

Ralph O. Bloemers, OSB No. 984172
ralph@crag.org – (503) 525-2727
Christopher G. Winter, OSB No. 984355
chris@crag.org – (503) 525-2725
Crag Law Center
917 SW Oak Street, Suit 417
Portland, OR 97205
Fax: (503) 296-5454

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

BARK, an Oregon non-profit corporation,
FRIENDS OF MOUNT HOOD, an Oregon
non-profit corporation, **NORTHWEST**
ENVIRONMENTAL DEFENSE CENTER,
an Oregon non-profit corporation, **THE**
SIERRA CLUB, a California non-profit
corporation,

Plaintiffs,

v.

LISA NORTHROP, Acting Forest
Supervisor of the Mt. Hood National Forest,
BILL WESTBROOK, Zigzag District
Ranger, **KENT CONNAUGHTON**, Regional
Forester for Region 6, and the **UNITED**
STATES FOREST SERVICE, a federal
agency.

Defendants.

Case No. 3:13-cv-00828-AA

MEMORANDUM IN SUPPORT OF
MOTION FOR TEMPORARY
RESTRAINING ORDER AND
PRELIMINARY INJUNCTION

Plaintiffs' Memorandum in Support of Motion for
Temporary Restraining Order and Preliminary
Injunction - i

Crag Law Center
917 SW Oak St., Suite 417
Portland, OR 97205
Tel. (503) 525-2727

PLAINTIFFS' CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 7.1 of the Federal Rules of Civil Procedure, Plaintiffs, Bark, Friends of Mount Hood, Northwest Environmental Defense Center, and Sierra Club, state that none of the plaintiff organizations have any parent companies, subsidiaries, or affiliates that have issued shares to the public.

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INTRODUCTION

This is an Administrative Procedure Act challenge of the approval by Defendants (the “Forest Service”) of R.L.K. and Company’s (“RLK”) proposal to develop the Timberline Ski Area Mountain Bike Trails and Skills Park (the “Project”) pursuant to an Environmental Assessment (“EA”). RLK operates year-round ski facilities at Timberline Lodge on Mt. Hood pursuant to a 30-year Special Use Permit (“SUP”) issued by the Forest Service. RLK proposes to construct 17 miles of new lift-served downhill mountain bike routes and skills park in the alpine and subalpine environment of Mt. Hood (the “downhill bike routes”).

Timberline Lodge is an Oregon icon that is visited by millions of people annually to ski, hike, climb and take in the scenery. The alpine flanks of Mt. Hood are biologically and culturally significant to people throughout Oregon and beyond. Timberline Lodge was built by the Works Progress Administration and dedicated by President Theodore Roosevelt. "I look forward to the day," declared President Roosevelt, "when many, many people from this country are going to come here in the west for skiing and tobogganing and various other forms of winter sports." Declaration of Dennis M. Chaney (“Chaney Decl.”) at ¶ 19. Timberline Lodge fell into disrepair but was saved by the late Richard L. Kohnstamm. The lodge is a National Historic Landmark and the National Park Service’s historic register report on the building states:

Mountain climbing and hiking had been the primary recreational use at the site, but the developmental plan emphasized skiing and tourism as the greatest potential growth . . . More attention began to be paid to keeping the site attractive in summer as well as winter because it was the beauty of the location that brought the tourists . . . Regional Forester C. J. Buck and some Forest Service personnel felt strongly that only activities such as trail riding, hiking, camping and skiing should be permitted. They did not allow the addition of a swimming pool, permanent tennis courts, or other forms of "urban" recreation.

Chaney Decl. ¶ 16, Exhibit A at 20.

In addition to running the publicly owned Timberline Lodge, RLK operates the Timberline ski area on public lands that have been designated for developed recreation. In the winter, spring and summer months, snow sports are the big draw. RLK applies over a 1,000,000 pounds of salt annually from the top of the Palmer snowfield down to the base of the Magic Mile lift to maintain the slopes into the summer for RLK's popular summer ski and snowboard camps.

While the alpine flanks of Mt. Hood around the Timberline Lodge are designated for developed recreation, the area is also designated a Tier-1 key watershed that contains Riparian Reserves and wetlands in the headwaters of Still Creek, the West Fork of the Salmon River, Glade Canyon and Sand Canyon. These four sub-watersheds form a significant and substantial portion of the headwaters of the Sandy River Basin. These lands and waters are protected by substantive standards and guidelines contained in the Mt. Hood National Forest Plan Land and Resources Management Plan ("LRMP") and the Northwest Forest Plan ("NWFP") that are designed to ensure that essential habitat for threatened, endangered and sensitive plants and animals is maintained and restored and not further degraded by development. Past construction has seriously degraded these sensitive headwater streams. Despite RLK's promises to restore areas degraded by its facilities, the aquatic environment is not in a properly functioning condition and poorly vegetated clearcuts, lift bases and service roads continue to deliver high levels of fine sediment into the aquatic system.

In 2009, RLK sent a Master Development Plan ("MDP") with plans for new development in and around the Timberline Lodge to the Forest Service. The MDP details plans for a new 17,000 plus square foot day lodge, an 800-car parking lot and a tubing hill. RLK subsequently amended the plan by adding a project providing for the construction of over 17 miles of lift-accessed downhill mountain bike trails and a skills park. The MDP is not available on the Forest

Service's website or on RLK's website and the public was never asked for its input. Despite the lack of public involvement, former Forest Supervisor Gary Larson accepted the plan and amended RLK's special use permit ("SUP") to incorporate the MDP into it. While the development plans were described as conceptual, the Forest Service has previously involved the public and conducted an analysis of the direct, indirect and cumulative effects of conceptual master development plans for other ski area expansions on Mt. Hood.

In 2010, RLK proposed to start implementing the plans in its MDP beginning with the Project. To claim that the Project would have no significant effect on the environment, the Forest Service combined this new construction with a suite of challenging restoration projects. The restoration projects included plans to address failed restoration required as part of past projects. The Forest Service claims that the restoration will cancel out the impacts from this new construction on the sensitive Still Creek and the West Fork of the Salmon watersheds.

Two-thirds of the 17 miles of bike routes will require removing vegetation in a swath up to 99 inches wide. In total, the bike routes would convert a cumulative 12 acres of sub-alpine land into bare mineral soils, including the permanent degradation of up to 2 acres of designated Riparian Reserves. The total boundary of this new facility within the Ski Permit Area is not stated in the EA but appears to be over 1 square mile – more than half of the existing ski permit area. The bike routes will double the total number of stream crossings in the area and increase the direct delivery of fine sediment into the aquatic system. Despite knowing sufficient details about the scope and location of the new parking lot and day lodge, the Forest Service did not consider the direct, indirect and cumulative impacts of all of these reasonably foreseeable projects when the first of these three big projects was being implemented. While the Forest Service is keenly aware of problems in both winter and summer with visitors exceeding the

capacity of the transportation and parking system, it chose to ignore the fact that this Project would further exacerbate these problems.

On November 19, 2012, former Mt. Hood National Forest Service supervisor Christopher Worth approved the Finding of No Significant Impact (“FONSI”) and Decision Notice (“DN”) authorizing RLK to begin construction of the Project. Supervisor Worth approved the project even though the Forest Service admits that the bike routes will have the same impacts that roads do on the landscape and that they will increase the amount of fine sediment entering Still Creek and the West Fork of the Salmon. During the spring run-off, rain-on-snow events and other wet weather storms, the bike routes will result in the delivery of additional fine sediment into critical habitat for Lower Columbia River steelhead and the only known population of *Scott’s apatanian caddisfly*, a Regional Forester designated Sensitive Species. Increased sedimentation threatens the continued viability of the only known robust population of this highly endemic glacial relict species, which is part of the food web for threatened trout and salmon.

Plaintiffs commented on the EA and timely appealed the Forest Service’s decision in 2013. The Forest Service received extensive comments from the plaintiffs, including information from an expert scientist asking the agency to provide the necessary factual and scientific support for its claims that it could immediately restore areas that had been degraded by past road construction, lift building and ground-disturbing activities. Plaintiffs contended that the Forest Service erred by not supporting these claims in the record, by downplaying the impacts of new construction and by ignoring the empirical evidence of past restoration failures. The Forest Service did not respond directly to the controversy nor did it explicitly determine how the project meets substantive standards designed to maintain aquatic health.

As explained in detail below, Plaintiffs' members and supporters will be irreparably and permanently harmed by project implementation. Plaintiffs are likely to prevail on the merits and have raised serious and substantial questions. Plaintiffs seek a narrowly tailored preliminary injunction against only the construction of the downhill bike routes and the skills park. Plaintiffs have no objection to RLK meeting its stewardship obligations by attempting to tackle the challenging restoration projects proposed in the EA. RLK has indicated its interest in beginning construction this summer as soon as the snow melts and, therefore, Plaintiffs moved quickly to file this complaint well before the snow has melted. RLK has significant ongoing operations, including, among other businesses, the operation of ski and snowboard camps from which it already derives significant revenues in the summer. The balance of the harms favors the protection of the environment. For these reasons, Plaintiffs respectfully request an injunction against the construction of the bike routes and skills park until this case is heard on the merits.

FACTUAL BACKGROUND

Mt. Hood is Oregon's icon and home to a diversity of plants and animals and the high alpine flanks of Mt. Hood are enjoyed by millions of people for recreational, ecological, educational, spiritual and scenic values. Chaney Decl. ¶¶ 8-12; Anuta Decl. ¶¶ 4-11; Burd Decl. ¶ 4-9; Nelson Decl. ¶¶ 8-12; Lawrence Decl. ¶¶ 3-4, 10-14. Still Creek provides critical habitat for Lower Columbia River winter steelhead. Declaration of Ralph O. Bloemers, Exh. 1 at 97, 99, 110 (describing impacts to listed fish); Exh. 7 at 18-19 (identifying fish species).¹

Forest Service surveys conducted in 2010 show that Still Creek significantly exceeds the legal limit for fine sediment set out by the LRMP and that the West Fork of the Salmon has twice

¹ Throughout this memorandum, for brevity the attachments to the Declaration of Ralph O. Bloemers (Dkt. 25) are simply referenced as "Exh. #" For cites to the EA (Exh. 1) and BA (Exh. 6), Plaintiffs will refer to and retain references to the original page numbers in the EA.

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the legal limit of fine sediment set out by the same. Exh. 1 at 58; Exh. 7 at 37, 40 (stating “both streams have substantial problems with sediment and turbidity related to highway sanding, ski area development, and road surface erosion”); Complaint ¶¶ 105, 106. The Forest Service admits “during the first storm events following construction, there would likely be a sediment/turbidity pulse into Still Creek and the West Fork of the Salmon which would occur in LCR winter steelhead critical habitat.” Exh. 7 at 43. The Forest Service admits that both Still Creek and the West Fork of the Salmon are in a chronic non-functioning condition. Exh. 7 at 36-37, 61-62. The Forest Service admits that neither Still Creek nor the West Fork of the Salmon have the competence to move this fine sediment out of the system. Exh. 7 at 39, 89. The Forest Service admits that the best-known functioning habitat for the *Scott’s apatanian caddisfly* (the “caddisfly”) is found in the West Fork of the Salmon River. Exh. 7 at 77. The Forest Service does not disclose whether the current condition of the West Fork of the Salmon is sufficient to support the continued viability of the caddisfly. *Id.* The Forest Service initially stated in its Biological Assessment prepared for the EA that:

Turbidity increases from the operation and maintenance of the Bike Park on and near LCR winter steelhead habitat in Still Creek may be large enough to have a negative, significant affect on listed steelhead trout and critical habitat. Turbidity and sediment increases may also adversely effect Region 6 Sensitive Scotts appatanian caddisfly populations in both the West Fork Salmon and Still Creek. Although operation plans and maintenance work will use PDC’s designed to minimize sediment increases in streams and steelhead habitat, turbidity may increase enough to temporarily affect steelhead distribution within the action area and annual sediment increases may reduce the quality and quantity of designated critical habitat for steelhead.

Exh. 6 at 40. The BA also stated that “[t]urbidity and sediment may also reduce preferred habitat for Scotts Apatanian caddisfly in Still Creek and West Fork Salmon River and potentially negatively impact the population size and distribution.” Exh. 6 at 40. The BE only offered the conclusion that the Project “may impact individuals or habitat, but will

not likely contribute to a trend towards Federal listing or loss of viability to the population or species” without providing an adequate analysis in support. Exh. 7 at 1.

The Forest Service is aware of and has accepted an MDP from RLK that contains a proposal to construct a 17,000 plus square foot day lodge and an 800-car parking lot in the West Fork of the Salmon River. Exh. 9-10. The Forest Service knows the size and location of these two projects and is aware of ongoing problems with the capacity of the existing transportation and parking facilities. Exh. 9-10; Exh. 1 at 205.

LEGAL BACKGROUND

I. National Environmental Policy Act

The National Environmental Policy Act (“NEPA”) is our nation’s “basic charter for protection of the environment.” 40 C.F.R. § 1500.1(a); Complaint at ¶¶ 114-125. NEPA requires that accurate “environmental information is available to public officials and citizens before decisions are made and before action is taken.” 40 C.F.R. § 1500.1(b). NEPA requires adequate disclosure of the direct, indirect and cumulative impacts of major federal actions that may significantly affect the quality of the human environment. 40 C.F.R. §§ 1501.2(b), 1508.7.

II. The National Forest Management Act

The National Forest Management Act (“NFMA”) mandates that the Forest Service have a Land and Resources Management Plan for the Mt. Hood National Forest (the “LRMP”) and that the agency manage the Mt. Hood National Forest according to that LRMP. 16 U.S.C. § 1604. The LRMP was developed to “guide all resource management activities and establish standards and guidelines for the Mt. Hood National Forest” and to “provide for the use and protection of forest resources, fulfill legislative requirements, and address local, regional, and national issues and concerns.” Exh. 3 (LRMP – Preface).

The LRMP establishes standards and guidelines directly protecting aquatic ecosystems, riparian resources and water quality. Exh. 3; Complaint at ¶¶ 129-138. Site-specific decisions within a National Forest must be consistent with the Forest Plan and its standards and guidelines. 16 U.S.C. § 1604; 36 C.F.R. § 219.15(b). The Northwest Forest Plan’s (“NFP’s”) Aquatic Conservation Strategy (“ACS”) amended the LRMP with respect to water quality within the range of the Northern Spotted Owl. Exh. 4. The overarching theme of the ACS objectives are to “maintain and restore” riparian resources, ecosystem health and fish populations. Exh. 4 at B-11.

A. Northwest Forest Plan – Aquatic Conservation Strategy Objectives

The ACS is intended to “maintain and restore” water quality and habitat health and not “impede or retard” water quality. Exh. 4, ACS at C-31 (Standards and Guidelines Purpose Statement), Complaint at ¶¶ 141-147. The ACS Objectives state, in part, that Forest Service lands will be managed to maintain and restore, under ACS Objective 4, “the water quality necessary to support healthy riparian, aquatic, and wetland ecosystems.” Exh. 4, Attachment A at B-11. ACS Objective 5 requires the Forest Service to maintain and restore “the sediment regime under which aquatic ecosystems evolved.” *Id.* Under ACS Objective 9, the Forest Service must maintain and restore “habitat to support well-distributed populations of native plant, invertebrate, and vertebrate riparian-dependent species.” *Id.*

Proper analysis of a project’s compliance with the ACS Objectives must be undertaken at both the watershed and project levels. *Pacific Coast Federation of Fisherman’s Associations, Inc. v. National Marine Fisheries Service*, 265 F.3d 1028, 1036 (9th Cir. 2001) (“PCFFA II”). The *PCFFA* court describes the scale of a *project site* as “generally cover[ing] only a few sections (square miles) or fractions of sections.” *Id.* at 1035. The *PCFFA* court explained that the NFP would fail to prevent project site degradation if a decision maker could ignore “the

cumulative effect of individual projects on small tributaries within watersheds.” *Id.* at 1035-36. The intent of the ACS Objectives is to mandate that the Forest Service find that a proposed management activity is consistent with the ACS Objectives. *Olympic Forest Coalition v. United States Forest Service*, 556 F. Supp. 2d 1198, 1201 (W.D. Wash 2008) (citing to the 1994 NFP Record of Decision). The 9 ACS Objectives are also coupled with other standards designed to prevent the Forest Service from approving degradation while claiming that the degradation is cancelled out by other restoration or mitigation activities. Specifically, ACS Standard WR-3 prohibits the “use [of] mitigation or planned restoration as a substitute for preventing habitat degradation” in Riparian Reserves. *Id.* at C-30, C-37.

B. Mt. Hood National Forest Plan – Protections for Aquatic Life.

The LRMP contains complementary standards to protect aquatic habitat and the life that depends on it. For example, FW-97 states that spawning habitat (e.g. pool tailouts and glides) shall maintain less than 20 percent fine sediments (i.e. particles less than 1.0 millimeter in diameter) on an area weighted average. Exh. 3 at 22 (Four-60). Likewise, the LRMP protects Sensitive Species which is defined to include animals “that are recognized by the Regional Forester as needing special management to prevent their being placed on the Federal or State Lists” of threatened and endangered species.” Exh. 3 at 61 (Glossary at 29); Complaint ¶ 278. The Mt. Hood Forest plan requires the Forest Service to ensure that enough functioning habitat remains to ensure the continued viability of Sensitive Species. Exh. 3 at 70-71.

STANDARD OF REVIEW

A plaintiff seeking a temporary restraining order and preliminary injunction “must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an

injunction is in the public interest.” *Winter v. Nat. Res. Def. Counsel*, 555 U.S. 7, 20 (2008). Courts may apply a “sliding scale” approach in their consideration of the success and harm factors. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011) (continuing to apply the sliding scale approach after *Winter*). Under this approach, “[f]or example, a stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits.” *Id.* Plaintiff, therefore, need only raise “serious questions going to the merits,” so long as it can demonstrate that the balance of hardships tips sharply in their favor. *Id.* at 1135 (“the ‘serious questions’ approach survives *Winter* when applied as part of the four-element *Winter* test”)

The majority of Plaintiffs claims in this case are reviewed under the Administrative Procedure Act (APA), 5 U.S.C. § 706. *The Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008). In reviewing the decisions at issue here, this Court must engage in a “thorough, probing, in-depth review,” *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971), and set aside the agency’s determinations if it finds them to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2). While this standard is a deferential one, the court must “not rubber-stamp . . . administrative decisions.” *Latino Issues Forum v. EPA*, 558 F.3d 936, 941 (9th Cir. 2009). There is “an important difference between the depth of [the court’s] review of an agency’s action and the scope of that review.” *NW Coalition v. EPA*, 544 F.3d 1043, 1052 n.7 (9th Cir. 2008). “Although the ultimate scope may be narrow, the depth must be sufficient for” the court to comprehend the agency’s decision. *Id.* (quoting *Center for Auto Safety v. Peck*, 751 F.2d 1336, 1373 (D.C. Cir. 1985)(J. Wright dissenting)); *Presley v. Etowah County Comm’n*, 502 U.S. 491, 508 (1992) (“Deference does not mean acquiescence”). The agency “must . . . articulate a satisfactory explanation for its action including

a rational connection between the facts found and the choices made.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal citations omitted).

ARGUMENT

The Forest Service’s EA, FONSI and DN for this project violate the law. Plaintiffs will suffer irreparable harm in the absence of preliminary injunctive relief. Plaintiffs have demonstrated they are likely to prevail on the merits and, at the very least plaintiffs have raised substantial and serious questions on the merits as to whether the project violates NFMA and NEPA. The balance of the harms favors granting plaintiffs’ request for preliminary relief.

I. Plaintiffs have demonstrated standing to bring this case.

Plaintiffs have standing to bring this case, as their members and supporters will suffer irreparable and immediate injury from project implementation. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), the Supreme Court set out three requirements for establishing standing. First, the plaintiff must allege an actual or imminent harm to a “legally protected interest.” *Id.* Second, “there must be a causal connection between the injury and the conduct complained of.” *Id.* Third, a favorable decision must be likely to redress the injury. *Id.*

Plaintiffs are non-profit conservation organizations with tens of thousands of members in the State of Oregon and the Plaintiffs and their members will suffer actual and imminent harms to their legally protected interests. Anuta Decl. ¶¶ 1-12; Chaney Decl. ¶ 1-29; Burd Decl. ¶¶ 1-10; Nelson Decl. ¶¶ 1-14; Lawrence Decl. ¶¶ 1-16. Plaintiffs’ supporters and members have firm plans to return to the project area, and their interests will be adversely affected and irreparably harmed by the Forest Service’s disregard of its statutory duties. *Id.*

Karl Anuta is an avid fly fisherman and has worked as a volunteer for NEDC to protect natural resources in the Pacific Northwest for over a decade. Anuta Decl. ¶¶ 2, 5, 7. Mr. Anuta

has fished in Still Creek and the Salmon River and intends to fish these waters in the foreseeable future. *Id.* ¶ 7. Mr. Anuta will be injured by the project because

construction and operation of a commercial downhill mountain bike park in [the project] area will permanently and irreparably impair my ability to enjoy hiking in these areas by disrupting my quiet enjoyment of the natural resources in the region, preventing safe hiking access to over 800 acres of the land surrounding Timberline Lodge, reducing the likelihood of viewing the wildlife that is there in the summer months and negatively [a]ffecting the land surrounding the historic Timberline lodge, as well as permanently altering the forest and open meadow landscape that I enjoy.

Id. ¶ 6. Further, the additional sediment-filled runoff that will be put into Still Creek and the West Fork of the Salmon River from the construction of the proposed project will harm Mr. Anuta in two ways: first, it will harm his interest in successful restoration of salmon and steelhead habitat on and downstream of Still Creek; second, it will harm his interest in the continued viability of aquatic life in the West Fork of the Salmon River. *Id.* ¶¶ 8, 10-12.

Dennis Chaney is a volunteer and member of the Friends of Mount Hood who has frequently visited Mt. Hood to hike and enjoy the area since his childhood. Chaney Decl. ¶¶ 1-6. Mr. Chaney will be injured by the project because it is incompatible with the historic legacy of the Timberline Lodge area as a place to hike, climb, and enjoy the natural scenery. *Id.* ¶ 21, 32. For Mr. Chaney and others who cherish this legacy, the Timberline Lodge area is a refuge from the urban environment. *Id.* ¶ 13. Mr. Chaney will be injured by the Forest Service's departure from the seventy-five year policy of the Forest Service to purposely protect the lodge and its environs from incompatible recreation. *Id.* ¶ 15-21. Traditional users like Mr. Chaney who are hiking the Mountaineer Trail while the project is operating at capacity will encounter mountain bikers bombing down the project's routes because when the project is at capacity there will be 220 bike crossings per hour at two intersections of the routes and Mountaineer Trail. *Id.* ¶ 12, 21.

Marla Nelson is a member and supporter of NEDC, which is an organization dedicated to protecting the environment and natural resources of the Pacific Northwest. Nelson Decl. ¶ 2, 4. Ms. Nelson regularly enjoys the high-alpine environments of Mt. Hood and has made many trips to the Timberline Lodge and the area surrounding it. *Id.* ¶¶ 8-9. Ms. Nelson enjoys swimming in Still Creek's clear waters and has camped along the Salmon River. *Id.* ¶ 11. The construction and operation of the project, along with the impacts from other foreseeable projects in the MDP, will permanently and irreparably harm Ms. Nelson's use and enjoyment of the area and degrade the ecosystem integrity of the project area. *Id.* ¶¶ 6, 10, 13-14.

Rhett Lawrence is the Conservation Director of the Oregon Chapter of the Sierra Club, which promotes conservation of Oregon's natural environment. Lawrence Decl. *Id.* ¶¶ 2, 5. Mr. Lawrence has also personally made numerous trips to recreate in and around the Timberline Lodge and enjoys doing so for the scenery, rich wildlife habitat, historic character, and opportunities for high alpine hiking in the relative quiet that the area offers. *Id.* ¶¶ 13-14. While the Sierra Club has a long history of supporting mountain biking opportunities and it has many members that are avid mountain bikers, the Sierra Club seeks to ensure that Still Creek and the West Fork of the Salmon River will be protected from further degradation. *Id.* ¶ 7, 15-16.

Lori Ann Burd is a member and supporter of Bark, which is dedicated to transforming the Mt. Hood National Forest into a place where natural processes prevail, wildlife thrives and local communities are invested in the Forest's restoration and preservation. Burd Decl. ¶ 2. Ms. Burd is a frequent visitor to the Timberline Lodge area. *Id.* ¶ 4-6. Ms. Burd enjoys the Timberline Lodge area for its sensitive native plants and wildlife. *Id.* ¶ 8-10. Ms. Burd intends to visit the Timberline Lodge area during future summers. *Id.* ¶ 9. The construction of the bike routes will directly and permanently harm Ms. Burd's use of the area. *Id.* ¶ 10.

The Plaintiffs and their supporters and members will sustain injury to their interests if the project is undertaken in the absence of a legally and scientifically sufficient analysis of the project's impacts and compliance with substantive standards designed to protect Still Creek and the West Fork of the Salmon. An order from this Court will redress these injuries.

II. Plaintiffs will be irreparably harmed in the absence of a temporary restraining order and preliminary injunction.

Plaintiffs' members use and enjoy the lands and waters in and around the Timberline Lodge and in the Still Creek and West Fork of the Salmon watersheds and intend to return in the future. See *infra* pp. 13-16. Plaintiffs' members will be harmed by the immediate implementation of this project. *Id.*; Declaration of Robert Wisseman at ¶¶ 11-33 (project will deliver fine sediment harming best known habitat for Region 6 Sensitive Species); Declaration of Jonathan J. Rhodes ¶¶ 81-87 (project will permanently degrade Riparian Reserves). The EA admits that the bike routes will convert a total of 12 acres of sub-alpine land into bare mineral soils, and degrade up to 2 acres of designated Riparian Reserves. The bike routes will double the number of stream crossings in the SUP area that may directly deliver sediment into the system. The Project will increase the amount of fine sediment entering Still Creek and the West Fork of the Salmon. The Forest Service admits that both the construction and restoration will sediment pulses in the short-term. Exh. 7 at 43. Small streams like the West Fork Salmon River have a limited capacity to move fine sediment downstream. *Id.* at 39, 59; Rhodes Decl. ¶¶ 69, 88-99.

Plaintiffs have provided the Court with expert declarations that explain these technical matters to the Court and underscore what the Forest Service did not disclose and consider in its analysis. For example, Plaintiffs retained Robert W. Wisseman who is the foremost expert in the caddisfly to review the Forest Service's analysis. Mr. Wisseman concluded that the "Forest Service has no idea how the only known viable population of [the caddisfly, which is located in

the West Fork of the Salmon,] will react to the predicted short-term and long-term inputs of fine sediment from the [Project].” Wisseman Decl. ¶¶ 30-33. Mr. Wisseman states that there is a high probability of the project causing irreparable harm to the caddisfly and contributing to a trend towards the listing of the species. *Id.*

Plaintiffs retained Jonathan Rhodes to review the Forest Service’s conclusions for gaps and flaws in the analysis. Mr. Rhodes found that the EA “fails to properly describe and assess the limited effectiveness of restoration in ameliorating the significant impacts of bike route construction and operation on soils, watersheds, streams, water quality, and aquatic habitat.” Rhodes Decl. ¶¶ 9-44. Mr. Rhodes discusses in detail the irreparable impacts that would result from the construction of the bike routes and skills park.

The Sandy River Basin Watershed Council (“SRBWC”) has extensive experience with restoration projects in the Basin and has invested substantial time and resources into restoring the fisheries in it. The SRBWC provided Plaintiffs with a declaration to: “explain the technical reasons why the Sandy Basin Watershed Council recommended against the construction and operation of 17 miles of new bike trails within the Timberline Special Use Permit area.”

Declaration of Stephen Wise at ¶ 2. Mr. Wise states that:

The Forest Service is relying on restoration to reduce the impacts of this project yet there are problems, due to past activities, that we feel must be corrected and proven to actually be effective before more facilities are constructed that will deliver pollution into the system. The Forest Service has not disclosed the scientific foundation to support its claim that the restoration will be immediately effective in the highly erodible volcanic soils found at these high elevations in the headwaters of these streams.

Wise Decl. at ¶ 9.C. Mr. Wise goes on to explain in detail the potential for irreparable harm that might result from this project to the aquatic system and plant communities found in this sub-alpine landscape. *Id.* at ¶¶ 13, 16, 18, 21, 24, 27-35.

A. Plaintiffs will be irreparably harmed by the project’s physical impacts.

The 9th Circuit has clearly delineated the test that this Court applies in determining whether plaintiff has demonstrated irreparable harm. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (“*Cottrell*”). Consistent with Supreme Court precedent, the 9th Circuit held that a plaintiff must show that irreparable harm is likely to result in the absence of the injunction. Alliance for the Wild Rockies’ members showed they used the forest in the project area for work and recreational purposes, such as hunting, fishing, hiking, horseback riding and cross-country skiing. The members asserted that their interests would be irreparably harmed by the challenged project because its members' ability to "view, experience, and utilize" the areas in their undisturbed state would be curtailed while the project was underway and affected for a long-time after it was implemented. As the Supreme Court has instructed, “[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.” *Cottrell* at 1135, citing to *Lands Council v. McNair*, 537 F.3d at 1004. The Supreme Court established that environmental injury of long duration is irreparable. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987). The physical alterations and permanent impacts that the project will have on the Mt. Hood National Forest are of the kind that the U.S. Supreme Court and courts in this Circuit have warned about and support the issuance of an injunction by this Court.

B. Plaintiffs will suffer a procedural harm due to the Forest Service’s failure to comply with NEPA and NFMA.

Courts have also frequently acted to preserve the status quo in order to rectify procedural harms that have been suffered by citizens and organizations: “[I]n the NEPA context, irreparable injury flows from the failure to evaluate the environmental impact of a major federal action.”

Sierra Club v. Bosworth, 510 F.3d 1016, 1033 (9th Cir. 2007). See also *New York Natural Res.*

Def. Council, Inc. v. Kleppe, 429 U.S. 1307, 1312 (1976) (“It is axiomatic that if the Government, without preparing an adequate impact statement, were to make an ‘irreversible commitment of resources,’ a citizen’s right to have environmental factors taken into account by the decisionmaker would be irreparably impaired.”); *see also Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985) (“[A]bsent unusual circumstances, an injunction is the appropriate remedy for a violation of NEPA’s procedural requirements.”). The unusual circumstances recognized by the Ninth Circuit are not present here. *Sierra Club v. Marsh*, 816 F.2d 1376, 1384 n. 11 (9th Cir. 1987) (citing *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 541 (1987)) (if injunction would interfere with a long-term contractual relationship or would result in irreparable harm to the environment then it may not issue).

Even in cases where substantial environmental harms may not be imminent, it is proper for courts to maintain the status quo and keep parties from investing heavily in an enterprise for which later consideration of injunctive remedies may involve onerous financial consequences that judicial options for enforcing the law become unworkable. *See Warm Springs Dam Task Force v. Gribble*, 417 U.S. 1301, 1310 (1974) (Granting stay of dam construction pending appeal to maintain the status quo and prevent further investment in the project that would limit subsequent agency choices); *Arlington Coalition on Transportation v. Volpe*, 458 F.2d 1323, 1333 (4th Cir. 1972) (“Further investment of time, effort, or money in the proposed route would make alteration or abandonment of the route increasingly less wise and, therefore, increasingly unlikely.”).²

² Congress has presumptively determined that the failure to comply with NEPA has detrimental consequences for the environment. *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002); *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 448-49 (10th Cir. 1996) (“injury of an increased risk of harm due to an agency’s uninformed decision is precisely the type of injury

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The injuries plaintiffs have identified are ones that cannot be compensated adequately in money damages and are substantial and unreasonable where the construction of the routes will result in destruction of vegetation, increased pulses of fine sediment, impacts and degradation of the aquatic system and proceed in contravention of numerous substantive Forest Plan standards.

III. Plaintiff is likely to succeed on the merits of its claims.

Natural resource law is complex and, therefore, it is somewhat rare to find a single case, let alone more than one, that is directly on point. Here, there are at least two cases that are directly on point, one from the 9th Circuit and another from the District of Oregon, which support the Plaintiffs' request for preliminary injunctive relief.

The first case involved a challenge against the expansion of the Mt. Ashland Ski Area in which the court found that the Forest Service violated NFMA and NEPA when it failed to comply with Forest Plan standards that required protection of Riparian Reserves and sensitive species, disclose and respond to the scientific controversy, and disclose and consider the cumulative impacts of a proposed ski area expansion. *Oregon Natural Res. Council Fund v. Goodman*, 505 F.3d 884, 890 (9th Cir. 2007) (“*ONRC*”). In *ONRC*, the Mt. Ashland Ski Area (“*MASA*”) sought to expand its terrain and add new facilities to meet the perceived demand for more ski opportunities. *ONRC* at 887. In part, the plaintiffs challenged the Forest Service for not adequately designating and protecting Riparian Reserves and also for using mitigation as a substitute for habitat degradation. *ONRC* at 893. The Court explained:

Under the ACS, Riparian Reserves are essentially buffer zones along streams, lakes, wetlands, and mudslide-risk areas, and “watersheds” are aquatic habitats or other hydrologically important areas. *See Pac. Coast Fed'n of Fishermen's Ass'ns*,

[NEPA] was designed to prevent.”); *Protect Key West, Inc. v. Cheney*, 795 F. Supp. 1552, 1563 (S.D. Fla. 1992) (granting injunction based on inadequacy of agency’s EA because “[i]rreparable harm results where environmental concerns have not been addressed by the NEPA process”).

Inc. v. Nat'l Marine Fisheries Serv., 265 F.3d 1028, 1031-32 (9th Cir. 2001). Recognizing that riparian terrain “offer[s] core areas of high quality stream habitat,” and that watersheds “are crucial to at-risk fish species and stocks and provide high quality water,” the ACS standards and guidelines “prohibit or regulate activities in Riparian Reserves that retard or prevent attainment of the Aquatic Conservation Strategy objectives.”

ONRC at 893-94. Further, the Court underscored that the Forest Service must comply with more than just the NWFP's ACS. *ONRC* at 894. The NWFP did not completely displace existing forest management plans when it was enacted. *ONRC* at 894. The NWFP not only sets out its own standards and guidelines but also provides that the standards and guidelines of the pre-existing individual forest management plans remain effective “where they are more restrictive or provide greater benefits to late-successional forest related species.” *Id* at 894.

In regards to the ACS, the Court stated that: “ACS Standard and Guideline WR-3 further prohibits the Forest Service from ‘us[ing] mitigation or planned restoration as a substitute for preventing habitat degradation’ within Riparian Reserves, and explains that ‘[p]riority must be given to protecting existing high quality habitat’ rather than compensating ‘for management actions that degrade existing habitat’ through mitigation and restoration. *Id.* at 894. These requirements are set forth in Plaintiffs’ complaint. Complaint at ¶¶ 142.

The Plaintiffs in *ONRC* also challenged the Forest Service for failing to ensure viable populations of Pacific fisher, which was designated by the Forest Service as a sensitive species. *ONRC* at 888, 890. Plaintiffs submitted technical information from one of the Forest Service’s own field biologists that had documented the presence of the Pacific fisher within the area. *Id.* at 890. Plaintiffs challenged the Forest Service for not providing adequate information to support its conclusion that the viability of the Pacific fisher would not be threatened by the project. *Id.* The Forest Service “conclud[ed] that the project posed no threat to the Pacific fisher because the expansion [would] impact less than one percent of the similarly forested land within three

miles.” *Id.* The 9th Circuit rejected these arguments and found that the use of habitat as a proxy for population violated the NFMA. *Id.* The Court reaffirmed that species viability may be met by estimating and preserving habitat ““*only where both the Forest Service's knowledge of what quality and quantity of habitat is necessary to support the species and the Forest Service's method for measuring the existing amount of that habitat are reasonably reliable and accurate.*” *ONRC* at 890 (emphasis in original) *citing to Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1175-76 (9th Cir. 2006).

Finally, the *ONRC* plaintiffs challenged the Forest Service for failing to adequately disclose the cumulative impacts of the ski area expansion in conjunction with other reasonably foreseeable future projects in the same watersheds. *ONRC* at 892. The 9th Circuit agreed with the plaintiffs and cited to its previous decision in *Klamath-Siskiyou Wildlands Center*:

Sometimes the total impact from a set of actions may be greater than the sum of the parts. For example, the addition of a small amount of sediment to a creek may have only a limited impact on salmon survival, or perhaps no impact at all. But the addition of a small amount here, a small amount there, and still more at another point could add up to something with a much greater impact, until there comes a point where even a marginal increase will mean that *no* salmon survive.

ONRC at 893 *citing to Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 994 (9th Cir. 2004) (emphasis in original).

The second case on point involved a challenge by a conservation group to the EA used to analyze the impacts of a proposal to grant a special use permit to the City of Bend to construct a large water supply pipeline that would allow the city to withdraw more water from Tumalo Creek in Central Oregon. *Central Oregon LandWatch v. Connaughton*, No. 6:12-cv-01757-TC, 2012 U.S. Dist. LEXIS 168495 (D. Or. Oct. 11, 2012) (“*LandWatch*”). In *LandWatch*, the court was faced with legal questions regarding the Forest Service’s compliance with INFISH, which are aquatic standards that apply in the Deschutes National Forest and require the agency to

maintain and restore the aquatic system. *Id.* The INFISH provisions are similar to and parallel the Aquatic Conservation Strategy Objectives at issue in *ONRC* and in this case. In response to a request for preliminary relief, the Court held that the record supported the plaintiff's likelihood of success on the merits. *Id.* at *4-5. Plaintiffs alleged that the Forest Service made conclusions about the project's impacts and compliance with the standards of INFISH that were unsupported by reasoning, analysis and data. *Id.* at 3-4. The Forest Service had relied on a temperature model that forecasted the increases in stream temperatures that would result from construction of a water diversion in Tumalo Creek, which is a tributary of the Deschutes River. *Id.* at 1-3. The court found that the Forest Service likely failed to meet its obligation under NEPA to take a hard look at the project's impacts because the stream-temperature model lacked the accuracy necessary to determine compliance with applicable water quality standards. *Id.* at 2-3. The court also found that the record supported plaintiff's likelihood of success on the merits of its NFMA claim that the Forest Service had failed to comply with the standards in INFISH because the Forest Service admitted in its BA that there might be violations of water quality standards mandated by the Deschutes National Forest LRMP and its modeling results did not actually determine whether the project complied with applicable standards. *Id.* at 3. The Court held that the Forest Service had not demonstrated compliance with the INFISH standards because the agency had not directly addressed the applicable standards in concluding that there would be little or no impact to water temperature of Tumalo Creek. *Id.* at 3.

The factual issues and legal standards closely parallel those at issue in *ONRC* and *LandWatch*. In this case, the Forest Service substituted mitigation for habitat degradation despite the prohibition against doing so for Riparian Reserves. Complaint ¶¶142, 155, Exh. 1 at 12, 65. The Forest Service makes conclusions regarding impacts to winter steelhead and the *Scott's*

apatanian caddisfly, a source of fish food for trout and salmon, without adequately supporting those conclusions in the record. Complaint at ¶¶ 176-183, 264-275; Wisseman Decl. ¶¶ 29-32. The Forest Service makes conclusions regarding compliance with the Aquatic Conservation Strategy Objectives that are not supported in the record. Complaint at ¶¶ 190-229. The Forest Service makes the scientifically controversial assumption that the restoration work will be immediately effective and it grossly overstates the benefits of restoration while grossly understating the impacts from the new construction. Complaint at ¶¶ 153-175. The Forest Service failed to adequately respond to the scientific controversy over the key assumptions it relied upon to reach its conclusions that the project would have no significant effect. *Id.*

Plaintiffs are likely to prevail on the merits and at the very least raise substantial questions for a number of discrete claims for substantive violations of the Northwest Forest Plan's Aquatic Conservation Strategy Objectives, Mt. Hood National Forest Plan Standards and the National Environmental Policy Act. *See LandWatch* at 4-5.

A. The Forest Service violated NFMA by failing to comply with mandatory ACS Standard WR-3.

The ACS Standard WR-3 requires the Forest Service “not [] use mitigation or planned restoration as a substitute for preventing habitat degradation” within Riparian Reserves, and explains that “[p]riority must be given to protecting existing high quality habitat’ rather than compensating ‘for management actions that degrade existing habitat’ through mitigation and restoration.” Exh. 4 (ACS S&Gs C-31, C-37). The EA admits that almost 20% of the construction of the downhill mountain bike routes will be in Riparian Reserves. Exh. 1 at 86 and 112 (admitting impacts to 2 acres of Riparian Reserves). The EA claims that future restoration activities will restore approximately 1.5 acres of Riparian Reserve. Exh. 1 at 86.

However, as outlined in *ONRC*, the Forest Service must comply with the mandatory Standard of ACS WR-3 that prohibits the use of mitigation or planned restoration as a substitute for preventing habitat degradation within Riparian Reserves. Throughout the EA and its supporting documents, the Forest Service relies on future attempts to restore previously damaged areas in the affected watersheds as a substitute for impacts from new construction. The agency does so despite the extensive empirical evidence in the EA that restoration has failed to work in the past and that restoration has even resulted in the introduction of invasive species.

B. The Forest Service violated NFMA by failing to comply with mandatory ACS Objectives 4, 5 and 9.

Management activities in the project area must meet the ACS Objectives. ACS Objective 4 states that the Forest Service:

[m]ust maintain and restore the water quality necessary to support healthy riparian, aquatic, and wetland ecosystems. Water quality must remain within the range that maintains the biological, physical, and chemical integrity of the system and benefits survival, growth, reproduction, and migration of individuals composing aquatic and riparian communities.

Exh. 4, Attachment A at B-11. The Forest Service violated ACS Objective 4. The FS addressed the proper standard, but it simply set forth a conclusion without any supporting analysis – and in contravention of the analysis that it had set forth in the EA. The standard in ACS Objective 4 is *to maintain and restore* water quality and not retard it.

Robert Wisseman reviewed the analysis prepared by the Forest Service and concluded that “proposed project activities in the Still and West Fork Salmon drainages will accelerate erosion of fine sediment into stream channels and degrade habitat for the species in the short term and for the foreseeable future.” Wisseman Decl. at ¶ 31. Further, “promised restoration in the Still Creek drainage will not provide any benefit to the West Fork Salmon population” of the caddisfly. Wisseman at ¶ 31. Thus, the agency has failed to comply with ACS 4 because the

proposed project would degrade water quality and harm the only known viable population of *Scott's apatanian caddisfly*.

ACS Objective 5 states that the Forest Service “[m]ust maintain and restore the sediment regime under which aquatic ecosystems evolved.” *Id.* The LRMP provides complementary guidance in the form of specific numeric criteria that require the Forest Service to maintain less than “20 percent fine sediments...on an area weighted average.” Exh. 3 at 22 (FW-97); Complaint ¶ 134. The Forest Service’s own Biological Evaluation states that fine sediment counts from 2010 are almost triple that amount in Still Creek and more than double that amount in the West Fork of the Salmon:

“Sediment and turbidity levels in the Analysis Area are substantially higher than natural background levels. Fine sediment (sand or silt <1 mm in diameter) accumulations in stream reaches in the Analysis Area are among the highest observed in clear-water tributaries on the Zigzag Ranger District....In Still Creek, surface fines were at 52% (Not Properly Functioning) and in the West Fork Salmon River, surface fines were at 44% (Not Properly Functioning) within the Analysis Area.”

Exh. 7 at 40. The Forest Service admits that the Project will produce additional fine sediment, but it completely fails to address how it will then meet these binding standards.

Third, the Forest Service has violated ACS Objective 9, which states that projects shall “[m]aintain and restore habitat to support well-distributed populations of native plant, invertebrate, and vertebrate riparian-dependent species.” Here, the EA admits that “[a]quatic invertebrate species may have low levels of short-term negative stream conditions” as a result of the project. Exh. 1 at 116, Table 26 (EA). The FONSI admits that “[f]ive aquatic species on the Regional Forester’s list are or may be present within the analysis area” and that the “project may impact individuals or habitat.” *Id.* at 9. Further, the EA states that the project will have a “small negative trend” on fish habitat. Exh. 1 at 112-13 (EA).

With regards to the impacts the project will have on the caddisfly, Robert Wisseman states that “the proposed construction and restoration activities are likely to impact [caddisfly] individuals and habitat and contribute to a trend towards Federal listing as an endangered species.” Wisseman Decl. ¶ 30. Additionally, Mr. Wisseman states that the Forest Service “has not disclosed the necessary factual information and analysis to reach this conclusion.” Wisseman Decl. ¶ 29. The relatively undisturbed West Fork of the Salmon is currently the only known robust population of the caddisfly. Wisseman Decl. ¶ 22, and the caddisfly likely occurred in the Still Creek watershed, but Still Creek probably no longer supports the caddisfly because of fine sediment as a result of past clearing and construction activities. Wisseman Decl. ¶¶ 24-25.

Thus, the Forest Service has violated ACS 9 because the project would fail to maintain habitat to support well-distributed populations of native plant, invertebrate, and vertebrate riparian-dependent species. The record shows that the Plaintiffs are likely to succeed on the merits for their various claims of ACS Standards and Objectives violations.

C. The Forest Service violated NFMA by approving a site-specific project without ensuring the viability of the *Scott’s apatanian caddisfly*, which is listed as a Sensitive Species in the MHNH.

Plaintiffs retained Robert Wisseman to provide a technical review of the Forest Service’s analysis contained in its Environmental Assessment and Biological Evaluation to evaluate whether the Forest Service adequately disclosed and considered its knowledge of what quality and quantity of habitat is necessary to support the caddisfly; and second, whether the Forest Service’s method for measuring the existing amount of caddisfly habitat are reasonably reliable and accurate. Mr. Wisseman is a well-recognized authority in the life history and habitat needs of the caddisfly in western North America. Mr. Wisseman also reviewed the Forest Service’s conclusion regarding the project impacts, and the available information and provides his own

conclusions on the likely impact given the available empirical data from the field. The EA and the BE contain the results of surveys that Mr. Wisseman performed for the Forest Service in 2010 as an independent contractor in the aquatic systems affected by the project. In his technical declaration Mr. Wisseman states that: “Caddisflies are an important component of many freshwater ecosystems, integral in energy transfer and food webs, including being important in fish diets.” Wisseman Decl. ¶ 11. Mr. Wisseman explains how sensitive the species is:

[larvae of the genus to which the *Scott’s apatanian caddisfly* belongs] live in small cold, mountain streams and springs, typically in subalpine and alpine habitats. They are representatives of a glacial relict fauna that is currently restricted in their distribution to mountaintops. Populations of any of the twelve western species are fragmented and isolated, occurring on certain mountains only. Even their distribution in streams on a single mountain is patchy. They are typically found over a narrow elevation band where they do occur. Climate change is expected to put the continued viability of many of these isolated populations further at risk.

Wisseman Decl. ¶ 13. Mr. Wisseman goes on to explain that: “To date the species has only been found in the West Fork Salmon River between about 4000 and 5000’ elevation, and a few miles east in the Iron Creek drainage, a tributary of the White River, at about 4000’ elevation.

Wisseman Decl. ¶ 15. At Iron Creek, only a few larvae have ever been collected, suggesting that the species is not common here.” Wisseman Decl. ¶ 15. In 2010, Mr. Wisseman advised the Forest Service that further surveys were required to determine just how rare this species might be. Wisseman Decl. ¶ 18. Despite his recommendation, the Forest Service decided to move ahead with a project that would impact the “only known robust population of the species.”

Wisseman Decl. ¶ 26.D.

The caddisfly will be adversely affected by the construction and operation of 17 miles of downhill bike routes and then further impacted by the proposals in the Master Development Plan to build a 17,000 square foot day lodge and 800-car parking lot in the headwaters of the West

Fork of the Salmon River. The EA states that the *Scott's apatanian caddisfly* is listed on the Mt. Hood Regional Forester's Special Status Species List as a sensitive species. Exh. 1 at 106 (EA); Complaint ¶ 279. While the Forest Service discloses that the project will impact known habitat for the caddisfly, the agency summarily concludes in its Biological Evaluation that the combination of construction and restoration will not adversely affect viable populations of the caddisfly. Exh. 7 at 1. The Forest Service does not adequately make known or disclose that this is the best-known habitat for the caddisfly in the entire world. Wisseman Decl. ¶¶ 17-18, 26-28. The Forest Service has plans to conduct more surveys to determine if this caddisfly is found anywhere else on Mt. Hood, but it plans to conduct these surveys after construction begins and additional fine sediment is delivered into the stream system. Wisseman Decl. ¶ 18.

According to Mr. Wisseman, the Forest Service has “not characterized or determined what habitat is needed to maintain the viability of the only known population that occurs in the West Fork of the Salmon River on Mt. Hood.” *Id.* ¶ 27. Mr. Wisseman's technical declaration underscores in detail exactly why and how the Forest Service has not met its obligations under the NFMA to ensure viable populations of this Region 6 Sensitive Species.

D. The Forest Service violated NEPA by making various conclusions in its EA regarding the impact of new construction and the effectiveness of proposed restoration that are not adequately supported in the record.

First, the Forest Service failed to disclose and respond to the extensive scientific literature submitted by the Plaintiffs' expert Jonathan J. Rhodes—much of which is from the Forest Service's own scientists—that runs directly counter to the Forest Service's claims regarding the impacts of proposed new construction and the success of proposed restoration. Exh. 1; Rhodes Decl. ¶ 9-44. The Forest Service uses scientific studies from other areas or studies that address unrelated issues to support its assumptions regarding construction impacts and restoration

benefits. *Id.* For example, the Forest Service cites a study from the Piedmont area of Virginia to support its claim that the best management practices at this project site and at this elevation will be effective. Complaint ¶ 169; Rhodes Decl. ¶¶ 37. This study was conducted at a site that is 600 feet in elevation that has climate and soils that differ quite substantially from the climate and fragile sub-alpine, volcanic ash soils that occur at the proposed project site, which would disturb the ground at elevations ranging from 4,800 to 6,000 feet. *Id.*

Second, the Forest Service presents misleading and incomplete information regarding the timing and effectiveness of proposed restoration efforts including road decommissioning and re-vegetation, which the Forest Service relies on to cancel out the increase in sediment delivery from the construction activities that it predicts. Rhodes Decl. ¶¶ 9-44.

Third, the Forest Service states that the downhill bike routes will have the same impacts at roads but also states—without clarification or explanation—that bike routes only expand the stream network by 50 feet at stream crossings while native surface roads expand the stream network by 750 feet at stream crossings. Rhodes Decl. ¶¶ 76-77.

Fourth, the Forest Service uses modeling approaches without disclosing adequate detail to allow the public to understand the model limitations. Rhodes Decl. ¶¶ 47-48.

Thus, like the situation in *Landwatch*, the record here supports plaintiffs' likelihood of success on the merits that the Forest Service made controversial conclusions about a project's impacts that were unsupported by adequate reasoning, analysis and data. The Forest Service cannot merely conclude that its key assumptions (e.g. restoration benefits will be immediate) without sharing the reasoning behind or the factual support for its conclusion. *Marble Mountain Audubon Soc. v. Rice*, 914 F.2d 179, 182 (9th Cir. 1990) ("An agency must set forth a reasoned explanation for its decision.")

E. The Forest Service violated NEPA by failing to take a hard look at the direct, indirect and cumulative effects on the Still Creek and West Fork of the Salmon River watersheds of accepting the MDP and amending the Special Use Permit.

In addition to challenging the Forest Service's decision to approve the bike park, plaintiffs also challenge the agency's failure to conduct any environmental analysis whatsoever when "accepting" the MDP and the amending this plan into RLK's special use permit. Exhs. 9-10. The decision to accept the MDP and amend the permit is a separate final agency action that will have an actual significant effect on both the environment and public participation. See, e.g. Exhs. 11-12. Because the Forest Service and RLK have chosen to piecemeal environmental review, the agency simply ignored looking at the direct, indirect and cumulative effects of the master development plan or include the public in its decision-making process.

NEPA requires the Forest Service to prepare an EIS for federal actions that may significantly affect the human environment, 42 U.S.C. § 4332(2)(C), and unless an action normally requires an EIS or is categorically excluded from analysis, the agency may prepare an EA to determine the significance of the action and whether an EIS is required. 40 C.F.R. §§ 1501.4(b), 1508.9. The agency must engage in NEPA analysis before making "any irreversible and irretrievable commitment of resources," and early enough that the analysis will inform the decision-making process. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 892 (9th Cir. 2002) (citing and quoting *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000) (other citations omitted). "A person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 737 (1998).

The MDP is a plan for a series of projects related to the development and expansion of commercial recreation within two watersheds in the SUP area. Exhs. 9-10. The MDP is a

proposal for the near-term development of a defined area, which the Forest Service reviewed, accepted, and incorporated into an existing use permit for the area. *Kleppe v. Sierra Club*, 427 U.S. 390, 400 (1976) (finding no evidence of a “proposal for an action of regional scope” because of the ill-defined nature of the future plans). “A single NEPA review document is required for distinct projects when there is a single proposal governing the projects.” *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 893 (9th Cir. 2002) (citing *Kleppe*, 427 U.S. at 399); 40 C.F.R. § 1508.25(a)(2). Of particular importance here are the cumulative effects of a new 800-car parking lot, a new day lodge and a new downhill, lift-served mountain biking park. An agency must consider the effects of cumulative actions in order to assess whether, collectively, the actions have a substantial impact. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 894 (9th Cir. 2002); *see e.g.* Exhs 11-12. In *Blue Mountains Biodiversity Project v. Blackwood*, the Ninth Circuit concluded that a series of timber sales, “developed as part of a comprehensive forest recovery strategy,” together posed potentially significant and cumulative impacts. *Blue Mountains*, 161 F.3d 1208, 1214-15 (9th Cir. 1998); 40 C.F.R. §§ 1508.7 (cumulative impact), 1508.25(a)(2) (cumulative actions should be discussed in the same EIS), 1508.27(b)(7) (consideration of cumulative impacts among actions). The sales were part of the same project, located in the same watershed, announced simultaneously, and were reasonably foreseeable. *Native Ecosystems Council*, 304 F.3d at 895 (summarizing *Blue Mountains*, 161 F.3d at 1215). By failing to address in an EIS whether the sales “*may* cause significant [environmental] degradation,” the Forest Service failed to take the “hard look” required by NEPA. *Blue Mountains*, 161 F.3d at 1216 (emphasis original) (internal quotations and citations omitted).

Likewise, the construction of the bike routes and skills park, the parking lot, the new day lodge, and the tubing hill are part of the same development plan, are located in the same watershed, were disclosed to the Forest Service within a year of one another, and are reasonably foreseeable. Exhs. 9-10. The Forest Service failed to take a “hard look” at the effects of the projects set forth in the MDP when it accepted the document and made it part of RLK’s SUP.

F. Forest Service failed to disclose and analyze impacts of all the reasonably foreseeable projects in the Environmental Assessment.

NEPA requires that EAs consider the impacts of the project together with “past, present, and reasonably foreseeable future actions.” *Native Ecosystems Council*, 304 F.3d at 895 (quoting 40 C.F.R. § 1508.7) (other citations omitted). Even if this court finds that the Forest Service was not required to analyze MDP when it amended the SUP, then the Forest Service should have considered the effects of the other projects set forth in the MDP when it analyzed the bike park – the first project to be implemented under the MDP. *See Native Ecosystems Council*, 304 F.3d at 895-96 (requiring disclosure of cumulative impacts from road density amendments in an EA).

Similar to the Forest Plan road density amendments at issue in *Native Ecosystems Council*, the Forest Service knew about the projects in the MDP and their location when it analyzed the bike park. Exhs. 9-10. And like the road density amendments, the projects in the MDP “may have cumulative impacts,” which the Forest Service is required to consider. *Native Ecosystems Council*, 304 F.3d at 896-97. NEPA requires “the assessment of the cumulative impact of ‘individually minor but collectively significant actions taking place over a period of time.’ ” *Id.* at 897 (citing 40 C.F.R. § 1508.7). Even in situations where some details of a project may change and others are unknown, there is enough information to allow for meaningful environmental analysis. *Realty Income Trust v. Eckerd*, 564 F.2d 447, 455 (D.C. Cir. 1977) (a project of known dimensions and location, but without known financing and which only

appeared in a prospectus, provided enough information for an EIS). In this case, the Forest Service knows enough about the bike routes and skills park, the day lodge and the parking lot, including their location and size from narrative descriptions and architectural drawings, to provide meaningful environmental analysis of their environmental effects in conjunction with the effects of the bike park. Exhs. 9-10. The Forest Service admits repeatedly that there are serious and growing transportation and parking problems at Timberline Lodge, and that the construction of the downhill biking facilities will further exacerbate the problems. Exh. 1 at 205. It cannot just bury its head in the sand and ignore the development of the parking lot set forth in the MDP.

G. The Forest Service violated NEPA by failing to adequately assess the intensity factors and prepare an EIS.

First, there is a substantive and well-documented controversy regarding the Forest Service's disclosure and analysis of the project's impacts on sedimentation, water quality, riparian reserves, fish, invertebrates, and general forest values. See generally, Rhodes Decl.; Wise Decl.; Wisseman Decl. The Forest Service failed to disclose and respond to the scientific studies from its own scientists that directly contradict its key assumptions regarding the impacts from the construction of 17 miles of new downhill bike routes and the timing and effectiveness of the proposal to attempt further restoration work to address the chronic non-functioning condition created by past activities. Exh. 1 at 67-72 (EA); see generally, Rhodes Decl. Further, the Forest Service failed to explain why the planned re-vegetation outlined in the EA will be effective in an area with a short growing season, harsh conditions, and sensitive soils. Wise Decl. ¶ 28; Rhodes Decl. ¶¶ 14, 18-19, 38. Second, the possible effects on the human environment are highly uncertain or involve unique or unknown risks. The EA states that the presence, abundance, and status of invertebrate species that reside in water bodies located near the project are not well understood. Exh. 1 at 97 (EA). The Forest Service did not disclose or determine

whether the construction project is likely to have a population-level impact on the caddisfly, which is a Region 6 Sensitive Species. Wisseman Decl. ¶¶ 27-33. As a result, the Forest Service has not met its obligation under NEPA to take a hard look at the direct, indirect and cumulative impacts of the project or to demonstrate compliance with applicable Forest Plan standards under the NFMA.

IV. Plaintiffs raise serious questions on the merits of their substantive claims.

Plaintiff has raised serious questions about whether the Forest Service has ensured the project complies with binding standards of the Northwest Forest Plan and the Mt. Hood National Forest Plan (under NFMA) and adequately involved the public and taken a hard look at the project's impacts (under NEPA). The serious questions doctrine applies in the context of injunctions when questions cannot be resolved at the hearing for injunction and the Court perceives a need to preserve the *status quo* and prevent harm to the parties. *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988). "Serious questions are 'substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.'" *Id.* (Internal citations omitted). "Serious questions need not promise a certainty of success, nor even present a probability of success, but must involve a 'fair chance of success on the merits.'" *Id.* (quoting *National Wildlife Fed'n v. Coston*, 773 F.2d 1513, 1517 (9th Cir.1985)). Plaintiffs have established serious questions on the merits.

V. The balance of equities favors Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction.

The relative hardship to the parties is a critical consideration when Courts consider a preliminary injunction. *Benda v. Grand Lodge of Int'l Assoc. of Machinists & Aerospace Workers*, 584 F.2d 308, 315 (9th Cir. 1978). "If the balance of harm tips decidedly toward the plaintiff, then the plaintiff need not show as robust a likelihood of success on the merits as when

the balance tips less decidedly.” *Id.* RLK makes significant revenue from its summer operations, which includes ski and snowboard camps (<http://www.timberlinesnowcamps.com/>). Plaintiffs submit that the risk of permanent ecological harm out-weighs the temporary economic harm that RLK may suffer pending compliance with the law. *ONRC*, 505 F.3d 884 (9th Cir. 2007). This is not a case where an injunction would halt ongoing economic activity rather it simply seeks to enjoin the expansion of an existing facility. *Id.*

On the other side of the balance of the harms are the injuries to Plaintiffs and its members and supporters that use and enjoy the area. See *infra* at 13-21. “Environmental injury, by its nature...is often permanent or at least of long duration, i.e., irreparable” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011) (quoting *The Lands Council v. McNair*, 537 F.3d 981, 1004 (9th Cir. 2008)(internal quotation omitted). Neither the Forest Service nor RLK can identify similar irreparable harm to their interests and “[p]reserving nature and avoiding irreparable environmental injury” is in the public interest. *Cottrell* at 1138 (quoting *Lands Council*, 537 F.3d at 1005).

All things considered, the balance of the harms tips sharply in plaintiffs’ favor.

VI. No bond should be required.

It is well established that in public interest environmental cases the plaintiff need not post bonds because of the potential chilling effect on litigation to protect the environment. Federal courts have consistently waived the bond requirement in public interest litigation, or required only a nominal bond. *See, e.g., People ex rel. Van de Kamp v. Tahoe Reg’l Plan*, 766 F.2d 1319 (9th Cir. 1985) (no bond); *Wilderness Soc’y v. Tyrrel*, 701 F. Supp. 1473 (E.D. Cal. 1988), *rev’d on other grounds*, 918 F.2d 813 (9th Cir. 1990) (\$100 bond); *Scherr v. Volpe*, 466 F.2d 1027 (7th Cir. 1972) (no bond); *Sierra Club v. Block*, 614 F. Supp. 488 (D. D.C. 1985) (\$20 bond).

CONCLUSION

For all of the reasons above, Plaintiffs respectfully requests that the Court enter a narrowly tailored injunction enjoining the Forest Service from authorizing or allowing RLK to begin construction of the downhill mountain bike routes and skill park while allowing RLK to attempt challenging restoration projects until further order of the Court.

Respectfully submitted this 4th day of May 2013.

/s/ Ralph O. Bloemers

Ralph O. Bloemers, OSB No. 984172

ralph@crag.org - (503) 525-2727

Christopher G. Winter, OSB No. 984355

chris@crag.org - (503) 525-2725

Crag Law Center

917 SW Oak Street, Suite 417

Portland, OR 97205

Fax: (503) 296-5454

Attorneys for Plaintiffs Bark, Friends of Mt. Hood, Northwest
Environmental Defense Center and Sierra Club

CERTIFICATE OF COMPLIANCE WITH LR 7-2

I certify that the foregoing brief complies with LR 7-2 because it does not exceed 35 pages, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of authorities, signature block, and certificates of counsel.

/s/ Ralph O. Bloemers
Ralph O. Bloemers, OSB. No. 984172
Attorney for Plaintiffs

**Plaintiff's Memorandum Supporting Motion for
Temporary Restraining Order and Preliminary
Injunction – Certificate of Service**

*Crag Law Center
917 SW Oak St., Suite 417
Portland, OR 97205
Tel. (503) 525-2727*