

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON

OREGON NATURAL DESERT )  
ASSOCIATION and WESTERN )  
WATERSHEDS PROJECT, )

Plaintiffs, )

vs. )

JERRY TAYLOR, Field Manager, Jordan )  
Resource Area, BLM, DAVE )  
HENDERSON, Vale District Manager, )  
BLM, BUREAU OF LAND MANAGE- )  
MENT, )

Defendants. )

Case No. 04-334-KI

OPINION AND ORDER

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- and -

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KING, Judge:

Plaintiffs Oregon Natural Desert Association and Western Watersheds Project bring an action against the Bureau of Land Management (“BLM”) and several individual BLM managers regarding the BLM’s actions and inactions pertaining to public lands within the Jordan Resource Area, and specifically, the Louse Canyon Geographic Management Area (“LCGMA”), in southeast Oregon.

Plaintiffs’ first claim for relief alleges that defendants have unreasonably delayed implementing pertinent regulations by failing to perform assessment, evaluation, and determination duties for the majority of public lands within the Jordan Resource Area. Plaintiffs allege that this failure to act constitutes agency action unlawfully withheld or unreasonably delayed under the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 et seq.

Plaintiffs' second claim for relief alleges that defendants are violating their mandatory duty to make changes in grazing management before the start of the next grazing season in the LCGMA. Plaintiffs allege defendants have violated this duty by failing to implement a final revised grazing management strategy and instead employing an interim strategy for at least three grazing seasons, after having made an initial determination that the area failed to meet applicable standards. Plaintiffs plead this claim as a failure to act, or in the alternative, a final agency action that is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law under the APA.

Before the court are plaintiffs' and defendants' cross motions for summary judgment (#10, #25). For the following reasons, I grant in part and defer ruling in part on the motions. Specifically, I grant summary judgment against plaintiffs' first claim for relief, but defer ruling on the merits of plaintiffs' second claim for relief insofar as it alleges that the actions taken by defendants vis-a-vis the LCGMA are arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

## **BACKGROUND**

### **I. Statutory and Regulatory Framework**

#### **A. FLPMA**

The Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701-1784, requires the BLM to manage livestock grazing on public lands consistent with the "principles of multiple use and sustained yield." 43 U.S.C. § 1732(a). BLM is required to manage the public lands and resources "without permanent impairment of the productivity of the land and the

quality of the environment.” Id. § 1702(c). The agency “shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.” Id. § 1732(b).

B. Federal Rangeland Health Regulations

In 1995, the Department of Interior amended the regulations, based on the authority provided by FLPMA as well as other statutes, governing BLM’s administration of livestock grazing on public lands. The regulations, known as the Federal Rangeland Health (“FRH”) regulations, establish fundamental ecological criteria for the management of livestock grazing on BLM lands. See 43 C.F.R. § 4180.1.

The regulations also required BLM to conduct a state standard and guideline development process in consultation with the public. Id. § 4180.2(a)-(b). The BLM Oregon/Washington State Office developed standards and guidelines, which were approved by the Secretary of Interior on August 12, 1997.<sup>1</sup>

The BLM also developed the “Rangeland Health Standards Handbook H-4180-1” to help field offices implement the state standards and guidelines. The Handbook sets forth a process for implementing the standards and guidelines. First, the BLM does an “assessment,” which is defined as an “estimation or judgement of the status of ecosystem structures, functions, or processes, within a specified geographic area (preferably a watershed or a group of contiguous watersheds) at a specific time.” AR Tab 8 at I-2. Next, BLM is to conduct an “evaluation,” which provides “an analysis and interpretation of the findings resulting from the assessment, relative to land health standards, to evaluate the degree of achievement of land health standards.”

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<sup>1</sup> The document is titled “Standards for Rangeland Health and Guidelines for Livestock Management for Public Lands Administered by the Bureau of Land Management in the States of Oregon and Washington.” AR Tab 10.

AR Tab 8 at I-3. Finally, the BLM makes a “determination,” which is the “[d]ocument recording the authorized officer’s finding that the existing grazing management practices or levels of grazing use on public lands [] either are or are not significant factors in failing to achieve the standards and conform with the guidelines within a specified geographic area. . . .” *Id.*

If BLM has determined that standards are not being met in an area, the regulations require BLM to revise grazing management by taking specific actions that will result in significant progress toward attainment of the standards:

The authorized officer *shall take appropriate action as soon as practicable but not later than the start of the next grazing year* upon determining that existing grazing management practices or levels of grazing use on public lands are significant factors in failing to achieve the standards and conform with the guidelines that are made effective under this section. Appropriate action means *implementing actions* pursuant to subparts 4110, 4120, 4130, and 4160 of this part *that will result in significant progress toward fulfillment of the standards and significant progress toward conformance with the guidelines.* Practices and activities subject to standards and guidelines include the development of grazing-related portions of activity plans, establishment of terms and conditions of permits, leases and other grazing authorizations, and range improvement activities such as vegetation manipulation, fence construction and development of water.

43 C.F.R. § 4180.2(c) (emphasis added).

## II. Factual and Procedural Background

The Jordan Resource Area is an administrative unit of BLM’s Vale District. The Jordan Resource Area includes approximately 2.5 million acres of public land. BLM has divided the Jordan Resource Area into eight Geographic Management Areas (“GMAs”). BLM has prioritized each of the eight GMAs based on criteria such as riparian habitat, wilderness study areas, Wild and Scenic Rivers, wild horses, and presence of special status plants and animals.

According to a letter from BLM to the public, the Jordan Resource Area is to have all FRH assessments, evaluations, and determinations completed by the year 2008. However, it has yet to complete any one GMA process, except what it has accomplished vis-a-vis the LCGMA.

The Jordan Resource Area selected the LCGMA as the highest priority and therefore the first of the eight GMAs to assess. The LCGMA occupies approximately 523,000 acres of public land and consists of seven grazing allotments, which are further divided into pastures. Plaintiffs discuss numerous significant features of the LCGMA, including that it contains three wilderness study areas and important plant and animal species such as redband trout and sage grouse leks.

On November 6, 2003, BLM transmitted the LCGMA Evaluation to interested members of the public. The Evaluation contains the results of the LCGMA rangeland health assessment, evaluation, determination and follow-up recommendations. The LCGMA Evaluation showed that certain pastures within the area did not meet rangeland health standards and that the existing grazing was a significant contributing factor. The Evaluation revealed that BLM made these determinations that standards and guidelines were not being met in December 2001.

Following these determinations, the BLM developed an interim grazing management strategy for the LCGMA in consultation with livestock permittees. The strategy entails a shift in the seasons in which livestock can graze such that the duration of grazing is reduced during the “hot season.” Plaintiffs describe this interim strategy as being nothing more than status quo, contending that the numbers of grazing livestock and the amount of forage authorized to be consumed have remained unchanged. BLM states that this interim strategy was put in place while BLM conducts an analysis under the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*, of the recommendations and proposed management alternatives included

in the Evaluation. Defendants assert that the alternative chosen as a result of the NEPA analysis will constitute the final decision implementing appropriate action.

### **LEGAL STANDARDS**

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). The initial burden is on the moving party to point out the absence of any genuine issue of material fact. Once the initial burden is satisfied, the burden shifts to the opponent to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). On a motion for summary judgment, the evidence is viewed in the light most favorable to the nonmoving party. Robi v. Reed, 173 F.3d 736, 739 (9th Cir.), cert. denied, 528 U.S. 375 (1999).

### **DISCUSSION**

As noted above, plaintiffs' challenges are brought under the judicial review provisions of the APA. Plaintiffs seek review of allegedly "final" agency actions as well as agency "failures to act."

The APA authorizes a court to "hold unlawful or set aside agency action, findings, and conclusions found to be. . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). To obtain judicial review under this section, a plaintiff must establish that the activities at issue are "final agency actions." Lujan v. National Wildlife Federation, 497 U.S. 871, 882 (1990). For an agency action to be considered final under the APA, two conditions must be satisfied. First, the action "must mark the consummation of the agency's decisionmaking process," and second, it "must be one by which rights or obligations

have been determined, or from which legal consequences will flow.” Bennett v. Spear, 520 U.S. 154, 177 (1997) (internal citations and quotations omitted).

The APA also provides that courts “shall [] compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1). The Supreme Court recently announced that “a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*.” Norton v. Southern Utah Wilderness Alliance (“SUWA”), 542 U.S. \_\_\_, 124 S. Ct. 2373, 2379 (2004) (emphasis in original). In SUWA, the Court examined 43 U.S.C. § 1782(c), which required BLM to manage wilderness study areas “in a manner so as not to impair the suitability of such areas for preservation as wilderness.” The Court held that this provision “is mandatory as to the object to be achieved, but it leaves BLM a great deal of discretion in deciding how to achieve it.” SUWA, 124 S. Ct. at 2380.

I. Plaintiffs’ First Claim for Relief

Plaintiffs’ first claim relates to defendants’ alleged failure to comply with its duties with respect to the seven GMAs for which defendants have not begun the assessment process. By failing to perform the assessment, evaluation, and determination obligations, plaintiffs contend defendants are violating mandatory duties, and their inaction constitutes agency action unreasonably delayed or unlawfully withheld under Section 706(1) of the APA.

Specifically, plaintiffs argue that 43 C.F.R. § 4180.2(c) imposes a mandatory duty on the agency to make a determination about whether the standards and guidelines are being met.

Therefore, plaintiffs ask the court to compel this allegedly “unlawfully withheld” agency action, including the assessment and evaluation steps that precede a determination.<sup>2</sup>

Defendants argue that the APA does not provide a basis for the court to compel BLM to conduct rangeland health assessments, evaluations, and determinations. In making this argument, defendants rely heavily on SUWA.<sup>3</sup> Defendants argue that assessments, evaluations, and determinations are not discrete agency actions, as the Court stressed were necessary in SUWA. Defendants further emphasize that even if the GMA processes were considered discrete agency actions, there is no mandatory timeframe to compel. Defendants point out that the regulations only direct the agency to take appropriate action as soon as practicable *upon determining that standards are not being met*, but the regulations do not dictate a specific time table for a determination to be made. Finally, defendants point out that the temporal targets for completing assessments and evaluations relied upon by plaintiffs are found in the Handbook or other agency manuals, not a statute or regulation, and those targets have not been exceeded.

While I find that defendants generally have the better arguments regarding the merits of plaintiffs’ first claim for relief, I need only address the issue of whether the assessments, evaluations, and determinations sought by plaintiffs are discrete agency actions. The Ninth Circuit’s recent decision in Center for Biological Diversity v. Veneman, 2005 WL 27565 (9<sup>th</sup> Cir. Jan. 7, 2005) (“CBD”), makes clear that they are not. As such, this court cannot compel

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<sup>2</sup> Plaintiffs also discuss this claim in the context of an agency action “unreasonably delayed,” the other standard listed in Section 706(1). This theory of agency liability is also dependent on a finding that discrete agency actions are at issue as contemplated by the Court in SUWA.

<sup>3</sup> I note that plaintiffs’ motion for summary judgment and opening brief were filed before the Court’s decision in SUWA.

defendants to undertake assessments, evaluations, and determinations as part of the GMA process (but, as discussed below, the court can compel agency action after a determination has been made that standards and guidelines are not being met due to grazing activities).

In their opening brief, plaintiffs rely heavily on the Ninth Circuit's initial opinion in Center for Biological Diversity v. Veneman, 335 F.3d 849 (9<sup>th</sup> Cir. 2003), withdrawn by 2005 WL 27565 (9<sup>th</sup> Cir. Jan. 7, 2005). See Memorandum In Support of Plaintiffs' Motion for Summary Judgment, p. 11-12. In that earlier opinion, the court held that the district court had jurisdiction to review the claim brought by the plaintiffs under Section 706(1) of the APA. In asserting their claim, the plaintiffs relied upon the following language from the Wild and Scenic Rivers Act:

In all planning for the use and development of water and related land resources, consideration shall be given by all Federal agencies involved to potential national wild, scenic and recreational river areas, and all river basin and project plan reports submitted to the Congress shall consider and discuss any such potentials.

16 U.S.C. § 1276(d)(1).

The court held that jurisdiction did exist under Section 706(1) of the APA because the above language created a "duty to consider" that constituted a mandatory duty to act. Center for Biological Diversity, 335 F.3d at 856. In reaching this conclusion, the court relied heavily on Montana Wilderness Ass'n, Inc. v. U.S. Forest Service, 314 F.3d 1146 (9<sup>th</sup> Cir. 2003) – a decision that was subsequently vacated by the Supreme Court in light of SUWA. Veneman v. Montana Wilderness Ass'n, Inc., 124 S. Ct. 2870 (2004).

Given the Court's pronouncements in SUWA and the elimination of Montana Wilderness as valid precedent, the Ninth Circuit granted the government's petition for panel rehearing in

Center for Biological Diversity. In its amended opinion, the court altered its conclusion that the plaintiffs had a basis to bring a claim under Section 706(1) of the APA. CBD, 2005 WL 27565, (9<sup>th</sup> Cir. Jan. 7, 2005). As the court succinctly explained its new conclusion:

Because the Court explained in SUWA that a “failure to consider” certain issues while planning for the use and development of land resources is not a failure to take discrete agency action, as required for standing under § 706(1), we now conclude that the [plaintiff] has not alleged a failure to take a discrete agency action.

Id. at \*1.<sup>4</sup>

The Ninth Circuit’s opinion in CBD undermines plaintiffs’ arguments. Despite the clear direction of the statutory language at issue in CBD (i.e., “consideration *shall* be given”), the court held that no mandatory duty was imposed on the agency that was actionable under Section 706(1) of the APA. Yet, in this case, the regulation at issue does not even direct BLM to make a determination (much less an assessment or evaluation) regarding the impact of existing grazing practices. See 43 C.F.R. § 4180.2(c). At best, the language implies that a determination must eventually be made through a process left to the agency’s discretion, but that is not enough post-SUWA to support a claim under Section 706(1) of the APA. In contrast, the regulation imposes a clear, mandatory duty on the agency (including a defined timeframe) once the agency makes a decision, i.e., after a determination is made that standards and guidelines are not being met due to grazing activities. Id.

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<sup>4</sup> In reaching its new conclusion, the court in CBD relied heavily on an example cited by the Court in SUWA. CBD, 2005 WL 27565, \*5 (9<sup>th</sup> Cir. Jan. 7, 2005); see also SUWA, 124 S. Ct. at 2380 (“The plaintiffs in National Wildlife Federation[, 497 U.S. 871 (1990),] would have fared no better if they had characterized the agency’s alleged ‘failure to revise land use plans in proper fashion’ and ‘failure to consider multiple use,’ ibid., in terms of ‘agency action unlawfully withheld’ under § 706(1), rather than agency action ‘not in accordance with law’ under § 706(2).”)

Plaintiffs do not allege a discrete agency action that BLM failed to take in regard to the seven GMAs in the Jordan Resource Area other than the LCGMA. Accordingly, summary judgment is granted against plaintiffs' first claim for relief.

II. Plaintiffs' Second Claim for Relief

Plaintiffs' second claim relates to the LCGMA and defendants' alleged failure to make and implement a final decision changing grazing practices in that area, having already determined standards are not being met. Again, plaintiffs allege that mandated agency action has been unlawfully withheld or unreasonably delayed.

Significantly, defendants do not defend against this claim on the basis that plaintiffs' claim is precluded under SUWA or that there is no final agency action. Instead, defendants argue that they have taken "appropriate action" with respect to the LCGMA. See 43 C.F.R. 4180.2(c) ("Appropriate action means implementing actions pursuant to subparts 4110, 4120, 4130, and 4160 of this part that will result in significant progress toward fulfillment of the standards and significant progress toward conformance with the guidelines.") In short, defendants assert that their interim strategy (now used for at least three grazing seasons) to reduce "hot season" grazing constitutes "appropriate action." Furthermore, they imply that such a remedial action was the most that they could do without first completing an analysis under NEPA and other applicable laws. Defendants go on to note that an Environmental Assessment related to alternative actions to take in the LCGMA was scheduled to be completed at the end of 2004. Reply in Support of Defendants' Cross-Motion for Summary Judgment, pp. 16-17.

Like defendants, plaintiffs dedicate most of their briefs to a discussion of their second claim for relief as one based on agency action (i.e., final grazing management changes within the

LCGMA) that has been unlawfully withheld or unreasonably delayed. As such, part of the relief sought by plaintiffs is an order directing BLM to complete the NEPA process on proposed grazing management changes within the LCGMA by December 31, 2004, and implement those changes by March 1, 2005 (or the start of the next grazing season, whichever is earlier).

Memorandum in Support of Plaintiffs' Motion for Summary Judgment, p. 25.

Importantly, however, plaintiffs do plead their second claim in the alternative and assert that the interim grazing management strategy relied upon by defendants for recent grazing seasons is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law pursuant to Section 706(2)(A) of the APA. This strikes the court as the appropriate way to evaluate BLM's actions vis-à-vis the LCGMA, rather than under the umbrella of agency inaction. This is particularly the case given that there is no mention of "interim" or "final" remedial actions in the relevant regulation, thus undercutting plaintiffs' theory that they can ask the court compel a "final revised grazing management strategy."

The court defers ruling on the cross-motions for summary judgment in regard to plaintiffs' second claim for relief. The court takes this approach to allow plaintiffs to consider the posture of this case now that their claim related to seven of the GMAs has been dismissed and, in general, the court has rejected plaintiffs' arguments premised on agency inaction. Likewise, given that we are now into the new year, the court asks the parties to assess and discuss where BLM is in regard to the NEPA process and whether an agreement is within reach for more extensive remedial actions that will constitute "appropriate action" within the LCGMA.

If the parties are unable to reach a settlement in the near term, the court encourages the parties to file supplemental briefs that address the merits of plaintiffs' second claim for relief

under only the theory that defendants' remedial actions for the LCGMA violate the standards in Section 706(2)(A) of the APA and the applicable standards of 43 C.F.R. 4180.2(c). One issue that the court would particularly like to see addressed in more detail is what remedial options other than the reduction of "hot season" grazing were available in the short-term to BLM without further analysis under NEPA or other laws and plans. The parties shall advise the court of their respective positions within 30 days from the date of this Opinion and Order.

### **CONCLUSION**

Based on the foregoing, plaintiffs' motion for summary judgment (#10) is DEFERRED IN PART and DENIED IN PART. Defendants' motion for summary judgment (#25) is DEFERRED IN PART and GRANTED IN PART.

IT IS SO ORDERED.

Dated this 18th day of January, 2005.

/s/ Garr M. King  
Garr M. King  
United States District Judge