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

OREGON NATURAL DESERT ASSOCIATION,)
WESTERN WATERSHEDS PROJECT, and)
COMMITTEE FOR IDAHO’S HIGH DESERT,)

Plaintiffs,)

v.)

BUREAU OF LAND MANAGEMENT and)
JERRY TAYLOR, Field Manager, Jordan)
Resource Area, BLM,)

Defendants.)

Case No. _____

COMPLAINT

(Environmental Matter)

NATURE OF ACTION

1. Defendants Bureau of Land Management and Jerry Taylor (hereinafter “BLM”) are violating 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, by attempting to implement an emergency fire rehabilitation of the 67,052-acre Jackies Butte Fire. The proposed

action would seed non-native plant species on 1500 acres of public lands burned in the Jordan Creek Fire and 33,787 acres of public lands burned in the Jackies Butte Fire, for a total of 35,287 acres (approximately 55 square miles) seeded to exotic species. The proposed seeding would consist predominantly of crested wheatgrass, an exotic plant species. This action seeks judicial relief ordering the BLM to comply with the requirements of NEPA and FLPMA in their management of the public lands in the Jackies Butte area of eastern Oregon.

JURISDICTION AND VENUE

2. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 because this action arises under the laws of the United States, including the National Environmental Policy Act, 42 U.S.C. §§ 4321–4361, the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701–1784, the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 et seq., the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq., and the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412 et seq. An actual, justiciable controversy exists between the parties, and the requested relief is therefore proper under 28 U.S.C. §§ 2201–2202 and 5 U.S.C. § 701–06.

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

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

PARTIES

5. Plaintiff OREGON NATURAL DESERT ASSOCIATION (ONDA) is an Oregon non-profit public interest organization of approximately 1500 members. It is headquartered in

Bend, Oregon and also has offices in Portland, Oregon. ONDA was established to protect, defend, and restore forever, the health of Oregon's native deserts. ONDA actively participates in Department of the Interior proceedings and decisions concerning the management of public lands in eastern Oregon. ONDA brings this action on its own behalf and on behalf of its members and staff, many of whom regularly enjoy and will continue to enjoy public lands within and surrounding the Jackies Butte allotment for educational, recreational, and scientific activities, including hiking, camping, and observing wildlife.

6. Plaintiff WESTERN WATERSHEDS PROJECT (WWP) is an Idaho non-profit membership organization dedicated to protecting and conserving the public lands and natural resources of watersheds in the American West. Formerly known as "Idaho Watersheds Project," WWP recently changed its name in order to reflect an expanded mission and involvement in the management of public lands throughout the west. WWP has over 1200 members, including members who live in Oregon. WWP, as an organization and on behalf of its members, is active in seeking to protect and improve the riparian areas, water quality, fisheries, wildlife, and other natural resources and ecological values of western watersheds. WWP and its members have actively participated in agency proceedings concerning the BLM's management of the Jackies Butte allotment. WWP brings this action on behalf of itself and its members.

7. Plaintiff COMMITTEE FOR IDAHO'S HIGH DESERT (CIHD) is an Idaho non-profit membership organization which is dedicated to the protection, restoration, and wise use and enjoyment of the public lands and resources of the sagebrush-steppe high desert of Idaho, eastern Oregon, and northern Nevada. CIHD has over 400 members, including members who live in Oregon. CIHD, as an organization and on behalf of its members, is concerned with and active in seeking to protect and improve the riparian areas, water quality, fisheries, wildlife, and

another natural resources and ecological values of high desert areas, including in the BLM's Vale District in which the Jackies Butte allotment is located. CIHD brings this action on behalf of itself and its members.

8. Plaintiffs and their member use and enjoy the waters, public lands, and natural resources of the Jackies Butte area for many recreational, scientific, spiritual, educational, aesthetic, and other purposes. Plaintiffs' members enjoy fishing, hiking, camping, hunting, bird watching, study, contemplation, photography, and other activities in and around the waters and public lands of the Jackies Butte area. Plaintiffs and their members also participate in information gathering and dissemination, education and public outreach, commenting upon proposed agency actions, and other activities relating to BLM's management and administration of Jackies Butte and the surrounding area. These interests are directly affected by BLM's failure or refusal to comply with federal laws and regulations in authorizing non-native seedings within the Jackies Butte area, and by BLM's failure or refusal to manage the area in a manner that will preserve all natural resources and protect all human uses in the area. The interests of Plaintiffs and their members have been and will continue to be injured and harmed by BLM's actions and/or inactions as complained of herein, including BLM's authorization of non-native seedings within the Jackies Butte area in violation of NEPA and FLPMA. Unless the relief prayed for herein is granted, Plaintiffs and their members will continue to suffer on-going and irreparable harm and injury to their interests.

9. Defendant BUREAU OF LAND MANAGEMENT (BLM) is an agency or instrumentality of the United States, and is charged with managing the public lands and resources of the Jackies Butte area in accordance and compliance with federal laws and regulations.

10. Defendant JERRY TAYLOR is sued solely in his official capacity as Field Office Manager of the BLM's Jordan Field Office, Vale District, in which the BLM Allotments covered by the proposed action are located. Mr. Taylor is the BLM official responsible for issuing the Jackies Butte/Jordan Creek Emergency Fire Rehabilitation Plan EA and September 24, 2001 "finding of no significant impact" (FONSI) and "decision record" (DR) approving the proposal, and has principal authority for the actions and inactions alleged herein.

LEGAL BACKGROUND

National Environmental Policy Act

11. The National Environmental Policy Act (NEPA) is our "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). NEPA's primary purposes are to insure fully informed decision-making and to provide for public participation in environmental analyses and decision-making. See id. § 1500.1(b), (c). The Council on Environmental Quality (CEQ) promulgated uniform regulations implementing NEPA that are binding on all federal agencies. 40 C.F.R. §§ 1500 et seq.

12. NEPA requires that federal agencies prepare an environmental impact statement (EIS) for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C § 4332(2)(C). NEPA requires that the decisionmaker, as well as the public, be fully informed—i.e., "that environmental information is available to public officials and citizens before decisions are made and before action is taken." 40 C.F.R. § 1500.1(b). NEPA ensures that the agency . . . will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger [public] audience." Robertson v. Methow Valley Citizens Council, 490

U.S. 332, 349 (1989). See also Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998) (agency analysis must be “fully informed and well-considered”).

13. The threshold question in a NEPA case is whether a proposed agency action will “significantly affect” the environment, thereby triggering the requirement to prepare an EIS. 42 U.S.C. § 4332(2)(C). See also Blue Mtns. Biodiversity Project, 161 F.3d at 1212. An agency may first prepare an environmental assessment (EA) to decide whether the environmental impacts of the proposed action are significant enough to require preparation of an EIS. An EA “briefly provide[s] sufficient evidence and analysis for determining whether to prepare an EIS or a finding of no significant impact [FONSI].” 40 C.F.R. § 1508.9.

14. If an agency decides not to prepare an EIS, it must provide a “convincing statement of reasons” to explain why a project’s impacts are insignificant.” 161 F.3d at 1212 (quoting Save the Yaak Comm. v. Block, 840F.2d 714, 717). The agency must show that it has taken a “hard look” at the environmental impacts of the proposed action. 161 F.3d at 1211. See also Nat’l Parks & Conservation Ass’n. v. Babbitt, 241 F.3d 722, 730 (9th Cir. 2001); Wetlands Action Network v. U.S. Army Corps of Eng., 222 F.3d 1105, 1114 (9th Cir. 2000) (reviewing agency’s decision to prepare and EA rather an EIS).

15. In determining whether to prepare an EIS as part of the NEPA planning process, an agency must consider the scope and the significant issues to be analyzed under a proposal. 40 C.F.R. § 1501.7(a)(2). “Scope” consists of both cumulative actions (“which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement”) and connected actions (“which means they are closely related and should therefore be discussed in the same impact statement”). Id. § 1508.25(a)(1), (2). In determining whether a proposed action will have a significant effect on the environment, an

agency must consider “[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts.” Id. § 1508.27(b)(7). If several actions have a cumulative environmental effect, “this consequence must be considered in an EIS.” Neighbors of Cuddy Mtn. v. U.S. Forest Serv., 137 F.3d 1372, 1378 (9th Cir. 1998) (internal quotes omitted).

16. An EIS must be prepared if “substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor.” Idaho Sporting Congress v. Thomas, 137 F. 3d 1146, 1149 (9th Cir. 1998) quoting Greenpeace Action v. Franklin, 14 F. 3d 1324, 1332 (9th Cir. 1992); see also Sierra Club v. U.S. Forest Serv., 843 F. 2d 1190, 1193 (9th Cir. 1988). See also 40 C.F.R. §1501.4 (EIS must be prepared if proposed action would normally be expected to have a significant impact on the environment). The EIS is intended to provide decisionmakers and the public with a complete and objective evaluation of both beneficial and adverse significant environmental impacts resulting from a proposed action and all reasonable alternatives. Id. § 1502.1 (an EIS “shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment”). See also BLM Handbook H-1790-1, NEPA Handbook, pg. V-1 (“BLM Handbook”).

Federal Land Policy and Management Act

17. The Federal Land Policy and Management Act (FLPMA) is the BLM’s basic “organic act” for management of the public lands under the agency’s administration. FLPMA requires the BLM to manage the public lands consistent with “principles of multiple use and sustained yield.” 43 U.S.C. § 1732(a). This means that the BLM must “take into account the long-term needs of future generations for renewable and nonrenewable resources, including, but

not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values.” Id. § 1702(c).

18. The BLM must manage the public lands in a manner consistent with FLPMA’s multiple use mandate, which requires management of resources “without permanent impairment” of the quality of the environment. Id. The primary standard for the BLM’s management of the public lands requires that “the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the [public] lands.” Id. § 1732(b) (emphasis added).

STATEMENT OF FACTS AND GENERAL ALLEGATIONS

19. On August 9, 2001, a lightning storm ignited fires on the south side of Jackies Butte; near the Bowden Ranch; and near the confluence of the Jordan Creek and the main stem of the Owyhee River, in eastern Oregon. The Jackies Butte fire burned a total of 67,052 acres of public land in the Jackies Butte Summer, Jackies Butte Winter, Bowden Hills, and Eiguren Allotments. The Jordan Creek fire burned approximately 1530 acres of public lands in the West Cow Creek Allotment. Each of these grazing allotments is managed by the BLM as part of Jordan Resource Area, within the BLM’s Vale District.

20. The Jackies Butte area features many important environmental and natural resource values, including its boundary to the north and east with the Owyhee Wild and Scenic River canyon corridor; its importance as a component—albeit highly degraded and fragmented as a result of historic and current overgrazing by livestock—of the sagebrush steppe ecosystem; the presence of year-long habitat for sage grouse, a BLM-special status species, including several sage grouse leks (breeding sites); the presence of federally protected wild horses; important Mule Deer and Pronghorn Antelope winter range; and the presence of California Bighorn Sheep

habitat.

21. Although the burned areas historically consisted of a Wyoming big sagebrush overstory with a bluebunch wheatgrass/Sandberg's bluegrass and bottlebrush squirreltail understory, continued overgrazing through the years has caused an increase in fire frequency and the area has become infested with the exotic weed species cheatgrass, pepperweed, and tumble mustard. The burned area was predominantly old crested wheatgrass seedings, cheatgrass, pepperweed, tumble mustard, and Russian thistle.

22. Following the Jackies Butte and Jordan Creek fires, the BLM issued the fire rehabilitation EA at issue in this action, proposing to seed non-native plant species (primarily crested wheatgrass) on 33,787 acres of the public lands burned in the Jackies Butte fire and 1500 acres of the public lands burned in the Jordan Creek fire. Despite recognizing that "[t]he lack of sagebrush cover in and around the Jackies Butte area has long been considered a limiting factor and threat to sagebrush steppe wildlife identified in the existing environment," the BLM proposed to aerially seed only 4500 acres (approximately seven percent) of the Jackies Butte burned area with sagebrush.

23. There are substantial questions whether the proposed action will significantly affect the environment, and the EA fails to provide a complete and objective evaluation of these significant environmental impacts. These include:

- (a) the failure of the EA to describe the effects of, and a rational explanation for, seeding 55 square miles of an already diminished ecosystem with exotic plant species, with respect to having any possibility in the future of establishing a native species vegetative community on these public lands;
- (b) the failure of the EA to discuss and describe any rehabilitation actions on the 31,765

burned acres not being seeded under the proposal, aside from two years or less of rest from livestock grazing;

(c) the failure to provide an adequate period of rest from livestock grazing after the seeding, if the BLM's ultimate objective is in fact to convert these areas back to native species (which is not explicitly stated in the EA);

(d) the failure to even mention the impacts of the rehabilitation, especially curtailed or inadequate rest from grazing, on important arid land ecosystem components such as microbiotic crusts;

(e) the failure to fully and adequately explain the deviation from established default BLM policy, as stated in the BLM Land Use Planning Manual, of re-seeding with native species, including the failure to provide any explanation of why past native seedings have failed;

(f) the failure to articulate a reasonable explanation of the decision to limit native species seeding to only seven percent of the burned area, again including the failure to explain why past native seeding attempts have failed;

(g) the effects with respect to soil-depletion of seeding crested wheatgrass in an area already severely affected by exotic plant species and livestock grazing;

(h) the fact that spending \$1.6 million to seed an exotic plant species is "controversial" within the meaning of 40 C.F.R. § 1508.27(b); and

(i) the failure to address the cumulative impacts of the proposed action in conjunction with other related, connected actions in the planning area, in particular the proposed Corbin Creek Pipeline, as well as past crested wheatgrass seeding that may overlap with the present proposal.

24. The presence of (and the BLM's failure to raise or answer) such substantial questions as to whether the proposed action will significantly affect the environment requires the BLM to prepare an EIS.

25. The EA also fails to discuss an adequate range of alternatives to the proposed action that meet the stated need and purpose, as required under NEPA, and provides a cursory analysis of alternatives. The purpose of the proposed action, according to the EA, is to "establish adapted perennials" to stabilize soils, prevent re-invasion of cheatgrass, reduce fire frequency, establish a perennial forage base for wild horses, wildlife and livestock, and re-establish a shrub cover in certain areas. EA at 1-2. The BLM fails to analyze any alternative that (1) seeds all native species on significant portions of burned land, (2) would mechanically seed sagebrush or other native shrubs, or (3) would use existing pasture fences instead of newly installed electric fencing.

26. The EA "considered but eliminated" without serious discussion alternatives that would (1) attempt temporary instead of electric fencing, (2) use a native seed mix, or (3) totally close to livestock grazing one pasture within the Jackies Butte Summer Allotment. However, without any discussion of the reasons for past failures in native seedings and the possibility of learning from past mistakes, the BLM has forsaken NEPA's mandate to fully discuss a reasonable range of alternatives and to provide full public disclosure of significant environmental impacts, the affected environment, and reasonable alternatives. 42 U.S.C. §§ 4332(2)(C)(iii) (EIS must contain "a detailed statement [of] . . . alternatives to the proposed action"); 4332(2)(E) (independent requirement that agencies must "study, develop, and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources"). See also 40 C.F.R. § 1500.1(b) (requiring

“that environmental information is available to public officials and citizens before decisions are made and before action is taken”); id. § 1502.1 (an EIS “shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment”); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989) (NEPA “ensures that the agency . . . will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger [public] audience.”); Blue Mtns. Biodiversity Project, 161 F.3d at 1212 (agency analysis must be “fully informed and well-considered”).

27. Without discussion of the vitally important environmental and other factors raised above, the BLM cannot claim that it has made an informed decision in the Jackies Butte EA. As a result of the EA’s shortcomings, the BLM has failed to take the requisite “hard look” at the proposed action.

28. In addition, the BLM has failed to satisfy its obligations under FLPMA, which requires the agency to manage the public lands according to the principles of “multiple use.” This means the BLM must manage the Jackies Butte Allotment and the surrounding public lands “without permanent impairment of the productivity of the land and the quality of the environment.” 43 U.S.C. § 1702(c) (emphasis added). The BLM has failed to analyze whether seeding to non-native plant species on such a vast scale is consistent with the agency’s multiple use mandate. Introduction of crested wheatgrass on over 35,000 acres of public land will permanently impair the quality of the lands within the Jackies Butte Allotment.

29. The proposed action also fails to satisfy FLPMA’s requirement that the BLM

“shall take any action necessary to prevent unnecessary or undue degradation of the [public] lands.” Id. § 1732(b). The BLM has defined “unnecessary or undue” to require the least degrading alternative. See Sierra Club v. Hodel, 675 F. Supp. 594, 610 (D. Utah 1987), aff’d in part, rev’d in part, 848 F.2d 1068 (10th Cir. 1988). The least degrading alternative in this case would be to reseed the entire burned area with native sagebrush and eliminate livestock grazing for a sufficient time to ensure establishment of native species.

30. The BLM’s failure to explain why past attempts at native seedings have failed makes it impossible to conclude that all reseeding of native vegetation will fail.

31. Defendants’ proposal to seed over 35,000 acres with the non-native species crested wheatgrass, in violation of NEPA and FLPMA, will result in continued ecological degradation of the Jackies Butte area, perhaps eliminating any realistic chance to restore this significant segment of the public land to its native condition. As a result, Plaintiffs will suffer irreparable injury and harm to their interests.

32. Plaintiffs have no adequate remedy at law for the Defendants’ violations as alleged herein. Without immediate injunctive relief ordering Defendants to comply with the procedural requirements of NEPA and the substantive requirements of FLPMA, by preparing an EIS that takes a hard look at the alternative courses of action and prevents unnecessary or undue degradation of the public lands, Plaintiffs will suffer irreparable harm.

**FIRST CLAIM FOR RELIEF:
VIOLATIONS OF NEPA**

33. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

34. NEPA requires all federal agencies to undertake a thorough and public analysis of the environmental consequences of proposed federal actions, including a detailed EIS for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C.

§ 4332(2)(C). NEPA also requires cumulative analyses of the likely environmental impacts of proposed actions. See 40 C.F.R. §§ 1508.7; 1508.25(a)(2). Such analyses must include consideration of a reasonable range of alternatives to a proposed action, and means to mitigate adverse impacts. 42 U.S.C. § 4332(2)(C)(iii) (alternatives); see also 40 C.F.R. § 1502.14 (alternatives including the proposed action).

35. The BLM violated NEPA and the federal regulations in multiple respects through issuance of the September 24, 2001 decision record and finding of no significant impact with respect to the Jackies Butte EA. Specifically:

- a. Based on the above facts and legal obligations, the BLM should have prepared an EIS for the proposed action, because the proposal is a major federal action that will significantly impact the environment.
- b. Based on the above facts and legal obligations, the EA violates NEPA because the document fails to analyze fully the cumulative impacts of seeding non-native plant species per the Jackies Butte EA, in connection with construction of the Corbin Creek Pipeline, also on the Jackies Butte Summer Allotment, and past crested wheatgrass seedings within the project area.
- c. Based on the above facts and legal obligations, the EA violates NEPA because the document fails to consider an adequate range of alternative courses of action that meet the proposal's stated need and purpose.
- c. Based on the above facts and legal obligations, the EA violates NEPA because the BLM has failed to take the requisite "hard look" at all the significant and potential environmental impacts of the proposed action.

36. These failures render the BLM’s decision arbitrary and capricious and not in accordance with NEPA and the federal regulations.

**SECOND CLAIM FOR RELIEF:
VIOLATIONS OF FLPMA AND THE APA**

37. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

38. FLPMA requires the BLM to manage the public lands in accordance with principles of multiple use and sustained yield, meaning the agency must manage the public lands “without permanent impairment” to the quality of the environment. 43 U.S.C. § 1702(c). FLPMA mandates that the BLM “shall take any action necessary to prevent unnecessary or undue degradation of the [public] lands.” *Id.* § 1732(b).

39. The BLM violated FLPMA and the APA in multiple respects through issuance of the September 24, 2001 decision record and finding of no significant impact with respect to the Jackies Butte EA. Specifically:

a. Based on the above facts and legal obligations, the BLM has failed to satisfy FLPMA’s mandate to manage the public lands consistent with the principles of multiple use and sustained yield—that is, the decision to seed over 35,000 acres of non-native plant species violates FLPMA’s requirement that the BLM manage the public lands “without permanent impairment” to those lands.

b. Based on the above facts and legal obligations, the BLM has failed to “take any action necessary to prevent unnecessary or undue degradation of the [public] lands.”

c. Defendants’ decision to implement the proposed action by seeding non-native plant species in the areas delineated in the Jackies Butte EA violates FLPMA, and is final agency action that is arbitrary, capricious, an abuse of discretion, and/or not in accordance with law under the federal Administrative Procedure Act, 5 U.S.C. § 706(2),

which has caused or threatens serious prejudice and injury to Plaintiffs' rights and interests.

WHEREFORE, Plaintiffs pray for relief as set forth below.

PRAYER FOR RELIEF

Plaintiffs respectfully request that the Court grant the following relief:

A. Order, declare, and adjudge that Defendants' proposed action in the Jackies Butte/Jordan Creek Emergency Fire Rehabilitation Plan EA violates NEPA, FLPMA, and the APA;

B. Issue temporary restraining order(s) and/or preliminary injunction(s), as requested by Plaintiffs, barring Defendants from implementing non-native plant species seeding until such time as Defendants have completed a lawful EIS that complies with the procedural requirements of NEPA and the substantive requirements of FLPMA;

C. Award Plaintiffs their reasonable costs, litigation expenses, and attorney's fees associated with this litigation pursuant to the Equal Access to Justice Act and all other applicable authorities; and

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

Dated this _____ day of December 2001.

Respectfully submitted,

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