

**Peter M. Lacy (“Mac”) (OSB # 01322)**  
Oregon Natural Desert Association  
917 SW Oak Street, Suite 408  
Portland, OR 97205  
(503) 525-0193  
lacy@onda.org

**Stephanie M. Parent (OSB # 92590)**  
Pacific Environmental Advocacy Center  
10015 SW Terwilliger Blvd.  
Portland, OR 97219  
(503) 768-6736  
(503) 768-6642 (fax)  
parent@lclark.edu

Attorneys for Plaintiffs

**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 REPLY  
IN SUPPORT OF PLAINTIFFS’  
MOTION FOR SUMMARY  
JUDGMENT**

**WAYNE WETZEL**, Acting Field Manager,  
Jordan Resource Area, BLM, **DAVE  
HENDERSON**, Vale District Manager, BLM,  
**BUREAU OF LAND MANAGEMENT**,

Defendants.

---

**INTRODUCTION**

In this supplemental briefing, ONDA has described how the interim grazing strategy the BLM has relied upon for four successive grazing seasons in the Louse Canyon GMA is (1) arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law, and (2) 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. In response, the BLM takes an unsupported reading of the term “appropriate action,” provides no satisfactory explanation why further changes beyond shifting livestock use dates were not employed, and continues to rely upon conclusory statements to defend the interim strategy. The agency’s decision to persist with the interim grazing strategy has allowed on-going livestock grazing to continue to damage these remote and wild public lands replete with breathtaking canyonlands and dramatic expanses of sagebrush-steppe—and in particular their vitally important stream and riparian areas. For the reasons that follow, as well as those set forth in ONDA’s opening supplemental memorandum, ONDA once again asks this court to provide the relief requested in ONDA’s opening supplemental memorandum.

### **ARGUMENT**

#### **I. THE BLM HAS FAILED TO REFUTE ONDA’S SHOWING THAT THE DECISION TO USE THE INTERIM GRAZING STRATEGY FOR FOUR SUCCESSIVE YEARS IS ARBITRARY AND CAPRICIOUS.**

The FRH regulations require that the BLM, upon determining that current grazing practices are causing failures to satisfy the Standards and Guidelines, must take “appropriate action” “that will result in significant progress” toward fulfillment of the standards and guidelines. 43 C.F.R. § 4180.2(c). The BLM takes an unsupported interpretation of this mandatory duty, arguing that the “ultimate goal” of its interim grazing strategy was “on-the-ground change.” BLM Supp. Memo at 14 (also noting “the grazing has been *changed* though the interim grazing management strategy”) (italics in original). But the regulations require not just change, but change which results in significant progress. Despite the regulations’ unambiguous requirement to achieve “significant progress,” the BLM suggests it is unreasonable to expect any discernable progress in a two to three year time period, attempting to paint ONDA’s desire to see

actual progress in terms of protected and recovering riparian areas—as is required under the regulations—as an extreme position. See id. at 15.

The BLM argues that its one-time, interim change made three years ago, which simply shifted the same livestock numbers and amount of forage allocated to domestic livestock grazing slightly earlier in the permitted grazing season, completely satisfied the requirements of the FRH regulations while the BLM eventually initiated its NEPA process. BLM Supp. Memo at 6–7. However, this position is inconsistent not only with the plain language of the regulations,<sup>1</sup> but also with the underlying purpose of the FRH regulations. As explained by the Department of Interior in 1995 in its notice of final rulemaking, “The Department believes that it would be inconsistent with its mandate to manage the public rangelands to allow an allotment to continue to deteriorate while prolonged monitoring studies are conducted in those instances where other reliable measures of rangeland health indicate a need for action.” 60 Fed. Reg. 9893, 9931 (Feb. 22, 1995) (emphasis added). The Department also confirmed the continuing nature of the BLM’s obligation, specifying that “[s]hould actions taken on a given allotment not lead to achieving those objectives it is incumbent upon the authorized officer to take appropriate action to assure that they do.” Id. at 9942.

In this case, the record demonstrates that the riparian areas, springs and other wet areas in the LCGMA continued to show signs of degradation even after the BLM implemented the interim strategy in 2002. See ONDA Supp. Memo at 14–20 (reviewing evidence of past and on-going degradation). Despite this on-going resource damage, the BLM elected to make no further changes in its interim grazing strategy. In fact, the BLM simply admits that it “chose to focus [its] attention on the development of long term solutions, rather than spend more time monitoring

---

<sup>1</sup> See especially ONDA Supp. Memo at 3–7 (detailed discussion of plain language of 43 C.F.R. § 4180.2(c)).

interim grazing measures.” Taylor Decl. at ¶ 17. But so long as the agency continued to delay its NEPA process to analyze long-term changes in grazing management (or even simply required longer than expected to initiate and complete that process), the BLM was obligated to continue to make short-term changes in order to satisfy the requirement to take appropriate action that results in significant progress.

In an attempt to support this decision not to make further changes to harmful grazing practices, the BLM tries to shift the focus away from its decisions by intimating that ONDA’s expectations are unreasonable. BLM Supp. Memo at 15 (claiming “ONDA would like to see ‘significant progress’ in the course of two to three years, but the fact is that land can only improve at a certain pace”). ONDA is sophisticated enough with respect to desert riparian ecology to understand that recovery of damaged ecologic resources cannot be “immediate.” Nevertheless, it is also very well-recognized that these riparian areas are in fact the quickest to respond to such conservation practices. If provided the proper relief from overgrazing, desert riparian areas’ herbaceous and woody vegetation, water tables, and critical stream hydrologic attributes such as bank stability and channel widths and depths can initiate significant nascent steps toward recovery. In fact, the BLM itself has concluded, “Generally, riparian areas are among the most resilient ecosystems. Depending on condition and potential, they usually respond more quickly than drier upland ranges to changes in management.” S. Leonard *et al.*, *Riparian Area Management: Grazing Management for Riparian-Wetland Areas*, BLM and USFS, Tech. Ref. 1737-14, at 1 (1997), [available at www-a.blm.gov/riparian/tech.htm](http://www-a.blm.gov/riparian/tech.htm). Importantly, though, “It only takes a few weeks of unauthorized use or overgrazing to set back years of progress in improving riparian systems. In one stream, annual use by a few head of

unauthorized livestock throughout most of the hot season period has nullified positive riparian habitat responses in an otherwise excellent grazing system.” *Id.* at 46 (citations omitted).

These well-established concepts are supported by the regulations, which are quite clear in mandating that the BLM insures “significant progress” toward recovery—not merely staving off further damage or providing for nothing more than “subtle improvement.” The Ninth Circuit has confirmed that the FRH regulations are intended “to achieve positive, on-the-ground changes in resource conditions . . . . Success will be measured in terms of concrete outcomes—not in terms of procedural actions.” *Idaho Watersheds Project v. Hahn*, 187 F.3d 1035, 1037 (9th Cir. 1999). See also AR Tab 10 at 1 (BLM’s OR/WA Standards & Guidelines, indicating one of objectives of FRH regulations is “to accelerate restoration and improvement of public rangelands to properly functioning conditions”) (emphasis added); 60 Fed. Reg. at 9898 (“The Department believes these provisions are critical to ensuring that BLM’s administration of grazing helps preserve currently healthy rangelands and restore healthy conditions to those areas that currently are not functioning properly, especially riparian areas.”) (emphasis added).

The BLM cites the controlling land use plan, the Southeastern Oregon Resource Management Plan (“SEORMP”), to support the argument that “spring grazing has been shown to be a use period compatible with riparian habitat improvement because it allows regrowth and recovery.” BLM Supp. Memo at 8–9 (citing AR Tab 15, Vol. 2 at 381). This overly simplistic conclusion ignores the BLM’s more detailed discussion in the SEORMP regarding this type of grazing during drought conditions. The SEORMP concludes that under spring grazing (February 1 to May 1), “[m]inimal impacts to plant vigor and health” occur under “light to moderate”

utilization<sup>2</sup>—but only “when adequate soil moisture is available for regrowth and completion of the annual growth cycle.” AR Tab 15, Vol. 2 at 380. However, “[m]oderate utilization, in years with minimal soil moisture available for regrowth after use, could deplete plant vigor and health, especially during periods of critical growth.” *Id.* (emphasis added). In the LCGMA pastures not meeting FRH Standards & Guidelines, the BLM allows a maximum utilization of up to 50%, which means these pastures are grazed under “moderate” utilization. *See* AR Tab 12 at 9–22 (LCGMA Evaluation—Campbell, Louse Canyon Community, and Star Valley Community allotment summaries). Therefore, the SEORMP indicates that the levels of grazing authorized in these pastures may cause resource damage during periods of drought.<sup>3</sup> And this is exactly what has happened over the course of the past several years under the interim grazing strategy—which did not reduce utilization levels, but rather simply moved the same numbers of livestock and authorized utilization levels a few weeks earlier in the grazing season.

Moreover, even if riparian vegetation is “less vulnerable” to grazing impacts during spring use under non-drought conditions, other resource problems are exacerbated under this earlier grazing scheme. During the earlier spring grazing authorized under the interim strategy, there is a “hazard of compaction of wet soils with hoof action . . . resulting in a reduction of infiltration and soil moisture capacity in fine-textured soils.” AR Tab 15, Vol. 2 at 381. The

---

<sup>2</sup> The BLM defines “light” utilization as up to 40%; “moderate” utilization is defined as from 41 to 60%. AR Tab 15, Vol. 2 at 377.

<sup>3</sup> The BLM also concludes that under summer (hot season) grazing (July 1 to October 31), impacts to riparian values are even greater than at other seasons of the year. AR Tab 15, Vol. 2 at 383. Importantly, the administrative record shows that the interim strategy still includes significant periods of summer grazing. For example, in 2004, the BLM authorized summer grazing on each of the allotments and pastures that failed to meet standards: Louse Canyon Community Allotment, *Louse Canyon Pasture* (grazing authorized 5-2 to 8-10); *Pole Creek Seeding Pasture* (7-16 to 9-15), *Steer Canyon Seeding Pasture* (7-16 to 10-1); Star Valley Community Allotment, *South Tent Creek Pasture* (6-1 to 7-31); Campbell Allotment, *Horse Hill Pasture* (5-1 to 7-15), *Starvation Brush Control Pasture* (5-3 to 10-30). AR Tab 3 at 01, 08, 19, 26, 32, 43 (2004 grazing authorizations).

LCGMA Evaluation confirms that stream bank and riparian area damage due to “hoof action” is widespread throughout the GMA. See AR Tab 12 at Table 4a (showing 32 of 96 total stream reaches measured as having “hoof action” as a basis for functioning-at-risk ratings); AR Tab 13 at Table 4b (showing 25 of 30 total spring/meadow sites measured as having “hoof action” as a basis for a functioning-at-risk or non-functioning rating); AR Tab 11 at 011 (wildlife habitat evaluation concluding that throughout LCGMA, “[a]ll wet meadow habitats showed signs of heavy utilization[,] and little residual cover is available in the fall due to domestic livestock use”). Nevertheless, the BLM has persisted with this slight shift to earlier season grazing, in spite of the agency’s prior recognition in the SEORMP that “[c]are must be taken to prevent streambank hoof shearing and to leave adequate carryover vegetation for bank protection and silt filtering during spring runoff.” AR Tab 15, Vol. 2 at 382. In short, the BLM has failed to provide any convincing evidence or point to any place in the administrative record that refutes ONDA’s showing that the decision to persist with the interim grazing strategy for four successive grazing seasons is arbitrary and capricious and otherwise not in accordance with FLPMA and the FRH regulations.

**II. THE BLM ADMITS IT HAD A RANGE OF SHORT-TERM REMEDIAL OPTIONS WITH WHICH TO ADDRESS THE IDENTIFIED ON-GOING GRAZING DAMAGE, BUT FAILS TO JUSTIFY ITS REFUSAL TO USE THOSE OPTIONS.**

The BLM admits that the most straightforward solution of all—simply reducing the number of livestock grazing in damaged pastures—was a possible non-NEPA, short-term solution to address the ongoing damage that was first disclosed in 2001. BLM Supp. Memo at 11. But the agency then never discusses in its briefing or elsewhere why a simple reduction in numbers was not a feasible solution, instead only stating that “BLM did not believe it was necessary to proceed directly to complete rest.” Id. at 12 (citing Second Taylor Decl. at ¶ 3). In

Taylor’s post-hoc attempt to explain why the BLM refused to implement any reductions in livestock numbers or forage utilization levels, he simply concludes in very general terms that “[w]e knew that the problems were associated with hot season grazing and knew that decreasing this grazing period was a viable strategy for improving riparian function and health.” Second Taylor Decl. at ¶ 3. As noted above, though, the interim strategy still included significant periods of hot season grazing. See supra n.3. Even more importantly, the conclusion that the problems identified were tied solely to hot season grazing is not borne out by the administrative record, which as ONDA has explained evidences on-going resource damage even under the interim strategy. See ONDA Supp. Memo at 14–20. Thus, the BLM fails to provide any satisfactory explanation as to why further changes were never considered or implemented, beyond the one-time shifting of the same numbers of livestock and forage allocations to a slightly earlier season of use. While this shift may have been a reasonable first attempt at taking appropriate action that would result in significant progress, the BLM’s refusal to make further modifications when it became clear that resource damage was continuing, is not defensible.

The BLM’s continued reliance on conclusory and unsupported statements to support its decision to do no more than shift its authorized grazing to earlier spring use is particularly troubling. In its supplemental briefing, the BLM again describes purported success in “restoring areas through reductions in hot season grazing,” citing unspecified actions at undisclosed locations “on threatened Lahontan cutthroat trout habitat in the Trout Creek GMA.” BLM Supp. Memo at 8, 12. Yet the BLM can point to nothing in the administrative record documenting any such success in the Trout Creek Mountains—for example, research studies, monitoring results, photographs, watershed assessments, published scientific literature, and so forth. All the BLM cites are several extremely general statements in the July 2004 declaration of Jerry Taylor. Id. at

8. In fact, in litigation involving the Owyhee Wild Rivers (which include within the LCGMA the West Little Owyhee system and part of the Main Owyhee River), this court rejected similarly unsupported claims of improvement by the BLM and Mr. Taylor:

Although the BLM asserts that its grazing management practices have generated improvements in the areas of concern first identified in 1993, the court concludes that the assertion is unsubstantiated by objective evidence except for the closure of Deary Pasture. Perhaps the most troubling evidence is Mr. Taylor’s testimony that the numbers of animals and the seasons of use have remained completely unchanged since implementation of the [Wild and Scenic Rivers] Plan, except when grazing permits have been increased to exploit good water years.

Ore. Natural Desert Ass’n v. Singleton, 75 F.Supp.2d 1139, 1150 (D. Or. 1999) (order permanently enjoining grazing in areas of concern along Owyhee Wild Rivers) (also stating, “The court is troubled by this indication that the BLM regards beneficial natural events as justifications for increased grazing, rather than as opportunities for recovery and enhancement of natural resources”).

Of course, even if Mr. Taylor’s 2004 declaration did contain some more detailed support for his claims, this post-hoc rationale cannot support the BLM’s decisions, which can be upheld only on the basis of the record before the agency at the time it made its decision. Anaheim Mem’l Hosp. v. Shalala, 130 F.3d 845, 849 (9th Cir. 1997); ASARCO, Inc. v. U.S. EPA, 616 F.2d 1153, 1159 (9th Cir. 1980). Thus, the BLM’s continued reliance on the interim strategy in the LCGMA despite continued resource damage does not constitute “appropriate action,” particularly in light of the wide range of reasonable non-NEPA options the agency has at its disposal—and again, not the least of which is simply reducing livestock numbers until a long-term strategy could be developed with full public participation.

///     ///     ///

### **III. THE BLM STILL HAS NOT ACCOUNTED FOR THE CONTINUED ECOLOGICAL HARM AND INJURY TO ONDA’S INTERESTS CAUSED BY THE INTERIM GRAZING STRATEGY.**

Even in its opening supplemental brief, the BLM still does not account for the continued ecological damage caused by the interim strategy. The agency dismisses ONDA’s showing of on-going damage as unsupported and continues to suggest that the mere fact of changed grazing practices is enough to satisfy 43 C.F.R. § 4180.2(c), without addressing the lack of any significant, on-the-ground progress in terms of ecological recovery. BLM Supp. Memo at 14–15. Because the BLM cannot refute the evidence of on-going ecological harm from current grazing practices in the LCGMA, and because the BLM has ignored the impacts of that harm on important public resources such as wilderness values and intact ecosystems, mitigating injunctive relief is appropriate in this case.

As ONDA pointed out previously, this court has the equitable power to order mitigation to address the unlawful grazing that has occurred in the LCGMA for the past several years. See ONDA Supp. Memo at 20–21; see also Natural Res. Def. Council v. Southwest Marine, Inc., 236 F.3d 985, 999 (9th Cir. 2000) (district court has “broad latitude in fashioning equitable relief when necessary to remedy an established wrong”) (internal quotes omitted). The traditional bases for injunctive relief are irreparable injury and inadequacy of legal remedies. Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 542 (1987). The court also must balance the equities between the parties and give due regard to the public interest. Id. It is well-established that “[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e. irreparable.” Id. at 545.

In this case, the administrative record shows that the interim grazing strategy has continued to result in on-going ecological damage. See ONDA Supp. Memo at 16–20 (reciting

evidence of exacerbated grazing damage due to persisting drought conditions, failure of interim measures to result in “significant progress,” and damage to wilderness values from on-going overgrazing); supra at 5–7 (discussing impacts of spring grazing, including bank damage and soil compaction). ONDA also has observed and called to the BLM’s attention the continuing adverse impacts of the interim grazing strategy.<sup>4</sup> Because the environmental injury already has occurred, injunctive relief is appropriate to allow the “land [to] repair itself.” Forest Guardians v. U.S. Forest Serv., 329 F.3d 1089, 1094 (9th Cir. 2003). Moreover, based on the damage that has occurred the past several years, and because the interim strategy remains in effect this year, the “record clearly supports the likelihood of continued injury absent adequate protective measures.” High Sierra Hikers Ass’n v. Blackwell, 390 F.3d 630, 642 (9th Cir. 2004).

As explained in ONDA’s opening supplemental brief, the public interest and a balancing of the equities also weigh in favor of mitigating injunctive relief. For example, here there are serious concerns that on-going overgrazing could permanently impair wilderness values on these public lands. See ONDA Supp. Memo at 18–20; Marlett Decl. at ¶ 10. That threat is exacerbated by the fact that the BLM thus far has refused to consider the impacts on wilderness values of its authorized grazing at either the land use planning level (i.e., in the SEORMP) or at the activity level (i.e., the LCGMA). ONDA Supp. Memo at 19–20; see also AR Tab 21a at 3–5 (ONDA protest). This also is in spite of the fact that the BLM’s Standards & Guidelines explicitly state

---

<sup>4</sup> See, e.g., AR Tab 21a at 3–8, 10 (ONDA protest of LCGMA EA proposed decision, citing continued unsuitable levels of grazing, misplaced reliance on herbaceous re-growth during drought conditions, impacts to wilderness values); AR Tab 21b at 1–2, 10–11, 16–17 (citing impacts from failed or abandoned structural range developments, impacts to sagebrush ecological communities, and impacts to upland and riparian bird species present in the LCGMA); AR Tab 21d at 4–5, 8–9, 15 (citing impacts to remnant native grasses, soils and special status species, impacts from spread of weeds, and discussing need for restoration via reduced grazing to initiate recovery). ONDA has brought these concerns to the BLM’s attention throughout the GMA process. See, e.g., Fite Decl. at ¶¶ 7–9; Moore Decl. at ¶¶ 3–4.

that “[a]lthough the focus of these standards is on domestic livestock grazing in [BLM] lands, on-the-ground decisions must consider the effects and impacts of all uses.” AR Tab 10 at 2.

The strong public interest in strict compliance with the FRH regulations’ purpose of restoring degraded ecosystems on the public lands is also evidenced by the Ninth Circuit’s recent findings concerning the “Idaho side” of the Owyhee Canyonlands. See Idaho Watersheds Project v. Hahn, 307 F.3d 815, 820–21 (9th Cir. 2002) (upholding permanent injunction containing protective measures to address overgrazing, and describing “ruggedly beautiful landscape,” “sculpted spectacular and wild canyonlands,” and “startling . . . ecological diversity, from arid sagebrush desert to lush juniper woodlands”). The Ninth Circuit also recognized the critical importance of stream and riparian areas in these arid sage-steppe landscapes, concluding that “[w]ater is life, and the health of the Owyhee depends on the health of its streams.” Id. at 821 (also describing detrimental impacts of grazing on these riparian areas). In this case, the springs in the LCGMA are “critically important from a regional perspective” due to the extraordinary rarity of spring complexes in the surrounding Owyhee country in Idaho and Nevada. AR Tab 21b at 2–3. The FRH regulations demand immediate action that results in significant progress, and those regulations are based on Congress’s mandate in FLPMA that the BLM “prevent unnecessary or undue degradation” to the public lands and manage those lands “without permanent impairment.” 43 U.S.C. §§ 1702(c), 1732(b). Here, the public interest favors strict compliance with these statutory and regulatory mandates, and this includes relief that will mitigate for continued unlawful grazing.

In short, because the harm, balancing of the equities, and the public interest all weigh in favor of mitigating injunctive relief, ONDA again respectfully requests that this court take the well-balanced approach outlined in ONDA’s opening supplemental brief. ONDA Supp. Memo at

21. In similar contexts, the Ninth Circuit has upheld district courts' orders of injunctive relief intended to mitigate for past or on-going environmental damage and to provide relief that provides environmental safeguards to protect the land until long-term changes are in place. See, e.g., Idaho Watersheds Project v. Hahn, 307 F.3d at 831 (affirming interim relief imposed by district court to remedy overgrazing on over one million acres of public lands in BLM's Owyhee Resource Area in Idaho, immediately to east of LCGMA). As in Idaho Watersheds Project, the relief requested by ONDA in this case presents a reasonable and balanced solution: it does not require complete elimination of grazing, but rather geographically and temporally limited grazing reductions and protective measures designed to mitigate for previous damage in areas the BLM identified as failing to meet Standards & Guidelines, coupled with an assessment by the BLM of the impacts of its authorized grazing on wilderness values. See ONDA Supp. Memo at 21; see also High Sierra Hikers Ass'n, 390 F.3d at 644 ("While awaiting BLM compliance [in Idaho Watersheds Project], the district court ordered interim relief allowing cattle grazing to continue but required that certain environmental safeguards be put in place to protect the land. We held that the district court acted within its authority to issue the injunction and the interim relief, finding that the lower court's actions were a fair and balanced remedy.") (citations omitted). In short, the reasonable, balanced remedy requested by ONDA will provide a chance for these degraded areas on some of the most spectacular, wild and remote landscapes in the lower forty-eight states, to initiate the significant progress toward recovery that is required under the FRH regulations.

### **CONCLUSION**

For the foregoing reasons, ONDA again 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 11th day of May, 2005.

Respectfully Submitted,

s/ Peter M. Lacy

---

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

Stephanie Parent (OSB # 92590)  
Pacific Environmental Advocacy Center

Attorneys for Plaintiffs