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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OREGON NATURAL DESERT ASS’N,
et al.,

Case No. 06-523-HO

Plaintiffs,

v.

RESPONSE TO LAIRD RANCH *ET AL.*
AMICUS CURIAE BRIEF

SHIRLEY GAMMON, Lakeview District
Manager, BLM, *et al.*,

Defendants.

INTRODUCTION

On March 12, 2007, this Court granted Laird Ranch *et al.* permission to appear as amicus curiae in the liability phase of this action and allowed Plaintiffs Oregon Natural Desert Association *et al.* (“ONDA”) to file a response to Laird Ranch’s amicus brief. ONDA hereby responds to Laird Ranch’s brief. The flawed premise of Laird Ranch’s brief is that ONDA seeks to have the Court substitute its judgment for BLM’s. As explained below, ONDA does not ask this Court to do so; nor does it ask the Court to “compel” particular resource inventories or substantive results in BLM’s management of the public lands at issue here. ONDA simply asks the Court to review BLM’s final decisions adopting the Lakeview RMP and the Beaty Butte AMP, based on the record before the Court, to determine whether BLM has complied with

specific procedural and substantive requirements under federal law. If the agency has failed to do so, the proper remedy, in general terms, under the Administrative Procedure Act is to vacate the unlawful decision(s) and remand to the agency for a new NEPA analysis consistent all with provisions of federal law.

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER ONDA’S CLAIMS.

Scattered throughout its brief, Laird Ranch makes the same jurisdictional arguments as BLM. Because ONDA already has responded to BLM’s arguments concerning issues of “final agency action” and ripeness, we will not make further such arguments here. See ONDA Reply at 2–7. Concerning the justiciability of ONDA’s Beaty Butte AMP claims, however, Laird Ranch claims the claims should not be heard because of “lack of prosecution.” Laird Ranch at 30. Adopting BLM’s statute of limitations argument, Laird Ranch seems to be arguing that ONDA was not entitled to dismiss its administrative appeal prior to a final decision on the merits. As ONDA has explained, though, once Interior issued its November 30, 2005 decision denying ONDA’s motion for summary judgment and request for injunctive relief, ONDA’s interests were harmed and ONDA was entitled to take its claims to federal court along with related claims against the Lakeview RMP. See ONDA Reply at 7–9.

In arguing ONDA’s claims could only have accrued upon Interior’s initial denial of ONDA’s stay request, BLM complains that Interior’s regulations “do not contemplate the filing of motions for injunctive relief” of the type ONDA filed in its administrative appeal. BLM Reply at 9. This argument is inconsistent with the regulations. Pursuant to Interior’s grazing appeal regulations, an administrative law judge has broad authority to set aside a BLM final decision if it is not reasonable or not in compliance with governing regulations. See 43 C.F.R. § 4.472(a).

Further, the ALJ stands in the place of the Secretary, and is authorized to render a *de novo* decision based on the record developed at hearing or on briefing on the merits. See 43 C.F.R. § 4.1. Interior’s Board of Land Appeals (“IBLA”) has confirmed that an ALJ may issue injunctive relief against BLM after a hearing or briefing on the merits. See, e.g., NWF v. BLM, 140 IBLA at 103–104 (upholding ALJ order enjoining grazing in canyons on Comb Wash Allotment pending BLM’s fulfillment of the NEPA and FLPMA duties agency was found to have violated). Where an ALJ either declines to exercise that broad authority or issues a decision refusing to grant injunctive relief, harm accrues to the administrative appellant, who is then free to seek recourse in the federal courts. See Idaho Watersheds Project v. Hahn, 307 F.3d 815, 826 (9th Cir. 2002) (exhaustion of administrative remedies not required under BLM regulations because they do not provide for rendering agency decision inoperative pending appeal) (citing Darby v. Cisneros, 509 U.S. 137, 152 (1993)).

II. BLM HAS A DUTY UNDER NEPA TO TAKE A “HARD LOOK” AT IMPACTS TO WILDERNESS RESOURCE VALUES.

A. Wilderness Is a Resource Like Any Other Under NEPA.

As ONDA has argued at length already, NEPA requires BLM to take a “hard look” at the environmental consequences of its proposed action on the “human environment.” 42 U.S.C. § 4332(2)(C). Wilderness is a resource like any other on the public lands. See ONDA Br. at 20; ONDA Reply at 10–12 (explaining this in detail). Therefore, BLM must examine the impacts to wilderness of its RMP decisions, just as it does for other resources such as fish and aquatic habitat, wild horses, or cultural and paleontological resources. See, e.g., AR Tab 2-26 (FEIS Vol. 1, viii–ix) (listing these and numerous other resources—with the notable absence of wilderness—as part of the “Affected Environment”). Laird Ranch claims this is an “unusual view,” Laird Ranch Br. at 17, yet the plain meaning of the term “human environment,” along with more than

forty years of statutory, regulatory, and administrative interpretation, unmistakably supports the conclusion that wilderness is a resource like any other.

This conclusion is based on: (1) the plain language of NEPA, which “comprehensive[ly]” defines the “human environment” as “the interrelations of *all* components of the natural environment,” 42 U.S.C. 4331(a) (emphasis added), 40 C.F.R. § 1508.14; (2) Congress’s recognition of wilderness as a distinct component of the natural environment in both the Wilderness Act, 16 U.S.C. § 1131(c), and in FLPMA, 43 U.S.C. §§ 1701(a)(8) (calling for preservation of public lands in “their natural condition”), 1702(i) (adopting Wilderness Act definition of “wilderness”); (3) the Department of the Interior’s careful definition of the “key factors” of wilderness in its 1978 and 2001 wilderness inventory handbooks, AR Tab 2-10 at 9–16 & Tab 6-2125, 6-2130 to -2133; and (4) BLM’s plain and unambiguous statement in the Lakeview RMP itself that “wilderness preservation is part of BLM’s multiple-use mandate and wilderness is recognized as part of the spectrum of resource values considered in the land use planning process.” AR Tab 2-33 (RMP 70).

However much Laird Ranch and BLM want to avoid confronting wilderness head-on, they cannot escape the inevitable conclusion, based soundly on plain statutory language and three decades of a consistent agency position, that wilderness is a resource like any other on the public lands. As such, BLM has an obligation to take a “hard look” at impacts to that resource in the EIS for the Lakeview RMP. 42 U.S.C. § 4332(2)(C); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 348 (1989). As the Ninth Circuit recently observed, “While it is true, as the agency claims, that NEPA’s requirements are not absolute, and are to be implemented consistent with other programs and requirements, this has never been interpreted by the Supreme Court as excusing NEPA’s application to a particularly sensitive issue.” San Luis Obispo

Mothers for Peace v. Nuclear Reg. Comm'n, 449 F.3d 1016, 1034 (9th Cir. 2006) (in context of holding NEPA required an agency to consider the environmental effects of a potential terrorist attack).

Laird Ranch declines to respond to this simple and straightforward argument. Instead, in its amicus brief it tries to transform ONDA's challenge to BLM's Record of Decision adopting the Lakeview RMP, into an attempt to "compel" a wilderness inventory. Laird Ranch Br. at 14–17; see also BLM Reply at 3–6 (describing ONDA's challenge to final agency action as an attempt to "compel" some unspecified "particular procedures"). Laird Ranch's argument, like that of BLM, confuses *how* with *whether*. See ONDA Reply at 3–4. Arguments about BLM's "discretion" to determine the methodology or process for maintaining up-to-date and accurate resource information are irrelevant to the narrow question at issue in this action. See, e.g., BLM Reply at 23 (discussing "methods or procedures" for inventorying and arguing BLM "has wide discretion regarding *how* and *when* to conduct" inventories) (emphasis added). The question before this Court is whether NEPA requires BLM to take a "hard look" at the impacts of its RMP decision on wilderness resource values, like it does for any other resource. Id. The answer is "yes," and because BLM refused to do so in its EIS, its Record of Decision adopting the Lakeview RMP violates NEPA.

B. Oregon Natural Desert Association v. Rasmussen Is Directly On-Point.

Laird Ranch also questions this Court's decision in Oregon Natural Desert Association v. Rasmussen, 451 F.Supp.2d 1202, 1213 (D. Or. 2006). Laird Ranch Br. at 14–17.¹ According to Laird Ranch, Rasmussen's conclusion that a BLM final decision violates NEPA "in the absence of current information on wilderness values," 451 F.Supp.2d at 1213, is wrong because it is

¹ Notably, BLM remains silent on Rasmussen on reply, save for a single reference to the decision in the midst of its renewed SUWA argument. BLM Reply at 4.

“inconsistent with” FLPMA. Laird Ranch Br. at 14. The Court’s decision in Rasmussen is based on NEPA’s “hard look” requirement. Under NEPA, the baseline for “environmental analysis that is the heart of the EIS” must “be accurate and complete.” Ctr. for Biol. Diversity v. Bureau of Land Mgmt., 422 F.Supp.2d 1115, 1163 (N.D. Cal. 2006) (citing Vermont Yankee Nuclear Pwr. Corp. v. Natural Res. Def. Council, 435 U.S. 519, 553 (1973)). The agency’s refusal to consider impacts to wilderness like any other resource violates NEPA. Rasmussen, 451 F.Supp.2d at 1213.

In the context of BLM land use planning, NEPA’s “hard look” requirement is animated by FLPMA’s inventory requirements. In FLPMA, Congress explained that “the national interest will be best realized if the public lands and their resources are periodically and systematically inventoried.” 43 U.S.C. § 1701(a)(2). Congress specifically directed that BLM conduct an inventory of the public lands and their resources and 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. § 1711(a). With that unambiguous statutory direction in mind, this Court’s ruling that NEPA requires accurate and up-to-date information, in order to take the requisite “hard look” at a particular resource, is correct in Rasmussen, and is equally applicable here.

Laird Ranch also contends that Rasmussen is “in direct conflict” with a prior decision concerning the Southeast Oregon Resource Management Plan, Ore. Natural Desert Ass’n v. Bureau of Land Mgmt. (“ONDA v. BLM”), 2005 WL 711663 (D. Or. 2005) (docketed on appeal as Case No. 05-35931), and that that case contains a “better reasoned analysis” of whether NEPA requires BLM to take a “hard look” at impacts to wilderness values. The sum total of that analysis is as follows:

I agree with defendants that because the preparation of WSA inventories does not by itself change the management or use public lands, the WSA claim here is not

viable. Plaintiffs have not shown that the BLM is legally required to perform a wilderness inventory. See Norton v. Southern Utah Wilderness Alliance, 124 S. Ct. 2373, 2379 (2004) (“a claim under [APA] § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take”).

ONDA v. BLM, 2005 WL 711663 at *4. That analysis contains no discussion of NEPA’s “hard look” requirement. Furthermore, under that reasoning, if applied to NEPA, an agency would have no obligation to consider impacts to *any* resource because NEPA mandates a procedure, not a substantive result. Thus, with all respect, ONDA v. BLM was wrongly decided because it did not analyze or answer the question before the Court: whether NEPA requires BLM to take a “hard look” at wilderness like any other component of the “human environment.”²

Finally, Laird Ranch contends Rasmussen is “distinguishable” from this case because in that case BLM had ONDA’s wilderness inventory report in front of it when the agency made its final decision. Laird Ranch Br. at 16; see also BLM Reply at 5 n.1, 16, 17 (making same argument). This ignores a fundamental tenet of NEPA, to wit:

[T]he primary responsibility for NEPA compliance is with the agency: “the agency bears the primary responsibility to ensure that it complies with NEPA, and an EA’s or EIS’ flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action.”

IlioUlaokalani Coalition v. Rumsfeld, 464 F.3d 1083, 1091 (9th Cir. 2006) (quoting Dep’t of Transp. v. Public Citizen, 541 U.S. 752, 765 (2004) (internal citation omitted)). This Court recognized this in Rasmussen when it explained:

² Laird Ranch also ignores the logical conclusion of its argument that a decision in ONDA’s favor here would be in “direct conflict” with ONDA v. BLM. Laird Ranch Br. at 14. The same will be true if this Court rules in favor of BLM, in “conflict” with Rasmussen’s holding, which concerns the same BLM district and the same outdated BLM wilderness inventory information at issue in this case. Obviously, neither decision is binding on this court. See ONDA Reply at 19 n.9. In reality, only Rasmussen directly addresses the question whether NEPA requires BLM to take a “hard look” at impacts to wilderness of its land use decisions.

ONDA did not have a responsibility to provide accurate information regarding any changes to the wilderness characteristics in the East-West Gulch before the EA was issued. BLM did.

451 F.Supp.2d at 1212–13.³ And in this case, of course, ONDA and other members of the public asked the agency, from the very beginning of the four-year RMP planning process, to examine impacts to wilderness resource values. See, e.g., AR Tab 2-26 (FEIS Vol. 4, at CR-281 to -283, CR-294 (Jan. 2002 comments on Draft EIS from ONDA and Sierra Club, raising the wilderness issue). In short, the burden was squarely on BLM to comply with NEPA’s requirement to take a “hard look” at impacts to human environment. BLM failed to do so.

C. BLM’s Analysis of Resources “Related” to the Wilderness Resource Does Not Satisfy NEPA.

Like BLM, Laird Ranch also argues that the agency’s collection of information “related to” wilderness suffices for actual analysis of impacts to wilderness resource values in the Lakeview RMP. Laird Ranch Br. at 18–22; see also BLM Br. at 25–26 (claiming BLM “maintained” a wilderness inventory, citing disparate, scattered documents from administrative record). As with the agency, though, Laird Ranch cannot point to any page in the Record of Decision, the EIS, or elsewhere in the administrative record where BLM states its intent to assess impacts to wilderness via this type of proxy approach. Indeed, it remains undisputed that in the

³ Following this identical argument, BLM even goes so far as to accuse ONDA of “sand-bagging” the agency. BLM Reply at 17. Nothing could be further from the truth. As explained above, ONDA and other members of the public asked BLM to consider impacts to wilderness resource values throughout the Lakeview RMP planning process. When it became clear BLM was not going to update its 1970s-era wilderness inventory information during the RMP process, ONDA conducted its own inventory in 2004 following BLM’s Record of Decision. See Miller Decl. at ¶¶ 5–6; Marlett Decl. at ¶¶ 14–17 (both explaining ONDA’s wilderness inventory program). As ONDA predicted, that inventory information, collected pursuant to BLM’s very own inventory protocol—which the agency held out to citizens like ONDA to use in their own inventories, AR 2-10—shows that significant portions of the public lands within the Lakeview RMP planning area do indeed possess wilderness values as defined by Congress and the Department of the Interior. AR Tab 3-3 (ONDA’s wilderness inventory report).

EIS, BLM made the affirmative decision to *only* consider impacts to wilderness within existing Wilderness Study Areas and about 3,000 acres of lands acquired since 1992. AR Tab 2-26 (FEIS Vol. 1, 2-57 to -59, referring only to existing WSAs and 3,139 acres of land acquired by BLM since 1992).

Even if BLM could implicitly adopt such an approach in its EIS, this would make it impossible for the public and decision makers to fully understand the environmental consequences of the Lakeview RMP on wilderness. Baltimore Gas & Electric Co. v. Natural Resources Def. Council, Inc., 462 U.S. 87, 97 (1983). Wilderness as a resource value on the public lands is well-defined. In none of its handbooks or other materials submitted as part of the administrative record has BLM explained any set of proxies for the key factors that define this resource: roadlessness, naturalness, and opportunities for solitude or primitive and unconfined recreation. See AR Tab 2-10 at 11–16 (2001 *Wilderness Inventory and Study Procedures* handbook). An agency’s NEPA analysis of a fragile, finite resource such as wilderness must be based on complete information and a rational basis in support found in the NEPA document itself. See, e.g., Blue Mtns. Biodiversity Project v. Blackwood, 161 F.3d 1208, 1214, 1216 (9th Cir. 1998).

Likewise, BLM’s analysis of “special management areas” such as Areas of Critical Environmental Concern (“ACECs”) does not save the agency. See Laird Ranch Br. at 20. Wilderness character does not translate directly into ACEC “relevance” or “importance” criteria. See 43 U.S.C. § 1702(a) (defining ACECs as areas where special management is needed to protect “important historic, cultural, or scenic values, fish and wildlife resources or other natural systems or processes” or to “protect life and safety from natural hazards”). BLM acknowledges this in its ACEC manual, stating, “An ACEC designation will not be used as a substitute for

wilderness suitability recommendations.” Attachment A, at 4; see also id. at 5 (stating same under “Relation to Wilderness Study Areas”). In short, BLM’s complete refusal to take the requisite “hard look” at one significant, fragile, and finite public resource, is simply not defensible under NEPA.

III. IN THE ABSENCE OF UP-TO-DATE, ACCURATE WILDERNESS INVENTORY INFORMATION, BLM’S LAKEVIEW RMP DECISION ALSO VIOLATES FLPMA.

Laird Ranch disputes whether FLPMA requires BLM to make its RMP decisions based on up-to-date, accurate information. Laird Ranch Br. at 10–14. They assert it is “fairly obvious” the agency is not. Id. at 10. In fact, Laird Ranch goes so far as to claim BLM’s resource inventories are “meaningless” and that Congress was “clear” that BLM “should manage the public lands without an updated Section 1711(a) inventory.” Id. at 15, 22. These arguments have no basis in the plain language of the statute.

As ONDA has explained, FLPMA requires BLM to balance competing multiple uses of the public lands and their resources, to “prevent unnecessary or undue degradation” to any particular resource, and to support those decisions by maintaining a current inventory of “all public lands and their resource values.” 43 U.S.C. §§ 1711(a), 1732(a), 1732(b). That BLM “shall prepare and maintain” the inventory “on a continuing basis” is mandatory. Id. § 1711(a). So is the requirement that the “inventory shall be kept current so as to reflect changes in conditions and to identify new and emerging resources and other values.” Id. See also ONDA Br. at 4–5, 14–17.

Both Laird Ranch and BLM argue these statutory requirements impose little more than a vague, discretionary obligation on the agency. Laird Ranch Br. at 11–12; BLM Reply at 5, 23–24. Both rely heavily on the statement in Section 201(a) that preparation and maintenance of an

inventory does not, “of itself, change or prevent change of the management or use of public lands.” 43 U.S.C. § 1711(a). As explained earlier, this argument once again confuses *how* with *whether*. There is no question BLM is required to balance multiple uses of the public lands when it prepares an RMP. *Id.* § 1701(a)(7) & (8), 1712(c)(1), 1732(a). Even if BLM retains the ultimate discretion on the final decision—that is, the final balance to be achieved among the various resources and values being managed for within the planning area—nothing in FLPMA supports Laird Ranch’s and BLM’s argument that BLM may, at its discretion, omit one significant, fragile, and finite resource from its multiple use analysis.

In the context of a grazing decision implicating BLM’s multiple-use duty, the Department of the Interior itself has explained that the 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. (“NWF v. BLM”), 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.” NWF v. BLM, 140 IBLA at 99 (emphasis added). Moreover, according to the Department of the Interior, BLM’s duty to prevent unnecessary or undue degradation requires the agency to make a *separate* finding accordingly, observing: “A [NEPA] finding that there will be not be significant impact does not mean either that the project has been reviewed for unnecessary and undue

degradation or that unnecessary or undue degradation will not occur.” Kendall’s Concerned Area Residents, 129 IBLA 130, 140–41 (1994).⁴

Thus, the task before this Court is to evaluate whether BLM engaged in a “reasoned or informed” “balancing test” that has “balanced competing resource values.” NWF v. BLM, 140 IBLA at 99, 101. On the basis of the administrative record here, the answer to that question is “no” because BLM completely refused to consider wilderness resource values in its analysis, aside from existing WSAs and a couple thousand acres of lands acquired since 1992. Even if BLM had balanced wilderness resource values among the other valid multiple uses of these public lands, its decisionmaking process could not be said to be “reasoned or informed” because its wilderness inventory information is outdated and no longer accurate. Accordingly, BLM’s Record of Decision adopting the Lakeview RMP is arbitrary, capricious, and not in accordance with FLPMA’s multiple-use mandate.

IV. BLM’S GRAZING DECISIONS FOR THE LAKEVIEW RMP AND BEATY BUTTE AMP VIOLATE NEPA’S ALTERNATIVES REQUIREMENT.

A. Lakeview RMP Grazing Alternatives.

Like BLM, Laird Ranch argues the agency satisfied NEPA’s requirement to consider all reasonable alternatives to the proposed action. Laird Ranch Br. at 22–30; see also BLM Reply at 19–22. According to Laird Ranch, “BLM was not required to examine an endless list” of alternatives “which would not achieve its purposes of providing a predictable, sustained flow of

⁴ Note that Laird Ranch radically misreads the unnecessary or undue degradation provision, claiming that “[a] logical reading of this provision is that Congress understood that undue and unnecessary degradation would occur.” Laird Ranch Br. at 25. The statute states unambiguously that “the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.” 43 U.S.C. § 1732(b). As one court recently explained, under this standard, “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).

economic benefits and a sustainable level of livestock grazing.” Laird Ranch Br. at 24. In FLPMA, Congress directed BLM to apply “multiple use” and “sustained yield” management to *all* public lands and their resource values, not just economic uses and not just livestock grazing. See 43 U.S.C. §§ 1702(c), (h) (definitions of terms). Congress declared the national policy of the United States that

the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use[.]

Id. § 1701(a)(8). BLM’s refusal to consider alternative land and forage allocations for grazing in the Lakeview RMP—including alternatives that would account for the impacts of those allocations on wilderness values—is inconsistent with FLPMA.

Both Laird Ranch and BLM claim the agency need not consider alternatives that account for the impacts of grazing on wilderness values. Laird Ranch Br. at 23–26; BLM Reply at 17–19. According to BLM, the “Grazing Guidelines,” found in the legislative history of the 1990 Arizona Desert Wilderness Act, show that grazing does not impair wilderness values. BLM Reply at 18–19. But those guidelines, which are not binding in any way⁵ and which have no relevance to BLM’s selection of NEPA alternatives in the Lakeview RMP, simply state that grazing might continue in a designated wilderness area *unless* it is impairing range (i.e., ecological) conditions. See BLM Reply Br. at 19 (BLM may make “adjustments in the numbers of livestock permitted to graze in wilderness areas” based on range condition “and the protection

⁵ In the Steens Mountain Cooperative Management and Protection Act of 2000, for example, Congress designated the 100,000-acre Steens Mountain Wilderness Area, within which no grazing is allowed. 16 U.S.C. § 460nnn-23(e)(2) (cancellation of grazing permits within “no livestock grazing area”).

of the range resource from deterioration”). The guidelines explain that adjustments to grazing “should be made as a result of revisions in the normal grazing and land management planning and policy setting process.” Id.

In other words, the guidelines simply reaffirm that BLM must assess the impacts of its grazing program on wilderness resource values during land management planning. They do not change the fact that the Lakeview RMP is the threshold decision-making point for BLM’s grazing decisions. 43 C.F.R. § 4100.0-8 (establishment of land areas for limited, restricted, or exclusive grazing use); AR Tab 3-2 at App. C, p.14 (*Land Use Planning Handbook*). They are irrelevant to the question whether BLM must, under NEPA, examine reasonable alternatives with respect to land areas and forage allocated to grazing in its RMP decisions. They certainly do not support the assertion that grazing and grazing-related infrastructure on the public lands cannot impact wilderness resource values.

Laird Ranch argues BLM properly refused to consider alternative forage allocations because it “is unreasonable and infeasible to expect such comprehensive plans to address specific issues to the level of detail Plaintiffs demand.” Laird Ranch Br. at 29; see also BLM Reply at 20–22 (making same argument). They broadly argue that “flexibility built into” the Lakeview RMP relieves BLM from engaging in this threshold decision now. Laird Ranch Br. at 29. This runs counter to the language of FLPMA, which requires BLM, in an RMP, to establish allowable uses, levels of production or use, areas of use, and resource condition goals and objectives for grazing. 43 U.S.C. § 1712(a); 43 C.F.R. § 4100.0-8. Forage allocations for “lands available for grazing” must be “expressed in animal unit months.” AR Tab 3-2 at App. C, p.14. The argument also ignores BLM’s prior established practice at the land use plan level of assigning livestock forage allocations by allotment. AR Tab 1-3 at Appendices I & II (Warner Lakes Management

Framework Plan). BLM determines allotment-specific AUM levels in this Plan, too. AR Tab 2-33 at A-8 to -141 (“Allotment Management Summaries”).

Most importantly, it is well-established under NEPA that

the purpose of an [EIS] is to evaluate the possibilities in light of current and contemplated plans and to produce an informed estimate of the environmental consequences *If an agency were able to defer analysis discussion of environmental consequences in an RMP, based on a promise to perform a comparable analysis in connection with later site-specific projects, no environmental consequences would ever need to be addressed in an EIS at the RMP level if comparable consequences might arise, but on a smaller scale, from a later site-specific action proposed pursuant to the RMP.*

Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1072 (9th Cir. 2002) (emphasis added, internal citation and quotes omitted). While the BLM certainly may consider grazing reductions in future, site-specific actions to better manage site specific areas and values, any such analyses are based on the initial grazing determinations made in the RMP. See 43 U.S.C. § 1732(a) (consistency provision). Accordingly, the agency’s refusal to consider alternative levels for those determinations is arbitrary, capricious, and not in accordance with NEPA’s requirement to consider reasonable alternatives. 42 U.S.C. §§ 4332(2)(C), (E).

B. Beaty Butte AMP Grazing Alternatives.

In the Beaty Butte AMP, BLM refused to consider any reduction in the amount of forage allocated to grazing, other than the all-or-nothing “No Grazing” alternative. AR Tab 1-17 at 16. Each of the other four alternatives considered (including the one selected) allocated an identical 26,121 AUMs to grazing. Id. BLM concedes this in its opening brief and remains silent on the point on reply. See BLM Br. at 24 (claiming “BLM did not need to consider alternative allocations . . . in developing the [AMP]”). Laird Ranch argues BLM was not required to consider alternative grazing levels in the AMP because the narrow purpose of the plan was to “develop a rest-rotation grazing management system.” Laird Ranch Br. at 30. This constricted

view ignores the statutory purpose of an allotment management plan, which “prescribes the manner in, and extent to, which livestock operations will be conducted in order to meet the multiple-use, sustained-yield, economic and other needs and objectives as determined for the lands.” 43 U.S.C. § 1702(k); see also *id.* § 1752(d) (AMPs “shall be tailored to the specific range condition of the area”).

Nothing in FLPMA provides so narrow a scope for an AMP. Indeed, the statute expressly provides that an AMP shall take into account not only “economic” but “other” needs, that an AMP shall account for range conditions, and that an AMP shall be developed to provide for multiple use management of the lands. *Id.* § 1702(k). This means one issue squarely before the agency when it undertakes preparation of an AMP is whether and to what extent grazing can and should continue on the public land at issue. Moreover, the administrative record shows it was unreasonable not to *at least consider* reduced grazing levels. BLM’s 1994 allotment evaluation found grazing problems on “localized areas” throughout the 500,000-acre allotment. AR Tab 1-7. The eventual AMP required an extensive network of rangeland projects in order to support the levels of grazing authorized under the Plan. AR Tab 1-20 (ROD App. 1-12 to 1-18, “Project List”). One reasonable alternative BLM should have analyzed is lower grazing levels that could be sustained without resort to miles and miles of fences and pipelines, dozens of water developments, and thousands of acres of vegetation “treatments.” See AR Tab 1-6 at 4–5 (1994 comments from ONRC). Thus, BLM’s decision to artificially constrain its alternatives to status quo grazing levels constitutes arbitrary and capricious decision-making, in violation of NEPA.

V. BLM FAILED TO PROPERLY CONSIDER GRAZING SUITABILITY.

As ONDA explained already, FLPMA requires an RMP to “provide by tracts or areas for the use of the public lands.” 43 U.S.C. § 1712(a); see also 43 C.F.R. §§ 1601.0-5(k), 4100.0-8.

The Public Rangelands Improvement Act (“PRIA”) directs BLM to maintain an “inventory of range conditions and record of trends of range conditions on the public rangelands. 43 U.S.C. § 1903(a). That inventory “shall be kept current on a regular basis for as to reflect changes in range conditions.” Id. By adopting the Lakeview RMP with status quo forage allocations based on a grazing suitability analysis performed more than 40 years ago, BLM’s Record of Decision is arbitrary and capricious, in violation of FLPMA and PRIA. See ONDA Reply at 31–32.

Laird Ranch and BLM both argue ONDA cannot “compel” an updated rangeland inventory, and that determinations concerning the suitability of the public lands for grazing are “implementation-level” decisions. Laird Ranch Br. at 31–32; BLM Reply at 24–25. Again, ONDA does not seek to “compel” a rangeland inventory. ONDA simply points to the undisputed fact that BLM refused to study or otherwise assess grazing suitability in the Lakeview RMP. See AR Tab 2-26 (FEIS Vol. 4, 225) (explaining that last grazing suitability analysis took place in 1950s and 1960s). In subsequent, site-specific decisions, BLM continues to refuse to assess suitability. See ONDA Ex. 1; AR Tab 1-6 at 5 (pointing out that last determination of “grazing preference” for the Beaty Butte Allotment occurred in 1983, when Warner Lakes Management Framework Plan was adopted). Neither Laird Ranch nor BLM provides an explanation for this “shell game” revealed by the record. Because BLM’s grazing allocations in the Lakeview RMP are based on suitability calculations last performed more than 40 years ago, and grazing preferences last established in the preceding land use plan, BLM’s decision to allocate grazing forage “based on current active preference,” AR Tab 2-2 at 4—i.e., simply maintaining the allocations set in the prior Management Framework Plan—is arbitrary and capricious.

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VI. BLM FAILED TO MAKE OR REVISIT ITS “CHIEFLY VALUABLE” DETERMINATIONS.

Both Laird Ranch and BLM argue the agency’s decision whether to make or revisit its “chiefly valuable” determinations is “wholly within BLM’s discretion.” Laird Ranch Br. at 32; see also BLM Reply at 27 (arguing the determinations are “purely discretionary”). Neither explains BLM’s pre-litigation statement that these determinations are made at the RMP level of land management. See AR Tab 3-2 at App. C, pp.20–21 (BLM’s *Land Use Planning Handbook*). Moreover, ONDA does not assert BLM has “an obligation to continually reassess the classification and suitability of public lands to determine whether those lands remain ‘chiefly valuable for grazing.’” Laird Ranch Br. at 33 (quoting administrative law judge decision at AR Tab 1-83). ONDA simply seeks to hold the BLM at its word that it will examine this issue once every two decades when it undertakes development of a new land use plan. As described in BLM’s handbook, this is a public issue and ONDA asked the agency from the beginning of the land use planning process to make this issue available for review in the RMP. BLM’s undisputed decision not to do so, AR Tab 2-33 (RMP 21), is arbitrary and capricious decision-making.

CONCLUSION

For the foregoing reasons, ONDA again respectfully requests this Court to grant summary judgment in Plaintiffs’ favor.

DATED this 26th day of March, 2007

Respectfully Submitted,

s/ Peter M. Lacy

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