

September 8, 2025

Via online portal: [US Forest Service NEPA Projects Home](#)

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Re: City of Bend Outback Site Conveyance EA

On behalf of Central Oregon LandWatch (“LandWatch”) and Oregon Wild, please accept these comments on the City of Bend Outback Site Conveyance Environmental Assessment (“EA”), posted on the Forest Service’s project website on August 7th, 2025.

LandWatch is a conservation organization that has advocated on behalf of fish, wildlife, and forests in Central Oregon for over 35 years. With more than 950 members in Central Oregon, LandWatch has a long history of protecting ecosystems within the Deschutes National Forest. LandWatch’s members and supporters live in Central Oregon, including on lands adjoining the Bend-Fort Rock Ranger District (“District”). They hunt, fish, take photographs, view wildlife, hike, mountain bike, and engage in other activities in the District generally, and in and around the Project area specifically.

Oregon Wild represents 20,000 members and supporters who share our mission to protect and restore Oregon’s wildlands, wildlife, and water as an enduring legacy. Our goal is to protect areas that remain intact while striving to restore areas that have been degraded. Oregon Wild has a long history of public involvement in management of the Deschutes National Forest.

LandWatch has a long history of engaging with the City of Bend (“City”) on its Bridge Creek intake facility and surface water treatment site and has closely followed the development of the City’s proposed expansion of the Outback Facility. When the City initially proposed a surface water improvement project 15 years ago, there were significant concerns raised by the public about the proposed cost and associated steep City water utility rate hikes, the economic feasibility, potential impacts of in-conduit hydro and associated infrastructure on Tumalo Creek,



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and many questions about the underlying analysis of the proposed actions. Some of those concerns remain.

LandWatch has potential concerns with three main elements of the proposed Outback Facility expansion: 1) the conveyance of 48 acres of federal public lands to the City; 2) future development of in-conduit hydro and the potential impacts of the City's water diversions on the surface water flows of Tumalo Creek; and 3) any proposed changes to land use zoning for the existing Outback Facility or proposed expansion area. Here, we provide comments on the proposed conveyance of 48 acres of the Deschutes National Forest ("DNF") to the City of Bend, in response to the Forest Service's August 7th letter initiating a combined 30-day public comment and scoping period on the site conveyance Draft EA.

I. TOWNSITE ACT

The Draft EA largely ignores and fails to comply with the Forest Service's various authorities and duties under the Townsite Act, 16 U.S.C. § 478a, and its implementing regulations, 36 C.F.R. Part 254. These legal requirements impose substantive and procedural duties upon the Forest Service that are not addressed in the Draft EA. Instead, the Draft EA incorrectly claims that the "Townsite Act does not provide specific standards or guidelines for analyzing potential environmental effects" (Draft EA at 10).

In order to convey land under the Townsite Act, the Forest Service must determine that the land conveyance "would serve indigenous community objectives that outweigh the public objectives and values which would be served by maintaining such tract in Federal ownership."¹ Yet the Draft EA does not discuss this substantive requirement and fails to demonstrate that conveyance of the *entire* 48-acre parcel to the City of Bend would outweigh the public benefits of maintaining the parcel, or a portion of the parcel, in federal ownership. The Draft EA's failure to address the Townsite Act's overarching standard is a major flaw.

LandWatch's most serious concern is that the Draft EA fundamentally misconstrues the Forest Service's authority under the Act to require the City of Bend to adopt mitigation measures that will protect the public values and resources in the area. The Draft EA suggests that the Forest Service lacks the authority to impose any project design criteria ("PDCs") or other mitigation measures as part of the land conveyance. *See* Draft EA at 19 (stating that PDCs could not apply to land that is conveyed). This is wrong. The Townsite Act provides the authority for the agency to:

¹ 16 U.S.C. § 478a



...condition conveyances of townsites upon the enactment, maintenance, and enforcement of a valid ordinance which assures any land so conveyed will be controlled by the governmental subdivision so that use of the area will not interfere with the protection, management, and development of adjacent or contiguous National Forest System lands.²

The Act's implementing regulations, which the Forest Service itself crafted and adopted, further require the agency to "[d]etermine if zoning ordinances, covenants, or standards are needed to protect adjacent National Forest land and to protect or mitigate valid existing rights and uses."³ Accordingly, the Forest Service has the authority and duty to evaluate and impose mitigation measures that will ensure the City protects the public values and resources on the surrounding National Forest land. The Draft EA's assumption that the Forest Service lacks this legal authority is a major legal flaw that prevented the agency from considering a wide range of potential mitigation measures, which undermines the Draft EA's range of alternatives and impact analysis.

The Draft EA also fails to demonstrate that the City of Bend submitted a complete application, as required by 36 C.F.R. § 254.21. As part of its application, the City was required to submit a "development plan, consisting of a narrative statement and map, which gives a detailed description of the intended use of the site and how essential community needs will be met by the purpose." *Id* § 254.21(b)(2). The Draft EA does not even mention this standard, and it is not clear that the City's integrated Water System Master Plan ("iWSMP") meets this standard.

LandWatch understands that the City's development plan for the site is not finalized and that elements still need to be worked out related to timing, funding, and future need. We are also aware that the City has a conceptual site plan map for the proposed land conveyance on the City's website. However, it's important that the public has a clear understanding of what the City plans to do with the Land once its conveyed. For land conveyances, the Forest Service should require a final development plan as part of the Draft EA to facilitate a meaningful analysis of the Proposed Action, protect the surrounding forest lands and natural resources, and prevent future City development that is contrary to "indigenous community objectives."

The Draft EA also ignores other Townsite Act regulatory standards. Although the Draft EA lists some of the substantive criteria that the City must consider under 36 C.F.R. § 254.22 (although it failed to cite the regulation) (Draft EA at 5), the Draft EA does not actually address those substantive requirements:

² 16 U.S.C. § 478a

³ 36 C.F.R. § 254.23(6)



- 1) Determine if the applicant has made a satisfactory showing that the land will meet essential community needs resulting from internal growth;
- (2) Determine if lands applied for would serve indigenous community objectives that outweigh other public objectives and values which would be served by maintaining such a tract in Federal ownership;
- (3) Determine if the sale would substantially affect or impair important scenic, wildlife, environmental, historical, archeological, or cultural values;
- (4) Evaluate the applicability of public comments;
- (5) Identify the extent of valid existing rights and uses; and
- (6) Determine if zoning ordinances, covenants, or standards are needed to protect adjacent National Forest land and to protect or mitigate valid existing rights and uses.⁴

The Draft EA should have, but did not, analyze and explain how the proposed action will comply with these regulatory criteria.

II. INADEQUATE RANGE OF ALTERNATIVES

The Forest Service failed to evaluate a reasonable range of alternatives to fulfill the intent of this proposal in accordance with the National Environmental Policy Act (“NEPA”).⁵ The Draft EA only analyzes two alternatives, the No Action Alternative and the Proposed Action.

Although there is no NEPA requirement for the minimum number of considered alternatives, an EA that considers only two reasonable alternatives will rarely satisfy the statute’s “hard look” standard.⁶ Viable alternatives are those that are feasible, meet the stated goals of the project, or are reasonably related to the purposes of the project.⁷ The Project lacks a reasonable range when there is the “existence of a viable and unexamined alternative,” or when two action alternatives are deemed nearly identical.⁸

Given that the Forest Service only analyzed two alternatives, there are myriad remaining viable and unexamined options that would still fulfill the Project’s purpose and need. At a minimum, the Forest Service should have included at least one alternative considering and analyzing one or all of the following:

⁴ 36 C.F.R. § 254.23(a)

⁵ 42 U.S.C. § 4332(2)(H)

⁶ *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1246-47 (9th Cir. 2005)

⁷ *Id.*; See *W. Watersheds Project v. Abbey*, 719 F.3d at 1052 (“Feasible alternatives should be considered in detail.”)

⁸ *Western Watersheds Project v. Abbey*, 719 F.3d 1035, 1050 (9th Cir. 2013); *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 813-14 (9th Cir. 1999).



- Seeking a Special Use Permit (“SUP”) for the purposes described, instead of conveying the 48 acres to the City of Bend. This is a reasonable alternative given that a SUP has been used to meet the City’s needs in the past. *See* Draft EA at 2 (“in 2002, a 14.14-acre area adjacent to the WFF was authorized for the expansion of the City’s potable water infrastructure under a Special Use Permit (SUP)”). The City and the Forest Service failed to demonstrate why City ownership, as opposed to issuance of a SUP, is needed to fulfill the City’s needs. Without such a showing, the Forest Service did not and cannot demonstrate that the City’s needs for ownership outweigh the benefits of maintaining federal ownership, which is a substantive requirement of the Townsite Act. Moreover, a SUP would give the Forest Service more power to mitigate the impact of the proposed action, which would better protect public resources and values, and ensure consistency with the applicable Forest Plan requirements (described below).
- Including a condition on the land conveyance that commits the City of Bend to limiting its water right to 18.2 cfs. Without such an express limitation in an alternative, the Draft EA improperly assumes that the City of Bend will limit its Bridge Creek diversion to 18.2 cfs in perpetuity; however, there are no assurances that will be the case in 50 years. Therefore, an alternative should condition the land exchange on the City of Bend limiting its diversion to 18.2 cfs. Such a condition is necessary to protect the public resources and values on the adjacent National Forest. As explained above, the Forest Service has the power and duty to impose such a condition under the Townsite Act.
- Conveying a smaller amount of land that better tailors the conveyance to City of Bend’s needs. Under the Townsite Act, the Forest Service must show that the conveyed land “would serve indigenous community objectives that outweigh the public objectives and values which would be served by maintaining such tract in Federal ownership.”⁹ The Draft EA has not demonstrated that the City needs the entire 48 acres, so the Forest Service must consider a more limited alternative that conveys a smaller amount of land. Two options for a smaller conveyance include:
 - A more limited conveyance of 14.14 acres, which were previously identified for the expansion of the City’s water infrastructure under a Forest Service SUP (See discussion in the Draft EA at 2).

⁹ 16 U.S.C. § 478a



- A more limited conveyance that retains some combination of High Scenic Integrity (retention) areas in Forest Service ownership. For example, an alternative could have considered a more limited conveyance that retained in public ownership areas identified as immediate foreground (MA-9) and that are adjacent to Skyliners road and within the proposed expansion area. This alternative would more closely conform to existing Deschutes National Forest Land and Resource Management Plan standards and guidelines.
- Requiring the City to adopt, and commit to enforcing and maintaining, a mitigation plan to limit the impacts to surrounding fish and wildlife habitat and other public resources and values. Such an alternative should require the City to incorporate some of the existing Deschutes Land and Resource Management Plan (“LRMP”) standards and guidelines into a mitigation plan for the conveyed lands, provide limits on the City’s diversion from Bridge and Tumalo Creeks, provide protection for large trees, and/or establish mitigation funding for habitat impacts. As explained above, the Forest Service has the authority and duty to impose such mitigation requirements, and the Draft EA’s failure to consider an alternative that imposes this or other mitigation is a serious legal flaw.

The Draft EA does not adequately describe how or why the purpose and need could not be met if alternatives including some or all of the above considerations were analyzed. Importantly, alternatives that consider a smaller conveyance or a SUP would be much cheaper than the Proposed Action, imposing less of a financial burden on the City and the local community.

III. LAND ADJUSTMENT AND CONVEYANCE

The Draft EA fails to describe what the land status under the Deschutes National Forest Land and Resource Management Plan (“LRMP”) is for the 48 acres proposed for conveyance. Under the Deschutes LRMP, standards and guidelines (“S&Gs”) are described for landownership adjustments. S&G LA-2 describes three groups of land to encourage “the best land pattern the Forest can seek” (LRMP at 4-87). Based on the information within the Draft EA and the land use allocations within the 48 acres proposed for conveyance (e.g. MA-7 and MA-9), LandWatch concludes that the majority, if not all, of the Project area falls into LA-2 Group 2.

The LRMP describes Group 2 lands as:

These lands are needed for a special type of management and allocated for that purpose. These land-use allocations include, but are not limited to, Special



Interest Areas; unroaded areas; and recreation, visual, soils, watershed, wildlife, range, and timber.

In most situations, the objective is to retain National Forest ownership and acquire private land.

(LRMP at 4-87). Given the general guidance to retain ownership of lands within the Project area, especially given the special type of management that is currently being applied under the LRMP, LandWatch has concerns about the potential impacts of conveying these 48 acres. At a minimum, we strongly emphasize the Forest Service's obligation to conduct a thorough analysis of the potential impacts of conveying these lands on the myriad resources under the Forest Service's purview.

IV. DEER HABITAT

As explained above, the Forest Service has substantive and procedural duties to analyze and protect public resources and values, including wildlife and environmental values, under the Townsite Act. *See also* Draft EA at 6 (admitting that under the Townsite Act, "the [Forest Service] must assess the environmental effects of the applicant's proposed development and the mitigating effects of the applicable state and local laws, zoning ordinances, covenants and standards (Forest Service Handbook [FSH] 5509.11 - Title Claims, Sales, and Grants Handbook, Section 22.32. [USDA FS, 2021])").

The Draft EA goes on to describe relevant LRMP land use allocations that overlap with the proposed Project area:

The Proposed Action is in MA-7 - Deer Habitat, as well as ODFW Deer Winter Range. Cover would be reduced as a result of tree removal for the road realignment.

Mule deer are wide-ranging, surrounding the Proposed Action Area, and would avoid the area during Proposed Action activities. Deer use within the Proposed Action Area has been limited by recreational use and the presence of people.

The Proposed Action is consistent with the LRMP. Although the Proposed Action would have a small negative impact on mule deer, the continued viability of this species is expected on NFS lands on the DNF.



(Draft EA at 26). The Draft EA further describes the Project area:

According to the LRMP, the Proposed Action Area is not in ODFW Key Elk Habitat, but a portion is within an area designated as MA-7 - Deer Habitat (see Figure 4, Wildlife Management Area within the Proposed Action Area). Approximately 24-acres of MA-7 - Deer Habitat are contained within the study area, representing 0.0001 percent of the total 208,900-acres of designated deer habitat in the DNF. In addition, a small portion of the eastern side of the Proposed Expansion Area is within ODFW-designated elk winter range, and the entire Proposed Action Area ODFW-designated deer winter range. Proposed Action activities for realigning the road could impact deer and elk by removal of trees that provide cover, and the Proposed Expansion Area would remove 48-acres of NFS land from the DNF; this is 0.00003 percent of the 1.6 million-acres that currently comprise the DNF. PDC were developed to help protect deer and elk during Proposed Action activities and minimize impacts to these species.

(Draft EA at 30). While the Forest Service recognizes that 48 acres of the DNF will be conveyed to the City, and 24 acres of MA-7 Deer Habitat will functionally be removed from the Deschutes National Forest, the Draft EA presents no actual analysis of the potential impact to mule deer habitat from the proposed conveyance. A mere description of the percentages of the MA-7 Deer Habitat and lands within the Deschutes National Forest proposed for conveyance does not satisfy the Townsite Act's requirements and NEPA's hard look standard and fails to meaningfully inform agency decision-making on potential impacts to mule deer and their habitat.

Further, there are no PDCs that provide any "help to protect deer and elk" that relate to the proposed land conveyance. For example, PDCs described in the Draft EA relating to seasonal restrictions for the Tumalo Winter Range Cooperative Closure would not apply to the 48 acres if owned by the City. How would this impact mule deer in the area?

The Draft EA further states that "[i]f there are relevant LRMP goals, objectives, standards, or guidelines for a specific resource area, those are discussed under the applicable resource in Chapter 3" (Draft EA at 8). However, as shown above, the Draft EA fails to provide any discussion of the relevant LRMP management objectives, standards or guidelines, and fails to consider the impacts of the proposed land conveyance on MA-7 Deer Habitat.

The Deschutes LRMP describes the goal of MA-7 Deer Habitat as "[t]o manage vegetation to provide optimum habitat conditions on deer winter and transition ranges while providing some domestic livestock forage, wood products, visual quality and recreation opportunities" LRMP at



4-113). The LRMP goes on to describe general themes and objectives for MA-7 Deer Habitat, including ideal conditions for cover and forage where “cover and forage areas should be in close proximity for optimum use by big game, with cover making up 40 percent of the land area. Approximately three-quarters of cover areas should be thermal cover with the remainder being hiding areas” (LRMP at 4-113). Specific MA-7 S&Gs that would no longer apply to the lands proposed for conveyance include but are not limited to M7-1, M7-13, M7-14, M7-20, M7-22.

The Draft EA includes no analysis of how applicable state and local laws, zoning ordinances, covenants, and standards might provide a mitigating effect on these resources. As such, the Forest Service failed to discuss these relevant provisions of the LRMP and failed to analyze the potential impact of the proposed conveyance on MA-7 Deer Habitat, including an analysis of the change in vegetation management that would occur under City ownership and development. The Forest Service must correct these flaws to comply with the Townsite Act by, *inter alia*, developing mitigation measures that protect Deer Habitat and requiring the City to comply with them as a condition of the land conveyance, or propose and adopt an alternative that conveys less land or uses a SUP in order to protect more deer habitat through federal ownership.

V. SCENIC VIEWS

As explained above, the Forest Service has substantive and procedural duties to analyze and protect public resources and values, including scenic and environmental values, under the Townsite Act. *See also* Draft EA at 6 (admitting that under the Townsite Act, “the [Forest Service] must assess the environmental effects of the applicant’s proposed development and the mitigating effects of the applicable state and local laws, zoning ordinances, covenants and standards (Forest Service Handbook [FSH] 5509.11 - Title Claims, Sales, and Grants Handbook, Section 22.32. [USDA FS, 2021])”).

The Draft EA states that “the Proposed Action would comply with the DNF LRMP S&Gs for Scenic Views (MA- 9 - Scenic Views) (see list in the Relevant Laws, Regulations, and Policy section above) through design of the road realignment, associated screening, and PDC” (Draft EA at 53).

The Draft EA states that “[i]f there are relevant LRMP goals, objectives, standards, or guidelines for a specific resource area, those are discussed under the applicable resource in Chapter 3” (Draft EA at 8)



However, like the section above on Deer Habitat, the Draft EA fails to provide any discussion of the relevant LRMP management objectives, standards or guidelines, and fails to consider impacts of the proposed land conveyance on Scenic Views.

As the Draft EA describes, the Project area overlaps significantly with MA-9 Scenic Views. The LRMP describes the goal of MA-9 Scenic Views as areas where “[l]andscapes seen from selected travel routes and use areas will be managed to maintain or enhance their appearance. To the casual observer, results of activities either will not be evident or will be visually subordinate to the natural landscape” (LRMP at 4-121). Here, the casual observer is very likely to notice the significant changes that would result from the City’s proposed development.

Among other relevant S&Gs for MA-9 Scenic Views, M9-5, M9-6, M9-11, M9-13, M9-19, and M9-33 relate to vegetation management and would no longer apply to the 48 acres if conveyed to the City. Further, M9-7 and M9-26 require that any proposed activity in MA-9 Foregrounds will be reviewed and analyzed by a landscape architect to determine necessary actions to retain the desired visual condition and the predicted visual condition following the activity.

The Draft EA includes no analysis of how applicable state and local laws, zoning ordinances, covenants and standards might provide a mitigating effect on the Scenic Views resources. Here, the Forest Service failed to analyze the potential impacts of the proposed conveyance on Scenic Views MA-9, including by failing to analyze the change in vegetation management that would occur under City ownership and development. Further, there is no discussion of a landscape architect reviewing the proposed activity in Foregrounds, as required by the LRMP.

VI. EASTSIDE SCREENS

As discussed above, for conveyances under the Townsite Act, “the [Forest Service] must assess the environmental effects of the applicant’s proposed development and the mitigating effects of the applicable state and local laws, zoning ordinances, covenants and standards (Forest Service Handbook [FSH] 5509.11 - Title Claims, Sales, and Grants Handbook, Section 22.32. [USDA FS, 2021])” (Draft EA at 6). The Forest Service must also analyze the impacts on environmental, wildlife, and scenic values and require conditions to protect the surrounding Forest.

The Forest Service failed to analyze the impact to large trees on the 48 acres of land proposed for conveyance. Under the Eastside Screens, the Forest Service generally cannot authorize the cutting of any trees ≥ 21 inches diameter at breast height (“DBH”).



There is no discussion or data presented on the current number of trees ≥ 21 inches DBH on the 48 acres proposed for conveyance. No other applicable state and local laws, zoning ordinances, covenants and standards would provide a mitigating effect on the loss of large trees should they occur within the Project area.

The Forest Service failed to analyze these potential impacts in the Draft EA and failed to provide any baseline data on the presence of large trees. The Forest Service's failure to demonstrate the conveyance's consistency with the Forest Plan violates NFMA, and the Townsite Act's substantive and procedural requirements related to protecting public resources and values, including environmental values.¹⁰

VII. IMPACTS TO FISH AND WILDLIFE HABITAT

As explained above, the Forest Service has substantive and procedural duties to analyze and protect public resources and values, including wildlife and environmental values, under the Townsite Act. *See also* Draft EA at 6 (admitting that under the Townsite Act, “the [Forest Service] must assess the environmental effects of the applicant’s proposed development and the mitigating effects of the applicable state and local laws, zoning ordinances, covenants and standards (Forest Service Handbook [FSH] 5509.11 - Title Claims, Sales, and Grants Handbook, Section 22.32. [USDA FS, 2021])”).

The Draft EA states that “[a]lthough direct wildlife impacts from the Proposed Action are expected, any potential impact represents a small loss relative to the large area of natural habitat in the surrounding area and would be offset through BMPs and measures to minimize unnecessary wildlife or habitat disturbance during construction of road realignment” (Draft EA at 24). While the Forest Service provides a high-level overview of effect determinations for select species, these reviews fail to adequately consider the impact on wildlife habitat of removing 48 acres from the Deschutes National Forest, the loss of associated Forest Plan standards and guidelines for habitat, and the impact on fish and wildlife of the subsequent development of those acres.

Further, no “BMPs and measures to minimize unnecessary wildlife or habitat disturbance” are described for the land conveyance or future development. No other applicable state and local laws, zoning ordinances, covenants, and standards would provide a mitigating effect on these impacts. Accordingly, the Forest Service should have, but failed to, analyze and impose mitigation measures that the City must adopt as part of any land conveyance to protect public values in this federal land, as required by the Townsite Act.

¹⁰ *See* 36 C.F.R. § 254.22(a)(3).



VIII. FAILURE TO PROVIDE ADEQUATE INFORMATION AND DATA

Information essential to facilitating meaningful public review and ensuring an informed agency decision is missing from the Draft EA. This includes key analyses cited by the Forest Service in the Draft EA, such as the Wildlife Effects Analysis, the Botany Effects Analysis, and Invasive Plant Risk Assessment. For nearly all Forest Service projects, these are routine documents provided to the public as part of the NEPA process. Without this information, it is impossible for the public to determine whether the agency has conducted an informed process based on the best available information.

IX. INCOMPLETE AND INACCURATE ENVIRONMENTAL BASELINE

The Forest Service did not provide sufficient data regarding the baseline conditions in the Project area to support its conclusions. NEPA's primary purposes are to ensure fully informed decision-making by the agency and to provide for public participation in the environmental analysis and decision-making process.¹¹

To comply with NEPA's "hard look" mandate, an agency must consider and disclose information about the resources it manages so that an adequate baseline exists to evaluate the environmental impacts of a proposed action.¹² Without establishing the baseline conditions in the Project area before the action begins, "there is simply no way to determine what effect the [action] will have on the environment and, consequently, no way to comply with NEPA."¹³

As explained above, the Forest Service has substantive and procedural duties to analyze and protect public resources and values, including wildlife and environmental values, under the Townsite Act. *See also* Draft EA at 6 (admitting that under the Townsite Act, "the [Forest Service] must assess the environmental effects of the applicant's proposed development and the mitigating effects of the applicable state and local laws, zoning ordinances, covenants and standards (Forest Service Handbook [FSH] 5509.11 - Title Claims, Sales, and Grants Handbook, Section 22.32. [USDA FS, 2021])"). Without adequate baseline information, it is impossible for the agency to fulfill these duties.

¹¹ 36 C.F.R. § 220.5(e)

¹² *See Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1379-80 (9th Cir. 1998).

¹³ *Half Moon Bay Fishermans' Marketing Ass'n v. Carlucci*, 857 F.2d 505, 508 (9th Cir. 1988); *see also Am. Rivers v. FERC*, 201 F.3d 1186, 1195 & n.15 (9th Cir. 2000) (noting that an accurate and complete baseline against which to compare potential effects of reasonable alternatives is "critical" to the NEPA process).



Among other missing, incomplete, or inaccurate elements of the Draft EA baseline, the Forest Service failed to establish an accurate environmental baseline to analyze potential impacts on Tumalo Creek, large tree structure, and baseline fish and wildlife habitat requirements.

X. TRIBAL TREATY RIGHTS

LandWatch acknowledges that Central Oregon, including those lands managed by the Forest Service, is the original homeland of the Wasq'u (Wasco) and Tana'ma (Warm Springs) Tribes. The Klamath and Molalla tribes—among others—have also frequented this area, as have the Nama (Paiute), who were eventually forcibly relocated to the Warm Springs Reservation. What we now know as Central Oregon is the ceded lands of the Warm Springs Tribes, where they retain the right to hunt, fish, and gather.

The Forest Service must consult early and often with Tribal governments to ensure that the interests of indigenous people are brought forward in the planning process and that lands identified for conveyance do not conflict with landscapes of cultural significance or rights on ceded lands. Moreover, the Townsite Act requires the Forest Service to determine if the conveyance “would substantially affect or impair important...historical, archeological, or cultural values.”¹⁴

XI. IMPACTS TO TUMALO CREEK

The City of Bend currently has state-issued water rights for 36.1 cfs of surface waters from Tumalo Creek, the City's primary water source (See figure 1 below).

¹⁴ 36 C.F.R. § 254.22(a)(3)



Table 2.2: Total Rates of Municipal and Quasi-Municipal Water Rights in the Upper Deschutes Basin. All data from OWRD's Water Rights Information System except as noted: Bend data from City of Bend Water Management and Conservation Plan (2011), Avion Water Co. data includes "Group Domestic" water rights acquired by Avion; data from Avion Water Co. Where applicable, rates show the maximum allowed rate (i.e., peak season) and do not include irrigation, hydropower, or other water rights held by water service providers.

Water Right held by Municipal Providers	Combined Maximum Authorized Rates (cfs)
City of Bend (Groundwater)	68.24
City of Bend (Surface water)	36.10*
City of Redmond	46.87
City of Prineville	24.56
City of Sisters	7.12
City of La Pine	2.23
Water Rights held by Quasi-Municipal Providers	
Avion Water Co.	58.36
Roats Water System, Inc.	4.10
Agate Water Co.	3.59
Deschutes Valley Water District	41.20
Sunriver Water, LLC	7.30
Cline Butte Utility Co.	6.34
Other	56.10
Total Combined Rate on Water Rights	359.70

*The City of Bend's 2013 Special Use Permit issued by the US Forest Service for its new surface water system limits the diversion of surface water from Bridge Creek/Tumalo Creek to 18.2 cfs. The permit has a term of 20 years.

Figure 1. Table 2.2 from the 2019 Upper Deschutes River Basin Study's technical memo *Task 1A – Water right Assessment: Historical Diversions and Instream Water Rights in the Deschutes Basin*.

The Special Use Permit ("SUP") BEN 1158 was granted by the Forest Service to the City of Bend in 2017 and authorizes a right-of-way to the City to operate and maintain a water system located on the Deschutes National Forest. The Forest Service SUP expires 12/31/2037.

As stated in the Draft EA, "[u]nder City Code and its Forest Service SUP, City flows are limited to a maximum of the demand "for municipal use," up to a maximum of 18.2 cubic feet per second from the Bridge Creek point of diversion (see Bend Code Section 14.10.090; SUP BEN1158)" (Draft EA at 57).

The Draft EA further states that the "temporal boundary for the Proposed Action is 50 years. The land transfer to the City would be indefinite" (Draft EA at 29). Given the Draft EA analysis period is 38 years longer than the current SUP, it is reasonable to assume that the current restriction on the City's diversion at the Bride Creek facility could change under renewal of the SUP, potentially increasing to more than 18.2 cfs, and up to 36.1 cfs.

Further, a limit of 18.2 cfs does not appear to be included in the actual text of the SUP. Instead, discussion of limiting the City's Bridge Creek diversion to 18.2 cfs appears in the City of Bend



Bridge Creek Water Supply System Operation and Maintenance Plan (“Maintenance Plan”). The Maintenance Plan states that “[t]he provisions of this Plan shall be incorporated by reference as terms and conditions of the special-use permit described above. Unlike the SUP, however, this Plan may be amended as conditions change” (Maintenance Plan at 3). Given that the Maintenance Plan may be amended outside of the SUP renewal process, this further raises questions about the assumption that the City will limit its diversion from Bridge Creek to 18.2 cfs for the next 50 years.

In fact, the City attempted to increase the diversion at Bridge Creek above 18.2 cfs in 2012 during the most recent SUP renewal process. Given this, it is reasonable to assume that the City will seek to increase its surface diversion under the SUP renewal process in either 2037 or 20 years later in 2057, as current and future SUPs expire. Both renewal timeframes would be within the 50-year temporal boundary of the Proposed Action. Similarly, changes to the City code are foreseeable as new city councilors are elected.

The Draft EA does describe that “[i]n-conduit hydropower projects generally exhibit limited or negligible environmental impact because they recover energy in a hydraulic system that is otherwise operating with energy dissipation or other operational control” (Draft EA at 57). However, this very limited discussion of the potential environmental impacts of in-conduit hydropower fails to consider the City increasing its diversion of surface water from Tumalo Creek under its SUP to support power generation and municipal consumption.

In the absence of an alternative that considers a condition on the land conveyance that commits the City of Bend to limiting its diversion from Tumalo and Bridge Creeks to 18.2 cfs, the Forest Service must consider and analyze any potential impacts to Tumalo and Bridge Creeks from the Proposed Action. Here, the Draft EA fails to conduct this analysis.

To address these inconsistencies, the Forest Service must condition the land conveyance on the City adopting a stronger ordinance that limits the diversion from Bridge Creek to 18.2 cfs permanently, or at least for the next 50 years. Such a condition falls within the Forest Service’s authority and duty under the Townsite Act and the Forest Plan to Bridge Creek, its fish and wildlife habitat, and other public values in the area.

Overall, the Draft EA’s inadequate analysis and lack of conditions fall short of the agency’s obligations under the Townsite Act and other applicable laws to protect Bridge Creek and Tumalo Creek, surrounding Forest Land, and related public resources and values.



XII. STATE AND LOCAL LAND USE REGULATIONS

The 48 acres proposed for conveyance to the City of Bend are designated “Forest” in the Deschutes County Comprehensive Plan and zoned “F1” by Deschutes County. Forest lands are protected for forest uses under Oregon statewide land use planning Goal 4. The 48 acres are also subject to two Deschutes County overlay zones: the Landscape Management (LM) overlay zone and Wildlife Area (WA) overlay zone. The LM zone provides protections for scenic views from inventoried roadways, and the WA zone provides protections to deer winter range and elk range on the subject property. Both of the LM and WA zones protect significant resources inventoried by Deschutes County under statewide land use planning Goal 5.

Although the Townsite Act and Forest Service Handbook require assessment on the environmental effects of the applicant’s proposed development and the mitigating effects of the applicable state and local laws, zoning ordinances, covenants and standards, the Draft EA does not analyze such effects.

We are further concerned that the City has apparently discussed with Deschutes County plans to redesignate and rezone the 48-acre subject property from its current Forest designation. If those plans are indeed in the works, the Draft EA must disclose them as reasonably foreseeable actions and must analyze the potential effects of such land use changes in its (currently missing) assessment of the mitigating effects of applicable state and local laws and zoning ordinances required under the Townsite Act.

XIII. CONCLUSION

Thank you for considering these comments. Please retain Central Oregon LandWatch on your list of interested public for this project.



Sincerely,



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