

## IV. MISCELLANEOUS

### A. *National Environmental Policy Act*

#### 1. *Oregon Natural Desert Ass'n v. Rose*, 921 F.3d 1185 (9th Cir. 2019)

The Oregon Natural Desert Association (ONDA) sued the Bureau of Land Management (BLM),<sup>[[1]]</sup> alleging that BLM's Travel Management Plan (Travel Plan) and Comprehensive Recreation Plan (Recreation Plan) for the Steens Mountain Cooperative Management and Protection Area (Steens Mountain Area), as well as the Interior Board of Land Appeals' (the Board) approval of the Travel Plan, violated the National Environmental Policy Act (NEPA),<sup>[[2]]</sup> the Federal Land Policy Management Act (FLPMA),<sup>[[3]]</sup> and the Steens Mountain Cooperative Management and Protection Act (Steens Act).<sup>[[4]]</sup> Harney County intervened to defend the Board's approval of the Travel Plan and cross-claimed against the BLM, challenging the Recreation Plan. The United States District Court for the District of Oregon granted BLM's motion for summary judgment, upholding both agency actions.<sup>[[5]]</sup> On appeal, the Ninth Circuit upheld the district court's finding that BLM satisfied its obligation to consult the Steens Mountain Advisory Council before issuing the Recreation Plan, but vacated and remanded the Travel Plan and Recreation Plan, holding that neither plans adequately established the baseline environmental conditions necessary for a procedurally adequate assessment of the environmental impacts, and thus were an arbitrary and capricious agency action.

This litigation arose from the BLM's issuance of the Travel and Recreation Plans regarding the route network for motorized vehicles in the Steens Mountain Area. The BLM developed the Recreation Plan, opened the public comment period on the revised Recreation Plan Environmental Assessment, and made Route Analysis Forms and aerial photographs available during this time. Neither the photographs nor the forms revealed any details about the conditions of the routes.

In addition, the Board affirmed the BLM's decision to open Obscure Routes to motorized travel, based on a new definition of the term "roads and trails." When presented with the issue in 2009, the Board concluded that there exists an inherent incongruity in determining that routes are obscure on the ground, and concluding that opening them to motorized use is consistent with the Steens Act.<sup>[[6]]</sup> In 2014, however, the Board redefined "roads and trails" to mean something that existed as a matter of record in October 2000 and that might again be used in the future, despite a present difficulty in physically tracing it on the ground. The BLM added the Obscure Routes back to the Steens Mountain transportation network only over the winter, while the area was largely inaccessible, therefore precluding the public from surveying the Obscure Routes.

During this time, the BLM formally briefed the Advisory Council on the Recreation plan, at which point it gave Advisory Council members copies of each route analysis and discussed the project. After the public comment period closed, the BLM attached ground photographs that had greater detail showing the vegetation and the condition of the routes themselves for a few Obscure Routes. Ultimately, the BLM issued the Recreation Plan and the Board approved the BLM's Travel Plan.

ONDA sued, alleging that BLM's Travel Plan and Recreation Plan for Steens Mountain Area, as well as the Board's approval of the Travel Plan, violated NEPA, FLPMA, and the Steens Act. The district court granted summary judgment for the BLM, denying ONDA's challenge to the Board's decision on the Travel Plan and the BLM decision regarding the Recreation Plan. On appeal, the Ninth Circuit reviewed the district court's grant of summary judgment de novo and applied the arbitrary and capricious standard under NEPA.

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[[1]] Defendants include BLM, Jeff Rose in his official capacity as Burns District Manager, the Interior Board of Land Appeals, and Rhonda Karges in her official capacity as Field Manager of Andrews Resource Area. [[1]]

[[2]] National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h (2012). [[2]]

[[3]] Federal Land Policy and Management Act of 1979, 43 U.S.C. §§ 1701–1787 (2012). [[3]]

[[4]] Steens Mountain Cooperative Management and Protection Area of 2000, 16 U.S.C. §§ 460nnn-11–460nnn-53. (2012). [[4]]

[[5]] *Or. Nat. Desert Ass'n v. Cain*, 292 F. Supp. 3d 1119, 1134 (D. Or. 2018). [[5]]

[[6]] 16 U.S.C. § 460nnn-22(b)(1). [[6]]

First, the Ninth Circuit analyzed the county's claim that the BLM failed to properly consult with the Advisory Council before issuing the Recreation Plan. The BLM argued that although it must make any decision to permanently close an existing road in the Steens Mountain Area in consultation with the Advisory Council, the Steens Act does not specify how the BLM must consult with the Council. The Ninth Circuit agreed with the BLM, holding that the BLM satisfied its obligation to consult the Council before issuing the Recreation Plan, so its action was not arbitrary and capricious. The court noted that the county failed to explain how the BLM's purported failure to consult the Council more extensively caused the BLM not to be fully aware of the environmental consequences of the proposed action, thereby precluding informed decision making and public participation. The Ninth Circuit concluded that even if the degree or mode of consultation were insufficient, any error was harmless to the county, and affirmed the holding of the district court.

Second, the Ninth Circuit considered ONDA's claim that the Board acted arbitrarily and capriciously by changing its definition of "roads and trails." The Board defended its decision to alter its definition by concluding that since the statute clearly meant to allow the BLM to designate roads and trails as open to motorized travel, the prohibition against motorized off-road travel meant that motorized travel that does not occur on either a road or a trail is prohibited. The Ninth Circuit rejected the Board's explanation, holding that the Board acted arbitrarily and capriciously by changing its definition of "roads and trails" without providing a reasoned explanation for the change. The Ninth Circuit noted that while an agency may change its policies over time, it must at least display awareness that it is changing its position and that there are good reasons for the new policy. However, because the BLM did not explain what led it to alter its earlier decision or why the new approach was more consistent with the text of the Steens Act, the Ninth Circuit vacated its approval of the Travel Plan and remanded it to the BLM.

Third, the Ninth Circuit addressed ONDA's claim that the Board Acted arbitrarily and capriciously by affirming the BLM's issuance of the Travel Plan without first establishing the baseline environmental conditions necessary for a procedurally adequate assessment of the Travel Plan's environmental impacts. The Board argued that the EA and the previous EIS contained the required analysis of the project's impact on noteworthy aspects of the Steens Mountain Area. The Ninth Circuit agreed with ONDA and held that the Board acted arbitrarily and capriciously in affirming the BLM's issuance of the travel plan, explaining that EA contained no references to any material in support or opposition to its conclusions and provided only a cursory analysis of the project's impact on important elements of the area, and thus was procedurally deficient under NEPA. Because the Ninth Circuit concluded the Travel Plan was inadequate on procedural grounds, it did not reach ONDA's substantive challenges to the Travel Plan.

Finally, the Ninth Circuit analyzed ONDA's claim that the BLM acted arbitrarily and capriciously in issuing the Recreation Plan without adequately establishing the baseline environmental conditions. The BLM defended its decision by pointing to route analysis forms and aerial photographs it made available during the comment period. The Ninth Circuit again agreed with ONDA, holding that the BLM's Recreation Plan was procedurally inadequate, and therefore arbitrary and capricious. The court reasoned that because the BLM provided supporting materials that failed to reveal any details about the condition of the Obscure Routes and because the BLM made more detailed photographs available only after the comment period closed, it could not be fully aware of the environmental consequences of the proposed action, thereby precluding informed decision making and public participation. Accordingly, the Ninth Circuit vacated the Recreation Plan and remanded it.

In sum, the Ninth Circuit held both the BLM's issuance of the Recreation Plan, and the Board's approval of the BLM's issuance of the Travel Plan, to be procedurally deficient under NEPA for failure to establish the baseline conditions necessary for careful consideration of information about significant environmental impacts to the Steens Mountain Area. The court vacated and remanded both plans.