



OREGON NATURAL DESERT ASSOCIATION, *ET AL.*
(ON JUDICIAL REMAND)

185 IBLA 59

Decided September 30, 2014



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

OREGON NATURAL DESERT ASSOCIATION, *ET AL.*
(ON JUDICIAL REMAND)

IBLA 2008-59-1

Decided September 30, 2014

Judicial remand of *Oregon Natural Desert Association*, 176 IBLA 371 (2009), for further adjudication consistent with the April 28, 2011, Opinion and Order issued by the U.S. District Court for the District of Oregon in *Oregon Natural Desert Association v. McDaniel*, No. 3:09-cv-00369-PK, 2011 WL 1654265, as later modified by the Court in its July 8, 2011, Opinion and Order. See 2011 WL 3841550.

Decision Record reaffirmed in part; Board decision vacated in part and Decision Record affirmed in part.

1. Federal Land Policy and Management Act of 1976:
Wilderness--Wilderness

Section 112(b)(1) of the Steens Act, 16 U.S.C. § 460nnn-22(b)(1) (2006), prohibits the “off road” use of motorized or mechanized vehicles on Federal lands in the Steens Mountain Cooperative Management and Protection Area (CMPA). The term “off road” as used in section 112(b)(1) means not on any *road or trail*. BLM may permit motorized or mechanized vehicles on Federal lands in the CMPA on such *roads and trails* as may be designated for their use.” BLM’s designation of “Obscure Routes,” characterized as difficult or impossible to locate on the ground, as open to motorized or mechanized use, does not violate the statutory prohibition against motorized off-road travel.

2. Federal Land Policy and Management Act of 1976:
Wilderness--Wilderness

Section 112(d)(1) of the Steens Act, 16 U.S.C. § 460nnn-22(d)(1) (2006), prohibits the construction of new roads or trails for motorized or mechanized vehicles on Federal lands in the Steens Mountain

Cooperative Management and Protection Area (CMPA). BLM's designation of routes that existed as a matter of record as of Oct. 30, 2000, when the Steens Act was enacted by Congress, as open to motorized or mechanized use or maintenance does not violate the statutory prohibition against the construction of new motorized roads or trails in the CMPA, even though the routes are hard to locate or cannot be found on the ground.

3. Federal Land Policy and Management Act of 1976:
Wilderness--Wilderness

BLM does not violate the non-impairment standard of section 603(c) of FLPMA, 43 U.S.C. § 1782(c) (2006), and the Interim Management Policy for Lands Under Wilderness Review, H-8550-1 (July 7, 1995), by designating routes in wilderness study areas as open to motorized or mechanized use, where the routes were in existence on Oct. 21, 1976, even though some of the routes may be hard to locate on the ground, or have ceased to exist, provided the use is conducted in the same manner and degree as conducted on Oct. 21, 1976. Such use, to the extent allowed by the Steens Act, will not impair the suitability of the wilderness study areas for designation as wilderness.

4. Grazing and Grazing Lands--Grazing Permits and
Licenses: Appeals--Wilderness

Section 202(d)(1) of the Steens Act, 16 U.S.C. § 460nnn-62(d)(1) (2006), provides that BLM will administer grazing use in the Steens Mountain Wilderness Area (WA) in accordance with, *inter alia*, section 4(d)(4) of the Wilderness Act, 16 U.S.C. § 1133(d)(4) (2006). Section 202(d)(1) allows grazing use at the level that existed on Oct. 30, 2000, when the Steens Mountain Cooperative Management and Protection Area was established, to continue. Motorized use of routes in connection with grazing is allowed for the purpose of maintaining fences and reservoirs and other legitimate grazing aims, provided such use occurs in those portions of the Steens Mountain WA where it was being conducted when the area was designated as wilderness. BLM may

designate as open to motorized use properly identified “Historical Routes” that existed on Oct. 30, 2000, even though they are obscure on the landscape and hard to locate on the ground.

5. Grazing and Grazing Lands--Grazing Permits and Licenses: Appeals--Wilderness

BLM’s designation of routes in the Steens Mountain Wilderness Area as open to motorized travel to facilitate access for grazing purposes, such as fence or reservoir maintenance, does not constitute a grazing decision that must be separately appealed pursuant to the Taylor Grazing Act, 43 U.S.C. §§ 315-315r (2006), or its implementing regulations, 43 C.F.R. Part 4100.

6. Federal Land Policy and Management Act of 1976: Wilderness--National Environmental Policy Act of 1969: Environmental Statements--Wilderness

BLM is required to accurately assess the environmental baseline under section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (2006). Where BLM has accurately assessed the status of all of the routes designated in the Steens Mountain Cooperative Management and Protection Area as open to motorized travel, focusing on routes other than those deemed to be well-known and undisputed, it has established adequate baseline conditions for determining the effects of its action on the environment. Section 102(2)(C) of NEPA does not require BLM to include in an EA the baseline information submitted by a member of the public. In summarizing the material offered in support of and in opposition to the designation of routes as open to motorized travel, the EA adequately established the environmental baseline for considering the likely impacts of the proposed decision.

7. Federal Land Policy and Management Act of 1976: Wilderness--National Environmental Policy Act of 1969: Environmental Statements--Wilderness

The concept of “connected actions” generally arises in determining the scope of an EIS. Connected actions

should be discussed if they would, in accordance with 40 C.F.R. § 1508.25(a): (i) automatically trigger other actions which may require an EIS; (ii) cannot or will not proceed unless other actions are undertaken previously or simultaneously; or (iii) are interdependent parts of a larger action and depend on the larger action for their justification. Although the Travel Management Plan (TMP) and the Comprehensive Recreation Plan (CRP) promulgated by BLM for the Steens Mountain Cooperative Management and Protection Area (CMPA) are interdependent parts of the larger Comprehensive Transportation Plan (CTP) envisioned for the CMPA, the TMP and CRP do not depend upon each other or upon the larger CTP for their justification. The TMP and the CRP each have independent utility, governing distinct uses of the public lands in the CMPA (motorized and non-motorized).

8. Federal Land Policy and Management Act of 1976:
Wilderness--National Environmental Policy Act of 1969:
Environmental Statements--Wilderness

Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (2006), requires BLM to consider the potential environmental impacts of a proposed action in an EIS if that action is a major Federal action significantly affecting the quality of the human environment. BLM's decision to issue a Travel Management Plan for the Steens Mountain Cooperative Management and Protection Area, based on an EA tiered to an EIS, will be upheld as being in accord with section 102(2)(C) of NEPA where the record demonstrates that BLM has, considering all relevant matters of environmental concern, taken a "hard look" at potential environmental impacts, and made a convincing case that no significant impact will result that was not already addressed in the EIS or that any such impact will be reduced to insignificance by the adoption of appropriate mitigation measures.

APPEARANCES: Peter M. Lacy, Esq., and Kristin F. Ruether, Esq., Portland, Oregon, for appellants; Bradley Grenham, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Bureau of Land Management; Ronald S. Yockim, Esq., and Dominic M. Carollo, Esq., Roseburg,

Oregon, for Harney County, Oregon (*amicus curiae*); Jeffrey C. Miller, Esq., Vancouver, Washington, for Oregon Wild (*amicus curiae*).

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

In an April 28, 2011, Opinion and Order issued by the U.S. District Court for the District of Oregon in *Oregon Natural Desert Association v. McDaniel* (*ONDA v. McDaniel*), No. 3:09-cv-00369-PK, 2011 WL 1654265, U.S. Magistrate Judge Paul Papak granted in part and denied in part cross-motions for summary judgment filed by the Oregon Natural Desert Association (ONDA) and the Bureau of Land Management (BLM), in a lawsuit brought by ONDA to challenge the Board's February 19, 2009, decision in *ONDA*, 176 IBLA 371. The Board's decision arose from an appeal brought by ONDA and others from a joint November 28, 2007, Decision Record/Final Decision (DR) of the Field Managers of the Andrews (Oregon) and Three Rivers (Oregon) Resource Areas (RAs), Burns District, BLM, approving the Steens Mountain Travel Management Plan (TMP).^{1/} The Court vacated our decision on most issues, and remanded the case to the Board for further adjudication consistent with its opinion. It later modified its April 2011 Opinion and Order, rescinding its vacatur of the Board's decision, restoring "IBLA's existing decision [and] . . . any underlying BLM findings, conclusions, decisions, or environmental analyses." *ONDA v. McDaniel*, No. 3:09-cv-00369-PK, 2011 WL 3841550, at *3 (D. Or. July 8, 2011).

We conclude, after carefully considering all of the legal issues identified by the Court on judicial remand, that ONDA has failed to establish that BLM erred in adopting the Steens Mountain TMP. To the extent the Board previously affirmed BLM's approval of the TMP, we now reaffirm our prior decision.^{2/} However, with regard to our previous reversal of BLM's decision to designate Obscure Routes as

^{1/} BLM's decision to approve the TMP was based on an Apr. 15, 2007, Environmental Assessment (EA) (OR-05-027-021), and a Nov. 28, 2007, Finding of No Significant Impact (FONSI), both of which were prepared pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006), and its implementing regulations, 40 C.F.R. §§ 1500.1-1518.4.

The administrative appeal was brought by ONDA, together with The Wilderness Society, American Hiking Society, Oregon Chapter of the Sierra Club, and Oregon Wild. However, only ONDA challenged the Board's decision in U.S. District Court and remains the only appellant challenging BLM's underlying decision.

^{2/} On judicial remand, the record before the Board consists of an Administrative Record (AR) and a Supplemental AR (SAR), which are on separate CDs. The AR and SAR are separately bates stamped and indexed.

open to motorized travel, we now vacate our prior reversal and affirm BLM's designation of all of the Obscure Routes as open to motorized travel.

I. BACKGROUND

On October 30, 2000, Congress enacted the Steens Mountain Cooperative Management and Protection Act of 2000 (Steens Act), 16 U.S.C. §§ 460nnn to 460nnn-122 (2006), creating the Steens Mountain Cooperative Management and Protection Area (CMPA).^{3/} The fundamental purpose of the Steens Act is “to conserve, protect, and manage the long-term ecological integrity of Steens Mountain for future and present generations.” 16 U.S.C. §§ 460nnn(5) (2006). Ecological integrity is defined by the statute as

a landscape where ecological processes are functioning to maintain the structure, composition, activity, and resilience of the landscape over time, including--

- (A) a complex of plant communities, habitats and conditions representative of variable and sustainable successional conditions; and
- (B) the maintenance of biological diversity, soil fertility, and genetic interchange.

Id. § 460nnn-12(a) (2006).

^{3/} In addition, the Steens Act created the 170,084-acre Steens Mountain Wilderness Area (Steens Mountain WA) within the CMPA; included 29 miles in the National Wild and Scenic Rivers System; established a Wildlands Juniper Management Area, a Redband Trout Reserve, and a 97,229-acre No Livestock Grazing Area (within the Steens Mountain WA); and withdrew a total of 1.1 million acres of public land from mineral and geothermal leasing, mostly within the CMPA. As a result of the wilderness inventory undertaken during the 15-year period after Oct. 21, 1976, pursuant to section 603(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782(a) (2006), BLM had previously designated approximately 120,506 acres of public land in the CMPA as part of 7 Wilderness Study Areas (WSAs). *See* EA at 18, 19; 45 Fed. Reg. 75,597 (Nov. 14, 1980); 46 Fed. Reg. 9,789 (Jan. 29, 1981); 46 Fed. Reg. 19,605 (Mar. 31, 1981); 46 Fed. Reg. 27,772 (May 21, 1981); *Catlow Steens Corp.*, 63 IBLA 85 (1982).

Section 111(a) of the Steens Act, 16 U.S.C. § 460nnn-21(a) (2006), directs the Secretary of the Interior to manage the Federal lands in the CMPA pursuant to FLPMA, 43 U.S.C. §§ 1701-1787 (2006), and other applicable law.

The CMPA, which is under the administrative jurisdiction of BLM,^{4/} is a high desert area ranging from aspen and juniper woodlands to sagebrush shrublands and grasslands, punctuated by perennial and intermittent streams, springs, and riparian areas. The CMPA encompasses 496,136 acres of public (428,156 acres), State (1,070 acres), and private (66,910 acres) land in the northern Great Basin in southeastern Oregon. The centerpiece of the CMPA is Steens Mountain, a nearly 10,000-foot high mountain that is designated by the Department for conservation, protection, and restoration under the National Landscape Conservation System (NLCS).

Section 112 of the Steens Act, 16 U.S.C. § 460nnn-22 (2006), places substantial restrictions on motorized and mechanized travel on Federal lands in the CMPA, generally prohibiting off-road vehicle use and restricting vehicle use to designated existing roads and trails (with limited exceptions) and precluding the construction of new roads or trails (with limited exceptions). BLM is not, however, precluded from constructing or maintaining trails for non-motorized or non-mechanized travel.

BLM was directed by the Steens Act to prepare “a comprehensive plan for the long-range protection and management of the Federal lands included in the [CMPA],” which would “include, as an integral part, a comprehensive transportation plan [CTP] 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.” 16 U.S.C. §§ 460nnn-21(b) and 460nnn-22(a) (2006).

BLM originally issued two July 15, 2005, Records of Decision (RODs), adopting a land-use plan (Andrews Management Unit (AMU) and the Steens Mountain CMPA Resource Management Plan (RMP)).^{5/} The RMP was intended to guide land management actions on close to 1.6 million acres of public land in the CMPA (428,000 acres) and part of the Andrews Resource Area known as the AMU

^{4/} Since the CMPA straddles a BLM jurisdictional boundary, administrative jurisdiction over the CMPA falls to both the Andrews and Three Rivers RAs, which together make up the Burns District. *See* 176 IBLA at 374 n.3.

^{5/} The Steens Mountain CMPA RMP actually consists of two RMPs, one covering the Steens Mountain CMPA and the other the AMU, both of which were approved in RODs issued by the Oregon/Washington State Director, BLM, on July 15, 2005. The RODs and RMPs can be found at <http://www.blm.gov/or/districts/burns/plans/burnsrmp.php> (last visited Sept. 19, 2014). The two RMPs share Appendices (A-O) and Maps. *See* http://www.blm.gov/or/districts/burns/plans/files/Andrews_Steens%20Appendices.pdf (last visited Sept. 19, 2014).

(1,221,000 acres). It included a Transportation Plan (TP) (Appendix M), which provided guidance regarding the maintenance, improvement, use, and accessibility of roads and trails in the CMPA.^{6/} The TP also provided for a site-specific on-the-ground route inventory, which would update and map all existing routes in the CMPA.

In conjunction with NEPA review, BLM issued a formal scoping notice in December 2006 with regard to preparation of the Steens Mountain TMP, the purpose of which was to “augment[] the [TP] and further define[] the motor vehicle route/trail network within the CMPA,” and also to “map[] known nonmotorized trails,” in order to conform to the Steens Act mandate to restrict motorized travel to designated existing routes and to provide for non-motorized travel on existing routes. DR at 1.^{7/} The goal of the TMP was to “determin[e] how best to manage travel in the CMPA while protecting resources including wilderness characteristics, providing for ‘reasonable’ access to private lands, providing for sustainable livestock grazing, providing recreation opportunities, and otherwise meeting RMP land management objectives.” EA at 3.^{8/}

With input from ONDA and other members of the public, BLM inventoried existing motorized and non-motorized travel routes in the CMPA. See EA at 11; DR at 1. The TMP “focused” on *motorized* travel in the CMPA, generally restricting such use to “previously established routes,” since “no cross-country vehicle travel is allowed within the CMPA.” DR at 4, 9. Motorized routes were grouped into seven categories, defined by the nature and extent of existing use, as follows: Base Routes, Obscure Routes, Historical Routes, Private Landowner Access Routes, Permit Routes, All-Terrain Vehicle (ATV) Routes, and Special Use Permit Routes. See EA at 12-13. Use of the routes was mostly either designated as open to the public or restricted to private users or landowners.

BLM noted that a full inventory of non-motorized routes and decisions regarding their formal designation and management, as part of a comprehensive plan for managing recreation in the CMPA, would await preparation of a Comprehensive Recreation Plan (CRP). See EA at 2 (“The RMP (Page RMP-67) requires the BLM to prepare a comprehensive recreation plan to more fully address if (and what types) recreation facilities and services are needed to provide for resource protection, visitor safety, and a wide range of high quality recreational activities”), 55-56;

^{6/} Appendix M appears at AR 10707-10714.

^{7/} The DR appears at AR 783-803. The CMPA TMP Decision Map, which depicts the various routes designated as open to motorized travel, as well as other features of the CMPA, appears at AR 803.

^{8/} The EA appears at AR 9950-10029.

DR at 1, 3-4. However, the TMP provided for *non-motorized* travel in the CMPA, noting that existing non-motorized routes would remain available for continued use.^{2/} DR at 4. BLM provided that BLM's current management policy related to non-motorized trails in the CMPA would remain in effect until completion of the CRP. EA at 2-3. BLM stated that "[i]mplementation of the decision [in the TMP] would not result in an appreciable change from current use of motorized and nonmotorized travel routes," and, since circumstances "would not measurably deviate from current conditions," it expected "no significant effect on recreational activities." DR at 9.

BLM has described the general effect of the TMP regarding the availability of routes in the CMPA to public use, as follows:

The Steens Act closed 104 route miles and the RMP Transportation Plan closed another six route miles. EA at 57. The present TMP Decision closes 1.23 mile[s] of a route[.]. EA at 57; Decision at 12, 17. As part of this closure, BLM closed the Weston Basin ATV route to protect wilderness by eliminating the opportunity for motorized incursions into wilderness. EA at 57; Decision at 12, 17. *555 miles of routes remain available for some form of public use.* EA at 57; Decision at 11. Most routes within the CMPA are closed to public travel from approximately mid-November to mid-May each year depending on weather. EA at 15. This is to protect road surfaces and adjacent natural resources from winter and spring impacts [during wet conditions] from motorized use. EA at 15. Approximately 80% of the CMPA is covered by this seasonal closure. EA at 15.

Response to Stay Request and Answer (Response) (IBLA 2008-59) at 3 (emphasis added).

On June 8, 2007, during BLM's preparation of the TMP, the U.S. District Court for the District of Oregon, in *ONDA v. Shuford*, No. 06-242-AA, 2007 WL 1695162 (D. Or.), *aff'd*, 405 Fed. Appx. 197 (9th Cir. 2010), *inter alia*, ruled that the RMP and appended TP violated the requirement of section 112(a) of the Steens Act, 16 U.S.C. § 460nnn-22(a) (2006), because they lacked "a comprehensive management system for travel over roads, ways, and trails," and other "significant components." 2007 WL 1695162, at *18, *19 (D. Or. June 8, 2007). Although

^{2/} See EA at 56 ("Use of both verified and unverified [non-motorized] trails may continue to occur unless public safety or resource protection concerns requiring corrective action are identified"); DR at 1 ("Within the CMPA, the[] [non-motorized] trails remain open to nonmotorized and nonmechanized uses"), 3-4, 9 ("Nonmotorized trails remain available for use"), 11 ("Nonmotorized trails remain available for hiking and equestrian uses").

the Court found that the RMP and TP did not comply with section 112(a) of the Steens Act, it did not invalidate the RMP and TP. Since the TMP had yet to be issued, the Court deferred consideration of the question of whether the TMP would, together with the RMP and TP, satisfy the Steens Act. *See id.* at *20.

In its April 2007 EA, BLM considered the potential environmental impacts of adopting the proposed action and alternatives thereto, pursuant to section 102(2)(C) of NEPA. The EA was tiered to the August 2004 Proposed RMP and Final Environmental Impact Statement (EIS) prepared in conjunction with promulgation of the RMP.^{10/} BLM considered the Proposed Action (Alternative D), which would principally leave approximately 555 miles of Base Routes open to motorized travel.^{11/} *See* EA at 17. The Proposed Action would leave all of the 36 miles of Obscure Routes open to motorized travel.^{12/} Of the Base Routes, approximately 445 miles are considered primitive roads, and the remaining miles consist of the Steens Loop Road (55.7 miles), a main road, and 54 miles of

^{10/} The Proposed RMP/Final EIS appears at AR 11052-12237. *See* <http://www.blm.gov/or/districts/burns/plans/burnsrmp.php> (last visited Sept. 19, 2014).

^{11/} BLM also considered Alternative A (Minimal Change), which would principally leave approximately 519 miles of Base Routes open to motorized travel, but close the 36 miles of Obscure Routes to motorized travel. *See* EA at 15. Alternative B (Maximize Use) would be similar to the Proposed Action. *See id.* at 16. Alternative C (Reduced Use), which was developed based on input from ONDA, would principally close approximately 250 miles of Base Routes, including all of the 36 miles of Obscure Routes, to motorized travel. *See id.* at 16. BLM also briefly considered a no action alternative. *See id.* at 13.

^{12/} The Obscure Routes are situated both within (27 miles) and outside (9 miles) the WSAs. *See* EA at 11, 12; DR at 12. They are, by BLM's definition, those routes that are "hard to locate or were not found [on the ground]." EA at 11; *see id.* at 12, 21-22. The phrase encompasses routes where there is little physical trace of the route on the ground, such that, while the route is virtually obliterated, it may yet be discerned with some effort, *i.e.*, "hard to locate" on the ground. However, it also encompasses routes where no physical trace of the route remains on the ground. Nonetheless, BLM states that, while they "have been difficult to locate [on the ground] for many years," the Obscure Routes are "shown on maps . . . and have not suffered off-road travel impacts from visitors searching for the routes." DR at 16; *see* EA at 21, 22 ("No locations where . . . multiple routes have been established [by those seeking to find and drive an Obscure Route] have been identified").

secondary roads.^{13/} *See id.* at 17-18, 35-36. No work would be undertaken to reestablish motorized vehicle passage in the case of the Obscure Routes, which would be depicted on maps, but not marked on the ground. *See EA* at 17, 65; 176 IBLA at 384 (“BLM is not affirmatively maintaining or reconstructing these routes,’ but instead it is ‘only continuing the status quo that the Obscure Routes remain open yet practically difficult to find or use.” (quoting BLM Response (IBLA 2008-59) at 11)), 392 (“BLM states that the [Obscure] [R]outes ‘will not be marked on-the-ground or signed,’ and that no effort will be made to ‘reestablish motorized passage.’ Response at 11 (*citing DR* at 11; *see DR* at 7 (‘Route conditions would not change’).”).

In their DR, the Field Managers decided to adopt the Proposed Action, concluding that it conformed with the RMP and would serve the public interest, by providing travel access into the CMPA for primitive camping, hunting, fishing, hiking, and other recreational activities.^{14/} They decided to go forward with implementation

^{13/} In Instruction Memorandum (IM) No. 2006-173, dated June 16, 2006 (AR 12409-12414), the Director, BLM, broke transportation routes down into three categories (roads, primitive roads, and trails), adopting standardized definitions, as follows:

- Road: A linear route declared a road by the owner, managed for use by low-clearance vehicles having four or more wheels, and maintained for regular and continuous use.
- Primitive Road: A linear route managed for use by four-wheel drive or high-clearance vehicles. Primitive roads do not normally meet any BLM road design standards.
- Trail: A linear route managed for human-powered, stock, or off-highway vehicle forms of transportation or for historical or heritage values. Trails are not generally managed for use by four-wheel drive or high-clearance vehicles.

Roads and Trails Terminology Report, dated April 2006 (attached to IM No. 2006-173), at 15.

The Steens Loop Road was assigned Maintenance Level 5, providing for annual maintenance, recognizing its status as a single or double lane road having “an aggregate or bituminous surface.” AMU and Steens Mountain CMPA RMPs Appendices (A-O) and Maps, Appendix M, at M-3. Most of the remaining routes were assigned Maintenance Level 2, providing for grading, brushing, and maintenance of drainage structures “as needed.” *Id.* at M-2; *see id.* at M-3; EA at 13, 36.

^{14/} BLM initially issued a May 31, 2007, DR/Proposed Decision, but, following the District Court’s June 8, 2007, opinion in *ONDA v. Shuford*, No. 06-242-AA, 2007 WL

(continued...)

of the TMP. They noted that in light of the closure of motorized travel routes in the wilderness area, many of the public comments favored keeping the remaining routes in the CMPA open to motorized travel—an approach adopted by BLM, given the absence of conflicts between motorized and non-motorized users and the fact that no significant resource damage was attributable to motorized travel. *See* DR at 16, 17. Should conflicts or adverse resource impacts occur, BLM provided for changing the availability of routes. *See* Response (IBLA 2008-59) at 9; DR at 4, 14, 15; EA at 14. The Field Managers also determined that implementation of the Proposed Action was not likely to significantly impact the human environment, and thus BLM was not required by section 102(2)(C) of NEPA to prepare an EIS.

ONDA and the other appellants filed a timely appeal from BLM's November 2007 DR, requesting the Board to stay the effect of the decision, and thus BLM's approval of the TMP, during the pendency of their appeal.^{15/} Their fundamental argument was that BLM had, in approving the TMP, violated the environmental review requirements of section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (2006), the multiple-use management and land-use plan conformance requirements of section 302(a) of FLPMA, 43 U.S.C. § 1732(a) (2006), and the transportation plan directive and prohibitions of section 112 of the Steens Act, 16 U.S.C. § 460nnn-22 (2006). These alleged violations purportedly stemmed from BLM's failure to address "non-motorized travel and recreation opportunities," BLM's decision to designate more than 500 miles of new motorized travel routes in existing and proposed WSAs, BLM's failure to "reconsider" closing travel routes "shown to be obsolete, redundant or causing resource damage," and BLM's decision to leave "more than 500 miles of motorized vehicle routes" open to motorized use. NA/SOR/Petition (IBLA 2008-59) at 7.

ONDA and the other appellants maintained that implementation of the TMP would allow "new and purposeful degradation of public resources," including the "fragmentation of wildlife habitat" and other harm to wildlife (including BLM-

^{14/} (...continued)

1695162 (D. Or.), finding that the RMP and TP did not satisfy section 112(a) of the Steens Act, BLM rescinded the DR/Proposed Decision on June 13, 2007.

^{15/} ONDA and the other appellants sought a stay since BLM was in the process of preparing maps for public distribution that would delineate the motorized travel routes, as well as devising a visitor information strategy, involving route signage, information kiosks, brochures, and "other tools to help familiarize the public with recreation opportunities on Steens Mountain." Notice of Appeal, Statement of Reasons, and Petition for Stay (NA/SOR/Petition) (IBLA 2008-59) at 26 (quoting EA at 14). The appellants feared that the public would shortly begin motor vehicle use of the routes designated as open to such use.

designated special status species), the “infestation and spread of noxious weeds to the detriment of native plant species,” and the “long-term or permanent damage to wilderness values within existing Wilderness Study Areas.”^{16/} NA/SOR/Petition (IBLA 2008-59) at 24. They favored allowing many, if not most, of the designated routes, which were described as “rocky, rutted, overgrown, and disappearing ways,” “to continue to be naturally reclaimed in order to conserve the ecological integrity of Steens Mountain.” *Id.* at 25.

ONDA and the other appellants requested the Board to reverse BLM’s November 2007 DR, and remand the case for preparation of a new CTP, as required by section 112(a) of the Steens Act, and for compliance with the Steens Act, FLPMA, and NEPA.

By order dated April 2, 2008, the Board granted in part and denied in part ONDA’s request to stay BLM’s November 2007 DR. We stayed the effect of the DR to the extent that it designated Obscure Routes as open to motorized travel, but otherwise allowed the remaining travel management determinations of the TMP to remain in effect.

After briefing by ONDA and BLM, we issued our February 2009 decision in *ONDA*, 176 IBLA 371, reversing BLM’s November 2007 DR to the extent that it designated Obscure Routes as open to motorized travel, but otherwise affirming the DR.

ONDA challenged the Board’s February 2009 decision in U.S. District Court, and on April 28, 2011, the Court issued an Opinion and Order ruling on the issues raised as a matter of law, concluding that there were no disputed issues of fact. On cross-motions for summary judgment, the Court affirmed in part and vacated in part

^{16/} In pursuing the matter on judicial remand, ONDA also states that Steens Mountain has an “important population” of Greater sage-grouse (*Centrocercus urophasianus*), which the Fish and Wildlife Service (FWS), U.S. Department of the Interior, recently determined warranted listing, range-wide, as a threatened or endangered species, under the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (2006), but which listing was precluded by higher priority listing actions. Motion for Summary Judgment/Opening Brief (ONDA Brief) at 3 (citing 75 Fed. Reg. 13,910, 13,988 (Mar. 23, 2010)). We note that in recently settling a Federal lawsuit, FWS committed to reconsider the warranted/but precluded status of the sage-grouse by issuing either a proposed listing rule or a not-warranted finding by Sept. 30, 2015. *See W. Watersheds Project v. U.S. Fish & Wildlife Serv.*, No. 4:10-CV-229-BLW, 2012 WL 369168 (D. Idaho Feb. 2, 2012), at *9. In the interim, the sage-grouse remains a BLM-designated sensitive species.

our decision, and remanded the case to the Board for further adjudication, consistent with its opinion.^{17/}

The Court stated that ONDA had raised nine legal issues in arguing that BLM had violated the transportation plan directive and prohibitions of section 112 of the Steens Act, the non-impairment requirement of section 603(c) of FLPMA, 43 U.S.C. § 1782(c) (2006), the non-impairment requirement of sections 2(a) and 4(b) of the Wilderness Act, 16 U.S.C. §§ 1131(a) and 1133(b) (2006), and the environmental review requirements of section 102(2)(C) of NEPA. *See* 2011 WL 1654265, at *9. The Court concluded that the Board had correctly ruled concerning two of the nine issues, specifically holding: (1) BLM did not violate the Steens Act by failing to prepare a CTP addressing non-motorized travel; and (2) BLM did not violate NEPA by failing to consider a reasonable range of alternatives in its EA. *See* 2011 WL 1654265, at *10-*13, *18-*20. However, it concluded that we had failed to properly rule concerning seven of the nine issues, and remanded the case to the Board with directions to adjudicate the seven issues that we had failed to “fully address,” specifically:

(1) whether BLM designated routes that did not exist as open to motorized travel, thus violating the statutory prohibition of off road motorized vehicle use (Steens Act);

(2) whether BLM approved the maintenance of routes that did not exist, in order to allow authorized motorized travel, thus violating the statutory prohibition of constructing new motorized roads and trails (Steens Act);

^{17/} Following its April 2011 Opinion and Order, the Court granted preliminary injunctive relief during the pendency of the proceeding before the Board on judicial remand, allowing BLM to undertake no or only limited maintenance activities on routes that had been designated as open to motorized travel, but that had been identified by ONDA as obscure or nonexistent on the ground. *See* 2011 WL 3841550, at *4 (“I find that ONDA has met its burden to show that an injunction is warranted to prevent maintenance that effectively creates new routes where they did not previously exist”); *ONDA v. McDaniel*, No. 3:09-cv-00369-PK, 2011 WL 3793710, at *2 (D. Or. Aug. 25, 2011); Opinion and Order, *ONDA v. McDaniel*, No. 3:09-cv-00369-PK (D. Or. Sept. 28, 2012), at *16-*17. We note that, while ONDA had sought to preclude or restrict maintenance of over 300 miles of routes, the Court limited the effect of the injunction to approximately 100 miles of routes that had been identified by ONDA as obscure or nonexistent on the ground. *See* 2011 WL 3841550, at *8, n.5; 2011 WL 3793710, at *2. Specifically, the Court provided for no maintenance in the case of 37 routes, totaling approximately 26 miles, and limited maintenance in the case of 76 routes, totaling approximately 64 miles.

(3) whether BLM designated Historical Routes or other routes in WSAs that did not exist or came into existence after FLPMA's enactment as open to motorized travel, thus violating the statutory non-impairment mandate for WSAs (FLPMA);

(4) whether BLM designated Historical Routes or other routes in the Steens Mountain Wilderness Area that did not exist or came into existence after enactment of the Steens Act as open to motorized travel, thus violating the statutory non-impairment mandate for wilderness areas (Wilderness Act);

(5) whether BLM failed to consider opposing views and assess accurate environmental baseline conditions concerning conflicts between motorized and non-motorized uses and users and ONDA wilderness and route inventory data submitted during the NEPA process (NEPA);

(6) whether BLM improperly segmented its analysis of the environmental consequences of connected actions by failing to analyze both motorized travel in the CMPA, approved as part of the TMP, and non-motorized travel in the CMPA, to be approved as part of the CRP (NEPA); and

(7) whether BLM failed to prepare an EIS addressing the significant environmental impacts of adopting the TMP (NEPA).

Id. at *26; *see id.* at *13-*17, *20-*23.

The District Court held that the Board had acted in an arbitrary and capricious manner in its failure “to review the TMP’s individual route determinations, the methodology BLM employed in conducting its route inventory, or the evidence presented by ONDA that BLM’s route designations ignored the actual conditions on the ground.” 2011 WL 1654265, at *10. The Court noted that the Board’s failure to address BLM’s individual route determinations extended not only to specific routes that ONDA challenged on appeal to the Board, but also other routes “that were implicated by ONDA’s broader concerns but were not specifically challenged in ONDA’s briefing.” *Id.* at *10 n.3. It regarded the Board’s failure to conduct a “reasoned analysis of BLM’s route inventory” as the “key factor” in its determination to vacate the Board’s decision. *Id.* at *10.

The Court concluded that, since the Board had failed to address the seven legal issues or to determine whether BLM had completely and accurately inventoried the existing routes in the CMPA, which was necessary to a proper resolution of the seven legal issues, the Board, in approving BLM’s adoption of the TMP, acted in an arbitrary and capricious manner, abused its discretion, or otherwise acted not in accordance with the law. The Court did not, however, express or intimate its

views on the resolution of any of the seven legal issues, or the question of whether BLM had, in fact, violated the Steens Act, FLPMA, Wilderness Act, or NEPA. The Court made clear, however, that in its view the Board had failed to provide a reasoned analysis supporting its determination that BLM had complied with these statutes; accordingly, the Court remanded the case to the Board for further action, consistent with the Court's opinion. *See* 2011 WL 1654265, at *24, *26. It also vacated our February 2009 decision, except to the extent that we had reversed BLM's determination to designate Obscure Routes as open to motorized travel, because ONDA and BLM were agreed that this aspect of our decision should remain in effect during the remand. *See id.* at *25, *26.

In response to ONDA's motion for reconsideration of the Court's April 2011 Opinion and Order, the Court concluded that it had acted improvidently in vacating the Board's decision. In a July 8, 2011, Opinion and Order, the Court rescinded its vacatur of the decision, but left in place its remand to the Board, since the deficiencies noted by the Court "could possibly be cured by further explanation from the IBLA." 2011 WL 3841550, at *3. The Court specifically directed the Board to "issue a new decision in which it *addresses the seven legal issues* ONDA exhausted but that the IBLA failed to consider, and, in doing so, analyzes the completeness and accuracy of BLM's route inventory." *Id.* (emphasis added). Pending the Board's ruling on judicial remand, the Court retained jurisdiction over the matter of ONDA's challenge to the Board's February 2009 decision.

The Court's remand to the Board raises fundamental questions regarding BLM's designation of all 555 miles of routes as open to motorized travel, principally whether, as of the time of issuance of the TMP, they had ceased to exist or become obscure or hard to locate on the ground, as a consequence of vegetative growth or other natural reclamation since they were first created. The Court specifically held that the existing administrative record provided to the Board by BLM failed to substantiate BLM's inventory of all the routes, including its assessment of their current status and use by members of the public, livestock grazing permittees, or others. In remanding the case to the Board, the Court held the Board was required to either "evaluate[] all the available data concerning each separate route opened to motor vehicle use" or "scrutinize the route inventory methodology as a whole . . . to determine whether the inventory yielded results reliable enough to form the basis for TMP route decisions and thereby comply with the various statutes." 2011 WL 1654265, at *22.

The Court instructed the Board to determine whether BLM had properly designated each and every one of the 555 miles of routes as open to motorized travel *or* to determine whether BLM had, in designating all of the 555 miles of routes as open to motorized travel, employed the methodology necessary to ensure that the designation was appropriate. Accordingly, the Board, by order dated June 6, 2013,

directed ONDA “to identify, with specificity, the routes that, in its view, BLM has improperly opened to motorized use and show how BLM’s decision was in error.” Order, IBLA 2008-59-1, at 2 (emphasis added). We also directed BLM, after receiving ONDA’s response to that order, “to explain its decision[.]” *Id.* at 2-3. In this manner, we sought to narrow the focus of the Board’s pending adjudication. We directed ONDA and BLM “to brief the subject of BLM’s route inventory methodology as a whole, and whether that methodology provides a reliable basis for the TMP route decisions at issue.” *Id.* at 2. ONDA and BLM were also permitted to supplement the administrative record, because the Court stated that we could require BLM to provide “additional support for its route designations,” and presumably could allow ONDA to provide additional support for its challenge to those route designations, in order to ensure that we could undertake a reasoned analysis of the seven legal issues. 2011 WL 1654265, at *23.

ONDA has moved for summary judgment in its favor as to the seven legal issues remanded to the Board, requesting we rule that BLM violated the Steens Act, FLPMA, Wilderness Act, and NEPA in adopting the TMP, and that we set aside BLM’s November 2007 DR and remand the case to BLM for preparation of an EIS and for compliance with the other statutes. *See* ONDA Brief at 44-46; Reply Brief at 43-44. ONDA asserts that

[t]he gravamen of ONDA’s suit is that after more than six years of transportation planning on Steens Mountain, BLM has issued a plan that *designates ‘roads’ open to motorized use where none exist on the ground* according to BLM’s definitions and evidence in the record. BLM’s plan thereby carves up roadless areas on Steens Mountain, fragmenting important sagebrush habitat and foreclosing Congress’ ability to one day preserve these areas as Wilderness by expanding the Steens Mountain Wilderness Area.

ONDA Brief at 8-9 (emphasis added).^{18/}

^{18/} ONDA asks the Board, in addition to setting aside BLM’s DR, to enjoin further implementation of the TMP, thus “barring maintenance and motorized use on route categories the Board determines were designated in violation of law,” and to render injunctive or other relief “necessary to mitigate for resource-damaging or -threatening actions taken prior to this Board’s issuance of a decision on ONDA’s claims.” ONDA Brief at 2, 45; *see* Reply Brief at 44-45 (“[T]he proper remedy is not only to set aside and remand the TMP[,]. . . but also to preserve the environmental status quo while BLM complies with the law.”). Were we to set aside the DR, the effect would be to prevent its implementation. No injunctive relief is necessary.

(continued...)

BLM objects to summary judgment in favor of ONDA, asserting that it has complied with the statutes. BLM asserts that, were ONDA to prevail, this would result in the failure to designate as open to motorized travel “routes over public lands used for access for recreation, livestock grazing, firefighting, ecological restoration, wild horse management, search and rescue and other purposes [that do not] cease to exist when they are not always used or maintained frequently enough to remove vegetation in the routes, but are still used and have continued utility.” BLM Opening Brief on Remand (BLM Brief) at 1.

The Court held that the Board did not err in concluding that BLM had complied with the Steens Act, by preparing a CTP addressing non-motorized travel, and with NEPA, by considering a reasonable range of alternatives. Thus, we need not consider these two issues further on judicial remand. However, the Court held that the Board did err in concluding or failing to conclude that BLM had complied with the Steens Act, FLPMA, the Wilderness Act, and NEPA regarding the remaining seven legal issues, and instructed the Board to render a decision addressing those issues. We now undertake to comply with the Court’s remand.^{19/}

II. ANALYSIS

A. BLM’s Inventory Was Complete and Accurate

As a preliminary matter, we deem it necessary to consider an overriding factual issue that is said by the Court to permeate almost all of the seven legal issues that the Board must address. 2011 WL 1654265, at *21. That factual issue concerns the accuracy and completeness of BLM’s route inventory. The Court states that the Board can now properly assess the accuracy and completeness of BLM’s route inventory by one of two approaches, either by determining whether BLM properly

^{18/} (...continued)

In addition, ONDA seems to be asking the Board to stay the effect of BLM’s DR, which is now in effect—as a consequence of the Court’s rescission of its vacatur—during the pendency of the present proceeding on judicial remand. While we have inherent authority to stay the effect of the DR, since we here resolve the matter, the question of a stay is now moot. *See, e.g., Jim D. Wills*, 123 IBLA 74, 77 (1992) (citing *B. H. Northcutt*, 75 IBLA 305, 307 (1983)). ONDA’s requests for injunctive or other relief are denied.

^{19/} In our June 2013 order, we granted a motion filed by Harney County, Oregon, to participate in the pending proceeding as an *amicus curiae*. Oregon Wild has also moved to participate as an *amicus curiae*. For good cause shown, the motion is granted. The briefs filed by the *amici curiae* have been considered by the Board in the course of addressing the judicial remand.

inventoried each and every mile of the designated routes or by determining whether BLM employed the proper methodology for inventorying routes.

Based on our careful review of the administrative record presented to the Court and as supplemented on judicial remand, we are persuaded that BLM's November 2007 DR was based on a complete and accurate inventory of the 555 miles of routes designated as open to motorized vehicle use in the CMPA.

The foremost factual issue raised by ONDA concerns whether the roads designated by BLM were in existence when designated or had ceased to exist because they were overgrown or otherwise naturally reclaimed to the point that no person could reasonably discern where they are located on the ground. ONDA repeatedly asserts that, when it is impossible to discern where routes are found on the ground, such routes have ceased to exist, and that it is improper for BLM to designate them as open to motorized travel—the issue to which we now turn, commencing with the adequacy of the inventory.

The Court characterized BLM's route inventory as “incomplete, hard to understand, and made more inscrutable by the sheer number of different routes, designations, and maps,” and stated that BLM's documentation amounted to a “scattershot memorialization of th[e] inventory.” 2011 WL 1654265, at *22, n.13. The Court specifically criticized (1) the Field Notes of Mark Sherbourne, Natural Resource Specialist, BLM, dated August 11, 2003, to November 10, 2005, which expressly covered 160 routes (although other routes were inventoried), as being heavily redacted and not usable in locating the routes on BLM's route map;^{20/} (2) approximately 30 field route maps with handwritten notations by Sherbourne; (3) 4 field route maps used by Sherbourne; (4) 1 model route inventory form used

^{20/} Sherbourne executed an Aug. 24, 2010, declaration that was filed with the Court on Aug. 27, 2010, and is attached to BLM's Brief as Ex. 69.

The record contains three declarations of Dr. Craig Miller, GIS Analyst, ONDA: (1) Declaration (Decl.) dated July 20, 2010 (attached to ONDA's July 23, 2010 Motion for Summary Judgment in *ONDA v. McDaniel*, No. 3:09-cv-00369-PK); (2) Decl. dated May 30, 2013 (attached to ONDA Brief); and (3) Decl. dated Aug. 2, 2013 (attached to ONDA Reply Brief). In the present decision, we cite to these declarations, respectively, as Miller Decl., 2d Miller Decl., and 3d Miller Decl.

While Sherbourne's field notes were redacted when included in the administrative record (AR 10289-10297), an unredacted version has since been provided to ONDA, covering the listed routes from 1 to 140. See BLM Brief at 17 n.6; Miller Decl., Attachments A, B, and E; 2d Miller Decl., ¶ 35, at 15; 2d Miller Decl., Attachments B and C. We find no unredacted version covering the listed routes from 141 through 160. However, we are not persuaded that the missing information affects the validity of BLM's inventory methodology as to these routes.

by BLM to record electronic geographic information system (GIS) and other route information; (5) maps prepared by Harney County, grazing permittees, and private landowners depicting existing and historic routes; (6) RMP route maps, which reflected routes discerned during the RMP NEPA process from 2001 to 2004; and (7) ONDA's December 7, 2005, and May 17, 2007, TP Recommendations, provided to BLM, which set forth "detailed route information, maps, geo-referenced photographs, and recommendations for closing many routes that were overgrown, impassable, or nonexistent." *Id.* at *22.

The Court stated that, because of the inadequacy of BLM's route inventory documentation in the record, there was "no way that the IBLA could have rationally determined that all of BLM's TMP route decisions were permissible under the Steens Act *based on the facts before it.*" 2011 WL 1654265, at *22 (emphasis added). The Court faulted the Board on the basis that it neither "evaluated all the available data concerning *each separate route* opened to motor vehicle use," nor "scrutinize[d] *the route inventory methodology as a whole . . .* to determine whether the inventory yielded results reliable enough to form the basis for TMP route decisions." *Id.* (emphasis added). It particularly noted that we had not considered "ONDA's ground-level geo-referenced photographs purportedly showing that individual routes designated as open to motor vehicles were, in fact, nonexistent or overgrown," which, the Court stated, offered "the only visual evidence in the record of the actual condition of routes." *Id.* at *23.

The Court therefore directed the Board to provide a record "robust enough to permit reasoned analysis of BLM's route inventory," requiring BLM, "if necessary, . . . to either provide additional support for its route designations or reassess those designations." 2011 WL 1654265, at *23.

We note ONDA's assertion that the Board is charged by the Court only with adjudicating whether BLM properly designated 519 miles of Base Routes, excluding the 36 miles of Obscure Routes, as open to motorized travel. *See* ONDA Brief at 16 n.7, 20. Inasmuch as the Court did not vacate the Board's decision, it left intact that portion of our decision reversing BLM's DR opening the Obscure Routes to motorized travel. It was therefore immune from further Board review, in the absence of compelling legal or equitable reasons to the contrary. *See, e.g., Heirs of Herculano Montoya*, 137 IBLA 142, 146 (1996). However, based upon our further review on remand, we now conclude that we reversed BLM's designation of Obscure Routes as open to motorized travel in error, and accordingly, we vacate that holding *sua sponte*.

ONDA has never asserted that any of the Obscure Routes did not, at one time, exist on the ground. Rather, it has asserted that some have become hard to find, while others have ceased to exist on the ground. *See* NA/SOR/Petition

(IBLA 2008-59) at 14. However, the record establishes that none of the Obscure Routes has ceased to exist on the ground, and ONDA does not dispute the fact that all of the Obscure Routes still exist *in the public record*.

The critical question is whether an Obscure Route was in existence at the time of designation of the CMPA on October 30, 2000, either on the ground or as a matter of record. If a particular Obscure Route existed on October 30, 2000, we conclude BLM may designate that route as open to motorized travel, without violating the Steens Act prohibitions against motorized off-road travel and new motorized road and trail construction. However, if the Obscure Route did not exist on October 30, 2000, either on the ground or as a matter of record, we conclude BLM may not designate the route as open to motorized travel without violating the statutory prohibitions. Further, where the Obscure Routes are situated in WSAs, if they were in existence on October 21, 1976, we conclude that they could continue to be used and maintained in the same manner and to the same degree as they were on that date, without violating the FLPMA non-impairment mandate.

The underlying question is whether BLM properly identified the status of all 555 miles of routes designated as open to motorized travel, regardless of whether they were labeled Base Routes, Obscure Routes, Historical Routes, or otherwise. If BLM improperly determined that any one of the routes was in existence on public lands in the CMPA as of October 30, 2000, or in a WSA as of October 21, 1976, designation of the route as open to motorized travel would run afoul of the prohibitions against motorized off-road travel and constructing new motorized roads and trails under sections 112(b) and (d) of the Steens Act, the non-impairment mandate applicable to WSAs under section 603(c) of FLPMA, or the non-impairment mandate applicable to wilderness areas under sections 2(a) and 4(b) of the Wilderness Act. Improperly assessing the status of any one of the 555 miles of routes may have impaired or prevented a proper assessment of the likely significant impacts under section 102(2)(C) of NEPA of designating the route as open to motorized travel.

We agree that, fundamentally, the case properly “turns on the existence or non-existence [at the relevant date(s)] of roads and trails utilized by people for motorized access.” County Brief at 1.

It is important to define the scope of ONDA’s challenge to BLM’s TMP decision. The Court noted that ONDA originally estimated that BLM had failed to inventory over 400 of the 555 miles of routes designated as open to motorized travel. See 2011 WL 1654265, at *23 n.16 (citing Miller Decl., ¶¶ 25-26, at 11). ONDA now states that BLM failed to inventory “somewhere between 300 and 400 miles of

routes” designated as open to motorized travel.^{21/} ONDA Brief at 27 (citing Miller Decl., ¶¶ 30-33, at 13-14); *see* 2d Miller Decl., ¶ 32, at 14 (“I can find no evidence in the record that BLM inventoried any routes outside of the Sherbourne Inventory”). The Court also indicated that ONDA identified “approximately 100 miles of routes” designated as open to motorized travel that were obscure on the landscape. 2011 WL 3793710, at *2; *see* Miller Decl., ¶ 3, at 2 (“101 of the 555 miles of routes . . . are obscure on the landscape having been essentially naturally reclaimed over time by nonuse”). Finally, the Court stated that ONDA asserted that 48 miles of routes designated as open to motorized travel were either documented by ONDA (39 miles) or admitted by BLM (9 miles) to be nonexistent or obscure. *See* 2011 WL 1654265, at *23 n.15 (citing Miller Decl., ¶¶ 33-34, at 14-15). ONDA also reported the identification of an additional 47 miles of routes that were said to be nonexistent or obscure. *See* Miller Decl., ¶¶ 16-18, 35, at 8, 15-16.

ONDA continues to argue that, since many of the routes designated as open to motorized travel have ceased to exist, BLM has acted in violation of the statutory prohibitions of off-road motorized travel and construction of new motorized routes. In reviewing the record in light of the Court’s directives on remand, one fact becomes clear: ONDA has yet to identify with specificity the routes it claims BLM improperly designated as open to motorized travel. In directing ONDA and BLM to brief the issues currently before the Board, we instructed ONDA to initially identify the specific routes in dispute. Having studied ONDA’s assertions regarding the disputed routes, we remain uncertain as to their number and identity. For this reason, we decide this case on the basis that BLM’s inventory process was sound.

Of the 555 miles of routes designated as open to motorized travel, ONDA did not, at least initially, specifically identify the routes at issue, stating only that “BLM is aware, with precision, of the 338 miles of routes that concern ONDA,” because they were identified in its injunction proposal to the Court.^{22/} Reply on Reports of

^{21/} Miller reported that he had determined that BLM failed to inventory approximately 415 miles of routes, because Sherbourne’s Inventory revealed that BLM inventoried only “approximately 108 miles” in the field and “32 additional miles” in the office or in discussions with local private landowners or Harney County, and there was “no indication that BLM evaluated any routes outside the Sherbourne Inventory.” Miller Decl., ¶¶ 25, 26, at 11. He thus concluded that “BLM designated the remaining 400+ miles as open to motorized use *in the absence of any data or supporting information.*” *Id.*, ¶ 25, at 11 (emphasis added).

^{22/} The Court noted that ONDA sought to enjoin maintenance “not only on allegedly ‘obscure’ routes, but also on routes that did not meet the frequently used definition of a ‘road,’” stating that ONDA thus “proposed allowing no maintenance on

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Remand and Recommendations for Procedures at 2. It appears that ONDA now objects to the designation of “more than 100 miles” of routes, and an additional 238 miles of routes, because, respectively, the routes “do not actually exist on the landscape,” having ceased to exist, or BLM does not know whether or not they exist on the landscape. ONDA Brief at 20.

ONDA further challenges BLM’s designation of Historical Routes and ATV Routes as open to motorized travel generally on the basis that they are, by definition, akin to Obscure Routes, which the Board previously held violated the statutory prohibitions against motorized off-road travel and construction of new motorized roads and trails.^{23/} See ONDA Brief at 21-24; Reply Brief at 2, 3; 2d Miller Decl., ¶¶ 12-15, at 6-8. According to ONDA, even though certain of the routes were in existence when the CMPA was designated, they were “hard to locate on the ground,” or they were not in existence upon designation of the CMPA, having been created or “pioneered” after the CMPA was created by users driving cross-country. ONDA Brief at 24. In either case, ONDA argues that BLM’s designation of the routes was contrary to the Steens Act prohibitions against motorized travel. *Id.*; see Reply Brief at 2; 2d Miller Decl., ¶¶ 16-19, at 8-10.

ONDA initially referred to a total of “103 miles of these ‘hard-to-find’ routes,” which included 58 miles or more it claims “BLM never set foot on,” together with 39 miles of routes that ONDA had identified as “obscure” and 9 miles of routes that BLM had identified as nonexistent or obscure. ONDA Brief at 24; see Reply Brief at 2; 2d Miller Decl., ¶¶ 16, 17, 33 (“[A]t least 103 miles of . . . routes . . . are in fact obscure”), 39, 41, 43, at 8, 9, 15, 17, 17-19, 20; 3d Miller Decl., ¶ 8, at 3. It later amended its allegation to encompass a total of 121.4 miles of “hard-to-find” routes, together with the 48 miles of nonexistent or obscure routes. See Reply Brief at 2; 3d Miller Decl., ¶ 7, at 3, Map 1. ONDA also stated that, in addition to the approximately 100 miles of routes that are obscure or nonexistent, there are “47 miles” of “newly added routes” that were “*not* in the transportation system at the time of CMPA designation,” since they were not depicted on the CMPA RMP

^{22/} (...continued)

approximately 224 miles of routes that never existed as roads and limited maintenance . . . on another 114 miles of routes that once were maintained as roads but now had fallen into disuse.” 2011 WL 3793710, at *2.

^{23/} BLM designated an undisclosed number of miles of Historical Routes, which had been used historically, but which were “currently hard to locate and/or . . . not identified during the WSA inventory process,” and 8 miles of ATV Routes, which had been affected by natural processes such that they were considered “no longer safe for [use by] full-sized vehicles,” as open to motorized travel. EA at 12, 13. The ATV Routes were reclassified as ATV trails in BLM’s TMP decision. See DR at 12.

Transportation Map (Map 12 (TP within the Planning Area (Existing Condition))) (AR 10760). Miller Decl., ¶¶ 16, 35, at 8, 15; 2d Miller Decl., ¶¶ 17, 43, at 9, 20; see 2d Miller Decl., ¶ 18, at 9; 3d Miller Decl., ¶¶ 8, 12, 13, at 3, 4-5, 5, Map 1; Reply Brief at 2. It argued that an “unknown” number of such routes had been created after the CMPA was created in 2000, noting that, “[i]f they indeed existed at the time, they were not considered significant enough to include in the transportation system.” Miller Decl., ¶ 17, at 3; 2d Miller Decl., ¶¶ 17, 18, at 9. It concluded that such routes are, in any event, obscure or nonexistent. See Miller Decl., ¶¶ 16, 35, at 8, 15-16; 2d Miller Decl., ¶¶ 17, 19, 43, at 9, 9-10, 20; 3d Miller Decl., ¶ 8, at 3.

ONDA states that, as a consequence of its participation in the land-use planning process that culminated in the CMPA RMP, it submitted Wilderness Inventory Recommendations (WIR), dated September 1, 2002, and a Supplemental WIR, dated November 1, 2002, both of which supported the designation of additional WSAs in the CMPA.^{24/} See 2d Miller Decl., ¶ 5, at 4. ONDA explains that the reports documented changes in the wilderness character of the CMPA and other public lands since the time of BLM’s original wilderness inventory, which began in 1978 and concluded in 1981, and, moreover, that the reports specifically “documented routes that are redundant or overgrown, rocky, rutted, impassable or virtually nonexistent on the ground.” ONDA Brief at 11. ONDA also provided Road Closure Recommendations (RCR), dated January 22, 2003, which urged the closure of existing routes in the Steens Mountain WA, WSAs, and other areas of the CMPA. See SAR 4074-86. Finally, it provided Transportation Plan Recommendations (TPR), dated December 7, 2005, and a Supplemental TPR, dated May 17, 2007, documenting, with geo-referenced photographs tied to GIS mapping, over 100 routes that were obscure or nonexistent and should not be designated as open to motorized travel.^{25/} See ONDA Brief at 14; 2d Miller Decl., ¶ 5, at 4.

^{24/} ONDA’s WIR and Supplemental WIR appear, respectively, at SAR 1737-3981 and SAR 3984-4073. ONDA has identified approximately 66,000 acres of additional public land in the CMPA appropriate for wilderness designation, which would result in the closure of more than 100 miles of existing routes. See Letter to BLM, dated May 21, 2007 (AR 12931-45), at 13.

^{25/} ONDA’s TPR and Supplemental TPR appear, respectively, at AR 12946-13257 and AR 13258-13290.

We note that in challenging the TMP, ONDA focuses exclusively on the TPR and Supplemental TPR, making little or no mention of any aspect of the WIR, Supplemental WIR, or RCR supportive of its objection to BLM’s designation of existing routes in the CMPA as open to motorized travel. We likewise find little of value in those documents to guide our adjudication, which is likely due to the fact that these reports primarily concerned either ONDA’s recommendations regarding

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With Sherbourne serving as the Team Lead for preparation of the TP and TMP, BLM inventoried all 555 miles of routes designated as open to motorized travel during the planning process, relying on existing information regarding the routes or a new assessment of the routes, using on-the-ground surveying, aerial photographs, and the testimony and documentation provided by local private landowners, grazing permittees, Harney County, and others.^{26/} See EA at 11 (“The route inventory called for in the RMP Transportation Plan was conducted during the 2003 through 2006 field seasons. Most routes within the CMPA were checked for general condition and degree of use by BLM staff. Private landowners, grazing operators, County Commissioners and the ONDA participated directly in conducting portions of the inventory and this information was provided to and considered by BLM.”); DR at 1; Sherbourne Decl., ¶¶ 1-2, 4-7, 8 (“The BLM conducted a complete inventory of the routes within the CMPA”), 9, at 2, 2-3, 4; BLM Brief at 16.^{27/}

^{25/} (...continued)

what public lands BLM should also designate as WSAs, in connection with promulgation of the CMPA RMP (WIR and Supplemental WIR), or ONDA’s recommendations regarding what routes, which were admittedly in existence, should be closed, in connection with promulgation of the TMP (RCR). It is clear that ONDA relied on the results of its field work and other efforts in connection with the WIR, Supplemental WIR, and RCR in preparing its TPR and Supplemental TPR and in deciding which routes to challenge in objecting to the TMP. We conclude that the heart of ONDA’s challenge to BLM’s designation of existing routes as open to motorized travel in the TMP, including all or most of its supporting evidence, is found in the TPR and Supplemental TPR. Thus, our focus is primarily on the evidence offered by ONDA in its TPR and Supplemental TPR.

^{26/} ONDA argues that BLM’s route inventory was deficient because it did not comply with the photographic documentation and other requirements of BLM’s *Roads National Inventory and Condition Assessment Guidance & Instructions Handbook* (Roads Inventory Handbook), H-9113-2 (Rel. 9-389 (10/21/2011)). See Reply Brief at 9-10. We note that the Handbook is applicable to “BLM roads,” thus appearing to exclude primitive roads and trails. Roads Inventory Handbook at 5; see BLM Manual, 9113 (Rel. 9-390 (10/21/2011)), at 9113.11; BLM Manual, 9115 (Rel. 9-391 (3/6/12)), at 9115.11; *Primitive Roads Inventory and Condition Assessment Guidance & Instructions Handbook*, H-9115-2 (Rel. 9-393 (3/6/2012)). In any event, the Handbook was adopted following the BLM decision now at issue. Such requirements do not appear in its predecessor. See *Roads Inventory and Maintenance Handbook*, H-9113-2 (Rel. 9-250 (12/19/85)).

^{27/} It is important to note BLM’s conclusion that designating the 555 miles of routes as open to motorized travel in the TMP “would not result in an appreciable change

(continued...)

BLM reports that, at the time it initiated the TMP process, approximately 501 miles of existing routes in the CMPA were already mapped, either as part of the TP (486) or as part of the wilderness inventory (15).^{28/} In promulgating the CMPA RMP, including the TP, BLM determined the location of those 501 miles, identifying them by name, depicting them on maps, and designating them as open or closed. It had already identified the 55-mile Steens Loop Road, 54 miles of secondary routes, and “numerous” primitive routes considered well-known and undisputed. Sherbourne Decl., ¶ 7, at 3; *see* EA at 17-18, 55 (“Steens Loop Road is the main travel route and the heart of public access to the CMPA. The road provides access for the majority of recreational opportunities including links to four developed campgrounds and seven overlooks.”), 56 (“[M]ost public land users . . . seldom leave Steens Loop Road.”); Decl. of Joan Suther, Field Manager, Andrews RA, dated June 22, 2011, ¶¶ 8 (“Approximately 72,824 people use Steens Loop [R]oad each year; it provides the sole motorized access to the most popular viewing spots on Steens Mountain.”), 10

^{27/} (...continued)

from current use of motorized and nonmotorized travel routes,” and therefore would not significantly affect existing travel in the CMPA. DR at 9 (emphasis added).

^{28/} *See* EA at 11, 12 (“There are approximately 556 miles of . . . routes currently available for vehicular use within the CMPA. . . . This includes 501 miles currently mapped in the Geographic Information System (GIS)[.] . . . About 15 miles of well-defined WSA ways were located during the route inventory These additional WSA route miles were not shown on RMP maps, but were identified during the WSA inventory process in the early 1980s.”); DR at 1 (“The TP . . . describ[es] road/route inventory information[.] . . . [T]he Travel Management Plan (TMP) . . . further defines the motor vehicle route/trail network within the CMPA.”), 6 (“The inventory also discovered about 15 miles of WSA ways that were part of the WSA inventory but not included on public use maps”); Sherbourne Decl., ¶ 13, at 5; AR 726-37 (Road Site Maintenance Summary Report, Andrews RA, dated Apr. 27, 1999); AMU and Steens Mountain CMPA RMPs Appendices (A-O) and Maps, Appendix M, at M-1 (“[T]he TP identifies the current route system (Map 13) and outlines the various route categories and road maintenance levels. . . . [T]he open roads and ways shown on Map 13 in the RMP represent the routes known to be historically available for motorized use and shall remain available for such use unless changed through the development of the updated [TMP].”), M-3 to M-4; AMU and Steens Mountain CMPA RMPs Appendices (A-O) and Maps at Map 11 (TP within the CMPA (Existing Condition) (AR 10759)), Map 12 (TP within the Planning Area (Existing Condition) (AR 10760)), and Map 13 (TP within the CMPA–Implementation (AR 10761)).

(“Routes in the CMPA are typically open only about half the year, given snow and spring moisture.”), at 3, 4.^{29/}

To save time and resources, BLM admittedly did not survey all of the routes designated as open to motorized travel on the ground, excluding routes that were “well-known” and “undisputed.” Sherbourne Decl., ¶ 7, at 3. ONDA does not challenge BLM’s decision to accept well-known and undisputed routes. *See* Reply Brief at 12.

When the RMP and TP were being prepared, BLM acknowledges that other routes were known to exist, but that “the exact location and uses of most of these routes are not currently known,” further noting that these unmapped routes would be inventoried in connection with promulgation of the TMP, in order “to determine if they should be added to the transportation system, converted to hiking trails, or closed and rehabilitated.” AMU and Steens Mountain CMPA RMPs Appendices (A-O) and Maps, Appendix M, at M-1. During the TMP process, BLM identified approximately 55 miles of existing routes outside of WSAs and the Steens Mountain WA. *See* EA at 11, 12 (“[Existing routes included] 55 miles missing from the GIS database used in the development of the Transportation Plan in the RMP. The routes included within these 55 miles are well-defined, mostly primitive roads outside of the WSAs and wilderness.”); DR at 6 (“Approximately 46 miles of new routes were found and mapped during the TMP route inventory. These routes are all outside wilderness and WSAs.”).

BLM inventoried many of the routes by sending BLM staff into the field to observe ground conditions or by having BLM staff review contemporary aerial photographs of ground conditions. *See* Sherbourne Decl., ¶¶ 4-6, at 2-3; AR 10288-97 (Sherbourne Field Notes and Map), 10299-332 (Field Inventory Maps), 13291-301 (Wilderness Inventory Maps, 1979-80). It also received extensive input from ONDA, the County, grazing permittees, private landowners, and other members of the public regarding the location of existing routes on the ground, including maps and testimony. *See* DR at 1; EA at 11; AR 10348-59 (Reported use), 10361 (Map), 10362 (ONDA Map), 10363 (County Map), 13312-16 (Grazing permittee), 13317-19 (Grazing permittee), 13320-59 (Grazing permittee), 13400-402 (Grazing permittees), 13414-30 (Grazing permittees), 13431-36 (Grazing permittee), 13437 (Grazing permittees), 13438-72 (Grazing permittees), 13473-79 (Private landowners); Sherbourne Decl., ¶ 5, at 2; Decl. of Steven E. Grasty, Judge, Harney County Court, dated June 18, 2009 (attached to County Brief), ¶ 8, at 4; Decl. of Dan Nichols, Commissioner, Harney County Court, dated Sept. 1, 2010 (attached to County Brief), ¶¶ 3-4, at 2-3. Where it did not survey individual routes, we find that BLM used

^{29/} The Suther declaration was filed with the Court on June 23, 2011.

reliable information provided by interested members of the public to determine which routes were in existence.

In identifying an existing route, BLM clearly did not rule out any route that had grass or other vegetation growing along the line of the route or had otherwise become naturally reclaimed, so long as the route could be traced on the ground.^{30/} Nor did BLM rule out any route that had, so far as could be determined, not been frequently used in the past. *See* Sherbourne Decl., ¶ 8, at 3 (“The condition of primitive . . . routes within the CMPA varies considerably. Some are two-track routes that do not require frequent maintenance with heavy equipment, while others are absent of vegetation due to periodic maintenance.”); ONDA Reply Brief at 20 (“A ‘way’ or ‘primitive route’ . . . is an actual, existing route on the landscape.”). Most of the routes in the CMPA are generally in a primitive state, being “maintained more by use than by equipment.” EA at 36; *see id.* at 17-18; Decl. of David C. Swisher, Environmental Protection Specialist, Andrews RA, dated Aug. 12, 2011 (Ex. 155 attached to BLM Brief), ¶¶ 4 (“Access into and within the CMPA is limited and the existing roads in the area are critical for management of these lands.”), 5 (“Most of the roads in the CMPA are only used seasonally due to weather conditions and changes in elevation. Roads in the area may begin at lower elevations and end or connect to another road at much higher elevations; because of these kinds of conditions the entire length of a particular road may not receive the same amount of use.”), 6 (“Roads in this area may not require any maintenance at all for many years, but conditions may change abruptly.”), 7 (“Seasonal weather conditions and management needs will usually determine which roads (if any) will require maintenance in a given year.”), at 2, 3.

In asserting a fatal defect because BLM did not itself survey all of the routes on the ground, ONDA completely discounts the other reliable evidence that can be used to determine the existence of a route, whether that evidence consists of aerial photographs taken of the land in question at or near the critical date, first-hand accounts by members of the public who visited the land in question at or around the

^{30/} BLM states that “most of the roads [and trails in the CMPA] consist of a natural surface” and are infrequently used and maintained, all of which results in vegetative growth and other natural reclamation. BLM Brief at 13 (citing Decl. of Connie Pettyjohn, Management & Program Analyst, Engineering Division, and Facility Asset Management Data Steward, Burns District, BLM, dated Aug. 12, 2011 (Ex. 151 attached to BLM Brief), ¶ 5, at 3). However, BLM argues that, despite vegetative growth and other natural reclamation, such routes may still be located on the ground and are used when necessary. *See id.* at 11-14.

critical time, or other appropriate evidence.^{31/} Beyond that, ONDA makes no effort to demonstrate the alleged fallacy of non-survey sources of evidence or offer any convincing reason why BLM should not consider and rely on such evidence to establish the existence of routes.

Section 112(b) of the Steens Act clearly authorizes BLM to designate existing roads and trails for use by motorized or mechanized vehicles. BLM need not designate an existing road or trail for motorized travel.^{32/} Thus, BLM is clearly accorded the discretionary authority, under section 112(b) of the Steens Act, to designate existing routes for use by motorized or mechanized vehicles. Further, the statute does not define what is meant by an existing route. It does not exclude routes that have become overgrown or otherwise naturally reclaimed, but whose line may be traced on the ground, or exclude routes that have been infrequently used in the past.^{33/} Nor does it exclude routes that exist only as a matter of record. Sections 112(b) and (d) of the Steens Act prohibit any “*off road*” motorized travel or the creation of any “*new road or trail for motorized or mechanized vehicles,*” except in limited circumstances. 16 U.S.C. § 460nnn-22(b) and (d) (2006) (emphasis added). A new route is clearly one that never existed, but has now been brought into existence, by construction or use.

We do not doubt “the potential relevance of ONDA’s independent route inventory data to BLM’s TMP decision.” 2011 WL 1654265, at *23. That inventory, like land owner and land use testimony and aerial photographs, is evidence to be considered and weighed in BLM’s assessment of the status of the routes designated as open to motorized travel. We considered ONDA’s ground-level geo-referenced

^{31/} ONDA also challenges the use of aerial photographs, since routes “that may seem quite visible on aerial photos may in fact be difficult or impossible to follow on the ground.” 3d Miller Decl., ¶ 11, at 4. We are not concerned with whether the routes at issue may be easily followed, only whether they exist. If they can be discerned from the air, we conclude that they exist.

^{32/} Should it desire to “permanently close an existing road” in the CMPA, however, BLM must act pursuant to section 112(c) of the Steens Act. 16 U.S.C. § 460nnn-22(c) (2006).

^{33/} See County Brief at 2 (“[T]he Steens [Act] could not have more broadly defined the character of routes open for motorized travel by allowing motorized travel on ‘roads and trails[.]’”), 8 (“Congress intended for motorized travel to be authorized over travel routes exhibiting a broad range of levels of use, maintenance and condition”), 12 (“The Board cannot overturn the BLM’s determination that a route exists based on factors Congress did not intend for the BLM to consider. *Motor Vehicle Mrds. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).”).

photographs and aerial photographs of various routes during our original review of the matter, and have done so again. However, this evidence suffers from the fact that ONDA's documentation does not concern all of the challenged routes, and, even where it does concern such routes, the data is limited in nature. ONDA has provided only a few ground-level photographs for each of the challenged routes, and each of the photographs shows only a relatively short stretch of that route, *i.e.*, the segment where the route is obscure to some degree. *See* 2d Miller Decl., at 11 (Map of ONDA Route Inventory Photo Points).^{34/} Further, at no time has ONDA demonstrated that the conditions observed in each of the photographs is representative of the route as a whole. In any event, most of these photographs disclose the existence of routes, although they have become partially obscured by vegetative growth and weathering.

We note that, as identified by the Court, ONDA's arguments that BLM violated the prohibitions against off-road travel and construction of new motorized roads and trails are derived from the basic allegation that the routes at issue are obscure. These routes were identified by ONDA as routes that had "fallen into obscurity," were "overgrown, rocky, rutted, impassable, and sometimes virtually nonexistent on the ground," or were simply "obscure" or "virtually nonexistent." *ONDA v. McDaniel*, 751 F. Supp. 2d 1151, 1162, 1163, 1164 (D. Or. 2011); *see* 2011 WL 1654265, at *21 ("ONDA generally complained that BLM's route inventory was inaccurate and incomplete, causing BLM to open routes to motorized travel that ONDA's own route inventory found were overgrown or non-existent on the landscape. This concern permeates ONDA's Steens Act claims, its FLPMA claim, [and] its Wilderness Act claim."), *22, *23, n.15. We find very little mention by the Court or ONDA of specific routes that are, in fact, nonexistent, rather than apparently nonexistent. ONDA's allegation of nonexistent routes is often phrased in terms of routes identified as "overgrown or non-existent on the landscape." 2011 WL 1654265, at *21 (emphasis added). But nowhere has ONDA clearly identified specific routes that are nonexistent along their entire length.

In his early declaration in support of ONDA's lawsuit, Miller stated that BLM had designated "routes that don't even exist on the ground." Miller Decl., ¶ 3, at 2.

^{34/} Sherbourne reports that BLM declined to rely on ground-level photographs to determine the existence of routes, since they might be taken at times of the year or at points along the route when vegetative growth might obscure an otherwise traceable route. *See* Sherbourne Decl., ¶¶ 10-11, at 4; BLM Brief at 34 ("[R]outes can be flush with vegetation in the spring and early summer before the recreation (primarily fall hunting), fire management, and grazing administration activities occur later in the year. . . . [T]he Steens Act does not make use of these routes impermissible simply because they are not always apparent.").

However, he also did not specify the routes that were nonexistent.^{35/} At best, he referred to routes that were purportedly nonexistent at particular points. Rather, Miller appeared to indicate that routes were either hard-to-locate, at best, or nonexistent, at worst, but without identifying those that fit the latter category. He also did not specify the nonexistent routes in his subsequent declarations filed with the Board, dated May 30, and August 2, 2013. See 2d Miller Decl., ¶¶ 3, 10-19, 22 (“ONDA’s reports identify obscure routes”), at 2, 6-10; 3d Miller Decl., ¶¶ 13, 15, 17 (“Those few overgrown, nearly invisible routes that have seen mechanical maintenance sometime in the past have not seen maintenance or appreciable use for decades”), at 5-7.

We will not presume that routes did not exist when the CMPA was created because they were not noted on the original CMPA maps, because we find no evidence confirming that these maps represented “the universe of existing routes” at that time. 2d Miller Decl., ¶ 18, at 9; see 3d Miller Decl., ¶¶ 12, 16, at 4-5, 6. Rather, the TMP process was clearly designed to identify all existing routes, and to determine which were appropriate for designation as open to motorized travel. See EA at 3 (“The TMP will augment the CMPA Transportation Plan[,] . . . using an updated route inventory to further define the motor vehicle network within the CMPA”); Sherbourne Decl., ¶¶ 3-4, at 2 (“Prior to enactment of the Steens Act, BLM had no comprehensive transportation plan for the Steens [Mountain], but rather a partial listing of routes and an outdated map showing most but not all routes occurring on what Congress designated as the . . . CMPA. . . . A major component of the TMP Decision was the thorough inventory of existing routes.”). The TMP did so, identifying a total of approximately 61 miles of routes (15 miles in WSAs and 46 miles elsewhere in the CMPA (exclusive of WSAs and the Steens Mountain WA)) that had not been previously identified. See DR at 6.

Nor can it be presumed, based solely on Miller’s assertion, that “BLM inventoried only a fraction of the routes,” or that any of the routes designated as open

^{35/} Miller also stated, at page 2 of an earlier Dec. 14, 2007, declaration (AR 307-10), that the routes that ONDA had inventoried simply did not qualify as roads:

Some of these routes have been reclaimed by natural processes to the extent that they are no longer visible. The remaining routes are so rocky, eroded, and/or overgrown as to be inaccessible to all motorized vehicles except those specially manufactured for off-road travel. None of the routes have been maintained to insure relatively regular and continuous use.

See also Decl. of Brent Fenty, Executive Director, ONDA, dated July 19, 2010 (attached to Motion for Summary Judgment), ¶ 15, at 5 (“BLM’s decision to designate as open for motorized use routes that have been *almost entirely* naturally reclaimed due to years of nonuse” (emphasis added)).

to motorized travel were nonexistent, because the record adequately supports the conclusion that BLM, in fact, inventoried all 555 miles of routes now designated as open to motorized travel.

We have scrutinized the methodology employed by BLM to determine existing routes, whether roads or trails, on the public lands in the CMPA. We acknowledge that BLM did not survey all of the routes designated as open to motorized travel on the ground. Nonetheless, we conclude that BLM's methodology for determining routes to be designated was appropriate to the task, and yielded complete and accurate results regarding existing routes from which it could be determined whether they were, in appropriate instances, in existence on October 30, 2000, in the case of the CMPA, or October 21, 1976, in the case of the WSAs.

In its brief on judicial remand, BLM details the efforts it undertook to assess the accuracy of ONDA's conclusion that over 100 miles of routes, delineated by Miller, were nonexistent or obscure, while the question of injunctive relief was pending before the Court, but following the Court's remand to the Board.^{36/} See BLM Brief at 19-30; 5th Decl. of Rhonda Karges, Planning & Environmental Coordinator, Burns District, dated Aug. 12, 2011 (Ex. 137 attached to BLM Brief), ¶¶ 2-7, at 2-3; Decl. of William J. Pieratt, Supervisory Natural Resource Specialist, Andrews RA, dated July 22, 2011 (Ex. 152 attached to BLM Brief), ¶ 2, at 2; Decl. of Rob Sharp, Rangeland Management Specialist, Three Rivers RA, dated July 21, 2011 (Ex. 154 attached to BLM Brief), ¶ 3, at 2-3; Decl. of Autumn Toelle, Rangeland Management Specialist, Andrews RA, dated Aug. 10, 2011 (Ex. 156 attached to BLM Brief), ¶¶ 3, 6-8, at 2, 8; 2d Decl. of Kelly Hazen, GIS Specialist, Burns District Office, dated Aug. 12, 2011 (Ex. 149 attached to BLM Brief), ¶¶ 3, 4, 6-8, at 2, 3; 2d Hazen Decl., Exs. A (Maps of ONDA's Nonexistent/Obscure Routes) and B (Allotment Maps).

^{36/} ONDA argues that the Board is precluded from considering any efforts by BLM to bolster, on judicial remand, the record evidence supporting the TMP decision, since the only question properly before the Board is whether the decision had a rational basis *at the time the decision was made*. See Reply Brief at 14-18. We have long held that the Board is not so constrained. Until the Board issues its final decision in this matter, there is no final Departmental action. See *Nat'l Wildlife Fed'n*, 145 IBLA 348, 361-62 (1998); *Benton C. Cavin*, 83 IBLA 107, 114-15 (1984) (citing *In Re Lick Gulch Timber Sale*, 72 IBLA 261, 273 n.6, 90 I.D. 189, 196 n.6 (1983)). We have permitted the record to be supplemented by BLM during the original pendency of an appeal or later on judicial remand, for the purpose of demonstrating that its decision was adequately supported, failing which the decision may be set aside and case remanded to BLM for further adjudication. See, e.g., *Briggs v. BLM*, 99 IBLA 137, 141-42 (1987), and cases cited. It has been permitted to do so here.

BLM states that, initially, Hazen obtained GIS locational data from ONDA regarding the routes, and prepared maps that could be used in verifying the accuracy of ONDA's report of nonexistent or obscure routes. Each of the routes at issue was identified by using a unique route identifier, either BLM's original TMP route number (e.g., 19), ONDA's route number (e.g., BC75), or a new route identifier (e.g., EEE). Thereafter, under Karges' direction, BLM sought to confirm the status of the nonexistent or obscure routes. Such efforts were documented in 81 CMPA Route Analysis Forms (18 CMPA Route Analysis Forms attached to BLM Brief; and Exs. A through KKK attached to Karges Decl.), and a database spreadsheet listing all of the nonexistent or obscure routes (Ex. LLL attached to Karges Decl.). BLM reports that, in the case of each of the nonexistent or obscure routes, "BLM staff identified the location of the route on a map and on an aerial photograph," and also described the purpose served by the route.^{37/} BLM Brief at 20; *see id.* at 20-29, 31.

As might be expected, given that much of the public lands in the CMPA (outside the No Livestock Grazing Area in the Steens Mountain WA) are covered by 40 grazing allotments, most of the allegedly nonexistent or obscure routes reportedly provide access to the grazing permittees, for the purposes of monitoring and maintaining fences, reservoirs, and other rangeland improvements, and to BLM, for the purposes of rangeland monitoring, maintaining grazing improvements, and grazing management.^{38/} While such routes may not be used or maintained on a

^{37/} BLM states that Ex. LLL "documents the route ID, map location, mileage, purpose, and additional information for each of ONDA's . . . allegedly obscure routes," with Exs. A through KKK adding, in the case of most of the routes, "map reference number, township and range, the route setting and visibility (due to precipitation, tree cover, etc.), primary purpose, a map, and an aerial photograph." BLM Brief at 21.

^{38/} BLM states:

Virtually all of the CMPA—outside of the no-grazing Wilderness area designated by the Steens Act—is within a grazing allotment. . . . There are close to 40 grazing allotments with acreage within the CMPA. . . . Allotments are broken up into pastures and within these areas are fences, watering facilities, salt licks, monitoring points, and other improvements. Grazing management requires adequate access for the BLM and the permittee to move cattle into and out of pastures; ability to monitor and manage cattle while they are on the pastures; and access for maintenance of fences, water developments, and other improvements. [Emphasis added.]

BLM Brief at 30; *see* SAR 5108-5145; 2d Hazen Decl., Ex. B (Allotment Maps); 2d Decl. of Louis Clayburn, Range Management Specialist, Andrews RA, dated July 22, 2011 (Ex. 148 attached to BLM Brief), ¶¶ 2-5, at 2-3; 2d Decl. of Travis

(continued...)

regular basis by permittees and BLM, they are, undoubtedly, necessary in connection with longstanding grazing use and BLM's corresponding grazing management. The other prominent reported use of the routes is to obtain access for recreational purposes, which may also cause them to be used and maintained on an irregular basis. We find no basis for concluding that vegetative growth or other natural reclamation undermines or negates the presence of such routes for purposes of complying with the Steens Act.

ONDA proposed to BLM that certain routes it identified as overgrown or otherwise naturally reclaimed be either permanently closed or at least closed to public use, excepting grazing permittees or others needing to use the routes for specific purposes. See Miller Decl., ¶ 6, at 4; 2d Miller Decl., ¶¶ 6 (“We identified a very large number of routes that were eroded, washed out, difficult or dangerous to travel, causing resource damage, redundant, or simply naturally reclaimed due to nonuse over the years.”), 50 (“ONDA recommended that 137 miles of routes be closed to motorized travel and that an additional 176 miles be available for administrative/special permit use only (but closed to general public recreational use). Most of the routes that ONDA recommended for closures are hard to follow (*i.e.*, ‘obscure’) and are in roadless areas with wilderness character.”), at 5, 22-23; 3d Miller Decl., ¶ 10, at 4 (“BLM fails to document . . . that the routes are easy to follow and clearly defined.”); Decl. of Dr. Jonathan L. Gelbard, Professional Ecologist, dated July 16, 2010 (Ex. 4 attached to ONDA Brief), at Attachment B. ONDA's documentation does not establish that the routes are nonexistent, but rather suggests that, while they exist, ONDA prefers that they be wholly or partially closed.

ONDA argues that BLM's own inventory identified “many” routes that were nonexistent or obscure. ONDA Brief at 25 (citing AR 10289-97, 10299-328; and 2d Miller Decl., ¶¶ 43-48, at 20-22). It asserts that BLM ignored “the contrary scientific advice of the agency's own experts.” Reply Brief at 13. ONDA refers to Sherbourne's field notes. However, such notes constituted BLM's initial assessment of the condition of routes, which were then subjected to closer scrutiny, resulting in BLM's final route determinations. See 2011 WL 1654265, at *22 (“Sherbourne explained that he created these notes over time ‘to provide baseline information for the TMP[] EA.’” (quoting Sherbourne Decl., ¶ 6, at 3)). Those notes disclosed the existence of other routes, admitting that they were hard to locate. See Miller Decl., ¶ 33, at 14.

^{38/} (...continued)

Miller, Range Management Specialist, Three Rivers RA, dated Aug. 1, 2011 (Ex. 150 attached to BLM Brief), ¶¶ 2-4, at 2-3; AR 13403-13 (Allotment Table and Maps); AMU and Steens Mountain CMPA RMPs Appendices (A-O) and Maps, at Map S-16 (Range Improvements); AR 13291-301. Authorized grazing use totals approximately 74,367 animal unit months. See EA at 66-67.

Further, ONDA's analysis suffers fundamentally from the fact that it regards routes that are obscure as, in effect, nonexistent. Indeed, ONDA's expert, Miller, states that an obscure route is a route "that for practical purposes does not exist[.]" 2d Miller Decl., ¶ 44, at 20-21. That is simply not the case. While difficult or hard to locate on the ground, routes that are obscure do, in fact, exist.

ONDA argues that its own evidence demonstrated that other "routes just do not exist" or "exist only because BLM drew a line on a map for the first time during the TMP planning process." ONDA Brief at 25, 26. However, ONDA identified only a handful of routes that were purportedly nonexistent at the location it photographed on the ground.^{39/} In most cases, these nonexistent routes were shown to exist at other locations along the route. See AR 12965 and 12967-71 (8243-0-00), 12973-74 (8243-0-C0), 12981 (BC18), 12998 (BC2n12), 13113-17 (8247-0-1BA), 13127-28 (RMt-1), 13182 (BR2), 13190-91 (BR3), 13224 (SFDB8), 13241-52 and 13254 (8244-0-G0). In other cases, BLM properly states that ONDA's photographs undermine its claim because they were taken when the routes were covered by dense vegetative growth, though they, in fact, exist.^{40/} See BLM Brief at 32 (citing AR 13160 (8244-0-KA)). Further, the vast majority of the routes photographed confirm they exist on the ground at the location ONDA photographed, although they ranged from clearly existent to barely existent.^{41/} Nonetheless, they existed, and accordingly could be designated by BLM, pursuant to section 112(b) of the Steens Act.

In addition, we note that many, if not most, of the aerial photographs provided by Miller in support of his assertion that approximately 100 miles of routes were obscure or nonexistent, in fact, disclose the existence of a route. See Miller Decl., ¶¶ 23, 34-38, 43-44, at 10, 15-17, 18-19, Attachments D and F. The fact that the

^{39/} ONDA's photographs that purport to show nonexistent routes appear at AR 12966 (8243-0-00), 12972 (8243-0-C0), 12982 (BC18), 12995 and 13005 (BC41c), 12999 and 13000 (BC2n12), 13118 (8247-0-1BA), 13125 and 13126 (RMt-1), 13160 (8244-0-KA), 13181 (BR2), 13192 (BR3), 13220 (SFDB7), 13225 and 13272 (SFDB8), 13240 and 13283 (SFDB4), and 13253 (8244-0-G0).

^{40/} ONDA responds that its photographs were properly taken in the late summer/early fall, when the vegetative growth would have died back. See Reply Brief at 11, n.5. Plainly, the vegetation was still vigorous, indicating that the photographs should have been taken in the late fall/winter, in order to more accurately represent ground conditions.

^{41/} ONDA's photographs that show existing routes appear at AR 12950-65, 12967-71, 12973-81, 12983-94, 12996-98, 13001-04, 13008-91, 13094-117, 13119-24, 13127-30, 13133-59, 13161-80, 13182-91, 13193-94, 13197-205, 13208-19, 13221-24, 13226-39, 13241-52, 13254-57, 13263, 13265, 13266, 13268-70, 13274-78, 13280, 13281, 13285-90.

routes were overgrown or otherwise barely visible, had been lightly used, or even showed no signs of use, did not undermine the fact that they were in present existence. Indeed, Sherbourne stated that he disagreed with ONDA's assertion that more than 100 miles of routes designated as open to motorized travel are "so faint that BLM violated the law by recognizing their existence." Sherbourne Decl., ¶ 8, at 3. BLM states that it determined that "all designated 'pioneered' routes were in place at the time the CMPA was designated," having been created by use, not construction. BLM Brief at 33 (citing Sherbourne Decl., ¶ 14, at 5). Weighing the evidence submitted by BLM and ONDA, we conclude that the preponderance of the evidence supports BLM's determination that all of the more than 100 miles of allegedly obscure routes do, in fact, exist on the ground.

In these circumstances, the burden falls to any party challenging BLM's assessment of existing routes in the CMPA to demonstrate, by a preponderance of the evidence, that BLM erred in determining that a route was in existence, at the appropriate time. *See* 176 IBLA at 380. That burden may be carried by a sufficient demonstration that BLM's assessment of the status of the route was materially flawed or failed to consider relevant factors, because BLM did not survey the route or base its assessment on reliable evidence regarding the existence of the route, and/or any other reason adequately showing that BLM had failed, in some way, to properly determine the status of the route at the critical time. In order to meet its burden, the party challenging BLM's assessment must offer its own independent survey of the route, or other reliable evidence, demonstrating that the route was not, in fact, in existence at the critical time. It must come forward with evidence of its own contradicting BLM's assessment. After reviewing all of the evidence in the record, we find that the preponderance of the evidence weighs in favor of BLM's assessment of existing routes.

After careful review, we have determined that the inventory was complete and accurate, and that ONDA has failed to establish, by a preponderance of the evidence, any error in BLM's determination of the existence of routes, as of October 30, 2000, in the case of the CMPA and the Steens Mountain WA, and October 21, 1976, in the case of the WSAs. The record is "robust enough to permit reasoned analysis of BLM's route inventory." 2011 WL 1654265, at *23.

Finally, it is important that we underscore ONDA's statement on judicial remand that the "gravamen" of its challenge, before the Court and the Board, is that "BLM . . . issued a plan that designates 'roads' open to motorized use where none exist on the ground according to BLM's definitions and evidence in the record." ONDA Brief at 8-9; *see* 3d Miller Decl., ¶ 4, at 2 (ONDA's first major concern with BLM's TMP decision "relates to the presence of routes within the CMPA that exist and are visible, but do not meet BLM's wilderness definition of a road (*i.e.*, mechanically maintained to insure relatively regular and continuous use).").

In discussing “BLM’s definitions” of roads, ONDA cites primarily to the definition used in determining the areas of the public lands that qualify as “roadless areas” for purposes of WSA designation pursuant to section 603(a) of FLPMA: “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 vehicles does not constitute a *road*.” ONDA Brief at 9 (quoting Wilderness Inventory and Study Procedures Handbook, H-6310-1 (Rel 6-122 (1/10/2001))), at 9 (quoting H.R. REP. NO. 94-1163, at 17 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6175, 6191)).^{42/} ONDA asserts further that “[m]uch of the legal inadequacy of the TMP flows from this critical distinction between the two types of routes.” *Id.* However, as discussed below, it is clear to us that ONDA’s challenge to the TMP fails because of the legal inadequacy of the critical distinction ONDA attempts to make between trails or ways and roads.

ONDA challenges BLM’s designation of routes in the CMPA as open to motorized travel on the basis that BLM is improperly allowing motor vehicle use to occur not on roads, but on trails or other lesser routes.^{43/} However, what governs BLM’s designation of routes in the CMPA is not section 603(c) of FLPMA or sections 2(a) and 4(b) of the Wilderness Act, but section 112(b) of the Steens Act. “[R]oads and trails,” neither of which is defined in the Steens Act, may properly be designated for motorized use. 16 U.S.C. § 460nnn-22(b) (2006). We find no support

^{42/} BLM’s management of WSAs was originally guided by its Interim Management Policy for Lands under Wilderness Review (IMP). The IMP was first published in the *Federal Register* on Dec. 12, 1979 (44 Fed. Reg. 72,013). It was later amended in ways that are not pertinent to this case (48 Fed. Reg. 31,854 (July 12, 1983)), and then incorporated in a Handbook (H-8550-1 (Rel. 8-36 (Nov. 10, 1987))), which was part of BLM’s Manual. *See Comm. for Idaho’s High Desert*, 139 IBLA 251, 253 n.3 (1997). The Handbook was later issued as H-8850-1 (Rel. 8-67 (July 5, 1995)), which was in effect at the time of BLM’s November 2007 DR and the Board’s February 2009 decision. The 1995 Handbook appears at AR 12346-12408. The Handbook has since been replaced by BLM Manual 6330, Management of WSAs (Rel. 9-395 (7/13/2012)).

^{43/} ONDA’s focus on whether routes constitute roads very likely stems from the fact that it has long been engaged in promoting the designation of WSAs and other portions of the Steens Mountain area as wilderness, and is thus concerned with whether such lands may be considered roadless. *See, e.g.*, Miller Decl., ¶¶ 5, 7, at 3-4, 4-5; 2d Miller Decl., ¶¶ 7 (“In conducting our surveys, ONDA followed the BLM wilderness and route inventory procedures that were in effect at the time: those described in BLM’s 2001 *Wilderness Inventory Study and Procedures* handbook.”), 8 (“The BLM handbook includes further detail on what each of these elements of a road is, and we applied those elements in our inventory work.”), at 5.

for ONDA's attempt to insert the definition of roads applicable to BLM's management of WSAs and wilderness areas into the Steens Act. ONDA overlooks the fact that the Steens Act permits the designation of trails as open to motorized travel, completely bypassing the need to find a road appropriate for such designation. We find no justification for the "distinction" offered by ONDA. In the words of the Court in *ONDA v. Shuford*, BLM was required to develop "a comprehensive management system for travel over roads, ways, and trails" in the CMPA. 2007 WL 1695162, at *18 (emphasis added).

We conclude that, in all cases, BLM properly determined that the routes challenged by ONDA in fact *existed* at the appropriate time, even though they may have been hard to locate on the ground.

ONDA contends that designating Base Routes, Historical Routes, and ATV Routes as open to motorized travel violates the two express prohibitions of the Steens Act of (1) motorized off-road travel and (2) construction of new motorized roads and trails. Its basic argument is that, since the routes essentially *do not exist* on the ground, BLM's decision to designate them as open to motorized travel effectively permits, in the short-term, motorized off-road travel of the public lands encompassed by the routes, and provides, in the long-term, given the expected maintenance, for the construction of new motorized roads or trails on the public lands encompassed by the routes, contrary to the statute.

B. BLM's Designation of Roads and Trails as Open to Motorized Travel Did Not Violate the Steens Act

BLM is authorized by the Steens Act to designate roads and trails that were in existence at the time of enactment of the statute on October 30, 2000, as open to motorized travel. ONDA argues on judicial remand, however, that the Board should hold that BLM's designation of Base Routes, Historical Routes, and ATV Routes as open to motorized travel violates the Steens Act prohibitions of motorized off-road travel and construction of new motorized roads and trails for the same reason that we so held in the case of *Obscure Routes*. See ONDA Brief at 22-23. It states that such routes "have, like the *Obscure Routes*, 'fallen into obscurity' and 'have become almost entirely . . . obliterated' by natural processes," such that "BLM did not even attempt to establish that the routes were present on the landscape." *Id.* at 23 (quoting 176 IBLA at 387); see 2d Miller Decl., ¶¶ 14, 15, at 7-8.

1. Prohibition Against Off-road Motorized Travel

[1] Section 112(b)(1) of the Steens Act prohibits the use of any motorized or mechanized vehicles "off road" on public lands in the CMPA, limiting such use "to such roads and trails as may be designated for their use as part of the management

plan.”^{44/} 16 U.S.C. § 460nnn-22(b)(1) (2006). ONDA argues that the TMP violated this statutory prohibition by designating as open to motorized travel “more than 100 miles of routes” that have ceased to exist as admitted by BLM or otherwise documented in the record. ONDA Brief at 21. Referring specifically to Base Routes, Historical Routes, and ATV Routes that are difficult or impossible to locate on the ground, ONDA argues that for the “same reason” the Board concluded that BLM had improperly designated Obscure Routes as open to motorized use in violation of the Steens Act, the Board should now determine that these routes also violate the prohibition. *Id.*

Before addressing the question of whether BLM violated the statutory prohibition of motorized “off road” travel, we note that the Court acknowledged confusion in the statute regarding the meaning of “off road.” *See* 2011 WL 1654265, at *13-*14. The Court pointed out that section 112(b)(1) of the Steens Act not only prohibits motorized “off road” travel, but also permits motorized travel on designated “roads and trails.” The Court noted that, under the statute, motorized travel on trails appeared to be allowed, even though such travel apparently would violate the prohibition against motorized off-road travel. The Court left it to the Board to resolve this statutory conundrum, recognizing that it bears on the question of whether BLM properly designated as open to motorized travel both Obscure Routes, defined as hard to locate or not found on the ground, and Historical Routes, defined as hard to locate and/or not identified during the WSA inventory process, an issue the Board did not adjudicate in its decision, but which ONDA asserts is covered by the statutory prohibition.^{45/}

^{44/} Section 112(b)(2) of the Steens Act, 16 U.S.C. § 460nnn-22(b)(2) (2006), permits motorized travel off-road and over undesignated roads or trails in certain limited circumstances. However, none of these exceptions is applicable here, since we are only concerned with motorized travel on designated roads or trails.

^{45/} The Court highlighted the need to resolve the question of what is covered by the statutory prohibition of motorized off-road travel in the case of both Obscure Routes and Historical Routes:

I note flaws in the general thrust of th[e] argument [regarding the applicability of the statutory prohibition to Obscure Routes and Historical Routes] embraced both by the IBLA and ONDA, since it does not consider all the relevant language of [the] Steens Act.

. . . .

. . . While § 460nnn-22(b)(1)(A) prohibits motorized “off road” travel, § 460nnn-22(b)(1)(B) permits motorized travel on “roads *and trails*” designated by the transportation plan. Thus, in the same breath, the Steens Act bans motorized vehicles on anything but “roads,” yet

(continued...)

Clearly, given the Court's uncertainty regarding the meaning of motorized "off road" travel, we must conclude that Congress' intent is not "unambiguously expressed," and that therefore the plain language of the statute does not control the matter. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). Rather, we must look to the statute as a whole and other evidence of Congressional intent.

It is a fundamental principle of statutory construction that all of the language in a statute is deemed to have meaning, such that no language is considered to be surplusage. See *Bennett v. Spear*, 520 U.S. 154, 173 (1997) ("It is the 'cardinal principle of statutory construction' . . . [that] [i]t is our duty 'to give effect, if possible, to every clause and word of a statute' . . . rather than to emasculate an entire section" (quoting *U.S. v. Menasche*, 348 U.S. 528, 538 (1955))); *Art Anderson (On Reconsideration)*, 182 IBLA 27, 31, n.6 (2012). Thus, where there is an apparent conflict in the language of a statute, such that the statutory provisions "are in certain respects inconsistent," that conflict must be reconciled to give effect, to the fullest extent possible, to the entirety of the statute. *Art Anderson (On Reconsideration)*, 182 IBLA at 31 n.6 (quoting *Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 871 (D.C. Cir. 1979)). Here, we resolve the conflict between § 460nnn-22(b)(1)(A) and § 460nnn-22(b)(1)(B) by concluding that since the statute clearly meant to allow BLM to designate roads and trails as open to motorized travel, the prohibition against motorized off-road travel logically can only mean that motorized travel that *does not occur on either a road or a trail* is prohibited.^{46/} Were we to hold otherwise, BLM's decision to permit motorized travel on designated trails, which is fully compliant with § 460nnn-22(b)(1)(B), would be considered to be inconsistent with the prohibition against motorized off-road travel in § 460nnn-22(b)(1)(A).

^{45/} (...continued)

permits motorized vehicles on "trails." This inherent contradiction undercuts the IBLA's reasoning based on the definitions of Obscure Routes, and ONDA's proposed extension of that reasoning to Historical Routes.

2011 WL 1654265, at *14.

^{46/} We note that ONDA appears to agree with our statutory interpretation that prohibited motorized off-road travel occurs only when travel occurs where there is no road or trail, since it properly gives effect to the prohibition against motorized off-road travel *and* the permission for motorized travel on designated roads and trails. See ONDA Brief at 22 ("The only way there could be a contradiction [between § 460nnn-22(b)(1)(A) and § 460nnn-22(b)(1)(B)] is if § 460nnn-22(b)(1)(B) allows BLM to designate 'roads and trails' that do not exist [as open to motorized travel].").

In summary, BLM is barred from permitting motorized travel “off road.” However, BLM is clearly also authorized to permit the use of motorized or mechanized vehicles on Federal lands in the CMPA on “such roads *and trails* as may be designated for their use.”^{47/} 16 U.S.C. § 460nnn-22(b)(1) (2006) (emphasis added). BLM issued the TMP, permitting motorized travel on the designated routes, even though they may be “trails” and not “roads.” See DR at 6 (“This decision designates existing routes that can continue to be used by the public”), 9 (“As no cross-country vehicle travel is allowed within the CMPA, motorized/mechanized vehicle use would continue to be limited to previously established routes.”). BLM’s decision to designate routes on roads and trails as open to motorized travel does not constitute authorization of off-road use by motorized vehicles in violation of the express prohibition of section 112(b)(1) of the Steens Act.^{48/} Consequently, to the extent Obscure Routes constitute trails, their designation as open to motorized travel does not violate the statutory prohibition of motorized off-road travel.

2. Prohibition Against Construction of New Roads or Trails for Motorized Travel

[2] Section 112(d)(1) of the Steens Act also provides that “[n]o new road or trail for motorized or mechanized vehicles may be constructed on Federal lands in the [CMPA][.]” 16 U.S.C. § 460nnn-22(d)(1) (2006). Congress did not define the phrase “new road or trail.” However, it seems clear that a *new* road or trail is to be distinguished from a road or trail that was in existence at the time of enactment of the Act, *i.e.*, October 30, 2000.

ONDA argues that BLM’s adoption of the TMP violates the statutory prohibition against constructing new motorized roads and trails by authorizing the maintenance of routes that had ceased to exist, whether those routes are Obscure Routes, Historical

^{47/} We conclude that the Court was right to suggest that, even though a route was hard to locate on the ground, and thus could not constitute a road, so long as it existed, and thus could constitute a trail, it could still be designated as open to motorized travel under section 112(b) of the Steens Act. See 2011 WL 1654265, at *14.

^{48/} In resolving the question of whether BLM properly designated Obscure Routes as open to motorized travel, the Board employed a strict definition of the statutory phrase “off road,” concluding that since such routes, which are defined as hard to locate or not found on the ground, cannot be considered “roads,” under any useful definition, any motorized travel on such routes must be considered off-road. See 176 IBLA at 385-87. This is at odds with the statutory language allowing “[t]he use of motorized or mechanized vehicles . . . [on] such *roads and trails* as may be designated for their use as part of the management plan.” 16 U.S.C. § 460nnn-22(b)(1) (2006) (emphasis added).

Routes, ATV Routes, or any other route. ONDA maintains any efforts to restore to use any route that may have existed at one time, but no longer existed on October 30, 2000, by construction, maintenance, or otherwise, must be viewed as the construction of a new motorized road or trail in violation of section 112(d)(1) of the Act.

We now reject ONDA's approach as contrary to the statute and its legislative history. Congress did not specify that an existing road or trail is solely a route that could, when the Act was enacted, be found on the ground. There is nothing to suggest that Congress intended to exclude routes that clearly existed as a matter of record at that time and that might again be used in the future, despite a present difficulty in physically tracing them on the ground. We disagree with ONDA's unsupported assertion that Congress intended to exclude roads and trails that existed as a matter of record when the Steens Act was enacted.

We agree with ONDA that authorizing the use and maintenance of routes that never existed would violate the statutory prohibition of the construction of new motorized roads and trails. However, since we are now persuaded that all of the routes at issue, whether Base Routes, Historical Routes, ATV Routes, or Obscure Routes, existed at the time of enactment of the statute, in most cases on the ground, although they were difficult to locate, or as a matter of record, we conclude that BLM's designation of such routes as open to motorized travel does not violate the statutory prohibition against the construction of new motorized roads and trails.

ONDA asserts that BLM is permitted by the Steens Act to construct or maintain trails "but only for 'nonmotorized or nonmechanized use.'" ONDA Brief at 22; *see id.* at 23; Reply Brief at 36. In ONDA's view, once a route has ceased to qualify as a road and falls to the status of a trail, or otherwise constitutes a trail, any authorization of motorized travel and related maintenance exceeds this statutory authority. ONDA cites 16 U.S.C. § 460nnn-22(d) (2006), which, in subsection (d)(1), prohibits the construction of new trails for motorized or mechanized use, except in very limited circumstances, and which, in subsection (d)(2), further provides that "[n]othing" in subsection (d) is "intended to limit the authority . . . to construct or maintain trails for nonmotorized or nonmechanized use."

We agree that subsection (d) significantly restricts the construction of new trails for motorized or mechanized use and allows new trails to be constructed only for non-motorized or non-mechanized use. However, it is not correct that BLM violates the statutory prohibition by allowing motorized travel and related maintenance on an existing trail, or that the statute restricts the use of existing trails to non-motorized and non-mechanized use. To so hold would be contrary to 16 U.S.C. § 460nnn-22(b) (2006), which allows the use of motorized or mechanized vehicles on designated "roads and trails." Thus, while BLM may not authorize the construction of new trails for motorized or mechanized use where a route never

existed, it may authorize the use of trails for motorized or mechanized use where an existing road has been naturally reclaimed to the point that it becomes an *existing trail*.

The Court noted that, given the Board's determination that BLM's decision to authorize motorized travel on Obscure Routes violated the off-road prohibition, we might conclude that BLM's decision to authorize motorized travel on Historical Routes, which were also defined as those routes that were either hard to locate or not identified during the WSA inventory process, equally violated the off-road prohibition.^{49/} See 2011 WL 1654265, at *14.

Consistent with the conclusion that we erred in holding that motorized travel on Obscure Routes is prohibited, we further hold that BLM's designation of Historical Routes as open to motorized travel does not violate the off-road prohibition. BLM has documented the existence of those Historical Routes. See BLM Brief at 39, 41-42. Further, ONDA now acknowledges that, since BLM has clarified that the Historical Routes are restricted to use by permittees, the designation of such routes as open to motorized travel does not run afoul of the statutory prohibition of motorized off-road travel, given the statutory exception at 16 U.S.C. § 460nnn-22(b)(2) (2006), for use in connection with constructing and maintaining agricultural facilities.^{50/} See Reply Brief at 33, 34 ("ONDA concedes that BLM permissibly designated Historical Routes in the CMPA outside of WSAs and Wilderness [Area]").

The Court further noted that the Board had failed to address ONDA's argument that BLM's designation of ATV Routes as open to motorized travel also violated the statutory prohibition against motorized off-road travel. ONDA asserts that because ATV Routes are defined as routes that are no longer safe for full-sized vehicles because of landslides or other natural erosion events, such routes are hard to locate or not found on the ground and, accordingly, are subject to the prohibition against motorized off-road travel. See 2011 WL 1654265, at *14. We again disagree with ONDA's

^{49/} ONDA also asserted that, by stating that "[n]ot all Historical Routes within the CMPA have been mapped," and thus were not identified during the WSA inventory process, BLM admitted that it "simply placed them on a TMP map without bothering to corroborate whether they exist on the ground." Brief at 22 (quoting EA at 12). By definition, Historical Routes include routes "not identified during the WSA inventory process." EA at 12. BLM, however, otherwise determined whether they were in existence. See *id.* ("[While not mapped], their use and need on public lands within the CMPA is recognized"). We find no evidence, and ONDA offers none, that BLM simply drew any routes on a map.

^{50/} ONDA properly states that the statutory exception is not available in the case of WSAs and the Steens Mountain WA. See Reply Brief at 34.

reasoning. BLM has documented the existence of the ATV Routes. See BLM Brief at 42-43. We find nothing in the definition of ATV Routes that indicates that they are necessarily hard to locate or not found on the ground. By definition, they exist, even though they may have been affected by landslides or other natural erosion events, making travel unsafe. In addition, travel is deemed unsafe only for full-sized motorized vehicles, not all motorized vehicles.

In particular, we find no basis in the record for ONDA's underlying premise that ATV Routes are the equivalent of Obscure Routes, and thus should be treated in the same manner by the Board. ATV Routes are not routes that "have been *destroyed* by 'landslides and natural erosion events' and 'are no longer safe for full-sized vehicles.'" ONDA Brief at 23 (quoting EA at 13) (emphasis added). Rather, they are routes that have been *affected* by landslides and natural erosion events to the point that they are no longer safe for full-sized vehicles. The Court noted that it appeared that the definition of ATV Routes focused on whether they were safe for use by full-sized vehicles as a consequence of damage by natural forces, "rather than their existence on the landscape." 2011 WL 1654265, at *14. That is exactly the case. ATV Routes are not routes that are difficult or impossible to locate on the ground, and accordingly are not like Obscure Routes. See BLM Brief at 43 ("BLM did not state that ATV [R]outes are similar to Obscure Routes or hard to find on the ground" (citing EA at 13)). We thus find no basis in the record to treat them like Obscure Routes, under any circumstances.

We conclude that BLM's designation of Obscure Routes, Historical Routes, ATV Routes, and other routes does not violate the statutory prohibition against motorized off-road travel and construction of new motorized roads and trails. BLM has documented the existence of all of these routes as of October 30, 2000. Because there is no evidence that BLM has authorized the use or maintenance of any routes that never existed we find no statutory violation. So long as a route existed as a matter of record, the fact that it has become overgrown or otherwise has been reclaimed by natural processes, which affects the degree to which it might be restored to full use by blading or other means, does not render it a new route or its use a "*de facto* construction of new roads." Reply Brief at 4. Nor does BLM's authorization of blading or other maintenance of a route that existed at the time of enactment of the Steens Act, either on the ground (although obscure) or as a matter of record (although apparently nonexistent), even where it dramatically improves the ability to follow the route on the landscape, constitute impermissible new construction. The use of any such route is not properly characterized as "off-road" within the meaning of the Act.

C. BLM Did Not Violate FLPMA's Non-Impairment Mandate

WSAs, defined as roadless areas of 5,000 acres or more with wilderness characteristics as identified by section 2(c) of the Wilderness Act, 16 U.S.C. § 1131(c)

(2006), were designated pursuant to section 603(a) of FLPMA. BLM was required to complete the section 603(a) designation process before the statutorily-imposed deadline of October 21, 1991, 15 years after enactment of FLPMA on October 21, 1976, whereupon the Secretary of the Interior was required to make recommendations to the President regarding designation of WSAs as WAs. The President would, when appropriate, propose designation to Congress. *See, e.g., Zenda Gold Corp.*, 155 IBLA 64, 71 (2001). Thereafter, during the period prior to Congressional action to approve or disapprove wilderness designation of WSAs, section 603(c) of FLPMA requires BLM to manage WSAs “in a manner *so as not to impair the suitability of such areas for preservation as wilderness*, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the same manner and degree in which the same was being conducted on October 21, 1976.” 43 U.S.C. § 1782(c) (2006) (emphasis added); *see ONDA v. BLM*, 625 F.3d 1092, 1098 (9th Cir. 2010); *Zenda Gold Corp.*, 155 IBLA at 71-72; *3R Minerals*, 148 IBLA 229, 231 (1999), *aff’d sub nom. Reeves v. U.S.*, 54 Fed. Cl. 652 (Fed. Cl. 2002).

[3] Section 204(b) of the Steens Act, 16 U.S.C. § 460nnn-64(b) (2006), requires BLM to manage WSAs in the CMPA consistent with the non-impairment mandate of section 603(c) of FLPMA. BLM is precluded, in the case of existing WSAs, from designating routes as open to motorized travel where doing so is likely to impair the suitability of the area for wilderness designation. *See The Wilderness Soc’y*, 176 IBLA 358, 364 n.14 (2009). However, even were impairment likely to occur, BLM is permitted to allow the use of motorized vehicles in the WSAs in connection with continuation of existing grandfathered uses in the same manner and degree in which they were being conducted on October 21, 1976. *See Zenda Gold Corp.*, 155 IBLA at 72. We noted in *Zenda Gold* that “[i]t is significant that the statute is referring to *actual existing uses*, as distinguished from statutory rights to use the land, when it authorizes continuation of existing uses in the same manner and degree.” *Id.* (emphasis added).

Generally speaking, we agree that designating Historical Routes or other routes as open to motorized travel when those routes did not exist on October 21, 1976, authorizes a use that is likely to impair the suitability of the public lands at issue for wilderness preservation. However, BLM is authorized to allow “primitive vehicle routes (‘ways’)” in existence on October 21, 1976, to remain in WSAs during the period of wilderness review, since they were not regarded at the time of inventory as impairing the suitability of the WSA for wilderness designation: “There is nothing in this IMP that requires such facilities to be removed or discontinued.”^{51/} H-8850-1

^{51/} While questions are raised regarding whether the routes at issue in the WSAs were in existence on Oct. 21, 1976, it is undisputed that none of these routes constitutes a road. Nor could they, since WSAs are, by definition, “roadless areas” of

(continued...)

(Rel. 8-67 (July 5, 1995)), I.B.7., at 12; *see* BLM Manual 6330 (Rel. 9-395 7/13/2012), at 1-27 (Motorized use is likely non-impairing “on primitive routes (or ‘ways’) identified by the BLM as existing on October 21, 1976.”); *The Wilderness Soc’y*, 176 IBLA at 364 n.14; *S. Utah Wilderness Alliance*, 142 IBLA 164, 165 (1998); *Uintah Mountain Club*, 112 IBLA 287, 292 (1990); *Cal. Wilderness Coal. (On Reconsideration)*, 105 IBLA 196, 202 (1988); DR at 9 (“Ways within WSAs, including Obscure Routes[,] remain available for public motorized and mechanized travel.” (Emphasis added.) Further, such ways may continue to be used and maintained for motor vehicle use: “[Existing ways] may be used and maintained as before, as long as this does not cause new impacts that would impair the area’s wilderness suitability.” H-8850-1 (Rel. 8-67 (July 5, 1995)), I.B.7., at 12; *see The Wilderness Soc’y*, 176 IBLA at 364 n.14.

ONDA argues that BLM’s designation of Historical Routes and other routes in the WSAs within the CMPA as open to motorized travel violates the non-impairment mandate of section 603(c) of FLPMA where the routes are *either* nonexistent, having never existed or having ceased to exist, *or* existent, but were not in existence on October 21, 1976. ONDA further contends that designation of routes that were in existence on October 21, 1976, as open to motorized travel violates the non-impairment mandate where they are not permitted for use in connection with grandfathered uses “in the same manner and degree in which the same was being conducted on October 21, 1976.”^{52/} 43 U.S.C. § 1782(c) (2006); *see* 2011 WL

^{51/} (...continued)

the public lands. 43 U.S.C. § 1782(a) (2006); *see ONDA v. BLM*, 625 F.3d at 1107 (“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.”). Rather, they clearly constitute trails.

^{52/} In deciding whether the designation of routes other than Historical Routes in the WSAs violates the non-impairment mandate of section 603(c) of FLPMA, we include Obscure Routes in our adjudication. In our original decision, we concluded that the designation of Obscure Routes as open to motorized travel violated the non-impairment mandate of section 603(c) of FLPMA “[f]or the reasons previously given as to why BLM’s designation of the Obscure Routes as open to motorized use violates the Steens Act.” 176 IBLA at 392-93. Those reasons were that the designation of such routes resulted in the authorization of motorized off-road travel and construction of new motorized roads and trails. Since we have now concluded that BLM properly designates Obscure Routes as open to motorized travel where they constitute existing trails, we think that BLM may designate Obscure Routes in the WSAs where they constituted existing trails on Oct. 21, 1976.

The Court noted that, in challenging BLM’s designation of routes in the WSAs as open to motorized travel, ONDA took particular exception to pioneered routes,

(continued...)

1654265, at *15-*17; Reply Brief at 20 (“ONDA has no problem with the TMP’s designation of existing primitive routes including ways within Wilderness Study Areas”).

The critical issue in determining whether BLM’s designation of WSA routes as open to motorized use violates the non-impairment standard of FLPMA is whether the routes were in existence on October 21, 1976, and whether continued use and maintenance for motorized travel is likely to impair the suitability of the WSAs for preservation of wilderness, or, even in the event of impairment, whether such use and maintenance is permissible because it allows grandfathered uses to continue in the manner and degree in which the same was being conducted on October 21, 1976. Given the present record, the overriding consideration is whether the WSA routes that BLM designated as open to motorized travel were existing ways that are to be used in the future in the same manner and degree as was occurring on October 21, 1976. In that situation, there clearly is no issue of impairment of the suitability of any of the WSAs for wilderness preservation, and accordingly no violation of the non-impairment mandate of section 603(c) of FLPMA.^{53/}

^{52/} (...continued)

which were not constructed, but rather created by use after Oct. 21, 1976. *See* 2011 WL 1654265, at *17. We accept that any route that came into existence after Oct. 21, 1976, whether constructed or created by use, would equally qualify as a route that did not exist on Oct. 21, 1976.

^{53/} *See* EA at 11 (“15 miles of WSA ways[] were found and added to the transportation network The ways were originally identified during the wilderness inventory in the early 1980s.”), 12 (“About 15 miles of well-defined WSA ways were located during the route inventory These additional WSA route miles . . . were identified during the WSA inventory process in the early 1980s. . . . The [Obscure] [R]outes in WSAs were identified in the original WSA inventory. . . . The[] [Historical] [R]outes represent the same manner and degree of vehicle travel that was occurring at passage of the FLPMA on October 21, 1976.”), 19 (“Much of Steens Mountain and the CMPA has been grazed by domestic livestock for over 100 years and motorized vehicle use by grazing permittees of Base and Historical Routes occurred prior to the passage of the FLPMA. Even with use of these routes by grazing permittees, several inventoried ways have become difficult to locate on-the-ground and are now identified as Obscure Routes”), 20 (“[I]nfrequent motorized vehicle use of . . . Historical Routes by grazing permittees would continue. This use has not resulted in observable routes. Continuing this use in the same manner and degree should not establish observable routes.”), 21, 22 (“Overall, motorized use of travel routes proposed under [the proposed action] . . . is not expected to contribute to impairment of WSA suitability for wilderness

(continued...)

BLM concluded that designating the routes in the WSAs as open to motorized travel would not violate the non-impairment mandate because the routes were in existence on October 21, 1976, and would continue to be used in the same manner and degree as was occurring on that date.^{54/} We find no fault with BLM's methodology or conclusions. To the contrary, the record demonstrates the care with which BLM evaluated the routes in the WSA's in terms of these criteria. Since all of the WSA routes were considered to be "ways," rather than "roads," they did not, on October 21, 1976, or thereafter, impair the suitability of the WSAs for wilderness preservation.

The Court stated that the Board needed to address the question of whether Historical Routes are defined as routes used by all members of the public or only grazing permittees to determine the nature of BLM's designation of the routes as open

^{53/} (...continued)

designation."); DR at 4 ("All Obscure Routes in WSAs were identified as 'Ways' as part of the original WSA inventories conducted in the early 1980s. The WSAs were designated with these routes in place. Leaving Obscure Routes in place will not degrade the wilderness values that initially qualified the areas for designation as a WSA. . . . Historical Routes are used only in support of permitted livestock grazing activities and constitute use 'in the same manner and degree' as occurred when . . . [FLPMA] provided for the inventory and designation of WSAs."), 5, 6 ("The inventory also discovered about 15 miles of WSA ways that were part of the WSA inventory but not included on public use maps."), 7 ("No new motorized access into WSAs would be established."), 9 ("Implementation of the decision would not result in an appreciable change from current use of motorized . . . travel routes."), 10 ("Motorized use of existing travel routes under the decision is not expected to prevent parcels from retaining wilderness characteristics."), 11 ("To carry out grazing permits, authorized permittees may use Permit Routes and Historical Routes within WSAs . . . to the same manner and degree as occurring at passage of the FLPMA on October 21, 1976."), 14; Sherbourne Decl., ¶¶ 13 ("About 15 miles of well-defined ways in or adjacent to [WSAs] were also located during the TMP . . . process."), 15 ("I reviewed documentation during the TMP . . . process indicating that various routes in . . . WSAs . . . were established grazing routes."), 18 ("I did not recommend addition of any routes to WSAs beyond those found in the original WSA inventory."), 20, at 5, 6, 7.

^{54/} Since motor vehicle use of all of the WSA routes was determined not to impair the wilderness suitability of the affected lands as of Oct. 21, 1976, and continued use in that same manner and degree will not impair wilderness suitability, there is no need to address the question of whether, *even if it was impairing*, such use may be permitted to continue in the same manner and degree as was occurring on Oct. 21, 1976.

to motorized use by members of the public or only grazing permittees, depending on the type of use, if any, on October 21, 1976. The Court stated that ONDA's concerns would be valid "[i]f . . . the TMP either (1) establishes Historical Routes that were not used by grazing permittees prior to the FLPMA and are now opened to grazing permittees, or (2) permits the general public to travel on Historical Routes that were previously used only by grazing permittees." 2011 WL 1654265, at *16.

We find that Historical Routes are properly defined as routes in existence on October 21, 1976, that are now designated for use only by grazing permittees, in the same manner and degree as was occurring on that date. The record amply demonstrates that BLM followed these criteria.^{55/}

In our February 2009 decision, we held that BLM's designation of Obscure Routes as open to motorized travel violated the FLPMA non-impairment mandate because the authorization of motorized travel on routes that have ceased to exist "re-establishes motorized passage, and will likely impair the suitability of the WSAs for designation as wilderness." 176 IBLA at 392. We now abandon that reasoning, holding that BLM may properly designate Obscure Routes that existed, either on the ground or as a matter of record, on October 21, 1976, as open to motorized travel even where they are currently obscure or nonexistent on the ground, but yet exist as a matter of record. ONDA argues that the same reasoning is applicable in the case of

^{55/} See EA at 12 ("The [Historical] [R]outes have been used to . . . administer livestock grazing permits. . . . These routes represent the same manner and degree of vehicle travel that was occurring at passage of the FLPMA on October 21, 1976. Not all Historical Routes within the CMPA have been mapped; however, their use and need on public lands within the CMPA is recognized."), 13 ("Historical Routes inside and outside WSAs[,] but excluding designated wilderness, remain available to livestock operators to the same manner and degree that was occurring at the passage of the FLPMA on October 21, 1976."), 17, 36 ("Historic[al] Routes . . . are seldom used, and mostly by grazing permittees, but are not considered routes open to the general public."); DR at 4 ("Historical Routes are used only in support of permitted livestock grazing activities."), 12 ("To carry out grazing permits, authorized permittees may use Permit Routes and Historical Routes within WSAs . . . to the same manner and degree as occurring at passage of the FLPMA on October 21, 1976."); Sherbourne Decl., ¶ 19, at 6 ("My recollection is that Historical Routes were often faint or hard to locate on the ground. This reflected that they were used infrequently, and only by grazing permittees. . . . Historical Routes are not available for public motorized use."); BLM Brief at 6 ("Historical Routes . . . are designated to carry out livestock grazing permits, . . . but *cannot be used by the public.*" (emphasis added)), 37, 38 ("Historical Routes are only available to permittees."); 3d Miller Decl., ¶ 18, at 7 ("ONDA accepts BLM's clarification that [Historical Routes in WSAs] are not available for public use.").

Historical Routes and other routes in the WSAs that either “(1) have fallen into obscurity on the landscape or (2) were created after the time the WSAs were established.” ONDA Brief at 26. It states that, in the seven WSAs of the CMPA, there are “many” routes that had fallen into obscurity and an “unknown” number of routes that were created after the WSAs were established. *Id.* at 27.

ONDA does not specifically identify all of the routes in WSAs designated as open to motorized travel that violate the FLPMA non-impairment mandate, but rather argues that, since BLM failed to inventory from 300 to 400 miles of routes designated as open to motorized travel, “[m]any [of which] are in WSAs,” and since ONDA has documented “examples” of routes in WSAs that have fallen into obscurity, ONDA has “almost certainly” demonstrated that these examples “are not isolated instances of obscure routes being designated within WSAs.” ONDA Brief at 27. ONDA concludes that “[w]ithout an inventory of the condition of the routes declared open, BLM lacks factual support for its determination that opening routes in WSAs would not impair the suitability of those lands for wilderness protection,” and thus violates the non-impairment mandate. *Id.*

ONDA further states that the “exclusive evidence” regarding what routes existed on October 21, 1976, consists of BLM’s record of the inventory work undertaken between 1978 and 1981, which is reflected in BLM’s Wilderness EIS.^{56/} ONDA Brief at 28. However, it also notes that BLM has provided, as a matter of policy, that routes may be considered to have existed on October 21, 1976, where they were “‘identified in the original wilderness inventory’” or, “‘if not identified . . . [in the original wilderness inventory], [BLM] ha[s] documented proof that the route existed at that time.’” *Id.* (quoting BLM Manual 6330 (Rel. 9-395 (7/13/2012)), at 1-27). ONDA states that BLM does not cite to any evidence taken from the original wilderness inventory work, but offers only “a few, largely illegible maps created 30+ years later during the TMP process.” ONDA claims those maps are evidence regarding the routes in existence on October 21, 1976, or they show that the routes were obscure or nonexistent on that date. *Id.* at 29.

The record does not support ONDA’s broad criticism. BLM inventoried all of the routes in the WSAs, and determined that they existed on the ground and/or as a matter of record as of October 21, 1976, and are to be used in the future in the same manner and degree as was then occurring. ONDA offers no affirmative evidence that any of these routes was not in existence on October 21, 1976, because they never existed or were created after that date, in the absence of which we will not assume that routes that were hard to locate on the ground or that existed only as a matter of

^{56/} Volume I of BLM’s December 1989 Final Oregon Wilderness EIS appears at SAR 34-908. Volume I of BLM’s October 1991 Wilderness Study Report appears at SAR 909-1661.

record did not exist as of October 21, 1976. The fact that a route is currently obscure does not mean that it was not in existence on October 21, 1976, and it does not mean that the route no longer exists.

In general, ONDA does not dispute the fact that the Historical Routes and other routes in WSAs are *ways*, which have long been open to motorized travel, or that motorized travel on ways may continue to occur within WSAs. See Miller Decl., ¶ 7, at 2 (“The routes ONDA ha[s] recommended for closure currently consist[] of a vast network of ways.”). Nor does it demonstrate that such use will impair the suitability of the WSAs for wilderness preservation, and that BLM’s decision to designate the routes as open to motorized travel violates the non-impairment mandate of section 603(c) of FLPMA. BLM has adequately documented the existence of the Historical Routes and other routes as ways in the WSAs. BLM has further documented that all of these routes were in existence on October 21, 1976, and will be permitted for use in the same manner and degree as was occurring on that date. See 2011 WL 1654265, at *16 (“If indeed the TMP only allows grazing permittees to continue their pre-FLPMA access over what are now termed Historical Routes, I cannot see how those Historical Routes violate the FLPMA, especially since ONDA repeatedly conceded that ‘recollected’ historic use by permittees would not run afoul of the FLPMA.”).

ONDA offers as an “example” of routes in WSAs that BLM designated as open to motorized travel, but that had fallen into obscurity or come into existence after the WSAs were established, certain routes in the 14,545-acre Bridge Creek WSA (OR-2-87). ONDA Brief at 29; Reply Brief at 38. ONDA initially noted that, while BLM designated 11 Historical Routes, totaling approximately 12 miles, as open to motorized travel in the WSA, in the Wilderness EIS, BLM noted the existence of only 6 ways totaling approximately 7 miles, inventoried only 4 of these routes, and designated “*several*” routes that were not in existence at the time of establishment of the WSA.^{57/} ONDA Brief at 29 (citing DR at CMPA TMP Decision Map (AR 803); and

^{57/} ONDA also stated that, in designating routes in the WSA, BLM acted contrary to ONDA’s survey evidence. Only two of the cited photographs (AR 423, 433) purport to show a nonexistent route (BC41c) that was designated as open to motorized travel. Aside from the fact that they do not depict the entirety of the route, they do not reveal whether the route was in existence on Oct. 21, 1976. The remainder of the cited photographs purport to support ONDA’s claim that the routes are obscure or nonexistent. See AR 378-421, 424-32. However, in addition to not disclosing whether the routes were in existence on Oct. 21, 1976, they relate to routes either outside the boundaries of the WSA or not designated as open to motorized travel. See DR at CMPA TMP Decision Map (AR 803).

Wilderness EIS at 610, 627 (Map 2 (Bridge Creek WSA))).^{58/} BLM responded that it inventoried “at least” 9 routes in the Bridge Creek WSA that were in existence at the time of WSA designation: “BLM inventoried the four routes shown on SAR 5146 (routes[]3, 90, 158, 159) BLM also inventoried 5 additional Historical Routes: 88, 88T, 89, 89T, and 91. *See* AR 10323[] [and] AR 10319 (annotated field maps); AR 10293 (inventory field notes). *See also* AR 10329 (BLM map annotated with routes in WSA indicated).” BLM Brief at 44. ONDA counters that all or part of 6 routes (88T, 89T, 90, 91, 158, 159) were not in existence when the WSA was designated, as shown by BLM’s Wilderness Inventory map for the WSA. *See* Reply Brief at 38-39. ONDA also states that BLM cannot designate the remaining 2 routes, which were not inventoried by BLM at all, because they do not appear on BLM’s 1989 Wilderness Inventory map for the WSA. *See id.* at 39-40.

BLM’s Wilderness Inventory map discloses the existence of all or part of 4 routes (3, 88, 89, and 90). *See* Wilderness EIS at 627; AR 13291, 13292. Sherbourne’s field notes also referred to these routes as having been inventoried as part of the Wilderness Inventory. *See* Sherbourne Decl., dated Aug. 24, 2010, Attachment B, at 1, 5. The other routes to which BLM refers were, according to Sherbourne’s field notes, either inventoried as part of the Wilderness Inventory, but not disclosed on the Inventory map (91), or not originally thought to have been inventoried as part of the Wilderness Inventory (88T, 89T, 158, 159). *See* Sherbourne Decl., Attachment B, at 5; AR 10297. In addition, there are other routes to which BLM does not refer at all, which were not disclosed on the Inventory map. *See* DR at CMPA TMP Decision Map (AR 803). BLM has long since admitted that the Inventory map did not disclose all of the routes that were in existence on October 21, 1976. *See* EA at 11, 12. BLM has, however, determined whether there were other routes in existence in the WSAs on October 21, 1976, as revealed during the Wilderness Inventory. *See* DR at 6. It clearly did so in the case of the Bridge Creek WSA. *See* AR 10319, 10323, 10329; SAR 5146. ONDA has not shown that these other routes were not in existence on October 21, 1976.

The fact that the Historical Routes and other routes were already informally open to motorized travel did not detract from BLM’s original decision to designate the WSAs. We hold that BLM properly concluded that formally designating them as open to motorized travel in the TMP is unlikely to impair the suitability of the WSAs for designation as wilderness. *See, e.g.*, DR at 4, 10 (“Motorized use of existing travel routes under the decision is not expected to prevent parcels from retaining wilderness characteristics.”), 11, 16 (“[M]onitoring has not found significant damage to resources from use of the existing route system.”). This will certainly be the case, since all of the WSA routes will only be maintained so as to permit them to be used in the same manner and degree as they were on October 21, 1976. *See, e.g.*, DR at 4 (“This

^{58/} ONDA provided a more legible copy of Map 2 as Ex. 7 attached to its Reply Brief.

decision stipulates that Historical Routes may be used as long as their character does not change. In other words, use of Historical Routes cannot make them more obvious than they presently are.”), 7 (“Route conditions [in the WSAs] would not change.”), 10 (“Motorized use of existing travel routes under the decision is not expected to prevent parcels from retaining wilderness characteristics.”), 11 (“Historical Routes can be used as long as their character does not change.”), 12. Since the designated routes will generally be “maintained solely by the passage of [motorized] vehicles,” as they have in the past, rather than “improved and maintained by mechanical means to insure relatively regular and continuous use,” we are not persuaded that their current status will change from “ways” to “roads.”

D. BLM Did Not Violate the Wilderness Act Non-Impairment Mandate

[4] Section 202(a) of the Steens Act, 16 U.S.C. § 460nnn-62(a) (2006), requires BLM to manage the Steens Mountain WA in the CMPA in accordance with the Wilderness Act. Section 2(a) of the Wilderness Act, 16 U.S.C. § 1131(a) (2006), requires BLM to manage wilderness areas, *inter alia*, “for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas[] [and] *the preservation of their wilderness character.*” (Emphasis added.) Section 4(b) of the Wilderness Act, 16 U.S.C. § 1133(b) (2006), similarly provides that BLM, in managing wilderness areas, *inter alia*, “shall be responsible for *preserving the wilderness character of the area.*” (Emphasis added.) We agree that the statutory provisions effectively impose upon BLM a non-impairment mandate applicable to wilderness areas. See ONDA Brief at 5 (citing *High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d 630, 648 (9th Cir. 2004)).

We also note that section 4(c) of the Wilderness Act, 16 U.S.C. § 1133(c) (2006), provides, *inter alia*, that, except as provided in the Act,

there shall be . . . no permanent road within any wilderness area[,] . . . except as necessary to meet minimum requirements for the administration of the area for the purpose of this Act (including measures required in emergencies involving the health and safety of persons within the area), there shall be no temporary road, no use of motor vehicles, . . . [and] no other form of mechanical transport.
[Emphasis added.]

See, e.g., *Wilderness Watch*, 168 IBLA 16, 38-40 (2006). The statute clearly precludes any new road construction or motorized or mechanized vehicle use.

The Court noted ONDA’s argument that by designating Historical Routes, Permit Routes, and/or ATV Routes as open to motorized travel, BLM had violated the

non-impairment mandate of the Wilderness Act. *See* 2011 WL 1654265, at *17. The Court stated that this argument pertained to specific routes in the Steens Mountain WA, namely, five routes (either Historical Routes or Permit Routes) and ATV Routes in the Indian Creek Road Area, all of which were deemed to have ceased to exist by virtue of natural reclamation by the time the WA was created. The Court observed further that ONDA had raised the issue of whether, in designating routes in the WA as open to motorized travel, BLM had failed to comply with the Congressional “Grazing Guidelines” (Guidelines) concerning the administration of grazing use in the WA, which were made applicable by the Steens Act. *See id.* As a related issue, the Court noted that BLM had questioned whether ONDA’s objection to the designation of any routes in the WA, for the purpose of facilitating grazing use, was barred because ONDA had failed to pursue a separate appeal from a BLM grazing decision. *See id.* The Court declined to resolve any of these questions, leaving them to the Board.

Concerning grazing use in the WA, section 202(d)(1) of the Steens Act, 16 U.S.C. § 460nnn-62(d)(1) (2006), allows authorized grazing use that was in place when the WA was designated on October 30, 2000, to continue in the WA, other than in the designated No Livestock Grazing Area.^{59/} The Steens Act provides that grazing use in the WA shall be administered in accordance with section 4(d)(4) of the Wilderness Act, 16 U.S.C. § 1133(d)(4) (2006).^{60/} Section 4(d)(4) of the Wilderness Act further provides, subject to reasonable regulation, for the continuation of existing grazing use.^{61/}

^{59/} The No Livestock Grazing Area was excepted from the allowance of continued grazing use by 16 U.S.C. §§ 460nnn-23(e)(2) and 460nnn-62(d) (2006).

^{60/} Section 4(d)(4) of the Wilderness Act also allows BLM to, *inter alia*, authorize prospecting for water resources, the establishment and maintenance of reservoirs, water-conservation works, . . . and *other facilities needed in the public interest, including the road construction and maintenance essential to development and use thereof*, upon [the] . . . determination that such use or uses . . . will better serve the interests of the United States and the people thereof than will its denial

16 U.S.C. § 1133(d)(4) (2006) (emphasis added). Section 4(d)(4) thus provides an exception, in appropriate circumstances, to the general preclusion in section 4(c) of temporary and permanent roads in wilderness areas. We find no evidence that BLM sought to invoke this authority with respect to any roads in the Steens Mountain WA.

^{61/} While section 4(d)(4) of the Wilderness Act provides for the continuation of grazing use in existence at the time of the Sept. 3, 1964, enactment of that Act, section 202(a) of the Steens Act provides that any reference to the effective date of

(continued...)

Section 202(d)(1) of the Steens Act requires BLM to administer grazing use in accordance with not only section 4(d)(4) of the Wilderness Act, but also the Steens Act, 16 U.S.C. §§ 460nnn-460nnn-122 (2006), and “the guidelines set forth in Appendices A and B of House Report 101-405 of the 101st Congress.”^{62/} 16 U.S.C. § 460nnn-62(d)(1) (2006). In addition to allowing the continuation of existing grazing, the Guidelines, *inter alia*, allow motorized vehicle use, for the purpose of maintaining fences and reservoirs and achieving other legitimate grazing aims, to occur “in those portions of a wilderness area where they had occurred *prior to the area’s designation as wilderness.*”^{63/} H.R. REP. NO. 101-405, at 42 (emphasis added). However, the Guidelines state that “maintenance or other activities may be accomplished through the occasional use of motorized equipment” only “[w]here practical alternatives do not exist,” adding that “[t]he use of motorized equipment should be based on a rule of practical necessity and reasonableness.” *Id.* The Guidelines further state that the use of motorized equipment may occur “where . . . such use would not have a significant adverse impact on the natural environment.” *Id.* Thus, while motor vehicle use could be permitted on existing routes in the WA, provided it furthers legitimate grazing aims, any such use was carefully circumscribed.

On judicial remand, ONDA challenges BLM’s designation of 12.8 miles of Historical Routes and “several miles” of ATV Routes “in the Indian Creek Road Area” as open to motorized travel in conjunction with authorized grazing use. *See* ONDA Brief at 31, 32. ONDA argues that, since the Historical Routes “are, by definition, obscure on the landscape,” designation will reestablish motorized vehicle use within the WA, contrary to sections 2(a) and 4(b) of the Wilderness Act and the Guidelines. ONDA contends that 5 of the Historical Routes (Routes 4 and 141 through 144) were not in existence when the WSAs, in which they were situated, were established, or later when the WA was created.^{64/} *See* ONDA Brief at 32; Reply Brief

^{61/} (...continued)

the Wilderness Act “shall be deemed to be a reference to October 30, 2000,” the date of enactment of the Steens Act. 16 U.S.C. § 460nnn-62(a) (2006).

^{62/} Appendix A of the House Report appears at AR 715-16.

^{63/} The Guidelines gave as examples of the permitted use of motorized equipment the following: “[T]he use of backhoes to maintain stock ponds, pickup trucks for major fence repairs, or specialized equipment to repair stock watering facilities.” H.R. REP. NO. 101-405, at 42 (1990).

^{64/} ONDA notes that section 202(c) of the Steens Act, 16 U.S.C. § 460nnn-62(c) (2006), permits the designation of routes as open to motorized travel even where they were not in existence when the WA was created in 2000 when they provide “reasonable access to private lands within the boundaries of the Wilderness Area.”

(continued...)

at 40-42; AR 10289, 10296; Miller Decl., Attachment E, at 1, 9; Sherbourne Decl., Attachment B, at 1; Final Oregon Wilderness EIS, Vol. I, at 550 (Map 2, Home Creek WSA (OR-2-85H)), 593 (Map 2, Blitzen River WSA (OR-2-86E)); Wilderness Study Report, Vol. I, at 313 (Map-1 (Home Creek Proposal)), 328 (Map-1 (Blitzen River Proposal)); SAR 5146.^{65/} ONDA further argues BLM has no evidence regarding any of the other Historical Routes. See Reply Brief at 41.

In addition, ONDA claims that the Indian Creek Road has “fallen into such disrepair[] [that] BLM . . . decided to ‘[c]onvert’ the route to an ATV ‘trail,’” and that BLM admitted the ATV Routes are obscure on the landscape. ONDA maintains that BLM’s designation of several miles of ATV Routes in the Indian Creek Road Area as open to motorized travel will reestablish motorized vehicle use within the WA, contrary to sections 2(a) and 4(b) of the Wilderness Act and the Guidelines. ONDA Brief at 32 (quoting Sherbourne Decl., Attachment B, at 2; and citing EA at 13).

BLM counters that the record includes documentation showing that all of the Historical Routes in the WA were in existence on October 30, 2000, and even as of October 21, 1976. See BLM Brief at 46-48 (citing, *inter alia*, CMPA TMP Wilderness Minimum Decision Analysis Map TP-6 (AR 802); Minimum Requirements Decision Guide, Worksheets, dated Mar. 21, 2007, at 11 (“Permit routes currently utilized in wilderness follow old closed routes . . . most of which appear to be two-track roads or historical roads that existed prior to the designation of the wilderness in 2000.”);^{66/} and SAR 5146); EA at 22-23, 24 (“What is now Steens Mountain Wilderness has been grazed by domestic livestock for over 100 years. . . . Today, grazing is authorized and managed on approximately 75,682 acres in wilderness within 14 grazing allotments.”); Sherbourne Decl., ¶ 15, 5 (“I reviewed documentation during the TMP . . . process indicating that various routes in Wilderness . . . were established grazing routes.”). BLM also states that it determined whether designating the routes in question conformed to the Guidelines. See Sherbourne Decl., ¶ 17, at 6 (“[BLM] analyzed access needs by allotment and restricted motorized access to minimum levels necessary to reasonably conduct management activities in Wilderness.”).

^{64/} (...continued)

However, it notes that, of the 5 routes, only Route 141 “leads to private land,” but that BLM nowhere asserted that it designated the route under this statutory authority, and, in any event, the other 4 routes do not benefit from this exception. ONDA Brief at 33.

^{65/} We note that Route 4 and Routes 141 through 144 are situated, respectively, in the Blitzen River and Home Creek WSAs. See SAR 5146; Final Oregon Wilderness EIS, Vol. I, at 549 (Map 1, Home Creek WSA), 592 (Map 1, Blitzen River WSA).

^{66/} The Minimum Requirements Decision Guide, Worksheets, appears at AR 9936-49.

We reject ONDA's basic position that BLM improperly designated Historical Routes in the WA as open to motorized travel because such routes are, by definition, obscure on the landscape. We recognize that Historical Routes in the WA are defined as "hard to locate" on the ground. EA at 12. However, BLM is correct that this does not mean the Routes do not exist. We conclude that BLM has demonstrated that all of the Historical Routes, including Routes 4 and 141 through 144, existed when the WA was created on October 30, 2000, and on October 21, 1976. ONDA offers no convincing argument or supporting evidence to the contrary.

BLM states that the challenged ATV Routes in the Indian Creek Road Area are not included in the WA, because they were cherry-stemmed out when the Area was designated in 2000. See BLM Brief at 49; DR at 2 ("The Indian Creek Road was left open in the Steens Act legislation and in the Steens RMP, therefore, changing these wilderness 'cherry stem' routes was not analyzed in the EA."), 9 ("Existing 'cherry-stemmed' routes through wilderness . . . remain open to motorized and mechanized public travel."), 12; EA at 17, 22; AMU and Steens Mountain CMPA RMPs Appendices (A-O) and Maps, Appendix M, at M-3 ("Keep the . . . Indian Creek . . . route[] open where bounded on both sides by wilderness."); CMPA TMP Wilderness Minimum Decision Analysis Map TP-6 (AR 802) (depicting "Interior Boundary/Cherry Stemmed Routes"); AMU and Steens Mountain CMPA RMPs Appendices (A-O) and Maps at Map 11; 176 IBLA at 387-88. Thus, regarding the ATV Routes in the Indian Creek Road Area, BLM was not required to adhere to the restrictions on motor vehicle use in the Wilderness Act or Grazing Guidelines. ONDA offers no evidence to the contrary. Moreover, ONDA later conceded that BLM's designation of ATV Routes does not violate the non-impairment mandate of the Wilderness Act, since it accepts that the routes are cherry-stemmed out of the WA. See Reply Brief at 40, 42-43.

Finally, it is important to note that all of the WA routes will be maintained so that their use will be in the same manner and degree as it was on October 30, 2000. See DR at 14 ("Any repair work needed on Permit Routes will be evaluated on a case-by-case basis and will be the minimum tool necessary as determined by a site-specific MDA [Minimum Decision Analysis], not to exceed conditions in place at the time wilderness was designated."), 16 ("Monitoring of Permit Routes within wilderness indicates the removal of public motorized travel, coupled with occasional use by the livestock operators, results in the gradual natural revegetation of these routes."); EA at 28-29; AMU and Steens Mountain CMPA RMPs Appendices (A-O) and Maps, Appendix M, at M-3 ("Ways within WSAs are not maintained other than by the passage of vehicles, with certain exceptions. Exceptions are limited to the minimum mechanical maintenance necessary to provide access as follows: 1) for emergencies[;] . . . 2) to grandfathered grazing uses and facilities as defined by the WSA IMP; 3) . . . to protect or improve the lands' wilderness values; and 4) to private inholdings. In these exceptions, maintenance will occur using the 'minimum tool concept' described in the WSA IMP.").

[5] BLM properly states that the Steens Act provides for “*limited motorized access* into [the WA] by grazing permittees,” and that, since roads are prohibited in wilderness areas, the Act “contemplates motorized travel on ground that is other than a ‘road,’” *i.e.*, including trails. BLM Brief at 7 (emphasis added). BLM argues, however, that the Board is now barred from adjudicating ONDA’s challenge to the designation of Historical Routes in the WA as open to motorized travel by grazing permittees because ONDA did not properly appeal for a hearing and decision by an Administrative Law Judge (ALJ), pursuant to 43 C.F.R. §§ 4.470-4.480 and Subpart 4160. BLM Brief at 49 (citing DR at 18 (“The grazing decision actions subject to appeal . . . are 1) prohibition of helicopter landings in wilderness, and 2) *limiting grazing permittee motor vehicle travel in wilderness.*”) (Emphasis added)).

BLM’s decision to designate Historical Routes in the WA as open to motorized travel does not “limit[]” such travel. DR at 18. However, BLM also provided, under the heading “NOTICE OF FINAL DECISION (Actions affecting grazing permits),” as follows:

Use of motorized vehicles within Steens Mountain Wilderness will only be authorized when there is *no practical alternative for accomplishing the livestock management activities* discussed below using nonmotorized or nonmechanized forms of travel. Motorized vehicle use by grazing permittees is allowed on Permit Routes and Historical Routes in wilderness for activities such as distribution of large quantities of salt (200 pounds or more) and checking critical water reservoirs in allotments with very limited live water or springs. Motorized or mechanized travel is only allowed in portions of the wilderness, as shown on CMPA TMP Decision Map, *where these activities were occurring at the time of wilderness designation*. Stipulations will be added to grazing permits outlining the degree of this access.^[67/]

^{67/} The Guidelines identified allowable motor vehicle use under the rule of practical necessity and reasonableness, which was later set forth in the TMP decision, as follows:

For example, motorized equipment need not be allowed for the placement of small quantities of salt or other activities where such activities can reasonably and practically be accomplished on horseback or foot. On the other hand, it may be appropriate to permit the occasional use of motorized equipment *to haul large quantities of salt to distribution points*. [Emphasis added.]

H.R. REP. NO. 101-405, at 42. They further stated that all allowable uses “should be expressly authorized in the grazing permits for the area involved.” *Id.*

Id. at 12 (emphasis added); *see id.* at 7 (“Motorized travel in wilderness provided under this decision would be confined to that of grazing permittees on a limited, BLM-monitored basis.”), 10 (“Within wilderness, limits to grazing management travel would be implemented.”), 11 (“Grazing permittees can use Permit and Historical Routes in wilderness for specific activities.”), 13 (“Utilizing motorized vehicles on Permit Routes . . . for large quantity salting activities generally involves three trips per allotment during the grazing season. Utilizing motorized vehicles on Permit Routes with water reservoirs . . . generally involves 10 to 20 trips per grazing season.”). BLM, thus, limited motorized travel by permittees in the WA. The fact that BLM clearly did so in accordance with the prescriptions of the Grazing Guidelines does not detract from the fact that the prescriptions acted to limit motorized travel by permittees.

Nonetheless, we do not agree with BLM that the designation of routes in the WA as open to motorized travel, even where it is intended to facilitate access for fence or reservoir maintenance or other grazing purposes, subject to the specified limitations, constitutes a grazing decision that must be separately appealed pursuant to the applicable regulations at 43 C.F.R. §§ 4.470-4.480 and Subpart 4160, so that the matter cannot now be raised. The designation of routes in the WA as open to motorized travel does not authorize any grazing use of the public lands, does not authorize the construction or maintenance of any fences, reservoirs, or other improvements of the public lands, and otherwise does not take any action pursuant to the Taylor Grazing Act, 43 U.S.C. §§ 315-315r (2006), or its implementing regulations, 43 C.F.R. Part 4100. Rather, it takes action pursuant to the transportation planning provisions of section 112 and related provisions of the Steens Act. While the decision places limitations on use of the routes by grazing permittees, it does not constrain their authorized grazing use or other activities under the Taylor Grazing Act or its implementing regulations, and it provides, when available, for the use of practical alternatives to motorized access. *See* EA at 68.^{68/}

^{68/} It is true that the applicable regulations provide for issuance of a proposed grazing decision that, in accordance with 43 C.F.R. § 4160.1(a), incorporates “*proposed actions, terms or conditions, or modifications relating to [grazing] applications, permits and agreements (including range improvement permits) or leases,*” which decision is subject to protest by “[a]ny . . . interested public” under 43 C.F.R. § 4160.2, and, once finalized, to appeal by any adversely affected person under 43 C.F.R. §§ 4.470(a) and 4160.4(a), for the purpose of a hearing and decision by an ALJ. (Emphasis added.) *See, e.g., Esperanza Grazing Ass’n*, 154 IBLA 47, 54 (2000); *Animal Prot. Inst. of Am.*, 120 IBLA 342, 344 (1991). However, BLM’s determination to limit motorized use on specified routes across the WA relates to grazing permits only to the extent that it affects the manner in which the permittees access the public lands for the purpose of managing their authorized grazing use. In short, the TMP decision does not concern “the administration of grazing districts” which would give rise to a right to a hearing under section 9 of the Taylor Grazing Act, 43 U.S.C.

(continued...)

ONDA was, accordingly, not required to separately appeal from the TMP decision, to the extent that it designated routes in the WA as open to motorized travel by grazing permittees pursuant to 43 C.F.R. §§ 4.470-4.480 and Subpart 4160. Rather, the issues raised concerning the designation of routes in the WA as open to motorized travel, subject to the specified limitations, are properly justiciable by the Board in the context of the present appeal from the TMP decision, now remanded to the Board.

E. BLM Did Not Violate NEPA

As we noted in *ONDA*, 176 IBLA at 393, BLM is required by section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (2006), to take a “hard look” at the potential environmental impacts of a proposed Federal action and alternatives thereto, and, in order to justify a FONSI, make a convincing case either that no significant impact will result therefrom or that any such impact will be reduced to insignificance by the adoption of appropriate mitigation measures. 42 U.S.C. § 4332(2)(C) (2006); *see, e.g., Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 681-82 (D.C. Cir. 1982); *Nez Perce Tribal Executive Comm.*, 120 IBLA 34, 37-38 (1991). We concluded that BLM met that standard in this case by adequately considering the likely effects of motorized travel on nonmotorized values and uses in the CMPA, and fulfilling the hard look requirement of section 102(2)(C) of NEPA. 176 IBLA at 393.

1. The Environmental Baseline and Opposing Views

[6] ONDA argued before the Court that BLM violated section 102(2)(C) of NEPA by failing to consider opposing views offered by ONDA, specifically referring to the route inventory data and closure recommendations provided to BLM during the RMP and/or TMP process. *See* 2011 WL 1654265, at *20-*21. Such data and recommendations included detailed electronic GIS mapping of the routes at issue, along with geo-referenced photographic evidence of the overgrown or naturally reclaimed nature of the routes. In a related vein, ONDA argued that, by failing to consider ONDA’s route inventory data and closure recommendations, BLM failed to accurately assess the environmental baseline conditions in the CMPA. *See id.*

We agree that BLM is required to accurately assess the environmental baseline. *See, e.g., Am. Rivers v. Fed. Energy Regulatory Comm’n*, 201 F.3d 1186, 1195 (9th Cir.

^{68/} (...continued)

§ 315h (2006). *LaRue v. Udall*, 324 F.2d 428, 432 (D.C. Cir. 1963); *see Esperanza Grazing Ass’n*, 154 IBLA at 55; *William N. Brailsford*, 140 IBLA 57, 59 (1997); *Lundgren v. BLM*, 126 IBLA 238, 244 n.9 (1993).

2000); *Ctr. for Biological Diversity*, 181 IBLA 325, 353 (2012). However, as the Court stated:

A baseline is not an independent legal requirement, but rather, a practical requirement in environmental analysis often employed to identify the environmental consequences of a proposed agency action. . . . Although this Court has had few occasions to address this issue, we have stated that “[w]ithout establishing . . . baseline conditions . . . there is simply no way to determine what effect [an action] will have on the environment and, consequently, no way to comply with NEPA.” *Half Moon Bay Fishermans’ Mktg. Ass’n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988).

201 F.3d at 1195 n.15 (emphasis added).

ONDA argues that BLM failed to accurately assess the environmental baseline, and thus the existing environmental conditions in the CMPA, from which it might properly judge the likely impacts of designating routes as open to motorized travel. See ONDA Brief at 34-35. ONDA asserts that the baseline reflected in the EA is “demonstrably false” to the extent that it reports the existence of “significant numbers and mileages” of routes, other than Obscure Routes, that are, in fact, “actually obscure,” and “between 300 and 400 miles of routes” that BLM failed to survey at all, and thus does not have any information regarding whether they exist. *Id.* at 34.

Contrary to ONDA’s assertion, we reiterate that our review indicates that BLM adequately assessed the status of all of the routes designated in the CMPA as open to motorized travel, focusing on routes other than those that were considered well-known and undisputed. ONDA has not demonstrated any error in BLM’s assessment of well-known and undisputed routes, and it has not demonstrated that any of the 300 to 400 miles of routes that BLM did not survey on the ground, but that were identified as existent based on aerial photographs or other evidence, did not exist. Most importantly, ONDA fails to appreciate the fact that routes that are obscure are not, by definition, nonexistent. BLM “is under no obligation to agree with ONDA’s assessment of routes.” *ONDA*, 173 IBLA 348, 354 n.9 (2008) (citing *Hells Canyon Alliance v. U.S. Forest Serv.*, 227 F.3d 1170, 1184 (9th Cir. 2000)). Thus, we discern no inherent inaccuracy in BLM’s report that such routes exist. While faint and otherwise hard to locate on the ground, they may be traced, with varying degrees of certainty.

ONDA refers to “nearly 2,700 pages” of environmental baseline information, provided to BLM between 2002 and 2007, that documents “actual, present-day route conditions in the CMPA.” ONDA Brief at 34, 35. ONDA asserts that, in refusing to

include any of this information in the EA, BLM violated its NEPA obligation to disclose and discuss opposing views. *See id.* at 35 (citing *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998) (“We do not find adequate support for the Forest Service’s decision in its argument that the 3,000 page administrative record contains supporting data. *The EA contains virtually no references to any material in support of or in opposition to its conclusions.* That is where the Forest Service’s defense of its position must be found.” (Emphasis added))).^{69/}

In challenging the adequacy of the EA, ONDA overlooks the fact that an EA need only briefly discuss the likely impacts of a proposed action, thereby “provid[ing] sufficient evidence and analysis for determining whether to prepare an [EIS].” 40 C.F.R. § 1508.9. “By nature, [an EA] is intended to be an overview of environmental concerns, *not* an exhaustive study of all environmental issues which the project raises.” *Bales Ranch, Inc.*, 151 IBLA 353, 358 (2000) (quoting *Don’t Ruin Our Park v. Stone*, 802 F. Supp. 1239, 1247 (M.D. Pa. 1992)). Much of the information that ONDA finds lacking in the EA is to be found in the AR, including all of the route inventory data and analysis provided by ONDA. That record was available to the public during BLM’s NEPA review and decisionmaking process.^{70/}

^{69/} We find the *Blue Mountains* case to be inapposite, since the Court found that the EA there contained little or nothing justifying the decision at issue, in the face of contrary information. Here, we find adequate support for BLM’s decision in the EA.

^{70/} On May 21, 2014, ONDA filed with the Board a Notice of Fact Development (ONDA Notice) based upon BLM’s issuance of the EA for the Steens Mountain CRP on Mar. 19, 2014. ONDA faults the new EA for relying upon the TMP for its environmental baseline. ONDA asserts that “the EA illustrates that the route network baseline BLM relied upon in the 2007 TMP was incomplete: two of the CRP EA’s alternatives reference and rely upon the same set of Route Analysis Forms BLM recently submitted to this Board in its February 4, 2014 ‘Notice of Filing Maps and Route Analysis Forms.’” ONDA Notice at 2-3. ONDA claims that the “Route Analysis Forms are post-decisional to the TMP, and the agency’s reliance upon them to support potential route closures or additions in the CRP shows . . . that the TMP’s route designations were based upon incomplete information.” *Id.* at 3.

As ONDA is aware, in its June 6, 2013, Order, the Board directed “ONDA to identify, with specificity, the routes that, in its view, BLM has improperly opened to motorized use and show how BLM’s decision was in error.” Order at 2. Not until it filed its Reply did ONDA attempt to identify the Obscure Routes, and it did so based upon a map that provided no route numbers or other location data. BLM itself “requested and obtained underlying GIS data for ONDA’s new map” and thereupon submitted “three BLM maps that depict ONDA’s allegedly obscure routes with route identifying numbers,” as well as “a table cross-referencing these allegedly obscure

(continued...)

The record documents BLM's consideration of all the route status information provided by ONDA, as part of the scoping and environmental review process, disclosing and discussing ONDA's opposing views when appropriate. *See, e.g.*, DR at 2-7 (Response to Public Comments); EA at 1-2. BLM properly notes that it went further, formulating and fully considering Alternative C, which was based in large part on "ONDA's [route] inventory and TMP recommendations." BLM Brief at 50 (citing EA at 15, 16-17). There is no requirement in section 102(2)(C) of NEPA or its implementing regulations that the route status information provided by ONDA be set forth in the EA, so long as BLM addressed that information in the course of considering the likely environmental impacts of designating the routes as open to motorized travel and in reaching its final TMP decision. *See ONDA*, 173 IBLA at 354. We conclude that, in summarizing the material offered in support of and in opposition to the designation of 555 miles of routes as open to motorized travel, the EA adequately established the environmental baseline for purposes of BLM's consideration of the likely impacts of the proposed TMP decision.

2. *Consideration of Connected Actions*

ONDA argued before the Court and now before the Board that BLM violated section 102(2)(C) of NEPA by improperly segmenting its analysis of the environmental consequences of connected actions, by failing to analyze both motorized travel in the CMPA, approved as part of the TMP, and non-motorized travel in the CMPA, to be approved as part of the CRP. *See* 2011 WL 1654265, at *21; ONDA Brief at 35-36. It states that the TMP and CRP are "interdependent parts of the larger, statutorily-mandated action of preparing a 'comprehensive' transportation plan for Steens Mountain." ONDA Brief at 35 (quoting 16 U.S.C. § 460nnn-22(a) (2006)).

[7] The Board has observed that "[t]he concept of 'connected actions' is generally invoked relative to determining the scope of an EIS." *W. Watersheds Project*,

^{70/} (...continued)

routes with BLM Route Analysis Forms." BLM Notice of Filing at 2. BLM further explains that it previously provided the Court with documentation regarding approximately 100 miles of routes identified in Miller's July 2010 Declaration as obscure or non-existent. The Route Analysis Forms that ONDA claims are post-decisional were prepared by BLM to supply information regarding route identification and location not supplied by ONDA. BLM states that "[t]o the extent these Route Analysis Forms [submitted to the Court] did not cover the new ONDA map and allegedly obscure routes, BLM has provided additional Route Analysis Forms" *Id.* In any event, we find ONDA's criticism of BLM for supplying information that ONDA itself should have supplied to be unwarranted.

175 IBLA 237, 253 (2008) (citing 40 C.F.R. § 1508.25). BLM is required to consider the environmental impacts of a proposed action and any other action that is “connected” to the proposed action. See, e.g., *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 968-69 (9th Cir. 2006); *Backcountry Against Dumps*, 179 IBLA 148, 171-72 (2010). The overall purpose of the regulation is to ensure that “closely related” actions which may have cumulatively significant impacts, and therefore should be discussed in the same environmental document, 40 C.F.R. § 1508.25(a)(1), are not improperly segmented into separate actions, each having less than significant impacts. *Haines Borough Assembly*, 145 IBLA 14, 22 (1998) (citing *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298 (D.C. Cir. 1987)).

An action will be considered connected to the proposed action when (1) the proposed action “[a]utomatically trigger[s]” the other action; (2) the proposed action “[c]annot or will not proceed unless [the] other action[] [is] taken previously or simultaneously”; or (3) the proposed action and the other action “[a]re interdependent parts of a larger action and depend on the larger action for their justification.” 40 C.F.R. § 1508.25(a)(1); see, e.g., *Wetlands Action Network v. U.S. Army Corps of Eng’rs*, 222 F.3d 1105, 1118 (9th Cir. 2000); *Thomas v. Peterson*, 753 F.2d 754, 758-59 (9th Cir. 1985); *Defenders of Wildlife*, 152 IBLA 1, 6 (2000). We have recognized that actions that have “independent utility” are not connected actions. See, e.g., *Great Basin Mine Watch*, 146 IBLA 248, 251 (1998); *Concerned Citizens for Responsible Mining (On Reconsideration)*, 131 IBLA 257, 266 (1994). Actions have independent utility if sufficient justification exists for each of the two actions, such that each may proceed without the other. *Great Basin Mine Watch*, 146 IBLA at 251.

ONDA argues that the TMP and CRP constitute connected actions by reason of the fact that they are interdependent parts of a larger action and depend on the larger action for their justification, within the meaning of 40 C.F.R. § 1508.25(a)(1). See ONDA Brief at 35; Reply Brief at 23-24. ONDA’s argument is based solely on the premise that, since the Steens Act provides for a “comprehensive” transportation plan, the TMP and CRP, which are to make up that plan, are “interdependent parts of a larger action.” ONDA Brief at 36 (quoting 16 U.S.C. § 460nnn-22(a); and 40 C.F.R. § 1508.25(a)(1)). There is some logic to the argument that, once issued, the TMP and CRP together will constitute the CTP envisioned in the Steens Act. From this perspective, the TMP and CRP may be said to constitute interdependent parts of the larger transportation plan. See DR at 4 (“There is overlap between the TMP and CRP.”).

Notwithstanding the overlap, we conclude that the TMP and CRP each have independent utility, governing distinct uses of the public lands in the CMPA (motorized and non-motorized). The TMP and CRP each may proceed without the

other, though together they ultimately will result in a comprehensive transportation plan.^{71/}

Moreover, ONDA offers no argument or supporting evidence for the proposition that, by bifurcating its promulgation of the CTP, BLM has overlooked any potential cumulative significant impact that will result from the promulgation of the TMP and CRP separately, and we discern no basis for assuming that it will. *See* ONDA Brief at 36; Reply Brief at 22-23; BLM Brief at 51 (“There is no evidence that a future . . . [CRP] would bring significant environmental effects that BLM sought to avoid by splitting the TMP and CRP.”).

We conclude that the TMP and CRP are not connected actions because “each could exist without the other, although each would benefit from the other’s presence.” *Nw. Res. Info. Ctr., Inc. v. Nat’l Marine Fisheries Serv.*, 56 F.3d 1060, 1068 (9th Cir. 1995). NEPA does not preclude BLM from first addressing the question of motorized travel, and then separately considering the question of non-motorized travel, which is what is envisioned. *See* 176 IBLA at 394 (“BLM will, when it further considers the question of nonmotorized travel [in the CRP], have to take into account its treatment of motorized travel in the TMP.”); DR at 4.^{72/} We thus find no impermissible segmentation of the NEPA process.

3. Requirement to Prepare an EIS

[8] ONDA argued before the Court and now before the Board that BLM violated section 102(2)(C) of NEPA by failing to prepare an EIS addressing the significant environmental impacts of adopting the TMP. *See* 2011 WL 1654265, at *21; ONDA Brief at 36-44; Reply Brief at 25-33. It asserts BLM is required to prepare an EIS not because it has shown that significant impacts will occur, but because it has raised “‘substantial questions’ . . . [regarding] whether a project may have a significant environmental effect.” ONDA Brief at 36-37 (quoting *Anderson v. Evans*, 371 F.3d 475, 488 (9th Cir. 2004)). ONDA concludes: “The vast motorized network BLM establishes surpasses this [EIS] standard.” Reply Brief at 25.

^{71/} ONDA states that the TMP and CRP do not have independent utility, but offers no argument or supporting evidence to that effect. *See* ONDA Brief at 36.

^{72/} BLM has indicated its willingness to revisit its motorized travel route decision, should conflicts arise in the future or should the need otherwise be shown for a change in its allocation of available routes to motorized or non-motorized use. *See* 176 IBLA at 381-82, 383; EA at 14. Further, as we have stated: “BLM has not, by issuing the TMP, made an irrevocable ‘commitment[] to motorized recreation at the expense of nonmotorized use and users’ that will have the effect of excluding or even severely curtailing nonmotorized travel in the CMPA.” 176 IBLA at 394 (quoting NA/SOR/Petition (IBLA 2008-59) at 26).

Section 102(2)(C) of NEPA requires BLM to consider the potential environmental impacts of a proposed action in an EIS if that action is a “major Federal action[] significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C) (2006). A BLM decision to proceed with a proposed action, based on an EA tiered to a programmatic EIS, will be upheld as being in accord with section 102(2)(C) of NEPA where the record demonstrates that BLM has, considering all relevant matters of environmental concern, taken a “hard look” at potential environmental impacts, and made a convincing case that no significant impact will result that was not already addressed in the EIS or that any such impact will be reduced to insignificance by the adoption of appropriate mitigation measures. *Ctr. for Native Ecosystems*, 182 IBLA 37, 50 (2012); *Wyo. Outdoor Council*, 173 IBLA 226, 235 (2007).

Importantly, in assessing the adequacy of an EA, we are guided by a “rule of reason,” such that the EA need only briefly discuss the likely impacts of a proposed action. *See, e.g., Bales Ranch, Inc.*, 151 IBLA at 358. An appellant carries the ultimate burden to demonstrate, with objective proof, that BLM failed to consider a substantial environmental question of significance to the proposed action, or otherwise failed to abide by section 102(2)(C) of NEPA. *See id.* at 357.

Moreover, BLM’s decision to issue a FONSI and not prepare an EIS “implicates agency expertise.” *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1274 (10th Cir. 2004). Thus, where, in assessing environmental impacts, BLM properly relies on the professional opinion of its technical experts, concerning matters within the realm of their expertise and which is reasonable and supported by record evidence, an appellant challenging such reliance must demonstrate, by a preponderance of the evidence, error in the data, methodology, analysis, or conclusion of the expert. *See, e.g., Wyo. Outdoor Council*, 173 IBLA at 235 (citing *Fred E. Payne*, 159 IBLA 69, 77-78 (2003)). A mere difference of opinion, even of expert opinion, will not suffice to show that BLM failed to fully comprehend the true nature, magnitude, or scope of the likely impacts. *See id.*

ONDA argues that BLM’s decision to “open[] hundreds of miles of routes in a [C]ongressionally protected area *may* have significant impacts,” thus requiring preparation of an EIS. ONDA Brief at 37. ONDA states that 40 C.F.R. § 1508.27 identifies 10 “*Intensity*” factors that help to determine whether a proposed action may have any significant impact, any one of which “may be sufficient to require preparation of an EIS.” *Id.* (quoting *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 865 (9th Cir. 2005)). ONDA asserts that three factors are implicated in the case of the TMP: “Unique characteristics of the geographic area, highly controversial effects, and uncertainty.” *Id.* However, ONDA leaves out of the *Ocean Advocates* quotation the Court’s qualification that any one factor may require an EIS “in appropriate circumstances.” 402 F.3d at 865.

We start from the premise that, having already determined that ONDA failed to establish that any of the routes designated as open to motorized travel was nonexistent, the adequacy of BLM's FONSI does not hinge on whether designation will result in the creation of any new roads or trails. Rather, the question is whether BLM's designation of existing routes is likely to significantly impact the human environment. Given this understanding, we proceed to address *seriatim* the three "Intensity" factors raised by ONDA.

First, BLM is directed by 40 C.F.R. § 1508.27, in evaluating the significance of likely impacts of the proposed TMP, to "consider[] . . . [u]nique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas." ONDA states that the CMPA is properly considered an ecologically critical area, because it was designated by Congress in the Steens Act for the protection of the long-term ecological integrity of Steens Mountain, included by the Department in its NLCS, contains all 87.5 miles of the Donner and Blitzen Wild and Scenic River, encompasses the 173,000-acre Steens Mountain WA, 118,637 acres in designated WSAs, 8 Areas of Critical Environmental Concern and/or Research Natural Areas, Redland Trout Reserve, a substantial portion of 1.1 million acres of public land withdrawn from mineral and geothermal leasing, and important year-round Greater sage-grouse habitat. See ONDA Brief at 37-38.

We do not doubt that the CMPA constitutes an ecologically critical area, owing to its importance for the protection of crucial aspects of the environment, recognized by the designation of all or part of the CMPA pursuant to the Steens Act, National Wild and Scenic River Act, Wilderness Act, FLPMA, and otherwise. It is clear that BLM was well aware of all of the designations and facts cited by ONDA, and took them into account when preparing the EA, tiered to the CMPA RMP EIS, and determining, in its FONSI, that adoption of the TMP was not likely to significantly impact the human environment. See EA at 18-19, 22-25, 29-30, 45-47, 51-52; DR at 7-8; BLM Brief at 60. ONDA has failed to demonstrate that any of the impacts of motorized vehicle use on any of the roads and trails designated for such use in the CMPA is likely, by reason of the ecologically-critical nature of the area, to significantly affect any aspect of the human environment. See ONDA Brief at 39-40.

It is not sufficient to simply cite to scientific literature, making no effort to establish the relevance of the material to the assessment of likely impacts from motor vehicle use on roads and trails to the particular action at issue here. See *Biodiversity Conservation Alliance*, 171 IBLA 218, 228-29 (2007); *Biodiversity Conservation Alliance*, 169 IBLA 321, 343 (2006). However, that is precisely what ONDA seeks to do by generally citing to the scientific literature regarding sage-grouse. See ONDA Brief at 39.

ONDA indicates that FWS' March 2010 warranted/but precluded listing decision has "heightened the[] concerns" regarding the likelihood of significant impacts to the sage-grouse, owing to the highly controversial nature and/or uncertainty of such impacts. ONDA Brief at 42 n.16. The impacts of human activities cited in the listing decision or elsewhere do not alone demonstrate that adoption of the TMP is likely to significantly impact the sage-grouse. *Id.*

BLM concluded, in its EA and DR, that designating the 555 miles of routes as open to motorized travel was not likely to significantly fragment wildlife habitat or otherwise adversely affect wildlife or wildlife habitat. *See* EA at 31-45; DR at 6 ("The BLM consulted with the Oregon Department of Fish and Wildlife [ODFW] during preparation on the TMP. Route densities, wildlife habitat fragmentation, and motor vehicle use levels were analyzed and determined not to be significant impacts to wildlife."), 7 ("Because of seasonal road closures[,] . . . the overall effects on wildlife would not be measurable. Limited traffic on open roads would have no significant effect. Road use and density criteria are well within acceptable levels."), 10.

If the Proposed Action is selected rather than Alternative C (Reduced Use), road density is expected to be, on average, approximately 0.83 (public lands) and 0.98 (all lands), rather than 0.46 (public lands) and 0.66 (all lands), miles per square mile and, given a one-half mile road buffer, only 45, rather than 67, percent of the public lands in the CMPA would qualify as "core area" for wildlife. *See* EA at 17, 43, 45. However, the likely impacts on wildlife and wildlife habitat do not depend solely on the size of the buffers. Rather, since most roads were primitive roads with infrequent use (which was not expected to change), the roads would be closed in the winter and spring, and vegetative and topographic screening exists along roads, no significant negative impact to wildlife or wildlife habitat was expected. *See* EA at 35-37, 43-45; DR at 3 ("infrequent use of most primitive routes by either vehicles or hikers"), 5 ("Traffic counter data indicates that visitation to the Steens [Mountain] has remained relatively constant over the past 10 years."), 9 ("Implementation of the decision would not result in an appreciable change from current use of motorized and nonmotorized travel routes."), 16 ("[V]isitor use away from the Steens Loop Road is generally light and solitude can be found in many areas of the CMPA most of the year. . . . Comments did not indicate conflicts between users and, in fact, stated that visitors rarely see others while driving or camping along many of the primitive routes."); Letter to BLM from ONDA, dated May 21, 2007, at 4 ("As a practical matter, the vast percentage of sightseeing from a motorized vehicle (or pleasure driving) on the Steens [Mountain] occurs on the Steens Mountain Road."). The closure of 104 miles of routes in the Steens Mountain WA has created large unroaded "core" habitat areas. *See* EA at 39, 45. Further, ODFW did not express concerns that road densities within the CMPA were affecting wildlife use of the area. *See id.* at 37.

While the motorized use of individual roads and trails will undoubtedly affect sage-grouse, we are not persuaded, given the distribution of roads throughout the 496,136-acre CMPA, which generally provides year-long habitat, and the exclusion of motorized travel during most of the critical breeding season, that the TMP decision may cumulatively impact sage-grouse in a significant manner. *See* EA at 32, 44. If BLM were to close existing routes to motorized travel, this action would concentrate motor vehicle use on a smaller number of routes, potentially increasing impacts to sage-grouse and other aspects of the human environment. *See* Proposed RMP and Final EIS, Vol. I, at 2-188; EA at 65 (“Closing 250 miles of routes would likely cause increased use . . . to remaining routes. Traffic counter data and people’s observations indicate the closing of 104 miles of Common Use Routes within Steens Mountain Wilderness has increased motorized traffic on other routes within the CMPA.”). It was BLM’s expert opinion that the TMP will not cumulatively impact sage-grouse in a significant manner—an opinion that is succinctly summarized by BLM on judicial remand:

BLM explained that the route system is not expected to pose an adverse effect to wildlife habitat or wildlife populations. AR 9989, 9965. BLM noted that the seasonal route closures of six months per year provide habitat protection during winter and spring. AR 9989, 9965. BLM further explained that the present route density is not of concern and that the infrequent use on Historical, Wilderness [P]ermit, and Grazing Administration [Permit] Routes would have little effect on wildlife. AR 9989. Sage-grouse breeding and nesting areas are protected by seasonal closures. AR 9990, 9966. Further, the closure of 104 miles of routes in wilderness has created large core unroaded habitat areas. AR 9991, 9997. In fact, despite ONDA’s notation of problems for sage-grouse range state-wide, ODFW has found that the BLM Burns District sage-grouse population has been stable with a fluctuating but slightly increasing trend from 1980 to 2010. ODFW *Greater Sage-Grouse Conservation Assessment and Strategy for Oregon* (April 2011) at 24-25.^[73/]

BLM Brief at 54. ONDA has failed to carry its burden to demonstrate that a cumulative significant impact to sage-grouse may occur.

Next, ONDA argues that BLM’s decision to designate 555 miles of routes as open to motorized travel is likely to result in a significant impact as a consequence of promoting the invasion and spread of noxious weeds, which can be thwarted only by

^{73/} ODFW’s report can be found at http://www.dfw.state.or.us/wildlife/sagegrouse/docs/20110422_GRSG_April_Final%2052511.pdf (last visited Sept. 19, 2014).

closing the routes. ONDA further notes that the “vast majority of the routes . . . are overgrown, rocky, rutted, impassable, and sometimes virtually nonexistent,” and are “precisely the types of vulnerable high desert routes BLM should have closed in order to protect the long-term ecological integrity of Steens Mountain.” NA/SOR/Petition (IBLA 2008-59) at 24.

We concluded, in our original decision, that BLM had addressed the likelihood that the TMP decision would contribute to the invasion and spread of noxious weeds in the CMPA:

In its EA, BLM considered the effects of various aspects of its Proposed Action, including leaving open the 555 miles of routes to motorized travel, from the standpoint of noxious weeds. It noted that noxious weeds were found at 361 sites in the CMPA, totaling 404.9 acres, mostly near roads or reservoirs. EA at 50. BLM recognized that leaving open the routes would render it more likely that noxious weeds would invade and/or spread through the CMPA, since motorized vehicles are a prime vector for the spread of noxious weeds, and that they were most likely to spread along roads and other travel corridors: “[O]pen routes are . . . more apt to have weed seeds introduced.” *Id.* at 51. BLM agreed that closing the routes would render it less likely that such invasion and/or spread would occur. *Id.* at 50-51. We find nothing in the EA at odds with appellants’ basic assertion that “more routes closed equals less exposure to noxious weeds, a decreased likelihood of new weed infestations, and a decreased likelihood of existing infestations spreading.” NA/Petition at 23.

176 IBLA at 389.

BLM clearly did not fail to appreciate the likelihood that opening routes would contribute to the invasion and/or spread of noxious weeds. It provided for monitoring and treating noxious weeds, further noting that

open routes are a “high priority for monitoring” and are “more easily monitored,” and that closing routes would render it less likely that they would be monitored for the invasion and/or spread of noxious weeds: “*Once roads are closed, they will likely receive less monitoring for weeds because of increased time and cost involved in traveling those routes on foot or horseback.*” (Emphasis added.) EA at 50 (emphasis added); *see* DR at 8.

176 IBLA at 389. BLM was concerned, from a practical standpoint, with the real possibility that closed routes were less likely to be monitored for the invasion and/or spread of noxious weeds than open routes. *See* Decl. of Lesley Richman, Coordinator,

Burns District Weed Program, dated Aug. 26, 2010 (Ex. 70 attached to BLM Brief), ¶¶ 6 (“The network of routes Burns BLM decided to keep open to vehicular traffic already exist, and are currently utilized as travel corridors by vehicles, hikers, horseback riders, wildlife, and livestock. Burns BLM currently monitors and treats any noxious weeds found along these routes on a regular basis. Because routes are traveled by our permanent staff on a regular basis, new weed introductions are typically discovered early on and generally treated the year they are introduced, before they have a chance to spread to adjacent plant communities.”), 8 (“Burns BLM would rather have our visitors concentrated in travel corridors that are easy to access, so we can monitor and treat the noxious weeds they may bring with them.”), at 2, 3; Decl. of Douglas Linn, Botanist, Burns District, dated Aug. 24, 2010 (Ex. 71 attached to BLM Brief), ¶¶ 5-7, at 2-3. We find no factual error in BLM’s conclusion.

We conclude that BLM adequately considered the likely impacts of designating 555 miles of routes as open to motorized travel in terms of the invasion and spread of noxious weeds. BLM determined that designation was not likely to significantly impact the human environment, because the TMP decision “would not increase the possibility of noxious weed establishment,” and “the road network in the CMPA would continue to be a high priority for monitoring and treating [weeds].” DR at 8.

ONDA’s evidence regarding the impacts likely to occur as a consequence of adoption of the TMP, in terms of the invasion and spread of noxious weeds attributable to motor vehicle use, consists of the professional opinion expressed by Gelbard in his July 16, 2010, declaration. See ONDA Brief at 39-40. However, Gelbard only reports the likely impacts of motor vehicle use on roads generally; he does not relate this information to the particular matter at hand or specifically demonstrate that any significant impact is likely attributable to designation of the routes at issue as open to motorized travel. See ONDA Brief at 40, n.15; Gelbard Decl., ¶¶ 7-81, at 5-49. ONDA has thus revealed only a difference of professional opinion regarding likely impacts, which is not sufficient to establish a NEPA violation. See, e.g., *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989) (“When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts.”); *Fred E. Payne*, 159 IBLA at 77-78. ONDA has not demonstrated that BLM ignored or overlooked any aspect of the question of noxious weed establishment, or otherwise erred in its analysis or conclusion.

Second, BLM is directed by 40 C.F.R. § 1508.27, in evaluating the significance of likely impacts of the proposed TMP, to “consider[] . . . [t]he degree to which the effects on the quality of the human environment are likely to be highly controversial.” Effects are deemed to be highly controversial “when ‘substantial questions are raised as to whether a project . . . may cause 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 & Conservation Ass’n v. Babbitt*,

241 F.3d 722, 736 (9th Cir. 2001) (quoting *Northwest Env'tl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1539 (9th Cir. 1997); and *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d at 1212).

ONDA states that there is a substantial dispute regarding the size, nature, and effect of the proposed designation of 555 miles of routes as open to motorized travel owing to the “nearly 2,700 . . . pages of high-quality, detailed, and comprehensive information [provided by ONDA prior to BLM’s November 2007 DR] undermining BLM’s baseline assumptions and documenting the potential for significant ecological damage under BLM’s plan.”^{74/} ONDA Brief at 41 (citing AR 12946-13290; SAR 1737-3981, 3984-4086, 5107). ONDA asserts that BLM failed to acknowledge or rebut the information provided by it because, as noted by the Court, the record developed by BLM did not reflect a comprehensive inventory of all of the routes designated as open to motorized travel. *See id.* (citing 2011 WL 1654265, at *22, nn.13 & 14). ONDA thus concludes that BLM failed to “consider[] conflicting expert testimony in preparing its FONSI,” and to take “a hard look at the proposed action by reasonably and fully informing itself of the appropriate facts.” *Id.* at 42 (quoting *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d at 736 n.14). It states that BLM, in the words of the Court, “failed to address ONDA’s ground-level geo-referenced photographs’ showing overgrown and nonexistent routes,” and “did not actually verify the existence of most of the routes it designated.” *Id.* (quoting 2011 WL 1654265, at *23).

We have in this opinion concluded that BLM undertook to comprehensively inventory all of the routes designated as open to motorized travel, and assess the likely environmental impacts of making the designations. In the course of doing so, BLM considered all of the information provided by ONDA regarding the existing status of the routes. We are not persuaded that any of the routes now designated as open to motorized travel are nonexistent. At worst, they are overgrown or otherwise naturally reclaimed, but not to the point that they have ceased to exist. We have found no instance where BLM was not aware of the nature of any route designated as open to motorized travel, and ONDA has not offered any “conflicting expert testimony” regarding the likely impacts of designating the 555 miles of routes as open to motorized travel that might be sufficient to give rise to a substantial dispute regarding the size, nature, or effect of taking that action.

^{74/} ONDA also notes that, during the planning process, BLM received almost 20,000 public comments “with all but a handful disputing its proposal and requesting meaningful route closures.” ONDA Brief at 41 (citing DR at 2; EA at 76; and 2d Miller Decl., ¶ 55, at 27). Whether the effects of a proposed action are likely to be highly controversial has nothing to do with the extent of public opposition to the action. *See Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d at 736; *Mary Lee Dereske*, 162 IBLA 303, 322 (2004).

Third, and finally, BLM is directed by 40 C.F.R. § 1508.27 to “consider[] . . . [t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.” When there is uncertainty regarding whether a proposed action is likely to significantly impact the human environment, and that “uncertainty may be resolved by further collection of data [and analysis],” “[p]reparation of an EIS is mandated.” *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d at 732. An EIS is only mandated where the uncertainty is high. *See Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d 701, 712 (9th Cir. 2009).

ONDA argues that a high degree of uncertainty exists regarding the likely effects of adoption of the TMP because, as noted by the Court, “BLM’s inventory and methodology [for identifying routes to designate as open to motorized travel] were so inadequate that they prevented . . . [a] meaningful review of the TMP.” ONDA Brief at 43 (citing 2011 WL 1654265, at *22, *23). The uncertainty to which ONDA refers concerns BLM’s identification of the routes to be designated as open to motorized travel, which necessarily impeded its ability to assess the likely effects of the taking of such action. *See id.* (“This case . . . far surpasses th[e] threshold [of high uncertainty] based on BLM’s ‘incomplete,’ ‘hard to understand,’ and ‘inscrutable’ inventory data” (quoting 2011 WL 1654265, at *22 n.13)).

We conclude that BLM identified all of the routes to be designated as open to motorized travel, sufficient for them to be located on the ground, and assessed the site-specific effects of taking such action. It expressly determined that the likely impacts of designating the routes as open to continued motorized travel was not likely to impact any aspect of the human environment in a highly uncertain manner, because they had been in existence for quite some time. *See* DR at 9 (“[TMP decision] would not result in an appreciable change from current use of motorized and nonmotorized travel routes”), 10 (“travel patterns would not be appreciably altered”), 16 (“[M]onitoring has not found significant damage to resources from use of the existing route system. . . . With a small number of documented exceptions, the BLM has been able to enforce the ‘limited to designated routes’ designation for the CMPA and believes visitors tend to stay on designated routes when provided with an adequate route network.”); Letter to BLM from ONDA, dated May 21, 2007, at 4-5 (“All alternatives except for Alternative C are very similar to a ‘no action’ alternative. . . . The vast majority of routes (500+ miles of Common Use Routes) would remain unchanged in all three alternatives.”); BLM Brief at 59 (“BLM was not, through the TMP, creating new routes or authorizing motorized access in a manner that exceeded the status quo.”). We find no uncertainty, high or otherwise, regarding the likely effects of adopting the TMP.

In general, ONDA fails to justify its contention that any of the routes designated as open to motorized travel will cause BLM to violate its general responsibility under the Steens Act to conserve, protect, and manage the long-term ecological integrity of Steens Mountain. It forgets that, in order to “further” and be “consistent with” this

purpose of the Act, BLM is directed by section 102(b) of the Steens Act, 16 U.S.C. § 460nnn-12(b) (2006), *inter alia*, “to promote grazing, recreation, historic, and other uses that are sustainable.” Such activities plainly require access into the CMPA, which is what designating the routes at issue is intended to provide.

III. CONCLUSION

We therefore conclude that ONDA has failed, on judicial remand, to carry its burden to demonstrate that BLM, in approving the Steens Mountain Travel Management Plan, to the extent that it was previously affirmed by the Board, violated section 112 of the Steens Act, section 603(c) of FLPMA, sections 2(a) and 4(b) of the Wilderness Act, or section 102(2)(C) of NEPA. Absent any showing of error, the Field Managers’ November 2007 DR will be reaffirmed. To the extent that we previously reversed the DR, rescinding BLM’s determination to designate Obscure Routes as open to motorized travel, our prior decision is vacated, and the DR is affirmed to the extent that it designated the Obscure Routes, whether they are hard to locate or not found on the ground, as open to motorized travel.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board’s February 2009 decision in *ONDA*, 176 IBLA 371, is vacated to the extent that it reversed the Field Managers’ November 2007 DR designation of Obscure Routes as open to motorized travel, and the Field Managers’ November 2007 DR is otherwise affirmed.

/s/

James F. Roberts
Administrative Judge

I concur:

/s/

Christina S. Kalavritinos
Administrative Judge