

**UNITED STATES COURT OF APPEALS
FOR THE
NINTH CIRCUIT**

Docket No. 05-35931

OREGON NATURAL DESERT ASSOCIATION, *et al.*

Plaintiff-Appellants,

v.

BUREAU OF LAND MANAGEMENT, *et al.*

Defendant-Appellees,

On Appeal From the
United States District Court for the
District of Oregon Pursuant to
28 U.S.C. § 1291

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INTRODUCTION

In their opening brief, Plaintiff-Appellants Oregon Natural Desert Association *et al.* (“ONDA”) explained why the Bureau of Land Management (“BLM”) violated NEPA when it issued a Record of Decision adopting the Southeastern Oregon Resource Management Plan (“SEORMP”) without considering impacts to wilderness, and without considering reasonable alternatives with respect to grazing allocations and off-highway vehicle (“OHV”) designations. ONDA also explained why its Federal Land Policy and Management Act (“FLPMA”) and Taylor Grazing Act (“TGA”) claims are ripe for review and therefore justiciable.

In response, BLM mischaracterizes ONDA’s wilderness claim, confusing deference to agency methodology with the question of whether the BLM is, in the first place, required under NEPA to take a “hard look” at wilderness as one of many resource values present on the public lands within the SEORMP planning area. BLM also intimates repeatedly that the “wilderness resource” is something invented by ONDA, while the record shows unmistakably that wilderness, as a resource value on the public lands, has been specifically recognized and defined for more than 40 years by Congress and by BLM itself.

Regarding ONDA’s grazing alternatives claim, BLM does not address the undisputed fact that the agency’s RMP grazing allocation decisions are threshold

decisions. These decisions must be made at the land use plan level in order to guide grazing management on the public lands for the next two decades. For the OHV alternatives claim, BLM responds unconvincingly that an alternative closing more lands to OHV use would add “little, if anything” to the agency’s analysis. The agency’s response also shows that for both the grazing and OHV alternatives analyses, BLM failed to consider alternatives that would reduce those uses in non-WSA roadless areas possessing wilderness values.

Finally, in response to ONDA’s ripeness argument, BLM fails to address head-on the undisputed fact that permitted livestock grazing is an on-going activity on these public lands, one that is subject to the threshold grazing decisions made at the land use plan level. BLM also incorrectly argues that ONDA’s claim is a failure to act claim under 5 U.S.C. § 706(1), when a challenge to the adequacy of a final Record of Decision adopting a land use plan is unmistakably “final agency action” under the Administrative Procedure Act (“APA”).

ARGUMENT

I. ONDA HAS PROPERLY CHALLENGED “FINAL AGENCY ACTION.”

Almost as an afterthought, BLM argues that the Supreme Court’s decision in Norton v. S. Utah Wilderness Alliance (“SUWA”), 542 U.S. 55 (2004), bars ONDA’s NEPA claim because ONDA has not challenged any “discrete agency action.” BLM Br. at 28–29. This argument fails because ONDA has challenged

BLM's Record of Decision adopting the SEORMP. See ER 55 (ROD); SER 2, 15, 23–30 (Complaint). A ROD issued at the completion of the NEPA process is “final agency action” for purposes of judicial review under the APA. Ore. Natural Resources Council v. Harrell, 52 F.3d 1499, 1503 (9th Cir.1995) (final agency action occurs with completion of the decision making process under NEPA, and a Final EIS and ROD are final agency actions); Klamath Siskiyou Wildlands Ctr. v. Boody, -- F.3d --, 2006 WL 3164793, at *9 (9th Cir. 2006) (“an agency action is completed when a land use plan is approved”); see also generally Ore. Natural Desert Ass'n v. U.S. Forest Serv., 465 F.3d 977, 982–84 (9th Cir. 2006) (discussing requirements for “final agency action”).

ONDA is not seeking to “compel” some particular type of wilderness inventory and analysis. BLM Br. at 29. Rather, ONDA challenges BLM's decision to adopt the SEORMP without having updated inventory information on wilderness values—in other words, a final decision that ONDA alleges violates the law because it relies upon outdated and inaccurate wilderness inventory information. See Ctr. for Biol. Diversity v. Bureau of Land Mgmt., 422 F.Supp.2d 1115, 1126, 1166 (N.D. Cal. 2006) (reviewing BLM land use plan as “final agency action” in case alleging violations of NEPA, FLPMA, and Endangered Species Act, and rejecting SUWA argument).

Likewise, BLM's reliance on Vermont Yankee Nuclear Pwr. Corp. v.

Natural Resources Def. Council, Inc., 435 U.S. 519 (1978), a case dealing with rulemaking procedures under the APA, fails. BLM Br. at 29–31. BLM argues that NEPA “does not require BLM to adopt ONDA’s ‘wilderness resource’ framework or conduct specialized ‘wilderness’ inventories when studying the effects of an RMP.” *Id.* at 31. But the agency confuses *how* with *whether*.¹ The question before this Court is whether NEPA requires BLM to take a “hard look” at the environmental consequences of its RMP decision on the wilderness resource, like any other resource on the public lands. How BLM achieves that “hard look” may well be entitled to some discretion, but in its *Wilderness Inventory Handbook*, BLM explained to the public exactly how it would do this. ER 668–677 (explaining policy and procedures). Rather than trying to impose a self-created “framework” on BLM, ONDA simply points to the detailed wilderness inventory protocol BLM itself created and held out to the public.

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

A. Wilderness is a Resource Like Any Other on the Public Lands.

BLM has a legal duty under NEPA to consider the wilderness resource during the SEORMP planning process. See ONDA Br. at 21. Indeed, BLM states in the SEORMP, “Under FLPMA wilderness preservation is part of BLM’s

¹ This issue of “how” versus “whether” is discussed in more detail below, *supra* II.B.

multiple-use mandate, and *wilderness is recognized as part of the spectrum of resource values* considered in the land use planning process.” ER 169 (emphasis added). Now, in the context of litigation, BLM argues that “NEPA contains no requirements that pertain to ‘wilderness inventories’ or ‘the wilderness resource.’” BLM Brief at 25.

BLM’s argument fails because NEPA requires that federal agencies consider the impacts of proposed actions on “the quality of the human environment.” 42 U.S.C. § 4332(2)(C). NEPA neither expressly defines the resources that comprise the human environment, nor does it exclude any resource, including wilderness or any of the myriad other resources BLM repeatedly points to as having been addressed in the SEORMP See BLM Brief at 32 n.9, 32–35, 42, 47, 59 (“over twenty other resources and values”). Wilderness is a significant and long-recognized resource, which BLM has excluded from its analysis. BLM has not interpreted the “human environment” in the “comprehensive” manner required by NEPA. See 40 C.F.R. § 1508.14; 42 U.S.C. § 4331(a); see also Found. for N. Am. Wild Sheep v. U.S. Dep’t of Agric., 681 F.2d 1172, 1177 (9th Cir. 1982) (noting “exceptionally broad scope of NEPA”).

In 1964, Congress recognized wilderness as a resource value on the public lands, by passing the Wilderness Act. The statute defines wilderness in detail, both as an ideal (“an area where the earth and its community of life are untrammelled by

man”), and in a legal sense, in terms of roadlessness, naturalness, and outstanding opportunities for solitude or primitive and unconfined recreation. 16 U.S.C. § 1131(c). In 1976, Congress in FLPMA applied the Wilderness Act to BLM public lands, calling in the statute’s policy declarations for preservation of public lands in “their natural condition.” 43 U.S.C. § 1701(a)(8); see also id. § 1702(i) (adopting definition of “wilderness” from Wilderness Act). As a resource *value* on the public lands, wilderness unquestionably fits within FLPMA’s management doctrine of “multiple use and sustained yield.” Id. § 1701(a)(7).

The Department of the Interior has carefully expanded upon the “key factors” of wilderness in both its 1978 and 2001 wilderness inventory handbooks. ER 244, 246–49, 671–77. Although BLM intimates time and again that “the wilderness resource” is some abstract notion made up by ONDA, ONDA simply uses the definition provided by Congress and the nomenclature BLM has adopted in its handbooks—and in particular the detailed 2001 handbook, which the agency adopted during the SEORMP planning process and which ONDA relied upon in conducting its own wilderness inventories. There, BLM states:

Wilderness is a *resource value* which fits within the framework of multiple-use on the public lands. In addition to its value as a setting for primitive recreation or solitude, wilderness can provide a range of benefits to other multiple resource values and uses which are of significance to the American people.

ER 669 (emphasis added); see also id. (“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” and “will use the land use planning process to determine which inventory areas are to be managed as WSAs.”); ER 169 (SEORMP recognizing wilderness as a resource value). In short, BLM’s attempt to color ONDA’s NEPA argument as seeking consideration of some invented environmental factor is no more than a failed attempt to escape the inevitable conclusion that wilderness is a resource—a component of the “human environment”—like any other on the public lands.

B. BLM’s Arguments Concerning “Methodology” Are Irrelevant to ONDA’s Claim.

The question before this Court is whether NEPA requires the BLM to consider the impacts of its proposed action on wilderness, like it does for any other element of “the human environment.” 42 U.S.C. § 4332(2)(C). BLM twists that simple question around, responding with argument concerning deference to an agency’s “analytic protocol” or “methodology.” BLM Br. at 25–27. This case is not about *how* BLM studies the impacts of its RMP decisions on wilderness values, but rather *whether* the agency studies those impacts. Here, BLM refused to consider wilderness values outside of existing WSAs in the SEORMP, and ONDA simply is seeking an order from the Court that the agency has a legal duty to do so under NEPA.

It is undisputed that the last time BLM inventoried wilderness values and

considered whether the public lands in the SEORMP planning area possessed statutorily- and BLM-defined wilderness characteristics, was in the 1970s. ER 12 (stating BLM's inventory was completed in November 1980). Likewise, it is undisputed that BLM refused to update its decades-old wilderness inventory during the SEORMP planning process. SER 75 ("Issues Eliminated from Detailed Study"); SER 80 (BLM would not "reopen [its] initial wilderness review"); ER 12–14 ("Wilderness Study Areas"). And ONDA's 2003 wilderness inventory report shows—using BLM's very own protocol, *i.e.* methodology—that millions of acres of these public lands do indeed contain wilderness values according to the agency's own detailed definitions. ER 261–663 (full report, prepared pursuant to BLM protocol established in 2001 handbook); ER 670–77 (setting out wilderness inventory requirements, including requirements "for such requests from the public to be considered").

By refusing to update its wilderness inventory information, BLM's SEORMP decision relies on outdated and inaccurate information concerning the wilderness resource. This violates NEPA. See, e.g., The Lands Council v. Powell, 395 F.3d 1019, 1031 (9th Cir. 2005) (stale fish habitat and population data inadequate under NEPA); Ctr. for Biol. Diversity, 422 F.Supp.2d at 1166 (land use plan was arbitrary and capricious where BLM failed to take a hard look at impacts on endemic invertebrates, relying on "outdated and inadequate inventories"). The

District of Oregon very recently confirmed this duty in the context of a proposed rangeland project on the Lakeview District, which lies adjacent to the SEORMP's Vale District, explaining:

[BLM] was obligated under NEPA to consider whether there were changes in or additions to the wilderness values within the East-West Gulch, and whether the proposed action in that area might negatively impact those wilderness values, if they exist. The court finds BLM did not meet that obligation by relying on the one-time inventory review conducted in 1992. Such reliance is not consistent with its statutory obligation to engage in a continuing inventory so as to be current on changing conditions and wilderness values. 43 U.S.C. § 1711(a). BLM's issuance of the East-West Gulch Projects EA and the accompanying Finding of No [Significant] Impact (FONSI) in the absence of current information on wilderness values was arbitrary and capricious, and, therefore, was in violation of NEPA and the APA.

Ore. Natural Desert Ass'n v. Rasmussen, 451 F.Supp.2d 1202, 1213 (D. Or. 2006).²

In preparing the SEORMP BLM refused, as it did in Rasmussen, to collect or update relevant information on wilderness characteristics—roadlessness, naturalness, and opportunities for solitude or primitive recreation—that would be impacted by the proposed action. Throughout the seven year SEORMP planning process, BLM insisted that its analysis of the wilderness resource occurred via a “one-time review” completed in 1992. ER 235 (protest response); Rasmussen, 451 F.Supp.2d at 1212 (BLM making same argument in East-West Gulch Projects

² Without any further explanation, BLM simply offers that Rasmussen “is legally incorrect and factually distinguishable from this case.” BLM Br. at 22 n.5.

case). According to BLM, the agency “has no policy to require the re-analysis of final wilderness suitability/non-suitability decisions made by the Secretary and the President.” ER 235; 451 F.Supp.2d at 1211–12 (arguing same); see also ER 47 (claiming, “A global reinventory by BLM to address wilderness values within the planning area is outside the scope of this plan”). While BLM may not have a policy to re-analyze wilderness values, it has a duty to do so under NEPA when it revises its land use plans.

C. Nothing in FLPMA Overrides NEPA’s Requirement to Consider Impacts to the Human Environment.

In response to ONDA’s NEPA claim, BLM leads with the argument that because FLPMA’s multiple-use mandate does not specifically list “wilderness” by name, this somehow relieves the agency from considering impacts to wilderness values during the NEPA process. BLM Br. at 22–25 (citing 43 U.S.C. § 1711(a)). Of course, ONDA’s FLPMA wilderness claim is not presently before this Court because the district court dismissed that claim as unripe for review. ER 754; see also ONDA Br. at 49–53 (argument concerning ripeness of this claim).

NEPA broadly requires that BLM analyze and disclose the environmental impacts from the SEORMP alternatives on “the human environment.” 40 C.F.R. § 1508.14 (“‘Human environment’ shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment.”). BLM’s argument that Section 302(a), FLPMA’s multiple use

mandate, “does not mention ‘wilderness’” is BLM’s attempt to limit its NEPA duties. See BLM Br. at 23. Omitting consideration of wilderness values on more than three million acres of public land, while at the same time considering “over twenty other resources and values” throughout all 4.6 million acres of public land at issue, is an unmistakable case of arbitrary decision making. See Half Moon Bay Fisherman’s Marketing Ass’n v. Carlucci, 857 F.2d 505, 510 (9th Cir. 1988) (“without establishing . . . baseline conditions . . . there is simply no way to determine what effect [an action] will have on the environment, and consequently, no way to comply with NEPA”).

In fact, Congress was quite clear that “multiple use” really does mean considering *all* resource values on the public lands—and not ignoring one finite, fragile resource. See 43 U.S.C. § 1701(a)(2), (8) (broad policy declarations). FLPMA’s lengthy definition of “multiple use” also contains no support for the argument that BLM may under NEPA simply, at its discretion, omit one significant resource from its analysis. Id. § 1702(c).³

Further, that Section 201(a) does not specifically name “wilderness” does not support BLM’s NEPA argument. See BLM Br. at 23. FLPMA requires an inventory of “all” public lands “and their resource and other values.” 43 U.S.C. §

³ See ONDA Br. Addendum (full statutory definition). Note also that, of the “more than twenty” other resources BLM points to as being analyzed in the EIS, BLM Br. at 31–37, most are *not* specifically mentioned in FLPMA’s multiple use definition. Cf. 43 U.S.C. § 1702(c) with BLM Br. at 32 n.9.

1711(a). It specifies certain types of values as included (but not limited to) in what must be inventoried. *Id.* It does not exclude any specific resource or public value. In Center for Biological Diversity, for example, Section 201 applied with respect to maintaining accurate and complete information on “endemic invertebrates” even though FLPMA does not specifically mention beetles and bees in its inventory mandate. 422 F.Supp.2d at 1166–68. In short, ONDA’s focus in this case is only “restrictive,” BLM Br. at 24, in the sense that ONDA has focused on the one resource the agency refused to consider while analyzing “more than twenty different [other] resource perspectives.” *Id.* at 31–32.

III. BLM’S ANALYSES OF OTHER RESOURCES CANNOT SUBSTITUTE FOR TAKING A HARD LOOK AT IMPACTS TO WILDERNESS VALUES.

BLM argues at length that the EIS’s discussion of “more than twenty different resource perspectives” somehow suffices for analyzing the one resource conspicuously omitted from the NEPA process. BLM Br. at 31–37. According to the agency, “BLM’s analysis had the incidental benefit of capturing the SEORMP’s effects on many ‘wilderness characteristics’ that may exist outside WSAs.” *Id.* at 32. This is a post-hoc rationalization presented for the first time in litigation, and therefore is due no deference. See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212–13 (1988). Nowhere in the SEORMP does BLM state that it intends to assess impacts to wilderness via some proxy approach that would

“capture” effects on “many” parts of the wilderness resource. In the EIS, BLM made the affirmative decision to *only* consider impacts to wilderness within existing WSAs. ER 12, 14 (discussing wilderness only within existing WSAs); SER 689–90 (discussing environmental consequences to wilderness for only 860 acres of lands adjacent to existing WSAs that were acquired since 1991).

Even if BLM could implicitly adopt such an approach in its EIS, this would make it impossible for the public and decision makers to fully understand the environmental consequences of the SEORMP on wilderness. Baltimore Gas & Electric Co. v. Natural Resources Def. Council, Inc., 462 U.S. 87, 97 (1983).

Wilderness as a resource value on the public lands is well-defined. In none of its handbooks or other materials submitted as part of the administrative record has BLM explained any set of proxies for the key factors of roadlessness, naturalness, and opportunities for solitude or primitive and unconfined recreation, which define this resource. See ER 664–77 (2001 handbook).

Nor does BLM’s study of “areas of critical environmental concern” (“ACECs”) serve as a “barometer” for analyzing impacts to wilderness. BLM Br. at 34. Wilderness character does not translate directly into ACEC relevance or importance criteria. See 43 U.S.C. § 1702(a) (defining ACECs as areas where special management is needed to protect “important historic, cultural, or scenic values, fish and wildlife resources or other natural systems or processes” or to

“protect life and safety from natural hazards”). BLM acknowledges this in its ACEC manual, stating, “An ACEC designation will not be used as a substitute for wilderness suitability recommendations.” Further Excerpts of Record (“FER”) 4; see also FER 14 (stating same under “Relation to Wilderness Study Areas”).

In short, although “only [a] certain level of study is possible at [the] programmatic planning stage,” BLM Br. at 36 (citing N. Alaska Env'tl. Ctr. v. Kempthorne, 457 F.3d 969, 976–77 (9th Cir. 2006)), in this case the agency’s complete refusal to take the requisite “hard look” at one significant, fragile, and finite public resource, is simply not defensible under NEPA.

IV. THE *SEORMP* DID NOT CONSIDER A REASONABLE RANGE OF ALTERNATIVES FOR GRAZING AND OHV USE.

A. Grazing Alternatives.

BLM failed to consider a reasonable range of alternatives with respect to areas allocated to grazing, as well as authorized levels of grazing. The RMP decision is a critical, threshold decision-making point for BLM’s grazing decisions. FLPMA requires BLM, in an RMP, to “provide by tracts or areas for the use of the public lands.” 43 U.S.C. § 1712(a). For grazing, BLM must establish land areas for limited, restricted, or exclusive use. 43 C.F.R. § 4100.0-8.

BLM confirms this in its *Land Use Planning Handbook* stating: “*Land Use Plan Decisions*: Identify lands available or not available for livestock grazing (see 43 CFR 4130.2(a)).” ER 259–60 (formatting in original). See also 43 C.F.R. §

4130.2(a) (grazing permits issued only for public lands “that are designated as available for livestock grazing through land use plans”); Ore. Natural Res. Council Action, 148 IBLA 186, 189–90 (1999) (initial graze/no-graze decision made at RMP level); 43 U.S.C. § 1732(a) (site-specific decisions must be consistent with RMP).

BLM relies heavily on Alternative D2 for its argument that the agency considered reasonable alternatives for land areas and AUMs allocated to livestock grazing, admitting that alternatives A, B, C, and D are “substantially similar.” See BLM Br. at 38–42. What this argument fails to recognize is that even Alternative D2 refused to consider reduced grazing allocations in non-WSA roadless areas with significant wilderness values. Instead, Alternative D2 simply tallies acreages of various *existing* special management categories, such as “selected habitat of Mulford’s milkvetch” or Wild and Scenic River corridors. ER 15–18. Nowhere in the EIS did BLM consider an alternative under which the agency’s threshold, RMP-level grazing decision would allocate to grazing fewer acres or AUMs in places containing important wilderness values. SER 309–18 (EIS’s full grazing alternatives section).

BLM states that “the planning and evaluation process failed to reveal any evidence that would have justified an immediate, wholesale reduction in grazing levels.” BLM Br. at 43. This likely is true with respect to wilderness because BLM

failed to collect the evidence. It is undisputed that BLM has only outdated wilderness inventory information, last collected in the 1970s, and BLM refused to even consider updating that information. See also ER 261–663 (ONDA wilderness report showing BLM’s inventory information is inaccurate). In other words, BLM’s statement that “there were no other areas where similar, immediate reductions were warranted,” id. at 44, is not supported in the record because BLM admits it did not update its decades-old information on wilderness in the planning area. See Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983) (agency action is arbitrary and capricious where agency entirely fails to consider an important aspect of the problem); see also Ctr. for Biol. Diversity, 422 F.Supp.2d at 1162 (EIS for BLM land use plan violated NEPA’s alternatives requirement “[w]here the information contained in the initial EIS was so incomplete or misleading that the decision maker and the public could not make an informed comparison of the alternatives”) (quoting Animal Def. Council v. Hodel, 840 F.2d 1432, 1439 (9th Cir. 1988)) (internal quotes omitted).

BLM’s argument also misses the point. The question is whether BLM considered in its EIS a reasonable range of alternatives and analyzed and disclosed the likely impacts from each of those alternatives on the human environment, not whether it eventually selected the “right” alternative. The alternatives section is the “heart of the environmental impact statement.” 40 C.F.R. § 1502.14; City of

Sausalito v. O’Neill, 386 F.3d 1186, 1207 (9th Cir. 2004) (quoting same). In refusing to consider any alternative that would provide increased protection to an important, finite public resource like wilderness, the EIS fails NEPA’s twin purposes of informed decisionmaking and providing for meaningful public participation on environmental analyses. 40 C.F.R. § 1500.1(b), (c); Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1153–54 (9th Cir. 2006); Baltimore Gas & Elec. Co., 462 U.S. at 97.⁴

Again, because an RMP is the threshold decision-making point for lands allocated or not allocated to livestock grazing for the next twenty years or more, looking at the environmental consequences of a reasonable range of alternatives—including reasonable reductions in lands initially allocated to grazing—is a critical step BLM failed to undertake. All of the agency’s site-specific grazing decisions over the next two decades will be based on this initial, critical decision in the RMP. 43 U.S.C. § 1732(a); SUWA, 542 U.S. at 69 (Section 302(a) “prevent[s] BLM from taking actions inconsistent with the provisions of a land use plan.”); see also ER 260 (“*Implementation Decisions*: For areas available for grazing [under the

⁴ BLM’s “adaptive management” argument also fails. Building flexibility into future management does not vitiate an agency’s duty to “[r]igorously explore and objectively evaluate *all reasonable alternatives*.” 40 C.F.R. § 1502.14(a). See also Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1072 (9th Cir. 2002) (applying alternatives requirement to RMP); Boody, 2006 WL 3164793, at *7–8 (rejecting BLM’s argument that “flexibility” of “adaptive management” substitutes for compliance with FLPMA).

RMP], identify allotment-specific (for one or several allotments) grazing management practices and permitted use . . .”) (formatting in original). By completely ignoring one key resource in the EIS, BLM has not provided the “meaningful analysis” it now argues it has undertaken. BLM Br. at 40. Thus, BLM violated NEPA by not analyzing reasonable alternatives for grazing allocations.

B. OHV Alternatives.

BLM failed to consider a reasonable range of alternatives with respect to areas designated as “closed” to OHV use in the SEORMP planning area. BLM admits that “ONDA is correct . . . that none of the alternatives would have designated as ‘closed’ more than 0.8% of the planning area.” BLM Br. at 45. However, just as it did in response to ONDA’s administrative protest, BLM still blurs the distinction between the open, limited, and closed categories of OHV designations BLM makes in its land use plans. BLM provides a detailed discussion of why the “open” and “limited” categories “mean very different things for OHV users and natural resources.” *Id.* at 46–47. Yet this still ignores the fundamental difference between those categories and the “closed” category. *See* ER 251–52, 253 (BLM’s *National Management Strategy* for OHVs, describing need for such strategy and the differences between the three regulatory categories); 43 C.F.R. § 8340.0-5(f), (g), (h) (regulatory definitions of three separate categories).

BLM also states that “[a]dding an alternative with greater ‘closed’

designations would have added little, if anything, to this [EIS] analysis.” BLM Br. at 49. This argument is inconsistent with NEPA, which is an “action-forcing” statute intended to

ensure[] that the agency, in reaching its decision, 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 audience that may also play a role in both the decisionmaking process and the implementation of that decision.

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989) (citing Baltimore Gas & Elec. Co., 462 U.S. at 97). In other words, whether analyzing greater amounts of closed areas actually would have “added . . . anything” to BLM’s analysis or actually resulted in greater protection of wilderness on the public lands, is not the issue under NEPA. See, e.g., Desert Citizens Against Pollution v. Bisson, 231 F.3d 1172, 1179 (9th Cir. 2000) (“A plaintiff need not establish with absolute certainty that adherence to the required procedures would necessarily change the agency’s ultimate decision.”).

Moreover, without any further explanation or support for this statement in the administrative record, this is the type of conclusory statement entitled to no deference by this Court. Motor Vehicle Mfrs., 463 U.S. at 43 (agency must articulate rational connection between facts found and choices made). BLM cites Headwaters, Inc. v. Bureau of Land Management, 914 F.2d 1174, 1181 (9th Cir. 1990) for the unremarkable proposition that “NEPA does not require a separate

analysis of alternatives which are not significantly distinguishable from alternatives actually considered, or which have substantially similar consequences.” BLM Br. at 49. By contrast here, the agency’s own regulations and nationwide management strategy both distinguish between these three categories, and require BLM to make OHV restriction decisions as part of the RMP process. 43 C.F.R. § 8342.2(a).

At the most fundamental level, BLM’s decision not to consider alternatives closing more areas to OHV use is arbitrary and capricious based on the SEORMP’s broad purposes of providing a “comprehensive [management] framework” and ensuring that the public lands are managed for multiple use and sustained yield, SER 66 (“Purpose and Need”). See IlioUlaokalani Coalition v. Rumsfeld, 464 F.3d 1083, 1097 (9th Cir. 2006) (“The scope of reasonable alternatives that an agency must consider is shaped by the purpose and need statement articulated by that agency.”). Simply put, the OHV alternatives presented in the EIS do not “foster[] informed decision-making and informed public participation.” Westlands Water Dist. v. U.S. Dep’t of Interior, 376 F.3d 853, 868 (9th Cir. 2004). This is a land use plan-level decision for which BLM simply has refused to even consider key environmentally-protective alternatives. Thus, BLM’s Record of Decision is arbitrary, capricious, and not in accordance with NEPA.

V. THE DISTRICT COURT HAS JURISDICTION OVER ONDA'S FLPMA AND TAYLOR GRAZING ACT CLAIMS.

ONDA's FLPMA and Taylor Grazing Act claims are ripe for review because they involve land use plan decisions that have immediate, concrete impacts upon ONDA's interests. Just as the district court did, BLM here incorrectly assumes that the Supreme Court's discussion in Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726 (1998), 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 BLM's response does not recognize that here, immediate and concrete impacts do flow from BLM's RMP-level wilderness, grazing, and OHV decisions in the SEORMP. And because these are decisions that will not be revisited in future, site-specific planning processes, ONDA's claims are ripe for review.

A. ONDA's Multiple Use Wilderness Claim is Ripe.

BLM's failure to balance the wilderness resource among multiple use resource values on the public lands during the SEORMP land use planning process is a procedural claim ripe for review. BLM does not contest this claim. See BLM Br. at 49–60 (responding only to grazing issues). In fact, the Department of the Interior has concluded that BLM's FLPMA multiple use planning duties are distinct from the agency's NEPA duties: "A [NEPA] finding that there will not be significant impact does not mean either that the project has been reviewed for

unnecessary or undue degradation or that unnecessary or undue degradation will not occur.” Kendall’s Concerned Area Residents, 129 IBLA 130, 140–41 (1994). See also Nat’l Wildlife Fed’n v. Bureau of Land Mgmt., 140 IBLA 85, 101 (1997) (FLPMA’s multiple use duty requires BLM to engage in a “reasoned or informed decisionmaking process” showing “that BLM has balanced competing resource values . . . in the manner that will best meet the present and future needs of the American people”). Citing Sierra Club v. Butz, 3 Env’tl. L. Rept. 20,292, 20,293 (9th Cir. 1973), the IBLA in NWF v. BLM explained that “the multiple-use principle ‘requires that the values in question be informedly and rationally taken into balance.’ . . . [A]n agency is required to engage in such a balancing test in order to determine whether a proposed activity is in the public interest.” 140 IBLA at 99. The multiple-use duty applies to all levels of BLM decision making, including RMP decisions. 43 U.S.C. § 1712(c). By refusing to balance wilderness values against other valid multiple uses on the public lands, BLM’s SEORMP decision violates FLPMA’s multiple use duty.

B. ONDA’s OHV Claims Under FLPMA are Ripe.

BLM’s final decision in the SEORMP designating certain areas open, limited, or closed to OHV use falls directly within Ohio Forestry’s example of land use plan decisions that may cause direct harm to public lands and resources and therefore are ripe for judicial review. 523 U.S. at 738–39. BLM does not respond

to ONDA's OHV claim ripeness discussion. See BLM Br. at 49–60 (responding only to grazing issues). Because Ohio Forestry is directly on point on this claim, BLM cannot show that the claim is not ripe, and the district court decision should be reversed.

C. ONDA's Grazing Claims are Properly Justiciable.

ONDA's grazing claims under FLPMA and the Taylor Grazing Act also are ripe for review because they involve land use plan decisions that have immediate, concrete impacts upon ONDA's interests. In response, BLM oversimplifies the nature of the agency's grazing decisions, incorrectly assuming that these decisions are directly analogous to Forest Service timber sale decisions. BLM Br. at 51–56. BLM also tries to fit ONDA's Taylor Grazing Act claim under the aegis of SUWA, arguing that a land use plan decision adopted without revisiting the threshold “chiefly valuable” determination is properly reviewed under Section 706(1) of the APA. BLM Br. at 56–59. Because BLM's SEORMP grazing decisions are quite distinct from the site-specific, yet to be proposed timber sales at issue in Ohio Forestry, and because the agency's Record of Decision is unmistakably a final agency action subject to judicial review, BLM's arguments fall short.

1. ONDA's grazing claims under FLPMA are ripe.

ONDA claims BLM violated FLPMA by failing to properly balance grazing against other valid multiple uses of the public lands in order to ensure the

authorized grazing will not cause unnecessary or undue degradation. 43 U.S.C. §§ 1712(c), 1732(a), 1732(b). Likening its grazing decisions to the timber sales at issue in Ohio Forestry, BLM argues this claim is not ripe for review because “RMPs designate areas of land as suitable for various uses but rely on site-specific agency actions to authorize those uses.” BLM Br. at 51. Yet the record shows that BLM’s grazing decision-making process is quite distinct from the Forest Service’s timber sale process.

Most importantly, in contrast to yet-to-be-proposed timber sales, livestock grazing is an ongoing activity on the public lands governed by the SEORMP. Prior to adoption of the SEORMP, BLM already had authorized livestock grazing on each of the 168 allotments throughout the planning area, under 219 separately-issued permits. ER 11. Those permits were issued under the previous land use plans (the Northern and Southern Malheur Management Framework Plans) and land use plan-level grazing program decisions (the Ironside and Southern Malheur grazing program EISs). ER 76–77, 79.

Thus, while BLM is correct that it has discretion, at the implementation level, to adjust specific grazing terms and conditions via permits, allotment management plans, or annual authorizations issued prior to turnout each grazing season, what that argument misses is that the grazing land and forage allocations in the SEORMP are the threshold decisions setting upper limits for management of

grazing on these public lands. See also ONDA v. U.S. Forest Serv., 465 F.3d at 979–81 (describing permits, AMPs, and annual authorizations).⁵ All subsequent permits, AMPs, and annual authorizations issued or renewed after adoption of the SEORMP must now be consistent with the RMP. 43 U.S.C. § 1732(a); see also ER 123 (“Applicable activity plans (including AMP’s [sic]), agreements, decisions, and/or terms and conditions of grazing use authorizations, *will be revised and implemented* to ensure that [RMP] objectives are met.”) (emphasis added). BLM’s grazing regulations expressly support ONDA’s argument:

Land use plans shall establish allowable uses (either singly or in combination), related levels of use or production to be maintained, areas of use, and resource condition goals and objectives to be obtained. . . . Livestock grazing activities and management actions approved by the authorized officer shall be in conformance with the land use plan[.]

43 C.F.R. § 4100.0-8. Unless the RMP has allocated a specific land area to grazing, BLM may not permit grazing to occur there. Likewise, BLM may not allow more than the RMP-allocated forage levels on a given allotment. See ER 183–99 (SEORMP allocations of specified land areas and forage levels, by allotment).

⁵ ONDA v. USEFS deals with Forest Service grazing, but the court’s discussion of this multi-part grazing decision-making process is equally applicable to BLM grazing management. All the rangeland provisions of FLPMA are expressly made applicable to livestock grazing on both the national forests and BLM lands. 43 U.S.C. §§ 1702(k) & (p), 1751, 1752, 1753 (grazing provisions and definitions applicable to Secretaries of Interior and of Agriculture).

The agency's grazing allocation decisions in the SEORMP are directly analogous to the OHV designations found to be ripe for review in Ohio Forestry, 523 U.S. at 738–39. While BLM may make future, site-specific decisions to close certain areas to OHV use where such use is causing or will cause resource damage, 43 C.F.R. § 8341.2(a), this does not render the RMP-level designations (open, limited, or closed) unripe for challenge upon issuance of a ROD adopting the RMP. Ohio Forestry, 523 U.S. at 738–39. Similarly, regardless of whether the agency might take further future action to restrict or otherwise manage grazing in a particular area, the SEORMP is BLM's "definitive statement" on where and how much grazing is allowed, on each and every allotment within the planning area, under all subsequent site-specific decisions. See Ctr. for Biol. Diversity v. U.S. Fish & Wildlife Serv., 450 F.3d 930, 940 (9th Cir. 2006) (agency action is ripe when it "is a definitive statement of [the] agency's position").

By contrast, the timber sale decisions found unripe in Ohio Forestry were not specifically authorized in the land use plan. For trees to be cut, 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." 523 U.S. at 734. Here, the "site" has been selected in the SEORMP. See ER 183–99 (specifying public land acres allocated to grazing, by allotment); ER 123 (referring to "current use

authorizations (Appendix E)"); 43 C.F.R. § 4100.0-8 (land use plans establish "areas of use" for grazing); ER 181–99 (examples of land and forage allocations, by allotment). The "harvesting method" has been established in the SEORMP. See, e.g., ER 183 (setting season of use for Jackies Butte Summer Allotment); FER 21 (adopting "[s]tandard design elements and procedures for rangeland improvements" "constructed as a portion of adaptive management . . . to achieve multiple use management objectives"). BLM prepared an "environmental review" for these grazing decisions, ER 5 (Proposed SEORMP and Final EIS), and the agency's final decision was subject to administrative review and subsequent review in federal court. SER 942, 969. In short, ONDA's grazing claims under FLPMA are readily distinguishable from Forest Service timber sales, and therefore are ripe for review.⁶

2. ONDA's grazing claims under the Taylor Grazing Act are ripe.

ONDA claims BLM violated the Taylor Grazing Act because in adopting the SEORMP, BLM refused to make or revisit its "chiefly valuable" determination.

⁶ BLM also argues briefly that even if ONDA's FLPMA claim is ripe for review, it fails on the merits because of BLM's "broad discretion" in deciding how to balance multiple uses on the public lands. BLM Br. at 59. However, the only question before the Court is whether ONDA's FLPMA and Taylor Grazing claims are ripe for review and therefore justiciable. See ONDA Br. at 13–14 (noting that as a practical matter, this Court need not reach the ripeness issue if it rules in ONDA's favor concerning one or more of BLM's NEPA violations). At any rate, the Court's resolution of ONDA's FLPMA claim "is largely dependent on how the Court resolves plaintiffs' challenges under NEPA." Ctr. for Biol. Diversity, 422 F.Supp.2d at 1167.

BLM argues the Taylor Grazing Act's classifications under sections 315 and 315f are discretionary decisions and therefore subject to review only under Section 706(1) of the APA. BLM Br. at 57–58 (citing SUWA, 542 U.S. at 64). Yet, in its *Land Use Planning Handbook*, BLM states that land classifications under Section 7 of the TGA, 43 U.S.C. § 315f, are decisions that are made at the RMP level. FER 22–23. Here, ONDA does not challenge the determinations themselves, but rather BLM's final Record of Decision to *not* make or revisit those determinations as part of its land use plan. ER 73 (stating under “Issues Eliminated from Detailed Study” that “‘chiefly valuable’ determinations were made with implementation of TGA in the 1930's [sic]” and that those determinations were “not reconsidered in this planning effort”). See, e.g., Animal Legal Def. Fund v. Veneman, 2006 WL 3375347, *17 (9th Cir. 2006) (holding Department of Agriculture decision not to adopt a Draft Policy that would have provided guidance to certain regulated entities, was “final agency action” and therefore judicially reviewable under APA § 706(2)(A)).

BLM claims that “even if these determinations were revisited, lands determined to not be ‘chiefly valuable’ for livestock grazing and withdrawn from the grazing district would most likely continue to be grazed under the TGA's lease system.” ER 227. This misses the point: the “chiefly valuable” determination is an RMP-level land use classification that BLM refused to make in the SEORMP, and

for which the agency has refused to present any criteria for its assessments, much less the original assessments themselves. The public will never know whether lands deemed not chiefly valuable for grazing would or would not continue to be grazed, unless BLM makes this classification decision in the RMP. See also 48 Stat. 1269, preamble, June 28, 1934 (TGA purpose is “[t]o stop injury to the public grazing lands by preventing overgrazing and soil deterioration”). Accordingly, BLM’s decision to adopt the SEORMP without determining which of the public lands within the planning area are, or remain, “chiefly valuable” for livestock grazing or the production of forage crops is arbitrary, capricious, and not in accordance with the Taylor Grazing Act and FLPMA. 43 U.S.C. §§ 315, 1701(a)(3), 1712(d). For purposes of this appeal, BLM’s final decision to “not reconsider[] in this planning effort,” ER 73, its “chiefly valuable” determinations, is final agency action reviewable by the district court.

CONCLUSION

For the foregoing reasons, as well as those stated in ONDA’s opening brief, ONDA again respectfully requests this Court to reverse the district court’s ruling, issue an opinion concerning BLM’s violations of law under NEPA and the justiciability of ONDA’s FLPMA and Taylor Grazing Act claims, and remand this matter to the agency.

Dated December 6, 2006

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this opening brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,985 words.

Date

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PROOF OF SERVICE

I, the undersigned, hereby certify that true and correct copies of Appellants' **REPLY BRIEF** and **FURTHER EXCERPTS OF RECORD** were transmitted via U.S. First Class Mail on December 6, 2006 to the following parties:

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