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

**OREGON NATURAL DESERT ASS’N and
WESTERN WATERSHEDS PROJECT**

Appellants,

v.

BUREAU OF LAND MANAGEMENT,

Respondent.

Notice of Appeal, Statement of Reasons,
and Petition for Stay of Decision for North
Fork Malheur Geographic Management
Area Rangeland Health Project (EA #
OR-030-006-007)

NOTICE OF APPEAL AND STATEMENT OF STANDING

Pursuant to 43 C.F.R. Part 4, Appellants Oregon Natural Desert Association and Western Watersheds project (collectively “ONDA”) hereby appeal the Decision Record for the North Fork Malheur Geographic Management Area Rangeland Health Project (EA # OR-030-006-007), dated August 13, 2007. ONDA received the Decision on September 17, 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 the Oregon Natural Desert Association 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.

Western Watersheds Project (“WWP”) is a non-profit membership organization based in Hailey, Idaho, with offices also in Montana, Wyoming, Utah and California. WWP is dedicated to protecting and conserving the public lands and natural resources of watersheds in the

American West. WWP, as an organization and on behalf of its 1200-plus members, is concerned with and active in seeking to protect and improve the wildlife, riparian areas, water quality, fisheries, and other natural resources and ecological values of watersheds throughout the West, including southeast Oregon. WWP is also active in monitoring ecological conditions in the Vale District; in reviewing and commenting upon agency grazing and other resource decisions, including those at issue here; and in publicizing the adverse ecological effects of grazing in this region.

Appellants bring this appeal on their own behalf and on behalf of their members and staff, many of whom regularly enjoy and intend to continue to enjoy the public lands in the Vale District's Malheur Resource Area, including the project area, for educational, recreational, spiritual, and scientific activities, including wildlife watching. The project would harm Appellants and their members by degrading the wilderness resource and wildlife habitat of the project area. Appellants' 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 Field Manager's 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 Fork Malheur Geographic Management Area ("GMA") encompasses 237,556 acres in an isolated portion of eastern Oregon, due west of Vale, along the North Fork Malheur River. The area is a patchwork of private and public land divided into 19 grazing allotments, with BLM managing over 120,000 acres of the area. EA at 14. The area features many important environmental and natural resource values, including the North Fork Malheur River, which is designated as administratively suitable for "Wild" classification under the Wild and Scenic Rivers Act, two Areas of Critical Environmental Concern (Castle Rock and North Fork Malheur River), and significant archaeological resources.

The GMA also contains remarkable wilderness values. It encompasses the 6,200 acre Castle Rock Wilderness Study Area ("WSA") and about 1,100 acres of the Beaver Dam Creek WSA. EA at 81. The area also contains two areas, Lake Ridge Proposed WSAs and the Proposed Beaver Dam Creek Addition, 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 for the Vale District, submitted to BLM on February 6, 2004.

Starting in 2000, BLM initiated the Standards and Guidelines (S&Gs) assessment process pursuant to the Fundamentals of Rangeland Health. 43 C.F.R. Part 4180 *et seq.* The final assessment report, issued on December 10, 2004, documented widespread and severe violations of S&Gs across the project area, many of which were determined to be caused by current livestock grazing. The evaluation found that 45 pastures within 11 allotments did not meet the

S&Gs due to current livestock grazing. EA at 15. Put another way, 78,878 acres of BLM land were not meeting S&Gs due to current livestock grazing—almost two thirds of the project area. EA at 25. Further, only 29% of riparian areas were in proper functioning condition, meaning 71% were not functioning or functioning at risk. Id. A full 28% of those were either functioning at risk with a downward trend or nonfunctioning. Id. The pasture-by-pasture results from a typical allotment, Agency Mountain, are presented in Table 1.

Table 1: Standard and Guidelines Assessment result for Agency Mountain Allotment.

Pasture	Standard 1: watershed function, uplands	Standard 2: watershed function, riparian	Standard 3: ecological processes	Standard 4: water quality	Standard 5: native, T&E, or locally important species
Water Gulch	Not assessed	Not meeting due to current livestock grazing	Not assessed	Not meeting due to current livestock grazing	Riparian: Not meeting due to current livestock grazing. Terrestrial: not assessed
Agency Mountain	Meeting	Not meeting due to current livestock grazing	Meeting	Not meeting due to current livestock grazing	Not meeting terrestrial or riparian, due to current livestock grazing
Angus	Not assessed	Not assessed	Not assessed	Not assessed	Not assessed
Reservoir Field	Not assessed	Not meeting due to current livestock grazing	Not assessed	Not meeting due to current livestock grazing	Riparian: Not meeting due to current livestock grazing. Terrestrial: not assessed
Orchard	Meeting	Not meeting due to current livestock grazing	Not meeting	Not meeting due to current livestock grazing	Not meeting terrestrial or riparian, due to current livestock grazing

As shown in Table 1, every pasture assessed failed to meet three standards due to current livestock grazing. It is also of note that Standards 1 and 3 (upland function and ecological processes) were not assessed for most pastures, meaning they may be in violation of the standards as well. These results are typical across the NFMGMA.

The North Fork Malheur GMA process sought to address these violations. In 2006, BLM prepared an EA to develop long-term and broad-scale changes in livestock use to come into compliance with the S&Gs. During two rounds of detailed comments, ONDA explained that it strongly supports the goal of meeting rangeland health standards, but that the EA 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 EA before issuing a final decision. ONDA specifically requested that BLM consider the significant wilderness values present within the NFMGMA, including new and detailed wilderness inventory information that had been provided to BLM in 2004 by ONDA. ONDA additionally asked BLM to address effects of the proposed action on declining sage grouse populations and their habitat, and the agency's overall refusal to conduct an analysis of the suitability of continued levels of grazing in these areas.

The Decision Record to implement the North Fork Malheur Geographic Management Area Rangeland Health 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 the project area. It proposes "juniper treatment" (that is, removal or other eradication of native juniper trees throughout the project area) on up to 84,321 acres of public land, which is approximately *two-thirds of all BLM land in the project area*. See EA at 6–8. It also authorizes "mowing" of up to 130 acres; burning, spraying and seeding of several hundred more acres; and "treatment" of aspen and mountain mahogany on an undisclosed number of acres. Id. But the EA wholly fails to explain why such treatments are needed, explain how they will achieve compliance with S&Gs, or even support the proposal with recent data. See EA Map 5 (stating that the EA's ecological status data is "current as of 1978").

The EA also authorizes a series of grazing-related projects, which are documented in 15 separate decisions subject to appeal before the Office of Hearings and Appeals. These decisions reissue the 10-year grazing permits for the 19 allotments within the NFMGMA along with instituting new grazing systems, which *largely leave existing permitted numbers and stocking rates in place*. At the same time, BLM concedes in the EA that many allotments' stocking rates "are near or past the threshold of long-term sustainability" and even "anticipate[s] that monitoring may indicate the need for adjustment in permitted use." E.g. EA at 110 (Agency Mountain Allotment). Further, BLM acknowledges that many of the new grazing systems are "very complex and will require the utmost diligence on the part of the permittee(s) to successfully implement." Id. at 112.

The grazing decisions also propose to reshape the landscape on these public lands by authorizing reconstruction of almost 100 water developments on public land and over a mile of new pipeline, ostensibly designed to shift grazing out of the riparian areas into uplands. See EA Map 10. However, the EA fails to analyze the impacts this increased grazing would have on uplands habitat. Finally, the EA authorizes several miles of new fencing, despite acknowledging that it cannot even maintain its current fencing. E.g. Agency Mountain S&G evaluation at 3 (stating many existing fences are in a state of disrepair).

Thus, by BLM's own admission, these projects are not likely to be successful in remedying the pervasive S&G violations caused by current livestock grazing. In fact, they will cause a great deal of new environmental degradation—including significant, potentially irreparable damage to wilderness resource values—the consequences of which BLM has largely ignored in this EA. BLM seems to have bent over backwards to avoid reducing the grazing that is the cause of the vast majority of violations.

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; failed to prepare an EIS; failed to conform to RMP requirements regarding special status species; and did not adequately consider the cumulative impacts of the proposed action. This decision adversely affects Appellants and their members. ONDA will be negatively impacted by the vegetation treatments across approximately 85,000 acres of public lands, because the treatments will harm wilderness values; will have been undertaken without benefit of the required analyses on wildlife, soils, and other resources; and the impacts of defunct rangeland projects have not been considered.

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 NFMGMA contain wilderness characteristics worthy of protection for future generations. The entire Castle Rock WSA (6,200 acres) and 1,100 acres of the 19,580-acre Beaver Dam WSA occur on the GMA. The GMA 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 February 6, 2004, ONDA submitted to BLM its Vale District Wilderness Inventory Report and Recommendations.¹ The nearly 400-page report includes for each of 42 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's final reports include 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 the BLM's definition of wilderness characteristics and documenting how that information is new and/or differs from the information in prior inventories conducted by the BLM regarding wilderness values for the area.

Of the 42 areas identified in ONDA's report as having significant wilderness values, the Lake Ridge Proposed WSA and the Beaver Dam Creek Proposed Addition lie within the NFMGMA planning 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/OwyheeInvRept.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 this GMA, the Southeastern Oregon

RMP (“SEORMP”). At that time, BLM did not assess impacts to wilderness resource values, arguing that it need not reopen the wilderness issue in the SEORMP because there was no new information suggesting its original inventory was incorrect. Because BLM failed to undertake or perform these duties during the SEORMP process, it must now insure that it fulfills these obligations during subsequent site-specific projects where wilderness resources may be impacted. The present project is one such instance. Both NEPA and FLPMA impose affirmative duties on the BLM to consider and use in its decision-making process information on and relating to this important public resource. Further, ONDA raised the issue in its scoping comments and EA comments for this project.

However, BLM utterly dismisses the issue in the final EA and decision. The EA tersely states that the agency determined that “no wilderness characteristics were found within the planning area.” EA at 85. Based on this threshold finding, BLM concluded that “no impact will occur as a result of implementing management actions.” EA at 25.

BLM’s explanation of its conclusion is extremely brief. It claims that it conducted an “updated inventory” using “spatial data, existing decision documents, staff experience, and data included with the citizen proposal.” EA at 84. Its description of its findings, *in its entirety*, is as follows:

Within NFMGMA, 13 original (1978-1980) inventory units were updated. This update also evaluated the three citizen proposal areas in Beaver Dam Creek Addition, Lake Ridge, and Cottonwood Creek, [] which were split due to the presence of vehicular route information and land ownership, resulting 13 new inventory units. All units evaluated lacked the wilderness characteristics defined above. While some units had individual wilderness characteristics, none possessed the full suite of characteristics sufficient to make practicable their preservation in an unimpaired condition.

EA at 85. No field notes, photographs, or other actual data is present in the EA to describe these findings or show how they were reached. Likewise, there are no photos, data or analyses specifically evaluating the findings as compared 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. ¶ 5–13. 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. ¶ 13.

This extraordinarily 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.

In this case, an analysis is needed of how the extensive vegetative treatments planned for areas with wilderness characteristics would affect those characteristics. The proposed juniper cutting on an immense scale would significantly deplete naturalness by creating fields of stumps. This is important because the widespread cutting and other treatments proposed will leave behind thousands of acres 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.

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 EA 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 EA 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").

In short, 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. The Decision makes no mention of the content of the inventory or the impacts of the proposal on wilderness values in non-recommended WSAs and non-WSA roadless areas in and around the action area. BLM has failed to meet its affirmative duty under NEPA to present, incorporate and consider this new information.

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

In addition to violating NEPA, BLM's Decision based on outdated or inaccurate wilderness inventory information violates FLPMA. 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[ie]d 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 EA 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 EA, BLM has necessarily failed to balance wilderness among the other valid multiple uses of these public lands. As such, BLM’s Decision is arbitrary, capricious, and not in accordance with FLPMA, 43 U.S.C. §§ 1732(a), (b).

III. BLM Must Prepare an EIS in Order to Take the Requisite “Hard Look” at the Environmental Consequences of this Massive Rangeland Project.

NEPA requires BLM to prepare an EIS for all major federal actions that “may significantly affect the quality of the human environment.” 42 U.S.C. § 4332(2)(C). “[A]n EIS *must* be prepared if ‘substantial questions are raised as to whether a project . . . *may* cause significant degradation of some human environmental factor. . . . To trigger this requirement a plaintiff need not show that significant effects *will in fact occur*, [but] raising substantial questions whether a project may have a significant effect is sufficient.” Ocean Advocates v. U.S. Army Corps of Eng’rs., 402 F.3d 846, 864–65 (9th Cir. 2005) (quotations omitted, emphasis in original). If an agency decides not to prepare an EIS, it must supply a “convincing statement of reasons” to explain why a project’s impacts are insignificant. Blue Mtns. Biodiversity Project v. Blackwood, 161 F.3d at 1212.

Whether there may be a significant effect on the environment requires consideration of two broad factors: “context and intensity.” See 40 C.F.R. § 1508.27; 42 U.S.C. § 4332(2)(C). Context refers to the setting in which the proposed action takes place. 40 C.F.R. § 1508.27(a). Intensity means “the severity of the impact.” *Id.* at § 1508.27(b). The regulations include ten “intensity,” factors that courts may consider, any one of which is sufficient to trigger an EIS.

Ocean Advocates v. U.S. Army Corps of Eng'rs., 402 F.3d at 865. BLM's issuance of a Finding of No Significant Impact ("FONSI") for the project is unsupported because instead of a "convincing statement of reasons," it consists of very cursory dismissals of all factors. For this reason, BLM's decision to prepare an EA is arbitrary, capricious and not in accordance with NEPA.

Even before conducting a detailed analysis of the factors, it is apparent from the sheer size and scope of the project that an EA is inappropriate. Again, the EA proposes an extraordinarily ambitious vegetation treatment project including burning and cutting junipers on *over 84,000 acres* of public land; hundreds of acres of mowing and spraying; approximately 100 spring redevelopments; and construction of several pipelines and fences. See EA Map 10. Many of these treatments and projects take place within both designated WSAs and non-WSA roadless areas with inventoried and documented wilderness values. These treatments would take place over the course of the next *eleven years*. EA at 6–8 (chart showing that many vegetative treatments will be implemented from 2009–2018). The project also involves grazing management decisions for fully 45 pastures determined to be in violation of applicable rangeland health standards. Finally, the project's extensive range improvements would affect populations of high-profile, declining imperiled species, including sage grouse and pygmy rabbit, by shifting grazing from riparian areas into upland habitat. For these reasons, this project requires an EIS rather than an EA.

Further, BLM's dismissals of the specific "context and intensity" factors in its FONSI are cursory and unpersuasive. In the FONSI's discussion of "context," BLM concludes in cursory fashion that the physical effects of the project would be "miniscule" and "largely unnoticeable even at the local level," and that "[n]one of the actions contemplated are irreversible." EA at 3. These statements are unpersuasive. Calling the impacts of a project of this magnitude "miniscule" simply contradicts reality. It ignores the huge geographic extent of the project area, the extensive, agency-documented S&G violations caused by current grazing levels, the effects of wide-scale vegetation manipulation, and the fragile nature of the environmental resources at stake—such as wilderness and declining populations of sage grouse and pygmy rabbit. These factors make clear that the "context" factor is triggered. BLM erred by simply hopefully stating that the effects would be "miniscule."

The FONSI similarly dismisses the "intensity" factors. BLM dismisses the "unique or unknown risks" factor by claiming that the SEORMP and the EA analyze the anticipated impacts, and that monitoring and mitigation will keep "uncertain effects and unknown risks at insignificant levels." EA at 4. For the "highly controversial effects" factor, BLM *only* considers financial impacts on permittees, making no mention of the effects caused by the 84,000 acres of vegetation manipulation, shifting grazing from riparian areas into uplands, the spread of weeds, or related matters. Id. at 4. For the "unique areas" and "precedent for future actions factor," BLM again wipes away the impacts on these areas by tersely stating that all effects are temporary in nature. Id. at 4–5.

The dismissals of the "intensity" factors are similarly unpersuasive. In fact, there are several unique, unknown risks and highly controversial effects inherent in this project. The impacts of changing the character of the vegetation across over 84,000 acres in the project area

are highly uncertain. BLM admits that “[f]ire effects may or may not improve herbaceous plant composition and subsequent grazing practices.” EA at 143. Leading juniper literature, such as Miller *et al.*’s *Biology, Ecology, and Management of Western Juniper* (2005)² (“Western Juniper”) notes that “introducing livestock too quickly after western juniper treatments may inhibit understory recovery, particularly on sites with a diminished perennial bunchgrass component and may permit dominance by weedy annuals.” Western Juniper at 51. In the short term, “this necessitates permitting existing plants on site to grow and produce viable seed,” which does not occur until “the second or third year after western juniper control.” *Id.* at 50. However, the EA lacks clear guidance mandating this sort of rest after juniper control. EA at 22. The project therefore has a very high risk of spreading weeds, especially when done in concert with spring redevelopments, new fences and pipelines, and maintenance of grazing at levels which have caused widespread S&G violations. The manipulations will also have an unknown effect on declining sensitive species in the area such as sage grouse and pygmy rabbit. BLM itself acknowledges that the “[i]mpacts of land treatments to pygmy rabbit habitat would be uncertain.” EA at 146.

The impacts of the project on wilderness values in the NFMGMA are similarly unique and unknown. Extensive juniper cutting and the associated stumps will “degrade the apparent naturalness and aesthetic beauty of the area” to an unknown degree. Miller Decl. ¶ 17. The map of the proposed juniper treatment areas shows that massive areas will be treated, but does not indicate what kind of treatment will be selected. EA Map 9. “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 Dec. ¶ 17. The spring redevelopments, fences, and pipelines will have other, real impacts on wilderness character. It is well-established that range developments and fences create new livestock trailing corridors, new denuded leading to weed infestations, and new visual intrusions on the landscape. In turn, this damages the potential for non-WSA roadless areas with wilderness characteristics to be further studied or potentially protected as wilderness. *Id.* Moreover, the proposed road maintenance to improve currently primitive routes throughout the project area, in order to build and maintain the extensive structural facilities, necessarily would impact the key wilderness characteristic of “roadlessness.” For these reasons, this project will indeed set precedent for future actions in these areas.

Finally, BLM relies heavily on analysis performed in the SEORMP EIS, over six years ago, to demonstrate the lack of significant impacts resulting from the project. EA at 3–5. But BLM itself has indicated in plain terms that the SEORMP was designed to set broad goals and objectives for resource management, with specific strategies and more detailed analyses occurring in the future at the site-specific project stage—such as this GMA process. *See, e.g.*, SEORMP FEIS, Vol. 3 at 76 (SEORMP “does not identify site-specific livestock management actions that would be implemented with the signing of [the ROD]” and “[t]hroughout the life of the plan, the adaptive management process . . . would be implemented within GMA’s [sic] and may result in site-specific reductions or increases in levels of authorized livestock use”); SEORMP at 111–13 (describing role of adaptive management in SEORMP implementation).

² This report should be in BLM’s administrative record for this project, and is also available on the internet at: <http://extension.oregonstate.edu/catalog/html/tb/tb152/tb152.pdf>.

Even BLM acknowledges that the proposed actions in the NFMGMA “were not identified as specific line items in the SEORMP FEIS and ROD.” EA at 15. The SEORMP EIS published six years ago simply does not analyze the specific impacts of landscape-wide vegetative treatments in the NFMGMA, such as weed infestations and decreased possibility of future wilderness protection. For this reason, the very broad analysis in the SEORMP cannot be said to have adequately analyzed the specific impacts of this project.

In short, BLM has not shown that the proposed action will not have significant impacts on the human environment. As the Ninth Circuit has held, “[a]n agency must set forth a reasoned explanation for its decision and cannot simply assert that its decision will have an insignificant effect on the environment.” Marble Mtn. Audubon Soc’y v. Rice, 914 F.2d 179, 182 (9th Cir. 1990). Because the EA and decision cover well over 100,000 acres of public land, are planned to take over a decade to implement, include broad-scale vegetation treatment over 84,000 acres of public land, involve grazing management decisions for areas determined to be in violation of applicable rangeland health standards, affect populations of declining imperiled species, and would take place within both designated WSAs and non-WSA roadless areas with inventoried and documented wilderness values, “substantial questions whether [the] project may have a significant effect” exist. Ocean Advocates, 402 F.3d at 864–65.

IV. BLM’s Analysis of Sagebrush Obligates and Noxious Weeds Does Not Comply with the SEORMP, FLPMA, or NEPA.

The SEORMP includes a Special Status Animal Species Objective stating that BLM will “[m]anage public land to *maintain, restore, or enhance* populations and habitats of special status animal species.” SEORMP ROD at 51 (emphasis added). Pygmy rabbits and sage grouse are two of the many special status species on the Vale District. *Id.* at 53–54. FLPMA requires the BLM to “manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed.” 43 U.S.C. § 1732(a); see also 43 C.F.R. § 4100.0-8 (requiring BLM to manage grazing activities and management actions on public lands in accordance with applicable land use plans). This project is not in accordance with the consistency mandate because it will in fact *degrade* habitats of sagebrush obligate species.

BLM admits that the decisions will have serious impacts on these sagebrush obligates because of the plans to burn and cut thousands of acres of habitat, destroying sage grouse habitat and introducing new populations of noxious weeds; constructing range improvements designed to shift livestock impacts from riparian areas to the upland habitat; and constructing new fences and pipelines in uplands. These less grazed, upland sagebrush areas are generally the strongholds of species such as sage grouse and pygmy rabbit.

BLM acknowledges that sagebrush obligates are currently facing severe threats on the Vale District from cheatgrass and increased blocks of grasslands from wildfire. EA at 143 (“cheatgrass is widespread in lower elevation areas of NFMGMA . . . and therefore presents a potential long-term threat to wildlife habitat integrity”); *id.* at 145 (“Large, contiguous blocks of native or exotic grassland habitat in the hundreds or thousands of acres are considered to be an immediate and long-term threat to sagebrush-dependent wildlife populations of Vale District.”)

It also acknowledges that the proposed vegetation manipulations such as prescribed fire “would be expected to result in increased risk of cheatgrass expansion within NFMGMA” and increase cheatgrass and medusahead density and cover. EA at 143, 99. BLM’s wildlife analysis acknowledges that the planned vegetation manipulation will harm sage grouse habitat in other ways. EA at 143 (“Fire-caused impacts to sage grouse nesting habitat can be substantial because of the nature of fire behavior. . . . Fire “can significantly reduce opportunities for nesting success . . .”; EA at 146 (“land treatments of any sort would decrease the amount of available sage grouse winter range”). And it acknowledges that the “[i]mpacts of land treatments to pygmy rabbit habitat would be uncertain.” *Id.* The analysis also acknowledges that the proposed grazing and range improvement projects would have clear, adverse effects on sagebrush obligates. EA at 147–149 (stating that grazing may diminish nesting success, pipelines and associated road maintenance may result in cheatgrass expansion and long-term habitat disturbance, and fences will result in increased predation from raptors and entanglement).

To make matters worse, as ONDA pointed out during the NEPA process, BLM lacks current comprehensive data on ecological conditions across the landscape of these and surrounding allotments. For example, *no* sage grouse nesting habitat studies have been conducted within the NFMGMA, “so there are no locally-derived data available to help BLM avoid potential impacts to nesting habitat.” EA at 146. BLM’s past failure to adequately monitor and collect data on degradation caused by livestock facilities, vegetation treatments, and management activities casts serious doubt on whether the agency’s current plans to conduct follow-up monitoring will actually occur and thus whether those plans can be relied upon to protect sage-grouse habitat values and show over time if the objectives are being met.

BLM’s extremely brief section on noxious weeds fails to address numerous kinds of aggressive noxious weeds known to be present in the GMA, such as bur buttercup, whitetop, scotch thistle, and perennial pepperweed.

This litany of projected impacts and effects make clear that the project will not “maintain, restore, or enhance” sagebrush obligate populations and habitats, such as pygmy rabbit and sage grouse, as required by the SEORMP. Instead, it will degrade populations and habitat. This degradation also contradicts BLM’s mandates under FLPMA to balance multiple uses and “take any action necessary to prevent unnecessary or undue degradation of the lands.” 43 U.S.C. § 1732(b). BLM’s approval of such degradation, and failure to consider noxious weeds thoroughly, also evinces a failure to take a “hard look” at impacts of the project under NEPA.

V. BLM has Failed to Conduct a Meaningful Cumulative Effects Analysis

BLM has not adequately analyzed the cumulative impacts of its proposed action on weeds, sagebrush obligate wildlife, wilderness, and other resources. This violates NEPA, which requires an analysis of the cumulative impacts of the proposed action. See 40 C.F.R. §§ 1508.7, 1508.25(a)(2). Cumulative impact is

the impact on the environment which results from the incremental impact of the action when added to other *past, present, and reasonably foreseeable future actions* regardless of what agency . . .

or person undertakes such other actions. Cumulative impacts can result from *individually minor but collectively significant actions* taking place over a period of time.

Ocean Advocates, 361 F.3d at 868 (quotation omitted, emphasis in original). Thus, the BLM must actually assess the cumulative effects of the proposed action in particular on the resources listed above. A cumulative impacts analysis requires “some quantified or detailed information; . . . [g]eneral statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided.” Id. An analysis is not adequate where “there is no quantified assessment of [projects’] combined environmental impacts” or “any objective quantification of the impacts.” Klamath-Siskiyou Wildlands Ctr., 387 F.3d at 994. Where an agency only makes “generalized conclusory statements that the effects are not significant or will be effectively mitigated,” the analysis is inadequate. Id. at 996.

Here, the cumulative effects section of the EA is stunningly brief and conclusory. The total analysis for the EA is a page and a half, and the analysis for the selected alternative is only four paragraphs. EA at 162–163. BLM simply reviews major components of the project and labels the impacts as “minor,” before concluding that the “cumulative effects of proposed management actions would result in progress towards the attainment of SEORMP and NFMGMA objectives” because of “grazing schedule and project design” and mitigation measures. Id. at 163.

This conclusion flatly contradicts numerous sections in the EA acknowledging serious environmental effects from the projects such as degraded wildlife habitat, increased cheatgrass expansion and unsustainable livestock grazing. E.g. EA at 146 (“treatments will “decrease the amount of available sage grouse winter range”); id. at 143 (vegetation manipulations “would be expected to result in increased risk of cheatgrass expansion within NFMGMA”); id. at 162 (grazing “near or past the threshold of long-term sustainability.”)

The analysis does not contain a single attempt to objectively quantify impacts. For example, it states that the rangeland projects would cause “*some* increases in localized disturbance around troughs” and Alternative 3 would provide for recovery “at a *higher* level.” EA at 162–163 (emphases added). It fails to quantify the projected “progress” towards attainment of SEORMP and NFMGMA objectives. EA at 163. These statements closely mirror the types of statements overturned as inadequate in Klamath-Siskiyou Wildlands Ctr. 387 F.3d at 995.

Nor does the analysis ever combine, and analyze together, the project impacts from all the numerous types of projects planned in the NFMGMA. Nor is there any analysis of the combined impacts of this project along with similar projects on nearby and adjacent GMAs such as Louse Canyon GMA, where thousands of acres of the same types of treatments are proposed (and currently halted under federal court litigation, Ore. Natural Desert Ass’n et al. v. Freeborn, No. 06-1311-MO (D. Or. filed Sept. 14, 2006), while BLM revisits similarly flawed wilderness findings). And there is no analysis of the impacts of past grazing and range improvement projects, when considered in tandem with current and future grazing and projects. Finally, there is no discussion whatsoever of impacts to WSAs or non-WSA roadless areas that possess

wilderness values or characteristics. (For that matter, the section is similarly conclusory in nature with respect to ACECs, special status plant species, soil, water, riparian and wetland areas, wildlife and wildlife habitats, special status animal species, wild and scenic rivers, and cultural resources.) To ignore the cumulative impacts to the wilderness resource of undertaking actions that potentially remove forever the possibility of wilderness designation on segments of the public lands that possess wilderness characteristics, is unlawful. These omissions render the analysis even worse than that in Klamath-Siskiyou Wildlands Ctr., where BLM at least attempted to tally other impacts planned in the watershed, and created a “checkbox” of resources to inform the public whether they would be affected. 387 F.3d at 995.

Here, the EA merely contains an extremely general statement that the cumulative effects of proposed management actions will result in the attainment of various SEORMP objectives. BLM’s complete failure to include “some quantified or detailed information” about the cumulative impacts across the landscape of the NFMGMA, as well as broader landscapes such as the Vale District, is arbitrary and capricious and not in accordance with the law.

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 NFMGMA, 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. ¶ 17. 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 over 84,000 acres, mowing of up to 130 acres; burning, spraying and seeding of several hundred more acres; aspen and mountain mahogany treatments on an unnamed number of acres; reconstruction of approximately 100 water developments on public land; new fencing; new pipelines; and reissuance of grazing permits within the NFMGMA. These projects will further cheatgrass invasions. EA at 143 (vegetation manipulations “would be expected to result in increased risk of cheatgrass expansion within NFMGMA.”) They will also cause the mowing or clearing of an unspecified number of acres of sagebrush habitat, livestock trailing along portions of the newly-created corridors, trampling, compaction and erosion of soils and microbiotic crusts, and

disruption and degradation of critical sage grouse and pygmy rabbit habitat and movement. These impacts will necessarily adversely impact and disturb wilderness values in areas documented by ONDA to possess significant wilderness values or characteristics. Although fences can be taken down, and other rangeland projects removed, the adverse environmental impacts that result from their construction and presence on the ground may be long-term and/or irreversible. This includes the continuation of status quo grazing numbers and levels of use when fewer livestock or better grazing practices may be warranted.

Losses of soil, native vegetation and 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, is minimal to nonexistent. To the best of our knowledge, BLM is maintaining its grazing management under an interim strategy in order to satisfy its mandatory obligation to make grazing changes prior to the start of the next grazing season upon determining that current grazing practices are causing failures to satisfy the Federal Rangeland Health regulations’ standards and guidelines. See 43 C.F.R. § 4180.2(c). Thus, there is no immediate or emergency need for the BLM to construct the proposed fencing and other rangeland projects.

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”). Although the BLM may argue that a stay would prevent progress from being made toward meeting Standards of Rangeland Health in NFMGMA, this is not a sufficient reason for moving forward with a project that fails to seriously consider better management solutions, such as reducing authorized AUMS to a level of grazing that is more suitable for the landscape and will allow rangeland health obligations to be met. Moreover, this project may well cause further damage to other parts of the allotments and other important multiple-use resources. Construction activities and permanent alterations of these public lands and high desert landscapes would 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 established 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; failed to prepare an EIS; failed to conform to RMP requirements regarding special status species; and did not adequately consider the cumulative impacts of the proposed action. As explained in ONDA's Statement of Reasons, this violates FLPMA and NEPA.

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 and purposeful degradation of public resources. The implementation of vegetative treatments over 84,000 acres, mowing of up to 130 acres; burning, spraying and seeding of several hundred more acres; aspen and mountain mahogany treatments on an unnamed number of acres; reconstruction of almost 100 water developments on public land; new fencing; new pipelines; and reissuance of grazing permits within the NFMGMA will result in disturbance to documented wilderness values, further fragmented and destroyed sage-steppe wildlife habitat, invasion and spread of noxious weeds to the detriment of native plant species, and potentially destroy critical nitrogen-fixing microbiotic crusts. Losses of soil and crusts, native vegetation, and native wildlife habitat, as well as degradation to the wilderness resource, are irreparable.

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 84,000 acres of vegetation manipulations, almost 100 spring developments, and numerous other facilities 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 and new "range improvement" physical barriers, and continued unsustainable use levels and associated ecological problems. 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 NFMGMA, 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 the 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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