



Oregon Natural Desert Association

VIA EMAIL

September 11, 2009

Thomas E. Rasmussen, Field Manager
Lakeview Resource Area
Bureau of Land Management
Lakeview District Office
1301 South G Street
Lakeview, OR 97630

Re: Comments on DOI-BLM-OR-L050-2009-0040-EA (“Horseshoe Pasture Riparian Improvement and Livestock Grazing Management Strategy”)

Dear Mr. Rasmussen:

Please accept these comments from the Oregon Natural Desert Association (“ONDA”) concerning BLM’s evaluation of alternatives intended to address continuing concerns over wet meadow and riparian conditions within the Horseshoe Pasture of the Juniper Mountain Allotment. We incorporate by reference our past comments and concerns over BLM’s previous iterations of this project.

ONDA supports protecting and restoring riparian habitats being degraded by current grazing practices, as well as conserving wilderness values. If BLM will update its wilderness evaluation to recognize and conserve the important wilderness values present within the citizen-proposed Juniper Mountain Wilderness Study Area, ONDA will support BLM’s selection of a modified Alternative 7. We explain our proposed modifications, as well as our concerns and requests with respect to your wilderness determinations, in the paragraphs that follow.

As written, Alternative 7 allows for construction of a 5-mile fence (called the “Horseshoe Fence”) along the ridgeline and side slopes of Juniper Mountain. The fence is intended to tie together existing pasture fences to provide better control of cattle and avoid unauthorized cattle trespass into the Horseshoe meadows below. The alternative would permanently eliminate grazing within the Horseshoe Pasture. Existing gates along BLM route 7155-AO¹ leading into the Horseshoe Pasture would be locked and no cattle guards would be installed. As we understand it, this route would therefore be closed within the Horseshoe Pasture under this

¹ This route, 7155-AO, appears to be identified as, or turn into, 7155-O-1A on the maps accompanying BLM’s wilderness inventory update. In these comments, we will refer to it as “7155-AO/7155-O-1A.”

alternative. Route 7155-O-1AA, which runs east-west within the Horseshoe Pasture, has already been closed via the Lakeview RMP (2004), and would remain closed under this alternative. The EA indicates this route closure has not yet been implemented, but would be once this project decision is finalized.

We do not support any alternative that would close or remove livestock from only the east half of the Horseshoe Pasture. Under these alternatives, a newly-created west half of the pasture would be of little to no value to grazing operations because it would not create a viable grazing pasture. As described in the EA, there are far greater benefits to multiple resource values in permanently closing the entire Horseshoe Pasture to grazing. Among other things, the additional two miles of fence required under alternatives splitting the pasture in half also would add \$16,000 to the cost of the project and would significantly increase the length of fence subject to deterioration, livestock trailing, spread of weeds and unauthorized livestock trespass in the cow-free east half of the pasture. In short, permanent removal of livestock from the entire Horseshoe Pasture makes the most sense, ecologically and economically. It also makes the most sense from a wilderness perspective because it involves fewer miles of new fencing and would remove and restore more habitat and natural values to this area that's so important to the larger roadless area on and around Juniper Mountain and Horseshoe Meadow.

We support the route closures described above because, as the EA recognizes, barring motorized access to the Horseshoe Pasture will benefit vegetation, water quality, soils, wildlife populations and habitat, and wilderness and primitive recreational values. At the two proposed locked gates on the 7155-AO/7155-O-1A route, BLM should install hiker-friendly passage through the fence to ensure easy access for those who wish to explore the newly cow-free area on foot. This will address the concern expressed in the EA over public access to the Horseshoe area.

For route 7155-O-1AA, BLM's final decision should ensure that the closure is accompanied by immediate restoration of the route to a natural condition, including native seeding. The route should be restored, at a minimum, to a single-track hiking trail. This will be consistent with the EA's purpose of restoring wet meadow condition and riparian function, as well as serving the broader, land use plan purposes of actively restoring areas no longer subject to detrimental impacts from livestock grazing, including habitat for special status species such as sage grouse.

Within the newly-closed Horseshoe Pasture, BLM's final decision also should provide for immediate removal of all human-made features (e.g., old rangeland projects or developments no longer necessary after the pasture is closed to grazing), and active restoration of the stream channel to natural conditions. The EA currently discusses the latter only under Alternative 2B. Under that alternative, BLM explains that restoration activities would include (1) cutting young, invasive western juniper trees in about 50 acres of the Horseshoe Meadow area, and (2) stabilizing headcuts in the meadow area by adding rock or wood to headcut sites, reshaping the channel and relaxing the slope of the nick point, planting riparian vegetation, and/or installed in-channel check dams.

We support including these types of active restoration activities as part of a modified Alternative 7. Coupled with the elimination of livestock grazing, this type of active restoration would most expressly further and quickly achieve the project's basic purpose of restoring wet meadow condition and riparian function.² If BLM adopts this alternative, ONDA would like to explore with BLM the possibility of organizing volunteer teams to help BLM implement what would be an exciting restoration project for our members and volunteers.

What we remain concerned about with this project is BLM's decision not to study impacts to wilderness in the EA. We have been urging BLM for close to five years to recognize the important wilderness values present in a 68,000 acre roadless area that covers Juniper Mountain and much of the surrounding grazing allotment. Although BLM has put together a more detailed wilderness update than it had previously undertaken, we still believe there are some basic flaws with the update and BLM's conclusions concerning the presence or absence of wilderness characteristics.

Because a key part of this project involves installing a 5 mile fence along the ridgeline and side slopes of Juniper Mountain itself, BLM must ensure its wilderness analysis is accurate in order to gain ONDA's support for what is otherwise a positive ecological restoration project. The EA's cumulative impacts section describes what's at stake in terms of adding additional miles of fencing and rangeland infrastructure to this allotment. If BLM will reevaluate ONDA's citizen wilderness proposal by studying the wilderness values present in the larger roadless area identified by ONDA, we will support adoption of a modified Alternative 7 as described above. However, it is important that BLM study the larger roadless area and recognize the outstanding wilderness values present in this unique area.

This need not change the authorized grazing operations nor the active restoration activities as described in the EA; but it will ensure that even with the addition of five new miles of fence, the area is acknowledged to possess wilderness characteristics that should otherwise be conserved for present and future generations. It is ONDA's hope that Congress may someday protect this area as Wilderness. As a first step, it is vital that BLM recognize special areas like this that meet Congress's definition of wilderness.

The basic flaw with BLM's latest wilderness evaluation is the agency's decision to dissect the larger Juniper Mountain proposed WSA into five smaller units. Based on the ID Team's decisions that most routes identified in the ONDA inventory as "ways" are instead

² We note also that if BLM's preferred alternative turned out not to be one that closes the Horseshoe Pasture, we would have concerns about your decision not to fully study an alternative that would permanently remove livestock from the entire allotment (see Alternative 10, dropped from detailed analysis). The economic reasons BLM cites for not fully studying this alternative have no bearing on whether it is a reasonable alternative for NEPA purposes. Whether or not such an alternative would be a preferred alternative, the analysis of undoubtedly significant, positive environmental effects of completely removing domestic livestock from this large area, would be very valuable in terms of studying the negative environmental consequences of maintaining any level or type of grazing in degraded areas on the allotment.

“roads” for wilderness inventory purposes, BLM studied these smaller units (1-71 Gray’s Butte, 1-72 Juniper Mountain, 1-85 Eagle Butte, 1-86 Natural Corral Draw and “Unnumbered Units”). For the most part, though, BLM’s photographs do not show conditions different than ONDA’s. In fact, many of BLM’s photos strongly support ONDA’s prior inventory findings that these routes meet the wilderness definition of ways rather than roads. We provide further specific comments below.

As you know, a “way” for wilderness inventory purposes is a route that is maintained solely by the passage of vehicles. A road, by contrast, is a route that has been (1) improved or maintained (2) by mechanical means (3) to insure relatively regular and continuous use. *See* 1978 Handbook at 5; 2001 Handbook at 9–10 (both defining “roads” and “ways” for wilderness inventory purposes).

This long-standing definition is “the one definition found in the legislative history, exactly.” 1978 Handbook at 2; *see also Charles Schwenke*, 67 IBLA 201, 203 (1982) (“In determining whether a particular vehicle route is a way or a road, BLM has relied upon a definition of the term ‘roadless’ set forth in H.R. Rep. No. 94-1163, 94th Cong., 2d Sess. 17 (1976).”). Thus:

The word “roadless” refers to the absence of roads which have been improved and maintained by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road.

1978 Handbook at 5; 2001 Handbook at 9; *Charles Schwenke*, 67 IBLA at 203. The record BLM has provided us shows that several of BLM’s “road” determinations in the Juniper Mountain proposed WSA are inconsistent with these long-standing definitions.

Route 6165-0-1C: BLM’s photos, like ONDA’s, show no roadside berms. The route is little more than a two-track through sagebrush. BLM’s Road Analysis Form claims only that the route was bladed at some time in the past. It notes that there are no maintenance records for this route. By the time a traveler reaches BLM photos points 2142 and 2143, the route becomes very rocky and rough. As BLM’s form indicates, it is only passable by a high-clearance vehicle at this point.

The form claims the route was bladed at some point in the past, but indicates the route has not been maintained. BLM claims there is evidence of improvements to the road, citing a road sign and a gate where the road passes a fence line. Signs and gates are not road improvements. These are not the types of things that ensure regular and continuous use of a route. Thus, because there is no evidence of improvements or maintenance, this is a way, not a road.

There are other problems evident on BLM’s form. First, whether a route is “**passable**” is not a factor in determining whether it is a road or a way. BLM claims on its evaluation form that the “route is currently passable by two-wheel drive high-clearance vehicle[s] along its entire length.” This is not the standard under the long-standing road definition. That definition asks instead whether the route has been improved or maintained by mechanical means “to insure

relatively regular and continuous use.” This is a higher standard than merely documenting that a route is “passable.” The route must be mechanically improved or maintained to “ensure” “relatively regular and continuous” use.

Under BLM’s lower standard, a route can be “passable” or “useable” so long as a “high clearance” or specialized vehicle can travel the route. This is inconsistent with definition of a road, which contemplates “ensuring” “regular and continuous” use—not merely by BLM staff or by grazing permittees, but including the general public. Congress intended for the Wilderness Act to preserve wilderness quality lands “for the American people of present and future generations.” 16 U.S.C. § 1131(a). Accordingly, the road definition drawn from the legislative history of FLPMA is not limited to mere “passability” by specialized vehicles. Rather, it contemplates “regular” and “continuous” use by the American people. A rough, overgrown, rocky two-track—although passable by a high-clearance pick-up truck or ATV—cannot be driven by an ordinary passenger vehicle—and therefore is not a “road” for wilderness inventory purposes. The sorts of primitive routes BLM would include as roads therefore are properly classified as ways under the plain terms of the road definition.

Next, a route’s **purpose** is not a factor in determining whether it is a road or a way. Applying its flawed “passable” criterion, BLM emphasizes several perceived purposes of the route to support the “road” finding. Basing road/way determinations on a route’s purpose is inconsistent with BLM’s Organic Act Directive (“OAD”) 78-61,³ which states plainly:

The purpose of the use of a route is not a factor to consider in determining whether a route is a way or a road. If a route has been improved and maintained by mechanical means to insure relatively regular and continuous use, it is a road, regardless of the purpose of that use.

OAD 78-61, Change 2, at 4 (Question 5) (underlining in original).

The “purpose” of a road may be recorded for information reasons but may not be used as a deciding factor in determining whether or not a route meets the road definition. This *determination must be made based only on the evidence of improvement, maintenance, and regular and continuous use, and no other factor.*

OAD 78-61, Change 3, at 6 (underlining in original; italic emphasis added).

In its evaluation, BLM focuses on the route’s purposes in providing grazing permittee access to manage grazing operations, and on BLM’s administrative use of the routes. Presumably

³ BLM issued OAD 78-61 in several parts in 1979 “to clarify various matters addressed in the Wilderness Inventory Handbook.” OAD 78-61, Change 2, at 1. It represents BLM’s long-standing interpretations of key terms related to the agency’s wilderness inventory authority and obligations, including the definition of a “road.” See, e.g., *Philip Allen Desert Wilderness Coalition*, 77 IBLA 330, 333 (1983) (“This definition [of a ‘road’] has been interpreted by BLM in Organic Act Directive (OAD), 78-61, Change 2 (June 28, 1979), at 4 . . .”).

BLM wants to keep the routes open as “roads” so as not to foreclose these private and administrative uses. What is important to recognize here is that even routes classified as “ways” for wilderness purposes remain available for continued permittee and agency use—and this is so even if the area is designated as a WSA.⁴ Moreover, livestock grazing is a “grandfathered” use under the Wilderness Act and thus allowed (with certain limitations not relevant here) to continue even in designated WSAs. 16 U.S.C. § 1133(d)(4); *see also* IMP at 12–13 (explaining the nature of “grandfathered” uses for livestock grazing). As the IBLA has explained:

[T]he extent to which wilderness designation would affect vehicle access through this portion of the unit is properly considered during the study phase of the wilderness review process, when competing uses of the land are compared. . . . The inventory phase is designed solely to identify those areas of the public lands having the wilderness characteristics defined by Congress.

Philip Allen Desert Wilderness Coalition, 77 IBLA at 334 (discussing BLM’s decision to classify a route as a boundary road because closing it “should the area become designated a[s] wilderness[] would be impractical”) (underlining in original; internal quotation marks omitted). As a result, BLM improperly relies on the route’s purposes when it should have focused solely on whether the route has been improved or maintained by mechanical means to ensure relatively regular and continuous use.

Finally, **speculation as to future maintenance** is not a factor in determining whether a route is a road or a way. BLM speculates that the route “would be maintained in the future if it became impassable.” This too is inconsistent with Congress’s definition of a road. Again, it relies on the flawed “passable” criterion. Even more importantly, the road definition asks BLM to determine a route’s *present, actual condition*—not what its condition might become in the future.

Likewise, a route’s assigned “maintenance level” in a BLM transportation plan is not a factor in determining whether it is a road or a way. BLM claims the disputed route is a road because it “is part of the BLM’s transportation network and has an assigned a [sic] road maintenance level of 2 within the facility asset management system (FAMS) database.” All or nearly all the routes BLM inventoried within ONDA’s Juniper Mountain proposed WSA are designated as Maintenance Level 2. According to BLM, this level is assigned to roads where management objectives require the road to be opened for limited administrative traffic. Typically, “these roads are passable by high clearance vehicles.” But a maintenance level assigned to a route on a map or in a transportation plan has nothing to do with its actual, present condition, and whether there is any actual evidence of mechanical construction or improvement.

Route 7155-00-00: BLM’s “road” determination here suffers from many of the same flaws described above. These include reliance on the route’s purposes and the fact that it is

⁴ *See, e.g.*, BLM, H-8550-1, *Interim Management Policy for Lands Under Wilderness Review* (“IMP”), at 15 (noting that vehicles may travel on existing ways and providing limited exceptions where vehicles may travel off boundary roads and existing ways).

included in BLM's transportation network, a reference to blading "at some point in the past," little or no evidence of modern day improvements or maintenance, and a reliance on speculative future maintenance "if needed." Moreover, it appears BLM has no photographs of this route except for photos at each end. The only photos of the middle portion of the route are ONDA's photos (CQ16 through CQ034. Photo CQ029 shows little more than a two-track passing through grass amidst uninterrupted sagebrush. Other photos show rough, rocky conditions (e.g., CQ16, CQ18) or merely the faintest, two-track path through grass or sagebrush (e.g., CQ20, CQ 21, CQ 22, CQ 28). Route 7155-00-00 is properly classified as a way rather than a road.

Route 7155-0-1: Again, BLM's "road" determination here suffers from many of the same flaws described above. These include reliance on the route's purposes and the fact that it is included in BLM's transportation network, "some evidence" of past construction in "some locations," little or no evidence of modern day improvements or maintenance, and a reliance on speculative future maintenance "if needed." BLM's evidence for this route is arguably even more suspect than the routes discussed above. Even though the FAMS database states that "the route has not been improved," BLM claims there is "some evidence" of mechanical construction as an unspecified time in the past. BLM admits there are no road maintenance records for the route. BLM claims that a gate and a road sign are evidence of mechanical "improvement" to the road. For the reasons already discussed above, none of this evidence could satisfy BLM's burden to prove that this is a road and not a way.

The photographs further support that this is a way, not a road. BLM's photo 2613.S, for example, shows a user-created drive-around where the route had deteriorated to such a point that users had begun to drive around an impassable section. BLM photo 2629.N also shows a braided road channel where users have created multiple routes or tracks in order to navigate this unmaintained stretch. These are the types of user-created sections—properly classifying this route as a way for wilderness inventory purposes—that the Office of Hearings and Appeals recently cited in a decision staying BLM's decision to move forward with a fence project on the West Wagontire Allotment in the Burns District. *Ore. Natural Desert Ass'n v. Bureau of Land Mgmt.*, OR-020-09-06 (Order dated May 11, 2009). Other photos show that the route is extremely rough and rocky in many places (e.g., BLM photo 2615.S, 2616.N, 2617.S, 2618.N, 2622.N). Again, this contradicts any assertion that the route has been improved or maintained to ensure regular and continuous use.

In the face of extensive evidence provided by ONDA in its wilderness inventory report, and based on the BLM evidence actually further supporting ONDA's conclusions, BLM would, if challenged, fail to overcome its burden to provide any evidence to contradict the ONDA report—and therefore support the agency's conclusions this and other key routes are roads. It is well-established that "[t]he contention that a route is, in fact, a road must be supported by proof of mechanical improvement and mechanical maintenance[.]" *Edward H. Howe*, 76 IBLA 27, 29 (1983) (underlining in original). Under NEPA, BLM's environmental analysis, including its assertion that no wilderness values exist in the project area, "shall be supported by *evidence* that the agency has made the necessary environmental analyses." 40 C.F.R. § 1502.1 (emphasis added). *See also Ore. Natural Desert Ass'n v. Bureau of Land Management* ("ONDA v. BLM"), 531 F.3d 1114, 1143 (9th Cir. 2008) (citing same, concluding that, by not discussing potential impacts to wilderness values in the NEPA document, BLM "did not provide the 'full and fair

discussion' of the issue required by NEPA, and also did not properly respond to ONDA's comments"); *ONDA v. Rasmussen*, 451 F.Supp.2d at 1212–13 (“ONDA did not have a responsibility to provide accurate monitoring regarding any changes to the wilderness characteristics in the [project area] before the EA was issued. BLM did.”).

Route 7155-0-1A: Again, BLM's “road” determination here suffers from many of the same flaws described above. These include reliance on the route's purposes and the fact that it is included in BLM's transportation network, construction in some locations more than 30 years ago, little or no evidence of modern day improvements or maintenance, and a reliance on speculative future maintenance “if it became impassable.” None of the photographs shows evidence of current mechanical maintenance or improvement that would ensure regular and continuous use. The form is consistent with this: it indicates the only record of any improvement or maintenance is a letter from the permittee explaining that some “[m]inor maintenance was conducted on short portions of this route between 1968 and the mid-1970's [sic].” BLM acknowledges “there is no evidence of recent maintenance.” In fact, BLM photos 2607.S and 2608.N show a braided route in which users have created several routes or tracks in order to navigate deteriorated, unmaintained sections of the route. As the OHA found in *ONDA v. BLM*, OR-020-09-06, this is evidence of a user-created way maintained solely by the passage of vehicles. The evidence therefore indicates this is a way, not a road.

Moreover, if BLM adopts an alternative under which this route is closed where it passes through the Horseshoe Pasture, this also eliminates this route as a “road” for wilderness inventory purposes. Even if its sections to the north and south of the Horseshoe Pasture were cherry-stem roads, BLM units 1-71 and 1-72 would be a contiguous roadless area via the unroaded Horseshoe Pasture.

Route 7155-0-1C: Again, BLM's “road” determination here suffers from many of the same flaws described above. These include reliance on the route's purposes and the fact that it is included in BLM's transportation network, construction in some locations more than 30 years ago, and little or no evidence of modern day improvements or maintenance. Here, ONDA's photos show once again that parts of the route have deteriorated to the extent that travelers have created drive-arounds (e.g., ONDA photo CQ32). BLM offers no photo documentation of the route except at its northern and southern termini. Based on the evidence in the documents BLM has produced, this is a way, not a road.

Route 7135-0-0: This route forms a boundary for ONDA's proposed WSA. BLM's field inventory shows that at least two miles of the route, south of the private land, is being naturally reclaimed “due to a lack of use and lack of recent maintenance” (e.g., BLM photo 2110). BLM therefore must study whether, because only a portion of this route can be cherry-stemmed into the roadless area, the ONDA Juniper Mountain proposed WSA should be expanded within BLM's unit 1-71.

Conclusions Concerning Wilderness. Based on the above discussion, all of the key interior routes BLM identified as roads are properly classified as ways for wilderness inventory purposes. The evidence strongly suggests BLM's “road” determinations are incorrect. ONDA asks BLM to reevaluate these determinations. If BLM's 1-71, 1-72, 1-86, 1-85 and unnumbered

units are combined as a single roadless area, the analysis of whether that larger area is in largely natural condition, and whether it contains outstanding opportunities for solitude or for primitive and unconfined recreation, should be much different. It is well-accepted that the larger an area, the more likely it is to be in overall natural condition and to contain such outstanding opportunities. Indeed, the EA recognizes the “overall natural character of the allotment.” Because BLM’s current naturalness and outstanding opportunities discussion is based on smaller sub-units of the larger roadless, we will not comment further on it at this time. We look forward to reviewing BLM’s findings based on the larger roadless area.

Conclusion

Thank you for the opportunity to participate in the planning effort for this proposal. For the reasons stated above, ONDA recommends that the BLM revise its wilderness inventory, review the larger roadless area and acknowledge the outstanding wilderness values present in this unique landscape. In so doing, BLM should revise the EA to recognize the presence of wilderness character within the project area, and explain why this project will benefit wilderness values. If BLM will do this, ONDA will support a BLM decision to adopt a modified Alternative 7 as described above. If you have any questions regarding these comments, please feel free to contact me at the address below, or Brent Fenty or Craig Miller in our Bend office.

Sincerely,

s/ Peter M. Lacy

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