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**UNITED STATES DEPARTMENT OF THE INTERIOR  
OFFICE OF HEARINGS AND APPEALS**

**OREGON NATURAL DESERT ASS’N,**

Appellant,

Appeal of East-West Gulch Projects

EA OR-010-2004-08

v.

**DECLARATION OF CRAIG MILLER**

**BUREAU OF LAND MANAGEMENT,**

Respondent.

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I, CRAIG MILLER, state and declare as follows:

1. My name is Craig Miller and I reside in Bend, Oregon. The following matters are personally known to me, and if called as a witness I would and could truthfully testify thereto.

2. I am past president of the Board of Directors of Plaintiff Oregon Natural Desert Association (“ONDA”). I also am a member of ONDA and serve as a part-time, contract employee of ONDA as a Geographic Information System (“GIS”) Consultant.

3. As part of my work as a GIS Consultant for ONDA, I am also an active participant in ONDA’s wilderness inventory program. I offer the following assessment of BLM’s response to ONDA’s administrative protest about ONDA’s wilderness inventory information. My statements are intended to demonstrate, among other things, that the BLM ignored or incorrectly characterized most or all of ONDA’s wilderness inventory information related to the

East-West Gulch Project making the BLM's final decision uninformed and unsupported. If the BLM had provided a careful and honest assessment of ONDA's inventory information, I believe the inevitable conclusion would have been that the area does indeed possess wilderness character, and that the East-West Gulch Project would cause irreparable harm to the wilderness values.

4. The BLM claims that wilderness character does not exist in the public lands surrounding the project area. The claim is purportedly based on ONDA's 2005 inventory information along with previous BLM inventory information from 1979 and 1980, additional field visits in 2005 and 2006, and current GIS datasets. However, there is little evidence that ONDA's 2005 inventory information was given serious (if any) consideration. Not once did the EA mention ONDA's photo documentation. Nowhere does BLM credit the new information presented by ONDA as having any merit.

5. BLM does agree with ONDA that the wilderness inventory definition of a road is at the crux of evaluating this area for its wilderness character. Although ONDA has photos that clearly document that routes crossing the proposed area are "ways" and not roads, BLM continues to insist that they are roads. Then BLM uses its disagreement about what constitutes a road to entirely bypass an assessment of ONDA's proposed WSA (Spaulding 2) addition, despite a judge's instruction to do so. For this reason, it will be important to review the wilderness inventory definition of a road, compare BLM's *new* definition in the EA and EA response, and then look at the facts on the ground.

6. The BLM's own definition of a road (as defined by Congress, taken from FLPMA and reiterated in the *Wilderness Inventory Study and Procedures* handbook, p.9), is a route that has "been improved and maintained by mechanical means to insure relatively regular and

continuous use.” This important phrase implies several conditions that must be met in order to meet the wilderness definition of a road.

7. First, the route must have been mechanically constructed or maintained some time in the past. Unless there is clear physical evidence or a historic record that mechanical maintenance has occurred at least once in the past, a route can not be defined as a road.

8. Second, the route must be mechanically maintained on an ongoing basis. A route that has been mechanically maintained several times a year, once a year, or even once every 2–3 years is no doubt a road. If, on the other hand, maintenance has not occurred for 5, 10, or even 25 years, the route is almost certainly not a road. Unless a route is maintained often enough, it will succumb to the erosive processes of weather, vehicle travel, and livestock trampling, and may eventually become obscured by the growth of vegetation, all of which will inhibit travel (photo 67).<sup>1</sup>

9. Third, the route must be in good enough condition that “relatively regular and continuous use” is “insured.” The word “relatively” means “to a relative degree or extent” and “relative” means “not absolute or independent.” Merriam-Webster’s Collegiate Dictionary, Tenth Ed. (1998). “Regular” means normal, typical, natural, or standard. Id. “Continuous” means “marked by uninterrupted extension in space, time, or sequence.” Id. “Insure” means “to make certain esp. by taking necessary measures and precautions.” Id. The wilderness definition of a road is simply a route that is kept in a condition that guarantees frequent travel. Photos 123 and 125 are examples of a route that clearly fits the definition of a road. The route is free of erosion, rocks, vegetation, and other impediments. It shows signs of recent maintenance including culverts, cattle guards, side drainages, and well-defined edges. Conditions that would prevent

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<sup>1</sup> The photo numbers I use in this declaration correspond to the last number(s) after the hyphen in the photo identifications. For example, Photo BTBT20070515-5 is referred to as Photo 5.

assurance of constant travel include ruts, rocks, vegetation, erosion, and obscuration. (See photos 8, 43).

10. In the East-West Gulch Projects EA wilderness evaluation, the BLM has contrived new criteria to define a “road,” thereby circumventing the intent of Congress. To fully appreciate the divergence from the original interpretation, it will be necessary to take a detailed look at the new criteria:

1. ***Regular and Continuous Use:*** vehicular use which has occurred and will continue to occur on a relatively regular basis. Examples are: access roads for equipment to maintain a stock water tank or other established water sources; access roads to maintained recreation sites or facilities; or access roads to mining claims. A high clearance 2 wheel-drive vehicle licensed for highway use is able to travel the route based on field verification.
2. ***Improved and maintained:*** actions taken physically by man to keep the road open to vehicular traffic. Improved does not necessarily mean formal construction. Maintained does not necessarily mean annual maintenance. (EA Appendix B p. 22)

11. Unprecedented is the stated requirement for a specialized vehicle (one with high clearance). Generally, high-clearance vehicles are necessary on routes where travel is difficult, for example eroded, rough, rock-strewn routes, or where vegetation has begun to overtake the route, i.e. a route that fits the category of a way. The resulting modified definition effectively removes the distinction between a road and a way. Using the new definition, a way only could be a route negotiable by vehicles dedicated to cross-country travel. It is not possible that congress had such a picture in mind for their original definition of a road.

12. Another new interpretation is adopted in the “improved and maintained” definition explanation. *Improved* are said to be actions taken physically by man to keep the road open, and not necessarily formal construction. Under this scenario, a traveler using a shovel to

remove a rock or cover a hole could be construed as creating a road! The EA allows virtually *any* route to fall under the definition of a road.

13. Finally, the definition of a road (as modified in the EA) provides for a route where travel is merely *possible* rather than *insured*. Just because a specialized vehicle is capable of negotiating a route does not *insure* regular and continuous travel. A route must be well-defined, have minimal impairments, and have a popular destination for regular and continuous use to be insured.

14. In the response to ONDA's protest, Rasmussen has taken the step of further modifying the definition of a road. Rasmussen states:

1. *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?* (Protest Response p.15)

15. If the amount of actual use is irrelevant, then in what way is continuous use insured? If use is not continuous, then not only is continuous use not insured, it doesn't even exist! Just as unfathomable is the claim that lack of recent maintenance is irrelevant, that it only needs to have had mechanical maintenance documented some time in the past. This qualifier to the definition seems to suggest that if any mechanical maintenance ever occurred on any portion of a route, then it is a road, and will always be a road, no matter its current condition. Under this definition, only routes created entirely by the passage of vehicles would qualify as a *way*. If this was the intent of Congress, it would have defined a road as a route that has *been improved and maintained by mechanical means* and entirely omitted *to insure relatively regular and continuous use*.

16. If one were to accept the new definition of a *road* as provided in the EA and protest response, a *way* can paradoxically be in better condition and more navigable than a road. Under this scenario, route condition is no longer a primary factor, and the distinction between a road and a way becomes incongruous.

17. To better understand the inconsistencies afforded by Rasmussen's revised inventory methodology, it will be instructive to look at *ways* that have never been in dispute, then compare these *ways* to the routes that BLM is now claiming are *roads* that fragment the proposed Spaulding WSA addition into smaller units. ONDA has photographed two undisputed *ways* chosen randomly inside the Spaulding WSA itself (photos 122, 124, and 126). These routes are in a condition that would be negotiable by most vehicles (not only specialized vehicles). They are not eroded, rough, or especially rocky. Lack of recent maintenance is apparent because vegetation and minor erosion exists, and the edges are not well-defined. Although signs of use are evident, the use is insufficient to be considered regular and continuous.

18. Now compare the condition of these undisputed *ways* with those that BLM now contends are roads. Photos 109 and 112 are of route 7116-0-1. (See EA appendix B Map 1, or BTBT\_EA\_MAP). These photos show routes that are in disrepair; vegetated, rocky, eroded, and rarely traveled. 7116-0-00 (photo 117) in fact shows no evidence of having ever been mechanically constructed, and indeed requires a specialized vehicle for travel. Likewise, photos 119 and 120 show route 6156-0-00 in a state of deterioration. These three routes comprise the border between ONDA's proposed WSA and the existing Spaulding WSA, and none of them meet the wilderness definition of a road. They are all in worse shape than the example ways mentioned above, none have been maintained for more than a quarter of a century, and they do

not receive (nor are they insured to receive) regular and continuous use. The Spaulding WSA therefore is contiguous with units 1-138 and 1-143, and not separated by a road.

19. Photo 90 shows the portion of route 6156-0-00 that separates units 1-138 and 1-143. Here the route is overgrown, eroded, and nearly impassable. There has been no mechanical maintenance on this route for at least a quarter of a century, and probably never. This route is certainly in worse condition than the example ways mentioned above; regular and continuous use does not occur, much less insured. Photos 58 and 59 show the north end of route 6156-0-00. This portion of the route separates units 1-142 and 1-143. We see a barely visible, revegetating, eroded track that shows no evidence of mechanical construction or maintenance. In places, it is barely passable (photo 63), and finally disappears completely (photo 66). And yet, incredibly, BLM makes the claim that this route meets the wilderness definition of a road. An unnamed way bypasses this portion of 6156-0-00 and meets up with it further south (photos 70 and 79). Units 1-138 and 1-143 are contiguous and not separated by a road.

20. Photos 106 and 107 show representative portions of 7106-0-00 accessing an inholding within ONDA's proposed WSA. Our photos suggest that of all the routes within the area, 7106-0-00 sees the most traffic. Despite this, the route is rocky and eroded in places, has not had maintenance for more than a quarter of a century, and does not have nor does it ensure regular and continuous use. Once again, travel on the example ways would be less difficult than traveling on this route. Photo 104 shows route 7106-0-1, a rocky, unmaintained, revegetating route. These two route segments separate units 1-137 and 1-138; they are ways, not roads, and the two units are contiguous with each other and not separated by a road.

21. Units 1-138 and 1-142 are separated by a portion of route 6166-0-00. Photos 92 and 99 demonstrate that this portion of route 6166-0-00 is rocky, eroded, overgrown, and nearly

impassable in places. It has had no maintenance for more than a quarter of a century. Regular and continuous use is not insured nor does it occur. Units 1-138 and 1-142 are contiguous and not separated by a road.

22. Another portion of 6166-0-00 separates units 1-137 and 1-142. Photos 28 and 101 demonstrate the unmaintained character of this route (eroded, rocky, overgrown). Regular and continuous use is not insured, nor does it occur. Units 1-137 and 1-142 are contiguous and not separated by a road. Route 6166-0-00 continues further north, separating Units 1-136 and 1-142 (Photos 32, 42, and 53). This route (for all the reasons stated above) is a way, not a road. Route 6166-0-A similarly qualifies as a way, not a road (photo 40). Units 1-136 and 1-142 are contiguous and not separated by a road.

23. Route 6196-0-00 was identified by ONDA as a way, but BLM claims to have performed maintenance on a portion of the route in 2000 (protest response p.15). Although ONDA does not agree that the 6196-0-00, by virtue of one-time maintenance last performed 7 years ago, is a road, we have updated our maps to cherry-stem 6196-0-00 out of our proposed WSA. The portion of route 6196-0-01 that the revised EA and protest response refers to is approximately 450 meters of grading that occurred (inexplicably) near the top of the pass (photo 5). The remainder of the route continues to be rocky, eroded, and overgrown, showing minimal use (photos 8, 11, and 13). Although there is no question that mechanical maintenance was performed on a small portion of the route, there is still no insurance of regular and continuous use because most of the route is not maintained, and the maintenance was done on a portion of the route that is disconnected from a road. Route 6196-0-01 does not meet the wilderness definition of a road and units 1-136 and 1-137 are contiguous with each other. (Whether or not

routes 6196-0-00 and 6196-0-1 meet the wilderness definition of a road, ONDA's proposed WSA remains a single, roadless area that is contiguous with the Spaulding WSA).

24. The photographic evidence that we provide shows several routes found within existing Wilderness Study Areas that undisputedly meet the wilderness definition of a *way* and compares them to the routes that traverse the proposed WSA addition. These are the routes that BLM contends meet the wilderness definition of a road. The evidence clearly shows that BLM's so-called "roads" are less navigable than routes that undeniably meet the definition of a *way*. There can be little question that BLM has arbitrarily attempted to divide a single roadless area identified by ONDA as possessing wilderness character into multiple smaller subunits to evade the Court's order to consider the impacts of the Beaty Butte project on the area's wilderness character.

25. Furthermore, the routes that border the Spaulding WSA are shown to be *ways*, so that the proposed WSA is contiguous with the Spaulding WSA and eligible to be united as a WSA addition. It is obvious that BLM has capriciously refused to consider ONDA's proposed WSA as an addition to the already existing Spaulding WSA.

26. Rasmussen points out that one of ONDA's photos (DT-8) erroneously purported to show route 7116-0-1 (Protest Response p.15). ONDA has corrected this by withdrawing photo DT-8 from the record and taking new inventory data along this route. See Photos 112, 117, 118, 120 (described above in ¶ 18).

27. **Naturalness:** In his protest response, Rasmussen states:

1. *...The BLM's naturalness evaluation is based on many factors, many of which your protest and ONDA's 2005 inventory appear to have either overlooked, ignored, or failed to consider...The BLM's current, on-the-ground conditions found numerous miles of roads, and unmaintained routes in existence that ONDA's inventory failed to document or properly address the negative impacts thereof...Further, the BLM found that these roads and unmaintained routes were "substantially noticeable" within close proximity*

*and did have a negative effect on the natural quality of a given unit...Further, there are numerous miles of existing fences, numerous existing livestock and wildlife water developments, and existing mining disturbances in the area...all of which are human disturbances that are “substantially noticeable” within close proximity and, therefore, have a negative effect on the overall naturalness of a given unit... (Protest Response p.15,16)*

28. There is no question that human disturbances have a negative effect on an area’s naturalness. This is the entire reason ONDA is so concerned about the disturbances that BLM is proposing in this EA. In fact, the disturbances already illegally implemented by BLM have negatively affected the naturalness of the ONDA’s proposed WSA to a serious degree (photos 6, 14, 17, 31, 44). There is also no question that existing ways, fences, and developments are often substantially noticeable within *close proximity*. The great leap in logic, however, is that just because they are substantially noticeable within close proximity that the 82,000-acre area as a whole will appear unnatural. The fact is, the area appears natural throughout (photos 24, 57, 77, 94, 95, 103, 110, 113, 116) and the unnatural features that do exist are noticeable only when one is in *close proximity*. Although noticeable, they are for the most part not *substantially* noticeable, even in close proximity (photos 26, 30, 50, 56, 60, 79, 83).

29. Rasmussen further states:

2. *The aerial percentages listed in the Findings section on page 21 of Appendix B were calculated to demonstrate the actual portion of a given unit where the effects of man are currently substantially unnoticeable. Although a map could have been presented in the wilderness evaluation...it does not change the overall finding in the evaluation that portions of each unit were in a natural condition, and portions were not. (Protest Response p.16)*

30. Rasmussen continues to refuse to elaborate how percentages were calculated. What methods were used? What specific disturbances were included? Why was fire and cheat grass mentioned in the “naturalness” section? How does this compare to existing WSAs using

the same methods? A straight answer to these questions and a map would have gone a long way to ease my suspicions.

31. In the Wilderness Act there is a fair amount of leeway about how many unnatural features are acceptable, but the most important question is whether the man-made features collectively dominate the landscape, and whether they cause the area to appear unnatural throughout. If a portion of the area appears predominantly unnatural, boundaries may be adjusted to exclude that portion from the proposal. See AR 0693–94 (defining “naturalness” factor). The BLM has conveniently omitted answering the question, *does the area appear unnatural throughout the area as a whole?*

**32. Opportunities for Solitude or Primitive and Unconfined Recreation:** In his protest response, Rasmussen continues to evade the central question by insisting that the area was correctly evaluated piecemeal (by subunit) rather than as a whole, and outside the context of an addition to the Spaulding WSA. Until the *road vs. way* issue is resolved, the impasse will remain.


33. ONDA has offered new information to help clarify the inadequacy of BLM’s inventory analysis. Their continued refusal to consider ONDA’s proposed WSA addition as required by the district court jeopardizes the wilderness character of the area. The significant new range “improvements” the agency plans to construct (and already began building in the fall of 2005) will necessarily impact the wilderness values documented in ONDA’s Proposed Spaulding WSA addition, and cause irreparable harm. This includes degradation of overall naturalness due to intrusive man-made structures and road construction, reduced opportunities for solitude because motorized intrusion would be increased by new road construction, and

compromised opportunities for primitive recreation due to displacement of wildlife by continued unsustainable livestock grazing.

34. ONDA is anxious to work with the BLM to arrive at an honest, sensible means of protecting our most valuable resources. These resources include habitat values that support important wildlife (including Western Sage Grouse, pygmy rabbit, Sage Sparrow, Brewer's Sparrow, Burrowing Owl), scenic values, and primitive recreational opportunities. Our opposing conclusions are not simply a matter of opinion, but a fundamental disparity about what Congress intended under the Wilderness Act.

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

DATED this 25<sup>th</sup> day of May, 2007.

A handwritten signature in black ink, appearing to read 'Craig Miller', written over a horizontal line.

Craig Miller