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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OREGON NATURAL DESERT ASS'N and
WESTERN WATERSHEDS PROJECT,

Plaintiffs,

v.

CAROLYN FREEBORN, Field Manager, Jordan Resource Area, BLM, **DAVE HENDERSON**, Vale District Manager, BLM, **BUREAU OF LAND MANAGEMENT**, and **UNITED STATES DEPARTMENT OF THE INTERIOR**,

Defendants.

Case No. 06-1311-MO

RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO STAY PROCEEDINGS

INTRODUCTION

Plaintiffs Oregon Natural Desert Association and Western Watersheds Project (collectively referred to as "ONDA") file this memorandum in response to a Motion for Stay of Proceedings (Dkt # 31) filed by Defendants Carolyn Freeborn *et al*. ("BLM"). While ONDA acknowledges that remand for preparation of a lawful NEPA analysis for the five "Louse Canyon Geographic Management Area" ("LCGMA") Final Decisions at issue here is *part* of the relief ONDA has requested in this action, ONDA opposes BLM's stay motion as untimely, inappropriate under well-established principles of administrative law, and not intended to fully or

properly address the underlying legal issues in this case. Perhaps most importantly, a stay is not warranted because BLM seeks to avoid judicial review while the primary challenged agency action—livestock grazing authorized under the five Final Decisions at issue—is ongoing. Because BLM has not satisfied its heavy burden of showing a stay is warranted, and because the type of "voluntary remand" BLM seeks is not warranted under the facts of this case, ONDA respectfully asks the Court to deny Defendants' motion.

RELEVANT BACKGROUND

ONDA initiated this action on September 14, 2006, challenging five BLM Final Decisions which collectively adopt the LCGMA rangeland project and its associated livestock grazing permit authorizations. Based on 2001 rangeland health evaluations under which the agency determined that current grazing practices were causing continued violations of ecological standards under the Federal Rangeland Health ("FRH") regulations, 43 C.F.R. Subpart 4180 *et seq*., BLM used the GMA process to make changes to grazing within the LCGMA. See Administrative Record ("AR") 785–87 (LCGMA Revised EA). The Final Decisions authorize issuance of five separate grazing permits for the seven grazing allotments within the LCGMA, as well as an extensive network of rangeland projects throughout the Area. AR 825–27 (overview of fencing, water development, and vegetation treatment projects). The ongoing livestock grazing will occur in important sagebrush steppe habitat, including within pastures determined by BLM to be in violation of FRH Standards and Guidelines. Some of the authorized projects would take place within areas inventoried and documented by ONDA to possess significant wilderness values. See Stipulation to Avoid Motion for Preliminary Injunction (Dkt # 25, hereafter "Stipulation"), Attach. C (map of projects and ONDA-inventoried areas); AR 1481–1883 (ONDA's Feb.6, 2004 wilderness inventory report).

ONDA's claims arise under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321–4361, and the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701–1784. ONDA alleges BLM: (1) has violated NEPA and FLPMA by adopting the LCGMA projects without taking a "hard look" at impacts to wilderness resource values and properly balancing wilderness among the valid multiple uses on these public lands, Complaint (Dkt # 1) at ¶¶ 50–55 (Claim One, NEPA), 56–58 (Claim Two, FLPMA); (2) has failed under FLPMA to properly consider the suitability of the public lands for continued domestic grazing, Complaint at ¶¶ 59–61 (Claim Three); (3) has failed under FLPMA to provide for riparian area protection and water quality in accordance with the governing land use plan, Complaint at ¶¶ 62–66 (Claim Four); (4) has failed, under NEPA and FLPMA, to take a "hard look" and ensure against "unnecessary or undue degradation" vis-à-vis defunct rangeland projects, Complaint at ¶¶ 67–71 (Claim Five); and (5) has violated NEPA by not preparing an environmental impact statement ("EIS"), Complaint ¶¶ 72–75 (Claim Six).

On September 20, 2006, ONDA filed a Motion for Temporary Restraining Order (Dkt # 4). Following BLM's agreement not to construct projects that would directly impact ONDA-inventoried and -proposed Wilderness Study Areas ("WSAs"), ONDA withdrew its motion (Dkt # 9). The parties discussed production of the administrative record and engaged in a good-faith discussion of potential settlement of ONDA's claims. The parties were not able to agree upon a settlement, and eventually, in January 2007, ONDA was forced to file a motion to compel production of the administrative record (Dkt # 15). This Court granted ONDA's motion to compel by Order dated March 1, 2007 (Dkt # 27).

Defendants' counsel first informed ONDA on January 19, 2007 that BLM intended to file a motion seeking to stay this litigation while the agency completed "additional analysis to

address potential impacts of the challenged decisions on any wilderness characteristics that may exist outside of WSAs within the project area." See Memo in Support of Motion to Compel (Dkt # 16), Attach. B (email letter from Defendants' counsel); see also BLM Stay Memo, Exh. A (Jan. 22, 2007 letter to public, stating same). During the February 28, 2007 telephone argument concerning ONDA's motion to compel, Defendants informed the Court that BLM would filed its stay motion within 7 to 10 days following the hearing. Finally, on April 13, 2007, BLM filed a motion to stay proceedings, asking the Court to stay this action indefinitely until the agency "augments its NEPA analysis." BLM Stay Memo at 2. To date, BLM has not yet issued for public review any "additional NEPA analysis." See BLM Stay Memo, Exh. A (stating BLM would "circulate for public review this additional NEPA analysis within the next three to six months").

ARGUMENT

I. STANDARD OF REVIEW

BLM fails to cite any standard of review for its motion. To achieve a stay, BLM "must make out a *clear case of hardship or inequity* in being required to go forward, if there is even a fair possibility that the stay for which [it] prays will work damage to some one else." Landis v. N. Am. Co., 299 U.S. 248, 255 (1936) (emphasis added); Lockyer v. Mirant Corp., 398 F.3d 1098, 1109–10 (9th Cir. 2005) (quoting Landis). In evaluating a motion to stay, courts weigh the competing interests at stake.

> Among these competing interests are the *possible damage* which may result from the granting of a stay, the *hardship or inequity* which a party may suffer in being required to go forward, and the *orderly course of justice* measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected from a stay.

CMAX, Inc. v. Hall, 300 F.2d 265, 268 (9th Cir. 1962) (emphasis added; citing Landis, 299 U.S. at 254–55); see also Cohen v. Carreon, 94 F.Supp.2d 1112, 1115 (D. Or. 2000) (citing CMAX and Landis); Natural Resources Def. Council v. Norton ("NRDC v. Norton"), 2007 WL 14283, *13–14 (E.D. Cal. 2007) (explaining standards for obtaining a stay, citing Landis, CMAX, and Lockyer). "Clear hardship or inequity" does not arise from merely forcing one litigant to "proceed toward trial" and "defend a suit, without more." Lockyer, 398 F.3d at 1112. As the moving party, BLM bears the burden of establishing a clear case of hardship or inequity if it is required to move forward in this action. Clinton v. Jones, 520 U.S. 681, 706 (1997) ("The proponent of a stay bears the burden of establishing its need.").

II. BLM HAS NOT SATISFIED ITS BURDEN OF SHOWING "A CLEAR CASE OF HARDSHIP OR INEQUITY."

Because it cites no standard of review for its stay motion, BLM makes no attempt to show that it will face "hardship or inequity" if this action is not stayed indefinitely. Moreover, although BLM's motion is styled as a motion to stay, BLM essentially asks this Court to remand the LCGMA Final Decisions to the agency so it may create new evidence that should have been part of the challenged grazing decisions in the first place. Whether styled as a request for a stay or for a "voluntary remand," this will amount to a judicially-supervised NEPA process under which the agency may collect evidence and revise its decisions until it eventually gets the process right. BLM has not shown it will suffer a "clear case of hardship or inequity" because: (1) a stay or remand would result in an improper post-hoc rationalization; (2) it would result in harm to ONDA and the public because ongoing grazing would continue during the requested stay; (3) the proposed stay or remand would not fully or properly address the claims before the Court; and (4) BLM's motion is untimely.

A. A Stay or "Voluntary Remand" Would Allow For Improper Post-Hoc Rationalization.

BLM's request here contains none of the attributes that might justify granting a request to stay proceedings or remand to the agency. The only reason identified for the request is that "a stay is warranted because the administrative record will be augmented and the decisions subject to review may be revised." BLM Stay Memo at 4.[1] BLM's stay request ignores the fundamental tenet of administrative law that "[t]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." Camp v. Pitts, 411 U.S. 138, 143 (1973). Under the APA, this Court is tasked with reviewing the LCGMA decisions on the basis of the record that was before the agency at the time it made those decisions. Southwest Ctr. for Biol. Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1450 (9th Cir. 1996). The type of post-hoc rationalization BLM seeks to engage in here has long been rejected by the courts. See Food Marketing Inst. v. ICC, 587 F.2d 1285, 1290 (D.C. Cir. 1978) ("Post-hoc rationalizations by the agency on remand are no more permissible than are such arguments when raised by appellate counsel during judicial review. See Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962).").

BLM made its LCGMA Final Decisions on July 7, 2005. AR 149, 273, 398, 524, 650 (the five Final Decisions). Those Final Decisions were based on a NEPA process initiated in September 2004. AR 1266 (Sept. 14, 2004 letter to public issuing EA for public comment). BLM

[1] BLM also alleges without elaboration that a stay is warranted to avoid "what could well turn out to be an advisory opinion" and to promote "efficient and cost-effective" litigation. BLM Stay Memo at 5. Neither of these reasons falls within the Supreme Court's and Ninth Circuit's "clear case of hardship or inequity" test for achieving a stay. Article III of the Constitution limits the judicial power of the federal courts to live "cases" or "controversies." As explained in more detail below, because BLM's proposed remand, for the asserted purpose of conducting additional analysis of "any wilderness values that may exist," will neither fully or properly address ONDA's wilderness claims, nor address the other four claims in ONDA's Complaint, this case remains "live."

undertook that NEPA process following the agency's determinations, in December 2001, that a number of pastures throughout the Louse Canyon GMA were suffering from chronic violations of the agency's Federal Rangeland Health regulations ecological standards. AR 2064, 2072, 2089, 2092, 2095, 2102 (Dec. 7, 2001 FRH determinations of failures to meet standards, presented in the "LCGMA Evaluation").

In 2001, because BLM had refused to consider wilderness resource values outside of existing WSAs as part of its land use planning process under the Southeastern Oregon Resource Management Plan ("SEORMP"),[2] ONDA asked the agency to instead consider wilderness as part of its LCGMA process. ONDA specifically asked BLM to consider the impacts of its LCGMA grazing authorizations on wilderness resource values, as well as to update the agency's wilderness inventory information (last collected in the 1970s) as part of the LCGMA planning process. AR 1907 (Nov. 15, 2001 letter from ONDA to BLM); see also AR 1250–52 (ONDA's Mar. 17, 2005 administrative protest, again raising same issues). BLM steadfastly refused to undertake such analysis. AR 1908 (Nov. 30, 2001 letter from BLM to ONDA, refusing to update inventory information or consider wilderness values as part of LCGMA process); AR 155–160 (2005 Final Decisions and administrative protest response); AR 31–32 (2005 administrative appeal response). Only seven months after ONDA initiated this action has BLM now moved for a stay in order to "voluntarily . . . conduct additional NEPA analysis" concerning "any wilderness characteristics found to be present." BLM Stay Memo at 5.

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[2] The SEORMP is the land use plan that governs BLM's management of about 4.6 million acres of public land in southeast Oregon. The LCGMA lies within the SEORMP's boundaries. See AR 2845 (Map GMA-1 showing GMAs in SEORMP planning area; LCGMA labeled as "j10").

"The post hoc rationalizations of the agency or the parties to this litigation cannot serve as a sufficient predicate for agency action." Am. Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 539 (1981). As comprehensively explained by one district court:

> It is firmly established that agencies cannot use post-hoc rationalizations to remedy inadequacies in the agency's decision and record. It is an axiom of administrative law that "an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself." Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168–69 (1962); Friends of the Clearwater v. Dombeck, 222 F.3d 552, 560 (9th Cir.2000), citing Camp v. Pitts, 411 U.S. 138, 142–43 (1973) (agency cannot rely on "post hoc rationalizations" to defend its earlier decisions; judicial review of an administrative agency's decision is limited to examination of the administrative record as it existed when the agency made the relevant decision); National Wildlife Fed'n v. National Marine Fisheries Serv., 235 F.Supp.2d 1143, 1152 (W.D. Wash. 2002) ("An agency seeking to justify its action may not offer a new explanation for the action, but must be judged on the rationale and record that led to the decision."). A new analysis cannot be used to support a decision already made. See also Securities & Exchange Comm'n v. Chenery Corp., 332 U.S. 194, 196 (1947) ("a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.").

Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation, 2006 WL 798920, at *3 (N.D. Cal. 2006). See also Blue Mtns. Biodiversity Project v. Blackwood, 161 F.3d 1208, 1216 (9th Cir. 1998) (emphasizing under NEPA "the importance of coherent and comprehensive up-front environmental analysis to ensure informed decision making to the end that 'the agency will not act on incomplete information, only to regret its decision after it is too late to correct'") (quoting Marsh v. Ore. Natural Res. Council, 490 U.S. 360, 371 (1989)).[3]

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[3] The only cases BLM cites concerning post-hoc rationalization are readily distinguished. BLM Stay Memo at 6. Ford Motor Co. v. NLRB, 305 U.S. 364 (1939), was decided before Congress passed the Administrative Procedure Act in 1946, and dealt with an appellate court's remand to an agency in a case involving a National Labor Relations Act provision allowing an agency to modify or set aside findings in an NLRB enforcement action. The passage BLM quotes from Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017 (9th Cir. 1980), simply recognizes that an appellate court might remand a case to a district court for further proceedings if,

The agency's statements as well as the administrative record show that BLM violated the law. BLM Stay Memo at 4 ("BLM did not examine potential effects of the projects and grazing management strategies of those [LCGMA] decisions on any wilderness characteristics that might be found to exist outside of existing WSAs."); AR 986–90 (LCGMA Revised EA, analyzing environmental impacts to wilderness values only in existing WSAs). When an agency has ignored a particular fact or element in making its determination, and the agency has not adequately explained its decision, courts should not grant a request for remand for the purpose of allowing the agency to consider issues that it had every opportunity to consider the first time. City of Brookings Mun. Tel. Co. v. F.C.C., 822 F.2d 1153, 1165 (D.C. Cir. 1987) (agencies cannot submit "post hoc rationalizations advanced to remedy inadequacies in the agency's record"). In this case, BLM was on notice since at least 2001 that it had a duty to take a "hard look" at impacts to wilderness resource values and to balance wilderness values among the other valid multiple uses within the Louse Canyon public lands. In short, BLM's stay request is an inappropriate attempt to supply a post-hoc rationalization for the challenged grazing decisions, to bolster its litigation position, and to further delay resolution of this case and protection of critical sagebrush-steppe habitat and outstanding wilderness values on these public lands in and surrounding the vast Owyhee Canyonlands.

B. A Stay is Inappropriate and Would Harm ONDA Because of On-Going, On-the-Ground Action.

Perhaps even more importantly, BLM seeks to "have it both ways" "by being permitted to continue to operate under the challenged [decisions] while maintaining that all litigation regarding those [decisions] should cease." NRDC v. Norton, 2007 WL 14283, at *12 (rejecting

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following an appealable decision, there were "supervening events" that were not before the district court. Id. at 1026.

this argument). BLM has not agreed to withdraw its Final Decisions. See BLM Stay Motion, Exh. A (stating only that implementation of rangeland projects, not on-going grazing, would be suspended while BLM completes additional analysis); Stipulation at ¶ 6.b. ("This stipulation does not prohibit BLM from using already constructed fences or otherwise affect any portion of the Challenged LCGMA Decisions, *including the authorization to carry out livestock grazing*, except as expressly provided herein.") (emphasis added).

Thus, BLM has and continues to implement the grazing portions of the LCGMA decisions, with livestock having been turned out onto these pastures beginning February 15, 2007. See AR 850–56 (describing grazing schedules by allotment, and showing turnout dates beginning between Feb. 15 and Mar. 1, 2007). Under these circumstances, while the challenged final agency action is being actively implemented by the agency, the Court should not authorize a stay or "voluntary remand." See NRDC v. Norton, 2007 WL 14283, at *12 (citing Rock Creek Alliance v. U.S. Fish & Wildlife Serv., No. CV 01-152-M-DWM, Order (D. Mont. Mar. 19, 2002), "in which the district court refused to authorize a voluntary remand where the agency refused to withdraw its [biological opinion decision]").

In fact, far from being the "best evidence" that ONDA would not be prejudiced by a stay, see BLM Stay Memo at 6–7, the Stipulation only staves off further structural additions to an already overwhelming rangeland infrastructure throughout the LCGMA. Grazing documented by BLM to have violated ecological standards under the FRH regulations will continue—and it will continue this year without many of the structural projects the agency claimed in its NEPA analysis were necessary to meet FRH Standards and Guidelines.

Defendants claim this "scenario is quite similar to" the facts in BARK v. U.S. Forest Serv., No. 04-356-MO (D. Or.). BLM Stay Memo at 5. In BARK, this Court stayed proceedings

when it became necessary for the Forest Service to engage in additional Endangered Species Act consultation following issuance of a Ninth Circuit decision. However, the key factor for the Court there, as set forth in its Order issuing the stay, was that during the stay, *no* on-the-ground or other implementing action would occur with respect to the challenged agency decision:

> During the pendency of the stay, defendant shall not authorize or undertake any ground-disturbing activities to implement the Slinky Timber Sale including, but not limited to: the auction or award of any portion of the sale; any logging, road building, or road reconstruction relating to the sale; or any site preparation for logging, road building, or road reconstruction related to the sale.

BARK v. U.S. Forest Serv., Order (Dkt # 36) (Apr. 26, 2005). By contrast here, the livestock grazing complained of in this action is an *on-going activity* throughout the LCGMA.[4]

This continuing grazing may cause environmental harm during the indefinite pendency of BLM's requested stay. This includes fragmentation and destruction of sage-steppe wildlife habitat, degradation of native vegetation, compaction and erosion of soil coupled with destruction of microbiotic crusts, and adverse impacts to irreplaceable archaeological resources. See, e.g., Fite Decl. (Dkt # 6), at ¶¶ 6, 8–9. The EA itself admits that impacts of the grazing operations associated with the LCGMA Final Decisions will include: "heavily impacted and denuded" vegetation surrounding new watering troughs and spring renovation projects "due to livestock concentration"; entrenched soils and denuded vegetation along livestock trails created along fence lines and surrounding wells; "adverse long-term impacts from concentrated livestock use" around "proposed and existing wells, pipelines, and spring troughs"; "significant potential for adverse effects" to "wildlife forage, cover, and structure" in upland habitats "as a result of

[4] And in BARK, the defendants specifically noted this important distinction. They explained that in American Rivers v. NOAA Fisheries, 2004 WL 2075032 (D. Or. Sept. 14, 2004), a case in which this Court denied an agency's stay request, "the Court was dealing with ongoing agency action, namely hydropower operations . . .[and] here, . . . no on-the ground activity can occur on the Slinky project until reiniated [sic] consultation has been completed." BARK, *Reply in Support of Defendant's Motion for Stay*, at 5 (Dkt # 27, dated Feb. 25, 2005).

intensified grazing use and smaller pasture sizes" while maintaining "same number of cattle within pastures that are reduced in size (due to fencing)"; potential for "long-term negative effects . . . if livestock movement patterns parallel to the fence line create pathways denuded of vegetation and prone to ablation"; and negative and potentially long-term impacts to aquatic habitat "by reducing the volume of natural flows available for wetlands or streams and thereby decreasing habitat area." See, e.g., AR 861–69, 926, 962, 978–80. Accordingly, this is a situation where on-going, ground-disturbing agency action counsels against issuing a stay.

C. BLM's Proposal Will Not Fully or Properly Address the Claims Before This Court.

BLM sheds little light in its stay motion or elsewhere on how it might reconsider or change the LCGMA Final Decisions. Certainly BLM has not committed to anything that would bind it relative to the issues under consideration by this Court. The agency explains that the purpose of its "additional analysis" is to "address[] the potential effects of the adopted LCGMA projects and grazing management strategies, as well as the other alternatives considered in the EA, on *any wilderness characteristics found to be present* outside of existing Wilderness Study Areas within the LCGMA." BLM Exh. A at 1 (emphasis added); see also BLM Stay Memo at 4 (explaining same and stating that "the decisions subject to review *may* be revised") (emphasis added). BLM's position is that it will analyze impacts to wilderness resource values *only* if "wilderness characteristics" are "found to be present."

In other words, BLM does not actually commit to including and evaluating up-to-date, accurate information (including ONDA's 2004 wilderness inventory report information) concerning wilderness values in its remanded NEPA document, which is what ONDA argues is required. See Blue Mtns. Biodiversity Project, 161 F.3d at 1214 (agency's analysis and "defense of its position" must be found in NEPA document itself); Ore. Natural Desert Ass'n v.

Rasmussen, 451 F.Supp.2d 1202, 1212–13 (D. Or. 2006) (holding that decision authorizing rangeland project violated NEPA where BLM failed to consider "whether there were changes in or additions to the wilderness values" and "whether the proposed action in that area might negatively impact those wilderness values"). Nor does BLM commit to allowing the public to participate in its multiple-use balancing process pursuant to FLPMA, in order to ensure the agency meets its statutory mandate to manage the LCGMA public lands for "multiple use and sustained yield" and to insure its final decision do not cause "unnecessary or undue degradation" of the lands. 43 U.S.C. §§ 1702(d) (requiring opportunities for public involvement in FLPMA decision making), 1732(a) (multiple-use provision), 1732(b) ("unnecessary or undue degradation" provision); see also Ore. Natural Desert Ass'n v. Shuford, 2006 WL 2601073, at *10 (D. Or. 2006) (stating that ONDA's wilderness claims fall under "two independent and dist[inct] statutory duties"—NEPA and FLPMA). Thus, BLM's requested relief does not ensure the agency will fully or properly address ONDA's two wilderness-related claims.

Defendants assert that "based on [BLM's] review and consideration of that earlier decision of this Court . . . [BLM] intends to address the potential effects of the five challenged decisions on any wilderness characteristics." BLM Stay Memo at 4. The unnamed decision is, of course, Oregon Natural Desert Ass'n v. Rasmussen. In Rasmussen, this Court held that BLM's decision authorizing a smaller but otherwise largely identical rangeland project on Beaty Butte in BLM's Lakeview District violated NEPA because BLM conducted "no significant wilderness analysis" for the EA, failed to take a "hard look" at impacts to wilderness resource values from the project, and improperly relied on the "one-time inventory" the agency had conducted in the 1970s. Rasmussen, 451 F.Supp.2d at 1212–13 (decision made "in the absence of current information on wilderness values" violates NEPA). Yet, because BLM has been on notice for

more than six years concerning impacts to wilderness resource values issues within the LCGMA, the agency cannot now use Rasmussen to escape or improperly delay judicial review.

Furthermore, and as BLM acknowledges, see BLM Stay Memo at 3–4, only two of ONDA's six claims in this action involve the potential effects of the LCGMA projects and grazing decisions on wilderness values. See Complaint (Dkt # 1) at ¶¶ 50–75 (claims for relief). ONDA's other claims target BLM's failure to properly consider the suitability of the public lands for continued domestic grazing, failure to provide for riparian area protection and water quality in accordance with the governing land use plan, failure to take a "hard look" and ensure against "unnecessary or undue degradation" vis-à-vis defunct rangeland projects, and failure to prepare an EIS. BLM's proposed "additional NEPA analysis" concerning "the potential effects of the adopted LCGMA projects and grazing management strategies . . . on any wilderness characteristics found to be present" in the LCGMA, BLM Exh. A at 1, will have no bearing on Claims Three, Four, Five, or Six. Moreover, Claims Three, Four and Five go to livestock grazing authorized under the Final Decisions that is currently on-going throughout the LCGMA. Thus, because BLM's proposed stay or remand will not directly address four of ONDA's six claims, and it is uncertain whether it would even properly address ONDA's two wilderness-related claims, this Court should not issue the relief the agency seeks in its motion.

D. BLM's Motion is Untimely.

Finally, BLM's motion also should be denied because it is untimely.[5] The time for "voluntary" reconsideration, BLM Stay Memo at 5, has long passed. As explained above, ONDA first specifically asked BLM to consider the impacts of its LCGMA grazing authorizations on

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[5] See, e.g., Steinberg v. U.S. Dep't of Justice, 23 F.3d 548, 551 (D.C. Cir. 1994) (request for remand on basis of intervening Supreme Court authority denied because agency's six month delay in seeking remand was too lengthy). Here, BLM's stay motion is doubly ineffective because it suffers from both lack of adequate grounds and untimeliness.

wilderness resource values in November 2001. AR 1907. BLM refused to do so, and continued to refuse to do so throughout the NEPA process for the LCGMA. AR 1908, 155–160, 31–32. ONDA filed its Complaint in September 2006. Dkt # 1. Thus, more than five years after first being put on notice, and seven months after this action was initiated, BLM's motion is far too late to justify "voluntary . . . additional NEPA analysis." BLM Stay Memo at 5.

In similar situations, courts have denied agencies' requests for stays or voluntary remands:

> The Court will not allow the voluntary remand proposed by defendants. Three years have passed since the Service declined to designate the frog's habitat as critical. Two years have passed since the Ninth Circuit's decision in *Natural Resources*. More than a year has passed since defendants were put on notice of this legal challenge. The Act authorizes the Service to revise the challenged decision at any time. 16 U.S.C. § 1533(a)(3)(B) (agency may revise critical habitat designation where appropriate).[[6]] The Service has had ample opportunity to reevaluate its decision of its own accord; now it must do so by order of the Court.

Jumping Frog Research Inst. v. Babbitt, 1999 WL 1244149, *2 (N.D. Cal. 1999). See also NRDC v. Norton, 2007 WL 14283, at *8–13, *13–16 (denying agency's motions for voluntary remand or for stay pending completion of re-consultation under the Endangered Species Act).

With this in mind, the harm to ONDA and the public interest far outweighs Defendants' desire to redo the LCGMA analyses before this Court has a chance to review the Final Decisions

[6] The case dealt with a request for a voluntary remand in an Endangered Species Act action. Of course, under NEPA there is no express provision like this allowing an agency to "revise" its decision "at any time." Because NEPA includes no private right of action, NEPA claims must be brought pursuant to the Administrative Procedure Act. Under an APA challenge to "final agency action," "the court shall review the whole record or those parts of it cited by a party." 5 U.S.C. § 706. The agency's decision must stand or fall on the record before the agency at the time of the decision. Camp v. Pitts, 411 U.S. 138 (1973). The agency's justification for its decision—i.e., the rational connection between the facts found and the decision made—must be contained within the four corners of the EA and DN/FONSI itself. Blue Mtns. Biodiversity Project, 161 F.3d at 1214; see also Olenhouse v. Community Credit Corp., 42 F.3d 1560, 1575–79 (10th Cir. 1994) (agency decision must be supported by the facts in the record).

on the merits. See CMAX, 300 F.2d at 268 (citing Landis, 299 U.S. at 254–55; courts weigh the competing interests at stake in evaluating a motion to stay). Granting BLM's motion and restarting the litigation process would not, as Defendants contend, conserve, but rather would squander, the Court's and the parties' resources. A stay or remand would undermine the time and effort ONDA has devoted in participating in the NEPA process, participating in the agency's administrative appeal process, filing this case, and seeking temporary solutions concerning some of the rangeland projects at issue. It also would undermine conservation of wilderness resource values and key sagebrush steppe wildlife habitat BLM is charged with protecting, as these public resources would continue to suffer under the current grazing regime until ONDA could once again secure judicial review at some unspecified time in the future after BLM has completed its post-decision process. Particularly because the complained of livestock grazing is currently ongoing, this is precisely the result the courts consistently have sought to avoid.

Accordingly, this litigation can and should proceed with briefing on the merits of ONDA's claims. BLM's choice not to analyze impacts to wilderness resource values during its multi-year LCGMA planning process, and any decision the agency may now make to not defend those portions of its LCGMA final decisions, should not deprive ONDA of its right to judicial review.[7] Granting a stay or remand would defeat judicial economy and harm the public interest because it would be an open invitation for BLM to "voluntarily" pull its grazing decisions only if and when it is sued in the future. See AR 1986 (LCGMA Evaluation explaining that Louse Canyon GMA is the first of eight GMA processes Vale District's Jordan Resource Area will

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[7] Although not directly relevant to this Court's decision on BLM's stay motion, the appropriate course of action would have been for the agency to settle one or more of ONDA's claims. At this point, any further analysis BLM undertakes concerning impacts to wilderness values might only be relevant to the scope of relief the Court might issue following a decision on the merits of ONDA's claims.

undertake). Thus, deciding the merits of ONDA's claims is the appropriate exercise of the Court's authority to determine whether the LCGMA Final Decisions, based on the existing administrative record, comply with NEPA, FLPMA, and the APA.

CONCLUSION

For the reasons stated above, ONDA respectfully asks this Court to deny Defendants' motion to stay.

DATED this 27th day of April, 2007

Respectfully Submitted,

s/ Peter M. Lacy

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

Of Attorneys for Plaintiffs