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

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

Case No. 04-CV-334-KI

Plaintiffs,

v.

**SUPPLEMENTAL BRIEF IN SUPPORT**  
**OF PLAINTIFFS’ MOTION FOR**  
**SUMMARY JUDGMENT**

**WAYNE WETZEL,**<sup>1</sup> Acting Field Manager,  
Jordan Resource Area, BLM, **DAVE**  
**HENDERSON,** Vale District Manager, BLM,  
**BUREAU OF LAND MANAGEMENT,**

Defendants.

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<sup>1</sup> Wayne Wetzel, Acting Jordan Resource Area Field Manager, is inserted here in place of his predecessor, Jerry Taylor, pursuant to Fed. R. Civ. P. 25(d) (substitution of parties, public officers).

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## INTRODUCTION

Plaintiffs Oregon Natural Desert Association and Western Watersheds Project (collectively referred to as “ONDA”) in this action allege that Defendants Bureau of Land Management *et al.* (“BLM”) have: (1) unreasonably delayed completing Federal Rangeland Health (“FRH”) regulations assessments and determinations on the majority of the public lands in the BLM’s Vale District, Jordan Resource Area; and (2) acted arbitrarily and capriciously by authorizing livestock grazing under an “interim” grazing management strategy in the Louse Canyon Geographic Management Area (“LCGMA”) after determining over three years ago that current livestock grazing practices are causing failures to meet standards. On January 18, 2005, the court issued an Opinion and Order granting summary judgment against ONDA’s first claim for relief and deferring ruling on ONDA’s second claim. Op. & Order at 3 (Dkt # 48). The court ordered the parties to file supplemental briefing addressing the merits of ONDA’s 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).” *Id.* at 13–14. The court indicated it would particularly like to see addressed “what remedial options other than reduction of ‘hot season’ grazing were available in the short-term to BLM without further analysis under NEPA or other laws and plans.” *Id.* at 14. For the reasons that follow, ONDA respectfully requests this court to: (1) declare that the interim grazing management strategy relied upon by the BLM for three or more consecutive grazing seasons is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law pursuant to Section 706(2)(A) of the APA; and (2) order the BLM to implement immediately grazing management changes within the LCGMA that constitute “appropriate action” under the

regulations, and to order other such relief as may mitigate the damage caused by successive years of unlawful grazing practices.

### ARGUMENT

The interim grazing management strategy the BLM has relied upon for four successive grazing seasons (including the current 2005 season) is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law, and it does not satisfy the FRH regulations' "appropriate action" requirement, resulting in continued ecological damage in violation of the Federal Land Policy and Management Act (FLPMA) and the regulations. The BLM argues that the interim strategy satisfies the "appropriate action" requirement because it limited the period of time during the "hot season"<sup>2</sup> that livestock were placed on areas failing to meet standards. BLM Resp. at 27. But the BLM does not point to any place in the administrative record showing that change was likely to result or resulted in "significant progress" toward fulfillment of the standards. See id. at 27–28. In fact, as demonstrated below, the ecological damage first identified by the BLM in 2001 has continued to manifest itself under the interim strategy for three successive years. While the interim strategy could be argued to have satisfied the FRH regulations for the 2002 grazing season (the first season in which it was implemented), the BLM's use of an interim strategy for four successive grazing seasons does not satisfy the regulations, as evidenced by the regulatory language, the BLM's interpretation of its regulations, and the administrative record.

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<sup>2</sup> The term "hot season" grazing refers to grazing during the summer months, typically between July 1 and September 15. See, e.g., AR Tab 15, Proposed SEORMP/FEIS, Vol. 2 at 382–83.

**I. THE BLM'S DECISION TO EMPLOY THE INTERIM GRAZING STRATEGY FOR FOUR SUCCESSIVE GRAZING SEASONS IS ARBITRARY AND CAPRICIOUS AND NOT IN ACCORDANCE WITH THE FRH REGULATIONS.**

The FRH regulations explicitly and unconditionally require the BLM to make a determination whether current grazing practices are causing failures to meet Standards & Guidelines, and then, if so, implement grazing changes that result in significant progress toward achieving 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 standards and conform with the guidelines . . . .

43 C.F.R. § 4180.2(c). The plain language of the regulations impose a mandatory and legally enforceable requirement upon the BLM to ensure that grazing management changes are in place before the start of the next grazing season. Idaho Watersheds Project v. Hahn, 187 F.3d 1035 (9th Cir. 1999). According to the regulations, “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.” 43 C.F.R. § 4180.2(c) (emphasis added). The BLM defines the term “significant progress” as: (1) “[m]ovement toward meeting standards and conforming to guidelines that is acceptable in terms of rate and magnitude. Acceptable levels of rate and magnitude must be realistic in terms of the capability of the resource, but must also be as expeditious and effective as practical,” AR Tab 8 at I-7; and (2) “a rate of progress that is consistent with the anticipated recovery rate described in plan objectives.” AR Tab 10 at 21 (referring to objectives found in

Resource Management Plan).<sup>3</sup> The plain language of the regulation requires appropriate action that would result in significant progress before the next grazing season.

In this case, the only action the BLM implemented prior to the next grazing season was a reduction in “hot season” grazing. Importantly, the administrative record does not contain any support (save for photos from 2001 and 2002) for the BLM’s decision that a reduction in hot season grazing is sufficient to result in significant progress toward meeting the Standards and Guidelines. While the scope of review under the “arbitrary and capricious” standard is narrow, an “agency must articulate a rational connection between the facts found and the conclusions made.” See Envtl. Def. Ctr. v. EPA, 344 F.3d 832, 858 n.36 (9th Cir. 2003). The BLM’s decision can be upheld only on the basis of the reasoning found in that decision. Anaheim Mem’l Hosp. v. Shalala, 130 F.3d 845, 849 (9th Cir. 1997). The only evidence before the court is Mr. Taylor’s post-decisional statement that the BLM’s decision has resulted in “subtle” change as a result of reducing the grazing that occurs during the hot season. Taylor Decl. at ¶ 16. As a result, the BLM’s initial decision is arbitrary and capricious because it lacks support in the record.

Further, the plain language of the regulations do not provide for interim measures. Moreover, the BLM’s decision to engage in a holding pattern by refusing to implement anything more than the “interim” measures employed in 2002 is contrary to the agency’s own established process for implementing the FRH regulations. After making a determination that an area is not meeting one or more standards and that current grazing is the cause of the failure, the BLM must, prior to the start of the next grazing season, take appropriate action as enumerated in the

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<sup>3</sup> Note, however, that these definitions of “significant progress,” found in the BLM’s Rangeland Health Standards Handbook and its “Oregon/Washington Standards for Rangeland Health,” are not part of the regulation and therefore are entitled to less deference. Christensen v. Harris County, 529 U.S. 576, 587 (2000) (“policy statements, agency manuals and enforcement guidelines . . . do not warrant Chevron deference”).

regulations. 43 C.F.R. § 4180.2(c). In its Rangeland Health Standards Handbook, the BLM interprets this regulation to mean:

If changes are to be made in the terms and conditions in the permit, they must be in place before the start of the next grazing season. Any proposals to implement restoration and range improvement projects must take into consideration the ability to budget these projects and implement appropriate actions before the beginning of the next grazing season. If other necessary actions cannot be implemented right away, then interim adjustments will be made prior to the next grazing season, and a schedule for “final” changes must be developed and documented.

AR Tab 8 at III-17 (emphasis added). In this case, the administrative record contains no documentation of the “interim grazing management strategy” other than its fleeting description in the LCGMA Evaluation itself. AR Tab 12 at 1-2. The record also contains no documentation of any schedule for final grazing management changes. The Evaluation states, “Changes in grazing use were initiated to address resource problems in the short-term until such time that a long-term strategy could be drafted and approved.” *Id.* Although the BLM stated on November 6, 2003 (after two full grazing seasons under the interim strategy) that it planned to analyze a range of alternative actions in an “upcoming NEPA analysis,” AR Tab 12 (cover letter), this serves neither as a “schedule” for final changes nor to comply with the requirement that changes to grazing management be made “as soon as practicable but not later than the start of the next grazing year upon determining that existing grazing management” is a significant factor in failing to achieve Standards and Guidelines. 43 C.F.R. § 4180.2(c) (emphasis added). The BLM’s decision to implement an “interim” grazing strategy with little or no documentation, and then to rest on that interim strategy for three or more successive grazing seasons after having determined numerous failures to meet Standards and Guidelines—is arbitrary and capricious and is evidence of a failure to implement grazing management changes as required by the FRH regulations.

Importantly, so far in this litigation, the BLM has ignored the part of “appropriate action” that requires that action to result in “significant progress” toward fulfillment of the standards. 43 C.F.R. § 4180.2(c). In its opening brief and in its reply, the BLM suggests that the mere fact that the agency implemented the interim strategy satisfies the requirement to take appropriate action, without any discussion of whether the changes made under the interim strategy resulted in “significant progress” toward meeting standards. See BLM Br. at 26–28; BLM Reply at 15–17. The BLM asserts that its changes have “had the effect” of reducing the amount of forage consumed each year since it implemented its interim strategy. BLM Resp. at 28; Taylor Decl. at ¶ 13. But the agency does not controvert ONDA’s demonstration of continued ecological damage by these grazing practices. Instead, the BLM suggests that because its hot season reduction approach has been successful in other areas outside of this GMA (but providing no citation to any published data or studies, see Taylor Decl. at ¶ 11), this somehow shows that “significant progress” will be made at some point in the future in this case. BLM Reply at 16–17 (also stating that “land can only improve at a certain pace” which “must be realistic”). But the BLM has a duty to support its decisions and there must be a “rational connection between the facts found and the choice made.” Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Here, the regulations are clear that where “existing grazing management practices or levels of use” are found to be significant factors in failing to meet Standards and Guidelines, the BLM must make grazing changes before the start of the next grazing season. 43 C.F.R. § 4180.2(c). The FRH regulations were adopted “to accelerate restoration and improvement” of public lands degraded by livestock grazing, see 60 Fed. Reg. 9893, 9920 (Feb. 22, 1995) (final rule), and there is nothing in this section suggesting that a “nondegradation” approach will suffice for making “significant progress” forward.

If it is true that the interim strategy “had the effect” of reducing AUMs, ONDA believes this is “a critical first step in instituting effective BLM management and oversight of livestock grazing in the area.” Marlett Decl. at ¶ 7. However, this is beside the point in the current challenge. The fact that photographs (not even any quantitative data) purportedly show “general, but subtle, improvement,” Taylor Decl. at ¶ 16, is irrelevant to the question whether the BLM is satisfying the requirements of 43 C.F.R. § 4180.2(c) when the agency fails to finalize any grazing management changes or even develop a plan to finalize such changes, in three consecutive grazing seasons following multiple determinations of failed standards. In short, the BLM’s argument that it has complied with the requirement to take “appropriate action” falls short and the agency’s decision to authorize grazing under the interim strategy for four consecutive years is arbitrary and capricious, an abuse of discretion and not in accordance with law.

**II. THE BLM HAD AVAILABLE A NUMBER OF SHORT-TERM REMEDIAL OPTIONS TO ADDRESS THE GRAZING MANAGEMENT FAILURES IT IDENTIFIED IN 2001.**

The BLM argues its decision to authorize for four consecutive years an interim strategy that relies exclusively on modest changes reducing “hot season” grazing is “appropriate action” under the FRH regulations. BLM Reply at 16. However, because the BLM had numerous effective short-term remedial options at its disposal during this time period, and in light of the evidence of continued degradation under the interim grazing scheme on these public lands, see infra Part III, the agency’s decision to persist with the interim strategy was arbitrary and capricious.

The FRH regulations state:

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). The actions that may constitute “appropriate action” under the above-enumerated subparts evidence a wide range of options at the BLM’s disposal to address the identified grazing failures—options that could have been implemented on a short-term time frame and which did not necessarily require NEPA analysis under that time frame. These represent the range of actions from which the BLM may choose in order to satisfy its mandatory duty to implement changes prior to the start of the next grazing season if it finds current grazing is causing failures to achieve Standards and Guidelines.

ONDA wishes to emphasize at the outset, however, that simply because the BLM has the limited discretion to make certain grazing decisions pursuant to the FRH regulations without NEPA analysis, this should be the exception rather than the rule. The BLM must in the short-term take available measures that do not necessarily require environmental analysis to insure significant progress towards meeting standards and conforming to guidelines. The immediacy of this regulatory requirement is consistent with Congress’s mandate in FLPMA that the BLM manage the public lands and resources “without permanent impairment,” 43 U.S.C. § 1702(c), and to “prevent unnecessary or undue degradation of the lands.” *Id.* § 1732(b). In this case, that means the BLM, following its determinations in December 2001 that current grazing was causing failures to meet Standards and Guidelines, should have made meaningful changes in grazing management prior to March 2002, and then should have used the next twelve months to engage in a NEPA analysis with full public participation to develop a final grazing strategy that would effectively address the identified failures beginning with the 2003 grazing season. To the

extent the BLM could not complete that NEPA process prior to March 2003, the agency had a continuing duty to use its authority under these subparts to make further changes to grazing that would insure significant progress toward meeting Standards and Guidelines.

**A. The Subparts Referenced in 43 C.F.R. § 4180.2(c) Provide the BLM With A Number of Short-Term Remedial Options That May Be Undertaken Without NEPA Analysis When Necessary.**

**1. Subpart 4110—Qualifications and Preference.**

This subpart includes direction on changes in permitted use, decreasing permitted use, and implementing reductions in permitted use. It states that the BLM must periodically review the permitted use specified in a grazing permit “and make changes in the permitted use as needed to manage, maintain or improve rangeland productivity, to assist in restoring ecosystems to properly functioning condition, to conform with land use plans or activity plans, or to comply with the provisions of subpart 4180 of this part.” 43 C.F.R. § 4110.3. These changes “must be supported by monitoring, field observations, ecological site inventory or other data.” *Id.* When monitoring or field observations “show grazing use or patterns of use are not consistent with the provisions of subpart 4180 . . . the authorized officer shall reduce permitted grazing use or otherwise modify management practices.” *Id.* § 4110.3-2 (emphasis added). Nothing here limits this directive to a one-time-only phenomenon. That is, if the BLM reduces grazing use or otherwise modifies management, but those reductions or modifications still do not result in significant progress toward meeting Standards and Guidelines, the plain language of the regulation requires further modification the following grazing season.

Finally, the regulations specify that reductions in permitted use shall be implemented “through a documented agreement or by decision of the authorized officer.” *Id.* § 4110.3-3. The

latter are issued as “proposed decisions” pursuant to 43 C.F.R. § 4160.1,<sup>4</sup> unless grazing poses an “imminent likelihood of significant resource damage”—in which case, the BLM may close some or all of the allotment at issue to grazing, or modify authorized grazing. Id. § 4110.3-3(b) Closures or reductions due to “imminent likelihood of significant resource damage” are issued as final decisions effective upon issuance or upon a specified date (commonly referred to as “full force and effect decisions”). Id. The “documented agreement” referred to in section 4110.3-3 is in theory what occurred with the interim strategy in this case, although there is no documentation of the agreement other than the annual authorizations and brief mention in the LCGMA Evaluation. See AR Tabs 1, 2, 3 (annual authorizations); Tab 12 at 2 (stating BLM and permittees jointly developed interim strategy).

Under each of the above options for changing or decreasing permitted use, the BLM retains the discretion under the regulations to implement those changes without conducting an environmental analysis under NEPA. This is because the changes envisioned in this subpart are very often changes that must be made on a very short time frame due to some unforeseen circumstance (e.g., a wildfire), “imminent likelihood of significant resource damage,” or as a result of the FRH regulations’ requirement that changes in areas failing to meet Standards and Guidelines must occur before the start of the next grazing season, which often leaves insufficient time to undertake a full NEPA analysis with public participation prior to the initial required management changes.

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<sup>4</sup> A proposed decision under this subpart may be protested within a very short time frame (15 days from receipt of the proposed decision) and any adverse decision following that may be appealed, also on a short time frame (30 days). 43 C.F.R. §§ 4160.2, 4160.3, 4160.4.

## **2. Subpart 4120—Grazing Management.**

This provision provides for “range improvements.” Range improvements generally include fences, watering troughs, pipelines, and other structures designed to aid in grazing management. The most significant aspect of this subpart is the provision specifically stating that proposed range improvement projects “shall be reviewed in accordance with [NEPA].” 43 C.F.R. § 4120.3-1(f). Thus, range improvements that are likely to result in significant environmental impacts are not available to the BLM to meet the short-term requirements of Section 4180 to make changes prior to the next grazing season. The omission of the explicit reference to NEPA in other sections of the regulations is further support for the BLM’s authority to make certain grazing changes, in particular, reductions in livestock numbers and/or AUMs, without undertaking an environmental analysis under NEPA, if certain conditions are present (e.g., imminent harm, as described above).

## **3. Subpart 4130—Authorizing Grazing Use.**

This subpart provides that the BLM may, without immediately undertaking any NEPA analyses, make certain modifications to grazing permits or approve temporary nonuse or conservation use if necessary. The BLM may modify permit terms and conditions following “consultation, cooperation, and coordination” with permittees and the interested public. 43 C.F.R. § 4130.3-3. The agency may do this when current grazing practices are not in conformance with the FRH regulations. *Id.* For example, the BLM could require the permittee to engage a full-time rider to ensure livestock do not graze within riparian areas. “To the extent practical,” the BLM shall provide permittees and the public an “opportunity to review, comment and give input during the preparation of reports that evaluate monitoring and other data that are used as a basis for making decisions to increase or decrease grazing use, or to change the terms

and conditions of a permit or lease.” *Id.* Similarly, the BLM may approve “temporary nonuse” or “conservation use” if such use is determined to be in conformance with the RMP, AMP or other activity plans and the provisions of Subpart 4180. *Id.* § 4130.2(g). Conservation use may be approved for periods of up to ten years when the BLM determines it will “promote rangeland resource protection or enhancement of resource values or uses, including more rapid progress toward resource condition objectives. *Id.* § 4130.2(g)(1).

Finally, permits shall include terms and conditions that ensure conformance with Subpart 4180. 43 C.F.R. § 4130.3-1. Thus, assuming the grazing permit underwent a full NEPA analysis when it was issued,<sup>5</sup> the BLM subsequently retains the discretion to make changes and modifications to permitted use in order to achieve permits terms and conditions. These types of changes frequently are made without NEPA analysis and generally are implemented via the BLM’s annual grazing authorizations. *See, e.g.*, AR Tab 3 at 1 (2004 annual authorization stating scheduled use “subject to change to meet [Standards and Guidelines]”). Without any NEPA analysis or public involvement, the AOIs make changes related livestock numbers, AUMs, seasons of use, and areas of use and grazing rotations. *See* AR Tabs 1, 2, 3, 19 (2001–2004 annual authorizations with no accompanying NEPA documentation).

**B. The BLM’s Rangeland Health Standards and NEPA Handbooks Also Show That the BLM Has Short-Term Remedial Options That May Be Undertaken Without NEPA Analysis.**

The BLM’s interpretation in its handbooks of its grazing management options is consistent with the regulatory scheme described above. For example, the agency’s Rangeland Health Standards Handbook includes several references to a subsequent, more detailed NEPA

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<sup>5</sup> As the court is aware, however, the BLM has lagged so far behind in this process that Congress has passed several appropriations bill “riders” allowing the terms and conditions of renewed grazing permits to remain in effect until NEPA analyses are completed. *See, e.g.*, Pub. L. No. 108-108, 117 Stat. 1241, § 325 (Nov. 10, 2003).

process, intended to occur only after initial changes to grazing management have been made in order to address immediate failures to comply with Standards and Guidelines. See AR Tab 8 at III-1 (explaining that information on existing resource conditions “will be used later if [NEPA] analysis of proposed action and alternatives is needed”), III-14 to III-16 (after making determination that current grazing is causing failures to meet standards and then taking appropriate action before start of next grazing season, describing subsequent steps of developing a longer-term plan to address failures and implementing the plan via a NEPA process); IV-2 (distinguishing between “NEPA Analysis (if needed)” and “Decision document (if needed),” the latter pursuant to 43 C.F.R. § 4160).

Similarly, the BLM’s NEPA Handbook describes a number of circumstances under which the agency may take certain actions without preparing a NEPA analysis. These include emergency actions exempt from NEPA under 40 C.F.R. § 1506.11, categorically excluded actions, see id. § 1508.4 (defined as actions which do not individually or cumulatively have a significant effect on the environment), and actions covered by an existing EA or EIS. See Pl. Ex. 23 (NEPA Handbook, H-1790-1, at I-1 to I-2). The latter category is the most obviously applicable here, as the BLM states in its final SEORMP, “Upon determining through the adaptive management process that existing grazing management practices or levels of grazing on public lands are significant factors in failing to achieve resource objectives, appropriate actions will be implemented.” See AR Tab 14 at 58 (also stating, “The current grazing use authorizations (Appendix E) will be maintained until analysis or evaluation through the adaptive management process identifies a need for adjustments to meet objectives”). Thus, the BLM in the controlling land use plan already has indicated that it will adjust grazing practices, through time, as it becomes clear that current grazing is causing failures to meet standards.

### **III. THE BLM'S DECISION TO AUTHORIZE GRAZING UNDER THE INTERIM STRATEGY FOR FOUR CONSECUTIVE YEARS HAS RESULTED IN ECOLOGICAL HARM AND HARM TO ONDA'S INTERESTS.**

The administrative record and the BLM's statements during this litigation demonstrate that the BLM's decision to continue with the interim strategy has resulted in continued ecological degradation and in harm to ONDA's interests in conservation of these public lands. This is further evidence of arbitrary and capricious agency action. If the BLM concedes that it did indeed have at its disposal further short-term remedial options it could have undertaken prior to completing a NEPA process for the LCGMA, in order to address the failures it identified in 2001, the agency is likely to then argue that the interim strategy satisfied the requirement to take "appropriate action." But because the record shows that the grazing damage identified by the BLM in 2001 has continued under the interim strategy, this necessarily leads to the conclusion that the agency acted arbitrarily and capriciously by not making further grazing adjustments in successive years in order to satisfy its statutory and regulatory mandates.

The LCGMA Evaluation documents that, as of December 7, 2001, then-current grazing practices were causing continuing damage to the ecological integrity of the public lands in the Louse Canyon GMA. See AR Tab 12 at 3-8, 3-16, 3-33, 3-36, 3-39, 3-46 (determinations of failures to meet standards, current grazing the cause). As early in the process as the summer and fall of 2000, however, the BLM concluded in its LCGMA Wildlife Habitat Evaluation that grazing was causing significant damage to wildlife habitat in a number of areas throughout the LCGMA. See AR Tab 11 at 011 ("[e]xceptions to the generally favorable patterns of livestock utilization observed in LCGMA" included heavy utilization and weak understory conditions in specific streams, heavy use and depleted understories within isolated mountain and/or Great

Basin sage communities,<sup>6</sup> “particularly severe” utilization around livestock watering troughs in seeded areas, and vulnerability to establishment of noxious and invasive weeds in heavily used areas). In fact, the agency specifically noted that throughout the GMA, “[a]ll wet meadow habitats showed signs of heavy utilization[,] and little residual cover is available in the fall due to domestic livestock use.” *Id.* (emphasis added).

In the LCGMA Evaluation, the BLM admits that one-third of the streams in the LCGMA are not meeting Standard 2 (Watershed Function—riparian/wetland), with 27% “Functioning at Risk, Trend Not Apparent,” 5 reaches “Functioning at Risk, Downward Trend,” and 3 reaches “Not Functioning.” AR Tab 12 at 2-31 to 2-34, Table 4a; AR Tab 13 (Errata Sheet). An astounding seventy-five percent or more<sup>7</sup> of the meadow/wetland complexes throughout the LCGMA, as well as nearly 30 springs, are “not functioning properly due to livestock trampling, overgrazing, or dewatering by developments.” AR Tab 12 at 2-53 (citing Table 4b). According to the BLM, “[t]hese habitat conditions impact amphibians, aquatic reptiles and invertebrates, and upland species that use wetlands for water sources, breeding, or forage.” *Id.*

Yet in this litigation, the BLM has taken the position that because the riparian areas comprise a very small percentage of the public lands covered by the LCGMA, and because vast areas of the uplands outside of those riparian areas are in good condition, ONDA’s claims of ecological degradation are “unfounded.” BLM Br. at 31.<sup>8</sup> But the BLM itself has recognized that

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<sup>6</sup> The term “isolated mountain and/or Great Basin sage communities” in an ecological term of art meaning that these sagebrush species occur in scattered, isolated pockets within the broader sagesteppe vegetative community present in the LCGMA. *See, e.g.*, AR Tab 12 at 2–3.

<sup>7</sup> The LCGMA Evaluation puts this number at 75%, although a review of Table 4b, AR Tab 13 at 08, shows that 27 of the 30 meadow/wetland sites measured—or 90%—are in fact not properly functioning.

<sup>8</sup> Note, though, that ONDA takes issue with the BLM’s assertions and proposals regarding the uplands in the LCGMA. *See* Pl. Ex. 24, at 6–8 (ONDA protest of BLM’s Proposed Decision under LCGMA EA, questioning shifting same unsustainable livestock numbers to areas that have

“[a]lthough riparian areas and wetlands cover less than 1 percent of the [SEORMP] planning area, their ecological significance far exceeds their limited physical area. Riparian and wetland areas are major contributors to ecosystem productivity and structural and biological diversity, particularly in drier climates.” AR Tab 15, Vol. 1, at 62. Further, these riparian areas, which are the single most diverse and ecologically productive habitats in the desert, provide critical food and shelter for fish and wildlife, affect the quantity and quality of water available, and help regulate the hydrologic regime. *Id.* See also Fite Decl. at ¶¶ 7–10 (contrasting wildlife and scenic values of the area with chronic degradation observed from livestock). Therefore, if the BLM’s determinations were based solely (or even primarily) on unacceptable conditions in the riparian areas, those failures are simply that much more significant. As a result, an order from this court directing the BLM to implement meaningful grazing management changes in the LCGMA is vitally important in order to stave off further ecological degradation that the current delays and failures have imposed.

The BLM also attempts to shift the blame for its continued failures to meet standards on the drought conditions in southeast Oregon. Although the BLM asserts the changes in season of use “had the effect” of reducing the amount of forage consumed, Taylor Decl. at ¶ 13, it can do little more than point to prolonged drought conditions and trespass grazing when it comes to explaining why “significant progress” has not, in fact, been made under the interim strategy. See id. at ¶¶ 14, 17. The FRH regulations do not provide any exception for meeting the standards or taking appropriate action to meet the standards based on drought. In fact, if drought conditions are persisting, this is all the more reason why the BLM must actually implement final grazing management changes and monitor those changes, rather than continue to rely upon inadequate

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been virtually ungrazed previously). Nevertheless, the BLM’s actual FRH determinations are not at issue in this litigation; thus, ONDA does not address this issue further in this memorandum.

interim changes. See also AR Tab 14 at 58 (SEORMP management objective, stating, “Livestock grazing will be managed during and following drought to maintain soil and vegetation health and productivity”). The BLM’s interim strategy relying exclusively on “herbaceous regrowth” after the grazing season, AR Tab 12 at 1-2, Taylor Decl. at ¶ 10, is simply not an effective strategy under drought conditions.<sup>9</sup>

In December 2003, after two years under the interim strategy, the BLM recognized the “cumulative impacts of prolonged drought[,]” stating, “Prolonged drought stress, in addition to grazing, is having detrimental impacts on plant health, plant vigor and forage production on much of our low and mid elevation rangeland.” AR Tab 18 at 1. The BLM also noted that the “impacts we have documented will not be erased by one or two good precipitation years” and encouraged permittees “to consider reducing your numbers to build in flexibility.” *Id.* Despite recognizing that the interim strategy had not been successful, the BLM elected to make no further changes to the interim grazing management strategy.

The BLM provides nothing in its briefing or the Taylor Declaration to indicate that current grazing in these areas is meeting standards. In fact, the BLM’s only statement during this litigation assessing the agency’s own measure of its progress under the interim strategy is the nebulous observation of “general, but subtle, improvement.” Taylor Decl. at ¶ 16. Although the BLM asserts the changes in season of use “had the effect” of reducing the amount of forage consumed, this does not change that fact that “significant progress” has not, in fact, been made under the interim strategy. Moreover, the only hard evidence of any actual assessment of the effects of its interim strategy to which the BLM can point in the administrative record, is a series

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<sup>9</sup> See, e.g., S. Leonard *et al.*, *Riparian Area Management: Grazing Management for Riparian-Wetland Areas*, BLM and USFS, Tech. Ref. 1737-14, at 11–12, 14, 30, 47 (1997), available at [www-a.blm.gov/riparian/tech.htm](http://www-a.blm.gov/riparian/tech.htm) (explaining effects of drought on regrowth and discussing impacts grazing duration and time permitted for regrowth).

of photo points, AR Tab 12 at App. K, and tabular summaries of “proper functioning condition” (“PFC”) assessments of streams and riparian areas. AR Tab 12 at Table 4a (stream PFC summary), Tab 13 at Table 4b (spring/wet meadow PFC summary). As ONDA noted previously, PFC is a qualitative method widely known to be highly subjective and lacking in scientific rigor. See Ex. 14 (National Research Council study stating that with PFC method, “emphasis is placed almost exclusively on hydrologic and geomorphic features rather than on biological or ecological functioning” and that “[v]irtually no direct attention is given to the terrestrial or wetland habitat functions of riparian areas”). Moreover, the BLM’s almost exclusive reliance on PFC directly contradicts the agency’s unambiguous Rangeland Health Standards Handbook direction: “**Do not use qualitative assessments as a trend monitoring method.**” AR Tab 8 at III-15 (boldface in original).

Finally, the harm of most serious concern to ONDA involves the effects of on-going damage from livestock overgrazing to wilderness values on these public lands. As ONDA’s executive director, Bill Marlett, has explained, ONDA and dozens of citizen volunteers conducted a comprehensive inventory of wilderness values on the public lands in the Vale District in 2003. Marlett Decl. at ¶ 10. ONDA performed its inventory pursuant to the protocol established in the BLM’s own “Wilderness Inventory Study and Procedures” handbook, and the final report includes maps identifying the boundaries of each area in question, annotated road and photo logs with GPS locations cued to the maps, and narratives analyzing each inventory unit under the BLM’s definition of wilderness characteristics and documenting how that information is new and/or differs from the information in prior inventories conducted by the BLM regarding wilderness values for the area. See Oregon Natural Desert Association, *Wilderness Inventory Recommendations: Vale District* (Feb. 6, 2004), available at

[www.onda.org/projects/owyhee/FullReport.pdf](http://www.onda.org/projects/owyhee/FullReport.pdf) (last modified Feb. 18, 2004). Of the 2.2 million acres of public land it inventoried, ONDA found 1.3 million acres to contain wilderness characteristics in accordance with BLM policy and definitions. ONDA presented its final wilderness inventory report and recommendations to the BLM on February 6, 2004. Marlett Decl. at ¶ 10.

A number of ONDA's Proposed WSAs or "Wilderness ACECs" lie within or are immediately adjacent to the LCGMA. Marlett Decl. at ¶ 10. This includes at least 84,000 acres of public lands within the LCGMA that ONDA identified as having wilderness characteristics according to the BLM's own definitions. See, e.g., Pl. Ex. 25 (excerpt from ONDA report, for "Oregon Butte Proposed WSA Addition"); see also 16 U.S.C. § 1131(c) (defining "wilderness" as areas that are un-roaded, primarily affected by the forces of nature, and provide outstanding opportunities for solitude and primitive recreation). Marlett has concluded:

From our assessment, it is apparent that the BLM's past failure to protect these public lands from the impacts of livestock grazing adversely limits the ability of public lands to be considered for future consideration as wilderness by Congress. If the BLM does not implement the FRH regulations and the necessary changes to grazing management in these sensitive areas, the possibility for wilderness designation on these public lands may be lost forever.

Id. Throughout the LCGMA and the SEORMP planning processes, ONDA has implored the BLM to consider the impacts of its actions (particularly livestock grazing) on wilderness values. See Pl. Ex. 24 at 3–5 (ONDA LCGMA protest). The BLM has refused to do so during both of these processes.<sup>10</sup> As a result, the BLM's decision to continue to authorize damaging grazing

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<sup>10</sup> The BLM has a mandatory duty under FLPMA to "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." 43 U.S.C. § 1711(a). The inventory "shall be kept current so as to reflect changes in conditions and to identify new and emerging resource and other values." Id. The BLM also has an

practices under the interim strategy, coupled with its refusal to consider at any juncture the impacts of its on-going grazing on wilderness values, leaves these remote, rugged public lands in danger of “unnecessary or undue degradation” and permanent impairment. In short, the BLM’s decision is arbitrary and capricious and not in accordance with FLPMA and the FRH regulations.

**IV. THIS COURT SHOULD ORDER THE BLM TO IMPLEMENT TAKE MEASURES TO MITIGATE FOR THE ECOLOGICAL DAMAGE CAUSED BY SEVERAL YEARS OF UNLAWFUL GRAZING AUTHORIZATIONS.**

Because the BLM has authorized grazing for four successive years under an unlawful and ecologically damaging interim grazing strategy, ONDA respectfully requests the court to order the agency to engage in mitigation that will address this harm. This court has the equitable power to order such mitigation even if the unlawful grazing ceases following completion of a NEPA process analyzing new grazing management strategies. For instance, in Forest Guardians v. U.S. Forest Serv., 329 F.3d 1089 (9th Cir. 2003), a challenge to a Forest Service three-year grazing scheme was not moot even after that scheme expired, because other relief could be ordered to mitigate the damage caused by the violation. The court specifically noted that such relief might include the district court’s ordering the Forest Service to move or remove livestock from the affected allotments “so the land can repair itself.” Id. at 1094. Likewise, a challenge to a timber sale was not moot even after harvest was completed because the court could order measures to mitigate the damage caused by the sale. Neighbors of Cuddy Mtn. v. Alexander, 303 F.3d 1059, 1065 (9th Cir. 2003); see also Cantrell v. City of Long Beach, 241 F.2d 674, 678–79 (9th Cir. 2001) (challenge to plan to develop naval station not mooted by destruction of buildings on the site because defendants could consider alternatives to the current reuse plan and develop ways to mitigate damage to bird habitat); Northwest Env’tl. Def. Ctr. v. Gordon, 849 F.2d 1241, 1245 (9th

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independent legal duty under NEPA to consider the wilderness resource during its planning efforts.

Cir. 1988) (challenge to regulations governing 1986 salmon fishing season not mooted by closing of season because the damage could be mitigated “by allowing more fish to spawn in 1989”).

Therefore, in this case, ONDA recommends that this court order the BLM to: (1) reduce livestock numbers and AUMs on the pastures determined to have failed to meet Standards and Guidelines due to current grazing practices, for a period of three years (equivalent to the period of the violation) and at a 25% reduction from the levels of use proposed in the LCGMA Proposed Decisions; (2) impose reasonable stubble height and bank stability standards in all riparian areas within the above pastures (including 0% allowable bank damage for any stream reach where the BLM identified “hoof action” as a basis for a “FARN,” “FARD,” or “NF” PFC rating in the LCGMA Evaluation); and (3) perform a supplemental NEPA analysis for the LCGMA analyzing the impacts of its proposed grazing levels, areas and seasons of use on the wilderness resource as documented in ONDA’s wilderness inventory report and recommendations. ONDA believes this represents a reasonable compromise relative to the seriousness of the damage that has occurred, the fact that legal violations have occurred for three years running, the fact that the BLM has refused during this or any other process to undertake any assessment of the impacts of these grazing practices on wilderness values, and the fact that ONDA recommended three years ago that the BLM rest the LCGMA in its entirety for five years in order to allow the area to experience an initial period of recovery before placing livestock on these degraded public lands once again. See Fite Decl. at ¶ 5 and Attach. 1; Moore Decl. at ¶¶ 3–5 and Attach. 1.

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**CONCLUSION**

For the foregoing reasons, ONDA respectfully requests the Court to grant Plaintiffs' Second Claim for Relief in their Motion for Summary Judgment and to order the BLM to implement grazing management changes and take any and all other such measures as this court deems necessary to mitigate for the ecological damage caused by several years of unlawful grazing management authorizations, as described above.

DATED this 20th day of April, 2005.

Respectfully Submitted,

s/ Peter M. Lacy

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