

UNITED STATES DISTRICT COURT - DISTRICT OF OREGON

Lawsuit filed 8/10/00 - 60 days to answer

Plaintiff's: Northwest Environmental Defense Center
Oregon Natural Resources Council
Central Oregon Forest Issues Committee

Defendants: United States Forest Service
Bureau of Land Management

I. INTRODUCTION

1. This is a civil action for declaratory and injunctive relief. Plaintiffs, the Northwest Environmental Defense Center, Oregon Natural Resource Council and Central Oregon Forest Issues Committee, challenge multiple decisions made by the U.S. Forest Service (Forest Service) and Bureau of Land Management (BLM) to approve designation of an off-highway vehicle (OHV) route referred to as the Back Country Discovery Route (BCDR) across the Fremont, Malheur, Umatilla, Ochoco, and Wallowa-Whitman National Forest and the BLM's Burns and Lakeview Districts.

2. This action arises under and alleges violations of the National Environmental Policy Act ("NEPA"), 42 U.S.C. 4321-4370, the Council of Environmental Quality's regulations implementing NEPA, 40 C.F.R 1500-1508 and the Administrative Procedures Act, 5 U.S.C. 551-706.

3. Plaintiffs seek: (1) a declaratory judgment that approving and proceeding to implement the BCDR without preparing an Environmental Impact Statement ("EIS") or Environmental Assessment ("EA") is in violation of NEPA, an abuse of the agency's discretion and an arbitrary and capricious agency action under the APA, 5 U.S.C. 706; (2) a declaration that Defendants' categorical exclusions of the BCDR designation were arbitrary, capricious and not in accordance with law; (3) an injunction barring Defendants, their permittees, or agents from taking any further actions to develop or promote the BCDR, including, but not limited to, sign installation, the creation or distribution of BCDR maps, or planning the development of BCDR support facilities including parking lots, staging areas and interpretive sites; and (4) an order for the Forest Service and BLM to remove any signage related to the BCDR on Forest Service or BLM lands that has already been installed until an EIS that meets the requirements of NEPA is prepared.

4. Plaintiffs also seek an award of costs and attorneys' fees pursuant to the Equal Access to Justice Act, 28 U.S.C. 2412.

II. JURISDICTION AND VENUE

5. Jurisdiction is proper in this Court under 28 U.S.C. 1331 and 28 U.S.C. 1346 because this action involves the United States as a defendant and arises under the laws of the United States. An actual, justiciable controversy now exists between Plaintiffs and Defendants, and the requested relief is proper under 28 U.S.C. 2201-2202, and 5 U.S.C. 701-706

6. Venue is proper in this Court pursuant to 28 U.S.C. 1391(e).

III. PARTIES

7. Plaintiff NORTHWEST ENVIRONMENTAL DEFENSE CENTER (hereinafter “NEDC”) is a public interest, non-profit corporation located in Portland, Oregon. NEDC’s mission is to preserve and protect the natural environment in the Pacific Northwest. NEDC has a thirty-year history of working as environmental advocates throughout Oregon and has submitted comments opposing the designation of the BCDR to both National Forest and BLM decisionmakers because of the issues addressed herein. NEDC’s members regularly derive aesthetic, scientific, educational, spiritual, and recreational benefits from the Forest Service and BLM lands that would be adversely affected by the BCDR. The BCDR and Defendants’ failure to adequately assess the effects of the BCDR will adversely affect NEDC and NEDC’s members.

8. Plaintiff OREGON NATURAL RESOURCES COUNCIL (hereinafter “ONRC”) is a non-profit corporation headquartered in Portland, Oregon, with approximately 4,000 members located throughout Oregon. ONRC is dedicated to defending and conserving Oregon’s wild lands, wildlife, and waters and restoring Oregon’s fully functional ecosystems with a full complement of native species. ONRC brings this action on its own behalf and on behalf of its members, many of whom regularly enjoy educational, recreational, and scientific activities, including hiking, camping, and observing wildlife in the National Forest and BLM lands that will be negatively affected by the BCDR.

9. Plaintiff CENTRAL OREGON FOREST ISSUES COMMITTEE (COFIC) is a non-profit organization based in Bend, Oregon whose mission is to preserve and protect natural ecosystem values in the central Oregon area. COFIC represents approximately 450 individual members many of whom use and enjoy National Forest and BLM lands in eastern Oregon for recreational, aesthetic, scientific, and spiritual purposes. COFIC members’ use of these areas would be adversely and significantly affected by the BCDR. Additionally, COFIC has been involved in opposing plans for the BCDR at the state level.

10. All three Plaintiff organizations have an organizational interest in the proper and lawful management of the Forest Service and BLM lands the BCDR would cross.

11. Plaintiffs’ aesthetic, recreational, scientific, and religious interests have been and will be continuing to be adversely affected and irreparably injured by Defendants’ actions. These are actual, concrete injuries caused by Defendants’ failure to comply with mandatory duties under NEPA, and other federal laws. The injuries would be redressed by the relief sought.

12. Defendant UNITED STATES FOREST SERVICE, an agency of the United States Department of Agriculture, is responsible for the lawful management of the Fremont, Ochoco, Wallowa-Whitman, Malheur, Umatilla, Deschutes, Rouge River, Umpqua, Willamette, and Winema National Forests.

13. Defendant UNITED STATES BUREAU OF LAND MANAGEMENT, an agency of the Department of the Interior, is responsible for the lawful management of the Lakeview, Burns, Medford and Prineville BLM Districts.

IV. SUMMARY OF FACTS AND GENERAL ALLEGATIONS

The Back Country Discovery Route

14. The BCDR is a large-scale, multi-phase project to designate and promote the use of more than 1,506 miles of existing roads and an unspecified number of miles of trails for OHV use on Forest Service and BLM lands in eastern Oregon. The BCDR has been in planning at the state and federal level for more than four years.
15. The purpose of the BCDR is to develop an interconnected, long distance system of leisurely, quality, scenic, recreational, motorized routes for people seeking a more primitive experience than offered by the State Highways and Forest Service and Bureau of Land Management Scenic Byways.
16. The Oregon section of the BCDR is part of a Mexico to Canada route system for OHV recreational use.
17. The purpose of the BCDR is to create and promote a new opportunity for OHV use in remote areas of eastern Oregon.
18. The BCDR includes three specific types of routes: “Principle Routes,” “Interim Routes” and “Alternate Routes.”
19. The BCDR includes two Principle north/south Routes and two Principle east/west Routes. These Routes are identified in the BCDR plan as Route #2, Route #3, Route #4, and Route #5. Attachment A is the only map provided to the public that shows the complete extent of BCDR Principle Routes.
20. Route #5 would extend 750 miles from Oregon’s southern border south of the town of Lakeview to the northern border of Oregon, east of Walla Walla, passing through the Fremont, Ochoco, Malheur, Wallowa-Whitman, and Umatilla National Forests and the Lakeview and Burns BLM Districts. Route #5 is the route that the Forest Service and BLM designated thus far.
21. The BCDR proposal, however, includes designation of at least three other principle routes that would extend at least another 754 miles.
22. Route #2 runs west to east and extend 136.9 miles from south of La Pine to just south of Paisley passing through the Deschutes, Winema and Fremont National Forests.
23. Route # 3 traverses 378 miles from the Oregon/California border, southeast of Ashland, north to the Dalles, through the Medford BLM District as well as the Rouge River, Umpqua, Deschutes, Willamette and Mt. Hood National Forests.
24. Route #4 includes 240 miles of roads, extending from near the town of Sisters east to near the town of Seneca.
25. Phase 1 of the BCDR includes Route #5 and Phase II includes Route #'s 2,3, and 4.

26. The BCDR also includes plans for the designation and development of “Alternative Routes,” which are planned as single track and full width dirt routes that require advanced operator skills and/or specialized equipment that will provide a bypass to a principal route, primarily for recreational purposes. Neither the locations, extent or impacts of these Alternate Routes were considered by Defendants, despite the fact the total mileage of Alternative Routes could substantially exceed the 1,506 miles planned to be designated as “Principle Routes” under the BCDR.

Designation of the Back Country Discovery Route

27. On January 3, 1996, the Forest Service, BLM and Oregon Parks and Recreation Department agreed to a Memorandum of Understanding relating to the process for planning the designation and development of the BCDR.

28. Defendants failed to prepare any environmental impact statements or environmental assessments pursuant to the National Environmental Policy Act to evaluate the environmental effects of the BCDR. Additionally, Defendants failed to consider or present to the public any alternates, such as a no action alternative, as required by NEPA. 42 U.S.C. 4332 (C)(iii).

29. Several Forests and Ranger Districts approved the BCDR and made a finding that the BCDR was categorically excluded from the National Environmental Policy Act’s environmental review requirements. Other Districts, though, only made a “note to the file” designating the BCDR and failed to make a written finding that the project was categorically excluded.

Fremont National Forest

30. Fremont National Forest’s Forest Supervisor, Charles Graham, approved the BCDR designation for approximately 133.4 miles of roads passing through the Lakeview, Paisley and Silver Lake Ranger Districts on May 11, 1999 with a “Note to File,” but did not make a written determination that the project was categorically excluded from the project.

Umatilla National Forest

31. The Umatilla National Forest Supervisor Jeff Blackwood categorically excluded the designation of the approximately 153.8 mile segment of the BCDR that passes through the Umatilla at the Forest level without a decision notice before February 19, 1999.

32. District Rangers for the LaGrande, Unity and Baker Ranger Districts on the Wallowa-Whitman National Forest designated more than a 142 mile segment of the BCDR that passes through their respective Ranger Districts by “letters to the file” on December 29, 1998, January 21, 1999 and April 21, 1999 respectively.

33. The LaGrande, Unity and Baker Ranger Districts failed to prepare any specialist reports that considered the potential effects of the BCDR on wildlife, soils, wetlands, water quality, or scenic resources and cultural resources.

Ochoco National Forest

34. The Ochoco National Forest made a finding that the designation of approximately 51.3 miles of the BCDR that would cross the Snow Mountain Ranger District was categorically excluded from NEPA in October of 1999.

Malheur National Forest

35. On the Malheur National Forest the Bear Valley Ranger District made a finding of categorical exclusion for the designation of 55 miles of the BCDR on August 27, 1999.

36. The Burns and Prairie City Ranger Districts on the Malheur National Forest are still in consultation with the U.S. Fish and Wildlife Service because of the BCDR's potential effects on Canada lynx and steelhead, which are both listed as threatened under the U.S. Endangered Species Act. These Districts have yet to approve the BCDR.

Burns BLM District

37. The Area Manager for the Burns District of the Bureau of Land Management made a finding that the designation of approximately 39.8 miles of the BCDR route that passed through the Burns District was categorically excluded from NEPA on February 24, 1999.

Lakeview BLM District

38. The Area Manager for the Bureau of Land Management's Lakeview District made a finding that the designation of approximately 50.8 miles of the BCDR route that passed through the Lakeview District was categorically excluded from NEPA on March 29, 1999.

Requirements of the National Environmental Policy Act

39. NEPA requires that an agency prepare an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C).

40. The Council on Environmental Quality (CEQ) promulgated uniform regulations to implement NEPA that are binding on all federal agencies. 40C.F.R. 1500 *et seq.*

41. Pursuant to the CEQ regulations, if a proposed action would normally be expected to have a significant impact on the environment, an EIS must be prepared. 40 C.F.R. 1501.4. If it is unclear whether a given federal action will have a significant affect, then an agency may prepare an EA in order to determine whether to prepare an EIS or a finding of no significant impact. 40 C.F.R. 1508.9(a).

42. The CEQ regulations define categorical exclusions as a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by the agency. 40 C.F.R. 1508.4.

43. The Forest Service and BLM have both identified the specific categories of actions that they claim may be excluded from preparation of an EA or EIS. Forest Service Handbook 31.1, 31.2; see also 36 C.F.R. 215.2; 516 BLM Departmental Manual 6 App. 5.

44. Both the Forest Service Handbook (FSH) and BLM Departmental Manual (DM) provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect and thus cannot be excluded. FSG 30.3; 516 DM 2 App.2.

Forest Service Categorical Exclusions

45. A proposed Forest Service action may be categorically excluded if it “Is within a category listed in sec. 31.1b or 31.2; and there are no extraordinary circumstances related to the proposed action.” FSH 30.3(1)(a), (b) (emphasis added).

46. The Forest Supervisors which documented their categorical exclusions stated that the designation of the BCDR fit under the category of excluded actions 31.1(b)(4), which applies to the “Repair and maintenance of roads, trails, and landline boundaries.” FSH 31.1(b)(4).

47. The BCDR designation does not, however, involve the repair or maintenance of any road or trail and is inconsistent with the examples of repair or maintenance projects given in FSG 31.1(b)(4)a)-(e).

48. Additionally, extraordinary circumstances existed that precluded Defendants’ use of a categorical exclusions.

49. The FSH explains that “Extraordinary circumstances include, but are not limited to, the presence of the following: a. Steep slopes or highly erosive soils; b. Threatened and endangered species or their critical habitat; c. Flood plains, wetlands, or municipal watersheds; d. Congressionally designated areas, such as wilderness, Wilderness study areas, or National Recreation Areas; e. Inventoried roadless areas; f. Research Natural Areas; g. Native American religious or cultural sites, archaeological sites, or historic properties or areas.” FSH 30.3(2)(a)-(g).

50. The scant record that does exist for the BCDR supports that not only does one of these “extraordinary circumstances” exist along the BCDR, but in fact all of these enumerated “extraordinary circumstances” exist along the BCDR and could be affected by its designation.

BLM Categorical Exclusions

51. A proposed BLM action must also fit within one of the agencies designated categories and the action must not fall under one of the designated exceptions where use of a categorical exclusion is not permitted as described in 516 DM 2, App. 2.

52. Both the Burns and Lakeview BLM Districts concluded that designation of the BCDR was excluded from NEPA review under the BLM’s categorical exclusion category for “Transportation Signs.” Specifically, the BLM’s Burns District stated that its designation of the BCDR was categorically excluded under 516 DM 6, App. 5.4(g)(2), which categorically excludes the “Installation of routine signs, markers, culverts, ditches, waterbars, gates, or cattleguards on/or adjacent to existing roads.”

53. The BLM's Lakeview District stated that their designation of the BCDR was categorically excluded under 516 DM 6, App. 5.4(g)(4), which categorically excludes "placement of recreational, special designation or informational signs, visitor registers, kiosks, and portable sanitation devices."

The Back Country Discovery Route is One Connected Action

54. The National Environmental Policy Act requires that federal agencies consider the effects of connected actions together in a single NEPA environmental review document. 40 C.F.R 1508.25 (a)(1).

55. Both the Forest Service and BLM, have acknowledged that each section of the BCDR will become a part of a larger route that passes through California, Oregon, and Washington.

56. The designation and development of Alternate Routes as well as parking areas and other facilities, which have been described as the next stage in the "sequence of activities" planned for the BCDR, are also actions connected to the designation of BCDR Principle Route #5, but the effects of these actions were not considered by Defendants.

Environment and Species Potentially Affected by the BCDR

57. The BCDR would cross a diverse and highly sensitive range of habitats that are used by numerous sensitive, threatened and endangered species of wildlife that are known to be negatively and significantly affected by human use of roads. These habitats include sensitive wetlands and riparian habitats, native grasslands, meadows, sand dunes, later-successional forests, and desert steppe habitats. Some of these areas have already been degraded by roads and motorized recreation and continue to be at risk while others remain remote, un-roaded and sensitive to disturbance.

58. Federally listed Threatened and Endangered species that could be affected by OHV use on the BCDR include but are not limited to the: Canada lynx, steelhead, Chinook salmon, bull trout, Northern bald eagle, golden eagle, American peregrine falcon and gray wolf.

59. Species listed as sensitive by the National Forest Regional Forest Supervisor and species that have been found by individual Forests to be sensitive that could be affected by OHV use on the BCDR include: California wolverine, pine marten, Preble's shrew, redband trout, ferruginous hawk, Townsends big-eared bat, western small-footed bat, burrowing owl, long-billed curlew, Pacific western big-eared bat, pileated woodpecker, western sage grouse, greater sandhill crane, upland sandpiper, Harlequin duck, California bighorn, Blue Mountain cryptochian, mountain quail, northern sagebrush lizard, and pygmy rabbit.

60. Management Indicator Species (MIS) are a group of wildlife species that are intended to represent other wildlife species and proposed Forest Service actions must be evaluated for their effects on these species. 36 C.F.R. 219(a)(2). Defendant Forest Service failed to consider the potential effects of the BCDR on MIS including: deer, elk, pine marten, bald eagle, golden eagle, peregrine falcon, prairie falcon, goshawk, pileated woodpecker, steelhead, Chinook salmon, or resident trout.

Impacts from Off-Highway Vehicles

61. OHVs are known to have negative and significant effects on wildlife due to direct mortality, habitat degradation and disturbance.
62. OHVs are known to cause significant damage to soils of every type as a result of soil compaction. Soil compaction in turn causes increased erosion, increased runoff, reduced plant production, inhibited seed germination, impairment of root penetration and growth, reduced soil permeability to air and water, reduced soil moisture, reduction in soil depth, reduction in groundwater discharge and increased colonization by exotic species.
63. OHVs can cause significant damage to plants in every floral community as a result of trampling, crushing, breaking, damaging seeds, impairing plant growth, reducing species diversity, increasing exotic species invasions and reducing vegetative cover. The use of OHVs is also known to increase the risk of fires.
64. Because of these impacts, OHV use has been documented to have significant effects on Forest Service and BLM lands in eastern Oregon.

V. FIRST CLAIM FOR RELIEF

The Decision by the Forest Service and Bureau of Land Management to Designate the Back Country Discovery Route Without Preparing an Environmental Impact Statement is Arbitrary, Capricious, an Abuse Of Discretion, and Not in Accordance With Law.

65. Plaintiffs incorporate by reference all preceding paragraphs.
66. NEPA requires an EIS when a proposed major federal project is proposed may significantly affect the quality of the environment. 42 U.S.C. 4332(2)(C).
67. Defendants have failed to evaluate, consider and disclose to the public, the direct, indirect and cumulative effects of the BCDR as required by NEPA and its implementing regulations despite evidence that those impacts will be significant. 40 C.F.R 1508.7; 1508.27(b)(7).
68. Specifically, Defendants failed to adequately evaluate, consider and disclose to the public the direct and indirect effects of increased OHV use on and adjacent to the roads and trails designated as the BCDR. Additionally, Defendants failed to adequately evaluate, consider and disclose the cumulative effects of increased OHV use that would occur on the BCDR in conjunction with the effects of existing OHV use on the BCDR route and the effects of actions connected to the designation of the BCDR's Principle Route #5.
69. The direct, indirect and cumulative effects of the BCDR's Principle and Alternative Routes that Defendants have failed to adequately evaluate, consider or disclose include but are not limited to:
- a. impacts on sensitive, threatened and endangered wildlife, fish, and plant species;
 - b. impacts on sensitive aquatic and terrestrial habitats;
 - c. impacts to roadless and Wilderness areas adjacent to the BCDR;
 - d. increased user conflicts;

- e. use of areas off the designated BCDR route;
- f. increased use of non-street legal vehicles along BCDR route;
- g. increased risk of fire;
- h. increased spread of noxious weeds;
- i. potential growth inducing effects in communities along the BCDR;
- j. effects of increased winter use of BCDR designated roads and trails;
- k. inconsistencies with Forest Plans and Resource Management Plans
- l. effects of Principle Route #2, #3 and #4 and the effects of the development planned to support BCDR use.

70. Additionally, Defendants failed to consider any clear alternatives to the designation of the BCDR as required by 42 U.S.C. 4332(C)(iii).

VI. SECOND CLAIM FOR RELIEF

The Decision by the Forest Service and BLM to Designate the Back County Discovery Route Without Preparing an Environmental Assessment is Arbitrary, Capricious, and Not in Accordance with Law.

71. Plaintiffs incorporate by reference all preceding paragraphs.

72. NEPA requires an EA when necessary to determine whether to prepare an EIS. 40 C.F.R. 1501.4.

73. In the alternative to preparing an EIS, Defendants should have at least prepared an EA to evaluate whether an EIS was required for the BCDR and failure to do so was in violation of both NEPA and the APA. 42 U.S.C. 4332(2)(C); 5 U.S.C. 706(2)(A).

VII. THIRD CLAIM FOR RELIEF

The Decision to Categorically Exclude the Designation of the BCDR is Arbitrary, Capricious, and Not in Accordance with Law.

74. Plaintiffs incorporate by reference all preceding paragraphs.

75. Defendant Forest Service's determination that designation of the BCDR was categorically excluded consistent with FSH 31.1(b)(4) "Repair and maintenance of roads, trails, and landline boundaries" is arbitrary, capricious, and not in accordance with law.

76. Designation of the BCDR is not a repair or maintenance project and extraordinary circumstances exist which prohibit the use of a categorical exclusion.

77. Defendant BLM's determination that designation of the BCDR was categorically excluded under the BLM's categorical exclusion for "Transportation Signs," 516 DM 6 App. 5(g)(2) and 5(g)(4), is arbitrary, capricious, and not in accordance with law.

78. Designation of the BCDR does not fit under this categorical exclusion and additionally under 516 DM 2, App 2. the BCDR could not be categorically excluded because of its effects.

RELIEF REQUESTED

WHEREFORE, the Plaintiffs respectfully request that this Court:

- A. Declare that Defendants' categorical exclusion of the BCDR and Defendants' decisions not prepare an EIS or EA was arbitrary, capricious, and in violation of NEPA;
- B. Enter an injunction barring Defendants, their permittees, licensees, contractors or agents from taking any further actions to develop or promote the BCDR, such as, but not limited to, sign installation, the creation of distribution of any map identifying the BCDR, or planning the development of BCDR support facilities (parking lots, staging areas, interpretive sites) until legally adequate EIS is completed;
- C. Alternatively, enter an injunction barring Defendants, their permittees, licensees, contractors or agents from taking any further actions to develop or promote the BCDR, such as, but not limited to, sign installation, the creation of distribution of any map identifying the BCDR, or planning the development of BCDR support facilities (parking lots, staging areas, interpretive sites) until a legally adequate EA is completed that assesses whether an EIS is necessary.
- D. Order the Forest Service and BLM to notify the Oregon Parks and Recreation Department (OPRD) that the BCDR was improperly designated and that the OPRD, its contractors and agents should not take any actions to promote or further develop the BCDR until an EIS is prepared and the project is found consistent with relevant environmental laws including the ESA and NFMA;
- E. Order the Forest Service and BLM to remove any signage related to the BCDR on Forest Service or BLM lands that has already been installed until such time that a legally adequate EIS is prepared;
- F. Allow the Plaintiffs to recover costs, expenses, expert witness fees, and reasonable attorney fees under 28 U.S.C. 2412; and
- G. Grant Plaintiffs such further relief as may seem to this Court to be just, proper, and equitable.

DATED this 3rd of August, 2000.

Respectfully submitted,

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