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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PENDLETON DIVISION

WILDEARTH GUARDIANS, et al., Plaintiffs, v. STACEY FORSON, Forest Supervisor, Ochoco National Forest; UNITED STATES FOREST SERVICES, Defendants, and OCHOCO TRAIL RIDERS, OREGON MOTORCYCLE RIDERS ASSOCIATION, PACIFIC NORTHWEST 4 WHEEL DRIVE ASSOCIATION, DESCHUTES COUNTY 4 WHEELERS, and THE BLUERIBBON COALITION, Defendant-Intervenors.	Case No. 2:17-cv-01004-SU (Lead) Case No. 2:17-cv-01091-SU (Trailing) Case No. 2:17-cv-01366-SU (Trailing) **INTERVENORS' CROSS-MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT AND IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT** ORAL ARGUMENT REQUESTED (calendared for May 22, 2018)

MOTION

These consolidated cases challenge the U.S. Forest Service June, 2017 final decision for the Ochoco National Forest Summit Trail System. Review occurs under the Administrative Procedure Act ("APA"). See, 5 U.S.C. § 702 et seq. Pursuant to Fed.R.Civ.P. 56(c) and in accordance with the parties' joint case management schedule (ECF 43) and the Court's Order entered January 24, 2018 (ECF 46), Defendant Intervenors the Ochoco Trail Riders, Oregon Motorcycle Riders Association, Pacific Northwest Four Wheel Drive Association, Deschutes County 4 Wheelers, and the BlueRibbon Coalition (collectively "Defendant Intervenors") hereby move for summary judgment in each of these three consolidated cases. Defendant Intervenors additionally concur in and join the cross-motion and arguments made by Federal Defendants (ECF 65, 65-1). In accordance with Local Rule 7-1, undersigned counsel certifies the parties have made a good faith effort through multiple telephone conferences to resolve the dispute and have been unable to do so.

The Administrative Record is properly before the Court, there are no genuine issues of material fact, and the Court may enter judgment as a matter of law in favor of Federal Defendants and Defendant Intervenors. This motion is based upon the contemporaneously submitted supporting memorandum, the pleadings and record in this matter, and any additional evidence and argument presented to the Court prior to decision in these matters. Defendant Intervenors respectfully request that the Court deny Plaintiffs' motions, grant Federal Defendants' and Defendant Intervenors' motions, and dismiss each of Plaintiffs' claims with prejudice.

INTRODUCTION

These cases involve the Summit Trail System Project on the Ochoco National Forest in central Oregon. The Project considered options for designating specialized trails for off-highway vehicles ("OHV") such as motorcycles, all-terrain vehicles, side-by-side or utility vehicles, and full size jeeps and 4 wheel drive vehicles. The Project reflects evolution over the last decade focusing on how the Forest Service manages vehicle travel in the National Forest System. A critical step in this evolution was adoption of the 2005 Travel Management Rule, which was founded on addressing "unmanaged recreation" and the premise that "[m]otor vehicles are a legitimate and appropriate way for people to enjoy their National Forests – in the right places, and with proper management." 70 Fed.Reg. 68264 (Nov. 9, 2005). The Project spanned roughly six years and three environmental impact statements to determine a few of those right places and that proper management.

These cases reflect Plaintiffs' passionate opposition, but on close analysis resemble a legal house of cards that tumbles through application of fundamental administrative law and common sense. The complaints in these three cases total 118 pages. Plaintiffs' summary judgment motions total 137 pages, plus an additional 110 pages of declarations. The State of Oregon Department of Fish and Wildlife ("ODFW") adds over forty more pages in a brief and motion to submit extra-record evidence as an "amicus."[1] If Defendant Intervenors can assist the Court, it will be through simplicity and clarity. Given Federal Defendants' compelling and authoritative arguments, in which Defendant Intervenors hereby join and concur, Defendant Intervenors will attempt to make a few additional points

[1] Defendant Intervenors, who are parties to the case, were granted intervention on multiple conditions including agreement they would not introduce materials outside the administrative record. Opinion and Order (ECF 35) at 4, 7.

on a handful of key themes. The Court should defer to the reasoned discretion of the Forest Service, deny Plaintiffs' motions, grant Federal Defendants' and Defendant Intervenors' motions, and dismiss these cases.

ARGUMENT

The Project reflected active involvement from a diverse spectrum of Forest visitors and engaged interests. The Forest Service at nearly every opportunity erred on the side of procedural caution and was clearly responsive, if not overly so, to the prominent voices of Plaintiffs and ODFW. Under deferential arbitrary and capricious review, the Forest struck a reasoned balance that is reflected in, and supported by, the record.

I. The "Baseline" Was Properly Considered and Supports the Decision.

Plaintiffs attempt to somehow twist the fact that Forest previously contained many hundreds of miles of now-closed road into a sword with which to challenge the Project. See, e.g., WildEarth Guardians et al. Plaintiffs' ("WEG") Br. (ECF 58) at 36-38; Oregon Hunters Assoc. ("OHA") Br. (ECF 48) at 12-20. These efforts all fail. Far from being legally deficient, the agency's treatment of the "baseline" compellingly supports the Decision.

The Project allows OHV travel at a dramatically reduced scale compared to historical use. The Forest contains 845,498 acres. AR 01398. The Forest initially implemented the Travel Management Rule in 2011 by all but wiping the slate clean of forested OHV trails, in order to cut off previously allowed cross-country travel on 88 percent of the Forest. AR 25298. This 2011 decision authorized only 26 miles of OHV trails. *Id*. The Forest at that time acknowledged that a future effort would be needed to consider restoration of some motorized trail opportunities. AR 12704. The Project area

encompassed less than half of the Forest, or 301,580 acres. AR 25218. Within the Project area, motorized travel occurred on as many as 1,820 miles of road. OHA Br. (ECF 48) at 17. More than half of these were "unauthorized routes" that were closed in the 2011 decision, resulting in roughly 821 miles of road that remain open to vehicle travel. Fed. Defs' Br. (ECF at 42-43). These 800 plus miles of roads are outside the alternatives considered and represent the transportation network by which anyone, including Plaintiffs, gain access to or through the Project area.

The Project ultimately authorized 137 miles of OHV routes. Fed. Defs' Br. (ECF 65-1) at 6. Plaintiffs understandably call these "new" routes but that term is potentially misleading. Of the 137 miles, 84 "are on existing roads" and the other 53 miles "'were located on existing disturbance as much as possible.'" *Id*. at 7 (quoting AR 28735). The point is that the Project does not authorize 137 miles of "new" trails across pristine wilderness. Rather, the Project restores a limited amount of OHV-intended trail riding in area that presently has 800 plus miles of other roads and historically had unlimited vehicle access, with at least 1,820 miles of discernible roads. One might naively hope that opponents of motorized vehicle use would applaud the Forest's definition of a "balance" between restricting and managing OHV use while recognizing it as a legitimate use of the National Forest System.

Arguments challenging an allegedly deficient "baseline" under the National Environmental Policy Act ("NEPA") rarely succeed, particularly in the travel management context. There, a flawed baseline claim has been dismissed as a "mere flyspeck" or "an issue of semantics" where the court found the agency's calculation "improper[ ]" but not arbitrary and capricious. *New Mexico OHV Alliance v. U.S. Forest Service*, 2014 U.S.

Dist. LEXIS 166041 at *19-22 (D. N.M. 2014), *rev'd and remanded on other grounds*, 645 Fed. Appx. 795 (10th Cir. 2016). Plaintiffs should fare no better here.

Plaintiffs' efforts to seize on the existence of "unauthorized" and lawfully created, but now closed, roads are particularly curious. For example, Central Oregon Land Watch ("COLW") seemingly implies that "more than 700 miles of unauthorized OHV routes" cannot lawfully be travelled but should be counted among the "wealth of routes for riding" along with 1,388 miles of roads in the Forest. COLW Br. (ECF 57) at 2.[2] OHA suggests the agency committed error by failing to count these routes that are formally closed to motorized travel in its motorized route density calculations. OHV Br. (ECF 48) at 18-20. This argument hinges on the assumption that the failure to provide "assurances or mechanisms" against illegal use of these routes makes them "the functional equivalent of an open road." *Id*. at 18. If this is some version of "a claim of inadequate law enforcement, such a claim is not reviewable under the APA." *SUWA v. Babbitt*, 2000 U.S. Dist. LEXIS 221170 at *23 (D. Utah 2000), *rev'd*, 301 F.3d 1217 (10th Cir. 2002), *rev'd and remanded*, *Norton v. SUWA*, 542 U.S. 55 (2004) (citing *Heckler v. Chaney*, 470 U.S. 821, 832 (1985)). If calculation of road miles in a travel planning "no action" alternative can constitute error, it would be more erroneous for the Forest Service to include closed routes in the "baseline" of routes available for motorized travel. It can hardly be said that Forest Service's

[2] Defendant Intervenors wish to make clear their strong opposition to illegal vehicle use, and their support of vigorous efforts to enforce reasonable rules and restrictions, including route closures. See, e.g., Fed Defs' Br. (ECF 65-1) at 8, 48. Additionally, suitable OHV riding opportunity cannot be provided on the road network, as COLW suggests. Those routes are generally suitable for travel by passenger automobiles, in many instances paved or gravel-surfaced roads, which often fail to provide a safe or desirable OHV riding experience.

interpretation was arbitrary and capricious to decide that closed roads should be treated as closed roads in calculating road density.

The "baseline" motorized route network does not provide a basis for concluding the Forest's Decision was arbitrary and capricious. Vehicle travel in the Project area historically occurred on thousands of miles of mapped and unmapped roads and trails. The Project dramatically reduces, defines, and actively manages continuing vehicle travel on a 137 mile OHV route system. Any impacts from this modest route system are far more sustainable and orders of magnitude below those associated with historical use of the Forest.

II. Controversy is A Basis for Upholding, Not Rejecting, the Decision.

The Plaintiffs suggest that the Project is unusually controversial, and that this controversy supports some basis for declaring the Project illegal. See, e.g., COLW Br. (ECF 57) at 11-12. They cast the level of opposition here as unprecedented in volume and coming from uniquely qualified scientists, at ODFW or selected by COLW. *Id*. at 12.

For starters, it is misleading to choose number of objections as the metric by which to gauge opposition.[3] Forest Service line officers frequently refer to travel management as one of their most controversial duties, and 28 objections at the end of a six year process is unremarkable, if not fewer than would be expected. See, *Norton v. SUWA*, 542 U.S. at 60 (noting that motorized travel and wilderness designation represent "a classic land use dilemma of sharply inconsistent uses"); *Pryors Coalition v. Weldon*, 803 F.Supp.2d 1184, 1197 (D. Mont. 2011), *aff'd*, 551 Fed. Appx. 426 (9th Cir. 2013) ("Common sense informs

[3] The administrative record is sequenced in chronological order, with the objections found between AR 25885 and AR 27176, interspersed between various emails and other documents apparently received by the agency during the objection period.

the Court that these divergent approaches to the enjoyment of the Beartooth District are irreconcilable."). In fact, the slate of objectors largely reflects the same names that appear within the Court's docket, including many who oppose the project for allowing too much vehicle access, as well as some who oppose it for providing too little. See, e.g., AR 26242 (Grace); AR 26285 (Ulrich); AR 26320 (Poplin); AR 26428 (Rodgriguez).

The volume or stridency of opposition to a project is of no legal significance. If the issue comes up, it is typically when a project is approved through an environmental assessment ("EA"), and a plaintiff contends that "controversy," which is one of the applicable regulatory factors, compelled generation of an environmental impact statement ("EIS"). There is no such issue here, for the Forest analyzed the project through an EIS, more than once, in fact. Still, the decisions are insightful, for they make clear that the National Environmental Policy Act ("NEPA") does not constitute a voting process. *WildEarth Guardians v. Provencio*, 272 F.Supp.3d 1136, 1161 (D. Ariz. 2017); *Wild Wilderness v. Allen*, 12 F.Supp.3d 1309 (D. Or. 2014), *aff'd*, 871 F.3d 719, 728 (9th Cir. 2017) ("The anecdotal evidence about snowmobiler preferences that Wild Wilderness marshaled for this factor did not rise to the level of the sorts of scientific controversies that would substantially undermine the reasonableness of the Forest Service's conclusions.").

Controversy or opposition are distractions from the Court's task of performing APA review. That review will show the Forest Service acted well within its substantial discretion in the Project.

III. Plaintiffs Inappropriately Second Guess Agency Specialists.

The vast majority of Plaintiffs' arguments reflect their strong disagreement with the Forest Service conclusions on technical issues, emphasizing elk management, road density,

and riparian health, water quality and fisheries habitat. These arguments are variously cast under the National Forest Management Act ("NFMA") and the National Environmental Policy Act ("NEPA"). See, e.g., WEG Br. (ECF 58) at 21-27; COLW Br. (ECF 57) at 17-33; OHA Br. (ECF 48) at 12-28. Aside from the specifics of the various claims, they all devolve into and are easily rejected through a fundamental tenet of administrative law. APA review is highly deferential to the agency's informed discretion. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) (arbitrary and capricious review focuses on "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment"). This deference is particularly acute on subjects like those at issue here, for courts "are to be most deferential when the agency is making predictions, within its area of special expertise, at the frontiers of science…[, and] we are to conduct a particularly deferential review of an agency's predictive judgments about areas that are within the agency's field of discretion and expertise . . . as long as they are reasonable." *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008) (en banc) (quotation marks and citations omitted), *abrogated on other grounds by Winter v. Natural Res. Defense Council*, 555 U.S. 7 (2008). Federal Defendants have carefully addressed the litany of Plaintiffs' attempts at second guessing Forest Service specialists. Fed. Defs. Br. (ECF 65-1) at 22-29 (NFMA elk); at 30-36 (NFMA riparian/fisheries); at 39-44 (NFMA road density); at 45-53 (NEPA elk); at 54-58 (NEPA watersheds/fisheries); at 59-63 (NEPA cumulative impacts).

These flaws are epitomized in the elk arguments. As much as the discussion evokes iconic images of tranquil bedding areas, nursing calves or rut-crazed herd bulls in wallows, it is by definition the inquiry that *McNair* declares all but off limits to judicial reversal. At

best, Plaintiffs try to rearrange the phrases in the scientific literature in a manner they consider more scholarly or proper. ODFW, while declining to seek party status, stands at the forefront of this effort in a perceived "shoulder to shoulder" relationship with the Forest Service possessing a "front row seat" with "a keen and unique understanding of the science at issue in this case." ODFW Br. (ECF 54) at 1. However valuable ODFW's input may be, it would be reversible error for the Court to favor ODFW's view over the Forest Service's, absent a clear determination that the federal agency's conclusions were irrational and without any basis in the record. The Forest Service has amply responded to the differing views and rationally explained the facts found and choices made. See, e.g., Fed. Defs' Br. (ECF 65-1) at 51 (clarifying interpretation of *Starkey* and *Hillis* studies, albeit to the apparent dissatisfaction of OHA).

However their burden might be defined, Plaintiffs and ODFW fall far short of it saying things like "[b]y increasing use of private lands in summer, elk will be depleting nutritional resources traditionally available for their winter maintenance." ODFW Br. (54) at 27; OHA Br. (ECF 48) at 26-27. Rural land owners do let hay stand to be grazed at the pleasure of elk – they cut it (more than once) to feed cattle. Elk grazing hay on private land in July are not "depleting nutritional resources" they might stockpile for consumption in January. The final and perhaps most emphatic point on elk is that they appear to be thriving on the Forest. ODFW nicely summarizes the data, pointing out that the population management objective for the applicable Ochoco unit was 500 head in 1981 and increased in every subsequent review, last reaching 4,500 in 2005. ODFW Br. (ECF 54) at 22-23. The 2015 actual population of elk in the Unit was estimated at 4,050. *Id*. at 23. This dramatic population increase mostly occurred prior to 2011 when the Forest was open to

cross-country vehicle travel, belying Plaintiffs' claims of impending doom upon the restoration of 137 miles of OHV routes via the Project.

Any proverbial room in central Oregon (or Salem) will be full of experts on elk, fisheries, riparian/watershed health, and related issues. The task here is not to decide which expert is right, or even engage a debate between them. The focus under the APA is on the Forest Service, and on the administrative record to the extent necessary to find support for the Forest Service's interpretations and conclusions. That support, and the agency's reasoned deliberation, is well apparent in this record. The Court should reject Plaintiffs' NEPA and NFMA claims.

IV. The Agency Addressed its Minimization Duties.

The "minimization criteria" still allow for substantial agency discretion and were not just considered but addressed in the Project. The minimization argument is raised by the WildEarth Guardians Plaintiffs. See, WEG Br. (ECF 58) at 9-20.

The minimization issue is hopefully becoming one of only historical meaning. There certainly exist instances where these claims have succeeded, hence WildEarth Guardians predictable inclusion of such a claim here. See, *id*., citing *WildEarth Guardians v. Montana Snowmobile Ass'n*, 790 F.3d 920 (9th Cir. 2015); *Idaho Conservation League v. Guzman*, 766 F.Supp.2d 1056 (D. Idaho 2011). Those cases involved review of Forest Service decisions each made in 2009. See, *WildEarth Guardians*, 790 F.3d at 922-23; *Idaho Conservation League*, No. 10-cv-0026-REB (D.Idaho) (Complaint (ECF 1) at ¶ 1).[4]

[4] Plaintiffs also cite to *Ctr. for Sierra Nevada Conservation v. U.S. Forest Service*, 832 F.Supp.2d 1138 (E.D. Cal. 2011). That case did include a minimization claim and generally outlined the legal framework, but it was not the basis of a ruling in plaintiffs' favor and provides little assistance here.

Both decisions turn on the conclusion that the Forest Service did nothing more than refer to its minimization duties, but did nothing to demonstrate how it complied with them. *WildEarth Guardians*, 790 F.3d at 931 ("the EIS and ROD demonstrate that the Forest Service neglected to consider the minimization criteria in the [Travel Management Rule] at all"); *Idaho Conservation League*, 766 F.Supp.2d at 1074 ("[s]imply listing the criteria and noting they were considered is not sufficient….In the instant case, there is no evidence reflecting how the Forest Service applied the minimization criteria."). These rulings against the Forest Service on minimization involve plans generated under earlier procedures which the lens of subsequent judicial decisions has been revealed in the cited instances to be lacking. The agency has reviewed and hopefully adapted to these decisions. The Project reflects such adaptation and compliance with the law.

Rather than the above-cited "fail to address minimization" cases, Federal Defendants properly compare this case to *Pryors Coalition.* See, 551 Fed. Appx. at 427-428. The projects are of similar scope, i.e. they did not involve Forest-wide travel plans with the attendant volume, complexity and potential for distraction, but rather subdivisions of a Forest and therefore more focused analysis. See, Fed. Defs' Br. (ECF 65-1) at 69-70. The agency here has demonstrated how it not only considered but acted upon the requisite factors. *Id*. at 65-68. The eventual influence of "minimization" is apparent in a very modest 137 mile route system within a 300,000 acre project area. The Court should reject WEG's minimization claim.

V. The Forest Service Amply Considered the Gray Wolf.

Several Plaintiffs bring claims focusing on analysis of the gray wolf, which in Oregon is a listed species under the Endangered Species Act ("ESA"). WEG Br. (ECF 58)

at 27-34; COLW Br. (ECF 57) at 34-35. These arguments are predicated on shoehorning this record into *Native Ecosystems Council v. Krueger*, 946 F.Supp.2d 1060, (D. Mont. 2013) and suggesting that the Forest fell on the wrong side of a bright line "may be present" standard. Federal Defendants have persuasively responded, and detailed the Forest's multiple layers of analysis in considering the gray wolf, including discussions with, and concurrence, from the Fish and Wildlife Service. Fed. Defs' Br. (ECF 65-1) at 72.

At a broader level, Plaintiffs' arguments are again betrayed by common sense. Any purported concern about the Project's impacts on the next wolf visiting the Ochoco focus on the extent to which OHV access will deplete elk populations, upon which the pioneering wolf(s) might prey. The elk population is at a high level, roughly eight times greater than in 1981 when motorized vehicle travel was largely unrestricted. Plaintiffs' alleged incremental crossing of a "may affect" threshold must answer how 137 miles of specialized OHV trails will cause elk population declines in an area with more than 800 miles of open roads. The Forest's determination that the Project will have no effect on a gray wolf suitably reflected in and supported by the record.

VI. Any Remedy Would Necessitate Further Proceedings.

Plaintiffs each summarily ask the Court to vacate and/or set aside the Decision. The Court should reject all of Plaintiffs' arguments, which will make it unnecessary to craft a remedy. However, if the Court finds merit in any of Plaintiffs' arguments the Court should conduct further proceedings to determine the proper remedy. In this universe of cases courts do not presume that vacatur is warranted. See, e.g., *Idaho Farm Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) (remand without vacatur). Should configuration of

some remedy be necessary, the parties should be offered the opportunity to brief the relevant factors, informed by the Court's decision on the merits.

CONCLUSION

The Summit Trail Project reflects thorough analysis and extensive public engagement. The Forest Service sought a carefully crafted balance that resulted in a very modest designation of trails in an area previously receiving significantly greater motorized travel. Given the highly deferential standard of review, the Court should uphold the validity of the Project Decision, deny Plaintiffs' motions, grant Federal Defendants' and Defendant Intervenors' motions, and dismiss Plaintiffs' claims in all three cases with prejudice.

Respectfully submitted this 16th day of March, 2018.

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Of Attorneys for Defendant-Intervenors

CERTIFICATE OF COMPLIANCE

This brief complies with the applicable word-count limitation as agreed upon by the parties (ECF 33) and under Local Rule 7-2 because it contains 3,244 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

/s/ Paul A. Turcke
Paul A. Turcke (admitted *pro hac vice*)

CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2018, I electronically transmitted the foregoing document to the Clerk's office using CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all counsel of record.

/s/ Paul A. Turcke
Paul A. Turcke (admitted *pro hac vice*)