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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OREGON NATURAL DESERT ASS’N,

Case No. 06-242-AA

Plaintiff,

and

CENTER FOR WATER ADVOCACY,

**MEMORANDUM IN SUPPORT OF
PLAINTIFF’S MOTION FOR
RECONSIDERATION**

Plaintiff-Intervenor,

v.

DANA R. SHUFORD, Burns District Manager,
BLM, *et al.*,

Defendants,

and

**HARNEY COUNTY and STEENS
MOUNTAIN LANDOWNER GROUP,**

Amicus Curiae on Liability,
Defendant-Intervenors on Remedy

INTRODUCTION

On June 8, 2007, this Court issued an Opinion & Order (Dkt # 187) in which it denied Plaintiff Oregon Natural Desert Association's ("ONDA") Motion for Summary Judgment (Dkt # 110) and granted ONDA's Motion for Partial Summary Judgment (Dkt # 17), in this action. ONDA asks the Court to reconsider its rulings on Claims One, Two and Seven, based on newly discovered evidence that was unavailable prior to the June 8, 2007 order. These three claims concern defendant Bureau of Land Management's ("BLM") evaluation of the impacts to wilderness values of its decision to adopt the Andrews-Steens Resource Management Plan ("RMP").

In this case, BLM concluded—based on an in-office review involving no field verification—that almost no wilderness values exist throughout more than half a million acres of public land inventoried by ONDA on and around Steens Mountain. Since the Court issued its opinion and order, new evidence presented by this motion shows that BLM's conclusion and the process the agency followed to reach it, are entitled to no deference. In February 2008, BLM completed a new wilderness inventory and NEPA analysis evaluating the presence or absence of wilderness values, and the environmental impacts of proposed management actions on those values, for the Louse Canyon Geographic Management Area ("GMA"). The Louse Canyon GMA lies within BLM's Vale District, directly to the east of the Burns District's Andrews Resource Area, the area at issue in this case. In undertaking this new inventory, which included conducting its own field inventory work and evaluating an ONDA wilderness inventory report, BLM reached the result ONDA has long suspected it would, agreeing with more than 80% of the 138,000 acres wilderness quality public lands at issue in ONDA's Louse Canyon wilderness proposal.

BLM's Louse Canyon GMA wilderness inventory is the agency's first major decision implementing a new policy recently issued by the BLM State Office. This new guidance explains how the agency must update its wilderness inventory information when preparing a land use or activity level plan. The new agency protocol includes specific guidance on reviewing citizen proposals such as the ONDA wilderness inventory report at the heart of this case. Moreover, the new protocol closely mirrors the levels of analysis ONDA has argued is necessary to satisfy BLM's NEPA and FLPMA obligations—in particular, the importance of photographic and field documentation to support BLM's conclusions concerning the presence or absence of wilderness values, especially if the agency reaches the opposite conclusion from the citizen report.

The new evidence presented here shows that BLM's Andrews-Steens RMP wilderness determination is entitled to no deference. This is because the new evidence shows that Burns BLM's wilderness inventory methodology was deficient in scientific rigor and environmental analysis, and completely inconsistent with BLM's long-standing, and now reinstated, wilderness inventory protocol. Because this new evidence shows BLM's at least tacit acknowledgement that the type of truncated, non-public analysis such as that performed during the Andrews-Steens RMP process simply does not meet the requirements of NEPA and FLPMA, ONDA respectfully requests this Court to reconsider its rulings on plaintiff's Claims One, Two and Seven and issue an order granting summary judgment in ONDA's favor on those claims.

STANDARD OF REVIEW

This Court has inherent equitable power to grant a motion for reconsideration where there has been an intervening change of law or fact, where new evidence or authority not previously available in the exercise of reasonable diligence has been discovered, or where reconsideration is necessary to correct a clear error of law or a manifest injustice. School Dist. No. 1J, Multnomah

County v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993). The Ninth Circuit has determined that as long as a district court retains jurisdiction over a matter, the district court possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order. City of Los Angeles v. Santa Monica BayKeeper, 254 F.3d 882, 885 (9th Cir. 2001) (quoting Melancon v. Texaco, Inc., 659 F.2d 551, 553 (5th Cir. 1981)); see also United States v. Smith, 389 F.3d 944, 948 (9th Cir. 2004). Pursuant to its common law authority, the district court may proceed in any manner not inconsistent with the limitations set forth in the Federal Rules of Civil Procedure to modify its orders or decisions. See City of Los Angeles, 254 F.3d at 887; see also Fed. R. Civ. P. 60(b) (allowing a litigant to seek relief from an order based on any of six categories, including newly discovered evidence and “any other reason justifying relief”). Under Rule 60(b), a motion seeking reconsideration of an order “shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.” Fed. R. Civ. P. 60(b).

NEW EVIDENCE:
BLM’S 2007 LOUSE CANYON WILDERNESS INVENTORY

Between 2001 and 2005, BLM’s Vale District undertook a planning process for the Louse Canyon Geographic Management Area. The Louse Canyon GMA covers about 530,000 acres of public land, largely situated around the Owyhee Wild and Scenic River in the southeast corner of Oregon. The area lies within the Vale District’s Jordan Resource Area, which lies directly adjacent and to the east of the Burns District’s Andrews Resource Area, the resource area at issue in this case. Under the governing land use plan, the Southeast Oregon Resource

Management Plan (“SEORMP”), the Vale District uses GMAs as an activity-level planning mechanism by which BLM makes adjustments to authorized land uses.¹

At the end of the GMA process for Louse Canyon, BLM in 2005 issued an environmental assessment and final decision, which provided for reissuance of five grazing permits and an extensive set of range projects (fences, water developments, vegetation projects, and so forth) to address resource concerns in the area, including violations of BLM’s rangeland health standards and guidelines for livestock grazing. Throughout the NEPA process, as well as during an administrative protest and appeal of the Louse Canyon GMA decision, ONDA asked BLM to consider the impacts to wilderness values of the grazing authorizations and the range projects. BLM steadfastly declined to do so.

In February 2004, during the NEPA process, ONDA provided Vale BLM with its own citizen wilderness inventory report that included wilderness recommendations for public lands within the Louse Canyon GMA planning area. That report follows the same format (based on BLM’s 1978 and 2001 wilderness inventory handbooks) as the one ONDA submitted to the Burns District in the Andrews-Steens RMP at issue in this action.² As the Louse Canyon GMA process continued, BLM still refused to assess the presence or absence of wilderness values in the area, including refusing to examine the information provided in the ONDA inventory report. Likewise, BLM refused to consider the impacts of its grazing and range projects decisions on these wilderness values. In September 2006, ONDA filed suit in this Court, challenging BLM’s decision to adopt five final decisions authorizing the Louse Canyon GMA grazing and range

¹ The SEORMP and Louse Canyon GMA documents are available at: www.blm.gov/or/districts/vale/index.php (last visited Apr. 7, 2008).

² ONDA’s Vale District wilderness inventory report is available at: www.onda.org/defending-desert-wilderness/campaign-to-protect-desert-wilderness/more-info-on-ondas-campaign-to-protect-desert-wilderness/OwyheeInvRept.pdf/view (last modified Apr. 7, 2008).

projects decisions. Ore. Natural Desert Ass'n v. Freeborn, Civ. No. 06-1311-MO (D. Or. filed Sept. 18, 2006). Claims One and Two in that action allege that BLM violated NEPA and FLPMA by adopting the Louse Canyon GMA final decisions without considering impacts to wilderness values.

ONDA immediately moved for preliminary injunctive relief, asking this Court to enjoin BLM from constructing any fences, pipelines or other range structures on the landscape within areas which ONDA had inventoried and found to possess outstanding wilderness values. BLM then agreed, via a stipulation entered with the Court, that the agency would not construct any such projects in ONDA-proposed wilderness areas until the Court had reached a decision on the merits. In January 2007, BLM announced that it would conduct additional analysis to determine the impacts of the proposed projects and grazing on “any wilderness characteristics found to be present outside of existing Wilderness Study Areas within the LCGMA.” Exhibit (“Exh.”) 1. The Court stayed the litigation to allow BLM to conduct this additional analysis.

Over the course of the next year, BLM updated its wilderness inventory information, including by analyzing ONDA’s wilderness inventory report and by conducting its own field inventory aimed at determining the presence or absence of wilderness values on the public lands within the Louse Canyon GMA. BLM conducted its 2007 Louse Canyon wilderness inventory pursuant to a new BLM State Office Instruction Memorandum (“IM H-6300-1”) titled, “Updating Resource Information Regarding Wilderness Characteristics and Consideration of Wilderness Characteristics in NEPA and Land Use Planning.” Exh. 2.³ The IM provides BLM’s new wilderness inventory protocol (essentially a reinstatement of the previous protocol as

³ ONDA first obtained a copy of this new Instruction Memorandum, which is labeled as a “draft,” in late-November 2007, when BLM produced it as part of an administrative record for an administrative appeal concerning a range project (the North Fork Malheur GMA project) elsewhere on the agency’s Vale District. ONDA is not aware of a “final” version of the IM.

outlined in the 1978 and 2001 wilderness inventory handbooks), including describing how and when the agency will review information and proposals provided by citizens. It applies to both land use and activity level plans. *Id.* at 1. It notes that “[r]ecent litigation has highlighted a need to maintain updated resource inventory information regarding wilderness characteristics” and that BLM “needs to establish clear and consistent direction . . . to update resource inventory information regarding wilderness characteristics, and to incorporate such information into the NEPA and planning processes.” *Id.*

BLM completed its Louse Canyon wilderness inventory and evaluations in December 2007. Exh. 3.⁴ In February 2008, BLM issued a supplemental NEPA document in which it presented and sought public input on its new NEPA documentation concerning impacts to wilderness values in the Louse Canyon GMA. Exh. 4. ONDA commented on BLM’s wilderness inventory and new environmental analysis by letter dated March 31, 2008.

After conducting its analysis and field-based inventory, BLM determined that of the 137,791 acres that ONDA found to meet the wilderness criteria, the agency agreed with ONDA for 111,891 of those acres.⁵ Exh. 3, Cover Memos at 1 (summary table of wilderness inventory findings). In reaching this conclusion, BLM examined its original 1980 wilderness inventory

⁴ Exhibit 3 consists of the two cover memoranda and the inventory documentation for 18 separate wilderness units. Because BLM’s numbering begins anew for each separate inventory unit, citations to Exhibit 3 will use the following format: Exh. 3, [name] Unit at [page].

⁵ Of a total of 286,000 acres inventoried in the Louse Canyon GMA (adding the 2007 inventory areas to the initial 1980 inventory), BLM and ONDA agree on more than 260,000 of those acres as to whether or not wilderness values are present. *See* Appendix A (attached to this brief) (summary chart of BLM/ONDA Louse Canyon wilderness inventory findings). In this case, where BLM conducted no review inventory, collected no photographic documentation of actual route conditions, and allowed no opportunity for public comment on the agency’s wilderness inventory findings, the agency determined that only 1,958 acres within the Andrews-Steens RMP planning area have wilderness character—out of 750,000 acres that ONDA inventoried and 540,000 acres shown to have wilderness character.

information, ONDA's February 6, 2004 wilderness inventory report, GIS and other data on rangeland projects and vehicular routes, road maintenance records, grazing allotment site-visit information, field observations conducted as part of the rangeland health assessments process in 2000, and—importantly—“[f]ield visits made from spring through summer 2007 . . . for the specific purpose of documenting evidence of road maintenance.” Exh. 3, Cover Memos at 2–3, 6.

ARGUMENT

In ruling in favor of BLM concerning ONDA's wilderness-based NEPA and FLPMA claims, this Court relied in large part on the high level of deference typically owed to an agency's “expertise.” See Opinion & Order at 20 (“BLM can rely on its expertise to determine whether a parcel has the requisite wilderness characteristics”; “in a factual situation where it is debatable whether a route is a ‘road’ or a ‘way,’ the court cannot substitute its judgment for that of BLM”), 26 (stating that “some level of updating occurred” and that “BLM has wide discretion in conducting its wilderness analysis and need not agree with ONDA's assessment. The court will defer to the agency's expertise in this regard . . .”). However, an inconsistent position taken by an agency on an issue casts serious doubt on the validity of its analysis, and the courts do not give deference to agency “expertise” when the agency has fluctuated in its position. See, e.g., Mt. Graham Red Squirrel v. Madigan, 954 F.2d 1441, 1457 (9th Cir. 1992).

The new evidence presented with this motion, which was not available to the Court or to the parties when this Court made its decision, now reveals the serious shortcomings and internal inconsistency in the Burns District's treatment of the citizen wilderness inventory information before it during the Andrews-Steens RMP process. It shows that BLM has now recognized that its previous approach of either ignoring the wilderness resource altogether or relegating it to an

internal, office “review” not subject to public review, is inconsistent with NEPA and FLPMA. And perhaps most importantly, it is evidence that what BLM did for the Andrews-Steens RMP is utterly inconsistent with not only its current approach to analyzing the presence of, and impacts to, wilderness values on the public lands—but also with the underlying legal framework which requires BLM to consider impacts to, and conservation of, wilderness values like any other resource during land use planning.

BLM’s 2007 wilderness inventory on the Vale District therefore is significant and precedent-setting for a number of reasons. Collectively, these reasons further support ONDA’s claims here that BLM violated the law when it undertook a vastly deficient analysis of wilderness values during the Andrews-Steens RMP planning process. This new evidence strongly suggests that if BLM were to go back today and conduct a wilderness inventory and analysis under its current protocol—which mirrors the long-established requirements set forth in both the 1978 and 2001 wilderness inventory handbooks—the agency undoubtedly would discover additional significant areas on and around Steens Mountain that possess outstanding wilderness characteristics as defined by Congress and as documented in ONDA’s 2002 wilderness inventory report submitted to BLM during the land use plan NEPA process.

A. BLM is Due No Deference Where it Acts Inconsistently and Fluctuates in its Position.

In rendering its June 2007 opinion, this Court concluded that BLM properly relied “on its expertise” to determine the presence or absence of wilderness values, and deferred to the agency “absent a showing that BLM failed to analyze the RMP’s impact on an obviously-present resource value.” See Opinion & Order at 20, 26. While agencies are entitled to a certain level of deference under the Administrative Procedure Act standard of review that this Court is to apply here, no such deference is warranted when, as here, the record shows the agency has used

inconsistent procedures or methodologies, and issued decisions that are plainly inconsistent with one another.

The Supreme Court has held that “[a]n agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is ‘entitled to considerably less deference’ than a consistently held agency view.” INS v. Cardoza-Fonesca, 480 U.S. 421, 446 n.30 (1987) (quoting Watt v. Alaska, 451 U.S. 259, 273 (1981)). An inconsistent position taken by an agency on an issue casts serious doubt on the validity of its analysis. See, e.g., Mt. Graham Red Squirrel, 954 F.2d at 1457 (holding that the court would not give deference to the agency’s “expertise” when the agency has fluctuated in its position); see also U.S. v. Mead, 533 U.S. 218, 228 (2001), citing Skidmore v. Swift, 323 U.S. 134, 139–40 (1944) (inconsistency is an indication of unpersuasiveness); Atchinson v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973) (agency that modifies longstanding policies “has the duty to explain its departure from prior norms”). Here, BLM has pursued a course that is inconsistent with the plain language of NEPA, FLPMA and agency policy and protocol dating back to 1978 concerning what constitutes wilderness on the public lands and how the agency must go about determining the presence or absence of wilderness character on those lands.

BLM’s 2007 Louse Canyon wilderness inventory effort now reveals the full scope of the errors committed by the agency during its Andrews-Steens RMP process. While courts defer to an “agency’s expertise in most cases, [courts] cannot defer *when the agency simply has not exercised its expertise.*” Public Citizen Health Research Group v. Tyson, 796 F.2d 1479, 1505 (D.C. Cir. 1986) (emphasis added). That is the case here, where BLM failed to conduct any field inventory or analysis in the Andrews-Steens RMP to determine whether more than half a million acres of public land identified by ONDA as having outstanding wilderness values, indeed

possess such values. Likewise, BLM cannot be said to have “exercised its expertise” when it refused to allow for public input on its internal, in-office assessments of ONDA’s inventory information—and thus made its decision in a closed-door vacuum devoid of meaningful comment from the public. And finally, BLM’s Louse Canyon wilderness inventory now reveals the full ramifications of Burns BLM’s decision not to conduct *any* ground-truthing or collect any current field inventory information for the Andrews-Steens RMP, either to support its own conclusions or refute the extensive field data presented by ONDA during the NEPA process.

Here, the numbers tell the story. In its 2007 Louse Canyon wilderness inventory, BLM and ONDA agreed on 112,000 of 138,000 non-WSA acres of public land at issue. This means BLM and ONDA agree as to more than 80% of these wilderness quality lands. The number climbs to more than 90% overall agreement if one includes the 1980 inventory findings (see n.4, *infra* and Appendix A, attached). Therefore, it is extraordinary that on the neighboring Burns District, BLM found less than 2,000 acres of wilderness quality lands out of a 540,000-acre citizen proposal. In other words, based on its office review of ONDA’s wilderness inventory information, Burns BLM agreed with less than one-half of one percent of ONDA’s well-documented findings. See also AR 04876 (BLM memorandum referring to “the *quality of the information submitted* and *ONDA’s attention to detail*”) (emphasis added).

In light of these facts, BLM’s failure to produce a single photograph or other piece of field evidence in the Andrews-Steens RMP wilderness analysis completely undermines its findings. As ONDA pointed out previously, the record shows that at least some Burns BLM staff recognized that field inventory work would be necessary to assess ONDA’s report and determine actual route conditions. See Miller Decl. (Dkt # 113), at ¶ 6 (explaining that despite lack of BLM internal consensus on several units, there is no record that BLM ever went into the field to

resolve those questions). Given the vastly different, politically-motivated, see ONDA Reply Brief (Dkt # 155) at 11, methodology Burns BLM employed to evaluate the presence or absence of wilderness values on the public lands surrounding Steens Mountain—a methodology deficient in scientific rigor and environmental analysis, and completely inconsistent with BLM’s wilderness inventory protocol both before and after the Andrews-Steens RMP was prepared—the agency’s EIS and final decision for the Andrews-Steens RMP is arbitrary, capricious and not in accordance with NEPA and FLPMA.

B. Route Status Can Change Over Time.

BLM’s 2007 Louse Canyon wilderness inventory highlights a number of significant issues that reveal just how arbitrary and inconsistent the 2004 Andrews-Steens effort was. First, it shows the significance of acknowledging that a route’s status can change (from “road” to “way”) over time, thereby allowing the emergence of new roadless areas potentially of wilderness quality. Of the 25,900 acres on which ONDA and BLM disagree within the Louse Canyon area, BLM agrees that those areas are in a natural condition and have important supplemental values (for example, as important habitat for sage grouse, a species under status review for listing under the Endangered Species Act). See, e.g., Exh. 3, Cover Memos at 1 (summary table of wilderness findings). These acres therefore would have been included (as wilderness quality lands) if BLM had agreed with ONDA on certain road/way determinations. For the most part, however, ONDA and BLM are in agreement as to which routes are properly classified as “roads” and which are “ways” within the Louse Canyon GMA area.

BLM even reclassified several routes from “road” to “motorized primitive trail” (in other words, a “way”). These routes were classified as roads in the original (1980) BLM inventory, and they were assigned road numbers in the Vale District’s transportation plan. That BLM now

agrees that a route's status can change over time directly conflicts with the "once a road, always a road" position the agency largely adopted in its Andrews-Steens RMP analysis. See, e.g., Miller Decl. ¶ 17 ("There is also an indication [from BLM's internal wilderness evaluation forms, AR 02869–02968] that BLM staff believes that if a route was originally constructed by mechanical means, then it is a road regardless of present condition."), ¶ 20 (discussing a specific such example as part of ONDA's Table Mountain proposed WSA Addition); AR 02870, 02874, 02900, 02912 (each making specific reference only to whether certain routes appear on BLM's "Transportation Map").

Most importantly, there is no other way to assess whether a route's physical condition has changed since the 1980 inventory, other than to look at it in the field. That is what BLM did in its 2007 Louse Canyon wilderness inventory—and what it failed to do in its 2004 Andrews-Steens RMP process. For its 2007 Louse Canyon inventory, BLM explains that it assigned one or more team members the task of "ground-truthing" route conditions within the wilderness study units. Exh. 3, Cover Memos at 3, 6. Using ONDA's inventory report maps and BLM maps, BLM conducted a "methodical vehicle inventory of *each road in question.*" Id. at 6 (emphasis added). Like ONDA's, BLM's inventory includes geo-referenced (GPS) photographs documenting the beginning of each route and where the route character changes condition, field notes cross-referenced with the photographs, and subsequent Geographic Information System ("GIS") mapping and analysis of this field data. Id.

By stark contrast here, BLM has never produced any documentation refuting the hundreds and hundreds of photographs documenting route conditions throughout the 24 roadless areas on and around Steens Mountain that ONDA found to possess wilderness character. BLM's Outdoor Recreation Planner has explained that, save for one instance, BLM reviewed ONDA's

proposals exclusively in the office utilizing maps and the team’s “knowledge of on-the-ground conditions.” Declaration of Evelyn Treiman (Dkt # 133) at ¶¶ 3–4. She states that BLM took only a single, one-day field trip. *Id.* ¶ 5. There is no evidence of this (or any other) field evaluation (much less any field inventory information or subsequent analysis that may have resulted) in the administrative record. BLM’s 2007 Louse Canyon wilderness inventory highlights that determining the presence or absence of roads is the critical, threshold step for any wilderness analysis. See also Miller Decl. ¶¶ 8–11 (explaining same). BLM’s failure to do so for its Andrews-Steens RMP analysis leaves its final RMP decision arbitrary, capricious, and unsupported by any rational basis in fact.

C. Reclassified Routes Along Wilderness Study Area Boundaries Allow for Enhancement of Existing WSAs

Second, BLM agreed in its Louse Canyon wilderness inventory that where a reclassified route runs along an existing WSA boundary, the new inventory area is properly considered to be *contiguous* with the existing WSA. This means the new inventory area qualifies as a potential expansion of the existing WSA. This occurred for two of ONDA’s five proposals within the Louse Canyon area. Exh. 3, Cover Memos at 4 (noting that Black Butte and Hanson Canyon inventory unit boundary roads “do not meet the definition of a road and therefore they have been reclassified as motorized primitive trails”). Both of these areas met the naturalness criterion, but on their own did not, in BLM’s assessment, meet the criterion for outstanding opportunities for solitude or primitive and unconfined recreation. In other words, if these areas had not been contiguous with an existing WSA, BLM would not have agreed that they possess wilderness character.⁶ However, because BLM recognized that the routes separating the new inventory

⁶ For example, in its inventory of the Black Butte Unit, BLM “determined that the northwestern and northern portion of BLM road 6350-0-B0 should no longer be classified as a road but as a

areas from the existing WSAs are not wilderness-precluding “roads,” these areas were considered to be contiguous to the WSAs. This means BLM properly evaluated their wilderness character not only on their own merits, but, importantly, through the lens of asking whether they *enhance* the already-recognized wilderness values present in the existing WSAs.

This highlights the error BLM committed time and again in its Andrews-Steens RMP wilderness office review. See, e.g., Miller Decl. ¶¶ 26–27 (discussing one such example where BLM’s unsupported conclusion that certain unmaintained routes are roads, meant the agency never looked at what the newly-inventoried contiguous roadless areas would add to the existing WSA). This also is consistent with BLM’s 2001 wilderness inventory handbook. See, e.g., AR 0694 (“When Inventory areas are contiguous to WSAs, evaluation of outstanding opportunities should consider and document whether Inventory areas have outstanding opportunities either on their own, or in combination with adjacent WSAs.”; “Each inventory area must be assessed on its own merits or in combination with an adjacent wilderness area or WSA”), AR 0702 (“Evaluation of the outstanding wilderness characteristics should consider adjacent lands that

motorized primitive trail Because of this route reclassification the Black Butte OR-036-008 unit is no longer isolated from the Owyhee Canyon WSA.” Exh. 3, Black Butte Unit at 6. This reclassification caused BLM to reverse its 1980 conclusion (see id. at 5) that the area did not possess outstanding opportunities for solitude or primitive and unconfined recreation:

However, the unit is now considered to provide opportunity for solitude since 5.65 miles of BLM road 6350-0-B0 was reclassified as a motorized primitive trail and BLM unit Black Butte OR-036-008 is no longer isolated from the Owyhee Canyon WSA. Because the Black Butte unit is contiguous with the WSA it is considered a continuation of those outstanding opportunities for solitude wilderness characteristics identified for the Owyhee Canyon WSA.

Exh. 3, Black Butte Unit at 7. See also id. at 8 (likewise concluding that the area now has outstanding opportunities for primitive and unconfined recreation, based on being contiguous with the existing WSA), 9 & 11 (summary of findings and map showing how unit is now contiguous to the existing WSA), 30–35 (detailed road analysis for route 6350-0-B0), 36–49 (BLM photos supporting conclusion that the route should be reclassified as a motorized primitive trail).

have identified wilderness characteristics such as WSAs and wilderness areas.”). Although it abandoned this long-standing concept during the Andrews-Steens RMP process, BLM has reinstated the concept of contiguous areas separated only by ways into its current wilderness inventory protocol. Exh. 2 at 12 (an inventory unit meets the size criterion if “[i]t is contiguous with a BLM WSA and is not separated from the WSA by a road, right-of-way, or non-federal land”).

D. BLM Failed to Examine Supplemental Values in the Andrews-Steens RMP Wilderness Analysis.

Next, the 2007 Louse Canyon inventory reveals the significance of examining, for the first time, supplemental values. In addition to size, naturalness, and outstanding opportunities for solitude or primitive and unconfined recreation, wilderness also may contain “supplemental values” such as ecological, geological, or other features of scientific, educational, scenic, or historical value. 16 U.S.C. § 1131(c); see also AR 0697 (BLM 2001 *Wilderness Inventory & Study Procedures* handbook). While an area need not possess supplemental values to be considered wilderness, these values “should be thoroughly considered when assessing an area’s overall value.” AR 0703. “For example, the presence of special wildlife values or a special geological feature may provide additional reasons for recommending an area as a WSA.” *Id.* Thus, where an area’s naturalness or opportunities for solitude or unconfined recreation are “border line,” the existence or absence of important supplemental values will frequently be the deciding factor as to whether the area is judged to be of wilderness quality.

BLM explains in its Louse Canyon inventory documentation that “[s]upplemental values have been included in BLM inventory units *which represents a change compared to the original inventories* [completed in 1980].” Exh. 3, Cover Memos at 5. There, BLM explains that the “main reason for concluding that new supplemental values are now present is because of the

absence of invasive plants and the presence of several important sagebrush obligate species of wildlife. Both of these qualities were considered to be of much less importance 29 years ago when [the] original wilderness inventories were conducted.” Id. Thus, BLM included analysis of these types of important supplemental values in its 2007 Louse Canyon wilderness inventory.

For example, like in most units in the Louse Canyon inventory area, BLM identified the Oregon Butte unit’s high ecological integrity as a supplemental wilderness value, observing that “the area possesses wildlife habitat supplemental values for sagebrush-dependant species of BLM management importance including pygmy rabbit, sagebrush vole, greater sage-grouse, Brewer’s sparrow, black-throated sparrow, sage sparrow, loggerhead shrike, and sage thrasher.” Exh. 3, Oregon Butte Unit at 9. These values are worth protecting as part of the wilderness character of the area because they can “contribute towards the existence of healthy sagebrush-dependent wildlife populations for a large area over the long term.” Id.

By contrast, Burns BLM completely failed to examine supplemental values during its Andrews-Steens RMP wilderness review. Each and every wilderness evaluation form in the administrative record includes short blurbs or check-marks *only* for size, naturalness, and solitude/unconfined recreation. See AR 02869–02968 (all evaluations). Again, this type of internal inconsistency, the scope and ramifications of which are fully revealed by the evidence presented here, means this Court owes BLM no deference where it has failed to exercise its expertise, or has done so extraordinarily inconsistently.

E. Public Involvement is Critical to Informed Analysis.

Finally, one of ONDA’s complaints about Burns BLM’s treatment of the citizen wilderness inventory information is that the public never had the chance to review and comment on BLM’s determinations concerning the presence or absence of wilderness values in the

planning area. See Miller Decl. ¶¶ 31–32. As a result, BLM’s determination that almost no wilderness quality lands outside of designated WSAs exist in the Andrews-Steens RMP planning area has never been subject to public scrutiny during any NEPA process. By contrast, in its Louse Canyon effort BLM provided ONDA, in January 2008, with its updated wilderness inventory information analysis. Then, BLM allowed ONDA and the public an opportunity to comment upon that updated inventory information and BLM’s subsequent NEPA analysis of the impacts of the Louse Canyon projects and grazing proposals on those wilderness values. See Exh. 4 (supplemental NEPA analysis and invitation for further public comment).

Citing the limited scope of judicial review of NEPA claims, this Court concluded in June 2007 that BLM properly “omitt[ed] from the [Andrews-Steens RMP] EIS the discussion of areas which it found to have no wilderness characteristics.” Opinion and Order at 18. However, while BLM may have some discretion to omit obviously absent resources from its analysis, the new evidence presented by this motion shows the agency’s approach in this case is unsupported by the record and is inconsistent with all prior and subsequent wilderness inventory efforts in which it has engaged.⁷ Indeed, even in areas in the Louse Canyon analysis which BLM found did not satisfy all the wilderness criteria, the agency still noted where one or more of the values were present—for example, where an area possesses near-natural condition due to vegetative

⁷ The new IM H-6300-1 recites that it does not apply to “any update of wilderness inventory information that may have been completed by any office during calendar year 2006,” Exh. 2 at 1—in other words, the Andrews-Steens RMP. We note that this is irrelevant to our argument here. Rather, this “new” policy and its first major implementation, in the Louse Canyon area, show inconsistent agency action and evidence a strong likelihood that if BLM had undertaken a proper wilderness analysis during the Andrews-Steens RMP effort (i.e., an analysis pursuant to this new IM, which mirrors both what ONDA did in its own inventory and the agency’s otherwise long-standing inventory protocol), the outcome of that plan would have been vastly different. Based on the extraordinary level of agreement between ONDA and BLM in the Louse Canyon area, it is highly probable that BLM would find similar merit in ONDA’s Steens Mountain area inventory.

screening and unnoticeable range structures, or where there are notable supplemental values such as excellent ecological integrity or outstanding habitat for sage grouse. See, e.g., Exh. 3, Twin Butte Unit at 6–9 (documentation of adequate size, naturalness and supplemental values present).

CONCLUSION

Faced with this new evidence, which was not available to the Court in June 2007 when it made its decision, this Court should reconsider ONDA’s wilderness-related NEPA and FLPMA claims. For the foregoing reasons, ONDA respectfully asks the Court to reconsider its rulings on Claims One, Two, and Seven, and issue an order granting summary judgment in ONDA’s favor on those claims.

DATED this 10th day of April, 2008

Respectfully Submitted,

s/ Peter M. Lacy

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Of Attorneys for Plaintiff

