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March 22, 2021

USDA Forest Service, Pacific Northwest Regional Office
Regional Forester, Objection Reviewing Officer
Attn: 1570 Objections/Debbie Anderson
PO Box 3623
Portland OR 97208-3623
objections-pnw-regional-office@usda.gov

RE: Objections to Government-Camp Land Exchange and Government Camp Land Exchange-Forest Plan Amendment on behalf of Thrive Hood River

Dear Objection Reviewing Officer, Regional Forester:

Pursuant to 36 C.F.R. Parts 218 and 219, Willamette Law Group submits these objections on behalf of Thrive Hood River[1] ("Thrive") and the Law Office of Karl G. Anuta submits these objections on behalf of Michael McCarthy.[2] The following groups also join in these objections:

[1] Thrive Hood River is the assumed business name of the Hood River Valley Residents' Committee, Inc., a non-profit corporation organized under the laws of the State of Oregon. Thrive's physical address is 5200 Woodworth Dr., Mount Hood Parkdale OR 97041, and its phone number is 541-490-5225.

[2] Mr. McCarthy's physical address is 8405 Clear Creek Rd., Parkdale OR 97041, and his phone number is 541-806-6476.

- The Cooper Spur Wild and Free Coalition[3];
- Oregon Wild[4];
- Friends of Mt. Hood[5];
- Oregon Kayak and Canoe Club[6];
- Oregon Nordic Club - Portland Chapter.[7]

Collectively Thrive, Mr. McCarthy, and the above-listed organizations are referred to herein as "the Objectors."

These objections relate to the 2021 *Government Camp - Cooper Spur Land Exchange and Forest Plan Amendment #21 Final Environmental Impact Statement* ("Final EIS") and the associated *Draft Record of Decision* ("Draft ROD"). Richard Periman, the Mt. Hood National Forest Supervisor, is the Responsible Official, and the proposed project would be implemented on the Mt. Hood National Forest in the Zigzag and Hood River Ranger Districts.

For purposes of these objections, Thrive is represented by Jesse Buss of Willamette Law Group. Mr. Buss' mailing address, phone number, and email address are set forth above. Michael McCarthy is represented by Karl G. Anuta, Strowbridge Bldg., 735 SW First Ave., Second

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3 Cooper Spur Wild and Free is a non-profit corporation organized under the laws of the State of Oregon. Its physical address is 8125 SW 71st Ave., Portland OR 97223, and its phone number is 360-901-3411.

4 Oregon Wild is the assumed business name of the Oregon Natural Resources Council Fund, a non-profit corporation organized under the laws of the State of Oregon. Its physical address is 5825 N. Greeley Ave, Portland OR 97217, and its phone number is 503-283-6343.

5 Friends of Mt. Hood, Inc. is a non-profit corporation organized under the laws of the State of Oregon. Its physical address is 5331 S. Macadam Ave., Suite 258, PMP #539, Portland OR 97239, and it does not have a phone number.

6 Oregon Kayak and Canoe Club, Inc. is a non-profit corporation organized under the laws of the State of Oregon. Its physical address is 4909 N. Cecelia St., Portland OR 97203, and its phone number is 360-901-3411.

7 Oregon Nordic Club, Inc. is a non-profit corporation organized under the laws of the State of Oregon. Its physical address is 4193 SW 100th Terrace, Beaverton OR 97005, and its phone number is 503-297-2958. Only the Portland Chapter of the Oregon Nordic Club joins in these objections.

Floor, Portland OR 97204. Please direct all correspondence and responses to these objections to Mr. Buss and Mr. Anuta.

The Objectors have previously submitted timely, written comments regarding this project throughout the periods where public comments were requested. *See, e.g.*, Exhibit G.
The public notice regarding the objection period for this project was published in the Oregonian on February 5, 2021 (attached as Exhibit H). These objections are timely under 36 C.F.R. §§ 218.7 and 219.56 because the Objectors are submitting them via email to objections-pnw-regional-office@usda.gov on March 22, 2021, which is both within 45 days and 60 days of that publication date.

The Objectors request an objection resolution meeting to address, and to try to resolve, the concerns raised in these objections.

Issues addressed in these objections:

There are two main objections: First the Forest Service's failure to comply with NEPA Second, the failure to comply with the 2009 Omnibus Act and the 2018 Clarification Act (collectively "the Act"). The objections are addressed in turn, below.

I. Violations of NEPA.

A. The purpose and need statement does not accurately reflect the imperatives of the Act.

The reasonableness of a purpose and need statement is assessed by considering the "statutory context of the federal action." *League of Wilderness Defenders v. U.S. Forest Serv.*, 689 F.3d 1060, 1069-70 (9th Cir. 2012). In this case, the primary statutory context is the Act, which governs the proposed land exchange. The purpose and need statement should therefore be entirely guided by the provisions of the Act.

Unfortunately, and inconsistently with the DEIS, the FEIS defines its objectives in a way that does not accurately reflect the imperatives of the Act, rendering the purpose and need statement unreasonable and unlawful for purposes of NEPA. As a result of this unreasonable purpose and need statement the FEIS considered an unreasonable set of alternatives. Both the unreasonable purpose and need statement and the resulting unreasonable set of alternatives violate NEPA. *Nat'l Parks & Conservation Ass'n v. BLM*, 606 F.3d 1058, 1070-72 (9th Cir. 2010).

As explained by the court in *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 666 (7th Cir. 1997), under NEPA, "the first thing an agency must define is the project's purpose." In this case, according to the FEIS at 8, "[t]he overall purpose of this project is to comply with the congressional direction and conditions in the Omnibus Act and Clarification Act."[8] Thrive agrees with and has no problem with that stated purpose. However, the FEIS then identifies several "needs" that are supposedly required to fulfill that purpose, which is where the trouble begins.

The FEIS defines the project's "needs" as follows:

1. "[T]here is an underlying need to move forward with the analysis of the exchange of lands between the Mt. Hood National Forest (the national forest) and Mt. Hood Meadows" (FEIS at 8);

2. "[T]he need to convey NFS lands and interest in lands, in exchange for private lands and interest in lands, including personal property and improvements of equal value" (*Id.*);

3. "[T]he need to account for the direction in [the Act] that triggers the congressional designation of approximately 1,710 acres of existing NFS lands to wilderness upon completion of the exchange," along with the congressional

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8 Except for the addition of the reference to the Clarification Act, the stated purpose of the project has not changed from that expressed in the DEIS. DEIS at 20.

designation of “up to 2,854 acres” as the Crystal Springs Watershed Special Resources Management Unit (*Id.*);

4. “[T]here is a need to programmatically amend the Forest Plan to assign land use allocations and standards and guidelines (that is, management direction) to the *newly acquired* land [] which would become designed as the Crystal Springs Watershed Special Resources Management Unit upon completion of the land exchange” (*Id.*) (Emphasis added);

5. “There is also a need to amend the Forest Plan to change the *existing* management direction for the NFS lands (approximately 2,090 acres) that would become part of the new management unit. Similarly, the management direction for existing NFS lands that would be part of the wilderness addition (approximately 1,710 acres) would need to reflect this change in designation” (*Id.*) (Emphasis in original);

6. [T]here is a need to evaluate the existing special use permit at the Cooper Spur Ski Area to address the conversion to wilderness area of approximately 1,012 acres within the existing permit area that are currently designated A11-Winter Recreation Area” (*Id.* at 9); and

7. “The Cooper Spur Mountain Resort, if acquired by the Forest Service, will also need to be evaluated for disposition and, potentially, the continued use through the issuance of a special use permit.” (*Id.*).

The Objectors have no issue with the needs expressed in numbers 2, 4, 5 and 6. However, the alleged needs expressed in numbers 1, 3, 7 are not accurate and, as explained below, inconsistent with the Act. Further, one need that is critical to compliance with the Act, and therefore should be included in the FEIS’s purpose and need statement, is not identified at all.

Need #1 (identified above) is not an actual project need. Although the Forest Service suggests that “there is an underlying need to move forward with the *analysis* of the exchange of lands,” FEIS at 8 (emphasis added), there is nothing in the Act that requires the Forest Service to undertake an analysis of the exchange. Rather, the Act calls for the exchange itself and defines its parameters. Just because the FEIS *itself* represents an analysis of alternative approaches to the exchange doesn't mean that an analysis is, in and of itself, a project need.[9] This need is therefore unreasonable under NEPA.

Need #3 is not accurate because it grossly misrepresents the provisions of the Act. While the Act, in section 1205(a)(1)(A), contemplates that *all* of the land "as generally depicted on the map entitled 'Crystal Springs Watershed Special Resources Management Unit', dated June 2006" be designated as such (which includes *all* of the non-Federal parcels), the FEIS identifies the Crystal Springs unit as only including "a *portion* of the offered non-Federal lands totaling *up to* 2,854 acres." FEIS at 8 (emphasis added). It is important to remember that the Act was precipitated by a Settlement Agreement between multiple parties (including Thrive and McCarthy) involved in long-pending disputes over various properties and actions on the north side of Mt. Hood. That Agreement, a copy of which is attached as Exhibit K, calls for the transfer of *all* of the lands, not just *a portion* of the lands.[10] If a supposed project need defines the land exchange in a way that does not ensure the full implementation of the Act (here, section 1205(a)(1)(A)), then that need is unreasonable under NEPA because it does not properly reflect the statutory context of the project.[11] That is the case with need #3.

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9 In light of the Act's requirements, the DEIS used different, and much more appropriate, language in describing this need. Instead of stating there is a need to "analyze" the exchange, as the FEIS does, the DEIS correctly stated that "there is an underlying need *to move forward with the exchange of lands* between the Mt. Hood National Forest and Mt. Hood Meadows Oregon, LLC, consistent with specific congressional direction[.]" DEIS at 20 (emphasis added).

10 The Settlement Agreement was subsequently amended, but that amendment did not fundamentally change the purpose and need. A copy of that document, the First Amendment to Settlement Agreement, is attached as Exhibit L.

11 Once again, the DEIS used much more accurate language in describing this need. Instead of describing the need to trigger the establishment of the new Crystal Springs unit as including only "*a portion* of the offered non-Federal lands totaling *up to* 2,854 acres," like the FEIS does, the DEIS described that need in terms consistent with the Act's purpose, which is to maximize the amount of land transferred in the exchange: "[U]pon completion of the exchange, the Crystal

Need #7 is not accurate under NEPA for the same reason. That is, it defines itself in such a way that it undermines the purpose and provisions of the Act itself (section 1205(a)(1)(A)). By conditioning itself on "if" the Cooper Spur Mountain Resort is acquired by the Forest Service, need #7 does not ensure that the Forest Service actually *will* acquire the Cooper Spur Mountain Resort (and, indeed, the Draft ROD proposes not to do so). FEIS at 9. But since the Cooper Spur Mountain Resort property is located within the area that section 1205(a)(1)(A) contemplates being designated as part of the Crystal Spring unit, excluding that property is inconsistent with the Act. Need #7 is therefore unreasonable under NEPA.[12]

The FEIS's purpose and need statement also lacks a need, referred to here as "proposed need #8," that relates to the Clarification Act of 2018. As amended by the Clarification Act, the Act now includes a provision (section 1206(a)(2)(E)(i)) that places emphasis on the "need" to equalize appraised values of the exchanged properties. That language reads: "[I]n addition to or in lieu of monetary compensation, a lesser area of Federal land or non-Federal land may be conveyed if *necessary* to equalize appraised values of the exchange properties[.]" *Id.*

Accordingly, the Forest Service should have included in the FEIS a need reflecting this provision of the Act. For example, the need could read as follows: "There is a need to determine if it is necessary to equalize appraised values of the exchange properties by conveying a lesser area of land in the exchange." As it stands, the FEIS fails to recognize this limitation of the Act, and that failure is reflected both in the alternatives considered by the Forest Service and the

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Springs [unit] would be created, which encompasses existing NFS lands *as well as the acquired lands totaling approximately 2,859 acres*." DEIS at 20 (emphasis added).

[12] The DEIS correctly framed need #7 as an actual, not a conditional, need: "The newly acquired Cooper Spur Mountain Resort also needs to be evaluated for the potential development and issuance of a new special use permit." DEIS at 21.

preferred alternative tentatively selected in the Draft ROD. The failure to include proposed need #8, or something similar to it, renders the purpose and need statement unreasonable under NEPA because it does not properly reflect the statutory context (i.e. section 1206(a)(2)(E)(i) of the Act).

The Objectors were unable to raise most of the above issues in comments on the DEIS because - as noted - the DEIS did not suffer from these problems. The Forest Service's amendments to the DEIS, as reflected in the FEIS, created most of these new issues. And as for proposed need #8, the Objectors could not raise that issue during the DEIS comment period because proposed need #8 is dependent on the Clarification Act of 2018, which had not yet been passed at the time of the DEIS comment period. For those reasons, the above-identified issues were properly preserved.

B. The chosen alternative does not fulfill the FEIS's *stated* purpose and need of the project.

According to the FEIS at 8, "[t]he overall purpose of this project is to comply with the congressional direction and conditions in the Omnibus Act and Clarification Act." The preferred alternative, Alternative 2, as modified by the Draft ROD, does not meet that purpose and need because the congressional direction in the Omnibus Act and the Clarification Act (collectively "the Act") is to exchange as much of the Federal and non-Federal land as possible while equalizing values, to trigger the designation of the Tilly Jane wilderness addition, and to protect the Crystal Springs drinking watershed as fully represented in the June 2006 Crystal Springs Watershed Special Resources Management Unit Map. However, as modified by the Draft ROD, Alternative 2 does *not* maximize the land exchanged, and it thereby risks *not* triggering the automatic designation of the Tilly Jane and Crystal Springs areas. Draft ROD at 4, Table 2 (parcel information of lands, Federal and non-Federal, not included in exchange).

This problem with modified Alternative 2 is explained in more detail below in section II regarding non-compliance with the Act itself. However, because compliance with the Act is itself the main purpose and need of the project when viewed from a NEPA perspective, noncompliance with the Act also results in noncompliance with NEPA. Accordingly, Thrive incorporates its arguments from section II into this section regarding NEPA compliance.

The FEIS further identifies that "there is also the need to account for the direction in the Omnibus Act that triggers the congressional designation of approximately 1,710 acres of existing NFS lands to wilderness upon completion of the exchange," along with the establishment of the 2,854-acre Crystal Springs Watershed Special Resources Management Unit. FEIS at 8. Because modified Alternative 2 does not result in the exchange contemplated by the Act, there is a serious question regarding whether completion of the land exchange proposed by modified Alternative 2 will actually trigger the 1,710-acre wilderness designation and 2,854-acre special resources management unit.

Section 1202(c)(2) of the Act calls for the addition of 1,710 acres to the Mount Hood Wilderness, to be known as the Tilly Jane addition. However that addition is only triggered "[o]n completion of the land exchange under section 1206(a)(2)." *Id.* So, if the Government Camp – Cooper Spur land exchange is *not* completed as specifically contemplated by the Act, can the Tilly Jane wilderness area addition occur? The same question arises regarding designation of the Crystal Springs Watershed Special Resources Management Unit under section 1205(a) of the Act. *See also* FEIS at 6 ("After the exchange of landownership identified in this land exchange is completed, this legislated action automatically establishes this new management unit, which also includes the non-Federal lands that would be acquired"). For these reasons, modified Alternative

2, as proposed in the Draft ROD, does not meet the FEIS's stated purpose and need to comply with the Act.

C. Failure to consider an adequate range of alternatives.

The NEPA alternatives analysis, in which an agency evaluates all "reasonable alternatives" and explains why alternatives eliminated from detailed study were not considered, is the heart of an EIS. 40 C.F.R. § 1502.14. Additionally, NEPA stipulates that an agency "shall not commit resources prejudicing selection of alternatives before making a final decision." 40 C.F.R. § 1502.2(f). Environmental impact statements are meant to analyze the impacts of a proposed action "rather than justify[] decisions already made." 40 C.F.R. § 1502.2(g); *see also Navajo Nation v. U.S. Forest Serv*., 479 F.3d 1024, 1054 (9th Cir. 2007), *aff'd en banc*, 535 F.3d 1058 (9th Cir. 2008) (adopting the opinion of the original three-judge panel regarding consideration of a reasonable range of alternatives); *see also Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000) ("An assessment must be prepared early enough so that it can serve practically as an important contribution to the decision-making process and will not be used to rationalize or justify decisions already made.").

The FEIS violates NEPA because it does not analyze all reasonable alternatives and serves only to justify a decision already made. In the comments on the DEIS the Objectors emphasized the importance of considering a range of alternatives for equalizing the values of the lands subject to the exchange. *See, e.g.,* Ex. G at 5. Those comments included the proposal that, if Mt. Hood Meadows' land and business holdings on the North side were worth more than the public land in Government Camp, then the Forest Service should consider alternatives in the following descending order of priority (and perhaps selecting more than one overlapping alternative):

1. Mt. Hood Meadows continues to operate the Cooper Spur Ski Area in a newly-configured permit size of approximately 50 acres on the same (or new) terms;
2. Mt. Hood Meadows continues to own the Inn at Cooper Spur property (Tract 5) totaling 2.84 acres, with some provision for water from existing sources;
3. A donation by Mt. Hood Meadows; and
4. The retention of a possible piece of land adjacent to the Inn at Cooper Spur which consists of forestland surrounding the 2.84-acre parcel (portion of Tract 7) and/or timber harvest on a portion of forestland of Tracts 1, 2, 3 and/or 8 on areas outside of steep slopes, riparian areas, the drinking watershed zone of contribution.

Other alternatives were also suggested by Thrive and other commenters. *See, e.g.*, Ex. G at 4-8. However, the Forest Service dismissed or ignored them all in the FEIS.

The problem with the FEIS's alternatives analysis isn't just the Forest Service's refusal to seriously consider reasonable suggested alternatives. Instead, the FEIS completely fails to disclose and analyze the various ways in which the appraised values of the exchange properties could be equalized. That is a major failure in light of section 1206(a)(2)(H)(i) of the Act, which allows for a lesser area of land to be exchanged "if necessary" to equalize the appraised values, in addition to or in lieu of monetary compensation. Despite that requirement, neither the FEIS nor the Draft ROD confront, let alone explain in any meaningful way, how modified Alternative 2 (or any other alternative) is "necessary" to equalize appraised values of the exchange properties.

An adequate alternatives analysis, developed with the benefit of the completed and updated appraisals, must consider a reasonable range of different methods to equalize values. Instead, the FEIS *does not even discuss the results of the appraisals at all*. As a result, nowhere in the FEIS or supporting documents are the appraised values of the exchange parcels discussed or analyzed in any way. To the contrary, the FEIS baldly states, without giving any parcel valuation information, that "The final mix of the Federal parcels and non-Federal parcels to be exchanged (including personal property and improvements to be exchanged, and respective appraised values) will be determined in the final Record of Decision." FEIS at 18.

It is only in the Draft ROD that any appraisal valuation information is given, *see* Draft ROD at 2, 4, but even then there is still no analysis of alternatives. Instead, the Draft ROD simply states that the East Parcel of Federal land, along with Tracts 4, 5, 6, and 7 of the non-Federal land, will not be conveyed. There are no findings of "necessity" under section 1206(a)(2)(H)(i) of the Act, even though such a finding is required if a lesser area of land is to be exchanged. And even if there was such a finding of "necessity" in the Draft ROD, it would be meaningless without a consideration in the FEIS of alternatives involving an exchange of different parcels, lot line adjustments, lot partitions, different monetary compensation, donation by Mt. Hood Meadows, or a combination thereof. For that reason, the alternatives analysis fails to consider a reasonable range of alternatives, is fundamentally flawed, and the FEIS violates NEPA.

Further, there is at least some evidence that the Forest Service used the FEIS merely to justify a decision that it had already made, in violation of NEPA. The Act, in section 1206(a)(2)(G)(i), states that "the Secretary and Mt. Hood Meadows may mutually agree for the Secretary to reserve a conservation easement to protect the identified wetland in accordance with applicable law." However, in the FEIS the Forest Service admits that, prior to completing its NEPA requirements, the agency decided "not to have the wetland conservation easement reserved." FEIS at iv.[13] Instead of making a pre-NEPA decision regarding the conservation

[13] The Forest Service may attempt to justify its decision based on the 120-day conservation easement deadline contained in section 1206(a)(2)(G)(i)(II) of the Act. But that arguments ignores the fact that the Act also contains another deadline which is long past, namely: that section 1206(a)(2)(F) contemplated that the land exchange itself "shall be completed not later than 16 months after the date of enactment of this Act." The latter deadline passed years ago, and

easement, the Forest Service should have considered the easement, or lack of it, as part of the alternatives analysis.

D. The complete appraisals were unlawfully excluded from the FEIS under NEPA.

NEPA requires that, if an agency prepares an appendix, the agency "shall publish it with the environmental impact statement, and it shall consist of:"

(a) Material prepared in connection with the EIS;

(b) Material substantiating any analysis fundamental to the impact statement;

(c) Material relevant to the decision to be made; and

(d) For FEISs, the public comment summaries and responses.

40 C.F.R. § 1502.19. Here, the Forest Service did prepare an appendix, FEIS at 395-455, but it does not include the appraisals prepared for the exchange parcels. Certainly the appraisals are "material relevant to the decision" because they control the values of the exchange parcels for purpose of this project. Accordingly, they should have been included in the appendix. The Forest Service's failure to include them was a violation of NEPA that impaired the substantial rights of the public to comment on the appraisals as key components of the FEIS.

<u>II. Violations of the Omnibus Act of 2009/Clarification Act of 2018.</u>

Congress passed legislation in 2009, referred to herein as the "Omnibus Act," directing the completion of a land exchange between Mt. Hood Meadows and the Forest Service. Omnibus Public Land Management Act of 2009, § 1206(a) (Public Law 111-11, 123 Stat. 1018). As it relates to that land exchange, the Omnibus Act was supplemented in 2018 by the "Clarification Act." Mount Hood Cooper Spur Land Exchange Clarification Act of 2018 (Public Law 115-110,

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yet the Forest Service is still pursuing the land exchange. It should do the same with the conservation easement, at least to the extent of considering it as part of the alternatives analysis.

131 Stat. 2270). Collectively and as operating together with regard to the Cooper Spur-Government Camp land exchange, the Omnibus Act and the Clarification Act are referred to herein simply as "the Act." The portion of the Act governing this land exchange is attached hereto as Exhibit A.

The Act is special legislation that applies solely to the Cooper Spur/Government Camp land exchange. Thus, its requirements are necessarily unique. As explained below, the chosen alternative under the Draft ROD does not comply with those unique requirements.[14] The Draft ROD, if adopted as proposed, is therefore arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law under the Administrative Procedure Act.

A. The chosen alternative improperly reduces the number of Federal and non-Federal acres subject to the land exchange.

The Forest Service's decision to trade substantially fewer acres of land than contemplated by the Act is a dramatic shift from the way the trade was framed in the DEIS. The DEIS implicitly acknowledged the intent to maximize the land trade acreages when it, in the Summary section, described the project's intent to convey "approximately 109 acres" of public land for "approximately 769 acres" of private land. DEIS at iii. This makes sense, given the Settlement Agreement that gave rise to the Act, and the provisions of the Act. Yet the FEIS's Summary section, and the Draft ROD, now describe the land trade as involving "*up to* 107 acres" of public land for "*up to* 764 acres" of private land, suggesting the Forest Service has broad discretion in

[14] The requirements of the Act are triggered when Mt. Hood Meadows "offers" to convey to the United States all right, title, and interest of Mt. Hood Meadows in and to the non-Federal land. § 1206(a)(2)(A). According to the FEIS, that "offer" trigger has occurred. *See, e.g.*, FEIS at 35-38 ("Lands and Infrastructure and Personal Property Offered to be Acquired"); *id.* at 35 ("[T]he actual acreage of the offered non-Federal lands is approximately 764"; *id.* at 36 ("The items listed are owned by Meadows North LLC and offered in this exchange"); *id.* ("Equipment and personal property located at this resort is also offered in this exchange along with the buildings and improvements").

deciding how much land to trade. FEIS at iii; Draft ROD at 2 (emphasis added). But the Forest Service does not have such broad discretion.

Section 1206(a)(2)(H)(i) of the Act allows a "lessor area of Federal land *or* non-Federal land" to be conveyed in the exchange "*if necessary to equalize appraised values of the exchange properties*, without limitation" (Emphasis added). The chosen alternative is inconsistent with that language because it purports to reduce the amount of both Federal *and* non-Federal land exchanged, instead of just one or the other. Further, the FEIS and Draft ROD contain no findings regarding the necessity of those land area reductions to equalize values. And finally, there is no actual need to reduce the exchange acreages at all. To correct these problems, the decision needs to be amended so that either all 107 acres of Federal land, all 764 acres of non-Federal land, or both, are traded in the exchange. And if either acreage amount is reduced to a "lesser area" under section (a)(2)(H)(i) of the Act, then findings and an explanation regarding the "necessity" of that reduction are required.

i. The Forest Service cannot reduce both the acreage of Federal land subject to the exchange and reduce the acreage of non-Federal land subject to the exchange. It must pick one or the other.

As the plain language of section 1206(a)(2)(H)(i) makes clear, an acreage reduction in this land exchange must be applied, if at all, to *either* the Federal property acreage "or" the non-Federal property acreage, but not both. Congress used the singular when it said "*a* lessor area" of land may be conveyed if necessary to equalize values, not the plural "lesser *areas*" of land may be conveyed if necessary to equalize values. *Id.* Congress also used the word "or" instead of "and." If Congress had intended to allow simultaneous reductions in *both* the Federal and non-Federal acreages, it could and would have done so. Congress did not, however, do so. Therefore, the Forest Service's decision to reduce both the Federal and non-Federal acreage subject to the exchange is arbitrary, capricious, and abuse of discretion, and otherwise not in accordance with law.

The "without limitation" language in section 1206(a)(2)(H)(i) does not alter the analysis. Those words modify the phrase "if necessary to equalize appraised values of the exchange properties" such that the Forest Service is not limited in the *amount* of acreage (either Federal *or* non-Federal, but not both) it can exclude from the land exchange in order to achieve an equalization of values. Reading the words "without limitation" such that they would allow the Forest Service discretion to reduce *both* Federal and non-Federal acreages ignores the Act's use of the word "or" and the singular-tense, as well as the fact that the entire point of the land exchange is to maximize the amount of land exchanged while equalizing values. Allowing reductions in both Federal and non-Federal acreages would undermine that purpose.

ii. The FEIS and Draft ROD contain no findings regarding the need to reduce the exchange acreages to equalize the exchange values.

Section 1206(a)(2)(H)(i) allows a reduction in exchange acreage only "if necessary to equalize appraised values of the exchange properties." The necessity requirement serves the purpose of the Act, which is to ensure the exchange of "approximately 770 acres of private land" for "approximately 107 acres of National Forest System land." Act, § 1206(a)(1)(C) & (E)(i). If there was no "need" requirement, then the Forest Service would have wide latitude to trade substantially lower acreage and the purpose of the Act would be frustrated. The necessity requirement thus maximizes the acreage that is exchanged while allowing enough flexibility in the acreage to equalize the values.[15] However, the Forest Service has failed to demonstrate or

15 The "without limitation" language does not give the Forest Service *carte blanche* to reduce the acreage subject to the exchange. That language gives the Forest Service discretion

make any findings showing that there is any need to reduce the Federal or non-Federal acreages subject to the exchange in order to equalize values.

Simply put, there is nothing in the FEIS or Draft ROD that explains how the reductions in acreages are "necessary to equalize values" in the exchange. Instead, the Forest Service summarily concludes that the reductions in exchange acreage are "necessary" because the Forest and Mt. Hood Meadows *agreed* that those reductions are necessary: "My decision also honors our cooperative engagement with Mt. Hood Meadows and reflects the agreement between the Forest Service and Mt. Hood Meadows regarding an appropriate area of lands to be exchanged as necessary to equalize values." Draft ROD at 5. Instead of an analysis or explanation, this appears to simply be a presentation of flawed circular logic. Essentially the Draft ROD is saying: "I find this thing to be necessary because I have agreed with someone else that it is necessary."

But nothing in the Act allows the reduction of exchange acreage simply due to an agreement by the Forest Service with Mt. Hood Meadows.[16] Instead, the Act requires a showing of actual *necessity*, which the Forest Service has not even attempted to undertake.

Neither is the reduced exchange acreage justified by a "need" to diminish the impacts on cultural resources and Native American treaty rights. Although the Draft ROD, at page 5, states that the chosen alternative "will reduce the amount of ceded lands lost in Government Camp to approximately 67 acres, rather than approximately 107 acres," and that "the cultural resources

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regarding the extent of acreage reduction, but that reduction must still be justified by necessity, and only to the extent required to equalize the values on either side of the exchange.

[16] The "agreement" with Mt. Hood Meadows cited by the Forest Service is not part of the FEIS or Draft ROD, and the Forest Service has not provided the public with a copy of it. Accordingly, if that agreement contains the requisite "need" analysis under Section 1206(a)(2)(H)(i) of the Act, that analysis is unavailable for review by the public as part of the administrative objection process. Therefore, because the agreement was not included with the FEIS or the Draft ROD, the Forest Service cannot rely on any analysis or findings it may contain to justify the Forest Service's decision on this project.

associated with the eastern parcel (P-3) at Government Camp will no longer be negatively affected by this land exchange because it will remain in Federal ownership," those justifications, even if legitimate, do not satisfy the requirements of the Act. As acknowledged in the FEIS at 81, cultural resources and treaty rights "are not directly related to the purpose and need of this project." Under the Act, the only reason the exchange acreages may be reduced is if a reduction is necessary to *equalize values*. Justifications based on balancing cultural resources and treaty rights are not sufficient under the Act.

iii. There is no actual need to reduce the exchange acreages to equalize the exchange values.

The Draft ROD proposes to select a modified Alternative 2, such that the East Parcel of Federal land and Tracts 4, 5, 6, and 7 of the non-Federal land are *not* exchanged. Draft ROD at 4, Table 2. According to the Draft ROD, the East Parcel is appraised at $1,899,200, Tracts 4 & 6 are together appraised at $2,003,923, Tract 5 is appraised at $1,996,961 (plus personal property valued at $395,439), and Tract 7 is appraised at $610,877. The parcels that are proposed to be exchanged are appraised as follows: West Parcel and South Loop Road Parcel (Federal - $3,759, 300); Tract 1 (non-Federal - $429,000); Tracts 2 & 3 (non-Federal - $2,673,000); and Tract 8 (non-Federal - $198,000), plus personal property ($410,240) and fixtures ($388,000) at the Cooper Spur Ski Area. Draft ROD at 2. This adds up to a total of $5,658,500 in appraised value for the Federal land, and $9,105,440 in appraised value for the non-Federal land and personal property. That is a difference in appraised value of $3,446,940 in favor of the non-Federal land/property.

According to the Act, "[i]f, after payment of compensation or adjustment of land area subject to the exchange under this Act, the amount by which the appraised value of the land and other property conveyed by Mt. Hood Meadows" exceeds the appraised value of the Federal land to be conveyed, then that additional value "shall be considered a donation by Mt. Hood Meadows to the United States." § 1206(a)(2)(H)(ii). According to the Forest Service, FEIS at 18, it can pay a cash equalization payment to Mt. Hood Meadows of up to 25% of the value of the Federal lands. That amounts to $1,414,625 in a cash equalization payment (0.25 x $5,658,500) which, if applied in full, leaves a remaining surplus value of non-Federal lands/property of $2,032,315 ($3,446,940 - $1,414,625). Under § 1206(a)(2)(H)(ii) of the Act, that surplus "shall" be considered a donation by Mt. Hood Meadows to the United States. There is, therefore, no actual need under § 1206(a)(2)(H)(i) to convey a lesser area of land under the exchange, and doing so would be arbitrary, capricious, and abuse of discretion, and otherwise not in accordance with law.

iv. Even if there is an actual need to reduce the exchange acreages to equalize the exchange values, the proposed reductions are too large.

The Draft ROD proposes to eliminate the East Parcel (Federal) and Tracts 4, 5, 6, and 7 (non-Federal) from the land exchange. However, even assuming there is a "need" to exchange a lesser area in order to equalize appraised values under § 1206(a)(2)(H)(i), the Forest Service's proposed reductions go much further than necessary. That is a violation of the Act.

As stated in the prior subsection, the total appraised value of the Federal land is $5,658,500, and the total appraised value of the non-Federal land/property is $9,105,440. That is a difference of $3,446,940. It is a simple matter to equalize those values without eliminating all of the East Parcel and Tracts 4, 5, 6, and 7 from the land exchange. For example, because Tract 5 is appraised at $2,392,400 ($1,996,961 land value plus $395,439 in personal property), eliminating *solely* Tract 5 from the land exchange would bring the difference in appraised values between the Federal and non-Federal lands to only $1,054,540 in favor of Mt. Hood Meadows. *See* Ex. M, Alternative A. That amount could be donated by Mt. Hood Meadows, equalized via cash payment from the Forest Service, or a combination of both. Similar possibilities exist for eliminating solely Tracts 2 & 3 or Tracts 4 & 6. *See id.*, Alternatives B and C, respectively.[17] Compared with modified Alternative 2 as proposed in the Draft ROD, all of these possibilities would reduce the amount of land "necessary" to equalize the exchange under section 1206(a)(2)(H)(i) of the Act. It would therefore be arbitrary and capricious for the Forest Service to continue with modified Alternative 2.

B. The complete appraisals haven't been provided to the public, in violation of the Act.

The Forest Service is required by the Act to "make available for public review the complete appraisals of the land to be exchanged" before completing the land exchange. § 1206(a)(2)(D)(iv). The Forest Service has erroneously interpreted that provision such that a person must submit a Freedom of Information Act (FOIA) request in order to obtain the appraisals: "Per the Clarification Act, prior to completing the land exchange, the Forest Service 'will make available for public review the complete appraisals of the land to be exchanged.' Any member of the public may request a copy of the appraisals by submitting a Freedom of Information Act request to the following email address: SM.FS.R6FOIA@usda.gov." FEIS at 18. However, by default and without regard to the Act, public land exchange appraisals

[17] Other possible combinations of parcels exist, too, but the Objectors do not here undertake a complete examination of those possibilities. The purpose of the offered examples is to show that parcel and value combinations exist that better comport with the purpose of the Act, but which were not considered by the Forest Service. In reconsidering its tentative decision under the Draft ROD, the Forest Service should undertake to develop and present a complete examination of the possible parcel and value combinations, and explain its reasoning in choosing one of those combinations, in compliance with the Act and NEPA.

are *already* subject to FOIA requests. Therefore, the Forest Service's interpretation of 1206(a)(2)(D)(iv) of the Act would render that language mere surplusage, which is an interpretation disfavored under the law. In other words, the public review provision of the Act must mean more than just making the appraisals subject to FOIA, because they already were. The most natural reading of the Act, therefore, is that the Forest Service was required to "make available for public review the complete appraisals" by posting them on its website along with the other project documents. At a minimum, that should have occurred before the objection period began. The Forest Service's failure to make the complete appraisals available for public review, except when requested via FOIA, is arbitrary, capricious, and abuse of discretion, and otherwise not in accordance with law.[18]

C. The appraisals are unlawfully flawed.

The Act requires that the appraisals relied upon by the Forest Service in determining the values of the Federal and non-Federal property involved in the land exchange shall be conducted in accordance with "nationally recognized appraisal standards," included the Uniform Appraisal Standards for Federal Land Acquisitions ("the Yellow Book") and the Uniform Standards of Professional Appraisal Practice ("USPAP"). § 1206(a)(2)(D)(ii). The appraisals relied on by the Forest Service in the Draft ROD do not comply with generally accepted appraisal standards, the Yellow Book, and USPAP, therefore the land exchange proposed under modified alternative 2 is

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[18] The undersigned counsel for Thrive submitted a FOIA request to the Forest Service on March 15, 2021, during the objection period for the Draft ROD and FEIS, requesting copies of the complete appraisals pursuant to the Act. Ex. R at 1. The Forest Service responded the next day, but not with copies of the requested documentation. *Id.* at 4. Instead, the agency stated that it has a "backlog of pending FOIA requests." *Id.* To date, counsel for Thrive still has not received the requested complete, unredacted Maloy appraisals.

noncompliant with the Act. As a result, adoption of the Draft ROD would be arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

The Forest Service utilized Maloy & Company, Inc.. from Birmingham, Alabama, to prepare appraisals of the Federal and non-federal property. Ex. N-O. Appraisals were obtained from that company in both 2017 and 2019. FEIS at 17. The Objectors obtained reviews of those appraisals from a highly-respected local appraiser, Donald R. Palmer, MAI, of Appraisal & Consulting Group, LLC. Mr. Palmer's reviews and conclusions are set forth in the attached Exhibits B-F. As explained in those exhibits and below, Mr. Palmer found that "Considering Mr. Maloy has not followed the acceptable guidelines [under the Yellow Book], it is my opinion that his report is not credible." Ex. F at 4. Mr. Palmer also found that some of Mr. Maloy's conclusions are "not supported or credible." *Id.*

To the extent that Mr. Palmer's analysis and conclusions are not set forth in full in the text of this objection letter, the Objectors fully adopt Mr. Palmer's review documents herein as part of these objections. By extension, the Objectors intend to fully adopt Mr. Palmer's arguments and conclusions as set forth in his review documentation.[19]

These objections are preserved because the Objectors have not been provided a formal opportunity to comment on the 2019 Maloy appraisals, which were issued and accepted by the Forest Service after the DEIS comment period expired.

[19] This is not an "incorporation of documents by reference" disallowed by 36 C.F.R. § 218.8(b). Rather, the Palmer documentation is actually included with and is part of these objections.

i. The Government Camp appraisals (Federal property).

Mr. Palmer reviewed both the 2017 and 2019 Maloy appraisals of the Government Camp property. Exs. B-C. In his review of the 2017 appraisal, among other things Mr. Palmer concludes that the sales comparables used by Mr. Maloy were "not credible and therefore the valuation conclusion is not credible." Ex. B at 11.

The errors of the 2017 appraisal were not corrected in the 2019 Government Camp appraisal. While Mr. Maloy chose new comparable sales for the 2019 appraisal, he did not follow generally accepted appraisal methodologies (including the Yellow Book methodology) in analyzing those comps. *See* Ex. C at 3-6. The result was that Mr. Maloy under-valued the Government Camp properties by at least $2.6 million. *Compare* Ex. C at 6 *with* Ex. N at 3 *and* Draft ROD at 2,4.

In his review of the 2019 Government Camp appraisal, Ex. C, Mr. Palmer finds that Mr. Maloy did not include confirmation sources for the comparable sales he used. *Id.* at 3, 4, 6. Rather, it appears Mr. Maloy relied on the deeds to confirm the sales prices. *Id.* This procedure is not an acceptable appraisal practice. It is also a violation of the Yellow Book, which requires sales to be confirmed with parties of the transaction. In failing to confirm the comparable sales with the buyer, seller, broker or other person having knowledge of the price, terms, and conditions of sale Mr. Maloy made multiple errors such as not adjusting for sales that were negotiated 1.5 to 2 years prior to closing. *Id.* at 6. Mr. Maloy erroneously stated that the sales comparables were fully developable and, unlike the Government Camp parcels, had no wetlands, trails easements or other encumbrances that would reduce developable land. *See generally id.* According to Mr. Palmer's research, Sale 1 and Sale 3 have encumbrances that render about 50% of their sites undevelopable. *Id.* at 3.

ii. The Cooper Spur appraisals (non-Federal property).

Like he did with the Government Camp appraisals, Mr. Palmer reviewed both the 2017 and 2019 iterations of the Cooper Spur (non-Federal property) appraisals completed by Mr. Maloy. *See* Exs. D-F. In his review of the 2017 appraisal he confined his analysis to the 156 acres designated as Forest Zone F-1. Ex. D at 1. Mr. Palmer concludes that "The [Maloy] appraisal inadequately evaluates the Highest & Best Use of the area zoned F-1" such that Mr. Maloy's conclusion "is not credible and therefore the valuation conclusion is not credible." *Id.*

My Palmer also completed a review of the 2019 update Cooper Spur appraisal written by Mr. Maloy. Ex. E. Unlike his prior review, this updated review was not confined to an analysis of the highest and best use of the 156 acres of F-1 property. *Id.* at 1-2. With regard to the house, 156 acres of land, and Nordic buildings, Mr. Palmer concluded that Mr. Maloy used the incorrect valuation approach. *Id.* at 3. While Mr. Maloy used the cost approach to value, that approach was flawed because it is very difficult to estimate an accurate replacement cost for the older improvements located on the Cooper Spur properties, and because of the uncertainties of depreciation. *Id.* Where, as here, land sales sharing a similar highest and best use are available for comparison, the sales comparison approach would have been appropriate. *Id.* Mr. Maloy's error resulted in an overvaluation of the property. *Id.* at 3-4. Similar valuation method errors resulting in over-inflated valuations are identified for the Cooper Spur Inn and the personal property, machinery, and equipment. *Id.* at 4-6.

In his final review regarding the Cooper Spur appraisals, Ex. F, completed on March 19, 2021, Mr. Palmer analyzes the 2019 Maloy appraisal for its treatment of tracts 4, 6, and 7, along with compliance with the Yellow Book. *Id.* at 1. Mr. Palmer, citing sections 4.4.2.3 and 1.5.2.2 of the Yellow Book, finds that Mr. Maloy did not include confirmation sources for the comparable sales he used in his appraisal. Rather, based on a review of datasheets included the Maloy appraisal's addenda, it appears Mr. Maloy relied on the deeds to confirm the sales prices. This procedure is not an acceptable appraisal practice. It is also a violation of the Yellow Book, which requires sales to be confirmed with parties of the transaction. Considering Mr. Maloy has not followed the acceptable guidelines under the Yellow Book, it is Mr. Palmer's opinion that Mr. Maloy's conclusions are "not credible." Ex. F at 4.

The land valuation technique used by Mr. Maloy is also not in accordance with generally accepted appraisal standards. Ex. F. at 4. Instead, Mr. Maloy used a flawed process that "has the potential for significant error." *Id.* One of the specific errors made by Mr. Maloy is that the "improvement characteristics of [his chosen comparables] and the amenities provided make it difficult to analyze these sales to determine a $/Acre conclusion for the subject. The additional improvements inflate the $/Acre." In other words, and as detailed in Mr. Palmer's review, Ex. F at 4-6, the comparable sales used by Mr. Maloy were inappropriate and insufficient. Ultimately Mr. Maloy concluded that $14,500/Acre was appropriate for these tracts, but Mr. Palmer found that conclusion "not supported or credible." *Id.* at 4. Using appropriate comparable sales, and adjusting for the improvements to the comparable sales, Mr. Palmer concludes that $5,300/Acre to $10,000/Acre is supported. *Id.* Put differently, Mr. Palmer found that Mr. Maloy clearly and substantially over-valued the Cooper Spur properties.

And finally, in its DEIS comments Thrive explained that the 2017 appraisals did not adequately account for what is *legally allowable* on the Federal land in Government Camp. Ex. G at 2-4. With the updated appraisals, the Forest Service has failed to fully correct those inadequacies. The result is that the appraisals do not accurately reflect fair market value for the parcels. Part of the problem is that, as outlined in the January 27, 2021 memo from Ralph

Bloemers (attached as Exhibit P), Mr. Maloy makes assumptions about several of the Cooper Spur properties that are demonstrably incorrect. *Id.* at 3-5. Chief among those are misapprehensions about the lawful and unlawful uses of land on those properties. *See id.* But as counsel for Hood River County made clear in its letter and attached memorandum to the Forest Service, dated April 24, 2018, several of the uses of the Cooper Spur properties that Mr. Maloy assumed were lawful are, in fact, not. *See generally* Exhibit S. Examples are the unpermitted wedding venue, spa, and associated amenities. *Id.* at 3-4; *see also* Ex. P at 43-48; Ex. T at 2 ("Staff agrees that the subject properties contain at least three land use violations[.]"), 11-13. Mr. Maloy was therefore wrong to build those assumptions about *legally allowable* uses into his 2019 appraisal when the Forest Service already knew those uses were not lawful. The result of Mr. Maloy's improper assumptions is a skewed perception in the appraisal of what lawfully conforming businesses could actually generate as revenue/income on those properties. The Forest Service's reliance on the 2019 Cooper Spur properties appraisal is therefore arbitrary, capricious, and abuse of discretion, and otherwise not in accordance with law.

Conclusion

For the above-described reasons, as well as the reasons identified with more technical precision, completeness, and particularity in Donald Palmer's reports (attached as Exhibits B-F), the FEIS and Draft ROD violate NEPA, the Act, and the APA. The Forest Service should therefore withdraw the FEIS and Draft ROD or otherwise amend its decision and supporting documentation to comply with NEPA and the Act.

Sincerely,

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Russ Pascoe
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for Oregon Kayak and Canoe Club

/s/ Dennis Chaney
Dennis Chaney
for Friends of Mt. Hood

cc: Heather Staten
Michael McCarthy

Exhibit List

Exhibit A Combined Omnibus Public Land Management Act of 2009, § 1206(a) (Public Law 111-11, 123 Stat. 1018), and Mount Hood Cooper Spur Land Exchange Clarification Act of 2018 (Public Law 115-110, 131 Stat. 2270)

Exhibit B Appraisal & Consulting Group, LLC report dated April 10, 2018 (RE: Government Camp Land)

Exhibit C Appraisal & Consulting Group, LLC report dated March 25, 2020 (RE: Government Camp Land)

Exhibit D Appraisal & Consulting Group, LLC report dated February 12, 2018 (RE: 156 acres F-1)

Exhibit E Appraisal & Consulting Group, LLC report dated March 25, 2020 (RE: Cooper Spur Land Exchange (Non-Federally Owned Land)

Exhibit F Appraisal & Consulting Group, LLC report dated March 19, 2021 (RE: Approximately 156.37 Acres of the Cooper Spur Properties)

Exhibit G DEIS Comments from Objectors

Exhibit H February 5, 2021 Oregonian notice

Exhibit I Uniform Appraisal Standards for Federal Land Acquisitions (UASFLA - the "Yellow Book")

Exhibit J Uniform Standards of Professional Appraisal Practice (USPAP)

Exhibit K 2005 Settlement Agreement

Exhibit L Amendment to 2005 Settlement Agreement

Exhibit M Equalization property and value examples (demonstrative)

Exhibit N Maloy Appraisal (Government Camp properties - 2019)

Exhibit O Maloy Appraisal (Cooper Spur properties - 2019)

Exhibit P Memo from Ralph Bloemers dated January 27, 2021 RE: appraisal flaws

Exhibit Q Valuation summaries (demonstrative)

Exhibit R FOIA request and confirmation of receipt (2021-03-15)

Exhibit S April 24, 2018 memo from Hood River County Counsel to Forest Service RE: lawful and unlawful uses of Cooper Spur properties and improvements

Exhibit T July 20, 2020 - letter from Hood River County Planning RE: illegal uses