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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 TO ALTER
OR AMEND JUDGMENT**

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 July 14, 2008, six days after this Court issued its Order and Opinion and entered Judgment in this action, the Ninth Circuit Court of Appeals issued its decision in Oregon Natural Desert Association v. Bureau of Land Management (“ONDA v. BLM”), -- F.3d --, 2008 WL 2718831 (9th Cir. July 14, 2008). In that case, the appellate court ruled that BLM violated the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 *et seq.*, by adopting the Southeastern Oregon Resource Management Plan without considering the potential impact to wilderness values of that land use plan decision. The court also ruled that BLM violated NEPA by failing to evaluate reasonable alternatives concerning areas closed to off-road vehicle use. Because both the rulings and the legal analysis in ONDA v. BLM are directly controlling and/or relevant to ONDA’s claims before this Court concerning BLM’s Andrews-Steens RMP, ONDA respectfully asks the Court to reconsider its rulings and alter or amend the judgment accordingly in ONDA’s favor.

BACKGROUND

I. The Background and Claims in This Case

This Court recently summarized the relevant background in this case in its July 8, 2008 Opinion and Order denying ONDA’s second motion for reconsideration and granting remedial relief in ONDA’s favor as to Claim 6, the Steens Act transportation plan claim. See ONDA v. Shuford, No. 06-242-AA, slip op. at 1–2 (D. Or. July 8, 2008). Directly relevant to this motion to alter or amend judgment are ONDA’s Claims 1, 3 and 7. Claim 1 alleges BLM violated NEPA by adopting the Andrews-Steens RMP without properly evaluating impacts to wilderness values. Claim 3 alleges BLM violated NEPA by adopting the Andrews-Steens RMP without considering

reasonable alternatives with respect to livestock grazing allocations and off-road vehicle route designations. Claim 7 alleges, *inter alia*, that BLM violated NEPA by adopting the Andrews-Steens RMP without taking a “hard look” at impacts resulting from its route designation decisions in the absence of the comprehensive transportation plan required by the Steens Act.

Claims 2, 4, 5 and 8 allege violations of substantive provisions of law under the Federal Land Policy and Management Act (“FLPMA”), 43 U.S.C. §§ 1701 *et seq.*, the Public Rangelands Improvement Act (“PRIA”), 43 U.S.C. §§ 1901 *et seq.*, and the Taylor Grazing Act, 43 U.S.C. §§ 315 *et seq.* Because the Ninth Circuit found BLM’s NEPA violations sufficient to vacate BLM’s SEORMP decision and remand to the agency to prepare a new NEPA analysis and land use plan, this motion takes the same approach. ONDA asks this Court to issue an amended judgment in ONDA’s favor as to Claims 1, 3 and 7 (as to NEPA only for the latter); to retain unaltered the judgment in ONDA’s favor as to Claim 6; and to vacate the Andrews-Steens RMP and remand to BLM as the Ninth Circuit has done in ONDA v. BLM. The Court need not (but may) reach Claims 2, 4, 5 and 8 (as well as the FLPMA and Steens Act allegations under Claim 7). See ONDA at 8580 (“Because we ultimately remand on NEPA grounds, we do not address the causes of action under the FLPMA and the Taylor Grazing Act, which may no longer pertain after remand, but focus instead on the NEPA issues.”).

II. The Ninth Circuit’s Decision in ONDA v. BLM

ONDA v. BLM deals with whether BLM complied with the requirements of NEPA when it developed the Southeastern Oregon Resource Management Plan (“SEORMP”) covering an area adjacent and to the east of the Andrews-Steens RMP planning area at issue in this case. ONDA v. BLM, 2008 WL 2718831 at *1. ONDA contended that BLM had not done so because it failed (1) properly to analyze the effects of the plan on lands possessing wilderness values; and

(2) properly to analyze management options for grazing and off-road vehicle use throughout the planning area. *Id.* The district court granted summary judgment for BLM. Ore. Natural Desert Ass'n v. Bureau of Land Mgmt., 2005 WL 711663 (D. Or. Mar. 29, 2005). The Ninth Circuit reversed and remanded to the district court with instructions to remand to BLM. ONDA v. BLM, 2008 WL 2718831 at *1, *29.

The relevant background of the SEORMP planning process and the events leading up to ONDA's lawsuit challenging BLM's decision adopting the SEORMP are set out in detail in the Ninth Circuit's opinion. *Id.* at *1–*15. In the SEORMP, BLM “did not explicitly consider wilderness values in its EIS, despite ONDA's repeated requests that it discuss and analyze wilderness characteristics on its lands in southeastern Oregon.” *Id.* at *15. Based on “the nature of the BLM's authority and obligations with regard to wilderness characteristics and the BLM's rationale for not considering lands with wilderness values,” *id.*, the Ninth Circuit determined that the agency violated NEPA. The court also held that BLM violated NEPA by failing to consider the impact of ORV designations in areas with wilderness values in the planning area, as well as by failing to consider any alternative closing more than a fraction of the area to ORV use. *Id.* at *28.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 59(e) provides that a party may file a motion to alter or amend a judgment within 10 days after the entry of the judgment. Under Rule 59(e), reconsideration is “appropriate if the district court (1) is presented with newly discovered evidence, (2) committed a clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law.” Sissoko v. Rocha, 440 F.3d 1145, 1153–54 (9th Cir. 2006) (quoting Dixon v. Wallowa County, 336 F.3d 1013, 1022 (9th Cir. 2003)). ONDA bases

this motion on an intervening change in controlling law, the Ninth Circuit's July 14, 2008 ONDA v. BLM decision. This Court entered judgment on July 8, 2008; thus, this motion is timely filed.

ARGUMENT

The Ninth Circuit's findings and conclusions of law in ONDA v. BLM control the claims at issue in this action. These claims fall broadly under the categories of (1) BLM's obligation to collect and keep up to date its own wilderness inventory data, (2) the central importance of public involvement during NEPA planning, (3) the need to discuss in the EIS any wilderness characteristics that BLM finds do exist, and (4) BLM's duty to consider reasonable alternatives with respect to off-road vehicle designations and grazing allocations. As was true in its preparation of the SEORMP, in preparing the Andrews-Steens RMP "BLM misunderstood the role of wilderness characteristics in its land use planning decisions." ONDA v. BLM, 2008 WL 2718831 at *26.

I. BLM's Failure to Collect and Keep Up-to-Date its Own Wilderness Inventory Data Leaves its Andrews-Steens RMP Decision in Violation of NEPA

In its detailed analysis of BLM's authority and obligations with respect to wilderness characteristics, the Ninth Circuit in ONDA v. BLM emphasizes BLM's obligation to maintain current, accurate information concerning wilderness values on the public lands. According to the court, wilderness values are among the values FLPMA specifically assigns to BLM to manage in land use plans. It bases this conclusion on statutory and regulatory authority, BLM guidance documents, and case law. 2008 WL 2718831 at *18-*23.

The court highlights *BLM's obligation to undertake and maintain* an "inventory of all public lands and their resource and other values," an inventory process which is to be 'kept current so as to reflect changes in conditions and to identify new and emerging resource and

other values.’” Id. at *19 (quoting 43 U.S.C. § 1711(a)). Wilderness values are “necessarily among those ‘resource and other values’” to which FLPMA’s inventory provision refers. Id. “In other words, wilderness characteristics are among the ‘resource and other values of the public lands to be inventoried under § 1711.” Id. at *4. By extending the authority and obligations of the Wilderness Act to BLM public lands, FLPMA “ensur[ed] that lands with wilderness characteristics *are regularly inventoried for use in land use planning.*” Id. at *3 (emphasis added). The court also refers to BLM’s obligation to collect new information and inventory data that will emphasize significant issues and decisions with the greatest potential impact. Id. at *2.

Because wilderness values then are among the resources and values “covered by the BLM’s multiple-use land use planning mandate,” id. at *21, NEPA in turn requires BLM to evaluate impacts to wilderness values: “Read carefully and in context, the FLPMA makes clear that wilderness characteristics are among the values which the BLM can address in its land use plans, and hence, *needs to address in the NEPA analysis* for land use plan governing areas which *may have wilderness values.*” Id. at *18 (emphasis added).

In this case, the administrative record shows, and this Court’s findings of fact in its June 8, 2007 opinion confirm, that BLM did *not* undertake any wilderness inventory of its own leading up to preparation of the Andrews-Steens RMP. Nor did BLM maintain its 1970s wilderness inventory information in order to keep it “current so as to reflect changes in conditions and to identify new and emerging resource and other values.” BLM admits that the one and only time it conducted a wilderness inventory within the planning area occurred via its

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original inventory conducted in the late 1970s pursuant to 43 U.S.C. § 1782.¹ See Ore. Natural Desert Ass'n v. Shuford, No. 06-242-AA, slip op. at 15 (D. Or. June 8, 2007).²

BLM concedes that the only manner in which it “updated” its three-decade old inventory information during the Andrews-Steens RMP process was by (1) “reviewing ONDA’s wilderness recommendations” and (2) “independently reviewing potential wilderness characteristics of several parcels acquired by BLM after 1991.” Shuford, slip op. at 15; see also id. at 16 (“BLM admits it relied primarily on a comprehensive wilderness review and WSA designation process *conducted prior to 1991*”). Simply “reviewing” a citizen’s information provided during the planning process—although vitally important for other reasons—does not satisfy FLPMA’s requirement that BLM shall undertake and maintain *its own* wilderness inventory of the public lands to be administered by the land use plan. The Ninth Circuit made clear that the responsibility to inventory for wilderness values, and to ensure that inventory information is current, is BLM’s, not the public’s—and one that arises directly under the statute. ONDA v. BLM, 2008 WL 2718831 at *2–*3 (discussing BLM’s inventory and land use planning duties under FLPMA), *3–*4 (discussing how FLPMA “ensur[es] that lands with wilderness characteristics are regularly inventoried for use in land use planning”), *18 (wilderness values are among the values BLM “needs to address in the NEPA analysis for a land

¹ It is important to note that BLM’s 1970s inventory information was not “updated” in 1991 as stated at page 15 of the Court’s the opinion. The 1991 date simply refers to when BLM finalized its *Wilderness Study Report for Oregon*, submitted by the President to Congress pursuant to 43 U.S.C. § 1782. AR 26644 (Final EIS, explaining that the planning area was “inventoried in the late 1970s and early 1980s to determine whether they contained wilderness values. Those areas found to have wilderness values were identified as WSAs and all other land was eliminated from further consideration in the wilderness review.”); see also AR 08022 (Field Manager clarifying that “the inventory was conducted in the late 1970’s [sic] (not during the 1980s), with decisions issued in November, 1980”). Thus, BLM’s actual field inventory work was completed in 1980.

² Citations to this opinion are hereafter cited in this memorandum as “Shuford, slip op. at ___.”

use plan”), *19 (FLPMA’s inventory provision requires BLM to maintain its inventory of wilderness values “continuously, with no time limit”), *21 (observing that, in its 2005 land use planning handbook, BLM “acknowledges the . . . responsibility . . . to analyze wilderness characteristics in the NEPA documents supporting the plan”). This is particularly so when the “review” occurs via an in-office, closed-door manner, as was the case here and as will be discussed in more detail in the following section.

Aside from its wholly internal review of ONDA’s report, the only other way in which BLM “updated” its wilderness inventory information was to review wilderness characteristics of several small parcels of land acquired after 1991 (the year BLM submitted its wilderness report to the President). Shuford, slip op. at 17. This part of the equation is irrelevant to the issue before the Court, for these acquired lands total 4,331 acres. AR 26648. This is a tiny fraction of the 1,645,139 acre planning area. BLM did not undertake any further field inventory work on the remaining 1,640,808 acres of land at issue in the Andrews-Steens RMP. See, e.g., ONDA Reply in Support of Second Reconsideration Mot. (Dkt # 240), at 13–14 (discussing same).³ Thus, BLM conducted no wilderness inventory work of its own (save for the 4,331 acres of acquired parcels)⁴ and merely “reviewed” ONDA’s information behind closed doors. BLM never presented its analysis in any NEPA documentation for public review. This is plainly inconsistent with BLM’s obligations as described by the Ninth Circuit in ONDA v. BLM.

³ Note too that BLM in the SEORMP case also undertook some similar evaluation of a few small parcels it acquired after 1991 within that planning area. See ONDA v. BLM, 2008 WL 2718831 at *8.

⁴ BLM also asserted that it “gathered additional information on the changes to the planning area, such as fences, roads, and other developments.” Shuford, slip op. at 23–24. This is similar to BLM’s “other resources” proxy argument, rejected by the Ninth Circuit. ONDA v. BLM, 2008 WL 2718831 at *25–*26. See also supra Section IV (discussing Ninth Circuit’s rejection of BLM’s “other resources” argument).

II. BLM Violated NEPA by Failing to Place Both its Data and Analysis Before the Public.

In our prior briefing, we have argued that BLM’s in-office, closed-door review of ONDA’s wilderness inventory information violated NEPA’s “hard look” requirement because it eviscerates NEPA’s emphasis on public participation in order to foster informed decision making. See, e.g., ONDA Memo in Support of Mot. For Summ. J. (Dkt # 112), at 18–19; ONDA Reply in Support of Second Reconsideration Mot. (Dkt # 240), at 12–13. This Court, however, concluded that the record shows that BLM “considered ONDA’s proposed WSAs” and that “BLM has the authority to reject ONDA’s inventory *without discussing its analysis* of those parcels that BLM found did not include wilderness characteristics.” Shuford, slip op. at 18–19 (emphasis added). The Ninth Circuit’s holding in ONDA v. BLM requires that this finding of law be revised, for several reasons.

BLM’s failure to place both its *data* and its *analysis* before the public, in the NEPA document, undermines the pivotal—and, as described by the Ninth Circuit, “democratic”—public purpose of NEPA. “NEPA’s purpose is realized not through substantive mandates but through the creation of a democratic decisionmaking structure that, although strictly procedural, is ‘almost certain to affect the agency’s substantive decision[s].’” ONDA v. BLM, 2008 WL 2718831 at *5 (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989)). Importantly, the Ninth Circuit emphasized that “by requiring agencies to take a ‘hard look’ at how the choices before them affect the environment, *and then to place their data and conclusions before the public* . . . NEPA relies upon democratic processes to ensure . . . that the most intelligent, optimally beneficial decision will ultimately be made” Id. (emphasis added, internal quotes omitted). “[P]ublic scrutiny [is] essential to implementing NEPA.” Id. (citing 40 C.F.R. § 1500.1(b)).

Here, as has been well documented in the briefing, BLM refused to conduct any wilderness inventory work of its own for nearly the entire planning area, and chose to look at ONDA's wilderness inventory report in an in-office, closed-door review. The data, analysis and conclusions that resulted from that review are not in any NEPA document, much less the draft EIS or final EIS themselves. If this information had been in the draft EIS, of course, the public would have had the opportunity to fully and fairly critique BLM's analyses, in the detailed fashion Craig Miller partially undertook in his declaration before this Court, during the NEPA process rather than later in court. See Miller Decl. (Dkt # 113) (analyzing in two examples issues ONDA would have raised with BLM during the NEPA process if the agency had included data and analyses from its internal wilderness checklist forms in the draft NEPA documents). Just like BLM's decision to only review its § 1782 wilderness survey in ONDA v. BLM, the agency's internal, non-public process here does not "provide a justification to eliminate wilderness issues from detailed study in the EIS." ONDA v. BLM, 2008 WL 2718831 at *21 (internal brackets and quotes omitted); see also id. at *22 (noting that BLM's 2005 land use planning handbook lists "wilderness characteristics" as distinct resources to be considered in the "area profile" of a land use plan).

Moreover, also as we have noted in the prior briefing, BLM never even disclosed to the public—until it appeared in the administrative record in this litigation—its in-office protocol for assessing ONDA's wilderness inventory report. See ONDA Memo in Support of Mot. for Summ. J. (Dkt # 112), at 10–11; see also AR 06688 (the internal document explaining BLM's "office review protocol"). This violates NEPA in the same way as BLM's "other resources" argument rejected by the Ninth Circuit. See ONDA v. BLM, 2008 WL 2718831 at *25–*26. There, BLM argued that by analyzing impacts to "a laundry list of other resource values that it *did* consider,"

its analysis had the “incidental benefit of capturing the [SEORMP’s] effects on many ‘wilderness characteristics.’” *Id.* at *25 (emphasis in original). The court rejected this post-hoc rationalization, explaining that “BLM supposes, apparently, that members of the public and government decisionmakers might be able to piece together a wilderness characteristics analysis from what the Bureau did say.” *Id.* This case is analogous. In its Final EIS, issued in 2004, BLM revealed only that ONDA “provided proposed WSA information” to BLM and that the agency conducted an “internal review” of that information. AR 26648.⁵ BLM did not disclose its review protocol. *Id.* Here, apparently, BLM would have the public “piece together a wilderness characteristics analysis” by including *nothing* in the EIS.

The EIS “is NEPA’s chief tool” to accomplish its action-forcing mandate to ensure full public participation and fully-informed agency decision making. ONDA v. BLM, 2008 WL 2718831 at *6. By veiling its in-office wilderness analysis from public scrutiny during the Andrews-Steens RMP process, BLM improperly has attempted to insulate itself against any dissenting opinions, much less public analysis of its wilderness findings and conclusions. The Ninth Circuit’s decision in ONDA v. BLM confirms that this fundamentally violates NEPA.

III. BLM Violated NEPA by Failing to Take a Hard Look at Wilderness Characteristics, Including Roadlessness, That BLM did Find to Exist.

In the Andrews-Steens RMP, BLM refused to bring any of ONDA’s wilderness proposals or inventory data (let alone its own, which it did and does not possess) into the NEPA documents, even where the agency admitted (on its internal checklists) wilderness characteristics

⁵ In the Draft EIS, of course, which was issued in August 2003, almost a year after ONDA submitted its wilderness inventory report, BLM refused to even acknowledge ONDA’s report and failed to include any discussion or analysis of wilderness values outside of existing WSAs. AR 23820–21.

exist.⁶ This is inconsistent with the Ninth Circuit’s discussion in ONDA v. BLM of “the related question of whether agencies need consider in NEPA documents the roadless character of lands under their management.” 2008 WL 2718831 at *22. The court observes that “roadlessness alone may require NEPA consideration in some circumstances, even though it chiefly relates to only one of several wilderness characteristics.” Id. Indeed, “roadlessness has environmental significance apart from permanent wilderness preservation.” Id. The Ninth Circuit concludes that “it would be very strange if roadlessness, a key factor in determining one of the wilderness characteristics, was alone worthy of NEPA consideration, while other statutorily-enumerated wilderness characteristics were not.” Id. at *23.

Here, the record shows that for 20 of ONDA’s 24 proposed WSAs, BLM found at least one of the statutorily prescribed wilderness characteristics to be present. See AR 8599 (BLM’s wilderness evaluation summary chart); AR 2869–2968 (BLM’s individual “Citizen Proposal Evaluation Forms”). Perhaps most significantly, BLM’s evaluations show that, even using its own, arguably flawed road/way analyses, the agency still found that there are no less than *31 separate roadless areas* within the Andrews-Steens RMP planning area that meet the Wilderness Act and FLPMA definition of roadlessness. Attachment A to this memorandum summarizes these BLM findings. Twenty-five of these roadless areas are greater than 5,000 acres and six, as potential additions to existing WSAs, are under the 5,000-acre threshold. Eight of these roadless areas are more than 20,000 acres each, with one BLM subunit within ONDA’s proposed Keg Springs WSA spanning a vast 43,430 roadless acres. See Attachment A. These are areas BLM agrees are roadless as that term is defined pursuant to the Wilderness Act and FLPMA.

⁶ This is, of course, with the exception of 2,033 acres of the Alvord Desert proposed WSA Addition, which BLM found to contain all three characteristics of wilderness. AR 26648.

Yet, BLM included *none* of this information in the EIS, and completely failed to analyze impacts to roadlessness in any of these areas. (The same is true of the other areas for which BLM found to exist individual wilderness characteristics of naturalness or outstanding opportunities for solitude or primitive and unconfined recreation.) This is egregious because roadlessness is not only a “key factor in determining one of the wilderness characteristics” but also is “alone worthy of NEPA consideration” in and of itself apart from its role in defining wilderness values on the public lands. ONDA v. BLM, 2008 WL 2718831 at *23; see also id. at *22 (observing that BLM’s 2005 land use planning handbook lists “wilderness characteristics” as distinct resources to be considered in the “area profile”). Even if BLM could have properly eliminated from the EIS the citizen wilderness proposals as packaged by ONDA from review, the Ninth Circuit makes clear that BLM still must evaluate the impacts to the individual characteristics of wilderness that the agency finds *do* exist.⁷

And this is particularly so with respect to roadlessness, whose “environmental importance” has been well documented by the Ninth Circuit. Id. *23 n.20 & *23 (“[r]oadless areas . . . also help conserve some of the last unspoiled wilderness in our country”) (quoting Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1121 (9th Cir. 2002)). Indeed, later in its opinion, the Ninth Circuit describes the potential adverse environmental impacts of ORVs, which

⁷ One reason for this is that individual wilderness characteristics can change over time. ONDA v. BLM, 2008 WL 2718831 at *13 (“[T]he presence of wilderness values may change over time, and . . . wilderness characteristics may have been reestablished in parts of the area . . .”). For example, a roadless area BLM today considers not to be otherwise “natural” for purposes of potential preservation as wilderness, might during the life of the land use plan reestablish naturalness—for example, by the later removal of human-made landscape features such as range developments or by natural reclamation of unused roads. This is the whole premise of ONDA’s wilderness inventory efforts, and the Ninth Circuit agrees with the logic of this premise, which fits within and directly stems from FLPMA’s directive to BLM to maintain wilderness inventory information on a continuing basis. See id. at *19 (FLPMA § 1711(a) requires BLM to maintain its inventory of wilderness values “continuously, with no time limit”).

include “churn[ing] up mud, transport[ing] mud and seeds into the regions through which they pass, and . . . significantly affect[ing] the outdoor recreation experience.” *Id.* at *29.

Accordingly, one significant hole in the EIS in this case is BLM’s failure to examine the impacts of its OHV designations (Claim 3) and its Steens transportation plan route decisions (Claim 7) on roadlessness throughout these 31 acknowledged, wilderness-potential roadless areas, which collectively cover more than 400,000 acres in the planning area. *See* Attachment A.⁸ As the Ninth Circuit observed, agencies must at the very least “acknowledge the existence of” these roadless areas. *Id.* at *25. In sum, BLM’s failure to take a hard look at the impacts of the Andrews-Steens RMP on roadlessness and other wilderness characteristics found to be present is of itself a violation of NEPA.

IV. BLM Cannot Satisfy the Ninth Circuit’s Remand Order in ONDA v. BLM by Doing What the Burns District Did in this Case.

Finally, as a practical matter, it is important that, in rewriting the SEORMP per the Ninth Circuit’s remand order, BLM cannot do what the Burns District did in preparing the Andrews-Steens RMP —i.e., conduct an in-office, closed-door review hidden from the public’s view.

After vacating the Record of Decision approving the SEORMP, the Ninth Circuit directed BLM:

to address in some manner *in its revised EIS whether, and to what extent,* wilderness values are now present in the planning area outside of existing WSAs and, if so how the Plan should treat land with such values.

ONDA v. BLM, 2008 WL 2718831 at *27 (emphasis added). In other words, the data and analysis, as well as the conclusions, *all* must appear in the EIS itself—and this includes areas

⁸ Moreover, this means there are an additional 140,000 roadless acres (outside of existing WSAs and Wilderness) total in the BLM subunits that the agency did *not* even include in its Citizen Proposal Evaluation Forms. AR 2869–2968. In other words, the 407,414 acres of roadless areas highlighted in Attachment A represent only those roadless areas that BLM accepted as meeting the wilderness definition of “roadless”—i.e., 5,000 acres or more in size, unless lying directly adjacent to an existing WSA. 16 U.S.C. § 1131(c).

where wilderness values (and individual characteristics) exist and areas where BLM finds they do not exist (“whether, and to what extent”).

The Ninth Circuit’s emphasis on democratic decision making, full public participation and fully-informed agency analysis—with data, analysis and conclusions presented *in* the NEPA document itself—underlines the fact that BLM’s Andrews-Steens RMP decision violates NEPA in the same way the SEORMP did. “[W]ilderness characteristics remain a resource the BLM has authority to manage, and so *must address in an EIS* concerning areas which *may* have such characteristics.” *Id.* at *22 (emphasis added); see also *id.* at *22–*23 (Ninth Circuit case law holds that roadlessness alone “has environmental significance” and requires NEPA analysis “in NEPA documents prepared for land use plans”). The Ninth Circuit also soundly rejected BLM’s “other resources” argument, *id.* at *25–*26, meaning BLM cannot argue that it has by some proxy analyzed impacts to, for example, roadlessness or naturalness.

In sum, as was the case with the SEORMP, “ONDA drew the BLM’s attention to” the issue of wilderness values during the Andrews-Steens RMP planning process. *Id.* at *26. ONDA “requested that the BLM give some attention to the matter *in its EIS*.” *Id.* (emphasis added). “It is fairly debatable issues of this kind that NEPA was designed to bring out in the open, for analysis and discussion in the service of sound decisionmaking.” *Id.* By refusing to allow its data and analyses to see the light of day during the NEPA process, and hiding behind a back-room internal review of ONDA’s wilderness inventory report, BLM has “misunderstood the role of wilderness characteristics in its land use planning.” *Id.* BLM has not provided the “‘full and fair discussion’ of the issue required by NEPA.” *Id.* (quoting 40 C.F.R. § 1502.1). Nor has it properly responded to ONDA’s comments. *Id.* (citing 40 C.F.R. § 1503.4).

Accordingly, as the Ninth Circuit did with the SEORMP, this Court should vacate the ROD approving the Andrews-Steens RMP and remand to BLM to address “*in its revised EIS whether, and to what extent,*” wilderness values are present in the planning area and, if so how the Andrews-Steens RMP should treat land with such values. *Id.* at *27 (emphasis added). Although the Ninth Circuit prescribes “no particular methodology” for that consideration, it is clear that it must happen out in the open, publicly, in the draft and final EIS, and not in an internal, secret review subsequent to which BLM simply announces its conclusion to the public without supporting data or analysis, let alone an opportunity for the public to comment upon those data, analyses and conclusions.

V. BLM Violated NEPA’s Alternatives Requirement Because it Failed to Consider the Impact of ORV Designations on Lands with Wilderness Values.

The Ninth Circuit’s holding that BLM violated NEPA’s alternatives requirement with respect to ORV alternatives applies here as well. The Ninth Circuit held that BLM violated NEPA’s alternatives requirement regarding ORVs for two independent reasons: (1) “BLM did not consider the impact of ORV designations on any lands with wilderness values on the planning area”; and (2) “no alternative . . . proposed closing more than a fraction of the planning area to OHV use.” ONDA v. BLM, 2008 WL 2718831 at *28. Here, the first flaw is present. In denying ONDA’s Claim 3 as to ORV alternatives, this Court recognized that, “Though BLM considered one alternative that prohibited OHV use over a substantial amount of public land within WSAs, this alternative did not include closing OHV use within areas that ONDA argues possess wilderness characteristics.” Shuford, slip op. at 33. This Court ruled against ONDA based on its prior reasoning that “BLM is not required to adopt ONDA’s wilderness inventory.” *Id.* However, because BLM violated NEPA under ONDA v. BLM by not taking the requisite hard look in the EIS at impacts to wilderness values within the Andrews-Steens RMP planning

area, it follows that BLM likewise has violated NEPA's alternatives requirement with respect to ORV designations. ONDA v. BLM, 2008 WL 2718831 at *28. The Ninth Circuit makes clear that "BLM must consider closures of significant portions of the land it manages, including . . . lands with wilderness characteristics." Id. at *29.

VI. BLM Violated NEPA's Alternatives Requirement Because it Failed to Consider Reduced Grazing on Lands with Wilderness Values.

Finally, the Ninth Circuit's ruling in ONDA v. BLM affects this Court's ruling concerning the grazing alternatives portion of ONDA's Claim 3. The court decided it need not reach the issue based on the fact that it may go away following BLM's analysis on remand concerning the presence of wilderness values and new management options in light of such values found to be present in the planning area. 2008 WL 2718831 at *28. Nevertheless, the court made clear that BLM's land use plan EISs must consider alternatives that "significantly shift the balance away from grazing on the public lands." Id. at *27 (citing California v. Block, 690 F.2d 753, 767 (9th Cir.1982)). This includes alternatives that would reduce grazing in areas outside of existing WSAs found to possess wilderness characteristics. Because BLM here should consider (on a remand) reducing grazing pressure in these areas as the Ninth Circuit suggested it might on remand in the SEORMP case, this Court also need not necessarily reach this issue at this time.⁹

⁹ However, ONDA notes that this Court's statement that "BLM has not violated NEPA by failing to consider an alternative that would reduce the lands allocated for grazing, because such alternative is not feasible or consistent with BLM's management duties," Shuford, slip op. at 30—directly conflicts with the Ninth Circuit's statement regarding the need to consider alternatives that "significantly shift the balance away from grazing on the public lands." ONDA v. BLM, 2008 WL 2718831 at *27. The SEORMP and the Andrews-Steens RMP have identical statutory purposes and NEPA purpose and need statements. Compare Shuford, slip op. at 29 (examination of the purpose and need, goals and objectives for the RMP) with ONDA v. BLM, 2008 WL 2718831 *16, *27 (describing the same "comprehensive framework for managing public land" and the "multiple use" mandate). We also note that this Court cited with approval

CONCLUSION

For the foregoing reasons, it is clear the Ninth Circuit's July 14, 2008 decision in ONDA v. BLM controls significant parts of this Court's analysis as set out in its June 8, 2007 opinion. Accordingly, ONDA respectfully requests the Court to alter or amend the judgment in this action so that: the Andrews-Steens RMP is vacated and remanded to BLM; judgment is entered in ONDA's favor as to Claims 1, 3 and 7 (as to NEPA only for the latter); is unaltered as to Claim 6; and with the Court not reaching Claims 2, 4, 5, 8 and the FLPMA and Steens Act allegations under Claim 7.

DATED this 18th day of July, 2008

Respectfully Submitted,

s/ Peter M. Lacy

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the ONDA v. BLM district court's decision on this issue. Shuford, slip op. at 31-32. That reasoning likewise is now reversed by the Ninth Circuit's opinion.