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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
MISSOULA DIVISION

BITTERROOT RIDGE RUNNERS SNOWMOBILE CLUB, *et al.* Plaintiffs, vs. U.S. FOREST SERVICE, *et al.*, Federal Defendants, and FRIENDS OF THE BITTERROOT, *et al.*, Intervenor Defendants.	)	Case No. 9:16-cv-00158-DLC FEDERAL DEFENDANTS' BRIEF IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT [ECF No. 38]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTRODUCTION

This action challenges the Bitterroot National Forest Travel Management Planning Project ("Travel Plan" or "Project"), which the U.S. Forest Service ("Service" or "USFS") implemented under the Travel Management Rule (the "Rule"). The first purpose and need of the Project is to "[a]ddress conflicts between motorized and non-motorized uses" with an objective to "[c]hange the existing motorized recreation designations to provide quality motorized recreation experiences while protecting natural resources and providing nonmotorized recreation opportunities outside of Designated Wilderness." AR00393. Within the Forest's boundaries, and particularly relevant to this action, are the Sapphire and Bluejoint Wilderness Study Areas ("Study Areas") and the Selway-Bitterroot and Bluejoint Recommended Wilderness Areas ("Recommended Wilderness").

To manage competing recreational interests and to implement the Rule, the Forest engaged in an eleven-year process that culminated in a May 2016 Record of Decision. As authorized, the decision implements a modified version of Alternative One, the preferred alternative. At issue in this action is the Service's decision to prohibit motorized and mechanical travel, including bicycles, in Study Areas and Recommended Wilderness. Based on extensive data and analysis, the Service determined that unregulated motorized and mechanical travel degrades the wilderness character of these areas, which is inconsistent with Service direction

and statutory mandates to maintain wilderness character until Congress considers the areas for inclusion in the National Wilderness Preservation System.

Plaintiffs consist of motorized and mechanized recreation organizations. They challenge the Travel Plan under the Montana Wilderness Study Act of 1977, Pub. L. No. 95-150; 91 Stat. 1243 (1977); the National Environmental Policy Act, 42 U.S.C. §§ 4331-4370h ("NEPA"); the National Forest Management Act, 16 U.S.C. §§ 1600-1614 ("NFMA"); and the Travel Management Rule, 36 C.F.R. pt. 212, 251, 261, and 295. As this brief and the Administrative Record show, the Service's rigorous analysis provided multiple opportunities for public involvement and complied with all applicable laws. The Court should deny Plaintiffs' motion for summary judgment and grant Federal Defendants' cross-motion for summary judgment.

II. FACTUAL BACKGROUND

Federal Defendants' contemporaneously filed Statement of Undisputed Facts sets forth the relevant factual background for the Travel Plan.

III. LEGAL BACKGROUND

A. Standard of Review

Challenges to agency compliance with the Wilderness Act, Montana Wilderness Study Act, NEPA, and NFMA are reviewed under the Administrative Procedure Act, 5 U.S.C. §§ 701-706. *Lands Council v. McNair*, 537 F.3d 981, 987

(9th Cir. 2008). Agency decisions may be overturned only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 891 (9th Cir. 2002) (quoting 5 U.S.C. § 706(2)(A)). This standard of review is highly deferential; an agency decision "will only be overturned if the agency committed a clear error in judgment." *Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1114-15 (9th Cir. 2000), *abrogated on other grounds by Wilderness Soc'y v. USFS*, 630 F.3d 1173 (9th Cir. 2011).

B. Montana Wilderness Study Act

The Montana Wilderness Study Act of 1977 ("Study Act") directed the Secretary of Agriculture to review certain lands within Montana to determine their suitability for preservation as wilderness. Pub. L. 95-150, 91 Stat. 1243; AR08969-70. The Study Act created two Study Areas on the Bitterroot: the Sapphire and the Bluejoint. *Id*., Sec. 2(a)(3), (4). Unless directed otherwise by Congress, the Secretary must manage these areas "so as to maintain their presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System." *Id.*, Sec.3(a). "Presently existing" refers to the wilderness character as it existed in 1977. *Russell Country Sportsmen v. USFS*, 668 F.3d 1037, 1042 (9th Cir. 2011).

C. National Environmental Policy Act

NEPA is a procedural statute that requires analysis and public disclosure of significant environmental effects to ensure informed decision-making; it does not require that agencies reach a particular result. 42 U.S.C. § 4321; 40 C.F.R. § 1502.1; *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). "NEPA merely prohibits uninformed – rather than unwise – agency action." *Robertson*, 490 U.S. at 351. A court is charged only with ensuring that the agency has presented a "'full and fair discussion of significant environmental impacts' so as to 'inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.'" *Lands Council*, 537 F.3d at 1001 (quoting 40 C.F.R. § 1502.1).

D. National Forest Management Act

The Service manages National Forests pursuant to NFMA and its implementing regulations, which provide for forest planning and management at the forest level and individual project level. *See* 16 U.S.C. § 1604; *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 729-30 (1998). At the forest level, the Service develops a forest plan, which establishes goals, objectives, standards, and guidelines for management of forest resources. 16 U.S.C. § 1604(g)(1)-(3). At the project level, site-specific projects must be consistent with the plan. 16 U.S.C. § 1604(i). The Service's interpretation of its forest plan is entitled to deference.

Native Ecosystems Council v. USFS, 418 F.3d 953, 960 (9th Cir. 2005).

E. The Travel Management Rule

In 2005 the Secretary of Agriculture adopted regulations that fundamentally changed the management of motor vehicles on National Forest System lands. Travel Management; Designated Routes & Areas for Motor Vehicle Use, 70 Fed. Reg. 68,264 (Nov. 9, 2005). The Rule has three parts. Subpart A covers issues such as the inventorying of roads in administrative units of the National Forest System. 36 C.F.R. §§ 212.1-212.21. Subpart B requires each administrative unit or ranger District of the Service to designate a system of roads, trails, and areas open to motor vehicle use by vehicle type and time of year. 36 C.F.R. §§ 212.50-212.57. Subpart C regulates over-snow vehicle use. 36 C.F.R. § 212.80-81. Once the roads, trails and areas are designated, all motor vehicle uses inconsistent with those designations are prohibited. 36 C.F.R. § 261.13.

IV. ARGUMENT

A. The Travel Plan maintains the wilderness character of Recommended Wilderness and Study Areas.

The Travel Plan prohibits motorized and mechanical transport in Recommended Wilderness and Study Areas. AR00193. Plaintiffs claim these prohibitions are arbitrary and capricious because the Service misapplied the relevant statutes, did not support the decision with site-specific analysis, and predetermined the outcome. Mem. in Supp. of Pls.' Mot for Summ. J. ("Pls.'

Mem.") 7-21, ECF No. 39; Compl. ¶¶ 129-41 (Count One), ¶¶ 142-53 (Count Two), Compl. ¶¶ 154-69 (Count Three), ¶¶ 192-98 (Count Six).[1] Contrary to Plaintiffs' claims, the Service engaged in a thorough and public analysis before deciding to close these areas to motorized and mechanical transport. The Travel Plan is consistent with the Service's management direction and is not arbitrary and capricious.

1. The Service has the authority to maintain wilderness character and the discretion, under appropriate circumstances, to enhance it.

Central to Plaintiffs' arguments in this case is their belief that the Service cannot manage Study Areas and Recommended Wilderness to preserve wilderness character. According to Plaintiffs, because there was open motorized and some mechanized travel in these areas in 1977, the Service must allow it to continue. Pls.' Mem. 16-18, 20-21. Plaintiffs are wrong.

The Project area contains the Sapphire and Bluejoint Study Areas. AR00560. Under the Study Act, the Service must maintain the 1977 wilderness

[1] Plaintiffs' brief does not address all of the claims alleged in the Complaint. Specifically, Count Three (Compl. ¶¶ 155-57, 160) alleges a violation of the Wilderness Act, 16 U.S.C. §§ 1131-36, and Count Seven (Compl. ¶¶ 199-211) alleges the Service violated NEPA because it did not consider an adequate range of alternatives in the draft Environmental Impact Statement ("EIS"). These counts are waived because Plaintiffs did not address the Wilderness Act or NEPA's range of alternatives in their opening brief. *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1033 (9th Cir. 2008) ("Arguments not raised by a party in its opening brief are deemed waived.").

character of these areas, "including 1977's relatively low volumes of motorized use . . . in addition to ensuring that the areas' physical potential for future wilderness designation is not destroyed." *Mont. Wilderness Ass'n v. McAllister*, 666 F.3d 549, 555 (9th Cir. 2011). The Project area also contains the Selway-Bitterroot and Bluejoint Recommended Wilderness. AR00560. The 1987 Forest Plan designated these areas and directed that "until Congress directs otherwise…[the] acreage will be managed to maintain the present potential for inclusion in the National Wilderness Preservation System." AR04637. Neither Study Areas nor Recommended Wilderness are "available for any use or activity that may reduce the wilderness potential of an area. Activities currently permitted may continue, pending designation, if the activities do not compromise wilderness values of the area." Forest Service Manual 1923.03; AR37502.

The Service thoroughly analyzed the direct, indirect, and cumulative environmental impacts of the alternatives on Recommended Wilderness (AR00563-71) and Study Areas (AR00571-83). For Recommended Wilderness, the Service found that motorized and mechanized use has increased sharply in the 40 years following the Study Act. AR00564-65. The Service determined that prohibiting motorized and mechanized use would "protect the existing high value of the areas for providing primitive recreation experiences, and ensure the area retains its wilderness qualities." AR00566, 00209-11.

For Study Areas, the Service examined how each alternative would either positively or negatively affect the wilderness character as it existed in 1977. AR00571-617. The Service found that "[m]otorized/mechanical transport use on roads and trails in wilderness study areas [] impacts their wilderness attributes." AR00587, 00610. The Forest Supervisor ultimately decided to prohibit motorized and mechanized transport in the Study Areas to preserve their wilderness character. AR00209. That determination was within her authority and was not "arbitrary and capricious."

Plaintiffs' argument here that the Service lacks the authority to eliminate motor use in any areas where it previously occurred is very similar to an argument rejected in *Russell Country Sportsmen*, 668 F.3d at 1039-40. There, recreational groups sought to block a travel management plan that reduced the availability of motorized recreational use in a Study Area. The recreational groups argued that the Study Act prevented the Service from degrading the 1977 wilderness character of the Study Area *and* from enhancing it. *Id.* at 1042. The Ninth Circuit rejected this argument and held the Study Act "plainly mandates preservation of a base level, but does not prohibit enhancing the area's wilderness character above that level." *Id.* The Ninth Circuit also found that Congress did not "mandate that motorized recreational levels be maintained. And Congress made clear that the Service was free to reduce motorized use levels when carrying out its general

obligations to manage national forests." *Id.* at 1044. While *Russell Country Sportsmen* concerned Study Areas, the same principle applies for Recommended Wilderness. *See Ten Lakes Snowmobile Club et al., v. USFS*, Case No. 9:15-cv-00148-DLC, 2017 WL 4707536, at *12 (D. Mont. Oct. 18, 2017) (the Service "has broad authority to manage and protect [Recommended Wilderness]….").

Plaintiffs complain that the Service misinterprets the Study Act because some motorized use existed in the Study Areas in 1977. Pls.' Mem. 17-18. While there may have been some motorized use on the Forest 40 years ago, the Service observed that "[v]ery little data was found to substantiate the volume of use or location of motorized/mechanical transport in these [Study Areas] in 1977." AR00208. The Service continued, "while the exact numbers of motorized/mechanized users is not known, it is clear that the current amount of use has far surpassed the 1977 levels." AR00209.

Plaintiffs also allege that the prohibitions on motorized and mechanized travel in both Study Areas and Recommended Wilderness "advance impermissible goals." Pls.' Mem. 16-17, 20-21. To the contrary, the decisions in the Travel Plan are consistent with the Service's obligations under the Study Act, and direction under the Forest Plan and Forest Service Manual. The Travel Plan preserves the wilderness character of these areas and allows Congress to consider the areas for designation as wilderness in the future. AR00209, 00211.

2. The Service used appropriate data and analyses to reach its decision.

Plaintiffs assert the Service failed to conduct site-specific analyses before closing Recommended Wilderness and Study Areas to motorized and mechanical use. Pls.' Mem. 14-16, 18-20. Plaintiffs' argument fails.

The Service conducted a rigorous review of available data. A Service economist analyzed the available data to estimate the number of motorized and mechanical users from 1977 to 2009 in the Study Areas. AR40921-410010. The Bluejoint study alone found that overall, snowmobile use grew more than fourfold, off-highway-vehicle use grew nine fold, and bicycle use went from virtually non-existent to a common use today. AR40921-40. In addition to this study, the final EIS also analyzed the identification and early evaluations of the areas (AR00571), the wilderness characteristics (AR00577), and the direct and indirect environmental effects of each alternative. AR00583-95; *see generally* AR00571-617. The Forest Supervisor acknowledged that while the available data for use in 1977 was limited, current use unquestionably showed a sharp increase in motorized and mechanized transport over the past 40 years. AR00209-10.

Plaintiffs do not identify what additional data they believe the Service should have used in its analyses. The Service is not required to obtain comprehensive user data for the past 40 years or conduct monitoring surveys to support its management decisions. The Ninth Circuit recognized that the Service's

"attempt to maintain 1977 wilderness character… may necessarily be approximate and qualitative." *Mont. Wilderness Ass'n*, 666 F.3d at 559. Here, the Service conducted a thorough analysis of available information to assess the impacts of motorized and mechanized use on the character of Recommended Wilderness. AR00563-617. This analysis satisfies NEPA's rule of reason and enabled the agency to make an informed decision. *Ctr. for Biological Diversity v. USFS*, 349 F.3d 1157, 1166 (9th Cir. 2003) (Courts employ "a rule of reason [standard] to determine whether the [EIS] contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences."); *Lands Council*, 537 F.3d at 991-92 ("The Forest Service is at liberty, of course, to use on-the-ground analysis if it deems it appropriate or necessary, but it is not required to do so.").

Plaintiffs' belief that the Service should have conducted a more site-specific analysis is based on selective excerpts from two emails that relate to earlier versions of the final EIS and draft Record of Decision. Pls.' Mem. 15 (citing AR45372 B-1, 44853 A-20). The emails, sent in 2011 and 2013, criticize the earlier versions for not incorporating enough of the available information on impacts. *See id.* The final documents respond to this critique and analyze the history and evolution of the trails, historical uses by various groups, and changes in vehicle use over time. AR00564. Based on comments from the public, the final

EIS discusses the increase in popularity of mountain biking (virtually non-existent in 1977), particularly on trails that lead to the wilderness boundary. AR00565. Each alternative is discussed in detail, including direct and indirect environmental effect analysis. AR00566-571. While the Service may not have had precise user data, it used its expertise and available information to conclude that prohibiting mechanical and motorized use would best protect the Recommended Wilderness. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983) (when "available data does not settle a regulatory issue . . . the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion.").

While Plaintiffs may disagree with how the Service reached its decision, the Service's analysis is not arbitrary and capricious. *Ten Lakes*, 2017 WL 4707536, at *11 ("The Forest Service provided a reasoned analysis of this issue in the ROD and FEIS for both forests, and considered the environmental impacts of its decision after weighing the relevant data and materials.").

3. <u>The Service did not predetermine the outcome of the Travel Plan.</u>

Plaintiffs complain that the Service impermissibly relied on "Region 1 Guidance" and predetermined the prohibition on motorized and mechanical transport in Recommended Wilderness. Pls.' Mem. 9-13.[2] Plaintiffs

[2] No single document constitutes "Region 1 Guidance." Here, Plaintiffs refer to

mischaracterize the role of the Region 1 Guidance; the Service did not predetermine the outcome.

NEPA's implementing regulations require an agency to identify a preferred alternative. 40 C.F.R. § 1502.14(e); *Ass'n of Pub. Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1185 (9th Cir. 1997). Though an agency may have a preferred course of action, NEPA's hard look "must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made." *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000). "Those alleging predetermination have a high hurdle to clear. It only occurs when an agency has made 'an irreversible and irretrievable commitment of resources' based upon a particular environmental outcome, prior to completing its requisite environmental analysis." *Defenders of Wildlife v. Hall*, 807 F. Supp. 2d 972, 984 (D. Mont. 2011) (citing *Metcalf*, 214 F.3d at 1143).

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two regional "consistency papers." AR43498; AR43781. The first, from October 2002, identifies topics that require regional consistency. AR43498. The second, from May 2009, provides background information and management recommendations for Study Areas. AR43781. Plaintiffs also rely on two emails from Chris Ryan, the then-Program Leader for Wilderness, Wild & Scenic Rivers, and Outfitters, whose responsibilities included providing advice and guidance as needed. AR43488-89, AR043496. There is some overlap with the "Region 1 Guidance" discussed in *Ten Lakes*, 2017 WL 4707536.

The Service undertook an eleven year evaluation of motorized and mechanical transport issues on the Forest. AR00185. The Service evaluated whether the established uses had diminished the wilderness character of Recommended Wilderness such that it could not be added to the wilderness preservation system. AR00559-71. The final EIS's development included six years of public involvement, and the final selected alternative itself incorporates public input. AR00187-90. The process included site-specific and year round analysis for motorized and mechanical uses. AR00223-25. This thorough record was the basis for the Service's decision.

Plaintiffs attempt to color the *entire* NEPA process by pointing to a few paragraphs in the final EIS and Record of Decision that use language similar to a 2009 email about motorized and mechanized recreation in Recommended Wilderness.[3] Pls.' Mem. 91-3 (citing AR43496, 00565). The cited paragraphs merely repeat long-standing requirements. AR43496. For example, the 2009 email and final EIS state that it "makes sense" to manage areas in a manner that is consistent with future designation as wilderness. *Id.*; AR00565. This merely paraphrases Forest Plan direction for Recommended Wilderness, which is to

[3] Plaintiffs also take issue with language that appeared in the draft EIS because it "predate[d] receipt of public comment on the Travel Plan DEIS." Pls.' Mem. 11. But the nature of a draft EIS is that it is always prepared before being presented for comment.

"manage to maintain their presently existing wilderness character and potential for inclusion in the wilderness system." AR04749. The 2009 email, final EIS, and Record of Decision also similarly describe management considerations to include impacts beyond those that may "scar" the land such as noise, loss of solitude, isolation and threats to ecosystem health. AR00565 (identifying need to "address physical, social values, (loss of solitude in the area, noise, isolation from others, fumes), and impacts to ecosystem health."). This language recognizes the realities of managing a forest that is subject to multiple uses. AR00197, 00483.

The Ninth Circuit has made almost identical observations when resolving a challenge to a travel management decision involving motorized uses in Study Areas. *Montana Wilderness Ass'n* found that to protect wilderness character, the Forest Service has an affirmative obligation to look beyond mere physical impacts by evaluating impacts such as noise, opportunity for solitude, isolation, and conflict. 666 F.3d at 556. Plaintiffs' attempt to use the emails' few sentences to raise speculative claims about the entire NEPA process fails; the decision was based on a thorough analysis of the relevant factors.

The Service demonstrated repeatedly that the analysis of motorized and mechanical transport in Recommended Wilderness was made in good faith and with public participation. The Forest engaged with the public at meetings and through comments and objections. AR00187-90. The alternative ultimately

selected was modified to incorporate public input, which shows the Service acted objectively and had not irretrievably committed to a certain course of action. AR00187. The Forest Supervisor even "considered establishing a limited quota permit system," but managing the site-specific challenges made such an option impractical. AR00209. If the Service's final decision was "in line" with guidance or an intention to manage the areas consistently with other forests in the region, that alone does not undermine the breadth and depth of the site-specific analysis conducted. As in *Ten Lakes*, Plaintiffs' "focus on Region 1 guidance is unfounded and purely speculative." 2017 WL 4707536, at *12. The Service did not predetermine its decision.

In sum, the Service engaged in a thorough and public analysis before deciding to close Study Areas and Recommended Wilderness to motorized and mechanical transport. The decision is not arbitrary and capricious. The Court should grant judgment in favor of Federal Defendants on Counts One, Two, Three, and Six.

B. <u>The Travel Plan is consistent with the Forest Plan.</u>

Plaintiffs allege the Travel Plan is inconsistent with the Forest Plan and violates NFMA. Pls.' Mem. 21-23; Compl. ¶¶ 220-27 (Count Nine).

A forest plan defines "broadly the uses allowed in various forest regions [and sets] goals and limits on various uses . . . but do[es] not directly compel

specific actions." *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 966 (9th Cir. 2003). Courts "defer[] to the Forest Service's interpretation of plan directives that are susceptible to more than one meaning unless the interpretation is plainly erroneous or inconsistent with the directive." *Siskiyou Reg'l Educ. Project v. USFS*, 565 F.3d 545, 555 (9th Cir. 2009).

Plaintiffs allege two inconsistencies with the Forest Plan. First, they claim the Travel Plan does not comply with Standard Three for Recommended Wilderness (Management Area Six), which directs the Service to "[c]ontinue uses which do not detract from wilderness values" such as "trailbikes and snowmobiles." Pls.' Mem. 21 (citing AR04749). This argument ignores the Service's determination that motorized and mechanized use would degraded wilderness character, AR00210, as well as the goal for Management Area Six, which requires Recommended Wilderness to be "manage[d] to maintain the presently existing wilderness characteristics and potential for inclusion in the wilderness system." AR04749. The Forest Supervisor explained that motorized and mechanized transportation "have changed or certain types of use have increased greatly," which degrades the wilderness character of Recommended Wilderness and conflicts with Standard Three. AR00210. By prohibiting motorized and mechanized use in such areas, the Service maintains the wilderness

characteristics and potential for designation as Wilderness by Congress as contemplated in the Forest Plan. *Id.*

Plaintiffs' second claim is that the Travel Plan is inconsistent with the Forest-wide management objective to "[p]rovide for the current mix of dispersed recreation by maintaining about 50 percent of the Forest in wilderness, about 20 percent in semiprimitive motorized recreation and about 30 percent in roaded areas." Pls.' Mem. 21 (citing AR04679). The Record of Decision explains the "amount of Forest open to a particular type of recreation is not measured by the amount of trail that traverses through a particular area." AR00233. The Travel Plan does not change land use allocations; it maintains the recreation opportunities as allocated in the Forest Plan. *Id.* The Travel Plan thus complies with the Forest Plan's Forest-wide objective and is consistent with the Forest Plan.[4] AR04679.

The Court should grant judgment in favor of Federal Defendants on Count Nine.

[4] Furthermore, Forest Plan objectives do not compel any specific action. *See Earth Island Inst. v. U.S. Forest Serv.*, 697 F.3d 1010, 1014 (9th Cir. 2012) (the "presence of a few, isolated provisions cast in mandatory language does not transform an otherwise suggestive set of guidelines into binding agency regulations."). The objective itself is purposefully general and contemplates deviation. AR04679 (saying objectives are "about" given percentages). The word "about" should not be read to prescribe a mandatory minimum, but rather as "recommended when possible." *Ecology Center v. Castaneda*, 574 F.3d 652, 661 (9th Cir. 2009).

C. The Travel Plan's vehicle designations comply with the Travel Management Rule.

Plaintiffs allege the Service violated the Rule when it designated areas for over-snow vehicle use and roads and trails for bicycle use. Pls.' Mem. 26-30; Compl. ¶¶ 170-91 (Counts Four and Five).

1. Over-snow vehicle restrictions comply with the Rule.

Subpart C of the Rule requires the Service to designate roads, trails, and areas for over-snow vehicle use. 36 C.F.R. § 212.81(a). The designation criteria for Subpart B, including minimization, apply to over-snow vehicle use. *Id.* § 212.81(d). Under the decision, the over-snow vehicle acreage declines from 748,981 acres to 543,840 acres on the 1.6 million acre Forest. AR00193, 00196 (Table 3). The majority of the removed acreage, or approximately 146,079 acres, is a result of the Service's decision to prohibit over-snow vehicle use in Recommended Wilderness and Study Areas. AR00222; *see* AR00565, 00587, 00610 (showing over-snow acreage). The remaining 59,062 acres are closed to over-snow travel to protect ecological processes, wildlife, soil and water resources, and provide a more primitive recreation experience. AR00203-05.

Plaintiffs first complain that "the snowmobile designations focus on areas rather than individual routes." Pls.' Mem. 26. This criticism is unfounded as Subpart C expressly allows for the Service to designate areas – not just roads or routes – for over-snow vehicle use. 36 C.F.R. § 212.81(a).

Plaintiffs then complain that the over-snow designations are arbitrary and lack analysis. Pls.' Mem. 26. To the contrary, the Service explains how and why it designated certain areas for over-snow vehicle use. Chapter 3.2 of the final EIS contains a detailed discussion of over-snow use, including the history and existing conditions of motorized and non-motorized over-snow use on the Bitterroot. AR00510-12. The same chapter then explains that the process used to analyze over-snow vehicle use was similar to the summer analysis process, with the major difference being that the Service analyzed over-snow use by acreage rather than miles of routes. AR00520, 36290-98. In other words, the Service conducted an inventory of existing over-snow vehicle use, compiled the data into a Forest-wide analysis, developed a proposed action, and solicited input from the public and stakeholders – all prior to developing the alternatives analyzed in the EIS. *Id.* The final EIS explained that over-snow vehicles would no longer be allowed in Recommended Wilderness and Study Areas because of use conflict, noise, safety, and impacts to winter wildlife. AR00564, 568-69.

The Service provided a reasoned explanation for over-snow vehicle designations. The Court should grant judgment in favor of Federal Defendants on Count Four.

2. Bicycle restrictions comply with the Rule.

The Service initiated the Project to implement the Rule and to comply with a settlement agreement about management of Montana's Study Areas. AR00185. Since the Service scoped the Project in September 2007, the purpose and need has included the "quality of recreational experience." AR36034. Based on comments received in response to scoping and on the draft EIS, the Forest Supervisor exercised her discretion to expand the analysis to include nonmotorized or mechanical transport uses, including bicycles. AR00185; *see, e.g.*, AR31363, 31406, 31450, 31480-81(scoping comments); AR01233-34, 01260, 01274 (draft EIS comments). She reasonably believed that undertaking "a forest-wide travel planning process" that did not look at all uses on the Forest "would be incomplete." AR00185. She also concluded that motorized recreation experiences could not be assessed without also considering nonmotorized recreation experiences. *Id.* As a result of this balanced analysis, the Project analysis included mechanical transport. AR00502-03. The decision prohibits mechanical transport, including bicycles, in the Recommended Wilderness and Study Areas. AR00193; *see* AR00526 (Table 3.2-15). The decision allows bicycles on all other roads and trails, with the exception of designated wilderness. AR00193.

Plaintiffs present three challenges to the Service's decision on bicycles. First, they claim the Service cannot rely on the Rule to designate roads and trails

for bicycle use. Pls.' Mem. 27. It may. When the Service promulgated the Rule, it declined to include bicycles and horses in the definition of off-highway vehicles but said, "Local Forest Service officials may choose to designate routes and areas for nonmotorized uses and enforce those designations with an order issued under 36 C.F.R. part 261, subpart B." 70 Fed. Reg. at 68,272. These regulations give the Service the authority to prohibit the use of vehicles – including bicycles – on roads and trails (36 C.F.R. §§ 261.54-55), off roads (*id.* § 261.56), and in Recommended Wilderness and Study Areas. *Id.* § 261.57; *see* 36 C.F.R. § 261.2 (defining vehicle). The Service's exercise of its authority under 36 C.F.R. subpart B to include bicycles in the Travel Plan was not arbitrary and capricious.

Second, Plaintiffs claim there is "no analysis of bicycle-specific 'environmental' impacts." Pls.' Mem. 27-28. The Service discussed impacts from mechanical transport, including bicycles, for each of the alternatives analyzed in detail. AR00502-03, 00524-26, 00531, 00535-36, 00541-42. The Service acknowledged that while "bicycles may not always have physical impacts on the landscape, prohibiting their use, along with motorized vehicles, from [Recommended Wilderness] acknowledges there are other, social effects to wilderness attributes associated with these types of uses." AR00525. The chapter on impacts to Recommended Wilderness explains that wilderness character is "free from modern human manipulation and impacts," AR00560-62, and that sights and

sounds of motorized and mechanical transport use may have indirect effects on wilderness character. AR00563.[5] The closure of Study Areas and Recommended Wilderness to bicycles was based on the requirement to manage the areas to maintain the wilderness character as it existed in 1977. AR04637-38. Given that bicycle use was not occurring in 1977 but has grown exponentially since then, AR00209-11, it was not arbitrary and capricious for the Service to prohibit bicycles in areas that may be suitable for designation as Wilderness.

Finally, Plaintiffs claim the prohibition of bicycles in Study Areas is a substantial change from the alternatives in the draft EIS and that the Service must prepare a supplemental EIS. Pls.' Mem. 28-30. NEPA's implementing regulations require an agency to supplement a draft or final EIS if "[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns." 40 C.F.R. § 1502.9(c)(1)(i). NEPA's implementing regulations allow the agency to modify alternatives, develop new alternatives, and supplement, improve, or modify its analyses. 40 C.F.R. § 1503.4. Supplementation is not required when (1) the new alternative is a minor variation of one of the alternatives considered in the draft EIS and (2) the new alternative is qualitatively within the spectrum of alternatives that were discussed in the draft EIS. *Russell Country*

[5] In a separately filed motion, Defendants move to strike the three extra-record documents Plaintiffs cite about environmental impacts from bicycles. *See* Pls.' Mem. 27-28 (citing extra-record material).

Sportsmen, 668 F.3d at 1045. An agency's decision on whether to supplement is reviewed under the arbitrary and capricious standard. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 375-76 (1989).

Plaintiffs do not explain how the prohibition of bicycles in Study Areas in the final EIS's alternatives constitutes a substantial change relevant to environmental concerns from the draft EIS's alternatives. *See* Pls.' Mem. 29-30. The prohibition on bicycles in Study Areas is a minor variation that is qualitatively within the spectrum of alternatives considered. Three of the four alternatives in the draft EIS, including the preferred alternative, prohibit bicycles in Recommended Wilderness. AR02969, 2975, 2978. Those alternatives also prohibited motorized travel in Study Areas. AR03010 (Table 3.3-3), 03018. The selected alternative removed approximately 110 miles from bicycle use, which is just 9% of the 1,222 miles available for mechanical transport on the Bitterroot. *See* AR00525, 00587, 00610. Including the prohibition on bicycles in Study Areas in the final EIS's alternatives was a minor variation and within the spectrum of alternatives considered in the draft EIS. *Great Old Broads for Wilderness v. Kimbrell*, 709 F.3d 836, 854 (9th Cir. 2013) (no supplementation required where the selected alternative comprised of elements from three alternatives "that were analyzed—as elements—in the final EIS."); *see also Russell Country Sportsmen*, 668 F.3d at 1049 (no supplementation required because there was "very little reason to believe

the modified travel plan will have environmental impacts that the agency has not already considered.").

Even if the Service should have included in the draft EIS an alternative that prohibited bicycles in Study Areas, the failure to do so was harmless. The harmless error analysis asks, "whether the error caused the agency not to be fully aware of the environmental consequences of the proposed action, thereby precluding informed decisionmaking and public participation, or otherwise materially affected the substance of the agency's decision." *Idaho Wool Growers Ass'n v. Vilsack*, 816 F.3d 1095, 1104 (9th Cir. 2016); *see* 5 U.S.C. § 706 (stating that courts reviewing agency decisions should take "due account ... of the rule of prejudicial error"). As discussed above, the Service was fully aware of the environmental consequences of prohibiting mechanized transport in Study Areas. Through the Service's predecisional review process, the public had an opportunity to comment on the draft Record of Decision as well as changes between the draft and final EIS. *See* 36 C.F.R. § 218. Some members of the public – including Plaintiff Bitterroot Backcountry Cyclists – objected on this very issue. AR00005, 00033. The reviewing officer determined that no further action was necessary on this issue because "[t]he objectors were informed and gave input on the concept of prohibiting bicycles in wilderness study areas." AR00143.

The Forest Supervisor's decision to include bicycle use in the Project was not arbitrary and capricious. The Court should grant judgment in favor of Federal Defendants on Count Five.

D. Non-motorized use designations comply with the Travel Management Rule.

Plaintiffs allege the Service violated the Rule when it designated areas for nonmotorized use. Pls.' Mem. 23-26; Compl. ¶¶ 212-19 (Count Eight).

Subpart B of the Rule requires each administrative unit or ranger district of the Service to designate a system of roads, trails, and areas open to motor vehicle use by vehicle type and time of year. 36 C.F.R. §§ 212.50-212.57. The Rule requires the Service to consider (among other factors) effects on the provision of recreational opportunities and conflicts among uses of National Forest System lands. 36 C.F.R. § 212.55(a). The Service must also consider, with the objective of minimizing, effects on "[c]onflicts between motor vehicle use and existing or proposed recreational uses," and the "[c]ompatibility of motor vehicle use with existing conditions in populated areas, taking into account sound, emissions, and other factors." *Id.* at § 212.55(b)(3), (5). The Project achieves the purpose and need to address conflicts between motorized and non-motorized uses by designating where motorized and nonmotorized use is permitted, designating blocks of land sufficient to provide a quiet nonmotorized recreation experience,

and approving seasonal closure of roads and trails to reduce hunting season conflicts. AR00198; *see* AR00482-558 (Chapter 3.2).

Plaintiffs' three arguments lack merit. First, they allege the Service violated the Rule because it considered conflicts between "users" and not "use." Pls.' Mem. 24. While the draft EIS stated the Project would address conflicts between motorized and nonmotorized "users," AR02889, the final EIS and Record of Decision address conflicts of "uses." AR00198, 00393-94. The final EIS explains that the Service changed the terminology to correct a misinterpretation among some members of the public. AR00394.

Plaintiffs also claim, with no relevant case support,[6] that the Service could not consider user preferences and personal values in reaching its decision about which areas to designate for nonmotorized use. Pls.' Mem. 24-25. There is no such prohibition in the Rule; Subpart B provides only general requirements to address "[c]onflicts between motor vehicle use and existing or proposed recreational uses" and the "[c]ompatibility of motor vehicle use with existing conditions." 36 C.F.R. § 212.55(b)(3), (5). The Service considered available data

[6] The two NEPA cases cited by Plaintiffs provide no support for criticizing how the Service interprets Subpart B of the Rule. Pls.' Mem. 24 (citing *Wild Wilderness v. Allen*, 871 F.3d 719, 728 (9th Cir. 2017) (discussing whether an action is likely to be highly controversial under 40 C.F.R. § 1508.27(b)(4) of NEPA) and *Simmons v. Army Corps of Eng'rs*, 120 F.3d 664, 669-70 (7th Cir. 1997) (discussing range of alternatives under NEPA)).

about recreational use and trends and then exercised its discretion to prohibit motorized and mechanized use in certain areas in order to address conflicts of use. *See, e.g.*, AR00482-558 (Chapter 3.2), 40921-40, 40941-60 (motorized and mechanized use in Study Areas).

Plaintiffs then claim the designation of non-motorized areas is "entirely bereft of data or fact." Pls.' Mem. 25. The record contradicts this assertion. Data from two rounds of National Visitor Use Monitoring surveys conducted between October 2001 and September 2007 supports the decision to designate areas for non-motorized use. AR00487-89. The surveys provide information about recreational use on the Bitterroot and are summarized in Table 3.2-1 of the final EIS. AR00488-89. In addition to the visitor use surveys, the Service considered comments from the public and state agencies about reported instances of conflicts of use on specific trails in the Forest. AR00512. For example, Montana Fish, Wildlife & Parks wrote that "each year comments about [off-highway vehicle] use rank first or second among complaints." *Id.* Other comments reported instances of conflicts on certain trails between bicycles and stock, hikers and motorcyclists, all-terrain vehicles and hikers, and horses and motorcycles. *Id.* The Service also considered general research about conflicting uses on National Forest System roads, trails, and areas. AR00512-14.

Plaintiff cites *Riverhawks v. Zepeda* for the proposition that the Service must conduct "real analysis of real visitors on actual sites in the project area." Pls.' Mem. 25 (citing 228 F. Supp. 2d 1173, 1884 (D. Or. 2002)). *Riverhawks* supports the decision because the Service conducted visitor use surveys on the Forest and solicited comments about use of the Forest. AR00488-89, 00512-14.

The Service's decision to designate areas for nonmotorized use is not arbitrary and capricious and complies with the Rule. The Court should grant judgment in favor of Federal Defendants on Count Eight.[7]

V. CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion for summary judgment on all claims and grant Federal Defendants' cross-motion for summary judgment in its entirety.

Respectfully submitted on this 13th day of December, 2017.

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[7] Plaintiffs ask the Court to set aside the Bitterroot Travel Plan. Pls.' Mem. 30-31. But Plaintiffs also state "[i]t may be appropriate to conduct further proceedings… to determine a proper remedy." *Id.* at 31. Federal Defendants agree with the latter statement. Should the Court find a violation, it should give the parties an opportunity to brief what remedy, if any, is appropriate. It is well-settled that a court has wide discretion to fashion an appropriate remedy. *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 541-42 (1987). Unless or until a specific violation is established, it will not be clear what a reasonable remedy might be.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief is 6,486 words as counted using the word count feature of Microsoft Word, excluding the caption, table of contents, table of authorities, signature blocks, certificate of compliance, and certificate of service.

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CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2017, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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