



Oregon Natural Desert Association

June 30, 2004

VIA FAX AND U.S. MAIL

Thomas E. Rasmussen, Field Manager, Lakeview Resource Area
Bureau of Land Management
Lakeview District Office
1301 South G Street
Lakeview, OR 97630

Re: Protest of EA OR-010-2004-07

Dear Mr. Rasmussen:

Pursuant to 43 C.F.R. § 4160.3(a), the Oregon Natural Desert Association (ONDA) hereby protests the proposed decision on the Buckaroo Pass Fence Extension and Water Development EA (OR-010-2004-07). Under § 4160.3(a), an interested public has 15 days after receipt of a proposed decision to protest that decision with the authorized officer. ONDA received the above-referenced Notice of Proposed Decision on June 15, 2004. As stated in ONDA's comment letter on the EA, ONDA is a non-profit public interest organization dedicated to preserving and protecting the public lands of eastern Oregon. ONDA's mission is to protect, defend, and restore forever, the health of Oregon's native deserts. The members and staff of ONDA use and enjoy the public lands, waters, and natural resources of the public lands on and surrounding the Lakeview Resource Area's Beaty Butte Allotment for countless recreational, scientific spiritual, educational, aesthetic, and other purposes.

Public Disclosure and Informed Agency Decision making

In its comments on the EA, ONDA expressed a concern that the EA does not contain enough information to satisfy the requirements of public disclosure and informed decision making, as required by NEPA. See Robertson v. Methow Valley Citizens, 490 U.S. 332, 349 (1989) (NEPA "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision."); Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1151 (9th Cir. 1998); see also Price Road Neighborhood Ass'n v. U.S. Dept. of Transp., 113 F.3d 1505, 1511 (9th Cir. 1997) ("One of the twin aims of NEPA is active public involvement and access to information"); Columbia Basin Land Preservation v. Schlesinger, 643 F.2d 585, 592 (9th Cir. 1981) (preparation of a NEPA document ensures that the public "can evaluate the environmental consequences independently"). You indicate that the CEQ has stated that EAs should be no more than ten to fifteen pages in length; however, if an agency cannot fit the basic information

required to satisfy NEPA's requirements into a ten to fifteen page document, the agency must either include the relevant and required information in a longer document or prepare an EIS instead of an EA. In fact, one of the purposes of an EA is to help the BLM decide whether to prepare an EIS. See 40 C.F.R. § 1501.4(c).

Although tiering is certainly permitted and appropriate in many instances in preparation of an EA or EIS, the Buckaroo Pass EA fails to present key pieces of information that must be in the main document, including: (1) what efforts have been made and why these efforts have failed, with respect to natural barriers and riders on the Beaty Butte Allotment; (2) a map that shows the locations of the originally envisioned fence corridors, compared to the locations of the fence(s) proposed in this EA; and (3) basic descriptions of impacts to soils and other resources from the proposed fence and water developments, aside from the more general descriptions contained in tiered-to documents. In short, the EA must contain enough information to support the BLM's decision as well as to inform the public and allow for meaningful public participation in this decision.

Purpose and Need and Range of Alternatives

In your response to ONDA's comments, you stated that new fences were recognized as one part of the process in fully implementing the 1998 Beaty Butte AMP. You acknowledge that riders are "an important component of grazing system implementation" under the AMP. However, you then suggest that riders were only needed "to keep cows in the appropriate pasture area until pasture fences could be constructed." As ONDA pointed out in its comments, the Beaty Butte AMP Record of Decision states, "Proper implementation of this plan will require the use of riders to move cattle between pastures (trailing), keep cattle inside designated areas, and keep cattle out of sensitive areas." ROD at App. 1-12. As well, the 2004 Beaty Butte Allotment annual operating plan (AOP) again places an emphasis on herding as envisioned in the AMP. See also 43 C.F.R. § 4120.2(d) (requirement to conform with AMP shall be incorporated into permit terms and conditions). In fact, the AOP states:

The [BLM] recognizes that a division fence does not completely exist between the North and South pastures. The permittees will use riders, as required by the Allotment Management Plan, to keep livestock out of the North Pasture. If drift from the South to the North Pasture occurs reasonable effort will be made by the permittees to remove cattle that have drifted into the North Pasture.

2004 AOP at 3 (emphasis added). The AMP/ROD does not suggest the requirement to use riders as part of the allotment's rest-rotation grazing system is of limited duration. If the problem this EA is addressing is the ineffectiveness of "natural barriers" and riders to "keep cattle out of the rested pasture[s]," then, under NEPA's requirement to "[r]igorously explore and objectively evaluate all reasonable alternatives," 40 C.F.R. § 1502.14(a), that would address the purpose and need for action, the BLM must explore alternatives that involve no fencing and/or no water development and more riders or more riding. You admit that the "original" North-South pasture fence was constructed several years ago and that it was thought that it could potentially be adequate to keep livestock out of the rested pasture. It has not proved sufficient; but the BLM must consider all reasonable alternatives to address that shortcoming, rather than just the easiest

option of building miles of new fence. Both the AMP and the AOP explicitly require herding to contain livestock within designated areas.

You also failed to respond to ONDA's comment that the EA must also consider as "reasonable" alternatives to address the stated problem less grazing and/or complete rest of both pastures. See 42 U.S.C. § 4332(2)(C)(iii) (EIS must contain "a detailed statement [of] . . . alternatives to the proposed action"); 42 U.S.C. § 4332(2)(E) (independent requirement that agencies must "study, develop, and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources"). See also 40 C.F.R. § 1502.1 (an EIS "shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment"); 1508.25 (scope of alternatives considered in an EIS must consist of "reasonable courses of actions").¹ Again, this is clearly envisioned by the AMP/ROD, which recognizes the inherent management flexibility built into the plan—flexibility that can be implemented each year via the AOPs. Rest from grazing would certainly achieve the AMP's goals with respect to diverse vegetative communities, enhanced habitats, adequate ground cover, long-term sustainable grazing practices, and maintenance of consumptive and non-consumptive uses. See AMP/ROD at App. 1-1, 1-10 to 1-11. It would also achieve the AMP's objectives with respect to PFC ratings, vegetative trends, sagebrush canopy cover, native perennial vegetation health, and overall plant community conditions. See AMP/ROD at 1-1 to 1-3.

Wetland and Riparian Zones

In response to ONDA's comments, you indicated that "[t]hese resources would not be impacted by the proposed pipeline developments because the two springs are already excluded from livestock grazing" and "both of these springs already have water developments associated with them." Given this response, the BLM must address whether the proposed action would comply with Public Water Reserve No. 107 ("PWR # 107"), which protects federal reserved water rights. Executive Order of April 17, 1926, previously codified at 43 C.F.R. § 292.1 (1938). See also General Land Office, Dept. of Int., Circular 1066, 51 I.D. 457–58 (1926) (stating "the above order [PWR # 107] was designed to preserve for general public use and benefit unreserved public lands containing water holes or other bodies of water needed or used by the public for watering purposes."). The Executive Order withdrew all springs and water holes on public lands and the surrounding acreage, and was designed to preserve for the general public lands containing water holes and other bodies of water needed or used by the public for water purposes. See Desert Survivors, 80 IBLA 111, 115 (1984) (rejecting BLM approval of a mining plan that did not adequately consider and protect water source under PWR # 107). Under the Executive Order, the BLM cannot authorize activities that will impair the public use of any of those waters. See, e.g., United States v. City and County of Denver, 656 P.2d 1, 31–32 (Colo. 1982) (upholding BLM claims of reserved water rights to more than 1500 springs and water holes, but finding purpose of reservation did not embrace the entire yield of the source). This

¹ Note that the required procedures for preparing an EA are the same as an EIS. Idaho Sporting Cong. v. Alexander, 222 F.3d 562, 565 n.2 (9th Cir. 2000); Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1152 (9th Cir. 1998).

withdrawal remains valid and was not rescinded with the enactment of FLPMA in 1976. See 43 U.S.C. § 1714. Finally, in approving a proposal for any further use of these wetlands and riparian zones, the BLM must specifically ensure that its proposed action does not cause “unnecessary or undue degradation” of the public lands and their resources, and does not cause “permanent impairment” of the productivity of the land and the quality of the environment.” Id. §§ 1732(b); 1702(c). These analyses are absent from the EA.

Noxious Weeds

Your response to ONDA’s concerns about the potential for the spread of weeds associated with nine new miles of fence essentially restates the inadequate discussion in the EA. Again, ONDA is very concerned that livestock trailing along nine new miles of fence, as well as the disturbance created along that nine mile corridor during construction, will have significant environmental impacts on these areas. ONDA is particularly concerned about the fact that these impacts will be in very close proximity to wilderness study areas. Under the law cited above regarding the BLM’s obligation to prepare a fully informed environmental document and to consider all reasonable alternatives to the proposed action, the BLM should consider reasonable alternatives that involve, for example, increased herding, decreased number of livestock, or rest for both pastures at the same time.

Wilderness Study Areas

Finally, with respect to WSAs, ONDA expressed a concern that the location of the proposed fences and pipelines would adversely impact wilderness values on the Basque Hills and Hawk Mountain WSAs. It appears from your response that the BLM has backed off from its initial assertion in the EA that the proposed fence and pipelines “would have no impact on wilderness values.” EA at 4. In your response you now seem to acknowledge that there would be *some* impact, but that the impact will be minimized. You also assert that “[t]he BLM can state that range projects located outside the WSA would not impact WSA values because the courts have ruled that visual or noise obtrusions that occur outside WSA or wilderness boundaries (outside sights and sounds) do not impact wilderness values.” ONDA is not aware of any such holdings, nor have you cited any in your response. Further, the AMP’s requirement to “minimize” the impacts of fences placed near WSAs counsels toward considering alternatives that would leave more of a buffer zone between any proposed fencing and water developments (and the livestock concentrations that will surely result post-construction) and WSAs. See ROD at App. 1-11.

Conclusion

For the above-stated reasons, ONDA therefore protests the BLM’s proposed decision and respectfully requests the BLM to modify the EA or prepare a more detailed EIS to comply with the requirements of NEPA, FLPMA and all other applicable laws. Once again, thank you for the opportunity to participate in the planning effort for this proposal. Please mail a copy of the final decision as soon as it is prepared. If you have any questions regarding this protest, please feel

free to contact me at the address below, or ONDA's executive director, Bill Marlett, at 541-330-2638 or bmarlett@onda.org.

Sincerely,

s/ Peter M. Lacy

Peter M. Lacy ("Mac"), Staff Attorney
Oregon Natural Desert Association
917 SW Oak Street, Suite 408
Portland, OR 97205
503.525.0193
lacy@onda.org

Cc: Bill Marlett, Executive Director
Oregon Natural Desert Association