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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

OREGON NATURAL DESERT ASS’N,

Case No. 06-242-AA

Plaintiff,

v.

**MEMORANDUM IN SUPPORT OF
PLAINTIFF’S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

DANA R. SHUFORD, Burns District Manager,
BLM, *et al.*,

Defendants.

INTRODUCTION

In this action, Plaintiff Oregon Natural Desert Association (“ONDA”) alleges that Defendants Bureau of Land Management *et al.* (hereinafter “BLM”) have violated several federal environmental laws in their adoption of the Andrews-Steens Resource Management Plan (“Andrews-Steens RMP”). In its Sixth Claim for Relief, ONDA alleges the BLM has violated the Steens Mountain Cooperative Management and Protection Act of 2000 (“Steens Act”), 16 U.S.C.

§§ 460nnn to 460nnn-122, by failing to complete the Transportation Plan called for at 16 U.S.C. §§ 460nnn-21(b), 460nnn-22(a). The Steens Act requires the BLM to develop, as an integral part of the management plan, a comprehensive transportation plan for Steens Mountain’s Cooperative Management and Protection Area no later than October 30, 2004. *Id.* § 460nnn-22(a). The BLM has not completed the required transportation plan. Therefore, ONDA respectfully asks this court to grant summary judgment in ONDA’s favor on Claim Six, including a declaration that the BLM has violated the Steens Act and an order enjoining the agency to prepare the required plan by a date certain.

JURISDICTION & STANDING

This court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this action arises under the laws of the United States, including the Steens Act, 16 U.S.C. §§ 460nnn to 460nnn-122, and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701 *et seq.* See Compl. at ¶¶ 1, 4. An actual, justiciable controversy exists between the parties, and the requested relief therefore is proper under 28 U.S.C. §§ 2201–2202 and 5 U.S.C. § 701–06. ONDA has challenged agency action “unlawfully withheld or unreasonably delayed,” which is actionable pursuant to the APA. 5 U.S.C. § 706(1). ONDA also has pled in the alternative that Claim 6 is justiciable because it challenges “final agency action” that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and therefore actionable pursuant to 5 U.S.C. § 706(2)(A). Compl. at ¶¶ 64–67.

ONDA has standing because the BLM failed to prepare, and include as an integral part of the Cooperative Management and Protection Area Resource Management Plan, the comprehensive Transportation Plan expressly required under the Steens Act. Congress required that the Transportation Plan be adopted no later than October 30, 2004. 16 U.S.C. §§ 460nnn-

21(b), 460nnn-22(a); see also Marlett Decl. at ¶¶ 4–10 (describing use and enjoyment of the public lands within the planning area). ONDA also has standing because the BLM’s adoption of the Andrews-Steens RMP in violation of a number of procedural and substantive provisions of federal environmental laws, including the Steens Act, has injured the interests of ONDA and its individual members. See Marlett Decl. at ¶¶ 12–13, 18–21 (describing injuries to ONDA’s interests from BLM’s failure to complete required Transportation Plan). The injury to ONDA caused by the BLM’s violation of the Steens Act can be remedied by the relief sought in this action. See Complaint at ¶¶ A, E, F (“Prayer for Relief”); Marlett Decl. at ¶¶ 12–13, 20–21.

STATEMENT OF FACTS

In 2000, Congress enacted the Steens Act to protect Steens Mountain, a nearly 10,000-foot elevation fault-block mountain in the northern Great Basin in southeast Oregon. The Act created the 170,000-acre Steens Mountain Wilderness; added 29 miles to the federal Wild and Scenic River System; withdrew 1.1 million acres from mining and geothermal development; established a Wildlands Juniper Management Area for experimentation, education, interpretation and demonstration of juniper management and restoration of native vegetation on the Steens; and designated the nation’s first Redband Trout Reserve. 16 U.S.C. §§ 460nnn-61, -71, -72, -91, -81. See also Marlett Decl. at ¶¶ 5, 7, 10 (describing ONDA’s involvement in development of Steens Act, and national significance of cow-free Steens Mountain Wilderness); ONDA Ex. 4 at 10.

The Act also established the Cooperative Management and Protection Area (“CMPA”), a 496,000-acre area managed by the BLM on the Steens. Id. § 460nnn-11(a); ONDA Ex. 4 at 10. The purpose of the CMPA “is to conserve, protect, and manage the long-term ecological integrity of Steens Mountain for future and present generations.” 16 U.S.C. § 460nnn-12(a). The Steens Act directs the BLM to prepare a management plan for the CMPA no later than October

30, 2004. Id. § 460nnn-21(b). The “management plan shall include, as an integral part, a comprehensive transportation plan for the Federal lands includes in the [CMPA], which shall address the maintenance, improvement, and closure of roads and trails as well as travel access.” Id. § 460nnn-22(a).

In 2002, the BLM issued to the public a scoping notice indicating the agency was beginning the planning process for a Resource Management Plan to govern the BLM’s management of about 1.6 million acres of public land within the BLM’s Andrews Resource Area and the Cooperative Management and Protection Area on Steens Mountain.¹ The RMP planning process continued over the next several years. See ONDA Ex. 4 at 6–8 (summarizing planning process). The BLM issued a Draft RMP/Draft EIS in October 2003 and a Proposed RMP/Final EIS in August 2004. Id. at 7. Pursuant to Department of the Interior regulations, 43 C.F.R. § 1610.5-2, ONDA administratively protested the Andrews-Steens Proposed RMP and Final EIS on September 9, 2004. ONDA Ex. 2. On June 10, 2005, the BLM denied ONDA’s protest in its entirety. ONDA Ex. 3. On or about July 15, 2005, the BLM issued two counterpart Records of Decision approving the “Andrews Management Unit Resource Management Plan” and the “Steens Mountain Cooperative Management and Protection Area Resource Management Plan.” See 70 Fed. Reg. 50,401 (Aug. 23, 2005) (notice of availability of ROD); ONDA Ex. 4 at 9.

The final RMP for the Cooperative Management and Protection Area (referred to here as the “CMPA RMP”) does not contain the Transportation Plan required by the Steens Act. Instead, the RMP states that further inventories and other work required to “complete the comprehensive

¹ The BLM analyzed these two areas under a single NEPA process. At the conclusion of this process, the BLM adopted two separate RMPs: the Andrews Management Unit RMP (“AMU RMP”) and the Steens Mountain Cooperative Management and Protection Area RMP (“CMPA RMP”). See ONDA Ex. 4 at 4. When referred to collectively, they are called the “Andrews-Steens RMP.” This brief focuses on the CMPA RMP because the Steens Act’s Transportation Plan requirement is unique to the CMPA.

requirements [of the Steens Act]” would be completed by December 31, 2005. ONDA Ex. 4 at 13. The RMP contains an appendix titled “Transportation Plan” that also does not meet the requirements of the Steens Act and also includes that same statement. ONDA Ex. 4 at 15–22. To date, the BLM has not completed the cited inventories or other work and has not yet issued a Transportation Plan. The most recent indication from the agency is that it has in fact “halted” work on the Transportation Plan. ONDA Ex. 5; see also Marlett Decl. at ¶ 11.

ARGUMENT

I. STANDARD OF REVIEW.

Summary judgment is appropriate when “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). See also Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). The substantive law governing a claim determines whether a fact is material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see also T.W. Elec. Serv. v. Pacific Elec. Contractors, 809 F.2d 626, 630 (9th Cir. 1987).

The APA sets forth standards governing judicial review of decisions made by federal administrative agencies. See Dickinson v. Zurko, 527 U.S. 150, 152 (1999); Mtn. Rhythm Res. v. FERC, 302 F.3d 958, 963 (9th Cir. 2002). Pursuant to the APA, this court shall “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1); Ctr. for Biol. Diversity v. Veneman, 335 F.3d 849, 854 (9th Cir. 2003).

Also under the APA the court may overturn agency action if the action was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); Marsh v. Ore. Natural Res. Council, 490 U.S. 360, 377 (1989); Blue Mtns. Biodiversity Project v. Blackwood, 161 F.3d 1208, 1211 (9th Cir. 1998). In determining whether an agency decision is arbitrary and capricious, courts consider “whether the decision was based

on a consideration of the relevant factors and whether there has been a clear error of judgment.” Marsh, 490 U.S. at 378. “A decision is arbitrary and capricious if the agency ‘has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.’” O’Keefe’s, Inc. v. U.S. Consumer Prod. Safety Comm’n, 92 F.3d 940, 942 (9th Cir. 1996) (quoting Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)). Although review under this standard is narrow, the agency must articulate a rational connection between the facts found and the conclusions made. Ore. Natural Res. Council v. Lowe, 109 F.3d 521, 526 (9th Cir. 1997); O’Keefe’s, 92 F.3d at 942; Envtl. Def. Ctr. v. EPA, 319 F.3d 398, 428 n.46 (9th Cir. 2003). Finally, an agency’s decision can be upheld only on the basis of the reasoning in that decision. Anaheim Mem’l Hosp. v. Shalala, 130 F.3d 845, 849 (9th Cir. 1997).

II. THE BLM HAS VIOLATED THE STEENS ACT BY FAILING TO PREPARE A TRANSPORTATION PLAN BY OCTOBER 30, 2004.

A. Agency Action Unlawfully Withheld: The BLM Had a Mandatory Statutory Duty to Prepare a Transportation Plan By October 30, 2004.

The Supreme Court has held that a plaintiff may challenge an agency’s failure to act under Section 706(1) of the Administrative Procedure Act, 5 U.S.C. § 706(1), “where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*.” Norton v. S. Utah Wilderness Alliance (“SUWA”), 542 U.S. 55, 64 (2004) (emphasis in original); see also Ctr. for Biol. Diversity v. Veneman, 394 F.3d 1108, 1111–13 (9th Cir. 2005) (discussing “failure to act” claims post-SUWA). That is the case here: the BLM has failed to comply with its mandatory duty to prepare a comprehensive transportation plan for Steens Mountain’s

Cooperative Management and Protection Area no later than October 30, 2004. The language in Sections 111(b) and 112(a) of the Steens Act is unambiguous:

Within four years after the date of the enactment of this Act,^[2] the Secretary shall develop a comprehensive plan for the long-range protection and management of the Federal lands included in the Cooperative Management and Protection Area, including the Wilderness Area.

The management plan shall include, as an integral part, a comprehensive transportation plan for the Federal lands included in the Cooperative Management and Protection Area, which shall address the maintenance, improvement, and closure of roads and trails as well as travel access.

16 U.S.C. §§ 460nnn-21(b), 460nnn-22(a). Because the BLM has failed to develop the Transportation Plan called for under Section 112(a), this court has jurisdiction over this claim and is directed by the APA to “compel agency action unlawfully withheld.” 5 U.S.C. § 706(1). See also Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1177 (9th Cir. 2002) (agency failure to comply with 12-month deadline in statute was not in accordance with that statute, and rejecting agency argument that “TRAC” factors³ for “unreasonable delay” apply, because “Congress has specifically provided a deadline for performance by the Service, so no balancing of factors is required or permitted”); Ctr. for Biol. Diversity v. Abraham, 218 F.Supp.2d 1143, 1163–64 (N.D. Cal. 2002) (plaintiff’s claim regarding agency failure to comply with mandatory statutory deadline properly challenged as agency action “unlawfully withheld” under APA); Forest Guardians v. Babbitt, 174 F.3d 1178, 1190 (10th Cir. 1999) (discussing distinction between “unlawfully withheld” and “unreasonably delayed,” holding that “when an entity

² Congress enacted the Steens Act on October 30, 2000. Pub. L. No. 106-399, 114 Stat. 1655 (codified at 16 U.S.C. § 460nnn *et seq.*).

³ In assessing *unreasonable delay* under the APA (as opposed to agency action unlawfully withheld), the Ninth Circuit applies the factors outlined by the D.C. Circuit in Telecomm. Research & Action Ctr. v. F.C.C. (“TRAC”), 750 F.2d 70, 80 (D.C. Cir 1984). See Independence Mining Co. v. Babbitt, 105 F.3d 502, 507 (9th Cir. 1997); Northcoast Envntl. Ctr. v. Glickman, 136 F.3d 660, 666–67 (9th Cir. 1998).

governed by the APA fails to comply with a statutorily imposed absolute deadline, it has unlawfully withheld agency action and courts, upon proper application, must compel the agency to act”; “the distinction . . . turns on whether Congress imposed a date-certain deadline on agency action”).

B. The BLM Has Not Developed the Required Transportation Plan.

When it adopted the Steens Mountain Cooperative Management and Protection Area RMP in July 2005, the BLM did so without the congressionally-mandated Transportation Plan. The BLM admits this in three places: in a letter to ONDA dated March 2, 2006; in the agency’s response to ONDA’s administrative protest of the RMP; and in the CMPA Record of Decision and Resource Management Plan itself. ONDA Ex. 3, 4, 5.⁴

1. The March 2, 2006 letter to Oregon Natural Desert Association.

By letter dated March 2, 2006 the BLM informed ONDA that the agency had been in a planning process for the Transportation Plan but that it had decided to “halt” that effort:

As you know, the Bureau of Land Management (BLM) was preparing for a public scoping period on the Steens Mountain Cooperative Management and Protection Area Travel Management Plan (TMP). Preparations on this effort have been halted, including public scoping and further development of the TMP, pending completion of the planning area road inventory.

ONDA Ex. 5. The letter indicates that the BLM intends to develop the plan with the Harney County Court in a process that will involve completing a road inventory, developing “the proposed plan itself,” engaging in a process to “substantiate all information” through public meetings and workshops, and to address other issues such as signing along identified routes. Id.

⁴ Note that “when a court considers a claim that an agency has failed to act in violation of a legal obligation, ‘review is not limited to the record as it existed at any single point in time, because there is no final agency action to demarcate the limits of the record.’” San Francisco BayKeeper v. Whitman, 297 F.3d 877, 886 (9th Cir. 2002) (quoting Friends of the Clearwater v. Dombeck, 222 F.3d 552, 560 (9th Cir. 2000)).

Thus, the letter is evidence that the BLM has not complied with the Steens Act. 16 U.S.C. §§ 460nnn-21(b), 460nnn-22(a).

2. The June 10, 2005 administrative protest response.

On June 10, 2005, the BLM responded by letter to ONDA's administrative protest of the Proposed RMP/Final EIS. ONDA Ex. 3. Among the issues ONDA raised in its protest was the BLM's failure to prepare the required the Transportation Plan. ONDA Ex. 2 at 3, 4–5. ONDA alleged that the BLM had not completed the required plan, that the BLM had not even conducted the necessary inventory of routes required for the plan, and that the BLM therefore had not properly assessed ecological impacts to resource values within the CMPA. *Id.* at 4–5. In response, the Department of the Interior admitted the BLM had not completed the Plan as required in the Steens Act: “The BLM with assistance of public and interest groups *will be developing a TMP subsequent to the RMP.*” ONDA Ex. 3 at 2. (emphasis added). The protest response goes on to state that the RMP includes an appendix providing “criteria” for eventual development of the Transportation Plan. *Id.* Finally, Interior's letter indicates the BLM would complete field inventory of routes during summer 2005 and engage in a NEPA analysis with a decision expected by December 2005. *Id.* As the March 2, 2006 letter confirms, no such analysis or decision has occurred yet. See also Marlett Decl. at ¶ 11 (observing same).

3. The July 2005 Record of Decision and Resource Management Plan.

In July 2005, the BLM issued two Records of Decision adopting the Andrews-Steens RMP(s). In the Cooperative Management and Protection Area RMP the BLM acknowledges its duty under Section 112 to prepare a comprehensive Transportation Plan, and claims “Appendix M [of the RMP] meets this legislative requirement.” ONDA Ex. 4 at 13. Yet, in the following sentences the RMP admits the Steens Act requirements have not been satisfied: “An EA/Travel

Plan based on specific field inventories and need determinations of all other routes within the CMPA *will complete the comprehensive requirements* and be completed by December 31, 2005.” *Id.* (emphasis added). The referenced appendix also makes clear that it is not the “comprehensive” Transportation Plan the Steens Act requires. *Id.* at 15 (including identical statement, plus: “Management actions within this [Transportation Plan] pertain only to the currently mapped routes”; once unmapped routes are inventoried, “an EA would be conducted to determine if they should be added to the transportation system, converted to hiking trails, or closed and rehabilitated”). Finally, the Record of Decision states that the RMP has developed Transportation Plan “criteria” but not that the BLM has developed an actual Transportation Plan. *Id.* at 5. In any event, the initial statement at page 62 (ONDA Ex. 4 at 13) of the CMPA RMP later is directly contradicted by the BLM’s statements in the March 2, 2006 and June 10, 2005 letters.

C. The BLM Has No Discretion to Act Outside of the Steens Act’s Mandatory Duty Tied to a Date-Certain Deadline.

Although the BLM admits it has not completed the comprehensive Transportation Plan required under Section 112(a), the agency also claims at various times that what it has done is sufficient. It is not because the Steens Act uses plain, unambiguous language in establishing this mandatory duty tied to a date-certain deadline. 16 U.S.C. §§ 460nnn-21(b), 460nnn-22(a). The BLM therefore lacks any discretion to elect to act outside of that deadline. The Supreme Court has made clear that when a statute uses the word “shall,” Congress has imposed a mandatory duty upon the subject of the command. See United States v. Monsanto, 491 U.S. 600, 607 (1989) (by using “shall” in civil forfeiture statute, “Congress could not have chose stronger words to express its intent that forfeiture be mandatory in cases where the statute applied”); see also Forest Guardians, 174 F.3d at 1187 (citing Monsanto and other Supreme Court cases for the

proposition that “shall” means shall); Envtl. Def. Ctr. v. Babbitt, 73 F.3d 867, 872 (9th Cir. 1985).

Accordingly, “when Congress by organic statute sets a specific deadline for agency action, neither the agency nor any court has discretion. The agency must act by the deadline.” Forest Guardians, 174 F.3d at 1190. Here, the Steens Act states that the Secretary “shall” develop a comprehensive management plan for the CMPA by October 30, 2004, and that the management plan “shall include, as an integral part,” a comprehensive Transportation Plan. 16 U.S.C. §§ 460nnn-21(b), 460nnn-22(a). By failing to comply with this unambiguous mandate tied to a date-certain deadline, the BLM has unlawfully withheld agency action within the meaning of Section 706(1) of the APA. The proper remedy is for this court to compel that unlawfully withheld agency action. 5 U.S.C. § 706(1).

III. THE BLM’S DECISION TO ADOPT THE CMPA RMP WITHOUT THE REQUIRED COMPREHENSIVE TRANSPORTATION PLAN VIOLATES THE STEENS ACT.

ONDA has pled in the alternative that the BLM’s final decision adopting the CMPA RMP without including the required comprehensive Transportation Plan is arbitrary, capricious, and not in accordance with the Steens Act, and therefore actionable pursuant to APA Section 706(2)(A). Compl. at ¶ 7. Because ONDA anticipates that the BLM may argue its CMPA RMP satisfies the Steens Act’s Transportation Plan requirement, ONDA sets out this alternative argument. In short, because the RMP lacks the comprehensive Transportation Plan required by the Act, the BLM’s decision to adopt that plan without complying with this mandatory statutory requirement is unlawful and should be set aside.

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A. The “Transportation Plan” at Appendix M of the RMP Does Not Satisfy the Steens Act.

In the CMPA RMP, the BLM included Appendix M, titled “Transportation Plan.” ONDA Ex. 4 at 15–22. This 8-page appendix includes one goal, one objective, a list of 35 one- or two-sentence “best management practices,” and a glossary of terms. Id. The BLM characterizes the appendix as follows:

Appendix M describes how routes within the CMPA will be managed. The [Transportation Plan] provides details on the various components of the transportation management system. The [Transportation Plan] identifies the current route system (Map 13) and outlines the various route categories and road maintenance levels. BMPs for route management, a glossary of transportation terms and Steens Act Section 112 off-road travel exception criteria are also attached.

Id. at 15. In the main text of the RMP, the BLM claims Appendix M “meets this legislative requirement [at 16 U.S.C. §§ 460nnn-21(b), 460nnn-22(a).]” Id. at 13. Yet in the same paragraph the BLM admits it has not completed “the comprehensive requirements” of Section 112, stating that yet another EA and “Travel Plan” would still be required following “specific field inventories and need determinations,” and announcing an “interim” route availability decision. Id. The BLM makes the exact same statements in the Appendix (purported plan) itself. Id. at 15. Nowhere in Appendix M (aside from the glossary of terms) does the BLM address non-motorized travel on hiking trails, as is expressly required by the Steens Act. 16 U.S.C. § 460nnn-22(a) (referring to roads, trails, and travel access).

At any rate, notwithstanding its admissions that the BLM has not completed “the comprehensive requirements” of Section 112(a), the agency’s statement that it has met that “legislative requirement” is flawed under the plain language of the statute itself. Because the BLM admits it has not completed “specific field inventories” and “need determinations” and

states that the “Transportation Plan” at Appendix M will only be “complete” when a “Travel Plan” is completed,⁵ this violates the Steens Act. In full, Section 112(a) states:

(a) Transportation plan. The management plan shall include, as an integral part, a comprehensive transportation plan for the Federal lands included in the Cooperative Management and Protection Area, which shall address the maintenance, improvement, and closure of roads and trails as well as travel access.

16 U.S.C. § 460nnn-22(a). Several words and phrases are key here. First, Congress directed that the Transportation Plan is to be “an integral part” of the RMP. The word “integral” means “[o]f or pertaining to a whole . . . constituent, component; *spec.* necessary to the completeness or integrity of the whole.” The Oxford English Dictionary Vol. VII, 1063 (Second Ed. 1989). The BLM’s admission that the purported Transportation Plan at Appendix M is not “complete,” ONDA Ex. 4 at 13, means that “plan” falls short of being a complete, constituent part of the RMP.

Second, the Transportation Plan must be “comprehensive.” The word “comprehensive” means “of large content or scope . . . inclusive of; *embracing.*” The Oxford English Dictionary Vol. III, 632 (Second Ed. 1989) (italics in original). Again, the BLM admits the “Transportation Plan” presented in Appendix M is not yet complete, acknowledging that the agency still needs to conduct specific field inventories and need determinations, and providing for an “interim” designation of routes in the CMPA. ONDA Ex. 4 at 13; see also id. at 5 (stating RMP only adopted “criteria” for an eventual Transportation Plan). The “plan” provided at Appendix M also

⁵ The Steens Act says nothing about a “Travel Plan.” See, e.g., 16 U.S.C. §§ 460nnn-22(a) (referring only to a “comprehensive transportation plan” which is an integral part of the “management plan”); 460nnn(6) (definitions section, defining “management plan”); see also ONDA Ex. 4 at 20–22 (glossary of terms with no term for “Travel Plan”). The BLM’s reference to a “travel plan” apparently stems from a 2004 Department of the Interior Instruction Memorandum concerning off-highway vehicle use designations. ONDA discusses that internal agency directive *supra* in section III.B.

is not comprehensive in that it completely fails to provide for non-motorized travel planning— i.e., trails. See id. at 15–22 (no mention of trails, except under a definition of the term “Trail Density” and reference to possible treatment of future inventories of unmapped routes). Section 112(a) specifically directs that the Transportation Plan “shall address” both “roads and trails as well as travel access.” 16 U.S.C. § 460nnn-22(a). The sentence regarding the to-be-completed “EA/Travel Plan” also does not specifically mention trails. ONDA Ex. 4 at 13 (referring only to “all other routes within the CMPA”). In short, the “Transportation Plan” at Appendix M does not satisfy the unambiguous requirements of the Steens Act.

B. The BLM Cannot Escape the Steens Act’s Requirements via an Internal Agency Directive.

In response to ONDA’s administrative protest of the Andrews-Steens RMP, the BLM claims that a 2004 BLM “Instruction Memorandum” (“IM”) “provides for a more detailed TMP to be completed subsequent to the RMP when complexity or incomplete data make it impossible to make all route selections during the RMP process.” ONDA Ex. 3 at 2; see also ONDA Ex. 1 (IM 2004-005). Aside from the fact that IM 2004-005 deals only with the BLM’s off-highway vehicle designations⁶—and not with the “comprehensive” plan for “roads and trails as well as travel access” required under the Steens Act’s Transportation Plan provision, 16 U.S.C. § 460nnn-22(a)—the BLM cannot undermine a congressional mandate via an agency policy directive. See, e.g., United States v. Louisiana-Pacific Corp., 967 F.2d 1372, 1376 (9th Cir. 1992) (courts “must ‘reject administrative constructions of a statute that are inconsistent with the

⁶ BLM regulations establish criteria for the agency to designate portions of the public lands as “open,” “limited” or “closed” to off-highway vehicle (“OHV”) use. 43 C.F.R. § 8340.0-1. Designation and redesignation of OHV restrictions on the public lands occurs as part of the RMP process. Id. § 8342.2(a). These regulations apply only to OHV use on the public lands and do not deal with, for example, issues of maintenance, improvement, road closures, access, and hiking trails, as called for at 16 U.S.C. § 460nnn-22(a).

statutory mandate or that frustrate the policy that Congress sought to implement.’’) (quoting United States v. Louisiana-Pacific Corp., 754 F.2d 1445, 1447 (9th Cir. 1985)). Thus, while the BLM may have validly relied upon IM 2005-005 to delay development of a travel plan for the Andrews Resource Area RMP, the agency is not at liberty to do so for the separate RMP for the Cooperative Management and Protection Area. Because Congress has spoken directly to the issue, the BLM has no discretion to ignore that directive. See, e.g., Forest Guardians, 174 F.3d at 1190 (“[W]hen Congress by organic statute sets a specific deadline for agency action, neither the agency nor any court has discretion. The agency must act by the deadline.”).

IV. THIS COURT SHOULD ORDER INJUNCTIVE AND DECLARATORY RELIEF TO REMEDY THE BLM’S VIOLATION OF THE STEENS ACT.

As discussed above, when a court determines an agency has unlawfully withheld or unreasonably delayed action, the APA directs that the court “shall compel” the agency to perform the mandatory duties required by law. 5 U.S.C. § 706(1). See also Forest Guardians, 174 F.3d at 1187–89 (discussing proper remedy under Section 706(1) and observing that Ninth Circuit also recognizes “shall means shall” reading of APA) (citing Envtl. Def. Ctr., 73 F.3d at 872). Here, that means the court must issue an order compelling the BLM to complete its Transportation Plan by a date certain. Because the Plan already is over a year-and-a-half overdue, and because the agency is actively implementing the CMPA RMP as well as site-specific projects within the CMPA, it is imperative that the agency be ordered to complete the Transportation Plan in a timely fashion. See, e.g., Marlett Decl. at ¶ 13 (describing projects implementing the RMP and/or occurring within the CMPA, including preparation of Allotment Management Plans, issuance of livestock grazing permits, landscape-scale vegetation treatment projects, and decisions regarding motorized access to private inholdings).

The harm to ONDA from the BLM’s failure to prepare the Transportation Plan

concurrently with the RMP is multi-faceted. First, as explained by ONDA’s executive director, this “made it difficult [during the RMP planning process] to fully evaluate ONDA’s [Wilderness Study Area] recommendations because the two issues are geographically interconnected. Without a thorough and robust evaluation of ONDA’s WSA recommendations coupled with a Transportation Plan, the public could be denied the opportunity to enjoy full protection of wilderness resources in the planning area.” Marlett Decl. at ¶ 12; see also id. at ¶¶ 15–17 (describing ONDA’s wilderness inventory program and submission of inventory information to BLM during RMP planning process). This calls into question the BLM’s ability to have adequately considered the impacts of its RMP decisions on wilderness and other public land resources, as is required not only by the Steens Act but also by FLPMA. See 16 U.S.C. § 460nnn-12(a) (purpose of CMPA “is to conserve, protect, and manage the long-term ecological integrity of Steens Mountain”); 43 U.S.C. §§ 1712(c)(1), 1732(a), 1732(b) (requiring BLM to “use and observe the principles of multiple use” when developing an RMP and managing public lands, and to “take any action necessary to prevent unnecessary or undue degradation of the lands”); see also Marlett Decl. at ¶¶ 20–21 (discussing same). Based on its extensive wilderness inventory, ONDA submitted to the BLM a road closure recommendation report in January 2003, during the RMP planning process. Marlett Decl. at ¶ 18 & Attachment 1. That report was intended to help inform the BLM’s development of the required Transportation Plan, and ONDA’s recommendations “were based on field observations that would protect resource conditions and wilderness values.” Id. at ¶¶ 18–19.

Second, the BLM’s subsequent, site-specific or implementation-level decisions, made in the absence of the required plan, are not fully informed concerning factors and resources Congress specifically directed the agency to have studied. See, e.g., Marlett Decl. at ¶¶ 13, 20;

16 U.S.C. §§ 460nnn-12, -21, -22. Thus, an injunction requiring the BLM to complete the Transportation Plan by a date-certain is “necessary to effectuate the congressional purpose behind the statute.” Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv., 422 F.3d 782, 795 (9th Cir. 2005) (citing Biodiversity Legal Found., 309 F.3d at 1177).

Finally, declaratory relief also is both appropriate and necessary here. A declaration that the BLM has violated the Steens Act’s requirement to prepare a “comprehensive” Transportation Plan that is an “integral part” of the RMP will “delineate[] important rights and responsibilities” and will be of “significant educational and lasting importance” by ensuring the BLM makes this critical component of the Act a top priority in the coming months. See Natural Res. Def. Council, Inc. v. EPA, 966 F.2d 1292, 1299 (9th Cir. 1992); see also Biodiversity Legal Found., 309 F.3d at 1172–73 (holding district court had jurisdiction to entertain request for declaratory relief if there was a “substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment”) (quoting Seattle Audubon Soc’y v. Mosely, 80 F.3d 1401, 1405 (9th Cir. 1996)). A declaration will also further Congress’s purpose in the Steens Act’s Cooperative Management and Protection Area: “to conserve, protect, and manage the long-term ecological integrity of Steens Mountain for future and present generations.” 16 U.S.C. § 460nnn-12(a). Finally, a declaration will help further Congress’s objectives for the CMPA, which include promoting sustainable uses on Steens Mountain, ensuring traditional access to archaeological sites by the Burns Paiute Tribe, and ensuring “conservation, protection, and improved management of” geological, biological, wildlife, riparian and scenic resources within the CMPA. Id. § 460nnn-12(b).

Congress recognized that in order to achieve these purposes and objectives, a comprehensive transportation plan needed to be an “integral part” of the broader management

plan. Id. § 460nnn-22(a). In ONDA’s view, Congress was correct to require a comprehensive process undertaken contemporaneously with the RMP, because only under this type of approach could the BLM properly take into consideration the impacts of its various management planning decisions on resources such as fish and wildlife habitat, wilderness values, and proper balancing between competing uses of the public lands. See, e.g., 43 U.S.C. §§ 1712(c)(1), 1732(a), 1732(b). See also Marlett Decl. at ¶¶ 12–14, 20–21 (describing same).

CONCLUSION

For the reasons stated above, ONDA respectfully requests this court to provide the declaratory and injunctive relief requested, including an order compelling Defendants to comply with the Steens Act by completing the comprehensive Transportation Plan called for at 16 U.S.C. § 460nnn-22(a), by a date certain.

DATED this 12th day of April 2006.

Respectfully submitted,

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