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11 IN THE UNITED STATES DISTRICT COURT  
12 FOR THE DISTRICT OF IDAHO

13 NORTH IDAHO COMMUNITY ACTION	)	Case No. CV05-273-N-EJL
14 NETWORK,	)	
	)	
15 Plaintiff,	)	
	)	MEMORANDUM OF POINTS
16 vs.	)	AND AUTHORITIES IN SUPPORT
	)	OF PLAINTIFF'S MOTION FOR
17 U.S. DEPARTMENT OF	)	SUMMARY JUDGMENT
18 TRANSPORTATION, <i>et al.</i> ,	)	
	)	
19	)	
20 Defendants.	)	
	)	
21 _____	)	

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<u>No.</u>	<u>Description</u>
Exhibit 1	Standing Declaration of Liz Sedler
Exhibit 2	Standing Declaration of Nancy F. Renk
Exhibit 3	The Army Corps of Engineer’s (“COE’s”) March 15, 2007 letter to Mr. David Karsann, Idaho Transportation Department, Re: 404 Permit Application
Exhibit 4	Agency correspondence regarding the Sandpoint Tunnel Alternative
Exhibit 5	Declaration of Steven J. Potter
Exhibit 6	Agency correspondence regarding the US-95 Project and impacts to the historic railroad Depot
Exhibit 7	Map of the four segment US-95 Project
Exhibit 8	Map of the <i>original design</i> of the US-95 Project (the Sand Creek Two-Lane Alternative) in the 1999 EIS
Exhibit 9	Map of the <i>eleven design changes</i> to the US-95 Project in the 2005 EA
Exhibit 10	Map of the <i>plan to dredge</i> Sand Creek in the 2006 Re-Evaluation
Exhibit 11	Opposition to the proposed Sand Creek Byway (Newspaper Ads)

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<sup>1</sup> Plaintiff’s Exhibits are properly before the Court. Exhibits 1-2 are submitted to demonstrate that Plaintiff meets the minimum requirements for Article III standing. Exhibit 3 is follow-up correspondence from the COE regarding Defendants’ 404 permit application which is included in the administrative record (AR). See AR 2591, 2644. Exhibit 4 is correspondence on the tunnel alternative missing from the AR. Exhibit 5 is a declaration from Steven Potter to authenticate the correspondence in Exhibit 4. Exhibit 6 is correspondence regarding the Depot missing from the AR. Exhibits 7-10 are copies of maps taken from the AR. Exhibit 11 includes local newspaper ads taken from the AR (see AR 2664).

1 INTRODUCTION

2 Plaintiff, North Idaho Community Action Network (“NICAN”) – an organization whose  
3 members are Sandpoint residents and downtown businesses owners – hereby submits this  
4 memorandum in support of its motion for summary judgment. At issue in this case is the Federal  
5 Highway Administration’s and Idaho Transportation Department’s (“Defendants”) controversial  
6 plan to convert Sandpoint’s historic waterfront district into an elevated freeway known as the US  
7 Highway 95 Sandpoint North and South Project (“US-95 Project” or “the Project”). As outlined  
8 below and evidenced by the record, in developing, funding, and authorizing the US-95 Project,  
9 Defendants have violated the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4332,  
10 and § 4 (f) of the Department of Transportation Act, 49 U.S.C. § 303.<sup>2</sup>

12 STANDARD OF REVIEW

13 As this is a record review case brought under the Administrative Procedures Act  
14 (“APA”), 5 U.S.C. § 706, the Court “may direct that summary judgment be granted to either  
15 party based upon . . . review of the administrative record.” Great Basin Mine Watch v. Hankins,  
16 456 F. 3d 955, 961 (9<sup>th</sup> Cir. 2006). Under the APA, the Court is to set aside agency action that is  
17 “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or found  
18 to be “without observance of procedure required by law.” 5 U.S.C. §§ 706 (2)(A), (D). Judicial  
19 review must be “searching and careful.” Ocean Advocates v. U.S Army Corp. of Engineers, 402  
20 F.3d 846, 858 (9<sup>th</sup> Cir. 2005). The Court must “not rubber-stamp” administrative decisions but  
21 “ensure that [the] agency has taken the requisite ‘hard look’ at the environmental consequences  
22 of its proposed action, carefully reviewing the record to ascertain whether the agency decision is  
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26  
27 <sup>2</sup> See Plaintiff’s statement of material facts, submitted herewith, for a detailed description  
28 of the Project, including the original design, changes, and dredging for the Sand Creek Byway.  
See also U.S. Fish & Wildlife (“FWS”) AR E-14 at 9-27 (detailed description of entire Project).

1 ‘founded on a reasoned evaluation of the relevant factors.’” Wetlands Action Network v. U.S.  
2 Army Corp. of Engineers, 22 F. 3d 1105, 1114 (9<sup>th</sup> Cir. 2000) (citations omitted).

### 3 ARGUMENT

#### 4 I. NEPA VIOLATIONS

5 NEPA “promotes its sweeping commitment to ‘prevent or eliminate damage to the  
6 environment’ . . . by focusing Government and public attention on the environmental effects of  
7 proposed agency action.” Marsh v. ONRC, 490 U.S. 360, 371 (1989). By so doing, “NEPA  
8 ensures that the agency will not act on incomplete information, only to regret its decision after it  
9 is too late to correct.” Id. Similarly, the “broad dissemination of information mandated by NEPA  
10 permits [the] public and other government agencies to react to the effects of a proposed action at  
11 a meaningful time.” Id.

12 Here, Defendants violated NEPA by: (1) failing to assess the *combined impact* of the  
13 original design, eleven design changes, and dredging needed for the Sand Creek byway segment  
14 of the Project in a single environmental impact statement (“EIS”); (2) deferring consideration of  
15 impacts for three of the four segments of the Project; (3) failing to consider *any* alternatives to  
16 the current, proposed action; (4) failing to prepare a supplemental environmental impact  
17 statement (“SEIS”); (5) failing to take a hard look at impacts to Sand Creek; and (6) failing to  
18 take a hard look at the impacts to historic properties.

#### 19 A. The Original Design, Eleven Changes, and Dredging for the Sand Creek Byway 20 Segment are Connected Actions that Need to be Included in a Single EIS

21 NEPA requires that all *connected actions* be addressed in a single EIS. See 40 C.F.R. §  
22 1508.25; Great Basin, 456 F. 3d at 968-69. Actions are “connected” if they “automatically  
23 trigger other actions . . . will not proceed unless other actions are taken previously . . . [or] are  
24 interdependent parts of a larger action.” 40 C.F.R. § 1508.25 (a)(1). The “purpose of this  
25 requirement is ‘to prevent an agency from dividing a project into multiple ‘actions,’ each of  
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28

1 which individually has an insignificant environmental impact, but which collectively have a  
2 substantial impact.” Great Basin, 456 F. 3d at 969. To determine whether multiple actions are  
3 “so connected as to mandate consideration in a single EIS,” the Ninth Circuit applies an  
4 “independent utility” test. See id. at 969. The crux “of the test is whether the actions ‘would  
5 have taken place with or without the other and thus had ‘independent utility.’” Id.

6 Applying the Ninth Circuit’s test, Defendants’ *multiple actions* for the Sand Creek byway  
7 segment of the US-95 Project, i.e., the original design in the 1999 EIS, eleven changes in the  
8 2005 EA, and dredging plan in the 2006 re-evaluation are connected actions that have no  
9 “independent utility.” See Administrative Record (“AR”) 2058 (original design in EIS); AR 2765  
10 (changes in EA); AR 2836 (dredging in re-evaluation).<sup>3</sup> The eleven design changes to the Sand  
11 Creek byway in the EA are *only* needed because of the existence of the original design in the EIS  
12 and there would be no need to dredge Sand Creek, as outlined in the re-evaluation, without the  
13 proposed changes in the EA. See e.g., AR 2836 at 3-8 (dredging needed for new shoreline  
14 extension). These three actions are thus connected or “interdependent parts” of the larger Sand  
15 Creek byway segment that must be included in a single EIS. See Great Basin, 456 F. 3d at 969.<sup>4</sup>

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19 <sup>3</sup> The AR citations in this memorandum are to the document’s index number. This is a  
20 convenient way to access the AR because the Court can use the index numbers to hyperlink to  
21 the actual documents. Within the documents, Plaintiff cites to the actual page numbers in the  
22 document whenever possible (e.g., AR 2765 at IV-6). If no page numbers are provided, then the  
citation is the actual, sequenced AR page number in the document.

23 <sup>4</sup> Defendants’ original design, changes, and dredging for the Sand Creek byway segment  
24 also qualify as “cumulative actions” that need to be included in a single EIS. See 40 C.F.R. §  
25 1508.25 (a). Addressing these multiple actions in a single EIS is the *only way* Defendants can  
26 adequately assess the cumulative effects on the environment. See Great Basin, 456 F.3d at 969;  
27 Ocean Advocates, 402 F. 3d at 868. At present, the changes to the Project in the EA are  
28 considered in isolation without *any* discussion of the combined effect of the changes in relation  
to the original design and proposed dredging activity. See AR 2765 at I-1 (“*Only* these additions  
and changes are the subject of this [EA]”). The same is true with respect the re-evaluation. See  
AR 2836 at 1-1 (re-evaluation *only* addresses the changes since issuance of FONSI).

1 B. Defendants Cannot Defer Consideration of Impacts for Three Segments of the  
2 US-95 Project

3 NEPA “is not designed to postpone analysis of an environmental consequence to the last  
4 possible moment. Rather, it is designed to require such analysis as soon as it can reasonably be  
5 done.” Kern v. Bureau of Land Management, 284 F.3d 1062, 1072 (9<sup>th</sup> Cir. 2002). If “it is  
6 reasonably possible to analyze the environmental consequences in an EIS . . . the agency is  
7 required to perform that analysis.” Id. In other words, an agency may not “avoid an obligation to  
8 analyze in an EIS environmental consequences that foreseeably arise from [a proposed action] . .  
9 . merely by saying that the consequences are unclear or will be analyzed later.” Id. Reasonable  
10 “forecasting and speculation is implicit in NEPA,” and agencies are not allowed to “shirk their  
11 responsibilities under NEPA by labeling any and all discussion of future environmental effects as  
12 [a] ‘crystal ball inquiry.’” Id.

13  
14 In this case, even though part of the “proposed action” and “preferred alternative,”  
15 Defendants defer consideration of impacts in the Sagle to Long Bridge, Long Bridge Widening,  
16 and Sandpoint to Kootenai Cutoff Road segments of the US-95 Project (hereinafter “three  
17 segments”) to some future date and some yet-to-be announced process. See AR 2765. Indeed,  
18 Defendants do not commit to consider such impacts in a NEPA document, stating only that an  
19 “analysis of potential resource impacts” for the three segments will be conducted at a later date,  
20 once the “design and construction” phase for the segments is scheduled. See AR 2765 at II-1, II-  
21 2; at III-1; at V-1. Without question, this “defer consideration of impacts” approach for the  
22 proposed US-95 Project violates NEPA. See Kern, 284 F.3d at 1072; 40 C.F.R. § 1502.16 (must  
23 assess the environmental impacts of all “proposed actions”).<sup>5</sup>  
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25  
26 <sup>5</sup> This is not (as Defendants will likely argue) a situation in which a more detailed  
27 analysis for the three segments is not possible because the exact specifications and design of the  
28 segments remains unknown. On the contrary, Defendants know the precise location and  
widening work needed for the other three segments of the US-95 Project. See AR 2058 at iv  
(map of entire Project). In fact, Defendants provided detailed information on the three segments

1 C. Defendants’ Failure to Consider *Any* Alternatives to the Current, Proposed Action  
2 is Arbitrary and Capricious

3 NEPA requires Defendants to consider “alternatives to the *proposed action*.” 42 U.S.C. §  
4 4332 (2)(C)(iii) (emphasis added). The alternatives analysis is “the heart of the [EIS]” because it  
5 presents “impacts of the proposal and the alternatives in comparative form, thus sharply defining  
6 the issues and providing a clear basis for choice among options.” 40 C.F.R. § 1502.14. By so  
7 doing, the alternatives requirement “guarantees that agency decision makers have before them  
8 and take into account all possible approaches to a particular project . . . which would alter the  
9 environmental impact and the cost-benefit analysis.” Pit River Tribe v. U.S. Forest Service, 469  
10 F. 3d 768, 785 (9<sup>th</sup> Cir. 2006). Here, while Defendants considered alternatives to the preferred  
11 “Sand Creek Two-Lane Alternative” in 1999 EIS Defendants failed to consider *any* alternatives  
12 to the current proposed action outlined in the 2005 EA and 2006 re-evaluation. See AR 2765 at I-  
13 2, AR 2836. As such, to date, Defendants have *never done* a comparative analysis of the  
14 currently proposed Sand Creek Byway (i.e., the three-lane highway, dredging and filling of Sand  
15 Creek, shoreline extension, bike path, lightweight fill structure, etc. . .) with other alternatives.  
16 Nor have Defendants weighed the environmental impacts of the currently proposed project  
17 against other alternatives or conducted a comparative cost-benefit analysis as required by NEPA.  
18 See id.; 42 U.S.C. § 4332 (2)(C)(iii); Pit River Tribe, 469 F. 3d at 785.

19  
20 D. Defendants’ Decision Not to Prepare an SEIS is Arbitrary and Capricious

21 NEPA requires Defendants to update their original EIS with a supplemental EIS (“SEIS”)  
22 whenever changes, new information, or circumstances result in *significant* environmental  
23

24  
25 to the U.S. Fish & Wildlife Service (“FWS”) outside the NEPA process. See AR 2836, Appendix  
26 A at 4-7 (discussing, in detail, the Long Bridge widening including need for 1,000 pilings); see  
27 also AR 619 at 4 (EPA’s comments urging more analysis on entire project); AR 2492 at 3-4  
28 (FWS noting that NEPA documents failed to contain “adequate description of all four  
[segments]”). AR 2492 at 3-4. Moreover, Defendants now acknowledge that they have finalized  
the design and specifications of the Sandpoint to Kootenai Cutoff segment. See AR 2836 at 2-2.

1 impacts not evaluated in the original EIS. See 23 C.F.R. § 771.130 (a). As explained by the  
2 courts, Defendants’ responsibilities “do not end with the initial [EIS]; supplemental  
3 documentation ‘is at times necessary to satisfy [NEPA’s] ‘action-forcing’ purposes.” Price Road  
4 Neighborhood Assoc. v. Dep’t of Transportation, 113 F. 3d 1505,1509 (9<sup>th</sup> Cir. 1997). Indeed, it  
5 “would be incongruous with [NEPA’s] approach to environmental protection, and with the Act’s  
6 manifest concern with preventing uninformed action, for the blinders to adverse environmental  
7 effects, once unequivocally removed, to be restored prior to the completion of agency action  
8 simply because the relevant proposal has received initial approval.” Marsh, 490 U.S. at 371.  
9 This does not mean, however, that an agency must prepare an SEIS every time new information  
10 comes to light. Id. at 373. Rather, preparation of an SEIS is only required when the changes, new  
11 information, or circumstances may result in *significant* environmental impacts. 23 C.F.R. §  
12 771.130 (a).<sup>6</sup>

14 If Defendants are “uncertain of the significance of the new impacts,” they are required to  
15 prepare an environmental assessment (“EA”) to “assess the impacts of the changes, new  
16 information, or new circumstances.” 23 C.F.R. § 771.130 (c). If the EA determines that the  
17 impacts are significant or if substantial questions are raised as to whether or not significant  
18 impacts may occur an SEIS *is required*. See 23 C.F.R. § 771.130 (a); Ocean Advocates, 402 F.  
19 3d at 864-65. Here, Defendants’ determination that the eleven changes outlined in the EA and  
20 dredging of Sand Creek (outlined in the re-evaluation) for the US-95 Project (hereinafter  
21 “changes”) does not warrant the preparation of an SEIS is arbitrary and capricious.<sup>7</sup>

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24 <sup>6</sup> The standard for preparing an SEIS under Defendants’ regulations differs slightly from  
25 the Council on Environmental Quality’s (“CEQ’s”) NEPA regulations. Compare 23 C.F.R. §  
26 771.130 (a) with 40 C.F.R. § 1502.9 (c)(1).

27 <sup>7</sup> Defendants decided not to prepare an SEIS on two occasions: (1) when issuing finding  
28 of no significant impact (“FONSI”) following release of the EA (see AR 2775, 2765 at VI-1);  
and (2) when issuing its “re-evaluation.” See AR 2836 at 5-1.

1           1.       The changes to the US-95 Project result in significant impacts not  
2                    previously evaluated in the EIS

3           The decision “whether to prepare a [SEIS] is similar to the decision whether to prepare an  
4 EIS in the first instance.” Marsh, 490 U.S. at 374. This is because both decisions require the  
5 acting agency to consider and evaluate what “‘significantly’ means.” Ocean Advocates, 402 F. 3d  
6 at 865; Price Road Neighborhood Assoc., 113 F. 3d at 1509-1510; Ecology Center v. Kimbell,  
7 2005 WL 1027203, \*4 (D. Idaho 2005) (same). The word “significantly” as used in NEPA  
8 “requires consideration of both context and intensity.” 40 C.F.R. § 1508.27. Context refers to the  
9 setting in which the proposed action takes place. See id. In this case, the setting is the historic  
10 waterfront district along Sand Creek – the “heart” of Sandpoint. See AR 2593 at 3. Intensity  
11 refers to the “severity of the impact.” Id. In considering the severity of the impact, the agency is  
12 directed to consider up to “ten factors that help inform the ‘significance of a project.’” Ocean  
13 Advocates, 402 F. 3d at 865. Application of six of these ten factors in this case reveals that both  
14 individually and in the aggregate, the changes to the US-95 Project will have a “significant”  
15 impact on the environment necessitating the need for an SEIS.

17                   a.       proximity and impacts to wetlands

18           First, in evaluating the intensity, Defendants are to consider the “unique characteristics of  
19 the geographic area such as proximity to . . . wetlands.” 40 C.F.R. § 1508.27 (b)(3). Here, the  
20 changes to the US-95 Project will have significant impacts to Sand Creek’s wetlands in ways not  
21 previously evaluated in the original EIS. See AR 2765 at IV-34; AR 2836 at 4-4; Ex. 3 at 1. In  
22 Defendants’ own words, “wetland impacts are anticipated *to be greater than* estimated in the  
23 EIS.” AR 2765 at IV-34 (emphasis added). Specifically, the changes to the Project will require  
24 extensive channel dredging of Sand Creek (see Ex. 10) and a “combined total of approximately  
25 84,750 cubic yards of fill material [to] be permanently and temporarily placed in Sand Creek  
26 below the ordinary high water mark” and “in wetlands.” AR 2836 at 4-4; see also AR 2591 (2.82  
27 acres of wetlands will be filled); AR 2593, Attachment A at 8 (A Technical Review of Impacts to  
28

1 Wetlands). Additional impacts to “undocumented” wetlands along the shoreline of Sand Creek,  
2 between Bridge Street and the railroad crossing at the north end of the project, are also  
3 anticipated. See Ex. 3 at 1 (Army Corp. of Engineers (“COE”) letter to Defendants).

4 b. controversy and uncertainty

5 Second, Defendants are to evaluate “the degree to which the effects on the quality of the  
6 human environment are likely to be highly controversial” and whether “the possible effects . . .  
7 are highly uncertain or involve unique or unknown risks.” 40 C.F.R. §§ 1508.27 (b)(4),(5). A  
8 “proposal is highly controversial when there is ‘a substantial dispute about the size, nature, or  
9 effect of the major federal action rather than the existence of opposition to use.” Anderson v.  
10 Evans, 371 F.3d 475, 489 (9<sup>th</sup> Cir. 2004) but see National Parks and Conservation Assoc. v.  
11 Babbitt, 241 F. 3d 722, 736 (9<sup>th</sup> Cir. 2001) (opposition from public deemed relevant by court).

13 Here, there is a substantial amount of controversy and uncertainty surrounding the  
14 changes to the US-95 Project. For instance, as mentioned earlier, even though the Sagle to Long  
15 Bridge, Long Bridge Widening, and Sandpoint to Kootenai Cutoff Road segments are part of the  
16 “proposed action” (indeed, they will connect to, and align with, the Sand Creek byway segment)  
17 there is no meaningful consideration of impacts for these three segments in Defendants’ NEPA  
18 documents. See AR 2765. As such, there remains considerable uncertainty about the overall  
19 size, cost, and impacts of the *entire* US-95 Project. The same is true with respect to Defendants’  
20 plan to dredge Sand Creek. See AR 2836; Ex. 10 (map). Uncertainty exists because Defendants  
21 *have never* considered the impacts of dredging Sand Creek in a NEPA document. See AR 2765.

23 Moreover, there is an enormous amount of controversy over how the changes to the  
24 Project will impact local businesses, tourism, and the overall aesthetic of downtown Sandpoint.  
25 See AR 2664; Ex. 11. Defendants downplay the affects in the EA, suggesting that changes will  
26 actually improve “business for downtown Sandpoint merchants” and result in a more “visually  
27 pleasing” setting. See AR 2765 at IV-18; at IV-65. Not only is this finding contradicted by  
28

1 Defendants' statements in the EIS (i.e., that some businesses may need to relocate or close), it is  
2 in conflict with the findings of an economist, other agencies, and local residents and downtown  
3 merchants who live and work along Sand Creek. See AR 2593 at Appendix C (Economic  
4 Impacts); Ex. 11; Ex. 3 at 12 (COE's concerns regarding aesthetic impacts to the waterfront); AR  
5 2664 at 3-6 (local merchants' concerns); AR 2633 (public comment).<sup>8</sup> In fact, approximately  
6 154 local businesses have come out against the Project. See Ex. 11 (AR 2664). These 154  
7 businesses are "deeply concerned about the economic impact of several years of construction  
8 along the entire eastern waterfront of Sandpoint and the loss of this extraordinary community  
9 asset forever." Id. While these 154 local businesses support "improving traffic downtown" they  
10 are equally unified in accomplishing this goal "without sacrificing the shorelines and skylines  
11 [which] define [Sandpoint's] . . . unique character and vitality." Id.<sup>9</sup>

12  
13 c. cumulatively significant impacts

14 Third, in evaluating intensity, Defendants are to assess whether the changes are "related  
15 to other actions with individually insignificant but cumulatively significant impacts." 40 C.F.R. §  
16 1508.27 (b)(7). Significance "exists if it is reasonable to anticipate a cumulatively significant  
17 impact on the environment." Id. A cumulative impact is defined as "the impact on the  
18 environment which results from the incremental impact of the action when added to other past,  
19

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20  
21 <sup>8</sup> Terry Moore, an economist with ECONorthwest, concluded that the "bypass will have  
22 some negative impacts on businesses in downtown Sandpoint." AR 2593 at 3-3 (Appendix C).  
23 Sandpoint "is rediscovering the amenity value of its waterfront and many businesses downtown  
24 are opening up the back of their establishments or moving entrances to the water side to take  
25 advantage of the amenity." Id. These "businesses on Sand Creek will be negatively effected by  
the visual impacts . . . along with the noise and dust from construction." Id.

26 <sup>9</sup> Also highly controversial are the US-95 Project's impacts on the historic railroad Depot  
27 and aquatic resources of Sand Creek. See Section II.B.2. below (on-going studies and impacts to  
28 Depot); Ex. 3 (COE's concerns regarding impacts to Sand Creek); AR 2363 (Idaho Dep't of Fish  
and Game's ("IDFG's") concerns over bike path and impacts to riparian areas); AR 2356 (Idaho  
Department of Lands' ("IDL's") concerns about fill to be placed in Sand Creek).

1 present, and reasonably foreseeable future actions.” Ocean Advocates, 402 F. 3d at 868. This  
2 cumulative analysis “must be more than perfunctory; it must provide a ‘useful analysis.’” Id.  
3 General “statements about possible effects and some risk” do not suffice and agencies cannot  
4 avoid significance “by terming the action temporary or by *breaking it down into small component*  
5 *parts.*” 40 C.F.R. § 1508.27 (b)(7) (emphasis added). Here, the eleven changes in the EA  
6 combined with the dredging plans outlined in the re-evaluation (along with other activities taking  
7 place in the region) will have a cumulatively significant impact on the natural function and  
8 aquatic resources of Sand Creek. Defendants, however, avoided looking at the cumulatively  
9 significant impacts to Sand Creek by breaking the US-95 Project down into small three  
10 component parts: (1) the original design in the 1999 EIS; (2) the eleven changes in the 2005 EA;  
11 and (3) the dredging of Sand Creek in the 2006 re-evaluation. See AR 2765 at I-1 (EA *only*  
12 addresses changes); AR 2836 at 1-1 (re-evaluation *only* addresses the changes since EA).

14 d. National Register of Historic Places

15 Fourth, in evaluating intensity, Defendants are to consider the “degree to which the action  
16 may adversely affect . . . sites . . . listed in or eligible for listing in the National Register of  
17 Historic Places.” 40 C.F.R. § 1508.27 (b)(8). While the original EIS did discuss impacts to  
18 historic sites based on a “ cursory field investigation,” the changes to the Project will now impact  
19 historic properties in ways not previously evaluated in the EIS. See AR 2765 at IV-60-63. For  
20 instance, Defendants’ new “Lightweight Fill Structure” includes extensive earthwork (including  
21 tearing up and replacing the Depot’s brick sidewalk) to build an embankment and retaining wall  
22 *within* the Depot’s protected 15 foot buffer. See AR 2550; see also Section II.B. below.

24 e. listed species

25 Fifth, evaluating intensity requires Defendants to consider the “degree to which the action  
26 may adversely affect [listed] species.” 40 C.F.R. § 1508.27 (b)(9). In this case, while the original  
27 EIS evaluated impacts to bald eagles along Sand Creek, the subsequent changes to the US-95  
28

1 Project and discovery of two new eagle nests near the Project suggest that eagles will be  
2 impacted in ways never previously analyzed in the EIS. See AR 2836 at F-1 to F-9. For instance,  
3 the new bike path will “bring substantially more pedestrians into the area than currently use this  
4 side of Sand Creek or than would occur under the original project design.” AR 2836 at F-8.  
5 Because “[p]edestrians are *more disruptive* to bald eagles than are passing vehicles . .  
6 .[p]edestrian use of the pathway would continue to *disturb and displace the occasional foraging*  
7 *bald eagle for the long term.*” Id. at F-8, F-9 (emphasis added).

8  
9 f. violation of federal laws

10 Lastly, to evaluate intensity, Defendants must consider whether “the action threatens a  
11 violation of Federal, State, or local law or requirements imposed for the protection of the  
12 environment.” 40 C.F.R. § 1508.27 (b)(10). Here, the changes to the US-95 Project threaten to  
13 violate: (1) § 4 (f) of the DOT Act (see Section II. below); (2) § 404 of the Clean Water Act  
14 (“CWA”), 33 U.S.C. § 1344; and (3) Executive Order 11990. Section 404 of the CWA, for  
15 instance, prohibits the dredging or filling of waters, including wetlands, if there is a “practicable  
16 alternative to the proposed discharge which would have less adverse impact on the aquatic  
17 ecosystem.” 40 C.F.R. § 230.10 (a). Executive Order 11990 includes similar requirements,  
18 mandating that Defendants avoid any “new construction in wetlands” if there is a practicable  
19 alternative. E.O. 11990 §§ 1, 2. A “practical alternative” is one that is “available and capable of  
20 being done after taking into consideration cost, existing technology, and logistics in light of the  
21 overall project purposes.” 40 C.F.R. § 230.10 (a)(2). Here, Defendants are unable to meet these  
22 requirements because as the COE suggests, there are a number of practicable alternatives to the  
23 Project that Defendants have not considered. See Ex. 3 at 5-7. These “include project designs  
24 which avoid or reduce the discharge of dredged or fill material into [Sand Creek].” Id.

25  
26 In sum, when viewed individually or in aggregate, the changes to the US-95 Project will  
27 have a significant effect on the environment requiring preparation of an SEIS. See Ocean  
28

1 Advocates, 402 F. 3d at 865 (the existence of only one intensity factor “may be sufficient to  
2 require preparation of an [SEIS]”). The new lane, off-ramp, shoreline extension, modified bridge  
3 structures (including the Lightweight Fill Structure), railroad embankment, bike path, habitat  
4 “enhancement” areas, north loop ramp, and dredging and filling of Sand Creek will have a  
5 significant effect on the environment as that term is defined under NEPA. See 40 C.F.R. §  
6 1508.27. Further, Plaintiff need not demonstrate that the changes to the US-95 Project will in  
7 fact result in significant impacts requiring preparation of an SEIS. Rather, the trigger is whether  
8 “*substantial questions are raised* as to whether [the changes to the US-95 Project] . . . may cause  
9 significant degradation of some human environmental factor.” Ocean Advocates, 402 F. 3d at  
10 864 (emphasis added). Without question, this “low standard” is satisfied in this case. Klamath  
11 Siskiyou Wildlands Center v. Boody, 468 F. 3d 549, 562 (9<sup>th</sup> Cir. 2006).<sup>10</sup>

13 2. Defendants’ failure to consider and evaluate the “significance” factors  
14 before deciding not to prepare an SEIS

15 In this case, Defendants *never* considered and applied NEPA’s significance factors  
16 discussed above in deciding not to prepare an SEIS. See AR 2765 (EA); AR 2836 (re-  
17 evaluation). In fact, the record reveals that Defendants put the proverbial cart before the horse by  
18 deciding to forgo preparation of an SEIS *before* analyzing the significance of the impacts and  
19 *before* finalizing the EA and issuing its re-evaluation. See AR 2129 (we “could prepare a . . .  
20 memorandum summarizing what took place and making a statement that a [SEIS] is not  
21 necessary”); AR at 2154 (pre-EA statement that an SEIS is not required); AR 2242 (“It was  
22 agreed. . . that ITD may proceed [with an EA instead of an SEIS]”; AR 2472 (as we move  
23 forward with the EA we need to “explain clearly in the beginning of the document the basis for  
24 doing an EA rather than a supplemental EIS”). As such, Defendants never took into account the  
25

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26  
27 <sup>10</sup> While Defendants did prepare an EA and re-evaluation to evaluate the changes, such  
28 documents “no matter how thorough . . . can never substitute for preparation of an EIS if the  
proposed action could significantly affect the environment.” Anderson, 371 F. 3d at 494.

1 context and intensity of the changes as those words are defined under NEPA. See 40 C.F.R. §  
2 1508.27. Nor did Defendants review and apply the ten intensity factors. See AR 2765; AR 2836.  
3 Instead, Defendants merely describe the changes to the US-95 Project in the EA and re-  
4 evaluation, concede (albeit in a cursory fashion) that some impacts to various resources will  
5 occur, and then conclude that such impacts are insignificant. See id.; see also AR 2765 at App. A  
6 at 3 (description of impacts). This is not enough.  
7

8 As explained by the courts, when an agency “decides not to prepare an EIS, ‘it must put  
9 forth a convincing statement of reasons’ that explain why the project will impact the environment  
10 no more than insignificantly.” Ocean Advocates, 402 F.3d at 864. “Conclusory assertions that an  
11 activity will have only an insignificant impact on the environment” is not enough. Id. (citation  
12 omitted). At a minimum, the Defendants must offer a “substantive analysis or evaluation of the  
13 [significance] factors.” Ecology Center, 2005 WL 1027203 at \*4. Defendants must make a  
14 “reasoned decision based on its evaluation of the significance – or lack of significance – of [the  
15 changes].” Marsh, 490 U.S. at 378.

16 3. Defendants’ Failure to take a hard look at two new, viable alternatives to  
17 the Sand Creek Byway

18 Defendants must prepare an SEIS if there is significant “new information” bearing on the  
19 proposed action. 40 C.F.R. § 1502.9 (c)(1)(ii). To comply with this obligation, Defendants are  
20 required to take a hard look at new information that comes to light after issuance of the EIS. See  
21 Marsh, 490 U.S. at 374. Taking a hard look means to carefully consider, evaluate, and make a  
22 reasoned determination whether the information is of such significance as to require an SEIS.  
23 Friends of the Clearwater v. Dombeck, 222 F. 3d 552, 558 (9<sup>th</sup> Cir. 2000). In this case,  
24 Defendants failed to consider, evaluate, and make a reasoned determination on two new, viable  
25  
26  
27  
28

1 alternatives to the Project: (1) the tunnel alternative; and (2) the through town roundabout  
2 alternative. See Ex. 3 at 5.<sup>11</sup>

3 As recognized by the COE, the new tunnel alternative “appears to involve little adverse  
4 impact to the aquatic ecosystem,” would “meet the project purpose,” and would cost  
5 approximately \$100 million (which is similar to the Sand Creek alignment). See Ex. 3 at 6.  
6 Additional advantages of the tunnel include “the need for a reduced right-of-way, limited visual  
7 and noise impacts, ease of snow clearing, elimination of surface street disruptions, and greater  
8 surface street capacity.” Id. Moreover, under this “alternative, the [pedestrian and bike] pathway  
9 could be constructed on the proposed Sand Creek highway alignment, avoiding the need to  
10 discharge fill material into Sand Creek.” Id. Likewise, the new through town roundabout surface  
11 alternative also “appears to meet the project purpose, be available, capable of being  
12 accomplished given existing technology and cost, and have less environmental impact.” Ex. 3 at  
13 4. Both of these potentially viable alternatives, therefore, need to be carefully considered and  
14 evaluated. Defendants, however, refused, stating that a presentation on the tunnel alternative to  
15 the Idaho Transportation Board (“the Board”) would:

16  
17 *be a waste of time for you and for us. The Transportation Dept. and the Board, are*  
18 *dedicated to the Sand Creek alignment. We studied many alternatives many years ago,*  
19 *and we do not intend on considering any other than the Preferred Alternative, Sand*  
20 *Creek. We are progressing as fast as possible to breaking ground. You are wasting your*  
21 *time with phone calls and letters. I don’t intend on returning your calls. Or respond to*  
22 *your letters. Just to clear the air.*

23 Ex. 4 at 1 (emphasis added). While the Board allowed a quick “eight minute” presentation on  
24 the tunnel alternative (see Ex. 4 at 3) the Board ultimately refused to consider or evaluate the  
25 tunnel option because they had already “completed” the NEPA process. See Ex. 4 at 4; at 8.

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26  
27 <sup>11</sup> The tunnel alternative is described in detail on the web at [www.SandpointTunnel.com](http://www.SandpointTunnel.com).  
28 Detailed information on the through town roundabout surface alternative can be found at  
[www.ConnectNorthIdaho.org](http://www.ConnectNorthIdaho.org).

1 E. Defendants’ Failure to Take a Hard Look at Impacts to Sand Creek

2 NEPA requires Defendants to take a hard look at the direct, indirect, and cumulative  
3 impacts of the US-95 Project. See Ecology Center v. Austin, 430 F.3d 1057, 1062 (9<sup>th</sup> Cir. 2005).  
4 In this case, Defendants failed to take a hard look at how the Project will directly, indirectly, and  
5 cumulatively impact the aquatic resources of Sand Creek.

6 First, Defendants fail to include *any discussion* (let alone impacts analysis) of its plan to  
7 dredge Sand Creek in either the original EIS or EA. See AR 2058; AR 2765. As such,  
8 Defendants never assessed the impacts of dredging on Sand Creek in a NEPA document or  
9 provided members of the public and other agencies the opportunity to review and comment on  
10 the dredging proposal as required by NEPA. See Earth Island Inst. v. U.S. Forest Service, 351  
11 F.3d 1291, 1300 (9<sup>th</sup> Cir. 2003) (agency must “consider every significant aspect of the  
12 environmental impact of a proposed action”); Foundation for North Am. Wild Sheep v. USDA,  
13 681 F.2d 1172, 1178 (9<sup>th</sup> Cir. 1982) (“The omission of any meaningful consideration of such  
14 fundamental factors precludes the type of informed decision-making mandated by NEPA”).  
15 While Defendants’ re-evaluation does disclose the dredging component (see AR 2836 at 3-4) this  
16 re-evaluation *is not* a NEPA document prepared pursuant to the Act’s public participation  
17 requirements and, as such, cannot be relied on to satisfy the Agencies’ NEPA obligations. See  
18 Idaho Sporting Congress v. Alexander, 222 F.3d 562, 566-568 (9<sup>th</sup> Cir. 2000) (re-evaluations  
19 cannot be used to “correct deficiencies” or “present information and analysis that it was required”  
20 to include in original NEPA document).<sup>12</sup>

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23  
24 <sup>12</sup> Defendants’ plan to dredge Sand Creek was not a “new” proposal that came about *after*  
25 issuance of the 2005 EA and FONSI. Rather, Defendants knew at the time they prepared the  
26 2005 EA and FONSI about their proposal to dredge Sand Creek. Defendants had stated,  
27 however, in their initial 2004 application for a 404 permit that the Project did not require any  
28 “dredging” because excavation in the creek would “occur ‘in the dry.’” AR 2733 at 3. The COE  
then clarified for Defendants that excavation below the ordinary high water mark constitutes  
“dredging.” AR 2754 at 4 (COE response to 3B), 11.

1 Second, Defendants failed to take a hard look at impacts to water quality despite the  
2 EPA’s specific request to address “existing and expected water quality (water temperature,  
3 dissolved oxygen, suspended sediment load, nutrient concentrations, and turbidity levels).” See  
4 AR 619 at 1-2. In fact, neither the EIS or EA contain any baseline data regarding the current  
5 status of these water quality factors or any discussion of how they might be impacted during  
6 construction. See AR 2058 at 77-81 (EIS); AR 2581 at IV (EA). The EA, for instance, mentions  
7 the design changes to the US-95 Project but fails to include *any analysis* of the impacts of such  
8 changes – including the dredging and filling of Sand Creek – on water quality. See AR 2581 at  
9 IV-31; see also AR 2632 at 1 (IDEQ’s comments); AR 2363 at 1 (Idaho Fish and Game’s  
10 comments); Fish & Wildlife (FWS) AR at E16 (FWS expressing concern about fill).<sup>13</sup> The same  
11 is true with respect to impacts to aquatic species (including fish species) in Sand Creek. To date,  
12 *no current surveys* have been conducted for aquatic life (including fish species) or aquatic habitat  
13 function and values that exist in Sand Creek. See AR 2488 at 51; FWS AR E-20 at 2.

15 Third, Defendants failed to consider the impacts of the US-95 Project on Sand Creek’s  
16 shallow water habitat or “mudflats” that exist when water levels in the Lake Pend Oreille are  
17 lowered. See Ex. 3 at 9. Sand Creek’s mudflats are “special aquatic sites that generally provide  
18 high value, shallow water habitat to migratory waterfowl and other water-dependent wildlife”  
19 that need to be taken into consideration. Id. Here, by evaluating impacts to Sand Creek *only*  
20 *when* the adjoining lake is full, Defendants failed to consider the value of such mudflats. See id.  
21 Finally, Defendants failed to consider impacts on *all wetlands* along Sand Creek. Defendants’  
22 estimate of impacts to wetlands is based on a 1998 wetland delineation completed for the original  
23 EIS. See AR 2058 at App. 2, 3. This delineation, however, is no longer considered accurate or  
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26  
27 <sup>13</sup> The EA does include a list of mitigation measures that would be employed to reduce  
28 impacts from the changes, but these measures are largely meaningless without first analyzing the  
magnitude of the actual impacts that would be mitigated. See AR 2581 at IV-31.

1 up-to-date. Specifically, the 1998 delineation “identified no wetlands between Bridge Street . .  
2 .and the railroad crossing at the north end of the project.” Ex. 3 at 3. According to the COE,  
3 however, “there are wetlands along the shoreline of Sand Creek that will be affected by project  
4 construction under the current design.” Id.

5 F. Defendants’ Failure to Take a Hard Look at Impacts to Historic Properties

6 Defendants have also failed to take a hard look at how the US-95 Project will impact  
7 historic properties. First, as described in detail below (see Section II.A) Defendants mistakenly  
8 limited the scope of their impacts analysis on historic properties to the Sand Creek Byway  
9 segment of the Project. See AR 2058 at 38- 43, 97-116, Appendix B (historic properties analysis  
10 limited to the Sand Creek byway segment of the “Sand Creek Alternative”); AR 2765 (same).  
11 As such, Defendants have yet to survey, identify, and evaluate *any* archaeological and historic  
12 sites in the Sagle to Long Bridge, Long Bridge, and Sandpoint to Kootenai segments.  
13

14 Second, Defendants failed to take hard look at how the construction and operation of the  
15 US-95 Project will impact the Burlington Northern Santa Fe (“BNSF”) Railroad Depot  
16 (“Depot”).<sup>14</sup> For instance, even though the current plans call for earthwork next to the Depot (see  
17 AR 2550 at 17), Defendants’ NEPA documents fail to address how settlement, vibration, and  
18 noise from the Project will impact the historic property, which includes a 15 foot buffer and  
19 associated landscaping (i.e., trees, lawn). See Ex. 6 at 1. The settlement of buildings, for  
20 example, “results from the consolidation of the underlying layer of soft to medium clay.” AR  
21 2767. Here, because the Depot “is constructed of brick” it is “*sensitive to potential settlement*  
22 and vibration.” AR 2550 at 8 (emphasis added). Compounding the problem are the soils along  
23  
24

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25  
26 <sup>14</sup> The Depot was built in 1916 and placed on the National Register in 1973. See 2058 at  
27 113 (photo). The Depot was listed “for both its architecture . . . and for its association with . .  
28 .the town of Sandpoint along the railroad.” Id. at 111. The Depot is the State’s “only Gothic style  
railway station” and the only remaining building from Sandpoint’s original townsite. Id.

1 Sand Creek which are very unstable. The EIS notes that the “[n]ew construction or expansion of  
2 US-95 along Sand Creek will encounter saturated, soft sediments of the Sand Creek delta and  
3 will likely require considerable reinforcement and stabilization.” AR 2058 at 65.<sup>15</sup> To “minimize  
4 the effects due to settlement,” Defendants plan to use lightweight fill in the area of the Depot. AR  
5 2581 at IV-62. However, even with lightweight fill, Defendants concede that approximately 10  
6 to 30 mm of settlement is anticipated for the Depot. See AR 2767 at 2. Most “of the settlement  
7 is anticipated to occur during the period of construction.” AR 2767. It is also “estimated that an  
8 additional 15 to 25mm of secondary compression may occur [over the next 20 years].” Id.  
9 However, the “the settlement period may be significantly longer than anticipated” because “wick  
10 drains could not be installed beneath the depot building itself.” Ex. 6 at 27. It is “anticipated that  
11 settlement induced in the Depot building will express itself in various ways, including subsidence  
12 of the building frame and cracking or opening of existing cracks in the walls and floors and at  
13 their interfaces.” Id. *None of this information* on settlement impacts is included in Defendants’  
14 NEPA documents, where it belongs. See e.g., Blue Mountains Biodiversity Project v.  
15 Blackwood, 161 F. 3d 1208, 1214 (9<sup>th</sup> Cir. 1998) (agency’s analysis “must be found” in the  
16 NEPA document itself).  
17

18  
19 The same is true with respect to vibration impacts. While Defendants concede such  
20 impacts exist (see AR 2550 at 8, Ex. 6 at 27) there is no discussion in Defendants’ NEPA  
21 documents on vibration impacts to the Depot. In terms of noise impacts, Defendants conclude  
22 that such impacts “are not considered adverse . . . given the similar transportation corridor nature  
23 of the present setting.” AR 2058 at 111. This conclusion, however, fails to take into account: (1)  
24 that the Depot access road is an unpaved, narrow driveway and in no way resembles the proposed  
25

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26  
27 <sup>15</sup> In the late 1950s when Defendants constructed the current US-95 route along the  
28 western edge of Sand Creek, the soils were so unstable that construction caused two major slides  
into the creek. See AR 2747.

1 three-lane interstate (see AR 2765 at Figure 11); and (2) the use of the area by trains (as opposed  
2 to the constant buzz of heavy trucks and cars) is appropriate with the historic setting of the  
3 railroad Depot. See AR 2747 at 2; see also AR 2765 at Figure 11.

4           Moreover, Defendants’ own regulations state that traffic noise impacts occur “when the  
5 predicted traffic noise levels approach or exceed the noise abatement criteria.” 23 C.F.R. § 772.5  
6 (g). The noise abatement criteria for the Depot area is 72 Leq. See AR 2401 at 6 (Noise  
7 Technical Report). With respect to the Project, Defendants reported the predicted traffic noises  
8 to be 69 Leq near the Depot. See 2765 at IV-25. Defendants, however, based this conclusion on  
9 data from a noise receptor located on the Cedar Street Bridge – *away from the Depot*. See id. As  
10 such, Defendants *never measured* noise levels from the Depot. Nor did Defendants take into  
11 account that the sound pressure level of a heavy truck at 15 meters is 90 decibels and “endangers  
12 hearing” and the sound pressure of construction noise at 3 meters is 110 decibels. See AR 2401  
13 (Noise Report) at 6; see also National Parks and Conservation Assoc. v. FAA, 998 F.3d 1523,  
14 1533 (10<sup>th</sup> Cir. 1993) (agency’s noise analysis based on faulty assumptions and subjective  
15 values). In this case, heavy truck use will occur at approximately 7 meters and construction noise  
16 to build the Lightweight Fill Structure will occur within the Depot property.  
17  
18

## 19 II. SECTION 4 (f) VIOLATIONS

20           The “functions of NEPA and section 4 (f), once triggered, are very different.” Coalition  
21 Against Raised Expressway v. Dole, 835 F. 2d 803, 811 n. 10 (11<sup>th</sup> Circuit 1988). Whereas  
22 NEPA “is procedural and requires the gathering of evidence on environmental impacts of a  
23 federal action . . . section 4 (f) requires that . . .historic sites be given *paramount importance* in  
24 the decision-making process.” Id. (emphasis added); Citizens to Preserve Overton Park v. Volpe,  
25 401 U.S. 402 (1971) (same). Indeed, pursuant to § 4 (f), Defendants are to make a “special effort  
26 [when authorizing highway projects] to preserve. . . historic sites.” 49 U.S.C. § 303 (c). While  
27  
28

1 consideration of “costs, directness of route, and community disruption” should not be ignored  
2 when deciding where to place a proposed highway project, pursuant to § 4 (f) such considerations  
3 are not “on an equal footing” with the preservation of 4 (f) properties. Citizens to Preserve  
4 Overton Park, 401 U.S. at 412. Rather, in adopting § 4 (f), “Congress clearly reflected its intent  
5 that there shall no longer be reckless, ill-considered, wanton desecration of . . . [historic] sites  
6 significantly related to our country’s heritage.” Id.

7  
8 In furtherance of this policy, § 4 (f) only allows Defendants to build fund, or approve a  
9 highway project that requires the “use” of a historic site if: (1) there is no “feasible and prudent  
10 alternative” to using such site; and (2) the project includes “all possible planning to minimize  
11 harm” to the site. 49 U.S.C. § 303 (c)(1). This is a “stringent” requirement. Stop H-3  
12 Association v. Coleman, 533 F. 2d 434, 438 (9<sup>th</sup> Cir. 1976). In this case, Defendants have  
13 violated § 4 (f)’s mandates by: (1) failing to survey, identify, and evaluate 4 (f) properties in *all*  
14 *four segments* of the US-95 Project; and (2) arbitrarily determining that the construction and  
15 operation of the US-95 Project would not result in the “use” of the historic railroad Depot.

16 A. Defendants’ Failure to Survey, Identify, and Evaluate Historic 4 (f) Properties in  
17 Three Segments of the US-95 Project

18 The first step in ensuring § 4 (f) compliance is to survey, identify, and evaluate *all*  
19 potential 4 (f) properties which may be “used” by any alternative under consideration. For  
20 historic properties, the federal agency, in cooperation with the applicant is to “consult with the  
21 State Historic Preservation Officer (SHPO) and appropriate local officials to identify all  
22 properties on or eligible for the National Register of Historic Places (National Register).” 23  
23 C.F.R. § 771.135 (e); see also AR 1617 at 2 (same). This identification process is to occur “early  
24 in the development of the action when alternatives to the proposed action are under study.” 23  
25 C.F.R. § 771.135 (b). In other words, the identification of § 4 (f) properties “should not be  
26 delayed pending project design or designation of a project preferred alternative.” AR 1938 at 2  
27 (Agency Memo); see also AR 1513 at 2 (identification of sites should not be “postponed to the  
28

1 design stage”); AR 1594 (same). In fact, in most cases, a final § 4 (f) determination is made  
2 “either in [the] . . . approval of the final EIS or in the ROD.” 23 C.F.R. § 771.135 (l); See also  
3 Corridor H Alternatives Inc. v. Slater, 166 F. 3d 368, 372 (D.C. Cir. 1999) (agency required to  
4 complete § 4 (f) process before issuing ROD).

5 Here, the “proposed action” and “preferred alternative” triggering § 4 (f), is the proposed  
6 US-95 Project which, as mentioned earlier, includes four segments extending from milepost  
7 469.75 to milepost 477.44. See Ex. 7 (map). Pursuant to § 4 (f) therefore, Defendants are to  
8 consult with the SHPO and identify and evaluate *all* 4 (f) properties that will or may be impacted  
9 by the entire US-95 Project. See 23 C.F.R. §§ 771.135 (b),(e),(l). Defendants, however,  
10 mistakenly limited the scope of their § 4 (f) evaluation to one segment of the four segment  
11 Project. See AR 2058 at 107 (EIS); AR 2765 at IV-66 (EA). While Defendants worked and  
12 consulted with the SHPO on identifying and evaluating § 4 (f) properties, they did so *only for* the  
13 Sand Creek Byway segment of the Project. To date, therefore, no identification and evaluation of  
14 § 4 (f) properties in the other three segments of the US-95 Project (i.e., Sagle to Long Bridge,  
15 Long Bridge, and Sandpoint to Kootenai segments) has been completed. This is a major  
16 oversight on Defendants’ part and an obvious violation of § 4 (f). See 23 C.F.R. §§ 771.135  
17 (b),(e),(l); Corridor H Alternatives Inc., 166 F. 3d at 372.<sup>16</sup>  
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23 <sup>16</sup> In planning the US-95 Project Defendants were warned by officials within the Federal  
24 Highway Administration that their § 4 (f) analysis was incomplete and deficient. These officials  
25 noted that the “discussions of cultural resources and 4 (f) are considered overall the weakest and  
26 will need extensive revision and supplementation.” AR 1594 at 1. The “discussion of cultural  
27 resources . . . should be more specific and *list all such resources*, by alternate, on or eligible for  
28 the National Register. This section needs much more detail and specificity and should be entirely  
rewritten.” Id. at 4 (emphasis added). The Sand Creek Alternative “has received only a cursory  
field review [and] no complete survey or subsurface testing has been performed.” AR 1126 at 22.

1 B. Defendants’ § 4 (f) Evaluation for the Depot is Arbitrary and Capricious

2 In approving the changes to the US-95 Project, Defendants determined that the proposed  
3 highway would not trigger a formal § 4 (f) analysis with respect to the Depot. See AR 2765 at  
4 IV-66. While Defendants concede that the Depot is a property that meets “the criteria under 23  
5 C.F.R. § 771.135 to qualify for protection by 4 (f)” they nonetheless maintain that the changes to  
6 US-95 Project will not “use” the Depot because the Project has been “designed to avoid any  
7 adverse affect” to the Depot property. See AR 2765 at IV-66. Defendants are incorrect and need  
8 to conduct a formal § 4 (f) analysis on the Depot for two reasons.  
9

10 1. The US-95 Project will result in the *physical or actual use* of the Depot

11 The word “use” within the meaning of § 4 (f) includes “when land is permanently  
12 incorporated into a transportation facility” or where “there is a temporary occupancy of land that  
13 is adverse in terms of [§ 4 (f)’s] preservationist purposes.” 23 C.F.R. § 771.135 (p)(1). These  
14 types of “uses” are commonly referred to as a physical or actual use of a § 4 (f) property. See  
15 Adler v. Lewis, 675 F. 2d 1085, 1091-92 (9<sup>th</sup> Cir. 1980) (discussing uses); Sierra Club v.  
16 Department of Transportation, 948 F. 2d 568 (9<sup>th</sup> Cir. 1991) (same). Generally, when *any*  
17 physical use of a § 4 (f) property is proposed, regardless of how minor, the requirement to  
18 conduct a formal § 4 (f) analysis is automatically triggered. See Township of Springfield v.  
19 Lewis, 702 F. 2d 426, 430 (3<sup>rd</sup> Cir. 1983) (“Any park use, regardless of degree invokes § 4 (f)”);  
20 Louisiana Environmental Society v. Coleman, 537 F. 2d 79, 84 (5<sup>th</sup> Cir. 1976) (same); Coalition  
21 on Sensible Transportation v. Dole, 826 F. 2d 60, 63 (D.C. Cir. 1987) (same).<sup>17</sup>  
22

23 Here, Defendants maintain they are not physically using the Depot property because they  
24 adopted an alternative that runs “parallel to [the Depot] on the west side of the building. The  
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26  
27 <sup>17</sup> In 2005 Congress amended § 4 (f) to allow for “de minimis impacts.” See 49 U.S.C. §  
28 303 (d) (added by P.L. 109-59); Coalition on Sensible Transportation, 826 F. 2d at 63  
(recognizing the de minimis exception). This *de minimis* exception does not apply in this case.

1 [three-lane interstate] will be 23 feet from the Depot and will be depressed 6.5 feet below the  
2 Depot’s ground level.” AR 2765 at IV-61; see also AR 2765 at Figure 11 (photo illustration of  
3 US-95 Project). Defendants are wrong. The construction of the US-95 Project – as currently  
4 proposed – will require the *actual or physical use* of the historic Depot property. The current  
5 plans call for the building of a retaining wall and embankment – known as the “Lightweight Fill  
6 Structure” – on the west side of the Depot structure. See AR 2550. The embankment will be  
7 carved “into the existing slope [adjacent to the Depot] and have a vertical face covered by precast  
8 concrete wall panels on the west side of the roadway.” Id. at 1. In addition, Defendants will build  
9 a new “dual-guardrail barrier” to separate the access road from the highway. See id.; see also AR  
10 2550 at 17 (Figure 3). In fact, the dual-guardrail barrier will actually extend underneath the  
11 Depot’s access road. See AR 2550 at 17. Importantly, all of this work will be conducted *within*  
12 the Depot’s 15 foot protected buffer. See AR 2550 at 17 (showing cross section); at Appendix A  
13 (showing project in relation to Depot). Defendants will cut an “excavation slope [that] will  
14 daylight at the Depot’s curb,” tear up and replace the current access road, remove and later  
15 reconstruct the Depot’s historic curb and brick sidewalk/platform, and remove and replace the  
16 sandstone water course on the westside and the sandstone column bases. See AR 2836 at 4-3; Ex.  
17 6 at 25. A new parking lot, handicap access ramp, brick pathway, fencing, and gates will also be  
18 constructed. See AR 2765 at IV-66.

21 Notably, no detail on the location and work need for the Lightweight Fill Structure is  
22 included in Defendants’ NEPA documents and corresponding § 4 (f) evaluations. See AR 2058  
23 at 107; AR 2765 at IV-66. In fact, in the EA, Defendants mention only “improvements” to the  
24 access road, parking area, sidewalks, and lighting and conclude that such improvements do not  
25 “constitute a use of the depot.” AR 2765 at IV-66. Defendants mention that there “will be earth-  
26 moving activities to construct the roadway embankment (fills) and cuts” but conveniently fail to  
27 mention where these activities will occur. See id. The same is true with respect to Defendants’  
28

1 correspondence with the SHPO. See Ex. 6 at 1; at 11. In fact, Defendants actually misrepresent  
2 the facts by telling the SHPO that the Project will occur “outside the 15 foot buffer.” See id. This  
3 is why, on at least five occasions Ms. Nancy Renk – a historian who has been working in the  
4 region for over 30 years – raised concerns about the Project’s proximity to the Depot and  
5 requested more information from Defendants and the SHPO. See AR 2606 at 3; Ex. 2  
6 (Declaration of Ms. Renk); Ex. 6 (correspondence).

7  
8 Specifically, Ms. Renk asked “[h]ow close will the excavation for the bypass come to the  
9 depot building?” Ex. 6 at 6. Defendants responded by saying that “the top of the excavation  
10 slope [for the Project] will daylight at the top of the basement wall of the depot.” Ex. 6 at 2.  
11 After Ms. Renk asked for clarification, Defendants explained that the excavation will “daylight at  
12 the [Depot’s] curb and that curb will be replaced.” Id. at 20. In sum, therefore, while Defendants  
13 were telling the public and the SHPO that the Project would not extend into the 15 foot buffer or  
14 disturb the associated landscaping (see Ex. 6 at 1), they were telling Ms. Renk just the opposite,  
15 explaining that excavation work would be undertaken *within* the 15 foot buffer.

16  
17 Regardless, because the Project requires the physical use of the Depot property, a formal  
18 § 4 (f) analysis is required. See e.g., Coalition on Sensible Transportation, 826 F. 2d at 63 (D.C.  
19 Cir. 1987) (construction of project, even with mitigation, which encroaches on property is a  
20 physical use triggering a 4 (f) analysis). Defendants cannot approve the US-95 Project unless: (1)  
21 there is no prudent and feasible alternative to using the Depot property; and (2) the Project  
22 includes all possible planning to minimize harm to the Depot property. 49 U.S.C. § 303 (c).

23 2. The US-95 Project will result in the *constructive use* of the Depot

24 The term “use” in section 4 (f) is to be “construed broadly, not limited to the concept of  
25 physical taking, but includes areas that are significantly, adversely affected by the project.”  
26 Adler, 675 F.2d at 1091. Even “off-site activities are governed by § 4 (f) if they create  
27 sufficiently serious impacts that would *substantially impair* the value of the site in terms of its  
28

1 prior significance and enjoyment.” Id. (emphasis added); see also 23 C.F.R. § 771.135 (p)(2)  
2 (constructive use occurs when project substantially impairs 4 (f) property).

3 Here, the US-95 Project will substantially impair the historic features and attributes of the  
4 Depot. Impacts include settlement of the Depot structure (see AR 2550 at 8), vibration caused by  
5 pile driving, earthwork, and traffic on the proposed interstate (see AR 2550 at 8), visual and  
6 audible intrusions, and impacts to the overall setting, including the landscaping, mature trees and  
7 lawn. See generally Section I.F. above (discussing impacts to Depot). Individually each of these  
8 impacts, though serious, may not rise to the level of a “substantial impairment” to the Depot.  
9 There is no question, however, that when viewed in the aggregate, such impacts are substantial.  
10 See e.g. Coalition Against a Raised Expressway, 835 F. 2d at 812 (must analyze cumulative  
11 impact on 4 (f) property to determine if a constructive use exists).<sup>18</sup>

### 12 CONCLUSION

13  
14 Wherefore, Plaintiff respectfully requests that the Court grant its motion for summary  
15 judgment, issue a declaratory judgment that Defendants have violated NEPA and § 4 (f), and  
16 enjoin the US-95 Project pending full compliance with NEPA and § 4 (f) as outlined above.

17 Respectfully submitted this 12<sup>th</sup> day of April, 2007.  
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19 <sup>18</sup> In response, Defendants will likely argue no constructive use exists because they  
20 obtained an agreement of “no adverse effect” from the SHPO. See 23 C.F.R. § 771.135 (p)(5)(i).  
21 Here, however, the SHPO expressed concern about impacts to the Depot and mandated that  
22 Defendants evaluate and report on the potential effects. See AR 2386 at 2. These conditions  
23 were later incorporated into a Memorandum of Agreement (“MOA”). See AR 2836 (App.D).  
24 The SHPO therefore conditioned its agreement on compliance with the MOA and the results of  
25 yet-to-be completed evaluation. See id. Further, throughout this process Defendants *never*  
26 provided the SHPO with complete and accurate information about the Project. Defendants even  
27 state to the SHPO that “project actions *will not extend beyond [the 15 foot] boundary*” nor  
28 “disturb the associated landscaping of the depot property.” Ex. 6 at 1, 11. The SHPO’s  
agreement was therefore based on incomplete and withheld information that, if corrected, may  
lead the SHPO to come to a different conclusion. See Pueblo of Sandia v. U.S., 50 F.3d 856, 862  
(10<sup>th</sup> Cir. 1995). Finally, both Defendants and the SHPO failed to take into account the  
cumulative impacts.

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8                    CERTIFICATE OF SERVICE

9                    I hereby certify that on the 12<sup>th</sup> day of April, 2007, I filed a copy of this document (along  
10 with a copy of Plaintiff's motion, statement of material facts, and exhibits) electronically through  
11 the CM/ECF system, which caused the following parties or counsel to be served by electronic  
12 means, as more fully reflected on the Notice of Electronic Filing:

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