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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

OREGON NATURAL DESERT ASS'N,

Plaintiff,

v.

THOMAS E. RASMUSSEN, Field Manager, Lakeview Resource Area, **SHIRLEY GAMMON**, District Manager, Lakeview District BLM, **GALE A. NORTON**, Secretary, U.S. Department of the Interior, **BUREAU OF LAND MANAGEMENT**, and **U.S. DEPARTMENT OF THE INTERIOR**,

Defendants.

Case No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(Environmental Matter)

NATURE OF ACTION

1. This action seeks judicial relief ordering Defendants to comply with the requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321–61, and the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701–84, with respect to the Bureau of Land Management's ("BLM") management of public lands with inventoried wilderness values on and surrounding Juniper Mountain in eastern Oregon's high desert.

2. Current domestic livestock grazing practices on parts of the Juniper Mountain Allotment are damaging natural resources and resulting in failures to meet the BLM's own basic ecological standards. Specifically, concentrated livestock use has so degraded fragile riparian resources in an area called Horseshoe Meadow, that the BLM, in a Rangeland Health Standards Assessment ("Assessment") dated September 30, 2004, determined that the area is not meeting the agency's riparian-wetland standard due to current grazing practices. According to the Assessment, current grazing practices have caused compaction of soils, erosion, and headcuts near the meadow's Horseshoe Spring, as evidenced by areas of bare ground, livestock trails, bank trampling, and "postholing."

3. Under the BLM's "Fundamentals of Rangeland Health" regulations ("FRH regulations"), 43 C.F.R. Part 4180, the agency has a mandatory duty to assess ecological conditions on the public lands and evaluate whether specific rangeland health standards are being met. If standards are not being met, and the BLM determines that existing grazing management or levels of grazing use are significant causal factors for the failure, the FRH regulations expressly require the BLM to implement grazing management changes on those lands no later than the start of the next grazing season.

4. In a belated attempt to comply with the FRH regulations' mandate on the Juniper Mountain Allotment, the BLM in June 2005 adopted a final decision to implement the Horseshoe Pasture Division Fence Environmental Assessment ("EA"). The project involves constructing five miles of new barbed-wire fence along almost the entire ridge of Juniper Mountain, in an old growth juniper forest within an area with documented wilderness values.

5. During the planning process for the project, the BLM refused to consider reasonable alternatives to new fencing, such as increasing herding or reducing grazing, and

refused to engage in an adequate analysis of the impacts of its action on a number of resources, including the wilderness resource, critical wildlife habitat, and the spread of invasive weeds.

6. Plaintiff Oregon Natural Desert Association ("ONDA") has been injured by Defendants' refusal or failure to comply with statutory and regulatory obligations. Defendants' decision to proceed with the Horseshoe Pasture Division Fence is arbitrary, capricious, and not in accordance with the law, and will result in significant adverse environmental impacts, some of which may be long-term or irreversible in nature.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this action arises under the laws of the United States, including NEPA; FLPMA; the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq.; the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq.; and the Equal Access to Justice Act, 28 U.S.C. § 2412 et seq. An actual, justiciable controversy exists between the parties, and the requested relief is therefore proper under 28 U.S.C. §§ 2201–2202 and 5 U.S.C. §§ 701–06.

8. Venue is proper in this Court under 28 U.S.C. § 1391 because all or a substantial part of the events or omissions giving rise to the claims herein occurred within this judicial district, Defendants reside in this district, and the public lands and resources at issue are located in this district.

9. The federal government has waived sovereign immunity in this action pursuant to 5 U.S.C. § 702.

10. ONDA has properly exhausted its administrative remedies. Id. at § 704.

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PARTIES

11. Plaintiff OREGON NATURAL DESERT ASSOCIATION is an Oregon non-profit public interest organization of approximately 1500 members. It is headquartered in Bend, Oregon and also has offices in Portland, Oregon. ONDA's mission is to protect, defend, and restore forever the health of Oregon's native deserts. ONDA actively participates in Department of the Interior and Bureau of Land Management activities concerning the management and protection of public lands. ONDA brings this action on its own behalf and on behalf of its members and staff, many of whom regularly enjoy and will continue to enjoy the public lands on and surrounding the area that is the subject of this action for educational, recreational, spiritual, and scientific activities. ONDA also has been active in monitoring ecological conditions and wilderness values in the BLM's Lakeview District, including the public lands on and surrounding Juniper Mountain and Horseshoe Meadow.

12. Defendant UNITED STATES DEPARTMENT OF THE INTERIOR is an executive branch department of the United States, and is charged with managing the public lands and resources in accordance and in compliance with federal laws and regulations. This includes the responsibility for overseeing and directing how its components and agencies implement those federal laws and regulations.

13. Defendant UNITED STATES BUREAU OF LAND MANAGEMENT ("BLM") is an agency or instrumentality of the United States, and is charged with managing the public lands and resources of the Lakeview District BLM in accordance and compliance with federal laws and regulations.

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14. Defendant GALE A. NORTON is sued solely in her official capacity as Secretary of the Department of the Interior. The Secretary of Interior is the official ultimately responsible for the Department's implementation of federal laws and regulations.

15. Defendant SHIRLEY GAMMON is sued solely in her official capacity as District Manager for the Lakeview District of the Bureau of Land Management, in which the Juniper Mountain Allotment and project area occur. Ms. Gammon is one of the BLM officials responsible for implementing the Horseshoe Pasture Division Fence project, and has principal authority for the actions and inactions alleged herein.

16. Defendant THOMAS E. RASMUSSEN is sued solely in his official capacity as Field Manager for the Lakeview Resource Area of the BLM's Lakeview District. Mr. Rasmussen is one of the BLM officials responsible for implementing the Horseshoe Pasture Division Fence EA, and has principal authority for the actions and inactions alleged herein.

STATEMENT OF FACTS

17. Juniper Mountain, located about 55 miles northeast of Lakeview, Oregon, is an isolated mountain in eastern Oregon's northern Great Basin. It rises dramatically from the surrounding sagebrush steppe landscape to an elevation of more than 6,000 feet. The mountain's ridgeline forms an unusual horseshoe shape, with the horseshoe opening to the west. Inside the horseshoe-shaped ridge lies Horseshoe Meadow and Horseshoe Spring. Both the ridge and the meadow provide important wildlife habitat for a wide variety of species. The BLM manages the public lands on and surrounding Juniper Mountain, including over 91,000 acres of land managed as the Juniper Mountain Allotment.

18. Much of Juniper Mountain is covered with an ancient old growth juniper forest. The tree canopy is 400 to 600 years old, with some trees up to 1,000 years old. According to the

BLM, the stand is the only old growth juniper woodland of both its size and tree canopy density throughout a vast region of southeast Oregon ranging from Klamath Falls to the Snake River basin. A wildfire burned part of the juniper forest in 2001, but much of it remains.

19. In 2004 the BLM officially recognized the uniqueness of this old growth juniper forest by designating both the mountain and Horseshoe Meadow as the Juniper Mountain Area of Critical Environmental Concern and Research Natural Area ("ACEC/ RNA"). ACECs are areas where special management is required to protect important values, and RNAs are created to maintain areas for scientific research. The Lakeview Resource Management Plan ("RMP") provides that where adverse impacts are identified in the Juniper Mountain ACEC/ RNA, "existing livestock use will be adjusted using a variety of methods, including, but not limited to, fencing, reduction in livestock numbers, and changes in grazing season of use."

20. Juniper Mountain supports a wide variety of wildlife and includes important habitat for Greater sage grouse, mule deer, pronghorn antelope, red-tailed hawk, sage thrasher, and countless other birds and mammals. Sage grouse is a particularly imperiled species that the BLM considers a "special status species" and the U.S. Fish & Wildlife Service has designated as a sensitive species. The Lakeview RMP states that the BLM will manage special status species to maintain, enhance, or restore their habitats or populations and also commits to managing for sage grouse pursuant to a national guidance document.

21. According to the Conservation Assessment of Greater Sage-grouse and Sagebrush Habitats, a comprehensive review of sage grouse data published by the Western Association of Fish and Wildlife Agencies in 2004, fences are harmful to sage grouse because: (1) they provide perches for sage grouse predators; and (2) sage grouse may be injured or killed when they fly

into fences. Fences also exacerbate the spread of invasive weeds by forming livestock trailing corridors and vehicular routes along fencelines.

22. Juniper Mountain also contains biological soil crusts, which are living organisms that prevent soil erosion, form a barrier to exotic species establishment, and contribute to soil and plant health by fixing Nitrogen in the soil. They are sensitive to disturbance such as livestock grazing.

23. Much of the Juniper Mountain Allotment contains wilderness characteristics worthy of protection for future generations. Specifically, the allotment contains a large area which ONDA has inventoried according to the BLM's wilderness inventory protocol and found to possess defined wilderness characteristics. ONDA's "Juniper Mountain Proposed Wilderness Study Area" covers 55,442 acres of the allotment's 91,000-plus acres.

24. The BLM's governing FRH regulations require the BLM to periodically assess ecological conditions on the public lands and make an evaluation of whether specific rangeland health standards are being met. If standards are not being met, and the BLM determines that existing grazing management or levels of grazing use are significant causal factors for the failure, the FRH regulations expressly require the BLM to implement grazing management changes on those lands no later than the start of the next grazing season. The Lakeview RMP requires compliance with the FRH regulations.

25. The BLM completed a Rangeland Health Assessment for the Juniper Mountain Allotment in 2004. The BLM determined that the Horseshoe Meadow and Horseshoe spring area did not meet the FRH regulations' Standard 2 (the riparian-wetland standard), due to current grazing practices.

26. The EA explains that under the current system, the Horseshoe pasture does not receive adequate rest due to trespassing cattle from other pastures.

27. The BLM did not implement grazing management changes on the allotment before the start of the 2005 grazing season.

28. In a belated attempt to meet its duty under the FRH regulations, in February 2005 the BLM issued for public comment the Horseshoe Pasture Division Fence EA and Finding of No Significant Impact ("FONSI"). The EA considers a No Action Alternative and the proposed action.

29. The proposed action involves construction of over five miles of new barbed-wire fence along almost the entire horseshoe-shaped ridgeline of Juniper Mountain. Construction would involve trimming or felling the old growth juniper trees with chainsaws and traveling the fence corridor with an ATV. The EA does not address impacts to wilderness characteristics, and states that "[n]either alternative is expected to have any significant secondary, indirect, or cumulative impacts on the resource values present within the allotment."

30. By letter dated March 31, 2005, ONDA provided detailed comments on the EA. In its comments, ONDA asked the BLM to analyze alternatives that would more effectively remedy the failure to meet the FRH regulations' riparian-wetland standard, requested more analysis on impacts to sage grouse, other wildlife and microbiotic crusts, and requested analysis on the cumulative impacts of the fence construction. ONDA also asked the BLM to consider the significant wilderness values present within and adjacent to the project area, including the detailed and new wilderness inventory information provided to the BLM by ONDA.

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31. By letter dated April 7, 2005, the BLM issued a Proposed Decision for the project. Pursuant to Department of the Interior regulations, ONDA on April 25, 2005 protested the Proposed Decision.

32. The BLM responded to ONDA's protest by letter dated June 20, 2005, denying the protest in its entirety and issuing its Final Decision to implement the proposed project.

33. On July 18, 2005, pursuant to the Department of the Interior appeal regulations, ONDA appealed the Final Decision for the Horseshoe Pasture Division Fence EA.

34. On September 7, 2005, the Department of the Interior's Office of Hearings and Appeals issued an Order denying ONDA's petition for a stay of the BLM's final decision. Under the Department's appeals regulations, the BLM at that point was free to implement the decision. Also at that point, ONDA was deemed to have exhausted its administrative remedies.

35. The BLM has stated it intends to construct the fence during May 2006. Grazing turnout on the Juniper Mountain Allotment is on or about April 8, 2006. ONDA therefore dismissed its administrative appeal on March 30, 2006 and filed this action for declaratory and injunctive relief in federal court.

FIRST CLAIM FOR RELIEF
NEPA—Range of Alternatives, Hard Look, Cumulative Impacts, New Information

36. Plaintiff realleges and incorporates by reference all preceding paragraphs.

37. NEPA requires the BLM to consider reasonable "alternatives to the proposed action" in an EA or EIS. 42 U.S.C. §§ 4332(2)(C)(iii), 4332(2)(E); 40 C.F.R. §§ 1508.9(b), 1502.14 (agencies shall "[r]igorously explore and objectively evaluate all reasonable alternatives"). The BLM "must explain why it has eliminated an alternative from detailed study." Native Ecosystems Council v. U.S. Forest Serv. ("NEC"), 428 F.3d 1233, 1245 (9th Cir. 2005), citing 40 C.F.R. § 1502.14(a). The purpose and need statement from which the alternatives are

derived must be reasonable. Westlands Water Dist. v. U.S. Dept. of Interior, 375 F.3d 853, 866 (9th Cir. 2004).

38. The BLM must take a "hard look" at the environmental consequences of the proposed action. NEC, 428 F.3d at 1239 (internal citation omitted).

39. In addition, NEPA requires an analysis of the cumulative environmental impacts of the proposed action. 40 C.F.R. §§ 1508.7, 1508.25(a)(2); Ocean Advocates v. U.S. Army Corps of Eng'rs, 361 F.3d 1108, 1128 (9th Cir. 2004).

40. Finally, NEPA requires the BLM to consider "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1509(c)(1)(ii).

41. The BLM's final decision is arbitrary, capricious and not in accordance with NEPA, and is therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)(A), because the agency analyzed an inadequate range of alternatives. This includes the BLM's decision not to consider in detail reasonable alternatives involving reduced grazing or increased herding. To the extent the range of alternatives was narrowed to meet the purpose and need statement, the purpose and need statement was unreasonable.

42. The BLM's final decision is arbitrary, capricious and not in accordance with NEPA, and is therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)(A), because the agency refused to take a "hard look" at the environmental consequences of its proposed action with respect to the wilderness resource.

43. The BLM's final decision is arbitrary, capricious and not in accordance with NEPA, and is therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)(A), because the

agency refused to analyze the cumulative impacts of its proposed action with respect to the wilderness resource.

44. The BLM's final decision is arbitrary, capricious and not in accordance with NEPA, and is therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)(A), because the agency refused to consider "significant new circumstances or information" regarding the wilderness resource as documented in ONDA's wilderness inventory report.

45. In the alternative, the BLM's failure to consider a reasonable range of alternatives, failure to take a "hard look" at the environmental consequences of its proposed action, failure to analyze the cumulative impacts of its proposed action, and failure to consider "significant new circumstances or information," constitutes agency action unlawfully withheld and is therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

SECOND CLAIM FOR RELIEF:
FLPMA—Consistency with Resource Management Plan

46. Plaintiff realleges and incorporates by reference all preceding paragraphs.

47. FLPMA requires the BLM to "manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed." 43 U.S.C. § 1732(a); see also 43 C.F.R. § 4100.0-8 (requiring BLM to manage grazing activities and management actions on public lands in accordance with applicable land use plans).

48. The Lakeview RMP states that: "Areas not in proper functioning condition will be managed to attain an upward trend in the composition and structure of key riparian/wetland vegetation and desired physical characteristics of the stream channel. Uses within the riparian conservation area and contributing upland watersheds will be allowed as long as there is measurable progress towards attainment of State water quality standards, proper functioning condition, and riparian management objectives." Lakeview RMP at 31.

49. The Lakeview RMP also states that: "Livestock grazing and related activities will be removed from those stream segments where proper functioning condition assessment ratings are functioning-at-risk with no apparent trend, downward trend, or nonfunctioning and where grazing is determined to be a factor in the current condition. . . . Exclusion of livestock will continue in these areas until systems are determined able to support reintroduction of grazing with proper management to improve riparian conditions." Id. at 43 (emphasis added).

50. The Lakeview RMP requires compliance with the FRH regulations.

51. According to the Assessment, the Horseshoe area is not in proper functioning condition and current grazing practices have contributed to that condition. Neither the Assessment nor the EA states that there is measurable progress towards attainment of State water quality standards, proper functioning condition, and riparian management objectives. But the BLM did not even consider excluding livestock.

52. The BLM failed to implement any changes to the grazing program before the 2005 grazing season, allowing potential cattle trespass and/or resource damage to continue; and failed to implement any changes to grazing management before the 2006 grazing season.

53. The BLM's decision to adopt and implement the Horseshoe Pasture Division Fence EA final decision and/or the BLM's 2005 and/or 2006 annual authorizations of status quo grazing practices are arbitrary, capricious and not in accordance with FLPMA and its implementing regulations, and are therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)(A), because the decisions are not in accordance with the above provisions of the RMP.

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THIRD CLAIM FOR RELIEF:
FLPMA—Continuing Inventory, Multiple-Use, Unnecessary or Undue Degradation

54. Plaintiff realleges and incorporates by reference all preceding paragraphs.

55. FLPMA requires the BLM to "prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values (including, but not limited to, outdoor recreation and scenic values)." 43 U.S.C. § 1711(a). The "inventory shall be kept current so as to reflect changes in condition and to identify new and emerging resource and other values." Id.

56. FLPMA requires that the BLM "shall manage the public lands under principles of multiple use and sustained yield." 43 U.S.C. §1732(a).

57. FLPMA requires that the BLM "shall . . . take any action necessary to prevent unnecessary or undue degradation of the [public] lands." 43 U.S.C. § 1732(b).

58. The BLM's decision to adopt and implement the Horseshoe Pasture Division Fence EA final decision without collecting or updating relevant information on the wilderness resource and without analyzing, incorporating, and/or otherwise using ONDA's wilderness inventory information, is arbitrary, capricious, and not in accordance with FLPMA, 43 U.S.C. §§ 1711(a), 1732(a), 1732(b), and therefore is actionable pursuant to the APA, 5 U.S.C. § 706(2)(A).

FOURTH CLAIM FOR RELIEF:
FLPMA and the FRH Regulations—
Failure to Make Changes in Grazing Management Before Start of Next Grazing Season

59. Plaintiff realleges and incorporates by reference all preceding paragraphs.

60. As described herein, the FRH regulations require that where the BLM has determined that grazing is causing violations of the ecological standards known as the "Fundamentals of Rangeland Health," or the FRH Standards and Guidelines, the agency must

revise grazing management on the affected public lands "as soon as practicable" and in any event "no later than the start of the next grazing year." See also Idaho Watersheds Project v. Hahn, 187 F.3d 1035 (9th Cir. 1999) (finding this is a mandatory, enforceable requirement).

61. Defendants violated and are violating the mandatory duty to make changes in grazing management before the start of the next grazing season, by (1) failing to implement any changes to the grazing program before the 2005 grazing season, allowing potential cattle trespass and/or resource damage to continue; and (2) failing to implement any changes to grazing management before the 2006 grazing season. This is agency action unlawfully withheld or unreasonably delayed, and thus actionable pursuant to 5 U.S.C. § 706(1). Alternatively, these violations are actionable because the BLM's 2005 and 2006 annual authorizations of status quo grazing practices in the absence of the changes required by the FRH regulations are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and therefore actionable pursuant to 5 U.S.C. § 706(2)(A).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court grant the following relief:

A. Order, declare, and adjudge that Defendants' final decision to undertake the proposed action under the Horseshoe Pasture Division Fence EA is final agency action that is arbitrary, capricious, and not in accordance with NEPA and FLPMA; and/or is agency action unlawfully withheld or unreasonably delayed;

B. Order Defendants to complete appropriate environmental analyses in compliance with the substantive and procedural requirements of NEPA and/or FLPMA;

C. Issue an injunction barring Defendants from implementing or further implementing any and all construction or other ground disturbing activity as part of the

Horseshoe Pasture Division Fence EA, unless and until such time as Defendants have completed a lawful EA that complies with the substantive and procedural requirements of NEPA and FLPMA;

D. Issue an injunction providing for any such mitigating injunctive relief that Plaintiff may pray for to remedy any completed activity done as part of the Horseshoe Pasture Division Fence EA, including removing the fence and mitigating any other on-the-ground impacts;

E. Issue an injunction providing for any such mitigating injunctive relief that Plaintiff may pray for to remedy the failure to make grazing changes in a timely fashion under the FRH regulations;

F. Award Plaintiff its reasonable costs, litigation expenses, and attorney's fees associated with this litigation as provided by the Equal Access to Justice Act, 28 U.S.C. § 2412 et seq., and all other applicable authorities; and

E. Grant such other further relief as the Court deems just and proper.

DATED this ___ day of March, 2006.

Respectfully submitted,

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Kristin F. Ruether (OSB # 05368)
Oregon Natural Desert Association

Of Attorneys for Plaintiff