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THE HONORABLE PATRICIA SULLIVAN

**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.

SHANE JEFFRIES, in his official capacity as  
Ochoco National Forest Supervisor; and  
UNITED STATES FOREST SERVICE,

Federal Defendants,

and

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

Defendant-Intervenors

Case No. 2:17-cv-1004-SU (Lead Case)  
Case No. 2:17-cv-1091-SU (Trailing Case)  
Case No. 2:17-cv-1366-SU (Trailing Case)

**FEDERAL DEFENDANTS'  
CONSOLIDATED MEMORANDUM IN  
SUPPORT OF CROSS MOTION FOR  
SUMMARY JUDGMENT AND IN  
RESPONSE TO PLAINTIFFS' MOTIONS  
FOR SUMMARY JUDGMENT**

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| APA     | Administrative Procedure Act                           |
| BiOp    | Biological Opinion                                     |
| COHVOPS | Central Oregon Combined Off-Highway Vehicle Operations |
| COLW    | Central Oregon Landwatch                               |
| EIS     | Environmental Impact Statement                         |
| ESA     | Endangered Species Act                                 |
| FWS     | U.S. Fish and Wildlife Service                         |
| HEI     | Habitat Effectiveness Index                            |
| INFISH  | Inland Native Fish Strategy                            |
| MVUM    | Motor Vehicle Use Map                                  |
| NEPA    | National Environmental Policy Act                      |
| NFMA    | National Forest Management Act                         |
| NFS     | National Forest System                                 |
| ODFW    | Oregon Department of Fish and Wildlife                 |
| OHA     | Oregon Hunters Association                             |
| OHV     | Off Highway Vehicle                                    |
| PDF     | Project Design Feature                                 |
| RHCA    | Riparian Habitat Conservation Area                     |
| RMO     | Riparian Management Objective                          |
| ROD     | Record of Decision                                     |
| SFEIS   | Supplemental Final Environmental Impact Statement      |
| TMR     | Travel Management Rule                                 |
| WEG     | WildEarth Guardians                                    |

## **I. INTRODUCTION**

The U.S. Forest Service manages the Ochoco National Forest (Forest) in central Oregon for multiple uses, including providing motorized recreational opportunities and protecting habitat for wildlife and fish. This multiple-use management requires the Forest Service to exercise substantial discretion based on its expertise and experience to balance the various and sometimes competing uses of National Forest System (NFS) lands.

In 2011, the Forest Service implemented the Travel Management Rule (TMR) on the Forest in a manner that closed nearly all forested trails to use by off-highway vehicles (OHVs). Before that time, nearly ninety percent of the Forest was available for cross-country OHV use, which had resulted in a large network of user-created trails. Recognizing a significant demand for OHV recreational use opportunities on the Forest, the Forest Service committed to developing a logical and sustainable OHV trail system that would meet that demand, prevent the unauthorized development and use of cross-country trails, and balance other uses of Forest resources.

In June 2017, after an extensive public process spanning several years and based on hundreds of pages of detailed environmental analyses, the Forest Service approved the Ochoco Summit Trail System Project (Project). The Project provides for a 137-mile network of roads and trails for four different classes of OHVs. It also includes seasonal restrictions and various other resource protection measures to protect wildlife and watersheds. The Forest Service determined that such a trail system properly balances the need to provide OHV recreational opportunities with the multitude of other uses for which the Forest must be managed.

Despite the extensive and transparent process used to develop the Project, several groups sued the Forest Service because they disagree with the Forest Service's approach to balancing

the uses of Forest resources. These three lawsuits have been consolidated in this action. First, a group of plaintiffs led by WildEarth Guardians (WEG) assert claims under the National Forest Management Act (NFMA), the National Environmental Policy Act (NEPA), the TMR, and the Endangered Species Act (ESA). WEG First Am. Compl. (WEG Am. Compl.), ECF No. 24. Second, Plaintiff Central Oregon Landwatch (COLW) brings claims under NFMA, NEPA, and the ESA. COLW First Am. Compl. (COLW Am. Compl.), ECF No. 24. Third, Plaintiff Oregon Hunters Association (OHA) alleges NFMA and NEPA claims. (OHA Compl.), ECF No. 1, No. 2:17-cv-1366.

All of these claims fail for the specific reasons discussed below. But they also all suffer from the same general flaws by inappropriately (1) second guessing the Forest Service's interpretation and implementation of its various management obligations, (2) ignoring the extensive and robust environmental analyses conducted by the Forest Service, and (3) flyspecking those analyses while giving no deference to the Forest Service's expert determinations. Because the Forest Service fully complied with NFMA, NEPA, the TMR, and the ESA, Federal Defendants' cross-motion for summary judgment should be granted, Plaintiffs' motions for summary judgment should be denied, all claims in these consolidated actions should be dismissed, and judgment should be entered in favor of Federal Defendants.

## **II. FACTUAL BACKGROUND**

### **A. Travel Management on the Ochoco National Forest**

The Forest spans 845,498 acres near the geographic center of Oregon. AR01398. The Forest Service manages the Forest pursuant to a 1989 Land and Resource Management Plan (Forest Plan) as amended by the Inland Native Fish Strategy (INFISH) in 1995 and the Travel Management Project's implementation of the Travel Management Rule. AR01386-875 (Forest

Plan); AR02563-80 (INFISH management standards and guidelines); AR12687 (amending Forest Plan in response to 2005 Travel Management Rule). As required by statute and regulation, the Forest Plan established Forest-wide multiple use “goals, objectives, and desired future conditions directing resource management on the Forest.” AR01398; *see also* AR02190-91 (Forest Plan record of decision). The multiple use goals include managing the Forest to “[p]rovide for a variety of recreational experiences across all areas of the [Forest]” and to “[p]rovide, manage and improve fish and wildlife habitats to maintain viable populations of existing native and desired non-native vertebrate species.” AR02191.

In 2011, the Forest issued a record of decision for the Travel Management Project, which implemented the 2005 Travel Management Rule to prohibit motorized use on the Forest unless designated for such use on the motor vehicle use map (MVUM). AR12682-725 (record of decision); 36 C.F.R. §§212.50, 212.56; *see infra* § III.C. Before that time, eighty-eight percent of the Forest was open to cross-country travel by motor vehicles. AR25298. Implementation of the Travel Management Rule left less than one percent of the Forest open to such travel and limited OHV access on designated trails to twenty-six miles. AR25298. The record of decision for the 2011 Travel Management Project acknowledged that it would affect opportunities for motorized trail use and referenced preliminary efforts that were underway to identify “where future motorized trail opportunities might be considered.” AR12704. Those preliminary efforts evolved into an extensive planning process that culminated in approval of the Project in June 2017.

**B. Ochoco Summit Trail System Project**

**1. Public Involvement in Developing the Project.**

The Forest held a series of public meetings “between 2006 and 2009 to explain the Travel Management Rule, gather input on [NFS] roads and trails, and discuss changes to the NFS roads and trails.” AR08580. This resulted in the Forest Service issuing a scoping notice in November 2009 detailing the need for a designated trail system on the Forest and including a proposed action. AR08578-605 (scoping notice). The scoping notice indicated that after implementation of the Travel Management Rule, only one motorized trail in a forested setting existed on the Forest and that it was too short to meet the demand for OHV recreational opportunities. AR08582. As a result, OHV users were “venturing off the trail and ha[d] created a network of loops” that represented “an unauthorized expansion of an undersized trail system.” *Id.* Such “unmanaged OHV use on federal lands ha[d] resulted in unplanned roads and trails, soil erosion, watershed and wildlife habitat damage, impacts to cultural sites, safety concerns, trespass and vandalism on adjacent private land and increased conflict between motorized and non-motorized recreational experiences.” AR08581.

To allay these harms and conflict, the Forest Service identified the need for “a successful OHV trail system” of “adequate length, diversity, difficulty, loops, alternative routes and other features to provide a quality experience and to keep the use on the designated system.” AR08582. In particular, the Forest Service identified a need to: (1) “designate a sustainable system of roads, trails and areas open to motor vehicles that will provide legal public access, enhance regulation of unmanaged wheeled motor vehicle travel, protect resources, and decrease conflicts between motorized and non-motorized use on the Ochoco National Forest;” (2) “provide a sufficient number and length of trail in a forested setting to disperse recreational

users and make a sustainable network of trails;” and (3) provide a diversity of off-highway motorized recreation opportunities including 4X4 vehicles, ATVs and motorcycles” consistent with “Forest Service policy to provide a diversity of road and trail opportunities for experiencing a variety of environments and modes of travel.” AR08582-83.

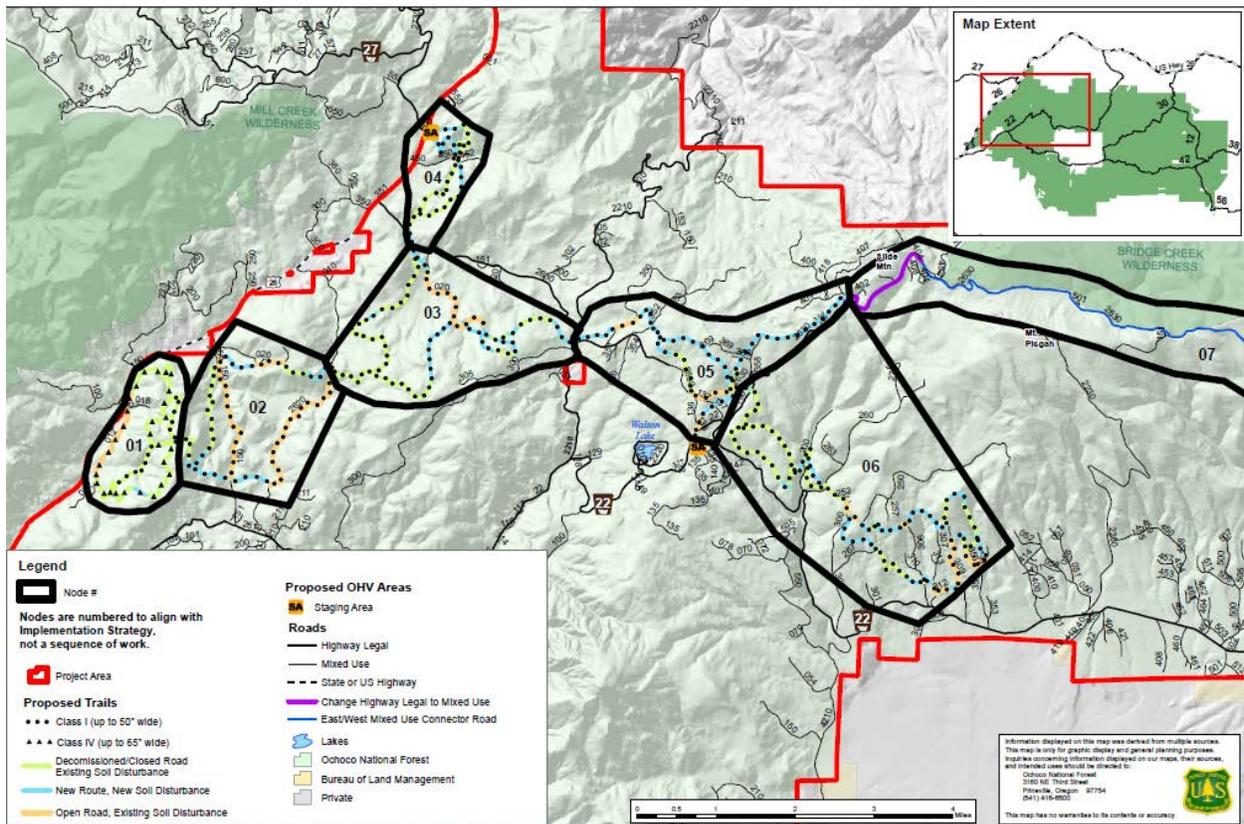
The Forest Service received seventy comment letters and emails from the public and other agencies in response to the scoping notice. AR25232. The Forest Service used information from that process to prepare and issue a draft Environmental Impact Statement (EIS) for the Project in January 2012 and a final EIS and draft record of decision (ROD) in March 2014. *Id.* The Forest Service withdrew the final EIS and draft ROD in 2014 to permit further dialogue with the public and other agencies and because of potentially changed circumstances due to a fire that had burned into the Project area.<sup>1</sup> *Id.* That same year, the Forest Service “conducted 19 presentations, field trips, and project updates with individuals, groups and organizations interested in the [Project].” *Id.* The Forest Service then issued a supplemental draft EIS in February 2016 and a supplemental final EIS (SFEIS) in September 2016. AR25203. This was followed by an objection period during which twenty-eight individuals submitted objections. AR28753. The Project interdisciplinary team and Deputy Regional Forester met with objectors in December 2016 and the Forest Supervisor had later discussions with several of the objectors. *Id.* In consideration of the input received throughout the administrative process, including during the objection process, the Forest Supervisor approved the Project in a final ROD dated June 27, 2017. AR28764; *see also* AR28753.

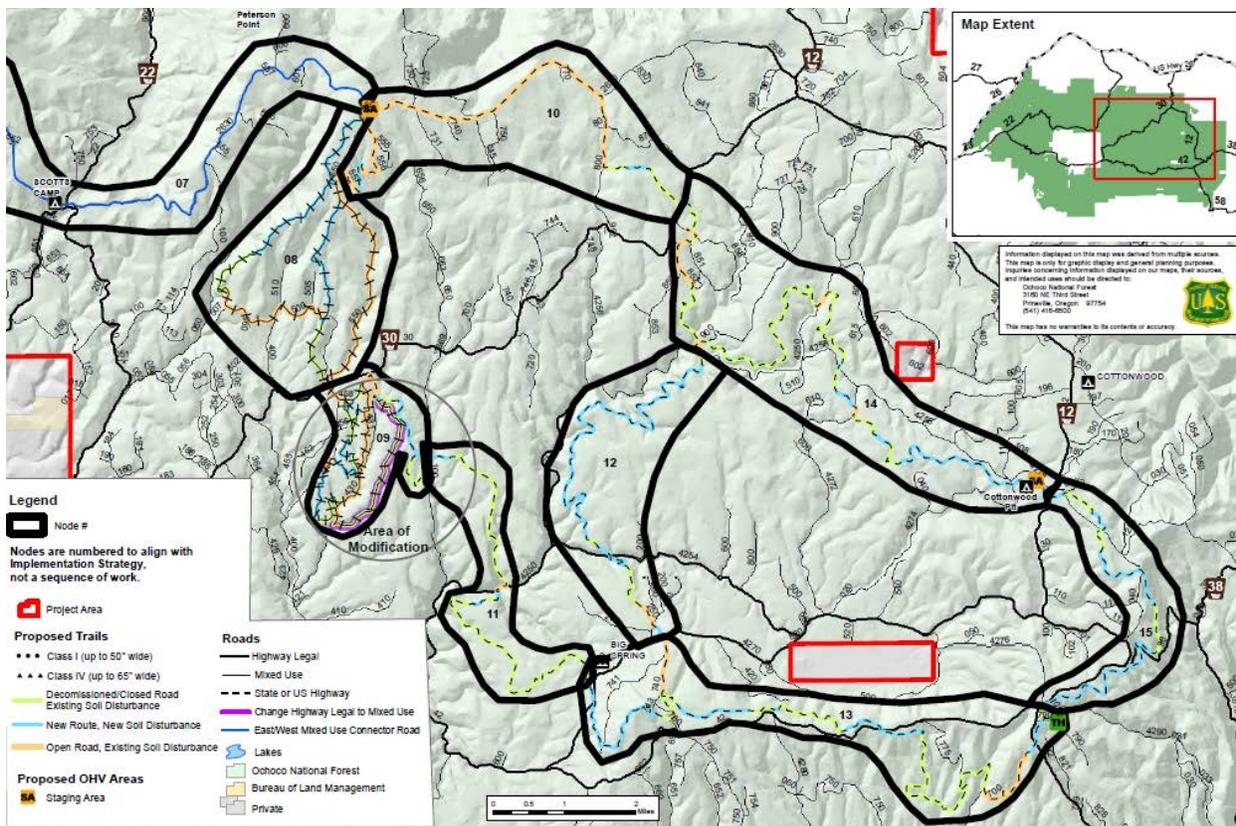
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<sup>1</sup> The Bailey Butte fire burned just over 10,000 acres in July 2014 and affected one subwatershed in the Project area. AR25448. Roughly five miles of the proposed trail is within the fire perimeter. *Id.*

## 2. Project Details

As illustrated in the below maps, the Project is a “site-specific effort” that consists of a 137-mile trail system throughout the Forest that provides recreation opportunities for four classes of OHVs. AR25226; AR28734-39.





AR28725-26.

Thirty miles of the Project are “connecting high-clearance roads” and the remainder are “some appropriately and sustainably located user-created trails,” “trails on existing roadbed,” and newly constructed trails. AR28734. Eighty-four of the 137 miles are on existing roads and the remaining 53 miles “[a]lthough identified as ‘new’ routes because they are not located on existing roads, . . . were located on existing disturbance as much as possible.” AR28735. Of the 107 miles of trail, the Project designates 38 miles of trails for class I vehicles (*i.e.*, ATVs, three-wheelers, and quads), 14 miles for class II vehicles (*i.e.*, jeeps or other four-wheel drive vehicles), 50 miles for class III vehicles (*i.e.*, motorcycles), and 5 miles for class IV vehicles (*i.e.*, side-by-sides). AR28735-38. The Project will incorporate forty existing stream crossings and will add thirty-nine new crossings. AR28743-44. And the trail system will be open to OHV

use from June 1 until September 30 and year round for non-motorized use, including hiking and horseback riding. AR28736.

As noted above, due to the lack of a designated trail system and user non-compliance with the closures instituted by the Travel Management Project, unauthorized OHV use exists on the Forest. AR25303. This results in user-created trails that are not properly designed and that can degrade the environment and result in conflict between motorized and non-motorized recreationists. *Id.*; *see also* AR25310 (addressing motorized and non-motorized conflicts). To address this unauthorized use, as part of implementing the Project, the Forest will identify an “OHV Management Area,” within which “a priority will be placed on education, increased compliance, and enforcement of the OHV use regulations including restricting OHV use to designated routes.” AR28738-39; *see* AR25262-68 (Education, Enforcement, Safety, and Operational Maintenance Plan). This approach is based on “a successful model used by the Central Oregon Combined Off-Highway Vehicle Operations (COHVOPS).” AR25262. The Forest will also close and rehabilitate unauthorized routes within that area. AR28739. Closures will be accomplished by installing barriers, concealing unauthorized trails, or revegetation. AR28739. Rehabilitation of areas disturbed by unauthorized use will include restoring cross drainage, storm proofing, bank stabilization, placement of woody debris, or revegetation. AR28739. The Forest will also identify a “Trail Implementation Area” in which to focus “efforts on trail development, signing, monitoring and maintenance, as well as for management of unwanted routes that are not included in the designated trail network.” *Id.*

The Project design incorporates a variety of resource protection measures, including project design features (PDFs) and mitigation measures. *Id.*; *see also* AR25253-70. The PDFs require trails to “be designed to minimize sediment transfer to watercourses . . . and to prevent

run-off from concentrating and running down the trail.” AR25254. To do this, the PDFs, which “are consistent with the National Best Management Practices for Water Quality Management on National Forest System Lands,” provide that, among other things: (1) “[s]tream approaches must be in an area that has the least grade or steepness perpendicular to the stream” and must be out sloped or hardened to “prevent movement of soil, gravels, and other surface materials;” (2) trails will be rerouted if possible “to avoid meadows, seeps, and springs;” (3) stream trail crossings will be constructed to meet the “Pacific Northwest Regional Aquatic Organism Passage Guidelines (sized for the 100-year flood and pass all aquatic organisms);” (4) in-water work will be done in accordance with Oregon Department of Fish and Wildlife (ODFW) guidelines; and (5) trails will be maintained “to avoid trail gullying and erosion that would increase sedimentation.” AR25255-56.

To protect big game, the PDFs place timing restrictions on Project “construction, reconstruction, decommissioning and maintenance activities from May 15 through June 30 within known elk calving areas, as established based upon telemetry data from radio collared elk in the Ochoco Mountains, district records, and other sources.” AR28759. Similarly, restrictions on such activities are imposed “from September 1 through October 15 within 0.25 mile of known elk wallows.” AR28760. These restrictions will also apply to any newly identified elk calving areas or elk wallows that “may be affected due to disturbance.” AR28759-60. Moreover, “[t]o the greatest extent possible, OHV trails will be routed away from water sources, mineral licks, wallows, wet meadows and aspen stands.” AR25260.

Finally, the Project provides for extensive monitoring. AR25268-70. This includes ongoing monitoring of soil and water quality to ensure the minimization of sedimentation and

erosion. It also includes “[p]eriodic monitoring of designated routes through special wildlife habitats such as elk calving areas . . . .” AR25269.

### **3. Analysis of Potential Environmental Effects**

The Forest Service prepared a detailed SFEIS to analyze the potential environmental effects of developing a designated OHV trail system on the Forest. AR25203-727. To assess those effects, the SFEIS identified and evaluated five alternatives, consisting of a no-action alternative and four action alternatives. The no-action alternative (Alternative 1) provided a baseline to permit “comparison of continuing the existing conditions without implementing the proposed actions.” AR25236. As such, the no-action alternative “would not implement any changes in the current management direction regarding motorized access,” including continuing “past decisions to close or decommission [NFS] roads that may not have been implemented through physical barriers or signing, or where the closure method was limited to not conducting routine maintenance activities.” *Id.* By contrast, the four action alternatives all contemplated curtailing unauthorized motorized use of non-designated trails by implementing the COHVOPS model for increased education, compliance, and enforcement described above, and by emphasizing “closure, concealment, rehabilitation or restoration of unauthorized and unwanted routes.” AR25252; AR25262.

The four action alternatives varied route locations and intended uses to address four issues identified during the scoping process: (1) the size and quality (*i.e.*, complexity, range of difficulty levels, dispersion of users, etc.) of the trail system; (2) the effect of the trail system on big game habitat; (3) the effect of the trail system on water quality and fish habitat; and (4) the effect of the trail system on potential conflict between motorized and non-motorized recreationists. AR25232-35 (identifying issues); AR25236-52 (detailing alternatives). The

SFEIS then provided over four hundred pages of analyses—supported by hundreds of pages of additional resource-specific reports—of the potential effects of the various alternatives on several resources, including transportation, recreation, soils, hydrology and aquatic species, and wildlife. AR25275-686 (SFEIS effects analysis); *see also* AR24817-979 (terrestrial wildlife report); AR25901-6027, AR26028-37, AR28328-33, AR28334-36 (hydrology and aquatic species report, appendices, and errata); AR10807-925 (redband trout report); AR24995-5024 (transportation report); AR24753-808 (soils report).

In consideration of these extensive analyses, the Forest Supervisor adopted the Project described above, which consists of Alternative 5 with the addition of one route that had been described in Alternative 2. AR28733. As discussed in the SFEIS, Alternative 5 was developed primarily to respond to issues regarding big game habitat, water quality and fish habitat, and conflict between motorized and non-motorized recreationists. AR25248. But it also has features intended to respond to issues regarding the size and quality of the trail system. *Id.*

As explained in the ROD, the Project’s purpose “is to designate motorized trails in order to provide a suitable experience for users while minimizing resource damage.” AR28740. The Project does this “by implementing a logical and sustainable trail system that meets the demand for trail opportunities for a variety of OHV vehicle classes while limiting impacts to soil, water, wildlife and botanical resources in the area.” *Id.* In particular, the Project designates trail routes to minimize impacts to sensitive resources, such as fish-bearing streams, and utilizes “existing open roads to the extent possible in order to reduce potential disturbance to wildlife.” AR28740-41. It also minimizes potential conflict between motorized and non-motorized users “by avoiding equestrian staging areas and non-system horse trails, favored wildflower and bird watching areas, developed campgrounds, unroaded areas and other designated recreation areas

and hiking/mountain biking trails,” and by limiting the season for OHV use “so that there is very little overlap with the big game hunting seasons.” AR28740.

#### **4. Forest Plan Amendments**

The Project also provides for short segments that briefly pass through three old growth management areas that “allow orderly and logical trail system design by linking existing open, mixed-use roads.” AR25663; AR25252 (identifying proposed amendments for Alternative 5). This will result in the construction of less than one mile of new trail in those areas and a total length of motorized trail of less than 1.5 mile on less than one acre of the 19,570 acres of Forest land in the old growth management area. AR28771; AR25662. The segments in these areas “are all within habitat blocks that are bordered by well-travelled open roads” and none “would cross a large block of interior forest habitat.” AR25663. In addition, the Project provides for the construction of new trail that would affect about sixteen acres of scabland habitat, which represents approximately .04 percent of the 41,296 acres of scabland habitat in the Project area. AR28777. These segments are needed “to allow orderly and logical trail system design by linking existing roads,” and most of them “are located on existing disturbance.” AR25664. A PDF applies to segments of trail crossing scablands that requires “treatments to prevent erosion.” AR25257.

Because the Forest Plan prohibits motorized use in old growth management areas and over scablands, the ROD amended the Forest Plan to authorize OHV use on the Project trails within those areas. AR28739. As explained in the SFEIS, these amendments are not significant because they represent only “a minor change in the Forest Plan standards and guidelines,” do not alter the multiple-use goals and objectives for long-term management of the Forest, affect a small area, relate only to the specific situation of allowing “construction of short trail segments

to connect existing roads in order to develop a logical trail system,” and do not authorize similar future actions. AR25675.

### III. LEGAL BACKGROUND

#### A. National Forest Management Act

NFMA, 16 U.S.C. §§ 1600-1687, directs the Forest Service to “develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System.” 16 U.S.C. § 1604(a); *see Ohio Forestry Ass’n, Inc. v. Sierra Club*, 523 U.S. 726, 729-30 (1998).

A land and resource management plan is a programmatic statement of intent that operates prospectively in a manner analogous to a zoning ordinance and guides all natural resource management activities on the forest. *Citizens for Better Forestry v. U.S. Dep’t of Agric.*, 341 F.3d 961, 966 (9th Cir. 2003). Site-specific projects must be consistent with the governing land and resource management plan and are subject to additional analysis under NEPA. *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1511-12 (9th Cir. 1992) (citation omitted).

Land and resource management plans must “provide for multiple use and sustained yield of the products and services obtained therefrom in accordance with the Multiple-Use Sustained Yield Act of 1960 [16 U.S.C. §528-431], and, in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness.” 16 U.S.C. §1604(e); *see also id.* § 528 (establishing multiple use policy); *Lands Council v. McNair*, 537 F.3d 981, 990 (9th Cir. 2008) (en banc) (“Congress has consistently acknowledged that the Forest Service must balance competing demands in managing National Forest System lands.”). The Forest Service has broad discretion to determine how to balance these uses to “best meet the needs of the American people.” *Id.* § 531(a) (defining “multiple use”); *see Perkins v. Bergland*, 608 F.2d

803, 806 (9th Cir. 1979) (noting this statutory language “breathes discretion at every pore.” (citation and quotation omitted)).

### **B. National Environmental Policy Act**

NEPA is a procedural statute that requires the federal government to consider the impacts of, and alternatives to, major federal actions significantly affecting the environment. 42 U.S.C. §§ 4321, 4331. Its purpose is to ensure that federal agencies take a “hard look” at the environmental consequences of their proposed actions before deciding to proceed. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989) (citation omitted). Although NEPA establishes procedures by which agencies must consider the environmental impacts of their actions, it does not dictate the substantive results of agency decision making. *Id.* at 350. As a result, a “court must avoid passing judgment on the substance of an agency’s decision.” *Westlands Water Dist. v. U.S. Dep’t of Interior*, 376 F.3d 853, 865 (9th Cir. 2004) (citing *Robertson*, 490 U.S. at 350).

NEPA requires agencies to provide the data on which they base their environmental analysis. *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1083 (9th Cir. 2011). Put another way, “an agency must support its conclusions with studies that the agency deems reliable.” *Id.* (citing *McNair*, 537 F.3d at 994). NEPA does not, however, specify the “quantum of information” an agency must possess about any resource before the agency may proceed with a given project. *Or. Nat. Desert Ass’n v. Shuford*, No. 06-242-AA, 2007 WL 1695162, at \*4 (D. Or. June 8, 2007), *aff’d sub nom. Or. Nat. Desert Ass’n v. McDaniel*, 405 F. App’x 197 (9th Cir. 2010) (citing *Alaska v. Andrus*, 580 F.2d 465, 473 (D.C. Cir. 1978), *vacated in part on other grounds, W. Oil & Gas Ass’n v. Alaska*, 439 U.S. 922 (1978)). “When the agency’s determination is founded on reasonable inferences from scientific data, a reviewing

court will not ‘substitute its judgment for that of the agency.’” *Protect Our Cmty. Found. v. Jewell*, 825 F.3d 571, 583 (9th Cir. 2016) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Regulations promulgated by the Council on Environmental Quality guide the implementation of NEPA. 40 C.F.R. §§ 1500-1508. One way in which an agency can comply with NEPA is by preparing an EIS, which is a detailed statement subject to extensive regulations regarding format, content, and methodology. *See* 40 C.F.R. pt. 1502. An EIS “must consider and assess the environmental consequences of the proposed action and reasonable alternatives to the action.” *Westlands*, 376 F.3d at 865 (citing 40 C.F.R. § 1502.14).

### **C. Forest Service Travel Management Rule**

The TMR is found at 36 C.F.R. Part 212 and is divided into Subparts A, B and C.<sup>2</sup> Subpart B was promulgated in 2005 and provided for a fundamental change in the management of motor vehicle use on NFS lands. 70 Fed. Reg. 68,264 (Nov. 9, 2005) (codified at 36 C.F.R. §§ 212.50-212.57). Up until that time, many individual units of the NFS were open to cross-country motor vehicle use off of roads and trails. *See* 69 Fed. Reg. 42,381, 42,382 (July 15, 2004) (Proposed TMR); *see also* 36 C.F.R. §§ 295.2, 295.5 (2004). This legal cross-country travel, prior to implementation of the 2005 Travel Management Rule, sometimes resulted in user-created routes becoming established on NFS lands through repeated use, often resulting in damage to forest resources. *See* 70 Fed. Reg. at 68,264-65; 69 Fed. Reg. at 42,384.

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<sup>2</sup> Subpart A, promulgated in 2001, governs general administration of the forest transportation system and directs the Forest Service to identify the most ecologically, economically and socially sustainable road system in terms of access for recreation, research and other land management activities. 36 C.F.R. §§ 212.1-212.21. Subpart C, promulgated in 2015, governs over-snow vehicle use. *See* 36 C.F.R. §§ 212.80-212.81. Subparts A and C are not at issue in this case. For purposes of this brief, Defendants refer to Subsection B and the Travel Management Rule interchangeably.

Subpart B of the Travel Management Rule seeks to eliminate unrestricted cross-country motor vehicle use by requiring each administrative unit or ranger district to designate those NFS roads, trails, and areas that are open for public motor vehicle use. 70 Fed. Reg. at 68,264-65; 36 C.F.R. §§ 212.50, 212.51(a). In addition to specific roads, trails, and areas, the Forest Service may include in a designation decision “the limited use of motor vehicles within a specified distance of certain forest roads or trails where motor vehicle use is allowed, and if appropriate within specified time periods, solely for the purposes of dispersed camping or retrieval of a downed big game animal by an individual who has legally taken that animal.” 36 C.F.R. § 212.51(b).

To comply with the Travel Management Rule, NFS roads, trails, and areas are designated for public motor vehicle use through environmental analysis including public involvement and are based on general and specific criteria, including but not limited to criteria derived from Executive Order 11644 (1972), as amended by Executive Order 11989 (1977), on off-road vehicle use. *See* 36 C.F.R. §§ 212.50(b), 212.55; 69 Fed. Reg. at 42,386, 42,388; 70 Fed. Reg. at 68,273. General designation criteria are found at 36 C.F.R. §212.55(a). Designation criteria specific to roads are found at 36 C.F.R. § 212.55(c). Designation criteria specific to trails and areas are found at 36 C.F.R. § 212.55(b). In designating trails and areas, the Forest Service must consider with the objective of minimizing: “(1) [d]amage to soil, watershed, vegetation, and other forest resources; (2) [h]arassment of wildlife and significant disruption of wildlife habitats;” (3) conflicts between motorized and other recreational uses on NFS lands; and (4) conflicts among classes of motorized uses. The agency also must consider “compatibility of motor vehicle use with existing conditions in populated areas.” 36 C.F.R. § 212.55(b). These factors are also known as the “minimization criteria.”

Once the Forest Service designates routes and areas as required under Subpart B, they are reflected on a MVUM. 36 C.F.R. § 212.56. Once a MVUM is adopted for a particular unit or district, any motor vehicle use not consistent with the designations reflected on the MVUM is prohibited. 36 C.F.R. § 261.13.

#### **D. Endangered Species Act**

The ESA was enacted “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b). For species listed as threatened or endangered, the Secretaries of the Interior and Commerce will also designate critical habitat. 16 U.S.C. § 1533(a)(3)(A). Under ESA section 7(a)(2), each federal agency must insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of the species’ designated critical habitat. 16 U.S.C. § 1536(a)(2). In fulfilling this obligation, each agency is required to “use the best scientific and commercial data available.” *Id.*

Under ESA section 7, an action agency, like the Forest Service here, first inquires with the U.S. Fish and Wildlife Service (FWS) whether any listed or proposed-to-be-listed species “may be present” in the area of the proposed action. 16 U.S.C. § 1536(c)(1). If the answer to this question is affirmative, the action agency may prepare a biological assessment to determine whether the identified species “is likely to be affected by such action.” *Id.* If the action agency independently determines that the action will have “no effect” on listed species or critical habitat, the agency has no further obligations under the ESA. *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1054 n.8 (9th Cir. 1994) (“[I]f the agency determines that a particular action will have no effect on an endangered or threatened species, the consultation requirements are not triggered.”);

*Friends of the River v. U.S. Army Corps of Eng'rs*, 870 F. Supp. 2d 966, 972 (E.D. Cal. 2012) (“If the agency determines that a particular action will have ‘no effect’ on a listed species or critical habitat, there is no consultation requirement.”). If, however, an agency determines that its actions “may affect” a listed species or its critical habitat, the agency must consult informally or formally with either FWS within the Department of the Interior or the National Marine Fisheries Service within the National Oceanic and Atmospheric Administration, depending on the species at issue.<sup>3</sup> 50 C.F.R. §§ 402.01, 402.14(a)-(b).

Informal consultation is “an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency . . . designed to assist the [action agency] in determining whether formal consultation . . . is required.” 50 C.F.R. § 402.13(a). “If during informal consultation it is determined by the [action agency], with the written concurrence of [FWS], that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary.” *Id.* If the action agency or FWS determines that the proposed action is likely to adversely affect listed species or designated critical habitat, the agencies proceed through formal consultation under Section 7 of the ESA. This process culminates in a biological opinion (BiOp), which includes a “detailed discussion of the effects of the action on listed species or critical habitat.” 50 C.F.R. § 402.14(h)(2). The BiOp assesses the likelihood of the proposed action resulting in jeopardy to a listed species or destruction or adverse modification to designated critical habitat. 50 C.F.R. § 402.14(g). The BiOp will also include an “incidental take statement,” which, if complied with,

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<sup>3</sup> Because the species at issue here is within the jurisdiction of FWS, FWS is the only expert consulting agency relevant in this case.

exempts the action from the prohibition against take. 16 U.S.C. §§ 1536(b)(4); 1532 (defining “take”).

#### **IV. STANDARD OF REVIEW**

##### **A. Administrative Procedure Act**

The Administrative Procedure Act (APA) requires courts to uphold agency actions unless they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Gardner v. U.S. Bureau of Land Mgmt.*, 638 F.3d 1217, 1224 (9th Cir. 2011) (quoting 5 U.S.C. § 706(2)(A)). An agency decision is arbitrary and capricious if it “relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43; *see also Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 66 (2004).

##### **B. Summary Judgment**

The Ninth Circuit has endorsed the use of summary judgment to review agency actions governed by the APA. *See, e.g., Nw. Motorcycle Ass’n v. USDA*, 18 F.3d 1468, 1471-72 (9th Cir. 1994). The court’s role is not to determine whether there are genuine disputes of fact, but instead to “determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.” *Occidental Eng’g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985). “[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.” *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam). The administrative agency itself is the fact-finder;

summary judgment is appropriate for determining “the legal question of whether the agency could reasonably have found the facts as it did.” *Occidental Eng’g Co.*, 753 F.2d at 770.

## **V. ARGUMENT**

Plaintiffs assert a menagerie of claims, all of which fail. First, the NFMA claims fail because the Forest Service reasonably determined that the Project complies with the Forest Plan’s standards and guidelines for managing elk and riparian areas. Second, the NEPA claims fail because the SFEIS took a hard look at the potential effects of the Project on elk, aquatic resources, road density, and the gray wolf as well as the cumulative impacts of the Project. Third, WEG’s Travel Management Rule claim fails because the Project considered, with the objective of minimizing, the Project’s potential to damage forest resources, harass wildlife and disrupt wildlife habitat, and cause conflict between motorized and non-motorized uses on the Forest. Finally, the ESA claims fail because the Forest Service reasonably evaluated the Project’s impacts on gray wolves and concluded that the Project would have “no effect” on the limited number of wolves passing through the Forest and Project area.

### **A. The Project Complies With NFMA.**

The Forest Plan accomplishes the delicate task of managing the Forest’s various resources to provide for multiple and often conflicting uses. It does this by first identifying forest management goals, objectives, and desired future conditions for twenty resources, including recreation, transportation system, water, and wildlife and fish. AR01423-24. Goals “provide broad direction for future management of the Forest,” “[o]bjectives represent projected, potential outputs in support of overall goals,” and desired future conditions identify “the anticipated physical changes that are likely to occur as a result of carrying out planned management practices over time.” AR01423.

For example, one of the Forest Plan’s recreation goals is to “[p]rovide for a variety of recreational experiences across all areas of the Ochoco National Forest, in a manner consistent with other resource objectives and environmental constraints.” AR01444. Thus, one of the Forest Plan’s objectives is to permit “ORV use, and trail construction and reconstruction, . . . where they are not in conflict with other resource objectives. Routes will be identified on the Forest to encourage use in specific areas by offering a variety of challenges and terrain.” AR01445. And the Forest Plan contemplated a desired future condition of ongoing ORV use on the Forest.<sup>4</sup> AR01447.

The Forest Plan next identifies twenty-eight management areas, which are “composed of lands with similar capabilities or characteristics.” AR01468. These areas are to be managed pursuant to “broad multiple use guidance,” but each area will “emphasize[] a specific resource or mix of resources.” *Id.* The Forest Plan allocates most of the Forest to the General Forest Management Area (MA-F22), which emphasizes the production of “timber and forage while meeting Forest-wide standards and guidelines for all resources,” including providing for “[r]ecreational off-road, motorized use.” AR01509-10.

Finally, the Forest Plan sets forth forest-wide and management area standards and guidelines grouped together by the twenty resources. AR01543. The “[s]tandards and guidelines state the bounds or constraints within which all practices are to be carried out in achieving the planned goals, objectives and desired future condition.” *Id.* For example, “ORV

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<sup>4</sup> The Forest Plan provided that “[m]ost of the Forest will continue to be open to [ORV] use.” AR01447. Implementation of the Travel Management Rule amended that desired future condition but still contemplated ongoing ORV use on the Forest. *See* AR12687.

use varies by management area,” and “[m]otorized use of trails [is] encouraged on designated routes” in the general forest management area (MA-F22).<sup>5</sup> AR01601, AR01614.

Plaintiffs variously argue that the Project violates NFMA because it does not comply with the Forest Plan with respect to management of elk, watersheds, and road and trail densities. These arguments lack merit. The Forest Service concluded that the Project is “consistent with the long-term management objectives as discussed in the Ochoco National Forest Plan as amended,” and that “[a]ll Forest Plan direction has been adhered to and incorporated in the project’s design.”<sup>6</sup> AR28754. For the reasons discussed below, this determination is supported by the record and is entitled to substantial deference. *See Native Ecosystem Council v. Weldon*, 697 F.3d 1043, 1056 (9th Cir. 2012) (noting Forest Service’s “interpretation and implementation of its own forest plan is entitled to substantial deference.”) (citation omitted)).

**1. The Project complies with the Forest Plan’s standards and guidelines for elk.**

The Project is consistent with the Forest Plan’s standards and guidelines for elk, as it secures effective elk habitat and protects special habitats. The Forest Plan’s objective for elk is “to manage the habitat to meet [ODFW] population objectives to the extent practical.” AR 01459. And the Plan’s Standard and Guideline for the General Forest Area (MF-22)<sup>7</sup> is to “[m]anage to provide habitat for big game, while meeting the primary emphasis for

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<sup>5</sup> The Forest Plan also provided that “[o]ff-trail [motorized] use will be discouraged” in the general forest management area. AR01614. Implementation of the Travel Management Rule altered that to be a prohibition on motorized use on non-designated trails. AR12687.

<sup>6</sup> As noted in the ROD and in § II.B.4 above, the Project required minor amendments to the Forest Plan. AR28754.

<sup>7</sup> The Project area also includes some Winter Range and General Forest Winter Range areas, which have similar standards and guidelines. No trail system will be established within Winter Range or General Forest Winter Range Forest Plan allocations. AR28742; AR25679 (“the

the specific management area.” AR01680. The Forest Plan identifies “quantity and quality of cover[] and open road density” as the main factors influencing the desired elk habitat effectiveness. AR01682.<sup>8</sup> The Forest Plan also provides guidelines to protect elk calving areas during fawning season and elk wallows during rutting season. As shown below, the Project meets the Plan’s guidance on habitat effectiveness, and in particular the Plan’s road density targets. The Project also complies with the Forest Plan’s guidelines and standards for special habitat.

**a. The Project meets the Forest Plan guidelines for elk habitat.**

To maintain the desired elk habitat effectiveness, the Forest Plan provides a target open road density of below 3.0 miles per square mile in the General Forest Management Area, within which the Project area primarily lies. AR01683 (Table 4-38).<sup>9</sup> The Project meets the standard, as the Forest Service has shown that, after implementation of the Project, the total motorized density in the Project area’s watersheds would be 2.06 miles per square mile. AR 25533 (Table 146); AR 28742 (Table 2). For its motorized density calculations, the Forest Service disclosed that there are 861 miles of existing open Forest Service roads within the nine watersheds in the

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Forest Service minimized effects to big game habitat by specifically excluding Winter Range and General Forest Winter Range management areas from consideration for trail placement”)

<sup>8</sup> The Forest Plan utilizes a Habitat Effectiveness Index (HEI), which measures habitat effectiveness based on road density and cover. AR01669. Of the habitat effectiveness factors, the Forest Service, in analyzing the Project’s effects, focused primarily on open road density, noting that “of the [elk habitat effectiveness] factors, motorized route density is the only index that may be affected by the proposed alternatives. This is due to the fact that the largest potential change in cover resulting from this project would be less than 1/10th of one percent at the scale of the project area’s General Forest Allocation.” AR25531.

<sup>9</sup> The three mile per square mile open road density standards for the Forest Plan is the average “based on management-area wide conditions.” AR01679.

Project area.<sup>10</sup> AR 25283. The Forest Service explained that its existing road mileage figure includes “all operational maintenance level 2 or higher roads” but does not include maintenance level 1 roads, as the Forest Service assumed that those roads are closed. AR25517.

Using those assumptions, the Forest Service calculated density of open roads and motorized trails by dividing the miles of route by 471.14, the total square miles of NFS land within the Project area. *See* AR25518 (Table 143). The Forest Service also calculated the respective open road and motorized trail density for each of the nine watersheds that lie in the Project area. *Id.* The Forest Service disclosed that the current estimated motorized density within the Project area is 1.83 miles per square mile. *Id.*

Then, for each alternative, the Forest Service added to the existing open road mileage (*i.e.*, 861 miles) the number of miles of motorized routes that the alternative would respectively add. For example, Alternative 5 would add 107 miles of open motorized routes, for a total of 968 miles of motorized routes. The Forest Service divided that number by 471.14 square miles (see above) to determine the total route density under each alternative. For Alternative 5, the Forest Service determined that the total motorized density would increase from 1.83 to 2.06 miles per square mile, well below the 3.0 mi/mi.<sup>2</sup> target.<sup>11</sup> *Id.* Thus, the Project complies with the Forest Plan’s road density targets for elk habitat effectiveness. AR28742 (Table 2).

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<sup>10</sup> The SFEIS also disclosed that there are network of motorized trails, including some “user-created” trails. AR 25284. The Forest Service did not calculate the density of “user created” motorized trails. The Forest Service noted that an OHV group had identified 188 miles of ATV trail, 87 miles of motorcycle, and 159 miles of shared use as “potential routes.” *Id.* The SFEIS also identified 270 miles of unclassified or nonjurisdictional roads. The Forest Service did not include those roads in the road density calculation.

<sup>11</sup> Similarly, in its cumulative impacts analysis, the Forest Service found that “the change in motorized route density index [from the Project] does not result in cumulative effects that preclude the area from meeting the standard” for habitat effectiveness in the Forest Plan. AR25532.

In addition to meeting the Forest Plan's motorized density targets, the Project meets the Forest Plan's broad elk habitat standards and guidelines for assuring habitat effectiveness. The SFEIS noted that "an important finding from the Starkey Experimental Forest and Range studies is that road (or route) density is not the best predictor of habitat effectiveness for elk. Instead a model based on distance bands proved to be . . . a more biologically meaningful tool."

AR25513. Thus, in addition to the motorized density calculations, the Forest Service used distance banding to analyze the amount of elk habitat that would likely be buffered from disturbance from use of motorized routes. *See, e.g.*, AR25528. The Forest Service determined that "elk security habitat" consists of acres that lie over one-half mile from an open motorized route and that "high value elk security habitat" includes acres that meet this half-mile buffer requirement and are at least 250 acres in size. *See, e.g.*, AR25511; AR25533. Based on this methodology, the Forest Service determined that, following implementation of Alternative 5, "there would be a total of 44,944 acres of National Forest lands greater than 800 m (1/2 mile) from an existing road." *See* AR25528. The Forest Service used this data to analyze Alternative 5's relative impact, determining that the Project would result in a modest two-percent reduction in security habitat acreage. *Id.*<sup>12</sup> These findings demonstrate that the Project meets the Forest Plan's guidelines for big game habitat.

OHA argues that the Project violates the Forest Plan because it does not "provide high quality habitat for elk and deer." *Or. Hunters Ass'n Mot. for Summ. J. 11*, ECF No. 48 (OHA Br.) (internal quotes omitted).<sup>13</sup> OHA, referencing its subsequent NEPA arguments, claims that

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<sup>12</sup> The Forest Service also found that "the continued viability of [elk] is expected to occur on the Forest" after Project implementation. AR25533-34.

<sup>13</sup> Defendants' responses to Plaintiffs' specific arguments about road density calculations are addressed below in Section V.A.3.

the Forest Service's analysis of road density and elk security habitat are flawed and that "the Forest Service has failed to ensure that the Summit Trail project is consistent with the Forest Plan." *Id.* 11-12. But as discussed more fully below (*see infra* § V.B.1.a.) the Forest Service took a hard look at the potential impacts on elk habitat and ensured that the Project would remain consistent with the Forest Plan's guidance and standards on elk habitat effectiveness.

**b. The Project meets the Forest Plan's standards for elk calving sites and rutting wallows.**

The Project meets the Forest Plan's standards for protection of elk calving sites and rutting wallows, implementing protective measures from the initial planning and design stages of the Project through planned implementation and mitigation. The Forest Plan contains the standard and guideline to "[p]rotect the character of elk calving sites" and "minimize disturbance from human activity during calving season (approximately May 15 – June 30)." AR01670. Similarly, the Forest Plan contains the standard and guideline to "[a]lso protect wallows during rutting season (September 1 to October 15)." *Id.* The Forest Plan does not contain any specific prohibitions or dictate the type and duration of seasonal restrictions for any recreational activity in relation to calving season or rutting season, thus allowing the Forest Service discretion in how to protect these area.

In order to protect elk calving sites and minimize disturbance from human activity during calving season, the Forest Service, at the outset of Project planning, coordinated with ODFW, which provided information on priority areas for protection of calving sites. AR08939-45. The Forest Service used this information regarding these priority areas to develop alternatives for the Project. AR10487-89. And based on this data, the Forest Service located trails away from areas with high concentrations of elk during the calving period. AR28742.

Further, the Project places seasonal restrictions on motorized use of the trail system to protect calving areas and sites. The trail system will be closed to motorized use each year until June 1, which prohibits motorized operation on trails during the beginning of calving season. The Forest Service found that these timing restrictions “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.” AR25679.

The Forest Service also placed additional timing restrictions on Project construction, reconstruction, decommissioning and maintenance activities. The Project prohibits these activities from May 15 through June 30 within known elk calving areas, as established based on telemetry data from collared elk in the Ochoco Mountains, district records and other sources, and for any new calving areas that it identifies. AR28684-85; AR28759-60. Finally, while the SFEIS’s site-specific seasonal restrictions related to minimizing human disturbance in elk calving sites and elk wallows were specific to trail construction, reconstruction and maintenance activities, the ROD expanded seasonal protections *to trail operation*, clarifying that identified calving sites and wallows on motorized trails would be protected from disturbing activities during the restricted seasons. AR28117; AR 28128; AR28759. In sum, the Forest Service’s adoption of protective measures for elk calving sites, from the genesis of the Project through Project implementation and monitoring, complies with the Forest Plan’s guidance for protection of elk calving.

With regard to elk wallows, the Forest Plan requires that the Forest Service “protect wallows during rutting season (September 1 to October 15).” AR01321; AR01670. To meet that standard, the SFEIS provides that “[t]o the greatest extent possible, OHV trails will be routed away from water sources, mineral licks, wallows, wet meadows and aspen stands.” AR25260. And similar to its seasonal restrictions to protect calving sites, the Project’s seasonal

restrictions prohibit motorized trail use after September 30, providing protection to those areas for the last two weeks of the rutting season. The Project further protects wallows by prohibiting construction, re-construction, decommissioning and maintenance activities from September 1 through October 15 within 0.25 mile of known elk wallows. AR25260. And as with calving sites, the ROD added a provision that the Forest Service will, in accordance with the Forest Plan, implement additional site-specific seasonal restrictions *on trail operation* “should new elk wallows be identified along the trail system where the character of the site may be affected due to disturbance.” AR28760.

Plaintiffs argue that, because the Project’s seasonal restrictions do not completely coincide with the respective calving and rutting seasons, the Project does not meet the Forest Plan’s standards. Pls.’ Mot. for Summ. J. & Opening Br. in Supp. 24-25, ECF No. 58 (WEG Br.); Cent. Or. Landwatch’s Mot. for Summ. J. & Mem. in Supp. 20-21, ECF No. 57 (COLW Br.); OHA Br. 10. Plaintiffs also argue that the additional site-specific seasonal protections currently apply only to construction and maintenance activities and do not limit operation on the trail. *Id.* But the Forest Plan’s guidelines to “minimize disturbance from human activity during calving season (approximately May 15 – June 30)” and “[a]lso protect wallows during rutting season (September 1 to October 15)” do not specify how the Forest Service must minimize disturbance and do not mandate seasonal restrictions for motorized use or for any other activity.<sup>14</sup> AR01670.

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<sup>14</sup> Indeed, the Project’s prohibition on motorized use from October 1 until June 1 is more restrictive than for the open, mixed-use road system itself, which, weather permitting and except for in the Rager Travel Management Area, is generally open year-round (*i.e.*, there are no seasonal restrictions on mixed use roads for the protection of special habitat). AR12689; AR22570-79.

The Forest Plan's general guidelines to "minimize disturbance from human activity during calving season (approximately May 15 – June 30 and protect wallows during rutting season (September 1 to October 15)" afford the Forest Service the discretion, in the context of its obligation to provide for multiple uses in the Forest, to implement measures that will meet those guidelines. *See Lindberg v. U.S. Forest Serv.*, 132 F. Supp. 3d 1255, 1273 (D. Or. 2015) ("Where a forest plan management directive is susceptible to more than one meaning, the Forest Service's interpretation and implementation of its own forest plan is accorded deference unless the interpretation is plainly erroneous"). In *Lindberg*, the plaintiffs alleged that the Forest Service violated the Deschutes Forest Plan's elk protection management standard, which read: "Facilities will not be developed nor activities promoted which would encourage public use during the winter." *Id.* The plaintiffs there asserted that the Forest Service's development of facilities, including a parking lot and trails, would "encourage[]" use during the winter and was thus in violation of that standard. *Id.* The district court found that the Forest Service was "entitled to deference in its interpretation of 'encouraging' winter use," and that it did not act arbitrarily or capriciously in approving the project. *Id.* at 1274.

Here, the Forest Service is similarly entitled to discretion in interpreting the guidelines to protect and minimize disturbance to calving sites and wallows during calving and rutting periods. It undisputedly has taken measures to accomplish this, through project design, seasonal restrictions, and mitigation measures. Plaintiffs may prefer different and more restrictive measures, but Plaintiffs have not shown that the Forest Service's interpretation and implementation of the Forest Plan's management standards on calving sites and wallows was clearly erroneous.

COLW also argues that the Project’s seasonal protections to special habitat areas do not comply with the Forest Plan’s guidelines because the Forest Service does not currently have “an accurate inventory of existing wallows and calving sites.” COLW Br. 19-20. First, as noted elsewhere, the Forest Service did consult with ODFW to obtain information on calving sites prior to developing Project alternatives. AR08939-45. And the Forest Service, using telemetry data collected by Oregon Department of Fisheries and Wildlife between 1989 and 1994 (ODFW 1998), avoided areas with high concentrations of elk during the calving period. SuppAR00066A-00130A.

Second, there is no provision in the Forest Plan or NFMA requiring the Forest Service to, prior to implementation of the Project, identify all of the calving or wallow sites in connection with its seasonal protection provisions. The Forest Service has ensured consistency with the Forest Plan’s standards for special habitat by taking measures at the outset of the Project to avoid critical sites and by applying and potentially expanding seasonal protections to any newly-identified sites. As with the scope and timing of the seasonal protections, the Forest Service appropriately used its discretion to interpret these Forest Plan guidelines and standards.

- 2. The Project complies with the Forest Plan’s standards and guidelines for riparian areas, including INFISH standards and guidelines.**
  - a. The Project complies with the Forest Plan by designing and maintaining trails to minimize impacts on riparian communities.**

The Forest Plan provides a general forest-wide standard to manage “[r]ecreational activities . . . to prevent site deterioration within riparian areas.” AR01601. WEG reads this provision in isolation in a manner that would prevent the construction of any stream crossings for recreational OHV use. WEG Br. 25. But this reading ignores the recreation standard for trails on the same page of the Forest Plan that provides for a trail system to be constructed and

maintained “to standards suitable for type and amount of use” and for trails to “be designed and maintained to minimize impacts on riparian communities.” AR01601-02. In other words, the Forest Plan expressly contemplates the construction of an OHV trail system so long as it minimizes impacts on riparian areas. That is exactly what the Project does “by implementing a logical and sustainable trail system that meets the demand for trail opportunities for a variety of OHV vehicle classes while limiting impacts to soil, water, wildlife and botanical resources in the area.” AR28740.

The Forest Service designed the Project “to avoid [Riparian Habitat Conservation Areas (RHCAs)] and stream crossings to the extent possible while still proposing a sustainable trail network” that responded to the identified need. AR25439-40. Routes that would have paralleled streams and “sensitive areas, such as seeps, springs, wet meadows and wetlands were largely avoided . . . .” AR25440; AR28152.<sup>15</sup> The operating season for the Project is also limited to June 1 through September 30, which “provides a better assurance of dry soil conditions during the open season of use.” AR25440. And the Project incorporates a variety of PDFs described in § II.B.2 above “that help to ensure that drainage is functional and measures are in place and effective in preventing erosion and sediment delivery.” AR25440.

Indeed, despite some short-term increases in “impacts [from] the addition of trails on the flow and sediment regimes,” long-term “impacts to watersheds flow and sediment regimes should decrease to levels below the existing condition” once the pre-existing user created trails have revegetated or been rehabilitated. AR25442. Moreover, “streambank conditions are

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<sup>15</sup> Plaintiffs complain that the Forest Service’s response to their objection relates to “different forest plan provisions applying different standards.” WEG Br. 25. It does not. It incorporates by reference a discussion of the requirement that impacts to riparian areas be minimized, which specifically addresses the Forest Plan’s requirement that impacts on riparian communities be minimized in designing and maintaining trails. AR28151-52.

expected to maintain or slightly improve over time with the implementation of [the Project]” because, “[r]elative to unmanaged OHV cross-country travel, fewer stream crossings would occur within all subwatersheds, and culverts or bridges would be installed at all new perennial and intermittent stream crossings.” AR25443. In short, the Project satisfies the Forest Plan by designing and maintaining the trail system to minimize impacts on riparian areas.

**b. The Project complies with INFISH standards and guidelines.**

INFISH provides direction in the Project area to protect habitat and populations of resident redband trout. AR25351. To do this, INFISH identified six Riparian Management Objectives (RMOs) used to assess and define good riparian habitat: (1) pool frequency; (2) water temperature; (3) large woody debris; (4) bank stability; (5) lower bank angle; and (6) width/depth ratio. AR02566. “RMOs provide the target toward which managers aim as they conduct resource management activities across the landscape.” AR02564. Stated differently, RMOs are “benchmarks against which to measure progress toward ultimate goals.” *Cent. Or. Landwatch v. Connaughton*, 696 F. App’x 816, 818 (9th Cir. 2017). INFISH also provided for the delineation of RHCAs in every watershed on the NFS lands “within the geographic range of the strategy.” AR02566. RHCAs “are portions of watersheds where riparian-dependent resources receive primary emphasis, and management activities are subject to specific standards and guidelines.” *Id.* The standards and guidelines “apply to all RHCAs and to projects and activities in areas outside RHCAs that are identified through NEPA analysis as potentially degrading RHCAs.” AR02568.

The Forest Service determined that the Project met the INFISH standards and guidelines. AR28754. This conclusion is subject to deference, and COLW’s arguments to the contrary are not well founded.

**i. The Forest Service was not required to conduct a watershed analysis of the Lower Deep Creek subwatershed and reasonably modified the RMOs based on watershed characteristics of the Project area.**

As an initial matter, COLW waived its arguments that the Forest Service violated INFISH by not conducting a watershed analysis of Lower Deep Creek. COLW Br. 29; *See Lands Council v. McNair*, 629 F.3d 1070, 1076 (9th Cir. 2010) (*McNair II*) (“A party forfeits arguments that are not raised during the administrative process.”). While COLW’s voluminous comments may have referred to Lower Deep Creek, they failed to articulate this specific objection and therefore deprived the Forest Service of an opportunity to respond. *See* AR26790 (objections to draft ROD noting Lower Deep Creek is a “priority watershed” but not arguing that this triggered a watershed analysis under INFISH). Such a failure results in waiver. But even if COLW had not waived this argument, it is meritless.

COLW correctly notes that INFISH provides for the Forest Service to “[c]omplete watershed analysis prior to construction of new recreation facilities in [RHCAs] *within priority watersheds.*” AR02571. COLW then cites to the SFEIS, which states that “Lower Deep Creek is a priority subwatershed.” AR25395. COLW, however, omits the remainder of that sentence, which provides that it is a priority subwatershed “as defined by the Forest Service Watershed Condition Framework Process.” *Id.* A “priority watershed” as defined by the Forest Service Watershed Condition Framework Process is different from the “[p]riority watersheds . . . designated in Oregon, Idaho, Montana, Nevada, and Washington” under INFISH. AR02575; *see also* AR25352-53 (explaining Forest Service Watershed Condition Framework). And Lower Deep Creek is not a priority watershed under INFISH. *See* AR02626 (map showing INFISH priority watersheds none of which are on the Forest). Therefore, INFISH did not require the Forest Service to conduct a watershed analysis of Lower Deep Creek.

Furthermore, COLW's argument that the Forest Service improperly modified certain INFISH RMOs fails. COLW again did not raise this particular argument with respect to modification of the RMOs for large woody debris and stream temperature during the administrative process and therefore waived those arguments. *See* AR26791-92; *McNair II*, 629 F.3d at 1076. In addition, the record shows that the Forest Service properly modified RMOs for large woody debris, stream temperature, and width/depth ratios to better correspond with the redband trout habitat in the Project area. As explained in the SFEIS, the Forest Service developed RMOs "describing good habitat . . . to describe desired condition for fish habitat." AR25351. These RMOs varied slightly from INFISH based on studies "for RMOs [that] better describe the habitat in the project area than INFISH." *Id.*; *see also* AR26028 (acknowledging INFISH RMOs but noting that other RMOs "have been better defined for the project area."). In other words, the Forest Service modified the RMOs based on the particular characteristics of the watersheds in the Project area and supported those changes with specific references. Utilizing RMOs tailored to the watersheds in the Project area was consistent with INFISH's standard that modifications to RMOs are appropriate "where watershed or stream reach specific data support the change," AR02564, and the Forest Service's interpretation of this standard is entitled to deference. *See Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836, 851 (9th Cir. 2013) (noting court will defer to Forest Service's interpretation of INFISH standard "unless it is plainly erroneous or inconsistent with the standard" (citation omitted)).

Moreover, the particular modifications made by the Forest Service were not arbitrary or capricious. INFISH provided a RMO of more than twenty pieces per mile of woody debris that is greater than twelve inches in diameter and thirty-five feet in length. AR02566. The RMO for large woody debris that the Forest Service determined was more appropriate for the Project area

provided for debris of the same diameter and length but increased its frequency to more than forty-eight pieces per mile in class IV streams and more than sixty-nine pieces per mile in other streams. The SFEIS explained the rationale for this RMO, and COLW does not argue that this was arbitrary or capricious. *See* AR25359-60; COLW Br. 30.

The Forest Service also adjusted the RMO for stream temperature. The SFEIS explained that “[r]edband trout have been found to typically be present in small- to medium-sized streams between 50°F (10°C) and 61°F (16°C), outside of this range they are less likely to be present (Meyer et al. 2010).” AR25357. In addition, the Forest Service considered the fact that the “state of Oregon assumes that waters” with a “seven-day average maximum temperature [that does] not exceed 18.0°C (64.4°F) . . . . will provide water temperatures suitable for redband trout spawning.” *Id.* In light of this information, the Forest Service used RMOs that classified stream temperature either as “Good” if its seven-day-average maximum temperature was between 10°C (50°F) and 14°C (57°F), as “Fair” if it was between 14°C (57°F) and 18°C (64°F), and “Poor” if it was greater than 18°C (64°F). AR25355; AR25357. These RMOs are supported by the cited references and are not arbitrary or capricious. *McNair*, 537 F.3d at 994 (holding Forest Service does not act arbitrarily or capriciously under NFMA where it “support[s] its conclusions that a project meets the requirements of the NFMA and relevant Forest Plan with studies that the agency, in its expertise, deems reliable.”).

Finally, the Forest Service reasonably modified the RMO for the width/depth ratio of streams in the Project area. The width/depth “ratio is the ratio of the bankfull surface width to the mean bankfull depth of the channel.” AR25361. The INFISH RMO applied an objective for all stream systems regardless of specific characteristics of a width/depth ratio of less than ten. AR02566. The Forest Service adopted a more nuanced approach based on a study that identified

width/depth ratios depending on the type of stream. AR25356; AR25361; SuppAR00942.

Again, this approach was not arbitrary or capricious.<sup>16</sup> See *McNair*, 537 F.3d at 994.

**ii. The Forest Service’s determination that the Project will not retard or prevent attainment of the RMOs and will avoid adverse effects to redband trout was not arbitrary or capricious.**

INFISH does not prohibit the construction or maintenance of OHV trails in RHCA’s but instead provides that trail design, construction, and operation must be done “in a manner that does not retard or prevent attainment of the [RMOs] and avoids adverse effects on inland native fish.” AR02571. “[T]o ‘retard’ . . . mean[s] to slow the rate of recovery below the near natural rate of recovery if no additional human caused disturbance was placed on the system.” AR02565.

The SFEIS examined the effects of the Project on the RMOs, including stream temperature, large woody debris, and width-depth ratios, and reasonably concluded that there would be little to no effect on those RMOs. AR25402-03. First, by incorporating the PDFs and other best management practices, sediment delivery to streams will be minimized during construction, and “[b]ecause very little removal of riparian vegetation is expected during implementation, construction of trails and stream crossings would have no effect on stream temperatures.” AR25402. Moreover, because the PDFs “prevent the removal of shade producing trees on streams on the [State’s list of section 303(d) “Water Quality Limited Waterbodies”] for water temperatures,” there will be no “reduction of shade on streams in the project area, resulting in no increase in stream temperatures.” *Id.*

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<sup>16</sup> And even if the Forest Service applied the INFISH standard, as discussed below, the Project would have no effect on whether that standard was met because the Project will have “no effect on instream width/depth ratios.” AR25403.

Second, the Forest Service determined that “project activities would have very limited effects on large woody debris, both active and potential.” *Id.* Although some large woody debris may be removed during Project construction where stream crossings are proposed to be installed, this material “would be moved either upstream or downstream of the site to maintain large wood numbers in project watersheds.” *Id.*

Third, the Forest Service determined that “project activities would have very limited effects on width/depth ratios in all streams within the project area.” AR25403. Stream crossings will be designed to meet the width/depth ratios, “removal of bank stabilizing vegetation would be very minimal and only occur at new stream crossings sites, and sediment analysis shows that compared to natural background sedimentation, the project would contribute insignificant amounts to alter instream width/depth ratios.” *Id.* As such, “there would be no effect on instream width/depth ratios.” *Id.*; *see also* AR25443 (noting “[a]s compared to historic OHV cross-country travel impacts, streambank conditions are expected to maintain or slightly improve over time with [Project] implementation . . .”).

In light of these findings, the Forest Service concluded that the Project “would neither retard nor prevent attainment of the [RMOs], as long as the appropriate [PDFs] are followed during construction and long-term maintenance.” AR25466. The Forest Service supported this conclusion with extensive reasoning and analysis, and it is not arbitrary or capricious. *See League of Wilderness Defs.-Blue Mountains Biodiversity Proj. v. U.S. Forest Serv.*, 445 F. Supp. 2d 1186, 1199 (D. Or. 2006) *rev’d in part on other grounds by* 549 F.3d 1211 (9th Cir. 2008) (finding no INFISH violation where “administrative record does not clearly show that there will be significant negative impacts to redband trout.”).

COLW nevertheless argues that the Forest Service was required to show that “adding 137 miles of permanent OHV trails including 39 new stream crossings \* \* \* will improve the condition of [Forest] watersheds.” COLW Br. 33; *see also* Amicus Oregon Department of Fish & Wildlife (ODFW) Mem. in Supp. of Pls.’ Mots. for Summ. J. 17, ECF No. 54 (ODFW Br.). As an initial matter, this misstates the INFISH standard, which does not require that the Project improve watersheds but instead requires that the Project not “slow the rate of recovery below the near natural rate of recovery.” AR02565. Moreover, COLW’s argument wholly dismisses the Project’s resource protection measures, including PDFs and monitoring that are designed to ensure that the Project will have no adverse long-term effect on RMOs. AR28739; AR25253-70; *see* AR28134-36 (responding to COLW’s objection). Because the Project will have no long-term adverse effects on the RMOs, it will not slow the rate of recovery of the watersheds in the Project area.

COLW also argues that the Project “would exacerbate ongoing cumulative effects” on watersheds that already do not meet the INFISH RMOs.<sup>17</sup> COLW Br. 31; *see also* ODFW Br. 17-18 (referencing “additive impacts” of Project). But, again, this argument ignores the Forest Service’s determination that the Project will have no meaningful effect on the RMOs through implementation of resource protection measures and will improve the watersheds over time through closures and rehabilitation of user created non-designated routes. Because the Project is

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<sup>17</sup> COLW refers to a “continued declining trend of Redband trout populations.” COLW Br. 31. The record does not support such a declining trend. Rather, redband trout populations are below historical numbers but are a self-sustaining population that is “not considered to be in immediate threat of declining precipitously, according to Oregon Department of Fish & Wildlife personnel (Hodgson, 2006).” AR25465.

not the cause of any existing RMO exceedances, there is no INFISH violation.<sup>18</sup> *Or. Wild v. U.S. Forest Serv.*, 193 F. Supp. 3d 1156, 1171 (D. Or. 2016) (rejecting INFISH claims because plaintiffs did not show grazing caused exceedances in water temperature and because INFISH “contemplates that its objectives are ‘targets’ that will not be met instantaneously.”)

**3. The Project complies with the Forest Plan’s standards and guidelines for road density.**

The Ochoco Forest Plan’s general Standards and Guidelines provide that “roads and trails will be at the lowest density which meets long-term resource needs.” AR01648. The Forest Plan defines road density as “the number of road miles per square mile of land area.” AR01849. As discussed above, the Forest Plan standard for road density to assure effective elk habitat is three miles of road per square mile for the General Forest Management Area, where the Project’s trail system lies. AR01683. This is the only applicable quantitative standard for road density in the Forest Plan, and as discussed above, the Project meets that standard. And because the motorized density in the Project area, after implementation of Alternative 5, would remain almost a full mile/mile<sup>2</sup> below the Plan’s target, the Project also meets the Plan’s goal of maintaining the lowest density to meet long-term resource needs.

Further, the Forest Service’s methodology for calculating motorized density is consistent with the Forest Plan’s methodology. The Forest Plan’s density standards are calculated for total

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<sup>18</sup> Similarly, ODFW maintains that some streams on the Forest exceed the Forest Plan standard for fine sediment and argues that “[t]he 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.” ODFW Br. 18. This argument, like the others, however, ignores the Project’s resource protection measures and the Forest Service’s determination that the Project will not retard attainment of the RMOs. *See* AR25442 (“[T]he trail system, as designed in Alternative 5, would not exacerbate existing water quality issues, because of appropriate design criteria and proper management and maintenance.”).

management areas (*e.g.*, for total General Forest or total General Forest winter range), and the mile per square mile calculation is aggregated across a management area, as opposed to by each square mile. *See, e.g.*, AR01681 (average of open road miles per section is “based on management area-wide conditions”). The Forest Plan, which refers to “open road density,” does not require motorized density calculations to consider closed roads. *Id.* Nor does the Forest Plan require motorized density calculations to include roads that are not under the Forest Service’s jurisdiction. *Id.*

As discussed *supra* § V.A.1.a., the Forest Service’s total motorized density analysis for the Project calculated density based on the existing network of open roads in combination with motorized routes proposed under the action alternatives. AR25363, AR25518. The Forest Service properly exercised its discretion to interpret the Forest Plan’s road density standards in this manner. *See Lindberg*, 132 F. Supp. 3d at 1273. The Forest Service’s density analysis also included density breakdowns by relevant management areas, watersheds, and subwatersheds, the latter two of which are more specific than the aggregation level in the Forest Plan. And all of these aggregation levels demonstrate the Project’s consistency with the Forest Plan’s motorized route density standards. *See* AR25533 (Table 146).

OHA argues that the Forest Service cited in the SFEIS several different numbers for existing road mileage within the Project area and that consequently the Forest Service’s existing mileage baselines and road density calculations are unreliable, making it “impossible to ascertain from the SFEIS and the record how the Summit Trail project will meet the road density standards in the Forest Plan.” OHA Br. 11. First, OHA did not raise during the objection period these alleged inconsistencies in the SEIS’s existing mileage baseline or road density calculations, and thus OHA has waived its right to assert those arguments here. *All. for the Wild Rockies v.*

*Bradford*, 35 F. Supp. 3d 1246, 1256 (D. Mont. 2014) aff'd, 856 F.3d 1238 (9th Cir. 2017) (citing *Havasupai Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991) (“belatedly raised issues may not form a basis for reversal of an agency decision”); *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 553-54 (1978) (“[A]dministrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that ‘ought to be’ considered and then, after failing to do more to bring the matter to the agency’s attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters ‘forcefully presented.’”))

In *Alliance for the Wild Rockies*, as here, the plaintiff contended that the Forest Service failed “to consistently disclose the number of existing miles of total road mileage” in the project area and that the inconsistencies rendered the Forest Service’s analysis arbitrary and capricious. *All. for the Wild Rockies*, 35 F. Supp. 3d at 1255. The Court dismissed the plaintiff’s claim that was based on this argument, finding that the plaintiff “failed to raise any issue with respect to the inconsistencies regarding total road mileage during the administrative review process” and thus had waived the right to assert a NEPA violation on the basis of alleged mileage inconsistencies. *Id.* at 1256 (citation omitted). OHA’s failure to raise the existing road baseline or the road density calculation methodology in the administrative review process compels the same result here, and the Court should dismiss its NFMA claims that challenge the Forest Service’s density calculations.

Moreover, even if OHA had not waived its right to challenge the Forest Service’s road mileage baseline and density calculations, the Forest Service reasonably chose its methodology for calculating motorized density and consistently applied that methodology to reach its conclusion: that, after Project implementation, the total motorized density would meet the Forest

Plan's target of less than 3.0 miles per square mile. OHA offers different methodologies and calculations based on different assumptions, but it does not identify any provision in the Forest Plan that would prevent the Forest Service from adopting its chosen methodologies and assumptions. *McNair II*, 629 F.3d at 1078 ("It is within the Forest Service's discretion to choose its methodology, as long as it explains why it is reliable").

For example, OHA alleges that the Forest Service's determination that there are 861<sup>19</sup> miles of existing and open roads and motorized trails in the Project area's watersheds is contradicted elsewhere in the SFEIS. OHA Br. 15. According to OHA, the Forest Service separately identifies "659 miles of operational maintenance level 2 roads, 140 miles of highway legal only roads (maintenance level 2<sup>20</sup> to 5) and 270 miles of 'unclassified or other jurisdiction roads' for a total of 1069 roads in the project area." *Id.* OHA argues that these different numbers render the Forest Service's calculations unreliable.

However, the Forest Service's disclosure of these differently-allocated mileage totals does not contradict the use, for purposes of road density calculations, of 861 miles of existing open roads in the Project area's watersheds. First, the Forest Service's use of the 861 mile figure is not significantly inconsistent, much less "wildly disparate" from its statements elsewhere in the SEIS that there are 799 miles of existing open road.<sup>21</sup> Second, OHA's

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<sup>19</sup> OHA cites the Forest Service's use of 862 miles. As noted above, the Forest Service determined that the total mileage of open roads in the Project Area was 861. AR25283.

<sup>20</sup> This reference to "level 2" here appears to be a typographical error, as elsewhere, the SFEIS refers to 140 miles of highway legal only (maintenance level 3 to 5) roads. AR25472.

<sup>21</sup> The open mileage numbers compiled in Table 8 equal 799 miles (674+75+13+37=799), a 62 mile discrepancy between the 861 mile number used by the Forest Service for the density calculation. *see also* AR25319 ("within the project area there are 799 miles of road open to motorized use").

alternative calculation above is misleading, as the Forest Service was not required to include the 270 miles of “unclassified or other jurisdictional roads” in its road density analysis. As discussed above, there is no provision in the Forest Plan requiring the Forest Service to include non-jurisdictional, unclassified roads in its road density calculations. The Forest Service’s disclosure of the mileage associated with these roads provides an additional source of information for the public, but it does not contradict the Forest Service’s road density calculations or otherwise make them arbitrary and capricious. Finally, as OHA concedes, even using OHA’s alternative calculations, the Project would still result in a total motorized density of “2.49 miles per square mile,” which would also comply with the Forest Plan’s density target. OHA Br. 15.

OHA also claims that the Forest Service’s reference to “1,820 miles of road” within the Project area undermines the reliability of the Forest Service’s road density calculations. OHA Br. 17. But the 1,820 mile figure, which would necessarily include mileage associated with unclassified and closed roads, is not related at all to the road density calculation methodology. The Forest Service used the 1,820 mile figure for a separate analytical purpose that has no effect on the road density calculations. Absent any contrary directive from the Forest Plan, the Forest Service had the discretion to make particular assumptions in its calculation methodologies.

Finally, WEG claims that the Forest Service did not comply with the Forest Plan’s road density standards because of a faulty assumption<sup>22</sup> that “the project meets the forest plan [road density] standard . . . based on the list of roads proposed for closure or decommissioning.” WEG Br. 26-27 (citing AR25852). But, as described above, the Forest Service’s analytical process for

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<sup>22</sup> WEG accurately cites to an objection response wherein a Forest Service representative asserted that closure and decommissioning would allow the Forest Service to meet the density requirements. The statement in the response is incorrect.

ensuring that the Project complies with the road density standard did not include assumptions about road closure or decommissioning, and the Forest Service did not input any projected closure or decommissioning data into its motorized density calculations. Thus, the incorrect statement made during the objection process does not have any bearing on the reliability of the Forest Service's actual calculations or its consistency with the Forest Plan's density standards.<sup>23</sup>

**B. The SFEIS Complies with NEPA.**

Plaintiffs maintain that the SFEIS failed to take a hard look at the potential effects of the Project on elk, watersheds, road densities, and the gray wolf. None of those arguments is well-founded. Instead, the SFEIS took a hard look at potential effects to (1) elk by analyzing the impacts to elk habitat, including special habitat; (2) watersheds by analyzing the potentially affected watersheds and subwatersheds using the best available data; and (3) the gray wolf by analyzing potential effects to prey populations such as elk even though gray wolves are not suspected or documented to occur in breeding populations or to persist on the Forest. Finally, the SFEIS also reasonably examined the potential cumulative effects of the Project on elk and aquatic resources. Plaintiffs' arguments to the contrary reflect nothing more than inappropriate "flyspecking" of the SFEIS's thorough analyses. See *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1063 (9th Cir. 1998) ("In determining whether the EIS contains a reasonably

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<sup>23</sup> Plaintiffs alleged a variety of claims in their complaints that they did not pursue in their opening briefs. For example, WEG did not pursue its NFMA claims related to mule deer, the Recreation Opportunity Spectrum, and old growth and scabland management areas. WEG Am. Compl. ¶¶ 82, 84, 86. And COLW did not pursue its NFMA claim related to old growth management areas. COLW Am. Compl. ¶ 258. Plaintiffs have waived all claims they failed to pursue in their opening briefs. See *City of Santa Clarita v. U.S. Dep't of Interior*, No. 02-cv-697, 2006 WL 4743970, at \*11 (C.D. Cal. Jan. 30, 2006) ("Claims not raised in a summary judgment motion should be considered abandoned and waived." (citation omitted)); cf. *Dream Games of Ariz., Inc. v. PC Onsite*, 561 F.3d 983, 994-95 (9th Cir. 2009) (determining that arguments are waived if not included in opening brief).

thorough discussion, we may not fly-speck the document and hold it insufficient on the basis of inconsequential, technical deficiencies.” (citation and quotation omitted)).

**1. The SFEIS took a hard look at the direct and indirect impacts of the Project.**

**a. The SFEIS’ analysis of the Project’s potential effects on elk was not arbitrary or capricious.**

**i. The Forest Service took a hard look at the potential impacts on elk habitat.**

As discussed above in section V.A.1.a., the Forest Service analyzed the Project’s potential impacts to elk habitat both by analyzing the total motorized density in the Project area and also by performing a distance banding analysis to analyze the various alternatives’ effect on “elk security habitat.” *See* AR25512-34; AR25513 (noting that studies have show that distance banding is “a more spatially explicit and biologically meaningful tool” than road density analysis). The SFEIS also includes the Forest Service’s description of how it applied distance bands and the ranges of those bands to analyze the effectiveness of elk habitat. The bands used by the Forest Service included:

- (a) acres and percent of the project area within ¼ mile [from an open motorized route];
- (b) acres and percent of the project area ¼ to ½ mile from an open motorized route;
- (c) acres and percent of the project area ½ to ¾ mile from an open motorized route;
- (d) acres and percent of the project area ¾ to 1 mile from an open motorized route; and
- (e) acres and percent of the project area greater than one mile from an open motorized route.

AR 25513.

The Forest Service then used the data from these bands to analyze each alternative’s respective impact to elk habitat. AR25518-34. Table 146 of the SFEIS provides summaries and comparisons of “key indicators,” including the distance banding results, for each alternative.

AR25533. The Forest Service reviewed all of these key indicators in order to understand the respective impacts of each alternative and to choose between those alternatives. This constitutes a hard look under NEPA. *See Cent. Sierra Envtl. Res. Ctr. v. U.S. Forest Serv.*, 916 F. Supp. 2d 1078, 1088 (E.D. Cal. 2013) (analysis of alternatives is the heart of NEPA); 40 C.F.R. § 1502.14 (same).

OHA alleges that the Forest Service's NEPA analysis of impacts to elk habitat is arbitrary and capricious because the Forest Service chose indicators and definitions that are distinct from some indicators and definitions in some studies on which the Forest Service relied. OHA Br. 22. OHA focuses on the *Hillis et al* 1991 study of elk habitat and alleges that the Forest Service failed to ensure the scientific integrity of its analysis for elk security "by ignoring the fundamental findings of the *Hillis* study on which it purports to rely." OHA Br. 24. Specifically, OHA claims that the Forest Service ignores *Hillis*' findings that (1) security areas should be "greater than or equal to 250 acres in size, greater than or equal to one half mile from an open road, and should comprise greater than or equal to 30% of a valid analysis unit," and that (2) "when cover is poor and terrain is gentle it may require a distance of greater than ½ a mile from open roads before security is effective." OHA Br. 23 (citing AR26752-53). COLW similarly asserts that the Forest Service's definition and therefore analysis of "elk security habitat" is flawed because, unlike *Hillis*, the Forest Service's definition did not consider habitat type. COLW Br. 23.

First, the Forest Service's effects analysis does not rely solely on *Hillis et al.* to estimate impacts to elk habitat effectiveness, nor must it. Agencies are not obligated to adopt the specific findings of any particular study. *Kern Co. Farm Bureau v. Allen*, 450 F.3d 1072, 1080-81 (9th Cir. 2006). The SFEIS references and summarizes the findings of several different studies for

guidance on attributes of elk habitat effectiveness. *See* AR25512-13 (citing, *e.g.*, *Wisdom* et al. (2005) and *Rowland* et al. (2005)). In light of the multiple studies cited by the Forest Service and in light of the Forest Service's own expertise, the Forest Service was not required to fully adopt *Hillis*' recommendations, and the Forest Service's consideration of *Hillis* without strict fealty to the study is appropriate.<sup>24</sup>

Second, while the Forest Service's definition of elk security habitat may be slightly different than *Hillis*' definition, and while the Forest Service approved the Project notwithstanding that less than thirty percent of the Project area is (before and after the Project) comprised of elk security habitat, there is no evidence that the Forest Service "ignored" *Hillis*' findings. To the contrary, the SFEIS adopted a definition of elk security habitat that is similar, if not identical to *Hillis*' definition. The Forest Service appropriately utilized *Hillis*, as well as other studies, to perform analysis of the Project and its impacts to elk habitat. That constitutes a hard look under NEPA. *See All. for Wild Rockies v. Kruger*, 950 F. Supp. 2d 1172, 1191 (D. Mont. 2013).

OHA, in addition to its NFMA claims addressed above, claims that the Forest Service's road density calculations are arbitrary and capricious under NEPA. OHA Br. 14-17. But as discussed above, OHA has waived that argument. Notwithstanding that waiver, OHA's claims lack merit. While OHA and the other Plaintiffs may disagree with the assumptions used by the Forest Service in performing its density calculations, the Forest Service disclosed those assumptions (*i.e.*, 861 miles of existing, administratively open road in the area's watersheds) and

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<sup>24</sup> Indeed, *Hillis* itself disclaims that "[u]nquestioning adherence to these guidelines may lead to serious misapplications and should be avoided" and that "[i]n analyzing security requirements for a specific area, interpretation of the guidelines is needed to ensure that the result makes biological sense for local conditions. The point of designating elk security areas is not to meet some generalized guidelines, but to provide functional habitat." AR26753.

consistently applied them in analyzing the five Project alternatives. And the SFEIS discloses in Table 143 (AR25518) and Table 146 (AR25533) the results of those calculations: the road and trail density for the Project area by alternative for each watershed and each management area.

OHA similarly asserts that, because the Forest Service decided not to include closed roads in its road density analysis, the Forest Service “has ignored and underestimated the fragmentation effects of this project on larger patches of elk security habitat” in violation of NEPA. OHA Br. 18. But while the Forest Service did not incorporate closed road mileage into its road density calculations, it did not “ignore” closed roads in its analysis of impacts on elk habitat. The Forest Service disclosed that there are “669 miles of closed roads, many of which are currently receiving unauthorized OHV use.” AR25472. And the Forest Service explained its expectation that, through the Project, “active enforcement within the OHV Management Area would occur at a higher level with implementation of education and enforcement programs under the leadership of COHVOPs,” and that the Project would provide “opportunities for funding to support closure, rehabilitation and restoration of unwanted and unauthorized routes within the OHV Management Area.” AR25475. The Forest Service also explained how it would mark and discourage or prohibit motorized use on closed and unauthorized user-created routes. AR25255 (“Physical closures will be implemented over time, in a prioritized order, where resource damage is occurring and/or where sensitive fish, wildlife, rare plant habitats are being affected.”); *see also* AR28782 (ROD’s implementation strategy to “[c]ontinue to decommission roads and trails as determined in NEPA decisions and obliterate user created routes to address resource issues”). AR28785 (ROD details of planned restoration work to implement unauthorized closures, including the Forest Service’s plan for expending \$110,000 over three years to implement road closures).

Further, the Forest Service's decision not to consider closed road mileage in its road density calculations or distance banding analysis was not arbitrary and capricious. OHA alleges that this decision is not supported by the guidance on consideration of closed roads in the Starkey research, on which the Forest Service also relied. OHA Br. 19-20. COLW similarly claims that the Forest Service's analysis to elk habitat is flawed because "the agency only included administratively open roads into its distance banding analysis, despite acknowledging that many closed roads and user-created routes are receiving motorized use." COLW Br. 22-23. But NEPA does not require the Forest Service to adopt the findings or recommendations of any particular study, *Allen*, 450 F.3d at 1080-81, or to "affirmatively [address] every uncertainty in its EIS." *McNair*, 537 F.3d at 1001. The Forest Service's decision to include only administratively open roads in its road density calculations and distance banding analysis provided sufficient information regarding relative impacts for the Forest Service to meaningfully analyze the alternatives.

Finally, COLW argues that the Forest Service failed to consider the "combined and synergistic" impacts of past, present, and reasonably foreseeable future activities" and that it failed to consider the connectivity between security habitat patches. COLW Br. 23-24. As to the combined and synergistic impacts, the Forest Service disclosed, as COLW notes, the various past and planned vegetation management projects in and around the Project area. COLW Br. 23. And, as explained below in § V.B.2.a., the Forest Service, in its cumulative impacts analysis, considered the combined effects of the Project with those vegetation management projects whose effects have an overlapping zone of influence. AR25476-77; *see also* AR25277 (Table 7).

As to COLW's allegations regarding the analysis of connectivity, the Forest Service is not obligated under NEPA to consider every conceivable element of habitat effectiveness. *See*

*Earth Island Inst. v. U.S. Forest Serv.*, 697 F.3d 1010, 1021 (9th Cir. 2012) (“Though the Forest Service did not perform the point-by-point type of counter-argument to experts that Plaintiffs appear to desire, our precedent makes clear that an agency need not respond to every single scientific study or comment.” (internal quotations and citation omitted)). While the Forest Service did disclose the potential effects of reduced connectivity (AR25467) and impacts on connectivity from habitat fragmentation (AR25468), the Forest Service, in its discretion, chose to rely primarily on the combination of motorized density analysis and distance banding analysis to determine the potential effects on elk habitat. The Forest Service’s biologists are entitled to deference in their scientific judgements and selection of methodology. *Native Ecosystem Council*, 697 F.3d at 1053 (“[W]e are required to apply the highest level of deference in our review of the Forest Service’s scientific judgments in selecting the elk hiding cover methodology”) (citations omitted).

**ii. The Forest Service took a hard look at impacts of potential elk displacement on private land.**

The Forest Service also took a hard look at the potential for a motorized trail system on the Forest lands to displace elk to private land. AR25532. The Forest Service identified the amount of secure cover (based on distance from motorized routes) available to deer and elk within two miles of private land. *Id.*; AR25533 (Table 145). The Forest Service used this measure to analyze the alternatives’ comparative likelihood of retaining elk on federal land and avoiding displacement to private land. AR25532-33. This analysis assumes that elk would be more likely to find secure cover on Forest lands and thus 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.” AR25532. The Forest

Service, in analyzing the potential displacement impact of the various alternatives, noted that “the difference between alternatives detected by this measure is very small . . .” *Id.*

OHA challenges the Forest Service’s analysis and asserts that “there is no scientific support” for the Forest Service’s use of an assumption “that elk will find secure cover within 2 miles of private land if forested stands exceeding 40% crown closure occur more than ½ mile from a motorized route.” OHA Br. 27-28. This is untrue. The Forest Service’s analysis relied in part on its own Wildlife Biologist’s professional judgment. And, as noted by OHA, the Wildlife Biologist, citing to *Starkey* and *Hillis*, made the following assumption:

a distance band of 2 miles interior to the private land boundary is a reasonable distance within which to expect that elk would find security habitat beyond their estimated flight distance without crossing over the Forest boundary (ie. [sic] they are not expected to travel 3200 m in response to disturbance when the maximum mean distance of elk to open roads is 950 m (field tour page 12, Figure 1).

AR 27977.

OHA disputes that *Starkey* supports this assumption and thus argues that the Forest Service’s analysis that incorporates the assumption is flawed. OHA Br. 28. But when specialists express conflicting views, the Forest Service has the discretion to rely on the reasoned opinions of its own experts, “even if, as an original matter, a court might find contrary views more persuasive.” *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989); *see also Inland Empire Pub. Lands Council v. Schultz*, 992 F.2d 977, 981 (9th Cir.1993) (holding that NEPA does not require that the Court determine that the best scientific data was used); *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 986 (9th Cir.1985) (under NEPA, court not required to resolve disagreements among scientists as to methodology). The Forest Service’s reliance on its own expert’s findings in conducting its analysis of potential elk displacement onto private land was reasonable and not arbitrary and capricious.

**iii. The Forest Service took a hard look at impacts to elk special habitats.**

In addition to the protective measures to known elk calving sites and wallows, the Forest Service disclosed and analyzed the potential impacts from the Project to areas that it identified as actual and potential elk special habitats. The Forest Service mapped potential elk calving habitat based on areas in proximity (within ¼ mile) to meadows, aspen and other riparian shrub habitats, where such areas occur on terrain with less than 25 percent slope. AR25522.<sup>25</sup> Then the Forest Service, for each alternative, overlaid the proposed routes onto the habitat maps to determine the extent that designated routes would occur within potential habitat. *See, e.g.*, AR25529. For Alternative 5, the Forest Service determined that “69 miles of designated routes occur within potential elk calving and deer fawning habitat. . . .” *Id.*

Next, the Forest Service used this data to calculate the amount of habitat that could be impacted by the proposed route system. *Id.* The Forest Service assumed that a route within potential habitat would reduce the effectiveness of that habitat area for “200 meters on each side of the route (160 acres per mile).” *Id.* Based on this assumption, the Forest Service calculated that the proposed routes in Alternative 5 could impact 11,040 acres of potential calving habitat in the Project area. *Id.*

COLW claims that the Forest Service violated NEPA by failing to gather sufficient baseline data on elk calving sites, asserting that the Forest Service inappropriately deferred any gathering of baseline data until the monitoring phase of the project, taking an “act first, study later” approach. *See* COLW Br. 18-19. COLW cites *Northern Plains Resource Council v. STB*, 668 F.3d 1067 for the proposition that, because the Forest Service did not disclose in its SFEIS

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<sup>25</sup> And for each alternative, the Forest Service determined the number of miles of designated routes that would occur within potential elk calving habitat. AR 25512-29.

the locations of elk calving sites and elk wallows, the Forest Service's NEPA analysis was insufficient. COLW Br. 17.

But the Forest Service's baseline data on special habitats is distinguishable from the baseline data, or lack thereof, in *Northern Plains Resource Council*. There, the Surface Transportation Board (STB) lacked any data on sage grouse habitat and concurred with BLM comments that it needed to conduct surveys to obtain that data. *N. Plains Res. Council, Inc.*, 668 F.3d at 1084. Yet, instead of conducting those surveys in its NEPA review, STB planned to conduct them as part of its mitigation measures. *Id.* Similarly, STB lacked baseline data on fish and aquatic resources, other wildlife, and sensitive plants, and proposed to conduct studies to obtain that data as part of mitigation measures. *Id.* The Ninth Circuit found that STB planned to "us[e] mitigation measures as a proxy for baseline data," which did not allow it to meet NEPA requirements to ensure that it carefully considered information about significant environmental impacts and to disclose relevant information to the public. *Id.* at 1085.

By contrast here, the Forest Service gathered considerable baseline data regarding elk special habitats. The Forest Service did extensive work prior to development of the proposed action to identify, in cooperation with ODFW and using telemetry data from ODFW, the elk calving sites as priority areas. AR08939-45. And the Forest Service mapped potential calving habitat and studied the potential impacts to that habitat from the proposed trail system. SuppAR07670-07672.

While the ROD added additional protections in applying and expanding seasonal restrictions to newly-identified sites, that is not the same as "act first, study later," as COLW alleges, and the Forest Service's supplemental protective measures are in stark contrast to *Northern Plains Resource Council*, where the agency lacked meaningful baseline data and

deferred the acquisition of that data until the mitigation phase. *Cf. W. Watersheds Project v. Jewell*, 221 F. Supp. 3d 1308, 1314-15 (D. Utah 2016) (upholding agency decision where “mitigation measures . . . were not considered alone, nor were they used as a proxy for baseline data. Rather, the mitigation measures were an additional factor that strengthened the conclusion” of the agency).

COLW also characterizes the telemetry data on which the Forest Service relied to identify elk calving habitat as stale and argues that its reliance on this data violates NEPA. COLW Br. 18. But similar to its “stale data” claims in the context of its INFISH arguments discussed below, COLW identifies no reliable evidence to show the results of the surveys and monitoring data “were likely incorrect or that the [conditions] in the project area had changed over time.” *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 763 (9th Cir. 2014) (denying request to enjoin timber sale where Forest Service’s FEIS was based on fifteen-year-old study where there was no reliable evidence that the study’s results were likely incorrect or that the status of bull trout in the project area had changed over time); *see also Idaho Rivers United v. U.S. Army Corps of Eng’rs*, No. C14-1800JLR, 2016 WL 498911, at \*19 (W.D. Wash. Feb. 9, 2016) (“An agency errs in relying on old data only when the agency has not shown that the data remains accurate.”). The Forest Service’s reliance on the telemetry data was appropriate.

**b. The SFEIS’ reliance on the best available data for all subwatersheds across the Forest was not arbitrary or capricious.**

To assess the potential effects of the Project on hydrology and aquatic species, the SFEIS described the existing conditions relative to nine habitat indicators in four watersheds and nine subwatersheds in the Project area. AR25355-56 (Table 62 identifying nine habitat indicators);

AR25364-66 (identifying watersheds and subwatersheds); AR25368-402 (watershed and subwatershed descriptions). The SFEIS relied on existing data from: (1) “Bottom Line Surveys [that] were conducted between 1991 and 2003 on the Ochoco National Forest on perennial and intermittent streams to determine if a streamside management unit was in compliance with the riparian zone standards and guidelines,” (2) “Level II Stream Surveys [that] were conducted between 1989 and 2014 on Ochoco National Forest perennial streams to identify existing riparian and aquatic ecosystem conditions on a basin-wide scale,” and (3) monitoring data that was “available for several streams in the project area.” AR25355. COLW argues that this data was incomplete and stale and therefore reliance on it was arbitrary or capricious. COLW Br. 25-27; *see also* ODFW Br. 19-20. This argument fails for at least three reasons.

First, NEPA does not require on-the-ground analysis and does not put a timeframe on the utility of previously collected data. *Great Basin Res. Watch v. Bureau of Land Mgmt.*, 844 F.3d 1095, 1101 (9th Cir. 2016) (“An agency need not conduct measurements of actual baseline conditions in every situation—it may estimate baseline conditions using data from a similar area, computer modeling, or some other reasonable method.”); *W. Watersheds Proj. v. Kenna*, No. 10-CV-1096-PHX-SMM, 2011 WL 5855095, at \*7 (D. Ariz. Nov. 22, 2011) *aff’d* 610 F. App’x 604 (9th Cir. 2015) (“Even without agency deference, NEPA does not establish a time frame for agency data collection and therefore, Plaintiff’s claim that Defendants relied on stale data is not relevant to the Court’s analysis of whether the agency took a hard look at the consequences of the implemented actions.”). Rather, as some courts have held, a violation of NEPA occurs only if a plaintiff shows that the agency ignored existing data. *See Alliance for the Wild Rockies v. Brazell*, 3:12-cv-466-MHW, 2013 WL 6200199, at \*27 (D. Idaho Nov. 27, 2013) (plaintiff must show agency ignored existing data); *cf. Cent. Or. Landwatch v. Connaughton*, 905 F. Supp. 2d

1192, 1197 (D. Or. 2012) (“The Forest Service had more recent baseline data available to it, but stated that the older data was adequate and that newer data was measured at different points.”). COLW has made no such showing here.

Second, and relatedly, COLW identifies “no reliable evidence” to show the results of the surveys and monitoring data “were likely incorrect or that the status of the [redband] trout in the project area had changed over time.” *Connaughton*, 752 F.3d at 763 (distinguishing *N. Plains Res. Council*, 668 F.3d at 1085-87 and *Lands Council v. Powell*, 395 F.3d 1019, 1030-31 (9th Cir. 2005)).<sup>26</sup> Instead of providing any reliable evidence to call into question the SFEIS’s analysis of existing conditions, COLW simply refers to the table in the SFEIS identifying past, present, and reasonably foreseeable future actions in or near the Project area and generally argues that those actions must have had some effect. But COLW fails to connect any of the listed actions to specific potential degradation of aquatic habitat in the Project area. COLW Br. 26. Moreover, the actions identified in the SFEIS must be conducted in accordance with the Forest Plan, including INFISH, which requires that those actions “not retard or prevent attainment of the [RMOs] and avoid adverse effects” to redband trout. AR02571. Because the actions must adhere to INFISH, they cannot be said to constitute “reliable evidence” of

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<sup>26</sup> COLW relies on *Powell* to argue that the Forest Service improperly relied on the habitat surveys. COLW Br. 26-27. Although *Powell* has not been overruled, a later en banc court reiterated that in *Powell*, “we expressly limited our holding that ‘on-site spot verification’ was required for soil analysis to ‘the circumstances of [that] case. . . . We accept the description in [*Powell*] that it was ‘limited to the circumstances of [that] case,’ and hold that it does not impose a categorical requirement of on-the-ground analysis or observation for soil analysis, or any other type of analysis.” *McNair*, 537 F.3d at 991. Although the analysis in *McNair* addressed the NFMA claims in *Powell*, the same reasoning supports a similarly narrow reading of the NEPA holding in *Powell* that the thirteen-year old survey data on cutthroat trout “was too outdated to carry the weight assigned to it.” *Powell*, 395 F.3d at 1031.

degradation of aquatic habitat in the Project area.<sup>27</sup> In contrast, the SFEIS noted that some projects, such as the Deep Creek Watershed Restoration Plan, were being implemented “to improve overall stream and riparian health and integrity within the watershed and improve water quality and associated habitat suitable for use by redband trout and other aquatic life.”

AR25279. Additionally, the Forest Service noted that redband trout “population densities have been on a steady, linear increase since 2003 suggesting that habitats have improved.” AR28137; *see also* AR25386-87; AR25391-92; AR25396.

Third, the Forest Service relied on more than the surveys to establish the environmental baseline. As explained during the objection resolution process, the analysis in the SFEIS “utilized research, relevant monitoring, field data, previous experience and professional judgment, as well as GIS information to provide the context, amount and duration of potential effects on aquatic resources from the proposed [Project].” AR28134. For example, in the Elliott Creek subwatershed, a fisheries biologist and hydrologist examined a stretch of Elliott Creek in August 2010 to assess the streambanks, vegetation, pools, and sediment deposition. AR25371. Similarly, Forest Service personnel visited Allen Creek in the Peterson Creek subwatershed in the summer of 2011 to assess its condition. AR25414. The SFEIS also included ODFW data on population of redband trout up until 2012 for various streams. *See, e.g.*, AR25374; AR25377-78;

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<sup>27</sup> ODFW makes similar arguments that suffer from the same shortcoming. ODFW Br. 19-20. But ODFW does refer specifically to potential changes to three streams in two subwatersheds due to the Maxwell Fire in 2006. *Id.* The SFEIS, however, provided a qualitative assessment of potential changes to those three areas as a result of the fire. AR25381. In addition, Forest Service personnel visited sites affected by the fire in 2010 and 2011. *See* AR 25371 (Elliott Creek); AR25414 (Allen Creek). The Forest Service’s approach to assessing existing conditions is subject to deference and was not arbitrary or capricious. Moreover, one of the PDFs requires a field review of any area affected by the Maxwell fire to ensure vegetation restoration treatments are completed before any Project activities are implemented. AR25256. This means no implementation activities will occur until restoration of the pre-fire baseline conditions.

AR25386-87. The Forest Service determined that the data considered in the SFEIS was “the best available data for all subwatersheds across the Forest.” AR28134. This determination is subject to deference, *Earth Island Inst.*, 697 F.3d at 1020 (“Because analysis of scientific data requires a high level of technical expertise, courts must defer to the informed discretion of the responsible federal agencies.”) (quoting *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1301 (9th Cir. 2003)), and the SFEIS’s reliance on such data satisfied NEPA’s twin aims of promoting informed decision making and public participation. *See Robertson*, 490 U.S. at 349.

**c. The SFEIS’ analysis of the Project’s potential effect on road and trail density was not arbitrary or capricious.**

OHA alleges that the Forest Service violated NEPA by “fail[ing] to adequately analyze compliance with the road density standards of the Forest Plan” and to take a “hard look” at road densities, “‘closed’ roads and user-created routes.” OHA Br. 12-20. As discussed above, in § V.A.3, OHA did not raise during the administrative process the issue of road density calculations or methodology, and OHA has waived its right to assert claims based on those issues. Further, even if OHA had not waived those rights, the Forest Service’s analysis of road and trail density was not arbitrary and capricious. *See supra*, § V.B.1.a.i.

**d. The SFEIS’ analysis of the Project’s potential effect on the gray wolf was not arbitrary or capricious.**

WEG maintains that the SFEIS failed to take a hard look at the Project’s potential effects to the gray wolf. WEG. BR. 38-39. The record belies this claim. The SFEIS noted that the Project area contains gray wolf “Dispersal/Transient” habitat but because “[w]olves are not suspected or documented to occur in breeding populations or to persist on the Ochoco National Forest,” the Forest Service identified no specific “denning, foraging or dispersal habitat” in the Project area. AR25477-79. But the SFEIS did incorporate its analysis of the potential effects to

wolf prey species, such as elk, and determined that the Project “is not expected to affect distribution and population size of prey species for wolves.” AR25479. As a result, the Project “would have no effect on potential wolf denning, foraging or dispersal habitat in the project area.” *Id.* This conclusion is consistent with the Forest Service’s reasonable determination that the Project would have no effect on the gray wolf under the ESA discussed in section V.D. below, and was not arbitrary or capricious.

**2. The SFEIS took a hard look at the cumulative impacts of the Project.**

A cumulative impact analysis “must be more than perfunctory; it must provide a ‘useful analysis of the cumulative impacts of past, present, and future projects.’” *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1075 (9th Cir. 2002) (quoting *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 810 (9th Cir. 1999)); *see* 40 C.F.R. § 1508.7. To be useful to decision-makers and the public, the cumulative impact analysis must include “some quantified or detailed information; . . . [g]eneral statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided.” *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 868 (9th Cir. 2005) (quoting *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1379–80 (9th Cir. 1998)). “Courts accord substantial deference to an agency’s determination of the scope of its ‘cumulative effects’ review.” *Cascadia Wildlands Project v. U.S. Forest Serv.*, 386 F. Supp. 2d 1149, 1167 (D. Or. 2005) (citing *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1071 (9th Cir. 2002)).

**a. The SFEIS took a hard look at cumulative impacts of the Project on elk habitat.**

The Forest Service analyzed the Project’s potential cumulative impacts to elk habitat in connection with vegetation treatments whose zone of influence overlap the Project area.

AR25531; *see also* AR25277 (Table 7). The Forest Service acknowledged that “[t]here is a potential cumulative impact of disturbance to big game animals that may be utilizing hiding cover within vegetation management project areas, from additional disturbance related to use of OHV trails in those areas.” AR25531. The Forest Service determined that changes in cover quantity and quality and temporary changes in motorized route density from the vegetation management projects could combine with the increases in motorized route density from the Project to affect the key indices of habitat effectiveness. *Id.* But the Forest Service found those changes would not be sufficiently significant to alter habitat effectiveness. AR25531-32. The Forest Service’s discussion of the cumulative effects on habitat effectiveness and on road density includes detailed and quantified data. *Id.* (analyzing road density changes from Project with habitat effectiveness ratings for areas of vegetation management projects). The Forest Service also considered in its cumulative impacts analysis the beneficial impact from its continued efforts to implement the 2005 Travel Management Rule by closing or decommissioning roads to mule deer and elk in the Project area. AR25532.

OHA asserts that the SFEIS’s cumulative impacts analysis is insufficient, alleging that “[t]he SFEIS only considers the cumulative effect of the proposed project along with past, present and future vegetation projects, open road density, and the (lack of) impact from displacement to private land.” OHA Br. 30 (citing AR25530-33). According to OHA, the Forest Service insufficiently considered the potential cumulative impacts to elk habitat in connection with “(1) grazing during critical forage times (2) the existing network of user-created trails and ‘closed’ roads, and (3) the legal and illegal harvest of elk.” *Id.*

As to grazing and the illegal and legal harvest of elk, there was no requirement for the Forest Service to specifically include them in its cumulative impact analysis. NEPA provides the

Forest Service the discretion to select the appropriate cumulative impact factors. *See Cascadia Wildlands Project*, 386 F. Supp. 2d at 1167. Plaintiffs do not cite to any studies or any rationale for why the Forest Service was required to include grazing in its cumulative impacts analysis for elk habitat. And, while the Forest Service does note in its cumulative impact analysis that increased motorized densities “may combine with the effects of fuel and vegetation management projects and may result in an increase in legal and illegal harvest of deer and elk,” it had no obligation to go one step further and consider the second order cumulative effects (*i.e.* a cumulative effect of a cumulative effect) of the “combined and cumulative effect of legal and illegal harvest in conjunction with the Summit Trial project.”

With respect to the cumulative impact of the Project in connection with user-created and administratively closed roads, the Forest Service, as noted above, did consider the effects on habitat of “closed or decommissioned roads that are still receiving motorized use.” AR25532. And the Forest Service recognized that those effects will diminish as it continues to implement road closures and decommissioning in compliance with the 2005 Travel Management Rule. *Id.*

COLW asserts that the Forest Service “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.” COLW Br. 22. COLW claims that “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” of the vegetation management activities. *Id.* at 24. This is inaccurate. The Forest Service quantitatively analyzed the cumulative impacts to motorized road density, which it identified as “the only [habitat effectiveness] index that may be affected by the proposed alternatives.” AR25531-32. This meets NEPA’s requirements for a hard look at cumulative impacts.

**b. The SFEIS took a hard look at cumulative impacts of the Project on aquatic resources.**

COLW also argues that the SFEIS failed to take a hard look at the cumulative impacts of the Project on aquatic resources. COLW Br. 27-29. The record, however, shows that the Forest Service took a hard look at those impacts by providing quantified and detailed information that permitted a useful analysis of impacts from past, present, and reasonably foreseeable future projects.

As an initial matter, the SFEIS relied “on current environmental conditions as a proxy for the impacts of past actions . . . because existing conditions reflect the aggregate impact of all prior human actions and natural events that have affected the environment and might contribute to cumulative effects.” *See* AR25275-76. This is consistent with NEPA. *See Cascadia Wildlands v. Bureau of Indian Affairs*, 801 F.3d 1105, 1111 (9th Cir. 2015) (stating an agency “may satisfy NEPA by aggregating the cumulative effects of past projects into an environmental baseline, against which the incremental impact of a proposed project is measured.”). COLW nevertheless attempts to confuse this issue by citing a report it submitted during the administrative process noting “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.” COLW Br. 28 (quoting AR26859). But this simply refers to past impacts, which the SFEIS properly accounted for in analyzing the existing condition.<sup>28</sup>

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<sup>28</sup> COLW also misleadingly altered the quote to refer to “Project area watersheds.” COLW Br. 28. The quote, however, referred specifically to “Deep Creek and its tributaries.” AR26859. And that area was already a “focus watershed” in which the Forest Service determined restoration projects were necessary to address the discrepancy between the “current conditions and desired conditions, as described in Forest Plan direction and management objectives.” AR25279.

COLW then tries to further confuse the record by claiming that the SFEIS’s cumulative effects analysis “maintained that impacts from past *and ongoing* activities . . . were disclosed in the [SFEIS’s analysis] of direct and indirect [effects].” *Id.* (emphasis added). That is not what the SFEIS says or does. The SFEIS’s assessment of cumulative effects to aquatic resources identified and described twenty-five “[f]uture and [*o*]ngoing [p]rojects.” AR25447-54. It then examined the cumulative effect of those “[f]uture and *ongoing* projects” on flow and sediment regime, sediment/turbidity, and aquatic species by quantitatively analyzing their effect on, among other things, road/trail densities and stream crossings. AR25455-66.<sup>29</sup> The SFEIS further noted that management of grazing in the Project areas has improved and that “[a]ctive rehabilitation of user-created trails would make them less usable to cattle.” AR25456. In light of these analyses, the SFEIS determined that “cumulative effects from future *and ongoing* projects to [aquatic resources] are anticipated to be negligible.” *Id.* (emphasis added); *see also* AR25459 (same for sediment delivery and turbidity). This is far different from the “analyses of the erosion and sediment delivery” that the court found to be “scant or lacking almost entirely” in the principal case relied on by COLW, *Idaho Rivers United v. Probert*, No. 3:16-cv-00102-CWD, 2016 WL 2757690 (D. Idaho May 12, 2016). COLW Br. 28-29. Instead, the SFEIS’s analysis provided a hard look at the potential environmental consequences of the Project, which permitted informed decision-making and public participation. This is all that NEPA requires.<sup>30</sup>

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<sup>29</sup> ODFW argues that “[i]nstead 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.” ODFW Br. 20-21. ODFW, however, cited only the portion of the SFEIS addressing potential effects of the Project to grazing. *Id.* at 21 (citing AR25636). An entirely different section of the SFEIS addresses effects to watershed health. *See* AR25447-64 (cumulative effects analysis for hydrology and aquatic species).

<sup>30</sup> Plaintiffs also alleged certain NEPA claims that they did not pursue in their opening briefs. For example, WEG did not pursue its NEPA claims related to cumulative impacts. WEG Am.

**C. The Project Complies With the Travel Management Rule.**

When designating trails and areas on NFS lands, the Travel Management Rule requires the Forest Service to consider “with the objective of minimizing: (1) Damage to soil, watershed, vegetation, and other forest resources; (2) Harassment of wildlife and significant disruption of wildlife habitats; [and] (3) Conflicts between motor vehicle use and existing or proposed recreational uses of National Forest System lands or neighboring Federal lands.” 36 C.F.R. § 212.55(b). To satisfy this obligation, the Forest Service must consider these minimization criteria and describe “how the selected routes were designed with the objective of minimizing impacts.” *WildEarth Guardians v. Mont. Snowmobile Ass’n*, 790 F.3d 920, 932 (9th Cir. 2015) (citations and quotations omitted). But this does not require the Forest Service “to impose an absolute, discernible limit on [motorized] use, regardless of whether there are competing uses or resources.” *Id.* at 930 n.10 (citations and quotations omitted). Instead, a court inquires whether the Forest Service complied with the minimization criteria “in a manner that is feasible, prudent, and reasonable in light of the agency’s multiple-use mandate.” *Id.*

Only WEG asserts a claim under the Travel Management Rule. WEG Br. 9-20. But that claim fails because the record in this case shows that in developing the Project, the Forest Service extensively considered with the objective of minimizing damage to forest resources, harassment of wildlife and disruption of habitat, and conflicts with other recreational uses. *See* AR25676-80 (summarizing compliance with Travel Management Rule).

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Compl. ¶ 110. And COLW did not pursue its NEPA claims related to the environmentally preferable alternative and mitigation. COLW Am. Compl. ¶¶ 281, 295-99. Plaintiffs have waived the claims they did not pursue in their opening briefs. *See City of Santa Clarita*, 2006 WL 4743970, at \*11.

After the 2005 Travel Management Rule inverted the previous management regime on the Forest, which permitted cross-country motorized travel unless it was expressly prohibited, the Forest Service pursued its multiple-use mandate by exploring the possibility of establishing a feasible, prudent, and reasonable trail system for OHV use. AR25226. Beginning in 2009, the Forest Service worked with a “broad spectrum of stakeholders” to identify opportunities and areas of concern related to the development of an OHV trail system. AR25230-31. The Forest Service initially proposed an OHV trail system in the McKay Creek subwatershed near Prineville, Oregon. Based on stakeholder input, however, the Forest Service eliminated this area from consideration due to a “distinct lack of common support for such an undertaking in that location.” AR25231. Instead, additional input identified “common support” for an OHV trail system in the area in which the Project was ultimately developed. *Id.*

Several additional concerns were identified during this “pre-scoping” process, including concerns about “effects to wildlife, fish, streams, sensitive habitats, forage and weeds” and “[u]ser conflicts associated with motorized/non-motorized recreation.” *Id.* The Forest Service considered these concerns in designing a proposed action that was released for public comment in November 2009 at the start of a formal scoping process. AR25232; AR08578-92 (scoping notice); AR08624-25 (notice of intent published in Federal Register).

In response to comments received during that process, the Forest Service identified and considered four alternative project designs that the SFEIS extensively analyzed. These four action alternatives varied route locations and intended uses to address four main issues identified during the scoping process: (1) the size and quality (*i.e.*, complexity, range of difficulty levels, dispersion of users, etc.) of the trail system; (2) the effect of the trail system on big game habitat; (3) the effect of the trail system on water quality and fish habitat; and (4) the effect of the trail

system on potential conflict between motorized and non-motorized recreationists. AR 25232-35 (identifying issues); AR25236-52 (detailing alternatives). Moreover, the SFEIS analyzed the potential environmental effects of the alternatives on: (1) soil, watershed, vegetation, and other forest resources; (2) wildlife and wildlife habitat; and (3) other recreational uses of Forest land. *See, e.g.*, AR25333-46 (soils); AR25346-467 (hydrology and aquatic species); AR25467-549 (wildlife); AR25297-325 (recreation). And as detailed above, the SFEIS explained how the Project minimizes effects to resources, including elk and watersheds. *See supra* §§ V.A.1., V.A.2.a.

The SFEIS proposed adoption of Alternative 2, which consisted of a 124-mile OHV trail network connected by forty-five miles of NFS roads that would be open for motorized use from May 1 through November 1 and that would include ten staging areas and six trailheads.

AR25236-40. Adoption of this alternative would have required five site-specific amendments to the Forest Plan, four of which addressed motorized crossings in Old Growth Management Areas and one of which permitted “designation/construction of motorized trail on scabland.”

AR25240.

Alternative 5 was developed with the intent “to provide a range of motorized trail opportunities and areas at a moderate scale while limiting potential for impacts to water quality, fish and wildlife habitat, and to be responsive to potential conflict between motorized and non-motorized recreational use.” AR25248. It varied from Alternative 2 by providing for a 105-mile OHV trail network connected by thirty miles of existing roads that would be open for motorized use from June 1 through September 30 each year and that would include four staging areas and one trailhead. AR25248-52. In addition, several of Alternative 5’s trail features differ from Alternative 2 in ways that minimize effects to forest resources. For example, portions of trail

that Alternative 2 opened to class I vehicles (*i.e.*, ATVs) were limited to class III vehicles (*i.e.*, motorcycles) in Alternative 5. AR25248. In addition, motorcycle “routes were adjusted to reduce stream crossings and to maximize placement on existing roadbeds,” the ATV network was “designed to utilize an existing network of old road beds and skid trails, while limiting potential conflict with equestrian and other non-motorized recreational use” in the area, and the jeep “route alignments were adjusted to reduce potential for impacts to riparian areas, swales and ephemeral draws.” AR25248-49. And adoption of Alternative 5 would require one fewer site-specific Forest Plan amendment related to Old Growth Management Areas than Alternative 2. AR25252.

Rather than selecting the SFEIS’s proposed action, the Forest Service ultimately adopted Alternative 5 with the addition of one route described in Alternative 2, which resulted in a 107-mile trail network with thirty miles of connecting roads. AR28733-34. It also incorporated numerous resource protection measures, including PDFs intended to minimize impacts to water quality and aquatic organisms, soils, invasive plants, and big game, and it provided for ongoing monitoring of soil and water quality, invasive plant species, wildlife, and other resources. AR25253-61; AR25268-70. Indeed, as noted in the ROD, Alternative 5 was the environmentally preferable alternative under NEPA:

By providing a logically and sustainably located motorized trail system, Alternative 5 best meets the Purpose and Need for the project while preserving desired resource conditions and addressing the need to restore and/or rehabilitate unauthorized routes in the project area. As with all the action alternatives, Alternative 5 was mindfully located to stay within identified “community support areas” and avoid sensitive habitats, best available big game forage, the wild horse territory, and identified and/or designated nonmotorized recreation routes. All the action alternatives include design features to protect natural resources and include rehabilitation of unauthorized routes to offset the effects of route creation. However, Alternative 5 rises above all other alternatives including the No Action [alternative] in terms of protection of the environment because it goes the farthest in providing effective protection of water quality and aquatic resources.

....

When fully implemented, Alternative 5 will deliver less sediment to project area streams than any other alternative, including the No Action alternative. The analysis documented in the SFEIS indicates that implementation of [the No Action alternative] would perpetuate unauthorized routes within the project area; modeling . . . indicates that these unauthorized routes would continue to deliver a large amount of sediment to project area streams if they are not blocked or restored. The modeling indicated that between the restoration of unauthorized routes and the thoughtful placement of designated trail segments, Alternative 5 would result in the least amount of sediment delivered to project area streams of all alternatives.

AR28753-54;<sup>31</sup> *see also* AR28743-44 (explaining Project avoided RHCAs and stream crossings “to the greatest extent possible” and “selected alternative includes the fewest number of miles of new trail within wetland areas.”).

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<sup>31</sup> ODFW argues that this determination was arbitrary and capricious under NEPA. ODFW Br. 12-14. ODFW, however, is not a party to this case. *See Miller-Wohl Co. v. Comm’r of Labor & Industry*, 694 F.2d 203, 204 (9th Cir. 1982) (“An amicus curiae is not a party to litigation.”). None of the Plaintiffs pursued a separate claim under NEPA on this ground in their briefs and there is no need for the Court to consider it. *Compare* COLW Am. Compl. ¶ 281, ECF No. 23 (alleging as part of NEPA claim that “the Forest Service assumed, arbitrarily, that implementation of the [Project] was the ‘environmentally preferable’ alternative”) *with* COLW Br. 15 (referring generally to the Forest Service’s determination of the “environmentally preferable” alternative but not pursuing separate NEPA claim on that basis). But even if the Court were to consider the argument, it is unfounded. The Forest Service explained the methods it would take to close and rehabilitate unauthorized routes as well as the previously successful model of education, enforcement, and monitoring it would use to enforce the closures of non-designated routes. *See* AR28738-39; AR25262-68 (Education, Enforcement, Safety, and Operational Maintenance Plan); AR25268-70 (monitoring). ODFW essentially argues that the Forest Service will not implement these measures. ODFW Br. 14. But the Forest Service is entitled to a “presumption of regularity,” and its determination that implementation of these measures would curtail unauthorized motorized use that would benefit the environment over the no action alternative was not arbitrary or capricious. *See Nat. Res. Def. Council, Inc. v. U.S. Forest Serv.*, 634 F. Supp. 2d 1045, 1065 (E.D. Cal. 2007) (“Although the [Forest Service] may not merely list the mitigation measures, the [Forest Service] is not required to discuss how [it] would fund its resource protection measures as plaintiffs suggest. ‘The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.’” (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926))).

In short, the record clearly supports the Forest Service's determination that it complied with the Travel Management Rule's minimization criteria by considering with the object of minimizing damage to forest resources, harassment of wildlife and disruption of habitat, and conflicts with non-motorized users. AR28756; AR25678-79 (summarizing efforts). WEG's reliance on *WildEarth Guardians v. Montana Snowmobile Association* to argue otherwise is misplaced. WEG Br. 11-12. That case involved a challenge to the designation in a forest plan of more than two-million acres of land for snowmobile use in which "the Forest Service neglected to consider the minimization criteria in the TMR at all." 790 F.3d at 921, 931. The court rejected the Forest Service's attempt to rely on "a single forest-wide analysis and general decisionmaking principles" to satisfy the minimization criteria and instead held that the Forest Service must "apply the minimization criteria to *each area* it designated for [motorized] use." *Id.* at 930. That is precisely what the Forest Service did here in applying the minimization criteria to the site-specific Project area. WEG seems to suggest that the Forest Service must apply the minimization criteria to every bend or curve in the trail. But that approach finds no support in the Travel Management Rule and is not the "more granular minimization analysis" referred to in *Montana Snowmobile Association*. *Id.* at 931.

Instead, the Forest Service's approach here is materially similar to the approach upheld in *Pryors Coalition v. Weldon*, 551 F. App'x 426, 427-28 (9th Cir. 2014), which involved a challenge to a Forest Service travel management plan. In developing the plan, the Forest Service "considered numerous alternative plans for route designations based on competing motorized and non-motorized uses," and modified one of the alternatives to reduce the total mileage of motorized routes; require the reduction of negative impacts to soil, fisheries, and water quality; avoid "route designations that would clearly contribute to unacceptable resource impacts"; and

impose “seasonal restrictions on roughly 64 miles of routes to reduce impacts on soil, vegetation, water quality, and wildlife.” *Id.* at 429-30.

All of those factors are present here. Namely, the Forest Service considered a variety of alternatives and selected an alternative with fewer miles of motorized routes than the proposed alternative, required implementation of resource protection measures, avoided sensitive habitats, required the reduction of negative impacts before trail construction (such as in the area affected by the Maxwell fire), and placed seasonal restrictions on motorized use to minimize impacts on big game and watersheds. As such, the Forest Service “did not act arbitrarily or capriciously in applying the TMR’s minimization criteria to [the Project]. Nor were the Forest Service’s minimization actions plainly erroneous or inconsistent with the language of the regulation.” *Id.* at 430.

**D. The Forest Service Discharged Its Endangered Species Act Duties and Reasonably Concluded that the Project Would Have No Effect on the Gray Wolf.**

Under the ESA Section 7, an action agency, like the Forest Service here, first inquires with FWS whether any listed or proposed-to-be-listed species “may be present” in the area of the proposed action. 16 U.S.C. § 1536(c)(1). If the answer to this question is affirmative, the action agency may prepare a biological assessment to determine whether the identified species “is likely to be affected by such action.” *Id.* If the action affects listed species or critical habitat, the agencies proceed through Section 7 consultation. Specifically, if the proposed action is not likely to adversely affect listed species, then informal consultation may be undertaken, whereas if the action is likely to adversely affect listed species, the agencies proceed through formal consultation. 50 C.F.R. §§ 402.13, 402.14. However, before reaching that point, and as a threshold matter, if the action agency determines that the action will have “no effect” on listed

species or critical habitat, the agency has no further obligations under the ESA. *Pac. Rivers Council*, 30 F.3d at 1054 n.8; *Protect Our Water v. Flowers*, 377 F. Supp. 2d 844, 871 (E.D. Cal. 2004) (“[I]f the agency determines that a particular action will have no effect on an endangered or threatened species, the formal consultation requirements are not triggered.”).

Here, the Forest Service prepared a biological evaluation of the threatened or endangered species that may be present on the Forest to evaluate if the species may be affected by the Project. *See* AR25477-78 (listing species to evaluate for the Forest). Because ESA-listed wolves may be present on the Forest, the Forest Service thereafter evaluated potential impacts to the gray wolf. *See* AR25478-79. It concluded that, because there were no resident wolves on the Forest or in the Project area and the Project would not affect the distribution and population of wolf prey in the area, the Project would have no effect on the gray wolf. AR25479. Thus, under the ESA consultation rubric just described, the Forest Service was not required to consult with FWS and it had no further obligations under the ESA.

This conclusion follows directly from the record evidence. The Forest Service acknowledged that radio-collared wolves had passed through the Forest, but concluded that there are no *resident* wolves in the Project area. In its SFEIS, the Forest Service noted that there are occasional reports of wolves on or near the Forest and few within the Project area, but many of those reports were not confirmed. *See id.*; *cf.* ODFW Br. 10 (only four radio-collared wolves have definitively passed through the Ochoco National Forest since 2011). For example, the Forest’s biologist actively sought out reports of wolves, AR24987, and used camera traps to try to follow up anecdotal reports of wolves with photographic evidence, AR27937, but beyond the collared-wolf data, no wolf report was confirmed. *See* AR27973; AR21635; AR21902; AR27930-32; AR24984; AR24986; AR26291-92; AR26254-55; AR25167-68; AR25149-51;

AR22472; Brown Decl., Ex. 1 (ODFW Map);<sup>32</sup> AR27937 (USFS biologist noting the presence of “numerous collared wolves within the last two years in and around the Forest”). But these limited sightings do not support the conclusion that wolves are denning on the Forest, or even that the Forest or Project area are part of a dispersal corridor.

The Forest Service therefore reasonably concluded that the Project would have no effect on the gray wolf because there were no wolves occupying the Forest, much less the Project area. *See Defs. of Wildlife v. Flowers*, 414 F.3d 1066, 1070 (9th Cir. 2005) (“[W]e review the district court’s decision de novo and hold that the [no effect] decision rested on the firm foundation that no pygmy-owls had been found to live within either project area”). Moreover, as noted, FWS recommended this determination. AR12930. Thus, this case is distinguishable from the Plaintiffs’ authority. In *Kraayenbrink* for example, both the action agency’s and FWS’s scientists concluded that consultation was required, but no consultation was performed. *See W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 497-98 (9th Cir. 2011).

Although it was not legally required to weigh in, FWS, the expert agency on endangered and threatened species, agreed with the Forest Service’s judgment that there would be no effect on the gray wolf. *See* AR 28829 (email documenting conversation with FWS); AR16265-67; AR12930. FWS’s concurrence with the Forest Service’s conclusion is entitled to deference. *See, e.g., Sierra Club v. Marsh*, 816 F.2d 1376, 1388 (9th Cir.1987) (deferring to FWS as to whether re-initiation of consultation was warranted under its regulations at 50 C.F.R. § 402.16),

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<sup>32</sup> Federal Defendants have opposed ODFW’s motion submitting this map in a contemporaneously filed opposition. Even if the Court considers the map, however, at most it shows that some radio collared wolves have dispersed through the Forest and through the Project area, a fact that the Forest admits in its SFEIS. AR25479.

*recognized as abrogated on other grounds by Cottonwood Env'tl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1091 (9th Cir. 2015).

Although this conclusion is reasonable and supported by the record, Plaintiffs WEG and COLW argue that the Forest Service misapplied the ESA and ignored impacts to wolves or their prey species. At bottom, however, Plaintiffs simply disagree with the Forest Service's conclusions and attempt to recast their policy disagreement as legal flaws or failures of analysis.

For example, WEG suggests that the Forest Service did not discharge its duties under the ESA by ignoring the legal standard for "may be present." WEG Br. 31-33. In doing so, WEG wrongly conflates the "may be present" standard with the "may effect" standard. *See, e.g.*, 16 U.S.C. § 1536(c)(1) (explaining that an action agency must evaluate species that may be present in a project area); 50 C.F.R. §§ 402.01, 402.14(a) ("Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat."). WEG's suggestion that the Forest Service acted arbitrarily or capriciously because gray wolves "may be present" in the Project area erases the lines between two distinct legal standards. *Cf.* WEG Br. 33 ("If gray wolves 'may be present' in the Summit Trail project area, there is no dispute that the project 'may affect' gray wolves."). And, any suggestion that the Forest did not agree that wolves "may be present" is also incorrect. WEG Br. 32 (explaining that wolves "may be present" in the area, a conclusion the Forest Service also reached). The Forest conducted a biological evaluation where it considered impacts to gray wolves, *because* it acknowledged that wolves may be present. *See* AR25477 ("Table 133 [which includes the gray wolf] lists the ... species that occur and/or have habitat on the Ochoco National Forest.").<sup>33</sup> It

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<sup>33</sup> Thus, this case is distinguishable from *Native Ecosystems Council v. Krueger*, 946 F. Supp. 2d 1060, 1074-75 (D. Mont. 2013), where FWS concluded that lynx did not meet the "may be present" standard (which the Court referred to as the first step in the ESA process) because they

decided, based on its analysis, that there was “no effect” to wolves and documented that conclusion in its biological evaluation. Thus, it discharged its duties under the ESA. *Protect Our Water*, 377 F. Supp. 2d at 871 (“[I]f the agency determines that a particular action will have no effect on an endangered or threatened species, the formal consultation requirements are not triggered.”).

Additionally, while all Plaintiffs (and amicus) acknowledge that there is no evidence that wolves are resident on the Forest (much less in the Project area), they contend that the Forest Service ignored impacts to suitable wolf habitat. These arguments largely rely on ODFW’s public comment letters, submitted as part of the administrative process. *See* AR26728-56. In those comments, ODFW opines that because wolf habitat suitability is strongly correlated with public ownership and low road density, the Project will reduce wolf habitat suitability and therefore “may affect” wolves. *See* ODFW Br. 11-12. Plaintiffs echo these arguments, also relying on ODFW’s letter. *See* COLW Br. 35; WEG Br. 33-34.<sup>34</sup>

As all parties and amicus agree, wolves are habitat generalists and thus can use a wide variety of habitats when they move through Oregon. *See, e.g.*, AR28546. The Forest Service acknowledges that, in general, wolves avoid densely roaded areas, however, the Project will not

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did not occupy the forest. In this case, no one disputes that wolves met the “may be present” standard, which is why the Forest Service analyzed wolves in its biological evaluation.

<sup>34</sup> As explained in text, COLW’s ESA arguments should be rejected because they lack merit. In addition, however, COLW lacks standing to argue any of its ESA claims. *WildEarth Guardians v. EPA*, 759 F.3d 1064, 1070 (9th Cir. 2014) (a plaintiff must establish standing for each claim it asserts). COLW submits no declarations that establish its standing to contest issues related to gray wolves. While its declarants express a generalized interest in viewing wildlife in the Ochoco National Forest and Project Area, *see, e.g.*, DN 51-1 – 57-4, none of its declarants testify to a particularized interest in viewing wolves in the Project Area and thus, COLW lacks standing to bring its ESA claim. *See All. For the Wild Rockies v. U.S. Dep’t of Agric.*, 772 F.3d 592, 598 (9th Cir. 2014) (plaintiff must show that the alleged interests are threatened by defendant’s actions).

substantially increase road density. *See* AR25533.<sup>35</sup> In addition, the Project will not affect public ownership of the Project area.<sup>36</sup> Thus, while it received Plaintiffs' comments, the Forest Service disagreed with their conclusions, but reasonably concluded that the Project will have no effect on wolves.

Plaintiffs also speculate that wolves "may be affected" by particular Project impacts to elk, which are a prey species for wolves. For example, Plaintiffs suggest the Project will affect the distribution and population of elk and that those effects will in turn, affect wolves. COLW Br. 35 (suggesting that the Project will "displac[e] wolf prey"); WEG Br. 33-34; ODFW Br. 11-12 (suggesting that the Project will reduce the "availability of elk" and shift elk onto private land). The Forest, however, considered impacts to elk and other prey species and concluded that "the project is not expected to affect distribution and population size of prey species for wolves." AR25479 (SFEIS 255). The Forest based this conclusion on a thorough evaluation of impacts to elk and deer. For example, the Forest considered the total motorized road density and concluded that at 2.06 mi/mi<sup>2</sup> it remained below the Forest Plan guideline (3.0 mi/mi<sup>2</sup>) to maintain elk habitat effectiveness. AR28742. It also performed a distance banding analysis to evaluate whether there would be impacts to what it called elk-security habitat, or habitat away from roads, and evaluated the potential displacement of elk onto private lands. *See supra* § B(1)(a)(i)-(ii). After evaluating these metrics, the Forest Service reasonably concluded that wolves would not be affected through impacts to their prey.

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<sup>35</sup> While the important point for the Forest Service's analysis is that the Project does not meaningfully change road density, the total motorized road density also falls below the standard ODFW used to map potential wolf range in its wolf reports (3.5 km/km<sup>2</sup>). *See* AR28675.

<sup>36</sup> When mapping wolf habitat, ODFW did not differentiate between public and private lands because in Oregon, wolves use both public and private lands. AR23783 (more documented wolves on private than public lands); AR28547 (similar 2016 data).

Here, the Forest Service evaluated possible impacts and concluded that the Project would have no effect on the gray wolf. Although it was not required to do so, out of an abundance of caution and acting as a good environmental steward, the Forest Service sought and obtained FWS's endorsement of its approach. In that regard, this case is distinguishable from *Native Ecosystems Council*, where a district court determined that because the project in question had "disturbance effects" the Forest Service was required to consult on impacts to grizzly bears. *Cf.* COLW Br. 35. *Krueger*, 946 F. Supp. 2d at 1079 ("While the 'disturbance effects' may be discountable or insignificant given the maintenance of connectivity for grizzly bears that might travel through the area, 'any possible effect' requires the Forest Service to obtain the concurrence of the Wildlife Service in order to avoid consultation.").

Because the Forest Service's consideration of impacts was reasonable and followed the rubric of the ESA, the Forest Service's no effect determination under the Endangered Species Act should be upheld.

**E. If the Court Were to Find a Legal Violation, the Parties Should Have the Opportunity to Brief the Appropriate Remedy.**

Plaintiffs request vacatur of the ROD and remand to the agency. For the reasons discussed above, there has been no violation of law and vacatur is not warranted. But even if the Court were to find a violation of law, Federal Defendants request the opportunity to brief the appropriate remedy. *See, e.g., Nat. Res. Def. Council v. Kempthorne*, 506 F. Supp. 2d 322, 388 (E.D. Cal. 2007) (ordering supplemental briefing on the appropriate remedy and noting that "it is not prudent to impose a remedy without further input from the parties."); *see also Humane Soc'y v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010) ("In rare circumstances when we deem it advisable that the agency action remain in force until the action can be reconsidered or replaced, we will remand without vacating the agency's action.").

**VI. CONCLUSION**

For the foregoing reasons, Federal Defendants respectfully request that their cross motion for summary judgment be granted, Plaintiffs' motions for summary judgment be denied, and judgment be entered accordingly.

Respectfully submitted, March 9, 2018,

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**CERTIFICATE OF COMPLIANCE**

The parties previously agreed that “Federal Defendants shall be permitted to file one consolidated memorandum addressing the claims and arguments in each Plaintiff group’s separate memoranda” and that the “word-count or page limits for Federal Defendants’ consolidated memorandum shall be the equivalent of three memoranda under Local Rule 7-2.” Combined Proposed Case Management Schedule for Consolidated Cases 11, ECF No. 33. This consolidated brief complies with this word-count limitation because it contains 23,855 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

*/s/ Shaun M. Pettigrew*  
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