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

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

Plaintiffs,

v.

**UNITED STATES DEPARTMENT OF
THE INTERIOR,**

Defendant.

Case No. 07-381-MO

**MEMORANDUM IN SUPPORT OF
PLAINTIFFS’ MOTION FOR
TEMPORARY RESTRAINING ORDER
AND/OR PRELIMINARY
INJUNCTION**

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INTRODUCTION

Plaintiffs Oregon Natural Desert Association (“ONDA”) and Western Watersheds Project (“WWP”) seek immediate injunctive relief to enforce an October 2006 Final Decision by the Bureau of Land Management (“BLM”), closing the 11,000-acre Bully Creek Pasture in the BLM’s Vale District of eastern Oregon to livestock grazing through 2008, in order to prevent imminent and irreparable resource damage.

BLM’s October 2006 Decision was based on six years of monitoring and study undertaken pursuant to a grazing management plan adopted in 2000, showing chronic violations of key ecological standards under the agency’s Fundamentals of Rangeland Health regulations. Yet on December 11, 2006, an administrative law judge in the Department of the Interior’s Office of Hearings and Appeals (“OHA”) granted a request by the Bully Creek Pasture permit holder—Jim Alves¹—to stay BLM’s Decision, meaning that Alves will now turn out livestock as early as May 1st this year and cause further irreparable ecological harm of the sorts already documented by BLM.

Because the OHA stay order is manifestly contrary to law, will result in violations of the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701–84, and the Fundamentals of Rangeland Health regulations, 43 C.F.R. Subpart 4180, and will result in imminent and irreparable harm to upland and riparian resources on these public lands, ONDA and WWP respectfully request this Court to issue immediate injunctive relief to enforce the BLM’s closure order and prevent grazing within the Bully Creek Pasture in 2007.

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¹ Jim Alves is the representative of Maynard Alves, whose name is on the grazing permit. Exh. N at 1.

LEGAL BACKGROUND

Federal Land Policy and Management Act

The Federal Land Policy and Management Act (“FLPMA”) is BLM’s “organic act” for management of the public lands. FLPMA requires BLM to manage the public lands consistent with the “principles of multiple use and sustained yield.” 43 U.S.C. § 1732(a). This means BLM must “take into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values.” *Id.* § 1702(c). To comply with FLPMA’s multiple use mandate, the BLM must make reasoned and informed analyses, balancing competing resource values to ensure that the public lands are managed 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.” *Id.* § 1702(c). One primary standard for BLM’s management of the public lands is that it “shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.” *Id.* § 1732(b). *See also Soda Mtn. Wilderness Council v. Norton*, 424 F.Supp.2d 1241, 1269 (E.D. Cal. 2006); *Ore. Natural Desert Ass’n v. Rasmussen*, 451 F.Supp.2d 1202, 1211 (D. Or. 2006) (both discussing FLPMA’s multiple use and unnecessary or undue degradation requirements).

FLPMA also provides that BLM must manage the public lands consistent with its land use plans. 43 U.S.C. § 1732(a). The Southeast Oregon Resource Management Plan (“SEORMP”) is the governing land use plan for the public lands at issue in this action. The SEORMP also adopts a more site-specific plan that governs a smaller area encompassing the land at issue in this action, known as the Bully Creek Landscape Area Management Project (“LAMP”). *See* Exh. H

at 2 (SEORMP, adopting all such activity-level plans). Therefore, BLM must implement the Bully Creek LAMP in order to act consistently with the SEORMP.

Federal Rangeland Health Regulations

In 1995, the Department of the Interior amended its regulations governing public lands livestock grazing. The regulations, known as the Fundamentals of Rangeland Health (“FRH”) regulations, establish fundamental ecological criteria for the management of livestock grazing on BLM lands. 43 C.F.R. Subpart 4180.² The FRH regulations establish four “Fundamentals of Rangeland Health” relating to water quality, riparian habitat, watershed conditions, and species habitat. *Id.* § 4180.1. The regulations also require BLM to develop state-specific standard and guidelines. *Id.* § 4180.2(a)-(b). *See* Exh. A (Oregon/ Washington Standards and Guidelines). The regulations require that where BLM has determined that grazing is causing violations of the ecological standards, BLM must revise grazing management on the affected public lands no later than the start of the next grazing year in a manner that will result in significant progress toward achieving the standards:

The authorized officer shall take appropriate action as soon as practicable but not later than the start of the next grazing year upon determining that existing grazing management practices or levels of grazing use on public lands are significant factors in failing to achieve the standards and conform with the guidelines that are made effective under this section. Appropriate action means implementing actions pursuant to subparts 4110, 4120, 4130, and 4160 of this part that will result in significant progress toward fulfillment of the standards and significant progress toward conformance with the guidelines. Practices and activities subject to standards and guidelines include the development of grazing-related portions of activity plans, establishment of terms and conditions of permits, leases and other grazing authorizations, and range improvement activities such as vegetation manipulation, fence construction and development of water.

² The grazing regulations were again amended in 2006, but the revisions to the FRH regulations, among others, were enjoined by court order. Western Watersheds Project v. Kraayenbrink, 2006 WL 2735772 (D. Idaho Sept. 25, 2006). Thus, the 1995 FRH regulations remain in effect.

43 C.F.R. § 4180.2(c) (emphasis added). The Ninth Circuit has held that this is an enforceable, clear mandate. Idaho Watersheds Project v. Hahn, 187 F.3d 1035 (9th Cir. 1999).

FACTUAL BACKGROUND

The Bully Creek Area

The Bully Creek Landscape Management Area (“Area”) encompasses over 350,000 acres, of which about 269,000 acres are public lands managed by BLM. Exh. D at 5. The Area is located in Malheur County near Westfall, Oregon, in the area generally bounded by Highway 20 (to the north) and Highway 26 (to the south). See id. at 26 (area map). The Bully Creek Area is managed as part of BLM’s Malheur Resource Area, within the agency’s Vale District.

The Area features many important environmental and natural resource values, including: some 18,400 acres of the 19,580-acre Beaver Dam Creek Wilderness Study Area (“WSA”) and two Areas of Critical Environmental Concern (BLM’s North Ridge Bully Creek and South Ridge Bully Creek “ACECs”), selected for their excellent representation of the native sagebrush community and sage grouse habitat. Exh. D at 17. The Area is home to a wide array of sagebrush-steppe and desert riparian wildlife, including native redband trout and a number of other native fish species, Greater sage grouse, pygmy rabbit, Columbia spotted frog, pronghorn antelope, and elk. Id. at 9-13, 17, 21. In fact, the Area contains 33 documented sage grouse leks (breeding sites) within or adjacent to the Area. Id. at 10; see also id. at 25 (map of leks).

Within the Bully Creek Landscape Management Area are more than 100 pastures distributed through twenty grazing allotments, including the 50,000-acre Willow Basin Allotment. Exh. D at 15-16. The Bully Creek Pasture is that allotment’s largest pasture, covering nearly 11,000 acres of public land in the headwaters of Bully Creek, the majority of which is within the Beaver Dam Creek WSA. Id. at 18. The Pasture also contains several thousand acres

of ONDA's Beaver Dam Creek Proposed WSA Addition, an area adjacent to the WSA that ONDA has inventoried and found to possess outstanding wilderness values it has asked BLM to protect. See Ruether Dec. ¶ 3. Bully Creek is on the State of Oregon's 303(d) list for water quality-limited streams; it is impaired by its fecal coliform levels. See Exh. H at 5.

Native interior redband trout are adversely affected by livestock grazing. The SEORMP found that livestock grazing "has been found by a number of authors to affect riparian function and the attainment of other riparian-related objectives." Exh. F at 3 (citations omitted). Specifically, grazing reduces riparian vegetation, which results, among other things, in destabilized stream banks, increased instream sediment, accelerated erosion, higher temperature due to reduced shade, and fecal contamination of water. See Exh. D at 12; see also Exh. B (scientific paper titled Survey of Livestock Influences on Stream and Riparian Ecosystems in the Western United States). Woody riparian vegetation such as willows and aspen is especially key to healthy native trout habitat because it provides shade along streambanks to help maintain the cold water redband trout require to survive, and because they help stabilize banks to prevent sedimentation and to provide cold water refugia in areas with overhanging banks. See id. Because trout require cold water, the LAMP explains that warm temperatures function to restrict their distribution, and trout "are intolerant of high sediment levels that bury eggs and suffocate fry." Exh. D at 12.

Heavy livestock grazing also harms sage grouse habitat. According to the LAMP, sage grouse need tall, thick stands of sagebrush, grasses and other plants to successfully nest, raise chicks, and hide from predators, Exh. D at 11, so grazing management that removes this cover harms the sage grouse. The LAMP acknowledges that sage grouse habitat would be improved by

“changing livestock grazing systems to increase the forb component while maintaining the desired range of plant heights.” Id.

Standards and Guidelines Assessment and the Bully Creek LAMP

Beginning in 1998, an interdisciplinary team of BLM experts undertook detailed monitoring and evaluation of ecological conditions on each of the Bully Creek Landscape Area allotments, in order to assess conformance with the FRH Standards and Guidelines and to provide the basis for adopting a LAMP to direct future grazing management in the Area. Because of their concern about the degraded conditions of the Area, members of ONDA and WWP participated extensively in this process, which included many meetings, field tours, and comment opportunities. Shake Decl. at ¶ 11, Moore Decl. at ¶¶ 8-11, Bray Decl. at ¶¶ 14-16, 18-21.

Results of BLM’s ecological monitoring were published for public review and comment in a Draft Bully Creek LAMP issued in July 1999. The Draft LAMP catalogued a broad array of degraded conditions, including over 80% of riparian pastures not meeting the standard for riparian-wetland health; only 23% of stream reaches found to be in “proper functioning condition,” nearly all aspen stands in declining health due to severe over-utilization by livestock, and widespread invasion of noxious weeds. See Exh. C at 2-5. In the Bully Creek Pasture, 8.5 miles of stream were found to be in proper functioning condition, while 10.75 miles were found to be “functioning at risk” (with 5 of those miles “functioning at risk with a downward trend”). Id. at 6. BLM found that “[t]here is no regeneration of aspen/willow/birch.” Id. at 7.

After public outreach and comment, BLM issued the Final Bully Creek Landscape Area Management Project in March 2000. Exh. D. The LAMP made formal findings that numerous pastures were violating one or more of the Standards and Guidelines. Two standards were not

being met as a result of current grazing practices in the Bully Creek Pasture: Standard 2 (riparian-wetland health) and Standard 5 (upland plant and animal habitat health). Id. at 28.

As required under the FRH regulations, the LAMP mandated actions intended to begin making significant progress toward meeting the Standards and Guidelines. The LAMP adopted new terms and conditions to be used in grazing permits, including changes in the grazing season and duration of use. Exh. D at 19, 28 (chart showing new grazing schedule for Bully Creek Pasture). The federally-issued grazing permit for the Willow Basin Allotment was modified to reflect these new terms and conditions and require conformance with the LAMP. Exh. G.

The LAMP also implemented a new monitoring strategy. Exh. D at 21-23. The strategy included the creation of quantitative standards—residual herbaceous vegetation (also known as “stubble height”) and incidence of use on woody species—as “[i]ndicators for potential resource damage.” Id. at 20. The standards are “<4-6” residual herbaceous vegetation and >30% incidence of use on woody species.” Id. Other, qualitative standards are to “improve” riparian vegetation, habitat diversity, and associated watershed function in areas not meeting Standards for Rangeland Health,³ id. at 6, and to “[r]etain streambank cover[,] minimize livestock grazing impacts on riparian areas and ensure[] improvement and/or maintenance of riparian vegetation.” Id. at 20. The LAMP required annual monitoring, plus progress reviews after three, five, and seven years. Id. at 21.

Finally, and most critically here, the LAMP identified corrective actions to be taken if significant progress was not being made toward ecological restoration as required under the Bully Creek LAMP and FRH standards and guidelines. The LAMP states that if progress is not being achieved, BLM will respond by implementing changes in grazing, including reduced or

³ The SEORMP likewise requires that “*Management will protect, maintain, or restore riparian condition, instream processes, and habitat diversity.*” Exh. H at 4 (emphasis added).

suspended Animal Unit Months (“AUMs”)⁴: “Where changes in season and duration of use do not, of themselves, resolve Rangeland Health issues[,] adjustments will be made [] which include a wide variety of options from land management actions to reduction or suspension of AUMs.” Exh. D at 19.

LAMP Implementation and BLM’s October 2006 Closure Decision

In the years following the adoption of the LAMP, BLM conducted annual monitoring of ecological conditions. While most allotments showed recovery, the Bully Creek Pasture was an exception. BLM recorded serious violations of the riparian herbaceous vegetation and woody species browse standards in the Pasture each and every year between 2001 and 2005. Exh. L at 4-5 (Final Decision, listing violations).

Pursuant to the LAMP, BLM in 2005 completed its scheduled fifth-year evaluation. Exh. J (summary of 2005 fifth-year monitoring report).⁵ This evaluation of long-term monitoring points chronicles the violations of standards from 2001-2005 and displays them in bar graphs. *Id.* at 6-9, 12-13. The report concludes that:

Overall, . . . the riparian areas in the Bully Creek Pasture were *not progressing towards properly functioning (objective in the Bully Creek LAMP) due to livestock*. The riparian herbaceous and woody vegetation was grazed too heavily from 2001 to 2005, and the photos indicate a *continuing static trend in a non properly functioning condition or a downward trend*. The recommendation for this pasture was to *close it for two years* to rest the riparian areas.

⁴ An AUM is the amount of forage necessary to sustain one cow for one month. 43 C.F.R. § 4100.0-5.

⁵ When BLM reported it lacked necessary funds to complete the fifth-year evaluation, WWP and ONDA entered a Cooperative Management Agreement with BLM and provided funding to enable BLM to complete the evaluation. *See* Exh. J at 2 (cover letter for 2005 monitoring report from BLM to ONDA, stating “Your support enabled us to complete the required monitoring that was necessary to conduct the 5th year review of the LAMP.”) *See also* Bray Decl. at ¶¶ 28-30 (explaining the contribution).

Id. at 14 (emphasis added). This conclusion is accompanied by color photographs showing creeks in the Pasture with heavily trampled streambanks supporting virtually no vegetation, and a utilization cage in an area subjected to very heavy grazing. Id. at 14-16. The photographs were taken in different years and indicate that little, if any, recovery had happened over time. Id. The report finds that livestock trespass (*i.e.*, livestock grazing in an unauthorized location or at an unauthorized time) in 2003, 2004, and 2005 contributed to the violations. Exh. J at 13-14 (2004 and 2005 grazing should have provided for some regrowth of riparian species, “but livestock trespasses through the summer and fall prevented this from happening.” See also Exh. I (BLM letter to Alves noting over 18 trespass incidents in 2004, including trespass in Bully Creek Pasture); Bray Decl. at ¶¶ 23-26 (discussing trespass).

Despite its specialists’ 2005 closure recommendation, BLM attempted to work with the Alves to attempt to meet the FRH Standards and Guidelines while still allowing grazing to continue. These efforts culminated in an April 2006 agreement between BLM and Alves, allowing for grazing to continue on Bully Creek Pasture in 2006. Exh. K.⁶ The agreement expressly reiterated the LAMP’s monitoring utilization and browse indicators and stated how they will be monitored. Id. at ¶¶ 2,5. The agreement also stated that livestock “will be removed from the pasture” if the indicators are exceeded before the end of the scheduled grazing period. Id. at ¶ 5.

The 2006 grazing season was scheduled to begin in the Bully Creek Pasture on September 15, 2006. Exh. L at 3. However, BLM once again discovered unauthorized, trespass

⁶ Plaintiffs only possess an unsigned version of the Agreement, but BLM’s Final Decision states it was signed in April 2006. Exh. L at 2.

cattle belonging to Alves on the Pasture several times before that date and issued a notice of unauthorized use. Id. Alves officially turned out his cattle on September 15, 2006. Id.

BLM conducted monitoring of the pasture on September 25, 2006. Exh. L at 3. At that time, after only *ten days* of authorized use, both standards were violated, some in a dramatic fashion. Id. at 5 (BLM data indicating that one creek's stubble height was 1.6 inches and woody species utilization was 82%, where the standards are 4-6 inches and 30%). BLM found that "riparian herbaceous stubble height was less than the 4-6 inch minimum and woody riparian browse incidence of use of current year's leaders was greater than 30 percent *for most reaches of streams in Bully Creek Pasture.*" Id. at 3 (emphasis added).

As a result of these further violations, BLM issued a Final Decision on October 6, 2006, temporarily closing the pasture for the remainder of that year and through the 2007 grazing season. Exh. L. BLM thoroughly explained its rationale, stating that the decision was "as a result of the *imminent likelihood of significant resource damage to riparian and related resource values which would occur if grazing were to continue in Bully Creek Pasture*" under the normal schedule. Id. at 3 (emphasis added). BLM concluded that closure for a year was warranted "because excessive livestock grazing impacts to riparian vegetation communities were documented in the fifth year evaluation of management actions identified in the Bully Creek LAMP." Id. The closure would "prevent further grazing use of riparian herbaceous and browsing of woody vegetation which would lead to declining riparian vegetation health and reduced streambank protection." Id. at 6.

The Office of Hearings and Appeals Order to Stay the Decision

On November 3, 2006, Alves administratively appealed BLM's Final Decision and requested a stay of the decision from OHA. BLM vigorously opposed the stay request in a brief

submitted by the Office of the Interior’s Regional Solicitor (“Solicitor”). Exh. N. On December 11, 2006, an OHA administrative law judge (“ALJ”) issued an order granting the permit holder’s petition for a stay of BLM’s decision—in other words, allowing the permit holder to turn out his livestock on the Bully Creek Pasture in 2007. Exh. O.

The ALJ’s order was based on a deeply flawed analysis of the stay factors governing proceedings before OHA.⁷ The ALJ applied an incorrect standard of review, ignoring Interior’s regulations providing that BLM may make changes in permitted use to prevent environmental damage and instead placing the burden of proof for why a stay should not be entered onto the BLM. See Exh. O at 10-14. He found that Alves raised “serious questions” as to the propriety of BLM’s monitoring techniques, without recognizing that BLM was *legally required to use* the techniques it selected. Id. at 14. The ALJ also inappropriately failed to give any deference whatsoever to BLM’s selection of monitoring techniques or determinations of environmental harm, inappropriately shifting the weight of proof to BLM. Instead, he afforded an enormous amount of weight to a declaration by Alves’ “range consultant,” whose declaration reported no educational degrees of any kind and no specific expertise in riparian ecology or stream hydrology. See id. at 10-16; Exh. M at 1-2 (Larson declaration). And the ALJ misbalanced the weight of the relative harm to the permit holder as compared to the public and the natural resources at issue, by affording far too much weight to financial considerations of the permit holder and dismissing BLM’s well-documented findings of environmental harm due to grazing

⁷ Similar to the standard for obtaining preliminary injunctive relief in federal court, a petition for stay of a final BLM grazing decision before OHA “must show sufficient justification based on the following standards: (1) The relative harm to the parties if the stay is granted or denied; (2) The likelihood of the appellant’s success on the merits; (3) The likelihood of immediate and irreparable harm if the stay is not granted; and (4) Whether the public interest favors granting the stay.” 43 C.F.R. § 4.471(c).

practices as “dubious.” Exh. O at 14-16. Notably, ONDA and WWP are *not* parties to this administrative appeal proceedings.

A hearing on the merits of Alves’ administrative appeal is not scheduled until August 2007. Exh. P (OHA scheduling order). During that time the ALJ’s stay order will remain in effect and allow continued grazing on the Bully Creek Pasture to cause irreparable harm, unless this Court issues the requested injunctive relief. ONDA and WWP do not know BLM’s planned turnout date onto the Bully Creek Pasture, but the LAMP permits turnout as early as May 1, and the grazing permit’s season of use begins on April 1. Exh. D at 28, Exh. G at 1. Thus, in the absence of preliminary injunctive relief from this Court, grazing will imminently begin on the Bully Creek Pasture and cause irreparable environmental damage and violations of the FRH Standards and Guidelines.

ARGUMENT

I. INJUNCTION STANDARDS.

Federal Rule of Civil Procedure 65 authorizes entry of immediate injunctive relief to prevent irreparable harm pending resolution of Plaintiffs’ claims on the merits. Fed. R. Civ. P. 65; Univ. of Texas v. Camenish, 451 U.S. 390, 395 (1981). The test for injunctive relief under Rule 65 balances considerations of a plaintiff’s likelihood of prevailing on the merits, the respective harms to the parties, and the public interest. Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982). The Ninth Circuit employs a “sliding scale” approach to evaluate these factors. Earth Island Inst. v. U.S. Forest Serv., 351 F.3d 1291, 1297–98 (9th Cir. 2003). Thus, injunctive relief is available to a plaintiff who “demonstrates *either* a combination of probable success on the merits and the possibility of irreparable injury *or* that serious questions are raised and the balance of hardships tips

sharply in his favor.” *Id.* (emphasis in original) (citing *Johnson v. Cal. State Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995); *A&M Records v. Napster*, 239 F.3d 1004, 1013 (9th Cir. 2001)).

II. ONDA AND WWP WILL PREVAIL ON THE MERITS.

A. The OHA Decision to Stay BLM’s October 2006 Closure Decision Violates the FRH Regulations.

The Department of the Interior, acting through the OHA ALJ, has violated its mandatory duties under the FRH Regulations by issuing the December 2006 stay order which allows livestock grazing to proceed on the Bully Creek Pasture in 2007, after BLM determined that any grazing in 2007 will cause irreparable environmental injury. The FRH regulations require that where, as here, BLM has determined that grazing is causing violations of the FRH Standards and Guidelines, BLM must revise grazing management on the affected public lands “no later than the start of the next grazing year” in a manner that “will result in significant progress toward fulfillment of the standards and significant progress toward conformance with the guidelines.” 43 C.F.R. § 4180.2(c).

Here, BLM concluded in its October 2006 Final Decision that current authorized grazing on the Bully Creek Pasture is causing violations of the FRH Standards and Guidelines, and has left riparian conditions throughout the Pasture in a downward trend. Based on more than six years of monitoring and evaluation, BLM determined that rest in 2007 is needed, not just to satisfy the Standards and Guidelines and Bully Creek LAMP requirements, but also to stave off imminent environmental damage. BLM stated in the Decision that: “Closure of Bully Creek Pasture is necessary at this time to better ensure meeting the following long-term objectives identified in the Bully Creek LAMP,” including the provision requiring it to improve conditions in areas not meeting Standards for Rangeland Health. Exh. L at 5. BLM further states: “In the absence of actions identified in the Bully Creek LAMP which were implemented to attain

healthy riparian vegetation, *significant progress toward fulfillment of the standards and significant progress toward conformance with the guidelines can not be attained.*” Id. at 7 (emphasis added). BLM explained that this is because “the intensity of livestock grazing use [under the current authorization] would not retain adequate cover and plant community structure to promote streambank stability, debris and sediment capture, and floodwater energy dissipation in riparian areas.” Id.

The Solicitor reiterated that BLM’s and the permit holder’s efforts leading up to the October 2006 decision were not successful in meeting Standards and Guidelines, and that the 2006 closure decision was necessary to achieve compliance with the FRH Regulations.

The BLM coordinated, cooperated, and consulted with Jim Alves to ensure livestock management actions [were] implemented as necessary to allow significant progress toward meeting standards and guidelines for rangeland health. However, these efforts *were not successful in ensuring that significant progress toward meeting standards and guidelines for the Bully Creek Pasture has been made.* Due to this lack of success in meeting terms and conditions, and *to comply with the rangeland health standards,* the BLM’s decision was issued on October 6, 2006. Based on the status of the Bully Creek Pasture and the lack of significant progress made in efforts to improve the riparian function of the Bully Creek Pasture, the BLM decided that the Bully Creek Pasture should also be rested from grazing for the 2007 season.

Exh. N at 5-6 (emphasis added). For these reasons highlighted by BLM and the Solicitor, the closure decision is needed to comply with FLPMA and the FRH regulations.

The ALJ’s order never squarely addressed the issue of whether the grazing on the Bully Creek Pasture was causing a violation of the FRH Regulations, since that was not at issue in the administrative appeal. Thus, the order sheds little light on this claim. Instead, the ALJ’s discussion of the merits of the appeal focused exclusively on whether BLM’s monitoring techniques were adequate. Exh. O at 10-14. The ALJ stated that there was a “sufficient likelihood” that Alves would succeed on the merits of his appeal because he raised “serious

questions” as to whether “BLM’s monitoring is incapable of yielding accurate information or that BLM materially departed from prescribed procedures.” Id. at 14. The ALJ’s analysis on this issue was deeply flawed and contained several errors of law.

First, the ALJ failed to recognize that BLM has broad authority to suspend grazing to prevent resource damage under FLPMA and the grazing regulations. BLM’s regulations provide, for example, that: “All permits and leases shall be made subject to cancellation, suspension, or modification for *any violation of these regulations or of any term or condition of the permit or lease.*” 43 C.F.R. § 4130.3-1 (emphasis added). They also mandate that:

[T]he authorized officer *will close allotments or portions of allotments to grazing by any kind of livestock or modify authorized grazing use . . . when the authorized officer determines and documents that . . . (ii) Continued grazing use poses an imminent likelihood of significant resource damage.*

Id. § 4110.3-3(b)(1) (emphasis added). Further, the regulations state that BLM “will reduce active use, otherwise modify management practices, or both” when “monitoring or documented field observations show grazing use or patterns of use are not consistent with the provisions of subpart 4180 [the FRH regulations], or grazing use is otherwise causing an unacceptable level or pattern of utilization.” Id. § 4110.3-2(b). Finally, BLM

may modify terms and conditions of the permit or lease when the active use or related management practices: (1) *Do not meet management objectives specified in:* (i) The land use plan; (ii) The pertinent allotment management plan or other activity plan . . . ; or (2) *Do not conform to the provisions of subpart 4180 of this part* [the FRH regulations].

Id. § 4130.3-3 (emphasis added).

BLM was thus well within the bounds of its authority when it issued its October 2006 Final Decision suspending grazing use based on violations of the LAMP, the SEORMP, the grazing permit, and the Agreement with the permit holder. The ALJ’s order was flawed as a matter of law because he never acknowledged this relevant authority in the order. Instead, he

inappropriately placed the burden of proof on BLM to defend its Final Decision via rebutting, “by counteraffidavit,” Larson’s monitoring criticisms. Exh. O at 10.

Furthermore, the ALJ failed to recognize that a challenge to BLM’s monitoring techniques fails here because BLM applied the monitoring techniques, standards, and indicators that it was *legally required to apply* under the SEORMP and Bully Creek LAMP. The LAMP set forth BLM’s monitoring strategy for this Pasture six years ago, leaving this type of tardy criticism wholly unfounded. In fact, if BLM had not used the techniques, standards, and indicators it used, it would be vulnerable to a claim that it was failing to act consistently with its resource management plan, in violation of the FLPMA consistency provision, 43 C.F.R. § 1732(a). See Exh. D at 20 (LAMP’s standards and indicators). BLM also applied the monitoring techniques it was required to use pursuant to the April 2006 signed Agreement between BLM and Alves. Exh. K at ¶¶ 2, 5. The Ninth Circuit has upheld the use of stubble height of key herbaceous riparian vegetation as a reasonable interim measure to protect the environment from livestock grazing damage. Idaho Watersheds Project v. Hahn, 307 F.3d 815 (9th Cir. 2002).

Even if BLM were not legally required to use its selected monitoring techniques, the ALJ’s discussion was flawed as a matter of law because it failed to give BLM any deference on the matter. The Supreme Court has held that for resolution of factual issues requiring “a high level of technical expertise, we must defer to the informed discretion of the responsible federal agencies.” Marsh v. Ore. Natural Res. Council, 490 U.S. 360, 375 (1989) (quoting Kleppe v. Sierra Club 427 U.S. 390, 412 (1976)). Indeed, “[w]hen examining this kind of scientific determination . . . a reviewing court must generally be at its most deferential”). Id. (quoting Baltimore Gas & Electric Co. v. Natural Res. Defense Council, Inc., 462 U.S. 87, 103 (1983)).

But the ALJ gave BLM no deference whatsoever. Instead, the ALJ improperly shifted the burden of proof to BLM to establish the validity of its monitoring program, citing the lack of a BLM affidavit, even though BLM submitted its October 2006 Final Decision and supporting documentation. Exh. O at 10. In the absence of any BLM affidavit—which is nowhere required by law—the ALJ relied on assertions by Alves’ declarant, Pat Larson, that BLM used improper monitoring procedures. *Id.* at 10-14. Again, the ALJ erred as a matter of law in shifting the burden of proof to BLM as to why a stay should not be entered, when the burden should rest squarely with the party seeking the stay.

Moreover, the ALJ failed to recognize that the statements it relied upon from Alves’ declarant are precisely the type of factual issues requiring high levels of technical expertise, to which the ALJ was required to defer to BLM’s judgment. *See Marsh*, 490 U.S. at 375. For example, the ALJ relied on Larson’s critique that BLM’s “selection of a plant to measure . . . was open to personal bias, and each selection was dependent on the ability of the observer to identify the plant.” Exh. O at 11. This is a technical question that should be left up to BLM specialists. Further, based on Larson’s apparent lack of any educational degrees or specific expertise in riparian ecology or stream hydrology, *see* Exh. M at 1-2, the ALJ should have afforded considerably less—if any—weight to Larson’s declaration, as compared to the expert agency’s findings and conclusions. The failure to give BLM any deference as to its monitoring techniques, standards, and indicators, particularly when those techniques and criteria had previously been subjected to a lengthy public process prior to being adopted, as well as the inappropriate burden-shifting, renders the ALJ’s conclusion incorrect as a matter of law.

Because this OHA stay decision now prevents BLM from suspending grazing on the Bully Creek Pasture as needed to make significant progress towards fulfillment of the FRH

Standards and Guidelines by the start of the next grazing year, the decision is arbitrary, capricious, and in violation of the FRH regulations, 43 C.F.R. § 4180.2(c).

B. OHA's Decision to Stay BLM's October 2006 Closure Decision Violates the FLPMA Consistency Provision.

FLPMA requires BLM to manage the public lands in a manner consistent with its land use plans. 43 U.S.C. § 1732(a). The governing land use plan (the SEORMP) incorporates the Bully Creek LAMP; thus, BLM must act consistently with the LAMP. Exh. H at 2. As explained above, the Bully Creek LAMP adopted two quantitative ecological standards as indicators of potential resource damage, residual herbaceous vegetation and incidence of use on woody species. In addition, both the LAMP and the SEORMP contain qualitative standards requiring management to maintain or improve riparian conditions. Exh. D at 6, 20; Exh. H at 4. The LAMP requires BLM to make adjustments when the changes are not successful in resolving Rangeland Health problems. Exh. D at 19, 21. Here, BLM determined unequivocally that that livestock grazing in the Bully Creek Pasture is not meeting the Bully Creek LAMP standards.

First, BLM determined that the LAMP's quantitative stubble height and shrub utilization standards were violated repeatedly between 2001 and 2005 and after only ten days of authorized grazing during the 2006 season. Exh. L at 4-5. In its fifth-year monitoring report, BLM reported that, for 2005, stubble height was less than three inches on all four monitored creeks, and woody species utilization was over 80% on both monitoring sites. Exh. L at 5. These values are well in excess of the LAMP standards of <4-6" residual herbaceous vegetation and >30% incidence of use on woody species. BLM again found violations in 2006. After only ten days of authorized grazing, all four creeks were in violation of the stubble height standard (with one creek having a mere 1.6-inch stubble height) and all four creeks violated the woody species use standard. Id.

Second, BLM determined that grazing on the Bully Creek Pasture violated the LAMP's qualitative trend requirement. BLM's 2005 fifth-year monitoring report concluded that "riparian areas in the Bully Creek Pasture were in a downward trend." Exh. L at 5. BLM also used monitoring photos to assess trend in its evaluation, which "indicate a continuing static trend in a non properly functioning condition or a downward trend." Exh. J at 14. Such trends violate the LAMP's requirement that management improve, or at the very least maintain, riparian conditions. See Exh. D at 19, 20 (LAMP trend requirements). Downward trends also violate the SEORMP's trend requirement. Exh. H at 4.

BLM concludes in its monitoring report and its Final Decision that rest is needed to reverse the downward trend: "Immediate closure of Bully Creek Pasture to livestock grazing is appropriate to prevent further grazing use of riparian herbaceous and browsing of woody vegetation which would lead to declining riparian vegetation health" Exh. L at 6. Because the OHA order prevents BLM from taking the actions necessary to ensure consistency with the Bully Creek LAMP and the SEORMP, that decision is arbitrary, capricious, and in violation of the FLPMA consistency provision, 43 U.S.C. § 1732(a).

C. OHA's Decision to Stay BLM's October 2006 Decision Will Cause Unnecessary or Undue Degradation and Fails to Balance Multiple Uses, in Violation of FLPMA.

The failures described in the preceding sections also violate FLPMA's multiple use mandate and the requirement that BLM manage the public lands in order to prevent "unnecessary or undue degradation." 43 U.S.C. §§ 1712(c)(1), 1732(a), (b). Indeed, the Department of the Interior adopted the FRH regulations expressly pursuant to the authority vested in it by Congress, including the multiple use mandate. See 60 Fed. Reg. 9893 *et seq.* (Feb. 22, 1995) (final rule adopting 1995 FRH regulations). For example, interpreting the multiple use balancing duty in the context of a challenge to BLM's issuance of a grazing permit and annual

grazing authorizations, the Department of the Interior’s Board of Land Appeals (“IBLA”) 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).

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, citation omitted).

Further, a cornerstone of the multiple use framework is that BLM “shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.” 43 C.F.R. § 1732(b). 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); see also Soda Mtn. Wilderness Council, 424 F.Supp.2d at 1270 (E.D. Cal. 2006) (“the BLM is obligated to consider in its EA whether there will be any unnecessary or undue degradation to the lands as a result of” the proposed action); 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”). BLM has not defined “unnecessary or undue degradation” by regulation in the grazing context. However, it has defined it in the context of mining within WSAs to mean “impacts greater than those that would normally be expected from an activity being accomplished in compliance with

current standards and regulations and based on sound practices, including use of the best reasonably available technology.” 43 C.F.R. § 3802.0-5(1).

Here, the OHA stay order failed to rationally balance the values on Bully Creek Pasture. The ALJ’s order contains virtually no recognition or discussion of the degradation the authorized grazing has caused to the riparian, upland, and wildlife resources of the Pasture. Furthermore, using this analogous regulatory definition for mining, or indeed any other plain language definition of the words “unnecessary” and “undue,” permitting grazing practices in Bully Creek Pasture in 2007 will cause unnecessary or undue degradation to the natural resources of the Bully Creek Pasture. The impacts of livestock grazing on the Bully Creek Pasture have been found to be “greater than those that would normally be expected from an activity being accomplished in compliance with current standards and regulations,” 43 C.F.R. § 3802.0-5(1), because the grazing has chronically been out of compliance with current standards and regulations. BLM’s Final Decision characterized the damage that occurred between 2001 and 2006 as “excessive” and explained that the same level of grazing “could very well severely affect the health of individual plants.” Exh. L at 6. BLM warns that there is an “imminent likelihood of significant resource damage to riparian and related resource values which would occur if grazing were to continue in Bully Creek Pasture as identified in the Bully Creek LAMP and your 2006 turnout statement.” Id. at 3. Under the plain meaning of the statute, “excessive,” “severe,” and “significant” damage to natural resources qualifies as unnecessary or undue degradation.

Because the OHA order fails to balance the multiple uses of the Bully Creek Pasture, forces BLM to take action which its experts have determined will cause unnecessary or undue degradation, and prohibits BLM from taking action to prevent such degradation, it is arbitrary,

capricious, and in violation of FLPMA's multiple use and unnecessary or undue degradation provisions, 43 U.S.C. §§ 1732(a), (b).

III. ABSENT AN INJUNCTION, GRAZING ON THE BULLY CREEK PASTURE WILL CAUSE IRREPARABLE HARM.

The Ninth Circuit has emphasized that “a preliminary injunction ‘only requires plaintiffs to show *probable* success on the merits and the *possibility* of irreparable harm.’” Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1158 (9th Cir. 2006), quoting Earth Island Inst. v. U.S. Forest Serv., 351 F.3d 1291, 1298 (9th Cir. 2003) (emphasis in original). As recognized by the Supreme Court, “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. Village of Gambell, 480 U.S. 531, 545 (1987). The Ninth Circuit has likewise held that “[w]hen the ‘proposed project may significantly degrade some human environmental factor,’ injunctive relief is appropriate.” Nat’l Parks & Conservation Ass’n v. Babbitt, 241 F.3d 722, 737 (9th Cir. 2001).

Here, BLM has chronicled at length how grazing the Bully Creek Pasture in 2007 will lead to irreparable harm on riparian resources:

This decision is issued as a final decision in the absence of a proposed decision as a result of the *imminent likelihood of significant resource damage to riparian and related resource values which would occur if grazing were to continue in Bully Creek Pasture*

Exh. L at 3 (emphasis added).

Immediate closure of Bully Creek Pasture to livestock grazing is appropriate to *prevent further grazing use of riparian herbaceous and browsing of woody vegetation which would lead to declining riparian vegetation health and reduced streambank protection from the hydrologic forces of stream flow.*

Id. at 6 (emphasis added).

Continued excessive utilization of riparian herbaceous and woody vegetation, as has happened between 2001 and 2006, could very well *severely affect the health of individual plants* leading to such effects as reduced root mass, thinning of the plant community and/or limit bank building.

Id. at 6-7 (citation omitted, emphasis added).

In the absence of actions identified in the Bully Creek LAMP[,] . . . the intensity of livestock grazing use *would not retain adequate cover and plant community structure* to promote streambank stability, debris and sediment capture, and floodwater energy dissipation in riparian areas.”

Id. at 7 (emphasis added).

As the Solicitor summarized before the OHA, “[t]he BLM’s decision, which included a thorough and detailed rationale, temporarily closed the Bully Creek Pasture to livestock grazing until 2008 to *prevent imminent damage to public land resources.*” Exh. N at 1 (emphasis added).

The Solicitor explained that failure to take BLM’s proposed corrective action “will likely result in [] the *continuation of a downward trend in riparian resources.*” Id. at 8 (emphasis added).

Such irreversible damage to riparian habitat in the arid eastern Oregon desert is critically significant. As the LAMP explained, such loss of vegetation due to livestock grazing will degrade habitat for interior redband trout and sage grouse. See Exh. D at 11-12. In the Proposed SEORMP, BLM recognized that “[a]lthough riparian areas and wetlands cover less than 1 percent of the [SEORMP] planning area, their ecological significance far exceeds their limited physical area. Riparian and wetland areas are major contributors to ecosystem productivity and structural and biological diversity, particularly in drier climates.” Exh. E at 2.

The riparian degradation would deprive Plaintiffs and their members the opportunity to fish, hunt, and recreate in the Bully Creek Pasture, as well as simply to enjoy thriving wildlife populations of special status species such as redband trout and sage grouse. See Moore Decl. at ¶¶ 3-7, 11-12 (stating that he has been visiting the area for over 45 years, describing how when

he was a boy he fished and cooked trout from the Bully Creek Pasture and observed abundant wildlife, describing how “[t]he condition of the landscape area and the riparian areas and the streams are in a deplorable condition today compared to what they were in the past years,” and concluding that livestock grazing “has virtually taken away the good fishing in the streams, the good hunting opportunities and also the opportunity to just enjoy an undamaged natural landscape.”) See also Bray Decl. at ¶¶ 38-41 (stating that he appreciates the “ruggedness and beauty of the Bully Creek Landscape Area,” but that “the degradation caused by livestock grazing has destroyed the value of my experience on these public lands,” and stating how he would never consider drinking water from the area for fear of contracting *e. coli* from the livestock waste in the water.) These are the types of impacts that are never fully recoverable and therefore represent irreversible harm to the environment. Because BLM, ONDA, and WWP have demonstrated that there is a “*possibility* of irreparable harm,” an injunction is appropriate. Earth Island Inst., 442 F.3d at 1158 (emphasis in original).

IV. THE BALANCE OF THE HARMS AND THE PUBLIC INTEREST FAVOR ISSUANCE OF AN INJUNCTION

Similarly, the balance of the harms and the public interest both favor issuance of an injunction. Because environmental injury is by its very nature often irreparable, the “balance of harms will usually favor the issuance of an injunction to protect the environment.” Amoco Prod. Co., 480 U.S. at 545. That is the case here. Plaintiffs and their members, who recreate on the public lands on and surrounding the Bully Creek Pasture, and who have spent countless hours documenting ecological values and wilderness values on these public lands, will be harmed if the Defendant is permitted to authorize grazing this year. See Moore Decl. at ¶¶ 3-7, 11-12; Bray Decl. at ¶¶ 38-41; Shake Decl. at ¶¶ 10-11. Aside from the irreparable on-the-ground harm to

public natural resources described above, implementation of this decision will result in a violation of federal laws and regulations.

Thus, the public interest will be served by an injunction in that the unique qualities of the public lands within the Bully Creek Pasture, including nationally significant fish, wildlife, and wilderness values, will be preserved until this Court can determine whether the Department of the Interior complied with mandatory legal duties under FLPMA and the FRH regulations. An injunction will temporarily preserve the status quo so that nascent recovery may begin in Bully Creek Pasture this year. In short, issuance of an injunction will prevent direct harm to ONDA, WWP, and their members, including imminent irreparable harm to the environment.

Conversely, the relative harm to Interior of issuing immediate injunctive relief is minimal or nonexistent. Interior's own expert land management agency, BLM, has already completed and issued its Final Decision to close the Bully Creek Pasture for a year of rest from grazing. An injunction would have no harmful impact on Interior, its Office of Hearings and Appeals, or the administrative law judge who applied incorrect standards and analyses in issuing the flawed stay order.

Nor can Alves, the permit holder, legitimately argue any cognizable harm that outweighs the imminent environmental damage continued grazing will cause. BLM permits to graze livestock on the public lands convey no "right, title, or interest, or estate in or to the public lands." 43 U.S.C. § 315b. See also Osborne v. United States, 145 F.2d 892, 896 (9th Cir. 1944) ("it has always been the intention and policy of the government to regard the use of its public lands for stock grazing . . . as a privilege which is withdrawable at any time for any use by the sovereign without the payment of compensation"); Public Lands Council v. Babbitt, 529 U.S. 728, 735 (2000) (noting that conditions placed on permits reflect the "leasehold nature of grazing

privileges”; that Congress has “made the grant of grazing privileges discretionary”; and that the federal government “retained the power to modify, fail to renew, or cancel a permit or lease for various reasons”).

As a matter of equity, any alleged financial loss to the permit holder will be entirely foreseeable based on the track record of over five years’ worth of violations and warnings given by BLM. Alves has known for over two years, since the publication of the 2005 monitoring report, that a temporary closure was recommended. As the Solicitor explained, “[a]ny harm incurred by [the permit holder] from the implementation of the BLM’s decision was completely foreseeable under federal law, the permit itself, and the agreement between the BLM and appellant—and is the result of [the permit holder’s] inability to comply with the terms and conditions of the grazing permit.” Exh. N at 8. In addition to violating standards for the past six years, Exh. L at 5-6, he has allowed his livestock to unlawfully trespass on the public lands during almost every year. See Exh. J at 13-14 (2005 monitoring report), Exh. I at 1-2 (trespass letter), Bray Decl. at ¶¶ 23-26.

As the Solicitor stated, “[t]imely implementation of the BLM’s decision is in the public interest” because the rest “would allow an opportunity for riparian vegetation recovery and retain adequate cover and plant community structure to promote streambank stability, debris and sediment capture, and floodwater energy dissipation in riparian areas.” Exh. N at 13. In contrast, failing to implement the BLM’s decision “would likely lead to the continuation of the downward trend of riparian areas recorded in recent years and failure to make significant progress toward meeting riparian-wetland standards and guidelines for grazing administration in Bully Creek Pasture. This is surely not in the public interest.” Id. ONDA and WWP agree with the Solicitor that the relative harm to the parties in this case tips in favor of the environment.

V. THE COURT SHOULD WAIVE THE BOND REQUIREMENT IN THIS CASE

ONDA and WWP respectfully request that if the court grants Plaintiffs' motion for injunctive relief, the court waive the bond requirement of Rule 65(c). It is settled law that the court has discretion to waive this requirement, or to set nominal security in certain circumstances. See, e.g., Wilderness Soc'y v. Terrel, 701 F. Supp. 1473, 1492 (E.D. Cal. 1988); Cal. v. Tahoe Reg'l Planning Agency, 766 F.2d 1319, 1325 (9th Cir. 1985), amended on other grounds, 775 F.2d 998 (9th Cir. 1985); Friends of the Earth v. Brinegar, 518 F.2d 322, 323 (9th Cir. 1975). The Ninth Circuit has held that a waiver is particularly appropriate "where requiring security would effectively deny access to judicial review." Tahoe Reg'l Planning Agency, 766 F.2d at 1325 (also noting potential chilling effect bond requirements pose on plaintiff litigation to protect environment and on public interest). Federal courts consistently have waived the bond requirement in public interest environmental litigation, or required only a nominal bond. See e.g., id. (no bond).⁸

The courts have articulated at least two main reasons for this rule, both of which apply in this case. First, ONDA's and WWP's lack of financial interest in the outcome warrants a waiver of the bond requirement. Rule 65(c) is based on the theory of unjust enrichment—i.e., that plaintiffs should not benefit financially from the wrongful granting of preliminary relief against defendants. Where, as here, a plaintiff gains no pecuniary interest from the injunction, the purpose of Rule 65(c) is not served and no bond should be required. See, e.g., Wisc. Heritages v. Harris, 476 F. Supp. 300, 302 (E.D. Wis. 1979). Second, requiring ONDA and WWP to post a substantial bond would effectively deny them access to the courts and discourage litigation brought to protect the environment. See, e.g., Natural Res. Def. Council v. Morton, 337 F. Supp. 167, 169 (D.D.C. 1971); Tahoe Reg'l Planning Agency, 766 F.2d at 1325 (court has discretion to

⁸ Plaintiffs can provide an extensive citation list of opinions from federal courts around the country (rulings of nominal or no bonds required), upon request from the court.

dispense with security requirement where requiring security would effectively deny access to judicial review for non-profit environmental group); Wisc. Heritages, 476 F. Supp. at 302; Wilderness Soc’y, 701 F. Supp. at 1492; Friends of the Earth, 518 F.2d 323. The general inability of nonprofit organizations to afford substantial bonds underscores this concern. Moreover, this case is in a Rule 65 position only because the Department of the Interior plans to authorize grazing on the Bully Creek Pasture despite the violations of law brought to its attention by BLM. As a result, the court should waive the bond requirements of Rule 65(c) in order to insure that the Department of the Interior may be held accountable when it fails to discharge statutory obligations.

CONCLUSION

For the reasons stated above, ONDA and WWP respectfully request that this court enter the relief requested herein and in Plaintiffs’ Motion for Temporary Restraining Order and/or Preliminary Injunction.

DATED this 30th day of March, 2007.

Respectfully submitted,

s/ Kristin F. Ruether

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