



Oregon Natural Desert Association

January 31, 2008

VIA EMAIL

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

Re: **Protest of Proposed Decision for Hickey Individual Allotment (0202)**

Dear Mr. Rasmussen:

Pursuant to 43 C.F.R. § 4160.1 and 4160.2, the Oregon Natural Desert Association (“ONDA”) hereby protests the BLM’s Proposed Decision, dated January 10, 2008, for the Hickey Individual Allotment (0202). For the reasons outlined in this protest, ONDA asks BLM to modify its final decision and prepare further NEPA review to comply with the requirements of NEPA, FLPMA, the Clean Water Act, and all other applicable laws.

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 Hickey Individual Allotment, particularly in the Fish Creek Rim area, for countless recreational, scientific spiritual, educational, aesthetic, and other purposes.

ARGUMENT

I. Impacts of Grazing on Sensitive Plant Species.

Our information indicates that a BLM Bureau Sensitive plant species of *Eriogonum* exists within the allotment. Current grazing is having negative impacts on the *Eriogonum* species, as well as nodding melic grass (*Melic stricta*, a BLM Bureau Tracking species), on the allotment. The Lakeview Resource Management Plan (“RMP”) recognizes that plant species are disappearing at an accelerated pace worldwide, and that the major cause of this is habitat destruction. FEIS Vol. 1, 2-13. This is certainly the case with *Eriogonum*, where only a handful of populations are known to exist. FEIS Vol. 1, 2-17. *Eriogonum* species are considered

threatened with extinction or presumed extinct by the Oregon Natural Heritage Program list. Id. Grazing destroys native plants and their habitat via trampling, soil erosion, consumption by livestock, and other ways. “Once lost, a species can never be recovered, and there is no way of knowing how useful it may have been.” FEIS Vol. 1, 2-13.¹

In other areas on the Lakeview District where sensitive plant species occur, BLM has sought to protect those species by increasing monitoring and research, excluding grazing from areas where they occur, and similar measures, in order to maintain and improve these species’ critical or essential habitat. See FEIS Vol. 1, 2-14; Lakeview RMP at 35–36. ONDA is not aware that BLM has taken any such steps to protect sensitive *Eriogonum* and nodding melic grass populations on the Hickey Individual Allotment. The Proposed Decision does not indicate any such steps; indeed, it does not even mention *Eriogonum*.

If adopted as is, we believe a final decision authorizing status quo grazing without adjusting grazing management to protect *Eriogonum* would violate NEPA and FLPMA. Such violations would include a failure to examine alternatives to the proposed action, a failure to take a “hard look” at the impacts of the authorized grazing on a sensitive plant species, a failure to ensure against “unnecessary or undue degradation” and manage the lands “without permanent impairment” pursuant to FLPMA’s multiple use mandate, a failure to base the decision on current and accurate inventory information, and a failure to manage grazing consistently with the underlying land use plan. 42 U.S.C. § 4332(2)(C); 43 U.S.C. §§ 1701(a)(8), 1702(c), 1711(a), 1732(a) & (b).

II. Impacts to Water Quality.

The 1999 rangeland health assessment and the 2004 RMP both indicate that water quality standards are not being met on Camas and Parsnip creeks. Although grazing was excluded from the lower reaches of the creeks in 1999, livestock grazing was still adversely impacting water quality in 2004 when the RMP was prepared. See FEIS Vol. 2, at A-39. That condition continues today. According to the RMP, “[w]here BLM-authorized activities are determined to be impacting water quality, [BLM must] modify management to improve surface water quality to meet/exceed state standards.” Id. Because the Proposed Decision authorizes the exact same animal numbers, authorized AUMs and season of use, it appears BLM has not complied with this land use plan requirement.

Section 313 of the Clean Water Act requires BLM to adhere to state water quality standards. 33 U.S.C. § 1323(a). Issuance of a federal permit to graze livestock is an “activity resulting, or which may result, in the discharge or runoff of pollutants.” Id. Both Camas and Parsnip creeks are on Oregon DEQ’s 303(d) list for elevated stream temperatures. FEIS Vol. 1, 2-27. Livestock grazing is one of the main causes of stream degradation via removal of riparian vegetation and destabilization of stream banks. Id. at 2-25; see also FEIS Vol. 2, A-39 (noting accelerated gully soil erosion in drainages along Camas Creek, and soil erosion in the Fish Creek Rim area).

¹ See also www.oregon.gov/ODA/PLANT/CONSERVATION/statelist.shtml (last modified Jan. 31, 2008) showing relevant *Eriogonum* species on the state threatened and candidate list).

In order to comply with its water quality mandates, BLM must provide for more concrete compliance with water quality standards until such time as TMDLs and WQRPs are prepared which cover this allotment or watershed. See, e.g., Sierra Club v. Austin, No. CV-03-22-M-DWM, slip op. at 18 (D. Mont. Apr. 30, 2003) (holding that a Forest Service decision to carry out a timber sale was unlawful where the sale was in watersheds with water quality limited streams lacking TMDLs and where sedimentation would result from those sales). See also Lakeview RMP at 39–42 (requiring compliance with state water quality standards and protection of watershed and surface water quality); 43 U.S.C. § 1732(a) (land use plan consistency provision).

III. Impacts to Riparian Areas.

Related to the issue of water quality, BLM must ensure that key riparian areas on the allotment are protected. The Lakeview RMP requires that riparian and wetland areas be managed to provide for attainment of proper functioning condition (“PFC”) and Riparian Management Objectives (“RMOs”). See, e.g., Lakeview RMP at 30–32. The RMP provides RMO criteria for pool frequency, temperature, large woody debris, bank stability, lower bank angle, width/depth ratio, and riparian vegetation. FEIS Vol. 2, A-155. The Proposed Decision does not appear to require compliance with, or monitoring of, these key attributes of healthy, functioning riparian areas. Without requiring any quantitative monitoring, and without setting forth in the grazing decision quantitative standards for livestock grazing in riparian areas, it will be impossible to determine whether the proposed grazing system is achieving “measurable progress” toward meeting state water quality standards, RMOs, and PFC.

IV. Impacts to Wilderness Values.

Neither the Proposed Decision, nor the underlying RMP examines potential impacts to wilderness values. In 2005, ONDA presented the Lakeview District with a report containing a comprehensive inventory of wilderness values (outside of existing Wilderness Study Areas) throughout the Lakeview Resource Area. One of the areas we found to possess wilderness characteristics as defined by the Wilderness Act, FLPMA and BLM’s subsequent wilderness inventory handbooks, is our Fish Creek Rim Proposed WSA Addition. ONDA, *Wilderness Inventory Recommendations: Lakeview District* (2005), at 79–86 (and photos).

Under NEPA, BLM must examine impacts to wilderness values like any other resource. See Ore. Natural Desert Ass’n v. Rasmussen, 451 F.Supp.2d 1202, 1212-13 (D. Or. 2006). BLM did not examine impacts to wilderness values outside of existing WSAs on the Hickey Individual Allotment during the RMP planning process. Nor is ONDA aware that BLM has done so during any other, site-specific analysis of grazing on this allotment, including the Proposed Decision, the Determination of NEPA Adequacy, the 1999 rangeland health assessment, or the 1970 allotment management plan.

The authorized grazing may negatively impact wilderness values in this area in several ways. First, grazing is adversely impacting special status plant species as described above. This impacts the naturalness of the area, opportunities for primitive recreation, and supplemental

values. Second, continued grazing means continued maintenance or improvement of rangeland structures on the allotment, which may impact naturalness opportunities for solitude or primitive and unconfined recreation, and supplemental values. This may also impact roadlessness if routes associated with structures such as fences, reservoirs or water developments are maintained. According to the RMP, the Hickey Individual Allotment, as of 2004, contains 3 miles of fence, 1 proposed and 3 completed reservoirs, 200 acres proposed for vegetative treatment or seeding, and 5.5 acres of treated weed sites. FEIS at 2-46. To the extent any of these impacts are occurring or may occur within the Fish Creek Rim WSA, this also runs afoul of FLPMA's nonimpairment mandate for Wilderness Study Areas. 43 U.S.C. § 1782(c).²

The Proposed Decision tiers to the RMP and specifically requires maintenance of such rangeland projects. It does not appear that BLM examined (either in the Proposed Decision or the RMP) not grazing this allotment, or reducing grazing to levels at which no further rangeland projects would be required or maintained. Because BLM failed to do so, it has failed to comply with its NEPA obligation to take a "hard look" at the impacts to wilderness values of its proposed action. Likewise, this violates FLPMA's multiple use balancing and unnecessary or undue degradation requirements. 43 U.S.C. §§ 1732(a), (b).

V. Grazing Allocation.

The Proposed Decision does not evaluate alternative levels of grazing. NEPA requires BLM to consider reasonable alternatives to a proposed action. 42 U.S.C. § 4332(2)(C). BLM did not prepare an EA or EIS for the Proposed Decision, instead relying upon a Determination of NEPA Adequacy tiering to the EIS for the Lakeview RMP. Because BLM failed to consider a reasonable range of alternatives with respect to land areas and forage levels allocated to grazing in the RMP, including specifically as to the Hickey Individual Allotment, this decision to authorize a new permit with no change in AUMs, number of grazing days or season of use, runs afoul of NEPA. This violates not only NEPA's alternatives and "hard look" requirements, but also FLPMA's multiple use and unnecessary or undue degradation provisions. 43 U.S.C. §§ 1732(a), (b).

Alternative grazing levels were last examined in the early 1980s in the Warner Lakes Management Framework Plan and accompanying rangeland program decision documents. In the 2004 Lakeview RMP, aside from Alternative E, which would have eliminated grazing from all public lands within the planning area, BLM examined no alternative that would have altered the 2.9 million acres of public land allocated to livestock grazing. FEIS Vol. 1, 3-38 to -40; FEIS Vol. 4, CR-264. Similarly, there was no alternative (save for Alternative E) in the RMP that would have reduced forage allocated exclusively to domestic livestock to any less than 80% (non-allotment specific) of current levels. FEIS Vol. 1, 3-38 to -40 (levels compared to current "average" authorization of 108,000 AUMs).

² We note, however, that the Proposed Decision does provide that the Field Manager must give prior approval for any maintenance or construction of range improvements or surface disturbing work done within the WSA. Are such decisions subject to NEPA analysis, including an opportunity for public comment and participation?

The RMP provides that grazing levels authorized in the land use plan will be adjusted during implementation or authorization of activity-level plans such as allotment management plans or terms and conditions of grazing use authorizations. Lakeview RMP at 52–53. Based on concerns about impacts to sensitive plant species, water quality and wilderness values, BLM must conduct further analysis of the impacts of the proposed grazing on these and other important public land resources and values. See also FEIS Vol. 2, A-40 (requiring adjustment of allotment management, including levels and areas of authorized use, seasons of use, and grazing system, within the Fish Creek Rim ACEC); 43 U.S.C. § 1732(a) (land use plan consistency provision).

VI. Impacts to Sage Grouse Populations and Habitat.

The Proposed Decision does not adequately evaluate impacts to sage grouse. BLM’s data shows that the Parsnip lek has begun to decline in 2007, after several years of an increasing trend. To our knowledge there has been no NEPA analysis of the impacts of livestock grazing on the Parsnip lek, either at the land use plan level or the activity plan level. BLM must examine the impacts of the proposed grazing levels and systems on sage grouse and their habitat, prior to issuing a new 5-year permit to graze on the public lands. Now that the U.S. Fish and Wildlife Service has issued a positive 90-day finding on a petition to list the pygmy rabbit under the Endangered Species Act, it is also particularly important that BLM likewise evaluate potential impacts to pygmy rabbits on the allotment.

VII. Appropriate Level of NEPA Analysis.

Finally, BLM has failed to conduct the necessary level of review to satisfy its obligations under NEPA, FLPMA, the Clean Water Act and other applicable authority. Only if prior NEPA documents have taken a “hard look” at potential environmental consequences may the BLM rely upon a Determination of NEPA Adequacy (“DNA”). Pennaco Energy, Inc. v. U.S. Dep’t of the Interior, 377 F.3d 1147, 1151 (10th Cir. 2004).

Here, BLM should have prepared an EA or EIS rather than a DNA. Among other things, there is now significant new information concerning wilderness values present on the allotment, which was unavailable to BLM when it made its prior grazing decisions (both at the land use plan and activity levels). The on-the-ground situation also has changed in that grazing under the current system, at current levels is not resulting in protection of sensitive plant species, continues to adversely impact water quality and riparian health, and may be at least partially responsible for the recent decline of sage grouse in the area.

Based on this significant new information or circumstances, and because the EIS for the RMP does not take the requisite “hard look” at these impacts on the Hickey Individual Allotment, BLM must prepare an EA or EIS for this grazing permit renewal decision. See, e.g., Portland Audubon Soc’y v. Babbitt, 998 F.2d 705, 708–09 (9th Cir. 2000) (agencies must supplement the existing environmental analysis if new circumstances “raise significant new information relevant to environmental concerns”); Friends of the Clearwater v. Dombeck, 222 F.3d 552, 557 (9th Cir. 2000) (agency “must be alert to new information that may alter the

results of its original environmental analysis, and continue to take a ‘hard look’ at the environmental effects of [its] planned actions”).

Likewise, BLM’s use of a DNA to support the Proposed Decision violates NEPA’s public participation mandate. Under NEPA, BLM “shall involve . . . the public to the extent practicable.” 40 C.F.R. § 1501.4(b). See also Anderson v. Evans, 371 F.3d 475, 487-88 (9th Cir. 2002) (various statutory and regulatory schemes require BLM to involve the public in its public lands decision-making processes).

And finally, it violates NEPA’s alternatives requirement. 42 U.S.C. § 4332(E). Thus, agencies, whether in an EIS or EA—or in those NEPA documents relied upon in a DNA, must “to the fullest extent possible” “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” So. Utah Wilderness Alliance v. Norton, 237 F. Supp. 2d, 48, 53–54 (D.D.C. 2002) (quoting 42 U.S.C. § 4332(E)).

CONCLUSION

For these reasons, ONDA respectfully protests the Proposed Decision and requests BLM to modify its final decision or to prepare an EA or EIS to evaluate impacts to the human environment and provide for compliance with the requirements of NEPA, FLPMA and all other applicable laws. If you have any questions regarding this protest, please feel free to contact me at the address below.

Sincerely,

s/ Peter M. Lacy

Peter M. Lacy (“Mac”), Senior Attorney
Oregon Natural Desert Association

917 SW Oak Street, Suite 409
Portland, OR 97205
503-525-0193
lacy@onda.org

Cc: Brent Fenty, Executive Director
Oregon Natural Desert Association