

Peter M. Lacy (“Mac”) (OSB # 01322)
Oregon Natural Desert Association
917 SW Oak Street, Suite 408
Portland, OR 97205
(503) 525-0193
lacy@onda.org

Stephanie M. Parent (OSB # 92590)
Pacific Environmental Advocacy Center
10015 SW Terwilliger Blvd.
Portland, OR 97219
(503) 768-6736
(503) 768-6642 (fax)
parent@lclark.edu

Laurence (“Laird”) J. Lucas (ISB # 4733)
P.O. Box 1342
Boise ID 83701
(208) 424-1466 (phone and fax)
llucas@rmci.net

Attorneys for Plaintiffs

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

**OREGON NATURAL DESERT ASS’N,
COMMITTEE FOR THE HIGH DESERT,
and WESTERN WATERSHEDS PROJECT,**

Case No. 03-CV-1017-JE

Plaintiffs,

v.

**BUREAU OF LAND MANAGEMENT,
ELAINE M. BRONG, State Director, Oregon/
Washington BLM, DAVE HENDERSON,
Vale District Manager, BLM, TOM DABBS,
Field Manager, Malheur Resource Area, BLM,
WAYNE WETZEL, Acting Field Manager,
Jordan Resource Area, BLM,**

**PLAINTIFFS’ OBJECTIONS TO
MAGISTRATE’S FINDINGS AND
RECOMMENDATION ON CROSS
MOTIONS FOR JUDGMENT**

Defendants.

Oral Argument Requested

TABLE OF CONTENTS

INTRODUCTION..... - 1 -

STATEMENT OF RELEVANT FACTS..... - 1 -

STANDARDS OF REVIEW - 3 -

ARGUMENT..... - 4 -

I. THE F&R IS INCORRECT BECAUSE ONDA’S FLPMA AND TAYLOR GRAZING ACT CLAIMS ARE JUSTICIABLE...... - 4 -

II. THE F&R IS INCORRECT BECAUSE THE BLM HAS A MANDATORY STATUTORY DUTY UNDER FLPMA TO INVENTORY FOR AND CONSIDER WILDERNESS VALUES, AS WELL AS AN INDEPENDENT DUTY UNDER NEPA TO CONSIDER THE WILDERNESS RESOURCE AND THE ENVIRONMENTAL CONSEQUENCES OF ITS LAND USE PLANNING DECISIONS ON THAT RESOURCE...... - 9 -

A. The BLM Violated FLPMA in Not Conducting an Inventory of Wilderness Resources on the Public Lands...... - 10 -

B. The BLM Violated NEPA By Refusing in the EIS to Consider the Environmental Consequences and Cumulative Impacts of the Proposed Action on Wilderness Resources...... - 13 -

III. THE F&R IS INCORRECT BECAUSE THE BLM ADOPTED THE SEORMP WITHOUT SATISFYING NEPA’S RANGE OF ALTERNATIVES AND “HARD LOOK” REQUIREMENTS...... - 17 -

A. The BLM Did Not Consider an Adequate Range of Alternatives With Respect to Authorized Levels of, and Areas Allocated to, Livestock Grazing...... - 17 -

B. The BLM Did Not Consider an Adequate Range of Alternatives With Respect to Areas Designated as Closed to Off-Highway Vehicle Use. - 22 -

C. The BLM Did Not Take a “Hard Look” at the Environmental Consequences of the Proposed Action...... - 24 -

1. Noxious Weeds. - 24 -

2. Microbotic Crusts...... - 26 -

3.	Livestock Grazing	- 28 -
4.	Analysis of the Management Situation	- 30 -
5.	Cumulative Impacts	- 31 -
IV.	THE BLM IGNORED MANDATORY LAND USE PLANNING REQUIREMENTS UNDER FLPMA AND THE TAYLOR GRAZING ACT	- 32 -
A.	The BLM Did Not Assess the Suitability of the Public Lands for Grazing	- 32 -
B.	The SEORMP Does Not Determine Which Areas of the Public Lands Remain “Chiefly Valuable” for Livestock Grazing	- 35 -
C.	The BLM Refused to Establish Livestock Grazing Standards in the SEORMP	- 36 -
D.	The BLM Has Not Shown Where It Balanced Competing Uses in a Way That Satisfies FLPMA’s Duty to “Prevent Unnecessary or Undue Degradation.”	- 37 -
	CONCLUSION	- 38 -

TABLE OF AUTHORITIES

CASES

Alaska Wilderness Recreation & Tourism v. Morrison, 67 F.3d 723 (9th Cir. 1995) - 21 -

Anaheim Mem’l Hosp. v. Shalala, 130 F.3d 845 (9th Cir. 1997)..... - 4 -

Biodiversity Legal Found. v. Badgley, 309 F.3d 1166 (9th Cir. 2002)..... - 23 -

Christensen v. Harris County, 529 U.S. 576 (2000) - 12 -

Colautti v. Franklin, 439 U.S. 379 (1979) - 23 -

Dickinson v. Zurko, 527 U.S. 150 (1999)..... - 3 -

Envtl. Def. Ctr. v. EPA, 319 F.3d 398 (9th Cir. 2003) - 4 -

Forest Guardians v. U.S. Forest Serv., 329 F.3d 1089 (9th Cir. 2003) - 4 -

Heartwood, Inc. v. U.S. Forest Serv., 230 F.3d 947 (7th Cir. 2000) - 9 -

Hells Canyon Alliance v. U.S. Forest Serv., 227 F.3d 1170 (9th Cir. 2000)..... - 24 -

Inland Empire Public Lands Council v. U.S. Forest Serv., 88 F.3d 754 (9th Cir. 1996) - 27 -

Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062 (9th Cir. 2002) - 9 -, - 19 -, - 31 -, - 32 -

Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt., 387 F.3d 989 (9th Cir. 2004).... - 32 -

Lake Mohave Boat Owners Ass’n v. Nat’l Park Serv., 138 F.3d 759 (9th Cir. 1998) - 34 -

League of Wilderness Defenders v. U.S. Forest Serv., Civ. No. 00-464-KI, slip op. (D. Or. 2000)..... - 34 -

Marsh v. Ore. Natural Res. Council, 490 U.S. 360 (1989)..... - 4 -

McDonnell Douglas Corp. v. Commodore Bus., 656 F.2d 1309 (9th Cir. 1981)..... - 3 -

Mtn. Rhythm Res. v. FERC, 302 F.3d 958 (9th Cir. 2002)..... - 3 -

Nat’l Wildlife Fed’n v. BLM, 140 IBLA 85, 101 (1997)..... - 37 -

Neighbors of Cuddy Mtn. v. U.S. Forest Serv., 137 F.3d 1372 (9th Cir. 1998)..... - 24 -, - 26 -, - 32 -

Norton v. Southern Utah Wilderness Alliance, 124 S.Ct. 2373 (2004).... - 14 -, - 29 -, - 30 -, - 38 -

Ohio Forestry Ass’n v. Sierra Club, 523 U.S. 726 (1998)..... - 4 -, - 6 -, - 8 -

Ore. Natural Res. Council Action, 148 IBLA 186 (1999)..... - 9 -, - 33 -

Price Rd. Neighborhood Ass’n v. U.S. Dep’t of Transp., 113 F.3d 1505 (9th Cir. 1997) - 17 -

Pub. Lands Council v. Babbitt, 167 F.3d 1287 (10th Cir. 1999)..... - 19 -

Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989)..... - 14 -, - 16 -, - 27 -

Wilderness Soc’y v. Thomas, 188 F.3d 1130 (9th Cir. 1999) - 5 -

Wyo. Outdoor Council v. U.S. Forest Serv., 165 F.3d 43 (D.C. Cir. 1999)..... - 8 -

STATUTES

16 U.S.C. § 1131(c) - 6 -, - 10 -

28 U.S.C. § 636(b) - 1 -, - 3 -

42 U.S.C. § 4332(2)(C)(iii)..... - 19 -

42 U.S.C. § 4332(2)(E)..... - 19 -

43 U.S.C. § 1702(c) - 21 -, - 37 -

43 U.S.C. § 1711 - 6 -, - 10 -, - 11 -

43 U.S.C. § 1712..... - 2 -, - 10 -, - 14 -, - 32 -

43 U.S.C. § 1732(a) - 21 -

43 U.S.C. § 1732(b) - 21 -, - 37 -

43 U.S.C. § 1752(c) - 7 -

43 U.S.C. § 1782..... - 11 -, - 12 -

43 U.S.C. § 1782(a)	- 11 -
43 U.S.C. § 1902(d)	- 35 -
43 U.S.C. § 1903(a)	- 34 -
43 U.S.C. § 315	- 35 -
43 U.S.C. § 315b	- 7 -, - 36 -
43 U.S.C. § 315f	- 36 -
5 U.S.C. § 706(1)	- 14 -, - 38 -
5 U.S.C. § 706(2)	- 3 -, - 14 -
National Forest Management Act, 16 U.S.C. §§ 1600–1614	- 4 -
Public Rangelands Improvement Act of 1978, 43 U.S.C. §§ 1901–08	- 34 -

OTHER AUTHORITIES

Executive Order 11,644 (Feb. 8, 1972).....	- 22 -
Pub. L. No. 108-108, 117 Stat. 1241, § 325 (Nov. 10, 2003).....	- 7 -

REGULATIONS

40 C.F.R. § 1500.1(b)	- 15 -
40 C.F.R. § 1502.16	- 25 -
40 C.F.R. § 1502.20	- 26 -
40 C.F.R. § 1508.27(b)(7).....	- 32 -
40 C.F.R. § 1508.28	- 26 -
43 C.F.R. § 1601.0-5(k)(1)	- 33 -
43 C.F.R. § 1601.0-5(k)(2)	- 33 -
43 C.F.R. § 1601.0-5(k)(4)	- 37 -
43 C.F.R. § 1610.4	- 13 -, - 30 -, - 31 -
43 C.F.R. § 1610.4-4	- 30 -
43 C.F.R. § 4100.0-5	- 18 -
43 C.F.R. § 4100.0-8	- 37 -
43 C.F.R. § 4110.3	- 7 -
43 C.F.R. § 4130.2(a).....	- 7 -, - 34 -
43 C.F.R. § 4130.3-3	- 7 -
43 C.F.R. § 4180.2(d)	- 30 -
43 C.F.R. § 8340.0	- 22 -
43 C.F.R. § 8342.2	- 22 -
43 C.F.R. Part 4180.....	- 30 -

INTRODUCTION

Pursuant to 28 U.S.C. § 636(b)(1), Plaintiffs Oregon Natural Desert Association *et al.* (“ONDA”) hereby object to the Findings and Recommendation (“F&R”) issued by Magistrate Judge Jelderks on March 29, 2005, which recommended denying ONDA’s claims and entering judgment for Defendants Bureau of Land Management *et al.* (“BLM”). As explained below, the magistrate erred in recommending that ONDA’s challenges to the BLM’s Southeastern Oregon Resource Management Plan (“SEORMP”) are not justiciable in key respects, when that agency authorizes livestock grazing and off-highway vehicle use that will damage public lands, and will further prevent protection of wilderness values across hundreds of thousands of acres of public land in southeast Oregon’s remote Owyhee Canyonlands and northern Great Basin. Further, the BLM violated the National Environmental Policy Act (NEPA) and the Federal Land Policy and Management Act (FLPMA) in adopting the SEORMP without considering the significant ecological harms that will result and without addressing a reasonable range of alternatives. Accordingly, because the BLM’s approval of the SEORMP is arbitrary, capricious and not in accordance with law, this court should reverse the magistrate’s recommendations and enter judgment for ONDA.

STATEMENT OF RELEVANT FACTS

At issue in this case is the BLM’s issuance of the SEORMP, which governs management of approximately 4.6 million acres of public lands in the high desert of southeast Oregon. This region stretches from the stunning Owyhee Canyonlands, to the remote Sheepshead and Trout Creek Mountains, up to the base of the Blue Mountains, and it includes large areas that are suitable for wilderness designation. This vast expanse of sagebrush steppe is part of the single largest remaining wildland in the lower forty-eight states, and as such is a vitally important part

of our National heritage. It is home to more than 350 species of fish and wildlife, including threatened, endangered, or sensitive species such as Western sage grouse, pygmy rabbit, bighorn sheep, and redband, bull and Lahontan cutthroat trout. These species depend both on vast areas of native sage-steppe uplands and the infrequent but significant perennial and intermittent streams, springs and riparian areas that breathe life into this arid high desert landscape.

Congress enacted FLPMA in 1976 to govern the BLM's management of the public lands, and it requires the BLM to adopt land use plans, known as "resource management plans" ("RMPs"), to guide all management decisions. See 43 U.S.C. § 1712. The BLM thus adopted the SEORMP in April 2003 to establish management requirements and land allocations for this area for the next twenty years. AR 4256 (SEORMP Record of Decision at *ii*).¹ Plaintiffs ONDA *et al.* are conservation organizations whose members use and enjoy the public lands within the SEORMP area, and who participated extensively in the RMP planning process—including by submitting scientific data and literature and detailed written comments to the BLM underscoring the significant values of this area for wildlife and fish and for potential wilderness preservation, and documenting how ongoing livestock grazing, off-highway vehicle ("OHV") use, and other human actions are causing serious degradation of these values. ONDA thus asked the BLM to consider meaningful alternatives to its proposed course of action, which essentially perpetuates the prior livestock grazing and OHV authorizations that are causing irreversible harm and refuses to consider the wilderness resource and impacts to wilderness values.

The BLM, however, elected to ignore this public input and instead approved the SEORMP based on an environmental impact statement ("EIS") that failed to evaluate the

¹ Pursuant to the magistrate judge's request prior to oral argument, the parties prepared each compiled in Excerpts of Record the pages they cited from the administrative record. For the convenience of the court, ONDA has provided an additional copy of its Excerpts of Record (Dkt # 98) with this memorandum.

alternatives and issues identified by ONDA and further failed to address meaningfully the adverse impacts that ongoing livestock grazing, OHV use and other actions are having—and will continue to have—particularly in preventing suitable areas from potential designation as wilderness. Accordingly, ONDA filed this action in July 2003 to challenge the BLM’s violations of law in adopting the SEORMP. The matter was assigned to Magistrate Judge Jelderks for a report and recommendation and he ordered the parties to submit “dispositive motions” addressing ONDA’s legal claims based on the administrative record filed by the BLM. Following briefing and argument, the magistrate issued his F&R on March 29, 2005, recommending that ONDA’s claims be denied and judgment granted to the BLM.

As explained below, the brief F&R mistakenly concludes that several of ONDA’s key claims are not justiciable, while misapplying controlling Ninth Circuit precedent on NEPA’s requirements. Accordingly, and for the reasons that follow, this court should reject the F&R and enter judgment for ONDA holding that the SEORMP is arbitrary, capricious and not in accordance with law.

STANDARDS OF REVIEW

This Court reviews *de novo* the magistrate judge’s F&R. 28 U.S.C. § 636(b); McDonnell Douglas Corp. v. Commodore Bus., 656 F.2d 1309, 1313 (9th Cir. 1981). Hence, this court must independently assess the SEORMP under the judicial review standards of the APA. See Dickinson v. Zurko, 527 U.S. 150, 152 (1999); Mtn. Rhythm Res. v. FERC, 302 F.3d 958, 963 (9th Cir. 2002). The APA directs this court to hold unlawful the SEORMP if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). Under these standards, the reviewing court must determine whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of

judgment. Marsh v. Ore. Natural Res. Council, 490 U.S. 360, 378 (1989); Forest Guardians v. U.S. Forest Serv., 329 F.3d 1089, 1097 (9th Cir. 2003). While the scope of review under the “arbitrary and capricious” standard is narrow, an “agency must articulate a rational connection between the facts found and the conclusions made.” See Envtl. Def. Ctr. v. EPA, 344 F.3d 832, 858 n.36 (9th Cir. 2003). See also 490 U.S. at 378 (court’s inquiry, though narrow, must be “searching and careful”). The BLM’s decision can be upheld only on the basis of the reasoning found in that decision. Anaheim Mem’l Hosp. v. Shalala, 130 F.3d 845, 849 (9th Cir. 1997).

ARGUMENT

I. THE F&R IS INCORRECT BECAUSE ONDA’S FLPMA AND TAYLOR GRAZING ACT CLAIMS ARE JUSTICIABLE.

ONDA’s claims are ripe for review. Citing Ohio Forestry Ass’n v. Sierra Club, 523 U.S. 726 (1998), the F&R concludes ONDA’s FLPMA and Taylor Grazing Act claims are not ripe, and thus nonjusticiable, because “[t]he SEORMP does not authorize specific actions that could harm plaintiffs.” FR at 13. This recommendation should be rejected because it misapplies both Ohio Forestry and the facts presented here.

In Ohio Forestry, the Supreme Court held a programmatic challenge to a forest plan adopted by the U.S. Forest Service under the National Forest Management Act (NFMA), 16 U.S.C. §§ 1600–1614, was not ripe for review because the plan did not authorize any specific logging of wildlife habitat with which the plaintiffs were concerned. The Court noted that the Forest Service still would need to propose and evaluate specific timber sales under NEPA and NFMA, and adopt site-specific timber sale decisions, which the plaintiffs could then challenge. Accordingly, the Court concluded that challenges to the forest plan as authorizing inappropriate logging were not then ripe for judicial review and should be brought against later site-specific timber sales. See 523 U.S. at 733–34.

Notably, however, Ohio Forestry acknowledges that challenges to a land use plan may be ripe for judicial review outside the timber sale context when the plan makes decisions that may cause either (1) imminent concrete injuries such as “allowing motorcycles into a bird-watching area” or “clos[ing] a specific area to off-road vehicles,” or (2) a site-specific injury causally related to an alleged defect in the forest plan. 523 U.S. at 738–39. See also Wilderness Soc’y v. Thomas, 188 F.3d 1130, 1133–34 (9th Cir. 1999) (discussing these categories of ripe challenges to land use plan determinations). The F&R here incorrectly assumes that Ohio Forestry’s discussion of logging on national forests automatically means that any challenge to a BLM land use plan under FLPMA will not be ripe for judicial review. But that assumption does not credit the Supreme Court’s acknowledgment that land use plans may be ripe for review when they make decisions that have immediate, concrete impacts upon a plaintiff’s interests. 523 U.S. at 732–33. The F&R compounds that legal error by failing to recognize that here, such immediate and concrete impacts do flow from the BLM’s decisions in the SEORMP, particularly with respect to wilderness values and the Plan’s OHV and grazing decisions.

With respect to wilderness, the BLM’s final decision in the SEORMP falls directly within the Ohio Forestry discussion of land use plan decisions authorizing OHV use in ways that may cause harm to public lands and hence are immediately ripe for judicial review. In preparing the SEORMP, the BLM failed to inventory millions of acres of public land for wilderness values, and the Plan allows on vast portions of the planning area unrestricted OHV use that will cause degradation of these lands, potentially rendering them unsuitable for future wilderness designation. See Pl. Br. at 23–24 (citing evidence of OHV damage and impacts, in record and declarations) Moreover, the BLM has taken this action in violation of FLPMA’s statutory mandate to inventory for this public resource and use that inventory information in preparing its

RMPs. 43 U.S.C. §§ 1711(a), 1712(a). For example, the BLM decided to consider no alternative that would close to damaging OHV use more than 0.8% of the 4.6 million acres of public lands in the planning area. But this decision involving a land use wholly incompatible with the definition of wilderness, see 16 U.S.C. § 1131(c), and in the absence of any inventory information with which to evaluate its impacts on the wilderness resource, is not a rational decision. This is precisely analogous to the situation identified in Ohio Forestry as an example of a proper challenge to a land use plan. 523 U.S. at 738–39 (allowing motorized vehicles into bird-watching areas or regarding closure of areas to OHVs).

The BLM’s grazing-related decisions in the SEORMP are similarly justiciable. The F&R is based on an incorrect understanding that an RMP is “a general plan and does not authorize any specific actions” and that “the SEORMP itself does not authorize grazing; rather, specific grazing permits, subject to annual review, authorize grazing.” FR at 13–14. In Ohio Forestry, the Court stated that because the forest plan at issue there “does not give anyone a legal right to cut trees, nor does it abolish anyone’s legal authority to object to trees being cut[,]” the plan did “not create adverse effects of a strictly legal kind.” 523 U.S. at 733. Before cutting trees, the Forest Service would have to “focus on a particular site, propose a specific harvesting method, prepare an environmental review, permit the public an opportunity to be heard, and (if challenged) justify the proposal in court.” Id. at 734. Here, in contrast to the future, site-specific timber sales yet to be proposed in Ohio Forestry, the BLM already has authorized grazing on each of the 168 allotments within the SEORMP planning area, AR 3995 (FEIS at 93) (authorization to graze livestock throughout planning area currently allotted under 219 separate permits), 4256 (SEORMP, App. E) (listing by allotment permitted seasons of use, authorized AUMs)—and that on-going grazing has been causing, and continues to cause, serious resource degradation. See,

e.g., Fite Decl. at ¶¶ 6–17, 19, 24–28 (describing degradation of streams and riparian areas, depleted vegetation and soil, impacts to fish and wildlife, altered fire regimes). Rather than reevaluate the current livestock grazing authorizations, the BLM in the SEORMP approved continuation of these grazing land and forage allocations for the next twenty years or more. Thus, unlike in Ohio Forestry, here the BLM has used the land use planning process to continue to authorizing livestock grazing on the public lands that is causing immediate, direct harm to ONDA’s interests. ONDA’s challenges to this BLM decision therefore are ripe for judicial review.

In short, like the Ohio Forestry example of a land use plan decision closing or opening certain areas to OHV use as one that may result in “imminent concrete injury to a party with an interest in the use of off-road vehicles” and therefore ripe for review, 523 U.S. at 738–39, the BLM’s decisions in the SEORMP to allocate or not allocate land areas and specified amounts of forage to domestic livestock causes imminent concrete injury to ONDA’s interests. The BLM’s decision adopting the SEORMP is thus a final decision that will never be more ripe for review.²

Finally, the BLM relied heavily on the distinction in Ohio Forestry between procedural

² Although the BLM is required to prepare NEPA analyses for grazing permit renewals, the agency has lagged so far behind in this process that Congress has passed several appropriations bill “riders” allowing the terms and conditions of renewed grazing permits to remain in effect until NEPA analyses are completed. See, e.g., Pub. L. No. 108-108, 117 Stat. 1241, § 325 (Nov. 10, 2003). The BLM itself does not expect to undertake new NEPA analyses for these allotments anytime in the near future. See BLM Instruction Memorandum 2003-071, available at www.blm.gov/nhp/efoia/wo/fy03/im2003-071.htm (last modified Nov. 23, 2004) (stating backlog will not be resolved until FY 2009 or later). The fact that the BLM may not prepare any new site-specific environmental evaluations of many or most of the subject allotments for many years into the future, while damaging livestock grazing continues, thus underscores why ONDA’s challenges are ripe here, under Ohio Forestry. Moreover, the BLM must renew or reissue grazing permits to qualified applicants unless the agency makes an affirmative decision to decrease or eliminate permitted use. See 43 U.S.C. § 315b (establishing grazing preference system), 1752(c) (establishing priority system for permit renewal); 43 C.F.R. §§ 4130.2(a) (permits “shall be issued to qualified applicants”), 4110.3 (changes in permitted use), 4130.3-3 (modification of permits).

and substantive challenges, mischaracterizing ONDA’s FLPMA and TGA claims purely as non-ripe substantive claims. Def. Br. at 34–35. But because ONDA’s FLPMA and TGA claims have become “concrete and final” and “since there no longer exists the possibility that further agency action will alter the claim in any fashion,” these claims are in fact ripe for judicial review. See Wyo. Outdoor Council v. U.S. Forest Serv., 165 F.3d 43, 51 (D.C. Cir. 1999). In Wyoming Outdoor Council, the D.C. Circuit determined the plaintiffs’ claim that the agency violated its regulations by authorizing an oil and gas lease without making specific findings required under the regulations, was in fact ripe for review because the Forest Service had “completely and finally implemented” its procedures under the regulation—that is, the agency had performed the procedure as it believed was required under the regulations and had no intention of re-performing the procedure. 165 F.3d at 51. In determining the claim was ripe, the court followed the Supreme Court’s statement that “a person with standing who is injured by a failure to comply with [some procedural requirement] may complain of that failure at the time the failure takes place, for the claim can never get riper.” Id. (citing 523 U.S. at 737).

This is the case here, where FLPMA and the BLM’s land use planning regulations specifically require the agency, during the RMP land use planning process to conduct an inventory of the public lands and their resources, use that inventory information to prepare the RMP, and assess the suitability of livestock grazing for the public lands at stake. These are mandatory, statutory duties the BLM must perform during the RMP process and which the BLM failed to perform in its preparation and adoption of the SEORMP. The BLM stated it feels it complied with each of these duties. There is no reason to believe the agency will return to these issues during some future, site-specific planning process. For example, the BLM refused to inventory the wilderness resource in adopting the SEORMP, and it continues to refuse to do so in

subsequent, site-specific or fine-scale planning efforts such as the GMA process.³ Similarly, the Department of the Interior’s own Board of Land Appeals has held that the decision “whether to allow grazing and at what levels” must be made at the land use planning level rather than during subsequent activity-level planning. Ore. Natural Res. Council Action, 148 IBLA 186, 189–90 (1999). Because these are land use planning defaults, for which there are immediate and concrete underlying injuries, see, e.g., Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1071 (9th Cir. 2002) (citing Heartwood, Inc. v. U.S. Forest Serv., 230 F.3d 947, 953 (7th Cir. 2000)), these claims will never become riper and consequently are justiciable. The F&R’s summary dismissal of these claims without analysis therefore is flawed and ONDA respectfully requests the court to review the merits of ONDA’s FLPMA and TGA claims.

II. THE F&R IS INCORRECT BECAUSE THE BLM HAS A MANDATORY STATUTORY DUTY UNDER FLPMA TO INVENTORY FOR AND CONSIDER WILDERNESS VALUES, AS WELL AS AN INDEPENDENT DUTY UNDER NEPA TO CONSIDER THE WILDERNESS RESOURCE AND THE ENVIRONMENTAL CONSEQUENCES OF ITS LAND USE PLANNING DECISIONS ON THAT RESOURCE.

One of ONDA’s primary complaints about the SEORMP centers upon the BLM’s violation of its statutory duties to inventory and protect public lands suitable for wilderness designation. These claims are two independent, distinct and mandatory statutory duties: FLPMA establishes the BLM’s duty to inventory for and consider the wilderness resource during the agency’s resource management planning process; NEPA requires the BLM to consider the environmental consequences and cumulative impacts on the wilderness resource of the proposed action.

³ See Pl. Ex. 5 (BLM response to ONDA letter asking why BLM would not conduct wilderness inventory as part of SEORMP and requesting in the alternative that BLM do so as part of subsequent GMA processes); Pl. Ex. 8, at 3–5 (Mar. 17, 2005 Protest of Proposed NEPA Decision for Louse Canyon GMA, based on fact that BLM refused to inventory for and consider wilderness resource and refused to consider ONDA’s wilderness inventory report).

The BLM has taken the position, in approving the SEORMP and in its briefing before this court, that it has no duty under FLPMA to inventory for or consider wilderness values during the RMP process; and hence the agency also argues it has no duty to consider anew wilderness values as part of the NEPA process for the SEORMP. In adopting the BLM's position, the F&R erred in its interpretation of both FLPMA and NEPA. Thus, for the reasons explained below, this court should reject those recommendations.

A. The BLM Violated FLPMA in Not Conducting an Inventory of Wilderness Resources on the Public Lands.

As a matter of law, the FLPMA-imposed mandate that the BLM must inventory wilderness resources on the public lands could hardly be more clear. FLPMA requires that the

Secretary shall 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), giving priority to areas of critical environmental concern. This inventory shall be kept current so as to reflect changes in conditions and to identify new and emerging resource and other values.

43 U.S.C. § 1711(a). The inventory information must be used in the agency's development and revision of RMPs. *Id.* § 1712(c). One of the resources for which the BLM must inventory is wilderness. *See* Pl. Ex. 4 at § .06 ("Wilderness is a resource value which fits within the framework of multiple-use on the public lands."); *see also* 16 U.S.C. § 1131(c) (definition of "wilderness").

Yet in preparing the SEORMP, the BLM refused to inventory the wilderness resource. *See* AR 4189 (claiming that wilderness inventory was a "one-time review" completed in 1992, that "BLM has no policy to require the re-analysis of final wilderness suitability/non-suitability decisions made by the Secretary and the President," and that "the Purpose and Need for the [SEORMP] specifically states that the recommendations for wilderness suitability are outside the

scope of this planning process”). This includes refusing to inventory and assess the suitability of formerly non-recommended wilderness study areas, as well as wilderness values on non-WSA roadless areas.⁴ The BLM’s decision not to inventory for wilderness values in its SEORMP land use planning process directly contravenes FLPMA and the land use planning regulations, and therefore makes the BLM’s decision arbitrary and capricious and not in accordance with law.

The BLM argues that once it completed its initial wilderness inventory and review under section 603, 43 U.S.C. § 1782(a), the agency had no further obligation to inventory for wilderness values, or authority to establish WSAs, on the public lands. Def. Br. at 36–37. But rather than setting inventory deadlines in FLPMA, Congress directed the BLM to “maintain” the inventories “on a continuing basis.” 43 U.S.C. § 1711(a). Only by doing so can the BLM satisfy FLPMA’s mandate to keep up to date on “changes in condition” and be able to “identify new and emerging resource and other values.” *Id.* Because section 201 sets no limit on the subject of inventories, and because it requires that inventories be conducted on a “continuing” basis, an interpretation that the BLM’s power to conduct wilderness inventories expired in 1991 could be upheld only if section 603 severely limits or supplants the section 201 inventory power. Section 603 does neither.

⁴ The BLM had a duty under FLPMA § 603(a) to conduct an initial inventory of BLM lands eligible for protection under the Wilderness Act, within fifteen years of FLPMA’s enactment in 1976. 43 U.S.C. § 1782. In Oregon, the BLM issued an “Oregon Wilderness Final EIS” in 1989 and a “Wilderness Study Report” with wilderness recommendations to Congress in 1991. AR 15278. The latter document recommended to Congress that some areas be designated as wilderness and others not be so designated. *Id.* Until Congress acts on those recommendations, the lands identified to have wilderness values are known as “wilderness study areas” (“WSAs”) and are managed so that their wilderness suitability is not “impaired.” 43 U.S.C. § 1782(c). As a result, there exist today on the public lands governed by the SEORMP WSAs that were not recommended to be designated as wilderness (“non-recommended WSAs”), as well as other roadless areas that contain wilderness characteristics but that have never even been considered or deemed eligible for wilderness recommendation—either under the initial section 603 inventory or under any subsequent land use planning process. These are what ONDA refers to as “non-WSA roadless areas.”

Section 603 does not authorize a distinct, one-time-only, wilderness inventory that expired fifteen years after FLPMA's creation. The plain language of the statute sets a fifteen-year deadline for the Secretary to review the lands "identified during the inventory required by section [201(a)] of this title as having wilderness characteristics described in the Wilderness Act," 43 U.S.C. § 1782(a) (emphasis added)—i.e., a deadline for the BLM's review of the results of an initial inventory carried out under the authority of section 201. See Christensen v. Harris County, 529 U.S. 576, 582–585 (2000) (interpreting analogous provision as establishing a "minimal guarantee" for implementation of the statute, rather than limiting the powers conferred under the statute). Thus, rather than two distinct inventory provisions in sections 201 and 603 that the BLM apparently envisions, there is only the single inventory provision in section 201 and a deadline in section 603 for the initial review of a wilderness inventory carried out under section 201.

The BLM offers little in response to ONDA's detailed explanation of the inventory and land use planning requirements set out by FLPMA and the regulations, and how the agency's wilderness inventory duty must be undertaken as part of the resource management planning process. See Pl. Br. at 35–40. For example, the BLM's own "Wilderness Inventory and Study Procedures" handbook explicitly confirms that "[w]ilderness is a resource value which fits within the framework of multiple-use on the public lands" and states, "The BLM will prepare and maintain on a continuing basis an inventory of certain public lands to determine the presence or absence of wilderness characteristics." See Pl. Ex. 4 at § .06. The BLM takes a litigation position that is the polar opposite of these statements, defending this new position with the fact that the agency rescinded its wilderness inventory handbook on June 20, 2003. Def. Reply at 20. This, of course, was two and a half months after the BLM issued its SEORMP ROD, 68 Fed. Reg. 16,307

(Apr. 3, 2003), meaning the handbook was the BLM's stated interpretation (and the one ONDA and the public relied upon) of its wilderness inventory duties at the time the SEORMP was adopted. Thus, the BLM does not explain how it could satisfy, in the absence of a current wilderness inventory and given its pre-litigation acknowledgement that wilderness is a resource like any other on the public lands, FLPMA's mandates to keep up to date on "changes in condition" of the public lands and their resources and to "identify new and emerging resource and other values." *Id.* § 1711(a). See also 43 C.F.R. § 1610.4 (regulations stating that "inventory data and information shall be collected" and used in land use planning).

Finally, the BLM dismisses as irrelevant ONDA's wilderness inventory report and recommendations, which, performed pursuant to the agency's own wilderness inventory protocol as specified in its Wilderness Study and Inventory Procedures Handbook, identified more than 1.3 million acres of public land within the SEORMP planning area as having BLM-defined wilderness qualities that the agency should have considered in the resource management planning process. See Pl. Ex. 3. ONDA's report comprehensively demonstrates the type of information the BLM refused to collect during its preparation of the SEORMP and which must be collected and used as part of the RMP planning process.⁵

B. The BLM Violated NEPA By Refusing in the EIS to Consider the Environmental Consequences and Cumulative Impacts of the Proposed Action on Wilderness Resources.

In addition to violating FLPMA, the BLM violated NEPA by refusing in the SEORMP EIS to present and discuss current conditions of, and potential impacts to, the wilderness resource in non-recommended WSAs and non-WSA roadless areas. The agency argues it need

⁵ The F&R denied the BLM's motion to strike ONDA's wilderness inventory report, finding that the report is admissible to inform whether the BLM failed to consider significant relevant information. FR at 14.

not discuss the impacts of the proposed action on the wilderness resource in these areas because it “is explicitly beyond the scope of the purpose and need of the SEORMP” and because in any event the agency analyzed wilderness values in land covered by the SEORMP in the 1970s and 1980s. Def. Br. at 29; AR 4256 (SEORMP at 2) (“recommendations for wilderness suitability have been previously analyzed . . . and are outside the scope of this planning process”). This argument fails because the BLM is required by FLPMA to conduct a continuing inventory of the public lands and their resources—including wilderness—and rely upon that inventory during resource management planning. 43 U.S.C. §§ 1711, 1712. Thus, the BLM necessarily has a NEPA duty to discuss in this EIS the environmental consequences and cumulative impacts of the proposed action on wilderness values.

The F&R reasoned that because inventorying for wilderness values “does not by itself change the management or use [of] public lands, the WSA claim here in not viable.” FR at 11. To support for this conclusion, the F&R cites the Supreme Court’s statement in Norton v. Southern Utah Wilderness Alliance (“SUWA”), 124 S.Ct. 2373 (2004), that an APA section 706(1) claim “can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*.” Id. at 2379. The F&R reasoning is incorrect because ONDA’s claim is a § 706(2) challenge to the BLM’s Record of Decision adopting the SEORMP, and nothing in SUWA alters a plaintiff’s ability to bring this type of claim against an agency’s final decision at the conclusion of a NEPA process. See also Ohio Forestry, 523 U.S. at 737 (“a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper”). It is well-settled that NEPA does not mandate particular results, but simply prescribes the necessary process. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).

Yet, those procedures are critically important because they “are almost certain to affect the agency’s substantive decision.” Id. Thus, the F&R’s conclusion that a wilderness inventory would not in itself change management of the public lands has no bearing on whether the BLM took the required “hard look” at the consequences of its proposed action on the wilderness resource.

Moreover, because many of the original justifications (now fifteen years or more old) for these non-recommendations and non-designations simply no longer are valid, the BLM must during this planning process: (1) re-assess the WSAs not recommended in 1989 for designation as wilderness; and (2) assess wilderness values on the significant remaining roadless areas in the planning area that were not designated as WSAs fifteen years ago when the BLM prepared its “Oregon Wilderness FEIS.” The BLM ignored repeated requests from ONDA and other members of the public to look at wilderness values during the SEORMP planning process in order to address the fact that the 1989 EIS was outdated and that many on-the-ground conditions, formerly planned (but never implemented) projects, and other resource values had changed over the course of the decade-plus since that previous EIS was prepared. See, e.g., AR 4172 (ONDA protest, including discussion of new information or changed circumstances in several current WSAs), 3997 (FEIS, Vol. 3 at 105) (summary of public comments requesting inventory of wilderness values). For example, many projects such as formerly planned open-pit gold mines, geothermal developments, utility corridors, transmission facilities and power plants that the BLM cited in 1989, AR 15278, as reasons why certain WSAs should not be designated by Congress as wilderness, have never occurred. See AR 4172. The BLM refused to include this key information in its EIS, in violation of NEPA’s requirement of full public disclosure of the affected environment. 40 C.F.R. § 1500.1(b) (requiring “that environmental information is

available to public officials and citizens before decisions are made and before action is taken”); Methow Valley, 490 U.S. at 349 (NEPA “ensures that the agency . . . will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger [public] audience.”). The fact that these projects are no longer planned, viable and/or feasible is highly significant because they no longer serve to place a “cloud” over these areas’ potential designation or conservation as wilderness or WSAs.

The SEORMP also contains no discussion of wilderness values on non-WSA roadless areas in the planning area. See AR 4256 (SEORMP at 13) (“This planning effort will not reopen the initial wilderness review mandated by section 603 of FLPMA, and it will not change existing decisions, signed by the Secretary of the Interior, to recommend areas as suitable for wilderness designation”). As is evident from ONDA’s subsequent submission to the BLM of a detailed Wilderness Inventory Report covering more than 2.2 million acres of public lands in southeast Oregon, there are literally hundreds of thousands of acres of public lands in this remote corner of Oregon’s high desert that do indeed contain significant wilderness values worthy of protection. See Pl. Ex. 3 (using BLM wilderness inventory protocol, finding 1.3 of 2.2 million acres inventoried to contain wilderness characteristics in accordance with BLM policy and definitions).

The BLM argues it need not assess wilderness values on non-WSA roadless areas because “those lands have no special classification and therefore are treated as are all other public lands in the planning area.” Def. Br. at 30. This proves ONDA’s point: it is precisely because these areas are treated no differently than any other lands in the planning area that it is essential the BLM actually inventory them for wilderness values and analyze that information in

a detailed discussion in the EIS. Bill Marlett, ONDA’s executive director, has concluded, “From our assessment, it is apparent that the BLM’s past failure to protect these public lands from the impacts of livestock grazing adversely limits the ability of public lands to be considered for future consideration as wilderness by Congress.” Marlett Decl. at ¶ 13. Marlett also points out that if the BLM fails to change current grazing practices in these areas, “the possibility for wilderness designation on these public lands may be lost forever.” Id.

In short, the BLM offers no explanation as to how refusing absolutely to collect, present and discuss this information in the EIS could suffice for taking the requisite “hard look” at the environmental consequences of the proposed action on the wilderness resource. To satisfy the “hard look” test, the BLM must have made a rational connection between the facts found and the choices made and must base its decision on a “reasoned evaluation of the relevant factors.” Price Rd. Neighborhood Ass’n v. U.S. Dep’t of Transp., 113 F.3d 1505, 1511 (9th Cir. 1997). Without performing the mandatory inventory of wilderness values on these public lands during the SEORMP planning process, the BLM has not even collected the “facts found” necessary to enlighten its “choices made.” As a result, the agency’s adoption of the SEORMP is arbitrary and capricious, an abuse of discretion and not in accordance with law.

III. THE F&R IS INCORRECT BECAUSE THE BLM ADOPTED THE *SEORMP* WITHOUT SATISFYING NEPA’S RANGE OF ALTERNATIVES AND “HARD LOOK” REQUIREMENTS.

A. The BLM Did Not Consider an Adequate Range of Alternatives With Respect to Authorized Levels of, and Areas Allocated to, Livestock Grazing.

The BLM in its EIS artificially constrained its analysis to essentially status quo allocations of livestock grazing throughout the planning area: The agency refused to consider any change in the amount of public land forage allocated exclusively to domestic livestock

(measured in animal unit months or “AUMs”⁶) and only looked at an extraordinarily narrow range of alternatives with respect to areas of the public lands allocated or not allocated to grazing. The F&R’s conclusion that the BLM considered an adequate range of alternatives is incorrect because it relies on the fact that the BLM may consider reducing AUMs in the future, wrongly concluding that this means the agency need not consider this issue at the RMP level of BLM land use planning. FR at 7.

Under no alternative (save for alternative D2, which was added after the final stage of public participation), did the BLM consider reducing authorized AUMs. AR 4256 (Record of Decision at xi). As a result, the amount of forage on these public lands allocated exclusively to domestic livestock grazing remains the same under the SEORMP as under the land use plans the SEORMP replaces, with the BLM refusing to even consider a change to that number. See id. (SEORMP at 58) (“The current grazing use authorizations (Appendix E) will be maintained”); AR 2177 (1998 BLM briefing paper stating “[t]here is no reallocation of grazing forage (AUMs)”); 2121 (1996 memo from SEORMP Project Manager to Project Core Team stating “[f]orage allocations were made in the [previous land use plans]”). The number of AUMs authorized by the BLM is to be proportional to the lands’ ability to sustain those levels of grazing, 43 C.F.R. § 4100.0-5, which means the agency failed to consider in this resource management planning effort whether these public lands could or should continue to be subjected to the same levels of livestock grazing as were established two decades ago under the previous land use plans.

The BLM tries to justify its refusal to consider a change to its domestic livestock forage allocations by arguing that all the alternatives except Alternative E (which simply excludes all

⁶ An AUM is the amount of forage necessary to sustain one cow for one month. 43 C.F.R. § 4100.0-5.

commodity uses) “allow for” AUM reductions “to achieve management objectives.” Def. Br. at 23 (citing AR 3995 (FEIS at 561), the EIS’s “Environmental Consequences” section, which speculates without elaboration that there are “[a]ctions which may cumulatively contribute to AUM reductions and decreased management flexibility”). This argument, upon which the F&R relies, is contrary to NEPA’s range of alternatives requirement. Simply leaving the door open for future environmental consideration does not satisfy NEPA’s requirement that the BLM study, develop, and analyze in this EIS a reasonable range of alternatives to the proposed action. 42 U.S.C. § 4332(2)(C)(iii); (2)(E). Instead, it only recognizes the BLM’s authority under FLPMA to adjust grazing practices at any time to address resource issues. See, e.g., Pub. Lands Council v. Babbitt, 167 F.3d 1287, 1305 (10th Cir. 1999) (FLPMA’s multiple-use mandate leaves BLM with “considerable administrative flexibility”), aff’d 529 U.S. 728 (2000). As the Ninth Circuit has observed:

[T]he 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, 284 F.3d at 1072 (emphasis added, internal citation and quotes omitted). Simply put, it is arbitrary and capricious to not even consider the most basic grazing management practice of all: a change in the amount of forage on the public lands the BLM allocates exclusively to consumption by domestic livestock.

Similarly, the BLM adopted the SEORMP without considering more than an extraordinarily limited range of alternatives with respect to areas of public land allocated to livestock grazing. Prior to the adoption of the SEORMP, 41,874 acres within the planning area

(about 0.9% of the total area) were not allocated to grazing. AR 3995 (FEIS at 94). The BLM explained these lands “have been set apart from grazing allotments for the specific purpose of improving or maintaining resource values that cannot be protected through mitigation of livestock impacts, or these areas were found unsuitable or unavailable for livestock grazing.” *Id.* Aside from Alternative E, which would close the entire planning area to grazing, the BLM considered four alternatives that would close no more than an additional two-tenths of a percent of the planning area to livestock grazing, and one alternative that would close about 32% of the planning area to grazing. AR 3995 (FEIS at 247–53). Against the backdrop of these alternatives, the Proposed RMP alternative designated about 58,900 acres of public land as not allocated to grazing. *Id.* (FEIS at 253). This is about a four-tenths of a percent increase in lands not allocated to grazing.⁷ None of these alternatives were supported with any significant baseline information, analysis or discussion to support the decisions to allocate or not allocate areas to grazing. *Id.* (FEIS at 250).

The BLM’s response suggests that because the agency considered a range of alternatives “between the[] extremes” of all or nothing, it has per se satisfied its legal obligation to analyze all reasonable alternatives to the proposed action. Def. Br. at 22–24. However, the agency has no choice but to admit that “most of the alternatives allocate a majority of the planning area to

⁷ In an attempt to soften the harshness of these numbers, the BLM points out that there are additional areas within the Owyhee Wild Rivers corridors that the BLM does not graze and that “do not contribute to the number of acres not allocated to grazing.” Def. Br. at 23. In fact, the BLM currently is enjoined by court order from authorizing any grazing in these areas. *Ore. Natural Desert Ass’n v. Singleton*, 75 F.Supp.2d 1139, 1153 (D. Or. 1999) (enjoining grazing from all BLM-identified “areas of concern” along the Main, West Little, and North Fork Owyhee River corridors). These 6,550 enjoined acres represent by far the single largest segment of land the BLM is excluding or not allocating to grazing under the SEORMP. *See* AR 3996 (FEIS, Vol. 2, Table T-1). It therefore is telling that the largest segment of land excluded or not allocated to grazing across these 4.6 million acres of public land is the result of a court order. Even in light of that court order, however, the BLM did not in the SEORMP decrease AUMs on the affected allotments or pasture units.

grazing.” *Id.* at 24. In its reply, the BLM concedes that the 0.4% additional not-allocated areas is a negligible difference constituting “nearly the same number of acres” as the previous management situation. Def. Reply at 5. Moreover, the BLM is unable to point in the administrative record to any rational connection between the facts found and choices made, to support allocating the same levels of grazing to fewer total acres. Yet this is what the BLM has done by refusing to consider any reduction whatsoever in AUMs.

The F&R is based on the conclusion that because the SEORMP is a temporally and geographically “comprehensive plan” it “cannot be expected to address specific issues in detail.” FR at 7. While NEPA does not require an agency to do the impossible, it does require the agency to analyze reasonable alternatives. Because the RMP is the threshold decision-making point for lands allocated and not allocated to livestock grazing for the next twenty years, looking at the environmental consequences of a reasonable range of alternatives—including reasonable reductions in lands and natural resources allocated to grazing—is a critical step the BLM refused to undertake. “The existence of a viable but unexamined alternative renders an environmental impact statement inadequate.” *Alaska Wilderness Recreation & Tourism v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995). Because FLPMA directs the BLM to manage for multiple use and sustained yield, 43 U.S.C. § 1732(a), to “prevent unnecessary or undue degradation” of the public lands, *id.* § 1732(b), and to prevent “permanent impairment” of the public lands, *id.* § 1702(c), it necessarily follows that reasonable alternatives the agency should consider in its NEPA process would include (1) some reduction in forage allocated to domestic livestock and (2) more than a highly skewed range of alternatives for areas allocated or not allocated to grazing. As a result, the BLM’s decision was arbitrary and capricious and the F&R incorrectly determined these analyses and decisions could lawfully be postponed to subsequent decision-

making processes.

B. The BLM Did Not Consider an Adequate Range of Alternatives With Respect to Areas Designated as Closed to Off-Highway Vehicle Use.

The BLM's adoption of the SEORMP also is arbitrary and capricious because the agency refused to consider a reasonable range of alternatives with respect to areas closed to damaging OHV use. The F&R wrongly decided this claim because it inaccurately interprets the BLM's OHV regulations to mean that the "limited" and "closed" designations provide equivalent resource protection from OHV impacts. FR at 8. Those regulations establish criteria for the agency to designate portions of the public lands as open, limited or closed to OHV use. 43 C.F.R. § 8340.0-1. "Open areas" are areas where "all types of vehicle use is permitted at all times, anywhere in the area." *Id.* § 8340.0-5(f). "Limited areas" are areas "restricted at certain times, in certain areas, and/or to certain vehicular use." *Id.* § 8340.0-5(g). "Closed areas" are areas "where off-road vehicle use is prohibited." *Id.* § 8340.0-5(h). Designation of OHV restrictions on the public lands occurs as part of the RMP process. *Id.* § 8342.2(a).

In spite of a long-standing closed-unless-designated-open policy for OHV use on the public lands, established in Executive Order 11,644 (Feb. 8, 1972), as amended, the BLM adopted the opposite approach in the SEORMP, restricting its alternatives so that no alternative would close to OHV use more than 0.8% of the planning area: Alternative A—30,585 acres closed (0.7% of the planning area); Alt. B—35,193 (0.8%); Alt. C—17,233 (0.4%); Alt. D—18,439 (0.4%); Alt. D2—18,439 (0.4%); Alt. E—278 acres (0.0%); and the Proposed RMP—15,826 (0.3%). AR 3995 (FEIS at 270). This is unambiguously contrary to NEPA's requirement to analyze a reasonable range of alternatives, and is amplified by the fact that earlier in the SEORMP planning process, the BLM predicted an increase in OHV use of as much as 150% over the next twenty years in southeast Oregon. AR 3802 (Draft EIS at 327).

Under the flawed argument that the “limited” and “closed” designations provide equivalent resource protection from OHV impacts, the fact that the BLM considered an adequate range of alternatives for areas left completely open to OHV use mitigates for the failure to consider a similar range with respect to closed areas. See FR at 8; Def. Br. at 24. But this is contrary to the BLM’s previous explanation why it differentiates between “limited” and “closed” OHV areas. Because the BLM was “increasingly concerned about the impacts of all types of recreational activities, including motorized OHV use,” the agency in 2001 developed a “National Management Strategy” for OHV use on public lands. AR 14888. The Strategy reinforces the use of these designations in order to protect public land resources, promote safety for public land users, and minimize conflicts among the various uses of the public lands. Id. at 14897. It also specifically emphasizes the need to develop various alternatives in RMPs with respect to OHV designations in order to analyze, among other things, the “capability of public land resources to sustain [OHV] use.” AR 14897.

To conclude that the limited and closed designations provide equivalent protection from adverse impacts and are “effectively[] the same,” Def. Br. at 24, Def. Reply at 6, renders the Department of the Interior’s OHV regulations meaningless, which is not favored by the courts. See Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1175 (9th Cir. 2002) (“It is an elementary canon of construction that an interpretation which gives effect to all sections of a statute is preferred.”) (citing Colautti v. Franklin, 439 U.S. 379, 392 (1979)). Because the BLM failed to look at a reasonable range of alternatives for areas closed to OHV use, and defends its decision with the untenable assertion that allowing OHVs onto roads within a particular area has no greater impact than not allowing OHVs into that area at all, the agency’s adoption of the SEORMP is arbitrary and capricious and not in accordance with law.

C. The BLM Did Not Take a “Hard Look” at the Environmental Consequences of the Proposed Action.

In assessing the adequacy of an EIS, the Ninth Circuit “employs a ‘rule of reason’ test to determine whether the EIS contains a ‘reasonably thorough discussion of the significant aspects of probable environmental consequences.’” Hells Canyon Alliance v. U.S. Forest Serv., 227 F.3d 1170, 1177 (9th Cir. 2000) (quoting Neighbors of Cuddy Mtn. v. U.S. Forest Serv., 137 F.3d 1372, 1376 (9th Cir. 1998)). Under this standard, the court’s “task is to ensure that the [agency] took a ‘hard look’ at these consequences.” Id. The SEORMP EIS does not satisfy this standard because the BLM failed to engage in a reasonably thorough discussion taking a “hard look” at the environmental consequences of the proposed action vis-à-vis the spread of noxious weeds, impacts on microbiotic crusts, and the impacts of livestock grazing.⁸ Because the F&R is based on the incorrect conclusion that there are or will be, fine-scale, activity level plans to deal with these issues, and that this vitiates the BLM’s obligation to take a hard look at environmental consequences of RMP-level decisions, FR at 9, that recommendation should be rejected and judgment entered for ONDA on these claims.

1. Noxious Weeds.

The BLM did not take a “hard look” at the impacts of the proposed action vis-à-vis noxious weeds—and in particular with respect to how its livestock grazing allocations may worsen the spread of weeds throughout the planning area. In fact, the BLM admits that the SEORMP “does not specifically address how grazing may exacerbate the spread of noxious weeds.” Def. Br. at 28. Despite this admission, the F&R confuses the “hard look” requirement with mitigation by assuming inclusion of a plan for controlling weeds satisfies NEPA’s

⁸ ONDA discusses the wilderness resource separately in Part II, above, in order to address the FLPMA and NEPA wilderness-related claims together.

requirement to engage in a “reasonably thorough discussion of the significant aspects of probable environmental consequences.” 137 F. 3d at 1376. But a discussion of mitigation is only one of several elements that must appear in the BLM’s environmental consequences section, which “forms the scientific and analytic basis for the comparisons” under the alternatives considered. 40 C.F.R. § 1502.16.

The BLM’s failure is readily evident in the EIS’s 1-page discussion of the “affected environment” with respect to weeds, which contains no information regarding such basic aspects of the problem as the current extent of weed infestations throughout the planning area, specific locations and species currently established in the planning area, or the causes of the spread of weeds in the planning area. AR 3995 (FEIS at 44–45). The sum total of the EIS’s discussion of the “environmental consequences” of the proposed action with respect to the spread of weeds is three sentences long:

Integrated weed management actions would slow the spread of established stands of noxious weeds and reduce the establishment of new infestations. Mitigating actions would be implemented to control vectors of seed dispersal and soil disturbance including recreational use, OHV use, livestock production, mineral exploration, and road traffic to limit negative impacts to rangeland vegetation communities and soils. New sites of weed dominance would be limited by management actions, resulting in the maintenance of vegetation communities consistent with DRFC [desired range of future conditions].

AR 3995 (FEIS at 431).

The SEORMP’s “Best Management Practices” (“BMPs”) appendix—which the BLM argues constitutes a “hard look” at the environmental consequences of the authorized grazing on the spread of weeds, Def. Br. at 28—also fails to satisfy the hard look requirement. The grazing management BMPs consist of just six sentences—the first three referring to structural “range improvements” (e.g., fences, watering troughs, pipelines) and the second three referring to a generic summary in another appendix of the “Effects of grazing by large herbivores.” AR 3997

(FEIS, Vol. 2 at 343). The noxious weed management section's only references to grazing recommend that the BLM "[c]ontrol weeds annually in areas frequently disturbed such as gravel pits, recreation sites, road sides [and] livestock concentration areas"; "[c]onsider livestock quarantine, removal, or timing limitations in weed infested areas"; and insure livestock feed and grain is certified weed free. AR 3997 (FEIS, Vol. 2 at 344). While these suggestions may be good advice, they are not an analysis of environmental consequences. In fact, this does not even amount to the "general statements about 'possible' effects and 'some risk'" the Ninth Circuit has held do not satisfy the "hard look" requirement "absent a justification regarding why more definitive information could not be provided." Neighbors of Cuddy Mtn., 137 F.3d at 1380.

The BLM also argues it properly tiered the EIS's discussion of the impacts of weeds to a 1986 document which discusses in very general terms a program to address noxious weeds across all of Oregon and Washington. Def. Br. at 28–29; see AR 18055. While agencies may tier project-specific documents to broader NEPA documents in certain situations, 40 C.F.R. §§ 1502.20, 1508.28, the 1986 ROD and EIS have nothing to do with the potential environmental consequences of the proposed grazing in the SEORMP. In fact, the BLM expressly states in the 1986 ROD that "[l]ivestock grazing management is a question addressed in other BLM planning efforts." AR 18070 (also stating "The question of heavy grazing as a factor contributing to the presence of noxious weeds is properly addressed elsewhere"). In short, the BLM can point to no place in the SEORMP or elsewhere in the record where it has properly addressed the role of livestock in the spread of noxious weeds on these public lands.

2. Microbiotic Crusts.

Microbiotic crusts are a fundamentally important ecological component of the sagebrush steppe. They are a critical indicator of healthy arid land ecosystems, serving important ecosystem

roles such as fixing nitrogen, increasing soil fertility, stabilizing soil, increasing the growth of higher plants, preventing the spread of noxious weeds, and increasing water filtration into the soil. See Pl. Ex. 2 at 1–7, 29–40 (BLM Tech. Ref. 1730-2, “Biological Soil Crusts: Ecology and Management”). Without analysis, the F&R concludes that “the EIS’s discussion of the environmental consequences of the SEORMP on the crusts was sufficient in light of the available information.” FR at 10. This conclusion is flawed because although NEPA does not necessarily require the BLM to do the impractical, see, e.g., Inland Empire Public Lands Council v. U.S. Forest Serv., 88 F.3d 754, 764 (9th Cir. 1996), the agency must “carefully consider[] detailed information concerning significant environmental impacts.” Methow Valley, 490 U.S. at 349. The BLM argues that because the agency lacks information on the location and distribution of crusts in the planning area, its cursory discussion of impacts on crusts “is adequate.” Def. Br. at 26. Yet it does not explain why the agency refused to inventory for at least some of this information during the seven-plus year SEORMP planning process. Moreover, the public repeatedly pointed to the importance of crusts in this high desert ecosystem and specifically asked the BLM to include and discuss, for example, baseline surface distribution maps, information on current crust status and distribution, and analysis of the impacts of the authorized grazing on crusts. AR 3997 (FEIS, Vol. 3 at 26, 73, 133–34) (summary of public comments). See also, e.g., FEIS, Vol. 3 at 189–91 (1999 comments from Idaho Watersheds Project and Committee for Idaho’s High Desert); 243–44, 246 (1999 comments from ONDA and five other organizations); 115 (informing BLM of specific areas of exceptional crust occurrences).

The BLM even neglected to discuss or incorporate its own seminal published research (Pl. Ex. 2) on the ecological role and management of crusts. In fact, the BLM tried to strike this document from the record even though the agency published it at least 16 months prior to issuing

the SEORMP Record of Decision. See Pl. Resp. to Mot. to Strike at 5–6 (Dkt # 93). Similarly, the BLM never discussed its findings from the Interior Columbia Basin Ecosystem Management Project⁹ regarding the types of grazing systems and management practices known to damage crusts.¹⁰ In short, the BLM’s argument that it did not have enough information to look at the issue more closely than it did in the SEORMP fails the “rule of reason” test that seeks to determine if the agency engaged in a reasonably thorough analysis of the issue. The F&R therefore should be rejected because it does not explain how the BLM’s decision supports a conclusion that the EIS’s discussion of crusts was “sufficient in light of the available information.” FR at 10.

3. Livestock Grazing.

The BLM unlawfully deferred to later decision-making processes any detailed or comprehensive assessment of the impacts of the authorized allocations of forage and land areas to livestock grazing. Although the BLM asserts that “site specific impact assessment is not practical” in an RMP, AR 4181, the agency nevertheless demonstrated it could make site-specific grazing decisions when so inclined. See, e.g., AR 4256 (SEORMP at 58) (decision to make a unit on the Ten Mile Allotment available for temporary grazing use by livestock from other Jordan Resource Area allotments). In most cases, however, the BLM relies heavily on a future “Geographic Management Area” (“GMA”) process to assess an all-encompassing array of resources that should have been assessed in this EIS. See Pl. Br. at 30, n.11 (citations to

⁹ The “ICBEMP” is the broad-scale, regional perspective ecological assessment that covers the SEORMP planning area, as well as parts of Oregon, Washington, Idaho and Montana. See AR 4256 (SEORMP at 16–17) (background and role of ICBEMP in BLM planning process).

¹⁰ See “Interior Columbia Basin Supplemental Draft EIS” (Mar. 2000), at 96–97, available at www.icbemp.gov (last modified Apr. 5, 2005); see also ICBEMP DEIS App. A (“Biological Crust Evaluation”), available at www.icbemp.gov/pdfs/sdeis/Volume2/Appendix13a.pdf (last modified Apr. 4, 2000) (evaluation matrix developed to assess potential for crust development and potential for management actions to negatively impact crusts).

numerous places in SEORMP deferring to GMA assessments).

The F&R concludes without analysis that “because of the scope of the SEORMP, the BLM’s analysis of livestock grazing is sufficient.” FR at 11. This is inconsistent with the case law explaining that an “agency may not avoid an obligation to analyze in an EIS environmental consequences that foreseeably arise from an RMP merely by saying that the consequences are unclear or will be analyzed later when an EA is prepared for a site-specific program proposed pursuant to the RMP.” Kern, 284 F.3d at 1072. The Ninth Circuit has explained the sound reasons for this rule:

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 later site-specific action proposed pursuant to the RMP.

Id.

The BLM argues, and the F&R agrees, that the agency is not required to analyze these impacts at anything other than the broadest of programmatic scales in the context of an RMP. Def. Br. at 31. While land use plans generally are “designed to guide and control future management actions and the development of subsequent, more detailed and limited scope plans for resources and uses,” SUWA, 124 S.Ct. at 2382, certain decisions must be made in an RMP. For example, neither the BLM nor the F&R address the BLM’s own interpretation of its land use planning requirements as described in its Land Use Planning Handbook, which indicates the BLM must determine at the RMP stage of land use planning which lands are or are not available

for grazing. AR 9069 (Pl. Ex. 1 at App. C, pp. 11–12).¹¹ Even assuming for the sake of argument that it is permissible to defer to the GMA process assessment of certain resource values, the GMA process carries with it no guarantee of any NEPA process. If the BLM determines current grazing practices are not causing any failures to meet the Federal Rangeland Health regulations, 43 C.F.R. Part 4180, then the agency does not undertake a NEPA process for those areas. See Pl. Br. at 29–30 (detailed explanation of role of GMAs in BLM’s Federal Rangeland Health regulations). Even more importantly, the GMA process simply does not address, for example, the impacts of grazing on the wilderness resource. See 43 C.F.R. § 4180.2(d) (standards and guidelines address only watershed function, nutrient cycling, water quality, and habitat quality). In short, the F&R should be rejected because the BLM has no basis in fact for its decision to continue essentially status quo grazing without taking a hard look at the impacts of livestock grazing on all other multiple use resources on the public lands to inform that decision.

4. Analysis of the Management Situation.

The FLPMA land use planning regulations require the BLM to prepare an “analysis of the management situation” (“AMS”). 43 C.F.R. § 1610.4-4. The purpose of the AMS is to allow the BLM to analyze its inventory and other information to provide the basis, consistent with multiple use principles, for formulating reasonable alternatives with respect to resource development or protection and estimated sustained levels of land uses. Id. The BLM admits an AMS is required but argues the regulations do not require it to “publish an AMS separately.” Def. Br. at 35. The F&R agrees with the BLM that the agency has “discretion in deciding whether or not to publish a separate AMS.” FR at 12.

¹¹ The Supreme Court in SUWA looked to the BLM’s Land Use Planning Handbook to help inform the types of decisions that should occur in an RMP versus in an implementation decision. See 124 S.Ct. at 2383. The Handbook is cited but not reproduced at AR 9069.

ONDA does not complain, however, about the absence of a published AMS. Rather, ONDA complains of the absence of any AMS—and the BLM cannot point to any document in the administrative record that purports to be the AMS. If the BLM had undertaken this important and mandatory land use planning requirement, the agency perhaps could have avoided many of the NEPA failures complained of in this action. As recent AMSs from neighboring BLM districts (all of which were published)¹² attest, the AMS is a significant step in the planning process. Outside of this litigation, the BLM summarized the importance of the AMS, stating, “The AMS is a crucial step in the BLM’s land use planning process, which guides the preparation of a RMP/EIS. The AMS assesses the condition of the various resources on public lands as well as the current management situation, the physical and biological characteristics, and the capability of the resources.”¹³ A failure to comply with the land use planning procedures set out at 43 C.F.R. § 1610.4 equates to a failure to take a “hard look” at the environmental consequences of the proposed action. See generally Kern, 284 F.3d at 1071–72.

5. Cumulative Impacts.

The SEORMP EIS fails to discuss adequately the cumulative impacts of the proposed action, and in particular the cumulative impacts of maintaining existing levels of livestock grazing throughout the planning area. Pl. Br. at 33–34. Although the BLM’s discussion of the cumulative impacts of grazing consisted of little more than a series of optimistic, generalized statements, see id., the agency claims this discussion was “indisputably adequate.” Def. Br. at 32. The F&R concludes without analysis that the “BLM’s discussion of cumulative impacts was adequate given the level of detail required in the SEORMP.” FR at 13.

¹² See Pl. Reply at 13, n.6 (citing AMSs from neighboring BLM districts).

¹³ See Andrews-Steens RMP, “Summary of the Analysis of the Management Situation” (Feb. 2002), at 1-1 (URL for this document cited at Pl. Reply at 13, n.6).

The BLM claims the SEORMP includes a “detailed discussion” of “anticipated impacts” with respect to grazing. Def. Br. at 33. The “discussion” the BLM cites is a less-than-one-page “Summary of Impacts” that does little more than list a handful of “[f]actors which may cause long term change in levels of authorized active use.” AR 3995 (FEIS at 574). A mere listing of factors that may impact the number of AUMs grazed is not equivalent to a “useful analysis of the cumulative impacts of past, present, and future projects.” Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt., 387 F.3d 989, 994 (9th Cir. 2004). Nor does it satisfy the requirement that the analysis provide “some quantified or detailed information; . . . [g]eneral statements about possible effects and some risks do not constitute a hard look absent a justification regarding why more definite information could not be provided.” Id. at 993–94 (quoting Neighbors of Cuddy Mtn., 137 F.3d at 1379) (internal quotes omitted, emphasis added).¹⁴ Because the administrative record demonstrates the BLM did little more than list general statements couched in vague terms with respect to the impacts of the authorized grazing, the F&R should be rejected on this claim.

IV. THE BLM IGNORED MANDATORY LAND USE PLANNING REQUIREMENTS UNDER FLPMA AND THE TAYLOR GRAZING ACT.

A. The BLM Did Not Assess the Suitability of the Public Lands for Grazing.

FLPMA requires the BLM to define which areas of the public lands are suitable for specific uses. 43 U.S.C. § 1712(a) (land use plans “provide by tracts or areas for the use of the public lands”). The BLM’s land use planning regulations further require the agency to establish in its RMPs “[l]and areas for limited, restricted or exclusive use” and “[a]llowable resource uses

¹⁴ The BLM also mistakenly claims that ONDA is requesting a “site-specific impact assessment” assessing cumulative impacts in “precise quantitative terms” See Def. Br. at 32–33. Although the BLM must for site-specific projects requiring NEPA analysis consider “[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts,” 40 C.F.R. § 1508.27(b)(7), this does not obviate the requirement that cumulative impacts also be addressed in an EIS for an RMP. Kern, 284 F.3d at 1076 (interpreting regulations to “require that [an] EIS consider the cumulative impact of the proposed action”).

. . . and related levels of production or use to be maintained.” 43 C.F.R. §§ 1601.0-5(k)(1), (2). Yet, the BLM argues it is not required to assess in the SEORMP the suitability of the public lands for continued levels, areas, and seasons of use for livestock grazing, and argues, “Therefore, the BLM acted within its discretion when it adopted the SEORMP without completing such determinations.” Def. Br. at 42–43 (emphasis added). Importantly, the agency admits that as part of the SEORMP planning process, it did not “re-assess the entire planning area to determine which areas are suitable for grazing.” Id. (emphasis in original). The SEORMP merely offers without elaboration the conclusory statement that the BLM decided to not allocate 58,900 acres to grazing “because it found the public land not suitable for livestock grazing, or because the BLM identified resource values on that land that it could not adequately protect from livestock grazing through mitigation measures.” Def. Br. at 42–43. See also AR 3997 (FEIS, Vol. 3 at 83). But the BLM cannot point to a single page in the administrative record setting out any criteria or assessment(s) it used or relied upon to make that decision, let alone any actual determinations. Def. Reply at 22 (citing only a list of areas not available for grazing). And as described above, the BLM refused to consider any change in the forage allocated exclusively to domestic livestock in the previous land use plans.

The Department of the Interior’s own Board of Land Appeals has held that the BLM’s graze/no-graze decision is made at the RMP level of land use planning, rather than at the activity levels through adaptive management. Ore. Natural Res. Council Action, 148 IBLA 186, 189–90 (1999) (appropriate process under which to consider and decide “whether to allow grazing and at what levels is clearly beyond the scope of an activity level plan such as an AMP”). This means the BLM must make this decision in its RMPs and that the agency here has unlawfully deferred it to subsequent GMAs, which the BLM admits “are considered activity level plans [which]

serve the purpose of an AMP.” Pl. Ex. 9 (Revised Louse Canyon GMA EA, Mar. 1, 2005).

Moreover, the BLM’s interpretation in its Land Use Planning Handbook of FLPMA and the regulations is clear: “*Land Use Plan Decisions*: Identify lands available or not available for livestock grazing (see 43 CFR 4130.2 (a)).” AR 9069 (Pl. Ex. 1 at App. C, pp. 11–12). The BLM specifically distinguishes these RMP-level decisions from site-specific, activity-level “implementation decisions”: “For areas available for grazing, identify allotment-specific (for one or several allotments) grazing management practices and permitted use based on monitoring and assessment information, as well as constraints and needs related to other resources.” *Id.* at 12 (emphasis added). Thus, the suitability determination at the RMP-level is critical to the BLM’s compliance at the site-specific stage with the FLPMA requirement that permits are issued to authorize grazing on public lands “that are designated as available for livestock grazing through land use plans.” 43 C.F.R. § 4130.2(a) (emphasis added). The BLM’s failure to act in a manner that is consistent with its handbook, without any explanation for the deviation, is “an indication of arbitrary and capricious behavior.” League of Wilderness Defenders v. U.S. Forest Serv., Civ. No. 00-464-KI, slip op. at 19–20 (D. Or. 2000); see also Lake Mohave Boat Owners Ass’n v. Nat’l Park Serv., 138 F.3d 759, 763 (9th Cir. 1998) (while agency deviation from own guidelines is not per se arbitrary or capricious, court reviewed record for agency’s explanation to determine if deviation is in fact arbitrary and capricious).

In addition, in the Public Rangelands Improvement Act of 1978 (“PRIA”), 43 U.S.C. §§ 1901–08, Congress directed that the BLM “shall update, develop (where necessary) and maintain on a continuing basis thereafter, an inventory of range conditions and record of trends of range conditions on the public rangelands” and that the inventory “shall be kept current on a regular basis so as to reflect changes in range conditions.” *Id.* § 1903(a) (referencing continuing

inventory duty at FLPMA § 201(a)). The PRIA specifically defines “range condition” as the ability of the land “to support various levels of productivity in accordance with range management objectives and the land use planning process, and relates to soil quality, forage values [], wildlife habitat, watershed and plant communities, [and] the present state of vegetation” in relation to vegetative potential. *Id.* § 1902(d). Thus, determining grazing suitability based on range condition is a continuing obligation for the BLM. At a minimum, the agency must make or revisit its suitability (graze/no-graze) decisions every twenty years or more when it revises its RMPs.

Finally, the BLM’s heavy reliance on “adaptive management” forestalls any significant decision-making in the RMP—particularly with respect to the required grazing suitability and “chiefly valuable” determinations. *See* Pl. Br. at 46–47. The BLM brushes this aside as nothing more than “plaintiffs’ approach to land use planning” and suggests ONDA is asking for some sort of non-statutory management strategy it has hand-crafted. Def. Br. at 44–45. But the requirement that the BLM assess the suitability of the public lands for continued levels, areas, and seasons of use for livestock grazing derives from FLPMA, PRIA and the regulations, the BLM’s own interpretations of those statutory and regulatory requirements, and the case law. ONDA does not dispute the BLM may employ “adaptive management” as a tool for land management under an RMP. What ONDA disputes is that the agency may rely upon future adaptive management measures to make assessments and determinations that are required by law to be made during the resource management planning process.

B. The SEORMP Does Not Determine Which Areas of the Public Lands Remain “Chiefly Valuable” for Livestock Grazing.

The BLM must also, as part of the RMP process, perform or revisit its Taylor Grazing Act “chiefly valuable” determinations. *See* 43 U.S.C. §§ 315 (public lands placed within grazing

districts must be, in opinion of Secretary of the Interior, “chiefly valuable for grazing and raising forage crops”), § 315f (authorizing Secretary “to examine and classify any lands . . . which are more valuable or suitable” for any other use than livestock grazing). The BLM claims it made these determinations in the 1930s. Def. Br. at 46; AR 4256 (SEORMP at 8). No such determinations appear in the administrative record. Even if such determinations did appear in the record that would not relieve the BLM of its duty to reconsider those determinations seventy years later in the context of this RMP. As the BLM observes, the TGA authorizes the agency to manage public lands grazing in order to “regulate the[] occupancy and use [of the public lands], to preserve the land and its resources from destructive or unnecessary injury, [and] to provide for the orderly use, improvement, and development of the range.” 43 U.S.C. § 315b. However, the BLM does not explain why it has declined to make or revisit the “chiefly valuable” determination in the SEORMP, when the agency’s own Land Use Planning Handbook indicates this land classification decision is made at the RMP level. See Pl. Br. at 45.

C. The BLM Refused to Establish Livestock Grazing Standards in the SEORMP.

Throughout the SEORMP planning process, ONDA and other members of the public asked the BLM to include quantitative, objective ecological standards for livestock grazing. See AR 3997 (FEIS, Vol. 3, at 246–47) (detailed proposed standards from ONDA and others); (FEIS, Vol. 3 at 189–90) (similar standards proposed by Idaho Watersheds Project and Committee for Idaho’s High Desert). The BLM refused to do so and the only such standards that occur in the entire SEORMP are the fish and aquatic habitat “Riparian Management Objectives” found in an appendix to the plan. AR 4256 (SEORMP, App. D3 at D-6). While these quantitative RMOs provide important management standards, they are of very limited geographic, temporal, and biological scope. See Pl. Br. at 49. These are the type of standards the BLM has refused to

include for the vast majority of the lands to be grazed under the SEORMP that do not lie within riparian areas. See AR 4256 (SEORMP at 62) (noting that “riparian areas and wetlands cover less than 1 percent of the [SEORMP] planning area”). The agency’s failure to do so runs counter to the regulations, the BLM’s own Land Use Planning Handbook, and the prior land use plans the SEORMP replaces. See Pl. Br. at 49–50. In particular, the regulations require the BLM in an RMP to establish “levels of production or use to be maintained,” 43 C.F.R. § 4100.0-8, and “program constraints and general management practices needed to achieve” those constraints. Id. § 1601.0-5(k)(4); see also AR 9069 (Pl. Ex. 1 at II-2 to II-3) (“Land health standards are to be incorporated into all new land use plans”).

D. The BLM Has Not Shown Where It Balanced Competing Uses in a Way That Satisfies FLPMA’s Duty to “Prevent Unnecessary or Undue Degradation.”

FLPMA’s multiple use mandate requires the BLM to manage the public lands “to prevent unnecessary or undue degradation of the lands.” 43 U.S.C. § 1732(b). It is well-established that the BLM must satisfy this duty by engaging in a reasoned and informed decision-making process. See Nat’l Wildlife Fed’n v. BLM, 140 IBLA 85, 101 (1997). To prove it has engaged in a reasoned and informed decision-making process, the BLM must show that it “has balanced competing resource values” to insure its actions are in the public interest as defined by FLPMA. Id. at 101; see also 43 U.S.C. § 1702(c) (definition of “multiple use”). If the court determines that the BLM acted arbitrarily and capriciously by not complying with mandatory land use planning requirements (such as the inventory and suitability assessment requirements) and by not considering an adequate range of alternatives or taking a “hard look” at environmental consequences, it necessarily follows that the agency violated its duty to engage in a reasoned and informed multiple use analysis under FLPMA. For example, the BLM admits that it fully intends to continue with “current levels of grazing use,” AR 4183, and asserts it has no obligation to

consider the impacts of its proposed action on wilderness values in non-recommended WSAs and non-WSA roadless areas. Without even considering reducing the amount of forage allocated to livestock over these 4.6 million acres of public land by a single AUM, and by refusing to inventory for and consider the wilderness resource during this resource management planning effort, the BLM cannot argue it has engaged in a reasoned and informed decision-making process that has balanced competing values and multiple uses of the public lands and resources.¹⁵

CONCLUSION

For the above-stated reasons, ONDA again respectfully requests this court to enter the relief requested in Plaintiffs' Dispositive Motion.

DATED this 15th day of April, 2005.

Respectfully Submitted,

s/ Peter M. Lacy

Peter M. Lacy (OSB # 01322)
Oregon Natural Desert Association

Of Attorneys for Plaintiffs

¹⁵ The BLM also argues the court is without jurisdiction to hear this claim because it is a "broad policy directive" not reviewable under the APA according to SUWA. Def. Br. at 46. ONDA concedes the duty to "prevent unnecessary or undue degradation" may not be independently enforceable under 5 U.S.C. § 706(1). But because it is tied back to specific, discrete, mandatory actions explicitly permitted to be challenged under SUWA, the BLM's decision to adopt the SEORMP without complying with mandatory land use planning requirements is arbitrary and capricious and not in accordance with law, and therefore actionable pursuant to section 706(2).