4160 (ORB050)

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Larry Maxwell
Maxwell Cattle, Inc.
23036 Maxwell Road
Lakeview, Oregon 97630

NOTICE OF FINAL DECISION
To Implement
West Wagontire Allotment-Tired Horse Butte Fence
Environmental Assessment
OR-08-025-030

Dear Mr. Maxwell:

1. Background

The West Wagontire Allotment-Tired Horse Butte Fence Environmental Assessment (EA) analyzed constructing a fence to divide the Tired Horse Butte Pasture into two pastures. This fence was recommended in the 2003 West Wagontire Allotment Evaluation to ensure livestock grazing management continues to meet Standards for Rangeland Health, Guidelines for Livestock Grazing Management, and allotment resource objectives.

2. Introduction

You are receiving this Decision because you are an interested public, permit holder of record or lienholder of record. The West Wagontire Allotment-Tired Horse Butte Fence EA OR-08-025-030, is tiered to the September 1991 Three Rivers Proposed Resource Management Plan/Final Environmental Impact Statement (PRMP/FEIS). Relevant information contained within the aforementioned document is incorporated by reference.

3. Public Comments and Protests Received and Responses

A copy of the original EA and unsigned Finding of No Significant Impact (FONSI) were mailed to Federal, State and County Agencies and other interested public on October 7, 2008. In addition, a public notice was posted in the Burns Times-Herald newspaper on October 8, 2008.

The Burns District Bureau of Land Management (BLM) received public comments on the West Wagontire Allotment-Tired Horse Butte Fence EA. BLM responses to public comments were provided with the proposed decision.

A protest from Oregon Natural Desert Association of the West Wagontire Allotment-Tired Horse Butte Fence EA proposed decision was timely received by the Burns District BLM. BLM responses to protest rationale are included in a separate document (enclosed).

4. Decision

Having considered the protest letter, protest rationale contained within, and the BLM responses to the protest rationale, it is my decision that the protest did not reveal the need for additional analysis of the West Wagontire Allotment-Tired Horse Butte Fence EA. BLM specialists reviewed the protest rationale in the protest letter and provided detailed responses to the relevant protest rationale in a separate document provided in addition to this decision. In addition, the original EA and FONSI have been supplemented to address issues identified in public comments and protest rationale; however this information did not warrant additional analysis of the effects in the EA. The issues raised in the protest rationale were not found to be substantive and did not reveal any reasoning for further delay in issuing a final decision for the West Wagontire Allotment-Tired Horse Butte Fence EA.

Additionally, a FONSI found the Proposed Action and No Action Alternative analyzed in OR-08-025-030 did not constitute a major Federal action that would adversely impact the quality of the human environment. Therefore, an EIS was unnecessary and will not be prepared.

Having considered the Proposed Action, No Action Alternative, and associated impacts and based on analysis in EA OR-08-025-030 and with consideration of public comments, it is my Final Decision to implement the Proposed Action (Alternative B) which includes fence construction and changes to livestock grazing management.

The Proposed Action is to construct 4.5 miles of barbed wire fence to divide the Tired Horse Butte Pasture into two pastures (East and West Tired Horse Butte Pastures). The fence will begin from the east-west pasture boundary fence between Tired Horse Butte and Chandler Butte Pastures, just west of where the existing fence crosses Sand Hollow Lost Creek Road (beginning in T. 25 S., R. 22 E., Sec. 25, SE¼NE¼). It will then extend north along the west side of Tired Horse Road and end at the northern Tired Horse Butte Pasture boundary fence (ending in T. 25 S., R. 22 E., Sec. 1, NE¼NW¼). The north end of the fence will veer slightly to the northwest in order to avoid private property. The fence will run between the southern trough filled by Sand Hollow Well and Tired Horse Road. This will allow the southern trough to service the proposed West Tired Horse Butte Pasture and the northern trough to service the proposed East Tired Horse Butte Pasture (see Map B for trough and pipeline locations).

The proposed fence will provide management to manipulate the east-west livestock distribution within the Tired Horse Butte Pasture by allowing implementation of an improved grazing rotation. The new grazing rotation will amend the grazing rotation established in the 2005 West Wagontire Allotment Management Plan (AMP), as follows:

Year 1

Rams Butte Pasture	10/15 – 01/15 and 05/15 – 05/20
West Chandler Butte Pasture	11/16 – 01/15
East Chandler Butte Pasture	04/01 – 05/15
West Tired Horse Butte Pasture	03/01 – 04/01
East Tired Horse Butte Pasture	01/16 – 02/28

Year 2

Rams Butte Pasture	10/15 – 01/15
West Chandler Butte Pasture	11/16 – 01/15
West Tired Horse Butte Pasture	03/01 – 05/05
East Tired Horse Butte Pasture	01/15 – 02/28
East Chandler Butte Pasture would be rested	

Design Features of the Proposed Action

Construction of the fence will consist of approximately 4.5-miles of fence that meets the standards for cattle, deer, and antelope in a multiple-use area, as described in BLM Handbook H-1741-1 – Fencing. The proposed fence will be a 38-inch tall, 3-strand barbed wire fence, with a smooth bottom strand. The wire spacing will also follow the standards with the bottom strand 16 inches off the ground, the middle and bottom strands will be 10 inches apart and there will be 12 inches between the top and middle strands.

In accordance with the 1992 Three Rivers RMP, the fence will be designed to prevent passage of livestock without stopping movement of wildlife. In accordance with the Visual Resource Management practices, found in the BLM Handbook H-1741-1 – Fencing, the proposed fenceline will not be bladed or scraped, and the most practical and unobtrusive materials will be used. In addition, when practical and consistent with the need for fencing, the fence will be located parallel to natural features, where the impact to wildlife is minimized, and the fence will be constructed in a straight line(s). Where the fence crosses an existing road, a gate will be installed. One gate will be needed when the fence crosses Tired Horse Reservoir Road in the center of the pasture (approximately T. 25 S., R. 22 E., Sec. 13, NE¼SE¼).

5. Rationale

This decision is based on meeting the Purpose and Need for the Action, consultation with Oregon Department of Fish and Wildlife, affected grazing permittee, local Harney County Government, public comments, and conformance with applicable laws and regulations. I have also selected the Proposed Action (Alternative B) based on the following decision factors (outside laws and regulations). Decision factors are additional questions or statements used by the decision maker to choose between alternatives that best meet project goals and resource objectives. These factors generally do not include satisfying legal mandates, which must occur under all alternatives. Rather decision factors assess, for example, the comparative cost, applicability, or adaptability of the alternatives considered.

Will the Final Decision to implement the Proposed Action:

a. Provide rangeland resources to grazing permittees and other users of the public lands?

Yes, the Tired Horse Butte Fence EA provides rangeland resources to grazing permittees by maintaining current Active Use AUMs while promoting rangeland health to enhance the opportunity of other users of the public lands for activities such as hunting, wildlife viewing, and motorized and nonmotorized recreation. The No Action Alternative will only partially meet this factor. Although rangeland resources will continue to be provided to grazing permittees and other users, the benefits associated with improved rangeland health to such resources, will not be realized.

b. Achieve project objectives?

Yes, the proposed fence will modify current grazing management by adjusting the timing and distribution of livestock grazing to ensure rangeland health standards and guidelines continue to be met. Improved livestock distribution and utilization patterns will maintain or improve plant communities within the Tired Horse Butte Pasture, subsequently maintaining or improving wildlife habitat, including sage-grouse. The No Action Alternative will not ensure rangeland health standards and guidelines are met in the future. Heavy utilization and lack of growing season rest may lead to downward trends in rangeland condition and wildlife habitat in the east side of the Tired Horse Butte Pasture.

c. Promote conservation of cultural resources?

Yes, the proposed fence will be inventoried for cultural resources prior to construction. Sites eligible for listing to the National Register of Historic Places within the area of effect will be avoided to mitigate potential effects. If avoidance is not a viable mitigation option, other measures such as surface collecting and mapping, testing, and full-scale excavation data recovery will be used.

d. Improve livestock distribution?

Yes, the proposed fence will increase control over the timing of spring and winter use, allowing management to decrease use on the east side of the Tired Horse Butte Pasture and increase use on the west side of the pasture. This will improve livestock distribution and promote more even utilization patterns. The No Action Alternative will not provide for improved livestock distribution within this pasture. Heavy utilization will continue in the east side of the Tired Horse Butte Pasture.

e. Achieve project objectives in a reasonable timeframe (1 to 5 years)?

Yes, upon construction of the proposed fence, changes to livestock grazing rotations and enhanced livestock distribution and utilization patterns will be immediate. Improvements in rangeland health will be realized after the first year of the proposed rotation, especially in the east side of the pasture. Benefits to wildlife species, including sage-grouse, will occur after the first year of the proposed rotation, as rangelands currently receiving heavy utilization will now provide residual herbage for forage and nesting cover.

f. Apply livestock grazing management that improves desirable plant communities by:

1. **allowing plants periodic opportunity to recover vigor?**
2. **allowing plants periodic opportunity for seed to ripen?**
3. **allowing plants periodic opportunity for seedlings to become established (i.e., recruitment)?**
4. **allowing litter to accumulate between plants?**

Yes, the proposed fence will implement a grazing rotation which provides plant communities periodic growing season rest from livestock grazing. The proposed rotation will apply an early spring grazing treatment (March 1 to April 1) every other year in the West Tired Horse Butte Pasture. This treatment will provide plants an opportunity to recover after utilization of early plant growth.

By removing livestock before all spring and summer precipitation occurs, plants will be able to store carbohydrates, set seed, and maintain vigor. A winter grazing treatment (January 15 to February 28) will occur each year in the East Tired Horse Butte Pasture. This treatment will occur when most plant species are dormant, have completed their life cycles and stored maximum carbohydrate reserves for the following growing season. Improved utilization patterns will allow for residual herbaceous plant material to accumulate on-the-ground as litter. The No Action Alternative will not allow for control on the timing of grazing; therefore, plants grazed in the spring will continue to be grazed the following winter. This will not allow for improvement of desirable plant communities.

g. Promote economic stability for the local and rural economy dependent upon public land grazing and public land uses?

Yes, the Proposed Action will provide economic benefits to the economies of Harney and Lake Counties through the purchase of supplies, equipment, and contractors to build the fence. The proposed fence is designed to improve rangeland conditions, which will maintain or increase forage production for livestock and wildlife. By maintaining a viable ranching operation and improving rangeland conditions in West Wagontire Allotment, the traditions associated with ranching communities of Harney and Lake Counties will be maintained. In addition, providing sustainable grazing management that improves habitat conditions for wildlife will in turn increase economic opportunities for recreational activities such as hunting.

h. Promote resistance to noxious weed invasion and establishment by encouraging diverse, productive, and vigorous plant communities?

Yes, grazing management will be implemented which will improve livestock distribution and utilization patterns, thus maintaining or improving rangeland health and encouraging diverse, productive, and vigorous plant communities. Maintaining healthy plant communities will promote resistance to noxious weed invasion and spread. The proposed fence is an activity which could open up niches for weed introductions. Ensuring vehicles and equipment used in construction are free of noxious weed seed or plant parts will aid in preventing introductions to the site. The BLM will closely monitor those disturbed areas for at least 3 years after the fence is constructed. If weeds are found, they will be treated as soon as possible using the most effective and appropriate methods available. The No Action Alternative will not promote resistance to noxious weeds as heavy utilization and lack of growing season rest will reduce plant vigor and rangeland health.

i. Would the alternative balance the 1992 Three Rivers RMP wildlife objectives (including conservation guidelines and life history needs for sage-grouse) with management direction for Vegetation and Grazing Management?

Yes, construction of the fence will follow Conservation Guidelines found in the Greater Sage-grouse Conservation Assessment and Strategy for Oregon. In accordance with the 1992 Three Rivers RMP, the fence will be designed to prevent the passage of livestock without stopping movement of wildlife. The proposed fence will implement a grazing rotation which provides plant communities periodic growing season rest from livestock grazing, and promotes more even utilization patterns. This will improve rangeland health, subsequently improving winter range for wildlife. The No Action Alternative will continue heavy utilization in the east side of the Tired Horse Butte Pasture, subsequently reducing wildlife habitat within the area.

I did not select the No Action Alternative because the continuation of current management under the No Action Alternative will not (1) ensure livestock grazing management continues to meet the Standards for Rangeland Health and (2) address allotment resource objectives from the 2005 AMP and the Purpose and Need of improving livestock distribution and utilization patterns within this pasture.

6. Authority

The enclosed West Wagontire Allotment-Tired Horse Butte Fence EA OR-08-025-030 is tiered to the September 1991 Three Rivers PRMP/FEIS. Relevant information contained within this document is incorporated by reference. The Proposed Action has been designed to conform to the following documents, which direct and provide the framework for management of BLM lands within Burns District:

- Taylor Grazing Act (43 U.S.C. 315), 1934
- The National Environmental Policy Act (42 U.S.C. 4321-4347), 1970
- Federal Land Policy and Management Act (43 U.S.C. 1701), 1976
- Endangered Species Act (16 U.S.C. 1544), 1973
- Public Rangelands Improvement Act (43 U.S.C. 1901), 1978
- 1992 Three Rivers RMP/Record of Decision/Rangeland Program Summary
- August 12, 1997 Standards for Rangeland Health and Guidelines for Livestock Management for Public Lands Administered by the BLM in the States of Oregon and Washington
- 1998 Burns District Noxious Weed Management Program EA (OR-020-98-05)
- BLM National Sage-grouse Habitat Conservation Strategy (2004)
- Greater Sage-grouse Conservation Assessment and Strategy for Oregon, August 2005
- West Wagontire AMP, 2005
- State, local, and Tribal laws, regulations, and land use plans

7. Appeal Procedures

Any applicant or other person whose interest is adversely affected by the final decision may file an appeal in accordance with 43 CFR 4.470 and 43 CFR 4160.3(a) and 4160.4. The appeal may be accompanied by a petition for a stay of the decision in accordance with 43 CFR 4.21, pending final determination on appeal. The appeal and petition for a stay must be filed in the office of the authorized officer, as noted above, within 30 days following receipt of the final decision.

This appeal shall state the reasons, clearly and concisely, why the appellant thinks the final decision is in error and otherwise comply with the provisions of 43 CFR 4.470 which is available at the BLM office. The petition for a stay and a copy of the appeal must also be filed with the Office of Hearings and Appeals at the following address:

United States Department of the Interior
Office of Hearings and Appeals
Departmental Cases Hearings Division
405 South Main Street, Suite 400
Salt Lake City, Utah 84111

Should you wish to file a petition for a stay, you must file within the appeal period. In accordance with 43 CFR 4.21(b)(1), a petition for a stay must show sufficient justification based on the following standards:

1. The relative harm to the parties if the stay is granted or denied.
2. The likelihood of the appellant's success on the merits.
3. The likelihood of immediate and irreparable harm if the stay is not granted.
4. Whether or not the public interest favors granting the stay.

As noted above, the petition for stay must be filed in the office of the authorized officer.

Sincerely,

/signature on file/

Richard Roy
Three Rivers Resource Area Field Manager

USDI, Bureau of Land Management
Three Rivers Resource Area, Burns District

Bureau of Land Management Response to
Protest Rationale Contained in Oregon Natural Desert Association's January 16, 2009
West Wagontire Allotment-Tired Horse Butte Fence Environmental Assessment
Protest Letter

February 11, 2009

Protest Rationale:

In our comments, we allege that BLM has failed to study reasonable alternatives to the proposed fence. This is required under NEPA.

BLM response to Protest Rationale:

The NEPA only requires analysis of reasonable alternatives. "What constitutes a reasonable range of alternatives depends on the nature of the proposal and the facts in each case." "Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable…" (Questions 1b and 2a, CEQ, Forty Most Asked Questions Concerning CEQ's NEPA Regulations). To be given serious consideration as a reasonable alternative, alternatives to the Proposed Action must: 1) meet the Purpose and Need for Action; 2) be consistent with RMP Objectives; 3) must differ in design; 4) have substantially different effects in which to analyze; 5) be feasible; and 6) its implementation must be realistic. There is no requirement to analyze alternatives which do not meet these criteria. No other reasonable alternatives were identified to accomplish both the purpose and need. Please also see BLM's response to Protest Rationale below regarding elimination of specific alternatives identified by ONDA.

Protest Rationale:

The purpose of the project is the [to] "modify current grazing practices within Tired Horse Pasture by adjusting the timing and distribution of livestock use to ensure continuance of achieving Standards for Rangeland Health"…ONDA commented that there are many other, less environmentally destructive alternatives BLM should have studied. We recommended, for example, reducing cattle numbers or AUMs on the pasture or allotment, adjusting the rest-rotation grazing cycle, increasing rest periods on the pasture or allotment, or using more riders either with or without concomitant grazing reductions. While we would like BLM to select one of these less damaging alternatives, it also is important that studying these alternatives will help inform BLM's environmental analysis and the public's ability to fully evaluate the environmental consequences of the selected alternative.

BLM response to Protest Rationale:

You are correct in stating the purpose of the project is to modify current grazing practices by adjusting the timing and distribution of livestock. However, in addition, the need for the project is to "improve livestock distribution and utilization patterns" (EA page 2). Simply reducing livestock numbers, and maintaining the current grazing rotation, would not resolve the issue of disproportionate utilization in the east side of the pasture. The EA (page 2) explains how "spring use disproportionately occurs on the east side of the pasture" because the topography of this area provides for earlier plant development (green up) to occur. Although reducing livestock numbers would reduce utilization within this pasture, spring grazing would continue to be focused on the east side of the pasture. The EA (page 2) also explains that the east side of this pasture has "larger areas of lower elevation" which provides land more suitable for winter grazing. Because spring grazing treatments are followed by winter grazing treatments (the following year), repeat defoliation of forage plant species would continue, without critical growing season rest between grazing treatments. This type of alternative would not fully meet the purpose and need of adjusting the timing and distribution of livestock to improve utilization patterns; therefore, it did not receive consideration as a reasonable alternative.

Using riders to actively herd livestock away from portions of the pasture receiving disproportionate utilization (east side) in lieu of the proposed fence was not analyzed as an alternative for several reasons. It is the experience of the BLM that active herding is only feasible in situations where reliable water sources and desired forage are well distributed throughout a given pasture. In this instance, the two reliable water sources located in the west side of the pasture have failed to prevent disproportionate utilization in the east side, even when water is turned off at the two troughs located in the middle of this pasture. During the spring, livestock will seek out areas containing the most palatable forage. In this case, the low elevation and earlier plant growth in the east side of this pasture will naturally draw livestock to this area. Actively herding livestock away from this area would likely only be successful for a matter of hours before livestock drift back.

The EA (page 8) has been updated to include rationale for not analyzing additional alternatives under the "Alternatives Considered but Eliminated from Further Analysis" section.

Protest Rationale:

BLM states that reducing grazing to 1 out of 3 years instead of building a fence "was not analyzed as an alternative because it would require the permittee to find alternative forage 2 out of 3 years." NEPA's basic purpose is to highlight the environmental consequences of a proposed action. Detailed study of an alternative that shows a more environmentally sensible approach is necessary to fully assess a less protective approach. Moreover, NEPA is about assessing impacts to the environment, not to private financial interests.

BLM response to Protest Rationale:

As stated in BLM's response to ONDA's original comments: "Reducing livestock grazing to 1 out of 3 years was not analyzed as an alternative because it would not adjust grazing management to meet the Purpose and Need of the project. Although grazing would be limited to 1 out of 3 years, on the years when grazing occurs, disproportionate utilization would continue in the eastern half of the Tired Horse Butte Pasture."

Although ONDA may consider them "private financial interests," the NEPA requires BLM to analyze all affected resources when making a reasonable decision; this includes Social and Economic Values. Reducing livestock grazing to 1 out of 3 years would require the permittee to find alternate forage 2 out of 3 years. This would pose negative impacts on the viability and sustainability of the affected permittees' operation, as alternate forage sources have become largely unavailable in the area and the cost of feeding hay is prohibitively higher than pasture. The Proposed Action implements a grazing rotation which would meet all rangeland health standards and guidelines and allotment-specific resource objectives, while providing a reliable forage source to the permittee each year.

Protest Rationale:

The EA fails to provide any concrete analysis of cumulative impacts. In fact, it lacks a cumulative impacts section altogether.

BLM Response to Protest Rationale:

The environmental consequences discussion described all expected effects including direct, indirect and cumulative on resources from enacting the proposed alternatives [see EA pages 8-28 (Cultural Heritage, Noxious Weeds, Wetland/Riparian Zones and Water Quality, Upland Vegetation, Biological Soil Crusts, Soils, and Wildlife/Locally Important Species and Habitat)]. A distinction between direct and indirect effects was not made and in many cases cumulative effects were only described as effects. All effects are considered direct and cumulative; therefore, use of these words may not appear.

The CEQ states "[g]enerally, agencies can conduct an adequate cumulative effects analysis by focusing on the current aggregate effects of past actions without delving into the historical details of individual past actions." This is because a description of the current state of the environment (Affected Environment by resource) inherently includes the effects of past actions. In addition, the Introduction Section of this EA, specifically the Purpose of and Need for Action, identifies past actions creating the current situation.

Reasonably Foreseeable Future Actions (RFFA) include those Federal and non-Federal activities not yet undertaken, but sufficiently likely to occur, that a Responsible Official of ordinary prudence would take such activities into account in reaching a decision. These Federal and non-Federal activities that must be taken into account in the analysis of cumulative impact include, but are not limited to, activities for which there are existing decisions, funding, or proposals identified by the bureau. These RFFAs must *fall within the geographic scope and timeframe* of the analysis being prepared. Rights-of-ways have been issued for wind energy testing on Round Top Butte and Glass Butte, averaging approximately 6 air miles northeast of the proposed fence. The only resource of concern *potentially* affected by all three projects would be sage-grouse. However:

1) The eastern portion of the Tired Horse Butte Pasture currently provides low quality sage-grouse habitat due to concentrated grazing pressure and heavy utilization of herbaceous vegetation. Enhanced vegetative conditions in the area would benefit sage-grouse by increasing forbs, which are important for females in the spring, and potentially provide more cover. The Three Rivers RMP/ROD (page 2-63) states, "Implement grazing systems on all sage grouse ranges to improve forb production and availability;"
2) The proposed fence is being constructed according to Conservation Guidelines found in the Greater Sage-grouse Conservation Assessment and Strategy for Oregon (Strategy);
    a. The proposed fence location is 1.2 and 2.5 miles from the nearest leks which is well outside the 0.6-mile radius for projects of this nature as described in the Strategy (page 76);
3) To reduce the likelihood of mortalities from collision, white plastic clips would be applied at regular intervals to all fence strands and between every fencepost (J. Connelly, et al. 2000);
4) Construction of the fence would not occur from March to May in order to reduce possible stress to sage-grouse during the strutting season;
5) No permanent impairment to sage-grouse habitat in the area would occur from implementation of the Proposed Action as there would be minimal surface disturbance as no blading would occur;
6) The Round Top Butte wildfire in 2007 eliminated most of the suitable habitat in the area near the met towers;
7) Yearlong habitat for sage-grouse would not be available for at least 15 years due to the Round Top Butte wildfire;
8) No permanent impairment to sage-grouse habitat in the area of the met towers would occur as the met towers are temporary in nature and would have minimal surface disturbance;
9) The met tower locations also comply with Instruction Memorandum OR-2008-014 which requires met towers to be located outside a 2-mile radius from leks or known concentration areas. The sage-grouse leks within 2 miles of the proposed met towers are inactive;
10) The met tower testing locations are in different water- and viewsheds.

Therefore, the Proposed Action when combined with wind testing would have no cumulative effects to sage-grouse habitat. The residual effects to sage-grouse after applying guidance from the Oregon Strategy and other mitigation would not be measurable.

Another RFFA is a geothermal lease sale; however, lease issuance alone does not authorize any ground-disturbing activities to explore for or develop geothermal resources without site-specific approval for the intended operation. Therefore, if there are no effects from sale of a lease there cannot be cumulative effects. The only other known RFFA within the geographic scope and timeframe of this analysis is continued livestock grazing.

There is no requirement to have a separate cumulative impacts section. Regulations require agencies to describe and analyze the impacts but not to labor over which category under which to place them. Both direct and indirect impacts accrue and interact to cause cumulative impacts.

Please see Chapter III, C. of the EA for a discussion on cumulative effects.

Protest Rationale:

BLM's refusal to provide this information [sage-grouse map], and to study it in the EA, is contrary to, and in violation of applicable law.

BLM Response to Protest Rationale:

Greater sage-grouse lek locations were acquired from the Oregon Department of Fish and Wildlife (ODFW) and used in the EA to analyze potential impacts of the project to sage-grouse (EA page 12, 13). Sage-grouse are sensitive to disturbance at leks. To minimize potential disturbance to leks and at the request of ODFW, BLM provided information concerning lek locations in descriptive text rather than with a visual illustration. Information was not withheld, and descriptions in the EA disclosed the locations of leks at the scale of Quarter-Quarter Sections. Additionally, the distance of each lek to the proposed fence was also provided (EA page 12). In response to this protest comment, a project map with sage-grouse leks is now incorporated for this project, with the caution that it not be widely distributed, to protect sage-grouse during their breeding activities.

Protest Rationale:

BLM is working with an inadequate 0.6 km (1.0 mi.) [should read 0.6 mi (1.0 km)] buffer [around sage-grouse leks].

BLM Response to Protest Rationale:

The 1 km buffer around active leks (EA page 7) is recommended in the guidelines published by the ODFW in *Greater sage-grouse conservation assessment and strategy for Oregon: a plan to maintain and enhance populations and habitat* (Hagen 2005). The recommendation is that new livestock facilities be 'at least 1 km from leks to avoid concentration of livestock, collision hazards to flying birds, or avian predator perches' (Hagen 2005, page 56). This is the most current strategy developed for sage-grouse by the ODFW.

Connelly et al. (2000) provides additional recommendations to 'increase the visibility of fences and other structures occurring within 1 km of seasonal ranges by flagging or similar means if these structures appear hazardous to flying grouse.' Although the closest point of the fence would be beyond the 1 km buffer from the nearest lek, the BLM proposes to attach permanent plastic tabs on the wires between posts to increase their visibility to wildlife (EA page 7). Based on project design (EA page 6-7), there would be minimal manipulation of sagebrush habitat during installation of the fence.

Protest Rationale:

"The project area includes outstanding wilderness values in roadless areas outside of existing Wilderness Study Areas (WSAs). If implemented, this project will have direct, indirect and cumulative environmental impacts to outstanding wilderness characteristics on these public lands." "For this project, the EA should present and analyze the effects of the proposed action on wilderness values in the project area."

BLM Response to Protest Rationale:

The issue of impacts to potential wilderness values was raised by ONDA for the project area. In 2008 an Interdisciplinary Team (IDT) analyzed both the information ONDA submitted and BLM information on current conditions along with field verification (where needed) as part of updating its original wilderness inventory. Based on that analysis, the BLM determined that its 1980 inventory finding that BLM-administered lands within the project area do not possess wilderness character remains valid. As such, wilderness characteristics were not analyzed further in the EA (EA page 5).

Recently, the Interior Board of Land Appeals *[ONDA, 173 IBLA 348 (2008)]* found that when BLM has completed an inventory of the wilderness resource and reached the conclusion that no lands meeting the necessary wilderness criteria are present in the project area, there is no NEPA requirement that BLM include a wilderness resource discussion in an EA. The Board stated, "There is no NEPA requirement that BLM include a wilderness resource discussion in an EA, unless the proposed action will result in environmental impacts to such a resource. When BLM has compiled the 'hard data' in satisfaction of its FLPMA inventory obligation that support its determination that the requisite wilderness characteristics are not found within the project area outside of existing WSAs, that 'hard data' need not be repeated in the EA concluding that no impact will occur to the wilderness resource." *[ONDA, 173 IBLA 354 (2008)]*

Protest Rationale:

"At the outset, we note the particular importance of studying the *cumulative* impact to wilderness values here because BLM has not studied wilderness values at the land use plan level in the Three Rivers Resource Area."

BLM Response to Protest Rationale:

BLM did update its wilderness inventory for the project area and found that wilderness character is not present. As a result, implementing the proposed project would not have any cumulative effects to wilderness character.

Protest Rationale:

Although BLM appears to have begun updating its wilderness inventory for portions of the Three Rivers Resource Area, it has not done so for the entire resource area. Nor has it studied wilderness character at the land use plan level for more than 15 years. The Ninth Circuit Court of Appeals recently confirmed that BLM is obligated to do so Ore. Natural Desert Ass'n v. Bureau of Land Management ("ONDA v. BLM"), 531 F. 3d 1114 (9th Cir. 2008). Today ONDA's report shows that many routes identified as roads in the 1980 inventory no longer meet BLM's road definition. Thus, ONDA's larger 196,000-acre Lonesome Lakes proposed WSA should now be analyzed.

BLM Response to Protest Rationale:

The wilderness inventory information provided by ONDA is being considered where updates to BLM's wilderness inventory are needed for project planning. However, there is no requirement under Section 201 of the Federal Land and Policy Management Act of 1976 that the BLM update its entire wilderness inventory at one time. BLM's unit boundary determinations may not be the same as those identified by ONDA. If BLM determines that an ONDA proposed WSA contains more than one BLM unit, each of those units may be updated at the same time or individually as needed.

Specifically regarding ONDA's proposed Lonesome Lakes WSA, BLM found that there are boundary roads separating BLM's Tired Horse Butte Unit from the rest of ONDA's Lonesome Lakes proposed WSA. Given that the project area does not extend past BLM's Tired Horse Butte Unit, the rest of ONDA's Lonesome Lakes proposed WSA has not been updated at this time. BLM's finding for the Tired Horse Butte Unit does not preclude BLM from updating its wilderness inventory information for BLM-administered lands in the rest of the ONDA's Lonesome Lakes proposed WSA as needed in the future.

As with any resource value of concern, wilderness character found outside WSAs will be addressed in future land use planning efforts, but there is no timing requirement for undertaking this planning effort, nor is there any requirement to maintain those values until such planning occurs. ONDA v. BLM did not prescribe a methodology for considering wilderness characteristics.

Protest Rationale:

The wilderness inventory unit boundary roads identified by BLM are not roads because there is no evidence of recent and regular maintenance and they have not been maintained for regular and continuous use by an ordinary passenger car and because they do not receive regular and continuous use by the public.

BLM Response to Protest Rationale:

The following guidance from the Draft H-6300-1-Wilderness Inventory Maintenance in BLM Oregon/Washington (July 2007) was used as the in the roads determination process.

> *The BLM will continue to base the definition of what constitutes a "road" from the FLPMA's legislative history. The language below is from the House of Representatives Committee Report 94-1163, page 17, dated May 15, 1976, on what became the FLPMA. It is the only statement regarding the definition of a road in the law or legislative history.*
>
> *"The word 'roadless' refers to the absence of roads which have been improved and maintained by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road."*
>
> *The BLM previously adopted and will continue to use the following sub-definitions of certain words and phrases in the BLM road definition stated above:*
>
> > *a. "**Improved and maintained**" – Actions taken physically by people to keep the road open to vehicle traffic. "Improved" does not necessarily mean formal construction. "Maintained" does not necessarily mean annual maintenance.*
> >
> > *b. "**Mechanical means**" – Use of hand or power machinery or tools.*
> >
> > *c. "**Relatively regular and continuous use**" – Vehicular use that 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 road that was established or has been maintained solely by the passage of vehicles would not be considered a road, even if it is used on a relatively regular and continuous basis. Vehicle routes constructed by mechanical means but that are no longer being maintained by mechanical methods are not roads. Sole use of hands and feet to move rocks or dirt without the use of tools or machinery does not meet the definition of "mechanical means." Roads need not be "maintained" on a regular basis but rather "maintained" when road conditions warrant actions to keep it in a usable condition. A dead-end (cherry-stem) road can form the boundary of an inventory area and does not by itself disqualify an area from being considered "roadless."*

There is not necessarily a requirement for regular maintenance of roads. "[A] route, or a segment of a route which was mechanically improved to permit the passage of vehicles, but which to date has not needed any further mechanical improvement or maintenance to facilitate the regular and continuous passage of vehicles, is also a road. To hold otherwise would be to say that once a road has been mechanically improved, in order to thereafter continue its status as such it must receive mechanical maintenance whether it needs it or not -- a ludicrous, impractical, and thoroughly unreasonable and unrealistic contortion of the accepted definition." *Sierra Club* 62 IBLA 367, 370 (1982). The road definition does not confine itself to public use only, nor to use by passenger vehicles. Instead, its legal interpretations have focused on use by vehicles pertinent to the purposes of the road.

The roads identified by BLM as boundary roads for the BLM wilderness inventory unit that includes the project area were found to have been constructed by mechanical means. The soils in this unit are very sandy and often need no regular annual maintenance. While ONDA's and BLM's photos indicate there is very minimal vegetation in the center of the roads, these roads are not overgrown and BLM's field review and the IDT that participated in the wilderness inventory update confirmed the roads are currently in a useable condition. The field review and the IDT also confirmed that these roads would be maintained in the future as needed to provide for a wide variety of resource management objectives and the roads are identified for maintenance as part of the BLM's transportation system which includes but is not limited to roads identified in its Facility Asset Management System.

Both information from the field review and the IDT confirmed that vehicle use occurs on a relatively regular basis on all of the boundary roads identified. The grazing permittee uses the roads to manage livestock operations, including releasing and gathering cattle, distributing salt and mineral blocks and checking and maintaining range developments. BLM personnel utilize the routes for monitoring rangeland and other resource conditions, checking range developments, and access for wildfire suppression. Use of the roads by the public does occur and is primarily associated with hunting and camping in late summer and fall.

Protest Rationale:

BLM's wilderness inventory update for the unit which includes the project area claims there are no opportunities for solitude present in their 8,400-acre unit due to a lack of "topographic screening." As we commented before, it is difficult to imagine not being able to find solitude in an 8,400-acre roadless area (let alone the larger 196,000-acre Lonesome Lakes proposed WSA).

BLM Response to Protest Rationale:

BLM's original wilderness inventory found that the subunit which includes the project area, "*offers no topographic screening and the scattered juniper provides little or no vegetative screening. There is no place within the subunit where a visitor could find a secluded spot. The subunit does not offer an outstanding opportunity for solitude."* (Wilderness Inventory – OR/WA Final Intensive Inventory Decisions, November 1980, pages 124-125)

No changes to the current condition of the unit were identified by the IDT relative to solitude that would modify the findings for this unit. The juniper vegetation is still scattered and has not increased to provide substantial screening. The landscape is open country, views are far-reaching, and there is not enough topographic and vegetative screening to provide outstanding solitude in this unit. Tired Horse Butte does not provide screening for outstanding solitude.

In 2008 an IDT analyzed both the information ONDA submitted and BLM information on current conditions along with field verification (where needed) as part of updating its original wilderness inventory. Based on that analysis, the BLM determined that its 1980 inventory finding that BLM-administered lands within the project area do not possess wilderness character remains valid. As such, wilderness characteristics were not analyzed further in the EA (EA page 5).

Protest Rationale:

BLM's wilderness inventory update for the unit which includes the project area claims there are no supplemental wilderness values present. This is inconsistent with the meaning and intent of a resource "inventory" under FLPMA. Because resource and values, including wilderness values change over time on these landscapes, it is vital for BLM's inventory assess all the factors of wilderness.

BLM Response to Protest Rationale:

The BLM did not claim in its update of this wilderness inventory unit that supplemental values are not present. In the context of wilderness, supplemental values, by definition, supplement wilderness values present in a given area. Given that wilderness character was not found to be present, the documentation of the presence or absence of supplemental values is not applicable to updating BLM's wilderness inventory. BLM does maintain and conduct inventories of other resource values when developing plans or project proposals, and these values are considered in such planning or project analyses.

The BLM did not claim in its update of this wilderness inventory unit that supplemental values are not present. Given that wilderness character was not found present, the documentation of the presence or absence of supplemental values is not required as a part of updating BLM's wilderness inventory. The presence of supplemental values does not provide the criteria to determine if an area has wilderness characteristics. The necessary wilderness characteristics are set out in Section 2(c) of the Wilderness Act of 1964. An area's eligibility hinges on whether it: "(1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; . . ."

The fact that an area, "may also contain ecological, geological, or other features of scientific, educational, scenic or historical value," as stated in Section 2(c)(4) does not change the requirement that an area must first have the other wilderness characteristics under Section 2(c)(1) through (3). "All three criteria . . . have to be met in order for an area outside of a designated wilderness or WSA to be found to contain 'wilderness character.'" [173 IBLA at 353, n.6].

Protest Rationale:

Even if BLM, after conducting further analysis, still finds the Tired Horse Butte Unit does not contain wilderness value, the area nevertheless is a substantial roadless area and is in natural condition. Roadlessness has environmental significance in and of itself. Among other important qualities, roadless areas protect watersheds and provide intact, connected biological corridors for species such as sage grouse. BLM should study the impacts of the project on the area's roadless character and naturalness, and ensure that any projects authorized in this area do not destroy roadlessness or naturalness.

BLM Response to Protest Rationale:

While BLM agrees that individual characteristics of wilderness may have some aspects in common with other multiple use values of an area—such as recreation, scenery or habitat—BLM disagrees that an area can qualify as having wilderness value if not all of the required characteristics of wilderness are present. In order for an area to possess wilderness value, or qualify for potential management to protect wilderness value, it must have all of the necessary characteristics of wilderness. Wilderness is defined in the Wilderness Act and this definition is adopted in FLPMA. 43 U.S.C. § 1702(i) (providing that the term "wilderness" as used in Section 1782 of FLPMA shall have the same meaning as it does in the Wilderness Act, 16 U.S.C. § 1131(c)). As the Ninth Circuit noted, "'wilderness characteristics' is a carefully-defined statutory concept, originating in the Wilderness Act." Oregon Natural Desert Association v. Bureau of Land Management ("ONDA v. BLM"), 531 F.3d 1114, 1142 (9th Cir. July 14, 2008). In the Wilderness Act, a "wilderness" is defined, "in contrast with those areas where man and his own works dominate the landscape," as:

> an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

16 U.S.C. §1131(c). This definition makes clear that for an area to qualify as having wilderness value, it cannot just possess some of the characteristics of wilderness. For instance, solitude could well be found in the midst of an abandoned mine site, but it would hardly qualify as an area that is "affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable" and would thus not qualify as having wilderness value. Just as a wild and scenic river does not exist wherever there is water, so an area cannot be called wilderness just because it has a characteristic of wilderness. Wilderness is a carefully-defined concept, as Congress has explicitly enumerated the necessary size and set of characteristics that must exist for there to be "wilderness." If one of the required components is not present there can be, by definition, no "wilderness." If an area fails to meet a required criterion, then the individual criteria have no meaning within the context of wilderness.

Outside of the wilderness context, individual characteristics of wilderness have some aspects in common with other values associated with the definition of "multiple use" in FLPMA. This includes values such as recreation, watershed, wildlife and fish, and natural scenic values. 43 U.S.C. § 1702(c). Multiple use management includes consideration of these values. Id. §§ 1702(c), 1711(a). For example, BLM may consider the presence or absence of roads in a NEPA document where relevant to values such as recreation, scenery, watersheds, fish and wildlife. Similarly, BLM may consider naturalness as part of the natural scenic value and may consider opportunities for solitude or primitive/unconfined recreation as part of an area's recreation value. In other words, where an area lacks all of the characteristics necessary for wilderness, individual characteristics may be considered as part of other multiple use values but they do not amount to a wilderness resource. The EA did address several of these related resources that were identified as being affected in the EA (EA Chapter III).