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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PENDLETON DIVISION

WILDEARTH GUARDIANS, OREGON
WILD, THE SIERRA CLUB, AND GREAT
OLD BROADS FOR WILDERNESS,

Plaintiffs,

v.

STACEY FORSON, in her official capacity as
Ochoco National Forester Supervisor; and
UNITED STATES FOREST SERVICE,

Defendants.

Case No. 2:17-cv-1004-SU (lead)

(Consolidated with Case Nos. 2:17-cv-1091-
SU and 2:17-cv-1366-SU)

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTIONS FOR SUMMARY
JUDGMENT

Request to Participate in Oral Argument

TABLE OF CONTENTS

I. INTRODUCTION 1

II. FACTUAL BACKGROUND..... 2

 A. Ochoco National Forest species, habitat and status 2

 B. Sources of law governing land management and OHV use in the Ochoco 3

 1. The Ochoco Forest Plan..... 3

 2. Travel Management Rule & 2011 Travel Management ROD..... 4

 3. OSTTS Project SFEIS and ROD..... 5

 C. ODFW’s longstanding involvement in the NEPA process..... 6

III. LEGAL FRAMEWORK 7

 A. NEPA 7

 B. National Forest Management Act..... 7

 C. Endangered Species Act 8

 D. Standard of Review..... 8

IV. ARGUMENT 9

 A. The Forest Service’s determination that the OSTTS Project will have “no effect” on gray wolves violates the ESA 9

 1. Gray wolf status, habitat and management..... 9

 2. Forest Service’s determination that the OSTTS Project will have “no effect” on gray wolves is arbitrary and capricious..... 10

 B. Forest Service’s reliance on unsupported assumptions regarding curtailment of unauthorized OHV use under Alternative 5 violates NEPA 12

 C. The Forest Service’s analysis of the OSTTS Project’s impacts on Redband trout and watershed health violates NFMA and NEPA 14

 1. Redband Trout and watershed health will be adversely impacted by the OSTTS Project and associated OHV use 14

 2. The SFEIS fails to evaluate how the OSTTS Project will impact quantitative water quality targets required by the Forest Plan and INFISH..... 16

 3. SFEIS determination that Alternative 5 will not exacerbate existing water quality conditions is not supported by the record 18

4.	The SFEIS relies on stale data to evaluate impacts of the OSTs Project on watershed health	19
5.	Forest Service fails to take a hard look at cumulative impacts from grazing.....	20
D.	The Forest Service’s analysis of impacts of the OSTs Project on elk violates NEPA and NFMA	21
1.	Big game species will be adversely impacted by the OSTs Project and associated OHV use	21
2.	The Forest Service failed to adequately analyze consistency with Forest Plan road density standards and to take the requisite hard look at road densities	24
3.	The SFEIS misapplies scientific studies regarding elk security habitat.....	25
4.	The Forest Service makes arbitrary assumptions and fails to utilize the best available science in analyzing the impacts of the OSTs Project on the problem of displacement of elk onto private land	26
5.	The Forest Service’s failure to impose timing restrictions to protect elk calving sites violates NFMA.....	28
V.	CONCLUSION.....	30

TABLE OF AUTHORITIES

Statutes

ORS 496.012..... 1

United States Code

16 U.S.C. § 1536..... 8

16 U.S.C. § 1604..... 8, 16, 24

40 C.F.R. § 1500 (2017) 7

40 C.F.R. § 1505 (2012) 12

40 C.F.R. §§ 1502 (2017) 7, 25, 28

40 C.F.R. §§ 1508 (2017) 7

42 U.S.C. § 4332 (2012)..... 7

5 U.S.C. § 706 (2012)..... 8

50 C.F.R. § 402..... 8

Rules and Regulations

OAR 635-080-0000 22

Cases

Brower v. Evans, 257 F.3d 1058 (9th Cir. 2001)..... 9

Cal. ex rel. Lockyer v. U.S. Dep't of Agric., 575 F.3d 999 (9th Cir. 2009) 11

Citizens for Better Forestry v. U.S. Dep't of Agric., 341 F.3d 961, 965 (9th Cir. 2003) 7, 8

Great Basin Res. Watch v. Bureau of Land Mgmt., 844 F.3d 1095 (9th Cir. 2016)..... 19

Karuk Tribe of Cal. v. U.S. Forest Serv., 681 F.3d 1006 (9th Cir. 2012)..... 8, 11

Lands Council v. McNair, 537 F.3d 981 (9th Cir. 2008)..... 9

Lands Council v. Powell, 395 F.3d 1019 (9th Cir. 2005) 19

Pac. Coast Fed'n of Fishermen's Ass'n, Inc. v. Nat'l Marine Fisheries Serv., 265 F.3d 1028 (9th Cir. 2001)..... 9

Save the Peaks Coal. v. U.S. Forest Serv., 669 F.3d 1025 (9th Cir. 2012) 28

Sierra Forest Legacy v. Sherman, 646 F.3d 1161 (9th Cir. 2011) 9

Page iii

The State of Oregon, by and through the Oregon Department of Fish and Wildlife (“ODFW”) submits this memorandum in support of the claims and summary judgment arguments of WildEarth Guardians *et al.*, Central Oregon Landwatch and Oregon Hunters Association (collectively, “Plaintiffs”). For the reasons described below, the State respectfully asks that the Court grant Plaintiffs’ motions for summary judgment. ODFW also supports Plaintiffs’ request for vacatur and remand of the underlying decision.

I. INTRODUCTION

“It is the policy of the State of Oregon that wildlife shall be managed to prevent serious depletion of any indigenous species and to provide the optimum recreational and aesthetic benefits for present and future generations of the citizens of this state.” ORS 496.012. Consistent with this statutory mandate, ODFW is charged with, among other things, managing fish and wildlife in a manner that maintains all species at optimum levels, managing public land and water to enhance the production and public enjoyment of wildlife, and making decisions that benefit the wildlife resources of the state and allow for the best social, economic and recreational utilization of wildlife resources by all user groups. *See* ORS 496.012(1), (2), (7). It is through this lens, and in furtherance of these goals, that the State of Oregon respectfully submits this amicus brief.

ODFW has a long history of working shoulder to shoulder with the U.S. Forest Service (“Forest Service”) to monitor and manage wildlife on national forests in Oregon, including the Ochoco National Forest (“Ochoco”). ODFW is an active participant in federal, state, tribal and private partnerships that seek to improve habitat for wildlife populations in the region. ODFW manages the recreational take of harvestable fish and wildlife in the Ochoco and administers the State of Oregon’s wildlife action plan—the Oregon Conservation Strategy—which identifies strategy species, habitats of concern and areas of conservation opportunities within the Ochoco. *See* Administrative Record (“AR”) 5836-6279. From this front row seat, ODFW has a keen and unique understanding of the science at issue in this case.

In the Supplemental Final Environmental Impact Statement (“SFEIS”) for the Ochoco Summit Trail System Project (“OSTS Project”), the Forest Service analyzed five alternatives related to the development of a trail system for motorized off-highway vehicles (“OHVs”) in the Ochoco. ODFW consistently recommended that the Forest Service implement Alternative 1 (the no action alternative) because all of the action alternatives will increase impacts to hydrology, and increase the frequency and intensity of motorized use in the Ochoco. In the Record of Decision for the OSTS Project (“ROD”), the Forest Service opted to implement Alternative 5, which allows for the creation of a 137-mile OHV trail network, including 39 new stream crossings, in the heart of the forest. The Forest Service identified Alternative 5 as environmentally preferable to Alternative 1 based on the premise that Alternative 1 would perpetuate unauthorized OHV use. With Alternative 5, the Forest Service assumed that unauthorized OHV use would cease altogether or be greatly reduced, despite the undisputed likelihood that Alternative 5 will attract thousands of new OHV recreationalists to the area.

The SFEIS and ROD for the OSTS Project rely on serious analytical errors and unfounded conclusions. As a result of these errors, the OSTS Project will have significant adverse impacts on vulnerable wildlife and their habitats that are not adequately addressed or disclosed by the Forest Service.

II. FACTUAL BACKGROUND

A. Ochoco National Forest species, habitat and status

The Ochoco is comprised of 845,498 acres that straddle Crook, Grant, Harney and Wheeler counties in central Oregon. AR 230, 1398. The Ochoco, “which in the language of the Paiute Indian means ‘Wind in the Willows,’” contains diverse vegetation, climate and geology that provide habitat for a wide variety of fish and wildlife species. AR 230. The Ochoco is unique. It contains important habitat that ODFW has long recognized must be preserved and protected. ODFW designated the Ochoco Mountains as a Conservation Opportunity Area in the Oregon Conservation Strategy, an ODFW plan that aims to improve the efficiency and

effectiveness of conservation in Oregon. AR 5836, 20850. The Ochoco Conservation Opportunity Area includes parts of the North Fork Crooked River designated as a Wild and Scenic River, the Scenic River Big Summit Prairie and numerous streams that provide habitat for Interior Columbia Basin Redband trout. AR 5959, 20850. Key habitats include aquatic, ponderosa pine woodlands, and wetlands and wet meadows. AR 05959. This same area has been recommended for protection in the American Fisheries Society Aquatic Diversity Areas, the Eastern Oregon Bird Conservation Plan and the Interior Columbia Basin Ecosystem Management Project plant biodiversity area. AR 05959, 20850. Numerous entities, including the Forest Service, have designated large areas in the Ochoco as critical for protection and conservation. AR 20850.

Over 375 different species of reptiles, amphibians, birds and mammals are known or expected to occur in the Ochoco, as well 15 species of game fish plus several nongame fish species. AR 233. The Ochoco also provides numerous opportunities for fishing, hunting, and wildlife viewing, which constitute the overwhelming majority of primary and secondary visitations to the Forest. AR 08940. OHV use constitutes only about three percent of the Forest's primary and secondary visitations. AR 08943.

Three species that are impacted by the decision to allow extensive use of OHVs in sensitive habitat are of particular concern to the State: gray wolves, Interior Columbia River Redband trout, and Rocky Mountain elk. Each of these species is discussed in detail in the Argument section below.

B. Sources of law governing land management and OHV use in the Ochoco

A variety of overlapping authorities govern land management and OHV use in the Ochoco.

1. The Ochoco Forest Plan

The 1989 Ochoco National Forest Land and Resource Management Plan ("Forest Plan"), as modified by the 1995 Inland Native Fish Strategy ("INFISH") Decision Notice, guides land

and aquatic management activities on the Ochoco. AR 25227. The Forest Plan establishes goals, objectives and desired future conditions; it identifies management areas within the Ochoco, and provides standards and guidelines for each management area as well as Forest-wide standards and guidelines. AR 25227. INFISH added goals and objectives for inland native fish habitat condition and function, and identified Riparian Habitat Conservation Areas (“RHCAs”) where management activities must meet interim standards and guidelines. AR 25227.

2. Travel Management Rule & 2011 Travel Management ROD

The use of OHVs in the Ochoco is largely governed by the Forest Service’s 2011 Deschutes and Ochoco Travel Management Record of Decision (“2011 Travel Management ROD”), which designated routes and areas that are available for motorized use. AR 25225, 12682-773. Under the 2011 Travel Management ROD, OHV use in the Ochocco is allowed only on these designated trails. Operating OHVs cross country or on user-created trails is illegal.

The Forest Service adopted the 2011 Travel Management ROD to comply with an earlier Forest Service regulation: the 2005 Travel Management Rule. AR 12687. The Forest Service enacted the Travel Management Rule based on the premise that “[c]urrent regulations [that] prohibit trail construction . . . and operation of vehicles in a manner damaging to the land, wildlife, or vegetation . . . have not proven sufficient to control proliferation of routes or environmental damage.” AR 05681. The Travel Management Rule directs national forests to publish a Motor Vehicle Use map to show where and under what conditions designated motorized access would be allowed. AR 25225. The Forest Service adopted the 2011 Travel Management ROD based on its conclusion that the selected alternative would “prevent the proliferation of unregulated motorized routes on the landscape.” AR 12690. This conclusion was based, in large part, on the Forest Service’s anticipated enforcement and regulation of unauthorized motorized access. AR 12694 (“[The selected alternative] will meet the purpose and need to improve public understanding and agency enforcement of motorized use regulations by providing consistent language and approaches to the regulation of motorized access.”),

12706 (“Education, enforcement, and evaluation are key components of this strategy” to prevent and reduce unauthorized OHV use.).

To date, enforcement efforts under the Travel Management Rule have not been fully implemented, and the Forest Service has been unsuccessful at curtailing illegal OHV use in the Ochoco. *See* AR 25630. According to Forest Service estimates, “[n]early 700 miles of user-created OHV routes, including open and closed roads and user-created trails, have been identified in the project area.” AR 25303. The Forest Service admits that this estimate is low. *See* AR 25514, 25461.

3. OSTS Project SFEIS and ROD

The Forest Service released the draft EIS for the OSTS Project in January of 2012 and the final EIS and draft Record of Decision in March of 2014.¹ The stated purpose and need for the OSTS Project was, among other things, “to provide a diversity of off-highway motorized recreation opportunities, for a range of OHV classes, to offset the loss of opportunities following the 2011 Travel Management decision.” AR 28734.

In the OSTS Project ROD, the Forest Service selected Alternative 5, which authorizes the creation of a 137-mile trail system for OHVs within the 301,580 acre OSTS Project Area. AR 26737, 28720, 28733-34. The Alternative 5 trail network will include designated routes for vehicles including motorcycles, all-terrain vehicles, Jeeps and other 4-wheel drive vehicles up to 80 inches (approximately six and a half feet) wide. AR 28734-35. As with the Travel Management Rule, the Forest Service’s identified need for the OSTS Project is that current “regulations have not proven sufficient to control the proliferation of unauthorized [OHV] routes or environmental damage” from unauthorized OHV use. AR 25225.

¹ The Forest Service withdrew the final EIS and draft Record of Decision in 2014 due in part to the Bailey Butte Fire of 2014, “which burned into the project area and created a condition that was potentially sufficiently different from the condition initially analyzed that additional analysis and some different design criteria were warranted. The Ochoco National Forest then initiated the supplemental draft EIS.” AR 28734.

Under all alternatives, including the no action alternative, the Forest Service is required to enforce the Travel Management ROD and seek to prevent and reduce unauthorized OHV use in the Ochoco. AR 12694, 12706. The SFEIS, however, does not analyze any alternative that involves full implementation and enforcement of the Travel Management ROD.

C. ODFW's longstanding involvement in the NEPA process

Oregon has actively participated in every phase of the NEPA process that led to the challenged decision and has consistently raised the objections and points contained herein.² ODFW provided written comments on or objections to the March 2009 Scoping Document, the January 2013 Draft Environmental Impact Statement, the March 2014 Final Environmental Impact Statement, the February 2016 Supplemental Draft Environmental Impact Statement and the September 2016 Supplemental Final Environmental Impact Statement. *See* AR 8939-45, 15225-39, 20836-54, 24340-44, 26728-56. These comments and objections provide the scientific basis for the State's position that the Forest Service failed to consider the best available science and ignored important aspects of the problem.

The State has repeatedly requested that the Forest Service undertake needed analyses to address and ameliorate ODFW's concerns. For example, ODFW asked early on, in 2009, that the Forest Service perform a regional assessment of the need for additional OHV trails and stated that, if this assessment demonstrated the need for an expansion of the existing trail system, ODFW would support trail system expansion in the Henderson Flat OHV area (an area less sensitive for fish and wildlife resources). AR 08942. This request was rejected. The Forest Service further rejected ODFW's request that the Forest Service use recent and accurate data to evaluate baseline conditions for watershed health. *See, e.g.*, AR 15228. Other examples abound of the Forest Service's refusal to perform needed analyses to adequately evaluate the impacts of the OSTs Project. *See, e.g.*, AR 15234 (ODFW request that Forest Service meaningfully review

² ODFW has consistently recommended that the Forest Service implement Alternative 1, the no action alternative. The SFEIS supports this conclusion. *See* AR 26730, 26744 (citing AR 25404, 25617, 25588, 25462).

motorized use of existing road and trail system in order to understand baseline impacts to fish and wildlife before moving forward with implementation of a new motorized trail system), AR 15231, 15233-34 (ODFW request that Forest Service meaningfully engage the public to review and discuss what a sustainable minimum motorized trail system should look like and associated trade-offs of development of an OHV trail system), 15234 (ODFW request that the Forest Service prioritize efforts to fully implement the existing mandate to curtail unauthorized OVH use under Travel Management ROD before engaging in the construction of an entirely new trail system without adequate mitigation). These requests were rejected.

III. LEGAL FRAMEWORK

A. NEPA

The National Environmental Policy Act (NEPA) “is our basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a) (2017). It requires each federal agency to prepare an environmental impact statement (“EIS”) for any major federal action that may significantly affect the environment. 42 U.S.C. § 4332(2)(C) (2012). An EIS must analyze both the “environmental impact of the proposed action” and the “alternatives to the proposed action.” *Id.* § 4332(2)(C)(i), (iii). NEPA requires that agencies “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” *Id.* § 4332(2)(E); *see also* 40 C.F.R. §§ 1502.14, 1502.16, 1508.25 (2017). The alternatives must compare the environmental impacts of the proposal and the alternatives, “thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.” 40 C.F.R. § 1502.14.

B. National Forest Management Act

National forests, such as the Ochoco, are managed by the Forest Service. *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 965 (9th Cir. 2003). The National Forest Management Act (“NFMA”) governs how the Forest Service must manage and administer the

Ochoco. *See id.* Pursuant to NFMA, the Forest Service must develop and implement a plan—known as a “land and resource management plan” or “forest plan”—for large “units” in the national forest. *See id.* at 966 (citing 16 U.S.C. § 1604(a)). The forest plan guides natural resource management activities. *See* 16 U.S.C. § 1604(a) (2012). Once a forest plan is in place, the Forest Service may develop “so-called ‘site-specific’ plans, which are prepared to effect specific, on-the-ground actions; these plans must be consistent with both sets of higher-level rules.” *Citizens for Better Forestry*, 341 F.3d at 966 (citing 16 U.S.C. § 1604(i)). NFMA requires the Forest Service to manage the Ochoco consistent with the Ochoco Forest Plan. *See* 16 U.S.C. § 1604(i).

C. Endangered Species Act

The Endangered Species Act (“ESA”) “requires consultation with the U.S. Fish and Wildlife Service (“USFWS”) or NOAA Fisheries Service for any “agency action” that “may affect” a listed species or its critical habitat.” *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1011 (9th Cir. 2012) (citing 16 U.S.C. § 1536(a)(2) and 50 C.F.R. § 402.14(a)). “The purpose of consultation is to obtain the expert opinion of wildlife agencies to determine whether the action is likely to jeopardize a listed species or adversely modify its critical habitat and, if so, to identify reasonable and prudent alternatives that will avoid the action’s unfavorable impacts.” *Id.* at 1020. “An agency may avoid the consultation requirement only if it determines that its action will have ‘no effect’ on a listed species or critical habitat.” *Id.* at 1027. If an agency determines that its action “may affect” a listed species, the agency must consult—formally or informally—with the appropriate expert wildlife agency. *Id.*

D. Standard of Review

The court reviews claims that the Forest Service violated NEPA, NFMA and the ESA pursuant to the standard in the Administrative Procedure Act (“APA”). This standard provides that the court shall hold unlawful and set aside an agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A) (2012).

A decision is arbitrary or capricious if the Forest Service “relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation 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.” *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1176-77 (9th Cir. 2011) (quoting *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008)). Deference to an agency’s scientific expertise is “not unlimited. The presumption of agency expertise can be rebutted when its decisions, while relying on scientific expertise, are not reasoned.” *Brower v. Evans*, 257 F.3d 1058, 1067 (9th Cir. 2001) (internal citation omitted). “Essentially, [the Court] must ask whether the agency considered the relevant factors and articulated a rational connection between the facts found and the choice made.” *Pac. Coast Fed’n of Fishermen’s Ass’n, Inc. v. Nat’l Marine Fisheries Serv.*, 265 F.3d 1028, 1034 (9th Cir. 2001) (internal quotation marks omitted).

IV. ARGUMENT

A. The Forest Service’s determination that the OSTS Project will have “no effect” on gray wolves violates the ESA

1. Gray wolf status, habitat and management

The gray wolf is listed as an endangered species under the federal ESA in the portion of Oregon that includes the Ochoco. AR 23781, 25478. The Ochoco contains suitable habitat for the gray wolf and falls within the species’ potential range. AR 28677-78. Wolves are habitat generalists, meaning that they can thrive in a variety of habitat types. AR 28559.

The gray wolf is a highly social species that lives in packs, which “are formed when male and female wolves develop a pair bond, breed and produce pups.” AR 28640. “When wolves reach sexual maturity, some remain in their natal packs while other leave, looking for a mate to start a new pack of their own.” AR 28642. Individual wolves are called “dispersers” and this critical phase of the gray wolf life cycle is called “dispersal.” AR 28642. A dispersing gray wolf may travel hundreds of miles “before locating vacant habitat, a mate or joining another pack.” AR 28642. Dispersal is a key part of the life cycle of the gray wolf and is an important aspect of

the establishment of wolf packs. *See* AR 28642. “The ability for wolves to effectively disperse from their natal territories and establish new populations is key to the success of” Oregon’s Wolf Conservation and Management Plan. AR 28547. Dispersal is also necessary “to provide continued expansion and ongoing genetic connectivity between wolf populations in other states and within the state.” AR 28547. Dispersal preserves genetic diversity of the species and avoids inbreeding and genetic deterioration. *See* AR 28553, 28559. As Oregon’s Wolf Conservation and Management Plan notes, “[g]enetic diversity is typically maintained via genetic interchange between subpopulations—as few as one to two immigrants per generation (approximately five years for wolves) can minimize the effects of inbreeding. This can be achieved by the demonstrated ability of wolves to rapidly disperse long distances and avoid inbreeding by selecting unrelated mates.” AR 28559 (internal citation omitted).

Since 2011, four different gray wolves have been conclusively documented dispersing through the Ochoco, in or near the OSTs Project Area. *See* Exhibit 1 to Declaration of Roblyn Brown (“Brown Decl.”) (diagram of dispersal paths for wolves OR3, OR24, OR28, and OR33); *see also* AR 23788 (Figure 5), AR 28527 (“OR33 dispersed through Central Oregon”), 28530 (Figure 5). The data, derived from GPS signals sent from radio collars attached to individual wolves, demonstrates that OR3 traveled through the Ochoco in 2011; OR24 traveled through in 2014; OR28 traveled through in 2015; and OR33 traveled through in 2016. Only about 11 percent of the gray wolves in Oregon have radio collars. AR 23787. Thus, the number of gray wolves traveling through the Ochoco is likely much higher. This is confirmed by the fact that gray wolves “are increasing in both distribution and abundance” throughout the state, including in and around the Ochoco. *See* AR 28553, 27937 (USFS biologist noting the presence of “numerous collared wolves within the last two years in and around the Forest”).

2. Forest Service’s determination that the OSTs Project will have “no effect” on gray wolves is arbitrary and capricious

As noted above, the “ESA requires consultation with the Fish and Wildlife Service or the NOAA Fisheries Service for any ‘agency action’ that ‘may affect’ a listed species or its critical

habitat.” *Karuk Tribe of Calif.*, 681 F.3d at 1011. The Ninth Circuit has “explained that ‘may affect’ is a ‘relatively low’ threshold for triggering consultation.” *Id.* at 1027 (citing *Cal. ex rel. Lockyer v. U.S. Dep’t of Agric.*, 575 F.3d 999, 1018 (9th Cir. 2009)). “Any possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the requirement.” *Id.* (internal quotation marks omitted).

The Forest Service determined that the proposed action will have no effect on the gray wolves. AR 25479. This determination is erroneous for several reasons. First, the Forest Service arbitrarily ignored the potential effects on the OSTS Project on gray wolves who are in the dispersal phase of the gray wolf life cycle and are therefore traveling through the Ochoco and OSTS Project Area. The Forest Service’s “no effect” determination is based on its factual finding that gray wolves “are not suspected or documented to occur in breeding populations or to persist on the Ochoco National Forest.” AR 25478. The Forest Service determined that the “may effect” determination is not warranted “until an active pack is identified” in the Ochoco. AR 25479. Even then, according to the Forest Service, the only potential effect would relate to “den sites.” AR 25479. By focusing only on breeding pairs and den sites, the SFEIS ignores effects on dispersing wolves which, like all gray wolves, are sensitive to human disturbance, road density and prey availability. AR 28559. The OSTS Project and associated OHV use will impact all three of these variables by increasing road density, human presence, and reducing availability of elk, which are a primary prey species for wolves where they co-occur. AR 28591, 28673, 28643.

Moreover, the Forest Service arbitrarily concluded that the selected alternative would have no effect on gray wolf habitat, including dispersal habitat and the population size or distribution of any gray wolf prey species. The OSTS Project is likely to directly influence the probability of gray wolves using the area for denning and foraging. “Wolf habitat suitability is strongly and positively correlated with public ownership.” AR 26744. As discussed below, *see infra* Section IV.D.4, the OSTS Project is likely to shift elk (i.e., wolf prey) to private lands.

“Prey availability and distributions are a strong determinant of wolf habitat suitability.”

AR 26743-44. A shift in prey distributions associated with the OSTs Project could cause wolves to forage on private property where wolves are less likely to persist, due to increased conflict with humans. AR 26744. Finally, areas of suitable wolf habitat are associated with low road densities. AR 26744. That finding is likely associated with increased human presence in areas with roads and increased human presence reduces the quality of wolf habitat. AR 26744. The OSTs Project will increase road densities and human use, which will decrease the suitability of habitat in the project area for wolves. AR 26744. Concluding that this project will have no effect on wolf habitat is arbitrary, capricious and ignores the best available science.

B. Forest Service’s reliance on unsupported assumptions regarding curtailment of unauthorized OHV use under Alternative 5 violates NEPA

Under NEPA, the Forest Service is required to identify the environmentally preferable alternative. 40 C.F.R. § 1505.2(b) (2012). Here, the Forest Service determined that the environmentally preferable alternative is Alternative 5. AR 28753. This determination is arbitrary, capricious and not supported by the record. In designating Alternative 5 as environmentally preferable to Alternative 1 (the no action alternative), the Forest Service relies on the premise that “implementation of Alternative 1 would perpetuate unauthorized routes within the project area.” AR 28754, 25405. The Forest Service further concluded that increased environmental impacts from the creation and use of a new OHV trail system under Alternative 5 will be offset because unauthorized OHV travel on user-created trails will be significantly abated. AR 25263-64, 28753-54. Yet the Forest Service relies on unsupported assumptions and reaches speculative conclusions about the effectiveness of its anticipated enforcement efforts to prevent and reduce unauthorized OHV travel under Alternative 5. The record demonstrates that implementation of Alternative 5 will result in OHV use that is additive to current use.

The Forest Service determined that unauthorized OHV travel throughout the OSTs Project Area will be abated by enforcement efforts that prioritize “[e]asily understandable signs, substantial public education and well-engineered barriers to prevent trail proliferation.”

AR 25263-64. The Forest Service provides no documentation from case studies or literature to support its determination about the effectiveness of signage and public education to convince OHV riders to abandon user-created trails and closed roads. With respect to using physical barriers to close user-created trails, the Forest Service's rehabilitation plan does not support the sweeping assumption that Alternative 5 will curtail unauthorized OHV use throughout the OSTs Project Area. AR 26737. The Forest Service plans to rehabilitate and monitor user-created trails only within the OHV Management Area.³ See AR 25472, 25255, 28170, 25837, 28172. The OHV Management Area, however, comprises only 25% of the 301,580 acre OSTs Project Area. AR 26737, 28720. Thus, hundreds of miles of user-created trails across 224,000 acres of forest will remain unrestored and available for unauthorized motorized use. AR 26738-39.

The Forest Service concedes that efforts to rehabilitate and monitor user-created trails, even within the OHV Management Area, are contingent on securing funding. See, e.g., AR 28170, 25462. Throughout the SFEIS, however, the Forest Service's reasoning depends upon funding and enforcement resources that are uncertain and not within the agency's control. The Forest Service intends to rely primarily on Central Oregon's Combined Off Highway Vehicle Operations ("COHVOPS")—a joint program of the Forest Service and the Bureau of Land Management ("BLM")—to enforce unauthorized OHV use in the OHV Management Area. AR 25304. COHVOPS is funded in part by the Forest Service and the BLM, as well as through grant funding from the State of Oregon ATV Allocation Funds, which are derived from the ATV Permit program and a portion of gas tax revenue. AR 25304, 25677, 25265. ATV Allocation Funds are unpredictable and vary from year to year. AR 15231, 26745. COHVOPS currently has responsibility for 938 miles of designated OHV roads and trails in central Oregon. AR 26745. COHVOPS' ability to obtain sufficient funding to adequately meet existing enforcement needs is increasingly difficult each year, even without considering the additional funding and enforcement personnel needed for the OSTs Project. AR 15231. The SFEIS does not discuss a

³ A map of the OHV Management Area can be found in the record at AR 28720.

contingency plan if funds are not awarded; it includes no information or analysis regarding trends in funding for COHVOPS nor any projections of future expenditures associated with curtailing unauthorized OHV use in the OSTTS Project Area. AR 26745. In short, the Forest Service's assumptions regarding curtailing unauthorized under Alternative 5 are unfounded given that funding and COHVOPS' presence cannot be dependably realized. *See* AR 26745.

Lastly, the Forest Service simply ignores that, under all alternatives, it has an obligation to enforce the Travel Management ROD, "which instructs managers to prohibit cross-country travel." AR 26745. The SFEIS analysis is deficient in that it fails to analyze options for prioritizing funds for closure and restoration of user-created trails and roads instead of expanding opportunities for motorized use. AR 26745. The SFEIS contains no analysis of alternative funding sources that could support efforts to curtail unauthorized use without constructing a new trail system that will draw thousands of new OHV users to the Ochoco. AR 26745. Instead, the Forest Service simply assumes that "grant funding to rehabilitate unauthorized routes and areas, to increase visitor compliance through education, information and enforcement would not be available" under Alternative 1. AR 28747.

ODFW has long expressed its concern that Forest Service would implement—but not be able to adequately administer, maintain or enforce—a developed OHV system, resulting in adverse impacts on fish and wildlife and loss of recreational opportunity. AR 08944. This concern is substantiated by the Forest Service's reliance on speculative assumptions regarding unauthorized OHV, and a history of failing to follow through on preexisting obligations to prevent unauthorized OHV use through education and enforcement.

C. The Forest Service's analysis of the OSTTS Project's impacts on Redband trout and watershed health violates NFMA and NEPA

1. Redband Trout and watershed health will be adversely impacted by the OSTTS Project and associated OHV use

The majority of streams in the OSTTS Project Area are inhabited by interior Columbia River Redband trout ("Redband trout"), which have historically been present throughout the

Ochoco. AR 25346, 15230. Redband trout is listed as a sensitive species under state and federal law. AR 15230. Many populations of Redband trout in the Ochoco are depressed and vulnerable to stochastic (chance) events. AR 15230, 24341. ODFW has invested significant resources into efforts to protect and restore native Redband trout populations and habitat, including working cooperatively with the Forest Service for over 15 years to address adverse impacts of livestock grazing on aquatic habitat and Redband trout populations in the Ochoco. AR 15230. Nonetheless, most streams in the Ochoco are severely degraded and fail to provide conditions that support conservation of the Redband trout populations. AR 15230, 24341. The majority of watersheds that will be impacted by the OSTs Project already have poor habitat conditions and declining fish density trends. AR 26730 (summarizing AR 25368-402). Habitat degradation—which manifests through high sediment load, impacts from grazing and high road density—is a primary influence on low abundance levels. AR 24341.

Of particular concern are the Crooked River Redband trout, which are genetically distinct from other populations. AR 15230. Their viability, and associated contribution to the genetic diversity of the species, is key to the long term conservation of the species. AR 15230. Most of these fish are in highly degraded and fragmented habitat, which contributes to low population abundance, low genetic diversity and high risk of extinction. AR 20840, 208430. Indeed, some isolated populations of Redband trout have been extirpated. AR 20841. The streams within the Ochoco represent the most extensive area of suitable Redband trout habitat remaining in the Crooked River subbasin, and the Ochoco populations are one of the few last strongholds for the survival of native Crooked River Redband trout. AR 20840, 15230.

OHV trails and associated OHV travel have well-documented adverse effects on fish, streams and riparian habitat. OHV recreation and trail construction can change runoff patterns, increase sediment, decrease riparian vegetation, increase water temperature, fragment habitat, and compromise the hydrology and stability of streams. AR 20841, 25352. Increased turbidity and sediment from soil erosion is a key issue in evaluating adverse impacts on fish and stream

health. *See* AR 20845. Increased or excess sediment can be detrimental, and potentially lethal, to aquatic organisms. AR 20841, 25358. As the SFEIS notes:

The numerous organisms forming the base of the aquatic food chain find shelter and habitat in the open spaces within stream gravel and cobble. Filling these spaces with sediment reduces the habitable volume of the stream. As sediment sources and delivery exceeds 20 percent of the total area on the substrate, deposits within the larger cobble material of the streambed produce an embedded channel, with consequent loss of aquatic habitat. Gravel embeddedness of less than 20 percent is essential to maintain a healthy salmonid population, particularly in those areas identified as potential or existing spawning areas (Bjornn and Reiser, 1991). If fine sediment exceeds 20 percent, the spaces between the rocks in the substrate are filled and oxygenation of eggs is reduced. Reduced oxygenation results in reduced success of fish and frog eggs surviving.

AR 25358; *see also* AR 20845 (“fine particles from soils can clog gills of fish, promote excessive algae growth, and reduce oxygen in waters” and excess sediment can fill “in gravel beds and destroys spawning habitat”). Soil disturbance and runoff associated with trail construction in or near riparian areas in the Ochoco may have severe adverse impacts on fish in the OSTs Project Area. AR 20842.

2. The SFEIS fails to evaluate how the OSTs Project will impact quantitative water quality targets required by the Forest Plan and INFISH

NFMA imposes a duty on the Forest Service to manage the Ochoco consistent with the Ochoco Forest Plan. *See* 16 U.S.C. § 1604(i). The Forest service violated this duty by failing to demonstrate that the OSTs Project is consistent with the Ochoco Forest Plan and INFISH. The Ochoco Forest Plan was enacted in 1989 with the stated objective that, in ten years, “work to restore riparian areas will have been completed,” AR 1919, and that in fifty years, “[a]ll riparian areas will be in excellent condition,” AR 1920. Nearly 30 later, the vast majority of the streams in the OSTs Project Area are far from meeting the Standards and Guidelines in the Forest Plan.

INFISH establishes riparian goals for the Ochoco as well as Riparian Management Objectives (“RMOs”). The riparian goals are, among other things, to maintain or restore

(1) “water quality, to a degree that provides for stable and productive riparian and aquatic ecosystems; (2) stream channel integrity, channel processes, and the sediment regime (including the elements of timing, volume, and character of sediment input and transport) under which the riparian and aquatic ecosystems developed; [and] (3) instream flows to support healthy riparian and aquatic habitats.” AR 02694. The RMOs establish specific objective relating to key habitat features, including water temperature, large woody debris and bank stability. AR 2696. INFISH provides that “[a]ctions that reduce habitat quality...would be inconsistent with the purpose of this interim direction. Without the benchmark provided by measureable RMOs, habitat suffers a continual erosion.” AR 2695. Standards and guidelines for all Riparian Habitat Conservation Areas (“RHCAs”) dictate that “where existing roads, facilities, and other improvements found to be causing an unacceptable risk cannot be relocated, eliminated or reconstructed, those improvements would be closed.” AR 2698. INFISH further requires that the Forest Service “[d]esign, construct, and operate recreational facilities, including trails and dispersed sites, in a manner that does not retard or prevent attainment of the Riparian Management Objectives and avoids adverse effects on inland native fish.” AR 2701.

The Forest Service fails to demonstrate how the addition of 137 miles of permanent OHV trails is consistent with INFISH riparian goals and does not retard attainment of RMOs. This failure is particularly serious where, as here, the watersheds that will be impacted are already failing to meet INFISH criteria. The SFEIS acknowledges that many of the streams and subwatersheds within the Ochoco are severely compromised and do not meet INFISH objectives. *See* AR 25368-402. For example, for the Elliot Creek subwatershed, the SFEIS states that “[g]enerally, aquatic habitat in the Elliott Creek watershed at surveyed locations is rated as being in poor condition. This is especially true for shade (did not meet forest plan standards at any site), large woody debris, temperature, physical barriers, pool frequency and pool quality, where almost all ratings at each surveyed location rated poor.” AR 25372. The additive impacts from

the OSTs Project are inconsistent with INFISH because they will further reduce habitat quality in several watersheds. AR 20844.

The SFEIS further acknowledges that streams with greater than 20% fine sediment are not properly functioning and do not meet Forest Plan standards. AR 25355, 25358. The threshold of 20% is well established in the literature. AR 20845 (citing literature). Numerous streams in the Ochoco are well in excess of this standard. *See, e.g.*, AR 25369-371, 25378-79, 25382-83, 25388-89, 25393. These streams are already severely compromised by land use practices including an extensive road network and livestock grazing. AR 20845. The impacts from the proposed OHV project will exacerbate these poor conditions and further compromise streambank stability, fish habitat and native fish populations by subjecting these sensitive areas to an OHV system. Thus, the OSTs Project violates the non-degradation standards of INFISH.

3. The SFEIS determination that Alternative 5 will not exacerbate existing water quality conditions is not supported by the record

The Forest Service's determination that Alternative 5—which outlines 71 stream crossings, AR 25598—will not exacerbate existing water quality conditions is arbitrary, capricious and not supported by the record. The SFEIS acknowledges that Alternative 5 “would increase the overall road/trail density and stream crossing density.” AR 25442. The SFEIS concludes, however, that “the trail system, as designed in Alternative 5, would not exacerbate existing water quality issues, because of appropriate design criteria and proper management and maintenance,” and that “once most user-created trails have revegetated (or are rehabilitated/restored (as prioritized)), impacts to watersheds flow and sediment regimes should decrease to levels below the existing condition.” AR 25442.

The conclusion that Alternative 5 will not exacerbate water quality issues is unfounded. The Forest Service provides no justification for how adding 137 miles of permanent OHV trails will avoid exacerbating existing water quality conditions. The SFEIS acknowledges that the primary factors limiting Redband trout in the Ochoco are high stream temperatures and channel degradation due to issues with riparian area management. AR 25465. Thus, the Forest Service

expressly concedes that current riparian management is compromising Redband trout populations in the Ochoco. The OSTs Project constitutes a permanent disturbance that will only exacerbate existing limiting factors for Redband trout. The Forest Service fails to provide evidence, documentation or supporting information that an increase in road/trail and stream crossing density will not increase sedimentation. AR 26730. Moreover, the Forest Service fails to identify a management and maintenance plan that will prevent increased sedimentation. The Forest Service relies on the rehabilitation and restoration of user-created trails, but fails to demonstrate a stable and reliable funding source to ensure this will occur. AR 26730.

4. The SFEIS relies on stale data to evaluate impacts of the OSTs Project on watershed health

NEPA requires that the Forest Service establish appropriate baseline conditions. The Ninth Circuit has found that an accurate evaluation of baseline conditions is “critical to any NEPA analysis” because, “[w]ithout establishing the 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.” *Great Basin Res. Watch v. Bureau of Land Mgmt.*, 844 F.3d 1095, 1101 (9th Cir. 2016) (omission and brackets in original). An agency’s reliance on stale data has been found to violate NEPA. *See Lands Council v. Powell*, 395 F.3d 1019, 1031 (9th Cir. 2005).

Here, the Forest Service violated NEPA by relying on stale data when evaluating the impacts of the OSTs Project on watershed health. AR 26731. The Forest Service relied on surveys conducted between 1991 and 2003 to determine compliance with the riparian zone standards and guidelines. AR 25355. Other surveys were conducted between 1989 and 2014. AR 25355. Most of the data points presented in the SFEIS regarding key habitat indicators (such as shade, water temperature and fine sediment) were collected in the early 1990s. *See* AR 26732. Decades-old data does not describe the current condition of the watershed.

There have been several disturbances in the Ochoco that have drastically changed watershed conditions since much of the data was collected. For example, in 2006, the Maxwell

Fire affected approximately 2,317 acres in Allen Creek, East Fork Allen Creek, and Elliot Creek drainages. AR 25381. The Maxwell Fire dramatically impacted the health of streams and the amount of fine sediment in these drainages. AR 26731, 20840. Without more recent data, it is impossible to adequately assess the impacts of increased sedimentation to fish populations. In response to this concern raised by ODFW, the Forest Service indicated that “baseline conditions due to the Maxwell Fire were documented in the baseline conditions at SFEIS 154 and 157.” AR 28134. This statement is inaccurate. *See* AR 25378, 25381 (simply noting increased sedimentation in the affected watersheds due to the Maxwell Fire). The SFEIS acknowledges that the Maxwell Fire impacted streams by reducing vegetation and increasing erosion and sediment load into streams, *see, e.g.*, AR 25454, 25450, but acknowledging that there have been impacts is not the same as meaningfully evaluating those impacts as required by NEPA. The SFEIS presents no data from after the Maxwell Fire to show how key habitat conditions such as fine sediment and bank stability were affected. In addition, there is no discussion or data to show how other vegetation management projects or grazing are impacting the ability of the vegetation to recover. The Forest Service’s reliance on decades-old data to evaluate current baseline conditions is arbitrary, capricious and violates NEPA.

5. Forest Service fails to take a hard look at cumulative impacts from grazing

NEPA requires the Forest Service to consider the cumulative impact of the OSTs Project. *See* 40 C.F.R. § 1508.25. “Cumulative impact” is 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 regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” 40 C.F.R. § 1508.7 (2017). The SFEIS fails to take the requisite hard look at the cumulative impacts of grazing on aquatic resources. AR 26733. As a result, the Forest Service’s evaluation of cumulative effects fails to comply with NEPA.

Instead of evaluating the cumulative impacts of grazing on watershed health when added to impacts from the OSTs Project, the Forest Service instead evaluated the impacts of OHV use

on the grazing program. *See, e.g.*, AR 25636 (“Direct and indirect effects to grazing operations should be minimal.”). Grazing has numerous adverse impacts on watershed health, including increasing sediment loads in spawning gravel, channel instability and stream width/depth ratios. AR 26734. The SFEIS does acknowledge that, with all action alternatives, “[l]ivestock may be displaced during high use times on the trail system and distribution throughout the project area could also be negatively affected with the increase of OHV use in a localized area. If livestock distribution is negatively impacted, localized areas in uplands and riparian areas may receive greater grazing utilization.” AR 25636. Increased grazing in sensitive riparian areas will serve to exacerbate adverse impacts to the watershed. Yet the Forest Service fails to account for these additive impacts in analyzing the effects of the OSTs Project.

The SFEIS further notes that “cattle would likely use some of the user-created trails across the Ochoco. Cattle use of these user-created trails would reduce the number and miles of trail that would revegetate over time. As discussed above, the SFEIS indicates that user-created trails outside of the OHV Management Area will not be actively revegetated. *See supra* Section IV.B. Thus, hundreds of miles of user-created trails across 224,000 acres of the Ochoco will remain available for cattle use. AR 26734. ODFW has met with the Forest Service multiple times over the past decades in an effort to improve grazing management and minimize resource impacts. AR 26734. While some improvements have been made, there remains much work to be done. The SFEIS fails to adequately analyze how implementation of the OSTs Project will exacerbate ongoing cumulative effects associated with livestock grazing.

D. The Forest Service’s analysis of impacts of the OSTs Project on elk violates NEPA and NFMA

1. Big game species will be adversely impacted by the OSTs Project and associated OHV use

The OSTs Project Area provides summer and winter range habitat for mule deer and Rocky Mountain elk. AR 25508. The Ochoco Forest Plan lists Rocky Mountain elk and mule

deer as Management Indicator Species,⁴ which act as a barometer for big game species that are sensitive to human disturbance. AR 10565, 10567, 25511. Rocky Mountain elk and mule deer both “are considered popular big game species and when combined contribute thousands of recreational visitor days each year to this area during hunting seasons, and for general wildlife viewing and photographic opportunities during other times of the year.” AR 25508.

Recreational activities associated with fish and wildlife significantly contribute to local economies. AR 08944, 25509. For example, in 2008, fish and wildlife activities generated 2.5 billion dollars of revenue for the State and millions of dollars for Crook and Wheeler counties alone. AR 08944, 25509.

Key components of elk and deer habitat include adequate habitat for calving and fawning, which primarily occur in proximity to riparian or meadow areas that provide high quality forage and cover, and security habitat. AR 1669-70. Cover is provided by vegetation, such as forested stands or thickets, as well by topographic features. Quantity and quality of cover and open road density are the main factors that influence the suitability of elk habitat. AR 1676.

ODFW’s long history of managing big game species provides important context for understanding the impacts of the OSTs Project. ODFW first established Wildlife Management Units⁵ (WMUs) for deer and elk in 1952. Supplemental Administrative Record (“Supp”) 00072. Within each WMU, ODFW sets a population management objective (MO) for each species. The MO is the number of wintering big game animals that ODFW manages for to prevent depletion of the species and “to provide optimum recreational and aesthetic benefits for the public.” AR 10568. The elk population MO for the Ochoco WMU—within which the OSTs Project falls—repeatedly has been revised upward. *See* Supp 00072 (established in 1981 at 500, revised to 1,500 in 1984, revised to 2,600 in 1994). In 2005, ODFW, in partnership with the Forest

⁴ Management Indicator Species are selected because their welfare is presumed to be an indicator of the welfare of other species using the same habitat or whose condition can be used to assess the impacts of management actions on a particular area. AR 10565.

⁵ Wildlife Management Units, also called Wildlife Units, are defined geographical areas established by ODFW for management of wildlife species. OAR 635-080-0000.

Service, conducted a formal review of MOs and found that the Ochoco contained adequate habitat to support an increased elk population. AR 26740. In response to this review, plus recommendations generated by a 36-member working group and the best available science, ODFW increased the elk population MO to 4,500. AR 20852, 26740. The 2015 population estimate for elk in the Ochoco WMU was 4,050. AR 25511.

It is well established that motorized access has profound adverse effects on big game. Elk are easily spooked by disturbances; they pay attention to approacher behavior and have greater perceptions of risk when disturbed in open habitats. AR 25512. Females or groups with young offspring are particularly likely to flee from human disturbances. AR 25512. The Forest Service acknowledges that “[a] key element of elk habitat management is providing hiding cover and security areas especially during the fall hunting seasons.” AR 25512. The Forest Service further recognizes that elk will leave an area that lacks sufficient hiding cover when disturbed by motor vehicles.” AR 25512. A key indicator of impacts on elk is road density, which is a measurement that reflects the number of miles of road per square mile.

The OSTs Project will affect elk by, among other things, increasing road and trail densities and increasing road and trail use rates. There is strong evidence that elk will avoid areas with roads open to motorized vehicle, Supp 112, AR 5708, AR 9431, and that avoidance is stronger as rates of use increase, Supp 99. The OSTs Project is fully expected to increase total use from recreation, resulting in increased traffic rates. Both of these effects will impact elk distribution. Displacement of elk in relation to motorized vehicle use results in a temporary or permanent reduction in effective habitat. Loss of effective habitat from motorized vehicle use is strongly associated with reduced local and regional elk populations. *See generally* Supp 2877-91. Furthermore, elk vulnerability to hunter harvest and poaching increases as open road density increases. The increased potential for legal and illegal mortality will have a negative effect on population size of elk. Elk in areas with higher road densities and areas with higher human disturbance from motorized vehicles have increased stress levels and increased

movement rates and subsequent energetic costs. Supp 10. Increased stress and movement rates will reduce body condition of elk, which is a primary determinant of pregnancy rates and can influence juvenile growth and survival. Consequently, the OSTS project is likely to affect performance of individual elk and could result in subsequent population level effects.

In summary, the many adverse effects of increased road and trail densities on elk include:

- Increased energy expenditure by elk from increased disturbance from motorized vehicles, which can impact individual animal reproductive performance, survival of offspring, and overwinter survival of adults. Combined, these reduced individual performance metrics can result in negative effects to elk population size.
- Decreased amounts of total effective habitat available to elk. Reduced amounts of effective habitat are linked to population declines of elk at local and regional scales.
- Decreased hunting opportunity on public lands. Increased road and trail densities and associated use will shift distributions of elk from public to private lands making elk unavailable to harvest by the public.
- Increased damage to private lands. Distribution shifts from public to private lands will increase damage as elk spend less time on public lands.
- Decreased hunter satisfaction. Hunters report increased hunter satisfaction when able to hunt in roadless areas or areas where ATV use is restricted.
- Increased harvest and poaching. Vulnerability of elk to legal harvest and poaching increase as motorized vehicle access increases.

2. The Forest Service failed to adequately analyze consistency with Forest Plan road density standards and to take the requisite hard look at road densities

The Forest Service violated NFMA by failing to ensure that the OSTS Project is consistent with the road density standards set out in the Forest Plan. *See* 16 U.S.C. § 1604(i).

The Forest Plan requires that road densities in the Ochoco are below three miles per square mile. The Forest Service fails to demonstrate that the OSTS Project is consistent with this requirement.

The Forest Service claims that, under all alternatives, road densities do not exceed three miles per square mile. AR 25518. This claim is unfounded. First, the Forest Service's calculation assumes that all operational maintenance level 1 roads are closed and thus excludes these roads from the density calculation. AR 25517. The Forest Service provides no justification for its assumption that motor vehicles will cease using maintenance level 1 roads, as

these roads have no physical barriers or even signs identifying their closure status. When these roads are included in the calculation, road and trail densities in the OSTS Project Area often exceed three miles per square mile and in some areas reach almost 11 miles per square mile. AR 26735-37 (Figs. 2 and 3). In addition, other analyses in the SFEIS reveal road densities under Alternative 5 that exceed the Forest Plan standards. For example, in Table 116, the SFEIS calculates that open and total road densities within 300 feet of streams range well over three miles per square mile in almost every subwatershed. AR 25445 (road densities are high for eight out of nine subwatersheds). Moreover, the Forest Service fails to adequately explain why it did not base its road density analysis “on management-area wide conditions,” as specified in the Forest Plan. AR 25518. The Forest Service instead opted to analyze road density looking at the watershed and subwatershed scale, rather than the management area. AR 25518. The Forest Service provides no biological justification for using the watershed scale to calculate road densities. In addition, the Forest Service fails to adequately explain whether it included private lands in its calculation. If so, the road density calculation is an underestimate, as private lands have lower road densities.

In sum, the SFEIS fails to provide a thorough and biologically meaningful analysis of road density required to accurately analyze the effects of the OSTS Project on elk. As a result, the Forest Service failed to demonstrate that the OSTS Project is consistent with the Ochoco Forest Plan, in violation of NFMA, and failed to take a hard look at the direct, indirect, and cumulative impacts of the OSTS Project, in violation of NEPA.

3. The SFEIS misapplies scientific studies regarding elk security habitat

The Forest Service acknowledges that motorized vehicles and road densities impact movements of elk. The SFEIS relies heavily on one study to assess the impacts of OHV travel on elk security: Hillis et al. (1991). AR 26734, 26751-56. Yet, the Forest Service ignores key portions of Hillis and cherry picks parts of the analysis. Thus, the Forest Service failed to ensure the scientific integrity of its analysis in violation of NEPA. *See* 40 C.F.R. § 1502.24 (2017)

(“Agencies shall ensure the professional integrity, including scientific integrity, of the discussions and analyzes in environmental impact statements.”).

In reliance on Hillis, the Forest Service defines elk security for forested stands as areas greater than 250 acres in size and greater than ½ mile from an open route. AR 25513. This definition is incomplete; the Forest Service omits three other very important aspects of Hillis:

- a. Hillis states that the elk security analysis must also consider that elk vulnerability increases when less than 30% of an analysis unit is comprised of security areas. Total acreage of elk security areas greater than 250 acres and more than ½ mile from a road in the OSTs Project Area total 44,940. This is approximately 15% of the 301,580 acre OSTs Project Area or half of what Hillis recommends. *See* AR 26734-35.
- b. The scope of Hillis is limited to analyzing security habitat for bull elk during hunting seasons. Under Alternative 5, the effects of the OSTs Project will be on all elk, not just bulls, from June 1 through September 30, a timeframe that is outside of established hunting seasons. AR 26734.
- c. Hillis was conducted in an area of western Montana with steep slopes and dense forest. The OSTs Project Area has less rugged topography and more open, dry forest types. Thus elk will be able to detect human activity on motorized routes from a greater distance in the Project Area. In choosing to use a distance of ½ mile from a road to define elk security, the Forest Service ignores Hillis’ recommendation that “when cover is poor and terrain is gentle it may require a distance of greater than one-half mile from open roads before security is effective.” AR 26734.

The above points highlight serious flaws in the Forest Service’s analysis of the OSTs Project’s impact on elk. In relying on Hillis, the Forest Service fails to consider the elk population as a whole as well as the appropriate seasonal habitat requirements that correlate with proposed OHV use. Furthermore, the Forest Service ignores key recommendations in Hillis and fails to consider Hillis in light of local conditions. AR 26734.

4. The Forest Service makes arbitrary assumptions and fails to utilize the best available science in analyzing the impacts of the OSTs Project on the problem of displacement of elk onto private land

The Forest Service makes arbitrary and unsupported assumptions in its analysis of the potential for elk displacement onto private land. The lack of open roads on private land

increases the probability of elk use. Displacement of elk onto private lands is problematic. Displacement makes it difficult for ODFW to manage elk populations to provide optimum recreational and aesthetic benefits to Oregonians and increases forage damage complaints from adjoining private landowners. AR 20852. The Forest Service assumed that elk would “be more likely to find secure cover and not be displaced to private land where forested stands exceeding 40% crown closure occur at a distance of more than ½ mile from a motorized route and where this occurs within 2 miles of private land.” AR 25532. This assumption is arbitrary and unsupported. AR 26742.

Elk security areas occur primarily around the outer edges of the OSTs Project Area. AR 26735 (Figure 1), 26738 (Figure 4), 26739 (Figure 5), 26742. Thus, elk are likely to be stranded in these security areas, hemmed in by the extensive road and trail network. AR 26742. The Forest Service ignores the need to provide connectivity through the OSTs Project Area between security areas. AR 26742. As use of the OHV travel increases, it will be exceedingly difficult for elk to easily move throughout the OSTs Project Area. AR 26742. Because they will already be on the edges of the Ochoco and within 2 miles of private land, elk will be more likely to utilize private land for forage and hiding cover. AR 26742. Furthermore, as OHV use will be allowed throughout the summer, elk displacement onto private lands is likely to occur in summer as well. AR 26742. Currently, elk typically move onto private lands around the Ochoco in the winter. AR 26742. By increasing use of private lands in summer, elk will be depleting nutritional resources traditionally available for their winter maintenance. This will further strain forage availability and necessitate more ODFW resources to respond to agricultural damage. AR 26742. Moreover, the SFEIS fails to include any monitoring plan for assuring that security areas will provide elk refuge from motorized recreation. AR 26739.

In addition, NEPA requires that the Forest Service utilize the best available science to analyze the impacts of the OSTs Project. In order to meet this obligation, ODFW repeatedly asked the Forest Service to incorporate the Blue Mountain Elk Nutrition and Habitat Model

(“Model”) into the SFEIS in order to accurately predict elk habitat use in the OSTs Project Area. AR 20852, 26739. The Model was developed in partnership with ODFW, the Forest Service’s Pacific Northwest Research Station (Starkey Experimental Forest) and La Grande Forestry and Range Science Lab. AR 26739, 24957. It was released in 2012 and was beta tested between 2012 and 2014. AR 24957. The Model is intended “to predict areas with potential for provision of relatively high quality forage during mid to late summer,” precisely when the motorized use will be occurring in the OSTs Project Area. AR 24957. The Model is based on assumptions that reflect elk behavior and geographic features of the Ochoco. AR 24957.

The Forest Service incorporated the Model as part of its Resource Report and Biological Evaluation for Terrestrial Wildlife. AR 24957. However, the Forest Service failed to adequately apply and analyze the Model for all alternatives. Instead of using the Model to predict elk use and identify areas of elk security under each alternative, the Forest Service applied the Model to select alternatives and then made qualitative judgements regarding the Model’s results. AR 24958. Furthermore, the Forest Service relies heavily on figures that make it difficult to discern the impact of the proposed action versus existing conditions. AR 24960-71. In order to properly apply the Model and depict the results in a transparent fashion, it is necessary to present a quantitative comparison (table form) showing the impact of each alternative on elk probability of use. *See* 40 C.F.R. § 1502.14 (environmental impacts of the proposal and the alternatives to the proposal must be presented in comparative form); 40 C.F.R. § 1502.24 (agencies must ensure scientific integrity of analysis); *Save the Peaks Coal. v. U.S. Forest Serv.*, 669 F.3d 1025, 1038 (9th Cir. 2012) (Forest Service must disclose its methodologies).

5. The Forest Service’s failure to impose timing restrictions to protect elk calving sites violates NFMA

The Forest Service fails to demonstrate that the OSTs Project is consistent with the Forest Plan’s requirement that the Forest Service must “[p]rotect the character of elk calving sites” and “[m]inimize disturbance from human activity during the calving season (approximately May 15 to June 30).” AR 1670.

Under Alternative 5, the season of permissible OHV recreational use is June 1 to September 30. Thus, OHV recreation will overlap with four of the six weeks of the elk calving season. The SFEIS asserts that “[t]he proposed season of use . . . would contribute to minimizing potential effects to many wildlife species by avoiding much of the early nesting/calving/fawning season, when disturbance can be more impactful to animals.”

AR 25679. The Forest Service provides no support for this assertion and fails to explain how allowing motorized use for the majority of the elk calving season will avoid disturbance to elk and their newly born calves and fawns that remain vulnerable throughout the summer.

AR 26743. Furthermore, Alternative 5 proposes 69 miles of designated motorized routes that could impact over 11,000 acres of potential elk calving and deer fawning habitat. AR 25528-29. This could have population wide effects on big game that depend on the Ochoco to rear their young. In response to this concern, voiced by ODFW and others, the Forest Service indicated that “if monitoring indicates that potential habitat is actually being used as calving habitat, a seasonal restriction would be placed on the affected trail segments.” AR 28117. Yet, the SFEIS provides no detail about how, when, where and with what funding such monitoring will occur. *See* AR 25269 (vaguely referring to “[p]eriodic monitoring of designated routes through special wildlife habitats such as elk calving areas”). The Forest Service fails to demonstrate that the SFEIS and ROD are consistent with the Ochoco Forest Plan’s standards for protection of calving sites, as required by NFMA.

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V. CONCLUSION

For the reasons discussed above, the State respectfully requests that the Court grant Plaintiffs' motions for summary judgment.

DATED February 2, 2018.

Respectfully submitted,

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