

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

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; **WILLIAM STELLE**, Regional
Administrator of the West Coast Region, and
the **NATIONAL MARINE FISHERIES**
SERVICE, a federal agency.

Defendants.

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

FIRST AMENDED COMPLAINT
FOR DECLARATORY
AND INJUNCTIVE RELIEF

(28 U.S.C. §§ 1331 & 1346)
(Environmental Matter – National
Environmental Policy Act, National Forest
Management Act, National Forest Ski Area
Permit Act, Endangered Species Act)

INTRODUCTION

1. This is an Administrative Procedure Act and Endangered Species Act challenge of the approval by Defendants Acting Forest Supervisor Lisa Northrop, Zigzag District Ranger Bill Westbrook, Region 6 Regional Forester Kent Connaughton, and the United States Forest Service (“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”), and of the informal consultation between Defendants National Marine Fisheries Service (“NMFS”), William Steele, Administrator of the West Coast Region, and the Forest Service, that resulted in a determination that the Project would was not likely to adversely affect species listed under the Endangered Species Act (“ESA”).

2. RLK currently operates year-round ski facilities at Timberline Lodge on the Mt. Hood National Forest in accordance with 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 a skills park adjacent to Timberline Lodge in the alpine and subalpine environment of Mt. Hood (the “downhill bike routes”).

3. This area of Mt. Hood is ecologically significant, consisting of fragile alpine and subalpine ecosystems that feature highly erosive volcanic soils, sensitive watersheds supporting imperiled runs of native fish and aquatic life, short growing seasons and highly variable weather and precipitation patterns.

4. The West Fork Salmon River and Still Creek sub-watersheds are located in the project area. The West Fork Salmon River has been designated as a Tier 1 Key Watershed and Still Creek has been designated as a Special Emphasis Watershed, under the Northwest Forest

Plan for the survival and recovery of native salmon, trout, and the sensitive aquatic life that supports them.

5. Lower Columbia River (“LCR”) steelhead, *Oncorynchus mykiss*, a species listed as threatened under the ESA, are present throughout most of the Still Creek sub-watershed. Still Creek, the Lower Salmon River, and the Zigzag River provide both spawning and rearing habitat for native winter LCR steelhead and this run is considered a core population in recovery efforts.

6. The existing infrastructure associated with Timberline Lodge and Ski Area has been and continues to be a major and chronic source of sediment delivery to Still Creek and West Fork Salmon River negatively impacting water quality and aquatic life. Existing sediment sources include ski area facilities, lifts, parking lots, roads, clear cutting ski runs, and highway sanding operations.

7. The Forest Service and NMFS engaged in informal consultation regarding the effects of the Project on LCR steelhead, and the Forest Service determined, and NMFS concurred, that despite increased sedimentation as a result of the Project, it was not likely to adversely affect (“NLAA”) the species.

8. Restoration activities described as Project Design Criteria (“PDCs”) and Best Management Practices (“BMPs”) required by the Forest Service in conjunction with the most recent lift construction—the Jeff Flood Express lift—were unsuccessful, resulting in well-documented sedimentation problems and degradation of aquatic conditions.

9. The construction of 17 miles of downhill bike routes will result in the exposure of over 12 acres of forested land and open meadows into bare and compacted soil surfaces. The bike routes will be up to 99 inches wide and double the number of stream crossings in the area. The Forest Service concedes that the construction and use of these downhill bike routes act the

same as roads on the landscape and that the downhill bike routes will significantly increase short- and long-term fine sediment delivery into Still Creek and the West Fork Salmon River.

10. In an effort to meet substantive watershed protections under the Northwest Forest Plan and the Mt. Hood National Forest Land and Resource Management Plan, the Forest Service proposed to construct the downhill bike routes, which will increase sediment delivery into the aquatic system, with plans to attempt restoration of areas within the SUP boundary that have been degraded from past projects including construction of the Jeff Flood Express lift (the “Express Lift”). A significant portion of the proposed restoration work was already required by the Forest Service as part of past projects and is the ongoing stewardship obligation of a permit holder to meet forest plan standards. The restoration work has either failed to work or was not implemented correctly.

11. RLK’s SUP requires that it prepare and submit a Master Development Plan (“MDP”) to the Forest Service. In January of 2009, RLK submitted an MDP that set forth plans to develop a new satellite lodge and expand overnight accommodation. This new lodge would include a brand new 2-story day-use lodge with an interior area of up to 17,270 square feet, construction of an adjacent 3-acre snow tubing area, and construction of an adjacent parking facility to accommodate 800 additional automobiles, nearly doubling parking capacity for Timberline Lodge. Construction of these new facilities will occur downhill from the existing Timberline Lodge at the bottom of Molly’s ski lift within the headwaters of the West Fork Salmon River.

12. Without providing the public any opportunity to provide input on the future development in and around the Historic Timberline Lodge or disclosing and analyzing the direct,

indirect, and cumulative environmental and social effects of these projects, the Forest Service accepted the MDP and amended the SUP in May of 2009.

13. In December of 2009, RLK submitted an amendment to add the construction of downhill mountain bike routes and a skills park within their SUP area. Without performing any environmental analysis, the Forest Service accepted this amendment and amended the SUP in February of 2010. That same month, RLK submitted a formal proposal for the construction of the downhill bike routes and skills park to the Forest Service and expand the ski permit area boundary for this new facility.

14. To date, the Forest Service has not sought public input into the MDP for the Timberline Lodge and Ski Area, nor has the Forest Service conducted an analysis of the direct, indirect, and cumulative impacts of constructing the downhill mountain bike routes along with all other reasonably foreseeable projects.

15. The Forest Service and RLK have plans to close and then re-open the Alpine and Glade trails to mountain biking.

16. The Forest Service knows that RLK plans to build more parking facilities and a new lodge as set forth in the MDP submitted by RLK in the West Fork Salmon River.

17. Defendants have failed to meet their procedural and substantive duties required by federal environmental law by:

(A) failing to prepare an Environmental Impact Statement for the Project given the scientific and public controversy over the significant impacts that the construction and operation of 17 miles of bike routes will have on trout, salmon, sensitive species, and the aquatic environment; the controversy over the effectiveness of the proposed restoration proposed as a substitute for habitat degradation; the foreseeable plans to expand overnight lodging and build a

new 800-plus car parking lot; the negative impact on user's experiences at the Historic Timberline Lodge; the negative impact on user experiences on the Historic Timberline trail and the Mountaineers trail from conflicts with users of the downhill bike routes; the negative impact of the downhill bike routes on elk who depend on the high-alpine meadows for summertime feeding and calving; the direct, indirect and cumulative effects of a new recreation facility on the current supply of similar recreation facilities in the vicinity; and the need to ensure compliance with the Mt. Hood Forest Plan, the Northwest Forest Plan and applicable laws.

(B) failing to disclose the scientific foundation for, and scientific controversy over, the key assumptions the Forest Service made to support its claim that restoration would be immediately effective in decreasing the amount of sediment delivered into the system and increasing the ability of water to infiltrate the degraded soils;

(C) failing to disclose the scientific foundation for, and scientific controversy over, the key assumptions the Forest Service made regarding the extent that the downhill bike trails will extend the drainage network, increase stream crossings and deliver sediment and turbidity in Still Creek and the West Fork Salmon River;

(D) failing to ensure compliance with the Northwest Forest Plan Aquatic Conservation Strategy Objectives ("ACS") and numerous other Northwest Forest Plan standards that are in place to protect Riparian Reserves and aquatic life;

(E) failing to adequately disclose, consider, and analyze the direct, indirect, and cumulative impacts of the reasonably foreseeable future projects in the area;

(F) violating the requirement that the agency maintain viable populations of the Scott's Apatanian caddisfly;

(G) failing to conduct any environmental analysis or involve the public in the major federal action of accepting the MDP and amending the SUP;

(H) failing to ensure that the expansion of the area of use complied with the Forest Plan and the National Forest Ski Area Permit Act of 1986;

(I) issuing an arbitrary and capricious NLAA determination, in violation of ESA Section 7(a)(2), 16 U.S.C. § 1536(a)(2), and 50 C.F.R. §§ 402.13(a), 402.14(b);

(J) issuing an arbitrary and capricious Letter of Concurrence, in violation of ESA Section 7(a)(2), 16 U.S.C. § 1536(a)(2), and 50 C.F.R. §§ 402.13(a), 402.14(b);

(K) failing to engage in formal consultation pursuant to Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), and 50 C.F.R. § 402.14(a);

(L) failing to ensure that actions will not jeopardize the continued existence of LCR steelhead or result in the destruction or adverse modification of critical habitat, as required by ESA Section 7(a)(2), 16 U.S.C. § 1536(a)(2); and

(M) failing to prepare supplemental NEPA analysis upon the discovery of significant new information.

18. For these reasons and as set forth in detail below, the decision of the Forest Service to approve the Project by issuing the Forest Service's EA, Finding of No Significant Impact ("FONSI"), and Decision Notice ("DN") is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with and/or without observance of procedure required by and in violation of National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321–4361, the National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1600 *et seq.*, the Administrative Procedures Act ("APA"), 5 U.S.C. § 551 *et seq.*, the National Forest Ski Area Permit Act of 1986 and amendments thereto ("SAPA"), 16 U.S.C. § 497b, the Special Use Permit regulations,

36 C.F.R. §§ 251.50–251.65, the Northwest Forest Plan, the Mt. Hood Land and Resource Management Plan, and the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* The EA does not contain the requisite information necessary to satisfy the statutory requirements of NEPA and NFMA, and the agencies' arbitrary and capricious informal concurrence violated Section 7(a)(2) of the ESA. Finally, the Forest Service failed to act, in violation of NEPA and the APA § 706(1), or in the alternative, acted arbitrarily, capriciously, otherwise not in accordance with, or without observance of procedure required by law, by failing to prepare supplemental NEPA with regard to significant new information.

19. This action seeks: (1) a declaratory judgment that the Forest Service approval of the Timberline Ski Area Mountain Bike Trails and Skills Park violates the APA, NEPA, NFMA, SAPA, the ESA and their implementing regulations; (2) an order compelling the Forest Service to comply with binding standards and guidelines required by the APA, NEPA, NFMA, SAPA, the ESA and their implementing regulations; (3) remand to the Forest Service and NMFS, and vacating the EA, DN, FONSI, and informal concurrence; and (4) an injunction permanently prohibiting the Forest Service from approving or allowing implementation the Project unless and until the Forest Service demonstrates compliance with all applicable provisions of the APA, NEPA, NFMA, SAPA, and the ESA.

JURISDICTION

20. Jurisdiction over this action is conferred by 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1346 (United States as a defendant), and 16 U.S.C. § 1540(g). Plaintiffs' claims arise under the National Environmental Policy Act (federal question), 42 U.S.C. §§ 4321–4361, the National Forest Management Act, 16 U.S.C. §§ 1600 *et seq.*, the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*, and the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* There

is a present, actual, and justiciable controversy between the parties. The relief sought is proper under 28 U.S.C. § 2201 (declaratory relief), § 2202 (injunctive relief), 5 U.S.C. §§ 701–706, and 16 U.S.C. § 1540(g)(3).

21. Plaintiffs have commented on and administratively appealed the Timberline Ski Area Mountain Bike Trails and Skills Park. The challenged agency action is subject to this Court’s review under 5 U.S.C. §§ 702, 704, and 706. The federal government has waived sovereign immunity in this action pursuant to 5 U.S.C. § 702 and 16 U.S.C. § 1540(g).

VENUE

22. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 and 16 U.S.C. § 1540(g)(3)(A). All or a substantial part of the events or omissions giving rise to the claims herein occurred within this judicial district. Defendant’s offices responsible for the actions giving rise to this cause of action are in Clackamas County. Three of the four Plaintiffs have offices in Portland, Oregon. The public lands and resources in question are located in Clackamas County. The Project has been approved for construction in Clackamas County.

PARTIES

23. Plaintiff Bark is based in Portland, Oregon and is a 501(c)(3) non-profit corporation that is comprised of grassroots activists working to defend wilderness and biodiversity from further human degradation. Bark’s mission is to conserve, protect, and restore environmental health, forest ecosystems, clean water, and biological diversity. Recognizing the rapid loss of biological diversity as a threat to all life, Bark’s members work to protect and restore public lands. Bark and its members actively participate in governmental decision-making processes on public lands and focus exclusively on the Mt. Hood National Forest in Oregon. Bark encourages just, sustainable communities in the Mt. Hood National Forest of the Cascade

Bioregion and neighboring areas. Bark believes that a diversified and sustainable economy depends on the wisest use of our natural resources. To that end, Bark works for the protection and restoration of forest ecosystems with a primary goal to reform destructive and unsustainable practices on public forestlands.

24. Plaintiff Friends of Mount Hood (“FOMH”) is an Oregon non-profit dedicated to monitoring development and management of the Mount Hood National Forest. FOMH is especially interested in protecting the alpine meadows, wetlands, streams, and forested slopes on the mountain for its members who frequent the area for recreational, aesthetic, spiritual, educational and scientific purposes. For more than two decades, FOMH has monitored the Mt. Hood National Forest where ski permit areas and associated development are located.

25. Plaintiff Northwest Environment Defense Center (“NEDC”) is a public charitable non-profit corporation based in Portland, Oregon exempt from taxation under section 501(c)(3) of the Internal Revenue Code. NEDC was founded in 1969 and is dedicated to the preservation and protection of the natural resources of the Pacific Northwest. NEDC’s members are lawyers, scientists, students, and citizens who use and enjoy the Mt. Hood National Forest and will be materially and irreparably injured by the construction and operation of the downhill bike routes.

26. Plaintiff Sierra Club is a national conservation organization with 580,000 members including over 20,000 members in Oregon. Its principal place of business in Oregon is the Chapter Office in Portland, Oregon. Its national headquarters is at 85 Second Street, San Francisco, CA 94105. Sierra Club members use the Mt. Hood National Forest for many purposes including hiking, camping, cross-country skiing, backpacking, fishing, bird watching, nature photography, horseback riding, mountain biking and biological study. Sierra Club and its members have been actively involved in planning processes for activities in the Mt. Hood

National Forest. Sierra Club members will be materially and adversely affected and irreparably injured by the construction and operation of the downhill bike routes and skills park.

27. Plaintiffs' members use and enjoy the Mt. Hood National Forest, including the project area and the affected lands downstream, for hiking, fishing, hunting, camping, photographing scenery and wildlife, and engaging in other vocational, scientific, and recreational activities. Plaintiffs' members derive recreational, inspirational, religious, scientific, educational, and aesthetic benefit from their activities within this national forest. Plaintiffs' members intend to continue to use and enjoy the Mt. Hood National Forest, including the project area and the lands and waters that will be affected by the proposed project, frequently and on an ongoing basis in the future.

28. The aesthetic, recreational, scientific, educational, and religious interests of Plaintiffs' members have been and will be adversely affected and irreparably injured if defendants construct the downhill bike routes and skills park components of the Project. These are actual, concrete injuries caused by defendants' failure to comply with mandatory duties under NEPA, NFMA, the APA, and the ESA. The relief Plaintiffs seek would redress their injury.

29. Defendant Lisa Northrop is the Forest Supervisor for the Mt. Hood National Forest who took over responsibility for the Mt. Hood National Forest for former Forest Supervisors Gary Larsen and Christopher Worth.

30. Defendant Bill Westbrook is the District Ranger for the Zigzag District for the Mt. Hood National Forest who is responsible for supervising the Interdisciplinary Team that prepared the EA for the Project.

31. Defendant Kent Connaughton is the Regional Forester for Region 6 based in Portland, Oregon who denied the administrative appeal of the Project filed by the Plaintiffs.

32. Defendant United States Forest Service is an agency of the United States and is a division of the Department of Agriculture. The Forest Service is responsible for implementing and/or complying with the National Environmental Policy Act, National Forest Management Act, Endangered Species Act, Ski Areas Permit Act and associated regulations and procedures applicable to the Project.

33. Defendant William Stelle is the Regional Administrator of the West Coast Region, National Marine Fisheries Service, who signed NMFS's Letter of Concurrence that is challenged in this case.

34. Defendant National Marine Fisheries Service is an agency of the United States Department of Commerce responsible for administering the provisions of the Endangered Species Act with regard to threatened and endangered anadromous salmonids, including Lower Columbia River Steelhead.

PROPOSED PROJECT

35. The Project involves the construction of new facilities containing 17 miles of lift-assisted downhill-only mountain bike routes along with a mountain bike skills park located within the Timberline Ski Area on the Zigzag Ranger District of the Mt. Hood National Forest. RLK currently operates this ski area under a 30-year Special Use Permit ("SUP") issued by the Forest Service. The boundaries of the SUP were expanded for the Project and mountain bikers will utilize the existing Jeff Flood Express Lift system to ascend the mountain.

36. The construction of 17 miles of mountain bike routes will result in over 12 acres of bare ground that will double the number of stream crossings in the affected sub-watersheds of Still Creek, West Fork Salmon River, Glade Creek, and Sand Canyon Creek. *See* EA at 1.

37. Distributed along the 17 miles of trails will be an estimated 70–90 man-made structures called Technical Trail Features (“TTFs”). The TTFs are made of wooden timbers and planks and are in place to add a variety of challenges for riders. The TTFs are designed for advanced skills and will have ride-around trails for beginners. The jumps will have landing zones of indeterminate size. The footprints of the TTFs, the ride-around trails, and the landing zones will add additional ground disturbance.

38. The majority of the 17 miles of downhill bike trails will be new construction in relatively undisturbed areas including high-alpine open meadows that are found in the upper portion of the SUP. *See* EA at 20, Figure 6. A small portion of the new construction will occur in disturbed areas that were developed with facilities for use in the winter months for skiing.

39. When describing the status quo of the SUP area, the EA states that “significant, measurable sediment is resulting both in the short term and long term as a result of winter sanding and plowing throughout the Action Area.” EA at 119.

40. The Biological Evaluation (“BE”) prepared by Zigzag Ranger District Biologist Kathryn Arendt states that: “The four sub-watersheds within the Analysis Area have been substantially altered by ski area development, road construction and maintenance, other recreational uses, and past logging practices. Separately and cumulatively, these activities have resulted in a loss of function of natural processes such as large wood recruitment and movement, connectivity of habitat, reduction of stream shading, alteration of riparian vegetation and function, and increased sedimentation and stream drainage networks.” Fisheries Biological Evaluation – Timberline Downhill Bike Park, July 12, 2012 (“BE”), at 36.

41. The EA admits that chronic sedimentation “is negatively impacting both LCR winter steelhead/critical habitat as well as Region 6 Sensitive macroinvertebrates which are assumed or known to inhabit the Action Area.” *Id.*

42. Instead of avoiding degradation of the headwaters of Still Creek and the West Fork Salmon, the Forest Service substituted a plan to concurrently attempt to restore degraded areas so it could claim that the Project will result in a net benefit to the aquatic system.

43. The proposal to attempt further restoration includes the decommissioning or obliteration of approximately 2.1 miles of existing roads and a series of proposals into different areas to attempt restoration projects at various previously disturbed sites and road systems. The total restoration area is approximately six acres. *Id.*

44. The Forest Service proposes to attempt watershed restoration activities including decommissioning portions of both the Pucci Service Road and the Stormin’ Norman Service Road. *See* EA at 28, Table 2. The Glade Trail is to be converted to a single-track trail, although the Forest Service admits that the conversion would not occur “until after the Timberline to Town Trail is completed and the Glade Trail is closed to mountain biking.” BE at 16.

45. The proposed restoration includes a plan to attempt to improve the surface of the Alpine Trail and manage water flow.

46. The proposed restoration includes a proposal to attempt to re-vegetate the Jeff Flood Bottom Terminal, the Pucci Bottom Terminal, the Kruser Run Landing, and the Roundhouse – West Leg Road. *Id.*

47. The restoration proposal includes activities that were required as part of past projects but were either not attempted or the attempts to re-vegetate and restore failed.

48. The EA only presented the Proposed Action and the No Action Alternative. Under the No Action Alternative, “[n]o new mountain bike trails or a skills park would be constructed, and the proposed restoration projects would not be implemented.” EA at 19.

49. The EA discusses the construction activities and the restoration activities as if the activities are separate projects. For example, when discussing restoration, the EA states that “[t]here may be an overlap in timing of this project [the restoration] with the Bike Park project.” EA at 119.

50. The EA states that restoration will occur “within or adjacent to the project area.” EA at 19.

51. The EA uses confusing and contradictory statements to describe the Project. The EA repeatedly discusses restoration as independent from “the project,” implying that the project consists only of construction but then later the EA uses the restoration as a substitute to cancel out the habitat degradation from the new construction.

52. The EA did not propose or consider alternatives that did not involve the substitution of restoration for habitat degradation or that restored the chronic non-functioning condition of the watershed without additional construction and habitat degradation.

53. The Forest Service acknowledges the presence of other mountain biking routes on the Mt. Hood National Forest but the Forest Service did not disclose the direct, indirect, and cumulative effects of another system in the context of the existing opportunities for mountain biking in the Mt. Hood National Forest or the region.

54. The Forest Service did not disclose or consider an alternative that would locate the mountain bike routes in another location on or near Mt. Hood National Forest, either as part of accepting the MDP and amending the SUP or as part of approving the Project.

55. The EA did not consider an alternative that would first restore the degraded condition in the headwaters of Still Creek and the West Fork of the Salmon and ensure the permit holder's operations are in compliance with applicable laws before considering further ground disturbing activities as part of new construction and development.

FACTUAL AND PROCEDURAL HISTORY

56. In 2008, RLK retained independent ski area consultant Bill Granger to help it outline and present its plan for the "continued development of the Timberline Ski Area within its Special Use Permit (SUP) boundary over the next ten years." Timberline Conceptual Master Plan, January 2009, Page 1.

57. The Forest Service accepted this 2009 Master Development Plan ("MDP"), deferring any environmental analysis. RLK then submitted an amendment to add the proposed construction of a system of mountain bike routes and a skills park to the MDP. Upon review and acceptance, former Mt. Hood National Forest Supervisor Gary Larsen incorporated this amendment into RLK's Special Use Permit and updated the authorizations of the SUP.

58. When RLK first proposed the concept for the downhill mountain bike routes and skills park, Forest Supervisor Gary Larsen planned to approve construction by categorically excluding the project from any environmental review.

59. When Forest Service specialists went out on the ground to assess the condition of the landscape, they discovered chronic sediment problems, failed restoration, a lack of monitoring and extensive resource degradation from past projects.

60. Forest Service specialists determined that the past projects in the area, like the Express Lift, had significantly degraded the environment within the SUP area. The existing roads, cut banks, extensive logging, and other ground disturbances that took place to build the

Express Lift and the associated ski trails had greatly expanded the drainage network and, in turn, resulted in chronic delivery of sediment to the surface water system. *See* BE at 36–37.

61. The Forest Service subsequently decided to perform an environmental analysis for the new construction to determine if the new construction might have significant environmental effects.

62. The Forest Service issued a letter formally introducing a project containing the new construction of the 17 miles of downhill mountain bike routes for scoping on June 29, 2010. The Forest Service proposed to undertake restoration to fix the degraded condition so it could claim that the restoration would cancel out the degradation from new construction.

63. Meeting notes from a meeting held on April 10, 2010 state that former Forest Supervisor Gary Larson began the meeting by discussing how important RLK was as a partner and how important it was to provide “new revenue streams” for RLK. Former Forest Supervisor Larsen strongly advocated for fast-tracking the project and asked the team to focus on making the project a success.

64. Through subsequent field surveys, the Forest Service determined that past construction of roads, lifts, ski runs, landing and associated disturbance has resulted in the land and aquatic system not being in a properly functioning condition. *See* BE at 36–37. The degraded conditions were leading to the chronic delivery of fine sediments into the headwaters Still Creek and West Fork Salmon River.

65. In an email dated August 8, 2010, Zigzag Ranger District Hydrologist Todd Parker stated that there were issues with RLK not completing required monitoring activities and associated reports for re-vegetation and wetlands, not planting huckleberry in 2009, not ensuring that re-vegetation was successful on areas disturbed during the construction of the Express Lift

as required in the re-vegetation plan and Storm Water pollution Control plan and that RLK needed to address drainage issues at the bottom of the Express Lift where the area is being drained directly into one of the forks of Still Creek. Todd Parker provided empirical evidence that past re-vegetation efforts had failed and the district botanist described how the past projects had led to the introduction of invasive species.

66. The Timberline Permit Administrator Christine Covington pushed the Interdisciplinary Team of specialists to reach a “No Effects” call.

67. In an email dated November 19, 2010, Christine Covington wrote: “This would be a working session with all of the water/soil/fish folks and Bill G to get everyone a little closer to the finish line in the analysis process and in the spirit of getting BEs [Biological Evaluations] completed with a "No Effect" Determination.”

68. In an email dated December 12, 2010, Christie Covington wrote to the Forest Service Interdisciplinary Team that: “Bill Westbrook would like to have a conference call or meeting if possible or both as soon as possible- this week or next to discuss the options for effects determination for aquatic resources on the Timberline Mt. Bike project. [A]lso we will want to discuss the idea regarding adding mitigation into the proposed action to try to reduce the ‘effects’ call.”

69. To make the claim that the restoration would offset the additional pulse of sediment from the construction and operation of the downhill bike park trails, the Forest Service assumed that the proposed restoration would be completely successful and the benefits of the restoration would be realized immediately, although the Forest Service did not provide scientific studies or evidence to support the claim that the proposal to attempt restoration on these highly erodible soils at this elevation would be immediately effective.

70. In an email dated December 3, 2010, Bill Granger wrote that: “Steve [Kruse, Director of Mountain Operations for RLK] has committed, and did commit again, to work with the Forest Service after the Decision on this EA to look at other trail-related opportunities such as putting mountain biking back on the Glade/Alpine, etc. However, those discussions have been tabled for now to protect the NEPA process for this EA.”

71. In the BE, the Forest Service admits that restoration of the Glade Trail would not take place concurrently with the construction of the bike trails and skills park while at the same time counting the restoration of the Glade Trail in its net benefit calculation.

72. The Forest Service agreed to exclude an analysis of the impacts of sedimentation being delivered to Still Creek and the West Fork Salmon from the Alpine and Glade Trails.

73. In an email dated December 6, 2010 Christine Covington wrote to the Forest Service Interdisciplinary team that: “Based on our conference call discussion today we agreed that we need to be very careful about ‘joint’ care of the trails as part of this [EA]. [B]est to stay focused on the constructed trails only as part of the proposed action. This will come later and will stay as more of a focus tied to Government Camp Trails EA and future work that Bill W[estbrook, District Ranger] would like to see with our overall trail maintenance with not only Timberline but Ski Bowl as well.”

74. A Preliminary Assessment of the environmental impacts of the Project was published on March 3, 2011. The Forest Service took public comment on the Preliminary Assessment for just over 30 days after the assessment was first published.

75. Plaintiffs submitted timely comments outlining the agency’s failure to comply with applicable federal laws.

76. Plaintiffs retained expert hydrologist Jonathan J. Rhodes who informed the Forest Service that its key assumptions and claims regarding the timing and effectiveness of the proposed restoration and the impacts of the new construction were scientifically controversial, contradicted by studies prepared by the Forest Service's own scientists, and that its modeling claims were not supported by evidence the record.

77. Plaintiffs' expert documented in detail that the re-vegetation and restoration efforts could not be completely and immediately effective as the Forest Service claimed.

78. The EA admits that the soils are highly erodible and that short summer growing seasons on Mt. Hood will limit the effectiveness of attempted restoration projects but nonetheless assumes the restoration will be immediately effective.

79. Plaintiffs' expert Jonathan J. Rhodes provided the Forest Service with numerous scientific studies, many of which were authored by Forest Service scientists, which underscored that road restoration work necessarily results in a short-term increase in sediment delivery and that, overall, the benefits of restoration, including road decommissioning, is slow to accrue and of limited effectiveness depending on the elevation and site conditions.

80. The Forest Service admitted that the Project would have significant effects if its key controversial assumptions did not prove to be true. For example, the Preliminary Assessment stated "[i]t is likely that if disturbed soils are not revegetated after the first year, sediment and turbidity events will continue to be generated from project construction until the disturbed areas are stabilized by vegetation (1-5 years)."

81. The watershed restoration activities include the decommissioning of two miles of existing roads and restoring environmental damage associated with the construction of the Jeff Flood Express Lift (the "Express Lift"). The Environmental Impact Statement and Record of

Decision for the Express Lift already required certain included restoration to be completed following the construction of the Express Lift.

82. The proposed restoration includes efforts to limit sediment delivery from existing trails, including the Glade Trail.

83. The Glade trail is currently open to mountain bike use and the Forest Service admits that the trail currently exhibits road-like conditions resulting from multiple paths down it and that it is a chronic source of sedimentation.

84. The Forest Service's contractor Bill Grainger agreed on a plan with Steve Kruse of RLK to agree to temporarily restrict public access, non-commercial mountain bike use on the Alpine and Glade Trails so the Forest Service could claim that work to restore the degraded condition of the Alpine and Glade Trails could be counted as part of the restoration.

85. The final EA was published in November of 2012. Forest Supervisor Christopher Worth signed the Decision Notice and Finding of No Significant Impact on November 19, 2012.

86. In the EA, the Forest Service made claims regarding the benefits of restoring degraded areas (including roads, cut banks, lift towers, and lift stations) which are incongruous and in conflict with its claims regarding the amount of sediment the bike trail system will contribute.

87. The EA admits that twice the amount of land will be disturbed as is proposed for attempted restoration projects and then asserts without sufficient scientific support that “[i]mplementation of the proposed action [including restoration] would decrease the stream drainage network by 2% over the entire project area.”

88. The EA used the claimed benefits of restoration in one sub-watershed to show a net decrease in another sub-watershed.

89. The watershed restoration activities include the decommissioning of two miles of existing roads and restoring environmental damage associated with the construction of the Express Lift.

90. The Environmental Impact Statement and Record of Decision for the Express Lift already required certain included restoration to be completed following the construction of the Express Lift.

91. In response to the scientific controversy, the Forest Service offered no empirical or relevant scientific evidence that the proposals to re-vegetate and restore the fragile sub-alpine slopes of Mt. Hood will be completely and immediately effective.

92. In response to the scientific controversy, the Forest Service offered no empirical data or relevant scientific evidence to support its key assumptions and claims regarding the extent the new construction of the mountain biking routes would have on the drainage network, riparian reserves, and aquatic life.

93. The Forest Service did not respond to the numerous scientific studies that Plaintiffs submitted into the record that contradict the assumptions that the Forest Service made to reach a determination of “No Effects.”

94. Expert hydrologist Jonathan J. Rhodes submitted a scientific study co-authored by Forest Service scientists R.B. Foltz, H. Rhee, and K. Yanosek into the record which scientifically documents that: “four years was not sufficient time for obliterated [decommissioned] roads to return to the pre-road (forest floor) conditions, especially for infiltration capacity.”

95. The Forest Service admitted that the bike trails would function the same as roads in terms of extended the drainage network and increasing the delivery of sediment and turbidity into the system. The Forest Service assumed that only 1% of the length of 17 miles of new

downhill bike routes would operate to extend and expand the drainage network, while admitting that the existing system roads and administrative use roads expanded the drainage network by 21% and 16% respectively.

96. Plaintiffs' expert hydrologist Jonathan J. Rhodes submitted a scientific study co-authored by Forest Service scientist Gordon Grant and others that documented how drainage network extension from roads in the western Cascades of Oregon increased drainage density by 21 to 50 percent. The study found that fifty-seven percent of the surveyed road length was connected to the stream network. The Forest Service provided no support for its grossly different claims regarding the hydrologic impact from the new downhill bike routes versus the existing roads.

97. The Forest Service's failure to provide scientific support for its controversial and contradictory assumptions regarding the impacts of the new construction and the benefits of the restoration that was substituted for habitat degradation resulted in a cascade of failures by the Forest Service to comply with various substantive protections for aquatic life contained in the Mt. Hood National Forest Land and Resource Management Plan ("Mt. Hood LRMP") and the Northwest Forest Plan ("NFP").

98. The Environmental Impact Statement for the Mt. Hood LMRP states at III-75 that: "The Department of Agriculture Policy on Fish and Wildlife directs the Forest Service to 'Manage habitats for all existing native and desired native plants, fish, and wildlife species in order to maintain at least viable populations for such species.'"

99. Still Creek provides critical habitat for Lower Columbia River (LCR) Steelhead and the West Fork Salmon River provides the best remaining habitat for the Scott's Apatanian Caddisfly, a Regional Forester Sensitive Species.

100. The Mt. Hood National Forest also provides habitat for the Western bumblebee (*Bombus Occidentalis*), a Regional Forester Sensitive Species. After the Forest Service completed its NEPA analysis and amended RLK's SUP, surveys conducted by the Xerces Society located the Western bumblebee in the Project area.

101. The Western bumblebee was added as a Sensitive Species in 2011, during the NEPA analysis for the Project. The agency had relied on the 2008 Sensitive Species list for its environmental analysis of the Project.

102. Although the Western bumblebee was historically distributed throughout Oregon, all western Oregon sightings in recent years have been only at high elevations and near the Pacific Crest—despite considerable efforts to find it elsewhere. The Forest Service admits that the population of this species has declined drastically throughout part of its former range. These surveys suggest that the high elevation remnant populations will be needed to serve as source populations should the Western bumblebee stand a chance of replicating its former range.

103. No surveys were undertaken to locate Western bumblebee nest sites in the Project area as part of the environmental analysis for the Project. Because Western bumblebee reproduction occurs at a colony level, disrupting even a few nests during construction, or during operation of the bike and skills part, could have a significant impact on a population of this species.

104. The Forest Service did not prepare a Biological Evaluation for the Western bumblebee. Nor did the agency disclose and consider impacts from the construction and operation of the bike and skills part to Western bumblebee habitat in a NEPA analysis.

105. Under the Mt. Hood LRMP, the Forest Service must assess the direct, indirect, and cumulative impacts and risks to the threatened, endangered and Regional Forester Sensitive Species and ensure that enough habitat remains to ensure the continued viability of this species.

106. The Sandy River supports several species of anadromous salmonids, including spring and fall Chinook, coho, winter steelhead. *See* BE at 18.

107. Sandy River spring Chinook, fall Chinook, and coho stock have been classified by several scientists studying west coast salmonids as at a high risk of extinction due to, among other factors, habitat loss and modification. BE at 18.

108. Lower Columbia River (“LCR”) winter run steelhead trout are indigenous to the Sandy River Basin and are found in Still Creek Campground at the bottom end of the proposed project area. *See* BE at 19.

109. The project area contains Critical Habitat for LCR steelhead. Still Creek, the Lower Salmon River, and the Zigzag River provide the majority of critical spawning and rearing habitat for LCR winter steelhead and consequently play a critical role in the recovery of LCR Steelhead.

110. The Forest Service admits that 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. BE at 40.

111. In Still Creek, surface fines were found in the Watershed Analysis to be at 52% (Not Properly Functioning) and in the West Fork Salmon River, surface fines were in the Watershed Analysis to be at 44% (Not Properly Functioning) within the Analysis Area. BE at 40.

112. The Forest Service admits that “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.” BE at 43.

113. The Forest Service acknowledged that the Project may affect LCR steelhead and its critical habitat, and on April 7, 2011 initiated consultation with NMFS pursuant to the ESA Section 7, 15 U.S.C. § 1536, and 40 C.F.R. § 402.13. For consultation purposes the Forest Service requested that NMFS concur with the Forest Service’s “May Affect, Not Likely to Adversely Affect” (“NLAA”) determination.

114. NMFS acquiesced by submitting to the Forest Service a Letter of Concurrence on June 13, 2011.

115. The Forest Service admitted that the construction and operation of the downhill mountain bike routes would result in the turbidity and sediment that 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.

116. The Forest Service did not determine the importance of the remaining habitat in the West Fork Salmon River to the Scott’s Apatanian Caddisfly nor did it determine whether the project was likely to have a population-level impact on the caddisfly.

117. The BE prepared for the Project states that “if disturbed soils are not re-vegetated after the first year, sediment, and turbidity events would continue to be generated from project construction until the disturbed areas are stabilized by vegetation which is likely to occur within five years.” BE at 44.

118. The BE states “[c]onsiderable road (highway and ski area roads) and parking lot construction, water supply development, chairlift construction, and vegetation clearing for ski

slopes has already occurred adjacent to and upslope of the four headwater tributaries in the Analysis Area. Each of these human activities increases fine sediment inputs to stream channels from the highly erodible volcanic soils in the area. These small stream channels naturally lack the hydraulic power or competence to effectively move fine sediment quickly downstream Current sediment loads are significant enough to impact threatened or endangered fish species and other sensitive aquatic fauna and acceleration of fine sediment inputs from human activities may eventually cause sufficient habitat alteration to adversely impact TES fish species downstream of the Analysis Area.” BE at 39–40.

119. Plaintiffs filed a timely appeal to the project on January 11, 2013 pursuant to 36 C.F.R § 215 *et seq.* Region 6 Regional Forester Kent Connaughton denied the appeal on February 25, 2013. Plaintiffs have exhausted all applicable administrative remedies. This dispute is now ripe for judicial review.

LEGAL BACKGROUND

Administrative Procedure Act

120. The Administrative Procedure Act (“APA”) confers a right of judicial review on any person adversely affected by agency action. 5 U.S.C. § 702. Neither NEPA nor NFMA contain a standard of review; these claims are reviewed under the APA. “Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.” 5 U.S.C. § 704. Upon review, the court shall hold unlawful and set aside agency actions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with and/or without observance of procedure required by law.” 5 U.S.C. § 706(2). The court shall also

compel agency action unlawfully withheld or unreasonably delayed in light of an agency's failure to act. 5 U.S.C. § 706(2).

National Environmental Policy Act

121. NEPA is our nation's "basic charter for protection of the environment." 40 C.F.R. § 1500.1(a). NEPA's primary purposes are to ensure fully informed decision-making and to provide for public participation in environmental analyses and decision-making. *See id.* § 1500.1(b), (c). NEPA requires federal agencies to prepare an Environmental Impact Statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The agency may determine that the proposed action is not likely to have a significant impact on the environment if the action fits within a pre-existing categorical exclusion. 40 C.F.R. § 1501.4(a)(2).

122. Major federal actions include "new or revised agency rules, regulations, *plans*, policies or procedures, and legislative proposals." 40 C.F.R. § 1508.18(a) (emphasis added). If the action may significantly affect the human environment, an agency may prepare an Environmental Assessment ("EA") to decide "whether to prepare an [EIS] or a finding of no significant impact." *Id.* at 1508.9(a)(1). In the EA, the agency must disclose to the public sufficient information and analysis to determine whether the agency must prepare an EIS or, in the alternative, a FONSI. 40 C.F.R. § 1508.9.

123. NEPA defines "significance" with respect to the context and intensity of the project. 40 C.F.R. § 1508.27. Subsection (b) to these NEPA regulations list ten specific factors that an agency should consider when assessing significance and deciding whether to prepare an EIS.

124. NEPA requires adequate disclosure of all environmental impacts, and specifically requires federal agencies to discuss the direct, indirect, and cumulative impacts of their proposed actions. 40 C.F.R. § 1501.2(b), § 1508.7. A cumulative impact results from the incremental impact of the proposed action when added to other past, present, and reasonably foreseeable future actions regardless of who undertakes the action. 40 C.F.R. § 1508.7. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. *Id.* Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts, should be discussed in the same environmental analysis document, whether that be an EIS or an EA. 40 C.F.R. § 1508.24(a)(2).

125. The Forest Service's regulations for NEPA compliance define "[r]easonably foreseeable future actions" as "[t]hose Federal or non-Federal activities not yet undertaken, for which there are existing decisions, funding, or identified proposals." 36 C.F.R. § 220.3. A project does not need to be finalized for it to be reasonable foreseeable.

126. NEPA requires that where several actions have a cumulative environmental impact, these consequences must be considered in an EIS. The Ninth Circuit confirmed the congressional intent of NEPA that useful information and analysis be provided to the public and the decision maker prior to the issuance of a decision and that "conclusory" statements and a list of environmental concerns is not an adequate cumulative effects analysis.

127. Section 1506.6(a) of the NEPA regulations further requires that the agency "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures." The procedural requirements of NEPA must be strictly interpreted.

128. NEPA requires consideration of the potential impact of an action before the action takes place. The NEPA document should identify methods used, reference scientific sources

relied upon, discuss responsible opposing views, and disclose incomplete or unavailable information. *See* 40 C.F.R. §§ 1502.22 and 1502.24.

129. Environmental information of high quality must be made available to public officials and citizens before decisions are made. 40 C.F.R. § 1500.1(b). Accurate scientific analysis and public scrutiny are essential to implementing NEPA. *Id.*

130. An EA must discuss the purpose and need for the proposed action and identify alternative ways of meeting the purpose and need. 40 C.F.R. § 1508.9(b). Identifying alternatives is the heart of the NEPA analysis. The lead agency must “rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.” 40 C.F.R. § 1502.14.

131. The purpose of NEPA’s alternatives analysis requirement is to foster informed decision-making and robust public involvement. 42 U.S.C. § 101; 42 U.S.C. § 102(2)(E); 40 C.F.R. § 1508.9(b).

132. A No Action alternative must always be included in a NEPA assessment and is analyzed to establish baseline environmental conditions and predictable outcomes of other actions that may result from the selection of the No Action alternative. 40 C.F.R. §1508.14(d). It is a means by which to draw comparisons between action alternatives and their respective impacts on the environment.

133. NEPA also requires an agency to supplement its environmental analysis “if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c)(1)(ii).

134. In evaluating whether the new circumstances or information require supplementation of the NEPA analysis, the agency may prepare reports or other documentation. The agency may not, however, use reports evaluating the significance of new information or changed circumstances as a substitute for analysis required by NEPA.

National Forest Management Act

135. The National Forest Management Act (“NFMA”), 16 U.S.C. §§ 1600–1614 was enacted by Congress in 1976 and it governs the Forest Service’s management of the National Forests.

136. NFMA requires the Forest Service to develop a Land and Resource Management Plan (“LRMP” or “Forest Plan”) for each National Forest, including the Mt. Hood National Forest. 16 U.S.C. § 1604.

137. Forest Plans contain standards and guidelines for public lands management and are implemented through the provisions of the NFMA. Site-specific decisions within a National Forest must be consistent with the Forest Plan and its standards and guidelines. *Id. See also* 16 U.S.C. § 1604(i); 36 C.F.R. § 219.15(b) (“Projects and activities authorized after approval of a plan . . . must be consistent with the plan . . .”).

Forest Management Standards and Guidelines

138. The Mt. Hood Land and Resource Management Plan establishes standards and guidelines for Forest Service actions and authorizations including the issuance of permits or approvals for the Project.

139. The Mt. Hood LRMP prioritizes the protection of water quality and fisheries by including standards and guidelines that seek to avoid impacts to water resources and riparian

areas or ecosystems. These standards and guidelines only permit specific management and development activities in riparian areas.

140. FW-087 states that existing aquatic habitat complexity shall be maintained or increased. Mt. Hood LRMP at Four-59.

141. FW- 088 states that pool habitat shall be maintained at natural levels or enhanced. Mt. Hood LRMP at Four-59.

142. FW- 089 states that volume of pools during low flows shall be maintained or increased. Mt. Hood LRMP at Four-59

143. 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. Mt. Hood LRMP at Four-60.

144. FW-102 states that streambank stability of the riparian management area shall be maintained in its natural condition. Mt. Hood LRMP at Four-60.

145. The Mt. Hood LRMP prioritizes preserving species diversity on land and in the water.

146. FW-148, 149, and 150 state that all “management activities shall preserve and enhance the diversity of plant and animal communities.” Mt. Hood LRMP at Four-67.

147. FW-104 states that special aquatic habitat (e.g. alcoves, secondary and overflow channels, ponds, and wetlands), and associated subsurface aquatic habitat (hyporheic zone) shall be maintained in natural condition or enhanced in both quantity and quality. Mt. Hood LRMP at Four-59.

148. The Mt. Hood LRMP has been amended to incorporate Aquatic Conservation Strategy (“ACS”) and Riparian Reserve standards and guidelines included in the Northwest Forest Plan (“NFP”).

149. The NFP amended all forest plans within the range of the Northern Spotted Owl. The Project area is governed by the NFP.

150. The NFP only permits activities that do not impede its ACS Objectives and prohibits those activities that retard the ACS objectives.

151. The ACS states: “[d]o not use mitigation or planned restoration as a substitute for preventing habitat degradation.” ACS WR-3.

152. ACS Objective 3 states that all projects shall “[m]aintain and restore the physical integrity of the aquatic system, including shorelines, banks, and bottom configurations.”

153. The ACS established numerous objectives that site-specific projects must satisfy, including ACS Objective 4, which states that the Forest Service must:

[m]aintain and restore 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.

154. ACS Objective 5 states that projects shall “[m]aintain and restore the sediment regime under which aquatic ecosystems evolved. Elements of the sediment regime include the timing, volume, rate, and character of sediment input, storage, and transport.”

155. ACS Objective 9 states that projects shall “[m]aintain and restore habitat to support well-distributed populations of native plant, invertebrate, and vertebrate riparian-dependent species.”

156. The Project area is within a Tier 1 key watershed. The ACS includes two designations for Key Watersheds. Tier 1 (Aquatic Conservation Emphasis) Key Watersheds contribute directly to conservation of at-risk anadromous salmonids, bull trout, and resident fish species. Tier 1 key watersheds also have a high potential of being restored as part of a watershed restoration program. The NFP Standards and Guidelines direct the Forest Service to reduce existing system and nonsystem road mileage outside roadless areas in Tier 1 Key Watersheds and prohibit any increase in the amount of roads in Key Watersheds.

Endangered Species Act

157. Congress enacted the ESA to “provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species” 15 U.S.C. § 1531(b). In addition to protections for endangered and threatened species, the ESA also protects listed species’ critical habitat, which is designated only after exhaustive scientific and economic review reveals that the area contains physical or biological features essential to conservation and which may require special management considerations or protection. 16 U.S.C. § 1532(5)(A)(i)(I), (II).

158. According to the U.S. Supreme Court, “[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.” *TVA v. Hill*, 437 U.S. 153, 184 (1978).

159. The United States Fish and Wildlife Service (FWS) administers the ESA with respect to terrestrial species under the jurisdiction of the Secretary of the Interior, while the National Marine Fisheries Service (“NMFS”) administers the ESA with respect to marine species under the jurisdiction of the Secretary of Commerce.

160. Section 7 of the ESA imposes both procedural and substantive duties on federal agencies. In carrying out their duties under the ESA, agencies must use the best available science, 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d), and must assess the direct, indirect, and cumulative effects of a project on listed species and critical habitat against the backdrop of the environmental baseline. 50 C.F.R. § 402.02. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area. *Id.*

161. Procedurally, federal agencies (“action agencies”) such as the Forest Service must engage in consultation with the FWS or NMFS (“consulting agencies”) if a proposed action may affect endangered or threatened species or critical habitat. 16 U.S.C. § 1536(a)(2). The action agency must make a preliminary determination regarding effects. 50 C.F.R. § 402.14(a)–(b). If the action agency decides that the proposed action may affect, but is not likely to adversely affect (“NLAA”) listed species or critical habitat, it may engage in informal consultation. *Id.* at §§ 402.13; 402.14(a).

162. Informal consultation is an “optional process that includes all discussions, correspondence, etc. between the [consulting agency] and the Federal agency . . . to assist the Federal agency in determining whether formal consultation or a conference is required” 50 C.F.R. § 402.13. If, during informal consultation, the consulting agency concurs in writing with the action agency’s determination, the consultation process is concluded. *Id.* at §§ 402.13, 402.14(b)(1).

163. On the other hand, formal consultation is required when the agency determines that its action is likely to adversely affect a listed species. *Id.* at § 402.14. Formal consultation requires that the consulting agency formulate a Biological Opinion (“BiOp”) determining

whether the action is likely to jeopardize the listed species or adversely modify its critical habitat. *Id.* at § 402.14(g).

164. Substantively, Section 7 requires that federal agencies ensure that their actions are not likely to jeopardize the continued existence of any threatened or endangered species or result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(a)(2).

165. Section 9 of the ESA makes it unlawful for any person to “take” endangered or threatened species. *Id.* at § 1538(a)(b). The ESA defines “take” broadly to include actions such as harassing, harming, wounding, killing, capturing, or attempting to engage in any such conduct. *Id.* at § 1532(19). According to ESA implementing regulations at 50 C.F.R. § 17.3, the term “harm” in the definition includes significant habitat modification or degradation that actually kills or injures wildlife. This can occur by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migration, feeding, or sheltering.

FIRST CLAIM FOR RELIEF
NEPA COMPLIANCE
FAILURE TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT

166. Plaintiffs hereby re-allege and incorporate all preceding paragraphs by reference.

167. The Forest Service violated NEPA by failing to adequately assess the intensity factors when determining significance under NEPA as outlined in 40 C.F.R. § 1508.27(b) and prepare an Environmental Impact Statement for this project.

168. The EA, FONSI, and Decision Notice are based on assumptions regarding the impacts of the new construction and the timing and effectiveness of proposed restoration that lack scientific integrity, are not adequately supported in the record, are scientifically controversial, and are in conflict with the findings from the Forest Service’s own scientists.

169. The Forest Service's claims rely on the assumption that the restoration will be immediately effective at off-setting the extent to which the new construction of 17 miles of downhill bike routes will extend the drainage networks, reduce the infiltration capacity of soils, increase peak flows, and increase sediment loading in Still Creek and the West Fork Salmon River.

170. The Forest Service significantly understates the extent the new construction of trails extends the drainage network, increases peak flows and otherwise alters the function and hydrology of the headwaters of Still Creek and the West Fork Salmon River by relying on assumptions that are not supported by a rational explanation or adequate scientific information.

The environmental effects are controversial

171. 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.

172. The EA presents misleading and incomplete information regarding the benefits of restoration efforts, including proposed road decommissioning and re-vegetation, which it relies upon to cancel out the increase in sediment delivery from the construction activities.

173. The Forest Service substitutes restoration activities for the avoidance of negative environmental impacts that will increase the sources of sediment delivery to the surface water in violation of the NFP. *See* EA at 12, 65.

174. The Forest Service fails 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 downhill bike routes and the timing and effectiveness of restoration work to address the chronic non-functioning condition created by past activities. EA at 67-72.

175. RLK provided empirical data in the record from the areas disturbed by past construction demonstrating that past restoration has failed and that the proposed restoration is likely to be ineffective.

176. The Forest Service's botany report states that previous restoration work in the area has led to the introduction of invasive weeds and non-native species to the area, which is actively harming and degrading ecosystem function. *See* EA at 44, 118–19, 163.

177. The Forest Service fails 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. The EA does not ensure that the benefits of the re-vegetation and restoration will accrue before the negative impacts from the construction of 17 miles of new downhill bike routes occur.

178. The EA provides no support or explanation for the quantitative data displayed in Table 14 on page 68 of the EA related to modeled sediment delivery to streams. The Forest Service's conclusions displayed in Table 14 are not adequately supported by an explanation or rationale.

179. The Forest Service's modeling results are a black box that are not reproducible by the public or outside experts and are based on flawed and unscientific assumptions.

180. The Forest Service states that native surface roads expand the stream network by 750 feet at stream crossings.

181. The Forest Service states that the downhill bike routes will have the same impacts as roads but that the bike routes expand the stream network by only 50 feet at stream crossings, which is 15 times less than the distance the Forest Service states is caused by roads.

182. The Forest Service uses modeling to attempt to disclose and compare the No-Action alternative to the Action alternative with the bike routes being used in "dry" conditions.

183. The Forest Service does not disclose or analyze the impact of the existence of the downhill bike routes on the landscape in wet conditions when not in use during spring snowmelt and other wet weather conditions.

184. The Forest Service uses modeling to attempt to disclose and compare the No-Action alternative to the Action Alternative with the downhill bike routes in “wet” conditions while the downhill bike routes are being used.

185. Available information from the Forest Service’s own research scientists on drainage network extension, sediment loading, and restoration activities runs directly counter to the unsupported assumptions presented by the Forest Service.

186. Instead of using available and relevant science to support its assumptions regarding the impacts from new construction and the benefits of restoration, the Forest Service used scientific studies from other areas or studies that address unrelated issues that are irrelevant to this area.

187. The agency cites a study from the Piedmont area of Virginia to support its claim that the restoration at this elevation will be effective (Lakel et al). This study was conducted at a site that is 600-feet in elevation, in soils and climate that are not at all comparable to the fragile sub-alpine, volcanic ash soils found at this elevation on Mt. Hood.

188. The Forest Service fails to disclose and respond to the extensive scientific literature submitted by Plaintiffs’ expert Jonathan J. Rhodes that runs directly counter to the Forest Service’s claims regarding the impact of the construction and operation of the downhill bike routes and the rate of success and the time necessary to restore roads and disturbed areas to a properly functioning condition.

189. Plaintiffs submitted a study co-authored by Forest Service scientists which was conducted in the Interior Columbia Basin in Idaho that included plots at higher elevation conditions that showed how attempted re-vegetation following road obliteration was minimally effective after four years in the high-elevation sites. Specifically, Forest Service scientist R. B. Foltz of the United States Department of Agriculture Rocky Mountain Research Station in Moscow Idaho found that: “[f]ollowing mulching seeding, and fertilizing, the lower elevation site displayed vegetation ground cover of 27% after three years, while high elevation sites treated in the same manner had significantly lower vegetation ground cover of 8% after four years.”

190. Plaintiffs submitted a study to the Forest Service authored K. Menning, D. Erman, K. Norman Johnson, and J. Sessions (“Menning et al”) that assessed the equivalent roaded area after restoration projects involving ripped and obliterated roads and landings in the Sierra Nevada National Forest.

191. The Menning et al study found that 1 year after complete obliteration, the former road was still equivalent to 40% of its pre-restoration impact, after 2-5 years it was 30% of its pre-restoration impact, after 10 years it was 20% of its original impact and after 50 years it was still equivalent to 10% of its original impact.

192. The Plaintiffs submitted extensive comments but the Forest Service did not respond to the studies and criticisms it received from the public and Plaintiffs’ expert.

193. The Forest Service did not adequately respond to the scientific controversy or present the public with scientific support for its scientifically controversial, unsupported and, therefore, arbitrary and capricious assumptions regarding the impacts of the new construction and the benefits of the restoration.

Possible effects on the human environment are highly uncertain or involve unique or unknown risks

194. The EA states that “[a]quatic macroinvertebrates are important residents of streams, lakes, and ponds in the Forest. Presence, abundance, and status of invertebrate species that reside in area water bodies are not well understood.” EA at 97.

195. The EA admits that the Project area contains Region 6 Sensitive Species, including the only known population of Scott’s Apatanian Caddisfly.

196. The EA identifies macroinvertebrates as “important.”

197. The FS has not adequately characterized the importance of the remaining habitat in the West Fork Salmon to the caddisfly.

198. The FS did not disclose or determine whether the construction project is likely to have a population-level impact on the caddisfly.

199. The Forest Service has not determined what quality and quantity of habitat is necessary to support the Scott’s Apatanian Caddisfly.

200. The Forest Service planned to do more surveys to determine whether there is sufficient existing habitat elsewhere to provide for viable populations of the Scott’s Apatanian Caddisfly, but not until after it completed the NEPA analysis.

201. The Forest Service’s assumptions and conclusions regarding the project’s impact on Scott’s Apatanian Caddisfly are conflicting and controversial.

202. The construction and operation of the downhill bike routes will exacerbate a parking situation and prevent other users from enjoying the Timberline Lodge in the summer months.

203. The construction and operation of the downhill bike routes will negatively impact the Historic Timberline Lodge

204. The construction and operation of the downhill bike routes will negatively impact the historic Timberline Trail, the Mountaineers trails, and the use and enjoyment of this area by quiet recreational users in the summer months.

205. The construction and operation of the downhill mountain bike routes will negatively impact and limit the ability of elk to use open meadows for feeding and calving in the summer months.

206. The construction and operation of the downhill mountain bike routes will violate numerous Forest Plan standards designed to protect threatened, endangered, and sensitive species and the aquatic life that supports those species.

207. The impacts of the Project are highly uncertain and involve unknown risks. The significance criteria for uncertain, unique or unknown risks is designed specifically to address situations where a more thorough analysis in the form of an EIS would serve a useful purpose by providing the decision maker with additional, detailed information to aid in adequately considering the environmental impacts.

The Project establishes a precedent for future actions with significant effects

208. The EA, FONSI, and DN allow for the installation of a new recreational facility, which will increase the need for on-mountain parking facilities.

209. The EA admits that the parking situation at Timberline is already untenable, as there is not enough available parking to meet current demands both in the winter and summer months. Existing parking lots frequently get “parked out.”

210. The Project thus establishes a precedent for a future action: the construction and operation of a new parking lot to accommodate increased use authorized by the Project.

211. The degree to which a project establishes a precedent for future actions is an intensity factor that must be addressed when evaluating “significance.” 40 C.F.R. § 1508.27(b)(6). An EIS is required to disclose and analyze the direct, indirect and cumulative effects of building new parking facilities in the same watershed and affecting the same resources as the Project.

SECOND CLAIM FOR RELIEF
NFMA COMPLIANCE
VIOLATIONS OF SUBSTANTIVE STANDARDS CONTAINED IN THE AQUATIC
CONSERVATION STRATEGY OBJECTIVES

212. Plaintiffs hereby re-allege and incorporate all preceding paragraphs by reference.

213. The Project will be implemented on Mt. Hood National Forest. All National Forests are managed pursuant to an applicable Land and Resource Management Plan. All projects on the Mt. Hood National Forest must be implemented in accordance with the Mt. Hood Land and Resource Management Plan of 1990. 16 U.S.C. § 1604(i).

214. All site-specific projects on the Mt. Hood National Forest are subject to the Standards and Guidelines included in the Northwest Forest Plan. The NFP has been incorporated into the Mt. Hood LRMP by amendment. The Project must comply with the Aquatic Conservation Strategy Objectives (“ACSO”) of the NFP.

215. The Project presents several violations of the ACSO related to maintaining and restoring sediment regimes, water quality, habitat for fish and invertebrate, and in-stream flows.

216. The construction of 17 miles of wide, banked, and sloping routes to be used as trails for downhill mountain bikes in the high-alpine headwaters of Still Creek and the West Fork Salmon River will increase sedimentation and peak flow and decrease the ability of water to infiltrate into the land.

217. The Project violates the ACSOs because the project does not “maintain the existing condition or lead to improved conditions in the long term.” NFP ROD at B-10.

218. The ACSO sets forth an anti-degradation standard.

219. The Forest Service admits degradation in the EA, but claims that the degradation is simply minor, short-term, or offset by restoration efforts.

220. The ACSOs are substantive standards that the agency must meet.

221. The claim that the Project will *minimize* impacts does not evidence compliance with the ACSO.

222. The law prohibits *an increase in degradation* under the ACSO.

ACSO #3

223. ACSO 3 states that all projects shall “[m]aintain and restore the physical integrity of the aquatic system, including shorelines, banks, and bottom configurations.”

224. Increased sedimentation will degrade stream bottom configurations via elevated fine sediments. This will result in reductions in pool volume and quality and contribute to stream widening and elevated width/depth ratios.

225. The increase in fine sediment delivery that is sure to be a result of trail construction outlined in the EA will degrade or at least alter the integrity of the aquatic system.

226. This violates ASCO 3 because any degradation does not maintain or restore the physical integrity of the aquatic system.

ACSO #5

227. ACSO 5 states that projects shall “[m]aintain and restore the sediment regime under which aquatic ecosystems evolved. Elements of the sediment regime include the timing, volume, rate, and character of sediment input, storage, and transport.”

228. The EA states that construction of bike trails will result in erosion that will lead to increased fine sediment delivery to surface waters that exist down slope from the project area.

EA at 12, 92, 95.

229. The FONSI admits that there are “existing sedimentation issues” in and around the Project area.

230. The increase in sediment delivery that will result from the construction of bike routes presents a direct conflict with ACSO 5 because the substantial increase in sedimentation contradicts the ACSO to maintain and restore the historical sediment regime.

231. The construction of over 17 miles of downhill bike routes will increase the volume, rate, and character of sediment input, storage, and transport by exposing 12 acres of bare mineral soils, thus increasing erosion during use, during rain events, during rain-on-snow events, and during spring snow melt.

232. The construction of the downhill bike routes and the associated stream crossings will increase sediment delivery to surface waters within the Sandy Basin Watershed thus altering the historic sediment regime and violating ACSO 5.

ACSO #4

233. ACSO 4 states that projects shall “[m]aintain and restore 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.”

234. The EA admits that the project will result in short-term impacts to water quality from an increase in sedimentation resulting from the construction of the bike routes. EA at 92.

235. The EA admits that the project will result in increased turbidity. EA at 95.

Turbidity degrades water quality.

236. The EA admits that fish live in streams that will be impacted by sedimentation and turbidity caused by the Project.

237. The EA admits that this sedimentation “may affect” listed LCR winter steelhead trout and its designated critical habitat under the Endangered Species Act.

238. The Forest Service’s aquatic specialist admitted that: “Turbidity 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.” Appendix G, Draft Biological Assessment at 40.

239. The admitted impact on listed fish species and aquatic life violates ACSO 4. The standard that any project must meet is one of “maintain and restore.”

240. By increasing sedimentation and turbidity in streams where listed LCR winter steelhead and the only known functioning population of Scott’s Apatanian Caddisfly live and reproduce, the project will necessarily degrade water quality vital to supporting healthy aquatic ecosystems.

241. The fact that these impacts are classified as “short-term” does not excuse the violation of ACSO 4.

242. The Project violates ACSO 4 because it results in water quality degradation that leads to impairment of survival, growth, reproduction, or migration of individual fish.

ACSO #9

243. ACSO 9 states that projects shall “[m]aintain and restore habitat to support well-distributed populations of native plant, invertebrate, and vertebrate riparian-dependent species.”

244. The EA admits that “[a]quatic invertebrate species may have low levels of short-term negative stream conditions” as a result of the Project. EA at 116, Table 26.

245. The FONSI admits that “[f]ive aquatic species on the Regional Forester’s list are or may be present within the analysis area . . . the project may impact individuals or habitat.” FONSI at 9.

246. The EA states that the Project will have a “small negative trend” on fish habitat. EA at 112–13.

247. ACSOs 4 and 9 are closely related. Increases in sedimentation and turbidity will degrade water quality in and around the Project Area. These waters provide habitat for native fish species such as coastal cutthroat trout and coho salmon.

248. The Forest Service admits that the Project degrades water quality and thus the Forest Service cannot demonstrate that the Project maintains or restores habitat for these fish in violation of ACSO 9.

249. The EA discloses that the project area includes the only known habitat for the native Scott’s Apatanian Caddisfly. The EA admits that the Project may adversely impact this species and its habitat.

250. The Forest Service admits a direct conflict with and violation of ACSOs 4 and 9 because any disturbance to this species and/or its habitat does not serve to maintain or restore the Scott’s Apatanian Caddisfly.

251. The Scott’s Apatanian Caddisfly is highly endemic and, at the time the Forest Service issued the EA, DN, and FONSI, the habitat in the West Fork Salmon River was the best functioning habitat that is known to remain for this species.

THIRD CLAIM FOR RELIEF
NFMA COMPLIANCE

VIOLATIONS OF RIPARIAN RESERVE STANDARDS AND GUIDELINES

252. Plaintiffs hereby re-allege and incorporate all preceding paragraphs by reference.

253. In addition to the ACSO, the NFP contains standards and guidelines related to maintain and restoring Riparian Reserves.

254. Activities in Riparian Reserves shall not retard or prevent attainment of the ACSO. NFP S&G, Page C-31.

255. The NFP requires that all projects that entail construction within a Riparian Reserve shall not prevent the meeting of the ACSO. RM1 – NFP S&G at C-34.

256. The EA states that there are approximately 300 acres of designated Riparian Reserves within the project analysis area. The EA admits that the construction of the downhill mountain bike trails will impact about 2 acres of Riparian Reserves. EA at 86, 112.

257. The EA then states that restoration activities will restore approximately 1.5 acres of the estimated 2 acres of Riparian Reserve that will be disturbed. EA at 86.

258. The ACSO never discusses restoration or mitigation as a possible avenue to avoid conflict with the ACSO.

259. The ACSO is an anti-degradation standard that seeks to maintain and restore; it does not permit the Forest Service to disturb and then attempt to restore.

260. The proposal in the EA to disturb and then restore is in direct conflict with WR-3 of the NFP which states that projects shall not "use mitigation or planned restoration as a substitute for preventing habitat degradation."

261. Plaintiffs requested that the Forest Service comply with the standard in WR-3, but the EA is silent on how this project complies with this standard.

262. Plaintiffs submitted a declaration from expert hydrologist Jonathan J. Rhodes that underscores that the Project will permanently degrade 2 acres of the Riparian Reserves.

263. The BE states that: “Field observations and review of aerial photographs found that riparian areas within the ski area remain in a fragmented state where they are intersected by ski runs, lifts, and access roads and approximately 19 acres out of 296.6 acres have been cleared of forest vegetation and/or developed as a result (Mt. Hood National Forest Aerial photography). In addition, roads, trails, campground, utility lines, and parking lots have permanently removed riparian cover in the Analysis Area.” BE at 63.

264. The Forest Service has not ensured compliance with the ACSO given its admission that the Project will disturb Riparian Reserves.

265. The Forest Service has failed to ensure compliance with the standards and guidelines outlined in the “Riparian Area” section of the Mt. Hood LRMP found in FW-080 through FW-136.

FOURTH CLAIM FOR RELIEF
NFMA COMPLIANCE
FAILURE TO ENSURE COMPLIANCE WITH MT. HOOD LAND AND RESOURCE
MANAGEMENT PLAN

266. Plaintiffs hereby re-allege and incorporate all preceding paragraphs by reference.

267. The Project as designed presents several conflicts with the Mt. Hood LRMP, which has been incorporated by amendment in the NFP.

Soil Resource Protection & Rehabilitation

268. FW-037 states that “[p]otentially ground disturbing activities shall be designed to limit disturbances to the soil organic horizon (i.e. litter and duff).” LRMP at Four-50.

269. The construction of 17 miles of new downhill bike routes will entail several miles of tread estimated at 66 inches or 5.5 feet in width and a disturbed area width estimated at 99 inches or 8.25 feet. EA at 22, Table 1.

270. The proposed construction will disturb the soil organic horizon, yet the EA never discusses FW-037 and concludes that the Project will not violate the standards and guidelines of the LRMP.

Water and Fish

271. FW-060 states that “[m]anagement practices causing detrimental changes in . . . deposits of sediment shall not be permitted.” LRMP at Four-53.

272. The Forest Service admits in the EA that the construction and use of new bike trails is very likely to result in increased sediment delivery to surface water in headwaters of the West Fork Salmon River and Still Creek.

273. The short-term impacts of the Project will increase the deposit of fine sediment, thus violating FW-060.

274. The EA does not address compliance with FW-060.

275. FW-137 states that “[f]ish habitat shall be maintained at existing levels or greater.” LRMP at Four-64.

276. The construction of the downhill bike routes will result in increased erosion that leads to increased sedimentation and turbidity in streams that fish utilize as habitat. Any degradation of water quality due to sedimentation or turbidity will have a direct negative impact on individual fish and fish habitat.

277. The EA fails to address and demonstrate compliance with FW-97 requiring that less than 20% fine sediment be maintained.

278. The EA fails to address and demonstrate compliance with FW-137.

Trails

279. FW-448 and FW-460 both state that “[t]rail systems shall be designed, located, managed, and maintained to consider user’s needs and other resource objectives.” LRMP at Four-97.

280. Currently, people interested in engaging in downhill mountain bike riding can access mountain bike trails in the summer months at the Mt. Hood Adventure Park at Ski Bowl located near Government Camp approximately six miles from Timberline Lodge. Mt. Hood Ski Bowl provides over forty miles of mountain bike trails traversing 1,500 vertical feet and a mountain bike skills park.

281. The EA acknowledges that downhill mountain biking opportunities exist at Ski Bowl but states that the lift-assisted bike trails at Ski Bowl “do not accommodate beginner or intermediate riders.” EA at 197.

282. The EA does not explain why the existing facility is not sufficient to meet user needs or why it cannot be modified or expanded into nearby beginner and intermediate slopes found at Multorpor and elsewhere within the existing permits area at Ski Bowl.

283. The Forest Service does not disclose the extent of existing trails that are either open to biking or specifically managed for mountain biking on the Mt. Hood National Forest or on surrounding public and private lands, and the cumulative benefits of those trails.

284. Within Forest Service Region 6, there are over 18,858 miles of trails on public lands managed by the Forest Service where bicycles are allowed and over 1,158 miles of trails that are specifically managed for mountain biking.

285. The Forest Service does not analyze the direct, indirect, and cumulative impacts of new downhill bike routes at Timberline in light of the total forest- and region-wide facts and figures regarding availability of alternative facilities and opportunities for mountain biking.

FIFTH CLAIM FOR RELIEF
NFMA COMPLIANCE
FAILURE TO ENSURE COMPLIANCE WITH THE DIVERSITY REQUIREMENT OF
THE MT. HOOD LAND AND RESOURCE MANAGEMENT PLAN

286. Plaintiffs hereby re-allege and incorporate all preceding paragraphs by reference.

287. The Project violates several standards and guidelines in the Mt. Hood LRMP related to preservation of species.

288. FW-148, 149, and 150 state that all “management activities shall preserve and enhance the diversity of plant and animal communities.” LRMP at Four-67.

289. FW-087 states that existing aquatic habitat complexity shall be maintained or increased. LRMP a Four-59.

290. The implementation of the Project will negatively affect steelhead, coho, Chinook, and coastal cutthroat trout as well as a variety of Management Indicator Species, including, but not limited to, the American marten and the Pileated woodpecker, and sensitive big game like Roosevelt elk.

291. The Project area contains the best-known habitat for the Scott’s Apatanian Caddisfly (the “caddisfly”).

292. The Forest Service acknowledges the caddisfly is a highly endemic, sensitive species with very narrowly distributed habitats.

293. The Forest Service acknowledges that the Project will negatively affect individuals and significant habitat of the caddisfly.

294. When the Forest Service issued the EA, DN, and FONSI, available information suggested that the Project will be constructed in the only known high-alpine habitat for the caddisfly and that the Project area includes the majority of the caddisfly's known habitat range in Oregon.

295. The EA fails to provide factual support and analysis necessary to assess whether the existing habitat is sufficient to maintain viable populations of the caddisfly.

296. The EA does not support its conclusions that the Project will protect, ensure and not harm the viability of the caddisfly.

297. Because the only known functioning population of the caddisfly will be negatively affected, the Forest Service has violated FW-148, FW-149, FW-150 and the requirement that it maintain viable populations of species contained in the Mt. Hood LRMP.

SIXTH CLAIM FOR RELIEF
NFMA COMPLIANCE
FAILURE TO ENSURE COMPLIANCE WITH STANDARDS AND GUIDELINES
OF THE MT. HOOD LAND AND RESOURCE MANAGEMENT PLAN
RELATED TO SENSITIVE SPECIES

298. Plaintiffs hereby re-allege and incorporate all preceding paragraphs by reference.

299. The Forest Service failed to comply with NFMA by approving a site-specific project in direct conflict with substantive forest plan standards related to sensitive species.

300. The Mt. Hood LRMP defines "sensitive species" 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. Mt. Hood LRMP, Glossary at 29.

301. 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. EA at 106.

302. The EA states that the Scott's Apatanian Caddisfly is present within the Project area and that the Project may impact individuals or habitat. EA at 113, Table 25.

303. The Scott's Apatanian Caddisfly is a Sensitive Species and, therefore, additional standards and guidelines apply to all projects that may impacts this species.

304. FW-175 states that "[h]abitat for threatened, endangered and sensitive plants and animals shall be protected and/or improved."

305. The Forest Service admits that individual Scott's Apatanian Caddisfly may be negatively impacted by the implementation of the Project and that the construction and operation of the downhill trails may impact the species at the population level.

306. The Project presents a direct conflict with FW-175 because any negative impact runs counter to the mandate to protect and/or improve.

307. The EA does not demonstrate how the Project will meet FW-175.

308. The Forest Service does not disclose whether the existing habitat is sufficient to maintain viable populations of caddisfly, and so the Forest Service cannot demonstrate compliance with FW-175.

SEVENTH CLAIM FOR RELIEF
NEPA COMPLIANCE
FAILURE TO DISCLOSE THE DIRECT, INDIRECT AND CUMULATIVE IMPACTS OF PAST, PRESENT, AND REASONABLY FORESEEABLE FUTURE PROJECTS IN THE ENVIRONMENTAL ANALYSIS

309. Plaintiffs hereby re-allege and incorporate all preceding paragraphs by reference.

310. The Forest Service failed to comply with NEPA by not taking the requisite hard look at all past, present, and reasonably foreseeable future actions affecting the quality of water within the Sandy River Basin.

311. Erosion is a problem for the entire Mt. Hood area and results in sedimentation and extension of existing drainage networks. Sedimentation is already occurring in the Project Area, and the Project, along with the reasonably foreseeable future projects set forth in the MDP, is likely to increase sediment delivery to streams in and around the Project Area.

312. The issue of sediment loading is a concern for this watershed because sedimentation degrades water quality.

313. The MDP sets forth specific enough plans for the construction of new roads, parking facilities, and overnight lodge facilities for the Forest Service to analyze and consider the impacts of these facilities in the West Fork Salmon River and Still Creek.

314. The foreseeable projects will extend the existing drainage network and further cumulatively degrade water quality.

315. The construction of the bike routes along with the foreseeable future projects set forth in the MDP and otherwise known by the Forest Service are likely to directly, indirectly, and cumulative impact native fish and aquatic life found in Still Creek and the West Fork Salmon River.

316. The EA fails to adequately address concerns related to increased erosion associated with the Project throughout its analysis.

317. The EA fails to adequately disclose the existing condition of the many watershed attributes affected by the Project.

318. The existing high-sedimentation levels would not be occurring had RLK effectively implemented Project Design Criteria and Best Management Practices on their past and ongoing ski area ground-disturbing activities, as mandated in the previous NEPA documents that permitted those ground disturbing activities.

319. The sedimentation resulting from past projects, the proposed project, and foreseeable future projects in the MDP constitutes a direct, indirect, and cumulative effect above and beyond the current sedimentation resulting from past and current ski area construction and operations that must be analyzed in an EIS.

EIGHTH CLAIM FOR RELIEF
NEPA COMPLIANCE
FAILURE TO ESTABLISH THE PROPER ENVIRONMENTAL BASELINE

320. Plaintiffs hereby re-allege and incorporate all preceding paragraphs by reference.

321. The EA's description and assessment of the environmental baseline for the project area is flawed.

322. The EA assumes that the "baseline condition" for assessment of environmental consequences of the construction and operation of the bike routes is the condition of the landscape after its existing degraded condition is restored via restoration efforts outlined in the EA itself.

323. The existing condition of the landscape is its current degraded condition; the land has not yet been restored.

324. The Project Area will not be in a restored, functioning state at the same time that construction of 17 miles of downhill mountain bike routes will exist on the landscape and be delivering sediment, whether the routes are in use or not.

325. The EA, Decision Notice, and Responses fail to assess "past" actions, arguing that the law only requires an assessment of current conditions.

326. The Forest Service presents figures, analysis, and a comparison of the impact of the construction and operation of the downhill mountain biking routes during dry conditions, coupled with the proposed restoration, as compared to the current condition.

327. The Forest Service presents one figure on the impact of the construction and operation of the downhill mountain biking routes during wet conditions while the system is in use as compared to the current condition.

328. The Forest Service does not present any figures, analysis, or comparison of the impact of the downhill mountain biking routes during wet weather conditions without use as compared to the current condition.

329. 36 C.F.R. § 220.4(f) requires that “the agency must determine what information regarding past actions is useful and relevant to the required analysis of cumulative effects.”

330. Critical past actions that must be assessed include the construction and development of the Jeff Flood Express Lift and the failure of road and construction site restoration activities to be implemented after the construction of those lift facilities.

331. The EA fails to disclose and analyze the impacts of the reasonably foreseeable future projects.

332. The construction of 17 miles of downhill bike routes will further degrade the streams and rivers in the Sandy Basin Watershed, which are already not in a functioning condition.

333. The construction of the lodge and parking facilities at the base of Molly’s lift will further extend the drainage network and degrade the West Fork Salmon River.

334. The planned future re-opening of the Glade and Alpine trails to mountain biking would further extend the drainage network.

335. The Sandy Basin Watershed Council recommended against the construction of the Project because the Project Area habitats are not in properly functioning condition, and anticipates further negative impacts to the aquatic and wildlife resources.

336. The Plaintiffs, the Sandy Basin Watershed Council, and members of the public repeatedly asked that the non-functioning condition and environmental impacts from past lift construction first be addressed and restored.

337. The restoration efforts required as part of the construction of the Express Lift have failed and the Forest Service's description of the current environmental baseline is based on the promised state of the environment, not the actual state as required by NEPA.

NINTH CLAIM FOR RELIEF
NEPA COMPLIANCE
FAILURE TO PREPARE NEPA FOR THE IMPACTS OF THE MASTER
DEVELOPMENT PLAN

339. Plaintiffs hereby re-allege and incorporate all preceding paragraphs by reference.

340. The EA fails to address the direct, indirect, and cumulative effects of the Project in combination with reasonably foreseeable future actions within the Special Use Permit area as proposed in the Master Development Plan accepted by Gary Larsen, Mt. Hood National Forest Supervisor, and incorporated in the Special Use Permit for the Timberline Ski Area.

341. NEPA requires the Forest Service to include discussion of direct, indirect, and cumulative impacts associated with the Project.

342. The Forest Service must disclose the direct, indirect, and cumulative impacts of all past, present, and reasonably foreseeable actions including all off-site and onsite, natural and human-induced, direct and indirect, public and private effects and include all variety of management-induced influences.

343. The EA, FONSI, and Decision Notice allow for the installation of a new recreational facility that will increase the need for more on-mountain parking facilities.

344. The parking situation at Timberline Lodge already leads to days when there is not enough available parking available to meet current demands both in the winter and summer months.

345. The proposed construction and operation of bike routes will only exacerbate the parking problems at Timberline.

346. RLK proposed to construct additional parking facilities, among other improvements, in its 2009 Master Development Plan.

347. The Forest Service has accepted the 2009 Master Plan and an amendment to it, and has incorporated these into RLK's Special Use Permit.

348. The Forest Service admits that parking is a problem and that additional parking lots are planned in the near future.

349. The Forest Service fails to address this factor and does not assess the direct, indirect, and cumulative effects of not having sufficient parking facilities available for visitors to Mt. Hood.

350. The Forest Service fails to address the reasonably foreseeable construction of over 800 additional parking spaces proposed by the MDP, within the same analysis area.

351. The Master Development Plan also proposes to build a new day-use lodge within the Project Area in the near future.

352. To meet the requirement that the agency take a "hard look" at the direct, indirect, and cumulative effects, some quantified or detailed information is required. Without such information, neither the courts nor the public, in reviewing the Forest Service's decisions, can be assured that the Forest Service provided the hard look that it is required to provide.

353. General statements about “possible” effects and “some risk” do not constitute a “hard look” absent a justification regarding why more definitive information cannot be provided.

354. The reasonable foreseeable action of constructing a new day-use lodge was not addressed in the EA, in violation of NEPA.

TENTH CLAIM FOR RELIEF
NEPA, NFMA, AND SKI AREA PERMIT ACT COMPLIANCE
FAILURE TO SUBMIT MASTER DEVELOPMENT PLAN AMENDMENT FOR
ENVIRONMENTAL ANALYSIS AND ENSURE CONSISTENCY WITH THE MT. HOOD
NATIONAL FOREST PLAN AND THE SKI AREA PERMIT ACT

355. Plaintiffs hereby re-allege and incorporate all preceding paragraphs by reference.

356. The Master Development Plan (“MDP”) is a required component of the Special Use Permit (“SUP”). The MDP amends the authorizations in the SUP.

357. The acceptance of the MDP and amendment of the SUP are final agency actions.

358. The acceptance of the MDP and amendment of the SUP are “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(1)(C).

359. The acceptance of the MDP and the amendment of the SUP will have implications on management practices that may significantly impact the quality of the human environment, and NEPA must be initiated at the early stages in planning.

360. The Forest Service violated NEPA, 43 U.S.C. § 4332(1)(C), by failing to prepare an Environmental Impact Statement, or, at bare minimum, an Environmental Assessment, to determine whether the acceptance of the MDP and the amendment of the SUP would have a significant impact on the environment.

361. As a proposed amendment to the SUP, the Forest Service never submitted the MDP to the public for comment nor did it undertake any environmental analysis of its action.

362. The Forest Service must review the environmental impacts of its amendment of the SUP by conducting an analysis prior to approving activities that implement the MDP.

363. As part of accepting the MDP and incorporating the MDP into the SUP, the Forest Service changed the authorized uses within the SUP to include summer uses.

364. The facilities and operations outlined in the SUP occur within lands allocated for A-11 Winter Recreation.

365. In conjunction with accepting the MDP, incorporating the MDP into the SUP, and accepting and incorporating the MDP amendment to authorize summer activities, the Forest Service expanded the area of land covered by the SUP to authorize the facilities proposed in this Project.

366. The downhill mountain bike routes within the expanded area are not ancillary to the operation of an existing winter recreation facility in violation of the Forest Plan.

ELEVENTH CLAIM FOR RELIEF
NEW INFORMATION RELATING TO THE WESTERN BUMBLEBEE

367. Plaintiffs hereby re-allege and incorporate all preceding paragraphs by reference.

368. The Forest Service failed to meet its procedural duties under NEPA and substantive duties under NFMA by failing to address Project impacts on the Western bumblebee, a Regional Forester Sensitive Species.

369. After the NEPA process was complete, the Forest Service was provided with new information regarding the presence of the Western bumblebee within the Project Area.

370. The biologists who surveyed for and located the Western bumblebee in the Project Area recommended that a thorough survey for the species' nests be conducted within the entire Project area.

371. The biologists informed the Forest Service that the ideal time to survey for Western bumblebee nests in that location would be in mid to late August.

372. The biologists informed the Forest Service that if any nests were found, the location of trails and the paths for construction vehicles should be located with a buffer of at least 25 meters on all sides of the nests.

373. The Forest Service has not conducted, and has not released to the public any plans for conducting surveys for Western bumblebee nests during the late summer.

374. Project Design Criteria (“PDC”) for the Project do not contain a provision for establishing a 25-foot buffer around any nesting sites located during construction or operation of the Project.

375. The biologists recommended conducting further surveys throughout the summer to identify when Western bumblebee queens emerge from hibernation within the Project Area. Because killing one queen can have dramatic consequences on entire populations, the biologists suggested that construction and operation of the Project should be dictated by the time queens emerge from hibernation.

376. The Forest Service has not conducted, and has not released to the public any plans for conducting any surveys related to hibernation timing for Western bumblebee queens. There is no PDC that addresses construction and operation timing related to hibernation emergence.

377. The biologists expressed further concern about the destruction of foraging habitat during the construction and operation of the Project, and recommended a thorough survey of Western bumblebee foraging habitat. The results of a survey of foraging habitat would provide information to allow for a key foraging habitat buffer of at least 10 meters, and to inform any re-vegetation work by providing a list of key plants utilized by the Western bumblebee.

378. The Forest Service has not conducted, and has not released to the public any plans for conducting surveys related to foraging habitat.

379. There are no PDCs that address foraging habitat buffers, or plant species to be used for re-vegetation specific to Western bumblebee foraging habitat.

380. The biologists further recommended that, because Western bumblebees are likely dependent on ground nesting mammals for nesting habitat, reviews be conducted related to Project impacts on ground nesting mammals. The Forest Service has not addressed this issue.

381. The Forest Service has a continuing duty under NEPA with regard to new information.

382. The agency must supplement its NEPA analysis upon the discovery of significant new information. 40 C.F.R. § 1502.9(c)(1)(ii).

383. The discovery of a Sensitive Species in the Project Area is significant new information requiring the preparation of a supplemental NEPA analysis.

384. Because the Forest Service has not prepared or released a supplemental NEPA analysis related to the Western bumblebee, the agency is in violation of NEPA and the APA § 706(1) for unlawfully withholding or unreasonably delaying required agency action, or in the alternative, APA § 706(2) for a decision not to prepare supplemental NEPA that was arbitrary, capricious, otherwise not in accordance with, or without observance of procedure required by, law.

385. The Forest Service is also in violation of several substantive NFMA standards outlined in the Mt. Hood LRMP, including FW-175 (providing that habitat for Sensitive Species shall be protected and/or improved), FW-185 (providing that other resource values may be limited or precluded in localized areas to facilitate recovery efforts for Sensitive Species), and

FW-176 (proving that Biological Evaluations shall be prepared for all Forest Service planned, funded, executed, or permitted programs or activities for possible effects on Sensitive Species).

386. By moving forward with authorization of the Project, and thereby making an irreversible and irretrievable commitment of resources before the full impacts of the Project on the Western bumblebee are known and compliance with the Mt. Hood LRMP is ensured, the Forest Service is in violation of NEPA and NFMA.

TWELFTH CLAIM FOR RELIEF
ESA COMPLIANCE
FAILURE TO COMPLY WITH ESA SECTION 7

387. Plaintiffs hereby re-allege and incorporate all preceding paragraphs by reference.

388. The Forest Service must engage in formal consultation with NMFS when a project “may affect” a listed species or its critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

389. The agencies may arrive at a “not likely to adversely affect” listed species or critical habitat only if the effects of a project are expected to be discountable, or insignificant, or completely beneficial.

390. Construction and operation of the Project will increase sediment, turbidity, embeddedness, road density, and the stream drainage network within critical habitat for LCR steelhead.

391. Increased levels of sediment in streams adversely affect fish habitat and survival by disrupting feeding, growth, and behavior, covering fish eggs and decreasing food habitat. High sediment levels can cause fish mortality and affect survival rates for juvenile fish.

392. The Forest Service and NMFS admit that sediment indicators for the Project are greater than insignificant. The Forest Service and NMFS also admit negative effects to other

habitat elements including substrate, Large Woody Debris, pool frequency, large pools, pool width/depth, drainage network, road density, disturbance, and riparian areas.

393. Proposed restoration for the Project is not reasonably specific, certain to occur, capable of implementation, or subject to deadlines or otherwise-enforceable obligations.

394. The perceived benefits of restoration effectiveness and timing stand in direct conflict with the best available science.

395. Benefits of restoration—if any—will be slow to accrue.

396. Restoration will not “offset” significant Project impacts to LCR steelhead and its critical habitat in the short-term, and the agencies’ conclusions about the degree to which restoration will “offset” significant long-term impacts of the Project rests on unverified and unsupported assumptions.

397. The Forest Service and NMFS did not engage in formal consultation, despite, not-insignificant Project effects in the short- and long-term.

398. The Forest Service and NFMS thus violated the procedural requirement of ESA Section 7 to engage in formal consultation because the Project “may affect” listed LCR steelhead and its critical habitat.

399. NMFS’ concurrence is legally flawed under the ESA and implementing regulations.

400. NMFS has a duty to assess the effects to listed species and critical habitat at the project level.

401. NMFS must ensure each project’s constancy with the Aquatic Conservation Strategy (“ACS”) of the NFP.

402. Here, NMFS evaluated effects to LCR steelhead and its critical habitat at the watershed level. It similarly evaluated consistency with the ACS at the watershed scale. NMFS did not evaluate the Project's consistency with the ACS, including WR-3, which states: "Do not use mitigation or planned restoration as a substitute for preventing habitat degradation." NMFS also did not adequately assess Project impacts against the backdrop of an already degraded environmental baseline, with numerous habitat elements already not properly functioning or at risk.

403. Because NFMS failed to ensure project-level consistency with the ACS, and evaluate effects to LCR steelehead and critical habitat at the site-specific scale—and against the backdrop of an already degraded environmental baseline—it violated ESA Section 7 and its implementing regulations.

404. The Forest Service has an independent, substantive duty under the ESA to ensure that its actions do not jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(a)(2) Reliance on a legally flawed concurrence does not satisfy this duty.

405. The Forest Service violated ESA Section 7's substantive duty when it relied on NMFS' legally flawed concurrence, which did not assess project-level consistency with the ACS.

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RELIEF REQUESTED

WHEREFORE, the plaintiff respectfully requests that this Court:

A. Declare that the Forest Service has violated the National Environmental Policy Act, 42 U.S.C. § 4331, *et seq.*, by issuing a final decision, EA and FONSI without first satisfying the requirements of NEPA with respect to adequate notice and comment, consideration of alternatives analysis, disclosure and assessment of the direct, indirect, and cumulative impacts of the Project and the acceptance of the MDP and amendment of the SUP, preparation of supplemental NEPA on the basis of significant new information, and consideration of violations of other, applicable federal, state, and local laws;

B. Declare that the Forest Service has violated the National Forest Management Act, 16 U.S.C. §§ 1600-1614, by issuing a final decision in conflict with applicable standards and guidelines as required by the Northwest Forest Plan and Mt. Hood Land and Resource Management Plan;

C. Vacate and set aside the EA, DN, and FONSI, and enjoin the Forest Service to prepare an EIS for the Project and the acceptance of the MDP and amendment of the SUP;

D. Compel the Forest Service to prepare supplemental NEPA analysis on the basis of significant new information;

E. Declare that the Forest Service and NMFS have violated the Endangered Species Act, 16 U.S.C. §§ 1521 *et seq.*, by failing to engage in formal consultation and failing to insure that actions will not jeopardize the continued existence of LCR steelhead or destroy or adversely modify its critical habitat;

F. Vacate and set aside the Letter of Concurrence for the Project and enjoin the Forest Service and NMFS to engage in formal consultation;

G. Grant Plaintiffs appropriate preliminary and permanent injunctive relief preventing the Forest Service and NMFS from implementing the project until the agencies comply with all applicable laws and regulations;

H. Award to plaintiff its costs, expenses, expert witness fees, and reasonable attorney fees under applicable law; and,

I. Grant plaintiff such further relief as may be just, proper, and equitable.

Respectfully submitted,

A handwritten signature in black ink that reads "Ralph Bloemers". The signature is written in a cursive, flowing style.

Ralph O. Bloemers, OSB. No. 98417i