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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,

Plaintiff-Intervenor,

v.

**REPLY IN SUPPORT OF
PLAINTIFF’S MOTION TO
RECONSIDER**

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

Defendants.

Plaintiff Oregon Natural Desert Association (“ONDA”) moved this Court to reconsider portions of its June 8, 2007 Opinion & Order (Dkt # 187) in light of two decisions by Administrative Law Judge James H. Heffernan, because of the decisions’ legal and factual

similarities to this case. Because Defendants and Amici Harney County and Steens Mountain Landowner Group (“SMLG”) have not made a compelling case that the decisions are not persuasive, ONDA respectfully requests this Court to reconsider its rulings on Claims One, Two, and Seven.

STANDARD OF REVIEW

Defendants and Amici object to the fact that ONDA did not identify a category pursuant to Rule 59(e) or Rule 60(b) on which to base its motion. BLM Br. at 1; Harney Co. Br. at 4–7; SMLG Br. at 3–5. This objection is misplaced because this Court is not bound by the strictures of Rules 59(e) or 60(b) in this instance, where the Opinion & Order was issued prior to final judgment, and the court still holds jurisdiction. See Opinion & Order at 47 (referencing future remedial phase). ONDA therefore made its motion pursuant to a district court’s inherent power to reconsider, rescind, or modify an interlocutory order. ONDA Mem. at 2. The Ninth Circuit has held that a district court is free to reconsider its own orders over which it retains jurisdiction. United States v. Smith, 389 F.3d 944, 948–949 (9th Cir. 2004) (holding district court did not err in reconsidering an order where it retained jurisdiction). The reasons for which a court may do so under these circumstances are much broader than those permitted under Rules 59(e) and 60(b): it may do so “for cause seen by it to be sufficient.” City of Los Angeles v. Santa Monica BayKeeper, 254 F.3d 882, 889 (9th Cir. 2001) (finding that a district court properly rescinded an interlocutory order because “[a]s long as a district court has jurisdiction over the case, then it possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient.” (quoting Melancon v. Texaco, Inc., 659 F.2d 551, 553 (5th Cir. 1981) (emphasis removed)). Thus, because this court still retains jurisdiction, it possesses authority to reconsider its order.

ARGUMENT

Defendants and Amici point out multiple times that the stay decisions are only preliminary decisions from the Interior Board of Land Appeals. E.g. BLM Br. at 2. ONDA readily acknowledges this and did not imply that any binding weight is due. ONDA Mem. at 4 (noting “persuasive, rather than binding, precedential value” of stay decisions). Defendants and Amici also object to the relevance of the stay decisions due to the different lands at issue. E.g. BLM Br. at 2. Again, ONDA readily acknowledges the lands at stake were different.

The important similarity between the two stay decisions and this case is that the types of data present (and absent) before the courts were very similar. In all three cases, the administrative record contained ONDA inventories consisting of many pages of data and photographs on route conditions and other wilderness characteristics. Further, BLM conducted evaluations of ONDA’s proposed Wilderness Study Areas in the project areas using the same evaluation forms. ONDA Br. at 8 (citing AR 0711-21 and ONDA I at 5–6). Finally, the administrative records all contain virtually no objective data or other evidence that rebuts the data found in ONDA’s inventories. See Miller Decl. at ¶¶ 14–20. ONDA submitted this motion despite the obvious differences in land area, because it believes these similarities make Judge Heffernan’s conclusion, that “[t]his record raises serious doubt as to the adequacy of the factual basis for BLM’s . . . conclusions,” informative. ONDA I at 15.

BLM’s implication that the facts in the stay decisions are distinguishable, because here BLM did analyze wilderness characteristics, is without merit. BLM Br. at 3–4. First, the minimal discussions present in the EIS did not touch upon the vast majority of lands reported to have wilderness characteristics in the project area. The limited discussion in the EIS only addressed wilderness values in the Alvord Desert Addition and three other small, newly-acquired parcels;

BLM cannot contest the fact that the EIS did not discuss wilderness values for any of the other twenty-three areas inventoried by ONDA. See AR 26648; see also BLM Summ. J. Br. at 11 (the 23 “remaining” parcels “were not . . . analyzed as having wilderness characteristics during the BLM planning process”).

Second, under the Administrative Procedure Act, the relevant inquiry is not just whether an issue was discussed, but whether the conclusion is supported by evidence. See O’Keefe’s, Inc. v. U.S. Consumer Prod. Safety Comm’n, 92 F.3d 940, 942 (9th Cir. 1996). And despite BLM’s attempt to imply otherwise, the administrative record contains virtually no current photographic or other inventory data—the type of data BLM’s own wilderness inventory protocol requires—to support the discussions and conclusions presented in the EIS. See ONDA Summ J. Br. at 20–23; ONDA Summ. J. Reply Br. at 10–12. BLM’s implication is belied by its own Declaration of Evelyn Treiman, to which it cites. BLM Br. at 4. Treiman explains that BLM reviewed ONDA’s proposals in the office utilizing maps and the team’s “knowledge of on-the-ground conditions.” Treiman Decl. at ¶¶ 3–4. She reports that they only took a single one-day field trip. Id. ¶ 5. For this reason, as in the stay decisions, the administrative record fails to support BLM’s conclusions.

Likewise, BLM’s allegation that ONDA’s data is untrustworthy lacks merit and is irrelevant. BLM suggests several ONDA photos were inaccurate. BLM Br. at 4 (citing Treiman Decl. at ¶ 7). The accusation is vague and unsupported by any documentation: the declaration does not even identify the allegedly inaccurate photos, which could make all the difference. For example, Treiman alleges that photos were “on or adjacent to private land.” Treiman Decl. at ¶ 7. Being adjacent to private land is of no consequence, and if the photo was designed to show the condition of a route, the background could justifiably have been private land. The accusations are

worth very little without any identification of the offending photographs or countervailing data (which is not present because, as the declaration admits, the charges were based on “comparing the maps,” not field documentation). *Id.* More importantly, ONDA has never claimed that its inventory was perfect—just as BLM’s was not. ONDA would have welcomed the opportunity to improve its inventory had BLM provided data to support its allegations. ONDA has only claimed that its data was *new* and that conditions on the ground needed to be reevaluated because conditions have changed since the 1970s—something the Treiman declaration makes clear was not done.

CONCLUSION

For these reasons, ONDA respectfully requests that this Court 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 14th day of September, 2007

Respectfully Submitted,

s/ Kristin F. Ruether

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Of Attorneys for Plaintiff