No. 12-35434

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Wildlands CPR, et al.,
Plaintiffs-Appellants

vs.

United States Forest Service, et al.,
Defendants-Appellees

and

Montana Snowmobile Assoc., et al.,
Intervenor-Defendant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

District Court No. CV-10-104 -M-DWM

APPELLANTS' REPLY BRIEF

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I. RESPONSE TO STATEMENT Of THE CASE AND FACTS

Wildlands does not take issue with Appellees' Statement of the Case. However, subsequent to the Answer Briefs, Wildlands moved the district court to find the Forest Service violated the remand order for failing to apply the minimization criteria to all trails open to snowmobiles. Thus while the Forest Service has filed a Notice of Satisfaction of Remand, the agency's compliance with the remand is contested. *Wildlands CPR v. U.S. Forest Service*, Case No. CV 10-104-M-DWM (D. Mont.) ECF Doc. No. 79.

The Forest Service presents two "facts" in its Answer Brief that merit a response. First, the Forest Service makes repeated reference to the "fact" that the Revised Forest Plan opens fewer acres to snowmobiling compared to the 1987 Forest Plan. *See e.g.* Forest Service Answer Brief (FS Brief) at 8, 10; Snowmobile Answer Brief at 27. The fact that the 2009 Revised Forest Plan allocates less acreage to winter motorized use than the previous Forest Plan is not legally relevant. While Wildlands certainly applauds administrative steps that increase resource protection, the fact that the Revised Forest Plan has less acreage open to snowmobiling than its predecessor does not lessen the agency's obligations under NEPA or the Executive Orders. As the district court found, and the Forest Service failed to appeal, "that less of the area is now open to snowmobiling now than was

open under the previous plans does not impact Plaintiffs' standing." ER Tab 3 at 12, Order at 8. Not only does that "fact" not impact Plaintiffs' standing, it does not affect this Court's analysis of the issues on appeal. The Revised Forest Plan and FEIS are final agency action, and this case turns on the administrative record underlying those actions, not on whether the 2009 Plan is better or worse than its predecessor.

The second irrelevant "fact" that the Forest Service injects into its Answer Brief concerns a subsequent decision, referred to as "ROD (for Record of Decision) #2." A more thorough explanation of the relationship between the Revised Forest Plan's Records of Decision, referred to as ROD #1 and ROD #2, follows.

The National Forest Management Act ("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 forest management with the binding authority of zoning regulations. Forest Plans must be revised at least every fifteen years. 16 U.S.C. § 1604(f)(5)(a).

Forest Plans provide a general framework, to be followed by later site-specific decisions. The Forest Service can also decide to make binding land allocations through the Forest Plan without further action, and those portions of the

Plan are immediately justiciable. The Supreme Court confirmed that Forest Plan decisions to open or close areas to motorized use in a Forest Plan are justiciable, because in such a decision, no further administrative action is required. *Ohio Forestry Assoc. v. Sierra Club*, 523 U.S. 726, 738 (1998). At issue here is the decision to allocate 2,000,000+ acres of the Beaverhead for winter motorized recreation, a decision which was made in ROD #1. ER Tab 10 at 110 (ROD at 15, Table 1); ER Tab 6 at 90 (Forest Plan, 30, Table 9); ER Tab 5 at 60 (CFEIS at 365, Table 98).[1] The Forest Service plans no additional environmental analysis of the impacts of allowing snowmobiling on the 2,000,000+ acres.

The Forest Service then issued a second Record of Decision (ROD #2, signed February 2012) implementing the trail and area closures for summer and winter motorized use per Forest Plan direction. AR J1-01. Wildlands did not challenge ROD #2's closure of areas to motorized use; Wildlands only wanted to challenge the decision that opened areas to winter motorized use.

The Forest Service asked the district court to dismiss the case because Wildlands did not administratively challenge ROD #2 and thus had not exhausted its remedies. The agency painted ROD #2 as the operative decision for allowing

1 The Forest Service agrees that ROD #1 was the final decision that allocated lands to winter motorized use: "The approximately 2,000,000 acres where over-snow vehicle use was allocated by the ROD [#1]…" FS Brf. at 10 n.3.

snowmobile use. The district court denied the challenge, finding the decision in ROD #2 "irrelevant" to Wildlands' challenge. ER Tab 3 at 18, Order at 14. ROD #2 "only implemented closures" which Wildlands did not want to challenge. *Id.* The Forest Service did not appeal the ruling that ROD #1 is the proper decision to challenge, yet continues to suggest here that ROD #2 is relevant for the disposition of this case.

On appeal, the Forest Service attempts to paint ROD #2 as the operative decision, and revive its failed exhaustion defense. "This ROD (#1) set forth management allocations on the Forest, but did not open or close any areas to over-snow vehicle use." FS Brf. at 10 c*iting* SER Tab 19 at 285 (I1-01 at 15). That statement contradicts the district court's finding that ROD #1 was the proper decision for Wildlands to challenge because that decision allowed snowmobiling on 2,000,000+ acres. It also contradicts the agency's own description of ROD #1 in its answer brief. *See* FS Brf. at 10, n.3 (stating ROD #1 allocated 2,000,000 acres to winter motorized recreation). It also contradicts the Forest Service's own description of ROD #2, which clearly states that ROD #2 implements *closure* decisions. *See* AR J1-01 (ROD #2, also at Tab 19 SER, under heading "This Record of Decision" which lists four categories of closure decisions effectuated in ROD #2). ROD #2 affirms that the 2009 Revised Forest Plan allowed

snowmobiling on 2,043,372 acres of the Beaverhead, including 1,921 miles of snowmobile routes. AR J1-01, "Recreation Access Summary Table" at 3. ROD #2 is irrelevant for determining whether the FEIS and ROD #1 adequately disclose and minimize the effects of allocating 2,000,000 acres to winter motorized use in contravention of NEPA and the Executive Orders.

ROD #2 remains relevant, however, in understanding why Wildlands "as-applied" challenge to the 2005 Travel Management Regulations (hereafter TMR) is ripe for judicial review. The TMR makes a distinction between winter and summer motorized use that Wildlands alleges contravenes the Executive Orders upon which the TMR is based. ROD #2 explains that subsequent analysis and site-specific decisions will occur for summer motorized use but not for winter motorized use. *See* AR J1-01, at 4. Thus winter travel planning on the Beaverhead, covered by the TMR, escapes site specific review for areas that are open to snowmobiling. It is this flaw, as applied on the Beaverhead, which contradicts the Executive Orders upon which the TMR is based.

II. SUMMARY OF ARGUMENT

Three issues are presented for review. First, this Court should find the FEIS fails to address the impacts of allowing snowmobiling on two million acres of the Beaverhead. While the Forest Service generally addressed how winter use

affects wildlife, it did not examine with any specificity the places where snowmobiling is allowed with respect to wildlife, though it acknowledged that snowmobiles can adversely affect wintering wildlife. The agency relies on studies pertaining to impacts from summer motorized uses, and asks the Court to infer that those studies apply to winter impacts.

Second, this Court should find that the Forest Service failed to apply the mandatory requirements of the Executive Orders, which require the Forest Service to minimize impacts from snowmobiles on forest resources and other forms of recreation. This Court should not ignore a host of recent decisions that find these duties to be substantive and non-discretionary, as the Forest Service asks. The agency did not once mention the Executive Orders in the ROD or FEIS.

Finally, Wildlands challenges the district court's dismissal of its challenge to the TMR as unripe. The challenge is ripe, because the 2009 Revised Forest Plan is a final agency action, and the agency never planned to apply the TMR to the winter motorized areas of the Plan, and in fact argues it is not required to do so.

III. ARGUMENT

A. The Forest Service Fails to Demonstrate that the FEIS Meets Ninth Circuit Standards for Adequately Addressing Impacts From Allocating Two Million Acres to Winter Motorized Use.

The gravamen of the NEPA dispute centers around the degree of specificity

required for analyzing snowmobile impacts on lands allocated for winter motorized use in the Revised Forest Plan. Wildlands alleges that the FEIS lacks enough site specific analysis to ensure "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 Citizens Council v. Robertson*, 490 U.S. 333, 349 (1989). The Forest Service responds by citing to several pages in the FEIS that it claims address the impacts from snowmobiling with the specificity that NEPA requires. *See e.g.* FS Brf. at 20. Thus the real dispute here is whether the data and analysis in the FEIS are adequate under well-established Ninth Circuit standards. However, the Forest Service first misstates Wildlands' NEPA arguments, interjecting issues not addressed by the court below. It then fails to demonstrate how the information and analysis in the FEIS meet Ninth Circuit standards.

1. <u>The Forest Service misstates Wildlands' NEPA argument.</u>

The Forest Service avers that Wildlands' true protest is the agency's choice of scope for its analysis. Thus Wildlands "claim that more site-specific detail is required is effectively an argument that the Forest Service must use a smaller geographic scale…" FS Brf. at 22. The Forest Service argues that this Court

should defer to "the agency's determination of the proper geographic scale at which to assess environmental impacts." FS Brf. at 18.

Wildlands does not challenge the agency's discretion to choose the geographic scope of its forest plan revision. Such an argument is easily resolved in the agency's favor. The Forest Service is statutorily obligated to revise a Forest Plan for the entire forest and prepare an EIS addressing the revision. The scope of the forest plan revision and accompanying NEPA analysis is thus mandated by law. 16 U.S.C. § 1604(f)(5)(a) (mandating revision of entire Forest Plan every 10-15 years). The Forest Service does not cite to any place in the complaint or the briefing where Wildlands challenges the authority of the Forest Service to conduct a Forest-wide EIS. Thus its suggestion that Wildlands "effectively" challenges the scope of the analysis is wrong. This Court should not head down the path of deciding Wildlands' NEPA claims by evaluating the legitimacy of the scope of the FEIS.

The agency can also decide whether to use the Forest Plan as the vehicle to make management decisions regarding winter motorized use. As *Ohio Forestry* teaches, forest plans can either be general, with on-the-ground decisions made at a later, second stage of decision-making, or the plan itself can make the land management decision and eschew further analysis. *Ohio Forestry Assn. v. Sierra*

Club, 523 U.S. 726 (1998). Here the Forest Service was entirely within its discretion to use the Revised Forest Plan as the vehicle to allocate two million acres to winter motorized use, and Wildlands does not argue to the contrary.

The proper issue for this Court to decide is whether, given the Forest Service's decision to use the Forest Plan as the vehicle to allocate lands to winter motorized use, the FEIS adequately disclosed the impacts of that decision.

2. The Forest Service's landscape level decision regarding winter motorized use does not lessen its obligations under NEPA.

The Forest Service also argues that because it has made a landscape level decision allocating a large area to winter motorized use, its obligation to address site specific impacts is lessened. According to the agency, "the level of detail that Wildlands believes is necessary is not appropriate for the Revised Forest Plan in light of its broad, forest-wide scope." FS Brf. at 18. The Forest Service cites this Circuit's landmark NEPA case *California v. Block* to support its decision. *Id.* Upon close inspection, *Block* supports the analysis that Wildlands advocates for here.

In *Block* the Forest Service prepared a nation-wide EIS on the wilderness suitability of roadless lands for over 60 million acres of National Forest. *California v. Block*, 690 F.2d 753, 756 (9th Cir. 1982). The Forest Service allocated the roadless lands into one of three land management allocations: wilderness,

non-wilderness and further planning. The roadless allocations had consequences for future management of these lands because those that were designated non-wilderness were likely released for development. California and numerous conservation groups challenged the agency's NEPA analysis of the individual roadless areas (there were hundreds) for lack of site-specific information to support its land allocation decisions. The District Court agreed and held that the EIS violated NEPA. *Id.*

On appeal, the Forest Service argued, as it does here, "that the degree of detail required by the district court is unwarranted." *Id.* at 760. The Forest Service argued that because it might make subsequent site-specific decisions, the nationwide EIS need not address each roadless area in detail. The Ninth Circuit rejected the Forest Service's attempt to eschew its NEPA duties simply because it made a landscape level decision:

> The "critical decision" to commit these areas for nonwilderness uses, at least for the next ten to fifteen years, is "irreversible and irretrievable." The site-specific impact of this decisive allocative decision must therefore be carefully scrutinized now and not when specific development proposals are made.

Id. at 763. The Court rejected the use of generalized scorings and rankings and required a more thorough analysis of each area that was allocated under the EIS. *Id.* at 764.

This Court's reasoning in *Block* applies here with full force. That the Beaverhead conducted a forest-wide analysis does not lessen its NEPA responsibilities. As in *Block*, "[T]he scope of the undertaking here, however, was the Forest Service's choice and not the courts'. NEPA contains no exemptions for projects of national scope." *Id.* at 765. NEPA doesn't provide a lower standard here simply because the Forest Service has chosen to make a forest-wide decision. *Block* is good precedent for requiring the specificity that Wildlands seeks here.

3. The FEIS fails to meet this Circuit's requirement for specificity and data disclosure.

Consistent with the standard in *Block*, subsequent decisions of this Circuit reinforce the need for specificity in an FEIS, without regard to the scale the agency chooses to implement its decisions. "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). 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." *Neighbors of Cuddy Mountain v. Forest Service*, 137 F.3d 1372, 1379 (9th Cir. 1998). NEPA's public disclosure mandate requires that the agency supply more than just generalized conclusions: "[N]EPA

requires that the agency provide the data on which it bases its environmental analysis." *Northern Plains Resource Council v. Surface Transportation Board*, 668 F.3d 1067, 1082 (9th Cir. 2011). Yet instead of addressing the relevant cases in this Circuit, the Forest Service continues to rely on cases rejected by the district court as irrelevant, like *No GWEN Alliance of Lane Cnty., Inc. v. Aldridge*, 855 F.2d 1380 (9th Circuit 1988). FS Brf. at 17; ER Tab 3 at 22, Order at 18.

4. The FEIS is deficient in its analysis of the impacts of snowmobiling on wildlife.

The Forest Service cites to the same statements in the FEIS as proof that the FEIS is sufficient that Wildlands uses to show that the FEIS is deficient. For example, the Forest Service states that winter recreation "can adversely affect wildlife by causing them to move away when demands on their energy reserve are at their highest." FS Brf. at 19 quoting FEIS at 509. Wildlands agrees that the statement is true, but standing alone, it is nothing but a "vague and conclusory statement without any supporting data" that does not meet NEPA's requirement for site-specific analysis. *Great Basin Mine Watch v. Hankins,* 456 F.3d 955, 973 (9th Cir. 2005). The Forest Service fails to show where it applied its knowledge that winter recreation affects animals' energy reserves, or why some winter range was left open. It provides no specific data showing where impacts to big game would occur on the 2,000,000+ acres of the Beaverhead allocated to winter motorized use.

It provides no explanation as to how, using the information in the FEIS, the agency reasonably minimized impacts to big game as required by the Executive Orders.

Acknowledging that the Forest Service did not connect the dots between its general disclosure about motorized impacts and its on-the-ground land allocations, the district court was left to "fill in the gaps" in the agency's reasoning. ER Tab 3 at 28 (*Order* at 24). As explained in Wildlands' Opening Brief, the district court erred by extrapolating from a table that was prepared exclusively to disclose summer motorized and non-motorized use impacts. *See* Wildlands Brf. at 27-8 discussing Table 179, found at ER Tab 5 at 72 (FEIS at p. 513). The Forest Service brushes aside this serious error by the district court. First it claims the information in Table 179 is merely "more focused" on road densities than snowmobile use. FS Brf. at 28. That statement is an inaccurate description of Table 179. Table 179 is entirely focused on summer motorized use and has nothing to do with snowmobiles. The Forest Service should have admitted this fact rather than try to obfuscate the issue. Then the Forest Service asks this Court to act like a panel of scientists, and draw "inferences" from Table 179. This Court should deny the invitation. If inferences can be drawn, then the burden is on the Forest Service, using credible science, to explain how a table on flight response from summer recreation is relevant to winter snowmobile use, and how it applied the information from the table in its land

allocations. This Court need not defer to conclusory statements that its data is adequate when the agency does not provide any "scientific studies or evidence in the record to support its assertion." *Northern Plains Resource Council*, 668 F. 3d at 1086, *citing Lands Council v. McNair*, 537 F.3d 981, 994 (9th Cir. 2008).

Aside from its attempt to use the summer motorized flight response in Table 179 in the FEIS, the Forest Service cannot point to a cogent analysis of how it examined the relationship between winter motorized use and wildlife impacts, and then how it acted on that analysis in allocating lands to winter motorized recreation. The Forest Service tells this Court it "qualitatively disclosed the effects of displacement." FS Brf. at 19. But its supporting citations, Table 176 and the data compilations at AR F-23 pages 18-23, provide no qualitative analysis. Both are simply coarse data compilations.

The Forest Service notes that the Montana Department of Fish Wildlife and Parks considers elk populations to be healthy. FS Brf. at 20. Healthy elk populations are a good thing in western Montana. However, that argument misses the mark as well. The status of elk populations is not "proof" that snowmobiling does not harm them, nor is it an analysis of impacts. *See generally Hapner v. Tidwell*, 621 F.3d 1239, 1251 (9th Cir.2010) (holding that Montana's determination that elk populations were healthy was irrelevant in assessing compliance with

NFMA). This suit is about NEPA disclosure and Executive Order compliance for Forest Service decisions that allow winter motorized use. NEPA requires the Forest Service to take a reasoned look at the impacts of what it is doing, and disclose that reasoned look to the public for comment and critique, no matter if elk populations are healthy or not. *Methow Valley*, supra, 390 U.S. at 349 ("NEPA ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.").

The Forest Service paints Wildlands' claims as a failure of the Forest Service to prepare a map showing wildlife habitat and snowmobile areas. FS Brf. at 21, *citing* Wildlands Brf. at 25-6. While Wildlands did suggest that maps depicting the relationship between wildlife habitat and areas open to snowmobile use would be helpful, preparing a map does not automatically cure a defective EIS. What cures a defective EIS is a cogent discussion of the proposed action (allowing snowmobiling on 2,000,000+ acres), an on-the-ground identification of the resource affected (wildlife habitat), and an analysis of how the action affects the resource. The choice of methodology and scale of analysis (landscape area, watershed etc.) is up to the agency, as long as it is reasonable.

Finally, the Forest Service takes the same conclusory approach regarding

impacts to moose, which it relegates to a lone footnote, despite the extensive discussion and record references in Wildlands Opening Brief. *Compare* FS Brf. at 20 n.4 *with* Wildlands Brf. at 14-15. The "analysis" of moose impacts in footnote 4 consists of the same few sentences from the FEIS and reference to Table 176 that the agency uses for analysis of impacts on all big game species.

Yet moose have much different habitat requirements than other big game species; Montana Department of Fish Wildlife and Parks made clear in its comments on the DEIS that riparian areas are critical to moose, and the disruption caused by snowmobiling through streams and adjacent riparian vegetation is a serious adverse impact. Using the Boulder River drainage as an example, because it had documented snowmobiles ripping through stream corridors, the Department explained:

> [m]oose occur commonly throughout this entire MA (the Boulder River-Sheepshead Management Area) and their needs should be specifically addressed, including the importance of not approaching or stressing them during the winter. …As important is ***the need to specify designated snowmobile routes so that snowmobiles are not damaging riparian areas that provide moose forage.***

The Department also provided specific information, obtained from aerial photographs, about snowmobile conflicts in moose habitat:

> 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.

ER Tab 8 at 102 (AR G5-06, emphasis added).

The Forest Service's response was a "thank you" and a promise to develop different alternatives for winter motorized recreation. ER Tab 9 at 108 (AR G5-10, Forest Service Response to Montana Department of Fish Wildlife and Parks at 13). The FEIS contains no additional analysis on moose impacts in the Boulder River or anywhere else on the Beaverhead. On appeal the agency's response is no better, burying the issue in a footnote and citing to nothing to show this court how impacts to moose were addressed. The flight response data for summer motorized use pertains to elk not moose. Moose rely on riparian vegetation for winter habitat, different from the winter habitat needs of other species. For moose, there is no data or analysis, and thus NEPA's twin mandate of informing the agency and the public of impacts has been ignored. *Methow Valley*, *supra*.

5. The FEIS fails to address how snowmobiling affects other winter recreational activities on the Beaverhead.

Wildlands challenged the NEPA analysis for impacts of snowmobiling on non-motorized recreation like cross-country skiing, snowshoeing and backcountry skiing. The Forest Service does not deny impacts, but claims to have addressed them with specificity and points to 30 pages in the FEIS. FS Brf. at 25. While 30 pages of discussion about recreation impacts would likely suffice for NEPA

compliance, closer inspection reveals the cited pages are general in nature, and address everything from horseback riding to summer vehicular access. This level of analysis is not sufficient to address and disclose impacts on other recreational uses.

B. The Forest Service Has Failed to Show Compliance with the ORV Executive Orders That Require the Agency to Minimize the Adverse Effects of Motor Vehicle Use.

Executive Orders 11644 and 11989 establish clear, independent, and enforceable requirements to minimize resource damage from motorized use. The district court found they had the force of law and could be enforced by private action. ER Tab 3 at 34-6; Order at 30-2. Other courts concur. *See e.g Conservation Law Foundation of New England, Inc. v. Secretary Clark*, 590 F. Supp. 1467, 1477 (D. Mass. 1984), *aff'd*, 864 F.2d 954 (1st Cir. 1989). Neither the Forest Service nor the Snowmobile groups appealed that ruling.

The Executive Orders require the Forest Service to locate and manage ORV areas and trails in National Forests to "minimize" damage to forest resources and harassment of wildlife. *See* Exec. Order 11644 §§ 3, 9 (Feb. 8, 1972), *as amended by* Exec. Order 11989 (May 24, 1977). Both "areas" and "trails," for summer and winter use, are subject to the same criteria to allow motorized use only after the government has minimized impacts on wildlife, water quality and recreation

conflicts, among others. Moreover, the substantive duties to minimize impacts are different than the duty under NEPA to simply disclose them.

1. The lower courts are nearly unanimous that the Executive Orders and accompanying regulations create substantive duties.

The Forest Service argues that cases interpreting the Executive Orders and TMR are inapplicable. FS Brf. at 34-35. However, several recent decisions impose a substantive obligation on the government to explain how its actions allowing motorized use were completed so as to minimize impacts on other resources. In a January 2013 opinion, *Central Sierra Environmental Resource Center v. US Forest Service (CSERC)*, Civ. No. S-10-2172 KJM-AC (E.D. CA, January 4, 2013), p. 20, summarized current judicial interpretations:

> Multiple district courts, many of them within the jurisdiction of this Court, have considered the Forest Service's obligations to minimize effects under the ORV Executive Orders and Subpart B of the Forest Service's Travel Management Regulation, 36 C.F.R. § 212. Most all of them have concluded that the Forest Service must actually explain how it aimed to minimize environmental damage in designating routes, though no specific outcome is required. *Minn. Ctr. for Envtl. Advocacy v. U.S. Forest Serv.*, CIV. 10-2178 SRN/LIB, 2012 WL 1231759, at *22 (D. Minn. Apr. 12, 2012); *Ctr. for Sierra Nev. Conservation v. U.S. Forest Serv.*, 832 F. Supp. 2d 1138, 1146 (E.D. Cal. 2011); *Idaho Conservation League*, 766 F. Supp. 2d at 1072-74.[2]

The Snowmobile Groups and the Forest Service try to distinguish these cases

2 *But see Pryors Coaition. v. Weldon*, 803 F. Supp. 2d 1184, 1195 (D. Mont. 2011) (the minimization language "does not mandate action. Rather, it is intended to lend guidance and maintain the regulation's objectives."). The *Pryors* case is pending on appeal to this Court on this issue.

because they focus on summer motorized travel planning. Snowmobile Brf. at 18-23. The distinction is wrong because the Executive Orders treat summer and winter ORV use alike, and apply the minimization criteria to all ORV allocations.

2. The Forest Service wrongfully denies that the Executive Orders impose substantive duties despite their mandatory plain language.

Executive Order 11644 sets forth a mandatory, substantive duty for the Forest Service to minimize damage to soil, watershed, vegetation, and other forest resources when it authorizes areas and trails for motorized use. *See e.g.* Exec. Order 11644 Sec. 3(a)(2) ("Areas and trails **shall be located** to minimize harassment of wildlife or significant disruption of wildlife habitats."). The use of the term "shall" makes the minimization criteria 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 a duty is mandatory).

The Forest Service now attempts to apply the words "consider" and "objective," that were added by the TMR, to the directives in the Executive Orders, to make the duty to minimize impacts from motorized use either optional, or a duty to disclose those impacts without minimizing them. FS Brf. p. 29-30. The Forest Service, because it concedes that the Executive Orders apply, having not appealed the district court's ruling, must now argue that their mandatory language is discretionary. However courts interpreting both the Executive Orders and the TMR

find the duties to be mandatory, despite the wording in the TMR.

For instance, in *Idaho Conservation League v. Guzman (ICL)*, 766 F.Supp.2d 1056 (D. Idaho 2011), the District Court of Idaho found that the Forest Service is "bound by the plain language of the ORV Executive Orders" and that the TMR, by incorporating that language, requires the Forest Service to both consider and minimize the impacts. *See ICL*, 766 F.Supp.2d at 1074. Likewise, the addition of the word "objective" in the TMR does not make the substantive duty – to minimize impacts to "soil, watershed, vegetation, and other forest resources" – optional. *Id.* In short, as to each specific resource criterion, the express terms of Executive Order 11644, and the TMR, set forth a mandatory duty to minimize the negative impacts of motor vehicle use on the federal public lands, though, as explained further below, minimize does not equate to eliminate. *See also CSERC* at p. 20 (the E.O. imposes an "affirmative obligation" on the Forest Service to actually show that it aimed to minimize environmental damage when designating trails and areas… This means the Forest Service must do more than merely consider those impacts.").

Unlike NEPA, which is procedural, the Executive Orders impose a substantive obligation to minimize environmental damage when designating areas and trails. *CSERC* at 23. The Forest Service cannot cite places in the FEIS demonstrating application of the minimization criteria to areas open to

snowmobiles. The agency also ignores district court's holding that the Executive Orders create mandatory duties, and its partial remand because the Forest Service failed to meet that duty. ER Tab 3 33-36, Order at 29-32.

Both the Forest Service and Snowmobile Groups complain that Wildlands seeks to impose an absolute duty to minimize that effectively bans snowmobile use, in furtherance of their "preservationist" agenda. *See e.g.* FS Brief at 30 ("extreme interpretation of 'minimize' would preclude any use at all, since impacts always can be reduced further by preventing them altogether."). Wildlands seeks no such construction of the Executive Orders. "Minimize" is not the same as "ban." As other courts have held, the duty to minimize is bounded by reason and the expectation that ORV use will occur. *See, e.g., CSERC* p. 19-20. The record contains no explanation as to why measures to reduce impacts were not considered, such as confining use to groomed trails, implementing a shorter season of use, restricting numbers of users, or other measures the agency can take to reduce snowmobile impact while allowing use to occur.

3. Implementation of the minimization criteria of the Executive Orders does not conflict with the agency's multiple use mandate.

The Forest Service argues that the minimization criteria cannot impose a mandatory duty because it conflicts with the multiple use mandate under the Multiple Use Sustained Yield Act (MUSY), 16 U.S.C. §§ 528-531. FS Brf. at 29.

However the Revised Forest Plan is **full** of authorized multiple uses. AR I1-01, ROD at 7-22. (listing Forest Plan multiple uses, including vegetation management, timber harvest, livestock grazing, motorized recreation, recommended wilderness, and wildlife habitat). ORV use is a legitimate multiple use, and that the agency has discretion under MUSY to permit it. However, Congress and the executive branch have often set clear boundaries on agency discretion under MUSY, to ensure that environmental resources are protected under the multiple use mandate. *See e.g.* 16 U.S.C. § 1604(g)(3)(e) (NFMA prohibition on timber harvest that damages soil, slopes or water courses). *See also* 16 U.S.C. § 1536 (Endangered Species Act prevents Forest Service from adversely modifying critical habitat). The Executive Orders are a similar constraint on multiple-use discretion.

4. The Forest Service fails, on this record, to show where it applied the minimization criteria to the 2,000,000+ acres allocated to snowmobiling.

Neither the Forest Service nor the Snowmobile groups cite to pages in the ROD or FEIS where the Executive Orders are discussed. Indeed, in the "Recreation" section of the FEIS, the Executive Orders are not even listed as applicable to recreation management. AR A1-40, FEIS at 401-402. While the FEIS discusses snowmobile impacts on wildlife, such a discussion under NEPA is

different than minimizing impacts under the Executive Orders. It is also true that the Forest Service closed areas of the Beaverhead to winter motorized use. But what is missing on this record is a discussion of how the minimization criteria were applied to the 60 percent of the Beaverhead that the Forest Service left open to motorized use.

C. Wildlands' As-Applied Challenge to the 2005 Travel Management Rule is Ripe for Judicial Review.

It is undisputed that the Revised Forest Plan and Record of Decision is the final agency action allowing snowmobiling on more than two million acres of the Beaverhead. It is also undisputed that the Forest Service enacted new Travel Management Regulations in 2005 that differ from previous travel management regulations (found at 36 C.F.R. part 295) and the Executive Orders upon which they are based in that they create different travel management planning requirements for summer and winter motorized recreation. The key difference is that Executive Order Section 3(a) 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." Pursuant to the EO, the minimization criteria apply to all off-road vehicle designations. By contrast, while the TMR requires application of the minimization criteria to designations allowing summer motorized use, the TMR creates a new definition for "over-snow vehicles" and then

requires application of the minimization criteria only when their use is restricted or prohibited. *See* 36 C.F.R. §§212.1, 212.51, and 212.81.

Wildlands claims the TMR unlawfully departs from its authorizing law, the Executive Orders. Wildlands' claim is ripe for judicial review because the Forest Service prepared the Revised Forest Plan under the auspices of the TMR, (ROD #2 recognizes this with its reference to the TMR). ROD #1 authorized areas for winter motorized use without applying the minimization criteria.

The district court found the challenge to the TMR was not ripe. The Forest Service argues that it did not use the TMR "in the manner Wildlands alleges," and that this challenge is therefore an improper facial challenge to the TMR. FS Brf. at 35. The Forest Service further argues that exceptions to the ripeness doctrine are inapplicable. FS Brf. at 41-42.

Once again the Forest Service tries to recast Wildlands' arguments. First, Wildlands does not bring a facial challenge to the TMR. The Amended Complaint and briefing at the district court make clear that Wildlands challenges the TMR as it was applied to the Revised Forest Plan. Nor does Wildlands argue that "special circumstances" allow an otherwise unripe challenge. Rather, Wildlands brings an as-applied challenge to the TMR, specifically to the validity of 36 C.F.R.§§ 212.51 and 212.81, provisions that allowed the Forest Service to **not** apply the minimization

criteria when it designated over 2,000,000 acres of the Beaverhead open to winter motorized use.

The parties agree that the two-part *Abbott Laboratories* ripeness test controls, and that a concrete action, as identified in *Lujan*, is required for Wildlands to challenge the TMR. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967); *Lujan v. Nat'l Wildlife Fed'n*, 487 U.S. 871, 891 (1990). Wildlands Brf. at 47, FS Brf. at 37-8. The *Abbott Labs* ripeness test is satisfied. Unlike the pre-enforcement challenge to regulations in *Abbott Labs*, the Revised Forest Plan, which opens to snowmobile use more than 2 million acres and 1,900 miles of routes, is final agency action. This case is hardly an "abstract disagreement." *Abbott Labs*, 387 U.S. at 149.

The Forest Service relies on *Earth Island Institute v. Ruthenbeck* for its assertion that this matter is not ripe. However, the claim presented here differs from that in *Ruthenbeck*, because Wildlands does not argue that the challenge is ripe merely because the "regulations are final agency action and present purely legal questions." *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 696 (9th Cir. 2007). Rather, Wildlands argues that it "felt the effects in a concrete way" when ROD #1 designated more than 2,000,000 acres to snowmobile use, without application of the minimization criteria. *Abbott Laboratories* 387 U.S. at 149. This case challenges

the Forest Service's use, in the FEIS and ROD #1, of the "exemption" in the TMR (36 C.F.R § 212.51(a)(3)) and 36 C.F.R. § 212.81. This exemption allowed the Forest Service to avoid the minimization criteria contained in 36 C.F.R. § 212.55 when designating more than 1,900 miles of trail and 2,000,000+ acres of the Beaverhead open to winter motorized use. This is in direct conflict with the TMR's authorizing law, Executive Order 11644, which requires that the minimization criteria be applied when allowing off-road vehicle use.

Complicating matters is that establishing ripeness to challenge the TMR here requires proving a void. The regulations (36 C.F.R. 212.51 and 212.81) provide that the Forest Service must apply the 36 CFR 212.55 minimization criteria to decisions **allowing summer** motorized use and to decisions **restricting and prohibiting winter** motorized winter use, but **not** to decisions **allowing motorized winter use**. Because the TMR allows the Forest Service to **not** apply the minimization criteria to the opening of areas/trails to motorized winter use, (without explicitly announcing its intention to **not** do so), Wildlands must show the Court an absence. To do so, the Court needs to look beyond ROD #1, which allows winter motorized use.

In ROD #2, the Forest Service acknowledges the requirement to apply the TMR to summer motorized use. AR J1-01 at 4. However, no such

acknowledgment was made for winter motorized use. That the Forest Service has failed to apply the minimization criteria to winter motorized use is further supported by the lower court's conclusion that the Beaverhead failed to apply the criteria to trails open to snowmobiles. *See* ER Tab 3 at 8, Order at 4. In ROD #2, the Forest Service commits to a third process to designate specific trails for summer motorized use:

> The next stage of travel planning will include further analysis to formally designate routes for motorized travel in areas where motorized use is permitted under 36 CFR 212 Subpart B and result in publication of Motor Vehicle Use Maps (MVUM) for the BDNF.

AR J101 at 4; SER Tab 21 at 305. Pursuant to Subpart B, 36 C.F.R. § 212.51(a), the minimization criteria apply only to designations for summer motorized use, and not to designations for winter motorized use. This third process is currently underway to evaluate what trails/areas will be designated for summer motorized use.

Thus, while the Forest Service recognized that compliance with the TMR required summer travel planning, it did not need to commit to winter travel planning because the TMR does not require the agency to apply the minimization criteria in areas available for winter motorized use. Ironically, the agency recognizes the need for such a process to address aquatic and riparian impacts from winter use, (*see* ER Tab 12 at 117 (citing FEIS p. 137)), but then fails to commit to any future planning.

Indeed, the district court recognized there was no additional process for travel planning for motorized winter use when it ruled that ROD #1 was the appropriate final decision for Wildlands' challenge to the opening of areas for motorized winter use. ER Tab 3 at 18. The Forest Service has not appealed this ruling.

Executive Order 11644 contains no distinction between winter and summer motorized use. The only justification for the Forest Service's differing treatment here is that the TMR has created this distinction. Wildlands does not argue that the Forest Service cannot promulgate regulations with different processes for summer and winter motorized use, but, rather, that whatever processes are used must comply with the Executive Orders. In the administrative appeal, responding to Wildlands' challenge to the opening of areas to winter motorized use, the Forest Service acknowledged that the minimization criteria contained in 36 CFR 212. 52 apply only when over-snow vehicle use (snowmobiles) will be "restricted or prohibited." ("Forest Service directives at Forest Service Manual (FSM) 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." ER Tab 12 at 117, AR I4- 5, Appeal Decision, p. 95, (emphasis added).

Moreover, although the Forest Service suggests the exemption may not exist, its Answer Brief explains:

> The Appeal Decision explained that the **designation process** in 36 C.F.R. §§ 212.52 through 212.57 must be followed when restricting or prohibiting over-snow vehicle use, but **does not apply to the present situation, in which over-snow vehicle use is allowed.**"

FS Brief at 40 (emphasis added). The Forest Service twice acknowledged that, pursuant to the TMR, it does not apply the minimization criteria contained in 36 C.F.R § 212.55 when it allows winter motorized use.

The TMR thus creates a hole in the motorized travel planning process allowing decisions to allocate lands to winter motorized use to escape review under the minimization criteria, in direct contradiction of the Executive Orders. It is this non-application of the minimization criteria (authorized by the TMR and acknowledged by the Forest Service) in the Revised Forest Plan that Wildlands challenges as inconsistent with the Executive Orders. The challenge is ripe for judicial review under *Abbott Labs* because the TMR is the authority allowing the Forest Service, without applying the minimization criteria, to designate more than 2,000,000+ acres on the Beaverhead as open to winter motorized use.

IV. CONCLUSION AND REQUEST FOR RELIEF

Wildlands requests that this Court reverse the district court's ruling on the sufficiency of the FEIS and application of the Executive Orders, and remand the

Revised Forest Plan to the Forest Service for completion of an adequate FEIS and winter travel management planning. Wildlands further requests that this Court hold that the challenge to the TMR ripe, and remand it for a determination on the merits.

Dated this 22nd day of January.

s/s Jack R. Tuholske

s/s Sarah A. Peters

Attorneys for Plaintiffs

CERTIFICATE OF COMPLIANCE

In accordance with the Appellate Rules of Procedure, the undersigned certifies that this brief has been prepared in a proportionally spaced typeface using Microsoft 2007 Word processor; the font size is 14, the style is Times New Roman and it contains 6,961 words (including headings, footnotes, and quotations, but not including table of contents, table of citations, addendums, rules and regulations, or certificates). This brief does not average more than 280 words per page excluding Certificate of Service and Certificate of Compliance.

/s/ Sarah A. Peters
Attorney for the Plaintiffs

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I hereby certify that I electronically filed the foregoing *Reply Brief of the Plaintiffs-Appellants* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 22, 2013.

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/s/ Sarah A. Peters
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