

Oregon Natural Desert Association

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VIA U.S. CERTIFIED MAIL, RETURN RECEIPT REQUESTED

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Appellant: *Oregon Natural Desert Association*

Re: Appeal and Petition for Stay of EA OR-010-2004-08 ("East-West Gulch Projects EA") and Field Manager's Final Decision as Transmitted via Response to Appellant's Protest

**NOTICE OF APPEAL, STATEMENT OF REASONS, AND PETITION FOR STAY**

**NOTICE OF APPEAL AND STATEMENT OF STANDING**

Pursuant to 43 C.F.R. Part 4, the Oregon Natural Desert Association ("ONDA") hereby appeals the Lakeview Resource Area Field Manager's Final Decision for the "East-West Gulch Projects EA" (OR-010-2004-08) on the Beaty Butte Allotment. ONDA appeals this decision, the EA and all associated documents and actions. This appeal is pursuant to all applicable authority, including the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1782, and the Bureau of Land Management's ("BLM") implementing regulations. Pursuant to 43 C.F.R. Subpart 4160, ONDA on March 17, 2007 timely protested the Field Manager's proposed decision. The Field Manager responded by letter dated April 25, 2007 (received by ONDA April

30, 2007), denying the protest in its entirety. ONDA incorporates by reference all protest points into this appeal.

The Oregon Natural Desert Association is an Oregon non-profit public interest organization of approximately 1,000 members. It is headquartered in Bend, Oregon and also has offices in Portland, Oregon. ONDA's mission is 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, including the Lakeview District's Beaty Butte Allotment and surrounding public lands, and is an interested public on the Beaty Butte Allotment. ONDA has been active in monitoring wilderness values and ecological conditions on the Beaty Butte Allotment since ONDA was established in 1987. See Marlett Decl. at ¶¶ 3–7.

ONDA has long held a particular interest in the management of the public lands on the Beaty Butte Allotment because of the area's significance as a critical swath of relatively intact sage-steppe habitat linking the Hart Mountain National Antelope Refuge to the northwest, to the Sheldon National Wildlife Refuge in northern Nevada, south of the allotment. The Beaty Butte Allotment contains nationally significant public lands which include wilderness study areas, proposed wild and scenic rivers, areas of critical environmental concern, research natural areas, numerous invaluable cultural sites, and significant landscape features such as Beatys Butte itself. Vast segments of the allotment, including the East and West gulches, contain wilderness characteristics worthy of protection for future generations.

The area also supports a wide variety of wildlife, and includes critical winter and migratory habitat for pronghorn antelope, as well as important habitat for sage grouse, pygmy rabbits, Western big-eared bats, ferruginous hawks, burrowing owl, desert and short-horned lizards, and countless other birds and mammals. Sage grouse and pygmy rabbit both are currently under consideration by the U.S. Fish & Wildlife Service for listing as threatened or endangered species under the Endangered Species Act, 16 U.S.C. §§ 1131 *et seq.*

ONDA brings this appeal on its own behalf and on behalf of its members and staff, many of whom regularly enjoy and will continue to enjoy the public lands that are the subject of this proposed action for educational, recreational, spiritual, and scientific activities. ONDA believes the Field Manager's decision is in error and not in accordance with the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, the National Historic Preservation Act of 1966 ("NHPA"), 16 U.S.C. § 470 *et seq.*, as amended, and the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701–1782.

## **BACKGROUND**

In this appeal, the Oregon Natural Desert Association seeks relief to address BLM's decision to implement an extensive "range improvement" project on public lands with inventoried wilderness values on Beatys Butte in eastern Oregon. A federal district court already has determined a prior BLM decision to move forward with this Project was unlawful, in violation of the National Environmental Policy Act. Ore. Natural Desert Ass'n v. Rasmussen, 451 F.Supp.2d 1202 (D. Or. 2006). This incarnation of the BLM's "East-West Gulch Projects" involves

construction of more than 13 miles of new barbed-wire fence, 3.7 miles of above-ground pipelines, 2 miles of new road, 6 new water troughs, 3 steel storage tanks, and 3 cattle guards—all in an area near the summit of Beaty Butte which possesses outstanding wilderness opportunities, regionally significant sagebrush-steppe wildlife habitat, and locally critical riparian habitat.

## **I. The Beaty Butte Allotment.**

Beaty Butte, which lies about 50 miles east of Lakeview, Oregon, is a 7,918-foot elevation volcanic butte situated in one of the most remote areas of eastern Oregon's high desert. The public lands on and surrounding Beaty Butte comprise a significant and critical swath of relatively intact sagebrush-steppe habitat linking the Hart Mountain National Antelope Refuge to the northwest, with the Sheldon National Wildlife Refuge in northern Nevada. The area contains nationally significant public lands which include wilderness study areas, proposed wild and scenic rivers, BLM-designated "Areas of Critical Environmental Concern" and "Research Natural Areas," invaluable cultural sites dating back thousands of years, and habitat for a wide array of sagebrush-steppe and desert riparian wildlife. Vast segments of the Beaty Butte Allotment, including the East and West Gulches, contain wilderness characteristics worthy of conservation for future generations.

The Bureau of Land Management's Lakeview District manages more than 3.5 million acres of public land in the high desert and northern Great Basin of south-central Oregon. The district's Lakeview Resource Area ranges from Klamath Falls, to Fort Rock and Christmas Valley, to Summer Lake, Lake Abert and Abert Rim, to the Hart Mountain National Antelope Refuge and Beaty Butte near the Oregon-Nevada border. See Lakeview Resource Management Plan ("RMP"), Final Environmental Impact Statement ("FEIS"), Vol. 1 at 1-1 & Vol. 3 at Map I-1. Encompassing almost 507,000 acres of public land, the Beaty Butte Allotment is one of the largest livestock grazing allotments in Oregon. See Beaty Butte Allotment Management Plan ("AMP") at A-99 (allotment summary).

The Beaty Butte Allotment is divided into eleven pastures, including the 200,000-acre North Pasture, within which the East and West Gulches are situated. AMP, Map 1 (showing pasture boundaries) & Appx. 1-3 to 1-6 (describing 11-pasture grazing rotation system). The allotment's configuration into pastures allows the BLM to authorize (or not authorize) grazing on a pasture-by-pasture basis each year, via "Annual Operating Plans." Near the summit of Beaty Butte are two oases of riparian habitat known as the East and West Gulches.

ONDA has long held a particular interest in the management of the public lands on the Beaty Butte Allotment because of the area's significance as a critical corridor of relatively intact sagebrush-steppe habitat linking the Hart Mountain National Antelope Refuge with the Sheldon National Wildlife Refuge in northern Nevada. See Lakeview RMP at Map G-3.<sup>1</sup> The allotment exhibits a stunningly diverse landscape, ranging from ridges and hills to table lands and rimrock, from sagebrush-steppe to playas, lakes, springs, streams and riparian areas, and from scattered

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<sup>1</sup> Map of grazing allotments in Lakeview Resource Area; Beaty Butte Allotment is identified as "0600."

old-growth juniper and mahogany woodlands to the 7,918-foot elevation defining landscape feature of Beatys Butte<sup>2</sup> itself. Beaty Butte Proposed AMP/FEIS at 25–30.

The area supports a wide diversity of wildlife, and includes critical winter and migratory habitat for pronghorn antelope, as well as important habitat for sage grouse, pygmy rabbits, Western big-eared bats, ferruginous hawks, burrowing owl, desert and short-horned lizards, and countless other birds and mammals. Beaty Butte Proposed AMP/FEIS at 35–37. The neighboring Hart Mountain and Sheldon wildlife refuges are unique in that they comprise the largest area in the Great Basin no longer grazed by livestock. Because the lands on and surrounding Beaty Butte comprise such a vital habitat corridor for wildlife, particularly pronghorn, the importance of this area in terms of ecosystem connectivity cannot be overstated. In fact, in 1998 ONDA and more than twenty other conservation organizations nominated the area encompassing the Beaty Butte Allotment to be designated by the BLM as the “Pronghorn Area of Critical Environmental Concern.” In short, the Beaty Butte Allotment contains nationally significant public lands whose continued vitality is threatened by a grazing management decision that has not been adopted with proper compliance to controlling statutes and regulations.

## II. The Wilderness Resource on the Public Lands.

“Wilderness” is legally defined by (1) size (at least 5,000 contiguous acres of public land), (2) naturalness (the area “generally appears to have been affect primarily by the forces of nature” and “imprint of man’s work” is “substantially unnoticeable”), and (3) either outstanding opportunities for solitude or for a primitive and unconfined type of recreation. 16 U.S.C. § 1131(c) (Wilderness Act definition); *see also* Exh. 1 (BLM *Wilderness Inventory Handbook* (hereafter “1978 Handbook”) (Sept. 27, 1978)), at 7 (defining “key factors” of wilderness); Exh. 2 (BLM H-6310-1, *Wilderness Inventory & Study Procedures* (“2001 Handbook”) (Jan. 10, 2001)), at 15–20 (more detailed discussion of same factors). Wilderness also may contain “supplemental values” such as ecological, geological, or other features of scientific, educational, scenic, or historical value. 16 U.S.C. § 1131(c); Exh. 2 at 20.

BLM acknowledges in the Lakeview RMP that:

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.

Exh. 2 at 8. Thus, even on parcel of public land where there is no congressionally-designated Wilderness, BLM still must consider wilderness characteristics in its multiple-use management of those lands. 43 U.S.C. §§ 1732(a); 1702(c); 1701(a)(7), (8).

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<sup>2</sup> The official geographic place name for the 7,918-foot butte is “Beatys Butte” (no apostrophe in official spelling), while the BLM-designated livestock grazing allotment that includes the butte and surrounding public land is the “Beaty Butte Allotment.”

Thus, one of the key factors in studying whether a parcel of public land contains wilderness character is determining whether or not it is roadless. Exh. 1 at 6–7; Exh. 2 at 13–14. To inform this analysis, BLM has long distinguished between “roads” and “ways” on the public lands. See Exh. 1 at 6; Exh. 2 at 13–14. A “way” maintained solely by the passage of vehicles is not considered a road, even if it is used on a regular and continuous basis. Exh. 1 at 6. Even a route originally constructed by mechanical means, but no longer maintained by such means, is not a road. Id. A road, by contrast, is a vehicle route that has “been improved and maintained by mechanical means to ensure relatively regular and continuous use.” Id.; see also Exh. 2 at 13–14 (further similar discussion in 2001 Handbook).

When Congress enacted FLPMA in 1976, it required the BLM under § 603(a) to conduct within fifteen years an initial inventory of BLM lands eligible for protection under the Wilderness Act. 43 U.S.C. § 1782(a); see also Exh. 1 at 3 (background on BLM’s initial inventory program). In Oregon, the BLM issued the “Oregon Wilderness Final EIS” in 1989 and a “Wilderness Study Report” with wilderness recommendations to Congress in 1991. The latter document recommended to Congress that some areas be designated as wilderness and others not be so designated. See AR Tab 8A at 2-57 to 2-59 (background on same in Lakeview Resource Area). Until Congress acts on those recommendations, the lands identified to have wilderness values are known as Wilderness Study Areas (“WSAs”) and are managed so that their wilderness suitability is not “impaired.” 43 U.S.C. § 1782(c). As a result, there exist today on the public lands WSAs recommended for wilderness designation, as well as WSAs that were *not recommended* to be designated as wilderness (“non-recommended WSAs”), and other roadless areas that contain wilderness characteristics but that have never even been considered or deemed eligible for wilderness recommendation—either under the initial § 603 inventory or under any subsequent land use planning process.

Vast segments of the Beaty Butte Allotment contain wilderness characteristics worthy of protection for future generations. Beaty Butte Proposed AMP/FEIS at 37–38. All or part of five Wilderness Study Areas, including the Spaulding, Hawk Mountain, Sage Hen Hills, Guano Creek, and Basque Hills WSAs, occur on the allotment. Id. These WSAs cover about 208,000 of the allotment’s 507,000 acres of public land. The allotment also contains additional areas which ONDA inventoried according to BLM’s own wilderness inventory protocol and found to possess defined wilderness characteristics.

### **III. ONDA’s Wilderness Inventory Report and Recommendations.**

Beginning in 2002, ONDA initiated a program to systematically inventory and document wilderness characteristics on the BLM-managed public lands in eastern Oregon. The premise of ONDA’s “Wilderness Research and Rescue” program is twofold: (1) that the BLM’s original, FLPMA-mandated wilderness inventory in the 1970s and 1980s failed to identify and document significant portions of public lands possessing wilderness characteristics; and (2) that on-the-ground conditions have changed substantially in the 25 years since the agency last conducted a wilderness inventory of its own—such that some areas now possess defined wilderness characteristics worthy of consideration and potential conservation.

ONDA followed the inventory protocol established in the BLM's *Wilderness Inventory Study and Procedures* handbook (Exhibit 2). ONDA's final reports include maps identifying the boundaries of each area in question, annotated road and photo logs with GPS locations cued to the maps, and narratives analyzing each inventory unit under the BLM's definition of wilderness characteristics and documenting how that information is new and/or differs from the information in prior inventories conducted by the BLM regarding wilderness values for the area.

On April, 1, 2005, ONDA provided to BLM's Lakeview District a final report titled, "Wilderness Inventory Recommendations: Lakeview BLM District." Of more than 2.6 million inventoried acres, ONDA found more than 1.7 million acres of wilderness-suitable public lands within the Lakeview District. See Wilderness Report at v (map of proposed wilderness study areas).<sup>3</sup> These are lands whose documented wilderness characteristics are not currently being recognized, protected, or otherwise managed for by the BLM.

In particular, the report includes extremely detailed inventory information on ONDA's "Spaulding Proposed WSA Addition." This area encompasses about 121,000 acres of public land and is bordered on the south by road 6156 and Highway 140, on the west by the Spaulding Wilderness Study Area and Beatys Butte Road, on the north by private property, and on the east by Beatys Butte Road. See Wilderness Report at 209, 215–16 (area description and maps). The East-West Gulch Projects EA planning area lies entirely within the Spaulding Proposed WSA Addition. See ONDA Comments (Feb. 21, 2007) (overview color map attached); EA Maps 1–6.

#### **IV. BLM's East-West Gulch Projects.**

The East-West Gulch Projects EA seeks to address continuing degradation from current livestock grazing practices and failures to meet natural resource standards on the Beaty Butte Allotment's North Pasture—and in particular within the fragile riparian areas in the East and West Gulches near the summit of Beaty Butte. FONSI at 1; EA at 1; see also Exh. 3 (July 8, 2003 letter and before-and-after photos from Dr. Stuart Garrett to BLM, documenting severe overgrazing and degradation in gulches).

In 1998, BLM conducted a rangeland health assessment for the Beaty Butte Allotment and determined that the area in the East and West Gulches was failing to meet the Federal Rangeland Health regulations' riparian/wetland standard. EA at 1.<sup>4</sup> BLM identified the highly

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<sup>3</sup> ONDA's wilderness inventory report, including excerpts relevant to the proposed Wilderness Study Area additions at issue here, and also including subsequent, supplemental inventory information provided by ONDA during the NEPA process for the Gulch Projects, should be part of the administrative record prepared by BLM for this appeal. The full report also is available at: [www.onda.org/defending-desert-wilderness/campaign-to-protect-desert-wilderness/more-info-on-ondas-campaign-to-protect-desert-wilderness/LakeviewInvRep.pdf/view](http://www.onda.org/defending-desert-wilderness/campaign-to-protect-desert-wilderness/more-info-on-ondas-campaign-to-protect-desert-wilderness/LakeviewInvRep.pdf/view) (last modified May 29, 2007).

<sup>4</sup> Adopted by the Department of the Interior in 1995 to establish fundamental ecological criteria for the management of BLM grazing lands, the Federal Rangeland Health ("FRH") regulations require all BLM grazing allotments to meet or show significant progress toward meeting four

incised channels in both gulches as being in “functional at risk condition with a downward trend.” *Id.* At the time of that assessment, BLM concluded that although livestock grazing was the cause of the damage, continued grazing in the area would not impede recovery of the degraded conditions. *Id.*

In August 2000, a wildfire burned the northern portion of the Beaty Butte Allotment, including the gulches. EA at 1. BLM rested the burned area from grazing until 2002 to allow for initial natural vegetative recovery. In July 2002, BLM authorized resumed grazing in the burned areas, including the gulches. Although BLM authorized fewer livestock than are allowed under the terms of the Allotment Management Plan, the nascent riparian recovery experienced in the gulches during the rest period was completely eviscerated by July 2003. Exh. 3 (documenting post-fire vegetative recovery and severe damage following resumption of grazing).

Following that serious setback, BLM State Office officials traveled to the Lakeview District in October 2003 to inspect the damage that had occurred. In January 2004, BLM identified three main concerns with Beaty Butte Allotment livestock grazing: (1) concentrated, heavy use in the East and West Gulches area; (2) livestock drifting between the North and South pastures when one or the other is rested; and (3) grazing problems during continuing drought conditions. Exh. 4 at 1–2 (BLM’s Jan. 21, 2004 Draft Action Plan).

To address these concerns and ongoing grazing damage in the gulches, the BLM issued an EA for this project on July 9, 2004, and then a revised EA on February 7, 2005. ONDA participated in each public comment opportunity for the project, twice submitting comments on the original EAs. Pursuant to Department of the Interior regulations, ONDA administratively protested and appealed the original decision. On July 20, 2005, the Office of Hearings and Appeals denied ONDA’s request to stay the project during the administrative appeal. In October 2005, BLM then began implementation of the East-West Gulch Projects. ONDA therefore dismissed its administrative appeal and filed suit in federal court.

On September 6, 2006, the district court granted in part and denied in part ONDA’s motion for summary judgment. The court ruled that BLM violated NEPA when it issued a final decision adopting the East-West Gulch Projects without considering impacts to wilderness resource values:

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“Fundamentals of Rangeland Health.” 43 C.F.R. § 4180 *et seq.* These relate to water quality, riparian habitat, watershed conditions, and species habitat. *Id.* § 4180.1. The FRH regulations provide for evaluation of whether those criteria are met, through application of FRH “Standards & Guidelines.” *Id.* § 4180.2(a), (b). When BLM determines that ecological conditions are not meeting one or more of the Standards & Guidelines due to grazing impacts, the FRH regulations expressly require BLM to revise grazing management “as soon as practicable, but not later than the start of the next grazing year” by adopting changes in livestock numbers, seasons of use, or other terms and conditions that “will result in significant progress toward fulfillment of” the Standards & Guidelines. 43 C.F.R. § 4180.1 & 4180.2(c); see also Idaho Watersheds Project v. Hahn, 187 F.3d 1035 (9th Cir. 1999).

The court finds BLM did not meet its obligation under NEPA simply by reviewing and critiquing ONDA's work product. It 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.

Rasmussen, 451 F.Supp.2d at 1213.

Following that ruling, the parties provided the district court with additional briefing concerning the type and scope of relief to be issued. On December 12, 2006, the district court issued an Order vacating BLM's final decision for the East-West Gulch Projects:

Accordingly, defendants' East-West Gulch Projects decision is vacated. Defendants are enjoined from further authorization or implementation of the decision, and further use of all facilities constructed pursuant to the decision, including roads, pipelines, storage tanks, and watering troughs, until defendants have completed (1) a current inventory to determine the wilderness values in the area and (2) an environmental assessment (EA), taking into account the current inventory, that complies with the requirements of the APA and NEPA. Defendants shall maintain already constructed facilities sufficiently to avoid environmental injury pending completion of a lawful EA or a decision to abandon the Projects.

Rasmussen, No. 05-1616-AS, Order at 2 (D. Or. Dec. 12, 2006).<sup>5</sup>

On January 22, 2007, BLM issued what it describes as "a revision to environmental assessment (EA#OR-010-2004-08)." EA Cover Letter (Jan. 22, 2007). The accompanying EA, identified by the exact same number as the vacated EA, is largely identical to the original document issued in 2005. The primary difference between the documents is the addition of an appendix to the document titled, "Evaluation Form – Updated of Wilderness Characteristic Information." EA, Appx. B.

BLM's "East-West Gulch Projects" involve construction of more than thirteen miles of new barbed-wire fence, 3.7 miles of above-ground pipelines, two miles of new road, six new water troughs, 3 steel storage tanks, and 3 cattle guards. See Notice of Proposed Decision at 1–2. The decision also would close and rehabilitate about 1.2 miles of the East Gulch route, relocating

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<sup>5</sup> Attached hereto as Exhibit 5.

that route a ridgeline above the gulch. Id. Finally, the decision would create a relatively modest riparian livestock enclosure in the East Gulch. Id.

ONDA submitted comments on the 2007 EA, on February 21, 2007, identifying a number of ecological and legal problems with BLM's EA and preferred alternative. ONDA argued that the EA violated both NEPA and FLPMA because BLM did not properly consider the impacts of the project on the wilderness resource, did not consider reasonable alternatives to address the identified grazing problems which necessitated a change in management in the first place, did not adequately consider the cumulative impacts of the project on wilderness and other resources, and did not properly balance multiple-use values on these public lands. ONDA explained that the proposed rangeland structures and road-building activities will cause long-term or permanent injury to wilderness and other public resources on Beatys Butte.

On March 16, 2007, ONDA administratively protested BLM's proposed decision for the East-West Gulch Projects. The Field Manager responded by letter dated April 25, 2007, denying ONDA's protest in its entirety and issuing a Final Decision to adopt the proposed decision. ONDA timely filed this administrative appeal.

## STANDARD OF REVIEW

To prevail on a petition for stay, the appellant must show sufficient justification based on the relative harm to the parties if the stay is granted or denied, the likelihood of appellant's success on the merits, the likelihood of immediate and irreparable harm if the stay is not granted, and whether the public interest favors granting a stay. 43 C.F.R. § 4.471(c)(2).

To achieve success on the merits, the appellant must meet its burden to demonstrate, by a preponderance of the evidence, that the Final Decision is unreasonable or does not substantially comply with NEPA, FLPMA, or the provisions of the federal grazing regulations found at 43 C.F.R. Part 4100. See 43 C.F.R. § 4.480(b); Eason v. BLM, 127 IBLA 259, 262 (1993). A BLM decision is arbitrary, capricious, or inequitable if it is not supported by any rational basis. Wayne D. Klump v. BLM, 124 IBLA 176, 182 (1992).

In balancing the likelihood of movant's success against the potential consequences of a stay on the other parties it has been held that it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus more deliberative investigation.

Wyoming Outdoor Council Inc., 153 IBLA 379, 388 (2000) (internal quotes omitted).

## STATEMENT OF REASONS

### **I. The EA is Inconsistent with the District Court's Order in ONDA v. Rasmussen.**

As described above, the district court vacated BLM's original East-West Gulch Projects final decision in the Rasmussen case. The district court issued this relief because the

Administrative Procedure Act provides that courts “*shall . . . hold unlawful and set aside* agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2) (emphasis added). Vacatur is the default position for agency action found to be arbitrary and capricious. See Federal Election Comm’n v. Akins, 524 U.S. 11, 25 (1998) (“If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency’s action and remand the case”); see also High Sierra Hikers Ass’n v. Blackwell, 390 F.3d 630, 640 (9th Cir. 2004) (“Further, when an agency has taken action without observe of the procedure required by law, that action will be set aside.”).

Vacatur means the agency’s final decision, and the NEPA documentation it relies upon (i.e., the EIS and Record of Decision, or the EA and FONSI) is “set aside.” 5 U.S.C. § 706(2); Idaho Sporting Cong. v. Alexander, 222 F.2d 562, 567 (9th Cir. 2000) (“NEPA is a procedural statute, and we have held that agency action taken without observance of the procedure required by law *will be set aside*”). When a final decision is vacated, the agency must begin the NEPA process anew in order to comply with NEPA’s procedural mandates and issue a new decision supported by a new NEPA analysis. See, e.g., Metcalf v. Daley, 214 F.3d 1135, 1146 (9th Cir. 2000) (“The district court is directed to order the Federal Defendants to set aside the FONSI, suspend implementation of the Agreement with the Tribe, begin the NEPA process afresh, and prepare a new EA.”). As the Ninth Circuit has explained in the context of rejecting an action an agency had committed to beforehand, the new NEPA analysis “must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made.” Id. at 1142.

Here, BLM describes its Jan. 22, 2007 EA as “a revision to environmental assessment (EA#OR-010-2004-08).” EA Cover Letter; see also EA at 2 (“The EA has been revised and is now being made available for an additional 30-day public review.”); BLM Protest Resp. at 6 (referring to the “current EA” as a “narrow” revision of “the previous iteration”). The EA is virtually identical to the February 2005 EA that was found unlawful and vacated by the district court. The section entitled “Comments and Issues Raised During Public Review” relates comments raised during the *NEPA process in 2004 and 2005 for the vacated EA*, rather than any new comments gathered or issues raised during a new NEPA process. See EA at 2–9.

ONDA raised these concerns in its administrative protest. In response, BLM argued that the district court only “set aside specific ‘findings’ of [BLM] rather than the entirety of its action.” BLM Protest Resp. at 1. Under BLM’s argument, the court only vacated “part” of the EA. Id. (“The Court did not order or expect the BLM to develop a new EA from scratch.”). These arguments are plainly inconsistent with the district court’s Order, which states, in unambiguous terms, that “defendants’ East-West Gulch Projects *decision is vacated.*” Exh. 5 (emphasis added); see also BLM Protest Resp. at 6 (admitting “The decision has been vacated by the Court.”). The district court did not specify that only “part” of BLM’s final decision was vacated; rather, it vacated the entire “decision.” Likewise, the court did not “remand” the decision to BLM to revise and reissue. See BLM Protest Resp. at 1 (arguing that “[c]onsistent with the Court’s direction” BLM “reviewed ONDA’s inventory information” and other information).

Before the district judge, BLM strenuously advanced the exact same position it takes here. In its brief concerning relief, BLM argued:

Defendants' proposed form of judgment is far more appropriate than Plaintiff's proposed order for two primary reasons. For one thing, it is commensurate with the scope of the procedural violation the Court found insofar as it limits the portion of the EA to be set aside to the parameters of that violation and, in so doing, recognizes that the Court upheld the EA against two other NEPA counts in which Plaintiff alleged that the document was deficient in other particulars.

Defendants' Brief Re: Proposed Form of Judgment, at 7. Likewise, in its Proposed Form of Judgment, BLM asked the district court to only set aside the East-West Gulch Projects decision "insofar as it lacks current information about effects on any wilderness values that may exist in the project area." Exh. 6, at 1–2 ("[Defendants' Proposed] Form of Judgment").

The district court rejected BLM's arguments and adopted a relief order instead vacating the entire decision as proposed by ONDA and as required under the APA and relevant case law. Exh. 5; see also Exh. 7 (ONDA's "[Proposed] Order and Injunction Regarding Final Relief"). Under these facts, BLM's argument that the district court only set aside "specific findings" by the agency and left in place portions of the earlier final decision, is without merit. Accordingly, BLM was under an obligation to "begin the NEPA process *afresh*, and prepare a *new* EA." Metcalf v. Daley, 214 F.3d at 1146 (emphasis added).<sup>6</sup>

Importantly, BLM's flawed conception of the district court's vacatur order undermines the agency's approach to grazing alternatives and other grazing issues in this EA. BLM argues the district court "validated" the "adequacy of the range of alternatives and the cumulative effects analysis in the EA." BLM Protest Resp. at 1; see also id. at 3 ("the Court validated the adequacy of the range of alternatives in the [original] EA . . . . Nowhere did the court instruct the BLM to consider additional alternatives"). Yet, because the court vacated the *entire* final decision, and because this means BLM was under an obligation to begin the NEPA process *afresh* by preparing and conducting a new environmental assessment, BLM's reliance on its earlier analyses is misplaced.

In short, BLM's admitted refusal to "develop a new EA from scratch"—despite the fact that the original EA and final decision was vacated—renders its Final Decision arbitrary, capricious, and not in accordance with law.

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<sup>6</sup> Even in light of these clear facts, BLM instead takes the astounding position that "it is not appropriate to use the BLM's supplementation of the EA to satisfy the Court identified deficiency as an occasion to new raise [sic] issues that should have been raised during earlier public review opportunities." BLM Protest Resp. at 7.

## II. BLM Violated NEPA By Failing to Take a “Hard Look” at the Environmental Consequences of the Proposed Action on Wilderness Resource Values.

NEPA is our “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). The 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.” Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1153–54 (9th Cir. 2006) (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 40 C.F.R. § 1500.1(b), (c). “Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.” Id. § 1500.1(b).

To satisfy NEPA, BLM must demonstrate it has taken a “hard look” at the environmental consequences of the proposed action. Ocean Advocates v. U.S. Army Corps of Eng’rs, 402 F.3d 846, 864 (9th Cir. 2005); Idaho Sporting Cong. v. Rittenhouse, 305 F.3d 957, 973 (9th Cir. 2002) (quoting Marsh v. Ore. Natural Res. Council, 490 U.S. 360, 374 (1989)); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 348 (1989). By focusing agency and public attention on the environmental effects of proposed agency action, “NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.” Marsh, 490 U.S. at 371 (quoting 42 U.S.C. § 4321 and 40 C.F.R. § 1502.9(c)). Federal agencies also must analyze and discuss “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” Id. § 1502.9(c).

BLM therefore has a legal duty under NEPA to consider the wilderness resource during the East-West Gulch Projects planning process. Rasmussen, 451 F.Supp.2d at 1212–13. NEPA requires federal agencies to consider the impacts of their proposed actions on “the quality of the human environment,” 42 U.S.C. § 4332(2)(C), and does not exclude wilderness from its requirements. See Rasmussen, 451 F.Supp.2d at 1213 (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”).

Here, BLM did not assess impacts to wilderness resource values in the EA because the agency determined that “[t]here are no . . . areas with wilderness characteristics” in the project area. FONSI at 1; see also EA at 25 (stating that BLM examined six “subunits” of ONDA’s Proposed Spaulding WSA Addition, and that “[n]one of the units contained all of the ‘key factors of wilderness character’”). Based on this threshold finding, BLM concluded that “wilderness character is lacking in the project area and will not be addressed further in this analysis.” EA at 25.

BLM bases its conclusion that there are no areas with wilderness characteristics within the project area on a seriously flawed analysis attached as an appendix (“Evaluation Form”) to the EA. BLM’s determination is wholly unsupported by the record before the agency during the NEPA process and by the record before this administrative court. This includes no new documentation of BLM’s own (e.g., inventory or other data, photographs, road maintenance logs,

or other evidence), and no new information that would rebut ONDA's inventory information and findings. Without any such countervailing evidence, BLM's decision not to analyze impacts to wilderness resource values is arbitrary, capricious, and not in accordance with NEPA.

As explained above, ONDA has provided BLM with extensive evidence of wilderness characteristics within its Spaulding Proposed WSA Addition—an 82,000-acre area ONDA proposes to be added to the existing Spaulding Wilderness Study Area. In March and April of 2005 (during the original East-West Gulch Projects NEPA process), ONDA provided BLM its full Lakeview District wilderness inventory report, which included a detailed section on the Spaulding Proposed WSA Addition. That report includes maps identifying the boundaries of each area in question, annotated road and photo logs with GPS locations cued to the maps, and narratives analyzing each inventory unit under the BLM's definition of wilderness characteristics and documenting how that information is new and/or differs from the information in prior inventories conducted by the BLM regarding wilderness values for the area.

With its February 21, 2007 comments ("ONDA Comments") on the EA at issue here, ONDA provided more detail further documenting roadlessness, naturalness, and outstanding opportunities for solitude or primitive and unconfined recreation in the project area. See ONDA Comments (21 pages of color attachments). In particular, because BLM in its Evaluation Form appendix claimed numerous routes within the area are "roads" rather than "ways" under Interior's definitions of these terms for wilderness purposes, ONDA provided documentation of each of the key disputed routes at issue. For each route or segment of a route, ONDA provided a photograph documenting the route's current condition, along with a map showing the photo's and route's exact location on the allotment. The contrast between routes that are clearly "roads" (e.g., the beginning of Route 6196-0-00, Photo DL-1) and routes that are overgrown, rough, eroded, and show little sign of "regular and continuous use" (e.g., further along that same route, Photo DL-10), is striking. See ONDA Comments (attachments).

Despite the extensive new evidence and inventory data before it, the BLM Field Manager inexplicably concluded that "I do not find your comments to be supported by any hard data, facts, or scientific literature" and dismissed ONDA's report and inventory information as "merely your preference or opinion." Letter from Thomas E. Rasmussen to Peter Lacy (Feb. 28, 2007) (in response to ONDA's NEPA comments). The record shows BLM had extensive new information from ONDA before it—information collected according to BLM's very own wilderness inventory protocol and based upon the Congressionally-defined key factors of wilderness.

Importantly, it is BLM's job, not the public's, to maintain current and accurate inventories of wilderness and other resources on the public lands, and to justify its decisions under the NEPA process. See, e.g., Blue Mtns. Biodiversity Project v. Blackwood, 161 F.3d 1208, 1214 (9th Cir. 1998) (holding EA was unlawful where it contained "virtually no reference to any material in support of or in opposition to its conclusions"). The district court recognized this when it rejected BLM's first attempt to adopt the Gulch Projects without properly assessing impacts to wilderness values: "ONDA did not have a responsibility to provide accurate information regarding any changes to the wilderness characteristics in the East-West Gulch before the EA was issued. BLM did." Rasmussen, 451 F.Supp.2d at 1212–13.

BLM's wilderness analysis in the EA's "Evaluation Form" appendix is legally inadequate for several fundamental reasons:

**A. Size.**

Claiming the Spaulding Proposed WSA Addition contains "numerous internal roads," BLM only considered the area as six separate, smaller units. EA at 25. These units are the inventory units BLM created during its initial inventory in the 1970s. Thus, BLM does not analyze the wilderness character of the larger area identified by ONDA and how it would enhance the existing Spaulding Wilderness Study Area. By chopping up the 82,000-acre area, BLM circumvents the intent of the district court's ruling. The single issue here boils down to whether the routes within the Proposed WSA meet the wilderness inventory definition of "roads" or "ways." See Miller Decl. at ¶ 5.

The core of the new information submitted to BLM by ONDA consists of photographic documentation showing that the routes traversing the 82,000-acre area in fact do not meet the *Wilderness Inventory Handbook* definition of a road. Instead, they are "ways" under BLM's and Interior's own definitions, and thus do not defeat the roadless factor for wilderness. In the EA, BLM refused to consider this new information, not even acknowledging in the EA that such new photographic documentation exists. See Miller Decl. at ¶ 4 ("there is little evidence that ONDA's 2005 inventory information was given serious (if any) consideration").

Instead, BLM attempts to redefine the term "road," significantly altering the *Wilderness Inventory Handbook* definition that has been in place for nearly 30 years. See Evaluation Form at 22 (providing new definition of "road"); Miller Decl. at ¶¶ 6–9 (reviewing the long-standing definition of the terms "road" and "way"), ¶¶ 10–16 (analyzing BLM's revised definitions used for the Gulch Projects Evaluation Forms). According to BLM's 1978 *Wilderness Inventory Handbook*, a "road" is a route that has "been improved and maintained by mechanical means to insure relatively regular and continuous use." Exh. 1 at 5; see also Exh. 2 at 9 (reiterating same). In other words, some form of mechanical maintenance must occur often enough to *assure* regular or frequent use. In contrast, a "way" does not receive such maintenance. Miller Decl. at ¶¶ 6–9. The Department of the Interior has used the same, consistent definitions of these two terms for nearly 30 years.

The Evaluation Form shows that none of the routes traversing the area have been maintained within the past quarter century. See Evaluation Form at 24 (Table 1). At most, the cursory summary information provided in Table 1 suggests that portions of a few routes may have been "maintained" as far as a parcel of private property or a water development. Under the wilderness criteria, of course, these types of segments may be "cherry-stemmed" out of an area that otherwise possesses wilderness character: "A dead-end (cherry-stem) road can form the boundary of an inventory area, and does not by itself disqualify an area from being considered 'roadless.'" Exh. 2 at 14.

ONDA's review of BLM's records of road maintenance since 1980 confirms this.<sup>7</sup> Yet BLM claims that all the routes "allow" regular or continuous use. See Evaluation Form at 24 (Table 1, stating that each route BLM included on the table "Currently Allows Regular or Continuous Use"). The routes are designated as open under the governing land use plan, the Lakeview RMP, so of course travel is *allowed*. However, travel that is "allowed" is not necessarily "insured." See Exh. 2 at 13–14; Miller Decl. at ¶¶ 13–15.

In fact, ONDA's photo documentation—the only photo documentation present in the record—reveals deteriorated, eroded, rocky, and overgrown ways that receive little to no use, and certainly not "regular" or "continuous" use. See Miller Decl. ¶¶ 17–26 (discussing ONDA's inventory information concerning road condition), and attached map/photograph sets (documenting same). See also Exh. 2 at 14 ("A route which was established or has been maintained solely by the passage of vehicles would not be considered a road, even if it is used on a relatively regular and continuous basis."). Yet, BLM simply asserts, with no further evidence in support of the statement, that "[t]hese roads continue to serve as unit boundaries." Evaluation Form at 3, 7, 10, 13, 17, 20. This includes no photo documentation of its own to rebut ONDA's extensive such documentation.

BLM claims it made its road-way determinations "based on updated road data" by comparing ONDA's wilderness inventory information to "BLM's road database" and "recent digital orthophoto quads" of the area. BLM Protest Resp. at 14. According to the agency, it "created field maps and then field verified the presence and condition of each route" during 2005 and 2006. *Id.* None of that information, or BLM's analysis of that information, appears in the EA. That is where the information and analyses must appear in order to satisfy NEPA. See, e.g., Blue Mtns. Biodiversity Project, 161 F.3d at 1214 ("The EA contains virtually no references to any material in support of or in opposition to its conclusions. That is where the [agency's] defense of its position must be found.").

BLM obfuscates the issue by suggesting a route designated as open is a road. See Miller Decl. at ¶¶ 10–15 (discussing BLM's revised definitions).<sup>8</sup> BLM states that "any existing route

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<sup>7</sup> A careful search of BLM's road maintenance accomplishments (materials dating back to 1998 obtained by ONDA via a request under the Freedom of Information Act) fails to indicate any maintenance on any of the numbered routes within the Spaulding Proposed WSA Addition.

<sup>8</sup> Inconsistent interpretations of key Wilderness Act terms and long-standing agency terms are entitled to little to no deference from this Court. See, e.g., Norfolk So. Railway Co. v. Shanklin, 529 U.S. 344, 356 (2000) (no deference when agency contradicts its previous interpretation); INS v. Cardoza-Fonesca, 480 U.S. 421, 446 n.30 (1987) ("[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view") (quoting Watt v. Alaska, 451 U.S. 259, 273, (1981)); Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 42 (1983) (there is a presumption of judicial review "against changes in current policy that are not justified by the rulemaking record."); Atchinson v. Wichita Board of Trade, 412 U.S. 800, 808 (1973) (agency that modifies longstanding policies "has the duty to explain its departure from prior norms."); Mt. Graham Red Squirrel v. Madigan, 954 F.2d 1441, 1457 (9th

that provides access to private land will be managed as a road and remain open regardless of its current condition or whether it meets the wilderness evaluation definition of a road.” Evaluation Form at 24. But the distinction between a “road” and a “way” does not rest on whether the route is open—only on whether it is being adequately maintained. Exh. 2 at 13–14.

BLM makes the blanket statement that nearly all the routes within ONDA’s proposed WSA “would be maintained in [the] future if [the] condition deteriorated.” Evaluation Form at 24 (Table 1). Again, this does not qualify these routes as roads under BLM’s definitions. As a practical matter, the condition on all of these routes already has deteriorated, having been subjected to the erosive and vegetating forces of nature for more than 25 years, and they have not been maintained during that time. The wilderness inventory definition of a road has nothing to do with conjecture about whether maintenance will occur in the future, but rather turns on the route’s *present condition* and *maintenance history*. See Miller Decl. at ¶¶ 7–15. Maintenance history clearly is absent, so the *present condition* of these routes must ultimately determine whether or not they meet the definition of a road. See, e.g., Evaluation Form at 14 (stating unit contains “2.3 miles of internal maintained roads (6176-0-00) [and] 10.4 miles of internal unmaintained routes” but providing no evidence in support of maintenance statements).

Finally, BLM attempts to cast doubt on ONDA’s inventory information by stating that “field evidence of ‘use’ on a given road can vary significantly by season.” BLM Protest Resp. at 14. According to BLM, “early in the growing season, when soils are wet and travel on a road may be limited by these wet conditions, opportunistic annual grasses can grow up in the tracks of a road.” *Id.* at 14–15. Many of ONDA’s photos, however, show not just “opportunistic annual grasses,” but either long-established sage brush plants, wildflowers, and similar vegetation that would have been obliterated long ago if the routes had been “maintained” or used regularly or continuously, or routes so rough and rocky as to be nearly impassible by most vehicles today. See, e.g., Miller Decl., Photos 28, 30, 40, 42, 43, 50, 53, 58, 59, 60, 63, 66, 67, 70, 79, 83, 90, 106, 112, 117, 122.

In short, ONDA’s wilderness inventory information shows that the routes at issue within the Spaulding Proposed WSA Addition are “ways” and that the area therefore is roadless for wilderness study purposes. The EA does not expressly address any of ONDA’s photo documentation, and provides no new documentation of its own to support otherwise blanket assertions, despite claiming that its analysis is based on “additional field visits conducted in 2005 and 2006.” Evaluation Form at 2. As such, ONDA has more than met its burden, on this one criterion of one claim, that it is likely to succeed on the merits and that it will be able to show on the merits that BLM’s Final Decision is not supported by any rational basis. 43 C.F.R. § 4.471(c)(2); Wayne D. Klump, 124 IBLA at 182.

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Cir. 1992) (holding that the court would not give deference to agency’s “expertise” when agency has fluctuated in its position); see also U.S. v. Mead, 533 U.S. 218, 228 (2001), citing Skidmore v. Swift, 323 U.S. 134, 139–40 (1944) (inconsistency is an indication of unpersuasiveness).

## B. Naturalness.

BLM's flawed determination that all the routes in question are "roads" leads to a flawed discussion of naturalness. By only recognizing several smaller "units" within the proposed WSA Addition, BLM short-circuits the discussion of whether ONDA's proposed 82,000-acre addition *enhances* the already recognized outstanding wilderness values in the existing Spaulding Wilderness Study Area.

BLM admits one of its units is natural, Evaluation Form at 3 (Unit 1-136), but claims the others are only "partially" natural and assigns percentages to those units to represent how natural they are. See Evaluation Form at 21 (summary table of findings). BLM does not make public how it arrived at these percentages or what specific conditions were considered "unnatural." Evaluation Form at 7, 10–11, 14, 17–18. See also Miller Decl. at ¶¶ 29–30 (discussing same). Without any defined method of calculating these percentages, BLM's naturalness determinations are arbitrary and without any rational basis in support.

Indeed, the Wilderness Act does not address naturalness in terms of percentages, but rather in terms of whether the area appears natural *overall* to the *average visitor*. Naturalness means the area "generally appears to have been affected primarily by the forces of nature" and "imprints of man's work" are "substantially unnoticeable." 16 U.S.C. § 1131(c); see also 43 U.S.C. § 1702(i) (FLPMA adopting same definition); Miller Decl. at ¶¶ 28, 31 (discussing naturalness and impacts of human disturbances). In its 2001 Handbook, BLM explained that the types of human impacts BLM identifies in its Evaluation *are* allowed in Wilderness so long as the area appears natural overall. See Exh. 2 at 16 (listing trails, fencing, spring developments, and reservoirs among the examples of allowable human impacts that do not necessarily defeat overall naturalness). According to BLM:

There is an important difference between an area's natural integrity and its apparent naturalness. Natural integrity refers to the presence or absence of ecosystems that are relatively unaffected by human's activities. Apparent naturalness refers to whether or not an area looks natural to the average visitor who is not familiar with the biological composition of natural ecosystems versus human-affected ecosystems in a given area. The presence or absence of naturalness (i.e., do the works of humans appear to be substantially unnoticeable to the average visitor?) is the question the Wilderness Act directs the review to assess.

Exh. 2 at 16.

Even in its protest response BLM remains circumspect when pressed on this issue, explaining only that "BLM's naturalness evaluation is based on many factors." Protest Resp. at 15; see also *id.* at 16 ("The aerial percentages . . . were calculated to demonstrate the actual portion of a given unit where the effects of man are currently substantially noticeable.") In very

general terms, BLM points to the presence of some primitive routes and various existing grazing structures, as support for its naturalness percentages. *Id.* at 15–16.<sup>9</sup>

Incredibly, BLM states, “Although a map could have been presented in the wilderness evaluation to make it clearer to the reviewer what portions of a unit actually were found to contain naturalness, it does not change the overall finding.” *Id.* at 16. In other words, BLM has purposely elected to withhold from the public any information, both in the EA and in its administrative protest response, concerning the agency’s criteria or specific findings on naturalness. This runs directly counter to one of NEPA’s basic purposes of ensuring that “environmental information is available to public officials and citizens before decisions are made and before actions are taken” in order to ensure “[a]ccurate scientific analysis, expert agency comments, and public scrutiny.” 40 C.F.R. § 1500.1(b); *see also Earth Island Inst.*, 442 F.3d at 1153–54 ; *Baltimore Gas & Elec. Co.*, 462 U.S. at 97. This is particularly troublesome where the public, specifically and on more than one occasion, asked for such information. ONDA Comments at 13; ONDA Protest at 14–15.

If BLM had provided its criteria or specific findings, it appears from the EA that they very likely would be inconsistent with the Wilderness Act, FLPMA, and the agency’s wilderness handbooks. For example, some of the unit evaluations allude to a 2000 wildfire that burned sage brush and generated a cheat grass invasion. Evaluation Form at 7, 14. The Evaluation implies that these burned areas are part of what BLM considers to be “unnatural” in the units. Yet, under BLM’s own definition of naturalness, wildfire is not a human-caused activity that defeats naturalness. *See* Evaluation Form at 22 (definition of naturalness); Exh. 2 at 16 (same). Wildfire is indeed a part of the natural system—that is, a “force of nature.”

However, because BLM refuses to disclose whether it counted burned areas as “natural” or “unnatural” the public—and this administrative court—is left to guess at the basis of the agency’s decision. The record before this court contains extensive photographic and other inventory data from ONDA documenting naturalness. *See, e.g., Miller Decl.* at ¶¶ 27–31, Photos 24, 26, 57, 77, 94, 95, 103, 104, 110, 113, 116.<sup>10</sup> It contains not a single photograph or map, and no hard data, from BLM to support the agency’s rejection of ONDA’s field findings. *See* Exh. 2 at 13 (instructing that wilderness inventory evaluations should include an evaluation form, road/way analysis, photo log, color photographs or slides, and maps). Nor does it contain any express analysis of ONDA’s inventory information. Where, as here, an agency decision is unsupported on the record before the reviewing judge, it must be invalidated as arbitrary and

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<sup>9</sup> Even if BLM’s claim that these scattered primitive routes and grazing facilities are “substantially noticeable” throughout the unit as a whole had merit, the agency could have adjusted the area’s boundaries to exclude these features. *See* Exh. 2 at 20 (“Boundary Adjustments”).

<sup>10</sup> ONDA also has not shied away from documenting the features within the area that area unnatural, either explaining why they do not defeat the overall natural appearance of the 82,000-acre area or citing them as the types of unnatural features ONDA fears proliferation of which will begin to seriously degrade this area’s otherwise outstanding wilderness qualities. *See, e.g., Miller Decl.* at ¶ 28 & Photos 14, 17, 26, 30, 31, 44, 50, 56, 60, 83.

capricious. Ore. Natural Res. Council v. Lowe, 109 F.3d 521, 526 (9th Cir. 1997); O’Keefe’s, Inc. v. U.S. Consumer Prod. Safety Comm’n, 92 F.3d 940, 942 (9th Cir. 1996); Envtl. Def. Ctr. v. EPA, 319 F.3d 398, 428 n.46 (9th Cir. 2003) (all stating that agencies must articulate a rational connection between the facts found and the conclusions made); Anaheim Mem’l Hosp. v. Shalala, 130 F.3d 845, 849 (9th Cir. 1997) (agency’s decision can be upheld only on the basis of the reasoning in that decision).

### **C. Outstanding Opportunities for Solitude or Primitive and Unconfined Recreation.**

Finally, BLM’s flawed road versus way determinations again taint its findings under this third wilderness criterion. By only looking at much smaller units than the 82,000-acre area ONDA documented, BLM once again short-circuits its analysis of whether there are outstanding opportunities for solitude or primitive and unconfined recreation in this area—opportunities that add to the existing solitude and recreation opportunities identified in the adjacent Spaulding Wilderness Study Area. See, e.g., Evaluation Form at 4 (claiming that the “relatively small size” of one 6,301-acre unit does not allow for solitude); see also Miller Decl. at ¶ 32 (addressing BLM’s fragmented analysis). Adding 82,000 acres to the existing Spaulding WSA undoubtedly would further enhance that WSA’s identified solitude and recreation opportunities.

The recurring theme in this part of BLM’s Evaluation is that the “lack of vegetative screening” makes it “possible to see across most of the unit[s] from any given observation point. It is therefore hard to avoid others who may be present anywhere in the unit.” See, e.g., Evaluation Form at 4. Elsewhere, BLM claims that “steep hills” and “highly exposed slopes” *also* preclude outstanding opportunities for solitude. See, e.g., Evaluation Form at 7, 11, 14. Under BLM’s analysis, neither flat nor up-and-down terrain can provide opportunities for solitude.

With its NEPA comments, ONDA provided a GIS-produced, shaded-relief topographic screening map, which showed peaks, ridges and valleys throughout the Proposed WSA. ONDA Comments, Map 2. The map, based on publicly available GIS (“Geographic Information System”) data, showed that the area possesses a rich network of up-and-down topography. ONDA Comments at 14. For example, a person standing on one side of any red (ridge) line on the map cannot see a person standing on the other side of that line.

Despite this unassailable fact borne out by topographic data and GIS computer analysis, BLM in its protest response still argues that “[e]ven large changes in elevation from one side of the unit to the other does not necessarily provide any significant screening from others within the unit.” Protest Resp. at 16. BLM provides no data or analysis of its own to support this conclusion. Id. As such, its determinations concerning opportunities for solitude or primitive and unconfined recreation are, like its roadlessness and naturalness determinations, without any rational basis in support and therefore arbitrary, capricious, and not in accordance with law. Again, without any rational basis in support, ONDA has, at a minimum, shown it is likely to succeed on the merits of its wilderness claim under NEPA.

### III. BLM Failed to Properly Balance Wilderness with Other Valid Multiple Uses of These Public Lands.

In addition to violating NEPA, BLM's Final Decision to move forward with the East-West Gulch Projects based on outdated or inaccurate wilderness inventory information and on a flawed analysis of the inventory information provided to it by ONDA, violates FLPMA. FLPMA requires BLM to manage the public lands consistent with the "principles of multiple use and sustained yield." 43 U.S.C. § 1732(a); see also id. § 1702(c) (defining "multiple use").

The Board of Land Appeals, interpreting the multiple use balancing duty in the context of a challenge to BLM's issuance of a grazing permit and two annual grazing authorizations, has explained that BLM must

engage in [a] *reasoned or informed decisionmaking process* concerning grazing in the canyons in the allotment. That process *must show that BLM has balanced competing resource values* to ensure that the public lands in the canyons are managed in the manner that will best meet the present and future needs of the American people.

Nat'l Wildlife Fed'n v. Bureau of Land Mgmt., 140 IBLA 85, 101 (1997) (emphasis added). Citing Sierra Club v. Butz, 3 Env'tl. L. Rept. 20,292, 20,293 (9th Cir. 1973), the IBLA 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 (emphasis added).

The cornerstone of FLPMA's multiple use framework requires that BLM "shall . . . take any action necessary to prevent unnecessary or undue degradation of the lands." 43 U.S.C. § 1732(b); see also Soda Mtn. Wilderness Council v. Norton, 424 F.Supp.2d 1241, 1269 (E.D. Cal. 2006). Accordingly, "BLM is obligated to consider in its [NEPA document] whether there will be any unnecessary or undue degradation to the lands as a result of" the proposed action. 424 F.Supp.2d at 1270.

The "unnecessary or undue degradation" standard evinces a clear intent on the part of Congress: "Interior is to prevent, not only unnecessary degradation, but also degradation that, while necessary to mining [the land use at issue in that case], is undue or excessive." Mineral Pol'y Ctr. v. Norton, 292 F.Supp.2d 30, 43 (D.D.C. 2003); Sierra Club v. Hodel, 848 F.2d 1068, 1075 (10th Cir. 1988) ("unnecessary or undue degradation" is an enforceable duty and provides "law to apply"). See also Ctr. for Biol. Diversity, 422 F.Supp.2d at 1167–68 (BLM land use plan decision violated FLPMA when decision was based on "outdated and inaccurate" inventory information); Soda Mtn., 424 F.Supp.2d at 1270–71 (BLM violated "unnecessary or undue degradation" standard where proposed land use plan amendment was based on contradictory and inconsistent grazing decisions that "fail[] to draw rational connections between the facts found and the decisions made" (citing Lowe, 109 F.3d at 526; 5 U.S.C. § 706(2)(A))).

Finally, in order to satisfy its multiple use duty, BLM

shall prepare and maintain on a continuing basis an inventory of all public lands and their resources and other values (including, but not limited to, outdoor recreation and scenic values), giving priority to areas of critical environmental concern.

43 U.S.C. § 1711(a). Congress directed that the “inventory shall be kept current so as to reflect changes in conditions and to identify new and emerging resource and other values.” Id. See also Rasmussen, 451 F.Supp.2d at 1213 (BLM failed to meet its NEPA obligation to properly consider impacts to wilderness values where it “rel[ie]d 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).”).

As explained above, BLM in the Gulch Projects EA decided not to examine impacts to wilderness resource values in the action area based on a highly flawed determination that such values do not exist. In addition to violating NEPA’s “hard look” requirement, this violates BLM’s procedural and substantive duties under FLPMA to properly balance multiple uses of the public lands and to ensure that its chosen course of action will not cause “unnecessary or undue degradation” to the public lands and resources. As recognized in Center for Biological Diversity, resolution of ONDA’s FLPMA claim “is largely dependent on how the Court resolves plaintiffs’ challenges under NEPA.” 422 F.Supp.2d at 1167. By not examining impacts to wilderness values in the EA, BLM has necessarily failed to balance wilderness among the other valid multiple uses of these public lands. As such, BLM’s Final Decision is arbitrary, capricious, and not in accordance with FLPMA, 43 U.S.C. §§ 1732(a), (b).

#### **IV. BLM Did Not Analyze An Adequate Range of Alternatives.**

In the Gulch Projects EA, BLM failed to analyze a reasonable range of alternatives because (1) it failed to analyze an alternative that would have rehabilitated the projects unlawfully constructed under the original EA and subsequently-vacated decision, and (2) it failed to consider an alternative using increased riders in lieu of additional structural fixes on the landscape.

NEPA requires the BLM to consider reasonable alternatives to the proposed action in an EA. 40 C.F.R. § 1508.9(b) (an EA “[s]hall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted”); see also Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228–29 (9th Cir. 1988) (consideration of alternatives critical to NEPA’s goals even where proposed action does not trigger EIS); Akiak Native Cmty. v. U.S. Postal Serv., 213 F.3d 1140, 1148 (9th Cir. 2000); Idaho Sporting Cong. v. Alexander, 222 F.3d 562, 565 n.2 (9th Cir. 2000); Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1152 (9th Cir. 1998) (all noting that an EA must consider a reasonable range of alternatives). The range of alternatives requirement is critical to serving NEPA’s primary purposes of insuring fully informed decision-making and providing for meaningful public participation in environmental analyses and decision-making. See 40 C.F.R. § 1500.1(b), (c). See also Southern Utah

Wilderness Alliance, 157 IBLA 150, 170 (2002) (discussing NEPA's purpose of fully-informed decisionmaking and requirement to take "hard look" at environmental consequences of proposed actions).

The available reasonable alternatives for a given project are determined by the purpose and need of the project. City of Carmel-by-the-Sea v. U.S. Dep't of the Interior, 123 F.3d 1142, 1155 (9th Cir. 1997). The Ninth Circuit has explained that an agency's selection and discussion of alternatives is reviewed under a "rule of reason," asking "whether the agency described those alternatives necessary to permit a reasoned choice." City of Angoon v. Hodel, 803 F.2d 1016, 1020 (9th Cir. 1986); see also Native Ecosystems Council v. U.S. Forest Serv., 428 F.3d 1233, 1246-7 (9th Cir. 2005).

The purpose of the East-West Gulch Projects is as follows:

The purpose and need for action is to move the riparian habitat within the gulches towards a healthier, functioning condition while allowing for continuing livestock grazing. Specifically, bank stabilization and riparian vegetation recovery are needed in East Gulch while some vegetation recovery is needed in West Gulch. Stabilizing the channel banks and improving vegetative conditions would provide better habitat conditions for wildlife and plant species.

FONSI at 1; see also EA at 1. Thus, the key, recurring words and phrases in BLM's purpose statement are "riparian habitat," "functioning condition," "vegetation recovery," and "wildlife and plant species."<sup>11</sup>

**Removal and Rehabilitation of Unlawfully Constructed Projects.** Because the district court vacated BLM's original Gulch Projects decision, BLM was obligated to begin the NEPA process "afresh." See Metcalf v. Daley, 214 F.3d at 1146. And because the original decision was found to be unlawful, the portions of the original Gulch Projects that BLM had already

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<sup>11</sup> BLM's inclusion of "allowing for continuing livestock grazing" is not proper in the purpose and need statement. Under NEPA, an EA or EIS "shall briefly specify *the underlying purpose and need to which the agency is responding* in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13. The "underlying purpose" of this proposal is unquestionably the highly degraded ecological conditions in the East and West gulches. BLM was not called to action to "continue livestock grazing" because grazing already is authorized under the terms of the relevant permit, allotment management plan, and annual operating plan(s). BLM may not narrow the purpose and need to a point where the agency can justify not considering reasonable alternatives such as reductions in grazing (as opposed to the wholesale elimination of grazing on the North Pasture considered under Alternative 6, EA at 15) to address the underlying problems at issue. See, e.g., Simmons v. U.S. Army Corps of Eng'rs, 120 F.3d 664, 666 (7th Cir. 1997); City of New York v. U.S. Dep't of Transp., 715 F.2d 732, 743 (2d Cir. 1983), cert. denied, 456 U.S. 1005 (1984) ("an agency will not be permitted to narrow the objective of its action artificially and thereby circumvent the requirement that relevant alternatives be considered"). See also Marlett Decl. at ¶¶ 9-15 (discussing stated purpose and need for East Gulch road and impacts of grazing on East Gulch gully erosion).

constructed were done so based on an unlawful EA and Finding of No Significant Impact. Accordingly, ONDA asked BLM to consider an alternative in the “new” EA that would *remove* these already-constructed facilities and *rehabilitate* the affected public lands. See ONDA Comments at 5.

BLM refused to do so, and its rationale shows that the agency did not complete the new NEPA analysis it was ordered to complete by the district court. BLM explains that:

If the BLM had assumed that the partially completed projects were a pre-existing condition for purposes of describing the no action alternative, it would have meant that those projects would also have had to be described in the affected environment section.

BLM Protest Resp. at 5. In other words, BLM admits it has not accurately described the affected environment and baseline conditions in its EA. This violates NEPA. Under NEPA, the baseline for “environmental analysis that is the heart of the EIS” must “be accurate and complete.” Ctr. for Biol. Diversity, 422 F.Supp.2d at 1163 (citing Vermont Yankee Nuclear Pwr. Corp. v. Natural Res. Def. Council, 435 U.S. 519, 553 (1973)). See also 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”);

BLM claims that “[alt]hough not expressly stated” in its EA, “a fundamental assumption underlying the no action alternative was that the new water developments, two cattle guards, and the partial new road, which have already been constructed, would need to be removed and those project sites rehabilitated.” BLM Protest Resp. at 5. Apparently, BLM would ask the Office of Hearings and Appeals to supply the agency’s “fundamental assumption[s]” for it, or to read into the EA words that simply are not there. This is highly disfavored by the courts. See, e.g., SEC v. Chenery Corp., 332 U.S. 194, 196–97 (“It will not do for a court to be compelled to guess at the theory underlying the agency’s action”); Camp v. Pitts, 411 U.S. 138 (1973) (remanding to decisionmaker to supply explanation).

This also is inconsistent with NEPA’s requirement that BLM consider a “no action” alternative. 40 C.F.R. § 1502.14(d). “No action” means maintaining the status quo, *i.e.* baseline conditions. See EA at 12 (“No Action Alternative is defined as not taking any additional management action(s)”). In explaining the importance of alternatives analysis in fulfilling NEPA’s statutory scheme and underlying purpose, the Ninth Circuit in one leading case has noted that “[i]nformed and meaningful consideration of alternatives—including the no action alternative—is thus an integral part of the statutory scheme.” Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228 (9th Cir. 1988).

Even if BLM could properly claim that removal and rehabilitation actions somehow fell under the aegis of the EA’s “no action” alternative, the EA provides no evidence that this was BLM’s intent. In fact, the EA shows that the “no action” alternative really did contemplate *no* further action—including no removal of existing projects or rehabilitation of areas impacted by BLM’s unlawful construction activities under the previous EA. For example, under livestock

grazing impacts, the EA explains that the No Action alternative would simply continue the current grazing system and use the currently constructed facilities. EA at 38. It says nothing about removing fencing or rehabilitating the newly-built road. *Id.* With no analysis of these key, environmentally important actions in any alternative in the EA, BLM's final decision is arbitrary, capricious, and not in accordance with NEPA's alternatives requirement.

**Alternative Using Increased Herding.** The EA's range of alternatives also lacks proper analysis of an alternative that would rely, in whole or in significant part, on increased herding as opposed to the purely structural fix every other alternative (save the across-the-board no grazing alternative) relies upon. EA at 12–15 (range of alternatives considered). Alternatives 2, 3, 4, and 5 are extremely similar, with all proposing building similar water developments and relocating a vehicle route to accommodate the same level of grazing. *Id.* They differ only in the details. *Id.* Alternative 6 would eliminate grazing from the allotment's North Pasture and reduce AUMs on the allotment by 50%. *Id.* at 15. However, it is never seriously considered, being described by BLM as included “[f]or analysis purposes” only. *Id.* (also claiming “it does not meet the purpose and need for the proposed action and would require Congressional notification to implement”).

BLM's cursory dismissal of Alternative 6 shows the agency should have considered more moderate alternatives involving reduced numbers or seasons of use, longer periods of rest, and increased herding. The EA states BLM “considered but eliminated from detailed study” alternatives that would reduce forage allocations, provide for increased periods of rest, rely solely on additional riders, or use a riparian enclosure without the accompanying water development projects. EA at 11.

Simply listing off and then discarding these alternatives does not satisfy NEPA. BLM must consider all reasonable alternatives. 40 C.F.R. §§ 1502.14(a), 1500.2(f). Analysis of alternatives must be “sufficiently detailed to reveal the agency's comparative evaluation of the environmental benefits, costs and risks of the proposed action and each reasonable alternative.” *Id.*; Bob Marshall Alliance, 852 F.2d 1223. That type of sufficient detail is not present for these alternatives.

An alternative relying on increased herding is particularly reasonable and should have been examined at the same level of detail as the structural-fix alternatives. BLM only suggests that this alternative is unreasonable because (1) it would require too many riders to be constantly present, and (2) “riders were not intended to serve as a permanent substitute to the proposed fencing projects” outlined in the 1998 Allotment Management Plan. EA at 11. Both of these assertions are unsupported in the record.

The Beaty Butte AMP expressly *requires* the use of riders to aid grazing management on the allotment: “Proper implementation of this plan *will require the use of riders* to move cattle between pastures (trailing), keep cattle inside designated areas, and keep cattle out of sensitive areas.” AMP at Appx. 1-12 (emphasis added). Every Annual Operating Plan BLM has issued since the AMP was adopted also expressly states that the “permittees will use riders, as required by the Allotment Management Plan.” See also 43 C.F.R. § 4120.2(d) (requirement to conform with AMP shall be incorporated into permit terms and conditions).

Because the EA contained no information that might have supported BLM's claim that "too many" riders would be required to make this type of alternative reasonable, ONDA asked BLM, during the NEPA process, to explain to the public "how many riders have been used on the Beaty Butte Allotment each year since the AMP was adopted, including when and where they were used on the allotment and over the course of each year's authorized grazing." ONDA Comments at 4; see also ONDA Protest at 5 (again asking for same information). Without this baseline information, BLM's assertions amount to little more than conclusory statements and the public is denied the opportunity to meaningfully participate in this aspect of the decision-making process. See Half Moon Bay Fisherman's Marketing Ass'n v. Carlucci, 857 F.2d at 510; Ctr. for Biol. Diversity, 422 F.Supp.2d at 1163.

BLM has never provided that information for the East-West Gulch Projects. Even in its protest response, BLM still refuses to provide this information, calling into question whether the agency even has such information. Under NEPA, BLM had an obligation to respond to ONDA's comments and requests for key information that would support or refute BLM's claims concerning herding. See 40 C.F.R. § 1503.4 ("Response to comments" stating that agencies "shall assess and consider comments . . . and shall respond" to comments by modifying alternatives, developing and evaluating "alternatives not previously given serious consideration by the agency," supplementing, improving or modifying its analysis, making factual corrections, or explaining why the comments do not warrant further agency response "citing the sources, authorities, or reasons which support the agency's position").

As this court held in the context of staying a similar BLM rangeland project decision for the Buckaroo Pass Fence (just to the south of the East and West Gulches, also on the Beaty Butte Allotment), "[i]ncreased herding is an obvious alternative to more fencing, yet BLM did not consider this alternative in the EA." Ore. Natural Desert Ass'n v. Bureau of Land Mgmt., OR-010-04-02, slip op. at 5 (Oct. 6, 2004) (order granting petition for stay). In that appeal, this court explained that BLM's

explanations for why past herding was not sufficient, why additional fencing was needed, and why additional herding did not meet the definition of a reasonable alternative are all conclusory. They are not supported by any detail as to the nature and extent of the past herding efforts, the nature and extent of the problem of livestock wandering into the rested pasture despite those efforts, the reasons why those efforts allegedly failed, or the reasons why additional herding does not meet the definition of a reasonable alternative. Without such information, it is difficult to conclude that BLM has established that it has taken a good-faith, objective, hard look at the environmental consequences of the proposed action and considered all reasonable alternatives.

Id.

BLM asserts that ruling "has little, if any, relevance" to the Gulch Projects, claiming that the two projects have different purposes. BLM Protest Resp. at 4. Whether the purpose is to "more clearly define two existing pastures" to address drifting livestock and overgrazing

(Buckaroo Pass Fence), or to recover riparian habitat “while allowing for continued livestock grazing” (East-West Gulch Projects), the basic purpose of both projects clearly is address grazing management and grazing damage issues that could just as easily be addressed with non-structural fixes as by building new fences and other range structures on these public lands. And without key information concerning the past herding management under the AMP, BLM’s conclusory statements at page 11 of the EA are without any rational basis in support.

Finally, BLM also argues that the district court “validated” its range of alternatives when that court granted summary judgment in BLM’s favor on a NEPA alternatives claim in Rasmussen. BLM Protest Resp. at 4. Again, because BLM violated NEPA in one significant respect, the district court vacated the entire decision, requiring BLM to start afresh under a new NEPA process. Even if BLM’s range of alternative had been valid in the first instance, now that BLM is under a duty to actually consider and manage for wilderness resource values on Beatys Butte, it must take that additional environmental factor into account when it develops and analyzes alternatives to address ecological damage from grazing in the East and West gulches and how best to address those issues while at the same time balancing conservation of wilderness values and ensuring no unnecessary or undue degradation to those values.

As stated at the outset, the IBLA applies a “rule of reason” approach in determining whether the range of alternatives considered by the BLM in the East-West Gulches Projects EA satisfies NEPA. Ctr. for Biol. Diversity et al., 162 IBLA 268 (2004) (citing Southern Utah Wilderness Alliance, 152 IBLA 217, 223–24 (2000)). Here, BLM has acted unreasonably because it refused, despite repeated requests from the public, to consider in detail obvious alternatives that would address the on-going damage to the gulches’ fragile riparian areas, that would insure those levels of livestock overuse are not simply shifted to other portions of the allotment, and that would provide for removal and rehabilitation in areas where projects were unlawfully constructed under the previous Gulch Projects EA. “The existence of a viable but unexamined alternative renders an environmental impact statement inadequate.” Alaska Wilderness Recreation & Tourism v. Morrison, 67 F.3d 723, 729 (9th Cir. 1995). In short, BLM simply has not supplied any rational explanation why it refused to even consider the reasonable potential solutions and key environmentally protective measures presented by ONDA during the NEPA process.

#### **V. BLM Failed NEPA’s “Hard Look” Requirement by Not Collecting or Presenting New Information and Field Data.**

BLM issued its final decision of the previous Gulch Projects EA on May 13, 2005. The revised EA, issued January 22, 2007, contains little or no new monitoring or other information concerning current ecological conditions in the East and West gulches, sage grouse populations and habitat, and pygmy rabbit populations and habitat, and cultural resources. As it did in the 2005 EA, BLM in this EA states that fences lines “would be cleared for pygmy rabbits prior to construction.” EA at 16. The EA makes similar statements concerning surveying for cultural resources as well as other aspects of the project (e.g., pipelines, troughs, spring sites, road work, cattle guards). See also EA at 24 (containing same statement as in 2005 EA that habitat surveys were conducted in 2004 for sage grouse and pygmy rabbit), 25 (same for cultural resources, for example along fence lines).

Because BLM actually completed construction or implementation of at least six miles of pipelines, three storage tanks, seven water troughs, 0.75 miles of new road, and two cattle guards, this information should already exist for each of these portions of the projects. Yet, BLM does not present any such information in the EA. Thus, in its EA comments, ONDA requested that BLM provide all survey data, completed in accordance with BLM's 2005 decision, as well as any subsequent survey, inventory, or other data collected since then, regarding cultural resources, pygmy rabbit habitat, riparian and grazing monitoring, noxious weeds, recreational use, and other uses. See ONDA Comments at 5–7 (multiple requests for information highlighted in boldface in comments). In its February 28, 2007 letter to ONDA, BLM responded simply: “No new data exists that is relevant to the impact assessment in the East-West Gulch project area.” Letter from Thomas E. Rasmussen to Peter Lacy (Feb. 28, 2007), at 1.

This admission exposes BLM's Final Decision as unsupported by key baseline information—information that the agency promised the public it would collect, and that it has an independent duty to collect. See 43 U.S.C. § 1711(a) (continuing inventory duty); 40 C.F.R. § 1502.15 (requirement that BLM “describe the environment of the areas to be affected or created by the alternatives under consideration”); see also Seattle Audubon Soc’y v. Moseley, 798 F.Supp. 1473, 1479 (W.D. Wash. 1992), aff’d 998 F.2d (9th Cir. 1993) (“A conclusory statement unsupported by empirical or experimental data, scientific authorities, or explanatory information of any kind not only fails to crystallize the issues, but affords no basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives.”). BLM is obligated to “ensure the professional integrity, including scientific integrity, of the discussions and analyses” of its NEPA documents. 40 C.F.R. § 1502.24.

In response to ONDA's protest, BLM dismissively claims it has “no need to revise the EA to include new data.” BLM Protest Resp. at 6. In an extraordinarily convoluted attempt to explain why it need not comply with the basic requirements of NEPA and FLPMA, BLM writes:

[N]o such new data has been collected or was available at the time the EA was published for public review that is relevant to the impact assessment specifically in the East-West Gulch project area, that needs to be included in the EA, particularly in light of the fact that the driving force behind the preparation of the current EA was the need to remedy the narrow deficiency the Court found in the previous iteration.

BLM Protest Resp. at 6.<sup>12</sup> BLM claims it need not provide any new information or analysis concerning non-wilderness issues or resources because “supplementation” of NEPA analysis is “limited to new circumstances or information,” citing the NEPA regulations’ supplementation provision. BLM Protest Resp. at 7 (citing 40 C.F.R. § 1502.9(c)). That provision does not apply here, of course, because the district court vacated BLM's previous decision, requiring the agency to prepare a *new* EA. See id. at 6 (“The decision has been vacated by the Court.”).

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<sup>12</sup> BLM also states, for example, that the “EA further notes on page 24 that habitat surveys were conducted”—yet provides none of the survey information or analyses in the EA, where it must appear. Blue Mtns. Biodiversity Project, 161 F.3d at 1214.

After being given multiple chances to produce the monitoring information and other data that adequately define key baseline conditions in the Gulches, and that support BLM's environmental analyses, BLM thus still refuses to produce any such information.<sup>13</sup> In other places, BLM improperly places the burden on ONDA to do the agency's job for it.<sup>14</sup> Accordingly, the EA does not contain "a reasonably thorough discussion of the significant aspects of probable environmental consequences." Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1071 (9th Cir. 2002) (internal quotes omitted), citing Ore. Natural Res. Council v. Lowe, 109 F.3d 521, 526 (9th Cir. 1997). Therefore, BLM has not satisfied its obligation to take a "hard look" at the environmental consequences of the proposed action. See Idaho Sporting Cong. v. Rittenhouse, 305 F.3d at 973 (quoting Marsh, 490 U.S. at 374); see also Methow Valley Citizens Council, 490 U.S. at 348; Southern Utah Wilderness Alliance, 157 IBLA at 170. ONDA has shown it is likely to prevail on this NEPA "hard look" claim and this Court should stay BLM's Final Decision.

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<sup>13</sup> See, e.g., BLM Protest Resp. at 7 (claiming ONDA has not proven that certain non-motorized recreational uses "actually occur" in the area and therefore declining to analyze), 7 ("BLM did not feel it was necessary to create maps showing the sage-grouse habitat or leks" present in the area, despite requests from the public for this information), 8 (admitting that there is "little known" about groundwater resources and "no data available" on water quantity or water quality for springs), 8 ("no flow measuring or other types of research have been conducted in the gulches or specifically at any of the springs in the project area"), 8 ("the exact nature of this change [directing livestock toward an area of special status Crosby's buckwheat] is uncertain").

<sup>14</sup> See, e.g., BLM Protest Resp. at 9 (claiming "you failed to provide any rationale or other information to support your claim" regarding concern for impacts of new grazing patterns on Crosby's buckwheat), 9 ("[you] have never provided any information or data specific to the Beaty Butte area to support your claim" that grazing can exacerbate the invasion and spread of noxious weeds, and requesting ONDA to provide BLM with "data, inventory information, or scientific research specific to the Beaty Butte area"), 12 ("[you] have never provided any information or data specific to the Beaty Butte area to support your claim" regarding concerns over grazing impacts in areas not previously subjected to heavy grazing). The duty to comply with NEPA's procedural requirements is BLM's, not the public's:

[T]he primary responsibility for NEPA compliance is with the agency: "the agency bears the primary responsibility to ensure that it complies with NEPA, and an EA's or EIS' flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action."

IlioUlaokalani Coalition v. Rumsfeld, 464 F.3d 1083, 1091 (9th Cir. 2006) (quoting Dep't of Transp. v. Public Citizen, 541 U.S. 752, 765 (2004) (internal citation omitted)); see also Rasmussen, 451 F.Supp.2d at 1212-13. ONDA more than satisfied its obligation to make its comments "as specific as possible," 40 C.F.R. § 1503.3 (specificity of comments), given the dearth of key information identified as lacking in the EA.

## **VI. BLM's Failure to Analyze Cultural Resource Information Prior to Issuing the EA Violates NEPA and the National Historic Preservation Act.**

Beatys Butte was a significant source of obsidian for native inhabitants of the area as far back as Clovis times. See, e.g., Beaty Butte AMP/FEIS at 38–40 (describing evidence that Beatys Butte “has been used by Native Americans for over 12,000 years”). Field surveys in 2004 confirmed the significance of the Beatys Butte area as an obsidian source area and confirmed the presence of archaeological sites. Not surprisingly, spring sites were “focal points” of prehistoric occupation. See EA at 25. Because BLM has not completed its survey work prior to issuance of its Final Decision, and because the EA does not present and discuss this important cultural resource information, BLM's Final Decision violates both NEPA and the National Historic Preservation Act of 1966 (“NHPA”), 16 U.S.C. § 470 *et seq.*, as amended.

### **A. NEPA Violation.**

Given the archaeological and cultural significance of the area, the failure to collect, present and discuss important cultural resource information prior to issuance of the EA falls short of NEPA's public disclosure requirements. See EA at 25 (“Some areas associated with Alternatives 2–5 still remain to be surveyed.”). ONDA specifically raised this issue in its comments, asking BLM to provide the monitoring, survey and other information it had collected on cultural resources, including all such information collected following the original 2005 decision. ONDA Comments at 9–10. After BLM failed to provide it in response to ONDA's comments, ONDA asked for this information again in its administrative protest. ONDA Protest at 11.

In response to ONDA's protest, BLM simply refers back to “public review comment response” in the EA, which, as explained at the outset, is a cut-and-paste of the response a similar comment made during the 2004–05 NEPA process. See BLM Protest Resp. at 13 (citing EA at 6–7). BLM's position is that it will address cultural resources if (and only if) they are discovered during implementation of the project—long after the decision over which alternative to select has been made. Id. at 13; EA at 6–7. This does not satisfy BLM's obligations under NEPA to ensure information is before decision makers and the public *before* decisions are made, to rigorously explore and objectively evaluate all reasonable alternatives, and to accurately describe the affected environment (including baseline conditions) and analyze environmental consequences. 40 C.F.R. §§ 1502.1, 1502.14, 1502.15, 1502.16. Collectively, these shortcomings show that BLM has not taken the requisite “hard look” at the potential impacts of its proposed action on cultural resources. Methow Valley Citizens Council, 490 U.S. at 348.

Indeed, BLM acknowledges in the EA that past adverse impacts to cultural resources on Beatys Butte have included trampling by livestock, road construction, and water development. EA at 25. BLM recognizes that “[d]amage to some cultural materials around the existing spring enclosures in both gulches has occurred due to trampling, primarily from concentration of cattle and to a lesser extent, wild horses.” Id. See also Beaty Butte AMP/FEIS at 72 (noting that construction of pipelines in areas with known cultural sites “could have severe negative impacts to the cultural resources located there if the resources are not avoided”). Yet, despite this unambiguous recognition of the problem, BLM refused to collect further information for the EA.

The failure to collect and disclose this information during the NEPA process allows BLM to “insulate[] its decisionmaking process from public scrutiny [rendering] NEPA’s procedures meaningless.” State of Cal. v. Block, 690 F.2d 753, 771 (9th Cir. 1982). Without completing a cultural resource inventory *prior to* issuing the EA (and despite the fact that BLM has been contemplating this project for several years now), there is no way for BLM or for the public to evaluate whether the proposed action involves or would adversely affect the “[u]nique characteristics of the geographic area such as proximity to historic or cultural resources.” 40 C.F.R. § 1508.27(b)(3). These deficiencies also violate FLPMA’s requirement that BLM engage in a reasoned and informed balancing process in order to satisfy its multiple use mandate and ensure its selected course of action will not cause “unnecessary or undue degradation.” 43 U.S.C. §§ 1732(a), (b).

### **B. NHPA Violation.**

The EA and Final Decision also violate Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470(f), and its implementing regulations, 36 C.F.R. §§ 800 *et seq.*

Section 106 of NHPA is a “stop, look, and listen” provision that requires each federal agency to consider the effects of its programs. . . . Under NHPA, a federal agency must make a reasonable and good faith effort to identify historic properties; determine whether identified properties are eligible for listing on the National Register based on criteria in 36 C.F.R. § 60.4; assess the effects of the undertaking on any eligible historic properties found; determine whether the effect will be adverse; and avoid or mitigate any adverse effects.

Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 805 (9th Cir. 1999) (citations omitted).

The EA lacks evidence that BLM complied with Section 106. It admits that adverse effects to cultural resources have occurred in the past and will continue to occur, but fails to effectively avoid or mitigate those effects. See, e.g., EA at 49 (“Cultural Impacts”). The EA also lacks information that BLM adequately consulted with members of the interested public. Simply sending the EA to tribal members is not enough. See 36 C.F.R. § 800.4(a) (requiring BLM to “determine and document the area of potential effects, as defined in [36 C.F.R.] § 800.16(d),” identify historic properties, and to affirmatively seek out information from the State Historic Preservation Officer, Native American tribes, consulting parties, and other individuals and organizations likely to have information or concerns about the project’s potential effects on cultural properties).

BLM responds that the “EA clearly states how it has (page 25) or will comply with” the NHPA. BLM Protest Resp. at 13. Although there is some flexibility for federal agencies to engage in post-decision NHPA review and mitigate any adverse impacts they discover, in this case BLM is on record, from the time it issued its original EA in July 2004, that it is aware of cultural resources in the project area and that it is aware of adverse impacts to those resources. Under these facts, where BLM has been aware of these issues for several years (and during the

course of preparation of three EA documents), it is arbitrary, capricious, and not in accordance with the NHPA for the agency to continue to defer a full and accurate inventory of cultural resources until after alternatives have been established and a final decision made.

## **VII. BLM Did Not Adequately Consider Cumulative Impacts.**

Finally, the EA does not present an adequate cumulative impacts analysis with respect to wilderness resource values, new fencing and water projects, impacts to sage grouse and pygmy rabbit populations, and weeds. NEPA requires an analysis of the cumulative impacts of the proposed action. See 40 C.F.R. §§ 1508.7, 1508.25(a)(2). Cumulative impact is

the impact on the environment which results from the incremental impact of the action when added to other past, present, and *reasonably foreseeable future actions* regardless of what agency . . . or person undertakes such other actions. Cumulative impacts can result from *individually minor but collectively significant actions* taking place over a period of time.

Ocean Advocates v. U.S. Army Corps of Eng'rs, 361 F.3d 1108, 1128 (9th Cir. 2004) (quoting Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1075 (9th Cir. 2002)); see also 40 C.F.R. § 1508.7 (CEQ definition). BLM must actually assess the cumulative effects of the proposed action, in particular with respect to wilderness resources, new fencing and water projects, impacts to sage grouse and pygmy rabbit populations and habitat, and weeds. See, e.g., Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt., 387 F.3d 989, 9979 (9th Cir. 2004) (EAs did not sufficiently identify or discuss incremental impacts). A mere listing of cumulative effects is insufficient. Neighbors of Cuddy Mtn. v. U.S. Forest Serv., 137 F.3d 1372, 1379 (9th Cir. 1998).

Here, the EA contains only very conclusory and unsupported comments on cumulative impacts, fails to mention impacts vis-à-vis other currently pending projects on the allotment, and improperly relies on “tiering” where the cumulative impacts of the newly proposed projects along with other past, present and future projects are not reasonably discussed in the tiered-to documents. An EA “may be deficient if it fails to include a cumulative impact analysis or to tier to an EIS that has conducted such an analysis.” See Kern, 284 F.3d at 1071. A mere listing of the cumulative effects is insufficient. Neighbors of Cuddy Mtn., 137 F.3d at 1379.

For wilderness, for example, the EA does not explain how its analysis of the Spaulding Proposed WSA Addition inventory information impacts its analyses and decisions concerning the remainder of that Proposed WSA Addition (i.e., the southern portion of the Addition), or of wilderness values cumulatively on the Beaty Butte Allotment. And by fragmenting ONDA’s inventory area into multiple smaller units based on flawed route analyses, BLM does not look cumulatively at impacts across all six of the sub-“units” it carved out of ONDA’s 82,000-acre proposal. Rather than respond directly to ONDA’s comment and protest points, BLM simply claims ONDA “failed to provide any specific reasoning as to why you believe the analysis if impacts to those resources is inadequate” and dismissively instructs ONDA that it “need[s] to be much more specific.” BLM Protest Resp. at 17.

For wilderness, the reason is simple: by determining that wilderness values “are absent” in the project area—and therefore declining to analyze direct and indirect impacts to wilderness values in the EA—it is uncontroverted that the EA likewise does not assess cumulative impacts on this resource it claims does not exist. See BLM Protest Resp. at 17 (“a NEPA analysis is supposed to focus on those components of the human environment that are actually present”). If ONDA prevails on its claim that BLM has violated NEPA by failing to consider impacts to wilderness values in the EA (under Section II, above), it necessarily follows that the agency also has failed to properly assess *cumulative* impacts to wilderness. This same reasoning applies to water projects and resources, impacts of fencing, impacts to sage grouse and other sage-dependent species, and weeds issues.

## PETITION FOR STAY

Pursuant to 43 C.F.R. §§ 4.21 and 4.471, ONDA hereby petitions for a Stay of the challenged decision. ONDA hereby respectfully requests the ALJ to Stay this contested decision until the appeal is resolved.

### I. The Relative Harm to the Parties Favors Issuance of a Stay.

ONDA and its members, who actively recreate on the public lands on and surrounding Beatys Butte’s East and West gulches, will be harmed if this final decision is permitted to proceed. Marlett Decl. at ¶¶ 12–15; ONDA Protest at 1–2. Implementation of this decision will result in a violation of federal laws and regulations as documented in the Statement of Reasons, as well as the loss of the ability of ONDA and its members to experience the land in question without viewing and experiencing ongoing degradation of important public resources and values.

If this flawed decision is implemented, the losses to the public will be significant and may be long-term and/or irreversible. This runs directly counter to FLPMA’s requirement that BLM manage the public lands in a manner “that will best meet the present and future needs of the American people” and “*without permanent impairment* of the productivity of the land and the quality of the environment.” 43 U.S.C. § 1702(c). (emphasis added). If BLM is permitted to proceed with its unlawful Final Decision, this would allow the agency to avoid its duty to “prevent unnecessary or undue degradation of the lands,” *id.* § 1732(b), as well as its procedural duties under NEPA. Davis v. Mineta, 302 F.3d 1104, 1115 (10th Cir. 2002) (“harm to the environment may be presumed when an agency fails to comply with the required NEPA procedure”).

Most significantly, the challenged decision would implement substantial new livestock “range improvement” facilities that will involve construction of more than thirteen miles of new barbed-wire fence, 3.7 miles of above-ground pipelines, two miles of new road, six new water troughs, 3 steel storage tanks, and 3 cattle guards—all in an area near the summit of Beaty Butte which possesses outstanding wilderness opportunities, an ecological oasis that is a key part of regionally significant sagebrush-steppe wildlife habitat, and locally critical riparian habitat. Moreover, these structures would be built on top of several miles of pipeline, and several tanks, cattle guards and segments of a new vehicle route, which already have been constructed pursuant

to BLM's original Gulch Projects decision previously found to be unlawful by the federal district court.

The Projects also would allow mowing or clearing of an unspecified number of acres of sagebrush habitat along fencelines, livestock trailing along newly-created corridors, the possible spread of invasive weeds along these corridors and new water locations as the result of livestock use in areas not previously (or recently) subjected to such heavy use, trampling, compaction and erosion of soils and microbiotic crusts along the corridor, disruption and degradation of critical pronghorn, sage grouse and pygmy rabbit habitat and movement, degradation of significant cultural resources, and disturbance to documented wilderness values.

Losses of soil, native vegetation and native wildlife habitat, and destruction or overutilization of rare desert springs, are irreparable. It is of particular concern that these impacts will occur within an area in which ONDA has comprehensively documented significant wilderness values. By failing to consider reasonable alternatives to solve the problem at issue—continued riparian degradation and overuse from livestock grazing in the East and West gulches—the BLM's decision also harms ONDA because the agency has summarily refused to consider viable options such as reduced grazing (numbers and/or periods of time), increased herding, or resting *both* the North and South pastures at once on this otherwise vast (523,000 acres) allotment. These types of options would solve the resource degradation problems at least as effectively as adding nearly twenty miles of new fence and pipeline. Yet, the BLM simply refused to consider them. BLM's decision not to consider removing illegally-constructed projects and rehabilitating those impacted areas also adversely affects ONDA. As a result, ONDA's interests are directly harmed. A Stay will prevent direct harm to ONDA, its members and their interests because of the violation of federal statutory and regulatory provisions on which ONDA relies.

Conversely, the relative harm to BLM, should a Stay issue, is minimal to nonexistent. The 2007 grazing season already is well underway on the Beaty Butte Allotment. Livestock turnout on the North Pasture occurred April 1, 2007. The 2007 AOP indicates that livestock will be off the North Pasture by early September. Thus, grazing in the 2007 grazing season will continue under the current terms of the 2007 AOP regardless of whether implementation of the Projects is stayed.

BLM has not indicated that construction of these Projects would have any impact this season's grazing. In fact, the Proposed Decision states that BLM intends to implement the projects "over a multiple year time span." Notice of Proposed Decision at 2. The road relocation and rehabilitation work would occur first, followed by the fencing projects, all of which are "subject to available staff and funding constraints." *Id.* Thus, there is no immediate or emergency need for BLM to construct the proposed fence and water developments.

If a Stay is not granted, BLM would be allowed to proceed with a project that has been developed and approved in contravention of federal law. This will cause potentially irreparable harm to the public lands involved, as described above. As the Tenth Circuit Court of Appeals recently observed, "harm to the environment may be presumed when an agency fails to comply with the required NEPA procedure." Davis v. Mineta, 302 F.3d at 1115; see also Amoco Prod.

Co. v. Village of Gambrel, 480 U.S. 531, 545 (1987) (“[e]nvironmental 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 . . . therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment”).

At least some construction activities and permanent alterations of these public lands and high desert landscapes would begin immediately if a Stay is not granted. At most, a Stay will require the agency to hold off on construction activities until this appeal can proceed on the merits and potentially until the agency prepares a fully-informed analysis and decision as required by NEPA and NHPA—and one that will avoid “unnecessary or undue degradation,” as required by FLPMA.

## **II. Appellant’s Likelihood of Success on the Merits Favors Issuance of a Stay.**

ONDA has established that it likely will succeed on the merits of this appeal based on the BLM’s: (1) failure to comply with the federal district court’s order to undertake a new NEPA process after the previous decision was vacated; (2) refusal in the EA to properly or adequately consider and balance wilderness resource values and impacts to wilderness values; (3) failure to consider an adequate range of alternatives to the proposed action that would also solve the resource and management problems presented; (4) failure to collect, present or otherwise take a “hard look” at significant new or updated information concerning key resources and impacts; (5) failure to fully and properly consider impacts to significant cultural resources known to be present and known to be impacted by grazing and the types of range projects proposed here; and (6) failure to adequately consider the cumulative impacts of the proposed action. By failing to satisfy these essential statutory requirements, BLM’s decision very likely will result in “unnecessary or undue degradation” and “permanent impairment” of the public lands, and fails to demonstrate the agency engaged in a balanced and informed multiple-use analysis.

ONDA therefore has met its burden of showing it is likely to succeed on the merits of one or more of its claims, 43 C.F.R. § 4.471(c)(2), because BLM’s Final Decision is unreasonable, does not substantially comply with NEPA, FLPMA and other provisions of federal environmental law, and is arbitrary, capricious and not supported by any rational basis. See 43 C.F.R. § 4.480(b); Eason v. BLM, 127 IBLA at 262; Wayne D. Klump v. BLM, 124 IBLA at 182.

## **III. The Likelihood of Irreparable Harm Favors Issuance of a Stay.**

The harm that will result from implementation of BLM’s Final Decision is irreparable in that it will allow new and purposeful degradation of public resources, including fragile and finite wilderness values. Construction of nearly 17 combined miles of new fences and pipelines (on top of those already unlawfully constructed) will result in fragmented and destroyed sage-steppe wildlife habitat, invasion and spread of noxious weeds to the detriment of native plant species, compaction and/or erosion of soil, destruction of critical nitrogen-fixing microbiotic crusts, and disturbance to wilderness values. Losses of soil and crusts, native vegetation, and native wildlife habitat, as well as degradation to the wilderness resource, are irreparable. Placement of new

watering troughs and continued piping of extremely limited water resources in this area also will irreparably harm the critically important riparian zones in the gulches.

Furthermore, implementation of this project without fully considering reasonable alternatives such as reduced grazing or increased herding will leave the fragile East and West gulches susceptible to the same type of severe resource degradation that led the BLM to propose these structural rangeland projects in the first place. BLM initiated this project in large measure due to concerns expressed (and resource degradation documented) in July 2003 by a member of the public over resource conditions in the gulches. In a letter to the BLM accompanied by a series of before- and after-grazing photos, Dr. Stuart Garrett documented severe overgrazing, damaged springs, adverse impacts to post-fire vegetative recovery, increases in weeds and other undesirable non-native plant species, and watershed and hydrological damage. See Exh. 3 (July 8, 2003 letter and photos; map of photo locations).

On September 3–4, 2003, members of the local and state BLM offices took a trip to the Beaty Butte Allotment to assess resource conditions; the BLM subsequently drafted an “Action Plan” dated January 21, 2004, which gave rise to the subject EA. See EA at 1, 2. Nevertheless, throughout multiple rounds of public comment, the BLM steadfastly refused to consider in detail reasonable option such as reduced grazing or increased herding. As a result, because BLM intends to construct the proposed structural projects in order to continue to authorize the same unsustainable numbers of livestock and levels of grazing, there is a very real possibility that types of degradation documented in Garrett’s 2002 and 2003 photos can and will be repeated once again in 2007 and beyond over the course of this multi-year project.

Finally, ONDA and its members will be deprived of the opportunity to enjoy thriving wildlife populations in intact natural habitats, including healthy and thriving populations of special status species such as pronghorn, sage grouse, and pygmy rabbits. Instead, ONDA and the public will be faced with the very real potential for additional acreages of flourishing exotic (plant) species invasions in areas not previously disturbed by over-grazing or weed invasions, as well as declining wildlife populations as their habitat continues to become fragmented by increased weeds and new “range improvement” physical barriers, and continued unsustainable use levels and associated ecological problems.

ONDA and its members also will be deprived of the opportunity to enjoy conservation of significant, finite, and outstanding wilderness resource values on Beatys Butte. Instead, they will be faced with construction and other human activities moving forward, before a decision on the merits, which will undoubtedly adversely impact, and perhaps irreparably harm, this fragile resource. See Miller Decl. & photographs.

If permitted to occur, these impacts will never be fully recoverable and therefore represent, through the loss of existing soils, microbiotic crusts, native vegetation, wildlife habitat, special status species and irreplaceable wilderness values, an irreparable action on the part of BLM that will harm the environment and the ability of ONDA to carry forward a legal contest of this decision, once it is in place.

#### IV. The Public Interest Favors Issuance of a Stay.

Finally, the public interest favors granting the requested Stay. The significant sage-steppe habitat and special status species, the magnificent wildlands on and surrounding Beatys Butte, and other important resources will be degraded irreparably if BLM is allowed to implement its Final Decision. This is not in the public interest. Rather, recovering the health of these public lands and resources, and ensuring fully-informed, balanced multiple-use decisionmaking in compliance with NEPA, FLPMA and other federal laws, is in the best interest of the public. In addition, the public interest as expressed by Congress in NEPA and FLPMA will be harmed if the BLM is permitted to act in contravention of federal laws and regulations intended to protect public resources.

#### CONCLUSION

ONDA believes the granting of a Stay in this matter clearly serves the interest of the health of ecosystems, native biota and the public on Oregon's public wildlands. Therefore, ONDA respectfully requests the ALJ to issue an order granting ONDA's Petition for Stay.

Respectfully,



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

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Encl.—

<u>EXHIBIT</u>	<u>DOCUMENT</u>
1	BLM, <i>Wilderness Inventory Handbook</i> (Sept. 27, 1978).
2	BLM, H-6310-1, <i>Wilderness Inventory &amp; Study Procedures</i> (Jan. 10, 2001).
3	Letter from Dr. Stuart Garrett to BLM (July 8, 2003) (with attachments).
4	<u>ONDA v. Rasmussen</u> , No. 05-1616-AS, Order (D. Or. Dec. 12, 2006).
5	BLM, <i>Draft Action Plan</i> (Jan. 21, 2004).

6 BLM, [Defendants' Proposed] Form of Judgment, ONDA v. Rasmussen, No. 05-1616-AS (Dec. 5, 2006).

7 ONDA, [Proposed] Order and Injunction Regarding Final Relief, ONDA v. Rasmussen, No. 05-1616-AS (Nov. 14, 2006).

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I served true and accurate copies of Appellant Oregon Natural Desert Association's foregoing **Notice of Appeal, Statement of Reasons, and Petition for Stay**, on the parties herein, via certified mail, return receipt requested, this 30th day of May, 2007, to:

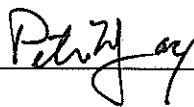
Thomas E. Rasmussen, Field Manager  
Lakeview Resource Area  
Bureau of Land Management  
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Office of the Regional Solicitor  
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Portland, OR 97232

United States Department of the Interior  
Board of Land Appeals  
Office of Hearings and Appeals  
139 East South Temple, Suite 600  
Salt Lake City, UT 84106

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

DATED this 30<sup>th</sup> day of May, 2007.



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

Attorney for Appellant