

APPEAL TO THE REGIONAL FORESTER,
PACIFIC NORTHWEST REGION,
USDA FOREST SERVICE REGION SIX,
OF A DECISION OF THE DISTRICT RANGER
OF THE EMIGRANT CREEK RANGER DISTRICT,
MALHEUR NATIONAL FOREST

OREGON CHAPTER SIERRA CLUB,
LEAGUE OF WILDERNESS DEFENDERS -
BLUE MOUNTAINS BIODIVERSITY PROJECT,
& OREGON NATURAL DESERT
ASSOCIATION,

APPELLANTS,

vs.

JEROME D. HENSLEY,
DISTRICT RANGER,
EMIGRANT CREEK RANGER DISTRICT,
MALHEUR NATIONAL FOREST,
DECIDING OFFICIAL

In Re: Appeal of the Decision Notice
and Environmental Assessment for the
Van Allotment Project , USDA
Forest Service, Emigrant Creek Ranger District,
Malheur National Forest

APPELLANTS' NOTICE OF APPEAL,
REQUEST FOR RELIEF, AND
STATEMENT OF REASONS

DATED THIS 1st DAY OF NOVEMBER, 2008

NOTICE OF APPEAL

Pursuant to 36 C.F.R. § 215, the Oregon Chapter Sierra Club, League Of Wilderness Defenders – Blue Mountains Biodiversity Project, and the Oregon Natural Desert Association hereby appeal the September 15, 2008 Decision Notice and Finding of No Significant Impact by Emigrant Creek District Ranger Jerome Hensley for the Van Range Allotment and the Final Environmental Assessment for Van Allotment, Emigrant Creek Ranger District, Malheur National Forest.

Description of Project: The project is comprised of the Van grazing allotment on the Emigrant Creek Ranger District, Malheur National Forest. The allotment encompasses approximately 6,600 acres of Malheur National Forest public lands within the Wolf Creek Watershed. The decision continues the authorization of livestock grazing on the Van Allotment and updates the Allotment Management Plan, with implementation expected to begin in spring 2009.

The decision includes:

- Resting the entire allotment for 3 to 5 consecutive years to allow the Forest Service to obtain funds, purchase materials and construct fences;
- Reduces the maximum permitted AUMs to 441 from the current 752, based on forage production estimates completed in 1957 and 1981, as current total livestock forage allocation exceeds available production;
- Establishes the potential season of use from May 15 through September 30, recommending that late summer and fall grazing be reduced as much as possible;
- The permitted/average numbers will be 142, subject to change in response to resource conditions;
- Establishes three riparian management pastures, with associated water gaps; the Frog and Hawthorne pastures will be rested until riparian vegetation recovers to “about 75% of the percent expected for the greenline capability group (Winward 2000).” When riparian conditions are met, expected to allow riparian “recovery at a near natural rate,” grazing will resume within the Frog and Hawthorne pastures. The Fry pasture will be closed to livestock grazing on the lower mile of Schurtz Creek;
- Regenerates aspen stands in Gabe Creek, Schurtz Creek, and Dry Creek by conifer removal, prescribe burning, protective fencing, and the exclusion of livestock grazing;
- “Range improvements:” changes in fencing and grazing patterns on Wolf Creek pasture and Dry Creek spring, and places two water troughs in existing dry stock ponds requiring water hauling by the permittee;
- Stream restoration activities: small check dams and large woody debris in Schurtz, Gabe, and Dry Creeks; and the stabilization of headcuts on Gabe and Dry Creeks;
- Changes the assessment time-period for the Forest Plan Standards and Guidelines for Upland and Riparian Utilization to the end of the current use period rather than the end of the growing season due to unpredictable late-summer growth. Upland utilization will not exceed 35% on grasses, 30% on shrubs; with livestock removed if livestock grazing approaches or exceeds these percentages. Riparian utilization standards are set similarly, not to exceed 35% on grasses, sedges, and rushes, and 30% on shrubs, with livestock to be removed if grazing utilization approaches or exceeds these standards or if bank alteration exceeds 20%;
- Use of an “adaptive management” process to determine if management changes are needed in the course of the proposed action.

As noted above, pursuant to 36 C.F.R. § 215, the below listed organizations are appealing the September 15, 2008 Decision Notice and Finding of No Significant Impact by Emigrant Creek District Ranger Jerome Hensley for the Van Range Allotment and the Final Environmental

Assessment for Van Allotment, Emigrant Creek Ranger District, Malheur National Forest.
Verification of the identity of appellants is available upon request.

Asante Riverwind,
Eastern Oregon Forest Organizer,
Oregon Chapter Sierra Club,
P.O. Box 5534, Bend, Oregon 97708
(541) 322-4065 office
asante.riverwind@sierraclub.org

Karen Coulter, Director
League of Wilderness Defenders-Blue Mountains Biodiversity Project
27803 Williams Lane, Fossil, Oregon 97830
(541) 468-2028 office
(541) 385-9167 voice mail

Dave Becker, Staff Attorney,
Oregon Natural Desert Association,
917 SW Oak St. Suite 409
Portland, OR 97205
(503) 525-0193
dbecker@onda.org

The Oregon Chapter Sierra Club, Oregon Natural Desert Association, and the League Of Wilderness Defenders – Blue Mountains Biodiversity Project have reviewed the Emigrant Creek Ranger District, Malheur National Forest, Van Allotment EA, Decision Notice, and Finding of No Significant Impact.

The Oregon Chapter Sierra Club represents over 23,000 members throughout Oregon, including the Club's Juniper Group, which has over 1,000 members throughout central and eastern Oregon. Sierra Club members feel strongly about nature, wilderness, natural forest ecosystems - including ecological recovery, wildlife, fisheries, and the environment. Sierra Club members regularly enjoy hiking, camping, wildlife watching, birding, ecological study, and photography within the national forests of central and eastern Oregon, including the Van allotment and surrounding area within the Malheur National Forest, and the Malheur, Owyhee, and Snake River systems. The Sierra Club has a significant, lengthy, and well-documented interest in the management of the forests and watersheds in which the Van Allotment livestock grazing is located.

Oregon Natural Desert Association is a non-profit public interest organization dedicated to preserving and protecting the public lands of eastern Oregon. Oregon Natural Desert Association has a long history of interest and involvement in Forest Service activities with respect to grazing, riparian areas, water quality, and fish and wildlife. Oregon Natural Desert Association's mission is to protect, defend, and restore forever the health of Oregon's native deserts, including the lands in the Malheur National Forest and the Malheur, Owyhee, and Snake River systems. The members and staff of Oregon Natural Desert Association use and enjoy the public lands, waters, and natural resources within the planning area for recreational, scientific, spiritual, educational, aesthetic, and other purposes. Oregon Natural Desert Association and its members also participate in information gathering and dissemination, education and public outreach, commenting upon proposed agency actions, and other activities relating to the Forest Service's management and administration of the public lands of eastern Oregon.

The League Of Wilderness Defenders - Blue Mountains Biodiversity Project has many members and volunteers throughout the Northwest. Members and volunteers of the LOWD-Blue Mountains Biodiversity Project regularly use the Malheur National Forest, including the Van allotment and surrounding areas, for hiking, ecological study, watching wildlife, viewing forest native botanical diversity, and avian species study. The LOWD - Blue Mountains Biodiversity Project has a long-standing and well-documented interest in the management of the public lands and waterways in which the Van Allotment livestock grazing is located.

REQUESTED RELIEF

1. That the Decision Notice, Finding of No Significant Impact, and Environmental Assessment for the van Allotment be modified to meet the objections presented in Appellants' Statement of Reasons, including but not limited to;
 - A. Defer the decision on whether, when, and how to consider the resumption on continued livestock grazing on the Van Allotment to a new EIS analysis to commence after five years of rest from livestock grazing;
 - B. Immediately implement the decision to rest the Van Allotment from livestock grazing and continue rest until the allotment has been rested for a minimum of five years;
 - C. Eliminate or modify all commercial logging activities that may occur as part of the removal of conifers from aspen stands. If commercial removal of conifers in aspen areas is to be included, it must be founded in sound non-controversial science recommendations, including provisions for the retention of all mature and old characteristic trees of all species within the affected area, and include provisions protecting soils and vegetative communities from disturbance, compaction, and harm;
 - D. Implement seasonal restrictions as appropriate on activities to protect nesting and fledging native and neotropical migrant birds, denning mammals, emerging spring plants and native invertebrate species;
2. That this EA and Decision be revised to ensure consistency with the Administrative Procedures Act, Clean Water Act, Endangered Species Act, National Environmental Policy Act, National Forest Management Act, Migratory Bird Treaty Act, these statutes' implementing regulations, and the Malheur National Forest Land and Resource Management Plan as amended by the Regional Forester's Amendment Number 2 (Eastside Screens).

Statement of Reasons

General Appeal Overview

In reviewing the Decision Notice and Environmental Assessment for the Van Allotment, our organizations generally appreciate the underlying intentions to begin to recover the resiliency and natural resource qualities of the allotment area. The EA's brief summary of allotment management history and ecology helps place current grazing issues and problems in perspective. Indeed, livestock grazing and associated management-caused degradation has been ongoing for over a century in the greater analysis area. In reading the EA, with its disclosures of environmental harms, causes, and prior failed management attempts to rectify grazing caused harms, it becomes ever-more apparent that it will likely require a similar lengthy period of time for sufficient recovery of the natural resources of the area to be successfully achieved. Simply reauthorizing continued livestock grazing after providing for a rest from active livestock grazing for only 3 to 5 years is insufficient to begin to meet the resource recovery objectives and needs for this area.

With this current EA and decision, it is important to recognize that this problematic and ineffectually managed allotment is apparently now going through yet another Allotment Management Plan process (when so many allotments have not yet undergone requisite NEPA analysis). However, due to widespread allotment degradation issues, the agency's focus on management efforts to restore this area are both necessary and appreciated. Given the extent and significance of current Van allotment grazing harms, it is clear that management provisions and assumptions made in the 1985 EA and AMP and the ensuing past 23 years of allotment management, oversight, and adaptive modifications have been incapable of meeting management resource objectives and LRMP standards.

The Decision Notice, FONSI, and EA fail to meet the requirements of the NEPA

Our organizations concur with the EA's disclosures regarding the imperative need to implement a minimum five-year rest period from any livestock grazing. However, the selected alternative allowing the resumption of livestock grazing after only 3 to 5 years of rest is legally deficient and ecologically premature at this time.

The decision authorizing the continuation of livestock grazing lacks the NEPA requisite substantive site-specific basis and expert scientific foundation, and instead appears to be based on unreasonable conjecture of what the as yet unknown future may hold regarding the potential for successful resource recovery in just 3 to 5 years. Agency decision-makers do not have dominion over what may actually transpire during the next 3 or more years. An adaptive management plan may not be adopted when it does not include quantified objectives or required mitigation measures, and where the plan does not provide a reasonable certainty that any adverse impacts to resources will be mitigated. The adaptive management plan described in the Decision Notice and EA does not provide quantified guidance regarding when particular actions will be taken to protect resources, nor does the plan indicate what triggers will result in the implementation of mitigation measures to protect resources. For example, the Decision Notice and EA provide no information regarding how the decision to resume grazing will be made, or what criteria will be involved. It is essential that such information be presented to the public in the NEPA analysis and also be included in the adaptive management plan to ensure that both the initial decision and subsequent implementation of the decision are not arbitrary. Where, as discussed below, an adaptive management plan might permit a decision that is directly contradictory to the findings of the EA, the decision to adopt that plan is arbitrary, capricious, and contrary to law.

Scientifically well-founded questions exist of whether such a limited rest period is sufficient for adequate resource recovery. Significant unknowns exist regarding cumulative impacts that were not sufficiently nor reasonably addressed in the EA. Among these are cumulative impacts that may impede or prevent the intended resource recovery, including impacts from both known and as yet unforeseen sources, whether natural or human caused including: potential fires, climate change, drought, landscape thinning logging planned in the area, increased OHV use and resultant resource degradation in the area, continuing declining population and habitat trends for imperiled species in the area, possible ESA uplisting of imperiled species, etc.).

The portions of the Decision Notice and the EA's selected alternative authorizing the resumption of livestock grazing in the area 3 to 5 years in the unknown future are based largely upon conjecture and unfounded expectations. NEPA requires sound science, adequate cumulative impacts analysis, and accurate site-specific conditions before a legally tenable decision may be reached. That portion of the decision authorizing livestock grazing resumption in 3 to 5 years as such is arbitrary and capricious, and must be withdrawn, allowing the portion of the decision responding to known resource recovery conditions and needs to be implemented, but deferring the decision whether to reauthorize livestock grazing 3 to 5 years in the future to new environmental assessment to be done at a later time, and based upon actual site specific resource concerns and scientifically founded recovery objectives and analysis as they exist at that future time.

Once area natural resources evidence significantly shows adequate recovery after a rest period of at least five years (or more if necessary), the agency could conduct a new environmental assessment process that would assess the impacts of either:

- implementing the planned “resumption of reduced grazing pressure,”
- or closing the allotment areas to grazing wholly or in part for a longer period to allow adequate time for area natural resource recovery and/or to prevent renewed degradation from livestock and thus maintain the area in a recovering natural condition.

The agency may not arbitrarily issue a decision based upon unfounded assumptions that the area will sufficiently be restored after just a short 3 to 5 year rest. Such a decision reasonably requires a new environmental analysis process *after* a 5 year rest period has occurred. Before livestock grazing renewal can be considered, a new analysis process must first assess and disclose area ecological recovery progress and current conditions in each of the management areas of concern: rangeland, aspen, riparian, etc; before a legally compliant decision reauthorizing livestock grazing may be responsibly issued.

By its own admissions the EA acknowledges that the decision to reauthorize the continuation of livestock grazing in just 3 to 5 years is arbitrary and capricious and not in accord with site specific conditions and needs or with scientific recommendations on resource recovery from livestock grazing. The Van EA on page 91 discloses that “five years is a minimum” to effectively initiate the recovery which the agency intends to achieve. The EA further quotes Clary and Webster (1989) as determining “that 10-12 years was not sufficient for riparian willow community recovery after severe livestock use, but acceptable wildlife habitat may occur after five years.” Accordingly it is improper to adopt an adaptive management plan that might allow grazing to resume in fewer than the five years of rest identified as the “minimum” necessary.

The EA identifies many areas of significant ecological harms, and an extensive landscape scale downward trend and/or stasis in area resource conditions. Given the extent of ecological recovery needs in the area; from recovering riparian area vegetation, instream water quality, adequate sustaining forage for native wildlife populations, and viable abundance and diversity of native botanical species, etc; it is clear from the disclosures within the EA that significant harms must be curtailed for an extended period. As per NEPA’s requirements of environmental significance identified in the Van Allotment EA, proposed continuing livestock grazing in this area must be further addressed in an EIS after a five or more year period of rest, with recovery progress disclosed and assessed at the conclusion of this extended rest period, before active grazing management could begin to be reasonably considered legally and ecologically acceptable in this area.

The EA Decision immediately resting the area from grazing for a minimum of five years should be retained and implemented, while the decision reauthorizing livestock grazing once the area has sufficiently recovered must be deferred until such recovery has actually occurred, and an EIS has been completed pursuant to the NEPA

The Van Allotment EA contains impressive documentation and disclosures of significant resource degradation and failures to comply with the Malheur LRMP as amended, and with applicable environmental policy laws. NEPA requires the Forest Service to prepare an EIS for all major federal actions that “may significantly affect the quality of the human environment.” 42 U.S.C. § 4332(2)(C). If an agency decides not to prepare an EIS, it must supply a “convincing statement of reasons” to explain why a project’s impacts are insignificant. Blue Mtns. Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998) (also holding that a “plaintiff need not show that significant effects will in fact occur” that it is enough for the plaintiff to raise “substantial questions whether a project may have a significant effect” on the environment). Because this decision includes eventually re-authorizing broad-scale grazing in an area with significant ongoing resource degradation, and the EA has identified and

disclosed quite a number of significant impacts, NEPA then requires an EIS before a decision approving resumed livestock grazing may be issued.

The EA at present can ecologically and legally be justifiably employed for a decision resting the allotment from livestock grazing for five years as proposed. It is ecologically imperative that this necessary management action be implemented as soon as possible without further delay, to prevent further irreparable resource degradation in the allotment area.

The EA may not however, be utilized to authorize resumed livestock grazing three to five years from now. The agency's contention that this area is "suitable for livestock grazing" is unsubstantiated, unreasonable and likely unwarranted given the preponderance of evidence in the EA disclosing significant resource degradation and long-term management failures to rectify this. The EA discloses "A 2005 forage production analysis determining suitable range conditions indicated the current total livestock forage allocation exceeds available production in a near normal growing season (livestock forage is over-allocated). Previous forage production estimates completed in 1957 and 1981 support this finding." (Chap. 1, pg 7). Past attempts to rectify harmful grazing impacts have largely failed to achieve LRMP standards and recovery objectives in this area.

The EA and Decision Notice plan once again, after a long period of management failures to effectively prevent grazing harms, to incrementally reduce grazing numbers and adjust grazing patterns. The EA discloses the failures of similar past reductions and adjustments, yet its management provisions would after a rest-period of only three to five years repeat yet another similar attempt. The proposed eventual resumption of grazing in this area would only serve to incrementally degrade the area, harming whatever recovery has been made within the short time-span of rest from grazing impacts.

Decades of harmful grazing abuse require extensive periods of time before ecological recovery may begin to be attained. A full EIS analysis of recovery progress, grazing suitability or lack thereof, and the likely direct and cumulative impacts of grazing resumption must be conducted assessing area conditions after five years of grazing rest has allowed for initial ecological recovery. Given the long track record of grazing management adverse impacts and failures, it is not possible at this time without further in-depth analysis to speculate whether grazing could reasonably and feasibly be resumed 3, 5, 10, or even 50 years from now without significant resource degradation. To meet the requirements of the NEPA, applicable environmental policy laws, and LRMP standards and objectives, an EIS assessing recovery progress and direct and cumulative environmental impacts and resource conditions is necessary before livestock grazing may be resumed in this area.

As such, the agency may only issue a partial EA decision, closing the allotment to livestock grazing for a minimum of five years, along with associated restoration actions. Grazing resumption provisions, interior allotment fencing in preparation for future grazing, and other actions that would be necessary only if livestock grazing is resumed in this area, should be deferred from this decision. Such grazing related actions require an EIS as noted above before a decision authorizing them may be legally and reasonably reached.

The Purpose and Need Fails to Meet the Legal Requirements of the NEPA

The EA identifies the "purpose" of the proposed action as being: "to continue authorization of livestock grazing in a manner that is consistent with the Malheur Forest Plan as amended." It states that "authorization is needed on this allotment because:

- Where consistent with other multiple use goals and objectives there is Congressional intent to allow grazing on suitable lands. (Multiple Use Sustained Yield Act of 1960, Wilderness Act of 1964, Forest and Rangeland Renewable

Resources Planning Act of 1974, Federal Land Policy and Management Act of 1976, National Forest Management Act of 1976).

- The allotment contains lands identified as suitable for domestic livestock grazing in the Malheur Forest Plan and continued domestic livestock grazing is consistent with the goals (Forest Plan pages IV-2), desired future conditions (Forest Plan pages IV-7 and IV-10), objectives (Forest Plan pages IV-18), forest wide standards (Forest Plan pages IV-34), and management areas (Forest Plan pages IV-50 through IV-137).
- The Malheur National Forest Plan permits livestock use on suitable range when the permittee manages livestock using prescribed practices (Forest Plan IV-2).
- It is Forest Service policy to make forage available to qualified livestock operators from lands suitable for grazing consistent with land management plans. (FSM 2203.1)
- By regulation, forage producing lands will be managed for livestock grazing where consistent with land management plans. (36 CFR 222.2 (c))”

However, the EA and Decision fail to adequately address the inherent agency assumption that, despite decades of significant livestock grazing-caused harms and consistent overall failures to meet grazing utilization standards and resource maintenance and recovery objectives, how the public lands in this allotment can yet be reasonably considered as “suitable for livestock grazing.” Indeed, the analysis information and “need” for this project call into serious substantive question the agency’s unwarranted foundational perspective that area lands are at all suitable for livestock grazing. The “need” for the project is presented in the EA as:

“Within the Van Allotment current livestock management is not producing adequate results and resource conditions are not always consistent with forest plan standards, guidelines, goals, and objectives. Because of these reasons, adjustments from current livestock management are needed. Adjustments from current management are proposed where existing conditions are not being met or are not improving at an acceptable rate towards desired conditions.”

The EA discloses the following conditions as the foundational “need” of this project:

“Unsatisfactory Range Conditions”

“There is a need to improve unsatisfactory range conditions because:

- Data collected outside livestock enclosure fences (riparian management pastures) indicates that suitable rangelands are in unsatisfactory condition.
- A 2005 forage production analysis determining suitable range conditions indicated the current total livestock forage allocation exceeds available production in a near normal growing season (livestock forage is over-allocated). Previous forage production estimates completed in 1957 and 1981 support this finding.”

Aspen Stands

There is a need to enhance, restore and protect aspen stands in Schurtz Creek, Dry Creek and Gabe Creek drainages because:

- Most aspen stands are small and appear as a few old decadent stems with little or no viable regeneration. This has occurred because they are being overgrown by conifers; disturbances that could regenerate the clones are lacking; ungulates browse the few new sprouts that do occur, and lowered water tables from stream down-cutting. Without protection from ungulates, aspen sprouts often are prevented from maturing by browsing.

Riparian Conditions

There is a need to enhance and restore riparian conditions in Middle Fork Wolf Creek, Schurtz Creek, Dry Creek and Gabe Creek drainages because:

- Streambanks need stabilization and the stream channels need to be reconnected to the floodplain in order to promote riparian species capable of stabilizing stream banks.
- Riparian vegetation along 2.24 miles of Schurtz Creek lacks the resiliency that allows a riparian wetland area to withstand (hold together during) high water events. Specifically there is a lack of diverse age-class distribution of riparian wetland vegetation, lack of diverse composition of riparian-wetland vegetation, lack of species that indicate maintenance of riparian-wetland soil moisture characteristics; lack of streambank vegetation comprised of those plants or plant communities that have root masses capable of withstanding high-streamflow events; lack of adequate riparian-wetland vegetative cover to protect banks and dissipate energy during high flows; and riparian-wetland plants do not exhibit high vigor.
- 2.24 miles of Schurtz Creek (reach 1, segment 1) failed to meet 5 of the six riparian management objectives in Forest Plan Amendment 29 (bank stability, pool frequency, width/depth ratio, water temperature, and large woody debris RMOs were not met, canopy closure was met);
- Riparian function was assessed adjacent to about 2.24 miles of Schurtz creek and determined to be Functional at Risk.
- Dry Creek Spring and another unnamed spring are being impacted by livestock trampling and over utilization of forage has reduced or eliminated many native riparian species at the spring sites.

Our organizations appreciate the disclosures within the EA of some of the significant resource degradation impacts, issues, and concerns that exist within the allotment area. We note that the disclosures, while compelling evidence of the need for an extended rest of the area from grazing, fail to disclose or address all of the resource degradation impacts and foundational issues in this area. Additionally, the disclosures noted above, within the EA, and evidenced in the allotment itself, offer strong substantiation that the agency's stated "purpose" of authorizing livestock grazing in this area is at odds with the LRMP and federal policy laws. Indeed, other than an inherently flawed and uncritical economics and social analysis, the EA and Decision Notice present no ecological or scientifically based "need" for reauthorizing livestock grazing. The EA fails to responsibly assess the economic and social values of recovering and maintaining the area's natural resources, instead sacrificing these inherent long-term ecological values to livestock grazing economics without adequate consideration whether the premises of the economic analysis are valid. The EA discloses ample evidence that livestock grazing in this area is both ecologically and economically unsustainable, yet fails to objectively and reasonably address these significant long-term issues, in violation of the NEPA.

The Stated "Purpose" of the EA Violates the NEPA

The stated "purpose" of this project fails to meet NEPA's most basic requirements. NEPA's requires the agency to develop a sound purpose and need, and incorporate expert advice and high quality science in developing a full range of reasonable alternatives that are all capable of meeting the purpose and need, and thus of selection, and which "take actions that protect, restore, and enhance the environment" (CEQ 1500 §1501.1(c)). NEPA directs that analysis include "reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions" and which "contribute to the preservation and enhancement of the environment." Instead the foundational inclusion of the

“authorization of livestock grazing” as the primary purpose of this EA violates the requirements of federal law.

In Muckelshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 814 fn. 7 (9th Cir. 1999) the Court held that the purpose and need cannot be so narrow that only one type of action alternative will work. In this case, the Forest Service has drawn its purpose too narrowly, with the unfortunate result that only one of its presented action alternatives could be considered acceptable. As the “purpose” is “to continue authorization of livestock grazing in a manner that is consistent with the Malheur Forest Plan as amended,” the selection of a no grazing alternative is not possible.

Yet, despite NEPA’s requirement that all action alternatives presented must be suitable for possible selection by the decision maker, the EA violates judicial caselaw (noted above) and NEPA requirements in its purpose for this project. While it is laudable that environmental qualifiers are placed upon continued grazing, this still has the end result of preventing the selection of a no grazing alternative, and predisposing the decision-maker to the selection of the only grazing action alternative presented instead. As a result of the EA’s narrowly defined purpose, which by its very definition excludes many reasonable alternatives, the Forest Service undermines the NEPA process and does not give serious consideration to the no grazing action alternative, or to the development of other potential alternatives based upon sound ecological science and long-term restoration objectives and needs.

In Methow Valley Citizens Council v. Regional Forester, 833 F.2d 810, 815 (9th Cir. 1987), rev’d in part on other grounds, 490 U.S. 332 (1989), the Ninth Circuit determined that the EIS was inadequate because it failed to examine all reasonable alternatives. The Court held that “the range of alternatives considered must be sufficient to permit a reasoned choice.” Here, beyond the statutorily required “no action alternative,” only two alternatives were developed and of these, only one was available for selection due to the legally deficient contrived “purpose.” As such, the Forest Service failed to comply with the NEPA by developing a scientifically sound legal purpose consistent with the needs of the project area, and by failing to fairly and objectively develop and assess all action alternatives.

Given the extent of significant resource degradation in the area; the failures of past management; and the scientific research recommendations concerning achieving resource recovery goals, grazing suitability, and grazing impacts; the purpose for this project should have read more appropriately as per the NEPA as: “The Purpose of this project is to provide for resource management and recovery in the allotment analysis area in a manner that is consistent with the Malheur Forest Plan as amended.” Such a legally unbiased and NEPA compliant purpose would have allowed for the full development, objective analysis, and potential selection of either the proposed action or the no grazing alternative, and the potential development of other reasonable action alternatives.

As noted before, given the length of time it has taken for the agency to address and begin preventing resource degradation in the Van Allotment, a decision authorizing the immediate suspension of livestock grazing in this allotment for a period of at least five years is not only ecologically warranted, it is legally required. As such, while that portion of the decision authorizing the resumption of livestock grazing in 3 to 5 years must be withdrawn and deferred to a new analysis process, the EA itself and that portion of the decision immediately resting the area from livestock grazing for up to five years should not be withdrawn. The current Decision Notice must instead be modified into a two-part decision: part one of which rests the area from livestock grazing for five or more years, and part two of which compels the agency to conduct an EIS assessing conditions and recovery progress at the end of five years – before the authorization of livestock grazing may be considered. If the EIS indicates that resource recovery and long-term resource maintenance goals require a longer suspension or permanent termination of livestock grazing in this area, the EA’s decision to rest the area for five or more years could be extended or revised accordingly. As the Malheur LRMP is outdated, and its determination of this area as suitable for livestock

grazing has proven to be erroneous, the EIS and/or the revised LRMP should also reassess this determination based upon the conditions, goals and objectives, and analysis in the EA and forthcoming EIS for this project.

Towards the Development of a Legally Compliant Purpose and EIS

In addition to the NEPA and legal citations above, we include herein the following from the NEPA's core tenets. These exemplify the current legal deficiencies of the Van EA and Decision. They can be employed to assist the agency in responsibly and legally revising its present decision. They can also be utilized in developing a future EIS capable of reaching an ecologically and legally acceptable decision for management in this area. The following core NEPA tenets serve as bedrock evidence that the Van EA's stated purpose and decision authorizing continued livestock grazing is in contravention to the NEPA and the intent of Congress:

- 1) Directing that actions not harm the environment: "NEPA, CEQ Regulation part 1500 - Purpose Policy and Mandate" "Sec. 1500.1 Purpose. (c) Ultimately, of course, it is not better documents, but better decision that count. NEPA's purpose is not to generate paperwork - even excellent paperwork - but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions **that protect, restore, and enhance the environment**. These regulations provide the direction to achieve this purpose."
- 2) Directing the agency to develop and analyze a reasonable range of alternatives that avoid or minimize environmental harms: "Sec. 1502
 - a. (e) Use the NEPA process **to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment**.
 - b. (f) Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, **to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.**"
- 3) More directions on the range of alternatives: "Sec. 1502.14 Alternatives including the proposed action. This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (Sec. 1502.15) and the Environmental Consequences (Sec. 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall: (a) **Rigorously explore and objectively evaluate all reasonable alternatives**, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated."
- 4) And finally, the very core of NEPA - Congressional intent and directives to "prevent or eliminate damage to the environment" From "The National Environmental Policy Act of 1969; Purpose Sec. 2 [42 USC § 4321]. The purposes of this Act are:
 - a. (a) To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality."
 - b. (b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential

considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may –

- i. 1. fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
- ii. 2. assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
- iii. 3. attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
- iv. 4. preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;
- v. 5. achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
- vi. 6. enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.”

In significant part, while the provisions resting the Van Allotment from continued livestock caused resource degradation for 3 to 5 years are laudable, that portion of the Van EA and Decision authorizing continued resumed livestock grazing fails to be based upon the core tenets of the NEPA expressed above. As such the portion of the decision authorizing the resumption of grazing must be deferred to a new EIS to be done five years from the implementation of the rest portion of this decision.

The Economics and Social Analysis Fails the Requirements of the NEPA

The EA’s Social & Economics analysis represents an interesting though erroneous perspective that fails NEPA’s comprehensive and objective analysis requirements due to its selective and grazing-biased presentation and conclusions. Among some of the notable NEPA deficiencies of this section are:

- The inclusion of public lands livestock grazing ranchers along with other area residents with occupations in “agriculture, forestry, fish, and hunting.” Given the geographically resource limited extent of public lands available for livestock grazing, and given the actual small number of permittees in the area as compared with the far greater number of residents with occupations that have been unwarrantedly lumped into this category, the analysis fails to objectively present the actual importance of public lands grazing in the region. Instead, by arbitrarily including all these vastly different categories into one grouping, the EA elevates the significance of public lands grazing allotments far above their actual economic importance in the region.
- The economic analysis fails to accurately disclose the full cost of public subsidies and funding of public lands allotments in the region. Grazing fees collected fail to match market rates for similar privately leased grazing lands. Agency staff time devoted to allotment management, analysis, contractual work, maintenance, and restoration is not adequately nor accurately assessed and disclosed.
- The true costs of both short and long-term restoration needs in the area are not accurately nor objectively disclosed and assessed.
- The economic value of enhanced ecological, scenic, and recreational qualities in the area are not addressed.
- Economic, ecological, and natural health sustainable alternatives to ecologically harmful

unsustainable livestock grazing and human health harmful bovine consumption are not disclosed and addressed in a comparative analysis. The EA fails to disclose any apparent awareness of increasing regional and national trends away from current livestock industry practices and consumption, towards more ecologically and economically sustainable healthy dietary requirements.

Like nature itself, societal economics are not a stagnant stasis process, but instead represent a socially dynamic process of adaptation and societal evolution. Ultimately the region's local economies will have to adapt to changing social and environmentally sustainable practices and patterns, especially given growing climate change and societal desires for public lands restoration and protection. The EA's analysis fails to disclose or properly address these significant issues, and as such fails to meet NEPA's requirements for meaningful scientifically reasonable expert analysis.

As the agency has included economics and social issues in its analysis and rationale for its proposed action, it is imperative that such analysis meet the requirements of the NEPA. Due to the above and other analysis deficiencies, the social and economics section of the EA fails to meet the legal requirements of the NEPA. The portion of the decision based in part on the presumptive economic and social "need" for continued livestock grazing must be withdrawn. A new EIS must objectively address and accurately disclose the range of economic and social conditions and considerations in the affected region, and within the greater society as these affect the region.

Additional EA and DN NEPA Legal Deficiencies & Non-Compliance

- In regard to vegetation recovery: Invasive plant presence, introduction, and spread in the area is a cause of ongoing resource degradation and management concern. Effective restoration of native vegetation, from riparian plants to upland grasses, forbes, and plants, has been accomplished elsewhere by simply closing areas to livestock grazing for extended periods of time of at least ten years. Conservationists in the Hells Canyon area and elsewhere have even achieved demonstrated success in eliminating and/or significantly reducing invasive cheat grass from areas closed long-term to livestock grazing. Many examples of native species botanical recovery in riparian and aspen areas closed to grazing abound. Kentucky bluegrass has been replacing native bunchgrasses and riparian area vegetation. Significant recovery of native bunchgrasses, riparian vegetation, and other native plant species would be possible if the area is closed to grazing for an extended period of time of ten or more years. The EA fails to disclose or properly address these significant issues, and must thus be corrected in a new EIS before resumed livestock grazing may be legally considered.
- The agency's proposed reduction in grazing pressure is potentially an essential beginning step to meeting restoration needs in the area, should further analysis determine the area is suitable to grazing at all. If so, while reducing AUMs may be a partial beginning, it is essential to reduce stocking levels and the length of grazing season periods. Potential ecological benefits from plans to reduce AUMs are inherently sabotaged from the onset if the agency continues to hold the stocking level and grazing season as in previous AMPs. It is imperative that a new EIS properly address AUM levels in association with actual land capabilities including native ungulate forage needs and native species habitat, viability, and distribution.
- Given district funding, resource, and personnel limitations and responsibilities, the EA fails to accurately disclose and address the agency's current inability, and actual capability of monitoring and managing the Malheur's many allotments. As such, oversight and monitoring provisions for the Van Allotment grazing resumption management are neither feasible nor reasonably within the capability of the agency. This issue should have been disclosed within the EA, with a range of alternative provisions and actions presented that are consistent with the agency's responsibilities

and capabilities. By limiting livestock grazing extent and impacts to only areas the agency can responsibly monitor and effectively manage, irreparable resource harms can be effectively curtailed, and should these occur, can be responsibly addressed within a short period of time. By charging permittees sufficient fees and bonds to cover the full costs of agency range personnel, monitoring, management, and restoration, perhaps the extent of available allotments could be brought within the capabilities and oversight duties of the agency. The EA fails to adequately disclose or address this significant issue. Without such provisions, the plans within the EA are of little effective meaning or substance, and as such the EA and the decision based upon it fail to meet the requirements of the NEPA. The portion of the decision reauthorizing continued livestock grazing must be withdrawn until these issues are disclosed and properly addressed.

- According to surveys the enclosure on Schurtz Creek is evidencing an initial recovery of riparian and upland areas. Additional impacts to area vegetation are occurring from an elk herd of approximately 100 in number. It is important that the agency monitor and assess the impacts of native ungulates and other species upon riparian and upland vegetation, and continue to restrict use of enclosures. As approximately 70% of the allotment includes winter range, and the overuse of critical browse is occurring (bitterbrush, mahogany, willow, etc.), it is important that if grazing is eventually resumed in this allotment stocking levels are substantially reduced to protect essential wildlife qualities and habitat. As the EA notes that cattle shift their diet to bitterbrush once grass seed has ripened, in addition to reduced numbers, either a shorter livestock grazing season is necessary or the elimination of livestock from this area is required. A new EIS must adequately address these issues before a legally compliant decision authorizing resumed livestock grazing may be issued.
- Small check dams if done carefully can help ongoing restoration efforts. It is important that provisions be included to monitor these placements to prevent undesirable impacts. Where check dams are impairing fish passage, stream flow, and/or habitat quality, these features should either be repaired and maintained or removed. Surveys note that an old check dam in the Schurtz Creek enclosure should be repaired or removed as it blocking fish passage from the pool below and interfering with the normal flow of the creek. While obviously ecologically beneficial stream restoration should be implemented, a new EIS must properly address scientifically controversial or potentially ecologically harmful portions of this decision.
- It is important that riparian area and other enclosures be navigable by native ungulate species, but not accessible to livestock. It is essential that should grazing be resumed, permittees are required to monitor these areas on a consistent daily basis to prevent harms from livestock that may become entrapped within them.
- If livestock grazing is eventually resumed in the allotment area, troughs located well away from springs, ponds, and reservoirs should be required, to protect these important water source areas from degradation. Work on such structures and locations should be deferred until an EIS is conducted addressing whether resumed livestock grazing is ecologically and legally acceptable.
- The EA fails to adequately address USFS responsibilities and capabilities regarding overall fence maintenance, including the maintenance of new riparian exclosures/enclosures. As the agency has insufficient funds for the proper timely maintenance of exclosures, and as a number are scheduled for removal, it is important that the new EIS assessing possible future grazing resumption address long-term funding and management provisions for fence maintenance.

- The EA decision must be modified to clarify that the 3-5 years of grazing rest will occur immediately (i.e. no grazing in 2009 – 2014) and that livestock grazing in the area will not resume until an EIS has been concluded and a legally and ecologically acceptable decision reached.
- The EA fails to adequately address direct and indirect cumulative impacts, ranging from nearby analysis area logging thinning as well as OHVs, burning, possible future fires, and other area impacts. Merely acknowledging these are occurring in the EA is insufficient to meet the requirements of the NEPA. As these impacts and management concerns affect the management area and overall project objectives, it is imperative they be sufficiently disclosed and addressed by incorporating analysis and action provisions associated with these known and likely/potential cumulative actions. The Harney County (Oregon Solutions) collaborative restoration/logging-thinning-burning project being developed in the Jane, Calamity, and Wolf Creek subwatershed areas will have significant impacts upon the area and agency long-term management objectives. Logging thinning and burning will result in significant landscape scale soil and vegetative disturbance. Recovering soils and vegetative communities are ecologically fragile; these are exceptionally vulnerable to invasive exotic plant introduction and spread, compaction, impairment of hydrological functioning, and harm to recovering subsurface soil communities and their ecological functioning. The EA fails to note what provisions will be taken to allow areas eventually underburned by the Jane project to recover. Similarly, invasive plant spread and introduction becomes a more significant issue in areas where soils are disturbed and vulnerable to erosion, compaction, and invasive plants due to logging machinery, road construction, burning, and other project actions. Increased OHV access and use in the area also must be addressed in relation to cumulative impacts concerns and restoration goals. As well, possible likely future fires in this area, given its level of fire risk, must be addressed and effective provisions made to reach long-term recovery goals in the event of a human or natural-caused fire. The decision must be modified deferring potential resumption of livestock grazing in five years to a new EIS which must address these and other cumulative impacts issues and needed ecologically protective provisions. As is the decision is in contravention to its stated resource recovery purpose and need objectives.
- There is seasonally limited water and forage availability. The EIS must address the natural range of fluctuations in the area and the range of cumulative grazing impacts given these variations and uncertainties. If grazing is to be resumed, the EIS must base AUM provisions upon the actual carrying capacity of the land during its repeated cyclic drought periods, and not upon an average or optimum period of carrying capacity. To do otherwise would only serve to irreparably undermine any resource recovery attained during the five year rest from livestock grazing.
- The 2002 Van Watershed Assessment was completed by private contractors. The EA failed to disclose if these contractors have any conflict of interest concerning livestock grazing in the region.
- Ecologically it is inconsistent with recovery management recommendations that restoration of critical riparian areas includes the excessive use of barbed wire, which can be harmful to wildlife and avian species. Use of barbed wire is considered “management failure” by the professional Colorado grazing management team as noted in their two workshops at the Malheur Supervisors office. Instead, it would be more appropriate for aspen exclosures to be buck and pole fences. Over time as the aspen is reestablished, such fences gradually return to the land. Other than periodic monitoring and limited repairs ensuring cattle are not entrapped and cause damage to aspen, such fences are less resource intensive and result in less risk of harm to native species. The failure of the EA to sufficiently disclose and address these significant issues violates the NEPA.

- Oregon State 303(d) and INFISH water quality standards are not being met. Before livestock grazing may be considered for resumption in this area, the agency must demonstrate within an EIS that this significant issue has been rectified, that area water quality has an established trend towards recovery or has indeed recovered, and that the resumption of grazing will not impair or harm water quality recovery and resource conditions. It is not legally compliant to authorize livestock grazing when such grazing fails to meet INFISH RMOs, nor is it legally acceptable to authorize resumed grazing where at best such grazing is only “moving toward” RMOs and INFISH legal requirements. Standards are set in place not to be mere measurements that are incapable of being met, but as required measures below which resource impacts are prohibited. A new EIS must appreciably address and meet these issues.

- The EA decision authorizes unspecified removal of conifers in aspen areas. The failure of the EA and the decision to specify the scientific basis and parameters for the felling and removal of conifers violates the NEPA. No diameter or age class limits are given. The EA and decision fail to disclose or address if conifer removal includes the removal of commercial timber, and/or involves a commercial timber sale. It fails to disclose if Forest Plan eastside screen provisions prohibiting the removal of trees above 21” dbh will be adhered to. It fails to specify provisions preventing harm to soils and vegetative communities in aspen stands. These ecological and legal failures need to be addressed, and the decision regarding the removal of conifers in aspen stands brought into accord with Forest Plan screen provisions, and with scientific recommendations for the retention of all mature and old characteristic conifer trees (regardless of diameter) within the affected aspen areas. If the decision does include commercial logging of conifers in aspen stands, this portion of the decision must be withdrawn and these issues responsibly addressed in a new legally compliant EIS. Non-commercial scientifically substantiated restoration thinning of small diameter conifers in aspen areas, providing soils and vegetation are properly protected, may otherwise proceed.

Conclusion

Our organizations appreciate the agency’s inherent motivations to improve and protect the natural resource qualities of the allotment area. We look forward to reviewing the progress of natural recovery and restoration in the project area over the coming five years, and working with the agency and community to address long-term management in this allotment and in the greater region. We encourage the agency to effectively protect the allotment area by implementing the closure and restoration provisions of the EA and decision, and by deferring further consideration of continued livestock grazing in this area until at least five years have passed and an EIS has been completed, as is legally required. We look forward to appeal resolution efforts to incorporate the above legal and ecological issues into a modified decision for the Van Allotment.

Sincerely,



Asante Riverwind
Eastern Oregon Forest Organizer
Oregon Chapter Sierra Club
P.O. Box 5534

Bend, Oregon 97708
(541) 322-4065 office
(541) 306-7737 field
asante.riverwind@sierraclub.org

and for: Dave Becker
Staff Attorney
Oregon Natural Desert Association
917 SW Oak Street, Suite 409
Portland, OR 97205
503-525-0193
dbecker@onda.org

and for: Karen Coulter, Director,
League Of Wilderness Defenders-Blue Mountains Biodiversity Project
27803 Williams Lane
Fossil, Oregon 97830
(541) 468-2028 office
(541) 385-9167 voice mail

Quotations, however, eloquent or inspiring, cannot compare to a day spent free amidst the wonders of wild nature...