



Oregon Natural Desert Association

February 21, 2007

VIA FAX

Ed Shepard, State Director
Oregon State Office
Bureau of Land Management
333 S.W. 1st. Avenue
Portland, OR 97204

Re: **Protest of Certain Parcels in the Bureau of Land Management's Notice of Competitive Oil and Gas Lease Sale – March 8, 2007**

Dear Mr. Shepard,

In accordance with 43 C.F.R. §§ 4.450-2 and 3120.1-3, the Oregon Natural Desert Association (“ONDA”) hereby protests certain parcels of oil and gas leases to be auctioned at the March 8, 2007 offering, in Portland, Oregon.

ONDA is a non-profit public interest organization dedicated to preserving and protecting the public lands of eastern Oregon. ONDA’s mission is to protect, defend, and restore forever, the health of Oregon’s native deserts. The members and staff of ONDA use and enjoy the public lands, waters, and natural resources of the public lands on and surrounding BLM’s Vale District for countless recreational, scientific spiritual, educational, aesthetic, and other purposes, including the challenged parcels.

As explained below, the Bureau of Land Management’s decision to sell and issue leases for the parcels at issue in this protest violates the National Environmental Policy Act (NEPA), the Federal Land Policy and Management Act (FLPMA), the National Historic Preservation Act (NHPA), the Wild and Scenic Rivers Act (WSRA), and the regulations and policies that implement these laws. ONDA therefore requests that BLM withdraw these lease parcels from sale until the agency has fully complied with these laws or, in the alternative, withdraw the parcels from sale until BLM attaches unconditional no-surface occupancy stipulations to the protested parcels.

Challenged parcels:

3-8-07-1, 3-8-07-2, 3-8-07-3, 3-8-07-4, 3-8-07-5, 3-8-07-6, 3-8-07-7, 3-8-07-8, 3-8-07-9, 3-8-07-10, 3-8-07-11, 3-8-07-12, 3-8-07-13, 3-8-07-14, 3-8-07-15, 3-8-07-16, 3-8-07-17, 3-8-07-18, 3-8-07-19, 3-8-07-20,

3-8-07-21, 3-8-07-22, 3-8-07-24, 3-8-07-25, 3-8-07-26, 3-8-07-27, 3-8-07-28, 3-8-07-29, 3-8-07-30, 3-8-07-31, 3-8-07-32, 3-8-07-33, 3-8-07-34, 3-8-07-35, 3-8-07-36, 3-8-07-37, 3-8-07-38, 3-8-07-46, 3-8-07-47, 3-8-07-48, 3-8-07-49, 3-8-07-50, 3-8-07-51, 3-8-07-52, 3-8-07-53, 3-8-07-54, 3-8-07-55, 3-8-07-56, 3-8-07-60, 3-8-07-62, 3-8-07-63, 3-8-07-64, 3-8-07-65, 3-8-07-66, 3-8-07-67, 3-8-07-70, 3-8-07-73, 3-8-07-74, 3-8-07-75, 3-8-07-76, 3-8-07-79, 3-8-07-80, 3-8-07-81, 3-8-07-83, 3-8-07-84, 3-8-07-85, 3-8-07-86, 3-8-07-87, 3-8-07-88, 3-8-07-89, 3-8-07-90, 3-8-07-91, 3-8-07-92, 3-8-07-93, 3-8-07-94, 3-8-07-95, 3-8-07-96, 3-8-07-97, 3-8-07-98, 3-8-07-99, 3-8-07-100, 3-8-07-101, 3-8-07-102, 3-8-07-103, 3-8-07-104, 3-8-07-105, 3-8-07-106, 3-8-07-107, 3-8-07-108, 3-8-07-109, 3-8-07-110, 3-8-07-111, 3-8-07-112, 3-8-07-113, 3-8-07-114, 3-8-07-115, 3-8-07-116, 3-8-07-117, 3-8-07-118, 3-8-07-119, 3-8-07-120, 3-8-07-121, 3-8-07-122, 3-8-07-123, 3-8-07-124, 3-8-07-125, 3-8-07-126, 3-8-07-127, 3-8-07-128, 3-8-07-129, 3-8-07-130, 3-8-07-131, 3-8-07-132, 3-8-07-133, 3-8-07-135, 3-8-07-136, 3-8-07-138, 3-8-07-139, 3-8-07-140, 3-8-07-142, 3-8-07-143, 3-8-07-147.

Failure to Prepare an EIS

The caselaw in the Ninth Circuit is clear: for parcels lacking a No Surface Occupancy stipulation, leasing is the point of commitment at which the federal government must conduct NEPA analysis through preparation of an EIS.

[T]he sale of a non-NSO oil or gas lease constitutes the “point of commitment;” after the lease is sold the government no longer has the ability to prohibit potentially significant inroads on the environment. By relinquishing the “no action” alternative without the preparation of an EIS, the government subverts NEPA's goal of insuring that federal agencies infuse in project planning a thorough consideration of environmental values. . . . [U]nless surface-disturbing activities may be absolutely precluded, the government must complete an EIS before it makes an irretrievable commitment of resources by selling non-NSO leases.

Conner v. Burford, 848 F.2d 1441, 1451 (9th Cir. 1988). BLM has not prepared an EIS for these leases, in violation of NEPA.

Nor has BLM established that it is appropriate to tier to the Southeast Oregon RMP FEIS to satisfy the EIS requirement. First, it has failed to complete or issue to the public any Determinations of NEPA Adequacy (“DNAs”) establishing this, prior to the close of the protest period.

Second, the SEORMP FEIS was premised upon the now-erroneous assumption that oil and gas leasing and development on the Vale District was unlikely because “[i]nterest has been sporadic throughout most of the 20th Century and no commercial quantities have ever been discovered.” SEORMP FEIS at 398. Its assumption has been proven wrong by changed circumstances, as evidenced by the significant increase in oil and gas leasing in the Vale District since the adoption of the RMP.

Third, the FEIS’s analysis of environmental impacts from oil and gas drilling is extraordinarily vague. It describes the potential impacts to the planning area from oil and gas leasing as “low” and cumulative impacts as “minor.” *Id.* There is no mention, let alone analysis, of the general or specific impacts or cumulative impacts that oil and gas development would have on wildlife, soils, biological crusts, wilderness values, visual

resources, recreation, cultural resources, or water quality. There is no site-specific analysis of impacts on any particular parcels of land. The analysis falls well short of the requisite “hard look” required for these resources. Under this standard, review consists of insuring that the agency took a “hard look” at the environmental consequences of the proposed action. See Idaho Sporting Cong. v. Rittenhouse, 305 F.3d 957, 973 (9th Cir. 2002). It also falls well short of what the Ninth Circuit has held a cumulative impacts analysis must include: “some quantified or detailed information.” Klamath-Siskiyou Wildlands Center v. BLM, 387 F.3d 989, 993 (9th Cir. 2004). “General statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided. The analysis must be more than perfunctory; it must provide a useful analysis of the cumulative impacts of past, present, and future projects.” Id. at 993-994 (internal quotations and citations omitted).

Wilderness Values: NEPA

The failure to consider impacts or cumulative impacts of the leasing either in a new EIS or in the SEORMP is particularly troubling with respect to wilderness values. The challenged parcels all encompass portions of eleven proposed Wilderness Study Areas (“proposed WSAs”) that were documented in a citizen wilderness inventory report submitted to the BLM by ONDA on February 6, 2004.¹ The proposed WSAs are identified as: Little Black Canyon, Lake Ridge, Hunter Peak, Monuments, Roostercombs, Dry Creek, Keeney Ridge, Freezeout Ridge, Sagebrush Gulch, Grassy Mountain, and Cherry Creek Addition. Several of the challenged parcels are also very close, or adjacent to, designated WSAs. BLM has failed to analyze the serious impacts on the wilderness resource that the leasing or subsequent development may have in both these types of areas. For example, drill pad and road construction would severely affect roadlessness, naturalness, and opportunities for solitude and primitive recreation.

The BLM has an independent legal duty under NEPA to consider impacts to the wilderness resource during its project planning processes. NEPA requires federal agencies to consider the impacts of their proposed actions on “the quality of the human environment,” 42 U.S.C. § 4332(2)(C), and does not exclude the wilderness resource from its requirements. NEPA requires the BLM to analyze and discuss new information as it emerges during the planning process. The BLM is under a continuing duty to supplement existing environmental analyses in response to “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1509(c)(1)(ii). NEPA requires a “full and fair discussion” of significant environmental impacts that is “supported by evidence that the agency has made the necessary environmental analyses.” Id. § 1502.1. The discussion must include an analysis of the likely cumulative environmental impacts of proposed actions. See id. §§ 1508.7, 1508.25(a)(2). Moreover, where, as here, the BLM has a distinct duty under FLPMA to collect inventory information on a particular resource or value on the public lands, that resource and information must necessarily be considered as part of the NEPA process. The District of Oregon recently confirmed this duty in the

¹ Available at <http://www.onda.org/projects/owyhee/OwyheeInvRept.pdf>.

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context of a proposed rangeland project in a proposed Wilderness Study Area, explaining:

[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. The court finds BLM did not meet that obligation by relying on the one-time inventory review conducted in 1992. Such reliance is not consistent with its statutory obligation to engage in a continuing inventory so as to be current on changing conditions and wilderness values. 43 U.S.C. § 1711(a). BLM's issuance of the East-West Gulch Projects EA and the accompanying Finding of No [Significant] Impact (FONSI) in the absence of current information on wilderness values was arbitrary and capricious, and, therefore, was in violation of NEPA and the APA.

Ore. Natural Desert Ass'n v. Rasmussen, 451 F.Supp.2d 1202, 1213 (D. Or. 2006). The District of Utah has similarly, recently held that BLM's failure to consider significant new information regarding the wilderness resource when leasing oil and gas parcels in proposed wilderness was a violation of NEPA. SUWA v. Norton, 457 F.Supp.2d 1253 (D. Ut. 2006). See also Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 553 (1978) (NEPA "places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action."); Fdn. for N. Am. Wild Sheep v. U.S. Dep't of Agric., 681 F.2d 1172, 1177 (9th Cir. 1982) (discussing "the exceptionally broad scope of NEPA.") Indeed, the NEPA regulations specifically direct that the "human environment" "shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment." 40 C.F.R. § 1508.14.

As was the case in Rasmussen, the leasing of these challenged parcels with no new NEPA analysis violates NEPA because the agency (1) failed to take a "hard look" at the environmental consequences of its proposed action with respect to the wilderness resource, by relying on outdated and inaccurate information on wilderness resource characteristics, such as roadlessness, naturalness, and opportunities for solitude and primitive recreation; (2) failed to consider significant new circumstances or information on those same wilderness resource characteristics; and (3) failed to analyze cumulative impacts of the proposed action with respect to the wilderness resource.

ONDA provided to BLM a detailed wilderness inventory in February 2004 documenting that there are indeed significant wilderness values in the leased areas. The report includes for each of the proposed WSAs: maps identifying the boundaries of each area, annotated road and photo logs with GPS locations cued to the maps, and narratives analyzing each inventory unit under BLM's definition of wilderness characteristics and documenting how that information is new and/or differs from the information in prior inventories conducted by BLM regarding wilderness values for the area. ONDA conducted its inventory in accordance with BLM's own 2001 "Wilderness Inventory and Study Procedures" Handbook, which directs public requests to consider certain lands

with wilderness characteristics to be accompanied by maps showing specific boundaries of the areas in question, photographic documentation, and detailed narratives describing the area's wilderness characteristics and how the newly presented information significantly differs from the information available in prior inventories conducted by BLM.

But the BLM has not considered this new information, which it only received after the preparation of the SEORMP. It has certainly not considered it during this leasing process, for which BLM is only preparing DNAs. DNAs "are an administrative convenience created by the BLM." SUWA v. Norton, 457 F.Supp.2d at 1255. They "are not new NEPA analyses, and the underpinnings of [a decision] not to supplement [] outdated EISs and EAs must rise or fall on the contents of the previously issued NEPA documents." Id. at 1264.

The pre-existing NEPA analysis for these leases —the SEORMP—is not adequate either because the SEORMP failed to analyze the impacts of oil and gas leasing on the wilderness resource at any scale. BLM wholly failed during the SEORMP planning process to re-analyze the suitability of non-recommended wilderness study areas (WSAs) for wilderness designation and to consider the potential wilderness values of other, non-WSA roadless areas. Because the BLM failed to undertake or perform these duties during the RMP process, it must now insure that it fulfills these obligations during subsequent site-specific projects where wilderness values may be impacted. Thus, the BLM must, through this process, consider any potential impacts to wilderness values of its proposed action. The decision to lease these parcels is not in accordance with NEPA because it failed to take a "hard look" at impacts or cumulative impacts to the wilderness resource.

Wilderness Values: FLPMA

FLPMA imposes on the BLM a substantive, continuing duty to manage the public lands for multiple-use and to prevent unnecessary or undue degradation to the public lands and their resources. 43 U.S.C. § 1732(a), (b). BLM must satisfy this duty by engaging in a reasoned and informed decision-making process. See Nat'l Wildlife Fed'n v. BLM, 140 IBLA 85, 101 (1997). To prove it has engaged in a reasoned and informed decision-making process, the BLM must show that it has "balanced competing resource values" to insure its actions are in the public interest as defined by FLPMA. Id. at 101; see also 43 U.S.C. § 1702(c) (definition of "multiple use"). Among the multiple use values the BLM must manage for are wilderness values or characteristics.

In order to fulfill its multiple use mandate, BLM must "prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values (including, but not limited to, outdoor recreation and scenic values)." 43 U.S.C. § 1711(a). The "inventory shall be kept current so as to reflect changes in condition and to identify new and emerging resources and other values." Id. ONDA's report represents the type of information the BLM had an independent duty to collect, update, present and consider during this planning effort. Here, the BLM has failed to do so with respect to the wilderness resource. By failing to adequately consider the impacts of the proposed action on wilderness values, the leasing decision violates FLPMA's multiple use mandate.

Again, the pre-existing NEPA analysis, the SEORMP, fails to meet the mandate because it fails to update the inventory or properly balance the wilderness resource at any scale. Here, because the BLM likewise failed to undertake or perform these duties during the RMP process, it must now insure that it fulfills these obligations during subsequent site-specific projects where wilderness values may be impacted. Because it fails to provide any new NEPA analysis for this leasing action, the leasing of these parcels is not in accordance with FLPMA because BLM fails to update the inventory, prevent unnecessary or undue degradation, or show that it has balanced competing resource values to protect the wilderness resource.

FLPMA also requires BLM to manage designated WSAs “in a manner so as not to impair the suitability of such areas for preservation as wilderness,” pursuant to FLPMA § 603. 43 U.S.C. § 1782(c). ONDA is concerned that several of the challenged parcels’ proximity to designated WSAs will serve to impair their suitability as wilderness. This is another issue that should have been, but was not, discussed in a new NEPA analysis.

Leasing the Contested Parcels Violates the National Historic Preservation Act

BLM’s decision to sell and issue leases for the contested parcels violates Section 106 of the NHPA, 16 U.S.C. § 470(f), and its implementing regulations, 36 C.F.R. §§ 800 et seq. The sale of an oil and gas lease is the point of “irreversible and irretrievable” commitment and is therefore an “undertaking” under the NHPA. See BLM Manual H-1624-1, Planning for Fluid Mineral Resources, Chapter I(B)(2); see also 36 C.F.R. § 800.16(y); Montana Wilderness Assoc. v. Fry, 310 F. Supp. 2d 1127, 1152-53 (D. Mont. 2004); Southern Utah Wilderness Alliance, 164 IBLA at 21-28. The NHPA’s implementing regulations further confirm that the “[t]ransfer, lease, or sale of property out of federal ownership and control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property’s historic significance” constitutes an “adverse effect” on historic properties. Id. § 800.5(a)(2)(vii) (emphasis added). See 65 Fed. Reg. 77689, 77720 (Dec. 12, 2000) (Protection of Historic Properties – Final Rule; Revision of Current Regulations) (discussing intent of § 800.5(a)(2)(iii)). Here, the DNAs are not now available for the public to review. Thus, at this time, there has been no analysis of the adverse effects on the cultural resources present in the contested leases.

BLM has further violated the NHPA by failing to adequately consult with members of the interested public such as ONDA regarding the effects of leasing all the protested parcels. Such consultation must take place before the BLM makes an irreversible and irretrievable commitment of resources – in other words before the March 2007 lease sale. The NHPA requires BLM to “determine and document the area of potential effects, as defined in [36 C.F.R.] § 800.16(d),” identify historic properties, and to affirmatively seek out information from the SHPO, Native American tribes, consulting parties, and other individuals and organizations likely to have information or concerns about the undertaking’s potential effects on historic properties. 36 C.F.R. § 800.4(a) (emphasis added). The NHPA further states that BLM shall utilize the information

gathered from the source listed above and in consultation with at a minimum the SHPO, Native American tribes, and consulting parties “identify historic properties within the area of potential affect.” Id. § 800.4(b). See id. § 800.04(b)(1) (discussing the “level of effort” required in the identification process as a “reasonable and good faith effort to carry out appropriate identification efforts”).

Here, as the DNAs are not now available for the public to review, it is not apparent that BLM has consulted with the Burns Paiute Tribe or other tribes in the area to identify historic properties within the specific leased areas. BLM did not contact ONDA in this regard. It should have because of ONDA’s demonstrated interest in the wilderness characteristics of the leased parcels, including the cultural resource aspect. ONDA’s 2004 inventory report contains numerous identifications of cultural resources such as arrowheads, lithic scatter, and shepherd’s stone structures, which ONDA pointed out were supplemental values that enhanced the areas’ wilderness suitability. Permitting public participation only at the protest stage is not equivalent to encouraging participation in an open NEPA process.

Leasing the Contested Parcels Violates the Wild and Scenic Rivers Act

Congress enacted the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271–1287, in 1968 to identify rivers that possess “outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values” and to preserve those rivers in free-flowing condition and protect their immediate environments “for the benefit and enjoyment of present and future generations.” Id. § 1271. Each component of the system, regardless of its classification as wild, scenic, or recreational, “shall be administered in such manner as to protect and enhance the values which caused it to be included in said system.” Id. (emphasis added). Further, “primary emphasis shall be given to protecting its esthetic, scenic, historic, archeologic, and scientific features.” Id. In addition to protection of a river’s free-flowing condition and outstandingly remarkable values, the WSRA specifies that managing agencies must protect the water quality of all rivers added to the system. Id. §§ 1271, 1283(c).

BLM did not provide a map with its Notice of Competitive Sale, nor has it completed DNAs at this time. Due to the sheer volume of areas being leased, it seems likely that some of the contested parcels are within the Owyhee River Wild and Scenic River Corridor. If this is in fact the case, leasing the contested parcels with no further NEPA analysis fails to “protect and enhance” the River’s values, and the SEORMP and River Plan fail to adequately analyze impacts or cumulative impacts of oil and gas leasing.

REQUEST FOR RELIEF

ONDA requests the following appropriate relief: (1) the withdrawal of the protested parcels from the March 2007 Competitive Oil and Gas Lease Sale until such time as the agency has complied with NEPA, FLPMA, and the NHPA or, in the alternative (2) withdrawal of the protested parcels until such time as BLM attaches no-surface occupancy stipulations to all protested parcels.

If you have any questions regarding this protest, please feel free to contact me at the address below.

Sincerely,

s/ Kristin F. Ruether

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