

*OREGON NATURAL DESERT ASSN. v. BUREAU OF LAND MANAGEMENT*<sup>1</sup>

In *Oregon Natural Desert Assn. v. Bureau of Land Management*, the Ninth Circuit Court of Appeals held that when the Bureau of Land Management (“BLM”) revises its land use plans, wilderness characteristics<sup>2</sup> must be addressed.<sup>3</sup> As a result, wilderness characteristics must also be reviewed in the accompanying Environmental Impact Statement (“EIS”), as required by the National Environmental Policy Act (“NEPA”).<sup>4</sup>

In order to grasp the impact of this decision, it is important to understand how the Federal Land Policy and Management Act (“FLPMA”), the Wilderness Act, and NEPA interact. FLPMA requires the BLM to “develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands.”<sup>5</sup> Among other mandates, land use plans are to “use and observe principles of multiple use and sustained yield.”<sup>6</sup>

The Wilderness Act was designed to protect lands with wilderness characteristics.<sup>7</sup> However, the Wilderness Act does not address the BLM’s management of federal lands.<sup>8</sup> Consequently, FLPMA, specifically § 1711(a), provides that “[t]he Secretary shall prepare and maintain on a continuing basis an inventory of all public lands and their resources and other

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<sup>1</sup> *Or. Nat. Desert Assn. v. Bureau of Land Mgt.*, 531 F.3d 1114 (9th Cir. 2008).

<sup>2</sup> Wilderness is defined as “an area where the earth and its community of life are untrammelled 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; (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.” *Id.* at 1118 (citing 16 U.S.C. § 1131(c) (2006)).

<sup>3</sup> *Id.* at 1142–1143.

<sup>4</sup> *Id.* at 1143.

<sup>5</sup> *Id.* at 1117 (citing 43 U.S.C. § 1712(a)).

<sup>6</sup> *Id.* (citing 43 U.S.C. § 1712(c)(1)).

<sup>7</sup> *Or. Nat. Desert Assn.*, 531 F.3d at 1118.

<sup>8</sup> *Id.*

values . . . .”<sup>9</sup> In addition, § 1782 of FLPMA requires the BLM to inventory lands with wilderness characteristics for permanent preservation.<sup>10</sup> Once the BLM completes the inventory, it recommends to the President which areas should be permanently protected.<sup>11</sup> The President then passes his recommendations to Congress, who decides which lands, if any, to designate as wilderness.<sup>12</sup>

NEPA requires agencies to complete an EIS to ensure the environmental impacts of the proposed action are analyzed and disclosed to the public.<sup>13</sup> The EIS must fully discuss all significant environmental impacts and provide any reasonable alternatives to the proposed action that would minimize adverse environmental impact.<sup>14</sup> Essentially, the agency must take a “hard look” at the environmental consequences of its proposed action.<sup>15</sup>

At issue in *Oregon Natural Desert Assn.* was the BLM’s review and inventory of potential wilderness areas in approximately four-and-a-half million acres of Southeastern Oregon.<sup>16</sup> In 1980, the BLM identified 32 Wilderness Study Areas (“WSAs”) in the planning area.<sup>17</sup> WSAs are areas that Congress has not yet approved for permanent preservation<sup>18</sup> that are managed under a non-impairment standard.<sup>19</sup> In 1989, the BLM recommended to the President that twenty one of the WSAs be permanently preserved as wilderness.<sup>20</sup> The President reported the BLM’s recommendations to Congress unchanged; however, Congress has failed to act on the

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<sup>9</sup> *Id.* at 1117 (citing 43 U.S.C. § 1711(a)).

<sup>10</sup> *Id.* at 1118 (citing 43 U.S.C. § 1782(a)).

<sup>11</sup> *Id.* (citing 43 U.S.C. § 1782(a)).

<sup>12</sup> *Id.* at 1119 (citing 43 U.S.C. § 1782(a)).

<sup>13</sup> *Or. Nat. Desert Assn.*, 531 F.3d at 1120.

<sup>14</sup> *Id.* at 1121.

<sup>15</sup> *Id.* at 1120.

<sup>16</sup> *Id.* at 1116.

<sup>17</sup> *Id.* at 1121.

<sup>18</sup> *Id.* at 1119.

<sup>19</sup> The non-impairment standard requires the BLM to manage the lands “so as not to impair the suitability of such areas for preservation as wilderness.” *Or. Nat. Desert Assn.*, 531 F.3d at 1119 (citing 43 U.S.C. § 1782(c)).

<sup>20</sup> *Id.* at 1121.

President's recommendations.<sup>21</sup> As a result, the WSAs are currently managed under the non-impairment standard.

In 1995, the BLM notified the public that it would be revising the Southeastern Oregon Management Plan (Plan).<sup>22</sup> In 1998, it released the revised Plan to the public.<sup>23</sup> The Oregon Natural Desert Association ("ONDA") raised a number of concerns with the proposed Plan, most importantly that the BLM should re-inventory lands with wilderness characteristics because they had not done so since 1980.<sup>24</sup> ONDA argued that wilderness characteristics are among the values of public lands that the BLM has authority to manage under its multiple use mandate for land use plans.<sup>25</sup> Accordingly, ONDA asserted the BLM violated NEPA when it failed to discuss wilderness characteristics in the Plan's EIS.<sup>26</sup>

The BLM addressed a few of ONDA's concerns and released the final Plan and EIS in 2001.<sup>27</sup> However, the BLM did not address how the Plan would affect areas with wilderness characteristics not already designated as WSAs.<sup>28</sup> The BLM argued that wilderness characteristics are of no consequence aside from surveying lands to recommend for permanent preservation, as required by the § 1782 process.<sup>29</sup>

The Ninth Circuit disagreed with the BLM and concluded that its failure to consider wilderness characteristics in the Plan violated NEPA.<sup>30</sup> Read together, § 1782 and § 1711 of FLPMA require that the inventory process identify wilderness characteristics because wilderness

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 1122.

<sup>24</sup> *Id.*

<sup>25</sup> *Or. Nat. Desert Assn.*, 531 F.3d at 1131.

<sup>26</sup> *Id.* at 1131.

<sup>27</sup> *Id.* at 1122.

<sup>28</sup> *Id.* at 1123.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 1133.

characteristics are recognized by FLPMA as a “resource and other value.”<sup>31</sup> Furthermore, the BLM’s mandate to manage public lands for “sustained yield and multiple use” allows it to take wilderness characteristics into account when developing land use plans.<sup>32</sup> Thus, the Ninth Circuit concluded that “a landscape’s wilderness characteristics generally must be considered in NEPA documents prepared for land use plans concerning the landscape, regardless of whether permanent wilderness preservation is an option.”<sup>33</sup>

The BLM set forth three arguments in addition to its original position that it has no duty to address wilderness characteristics outside of the § 1782 process.<sup>34</sup> First, the BLM argued that according to the United States Supreme Court’s holding in *Norton v. Southern Utah Wilderness Alliance*,<sup>35</sup> in order to file suit to compel an agency to take a particular action under 5 U.S.C. § 706(1) (1993), the plaintiff must assert the agency failed to take a discrete action that it is required to take.<sup>36</sup> The BLM argued that addressing wilderness characteristics in the land use planning process is not a discrete action it is required to take.<sup>37</sup> The Court rejected this argument on the basis that ONDA did not file suit under 5 U.S.C. § 706(1); rather, it challenged the EIS under 5 U.S.C. § 706(2)(A) as “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”<sup>38</sup> The Court concluded that ONDA’s suit against the BLM satisfied the requirements of 5 U.S.C. § 706(2)(A).

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<sup>31</sup> *Or. Nat. Desert Assn.*, 531 F.3d at 1119 (citing *Sierra Club v. Watt*, 608 F. Supp. 305, 309–310 (C.D. Cal. 1985) (describing the “inventory preparation requirement of [§ 1711]” as the first step in the wilderness review and designation process of § 1782); *Wilderness Socy.*, 119 Int. Bd. Land Apps. 168, 170–172 (U.S. Dept. Int. 1991) (discussing the wilderness process as occurring under both §§ 1711 and 1782).

<sup>32</sup> *Id.* at 1135.

<sup>33</sup> *Id.* at 1138.

<sup>34</sup> *Id.* at 1139.

<sup>35</sup> 542 U.S. 55 (2004).

<sup>36</sup> *Or. Nat. Desert Assn.*, 531 F.3d at 1139.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

Next, the BLM argued that the Supreme Court's holding in *Vermont Yankee Nuclear Power Corp. v. Natural Resource Defense Council*,<sup>39</sup> prevents courts from directing agencies to use specific procedures to comply with NEPA.<sup>40</sup> In *Vermont Yankee* the Court held that "NEPA cannot serve as the basis for a substantial revision of the carefully constructed procedural specifications of the Administrative Procedures Act (APA)."<sup>41</sup> Therefore, a requirement that mandates the BLM to address wilderness characteristics would violate the holding in *Vermont Yankee*.<sup>42</sup> The Ninth Circuit also rejected this argument. It reasoned that requiring the BLM to comply with its NEPA obligations is consistent with the Court's holding in *Vermont Yankee* because the court is simply directing "compliance with a procedure that is required, namely, the EIS requirement."<sup>43</sup>

Lastly, the BLM argued that because it considered other resource values, such as animal habitat and visual resources, the consideration of these other values had the incidental effect of capturing wilderness characteristics.<sup>44</sup> Again, the Ninth Circuit found this argument unpersuasive. The BLM did not develop a methodology by which consideration of other resources could be used to analyze wilderness characteristics.<sup>45</sup> Instead, it set forth this reasoning in response to litigation.<sup>46</sup> In its EIS, the BLM simply denied it had any duty to address wilderness characteristics outside of the § 1782 process.<sup>47</sup>

After reviewing the BLM's three additional arguments, the Ninth Circuit reiterated its conclusion that the BLM cannot refuse to address wilderness characteristics when it is revising

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<sup>39</sup> *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519 (1978).

<sup>40</sup> *Or. Nat. Desert Assn.*, 531 F.3d at 1140.

<sup>41</sup> *Id.* (quoting *Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 548–549).

<sup>42</sup> *Or. Nat. Desert Assn.*, 531 F.3d at 1140.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 1141.

<sup>45</sup> *Id.* at 1142.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

land use plans simply because it previously recommended lands for permanent preservation within the planning area.<sup>48</sup> That is, the BLM not only has a duty under § 1782 to analyze wilderness characteristics, but it also has a duty under § 1711 to consider wilderness characteristics in the land use planning process.<sup>49</sup> Thus, the court held the BLM did not comply with NEPA when it refused to analyze the Plan's impact on wilderness characteristics.<sup>50</sup>

This is the first time the Ninth Circuit has concluded that a federal agency must take wilderness characteristics into account when revising or developing land use plans. The significance of this decision is that it requires not only the BLM, but also the United States Forest Service, the National Parks Service, and the United States Fish and Wildlife Service, to address and respond to public comment concerning the protection of wilderness areas. These agencies can no longer refuse to consider the public's concern that wilderness areas on federal lands are not adequately protected. Additionally, the EIS requirement, which is subject to public comment, forces these federal agencies to discuss alternatives that would decrease the impact of their proposed action on areas with wilderness characteristics.

— *Megan McCrae*

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<sup>48</sup> *Or. Nat. Desert Assn.*, 531 F.3d at 1142–1143.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 1143.