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

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

Case No. 06-1311-MO

Plaintiffs,

v.

**MEMORANDUM IN SUPPORT OF
MOTION TO COMPEL PRODUCTION
OF ADMINISTRATIVE RECORD**

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.

INTRODUCTION

Plaintiffs Oregon Natural Desert Association and Western Watersheds Project (collectively referred to as “ONDA”) respectfully request that the court enter an order requiring Defendants Carolyn Freeborn *et al.* (“BLM”) to file the administrative record in the above-captioned action. Despite its best attempts, ONDA has been unable to broker an agreement with BLM concerning production of the record and setting dates for briefing an ONDA summary judgment motion. BLM’s most recent communication to ONDA indicates the agency will not produce the administrative record because it intends to file a motion to stay litigation while the

agency patches up its flawed NEPA analysis for the challenged project. Because this Court must review the challenged agency decisions on the basis of the whole record as it existed at the time the agency made those decisions, and because further delay in production of the administrative record will harm ONDA's and the public's interests, ONDA respectfully asks the Court to grant the relief prayed for herein.

BACKGROUND

ONDA initiated this action on September 14, 2006, challenging BLM's final decision to adopt the "Louse Canyon Geographic Management Area" ("LCGMA") rangeland project and its associated livestock grazing permit re-authorizations. 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. See also Memorandum in Support of Plaintiffs' Motion for Temporary Restraining Order (Dkt # 7) (describing claims in detail).

Following BLM's agreement not to construct projects that would directly impact ONDA-inventoried and -proposed Wilderness Study Areas ("WSAs"), and ONDA's subsequent withdrawal of its Motion for Temporary Restraining Order (Dkt ## 9, 10), the parties discussed production of the administrative record and also engaged in a good-faith discussion of potential settlement of ONDA's claims. Despite their efforts, the parties were not able to agree upon a settlement. On December 13, 2006, counsel for ONDA contacted Defendants in writing to confirm that settlement was not currently possible between the parties and that the administrative record needed only to be organized and numbered in order to be filed with the Court. ONDA asked BLM to confirm a date by which it could file the administrative record so that the parties could work from there on establishing a summary judgment briefing schedule.

Counsel for Defendants had initially promised to file the record by November 17, 2006 or the “first full week of December,” see Attachment A, and then represented to ONDA and to the Court on December 22, 2006 that the record was essentially prepared save for scanning and numbering. See Attachments A & B (also indicating Defendants would lodge the record “shortly after” counsel’s return from vacation, Jan. 4, 2007). On January 19, 2007, Defendants’ counsel informed ONDA that BLM intends to file a motion seeking to stay this litigation while the agency completes “additional analysis and reconsider[s] the challenged decisions in the light thereof.” See Attachment B. Three days later, BLM issued a letter to the public stating its intention to “augment the analysis in the EA.” Attachment C.¹ As of this filing more than four months after this action was initiated, BLM has not filed an administrative record and opposes this motion, asserting that it will not file a record at this time.

ARGUMENT

ONDA challenges the LCGMA EA and its five associated Final Decisions, alleging a number of violations of NEPA and FLPMA. Because those statutes do not contain a private right of action, BLM’s Final Decisions, under which the agency adopted the rangeland projects and grazing schemes analyzed in the LCGMA EA, are reviewed under the Administrative Procedure Act (“APA”). 5 U.S.C. § 701 *et seq.* The APA directs courts to hold unlawful and set aside final agency action, findings, and conclusions that are arbitrary, capricious, an abuse of discretion, or

¹ If Defendants do file a motion to stay, ONDA will respond in more detail at that time. In general, ONDA will oppose any such motion on the basis that: (1) BLM should not be permitted to patch up decisions already made because the Court’s decision of the lawfulness of the challenged final decisions is to be based on the administrative record as it existed at the time those decision were made; (2) any such “additional analysis” pertaining to wilderness values would have no direct impact on at least four of ONDA’s six claims, concerning issues such as the agency’s range of alternatives under NEPA, its consideration of the suitability of these lands for further grazing, and its failure to provide for riparian function standards as required under the governing land use plan (Claims III, IV, V, and VI); and (3) a stay would harm ONDA’s and the public’s interests, both procedurally and substantively (i.e., on the ground).

otherwise not in accordance with law. Id. § 706(2)(A). See, e.g., Bennett v. Spear, 520 U.S. 154, 175 (1997) (describing “final” agency action); 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”); Mont. Snowmobile Ass’n v. Wildes, 103 F.Supp.2d 1239, 1241–42 (D. Mont. 2000) (“Final agency action occurs with the completion of the decision making process under NEPA.”) (citing Ore. Natural Res. Council v. Harrell, 52 F.3d 1499, 1503 (9th Cir.1995)); Idaho Watersheds Project v. Hahn, 307 F.3d 815, 828 (9th Cir. 2002) (holding that BLM’s issuance of grazing permits constitutes final agency action).

Under the scope of review outlined in the APA, the statutory language of Section 706 is unambiguous: “In making the foregoing determinations, the court shall review *the whole record* or those parts of it cited by a party” 5 U.S.C. § 706 (emphasis added). The “whole record” language refers to the administrative record. See Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 743–44 (1985). Furthermore, judicial review is conducted on the basis of the record that was before the agency *at the time it made its decision* and, with certain exceptions, should normally be limited to that record. See Southwest Ctr. for Biol. Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1450 (9th Cir. 1996).² The Ninth Circuit has held that an agency must produce an administrative record to supply the evidence for the affirmative decisions that it made at the time that it made them. Friends of the Clearwater v. Dombeck, 222 F.3d 552, 560 (9th Cir. 2000) (stating that “[w]hen a plaintiff challenges a final agency action, judicial review is normally limited to the administrative record in existence at the time of the agency’s decision”) (citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971)); see also Camp v.

² See also Lands Council v. Powell, 395 F.3d 1019, 1030 (9th Cir. 2005); Inland Empire Public Lands Council v. Glickman, 88 F.3d 697, 703–04 (9th Cir. 1996) (describing standards for supplementation of administrative record).

Pitts, 411 U.S. 138, 143 (1973) (“The focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.”).

Accordingly, whether BLM conducts further analyses or not, this Court’s review of the agency’s Final Decisions is limited to the record as it existed at the time those decisions were made. The five Final Decisions under challenge are dated July 7, 2005. See Complaint & Answer at ¶ 43. Thus, all evidence purporting to support those Final Decisions must have been before the agency as of July 7, 2005. Citizens to Preserve Overton Park, 401 U.S. at 420. If Defendants wish to supplement the administrative record prior to or during briefing of cross-motions for summary judgment, they could seek leave to do so, justifying their request under the standards announced by the Ninth Circuit in Inland Empire. 88 F.3d at 703–04.

BLM’s refusal to file the administrative record, and its announced desire to undertake “additional analysis” to “augment” the existing EA, is an attempt to escape the inevitable. As Defendants well know, this Court ruled less than five months ago that BLM has a duty to consider impacts to wilderness resource values when it approves rangeland projects such as the ones at issue here. Ore. Natural Desert Ass’n v. Rasmussen, 451 F.Supp.2d 1202, 1213 (D. Or. 2006). BLM simply has failed to do so for the LCGMA projects. The Court should reject Defendants’ attempt to thwart the purposes of NEPA by preparing a post-hoc analysis to bandage a faulty decision already made. See Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1153–54 (9th Cir. 2006) (statute’s twin objectives are to ensure that BLM “consider[s] every significant aspect of the environmental impact of a proposed action” and to “inform the public that it has indeed considered environmental concerns in its decisionmaking process”) (citing Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1066 (9th Cir. 2002)); Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 97 (1983). See also Blue Mtns. Biodiversity

Project v. Blackwood, 161 F.3d 1208, 1216 (9th Cir. 1998) (emphasizing “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)).

By withholding production of the administrative record, Defendants harm ONDA’s and the public’s interests and impede ONDA’s ability to move forward with this litigation. The Ninth Circuit and other courts consistently have made clear that an agency’s failure to comply with NEPA’s procedural requirements constitutes immediate and irreparable injury to a plaintiff’s interests. “In the NEPA context, irreparable injury flows from the failure to evaluate the environmental impact of a major federal action.” High Sierra Hikers Ass’n v. Blackwell, 390 F.3d 630, 642 (9th Cir. 2004), citing Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985); see also Citizens for Better Forestry v. U.S. Dep’t of Agric., 341 F.3d 961, 971 (9th Cir. 2003) (“environmental plaintiff was ‘surely . . . harmed [when agency action] precluded the kind of public comment and participation NEPA requires’”); Davis v. Mineta, 302 F.3d 1104, 1115 (10th Cir. 2002) (holding that “harm to the environment may be presumed when an agency fails to comply with the required NEPA procedure”). Likewise, Defendants’ refusal to file the administrative record impedes this Court’s obligation to determine the legality of the challenged final agency actions by “review[ing] the whole record or those parts of it cited by a party.” 5 U.S.C. § 706.

BLM’s continued delay in producing the record also threatens on-the-ground harm to ONDA’s interests. In addition to harm to wilderness resource values, the LCGMA projects, if implemented, will cause: an increased risk of invasion and dominance of exotic plant species;

conversion of treated areas for 20 to 70 years to a grass-dominated (rather than native sage-steppe shrubland) landscape; pipeline construction scars that will last at least two to five years; “heavily impacted and denuded” vegetation surrounding new watering troughs and spring renovation projects “due to livestock concentration”; “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 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 Memorandum in Support of Plaintiffs’ Motion for Temporary Restraining Order (Dkt # 7), at 25–29 (describing potential for irreparable harm, citing and quoting from Ex. 1 [BLM’s LCGMA EA] at 9–16).

With grazing turnout scheduled on or about March 1, 2007, see BLM Answer at ¶ 29 (admitting grazing season runs from March 1 to Oct. 15 on allotments at issue), ONDA and the public face the probability that, absent injunctive relief, the livestock grazing and/or rangeland projects authorized pursuant to the decisions under challenge will begin long before this court could possibly review the merits of ONDA’s claims. Many of the challenged projects already have been completed, see Attachment C, meaning new grazing use patterns and levels dependent on those projects could now occur as early as March 1, 2007. Unfortunately, in the absence of court intervention at this point, the threat of injury to ONDA’s and the public’s interests is imminent. See also Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 545 (1987)

(recognizing that “environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e. irreparable”). At a minimum, therefore, BLM should be compelled to immediately produce the administrative record so that this action may be kept moving at an appropriate pace.

CONCLUSION

For the reasons stated above, ONDA respectfully asks this Court to order Defendants to immediately file the administrative record purporting to support the challenged Final Decisions.

DATED this 29th day of January, 2007

Respectfully Submitted,

s/ Peter M. Lacy

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Of Attorneys for Plaintiffs