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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

BITTERROOT RIDGE RUNNERS SNOWMOBILE CLUB, et al., Plaintiffs, vs. U.S. FOREST SERVICE, et al., Defendants, and FRIENDS OF THE BITTERROOT, et al., Defendant-Intervenors.	Case No. CV 16-158-M-DLC **DEFENDANT-INTERVENORS' MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND IN RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

This case concerns the U.S. Forest Service's decision to manage wilderness-quality lands in the Bitterroot National Forest—including the Blue Joint Wilderness Study Area ("WSA"), the Sapphire WSA, and the Selway-Bitterroot Recommended Wilderness Area—to protect their wilderness character. These areas have unique values that are threatened by excessive human encroachment. The Sapphire WSA encompasses a portion of the Sapphire Crest biological corridor, which is an important wildlife migration route. Grizzly bears documented in the Sapphire Mountains, for example, are believed to have traveled along this biological corridor. The Blue Joint WSA and the Selway-Bitterroot Recommended Wilderness in turn provide an ecological buffer for the adjacent Selway-Bitterroot Wilderness and Frank Church-River of No Return Wilderness, which together make up one of the last great undeveloped ecosystems in the continental United States—and, indeed, in the temperate zones of the world. This buffer ensures that the ecosystem's complement of rare carnivores, game species, and pristine habitat is protected from the impacts of increasing development in the Bitterroot Valley.

Motorized and mechanized recreation has increased dramatically in the Bitterroot National Forest over the last forty years and today threatens the ecological and wilderness values of these lands. In the challenged decision, the

Service responded to this threat by adopting the Bitterroot National Forest Travel Management Plan ("Travel Plan"), which closed these WSAs and recommended wilderness areas to such non-wilderness uses to protect their wilderness character and other forest resources. In so doing, the Service acted consistent with the law.

Plaintiffs Bitterroot Ridge Runners, et al., raise an assortment of claims against this decision. Many echo arguments that this Court recently rejected in Ten Lakes Snowmobile Club v. U.S. Forest Service, No. CV 15-148-M-DLC, 2017 WL 4707536 (D. Mont. Oct. 18, 2017). Others are foreclosed by governing Ninth Circuit precedent. None of Plaintiffs' claims has merit and this Court should reject Plaintiffs' challenges.

BACKGROUND

Defendant-Intervenors adopt Federal Defendants' Statement of Undisputed Facts, ECF No. 48, which sets out the background of this case.

ARGUMENT

This Court should grant Defendant-Intervenors' motion for summary judgment because "there is no genuine dispute as to any material fact," Fed. R. Civ. P. 56(a), and the Travel Plan does not violate the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq.; the National Forest Management Act ("NFMA"), 16 U.S.C. § 1600 et seq.; the Montana Wilderness Study Act of

1977 ("Study Act"), Pub. L. No. 95-150, 91 Stat. 1243; or the Travel Management Rule, 36 C.F.R. pt. 212, subpt. B.

This Court reviews Plaintiffs' NEPA, NFMA, Study Act, and Travel Management Rule challenges under the Administrative Procedure Act ("APA"). See e.g., Sierra Forest Legacy v. Sherman, 646 F.3d 1161, 1176 (9th Cir. 2011); Hells Canyon All. v. U.S. Forest Serv., 227 F.3d 1170, 1176 (9th Cir. 2000), as amended (Nov. 29, 2000). Under the APA's framework for judicial review, the Court may set aside the challenged Plan only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "The party challenging the agency action has the burden of showing there is not 'a rational connection between the facts found and the choice made' or that there was a clear error in judgment based on the relevant factors." The Wilderness Soc'y v. Bosworth, 118 F. Supp. 2d 1082, 1088 (D. Mont. 2000) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)). Plaintiffs fail to carry this burden.

I. THE TRAVEL PLAN LAWFULLY PRESERVES WILDERNESS CHARACTER IN WILDERNESS STUDY AREAS

Plaintiffs mount a variety of challenges to the Travel Plan's protection for the Blue Joint and Sapphire WSAs. Memorandum in Support of Plaintiffs' Motion for Summary Judgment ("Pls. Br."), ECF No. 39, at 17-23. None has merit.

The Study Act provides that the Blue Joint and Sapphire WSAs must, "until Congress determines otherwise, be administered by the Secretary of Agriculture so as to maintain their presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System." Pub. L. No. 95-150 § 3(a). In meeting this mandate, the Service must preserve not only the study areas' physical wilderness characteristics but also other wilderness qualities, such as opportunities for solitude. Mont. Wilderness Ass'n v. McAllister, 666 F.3d 549, 557 (9th Cir. 2011).

Plaintiffs first argue that the Travel Plan violates these requirements because, they claim, the Service unlawfully enhanced wilderness character in the WSAs beyond 1977 levels. Pls. Br. 17-18. This argument is foreclosed by Russell Country Sportsmen v. U.S. Forest Service, 668 F.3d 1037 (9th Cir. 2011). In Russell Country, motorized user groups challenged a travel plan that eliminated motor vehicle use in the Middle Fork of the Judith WSA "except for one connected complex of trails (approximately 12 miles)" and a road system that was necessary to access private land. Id. at 1040. The groups argued that this restriction illegally enhanced wilderness character, contrary to Study Act requirements, because the Service had reduced "overall motorized use miles in the study area beyond 1977 levels." Id. at 1042. The Ninth Circuit rejected this argument, concluding, based on the Act's text and legislative history, that "Congress did not … mandate that

motorized recreation levels be maintained" and "nothing in the Study Act prohibits the Service from enhancing the wilderness character of a wilderness study area." Id. at 1044.

Plaintiffs are apparently not done fighting the Russell Country war. Despite this controlling precedent on the issue presented by their claim, Plaintiffs argue that the Study Act required the Service to continue to permit motorized uses that existed in the Blue Joint and Sapphire WSAs in 1977. Pls. Br. 17-18. Plaintiffs first argue that the Service's interpretation of Study Act requirements is contrary to the Act's legislative history, and therefore not entitled to deference under Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984). Pls. Br. 17-18. However, the Ninth Circuit in Russell Country reviewed the legislative history that Plaintiffs cite, and concluded that Congress did not intend to "mandate that motorized recreational levels be maintained." Russell Country, 668 F.3d at 1044 (discussing S. Rep. No. 95-163 (1977) and H.R. Rep. No. 95-620 (1977)).

Plaintiffs further quote language from a 2001 decision from this District to support their Study Act interpretation, ignoring the fact that Russell Country is a more recent decision from a higher court, and that it reversed a district court decision that adopted nearly identical language to the district court decision Plaintiffs now cite. Pls. Br. at 5, 18. The district court in Russell Country held: "To the extent wilderness character was there in 1977, it was to be maintained. To

the extent the wilderness character was lacking in 1977, it was not to be imposed," Russell Country, 668 F.3d at 1041 (quoting lower court ruling)—essentially the same language that Plaintiffs now advance to support their argument. See Pls. Br. 5 (quoting Mont. Wilderness Ass'n v. U.S. Forest Serv., 146 F.Supp.2d 1118, 1124 (D. Mont. 2001)). But the Ninth Circuit reached a different conclusion in agreeing with the Service that the Study Act "creates a floor, not a ceiling, for environmental protection." Russell Country, 668 F.3d at 1042 (quotation marks omitted).

Rather than address Russell Country's discussion of the Study Act on this point, Plaintiffs dismiss it as "largely dictum." Pls. Br. 6 n.1. However, the Russell Country holding that the Study Act permits the Service to enhance wilderness character was necessary to the Ninth Circuit's decision to reverse the district court's conclusion that the Service violated the Study Act by unlawfully enhancing wilderness character in a WSA. Russell Country, 668 F.3d at 1041, 1044; see Black's Law Dictionary (10th ed. 2014) (defining "obiter dictum" as "[a] judicial comment … that is unnecessary to the decision in the case and therefore not precedential").

Plaintiffs further argue that Russell Country's holdings turned on "the facts of the particular agency decision at issue." Pls. Br. 6 n.1. To the contrary, the pertinent Ninth Circuit discussion interpreted the Act's text and legislative history

and did not mention the facts of that case. Russell Country, 668 F.3d at 1042-45. Plaintiffs' attempt to dismiss Russell Country is therefore unavailing.[1]

Plaintiffs next argue that the record does not support the Service's decision to restrict motorized and mechanized use in WSAs to preserve their wilderness character. Pls. Br. 18-20. Plaintiffs are wrong. As the Service's Record of Decision ("ROD") observes, regional and national recreational use data, as well as a 1985 estimate of snowmobile use in the Sapphire WSA, indicate that "motorized use in the WSAs, both summer and winter, has more than doubled since 1977" and "mountain biking has grown from non-existent in 1977 to a common activity today." AR 208-09. The Service found, consistent with Ninth Circuit precedent, that this increased motorized and mechanized use has reduced wilderness character, including opportunities for solitude, apparent naturalness, and natural integrity in the Blue Joint and Sapphire WSAs. AR 209, 562, 587-589; see also McAllister, 666 F.3d at 558. Further, the agency record establishes that bicycles and motor vehicles threaten disturbance of wildlife, such as elk, to a greater degree than humans on horseback or foot. See AR 748-49; AR 561 (describing wilderness character attributes, which include natural integrity). Given these

[1] Plaintiffs later offer a variation on their no-enhancement theme, writing that the Service erred because its WSA management decision was designed to "preserve wilderness character," not, as the Act requires, to "maintain" such character, Pls. Br. 20-21. But, as Plaintiffs themselves acknowledge, Pls. Br. 6, Russell Country rejected that argument too, noting that "maintain," as used in the Study Act, is synonymous with "preserve." See 668 F.3d at 1042.

impacts, the Service correctly concluded that "some restriction on the volume and location of use is necessary to maintain the areas' 1977 wilderness character." AR 209.

Despite this analysis, Plaintiffs argue that the Service's decision was based on a misinterpretation of McAllister, 666 F.3d 549, because, according to Plaintiffs, the Service impermissibly equated levels of motorized use with wilderness character. Pls. Br. 19-20. To the contrary, however, the Service carefully acted according to McAllister's instructions: It considered the impacts of increased motor vehicle use on the opportunities for solitude in the Blue Joint and Sapphire WSAs and determined that the Travel Plan's motor vehicle use restrictions would be "adequate to maintain 1977 wilderness character for the enjoyment of current users." 666 F.3d at 558.

Further, as discussed, the Service amply demonstrated that increased motorized use degrades wilderness character. See AR 209, 562, 587-589. That finding comports with common sense: As McAllister held, "[i]ncreased volume of motorized use has obvious and potentially significant impacts on opportunities for solitude available within a study area.… Increased noise from snowmobiles and motorcycles, for example, may greatly disturb users seeking quiet and solitude." 666 F.3d at 558. Plaintiffs do not explain why motorized use in the Bitterroot is an exception to this rule.

Plaintiffs nevertheless attempt to undermine the Service's credibility by citing a 2013 draft ROD, which includes a comment from an unidentified person suggesting that the decision to close the Chain of Lakes trail was "due to its location within the Sapphire WSA, and the ruling from the" Ninth Circuit, and "has nothing to do with resource impacts," AR 44853 (attachment at page 6); Pls. Br. 20. However, this comment does not reflect the Service's actual rationale for closing the Chain of Lakes trail. The ROD states that the Service closed this trail, like other trails in the WSAs, to reverse the degradation of wilderness character caused by increased motorized and mechanized uses over the past forty years. See AR 223-24. Further, a comment by an individual agency employee that is contrary to the agency's official reasoning does not "render fatally infirm the otherwise unbiased environmental analysis of an entire agency." See Forest Guardians v. U.S. Fish & Wildlife Serv., 611 F.3d 692, 718 (10th Cir. 2010).

Plaintiffs' last refuge is to argue that the Service was required to consider alternative management responses to address motor vehicle and mountain bike use in WSAs. Pls. Br. 20. The Study Act, however, does not require the Service to consider management alternatives. To the extent Plaintiffs attempt to claim a NFMA violation with reference to a Region 1 Supplement to the Forest Service Manual, that claim too is flawed. Pls. Br. 20 (citing AR 41320-22). The Service through its NEPA analysis did consider management alternatives. AR 402-49.

(discussing alternatives). Specifically, the Service considered reducing motorized use through a permit system, but concluded that such a system would be unworkable due to the absence of "geographic features to help users determine their location in the [Sapphire] WSA" relative to restricted areas and "the lack of base line data on 1977 use levels" in either WSA "with which to establish even a theoretical quota." AR 209. The Service therefore closed these areas to motorized and mechanized use to comply with the Study Act. AR 209.[2]

II. THE PLAN'S RECOMMENDED WILDERNESS PRESCRIPTIONS ARE EQUALLY VALID

Plaintiffs further argue that the Service's recommended wilderness area restrictions are unlawful, but these claims are also meritless.

Citing no law, Plaintiffs claim the Service failed to perform an adequate site-specific analysis to support its travel management decision. Pls. Br. 14-16. This argument mirrors a claim that this Court rejected in Ten Lakes, holding that a similar Service analysis of motor vehicles' impacts to grizzly bears and other wildlife was sufficient to support a decision to prohibit motorized and mechanized uses in recommended wilderness. 2017 WL 4707536, at *11. Plaintiffs fail to justify a different result here.

[2] Plaintiffs also allege that motorized trail miles in WSAs have decreased, Pls. Br. 18, but the Service's decision to restrict motorized use was based on an increase in the number of motorized users, not an increase in the number of trail miles open to such users. AR 208-09.

Plaintiffs appear to raise this claim under NEPA, Pls. Br. 14, but the key question under NEPA is whether the EIS demonstrates that the Service took a "hard look" at the environmental consequences of its decision. California v. Block, 690 F.2d 753, 761, 776 (9th Cir. 1982). Consistent with NEPA's purpose of environmental protection, the requisite level of analysis for agency decisions that preserve and protect the environment need not be as probing as for decisions that degrade the environment. See id. at 776 (rejecting argument that, where an EIS is legally insufficient to support nonwilderness designations, it must also be legally insufficient to support wilderness designations). Plaintiffs ignore this standard.

In any event, Plaintiffs' argument defies the record. The Service listed the specific benefits to wilderness character that will flow from prohibiting motorized and mechanized uses in recommended wilderness, including reducing "ground disturbance associated with motorized vehicles in particular," AR 211; reducing motor vehicle noise and increasing opportunities for solitude, AR 566, 569 (describing snowmobile impacts); and increasing these areas' natural, undeveloped, and remote character, AR 567. The Service further identified other impacts caused by motor vehicles, such as impacts to stream bottoms, elk, and bighorn sheep. AR 203-05. Final EIS Appendix G in particular catalogues these impacts on a trail-by-trail basis. AR 2215-45. Plaintiffs have not explained what

additional information they would have the Service provide, and NEPA does not require more. See Ten Lakes, 2017 WL 4707536, at *11.

Plaintiffs further argue that the Service improperly relied on future impacts to wilderness character in recommended wilderness. Pls. Br. 15. Plaintiffs ignore, however, the Service's analysis of present wilderness character impacts, in particular impacts to opportunities for solitude in these areas. AR 566-69. Further, the Forest Plan requires the Service to maintain not only the areas' presently existing wilderness character as of 1977 but also their "potential for inclusion in the wilderness system." AR 4749 (emphasis added). Maintaining an area's potential for wilderness designation necessarily encompasses a forward-looking analysis.

Plaintiffs also object to the Service's statement that permitting uses that are inconsistent with wilderness designation "creates a constituency that will have a strong propensity to oppose [wilderness] recommendation and any subsequent designation legislation." Pls. Br. 16-17; AR 210. However, there was nothing irrational about the Service's conclusion that encouraging such a constituency would undermine the recommended wilderness's potential for future wilderness designation and thereby violate the Forest Plan. See AR 4749.

In addition to arguing that the Service's analysis of wilderness character impacts was inadequate, Plaintiffs claim that the Service violated the Bitterroot

National Forest Plan's requirements for managing recommended wilderness areas. Pls. 21-23. However, the Forest Plan—like the Study Act—instructs the Service to "manage [recommended wilderness] to maintain the presently existing wilderness characteristics and potential for inclusion in the wilderness system." AR 4749; Pub. L. No. 95-150 § 3(a). The Plan further provides that the Service will "[c]ontinue current uses which do not detract from wilderness values. Transitory uses such as chainsaws, trailbikes and snowmobiles are appropriate if permitted by the Forest's Travel Plan." Id.

Plaintiffs focus on the second provision, and argue that the Forest Plan should be read to create a presumption that the Service will "'continue current uses' unless they 'detract from wilderness values.'" Pls. Br. 22 (emphasis added). The Plan, however, does not include the word "unless." See AR 4749 ("Continue current uses which do not detract from wilderness values."). Accordingly, Plaintiffs' alleged presumption in favor of motorized use does not exist in the Forest Plan, especially in light of the Plan's direction that the Service protect the areas' wilderness character. AR 4749.

Plaintiffs further argue that the Travel Plan violates Forest Plan direction to maintain "about 50 percent of the Forest in wilderness, about 20 percent in semiprimitive motorized recreation, and about 30 percent in roaded areas." Pls. Br. 21 (quoting AR 4679). As the ROD explains, however, this objective refers to

management area classifications, not to the total mileage of roads and trails open to a particular type of vehicle. AR 233. Management area classifications were set by the Forest Plan, and the Travel Plan did not alter them. Id.; see also AR 259-62 (table summarizing Forest Plan's management area classifications).

Having failed to undermine the Travel Plan on its merits, Plaintiffs claim that the Service violated NEPA because its discussion of wilderness character impacts is a pretense to mask a secret decision the Service made in 2009 to ban all motor vehicles and bicycles in recommended wilderness areas throughout the Service's Northern Region. Pls. Br. 9-13. This echoes an argument rejected by this Court in Ten Lakes, and Plaintiffs have not shown that the Court should reach a different decision here.

At the outset, Plaintiffs' theory—even if accepted for the sake of argument—fails to make out a NEPA violation. Under NEPA, it was permissible for the Service to approach the travel planning process with a preferred outcome in mind. See Forest Guardians, 611 F.3d at 718 (finding no NEPA violation where "[a]t most, the evidence demonstrates that FWS had a preferred alternative"). As Plaintiffs acknowledge, Pls. Br. 12, "NEPA does not require that agency officials be 'subjectively impartial'" in approaching their decisions. Metcalf v. Daley, 214 F.3d 1135, 1142 (9th Cir. 2000). Indeed, NEPA regulations require an agency to

identify a preferred alternative in the draft environmental impact statement. 40 C.F.R. § 1502.14(e).

To be sure, it is also true that, "[b]efore issuing its final decision, the Forest Service is prohibited from taking any action that 'limit[s its] choice of reasonable alternatives' identified in the decision-making process.'" WildWest Inst. v. Bull, 547 F.3d 1162, 1168 (9th Cir. 2008) (quoting 40 C.F.R. § 1506.1(a)(2)). But this prohibition applies to "'commit[ting] resources' which would prejudice the Forest Service's selection of alternatives." Id. (quoting 40 C.F.R. § 1502.2(f)). Accordingly, the Ninth Circuit has found such an impermissible commitment where the agency entered into a contract binding it to a certain outcome before completing its NEPA analysis. Metcalf v. Daley, 214 F.3d at 1143; see also Davis v. Mineta, 302 F.3d 1104, 1112 (10th Cir. 2002) (consultant preparing an environmental assessment for agency "was contractually obligated to prepare a [finding of no significant impact]"), abrogated on other grounds by Winter v. Nat. Res. Def. Council, 555 U.S. 7 (2008). If, however, an agency "clearly retained the authority to change course or to alter the plan it was considering implementing," it does not violate NEPA. WildWest Inst., 547 F.3d at 1169.

Here, Plaintiffs have not shown that the Region 1 guidance impermissibly bound the agency before completion of the NEPA process. As an initial matter, Plaintiffs overstate the alleged role of the guidance in the Bitterroot travel planning

process. Plaintiffs incorrectly state that the Draft ROD, Final EIS, Final ROD, and Response to Objections all parrot the Region 1 guidance. Pls. Br. 11-12. However, the language that Plaintiffs seize upon does not appear in the Region 1 guidance, see AR 43781, but in a July 2009 email sent by Chris Ryan, a former Service employee. Compare AR 43496 (email) with AR 565 (Final EIS), AR 2825 (Draft ROD), AR 210 (Final ROD). Plaintiffs have not shown that the 2009 email was the source of language in these NEPA documents, but in any event they do not explain why it would be improper for Chris Ryan, at that time the Northern Region's program leader for wilderness, to provide Bitterroot officials with "guidance on how to treat recommended wilderness in the forest planning process." AR 43496-97.

Further, even accepting, for the sake of argument, Plaintiffs' inference that language in the Draft EIS was derived from the Region 1 guidance, nothing in the record suggests that Service officials felt the guidance was binding, as Plaintiffs allege. See Pls. Br. 10-11, 13. Plaintiffs cite emails describing a letter from former Service employee Kathy McAllister, which, according to the emails, specified how recommended wilderness would be managed. AR 43643; see also AR 43644 (describing "letter from Gail"). However, Service employees could not find this letter. See AR 43644. Chris Ryan responded to one query about the letter, writing "I dont' [sic] think there was ever a lttr [sic] but we have this consistency

paper," and attaching the Region 1 guidance document. AR 43643. None of the emails, including Ryan's email, suggests that the guidance document is binding.

Indeed, another document Plaintiffs cite states that the Service has "never referred" to the Region 1 guidance "as policy." AR 43665. Plaintiffs also cite notes from a 2009 Region 1 conference call, in which an official named "Dave" made a recommendation that "if you're not consistent with guidance in paper your forest supervisor needs to talk with the [Regional Forester] before a decision is signed." Pls. Br. 10-11 (quoting AR 43561). Even taking this statement, as Plaintiffs do, as a directive, the statement indicates only that the guidance should trigger discussion between a forest supervisor and the regional forester and does not indicate that the guidance was binding. At most, Plaintiffs have shown that the Service had a policy preference for alternatives that would restrict motor vehicle

and bicycle use in recommended wilderness. As discussed supra, however, that does not violate NEPA.[3]

The cases Plaintiffs cite do not establish that an agency's policy preference can constitute an irreversible commitment of resources. Pls. Br. 12-13. In each of the cases where a court found an impermissible irreversible commitment, the agency had entered into a binding contract to reach a predetermined outcome prior to completing its NEPA analysis. Metcalf v. Daley, 214 F.3d at 1143; Davis v. Mineta, 302 F.3d at 1112; see also Wyoming v. U.S. Dept. of Agric., 661 F.3d 1209, 1265-66 (10th Cir. 2011) (finding no irreversible commitment in the absence of "a contractual obligation or other binding agreement"). Other cases Plaintiffs cite found no irreversible commitment, even where the Service had spent $208,000 to mark trees in preparation for logging, WildWest Inst., 547 F.3d at 1169, or where the U.S. Fish and Wildlife Service had entered into a grant agreement with a

[3] Plaintiffs' additional record citations are either irrelevant or merely show that certain Service officials believed, consistent with the Forest Plan, that uses that degrade wilderness character should not be permitted in recommended wilderness. Plaintiffs cite a 2010 email from Chris Ryan, in which she explained to a Bitterroot employee that motor vehicles and bicycles should be restricted in recommended wilderness because they degrade wilderness character and undermine the areas' potential for future wilderness designation. Pls. Br. 11; AR 43753. Notably, Ryan does not refer to the Region 1 guidance, or suggest that the guidance mandates restricting motorized and mechanized uses. See AR 43753. Plaintiffs further quote a 2007 email, in which Ryan describes a conversation with former Regional Forester Tidwell, and states that "he is supporting our stand." Pls. Br. 11; AR 43592. But again this at most demonstrates a policy preference, not a binding mandate.

non-profit providing that the non-profit would conduct research and contact New Mexico landowners "with regard to the potential establishment of an experimental nonessential 10(j) population" of falcons, regardless whether the agency actually decided through the EIS process to establish such an experimental population, Forest Guardians, 611 F.3d at 718-19.

The sole cited authority that could support Plaintiffs' argument, Int'l Snowmobile Mfrs. Ass'n v. Norton, 340 F. Supp. 2d 1249, 1261 (D. Wyo. 2004) (cited in Pls. Br. 13), did find an irreversible commitment based on an Assistant Secretary of Interior's public statement, but that outcome is contrary to the rule in the Ninth Circuit, which requires a binding commitment of resources that limits the choice of reasonable alternatives. WildWest Institute, 547 F.3d at 1169 (no irreversible commitment of resources where agency "clearly retained the authority to change course or alter the plan it was considering implementing"). A statement by even a high-ranking agency official, however forceful, does not limit the agency's power to change its mind. Otherwise, cabinet secretaries would run afoul of NEPA every time they directed a subordinate agency to take a major federal action. In any event, there is no equivalent pronouncement by a high-ranking Service official in this case.

III. THE SERVICE COMPLIED WITH ITS TRAVEL MANAGEMENT RULE

In addition to their recommended wilderness and WSA claims, Plaintiffs argue that the Travel Plan violates the Service's Travel Management Rule. Pls. Br. 23-26. However, the Travel Plan properly considered and minimized conflicts between motorized and non-motorized users as the Travel Management Rule requires.

Under Executive Order 11644, 37 Fed. Reg. 2877 (Feb. 8, 1972), and the Travel Management Rule, 36 C.F.R. § 212.55, the Service may not allow motor vehicles on any Forest Service lands unless it has considered and minimized impacts to forest resources, wildlife, and other recreational uses in "each area it designated" for motorized use. Id. § 212.55(b); WildEarth Guardians v. U.S. Forest Serv., 790 F.3d 920, 930-32 (9th Cir. 2015). In particular, the Travel Management Rule instructs the Service to "consider effects … with the objective of minimizing … [c]onflicts between motor vehicle use and existing or proposed recreational uses of National Forest System Lands." 36 C.F.R. § 212.55(b)(3).

Plaintiffs challenge the Service's use-conflicts analysis, contending that it is "entirely bereft of data or fact." Pls. Br. 25. Plaintiffs, however, ignore the Final EIS's findings concerning conflicts between cross-country skiers and snowmobiles, AR 510 (noting that "effects of exhaust smells, noise, loss of solitude, and safety concerns with fast moving vehicles degrade [skiers and

snowshoers'] experience"); hunters and motor vehicles, AR 512 (describing results of Montana Fish, Wildlife & Parks survey of "several thousand hunters" in the Bitterroot area, which found that "each year comments about OHV use rank first or second among complaints"); bicycles and stock animals, id. (describing reports of conflict on the Coyote Coulee Trail); and ATVs and hikers, id. (noting conflict on the Divide Trail). Indeed, Appendix G to the Final EIS provides trail-by-trail rationales for the Service's management decisions, and identifies multiple trails that were closed to mitigate specific conflicts. See, e.g., AR 2237 (noting that a seasonal closure on Trail #182 would "reduce user conflicts between motorized and non-motorized bow hunters"). The Service further identified other forest resource impacts caused by motor vehicles, such as impacts to stream bottoms, elk, and bighorn sheep. AR 203-05.[4]

Plaintiffs also argue that the Travel Management Rule did not permit the Service to address conflicts between motorized and non-motorized users rather than uses. Pls. Br. 24. Plaintiffs make a distinction without a difference: The Travel Management Rule discusses user conflicts and use conflicts interchangeably and speaks to the need to address both. See Travel Management; Designated Routes and Areas for Motor Vehicle Use, 70 Fed. Reg. 68,264, 68,271 (Nov. 9,

[4] The accuracy of this conflicts analysis is confirmed by the breadth of interests represented in the defendant-intervenor coalition, which includes hunters, anglers, backcountry horse packers, winter and summer non-motorized recreationists, and conservationists all united in defense of the challenged Travel Plan.

2005) (discussing need to address "user conflicts"); id. at 68,267 (noting that Rule addresses "conflicts among uses").

To the extent that Plaintiffs allege that there is, in fact, no conflict between motorized users and non-motorized users, the record documents discussed above—along with Plaintiffs' own brief—amply contradict their argument. See AR 510, 512; Pls. Br. 25 (noting that "thousands of 'quiet users'" will benefit under the Travel Plan); see also Pryors Coal. v. Weldon, 803 F. Supp. 2d 1184, 1197 (D. Mont. 2011) (describing motorized and non-motorized uses and concluding that "[c]ommon sense informs the Court that these divergent approaches to the enjoyment of the Beartooth District are irreconcilable"), aff'd, 551 F. App'x 426 (9th Cir. 2014).[5]

Plaintiffs next argue that the Service's decision was contrary to the Travel Management Rule's intent because the Service used the travel planning process to create areas for quiet-use recreation, rather than motor vehicle use. Pls. Br. 23. However, the Travel Management Rule and the executive orders that preceded it were intended to stem a rising tide of motor vehicle use on public lands by limiting

[5] Plaintiffs cite Wild Wilderness v. Allen, 871 F.3d 719 (9th Cir. 2017), to support their proposition that the Service is not permitted to consider user conflicts in making travel planning decisions. See Pls. Br. 24. Wild Wilderness, however, held that passionate opposition to a proposed project is not by itself a significant environmental impact that can trigger NEPA's EIS requirement. 871 F.3d at 728. Wild Wilderness does not address the Travel Management Rule.

such use to designated routes and areas—not to promote such use. See 70 Fed. Reg. at 68,264 (describing need for Travel Management Rule and noting that "[s]ome National Forest visitors report that their ability to enjoy quiet recreational experiences is affected by visitors using motor vehicles"); Executive Order 11644, 37 Fed. Reg. at 2877 (Order's purpose is to "ensure that the use of off-road vehicles on public lands will be controlled and directed so as to protect the resources of those lands, to promote the safety of all users of those lands, and to minimize conflicts among the various uses of those lands"); 36 C.F.R. §§ 212.50(a), 261.13 (prohibiting motor vehicle use except in and on designated trails and areas).

Plaintiffs also make several claims concerning the Travel Plan's snowmobile restrictions, but offer little in the way of support for these claims. See Pls. Br. 26. To the extent Plaintiffs attempt to argue that it was improper for the Service to designate areas, rather than routes, for snowmobile use, the Travel Management Rule contradicts them by instructing the Service to designate "roads," "trails," and "areas" for snowmobile use. 36 C.F.R. § 212.80(a). Plaintiffs further quote notes from a July 2007 "Motorized Recreation Planning" meeting, which state that the Service rejected a proposal to close certain areas to over-snow use because "there is no conflict of recreational use" in those areas. AR 36696. The document, however, does not specify what areas the Service deemed inappropriate for closure

and therefore cannot support Plaintiffs' claim that the recommended wilderness and WSA closures were arbitrary. In any event, the Service properly prohibited snowmobiles in recommended wilderness and WSAs pursuant to the Forest Plan, Study Act, and Travel Management Rule, as described above.

IV. NO SUPPLEMENTAL EIS IS REQUIRED

Despite the analysis of wilderness character impacts discussed supra, Plaintiffs insist that the Service inadequately considered bicycle restrictions, because the Service increased bicycle closures by about nine percent in its final decision to preserve wilderness character in WSAs and recommended wilderness. Pls. Br. 28-30. Plaintiffs wrongly claim the Service should have analyzed this change in a supplemental EIS.

NEPA regulations require that an agency supplement a draft EIS if the agency makes "substantial changes in the proposed action that are relevant to environmental concerns[.]" 40 C.F.R. § 1502.9(c)(1). Only when the final action "departs substantially from the alternatives described in the draft EIS" is a supplemental EIS required. Russell Country, 668 F.3d at 1045. Changes that are a "minor variation of one of the alternatives discussed in the draft EIS" and "qualitatively within the spectrum of alternatives that were discussed in the draft [EIS]" are not substantial changes requiring supplemental review. Id. (emphasis in original) (quotation marks omitted); accord Ten Lakes, 2017 WL 4707536, at *7-8.

Here, the ROD did not depart substantially from the alternatives discussed in the Draft EIS. The ROD closed 110 miles of trails in WSAs in addition to the 68 miles of trails already closed in recommended wilderness areas in the Draft EIS, reducing the total trail miles available to bicycles in the Bitterroot forest from 1,222 to 1,112. See AR 196; AR 526 (total miles of routes available to bikes, including trails in WSAs). This nine percent change in bicycle access is a minor variation of the Draft EIS alternatives, which all prohibited bicycle use in recommended wilderness areas. Further, this change is "qualitatively within the spectrum of alternatives," because, like the alternatives discussed in the Draft EIS, the final decision closes wilderness-quality lands to bicycle use to preserve their wilderness character. See Russell Country, 668 F.3d at 1046-49 (supplemental EIS not required where "final decision included several trail closures that were not included in any of the alternatives discussed in the DEIS"); Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1118 (Dec. 12, 2002) (supplemental EIS not required for addition of 4.2 million acres of inventoried roadless areas), abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv., 630 F.3d 1173 (9th Cir. 2011); Cf. Ten Lakes, 2017 WL 4707536, at *8 (supplemental EIS not required for 2,700 acres of additional wild and scenic river allocations).

Indeed, Plaintiffs do not assert that bicycle use in WSAs has some unique environmental impact that the Service's recommended wilderness analysis did not

capture, but rather argue that NEPA required the Service to "address the issue of bicycle access in WSAs." Pls. Br. 29 (emphasis added). An impact on the subjective experience of mountain bikers is not, however, a factor that NEPA requires the Service to consider. Bicycle Trails Council of Marin v. Babbitt, 82 F.3d 1445, 1466 (9th Cir. 1996), as amended (June 17, 1996) (NEPA does not require agency to consider impact of trail closures on bicyclists' "subjective experiences").[6]

In addition to their supplemental EIS argument, Plaintiffs advance several misleading and incorrect claims about the Service's analysis of bicycle restrictions. Plaintiffs argue that the Service did not identify the authority for its prohibitions on bicycle use. Pls. Br. 27. However, as Plaintiffs themselves point out, the Service issued its order pursuant to 36 C.F.R. part 261, subpart B. Pls. Br. 27. This subpart provides Service officials with authority to "issue orders which close or restrict the use of any National Forest System road or trail." 36 C.F.R. § 261.50(b). Plaintiffs do not explain how the Travel Plan's bicycle restrictions lack authorization under this provision. Id. § 261.50(b); see also id. § 261.55

[6] Plaintiffs cite an internal Forest Service email for the proposition that a supplemental EIS was required under these circumstances. Pls. Br. 30 (citing AR 43661). However, the obligation to prepare a supplemental EIS does not flow from an email but from the NEPA regulations. Plaintiffs have not shown that the regulations require additional NEPA documentation.

(providing Service with authority to issue orders prohibiting the use of "any type of vehicle" on a National Forest System trail).

Plaintiffs also argue that the Service failed to identify trail impacts caused by bicycles. Pls. Br. 27. This argument misconstrues the Service's analysis, however, which closed areas primarily due to use conflicts and inconsistency with wilderness character. See AR 208-11. Because any form of "mechanical transport," including bicycles, is prohibited in designated wilderness, the presence of such vehicles in recommended wilderness areas is inconsistent with their wilderness character. 16 U.S.C. § 1133(c); AR 502 (stating Forest Service Manual definition of "mechanical transport"). For example, bicycle use in the Bitterroot affects natural integrity by disturbing elk, and reduces opportunities for solitude by increasing the frequency of contact and conflict between bicyclists and stock animals. AR 512, 748-49; see also AR 561 (describing wilderness character attributes, which include natural integrity and solitude).[7]

Plaintiffs do not deny that bicycles cause such impacts, but nevertheless argue that the Service should have adopted an alternative management approach. Pls. Br. 28. However, the Service considered and rejected such management alternatives, including a proposal to adopt a land use designation that would permit

[7] In any event, 1,112 miles of trails remain open to bicyclists in the Bitterroot. See AR 196; AR 526.

bicycles in recommended wilderness. See AR 430. The law required nothing more.

V. ANY REMEDY SHOULD NOT VACATE THE TRAVEL PLAN

If, contrary to the argument above, the Court finds in Plaintiffs' favor on any of their claims—which it should not do—Defendant-Intervenors request that this Court order remand without vacatur of the Travel Plan. Remand without vacatur is appropriate as a matter of equity to preserve the protections for WSAs and recommended wilderness provided in the Travel Plan. See Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1405 (9th Cir. 1995) (remanding without vacatur decision that protected endangered species).

"Whether agency action should be vacated depends on how serious the agency's errors are 'and the disruptive consequences of an interim change that may itself be changed.'" Cal. Cmtys. Against Toxics v. EPA, 688 F.3d 989, 992 (9th Cir. 2012) (citations omitted). None of the errors alleged by Plaintiffs, even if valid (which they are not), are severe enough to warrant vacatur. An interim change that reinstates the former travel management regime would reverse nearly ten years of effort, including considerable public effort to protect WSAs and recommended wilderness from motorized and mechanized use. Moreover, as discussed above, vacatur would diminish the wilderness characteristics of WSAs

and recommended wilderness and threaten opportunities for these areas to receive permanent protection.

CONCLUSION

For the foregoing reasons, the Court should grant Defendant-Intervenors' motion for summary judgment and deny Plaintiffs' motion for summary judgment.

Respectfully submitted this 20th day of December, 2017.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Opposition to Motion to Supplement the Administrative Record contains 6,472 words in compliance with Local Civil Rule 7.1(d)(2)(A).

/s/ Joshua R. Purtle
Joshua R. Purtle

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was today served via the Court's CM/ECF system on all counsel of record.

/s/ Joshua R. Purtle
Joshua R. Purtle