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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

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

CENTER FOR WATER ADVOCACY,

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

A long-established and fundamental precept of administrative law holds that “[t]he weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, *its consistency with earlier and later pronouncements*, and all those factors which give it power to persuade, if lacking power to control.” Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (emphasis added). Whether BLM’s Burns District’s 2004 wilderness inventory is due deference, as this Court found in its June 2007 opinion, is squarely called into question by the BLM Vale District’s 2007 Louse Canyon GMA wilderness inventory, a later pronouncement of the agency dramatically and irreconcilably at odds with the 2004 decision by the Burns District. The 2007 BLM decision and 2008 supplemental NEPA document were significant agency decisions on the process and substance of conducting wilderness inventories which were unavailable to this Court when it issued its decision in June 2007, warranting reconsideration of that decision.

Since 1978, BLM has evaluated millions of acres of the public lands it administers for their wilderness character, pursuant to congressional direction in the Wilderness Act and the Federal Land Policy and Management Act (“FLPMA”). In defining wilderness, Congress used words not found in any other law. Wilderness is an area where “the earth and its community of life” are “untrammeled by man.” 16 U.S.C. § 1131(c). Wilderness is public land “retaining its primeval character and influence.” Id. It is affected primarily by “the forces of nature.” Id.; see also 43 U.S.C. § 1702(i) (adopting same definition of wilderness in FLPMA). Congress chose special, unique words to describe wilderness, understanding the importance of securing for future generations “an enduring resource of wilderness” on the public lands. 16 U.S.C. § 1131(a).

At the same time, in addition to the philosophical definition of wilderness that appears in the first half of Section 2(c) of the Wilderness Act, Congress carefully set out in the second half of that section the key factors that provide the legal definition of this critically important public resource. Thus, wilderness is defined legally by size, outstanding opportunities for solitude or primitive and unconfined recreation, and naturalness. *Id.* § 1131(c). In 1978, the Department of the Interior issued BLM’s first *Wilderness Inventory Handbook*, explaining the agency’s wilderness inventory policies and procedures. AR 28227. In 2001, BLM issued its *Wilderness Inventory and Study Procedures* handbook, AR 0679, reiterating those long-established policies and procedures—including definitions of key terms such as the distinction between “roads” and “ways” on the public lands. BLM specifically directed that wilderness inventory information “should be used in the land use planning process to make the appropriate land use allocations” and to “insure that wilderness values are being adequately addressed in an environmental analysis” of a land use plan’s potential impacts to this finite resource. AR 0707.

BLM turned its back on these long-held interpretations of law during its Andrews-Steens RMP planning process. Rather than update its 1970s-era wilderness inventory, BLM at first refused entirely to consider wilderness as a resource outside of existing Wilderness Study Areas established more than fifteen years ago. AR 23820–21 (Draft EIS wilderness section referring only to existing WSAs and not even mentioning that the agency had received a substantial citizen inventory and proposal). Later, BLM acknowledged it had received a citizen wilderness inventory, but decided to deal with it in-office, with no public comment process, and without assessing any of the data provided by actually going into the field to evaluate the lands in question. BLM claimed it need not follow its own wilderness inventory protocol in the Andrews-Steens RMP because it had revoked its 2001 handbook in a controversial settlement with the

State of Utah. AR 26538 (statement in EIS), 28219 (internal agency memo discussing application of settlement on RMP). Today, BLM has reinstated its long-standing wilderness inventory protocol. In its first implementation of its new, statewide 2006 Instruction Memorandum, BLM arrived at the very result ONDA long suspected it would—the result required by an honest and consistent application of the legal principles which had traditionally guided wilderness inventories. By actually taking a hard look at ONDA’s wilderness inventory report for the Louse Canyon GMA, BLM agreed with ONDA that more than 80% of 138,000 acres in the neighboring Owyhee Canyonlands do indeed possess outstanding wilderness values worthy of protecting for future generations as part of an enduring resource of wilderness.

Accordingly, BLM’s final decision in 2004 adopting the Andrews-Steens RMP is entitled to no deference from this Court. The administrative record shows BLM’s evaluation of the land use plan’s environmental impacts to wilderness values was extraordinarily truncated and non-public. The new evidence ONDA has presented by this motion further reveals the full scope of the agency’s errors, and the inconsistency between the 2004 decision and later (and prior) agency practice. BLM’s wilderness inventory methodology during the Andrews-Steens RMP NEPA process was deficient in scientific rigor and environmental analysis. It was completely inconsistent with the agency’s long-standing, and now reinstated, wilderness inventory protocol. The public was never given a chance to comment on any BLM analysis of the presence or absence of wilderness values in the area—including BLM’s evaluation of a 2,245-page citizen wilderness inventory report provided to the agency during the NEPA process. AR 20655–22899. These errors leave BLM’s final decision far short of satisfying NEPA’s requirements that agencies ensure adequate public participation and undertake fully informed analyses in order to take the requisite “hard look” at the environmental impacts of their proposed actions.

Accordingly, BLM has violated NEPA (and likewise FLPMA's multiple-use balancing requirement), and this Court should grant summary judgment in ONDA's favor as to Claims One, Two and Seven.

ARGUMENT

I. Reconsideration is Appropriate Given the Discovery of New Evidence Showing Inconsistent Agency Behavior.

BLM argues that ONDA simply "rehashes" arguments and that the new evidence presented by this motion is not relevant. BLM Resp. at 1–4; see also SMLG Resp. at 8–9 (arguing same). To be sure, the statutory obligations at issue here have not changed. Under NEPA, BLM must take a "hard look" at impacts to wilderness resource values like any other resource on the public lands. Under FLPMA, BLM must balance conservation of wilderness values against other valid multiple use resources on the public lands, ensuring that there is no permanent impairment or unnecessary or undue degradation to those resources (including wilderness). The agency's environmental analysis and its multiple-use balancing analysis must be supported by accurate, up-to-date baseline information.

However, the December 2007 Louse Canyon GMA wilderness inventory illustrates that what *has* changed—and significantly—is BLM's interpretation and implementation of its legal obligations. BLM's behavior has fluctuated wildly over the course of the past seven years—from analytic protocols down to interpretations of critical definitions of the key factors of wilderness. It also fluctuates wildly from one BLM field office to the next. Both before, and now after, BLM undertook its Andrews-Steens RMP land use planning process, the agency clearly and unmistakably acknowledged its obligation to inventory for and consider impacts to wilderness values like any other resource on the public lands. Likewise, both before and after the Andrews-Steens RMP process, BLM undertook wilderness inventories through a transparent process,

insuring its final decisions were supported by accurate baseline information and fully informed environmental analysis. Given BLM’s extraordinarily inconsistent behavior in how it evaluates impacts to wilderness on the public lands—indeed, how it even defines the key factors of wilderness—this request for reconsideration is appropriate, and the evidence presented is unquestionably relevant. Skidmore, 323 U.S. at 140 (consistency with prior and later pronouncements of an agency is relevant to the degree of deference due to the agency action under review). Because BLM never once explains these sea changes in its approach to assessing wilderness, continuing to rely instead on the crutch of asking the Court to extend inappropriate deference to inconsistent agency action, the Court should now find BLM’s decision to adopt the RMP arbitrary, capricious and not in accordance with law.

A. BLM’s Louse Canyon GMA decision is relevant because it shows BLM has reinstated its previous wilderness inventory protocol.

Relying on the Court’s reasoning for denying ONDA’s earlier reconsideration request, BLM first argues that because its Louse Canyon GMA wilderness inventory deals with different decisions and different public lands, it is “wholly inapposite” here. BLM Resp. at 1–2. This argument ignores fundamental differences between the evidence presented in the earlier reconsideration request and the new evidence now before the Court with this motion. The earlier evidence consisted of an administrative law judge’s rulings that BLM had not properly considered impacts to wilderness values of a series of proposed range projects within a citizen-inventoried area. The ALJ ruled that the record raised “serious doubt as to the adequacy of the factual basis” for BLM’s wilderness-related conclusions. See Dkt # 189, Exhibit A at 15 (ONDA v. BLM, OR-010-07-01 (June 25, 2007)). This Court declined to reconsider its own wilderness-related decisions based on finding that the ALJ’s decisions were preliminary administrative decisions based on different BLM decisions and parcels of land. Order (Dkt # 204) at 2.

By contrast, the evidence now presented to the Court consists of BLM's contradictory implementation of its own wilderness inventory protocol, as applied to a citizen wilderness inventory report generated by ONDA that is of the exact same type as the one at issue in this case. BLM's decision to issue a new protocol reinstating long-standing wilderness inventory procedures and to apply it to directly analogous citizen-generated inventory data in order to satisfy its obligations under NEPA and FLPMA in the Louse Canyon GMA, shows just how inconsistent and unsupported its methodology was in the Andrews-Steens RMP process. This type of significant fluctuation in agency position, which yields wild fluctuations in the results obtained, shows that this Court should reconsider its earlier decision and extend no deference to BLM here. See Mt. Graham Red Squirrel v. Madigan, 954 F.2d 1441, 1457 (9th Cir. 1992) (courts will not give deference to agency "expertise" when the agency has fluctuated in its position).

Judge Heffernan correctly refused to defer to BLM's no-wilderness decision where the agency provided no evidence to support its conclusions. The new evidence presented here, which consists of BLM's own reinstated interpretation of how to assess the presence or absence of wilderness values on the public land, now reveals that Judge Heffernan's skepticism was well-founded. Where BLM actually ground-truths inventory information provided to it, engaging in a transparent and fully-informed decision-making process, the outcome is quite different, underscoring the arbitrariness of BLM's wilderness inventory in the Andrews-Steens RMP.

B. That BLM has labeled its new wilderness inventory Instruction Memorandum as a "draft" is irrelevant to this motion.

BLM has labeled its new wilderness inventory Instruction Memorandum as a "draft," and so far refuses to issue it in final form. That does not undermine this motion. See BLM Resp. at 2-4 (arguing that "draft" agency handbooks cannot be "enforced"). The fact of the matter is that

BLM is, in practice, applying its 2006 Instruction Memorandum to ongoing agency planning throughout its Oregon districts—including in its latest Resource Management Plan.¹ Moreover, the 2006 Instruction Memorandum reinstates the long-established inventory protocol BLM set forth to guide its own and citizens' wilderness inventory efforts, in its 2001 *Wilderness Inventory and Study Procedures* handbook. That inventory protocol, including definitions of key terms such as “road” and “way,” stems from the original 1978 *Wilderness Inventory Handbook*.

The Department of the Interior “revoked” its 2001 handbook in a controversial settlement agreement with the State of Utah in 2003. See So. Utah Wilderness Alliance v. Norton, 457 F.Supp.2d 1253, 1257 (D. Utah 2006). (The District of Utah later reversed its approval of that settlement after the Tenth Circuit Court of Appeals ruled that it was illegal.) Importantly, none of this changes BLM's underlying legal obligations under NEPA and FLPMA: the agency must consider impacts to wilderness values like any other resource when it prepares a land use plan; it must base its land use plan decisions on up-to-date, accurate baseline information; and it must balance those values against other valid multiple uses of the public lands, ensuring no permanent impairment of the values and that its land use plan will not cause unnecessary or undue degradation to wilderness (or any other resource);. 42 U.S.C. §§ 4332(2)(A), (2)(C); 43 U.S.C. §§ 1711(a), 1712(c), 1732(a) & (b).

It is for this latter reason that BLM's argument that ONDA is trying to “enforce” an agency handbook falls short. See BLM Resp. at 3, 4–5. It is NEPA and FLPMA that provide the enforceable provisions of law upon which ONDA's Claims One, Two and Seven rest. In any

¹ Since this motion was filed, ONDA has learned that BLM is applying the 2006 Instruction Memorandum and wilderness inventory protocol to its John Day Resource Management Plan, which is now underway on BLM's Prineville District, north of the Burns District. See Second Declaration of Craig Miller, at ¶ 4. This includes BLM's evaluation of ONDA's February 2007 citizen wilderness inventory report covering public lands within that RMP planning area.

event, BLM's failure or refusal to follow its own guidance is evidence of arbitrary and capricious agency behavior. See, e.g., Lake Mohave Boat Owners Ass'n v. Nat'l Park Serv., 138 F.3d 759, 763 (9th Cir. 1998) (while agency's deviation from its own guidelines is not per se arbitrary or capricious, court reviewed the record for agency's explanation to determine if deviation is in fact arbitrary and capricious); League of Wilderness Defenders v. U.S. Forest Serv., Civ. No. 00-464-KI, slip op. at 19–20 (D. Or. 2000) (agency failure to act in a manner that is consistent with its handbook, without any explanation for the deviation, is “an indication of arbitrary and capricious behavior”); see also Atchinson, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973) (where agency modifies or overrides longstanding precedents or policies, it “has a duty to explain its departure from prior norms”).

Finally, citing Southwest Ctr. For Biological Diversity v. U.S. Forest Serv., 100 F.3d 1443 (9th Cir. 1996), BLM argues its 2006 Instruction Memorandum and its Louse Canyon GMA wilderness inventory analysis “may not be advanced as a new ground for challenging an agency action.” BLM Resp. at 3–4; see also SMLG Resp. at 4–5 (making same argument). That case concerned the relevant scope of the administrative record in an action brought pursuant to the Administrative Procedure Act. Judicial review of an agency action “typically focuses on the administrative record in existence at the time of the decision and does not encompass any part of the record that is made initially in the reviewing court.” Southwest Ctr., 100 F.3d at 1450. Here the government's argument is a red herring: the evidence of the Louse Canyon GMA wilderness inventory and 2006 Instruction Memorandum are not proffered to supplement the record that was before BLM when it revised the Andrews-Steens RMP in 2004. Rather—consistent with the direction in Skidmore—they illustrate the inconsistency of the 2004 decision with prior and later constructions by BLM of its obligations to conduct wilderness inventories and evaluate impacts

to wilderness resource values. In any event, BLM’s 2006 Instruction Memorandum and its Louse Canyon GMA wilderness inventory fit within a well-established exception to the general rule against extra-record evidence because they show that BLM has acted inconsistently and has not properly evaluated the environmental impacts of the Andrews-Steens RMP. Lands Council v. Powell, 395 F.3d 1019, 1030 (9th Cir. 2005) (extra-record evidence is admissible “if admission is necessary to determine ‘whether the agency has considered all relevant factors and has explained its decision’”) (quoting Southwest Ctr., 100 F.3d at 1450).

C. Reconsideration will not prejudice any party.

The SMLG argues that reconsideration would be “highly prejudicial” because “the parties would likely have to reconsider their briefing on the proper remedy.” SMLJ Resp. at 6. SMLG does not explain why it would be prejudicial for all parties to be given an equal opportunity to brief any further remedial issues that may arise. In any event, this Court need not necessarily call for additional briefing. The remedy is clear under the APA, which requires courts to “hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). If the Court determines that BLM’s Record of Decision adopting the Andrews-Steens RMP is arbitrary and capricious agency action, unsupported by any rational basis in fact, the Court should set aside the ROD and order BLM to undertake a new NEPA analysis, which properly evaluates impacts to wilderness resource values throughout the planning area. This is a discrete and severable obligation from the travel management planning process under the Steens Act on which the parties have submitted remedy briefing.

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II. BLM’s Louse Canyon GMA Wilderness Inventory Demonstrates that where BLM Actually Exercises its Expertise, the Results are Vastly Different.

BLM’s Louse Canyon GMA wilderness inventory demonstrates that proper application of the statutorily-prescribed criteria that define wilderness on the public lands, including undertaking a field inventory to confirm or refute citizen inventory data, yields a vastly different result from the type of closed-door, in-office job BLM used for the Andrews-Steens RMP. BLM disagrees because, in its view, it may apply different protocols and arrive at completely different (sometimes polar opposite) decisions every time it undertakes a new management decision anywhere on the public lands. However, the evidence now before this Court reveals that BLM’s analysis was flawed from the ground up, when it considered (or failed to consider) the impacts the Andrews-Steens RMP would have on wilderness resource values on more than half a million acres on and around Steens Mountain.

A. BLM’s Louse Canyon GMA inventory demonstrates this is not a “scientific matter” to which the agency should be afforded an extreme level of deference.

BLM and the SMLG both argue the Court should extend a high level of deference to the agency because its internal wilderness review is a “scientific matter” requiring “deference to an agency’s technical expertise.” BLM Resp. at 6; SMLG Resp. at 6–7. Yet, in preparing its original 2001 *Wilderness Inventory and Study Procedures* handbook, one of BLM’s express purposes was to provide citizens with a protocol they could use in conducting their own wilderness inventories on the public lands and in presenting the results of those citizen inventories to BLM. See AR 0686 (section of 2001 handbook titled “Evaluation of New Information Suggesting That an Area of Public Land Has Wilderness Characteristics,” explaining to the public what must be included in citizen wilderness inventories and proposals). In its 2006 Instruction Memorandum, BLM reinstates this type of “uniform approach” for “provid[ing] a framework for updating

resource information contained in wilderness inventories as well as consideration and evaluation of citizen input regarding wilderness inventories.” ONDA Exh. 2 at 1, 2. Because inventorying and photographing vehicle routes to show actual route condition in order to determine whether they are properly categorized as roads or ways is not a matter requiring special “technical expertise,” BLM’s unsupported contrary conclusions in the Andrews-Steens RMP should not be afforded any special level of deference by this Court. BLM’s Louse Canyon GMA wilderness evaluation shows that ONDA has accurately applied BLM’s wilderness inventory protocol and is capable of achieving repeatable, accurate field observations.

B. BLM’s North Fork Malheur GMA decision suffers from the same flaws as its Andrews-Steens RMP decision.

BLM argues that its wilderness findings within its North Fork Malheur GMA—in which the agency found *zero* of ONDA’s 60,000-plus acre proposal to possess wilderness value—support its nearly identical conclusion in the Andrews-Steens RMP. BLM Resp. at 5. What BLM does not reveal is that, as was the case for the Andrews-Steens RMP, BLM refused to conduct any field inventory or evaluation to support its North Fork Malheur GMA decision. See Ore. Natural Desert Ass’n & Western Watersheds Project, 173 IBLA 348, 352–55 (Feb. 21, 2008). ONDA has filed suit in this Court challenging BLM’s North Fork Malheur GMA decision. Ore. Natural Desert Ass’n v. Ryan, No. 08-576-BR (D. Or. filed May 13, 2008). We expect that if and when BLM goes back and applies its 2006 Instruction Memorandum wilderness inventory protocol as it has in the Louse Canyon GMA, the results will be similar—*i.e.*, BLM will find that a majority of ONDA’s wilderness report indeed has merit. For now, BLM’s North Fork Malheur GMA decision simply shows the extraordinary inconsistency from which the Oregon BLM’s wilderness inventory efforts continue to suffer.

While agreement between ONDA and BLM as to which areas possess wilderness values may not be 80 to 90% for every inventory area at issue in Oregon, it is clear, based on the administrative record and this new evidence now before the Court, that the instances where BLM has found no or only token areas in which it agrees with ONDA are lacking in any rational basis in fact. That is, where BLM produces no evidence refuting thousands of photographs, GIS maps and field data sheets, its decisions cannot be said to anything other than conclusory and unsupported by the record before the Court. In these instances, where BLM fails or refuses to exercise its expertise or discretion, this Court owes the agency no deference. Public Citizen Health Research Group v. Tyson, 796 F.2d 1479, 1505 (D.C. Cir. 1986) (courts “cannot defer when the agency simply has not exercised its expertise”).

C. BLM’s Louse Canyon GMA inventory demonstrates the importance of public participation in agency environmental decision-making.

BLM argues it did not violate NEPA by failing to include key baseline resource information for wilderness values in any NEPA document for its Andrews-Steens RMP. BLM Resp. at 7. Simply making information “available” to the public or discussing it on the phone, see BLM Resp. at 7–8, is inadequate under NEPA. NEPA is an action-forcing statute intended to ensure that agencies consider the impacts of proposed actions to the environment before taking action. Agencies must actually present information on resources and resource conditions in the NEPA document itself in order to satisfy NEPA’s twin purposes of ensuring informed decisionmaking and meaningful public participation on environmental analyses. Blue Mtns. Biodiversity Project v. Blackwood, 161 F.3d 1208, 1214 (9th Cir. 1998) (“The EA contains virtually no references to any material in support of or in opposition to its conclusions. That is where the [agency’s] defense of its position must be found.”); see also Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1153–54 (9th Cir. 2006) (NEPA’s twin purposes); 40 C.F.R. §

1500.1(b), (c). FLPMA likewise requires public participation, 43 U.S.C. §§ 1702(d), 1712(a) & (f), 43 C.F.R. §§ 1601.8, 1610.2, and informed decision making, 43 U.S.C. §§ 1701(a)(2), 1711(a), 1712(c)(2) & (4), 43 C.F.R. §§ 1610.4-3 & -4.

BLM's Louse Canyon GMA planning process demonstrates that where BLM engages in transparent analysis and decision making, including providing the public with the information and analysis upon which the agency relies to make its land management decisions, the final decision is far more likely to satisfy NEPA's ultimate objective of protecting the environment. See 40 C.F.R. § 1500.1(c) ("Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.").

D. BLM's Louse Canyon GMA inventory demonstrates that field documentation is critical.

BLM's Louse Canyon GMA wilderness inventory demonstrates the critical importance of actually assessing wilderness criteria in the field. Common sense dictates that it is *even more important* to do so in situations where BLM's preliminary, in-office conclusion is that none of the citizen-inventoried areas are likely to have wilderness character. "[A]llowing the [BLM] to rely on expert opinion without hard data either vitiates a plaintiff's ability to challenge an agency action or results in the courts second guessing an agency's scientific conclusions." Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1150 (9th Cir. 1998). Even in the instances during the Andrews-Steens RMP planning process in which BLM admitted it needed to conduct actual field inventory work to assess ONDA's report, the administrative record contains *not a single document showing* that any such work ever occurred—much less the results of any such field

review. Nor has BLM, in the Treiman Declaration or anywhere else, produced any evidence to rebut this unsubstantiated claim, rendering the agency's claim conclusory and unreliable. Idaho Sporting Cong., 137 F.3d at 1150 (rejecting the Forest Service's attempt to rely on an expert report that contained no hard data); Leigh v. Warner Bros., Inc., 212 F.3d 1210, 1217 (11th Cir. 2000) (holding that affidavits that contain "conclusory allegations without specific supporting facts have no probative value"). It is undisputed, therefore, that BLM arrived at its conclusion that less than one half of one percent of more than half a million acres documented by ONDA's citizen inventory actually have wilderness values without ever having updated its own information with up-to-date, accurate data from the field to support its polar opposite conclusions.

In response to this motion, BLM once again can point the Court to no documentation whatsoever to show that BLM ever undertook the field work the agency itself admitted was necessary make determinations on at least ONDA's Table Mountain, Roaring Springs and Keg Springs inventory areas. See BLM Resp. at 8 (claiming, without support that BLM "arranged for field tours"); see also Miller Decl. (Dkt # 113) at ¶ 6 ("We can find no record that any field tours ever took place. If visits did take place, no notes or observations that resulted were included in the FOIA documents or in the administrative record the BLM produced in response to ONDA's lawsuit. It appears that BLM's claim that these three areas lack wilderness character is particularly arbitrary.").

BLM's cherry-picked attempts to discredit ONDA's inventory report further elucidate the arbitrariness of the agency's decision. BLM criticizes a few unspecified ONDA photographs associated with ONDA's West Blitzen River Proposed WSA Addition because they were taken "on or adjacent to private lands" or show private lands in the photo. BLM Resp. 10 (citing the

Treiman Declaration). This highlights just how cursory BLM's analysis of ONDA's report was. If BLM had taken a harder look at ONDA's report and actually visited these places in the field,² the agency would have recognized that photos it apparently questions are indeed relevant to the citizen proposal. ONDA clearly explains in the West Blitzen River section of its report that "[t]here is a 40 acre parcel of private land near the east border that would become an inholding if the proposed addition is added to the Blitzen River WSA (see map)." AR 21033.

In other words, ONDA not only documented wilderness values within the public lands in the proposed WSA Addition, but also within immediately adjacent inheld private lands that would be prime candidates for future land exchanges intended to consolidate public, wilderness-quality lands. As BLM knows, such land exchanges are commonplace—particularly for the purpose of consolidating wilderness-quality public lands, and particularly on Steens Mountain. See 16 U.S.C. §§ 460nnn-24 (authorizing BLM to acquire private inheld lands within the boundaries of the Cooperative Management and Protection Area), 460nnn-101 to -104 (authorizing specific land exchanges "[f]or the purpose of protecting and consolidating Federal lands within the [CMPA]"). BLM's intimation that ONDA has tried to pass off pictures of private lands as wilderness quality public lands is completely unfounded and only shows how superficial the agency's wilderness review indeed was.

Moreover, it is not enough for the agency simply to criticize ONDA's submissions when the agency does not produce—indeed, *cannot* produce—data that contradicts the evidence presented in ONDA's submissions. Ore. Natural Desert Ass'n v. U.S. Forest Serv., No. 03-213-

² Every ONDA photo is accompanied with GPS coordinates and corresponding GIS-produced maps, allowing BLM or anyone else to visit that exact location in the field. See, e.g., AR 20701–708 (inventory photo log for Black Point Proposed Wilderness Study Area).

JO, 2004 WL 1293909 (D. Or. June 10, 2004), at *6 (rejecting agency critique of plaintiffs' evidence because agency failed to produce any data to counter plaintiffs' data).

BLM also insists in its brief that it need not follow the long-established definition of a road, claiming that any route "subject to future maintenance" is a wilderness-precluding road. BLM Resp. at 10. A road is a vehicle route that has "been improved and maintained by mechanical means to ensure relatively regular and continuous use." AR 0690. See also Exh. 2 at 12 (BLM's 2006 Instruction Memorandum using same definition); Miller Decl. ¶¶ 8–11 (discussing distinction between roads and ways). A "way" maintained solely by the passage of vehicles is not considered a road, even if it is used on a regular and continuous basis. AR 0690. Even a route originally constructed by mechanical means, but no longer maintained by such means, is not a road. Id. The definitions of these two key terms were first adopted by the Department of the Interior in BLM's 1978 *Wilderness Inventory Handbook*. As BLM explained at that time:

This language [the definition of a "road"] is quoted exactly from the legislative history of FLPMA, the House of Representatives Report 94-1163, page 17, May 15, 1976. It is the *only* statement regarding the definition of a road in the law or legislative history.

AR 28233 (emphasis in original). BLM explained that "[f]rom the language in FLPMA's legislative history, it appears that *Congress specifically intended the BLM to follow the definition in the House Report*. Under these circumstances, the BLM has adopted and will use the road definition quoted from FLPMA's legislative history." Id. (emphasis added) (then going on to provide specific "sub-definitions" for the terms "improved and maintained," "mechanical tools," and "relatively regular and continuous use"). More than twenty years later, in 2001, the Department of the Interior once again reaffirmed that "BLM will continue to base the definition of what constitutes a 'road' from the FLPMA's legislative history." AR 0691. BLM's 2006

Instruction Memorandum confirms it again—only the 2004 Andrews-Steens RMP is an aberration.

Under these circumstances, BLM’s decision to disregard the key elements of maintenance history and actual route condition, in order to help rule out more than half a million acres of wilderness quality public land from being subject to environmental analysis under NEPA, was arbitrary, capricious and not in accordance with the law.

E. BLM’s Louse Canyon GMA inventory demonstrates the importance of evaluating supplemental wilderness values.

Finally, BLM claims it committed no error by refusing to consider supplemental wilderness values during its in-office wilderness review, claiming these values “do not provide the criteria to determine if an area has wilderness characteristics.” BLM Resp. at 11. BLM is only half right here. It is true that supplemental values are not required for an area to have wilderness value. 16 U.S.C. § 1131(c). However, these values, such as ecologically essential sage grouse habitat or unique geological features, *are* wilderness values. *Id.* And supplemental values can, and should, influence the final decision as to an area’s relative worth as an addition to our Nation’s protected wildlands. *See, e.g.*, AR 0703 (BLM’s 2001 wilderness inventory handbook, stating that these values “should be thoroughly considered when assessing an area’s overall value”); Exh. 2 at 13 (“If present, include a description of these values.”). Here, BLM failed to include supplemental values as part of its analysis, even though the evidence before the Court shows that BLM now has acknowledged the importance of these values in assessing wilderness values on the public lands through its Louse Canyon GMA decision and 2006 Instruction Memorandum. Again, the 2004 Andrews-Steens RMP decision stands as an inconsistent outlier to the BLM’s practice of evaluating wilderness values on the public lands.

CONCLUSION

For the reasons stated above as well as in ONDA's opening memorandum in support of its motion asking this Court to reconsider ONDA's wilderness-related NEPA and FLPMA claims, ONDA again 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 20th day of May, 2008

Respectfully Submitted,

s/ Peter M. Lacy

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Of Attorneys for Plaintiff