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

**OREGON NATURAL DESERT ASS’N,**

Plaintiff,

v.

**KENNY MCDANIEL**, Burns District  
Manager, BLM, *et al.*,

Defendants.

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Case No. CV-09-369-PK

**MEMORANDUM IN SUPPORT  
OF MOTION FOR SUMMARY  
JUDGMENT**

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## INTRODUCTION

Plaintiff Oregon Natural Desert Association (“ONDA”) moves for summary judgment on its claims that the Bureau of Land Management (“BLM”) has adopted a Travel Management Plan (“TMP”) for Steens Mountain in violation of the Steens Mountain Cooperative Management and Protection Act of 2000 (“Steens Act”), 16 U.S.C. § 460nnn *et seq.*, Federal Land Policy and Management Act of 1976 (“FLPMA”), 43 U.S.C. §§ 1701–87, Wilderness Act of 1964, 16 U.S.C. §§ 1131–36, and National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321–61. The plan establishes illegal off-road driving routes that threaten existing and proposed wilderness areas, fragment wildlife habitat and open the mountain to weed infestations within this congressionally-protected area.

BLM’s plan establishes motorized travel on 555 miles of routes, but the record shows more than 100 miles of the routes have virtually disappeared, having been naturally reclaimed into native sagebrush and grassland through nonuse over the years. The agency’s decision to designate these areas for motorized use violates federal laws prohibiting off-road travel and creation or re-establishment of new roads on Steens Mountain, as well as laws protecting against damage to wilderness areas and requiring BLM to prioritize protection of “long-term ecological integrity” above all else on the mountain.

The TMP also violates Congress’s directive that the agency prepare a “comprehensive” travel plan for motorized *and* non-motorized travel on Steens Mountain. Despite this Court’s 2006 ruling that an earlier incarnation of the plan failed to meet this requirement, BLM once again has issued a travel decision inconsistent with the law. The TMP fails to plan for non-motorized travel on Steens Mountain, deferring that issue to a future decision. If implemented as proposed, BLM’s plan will destroy roadless habitat and wilderness values throughout this

remarkable, nationally significant landscape. Motorized access will be enshrined before non-motorized recreation is considered. Finally, the record shows that opening more than 500 miles of roads on Steens Mountain “may have a significant effect” on the environment, and BLM therefore should have prepared an environmental impact statement (“EIS”) under NEPA to study these effects.

## **BACKGROUND**

### **I. STEENS MOUNTAIN**

Steens Mountain is situated deep in southeast Oregon’s high desert. It is part of an expansive landscape punctuated by the high mountains, broad valleys and desert playas typical of the northern Great Basin. This basin-and-range landscape started to form 18 million years ago as the earth’s crust began stretching westward. That fault movement, which continues today, was followed by large volcanic flows of basalt and intense climate changes. These factors have worked together to create the 60-mile long, 9,773-foot high Steens Mountain. Its precipitous, east-facing escarpment overlooks the ancient Alvord Desert a mile below. Less than a million years ago alpine glaciers formed broad valleys on top of the mountain and carved dramatic gorges up to 2,000 feet deep. *See* Administrative Record (“AR”) 11366–67 (general description of “Affected Environment” in Andrews-Steens Resource Management Plan (“RMP”) FEIS), 10749 & 11052 (general vicinity maps); *see also* Complaint ¶¶ 16–31 (further background).

Much of the landscape is sagebrush steppe, interspersed with juniper woodlands, aspen groves and relic fir stands, and dotted with wet meadows, alpine shrub communities, and grasslands. Desert streams and wetlands provide habitat and life-giving waters to hundreds of fish and wildlife species. *See* AR 11368, 11375–82. Steens Mountain is home to a wide range of wildlife and fish. These include mammals such as wolverine, bighorn sheep, pronghorn antelope,

elk, badger, cougar, coyote, marmot and eight special status species of bats. *See* AR 11385–88, 11391–96, 11400–01. More than 110 species of resident and migratory birds inhabit the area. These include special status species such as Northern goshawk and Swainson’s hawk; sagebrush canopy-nesting species such as sage thrasher and sage sparrow; and woodland species such as flycatchers, dark-eyed junco, bushtit, and chipping sparrow. *See* AR 11387, 11391–93.

Among the multitude of birds on Steens Mountain is an important population of sage grouse, a species recently determined by the U.S. Fish & Wildlife Service to be warranted for listing under the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* 12-Month Findings for Petitions to List the Greater Sage-Grouse (*Centrocercus urophasianus*) as Threatened or Endangered, 75 Fed. Reg. 13910 (2010). Once numbering more than a million birds across 13 western states and 3 Canadian provinces, sage grouse numbers have declined severely over the last 50 years. *Id.* at 13920–23. Sage grouse are sagebrush obligates, meaning that they depend on sagebrush year round for roosting, cover and food. *Id.* at 13915. Specifically, sage grouse depend on large areas of contiguous, interconnected sagebrush. *Id.* at 13916, 13923–24. Sagebrush is one of the most imperiled ecosystems in North America. *Id.* at 13916. Habitat fragmentation and weed infestation are among the primary causes of the decline of sage grouse populations. *Id.* at 13927, 13935–37.

There are sage grouse leks (breeding sites) and lek complexes throughout Steens Mountain. AR 9984 (EA), 11024 (map showing leks). Leks generally are located away from roads and other human disturbances, in areas of low sagebrush or other relatively open sites. 75 Fed. Reg. at 13915. Oregon sage grouse populations and sagebrush habitats comprise nearly 20% of the range wide distribution of the species. *See* AR 11394–95; 75 Fed. Reg. at 13919–20 (showing core sage grouse management zones identified by USFWS).

## **II. FEDERAL LAND MANAGEMENT**

### **A. The Wilderness Act.**

Among public lands resources, “lands with statutorily-defined wilderness characteristics are of particular importance.” *Or. Natural Desert Ass’n v. BLM*, 531 F.3d 1114, 1118 (9th Cir. 2008). In 1964, Congress identified the conservation of such lands as a national priority in the Wilderness Act. 16 U.S.C. § 1131(a). Intended to “secure for the American people of present and future generations the benefits of an enduring resource of wilderness[,]” the Wilderness Act provides for the protection and preservation of federal lands in their natural condition. *Id.* Using unique words found in no other natural resource protection law, Congress defined “wilderness,” contrasted with “areas where man and his own works dominate the landscape,” as “an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain.” *Id.* § 1131(c). By definition, wilderness areas retain their “primeval character and influence, without permanent improvements or human habitation,” and retain “outstanding opportunities for solitude or a primitive and unconfined type of recreation.” *Id.* For areas that Congress has designated as Wilderness, such as the Steens Mountain Wilderness Area, the administering agency “shall be responsible for preserving the wilderness character of the area.” *Id.* § 1133(b). This is a “non-impairment” mandate for Wilderness areas. *See High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d 630, 648 (9th Cir. 2004).

### **B. The Federal Land Policy and Management Act.**

Congress passed FLPMA in 1976 to govern BLM’s management of the public lands. FLPMA establishes systems for information gathering and land use planning. It directs BLM to “develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands.” 43 U.S.C. § 1712(a); *see also ONDA*, 531 F.3d at 1116–18

(describing land use planning under FLPMA). BLM must manage the public lands in accordance with these land use plans. 43 U.S.C. § 1732(a).

Because the Wilderness Act did not directly address BLM's management of its lands, Congress directed BLM in FLPMA to review wilderness values on the lands the agency manages. FLPMA provided for an initial review of lands eligible for protection under the Wilderness Act. Section 603(a) required the Secretary to review roadless areas identified during inventories undertaken pursuant to § 201(a) as having wilderness characteristics, and present a recommendation to the President as to the suitability of those areas for wilderness protection. *Id.* §§ 1782(a), 1711(a); *see also id.* § 1702(i) (adopting Wilderness Act definition of "wilderness"). The President in turn gave Congress "his recommendation with respect to the designation as wilderness of each [agency-recommended] area," and Congress may then "designat[e] as wilderness" the lands it deems appropriate. *Id.* § 1782(b).

In the interim between BLM's initial wilderness review and Congress's final preservation decision, BLM must, with a few exceptions not relevant here, manage all the lands it has reviewed "so as not to impair the suitability of such areas for preservation as wilderness." *Id.* § 1782(c). The lands managed according to this "non-impairment" standard are known as "wilderness study areas" or "WSAs." *See ONDA*, 531 F.3d at 1119.

### **C. The Steens Act.**

In 2000, Congress passed the Steens Act, creating the Cooperative Management and Protection Area ("CMPA"), a 496,000-acre protected area managed by BLM and covering most of Steens Mountain. 16 U.S.C. § 460nnn-11(a); AR 11158; SAR 5148 (map showing CMPA boundaries). "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); *see also id.* § 460nnn(5) (defining “ecological integrity”).

The Act also created the 173,000-acre Steens Mountain Wilderness Area; added 29 miles to the National Wild and Scenic River System; withdrew 1.1 million acres from mineral and geothermal leasing; established a Wildlands Juniper Management Area; designated the nation’s first Redband Trout Reserve; and set aside a 97,000 acre No Livestock Grazing Area. 16 U.S.C. §§ 460nnn-61, -71, -81, -91, -72, -11(b), -23(e)(2). Most of the No Livestock Grazing Area lies within the Steens Mountain Wilderness Area. All of these areas except for the broad mineral and geothermal withdrawal area are within the CMPA. *See* SAR 5148, AR 10750 & 10752 (maps).

Congress directed BLM to prepare a land use plan “for the long-range protection and management of the Federal lands included in the [CMPA]” by October 30, 2004. 16 U.S.C. § 460nnn-21(b). The plan was to “include, as an integral part, a comprehensive transportation plan for the Federal lands included in the [CMPA], which shall address the maintenance, improvement, and closure of roads and trails as well as travel access.” *Id.* § 460nnn-22(a).

Beyond requiring a comprehensive transportation plan, the Steens Act places substantial prohibitions on the use of motorized and mechanized vehicles within the CMPA. *Id.* § 460nnn-22. It prohibits their use off-road and limits their use to designated, existing roads and trails, with limited exceptions. *Id.* § 460nnn-22(b). It also prohibits construction of new roads or trails for motorized or mechanized vehicles unless the agency determines it necessary for public safety or protection of the environment. *Id.* § 460nnn-22(d). Constructing or maintaining trails for non-motorized or non-mechanized travel (*e.g.*, hiking or horseback riding trails) is not prohibited.

#### **D. The National Environmental Policy Act.**

NEPA is our “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). In NEPA, Congress declared as a national policy “creat[ing] and maintain[ing]

conditions under which man and nature can exist in productive harmony.” 42 U.S.C. § 4331(a). “NEPA’s purpose is realized not through substantive mandates but through the creation of a democratic decisionmaking structure that, although strictly procedural, is ‘almost certain to affect the agency’s substantive decision[s].’” *ONDA*, 531 F.3d at 1120 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)). NEPA serves two purposes: (1) “it ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts,” and (2) it “guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.” *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004) (quoting *Methow Valley*, 490 U.S. at 349) (internal citations and alteration omitted); *see also* 40 C.F.R. § 1500.1(b) (requiring “high quality” information, “[a]ccurate scientific analysis” and “public scrutiny”). By requiring agencies to take a “hard look” at the choices before them and how they “affect the environment, and then to place their data and conclusions before the public . . . NEPA relies on democratic processes to ensure . . . that ‘the most intelligent, optimally beneficial decision will ultimately be made.’” *ONDA*, 531 F.3d at 1120 (internal citations omitted).

NEPA requires BLM to prepare an EIS for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). The agency may avoid an EIS only if it finds, after preparing an environmental assessment (“EA”), that the action will “no significant impact.” 40 C.F.R. §§ 1508.9(a), 1508.13. The EIS is NEPA’s “chief tool, designed as an ‘action-forcing device to [e]nsure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government.’” *ONDA*, 531 F.3d at 1121 (quoting 40 C.F.R. § 1502.1). In an EIS, agencies must “provide full and fair discussion of

significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize impacts or enhance the quality of the human environment.” 40 C.F.R. § 1502.1; *see also* 42 U.S.C. § 4332(2)(C), (E) (EIS and alternatives requirements); 40 C.F.R. Pt. 1502 (same).

To fulfill this mandate, agencies must “consider every significant aspect of the environmental impact of a proposed action” in an EIS. *ONDA*, 531 F.3d at 1130 (citing *Vermont Yankee Nuclear Pwr. Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 553 (1978)). This includes studying the direct and indirect effects and cumulative impacts of the action, *see* 40 C.F.R. §§ 1508.7, 1508.8, as well as studying “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” *Id.* § 1502.9(c)(1)(ii). An agency must disclose and discuss any “responsible opposing views” and scientific information. *Id.* § 1502.9(b); *Ctr. for Biol. Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1167–68 (9th Cir. 2003). In the EIS, an agency also must “[r]igorously explore and objectively evaluate all reasonable alternatives.” *Id.* § 1502.14. The alternatives section is “the heart of the environmental impact statement.” *Id.* “The existence of a viable but unexamined alternative renders an [EIS] inadequate.” *ONDA*, 531 F.3d at 1121 (citing *Westlands Water Dist. v. U.S. Dep’t of Interior*, 376 F.3d 853, 868 (9th Cir. 2004)).

### **III. BLM’S PLANS FOR STEENS MOUNTAIN**

The gravamen of ONDA’s suit is that after more than five years of transportation planning on Steens Mountain, BLM has issued a plan that is not “comprehensive” and at the same time designates “roads” where none exist, on the ground, according to BLM’s definitions and evidence in the record. By ignoring non-motorized uses and by designating roads where none exist, BLM’s plan carves up roadless areas on Steens Mountain, fragmenting core

sagebrush habitat and foreclosing Congress's ability to one day preserve these areas as Wilderness by expanding the Steens Mountain Wilderness Area.

In its planning, BLM distinguishes “roads that had been actively maintained from ways that were maintained solely by the passage of vehicles. *The presence of ways did not render an area roaded* so as to eliminate that area from further evaluation as wilderness.” *ONDA*, 531 F.3d at 1128 (internal quotes omitted) (emphasis added). BLM's long-standing definition provides:

The word “roadless” refers to the absence of roads which have been improved and maintained by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of a vehicle does not constitute a road.

Miller Decl. at ¶ 7 & Attach. C (emphasis added) (also explaining that this language is Congress's from FLPMA's legislative history);<sup>1</sup> see also SAR 7. Much of the legal inadequacy of the TMP flows from this critical distinction between the two types of routes.<sup>2</sup>

#### **A. The Steens Mountain Land Use Planning Process.**

The process that led to the TMP challenged here began in February 2002, when BLM began to prepare two counterpart land use plans, the Andrews Management Unit (or “AMU”) RMP and the CMPA RMP. AR 10781–83 (overview of planning process); 16 U.S.C. §§ 460nnn-21(b), -22(a) (Steens Act's land use plan and transportation plan requirements). Collectively,

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<sup>1</sup> The Miller, Rasmussen, Gelbard and Fenty declarations (filed herewith), fit within the established exceptions to the general rule limiting a court's review of a challenged agency decision to the administrative record. See *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005) (explaining district courts may admit extra-record evidence if necessary to determine “whether the agency has considered all relevant factors and has explained its decision,” (2) if “the agency has relied on documents not in the record,” (3) “when supplementing the record is necessary to explain technical terms or complex subject matter,” or (4) “when plaintiffs make a showing of agency bad faith”) (quoting *Southwest Ctr. for Biol. Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996)). The Miller, Rasmussen and Fenty declarations also show that ONDA has standing.

<sup>2</sup> “Route” is a universal term meaning any “linear ground transportation feature such as a way or road.” AR 10484.

they are referred to as the Andrews-Steens RMP. Throughout the planning process, ONDA met with BLM staff, submitted scientific data and literature, and provided detailed written comments underscoring Steens Mountain's significant wilderness and wildlife habitat values. *See Or. Natural Desert Ass'n v. Shuford*, No. 06-242-AA, 2007 WL 1695162, \*2 (D. Or. June 8, 2007).

Chief among ONDA's concerns was the fact that BLM had not inventoried lands with wilderness characteristics since the agency's initial inventory in the 1970s. ONDA asked BLM to update its wilderness inventory and consider the plan's impacts to wilderness and roadless areas on Steens Mountain. BLM refused to collect new wilderness data outside of existing Wilderness and WSAs, so ONDA undertook its own wilderness survey. In a 1,660-page report, ONDA documented changes that had occurred on the landscape since November 1980 when BLM completed its field inventory supporting its original wilderness recommendations. SAR 1737–3981 & 3984–4073 (hereafter the “ONDA Wilderness Report”)<sup>3</sup>; *see also ONDA*, 531 F.3d at 1127–28 (explaining same, for ONDA's Vale District report for the Southeastern Oregon RMP or “SEORMP”); SAR 909–1681 (BLM's original wilderness EIS and Wilderness Study Report).

Because the Wilderness Act defines wilderness as an area that “generally appears to have been affected primarily by the forces of nature,” 16 U.S.C. § 1131(c)(1), “BLM has long treated the presence of roads as cancelling out any other wilderness characteristics an area might otherwise have, as they defeat the ‘natural conditions’ wilderness characteristic.” *ONDA*, 531 F.3d at 1128; *see also* 43 U.S.C. § 1782(c) (providing that the § 603 review should focus on roadless areas); SAR 7–8 (BLM's 1978 handbook, discussing roadlessness). ONDA therefore focused on surveying current route conditions throughout the planning area. *See* 531 F.3d at

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<sup>3</sup> *Also available at* [www.onda.org/defending-desert-wilderness/steens-mountain-wilderness](http://www.onda.org/defending-desert-wilderness/steens-mountain-wilderness) (last visited July 20, 2010).

1128–29; Miller Decl. ¶ 7. ONDA used the inventory procedures BLM adopted in its 2001 wilderness inventory handbook. Miller Decl., Attach. C at 12, 39–53 (describing required content for citizen wilderness reports).

ONDA’s report disclosed significant changes on the landscape since BLM’s 1970s inventory. Lands that BLM determined lacked wilderness character more than two decades earlier had reverted to a more natural state and, according to the ONDA Wilderness Report, now met the statutory and BLM handbook definition of wilderness. Many of these changes occurred “because little-used roads had deteriorated since November 1980.” *ONDA*, 531 F.3d at 1128 (citing ONDA report on SEORMP lands); *see also, e.g.*, SAR 1990–92 (explaining same for the Blitzen River South Roadless Area). This conclusion turned on the crucial distinction between “roads” and “ways.” *ONDA*, 531 F.3d at 1128. Most importantly, many routes that BLM had identified as “roads” in the 1970s inventory had reverted to “ways” over the years.

Of about 750,000 acres of public land inventoried, ONDA identified about 545,000 acres on and around Steens Mountain that possess the statutorily defined characteristics of wilderness—that is, public lands which consist of 5,000 or more roadless acres, are primarily affected by the forces of nature, and provide outstanding opportunities for solitude and primitive recreation. *See* 16 U.S.C. § 1131(c). Eleven of these newly-identified roadless areas, covering more than 81,000 acres, lie within the CMPA, and therefore TMP planning area. SAR 1737–3981 & 3984–4073.

In January 2003, ONDA prepared and submitted to BLM a separate route inventory report to aid the comprehensive transportation plan BLM was to prepare as an “integral” part of the RMP. SAR 4074–86; 16 U.S.C. § 460nnn-22(a). Relying on the survey data from the ONDA Wilderness Report, ONDA documented routes that are redundant or overgrown, rocky, rutted,

impassable or virtually nonexistent on the ground. ONDA asked BLM to close these routes to motorized use. SAR 4074–86.

In an attempt to satisfy the Steens Act mandate of a comprehensive plan, the July 2005 CMPA RMP contained a short appendix which BLM denominated as its transportation plan (“TP”). AR 10766, 10707–14. The plan provided general guidance regarding the maintenance, improvement, use and accessibility of roads in the CMPA. AR 10707–14. It identified the need to conduct on-the-ground inventories. AR 10707. The RMP stated that such inventories and other work required to “complete the comprehensive requirements [of the Steens Act]” would be completed by December 31, 2005. AR 10847. In February 2006, ONDA filed suit in this Court, alleging, among other claims, that BLM had violated the Steens Act by adopting the CMPA RMP without including the comprehensive transportation plan required by 16 U.S.C. § 460nnn-22(a). *See Shuford*, 2007 WL 1695162 at \*2.

### **B. The Steens Mountain Travel Management Plan.**

While that lawsuit was pending, BLM announced in December 2006 it was going to prepare what it called a “Travel Management Plan.” AR 10248. BLM claimed the TMP would “complete the [Steens Act’s] comprehensive requirements.” AR 9929. BLM received more than 12,000 public comment letters in response to the notice, including from ONDA. AR 10028, 10036–10247 (public comment letters and emails), 10190 (example of one of the thousands of comment letters sent in by members of The Wilderness Society),<sup>4</sup> 10116–19 (ONDA comments). The comments overwhelmingly supported reducing areas open to motorized vehicles on Steens Mountain. *See Miller Decl.* ¶ 46.

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<sup>4</sup> BLM did not produce these 11,000 public comment letters favoring significant road closures in the administrative record. *See* AR 10190 and BLM’s “Document Description” for this document in the AR Index (Dkt # 22).

In April 2007, BLM released an EA for the TMP. AR 9913. In the EA, BLM purported to identify 556 miles of motorized routes and grouped them into various categories defined by their condition and the nature of their use. BLM created a variety of route categories: Base Routes, Obscure Routes, Historical Routes, Private Landowner Access Routes, Permit Routes, All-Terrain Vehicle (“ATV”) Routes and Special Use Permit Routes. AR 9963–65. BLM proposed to designate 555 of the 556 miles of routes as open to motorized vehicle use. AR 9969.

Obscure Routes are, by BLM’s definition, “hard to locate on-the-ground.” AR 9964. By reason of time and disuse, such routes show little or no physical trace on the ground and have fallen into obscurity, having essentially been reclaimed by natural processes. *See Or. Natural Desert Ass’n*, 176 IBLA 371, 384 (2009) (available at AR 41). BLM explains that because these routes are not “observable on-the-ground,” this “may cause confusion for some visitors using mapped routes for navigation.” AR 10017. ATV Routes are similar. BLM explains in the EA that due to landslides and natural erosion, these routes “are no longer safe for full-sized vehicles.” AR 9965. Historical Routes also are similar: these routes “are currently hard to locate and/or were not identified” during BLM’s 1970s wilderness inventory. AR 9964. Many of the Base Routes are likewise “obscure” or difficult or impossible to identify on the ground. *See Miller Decl.* ¶¶ 16–18, 36–39, 43–44, 47–48.

BLM limits the EA to motorized travel routes. BLM admitted that, as was the case for the TP, it had not yet completed an inventory of non-motorized routes and trails. AR 10007–08 (EA explaining that BLM’s current inventory of trails is incomplete); AR 783 (BLM’s Decision Record stating, “Full nonmotorized trail inventories have not yet been completed”). Decisions regarding designation and management of non-motorized routes may occur as part of yet another subsequent plan, this one to be called a “comprehensive recreation plan” or “CRP.” AR 783,

785–86. For non-motorized routes, the TMP provides only that any known, existing such routes will remain available for continued use. AR 786. The TMP does also not address motorized or mechanized use by snowmobiles, mountain bikes or helicopters, again deferring those issues to the CRP. AR 785–86.

ONDA submitted written comments on the EA. AR 12931–45. Among other things, ONDA asked BLM to plan for motorized *and* non-motorized travel at the same time rather than once again pushing the latter to a future planning process, and to close certain routes to protect the environment. Aside from citing its 2002 Wilderness Report (SAR 1737–3981 & 3984–4073) and its 2003 route closures report (SAR 4074–86), ONDA updated its route inventory data and in 2007 submitted a new, 242-page route inventory report. AR 12946–13257 (hereafter, the “Transportation Report”). Using geo-referenced photographs along with Geographic Information System (“GIS”) mapping and analysis, that report documents more than 100 separate routes which ONDA surveyed and found to be overgrown, rocky, rutted, impassable, and barely- or non-existent on the ground. *See also* Miller Decl. ¶¶ 3, 20–21, 48. Many of the routes documented in ONDA’s report have been naturally reclaimed over time by nonuse. Still other routes are documented as being redundant, duplicative or otherwise unnecessary on the landscape. *E.g.*, AR 12957, 12961, 13126, 13145, 13160, 13161, 13257 (examples of naturally reclaimed and overgrown routes); 12953, 13013, 13056, 13098, 13106, 13230 (examples of rocky and impassible routes).

BLM received 9,872 public comments in response to its EA. AR 784, 851–9908. As was the case during the scoping period, the public once again overwhelmingly asked BLM to adopt a plan that would close substantial portions of the routes the agency had identified on Steens Mountain. *See id.*; Miller Decl. ¶ 46. The public comment period closed on May 21, 2007. Seven

business days later on May 31, 2007, after purportedly reviewing the tremendous response from the public, BLM issued a final decision. AR 832. In its decision, BLM designated as open for motorized use 555 out of the 556 miles of routes it had purported to identify. AR 840.

The following week, on June 8, 2007, this Court in *Shuford* ruled that BLM's TP was unlawful under the Steens Act. *Shuford*, 2007 WL 1695162 at \*16–\*18. It granted summary judgment in ONDA's favor on its claim that the TP did not satisfy the Act's requirement to prepare a "comprehensive transportation plan" to address "the maintenance, improvement, and closure of roads and trails as well as travel access" within the CMPA. The Court agreed with ONDA that the TP was neither comprehensive nor integral under the ordinary meaning of those terms. *Id.* Several days later, BLM "rescinded" its TMP decision to "take into account" the Court's decision and issue a new decision. AR 827. BLM did not seek further comment from the public. *Id.* In November 2007, BLM issued a new TMP decision, which is the subject of this lawsuit. AR 783. In that decision BLM decided once again to adopt the Proposed Action, unchanged. AR 794. BLM did not issue a new EA, continuing to rely upon the April 2007 EA. AR 783–84.

ONDA appealed the decision with the Department of the Interior's Board of Land Appeals ("IBLA") in January 2008. AR 619–690, 242–294. In April, the IBLA preliminarily enjoined BLM from implementing its TMP decision as to the Obscure Routes. AR 202. The Board agreed with ONDA that BLM's designation of these routes violated the Steens Act's prohibitions on off-road motorized travel and creation of new vehicle routes, and FLPMA's non-impairment requirement. AR 209–10.

On February 19, 2009, the IBLA issued a merits decision on ONDA's appeal, affirming in part and reversing in part BLM's TMP decision. AR 41. The Board agreed with ONDA that

BLM's decision to open the Obscure Routes within the CMPA violated the Steens Act and FLPMA. AR 53–57. Based on that ruling, the Board “reverse[d] the Field Manager’s decision to open the Obscure Routes to motorized use as contrary to section 112 of the Steens Act, 16 U.S.C. § 460nnn-22 (2006), as well as section 603(c) of FLPMA, 43 U.S.C. § 1782(c) (2000).” AR 65. The Board affirmed BLM’s decision in all other respects. *Id.* ONDA filed this action on April 13, 2009.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that 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 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). The Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701 *et seq.*, sets forth standards governing judicial review of decisions made by federal agencies. *See Dickinson v. Zurko*, 527 U.S. 150, 152 (1999); *Mtn. Rhythm Res. v. FERC*, 302 F.3d 958, 963 (9th Cir. 2002). Under the APA, a court “shall” hold unlawful agency actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

While the “scope of review” under APA § 706(2)(A) is narrow, an agency must articulate a rational connection between the facts found and the conclusions made. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989) (court’s inquiry must be “searching and careful”). Applying a “depth of review” sufficient for the court “to be able to comprehend the agency’s

handling of the evidence cited or relied upon,” this Court “must disapprove the agency’s action” “where the agency’s reasoning is irrational, unclear, or not supported by the data it purports to interpret.” *N.W. Coalition for Alternatives to Pesticides v. EPA*, 544 F.3d 1043, 1052 n.7 (9th Cir. 2008) (internal quotes omitted). 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.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An agency’s decision can be upheld only on the basis of the reasoning found in that decision. *Anaheim Mem’l Hosp. v. Shalala*, 130 F.3d 845, 849 (9th Cir. 1997).

## **II. STEENS ACT VIOLATIONS (CLAIM 1)**

### **A. BLM Failed to Address Motorized *and* Non-Motorized Travel in the TMP.**

The Steens Act requires that BLM shall address, comprehensively, motorized *and* non-motorized issues and uses in its transportation plan. 16 U.S.C. § 460nnn-22(a) (referring to the “maintenance, improvement, and closure of *roads and trails* as well as *travel access*”) (emphasis added). This Court has confirmed that addressing both motorized *and* non-motorized travel, together in a single plan, “is unambiguously required by the statute.” *Shuford*, 2007 WL 1695162, at \*19.

The reason Congress required BLM to “comprehensively” plan for motorized and non-motorized use at the same time becomes clear in looking at a map showing the impact of BLM’s vast, motorized route network. *See* Rasmussen Decl. ¶¶ 46–64 & Attach. 1–2 (maps showing 1- and 2-miles buffers around the TMP’s motorized route network); AR 10119 (similar map

showing 3-mile buffers). BLM's plan leaves a visitor seeking a quiet recreational experience on Steens Mountain almost nowhere in the 496,000 acre CMPA in which she can avoid the noise and landscape fragmentation of motorized routes. *See* Rasmussen Decl. ¶¶ 51–52 (explaining that less than 10% of the CMPA is farther than 2 miles from an open route); *see also* AR 10068–83 (scientific report describing habitat fragmentation from roads).

BLM expressly limited the TMP to motorized issues, in violation of the Steens Act. In the EA, BLM describes the purpose of the TMP as follows: “The TMP will augment the CMPA Transportation Plan, which is part of the Steens Mountain CMPA RMP, using an updated route inventory *to further define the motor vehicle route network within the CMPA*. The TMP will also provide guidance on maintenance, improvement, and accessibility of these routes.” AR 9955 (emphasis added). BLM's Decision Record states that the EA “was completed to analyze potential effects of *motorized* access through implementing the various alternatives.” AR 783 (emphasis added); *see also* AR 786 (“The TMP EA focuses on motorized travel routes”).

The only attention BLM gave to non-motorized travel is to state that “known,” “existing” trails remain “available.” AR 783, 786. The term “nonmotorized” appears only four times in the 77-page EA. AR 9954, 9955, 9956, 9981. Only the first is of any relevance, explaining that BLM deferred non-motorized travel planning to a subsequent process:

Planning associated with designation or construction of new nonmotorized trails or expansion of snowmobile use *would be addressed* as part of that comprehensive plan. Management of trails and snowmobiles is *beyond the scope of this EA* because it will be analyzed in the [CRP].

AR 9955 (emphasis added). BLM also admits in the Decision Record that “[f]ull nonmotorized trail inventories have not yet been completed, and are expected to be completed during development of the [CRP].” AR 783.

Exactly as its Transportation Plan did, BLM's TMP decision violates the plain language

of the Steens Act. In *Shuford*, this Court held that BLM’s decision to adopt the TP without addressing non-motorized travel violated the requirement that BLM “comprehensively” plan for “the maintenance, improvement, and closure of roads and trails as well as travel access.” 2007 WL 1695162, at \*19 (quoting 16 U.S.C. § 460nnn-22(a)). BLM committed the same error in the TMP by failing to satisfy the “unambiguous” terms of the Steens Act. *Id.* Nothing in the Steens Act allows BLM to defer its mandatory duty to prepare a comprehensive, integral transportation plan for Steens Mountain. *Id.* Put simply, “comprehensive” means comprehensive:

While BLM is correct that it can, and must, supplement its transportation plan with future relevant information, *see* 16 U.S.C. § 460nnn-21(b), I find that the Steens Act requires BLM to do more than simply describe the components or criteria of a future plan and *defer development of the transportation plan to a later planning process. BLM’s approach violates the express intent of Congress, as set forth in the Steens Act*, that BLM complete a comprehensive transportation plan integral to the CMPA RMP by the statutory deadline.

2007 WL 1695162, at \*19 (emphasis added). Accordingly, BLM’s decision to omit non-motorized use and trails from its TMP is arbitrary, capricious, and in violation of the Steens Act. 16 U.S.C. § 460nnn-22.

**B. BLM’s Decision Allows Prohibited Off-Road Vehicle Use and Construction or Establishment of New Motorized Roads.**

Of the 519 miles<sup>5</sup> of routes BLM has opened to motorized travel on Steens Mountain, the record shows that more than 100 miles do not actually exist on the landscape. Miller Decl. ¶¶ 3, 48. By allowing visitors to drive on—or, more accurately, search for—these routes, BLM has

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<sup>5</sup> The IBLA’s February 19, 2009 decision, *Or. Natural Desert Ass’n*, 176 IBLA 371, AR 41, constitutes a final decision of the Secretary of the Interior, thereby amending BLM’s final Decision Record. 43 C.F.R. § 4.1. Accordingly, it is the law of the case that BLM’s decision to open Obscure Routes is unlawful under the Steens Act and FLPMA. *See also* Answer (Dkt # 19) at ¶¶ 68–69 (admitting these IBLA determinations of legal violations). For this reason, we assume BLM’s final decision now opens 519 miles of routes on Steens Mountain—that is, the 555 miles designated in the Decision Record, AR 793, minus the 36 miles of Obscure Routes invalidated by the IBLA. AR 53–57, 60–63.

violated the Steens Act's prohibitions of off-road vehicle use and establishment of new roads or trails for motorized or mechanized use. 16 U.S.C. § 460nnn-22(b), (d).

The Department of the Interior already has concluded that BLM's decision to open Obscure Routes violated the Steens Act and FLPMA. AR 55, 57, 62. The IBLA based its decision on BLM's own definition of the routes. AR 54. The EA defines Obscure Routes as "hard to locate on-the-ground." AR 9964; *see also* AR 9963, 9973–74 (describing Obscure Routes as "hard to locate," "hard to identify" or "not found"). BLM's definition "encompasses routes where there is little physical trace of the route on the ground, as well as routes where no physical trace remains on the ground." AR 54.

The IBLA explained that "there is an inherent incongruity in determining that routes are 'obscure,' or difficult or impossible to identify on the ground, and concluding that opening them to motorized use is consistent with the Steens Act." AR 55. Given their physical condition (or lack thereof) on the landscape, the routes are not roads "under any definition." AR 57; *see also* AR 56 (explaining why the routes do not meet any of BLM's various definitions of a "road" found in the agency's *Wilderness Inventory Handbook* (Sept. 27, 1978) (SAR 7), its motorized use regulations (43 C.F.R. § 19.2(e)), or its April 2006 *Roads and Trails Terminology Report* (SAR 5070)).

Because the routes "have all but been entirely reclaimed (due to lack of use) by natural processes," BLM's decision to allow motorized vehicles to use them sanctions off-road travel and creates or re-establishes roads or trails in the CMPA: "now providing maps of such routes and allowing motorized and mechanized vehicles to hunt on the ground for such routes would appear to constitute 'off road' use of the CMPA." AR 55. Thus, concluded the IBLA, "BLM's decision to designate the Obscure Routes, which have, by reason of the passage of time and

disuse, fallen into obscurity, as open to motorized travel violates section 112(b)(1) and (d)(1) of the Steens Act.” *Id.* (referring to 16 U.S.C. § 460nnn-22(b)(1) & (d)(1)). Likewise, “opening the Obscure Routes to motorized or mechanized use will violate BLM’s general responsibility under the Steens Act to conserve, protect, and manage the long-term ecological integrity of Steens Mountain.” AR 55 (referring to 16 U.S.C. § 460nnn-12(a)).

The IBLA’s reasoning, and its interpretation of the Steens Act’s prohibitions on off-road use and establishment of new roads or trails for motorized or mechanized use, extend with equal weight to *any* route that is “obscure” or “or difficult or impossible to identify on the ground” on Steens Mountain—regardless of the label BLM assigns to it (*i.e.*, Obscure, Base, ATV or Historical). Thus, of the 519 miles of routes now open to motorized use, the record shows there still are more than 100 miles of routes that BLM has authorized for motorized travel in violation of the Steens Act. 16 U.S.C. §§ 460nnn-12(a), -22(b)(1), -22(d)(1). This is borne out by (1) BLM’s own descriptions of the routes in the EA and (2) evidence in the administrative record of actual route conditions.

### ***1. BLM’s Findings and Definitions in the EA.***

BLM describes Historical Routes in nearly identical terms as Obscure Routes: they are “currently hard to locate and/or [ ] not identified during the [1970s] WSA inventory process.” AR 9964. The EA explains that “[n]ot all Historical Routes within the CMPA have been mapped.” *Id.* Nowhere in its EA or Decision Record does BLM reveal how many miles of Historical Routes it has opened in the TMP. *See* AR 9950–10029, 783–803; Miller Decl. ¶ 13. For routes BLM describes as “not identified” during its 1970s wilderness inventory, this means the agency simply placed them on a TMP map without bothering to corroborate whether they exist on the ground. *See* Miller Decl. ¶¶ 11–14. Because the EA fails to provide any data on

Historical Route mileages, it is impossible to understand this part of the agency's decision. *Id.* ¶ 13 (explaining best estimate that 15% of these routes are in Wilderness, 50% are in WSAs and 15% are in the remaining CMPA areas). To the extent that some unspecified number of Historical Routes have never been mapped at all, and because by BLM's own definition these routes are "obscure" on the landscape like the Obscure Routes, this constitutes authorization of off-road vehicle use and creation or re-establishment of motorized roads or trails on Steens Mountain. The story is similar for ATV Routes, which have been destroyed by "landslides and natural erosion events," and "are no longer safe for full-sized vehicles." AR 9965. By definition, these routes have like the Obscure Routes "fallen into obscurity" and "have become almost entirely . . . obliterated" by natural processes. *See* AR 57. BLM's designation of Historical and ATV routes therefore violates the Steens Act in the same way as designation of the Obscure Routes. 16 U.S.C. § 460nnn-12(a), -22(b), (d); *see also* AR 53–57.

## ***2. Evidence in the Administrative Record.***

The record provides further evidence that many routes BLM designated as open are obscure on the landscape and therefore illegally designated for motorized use. For example, in addition to documenting problems with BLM's Obscure and Historical routes, the ONDA reports also show that BLM added many *new* routes under the TMP decision—that is, routes that were not in BLM's transportation system at the time Congress established the CMPA. Some of these routes were hard to locate on the ground but nevertheless designated, while others were "pioneered" after designation of the CMPA. Miller Decl. ¶¶ 16–18, 45 (discussing information in the record and additional evidence such as aerial photographs). Typically, BLM includes these routes as "Base Routes" in the TMP. Piecing together BLM's analysis, and in particular information in BLM's incomplete route inventory—which appears at AR 10288–97 but not in

the EA—there are 9 miles of routes BLM identified as “nonexistent,” “faint,” “no longer visible,” “cow trail” and so forth—yet still designated as open for motorized use under the TMP. Miller Decl. ¶ 33. There are at least 40 other routes, totaling 39 miles, that the ONDA data and aerial imagery show are obscure. *Id.* ¶ 34. There are at least 65 other new routes, totaling 47 miles, which BLM added and opened even though the agency had not previously recognized the routes within the CMPA. *Id.* ¶¶ 35–39. In short, substantial evidence in the EA and in the record shows that BLM opened significant numbers and mileages of routes, beyond its so-called Obscure Routes, that are “obscure” on the landscape and therefore open to motorized use in violation of the Steens Act. 16 U.S.C. § 460nnn-12(a), -22(b), (d); *see also* AR 53–57.

### **III. FLPMA VIOLATIONS (CLAIM 2)**

For routes in or adjacent to Wilderness Study Areas, BLM’s decision violates FLPMA’s non-impairment requirement, 43 U.S.C. § 1782(c), again because many such routes are obscure on the landscape. Here too, the IBLA agreed with ONDA that BLM’s decision to open Obscure Routes in WSAs violated FLPMA. AR 60–63 (“we conclude that such a designation also violates the nonimpairment standard of section 603 of FLPMA”). This is because “motorized use of those Routes . . . re-establishes motorized passage, and will likely impair the suitability of the WSAs for designation as wilderness.” AR 62. For the same reason, any route designated by BLM as open to motorized use but which actually is obscure is, regardless of what name BLM gives it, in violation of the FLPMA non-impairment requirement.

There are many such routes within the CMPA’s seven WSAs. *See* AR 803 (DR map). For example, there are an undisclosed number and mileage of Historical Routes within WSAs. Miller Decl. ¶ 13 (estimating that about 50% of the TMP’s Historical Routes are within WSAs). Though the EA fails to disclose this information, the record reveals BLM also added “an

unknown number” of other routes “pioneered” (*i.e.*, user-created) *after* Congress created the CMPA, including within WSAs. *Id.* ¶¶ 15–16. Because those routes did not exist at the time the WSAs were established, let alone at the time the Steens Act created the CMPA, they violate the non-impairment mandate. This is because authorizing these routes for motorized travel “re-establishes motorized passage, and will likely impair the suitability of the WSAs for designation as wilderness.” AR 62.

The record also contains examples of BLM-designated routes within WSAs documented by ONDA as no longer existing. *See* Miller Decl. ¶¶ 43–44 (and photos and maps cited). Finally, BLM opened to motorized use more than 400 miles of routes *without inventorying those routes at all.* *Id.* ¶ 47. Of those, 18.3 miles are in WSAs, suggesting that the examples documented by ONDA almost certainly are not isolated instances of obscure routes being designated within WSAs. *Id.* Without an inventory of the condition of the routes declared open, BLM lacks factual support for its determination that opening such routes would not impair the suitability of the land for wilderness protection. On this record, BLM’s decision to open such routes to motorized use violates FLPMA’s non-impairment mandate, 43 U.S.C. § 1782(c), rendering the TMP decision arbitrary and capricious.

#### **IV. WILDERNESS ACT VIOLATIONS (CLAIM 3)**

Next, BLM’s decision violates the Wilderness Act’s non-impairment requirement, 16 U.S.C. § 1133(b), in the same way it violates FLPMA: because it reestablishes motorized use and therefore will impair wilderness values within the Steens Mountain Wilderness Area. Specifically, BLM designated a number of obscure Historical Routes, obscure ATV Routes and illegally-created routes within the Wilderness Area.

The Steens Act and FLPMA require BLM to adhere to the requirements of the

Wilderness Act. 16 U.S.C. § 460nnn-62(a); 43 U.S.C. § 1782(c). Relevant to transportation planning, the Steens Act also provides that livestock grazing within the Wilderness Area shall be administered in accordance with “the guidelines set forth in Appendices A and B of House Report 101-405 of the 101st Congress.” 16 U.S.C. § 460nnn-62(d)(1). These “Grazing Guidelines” provide guidance to BLM in administering “grandfathered” grazing in Wilderness areas. AR 715–16. Among other things, the Guidelines provide that motorized use in Wilderness (for maintaining facilities such as fences or reservoirs) is permitted only “in those portions of a wilderness area where they had occurred prior to the area’s designation as wilderness.” AR 716. The Guidelines expressly do not “reestablish uses where such uses have been discontinued.” *Id.*

In the TMP, BLM authorized motorized use for grazing permittees on 37.4 miles of routes in the Wilderness Area. *See* AR 802 (DR map). Of these, 24.6 miles are on what BLM classified as Grazing Permit Routes, while 12.8 miles are on Historical Routes. *Id.* The 12.8 miles of Historical Routes designated in Wilderness are unlawful for the same reason as described above: because they are, by definition, obscure on the landscape and will reestablish motorized use within the Wilderness Area. *Supra* Section II.B.

These 12.8 miles of routes also are unlawfully designated because the record shows that at least five of them have been created illegally. BLM’s TMP route inventory shows that the agency could not find and therefore did not designate routes 4, 141, 142, 143 and 144 during its FLPMA § 603 inventory. AR 10289, 10296. Thus, these routes did not exist as of 1992 when BLM issued its final WSA decisions. SAR 909, 1662. Starting then, it would have been illegal under FLPMA to create or re-establish these routes for motorized use within the WSAs. 43 U.S.C. § 1782(c). The same is true now, under the Wilderness Act, of creating or re-establishing them once the Steens Mountain Wilderness Area was created. 16 U.S.C. §§ 460nnn-62(a),

1133(b). And the Grazing Guidelines confirm that BLM may authorize motorized use for purposes of permitted grazing *only* if such use was occurring at the time of Wilderness designation. AR 716. Because it was not on these five Historical Routes, BLM's TMP decision to authorize motorized use on these routes is arbitrary, capricious and not in accordance with the Wilderness Act's non-impairment mandate. 16 U.S.C. § 1133(b).

Finally, BLM's authorization of motorized use on several miles of ATV Routes within the Wilderness Area in the Indian Creek Road area also violates the Wilderness Act. *See* AR 803 (DR map showing locations). Again, ATV Routes have been destroyed by natural processes and are obscure on the landscape. AR 9965; *see also* AR 10290 (BLM's inventory documenting this route as being "unsafe for full size vehicles"). Because the Indian Creek Road had fallen into such disrepair, BLM in its field survey decided to "[c]onvert" the route to an ATV route. AR 10290. This constitutes prohibited creation or re-establishment of a new motorized road or trail under the Steens Act. 16 U.S.C. § 460nnn-22(d)(1). Therefore, BLM's decision is arbitrary, capricious and not in accordance with the Wilderness Act. *Id.* § 1133(b).

#### **V. NEPA VIOLATIONS (CLAIM 4)**

Finally, BLM's decision violates NEPA in multiple ways. The agency (a) failed to consider reasonable alternatives and disclose responsible opposing viewpoints, (b) improperly segmented the environmental analysis and (c) improperly relied on a FONSI, thereby failing to prepare an EIS for a major federal action that will significantly impact the human environment.

##### **A. BLM Failed to Consider Reasonable Alternatives and to Disclose Responsible Opposing Views.**

The alternatives requirement is critical to serving NEPA's main purposes of insuring informed decision-making and meaningful public participation. 40 C.F.R. § 1500.1(b), (c). The "touchstone" for courts reviewing NEPA documents is whether the agency's "selection and

discussion of alternatives fosters informed decisionmaking and informed public participation.” *ONDA*, 531 F.3d at 1143 (quoting *Westlands Water*, 376 F.3d at 872). “The existence of a viable but unexamined alternative renders [a NEPA document] inadequate.” 376 F.3d at 868.

BLM failed to consider and plan for non-motorized travel, limiting its environmental analysis to addressing motorized travel. *See supra* Section II. As a result, it examined no alternative involving designation of hiking, horseback or other non-motorized trails. *See AR 9967–70* (description of the four alternatives BLM considered). This failure precluded any meaningful analysis of the inherent conflicts between motorized and non-motorized uses and users. *See Rasmussen Decl.* ¶¶ 16–17, 28–39, 45–55 (describing impacts to environment and the conflicts between quiet recreation and motorized vehicle use); *Fenty Decl.* ¶¶ 14–16 (describing negative impacts of motorized use on pristine wilderness and unfragmented wildlife habitat). By failing to study non-motorized alternatives and impacts to quiet recreation on Steens Mountain, BLM failed to take the requisite “hard look” under NEPA. *ONDA*, 531 F.3d at 1120.

BLM’s NEPA obligation to take a “hard look” at motorized *and* non-motorized travel stems directly from its Steens Act duty to prepare “a comprehensive transportation plan.” For example, in *ONDA* the Ninth Circuit examined whether BLM violated NEPA when it did not consider wilderness values in its EIS. 531 F.3d at 1115–16, 1130. To make this determination under NEPA, the court explained the relevance of the underlying, substantive statute governing the resource at issue: “To determine whether it violated NEPA by failing to [discuss and analyze wilderness characteristics], we consider the nature of the BLM’s authority and obligations with regard to wilderness characteristics and the BLM’s rationale for not considering lands with wilderness values.” *Id.* at 1130. Thus, the court examined BLM’s statutory and regulatory authority and obligations under FLPMA. *Id.* at 1133–36.

Accordingly, the Steens Act’s mandatory requirement that BLM shall prepare a “comprehensive” transportation plan, 16 U.S.C. § 460nnn-22(a), which “unambiguously” means both motorized *and* non-motorized travel, *Shuford*, 2007 WL 1695162, at \*19, means that BLM was bound to consider alternatives that encompassed both motorized and non-motorized travel. BLM also failed to disclose and discuss “responsible opposing viewpoints.” *Ctr. for Biological Diversity*, 349 F.3d at 1167–68; 40 C.F.R. § 1502.9(b). According to the EA, Alternative C, which BLM rejected, “is primarily based on input received from ONDA,” without further discussion of what that input was. There is no mention anywhere in the EA of ONDA’s wilderness and route inventory reports information, let alone any analysis of ONDA’s contention that more than 100 miles of the routes BLM designated are “obscure” and therefore do not actually exist on the landscape—thereby undermining BLM’s baseline assumption for the number and mileage of motorized routes to be considered in the EA. Because it failed to consider viable alternatives and to disclose and discuss the ONDA views and survey data, BLM’s final decision is arbitrary, capricious and not in accordance with NEPA. 42 U.S.C. §§ 4332(2)(C), (E).

**B. BLM Improperly Segmented Connected Actions.**

The TMP and CRP are interdependent parts of the larger action of preparing a “comprehensive” transportation plan for Steens Mountain. BLM improperly segmented its environmental analysis by splintering the TMP and CRP into separate analyses. NEPA requires BLM to review all direct, indirect and cumulative impacts of a proposed action. *See* 40 C.F.R. §§ 1508.7, 1508.8, 1508.25. This includes impacts caused by connected actions. *Id.* § 1508.25(a)(1). A connected action is one that is “closely related and therefore should be discussed in the same impact statement.” *Id.* Actions are connected if they fall into any of three categories, the third of which is relevant here: actions that “[a]re interdependent parts of a larger action and depend on

the larger action for their justification.” *Id.* § 1508.25(a)(1)(iii).

The purpose of this requirement is “to prevent an agency from dividing a project into multiple actions, each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.” *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (9th Cir. 2006) (internal quotes omitted). The Ninth Circuit applies an “independent utility” test to determine whether actions “are so connected as to mandate consideration in a single EIS.” *Id.* “The crux of the test is whether each of two projects would have taken place with or without the other and thus had independent utility.” *Id.* (internal quotes omitted).

Here, in BLM’s own words, the agency developed the “motor vehicle route network” analyzed in the EA and established by the TMP “as part of a comprehensive” transportation planning strategy that, as BLM admits, also will include the CRP. *See* AR 783. Of course, BLM used the word “comprehensive” to refer to the TMP and CRP together because that is what the Steens Act requires. 16 U.S.C. § 460nnn-22; *Shuford*, 2007 WL 1695162, at \*19. Under these circumstances, the TMP and the CRP are “interdependent parts of a larger action.” 40 C.F.R. § 1508.25(a)(1)(iii). BLM therefore was required by NEPA to prepare a single EIS for the “comprehensive” transportation plan required by 16 U.S.C. § 460nnn-22(a). BLM’s decision not to do so undermines informed decisionmaking and meaningful public participation and is arbitrary, capricious and in violation of NEPA. 40 C.F.R. § 1508.25.

**C. BLM’s TMP May Cause Significant Environmental Impacts and Must be Studied in an EIS.**

Even if it was permissible for BLM to restrict its NEPA analysis to motorized route designations, the agency still violated NEPA by failing to prepare an EIS. That is because the designation of 519 miles of motorized routes crisscrossing Steens Mountain may cause significant impacts to native sagebrush habitat, populations of sensitive wildlife species and quiet

recreation. 42 U.S.C. § 4332(2)(C); *see also* 40 C.F.R. § 1501.4 (“Whether to prepare an environmental impact statement”). BLM’s “Finding of No Significant Impact” cannot withstand scrutiny on the record before the Court.

To prevail on this claim, ONDA need not show that significant impacts *will* occur. Instead, BLM must prepare an EIS if “the agency’s action may have a significant impact upon the environment.” *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001) (emphasis in original; internal quotes omitted); *see also Anderson v. Evans*, 371 F.3d 475, 488 (9th Cir. 2004) (an EIS is required if “substantial questions” exist as to whether a project may have a significant environmental effect). “This is a low standard.” *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006). BLM, on the other hand, bears the burden of producing “a convincing statement of reasons” showing why the impacts of the TMP are insignificant. *Nat’l Parks*, 241 F.3d at 730. Because there are, at a minimum, “substantial questions” about whether the plan “may” have significant environmental effects, BLM violated NEPA by failing to prepare an EIS.

***1. Allowing motorized use on 519 miles of routes on Steens Mountain may cause significant effects.***

That there “may” be significant effects from BLM’s TMP decision is evident on the record before this Court. We focus here on the single biggest threat to the “long-term ecological integrity” of Steens Mountain: invasion by non-native plant species, or weeds. The ecological impact of roads on the spread of weeds is “recognized, virtually by scientific consensus, as one of the greatest threats to desert ecosystems of the Intermountain West, including southeastern Oregon.” Gelbard Decl. ¶ 5. The impacts of weeds on these ecosystems range from reductions in biodiversity and wildlife habitat, to changes in ecosystem processes such as fire frequency and hydrology, to increases in erosion and soil loss. *Id.* at ¶ 8–10. Roads serve as “major conduits”

for the spread of invasive species because they are the “entry points for virtually all human impacts to terrestrial ecosystems.” *Id.* ¶¶ 11–12. The integral link between the presence of roads and the spread of weeds is well-accepted in the scientific literature. *Id.* ¶ 13 (and Table 1).

ONDA and others brought this to BLM’s attention during the NEPA process. *See, e.g.*, AR 12932, 12937 & 12939–40 (ONDA comment letters); AR 10068–83 & 10084–99 (scientific reports submitted by The Wilderness Society). Ecologist Dr. Jonathan Gelbard explains that the BLM’s decision to open 519 miles of driving routes on Steens Mountain risks substantial damage to native plant communities and to soils and biological soil crusts. Gelbard Decl. ¶¶ 21–26. BLM’s environmental analysis fails to support its conclusion that the TMP will have “no significant impact” on the ecological integrity of Steens Mountain. For example, BLM failed to conduct a road-level “vulnerability analysis” assessing basic risk factors such as traffic levels, soil fertility and plant community conditions. *Id.* ¶¶ 44–47. If it had, BLM “could have evaluated the vulnerabilities of its road network to weed invasions and determined which routes can remain open with minimal risk of causing resource damage.” *Id.* ¶ 47. Likewise, BLM failed to consider steps to protect biological soil crusts as barriers to weed infestations, *id.* ¶¶ 57–65, and failed to consider whether livestock grazing in plant communities neighboring roads should be adjusted to minimize the threat of cattle spreading roadside invasions into neighboring, intact native plant communities, *id.* ¶¶ 66–71. Combined with the fact that it is disputed whether more than 100 miles of BLM’s roads even exist, it is virtually irrefutable that the TMP “may” impact Steens Mountain’s ecological integrity.

In the EA, BLM admits that (1) the CMPA already contains **361** noxious weed sites, (2) the “vast majority of noxious weed sites in the CMPA occurs along roads or around [livestock] reservoirs,” (3) “[r]oads and travel corridors are typically the likely place for new introductions

of weeds” and (4) maintained roads “receive considerably more disturbance than the average landscape, *exponentially increasing* sites susceptible to new weed introductions.” AR 10002 (emphasis added). Given the known threats of roads vis-à-vis weed invasion, combined with these statements in the EA itself, BLM fails to provide “a convincing statement of reasons” to support its finding of “no significant impact.” *Nat’l Parks*, 241 F.3d at 730. BLM’s decision to prepare an EA/FONSI instead of an EIS therefore is arbitrary, capricious and not in accordance with NEPA. 42 U.S.C. § 4332(2)(C).

**2. The NEPA “Significance Factors” require preparation of an EIS.**

The NEPA regulations establish ten factors that also help determine whether an agency action “may” cause significant impacts and thus require an EIS. 40 C.F.R. § 1508.27(b). Any “one of these factors may be sufficient to require preparation of an EIS in appropriate circumstances.” *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 865 (9th Cir. 2005). The TMP implicates several of these factors.

**Unique Characteristics of the Geographic Area.** One significance factor asks whether there are “[u]nique characteristics of the geographic area such as proximity to . . . wild and scenic rivers, or ecologically critical areas.” 40 C.F.R. § 1508.27(b)(3). Steens Mountain is an ecologically critical area; indeed, the single purpose Congress assigned to the CMPA is “to conserve, protect, and manage the *long-term ecological integrity* of Steens Mountain.” 16 U.S.C. § 460nnn-12(a) (emphasis added); *Shuford*, 2007 WL 1695162, at \*1. In 2009, Congress established BLM’s National Landscape Conservation System to “conserve, protect, and restore . . . nationally significant landscapes,” placing Steens Mountain at the top of the list of initial places included in the system. 16 U.S.C. §§ 7202(a), 7202(b)(2)(A). The CMPA is a core habitat area for imperiled sage grouse, AR 9984, contains three congressionally-designated Wild and

Scenic River systems protecting 105 miles of desert streams in 12 separate river corridors, AR 9982, 11438, and the vast majority of the area contains outstanding wilderness character, including the Steens Mountain Wilderness Area (173,000 acres), seven WSAs (120,000 acres), and eleven citizen-proposed wilderness areas (81,000 acres). AR 9971, AR 9974, SAR 1737–3981, SAR 3984–4073 & AR 313 (overview map of wilderness character lands). In short, Steens Mountain is a unique landscape in the American West. *See also* AR 9975 (EA describing the “[u]nique landscape, plant and wildlife features” of Steens Mountain), AR 9999 (EA describing the “unique ecosystem” sought to be protected by the CMPA’s Redband Trout Reserve).

**Highly Controversial Effects.** Another significance factor assesses “[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial.” 40 C.F.R. § 1508.27(b)(4). Effects are “controversial” “when substantial questions are raised as to whether a project may cause a significant degradation of some human environmental factor or there is a substantial dispute about the size, nature, or effect of the major federal action.” *Nat’l Parks*, 241 F.3d at 736 (internal citation, ellipsis, brackets and quotation marks omitted); *see also* *Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1193 (9th Cir. 1998). The Gelbard, Miller and Rasmussen declarations show that there are “substantial questions” as to whether BLM’s vast motorized route network “may” degrade ecological integrity, wilderness values and quiet recreation on Steens Mountain. *E.g.*, Gelbard Decl. ¶ 82 (“BLM’s decision and the EA’s environmental analysis purporting to support that decision . . . is not scientifically defensible”); Miller Decl. ¶ 39 (“none of these data, or even summaries or analyses of the data appear in the EA itself, which made it impossible for the public to evaluate BLM’s environmental analysis in any meaningful way”); Rasmussen Decl. ¶¶ 45–55 (explaining likely impacts from ORV noise).

ONDA’s experts have explained several important gaps and omissions in BLM’s

environmental baseline and analysis and the likely environmental impacts of opening a 519 mile labyrinth of roads on Steens Mountain. BLM received almost 20,000 public comments with all but a handful disputing its proposal and pleading for significant road closures. AR 784, 10028. Perhaps most importantly, during the NEPA process ONDA submitted nearly 2,000 pages of information undermining BLM's baseline assumptions and documenting the potential for significant ecological damage under BLM's plan. AR 12946–13290, SAR 1737–3981, SAR 3984–4073, SAR 4074–86, SAR 5107; *see also* Miller Decl. ¶¶ 3, 48 (describing that more than 100 miles of BLM's routes are obscure or do not even exist). The environmental baseline is an integral part of a NEPA document and it is against this information that an agency measures and evaluates impacts. 40 C.F.R. § 1502.15; *Am. Rivers v. FERC*, 201 F.3d 1186, 1195 & n.15 (9th Cir. 2000).

**Uncertainty.** A third factor asks whether “the possible effects on the human environment are highly uncertain or involve unique or unknown risks.” 40 C.F.R. § 1508.27(b)(5); *Nat'l Parks*, 241 F.3d at 732. There are significant uncertainties here. In addition to information questioning whether 20% or more of BLM's routes even exist, other uncertainties include, for example, BLM's (1) failure to inventory more than 400 of the 556 miles of routes it considered in the TMP, Miller Decl. ¶¶ 25–27, 47 & AR 10288–97, (2) failure to conduct a vulnerability analysis to assess routes particularly susceptible to weed infestation, Gelbard Decl. ¶¶ 44–47, and (3) failure to complete non-motorized trail inventories, AR 783 & 10008. The latter is the same uncertainty this Court highlighted in *Shuford*. 2007 WL 1695162 at \*19 (given BLM's statement that “[o]ther routes are known to exist; however the exact locations and uses of most of these routes are not currently known[,]” this Court concluded, “It is therefore difficult to view the transportation plan in Appendix M as ‘comprehensive’ or ‘integral.’”). Given the Steens

Act's unambiguous command to *comprehensively* plan for motorized *and* non-motorized use, this uncertainty alone requires an EIS.

In short, ONDA has established that *substantial questions* exist about whether the TMP *may* have a significant impact, therefore requiring that BLM prepare an EIS. BLM refused to deal with non-motorized travel in the TMP and admits it has not completed basic inventories of non-motorized routes. ONDA's experts have explained why BLM's decision seriously understates or ignores effects with respect to weed infestation and quiet recreation. The record raises substantial questions whether many of BLM's designated routes even exist. BLM therefore has failed to provide a convincing statement of reasons showing why the impacts of the TMP are insignificant. Accordingly, BLM's decision to prepare an EA/FONSI instead of an EIS is arbitrary, capricious and not in accordance with NEPA. 42 U.S.C. § 4332(2)(C).

### **CONCLUSION**

For these reasons, BLM's decision to adopt the Steens Mountain TMP is arbitrary, capricious and not in accordance with the Steens Act, FLPMA, the Wilderness Act and NEPA. Accordingly, and pursuant to the APA, the Court should issue summary judgment in ONDA's favor, set aside the TMP, enjoin further implementation of the TMP and order BLM to prepare a lawful TMP and environmental analysis.

DATED this 23d day of July 2010.

Respectfully Submitted,

s/ Peter M. Lacy

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Of Attorneys for Plaintiff