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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.

**PLAINTIFF’S REPLY IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY
JUDGMENT (CLAIM 6)**

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

Defendants.

INTRODUCTION

In its opening brief in support of this partial summary judgment motion, Plaintiff Oregon Natural Desert Association (“ONDA”) explained why Defendants Bureau of Land Management *et al.* (“BLM”) violated the Steens Act by: (1) failing to complete the comprehensive Transportation Plan required at 16 U.S.C. §§ 460nnn-21(b), 460nnn-22(a); and (2) adopting the Cooperative Management and Protection Area (“CMPA”) RMP without this required plan. In

response, Defendants argue that Appendix M of the CMPA RMP satisfies the Steens Act’s Transportation Plan requirement, and that the agency is entitled to an unusual degree of deference with respect to how and when it completes mandatory duties imposed on it by Congress. Defendants also dispute the applicable standard of review, arguing this court should review the BLM’s adoption of the RMP under the “arbitrary and capricious” standard of review, rather than review the agency’s failure to prepare the statutorily-required Transportation Plan under Section 706(1) of the APA. Each of Defendants’ arguments fall short because they do not account for the BLM’s otherwise undisputed failure to complete the Transportation Plan, incorrectly argue the agency had discretion to defer actions unambiguously required by Congress in the Steens Act to subsequent, agency-created planning processes, and incorrectly invoke “Chevron deference.” For the reasons that follow, as well as those set forth in its opening brief, ONDA again respectfully asks this court to grant summary judgment in ONDA’s favor on Claim Six.

ARGUMENT

I. ONDA HAS STANDING TO PURSUE ITS CLAIMS IN THIS ACTION.

In their provisional brief opposing ONDA’s partial summary judgment motion, Applicant-Intervenor Steens Mountain Landowner Group, Inc. (“SMLG”) argues ONDA lacks standing to pursue Claim Six. SMLG Br. at 4–7. To have standing at the summary judgment stage, a plaintiff must “set forth” by affidavit or other evidence “specific facts” showing injury, causation, and redressability. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992); Fed. R. Civ. P. 56(e). ONDA has done so here, as is evidenced by: the declaration of executive director Bill Marlett (Dkt # 20); ONDA’s administrative protest of the Andrews-Steens RMP decision, see ONDA Ex. 2 at 1–2; and the Department of the Interior’s response to that protest,

see ONDA Ex. 3 at 1. The SMLG’s arguments are inconsistent with the case law concerning standing, and the applicant-intervenor ignores the extensive, site-specific use, enjoyment, and study of the public lands at issue, which ONDA and its members have engaged in via wilderness inventories, participation in the BLM’s land use planning process, and a wide variety of other activities on these public lands. See, e.g., Marlett Dec. at ¶¶ 4, 5, 9, 21. In short, ONDA has shown that the organization and its members use and enjoy public lands throughout the CMPA, that the BLM’s failure to complete the Transportation Plan as part of the RMP made it difficult to fully evaluate ONDA’s wilderness recommendations, and that the relief ONDA has requested will redress the complained of injuries. Finally, Federal Defendants do not dispute ONDA’s standing in this action.

II. THE BLM VIOLATED THE STEENS ACT BY FAILING TO PREPARE THE STATUTORILY-MANDATED TRANSPORTATION PLAN BY OCTOBER 30, 2004.

A. ONDA Has Properly Challenged the BLM’s Failure to Act Pursuant to APA Section 706(1).

ONDA’s primary allegation is that 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 by October 30, 2004. This is a failure to act claim, actionable pursuant to APA § 706(1). See Compl. at ¶¶ 64–67. In response, Defendants argue ONDA’s claim should be reviewed under APA § 706(2)(A), claiming “the agency has taken action by including the Transportation Plan in the CMPA ROD.” BLM Br. at 2. As a result, Defendants structure their argument solely in response to ONDA’s alternative claim under Section 706(2)(A). Id. at 6–13 (complete Argument section).

Defendants are wrong on this point, though, because their argument fails to recognize that a plaintiff may challenge any agency failure “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). In other words, simply because Defendants can identify *some* final agency action that the BLM has taken (e.g., the Record of Decision adopting the RMP) does not preclude ONDA from challenging the BLM’s failure to take a discrete and separate agency action the BLM is *also* required to take—even if that requirement was to have been undertaken contemporaneously with a final agency action that was completed. Defendants provide no case support for their proposition. Defendants’ argument ignores the Supreme Court’s analysis of what constitutes a 706(1) claim, and instead attempts to confuse the issue by positing this misleading argument that an RMP decision somehow subsumes all other agency actions ONDA might challenge.

Here, the BLM was required not only to prepare the Resource Management Plan required by Section 111(b) of the Steens Act, 16 U.S.C. § 460nnn-21(b), and by the Federal Land Policy and Management Act, 43 U.S.C. § 1712, but *also* to prepare the comprehensive Transportation Plan required by Section 112(a) of the Steens Act, 16 U.S.C. § 460nnn-22(a). That the Steens Act requires the Transportation Plan to be an “integral part” of the RMP has no bearing on a plaintiff’s ability to challenge the BLM’s failure to prepare that Plan, so long as it meets the standard set out by the Supreme Court in SUWA. Therefore, ONDA’s Sixth Claim is properly reviewed under Section 706(1) of the APA.

B. The BLM Fails to Overcome the Evidence Showing the Agency Failed to Prepare the Statutorily-Mandated Transportation Plan.

Defendants do not dispute that the BLM had a mandatory duty to prepare a comprehensive Transportation Plan as an integral part of the CMPA RMP, no later than October 30, 2004. See Def. Resp. to Plaintiff’s Concise Statement of Material Facts, at ¶¶ 3–4 (admitting same). Instead, they argue the BLM has satisfied that statutory requirement with the inclusion of

“Appendix M” of the CMPA RMP. BLM Br. at 6. To support this assertion, Defendants offer a single, unavailing argument distinguishing between the statutorily-required Transportation Plan and a BLM-created “Travel Management Plan.” *Id.* at 8. Defendants’ argument fails because Congress unambiguously required the BLM to prepare a “comprehensive transportation plan” that was to be an “integral part” of the RMP—therefore leaving the BLM with no discretion to alter those mandatory statutory obligations, including no discretion to postpone crucial aspects of the Transportation Plan to a later “Travel Management Plan.” 16 U.S.C. §§ 460nnn-21(b), 460nnn-22(a).

With its opening brief, ONDA offered three principal pieces of evidence to show that the BLM had failed to prepare the Transportation Plan required by the Steens Act. These are: (1) the BLM’s March 2, 2006 letter to ONDA stating that the agency still needed to complete a road inventory, prepare “the proposed [‘Travel Management Plan’] itself,” substantiate inventory information, and address issues such as signing throughout the planning area; (2) the BLM’s June 10, 2005 response to ONDA’s administrative protest, in which the agency stated it “will be developing a TMP subsequent to the RMP”; and (3) the ROD/RMP itself, in which the BLM states that its so-called “Travel Management Plan” “will complete the comprehensive requirements” of 16 U.S.C. § 460nnn-22(a). See ONDA Ex. 3, 4, 5.

The BLM’s argument is that it satisfied the Steens Act by including, as Appendix M to the RMP, a bare-bones outline of what the future comprehensive plan might or should look like, while deferring to a subsequent, agency-created planning process nearly all of the planning actions that were necessary to complete the type of “comprehensive” and “integral” plan the Act actually requires. In other words, the BLM is attempting to substitute its placeholder approach

for the clear and concise requirements set forth by Congress in the Steens Act. According to Defendants:

[T]he subsequent Travel Management Plan [is] provided for in the Transportation Plan. . . . [T]his subsequent Travel Management Plan will provide for site-specific evaluation of routes which were not assessed in the field on a site-specific basis for the RMP Transportation Plan.

Def. Resp. to Plaintiff's Concise Statement of Material Facts, at ¶ 10; see also BLM Br. at 8 (“The Travel Management Plan follows the comprehensive Transportation Plan (TP) which is already completed.”).

This explanation fails because Congress provided only for a single “comprehensive transportation plan” that was to be an “integral part” of the RMP, rather than the multi-plan, placeholder approach the BLM later created. See 16 U.S.C. §§ 460nnn-21(b), 460nnn-22(a). Nowhere in the Steens Act does Congress authorize the BLM to defer portions of the Transportation Plan to a subsequent planning process or beyond the October 30, 2004 deadline. Instead, Congress gave the BLM four years to prepare a “comprehensive” Transportation Plan, to be prepared simultaneously with, and as an integral part of, the RMP. “Comprehensive” means comprehensive—not merely setting out broad “goals,” BLM Br. at 6, 11, or “interim direction,” id. at 9, or “interim designations,” id. at 10, or later arguing that scattered pages from the RMP and other management plans collectively constitute certain parts of the “Transportation Plan.” See id. at 10 (arguing non-motorized travel “is addressed as part of the Resource Management Plan addressing wilderness and recreation” and that “[h]iking trails within the Steens Mountain Wilderness are detailed within the Steens Mountain Wilderness Plan¹”).

¹ The Steens Mountain Wilderness and Wild and Scenic Rivers Plan is a separate, activity-level management plan providing guidance and standards for the Steens Mountain Wilderness and the congressionally-designated wild and scenic rivers within the CMPA. While the BLM's Record of Decision adopting the CMPA RMP was subject to an administrative protest pursuant to the

In fact, throughout their brief Defendants admit that most critical aspects of what should have constituted the comprehensive Transportation Plan simply have not been accomplished. These include critical field assessments and need determinations for routes; public review of the BLM's inventories, assessments, and determinations; and management of hiking trails throughout the more than 200,000 acres of the CMPA outside of the Steens Mountain Wilderness:

- “While it is true that BLM was *not able to do a field assessment and determination of the need for every route*, the Transportation Plan provides for designations of all routes known to be historically available for motorized use *pending site-specific review and refinement of designations* of certain routes.” BLM Br. at 7 (emphasis added).
- “A *subsequent* Travel Management Plan and environmental assessment will provide for *specific field assessments and need determinations* for remaining routes within the CMPA.” BLM Br. at 7–8 (emphasis added).
- “The Travel Management Plan *will also provide for a public process to substantiate information from this assessment*.” BLM Br. at 8 (emphasis added).
- “The [March 2, 2006] letter . . . refers to the *subsequent route-specific assessment* and EA known as the Travel Management Plan (TMP) for the CMPA.” BLM Br. at 8 (emphasis added).
- “[T]his subsequent Travel Management Plan will provide for *site-specific assessment of certain routes which were not fully assessed in the field for the Transportation Plan* in the [CMPA RMP].” BLM Br. at 8 (emphasis added).
- “[I]t is true that BLM will follow up with a Travel Management Plan that will *refine* Transportation Plan *interim designations for routes that could not be fully assessed in the field*” BLM Br. at 10 (emphasis added).
- “*In the interim*, the Transportation Plan addresses maintenance and use of all known routes.” BLM Br. at 10 (emphasis added).

Department of the Interior's appeals regulations, the Steens Mountain Wilderness and Wild and Scenic Rivers Plan was subject to a separate 30-day appeal period under those regulations. See ONDA Ex. 4 at 2–3 (BLM ROD cover letter explaining administrative protest and appeal procedures); 43 C.F.R. Part 4 (public land hearings and appeals); 43 C.F.R. § 1610.5-2 (protest procedures for RMPs).

- “The [RMP] provides for *hiking trails outside wilderness to be further addressed in a comprehensive recreation plan* that will be prepared after the Resource Management Plan is completed.” BLM Br. at 11 (emphasis added).

Furthermore, nowhere in Appendix M or any other document cited by the BLM did the agency discuss or incorporate ONDA’s January 2003 road closure recommendations report or the detailed wilderness inventory report and recommendations ONDA provided to the agency during the RMP planning process. See Marlett Decl. at ¶¶ 12, 15–18, and Attach. 1.

What this litany of deferred actions and ignored data shows is that the BLM simply has not prepared the “comprehensive” plan Congress mandated. Defendants feebly argue that the BLM “*addressed*” the issues identified by Congress in Section 112(a). BLM Br. at 13 (emphasis in original). But the BLM cannot turn the clear substantive duty to include certain components in the management plan (i.e., a duty mandating a result), into a procedural duty only to “address” those issues. The BLM’s argument attempts to change the language of the statute, which does not simply say “address,” but rather mandates that the BLM’s “management plan *shall include*, as an integral part, a comprehensive transportation plan for the Federal lands included in the Cooperative Management and Protection Area” 16 U.S.C. § 460nnn-22(a). Accordingly, Defendants have not overcome ONDA’s showing that the BLM has failed to prepare the comprehensive Transportation Plan required by the Steens Act.

III. ONDA’S TRANSPORTATION PLAN CLAIM ALSO IS ACTIONABLE PURSUANT TO APA SECTION 706(2)(A).

In its opening brief, ONDA also explained why, as an alternative permutation of its claim, the BLM’s decision to adopt the CMPA RMP is arbitrary and capricious because the agency did so without including the required Transportation Plan. In response, Defendants argue their interpretation of the Steens Act is entitled to deference under Chevron U.S.A., Inc. v. Natural Res. Defense Council, 467 U.S. 837 (1984). BLM Br. at 11. But because the Record of

Decision adopting the CMPA RMP and Transportation Plan is not a statute, regulation, or rule entitled to Chevron deference, this court has an independent duty to review that decision to determine whether it is arbitrary, capricious, or not in accordance with law. Even under the Chevron analytical framework, the Steens Act is clear and unambiguous, meaning this court owes no deference to the agency’s “interpretation” and the plain meaning of Congress must be enforced.

A. The BLM Is Not Entitled to Deference.

Because the Steens Act does not create a private right of action, judicial review of agency action under the Act is governed by the APA, 5 U.S.C. §§ 701 *et seq.* As explained in ONDA’s opening brief, ONDA Br. at 5–6, under the APA, an agency action may be set aside if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); see also The Wilderness Soc’y v. U.S. Fish & Wildlife Serv., 353 F.3d 1051, 1059 (9th Cir. 2003). Defendants are wrong, though, when they argue that the BLM is entitled to deference regarding its “interpretation” of the Steens Act’s Transportation Plan requirement. BLM Br. at 11. As an initial matter, neither the CMPA RMP nor the Transportation Plan allegedly included as an appendix to the RMP is a statute, regulation, or rule. Instead, the RMP and the Transportation Plan consist of an Environmental Impact Statement and Record of Decision that collectively establish standards and guidelines for the management of federal land. It is the district court’s duty to independently review the agency’s decision and determine whether that decision was arbitrary, capricious, or not in accordance with law. 5 U.S.C. §

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706(2)(A). See Ore. Natural Res. Council Fund v. Brong, No. 04-693-AA, slip op. at 46 (D. Or. Nov. 8, 2004) (holding same with respect to Northwest Forest Plan).²

Even under the well-established analytical framework employed in assessing the deference due agency decisions, the BLM is not entitled to the Chevron deference its counsel seeks. As the Ninth Circuit has explained, “[i]f the statute is clear and unambiguous, no deference is required and the plain meaning of Congress will be enforced.” High Sierra Hikers Ass’n v. Blackwell, 390 F.3d 630, 638 (9th Cir. 2004) (citing Chevron, 467 U.S. at 842–43); Wilderness Soc’y, 353 F.3d at 1059 (same). “If the statute is ambiguous, the agency’s decision is entitled to Chevron deference if it has the force of law.” High Sierra Hikers, 390 F.3d at 638 (citing United States v. Mead Corp., 533 U.S. 218 (2001)). If the decision “does not have the force of law, it is reviewed with ‘respect’ according to the factors set out in Mead and [Skidmore v. Swift & Co., 323 U.S. 134 (1944)].” Id.

Thus, following Wilderness Society and High Sierra Hikers, this court would begin by asking whether the Transportation Plan “offends the plain meaning and manifest congressional intent of the [Steens Act].” Wilderness Soc’y, 353 F.3d at 1060. If so, “Congress’s intent must be enforced and that is the end of the matter.” Id. Under Chevron, the inquiry is “‘whether Congress has directly spoken to the precise question at issue.’” Id. (quoting Chevron, 467 U.S. at 842). To answer this question, the courts employ canons of statutory construction to help give meaning to a statute’s words, beginning with the language of the statute. Id. (citing Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 56 (1987)). Unless otherwise defined, words are interpreted as taking their “ordinary, contemporary, common meaning.” Id. (citing United States v. Smith, 155 F.3d 1051, 1057 (9th Cir. 1998)).

² Relevant excerpts attached for the convenience of the court, as Attachment A. Also available at 2004 WL 2554575 (see page *19).

Here, ONDA already has discussed the plain meaning of the key terms in Section 112 of the Steens Act. See ONDA Br. at 12–14. The plain meanings of the terms “comprehensive” and “integral” are not ambiguous. Defendants do not address the plain meaning of these key statutory terms. Instead, they simply argue that the “Steens Act is silent regarding the level of detail that should be included in the transportation plan.” BLM Br. at 12. Yet, Congress answered that question by (1) directing that the plan be “comprehensive”—i.e., all-embracing and inclusive—and (2) by actually listing the specific components the plan “shall address”: maintenance, improvement, and closure of roads and trails, as well as travel access. 16 U.S.C. § 460nnn-22(a). Defendants’ argument that Section 112 “does not specify that the Transportation plan [sic] include an assessment of every route in the CMPA[,]” BLM Br. at 12, simply does not comport with the plain meaning of the word “comprehensive.”

As ONDA pointed out previously, Appendix M merely includes a goal, an objective, a list of 35 one- or two-sentence “best management practices,” and a glossary of terms. ONDA Ex. 4 at 15–22. In the RMP, the BLM concedes it has not yet completed “the comprehensive requirements” of Section 112. Id. at 13. The agency admits it has not completed necessary field inventories and need determinations, and that certain route designations are only “interim” in nature. Id. Nowhere in Appendix M 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). And certain components of the purported Transportation Plan appear in separate management plans, as opposed to being in a single, comprehensive transportation plan that is an “integral part” of the RMP as required by Section 112. See BLM Br. at 11 (“Hiking trails within the Steens Mountain Wilderness are detailed within the Steens Mountain Wilderness Plan.”). The BLM has not satisfied Congress’s Transportation Plan mandate under the plain

meaning of Section 112 of the Steens Act. Therefore, this court owes no deference to the BLM's Record of Decision adopting the CMPA RMP.

B. The BLM's "Delegation" Argument Also Fails.

Along these same lines, Defendants argue this court should extend Chevron deference to the BLM because Congress purportedly delegated to the BLM authority "to fill gaps left in" the Steens Act. BLM Br. at 12. This argument fails for the same reasons described above: what the court is reviewing here is the BLM's Record of Decision adopting the CMPA RMP, not a BLM rulemaking interpreting Sections 111 and 112 of the Steens Act. Defendants provide no facts or case law to support the allegation that the Record of Decision meets the test set out in Mead, 533 U.S. at 226–27, to receive Chevron deference: "that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." Instead, the evidence presented is limited to a single quote from the Steens Act. BLM Br. at 12. By no means have Defendants established that the Steens Act contained an "indication of . . . congressional intent" that the BLM was delegated authority under Section 112 comparable to adjudication or notice-and-comment rulemaking. Mead, 533 U.S. at 227.

Instead, the Steens Act's Transportation Plan provision is a congressional mandate, not a "delegation" of authority in the sense the Court discusses in Chevron and Mead. The BLM is not "merely exercising its authority to fill gaps in the statute" but rather is responding to a mandatory, statutory duty established by Congress to prepare a comprehensive Transportation Plan by a date certain. As explained above, the BLM cannot turn the clear substantive duty to include certain components in the management plan (i.e., a duty mandating a result), into a procedural duty only to "address" those issues. The BLM's argument attempts to change the

language of the statute, which does not only say “address,” but also mandates that the BLM “shall include” a comprehensive transportation plan. 16 U.S.C. § 460nnn-22(a). Therefore, the BLM’s delegation argument fails and this court should review the agency’s adoption of the CMPA RMP without the required Transportation Plan under the APA’s “arbitrary and capricious” standard of review, as articulated in ONDA’s opening brief. See ONDA Br. at 5–6.

CONCLUSION

For the reasons stated above, as well as those stated in ONDA’s opening brief in support of its motion for partial summary judgment, ONDA again respectfully asks this court to grant summary judgment in its favor as to Claim Six, and to order the BLM to prepare the statutorily-mandated Transportation Plan by a date certain.

DATED this 11th day of August, 2006

Respectfully Submitted,

s/ Peter M. Lacy

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