cases more than 15–20 years old, the agency failed to accurately present the current condition of aquatic habitat, in violation of NEPA.

Analogously, the Forest Service’s reliance on stale data on aquatic habitat was found to be arbitrary and capricious by the Ninth Circuit in *Lands Council v. Powell*, 395 F.3d 1019, 1031 (9th Cir. 2005). There, the Forest Service relied on surveys of habitat conditions of Westslope Cutthroat trout that were 13 years old. The Ninth Circuit decided that:

²² *See* AR25369–401 (t. 70–71, 74–75, 77–78, 80–81, 83–84, 87–88, 90–91, 93–94, 97–98 (showing 202 of 229 data points are 10+ years old for non-temperature habitat indicators, and 113 of 117 data points are 10+ years old for temperature); *see id.* (158 of 229 data points are *pre*-2000 for non-temperature habitat indicators, and 72 of 117 data points are *pre*-2000 for temperature).

Evidence of the current habitat conditions, and any degradation or improvement in the last 13 years, is relevant evidence in analyzing and determining what, if any, impact the current Project will have on the cumulative effect of current and past timber harvesting on trout habitat and on trout population. Instead, the Forest Service predicted the Project's impact on the Westslope Cutthroat Trout (and its habitat) using stale habitat data.

Id. According to the Circuit Court, the stale data “was too outdated to carry the weight assigned to it,” preventing the agency from “making an accurate cumulative impact assessment of the Project * * *.” *Id.* It is so too, here, where the agency’s “historical” data failed to provide an accurate baseline for measuring the impacts of past and ongoing projects and assessing cumulative effects. *See also N. Plains*, 668 F.3d at 1086 (also holding that the agency acted arbitrarily where it relied on data that was too stale to carry the weight assigned to it).

2. The agency failed to account for important aspects of the problem when measuring cumulative sediment delivery.

The Forest Service concluded that there would be immeasurable cumulative effects to aquatic habitat, beyond those described in the “Direct and Indirect Effects” section of the SFEIS. AR25456–57; AR25459. The agency made a clear error of judgment because as described above, impacts from grazing and unauthorized OHV use were not captured in the analysis of “existing” conditions. Nor were they accounted for in the analysis of direct and indirect effects, as described below. Accordingly, the agency did not provide any quantified or detailed information about the impacts from past and ongoing grazing and unauthorized OHV use. *See Te Moak Tribe v. U.S. DOI*, 608 F.3d 592, 604 (9th Cir. 2010) (holding that a discussion of direct effects in lieu of a discussion of cumulative impacts is inadequate under NEPA).

Grazing and unauthorized OHV use are widespread in the Project Area. *See* AR25602 (“Cattle grazing occurs on most of the project area * * *.”); AR25303 (nearly 700 miles of unauthorized OHV routes in the Project Area). Both of these activities cause significant degradation of aquatic resources. *See* AR26898–900 (grazing and OHV use in riparian areas adversely affects

water quality and stream integrity).²³ Based on decades of field studies, empirical research, and literature review, LandWatch’s expert Amy Stuart notes that the “cumulative impacts of the extensive road network (open, closed, and decommissioned), illegal motorized user trails, and livestock grazing have already compromised [Project Area watersheds] with high sediment loads, poor riparian conditions, and high summer [water] temperatures.” AR26859.

In its direct and indirect effects analysis, the agency analyzed modeled sediment delivery from use of the OHV routes (not construction), as compared to modeled levels of background sediment. AR25364, 25425. But the agency admitted that this analysis of sediment delivery “[did] not take into account other land management activities such as grazing, timber harvest, and recreation development * * *.” AR25765; *see also* 25766. And yet in the “cumulative effects” section, the agency maintained that the impacts from past and ongoing activities—such as grazing and unauthorized OHV use—were disclosed in the direct and indirect section of the SFEIS. *See* AR25455; AR25457.

The District of Idaho recently addressed a similar flaw in *Idaho Rivers United v. Probert*, No. 3:16-cv-00102-CWD, 2016 U.S. Dist. LEXIS 63767 (D. Idaho May 12, 2016). There, like here, “the quantified baseline sediment estimate [did] not include, and was not updated to include, the cumulative sediment impacts from the neighboring state and private post-fir harvesting activities.” *Id.* at *36. Because those activities were sources of erosion and sediment delivery, adding to the overall sediment delivery in the river system, the failure to account for them in the cumulative effects analysis was arbitrary and capricious. *Id.* at *36–37. Likewise here, the impacts to aquatic resources from grazing and unauthorized OHV use are not unaccounted for in the agency’s analysis,

²³ *See also* AR26906 (“[G]razing greatly elevates sediment delivery to streams via several mechanisms, including direct bank damage from trampling, loss of bank stability, gullyng, loss of soil cover, increased runoff due to soil compaction, and vastly elevated levels of channel erosion, which deposits sediment directly into streams.”); SUPP1671 (“Following any level of disturbance, runoff and sediment generated on the ATV trails increased by 56 percent and 625 percent, respectively, compared to the undisturbed forest floor.”).

indicating a failure to take a hard look at sediment impacts to aquatic habitat. *See Te Moak Tribe*, 608 F.3d at 604; *see also Klamath Siskiyou Wildlands Ctr. v. U.S. BLM*, 387 F.3d 989, 994 (9th Cir. 2004) (NEPA violation where agency discussed only the direct effects rather than cumulative impacts).

B. The Forest Service failed to demonstrate INFISH consistency.

To comply with INFISH, each site-specific project decision must contain a determination that a project is consistent with the Standards and Guidelines that prohibit or restrict land management activities in RHCAs that would retard or prevent attainment of RMOs or adversely affect inland native fish. AR2549. The Forest Service failed to provide a rational explanation for how the OHV Project is consistent with INFISH Standard and Guideline RM-1, which required the agency to take two steps before approving the OHV Project: (1) complete Watershed Analysis, and (2) demonstrate that the OHV Project would not retard or prevent attainment of the RMOs.

1. The agency failed to undertake Watershed Analysis.

RM-1 plainly provides that the Forest Service must “[c]omplete watershed analysis prior to construction of new recreation facilities in [RHCAs] within priority watersheds.” AR2571. Moreover, the agency must complete watershed analysis before modifying any RMOs, unless the agency obtains “stream reach specific data” to support the change. AR2564. Despite these explicit directives, the agency did not complete watershed analysis, in derogation of its INFISH duties.

Watershed analysis requirements apply to any recreation facility construction—including trails—in RHCAs within “priority watersheds.” AR2571, 2624. Within the Project Area, Lower Deep Creek is a “priority watershed.” AR25395. The agency, however, never purports to have completed a watershed analysis before constructing new trails and stream crossings within this priority watershed. *See supra* (2 miles of trail and 5 stream crossings). Indeed, the SFEIS is silent as to whether the agency conducted any watershed analysis in general, and there is no record evidence that the agency undertook a watershed analysis for Lower Deep Creek in particular.

INFISH also instructs that the agency must complete a watershed analysis before modifying any of the RMOs, unless the modification is supported by “stream reach specific data.” AR2564. In all cases, the agency must provide “rationale supporting the change.” *Id.* Here, the agency modified the RMOs for temperature, LWD, and width/depth ratios, but did not purport to rely on a completed watershed analysis. *Compare* AR2566 *with* AR25355–56. For temperature criteria, the agency cited a study by Meyer et al. 2010 and State of Oregon water quality standards.²⁴ The agency did not state how these sources supply “stream reach specific data” that provides a basis for modifying the INFISH temperature RMO. INFISH provides that there must be an “ecological basis for the change,” based on “local geology, topography, climate, and potential vegetation.” AR2564. The agency failed to acknowledge that it was modifying the INFISH temperature RMO, let provide any supporting rationale for the modification. *See id.*²⁵

For width/depth ratio criteria, the agency relied on a study by Rosgen (1996), which classifies stream channels. AR25356, 25361; SUPP940. Whereas INFISH requires width/depth ratios “below 10” (mean wetted width by mean depth) in all cases, the agency instead set width/depth ratios by channel type. *See id.* For C-type channels, for example, the agency classified “above 12” as “properly functioning,” with no upper bound. AR25356. The agency never supplied any stream reach specific data to support the modification. In fact, the agency admitted that it lacked any data on reference reach sites, because “collecting the reference reach data is an intensive process.” AR25361. INFISH, however, speaks of no “difficulty” exception; rather, the RMOs apply in the absence of watershed analysis or “stream reach specific data.” Because the agency modified

²⁴ Based on these sources, the agency designated temperatures between 10 to 14 degrees Celsius as “Good,” temperatures between 14 and 18°C as “Fair,” and temperatures above 18°C as “Poor.” AR25355. In contrast, INFISH sets 59° Fahrenheit (15°C) as the standard for adult holding habitat, and 48°F (8.9°C) as the standard for adult spawning habitat. AR2566.

²⁵ For its modified LWD criteria, the agency did provide some supporting rationale. *See* AR25359–60. Although the rationale was not based on watershed analysis or “stream reach specific data,” it noticeably contrasts with the agency’s silent departure from the temperature RMO.

the RMOs without either, it acted arbitrarily and contrary to INFISH. *Cf.* Ex. 5 at 29–30 (agency failed to undertake watershed analysis despite lack of site-specific data).²⁶

2. The agency failed to demonstrate that the OHV Project would not retard or prevent attainment of RMOs.

For site-specific projects, the Forest Service must apply the RMOs through a “thorough analysis” of whether a project would retard the near natural rate of recovery. AR2565. Here, the agency generally concluded that OHV Project activities “are within INFISH requirements and direction,” AR25466, and specifically concluded with respect to RM-1 that “all action alternatives would neither retard nor prevent attainment of the [RMOs], as long as the appropriate Project Design Criteria are followed during construction and long-term maintenance.” *Id.* These summary conclusions are devoid of reasoning, analysis, and data, and the agency failed to explain how this habitat-degrading project is consistent with INFISH.

The agency admits that Project Area subwatersheds exhibit “poor” conditions, and due to more recent activities like logging, grazing, and unauthorized OHV use, conditions are likely worse than captured by the agency’s data. *See supra.* This is confirmed by the continued declining trend of Redband trout populations, which ODFW attributes to streams with “poor width/depth ratios, high sediment load, and elevated temperatures.” AR24341.²⁷ On top of these degraded conditions, the OHV Project “would exacerbate ongoing cumulative effects associated with grazing, sediment loads in spawning gravel, channel instability, and increasing stream width/depth ratios.” AR26734.

The agency did not model or otherwise analyze quantitatively the short-term impacts from construction and reconstruction of OHV trail routes and bridges, culverts, and other stream crossings, but the agency did admit heavy impacts. *See* AR25446 (“Short-term sediment inputs from

²⁶ Exhibit 5 is *Idaho Conserv. League v. Bennett*, No. CV-04-447-S-MHW, 2005 U.S. Dist. LEXIS 35356 (D. Idaho April 29, 2005).

²⁷ *See also* AR25374, 377, 386, 387, 391, 392, 395, 396 (charts showing declining trend).

trail construction, especially at stream crossings, may have negative effects during construction when turbidity is high. These negative effects may include fish displacement during times of high turbidity, limiting feeding, and possible mortality.”); *see also* AR25460 (acknowledging that fish habitat would be affected by filling of pools and gravels used by fish). The SFEIS and ROD are devoid of any explanation, however, as to how these significant short-term impacts will neither retard nor prevent attainment of the RMOs. *See* Ex. 6 at 17 (“The court, therefore, concludes that the Forest Service violated [NFMA] by approving the implementation of [the project] without first establishing that short-term adverse impacts of the project on redband trout and short-term retardation of RMOs set forth in INFISH would not be inconsistent with the Ochoco forest plan.”).²⁸

Nor did the agency make an explicit finding as to how the long-term impacts of the OHV trail system—including increased route densities and added stream crossings—would be consistent with INFISH. As recognized by the drafters of INFISH, heavy use of recreation sites in riparian areas “often results in severe compaction and bank sloughing, not unlike the effects of heavy livestock use.” *Id.* The agency summarily stated that “all action alternatives would neither retard nor prevent attainment of the RMOs,” “[a]s discussed above in the effects analysis,” AR25466, but the connection between INFISH consistency and the “discussion in the effects analysis” is not apparent. In the effects analysis, the agency contended that (1) non-construction sediment impacts would be “insignificant” relative to natural background conditions, and (2) Project implementation would yield less sediment delivery relative to historic OHV cross-country travel. *See* AR25403, 25443. But neither of these findings can serve as a surrogate for an INFISH consistency determination.

For one, the comparison of the OHV Project’s sediment inputs to natural background conditions is irrelevant for purposes of INFISH. Under INFISH, “Actions that reduce habitat

²⁸ Exhibit 6 is *League of Wilderness Def. v. U.S. Forest Serv.*, No. cv-03-1563-AS, 2005 U.S. Dist. LEXIS 30718 (D. Or. June 6, 2005).

quality, whether existing conditions are better or worse than objective values, would be inconsistent with the purpose of [INFISH]. Without the benchmark provided by measurable RMOs, habitat suffers a continual erosion.” AR2565. The agency has not explained how adding a long-term, habitat-degrading project onto an existing, degraded system is consistent with the INFISH duty not to retard or prevent attainment of the RMOs; *cf. LandWatch v. Connaughton*, 905 F. Supp. 2d 1192, 1196 (D. Or. 2012) (“It is not enough for the Forest Service to simply conclude that there is no or little impact to the water temperature [RMO] due to the Project without reasoning, analysis, and data. An Agency must set for a reasoned explanation for its decision and cannot simply assert that its decision will have an insignificant effect on the environment.”) (citation omitted).²⁹

Second, the agency’s claim that the OHV Project would be more beneficial over the long-term as compared to unregulated cross-country travel also fails to establish INFISH consistency. Other courts in this District have held that a project’s short-term impacts may be consistent with INFISH where a project yields long-term benefits. *See League of Wilderness Def. v. U.S. Forest Serv.*, 445 F. Supp. 2d 1186, 1199 (D. Or. 2006). But here, as noted by ODFW, the “ONF provides no justification for how adding 137 miles of permanent OHV trails including 39 new stream crossings * * * will improve the condition of ONF watersheds.” AR26731. In light of the degraded baseline conditions and the habitat degrading impacts of a new OHV trail, the Forest Service failed to provide a rational explanation as to how the short- and long-term impacts to aquatic habitat would not retard or prevent attainment of the RMOs or adversely affect inland native fish.

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²⁹ Moreover, the OHV Project’s impacts are additive to the impacts from logging, grazing, and unauthorized OHV use. Comparing the OHV Project’s impacts to “background” conditions—which does not include these cumulative impacts—is nothing more than attempt to mask the OHV Project’s true impacts. *See* AR26912–17; *cf. Pac. Coast Fed’n of Fishermen’s Ass’ns v. NMFS*, 265 F.3d 1028, 1037 (9th Cir. 2001) (agency cannot “minimize” impacts by simply adopting a scale of analysis so broad that it marginalizes the site-specific impact of the activity on ecosystem health).

IV. The Forest Service Failed to Comply with the ESA With Respect to Gray Wolves.

Section 7 of the ESA requires consultation with the FWS for any agency action that “may affect” a listed species or its critical habitat. *Karuk Tribe v. U.S. Forest Serv.*, 681 F.3d 1006, 1011 (2012) (*en banc*) (citing 16 U.S.C. § 1536(a)(2); 50 C.F.R. 402.14(a)). An agency may avoid consultation only if it determines that its action will have “no effect,” because “actions that have *any chance* of affecting listed species or critical habitat—even it is later determined that the actions are ‘not likely’ to do so—require at least some consultation under the ESA.” *See id.* at 1027.

The Forest Service determined that the OHV Project would have “no effect” on wolves, and thereby did not engage in formal or informal consultation with the FWS. AR25479; AR27939. The agency dismissed wolf presence on account of the fact that “occupied habitat” is not known to occur in the Project Area: “Because wolves are not known to reproduce or persist in the [Ochoco] in general and the project area in particular, no denning, foraging or dispersal habitat has been identified.” AR25479. This conclusion lacks a rational basis. Wolves are *in fact* dispersing through the Project Area, as confirmed by multiple verified sightings and ODFW telemetry data. *See supra*. And the agency directly undercut its own assertion that no dispersal habitat has been identified by admitting that “Dispersal / Transient” habitat is present within the Project Area. AR2547; *cf. Native Ecosystems Council v. Krueger*, 946 F. Supp. 2d 1060, 1074–75 (D. Mont. 2013) (the relevant question for purposes of Section 7 consultation is whether a species may be present, not whether project area contains “occupied habitat”).

Given the presence of wolves and dispersal habitat, the agency had a duty to determine whether the OHV Project “may affect” wolves. *See* 50 C.F.R. § 402.12. But the agency’s answer to this question was again bound up with the assertion that there is no “occupied” wolf habitat. AR25479 (“Since wolves are not known to occupy habitat on the [Ochoco] the determination is ‘No Effect’ (NE) for gray wolves.”). Under Circuit Precedent, however, the dispositive question is

whether the OHV Project “may affect” wolves. According to the Circuit Court, “‘may affect’ is a ‘relatively low’ threshold for triggering consultation.” *Karuk*, 681 F.3d at 1027. The question is not whether the Project Area contains occupied habitat, but whether a project will cause “[a]ny possible effect, whether beneficial, benign, adverse or of an undetermined character * * *.” *Id.* (citing *Cal ex. Rel. Lockyer*, 575 F.3d at 1018–19, in turn quoting 51 Fed. Reg. at 19,949, 19,949 (June 3, 1986)). When the right question is asked, it is clear that the OHV Project “may affect” wolves.

The Forest Service admits that roads and OHV routes can affect wolves by reducing their available prey, such as elk, and decreasing the suitability of denning, foraging, and dispersal habitat. ECF23, 27 ¶ 105. According to the best available science and the expert state agency, the OHV Project would increase route densities and increase motorized use rates, thereby displacing wolf prey and decreasing the suitability of habitat for denning, foraging, or dispersing. *See* AR26744. The Forest Service made no showing that the OHV Project’s potential to decrease prey availability and degrade suitable habitat does not cross the low “may affect” threshold. *See Krueger*, 946 F. Supp. 2d at 1080 (“no effect” determination was arbitrary where the agency “failed to analyze whether the temporary increase in road density and the temporary decrease in summer secure areas during the Project’s 5–10 year duration would affect transitory grizzly bears”). Because the Forest Service “failed to consider relevant expert analysis or articulate a rational connection between the facts found and the choice made,” the “no effect” determination and decision to forego consultation was arbitrary and contrary to the ESA. *See Kraayenbrink*, 632 F.3d at 498.

CONCLUSION

For all of the foregoing reasons, LandWatch respectfully asks the Court to grant its *Motion for Summary Judgment*, hold unlawful and set aside the Forest Service’s SFEIS and ROD, and remand to the agency to comply with NEPA, NFMA, and the ESA.

DATED this 2nd day of February, 2018.

Respectfully submitted,

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TABLE OF RECORD CITATIONS

<u>Administrative Record (“AR”)</u>		
AR	DATE	<i>Author / TITLE</i>
186–2239 <i>passim</i>	8/30/1989	<i>U.S. Forest Service</i> , Ochoco National Forest Final Environmental Impact Statement, Appendices Volumes 1 and 2, Record of Decision, and Land and Resource Management Plan
2543–2750 <i>passim</i>	07/28/1995	<i>U.S. Forest Service</i> , Inland Native Fish Strategy – Decision Notice, Finding of No Significant Impact, and Environmental Assessment
5708–5719 5709, 5712, 5714	2005	<i>Rowland et al.</i> , Effects of Roads on Elk: Implications for Management in Forested Ecosystems
8578–8605 8578	11/12/2009	<i>U.S. Forest Service</i> , Scoping Document – Ochoco Summit Trail System Proposed Action
8939–8945 8940	12/21/2009	<i>Oregon Department of Fish and Wildlife</i> , Scoping Comments – Ochoco Summit OHV Trails Project
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12780–12782 12780	11/17/2011	<i>Oregon Department of Fish and Wildlife</i> , Memorandum re: Extensive Trails Network Already in Existence
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25203–25727 <i>passim</i>	09/2016	<i>U.S. Forest Service</i> , Supplemental Final Environmental Impact Statement – Ochoco Summit Trail System Project
25728–25853 <i>passim</i>	09/30/2016	<i>U.S. Forest Service</i> , Supplemental Final Environmental Impact Statement – Appendix A – Response to Comments
26447–26513 26452, 26496	11/04/2016	<i>Amy Stuart, Mike Gerdes, Glen Ardt, and Geoff Gerdes</i> , Objections to the Ochoco Summit Trail System Project
26760–26995 <i>passim</i>	11/07/2016	<i>Central Oregon LandWatch</i> , Objection to the Ochoco Summit Trail System Project (including Expert Reports of Amy Stuart, Jonathan Rhodes, and Mike Gerdes)
26728–26756 <i>passim</i>	11/07/2016	<i>Oregon Department of Fish and Wildlife</i> , Objection to the Ochoco Summit Trail System Project Supplemental Final Environmental Impact Statement and Record of Decision (including Hillis et al. 1991)
27930–27932 27930	12/07/2016	<i>U.S. Forest Service</i> , Intra-Agency Email Correspondence re: Wolves
27936–27944 27939	12/07/2016	<i>U.S. Forest Service</i> , Intra-Agency Email Correspondence re: Wolves
27958–27968 27961, 27962, 27966	12/13/2016	<i>U.S. Forest Service</i> , Meeting Notes: Objection Resolution Meeting
28092–28095 28093–94	01/23/2017	<i>U.S. Forest Service</i> , Ochoco Summit Trail System Project - Response to Objection (#17-06-00-0033-218(B))
28114–28216 28119, 28128	01/2017	<i>U.S. Forest Service</i> , Ochoco Summit Trail System Project – Objection Statements and Responses
28536–28681 <i>passim</i>	04/2017	<i>Oregon Department of Fish and Wildlife</i> , Oregon Wolf Conservation and Management Plan (Draft)
28521–28535 28524, 28533–34, 23788	04/11/2017	<i>Oregon Department of Fish and Wildlife</i> , Oregon Wolf Conservation and Management DRAFT 2016 Annual Report
28688–28690 28699	05/16/2017	<i>U.S. Forest Service</i> , Meeting Notes: Ochoco Summit Trail System Update – Partners and Stakeholders
28727–28787 <i>passim</i>	06/2017	<i>U.S. Forest Service</i> , Record of Decision – Ochoco Summit Trail System Project and Forest Plan Amendments

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Supplemental Administrative Record (“SUPP”)		
SUPP	DATE	<i>Author / TITLE</i>
424–439 429	2005	<i>Wisdom, et al.</i> , Effects of Off-Road Recreation on Mule Deer and Elk
1633–1651 1649–50	2007	<i>Stuart, et al.</i> , Redband Trout Investigations in the Crooked River Basin
1663–1786 1671	12/2008	<i>Meadoms</i> , Effects of All-Terrain Vehicles on Forested Lands and Grasslands
940–948	1990	<i>Rosgen</i> , Applied River Morphology
19557–19619 19582 [in 12215–23240]	02/2003	<i>Oregon Department of Fish and Wildlife</i> , Oregon’s Elk Management Plan
20112–20121 20112, 20119 [in 12215–23240]	2000	<i>Phillips et al.</i> , Reproductive Success of Elk Following Disturbance By Humans During Calving Season

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February 2018, a true and accurate copy of MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT was filed electronically via the CM/ECF system by the United States District Court, District of Oregon.

DATED this 2nd day of February, 2018.

/s/ Oliver J. H. Stiefel
Oliver J. H. Stiefel
Of Counsel for Plaintiff LandWatch