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**UNITED STATES DEPARTMENT OF THE INTERIOR
INTERIOR BOARD OF LAND APPEALS**

OREGON NATURAL DESERT ASS’N

Appellant,

Notice of Appeal, Statement of Reasons,
and Petition for Stay of Decision for North
Steens Ecosystem Restoration Project

v.

BUREAU OF LAND MANAGEMENT,

Respondent.

NOTICE OF APPEAL AND STATEMENT OF STANDING

Pursuant to 43 C.F.R. Part 4, Appellant Oregon Natural Desert Association (“ONDA”) hereby appeals the Record of Decision for the North Steens Ecosystem Restoration Project, dated September 28, 2007. This appeal is pursuant to all applicable authority, including the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1782, and the Bureau of Land Management’s (“BLM”) implementing regulations.

The Oregon Natural Desert Association is a non-profit public interest organization dedicated to preserving and protecting the public lands of eastern Oregon. Its mission is to protect, defend, and restore forever the health of Oregon’s native deserts. The members and staff of ONDA use and enjoy the public lands, water, and natural resources within and surrounding the project area for recreational, scientific, spiritual, educational, aesthetic, and other purposes.

ONDA brings this appeal on its own behalf and on behalf of its members and staff, many of whom regularly enjoy and intend to continue to enjoy the public lands in the Andrews Management Unit and the Steens Mountain Cooperative Management and Protection Area, including the project area, for educational, recreational, spiritual, and scientific activities, including wildlife watching. The project would harm ONDA and its members by degrading the wilderness resource and wildlife habitat of the project area. ONDA’s members were also procedurally harmed by BLM’s failure to follow the procedures required by the National

Environmental Policy Act and Federal Land Policy and Management Act. ONDA believes the decision is in error and not in accordance with the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 *et seq.*, and its implementing regulations, and the Federal Land Policy and Management Act (“FLPMA”), 43 U.S.C. §§ 1701–1782, and its implementing regulations. ONDA asks BLM to withdraw the decision and prepare NEPA documentation that adequately and properly addresses these issues and complies with all relevant statutory and regulatory requirements.

BACKGROUND

The North Steens Ecosystem Restoration Project project area encompasses 336,000 acres on and around Steens Mountain, located in the remote southeastern corner of Oregon. The area features incredible environmental and wilderness values, including over 105,000 acres within the Steens Mountain Wilderness and the Donner und Blitzen Wild and Scenic River, and over 79,000 acres within six Wilderness Study Areas (“WSAs”) including the Bridge Creek, Blitzen River, South Fork Donner und Blitzen River, Home Creek, High Steens, and Lower Stonehouse WSAs. The area also contains 24 areas found to contain wilderness characteristics in a citizen inventory conducted by ONDA, pursuant to BLM’s own wilderness inventory protocol. ONDA first documented its data and recommendations to BLM in a Wilderness Inventory Report and Recommendations, submitted to BLM in 2002.

During several rounds of detailed comments, ONDA explained that it strongly supports the goal of ecological restoration, but that the FEIS and the preferred alternative fell well short in providing the analysis and action necessary for achieving this goal. ONDA asked BLM to consider remedying several significant shortcomings in the FEIS before issuing a final decision. ONDA specifically requested that BLM consider the significant wilderness values present within the project area, in light of the route maintenance and juniper cutting planned in areas containing such values. ONDA additionally asked BLM to consider environmental impacts of current livestock grazing and to address effects of the proposed action on declining sage grouse populations and their habitat.

The Record of Decision (“ROD”) to implement the project addressed few of ONDA’s concerns. Instead, it authorizes a truly immense program of “vegetative treatments” that would significantly change the basic character of Steens Mountain. It proposes mechanical and prescribed fire treatments on up to 188,336 acres, which BLM describes as *45–65 percent of the project area* outside wilderness. ROD at 13. Within those acres, up to 81,396 acres of juniper-dominated areas will be “treated” (that is, junipers cut or burned) in order to decrease junipers by 75%. *Id.* The ROD authorizes juniper cutting, mechanical treatment, and cross-country use of motor vehicles in WSAs, if objectives in WSAs are not met with fire. ROD at 2. The project also outlines plans to blade or otherwise maintain many remote two-track routes, within proposed WSAs, which has the potential to irreversibly foreclose wilderness designation and alter the character of areas. ROD at 3. Furthermore, “[p]ermanent fencing” may be installed to adjust grazing following treatment “as determined necessary.” ROD at 5.

Perhaps the most troubling aspect of the project is that locations of many important project components—such as fence construction, juniper cutting, or road blading—are not

given. Instead, the ROD gives BLM a virtual blank check to use its discretion to choose where these activities will occur over the next decade. See FEIS at 55 (map of preferred alternative, not showing which types of treatments will occur where, or where road maintenance and fence construction will occur).

STANDARD OF REVIEW

To prevail on a petition for stay, the appellant must show sufficient justification based on the relative harm to the parties if the stay is granted or denied, the likelihood of appellant's success on the merits, the likelihood of immediate and irreparable harm if the stay is not granted, and whether the public interest favors granting a stay. 43 C.F.R. § 4.471(c)(2).

To achieve success on the merits, the appellant must meet its burden to demonstrate, by a preponderance of the evidence, that the Final Decision is unreasonable or does not substantially comply with NEPA, FLPMA, or the provisions of the federal grazing regulations found at 43 C.F.R. Part 4100. See 43 C.F.R. § 4.480(b); Eason v. BLM, 127 IBLA 259, 262 (1993). A BLM decision is arbitrary, capricious, or inequitable if it is not supported by any rational basis. Wayne D. Klump v. BLM, 124 IBLA 176, 182 (1992).

In balancing the likelihood of movant's success against the potential consequences of a stay on the other parties it has been held that it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus more deliberative investigation.

Wyoming Outdoor Council Inc., 153 IBLA 379, 388 (2000) (internal quotes omitted).

STATEMENT OF REASONS

BLM's final decision violates both NEPA and FLPMA because the agency refused to consider wilderness values and impacts to the wilderness resource; failed to balance multiple uses; and failed to comply with FLPMA § 603 and the Interim Management Policy. This decision adversely affects ONDA and its members. ONDA will be negatively impacted by the vegetation treatments across up to 188,000 acres of public lands, because the treatments will harm wilderness values and will have been undertaken without benefit of the required analyses on wildlife, soils, and other resources.

I. BLM Violated NEPA By Failing to Take a "Hard Look" at the Environmental Consequences of the Proposed Action on Wilderness Resource Values.

A. The Wilderness Resource on the Public Lands.

"Wilderness" is legally defined by (1) size (at least 5,000 contiguous acres of public land), (2) naturalness (the area "generally appears to have been affected primarily by the forces of nature" and "imprint of man's work" is "substantially unnoticeable"), and (3) either outstanding opportunities for solitude or for a primitive and unconfined type of recreation. 16 U.S.C. §

1131(c) (Wilderness Act definition); *see also* Exh. 1 (BLM *Wilderness Inventory Handbook* (hereafter “1978 Handbook”) (Sept. 27, 1978)), at 7 (defining “key factors” of wilderness); Exh. 2 (BLM H-6310-1, *Wilderness Inventory & Study Procedures* (“2001 Handbook”) (Jan. 10, 2001)), at 15–20 (more detailed discussion of same factors). Wilderness also may contain “supplemental values” such as ecological, geological, or other features of scientific, educational, scenic, or historical value. 16 U.S.C. § 1131(c); Exh. 2 at 20. Thus, even on parcel of public land where there is no congressionally-designated Wilderness, BLM still must consider wilderness characteristics in its multiple-use management of those lands. 43 U.S.C. §§ 1732(a); 1702(c); 1701(a)(7), (8).

When Congress enacted FLPMA in 1976, it required the BLM under § 603(a) to conduct within fifteen years an initial inventory of BLM lands eligible for protection under the Wilderness Act. 43 U.S.C. § 1782(a); *see also* Exh. 1 at 3 (background on BLM’s initial inventory program). In Oregon, the BLM issued the “Oregon Wilderness Final EIS” in 1989 and a “Wilderness Study Report” with wilderness recommendations to Congress in 1991. The latter document recommended to Congress that some areas be designated as wilderness and others not be so designated. Until Congress acts on those recommendations, the lands identified to have wilderness values are known as Wilderness Study Areas (“WSAs”) and are managed so that their wilderness suitability is not “impaired.” 43 U.S.C. § 1782(c). As a result, there exist today on the public lands WSAs recommended for wilderness designation, as well as WSAs that were *not recommended* to be designated as wilderness (“non-recommended WSAs”), and other roadless areas that contain wilderness characteristics but that have never even been considered or deemed eligible for wilderness recommendation—either under the initial § 603 inventory or under any subsequent land use planning process.

Large segments of the project area contain wilderness characteristics worthy of protection for future generations, including the designated Steens Mountain Wilderness and over 79,000 acres within six Wilderness Study Areas (“WSAs”) including the Bridge Creek, Blitzen River, South Fork Donner und Blitzen River, Home Creek, High Steens, and Lower Stonehouse WSAs. The area also contains additional areas which ONDA inventoried according to BLM’s own wilderness inventory protocol and found to possess defined wilderness characteristics.

B. ONDA’s Wilderness Inventory Report and Recommendations.

Beginning in 2002, ONDA initiated a program to systematically inventory and document wilderness characteristics on the BLM-managed public lands in eastern Oregon. The premise of ONDA’s “Wilderness Research and Rescue” program is twofold: (1) that the BLM’s original, FLPMA-mandated wilderness inventory in the 1970s and 1980s failed to identify and document significant portions of public lands possessing wilderness characteristics; and (2) that on-the-ground conditions have changed substantially in the 25 years since the agency last conducted a wilderness inventory of its own—such that some areas now possesses defined wilderness characteristics worthy of consideration and potential conservation. ONDA followed the inventory protocol established in the BLM’s *Wilderness Inventory Study and Procedures* handbook, which directs public requests to consider certain lands with wilderness characteristics to be accompanied by maps showing specific boundaries of the areas in question, detailed narratives describing the area’s wilderness characteristics and documenting how the newly

presented information significantly differs from the information available in prior inventories conducted by BLM, and photographic documentation. Exh. 2.

On September 1, 2002 and November 1, 2002, ONDA submitted to BLM its Andrews-Steens Wilderness Inventory Report and Recommendations.¹ The nearly 200-page report includes for each of 24 proposed WSAs, proposed WSA additions or wilderness ACECs recommended by ONDA maps identifying the boundaries of each area in question, annotated road and photo logs with GPS locations cued to the maps, and narratives analyzing each inventory unit under BLM's definition of wilderness characteristics and documenting how that information is new and/or differs from the information in prior inventories conducted by BLM regarding wilderness values for the area.

ONDA identified 24 areas as having significant wilderness values, and most lie within the project area. The impacts to the wilderness values in these areas are worthy of protection under the BLM's multiple use management of the public lands, but at a minimum should have at least been *considered* during this NEPA process.

C. BLM Unlawfully Failed to Consider the Wilderness Resource in the NEPA Process.

NEPA's twin objectives are to ensure that BLM "consider[s] every significant aspect of the environmental impact of a proposed action" and to "inform the public that it has indeed considered environmental concerns in its decisionmaking process." Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1153-54 (9th Cir. 2006) (citing Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1066 (9th Cir. 2002)); Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 97 (1983). See also 40 C.F.R. § 1500.1(b), (c). "Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." Id. § 1500.1(b).

To satisfy NEPA, BLM must demonstrate it has taken a "hard look" at the environmental consequences of the proposed action. Ocean Advocates v. U.S. Army Corps of Eng'rs, 402 F.3d 846, 864 (9th Cir. 2005); Idaho Sporting Cong. v. Rittenhouse, 305 F.3d 957, 973 (9th Cir. 2002) (quoting Marsh v. Ore. Natural Res. Council, 490 U.S. 360, 374 (1989)); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 348 (1989). By focusing agency and public attention on the environmental effects of proposed agency action, "NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." Marsh, 490 U.S. at 371 (quoting 42 U.S.C. § 4321 and 40 C.F.R. § 1502.9(c)). Federal agencies also must analyze and discuss "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." Id. § 1502.9(c). NEPA requires federal agencies to consider the impacts of their proposed actions on "the quality of the human environment," 42 U.S.C. § 4332(2)(C), and does not exclude wilderness from its requirements.

¹ The report should be in BLM's administrative record for this project, and is also available on the internet at: <http://www.onda.org/defending-desert-wilderness/campaign-to-protect-desert-wilderness/more-info-on-ondas-campaign-to-protect-desert-wilderness/2002%20Steens%20Mountain%20Wilderness%20Recomendations.pdf/view>

BLM therefore has a legal duty under NEPA to consider the wilderness resource during the GMA planning process. Judges have recently confirmed this NEPA wilderness duty for three separate decisions involving analogous range improvement projects in eastern Oregon. In Ore. Natural Desert Ass'n v. Rasmussen, a challenge to a range project in lands documented by ONDA to have wilderness characteristics, the district court held that:

The court finds BLM did not meet its obligation under NEPA simply by reviewing and critiquing ONDA's work product. *It was obligated under NEPA to consider whether there were changes in or additions to the wilderness values within the [project area], and whether the proposed action in that area might negatively impact those wilderness values, if they exist.* The court finds BLM did not meet that obligation by relying on the one-time inventory review conducted in 1992. Such reliance is not consistent with its statutory obligation to engage in a continuing inventory so as to be current on changing conditions and wilderness values. 43 U.S.C. § 1711(a). BLM's issuance of the East-West Gulch Projects EA and the accompanying Finding of no [Significant] Impact (FONSI) in the absence of current information on wilderness values was arbitrary and capricious, and, therefore, was in violation of NEPA and the APA.

451 F.Supp.2d 1202, 1213 (D. Or. 2006) (emphasis added). Additionally, Administrative Law Judge James H. Heffernan recently issued two decisions staying BLM decisions to implement rangeland projects on Oregon BLM's Lakeview District, when the agency failed to properly consider impacts to wilderness values. Ore. Natural Desert Ass'n v. Bureau of Land Mgmt. ("ONDA I"), No. OR-010-07-01 (June 25, 2007) (Attach. A); Ore. Natural Desert Ass'n v. Bureau of Land Mgmt. ("ONDA II"), No. OR-010-07-02 (July 6, 2007) (Attach. B). Judge Heffernan based his decisions in part on his finding that:

This record raises serious doubt as to the adequacy of the factual basis for BLM's related conclusions that the routes are roads, that the proposed WSA should be divided into smaller units along those roads for purposes of analyzing wilderness character, that no wilderness character is present, and therefore that any potential impacts to wilderness values need not be considered or analyzed.

ONDA I at 15. While BLM provided almost no evidence or other data to support its conclusions that wilderness values are not present in the planning area, Judge Heffernan, in assessing BLM's contention that all of the vehicle routes in the area are "roads" rather than "ways," found that "ONDA's scores of photographs show that the routes in question are generally eroded, rocky, and overgrown with vegetation, evidencing little use and no maintenance." ONDA I at 14. Therefore, "ONDA's photos raise serious doubts as to the accuracy of BLM's opinion" that no wilderness values exist on these public lands. *Id.* The decision in ONDA II is based on similar findings and legal conclusions. See ONDA II at 1-7 (background), 7-10 (relevant discussion concerning wilderness issues).

Here, ONDA has raised the issue numerous times, from the very start. ONDA first raised the issue in the planning process for the RMP governing the project area, the Andrews-Steens RMP, and again in successive rounds of comments for this project. However, BLM ignores the

issue. In its description of the Affected Environment, the FEIS briefly states that “[a]s part of the Steens Mountain CMPA ROD/RMP[], two parcels within the Project Area were identified as having wilderness characteristics,” locates those small parcels, and states that they will be managed to protect wilderness characteristics but are not provided any special management status. FEIS at 104. In the corresponding section on Environmental Consequences, the FEIS provides one sentence stating that impacts on parcels with wilderness characteristics will be the same as those to WSAs. FEIS at 182. Both of these sections are flawed.

BLM’s dismissal of all 22 other areas in the Affected Environment section, despite ONDA’s detailed inventory report detailing their wilderness characteristics, is flawed because BLM presents nothing to support its rationale. No mention or analysis is present for the 22 other areas ONDA identified as having wilderness characteristics and brought to BLM’s attention. No field notes, photographs, or other actual data is present in the FEIS or ROD to describe BLM’s findings or show how they were reached. Likewise, there are no photos, data or analyses comparing BLM’s data against the scores of photos, maps and other data presented to it by ONDA. For example, ONDA’s report showed that many routes in the project area were in fact “ways” instead of “roads” because of poor conditions and lack of maintenance. See Miller Decl. ¶ 5–11. The report included many photographs in support of its conclusions. BLM does not even identify which routes in the project area it determined to be roads versus ways, much less present any data as to why, or explanation as to why ONDA’s more recent field data was incorrect. “They have provided no documentation to refute ONDA’s photographic evidence, but instead suggest that their knowledge and experience trumps the evidence.” Miller Decl. ¶ 11. Under the Administrative Procedure Act, an agency decision is arbitrary and capricious if the agency “offered an explanation for its decision that runs *counter to the evidence before the agency*.” O’Keefe’s, Inc. v. U.S. Consumer Prod. Safety Comm’n, 92 F.3d 940, 942 (9th Cir. 1996) (emphasis added; citing Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)). That is the case here.

Furthermore, that analysis must appear in the NEPA document itself. The Ninth Circuit has repeatedly held that environmental documents must explain their conclusions—and contain or summarize the data upon which they were based. “[A]llowing the Forest Service to rely on expert opinion *without hard data* either vitiates a plaintiff’s ability to challenge an agency action or results in the courts second guessing an agency’s scientific conclusions. As both of these results are unacceptable, we conclude that *NEPA requires that the public receive the underlying environmental data from which a Forest Service expert derived her opinion*.” Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1150 (9th Cir. 1998) (emphasis added). See also Klamath-Siskiyou Wildlands Ctr. v. BLM, 387 F.3d 989, 996 (9th Cir. 2004) (“[W]hile the conclusions of agency experts are surely entitled to deference, NEPA documents are inadequate if they contain only narratives of expert opinions”) (citing Idaho Sporting Cong.); Blue Mtns. Biodiversity Project v. Blackwood, 161 F.3d 1208, 1214 (9th Cir. 1998) (holding EA was unlawful where it contained “virtually no reference to any material in support of or in opposition to its conclusions”).

Because the FEIS lacks any data to support BLM’s findings, ONDA and the public never had a chance during the NEPA process to comment on and respond to BLM’s “analysis” of ONDA’s wilderness inventory information. This is critical because the BLM’s refusal to include

this information in the FEIS so that the agency and the public could make reasoned and informed analyses as to the impacts on wilderness characteristics frustrates NEPA's central purposes of fully informed decision-making and public participation. See, e.g., Columbia Basin Land Preservation v. Schlesinger, 643 F.2d 585, 592 (9th Cir. 1981) (preparation of a NEPA document ensures that the public "can evaluate the environmental consequences independently").

This very brief dismissal of the wilderness issue violates NEPA. As noted, BLM is "obligated under NEPA to consider whether there were changes in or additions to the wilderness values within the [project area], and whether the proposed action in that area might negatively impact those wilderness values, if they exist." Rasmussen, 451 F.Supp.2d at 1213. In fact, the wilderness analysis present in this EA is *far less detailed* than those invalidated in ONDA I and ONDA II. In those cases, BLM at least attempted to explain why it disagreed with ONDA's wilderness recommendations by including appendices to its EAs describing the wilderness characteristics of each proposed WSA in question.

Presumably, BLM wishes to defer to its dismissal of the proposed WSAs in its preparation of the Steens RMP. However, the RMP does not rescue this FEIS's flaws, because it, too, failed to support its decision to discard the 22 areas. In its RMP preparation, BLM purportedly undertook an analysis of ONDA's wilderness inventory report. The analysis was the subject of recent litigation before the District of Oregon, in which the court found the analysis did not violate NEPA. Ore. Natural Desert Ass'n v. Shuford, 2007 WL 1695162, *6-*9 (D. Or. 2007). ONDA respectfully disagrees with the court's conclusion, because BLM's analysis there was an in-office review, meaning BLM collected and presented no actual, countervailing data to rebut ONDA's inventory report conducted pursuant to BLM's protocols. For example, the *only* evidence of actual route condition before BLM during its RMP planning process was ONDA's inventory report. ONDA notes that BLM in ONDA I and ONDA II did virtually the same type of analysis—using the same type of review forms and failing to meaningfully document any field data. There, the only photographs taken by BLM were "digital orthophoto quads" (i.e., aerial photos), which Judge Heffernan concluded were insufficient to overcome "ONDA's scores of photographs show[ing] that the routes in question are generally eroded, rocky, overgrown with vegetation [and] evidencing little use and no maintenance." ONDA I at 14. In those cases, Judge Heffernan found that "[t]his record raises serious doubt as to the adequacy of the factual basis for BLM's . . . conclusions." Id. at 15. In sum, BLM's Affected Environment section is flawed because it has not meaningfully analyzed the wilderness resource present in the project area either at the RMP stage, or here.

As noted, BLM did identify two small non-WSA areas as having wilderness characteristics in the project area. BLM's section on Environmental Consequences is also flawed because it ignores significant impacts of the project on these areas including fencing, driving cross-country, and road maintenance. Again, the FEIS provides a single sentence referring the reader to the section on impacts to WSAs. FEIS at 182. However, that section makes no mention of the impacts of the undetermined amount of fencing on naturalness or other wilderness characteristics; no mention of the impacts of driving cross-country; no mention of the impacts of maintaining "[m]ost routes" in the project area "within 1-year of project implementation," id. at 17, 189–190; and little mention of the impacts of juniper cutting or mechanical treatments. Id. at 180–181.

These omissions are significant because all the listed impacts can degrade wilderness characteristics. Fences degrade naturalness and create long, linear corridors of livestock concentration, soil compaction, and weed infestations. Driving cross-country can create new routes, which also brings a reduction in naturalness and weed infestations. The impacts of maintaining routes within a proposed WSA is perhaps the most serious: because roadlessness is a requirement for wilderness, and maintenance is the difference between a road and a way, maintaining a way within a proposed WSA could forever preclude an area from wilderness designation. See Exh. 1 at 7 (defining “key factors” of wilderness). Finally, juniper cutting and mechanical treatments can seriously degrade naturalness by creating vast expanses of stumps and slash piles. “Although not permanent, the downed trees and persistent stumps will degrade the apparent naturalness and aesthetic beauty of the area. . . . Considering the ubiquitous nature of the proposed treatments, the consequent degradation of wilderness character in the area is likely to be so severe as to permanently forgo the possibility of wilderness protection in the future.” Miller Decl. ¶ 17. The Environmental Consequences analysis for WSAs mentions the cutting, but only to suggest that the stumps be cut low and perhaps rounded—not describing or quantifying the losses to naturalness in any way. FEIS at 180. All of these activities also have the potential to degrade primitive and unconfined recreation opportunities, but BLM does not analyze how the impacts would affect this wilderness characteristic.

In sum, ONDA’s report shows that many conditions have changed on the landscape in this area since the BLM conducted its initial, statewide wilderness inventory in the late-1970s. As a result, the BLM must consider these new circumstances and this important resource during this NEPA analysis. ONDA’s report represents the type of information BLM had a duty to collect, present and consider during this planning effort. Rasmussen, 451 F.Supp.2d at 1213. BLM has failed to meet its affirmative duty under NEPA to present, incorporate and consider this new information, and to evaluate the impacts of the project on the few non-WSA areas it acknowledges contain wilderness characteristics.

II. BLM Failed to Properly Balance Wilderness with Other Valid Multiple Uses of These Public Lands.

In addition to violating NEPA, BLM’s ROD violates FLPMA because it is based on outdated or inaccurate wilderness inventory information. FLPMA requires BLM to manage the public lands consistent with the “principles of multiple use and sustained yield.” 43 U.S.C. § 1732(a); see also id. § 1702(c) (defining “multiple use”). This duty is independent and distinct from the NEPA duty.

The Board of Land Appeals, interpreting the multiple use balancing duty in the context of a challenge to BLM’s issuance of a grazing permit and two annual grazing authorizations, has explained that BLM must

engage in [a] *reasoned or informed decisionmaking process* concerning grazing in the canyons in the allotment. That process *must show that BLM has balanced competing resource values* to ensure that the public lands in the canyons are managed in the manner that will best meet the present and future needs of the American people.

Nat'l Wildlife Fed'n v. Bureau of Land Mgmt., 140 IBLA 85, 101 (1997) (emphasis added). Citing Sierra Club v. Butz, 3 Env'tl. L. Rept. 20,292, 20,293 (9th Cir. 1973), the IBLA explained that "the multiple-use principle 'requires that the values in question be informedly and rationally taken into balance.' . . . [A]n agency is required to engage in such a *balancing test* in order to determine *whether a proposed activity* is in the public interest." 140 IBLA at 99 (emphasis added).

The cornerstone of FLPMA's multiple use framework requires that BLM "shall . . . take any action necessary to prevent unnecessary or undue degradation of the lands." 43 U.S.C. § 1732(b); see also Soda Mtn. Wilderness Council v. Norton, 424 F.Supp.2d 1241, 1269 (E.D. Cal. 2006) (BLM violated "unnecessary or undue degradation" standard where proposed land use plan amendment was based on contradictory and inconsistent grazing decisions that "fail[] to draw rational connections between the facts found and the decisions made) (citing Lowe, 109 F.3d at 526; 5 U.S.C. § 706(2)(A)). Accordingly, "BLM is obligated to consider in its [NEPA document] whether there will be any unnecessary or undue degradation to the lands as a result of" the proposed action. Soda Mtn., 424 F.Supp.2d at 1270.

The "unnecessary or undue degradation" standard evinces a clear intent on the part of Congress: "Interior is to prevent, not only unnecessary degradation, but also degradation that, while necessary to mining [the land use at issue in that case], is undue or excessive." Mineral Pol'y Ctr. v. Norton, 292 F.Supp.2d 30, 43 (D.D.C. 2003); Sierra Club v. Hodel, 848 F.2d 1068, 1075 (10th Cir. 1988) ("unnecessary or undue degradation" is an enforceable duty and provides "law to apply").

Finally, in order to satisfy its multiple use duty, BLM

shall prepare and maintain on a continuing basis an inventory of all public lands and their resources and other values (including, but not limited to, outdoor recreation and scenic values), giving priority to areas of critical environmental concern.

43 U.S.C. § 1711(a). Congress directed that the "inventory shall be kept current so as to reflect changes in conditions and to identify new and emerging resource and other values." Id. See also Rasmussen, 451 F.Supp.2d at 1213 (BLM failed to meet its NEPA obligation to properly consider impacts to wilderness values where it "rel[ied] on the one-time inventory review conducted in 1992. Such reliance is not consistent with its statutory obligation to engage in a continuing inventory so as to be current on changing conditions and wilderness values. 43 U.S.C. § 1711(a)."). See also Ctr. for Biol. Diversity v. BLM, 422 F.Supp.2d 1115, 1167-68 (N.D. Cal. 2006) (BLM land use plan decision violated FLPMA when decision was based on "obviously outdated and inaccurate" inventory information).

As explained above, BLM in the FEIS decided not to examine impacts to wilderness resource values in the action area based on an outdated, and undocumented, determination that such values do not exist. In addition to violating NEPA's "hard look" requirement, this violates BLM's procedural and substantive duties under FLPMA to properly balance multiple uses of the

public lands and to ensure that its chosen course of action will not cause “unnecessary or undue degradation” to the public lands and resources. As recognized in Center for Biological Diversity, resolution of ONDA’s FLPMA claim “is largely dependent on how the Court resolves plaintiffs’ challenges under NEPA.” 422 F.Supp.2d at 1167. By not examining impacts to wilderness values in the FEIS, BLM has necessarily failed to balance wilderness among the other valid multiple uses of these public lands. As such, BLM’s ROD is arbitrary, capricious, and not in accordance with FLPMA, 43 U.S.C. §§ 1732(a), (b).

III. BLM’s Proposed Treatments in Wilderness Study Areas Do Not Comply with FLPMA Section 603 or the Interim Management Policy.

Under FLPMA’s § 603, BLM is required to manage WSAs “in a manner so as not to impair the suitability of such areas for preservation as wilderness.” 43 U.S.C. § 1782(c). BLM also must take any action required to prevent unnecessary or undue degradation of the lands. Id. BLM expanded and developed this mandate in its Interim Management Policy for Lands Under Wilderness Review (“IMP”). The IMP contains the following guidance for vegetative manipulation:

Vegetative manipulation by chemical, mechanical, or biological means will not be permitted except: (1) plantings or seedings established before October 21, 1976 may be maintained but not expanded; (2) activities that qualify under the manner and degree provision for grandfathered grazing uses; and, (3) control of noxious weeds and individual exotic plants such as tamarisk when there is no effective alternative and when control . . . is necessary to maintain the natural ecological balances within a WSA or portion of a WSA.

IMP at III(C)(2). The IMP contains further guidance for forestry:

Removal of forest fiber products shall not be permitted on lands under wilderness review. . . . *Stand conversion does not conform with the non-impairment criteria and will not be permitted.* For example, burning of an aspen stand that was being converted into a conifer stand or burning sagebrush to create more grassland *would not be permitted.*

Id. at III(F)(emphasis added). And guidance for recreation provides that “No vehicle designation in a WSA may allow vehicles to travel off existing ways and trails,” with exceptions only for sand dune or snow areas and where designated open prior to 1976. Id. at III(H)(11).

The project proposes “full treatment” within WSAs: “[a]ll treatment methods including juniper cutting and piling will occur within WSAs.” ROD at 13. These treatments include juniper cutting, mechanical treatments, prescribed fire, fencing, seeding, and planting. ROD at 1. These treatments are designed to reduce juniper cover by 75% and increase grasslands. Id. at 13–14. BLM also proposes motorized off-road travel as needed “for proper project implementation and for fire fighter safety.” Id. at 24. These proposed treatments do not meet the plain language of the IMP or FLPMA § 1782(c), and thus are likely to unlawfully impair the suitability of the designated WSAs for preservation as wilderness.

V. Maintaining and Upgrading Routes within the CMPA Does Not Comply with the Steens Act or NEPA.

As noted, the project proposes extensive road maintenance. The FEIS states that “Routes used as fire lines and access to burn areas may experience heavy use resulting in limited to moderate damage. Damaged routes would be maintained as needed, consistent with identified maintenance standards. Most routes would receive maintenance within 1-year of project implementation.” FEIS at 190.

PETITION FOR STAY

Pursuant to 43 C.F.R. §§ 4.21 and 4.471, ONDA hereby petitions for a stay of the challenged decision. ONDA respectfully requests the IBLA to stay this contested decision until the appeal is resolved.

I. The Relative Harm to the Parties Favors Issuance of a Stay.

ONDA and its members, who actively recreate on the public lands on and surrounding the project area, will be harmed if this final decision is permitted to proceed. Implementation of this decision will result in a violation of federal laws and regulations as documented in the Statement of Reasons, as well as the loss of the ability of ONDA and its members to experience the land in question without viewing and experiencing ongoing degradation of important public resources and values. Miller Decl. ¶ 18. If this flawed decision is implemented, the losses to the public will be significant and may be long-term and/or irreversible. This runs directly counter to FLPMA’s requirement that the BLM manage the public lands in a manner “that will best meet the present and future needs of the American people” and “without permanent impairment of the productivity of the land and the quality of the environment.” 43 U.S.C. § 1702(c). If the BLM is permitted to proceed with its unlawful final decision, this would allow the agency to avoid its duty to “prevent unnecessary or undue degradation of the lands.” Id. § 1732(b).

Most significantly, the EA seeks to implement vegetative treatments on up to 188,336 acres, or 45–65 percent of the project area outside designated wilderness. ROD at 13. This is a truly immense project. Within those acres, up to 81,396 acres of juniper-dominated areas will be “treated” (that is, junipers cut or burned) in order to decrease junipers by 75%. *Id.* The ROD authorizes juniper cutting, mechanical treatment, and cross-country use of motor vehicles in WSAs. ROD at 2. The project also outlines plans to blade or otherwise maintain many remote two-track routes, including within proposed WSAs, which has the potential to *irreversibly foreclose* wilderness designation and alter the character of areas. *See* ROD at 3. Furthermore, undetermined amounts of “[p]ermanent fencing” may be installed, in undisclosed locations, to adjust grazing following treatment “as determined necessary.” ROD at 5.

These impacts will necessarily adversely impact and disturb naturalness and other wilderness values in WSAs and areas documented by ONDA to possess significant wilderness values. Wilderness is a sensitive resource, and desert lands are slow to heal. The impacts from blading, fence construction, and large vegetation removal and alteration may be long-term and/or irreversible. Miller Decl. ¶15–17.

The vegetative treatments will also impact imperiled wildlife. BLM admits that the juniper and sagebrush cutting and burning would create “voids of unsuitable habitat for sage-grouse” and “would decrease habitat for sage-grouse for up to 15 years” in the north end of the project area. FEIS at 157, 153. The sagebrush removal “could affect the amount of suitable nesting sites,” causing female sage grouse to “move to other available habitat but nesting success would likely decrease.” *Id.* at 152.

Losses of soil, native vegetation and imperiled native wildlife habitat are irreparable. It is of particular concern that these impacts will occur within an area in which ONDA has comprehensively documented significant wilderness values. The result of issuance of a stay of this decision will be the prevention of direct harm to ONDA, its members and their interests because of the violation of federal statutory and regulatory provisions on which ONDA relies.

Conversely, the relative harm to the BLM, should the Office of Hearings and Appeals (“OHA”) grant the requested stay, to the best of our knowledge, is minimal. Juniper expansion is has been occurring for decades and there is no emergency need to embark on a controversial and irreparable treatment regime. The projects proposed are long-term and will take many years to complete. Thus, there is no immediate or emergency need for the BLM to begin this fall.

Furthermore, if a stay is not granted, the BLM would be allowed to proceed with a project that has been developed and approved in contravention of federal law. This will cause potentially irreparable harm to the public lands involved, as described above. As the Tenth Circuit Court of Appeals recently observed, “harm to the environment may be presumed when an agency fails to comply with the required NEPA procedure.” *Davis v. Mineta*, 302 F.3d 1104, 1115 (10th Cir. 2002); *see also Amoco Prod. Co. v. Village of Gambel*, 480 U.S. 531, 545 (1987) (“[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable . . . therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment”). Alterations of these high desert public lands could begin immediately if a stay is not granted. At most, a stay will require the agency to hold off on construction activities until this appeal can proceed on the merits and potentially until the agency prepares a fully-informed analysis and decision as required by NEPA—and one that will avoid causing “unnecessary or undue degradation,” as required by FLPMA.

II. Appellants’ Likelihood of Success on the Merits Favors Issuance of a Stay.

ONDA has explained that it likely will succeed on the merits of this appeal because the agency refused to consider wilderness values and impacts to the wilderness resource; failed to balance multiple uses; and failed to comply with FLPMA § 603 and the IMP. As explained in ONDA’s Statement of Reasons, these failures violate FLPMA and NEPA.

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III. The Likelihood of Irreparable Harm Favors Issuance of a Stay.

The harm that will result from implementation of the BLM's final decision is irreparable in that it will allow new degradation of fragile public resources. The implementation of vegetative treatments over up to 188,336 acres, as well as road maintenance and fence construction, will result in disturbance to documented wilderness values by creation of vast expanses of stumps, further fragmented and destroyed habitat for already imperiled sagebrush obligate wildlife species such as sage grouse, and likely invasion and spread of noxious weeds to the detriment of native plant species. Losses of native vegetation and native wildlife habitat, as well as degradation to the wilderness resource, are irreparable. The finite amount of wilderness on Steens Mountain will decrease if this project proceeds during the merits.

Finally, ONDA and its members will be deprived of the opportunity to enjoy thriving wildlife populations in intact natural habitats, including healthy and thriving populations of special status species such as, sage grouse, ferruginous hawks and pygmy rabbits. The public will also be deprived of the opportunity to enjoy an area worthy of consideration for designation as wilderness, without the adverse, cumulative impacts to naturalness, solitude, and primitive states, if over 188,000 acres of vegetation manipulations are permitted. Instead, ONDA and the public will be faced with the very real potential for additional acreages of flourishing exotic plant species invasions in areas not previously disturbed by over-grazing or weed invasions, as well as declining wildlife populations as their habitat continues to become fragmented by increased weeds. If permitted to occur, these impacts will never be fully recoverable and therefore represent, through the loss of existing soils, microbiotic crusts, native vegetation, wildlife habitat, special status species and irreplaceable wilderness values, an irreparable action on the part of the BLM that will harm the environment and the ability of ONDA to carry forward a legal contest of this decision, once it is in place.

IV. The Public Interest Favors Issuance of a Stay.

Finally, the public interest favors granting the requested stay. The significant sage-steppe habitat and special status species, the magnificent wildlands on and surrounding the project area, and other important resources will be degraded irreparably if the BLM is allowed to implement its final decision. This is not in the public interest. Rather, recovering the health of these public lands and resources, and ensuring fully informed, balanced multiple-use decision-making in compliance with NEPA, FLPMA and other federal laws, is in the best interest of the public. In addition, the public interest as expressed by Congress in NEPA and FLPMA will be harmed if BLM is permitted to act in contravention of federal laws and regulations intended to protect public resources. FLPMA clearly recognizes the national interest in preserving and protecting wildlife and the wilderness resource for future generations. See 43 U.S.C. § 1701(2), (8). See also Seattle Audubon Soc'y v. Evans, 771 F. Supp. 1081, 1096 (W.D. Wash. 1991) (agency violation of statute "invokes a public interest of the highest order: the interest in having government officials act in accordance with the law"); Sierra Club v. Lujan, 716 F. Supp. 1289, 1293. (D. Ariz., 1989) (where environmental laws have been violated and harm to environment is imminent, "[t]he public interest is obvious" and an injunction should issue); Patriot v. U.S. Dep't of Housing and Urban Dev., 963 F.Supp. 1, 6 (D.D.C. 1997) ("the public interest is best served by having federal agencies comply with the requirements of federal law").

CONCLUSION

ONDA believes the granting of a Stay in this matter serves the interest of the health of native biota and the public on Oregon's public lands. Therefore, ONDA respectfully requests the IBLA to issue an order granting ONDA's Petition for Stay.

Respectfully,

s/ Kristin F. Ruether

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