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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OREGON NATURAL DESERT ASS’N,

Case No. 05-1616-AS

Plaintiff,

v.

**PLAINTIFF’S RESPONSE TO
DEFENDANTS’ OBJECTIONS TO
FINDINGS AND
RECOMMENDATION**

THOMAS E. RASMUSSEN, Field Manager,
Lakeview Resource Area, **SHIRLEY
GAMMON**, District Manager, Lakeview
District BLM, **GALE A. NORTON**, Secretary,
U.S. Department of the Interior, **BUREAU OF
LAND MANAGEMENT**, and **U.S.
DEPARTMENT OF THE INTERIOR**,

Defendants.

INTRODUCTION

On May 30, 2006, Defendants Thomas E. Rasmussen *et al.* (hereafter “BLM”) filed objections (Dkt # 79) to Judge Ashmanskas’s Findings and Recommendation, challenging the court’s recommendation that ONDA is entitled to summary judgment because the BLM did not adequately consider impacts to the wilderness resource in its East-West Gulch Projects decision. Defendants argue the court’s F&R is in error because it is based on certain “factual inaccuracies.” BLM Obj. at 2. Because the record dispels each of Defendants’ alleged

inaccuracies, ONDA respectfully requests the court to uphold this portion of Judge Ashmanskas's ruling on ONDA's NEPA claim.

ARGUMENT

I. THE BLM VIOLATED NEPA BECAUSE THE AGENCY DID NOT CONSIDER IMPACTS TO THE WILDERNESS RESOURCE IN THE EA.

The BLM disputes Judge Ashmanskas's finding that the BLM's environmental assessment ("EA") contained an inadequate analysis of wilderness values to meet its obligation under NEPA. BLM Obj. at 1-2. The BLM alleges that one of the F&R's "factual inaccuracies" is that it assumes that "the information in the environmental assessment on wilderness characteristics was not current and accurate information." *Id.* at 2. But the BLM cannot seriously dispute that the EA had absolutely no analysis of wilderness values. As the court put it, "BLM did not address wilderness issues at all," instead stating that wilderness values are either "not present" or "would not be significantly affected" within the project area. F&R at 15; AR Tab 35A at 19 (also stating wilderness issue is "not discussed further" in EA).

Only after ONDA administratively protested the BLM's proposed decision did the agency respond for the first time to the wilderness issue. AR Tab 46 at 3-7. This is too late to satisfy NEPA: the BLM's discussion of wilderness characteristics and the impacts of the proposed action on wilderness resources must appear in the EA itself. *See, e.g., 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.")¹ ONDA and the public never had a

¹ Note also that this runs directly counter to the BLM's 2001 *Wilderness Inventory & Study Procedures* handbook, which states:

chance *during the NEPA process* to respond to the BLM's post hoc "analysis" of ONDA's wilderness inventory information. This is critical because the BLM's refusal to include this information in the EA so that the agency and the public could make reasoned and informed analyses as to the impacts of the project on wilderness characteristics frustrates NEPA's twin purposes of fully informed decision-making and public participation. See, e.g., Columbia Basin Land Preservation v. Schlesinger, 643 F.2d 585, 592 (9th Cir. 1981) (preparation of a NEPA document ensures that the public "can evaluate the environmental consequences independently"); Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 97 (1983) (NEPA's twin objectives are to ensure agencies "consider every significant aspect of the environmental impact of a proposed action" and "ensure[] that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process").

Indeed, the Ninth Circuit has confirmed that an agency's failure to allow public input during the NEPA process "undermines the very purpose of NEPA," which is to "ensure[] that federal agencies are informed of environmental consequences before making decisions and that the information is available to the public." Citizens for Better Forestry v. U.S. Dep't of Agric., 341 F.3d 961, 970-71 (9th Cir. 2003) (internal quotation omitted). Failure to inform the public causes harm, consisting of "added risk to the environment that takes place when governmental

If the BLM determines that impacts from a proposed action could degrade the wilderness values or the roadless character so as to disqualify the [action] area from further consideration as a WSA, the BLM must consider *in the NEPA document* an alternative of mitigating or relocating the proposed action to avoid or minimize impacts on wilderness values; and must also consider the alternative of postponing a decision on the proposed action until the wilderness values can be addressed through a new land use plan or plan amendment.

ONDA Ex. 2 at 10 (emphasis added). The handbook also states that where NEPA analysis "shows that a proposed action would disqualify the area from further consideration" as a WSA, the agency should postpone the action until it can address wilderness values in a new land use plan or amendment. Id.

decisionmakers make up their minds without having before them an analysis (with public comment) of the likely effects of their decision on the environment. NEPA’s object is to minimize that risk, the risk of uninformed choice.” *Id.* at 971 (internal quotation omitted).

In this case, the BLM never provided the public with an opportunity to review and comment on its cursory, flawed analysis of ONDA’s wilderness inventory information. If ONDA had had the chance to review the BLM’s wilderness “findings” during the NEPA process, ONDA would have been able to respond directly to the Field Manager’s flawed interpretations of defined wilderness characteristics and erroneous assertions as to on-the-ground circumstances. See ONDA Br. at 18–20. Before Judge Ashmanskas, ONDA submitted the Declaration of Craig Miller, which, among other things, describes in part how ONDA would have responded to the Field Manager’s comments had it been provided an opportunity. See Miller Decl. (Dkt # 26), at ¶¶ 3–11. But since ONDA and the public never had such an opportunity, the BLM’s belated analysis was insufficient under NEPA.

II. THE RECORD SHOWS THE BLM’S POST-HOC ANALYSIS IN THE PROTEST RESPONSE LETTER IS FLAWED.

Defendants also dispute Judge Ashmanskas’s finding that the BLM’s analysis was inadequate. According to Defendants, Judge Ashmanskas did not “fully consider” the “detailed review” the BLM allegedly undertook concerning ONDA’s wilderness inventory information. BLM Obj. at 2. This argument falls short because, even if it was acceptable for the BLM to conduct its analysis of the wilderness resource in a protest response letter rather than in an environmental assessment, the analysis: (1) did not take a hard look at wilderness values; (2) relied on outdated and inaccurate inventory information; and (3) did not fully consider or respond to ONDA’s wilderness inventory information.

A. The Post-Hoc Analysis Did Not Take a Hard Look at Wilderness Values.

The analysis the BLM did eventually perform on wilderness values was inadequate under NEPA and factually flawed. It was inadequate because nothing Defendants cite to in their Objections shows the BLM took a “hard look” at the environmental consequences of the East-West Gulch Projects decision on the wilderness resource on Beaty Butte. To satisfy NEPA, the BLM must ensure it has taken a “hard look” at “every significant aspect of the environmental impact of a proposed action” and it must “inform the public that it has indeed considered environmental concerns in its decisionmaking process.” Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1153–54 (9th Cir. 2006) (citing Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1066 (9th Cir. 2002)); see also Ocean Advocates v. U.S. Army Corps of Eng’rs, 402 F.3d 846, 864 (9th Cir. 2005); Idaho Sporting Cong. v. Rittenhouse, 305 F.3d 957, 973 (9th Cir. 2002) (quoting Marsh v. Ore. Natural Res. Council, 490 U.S. 360, 374 (1989)); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 348 (1989) (all describing “hard look” requirement). The F&R correctly notes that the BLM was “obligated under NEPA to consider whether there were changes in or additions to the wilderness values within the East-West Gulch, and whether the proposed action in that area might negatively impact those wilderness values, if they exist.” F&R at 17.

Nothing in Defendants’ Objections suggests that any new analysis was conducted during the East-West Gulch Projects NEPA process. Defendants cite nothing more than preparation of a map; a list of mileages of roads, trails, fences, and pipelines; extraordinarily brief “findings” that naturalness and opportunities for solitude or unconfined recreation do not exist in ONDA’s Spaulding Proposed WSA Addition; and a list of rangeland developments in the 1998 AMP. BLM Obj. at 6–8; see AR Tab 46 at 3–7.

There is no information suggesting BLM personnel actually analyzed the wilderness characteristics of the area. As described in detail in ONDA's Objections (Dkt # 78), wilderness is defined by: (1) size (at least 5,000 contiguous acres of public land); (2) naturalness (the area "generally appears to have been affect primarily by the forces of nature" and "imprint of man's work" is "substantially unnoticeable"); and (3) either outstanding opportunities for solitude or for a primitive and unconfined type of recreation. See ONDA Obj. at 4–5.² Wilderness also may contain "supplemental values" such as ecological, geological, or other features of scientific, educational, scenic, or historical value. ONDA Ex. 2 at 20; 16 U.S.C. § 1131(c).

These characteristics simply cannot be inventoried—let alone adequately analyzed under NEPA's "hard look" standard—by maps and lists alone. Defendants acknowledge as much when they state that "physical developments such as roads *affect* naturalness and opportunities for solitude or primitive and unconfined types of recreation." BLM Obj. at 8 (emphasis added). Thus, the BLM recognizes that while physical developments affect wilderness characteristics, they do not *define* wilderness. And these physical developments are the only aspect of wilderness characteristics that the BLM in its post-hoc analysis tallied and used to discard the wilderness issue. The BLM never considered the on-the-ground *impact* of the developments on wilderness characteristics, which should be at the very heart of a wilderness inventory and NEPA review of impacts to wilderness.

In short, the BLM's failure or refusal to take a "hard look" at impacts to the wilderness resource during the NEPA process undermines each of NEPA's twin purposes of informed agency decision-making and informed public participation, Methow Valley, 490 U.S. at 349, and

² Citing 16 U.S.C. § 1131(c) (Wilderness Act definition); ONDA Ex. 1 (BLM 1978 *Wilderness Inventory Handbook*), at 7 (defining "key factors" of wilderness); ONDA Ex. 2 (BLM 2001 *Wilderness Inventory & Study Procedures handbook*), at 15–20 (more detailed discussion of same factors).

therefore violates NEPA. See also Citizens for Better Forestry, 341 F.3d at 971 (“environmental plaintiff was ‘surely . . . harmed [when agency action] precluded the kind of public comment and participation NEPA requires’”). Far from the “detailed review” Defendants refer to, BLM Obj. at 2, Judge Ashmanskas more accurately characterized the BLM’s review as reliance on the circa-1970s–1980s, “one-time inventory review” plus inadequately “reviewing and critiquing ONDA’s work product.” F&R at 17. Thus, Defendants’ argument that the BLM’s post-hoc, inaccurate, and incomplete review of ONDA’s inventory information was sufficient to satisfy NEPA falls short here.

B. The Post-Hoc Analysis Relied on Outdated and Inaccurate Inventory Information.

Defendants argue the court was incorrect in finding that the “BLM did not meet [its NEPA] obligation by relying on the one-time inventory review conducted in 1992.” BLM Obj. at 1. Instead, Defendants argue that the wilderness information in the EA was “current and accurate information.” Id. at 2. The record belies both of these assertions.

First, the administrative record shows that the last time the BLM conducted any actual, on-the-ground wilderness inventory for the public lands within the East-West Gulch Projects planning area was 1980. AR Tab 39 at 4 (BLM response to ONDA comments); Tab 46 (attachment to letter, titled “Wilderness Inventory. Oregon and Washington. Final Intensive Inventory Decisions”). The Department of the Interior issued its final WSA recommendations to the President, pursuant to FLPMA § 603(a), in 1992.³ The 1980 inventory data are not “current” information.

³ See ONDA Obj. at 12 n.4 (explaining discrepancy between dates used to describe BLM’s single, previous inventory and wilderness review).

Second, the BLM’s outdated information is no longer accurate. As explained by Craig Miller, ONDA’s 2004 inventory and reevaluation show that the BLM’s decades-old information is no longer representative of on-the-ground conditions. Miller Decl. at ¶ 9. Those conditions have changed substantially since the agency conducted its original wilderness inventory more than a quarter-century ago—such that this area now possesses defined wilderness characteristics worthy of consideration and conservation. *Id.* at ¶¶ 3–8. For example, while the BLM concluded in 1980 that its various subunits were divided by “roads,” thus precluding those areas from potential wilderness protection due to their limited size, see AR Tab 46 at 4–6, ONDA’s 2004 report shows that those areas do in fact meet the size criteria because those routes are now unmaintained, overgrown, impassable “ways.” AR Tab 43S at 210–212.

Defendants argue that because the BLM keeps records on the locations of roads (routes), fences, pipelines, and water developments, this somehow renders the BLM’s *wilderness* inventory information “current and accurate.” BLM Obj. at 8. But as noted above, lists of locations of such developments represent only one part of the wilderness resource, which encompasses several, well-defined “key factors.” 16 U.S.C. 1131(c); ONDA Ex. 2 at 15–20. For this reason, the BLM’s post-hoc analysis did not adequately update the BLM’s information on wilderness values, and Judge Ashmanskas was correct in finding that “BLM needed current and accurate information on wilderness values” and “did not have such information.” F&R at 21.

C. The Post-Hoc Analysis Did Not Fully Consider ONDA’s Wilderness Inventory Information.

The BLM argues that as part of its “detailed review” in its protest response letter, it sufficiently “explained why no changes to the proposed action or analysis were necessary in response to ONDA’s comments.” BLM Obj. at 2, 8. This is incorrect because the BLM’s letter failed to address much of ONDA’s inventory information.

The ONDA inventory, conducted following the inventory protocol the BLM itself established in its *Wilderness Inventory Study & Procedures* handbook⁴, contains annotated road and photo logs with GPS locations cued to hundreds of photographs and inventory locations, as well as narratives analyzing each inventory unit under the BLM's definition of wilderness characteristics and documenting how that information is new and/or differs from the information in prior inventories conducted by the BLM regarding wilderness values for the area. See Marlett Decl. at ¶ 10; Miller Decl. at ¶¶ 5–6; AR Tab 43S (relevant excerpts from ONDA's 2005 Lakeview wilderness inventory).

But the BLM protest response letter ignores much, if not most, of ONDA's inventory information. For example, ONDA's inventory contains over 30 route descriptions within the Spaulding Proposed WSA Addition that demonstrate those routes are properly classified as "ways" rather than "roads." AR Tab 43S at 221-23. In stark contrast, the protest response letter provided only a single example of a route ("Route 6196-0-00") which the Field Manager asserted was a road rather than a way. See AR Tab 46 at 6; Miller Decl. at ¶¶ 5–7 (discussing conditions of routes in Spaulding Proposed WSA Addition, and Field Manager's lone example of Route 6196-0-00). Mr. Miller explains that ONDA's inventory information, combined with a review of the BLM's own route maintenance records for the past five years, show that the Field Manager's

⁴ The BLM claims its 2001 Handbook "is irrelevant" because the agency rescinded it in June 2003. See BLM MSJ Memo (Dkt # 40) at 13 n.4; see also BLM Obj. at 5. That rescission was based on an April 2003 consent decree entered in Utah v. Norton, Civ. No. 2:96:CV0870 B (D. Utah filed Oct. 14, 1996), in which the BLM "acknowledged" that its authority to conduct wilderness reviews expired in 1993, and that the agency is without authority to establish new WSAs. See BLM Ex. 5 at 2 (Instruction Memo. 2003-275). However, the Utah district court granted the motion of intervenors Southern Utah Wilderness Alliance *et al.* to withdraw the court's approval of the consent decree, pending decisions on outstanding motions, including the validity of the settlement, which has been challenged. Utah Dkt # 261 (bench order vacating consent decree). In any event, the BLM's 2001 Handbook was in force when ONDA initiated its citizen wilderness inventory program and ONDA believes it still represents a detailed, valid, and comprehensive protocol for conducting such inventories. See Marlett Decl. at ¶ 10 n.1.

statement is incorrect and appears to ignore the BLM’s own definition of roadlessness. Miller Decl. at ¶¶ 5–7. Indeed, Miller explains that the single route the Field Manager selected for his analysis is “by far in the *best* condition of *any* of the numbered routes within the Spaulding Proposed WSA addition.” Miller Decl. at ¶ 7 (emphasis in original).⁵

ONDA’s report also documents that the Spaulding Proposed WSA Addition is “primarily affected by the forces of nature” and that there are outstanding opportunities for solitude and primitive recreation, including hiking, photography, wildlife observation, and hunting. AR Tab 43S at 212–213. The area also includes “supplemental values” in the form of potentially significant archaeological resources, and the presence of sage grouse, pygmy rabbit, California bighorn sheep, burrowing owl and peregrine falcon. *Id.* at 213–214. The BLM’s protest response does nothing to disprove these portions of ONDA’s report.

Thus, the BLM’s decision to build or reconstruct miles upon miles of new fences, pipelines, and roads—actions which would directly reduce the area’s ability to be considered for protection as wilderness—is arbitrary and capricious in the absence of a full and informed analysis of the environmental impacts of the project. See Marlett Decl. at ¶¶ 13–15; Miller Decl. at ¶ 10; see also AR Tab 43S at Photos 36, 33 (example of a “way” created simply by virtue of the presence of a fence line; the types of livestock watering troughs that could impact area’s naturalness).

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⁵ Miller goes on to explain that even if the very beginning of this route could be considered to meet the definition of a road, after two miles “it deteriorates into an unmaintained way (ONDA 2004 photo DL9 (AR Tab 43S, Photo 73))” and “could easily be cherry-stemmed out of the proposed WSA and should not be the sole reason to discount the entire proposal.” Miller Decl. at ¶ 7 (also explaining, in footnote 2, BLM’s 2001 Handbook concept of “cherry-stemming”).

CONCLUSION

For the foregoing reasons, ONDA respectfully requests the court to uphold Judge Ashmanskas' recommended ruling that the BLM violated NEPA by issuing the East-West Gulch Projects EA in the absence of current, accurate information on the wilderness resource. As explained in ONDA's Objections, ONDA also respectfully requests the court to reverse the magistrate's recommendations on the remaining NEPA (cumulative impacts, range of alternatives) and FLPMA (multiple use and unnecessary or undue degradation) claims and enter judgment for ONDA.

DATED this 23d day of June, 2006

Respectfully Submitted,

s/ Peter M. Lacy

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Of Attorneys for Plaintiff