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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

OREGON NATURAL DESERT ASS’N et al.

Plaintiffs,

v.

BUREAU OF LAND MANAGEMENT et al.

Defendants.

Case No. 03-CV-1017-JE

**PLAINTIFFS’ RESPONSE TO
DEFENDANTS’ MOTION TO STRIKE
DECLARATIONS AND EXHIBITS**

INTRODUCTION

Defendants have moved this court to strike the declarations of Dr. Jonathan Gelbard and Kathleen Fite (Dkt # 55, 56), as well as Exhibits 2 and 3 to Plaintiffs’ memorandum in support (Dkt # 52) of their dispositive motion. Because the exhibits and declarations either should have been in the administrative record in the first place or fit within one or more of the exceptions to

the general rule that judicial review of an agency decision is based initially on the administrative record in existence at the time of the decision, Plaintiffs respectfully request the court to deny Defendants' motion.

ARGUMENT

I. THE EXHIBITS ARE PROPERLY BEFORE THE COURT BECAUSE THEY EITHER FIT WITHIN ONE OR MORE OF THE RECORD-REVIEW EXCEPTIONS OR SHOULD HAVE BEEN IN THE ADMINISTRATIVE RECORD IN THE FIRST PLACE.

Judicial review of an agency action “typically focuses on the administrative record in existence at the time of the decision and does not encompass any part of the record that is made initially in the reviewing court.” Southwest Ctr. for Biol. Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1450 (9th Cir. 1996). The Ninth Circuit has, however, crafted narrow exceptions to this general rule. Thus, district courts may admit extra-record evidence:

(1) if admission is necessary to determine “whether the agency has considered all relevant factors and has explained its decision,” (2) if “the agency has relied on documents not in the record,” (3) “when supplementing the record is necessary to explain technical terms or complex subject matter,” or (4) “when plaintiffs make a showing of agency bad faith.”

Lands Council v. Powell, 379 F.3d 738, 747 (9th Cir. 2004) (quoting Southwest Ctr., 100 F.3d at 1450). These exceptions “operate to identify and plug holes in the administrative record.” Id.

Importantly, and as Defendants fail to acknowledge in their brief, “in NEPA cases, the court may extend its review beyond the administrative record and permit the introduction of new evidence where the plaintiff alleges ‘that an EIS has neglected to mention a serious environmental consequence, failed adequately to discuss some reasonable alternative, or otherwise swept stubborn problems or serious criticism . . . under the rug.’” Ore. Natural Res. Council v. Lowe, 109 F.3d 521, 526–27 (9th Cir. 1997) (citing Animal Def. Council v. Hodel, 840 F.2d 1432, 1437 (9th Cir. 1988)) (some internal quotes omitted). This is precisely the case

here, where Plaintiffs have asserted the BLM failed to comply with NEPA's requirements to consider a reasonable range of alternatives and take a "hard look" at the environmental consequences of the proposed action, as well as several key land use planning process requirements under FLPMA, such as the requirement to inventory the public lands and use that inventory information during preparation of an RMP. Therefore, Plaintiffs' Exhibits 2 and 3 are properly before the court because they fit the first and third exceptions enumerated above, and Exhibit 2 should have been in the administrative record in the first place.

A. ONDA's Wilderness Inventory Report Fits Within the Exceptions Because It Shows the BLM Did Not Consider All Relevant Factors and Adequately Explain its Decision, and It Explains Complex Subject Matter.

Exhibit 3 is Plaintiff Oregon Natural Desert Association's (ONDA) Vale District "Wilderness Inventory Report and Recommendations," which was submitted to the BLM's Vale District on February 6, 2004. As described in Plaintiffs' opening brief in support of their dispositive motion, this document is a detailed report presenting the results and recommendations of ONDA's inventory of wilderness values on over 2.2 million acres of public land (almost exclusively within the SEORMP planning area) in southeast Oregon. See Pl. Br. at 26–27, 39–40. ONDA followed the wilderness inventory protocol established in the BLM's own Wilderness Inventory Study and Procedures handbook, see Pl. Ex. 4, and the final report includes maps identifying the boundaries of each area in question, annotated road and photo logs with GPS locations cued to the maps, and narratives analyzing each inventory unit under the BLM's definition of wilderness characteristics and documenting how that information differs from the information in prior inventories conducted by the BLM regarding wilderness values for the area. See Pl. Br. at 26–27, 39–40. See also Ex. 3 at cover letter (explaining inventory protocol).

Although Defendants assert that Plaintiffs submitted the exhibit "with nary a mention of

how or why the Court should consider” it, Def. Br. at 6, this simply is not true. In Plaintiffs’ opening brief, they explained the relevance of ONDA’s wilderness inventory report under two separate claims. First, the Report is relevant to Plaintiffs’ NEPA claim that the BLM failed to take the requisite “hard look” at the environmental consequences of the proposed action on non-recommended wilderness study areas (“WSAs”) and non-WSA roadless areas. Pl. Br. at 27. As Plaintiffs explained, “At a minimum, the BLM has a duty to inventory for this type of information—which, prior to ONDA’s submission of the Report, the BLM did not possess at all—and a duty to present and discuss the information in the FEIS at the RMP level of BLM land use planning, and consider the impacts of its other land use decisions on these wilderness-eligible areas.” *Id.* Second, the Report is relevant to Plaintiffs’ FLPMA claim that the BLM acted arbitrarily and capriciously by adopting the SEORMP without conducting an inventory of the wilderness resource on the public lands and using that information in its preparation of the RMP. Pl. Br. at 35–40. See also 43 U.S.C. §§ 1711, 1712. Again, Plaintiffs explained that ONDA’s inventory “is exactly the type of information the BLM refused to collect during its preparation of the SEORMP, and exactly the type of information FLPMA requires the agency to collect during the resource management planning process.” *Id.* at 40.

It therefore is difficult to grasp how Defendants can accuse Plaintiffs of “nary a mention” of why the court should consider the Report. The Report is directly relevant to the question of whether the BLM considered all relevant factors and has explained its decision(s) in the SEORMP. Thus, it fits the first extra-record evidence exception. The Report also explains “complex subject matter” in that it provides an example, in strict accordance with the BLM’s own wilderness inventory protocol, of the information the BLM should have collected and used during the resource management planning process. Because the agency completely failed to

collect this information during the seven years it took to prepare the SEORMP, the information does not appear in the administrative record. The only wilderness inventory information cited in the administrative record is the BLM's 1989 "Oregon Wilderness Final EIS," see AR at 15278, which Plaintiffs argue is outdated because on-the-ground conditions, formerly planned projects, and other resource values have changed over the course of the fifteen years since that EIS was published. See Pl. Br. at 25–26. ONDA's Report shows one 1.3 million acres' worth of examples of wilderness values the BLM refused to inventory for and consider in the SEORMP. Therefore, the Report is properly before the court and should not be stricken.

B. The BLM's Technical Reference on Microbiotic Crusts Should Be in the Administrative Record.

Exhibit 2, the BLM's Technical Reference 1730-2 titled, "Biological Soil Crusts: Ecology and Management," should have been in the administrative record in the first place. See Pl. Br. at 19, n.8 (noting same). Defendants argue that "Exhibit 2, although published in 2001, [does not] belong in the Administrative Record because it was not available to BLM prior to the time that the SEORMP was sent to the printer for publication." Def. Br. at 5, n.1. However, the final agency action Plaintiffs challenge in this lawsuit is the BLM's adoption of the SEORMP, which occurred when the agency signed its Record of Decision on or about April 3, 2003. See 68 Fed. Reg. 16,307 (Apr. 3, 2003) (stating State Director of Oregon/Washington BLM had issued ROD approving the SEORMP); see also AR at 4256 (SEORMP ROD, erroneously dated "September 2002"). While the Technical Reference is only dated "2001," it was at least in existence by the time ONDA submitted its protest to the BLM Director on December 5, 2001. AR at 4151 (citing Tech. Ref. 1730-2). This means the BLM had this document in its possession for at least sixteen months before issuing the decision challenged in this action. Examination of this document clearly would not thwart the "long-standing rule that 'the focal point for judicial

review should be the administrative record already in existence” at the time the decision was made. Inland Empire Public Lands Council v. Glickman, 88 F.3d 697, 703 (9th Cir. 1996) (citing Camp v. Pitts, 411 U.S. 138, 142 (1973)).¹ Thus, it is properly before the court and should not be stricken.

II. THE GELBARD AND FITE DECLARATIONS ARE ADMISSIBLE BECAUSE THEY FIT WITHIN ONE OR MORE OF THE EXCEPTIONS TO THE RULE LIMITING REVIEW TO THE RECORD.

The declarants are a scientist and a naturalist who have had experience and involvement directly germane to the decisions the BLM made in the SEORMP. Defendants argue Plaintiffs failed to “establish a proper foundation on which either Dr. Gelbard or Ms. Fite may proffer the vast majority of the myriad opinions and allegations set forth in their declarations as federal evidence.” Def. Br. at 6. This assertion is without support because the declarations further substantiate relevant information already submitted to the agency as part of the administrative record and serve to highlight relevant factors not adequately considered by the BLM in its preparation of the SEORMP.

Dr. Gelbard is a professional biologist whose special areas of interest and expertise include the biology, management and restoration of desert and grassland ecosystems, the impacts of invasive weed species in those systems, and the major causes of the spread of weeds in those systems, including livestock grazing and off-highway vehicle use. Gelbard Decl. at ¶¶ 1–3. Defendants admit Dr. Gelbard is qualified “to speak to invasive weed issues” and the impacts of

¹ Even if this document had to be admitted via one of the record-review exceptions, its admission would be necessary to help the court determine whether the BLM considered all relevant factors and explained its decision. As Plaintiffs explained in their opening brief, this Technical Reference is the leading scientific study of microbiotic crusts, their role in arid ecosystems, and the impacts of land use management (including livestock grazing) on crusts. Pl. Br. at 20. The administrative record contains almost no useful information on microbiotic crusts, which increases the importance of this document in showing the BLM failed to consider all relevant factors, and makes this document necessary to explain complex subject matter. Id.

roads on weeds, but dispute that he is qualified to offer expert opinions on microbiotic crusts or the effects of grazing. Def. Br. at 9. This conclusory assertion is without merit, as Dr. Gelbard explains in detail the close relationship between weeds and microbiotic crusts in these ecosystems, Gelbard Decl. at ¶¶ 3, 6, 17–19, 21–31, 61, as well as the impacts of livestock grazing (including the grazing proposed in the SEORMP) on crusts, *id.* at ¶¶ 36, 38, 41, 61, and on the spread of weeds. *Id.* at ¶¶ 33–38, 41. Dr. Gelbard explains relevant issues the BLM neglected to consider in adopting the SEORMP, based on his experience, publications, review of the relevant scientific literature and review of the SEORMP FEIS. Thus, his declaration adequately explains the record and highlights relevant factors contained in the administrative record but not considered by the agency. Because Dr. Gelbard clearly is qualified to discuss each of the issues he raises in his declaration, Defendants’ unsupported argument questioning his qualifications should be rejected and his declaration should not be stricken.

Katie Fite is the Biodiversity Director of Plaintiff Western Watersheds Project and has been involved in the SEORMP planning process from its beginning. Fite Decl. at ¶¶ 2, 4–5. She has spent an extensive amount of time in the field throughout the SEORMP planning area examining resource conditions and the impacts of grazing, OHV use and other factors on those resources. *See id.* at ¶¶ 6, 23, 39–40. Her detailed on-the-ground knowledge of resource conditions in the planning area is directly relevant to explaining the record and highlighting relevant factors the BLM neglected to consider during the SEORMP planning process. *Id.* at ¶¶ 7–13, 15, 21–23, 27, 31, 39. For example, Ms. Fite describes specific locations and areas where the BLM has employed vast networks of spring developments, pipelines, watering troughs and other structural “range improvements” in an attempt to make the status quo number of AUMs authorized under the SEORMP sustainable. *Id.* at 8, 15, 22–23. This is relevant to Plaintiffs’

claim that the BLM acted arbitrarily and capriciously by adopting the SEORMP without even considering reducing the number of AUMs authorized under the plan. See Pl. Br. at 13–17. Her discussion of the cumulative impacts of grazing throughout the planning area further elucidates issues not adequately considered by the BLM and relevant to Plaintiffs’ claims that the agency failed to take a “hard look” at the environmental consequences of the proposed action. See, e.g., Fite Decl. at ¶¶ 18–20, 22–23 (weeds); 19, 23 (microbiotic crusts); 29, 31, 33 (wilderness values). In short, the Fite Declaration will aid in determining whether the BLM considered all relevant factors and adequately explained its decision, and helps to explain complex subject matter by providing concrete examples from throughout the vast geographic area covered by the SEORMP, to support Plaintiffs’ claims. Thus, the Fite Declaration is properly before the court and should not be stricken.

III. THE RECORD DOES NOT SUPPORT DEFENDANTS’ ARGUMENT THAT PLAINTIFFS FAILED TO SUBMIT THIS INFORMATION TO THE BLM IN A TIMELY MANNER.

Defendants argue that Plaintiffs failed to submit the Gelbard and Fite declarations, as well as the ONDA Wilderness Inventory Report, to the BLM in a timely manner and that allowing Plaintiffs to rely on the documents “would run roughshod” over the general rule that review is limited to the record in front of the agency at the time of its decision. Def. Br. at 3–4. To support this argument, Defendants rely on the Supreme Court’s statement that “[p]ersons challenging an agency’s compliance with NEPA must ‘structure their participation so that it . . . alerts the agency to the [parties’] position and contentions,’ in order to allow the agency to give the issue meaningful consideration.” Dept. of Transp. v. Pub. Citizen, 124 S.Ct. 2204, 2213 (2004) (citing Vermont Yankee Nuclear Pwr. Corp. v. Natural Res. Def. Council, 435 U.S. 519, 553 (1978)). In that case, the Court found that because the respondents did not during the NEPA

process raise the issues they later complained about in court, the agency “was not given the opportunity to examine” those issues. Id. at 2213–14.

In this case, Plaintiffs did raise the issues complained of and did so at every opportunity throughout the SEORMP planning process. Defendants acknowledge that “Plaintiffs were involved in virtually every stage of [the] process.” Def. Br. at 4. At each of those times cited by Defendants, Plaintiffs raised all of the issues discussed in the Gelbard and Fite declarations, as well as the wilderness inventory issue. See, e.g., AR at 3997 (FEIS, Vol. 3 at 242–51) (1999 ONDA comments on Draft EIS, including detailed discussions of range of alternatives and cumulative impacts, noxious weeds, rangeland vegetation, juniper management, soils, microbiotic crusts, fire strategy, water and riparian resources, fish and wildlife populations and habitat, off-highway vehicles, wild and scenic rivers, wilderness values, grazing allocations and AUMs, structural “range improvements,” native and non-native seeding, failure to assess lands suitable for grazing and lands “chiefly valuable” for grazing, failure to include numerical and objective standards for grazing management, shortcomings of “Best Management Practices,” criticism of “adaptive management,” and detailed recommendations for a conservation alternative including quantitative management standards).

Inexplicably, Defendants assert that “[a]t none of these points in the process and in none of these various submissions did Plaintiffs provide to BLM the subject declarations or exhibits that they now seek to add to the record in this court.” Def. Br. at 4. Plaintiffs question how they could have submitted the Gelbard and Fite declarations during the SEORMP planning process since the declarations were created in 2004. More important, though, is the fact that the declarations do not introduce “new rationalization[s]” to attack the BLM’s decision. See id. Rather, they further explain the injuries to Plaintiffs’ organizational (and individual members’)

interests and the high desert ecosystems Plaintiffs seek to conserve, the significant factors the BLM failed to consider during the SEORMP planning process, and the threats these ecosystems face and how the SEORMP's management schemes do not adequately address those threats. Plaintiffs also plainly could not have submitted ONDA Wilderness Inventory Report during the SEORMP planning process because the inventory took place in 2003 and the report was completed in early 2004. The timing is not insignificant, though: if the BLM had, as is required by FLPMA, conducted an inventory of wilderness resources throughout the planning area at some point during the seven-plus-year SEORMP planning process, and used that inventory information during its preparation of the SEORMP, perhaps ONDA would not have had to conduct its own southeast Oregon wilderness inventory.

Defendants also complain that Plaintiffs did not request the BLM to supplement the administrative record with the Report during this litigation. Def. Br. at 6. Based on Defendants' statement in response to Plaintiffs' January 30, 2004 letter requesting supplementation of the administrative record—that information which “post-dates the Record of Decision” is “untimely” and “does not warrant inclusion” in the administrative record, see Lacy Decl., Attach. 5—Plaintiffs had no reason to believe Defendants would supplement the record with ONDA's subsequently completed Wilderness Inventory Report. Instead, ONDA submitted the Report directly to the BLM on February 6, 2004. Thus, even under the Lands Council dicta, 379 F.3d at 747, n.11 (“Normally, if an Agency's administrative record is incomplete, we would expect litigants to seek to supplement the record in the agency before seeking to expand the record before the district court”), Plaintiffs acted reasonably by providing the Report to the BLM. More fundamentally, however, if the temporal boundary for what should be included in the administrative record indeed stops at the point at which the agency makes its decision, then

ONDA's Wilderness Inventory Report is more properly before this court as an exception to the extra-record evidence rule than as a supplemental part of the administrative record itself.

Because the Report fits under two of the exceptions discussed above, it is therefore properly before the court.

CONCLUSION

For the above-stated reasons, Plaintiffs respectfully request the court to deny Defendants' motion to strike.

DATED this 26th day of November, 2004

Respectfully submitted,

s/ Peter M. Lacy

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