May 11, 2016

Director (210), Bureau of Land Management
Attention: Protest Coordinator
P.O. Box 71383
Washington, D.C. 20024-1383

Regular Mail &
via email to
protest@blm.gov

Re: Douglas County Protest of BLM's Proposed Western Oregon Resource Management Plan/Final Environmental Impact Statement

Dear Director:

The Douglas County Board of County Commissioners ("Board") on behalf of Douglas County, Oregon ("Douglas County"), hereby protests the BLM's Proposed Western Oregon Resource Management Plan ("PRMP") and accompanying Final Environmental Impact Statement ("FEIS").

Douglas County has participated in the planning process for this PRMP and has interests that may be adversely affected by the planning decision.

This protest is timely submitted within the 30 day period commencing with the date the Environmental Protection Agency published the Notice of Availability in the Federal Register (April 15, 2016).

Consistent with the BLM's protest procedures as set forth in 43 CFR §1610.5-2, Douglas County provides the following:

A. Protester's Name and Contact Information.

Douglas County
Board of County Commissioners
Douglas County Courthouse
1036 SE Douglas
Roseburg, Oregon 97470
(541) 440-4201

B. Protester's Interest.

Douglas County is one of the Counties wherein the BLM managed O&C grant lands and Coos Bay Wagon Road (CBWR) lands are situated.

Douglas County was among the intended beneficiaries of both the O & C grant lands and the revested CBWR lands. In the original railroad grant Congress intended that the O & C grant lands be dedicated to the settlement and up building of Douglas County and the State of Oregon. The O&C Act of 1937, 43 U.S.C. §§1181a et seq (1937 O& C Act) was intended to maintain the relative rights of the parties, including Douglas County, under the original grant.

While the original CBWR grant was not specifically dedicating the lands to benefit Douglas and Coos Counties, the subsequent Coos Bay Wagon Road Act of May 24, 1939 was designed with the purpose of providing revenue sharing to benefit the local communities within these two counties (Act of May 24, 1939, 53 Stat 753).

The 1937 O & C Act governs the management of the timber resources on both the O&C and CBWR lands and directs the distribution of revenues produced from the sale and harvest of timber on those lands. The 1937 O & C Act provides that 75 percent of all revenues from the sale of timber is shared with the O&C Counties. While the substantive legislation mandated a 75-25 revenue sharing, Congress in periodic Interior Appropriations Acts effectively reduced to this to a 50 percent revenue sharing. The CBWR has a slightly different distribution formula but is likewise designed for the benefit of the local communities.

The revenue sharing is a critical component of general fund budget of Douglas County. It is the primary source of funding within Douglas County for essential public services such as law enforcement, jails, public health, parks, libraries, and an array of other services critical to the local community. With the large expanse of federally managed lands within Douglas County and the resulting limited tax base,[1] the ability of Douglas County to provide for the public safety and welfare is dependent upon the mandated revenue sharing. Further, the overall economic stability of the County is dependent upon the harvests from the O & C grant lands.

In recognition of the importance of the O &C grant to Douglas County, the Board entered into a formal cooperating agency agreement with the BLM. Douglas County was afforded this role in recognition of the "special expertise" of Douglas County relative to the matters to be addressed in the planning effort (*i.e.* social and economic impacts and reasonable alternatives).

[1] With the Oregon Constitutional limitation on tax rates, the County is unable to raise property taxes sufficient to substitute for the O & C grant land revenues. Any increase in the County tax rate would also significantly and adversely impact other local governments as a result of the constitutional limitations of the Oregon Constitution ArticleXI§11b.

Douglas County submitted comments on the draft and joined with the Association of O & C Counties in the comments submitted August 20, 2015, regarding the DRMP /DEIS. Likewise Douglas County joined with the Association of O & C Counties in the supplemental comments in the letter dated February 26, 2016.

While the impacts to Douglas County are extensively discussed in its earlier comments, in light of the current PRMP strategy it is clear that the County's earlier comments understated the impacts. As a result the proposed reduction in the actual timber sale program and reclassification of harvests from historical practice, the PRMP if adopted will deprive Douglas County of many millions of dollars every year and in turn force layoffs of Douglas County's employees and reductions in its ability to provide basic public services. In addition, failure by the BLM to manage all O&C and CBWR timberlands for sustained yield production with a minimum timber sale level of 500 mmbf per year will deprive the wood products industry of raw materials for manufacturing. The timber resource is a very significant regional employment generator, accounting for approximately 30% of the local job base. These jobs and attendant economic activity are dependent on the commitments of the O & C grants. Without this commitment, Douglas County will see increased levels of unemployment, increased demand on services provided by Douglas County and a further destabilization of the very region that Congress sought to stabilize and promote in the O & C Acts.

C. Issues Being Protested.

1. The PRMP/EIS can not be implemented consistent with existing law.

As the Board commented in its prior submissions relative to the Planning Criteria, the assumptions that drove the Draft Resource Management Plan/Environmental Impact Statement ("DRMP/EIS") and the identified proposed alternatives therein failed to properly recognize that the purpose and need of the DRMP/EIS must be consistent with the purposes underlying the Settlers Clause in the "Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from the Central Pacific Railroad in California to Portland ("Railroad Grant") (14 Stat 239) July 25, 1866, as amended. The PRMP suffers from the same failure to follow existing law.

Congress in the Act of April 10, 1869 amended the original Railroad Grant to add the Settlers Clause by incorporating the following language to section 6 of the original act:

> "Provided further, That the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre." (Chap. 69, 16 Stat at L. 47). (*See also* Act of May 4, 1870, Chap. 69, Stat at L. 94).

When the United States Supreme Court found that the Oregon and California Railroad had violated the Settlers Clause of the Railroad Grant, it also specified that the remedy for the breach was for Congress to address in legislation a process that would fulfill the Congressional intent of the original Railroad Grant (*Oregon and California Railroad Co. v. United States*, 238 U.S. 393, 408, 35 S. Ct. 908, 59 L. Ed. 1360 (1914)).

In doing so the Court specifically rejected the decree by the lower court that the lands were forfeited to the United States as a result of a failure to meet a "condition subsequent."[2] Rather, the U.S. Supreme Court found the Settlers Clause to be a covenant that yet needed to be fulfilled. It left to Congress to determine how to fulfill the covenant under the changed circumstances that were present.

In response to direction of the Supreme Court, Congress passed the Chamberlain-Ferris Act of 1916 (Pub. L. No. 86, 39 Stat 219). Congress expressly noted that the purpose of the 1916 Act was to recognize and implement Congress' original purpose[3] for incorporating the Settlers Clause into the Railroad Grant.

The Committee was clear as to the purpose when it noted:

> ". . . grant lands were, by the granting acts, dedicated to the settlement and upbuilding of the State of Oregon…
>
> This object which the Supreme Court so eloquently said Congress had in mind was largely defeated by the railroad company's failure to observe the settlers clause. The major portion of the grant lands is still a wilderness - a 'vast solitude'.

[2] The United States had brought suit alleging that the Settlers provisions constituted "conditions subsequent" and that a breach of the conditions resulted in a forfeiture of the unsold lands to the United States. (*Oregon & California R. Co. v. United States*, 243 U.S. 549, 37 Sup. Ct. 443, 445 (1916)).

[3] The Supreme Court identified the purposes of the O & C Railroad Grant as twofold: first to build the railroad; and, secondly to get the grant lands into the hands of bona fide settlers for the upbuilding of the areas surrounding the railroad. It is this second purpose that is the underlying foundation that provides the legislative intent for interpretation of the Chamberlain Ferris Act of 1916 (Pub. L. No. 86, 39 Stat 219), the Stanfield Act of 1926 (Pub. L. No. 523, 44 Stat 915), and the O & C Act of 1937 (50 Stat. 874). All alternatives must start and end with this intent as their foundation – namely that they are consistent with the O & C Railroad Grant purpose. (*See King et al v. Burwell, Secretary of Health and Human Services, et al* 135 S. Ct. 2480, 2492 (June 25, 2015)). In interpreting legislation, the Supreme Court looks to the intent of the Act in its broader structure to determine the meaning of specific language. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme since only one of the meanings produces a substantive effect that is compatible with the rest of the law. An interpretation must be rejected if it would destabilize the intended purpose – in this case the local communities - In this case the proposed plan creates the very destabilization that Congress designed the Act to avoid. The BLM can not adopt a plan that is founded upon an interpretation of federal statutes that negates the legislations own stated purposes.

> The railroad company was chosen as the agent of Congress to effect the settlement of the grant lands. It was untrue to its trust;[4] except in a very small measure it refused to sell the grant lands to actual settlers, thereby retarding the settlement and development of the State of Oregon.
>
> Inasmuch as the original purpose of the granting acts was the welfare of the State of Oregon, your committee feels that this purpose should now be resumed. It can only be accomplished by devoting the grant lands or their proceeds to the original purpose of hastening the development of the State."[5] (64th Congress 1st Session, Sen. Report 494, May 18, 1916, pp. 41-42).

The foundation of the 1916 Act was the understanding by Congress that it was:

> ". . . no more than equitable[6] that Oregon should reap the full benefit originally intended to be conferred on the State by the granting acts, viz., the devoting of the lands, or the proceeds therefrom to the upbuilding of the State." (*Id.* p. 42).[7]

Contemporaneously with the adoption of the 1916 Act, the Department of Interior also interpreted the 1916 Act in like manner when it stated that the "main object of the Chamberlain-Ferris Act was to "carry out the originally planned disposition and maintain the relative rights of interested parties under the original granting act." (Statement of Rufus G. Poole, ESQ. Office of the Secretary Department of Interior before the House Committee on the Public Lands, April 13, 1937, p. 5).

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[4] This view of the federal government's fiduciary duties is supported by the U.S. Supreme Court holding in *Mitchell II*, 463 U.S. 206, 225 (1983) wherein it held that "a fiduciary relationship necessarily arises when the government assumes such elaborate control over ... property belonging to a beneficiary"--in particular where, as here, "[a]ll of the necessary elements of a common-law trust are present." 463 U.S. at 225.

The Supreme Court also noted that:

> [W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection. *See Cobell v. Norton*, 240 F.3d 1081, 1088 (D.C. Cir., 2001). *United States v. Mitchell* ("Mitchell II"), (quoting *Navajo Tribe of Indians v. United States*, 224 Ct. Cl. 171, 183 (1980)).

As a result of the revestment under the Chamberlain-Ferris Act, the counties became beneficiaries of the trust lands, but lost the right to sell, lease, or burden the property. The general "contours" of the government's obligations may be defined by the O & C Act, but the interstices of the relationship to the beneficiaries must be filled in through reference to general trust law.

[5] The Grant dedicated the lands and their proceeds to the development of the State.

[6] The recognition of this equitable obligation sets the context for the application of the fiduciary relationship of the BLM to the O & C Counties.

[7] Not only did Congress recognize the unique role of these lands, Congress also expressly stated "We deem it only just and equitable that Congress should make the allotments [in the] proposed amendments of this committee to the State of Oregon in reparation for the great damage it has sustained by the refusal to permit settlement of the grant lands." 64th Congress 1st Session, Sen. Report 494, May 18, 1916, p.42.

While the subsequent 1937 O & C Act was necessitated by failures of the Chamberlain-Ferris Act to achieve the purposes of the original grant, it nonetheless sought to maintain the relative rights of the parties under the original grant. The 1937 Act was intended by Congress to be a solution to the problems created by the Revestment Act of June 9, 1916 and the Act of July 13, 1926. (*Id.* p. 3.) that prevented the fulfillment of the Congressional intent relative to the Settlers Clause.

Notably, the 1937 Act did not change the original purpose of either the original Settlers Clause or the 1916 Act, rather it sought to resolve the problems associated with the sale of the forest without consideration of the impact on the community industries.

The purpose of the 1937 Act was to provide through the sustained yield principles the

> "conservation and scientific management for this vast Federal property which now receives no planned management beyond liquidation of timber assets and protection from fire." (75th Cong. 1st Sess, House Report No. 1119, p. 2).

The House Committee noted that the purpose of the sustained yield provision was that:

> "[t]his type of management will make for a more permanent type of community, contribute to the economic stability of local dependent industries, protect watersheds, and aid in regulating waterflow." (House Committee Report 1119, 75th Congress, June 28, 1937, p. 2).

The Ninth Circuit Court of Appeals subsequently found that:

> "*** The purposes of the O & C Act were twofold. **First, the O & C Act was intended to provide the counties in which the O & C land was located with the stream of revenue which had been promised but not delivered** by the Chamberlain-Ferris Revestment Act ***. *** The counties had failed to derive appreciable revenue from the Chamberlain-Ferris Act primarily because the lands in question were not managed as so to provide a significant revenue stream; the O & C Act sought to change this. *** Second, the O & C Act intended to halt previous practices of clear-cutting without reforestation, which was leading to a depletion of forest resources." (*Headwaters, Inc. v. BLM, Medford Dist.*, 914 F2d 1174, 1183-84 (9th Cir. 1990)) (emphasis added).

In *Headwaters*, the Ninth Circuit made clear that timber production and harvest was the way Congress intended to achieve the goal of the original Railroad Grant's Settlers Clause. Congress intended through the sustained yield program of the O & C

Act to provide the significant revenue stream to the counties and to support the local economies and industries.

Congress has consistently and clearly stated its intent with respect to the O & C lands when it noted:

> "In so far as changed conditions permit, it is surely no more than equitable that Oregon should reap the full benefit originally intended to be conferred on the State by the granting acts, *viz*., the devotion of the lands, or the proceeds therefrom, to the upbuilding of the State." 64th Cong. 1st Session Senate Report 494, p. 42 (May 18, 1916).

Unfortunately, the PRMP is founded upon alternatives that are clearly the antithesis of this purpose. While a NEPA review includes a reasonable range of alternatives, the actual decision must be implementable under existing law. In this case, the PRMP has elevated other goals over the purposes of the grants – converting the lands to purposes other than contemplated by the O & C Acts.

The PRMP ignores the explicit timber resource management provisions of the O & C Acts which requires that all lands biologically capable of producing timber:

> "* * * shall be managed * * * for permanent forest production, and the timber thereon shall be sold, cut and removed in conformity with the principal [sic] of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow,[8] and contributing to the economic stability of local communities and industries, and providing recreational facilities[9] * * *." Oregon

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[8] The phrase "regulating stream flows" was intended to be construed "to mean the protection of the watersheds and the run-off of waters before they reach or flow into the streams." (75th Cong. 1st Session, Sen. Report. No. 1231, p. 5 (Aug. 16, 1937)). In a case involving a dispute over access to timberlands made difficult because of the checkerboard pattern of private and public ownership that is characteristic of the areas that include the O&C and CBWR lands, the Ninth Circuit said the following about the secondary benefit of protecting watersheds through sustained yield timber production:

> "*** In 1937, Congress declared that these lands were to be managed as part of a 'sustained yield timber program' for the benefit of dependent communities. *** In order to protect watersheds and maintain economic stability in the area, long-term federal timber yields were guaranteed by limiting the maximum harvest to the volume of new timber growth." (*United States v. Weyerhaeuser Co*., 538 F2d 1363, 1364-65 (9th Cir. 1976)).

[9] The use of the phrase "recreational facilities" was incorporated to allow the generation of revenues through the leasing of facilities. It was not intended to elevate non-income generating recreation above timber production. As the Ninth Circuit noted:

> ". . . the provisions of the revestiture statue affecting Oregon and California railroad lands do not alter the situation. The provisions of 43 U.S.C. Sec. 1181a make it clear that the primary use of the revested lands is for timber production to be managed in conformity with the provision of

and California Railroad and Coos Bay Wagon Road Grant Lands Act; 43 U.S.C. § 1181a.

It is this overall statutory structure of the Railroad Grant and the subsequent legislation to achieve the purposes of the grant that sets the context for the PRMP/FEIS alternatives.

All NEPA alternatives must be evaluated in the context of their achieving the purposes of the original Railroad Grant and subsequent legislation – and the CBWR Act of May 24, 1939. It is axiomatic that the BLM cannot adopt an interpretation of these Acts such that it negates their stated purposes. *See New York State Dept. Social Services v. Dublino*, 413 U.S. 405, 419-20, 93 S. Ct. 2507, 2516 (1973) (It would be incongruous for Congress on the one hand to promote a stated right while on the other hand to prevent efforts to that same end.)

By disregarding the original purposes of Congress when it adopted the Settlers Clause and the 1939 CBWR Act, the PRMP simply results in a destabilizing death spiral for Douglas County, rather than a pathway to the upbuilding of the community. It is implausible that Congress meant for any of the O & C or CBWR legislation to be interpreted to operate in a manner that destabilized the economic and social fabric of Douglas County or any of the other Western Oregon counties.

2. The statement of purpose and need departs from the O & C Act definition of sustained yield.

While Congress determined that "sustained yield" of timber was to be a mechanism for achieving the original purposes of the Oregon and California Railroad Grant, the PRMP/FEIS arbitrarily adopted a definition of sustained yield that tramples upon the original Congressional intent. The BLM simply ignored the purpose that Congress sought to achieve by adopting the sustained yield concept in the 1937 Act.

The original intent of the sustained yield concept was to provide a long term production of timber and thereby a significant income stream to achieve the purpose of the Settlers Clause. The BLM has taken considerable license in interpreting the phrase "sustained yield" in a manner that results in a total disregard of the context in which Congress adopted the sustained yield concept in the 1937 Act. (*See King et al v. Burwell, Secretary of Health and Human Services, et al* 135 S. Ct. at 2492 (June 25, 2015) (The Court cannot interpret federal statutes to negate the statutes own stated purposes.).

The context for defining the "sustained yield" language in the 1937 Act, is found in the Supreme Court's statements that the railroad grant policy was for the grant lands to be dedicated to the settlement and upbuilding of the State of Oregon, a

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sustained yield, and the provision of recreational facilities as a secondary use." (*O'Neal v. U.S.* 814 F.2d 1285, 1287 (1987)).

policy that was defeated by the railroad company's failure to observe the Settlers Clause. The Supreme Court noted that this failure resulted in a "major portion of the grant lands is still a wilderness – a vast solitude" – a result that was contrary to the grant. (*See* Senate Report 494, 64th Congress May 18, 1916).

As Rep. James W. Mott testified in the May 25, 1937 congressional hearing, the sustained yield management was not to impair or diminish the revenue from the lands that the counties were entitled under the existing law.

Unfortunately, the BLM has developed alternatives that would all unlawfully reserve O & C timberlands from timber harvest and designate them for secondary purposes that do not meet or only tangently touch on the purposes of the O & C Grant lands. For example, each alternative incorporates the following common hard wired design features: (1) designate "large block forest *reserves*" where timber harvest would be prohibited or severely limited and managed for spotted owl and marbled murrelet habitat;[10] (2) *reserve* all forests more than 120-160 years old and prohibit timber harvest on these lands;[11] and (3) designate riparian *reserves* and prohibit timber harvest within these areas and limit thinning in buffers. [12] None of these elements are however, a purpose found in the Railroad Grant nor in any of the legislation implementing the grant.

Each of these three common plan design features effectively nullify the statutorily primary purpose of timber production established by Congress in the O & C Act and equally violates the purposes Congress adopted in the Settlers Clause of the Oregon and California Railroad Grant.

What the Supreme Court saw as the result of the failure of the Settlers Clause – namely, leaving the land in a wilderness or vast solitude – is the same fundamental failure of grant purpose that will result from the proposed BLM planning alternatives allocating 29-57% of the lands to Late Successional Reserves or 14-38% of the lands into riparian reserves.

Congress clearly intended in the 1937 Act that the counties would receive payments based on harvest and that these payments were in part to achieve the original

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[10] The Ninth Circuit previously addressed the extent to which these lands can be managed for wildlife purposes, such as the northern spotted owl, when it noted:

> "*** **Nowhere does the legislative history suggest that wildlife habitat conservation or conservation of old growth forest is a goal on a par with timber production, or indeed that it is a goal of the O & C Act at all."** (*Headwaters*, 914 F2d at 1184).

[11] It is hard to find a distinction between the concern Congress expressed in 1916 relative to the "major portion of the grant lands . . . [still] a wilderness – a vast solitude" (Sen. Report 494, 64th Congress May 18, 1916) and the PRMP's proposed management of late successional reserves.

[12] The 1937 Act specified that the phrase "regulating stream flows" was intended to be construed "to mean the protection of the watersheds and the run-off of waters before they reach or flow into the streams." (75th Cong. 1st Session, Sen Report. No. 1231, p. 5 (Aug. 16, 1937)).

purposes. Not only was the sustained yield program designed to achieve the original purposes of the Railroad Grant, in the 1937 Act, the counties also gave up valuable consideration in reliance on the sustained yield program when they not only forgo arguments to have the land in private ownership but also by foregoing any tax claims to the property.

> "Under the terms of the act of July 13, 1926, the land-grant counties submit annual claims for the equivalent of the taxes which would have accrued from these lands had they remained in private ownership. . . But hereafter, no additional tax claims will accrue to such counties as under present law, as the bill provides that their rights shall be limited to a fixed percentage of the proceeds from the lands." (House Committee Report 1119, p. 3).[13]

Like the 1916 Act, the object of the 1937 Act was to maintain the relative rights of the interested parties under the original granting act. It did not create new rights – nor could it while being true to the original purposes of the Railroad Grant. In this case the range of alternatives elevates secondary purposes above the primary purposes in a manner that fails to maintain the relative rights.

As noted earlier, in enacting the O & C Act, Congress reserved all the lands classified as timberlands for the sole dominant purpose of "permanent forest production" and mandated that the BLM sell the maximum sustained yield productive capacity of timber from those lands on an annual basis. "Congress intended to use 'forest production' and 'timber production' synonymously." (*Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1184 (9th Cir. 1990)).

It is therefore in violation of the O & C Act for the BLM to reserve or otherwise manage O & C lands classified as timberlands for any dominant purpose other than timber production.

3. The PRMP/FEIS limits the public's ability to knowingly review and comment.

In the development and/or amendment of Resource Management Plans, the Federal Land Policy and Management Act of 1976 ("FLPMA") requires the BLM to allow opportunities for public involvement (43 U.S.C. §1712(f)). Likewise under the Council on Environmental Quality ("CEQ") regulations, the BLM is to provide the public with an appropriate opportunity to knowingly review and comment on proposed actions (40 C.F.R. §1503.1(a)(4)).

Since the alternatives assist in understanding and evaluating the proposed action, it is axiomatic that for the public to have the ability to knowingly comment requires

[13] The statutory obligations and fiduciary role imposed upon the Department of Interior relative to the beneficiaries of the Railroad Grant are akin to the same roles imposed on the Department with respect to Indian assets. (*See Cobell v. Norton)*.

that the BLM have a range of alternatives that fully explore the options available to achieve the true purpose – namely the achievement of the Congressional intent in adopting the O & C legislation.

The touchstone inquiry is whether an EIS's selection and discussion of alternatives fosters informed decision-making and informed public participation. (*California v. Block*, 690 F.2d 753, 767 (9th Cir.1982)). While NEPA does not require the consideration of alternatives which are infeasible, ineffective, or inconsistent with the basic policy objectives for the management of the area **the alternatives must nonetheless be responsive to the underlying policy objectives for these lands as established by Congress** – namely the Settlers Clause, the 1916 Act and the 1937 O & C Act.

Unfortunately for Douglas County and the other Oregon counties, the FEIS establishes an alternatives framework wherein all of the action alternatives are hard wired such that none of them fulfill the purposes of the original Railroad Grant. Rather than recognize these lands are to be managed for the benefit of the dependent communities, the PRMP simply elevates other secondary purposes above the Congressional declared policy for these lands – thereby hardwiring the EIS analysis to preclude consideration of alternatives that meet the underlying policy objectives established by Congress in the Settlers Clause.

The statement of purpose and need, as well as the range of alternatives, violate the planning criteria of FLPMA[14] and the requirements of NEPA by unreasonably defining the alternatives in a manner that artificially narrows the decision space.

The true decision space is in the context of the Oregon and California Railroad Grant; the Act of August 28, 1937 (50 Stat. 874; 43 U.S.C. §1181a-1181j); and, the Act of May 24, 1939 (53 Stat. 753) insofar as they relate to management of timber resources.

The failure to include alternatives that address the purposes of the Oregon and California Railroad Grant has not only pre-ordained the decision but has also limited the public's ability to knowingly comment on the proposed actions in the context of the O & C Railroad Grant purposes.

To timely disclose the impacts an alternative must be included that is consistent to the fullest extent with the Congressional intent and the Federal trust obligation to Douglas County and the other O & C dependent communities.

[14] These O & C Acts prevail over conflicting provisions of the FLPMA (43 USC §1701).

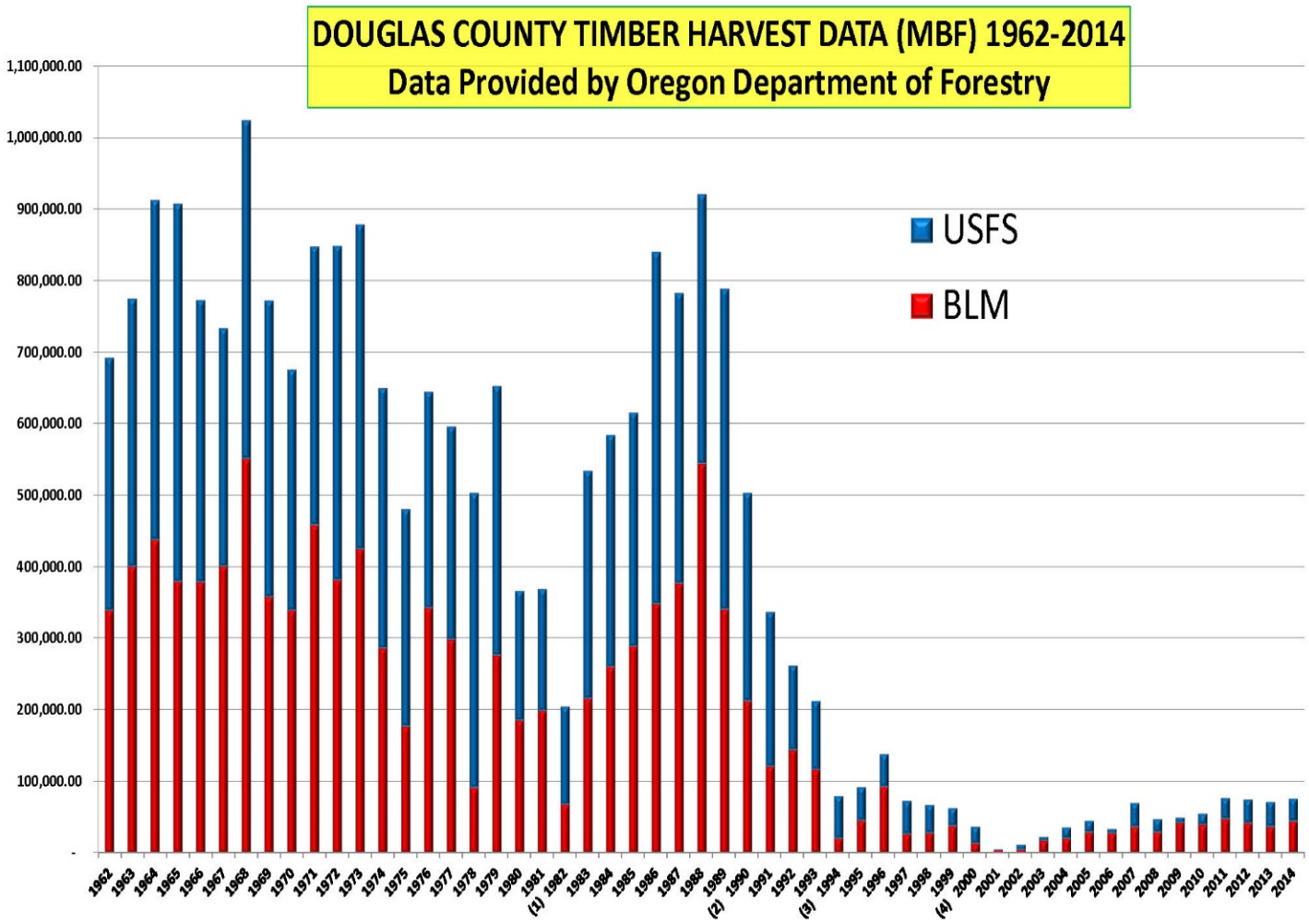
4. The social and economic effects analysis does not properly inform the public or decision maker.

Notwithstanding the clear context of the various O & C legislation, the PRMP/FEIS candidly acknowledges that under the proposed action, employment effects to low-income populations in Coos and Curry would be disproportionately negative and that employment affects to the population of Douglas, and Klamath Counties[15] **would be disproportionately negative** – irrespective of social economic status. Further the proposed action recognizes that Tribes within these counties **would be vulnerable** to these disproportionate negative effects. (PRMP/EIS p. xxxii). In other words the proposed action would be destabilizing to these communities.

As the community leaders and tribal leaders repeatedly advised the BLM during the outreach, the BLM management practices have resulted in a forest that is not well managed, very few jobs are generated, and, management is litigation prone. All of these practices have created uncertainty and a financial burden on the local communities and tribes. (*See* DRMP Appendix O, pp. 1333-1365). Douglas County Commissioner Tim Freeman, and other county commissioners, at the Roseburg meeting repeatedly raised red flag warnings about the major adverse socio-economic impacts of not only the current BLM management but also the impacts from the various action alternatives of the DRMP/EIS.

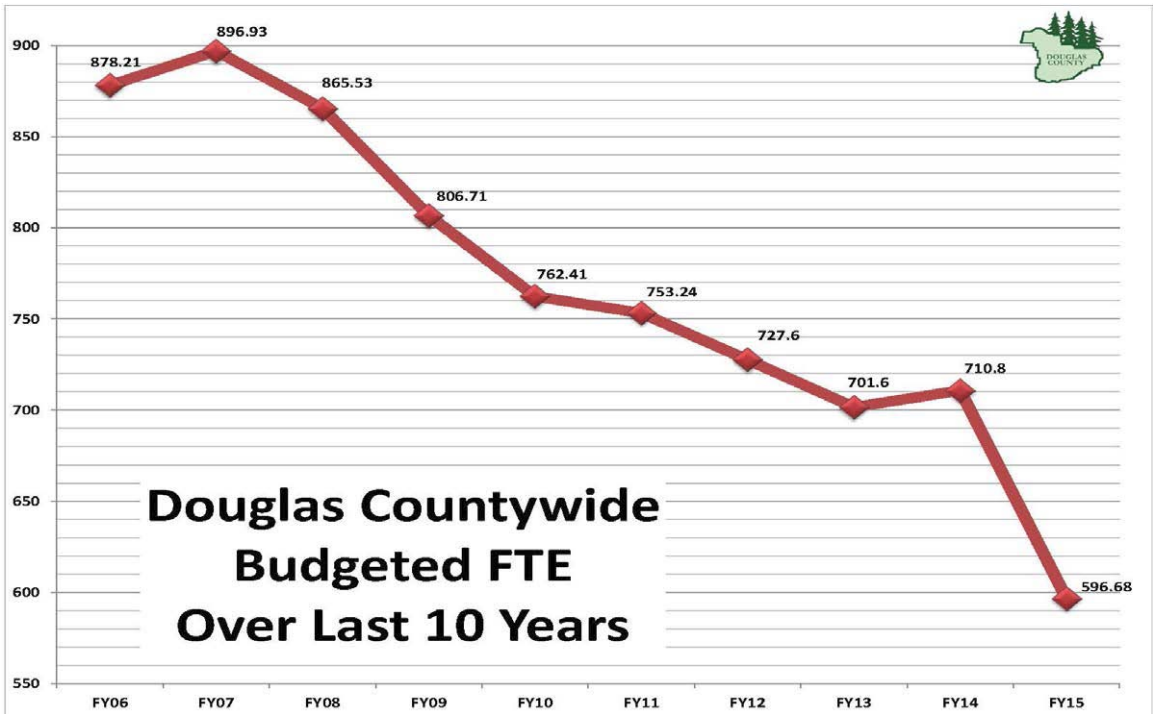
Not only does current management not reflect the intent of the O & C Railroad Grant and subsequent O & C legislation, the proposed alternative simply moves further away from the up building context of the Grant and creates the very destabilization the O & C Acts were designed to prevent.

[15] These four counties contain a majority of the O & C lands.

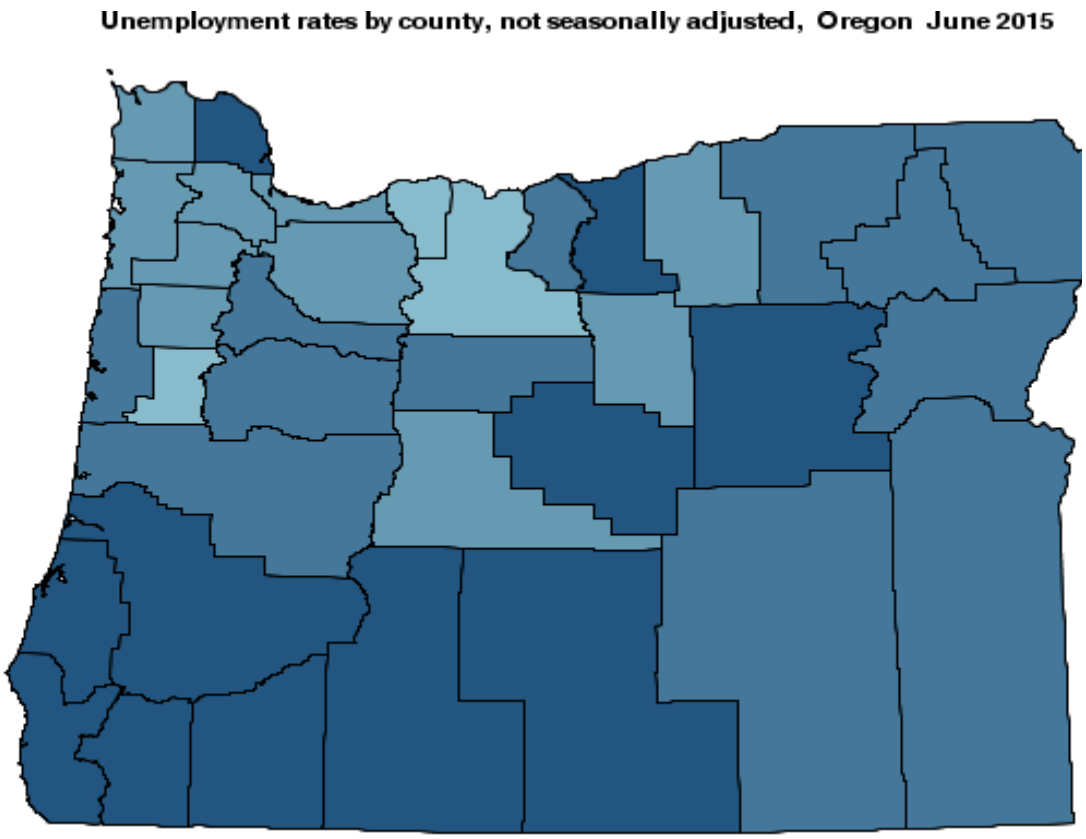


(1) National Recession (2) Northern Spotted Owl Listed as Endangered Species (3) Northwest Forest Plan Adopted (4) Secure Rural Schools and Community Self-Determination Act of 2000 Passed

As the above chart illustrates the timber management over recent years has effectively destabilized the local communities. The adverse impacts are further illustrated by the employment changes in the County.



To timely disclose the impacts an alternative must be included that is consistent to the fullest extent with the Congressional intent and the Federal trust obligation to the local communities.



The dark blue areas represent unemployment rates in the 7.0-9.9% level in June of 2015. (http://data.bls.gov/map/MapToolServlet). Given the BLM management practices, it is not a coincidence that the O & C Counties of south western Oregon (Douglas, Coos, Curry, Josephine, Jackson and Klamath) are among the highest unemployment areas.

By way of comparison in June, 2009, the unemployment rate in Douglas County was 15.7% and for the same six counties the rate ranged from 13.1 to15.7%. In June of 1990 the Douglas County unemployment rate was 6.6%. (http://data.bls.gov/map/MapToolServlet).

Douglas County's ability to provide services is directly tied not only to the number of persons employed in the County and by the County, but also by the amount of timber receipts derived from the O & C lands. As beneficiary of the Settlers Clause, the County has been able to provide a stable environment of government services to the community. However, today the County is forced to rely primarily on reserve funds to pay for those services – a source that is quickly being depleted and cannot continue.

While the DRMP/EIS economic analysis purports to address the local economic impacts, it does so by reference to county payments, rather than a more appropriate discussion of how these payments are utilized by the counties to provide essential services (*e.g.* sheriff patrol, jail capacity, emergency communications and response,

criminal prosecution capacity, juvenile services, transportation infrastructure, water resources enhancement, economic development and job creation efforts, libraries, museum, recreation and other cultural enhancement efforts). To offset the loss of O & C revenues, the counties are forced to curtail or terminate these services (e.g. mental health, library, etc.) or increase fees (e.g. parks), all of which have disparate impact on low income citizens. These are the true economic impacts that should have been addressed in the PRMP/FEIS. Absent a clear description of the pending impacts, the public simply did not have the opportunity to knowingly comment.

Rather than address the social and economic conditions of the County, or the O & C region, the BLM simply assumes that any harvest – no matter how minimal - will satisfy the Congressional mandates for the O & C lands. The PRMP simply ignores these mandates and establish a process that destabilizes the local communities. The PRMP simply reverts the region back to experiencing the very damages that the 1937 Act was designed to resolve.

Management in recent years for purposes other than the Railroad Grant Settlers Clause has dominated the use of these lands to the point where the Congressional design that the sustained yield management would achieve the purposes of the Settlers Clause has simply been left out of the equation. By the expansive definition being proposed in the PRMP for sustained yield, the management for timber revenues simply moves to the back of the bus giving the preferred seats to other purposes. [16]

Under the proposed action alternatives it is clear that the BLM does not consider the achievement of the Settlers Clause as being on par with these other objectives. The BLM has flipped the priorities such that the Settlers Clause objectives are now subrogated to the point that the BLM's proposed management strategies actually serve to undermine the foundations of these O & C dependent communities.

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[16] This is not a new issue. The Ninth Circuit previously addressed the extent to which these lands can be managed for wildlife purposes when it noted:

> ". . . **Nowhere does the legislative history suggest that wildlife habitat conservation or conservation of old growth forest is a goal on a par with timber production, or indeed that it is a goal of the O & C Act at all**."
> *Headwaters*, 914 F2d at 1184.

5. The BLM Planning Criteria have Deprived the Public of Ability to Comment on "Reasonable and Prudent Alternatives" to Avoid Jeopardy.

The BLM methodology is also flawed in that it is improperly limiting the public's ability to comment by purposefully hard wiring the regulatory agency comments while excluding alternatives that fulfill the 1937 O & C Act and Railroad Grant.

The BLM has essentially hard wired regulatory agency comments without affording the public the opportunity to knowingly review and comment on the accuracy of the comments or other alternative measures that could prevent jeopardy while achieving the purposes of the O & C Act.

By designing alternatives that are driven by regulatory agency guidelines which have elevated secondary purposes over the primary purpose, the BLM fails to set forth and explore a range of alternatives that allow for fulfillment of the Railroad Grant. Further, when the regulatory agencies drive the alternatives development process they are operating outside the normal checks and balances afforded the public under the regulatory agencies' principal acts (*e.g.* Endangered Species Act).

For example, by incorporating recommendations from the United States Fish and Wildlife Service ("USFWS") into the planning process, it short circuits the biological opinion process utilized to determine potential jeopardy under the ESA and shortcuts the "reasonable and prudent alternatives" process of the ESA.

The USFWS consultation regulations not only define the jeopardy factors to be considered, but also explain that the Service has a duty under the ESA to propose "reasonable and prudent alternatives" that would avoid jeopardy and adverse modification. These "reasonable and prudent alternatives" are to be: (1) consistent with the purpose of the underlying action [implementation of the various O & C legislation]; (2) consistent with the action agency's [BLM] authority [O & C legislation & FLPMA]; and (3) economically and technologically feasible.

The public is to be afforded the opportunity to review and comment on the regulatory agency's proposed "reasonable and prudent alternatives" when the action agency develops its own NEPA analysis – an analysis that is required to occur after public disclosure of the reasonable and prudent alternatives and prior to any final decision.

It is notable that the USFWS has recently been submitting to outside peer review its "reasonable and prudent alternatives" during its jeopardy process. However, in this case the BLM simply hard wired the USFWS' strategy without these "reasonable and prudent alternatives" being subjected to either outside peer review or public review. The agencies have essentially short circuited the process by simply hardwiring into all alternatives the agency's "reasonable and prudent alternatives" recommendations.

It is important to also recognize that the ESA does not require the action agency to adopt the "reasonable and prudent alternatives." It may instead elect to exercise other steps to avoid an ESA taking of the species. In this case, the BLM simply short circuited the process by hard wiring the "reasonable and prudent alternatives" recommendations into every action alternative and does not disclose what other options may be available.

By short circuiting the ESA process and imbedding the Service's comments into the alternatives, the public does not have the opportunity to fully and knowingly comment nor is the decision maker afforded the information to fully understand the options available.

6. The flawed purpose and need statement taints the planning effort.

The Counties identified fundamental flaws in the process early when the County representatives met with State Director Perez and Mark Brown in July, 2013, to express grave reservations about the path the BLM had chosen. Following that meeting, the Counties reiterated their concerns in a letter sent to Mr. Perez in early August. We now restate the concerns previously made, by quoting from the letter to the BLM of August 7:

> "Thank you for meeting with the representatives of this Association on July 19, 2013, to hear our concerns about the Purpose and Need Statement ("PNS") for the Western Oregon planning effort. The Association of O & C Counties continues to have serious reservations about how the PNS will be used to limit the scope of alternatives that will be analyzed in the planning process. If this process proceeds as indicated in the PNS, the result will be failure to analyze a reasonable range of alternatives, a violation of one of the most fundamental planning obligations of the agency."
>
> "The PNS is a significant departure from the Notice of Intent (NOI) published in the Federal Register on March 9, 2012. The NOI acknowledges that the vast majority of the BLM administered lands in the planning area are O & C and CBWR lands, managed under the statutory authority of the O & C Act of 1937. The NOI further states that the RMPs and EIS will conform to this statutory requirement and will comply with the Endangered Species Act, Clean Water Act, NEPA and other Federal laws. The PNS, however, emphasizes meeting regulatory compliance objectives first, prior to meeting BLM'S statutory obligations under the O & C Act. The PNS provided no discussion about how the statutory requirements and the regulatory requirements should be met simultaneously."
>
> * * *
>
> "The PNS guides the development of plans by establishing sideboards for the development of alternatives to be considered. It also has the potential for

creating false expectations and outcomes. The PNS appears to limit the range of alternatives in a way that forecloses consideration of any alternative designed to simultaneously comply with the O & C Act and meet regulatory constraints imposed by the ESA, the Clean Water Act, and other legislation. Failure to include such an alternative means that the BLM will not even evaluate the possibility of accomplishing what we believe is required by the law. The BLM's 2008 RMPs proved that it is possible to achieve the required outcomes by seeking the most efficient means of achieving otherwise competing values simultaneously, rather than serially, as it appears is being required by the PNS. Limiting evaluation of alternatives in this manner is rigging the process in a way that assures an outcome completely unacceptable to the intended beneficiaries of the O & C Act, the O & C Counties."

"At the meeting Mark Brown stated that many things are not expressed in the PNS that will further evolve in the Planning Criteria. We suggest that the changed economic circumstances of the counties and the implications of returning to timber sale receipts as the source of revenue be acknowledged. That would form the basis for adding the generation of revenue as an objective of the plan as intended under the O & C Act. The Planning Criteria could also establish clearer standards that reflect the NOI for compliance standards for ESA and CWA."

The BLM did not respond to this letter and, based on what has been published in the PRMP/FEIS, the BLM has clearly chosen to ignore the Counties' concerns.

FLPMA expressly requires that the BLM not only "coordinate" its land use planning and management activities with the land use planning and management programs of local governments, it is also to ensure that the BLM land use plans and the amendments thereto are:

> "consistent with State **and local plans to the maximum extent** . . . consistent with Federal law." 43 U.S.C. §1712(c)(9).

The BLM overlooks that unique role that the Counties have as beneficiaries of the Settlers Clause as well as their roles under the FLPMA and the O & C Acts, the failure to respond to the comments violates FLPMA requirements that the BLM keep apprised of the local land use plans; assure consideration of local plans; assist in resolving inconsistencies; and, provide for meaningful public involvement of elected local officials.

Further, it violates the requirements that the BLM plans be consistent with the plans and management programs of local governments to the extent possible. Under the provisions of 43 U.S.C. §1712(a)(9) and 43 C.F.R. §1610.3-2, any FLPMA land use planning is required to be coordinated with and be consistent with the **plans, policies and programs of the local governments**.

The FLPMA is clear that the BLM is not only to coordinate with the local counties (43 U.S.C. §1712(c)(9), it is also to be consistent with the plans and policies of the counties **"to the maximum extent"** (43 U.S.C. §1712(c) (9).

The "maximum extent" requirement is trumped only if the BLM finds an inconsistency between county plans and policies and the Federal law and the purposes of FLPMA that prevent being consistent. In this case the consistency review must be in the context of the purposes of the O & C acts and only if there is no possible manner to resolve the inconsistency in a manner consistent with the federal law, does FLPMA afford the opportunity to select an inconsistent alternative.

However before the BLM can find that the federal law preempts the local plans and policies, the BLM must first actually undertake the consistency review in good faith both at a local government level **and** at the Governor of Oregon level; and, secondly, make a finding that there is no possible alternative that will allow consistency with the local plans and policies.

While the PRMP/FEIS references that a consistency review will be afforded the Governor of Oregon after the resolution of protests (PRMP/FEIS, p. ii), it fails to recognize that the consistency review includes local governments as well.

7. Consistency with local authorities' fire protection policies.

The PRMP/EIS fails to discuss the consistency with the Douglas Fire Protection Association, Douglas County, and/or the Oregon Department of Forestry fire protection and management requirements and practices.

The 1937 O & C Act specified that when the BLM formulates regulations for the protection of the revested lands, it is mandated that:

> "rules and regulations for the protection of the revested lands from fire shall conform with the requirements and practices of the State of Oregon in so far as the same are **consistent** with the interests of the United States." 43 U.S.C. §1181e.

While the PRMP/FEIS contains an informative discussion on the ability of each of the alternatives to improve the forest fire resiliency, it does not address whether the requisite consistency review has occurred.[17]

Congress recognized that to avoid confusion and chaos the fire protection on the O & C revested lands must be in conformity with the fire protection programs of the State of Oregon.

[17] This consistency review is distinct from the consistency and coordination required under the FLPMA.

The local Douglas Forest Protective Association, has expressed grave concerns with the BLM's snag retention; fuels management programs; road closures; and, failure to control brush fields. These deficiencies are not only creating significant risk to fire fighters, forest workers and the public, it is increasing the risk of fire to the neighboring private lands. Given the checkerboard nature of the O & C lands the lack of fire prevention on the O & C lands effectively increases the risk to private lands. This "transfer of risk" is clearly evident as illustrated by the Douglas Fire Complex and the fire risk posed by the current Late Successional Reserves.

While the PRMP/FEIS address fire risk in the context of creating fire resilient forests, it does not address the other concerns raised by the DFPA.[18] DFPA specifically stated that:

> "All alternatives proposed in the current Draft RMP fail to adequately address post fire/natural disaster salvage or fuels mitigation as a viable alternative to reducing high intensity fires on the landscape, nor does the Draft RMP address a strategy to reduce the number of large fires or how the agency intends to reduce the number of acres burned."

The DFPA correctly noted the risk of fire is shared in the O & C checkerboard and that it is "imperative that all landowners take significant and timely actions to reduce the risk of large high severity fires in the future."

The PRMP/FEIS simply fails to address how the proposed action alternative effectively reduces the risk not only to the BLM lands but also to the neighboring private lands in the checkerboard.

In addition, Douglas County has, in response to the Healthy Forest Restoration Act, created a community fire action plan. While the PRMP/FEIS generically references these community wildfire protection plans, it does not address how BLM will comply with these plans nor the impacts of compliance. The PRMP/FEIS merely states:

> The Healthy Forest Restoration Act provides the latitude to Community Wildfire Protection Plans (CWPP) to refine their WUI boundary, based on vegetation conditions, topography, and geographic features, including infrastructure, where strategic fuel reduction can reduce risks from large, severe wildfires and promote fire-adapted communities. Additionally, CWPPs may incorporate areas near communities that have important economic, social, cultural, visual, and ecological values in the delineation of their WUI boundary (CWPP Handbook 2004). Collaborating partners, including the

[18] It is more than passing interest that the DRMP/EIS acknowledges that the modest shifts under any alternative would not result in any substantial change in the overall landscape fire resilience in the region. p. xxviii. Notwithstanding that one of the purposes of the DRMP is to address fire resiliency it does not appear to have considered a sufficiently broad range of action alternatives.

> BLM, use Community Wildfire Protection Plans and WUI boundaries for local coordination, prioritization, and implementation of landscape-level fuel treatments. These plans often contain fine-scale analysis that provide a robust investigation of ways to prioritize fire risk mitigation around locally identified and vetted highly valued resources and assets (*e.g*. Metlen et al. 2015), and aid in the identification of strategically defensible fuel breaks for wildland fire management.[19] DRMP/FEIS p. 255.

While implementation of the CWPP would have positive benefits relative to achieving a more fire resilient forest, we do not see any of the alternatives addressing these elements. In fact one is left with the impression that fire risk may in fact be increased over the life of the RMP as a result of the BLM utilizing prescribed burns or departing from a wildfire suppression strategy.

Recent denial of claims for damages resulting from the inability of the Forest Service to control a prescribed burn in the National Grasslands further illustrates the need for consistency with State policies on fire as well as closer scrutiny of measures to increase resiliency.

We provide these two examples of concerns of State of Oregon agencies charged with protecting lands within the County from fire not only to illustrate the concerns that are not addressed in the PMP/FEIS, but also to illustrate that the requisite consistency review has not been undertaken and documented in this PRMP/FEIS. The consistency review needs to be completed and disclosed for public review and comment prior to the issuance of the Record of Decision.

Of concern to Douglas County is the PRMP proposal to designate large areas as LSR and the concurrent failure to develop any alternative that effectively reduces the stand level fire hazard within Late Successional Reserves.

While the BLM asserts there would be no difference between alternatives relative to wildfire response, it is ignoring that the differences are there given the variations in Late Successional Reserves; post fire management of Late Successional Reserves; snag retention; and, the variations in road systems. The BLM needs to address more than just fire resilience but also wildfire response both in the context of active fire as well as post fire activities.

8. Association of O & C Counties Protest

Douglas County is a party to the Protest of the Association of O & C Counties and that protest is incorporated here by reference. The additional points herein are raised separately by Douglas County as an individual protester.

[19] It is of more than passing interest that the revised language omitted reference to the "recognition and protection of local values."

Conclusion.

The Board of County Commissioners for Douglas County requests that the PRMP be revised to be consistent with the Congressional intent of the CBWR Act of 1939 and the Railroad Grant and the provisions of the 1916 and 1937 Acts.

D. Parts of Plan Being Protested.

Without waiving its right to later challenge other parts of the PRMP, Douglas County herein protests:

1. Volume 1; and

2. Volume 2.

E. Documents Supporting the Protest.

1. The Douglas County comments on the DRMP;
2. Douglas County comments at the public meetings;
3. AOCC comments dated August 20, 2015, including all attachments;
4. AOCC's letter dated February 26, 2016, including the 26 items enclosed therewith.

F. Statement of Explanation of Why the PRMP Should Not Be Adopted.

The PMRP violates the Settlers Clause of the O&C railroad grant and the BLM's mandatory obligations under the 1937 O&C Act to manage the O&C lands for permanent forest production on a sustained yield basis and to establish a minimum harvest level of 500 mmbf per year. The PMRP violates the purposes of the CBWR Act of 1939.

G. Conclusion.

The Director should reject the PRMP in its entirety and refer it back to the State Director for Oregon with instructions to make the proposal consistent with the Congressional intent.

Respectfully submitted,
Board of County Commissioners
Douglas County, Oregon

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