

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OREGON NATURAL DESERT
ASSOCIATION,

Plaintiff,

v.

DANA SHUFORD, Burns District
Manager, BLM, KARLA BIRD,
Andrews Resource Area Field
Manager, JOAN M. SUTHER, Three
Rivers Resource Area Field
Manager, ELAINE M. BRONG, State
Director, Oregon/Washington
BLM, GALE A. NORTON, Secretary,
United States Department of the
Interior, U.S. BUREAU OF LAND
MANAGEMENT, and U.S. DEPARTMENT
OF THE INTERIOR,

Defendants.

Civ No. 06-242-AA

OPINION AND ORDER

AIKEN, Judge:

On February 21, 2006, plaintiff filed suit alleging that the adoption of the Andrews-Steens Resource Management Plan (RMP) by the Bureau of Land Management (BLM) violated the National Environmental Policy Act (NEPA), the Federal Land Policy and

Management Act (FLPMA), the Public Rangelands Improvement Act, the Taylor Grazing Act, and the Steens Mountain Cooperative Management and Protection Act (Steens Act). In an Opinion and Order dated June 8, 2007, I granted plaintiff's and plaintiff-intervenor's motions for summary judgment as to plaintiff's Steens Act claim (Claim Six) and granted defendants' motions for summary judgment on all remaining claims (Claims One through Five and Seven). With respect to Claim Six, I found that a Transportation Plan (TP) adopted as part of the RMP for the Cooperative Management and Protection Area (CMPA), did not meet the provision of the Steens Act that requires the adoption of a "comprehensive transportation plan" to address "the maintenance, improvement, and closure of roads and trails as well as travel access" within the CMPA. 16 U.S.C. § 460nnn-22(a).

Currently before the court are plaintiff's Second Motion for Reconsideration and the parties' respective requests for appropriate remedial relief.

A. Motion for Reconsideration

For a second time, plaintiff moves for reconsideration of the court's findings and ruling that defendants' designation of wilderness areas in the Andrews-Steens RMP did not violate NEPA or FLPMA as alleged in Claims One, Two, and Seven.

In its first motion for reconsideration, plaintiff relied on two decisions issued by the Department of Interior's Office of

Hearings and Appeals that stayed BLM's implementation of rangeland projects within the Lakeview District. The stay was issued after an administrative law judge found that plaintiff raised a likelihood of success on the merits with respect to its claims that the agency failed to consider impacts to wilderness values. I denied plaintiff's motion, finding that reconsideration was not warranted by preliminary administrative decisions staying BLM projects that were reviewed by a different BLM district, subjected to different review processes, and affected different parcels of land than those involved in this case.

Similarly, plaintiff's current motion relies on actions taken with respect to lands outside the purview of the Andrews-Steens RMP. Plaintiff now invokes the BLM's recent draft proposal to adopt wilderness inventory policies and protocol similar to those proposed and favored by plaintiff in conducting a wilderness inventory in the Louse Canyon Geographic Management Area (GMA) within BLM's Vale District. Plaintiff emphasizes that in conducting this inventory, BLM generally agreed with plaintiff regarding wilderness values for the Louse Canyon GMA. Plaintiff maintains that this "new evidence" - evidence of BLM's implementation of a revised wilderness inventory policy - establishes that its actions taken with respect to the Andrews-Steens RMP are entitled to no deference. I disagree.

As emphasized by defendants, plaintiff fails to establish how

BLM's actions with respect to different lands in a different management unit within a different BLM district render any part of the Andrews-Steens RMP arbitrary and capricious. Instead, plaintiff contrasts BLM's decisions in the Louse Canyon GMA with those in the Andrews-Steens CMPA to highlight the alleged deficiencies of defendants' wilderness decisions in this case. However, it is undisputed that the Louse Canyon GMA involves different lands and draft wilderness inventory policies that were not in place or applicable to development of the Andrews-Steens RMP. In essence, plaintiff argues that by adopting new wilderness inventory policies, BLM has effectively admitted that its past inventories and wilderness designation practices failed to comply with NEPA and FLPMA. However, BLM has made no such admission, and subsequent remedial efforts are generally inadmissible to establish liability. Fed. R. Evid. 407.

Moreover, plaintiff has well-documented the alleged deficiencies with the wilderness inventory protocol followed by BLM in developing the Andrews-Steens RMP, and the court thoroughly reviewed and analyzed plaintiff's NEPA and FLPMA claims. Regardless of whether plaintiff persuaded BLM to utilize an updated and arguably improved protocol of assessing wilderness characteristics in the Louse Canyon GMA, BLM's proposed adoption of such protocol does not establish that BLM would have made different wilderness designations with respect to the Andrews-Steens RMP or

that BLM's actions in this case were arbitrary and capricious. Accordingly, the motion for reconsideration is denied.

B. Remedial Relief

The final issue in this case is the proper remedy for BLM's failure to prepare a transportation plan as required the Steens Act.

As the parties were briefing the summary judgment motions in this case, BLM was preparing a Steens Mountain Travel Management Plan (TMP) and accompanying Environmental Assessment (EA). In January 2007, BLM issued a NEPA scoping notice and sought public comment on TMP. On April 15, 2007, BLM issued the EA and a Finding of No Significant Impact for the TMP and allowed public comment until May 21, 2007. On May 31, 2007, the BLM issued a Decision Record to adopt the TMP/EA.

After I issued my decision in this case on June 8, 2007, BLM rescinded the TMP decision of May 31, 2007. On November 28, 2007, BLM issued a new TMP decision. Defendants maintain that the TMP, in conjunction with the TP, complies with the Steens Act transportation plan requirement.

On January 4, 2008, plaintiff administratively appealed the TMP before the Department of Interior's Board of Land Appeals (IBLA) and requested a stay of BLM's final TMP decision. Plaintiff maintains that the TMP is not a comprehensive transportation plan under the Steens Act, because it does not address non-motorized

travel and recreational opportunities. Additionally, plaintiff claims that the TMP violates the Steens Act, NEPA, and FLPMA because it designates new routes in existing Wilderness Study Areas, fails to consider closures on obsolete, redundant, or damaging routes, and opens more than 550 miles of routes to motorized use.

To date, neither party has informed the court whether IBLA stayed the TMP or whether the BLM's decision to adopt the TMP is now final. Regardless, plaintiff, plaintiff-intervenor Center for Water Advocacy defendants, and defendant-intervenor Steens Mountain Landowners Group agree that the TMP is relevant to determine the proper remedy, even though they disagree about the type of remedy the court should impose. Only defendant-intervenor Harney County argues that the TMP, until final, has no relevance to the remedial relief available to plaintiff.

Plaintiff and plaintiff-intervenor argue that the court should issue declaratory judgment in its favor, set aside and vacate the TP, and order defendants to prepare a new transportation plan that complies with the Steens Act within one year from date of judgment. Plaintiff argues that BLM's adoption of the TMP and its reliance on the TP subsequent to the court's decision reflects defendants' intent to do an "end run" around the ruling, and that if the TP is not vacated, defendants will pursue a legally-flawed TMP.

Defendants maintain that vacatur of the TP is unnecessary,

because they have remedied the deficiencies in the TP through the TMP and commenced preparation of a Comprehensive Recreation Plan (CRP) for the CMPA at the behest of the Steens Mountain Advisory Council. Accordingly, defendants argue that the proper remedy is to issue declaratory judgment in favor of plaintiff on Claim Six reiterating the court's ruling on the TP and finding that BLM has remedied the TP's deficiencies, thus rendering plaintiff's request for injunctive relief moot. Intervenor Harney County maintains that, until the TMP is final, the proper remedy is simply to remand the matter to the BLM with instructions. Intervenor Steens Mountain Landowner Group argues that the court should stay this proceeding until the TMP is final and subject to judicial review. For the reasons explained below, I agree with Harney County and remand the matter with instructions, though without vacatur.

Generally, vacatur of the unlawful agency action is the ordinary APA remedy; however, remand to the agency without vacatur is within a court's authority under the APA. See Chamber of Commerce v. SEC, 443 F.3d 890, 908-09 (D.C. Cir. 2006); Central Me. Power Co. v. FERC, 252 F.3d 34, 48 (1st Cir. 2001); Nat'l. Org. of Veterans' Advocates v. Sec'y of Veterans Affairs, 260 F.3d 1365, 1380-81 (Fed. Cir.2001); Central and South West Servs., Inc. v. EPA, 220 F.3d 683, 692 (5th Cir. 2000); Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1405-06 (9th Cir. 1995). In determining whether to remand without vacatur, the court must weigh the balance

of equities, the public interest, and the magnitude of the agency's errors and the likelihood that they can be cured. Central Me. Power Co., 252 F.3d at 48.

Plaintiff argues that without vacatur, defendants will proceed with a "piecemeal" approach to development of a transportation plan, as evidenced by its reliance on the TP in preparing the TMP and by its intent to address non-motorized routes and travel in an unfinished CRP. Plaintiff's argument is premised on its claims that the TMP is legally flawed and that vacatur of the TP will necessarily render the TMP invalid, as the TMP incorporates and relies on information contained in the TP. See Plaintiff's Opening Brief Regarding Declaratory and Injunctive Relief, p. 7 ("Absent vacatur, BLM will continue to press forward with a TMP containing the same legal flaws as the unlawful [TP]."). However, whether the TMP is legally flawed is not the issue currently before the court; the issue is whether the TP must be vacated in order to remedy defendants' failure to complete a transportation plan as required by the Steens Act.

Contrary to plaintiff's assertions, I find no harm to the public interest if the TP is not vacated. Plaintiff is correct that the Steens Act requires a transportation plan to be "comprehensive" in scope and "integral" to the RMP. At the same time, the Steens Act provides little guidance with respect to the substance that must be contained in a transportation plan.

Although I found the TP insufficient in scope, I did not find that the information contained in the TP was substantively flawed or that such information could not be supplemented after further analysis and review of travel routes. Thus, the agency's error was not egregious and can likely be remedied with further review. Indeed, plaintiff agrees that defendants could and should use all of the information they obtained in preparing the TP when reviewing additional information the court found lacking. Accordingly, I fail to discern any harm to plaintiff or the public interest if defendants utilize and incorporate the information from the TP in a subsequent transportation review, whether it be the TMP or another transportation plan. In fact, BLM has utilized the TP in preparing the TMP and a comprehensive recreation plan. If the TP is vacated in its entirety, it is arguable that the BLM would be required to begin those processes anew.

More importantly, the TP does not authorize implementation of the TMP (or any site-specific action within the CMPA). To the contrary, the TMP is a separate agency action that is subject to NEPA review as well as administrative and judicial challenges. Whether the TMP violates the Steens Act, NEPA, and/or FLPMA are claims that must be raised and resolved in a separate proceeding. For this reason, it is likewise inappropriate for the court to make any findings as to whether the TMP adequately remedies the deficiencies in the TP. In sum, the legality of the TMP is a

distinct issue, and one that is not before this court.

Therefore, vacatur of the TP is not necessary to avoid harm to the public interest and I find that the balance of equities weigh in favor of remand without vacatur. Accordingly, this case is remanded to defendants with instructions to prepare a transportation plan as required by the Steens Act. In so ruling, I make no determination as to the adequacy of the TMP.

CONCLUSION

For the reasons explained above, plaintiff's Second Motion for Reconsideration (doc. 232) is DENIED. As explained in the court's Opinion and Order dated June 8, 2007, the Transportation Plan contained in the RMP is arbitrary, capricious and not in accordance with the Steens Act, and the matter is remanded to the BLM for development of a transportation plan that meets the requirements of the Steens Act. Judgment shall issue accordingly in favor of plaintiff on Claim Six, and judgment shall issue in favor of defendants on all other claims.

IT IS SO ORDERED.

Dated this 8th day of July, 2008.

/s/ ANN AIKEN
Ann Aiken
United States District Judge