

**OWYHEE BASIN**  
**STEWARDSHIP COALITION**

Designing a Healthy Working Landscape while Preserving the  
Lands, Communities, and Culture in Malheur County

## **Malheur County Healthy Working Ecosystems Act Legislative Concept\***

Owyhee Basin Stewardship Coalition (“OBSC”) seeks legislation that will create a model of how to utilize current science in an active management system to aid in the rehabilitation, enhancement, and protection of federal public lands. This legislation applies to federal public lands within the boundaries of Malheur County, Oregon; we hope this will become a model to use throughout the western United States. County boundaries were selected as a vehicle to utilize the already existing frameworks in Malheur County. This legislation will allow active land management practices and policies to be implemented quickly and efficiently with the aim of preserving the multiple-uses of our federal public lands and creating strategies to deal with future pressures from growing human populations and climate change.<sup>1</sup>

OBSC was formed in 2015 to oppose the unilateral designation of a National Monument in Malheur County by the President. Since that successful effort, OBSC has been developing a plan to pass legislation to rehabilitate, enhance, and protect the public lands and Malheur County’s Cultural Industries.<sup>2</sup> OBSC has spent countless hours exploring and debating the possible Congressional designations that could be placed on the public lands in Malheur County. After exhausting options that would include federal designation, OBSC determined that the responsible solution did not include federal designation but instead efforts focused on rehabilitation, enhancement, and protection of the diverse ecosystems in these public lands.

The Federal Land Policy and Management Act of 1976 (“FLPMA”) envisioned the BLM managing public lands for “multi-use and sustained yield;” a standard this legislation would follow. Although this management standard is no small task on any day, given several additional layers of designations and regulations over the years, plus the threat of litigation, it has become a merely aspirational standard. OBSC’s legislative proposal temporarily lifts the layers that are preventing the BLM from managing the public lands as contemplated by FLPMA and minimizes the threat of litigation that might follow efforts to rehabilitate the most vulnerable areas.

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\* Please note this is a working document. Consequently it may be modified from time-to-time as additional conversations occur. This draft is current as of December 1, 2018.

<sup>1</sup> The public lands referred to in this document are lands in Malheur County managed by the BLM.

<sup>2</sup> Malheur County is home to several industries that make it unique. Without protecting these industries during the implementation of this legislation, there will be negative cultural and economic impacts in Malheur County. These industries are: ranching, farming, dispersed recreation, and mining.

OBSC's legislative proposal is simple and straightforward, giving the Bureau of Land Management ("BLM") authority to apply relevant science and flexible land management practices to foster a healthy working ecosystem in Malheur County. This legislation will include the appropriate, long-term funding to accomplish the work required for rehabilitation and all future ecosystem maintenance and management efforts. It will create significant employment opportunities for local and regional contractors and boost business income through the purchase of required inputs from local suppliers when possible.<sup>3</sup> The legislation also creates a commission that works directly with the BLM and interested parties to develop the implementation strategy and helps facilitate non-judicial settlements between the BLM and potential litigants. An educational component will provide students hands-on educational training and a critical role in implementing and monitoring the land management policies.

This legislation is critical to developing policies that provide the BLM necessary flexibility to successfully implement this plan. This legislation will create a model for collaborative range management and protection, while supporting Cultural Industries and the local economy, and providing educational opportunities.

### **Land Management**

Ecosystem function and health is the focus of this plan. A "healthy ecosystem" is composed of sustainable stands of perennial grasses and shrubs. This requires active land management and control of invasive grasses, plants, and trees. A healthy ecosystem will protect and enhance opportunities for wildlife, recreation, and Cultural Industries to thrive in Malheur County.

The land management portion of this legislation will be structured as follows:

1. Complete Ecological Site Inventory using Natural Resource Conservation Service standards to generate a current inventory of flora and soil profiles on public lands in Malheur County;
2. Malheur Accountability Commission ("MAC") and BLM will select an objective standard to measure range health by that will determine which lands need treatment and which do not;
3. MAC and BLM develop a comprehensive management plan to implement this legislation's mandates without curtailing current permitted uses;<sup>4</sup>
4. Temporary lifting of land designations and overlays on any portion of public lands in Malheur County that requires treatment;<sup>5</sup>

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<sup>3</sup> Malheur County has the lowest per-capita annual personal income in the State of Oregon. At \$29,714.00, it is 34.5% below the state average.

<sup>4</sup> This process will require frequent communication and coordination with permittees whose operations may, or will be, affected by any temporary modification of grazing leases.

<sup>5</sup> The Congressionally designated Owyhee Wild and Scenic River will remain in place during the treatment and rehabilitation phases. The designations on public lands in Malheur County that may need to be temporarily set aside are: Wilderness Study Areas and Areas of Critical Environmental Concern as directed by FLPMA and Research Natural Areas, Landscape Area Management Project, Lands with Wilderness

5. Categorical Exclusion or a complete exemption from NEPA will be granted for restoration activities required under the legislation;<sup>6</sup>
6. Removal or control of invasive annual grasses, plants, and trees through the most efficient, effective, and economic treatments;<sup>7</sup>
7. Introduction of appropriate native grasses or perennial grasses and shrubs through the most efficient, effective, and economic methods as science can agree supports the mandates in the legislation;
8. Additional water systems development and maintenance using the most efficient, effective, and economic means possible to encourage dispersed utilization by wildlife, wild horses, and livestock;
9. Long-term maintenance and monitoring of public lands in Malheur County in coordination with the Educational Institution.

The structure outlined above represents the responsible solution to address the vulnerabilities present on public lands. These management actions will bolster ecosystem resilience, create family-wage jobs locally, and strengthen the Cultural Industries that are the economic base of the County and surrounding areas.<sup>3</sup>

The effects of enacting legislation that mandates a wholesale ecosystem enhancement and the protection of current permitted uses provide benefits that reach far beyond the land improved. These positive benefits have a global impact. Through holistic management of the land and protection of the ecosystem functions, this proposed legislation will create healthy public lands for wildlife, reduce catastrophic wildfires, sequester carbon more efficiently while releasing less carbon via fire, and provide clean water to fish, wildlife, and all who rely on the watershed systems.

We must ensure that the BLM will be able to implement the legislation without being legally or procedurally delayed with the full National Environmental Policy Act (“NEPA”) requirements. Providing a Categorical Exclusion, or full exemption from NEPA, for treatment actions related to this legislation will provide the necessary flexibility to operate without the additional burden of Environmental Assessments or Environmental Impact Statements. A Categorical Exclusion allows the BLM to more quickly begin the planning and implementation strategies for the treatments mandated by the legislation. These exclusions

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Characteristics, and Instant Study Areas put in place administratively. Within any designation only areas that require treatment according to the inventory will be temporarily lifted to accomplish the goals of this legislation. Areas that are determined do not need treatment according to the standard selected will continue to be managed as currently designated with no change during the rehabilitation efforts.

<sup>6</sup> This legislation will grant the BLM a Categorical Exclusion or a full exemption from NEPA for restoration and related activities associated with restoring public lands in Malheur County to a healthy state. These will include: ground disturbances to kill, control, and remove invasive species and seeding of affected areas with required native perennial grasses and shrubs. Any ensuing litigation to interpret the NEPA Categorical Exclusions will not be eligible for EAJA payments (see Malheur Accountability Commission, *infra*).

<sup>7</sup> There is not one treatment or control option that is superior to others. The BLM has several options to choose from, including: mechanical, chemical, and biological competition. One, or a combination, of these control options may be appropriate in any given area, but not necessarily in an adjoining area. It will be critical for the BLM and MAC to carefully and strategically develop a control and treatment plan.

from NEPA will also reduce the constant threat of litigation that comes over time as the BLM works through the implementation process.

The lands in Malheur County operate as part of a cohesive and unified ecosystem.<sup>8</sup> A healthy ecosystem, definition ultimately to be determined as the standard for rehabilitation, will be composed largely of perennial grasses, shrubs, and trees, and will provide compounding, sustainable benefits for the ecosystem and Cultural Industries. A range ecosystem dominated by intact, robust perennial flora reduces the long-term, negative impacts of frequent, catastrophic wildfire by preserving critical habitat for wildlife, protecting soil and water quality from detrimental erosion, shielding Cultural Industries in the County from disruption, and mitigating the direct release of carbon into the atmosphere.<sup>9</sup>

The MAC and BLM will address the expansion of existing water systems or creation of additional water systems. As artificial water resources are currently distributed, wildlife, wild horses, and livestock are forced to remain proximate to areas with consistent water during the hot, dry months. Increasing the availability of water through development of pipelines and other water systems promotes a more controlled distribution of foraging species on the land. This biological tool allows for focused rehabilitation efforts in challenging areas.

### **Malheur Accountability Commission**

A critical aspect in ensuring that the objectives described in this document, and ultimately the legislation contemplated herein, are implemented properly is developing an accountability function. The Malheur Accountability Commission (“MAC”) will be composed of a diverse group of individuals who represent the Cultural Industries.<sup>10</sup> MAC will work closely with the BLM to implement this legislation in the most efficient, effective, and economic manner.

The MAC will be composed of seven voting members and one non-voting, *ex officio* member. All voting members of the MAC will be residents of Malheur County. The non-voting, *ex officio* member will be a Vale district BLM employee who may be the District Manager or a nominee provided by the Vale District BLM. Three voting members will be appointed to the MAC from the list of nominees provided by the Malheur County Court, three voting members will be appointed from the list of nominees provided by the sitting United States Senators from Oregon, and one voting member will be an employee of the

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<sup>8</sup> Currently the intrusion of invasive annual grasses, plants, and trees disrupts and jeopardizes the resilience of the entire ecosystem and Cultural Industries in Malheur County. Invasive species increase the risk of catastrophic wildfires that destroy habitat wildlife depend on, threaten water quality leading to increased erosion in and from burned areas, and rapidly release large amounts of carbon into the atmosphere.

<sup>9</sup> Rangelands that are dominated by perennial grasses significantly reduce the risk of catastrophic wildfire because these grasses mature in late summer or early fall as opposed to late spring or early summer, unlike many invasive annuals, thus creating a shorter fire season. Along with the shortening of fire season, perennial grasses reduce the amount of wind and water erosion that is typically associated with post-burn landscapes.

<sup>10</sup> The MAC will replace the SE Oregon Resource Advisory Council’s function when it comes to specific decisions that are in conflict with the legislation and the SE Oregon Resource Management Plan.

Educational Institution who may be the Dean or a nominee provided by the Educational Institution board. The Secretary of Interior will make all appointments to the MAC. Members will be appointed to serve one, three-year term, and may be reappointed for up to one additional term after their initial appointment.<sup>11</sup>

The MAC will be granted authority under the Federal Advisory Committee Act (“FACA”) Section 9(b).<sup>12</sup> The BLM and MAC will work to design and develop procedures and timelines for implementing the management mandates in ways that do not interfere with current permitted uses on public lands in Malheur County. This will involve strategically planning the location, timing, and duration of active land management procedures that will be undertaken pursuant to the legislation. The MAC will also develop key performance measures and track spending for the BLM’s implementation and maintenance efforts. The MAC will annually report to the appropriate congressional subcommittees on the progress of the BLM to maintain fiscal accountability in implementing this legislation. Funding will be tied to the BLM’s ability to successfully implement the mandates according to the legislative intent and direction.

The MAC will act as a mandatory alternative dispute resolution body for all complaints and legal questions regarding the legislation’s implementation policies and its post-implementation monitoring. The MAC will serve as a neutral third-party to timely resolve complaints arising to interpret implementation policies, actions, and post-implementation monitoring phases. The MAC will facilitate open, constructive dialogue between the BLM and the challenging party(s). Litigation will not be prohibited under this legislation; however there will be a mandate requiring potential litigants to first bring their complaint(s) before the MAC to work on binding, non-judicial resolution before proceeding to court. Working with the MAC, the BLM and challenging party(s) will have 90-days to sign a final settlement agreement before the challenging party(s) may file their complaint in the appropriate court if no agreement can be reached. The 90-day alternate dispute mandate will be waived if the challenging party(s) can show that it will suffer immediate and irreparable harm without immediate judicial intervention.

Once adopted, to prevent the purposes of this legislation from becoming targets for litigation with the ability to “sue and settle” that has arisen under the Equal Access to Justice Act (“EAJA”), any lawsuit that is brought to interpret or enforce the Malheur County Healthy Working Ecosystem Act will not be eligible for EAJA payments unless there is a

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<sup>11</sup> The Secretary’s initial appointments will create a staggered MAC to prevent a situation that would require replacing all members and institutional knowledge at the same time. During the initial appointments, the Secretary of Interior shall choose one member from the County’s and one member from the Senator’s nominees to serve for four-year initial terms and one member from the County’s and one member from the Senator’s nominees to serve five-year initial terms. Members selected for longer initial terms will be allowed to sit for a second term. After the initial appointment, all future appointment will be made according to the policies set forth above.

<sup>12</sup> “... [u]nless otherwise specifically provided by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions. Determinations of action to be taken and policy to be expressed with respect to matters upon which an advisory committee reports or makes recommendations shall be made solely by the President or an officer of the Federal Government.” Federal Advisory Committee Act (Public Law 92-463 §9(b)).

final judgment based on the merits of the case, which is only possible after complying with the mandatory alternative dispute resolution steps described above.<sup>13</sup>

### **Educational Institution**

The legislation will include an educational component with congressional funding to build and outfit an institution, the “Educational Institution,” in Malheur County. This will be managed by an Oregon University and possibly other land-grant universities in the west and deliver degree programs related to range, livestock, and wildlife management and sciences in the four, six, and eight-year program arena.

The Educational Institution will provide students and department leaders the opportunity to engage and interact with agencies, ranchers, researchers, recreationalists, and land managers. Students will use the public lands as their classroom and lab. Students who attend the Educational Institution will provide an invaluable role in implementing and monitoring the land management objectives of this legislative proposal. Students will work closely with agency personnel to develop policies required to implement the legislative directives. After implementation, students will be critical in monitoring progress and conducting additional research and experiments to further rangeland management strategies and practices in the western United States.

The goal of the Educational Institution will be to attain the National Institute of Food and Agriculture’s (“NIFA”) Centers of Excellence designation.<sup>14</sup> This will make the Educational Institution competitive in applying for and receiving federal research grants to further the research ability of the Educational Institution. This will provide the ability to engage in more research that will benefit the rangelands in the west.

The Educational Institution will partner with local learning institutions to provide experiential learning and engagement opportunities for students in local school districts. Students in vo-ag classes and Career and Technical Education programs will gain on-the-range experience learning side-by-side with the Educational Institution staff and students. This model allows high school students to engage in the implementation process where they may gain both skills and appreciation for the public lands that they would not be exposed to in the classroom. Sticking with local opportunities, the BLM could partner with Snake River Correctional Institution to engage certain inmates in the process of growing and constructing inputs that will be required to carry out the mandates in the legislation.

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<sup>13</sup> “On the merits” refers to a judgment, decision, or ruling that a court will make based on the law, after hearing all of the relevant facts and evidence presented in court. In the event a litigant prevails on the merits in any case the maximum payout under EAJA will be attorney’s fees at \$125.00 per hour or \$100,000.00, whichever is less.

<sup>14</sup> “The Farm Bill requires that NIFA recognize Centers of Excellence (COE) in research, extension, and education in the food and agricultural sciences. The [Farm Bill] calls for the [USDA] to give priority...funding to applications from COE’s in its research and extension competitive grant programs. Eligibility is broad, [an] application must include one of the following: state agricultural experiment stations; colleges and universities; university research foundations; other research institutions and organizations; Federal agencies; national laboratories; private organizations, foundations or corporations; or individuals.”

With several degree tracks to choose from, students from the Educational Institution will leave prepared to work for federal and state agencies, private landholders, or conservation groups in land and or wildlife management. Students who wish to work for the federal government upon graduation may be able to obtain special priority status under the Public Lands Corps depending on the work they've engaged in during their education.<sup>15</sup> This will promote additional engagement from students, especially those interested in federal work, in the rehabilitation process directed by the mandates of this legislation.

### **Travel management**

Federal management agencies and the MAC will identify and inventory all existing transportation features, including: roads, potential roads, primitive roads, trails, and travel-related linear features within Malheur County. Additionally, all rights-of-ways, pipelines, fence lines, travel-related linear features, such as airstrips, reservoirs, and rivers, may be included.<sup>16</sup>

The transportation network provides public and administrative access to public lands and contains many features, including roads, primitive roads, and trails, both planned and unplanned. The route inventory will be created using the best available information obtained from maps, satellite images, airborne resources, or on-the-ground field verification, and validation to create the most comprehensive transportation network map possible.

Federal management agencies collaborating with local and state agencies will work with the MAC to identify all travel-related linear features that will remain accessible and open to the public. Once the transportation inventory has been completed, the transportation features on the BLM's Travel Management Plan will be codified.

### **Summary**

The Healthy Working Ecosystems Act encompasses the tools and mechanisms that the OBSC agrees are the right solution to the problems that Malheur County's public lands are currently facing and will face long-term if nothing proactive is done. We feel that land designation does not equal land protection in this region due to threats and challenges faced from invasive plant species and wildfires. A healthy ecosystem is the backbone for success of the Cultural Industries in Malheur County. The system we aspire to create develops a comprehensive strategy for meeting challenges to ecosystem health without jeopardizing the economy of Malheur County. The MAC and the BLM working together to develop flexible, innovative ways to implement the mandates will enhance and protect the

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<sup>15</sup> The Public Land Corps (PLC) Hiring Authority is an opportunity for youth between ages of 16 to 30 years who work on conservation projects on public lands. Once they complete 640 hours, of which 120 hours have to be on Federal Public Lands, through the PLC, they receive a certificate stating they have successfully completed the PLC requirements and then have up to two years to apply to Merit Promotion vacancy announcements for permanent positions. That means they can apply for vacant federal jobs as if they were already a federal employee - meaning more opportunities and less competition.

<sup>16</sup> Because the MAC is composed of members nominated by State and Local governmental entities it will be able to represent these entities in the road inventory instead of relying on coordination between the BLM and state and local interests.

public lands and the sustainability of Cultural Industries in Malheur County. The OBSC strongly believes that the successes of this management concept will provide a sizeable, exportable model for the benefit of any rangeland biome.