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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.

JERRY TAYLOR, Field Manager, Jordan
Resource Area, BLM, **DAVE HENDERSON**,
Vale District Manager, BLM, **BUREAU OF
LAND MANAGEMENT**,

**REPLY IN SUPPORT OF
PLAINTIFFS’ MOTION FOR
SUMMARY JUDGMENT
AND IN RESPONSE TO
DEFENDANTS’ CROSS-MOTION FOR
SUMMARY JUDGMENT**

Defendants.

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INTRODUCTION

In this lawsuit, Plaintiffs allege the Bureau of Land Management's (BLM) Vale District, Jordan Resource Area field office, has unreasonably delayed performance of its mandatory duties under the Federal Rangeland Health regulations, by: (1) failing to implement final changes to grazing management in the Louse Canyon Geographic Management Area ("LCGMA") after determining that current livestock grazing practices are causing failures to meet standards; and (2) failing to complete FRH assessments, evaluations and determinations on any of the other seven GMAs in the BLM's Jordan Resource Area. In its response, the BLM attempts to discredit this action by: arguing incorrectly that APA Section 706(1) does not provide a basis for the court to compel the agency actions unreasonable delayed and unlawfully withheld in this case; attempting to convince the court Plaintiffs are trying to enforce the BLM's Rangeland Health Standards Handbook, as opposed to federal statutory and regulatory provisions; and by arguing that the agency is entitled to essentially unbridled discretion with respect to how and when it completes its rangeland health determination duties. These arguments fail to overcome Plaintiffs' showing that the BLM's lengthy delays and failures to comply with the FRH regulations in the Jordan Resource Area are unlawful and unreasonable.

ARGUMENT

I. Defendants Cite an Incorrect Standard of Review and Fail to Respond to Plaintiffs' Concise Statement of Material Facts.

Defendants correctly recognize that the APA provides standards governing judicial review of decision made by federal agencies. However, they are in incorrect in their assertion that the summary judgment standard of Federal Rule of Civil Procedure 56 "is simply inapplicable" to this case. BLM Resp. at 10. To support this mistaken assertion, Defendants cite a Tenth Circuit case that is not binding, current case law in this circuit. *Id.* (citing Olenhouse v.

Commodity Credit Corp., 42 F.3d 1560 (10th Cir. 1994)). While some judges in the District of Oregon have employed an Olenhouse-style disposition and briefing format on a case-by-case basis, that has not been done in this case. See Dkt # 19 (Order setting briefing schedule on summary judgment). Moreover, if this was to be treated as an Olenhouse-style dispositive motion, there would only be an opening dispositive motion by Plaintiffs, a response by Defendants, and a reply by Plaintiffs—under the rule announced by the Tenth Circuit in Olenhouse, there typically would not be a final reply as Defendants are afforded in this case. See 42 F.3d at 1579–80. Because of Defendants’ mistaken belief that Rule 56 does not apply to this motion, they also have failed to comply with the Local Rules by electing not to file a response to Plaintiffs’ Concise Statement of Material Facts. See BLM Resp. at 10, n.4 (referring to filing of Concise Statement of Material Facts as “superfluous” and claiming Defendants “therefore need not submit any such statements with their motion”). Local Rule 56.1 is very clear in requiring an opposition to a motion for summary judgment to “include a response to the separate concise statement that responds to each numbered paragraph of the moving party’s facts by (A) Accepting or denying each fact contained in the moving party’s concise statement; or (B) Articulating opposition to the moving party’s contention or interpretation of the undisputed material fact.” LR 56.1(b)(1). Because the BLM has failed to respond, the material facts set forth in Plaintiffs’ Concise Statement are deemed admitted for purposes of this motion for summary judgment. LR 56.1(f).

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II. Plaintiffs' Claims Are Properly Actionable Pursuant to APA Section 706(1) Because Plaintiffs Have Asked the Court to Compel the BLM to Perform a Mandated, Discrete Agency Action.

A. Plaintiffs challenge the BLM's unreasonable delay in implementing discrete agency action that the BLM is required to take.

The BLM relies on the Supreme Court's recent decision in Norton v. Southern Utah Wilderness Alliance ("SUWA"), 542 U.S. ___, 124 S.Ct. 2373, 2004 WL 1301302 (2004), to argue that Plaintiffs have not brought properly cognizable APA § 706(1) claims in this lawsuit. BLM Resp. at 11. In June 2004, the Supreme Court ruled in SUWA 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*." 124 S.Ct. at 2379 (emphasis in original). In this lawsuit, Plaintiffs' First Claim for Relief is a 706(1) claim, alleging that the BLM has unreasonably delayed implementing the FRH regulations by failing to perform its assessment, evaluation and determination duties for the public lands in the Jordan Resource Area, over five years into the ten-year timeframe within which the BLM must complete the process, and over eight years after the BLM adopted the FRH regulations.

1. The FRH Determinations are Discrete Agency Actions.

In SUWA, the Court determined it did not have the authority to "compel agency action unlawfully withheld or unreasonably delayed" with respect to SUWA's first claim that the BLM had violated its mandate to manage WSAs "in a manner so as not to impair the suitability of such areas for preservation as wilderness." 43 U.S.C. § 1782(c). The Court determined that section 1782(c) "is mandatory as to the object to be achieved, but it leaves BLM a great deal of discretion in deciding how to achieve it." 124 S.Ct. at 2380. For that reason, "[i]f courts were empowered to enter general orders compelling compliance with broad statutory mandates, they

would necessarily be empowered, as well, to determine whether compliance was achieved.” Id. at 2381.

In this case, Plaintiffs challenge the BLM’s failure to perform the discrete actions of conducting the assessments of existing grazing management and levels of use and making determinations whether that grazing is meeting FRH standards. The determinations are not the type of “broad statutory mandate[.]” the Court described in SUWA. Id. Rather, performance of the BLM’s FRH duties is a discrete agency action as described in the BLM’s regulations requiring that the BLM take appropriate action

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

43 C.F.R. § 4180.2(c). Here, BLM has failed to make the determination of whether existing grazing is meeting or not meeting FRH standards. This is a discrete action that Plaintiffs are entitled to compel under APA Section 706(1).

In arguing that its rangeland health assessments, evaluations and determinations are not discrete agency action within the meaning of the APA, the BLM asserts that the only discrete agency action potentially involved in the FRH process is final agency action changing grazing practices, if (and only if) warranted by a determination that livestock are causing a failure to meet standards. BLM Resp. at 14. However, this litigation position directly conflicts with the BLM’s own interpretation of the regulations. In an Instruction Memorandum transmitted to all field offices following the adoption of the regulations, the BLM Director in Washington, D.C. states in no uncertain terms that “the decision of the authorized officer that an area does or does not meet a standard is appealable” pursuant to Department of Interior appeals regulations. Ex. 10 (Instruction Memorandum 96-172, “Standards and Guidelines Implementation” (Aug. 28,

1996)). In other words, the agency already has admitted that FRH determinations are in fact final, appealable actions—and therefore are discrete agency actions for purposes of APA review.

In cases like this, where the BLM has now adopted an interpretation of its FRH duties which abandons the agency’s previous position, the Ninth Circuit has consistently held that no, or considerably less, deference is owed to the agency. See Young v. Reno, 114 F.3d 879, 883 (9th Cir. 1997) (An “agency interpretation of a relevant provision which conflicts with an agency’s earlier interpretation is ‘entitled to considerably less deference’ than a consistently held agency view.”) (quoting INS v. Cardozo-Fonseca, 480 U.S. 421, 446 n.30 (1987)); United States v. Trident Seafoods Corp., 60 F.3d 556, 559 (9th Cir. 1995) (no deference owed when agency is advancing litigation position); Resources Invs. Inc. v. U.S. Army Corps of Eng’rs, 151 F.3d 1162, 1165 (9th Cir. 1998) (deference “does not extend to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice”). “[I]nconsistent interpretations of a statute by an agency, relied on in good faith by the public, do not command the usual measure of deference to agency action.” Pfaff v. U.S. Dept. of Housing & Urban Dev., 88 F.3d 739, 748 (9th Cir. 1996). All of these principles apply to the case at hand.

Moreover, the APA definition of “agency action” includes the term “order,” which is defined as “the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency.” 5 U.S.C. § 551(13), (6). A rangeland health assessment and determination clearly is an “order” as defined by the APA, because these determinations are final dispositions or declarations of whether or not standards are being met and, if not, whether current livestock grazing practices are the cause of the failure. Rangeland health assessments,

evaluations and determinations finalized pursuant to the Vale District's GMA process are therefore discrete agency action the BLM is required to take.¹

The BLM's FRH duties are also clearly distinguished from its broader land use planning duties. See 43 C.F.R. Subpart 1610 (describing resource management planning process). In SUWA, the Court rejected SUWA's second claim that the BLM failed to comply with certain provisions in its land use plans. Nevertheless, the Court did acknowledge that the agency is required to act in accordance with land use plans when making site-specific decisions. 124 S.Ct. at 2382 (citing requirement that "[t]he Secretary shall manage the public lands . . . in accordance with the land use plans[,]" 43 U.S.C. § 1732(a)). Whereas the Court characterized a land use plan as "generally a statement of priorities" that "guides and constrains actions, but does not . . . prescribe them[,]" 124 S.Ct. at 2382, the BLM's rangeland health determinations via the GMA process are clearly more discrete, site-specific, and resource use-specific agency actions. The FRH regulations are far from the "will do"-type projections cited by the Court as set forth in land use plans. Id. at 2384. In fact, the BLM's own description of the interplay and differences between the Vale District's Southeast Oregon Resource Management Plan ("SEORMP") (which includes the area covered by the LCGMA), see AR Tab 14, and the resource areas' GMAs clearly supports the discreteness and site-specificity of the GMAs.

In the SEORMP, the BLM relies heavily on the GMA process as the appropriate decision-making point for analyses of the effects of grazing on ecological conditions: According to the BLM, "The step-down from SEORMP to the fine scale is the GMA assessment,

¹ Furthermore, because Plaintiffs have challenged discrete agency action the BLM is required to take, the TRAC factors, as described in detail in Plaintiffs' opening brief, do apply to this case. Telecomm. Research & Action Ctr. v. F.C.C. ("TRAC"), 750 F.2d 70, 80 (D.C. Cir 1984). The BLM incorrectly argues they do not because the BLM mistakenly believes "no . . . authority exists to compel completion of the assessments, evaluations, and determinations." BLM Resp. at 18.

evaluation, and planning.” AR Tab 14, at 17. In fact, the BLM describes its GMAs as “fine scale” actions that “contain more detailed, site specific monitoring, assessment and management recommendations for a relatively small portion, Geographic Management Area (GMA), of the planning area.” See Ex. 11 (BLM response to ONDA’s administrative protest of the SEORMP Final Environmental Impact Statement and ROD). Finally, in the SEORMP the BLM relies heavily upon the GMA process as the centerpiece of the Plan’s “adaptive management” program over the next two-plus decades.²

2. The FRH Determinations are Mandatory.

Making the FRH determinations is mandatory. The FRH regulations clearly state that the BLM

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

43 C.F.R. § 4180.2(c). The use of the mandatory “shall” clearly indicates that the BLM is required to take discrete agency action. See Idaho Watersheds Project v. Hahn, 187 F.3d 1035 (9th Cir. 1999). Moreover, the word “shall” necessarily applies to both the requirement to take appropriate action and to the determination of whether the existing grazing is a significant factor in the failure to meet standards. See, e.g., Ctr. for Biol. Diversity v. Norton, 254 F.3d 833, 837 (9th Cir. 2001) (“[S]hall’ means shall”) (quoting Forest Guardians v. Babbitt, 174 F.3d 1178, 1187–88 (10th Cir. 1999)). To interpret this language to require the “appropriate” action but not

² The agency asserts in the SEORMP that the GMA process will serve as a key assessment and evaluation tool for resources and issues as diverse as microbotic crusts, significant cave sites, wildlife habitat conditions, sagebrush habitat, determining the “amount of acres to be specifically managed for different [vegetative] attributes,” identification of key wildlife species, “[d]etailed analysis of local aquifers and other information on water resources,” addressing stream and vegetation problems, gathering site-specific information on fish habitat conditions, and soil impacts analyses. See AR Tab 14, at 10, 15, 51, F-5; AR Tab 15, Vol. 3, at 21, 46, 57, 67, 133.

to require the underlying determination that will trigger the appropriate action would render the entire regulation meaningless. See Biodiversity Legal Fdn. v. Badgley, 309 F.3d 1166, 1175 (9th Cir. 2002) (“It is an elementary canon of construction that an interpretation which gives effect to all sections of a statute is preferred.”) (citing Colautti v. Franklin, 439 U.S. 379, 392 (1979)).

3. The BLM’s Delay in Making the FRH Determinations is Unreasonable.

The fact that the FRH regulations themselves do not contain a timeframe in which to complete the Standards & Guidelines assessments, evaluations and determinations does not preclude Plaintiffs’ claims pursuant to Section 706(1). See BLM Resp. at 14–16. The Supreme Court in SUWA explicitly states that “[o]f course § 706(1) also authorizes courts to ‘compel agency action . . . unreasonably delayed’” so long as the agency action is required. 124 S.Ct. at 2379, n.1. In other words, the lack of a date-certain in the regulations for the BLM to complete its FRH determinations does not render the timeframe in which to comply with this duty wholly discretionary on the part of the BLM.

a. The BLM’s own Rangeland Health Handbook and Instruction Memoranda provide the best evidence of the agency’s pre-litigation interpretations of its FRH duties.

The BLM set its own 10-year deadline, which in the agency’s mind is a reasonable amount of time within which to satisfy the duties outlined in 43 C.F.R. Subpart 4180. As recently as 2003, the BLM reiterated that “It has been and remains BLM policy that States are to complete land health standards evaluations on at least 10 percent of the livestock grazing lands under their jurisdiction each year until the assessments are complete.” AR Tab 17 (BLM Instruction Memorandum, also stating, “Therefore, by the end of FY 2009, all carryover grazing permits shall be fully processed using the information from the land health standards evaluations as needed to complete environmental impact analysis”). Moreover, the agency has referred to

this timeline not just once but time and time again. AR Tab 12, at 1-1 (LCGMA Evaluation referencing Sept. 12, 1998 RAC approval of 10-year assessment schedule); Ex. 12, at 2 (1998 BLM Instruction Memorandum instructing field offices to “set a schedule for addressing [FRH standards and guidelines], giving priority to areas believed to be at risk—in degraded condition or downward trend and in danger of losing potential” and stating that in order to complete rangeland assessments in a “reasonable time frame,” Authorized Officers “should ensure that at least ten percent of the livestock grazing lands under their jurisdiction are assessed each year until the assessments are complete”); AR Tab 12, App. F (Mar. 3, 1999 letter to public from Vale BLM referring to 1998 RAC approval of schedule and to “S&G assessment and implementation within a ten year timeframe which started in 1998”); AR Tab 8, at III-3 (2001 BLM Rangeland Health handbook, stating that in order to complete rangeland assessments in a “reasonable time frame” “each Authorized Officer should ensure that an average of ten percent of the public lands under their jurisdiction are assessed and evaluated each year until the initial round of assessments and evaluations are complete”); Ex. 13 (Vale District, BLM, “History and Process for Assessing Range Health Standards” (last modified July 11, 2002), [available at www.or.blm.gov/Vale/Range/HistoryandProcessforAssessingRangeHealthStandards.pdf](http://www.or.blm.gov/Vale/Range/HistoryandProcessforAssessingRangeHealthStandards.pdf)) (stating that following 1997 Interior Secretary approval of Oregon/Washington Standards & Guidelines, “BLM field offices in Oregon/Washington were then directed to assess range health status according to these state standards over a 10-year period (1998–2008)”).

At the outset, it is important to note here that the BLM misunderstands Plaintiffs’ reference to the BLM’s Rangeland Health Handbook as an attempt to actually “enforce” its terms. BLM Resp. at 15 (citing Western Radio Servs. Co. v. Espy, 79 F.3d 896 (9th Cir. 1996)). However, Plaintiffs are not trying to enforce the terms of the BLM’s handbook. Rather, the

BLM's own interpretations of its statutory and regulatory obligations, as contained in the Rangeland Health Handbook and Instruction Memoranda are the best evidence of the agency's prior and unbiased interpretation of its duties under FLPMA and the FRH regulations. The BLM's failure to act in a manner that is consistent with its handbook, without explanation of its deviation, is "an indication of arbitrary and capricious behavior." League of Wilderness Defenders v. U.S. Forest Service, Civ. No. 00-464-KI, slip op. at 19–20 (D. Or. 2000)³; see also Lake Mohave Boat Owners Ass'n v. Nat'l Park Serv., 138 F.3d 759, 763 (9th Cir. 1998) (while agency's deviation from its own guidelines is not per se arbitrary or capricious, court reviewed the record for agency's explanation to determine if deviation is in fact arbitrary and capricious). It is well-established that where an agency abandons its own "custom and practice" for the sake of litigation, no judicial deference should be afforded to the agency. See United States v. Trident Seafoods Corp., 60 F.3d 556, 559 (9th Cir. 1995) (no deference owed when agency is advancing litigation position); Resources Invs., Inc. v. U.S. Army Corps of Eng'rs, 151 F.3d 1162, 1165 (9th Cir. 1998) (deference "does not extend to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice"). Accordingly, the BLM's own statements regarding the timeframes it feels are reasonable, and schedules it has set, to achieve its mandatory FRH duties are the best evidence of what should be considered "reasonable" for purposes of assessing the Jordan Resource Area's current delay in performing those duties.

Finally, the BLM's intimation that 706(1) failure to act or unreasonable delay claims no longer exist following the SUWA decision is simply incorrect. In fact, only a week after the SUWA decision, the D.C. Court of Appeals held that the Federal Energy Regulatory Commission's (FERC) six-year delay in answering a petition was plainly unreasonable. In re:

³ For the convenience of the court, and pursuant to Local Rule 100, a copy of the relevant pages of the slip opinion is attached to this memorandum following the exhibits.

American Rivers and Idaho Rivers Utd., 2004 WL 1379864 (D.C. Cir. June 22, 2004). In American Rivers, the court reiterated the fact that it has “jurisdiction to entertain the request [to grant a writ of mandamus for unreasonable delay under APA § 706(1)] in order to safeguard our prospective jurisdiction” under the federal statute at issue. Id. at *4. The court also described in detail its test under the TRAC factors and stated that “FERC’s six-year-plus delay is nothing less than egregious.” Id. at *5–6. The court also notes that FERC’s delay in this particular case is “apparently . . . uncharacteristic” and cites a great number of cases demonstrating that the agency usually provides “relatively swift treatment” to petitions such as the one at issue in American Rivers.

b. None of the BLM’s arguments as to the reasonableness of the delay in performing its FRH duties are convincing.

The BLM offers a series of arguments as to why its Jordan Resource Area’s extensive delays are not unreasonable. These excuses range from continual caveats that published schedules may be revised, to weak assertions that the agency has made “considerable progress” on its GMA work to date, to a baseless argument that a recent appropriations bill rider leaves performance of the BLM’s FRH duties solely to the discretion of the BLM, with no judicial “interference” permitted. However, none of these arguments is persuasive and none overcome the evidence in the record showing that the BLM’s delays have been unreasonable.

The BLM first argues its delay is reasonable because despite the fact it set a ten-year deadline within which to complete its FRH duties, the agency repeatedly noted that the schedule would be “reviewed periodically and may be revised upon changing conditions and/or information.” BLM Resp. at 16 (citing AR Tab 12, App. F (Mar. 3, 1999 letter to public) and AR Tab 14, at 17 (SEORMP/ROD)). However, the fact that the Vale District, Jordan Resource Area continually warned that it might not adhere to its ten-year schedule does not excuse the delay.

Instead, it only provides further evidence suggesting the Jordan Resource Area was never interested in being subjected to any schedule for completing its FRH duties.⁴ Mr. Taylor indicates that the Jordan Resource Area is “striving to get [the FRH assessments and evaluations] done as soon as possible,” but is quick to argue that “we are not required by law or regulation to meet a particular timeframe for completion of FRH assessments and evaluations.” Taylor Decl. at ¶ 9. It is telling that nowhere in his declaration does Mr. Taylor offer any estimate as to when the Jordan Resource Area now expects to complete its FRH duties for each of the eight GMAs it has established. Moreover, while the BLM argues that “changing conditions and/or information” could affect the schedule, there is no indication in the BLM’s Response or in the Taylor declaration that there has been any change in GMA priorities since the priority list was adopted in 1998; nor is there any indication of any changes in resource conditions or issues of concern. Compare AR Tab 12, Appendix F (March 3, 1999 letter to public, listing “Upland Watershed, W&S River, WSA’s [sic], Riparian, Weeds, Sensitive Species” as issues of concern) to AR Tab 15, Proposed Southeast Oregon RMP, Vol. 1, at 147 (same list of issues of concern, except that it added an administrative designation called “areas of critical environmental concern” (“ACEC”) and actually dropped sensitive species as an issue of concern).

The BLM next argues that it has in fact made “considerable progress in the face of a difficult workload.” BLM Resp. at 19. To support this argument, the agency invokes the number

⁴The BLM also argues that in any event the ten-year deadline has not yet passed, thus rendering this action “without merit.” BLM Resp. at 17. Under this logic, however, the agency would be immune from claims of “unreasonable delay” or “failure to act” even if it refused to do anything further until December 31, 2008. Clearly this runs counter to established case law, particularly the body of law that follows the TRAC factors analysis of the reasonableness of agency delays. See TRAC, 750 F.2d at 80 (timeliness of agency action governed by a “rule of reason”); MCI Telecomm. v. FCC, 627 F.2d 322, 344 (D.C. Cir. 1980) (“[t]here comes a point when relegating issues to proceedings that go on without conclusion in any kind of reasonable time frame is tantamount to refusing to address the issues at all and the result is a denial of justice”)(internal quotes omitted).

and percentage of stream miles and acres it expects to have assessed by the conclusion of this or next field season, and argues that the LCGMA, as the first of the Jordan Resource Area's eight GMAs, involved a "learning process." *Id.* at 19–20. The BLM points out that by the time it completes its FRH assessments the Trout Creek GMA—which it clearly has not yet done—it will have assessed (but not yet evaluated or made determinations on) 72% of the stream miles and over 1 million of the Jordan Resource Area's 2.5 million acres. Taylor Decl. at ¶ 6. Aside from the fact that this work has not yet been completed ("The inventories are ongoing in the Trout Creek GMA and we should be ready with the evaluation and determinations by the end of 2005."), Taylor Decl. at ¶ 5, these numbers are misleading with respect to the level of "considerable progress" they actually represent. What the BLM fails to mention is that the "proper functioning condition" (PFC) method it is relying upon to assess stream health 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"). See also AR Tab 12, at 1-30 (stating BLM "has adopted the PFC assessment as a standard for evaluating riparian areas"). The National Research Council has noted that because the approach "is qualitative, PFC is vulnerable to subjective application, which places a great burden on the consistency and skill of the local assessment teams." Ex. 14. In fact, the PFC method involves no measurement of any stream or riparian attribute and even the National Riparian Service Team (NRST), which developed the method, states that PFC is a "checklist" method that is "an appropriate starting point for determining and prioritizing the type and location of quantitative inventory or monitoring necessary." Ex. 15 (NRST, "PFC (Proper

Functioning Condition), What It Is – What It Isn’t – Lentic” (last modified Apr. 9, 2004), available at www.or.blm.gov/nrst/Training/Pdf_Docs/PFC_%20Is_Isn_t_%20Lentic1.pdf).

Moreover, the BLM does not even mention, for example, inventory and assessment of microbiotic crusts or other important resources that are critical to determining rangeland health under Standards 3 (ecological processes), 4 (water quality), or 5 (native, threatened and endangered and locally important species). See, e.g., AR Tab 10, at 11–14 (describing standards and potential indicators such as plant litter and organic matter in soil, and water temperature and fecal coliform). As a result, the BLM’s argument that conducting PFC assessments on several hundred stream miles in the LCGMA and elsewhere equates to “reasonable progress” toward complying with its FRH regulations duties, simply is not convincing.

Neither does the agency’s “learning process” argument hold true. The agency acknowledged eight years ago that

Managing livestock grazing in a manner which ensures sustainability of rangeland resource is not a “new” or “additional” responsibility. The development and application of standards and guidelines provides a clear statement and common understanding of the desired resource conditions. Determining conformance with clearly stated, commonly accepted standards should result in more focused monitoring.

Ex. 10 (1996 Instruction Memorandum) (emphasis added). The BLM was quite clear that the regulations “do not require a separate monitoring effort be initiated for the purpose of evaluating each allotment to determine conformance with the standards.” Id.⁵ Thus, when Mr. Taylor states that his staff had to learn “new methods” and become familiar with “new tools,” Taylor Decl. at ¶ 8, this suggests either misguided grazing management prior to implementation of the FRH regulations or a misunderstanding of the regulations’ requirements. Perhaps even more telling

⁵In fact, the BLM recently proposed changes to the FRH regulations that would, among other things, actually require monitoring to support these determinations. However, the current regulations do not necessarily require monitoring data.

are the inconsistencies that surface in the BLM's response. In his declaration, Mr. Taylor states, "We knew these first two GMAs [Louse Canyon and Trout Creek] would take us longer than the rest, because of the logistics involved and the complexity of issues." Taylor Decl. at ¶ 8. Yet, he does not explain why, if this is the case, the BLM did not schedule in more time to complete those assessment processes when it released its schedule in the March 3, 1999 letter to the public. See AR Tab 12, App. F. In addition, far from the "new methods" and "new tools" Mr. Taylor alludes to, the BLM's Jordan Resource Area has in fact been relying on the same inadequate qualitative PFC method as its primary method of assessing stream and riparian health since at least 1998. This court previously rejected the Vale BLM's suggestion that PFC is relevant to the issue of whether the BLM was complying with the Wild and Scenic Rivers Act requirement to "protect and enhance" river values. Ore. Natural Desert Ass'n v. Singleton, 47 F.Supp.2d 1182, 1189 (D. Or. 1998). In the Owyhee Wild Rivers case, the BLM documented the attainment of "Properly Functioning Condition" of riparian areas on over 146 miles (93%) of designated rivers, with only 6.8 miles (4.4%) classified as "Functioning at risk." 47 F.Supp.2d at 1189. The court responded flatly that "[t]he evidence does not reveal how 'properly functioning riparian areas' or 'at risk' areas correspond to the requirements of the WSRA." Id. at 1190. Likewise in this case, several hundred miles of PFC assessments, performed several years after they were supposed to have occurred, and even after one federal court had already cast serious doubt over the method's utility in a similar context, simply do not rise to the level of "considerable progress" toward satisfying FRH obligations.

Finally, the BLM abandons arguments over the reasonableness of its delay and instead tries to argue that a recent congressional appropriations bill rider leaves performance of the BLM's FRH duties to the sole discretion of the BLM. BLM Resp. at 21. As this court is aware—

and has held twice within the past three months—nothing in the cited provision precludes this court’s authority to grant necessary or proper relief in this case. See Ore. Natural Desert Ass’n v. U.S. Forest Serv., No. 03-381-HA, 2004 WL 1592606, at *10 (D. Or. July 15, 2004) (citing Ore. Natural Desert Ass’n v. U.S. Forest Serv., No. 03-213-KI (D. Or. June 10, 2004)) (“Judge King addressed this argument in his preliminary injunction opinion, and stated that ‘I do not believe the amendments affect my ability to consider injunctive relief on any of plaintiffs’ other claims. Congress’s action appears to prevent courts from vacating permits, but that is not what the plaintiffs are seeking.’ . . . This court agrees with this sound reasoning and adopts it.”). Moreover, the appropriations riders Defendants refer to address the issue of grazing permit reissuance and the associated NEPA documentation that must accompany that process. This is an entirely separate process and set of requirements from the BLM’s FRH regulations obligations. In the series of appropriations bill riders that began with the 1995 Rescissions Act and most recently included the 2004 Omnibus Appropriations Bill, P.L. 108-108, § 325, Congress was addressing the BLM’s and the Forest Service’s inability to timely process under the required NEPA process all of the expiring grazing permits up for renewal. This is entirely distinct from the FRH regulations at issue in this action.

c. Neighboring BLM Districts and Resource Areas are successfully adhering to the ten-year schedule for completion of FRH duties.

In this case, although the BLM provides a litany of reasons why its years-long delay in fulfilling its FRH obligations in the Jordan Resource Area should be deemed “reasonable,” the fact of the matter is that other neighboring BLM districts appear to be having little trouble meeting their 10-year schedules and associated deadlines. For example, as of July 2003, the Burns District, which manages about 3.36 million acres of public land to the west of the Vale District, has completed FRH assessment processes on 119 allotments covering 1,397,310 acres

of public lands since 1998. See Ex. 16 (Burns District, BLM, “Planning Update” (July 2003), available at www.or.blm.gov/Burns/Planning/FY03Planning%20Update.pdf).⁶ This represents approximately 43% of the total acres of public lands in that district, id., and more than 37% more acres assessed through July 2003 than the Vale District has assessed through July 2004. The Lakeview District, which manages a little over 3.4 million acres of public lands in south-central Oregon to the west of the Burns District, has made even further progress. Its 3.2 million-acre Lakeview Resource Area has completed FRH assessments on 1,457,464 acres (46%) of the public lands on 56 of the 219 allotments under its jurisdiction. See Lakeview District, BLM, “Range Management” and “Rangeland Health Assessments” (last modified Feb. 23, 2004), available at www.or.blm.gov/Lakeview/whatwedo/range.htm. The Lakeview District’s Klamath Falls Resource Area, which manages 212,000 acres of public lands, had, as of January 2004, completed FRH assessments on 76% of the Resource Area’s allotted acres since it began the assessment process in 1999. See Ex. 17, at 53 (Lakeview District, BLM, “Klamath Falls Resource Area Annual Program Summary and Monitoring Report, Fiscal Year 2003” (Jan. 2004), available at www.or.blm.gov/Lakeview/Planning/kfraplans/2003_APS.pdf. Moreover, the Klamath Falls Resource Area indicated that, as of the close of Fiscal Year 2003, the resource area had completed FRH assessments on “all of the high priority allotments in the resource area.” Id. at 54 (emphasis added). Finally, to the east of the Vale District, the Idaho BLM reported in its 2003 statewide update that as of last year its districts had completed FRH assessments and determinations on 5.5 million of its 11.9 million acres of public lands, which is about 47 percent of the BLM lands in Idaho. See Ex. 18 (BLM, “2003 Idaho Update” (2004), available at www.id.blm.gov/publications/data/IdahoUpdate03.pdf.

⁶The July 2003 annual “Planning Update” is the most recent such update available on the Burns BLM website.

What each of these examples shows is that the BLM's Vale District, Jordan Resource Area is well off the reasonable pace and efficiency rate each of its other adjacent BLM districts and resource areas has been able to accomplish in the same amount of time. Furthermore, nothing in the BLM's Response nor the Taylor declaration provides any indication the Jordan Resource Area is unique from its neighboring BLM districts and resource areas and should be subject to a different set of rules from everyone else. In American Rivers, the D.C. Circuit noted that FERC had "in no way indicated that any practical impediments have prevented a response or that any 'agency activities of a higher or competing priority' have required its attention." 2004 WL 1379864 at *6 (citing In re United Mine Workers of Am. Int'l Union, 190 F.3d 545, 549 (D.C. Cir. 1999)). As explained in Plaintiffs' opening brief in support of summary judgment, this is also the case here, where the Vale BLM has stated in no uncertain terms that the GMA process is critical to its rangeland health efforts under the Southeast Oregon RMP and that the LCGMA is its number one priority GMA to complete in the Jordan Resource Area. See Pl. Br. at 24–25. As in American Rivers, Plaintiffs here "are entitled to an end to [the BLM's] marathon round of administrative keep-away and soon." 2004 WL 1379864 at *6.

B. The BLM also has failed to implement final grazing management changes on allotments in the LCGMA determined to have failed to meet standards, and the agency's assertion that its "interim grazing management strategy" constitutes "appropriate action" as required by 43 C.F.R. § 4180.2(c) is not supported by the record or the agency's own interpretations of what that term means.

The BLM argues that the "interim grazing management strategy" it implemented prior to the 2002 grazing season, and has used since that time, satisfies the FRH regulations' requirement that the BLM take "appropriate action" to resolve failures to meet Standards & Guidelines. BLM Resp. at 26. While the interim strategy could be argued to have satisfied this requirement for the 2002 grazing season, the BLM's use of an interim strategy for three successive grazing seasons

does not satisfy the regulations. 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). The term “significant progress” means “[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. The BLM also defines “significant progress” as “a rate of progress that is consistent with the anticipated recovery rate described in plan objectives.” AR Tab 10, at 21.

Here, 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 certain areas are not meeting one or more standards and that current grazing is the cause of those failures, the BLM’s must, prior to the start of the next grazing season, take appropriate action as enumerated in the regulations. 43 C.F.R. § 4180.2(c). The BLM’s own Rangeland Health Handbook states quite clearly:

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 LCGMA 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 has stated that it plans 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 practices or levels of grazing use on public lands are significant factors in failing to achieve the standards and conform with the guidelines.” 43 C.F.R. § 4180.2(c) (emphasis added). The conclusion is inexorable, therefore, that the BLM’s decision to implement an “interim” grazing strategy with little or no documentation, and then to rest on that interim strategy for at least three consecutive grazing seasons after having determined clear 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.

The BLM asserts that its changes have resulted in lesser amounts of forage consumed each year since it implemented its interim strategy. BLM Resp. at 28; Taylor Decl. at ¶ 13. If this is indeed true, Plaintiffs believe 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, note—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 has failed to act or unreasonably delayed agency action within the meaning of APA § 706(1).

III. Plaintiffs' Claim that the BLM Has Violated the Mandatory Duty to Make Grazing Changes in the Louse Canyon GMA Before the Start of the Next Grazing Season is Also Actionable Pursuant to APA Section 706(A)(2).

Plaintiffs' Second Claim for Relief alleges that the BLM has violated the mandatory duty to make changes in grazing management before the start of the next grazing season in the Louse Canyon GMA. Plaintiffs pled this claim as a 706(1) failure to act, or in the alternative final agency action that is arbitrary and capricious under 706(2)(A), via the BLM's annual authorizations of interim grazing practices in its "Annual Operating Instructions" (turnout statements).⁷

With respect to APA Section 706(2)(A), the Court in SUWA held that:

The statutory directive that BLM manage "in accordance with" land use plans, and the regulatory requirement that authorizations and actions "conform to" those plans, prevent BLM from taking actions inconsistent with the provisions of a land use plan. Unless and until the plan is amended, such actions can be set aside as contrary to law pursuant to 5 U.S.C. § 706(2).

124 S.Ct. at 2382. Thus, as allowed by the Court in SUWA, Plaintiffs' second claim challenges site-specific, final agency action under APA Section 706(2). As described in detail above, the BLM's issuance of annual grazing authorizations incorporating the "interim grazing management strategy," after acknowledging three years ago that current grazing practices were causing failures to satisfy the Standards and Guidelines, clearly violates the FRH regulations'

⁷ Incidentally, Defendants seem to suggest that because Plaintiffs pled the claim as a 706(2)(A) claim "in the alternative," this somehow lessens the strength of that claim. BLM Resp. at 24. Federal Rule of Civil Procedure 8 specifically allows a party to "state as many separate claims or defenses as the party has regardless of consistency." Fed. R. Civ. P. 8(e)(2). Moreover, the line between 706(1) failures to act and 706(A)(2) final agency actions is not always bright and it is common for parties to plead these two permutations of agency action in the alternative.

requirement that the BLM “shall take appropriate action” that “will result in significant progress” “as soon as practicable but not later than the start of the next grazing year.” 43 C.F.R. § 4180.2(c). Because annual operating plans and instructions are final agency actions, see Ore. Natural Desert Ass’n v. U.S. Forest Serv., 312 F.Supp.2d 1337, 1343 (D. Or. 2004) (holding that annual operating plans are final agency actions, challengeable pursuant to APA § 706(2)(A)); Ore. Natural Desert Ass’n v. U.S. Forest Serv., No. 03-381, 2004 WL 1592606, at *8–9 (D. Or. July 15, 2004) (holding same), and because the BLM has violated the express terms of the FRH regulations via its annual grazing authorizations in at least 2003 and 2004, this is final agency action that is arbitrary and capricious and not in accordance with law.

IV. Plaintiffs Are Entitled to Summary Judgment and an Order Compelling the BLM to Perform its Mandatory FRH Regulations Duties in the Jordan Resource Area.

In resisting against the possibility of having to step up to anything other than its own view of a “reasonable pace” in completing its FRH duties, the Vale District BLM claims that “ONDA fails to provide any recognition of the enormity of the task of assessing the condition of 2.5 million acres of land—some of which is very remote.” BLM Resp. at 24. In fact, ONDA is well aware of the remoteness of the Owyhee Canyonlands and surrounding country, and the “enormity” of a project of this scale, having recently completed an exhaustive inventory documenting wilderness values on public lands throughout the Vale District. See Marlett Decl. at ¶ 10. In a single field season in 2003, ONDA staff and volunteers inventoried over 2.2 million acres of public lands, which resulted in the recommendation of 42 new wilderness study areas (“WSAs”) or wilderness areas of critical environmental concern (“ACECs”) totaling more than 1.3 million acres, either wholly or partially within the Vale District. Id. See also www.onda.org/projects/owyhee/FullReport.pdf (copy of full 400-plus page report and recommendations to BLM, complete with maps, detailed narratives, and road logs, per BLM

Wilderness Inventory Handbook). And while the BLM claims that ONDA’s assertion of harm resulting from current grazing practices is “conclusory at best,” BLM Resp. at 22, Bill Marlett has stated quite clearly that:

From our assessment [through ONDA’s wilderness inventory process], 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.

Marlett Decl. at ¶ 10. Katie Fite also describes how she and other Western Watersheds Project members have visited the LCGMA and surrounding Jordan Resource Area public lands numerous times, including in-depth field reviews of conditions on the LCGMA. Fite Decl. at ¶¶ 4–7. Ms. Fite also has written letters to the Vale BLM expressing specific concerns about “livestock degradation of the uplands and riparian areas, including livestock trampling and grazing damage to springs and streams, degradation of sagebrush-steppe communities, livestock damage to unique cultural sites, the harmful impacts of the construction of new livestock facilities on recreational and other uses of these lands, and the management failures associated with existing livestock facilities, which often fall into disrepair.” *Id.* ¶ 7. She has also met personally with BLM staff in Vale, Oregon, to discuss those specific concerns. *Id.* Very often, the BLM simply disregarded the suggestions and comments of members of the public such as Ms. Fite and Bob Moore, dismissing reasonable grazing management suggestions and failing to involve interested members of the public at significant decision-making points—most significantly, implementation of the interim grazing management strategy. *See* Fite Decl. at ¶ 5 and Attachment; Moore Decl. at ¶¶ 3–5 and Attachment.

In fact, the court need look no further than the LCGMA Evaluation itself for evidence that current grazing practices are causing continuing damage to the ecological integrity of 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). The BLM provides nothing in its Response or the Taylor Declaration to indicate that current grazing in these areas is meeting standards. The best Mr. Taylor can do is to assert that the BLM has observed “general, but subtle, improvement.” Taylor Decl. at ¶ 16. Although Mr. Taylor asserts the changes in season of use “had the effect” of reducing the amount of forage consumed, id. at ¶ 13, he 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. 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 interim changes.

The BLM argues that “[a] finding that a standard is not being met somewhere within a pasture, however, does not mean that all of the land in the pasture is not healthy.” BLM Resp. at 31. The BLM has already admitted, though, that the agency itself determined that standards have been violated in 6 of the 21 pastures in the LCGMA, and that those pastures account for approximately 220,155 acres of public lands, or 42%, of the public lands within the LCGMA. See Plaintiffs’ Concise Statement of Material Facts, at ¶¶ 9, 11. Even if some of these failure-to-meet-standards determinations were based solely on failures in discrete riparian areas covering a much smaller percentage of those 220,000 acres of land, it is essential to understand the critical significance of these riparian areas in the arid southeast Oregon desert. The Vale BLM has previously recognized that “[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 provide critical food and shelter for fish and wildlife, affect the quantity and quality of water available, and help regulate the hydrologic regime. Id. Therefore, if the failure to meet standards determinations were based solely on unacceptable watershed, ecological, water quality and/or species habitat conditions in those pastures’ riparian areas, those failures are simply that much more significant. As a result, an order from this court compelling the BLM to set and adhere to a schedule for complying with the rest of its Jordan Resource Area FRH assessments and determinations, and to implement required final 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.

CONCLUSION

For the foregoing reasons, Plaintiffs again respectfully request the Court to grant Plaintiffs’ Motion for Summary Judgment and to order the BLM to implement grazing management changes and set and adhere to a schedule for complying with the FRH regulations, as described above.

DATED this 3rd day of September, 2004.

Respectfully Submitted,

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