

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

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**Docket No. 05-35931**

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**OREGON NATURAL DESERT ASSOCIATION, *et al.***

Plaintiff-Appellants,

**v.**

**BUREAU OF LAND MANAGEMENT, *et al.***

Defendant-Appellees,

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

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**OPENING BRIEF OF PLAINTIFF-APPELLANTS**

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## **CORPORATE DISCLOSURE STATEMENT**

Appellants Oregon Natural Desert Association, Western Watersheds Project, and Committee for the High Desert are non-profit corporations and have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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## STATEMENT OF JURISDICTION

Jurisdiction is proper in the United States District Court under 28 U.S.C. § 1331 because this action is brought against federal defendants United States Bureau of Land Management *et al.* (“BLM”) for violations of the laws of the United States, including the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321–4370(e), the Federal Land Policy and Management Act (“FLPMA”), 43 U.S.C. §§ 1701–1784, the Taylor Grazing Act, 43 U.S.C. §§ 315 *et seq.*, and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701 *et seq.* Plaintiff-Appellants Oregon Natural Desert Association *et al.* (hereinafter “ONDA”) are conservation organizations whose members use and enjoy the public lands within the area governed by the Southeastern Oregon Resource Management Plan (“SEORMP”) and who participated extensively in the RMP planning process.<sup>1</sup> This appeal seeks review of the district court’s July 22, 2005 Order and accompanying Judgment, which is a final decision disposing of all of ONDA’s claims with prejudice. Excerpts of Record (“ER”) at 757, 761. This court has jurisdiction under 28 U.S.C. § 1291 to review appeals from all final decisions of the district courts of the United States. ONDA timely filed its Notice of Appeal on September 8, 2005. See Fed. R. App. P. 4(a)(1)(B); ER 763. ONDA submits this opening brief pursuant to this court’s Amended Order dated May 25, 2006.

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<sup>1</sup> The record demonstrates that each Plaintiff-Appellant has standing, which the BLM has not challenged. ER 224; see also ER 735–41.

## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

- I.** Whether the BLM violated NEPA when the agency failed to take a “hard look” at the environmental consequences and cumulative impacts on the wilderness resource of its decision adopting the SEORMP.
- II.** Whether the BLM violated NEPA by adopting the SEORMP without considering a reasonable range of alternatives to the proposed action, with respect to domestic livestock grazing allocations and off-highway vehicle use designations.
- III.** Whether ONDA’s Federal Land Policy and Management Act and Taylor Grazing Act claims were ripe for review and therefore justiciable.

## **STATEMENT OF THE CASE**

The lawsuit underlying this appeal seeks judicial relief ordering the BLM to comply with key requirements of NEPA, FLPMA, and the Taylor Grazing Act in its management of public lands in southeast Oregon’s high desert. These lands span some of the most remote and wild landscapes in the lower forty-eight states, including expansive areas of sagebrush-steppe dissected by the Owyhee Canyonlands. In 2003, the BLM adopted the “Southeastern Oregon Resource Management Plan,” a land use plan intended to guide management of more than four million acres of public land for the next twenty years or more. Among other things, the Plan designates areas open or closed to domestic livestock grazing, sets

forage allocations for grazing, and establishes areas open or closed to off-highway vehicle use. These and other decisions made in the Plan impact wilderness values on the public lands.

ONDA alleges the BLM has acted arbitrarily and capriciously by adopting the SEORMP without complying with key requirements under NEPA, FLPMA, and the Taylor Grazing Act. This includes adopting the Plan based on outdated and inaccurate inventory data on the wilderness resource, without properly considering the environmental consequences to the wilderness resource of the proposed land use plan, and without considering a reasonable range of alternatives concerning livestock grazing allocations and off-highway vehicle use designations. The BLM also violated FLPMA's duty to affirmatively balance multiple-uses on the public lands, ensuring land management decisions do not cause "unnecessary or undue degradation," and to base those decisions on current inventory information on key resources such as wilderness. Finally, the BLM's decision violates FLPMA and the Taylor Grazing Act because the agency failed to consider the suitability of these public lands for domestic livestock grazing or whether the lands indeed are, or remain, "chiefly valuable" for grazing.

The BLM's failure to base its decision on up-to-date and accurate information concerning the wilderness resource has left literally hundreds of thousands of acres of public land vulnerable to land use activities that may

adversely impact the key, statutorily-defined factors of wilderness: roadlessness, naturalness, and outstanding opportunities for solitude or primitive and unconfined recreation. Likewise, the BLM's failure to consider reasonable alternatives concerning allocations of the public lands to domestic livestock grazing and off-highway vehicle use, leaves millions of acres open to such uses without considering fully the environmental consequences of those long-term land use decisions. These activities adversely impact resources as diverse as fish and wildlife populations and habitat, vegetation, water quality and quantity, recreational uses, cultural resources, and wilderness values.

ONDA filed this action in the District of Oregon on July 29, 2003. See ER 768 (district court docket sheet). The parties briefed cross-dispositive motions before a magistrate judge, who on March 29, 2005 issued a Findings and Recommendation ("F&R"), recommending that ONDA's claims be denied and judgment granted to the BLM. ER 742-56. On July 22, 2005, the district court adopted the magistrate's F&R and entered judgment against ONDA. ER 757-59 (Order); ER 761-62 (Judgment). ONDA timely filed its Notice of Appeal on September 8, 2005. ER 763-64.

### **STATEMENT OF THE RELEVANT FACTS**

At issue in this case is the BLM's adoption of the SEORMP, which governs management of about 4.6 million acres of public lands in southeast Oregon's high

desert. ER 67. This region stretches from the canyonlands of the Owyhee Wild and Scenic Rivers, to the remote Sheepshead and Trout Creek Mountains of the northern Great Basin, and up to the southeast front of the Blue Mountains, where the Malheur River emerges to join the Snake River. See ER 68 (general location map), 221 (regional relief map). It includes substantial areas that are suitable for wilderness designation. This vast expanse of sagebrush steppe includes part of the single largest remaining wildland in the lower forty-eight states, and as such is a vitally important part of our National heritage. It is home to more than 350 species of fish and wildlife, including threatened, endangered, and sensitive species such as Western sage grouse, pygmy rabbit, bighorn sheep, pronghorn antelope, lynx, and three species of native trout—redband, bull, and Lahontan cutthroat. These species depend both on native sage-steppe uplands and the infrequent but highly significant perennial and intermittent streams, springs and riparian areas that breathe life into this arid, high desert landscape.<sup>2</sup>

## **I. FLPMA AND BLM LAND USE PLANNING**

Congress enacted FLPMA in 1976 to govern the BLM's management of the public lands. In FLPMA, Congress added a new management structure—land use

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<sup>2</sup> See also Idaho Watersheds Project v. Hahn, 307 F.3d 815, 820–21 (9th Cir. 2002) (describing on “Idaho side” of Owyhee canyonlands “ruggedly beautiful landscape,” “sculpted spectacular and wild canyonlands,” and “startling . . . ecological diversity, from arid sagebrush desert to lush juniper woodlands”); Ore. Natural Desert Ass’n v. Singleton, 47 F.Supp.2d 1182, 1184–85 (D. Or. 1998) (describing Owyhee Wild Rivers, within SEORMP planning area).

planning—directing that the BLM “shall, with public involvement and consistent with the terms and conditions of this Act, develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands.” 43 U.S.C. § 1712(a). These land use plans are known as “resource management plans” or “RMPs.” 43 C.F.R. § 1601.0-5(k). FLPMA requires the BLM to manage the public lands consistent with the “principles of multiple use and sustained yield,” 43 U.S.C. § 1732(a), and an RMP must adhere to multiple use principles. *Id.* § 1712(c)(1); 43 C.F.R. §§ 1610.4-4, 1601.0-2, 1601.0-5(k)(1) (RMPs must establish “land areas for limited, restricted or exclusive use”). See also 43 U.S.C. § 1702(c) (defining “multiple use”). An RMP is a “major Federal action significantly affecting the quality of the human environment” and therefore requires the BLM to prepare an environmental impact statement (“EIS”) under NEPA, as part of the resource management planning process. 43 C.F.R. § 1601.0-6.

Recognizing that the BLM could only satisfy its multiple use mandate if the agency had a thorough understanding—both at a single point in time and *through time*—of the resources under its control, Section 201 requires that the BLM

shall prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values (including, but not limited to, outdoor recreation and scenic values), giving priority to areas of critical environmental concern. This inventory shall be kept current so as to reflect changes in conditions and to identify new and emerging resource and other values.

43 U.S.C. § 1711(a); see also id. § 1701(a)(2) (“the national interest will be best realized if the public lands and their resources are periodically and systematically inventoried”). In preparing an RMP, the BLM must rely on these inventories of the public lands, their resources, and other values. Id. § 1712(c)(4).

The BLM initiated the planning process for the SEORMP in August 1995. After releasing a Draft RMP/EIS in 1998 and a Final RMP/EIS in 2001, the BLM issued a Record of Decision (“ROD”) adopting the SEORMP in 2003. ER 73–74 (summary of planning process); 68 Fed. Reg. 16,307 (Apr. 3, 2003). The SEORMP establishes management requirements and land allocations for this area of the public lands for the next twenty years. ER 55 (ROD).

During the RMP planning process, ONDA met with BLM staff, submitted scientific data and literature, and provided detailed written comments underscoring the significant values of this area for wildlife and fish and for potential wilderness preservation. ONDA documented how ongoing livestock grazing, off-highway vehicle (“OHV”) use, and other human actions governed by the RMP are causing substantial degradation of these values. ONDA also asked the BLM to consider meaningful alternatives to its proposed course of action, which essentially perpetuates prior livestock grazing and OHV authorizations that are causing irreversible harm and for which the BLM completely refused to consider impacts to the wilderness resource on millions of acres of public land.

The BLM ignored this public input and instead approved the SEORMP based on an EIS that failed to evaluate issues and alternatives identified by ONDA and other members of the public. The EIS failed to address meaningfully the adverse impacts that ongoing livestock grazing, OHV use and other actions are having—and will continue to have—particularly in preventing suitable areas from potential conservation as wilderness. Accordingly, ONDA filed this action in July 2003 to challenge the BLM’s violations of law in adopting the SEORMP.

## **II. THE WILDERNESS RESOURCE ON THE PUBLIC LANDS**

“Wilderness” is defined legally by (1) size (at least 5,000 contiguous acres of public land), (2) naturalness (the area “generally appears to have been affected primarily by the forces of nature” and “imprints of man’s work” are “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); 43 U.S.C. § 1702(i) (adopting same definition); see also ER 244 (BLM’s 1978 *Wilderness Inventory Handbook*); ER 671–77 (more detailed discussion of same factors in BLM’s 2001 *Wilderness Inventory & Study Procedures* handbook). 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); see also ER 677.

While only Congress can designate Wilderness, 16 U.S.C. § 1132 (designation of wilderness areas), the BLM may designate Wilderness Study Areas (“WSAs”) and must manage for wilderness values on the public lands. According to the BLM:

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

ER 669. In the SEORMP itself, the BLM acknowledges, “Under FLPMA wilderness preservation is part of BLM’s multiple-use mandate, and wilderness is recognized as part of the spectrum of resource values considered in the land use planning process.” ER 169. Thus, even on a parcel of public land where there is no congressionally-designated Wilderness, the 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).

When Congress enacted FLPMA in 1976, it required the Secretary of the Interior to conduct an initial review of BLM lands eligible for protection under the Wilderness Act. 43 U.S.C. § 1782(a). Section 603(a) required the Secretary, within fifteen years of the statute’s enactment, to review roadless areas identified during inventories undertaken pursuant to Section 201(a) as having wilderness characteristics, and to report to the President his recommendation as to the

suitability of those areas for preservation as wilderness. Id. §§ 1782(a), 1711(a); see also ER 241 (background on BLM’s initial wilderness review program). In Oregon, the BLM issued an *Oregon Wilderness Final EIS* in 1989, ER 255, and a *Wilderness Study Report* with wilderness recommendations to Congress in 1991. Id.; see also ER 80 (background on same in SEORMP planning area).

Until Congress acts on those recommendations, the lands identified to have wilderness values are known WSAs and are managed so that their wilderness suitability is not “impaired.” 43 U.S.C. § 1782(c). As a result, there exist 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”). See ER 80. There also are additional roadless areas outside of currently existing WSAs that contain wilderness characteristics but that have never been considered or deemed eligible for wilderness designation (“non-WSA roadless areas”)—either under the initial Section 603 review process or under any subsequent land use planning process.

### **III. THE WILDERNESS RESOURCE WITHIN THE SEORMP PLANNING AREA**

Considerable portions of the SEORMP planning area contain wilderness characteristics worthy of preservation for future generations. Thirty-two WSAs covering about 1.2 million acres occur within the area. ER 12; see also ER 222–23 (map of WSAs). In its 1991 *Wilderness Study Report for Oregon*, the BLM

recommended that all or a portion of twenty-one of those WSAs, covering about 638,000 acres, be designated by Congress as Wilderness, and recommended that the eleven other WSAs not be designated as Wilderness. ER 12. Congress has yet to act on those recommendations. ER 14. The SEORMP planning area also contains more than a million acres of public lands outside existing WSAs, which possess defined wilderness characteristics. Wilderness characteristics on these lands are not identified in the SEORMP. See ER 12–14 (discussing wilderness resource only for previously existing WSAs).

Beginning in 2002, the Oregon Natural Desert Association initiated a program to systematically inventory and document wilderness characteristics on the BLM-managed public lands in eastern Oregon. ER 739–40, 262–63. The premise of ONDA’s “Wilderness Research and Rescue” program is twofold: (1) that the BLM’s original wilderness review 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. See id. See also 16 U.S.C. § 1131(a) (Congressional policy regarding preservation of wilderness, referring to threats of

increasing population, expanding settlement, growing mechanization, and importance of lands preserved and protected in natural condition).

When it became clear that the BLM would not update its wilderness inventory information as required by FLPMA during the SEORMP planning process, in 2003 ONDA conducted its own such inventory throughout the BLM's Vale District in southeast Oregon. ER 739–40. During the course of a full year of field work and GIS mapping and analysis, ONDA inventoried more than 2.2 million acres of public land. ER 262–63 (inventory report cover letter). ONDA identified 1.3 million acres either wholly or partially in the Vale District as having wilderness characteristics as defined by the Wilderness Act, FLPMA, and the Department of the Interior itself—that is, public lands which are roadless, primarily affected by the forces of nature, and provide outstanding opportunities for solitude and primitive recreation. *Id.* These are lands whose documented wilderness characteristics are not currently being recognized, protected, or otherwise managed for by the BLM.

ONDA followed the inventory protocol the BLM established in the agency's 2001 *Wilderness Inventory Study and Procedures* handbook. ER 262. ONDA's 400-page 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 the BLM gathered in its original, 1970s and 1980s-era wilderness inventory. ER 261–663 (full report), 739–40. The report also includes thousands of photographs.<sup>3</sup>

### **SUMMARY OF THE ARGUMENT**

This appeal raises three discrete issues: first, whether the BLM violated NEPA when it adopted the SEORMP without taking a “hard look” at the environmental consequences of the action on the wilderness resource; and second by failing to consider a reasonable range of alternatives to the proposed action with respect to domestic livestock grazing allocations and off-highway vehicle use designations; and finally, whether the district court erred in determining ONDA’s FLPMA and Taylor Grazing Act claims were unripe for review and therefore not justiciable.

If this court agrees with ONDA that the BLM violated NEPA in one or more respects, the appropriate relief is to remand to the agency for a new NEPA review and a new RMP decision. Thus, this court’s primary task is to reverse and remand to the BLM based on the agency’s violations of NEPA. ONDA also asks that the

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<sup>3</sup> Due to the number of photos, they are not reproduced in the administrative record. ONDA’s full inventory report, including the photographs, is available at: [www.onda.org/projects/ohdpa/index.html](http://www.onda.org/projects/ohdpa/index.html) (last modified June 7, 2006) (“2003 Owyhee Canyonlands” wilderness recommendations). See ER 739 (referring reader to ONDA website for full report).

court correct the district court's erroneous ruling on the ripeness issue for ONDA's FLPMA and Taylor Grazing Act claims. As a practical matter, though, this court need not necessarily reach the ripeness issue if it rules for ONDA concerning one or more of the BLM's NEPA violations.

The crux of this appeal therefore focuses on key violations of NEPA in the BLM's decision to adopt the SEORMP. First, the BLM refused to properly consider impacts to the wilderness resource. To justify its refusal, the agency relied on outdated and inaccurate wilderness resource inventory information, collected in the 1970s and 1980s. The BLM argued it had no obligation to update that information, or to consider new or changed on-the-ground conditions, when preparing the SEORMP. But NEPA requires federal agencies to consider in detail the environmental impact of proposed actions on the "quality of the human environment." 42 U.S.C. § 4332(2)(C). The wilderness resource, which is defined by roadlessness, naturalness, and outstanding opportunities for primitive or unconfined recreation, 16 U.S.C. § 1131(a), is one component of the "human environment." Accordingly, the BLM's refusal to consider impacts to the wilderness resource throughout millions of acres of public land governed by the SEORMP, relying instead on outdated and inaccurate wilderness inventory data, violates NEPA. This failure includes not only consideration of direct and indirect environmental consequences, but also cumulative impacts to the wilderness

resource. 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1502.16, 1508.7, 1508.8, 1508.25 (all addressing required scope of an EIS).

Second, the BLM violated NEPA by failing to consider in the EIS a reasonable range of alternatives to the proposed action concerning domestic livestock grazing allocations and OHV use designations. See 42 U.S.C. §§ 4332(2)(C)(iii), 4332(2)(E). The BLM refused to consider alternatives that would alter levels of grazing and areas allocated to grazing, from those established more than two decades earlier in the land use plans the SEORMP replaces. Likewise, the BLM refused to consider any alternative that would close more than a fraction of one percent of the 4.6 million acres of public land at issue, to potentially destructive off-highway vehicle use. The BLM's failure to consider viable alternatives in these key respects renders its EIS inadequate.

Finally, the district court erred by concluding that ONDA's FLPMA and Taylor Grazing Act claims are unripe for judicial review. Citing Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726 (1998), the district court based its decision on a finding that the SEORMP "does not authorize specific actions that could harm plaintiffs." ER 754. But because ONDA's claims target land use planning defaults concerning consideration of the wilderness resource, off-highway vehicle use designations, and grazing allocations, for which there are immediate procedural and concrete underlying injuries, these claims will never become riper and

consequently are justiciable. Accordingly, ONDA's FLPMA and Taylor Grazing Act claims are ripe for review.

Because the BLM has violated NEPA, FLPMA, and the Taylor Grazing Act in key respects, and because ONDA has properly challenged a specific final agency action that is ripe for judicial review, this court should reverse the district court's decision and remand to the BLM for the agency to prepare a new NEPA review and issue a new RMP decision.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

This court reviews a district court's grant of summary judgment *de novo*. Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation, 426 F.3d 1082, 1090 (9th Cir. 2005) (citing Buono v. Norton, 371 F.3d 543, 545 (9th Cir. 2004)); see also Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., 377 F.3d 949, 959 n.14 (9th Cir. 2004) (*de novo* review of district court decision on cross motions for summary judgment). The BLM's Record of Decision adopting the SEORMP is a final agency decision subject to review under Section 706 of the APA. Bennett v. Spear, 520 U.S. 154, 178–79 (1997). Such decisions may be set aside if “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). Review under this standard is narrow; the reviewing court may not substitute its judgment for that of the agency. Marsh

v. Ore. Natural Res. Council, 490 U.S. 360, 375–76 (1989). The agency must articulate a rational connection between the facts found and the conclusions made. Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983).

While the court's review is deferential, its inquiry must "be searching and careful." Marsh, 490 U.S. at 378. The court must determine whether the agency's decision was "based on a consideration of the relevant factors and whether there has been a clear error of judgment." Id. If the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise, the agency action may be overturned as unlawful. Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43.

This court reviews a district court's determination that it lacked subject matter jurisdiction *de novo*. See Hambleton Bros. Lumber Co. v. Balkin Enter., Inc., 397 F.3d 1217, 1226 (9th Cir. 2005); Buono, 371 F.3d at 545; United States v. Peninsula Communications, Inc., 287 F.3d 832, 836 (9th Cir. 2002). Ripeness is a question of law reviewed *de novo*. Qwest Corp. v. City of Surprise, 434 F.3d 1176, 1180 (9th Cir. 2006); Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1070

(9th Cir. 2002) (citing Natural Res. Def. Council v. Houston, 146 F.3d 1118, 1131 (9th Cir. 1998)).

## **II. THE BLM VIOLATED NEPA BY FAILING TO TAKE A “HARD LOOK” AT THE ENVIRONMENTAL CONSEQUENCES TO THE WILDERNESS RESOURCE OF ITS LAND USE PLAN DECISION.**

ONDA’s primary complaint about the SEORMP concerns the BLM’s management of public lands containing outstanding wilderness values. This concern gives rise to claims under two independent and distinct statutory duties. NEPA requires the BLM to take a “hard look” at the direct, indirect, and cumulative impacts of its decision on the wilderness resource. 42 U.S.C. § 4332(2)(C). FLPMA establishes the BLM’s duty to affirmatively balance the wilderness resource against other valid “multiple uses” of the public lands, ensuring its selected course of action will not cause “unnecessary or undue degradation” of the lands. 43 U.S.C. §§ 1732(a), 1732(b). The BLM must achieve that purpose by collecting and maintaining accurate, up-to-date inventory information on wilderness and other resources. Id. § 1711(a), 1712(c).

The BLM consistently has taken the position that it has no duty under FLPMA to inventory for or consider wilderness values during the land use planning process; and hence the agency also argues it has no duty to consider wilderness values as part of the NEPA process for the SEORMP. ER 78 (RMP), 47 (Final EIS), 235 (BLM response to ONDA administrative protest). For the reasons

explained below, this court should reverse the BLM's unlawful decision and issue an order remanding the decision to the agency and requiring it to take a "hard look" at the environmental consequences and cumulative impacts of its proposed land use plan decision on the wilderness resource.

**A. NEPA's "Hard Look" Requirement: Ensuring Federal Agencies Fully Consider the Environmental Consequences of Proposed Actions and That the Public is Fully Informed as to Those Analyses.**

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 the 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, 284 F.3d at 1066); 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). Thus, "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. . . . Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." Id. § 1500.1(b). NEPA's emphasis on "the importance of coherent and comprehensive up-front environmental analysis [] ensure[s] informed decision making to the end that the agency will not act on incomplete information, only to regret its decision

after it is too late to correct.” Blue Mtns. Biodiversity Project v. Blackwood, 161 F.3d 1208, 1216 (9th Cir. 1998).

For all actions “significantly affecting the quality of the human environment,” the BLM must provide a detailed statement on the “environmental impact of the proposed action,” alternatives to the proposed actions, and any “irreversible and irretrievable commitments of resources” that would occur with implementation of the action. 42 U.S.C. § 4332(2)(C); Earth Island Inst., 442 F.3d at 1153. An EIS must contain a “full and fair discussion” of significant environmental impacts that is “supported by evidence that the agency has made the necessary environmental analyses.” 40 C.F.R. § 1502.1. The discussion must include an analysis of the direct, indirect, and likely cumulative impacts of the proposed action. Earth Island Inst., 442 F.3d at 1159; see also 40 C.F.R. §§ 1508.7, 1508.8, 1508.25. 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). To satisfy NEPA, the 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, 490 U.S. at 374); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 348 (1989).

**B. NEPA Requires the BLM to Consider Impacts on Wilderness Like Any Other Resource.**

The BLM has a legal duty under NEPA to consider the wilderness resource during the SEORMP planning process. 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 the wilderness resource from its requirements. Indeed, the Council on Environmental Quality regulations specifically direct that the “human environment” “shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment.” 40 C.F.R. § 1508.14; see also 42 U.S.C. § 4331(a) (broad Congressional declaration of national environmental policy, referring to “the interrelations of all components of the natural environment”); Found. for N. Am. Wild Sheep v. U.S. Dep’t of Agric., 681 F.2d 1172, 1177 (9th Cir. 1982) (discussing “the exceptionally broad scope of NEPA”); San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm’n, -- F.3d --, 2006 WL 1511889, at \*9–\*11 (9th Cir. 2006) (holding NEPA required NEC to consider environmental impacts of a terrorist attack). Thus, wilderness is a resource like any other on the public lands, see ER 669 & 169, and as such the BLM must consider the environmental impacts of its proposed actions on that resource.

**C. The BLM's Decision to Adopt the SEORMP Without Considering the Effects of the Plan on the Wilderness Resource Violates NEPA.**

In preparing the SEORMP, the BLM refused to collect or update relevant information on wilderness characteristics, such as roadlessness, naturalness, and opportunities for solitude and primitive recreation, that would be impacted by the proposed action. Throughout the seven-year SEORMP planning process, the BLM insisted that its analysis of the wilderness resource occurred via a “one-time review” completed in 1992. ER 235 (protest response). According to the BLM, the agency “has no policy to require the re-analysis of final wilderness suitability/non-suitability decisions made by the Secretary and the President,” and “the Purpose and Need for the [SEORMP] specifically states that the recommendations for wilderness suitability are outside the scope of this planning process.” *Id.* In confirming the BLM has only conducted a single inventory of the wilderness resource, in the 1970s and 1980s, the agency claims:

A global reinventory by BLM to address wilderness values within the planning area is outside the scope of this plan. In accordance with FLPMA, with substantial public input and review, BLM has completed its required evaluation and assessment of wilderness values on public lands with earlier planning efforts.

ER 47. The EIS therefore contains no discussion of this important resource and multiple-use value, outside of existing WSAs. This means the BLM failed to

consider impacts to the wilderness resource on approximately 3.4 million acres<sup>4</sup> of public land governed by the SEORMP.

As ONDA's subsequent wilderness inventory report documents, a significant portion of those lands do contain statutorily- and BLM-defined wilderness characteristics that should have been considered. These areas encompass about 1.3 million acres of public land in 42 separate roadless areas. ER 262, 267 (map of ONDA-inventoried areas). The significant wilderness values present in these areas are worthy of protection as part of the BLM's multiple-use management of the public lands—but at a minimum should have been considered as part of the NEPA process to determine the SEORMP's potential impacts to this fragile and finite resource.

The BLM has defended its refusal to consider wilderness in this EIS by arguing it satisfied any obligation to do so when it completed an initial wilderness review under FLPMA § 603 in the 1970s and 1980s. See ER 47, 78, 235. By its 1991 recommendations to Congress, the BLM eliminated hundreds of thousands of acres of lands from further study as potential wilderness based on the agency's initial wilderness review. See, e.g., ER 262–63. The BLM did not update its initial inventory, more than a quarter of a century later when it undertook the SEORMP planning process. ONDA's 2003 inventory data show that the BLM's decades-old

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<sup>4</sup> That is, the portion of the planning area lying outside of existing WSAs, which cover about 1.2 million acres of the planning area. See ER 12.

information is not representative of current on-the-ground conditions either because the BLM's initial review was inaccurate or because conditions have substantially changed such that these areas now possess defined wilderness characteristics worthy of consideration and conservation. ER 268–663.

In many cases, new inventory information shows the BLM's existing inventory data from the 1970s and 1980s simply is inaccurate. For example, one of the 42 wilderness inventory units included on ONDA's report is the 40,284-acre Oregon Butte Proposed WSA Addition. ER 480–89. In 1989, the BLM eliminated the public lands within this area from further study as wilderness because its various BLM-created subunits either purportedly had “substantially noticeable” developments or did not offer “outstanding opportunities” for solitude or a primitive and unconfined type of recreation. ER 482. The BLM determined in the 1980s that the lands within ONDA's Oregon Butte Proposed WSA Addition were divided by roads, thus precluding those areas from further wilderness study. However, ONDA's 2003 inventory shows that various routes formerly considered by the BLM to be “roads” are in fact unmaintained, overgrown, impassable “ways.” ER 480–81.<sup>5</sup> Thus, those areas are not or are no longer divided by “roads.”

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<sup>5</sup> Whether a route is a “road” or a “way” is essential to determining whether a parcel may possess wilderness characteristics, because one part of the definition of wilderness is that it must be roadless. See ER 244; 16 U.S.C. § 1131(c). The BLM's wilderness policy states that a “way” maintained solely by the passage of vehicles does not constitute a road, even if it is used on a regular and continuous

Id. In addition, the report documents that the Oregon Butte Proposed WSA Addition is “primarily affected by the forces of nature” and that there are outstanding opportunities for solitude and primitive recreation, including birding, wildlife observation, hiking, photography, and geological study. ER 481–82. The area also includes “supplemental values” in the form of significant wildlife populations, including sensitive species such as the ferruginous hawk, Tahoe sucker, Lahontan redbreast (shiner), pygmy rabbit, and white-tailed antelope squirrel. ER 482. Thus, decisions in the SEORMP that impact this area, such as grazing allocations, OHV use designations, and mineral leasing availability, were made without considering whether and how those actions could impact the wilderness resource in this area.<sup>6</sup>

This case is very similar to a case recently decided in the Northern District of California. Ctr. for Biol. Diversity v. Bureau of Land Mgmt., 422 F.Supp.2d 1115 (N.D. Cal. 2006). In that case, the plaintiffs challenged a BLM decision

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basis. ER 243. Even a route originally constructed by mechanical means, but no longer maintained by such means, is not a road. Id. A road, by comparison, is a vehicle route that has “been improved and maintained by mechanical means to ensure relatively regular and continuous use.” Id.

<sup>6</sup> Compare ER 483 (Oregon Butte Proposed WSA Addition map) with ER 219 (Map MIN-6, showing area within Oregon Butte Proposed WSA Addition labeled as open to mineral leasing) & ER 220 (Map OHV-PRMP, showing northern half of Proposed WSA as open to OHV use on existing “roads” and southern half completely open to OHV use). See also, e.g., ER 10 (lands not designated as WSAs determined to be open to mineral leasing).

adopting a land use plan for the Imperial Sand Dunes Recreation Area (“ISDRA”). 422 F.Supp.2d at 1120–21. The plaintiffs alleged that the BLM violated NEPA because: (1) the EIS for the plan completely ignored the existence of a number of endemic invertebrates (beetles and bees) found in the Dunes; (2) the EIS failed to adequately analyze the effect of the plan on those endemic invertebrates that were identified in the EIS; and (3) the agency failed to gather existing information or do independent research regarding the unique endemic invertebrates of the Dunes. *Id.* at 1162. The court agreed, concluding that “the BLM failed to take . . . a ‘hard look’ at the impact of the [Plan] on endemic invertebrates for a number of related reasons.” *Id.* at 1163.

Similar to the BLM’s argument here that it need only consider impacts to the wilderness resource in existing WSAs, the BLM in Center for Biological Diversity argued it needed only to examine the effects of the plan on the five endemic invertebrates actually listed in the EIS. *Id.* at 1162 The court rejected that claim, explaining that NEPA “places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action.” *Id.* at 1163 (quoting Vermont Yankee Nuclear Pwr. Corp. v. Natural Res. Def. Council, 435 U.S. 519, 553 (1973)); see also 42 U.S.C. § 4332(2)(C) (requiring agencies to consider impacts to “the human environment”). The court observed that the “Affected Environment” chapter of an EIS sets the baseline for “environmental

analysis that is the heart of the EIS” and that it therefore “is important that the baseline be accurate and complete.” Id. Therefore, concluded the court, if “numerous species are omitted from the environmental baseline, neither the Court nor the public can be assured that the BLM took a ‘hard look’ at the environmental impacts on those species.” Id.

The SEORMP is analogous because the environmental baseline in Chapter 2 (“Affected Environment”) of the EIS contains no information on the wilderness resource outside of existing WSAs. See ER 12–14 (discussing wilderness only in designated WSAs). The EIS lacks the “accurate and complete” baseline required to analyze the wilderness resource the BLM is charged with managing and inventorying on an ongoing basis. In Center for Biological Diversity, the BLM acknowledged it was aware of existing resource inventories (prepared by the State, scientific researchers, and the BLM itself) describing the species at issue, yet did not include that information in the EIS itself. 422 F.Supp.2d at 1163. In this case, the BLM simply admits it has not gathered or updated information on the wilderness resource since the 1970s and 1980s. ER 47 (stating a “global reinventory” of wilderness resource “is outside the scope of [the SEORMP]”). Thus, as in Center for Biological Diversity, 422 F.Supp.2d at 1164, “there is no indication from the EIS itself that the BLM considered the environmental impact of the [Plan] on” the wilderness resource on close to three and a half million acres

of public land outside of existing WSAs, including more than a million acres subsequently identified by ONDA as having wilderness characteristics. These omissions violate NEPA.

**D. The BLM’s Decision to Adopt the SEORMP Without Considering the Cumulative Impact of the Plan on the Wilderness Resource Violates NEPA.**

Because the BLM failed to consider the direct and indirect effects of its land use plan decision on the wilderness resource, and instead based its decision on outdated and inaccurate inventory information, it follows that the agency also failed to properly consider the cumulative impact of its decision on wilderness values. The BLM must “take a hard look at the environmental consequences of its proposed action” with respect to direct, indirect, *and* cumulative impacts. Blue Mtns., 161 F.3d at 1211; see also Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt., 387 F.3d 989, 997 (9th Cir. 2004). 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 . . . . Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7; see also Ocean Advocates, 361 F.3d at 1128 (discussing cumulative impact requirement).

Here, the BLM conducted only a single review of wilderness values on these public lands, which was completed almost fifteen years ago and based on inventory

data from the 1970s and 1980s. ER 79–80. That review is not only outdated but also in many instances is inaccurate. See ER 261–663 (ONDA 2003 inventory report). Cumulative impact analysis is particularly critical for the wilderness resource because it is a fragile, finite resource, and one highly susceptible to cumulative degradation over both time and space. The key factors that define wilderness are couched in terms of cumulative impacts. 16 U.S.C. § 1131(c). “Naturalness,” for example, is defined in terms of determining if a particular area “generally appears” to have been “affected primarily by” the forces of nature, with the “imprint of man’s work substantially unnoticeable.” Id.; ER 247–48. The BLM captured the essence of the issue in its 1978 Wilderness Inventory Handbook:

*If several minor impacts exist, summarize their cumulative effect on the area’s degree of naturalness. . . . [I]f an outside impact of major significance exists, it should be at least noted in the overall inventory unit description . . . . The number, size, and distribution of the imprints of man’s work to the overall size of the unit should be considered in making the naturalness determination. For example, in larger roadless areas, more or greater impacts may be more acceptable than in smaller areas.*

ER 248 (emphasis added); see also ER 673–74 (similar discussion in 2001 *Wilderness Inventory & Study Procedures* handbook). This description closely tracks NEPA’s definition of “cumulative impact,” which talks about past, present, and reasonably foreseeable future actions, and “individually minor but collectively significant actions” taking place “over a period of time.” See Ocean Advocates, 361 F.3d at 1128. Thus, while a mineral exploration project here, or a grazing

development project such as a new fence or water pipeline there, may not in and of themselves have a significant impact on the wilderness resource throughout the SEORMP planning area, the cumulative impact of these types of RMP-level decisions across 4.6 million acres of public land cannot be ignored.

In short, by relying on outdated and inaccurate inventory information, and without collecting and analyzing up-to-date information, the BLM's final decision to adopt the SEORMP is without any rational basis to support it. See Marsh, 490 U.S. at 377–78. Neither the EIS nor anything else in the record discloses or discusses the direct, indirect, and cumulative impacts of the SEORMP on wilderness resources throughout 1.3 million acres of non-WSA roadless areas currently containing defined wilderness characteristics. If the central purpose of a NEPA document “is to obviate the need for speculation by insuring that available data are gathered and analyzed prior to the implementation of the proposed action” Native Ecosystems Council v. U.S. Forest Serv., 428 F.3d 1233, 1240 (9th Cir. 2005), the EIS prepared for the SEORMP has failed that purpose. As a result, the BLM's decision is arbitrary and capricious, not in accordance with NEPA, and should be overturned.

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### **III. THE BLM VIOLATED NEPA BY ADOPTING THE *SEORMP* WITHOUT CONSIDERING A REASONABLE RANGE OF ALTERNATIVES.**

In addition to violating NEPA by relying on outdated and inaccurate information concerning the wilderness resource, and thereby not taking the requisite hard look at impacts to that resource, the BLM also violated NEPA's alternatives requirement. The agency failed to consider a reasonable range of alternatives with respect to authorized levels of, and areas allocated to livestock grazing, as well as concerning areas designated as closed to OHV use. These failures are significant because grazing and OHV use can cause substantial environmental harm—harm that can directly impact the key factors of wilderness.

#### **A. NEPA's Range of Alternatives Requirement: The "Heart" of the Environmental Impact Statement.**

NEPA requires the BLM to consider reasonable alternatives to the proposed action in an EIS. 42 U.S.C. §§ 4332(2)(C)(iii), 4332(2)(E). The alternatives requirement is the primary method by which NEPA achieves its purpose of encouraging agencies to take into account the impacts of their decisions. "The alternatives section is 'the heart of the environmental impact statement.'" City of Sausalito v. O'Neill, 386 F.3d 1186, 1207 (9th Cir. 2004) (quoting 40 C.F.R. § 1502.14). The purpose of the alternatives section is to "present the environmental impacts of the proposal and the alternatives" and to "thus sharply defin[e] the issues and provid[e] a clear basis for choice among options by the decisionmaker

and the public.” 40 C.F.R. § 1502.14. To that end, the agency must “[r]igorously explore and objectively evaluate all reasonable alternatives.” Id.

The range of alternatives requirement is critical to serving NEPA’s primary purposes of insuring fully informed decisions and providing for meaningful public participation in environmental analyses decision-making. See 40 C.F.R. § 1500.1(b), (c). Thus, by examining both the environmental impacts of the desired path and the impacts of other reasonable alternatives, NEPA enables an agency, and the public it serves, to evaluate whether the government has other options it could take that might be less damaging to the natural environment. Headwaters, Inc. v. Bureau of Land Mgmt., 914 F.2d 1174, 1180 (9th Cir. 1990) (“the touchstone for our inquiry is whether an EIS’s selection and discussion of alternatives fosters informed decision-making and informed public participation”) (citing California v. Block, 690 F.2d 753, 767 (9th Cir. 1982)).

The Ninth Circuit reviews an agency’s selection and discussion of alternatives under a “rule of reason” “in judging 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, 428 F.3d at 1246–47. The “existence of a viable but unexamined alternative renders an environmental impact statement inadequate” and requires that an agency’s action be set aside. Alaska Wilderness Recreation & Tourism v.

Morrison, 67 F.3d 723, 729 (9th Cir. 1995); Idaho Conservation League v.

Mumma, 956 F.2d 1508, 1519 (9th Cir. 1992); Citizens for a Better Henderson v.

Hodel, 768 F.2d 1051, 1057 (9th Cir. 1985).

**B. The BLM Did Not Consider a Reasonable Range of Alternatives with Respect to Authorized Levels of, and Areas Allocated to, Livestock Grazing.**

The purpose of an RMP is to “provide by tracts or areas for the use of the public lands.” 43 U.S.C. § 1712(a). The BLM’s land use planning regulations provide that RMPs must establish “land areas for limited, restricted or exclusive use.” 43 C.F.R. § 1601.0-5(k)(1). For livestock grazing, this means the agency must establish allowable uses, levels of production or use, areas of use, and resource conditions, goals and objectives. *Id.* § 4100.0-8. Thus, in an RMP, the BLM designates areas either allocated or not allocated to grazing, and sets allocations of forage dedicated exclusively to domestic livestock, measured in terms of “animal unit months” or “AUMs.”<sup>7</sup> The Department of the Interior’s own Board of Land Appeals (“IBLA”) has determined that the BLM’s initial graze/no-graze decision must be made at the RMP level of land use planning, as opposed to subsequent, implementation-level decisions. Ore. Natural Res. Council Action, 148 IBLA 186, 189–90 (1999) (“whether to allow grazing and at what levels is clearly beyond the scope of an activity level plan such as an [allotment management

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<sup>7</sup> An AUM is the amount of forage necessary to sustain one cow for one month. 43 C.F.R. § 4100.0-5.

plan]”). See also 60 Fed. Reg. 9893, 9928 (Feb. 22, 1995) (final rule adopting BLM’s Federal Rangeland Health regulations, 43 C.F.R. Subpart 4180, stating, “Permitted use is not subject to yearly change. Permitted use will be established through the land use planning process . . . .”).

In the SEORMP EIS, the BLM artificially constrained its analysis to essentially status quo allocations of livestock grazing throughout the planning area: the agency refused to consider any change in the amount of public land forage allocated exclusively to domestic livestock, and only looked at an extraordinarily narrow range of alternatives with respect to land areas allocated versus not allocated to grazing. Yet, these decisions are critically important at the RMP level because they set the outer limits within which ongoing and future grazing authorizations must be made. 43 U.S.C. § 1732(a) (site-specific decisions must be consistent with RMP); see, e.g., ER 22–23 (example from “Allotment Summaries” appendix, authorizing 11,235 AUMs for annual grazing between March 1st and October 31st, on all 136,131 acres of Louse Canyon Community Allotment).

The RMP grazing forage and land allocations also represent the one and only decision-making point at which the BLM considers the impacts of grazing on the public lands—including balancing competing and sometimes conflicting multiple uses of the lands—via a broad, landscape-level analysis. 43 U.S.C. § 1712(c)(1) (requirement to apply multiple use balancing to RMP decisions). Once

an area is allocated for grazing in an RMP, the BLM can only decide that the area is no longer allocated for grazing through an RMP amendment. 43 C.F.R. § 1610.5-5 (amendment of RMPs); ER 179. Without analyzing reasonable alternatives involving decreased forage allocations and/or increased areas not allocated to grazing in order to protect fragile resources such as wilderness, the BLM's decision is not based on a consideration of the relevant factors and fails the Ninth Circuit's "rule of reason" test for determining whether an agency considered an adequate range of alternatives. See Marsh, 490 U.S. at 378; City of Carmel-by-the-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1155 (9th Cir. 1997).

**1. The BLM failed to analyze a reasonable range of alternatives with respect to levels of forage allocated exclusively to domestic livestock grazing.**

From the beginning of the NEPA process for the SEORMP, the BLM stated it would not consider changing the levels of "forage" allocated to domestic livestock grazing throughout the 4.6 million acres of public land governed by the Plan. See, e.g., ER 1 (1996 memo from SEORMP Project Manager to Project Core Team stating "[f]orage allocations were made in the [previous land use plans]"); ER 2 (1998 BLM briefing paper stating, "There is no reallocation of grazing forage (AUMs)"); ER 123 (RMP stating, "The current grazing use authorizations (Appendix E) will be maintained"). The BLM argues analyzing no range of forage allocations was acceptable because the agency may consider reducing AUMs in the

future. ER 76–77. According to the BLM, flexibility in future management relieves the agency from considering this issue at the RMP level of BLM land use planning. See ER 748 (F&R), 123 (discussing “adaptive management” for grazing). As a result, the amount of forage allocated exclusively to domestic grazing remains the same under the SEORMP as under the decades-old land use plans the SEORMP replaces. ER 1.

Only after the NEPA public participation process was complete did the BLM add “Alternative D2,” which would have involved substantial reductions in authorized AUMs. See ER 64. That alternative simply tallied up acreages of various categories of special management areas (such as Wild and Scenic River corridors and existing WSAs) that ostensibly were analyzed for reduced grazing. See ER 15–18. But neither it nor any other alternative considered, for example, reduced grazing in non-WSA roadless areas that possess currently unprotected, unmanaged-for wilderness characteristics. See ER 16 (Table 3-7, “D2 rationale” column); ER 78 (stating SEORMP did not “reopen the initial wilderness review”). The BLM’s refusal to “rigorously explore and objectively evaluate all reasonable alternatives” renders the SEORMP EIS inadequate and therefore unlawful under NEPA. Natural Res. Def. Council v. U.S. Forest Serv., 421 F.3d 797, 813 (9th Cir. 2005) (citing 40 C.F.R. § 1502.14(a) & City of Carmel, 123 F.3d at 1155).

The BLM justifies its refusal to consider a change to its livestock forage allocations by arguing that all the alternatives except Alternative E (which simply excludes all commodity uses across the board) “allow for” AUM reductions “to achieve management objectives.” See ER 20 (EIS “Environmental Consequences” section, speculating without explanation that there are “[a]ctions which may cumulatively contribute to AUM reductions and decreased management flexibility”); ER 748 (F&R concluding alternatives reasonable based on this reasoning). This argument is inconsistent with NEPA. Simply leaving the door open for future environmental consideration<sup>8</sup> does not satisfy NEPA’s requirement that the BLM study, develop, and analyze *in this EIS* a reasonable range of alternatives to the proposed action. 42 U.S.C. §§ 4332(2)(C)(iii), 4332(2)(E).

As the Ninth Circuit has observed:

[T]he purpose of an [EIS] is to evaluate the possibilities in light of current and contemplated plans and to produce an informed estimate of the environmental consequences . . . . *If an agency were able to defer analysis discussion of environmental consequences in an RMP, based on a promise to perform a comparable analysis in connection with later site-specific projects, no environmental consequences would ever need to be addressed in an EIS at the RMP level if comparable consequences might arise, but on a smaller scale, from a later site-specific action proposed pursuant to the RMP.*

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<sup>8</sup> Instead, BLM’s argument only recognizes its existing authority under FLPMA to adjust grazing practices at any time to address resource issues. See, e.g., Pub. Lands Council v. Babbitt, 167 F.3d 1287, 1305 (10th Cir. 1999) (FLPMA’s multiple-use mandate leaves BLM with “considerable administrative flexibility”), aff’d 529 U.S. 728 (2000).

Kern, 284 F.3d at 1072 (emphasis added, internal citation and quotes omitted).

While the BLM certainly may consider grazing reductions in future, site-specific actions or planning processes, any such analyses must be based on the initial grazing determinations made in the RMP. See 43 U.S.C. § 1732(a); Ore. Natural Res. Council Action, 148 IBLA at 189–90 (graze/no-graze decision made at RMP level of land use planning). Simply put, it is arbitrary and capricious to not even consider the most basic grazing management practice of all: a change in the amount of public land forage the BLM allocates exclusively to consumption by private domestic livestock.

**2. The BLM failed to analyze a reasonable range of alternatives with respect to areas of the public lands allocated to domestic livestock grazing.**

Similarly, the BLM adopted the SEORMP without considering more than an extraordinarily limited range of alternatives with respect to *land areas* allocated to livestock grazing. See 43 U.S.C. § 1712(a) (requiring RMPs to “provide by tracts or areas for the use of the public lands”); 43 C.F.R. § 1601.0-5(k)(1) (RMPs must establish “land areas for limited, restricted or exclusive use”); id. § 4100.0-8 (same requirement concerning areas allocated to grazing). Prior to adoption of the SEORMP 41,874 acres within the planning area (about 0.9% of the total area) were not allocated to grazing. ER 11, 15, 37, 64. The BLM states that these lands “have been set apart from grazing allotments for the specific purpose of improving or

maintaining resource values that cannot be protected through mitigation of livestock impacts, or these areas were found unsuitable or unavailable for livestock grazing.” ER 37. There is no indication in the RMP or elsewhere in the administrative record that provides the basis for the BLM’s statement regarding the 41,874 acres.

In the final SEORMP, the BLM decided, without any elaboration, not to allocate 58,900 acres to grazing “as identified in Table 9, Appendix T, and Maps LVST-1M and LVST-1J.” ER 123. Neither the ROD, the referenced sections, nor any other portion of the EIS contains any actual criteria or assessment of suitability to support the BLM’s decision not to allocate the 58,900 acres to grazing or its *de facto* decision determining the rest of the 4.6 million-acre planning area is “suitable” for grazing. See ER 121–25, 11. Appendix T simply states that livestock will be excluded from certain areas to “protect resource values or facilities from livestock impacts.” ER 212. The appendix provides a generic, non-exclusive list of “examples” of such values and facilities. Id. But there is no explanation why some lands with wilderness values, for example, have been excluded from livestock use while others have not. Id.; see also 213–216 (list of excluded areas with no explanation why grazing is excluded on any of the areas).

Aside from Alternative E, which would have closed the entire planning area to grazing, the BLM considered four alternatives that would close no more than an

additional 0.2% of the planning area to livestock grazing, and one alternative that would close about a third of the planning area to grazing. ER 64. Against the backdrop of these alternatives, the Proposed RMP designated about 58,900 acres of public land as not allocated to grazing. Id.; see also ER 18. This is about a 0.4% increase in lands not allocated to grazing.<sup>9</sup> None of these alternatives were supported with any significant baseline information, analyses, or discussion to support the decisions to allocate or not allocate areas to grazing. ER 15. See, e.g., Ctr. for Biol. Diversity, 422 F.Supp.2d at 1163 (discussing importance of baseline information in NEPA document being “accurate and complete”).

Most importantly, none of these alternatives considered whether non-WSA roadless areas with wilderness characteristics should have been evaluated for potential removal from the millions of acres allocated to grazing. This is important because the SEORMP also authorizes specific levels of “rangeland project development” to support the 420,584 AUMs the Plan allocates to domestic grazing. ER 124. This includes structural projects such as fences, water developments, pipelines and reservoirs, as well as vegetation manipulation projects

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<sup>9</sup> There are 6,550 acres within the Owyhee Wild Rivers corridor that are not grazed due to a permanent injunction. Ore. Natural Desert Ass’n v. Singleton, 75 F.Supp.2d 1139, 1153 (D. Or. 1999) (enjoining grazing from all BLM-identified “areas of concern” along Main, West Little, and North Fork Owyhee River corridors). These enjoined acres represent by far the single largest segment of land the BLM is excluding or not allocating to grazing under the SEORMP. See ER 38–45 (Table T-1).

such as seeding and prescribed fire. Id. Each of these types of projects could degrade wilderness characteristics such as naturalness or opportunities for primitive and unconfined recreation. They also could impact roadlessness as new roads are constructed to implement projects in remote areas. See also ER 64 (estimating 300 miles of fences required to support authorized AUMs). While the BLM may prepare further NEPA analyses for some of these projects, this does not relieve the agency from considering the RMP-level impacts of the infrastructure the agency acknowledges will be required to support its RMP-level grazing allocation. Kern, 284 F.3d at 1072.

Finally, where “an action is taken pursuant to a specific statute, the statutory objectives of the project serve as a guide by which to determine the reasonableness of objectives outlined in the EIS.” Westlands Water Dist. v. U.S. Dep’t of the Interior, 376 F.3d 853, 866 (9th Cir. 2004). Because an RMP is the *threshold decision-making point* for lands allocated or not allocated to livestock grazing for the next twenty years or more, 43 C.F.R. §§ 1601.0-5(k)(1) & (k)(2), 4100.0-8, looking at the environmental consequences of a reasonable range of alternatives—including reasonable reductions in lands and natural resources allocated to grazing—is a critical step the BLM failed to undertake. All of the agency’s site-specific grazing decisions over the next two decades will be based on this initial,

critical decision in the RMP. 43 U.S.C. § 1732(a).<sup>10</sup> And because FLPMA directs the BLM to manage for multiple use and sustained yield, *id.*, to “prevent unnecessary or undue degradation” of the public lands, *id.* § 1732(b), and to prevent “permanent impairment” of the public lands, *id.* § 1702(c), it necessarily follows that reasonable alternatives in the SEORMP NEPA process should include (1) *some* reduction in forage allocated to domestic livestock and (2) more than a highly skewed range of alternatives for areas allocated or not allocated to grazing. See Natural Res. Def. Council, 421 F.3d at 813 (“existence of a viable but unexamined alternative renders an [EIS] inadequate”). As a result, the BLM’s decision was arbitrary, capricious, and not in accordance with NEPA.

**C. The BLM Did Not Consider an Adequate Range of Alternatives With Respect to Areas Designated as Closed to Off-Highway Vehicles.**

The BLM’s adoption of the SEORMP also is unlawful because the agency failed to consider a reasonable range of alternatives with respect to areas closed to potentially irreparable damage from OHV use. The BLM has defended its decision

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<sup>10</sup> See also ER 259–60 (BLM *Land Use Planning Handbook* stating: “*Land Use Plan Decisions*: Identify lands available or not available for livestock grazing (see 43 CFR 4130.2(a)).” (formatting in original). The BLM specifically distinguishes these RMP-level decisions from site-specific “implementation decisions”: “For areas available for grazing, identify allotment-specific (for one or several allotments) grazing management practices and permitted use based on monitoring and assessment information, as well as constraints and needs related to other resources.” ER 260. See also 43 C.F.R. § 4130.2(a) (grazing permits issued only for public lands “that are designated as available for livestock grazing through land use plans”).

based on an inaccurate interpretation of Interior’s OHV regulations, arguing that the regulations’ “limited” and “closed” designations provide equivalent resource protection from OHV impacts. See ER 749. Because the BLM refused to analyze any alternative closing more than 0.8% of the planning area to OHVs, and because the basis of its decision directly contradicts the plain language of its own regulations, the BLM has violated NEPA’s alternatives requirement.

The Department of the Interior’s regulations establish criteria for the BLM to designate portions of the public lands as open, limited, or closed to OHV use. 43 C.F.R. § 8340.0-1; ER 200. “Open areas” are areas where “all types of vehicle use is permitted at all times, anywhere in the area.” 43 C.F.R. § 8340.0-5(f). “Limited areas” are “restricted at certain times, in certain areas, and/or to certain vehicular use.” Id. § 8340.0-5(g). “Closed areas” are areas “where off-road vehicle use is prohibited.” Id. § 8340.0-5(h). Designation of OHV restrictions on the public lands occurs at the RMP level. Id. § 8342.2(a).

Despite a long-standing closed-unless-designated-open policy for OHV use on the public lands, established in Executive Order 11,644 (Feb. 8, 1972), as amended, the BLM adopted the opposite approach in the SEORMP. In its NEPA analysis, the agency restricted its alternatives so that no alternative would close to OHV use more than 0.8% of the planning area:

Alternative A	30,585 acres closed	0.7% of planning area
Alternative B	35,193	0.8%

Alternative C	17,233	0.4%
Alternative D	18,439	0.4%
Alternative D2	18,439	0.4%
Alternative E	278	0.0%
Proposed RMP	15,826	0.3%

ER 19. This is directly contrary to NEPA’s alternatives requirement, and is amplified by the fact that during the SEORMP planning process, the BLM predicted an increase in OHV use in southeast Oregon of as much as 150% over the life of the plan. ER 4. See also Norton v. So. Utah Wilderness Alliance, 542 U.S. 55, 60 (2004) (describing sharp increase in OHV use on public lands over last two decades, and conflicts between OHV use and wilderness).

The BLM defended this decision based on the argument that the “limited” and “closed” designations provide equivalent resource protection from OHV impacts. See ER 749. Under this flawed analysis, the BLM argues that its consideration of a relatively more balanced range of alternatives for areas left completely open to OHV use mitigates for the failure to consider a similar range with respect to closed areas. See ER 233–34. But this contradicts the BLM’s own explanation of why it differentiates between “limited” and “closed” OHV areas. In 2001, because the BLM was “increasingly concerned about the impacts of all types of recreational activities, including motorized OHV use,” the agency developed a “National Management Strategy” for OHV use on public lands. ER 250. The Strategy reinforces the use of these designations in order to protect public land

resources, promote safety for public land users, and minimize conflicts among the various uses of the public lands. ER 254. It also specifically emphasizes the need to affirmatively develop *in RMPs* various alternatives with respect to OHV designations in order to analyze, among other things, the “capability of public land resources to sustain [OHV] use.” Id.

The argument that limited and closed designations provide equivalent levels of resource protection renders Interior’s OHV regulations meaningless, a result disfavored by the courts. See Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1175 (9th Cir. 2002) (“It is an elementary canon of construction that an interpretation which gives effect to all sections of a statute is preferred.”) (citing Colautti v. Franklin, 439 U.S. 379, 392 (1979)). A vehicle traveling cross-country through native sage-steppe habitat will necessarily cause more degradation (for example, spreading weeds, compacting soil, harassing special status wildlife such as sage grouse or pygmy rabbits) than a vehicle traveling on an existing route. More fundamentally, areas in which OHV use is “limited” to existing roads necessarily are more susceptible to illegal off-road exploration than areas that are completely closed to OHV use. See, e.g., ER 704–706 (declaration describing same). In sum, the BLM’s decision adopting of the SEORMP without analyzing a reasonable range of alternatives for areas closed to OHV use is arbitrary, capricious, and not in accordance with NEPA.

#### **IV. THE DISTRICT COURT HAS JURISDICTION OVER ONDA'S FLPMA AND TAYLOR GRAZING ACT CLAIMS BECAUSE THEY ARE RIPE FOR REVIEW.**

To resolve a ripeness claim, this court considers “(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented.” Ctr. for Biol. Diversity v. U.S. Fish & Wildlife Serv., -- F.3d --, 2006 WL 1521120, at \* 7 (9th Cir. 2006) (citing Ohio Forestry, 523 U.S. at 733; Citizens for Better Forestry v. U.S. Dep't of Agric., 341 F.3d 961, 976–77 (9th Cir. 2003)). The district court determined ONDA's FLPMA and Taylor Grazing Act claims are not ripe, and thus nonjusticiable, because “[t]he SEORMP does not authorize specific actions that could harm plaintiffs.” ER 754 (citing Ohio Forestry, 523 U.S. 726). This conclusion should be reversed because it misapplies both Ohio Forestry and the facts presented here.

In Ohio Forestry, the Supreme Court held a programmatic challenge to a forest plan adopted by the U.S. Forest Service under the National Forest Management Act (“NFMA”), 16 U.S.C. §§ 1600–14, was not ripe for review because the plan did not authorize any specific logging of wildlife habitat with which the plaintiffs were concerned. The Court noted that the Forest Service still would need to propose and evaluate specific timber sales under NEPA and NFMA,

and adopt site-specific timber sale decisions, which the plaintiffs could then challenge. Accordingly, the Court concluded that challenges to the forest plan as authorizing inappropriate logging were not ripe for judicial review and should be brought against later site-specific timber sales. See 523 U.S. at 733–34. Notably, however, Ohio Forestry acknowledges that challenges to a land use plan may be ripe for judicial review outside the timber sale context when the plan makes decisions that may cause either (1) imminent concrete injuries such as “allowing motorcycles into a bird-watching area” or “clos[ing] a specific area to off-road vehicles,” or (2) a site-specific injury causally related to an alleged defect in the land use plan. 523 U.S. at 738–39. See also Citizens for Better Forestry, 341 F.3d 976–77; Kern, 284 F.3d at 1070–71; Wilderness Soc’y v. Thomas, 188 F.3d 1130, 1133–34 (9th Cir. 1999) (all discussing these categories of ripe challenges to land use plan determinations).

The district court here incorrectly assumed that Ohio Forestry’s discussion of logging on national forests automatically means that any challenge to a BLM land use plan under FLPMA will not be ripe for judicial review. But that assumption does not credit the Supreme Court’s acknowledgment that land use plans may be ripe for review when they make decisions that have immediate, concrete impacts upon a plaintiff’s interests. 523 U.S. at 732–33; see also Ctr. for Biol. Diversity, 2006 WL 1521120, at \*7. The district court compounds that legal

error by failing to recognize that here, such immediate and concrete impacts do flow from the BLM's decisions in the SEORMP, particularly concerning the analysis of the wilderness resource and the Plan's OHV and grazing decisions.

In this case, ONDA raised a number of discrete claims under FLPMA and the Taylor Grazing Act, which have immediate and concrete impacts on ONDA's interests. The first concerns the BLM's failure to conduct a multiple use balancing analysis in the SEORMP planning process that considers whether its land use plan decisions will cause unnecessary or undue degradation of the wilderness resource based on current inventory data. This is a procedural undertaking that the BLM ignored; therefore, it is never riper than when the BLM issued its decision adopting the SEORMP. Second, by adopting the SEORMP, the BLM decided which lands are open to OHV use, which are not, and where certain "limited" OHV use is allowed. This decision has immediate impact on ONDA, and the BLM will not revisit it. Finally, in the SEORMP, the BLM decided which lands are allocated to grazing use and the total amount of forage allocated to domestic livestock. These decisions likewise cause ONDA harm and will not be revisited. As a result, each of these claims is ripe for review.

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**A. ONDA’s Multiple Use Wilderness Claim is Ripe.**

The BLM’s failure to balance the wilderness resource among multiple use resource values of the public lands during the SEORMP land use planning process is a procedural claim ripe for review.

**1. Delayed review would cause hardship to ONDA.**

Delayed review would cause “hardship” because ONDA’s claim targets a procedural land use planning requirement the BLM failed to undertake when it made its decision adopting the SEORMP, and because that decision authorizes activities on the public lands directly and immediately impacting the wilderness resource. See Ctr. for Biol. Diversity, 2006 WL 1521120, at \*7. FLPMA requires the BLM to engage in a multiple use balancing analysis when it prepares an RMP, ensuring its final decision will “prevent unnecessary or undue degradation” of the public lands. 43 U.S.C. §§ 1712(c), 1732(b). According to Interior, the BLM must

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

Nat’l Wildlife Fed’n v. BLM, 140 IBLA 85, 101 (1997). In its land use planning and other management decisions, “Interior is to prevent, not only unnecessary degradation, but also degradation that, while necessary to [a particular use], is undue or excessive.” Mineral Pol’y Ctr. v. Norton, 292 F.Supp.2d 30, 43 (D.D.C. 2003). That analysis is to be based upon up-to-date, accurate inventory

information. 43 U.S.C. §§ 1711(a), 1712(c). In the district court, ONDA alleged that the BLM's decision to adopt the SEORMP based on outdated, inaccurate inventory information as to the wilderness resource violates these land use planning requirements under FLPMA.

Importantly, FLPMA's multiple use requirement is an affirmative duty under the BLM's land use planning process, distinct from NEPA's "hard look" and alternatives requirements. The Department of the Interior itself has explained that the unnecessary or undue degradation duty requires the BLM to make a *separate finding* accordingly: "A [NEPA] finding that there will be not be significant impact *does not mean* either that the project has been reviewed for unnecessary and undue degradation or that unnecessary or undue degradation will not occur." Kendall's Concerned Area Residents, 129 IBLA 130, 140–41 (1994) (emphasis added). See also Soda Mtn. Wilderness Council v. Norton, 424 F.Supp.2d 1241, 1270 (E.D. Cal. 2006) ("the Bureau 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). Each of these distinct duties under NEPA and FLPMA are the type of procedural obligations which can become no more ripe for review once the BLM adopts its final land use plan decision. See, e.g., Ctr. for Biol. Diversity v. Bureau of Land Mgmt., 422 F.Supp.2d at 1166–68 (finding violations of multiple use, unnecessary or undue degradation, and inventory

requirements in BLM decision to adopt a land use plan for Imperial Sand Dunes Recreation Area).

The BLM’s decision causes “hardship” to ONDA because the SEORMP creates legal rights that impact the wilderness resource—for example, designating areas open or closed to OHV use, and allocating areas and forage levels to grazing for the next two decades. See Ctr. for Biol. Diversity, 2006 WL 1521120, at \*7 (hardship present where agency action “creates a legal right” or “directly authorizes” an action that causes harm). The BLM’s decision to not balance preservation of the wilderness resource against other valid multiple uses of the public lands, stating that process occurred via a one-time event culminating in 1991, “is a definitive statement of [the] agency’s position” on the issue and “has a direct and immediate effect on” ONDA’s interests. Id. Thus, not only has the BLM failed to take a “hard look” at impacts to the wilderness resource under NEPA, but it also failed to balance this resource against other multiple uses of these public lands under FLPMA. Because the BLM had a duty to satisfy these procedural FLPMA requirements during the RMP process, the injury to ONDA stemming from the agency’s failure to do so already has occurred and the action cannot become riper. See Ohio Forestry, 523 U.S. at 737.

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**2. Judicial intervention will not inappropriately interfere with further administrative action.**

In Center for Biological Diversity, this court ruled the Fish & Wildlife Service's "policy" on a mining project was "fixed" and would "not be reconsidered" because the Service had issued its final biological opinion (under the Endangered Species Act) that the project would not cause jeopardy to a listed fish species present in the project area. Id. at \*1, \*7 (citing Ohio Forestry, 523 U.S. at 735). This case is analogous because the BLM has issued its final ROD adopting the SEORMP. ER 50. See also Wyo. Outdoor Council v. U.S. Forest Serv., 165 F.3d 43, 51 (D.C. Cir. 1999) (plaintiff's claim that the agency violated regulations by authorizing oil and gas lease without making specific findings required under regulations, was ripe for review because agency had "completely and finally implemented" its procedures under the regulation); Citizens for Better Forestry, 341 F.3d at 977 (action ripe for review where "[j]udicial intervention would not interfere with further administrative action because the [challenged action] is at an administrative resting place"). Here, the BLM has stated that its review of the wilderness resource was a "one-time" event and that the agency will not "reopen the initial wilderness review mandated by section 603 of FLPMA, and it will not change existing decisions" regarding wilderness suitability. ER 235, 78. In short, the BLM prepared the SEORMP as it believed was required under FLPMA and the BLM's land use planning regulations, and there is no indication the agency will

return to these issues during some future, site-specific planning process. See ER 78.

**3. The courts would not benefit from further factual development of the issues presented.**

Throughout its multi-year SEORMP planning process, including in the final ROD, the BLM has reiterated time and again its position that it is under no obligation to balance the wilderness resource outside of existing WSAs against other multiple uses of the public lands. Nor will the BLM revisit these procedural requirements in later decision-making processes. Just as the BLM refused to inventory the wilderness resources in adopting the SEORMP, it continues to refuse to do so in subsequent, site-specific or fine-scale planning efforts. For example, when asked whether it would consider the wilderness resource in the context of subsequent implementation-level Geographic Management Area (“GMA”) processes adopted in the SEORMP, the BLM stated, “A re-inventory of wilderness values is well beyond the scope of the GMA assessment and evaluation process.” ER 678. See also ER 81–82 (explaining role of GMAs as a “fine scale” “step down” intended to implement the SEORMP). Thus, further factual development will not assist the courts in resolving the legal question at issue. See also Ctr. for Biol. Diversity, 2006 WL 1521120, at \*7 (citing Ohio Forestry, 523 U.S. at 737) (“The voluminous administrative record in the case covers virtually every conceivable angle of the project, and we may safely base our decision on it.”).

**B. The BLM’s OHV and Grazing Decisions in the SEORMP are Ripe.**

The BLM’s final decision in the SEORMP designating certain areas open to OHV use falls directly within Ohio Forestry’s example of land use plan decisions that may cause harm to public lands and resources—and hence are immediately ripe for judicial review. 523 U.S. at 738–39. The Plan allows OHV use on more than 99% of the planning area, and it allows on more than 2.6 million acres of public land completely unrestricted OHV use that will cause degradation of these lands, potentially rendering them unsuitable for future wilderness designation. See ER 64 (OHV designations); ER 703–06 (describing impacts of OHV use).

The BLM’s OHV decisions cause “hardship” because they are the agency’s final authorization in this respect and because they will have “a direct and immediate effect” on potential preservation of the wilderness resource. See Ctr. for Biol. Diversity, 2006 WL 1521120, at \*7. OHV use is a land use wholly incompatible with the definition of “wilderness.” See 16 U.S.C. § 1131(c). And while the BLM may ultimately have discretion as to the final balance it strikes between allowing unrestricted OHV use versus conserving wilderness values, its decisions must be well-informed and its analysis must show those decisions will not cause permanent impairment or unnecessary or undue degradation. Marsh, 490 U.S. at 377–78; 43 U.S.C. §§ 1702(c), 1732(b). In the absence of up-to-date and accurate inventory information with which to evaluate impacts of OHV

designations on the wilderness resource, the BLM's decision has no rational basis in support. 490 U.S. at 377–78.

Importantly, the RMP is the BLM's final word on OHV use designations, 43 C.F.R. § 8342.2(a); there will be no subsequent, site-specific decision ONDA could challenge in this respect, when OHVs are found to be causing damage to wilderness values in one or more of ONDA's inventory units. This is precisely analogous to Ohio Forestry's example of a proper challenge to a land use plan. 523 U.S. at 739 (“And, at oral argument, the Solicitor General agreed that if the Sierra Club's claim was ‘that [the] plan was allowing motorcycles into a bird-watching area or something like that, that would be immediately justiciable.’”); see also Ctr. for Biol. Diversity, 2006 WL 1521120, at \*7 (judicial review will not interfere with further administrative action where agency decision is fixed and will not be reconsidered).

ONDA's grazing-related FLPMA and Taylor Grazing Act claims are similarly justiciable. ONDA has alleged the BLM violated FLPMA by failing to balance grazing against multiple uses of the public lands in order to ensure the authorized grazing will not cause unnecessary or undue degradation. 43 U.S.C. §§ 1712, 1732. ONDA also alleged the BLM violated a related provision in the Taylor Grazing Act by failing to determine whether the public lands are, or remain, “chiefly valuable” for grazing. Id. §§ 315, 315f.

The district court decision is based on an overly simplified analysis, concluding that an RMP is a “general plan and does not authorize any specific actions” and that “the SEORMP itself does not authorize grazing; rather, specific grazing permits, subject to annual review, authorize grazing.” ER 754–55. In Ohio Forestry, the Supreme Court stated that because the forest plan at issue did not “give anyone a legal right to cut trees” nor “establish anyone’s legal authority to object to trees being cut[,]” the plan did “not create adverse effects of a strictly legal kind.” 523 U.S. at 733. Before cutting trees, the Forest Service would have to “focus on a particular site, propose a specific harvesting method, prepare an environmental review, permit the public an opportunity to be heard, and (if challenged) justify the proposal in court.” Id. at 734.

Here, in contrast to the future, site-specific timber sales yet to be proposed in Ohio Forestry, the BLM—prior to adoption of the RMP—*already has authorized grazing on each* of the 168 allotments within the SEORMP planning area. ER 11 (authorization to graze livestock throughout planning area currently allotted under 219 separate permits). The SEORMP specifically approves seasons of use and AUMs for each and every allotment governed by the Plan, based on grazing authorizations set in the early 1980s in the preceding land use plans. ER 67, 76–77 (“Livestock forage allocations—established in the Ironside and Southern Malheur grazing program EIS’s [sic] and subsequent agreements and decisions—will not be

revised immediately [sic] by this plan.”); ER 181, 182–199 (“Allotment Summaries” setting grazing allocations). That on-going grazing, reauthorized by the SEORMP, has caused, and continues to cause, serious resource degradation. See, e.g., ER 715–21, 723–24, 729–30 (describing impacts of grazing on various resources, including site-specific impacts); ER 201–11 (“Effects of Intensity and Season of Grazing”).

Thus, the SEORMP is the BLM’s “definitive statement” on where and how much grazing is allowed on these public lands for the next twenty years. See Ctr. for Biol. Diversity, 2006 WL 1521120, at \*7. And although the BLM issues 10-year term grazing permits to individuals on an allotment-specific basis, the agency must ensure its site-specific decisions are consistent with the RMP. 43 U.S.C. § 1732(a). This underscores the importance of the RMP-level grazing decisions as the initial, threshold decision-making point for grazing authorization. See Ore. Natural Res. Council Action, 148 IBLA at 189–90.

In short, like the Ohio Forestry example of a land use plan decision closing or opening certain areas to OHV use as one that may result in “imminent concrete injury to a party with an interest in the use of off-road vehicles” and therefore ripe for review, 523 U.S. at 738–39, the BLM’s decisions in the SEORMP to allocate or not allocate land areas and specified amounts of forage to domestic livestock, in particular without balancing continued widespread domestic grazing against

preservation of the wilderness resource, causes imminent concrete injury to ONDA's interests. Because ONDA's FLPMA claims have become "concrete and final" and "since there no longer exists the possibility that further agency action will alter the claim in any fashion," these claims are ripe for judicial review. See Wyo. Outdoor Council, 165 F.3d at 51; Ctr. for Biol. Diversity, 2006 WL 1521120, at \*7. The district court's summary dismissal of these claims without analysis therefore is flawed and ONDA respectfully requests this court to reverse that ruling.

### **CONCLUSION**

For the foregoing reasons, ONDA respectfully requests this court to issue an opinion on *de novo* review that reverses the district court's grant of summary judgment in the BLM's favor and denial of summary judgment for ONDA. ONDA further respectfully requests this court to issue an opinion based on the record that: the BLM violated NEPA by failing to take a "hard look" at the environmental consequences of its proposed action on the wilderness resource; the BLM violated NEPA by failing to consider a reasonable range of alternatives with respect to grazing allocations and/or off-highway vehicle designations; and that ONDA's FLPMA and Taylor Grazing Act claims are ripe for review and therefore justiciable. ONDA respectfully requests that this court remand this matter to the agency ordering the agency to prepare a new NEPA review and issue a new NEPA

decision consistent with this court's opinion. ONDA also intends to seek attorney fees for this appeal pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 *et seq.*

Dated June 8, 2006

Respectfully submitted,

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Peter M. Lacy ("Mac") (OSB # 01322)  
Of Attorneys for Plaintiff-Appellants

**STATEMENT OF RELATED CASES**

ONDA knows of no related cases currently pending before this court.

**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this opening brief is proportionately spaced, has a typeface of 14 points or more, and contains 13,910 words.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Peter M. Lacy (“Mac”) (OSB # 01322)  
Of Attorneys for Plaintiff-Appellants

## **PROOF OF SERVICE**

I, the undersigned, hereby certify that true and correct copies of Appellants' **OPENING BRIEF** and **EXCERPTS OF RECORD** were transmitted via U.S. First Class Mail on June 8, 2006 to the following parties:

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## ADDENDUM TO APPELLANTS' OPENING BRIEF

### Relevant Statutory Provisions

Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–84. The relevant portions of Sections 102, 103, 201, 202, 302, and 603 are provided below:

#### **§ 1701. Congressional declaration of policy**

(a) The Congress declares that it is the policy of the United States that—

\* \* \*

(2) the national interest will be best realized if the public lands and their resources are periodically and systematically inventoried and their present and future use is projected through a land use planning process coordinated with other Federal and State planning efforts;

\* \* \*

(7) goals and objectives be established by law as guidelines for public land use planning, and that management be on the basis of multiple use and sustained yield unless otherwise specified by law;

(8) the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use;

\* \* \*

#### **§ 1702. Definitions**

\* \* \*

(c) The term “multiple use” means the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of

the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.

\* \* \*

(i) The term “wilderness” as used in section 1782 of this title shall have the same meaning as it does in section 1131(c) of Title 16.

\* \* \*

### **§ 1711. Continuing inventory and identification of public lands; preparation and maintenance**

(a) The Secretary shall prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values (including, but not limited to, outdoor recreation and scenic values), giving priority to areas of critical environmental concern. This inventory shall be kept current so as to reflect changes in conditions and to identify new and emerging resource and other values. The preparation and maintenance of such inventory or the identification of such areas shall not, of itself, change or prevent change of the management or use of public lands.

\* \* \*

### **§ 1712. Land use plans**

#### **Development, maintenance, and revision by Secretary**

(a) The Secretary shall, with public involvement and consistent with the terms and conditions of this Act, develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands. Land use plans shall be developed for the public lands regardless of whether such lands previously have been classified, withdrawn, set aside, or otherwise designated for one or more uses.

\* \* \*

### **Criteria for development and revision**

(c) In the development and revision of land use plans, the Secretary shall—

(1) use and observe the principles of multiple use and sustained yield set forth in this and other applicable law;

(2) use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences;

(3) give priority to the designation and protection of areas of critical environmental concern;

(4) rely, to the extent it is available, on the inventory of the public lands, their resources, and other values;

(5) consider present and potential uses of the public lands;

(6) consider the relative scarcity of the values involved and the availability of alternative means (including recycling) and sites for realization of those values;

(7) weigh long-term benefits to the public against short-term benefits;

\* \* \*

### **§ 1732. Management of use, occupancy, and development of public lands**

## **Multiple use and sustained yield requirements applicable; exception**

(a) The Secretary shall manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed by him under section 1712 of this title when they are available, except that where a tract of such public land has been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law.

Easements, permits, etc., for utilization through habitation, cultivation,  
and development of small trade or manufacturing concerns;  
applicable statutory requirements

(b) \* \* \* In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.

## **§ 1782. Bureau of Land Management Wilderness Study**

### **Lands subject to review and designation and wilderness**

(a) Within fifteen years after October 21, 1976, the Secretary shall review those roadless areas of five thousand acres or more and roadless islands of the public lands, identified during the inventory required by section 1711(a) of this title as having wilderness characteristics described in the Wilderness Act of September 3, 1964 (78 Stat. 890; 16 U.S.C. 1131 et seq.) and shall from time to time report to the President his recommendation as to the suitability or nonsuitability of each such area or island for preservation as wilderness \* \* \* The review required by this subsection shall be conducted in accordance with the procedure specified in section 3(d) of the Wilderness Act (16 U.S.C. 1132(d)).

### **Presidential recommendation for designation as wilderness**

(b) The President shall advise the President of the Senate and the Speaker of the House of Representatives of his recommendations with respect to designation as wilderness of each such area, together with a map thereof and a definition of its boundaries. Such advice by the President shall be given within two years of the receipt of each report from the Secretary. A recommendation of the President for designation as wilderness shall become effective only if so provided by an Act of Congress.

### **Status of lands during period of review and determination**

(c) During the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to

impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on October 21, 1976: Provided, That, in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection. \* \* \*