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**ORDER**

OREGON NATURAL DESERT ASSOCIATION,	)	OR-010-07-01
	)	
Appellant	)	Appeal from the Field Manager's Final Decision dated April 24, 2007, involving the East-West Gulch Projects on the Beaty Butte Allotment, Lakeview Resource Area, Oregon
v.	)	
BUREAU OF LAND MANAGEMENT,	)	
	)	
Respondent	)	

**PETITION FOR A STAY GRANTED**

**I. Background**

Appellant Oregon Natural Desert Association (ONDA) has appealed from and petitioned for a stay of the effect of an April 24, 2007, final decision (2007 Decision) of the Lakeview Resource Area Field Manager, Bureau of Land Management (BLM). That decision provides for the construction of certain range improvements known as the "Beaty Butte East-West Gulch Projects" (Projects) in the North Pasture of the Beaty Butte Allotment (Allotment).

The purpose of the Projects is to improve riparian conditions in the East-West Gulch. In a 1998 rangeland health standards assessment for the Allotment, BLM concluded that the East-West Gulch was in a "functional at risk condition with a downward trend." In order to achieve proper functioning condition (PFC), the channel will need to widen and form a new floodplain. At the time of the assessment, it was determined that continued livestock use in the area would neither impede nor supplement floodplain development and was not considered to be a significant factor for not meeting the riparian/wetland standard.

Subsequently, riparian vegetation in portions of the area was set back by a wildfire in 2000. Recovery of the vegetation has been hindered in localized areas by concentrated cattle use. In addition, East Gulch is still actively incising, which is exacerbated by the down-cutting effects of water concentration and acceleration caused by the unimproved road alongside the incised channel.

The Projects include constructing approximately 13.25 miles of drift and exclosure fencing, two cattleguards, three pipelines with an approximate total length of 7.75 miles, watering troughs, and water storage tanks. Also contemplated are moving a seventh existing trough to a new location, closing and rehabilitating about 1.2 miles of existing road in East Gulch, and relocating the road further upslope along a ridgeline.

The Projects were previously authorized under a decision dated May 13, 2005 (2005 Decision). ONDA appealed and petitioned for a stay of that decision.

The 2005 Decision was supported by a Finding of No Significant Impact (FONSI) and an environmental assessment (2005 EA) which considered various alternatives to the actions authorized by the 2005 Decision. Therein, BLM listed "wilderness" as one of the resource values or issues either not present in the area or not significantly affected by any of the alternatives considered and therefore did not further discuss wilderness values or issues.

In a letter dated March 9, 2005, containing comments to the 2005 EA, ONDA disputed BLM's position on wilderness values. Accompanying the letter was a report, including photos, detailing ONDA's recent wilderness inventory of the Beaty Butte Allotment completed in accordance with BLM's own wilderness inventory protocol. ONDA proposed wilderness study area designation for 82,532 acres of BLM land which encompasses the Projects area and which is sandwiched between the existing Spaulding Wilderness Study Area (WSA) and Basque Hills WSA. ONDA referred to this area as the Spaulding Proposed WSA Addition 2. In the letter ONDA opined that its inventory is new information which BLM should have collected and should consider and that

[t]he proposed WSA addition is roadless, is not separated from the Spaulding WSA by roads, is in an apparently natural condition, contains outstanding opportunities for solitude and recreation, and possesses supplemental values, particularly when combined with the

Spaulding WSA. The area deserved to be protected as a wilderness study area, a wilderness [area of critical environmental concern], or some similar designation to recognize its outstanding wilderness values.

BLM responded in a May 13, 2005 letter accompanying the 2005 Decision that the project area was dropped from further wilderness study in 1980 before reaching the status of a wilderness study area. According to BLM, the one-time wilderness review process was completed for Oregon on July 22, 1992, when the President transmitted his official wilderness recommendations for Oregon to Congress.

ONDA argued on appeal that BLM violated NEPA by failing to consider wilderness values and impacts to the wilderness resource. ONDA argued that many conditions changed in the area since BLM conducted its original wilderness inventory in the late 1970's and that BLM should have considered, but did not consider, those changes.

This office denied ONDA's stay petition, which precipitated two events. First, BLM began building some of the Projects, completing about six miles of pipelines, three storage tanks, seven troughs, and two cattle guards. Also, about 0.75 miles of a new road was developed to provide access to the troughs and storage tanks. Second, ONDA sought and obtained a dismissal of its appeal so it could file an action in Federal court challenging the 2005 Decision.

On April 20, 2006, Magistrate Judge Ashmanskas issued Findings and Recommendation on cross-motions for summary judgment in which he concluded that the defendants violated the Administrative Procedure Act (APA) and National Environmental Policy Act of 1969 (NEPA) "on the sole ground that BLM did not have sufficient current information on wilderness values in the East-West Gulch to make an informed, adequate determination of the environmental impact of the East-West Gulch Projects on wilderness values." Judge Ashmanskas also concluded that defendants considered a reasonable range of alternatives, that BLM's failure to discuss potential alternatives for grazing limitations and herding in greater depth was not arbitrary and capricious, and that BLM adequately addressed the cumulative impacts of its proposed actions. He also concluded that ONDA's claims arose under the APA and NEPA, not the Federal Land Policy and Management Act of 1977 (FLPMA).

Largely as a result of Judge Ashmanskas' ruling, BLM announced in a June 21, 2006, letter that it would conduct supplemental analysis of the Projects' effects under NEPA. It also suspended any further ground-disturbing implementation of the 2005 Decision until it considered whether to drop or revise some or all of the remaining unimplemented Projects in light of that supplemental analysis.

In a September 6, 2006, Order, the Federal district court affirmed and adopted Magistrate Judge Ashmanskas's Findings and Recommendation dated April 20, 2006. On December 12, 2006, the court issued an order identifying the remedy for the violation of the APA and NEPA as follows:

Accordingly, defendants' East-West Gulch Projects decision is vacated. Defendants are enjoined from further authorization or implementation of the decision, and further use of all facilities constructed pursuant to the decision, including roads, pipelines, storage tanks, and watering troughs, until defendants have completed (1) a current inventory to determine the wilderness values in the area and (2) an environmental assessment (EA), taking into account the current inventory, that complies with the requirements of the APA and NEPA.

On January 22, 2007, BLM issued a FONSI and revised EA (2007 EA) very similar to the 2005 EA, but containing certain changes. The most notable changes address the sole deficiency in the 2005 EA identified by the district court, *i.e.*, the lack of sufficient current information on wilderness values in the East-West Gulch.

After ONDA submitted comments to the 2007 EA, BLM issued a response to those comments and a proposed decision contemplating authorization of the Projects. After ONDA filed a protest of the proposed decision, BLM issued the 2007 Decision to implement Alternative 4 of the 2007 EA and a letter dated April 25, 2007, addressing the points raised in ONDA's protest.

At page 25 of the 2007 EA, BLM concluded the following with regard to wilderness character of the Projects area:

... [T]he proposed WSA unit contained numerous internal roads and, therefore, needed to be considered as 6 separate, smaller units. Five of the six units met the minimum size requirement. Five of the six units were 50% or more in a primarily natural condition. None of the units

contained outstanding opportunities for solitude or primitive and confined recreation. Five of the six units contained supplemental values related to bighorn sheep, sage-grouse, and pygmy rabbit habitat, along with the potential for archeological resources (Appendix B).

None of the units contained all of the "key factors of wilderness character" of:

- a) size - at least 5,000 contiguous roadless acres of public land,
- b) naturalness - the imprint of man's work must be substantially unnoticeable,
- c) an outstanding opportunity for solitude or an outstanding opportunity for primitive and unconfined type of recreation.

All three criteria have to be met in order for an area outside of a designated wilderness or WSA to be found to contain "wilderness character". Based on the results of the evaluation, wilderness character is lacking in the project area and will not be addressed further in this analysis.

Attached to the 2007 EA is an Appendix B entitled "Wilderness Evaluation for Proposed Spaulding WSA Addition 2." Therein, BLM elaborated at page 2:

During their inventory effort, ONDA identified all routes inside the [Spaulding Proposed WSA Addition 2] boundar[ies] as meeting the former definition of a way. The BLM reviewed this new inventory information and compared it with the previous inventory information contained in the BLM's wilderness files, previously published inventory findings (BLM 1979, 1980), current GIS datasets, and additional field visits conducted in 2005 and 2006. The proposed WSA covers five smaller inventory units that were previously evaluated and found to be bounded by roads in 1980 (BLM 1980). The relationship between the Spaulding Proposed WSA boundary and the five smaller inventory unit boundaries is shown on Map 1.

Based on all of the available information, the BLM concludes that the internal routes known as BLM Road 7106-0-00, 7106-0-1, 6156-0-00,

6166-0-00, 6196-0-00, and 6196-0-1, which ONDA identifies as ways, still in fact meet the wilderness inventory definition of a road. The reasoning for these individual road determinations is summarized in Table 1. For this reason, the remainder of this evaluation documents the presence or absence of wilderness characteristics by comparing current conditions within the five former wilderness inventory unit boundaries with conditions documented during the 1980 inventory.

In the present appeal, ONDA once again argues that BLM violated NEPA in various ways, including but not limited to, failing to take a "hard look" at impacts to wilderness values. BLM opposes the petition and has moved to place in effect by no later than June 27, 2007, those portions of the 2007 Decision which would "allow for the limited provision of water [(via the pipelines and troughs already completed and authorized by both the 2005 Decision and 2007 Decision)] to the wild horses on BLM public lands during existing drought conditions within the affected area."

## II. Petition for a Stay

To prevail on its petition, ONDA must show, in accordance with 43 C.F.R. § 4.471(c) (2), sufficient justification based on the relative harm to the parties if the stay is granted or denied, the likelihood of ONDA's success on the merits, the likelihood of immediate and irreparable harm if the stay is not granted, and whether the public interest favors the granting of the stay. As the party seeking the stay, ONDA bears the burden of demonstrating that a stay is warranted under each of the regulatory criteria. See 43 C.F.R. § 4.471(d); *Oregon Natural Resources Council*, 148 IBLA 186, 188 (1993).

To achieve success on the merits, ONDA must meet its burden to demonstrate, by a preponderance of the evidence, that the Final Decision is unreasonable or does not substantially comply with the provisions of the Federal grazing regulations found at 43 C.F.R. part 4100. See 43 C.F.R. § 4.480(b); *Eason v. BLM*, 127 IBLA 259, 262 (1993). A BLM decision may be regarded as arbitrary, capricious, or inequitable only where it is not supported by any rational basis. *Wayne D. Klump v. BLM*, 124 IBLA 176, 182 (1992).

In balancing the likelihood of movant's success against the potential consequences of a stay on the other parties 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 for more deliberative investigation." Hamilton Watch Co. v. Benrus Watch Co., 206 F. 2d 738, 740 (2d Cir. 1953), quoted in Placid Oil Co. v. United States Department of the Interior, 491 F. Supp. 895, 905 (N. D. Texas 1980).

*Wyoming Outdoor Council Inc.*, 153 IBLA 379, 388 (2000) (quoting *Sierra Club*, 108 IBLA 381, 384-85 (1989)). Based upon a preliminary review of the record and pleadings, and as more fully discussed below, I find that ONDA has met its burden of showing that a stay is warranted.

#### A. Likelihood of Success on the Merits

The law applicable to ONDA's assertions that BLM has violated NEPA is as follows. The policy goals of NEPA are to protect and promote environmental quality, 42 U.S.C. § 4331 (1994), through a set of "action-forcing" procedures. See *Robertson v. Methowvalley Citizens Council*, 490 U.S. 332, 348 (1989). Among other things, NEPA requires that an environmental impact statement (EIS) be prepared for any proposed "major Federal action[] significantly affecting the quality of the human environment." 42 U. S. C. § 4332 (2)(C) (1994).

The statutory requirement that a federal agency contemplating a major action prepare such an environmental impact statement serves NEPA's "action-forcing" purpose in two important respects. It ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.

*Robertson*, 490 U.S. at 349 (citations omitted).

[Thus, NEPA] procedures are designed to "insure a fully informed and well-considered decision." Vermont Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978). NEPA does not require agencies to elevate environmental concerns over other appropriate considerations. Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 97 (1983). Rather, NEPA

only requires that an agency take a "hard look" at the environmental effects of any major Federal action. Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976). NEPA assures that decision-makers are fully apprised of the likely effects of alternative courses of action so that their selections represent informed decisions. In re Bryant Eagle Timber Sale, 133 IBLA 25, 29 (1995).

*Southern Utah Wilderness Alliance*, 157 IBLA 150, 170 (2002), *rev'd on other grounds*, 237 F. Supp. 2d 48 (2002). Thus, "[a]n agency is required to provide enough detail in a NEPA document to establish that it has taken a good-faith, objective, hard look at the environmental consequences of the proposed actions." *Utah Wilderness Association*, 140 IBLA 147, 152 (1997) (quoting *In the Matter of the Appeals of Committee for Idaho's High Desert, Golden Eagle Audubon Society, and John Barringer*, SEC 92-ID 101, at 11).

To determine whether a proposed action will have a significant impact on the human environment, an agency first analyzes the environmental impacts in an EA. 40 C.F.R. §§ 1501.3, 1501.4( c).

In preparing an EA to assess whether an EIS is required under section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (1994), an agency must take a "hard look" at the proposal being addressed, identifying relevant areas of environmental concern, so that it might make an informed determination regarding whether the environmental impact is insignificant or impacts will be reduced to insignificance by mitigation measures. As a general rule, the Board will affirm a FONSI with respect to a proposed action if the record establishes that a careful review of environmental problems has been made, all relevant environmental concerns have been identified, and the final determination is reasonable. The record must establish that the FONSI was based on reasoned decisionmaking. Thus, one challenging a FONSI must demonstrate either an error of law or fact or that the analysis failed to consider a substantial environmental problem of material significance. The ultimate burden of proof is on the challenging party and that burden must be satisfied by objective evidence. Mere differences of opinion provide no basis for reversal.

*Wyoming Outdoor Council*, 158 IBLA 155, 160 (2003) (citations omitted).

As more fully explained below, ONDA's allegations as to the adequacy of BLM's analysis of wilderness values raises serious questions as to whether BLM's 2007 Decision is supported by adequate information and the actual facts. ONDA has presented objective proof establishing a sufficient likelihood of error in BLM's conclusion that the area affected by the Projects lacks wilderness character and therefore that BLM should have considered the impacts to wilderness values. Consequently, ONDA has established a sufficient likelihood of success on the merits of its claims that BLM's decision lacks a rational basis and that BLM failed to comply with NEPA's mandate that an EA contain adequate information to make an informed decision and to establish that the agency has taken a good-faith, objective, hard look at the environmental consequences of the proposed actions.

BLM's enumeration in the 2007 EA of the key factors for identification of areas with wilderness character is in accordance with the Department's Wilderness Inventory Handbook (WIH) (1978), which identifies the key factors to be: (1) "Size. At least 5,000 contiguous roadless acres of public land[;]" (2) "Naturalness. The imprint of man's work must be substantially unnoticeable[;]" and (3) "Either: a. An outstanding opportunity for solitude, or b. An outstanding opportunity for a primitive and unconfined type of recreation." WIH at 6. BLM found that all but one unit met the size requirement and that those meeting the size requirement did not meet the "solitude or primitive recreation" requirement but did meet the naturalness requirement wholly or partially.

BLM estimated the percentage of each unit which was natural but did not identify which portions were considered natural or not. This was not conducive to understanding its findings or obtaining feedback from the public.

Further, several of the percentages are improperly skewed by attributing a negative effect on the overall natural condition of burned areas to the presence of increased cheatgrass in the recent past. *Id.* at 3 (Unit 1-136), 7 (Unit 1-137), 14 (Unit 1-142). This attribution is contrary to the standard established in the OAD 78-61, Change 2, dated June 28, 179, at page 4, which the Board has found to be authorized by the Wilderness Act. *Catlow Steens Corp.*, 63 IBLA 85, 87 (1982).

Page 4 states:

There is an important difference between an area's natural integrity and its apparent naturalness. Natural integrity refers to the presence

or absence of ecosystems that are relatively unaffected by man's activities. Apparent naturalness refers to whether or not an area looks natural to the average visitor who is not familiar with the biological composition of natural ecosystems versus man-affected ecosystems in a given area. As reflected in the [WIH], the presence or absence of apparent naturalness (i.e., do the works of man appear to be substantially unnoticeable to the average visitor) is the question that the inventory must assess.

Under this guidance, naturalness is based upon apparent naturalness rather than natural integrity and the presence of cheatgrass pertains to natural integrity rather than apparent naturalness. Consequently, the presence of cheatgrass should not be a factor in determining naturalness and BLM improperly considered the presence of cheatgrass as diminishing naturalness.

There is a likelihood that BLM's evaluation of the "solitude or primitive recreation" characteristic is in error as well. The likely error relates to the most fundamental point of disagreement between the parties affecting the determination of whether the Projects area has wilderness character, namely whether various vehicular routes fall under the wilderness inventory definition of a road.

This disagreement is fundamental because BLM's division of the Spaulding Proposed WSA Addition 2 into six separate units for analysis of wilderness characteristics was dependent upon its classification of various routes internal to the proposed WSA as "roads." That division into smaller units manifestly affected BLM's analysis of the "solitude" or "primitive recreation" characteristic, as BLM repeatedly refers to the relatively small size or narrow shape of the units as a factor in concluding that none of the units possess this characteristic. *See, e.g.*, 2007 EA, Appendix B at 4-5 (Unit 1-136), 8-9 (Unit 1-137), 12 (Unit 1-138), 14-15 (Unit 1-142), 18 (Unit 1-143).

This is critical, as BLM found that the units possessed **in whole or in part** the other two requisite characteristics of size and "naturalness." Having concluded that many of the internal routes were "roads," BLM designated them as boundaries for multiple, smaller units because

[s]ection 603(a) of FLPMA, [43 U.S.C. § 1782(a)], directs the Secretary to review [for wilderness characteristics] only roadless areas of 5,000

acres or more. Accordingly, before a unit may proceed to study, BLM must draw the boundary of the unit to exclude roads. Jacqueline L. McGarva, 60 IBLA 278 (1981).

*Philip Allen*, 77 IBLA 330, 333 (1983).

BLM has adopted the definition of "road" suggested by the legislative history of FLPMA at H.R. Rep. No. 1163, 94th Cong., 2d Sess. 17 (1976), wherein it is stated: "The word 'roadless' refers to the absence of roads which have been improved and maintained by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road."

The definition of "road" provides that the route must have been "improved and maintained by mechanical means." *Id.* (emphasis added). This definition has been interpreted by BLM in Organic Act Directive (OAD), 78-61, Change 2 (June 28, 1979), at 4, to include the situation where the route "has been improved to insure relatively regular and continuous use but has not yet required maintenance." Thus, even though it has been unnecessary to maintain a route by mechanical means, . . . a route may nevertheless be considered a "road."

*Philip Allen*, 77 IBLA 330, 333 (1983).

To hold otherwise would be to say that once a road has been mechanically improved, in order to thereafter continue its status it must receive mechanical maintenance whether it needs it or not – a ludicrous, impractical, and thoroughly unreasonable and unrealistic contortion of the accepted definition.

*Sierra Club*, 62 IBLA 367, 370 (1982).

However, such a route must at least have been improved by mechanical means. It is not sufficient that a route is subject to relatively regular and continuous use. In OAD 78-61, Change 2, at 4, BLM states that: "Improvements and relatively regular and continuous

use would be an indication that the road would be maintained if the need were to arise." (Emphasis added.)

*Philip Allen*, 77 IBLA at 333-34 (footnote omitted).

"Absent information demonstrating that maintenance is unnecessary, a finding of mechanical maintenance is necessary to characterize a vehicle route as a road." *Square Butte Grazing Assoc.*, 67 IBLA 25, 29 (1982); *see also Utah Wilderness Assoc.*, 86 IBLA 89, 110 (1985) (BLM decision set aside where record lacks adequate support for BLM's conclusion that certain routes were roads). Further, if the entire length of a vehicle route has not been improved and maintained by mechanical means to insure relatively regular and continuous use, then those parts not so improved and maintained properly should be classified as "ways." *Id.*

BLM provided an explanation for its evaluation of the status of the vehicular routes and related unit boundary determinations in an April 25, 2007, letter which accompanied its 2007 Decision. That letter responds to ONDA's comments in its protest of the proposed decision. BLM explained:

As documented in Appendix B, the BLM made its unit boundary determinations based on updated road data. The BLM initiated its road determination by comparing ONDA's 2005 inventory maps, photo logs, and photos with existing road information within the BLM's road database (referred to as GTRN) and recent digital orthophoto quads (DOQs) of the area. The BLM digitized potential new road lines using the DOQs as a backdrop and a "heads-up" digitizing process. The BLM created field maps and then field verified the presence and condition of each route (both existing and new) during 2005 and 2006. The field inventory results were recorded on field maps and, in some cases, collected using global positioning system (GPS) technology. This field data was then used to update the GTRN dataset. This update process has been documented . . . through the creation of GTRN metadata records.

The BLM assumed that the previous inventory from 1980 identified many wilderness inventory unit boundaries as roads based on actual field evidence of mechanical maintenance or improvement that existed in 1980, along with a determination that a given route insured regular

and continuous use as of 1980. Therefore, what remained for the current evaluation was to determine if a given route: 1) had been maintained or improved since 1980 or, 2) continued to insure relatively regular and continuous use.

In many, but not all cases, the BLM found no clear evidence of recent mechanical maintenance or improvement (Table 1, page 24, Appendix B). The next criterion BLM addressed was whether or not a given road insured relatively regular or continuous use. The BLM disagrees that ONDA's 2005 inventory photos demonstrate all of the roads in question (ie those listed in Table 1, Appendix B) have "deteriorated" to the point of failing to insure relatively regular and continuous use. In actuality, the BLM used those same photos, along with the field inventory work described above, in making its determination that these roads do, in fact, continue to insure relatively regular and continuous use.

You also state that ONDA's photos demonstrate "little use". The field evidence of "use" on a given road can vary significantly by season. . . . Finally, the amount of actual use or lack of recent maintenance is irrelevant. The standard that must be met has been and remains: does a given route insure relatively regular and continuous use and does it have a documented history of mechanical maintenance or improvement . . . ? If so, the route is a road for wilderness inventory purposes.

ONDA's following critique of BLM's wilderness characteristics evaluation is well taken:

BLM argues it "conducted its own evaluation of wilderness characteristics in the project area, finding that none exist. . . . 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 [hard] 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 [taken in May 2007] 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.

Appellant's Supplemental Statement of Reasons and Reply in Support of Petition for Stay at 1-2.

The only photographs taken by BLM were "digital orthophoto quads." ONDA's comments regarding these photos are also well taken. ONDA noted that the photos

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 a 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.

*Id.* at 4.

ONDA's scores of photographs show that the routes in question are generally eroded, rocky, and overgrown with vegetation, evidencing little use and no maintenance. Indeed, BLM acknowledges that most of the routes have not been maintained since 1980.

BLM opines that maintenance is not necessary because the conditions of the routes purportedly insure relatively regular and continuous use. BLM defines such use as use by high clearance two-wheel-drive vehicles. However, BLM has no data on actual usage, offers only vague statements of observations of unquantified use, and ONDA's photos raise serious doubts as to the accuracy of BLM's opinion.

BLM indicates that some of the routes in question have received maintenance since 1980, namely routes 6196-0-00, 6196-0-1, 6176-0-00, and 6176-0-1 (2007 EA, Appendix B, at 24), but does not identify the nature, frequency, or extent of such maintenance. Routes 6196-0-00 and 6196-0-1 separate Unit 1-136 from Unit 1-137 and routes 6176-0-00 and 6176-0-1 are part of the east and west boundaries, respectively, of the proposed WSA.

In its April 25, 2007, letter, BLM does more specifically state that route 6196-0-00 received maintenance in 2000 following wildfire suppression activities and that route 6196-0-1 received maintenance in 2006. Craig Miller, an employee and member of ONDA, responds that even if route 6196-0-00 qualifies as a road, it can be cherry-stemmed out of any WSA, that the maintenance of route 6196-0-1 occurred over only a small 450-meter portion near the top of a pass, and that ONDA has submitted photos showing that the remainder of that route is rocky, eroded, and overgrown. Declaration of Graig Miller at ¶ 23.

This record raises serious doubt as to the adequacy of the factual basis for BLM's related conclusions that the routes are roads, that the proposed WSA should be divided into smaller units along those roads for purposes of analyzing wilderness character, that no wilderness character is present, and therefore that any potential impacts to wilderness values need not be considered or analyzed. This serious doubt establishes a sufficient likelihood of success on the merits, especially given the aforementioned precedent requiring adequate informational support to establish that BLM took a "hard look" at the environmental impacts and to uphold a BLM determination that a route is a road.

**B. Relative Harm and Likelihood of Immediate and Irreparable Harm**

ONDA has also shown that the relative harm to the parties of granting or denying a stay favors a stay and that there is a sufficient likelihood of immediate and irreparable harm if a stay is not granted.

[W]hen a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered. \* \* \*

It is appropriate for [a tribunal] to recognize this type of injury in a NEPA case, for it reflects the very theory upon which NEPA is based – a theory aimed at presenting governmental decision-makers with relevant environmental data before they commit themselves to a course of action. This is not to say that a likely NEPA violation automatically calls for an injunction [or stay]; the balance of harms may point the other way.

\*\*\* [T]he harm [caused by a NEPA violation] consists of the added risk to the environment that takes place when governmental decisionmakers make up their minds without having before them an [adequate] analysis (with prior public comment) of the likely effects of their decision upon the environment. \*\*\* [A tribunal] should take account of the potentially irreparable nature of this decisionmaking risk to the environment when considering a request for preliminary injunction or [stay].

*Sierra Club v. Marsh*, 872 F.2d 479, 500-01 (1<sup>st</sup> Cir. 1989) (quoting *Commonwealth of Massachusetts v. Watt*, 716 F.2d 946, 952 (1<sup>st</sup> Cir. 1983)); see also *Injunctions Under NEPA After Weinberger v. Romero-Barcelo and Amoco Production Co. v. Village of Gambell*, 5 Wis. Env'tl. L. J. 1 (1998). Thus, BLM's likely NEPA violation entails a potentially irreparable risk to the environment that must be considered in assessing the likelihood of irreparable harm and the relative harm to the parties.

ONDA argues that its members also will be harmed by the loss of their ability to experience the lands in question without ongoing degradation of important public resources and values that will be significant and may be long-term and/or irreparable. ONDA contends that the

[c]onstruction of nearly 17 combined miles of new fences and pipelines (on top of those already constructed) will result in fragmented and destroyed sage-steppe wildlife habitat, invasion and spread of noxious weeds to the detriment of native plant species, compaction and/or erosion of soil, destruction of critical nitrogen-fixing microbiotic crusts, and disturbance to wilderness values. Losses of soil and crusts, native vegetation, and native wildlife habitat, as well as degradation to the wilderness resource, are irreparable.

Some of ONDA's harm contentions are supported by the 2007 EA, in which BLM acknowledged that soil disturbance will result from the short-term construction activities and long-term livestock trailing along the fences, new cattle usage around water troughs, and the road realignment and rehabilitation and that such disturbance could create favorable situations for noxious weed introduction and establishment in the short term. EA at 32, 37. BLM further acknowledged the adverse effects to vegetation which will occur at the road realignment and around the water troughs and the soil compaction which will take place around the troughs. EA at 30, 35.

BLM argues that harm will certainly continue in the riparian zones of the East-West Gulch if Project implementation is stayed. It opines that it will not be possible to keep cattle out of the riparian areas in East-West Gulch without the water development and riparian exclosure fence. It also contends that delay in implementing the Projects will retard the long-term riparian and sage-grouse habitat recovery in the gulches.

It further argues that the wild horses and livestock permittees seeking to use the already-constructed projects for watering livestock in the North Pasture will be harmed if a stay is granted. The permittees began grazing this year in the North Pasture on April 1, 2007. BLM speculates that a stay could lead to the permittees having to temporarily haul water into the area or to early removal of livestock from the pasture before the end of the authorized grazing season, involving considerable expense/loss of income to the permittees.

This alleged harm is more speculative and ONDA points out that the permittees have not intervened to complain that a stay will cause them harm, irreparable or otherwise. ONDA also notes that after the 2007 season, grazing will not commence again in the North Pasture until the spring of 2009. Under these circumstances, a stay would likely involve minimal harm, as the matter would likely be resolved substantially before grazing will again occur in the spring of 2009. Further, if necessary and deemed appropriate, BLM could move to lift the stay before spring of 2009.

Ultimately, the weighing of the relative harms tips the balance in favor of granting a stay based upon the harm of the added risk to the environment resulting from the likely lack of adequate NEPA analysis. Likewise, that harm establishes a sufficient likelihood of irreparable harm.

### C. Public Interest

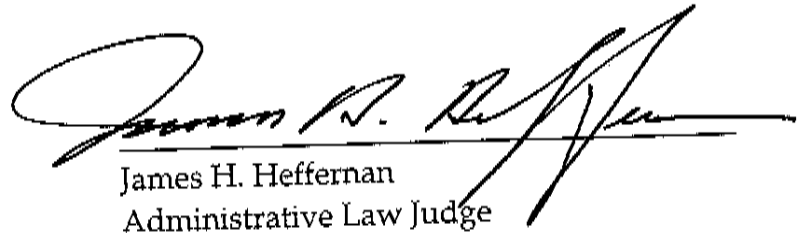
Finally, the public interest favors granting a stay. Before BLM makes an irretrievable commitment of resources, including expending substantial amounts of money on range improvements, the issue of whether BLM complied with NEPA should be fairly litigated and deliberately investigated to insure that the purposes of NEPA are served. Given that BLM likely erred in failing to consider impacts to wilderness values, there is a substantial risk that the 2007 Decision is not a well-informed decision and that BLM would have chosen other actions to make progress towards fulfillment of the objectives and standards for the allotments.

### III. BLM's Request for Partial Immediate Effect

The foregoing analysis for granting a stay also weighs against granting BLM's request to place a portion of the 2007 Decision into immediate effect so that water can be made available to wild horses via the pipelines and troughs. Further, BLM has made no showing that it has no other options for addressing the perceived wild horse problem. Thus, no persuasive reasoning has been offered for treating that portion of the decision differently and altering the overall conclusion that the public interest does not favor implementing the decision.

### IV. Conclusion

Based upon the foregoing, **THE 2007 DECISION IS HEREBY STAYED. FURTHER, BLM'S REQUEST TO PLACE A PORTION OF THAT DECISION INTO IMMEDIATE EFFECT IS HEREBY DENIED.**



James H. Heffernan  
Administrative Law Judge

### Appeal Information

Any person who has a right to appeal under 43 CFR § 4.410 or other applicable regulation may appeal this order to the Interior Board of Land Appeals. The notice of appeal must be filed with the office of the Administrative Law Judge who issued the order within 30 days of receiving the order, and a copy of the notice

must be served on every other party. In accordance with 43 CFR § 4.478(c), the Board will issue an expedited briefing schedule and decide the appeal promptly.

See page 20 for distribution

OR-010-07-01

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