



THE WILDERNESS SOCIETY

July 28, 2006

Bureau of Land Management
Owyhee Field Office
Attn: Mitch Jaurena
20 First Avenue West
Marsing, Idaho 83639

Re: Comments – Predecisional EA for Wilson Creek Subregion Travel Management Plan

Dear Mr. Jaurena:

Please accept the following comments on behalf of The Wilderness Society with regards to the Predecisional EA for the Wilson Creek Subregion Travel Management Plan. The Owyhee Front SRMA has experienced severe resource damage as a result of unregulated and unauthorized-cross country motorized use, and we applaud your efforts to move the TMP process forward in the Owyhee Front SRMA. The TMP you are proposing takes several positive steps towards addressing the desires of a variety of recreationists and alleviating problems associated with motorized use.

With a few exceptions, we would support Alternative 2, the proposed action, were it not for the fact that all asserted R.S. 2477 claims will be left open to motorized use in that alternative. Since this TMP will be the first TMP prepared for the Owyhee Front SRMA, we believe it is especially important to resolve key areas of concern at this point, in order to avoid a noncompliant plan and the resulting delays in completing a comprehensive travel plan for this area. Our primary concern with the proposed action is the fact that all R.S. 2477 *assertions* are being treated as valid until proven otherwise. We will discuss this issue in more detail later, but first, we would like to highlight several aspects of the proposed TMP that are commendable.

First, the fact that there will be a designated motorized and non-motorized trail system will not only help to alleviate user-conflicts, but it will also provide the opportunity for enforcement of illegal use. Having a designated trail system and curbing user-created motorized recreation routes will undoubtedly have a beneficial impact on the ecosystem. Second, the fact that 36 miles of routes (in the proposed action) will be closed to motorized use will undoubtedly be beneficial to maintaining the ecological integrity of the area through an overall reduction in road density, decreased wildlife disturbance, and a reduction in soil erosion. Also, the emphasis in the Wilson Creek sub-region on non-motorized recreation will help to provide for a diverse range of non-motorized recreation opportunities.

I. PROTECTIONS FOR SAGE GROUSE HABITAT IN THE TMP SHOULD BE STRENGTHENED.

We are encouraged by the fact that the proposed action seeks to “reduce the potential for increased motorized route use in sagebrush habitat utilized by sage grouse, loggerhead shrike and other sagebrush-obligate species.” Predecisional EA, p. 9. The habitat for sage grouse and other sagebrush-obligate species in the Owyhee Front SRMA is increasingly being marginalized and fragmented by unauthorized motorized use. A designated system of routes that puts the needs of these species in the forefront will help to ensure that their habitat will not be compromised.

Since sage grouse habitat connectivity is vital to the continuation of the species, and given the goal of the Wilson Creek TMP to reduce motorized use in sage grouse habitat, we are particularly concerned about one of the proposed roads that is located near an active sage grouse lek (For reference, it is the only road that has a seasonal closure recommendation in the preferred alternative). Along with our comments we have attached a recent study compiled by one of the leading scientists on sage-grouse entitled, *A Blueprint for Sage-grouse Conservation and Recovery*, which details the habitat requirements for successful and sustaining sage-grouse populations and which we incorporate by reference into our comments. It also gives specific distances from roads that are necessary in order to maintain active leks. According to the study, “no surface occupancy should be allowed within 5.5 km of all active sage-grouse leks.¹” In accordance with this study, the road in question, if it is within 5.5 km of the active lek, should be closed. In addition, the proposed management for protection of sage-grouse habitat as outlined in the Blueprint should be taken into consideration for permitting motorized use throughout the Wilson Creek subregion and the remainder of the Owyhee Front SRMA.

Since the road that runs near the lek previously mentioned is not a main thoroughfare and is only .8 miles long, there is a unique opportunity to close this road completely or turn it into a hiking and horseback riding only trail. Also, because the emphasis in the Wilson Creek subregion is on non-motorized recreation, turning this road into a hiking only trail or closing the road completely would be consistent with the goals of this TMP and federal regulation requirements for special status species (43 C.F.R. § 8342.1(b)). In addition, it would be a relatively minor change to the proposed action.

Recommendations: Consistent with the priorities of the proposed action in the Wilson Creek and the best available science on the management actions needed to conserve sage grouse habitat, the Wilson Creek TMP should close or convert the above-referenced road to non-motorized use and take other actions to apply the protective measures set out in the Blueprint for Sage-grouse Conservation and Recovery to this TMP.

The following sections will discuss our concerns associated with the proposed action in the EA with regards to R.S. 2477 routes.

¹ Braun, Clait E. Ph.D. “A Blueprint for Sage-grouse Conservation and Recovery.” May, 2006, p. 15.

II. THE BLM NOT ONLY HAS EXPRESS AUTHORITY TO CLOSE ROUTES IN TMPs, BUT IS OBLIGATED TO CLOSE ANY ROUTES THAT WILL CAUSE SIGNIFICANT DAMAGE

We are concerned that the Predecisional EA's preferred alternative designates seventy-seven miles of motorized routes based solely on the fact that someone has informally *asserted*, without legal adjudication, that they are R.S. 2477 right of ways. Based on the BLM's own analysis, it is apparent that designating these assertions as open to motorized use will cause significant degradation to natural resources and wildlife, and lead to conflicts between users of the land.

OHV areas were designated under the Owyhee Resource Management Plan (ORMP). The EA reinforces the fact that the Wilson Creek Subregion is part of and must conform to the objectives of the Owyhee Front SRMA. We believe the Preliminary EA is out of compliance with that agreement and in order to maintain compliance the BLM should designate routes in the subsequent Travel Management Plans based on their characteristics as necessary routes for travel and recreation, and not upon their label as R.S. 2477 assertions.

The Wilson Creek Predecisional EA further explains that this particular subregion is unique because of its traditionally heavy non-motorized recreational use and low levels of motorized recreation. Due to these findings, the goals of the TMP, set out in Section 1.3 of the Predecisional EA, not only place an emphasis on non-motorized recreation, but also express the need for a "*basic and practical* motorized transportation system that meets the *needs* of the *local* communities that *depend on* and *regularly utilize* public lands." Predecisional EA, p. 2. Thus, because of the special nature of the area, routes that are not necessary for a transportation system with a focus on local and frequent access, and instead focus on motorized recreation, should not be designated routes in the Wilson Creek Subregion. As discussed in detail below, regardless of what is asserted as an R.S. 2477 route, the BLM is obligated to designate as "closed" any route that does not display characteristics that are in line with the goals of the TMP.

1. If the BLM chooses to designate all R.S. 2477 assertions merely because they have been claimed as routes under R.S. 2477, then the BLM will be in violation of the agency's duty not to minimize damage, harassment, and conflicts under the federal regulations

The BLM Land Use Planning Handbook (H-1601-1) and the federal regulations cited therein give the BLM the authority to designate all off-highway vehicle (OHV) management areas. The regulations also expressly mandate that the BLM classify these areas as "*open, limited, or closed* to motorized travel activities." *BLM Handbook*, H-1601-1, Appendix C, p. 18 (3/11/2005). The regulations set criteria for designations of the OHV areas and the location of routes for motorized recreation in 43 C.F.R. § 8342.1:

- (a) Areas and trails shall be located to **minimize damage to soil, watershed, vegetation, air, or other resources of the public lands, and to prevent impairment of wilderness suitability.**
- (b) Areas and trails shall be located to **minimize harassment of wildlife or significant disruption of wildlife habitats.** Special attention will be given to protect endangered or threatened species and their habitats.

(c) Areas and trails shall be located to **minimize conflicts between off-road vehicle use and other existing or proposed recreational uses of the same or neighboring public lands, and to ensure the compatibility of such uses with existing conditions in populated areas, taking into account noise and other factors.**

The EA implicitly points to many of the conflicts that have arisen or will arise when OHV motorized use is allowed to continue on the routes. For example, Alternative 3 would close some of the R.S. 2477 assertion routes, “1) to reduce potential *trespass* on private land; 2) to provide access to range improvement projects while reducing *human disturbance in key sagebrush habitat and wild horse use areas*, [and] 3) to reduce the *density of motorized routes in highly erosive soils*.” Predecisional EA, pp. 15-15. Other reasons for closing the assertion routes in Alternative 3 are to “reduce existing disturbances in sagebrush habitat” and because some of the asserted routes are “actually single-track trails.” Given the goals of the TMP and the number of conflicts that have arisen as a result of motorized use, it would appear that closing many of the R.S. 2477 routes would be the most logical action for the BLM in the Wilson Creek Subregion, especially considering the following problems associated with motorized use, which are highlighted in the Predecisional EA:

- OHV activity causes **erosion and disturbance** of sensitive **soils** and crusts.
- Natural **vegetation** communities have become **fragmented**, and at least one population of Malheur phacelia and other important plant species may be impaired by OHV use.
- OHV use causes **increased sedimentation in watersheds** as motorized vehicles cross streams and soils are eroded.
- Many types of **wildlife**, including Redband trout, sage grouse, bighorn sheep, and many others will incur increased harassment and habitat disruption from OHVs.
- **Conflicts between motorized users and other recreation users** will continue to arise due to the expanding of single-track trails by OHV use and noise and dust disrupting the non-motorized user’s recreation experience.

It is apparent from the EA that off-highway motorized use can cause significant damage and conflicts. By automatically designating R.S. 2477 assertions in the TMP, without minimizing the impacts of motorized uses on the trails, the BLM will be in violation of its duty under the governing regulations.

2. Certain language in the predecisional EA inaccurately suggests that the BLM must designate R.S. 2477 assertions as routes until the legal status of the claims are resolved

Much of our concern about the treatment of R.S. 2477 assertions stems from language in the Predecisional EA which suggests that the Owyhee Field Office will only close routes that are R.S. 2477 assertions when and if they are found to be legally invalid. The following paragraph is especially worrisome:

Similarly, Alternative 2 leaves all RS-2477 assertions made by Owyhee County and by individual residents open to all uses, including motorized recreational use, in deference to the ongoing, but incomplete legal disposition of these assertions. Should the legal status of these RS-2477 assertion routes be resolved at some date in the future, BLM

would then consider converting some of these routes that are not determined to be legal right-of-ways of non-motorized trail routes, or closing all or some of these routes to reduce impacts to sensitive resources. Predecisional EA, p. 57

This paragraph and the overall approach to RS 2477 claims in the TMP must be reconsidered due to inconsistencies with established law and guidance. The R.S. 2477 status of a route is not a necessary consideration in the process of designating routes in a TMP. Instruction Memorandum (IM) 2006-159, which addresses non-binding determinations that may be made by field or state offices, is very clear that there is ***no requirement*** for the agency to conduct a non-binding determination as part of travel planning in general or even in relation to specific road closures. Further, as noted in the guidance and by the Tenth Circuit Court of Appeals, the BLM cannot make determinations as to the validity of R.S. 2477 claims – only a court can make a final determination.² As a result, delaying decisions on closing routes that are damaging other resources or causing conflicts with other users of the public lands until a court make a determination “some date in the future,” could allow use to continue despite an obvious need for closure based on the BLM’s own legal and policy guidance. Where there is a valid R.S. 2477 claim, BLM still has the authority to manage the claim to ensure its compliance with environmental and other laws.

If the routes are causing damage to soil, watersheds, vegetation, and/or wildlife, as well as causing conflict among recreational users, then the BLM has obligations under the regulations cited above, as well as more generally under FLPMA, to prevent this from happening. The BLM cannot wait until the legal status of these assertions are resolved, or it will be ignoring its duties of properly designating routes in a TMP and managing the land. In fact, the IBLA has recently confirmed that BLM is legally permitted to complete transportation plans for areas without addressing R.S. 2477 claims³.

Recommendations: Consistent with the priorities of the proposed action in the Wilson Creek Subregion, reduction in motorized use and route density throughout the subregion, focus on non-motorized uses, and ecological integrity should be the highest priorities for the TMP. To achieve these priorities, you should designate any routes that are causing or will cause significant damage to natural resources, wildlife, and/or conflicts among recreation users as “closed,” regardless of whether they are also R.S. 2477 assertions. The TMP should clarify that travel management planning will proceed based on the established priorities for the Wilson Creek area and applicable BLM regulations, and will not delay decisions based on R.S. 2477 assertions. You should consider either deleting the first paragraph on page 57, or revising the paragraph to state:

Similarly, the BLM retains its discretionary authority to close any or all of the routes for the purposes of reducing impacts to soil, watersheds, vegetation, and/or wildlife, as well as

² Southern Utah Wilderness Alliance v. Bureau of Land Management, 425 F.3d 735, 757 (10th Cir.2005)

³ See Rainer Huck, 168 IBLA 365, 398-99 (April 18, 2006) (“BLM did not need to decide the validity of the R.S. 2477 assertions in order to make its route designations, especially since it did not intend its analysis to affect any R.S. 2477 validity determinations and indicated that the Plan would be adjusted to reflect any R.S. 2477 decisions.”). The IBLA further declined to adopt the appellants’ suggestion that “the Department must engage in a 10-year quest to inventory routes OHV users may have carved out of the public lands by virtue of repetitive use” as part of land management planning, particularly where claimants submitted little or no evidence. 168 IBLA at 399 n.17.

causing conflict among recreational users or otherwise preventing damage to the land, as mandated in 43 C.F.R. § 8342.1 and FLPMA. Existing routes that may have R.S. 2477 asserted claims will be examined and appropriately designated in the same manner as other routes in the TMP. These determinations will not affect valid existing rights.

III. THE BLM MUST PREPARE AN ENVIRONMENTAL IMPACT STATEMENT

If the BLM plans to designate asserted R.S. 2477 claims as open to motorized use in the Wilson Creek Subregion TMP, then the BLM is required under NEPA to issue an Environmental Impact Statement before implementing the TMP. Statutory and case law both make clear that “[i]f an agency's preliminary environmental assessment of a project suggests that no significant environmental impact is likely, the agency issues a Finding of No Significant Impact”; but if significant environmental impact is likely, then an EIS is required. *See* 40 C.F.R. §§ 1508.9, 1508.3; 42 U.S.C. § 4332(2)(C); *Sierra Club v. U.S. Army of Engineers*, 446 F.3d 808 (8th Cir. 2006). It is evident from the Predecisional EA’s findings that the action of leaving all R.S. 2477 assertions open will have significant environmental impacts warranting an EIS. The increasing popularity and environmentally destructive nature of OHV use requires that a complete EIS be prepared.

The Predecisional EA acknowledges the potential for significant environmental impacts stemming specifically from the motorized use of R.S. 2477 assertions. The following findings were made in the EA in discussing impacts to the environment from motorized use of mostly R.S. 2477 assertions:

- The **most severe** erosion of soils has occurred because of OHV use. Significant impacts include, “destruction of soil aggregates, compaction of the soil, formation of channels, and sloughing of washes.” The EA went on to note that the “same impacts occur from non-motorized activities also but usually to a lesser degree.” Predecisional EA, pp. 18-19.
- Motorized OHV use, authorized and unauthorized, has fragmented native plant communities and “**heavily impacted**” one Malheur yellow phacelia population, which is classified as a globally rare, moderate risk of endangerment species (*See*, “Field Guide to the Special Status Plant Species of the BLM Lower Snake River District,” April 2000). Predecisional EA, pp. 21-22.
- Hardtrigger Creek, Reynolds Creek, and Snake River are already listed under 303(d) of the Clean Water Act for not meeting Idaho water quality standards. The EA shows that under this TMP will cause **more sediment** to flow into these waters, and further compromising their quality. Predecisional EA, p. 23.
- Many species of wildlife and their habitat may potentially be **significantly degraded**. Said species includes the endangered Idaho springsnail and the BLM sensitive species Redband trout, as well as deer, pronghorn, bighorn sheep, sage grouse, various reptiles, and several other species. Predecisional EA, pp. 27-28.

If all of the R.S. 2477 assertions in the proposed action are left open for motorized use, the routes, valid or not, will continue to have increasingly negative impacts on the environment. The EA points out that in the Owyhee Front motorized OHV use is very heavy and continues to grow

at a rapid rate. This use is highly disruptive and can cause immense damage to the lands and wildlife.⁴ According to the EA, in addition to permitted OHV use, there are also a great number of unauthorized OHV uses and conversion of single-track routes into wider OHV routes.

NEPA requires the preparation of an EIS for any major federal action significantly affecting the human environment. 40 C.F.R. 1504.1. It is evident from the Predecisional EA that leaving seventy-seven miles of R.S. 2477 assertions open for all uses will undoubtedly lead to significant degradation of the land.

Recommendation: Due to the significant impacts found within the EA's analysis, the BLM should go on to issue a complete Environmental Impact Statement, as required by NEPA, § 4332(2)(C), to analyze the direct, indirect and cumulative effects of leaving all of the R.S. 2477 assertions open to motorized use. The future and continued use of the routes will exacerbate the degradation to the land already occurring from the use of the routes.

IV. THE OWYHEE FIELD OFFICE SHOULD FOLLOW THE LITTLE SNAKE FIELD OFFICE IN DEFERRING THIS CONTROVERSIAL AUTHORITY

In the EA, it is stated that under the proposed action, all R.S. 2477 assertion routes will remain open to motorized use. As stated above, the BLM has the authority and obligation to close many of these asserted routes to prevent further damage and the decisions made in the TMP will not affect valid existing rights, such as R.S. 2477 rights-of-way. The BLM's Little Snake Field Office in Colorado, is conducting planning in a similar situation and has framed an approach that is consistent with the current law and guidance discussed above, and which could be instructive for travel planning in the Owyhee Front SRMA.

The Little Snake Field Office has decided that it will treat the R.S. 2477 assertion routes like any others in making route designations, but acknowledge the existence of the claims and ensure that any planning/NEPA documents that come out also highlight the fact that they are subject to valid existing rights, such as R.S. 2477 rights-of-way. This office has also developed language to clarify that if any R.S. 2477 claims are legally resolved in the future, they will become open to vehicle use. The proposed language states:

⁴ In a recent Supreme Court opinion, Justice Scalia recognized the increased popularity and negative consequences of OHV/ORVs.

Protection of wilderness has come into increasing conflict with another element of multiple use, recreational use of so-called off-road vehicles (ORVs), which include vehicles primarily designed for off-road use, such as lightweight, four-wheel "all-terrain vehicles," and vehicles capable of such use, such as sport utility vehicles. See 43 CFR § 8340.0-5(a) (2003). According to the United States Forest Service's most recent estimates, some 42 million Americans participate in off-road travel each year, more than double the number two decades ago. The use of ORVs on federal land has negative environmental consequences, including soil disruption and compaction, harassment of animals, and annoyance of wilderness lovers.

Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 60 (2004) (citations omitted).

If some or all of the R.S. 2477 assertions were to be recognized as valid, routes that were closed in the RMP would become open to vehicle travel, making these routes available to vehicle use. This could change the character of the area, including but not limited to the recreation experience, which ultimately could result in a change in management if vehicle use were inconsistent with the management objectives described in the RMP for that area.

This approach has been accepted by the Moffat County Commissioners, most of whom have been actively engaged in R.S. 2477 assertions and debate. We support this approach, as it addresses the concerns of local claimants of R.S. 2477 right of ways, while also preventing further conflicts and environmental degradation.

We have attached the document from the Little Snake Field Office that describes their approach. For more information on this approach, you can also speak with Field Manager John Husband at:

Little Snake Field Office
John Husband, Field Manager
455 Emerson Street
Craig, CO 81625-1129
(970) 826-5000
FAX:(970) 826-5002

In conclusion, we would like to reiterate that fact that your commitment to completing a TMP for the Wilson Creek Subregion without delay is a tremendous step in the right direction. We appreciate the hard work that you have put into this TMP thus far. You have impressed us with your willingness to listen to our recommendations and concerns up to this point, and we ask that you do the same with these comments. We sincerely thank you for taking the time discuss our concerns with the TMP and look forward to working with you in the future. Thank you for your time.

Sincerely,

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