

**UNITED STATES COURT OF APPEALS  
FOR THE  
NINTH CIRCUIT**

**Docket No. 05-35931**

**OREGON NATURAL DESERT ASSOCIATION, *et al.***

Plaintiff-Appellants,

**v.**

**BUREAU OF LAND MANAGEMENT, *et al.***

Defendant-Appellees,

On Appeal From the  
United States District Court for the  
District of Oregon Pursuant to  
28 U.S.C. § 1291

**RESPONSE TO BLM’S PETITION FOR PANEL REHEARING**

---

<b>Peter M. Lacy (“Mac”)</b> <b>Oregon Natural Desert Association</b> 917 SW Oak Street, Suite 408 Portland, OR 97205 (503) 525-0193 lacy@onda.org	<b>Stephanie M. Parent</b> 4685 SW Flower Place Portland, OR 97221 (503) 320-3235 (503) 768-6642 (fax) parentlaw@gmail.com
<b>Laurence (“Laird”) J. Lucas</b> P.O. Box 1342 Boise, ID 83701 (208) 424-1466 (phone and fax) llucas@lairdlucas.org	

Attorneys for Plaintiff-Appellants Oregon Natural Desert Association,  
Western Watersheds Project, and Committee for the High Desert

## INTRODUCTION

BLM asks the Court to “delete[] all references to setting aside the ROD and barring implementation of the Plan.” BLM Petition for Rehearing (hereafter “BLM Petition”) at 12. The Court should deny this drastic request, which is inconsistent with the Administrative Procedure Act’s requirement that the Court shall hold unlawful and set aside unlawful agency action, findings, and conclusions. The Court properly set aside and enjoined implementation of BLM’s unlawful decision adopting the Southeastern Oregon Resource Management Plan (“SEORMP”).

The Court need only make one important amendment to its remedial order, based on BLM’s implicit threat that it will undertake less protective management if the vacatur remains in place—and that is to specify that any action or activity undertaken within the SEORMP planning area during the interim remand period (*i.e.*, while BLM complies with the Court’s order to prepare a new or revised EIS and final decision) shall not impair wilderness characteristics on lands outside of existing WSAs. This will ensure preservation of the environmental status quo while BLM undertakes a lawful NEPA analysis.

Alternatively, and again to avoid BLM’s threat to undertake less protective management, this Court could issue a tailored injunction vacating the ROD but leaving the SEORMP land use decisions in place (as specified in more detail below) to ensure protection of the environment while BLM takes a fresh look at

the issues in its new or revised EIS and RMP that remedies the deficiencies identified by the Court. Here too, the Court should ensure that wilderness characteristics are protected during the interim period by ordering that any action or activity undertaken within the SEORMP planning area during the interim remand period shall not impair wilderness characteristics.

### **ARGUMENT**

#### **I. The Court Properly Vacated BLM's Unlawful Record of Decision and the Accompanying NEPA Documents.**

In its opinion, this Court found that BLM violated NEPA when it issued a ROD adopting the SEORMP. Based on a comprehensive analysis of the statutes, regulations, agency guidance and case law that shape “the nature of the BLM’s authority and obligations with regard to wilderness characteristics” in land use planning, the Court explained that BLM has a legal duty under NEPA to study the impacts of its land use plans on wilderness values. *Ore. Natural Desert Ass’n v. Bureau of Land Management* (“*ONDA v. BLM*”), 531 F.3d 1114, 1130 (9th Cir. 2008).

In sum, the BLM misunderstood the role of wilderness characteristics in its land use planning decisions. Contrary to the understanding it expressed, wilderness characteristics are a value which, under the FLPMA, the Bureau has the continuing authority to manage, even after it has fulfilled its 43 U.S.C. § 1782 duties to recommend some lands with wilderness characteristics for permanent congressional protection. . . . [BLM] did not provide the “full and fair discussion” of the issue required by NEPA, and also did not properly respond to ONDA’s comments.

*Id.* at 1142–43 (footnote omitted, holding that BLM also failed to adequately study cumulative impacts on lands with wilderness characteristics). BLM also failed to consider adequate alternatives with respect to its off-road vehicle (“ORV”) designations. *Id.* at 1144–45. Ordinarily, these violations mandate that a court must vacate the agency’s unlawful decision, including the flawed NEPA document.

This Court reviewed BLM’s decision as “final agency action” under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701 *et seq.* *ONDA v. BLM*, 531 F.3d at 1139–40. The APA provides that the Court “*shall . . . 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) (emphasis added). The term “shall” imposes a mandatory duty. *United States v. Monsanto*, 491 U.S. 600, 607 (1988); *Brower v. Evans*, 257 F.3d 1058, 1067 & n.10 (9th Cir. 2001) (“‘Shall’ means shall.”).

Given the APA’s unambiguous language, courts have set vacatur as the default position for agency action found to be arbitrary and capricious. *See Fed. Election Comm’n v. Akins*, 524 U.S. 11, 25 (1998) (“If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency’s action and remand the case”); *see also N.W. Env’tl. Def. Ctr. v. Bonneville Pwr. Admin.*, 477 F.3d 668, 681 (9th Cir. 2007) (“Under the APA, we must set aside BPA’s action if it was ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance

with law.’ 5 U.S.C. § 706(2)(A).’); *High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d 630, 640 (9th Cir. 2004) (“Further, when an agency has taken action without observance of the procedure required by law, that action will be set aside.”).

Similarly, under NEPA vacatur of an agency’s unlawful ROD and EIS generally is appropriate. “NEPA is a procedural statute, and we have held that agency action taken without observance of the procedure required by law will be set aside.” *Idaho Sporting Cong. v. Alexander*, 222 F.23 562, 567 (9th Cir. 2000); *Metcalf v. Daley*, 214 F.3d 1135, 1146 (9th Cir. 2000) (“The district court is directed to order the Federal Defendants to set aside the FONSI, suspend implementation of the Agreement with the Tribe, begin the NEPA process afresh, and prepare a new EA.”). Courts in other circuits have reached the same conclusion. *See, e.g., Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077 (D.C. Cir. 2001) (finding that if a plaintiff “prevails on its APA claim, it is entitled to relief under that statute, which normally will be a vacatur of the agency’s” decision).

BLM relies almost exclusively on this Court’s decision in *Kern v. BLM*, 284 F.3d 1062 (9th Cir. 2002), to support its contention that the SEORMP should not be set aside. BLM Petition at 3–5. It is true that the Court did not vacate the land use plan at issue in *Kern*, instead remanding to the district court with instruction to enter summary judgment for the plaintiff. 284 F.3d at 1079. However, the opinion contains no analysis or discussion of the issue, and therefore provides no concrete

criteria upon which BLM might base an argument that this exception to the default rule of vacatur should apply here.<sup>1</sup> And *Kern*'s discussion of the adequacy of a project-specific EA prepared to implement a deficient land use plan-level EIS, *see* BLM Petition at 4–5, has no bearing on this case. There is no question that BLM may continue to undertake site-specific management of the public lands while it prepares a new EIS and RMP. *See id.* at 5. While such decisions may not tier to the SEORMP until it is redone, they must nevertheless be consistent with BLM's multiple-use and other land management authority and obligations.<sup>2 3</sup>

---

<sup>1</sup> BLM also relies on *Forelaws on Board v. Johnson*, 743 F.2d 677 (9th Cir. 1984). *Forelaws* predates *all* of the cases cited in this response, as well as *all* of those cited in BLM's brief in which the agency agrees that injunctive relief is "often appropriate in the face of adjudicated NEPA violations." BLM Petition at 10. It simply ranks as an exception to the default rule that an unlawful agency decision shall be set aside. Indeed, this Court expressly observed in *Forelaws* that it faced "unusual case" due to apparently conflicting provisions between NEPA and the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839-839h (1982), the substantive statute at issue in that case. 743 F.2d at 685. There are no such special or unusual circumstances present in this case. Thus, there is no "general principle" which emerges from *Forelaws*, as BLM argues. BLM Petition at 5.

<sup>2</sup> *See, e.g., infra* note 6 (giving examples of such activity-level regulatory authority and obligations).

<sup>3</sup> BLM also argues the Court should ignore well-established principles of APA and NEPA case law because "ONDA did not ask" the Court to set aside the SEORMP. BLM Petition at 3. ONDA pled its claims challenging BLM's ROD under APA § 706(2), which requires that a court shall set aside an unlawful agency decision. SER 1–33 (First Amended Complaint).

Despite this, BLM asks this Court to leave the unlawful SEORMP decision in place *and* to allow BLM to continue to implement that decision while it prepares a new or revised EIS. BLM Petition at 12. In addition to running counter to the default position set by APA § 706(2) and well-established NEPA case law, BLM's approach result would contradict NEPA's basic purposes of fully-informed decision-making and full public participation. *ONDA v. BLM*, 531 F.3d at 1120 (explaining NEPA's purposes, citing *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 768 (2004)). If BLM is permitted to simply patch up the existing NEPA document without taking a comprehensive, fresh look at impacts to, and options for managing, wilderness values throughout the SEORMP planning area, the resulting process would threaten to be a pro forma exercise in post hoc rationalization for a decision already made. *See, e.g., Metcalf v. Daley*, 214 F.3d at 1142 (rejecting action that agency had committed beforehand in writing to support because a NEPA analysis "must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made"); *Food Mktg. Inst. v. ICC*, 587 F.2d 1285, 1290 (D.C. Cir. 1978) ("[T]he agency's action on remand must be more than a barren exercise of supplying reasons to support a pre-ordained result. Post-hoc rationalizations by the agency on remand are no more permissible than are such arguments when raised by appellate counsel during judicial review."). Moreover, allowing BLM to defer

its study of impacts to wilderness values to a case-by-case basis, *see* BLM Petition at 11, would completely undermine any comprehensive, land use plan- and landscape-level study of wilderness values on these lands, and would eviscerate the democratic decisionmaking process NEPA guarantees to the public BLM serves. *ONDA v. BLM*, 531 F.3d at 1133–36 (discussing BLM’s statutory and regulatory authority and obligations with respect to wilderness values during land use planning), 1120 (referring to NEPA’s theory of democratic decisionmaking).

## **II. The Environmental Status Quo Should Be Maintained in the Interim.**

If this Court alters its decision at all, it should be to issue injunctive relief that will protect the environment during the interim period while BLM prepares its new Plan. Thus, not only must BLM be ordered to start afresh here, rather than from the tainted position of an analysis completed under a fundamentally flawed legal position, but it *also* must be enjoined from undertaking any action or activity that may cause or result in harm to the fragile, finite wilderness characteristics present within the SEORMP area, outside of existing WSAs<sup>4</sup>, until it has complied

---

<sup>4</sup> We specify that the requested injunction should apply to roadless areas with wilderness characteristics *outside of existing WSAs* because existing WSAs are protected by FLPMA’s nonimpairment mandate. 43 U.S.C. § 1782(c). *See also ONDA v. BLM*, 531 F.3d at 1119 (discussing the requirements of FLPMA § 1782 with respect to existing WSAs).

with the Court’s order to prepare a new or revised EIS and final land use plan decision.<sup>5</sup>

The case law makes clear that a NEPA violation generally requires issuance of injunctive relief to protect the environment until the agency prepares a lawful environmental analysis. Although an injunction is an equitable remedy the issuance of which is within the Court’s discretion, *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987), Ninth Circuit cases “repeatedly have held that, absent ‘unusual circumstances,’ an injunction is the appropriate remedy for a violation of NEPA’s procedural requirements.” *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985); *see also Nat’l Parks Conservation Ass’n v. Babbitt*, 241 F.3d 722, 737 (9th Cir. 2001) (in the NEPA context, “[w]hen the proposed project may significantly degrade some human environmental factor, injunctive relief is appropriate”); *Ore. Natural Resources Council Fund v. Brong*, 492 F.3d 1120, 1135 (9th Cir. 2007) (“Because the APA ‘dictates that we should “hold unlawful and set aside agency action ... not in accordance with law,” ’ [ ] we affirm the district court’s decision to enjoin the Project from going forward.”) (citation omitted). Such “unusual circumstances” exist only where the injunction itself would cause irreparable harm. *See Thomas v. Peterson*, 753 F.2d at 764, n.8.

---

<sup>5</sup> We include a proposed order amending the Court’s opinion accordingly, at Appendix A to this brief.

This Court has defined the “requisite harm” for an injunction based on a NEPA violation as “the failure to follow appropriate procedures.” *Nat’l Parks*, 241 F.3d at 737 n.18. In finding the SEORMP ROD and EIS deficient in this case, this Court has found just such a failure to follow the appropriate procedures. *ONDA v. BLM*, 531 F.3d at 1142–43, 1144–45. *See also* BLM Petition at 10 (agreeing that this Court’s decisions hold “that some form of injunctive relief is often appropriate in the face of adjudicated NEPA violations”).

The equities unmistakably support such relief in this case. As this Court observed in its opinion, over the course of more than a decade now ONDA has sought to convince BLM to study and affirmatively manage the outstanding—and still unrecognized—wilderness values present in non-WSA roadless areas in southeast Oregon. *See ONDA v. BLM*, 531 F.3d at 1121–22 (describing the planning process for the SEORMP). BLM steadfastly refused to do so. *Id.* at 1123, 1124, 1127, 1131, 1142–43. As a result, BLM issued a land use plan which completely ignored this significant resource value on the public lands, and therefore the environmental impacts to this value from the various management decisions BLM makes in its RMP. *Id.* at 1130.

Now, wilderness values that may be present on these remarkable landscapes must be protected during the interim period while BLM re-writes its Plan. *See, e.g.*, ER 703–08 (Gelbard Decl. ¶¶ 47–60, explaining impacts of ORVs and roads,

including road construction and maintenance, on roadless habitats); ER 737–39 (Marlett Decl. ¶¶ 8–9 & 13, explaining some of the potential threats to wilderness values under the current plan); ER 725–29 (Fite Decl. ¶¶ 31–34, same); ER 261–663 (ONDA report documenting presence of wilderness characteristics on 1.3 million acres outside existing WSAs). *See also ONDA v. BLM*, 531 F.3d at 1118 (pointing out that “Congress identified the conservation of [lands with wilderness characteristics] as a national priority in the Wilderness Act”), 1128–29 (observing, without expressly approving or disapproving its empirical findings, that ONDA’s citizen report suggests that there are now 1.3 million acres of non-WSA roadless lands that possess statutorily-defined wilderness characteristics), 1138 (noting the “environmental importance of roadlessness” for preservation of watersheds, wildlife habitat and “some of the last unspoiled wilderness in our country”).

Vacatur of the ROD and EIS, so long as it is coupled with additional injunctive relief prohibiting damage to wilderness values until BLM complies with the law, will protect against, rather than result in, irreparable harm to the environment. Thus, the relief ONDA requests here will maintain currently unrecognized and unprotected wilderness values until BLM properly studies their presence and how the Plan should treat land with such values. *See ONDA v. BLM*, 531 F.3d at 1143. This is important (1) given BLM’s statement that it may undertake significantly less protective management of the lands if the SEORMP is

set aside, BLM Petition at 8 & 9, and (2) because BLM has steadfastly refused to study or recognize those values since at least 1995 when the SEORMP planning process began. *ONDA v. BLM*, 531 F.3d at 1123–24 (during NEPA process), 1127 (during administrative protest), 1131 (during litigation).<sup>6</sup>

Finally, even after the ROD and EIS are vacated, nothing precludes BLM from using the underlying information it already has collected as it manages these public lands during the interim period while it revises its EIS and prepares a new land use plan decision. Regardless of whether or not some of these SEORMP decisions are “connected” to the violations this Court identified, *see* BLM Petition at 10, vacatur of the entire ROD and EIS/RMP will ensure that BLM will take a fresh, comprehensive and integrated “hard look” at the full spectrum of resources, values and management issues before it—rather than merely trying to “patch up”

---

<sup>6</sup> To the extent BLM’s examples describe other SEORMP provisions arguably “more protective” in the SEORMP than in the preceding Management Framework Plans (“MFPs”), BLM Petition at 8–10, BLM retains sufficient authority and discretion to take any resource protective action during the time when it is revising the Plan. For example, BLM has authority to enact site-specific, immediate closures where ORVs are causing resource damage, *see ONDA v. BLM*, 531 F.3d at 1126 (citing BLM’s ORV regulations), and to make changes to grazing management whenever it determines that current grazing practices are causing failures to meet certain ecological standards. 43 C.F.R. §§ 4180.1 & 4180.2(c) (BLM’s Rangeland Health Regulations); *see also Idaho Watersheds Project v. Hahn*, 187 F.3d 1035 (9th Cir. 1999) (these regulations place a mandatory, legally enforceable requirement upon BLM to ensure that these changes are in place before the start of the next grazing season).

limited flaws to support a pre-ordained decision, as its brief suggests is likely under the approach BLM urges upon the Court.

**III. Alternatively, this Court May Partially Vacate the Decision so Long as Wilderness Characteristics are Protected in the Interim Period While BLM Prepares a New RMP.**

Should the Court decide to exercise its discretion to alter the default remedy of vacatur, ONDA agrees that the RMP could remain in place during the remand to the agency so long as (1) the ROD is vacated and (2) wilderness characteristics on the lands at issue are protected in the interim period. Because there is no date certain deadline by which BLM must complete its revised RMP and EIS, and issue a new ROD adopting that Plan, it is critical that this Court issue an injunction, as described above, barring harm to wilderness characteristics until BLM issues its new decision.

While BLM seems to suggest that the district court should make this determination, this Court has before it all the information necessary to decide the proper scope of relief to remedy the NEPA violations it has identified in BLM's SEORMP decision. *Nat'l Parks*, 241 F.3d at 739. It is well within this Court's equitable powers to tailor its injunctive relief to fit the circumstances of a particular case. *See, e.g., Lester v. Parker*, 235 F.2d 787, 789–90 (9th Cir. 1956) (recognizing

“the inherent power possessed by any court of equity” to issue an injunction, “to make that injunction effective, and to prevent the frustration thereof”).<sup>7</sup>

Therefore, if the Court decides to exercise its discretion in this regard, ONDA agrees with BLM that certain SEORMP decisions<sup>8</sup> that are environmentally protective or that do not pose a direct or immediate threat of harm to any of the characteristics of wilderness should remain in place and may be implemented according to the Plan. Other SEORMP decisions that clearly may cause or result in damage to wilderness characteristics must be enjoined to protect the environmental status quo while BLM corrects the deficiencies identified by this Court. The Court should accomplish this by issuing a general order, as described in the preceding section, specifying that BLM is prohibited during the interim period

---

<sup>7</sup> See also *High Sierra Hikers Ass’n*, 390 F.3d at 649 (“Until such time as the Forest Service complies with the court’s order concerning the NEPA procedural requirements, and thereafter reaches a decision concerning the commercial activity permissible in the Wilderness Areas, the Court’s interim injunction [ordering reductions in allocations of special-use permits, and limiting access to areas of environmental concern] largely addresses the requirements of the Wilderness Act”).

<sup>8</sup> These land use plan decisions are described under the heading “Management Actions” by resource category in the SEORMP. ER 93–176 (RMP at 28–111). Management Actions are “measures that are to be undertaken in order to attain or achieve the stated objective.” ER 92 (RMP at 27).

from taking any action or activity that may cause or result in harm to wilderness characteristics that may exist outside of existing WSAs.<sup>9</sup>

Such injunctive relief will protect against potential harm to wilderness characteristics from, for example, the Plan’s decisions: authorizing implementation of nonnative seedings and creation of firebreaks, ER 104–06 (RMP at 39–41); authorizing thinning, prescribed fire, commercial timber harvest and other forest “treatment” actions, ER 107–08 (RMP at 42–43); authorizing construction of new fences and range projects to manage livestock grazing, ER 123–24 (RMP at 58–59); designating as “open” or “limited” any areas previously “closed” to ORVs, ER130–32 (RMP at 65–67); and designating energy and mineral location and leasing, ER 94–102 (RMP at 29–37), Visual Resource Management classes, ER 132–33 (RMP at 67–68), lands available for disposal out of the federal domain, ER 173–74 (RMP at 108–109), and new utility corridors, ER 175 (RMP at 110), that may conflict with areas found to possess wilderness characteristics. It should be made clear, however, that although the SEORMP is left in place and BLM may (subject to the injunction barring harm to wilderness values) implement its land use plan decisions during the interim remand period, BLM nevertheless must fully reexamine the impacts to wilderness values as it prepares its new EIS and RMP.

---

<sup>9</sup> We include a proposed order amending the Court’s opinion accordingly, at Appendix B to this brief.

## CONCLUSION

For the foregoing reasons, ONDA respectfully requests this Court to deny BLM's petition for panel rehearing as to remedy and to instead amend its decision to order that wilderness values that may be present outside of existing WSAs on the lands within the SEORMP planning area shall be maintained until BLM has complied with the Court's order to prepare a new or revised EIS and final decision; or, alternatively, to issue a tailored injunction vacating the ROD but leaving in place the SEORMP provisions as specified above, while again also ordering that wilderness values that may be present on the lands shall be maintained during the interim period.

Dated September 29, 2008

Respectfully submitted,

---

Peter M. Lacy ("Mac"), Senior Attorney  
Oregon Natural Desert Association

Of Attorneys for Plaintiff-Appellants

**CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULE 40-1**

I certify that pursuant to Circuit Rule 40-1, the attached response to BLM's petition for panel rehearing is proportionately spaced, has a typeface of 14 points or more, and contains 3,692 words (petitions and answers must not exceed 4,200 words).

---

Peter M. Lacy ("Mac"), Senior Attorney  
Oregon Natural Desert Association

## **APPENDIX A: PROPOSED ORDER**

Defendant-appellees' Petition for Panel Rehearing Regarding Remedy is GRANTED IN PART AND DENIED IN PART.

The opinion of the Court in this case, *Oregon Natural Desert Ass'n v. Bureau of Land Management*, 531 F.3d 1114 (9th Cir. 2008), is amended as follows:

At the end of Section II.B.5 of the Court's opinion, 531 F.3d at 1143, insert the following sentence:

“Until BLM issues a new ROD based on its revised EIS and Plan, BLM is enjoined from undertaking any action or activity that may cause or result in harm to wilderness characteristics outside of existing WSAs within the SEORMP planning area.”

In Section III of the Court's opinion, 531 F.3d at 1145, add the following sentence at the end of the first paragraph of that section:

“Until BLM issues a new ROD based on its revised EIS and Plan, BLM is enjoined from undertaking any action or activity that may cause or result in harm to wilderness characteristics outside of existing WSAs within the SEORMP planning area.”

Replace the last sentence of the second paragraph of Section III with the following:

“We therefore remand to the district court with instructions to enter the relief described herein and to remand to the BLM to remedy the deficiencies we have discussed.”

IT IS SO ORDERED.

## **APPENDIX B: PROPOSED ORDER**

Defendant-appellees' Petition for Panel Rehearing Regarding Remedy is GRANTED IN PART AND DENIED IN PART.

The opinion of the Court in this case, *Oregon Natural Desert Ass'n v. Bureau of Land Management*, 531 F.3d 1114 (9th Cir. 2008), is amended as follows:

In Section II.B.5 of the Court's opinion, 531 F.3d at 1143, replace the first sentence of the last paragraph of that section with the following:

"We therefore vacate the ROD approving the EIS and Plan, *see* 5 U.S.C. § 706(2), but leave in place decisions made in the Plan as specified in Section III of this opinion."

In Section III of the Court's opinion, 531 F.3d at 1145, replace the first paragraph of that section with the following:

"The EIS violated NEPA in the ways we have stated. We hold unlawful and set aside the ROD approving the EIS and the Southeast Oregon Plan. *See* 5 U.S.C. § 706(2). BLM shall prepare a revised EIS to remedy the deficiencies we have discussed. During the interim period while BLM prepares its revised EIS and Plan, the land use decisions made in the SEORMP shall remain in place, and may be implemented, except that until BLM issues a new ROD based on its revised EIS and Plan, BLM is enjoined from undertaking any action or activity that may cause or result in harm to wilderness characteristics outside of existing WSAs within the SEORMP planning area."

Replace the last sentence of the second paragraph of that section with the following:

"We therefore remand to the district court with instructions to enter the relief described herein and to remand to the BLM to remedy the deficiencies we have discussed."

IT IS SO ORDERED.

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response to BLM's Petition for Panel Rehearing has been served by First-Class Mail, this 29th day of September, 2008, on the following counsel:

David C. Shilton  
Attorney, Appellate Section  
Environmental & Natural Resources Div.  
U.S. Department of Justice  
P.O. Box 23795, L'Enfant Plaza Station  
Washington, D.C. 20026

Mariel J. Combs  
Office of the Regional Solicitor  
Department of Interior  
Pacific Northwest Region  
805 SW Broadway, Suite 600  
Portland, OR 97205

Stephen J. Odell  
Assistant U.S. Attorney  
100 SW Third Ave., Suite 600  
Portland, OR 97204

Karen Budd-Falen  
Budd-Falen Law Offices  
P.O. Box 346  
Cheyenne, WY 82006

Elizabeth Howard  
Dunn Carney Allen Higgins & Tongue  
Suite 1500  
851 S.W. Sixth  
Portland, OR 97204

---

Peter M. Lacy ("Mac"), Senior Attorney  
Oregon Natural Desert Association