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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

WILDLANDS CPR; FRIENDS OF THE)
BITTERROOT, MONTANANS FOR)
QUIET RECREATION)
)
Plaintiffs,)
)
vs.)
)
UNITED STATES FOREST SERVICE;)
LESLIE WELDON , in her official capacity)
as Regional Forester, Region One;)
GLORIA MANNING and DAVE MEYER,)
)
Defendants.)
and)
MONTANA SNOWMOBILE ASS'N)
and IDAHO STATE SNOWMOBILE)
ASS'N.)
Intervenor)

No. CV-10-104-M-DWM

**BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION
FOR SUMMARY
JUDGMENT
(REVISED)**

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INTRODUCTION

The Beaverhead-Deerlodge National Forest (Beaverhead-Deerlodge) enacted a revised Forest Plan permitting snowmobile use on nearly 2,000,000 acres of public land. The decision was made with virtually no analysis of site specific impacts of snowmobiling. Those impacts – loss of wildlife habitat, damage to soils, air and water pollution, incompatibility with other winter recreation – are well documented in this record. While snowmobiling is appropriate in some places, designation of such places requires careful analysis and compliance with both the National Environmental Policy Act (NEPA) and the Executive Orders governing motorized use of public lands. Neither occurred here, and as a result the Forest Service has made an ill-informed decision with significant, though undisclosed, environmental consequences.

In a 2005 informal rulemaking under the Administrative Procedure Act (APA), the Forest Service enacted the Travel Management Rule (Travel Rule) governing the designation of trails and areas where motorized uses can occur. Unlike its predecessor, the 2005 Travel Rule exempted snowmobile trails and areas from minimizing adverse impacts. The Travel Rule's snowmobile exemption is arbitrary and capricious for two reasons. First, it is inconsistent with the Executive Orders that provide its legal authority, because those Orders require

site-specific minimization of adverse impacts before opening trails and areas to snowmobiles. Second, the Forest Service's reasons for exempting snowmobiles from requirements applicable to other off-road vehicles are illogical, because they ignore profound negative impacts of unregulated snowmobile use on wildlife, winter recreation, soils, water, and air.

Plaintiffs ask this court to declare the portions of the revised Forest Plan pertaining to snowmobile use unlawful, set aside those provisions, remand the Plan to the Forest Service, and devise an equitable interim remedy to protect the landscape and still accommodate some snowmobile use. Plaintiffs further request that the Court declare the 2005 Travel Rule Subpart C unlawful and therefore void.

BACKGROUND

A. The National Forest Management Act and the Revised Forest Plan.

The National Forest Management Act ("NFMA") provides a comprehensive method for planning and management of our national forests. NFMA requires the Forest Service to develop a Land Resource Management Plan ("Forest Plan") for each unit of the National Forest System. 16 U.S.C. § 1604(f)(1). Once enacted, the Forest Plan governs the use of the forest, and all activities must be consistent with the standards and guidelines contained in the Forest Plan. Forest Plans must

be revised at least every fifteen years. 16 U.S.C. § 1604(f)(5)(a).

On January 14, 2009, the Beaverhead-Deerlodge approved a revised Forest Plan, Record of Decision and Final Environmental Impact Statement (FEIS), replacing the 1986 and 1987 Forest Plans. The Beaverhead and Deerlodge National Forests were administratively separate but now are governed as one administrative unit under the Revised Plan.

While the Record of Decision adopting the Revised Forest Plan generally makes broad, strategic decisions identifying goals, standards, and suitable uses for the Beaverhead-Deerlodge, it also expressly permits snowmobile use in specific areas. The Revised Plan and FEIS contain maps, tables and statements demonstrating that adoption of the Revised Plan marked the culmination of the agency's decision-making process to allow snowmobiling on nearly two million acres. *SOMF 1.*

B. Background on Snowmobile Impacts on the Beaverhead-Deerlodge.

Snowmobile use on the Beaverhead-Deerlodge has substantially increased in the last twenty five years. The “unmanaged expansion” has “resulted in resource damage, wildlife impacts, and competition and conflict between user groups.” *SOMF 2.* Modern snowmobiles travel to steep, remote, ungroomed areas, “highmarking” alpine bowls never previously accessible to riders. *SOMF 3.*

More powerful engines push snowmobiles into steeper, more remote terrain. As a result, snowmobile impacts on other resources are more serious, more widespread and further-reaching than ever before. *Id.*

1. Displacement of wildlife from winter range.

The Revised Plan designates more than 50 percent of big game winter range open to snowmobiles. Snowmobile use displaces wildlife from winter range at the time when demands on their energy reserves are highest and most detrimental to winter survival. *SOMF 5-6.* Snowmobiling on the Beaverhead-Deerlodge has already displaced big game such as moose, elk, mountain goat, mule deer, and bighorn sheep from their winter range, and increased snowmobile use will further stress these animals on their winter range. *Id.* For example, moose have been displaced from parts of the West Fork Madison River and elk have been displaced from traditional winter range in Berkins Flat on the Jefferson Ranger District from snowmobiles. *SOMF 7.*

Secure areas for elk are directly impacted by motorized vehicle disturbance. *SOMF 21.* Elk avoid snowmobiles, thereby reducing habitat otherwise available to them. *Id.* Approximately 28,803 elk inhabit the Beaverhead-Deerlodge. Snowmobiles displace elk from winter range on public land, causing the adverse social consequence of forcing them forage on private land, where “they are not

welcome.” *SOMF 7*.

The FEIS noted that “motorized winter recreation can create localized disturbance to wildlife.” *SOMF 13*. But the FEIS does not address localized disturbances. The Montana Department of Fish Wildlife and Parks (the Department) provided comments to the Forest Service regarding snowmobile impacts to wildlife in specific areas. Department wildlife biologists observed snowmobiles tracks running over elk beds and feeding areas. *SOMF 11*.

The FEIS doesn’t analyze the Revised Plan impact on winter range habitat for elk and other species at the site-specific level in the areas where snowmobile use is permitted under the Revised Plan.

2. Impacts to wolverines.

Wolverines, a rare carnivore inhabiting alpine, mostly roadless cirques of the Beaverhead-Deerlodge, are extirpated from much of the lower 48 states. Wolverine are found in low densities throughout the Beaverhead-Deerlodge. The Beaverhead-Deerlodge designated wolverine as a Management Indicator Species (“MIS”). MIS species are selected to indicate the effects of management activities. The “wolverine was selected as [a] wildlife MIS to measure the effectiveness of maintaining winter denning habitat secure from snowmobile impacts.” *SOMF 14,15*.

Wolverine denning habitat, high mountain cirques that were historically considered inaccessible to snowmobiles, is increasingly accessible by high powered machines. *SOMF 15*. Female wolverines are negatively impacted by snowmobiles near their den sites. Snowmobile disturbances can have adverse effects on the survival of their young. In addition, “increased cross-country snowmobile use can also displace wolverines from big-game winter range where they can forage on winter-killed elk and deer.” *SOMF 16*.

The FEIS divides the forest into different “landscapes” and displays in a table the percent of each landscape is closed to snowmobiling for wolverine denning. *SOMF 17-18*. Aside from this general table, the FEIS does not analyze or disclose the impacts to wolverines from snowmobile use in each of these specific areas. The Forest Service states that “individual impacts to wolverines may occur,” but does not disclose what the impacts might be, or which specific areas may contain individually impacted wolverines. *SOMF 19*.

3. Mountain goats.

Mountain goats, another iconic Montana wildlife species, were also selected as MIS to assess management impacts of high elevation snowmobile use.

Snowmobiling will affect mountain goats in their winter range. *SOMF 20*. The Department commented on specific areas where snowmobiles were affecting

mountain goats. SOMF 10. The FEIS did not analyze impacts to mountain goats in places where snowmobiling is now permitted.

4. Impacts to Recreation, Increased Air and Water Pollution.

There are only three trail systems maintained for cross-country skiers in the Beaverhead-Deerlodge. The number of cross-country skiers is decreasing in areas where snowmobile use is allowed to increase. Snowmobiles create conflicts with recreational users, because of noise and air pollution, visual impacts to the landscape and loss of “quiet recreation” opportunities. *SOMF 4*. One of the most important areas for both quiet recreation and wolverines, Wolverine Basin, is not analyzed in detail and is largely unprotected. *SOMF 32-33*.

Snowmobiles cause air and water pollution. Both EPA and the Department explained that snowmobile exhaust leaves toxic compounds in the snow which can pollute watercourses. *SOMF 22-23*. Specific places where snowmobiles could impact fisheries were identified. The FEIS contains no discussion of where and how snowmobile routes could affect water quality. *SOMF 24*. Snowmobiles on low snow packs can harm soils and alpine vegetation. *SOMF 25*. These impacts were not addressed for the areas where snowmobiling is permitted.

C. Exhaustion of Administrative Remedies.

Plaintiffs filed administrative appeals of the Revised Forest Plan. Plaintiffs

raised the issues that are the subject of this lawsuit. The Forest Service made no substantive response to several of Plaintiffs' appeal points in the Appeal Decision. *SOMF 26-27*. For example, Plaintiffs' appeal alleged that the Revised Forest Plan failed to meet the requirements under Executive Orders 11644 and 11989. The Appeal Response does not explain where in the record the Forest Service fulfilled the requirements of the Executive Orders. *SOMF 27*. The Appeal Response consistently failed to address difficult issues, further underscoring the arbitrariness of the FEIS and Record Of Decision. *SOMF 27-35*.

ARGUMENT

A. Standards for Summary Judgment.

Summary judgment may be granted if the movant shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1986).

The standard of judicial review for NEPA, Executive Order compliance and validity of the Travel Rule claims comes from the APA, 5 U.S.C. § 706 (2) (A): "The reviewing court **shall hold unlawful and set aside agency action** that is... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." A decision is arbitrary and capricious if "the agency has relied on

factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The standard is applied to the informal rulemaking embodied in the Revised Plan and Travel Rule under 5 U.S.C. §553.

Although the standard is deferential, courts may not merely "rubber stamp ... decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Bureau of Alcohol, Tobacco and Firearms v. F.L.R.A.*, 464 U.S. 89, 97 (1983). Consistent with the role of Article III judges as the final arbiters of the law, the *State Farm* standard requires a "hard look" at the merits of the agency's decision, to insure it is the product of reasoned decision-making, well-supported by the record.

B. Plaintiffs' Claims are Ripe.

The Forest Service may argue judicial that review is not ripe because the Revised Plan provides broad, programmatic guidance. However, the Supreme Court foreclosed an such argument in *Ohio Forestry*. Challenges to general guidelines about logging methods or objectives in a forest plan are not ripe

because such guidelines do not inflict “significant practical harm.” *Ohio Forestry Assn. v. Sierra Club*, 523 U.S. 726, 733 (1998). However, when a plan “allow(s) motorcycles into a bird-watching area or something [like that], that would be immediately justiciable.” *Id.* at 739 (quoting government attorney at oral argument). The Beaverhead-Deerlodge plan made such a justiciable decision by opening nearly two million acres of the forest to snowmobile use. Plaintiffs’ challenge to the Plan is ripe because the Plan is a decision document with on-the-ground consequences. The NEPA claim is also ripe because a litigant harmed by “a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper.” *Id.*

C. The FEIS Fails to Take a Hard Look at the Site Specific Consequences of Allowing Snowmobile Use on 60% of the Beaverhead-Deerlodge.

1. NEPA is our nation’s premier environmental protection law.

NEPA imbues all federal agencies with the responsibility to insure that environmental impacts are fully assessed and disclosed before action occurs. “NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast. *Methow Valley*, 490 U.S. at 349 (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976)). As the Supreme Court explained:

NEPA promotes its sweeping commitment to ‘prevent or eliminate damage to the environment and biosphere’ by focusing Government and public attention on the environmental effects of proposed agency action. By so focusing agency attention, NEPA ensures that the agency will not act on incomplete [or outdated] information, only to regret its decision after it is too late to correct.

Marsh v. Or. Nat. Resources Council, 490 U.S. 360, 371 (1989) (citing 42 U.S.C. § 4321); *Methow Valley*, 490 U.S. at 349.

“An EIS may be found inadequate under NEPA if it does not reasonably [set] forth sufficient information to enable the decision maker to consider the environmental factors and make a reasoned decision.” *Half Moon Bay Fishermans' Mktg. Assn. v. Carlucci*, 857 F.2d 505, 508 (9th Cir. 1988). For an agency to address the environmental impacts of its actions, some level of “quantified or detailed information is required.” *Neighbors of Cuddy Mountain v. Forest Service*, 137 F.3d 1372, 1379 (9th Cir. 1998). Without quantified, site specific information, “neither the courts nor the public . . . can be assured that the [government] provided the hard look that it is required to provide.” *Id.* The Court must “not rubber-stamp” agency decisions and must “ensure that [the] agency has taken the requisite ‘hard look’ at the environmental consequences of its proposed action, carefully reviewing the record to ascertain whether the agency decision is ‘founded on a reasoned evaluation of the relevant factors.’” *Wetlands Action*

Network v. U.S. Army Corps of Eng'rs, 222 F.3d 1105, 1114 (9th Cir. 2000)

(internal citations omitted).

2. The Beaverhead-Deerlodge Forest Plan FEIS Fails to adequately address the site specific impacts of snowmobiling on wildlife.

The revised Forest Plan opens vast areas of the Beaverhead-Deerlodge to snowmobiles. The agency admits that snowmobiles disrupt wildlife, cause air, noise and water pollution, and conflict with other types of winter recreation.

SOMF 4,5,6,13, 16, 20, 21. However, the requisite “searching and careful” review of the record, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), yields little evidence that the Forest Service evaluated the site-specific impacts of its decision on these parameters. Despite comments by the Plaintiffs, the Department and the U.S. Environmental Protection Agency (EPA), the agency cast a blind eye on site-specific snowmobiling impacts. NEPA requires more.

The FEIS contains no analysis of how snowmobile use will impact specific winter range habitats for elk. The Beaverhead-Deerlodge is home to more than 28,000 elk. The Draft EIS contained little site specific information and virtually no analysis about how snowmobile use in specific areas would affect big game winter range. The Department provided information about winter range and snowmobiles in the Boulder River-Sheepshead Management Area, Kit Carson

Management Area, I-15 Corridor Management Area and Mormon-Buffalo Management Area. *SOMF 8*. The following exchange is indicative of the Forest Service's response to the comments regarding the lack of site specific analysis.

The Department commented that "(t)he proposed plan indicates, 'Some habitat for wintering elk is affected by snowmobiles. Elk winter range maps are not accurate enough to resolve this problem.' Attached is a map of known winter use areas by elk." Rather than use the new information and prepare more detailed analysis (possibly leading to excluding specific areas) the Forest Service stated "This is something we should discuss further." No further site specific analysis of impacts to elk winter range was provided in the FEIS. Other comments about impacts to wildlife winter range from the EPA and conservation groups received the same cursory dismissal. *SOMF 11*. While agencies may be entitled to some deference on scientific matters, this Court "cannot defer to a void." *Or. Nat. Desert Assoc. v. BLM*, 625 F.3d 1092, 1121 (9th Cir. 2010).

Examples abound of the Forest Service's willingness to cast a blind eye to site-specific information about snowmobile impacts on wildlife. The Department commented:

As important is ***the need to specify designated snowmobile routes so that snowmobiles are not damaging riparian areas that provide moose forage.*** From aerial surveys conducted throughout [the

Boulder River MA] it is apparent that snowmobilers are driving cross-country through willow communities, likely causing damage to the health and vitality of these communities as well as reducing moose forage. (emphasis added).

The agency's response: "Thank you for the comment. The alternatives in the DEIS will show a range of areas open and closed to winter motorized recreation."

The FEIS contains no new information about snowmobile impacts on moose in the Boulder River area and trail designations in riparian areas. *SOMF 8-9*. The same lack of analysis occurred for mountain goats, a Management Indicator Species that can be driven from habitat by snowmobiles. *SOMF 20*.

Plaintiffs raised these same issues in the administrative appeal. *SOMF 10*. The Forest Service responded by stating that the "hunting season in the fall poses the greatest potential human disturbance..." *SOMF 35*. The agency's response misses the mark. That hunting causes disturbance to wildlife is not the issue. The relevant issue is the **additional** disturbance to wildlife posed by snowmobiles. The best response the agency can muster is a citation back to the FEIS, citing to pages pp. 488-489, 508-510, 513. The cited pages yield only general information: pages 488-9 mostly discuss grizzly bears, pages 508-510 provide only general, forest-wide impacts, and page 513 provides a general discussion of wolverine impacts. Table 176 at page 510 of the FEIS depicts the percentage of winter range offlimits

to snowmobiles under various alternatives. This table is not a substitute for site-specific analysis.

The same lack of site-specific analysis is evident for wolverines. The Beaverhead-Deerlodge has important populations contains significant wolverine habitat; the species is a Management Indicator Species for the entire Forest. *SOMF 14*. This iconic species has substantially diminished over the past century, is extirpated from much of the lower 48 states, and has been petitioned for protection under the ESA and was found to be warranted for listing but precluded by limited agency resources. 75 Fed. Reg. 78030 (Dec. 14, 2010). This reclusive mammal is easily disturbed by human activity. The advent of high-powered snowmobiles has allowed humans to disturb the high and remote alpine cirques that are favored by this species. FEIS at 510 (“technological improvements enable snowmobiles to reach areas previously considered impossible”). The Forest Service is well aware of the problems that snowmobiles pose for wolverines.

The agency did some analysis based on wolverine denning habitat, which, while important, represents only part of the impacts to wolverines. Wolverine need to be able to move across large areas of undisturbed habitat. These linkages are critical to species viability. Wolverines also depend on other species for prey. Plaintiffs raised these issues in their comments and administrative appeal. *SOMF*

30, 32, 33. The Appeal Decision points to the FEIS at pages 535-539 that supposedly address “areas of linkages or connectivity.” *SOMF 35A*. The connectivity discussion is contained in one paragraph on page 538 and is hopelessly vague; wolverines are not specifically mentioned. The failure to consider habitat connectivity is a failure to consider a relevant factor under *State Farm*.

3. The FEIS fails to provide adequate analysis of other adverse environmental impacts caused by snowmobiles.

The lack of site-specific analysis on wildlife winter range and wolverines is endemic to much of the FEIS. The record demonstrates, for example, that snowmobiles can contribute to increased water pollution. Two-stroke engines are dirty. As much as 30% of toxic components of gasoline are not combusted, is deposited on the snow, eventually melting into local water courses. Some lakes, streams and riparian areas on the Beaverhead-Deerlodge are heavily used by snowmobiles. The water pollution issue was raised in comments by the Department, EPA and conservation groups. *SOMF 22-24*.

The FEIS lacks any site-specific analysis of water pollution from snowmobiles riding on watercourses in the areas designated open to winter motorized use. In its Appeal Decision, the Forest Service claims “pages 137-139

of the FEIS address the effects of snowmobile use to the aquatic resources.” The statement is false. Impacts to aquatic resources are addressed in a lone paragraph couched in general, vague terms. While recognizing that “Contamination by human waste and by petroleum products such as motor oil and gasoline can degrade water quality in waters adjacent to areas of concentrated use....” the agency eschewed further analysis. “Because site conditions vary, and because these sites are relatively small in area and widely dispersed, it is reasonable to assume that cumulative impacts will not be measurable at the forestwide scale.” *Id.* No analysis was done to support this statement; the Forest Service promised instead that “winter activities that appear to be problematic will be identified and rectified during project-level analysis.” *Id. See SOMF 26A.* However, there are no project level analysis required - the areas are already open to winter motorized use.

The same problem is evident for conflicts between snowmobile use and quiet winter recreation like skiing and snowshoeing. No site specific analysis of conflicts between snowmobiles and quiet recreationists is provided, though the conflicts are well-known. In one area of particular importance to backcountry skiers, the Mount Jefferson area, the agency simply drew an imaginary line across the landscape to try to separate the two uses, while admitting it could not enforce

the closure. *SOMF* 32-34.

For activities like logging and grazing, the Forest Plan is a general guidance document. Further NEPA analysis is required before these activities occur. *See Ohio Forestry, supra.*, 729-30. However, the Beaverhead-Deerlodge Revised Plan and FEIS are the sole decision documents approving snowmobile use. The agency will not conduct further analysis - the areas were lawfully open the day the Revised Plan was approved.

In sum, the FEIS fails as a matter of law for lack of specificity. The Environmental Consequences section of an FEIS is the “analytical and scientific basis” for the comparisons made between alternatives. It must disclose both the direct and indirect effects of the proposed action. 40 C.F.R. § 1502.16. “The detail that NEPA requires in an EIS depends upon the nature and scope of the proposed action.” *State of California v. Block* 690 U.S. 573, 761 (9th Cir. 1982) *citing Aberdeen & Rockfish R.R. Co. v. Students Challenging Regulatory Agency Procedures*, 422 U.S. 289, 322 (1975). The Supreme Court has made clear that the complete disclosure of environmental consequences is the *sine qua non* of NEPA. *Marsh, supra*, 390 U.S. at 471 (The thrust of NEPA is “focusing Government and public attention on the **environmental effects of proposed agency action**”). The Forest Service decided to open nearly 2 million acres to

winter motorized use in its Forest Plan. It is the agency's job to comply with NEPA. While conducting a "detailed site specific analysis....will be no simple task and will be laden with empirical uncertainty.... the scope of the undertaking here, however was the Forest Service's choice and not the Courts." *Block*, 690 F.2d at 764.

C. The Revised Forest Plan Violates Executive Orders 11644 and 11989.

In 1972, President Nixon issued Executive Order 11644 to address increasing damage to federal public lands from off-road vehicles. *See* Exec. Order 11644 (February 8, 1972). President Carter amended this Order in 1977 to provide further protection to these lands. *See* Exec. Order 11989 (May 24, 1977); *see also Utah Shared Access Alliance v. Carpenter*, 463 F.3d 1125, 1130 (10th Cir. 2006) (Executive Order 11989 amended Executive Order 11644 and "strengthened it considerably"). The Executive Orders further the purpose and policies of NEPA and therefore carry an independent duty with which the agency must comply. *Id.*

Executive Order 11644 defines "off-road vehicle" as "any motorized vehicle designed for or capable of cross-country travel on or immediately over land, water, sand, snow, ice, marsh, swampland, or other natural terrain." Executive

Order 11644 § 2 (3). This definition encompasses snowmobiles. The Forest Service acknowledged this when promulgating its travel management regulation in 2005:

Snowmobiles are “off-road vehicles” under Executive Order 11644 and subject to the direction “to provide for administrative designation of the specific areas and trails on public lands on which the use of off-road vehicles may be permitted, and areas in which the use of off-road vehicles may not be permitted” (Executive Order 11644, Sec. 3(a)).

70 Fed. Reg. 68,273 (Nov. 9, 2005).

Executive Order 11644 requires agency regulations to minimize off-road vehicle impacts as follows:

- (1) Areas and trails **shall** be located to minimize damage to soil, watershed, vegetation, or other resources of the public lands.
- (2) Areas and trails **shall** be located to minimize harassment of wildlife or significant disruption of wildlife habitats.
- (3) Areas and trails **shall** be located to minimize conflicts between off-road vehicle use and other existing or proposed recreational uses of the same or neighboring public lands, and to ensure the compatibility of such uses with existing conditions in populated areas, taking into account noise and other factors.

Exec. Order 11644 at § 3 (emphasis added). These criteria, the “minimization criteria,” require federal agencies to minimize motorized impacts for summer and winter users. They are substantive and subject to judicial review. *Conservation Law Foundation v. Clark*, 590 F. Supp. 1467, 1477 (D. Mass. 1984) (holding that

Order 11644 is “invested with the status of law” and enforceable), *aff'd*, 864 F.2d 954 (1st Cir. 1989).

Recently, the duties imposed by the Executive Orders were re-affirmed by the Idaho District Court, which held that the Salmon-Challis travel plan violated the 2005 Travel Management Rule (Travel Rule) and the Executive Orders. The Forest Service must not only document that it “considered” the criteria in the Travel Rule and Executive Orders that require minimization of impacts on watersheds, soil, vegetation, wildlife, recreational conflicts, etc. when it designates areas for motorized use, the agency must also explain “how the minimization criteria were applied in the route designation decisions” with the objective of minimizing impacts. *Idaho Conservation League v. Guzman*, 2011 WL 447456, at *17 (D. Idaho Feb. 4, 2011).

Guzman relied on an earlier decision overturning aspects of a Bureau of Land Management resource management plan for the California Desert Conservation Area. *Ctr. for Biological Diversity v. U.S. Dept. of Interior*, 2009 U.S. Dist. LEXIS 90016 (N.D. Cal. 2009). That court found a similar violation because the agency failed to demonstrate how the “minimization criteria were in fact applied when [Off-Highway Vehicle] routes were designated” during the planning process. *Id.*

at 28. Both the BLM and the Forest Service are bound by the plain language of the Executive Orders and both land management agencies must consider the impacts of off-road vehicle use and attempt to minimize those impacts. *Guzman* at *17.

The Beaverhead-Deerlodge Revised Plan and FEIS provide no evidence of how the minimization criteria in the Executive Orders were applied for areas where snowmobile use was designated. The FEIS also contains virtually no site-specific analysis of snowmobile impacts on wildlife, recreation or water quality. The Executive Orders require assessment of these impacts and then application of the information to minimize impacts to each area before designation for snowmobiles. *See* Exec. Order 11644 Sec. 3(a)(2) (“Areas and trails **shall be located** to minimize harassment of wildlife or significant disruption of wildlife habitats.”). Nowhere in this record does the Forest Service provide an area-by-area analysis of how it has minimized the harassment of wildlife or disruption of wildlife habitat in the areas it has opened to snowmobiles.

The same is true for designating areas that minimize conflicts with other recreation; such areas “shall be located to minimize conflicts between off-road vehicle use and other existing or proposed recreational uses.” Exec. Order 11644 Sec. 3(a)(3). The Executive Orders also require the same minimization of impacts

on soils, water, and vegetation. *Id.* Sec. 3(a)(1). These requirements are mandatory; the word “shall” admits of no discretion. *See United States v. Monsanto*, 491 U.S. 600, 607 (1989) (the use of the word “shall” means duty is mandatory).

The agency’s failure is more glaring because it knows that snowmobile technology has changed, allowing snowmobiles to access more remote terrain. *SOMF 2-3*. The agency’s duty to minimize impacts is amplified by the fact that snowmobiles can fully utilize the areas now open to them. Moreover, the agency knows that “assuming increased snowmobile use, animals on big game winter range would be increasingly stressed by motorized use during the time of the year they are most vulnerable to depletion of their energy reserves.” *SOMF 5-6*. The record contains no evidence as to how the Forest Service applied this knowledge in specific areas before allowing snowmobiles.

Instead the Beaverhead-Deerlodge attempts to rely on the same rationale discredited in *Guzman*, claiming that the total area open to snowmobiles is a reduction from its earlier motorized use allocations. *See Appeal Decision (AR I5-04, 104-105)*. However, this general statement does not comport with the requirements of the Executive Orders. While an overall reduction in snowmobile usage to lessen environmental impacts is a worthy goal, it does not equate to a

minimization of impacts of individual areas and routes that were opened via the Revised Forest Plan. As the courts in both *Guzman* and *Center for Biological Diversity* explained, “[m]inimize’ as used in the regulation does not refer to the number of routes, nor their overall mileage. It refers to the effects of route designations, *i.e.* the [Forest Service] is required to place routes specifically to minimize ‘damage’ to public resources, ‘harassment’ and ‘disruption’ of wildlife and its habitat, and minimize ‘conflicts’ of uses.” *ICL* at *16 (quoting *Ctr. for Biological Diversity v. U.S. Dept. of Interior, supra.*). Here, the Beaverhead-Deerlodge failed to apply the minimization criteria in the Executive Orders for designating areas of snowmobile use. The Revised Plan and Record of Decision violate Executive Order 11644, as amended.

D. Subpart C of the Travel Rule is Inconsistent with Executive Order 11644, was Not Supported by Adequate Reasons and is Therefore Invalid.

The Executive Orders’ substantive requirements have been further defined by regulations promulgated by each land management agency. Before 2005, Forest Service regulations required both summer and winter motorized use to apply the minimization criteria when areas and trails were designated for motorized use. *See* 36 C.F.R. part 295 (repealed 2005). In 2005, the Forest Service revised these regulations in a new rule, the 2005 Travel Management

Rule, 36 C.F.R. part 212 (“Travel Rule”). *See* 70 Fed. Reg. 68264 (Nov. 9, 2005). In Subpart C, the new Travel Rule exempts snowmobiles from the criteria in the Executive Orders that requires that impacts on resources be evaluated and minimized before areas are designated for snowmobile use. As applied to the Beaverhead-Deerlodge, the 2005 Travel Rule is inconsistent with its authorizing authority and is based on the arbitrary and irrational premise that snowmobile impacts to wildlife, air and water pollution and other recreation are fundamentally different than impacts caused by other motorized vehicles.

1. Inconsistent with Executive Orders.

An agency's interpretation of its own regulation is entitled to deference only if that interpretation is consistent with the wording of the regulation and consistent with the statute under which the regulation was promulgated. *Mines v. Sullivan*, 981 F.2d 1068, 1070 (9th Cir. 1992), *citing United States v. Larionoff*, 431 U.S. 864, 872-73 (1977). The Travel Rule was implemented in part to satisfy the Executive Orders’ requirement to minimize impacts from off-road vehicle designations. 70 Fed. Reg. 68,264. The Executive Orders require the promulgation of regulations that require that the designation of off-road vehicle use be “based upon the protection of the resources of the public lands, promotion of the safety of all users of those lands, and minimization of conflicts among the

various uses of those lands.” Exec. Order 11,644, § 3. Subpart C of the Travel Rule does not meet these threshold requirements because snowmobile areas can be designated without application of the Executive Order criteria.

While the Travel Rule contains a definition for “off-road vehicles” like the Executive Orders (although renamed “off-highway vehicle”), the rule reclassified snowmobiles, which are included in the definition of “off-road vehicle” in the Executive Orders, as “over-snow vehicles.” *Compare* Exec. Order 11,644 § 2, *with* 36 C.F.R. § 212.1. This change in terminology had tremendous consequences because the Forest Service then exempted snowmobiles from the mandatory minimization criteria in the Travel Rule. *See* 70 Fed. Reg. 68,273 (stating that snowmobiles are “off-road vehicles” under the Executive Orders and that the final rule exempts snowmobiles from the mandatory designation scheme provided for summer motor vehicles). Instead, the snowmobile portion of the Travel Rule, 36 C.F.R. § 212.81(c), only requires that the minimization criteria be applied “if the responsible official proposes *restrictions or prohibitions* on use by over-snow vehicles.” *Id.* (emphasis added); *see also* 70 Fed. Reg. 68,283 (stating the same). Thus, though the Executive Orders make no distinction between snowmobiles and other types of off-road vehicles, the agency made such a distinction in the Travel Rule and permits snowmobile area designations without

minimizing the impacts of the designation on wildlife, recreation and so forth.

The Beaverhead-Deerlodge relied on the exemption created in Subpart C of the Travel Rule in order to avoid applying the minimization criteria in its designation of areas open to snowmobile use. In fact, in the appeal response, the Beaverhead-Deerlodge admitted its failure to use the Travel Rule's designation criteria because of the exemption for snowmobiles:

Forest Service directives at Forest Service Manual 7718.1 implementing the new travel management regulations clarify that over-snow vehicle use may be restricted or prohibited under 36 CFR 212.81 and 261.14, which require compliance with the designation process at 36 CFR 212.52 through 212.57, or through issuance of an order under 36 CFR Part 261, Subpart B, *which does not require compliance with 36 CFR 212.52 through 212.57.*

AR 14-5 Appeal Decision at 95.

Due to the flawed Travel Rule, the Beaverhead-Deerlodge was not required to use the trail designation criteria of the Travel Rule that apply to summer motorized use. Because the Travel Rule contains an exemption not found in the Executive Orders, its source of authority, application of the Travel Rule here meant that snowmobiles were exempt from any review under the Travel Rule. Because the 2005 Travel Rule fails to adequately implement the Executive Orders' requirements for snowmobile management, both the Beaverhead-Deerlodge's decision and Subpart C of the Travel Rule itself are illegal.

2. Subpart C of the Travel Rule Conflicts with Past Regulations and Lacks Adequate Justification.

Without adequate justification, the Travel Rule, 36 C.F.R. § 212.81, reversed the long-standing requirements contained in 36 C.F.R. § 295.2 for snowmobile management. The previous rule required snowmobile route designations to undergo the same review as other summer motorized use. Agency decisions that conflict with previous decisions are “‘entitled to considerably less deference’ than a consistently held agency view.” *Immigration and Naturalization Service v. Cardoza-Fonesca*, 480 U.S. 421, 446 n. 30 (1987), quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981).

The Forest Service utilized the old rule at 36 C.F.R. part 295 for over two decades. The Bureau of Land Management still has a nearly identical rule. 43 C.F.R. §8340 *et seq.* Both treat snowmobiles like all other motorized off-trail vehicles. There is no evidence in this record that using the same standards for summer and winter motorized uses was causing resource degradation. Yet the Forest Service stripped the protections in its previous rule with little explanation. Where an agency overrides longstanding policies, such as those in place in 36 C.F.R. § 295.2, it “has a duty to explain its departure from prior norms” in the administrative record, which it has not done here. *See Atchinson v. Wichita Board*

of Trade, 412 U.S. 800, 808 (1973).

The requirements in the summer portion of the Travel Rule, 36 C.F.R. § 212.55, are nearly identical to the requirements in 36 C.F.R. § 295.2, and the Executive Orders, that previously regulated all off road vehicles. In response to public comments on the draft Travel Rule expressing concern that the Travel Rule dropped these requirements for snowmobiles, the agency stated:

[T]he Department believes that cross-country use of snowmobiles presents a different set of management issues and environmental impacts than cross-country use of other types of motor vehicles. Therefore, the final rule exempts snowmobiles from the mandatory designation scheme provided for under § 212.51, but retains a manager's ability to allow, restrict, or prohibit snowmobile travel, as appropriate, on a case-by-case basis (§ 212.81).

70 Fed. Reg. 68283. The Forest Service doesn't deny that there are environmental impacts from snowmobile use; it just claims, vaguely, that they are "different." No cases studies or scientific evidence is provided. This limited explanation fails to articulate a rational basis for exempting snowmobile use from the requirements of the Executive Orders. Further, it fails to provide any rational explanation for the change in course from the former rule. *SOMF 38-43*.

Obviously snowmobiles don't have wheels and don't operate in the summer. Beyond that, the record for the Beaverhead-Deerlodge shows that the adverse environmental impacts from snowmobiles affect the same environmental

parameters as all-terrain vehicles and dirt bikes. Both affect wildlife, water and air quality, soil, and vegetation. Both affect non-motorized recreation.

A review of the administrative record for the Travel Rule provides no insight into what the different issues and impacts might be, or why the new regulation declined to regulate those issues and impacts. (*See* the Travel Rule AR C6 (statement acknowledging that summer use and winter use have different issues that must both be addressed by the rule, but not outlining what those differences might be, or how they were being addressed); E25 (states that snowmobile problems mirror off-highway vehicle problems, and in many areas have a greater impact, and that the Travel Rule needs to address both); I160 (e-mail from Forest Service personnel asking why the Travel Rule was not addressing snowmobiles, but the AR provides no response to that question).

Where an agency modifies or overrides longstanding precedents or policies, such as those in place in 36 C.F.R. § 295.2, it “has a duty to explain its departure from prior norms” in the administrative record, which it has not done here. *See Atchinson v. Wichita Board of Trade*, 412 U.S. 800, 808 (1973). The issue was raised in comments and largely ignored.

Disparate treatment of snowmobiles from other off-road vehicles is not supported by the Travel Rule’s administrative record. The agency fails to provide

a rational basis for the decision to exclude snowmobile designations from the requirements of the Travel Rule and the Executive Orders. The “rather stunning lack of evidence that the Secretary gave plaintiffs' objections any such consideration” is grounds for invalidating the rule as arbitrary. *Beno v Shalala*, 30 F.3d 1057, 1074. (9th Cir. 1994).

CONCLUSION

Plaintiffs request this Court to declare unlawful, vacate and remand the Revised Forest Plan, FEIS and Travel Rule for the reasons stated herein, and to conduct further proceedings on the appropriate interim relief.

Dated June 13th, 2011.

/s/ Jack R. Tuholske

/s/ Sarah Peters
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. Of Civ P. 7.1(d)(2) and complies with the type style requirements of Fed. R. Civ. P. 10.1. This brief has been prepared in a proportionally spaced typeface using Corel WordPerfect X5; the font size is 14 and the style is Times New Roman and it contains 6482 words (including headings, footnotes, and quotations, but not including table of contents, table of citations, addendums, rules and regulations, or certificates). Brief does not average more than 280 words per page excluding Certificate of Service and Certificate of Compliance.

/s/ Jack R. Tuholske

Certificate of Service

I hereby certify that on September 22, 2011, I caused to be electronically filed the foregoing, with the Clerk of the District Court of the United States for the District of Montana, Missoula Division, using the CM/ECF system.

I further certify that a copy of the foregoing will be electronically served on all participants who are registered with the CM/ECF system by the CM/ECF system.

/s/ Jack R. Tuholske
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