

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OREGON NATURAL DESERT ASSOCIATION
and CENTER FOR BIOLOGICAL
DIVERSITY,

Plaintiffs,

Civil No. 03-381-HA

v.

OPINION AND
O R D E R

UNITED STATES FOREST SERVICE,
and ROGER W. WILLIAMS, Malheur
National Forest Supervisor,

Defendants,

DAYVILLE GRAZING ASSOCIATION and
OREGON CATTLEMENS ASSOCIATION,

Defendant-Intervenors.

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HAGGERTY, Chief Judge:

This case is brought by plaintiffs Oregon Natural Desert Association and the Center for Biological Diversity seeking an order prohibiting the Forest Service from allowing any livestock grazing on the public lands of the Murderers Creek and Blue Mountain Allotments until plaintiffs' claims can be heard on the merits. The two allotments are located on the Malheur National Forest ("MNF"), which is encompassed within the John Day River Basin.

This lawsuit was filed in March 2003. Subsequently the parties sought and obtained multiple schedule extensions. Plaintiffs filed a Second Amended Complaint in February 2004 and a Motion for Preliminary Injunction on March 19, 2004. The defendants and intervenors obtained two extensions for filing Responses, and a hearing was conducted in court on July 9, 2004. Plaintiffs and defendants solicited testimony at the hearing and all three parties presented persuasive argument for their respective positions.

FACTUAL BACKGROUND

The MNF contains grazing allotments that are governed by a permit system under the Federal Land Policy and Management Act of 1976 ("FLPMA"). Defendant United States Forest Service ("Forest Service") manages livestock grazing on national forests by using three separate decision-making processes: (1) federally issued grazing permits; (2) allotment management plans ("AMPs"); and (3) annual operating plans, currently referred to as annual operating instructions ("AOIs").

A grazing permit is a "document authorizing livestock to use National Forest System or other lands under Forest Service control for the purpose of livestock production" 36 C.F.R. § 222.1(b)(5). Generally, permits are issued for periods of ten years. 36 C.F.R. § 222.3(1). Permits are issued according to a priority system tied to ownership of private "base property" and set limits on allowable numbers of livestock and seasons of use based on an allotment's estimated ability to sustain certain average levels of use. *See* C.F.R. § 222.3(c)(1)(ii); *see also* 43 U.S.C. § 1752.

An AMP is an allotment-specific planning document that: (1) prescribes how grazing operations will be conducted in order to meet multiple-use and other goals and objectives; (2) describes any range improvements to meet allotment objectives; and (3) contains any other grazing management provisions and objectives prescribed by the Forest Service. 36 C.F.R. § 222.1(b)(2).

The Forest Service's regulations require that an AMP be issued for all grazing allotments. An AMP prescribes the extent of grazing on an allotment and must be consistent with the Forest's Land and Resource Management Plan (the "Forest Plan") for a particular region.

An AOI is a signed agreement issued annually by the Forest Service to a permittee that sets final authorized dates of grazing (the "season of use"), pasture and grazing system rotations, numbers of livestock permitted for the upcoming season, monitoring and reporting requirements, and maximum limits of forage use by livestock. Each allotment is further divided into pastures or units, which allows the Forest Service to control grazing on each allotment at different times and the levels of use throughout the grazing season. The AOIs must also be consistent with the Forest Plan.

The Murderers Creek Allotment and the Blue Mountain Allotment are two allotments located on the MNF and are the subject of this suit. Streams within these allotments are homes to the anadromous Mid-Columbia River steelhead trout, a species listed as threatened under the Endangered Species Act ("ESA"), and a designated Management Indicator Species on the MNF. The two allotments contain critical habitat for

the steelhead, such as riparian vegetation, water quality, temperature, spawning "gravel," and safe passage conditions.

Murderers Creek Allotment

The Murderers Creek Allotment encompasses 62,656 acres within the 85,044 acres of the Murderers Creek Watershed in the John Day River system. The Murderers Creek Allotment is made up of ten units or pastures. Six contain steelhead spawning or rearing habitat. Three herds graze the Murderers Creek Allotment: the north, middle, and south herds.

Blue Mountain Allotment

The Blue Mountain Allotment encompasses 22,447 acres of the MNF, including twenty-one miles of steelhead-bearing streams. Steelhead habitat exists in each of the Blue Mountain Allotment's four units. It appears undisputed that concentrated livestock use has been the most significant negative impact upon the riparian vegetation in the Blue Mountain Allotment. In past seasons, approximately 175 cow and calf pairs have grazed on the Blue Mountain Allotment from mid-June until the end of September.

PROCEDURAL BACKGROUND

The National Forest Management Act of 1976 (NFMA) imposes a substantive duty on the Forest Service to provide sufficient habitat to maintain viable, well-distributed populations of wildlife species throughout their existing ranges. NFMA directs the Secretary of Agriculture to develop, maintain, and, as appropriate, revise Forest Plans for each unit of the National Forest system. 16 U.S.C. § 1604(a). In developing Forest Plans, the Secretary of Agriculture must use a systematic interdisciplinary approach to achieve

integrated consideration of physical, biological, economic, and other sciences, 16 U. S.C. § 1606(b), and must provide for public participation in development and review. 16 U.S.C. § 1606(d).

Once approved, the Forest Plan requires compliance with standards and guidelines by individual site-specific projects. Site-specific projects must be evaluated for compliance with the requirements of the National Environmental Policy Act (NEPA), the ESA, and other applicable laws and regulations.

The NFMA provides a two-step process for forest planning. *Inland Empire Pub. Lands Council v. United States Forest Serv.*, 88 F.3d 754, 757 (9th Cir. 1996). The Forest Service is required to develop a Forest Plan and an Environmental Impact Statement (EIS) for the entire forest. 36 C.F.R. § 219.10(a), (b). After the Forest Plan is in place the site-specific projects are assessed by the Forest Service. *Id.* A site-specific project must be consistent with the Forest Plan for the larger area. *See Inland Empire*, 88 F.3d at 757; *see also* 16 U.S.C. § 1604(I) ("Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans"); 36 C.F.R. § 219.10(e) ("[T]he Forest Supervisor shall ensure that . . . all outstanding and future permits, contracts, cooperative agreements, and other instruments for occupancy and use of affected lands are consistent with the plan"). *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1377 (9th Cir. 1998).

Agency actions challenged under the NFMA are reviewed in accordance with the Administrative Procedure Act ("APA") to determine if they were arbitrary and capricious, an abuse of discretion, or not in accordance with the law. 5 U.S.C. § 706(2)(A); *Idaho*

Sporting Congress v. Thomas, et al., 137 F.3d 1146, 1149 (9th Cir. 1998); *Oregon Natural Res. Council v. Lowe*, 109 F.3d 521, 526 (9th Cir. 1997) (applying arbitrary and capricious standard to NFMA and NEPA actions). In determining whether the Forest Service's decision was arbitrary and capricious, courts "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989) (citation omitted). "A decision is arbitrary and capricious if the agency 'has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *O'Keeffe's, Inc. v. United States Consumer Prod. Safety Comm.*, 92 F.3d 940, 942 (9th Cir. 1996) (quoting *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

An action is arbitrary and capricious if the agency fails to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n.*, 463 U.S. at 43 (citations omitted). The agency is also required to disclose the grounds upon which it acted. *Atchison T. & S.F. Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 807 (1973). "Review under the arbitrary and capricious standard is narrow, and the reviewing court may not substitute its judgment for that of the agency." *O'Keeffe's, Inc.*, 92 F.3d at 942 (citation omitted); *see also Friends of Wild Swan, Inc. v. United States Forest Service*, 966 F. Supp. 1002, 1012 (D. Or. 1997). Deference to

the agency is particularly appropriate "when questions of scientific methodology are involved." *Inland Empire*, 88 F.3d at 760.

The MNF adopted its Forest Plan in 1990. The Plan requires the Forest to promote the objectives of Management Indicator Species (such as steelhead) and to provide preferential treatment to anadromous fish in areas suitable for grazing. Standards are included to provide necessary habitat to maintain or increase steelhead populations and to implement riparian improvement activities. Specifically, grazing is to be managed so that water quality meets Oregon State standards and fish populations are maintained at an acceptable condition or in an upward trend.

To further bolster the protections for anadromous fish species, a regional aquatic conservation strategy known as PACFISH was subsequently developed and amended the MNF Forest Plan. PACFISH amended the Malheur National Forest Land and Resource Management Plan for watersheds with anadromous fish. In *Friends of Wild Swan*, this court described PACFISH:

After plaintiffs filed this lawsuit, defendant Forest Service approved two decisions that amended the regional guides . . . and the forest plans for the National Forests at issue. These decisions are known as PACFISH, approved on February 25, 1995, and INFISH (Inland Native Fish Strategy), approved on July 28, 1995. PACFISH amended four regional guides and fifteen forest plans, while INFISH amended three regional guides and 22 forest plans. Both plans were designed as interim strategies expected to last 18 months. PACFISH was formally extended when its 18-month term expired, and INFISH, which had no firm expiration date, was extended administratively.

* * *

PACFISH establishes goals for watershed, riparian and stream channel conditions to protect and restore habitat. Riparian management objectives (RMOs), delineation of Riparian Habitat Conservation Areas (RHCAs), and establishment of standards and guidelines to govern management actions that will impact fish habitat are the means of achieving these goals. The RMOs establish measurable habitat parameters that define good fish habitat and

provide criteria against which progress toward attainment of the riparian goals is measured.

* * *

The Interim Strategies for Managing Anadromous Fish-Producing Watersheds in Eastern Oregon and Washington, Idaho, and Portions of California, commonly known as PACFISH, include "a range of interim management strategies designed to arrest the degradation and begin the restoration of habitat for Pacific salmon, steelhead, and sea-run cutthroat trout (anadromous fish)."

Friends of Wild Swan, 966 F. Supp. at 1010-1019.

The applicable RMOs include pool frequency, water temperature, large woody debris, bank stability, lower bank angle, and width to depth ratio. The grazing standard "GM-1" in PACFISH requires the Forest Service to modify grazing practices that retard or prevent RMOs from being attained or are likely to adversely affect listed anadromous fish. Grazing should be suspended if adjusting practices is ineffective in meeting the RMOs or avoiding the adverse effects on the listed fish. This standard is at the heart of plaintiffs's claims and specifically provides that the Forest Service must:

Modify grazing practices (e.g., accessibility of riparian areas to livestock, length of grazing season, stocking levels, timing of grazing, etc.) that retard or prevent the attainment of Riparian Management Objectives or are likely to adversely affect inland native fish. Suspend grazing if adjusting practices is not effective in meeting Riparian Management Objectives.

In 1999, the Forest Service adopted a Grazing Implementation Monitoring Module ("Module") to meet its responsibilities to monitor grazing allotments. This Module was revised in 2000 and 2002, and the Forest Service asserts that the Module meets the implementation monitoring requirements outlined in PACFISH. Monitoring is required on forty percent of the pastures that contain riparian areas and lie within watersheds containing ESA-listed fish. "Move triggers" are examined to determine when cattle should be moved.

These include the height of grasses at the end of grazing season, forage and shrub utilization, and bank damage. The triggers are designed to maintain acceptable levels of livestock effects upon stream channels and riparian vegetation. The 2002 amendments instruct the Forest Service to monitor woody shrub species and streambank stability and stubble height.

Plaintiffs assert that eight years after invoking PACFISH, it remains unclear whether the Forest Service has implemented an effective monitoring strategy on the Murderers Creek Allotment or Blue Mountain Allotment as required by PACFISH. Plaintiffs assert seven claims, which are construed as follows. Claims One, Two, and Three argue that defendants' final, discrete decision to authorize grazing via AOIs is inconsistent with the applicable Forest Plan as amended by PACFISH and thereby violates NFMA. Claims Four and Six allege that defendants have unreasonably failed to adopt current AMPs for the two allotments. An AMP has never been adopted for the Blue Mountain Allotment, and the AMP for the Murderers Creek Allotment is over twenty years old. Claims Five and Seven assert that defendants have wrongfully failed to perform analysis and collect data regarding the existing AMP and the AOIs as required by NEPA.

The issue before the court now is whether this court should issue a preliminary injunction prohibiting any further grazing on the Blue Mountain and Murderers Creek Allotments until the merits of plaintiffs' claims can be adjudicated. For the reasons that follow, this court declines to grant such an injunction.

STANDARDS

"The standard for granting a preliminary injunction balances the plaintiff's likelihood of success against the relative hardship to the parties." *Clear Channel Outdoor Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003). The plaintiff must demonstrate either: "(1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in its favor." *Id.* "These two alternatives represent extremes of a single continuum, rather than two separate tests Thus, the greater the relative hardship to [the party seeking the preliminary injunction,] the less probability of success must be shown." *Id.* (citation and internal quotations omitted). "Serious questions" are those "questions which cannot be resolved one way or the other at the hearing on the injunction" *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988). Serious questions are substantial, difficult, and doubtful enough to require more considered investigation. *Id.* Such questions need not show a certainty of success, nor even demonstrate a probability of success, but rather "must involve a `fair chance of success on the merits.'" *Id.* (quoting *Nat'l Wildlife Fed'n v. Coston*, 773 F.2d 1513, 1517 (9th Cir. 1985)).

When considering the issuance of a injunction in a case in which the court will need to address the environmental impact of a proposed agency action, the court must assume that "Environmental 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." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987). Consequently, where a plaintiff has shown that environmental injury is sufficiently likely, "the balance of the harms will usually favor the issuance of an injunction to protect the environment." *Id.*

QUESTIONS PRESENTED

- I. Have plaintiffs raised "substantial questions" as to whether the Forest Service acted arbitrarily or capriciously under NFMA and the APA by authorizing grazing activities on the Murderers Creek Allotment and Blue Mountain Allotment:
 - A. that prevent attainment of the applicable RMOs and are likely to adversely affect listed fish?
 - B. without collecting required monitoring information?
 - C. without collecting trend data for relevant Management Indicator Species ("MIS") and by violating other MIS requirements?
- II. Have plaintiffs raised substantial questions as to whether the Forest Service has wrongfully withheld and delayed revisions of Allotment Management Plans on the Murderers Creek Allotment and Blue Mountain Allotment, by failing to develop an AMP for the Blue Mountain Allotment and never conducting NEPA analysis on the Murderers Creek Allotment AMP?
- III. Have plaintiffs established the possibility of immediate and irreparable injury?

ANALYSIS

The parties have submitted substantial evidence in the form of the Administrative Record, expert declarations, photographs, agency studies, and independent monitoring data. The court has reviewed these submissions and exhibits. For purposes of issuing a timely ruling on the question of whether to grant a preliminary injunction, the court is constrained to offer its summary interpretation of this evidence. Further analysis and interpretation will be undertaken, where necessary, as this action is adjudicated on the merits.

Plaintiffs have submitted strong evidence suggesting that the Forest Service's management of livestock grazing, or lack thereof, has caused and is causing ecological damage to the riparian habitats of the Murderers Creek Allotment and Blue Mountain Allotment. Plaintiffs' evidence suggests numerous failures on the part of defendants to meet

the applicable standards and the PACFISH RMOs for stubble height, bank damage, bank stability, shrub use, water temperature, width-to-depth ratio, and pool frequency. Plaintiffs' experts conclude that grazing occurring in the allotments is not only retarding attainment of the RMOs, but is causing continued damage and that the Forest Service is failing to meet the applicable Forest Plan standards.

Defendants offer little evidence to refute plaintiffs' contentions of the damage caused by grazing, and in some instances tacitly or explicitly acknowledge this impact. Of particular note, the Forest Service elected to "rest" the Blue Mountain Allotment after this lawsuit was filed. "Resting" an allotment means suspending grazing where it is retarding attainment of RMOs or is likely to adversely affect listed fish. Even after this resting, the negative effects of grazing on the Blue Mountain Allotment are still evident, according to plaintiffs' experts. *See Rhodes Declar.* at 11.

Plaintiffs argue that despite overwhelming evidence that grazing is retarding or preventing the attainment of RMOs on the Murderers Creek Allotment and Blue Mountain Allotment, the Forest Service has failed to make the meaningful modifications required by the Forest Plan as amended by PACFISH. Under PACFISH grazing standard GM-1, grazing must be suspended when modifications are ineffective in meeting RMOs or avoiding adverse effects on listed fish.

Plaintiffs also emphasize their challenge regarding defendants' alleged noncompliance with NFMA requirements to designate and maintain Management Indicator Species (MIS). MIS are proxies used to measure the effects of Forest Service strategies. Here, steelhead are a designated MIS on the MNF. In order to provide the needed habitat

for steelhead, the Forest Plan requires the MNF to monitor habitat capability in all subwatersheds that have existing or potential anadromous fish habitat. Plaintiffs describe this as "a proxy-on-proxy approach" to MIS viability analysis.

The proxy-on-proxy approach is permitted under limited circumstances in the Ninth Circuit. In *Idaho Sporting Congress v. Rittenhouse*, 305 F.3d 957 (9th Cir. 2002), the Forest Service's use of habitat as a proxy for population monitoring of the MIS was found to be arbitrary and capricious. Plaintiffs argue the same is true here, since the government fails to justify the use of the proxy-on-proxy approach.

The Forest Service's annual Monitoring and Evaluation Reports (M&E) indicate that no sampling of adequate intensity to estimate fish populations has been completed (1993 and 1994 M & E), and in 1997 the Report recognized that concerns over the viability of steelhead and other species continues to increase because of the uncertainty regarding the status of the species. In sum, plaintiffs contend that the Forest Service elected to gather relevant information for making management decisions by monitoring MIS species. Plaintiffs assert that because the Forest Service is monitoring steelhead populations inadequately, and failing to collect useful information for determining the adequacy of the steelhead habitat is being provided for steelhead, the Forest Service is acting arbitrarily and capriciously.

Defendants respond to these claims in several ways. They raise jurisdictional challenges, discussed below, and also assert that the 2004 AOIs substantially change the grazing practices on the allotments at issue and therefore place defendants in compliance with federal law.

Specifically, the AOI for the Murderers Creek Allotment dramatically alters the permissible grazing for the middle and south herds, combining the herds and limiting the grazing in any pasture to three weeks, and shortening the season by two weeks. Defendants claim an overall twenty percent reduction of grazing use.

In the AOI for the Blue Mountain Allotment, the permittee is now limited to grazing 40 cow-calf pairs for two months, where previously 175 pairs grazed for 3.5 months. Defendants Ex. E at 1.

Moreover, the Forest Service has joined with the Fish and Wildlife Service to assist in preparing a Biological Assessment for the allotments. Defendants indicate that the team of biologists concur that the grazing scheduled for 2004 is not likely to adversely affect any listed species. Defendants Ex. C at 12, Ex. E at 12.

The Forest Service also retained an expert, Wayne Elmore, to evaluate plaintiffs' claims and to assess the allotments. Elmore is an expert in rangeland management with over thirty-five years experience managing forests and studying the effects of grazing upon riparian ecosystems. Elmore amplifies the government's position that the allotments in question reflect adverse impacts of historical grazing practices that started in the late 1800s, and he acknowledges that the south and middle herd pastures on the Murderers Creek Allotment are in a static or downward trend. Elmore calls for a change in the management of the herds, and that the changes in the 2004 AOI is, essentially, a start in the right direction. Elmore concludes that the grazing authorized on the Murderers Creek Allotment and the Blue Mountain Allotment in the 2004 AOI will not result in irreparable harm to riparian sources.

Before addressing defendants' jurisdictional challenges, the court pauses to examine the merits of the parties' relative positions. Judge King of this court is facing a similar dispute in *Oregon Natural Desert Association v. United States Forest Service*, Civ. No. 03-213-KI. In his Opinion and Order of June 10, 2004, Judge King ruled upon the plaintiffs' request for an order prohibiting the Forest Service and the intervenors from authorizing, allowing, or conducting any grazing on any portion of the Bluebucket, Dollar Basin/Star Glade, Flag Prairie, Spring Creek, North Fork, or Ott allotments that lies within, or is not securely and permanently fenced from, wild and scenic river corridors on the MNF until plaintiffs' claims could be heard on the merits. While denying such an injunction, Judge King reiterated defendants' duties under the National Wild and Scenic Rivers Act ("WSRA") to protect certain rivers. The court also recognized the Forest Service's duties under NFMA to develop, maintain and revise Forest Plans so that permits, contracts, and other instruments for the use and occupancy of National Forest System lands are consistent with such plans, are mandatory and non-discretionary and can give rise to claims that challenge agency inaction or seek review of actions that are alleged to be arbitrary and capricious. *See* Opinion and Order, June 10, 2004, at 7-9 (citations omitted). The court concluded that "Plaintiffs have submitted fairly convincing evidence that the Forest Service's management of livestock grazing has caused ecological damage to the riparian habitats of the Malheur and North Fork Malheur river corridors and their watersheds." *Id.* at 13.

In addressing the defendants' argument, similar to one raised here, that the new 2004 AOIs will satisfy federal law, the court stated, "I am optimistic that the changes made in the AOIs will have beneficial effects on the degraded areas, but because of the substantial

evidence suggesting that full resting may be needed in many of the areas, I am doubtful that these changes will fully remedy the harms at issue." *Id.* at 14. The court concluded, "Plaintiffs have made a strong showing that standards are not being met and that they are likely to prevail in proving violations of the WSRA and NFMA provisions at issue." *Id.* at 16.

The same is true in the case before this court. Although defendants offer optimistic assessments that the 2004 AOIs will improve the static or degrading conditions in the damaged areas on the Murderers Creek Allotment and Blue Mountain Allotment, such optimism fails to refute plaintiffs' evidence that defendants have not been, and are not, in compliance with either NFMA, the requirements to advance and adopt AMPs, or the mandates under NEPA for AMPs and AOIs. It remains to be seen which parties' experts most accurately project the effects and consequences of the 2004 AOIs. This court is unable to determine with certainty the likely significance of the new modifications, and speculation on that question would be inappropriate. The decisions to rest the Blue Mountain Allotment last year and to call for limitations in the current AOIs, suggest a welcome, improved attentiveness on defendants' part to the critical questions regarding how to better balance land use needs with and environmental concerns on the MNF. This encouraging attentiveness, however, is not dispositive on either the issue of whether to issue a preliminary injunction or in evaluating the merits of plaintiffs' claims. As the record currently stands, in light of the evidence presented by the parties, plaintiffs present some likelihood of succeeding on the merits of their claims regarding defendants' final, discrete decisions to proceed to permit grazing on the Murderers Creek Allotment and the Blue

Mountain Allotment that appears inconsistent with the applicable Forest Plan, is unsupported by required data, and is without NEPA analysis and without an AMP (the Blue Mountain Allotment) or with an AMP that is over 20 years old (the Murderers Creek Allotment).

Defendants urge this court to declare that it lacks authority to compel the kind of compliance and monitoring plaintiffs believe is necessary and required. Defendants rely upon *Norton v. Southern Utah Wilderness Alliance*, 124 S. Ct. 2373 (2004), in which the United States Supreme Court rejected the claims brought by several environmental groups that alleged that the Bureau of Land Management ("BLM") failed to adequately protect certain public Wilderness Study Areas in Utah from off-road vehicle use. The plaintiffs contended that the BLM violated its management duties under FLPMA, failed to implement provisions the required monitoring of designated areas and to undertake corrective action as necessary, and failed to comply with NEPA requirements. *Id.* at 2378. The Court construed these claims as "failure to act" claims, which "are sometimes remediable under the APA, but not always." *Id.* The Court reasoned that "the only agency action that can be [judicially] compelled under the APA is action legally *required*." *Id.* at 2379 (emphasis in original). Such claims "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Id.* (emphasis in original). Courts may compel action that is unreasonably delayed, but for a delay to be unreasonable, the action must be required of the agency. *Id.* at n.1.

Defendants portray plaintiffs' claims as "failure to act" allegations similar to those rejected in *Norton*. This court concludes that plaintiffs' claims instead fall within the kinds

recognized in *Norton* as valid and viable. Plaintiffs are challenging discrete, final agency actions pursuant to Section 706(2) of the APA. These include decisions to authorize grazing that is allegedly inconsistent with Forest Plan requirements. Plaintiffs also challenge defendants' allegedly unreasonable delays in undertaking legally required agency action such as adopting AMPs and undertaking NEPA analyses. These challenges are valid pursuant to Section 706(1) of the APA. *See Norton*, 124 S. Ct. at 2380.

The government also relies upon two appropriations bills enacted by Congress in 2003 that allow certain grazing permits renewed by 2003 to remain in effect until a NEPA analysis is completed. *See* Pub. L. No. 108-7, 117 Stat. 11, § 328 (February 20, 2003); Pub. L. No. 108-11, § 2401 (April 7, 2003). On November 10, 2003, the President also signed the 2004 Department of Interior and Related Agencies Appropriations Act, Pub. L. 108-108, 117 Stat. 1241. Section 325 of that Act provides that notwithstanding Section 504 of the Rescissions Act, the timing for completing environmental analyses for Forest Service grazing allotments shall be left to the discretion of the agency. For permits renewed prior to 2004, the Act provides that "the terms and conditions of the renewed grazing permit shall remain in effect until such time as the Secretary of Agriculture completes the process of the renewed permit in compliance with all applicable laws and regulations or until expiration of the permit" For grazing permits expiring between 2004 and 2008, the Act provides that those permits "shall be renewed" under the same terms and conditions until the agency "completes the processing of such permit or lease in compliance with all applicable laws and regulations, at which time such permit or lease may be canceled, suspended or modified . . . to meet the requirements of such applicable laws and regulations."

Judge King addressed this argument in his preliminary injunction opinion, and stated that "I do not believe the amendments affect my ability to consider injunctive relief on any of plaintiffs' other claims. Congress's action appears to prevent courts from vacating permits, but that is not what the plaintiffs are seeking." *Oregon Natural Desert Ass'n*, Civ. No. 03-213-KI, Opinion and Order, June 10, 2004, at 18. Regarding the question of issuing a declaratory judgment, the court agreed with the plaintiffs that "nothing in the amendments prevents the court from declaring that the Forest Service violated NEPA by issuing the permits and annually authorizing grazing through AOIs without the required analyses and that it violated the Rescissions Act by failing to adhere to a schedule for such analyses," and there is nothing in the legislation precluding the court from establishing a schedule for NEPA analyses. *Id.*

This court agrees with this sound reasoning and adopts it.

Having determined that plaintiffs present a likelihood of succeeding on the merits of their claims and remaining unpersuaded by defendants' jurisdictional challenges, this court turns to the daunting task of balancing the hardships the preliminary injunction being sought would impose. The court is mindful of the Supreme Court's teaching that environmental injury, by its nature, is often irreparable, and that the balance of the harms will usually favor the issuance of an injunction to protect the environment. *Amoco Prod. Co.*, 480 U.S. at 545. Plaintiffs also argue compellingly that the crisis that would ensue for the affected ranchers if grazing were enjoined on the Blue Mountain and Murderers Creek Allotments is largely a consequence of defendants' making.

However, as Judge King was, this court is confronted with the dilemma of having to decide whether to issue the extraordinary relief of an injunction on the eve of the grazing season. In consideration of this critical timing and its impact of transforming an injunction into an immediate, profound threat to the affected ranchers' livelihood, a threat that could inflict more than mere economic harm upon these ranchers and their families, this court concludes that the balance of harms tips slightly against issuing an injunction at this time.

This court also shares Judge King's view in recognizing what amounts to a dire need for better management of grazing on these public lands, and that recent management has fallen short of the legal mandates related to the protection of the land and water and the endangered species dependent thereon. *See Oregon Natural Desert Ass'n*, Civ. No. 03-213-KI, Opinion and Order, June 10, 2004, at 19. Although the court will not, at this point, exacerbate the current situation by inflicting a last-minute injunction upon the affected ranchers, a rededication on the part of the Forest Service to meeting the challenges inherent in balancing the legitimate land use interests and the legitimate environmental concerns is needed. Though by no means a preferred remedy, the entry of an injunction before the next grazing season remains a viable consideration for this court in the quest for achieving that balance.

CONCLUSION

For the foregoing reasons, plaintiffs' Motion for Preliminary Injunction (Doc. # 48) is denied. The parties are instructed to confer regarding a method and a schedule for resolving the merits of plaintiffs' claims. The parties shall file a proposed schedule in the form of a Joint Status Report to the court no later than August 6, 2004. If the parties cannot

reach agreement regarding a proposed schedule or other issues, the parties shall file individual Status Reports by that date outlining the parties' respective positions.

IT IS SO ORDERED.

Dated this 15 day of July 2004.

/s/Ancer L.Haggerty

Ancer L. Haggerty
United States District Judge