



Oregon Natural Desert Association

June 20, 2007

VIA U.S. MAIL & FAX

United States Department of the Interior
Board of Land Appeals
Office of Hearings and Appeals
405 South Main Street, Suite 400
Salt Lake City, UT 84111

Re: Appellant's **Supplemental Statement of Reasons and Reply in Support of Petition for Stay**, in Appeal and Petition for Stay of EA OR-010-2004-08 ("East-West Gulch Projects EA").

INTRODUCTION

Pursuant to 43 C.F.R. Part 4, Appellant Oregon Natural Desert Association ("ONDA") hereby files this supplemental statement of reasons as a reply in support of its appeal and petition for stay of Respondent Bureau of Land Management's ("BLM") final decision to implement the East-West Gulch Projects (EA OR-010-2004-08). ONDA files this brief primarily to address BLM's new arguments or assertions concerning key wilderness criteria, and concerning a recently issued decision by the District of Oregon concerning an ONDA challenge to the Andrews-Steens Resource Management Plan. Ore. Natural Desert Ass'n v. Shuford, No. 06-242-AA (D. Or. June 8, 2007).¹ Because BLM makes several new assertions or expands on previous positions in detail for the first time, and because the district court opinion was issued after ONDA filed its Notice of Appeal, Statement of Reasons and Petition for Stay, ONDA respectfully asks the Office of Hearings and Appeals to consider this additional briefing.

ARGUMENT

I. BLM Violated NEPA and FLPMA in its Consideration of Impacts to Wilderness Values on Beatys Butte.

In its opening brief, ONDA described how BLM's final decision violated NEPA and FLPMA by failing to take a "hard look" at impacts to wilderness values, and by failing to properly balance wilderness among the other valid multiple use resource values present on Beatys Butte. See SOR at 12-19 (NEPA argument), 20-21 (FLPMA argument). In response, BLM argues it "conducted its own evaluation" of wilderness characteristics in the project area,

¹ The district court's Opinion and Order is attached as "Exhibit 2" to BLM's response. We will cite it hereafter as follows: "Shuford, slip op. at [PAGE]."

finding that none exist. BLM Resp. at 5. Yet, aside from describing the types of information it reviewed—almost exclusively in the office as opposed to in the field—BLM still provides no hard evidence to support its conclusion. And although BLM claims it conducted additional field reviews in 2005 and 2006, there is no evidence of such reviews either in the EA or in the administrative record. For example, the only evidence of actual route condition is and remains the scores of photographs and inventory data provided by ONDA first in its 2005 wilderness inventory report and then updated in its 2007 inventory information. See Miller Decl. (photographs with GIS maps, attached). BLM refers time and again to its recent “field inventory” but never provides any data from that inventory—only the conclusory allegation that no wilderness values are present on Beatys Butte. See, e.g., BLM Resp. at 5, 8, 9. Indeed, throughout the entire EA, the wilderness “Evaluation Form” appendix to the EA, and all post-decision documents (e.g., the Whitman Declaration), there is not a single photograph documenting the present, actual condition of the routes in question.

BLM also argues at length that the district court’s recent decision in ONDA v. Shuford supports the agency’s argument that it sufficiently considered impacts to wilderness values here. BLM Resp. at 6, 7, 9, 11–12. Shuford is distinguishable for at least [xxx] reasons.

First, it is factually distinct. In Shuford, ONDA challenged the neighboring Burns District’s Record of Decision adopting a land use plan for the 1.6 million acre Andrews-Steens Resource Management Planning area. Shuford, slip op. at 3–4. As opposed to the site-specific, implementation-level project at issue here, Shuford dealt with a land use plan “intended to provide long-term, broad direction to the agency in managing public lands.” Id. at 13.

BLM argues Shuford stands for the proposition that “BLM only has to have an adequate environmental baseline of resource information to satisfy NEPA’s ‘hard look’ requirement” and that BLM may “reject” citizen wilderness inventory information “without discussing its analysis of those parcels that BLM found did not include wilderness characteristics.” BLM Resp. at 6. While NEPA is unquestionably a procedural statute that does not mandate particular results, see Shuford, slip op. at 20, it is also beyond question that when those procedures are not followed an agency’s decision may be found to be arbitrary, capricious, and not in accordance with law.

Thus, although Shuford states that BLM may “rely on its expertise to determine whether a parcel has the requisite wilderness characteristics, including the presence or absence of roads,” id., on the record before *this* court, BLM cannot point to any *hard countervailing evidence* that would rebut ONDA’s evidence of route condition. And even more importantly, BLM does not have “discretion” to change the rules with respect to what constitutes a “road” versus a “way” for purposes of evaluating the presence or absence of wilderness character.

As explained in ONDA’s Statement of Reasons, a “road” is a vehicle route that has “been improved and maintained by mechanical means to ensure relatively regular and continuous use.” Exh. 1 at 6; see also Exh. 2 at 13–14 (further similar discussion in 2001 Handbook). 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. Id. *Even a route originally constructed by mechanical means, but no longer maintained by such means, is not a road.* Id.

This is the long-standing definition of these two key terms, first adopted by the Department of the Interior in BLM's *Wilderness Inventory Handbook* in 1978 (Exhibit 1). 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.

Exh. 1 at 6 (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.* (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, Interior and BLM once again reaffirmed that the "BLM will continue to base the definition of what constitutes a 'road' from the FLPMA's legislative history." Exh. 2 at 14.

Thus, as explained in ONDA's Statement of Reasons and in the Miller Declaration, three conditions must be met for a route to be considered a road. See SOR at 4-5; Miller Decl. at ¶¶ 7-9. First, the route must have been mechanically constructed or maintained sometime in the past. To prove mechanical construction or maintenance, there must be clear physical evidence or a historic record that mechanical maintenance has occurred at least once in the past. Second, the route must be mechanically maintained on an ongoing basis. Although maintenance need not occur on an annual basis, see Exh. 1 at 6, it must be maintained often enough so that it will not succumb to the erosive processes of weather, vehicle travel, livestock trampling, and the growth of vegetation—all of which will inhibit "regular and continuous" travel. Third, the route must be in good enough condition to "insure relatively regular and continuous use."

BLM admits in its response that the definition it has used here is only "largely the same" as the long-standing definition adopted by Interior in 1978. BLM Resp. at 7 (explaining that its changes to the definition are "intended as a guide or cross-walk to assist in querying the data" used to assess routes).² BLM also admits that neither the EA nor the administrative record before the OHA contains any hard evidence to support the agency's determinations that certain routes are roads rather than ways. See BLM Resp. at 8 (stating only that the *process* BLM undertook "documented in Appendix B of the EA"—and not that any evidence appears in the EA or

² As one example of how the BLM has misinterpreted the plain language of the "road" definition, consider BLM's new criterion that "regular and continuous use" is "insured" if a "high clearance, 2 wheel-drive vehicle" can travel on the route. BLM Resp. at 7. This equates "possible" with "insured." It is akin to saying that if a high-clearance, 2-wheel drive vehicle can travel cross country over a certain area (i.e., if it's "possible"), then relatively regular and continuous cross-country travel is "insured." Moreover, there is no limitation in the Congressional road definition on the "type or class" of vehicle for which "regular and continuous" use must be insured. See Exh. 1 at 6.

elsewhere). BLM also “admits it has not routinely kept good records of road maintenance activities.” *Id.*

Thus, as to the critical road versus way issue, we are left with nothing more than the agency’s word against evidence collected and provided (pursuant to BLM’s own protocol as described to the public in its 2001 *Wilderness Inventory and Study Procedures* handbook) by ONDA. At a minimum, whether these routes are roads or ways presents a disputed issue of material fact that, absent countervailing evidence from the agency, should be weighed in ONDA’s favor for purposes of the Petition for Stay.

The closest thing BLM points to in an attempt rebut the evidence presented in ONDA’s photographs are “digital orthophoto quads” of the area. BLM Resp. at 7–8. These aerial photographs, the most recent of which BLM examined are more than a decade old, were taken from aircraft and are at a resolution vastly insufficient to determine what condition a route is in. When compared to a GPS-referenced photograph taken at specific location on the ground, a digital orthoquad is virtually useless. In any event, BLM does not even provide these aerial photographs in the record.³

BLM relies on the district court’s statement in *Shuford* that, in order to comply with NEPA’s “hard look” requirement, agencies are merely required to “maintain a current inventory of resources” so that an “adequate baseline” exists to evaluate the environmental impacts of a proposed action. BLM Resp. at 11 (citing *Shuford*, slip op. at 11). Here, by providing no countervailing evidence of its own, and by simply offering conclusory statements “rejecting” ONDA’s inventory data, BLM cannot—at least on the record before the OHA here—argue it has maintained a “current” inventory or an “adequate baseline” for wilderness values. The few pieces of its analysis it points to in its response—low-resolution aerial photographs, “metadata” (i.e., data about data), field trips of which there is no documentation—are simply insufficient to base a conclusion on concerning the well- and long-defined terms that control whether a route is a road.

Based on these myriad inconsistencies or shortcomings, ONDA has satisfied its burden of showing it is likely to succeed on the merits.⁴ *See, e.g., Wyoming Outdoor Council Inc.*, 153

³ ONDA also notes that BLM’s statement that it “drove these [unspecified] routes in 2005 and 2006” and “found that a high clearance, 2 wheel-drive vehicle . . . is able to travel these routes”—is impermissible testimony evidence provided in the agency’s brief. Again, there is no evidence in the EA or elsewhere in the administrative record of these purported findings—for example, in the form of photographs and monitoring logs taken and recorded during these trips.

⁴ Similarly, BLM’s new interpretation of “naturalness” is inconsistent with the longstanding definition. BLM states (for the first time, this having not been revealed during the NEPA process) that the “presence of cheatgrass, a non-native annual grass, is what had a negative effect on naturalness [in BLM’s evaluation of wilderness characteristics], not the wildfire per se.” BLM Resp. at 10. Nowhere in the naturalness criterion has cheatgrass (or any other non-native, naturally occurring grasses) ever been used to suggest unnaturalness, even in the original inventory in 1980. *See, e.g., Exh. 1* at 13 (defining naturalness as an area “generally . . . affected primarily by the forces of nature” and referring to “imprints of man’s work”; not listing “wildfire” or “presence of non-native annual grasses” as any of the specific Congressional

IBLA 379, 388 (2000) (“it has been held that it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus more deliberative investigation).

II. The Relative Harms and Likelihood of Irreparable Harm to the Environment Favor Issuance of a Stay.

ONDA explained in its Petition for Stay that long-term or irreparable harm will result if BLM is allowed to implement this extensive rangeland project on Beatys Butte, and that the relative harms at stake favor maintaining the status quo until the merits of ONDA’s claims can be decided. *See* SOR at 32–35. BLM argues instead that irreparable harm will occur if the project is not implemented immediately. BLM Resp. at 20–21. The agency’s argument fails for several reasons.

First, BLM’s primary allegation of “irreparable harm” is to the livestock grazing permittees. BLM Resp. at 20–21; *see also* BLM Resp. at 3 (alleging same in “relative harms” section). According to BLM, this is “the most significant short-term harm” that would result if a stay was granted. *Id.* at 3. BLM argues that if the permittees are required to haul water to the allotment or remove their cattle earlier than planned (which will happen anyway, due to the ongoing severe drought in the region), they will suffer “considerable personal expense/loss of income.” *Id.* At 21. There are a number of problems with this assertion: (1) “Considerable” is not the same as “irreparable.” (2) Nor is there any evidence of the economic impact a stay might have on any individuals. (3) This is a harm to a third-party, not to the respondent BLM. And finally, (4), no permittee has complained in this appeal that a stay would cause him or her “irreparable harm.”⁵

examples of non-natural impacts of man). Also in its naturalness discussion, BLM claims ONDA’s “inventory failed to document the presence of any of these man-made features or describe their effects on the area’s naturalness.” BLM Resp. 10. This statement is not true. In addition to discussing naturalness in its original 2005 inventory and including photos of isolated man-made features in the otherwise vast 82,000-acre area, ONDA again discussed this, with accompanying photographic evidence, in Craig Miller’s declaration (and attached photos) filed with ONDA’s stay petition. *See esp.* Miller Decl. at ¶¶ 27–28.

⁵ Indeed, even if there was any documentation of economic harm to some third party that might result from a stay, it would be irrelevant. The decision to issue a grazing permit is solely at the discretion of the BLM, and because those federally-issued permits convey no “right, title, or interest, or estate in or to the public lands,” 43 U.S.C. § 315b. *See also Osborne v. United States*, 145 F.2d 892, 896 (9th Cir. 1944) (“it has always been the intention and policy of the government to regard the use of its public lands for stock grazing . . . as a privilege which is withdrawable at any time for any use by the sovereign without the payment of compensation”); *Public Lands Council v. Babbitt*, 529 U.S. 728, 735 (2000) (noting that conditions placed on permits reflect the “leasehold nature of grazing privileges”; that Congress has “made the grant of grazing privileges discretionary”; and that the federal government “retained the power to modify, fail to renew, or cancel a permit or lease for various reasons”).

Second, BLM's assertion that the riparian areas in the East and West Gulches would continue to suffer from overgrazing is without merit. BLM claims that "[w]ithout the water development and riparian exclosure fence *it will not be possible* to keep cattle out of the riparian areas in East-West Gulch." BLM Resp. at 21 (emphasis added). This ignores BLM's broad authority under FLPMA and the Federal Rangeland Health regulations, 43 C.F.R. Subpart 4180, to manage its authorized grazing on the federal public lands, which includes the ability to adjust grazing authorizations or to impose terms and conditions on authorized grazing so that harm to the environment is avoided.⁶ Moreover, grazing will not commence again on the North Pasture until the spring on 2009. Even under BLM's speculative scenario where the OHA does not make a final decision on the merits prior to that time, the agency could file a subsequent motion seeking relief from any stay order issued.

Third, BLM claims a stay "would negatively impact wild horses of the allotment." BLM Resp. at 21. Again, "negative" impacts are not the same as "irreparable" impacts. And again, BLM has discretion to allow water to be hauled into the allotment or to remove livestock competing for limited water resources with wild horses. Though possibly inconvenient and more costly than the alternative, these modest "harms" do not outweigh the irreparable harm to wilderness and other ecological values demonstrated in ONDA's Petition for Stay.

CONCLUSION

For the reasons explained above, as well as those set forth in ONDA's Statement of Reasons and Petition for Stay, ONDA again respectfully asks the Office of Hearings and Appeals to issue an order staying implementation of BLM's East-West Gulch Projects decision.

Respectfully,



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⁶ See, e.g., 43 C.F.R. § 4110.3-3(b)(1) ("The authorized officer will close allotments or portions of allotments to grazing by any kind of livestock or modify authorized grazing use . . . when the authorized officer determines and documents that . . . (ii) Continued grazing use poses an imminent likelihood of significant resource damage."); *id.* § 4110.3-2(b) (BLM "will reduce active use, otherwise modify management practices, or both" when "monitoring or documented field observations show grazing use or patterns of use are not consistent with the provisions of subpart 4180 [the FRH regulations], or grazing use is otherwise causing an unacceptable level or pattern of utilization").

Cc: Thomas E. Rasmussen, Field Manager
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served true and accurate copies of Appellant Oregon Natural Desert Association's foregoing **Supplemental Statement of Reasons and Reply in Support of Petition for Stay**, on the parties herein, this 20th day of June, 2007, to:

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Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

DATED this 20th day of June, 2007.



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Oregon Natural Desert Association

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