Litigation Update: Steens Mountain

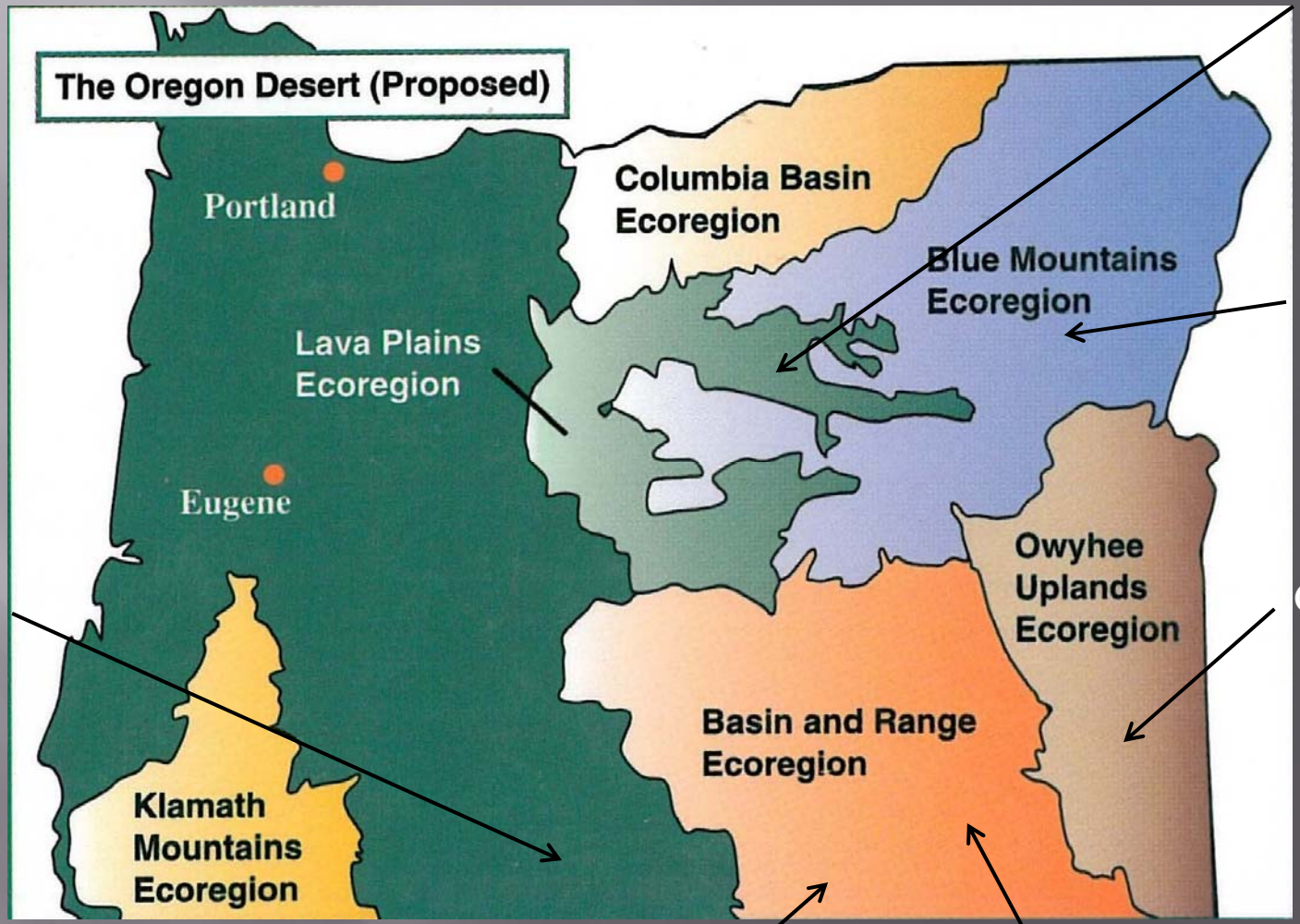
Mac Lacy, Senior Attorney | lacy@onda.org
Oregon Natural Desert Association
www.onda.org

OSB Environmental & Natural Resources Section
Oct. 3, 2019 – Portland, Oregon

Overview

- The Geography and Issues of Defending Oregon's High Desert
- Steens Mountain
- Travel Planning
- Livestock Grazing
- Sage-Grouse Conservation

The Geography of Defending Oregon's High Desert



Map adapted from Kerr (2000)

John Day Basin

Malheur Basin

Fremont-Winema

Owyhee Canyonlands

National & Policy Issues

Hart-Sheldon

Steens Mountain

Steens Mountain

- 60-mile long, fault-block mountain, 9,773’ elevation.
- Large roadless areas essential to regionally significant sage-grouse population.
- Steens Mountain Cooperative Management and Protection Act of 2000, 16 U.S.C. § 460nnn *et seq*.

Juniper snag, Big Indian Gorge

Issues

Wilderness

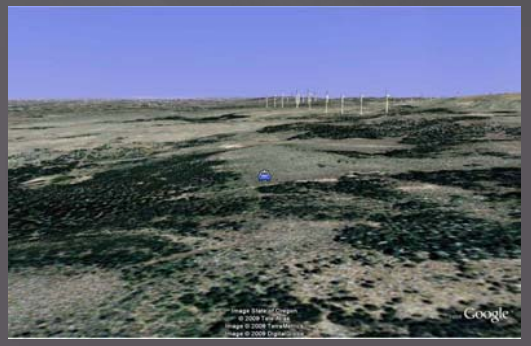
Imperiled Species

Fire and
Invasives

Livestock
Grazing

Travel
Planning

Energy
Development



A Bird in Serious Trouble

- Oregon population declined by 7.7% in 2017, 10.2% in 2018, and 24.9% in 2019 – now 30% below ODFW's 2003 baseline estimate of 29,237 birds left.
- Perhaps only 50,000 birds left across the West, from as many as 16 million pre-European settlement.
- Life history revolves around seasons in Sagebrush Sea.
- Habitat "strongholds" in Oregon and Wyoming.

Greater Sage-Grouse
(*Centrocercus urophasianus*)

The Sagebrush Sea

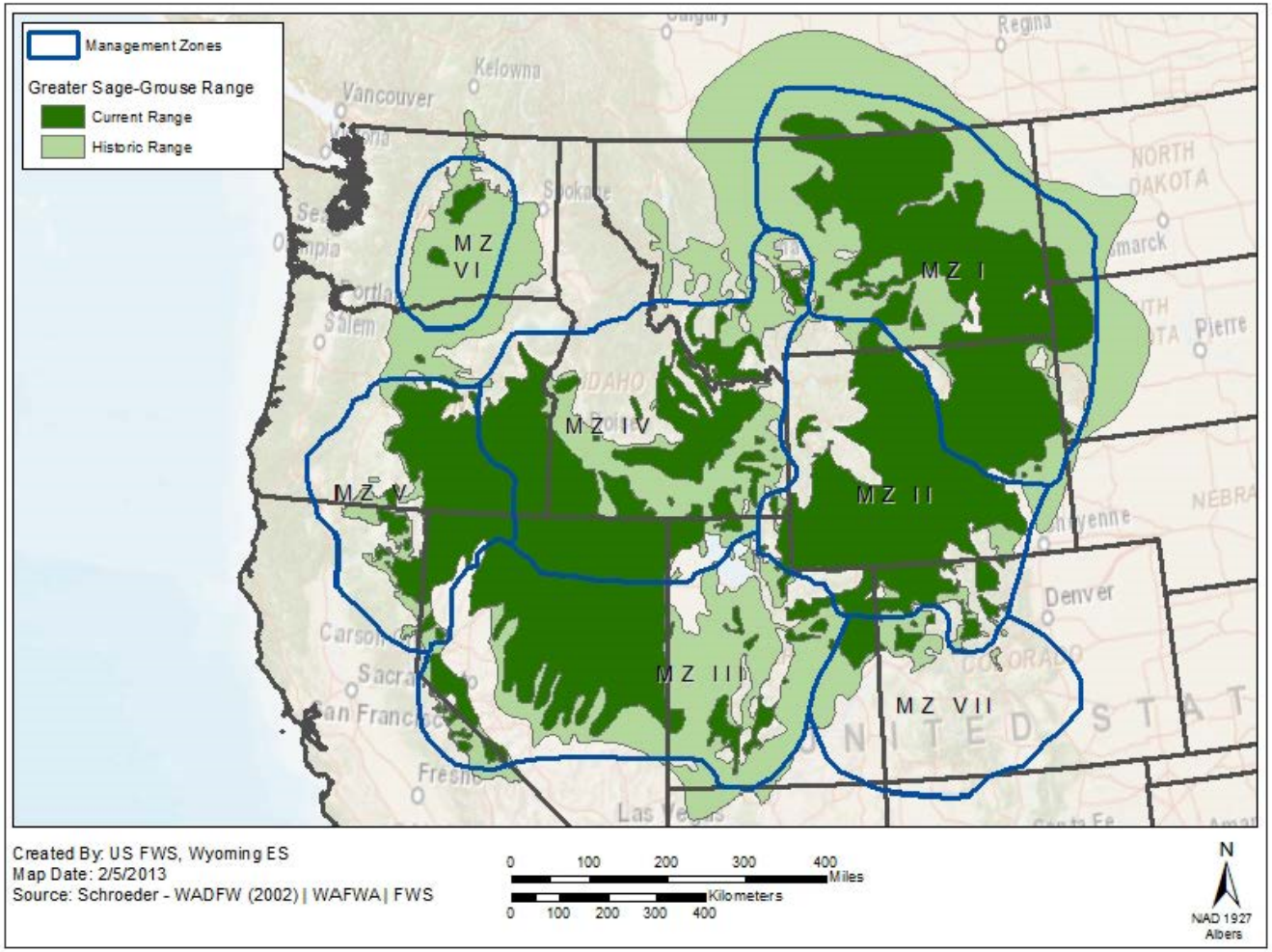
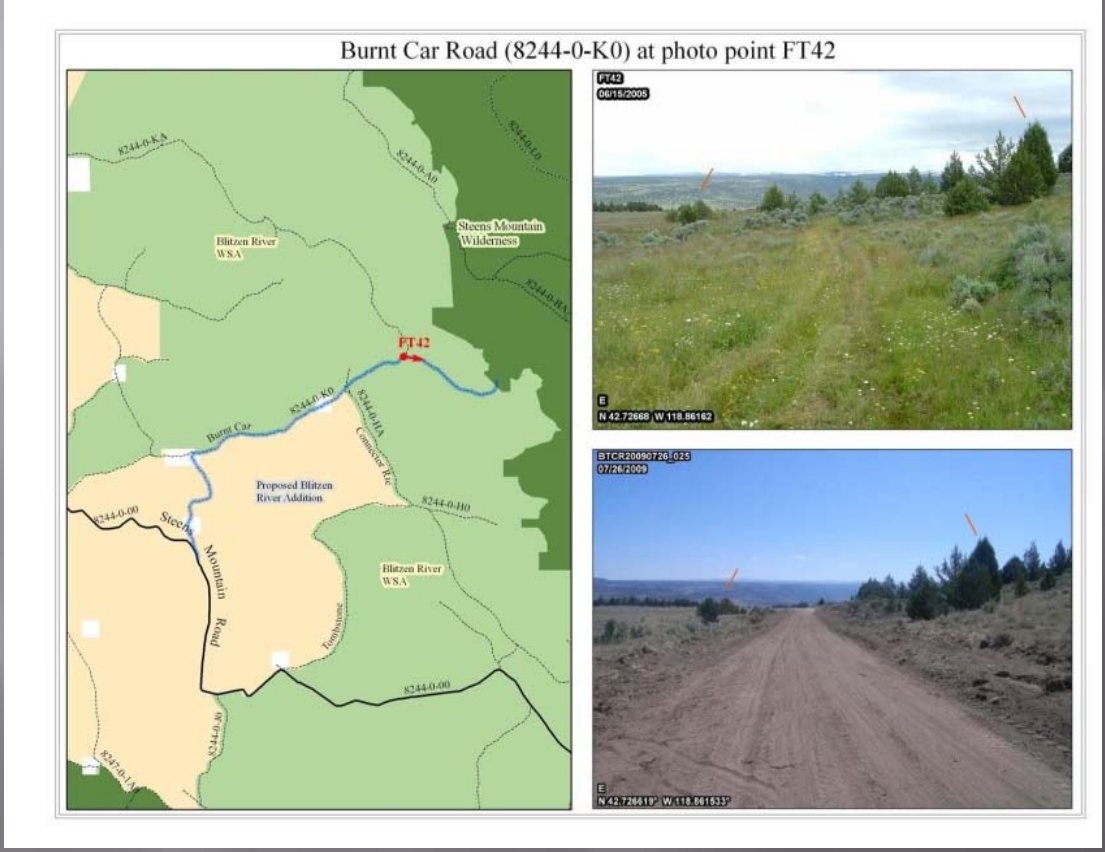


Figure 1. The current (occupied since the late 1990s) and historic (maximum distribution from the 1800s to early 1990s) range of the greater sage-grouse (Schroeder et al. 2004).

U.S. Fish and Wildlife Service. 2013. Greater Sage-grouse (*Centrocercus urophasianus*) Conservation Objectives: Final Report. U.S. Fish and Wildlife Service, Denver, CO. February 2013.

ONDA v. Rose, 921 F.3d 1185 (9th Cir. 2019)
(Steens Mountain Travel and Recreation Plans)



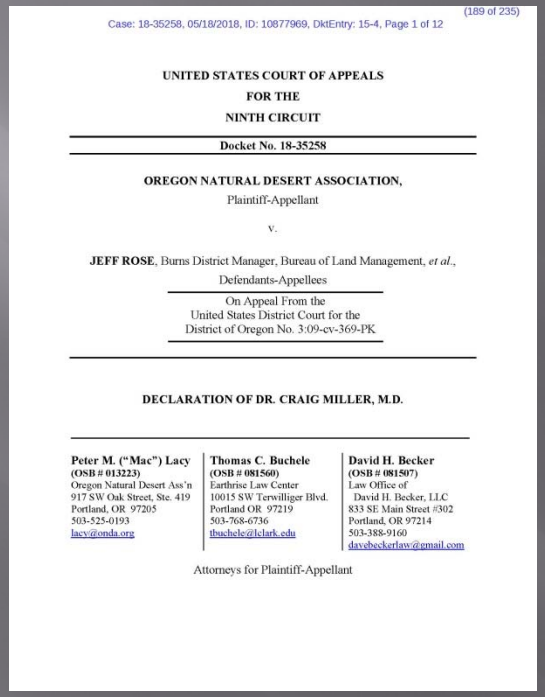
BLM proposes 555-mile motorized road network to fulfill Steens Act travel planning requirement, in 2007.

Citizen inventories shows many of the roads don't exist on the ground.

Multiple rounds of administrative appeals and federal court litigation, plus multiple agency decisions.

Showing "Arbitrary and Capricious" Agency Action under the APA, 5 U.S.C. § 706(2)(A)

Ground-based photos and field surveys



(189 of 235)
Case: 18-35258, 05/18/2018, ID: 10877969, DktEntry: 15-4, Page 1 of 12

UNITED STATES COURT OF APPEALS
FOR THE
NINTH CIRCUIT

Docket No. 18-35258

OREGON NATURAL DESERT ASSOCIATION,
Plaintiff-Appellant

v.

JEFF ROSE, Burns District Manager, Bureau of Land Management, *et al.*,
Defendants-Appellees

On Appeal From the
United States District Court for the
District of Oregon No. 3:09-cv-369-PK

DECLARATION OF DR. CRAIG MILLER, M.D.

Peter M. ("Mac") Lacy
(OSB # 013223)
Oregon Natural Desert Ass'n
917 SW Oak Street, Ste. 419
Portland, OR 97205
503-525-0193
lacy@onda.org

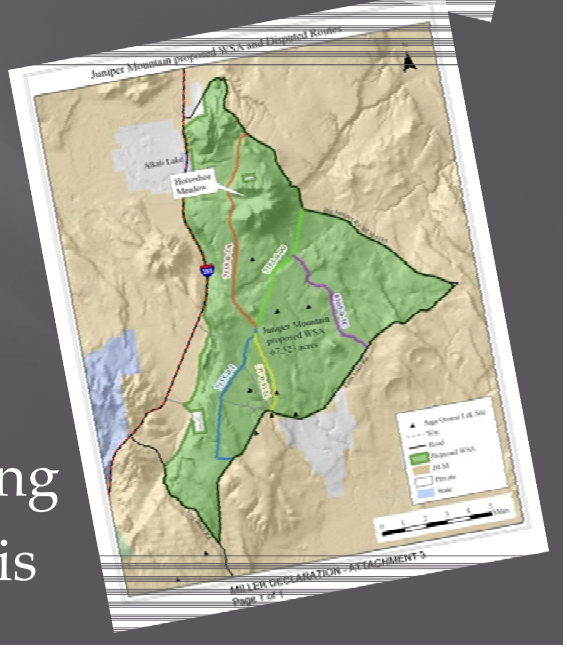
Thomas C. Buchele
(OSB # 081560)
Earthrise Law Center
10015 SW Terwilliger Blvd.
Portland OR 97219
503-768-6736
tbuchele@lclark.edu

David H. Becker
(OSB # 081507)
Law Office of
David H. Becker, LLC
833 SE Main Street #302
Portland, OR 97214
503-388-9160
davebeckerlaw@gmail.com

Attorneys for Plaintiff-Appellant

Expert Declarations

Satellite images



GIS mapping and analysis

Steens Mountain Travel and Recreation Plans: Key Rulings

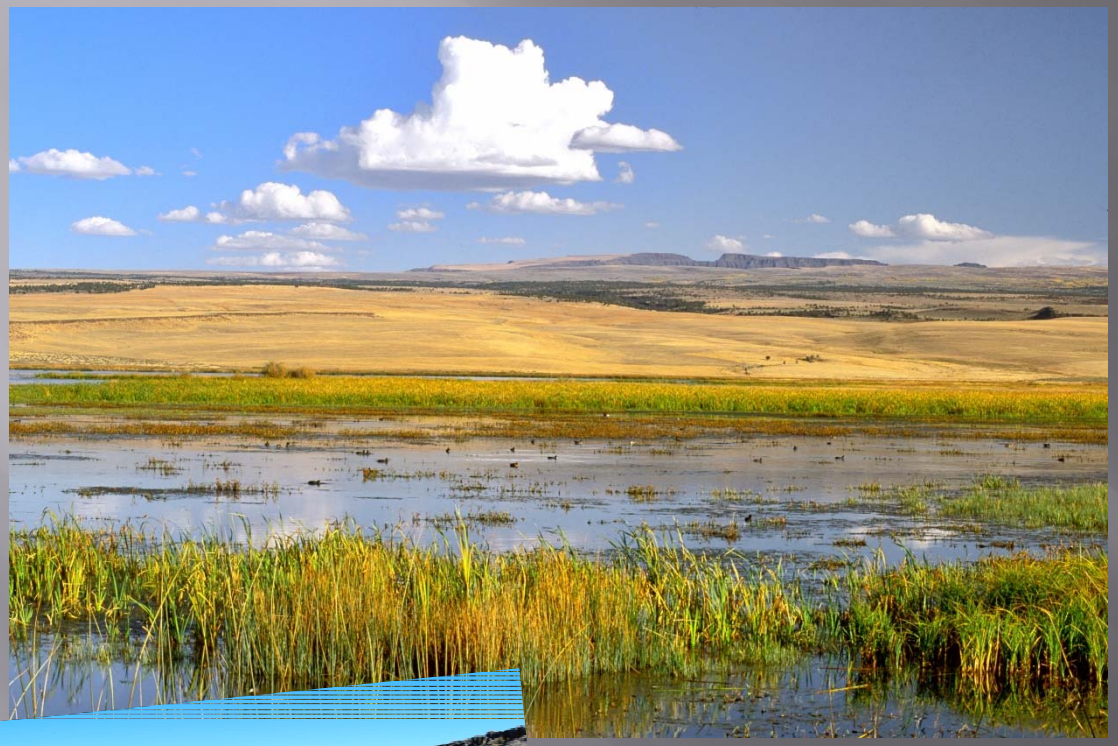
ONDA v. McDaniel, 751 F. Supp. 2d 1151 (D. Or. 2011) (exploring requirement that a plaintiff must administratively exhaust all issues it later seeks to litigate in district court).

ONDA v. McDaniel, 2011 WL 1654265 (D. Or. Apr. 28, 2011) (IBLA decision approving BLM travel plan held arbitrary and capricious based on incomplete and inaccurate road inventory).

ONDA v. Rose, 921 F.3d 1185 (9th Cir. 2019) (BLM violated NEPA by changing its definition of "roads and trails" without providing a reasoned explanation, failing to establish baseline environmental conditions for physical condition of routes, and failing to establish accurate baseline for Obscure Routes).

Injunction in place since 2012 has protected against establishing or upgrading about 120 miles of primitive routes in CMPA.

W. Watersheds Proj. v. Bernhardt, No. 2:19-cv-750-SI, 2019 WL 3206835 (D. Or. July 16, 2019) (Steens Mountain livestock grazing)

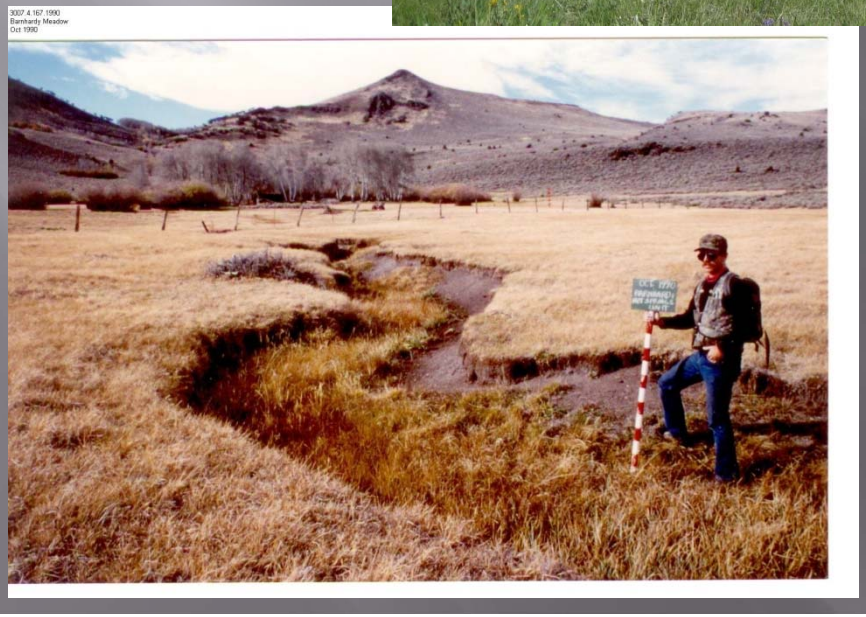


Following presidential pardon, Secretary Zinke orders BLM to reissue cancelled grazing permit.

BLM excludes permit from full environmental review, ignoring record of performance, ARMPA, and ungrazed baseline.

Court issues PI based on likely harm to dwindling local sage-grouse population and to fragile stream and riparian habitat for redband trout.

ONDA v. Hanley, No. 3:19-cv-1550-SB
(D. Or. filed Sept. 27, 2019)
(Sage-Grouse Plan Research Natural Areas)



Sweeping 2015 plans adopted to avoid ESA listing. Numerous state and industry lawsuits follow.

2019 amendments to BLM plans weaken and remove protections, including abandoning grazing closures for scientific research in 13 key RNAs in Oregon.

Lawsuit targets unexplained reversal.

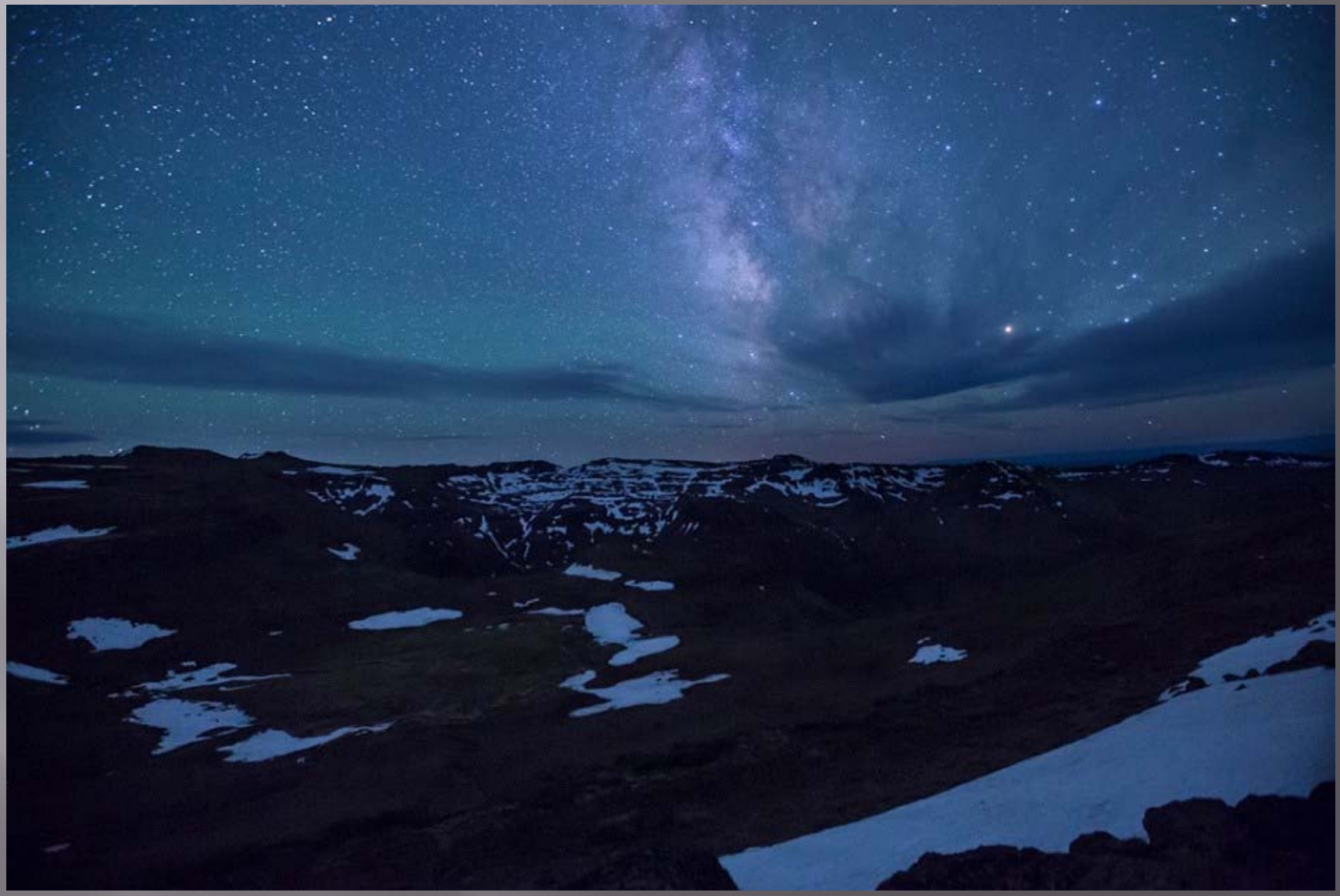


Photo credits: G. Burke, D. Bates, T. Fisher, K. Smith, G. Wuerthner, M. Lacy, and ONDA.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

WESTERN WATERSHEDS PROJECT, CENTER FOR BIOLOGICAL DIVERSITY, and **WILDEARTH GUARDIANS**, Plaintiffs, v. **DAVID BERNHARDT**, Secretary of the Interior, **JEFFREY ROSE,** District Manager Burns District Bureau of Land Management, and **BUREAU OF LAND MANAGEMENT**, Defendants.	Case No. 2:19-cv-0750-SI **OPINION AND ORDER**

David H. Becker, LAW OFFICE OF DAVID H. BECKER, LLC, 4110 SE Hawthorne Blvd. No. 168, Portland, OR 97214; Talasi B. Brooks, WESTERN WATERSHEDS PROJECT, INC., P.O. Box 2863, Boise, ID 83701; Paul David Ruprecht, WESTERN WATERSHEDS PROJECT, INC., PO Box 12356, Reno, NV 89510. Of Attorneys for Plaintiffs.

Billy J. Williams, United States Attorney, and Stephen J. Odell, Assistant United States Attorney, UNITED STATES ATTORNEY'S OFFICE, 1000 SW Third Avenue, Suite 600, Portland, OR 97204. Of Attorneys for Defendants.

Michael H. Simon, District Judge.

Plaintiffs bring this action challenging Defendants' grant of a renewed Grazing Permit (the "Permit") to Hammond Ranches, Inc. ("HRI") on four allotments—Mud Creek, Hammond, Hammond FFR, and Hardie Summer. Plaintiffs argue that then-Secretary of the Interior Ryan

Zinke[1] and Defendant Bureau of Land Management ("BLM") acted arbitrarily and capriciously in violation of the Administrative Procedures Act ("APA")[2] because they failed to follow the requirements of the National Environmental Policy Act of 1969 ("NEPA"),[3] the Federal Land Policy and Management Act of 1976 ("FLPMA),[4] and applicable BLM regulations. Plaintiffs allege that Defendants violated these statutes and regulations when Secretary Zinke ordered that HRI's previous grazing permit be renewed without conducting the analyses required by the FLPMA, BLM regulations, and NEPA, and under the 2015 Oregon Greater Sage-Grouse Approved RMP Amendment ("GSG-ARMPA"). Plaintiffs also allege that Defendants violated these statutes when BLM issued a categorical exclusion environmental review and approval ("CX") and the approved Permit without performing the required analyses.

Plaintiffs filed a motion for temporary restraining order ("TRO") and preliminary injunction to enjoin grazing on the four allotments. On June 4, 2019, the Court granted Plaintiffs' motion for a TRO and enjoined grazing on the Mud Creek and Hardie Summer allotments through July 2, 2019. The TRO was extended until July 17, 2019 at 5:00 p.m., by the stipulation of the parties. Before the Court is Plaintiffs' amended motion for preliminary injunction, requesting an order enjoining Defendants from allowing turnout and grazing of livestock on the Mud Creek and Hardie Summer allotments until the Court resolves the merits of this case. It is the parties' and the Court's intention to resolve the merits of the case before the 2020 grazing season begins.

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[1] Defendant David Bernhardt is the current Secretary of the Interior.

[2] 5 U.S.C. §§ 701 *et seq*.

[3] 42 U.S.C. §§ 4321 *et seq*.

[4] 43 U.S.C. §§ 1701 *et seq*.

HRI's cattle are currently on the Hammond and Hammond FFR allotments. The cattle have not yet entered the Mud Creek or Hardie Summer allotments. Thus, the requested injunction would not require any cattle be removed from either allotment.

Defendants respond to Plaintiffs' motion for a preliminary injunction primarily by arguing that Plaintiffs have not demonstrated that they will suffer irreparable harm on the Hardie Summer allotment[5] in the absence of preliminary relief. Defendants also argue Plaintiffs fail to show that they are likely to succeed on the merits of their claims and that the balance of the equities and public interest considerations support issuing a preliminary injunction. On June 28 and July 2, 2019, the Court held an evidentiary hearing on Plaintiffs' motion.

At the beginning of the hearing on June 28th, Defendants proposed an alternative grazing plan for the Court's consideration. Under this proposed amended grazing plan, there would be no authorized grazing on the Mud Creek allotment except for when the cattle "quickly and methodically trail through" to get to the Hardie Summer allotment.[6] On the Hardie Summer allotment, the pasture known as Fir Creek[7] would be rested, and the remaining pastures would be

[5] Defendants did not present evidence or argument regarding irreparable harm on Mud Creek in response to this motion, although Defendants provided such information in response to Plaintiffs' motion for a TRO.

[6] Defense counsel only proposed trailing through the Mud Creek allotment "to get to Hardie Summer." The Court's order will permit "trailing through" also to return from the Hardie Summer allotment if needed, but will limit the total number of days cattle may be in the Mud Creek allotment due to the extremely poor condition of the allotment and the presence of the sage-grouse lek on the allotment.

[7] At the hearing, counsel described the pasture as "Fir Creek No. 4," but in the exhibits submitted to the Court the pasture is referenced as "Fir Creek." *See, e.g.* ECF 24, 40. The Court believes the reference to "number four" is meant to indicate that Fir Creek is the fourth of the five pastures in the Hardie Summer allotment. The Court references the pasture as it is described in the exhibits—"Fir Creek." To the extent there is, however, a difference between "Fir Creek" and "Fir Creek No. 4," the Court intends for the rested pasture to be the pasture referenced by counsel at the hearing.

grazed at a 30 percent utilization standard instead of the 50 percent utilization standard authorized in the Permit. For the reasons discussed below, the Court grants in part Plaintiffs' motion for a preliminary injunction. The Court enjoins any turnout and grazing beyond the amended grazing plan proposed by Defendants at the beginning of the June 28, 2019 hearing.

STANDARDS

A. Motion for a Preliminary Injunction

A preliminary injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7, 22 (2008). A plaintiff seeking a preliminary injunction generally must show that: (1) he or she is likely to succeed on the merits; (2) he or she is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his or her favor; and (4) that an injunction is in the public interest. *Id.* at 20 (rejecting the Ninth Circuit's earlier rule that the mere "possibility" of irreparable harm, as opposed to its likelihood, was sufficient, in some circumstances, to justify a preliminary injunction).

The Supreme Court's decision in *Winter*, however, did not disturb the Ninth Circuit's alternative "serious questions" test. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011). Under this test, "'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met." *Id.* at 1132. Thus, a preliminary injunction may be granted "if there is a likelihood of irreparable injury to plaintiff; there are serious questions going to the merits; the balance of hardships tips sharply in favor of the plaintiff; and the injunction is in the public interest." *M.R. v. Dreyfus*, 697 F.3d 706, 725 (9th Cir. 2012).

B. National Environmental Policy Act

NEPA "is our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a).[8] "NEPA requires that 'to the fullest extent possible . . . all agencies of the Federal Government shall' complete an environmental impact statement (EIS) in connection with 'every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.'" *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 640-41 (9th Cir. 2014) (alteration in original) (quoting 42 U.S.C. § 4332(2)(C)). "In addition to the proposed agency action, every EIS must '[r]igorously explore and objectively evaluate all reasonable alternatives' to that action. 40 C.F.R. § 1502.14(a). The analysis of alternatives to the proposed action is 'the heart of the environmental impact statement.'" *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 623 F.3d 633, 642 (9th Cir. 2010) (second citation omitted). The purpose of NEPA is twofold: "(1) to ensure that agencies carefully consider information about significant environmental impacts and (2) to guarantee relevant information is available to the public." *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1072 (9th Cir. 2011). "In order to accomplish this, NEPA imposes procedural requirements designed to force agencies to take a 'hard look' at environmental consequences." *Lands Council v. Powell*, 395 F.3d 1019, 1027 (9th Cir. 2005) (citation omitted).

[8] The Council on Environmental Quality promulgates regulations implementing NEPA (40 CFR Parts 1500-1508) that are binding on federal agencies and are given substantial deference by courts. *See Cal. ex rel. Imperial Cnty. Air Pollution Control Dist. v. U.S. Dep't of the Interior*, 767 F.3d 781, 789 n.3 (9th Cir. 2014) (given substantial deference by courts); *ONRC Action v. Bureau of Land Mgmt.*, 150 F.3d 1132, 1138 n.3 (9th Cir. 1998) (binding on federal agencies).

C. Federal Land Policy and Management Act and BLM Regulations

Grazing on federal lands is governed by, among other statutes and regulations, the Taylor Grazing Act of 1934[9] ("Taylor Grazing Act") and the FLPMA. The Taylor Grazing Act requires persons seeking to graze livestock on public lands to obtain a permit from the Department of the Interior. The Taylor Grazing Act provides for the "orderly use, improvement, and development of the range" on public lands. 43 U.S.C. § 315a. "The Taylor Grazing Act authorized the Secretary of the Interior 'to issue or cause to be issued permits to graze livestock' pursuant to 'his rules and regulations.'" *United States v. Estate of Hage*, 810 F.3d 712, 717 (9th Cir. 2016) (quoting 43 U.S.C. § 315b). "[T]he implied license under which the United States has suffered its public domain to be used as a pasture for sheep and cattle . . . was curtailed and qualified by Congress, to the extent that such privilege should not be exercised in contravention of the rules and regulations." *United States v. Grimaud*, 220 U.S. 506, 521 (1911) (citation omitted).

The goals of the Taylor Grazing Act "are to 'stop injury' to the lands from 'overgrazing and soil deterioration,' to "provide for their use, improvement and development," and 'to stabilize the livestock industry dependent on the public range.'" *Pub. Lands Council v. Babbitt*, 529 U.S. 728, 733 (2000) (quoting 48 Stat. 1269). "As grazing allocations were determined, the Department would issue a permit measuring grazing privileges in terms of 'animal unit months' (AUMs), *i.e.*, the right to obtain the forage needed to sustain one cow (or five sheep) for one month." *Id.* at 735; *see also* 43 C.F.R. § 4100.0-5 (defining AUM).

The FLPMA provides additional direction for the management of public lands. "In enacting FLPMA, 'Congress declared that it is the policy of the United States to manage the public lands in a manner that will protect the quality of scientific, scenic, historical, ecological,

[9] 43 U.S.C. § 315 *et seq*.

environmental, air, and atmospheric, water resource, and archeological values.'" *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 498-99 (9th Cir. 2011) (quoting *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 581 F.3d 1063, 1075 (9th Cir. 2009)). The FLPMA instructs that permits for grazing on public lands ordinarily shall be issued for a 10-year term, subject to such terms and conditions as BLM deems appropriate and consistent with governing law. 43 U.S.C. § 1752(a). The FLPMA also establishes that a permittee holding an expiring grazing permit will be given first priority for renewal if the permittee "is in compliance with the rules and regulations issued [by the Secretary] and the terms and conditions of the permit." 43 U.S.C. § 1752(c).

BLM has issued regulations to implement the Taylor Grazing Act and the FLPMA. 43 C.F.R. §§ 4100-4190.1 (2005).[10] BLM's regulations specify "mandatory qualifications" for an applicant for a permit for grazing on public lands. 43 C.F.R. § 4110.1. These include that any applicant for renewal of a grazing permit "*must be* determined by the authorized officer to have a satisfactory record of performance." *Id.* § 4110.1(b) (emphasis added). The regulations further provide that the authorized officer "*will determine* whether applicants for the renewal of permits . . . and any affiliates, have a satisfactory record of performance," and that "[t]he authorized officer *will not renew* . . . a permit . . . unless the applicant and all affiliates have a satisfactory record of performance." *Id.* § 4130.1-1(b) (emphasis added). A satisfactory record means that the applicant is in "substantial compliance with" regulations applicable to the permit. *Id.* § 4130.1-1(b)(1)(i). "The authorized officer may take into consideration

[10] Although BLM issued amended regulations in 2006, those regulations have been enjoined by the U.S. District Court for the District of Idaho, *see W. Watersheds Project v. Kraayenbrink*, 538 F. Supp. 2d 1302 (D. Idaho 2008), and are not in effect for the relevant BLM field office.

circumstances beyond the control of the applicant or affiliate in determining whether the applicant and affiliates are in substantial compliance with permit or lease terms and conditions and applicable rules and regulations." *Id.* § 4130.1-1(b)(1)(ii).

BLM regulations applicable to a grazing permit prohibit: "(3) Cutting, burning, spraying, destroying, or removing vegetation without authorization"; and "(4) Damaging or removing U.S. property without authorization." *Id.* § 4140.l(b). BLM also has regulations applicable to preventing wildfires, which apply to users of public lands, including grazing permit holders. These regulations prohibit, without authorization, a user to: "[c]ause a fire, other than a campfire, or the industrial flaring of gas, to be ignited by any source; [b]urn, timber, trees, slash, brush, tundra or grass except as used in campfires; [l]eave a fire without extinguishing it; [or] [r]esist or interfere with the efforts of firefighter(s) to extinguish a fire." *Id.* § 9212.1(a), (c), (d), (f).

FLPMA also directs BLM to develop and maintain comprehensive Resource Management Plans ("RMPs") that govern all aspects of public land management, including grazing administration. 43 U.S.C. § 1712. Grazing permits must be consistent with RMPs. 43 U.S.C. § 1732(a); 43 C.F.R. § 4100.0-8. RMPs constrain grazing permits by determining where grazing will or will not be allowed and by setting environmental standards that grazing permits must meet. *See* 43 U.S.C. § 1732(a) (requiring management "in accordance with the [RMPs]"); *id.* § 1752(c)(1) (conditioning renewal of grazing permits on lands remaining available for grazing in accordance with RMPs).

The land use plans covering the four allotments at issue in this case are the Steens Mountain Cooperative Management and Protection Area ("CMPA") Resource RMP and the Andrews Management Unit RMP, both approved in July 2005. In 2015, both of these RMPs were amended by the Oregon GSG-ARMPA. The GSG-ARMPA defines various categories of

important sage-grouse habitat requiring special protection and consideration, including Priority Habitat Management Areas ("PHMAs"), General Habitat Management Areas ("GHMAs"), and Sagebrush Focal Areas ("SFAs"), which are a subset of PHMAs. PHMAs are "BLM-administered lands identified as having the highest value to maintaining sustainable [greater sage-grouse] populations." GHMAs are "BLM-administered lands where some special management will apply to sustain [greater sage-grouse populations; areas of occupied seasonal or year-round habitat outside of PHMA[s]." SFAs are areas that "represent recognized strongholds for [greater sage-grouse]."

The 2015 GSG-ARMPA also specifies certain "Management Decisions." One of these requires that any "NEPA analysis for renewals . . . of livestock grazing permits/leases that include lands within SFA and PHMA will include specific management thresholds based on [greater sage-grouse] Habitat Objectives . . . Land Health Standards . . . and ecological site potential, and one or more defined responses that will allow the authorizing officer to make adjustments to livestock grazing that have already been subjected to NEPA analysis."

D. Administrative Procedures Act

Neither NEPA nor the FLPMA provide a separate standard of review. Thus, claims under these Acts are reviewed under the standards of the APA. *See Jewell*, 747 F.3d at 601 (NEPA); *Mont. Wilderness Ass'n v. Connell*, 725 F.3d 988, 994 (9th Cir. 2013) (FLPMA). Under the APA, "an agency action must be upheld on review unless it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Jewell*, 747 F.3d at 601 (quoting 5 U.S.C. § 706(2)(A)). A reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* (quotation marks and citation omitted). The reviewing court's inquiry must be "thorough," but "the standard of review is highly deferential; the agency's decision is entitled to a presumption of

regularity, and [the court] may not substitute [its] judgment for that of the agency." *Id.* (quotation marks and citation omitted).

Although a court's review is deferential, the court "must engage in a careful, searching review to ensure that the agency has made a rational analysis and decision on the record before it." *Nat'l Wildlife Fed. v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 927 (9th Cir. 2007). "[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)); *see also Brower v. Evans*, 257 F.3d 1058, 1067 (9th Cir. 2001) ("The presumption of agency expertise can be rebutted when its decisions, while relying on scientific expertise, are not reasoned."). The reasoned-decisionmaking requirement, the Supreme Court has often observed, includes a duty to explain any "departure from prior norms." *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973); *see also Int'l Union, UAW v. NLRB*, 802 F.2d 969, 973-74 (7th Cir. 1986) ("[A]n administrative agency is not allowed to change direction without some explanation of what it is doing and why."). A court also "must not 'rubber-stamp' . . . administrative decisions that [it] deem[s] inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 858 (9th Cir. 2005) (first alteration in original, remaining alterations added).

FINDINGS OF FACT

Based on the evidence presented by the parties, the Court finds the following facts are more likely true than not:

Background of HRI's Permit

1. HRI is a family-owned Oregon ranching corporation. Its shareholders are Steven Dwight Hammond, his wife Earlyna Hammond, and his parents Dwight Lincoln Hammond and Susan Hammond, through their Trust. Steven Hammond is the President of HRI, Dwight Hammond is the Vice President, and Earlyna Hammond is the Secretary.

2. HRI began grazing on public BLM lands in 1964. Before the Permit at issue in this case, the most recent permit granted to HRI was Permit No. 3602564, which had a term from March 1, 2004 to February 28, 2014. This permit authorized, for each year: 68 cattle and 471 AUMs on Hammond, from April 1 to October 30; 32 cattle and 32 AUMs on Hammond FFR, from April 1 to April 30; 390 cattle and 590 AUMs on Mud Creek, from May 16 to June 30; and 408 cattle and 407 AUMs on Hardie Summer, from July 1 to September 30.

3. On February 14, 2014, BLM denied HRI's Application for Permit Renewal. BLM explained that under its regulations permit holders and their "affiliates" must be in compliance with the rules and regulations issued by the Secretary of the Department of the Interior and the terms and conditions in the permit. BLM found that Steven Hammond and Dwight Hammond were affiliates of HRI. BLM also found that their criminal convictions for intentionally setting fires on public lands violated the regulations prohibiting cutting, burning spraying, destroying, or removing vegetation without authorization and damaging or removing U.S. property without authorization. 43 C.F.R. § 4140.1. BLM further concluded that the Hammonds' conduct violated 43 C.F.R. § 9212.1(a), (c), (d), and (f).

4. BLM summarized in detail the witness testimony at the criminal trial, and characterized this testimony as demonstrating "how the Hammonds violated BLM grazing regulations and the terms of [HRI's] grazing permit, endangered the lives of numerous

individuals, including firefighters, and altered ecological conditions on public lands." BLM described testimony of the Hammonds lighting multiple fires.

5. Steven Hammond was convicted of two counts, one relating to a 2001 fire and one relating to a 2006 fire. Dwight Hammond was convicted of one count, relating to a 2006 fire. The jury acquitted the Hammonds of several charges. The jury could not reach a verdict on several charges and the judge instructed the jury to continue deliberations on those charges. While the jury was deliberating, the prosecution and defense reached an agreement and the trial ended.

6. In reaching its final decision in 2014 denying HRI's application to renew Permit No. 3602564, BLM accepted the sworn testimony at trial and, after a "thorough[] review[]," rejected the protest filed by HRI that the sworn testimony was inaccurate or incomplete.

7. BLM concluded that HRI and its affiliates had an unsatisfactory record of performance. BLM stated: "The Hammond fire-setting maliciously and knowingly placed public recreationists, firefighters, and BLM range staff at high risk just to further [HRI's] grazing interests." BLM also noted that the "Hammonds set the fires because they disagreed with how BLM managed the land. The Hammonds acted in the interest of improving the rangeland forage for their cattle, but not necessarily for other resources like wildlife habitat."

8. BLM concluded that each criminal conviction, standing alone or in combination, constitutes an unsatisfactory record of performance. BLM explained:

> The Hammonds' malicious disregard for human life and public property shows contempt for BLM regulation of public land. The Hammonds' interference with firefighting efforts is antithetical to orderly use of resources. The Hammonds' disregard for orderly and planned prescribed burning that accounts for ecological objectives and human safety is incompatible with the orderly use and improvement of resources. The BLM carefully plans and conducts prescribed burns to meet ecological objectives, such as

> retaining sagebrush and bitterbrush habitat. By taking matters into their own hands and burning public lands outside of the official BLM process, the Hammonds altered the Burns District's prescribed fire management strategy for years to come. Good stewardship is more than just producing grass for livestock—it requires orderly conduct that protects the multiple objectives of public lands and the lives of those who work and recreate on public lands.

9. BLM also concluded that the Hammonds' "additional fire-setting described in the criminal trial," outside of their criminal convictions, constituted an unsatisfactory record of performance. BLM found that "the testimony shows a pattern of intentional fire-setting by Dwight and Steven Hammond—beyond the fires for which they were convicted—demonstrating their callous disregard for human life and BLM multiple use objectives for the land."

10. HRI appealed BLM's decision and sought a stay of the decision. On April 28, 2014, the Office of Hearings and Appeals ("OHA") denied the Hammonds' motion for a stay and BLM's decision went into effect. OHA found that the criminal convictions were sufficient to establish violations of governing regulations. OHA also found that BLM correctly relied on other evidence of "multiple instances of the Hammonds setting fires to eliminate juniper for the purpose of increasing forage for their cattle" and held that their "pattern of starting fires that damage vegetation on public lands and endangers lives is sufficiently serious to warrant permit non-renewal."

11. HRI appealed the stay denial to the Interior Board of Land Appeals, and it affirmed the denial of the stay. Meanwhile, in the appeal the OHA was considering, the assigned judge was evaluating whether to have the case proceed to summary judgment or directly to a hearing. Industry trade organizations began lobbying then-Secretary of the Interior Zinke and President Donald J. Trump. Between May and November 2018, briefs were filed before the assigned OHA judge.

12. On July 10, 2018, President Trump issued Executive Grants of Clemency, pardoning Steve and Dwight Hammond for their crimes and commuting their sentences. Steve Hammond had served three years of his five-year sentence and Dwight Hammond had served four years of his five-year sentence.

13. On December 28, 2018, Secretary Zinke exercised his authority to assume jurisdiction over the appeal the OHA was considering. On January 2, 2019, his last day in office, Secretary Zinke issued his decision. He set out the factual and procedural history of the case in slightly more than one page, the applicable law in slightly more than one page, and his analysis in one paragraph. Secretary Zinke's analysis, in its entirety, states:

> I find that the pardons constitute unique and important changed circumstances since the BLM made its decision. In light of the Grants of Executive Clemency, the years of imprisonment, and civil damages paid by the Hammonds, I find that it is consistent with the intent of the pardons—and in particular their reflection of the President's judgment as to the seriousness of the Hammonds' offenses—to renew the Hammonds' permit for the duration of the term that would have commenced in 2014. The Hammonds' continuance of grazing will depend on compliance with BLM's grazing regulations. I do not find fault with BLM's assessment of the law and facts in its 2014 Decision and I reiterate BLM' s concern for human safety on public lands. The safety of our Nation's firefighters and others working and recreating on public lands remains paramount. I will ask BLM to keep the Office of the Secretary apprised of any permit compliance and human safety issues.

14. Secretary Zinke concluded his decision by remanding "the matter to BLM with instructions to renew, within 30 days of the date of this decision, the permit under the same terms and conditions for the balance of the renewal period."

15. On February 5, 2019, BLM Rangeland Management Specialist Jamie McCormack circulated a memorandum to Burns District Manager Jeffrey Rose. This memorandum noted that Secretary Zinke had directed BLM to renew the Permit under the same terms and conditions as

the previous permit. The memorandum stated that BLM had conducted standards and guidelines assessments and evaluations in 2018 on the four allotments, standards were being achieved except the standard relating to species, the failure of that standard was not caused by grazing, and thus the Permit qualified for a CX under the FLPMA, which constitutes compliance with NEPA. Mr. Rose concurred with this conclusion.

16. The CX was dated February 1, 2019, but signed on February 4 and 5, 2019. It concluded that "the proposed action did not trigger any of the extraordinary circumstances described in 43 C.F.R. § 46.215." The CX also concluded that the Permit was "in conformance with the [land use plans], qualifies as a categorical exclusion, and does not require further NEPA analysis."

17. On February 13, 2019, Jeffrey Rose of BLM and Steve Hammond of HRI signed the Permit, with an effective date of February 1, 2019 through February 28, 2024.

18. BLM did not complete an EIS or environmental assessment ("EA") analyzing the Permit's proposed grazing on the allotments, or any alternatives. There is no evidence in the record that BLM previously conducted an EA or an EIS with respect to any earlier permits.

Plaintiffs' Receipt of Permit and CX

19. On January 29, 2019, counsel for Plaintiff Western Watersheds Project ("Western Watersheds") noted the media coverage of Secretary Zinke's decision and asked the Department of the Interior and BLM for a copy of that decision. Both agencies provided a copy that same day. BLM noted, however, that they had just received the decision and "the details of how we will implement this decision have not been finalized."

20. Plaintiffs requested copies of documents relating to the decision, including a copy of the Permit, and submitted a request under the Freedom of Information Act ("FOIA"). On

March 25, 2019, Plaintiffs again requested a copy of the Permit, noting that Western Watersheds had not yet received a copy. BLM responded that because Western Watersheds had submitted a FOIA request, the information would be provided under that request.

21. On April 1, 2019, counsel for Western Watersheds responded to BLM, noting that the statutory deadline under FOIA had expired without a response, BLM had indicated it would not provide any response to the FOIA request until May 22, 2019, Western Watersheds believed it had a right to the information as an "interested party" under BLM regulations, and it would be a simple matter to email a copy. BLM provided a copy of the Permit and CX to Western Watersheds on April 1, 2019.

22. Although the Permit authorized grazing to begin on April 1, HRI began grazing on March 25, 2019. No application for different use than is authorized by the Permit, which is required by the Permit before such changed use can begin, was provided to the Court.

23. The Permit authorized 68 cattle and 471 AUMs on the Hammond allotment.[11] BLM "orally" authorized an increase of up to 490 cattle. No application for different use than is authorized by the Permit, which is required by the Permit before such changed use can begin, was provided to the Court. BLM later realized they had "miscalculated" that this number of cattle would comply with the Permit's limitation of 471 AUMs, and thus noted that HRI's total AUMs were in excess of the Permit.

24. BLM issued letters to HRI adjusting the time frame and number of cattle that could be grazed on the Mud Creek and Hardie Summer allotments, in part due to this litigation.

[11] The Hammond allotment is authorized for grazing for seven months and is designated as 99 percent active. Thus, the total AUMs are calculated at 68 (cows) times 7 (months) times .99 equals 471.

Characteristics of the Allotments

25. The Mud Creek allotment is approximately 8,200 acres, all of which is publicly-owned. It contains streams, including Dry Creek and Mud Creek.

26. The Hardie Summer allotment is approximately 9,800 acres, of which approximately 39 percent is owned by HRI and 61 percent (6,000 acres) is publicly-owned. The allotment is subdivided into five pastures on which the cattle rotate during grazing. The Bridge Creek pasture is publicly-owned, the Cabin pasture is nearly equally owned between BLM and HRI, and the North, Fir Creek, and Sylvies pastures are predominantly owned by HRI.

27. The Hardie Summer allotment also contains five streams, consisting of 3.3 miles of publicly-owned streams with riparian habitat. These streams are: Big Fir Creek, Little Fir Creek, Fish Creek, Lake Creek, and Big Bridge Creek. Big Fir Creek and Little Fir Creek are perennial streams with a significant portion (about half) on public land. Fish Creek is on private land and about 90 percent of Lake Creek is on private land. Big Bridge Creek is an intermittent stream that is mostly on private land. These streams are home to redband trout.

28. The two allotments lie within the Steens Mountain CMPA. This area was designated by Congress with the purpose "to conserve, protect, and manage the long-term ecological integrity of Steens Mountain for future and present generations." 16 U.S.C. § 460nnn-12(a). Objectives of this designation include to promote grazing, recreation, historic, and other uses that are sustainable, and to ensure the conservation, protection, and improved management of the ecological, social, and economic environment of the CMPA, including geological, biological, wildlife, riparian, and scenic resources. *Id.* § 460nnn-12(b)(2), (4).

29. To assess the effects of this grazing, BLM developed a set of standards to measure the status of the soil, vegetation, riparian areas, and wildlife on the range. The standards are known as the Standards for Rangeland Health.

30. BLM completed evaluations of Standards for Rangeland Health on the Mud Creek and Hardie Summer allotments in 2007 and 2018. These assessments were performed by an interdisciplinary team consisting of multiple agency specialists. The 2007 evaluation was based on data gathered by interdisciplinary teams in 2006, before the fires that had been set by the Hammonds in August 2006 burned much of the allotments and thus changed their rangeland characteristics.

31. For the Mud Creek allotment, the 2007 evaluation concluded that the allotment was not meeting two of the five standards, Standard 5 that relates to native species, species listed under the Endangered Species Act ("ESA"), or locally important species, and Standard 3 that relates to ecological processes. The 2018 evaluation concluded that the allotment was not meeting Standard 5. The assessment further noted that an Assessment, Inventory, and Monitoring project was initiated in 2016 but sage-grouse habitat determinations could not be completed until the data collection is finished in 2020. Based on available information, BLM found that sage-grouse habitat overall was rated as "marginal" because of the lack of sagebrush cover and continuity due to recent fires and juniper encroachment, and the presence of invasive annual grasses. The evaluation found that sage-grouse habitat exists on the allotment and where it does, it is suitable for winter, leking,[12] nesting, and early spring brood rearing.

32. For the Hardie Summer allotment, the 2007 evaluation found that all five standards were being met. The 2018 evaluation found that the allotment did not meet Standard 5.

[12] A "lek" is a sage-grouse breeding ground. "Leking" means breeding.

The Hardie Summer allotment failed this standard because species composition and diversity had been altered. The assessment noted this alteration was likely caused by juniper encroachment and fire. The assessment also noted that although there were no known sage-grouse leks on the allotment, "year-round habitat for sage-grouse does occur where sagebrush is present." ECF 39-2 at 3. The assessment further noted that an Assessment, Inventory, and Monitoring project was initiated in 2016 but sage-grouse habitat determinations could not be completed until the data collection is finished in 2020. Based on available information, BLM concluded that the allotment offers "suitable year-round conditions for sage-grouse habitat." This habitat was rated "marginal" due to the juniper encroachment and the "infestations of invasive annual grasses within large fire scars adjacent to the allotment." *Id.* To meet this Standard, BLM recommended reducing juniper, reducing habitat loss, and treating invasive grasses. BLM concluded that grazing was not a causal factor for current habitat conditions.

33. The allotments include Greater Sage-Grouse habitats designated in 2015 as PHMAs and GHMAs. The Mud Creek allotment also includes a sage-grouse breeding ground ("lek"), known as the South Bridge Creek lek. Two more leks, known as North Bridge Creek Nos. 1 and 2, lie less than two miles from the Mud Creek, Hammond, and Hammond FFR allotments and within three miles of the Hardie Summer allotment.

34. The Hardie Summer allotment provides year-round habitat for sage-grouse, which are present at least from June to September.

35. The 2006 fire more likely than not set by the Hammonds burned significant portions of the Mud Creek and Hardie Summer allotments. The Hammonds set the fire to burn brush and shrubs to increase the area for grass to grow for grazing. Because of the 2006 fire, the

remaining areas of sagebrush on the Hardie Summer and Mud Creek allotments are of critical importance to sage-grouse.

36. Without active intervention such as planting seedlings, it will take from 50 to 100 years for sagebrush to naturally reestablish in the allotments.

37. Grazing reduces the likelihood that sagebrush will reestablish.

38. The riparian vegetation on the Hardie Summer allotment is showing signs of recovery after five years without grazing. Willows are regrowing and regaining their natural shape rather than a high browse line from grazing. Willows provide bank stability and overhang hiding cover for fish, are a source of nutrient and insect input critical for trout survival, provide shade necessary to keep stream temperatures low, and are a nesting and insect source for birds. They are, however, palatable to cattle later in the grazing season.

39. Riparian areas take approximately 20 years to recover from overgrazing and poor management practices.

40. Cattle that graze later in the season, like in the Hardie Summer allotment, are grazing when many grasses have desiccated and it is hot and thus they are drawn to the cooler, greener, riparian areas. Mr. Matthew Obradovich, a BLM employee and one of Defendants' experts who has regularly visited the Hardie Summer allotment, testified that generally by August 1st the grasses and forbs on the allotment are drying and less attractive to cattle and other wildlife.

41. A single, poorly managed grazing season on Hardie Summer is likely to eliminate the recovery of the vegetation that has grown during the past five years.

Sage-Grouse

42. The Greater Sage-Grouse is a bird that requires large expanses to meet its seasonal habitat requirements. The loss of habitat from fragmentation decreases the connectivity between seasonal habitats, potentially resulting in the loss of population.

43. BLM has designated the Greater Sage-Grouse as a "sensitive" species. This requires that the "species be afforded, at a minimum, the same protections as candidate species for listing under the ESA; and provides that BLM Field Office managers are responsible for implementing the policy, including by [e]nsuring actions are evaluated to determine if special status species objectives are being met." *W. Watersheds Project v. Dyer*, 2009 WL 484438, at *8 (D. Idaho Feb. 26, 2009) (quotation marks omitted) (alteration in original).

44. The Greater Sage-Grouse requires sagebrush for every part of its life cycle. In spring, nesting and brood-rearing sage-grouse use sagebrush for cover and forage. In summer, sagebrush is used for cover and forage as the birds move from nesting and brood-rearing sites to wetter areas. In the fall and winter, sage-grouse use sagebrush is for food.

45. Sage-grouse also require tall grasses for cover and forbs for food in spring and during nesting and brood-rearing. Forbs also attract insects that are vital to young chicks. Sage-grouse also rely on the edges of riparian habitats near meadows and stream areas.

46. Non-sagebrush habitat, including tall grasses, can provide Sage-grouse nesting habitat, particularly from April to August.

47. BLM personnel have seen male and female sage-grouse in the lek on Mud Creek.

48. BLM personnel noted in June 2018 evaluations of the Bridge Creek and Cabin pastures on the Hardie Summer allotment that sage-grouse use those pastures.

49. Livestock grazing is known to be detrimental for sage-grouse because it reduces the height and density of grasses and forbs. Livestock grazing also increases susceptibility of Wyoming big sagebrush ecosystems to cheatgrass invasion as livestock trample biological soil crusts, suppress native bunchgrasses, and shorten fire-return. Domestic livestock disperse exotic seeds at about two orders of magnitude greater than do native ungulates, further increasing cheatgrass spread. Cheatgrass is highly flammable and suppresses sagebrush initiation and growth.

50. The areas containing the South Bridge Creek and North Bridge Creek leks burned in the 2006 fire that was more likely than not set by the Hammonds. The number of birds attending the South Bridge Creek lek rebounded after the fire but has again declined. The North Bridge Creek No. 1 lek is no longer active. The North Bridge Creek No. 2 lek has varied in its use, generally around the low teens, with 2019 showing nine males using the lek.

Redband Trout

51. BLM has designated redband trout as a "sensitive species."

52. Redband trout spawn primarily in spring (March-June) and remain in place until they migrate in fall. They spawn exclusively in flowing waters. Water temperature and stream flow affect migration timing. Juveniles migrate downstream to their ancestral lake or river after one-to-three years in natal areas.

53. Redband trout do best in areas with undercut banks, large woody debris, and overhanging vegetation. A study of redband trout in sagebrush desert basin streams found that abundance increased as habitat criteria such as stream shading, bank cover and stability, fine sediment, and cover for adults increased. The study also found that stream shade in the uppermost 50 meters of a stream would result in the greatest increase in fish density.

54. Although redband trout are more tolerant of higher stream temperatures than other salmonids, they are still sensitive to water temperature. Their ultimate upper incipient lethal temperature ("UUILT") is 26-27°C. Their ideal growth temperature is 13°C. Their optimum temperature is 18°C. They also rely on macroinvertebrate species that are very sensitive to temperature change.

55. Redband trout suffer sublethal problems at temperatures below the UUILT, including increased prevalence of disease, inability to feed, swim, or avoid predators, impaired growth rates, inability to smolt, alteration of smolt timing, and altered balance of competition with other species.

56. Water temperatures in Bridge Creek can reach 24°C on a hot summer day.

57. Livestock grazing is a major source of degradation in the quantity and quality of riparian habitat and habitat for salmonids. Grazing causes streambank damage, removal of riparian vegetation, loss of large woody debris, fine sediment delivery, loss of overhanging banks, increased water temperature, channel widening, shallowing of flow depth, loss of pools, loss of fish cover structures, degradation of spawning habitat, alteration of food base, trampling of redds (spawning beds), and reduced dissolved oxygen in redds.

Additional Problems Caused by Grazing

58. Grazing late in the season on Hardie Summer occurs when cheatgrass is mostly dried and less palatable to cattle. Exotic crested wheat grass is also less palatable to cattle. Cattle generally find native bunchgrasses more palatable.

59. Grazing to reduce fire intensity requires a reduction in exotic and invasive grasses, but that would require that first the native bunchgrasses and forbs be overgrazed, which is harmful.

60. When too much grazing is allowed after fire damage, cattle will destroy native vegetation and spread cheatgrass, whereas sagebrush steppe in the absence of grazing is more fire resistant.

61. Livestock grazing has been linked to juniper expansion. Juniper expansion is one of the reasons the allotments failed Standard 5.

62. Properly managed grazing, including grazing at a utilization standard that is appropriate for the particular allotment and grazing with consideration to the varying palatability of different forage and the sensitivity and importance, if any, of the riparian zones of a particular allotment, may reduce the harmful effects from grazing.

63. The permitted grazing on Mud Creek and Hardie Summer is likely to cause harm to Greater Sage-Brush habitat and status by: (1) reducing tall grasses and forbs during breeding and nesting season in the allotments; (2) reducing cover for nesting hens and chicks to avoid predation; (3) increasing the spread of cheatgrass; (4) reducing the chances of sagebrush recovery and increasing the chances of juniper expansion; (5) reducing the forage available to nesting hens and chicks; (6) creating habitat fragmentation, including with the SFA south of Steens Mountain; and (7) degrading the riparian areas and wet meadows of the Hardie Summer allotment. Because of the importance of nesting in the months of June through August, some of this harm is likely to be immediate. Additionally, because of the fragile state of the lek on Mud Creek, its connectivity to the surrounding leks, and sensitive status of the Greater Sage-Grouse, harm to the Mud Creek lek is likely to cause irreparable harm to neighboring leks.

64. The permitted grazing is likely to cause harm to redband trout habitat and status by: (1) increasing water temperature; (2) decreasing willows and other shade-providing cover; (3) trampling of redds; (4) causing streambank damage; (5) removing riparian vegetation; and

(6) causing loss of large woody debris. Because the permitted grazing in the Hardie Summer allotment is late in the season and cattle will be drawn to riparian areas, this harm will be immediate.

65. Defendants' proposed revised grazing plan that authorizes: (1) no AUMs on the Mud Creek allotment and allows only expeditious trailing through that allotment; (2) resting the Fir Creek pasture on the Hardie Summer allotment; and (3) grazing the remaining Hardie Summer pastures at 30 percent utilization, mitigates the immediate irreparable harm found by the Court arising from the grazing authorized by the Permit. Although Defendants did not quantify what 30 percent utilization equates to in terms of number of cattle, if 50 percent utilization across five pastures allows for 408 cattle, then presumably 30 percent utilization across four pastures would allow for significantly fewer cattle. The Court accepts Defense counsel's representation at the hearing that the proposed "alternative strategy for grazing in the upcoming season . . . would allow for some grazing to go forward in 2019 on Hardie Summer, but much less than what the Plaintiffs are seeking to enjoin." When Defense counsel made this representation, he specifically acknowledged that Plaintiffs were only seeking to enjoin grazing on the Mud Creek and Hardie Summer allotments, noting that Plaintiffs "have now indicated they only seek to have this preliminary injunction address two allotments instead of four, which was the original motion." The amended grazing plan therefore mitigates harm to sage-grouse by eliminating nearly all grazing on the Mud Creek allotment and significantly reducing the grazing on the Hardie Summer allotment. It also mitigates the irreparable harm to redband trout by eliminating grazing on a large portion of the Little Fir Creek, and significantly reducing grazing on the remaining pastures. The Court finds persuasive the expert testimony from both Plaintiffs' and Defendants'

experts that a 30 percent utilization standard for the four pastures of the Hardie Summer allotment for a single season would not cause irreparable harm to sage-grouse or redband trout.

CONCLUSIONS OF LAW

A. Likelihood of Success on the Merits

Plaintiffs carry the burden at the preliminary injunction stage for the same elements that they must prove at trial, and Defendants carry the burden for the elements and affirmative defenses that they must prove at trial. *Gonzales v. O Centro Espirita Beneficente UNIAO do Vegetal*, 546 U.S. 418, 429 (2006) ("The point remains that the burdens at the preliminary injunction stage track the burdens at trial."). The Court discussed the likelihood of success on the merits in its Opinion and Order granting Plaintiffs' TRO ("TRO Opinion"), and will not repeat that discussion here, other than to address the arguments raised by Defendants.

1. Secretary Zinke's Decision and the FLPMA and Regulations

Defendants first argue that Plaintiffs are not likely to succeed on their challenge to Secretary Zinke's decision because it was appropriate for Secretary Zinke to find that HRI had the requisite satisfactory record of performance in light of the 2018 grants of Executive Clemency by President Trump. The first problem with this argument is that Secretary Zinke did not find that HRI and its affiliates had a satisfactory record of compliance. To the contrary, Secretary Zinke expressly stated that he found no fault with BLM's 2014 legal and factual findings, which were that HRI and its affiliates did not have a satisfactory record of compliance and thus did not qualify for renewal of the permit.

The second problem with this argument is that a Presidential pardon does not overturn a judgment of conviction, does not clear a person of the underlying conduct of conviction, constitutes a confession of guilt, and does not preclude a government agency from considering the underlying conduct in evaluating permit applications. *See Nixon v. United States*, 506

U.S. 224, 232 (1993) ("But the granting of a pardon is in no sense an overturning of a judgment of conviction by some other tribunal; it is "[a]n executive action that mitigates or sets aside *punishment* for a crime." (emphasis in original) (quoting Black's Law Dictionary 1113 (6th ed. 1990)); *United States v. Schaffer*, 240 F.3d 35, 38 (D.C. Cir. 2001) ("In fact, acceptance of a pardon may imply a confession of guilt."); *Bjerkan v. United States*, 529 F.2d 125 (7th Cir. 1975) ("A pardon does not 'blot out guilt' nor does it restore the offender to a state of innocence in the eye of the law . . . .").

As explained by the Seventh Circuit, if a necessary qualification involves character or other qualifications that are affected by the underlying conduct regardless of conviction, the pardon has little effect, whereas when the qualifications are based on the fact of conviction, the pardon removes disqualification:

> The pardon removes all legal punishment for the offense. Therefore if the mere conviction involves certain disqualifications which would not follow from the commission of the crime without conviction, the pardon removes such disqualifications. On the other hand, if character is a necessary qualification and the commission of a crime would disqualify even though there had been no criminal prosecution for the crime, the fact that the criminal has been convicted and pardoned does not make him any more eligible.

Yasak v. Ret. Bd. of Policemen's Annuity & Benefit Fund of Chicago, 357 F.3d 677, 683 n.5 (7th Cir. 2004) (quoting *Bjerkan v. United States*, 529 F.2d 125, 128 n.2 (7th Cir. 1975)) (noting that "the effects of the *commission of the offense* linger after a pardon, the effects of the *conviction* are all but wiped out") (emphasis added). BLM's 2014 conclusions, left undisturbed by Zinke, were based on the conduct and character of the Hammonds in committing the offense, not the mere fact of the conviction (including conduct for which there was no conviction). Thus, Plaintiffs are likely to succeed in arguing that the pardons "do[] not make [HRI] more eligible." *Id.*

Defendants also argue that Zinke appropriately expressed an awareness that he was disagreeing with the decision of a subordinate official (the 2014 BLM denial) and set forth the basis of that disagreement. Zinke, however, did not disagree with anything in the 2014 BLM denial. He specifically stated that he found "no fault" with that opinion. The only thing different in Zinke's opinion was the conclusion to grant the permit renewal, and the only explanation for that decision was the Presidential pardons, the Hammonds' (abbreviated) time spent in prison, and the civil damages paid. Zinke did not: (1) find that the Hammonds were in compliance with the terms of the permit and the governing rules and regulations; (2) explain why, if he now found that the Hammonds were in compliance, his finding was different than BLM's 2014 finding; (3) explain how, if the Presidential pardons were the basis of any new finding of compliance, they formed the basis of that finding; (4) address BLM's 2014 findings relating to conduct other than the conduct that supported the criminal convictions; or (5) explain how or why the Permit could issue if he was not finding that Hammonds were in compliance.

Defendants further argue that it is wholly within the discretion of the Secretary to determine whether a permittee has a "satisfactory record of performance" under 43 C.F.R. §§ 4110.1(b) and 4130.1-1(b)(1). Congress, however, has established the requirement that a permittee be "in compliance with the rules and regulations issued and the terms and conditions in the permit" before the Secretary can renew a permit. 43 U.S.C. § 1752(c); 43 U.S.C. § 315(b); *see also Hage*, 810 F.3d at 717. This requirement mandated by Congress "curtailed and qualified" the discretion of the Secretary. *Cf. Grimaud*, 220 U.S. at 521.

The agency has established that whether a permittee is in "substantial compliance" is to be determined by considering both "the number of prior incidents of noncompliance," and "the nature and seriousness of any noncompliances," recognizing that the ultimate aim of a BLM

decision regarding renewal is to use the record of performance "to confirm the ability" of a permittee "to be a [good] steward of the public land," and thus "to ensure that permittees . . . are good stewards of the land," thereby "protect[ing] [the land] from destruction or unnecessary injury and provid[ing] for orderly use, improvement, and development of resources." *Grazing Administration—Exclusive of Alaska (Final Rule)*, 60 Fed. Reg. 9894, 9925 (Feb. 22, 1995) (alterations added). The Secretary may not disregard governing statutes and agency regulations in making discretionary determinations. *See, e.g.*, *Erie Boulevard Hydropower, LP v. Fed. Energy Regulatory Comm'n*, 878 F.3d 258, 269 (D.C. Cir. 2017) ("It is axiomatic that an agency is bound by its own regulations. Therefore, if an agency action fails to comply with its regulations, that action may be set aside as arbitrary and capricious." (alteration, quotation marks, and citation omitted); *Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 841, 852 (9th Cir. 2003) (upholding challenge under the APA and finding that "[h]aving chosen to promulgate the [ ] policy, the [agency] must follow that policy"); *Friends of Richards-Gebaur Airport v. F.A.A.*, 251 F.3d 1178, 1195 (8th Cir. 2001) ("[A]n agency implementing a statute may not ignore . . . a standard articulated in the statute.").

The Department of Interior and the Secretary is obligated to follow statutory requirements and agency rules and regulations when making grazing determinations. *See Grimaud*, 220 U.S. at 521. Zinke did not perform an analysis of the Hammonds' number of prior incidents of noncompliance, the nature and seriousness of the incidents of noncompliance (particularly the incidents outside of the convictions), evaluate whether the Hammonds would be good stewards of the land, make a finding of whether the Hammonds were in compliance with the rules and regulations or terms of the 2004-2014 permit, or otherwise follow the directives of the governing statutes and regulations. Defendants' arguments that such findings were made or

were made "implicitly" are improper *post hoc* rationalizations. *Motor Vehicle Mfrs.*, 463 U.S. at 50 (noting that "courts may not accept appellate counsel's post hoc rationalizations for agency action" and that "[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself"). Accordingly, Plaintiffs have shown a likelihood of success on their claim that Secretary Zinke's decision was arbitrary and capricious and otherwise not in conformance with the law.

2. Agency Decisions and the GSG-ARMPA

Plaintiffs allege that Zinke and BLM's decision violated NEPA, including the particular NEPA analysis required by the 2015 GSG-ARMPA. Defendants argue that the 2015 GSG-ARMPA is not applicable to the Permit decision and that if it is, it was sufficiently complied with.

Defendants' first argument is that because the Hammond's original permit expired in 2014 and was renewed in 2019 based on changed circumstances that arose in 2018, the 2015 GSG-ARMPA amendment should not apply because it was not in effect in 2014 when the original permit expired. This argument is legally incorrect. *Ziffrin, Inc. v. United States*, 318 U.S. 73, 78 (1943) ("[A] change of law pending an administrative hearing must be followed in relation to permits for future acts. Otherwise the administrative body would issue orders contrary to the existing legislation."); *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 848 (1990), Scalia, J., concurring (noting that *Ziffrin* required the administrative agency "to apply current law (rather than the law in effect at the time of filing of the permit application) in determining whether the applicant was qualified to obtain a permit for future operations"); *Pentheny, Ltd. v. Gov't of Virgin Islands*, 360 F.2d 786, 790 (3d Cir. 1966) ("[An administrative] agency is required to act under the law as it stands when its order is entered."). This makes particular sense in the context of environmental assessments under NEPA and the GSG-

ARMPA. These are directed at agency *action* and are designed to help agency decisionmakers make fully informed decisions and determine the best course of action, and thus the relevant statutes and regulations under these laws would be those as of the time the decision (the relevant action) was made.

Defendants' argument not to apply the changed circumstance of the 2015 GSG-ARMPA also is contrary to their assertion that the agency could review and consider as benefit to the Hammonds the changed circumstances after 2014 (the pardons, the prison time, the civil penalties paid). Defendants must be consistent. If the Court and the agency are to consider the facts as they exist in 2019 when the agency decision was made, that would include the fact that the GSG-ARMPA was passed in 2015.

Defendants argue that the 2015 GSG-ARMPA was properly applied because it merely requires that the NEPA analysis include certain thresholds, and the agency did not need to prepare a NEPA analysis for the Permit. This issue is discussed below.

3. Agency Decisions and NEPA

Plaintiffs challenge Zinke's and BLM's actions as violating NEPA. Defendants argue that the agency was authorized to forego a NEPA analysis under laws allowing for a "NEPA exclusion" and that BLM complied with NEPA by issuing the CX.

a. Whether the agency could forego a NEPA analysis

Defendants contend that under the FLPMA, no NEPA analysis was required to be prepared before the Permit was renewed. Defendants then characterize this as a "NEPA exclusion." The FLPMA was amended on December 19, 2014, establishing that:

> (2) Continuation of terms under new permit or lease
>
> The terms and conditions in a grazing permit or lease that has expired . . . shall be continued under a new permit or lease until the date on which the Secretary concerned completes any

> environmental analysis and documentation for the permit or lease required under [NEPA] and other applicable laws.
>
> (3) Completion of processing
>
> As of the date on which the Secretary concerned completes the processing of a grazing permit or lease in accordance with paragraph (2), the permit or lease may be canceled, suspended, or modified, in whole or in part.

43 U.S.C. § 1752(c)(2)-(3) (emphasis omitted).[13]

Defendants are correct that under the FLPMA, a NEPA analysis is not required to be completed *before* a permit is renewed. This is not, however, an exemption or exclusion from the requirements of NEPA or other applicable laws. This provision merely allows for a "limited grace period" for the agency to conduct the required environmental analysis. *See WWP v. BLM*, 629 F. Supp. 2d 951, 970 (D. Ariz. 2009) (analyzing the nearly identical text of Section 325); *see also W. Watersheds Project v. Zinke*, 347 F. Supp. 3d 554, 558 (D. Idaho 2018) ("Thus, there is no repeal of environmental laws—the BLM is still required to meet the demands of NEPA, FLPMA, and the FRH regulations, but just not prior to the renewal of those permits.") (analyzing Section 325). After the required environmental review is completed, permits may then be canceled, suspended, or modified. Defendants' argument that they were subject to a "NEPA exclusion" is incorrect. Because Defendants do not argue, and the record does not support, that Defendants intend to conduct a NEPA analysis in the future, reliance on § 1752(c) does not refute Plaintiffs' likelihood of success on the merits of this claim.

[13] Before this amendment, a similar provision was contained in the terms of an appropriations rider, Sec. 325 of Pub. L. No. 108-108 (2003) ("Section 325"), which was in effect through 2014 through operation of Sec. 415 of Pub. L. No. 112-74 (2011), as amended and extended by Sec. 411 of Pub. L. No. 113-76 (2014).

b. Categorical exclusion

Plaintiffs allege that Zinke and BLM did not perform the proper NEPA analysis. As noted above, there is no evidence or argument that Defendants will conduct a NEPA analysis at a reasonable time in the future as authorized by § 1752(c)(2). Indeed, BLM issued the CX, which concluded that no further NEPA analysis was required. Thus, the question is whether Plaintiffs are likely to succeed on their claim that the CX violated NEPA and the GSG-ARMPA.

A CX is "a category of actions which do not individually or cumulatively have a significant effect on the human environment." 40 C.F.R. § 1508.4. The FLPMA authorizes the use of a CX for a grazing permit if "the issued permit or lease continues the *current* grazing management of the allotment." 43 U.S.C. § 1752(h)(1)(A) (emphasis added). The Secretary also must have found that the allotment meets all the Rangeland Health Evaluation standards, or if not, that it failed standards "due to factors other than *existing* livestock grazing." *Id.* § 1752(h)(1)(B)(ii)(1)(bb) (emphasis added). Finally, even if both of those two criteria are met, the Secretary may not use a CX if there are "extraordinary circumstances in which a normally excluded action may have a significant environmental effect." 40 C.F.R. § 1508.4. Such circumstances include when an action may cause "significant impacts on . . . ecologically significant or critical areas," or when an action may "[c]ontribute to the introduction, continued existence, or spread of noxious weeds or non-native invasive species." 43 C.F.R. § 46.215(b), (l).

BLM found that the Permit qualified for a CX and that no extraordinary circumstances were present. Defendants simply state that the Court should defer to BLM's findings in the CX, without providing further argument, evidence, or authority. At the time that the CX was issued, however, the four allotments had not been grazed in at least five years. Thus the "current" grazing management was no grazing and the "existing" grazing was none. BLM did not explain in the CX how the Permit met the requirements of § 1752(h)(1)(A) when there was no "current"

grazing that the Permit maintained, or of § 1752(g)(1)(B)(ii)(1)(bb) when at the time of the most recent Rangeland Health Evaluation finding that grazing had not caused the failure of the standards there had not been grazing for years.

Amicus Oregon Farm Bureau Federation ("OFBF") cites *Wildearth Guardians v. U.S. Forest Service* to support the argument that BLM's finding that the Permit continues current grazing practices is likely to be upheld on review on the merits. 668 F. Supp. 2d 1314 (D.N.M. 2009). The court in *Wildearth*, however, noted that the relevant agency regional office had defined "current grazing management" as management implemented over the last three to five years. *Id.* at 1327. Where no current management plan is in place, then only the "implementation or modification of minor management practices, facilities, and improvements may be categorically excluded." *Id.* The court further recognized that the agency could implement "adaptive management flexibility that has been responsive to needed adjustments in permitted actions" based on changed circumstances. *Id.* at 1328. The management over the last three to five years of the Mud Creek and Hardie Summer allotments was no grazing. Allowing grazing from no grazing is not a "minor" management plan and is not indicative of "adaptive management flexibility" that is responsive to new circumstances.

OFBF also argues that allowing the CX is consistent with the legislative history of the appropriations riders and subsequent amendment to the FLPMA that allows for such exclusions. OFBF notes that permitting a CX in permit renewals was intended to make the environmental review process more efficient for allotments where the level of complexity of environmental issues is "negligible" and that applies in to this CX. This conclusion, however, puts the cart before the horse. The problem with BLM not having conducted an EA or EIS on the allotments, particularly after the 2015 GSG-ARMPA was passed, is that is unknown whether the level of

complexity of environmental issues in negligible on these allotments. To the contrary, they have a history of failing at least Standard 5, which indicates that there are environmental concerns.

In analyzing whether extraordinary circumstances exist, BLM provided brief, conclusory rationale. Regarding the effect on migratory birds and on ecologically significant or critical areas, BLM stated: "The proposed action to continue livestock grazing as it currently exists would not alter any of the available landscape; there would be no effect to migratory birds or their habitat." ECF 7-4 at 3. Regarding the spread of noxious weeds or non-native invasive species, BLM stated: "Noxious weeds are known to be present in and in close proximity to these allotments. Treatments are on-going. The weeds are currently not present in sufficient quantity to be considered a significant impact in these allotments." *Id.* at 5. BLM did not, however, analyze how or whether grazing would affect the treatment of these noxious weeds or the spread of these "known" weeds. BLM also did not address invasive grasses,[14] even though the 2018 Rangeland Health Evaluations specifically found that the allotments failed Standard 5 in part because of annual invasive grasses. ECF 21-2 at 3; ECF 39-2 at 3; ECF 39-3 at 4; *see also* ECF 22 at 10 (Ms. McCormack stating in her first declaration that the assessed allotments were found in 2018 to fail Standard 5 because of "western juniper presence, lack of sagebrush, and annual invasive grass contributing to risk of future wildfire as it relates to Greater sage-grouse"); ECF 23 at 7 (Mr. Matthew Obradovich stating in his first declaration that the assessed allotments were found in 2018 to fail Standard 5 "due to the persistence of juniper, the increase in invasive annual

[14] It is unclear whether BLM considered the invasive grasses to be "noxious weeds." It does not appear so, because the noxious weeds were noted not to have a substantial impact and the invasive grasses were found to be a reason the allotments failed Standard 5. Even if the invasive grasses and noxious weeds were considered the same thing, as discussed, BLM did not sufficiently analyze this category.

grasses and the continued lack of sagebrush where it had been eliminated in the 2006 Granddad Fire").

Contrary to Defendants' argument, the Court gives only limited deference to an agency's conclusory opinion that is unsupported by meaningful analysis. *See Garcia v. Holder*, 659 F.3d 1261, 1267 (9th Cir. 2011) ("Where the [the agency's] decision does not give thorough reasoning, but instead is conclusory or lacks meaningful analysis, we give that decision only limited deference."); *Guevara v. Holder*, 649 F.3d 1086, 1091 (9th Cir. 2011) (giving only "some deference" to an agency opinion that "lacks a thorough and meaningful analysis"). Plaintiffs have shown a likelihood of success on the merits on their claim that BLM's issuance of the CX violated NEPA.

B. Likelihood of Irreparable Harm

Plaintiffs allege that they are likely to suffer irreparable harm before this case is resolved on the merits if grazing is not enjoined from harm to sage-grouse and redband trout, harm from the procedural violation of Defendants' failure to comply with NEPA, and harm to Plaintiffs' personal interests in the use and enjoyment of the allotments in their ungrazed state. Defendants and OFBF argue that Plaintiffs fail to demonstrate with sufficient likelihood that they will suffer irreparable harm based on the following: (1) the Rangeland Health Evaluations BLM conducted on the allotments; (2) the evidence from Defendants' experts; (3) the history of grazing on the allotments; and (4) the fact that the land can recover from grazing and thus harm is not irreparable. The Court first addresses Defendants' evidence and then considers the harm alleged by Plaintiffs.

1. Defendants' Evidence

a. Rangeland Health Evaluations

BLM's 2018 Rangeland Health Evaluation on the Mud Creek and Hardie Summer allotments concluded that neither met Standard 5 relating to species. According to BLM, these allotments failed the standard because of fire damage, juniper encroachment, and invasive grasses. BLM found that Mud Creek was suitable for sage-grouse leking and brood rearing and that Hardie Summer was had suitable year-round conditions for sage-grouse habitat. The sage-grouse habitat was rated as "marginal."

The Rangeland Health Evaluation, however, is not an analysis of harm to species or habitat by the proposed action. Nor is it a comprehensive analysis of the type required by NEPA. The Mud Creek analysis involved a review of only three of the 8,200 acres (0.00036 percent) and the Hardie Summer analysis involved a review of only three of the 6,000 public acres (0.001 percent). The 2018 Hardie Summer and Mud Creek evaluations specifically acknowledged that an Assessment, Inventory, and Monitoring project was ongoing and that the analysis relating to sage-grouse and its habitat required the completion of the collection of data, expected by 2020. The Rangeland Health Evaluations also do not analyze the effects of the grazing authorized in the Permit on redband trout or sage-grouse or their habitat. Rangeland Health Evaluations are not an evaluation of a proposed action, but "are expressions of the physical and biological condition or degree of function necessary to sustain healthy rangeland ecosystems." *Standards for Rangeland Health and Guidelines for Livestock Grazing Management for Public Lands Administered by the Bureau of Land Management in the States of Oregon and Washington*, at 3 (August 12, 1997).

Additionally, the Rangeland Health Evaluations did not consider the cumulative impacts of grazing on the four allotments but instead assessed each allotment individually. A NEPA

analysis of these allotments likely would require consideration of cumulative impacts, which might reveal environmental effects that an individual analysis does not. *See Watersheds Project v. Bennett*, 392 F. Supp. 2d 1217, 1223-24 (D. Idaho 2005), *modified in part sub nom. W. Watersheds Project v. Ellis*, 803 F. Supp. 2d 1175 (D. Idaho 2011) (rejecting a cursory analysis in an EA involving grazing allotments that did not include a detailed cumulative impact analysis); *W. Watersheds Project v. Rosenkrance*, 2011 WL 39651, at *12 (D. Idaho Jan. 5, 2011) ("BLM's rangeland health assessment process may complement NEPA; it does not displace NEPA's requirement that BLM take a 'hard look' at the cumulative impacts of a proposed action."). They also not evaluate factors such as connectivity to neighboring leks. Simply put, "BLM's rangeland health assessments are not NEPA documents." *Rosenkrance*, 2011 WL 39651, at *12.

Defendants did not perform an EIS or even an EA on the allotments. Defendants' reliance on the Rangeland Health Evaluations as evidence that the proposed grazing will not cause harm to species or habitat is misplaced because those evaluations serve a different purpose and perform a different analysis.

b. Evidence from Defendants' experts

Defendants' expert Mr. Obradovich relies on the Rangeland Health Evaluations as providing "a sound basis" for concluding that the grazing allowed from 2004-2014 was not excessive or improper. As discussed above, these evaluations are not a sufficient basis to conclude that the proposed grazing will not now cause irreparable harm. Mr. Obradovich also opines that because the number of sage-grouse males increased on the leks on Mud Creek between 1995 and 2005, grazing must not be causing harm that led to the reduction in sage-grouse after 2006. This, however, does not take into account the cumulative effect of the harm from the fire in 2006 plus grazing on the allotment after the fire. Mr. Obradovich did not discuss,

as Plaintiffs' experts do, how an ecological system that could handle a certain level of grazing before a fire cannot handle that same level of grazing after a fire. *See, e.g.*, *Dyer*, 2009 WL 484438, at *27 (ordering, when sensitive species including sage-grouse were involved, that after a fire "BLM must abandon the grazing-as-usual model used in the 2008 authorizations, and modify grazing levels and seasons-of-use in the unburned areas"). Additionally, as Mr. Obradovich notes, climate change and other ecological factors affect sage-grouse. BLM did not evaluate the proposed grazing in combination with those other factors.

Ms. McCormack also relies on the Rangeland Health Evaluations as "demonstrate[ing] livestock have been grazing properly over time." ECF 22 at 13; *see also* ECF 40 at 14. She concludes that continuing grazing at the same levels means continuing land management "that has helped facilitate and allowed for improved riparian areas in these allotments between at least 1980 and 2014." ECF 22 at 14; *see also* ECF 40 at 17. She emphasizes improvements to the riparian areas of the Hammond and Mud Creek allotments, because cattle do not have much access to those areas (unlike in the Hardie Summer riparian areas).

In their declarations, both of these experts also generally discuss the benefits of "properly managed" grazing, but neither analyze what properly managed grazing would be on these particular allotments given their current states—post-fire, with current vegetation levels, with the current status of sage-grouse and redband trout and their habitat, with current climate conditions, and in light of other ecological factors. Defendants' experts discuss the recent historical grazing practice as if that necessarily is a model of what is "proper" grazing. Determining proper grazing, however, is what a NEPA analysis is for. It allows BLM to analyze the environmental effects of a proposed action and to consider alternatives to that action. At this point, BLM does

not know the environmental effects of the proposed grazing on the allotments as they stand today or alternative levels of grazing because that analysis was not performed.

Ms. Lindsay Davies relies on Proper Functioning Conditioning ("PFC") assessments from 1999 and 2006 when grazing was active as supporting that grazing will not harm riparian conditions. Those evaluations, like Rangeland Health Evaluations, are not comprehensive. Indeed, BLM has specifically explained in describing the function of a PFC that it is not intended to evaluate fish habitat. The PFC Technical Reference guide states:

> A PFC assessment provides fundamental information regarding the physical function and condition of the riparian area; however, additional information is often needed to obtain a comprehensive assessment of riparian condition. Fish or wildlife habitat and water quality assessments are examples of additional resource assessments that may be needed to characterize overall riparian condition in preparation for subsequent activities. Often these assessments can be done simultaneously with the PFC assessment.

ECF 42-2 at 16.

Additionally, the 1999 and 2006 PFCs do not include current conditions such as the effects of climate change and fire. In other words, if the ecological condition of the riparian areas, including stream temperatures, are stressed by factors such as climate change and higher temperatures in recent years, or neighboring areas that have been and have not yet recovered, then adding grazing may cause harm that was not previously present when the earlier assessments were completed. Courts also have questioned the weight that PFC assessments and experts relying on them or their methodology should be given when assessing the status of riparian areas. *See, e.g.*, *Oregon Nat. Desert Ass'n v. U.S. Forest Serv.*, 2004 WL 1293909, at *7 (D. Or. June 10, 2004) ("[T]he PFC method is a *qualitative* method. Rhodes cites to numerous sources which question the usefulness of the methodology because it is considered highly subjective." (emphasis in original)); *Oregon Nat. Desert Ass'n v. Singleton*, 47 F. Supp. 2d 1182,

1190 (D. Or. 1998) (noting that a PFC "does not reveal how 'properly functioning riparian areas' or 'at risk' areas correspond to the requirements of the [Wild and Scenic Rivers Act]," which is to protect and enhance the river's "outstandingly remarkable values").

Ms. Davies also relies on the Oregon Department of Fish and Wildlife's 2018 Draft Malheur Lakes Redband Conservation Plan ("Draft Redband Conservation Plan"), which included a population risk assessment of the population that includes the redband trout in the allotments as being at "low risk" of extinction. This Draft Redband Conservation Plan, however, described the headwater streams as "close to pristine and capable of supporting a healthy population of redband trout." Ms. Davies does not discuss whether grazing on the allotments would affect the "close to pristine" streams and if so whether it would affect population of redband trout on the allotments. Additionally, the fact that a population is "robust" does not mean that grazing will not negatively affect the population's habitat. Moreover, the draft document discussed the entire population in the relevant region, not the specific population on the streams in the allotments or whether affecting those populations would have a cumulative effect on the populations in the region.

c. Past grazing

The fact that there was grazing in the past does not mean that Plaintiffs cannot demonstrate likely irreparable harm. This is so for several reasons. First, there is nothing in the record to indicate that BLM has ever performed an EA or EIS on the proposed grazing, and thus the previous grazing may have been causing irreparable harm to sage-grouse and redband trout without BLM's knowledge. Second, circumstances have changed since the previous grazing, including both climate change causing increased temperatures and the passage of the GSG-ARMPA requiring additional protection for sage-grouse.

d. Ability of the allotments eventually to recover

OFBF argues that because the allotments will eventually recover, including the recovery Plaintiffs argue has been made during the last five years, any harm from grazing is not irreparable. OFBF misinterprets "irreparable" harm. Harm is "irreparable" when it cannot "be adequately remedied by money damages and is often permanent or at least of long duration." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987). Although sagebrush may recover within 50 to 100 years and riparian areas take 20 years to recover, that does not mean that harm to this habitat is not irreparable. Trees can be replanted and will grow and yet logging is regularly found to be irreparable harm. *See, e.g.*, *Connaughton*, 752 F.3d at 764 ("Neither the planting of new seedlings nor the paying of money damages can normally remedy such damage. The harm here, as with many instances of this kind of harm, is irreparable for the purposes of the preliminary injunction analysis."). Moreover, harm to the redband trout and sage-grouse themselves may also be irreparable harm.

2. Likely Harm to Sage-Grouse

Livestock grazing is likely to cause destruction of sage-grouse habitat. *Dyer*, 2009 WL 484438, at *11, *13. "Livestock can also trample or disturb [sage-grouse] nests and cause nesting females to flush from the nest, revealing the eggs to nest predators such as ravens." ECF 41 at 7 (Obradovich Second Declaration). Sage-grouse have been reported by BLM employees on both Mud Creek and Hardie Summer allotments. Both of these allotments failed Standard 5 relating to species.

The South Bridge Creek lek on the Mud Creek allotment has declined to only two males and the North Bridge Creek leks also have been declining, and one is now unoccupied. Plaintiffs have shown that it is likely that these already fragile populations are exposed to greater risk if grazing is recommenced. Plaintiffs' expert opines that grazing on the Mud Creek allotment will

likely lead sage-grouse to abandon the South Bridge Creek lek and it may affect the North Bridge Creek leks as well. Defendants' expert agrees that there is connectivity between the Mud Creek allotment and the surrounding allotment. Thus, harm to this lek is likely to affect neighboring leks.

The U.S. Fish & Wildlife Service recognizes that high grass cover is "critical for reproductive success" in sage-grouse and that "the average nest success for sage-grouse in habitats where sagebrush has not been disturbed is higher than for sage-grouse in disturbed habitats." U.S. Fish & Wildlife has recognized that high grasses, in and of themselves, can serve as nesting habitat for sage-grouse. Grasses are more important from April through August during a critical nesting time period.

The Mud Creek and Hardie Summer allotments suffer from cheatgrass invasions after the fire. "Livestock grazing is one vector by which cheatgrass and other invasive weeds are spread into and then displace native vegetation." *Dyer*, 2009 WL 484438, at *11; *see also Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 229 F. Supp. 2d 1140, 1148 (D. Or. 2002) (noting that the "increasing spread of noxious weeds[,] especially by cattle" needed to be considered in a new EIS). Cheatgrass also reduces the likelihood of sagebrush recovery and increases the risk of fire. *Dyer*, 2009 WL 484438, at *7, 10-11.

Plaintiffs' expert Dr. Clait E. Braun opines that the added stressor of grazing on the allotments could extirpate the local sage-grouse population, harming connectivity with adjacent, larger sage-grouse populations. Plaintiffs' expert also discusses the importance of the lek located on the Mud Creek allotment, the danger to hens and chicks in June-August that are likely nesting, and the importance of high grasses and forbs to hens and chicks.

Defendants' expert Mr. Obradovich states that he has seen females coming to breed in the lek on the Mud Creek allotment. Defendants' expert notes generally that sage-grouse avoid areas with greater than four percent juniper, although he does not state that any particular area of the Mud Creek allotment has greater than four percent juniper. He also states generally that the nearest "suitable" sagebrush for nesting is three miles from the Mud Creek lek. He does not, however, state that he has not observed any nesting on the Mud Creek allotment. High grasses can also provide habitat for nesting.

When Plaintiffs' expert Dr. Braun visited the Hardie Summer allotment, he saw two sage-grouse. BLM employees also reported in June 2018 that sage-grouse use that allotment. The Hardie Summer allotment is of particular importance because it has the "best" sage-grouse habitat after the 2006 fire set by the Hammonds. The months of July and August are an important period for rearing sage-grouse young, and livestock disturbance during these months can cause irreparable harm to nests, hens, and chicks.

The Court considers the known damage caused by livestock, risk to nests, hens, and chicks in the next few months, fragile state of the Mud Creek lek, importance of the remaining sage-grouse habitat on the Hardie Summer allotment after the 2006 fire, fact that the allotments contain areas designated as PHMAs and GHMAs, and fact that a single grazing season with too much grazing is likely to eliminate the ecological gains of the last five years on the Hardie Summer allotment. In light of these factors, Plaintiffs have shown likely irreparable harm to sage-grouse and their habitat from the grazing authorized in the Permit.[15]

[15] The Court disagrees with OFBF's argument that even if the Mud Creek lek is extinguished and the sage-grouse on these allotments perish it is insufficient to demonstrate irreparable harm because Plaintiffs do not demonstrate harm to the entire species. First, Plaintiffs have shown that extinguishment of the Mud Creek lek will affect neighboring leks. Second, Plaintiffs do not need to show irreparable harm at the species level. "Irreparable harm should be

Plaintiffs fail to meet their burden, however, of showing irreparable harm from a single grazing season under Defendants' amended grazing proposal of a 30 percent utilization standard on the Hardie Summer pastures other than the Fir Creek pasture, which would be rested. Plaintiffs' expert Dr. Braun testified that 30 percent utilization on the Hardie Summer allotment would be "proper" and would not cause irreparable harm. All of Defendants' experts who testified at the evidentiary hearing opined that 30 percent utilization (and higher) would not cause irreparable harm.

The only expert to testify that the proposed 30 percent utilization on the Hardie Summer allotment would cause irreparable harm was Plaintiffs' expert Dr. J. Boone Kauffman. After considering all of the testimony and evidence submitted by the parties, the Court finds the evidence more persuasive that one season of 30 percent utilization on the Hardie Summer allotment other than the Fir Creek pasture is not likely to cause irreparable harm to sage-grouse. This is because of the current good condition of much of the allotment, the presence of sagebrush habitat on the allotment that is available to sage-grouse and is not likely to be where the cattle will graze, the reduced level of utilization likely allows for sufficient grasses and forbs for both cattle and sage-grouse, and the reduced level of utilization is less likely to increase the spread of cheatgrass.

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determined by reference to the purposes of the statute being enforced." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 818 (9th Cir. 2018). One purpose of the FLPMA is to protect ecological resources such as species, the purpose of the GSG-ARMPA to conserve the sage-grouse, and one purpose of the Steens Mountain CMPA is the conservation of species. When protection of species is a purpose, this may be done in incremental steps. *Id.*; *see also Nat'l Wildlife Fed. v. Burlington N. R.R.*, 23 F.3d 1508, 1512 n.8 (9th Cir. 1994) (discussing with approval a case in which only three to nine grizzly bears would have been killed as sufficient to support an injunction under the ESA).

3. Likely Harm to Redband Trout

Livestock grazing is known to cause harm to riparian habitat. *Oregon Wild, v. Constance Cummins*, 239 F. Supp. 3d 1247, 1277 (D. Or. 2017); *Oregon Nat. Desert Ass'n v. Tidwell*, 716 F. Supp. 2d 982, 991 (D. Or. 2010). The riparian areas in Hardie Summer are accessible to livestock.

Defendants' expert Dr. Tamzen K. Stringham and Plaintiffs' expert Dr. Kauffman both discuss how willow trees in the riparian area currently show a normal growth instead of the "mushroom shape" caused by grazing. They disagree over whether the willows were previously affected by grazing and previously had a "mushroom shape." The Court finds the evidence persuasive that the willows were previously affected by grazing. Ms. Stringham relies on the previous PFCs to generally conclude that reintroducing grazing would not negatively affect the ecosystem function gains of the last five years. She does not address the changed circumstances or the fact that PFCs do not analyze fish habitat. As discussed above, the Court does not give much weight to the PFCs because they do not analyze fish habitat or effects on fish species in the same manner as does a NEPA analysis.

The Court is persuaded by the testimony of Plaintiffs' experts that the riparian areas of the Hardie Summer allotment are likely to face irreparable harm if the permitted grazing is allowed to commence. As discussed above, the assessments conducted by BLM and relied on by Defendants' experts did not address the same issues. In light of the significant harm to riparian habitat that cattle can cause, the sensitive status of redband trout, and the current status of the Hardie Summer allotment's recovery, Plaintiffs have demonstrated a likely irreparable harm to redband trout and their habitat with the permitted grazing.

Plaintiffs have not, however, demonstrated a likely irreparable harm to redband trout and their habitat with the proposed reduced grazing plan. As discussed in the section relating to harm

to sage-grouse, the amended grazing plan rests the Fir Creek pasture, which contains a large portion of Little Fir Creek. The remaining four pastures will be grazed at 30 percent utilization, which most of the experts opined will not cause irreparable harm given the current amount of available vegetation on the Hardie Summer allotment. The evidence shows that there is sufficient vegetation to support cattle and not place the riparian zones in jeopardy at the reduced level of grazing.

The Court has some concern, however, with the fact that the grasses and forbs will be dying during the proposed grazing and the riparian areas will become more attractive to cattle. The Court also is concerned with HRI's history of noncompliance, including apparently grazing beyond authorized AUMs, and BLM's recent history of lax enforcement of permit terms with this permittee and changing permit terms on the fly, without proper documentation and without following required procedures, such as what occurred at the beginning of this grazing season on the Hammond allotment. Accordingly, the Court will require BLM to monitor at least once per month of the grazing season (July, August, and September) the actual usage on the Hardie Summer allotment and the condition of a sample of the grazed riparian areas, and to file with the Court within two weeks after the close of the permitted season on the Hardie Summer allotment a report of the findings. Defendants will also be required to file the Actual Grazing Use Reports completed by HRI for the Mud Creek and Hardie Summer allotments.

4. Likely Harm to Plaintiffs' Members' Personal Use and Enjoyment

Plaintiffs allege that their members will suffer irreparable harm in the loss of their personal use and enjoyment of the allotments in their ungrazed state. Defendants do not respond to this allegation. OFBF argues that this harm is *de minimus* and insufficient to support an injunction because the allotments constitute a small part (39 square miles) of the surrounding 5,125 miles. OFBF does not specify whether that surrounding 5,125 miles is public

or private land, and thus whether it would be accessible to Plaintiffs for to view, experience, use, and enjoy.

The Ninth Circuit has held that loss of the ability to view, experience, and use a forested area in its undisturbed state, even though there were significant other forested areas available, sufficed to allege irreparable harm for a preliminary injunction. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). *Cottrell* involved the harvesting of 1,652 acres of forest, and the Ninth Circuit concluded the ability to view, experience, and utilize that amount of acreage was not *de minimus*. *Id.* The allotments here total 15,800 acres, and the loss of the ability to enjoy them if they are irreparably harmed is not *de minimus*.[16] Because the Court has found grazing at the permitted level is likely to cause irreparable harm to the allotments, Plaintiffs have shown a likely irreparable harm from the loss of their ability to view, experience, use, and enjoy the allotments if grazing is allowed at the level in the Permit. Because the Court has found grazing at the proposed reduced level is not likely to cause irreparable harm to the allotments, Plaintiffs have not shown a likely irreparable harm in their ability to view, experience, use, and enjoy the allotments if grazing is allowed at the reduced level.

5. Likely Harm from NEPA Violation

Plaintiffs argue that they have shown a likelihood of irreparable injury from Defendants' alleged violation of NEPA. When a court finds a likelihood of success on the merits of a NEPA claim coupled with likely environmental harm (as the Court finds in this case with grazing at the permitted level), the NEPA violation generally is found to rise to the level of irreparable harm

[16] Because short-term grazing is different than harvesting trees in a forest, the Court finds that the loss of use and enjoyment analysis turns on whether the grazing would itself harm the allotment. Otherwise, a plaintiff's subjective statement that he or she desires to use and enjoy an ungrazed parcel of land would suffice for a finding of irreparable harm.

supporting preliminary injunctive relief. *See, e.g.*, *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 24 (D.D.C. 2009) ("When a procedural violation of NEPA is combined with a showing of environmental or aesthetic injury, courts have not hesitated to find a likelihood of irreparable injury.") (citing cases); *cf. Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989); *Sierra Club v. U.S. Army Corps of Eng'rs*, 990 F. Supp. 2d 9, 40-41 (D.D.C. 2013). This is because

> [t]he NEPA duty is more than a technicality; it is an extremely important statutory requirement to serve the public and the agency *before* major federal actions occur. If plaintiffs succeed on the merits, then the lack of an adequate environmental consideration looms as a serious, immediate, and irreparable injury. Although the *balancing* of this harm against other factors is necessarily particularized, the injury itself is clear.

Found. on Econ. Trends v. Heckler, 756 F.2d 143, 157 (D.C. Cir. 1985) (emphasis in original) (citations omitted).

The First Circuit made a similar point in *Marsh*:

> NEPA is not designed to prevent all possible harm to the environment; it foresees that decisionmakers may choose to inflict such harm, for perfectly good reasons. Rather, NEPA is designed to influence the decisionmaking process; its aim is to make government officials notice environmental considerations and take them into account. Thus, *when a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered*. . . . Moreover, to set aside the agency's action at a later date will not necessarily undo the harm. The agency as well as private parties may well have become committed to the previously chosen course of action, and new information—a new EIS—may bring about a *new* decision, but it is that much less likely to bring about a *different* one. It is far easier to influence an initial choice than to change a mind already made up.
>
> It is appropriate for the courts to recognize this type of injury in a NEPA case, for it reflects the very theory upon which NEPA is based—a theory aimed at presenting governmental decision-makers with relevant environmental data *before* they commit themselves to a course of action. This is not to say that a likely

> NEPA violation automatically calls for an injunction; the *balance* of harms may point the other way. It is simply to say that a plaintiff seeking an injunction cannot be stopped at the *threshold* by pointing to additional steps between the governmental decision and environmental harm."

Marsh, 872 F.2d at 500 (emphasis in original).

Because the Court has found likely irreparable environmental harm with grazing at the level authorized in the Permit, Plaintiffs have shown likely irreparable harm from Defendants' alleged NEPA violations. Because, however, Plaintiffs have not shown likely irreparable environmental or aesthetic harm at Defendants' proposed alternative reduced grazing level, in considering grazing at that level, Plaintiffs have not shown likely irreparable harm from Defendants' alleged NEPA violations.

C. Balancing the Equities

In weighing equities, a court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24 (citation omitted). When the government is the defendant, generally the balancing of the equities and the public interest factors merge. *See, e.g.*, *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 766 (9th Cir. 2014). Because there are interests of a third party (HRI) and *amici*, however, the Court finds it appropriate to consider these factors separately. *Id.* (considering the factors separately in light of the intervenors' interests).

Defendants present the same arguments, in almost the identical format, that they presented in opposing Plaintiffs' motion for a temporary restraining order. The Court rejects those arguments for the same reasons the Court discussed in its TRO Opinion. *W. Watersheds Project v. Bernhardt*, 2019 WL 2372595, at *14-16 (D. Or. June 5, 2019). The Court adds that

the fact that vegetation can "grow back" does not change the balance of equities. The irreparable harm alleged by Plaintiffs is not the short-term loss of vegetation eaten by cattle.

Defendants also raise a new argument that there is an additional equitable consideration relating to the fire danger that will be created if cattle are not permitted to graze in the allotments. This argument is more appropriately considered in the public interest factor. *See Connaughton*, 752 F.3d at 766. The Court finds that the balance of the equities tips in favor of Plaintiffs.

D. Public Interest

When determining the public interest, a court "primarily addresses impact on non-parties rather than parties." *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 766 (9th Cir. 2014) (quoting *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 947 (9th Cir. 2002). When the alleged action by the government violates federal law, the public interest factor generally weighs in favor of the plaintiff. *See Valle del Sol*, 732 F.3d at 1029; *see also Inland Empire-Immigrant Youth Collective v. Nielsen*, 2018 WL 1061408, at *21 (C.D. Cal. Feb. 26, 2018) ("In addition, the Court again notes the public interest that exists in ensuring that the government complies with its obligations under the law and follows its own procedures." (quotation marks omitted)); *Coyotl v. Kelly*, 261 F. Supp. 3d 1328, 1344 (N.D. Ga. 2017) ("[T]he public has an interest in government agencies being required to comply with their own written guidelines instead of engaging in arbitrary decision making.").

Defendants argue that because the underlying statutes governing the use of Steens Mountain and public resources support "grazing," as well as other uses, Plaintiffs fail to show that the public interest favors a preliminary injunction. The statutes also, however, support conservation. Thus, considering the purposes of those statutes is not particularly helpful in

evaluating the public interest factor. Because NEPA's purpose has not been met, however, considering statutory goals and purposes tips slightly in favor of granting a preliminary injunction.

Defendants also argue that a preliminary injunction will cause an increased fire danger, which is contrary to the public interest. Defendants' experts Ms. McCormack and Mr. Obradovic submitted declarations that briefly address this issue. Defendants also submitted the declaration of lay witnesses Fred I. Otley, a neighboring ranch owner and President of the Steens Mountain Landowners Group ("SMLG"), and Ruth E. Danielsen, a neighboring property owner, the Steens Mountain Private Property Landowner Representative on the Steens Mountain Advisory Council, and a member of SMLG. *Amicus* Harney County submitted the declaration of lay witness Mark Owens, County Commissioner for Harney County.

A claim of increased fire danger is given great weight when the claimed danger is "imminent or the danger has begun." *Connaughton*, 752 F.3d at 766. "Without evidence of an imminent threat . . . the inability to mitigate such risks for a temporary period" generally does not outweigh other public interests. *Id.*; *Accord Bark v. United States Forest Serv.*, 2019 WL 2344771, at *3 (D. Or. June 3, 2019) (distinguishing *Connaughton* because the parcels at issue "are assigned a high wildfire risk rating, and have a moderate to high risk of stand replacing wildfire" (quotation marks omitted)).

Defendants' expert declarations and testimony at the hearing do not support a finding that there is an imminent risk of increased fire danger, particularly on the Hardie Summer allotment where the proposed grazing would predominately occur. Ms. McCormack does not state that a lack of grazing by HRI in any of the allotments during the time period of a preliminary injunction would increase fire danger. She merely discusses generally that grazing, when

"properly prescribed" can have beneficial effects and discusses general research indicating that "[p]roperly managed livestock grazing can decrease risk, size, and severity of wildfires and decrease the risk of post-fire exotic annual grass invasion." ECF 40 at 15 (citation omitted). Mr. Obradovich states that "the *potential* exists in the absence of grazing for fine fuels such as grasses, both native and invasive annuals, *to accumulate over several years* of growth to the point where the accumulation *becomes* a hazard that would readily carry a more intense fire." ECF 41 at 8 (emphasis added). Mr. Obradovich's declaration is speculative and describes a risk that might occur in the future, not a risk that is currently present or imminent. At the hearing, Mr. Obradovich's testimony was similarly general in nature and did not describe a currently present or imminent fire danger. Dr. Tamzen Stringham testified that she did not see any cheatgrass on the Hardie Summer allotment and that there is low risk that cheatgrass can become dominate on that allotment based on its ecological characteristics. She expressed no concern about fire danger on that allotment. She testified generally regarding fine fuels and fire risk but not specifically with respect to the Mud Creek (or Hardie Summer) allotment. Her concern regarding the Mud Creek allotment was that without grazing cheatgrass would "maintain control" of the allotment.

Defendants' and Harney County's lay witnesses describe general concerns regarding increased fuels from lack of grazing and that this causes an increase in the risk of a "catastrophic" fire.[17] Plaintiffs, however, provide expert testimony that grazing increases the risk of fire by exacerbating the spread of cheatgrass. ECF 29 at 5; ECF 59 at 20-21; *see also Dyer*, 2009 WL 484438, at *7, *11 (finding that "[t]he increased flammability of cheatgrass

[17] Mr. Otley and Ms. Danielsen's declarations also include improper legal conclusions and expert opinions, which the Court disregards.

causes increased fire intensity and frequency," "[t]he proliferation of annual invasive grasses (notably cheatgrass) is one of the leading causes of the heightened fire danger," and "[l]ivestock grazing is one vector by which cheatgrass and other invasive weeds are spread into and then displace native vegetation"). Defendants' expert Mr. Obradovich also testified at the hearing that grazing is a vector by which cheatgrass can be spread. Additionally, the significant fire in 2006 (more likely than not set by the Hammonds), occurred after decades of grazing.

Further, BLM specifically found that by denying the permit renewal to HRI, "the Hammonds will no longer have the economic incentive to burn public land allotments without authorization and endanger people." ECF 7-2 at 17. Thus, BLM concluded that not renewing the permit reduced the danger that the Hammonds would set more fires. In any event, the evidence does not show that the claimed increase risk of fire danger is imminent.

Defendants also argue that considering the harm to non-party HRI should result in the Court finding that the public interest factor does not support issuing a preliminary injunction. The Court discussed the harm to HRI in the TRO Opinion. *W. Watersheds*, 2019 WL 2372595, at *15-16. Defendants offer no new argument or evidence that persuades the Court to change that analysis.[18] Defendants simply argue that the harm to HRI is greater with a preliminary injunction than with a TRO. At the TRO stage, however, the Court had analyzed HRI's harm considering the cost of replacement grazing from June 1 through October 30, not the cost of replacing four weeks of grazing (the term of the TRO). The harm to HRI is now *less*, because HRI has grazed cattle for more than three months at a much higher level of AUMs than authorized in the Permit,

[18] The Court disagrees with Defendants that the requested injunction is mandatory versus permissive. The requested injunction would *preclude* grazing from *commencing* on the Mud Creek or Hardie Summer allotments this year. The injunction would not require the round up and removal of cattle from any allotment. The cattle simply would not be allowed to be moved onto the Mud Creek or Hardie Summer allotments.

due to BLM's "calculation error." Furthermore, limiting the injunction to only grazing above Defendants' alternative proposed grazing plan reduces the potential harm to HRI, because some grazing will be allowed on the Hardie Summer allotment. Moreover, during the previous years when HRI could not graze on federal land, the U.S. Department of Agriculture paid HRI a significant increase in subsidies, indicating that such subsidies may be available to counter the economic harm caused by a reduced ability to graze on federal land. ECF 57-6. For example, from 2010-2013, the last four years of the previous grazing permit, HRI received a total of $84,065 in subsidies. From 2014-2017, the first four years in which the permit was denied, HRI received a total of $587,590 in subsidies, an increase of more than $500,000. *Id.*

Harney County expresses concern about the potential public impact on other grazing permittees arising from the legal precedent of enjoining in the "middle" of the grazing "season." As the Court discussed in its TRO Opinion, the facts here are unique. *W. Watersheds*, 2019 WL 2372595, at *15. Despite repeated requests, Defendants refused to provide Plaintiffs with the Permit and CX until *after grazing began*. These documents were necessary for Plaintiffs to file a motion for preliminary injunctive relief, particularly given the evidentiary burden on Plaintiffs to obtain such relief. Thus, Plaintiffs were unable to file their motion before the grazing season began due to Defendants' behavior. Denying the motion on the grounds that it was filed after grazing began would reward Defendants for their behavior and may encourage Defendants to repeat this behavior as a strategy to prevail against future motions for preliminary injunctive relief. Additionally, grazing has not yet begun on the Mud Creek and Hardie Summer allotments, and thus grazing is not ongoing (or "in the middle") on those allotments.

Harney County also expresses concern that an injunction would exacerbate tensions in the local community regarding federal land management. Harney County notes that these

tensions have been heightened by the situation with Hammonds and with "outsiders" using that situation in the standoff at the Malheur National Wildlife Refuge. Harney County requests that the grazing be allowed to continue so that the community can "move on." Although Harney County's desire to move on from a difficult period is understandable, as noted above courts have long held that there is a strong public interest in having the government comply with governing statutes and regulations. Additionally, if the community is sensitive to federal management of public lands, ensuring that the federal government comply with the governing statutes and regulations is of particular public importance.

Harney County further argues that the economic effect on the community must be considered. The only economic harm asserted, however, is the cost to HRI of finding alternative grazing during the time period of the injunction and moving the cattle from the Hammond and Hammond FFR allotments to that alternative location (instead of moving the cattle to the Mud Creek and Hardie Summer allotments). There are no lost jobs or other community economic harms asserted.[19]

Some of Defendants' witnesses and *amici* express concern about the Court permanently enjoining all grazing on the allotments. Such an injunction is not before the Court. The Court is considering a preliminary injunction of limited scope and limited duration, based on likely irreparable harm that has been shown particularly because BLM did not perform the required environmental assessment. The Court expresses no opinion regarding whether if BLM performs the required environmental assessment and follows the applicable statutes and regulations in reviewing and issuing a permit to HRI or any other person to graze cattle on the allotments such

[19] The Court does not accept the conclusory assertion that because Harney County is a "tight-knit community" enjoining HRI's grazing would negatively affect the entire Harney County agricultural economy for this year and into the future.

grazing could or would be enjoined. Weighing all of the public interest considerations, the Court finds that issuing a preliminary injunction is in the public interest.

E. Conclusion

All four *Winter* factors weigh in favor of granting a preliminary injunction when considering grazing at the level authorized in the Permit. Plaintiffs have met their burden to demonstrate a need for preliminary injunctive relief until the Court decides the merits of this case.

F. Bond

For the reasons previously stated in the TRO Opinion, no bond is required.

PRELIMINARY INJUNCTION

Plaintiffs' Motion for a Preliminary Injunction is **GRANTED IN PART**. Until the Court resolves this case on the merits or orders otherwise, or until such time as the parties agree in writing to amend, supersede, or terminate this Preliminary Injunction, **IT IS ORDERED:**

1. Defendants are enjoined from allowing turnout and grazing of livestock by Hammond Ranches, Inc. on the Mud Creek allotment, except for when cattle quickly and methodically trail through the allotment to reach the Hardie Summer allotment and, if needed, return from the Hardie Summer allotment. Total time trailing through the Mud Creek allotment may not exceed 14 days.

2. Defendants are enjoined from allowing turnout and grazing of livestock by Hammond Ranches, Inc. on the BLM-controlled portion of the Hardie Summer allotment's Fir Creek pasture.

3. Defendants are enjoined from allowing turnout and grazing of livestock by Hammond Ranches, Inc. on the BLM-controlled portions of the Hardie Summer allotment's remaining four pastures above a 30 percent utilization standard.

4. Defendants shall monitor the actual use on the Hardie Summer allotment at least once per month during the permitted grazing season on the allotment (July, August, and September) and shall also review the condition of a sample of the riparian areas being grazed on the allotment. On or before October 14, 2019, two weeks after the expiration of the permitted grazing season on the Hardie Summer allotment (September 30, 2019), Defendants shall file with the Court in this case a report of their findings from the monitoring. Defendants shall also file with the Court in this case the Actual Grazing Use Report forms submitted by HRI on the Mud Creek and Hardie Summer allotments within two weeks of receiving these forms from HRI.

CONCLUSION

Plaintiffs' Motion for a Preliminary Injunction (ECF 7) is granted in part.

IT IS SO ORDERED.

DATED this 16th day of July, 2019.

/s/ *Michael H. Simon*
Michael H. Simon
United States District Judge

Peter M. ("Mac") Lacy (OSB # 013223)
Oregon Natural Desert Association
2009 NE Alberta St., Ste. 207
Portland, OR 97211
(503) 525-0193
lacy@onda.org

David H. Becker (OSB # 081507)
Law Office of David H. Becker, LLC
4110 SE Hawthorne Blvd. # 168
Portland, OR 97214
(503) 388-9160
davebeckerlaw@gmail.com

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

OREGON NATURAL DESERT ASS'N, **AUDUBON SOCIETY OF PORTLAND**, and **DEFENDERS OF WILDLIFE**,

Plaintiffs,

v.

THERESA HANLEY, State Director (Acting), BLM Oregon/Washington, and **BUREAU OF LAND MANAGEMENT**,

Defendants

Case No. _____

COMPLAINT

(Environmental Matter)

NATURE OF ACTION

1. This case seeks judicial reversal and vacatur of the Bureau of Land Management's ("BLM") March 2019 decision to reverse and abandon a provision from the agency's 2015

conservation plan for Greater sage-grouse (*Centrocerus urophasianus*) (hereinafter "sage-grouse") in Oregon that had closed about 22,000 acres in 13 specially-protected Research Natural Areas ("RNAs") to livestock grazing, for scientific research and study. These ungrazed areas serve as indispensable control sites to study the effects of grazing—and of not grazing—on unique sagebrush plant communities that are essential to the survival and recovery of the sage-grouse. Although BLM recognizes this fact, the agency under the Trump Administration has decided to forsake its research goals identified in the 2015 plan. If implemented as approved, BLM through this plan amendment will abandon science, severely limiting the agency's ability to contribute to conservation of the sage-grouse.

2. BLM's 2015 conservation plan—the Oregon Greater Sage-Grouse Approved Resource Management Plan Amendment ("2015 ARMPA")—amended eight Resource Management Plans ("RMPs") in Oregon to conserve, enhance, and restore sage-grouse habitat. The 2019 decision—the Oregon Greater Sage-Grouse Record of Decision and Approved Resource Management Plan Amendment ("2019 ARMPA")—amends these RMPs to eliminate the grazing closures to protect sage-grouse habitat within RNAs that the earlier plan implemented. The elimination of the grazing closures in the 13 RNAs, and adjustment to three related management objectives and direction, were the only changes the 2019 ARMPA made to the 2015 plan.

3. The Trump Administration falsely asserts that the 2019 amendment, and similar contemporaneous amendments in other states across the West, builds upon and improves the 2015 plan. In truth, the 2019 amendments universally decrease protections for the sage-grouse, remove key regulatory mechanisms on which the U.S. Fish and Wildlife Service ("FWS") based its 2015 decision that the sage-grouse is "not warranted" for listing under the Endangered

Species Act ("ESA"),[1] and will hasten the sage-grouse's decline toward extinction. The conservation and scientific importance of the closure of RNAs to grazing was essentially undisputed during the public process. These places represent important habitat areas for sage-grouse in Oregon, as well as other natural and cultural values. They are critical to BLM's ability to assess the impacts of livestock grazing and associated grazing management actions on sage-grouse, whether the removal of livestock will promote the recovery of degraded habitat to the benefit of sage-grouse, and whether the agency's 2015 plan is actually working.

4. Plaintiffs, the Oregon Natural Desert Association, Audubon Society of Portland, and Defenders of Wildlife, file this action to ensure that BLM is not permitted to blindly repudiate the science-based conservation and research measures required by law and adopted for 13 identified RNAs in the 2015 plan. Accordingly, plaintiffs seek relief from this Court to set aside and vacate BLM's 2019 ARMPA and the related Final Environmental Impact Statement ("FEIS"), and order BLM to prepare a new or supplemental environmental review with regard to any portions of the 2019 ARMPA found by this Court to be adopted arbitrarily, capriciously, in abuse of discretion, or otherwise not in accordance with law.

JURISDICTION AND VENUE

5. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 because this action arises under the laws of the United States, including the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321–4370m-12, the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701–87, the Administrative Procedure Act ("APA"), 5 U.S.C. §§

[1] 12-Month Findings on a Petition to List Greater Sage-Grouse (*Centrocerus urophasianus*) as an Endangered or Threatened Species, 80 Fed. Reg. 59,858 (Oct. 2, 2015) (determining sage-grouse "not warranted" for listing as an endangered species, based on the important new conservation measures adopted in the 2015 sage-grouse plans in Oregon and throughout the West).

701 *et seq*., and the Equal Access to Justice Act, 28 U.S.C. § 2412 *et seq*. An actual, justiciable controversy exists between the parties, and the requested relief is therefore proper under 28 U.S.C. §§ 2201–2202 and 5 U.S.C. § 701–06.

6. Venue is proper in this Court under 28 U.S.C. § 1391 because all or a substantial part of the events or omissions giving rise to the claims herein occurred within this judicial district, the decision to approve the 2019 ARMPA was issued within this district by the BLM's State Director in Portland, Oregon, defendants reside in this district, and the public lands and resources and agency records in question are located in this district.

7. The federal government has waived sovereign immunity in this action pursuant to 5 U.S.C. § 702.

PARTIES

8. Plaintiff OREGON NATURAL DESERT ASSOCIATION ("ONDA") is an Oregon non-profit, public interest organization of about 10,000 members and supporters. It has offices in Portland, Oregon and Bend, Oregon. ONDA's mission is to protect, defend, and restore forever, the health of Oregon's native deserts. ONDA actively participates in BLM and Department of the Interior proceedings and decisions concerning the management of public lands in eastern Oregon. ONDA brings this action on its own behalf and on behalf of its members and staff, many of whom regularly enjoy and will continue to enjoy the public lands and resources that are the subject of the final agency decision challenged in this action, for educational, recreational, spiritual, and scientific activities. ONDA has been active in monitoring ecological conditions for the sage-grouse on public lands managed by BLM throughout eastern Oregon, including within the agency's Prineville, Lakeview, Burns, and Vale Districts. ONDA

participated throughout the public processes that led to BLM's adoption of the 2015 ARMPA and the 2019 ARMPA.

9. Plaintiff AUDUBON SOCIETY OF PORTLAND ("Portland Audubon") is an Oregon non-profit, public interest conservation organization with over 17,000 members. Portland Audubon's mission to "promote the enjoyment, understanding and protection of native birds, other wildlife and their habitats." Portland Audubon has a long-standing interest in protecting birds, wildlife, and habitat and engaging people with nature in central and eastern Oregon dating back to its founding in 1902. Among its earliest priorities was advocating for the protection of Malheur National Wildlife Refuge. It continues this work in central and eastern Oregon through engagement in wildlife policy issues, research projects, field trips, volunteer work parties, and public outreach events. Portland Audubon currently has one full-time staff position located in Harney County and augments this position with additional paid seasonal support. Portland Audubon has a strong and long-standing interest in the protection of the Greater sage-grouse. It commissioned a Status Report of sage-grouse populations with an emphasis on populations in Oregon and Washington in 1994. Portland Audubon has served on the Oregon Sage-grouse Conservation Partnership (SageCon) since its inception in 2010. Portland Audubon and its members regularly visit the areas and landscapes at issue here on natural history related trips, and Portland Audubon has engaged with the BLM and Department of the Interior throughout the public processes that led to BLM's adoption of the 2015 ARMPA and the 2019 ARMPA. Portland Audubon brings this action on its own behalf and on behalf of its members, staff, and volunteers, many of whom regularly enjoy and will continue to enjoy the public lands that are the subject of the final agency decision challenged in this action, for educational, recreational, spiritual, scientific and other activities and pursuits.

10. Plaintiff DEFENDERS OF WILDLIFE ("Defenders") is a national non-profit conservation organization focused on wildlife and habitat conservation and the preservation of biodiversity nationwide. Based in Washington, D.C., the organization also maintains field offices across the country and represents approximately 1.8 million members and supporters, including 34,280 in Oregon. Defenders is deeply engaged in public lands management and wildlife protection, including the conservation and recovery of Greater sage-grouse and sagebrush habitats. The organization has participated in every phase of the National Greater Sage-Grouse Planning Strategy since its inception in 2011. This has included years of BLM planning in sage-grouse habitats in Oregon, where Defenders has provided extensive input and data to support improved management of sage-grouse and other sagebrush-dependent species on millions of acres of public lands. Defenders brings this action on its own behalf and on behalf of its members, staff, and volunteers, many of whom regularly enjoy and will continue to enjoy the public lands that are the subject of the final agency decision challenged in this action, for educational, recreational, spiritual, scientific and other activities and pursuits.

11. The plaintiffs and their members use and enjoy the waters, public lands, and natural resources on and surrounding the 13 Research Natural Areas at issue in this case, for recreational, scientific, spiritual, educational, aesthetic, and other purposes. They enjoy fishing, hiking, camping, hunting, bird watching, study, contemplation, photography and other activities in and around these public lands. The plaintiffs and their members also participate in information gathering and dissemination, education and public outreach, participating in agency land use and conservation planning processes, and other activities relating to BLM's management and administration of these public lands.

12. Defendant THERESA HANLEY is sued solely in her official capacity as acting State Director of the BLM Oregon/Washington, in Portland, Oregon. The State Director is the BLM official responsible for signing and approving the 2019 ARMPA at issue in this case, and has principal authority for the actions and inactions alleged herein.

13. Defendant BUREAU OF LAND MANAGEMENT is an agency or instrumentality of the United States, and is charged with managing the public lands and resources governed by the 2019 ARMPA at issue in this case, in accordance and compliance with federal laws and regulations.

STATEMENT OF FACTS

14. Greater sage-grouse are symbolic of the vast, open lands between the Rocky Mountains and the Sierra Nevada and Cascade ranges. But sage-grouse are in trouble. As many as 16 million of these iconic birds once ranged across 297 million acres of sagebrush grasslands, an area of western North America so vast it is sometimes called the Sagebrush Sea. Over the past 200 years, agriculture and development have reduced the bird's available habitat by nearly half. In that time, sage-grouse abundance has steadily declined to perhaps fewer than 50,000 birds range wide today, by some estimates. Scientists understand that the fate of the sage-grouse may be a harbinger for hundreds of other species dependent upon the West's sagebrush habitats.

15. Today, the sagebrush ecosystem is among the most vulnerable in North America. The sage-grouse is in danger of extinction from fragmentation and loss of its sagebrush habitat and increasing isolation of populations due to human activities, including livestock grazing, energy development and transmission, and ever-expanding motorized transportation networks. Other factors, like Earth's changing climate, the establishment and spread of weeds and invasive

species that replace sagebrush plant communities, and changing wildfire regimes in sagebrush landscapes, also have damaged sage-grouse habitat throughout the West.

16. Livestock grazing is one of the most ubiquitous threats to the sage-grouse. Grazing cattle consume native plants, trample and destroy soils and fragile spring and riparian areas, and increase the spread of sagebrush-replacing weeds. Cattle grazing in sage-grouse nesting areas during the April-May nesting season can cause sage-grouse hens to abandon their nests. The infrastructure of watering systems and barbed-wire fencing needed to manage large herds of cattle in the desert also fragment and destroy sagebrush habitat, artificially concentrating cattle in important sage-grouse habitat areas, dewatering natural springs and water courses, and creating thousands of potential breeding grounds for West Nile virus-carrying mosquitoes as water stagnates in reservoirs, cattle troughs, and even cattle hoof prints. The virus is 100% fatal to sage-grouse.

17. On December 29, 2003, plaintiff Oregon Natural Desert Association, joined by 20 other conservation groups, petitioned the FWS to list the sage-grouse as threatened or endangered under the ESA. *See* 12-Month Findings on a Petition to List Greater Sage-Grouse (*Centrocerus urophasianus*) as an Endangered or Threatened Species, 80 Fed. Reg. 59,858, 59,859 (Oct. 2, 2015) (table summarizing previous federal actions for sage-grouse). The FWS denied that petition, concluding that the sage-grouse was "not warranted" for protection under the ESA. In 2007, a federal district court reversed that determination. *W. Watersheds Proj. v. U.S. Fish & Wildlife Serv.*, 535 F. Supp. 2d 1173 (D. Idaho 2007).

18. After further study, the FWS published a new finding in 2010, determining that ESA protection was now "warranted" for the sage-grouse because of loss and fragmentation of sagebrush habitat and the inadequacy of the various state conservation plans then in place. 12-

Month Findings for Petitions to List the Greater Sage-Grouse (*Centrocerus urophasianus*) as Threatened or Endangered, 75 Fed. Reg. 13,910 (Mar. 23, 2010). However, FWS also determined that listing of the sage-grouse was precluded by higher priority listing actions. *Id*. at 13,910.

19. The FWS based its "warranted" determination upon a 2009 monograph commissioned by the U.S. Geological Survey—*Ecology and Conservation of Greater Sage-grouse: A Landscape Species and its Habitats*—regarding the imperiled status of the sage-grouse and its habitat. The monograph collected unprecedented new research on the bird's life history, habitat needs, and threats to its survival and recovery. Much of the new research showed that sage-grouse are affected by habitat disturbance on far greater spatial scales than scientists had previously recognized.

20. Citing that 2010 FWS finding, BLM, along with the U.S. Forest Service, launched its National Greater Sage-Grouse Planning Strategy in 2011. Under the Strategy, the agencies would amend federal land use plans across the West with sage-grouse conservation measures to avoid ESA listing. To guide that Strategy, a National Technical Team of sage-grouse experts was convened. The team released its Report on National Greater Sage-grouse Conservation Measures ("NTT Report") in December 2011.

21. The NTT Report emphasized the "overall objective" of protecting priority sage-grouse habitats from anthropogenic disturbances. Because of "the degree of uncertainty associated with managing natural resources," the National Technical Team emphasized that monitoring is "necessary to provide an objective appraisal of the effects of potentially positive conservation actions and to assess the relative negative effects of management actions to sage-grouse populations and their habitats." Adaptive management, based on monitoring, "reveals

substantial gaps in knowledge about key processes and functional relationships . . . and therefore helps to identify and prioritize research needs." The team recommended that BLM study, among other things, the long-term effects of overgrazing on sagebrush habitat, habitat changes due to herbivory, and altered sage-grouse behavior due to the presence of domestic livestock.

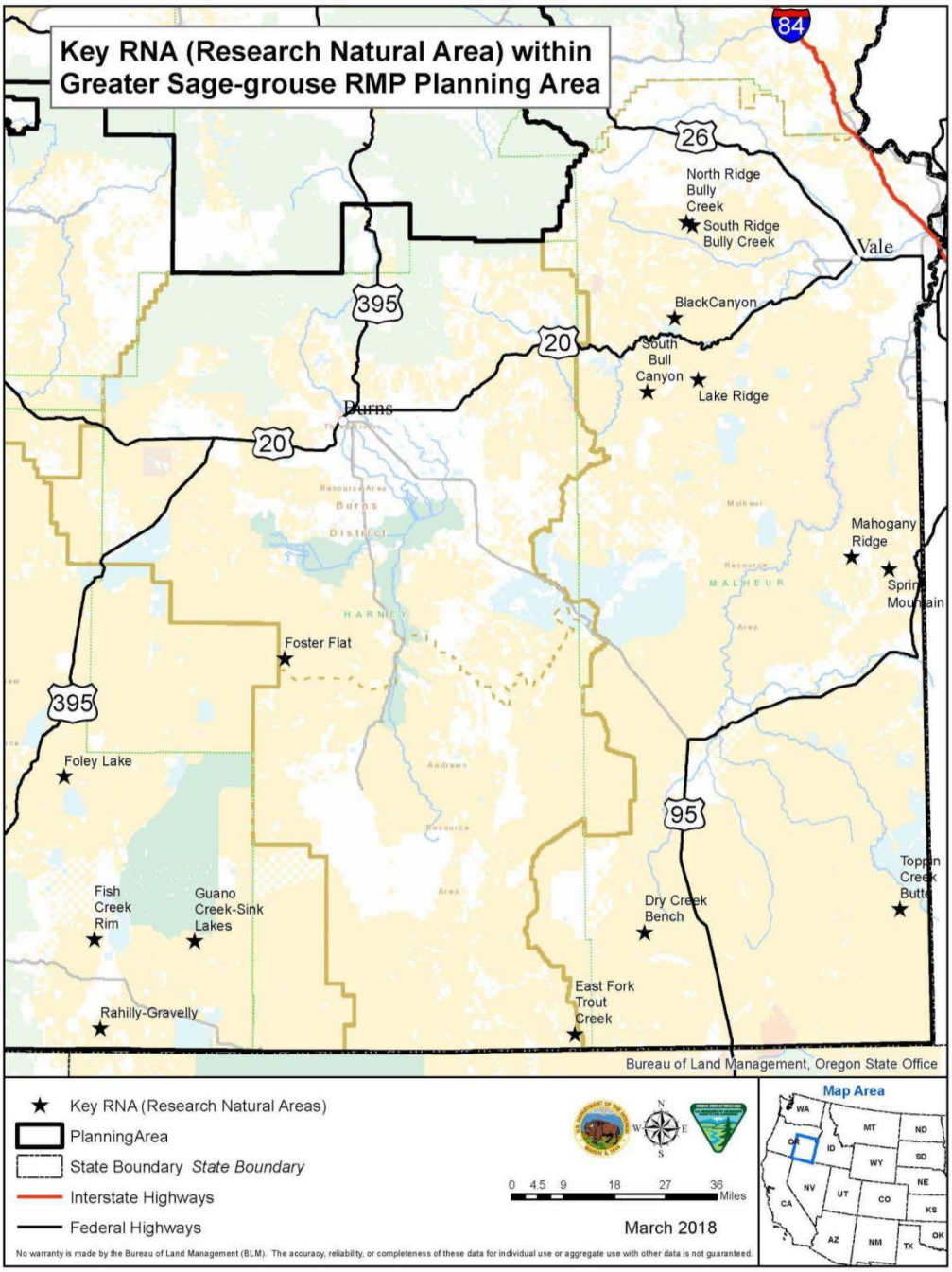
22. In 2013, the FWS released its own expert Conservation Objectives Team Report ("COT Report"). That report identified Priority Areas for Conservation ("PACs"). These are "key habitats necessary for sage-grouse conservation." The COT Report emphasized that preserving the PACs "is the essential foundation for sage-grouse conservation." There are twenty PACs in Oregon.

23. Finally, in 2015, BLM and the Forest Service unveiled a series of sweeping new plans to protect the sage-grouse and its sagebrush habitats on public lands across the West. The 2015 plans—known as Approved Resource Management Plan Amendments or "ARMPAs"—amended 98 existing land use plans across ten western states. This included eight BLM RMPs in Oregon, in the agency's Prineville, Lakeview, Burns, and Vale districts. The 2015 ARMPAs incorporated the NTT and COT Reports and were based on the "best available science."

24. Key features of the 2015 ARMPAs included protections for highest-priority habitats designated as Sagebrush Focal Areas, density and disturbance caps for energy and other industrial activity, buffers around sage-grouse breeding sites (called "leks"), triggers for increased protections if habitats or populations fall below specified levels, and a net conservation gain mitigation requirement for activities that affect grouse habitat.

25. The 2015 ARMPA plans emphasized the need for monitoring to inform adaptive management and assess whether the plans are working. In Oregon, the 2015 ARMPA closed 13 "key" RNAs, covering a total of 21,959 acres of public land, to livestock grazing, reserving these

areas for scientific research and study. The 2015 ARMPA also retained closures of two other key RNAs (Foster Flat and Guano Creek-Sink Lakes) which had already been closed to livestock grazing during previous land management planning processes. The map below shows the location of the key RNAs in eastern Oregon.



26. BLM explained that the key RNAs were critical to the agency's ability to assess the impacts of livestock grazing and associated grazing management actions on sage-grouse, and for gauging the effectiveness of the 2015 plan's grazing measures. By removing grazing from these areas, BLM could study how a series of unique sagebrush plant communities responded in the absence of this otherwise ubiquitous, potentially destructive land use. In other words, these places were to serve as undisturbed baseline reference areas for the sagebrush plant communities they represent. There are almost no ungrazed areas on public lands within the range of the sage-grouse in eastern Oregon, so the key RNAs grazing closure was crucial BLM's ability to understand the effects of its grazing decisions and management throughout Oregon's high desert on the sage-grouse.

27. The 2015 federal plans represented an important step forward for sage-grouse conservation. This is clear from the steady stream of ensuing lawsuits filed by industry groups and state and county governments hostile to the conservation of the sage-grouse and its remaining habitats.[2] In all of those lawsuits, the plaintiffs asked courts to throw out BLM's sage-grouse plans—which would leave the bird unprotected save for scattershot, inconsistent, and generally far weaker state plans.

[2] *See Cahill Ranches, Inc. v. BLM*, No. 1:17-cv-960-CL (D. Or. filed June 19, 2017); *Bd. of Cnty. Commr's of the Cnty. of Garfield, Colo. v. Zinke*, No. 1:17-cv-01199-WYD (D. Colo. filed May 15, 2017); *Harney Soil & Water Conservation Dist. v. U.S. Dep't of the Interior*, No. 1:16-cv-2400-EGS (D.D.C. filed Dec. 7, 2016); *W. Energy Alliance v. U.S. Dep't of Interior*, No. 16-cv-112 (D.N.D. filed May 12, 2016); *Am. Exploration & Mining Ass'n v. U.S. Dep't of the Interior*, No. 16-cv-737 (D.D.C. filed Apr. 19, 2016); *Wyo. Coalition of Local Gov'ts v. U.S. Dep't of Interior*, No. 2:16-cv-41 (D. Wyo. filed Mar. 1, 2016); *Herbert v. Jewell*, No. 2:16-cv-101 (D. Utah filed Feb. 4, 2016); *Wyo. Stock Growers Ass'n v. U.S. Dep't of Interior*, No. 2:15-cv-181 (D. Wyo. filed Oct. 14, 2015); *Otter v. Jewell*, No. 1:15-cv-1566 (D.D.C. filed Sept. 25, 2015); *W. Exploration, LLC v. U.S. Dep't of the Interior*, No. 3:15-cv-491 (D. Nev. filed Sept. 23, 2015).

28. For some time, Oregon was the only state whose 2015 ARMPA was not subject to any direct challenge in federal court. BLM's sage-grouse plan for Oregon had resulted in large measure from collaborative work undertaken by the Sage Grouse Conservation Partnership ("SageCon"). Using an "all lands, all threats" approach to sage-grouse conservation, and supporting community sustainability in eastern Oregon into the future, the SageCon group sought to coordinate federal, state, and local efforts to address the multiple threats to sage-grouse across the eastern Oregon sagebrush landscape. While BLM's 2015 ARMPA for Oregon was not perfect,[3] a broad cross-section of stakeholders, including state and local governments, conservation groups, landowners, ranchers, and others, largely felt that the plan was an important first step in the difficult task of saving the sage-grouse from extinction.

29. In 2017, however, after Donald J. Trump took office, his new Secretary of the Interior, Ryan Zinke, issued an order directing the Department of the Interior to "review" the federal sage-grouse plans. A departmental review team in Washington, D.C. issued a report identifying ways to generally weaken or remove protections or processes established in the 2015 plans.

30. By that time, all of the anti-grouse challengers to the 2015 plans had agreed to stay their lawsuits as the Department of Interior continued its "review." In October 2017, BLM published a Notice of Intent to reopen the process and amend the 2015 sage-grouse plans across the West, including the one for Oregon.

[3] *See, e.g.*, *W. Watersheds Proj. v. Schneider*, No. 1:16-cv-00083-BLW (D. Idaho filed Feb. 25, 2016) (lawsuit filed by environmental plaintiffs fighting on behalf of the sage-grouse, aimed at upholding the plans while at the same time fixing some of their key problems including BLM's failure to undertake any range-wide analysis of sage-grouse habitats and populations).

31. Even before the end of the first public comment period, the anti-grouse plaintiffs already gained significant rollbacks from the 2015 plans. Secretary Zinke announced in October 2017 that he was cancelling a 10 million acre mining withdrawal that had been part of BLM's 2015 decisions. And, in December 2017, he rescinded several BLM policies on mitigation, including eliminating "compensatory" mitigation that had allowed the agency to charge fees where, for example, an energy development would result in lost acres of sage-grouse habitat.

32. BLM issued a Draft RMP Amendment and Environmental Impact Statement for public review in April 2018. Throughout the NEPA process, the Oregon Natural Desert Association, Portland Audubon, and Defenders of Wildlife (referred to hereinafter collectively as "ONDA") and their members participated by attending public meetings, speaking with BLM officials, reviewing agency environmental reviews, and submitting comment letters and other materials for the agency to consider. In general, ONDA and others asked BLM to reject the Trump administration's proposal to remove protections and conservation measures from the 2015 plan for Oregon. If anything, argued ONDA, the agency should consider other reasonable alternatives—for example, a less drastic, partial reversal, or addressing important issues that had been ignored in the 2015 plan, like winter habitat, genetic connectivity, and global climate change.

33. ONDA asked BLM to disclose information essential to a meaningful review—for example, economic and land management information—that would allow public reviewers (as well as the agency decisionmakers) to understand the actual effects of what was being proposed, and whether BLM's stated justifications for amending the plan had any basis in fact. ONDA asked for that kind of information both through its comment letters and, when BLM did not

include the information in its public NEPA documents, requests made under the Freedom of Information Act ("FOIA").

34. ONDA pointed out that sage-grouse continue to struggle in Oregon. The bird's statewide population has declined dramatically in recent years. It dropped by 7.7% in 2017, then by another 10.2% in 2018, and then by another 24.9% in 2019. By the end of 2018, the Oregon Department of Fish and Wildlife had estimated that the Oregon statewide sage-grouse population has now dropped to about 18,421 individuals. This is far below the State of Oregon's population goal and is 37% below the 2003 baseline population estimate of 29,237 individuals.

35. Through these and other comments, ONDA urged BLM to either select the "No Action" alternative, leaving the 2015 plan unchanged, or to undertake a new or supplemental review to address the many problems ONDA and others had identified with the 2015 plan throughout the public process.

36. On November 26, 2018, BLM issued a Proposed Resource Management Plan Amendment and FEIS. The agency refused to consider in detail any of the other alternatives ONDA and the public had suggested, and proposed to select its only "action" alternative, the Proposed Plan Amendment, which eliminated the grazing closures on 13 key RNAs.

37. On January 7, 2019, pursuant to BLM's land use planning regulations, the Oregon Natural Desert Association, Audubon Society of Portland, Defenders of Wildlife, and other conservation groups protested the agency's proposed decision. The groups argued that BLM had failed to provide a reasoned explanation for its about-face, failed to demonstrate that it took the required "hard look" at the environmental effects of weakening the 2015 ARMPA by eliminating the 2015 RNA grazing closures, and failed to ensure the reversal in policy would not result in

impermissible "unnecessary or undue degradation" to the public lands and resources in the planning area.

38. On March 15, 2019, the Acting State Director for BLM Oregon/Washington, Theresa Hanley, issued a Record of Decision ("ROD") approving the 2019 ARMPA to amend BLM's Oregon sage-grouse plan. The 2019 ARMPA reverses the 2015 ARMPA decision to close to livestock grazing, for scientific research and study, the 13 "key" RNAs, and changes two Objectives and one Management Direction related to these again-unprotected RNAs. These are the specially-designated areas that the agency had explained in 2015 were critical to BLM's ability to assess the impacts of grazing and associated grazing management actions on sage-grouse, and for gauging the effectiveness of the 2015 plan. The 2019 ARMPA does retain the closures of the Foster Flat and Guano Creek-Sink Lakes RNAs that had been closed to grazing prior to the 2015 ARMPA.

39. BLM bases its 2019 decision on a desire "to eliminate economic impacts to certain livestock operators." Yet, the agency fails, for example, to name the operators, the federally-issued permits, or even the federal grazing allotments at issue, and provides no specific, quantitative, economic analysis of the presumed financial impacts. Instead, BLM merely references "the potential for economic impacts" in the most general of terms. The only numeric indicator BLM provides—the number of animal unit months[4] not available for grazing—is actually shown in the 2018 FEIS to be lower today than BLM said it was in the agency's 2015 statement. In other words: whatever the economic impact to these unidentified grazing permits and operations actually might be, the FEIS shows it is actually *smaller* than BLM assumed in

[4] An animal unit month, or "AUM," is the amount of vegetation required to support one cow or one cow/calf pair for one month, representing approximately 800 pounds of vegetation.

2015. And in 2015, the agency found that even eliminating the higher number of AUMs would have "negligible or no impact on livestock grazing and range management."

40. BLM has stated that the 13 "key" RNAs closed to grazing in 2015 were the "minimum number of sites and areas necessary" to provide "sufficient replication and support a coherent research plan that would provide data with the statistical power" to extrapolate the results across all sage-grouse range in Oregon. In 2015, BLM also considered every other known ungrazed area in eastern Oregon, but found that *none* were sufficient to provide the information that the 13 identified key RNAs would provide.

41. By reversing course and abandoning the RNA grazing closure, the Trump administration has signaled that it does not want to collect or even see data about what effects livestock grazing has on sagebrush plant communities in Oregon and whether BLM's sage-grouse conservation plan for Oregon is working—in essence sticking its head in the sand and eschewing science-based conservation.

FIRST CLAIM FOR RELIEF
NATIONAL ENVIRONMENTAL POLICY ACT

42. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

43. NEPA is our "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). It "declares a broad national commitment to protecting and promoting environmental quality." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989); *see* 42 U.S.C. § 4331. NEPA requires federal agencies to study the environmental impacts of proposed actions and the reasonable alternatives that would avoid or minimize such impacts or enhance the quality of the human environment. 42 U.S.C. § 4332(2)(C); 40 C.F.R. Pt. 1502.

44. Aimed at informed agency decisionmaking and meaningful public participation, NEPA's "action-forcing" procedures require agencies to, among other things, properly define

proposals, develop a reasonable "purpose and need" statement to frame the environmental review, consider a reasonable range of alternatives, establish an accurate baseline for analysis, ensure the professional and scientific integrity if its discussions and analyses, include all information that is "essential to a reasoned choice," discuss mitigation measures including the effectiveness of those measures, and study related proposals in a single impact statement. *See, e.g.*, 40 C.F.R. §§ 1500.1(b), 1500.2(b), 1502.1, 1502.4(a), 1502.13, 1502.15 1502.22(a), 1502.24, 1508.20.

45. BLM has violated NEPA and its implementing regulations through issuance of the March 15, 2019 Record of Decision and Approved Resource Management Plan Amendment and the accompanying Final Environmental Impact Statement. These violations include, but are not limited to:

a. Relying upon a "purpose and need" statement so unreasonably narrow that it constrained BLM's analysis and eliminated reasonable alternatives that would have supported the ARMPA's basic purpose of conserving, enhancing, and restoring sage-grouse habitat;

b. Failing to consider a reasonable range of alternatives, including failing to fully consider viable and feasible alternatives offered by the public during the NEPA process;

c. Failing to establish an accurate environmental baseline with regard to presumed negative economic impacts and the conservation and scientific value of the key Research Natural Areas;

d. Failing to obtain and disclose to the public missing economic and other information essential to a reasoned choice;

e. Failing to consider the relationship of the plan amendment to global climate change, including failing to consider effects specific to RNAs that lie within BLM-identified Climate Change Conservation Areas;

f. Failing to discuss in a meaningful way whether the vague, unenforceable, and voluntary mitigation measures listed in the EIS will be effective;

g. Failing to prepare a programmatic EIS to consider the effects of the plan amendment on a landscape-wide basis; and

h. Failing to consider significant factors related to the conditions of sage-grouse and their habitat, including but not limited to recent declines in the sage-grouse population in Oregon and other states throughout the bird's habitat.

46. Ultimately, BLM's unexplained reversal of its 2015 ARMPA decision to close key Research Natural Areas to grazing, through issuance of the 2019 ARMPA, was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law because the agency failed to give good reasons for its reversal of policy, including by failing to provide the "more specific" assessment of economic effects the agency claimed was necessary and by failing to explain how elimination of the "minimum necessary" baseline research areas is consistent with statutory and regulatory requirements aimed at ensuring BLM takes a "hard look" at its proposal's environmental consequences.

47. BLM's final decisions to adopt the 2019 ROD and FEIS therefore are arbitrary, capricious, an abuse of discretion, and not in accordance with NEPA and its implementing regulations, and have caused or threaten serious prejudice and injury to plaintiffs' rights and interests.

48. The 2019 ROD and FEIS constitute final agency actions judicially reviewable by this Court pursuant to 5 U.S.C. §§ 704 and 706(2), and must be held unlawful and set aside for the reasons identified above.

SECOND CLAIM FOR RELIEF
FEDERAL LAND POLICY AND MANAGEMENT ACT

49. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

50. FLPMA requires BLM to "develop, maintain, and . . . revise" land use plans, such as the ones at issue in this case, in order to carry out its obligations to manage the public lands "in a manner that will protect the quality of scientific, historical, ecological, environmental, air and atmospheric, water resource, and archeological values" and "preserve and protect certain public lands in their natural condition." 43 U.S.C. §§ 1701(a)(8), 1712(a)–(c); 43 C.F.R. § 1610.5-5. Once developed, BLM must manage the public lands "in accordance with" these land use plans. 43 U.S.C. § 1732(a).

51. BLM must manage the public lands consistent with the "principles of multiple use and sustained yield" and "take any action necessary to prevent unnecessary or undue degradation of the lands." 43 U.S.C. §§ 1732(a), (b). The term "multiple use" includes management "without permanent impairment of the productivity of the land and the quality of the environment." *Id.* § 1702(c). To ensure it has adequate information to fulfill these obligations, BLM must "prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values." *Id.* § 1711(a). This inventory "shall be kept current so as to reflect changes in conditions." *Id.*

52. BLM must give priority to the "inventory," "designation," and "protection" of "areas of critical environmental concern." 43 U.S.C. §§ 1711(a), 1712(c)(3). These "ACECs" are areas on the public lands where special management attention is required to "protect and prevent

irreparable damage to" important fish and wildlife resources, and other natural systems or processes. *Id*. § 1702(a).

53. Research Natural Areas are a special kind of ACEC where certain values are protected or managed for scientific purposes and natural processes are allowed to dominate. The "primary purpose" of all RNAs is "research and education." 43 C.F.R. § 8223.0-5(a). "No person shall use, occupy, construct, or maintain facilities in a manner inconsistent with the purpose of the research natural area" and "[s]cientists and educators shall use the area in a manner that is nondestructive and consistent with the purpose of the research natural area." *Id*. § 8223.1(b), (c).

54. BLM has violated FLPMA and its implementing regulations through issuance of the March 15, 2019 Record of Decision and Approved Resource Management Plan Amendment. These violations include, but are not limited to:

a. Failing to prevent unnecessary or undue degradation of public lands and resources, including failing to consider and provide a reasoned explanation as to whether there will be any unnecessary or undue degradation to, or permanent impairment of, the lands as a result of BLM's change in policy and decision to make the 13 key RNAs available for livestock grazing;

b. Failing to provide any non-arbitrary explanation as to why or how reinstating livestock grazing in the 13 key RNAs closed to grazing is "necessary" for the sage-grouse or for purposes of scientific study;

c. Failing to give priority to the inventory, designation, and protection of the natural resources and values of the key RNAs, including by making the key RNAs available to livestock grazing, a destructive and inconsistent use of these specially-protected areas; and

d. Failing to manage the key RNAs consistent with their primary purpose of research and education, including by making the key RNAs available to livestock grazing, a destructive and inconsistent use of these specially-protected areas.

55. Ultimately, BLM's unexplained reversal of its 2015 ARMPA decision to close key Research Natural Areas to grazing, through issuance of the 2019 ARMPA, was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law because the agency failed to give good reasons for its unexplained reversal of policy, including by failing to provide the "more specific" assessment of economic effects the agency claimed was necessary, by failing to appropriately prioritize these areas, and by failing to explain how elimination of the "minimum necessary" baseline research areas is consistent with statutory and regulatory requirements to, for example, "prevent unnecessary or undue degradation" of public lands and resources and "protect and prevent irreparable damage to" RNAs.

56. BLM's final decision to adopt the 2019 ROD and FEIS therefore are arbitrary, capricious, an abuse of discretion, and not in accordance with FLPMA and its implementing regulations, and have caused or threaten serious prejudice and injury to plaintiffs' rights and interests.

57. The 2019 ROD and FEIS constitute final agency actions judicially reviewable by this Court pursuant to 5 U.S.C. § 706(2), and must be held unlawful and set aside for the reasons identified above.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court grant the following relief:

A. Order, declare, and adjudge that defendants' March 15, 2019 Record of Decision and Approved Resource Management Plan Amendment and accompanying Final Environmental Impact Statement are unlawful under, and in violation of, NEPA and FLPMA;

B. Issue an order setting aside and vacating defendants' March 15, 2019 Record of Decision and Approved Resource Management Plan Amendment and accompanying Final Environmental Impact Statement;

C. Enter injunctive relief barring defendants from implementing or further implementing the March 15, 2019 Record of Decision and Approved Resource Management Plan Amendment, unless and until such time as defendants have completed a lawful environmental analysis and issued a new, lawful decision that complies with the requirements of the APA, NEPA, and FLPMA, as well as any further injunctive or other relief necessary to mitigate for any resource-damaging or -threatening actions taken prior to this Court's issuance of a decision on plaintiffs' claims;

D. Issue an order directing defendants to immediately implement and impose the closures of the 13 key RNAs provided for in the 2015 ARMPA;

E. Award plaintiffs their reasonable costs, litigation expenses, and attorney's fees associated with this litigation as provided by the Equal Access to Justice Act, 28 U.S.C. § 2412 *et seq*., and all other applicable authorities; and

E. Grant such other further relief as plaintiffs may request or the Court deems just and proper.

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DATED this 27th day of September, 2019.

Respectfully submitted,

s/ Peter M. Lacy

Peter M. ("Mac") Lacy
Oregon Natural Desert Association

Of Attorneys for Plaintiffs

921 F.3d 1185
United States Court of Appeals, Ninth Circuit.

OREGON NATURAL DESERT ASSOCIATION, Plaintiff-Appellant/ Cross-Appellee,
v.
Jeff ROSE, Burns District Manager, BLM; U.S. Bureau of Land Management; Interior Board of Land Appeals; Rhonda Karges, Field Manager, Andrews Resource Area, BLM, Defendants-Appellees,
and
Harney County, Intervenor-Defendant-Appellee/ Cross-Appellant.

Nos. 18-35258
|
18-35282
|
Argued and Submitted March 8, 2019 Portland, Oregon
|
Filed April 25, 2019

Synopsis

Background: Environmental organization brought action alleging that Bureau of Land Management's (BLM) travel management plan (TMP) and comprehensive recreation plan (CRP) for wilderness area violated Steens Mountain Cooperative Management and Protection Act (SMCMPA), Federal Land Policy and Management Act (FLPMA), Wilderness Act, and National Environmental Policy Act (NEPA). The United States District Court for the District of Oregon, Paul J. Papak II, United States Magistrate Judge, 292 F.Supp.3d 1119, granted government's motion for summary judgment. Organization appealed.

Holdings: The Court of Appeals, Graber, Circuit Judge, held that:

Steens Mountain Advisory Council did not have any power under SMCMPA to make management decisions for Steens Mountain Cooperative Management and Protection Area or to veto management decisions by BLM;

BLM adequately consulted Advisory Council;

purported failure of BLM of not adequately consulting Advisory Council was harmless to county;

Interior Board of Land Appeals acted arbitrarily and capriciously when issuing Steens Mountain Travel Management Plan;

Board and BLM had discretion under SMCMPA to redefine "road" or "trail" when issuing Travel Management Plan;

Board acted arbitrarily and capriciously by affirming BLM's issuance of Travel Management Plan due to failure of Bureau to establish baseline environmental conditions; and

BLM acted arbitrarily and capriciously in issuing Steens Mountain Comprehensive Recreation Plan due to its failure to establish baseline conditions necessary for it to carefully consider information about significant environmental impacts to Steens Mountain Cooperative Management and Protection Area.

Affirmed in part, vacated in part, and remanded.

Attorneys and Law Firms

***1187** Peter M. Lacy (argued), Oregon Natural Desert Association, Portland, Oregon; Thomas C. Buchele, Earthrise Law Center, Portland, Oregon; David H. Becker, Law Office of David H. Becker, Portland, Oregon; for Plaintiff-Appellant/Cross-Appellee.

Dominic M. Carollo (argued), Yockim Carollo LLP, Roseburg, Oregon, for Intervenor-Defendant-Appellee/ Cross-Appellant.

Sean E. Martin (argued), Assistant United States Attorney; Kelly A. Zusman, Appellate Chief; Billy J. Williams, United States Attorney; United States Attorney's Office, Portland, Oregon; for Defendants-Appellees.

Appeals from the United States District Court for the District of Oregon, Paul J. Papak II, Magistrate Judge, Presiding, D.C. No. 3:09-cv-00369-PK

Before: Susan P. Graber and Marsha S. Berzon, Circuit Judges, and Eduardo C. Robreno, [*] District Judge.

OPINION

GRABER, Circuit Judge:

***1188** This litigation arose from the Bureau of Land Management's decisions about the route network for motorized vehicles in the Steens Mountain Cooperative Management and Protection Area ("Steens Mountain Area"). The Bureau issued two plans: the Steens Mountain Travel Management Plan ("Travel Plan") and the Steens Mountain Comprehensive Recreation Plan ("Recreation Plan"). Plaintiff Oregon Natural Desert Association ("ONDA") challenged the Recreation Plan, and the Interior Board of Land Appeals' ("Board") approval of the Travel Plan, under the National Environmental Policy Act of 1969 ("NEPA"), the Federal Land Policy Management Act of 1976 ("FLPMA"), and the Steens Mountain Cooperative Management and Protection Act of 2000 ("Steens Act"). Harney County intervened to defend the Board's approval of the Travel Plan, but also cross-claimed against the Bureau to challenge the Recreation Plan as arbitrary and capricious. The district court upheld both agency actions. Reviewing de novo, *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 991 (9th Cir. 2014), we affirm in part, vacate in part, and remand.

A. *Consultation with the Advisory Council*

The Bureau satisfied its obligation to consult the Steens Mountain Advisory Council before issuing the Recreation Plan, so its action was not arbitrary and capricious in that respect. 5 U.S.C. § 706(2)(A). Although the Bureau must make any decision "to permanently close an existing road" or "restrict the access of motorized or mechanized vehicles on certain roads" in the Steens Mountain Area "in consultation with the advisory council," 16 U.S.C. § 460nnn-22(c), the Steens Act does not specify *how* the Bureau must consult with the Advisory Council. The Advisory Council has no power to make management decisions for the Steens Mountain Area or to veto the Bureau's management decisions. *See id.* § 460nnn-51(a) (establishing the Advisory Council solely "to advise" the Secretary of the Interior in managing the Steens Mountain Area).

Here, the Bureau opened the public comment period for the revised Recreation Plan Environmental Assessment ("EA") on January 12, 2015. The Bureau formally ***1189** briefed the Advisory Council on the Recreation Plan about two weeks later, during meetings in which the Bureau gave Advisory Council members copies of each route analysis and discussed the project. At the end of the meetings, the Advisory Council suggested that the Bureau should "use the information" from the meetings and act as it saw fit. In short, the Bureau adequately consulted the Advisory Council.

Even if the degree or mode of consultation were insufficient, any error was harmless to the County. The County responded to the revised EA months before the Bureau issued the final Recreation Plan decision and Finding of No Significant Impact ("FONSI") in April 2015. The County cannot explain how the Bureau's purported failure to consult the Advisory Council more extensively "caused the agency not to be fully aware of the environmental consequences of the proposed action, thereby precluding informed decisionmaking and public participation, or otherwise materially affected the substance of the agency's decision." *Idaho Wool Growers Ass'n v. Vilsack*, 816 F.3d 1095, 1104 (9th Cir. 2016).

B. *Definition of "Roads and Trails"*

The Board acted arbitrarily and capriciously by changing its definition of "roads and trails" without providing a reasoned explanation for the change. *Encino Motorcars, LLC v. Navarro*, —— U.S. ——, 136 S.Ct. 2117, 2125–26, 195 L.Ed.2d 382 (2016). The Steens Act prohibits the use of motorized vehicles "off road," but also authorizes the use of motorized vehicles on "roads and trails," without defining those terms. 16 U.S.C. § 460nnn-22(b)(1). The Board reconciled this seeming contradiction "by concluding that since the statute clearly meant to allow [the Bureau] to designate roads and trails as open to motorized travel, the prohibition against motorized off-road travel logically can only mean that motorized travel that *does not occur on either a road or a trail* is prohibited."[1] Although the Steens Act does not use the term "route," the Board used that more generic term throughout its decisions to encompass "roads and trails."

In its 2009 decision on the Travel Plan, the Board decided that there exists "inherent incongruity in determining that routes are 'obscure,' or difficult or impossible to identify on the ground, and concluding that opening them to motorized use is consistent with the Steens Act." In other words, the Board determined that a route that is "difficult or impossible to identify on the ground" is neither a road nor a trail under the Steens Act. The Board thus reversed the Bureau's decision to allow motorized travel on 36 miles of Obscure Routes.

But in its 2014 remand decision on the Travel Plan, the Board reversed course and sua sponte overturned its own decision to close the Obscure Routes. For the first time, the Board defined "route" to mean something that "existed as a matter of record" in October 2000—when Congress enacted the Steens Act [2] —"and that might again be used in the future, despite a present difficulty in physically tracing [it] on the ground." The "record" to which the Board referred included sources such as hand-drawn maps and testimony from local ranchers and grazing permittees, whether those maps or testimony existed in 2000 or only later.

***1190** Of course, agencies may change their policies over time. But an agency must "at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.' " *Encino Motorcars*, 136 S.Ct. at 2126 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009)). The Board failed to do that. The Board did not explain, for example, what led it to alter its earlier decision or why the new approach was more consistent with the text of the Steens Act. It also did not explain why it could rely on a "record" that was created after the effective dates of both the Steens Act and the FLPMA and that consisted largely of representations made by interested local parties. *See id.* at 2127 (discussing how the agency might have justified its choice). Because the Board acted arbitrarily and capriciously, we vacate its approval of the Travel Plan and remand.

Because the Steens Act leaves room for agency discretion in this area, such that the Board or the Bureau could redefine "road" or "trail" on remand even if we endeavored to define those terms first, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005), we do not define the terms here. [3] We leave it to the agency, in the first instance, to explain its change in position or to craft new definitions and explain them.

C. *The Travel Plan*

The Board also acted arbitrarily and capriciously by affirming the Bureau's issuance of the Travel Plan. Even assuming that the Bureau properly inventoried all "roads and trails" in the Steens Mountain Area, the Bureau failed to establish the baseline environmental conditions necessary for a procedurally adequate assessment of the Travel Plan's environmental impacts. "Without establishing the baseline conditions" before a project begins, "there is simply no way to determine what effect the project will have on the environment and, consequently, no way to comply with NEPA." *Great Basin Res. Watch v. BLM*, 844 F.3d 1095, 1101 (9th Cir. 2016) (brackets omitted) (quoting *Half Moon Bay Fishermans' Mktg. Ass'n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988)).

Nothing in the Travel Plan EA establishes the physical condition of the routes, such as whether they are overgrown with vegetation or have become impassable in certain spots. Indeed, the Bureau acknowledged that it included some routes in the inventory even though its staff could not find those routes on the ground. Despite that lack of information, the Travel Plan EA authorized most routes for "Level 2" maintenance, which involves mechanically grading a route and "brushing" (removing) roadside vegetation. Such "routine" maintenance can dramatically change a lightly used route and its surroundings. Thus, without understanding the actual condition of the routes on the ground, the Bureau could not properly assess the environmental impact of allowing motorized travel on more than 500 miles of routes, or of carrying out mechanical maintenance on those routes. The Bureau "had a duty to assess, in some reasonable way, the actual baseline conditions" in the Steens Mountain Area, *Or. Nat. Desert Ass'n v. Jewell*, 840 F.3d 562, 569 (9th Cir. 2016), but it failed to perform that duty.

NEPA does not require the Bureau to accept ONDA's assessment of the ***1191** environmental consequences of the Travel Plan. It does, however, require the Bureau to "articulate[ ] a rational connection between the facts found and the choice made," instead of relying on an ipse dixit assessment of environmental impacts over a contrary expert opinion and data. *Pac. Coast Fed'n of Fishermen's Ass'ns v. Blank*, 693 F.3d 1084, 1091 (9th Cir. 2012) (internal quotation marks omitted). Ordinarily, we must defer to an agency's technical expertise and reasonable choice of methodology, because NEPA "does not require adherence to a particular analytic protocol." *Or. Nat. Desert Ass'n v. BLM* ("*ONDA v. BLM* "), 625 F.3d 1092, 1121 (9th Cir. 2010) (quoting *Ass'n of Pub. Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1188 (9th Cir. 1997)). And an agency need not measure "actual baseline conditions in every situation—it may estimate baseline conditions using data from a similar area, computer modeling, or some other reasonable method." *Great Basin*, 844 F.3d at 1101. But here, the Bureau did not use *any* method or estimate—aside from making generic statements about roads in the Steens Mountain Area—to establish baseline conditions. We "cannot defer to a void." *ONDA v. BLM*, 625 F.3d at 1121.

The EA itself "contains virtually no references to any material in support of or in opposition to its conclusions," even though the EA "is where the [Bureau's] defense of its position must be found."[4] *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998) (citing 40 C.F.R. § 1508.9(a)). The EA and the previous Environmental Impact Statement ("EIS") to which it is tiered contain only a cursory analysis of the project's impact on noteworthy aspects of the Steens Mountain Area, such as the sage grouse population and the spread of noxious weed infestations. We have warned that "general statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification" for why an agency could not supply more "definitive information." *Id.* at 1213 (internal quotation marks omitted). The EA and the EIS lack any such justification. Accordingly, we vacate the Board's approval of the Travel Plan, and remand with instructions for the Board to remand the Travel Plan to the Bureau for reconsideration.

Because we conclude that the Travel Plan is procedurally deficient under NEPA, we do not reach ONDA's substantive challenges to the Travel Plan under the Steens Act and the FLPMA. Likewise, we do not decide whether the Bureau must prepare an EIS for the Travel Plan.[5]

> ***1192** Having addressed the problems we have identified, the [Bureau] may decide to make different choices. NEPA is not a paper exercise, and new analyses may point in new directions. As a result, although ONDA also raises concerns regarding alleged substantive and procedural flaws within the Plan, we do not reach those issues today. The problems it identifies may never arise once the [Bureau] has had a chance to see the choices before it with fresh eyes.

ONDA v. BLM, 625 F.3d at 1124.

D. *Recreation Plan*

The Bureau acted arbitrarily and capriciously in issuing the Recreation Plan. Here, too, the Bureau failed to establish the baseline conditions necessary for it to "carefully consider information about significant environmental impacts" to the Steens Mountain Area. *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1085 (9th Cir. 2011).

This time around, the Bureau made Route Analysis Forms and aerial photographs available during the comment period. But neither the photographs nor the forms themselves reveal any details about the condition of the Obscure Routes. Each form starts with the following prompt: "Please describe the general setting of the area including precipitation and vegetation and compare this data to an average precipitation year. Provide any other pertinent information." Yet, even though the Bureau seemingly recognized the importance of establishing baseline conditions (such as the vegetation on each route), the completed forms fail to provide any details responsive to the prompt. Without establishing baseline conditions for the Obscure Routes, the Bureau could not have analyzed the environmental impacts of the Recreation Plan properly. *Great Basin*, 844 F.3d at 1101.

At some point *after* the public comment period closed, the Bureau attached ground photographs for a few Obscure Routes to the forms; the photographs show details about vegetation and the condition of the routes themselves. Such late analysis, "conducted without any input from the public," impedes NEPA's goal of giving the public a role to play in the decisionmaking process and so "cannot cure deficiencies" in an EA. *Id.* at 1104. And, because the Bureau added the Obscure Routes back to the Steens Mountain transportation network only over the 2014–15 winter, while the Steens Mountain was largely inaccessible, ONDA did not have a chance to survey the Obscure Routes and respond to the photographs. Thus, the Bureau's failure to make the photographs available during the public comment period " 'caused the agency not to be fully aware of the environmental consequences of the proposed action, thereby precluding informed decisionmaking and public participation." *Idaho Wool Growers*, 816 F.3d at 1104. Accordingly, we vacate the Recreation Plan and remand.

For the reasons explained above, we do not reach ONDA's substantive challenges to the Recreation Plan and we do not decide whether the Bureau should have prepared an EIS for the Recreation Plan. *ONDA v. BLM*, 625 F.3d at 1124.

E. *Costs*

Because we vacate and remand as to ONDA's NEPA claims, we also vacate the $4,937.99 cost award to the Bureau. Fed. R. Civ. P. 54(d)(1).

***1193 AFFIRMED in part, VACATED in part, and REMANDED**. The parties shall bear their own costs on appeal.

All Citations

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Footnotes

* The Honorable Eduardo C. Robreno, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

1 ONDA agrees with this interpretation.

2 Or, for routes within the Steens Mountain Wilderness, that existed as a matter of record in October 1976, when Congress enacted the FLPMA.

3 We note, however, that the Bureau referred to the routes in the Travel Plan and the Recreation Plan as both "routes" and "roads." On remand, it would be prudent for the Bureau to clarify whether all the routes are roads, or whether some routes are trails.

4 To the extent that the Board relied on "Route Analysis Forms" that the Bureau submitted on remand, that reliance was arbitrary and capricious. Whatever the forms' contents, the Bureau created them years *after* it released the Travel Plan EA and FONSI in 2007. Thus, the public never saw the forms and never had an opportunity to comment on them, "frustrating NEPA's goal of allowing the public the opportunity to play a role in the decisionmaking process." *Great Basin*, 844 F.3d at 1104 (internal quotation marks and alteration omitted).

5 That said, we disagree with the Bureau and the County that an EIS is unnecessary because the Travel Plan simply maintained the "status quo." Not so. The Travel Plan added about 70 miles of motorized routes to the transportation network in the Steens Mountain Area and closed 1.23 miles of routes to motorized access. By contrast, "status quo" cases involve the "mere continued operation of a facility." *See Burbank Anti-Noise Grp. v. Goldschmidt*, 623 F.2d 115, 116 (9th Cir. 1980) (per curiam) (holding that the FAA did not need to prepare an EIS before providing financial assistance that would allow an entity to purchase and continue operating an existing airport); *see also Upper Snake River Chapter of Trout Unlimited v. Hodel*, 921 F.2d 232, 235 (9th Cir. 1990) (holding that the Bureau of Reclamation did not need to prepare an EIS before adjusting the flow of water from a dam, because the agency had been occasionally adjusting the water flow "for upwards of ten years").