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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON**

**OREGON NATURAL DESERT  
ASSOCIATION, et al.**

Case No. CV-03-381-HA

Plaintiffs,

v.

**PLAINTIFFS’ OPPOSITION  
TO MOTION TO STRIKE**

**UNITED STATES FOREST SERVICE,  
et al.,**

**ORAL ARGUMENT REQUESTED**

Defendants,

**DAYVILLE GRAZING ASSOCIATION  
and OREGON CATTLEMENS  
ASSOCIATION,**

Defendant-Intervenors.

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Defendant-Intervenors, Dayville Grazing Association and Oregon Cattlemens Association  
(hereafter “OCA”), have moved to strike the Second Declaration of Jonathan J. Rhodes (Dkt.

#114), the Third Declaration of Robert L. Beschta (Dkt. #113), and the Second Declaration of Christopher Christie, except paragraphs one and three (Dkt. #115). See Motion to Strike at 2 (Dkt. #120). OCA also asks that this Court strike all references to these Declarations in Plaintiffs' Motion and Memorandum for Summary Judgment. Id. OCA argues only that the declarations are extra-record and do not fit any of the well-accepted circumstances in which this Court may consider extra-record evidence. Defendants, the U.S. Forest Service, has joined in OCA's motion to strike, but does not raise any additional argument. Notice of Joinder (Dkt. #130).

Plaintiffs respectfully request the Court to deny the motion to strike. First, the declarations fit within one or more of the exceptions to the general rule that judicial review of the merits of an agency's decision is limited to the administrative record. In addition, the declarations provide evidence and expert testimony of the short- and long-term ecological harm caused by the Forest Service's grazing management decisions. Because this evidence and testimony concerns Plaintiffs' pattern and practice claims and the request for relief, Plaintiffs are not limited to the existing administrative record.

### **ARGUMENT**

#### **I. THE DECLARATIONS ARE PROPERLY BEFORE THE COURT BECAUSE THEY FIT WITHIN ONE OR MORE OF THE RECORD-REVIEW EXCEPTIONS.**

Judicial review of an agency action "typically focuses on the administrative record in existence at the time of the decision and does not encompass any part of the record that is made initially in the reviewing court." Southwest Ctr. for Biol. Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1450 (9th Cir. 1996). There are, however, well-accepted exceptions to this general rule.

Thus, district courts may admit extra-record evidence:

(1) if admission is necessary to determine “whether the agency has considered all relevant factors and has explained its decision,” (2) if “the agency has relied on documents not in the record,” (3) “when supplementing the record is necessary to explain technical terms or complex subject matter,” or (4) “when plaintiffs make a showing of agency bad faith.”

Lands Council v. Powell, 379 F.3d 738, 747 (9th Cir. 2004) (quoting Southwest Ctr., 100 F.3d at

1450). These exceptions “operate to identify and plug holes in the administrative record.” Id.

Each of the three declarations submitted with Plaintiffs’ summary judgment papers are properly before the Court because they fit the first and third exceptions.

**A. The Declarations Fit Within the Exceptions Because They Show the Forest Service Did Not Consider All Relevant Factors and Adequately Explain its Decisions.**

At issue, in part, is whether the Forest Service is complying with the National Forest Management Act requirement to act consistent with the Malheur Forest Plan requirements, including the PACFISH grazing standard to not prevent or retard attainment of Riparian Management Objectives (RMOs) and the standard to provide for and enhance steelhead and its habitat, a forest Management Indicator Species. The declarations at issue identify a number of relevant factors that the Forest Service has failed to consider in making its grazing management decisions. A review of the administrative record, along with the declarations, demonstrate that the administrative record produced by the Forest Service is completely lacking in relevant monitoring information necessary to make rationale grazing decisions, including successive measurements of RMOs, evaluation of those measurements in comparison to existing grazing, and comparison of grazing within allotments to the enclosures where grazing has been excluded.

The Third Beschta Declaration and the Second Rhodes Declaration explain how livestock grazing in the allotments at issue is affecting ecological values, including steelhead and their habitat, and discuss whether Forest Service-authorized grazing practices are affecting the rate of recovery of the relevant ecological standards in PACFISH, including discussing relevant scientific literature.<sup>1</sup> See Third Beschta Decl. passim; Second Rhodes Decl. passim. The declarations also demonstrate that the limited rest that portions of the two allotments recently received has not restored the degraded riparian and aquatic habitat to meet the ecological PACFISH standards. Third Beschta Decl. ¶¶ 5-9; Second Rhodes Decl. ¶¶ 11-23. Finally, both declarations describe the importance and relevance of the ecological conditions within grazing enclosures to the grazing management decisions. Third Beschta Decl. ¶¶ 10-15; Second Rhodes Decl. ¶¶ 30. The administrative record contains little to no discussion of the effects of the grazing on the PACFISH RMOs, steelhead and its habitat, or the comparable ecological condition in enclosures – all of which are relevant factors the agency could and should have considered in making its grazing decisions. As a result, Plaintiffs are entitled to rely upon the Third Beschta and Second Rhodes declarations to discuss the relevant factors.

Finally, the Second Christie declaration, with attachments, provide monitoring information and photographic evidence that do not appear in the administrative record. The Christie monitoring data in particular provide a comprehensive look at the ecological damage Forest Service-authorized grazing has caused in these allotments. Because the Forest Service has no comparably comprehensive data, Christie's declaration and monitoring is evidence that the

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<sup>1</sup>Further explanation is provided in the First and Second Declarations of Dr. Beschta (Dkt. ##50, 84), the Declaration of Dr. J. Boone Kauffman (Dkt. #51), the First Declaration of Jonathan J. Rhodes (Dkt. #52). None of the Defendants have moved to strike these declarations.

Forest Service did not consider all relevant factors and did not adequately explain the challenged decisions.

All three declaration also are directly relevant to the Forest Service's argument that the changes made in the 2004 AOIs were "significant" and would result in no further violations of standards. See Def. Mem. in Resp. to Plaintiffs' Mot. for Preliminary Injunction (Dkt # 70), at 26. Although Defendants have not yet filed their memo and cross-motion responding to Plaintiffs' motion for summary judgment, one would assume Defendants will continue to assert the grazing management changes made prior to the 2004 grazing season satisfied PACFISH's requirement to modify grazing practices that retard attainment of riparian management objectives. Plaintiffs' argument, as supported by the challenged declarations, is that these and all previous management changes have continued to result in failures to meet standards, and only permanent injunctive relief can at this point satisfy PACFISH and begin the long process of ecological recovery these watersheds will require. Pl. Memo in Support at 40–42. A court may consider post-decisional evidence when that evidence confirms or, as in this case, disproves the assumptions upon which the challenged decision relies. See Ass'n of Pacific Fisheries v. EPA, 615 F.2d 794, 811–12 (9th Cir. 1980) ("If the post decisional studies showed that the Agency proceeded upon assumptions that were entirely fictional or utterly without scientific support, then post decisional data might be utilized by the party challenging the regulation.").

The declarations that OCA seeks to strike are directly relevant to the question of whether the Forest Service considered all relevant factors and has explained its decisions in the annual operating instructions. Thus, they fit the first extra-record evidence exception.

**B. The Declarations Fit Within the Exceptions Because They Help Explain Complex Subject Matter.**

The declarations also explain “complex subject matter” in that they provide discussions that do not appear anywhere else in the administrative record concerning complex riparian and hydrological processes and the ecological implications of the Forest Service’s failure to meet basic grazing standards. The AOIs, which are the decisions challenged in this litigation, certainly do not contain any explanation of riparian and hydrological processes. See SSMCAR 192, 197 (2004 AOIs). The Forest Service’s most detailed look at these processes and factors occurs in its biological assessments. See SSPAR 334. However, these documents do not provide the level of detail that Beschta and Rhodes provide; nor do they acknowledge or discuss in any detail the ecological degradation described by these experts. In particular, Beschta and Rhodes highlight the long-term effects of continued grazing combined with the past damage these river corridors and watersheds have suffered. See, e.g., Third Beschta Decl. at ¶¶ 10-16 (comparing allotments at issue with relevant exclosures to inform short- and long-term impacts, degradation and potential for recovery). Because the Forest Service failed to collect, present or discuss information specific to the allotments and watersheds at issue in this litigation, and in particular failed to consider the long-term effects of continued grazing combined with past and present ecological damage, the information contained in the Beschta and Rhodes declarations, as well as the Christie monitoring data, is critically important to helping explain this complex technical subject matter. Therefore, the declarations are properly before the court under the third extra-record evidence exception and should not be stricken.

**C. The Declarations Filed With Plaintiffs' Preliminary Injunction Motion Should Be in the Administrative Record.**

Defendants do not seek to strike other declarations submitted in support of Plaintiffs' Motion for Preliminary Injunction. See First and Second Declarations of Dr. Beschta (Dkt. ##50, 84), the Declaration of Dr. J. Boone Kauffman (Dkt. #51), the First Declaration of Jonathan J. Rhodes (Dkt. #52), First Declaration of Chris Christie (Dkt. #53). These declarations, submitted in this litigation against the Forest Service in March, 2003, should be part of the administrative records for the 2004 grazing decisions. To the extent that the Forest Service has failed to consider the information and evidence in all of these declarations in making its 2004 grazing decisions and in preparing the administrative record further demonstrates the lack of support for the 2004 grazing decisions. Because those materials were in the agency's possession prior to its final decisions, they should in fact be in the administrative record.

That Plaintiffs did not specifically request Defendants to add those materials to the administrative record after Defendants lodged the record should not prejudice Plaintiffs. The recent language in The Lands Council, suggesting that a plaintiff could have "moved the agency to supplement its record with this evidence" is *dicta* because the court held it "need not address the extra-record evidence issue because we have determined that there are other bases for reversing the district court and enjoining the Project." The Lands Council, 379 F.3d at 748 (stating that the evidence could be "submitted to the Forest Service, and be made part of the administrative record, if and when the Forest Service conducts a new NEPA analysis of the Project"). The Ninth Circuit's suggestions are well-taken<sup>2</sup>, however, they were made in the

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<sup>2</sup>Plaintiffs have submitted the Third Beschta Declaration, the Second Rhodes Declaration and the Second Christie Declaration to the Forest Service by letter and enclosure to its litigation counsel on November 22, 2004.

context of not deciding the extra-record issue and made several months after the Forest Service made its 2004 grazing decisions. Moreover, as this Court knows, the Forest Service does not conduct any NEPA analysis for its Annual Operating Instructions, and it has failed to prepare or update required Allotment Management Plans (AMPs), accompanied by any NEPA analysis. Therefore, the process that the Ninth Circuit suggests a plaintiff use to submit information is not available here. Riverhawks v. Zepeda, 228 F.Supp.2d 1173, 1181 (D. Or. 2002) (“defendants cannot assail plaintiffs’ failure to submit their expert reports when the Forest Service did not provide public notice or an opportunity for comment regarding the proposal”).

By providing the declarations to Defendants in March, well before the 2004 grazing decisions, and by requesting multiple times in the two months prior to filing the preliminary injunction motion that Defendants consider resting the allotments pending the court’s decision on the merits, Plaintiffs made a good-faith effort to ensure the Forest Service would consider Plaintiffs’ data and findings showing extreme ecological damage to the areas in question. Therefore, examination of these declarations clearly would not thwart the “long-standing rule that ‘the focal point for judicial review should be the administrative record already in existence’” at the time the decision was made. Inland Empire Public Lands Council v. Glickman, 88 F.3d 697, 703 (9th Cir. 1996) (citing Camp v. Pitts, 411 U.S. 138, 142 (1973)). Thus, they are properly before the court and should be in the administrative record.<sup>3</sup>

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<sup>3</sup> Note also that these documents alternatively could be admitted via the second extra-record exception, which allows the court to admit extra-record materials where “the agency has relied on documents not in the record.” Lands Council v. Powell, 379 F.3d at 747. As noted above, because the Forest Service did not complete its 2004 grazing authorizations until at least July, 2004, the agency had Plaintiffs’ monitoring data and expert findings and recommendations in its possession for three months or more prior to making final decisions on its 2004 AOIs.

**II. THE DECLARATIONS ARE PROPERLY BEFORE THE COURT TO DEMONSTRATE PLAINTIFFS' PATTERN AND PRACTICE CLAIMS AND ENTITLEMENT TO THE REQUESTED RELIEF.**

Apart from their admissibility on the merits, Plaintiffs' declaration testimony and evidence is admissible to support their pattern and practice claims and request for injunctive relief. See, e.g., Oregon Natural Desert Ass'n v U.S. Forest Svc., 03-381, slip op. at 7 (Dec. 23, 2004)(Dkt. #127) (pattern and practice claims "appear capable of being developed via lay and expert declarations"); Idaho Watersheds Project v. Hahn, 307 F.3d 815, 833-34 (9th Cir. 2002) (reviewing agency extra-record declaration filed to inform permanent injunction); see also Leboeuf, Lamb, Greene & Macrae, LLP v. Abraham, 215 F.Supp.2d 73, 82 (D.D.C. 2002) (supplemental extra-record evidence allowed "in cases where relief is at issue") (citing Esch v. Yeutter, 876 F.2d 976, 991 (D.C. Cir. 1989)).

As this Court is aware, Plaintiffs have requested the court to enjoin livestock grazing on the allotments at issue until the Forest Service can demonstrate compliance with all applicable law and regulation. See Mot. for Summary Judgment at ¶ H (Dkt. #112). Plaintiffs support that request and its pattern and practice claims, in part, by the declarations of Beschta, Rhodes, and Christie, who provide evidence that the Forest Service's annual grazing authorizations have caused, and will continue to cause, significant ecological degradation within the allotments at issue. See, e.g., Pl. Memo in Support of Summ. J. at 39 (discussing why injunctive relief is necessary and relying on monitoring data and expert conclusions and recommendations). Thus, because permanent injunctive relief is at issue in Plaintiffs' motion for summary judgment, the challenged declarations are properly before the court and should not be stricken.

## CONCLUSION

In short, Defendants ask this Court to review the merits and remedies of this action in a vacuum secure from potentially damaging information. But this information helps explain key factors the Forest Service failed to consider and complex subject matter concerning the impacts continued grazing is having on these allotments. As the Ninth Circuit has stated previously:

[I]t is both unrealistic and unwise to “straightjacket” the reviewing court with the administrative record. It will often be impossible, especially when highly technical matters are involved, for the court to determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not. The court cannot adequately discharge its duty to engage in a “substantial inquiry” if it is required to take the agency’s word that it considered all relevant matters.

Asarco Inc. v. EPA, 616 F.2d 1153, 1160 (9th Cir. 1980). Therefore, for the above-stated reasons, Plaintiffs respectfully request the court to deny OCA’s motion to strike.

Dated this 4<sup>th</sup> day of January, 2005

Respectfully Submitted,

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