



Oregon Natural Desert Association

March 16, 2007

VIA EMAIL

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Bureau of Land Management  
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Re: **Protest of Proposed Decision for EA OR-010-2004-08 (East-West Gulches Projects)**

Dear Mr. Rasmussen:

Pursuant to 43 C.F.R. § 4160.3(a), the Oregon Natural Desert Association (“ONDA”) hereby protests the BLM’s proposed decision for the Revised East-West Gulches Projects EA (OR-010-2004-08). Under § 4160.3(a), an interested public has 15 days after receipt of a proposed decision to protest that decision with the authorized officer. ONDA received the above-referenced Notice of Proposed Decision on March 2, 2007. For the reasons outlined in this protest, as well as those described in ONDA’s February 21, 2007; March 9, 2005; and July 23, 2004 comment letters on this project, ONDA hereby protests the Proposed Decision and requests the BLM to modify the EA or prepare a more detailed EIS to comply with the requirements of NEPA, FLPMA and all other applicable laws.

As stated in ONDA’s comment letter on the EA, 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 the Lakeview Resource Area’s Beaty Butte Allotment for countless recreational, scientific spiritual, educational, aesthetic, and other purposes.

Through three rounds of detailed comments on this project, ONDA has explained that the EA does not go far enough to protect the fragile East and West Gulch areas from continued degradation resulting from concentrated overgrazing, the effects of fire, severe drought, the spread of invasive weed species, and degradation of wilderness resource values on these public lands. ONDA further observed that these issues would not be resolved by piping water to new locations, nor by the small East Gulch riparian enclosure. As it did previously, ONDA once again recommends a much larger enclosure, covering both West and East Gulches (including the saddle between the two) as well as some portion of the important contiguous upland areas. Based

on the clear evidence of significant adverse environmental impacts caused by current grazing practices, ONDA again recommends that the BLM should consider significant changes to grazing practices throughout the North Pasture and the allotment as a whole to avoid continued exacerbation of these resource concerns from continued overgrazing.

This EA is guided by litigation in which a federal district court held that BLM violated NEPA when it failed to consider impacts to wilderness resource values, improperly basing its final decision on outdated and inaccurate information. These same defects remain in a largely unchanged EA. ONDA once again requests the BLM to consider the significant wilderness values present in the project area, including the detailed wilderness inventory information ONDA provided earlier in this NEPA process. Because the EA remains unchanged in many important respects, ONDA hereby incorporates by reference each of its previous comments, protests, and administrative appeals concerning previous versions of this project.

ONDA is disappointed at BLM's failure to respond to most of the questions raised, and even placed in boldface, in our comments on this latest EA. The comment response letter to ONDA dated February 28, 2007 and Proposed Decision contain little to no new data or analysis to supplement the many deficiencies identified in ONDA's comments. Here, we again place our most critical information requests in boldface and renew our request that BLM respond to them.

#### **The EA is Inconsistent with the Court's Order in *ONDA v. Rasmussen***

On Dec. 12, 2006, the District of Oregon issued an Order vacating the East-West Gulch Projects decision. The Order stated:

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. Defendants shall maintain already constructed facilities sufficiently to avoid environmental injury pending completion of a lawful EA or a decision to abandon the Projects.

Ore. Natural Desert Ass'n v. Rasmussen, No. 05-1616-AS, Order at 2 (D. Or. Dec. 12, 2006).

BLM describes its current EA in the Jan. 22, 2007 cover letter as "a revision to environmental assessment (EA#OR-010-2004-08)." Although the unlawful Feb. 2005 Revised EA was *vacated*, BLM appears to have prepared a virtually identical document here. See EA at 2 ("The EA has been revised and is now being made available for an additional 30-day public review."). Large portions of the EA are identical to the vacated document. The section entitled "Comments and Issues Raised During Public Review" relates comments raised during the NEPA process in 2004 and 2005 for the vacated EA, rather than any new comments gathered or issues raised during this new NEPA process.

Vacatur means the agency must *begin anew* in order to comply with NEPA's procedural mandates. Thus, the new EA must independently comply with NEPA, regardless of any similarities to the previous EAs. BLM's issuance of a "revised" EA thwarts NEPA's basic purposes of fully-informed decision-making and full public participation. Simply patching up an existing NEPA document without taking a fresh look at options and impacts to wilderness values within the East and West Gulches threatens a pro forma exercise in post hoc rationalization. See, e.g., Metcalf v. Daley, 214 F.3d 1135, 1142 (9th Cir. 2000) (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"). BLM's refusal to prepare a new EA is inconsistent with the district court's order and renders BLM's proposed decision arbitrary and capricious agency action that is not in accordance with the law.

### **Identification of a Preferred Alternative**

Neither the current EA nor its previous incarnations identified a preferred alternative. As explained previously, the CEQ NEPA regulations and controlling Ninth Circuit case law require the BLM to do so. NEPA's primary purposes are to insure fully informed decision-making and to provide for public participation in environmental analyses and decision-making. See 40 C.F.R. §§ 1500.1(b), (c). BLM does not provide any compelling reason why it refused to publicly identify its preferred alternative until it issued its Proposed Decision. **Please explain why BLM failed to identify its preferred alternative.** BLM failed to respond to this question in ONDA's comments. BLM's refusal to comply with the NEPA regulations renders the BLM's decision arbitrary and capricious agency action that is not in accordance with the law.

### **Purpose and Need; Alternatives Not Considered**

The EA states that "The purpose and need for the proposed action is to move the riparian habitat within East Gulch and West Gulches towards a healthier, functioning condition *while allowing for continued livestock grazing at permitted levels.*" EA at 1 (emphasis added). The BLM may not narrow the purpose and need to a point where the agency can justify not considering reasonable alternatives such as reductions in grazing to address the underlying problems at issue. See, e.g., Simmons v. U.S. Army Corps of Eng'rs, 120 F.3d 664, 666 (7th Cir. 1997); City of New York v. U.S. Dep't of Transp., 715 F.2d 732, 743 (2d Cir. 1983) ("an agency will not be permitted to narrow the objective of its action artificially and thereby circumvent the requirement that relevant alternatives be considered"). As one court has explained:

One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing "reasonable alternatives" out of consideration (and even out of existence). The federal courts cannot condone an agency's frustration of Congressional will. If the agency constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role. Nor can the agency satisfy the Act. 42 U.S.C. § 4332(2)(E).

Simmons, 120 F.3d at 666. The reason these Projects are being proposed is to address serious, well-documented degradation to riparian resources in the East and West Gulches—degradation caused by current livestock grazing practices. Removing grazing from this pasture would unquestionably meet the purpose of recovering riparian habitat. This highlights the unreasonableness of BLM’s tacked-on final phrase concerning “permitted levels” of livestock grazing. Further, the last decade of management has proven that this allotment cannot sustain anywhere near the permitted level of grazing of more than 26,000 AUMs. BLM’s unreasonably narrow purpose and need statement renders the BLM’s decision arbitrary and capricious agency action that is not in accordance with the law.

The current EA fails to analyze in detail a reasonable range of alternatives. Alternatives 2–5 are extremely similar: they all propose building similar water developments and relocating a vehicle route, to accommodate the same level of grazing. They differ only in the details. The only alternative fully considered that analyzes a different approach is Alternative 6, which involves permanent removal of grazing from the North Pasture and a 50% reduction in AUMs. But even this alternative retains unsustainably high levels of grazing; it shifts grazing in the South Pasture to an every-year schedule and the EA expresses concern that such grazing “could negatively affect wilderness characteristics (primarily naturalness) in Rincon, Sage Hen Hills, Spaulding, and Hawk Mountain WSAs if the grazing level or intensity exceeds that which occurred in 1976.”<sup>1</sup> EA at 47. Furthermore, BLM does not give Alternative 6 real consideration. The EA refers to the alternative as being considered only “[f]or analysis purposes” and states that it “is being considered in detail despite the fact that it does not meet the purpose and need for the proposed action and would require Congressional notification to implement.” EA at 15.

To the contrary, an alternative that removes or shifts livestock numbers and AUMs away from the degraded North Pasture fits even the BLM’s constrictive purpose and need statement. And the need for Congressional notification should not relegate an alternative to straw-man status. Nothing in FLPMA’s Congressional reporting provision prohibits BLM from adopting a final decision that would remove grazing from the North Pasture. Because BLM only “fully” considered a single alternative that did not involve water developments, and did not actually consider that alternative fully, it failed to consider a reasonable range of alternatives. BLM’s cursory dismissal of Alternative 6 indicates the agency should have considered in more detail more “moderate” alternatives involving reduced numbers or seasons of use, longer periods of rest, and increased herding.

The EA states that BLM considered but eliminated from further study an alternative that considered reduced forage allocations and/or longer periods of rest, an alternative that relied solely on the use of additional riders, and an alternative that used a riparian enclosure without any accompanying water developments. EA at 11. Simply listing off and then discarding these alternatives does not satisfy NEPA. BLM must consider all reasonable alternatives. 40 C.F.R. §§ 1502.14(a), 1500.2(f). Analysis of alternatives must be “*sufficiently detailed* to reveal the agency’s comparative evaluation of the environmental benefits, costs and risks of the proposed action and each reasonable alternative.” Id. (emphasis added); see id. § 1502.14(a); Bob Marshall Alliance v. Hodel, 852 F.2d 1223 (9th Cir. 1988), cert. denied, 489 U.S. 1066 (1988). That type

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<sup>1</sup> Such degradation would violate the Interim Management Policy for Lands Under Wilderness Review.

of sufficient detail is not present for the above reasonable alternatives. Indeed, BLM admits these alternatives were “eliminated from detailed study.” EA at 11.

The alternative relying on the use of riders is particularly reasonable and should have been examined at the same level of detail as all of the structural-fix alternatives. BLM suggests this alternative is unreasonable because (1) it would require too many riders to be constantly present, and (2) “riders were not intended to serve as a permanent substitute to the proposed fencing projects” outlined in the AMP. EA at 11. As described in ONDA’s comments, both assertions are unsupported. The AMP *requires* the use of riders to aid grazing management, and does not specify how many riders are to be used; BLM cannot simply read that portion of the AMP out of existence. Subsequent annual operating instructions reiterate this requirement. Further, BLM has failed (again) to disclose the most basic information regarding the current riding strategy, such as the number of riders used, when they are used. **Please explain how many riders have been used on the Beaty Butte Allotment each year since the AMP was adopted, including when and where they were used on the allotment and over the course of each year’s authorized grazing.** BLM failed to respond to this question in ONDA’s comments.

As the Department of the Interior’s Office of Hearings and Appeals (“OHA”) held in the context of the Buckaroo Pass Fence project on this same allotment, the failure to consider a herding alternative is not supported when “not supported by any detail as to the nature and extent of the past herding efforts . . . or the reasons why additional herding does not meet the definition of a reasonable alternative.” Ore. Natural Desert Ass’n v. Bureau of Land Mgmt., OR-010-04-02, slip op. at 5 (Oct. 6, 2004) (order granting petition for stay). **Please explain why BLM feels this EA and project are any different than the Buckaroo Pass Project—in particular why BLM asserts (if it does) that it can issue this EA without any “detail as to the nature and extent of” past herding efforts and the other types of information ONDA has requested above.** BLM failed to respond to this question in ONDA’s comments. In the absence of this information, BLM’s assertions amount to little more than conclusory statements and the public is denied an opportunity to meaningfully participate in this aspect of the decision-making process. We would like an opportunity to review your actual justification for your statements concerning herding, including any data or monitoring BLM relies upon in making its assertions. If no such data exists, please explain this.

### **Pre-Decided Outcomes; Alternative Involving Rehabilitation**

Under Alternative 2 (“Implement Action Plan”), BLM lists a series of “actions that would modify the current grazing management.” EA at 12–13. This list appears identical to previous versions of this EA (i.e., the EA found to be unlawful by the district court). The EA failed to mention which had already been completed, in whole or in part, or contain a map. The letter, for the first time, acknowledges that new water developments, 2 cattle guards, and a partial new road have been constructed. Letter at 2. However, BLM has still not provided a map identifying these projects, as requested in ONDA’s comments.

Because the last incarnation of this EA was found to be illegal, BLM must now analyze an alternative that would *remove* the already-constructed projects from the landscape. This is different from the “No Action” and “No Grazing” alternatives, neither of which indicates what

would happen to already-existing projects built under the vacated EA and previous decision. In response to ONDA's comments on this issue, BLM in its letter responds that an implicit "central assumption" of the no action alternative was that the existing projects would be removed and rehabilitated. Letter at 2. This is a fundamental misunderstanding of what the "No Action" alternative is under a NEPA analysis. "No action" means just that: performing no change to current management. Conversely, removing already-constructed projects or rehabilitating already-constructed routes are "actions" that must reasonably be considered in this NEPA analysis.

BLM further states that the court order overturning the previous EA "found that the previous EA's range of alternatives was adequate" and "did not instruct the BLM to remove any of the projects or evaluate a new alternative in the EA addressing removal of these projects." *Id.* BLM misses the point. The district court's relief order *vacated* the decision and ordered BLM to prepare a new EA "that complies with the requirements of the APA and NEPA." *Ore. Natural Desert Ass'n v. Rasmussen*, No. 05-1616-AS, Order at 2 (D. Or. Dec. 12, 2006). Thus, the new EA must stand on its own two legs and independently comply with NEPA, regardless of any similarities to the previous EA. Further, the relief order orders Defendants to "maintain already constructed facilities sufficiently to avoid environmental injury pending completion of a lawful EA or a decision to abandon the Projects." *Id.* (emphasis added). This statement further emphasizes that BLM should consider a decision to abandon, or rehabilitate, the projects.

### **Absence of New Information and Field Data**

BLM issued its final decision on the first version of this Project on May 13, 2005. The revised EA, issued a year-and-a-half later, contains little or no new monitoring or other information concerning, for example, current conditions in the East and West Gulches, sage grouse populations and habitat, and pygmy rabbit populations and habitat. As it did in the 2005 EA, this EA states that fence lines "would be cleared for pygmy rabbits prior to construction." EA at 16. The EA makes similar statements concerning surveying for cultural resources as well as other aspects of the project (e.g., pipelines, troughs, spring sites, road work, cattle gates). *See also* EA at 24 (containing same statement as in 2005 EA that habitat surveys were conducted in 2004 for sage-grouse and pygmy rabbit), 25 (same for cultural resources, for example along fence lines). Because BLM actually completed construction or implementation of at least six miles of pipelines, three storage tanks, seven watering troughs, 0.75 miles of new road, and two cattle guards, this type of information should already exist for each of these projects.

In its EA comments, ONDA requested that BLM provide all survey data, completed in accordance with BLM's 2005 decision, as well as any subsequent survey, inventory, or other data collected since then, regarding cultural resources, pygmy rabbit habitat, riparian and grazing monitoring, noxious weeds, recreational use, and other resources. In response, BLM states, "No such new data exists that is relevant to the impact assessment in the East-West Gulch project area." Letter at 1. If the original EA and final decision expressly called for this data being collected, how can the data not be "relevant" to the project?

This admission exposes several components of the EA as unsupported. First and foremost, the admission calls into grave doubt the BLM's intention of conducting the promised

monitoring on the new projects, having failed to do so for the projects constructed pursuant to the previous EA. ONDA's EA comments also asked for the production of basic livestock monitoring, including condition and PFC ratings at the time the AMP and rangeland health evaluation were adopted/performed, at the time the Action Plan was devised, at the time of the 2005 decision, and at the time the 2007 Revised EA was issued. **Please provide all quantitative and/or other data BLM has collected for each of these points in time, as well as 2005-07 actual use data and any end-of-season or other monitoring.** BLM provided no data or response to this request in its response letter, calling into question the basis for their livestock grazing assumptions.

As another example, ONDA's EA comments noted that the "affected environment" for recreation purportedly changed between the 2005 and current EAs. In the 2005 EA, BLM describes the affected environment for recreation as follows: "The primary recreational activities occurring within the area include hunting, sight seeing, and general enjoyment of the high desert environment." In the current EA, BLM has changed that statement to: "The primary recreational activities documented specifically within the project area include hunting and motorized sight seeing." ONDA requested any documentation that supports this change. BLM admitted it has none in the response letter, calling into question the basis for this statement which appears to devalue primitive, nonmotorized recreation.

In sum, these deficiencies violate NEPA's "hard look" requirement and the requirement to achieve full public disclosure and informed decision making. See Robertson v. Methow Valley Citizens, 490 U.S. 332, 349 (1989) (NEPA "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."). They also violate FLPMA's requirement that BLM engage in a reasoned and informed decision-making process in order to satisfy its multiple use mandate and to prevent unnecessary or undue degradation of the public lands. 43 U.S.C. §§ 1732(a), (b). Likewise, they leave the project decision inconsistent with the Lakeview RMP, in violation of FLPMA's plan consistency provision. Id. § 1732(a).

### **Impacts to Recreation**

Because the EA does not recognize the various types of non-motorized recreation opportunities and uses ONDA has documented in this area, it does not analyze impacts to these types of recreation. EA at 46-47 (referring only to impacts of fencing on hunters and OHV users, with some references to "recreational wildlife viewing"). **Please analyze the impacts to hikers, photographers, horseback riders, and other public land users who wish to explore this area by non-motorized means.** BLM failed to respond to this request in ONDA's comments. The failure to analyze the impacts of the project on non-motorized recreation opportunities renders the decision arbitrary, capricious, and not in accordance with NEPA and FLPMA.

### **West and East Gulch Water Projects: Impacts on Sage Grouse Habitat**

The EA still contains no detailed discussion of the potential impacts to sage grouse habitat of piping water from the relatively few natural springs, seeps and other wet areas in the East and West Gulches. ONDA previously commented that because water availability on the

allotment is so limited, and because the wet meadows in the action area are so crucial to sage grouse, the BLM should not construct any new pipelines unless it can demonstrate there will be no adverse impacts to sage grouse due to spring dewatering. The alternatives only contain conclusory statements over whether impacts under each alternative would be “more” or “less” than under the others. EA at 45–46. **Please specifically state what the rate of flow is at each spring at issue, and what the rate of flow would be under the various alternatives. Please also include this before-and-after information for the pipelines and other water projects already completed pursuant to the previous EA.** BLM failed to respond to these questions presented in ONDA’s comments, calling into question the basis for its assumptions about impacts to sage grouse.

ONDA also commented previously that the EA should present a more detailed analysis of how any proposed pipelines would comply with *each* of BLM’s Greater sage-grouse guidelines. The Lakeview RMP requires the BLM to manage sage grouse habitat in accordance with these guidelines. The EA does not discuss adequately the potential effects of the proposed pipelines on nearby leks or the surrounding sagebrush habitat. **Please show the locations of leks and sage grouse habitat on the project maps.** BLM failed to respond to this request presented in ONDA’s comments. These shortcomings violate NEPA’s “hard look” requirement and the requirement to achieve full public disclosure and informed decision making. They also violate FLPMA’s multiple use balancing and unnecessary or undue degradation requirements.

### **Impacts on Rare Plants**

ONDA submitted a separate, timely EA comment letter regarding rare plants after discovering the alignment of the proposed fences would push cattle down the east side of Beaty Butte to the Fish Rim area, where there are populations of Crosbys buckwheat. There are also snowberry populations in the East Gulch. ONDA requested that BLM analyze the direct, indirect, and cumulative impacts to these plant populations under each alternative. BLM admits that the selected alternative could have some negative impacts to these plants, and that monitoring is needed to determine what effects will occur to the plants, and the overall effect on the conservation of the plant populations. EA at 44. But it is not clear if this monitoring will actually occur. BLM has failed to take a “hard look” at impacts to these plants under NEPA, and this also violates FLPMA’s multiple use balancing and unnecessary or undue degradation requirements.

### **Mitigation and Road Rehabilitation**

In its EA comments, ONDA requested information about the completed road rehabilitation, but received no response from BLM. **Please provide information (including maps) concerning the work already completed with respect to the closed and rehabilitated “East Gulch road,” as well as the portion of the newly-constructed route completed under the previous EA. Please include BLM’s photographs of these areas so that the public can see the impacts of these portions of the project.**

The EA and response letter fail to consider when to reintroduce livestock, despite ONDA’s comment that livestock should not be reintroduced to any rehabilitated road areas until

native species have become well-established. The first alternative should always be to eliminate the causes of disturbance. Because disturbance by livestock is a major cause of weed invasion, it must be eliminated or significantly reduced for rehabilitated lands to recover. The EA and response letter fail to provide any weed monitoring information for the newly-constructed route above East Gulch despite ONDA requesting such information in its comments.

### **Grazing in the Riparian Area**

Under the alternatives in which a riparian unit would be created, the EA indicates that grazing may be reintroduced into the unit once the “riparian vegetation has achieved a mid-seral condition with an upward trend, which is equivalent to a properly functioning condition (PFC) rating.” EA at 13. Once this condition is achieved, the “area within the new fence would have regulated use as a small riparian pasture.” *Id.* As ONDA commented previously, these extremely degraded riparian areas will need multiple years’ rest at a minimum to begin to recover from the overgrazing they have experienced in recent years. Given the extreme degradation these areas have suffered, however, the BLM should opt for permanent rest for any new riparian unit(s).

ONDA also previously commented that the EA should include some actual, quantitative criteria that will be used to determine whether and when grazing may be allowed to resume at some level in the excluded area (should the BLM opt for an alternative in which grazing could resume in this area). The EA’s definition of “mid-seral vegetative condition” still does not provide the type of quantitative, objective measure that the public can reasonably rely upon. The statement that root depth and density and litter cover “would be measured” still provides no information as to what species will be measured and depths, densities and cover percentages will be deemed acceptable. These criteria are simply too vague. As it currently reads, the EA still contains no objective, quantitative measures, and only states vaguely in various places that grazing would be excluded from the riparian pasture for “several years.” **Please also explain the current grazing standards in place—and in particular any measurable, quantitative standards that exist—for grazing on the Beaty Butte Allotment, North Pasture, under the RMP, AMP, annual authorizations or elsewhere.** BLM failed to respond to this request in ONDA’s comments.

The Lakeview RMP requires that riparian and wetland areas be managed to provide for attainment of Proper Functioning Condition (“PFC”) and Riparian Management Objectives (“RMOs”). RMP Appendix F. The RMP provides RMO criteria for pool frequency, temperature, large woody debris, bank stability, lower bank angle, width/depth ratio, and riparian vegetation. *Id.* at A-155. The EA and decision is inconsistent with the RMP because it does not require compliance with, or even monitoring of, the key attributes of healthy, functioning riparian areas, which the BLM set forth in the land use plan. Without requiring any quantitative monitoring, and without setting forth a single quantitative standard for livestock grazing in riparian areas, the BLM will have no idea whether its selected grazing system is achieving “measurable progress” toward meeting state water quality standards, RMOs, and PFC. Accordingly, the BLM’s decision is arbitrary, capricious, and not in accordance with FLPMA. 43 U.S.C. § 1732(a) (land use plan consistency provision).

As was documented in 2003, one year of grazing can cause devastating effects to these fragile, unique riparian areas. Even the early season, short duration grazing proposed under some alternatives can result in significant degradation of these areas. Reliance on “regrowth” is not a tenable grazing management strategy in the midst of a long-term drought and in an area which receives only eleven inches of precipitation annually. **Please produce the data or other information BLM relies upon to support this assumption, including any utilization study data showing baseline conditions and expected and actual growth and regrowth on the North Pasture.** BLM failed to respond to this request in ONDA’s comments. At best, reliance on regrowth simply maintains the status quo (degraded conditions, inadequate herbaceous regeneration), and at worst—in drought conditions—it causes continued degradation. The strategy is certainly arbitrary if the BLM is unwilling to adopt any sort of drought policy (e.g., reduction in AUMs based on drought conditions) for this allotment.

### **Impacts to Areas Not Previously Subjected to Heavy Grazing Pressure**

ONDA is very concerned over the potential adverse impacts stemming from increased grazing in areas that have not previously been subjected to the heavy grazing seen elsewhere on the allotment. The EA admits that the new fences and watering troughs proposed under the various alternatives would draw livestock to areas that currently receive no use or slight use. It is arguable whether this would “improve animal distribution” on the allotment, as the BLM asserts, or whether it would simply shift areas of current overgrazing to areas that have not yet been overgrazed under the current grazing system. As noted, the EA fails to present any monitoring whatsoever on species likely to rely on the ungrazed areas such as sage grouse or pygmy rabbits, and the letter admits that no new monitoring has been done on these species. Letter at 1.

Of particular concern here is the potential for the establishment and spread of noxious weeds. As noted in the EA, weeds already are present in the gulches and in particular near every road and water project currently in existence in the vicinity. EA at 20. Heavy livestock use around existing water sources is known to introduce new weed sites and spread existing sites. The EA states that the “most common vectors of weed transport (seeds/vegetative material) are disturbances associated with road maintenance, vehicle use (on and off-road), people, and water transport.” EA at 20–21. The failure to acknowledge livestock grazing as one of the principal causes of the establishment and spread of weeds in the project area is inexplicable. The AMP, although also circumspect about the precise causes of weed spread, notes that weeds occur along roads, near water developments and at other repeatedly disturbed areas. AMP at 30. It is particularly troubling that the BLM appears willing to turn a blind eye the relationship between cheat grass and livestock grazing. The EA states that the various locations of cheatgrass patches appeared to have “no relationship” to previous grazing pressure. It has been documented that cheat grass on the Beaty Butte Allotment is closely tied to places where livestock congregate and overgraze. As noted, the EA fails to present any monitoring whatsoever on noxious weeds, and the letter admits that no new monitoring has been done. Letter at 1. These deficiencies violate NEPA and FLPMA’s requirement that BLM engage in a reasoned and informed decision-making process in order to satisfy its multiple use mandate and to prevent unnecessary or undue degradation of the public lands.

## Cultural Resource Inventory

ONDA previously expressed the concern that the EA indicates some areas, including areas subject to potential fence construction, have not yet been surveyed for cultural resources. Beaty Butte was a significant source of obsidian for native inhabitants of the area as far back as Clovis times. Field surveys in 2004 confirmed the significance of the Beaty Butte area as an obsidian source area and the presence of archaeological sites. Not surprisingly, spring sites were “focal points” of prehistoric occupation. See EA at 25.

Given the archaeological and cultural significance of the area, the failure to collect, present and discuss important cultural resource information *prior to* issuance of the EA—and the fact that a final alternatives decision may once again be made prior to obtaining this information—is contrary to NEPA’s full public disclosure requirements. See EA at 25 (“Some areas associated with Alternatives 2–5 still remain to be surveyed”). **Please provide all monitoring, survey, and other information BLM has collected in this regard, including all such information collected between the original project decision in May 2005 and today.** BLM failed to respond to this question and provides no further comment on the issue in its letter to ONDA and in the Proposed Decision. This is exacerbated by the fact that BLM has acknowledged that past adverse impacts to cultural resources have included trampling by livestock, road construction, and water development. The failure to disclose this information during the comment period allows the BLM to “insulate[] its decisionmaking process from public scrutiny [rendering] NEPA’s procedures meaningless.” State of Cal. v. Block, 690 F.2d 753, 771 (9th Cir. 1982). Without completing a cultural resource survey prior to the EA, so that the information from the survey may be presented and discussed, there is no way for land managers or the public to evaluate whether the proposed action involves or would adversely affect the “[u]nique characteristics of the geographic area such as proximity to historic or cultural resources.” 40 C.F.R. § 1508.27(b)(3). These deficiencies violate NEPA and FLPMA’s requirement that BLM engage in a reasoned and informed decision-making process in order to satisfy its multiple use mandate and to prevent unnecessary or undue degradation of the public lands.

The EA and decision further violate Section 106 of the NHPA, 16 U.S.C. § 470(f), and its implementing regulations, 36 C.F.R. §§ 800 et seq. “Section 106 of NHPA is a ‘stop, look, and listen’ provision that requires each federal agency to consider the effects of its programs. . . . Under NHPA, a federal agency must make a reasonable and good faith effort to identify historic properties; determine whether identified properties are eligible for listing on the National Register based on criteria in 36 C.F.R. § 60.4; assess the effects of the undertaking on any eligible historic properties found; determine whether the effect will be adverse; and avoid or mitigate any adverse effects.” Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 805 (9th Cir, 1999) (citations omitted). The EA lacks evidence that it complied with Section 106. It admits that adverse effects to cultural resources will occur, but fails to effectively avoid or mitigate the adverse effects. See, e.g. EA at 49. The EA also lacks information that BLM adequately consulted with members of the interested public. 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). The EA and Proposed Decision lack evidence that this consultation occurred.

### **Wilderness Values**

BLM is under a 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). Among the multiple use values the BLM must manage for is the wilderness resource. FLPMA also requires the BLM to "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)." *Id.* § 1711(a). The "inventory shall be kept current so as to reflect changes in condition and to identify new and emerging resource and other values." *Id.* Under NEPA, BLM must take a "hard look" at impacts to wilderness resource values. 42 U.S.C. § 4332(2)(C).

As described in ONDA's comments, ONDA in 2004–05 conducted an inventory and assessment of wilderness values on the Beaty Butte Allotment, following BLM's wilderness inventory protocol. The inventory documented significant wilderness values present in and adjacent to the planning area, known as the Spaulding Proposed WSA Addition. The inventory explained how all three criteria of wilderness were met. In support, ONDA offered countless photographs of routes once considered "roads" by BLM demonstrating that they are now "ways," along with documentation of naturalness and opportunities for solitude. ONDA re-submitted many of the photographs of routes in the project area along with its most recent comments on the EA.

BLM's FONSI asserts that there are no "areas with wilderness characteristics" present within the project area. Based on this assertion, the wilderness resource is not addressed in the EA. EA at 25. Rather, it contains an appendix ("Evaluation Form") dismissing the presence of wilderness values. BLM's determination that wilderness values do not exist in the project area is wholly unsupported by any new documentation of its own (data, photos, or other evidence) or any documentation rebutting ONDA's inventory.

Ironically, the letter from Field Manager Rasmussen states that "I do not find your comments to be supported by any hard data, facts, or scientific literature and are, in fact, merely your preference or opinion." Letter at 2. This statement makes no sense considering the dozens of photographs ONDA submitted both with its inventory and with its comments on the EA, documenting the condition of routes within the project area—none of which BLM discusses. ONDA's report also includes other inventory data and narratives on route conditions, naturalness, opportunities for solitude or primitive and unconfined recreation, and supplemental values. These are precisely the types of information, presented in precisely the same format, that BLM and the Department of the Interior explained should be presented by citizens in their own

wilderness inventory reports, in BLM's 2001 *Wilderness Inventory and Study Procedures* handbook.

Importantly, it is BLM's job, not ONDA's or other members of the public, to do the research required to support and justify the decisions made in a NEPA document. See, e.g., Blue Mtns. Biodiversity Project v. Blackwood, 161 F.3d 1208, 1214 (9th Cir. 1998) (holding EA inadequate where it contained "virtually no reference to any material in support of or in opposition to its conclusions."). See also ONDA v. Rasmussen, 451 F.Supp.2d 1202, 1212-13 (D. Or. 2006) ("ONDA did not have a responsibility to provide accurate information regarding any changes to the wilderness characteristics in the East-West Gulch before the EA was issued. BLM did.") The wilderness analysis is legally inadequate for several reasons.

**Size.** First, claiming that the Spaulding Proposed WSA Addition contains "numerous internal roads," BLM considered the area as six separate, smaller units. EA at 25. These units are the inventory units BLM created during its 1980 initial wilderness inventory. Thus, BLM does not analyze the wilderness character of the larger area identified by ONDA and how it would enhance the existing Spaulding WSA. By this method, BLM attempts to circumvent the intent of the court ruling. The singular issue boils down to whether the routes within the proposed WSA meet the wilderness inventory definition of a "road" or of a "way."

The core of the new information offered by ONDA centers on photographic documentation showing that the routes traversing the 82,000-acre area in fact do not meet the *Wilderness Inventory Handbook* definition of a road. Instead, they are "ways" and therefore do not defeat the roadless factor for wilderness. BLM has refused to consider this new information, not once even admitting in the EA that such photographic documentation exists. Instead, BLM attempts to redefine the term "road" (rather than using the *Wilderness Inventory Handbook* definition). According to BLM's 1978 *Wilderness Inventory Handbook*, a "road" is a route that has "been improved and maintained by mechanical means to insure relatively regular and continuous use." 1978 Handbook at 5; see also 2001 Handbook at 9 (reiterating same). In other words, some form of mechanical maintenance must occur often enough to *assure* regular or frequent use. In contrast, a "way" does not receive such maintenance. As described in ONDA's comments, prior to issuance of this EA, the Department of the Interior has used the same, consistent definition of the term "road" for more than 25 years.

BLM admits that none of the routes traversing the area have been maintained within the past quarter century. See Evaluation Form at 24 (Table 1). ONDA's review of BLM's records of road maintenance since 1980 confirms this. Yet BLM claims that all the routes "allow" regular or continuous use. The routes are designated open, so of course travel is *allowed*. On the other hand, travel that is "allowed" is not necessarily "insured." In fact, ONDA's photo documentation clearly reveals deteriorated and overgrown ways that receive little to no use, and certainly not regular or continuous use. Yet, BLM simply asserts that "[t]hese roads continue to serve as unit boundaries[.]" with no further evidence in support of the statement. See Evaluation Form at 3, 7, 10, 13, 17, 20. This includes no photo documentation rebutting ONDA's extensive such documentation.

BLM further obfuscates the issue by suggesting a route that is designated open is a road. BLM states that “any existing route that provides access to private land will be managed as a road and remain open regardless of its current condition or whether it meets the wilderness evaluation definition of a road.” Evaluation Form at 24. However, the distinction between a “road” and a “way” does not rest on whether the route is open, but only on whether it is being adequately maintained.

Finally, BLM makes the blanket statement that all the routes within ONDA’s proposed WSA would be maintained in the future if the condition deteriorated. As a practical matter, the condition on all of these routes already has deteriorated, having been subjected to the erosive and vegetating forces of nature for more than 25 years, and they have not been maintained during that time. The wilderness inventory definition of a road has nothing to do with conjecture about whether maintenance will occur in the future, but rather turns on the route’s *present condition* and *maintenance history*. Maintenance history clearly is absent, so the *present condition* of these routes will ultimately determine whether or not they meet the definition of a road. See, e.g., Evaluation Form at 14 (stating unit contains “2.3 miles of internal maintained roads (6176-0-00) [and] 10.4 miles of internal unmaintained routes” but providing no evidence in support of maintenance statements).

ONDA has provided to BLM a set of photographs and related data documenting the condition of these routes, both in its original inventory and attached to its EA comments. That documentation shows that travel is neither regular nor continuous, nor is such travel assured. The EA has not addressed any of ONDA’s photo documentation. Nor does BLM provide any new documentation of its own (data, photos, or other evidence) to support its assertions, despite claiming that its analysis is based on “additional field visits conducted in 2005 and 2006.” Evaluation Form at 2.

**Naturalness.** The flawed determinations that all the routes in question are “roads” in turn leads to a flawed discussion of “naturalness.” By only recognizing several smaller units, BLM short-circuits a discussion about the enhancement this 82,000-acre addition would bring to the Spaulding WSA by increasing the naturalness that already exists in the WSA.

The naturalness discussion contains other flaws. When discussing naturalness in the Evaluation, BLM repeatedly quotes a percentage of land area that is natural, but does not indicate how the agency arrived at the percentage. See, e.g., Evaluation Form at 21 (summarizing “Natural Condition” percentages). BLM needs to make public what the specific conditions were that were considered unnatural, and exactly how it arrived at these percentages. Without a defined method of calculating the percentages, the number is arbitrary.

As an example, most of the evaluations allude to a wildfire that destroyed sage brush and generated a cheatgrass invasion. Although such areas should be considered natural under the BLM definition, see Evaluation Form at 22 (defining “Natural Condition”) & 2001 Handbook at 12, it is implied at times that all areas in this condition were calculated out of the “natural” percentage. In fact, the Wilderness Act does not address percentages at all, but rather whether the area appears natural *overall*, despite the presence of the imprints of man in places. Incidentally,

there are no maps showing the extent of the wildlife; nor are there any photographs or other information showing how the allotment has recovered in the years since the wildfire.

The Evaluation also states that certain man-made features, such as ways, fences, and reservoirs, are “noticeable” in significant portions of the area. This is belied by the photos in ONDA’s report and by the topographic screening map attached as part of Exhibit A to ONDA’s comments. BLM provides no photographs or other documentation of its own to support its statements on this point, and fails to recognize or discuss the new photos and topographic screening map submitted with ONDA’s comments.

**Opportunities for Solitude or Primitive and Unconfined Recreation.** Again, the flawed determinations that all the routes in question are “roads” in turn leads to a flawed discussion of opportunities for solitude or primitive and unconfined recreation. By only recognizing several smaller units, BLM short-circuits a discussion about the enhancement the addition would bring to the Spaulding WSA by increasing the opportunities that already exist in the WSA. Adding 82,000 acres to an existing WSA would unquestionably further enhance existing outstanding opportunities for solitude or primitive and unconfined recreation.

Throughout the Evaluation, BLM claims the “lack of vegetative screening” makes it “possible to see across most of the [sub]unit from any given observation point. It is therefore hard to avoid others who may be present anywhere in the unit.” This is inconsistent with the neighboring statement that current visitation levels are low in this area (quite an understatement). Elsewhere, BLM claims that “steep hills” have “highly exposed slopes” that *also* preclude outstanding opportunities for solitude. Under BLM’s analysis, it appears that neither flat nor up-and-down terrain can provide opportunities for solitude. **Please explain just what would be required to achieve solitude in an 82,000 acre area.** BLM also claims that 16,000 acres (for the agency’s 1-142 subunit) is too “small” to provide outstanding opportunities for solitude or primitive and unconfined recreation. Evaluation Form at 15. **Again, please explain how one cannot achieve solitude in even a 16,000 acre area (let alone 82,000 acres or more) in one of the most remote corners of Oregon’s high desert. Please explain how your answer comports with Congress’s decision that 5,000 acres is sufficient for potential protection as wilderness.** BLM failed to respond to these questions during this or any previous public comment period.

Most importantly, BLM’s lack of screening assertion simply does not comport with the facts on the ground. The topographic screening map included with Exhibit A to ONDA’s comments demonstrates the dendritic network of peaks, valleys, and drainages in the Proposed Spaulding WSA Addition 2. Once inside the unit, topographic variation is obvious. Topographic screening is provided by up-and-down terrain. Moreover, vegetative screening is not required to provide a sense of solitude, and is not an expected feature of the desert environment. See, e.g., 2001 handbook at 14 (“Do not assume that simply because an area or portion of an area is flat and/or unvegetated, it automatically lacks an outstanding opportunity for solitude . . . . Consideration must be given to the interrelationship between size, screening, configuration, and other factors that influence solitude.”). A visual overview of the peaks, ridges, and valleys of the area reveals a complex topography containing a high density of up-and-down terrain. ONDA prepared the topographic screening map using topographic data readily available to any GIS analyst. Elevation gains are significant and there are numerous peaks providing spectacular 360-

degree views. The photos and the facts directly contradict BLM's statements that topographic screening is limited, but BLM provides no response to this new data in its letter.

The Evaluation also states that the presence of private inholdings limits wilderness characteristics. There is nothing in BLM's wilderness handbooks or elsewhere suggesting the presence of such inholdings directly defeats wilderness character. The inholdings in ONDA's Spaulding Proposed WSA Addition 2 cover a fraction of the 82,000 acre area. See Exhibit A (overview map). Furthermore, these inholdings are not developed in any way that would require motorized access. The presence of a single private landholder "out in the area" to "periodically" access his or her land hardly defeats the otherwise impressive opportunities for solitude or primitive and unconfined recreation present in this 82,000 acre area.

The Evaluation also includes a great deal of information concerning "recreation opportunity spectrum classes" and off-highway vehicle designations under the Lakeview RMP. It is unclear why this information is relevant. Please explain this in your final decision. The touchstone for evaluating whether the Spaulding Proposed WSA Addition 2 possesses wilderness character revolves around *further* such opportunities when combined with the already recognized outstanding opportunities for solitude and primitive and unconfined recreation in the existing Spaulding WSA. BLM's 2001 Handbook also explains that BLM must not use any type of rating system or scale when evaluating each unit on its own. The recreation classes and OHV designations described in this portion of Evaluation Form were designed for completely different (non-wilderness) purposes as part of BLM's land use planning process.

**Additional Issues.** The Evaluation also admits that one 1,560 acre unit was never inventoried at all in BLM's original 1970s inventory. Because BLM claims this "Unnamed Unit" is bounded by roads it once again declines to inventory or further evaluate this area. Because ONDA's wilderness inventory report shows that this area is not bounded by roads and therefore fits within the Spaulding Proposed WSA Addition 2, it should be considered in concert with the larger inventory area and proposal. BLM presents no evidence to controvert ONDA's report. See Evaluation Form at 20. ONDA's inventory information appears to be the only wilderness inventory information in existence for this sub-unit.

In summary, the wilderness analysis renders the decision arbitrary, capricious, and unsupported by law because BLM failed to take a hard look at either the wilderness resource itself or ONDA's significant new information. As such it flaunts the district court's ruling that "[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. Ore. Natural Desert Ass'n v. Rasmussen, 451 F.Supp.2d at 1213. The analysis also violates FLPMA's requirements that BLM engage in a reasoned and informed decision-making process in order to satisfy its multiple use mandate and to prevent unnecessary or undue degradation of the public lands, 43 U.S.C. §§ 1732(a), (b), and the requirement to maintain an updated inventory. Id. at § 1711(a). Finally, BLM's analysis falls short because its discussion of wilderness values and the impacts of the proposed action on wilderness resources must appear in the EA itself, not an appendix. See, e.g., Blue Mtns. Biodiversity Project v. Blackwood, 161 F.3d 1208, 1214 (9th Cir. 1998) ("The EA

contains virtually no references to any material in support of or in opposition to its conclusions. That is where the [agency's] defense of its position must be found.”).

### **Cumulative Impacts**

Finally, the analysis of the cumulative impacts of the alternatives in this EA is inadequate. NEPA requires an analysis of the cumulative effects of the proposed action (which the BLM has not identified). See 40 C.F.R. §§ 1508.7, 1508.25(a)(2). Cumulative impacts are defined as the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions. *Id.* § 1508.8. The BLM must actually assess the cumulative effects of the proposed action, in particular with respect to wilderness resources, new fencing and water projects, impacts to sage grouse and pygmy rabbit populations and habitat, and weeds. See, e.g., Klamath-Siskiyou Wildlands v. Bureau of Land Mgmt., 387 F.3d 989, 997 (9th Cir. 2004) (EAs did not sufficiently identify or discuss incremental impacts). An EA “may be deficient if it fails to include a cumulative impact analysis or to tier to an EIS that has conducted such an analysis.” See Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1071 (9th Cir. 2002). A mere listing of the cumulative effects is insufficient. Neighbors of Cuddy Mtn. v. U.S. Forest Serv., 137 F.3d 1372, 1379 (9th Cir. 1998).

As ONDA explained in detail in its comment letters, the EA contains only very conclusory and/or unsupported comments on cumulative impacts, fails to mention impacts vis-à-vis other currently pending projects, and improperly relies on “tiering” where the cumulative impacts of the newly proposed projects along with other past, present and future projects are not reasonably discussed in the tiered-to documents. For wilderness, for example, BLM has not explained how its analysis and decisions here concerning the Spauling Proposed WSA Addition cumulatively impact its analyses and decisions concerning the remainder of that WSA Addition as well as the other proposed WSAs and the wilderness resource overall on the Beaty Butte Allotment. BLM has not added to or amended its cumulative impacts analysis in the Proposed Decision for this or any other resource at issue. Therefore, that discussion remains inadequate and in violation of NEPA, thus rendering the Proposed Decision arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law.

### **Conclusion**

For the reasons stated above, ONDA hereby protests the Proposed Decision and requests the BLM to modify the EA or prepare an EIS to comply with the requirements of NEPA, FLPMA and all other applicable laws. If you have any questions regarding this protest, please feel free to contact me at the address below.

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Sincerely,

s/ Kristin F. Ruether

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