

1 **Example, Of Necessary Lands Issue: September 25, 2009 Appeal to**
2 **LUBA (LUBA No. 2008-224) Assignment of Error On “Necessary**
3 **Lands” That Involved the BLM Sprague Seed Orchard**

4 **B. SECOND ASSIGNMENT OF ERROR**

5 **The County’s Findings That the Subject Property Is Not Forest Land**
6 **Protected by Goal 4, as “Adjacent or Nearby Lands Which Are Necessary**
7 **to Permit Forest Operations or Practices” Are Inadequate and Not**
8 **Supported by Substantial Evidence in the Record**

9 **1. Assignment of Error**

10 The findings that the subject property is not necessary to permit forest operations
11 or practices on adjacent or nearby lands are conclusory, inadequate, and not supported
12 by substantial evidence in the whole record. The county’s findings fail to list and
13 describe existing or potential farm practices and forest operations on adjacent or nearby
14 lands. The county’s findings do not contain the required analysis of how the uses
15 permitted by the proposed non-resource designations may or may not significantly
16 impede or significantly increase the cost of accepted forest operations or practices. The
17 required analysis could not even be undertaken in the absence of an adequate listing and
18 description of surrounding and nearby forest operations and practices.

19 **2. Summary Of Standards And Criteria, Relevant Laws, And Rules**

20 Approval of the plan amendment requires findings of compliance with Oregon
21 Statewide Goal 4 - Forest Land, JCCP Goal 11 Policy 3.B.[3], JCCP Goal 11 Policy
22 3.C., RLDC 46.050.B.3. and RLDC 46.050.C. App B1

1 Goal 4 defines forest land to include “adjacent or nearby lands which are
2 necessary to permit forest operations or practices.” JCCP Goal 11 Policy 3.B[3]
3 implements this element of Goal 4 and requires findings that the subject property is not
4 “necessary lands.” JCCP Goal 11 Policy 3.C., RLDC 46.050.B.3. and RLDC 46.050.C
5 explain what facts and factors are to be considered and how the analysis is to be
6 conducted.

7 **3. Summary of Applicable Findings Of Fact**

8 The county’s November 26, 2008 Findings Of Fact concludes that the subject
9 property is not necessary to permit farm or forest practices on adjacent or nearby lands
10 in accordance with the requirements of RLDC 46.050.C. Finding III.I., Recs 63 - 64,
11 App A and App C; Finding III.J., Rec 64, App A and App C

12 **4. Analysis of Facts And Arguments**

13 JCCP Goal 11 Policy 3.C.[3] and RLDC 46.050.C.3 require a review that lists
14 and describes existing or potential farm practices and forest operations on adjacent or
15 nearby lands, as well as the general geography and potential land uses on the subject
16 property. The county’s findings do not include the required list and description of forest
17 operations on adjacent or nearby lands.

18 JCCP Goal 11 Policy 3.C.[3] and RLDC 46.050.C.3 further require an analysis
19 of how the uses permitted by the proposed non-resource designations may or may not
20 significantly impede or significantly increase the cost of accepted farm practices or
21 forest operations. The county’s findings do not include the required analysis.

22 **a) Character Of Area**

1 Evidence in the record establishes that all of the land to the west, north, and east
2 of the subject property are planned and zoned for resource uses along with the associated
3 operations or practices necessary to support those resource uses. Recs 797, 872, 1,463,
4 2,116 - 2,117 Aerial photographs show that the subject property and its surroundings
5 lands are either predominately forest or agricultural uses, even those lands zoned rural
6 residential. Recs. 136 - 137, 798, 800, 1,464, 1,466, 2,112 - 2,114, 2,118 The BLM, the
7 largest forest manager in Josephine County, administers large areas of land in the
8 Merlin-Hugo areas in general; and adjacent to or nearby the subject property in
9 particular. Recs 2,118, 2,119

10 **b) Adjacent BLM Forest Management Units, BLM Policy And**
11 **Concerns, Impacts, And Findings**

12 Two large BLM commercial management units are adjacent to the 158 acre
13 subject property: 1. 193.20 acre Sprague Seed Orchard (two parcels) to the east, and 280
14 acre parcel to the north (BLM Unit 2). Both are managed by BLM as a “Southern
15 General Forest Management Area”. Recs 801, 1,054 - 1,055, 1,252 - 1,253, 1,467,
16 2,118 - 2,119 The BLM’s stated objectives and map (Rec 2,119) for General Forest
17 Management Area and Connectivity/Diversity Blocks contradict the county’s Finding
18 III.I. and Finding III.J. that the adjacent BLM properties are not managed for commercial
19 timber and other commercial forest commodities:

20 “Produce a sustainable supply of timber and other forest commodities.” Recs
21 2,462, 2,466 - 2,467

22
23 The BLM’s “Resource Management Plan and Environmental Impact Statement”
24 states that these two large adjacent parcels are managed as general forest management

1 areas, or commercial forest land. Recs 2,119, 2,459 - 2,460, 2,461 - 2,464, 2,465 - 2,469

2 These general forest management areas are BLM's primary allocations for lands
3 available for scheduled timber harvest. Recs 2,462 - 2,463, 2,466 - 2,467

4 Evidence in the record from BLM identified potential conflicts between BLM's
5 resource management and rural residential living activities on lands located near the
6 Sprague Seed Orchard and BLM Unit 2: Recs 2,026 - 2,031, 2,474 - 2,475

7 "This letter is in reference to Township 35 South, Range 6 West, Section 8, Tax
8 Lot 100, 157.93 acres located in 3200 block of Hugo Road. The Bureau of Land
9 Management (BLM) would like to express our concern related to Amending and
10 Updating the Comprehensive Plan, Rural Development Code: Article 46 for the
11 3200 block of Hugo Road. The BLM administers public land in Township 35
12 South, Range 6 West, Section 5 and 9 in Merlin adjacent to Tax Lot 100 to the
13 East, better known as the Charles A. Sprague Seed Orchard, and to the North."
14 Rec 2,474

15
16 "Our concerns are access, easements, rights-of-way, fire and residential land use
17 next to BLM administered lands. RR-5 development near the Seed Orchard has
18 a high potential for creating problems relating to drainage, access, fire breaks,
19 and other resource issues in the future. The Seed Orchard is an agricultural
20 operation and BLM property to the north is forest lands. This type of land use
21 next to residential subdivision has created conflict in the past with residential
22 neighbors." Rec 2,474

23
24 "BLM has concerns regarding a high density development near the Seed Orchard
25 and forest lands. If it were to be approved BLM would recommend a minimum
26 of a 150 foot set back on the private land from any BLM/private shared property
27 lines to reduce the risk of adverse effects on BLM lands caused by the close
28 proximity of building sites and development. This would be consistent with the
29 150' setback on the East side of the Orchard. BLM request that local County
30 Planning work closely with BLM to identify and mitigate access and other issues
31 in advance of issuing permits for development (especially in subdivision
32 developments)." Rec 2,474

33
34 "The nature of the checkerboard pattern of the public lands managed by the BLM
35 in Medford has created some level of management difficulty. Most of these
36 lands are located in alternating sections across the district resulting in the
37 presence of a "neighbor" in almost every direction. Property boundaries are
38 established and must be respected." Recs 701, 1,405

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1 “The Bureau’s present Resource Management Plan (RMP) addresses these
2 “rural” interface areas and determined in 1995 that the Medford District has
3 about 136,000 acres of this “transition” area. In our plan we have stated what
4 actions we would take with regards to project planning, mitigation measures,
5 public hazards, road systems, fire risks, traffic and many others.” Recs 701,
6 1,405

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8 “Since 1995, there has been an increase in the number of neighbors that we have
9 living adjacent to BLM managed lands. Until our management plans are
10 superseded by a new management plan, we expect to follow our present
11 guidelines regardless of the increased residential areas adjacent to public lands.
12 Due to the number of neighbors to BLM managed lands, buffering is not a
13 feasible option because of the large amount of perimeter area we have. BLM
14 policy is to manage our lands in a fashion consistent with our management plan
15 right up to the property line.” Recs 701, 1,405

16
17 The county Finding III.I. erroneously identify that “No testimony was offered to
18 establish a need for the subject property in order to continue the seed production.” (Rec
19 63) and commercial management of adjacent lands. Both the BLM (Recs 700 - 701,
20 1,223 - 1,225, 1,404 - 1,405; 2,474 - 2,475, App D) and others testified about concerns
21 (Recs 1,860 - 1,865, 2,026 - 2,031) that the subject parcel was necessary lands to permit
22 forest operations or practices on adjacent lands. The BLM identified specific concerns
23 with the proposed development impacting adjacent BLM management units and the need
24 for buffering to minimize land use conflicts.

25 On February 5, 2007 Dave Russell, Manager, BLM Sprague Seed Orchard,
26 followed up the two BLM letters in the record with oral testimony before the RPC which
27 follows in relevant part:

28 “I’m Dave Russell, I am the Seed Orchard Manager for the Sprague Seed
29 Orchard, Bureau of Land Management. . . . Rather we have some concerns about
30 how it might affect our operation, and some suggestions for mitigation. . . .”
31 “And, specifically our concerns have to do with fire and fuels, potential wildfire,
32 and changes in drainage, and how development might affect the well that we
33 have back on the property.” Recs 1,223 - 1,225, App D

1 “The fire issue is, we currently, maintain sugar pine tress back there and in kinda
2 open fields that we mow the grass to four to six inches every year to mitigate the
3 fire danger and for cultural activity in terms of accessing our trees and irrigating
4 them. And, we would have concerns that if development occurs back there, in
5 terms of the fuels profile and a lot of neighbors, wildfires could start with human
6 activity back there, and move on to our land. No one can determine its effects
7 per say or response time, but my only suggestion there at this time would be that,
8 if development occurs active fuel management projects, reduction of fuels, and
9 reduction of fuels profiles occur immediately during, or just prior to any
10 development back there rather than after the fact. It becomes more messy when
11 you get a lot of houses in different land owners back there.” Recs 1,223 - 1,225,
12 App D
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14 “. . . So we would have concerns if a number of wells were introduced in that
15 area, or in some level of drainage was changed. . . .” Recs 1,223 - 1,225, App D
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17 “As it concerns drainage we currently ask, and have held to a 150 foot setback
18 as it regards to the southeast 40 on our orchard. We think that is a good distance
19 that ought to be maintained from our orchard in terms of new housing. And, I
20 will give you a couple of examples of a couple of problems we have that did
21 affect us, so that you know that the 150 foot is something we’ve had experience
22 with. . . .” Recs 1,223 - 1,225, App D
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24 The county failed to respond to or make findings regarding these BLM stated
25 concerns.

26 **c) Other Evidence In Record**
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28 According to the ODF there is an increased occurrence of wildfire from increased
29 densities of rural residential units in the forest. The retention of normally accepted
30 wildfire fighting strategies on adjacent or nearby commercial forest uses is being lost as
31 a result of these increased densities. The Salem ODF and the local ODF’s Grants Pass
32 Unit Forester have stated that as development occurs, conflicts between residential
33 activities and commercial forest uses increase and result in lower timber production.
34 They quote Wear in support of the position that as nearby population increases the
35 probability of management decreases (Wear.1999. *The effects of population growth on*

1 *timber management and inventories in Virginia. Forest Ecology and Management*, 118:
2 107-115). The ODF is concerned that increased development would negatively impact
3 commercial production on developed and adjacent lands. Recs 2,186 - 2,190, 1,402

4 The ODF's Grants Pass Unit Forester is specific in his concerns about the
5 Virginia research by Wear that include the subject property:

6 "The finding in the Virginia based research of **increased development**
7 **negatively impacting commercial production is likely universal.** The FPA
8 (ORS 527.630) sets a public policy of encouraging forest management as the
9 leading use of private forestland in Oregon. . . ." (emphasis added) Rec 1,402
10

11 Evidence in the record establishes that forest operations and practices are
12 occurring on adjacent and nearby resource lands and that there is conflict between the
13 resource management and extraction activities and the rural and residential uses
14 activities of new neighbors. There is evidence in the record that this conflict
15 significantly increases the cost of the resource practices or operations. ODF's position
16 is that continued fragmentation of resource lands into new rural residential land will
17 accelerate this conflict process, and the cost of doing business to the point, where in
18 some cases, it will cause a cessation of the forest operations and practices. *See (Doob*
19 *vs. Josephine County, 27 Or LUBA 293 (1994); LUBA No. 94-018 (5/25/94)).*

20 **d) Conditions Of Approval**

21 The BLM identified issues of concern and recommended a condition of approval
22 regarding the Sprague Seed Orchard and BLM Unit 2 for a minimum of a 150 foot set
23 back on the private land from any BLM/private shared property lines to reduce the risk
24 of adverse effects on BLM lands caused by the close proximity of building sites and
25 development. The findings (Recs 49 - 67, App A) had no conditions of approval (JCCP

1 Goal 11, Policy 3.C.[5]) applied to the subject property which would assure its special
2 benefit to the Sprague Seed Orchard and BLM Unit 2 to continue for purposes of
3 maintaining a water supply and minimizing land use conflicts. Recs 701, 1,405, 1,223 -
4 1,225, 2,474, App D

5 **5. Conclusion Statement**

6 The findings that the subject property is not necessary to permit forest operations
7 or practices on adjacent or nearby lands are inadequate and are not supported by
8 substantial evidence in the record. The county's findings fail to list and describe existing
9 or potential farm practices and forest operations on adjacent or nearby lands and are
10 contradicted by BLM testimony in the record concerning management of adjacent lands.

11 The county's findings do not contain the required analysis of how the uses permitted by
12 the proposed non-resource designations may or may not significantly impede or
13 significantly increase the cost of accepted forest operations or practices and were not
14 adequate and could not even be undertaken in the absence of the required listing and
15 description of surrounding and nearby forest operations and practices.

16 The county's conclusion that the subject property is not forest lands necessary
17 to permit forest operations or practices on adjacent or nearby lands is contrary to
18 applicable law and is based on inadequate findings not supported by substantial evidence
19 in the whole record. Therefore, the county's decision should be remanded. ORS
20 197.835(9)(a)(C); 197.835(11)(b).

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1 ***Walker et al v. Josephine County (LUBA No. 2008-224; pages 6 - 9)***
2 *Walker v. Josephine County*, 60 Or LUBA 186 (2009).
3 <http://www.oregon.gov/LUBA/docs/Opinions/2009/12-09/08224.pdf>
4

5 March 18, 2011 Note The BLM actively tried to protect its interests in the local land
6 use proceedings (i.e., two BLM letters and testimony from BLM Sprague Seed
7 Orchard Manager (see previous). Petitioners observe that BLM would have better
8 protected its interests if it had framed its testimony in Oregon Statewide Goal 4 -
9 Forest Lands language. The observation is that BLM should continue to do what it is
10 doing - protect its cumulative interests in managing the scattered BLM RIA-
11 administered lands. The following is part of LUBA's rationale for denying this
12 assignment of error (*Walker v. Josephine County*, 60 Or LUBA 186 (2009); page 8).

A closer question exists as to whether the county's findings are adequate to respond to the issue raised below regarding whether resource use of the subject property is necessary to permit the farm and forest practices on nearby BLM land, including operation of the BLM's seed orchard. Petitioners cite to letters from the BLM seed orchard administrators that express concerns about residential development near the orchard. Those letters, however, do not express the BLM's belief that the subject property is necessary for the continued operation of the orchard, merely that conflicts with residential uses may occur. The BLM suggested that any residential uses adjacent to the seed orchard include a 150-foot setback from the orchard. While petitioners are correct that the decision does not impose any setback from BLM land, that does not mean that even without the setbacks that the subject property is necessary to permit operation of the seed orchard. In fact, it tends to demonstrate that the subject property in itself is not necessary at all to continue the existing farm and forest uses. The possibility that certain potential uses might cause some conflicts with the existing farm and forest uses does not demonstrate that the subject property is necessary for continued farm and forest operations. Furthermore, the fact that BLM believed a 150-foot buffer would reduce conflicts with the seed orchard suggests that any potential impacts are not so severe

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