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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

AMY GRANAT, *et al.*,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,

Federal Defendants.

Case No. 2:15-CV-0605-MCE-EFB (TEMP)

Date: July 28, 2016
Time: 2:00 p.m.
Judge: Hon. Morrison C. England, Jr.
Place: 501 "I" Street
Courtroom: No. 7, 14th Floor
Sacramento, CA

FEDERAL DEFENDANTS' MEMORANDUM AND POINTS OF AUTHORITY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT [ECF No. 31]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

TABLE OF ACRONYMS

APA	Administrative Procedure Act
CEQ	Council on Environmental Quality
CORVA	California Off-Road Vehicle Association
DEIS	Draft Environmental Impact Statement
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FEIS	Final Environmental Impact Statement
INFRA	Forest Service Infrastructure Database
ML	Maintenance Level
MUTCD	Manual of Uniform Traffic Control Devices
MVUM	Motor Vehicle Use Map
NEPA	National Environmental Policy Act
NFS	National Forest System
NFTS	National Forest Transportation System
OHV	Off-Highway Vehicle
ROD	Record of Decision
SAC	Sierra Access Coalition
SOF	Statement of Facts

Federal Defendants lodged the Administrative Record on March 18, 2016. ECF No. 29. Citations use the following format: PLU-[volume]-[bates number].

I. INTRODUCTION

Unmanaged motor vehicle use on National Forests, particularly off-highway vehicle use, has resulted in unplanned roads and trails, erosion, watershed and habitat degradation, and impacts to cultural resource sites. These routes were developed without agency authorization, environmental analysis or public involvement. They are not monitored or maintained as roads and trails that are part of the National Forest Transportation System ("NFTS"). While some of the unauthorized routes may be well sited, provide excellent recreation opportunities for motorized and non-motorized recreationists, and may enhance the NFTS, other routes have no apparent purpose or negatively impact forest resources.

The Travel Management Rule, adopted by the Secretary of Agriculture in 2005, addresses the management of motor vehicles on National Forest System lands. Relevant to this action, the Rule requires each National Forest to designate a system of roads, trails, and areas open to motor vehicle use by vehicle type and time of year. As part of the designation process, the Plumas National Forest ("Forest") conducted a rigorous assessment of the both the existing NFTS network and all unauthorized routes on the 1.2 million acre Forest. The Forest Service provided multiple opportunities for public involvement, including allowing members of the public to identify specific unauthorized routes to be considered for designation. The Forest Service ultimately considered and completed field surveys for 410 miles of unauthorized routes for possible inclusion in the NFTS. In a detailed environmental impact statement, the Forest Service analyzed the potential effects of multiple alternatives for designation of routes on the Forest.

In August 2010, the Forest Service issued a Record of Decision implementing the Travel Management Rule on the Plumas National Forest. The decision increased the motorized trail network from 130 miles to 364 miles and prohibits cross-country motorized travel. The decision also restricts motorized travel by vehicle class to the designated transportation system on the Forest. The decision reflects a careful balancing of competing interests and concerns as well as the need to protect resources. It provides a transportation system that can be managed and maintained into the future given the Agency's limited resources.

Four and half years after the Forest Service implemented the Travel Management Rule on the Plumas National Forest, a group of individuals, off-highway recreation groups, and two counties filed this action. Plaintiffs raise a series of complaints that allege the decision violates the Travel Management Rule and the National Environmental Policy Act ("NEPA"). But as this brief and the Administrative Record show, the Forest Service's rigorous analysis of which routes to designate provided multiple opportunities for public involvement and complied with all applicable laws. The Court should deny Plaintiffs' motion for summary judgment in its entirety and grant Federal Defendants' cross-motion for summary judgment in its entirety.

II. LEGAL FRAMEWORK

A. Standard of Review

Challenges to agency compliance with NEPA are reviewed under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc). Agency decisions may be overturned only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 891 (9th Cir. 2002) (quoting 5 U.S.C. § 706(2)(A)). This standard of review is highly deferential; an agency decision "will only be overturned if the agency committed a clear error in judgment." *Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1114-15 (9th Cir. 2000), *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011). The court's task is simply "to insure a fully informed and well considered decision, not necessarily a decision [the court] would have reached had [it] been [a member] of the decisionmaking unit of the agency." *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 558 (1978).

The Ninth Circuit has endorsed the use of Rule 56 motions for summary judgment to review agency administrative decisions under the limitations imposed by the APA. *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471-72 (9th Cir. 1994). Because the

court's role under the APA is not to "find facts" but is limited to reviewing the administrative record to determine whether the federal agencies considered the relevant factors and reached conclusions that were not arbitrary and capricious, there can be no genuine issue of material fact, and summary judgment is the appropriate process to resolve this case. *See Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985). Further, judicial review is limited to the Administrative Record lodged with the Court. 5 U.S.C. § 706 ("In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party….").

B. The National Environmental Policy Act

NEPA is a procedural statute that requires analysis and public disclosure of significant environmental effects to ensure informed decision-making; it does not require that agencies reach a particular result. 42 U.S.C. § 4321; 40 C.F.R. § 1501.1; *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). "NEPA merely prohibits uninformed – rather than unwise – agency action." *Id.* at 351. A court is charged only with ensuring that the agency has presented a "'full and fair discussion of significant environmental impacts' so as to 'inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.'" *Lands Council*, 537 F.3d at 1001 (quoting 40 C.F.R. § 1502.1).

C. The Travel Management Rule

In 2005 the Secretary of Agriculture adopted regulations that fundamentally changed the management of motor vehicles on National Forest System ("NFS") lands. Travel Management; Designated Routes & Areas for Motor Vehicle Use, 70 Fed. Reg. 68,264 (Nov. 9, 2005) (codified at 36 C.F.R. pt. 212, 251, 261, and 295). Subpart B, the only subpart relevant in this action, implements the Forest Service's authority under its Organic Act, 16 U.S.C. § 551; the Bankhead Jones Farm Tenant Act, 7 U.S.C. § 1011(f); Executive Order 11644, 37 Fed. Reg.

2,877 (Feb. 8, 1972); and Executive Order 11989, 42 Fed. Reg. 26,959 (May 24, 1977).[1] Subpart B requires each administrative unit or ranger District of the Forest Service to designate a system of roads, trails, and areas open to motor vehicle use by vehicle type and time of year.[2] 36 C.F.R. §§ 212.50-212.57. Once the roads, trails and areas are designated for motor vehicle use, all motor vehicle uses inconsistent with those designations are prohibited. 36 C.F.R. § 261.13. The 2005 Travel Management Rule defines unauthorized routes as roads or trails that are not included in an official forest transportation atlas.[3] 36 C.F.R. § 212.1.

> Responsible officials are to designate roads, trails and areas for motor vehicle use
>
> consider[ing] effects on National Forest System natural and cultural resources, public safety, provision of recreational opportunities, access needs, conflicts among uses of National Forest System lands, the need for maintenance and administration of roads, trails, and areas that would arise if the uses under consideration are designated; and the availability of resources for that maintenance and administration.

36 C.F.R. § 212.55(a). In addition to the criteria set forth in 36 C.F.R. § 212.55(a), when designating trails and areas, the responsible official "shall consider effects…with the objective of minimizing" (1) damage to soil, watershed, vegetation and other forest resources; (2) harassment of wildlife and significant disruption of wildlife habitats; and (3) conflicts between motor vehicle use and existing or proposed recreational uses of NFS lands or neighboring Federal lands. 36 C.F.R. § 212.55(b). When designating roads, "the responsible official shall consider: (1) speed, volume, composition, and distribution of traffic on roads; and (2) compatibility of vehicle class with road geometry and road surfacing." 36 C.F.R. § 212.55(c).

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[1] The Rule is divided into Subparts A, B, and C. 36 C.F.R. Part 212. Subpart A covers issues such as the inventorying of roads in administrative units of the NFS. 36 C.F.R. §§ 212.1-212.21. Subpart C regulates over-snow vehicle use. 36 C.F.R. § 212.80-81.

[2] Forest Service regulations define road and trails according to width and how they are managed. A "road" is "a motor vehicle route over 50 inches wide, unless identified and managed as a trail." 36 C.F.R. § 212.1. A "trail" is "a route 50 inches or less in width or a route over 50 inches wide that is identified and managed as a trail." *Id.*

[3] The Forest Transportation Atlas is the official repository of forest transportation facility decisions for each National Forest. PLU-C-000968.

III. FACTUAL BACKGROUND[4]

A. The Forest inventoried all user-created routes.

Prior to the 2005 Travel Management Rule, the Plumas National Forest was open to most cross-country motor vehicle use unless the Forest took action to close a road, trail, or area. Federal Defendants' Statement of Undisputed Facts ("SOF") ¶ 1. The Forest contained approximately 4,137 miles of NFS roads and 130 miles of NFS motorized trails as a result of historical and ongoing access needs for forest and fuels management activities, mineral exploration and mining, livestock grazing, recreational activities, fire prevention and suppression, and for reaching private parcels within the Plumas National Forest. *Id.* ¶ 3. Much of this extensive system was already part of the NFTS. *Id.* ¶ 4.

Beginning in 2004, the Forest Service began a rigorous evaluation of all user created routes to determine whether to designate them as part of the NFTS. Under Agency supervision, an independent contractor reviewed and mapped routes used by off-highway vehicles ("OHVs") in the Forest. PLU-B-000058. During 2004 and 2005, the Forest Service solicited information from the public as to trails and routes they frequented. *Id.* The Forest Service held a series of public meetings to provide on-the-ground training to educate the public to locate and map their favorite areas so they could provide that information to the Forest Service. *Id.* In 2005, the Plumas National Forest completed an extensive inventory of unauthorized routes on NFS lands open to cross-country motorized travel. PLU-B-000052. This inventory involved the examination of Agency records to populate the Forest Service's infrastructure database ("INFRA") and verify the Forest Transportation Atlas.[5] PLU-B-000053.

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[4] The factual background presented here focuses on the process by which the Plumas National Forest designated trails for inclusion in the NFTS, the authorized decision, and public involvement. Additional facts are incorporated into the argument section and are located in Federal Defendants' Statement of Undisputed Facts.

[5] INFRA contains details concerning the management of individual roads and trails. PLU-B-000053. Agency records included existing road and trail atlases, Forest maps, maintenance plans and expenditures, prior project decisions subjected to NEPA, and GIS data. PLU-B-000053.

By April 2007, the Forest Service developed the "first cut" route map, which included more than 220 miles of user created motorized routes proposed for inclusion in the NFTS. PLU-B-00005; *see* PLU-G-001383-95 (first cut spreadsheets); PLU-G-001380-82 (first cut maps). The first cut consisted of known routes used by the public, including destinations, loops, and spur routes to fishing access and dispersed camping sites. PLU-B-000058. The first cut avoided routes on private land with no right of way, routes where motorized use would conflict with existing uses, and routes with measurable resource impacts. *Id.* The Forest Service then held another series of public meetings and workshops in the spring of 2007 to identify which routes should become part of the scoping process for the Project. *Id.* These public meetings and workshops identified an additional 155 miles of user created motorized routes proposed for inclusion in the NFTS. PLU-B-000081. After public scoping, the Forest Service surveyed an additional 35 miles as possible trail additions, bringing the total to 410 miles of routes surveyed and considered for possible inclusion in the NFTS. PLU-B-000081. In the fall of 2007 and summer of 2008, the Forest Service completed field surveys for *all* of the approximately 410 miles being considered for designation under the proposed action and conducted subsequent field visits for routes that impacted other resources. PLU-B-000081.

B. <u>The Project designated NFS roads, trails, and areas for motor vehicle use</u>.

The FEIS considered in detail four action alternatives and a no-action alternative. PLU-B-000062. All four action alternatives prohibit cross-country travel except in smaller open areas specifically designated for such use. PLU-B-000067. These four action alternatives vary in the number of miles of motorized trails designated to be added to the NFS, acres added that are open to OHV use, and miles changed from highway legal only to mixed use. PLU-B-000086 (Table 3); PLU-B-000067-80; SOF ¶ 41 (Table). The no-action alternative maintains the status quo and provides a baseline for comparing the other alternatives. PLU-B-000067. The Forest Service also considered eleven alternatives but eliminated these from detailed study because they did not meet the purpose and need of the Project. PLU-B-000081-85; SOF ¶ 40.

The FEIS describes the environmental effects for the designation of new trails or open areas to the NFTS for each of the action alternatives. PLU-B-000088-89; *see* PLU-B-000101-11 (sections discussing direct and indirect effects of adding facilities to the NFTS in each alternative); PLU-B-000143-52 (discussing site-specific analysis of routes). Appendix A in the FEIS contains site-specific information for each route proposed for addition to the NFTS and identifies the alternative(s) under which the route is proposed, the type of vehicle(s) that would be allowed, and the season when the route would be open. PLU-B-000090; PLU-B-000494-524 (Appendix A). In addition, Appendix A identifies any resource concerns and necessary maintenance and mitigation measures. PLU-B-000090. As part of its analysis of each route, the Forest Service painstakingly evaluated every single route proposed for inclusion in the NFTS by evaluating the benefits and access as well as the concerns and risks. PLU-G-001238-41, 1266-69, 1293-308 (final inventory spreadsheets); *see* PLU-G-001255 (inventory definitions for comment codes in the OHV assessment worksheets). The FEIS and Record of Decision ("ROD") also detail mitigation measures for each proposed route addition to the NFTS to address issues related to the criteria at 36 C.F.R. § 212.55. PLU-B-000016, -35-38, -65-66.

After a rigorous analysis and extensive opportunity for public comment, the Forest Supervisor signed the ROD on August 30, 2010. PLU-B-000028; SOF ¶ 44. The ROD selected Alternative Five, with two minor modifications.[6] Alternative Five designates an additional 234 miles of motorized trails to the NFTS for public use. SOF ¶ 47. Of these additional miles of trails, 156 miles are suitable for all vehicles, 39 miles are suitable for vehicles up to 50 inches wide, and 39 miles are suitable for motorcycles only. *Id*. The ROD prohibits cross-country motorized travel and motor vehicle travel off designated NFTS roads and trails, and areas by the public, except as allowed by permit. PLU-B-000016; 36 C.F.R. § 212.50(a). This restricts motor vehicle travel to the NFTS. PLU-B-000017; 36 C.F.R. § 261.13.

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[6] One modification removes one 600-foot trail segment due to safety concerns. The second modification drops certain trails to comply with a programmatic agreement with the U.S. Fish & Wildlife Service regarding potential effects to the California red-legged frog critical aquatic refuge areas. PLU-B-000014-16; SOF ¶ 46.

C. The Forest Service provided extensive opportunities for public involvement.

In addition to the opportunities for public involvement described above, the Forest Service engaged in extensive public outreach as part of the NEPA process. During scoping, the Forest Service solicited public comment on its proposed action and held a series of public meetings to explain the proposed action. SOF ¶ 17. The Forest Service used presentations, phone calls, news releases, website postings, and e-mails to alert the public of the opportunity to comment on the proposed action. *Id.* ¶ 25. The Agency also held three public meetings in different cities to explain the Proposed Action. *Id*. Over 3,300 comments were received, although many were identical emails. *Id.*

The public had additional opportunities to participate through comments on the Draft and Final EIS. SOF ¶ 23. The Forest sent letters to interested parties, published a legal notice regarding availability of the DEIS in the Feather River Bulletin, and sent follow-up letters. *Id.* ¶¶ 30, 31. The Forest received over 4,310 public comment letters on the DEIS, including 340 original responses and 3,970 form letters. *Id.* ¶ 32. The Forest Service reviewed all submitted comments. *Id.* The FEIS included responses to comments that the Forest Service had received on the DEIS. *Id.* ¶ 38. After issuance of the ROD, the Forest Service provided an administrative appeal period. *Id.* ¶ 57. Nine individual appeals and associated attachments were received, and a reviewing official addressed all nine appeals and their associated points in a written decision. *Id.*

IV. ARGUMENT

A. The Forest Service's analysis of unauthorized routes complies with all applicable authorities and is entitled to deference.

Plaintiffs fault the Forest Service's designation methodology for not conducting an on-site evaluation of all 1,107 miles of unauthorized routes identified in the inventory. Pls.' Br. 11-14; Compl. ¶¶ 68-82, 111-121 (Claims 1 and 4), ECF No. 1. Plaintiffs cite no authority (and none exists) that requires the Forest Service to physically inspect each mile or every single route of the unauthorized roads or trails on the entire 1.2 million acre National Forest. Nor do they explain how the additional time and effort to collect such information would be necessary to meet NEPA's goals for informed public participation or agency decision-making.

1. The EIS adequately analyzed unauthorized routes.

The Forest Service rigorously evaluated all unauthorized routes for possible inclusion in the NFTS. An on-site evaluation of every route would not have contributed to the Forest Service's or the public's understanding of the effects of the unauthorized routes.

Courts employ "a rule of reason standard to determine whether the EIS contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences." *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. Allen*, 615 F.3d 1122, 1130 (9th Cir. 2010). This standard "requires a pragmatic judgment whether the EIS's form, content[,] and preparation foster both informed decision-making and informed public participation." *Native Ecosystems*, 418 F.3d at 960. The detail required in an EIS "depends on the nature and scope of the proposed action." *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982). "The inquiry is 'whether claimed deficiencies in a FEIS are merely flyspecks, or are significant enough to defeat the goals of informed decision making and informed public comment.'" *Ctr. for Sierra Nev. Conservation v. U.S. Forest Service*, 832 F. Supp. 2d 1138, 1149 (E.D. Cal. 2011) (*quoting Nevada v. Dep't of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006)); *see also Ohio Valley Trail Riders v. Worthington*, 111 F. Supp. 2d 878, 883 (D. Ky. 2000) (concluding the Forest Service was not required by NEPA to identify precisely which trails are closed to OHVs). The agency's determination as to whether particular evidence is, or is not, necessary to support the EIS's conclusions is entitled to deference. *Lands Council*, 537 F.3d at 991-92 ("The Forest Service is at liberty, of course, to use on-the-ground analysis if it deems it appropriate or necessary, but it is not required to do so.").

Plaintiffs' claim that the Forest Service must conduct an on-site analysis of all unauthorized routes contradicts the rule of reason courts use to determine "whether the EIS contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences." *League of Wilderness Defenders*, 615 F.3d at 1130. Furthermore, this Court has already rejected this very same argument in a challenge to the Tahoe National Forest travel management decision. The Court held:

> because of the number of routes, it was reasonable for defendants to focus on analyzing in detail only designating routes that the public specifically recommended. Moreover, analyzing environmental impacts of all the roads and trails historically used would not have had a substantially different effect from the alternatives that the [FEIS] already considered.

Transcript of Oral Argument at 65-66, *Friends of Tahoe Forest Access v. U.S. Dep't of Agric.*, No. 2:12-cv-1876-JAM-CAD (E.D. Cal. Dec. 19, 2013), ECF No. 48.[7] This Court also rejected similar arguments in challenges to the travel management decisions on the Eldorado and Klamath National Forests. *Ctr. for Sierra Nevada Conservation*, 832 F. Supp. 2d at 1160 (holding that "[p]laintiffs' challenges to the adequacy of this type of data are meritless" where the Eldorado National Forest Service relied on GIS data, route evaluation forms, and additional field assessments to designate routes); *Klamath-Siskiyou Wildlands v. Graham*, 899 F. Supp. 2d 948, 964 (E.D. Cal. 2012) (finding that information disclosed by the Klamath National Forest "provided Plaintiffs with sufficient information to evaluate the environmental effects of the proposed action."). The Court should reach the same conclusion here.

Plaintiffs claim the Forest Service "summarily rejected" 1,528 routes they specifically requested to be designated. Pls.' Br. 13 (citing PLU-D-012283-3831). Plaintiffs fail to identify a single, specific route the Forest Service did not consider for designation. In fact, the record demonstrates that the Forest Service considered Plaintiffs' suggestions for designating specific routes. SOF ¶¶ 61-63 (showing consideration of trails 10M12, 12M12, 13M10B). Plaintiffs then claim the Forest Service should not have "summarily excluded" roads and trails less than one-half mile in length or dead-end spurs. Pls.' Br. 14. To support their argument, Plaintiffs refer to three spreadsheets but fail to identify any specific routes they think were improperly excluded from consideration. Pls.' Br. 14 (citing PLU-G-001242, PLU-G-001261, PLU-G-001277). On the contrary, the first cut included spur routes known to be used for fishing access and favorite dispersed camping sites. PLU-B-000058. The first cut did exclude some routes

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[7] The district court did not issue a detailed opinion explaining its reasoning. Rather, the opinion affirmed Defendants' cross-motion for summary judgment "for the reasons stated in the transcript of the proceedings held on November 22, 2013." Order, ECF No. 50.

from private land with no public right of way, routes where motorized use would conflict with existing uses, short dead-end spurs, and routes with measurable resource impacts. PLU-B-000058, -81, -1693. Although certain routes were not initially identified by the Forest to include in the scoping and later proposed action, the public had an opportunity to recommend additional routes for inclusion. PLU-B-000059; SOF ¶ 22. An on-site evaluation was not required.

2. The Forest Service followed Agency guidance.

Plaintiffs also claim the lack of an on-site evaluation of every mile of unauthorized routes violates the Route Designation Guidebook and thus the Travel Management Rule. Pls.' Br. 14. Plaintiffs offer only a conclusory statement and do not explain how the Project is contrary to the objectives of the Guidebook or not in accordance with law.

To facilitate travel management planning, the Forest Service developed the Route Designation Guidebook. PLU-C-001689-842. The Guidebook presents procedures for implementing the Travel Management Rule for the National Forests in California, PLU-C-001693, and provides a short explanation of the interpretations of thirteen policies and assumptions, one of which is the minimization of restrictions on recreation opportunities cited by Plaintiffs. PLU-C-001696-700. The Guidebook states in its introduction that "[t]his guidebook is just that, a guide. All units must evaluate their situations and local issues and apply the procedures as appropriate to their needs." PLU-C-001695.

Contrary to Plaintiffs' reading of the Guidebook, there is no requirement or recommendation that the Forest Service gather on-site data for every single mile or route. *See* PLU-C-001689-842. Instead, as part of the five step process recommended for route designation, the Guidebook says "[a]void collecting new field information except for that which is critical." PLU-C-001711. Even if the Guidebook called for gathering on-site data, the Guidebook is neither binding on the Forest Service nor enforceable by third parties. *See W. Radio Servs. Co., Inc. v. Espy*, 79 F.3d 896, 901 (9th Cir. 1996) (Forest Service Manual and Handbook are not binding). Therefore, Plaintiffs have not shown any violation of the Travel Management Rule.

In sum, Plaintiffs fail to explain how conducting on-site visits to all unauthorized routes would have led to better informed decision-making or provided them with information needed to participate in the decision-making process. The Forest Service conducted an appropriate level of analysis and public involvement to determine which of the hundreds of miles of unauthorized routes should properly be brought forward for detailed analysis in the FEIS. For these reasons, the Court should grant summary judgment in favor of Federal Defendants on this claim.

B. The decision to prohibit non-highway legal vehicles on maintenance level three roads is a reasonable interpretation of the Travel Management Rule.

Plaintiffs claim that the Forest Service improperly excluded non-highway legal vehicles from ML-3 roads. Pls.' Br. 11-16; Compl. ¶¶ 68-82, 111-121 (Claims 1 and 4). But the Forest Service reasonably interpreted its own regulations to classify ML-3 roads as highways on which non-highway legal vehicles are prohibited, absent a route-specific designation as mixed-use made at the discretion of the Regional Forester. Courts give wide deference to an agency's interpretation of its own regulation. "[W]here an agency interprets its own regulation, even if through an informal process, its interpretation of an ambiguous regulation is controlling under *Auer* unless 'plainly erroneous or inconsistent with the regulation.'" *Bassiri v. Xerox Corp.*, 463 F.3d 927, 930 (9th Cir. 2006) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

The Forest Service classifies roads into five groups according to maintenance level. PLU-C-000814-73 (Guidelines for Road Maintenance Levels); *see* SOF ¶¶ 5-10 (providing definitions and attributes of maintenance levels 1 through 5). Maintenance levels are defined as the level of service provided by, and maintenance required for, a specific road. PLU-C-000819. Relevant to this action is ML-3, which is for "roads open and maintained for travel by prudent drivers in a standard passenger cars." PLU-C-000836; SOF ¶ 8. ML-3 roads are subject to the requirements of the Highway Safety Act, 23 U.S.C. § 101 *et. seq.*, and the Manual of Uniform Traffic Control Devices ("MUTCD").[8] *Id.* In consideration of public safety, to be consistent

[8] The MUTCD is the Federal Highway Administration's national standard for all traffic control devices. 23 C.F.R. § 655.603(a).

with State traffic laws, and to concur with U.S. Department of Transportation regulations, the Forest Service equates roads maintained for passenger use (ML-3, 4, and 5) to roads defined as "highways" under the California Vehicle Code. PLU-B-000127; PLU-C-001544; *see* 23 C.F.R. § 460.2 (defining "open to public travel" as being "passable by four-wheel standard passenger cars"). State traffic laws generally apply to these roads. PLU-C-001544.

The Forest Service has the discretion to allow "motorized mixed use," which is the "designation of an NFS road for use by both highway-legal and non-highway legal motor vehicles." PLU-C-001849 (citing Forest Service Manual § 7705). The decision on whether to allow mixed use is at the discretion of the Regional Forester and may be made after adequate analysis, which includes a review of state traffic law and engineering analysis. PLU-C-001849, PLU-C-001533. Prior to allowing mixed use on a ML-3 road, the Forest Service must consider whether to reclassify the road to a ML-2 high clearance road. PLU-C-001544. ML-2 roads are not considered highways and are generally open for mixed use. PLU-C-001533. The Forest Service limits mixed use on ML-3 roads to road segments that do not exceed three miles and for which reclassification is infeasible. PLU-C-001545. Exceptions to the three-mile limit may be approved by the Regional Engineer in rare cases. PLU-C-001545. The analysis of whether to allow "mixed use" on ML-3 roads must consider the probability and severity of accidents. PLU-C-001544; *see* PLU-C-000554-59 (Guidebook for Engineering Analysis).

The Project restricts motor vehicle travel to the NFTS. PLU-B-000060. And since non-highway legal vehicles are prohibited from ML-3, 4, and 5 roads, non-highway legal vehicles are restricted to ML-1 and 2 roads. PLU-B-00102, 104, 106 (stating that Alternatives 1, 2, and 3 "do not provide mixed use."). But the Project still provides for substantial recreation access in the Forest. For example, during the 2005 inventory, the Forest classified 125.5 miles of ML-3 roads as ML-2 roads.[9] PLU-G-001326. The decision designates all ML-2 roads as open to all

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[9] Subsequent to identifying the 129.7 miles of ML-3 roads that would be changed to ML-2, the Forest Service determined that 4.2 miles of road 28N03 should remain as ML-3. *See* PLU-G-001302 (identifying safety concerns for 28N03); PLU-J-000002 (identifying 28N03 as ML-3).

vehicles, PLU-B-000127, and specifically allows for mixed use on 4.1 miles of the Slate Creek road, a ML-3 road. PLU-B-000080; PLU-B-000016.

Plaintiffs' disagreement with the exclusion of non-highway vehicles from ML-3, 4, and 5 roads challenges the Forest Service's interpretation of its own regulations for what vehicles are allowed on which maintenance levels of roads, and the discretionary decision on whether to allow mixed use on certain roads. As to the former, the Forest Service's decision to consider ML-3 roads as "highways" is a reasonable interpretation of its own regulation and is entitled to deference. *Bassiri*, 463 F.3d at 930; *Pub. Lands for the People, Inc. v. U.S. Dep't of Agric.*, 697 F.3d 1192, 1199 (9th Cir. 2012) (according "wide deference" to the Forest Service Manual's interpretation of a regulation defining "public roads"). The Agency's interpretation is reasonable because it is consistent with State traffic laws and concurs with U.S. Department of Transportation regulations. That this interpretation of the Travel Management Rule came in the form of letters or memoranda from the Regional Office is of no import. *Go v. Holder*, 744 F.3d 604, 611 (9th Cir. 2014) ("an agency's interpretation of an ambiguous regulation – no matter how informal the pronouncement in which the agency advances its interpretation – is controlling, unless that interpretation is plainly erroneous or inconsistent with the regulation itself."); *Siskiyou Reg'l Educ. Project v. U.S. Forest Serv.*, 565 F.3d 545, 548, 554-57 (9th Cir.2009) (deferring to the interpretation of a "mining-related directive" set forth in a "Memorandum to Regional Foresters" issued by the Forest Service). Because non-highway legal vehicles are, by their very definition, not legal on highways, the Forest Service reasonably interpreted its regulations to prohibit these vehicles from traveling on ML-3 roads. The Forest Service did not need to produce the reams of traffic and accident data to justify its interpretation of its own regulations. Plaintiffs have not met their burden to show that the Forest Service's interpretation was plainly erroneous or inconsistent with the Travel Management Rule itself.

As to the latter, whether the Forest Service allows mixed use on certain roads is at the discretion of the Regional Forester. PLU-C-001849, PLU-C-001533. Plaintiffs' claim that the Forest Service needed to produce accident and safety reports to *prohibit* mixed use of ML-3

roads is the exact opposite of what the Agency must do. The starting point is the assumption that there will not be mixed use, and Plaintiffs' assertions to the contrary should be rejected. If the Forest Service wants to *allow* mixed use on a road, it first considers whether the road could be reclassified. Only if the answer is no does the Agency then consider the probability and severity of accidents. PLU-C-001544-45. The Administrative Record shows that the Forest Service considered recreational opportunities when it classified the roads. It reclassified 125.7 miles of ML-3 roads as ML-2, PLU-G-001326, and it allowed mixed use on a 4.1 mile stretch of Slate Creek road. PLU-B-000080; PLU-B-000016. The Forest Service reasonably interpreted the Travel Management Rule and related statutes and guidance so its decision should be upheld.

Plaintiffs also claim that the decision not to allow non-highway legal vehicles on highways is contrary to Agency procedures. Pls.' Br. 15. First, they cite to the Route Designation Guidebook and claim that the decision does not apply the minimum restrictions required to protect resources and provide for user safety while continuing to provide for recreation opportunities. *Id.* (citing PLU-C-001696). As discussed *supra* in Part IV.A.2, the specific guidance cited by Plaintiffs is one of thirteen interpretations of policies and assumptions. *See* PLU-C-001696-700. The decision not to allow non-highway legal vehicles on ML-3 roads strikes the appropriate balance between protection of resources, user safety, and recreational access. Second, they claim "the Forest Service's procedures call for an engineering analysis in decisions on motorized traffic." Pls.' Br. 15 (citing PLU-D-008356-57, PLU-D-008419, PLU-C-001544). The first two citations are Plaintiffs' own personal comments on the DEIS and are not Forest Service procedures. The third citation is to Forest Service guidance and does not support Plaintiffs' claim. To the contrary, the letter states that approval by the Regional Forester is only required when the Forest Service proposes to allow mixed use on a road that cannot be reclassified. PLU-C-001545.

The Forest Service's decision to prohibit non-highway legal vehicles on ML-3 roads is a reasonable interpretation of its own regulations. The Court should grant summary judgment in favor of Federal Defendants on this claim.

C. The Forest Service's coordination with local governments satisfied the Travel Management Rule and NEPA.

Plaintiffs allege that that neither the DEIS nor the FEIS reflected consideration of the connection between the Forest routes and the counties' road system. Pls.' Br. 20-24; Compl. ¶¶ 83-99, 100-10 (Claims 2 and 3). Specifically, Plaintiffs argue that the Forest Service did not comply with their requests for designation of certain routes, and thus violated sections 1502.16 and 1506.2 of NEPA regulations and section 212.53 of the Travel Management Rule. However, the requirement to coordinate does not mean blindly adopting any local law or policy as Plaintiffs suggest. The Forest Service coordinated its travel management planning efforts with Butte County and Plumas County and did not duplicate or conflict with local planning. Those efforts met both the letter and spirit of the Travel Management Rule and NEPA.

First, Plaintiffs allege that the Forest Service failed to comply with its duty to coordinate under the Travel Management Rule, 36 C.F.R. § 212.53. This allegation is simply not true. The Forest staff sought input from Plumas and Butte County officials on numerous occasions between 2003 and 2009. SOF ¶ 26. The record clearly supports that the Forest demonstrated its intent to coordinate. The record indicates that the Regional Forester's office asked for, and was granted, a discretionary time extension for the stated purpose of ". . . fulfilling the participatory intent of the NEPA process" with "Plumas, Lassen, and Butte counties . . . ." PLU-A-000057. In addition, the Forest Service has stated that as it develops user maps, it will utilize county roads as connectors and show them as other public roads on its Motor Vehicle Use Map ("MVUM") and that it remains open to considering additional specific trails in the future. SOF ¶ 56; *see* PLU-J-000002 (2013 MVUM showing "other public roads" designation). The counties had numerous opportunities to register both their general and specific comments regarding the route designation. SOF ¶¶ 37, 58, 59. The Forest Service considered the counties' comments and objections that were presented. While coordination with local governments is essential, "the Forest Service retains ultimate responsibility, as provided by Congress, for management of uses on the NFS." Travel Management Rule, 70 Fed. Reg. at 68,272. Given this history of seeking

input from the counties, there can be no serious claim that the Forest Service failed to coordinate as called for by section 212.53 of the Travel Management Rule.

Second, Plaintiffs allege that the Forest Service did not fully cooperate with the Counties under 40 C.F.R. § 1506.2. This section of NEPA regulations, entitled "Elimination of duplication with State and local procedures," on its face talks about reducing duplication between requirements under NEPA and local laws. *See Save Strawberry Canyon v. Dep't of Energy*, 613 F. Supp. 2d 1177, 1188 (N.D. Cal. 2009) (stating that this regulation does not instruct "that NEPA review gives way to any parallel state process but rather that the federal and state agencies should cooperate in order to reduce duplication to the extent possible . . ."). The goal of the regulation is to streamline the analytical processes that may cross federal and local lines. Plaintiffs do not identify any relevant local planning process that was ignored or specific duplication that was created. As such, they fail to meet their burden to show the Project decision is arbitrary and capricious. And as stated above, the Forest Service communicated frequently with the counties, creating an environment to avoid duplication of effort.

In effect, despite the Supreme Court's repeated admonitions that NEPA is a purely procedural statute, *see, e.g., Robertson*, 490 U.S. at 350, Plaintiffs read a substantive requirement into this NEPA regulation that would force federal agencies to make their proposed actions consistent with local law. Not surprisingly, courts have rejected such interpretations. For example, in *Glisson v. U.S. Forest Serv.*, 138 F.3d 1181, 1183 (7th Cir. 1998), the Seventh Circuit admonished that 40 C.F.R. § 1506.2(d) "does not require that the [federal agency] bow to local law – only that it consider it." *See also Yount v. Salazar*, No. CV11-8171 PCT-DGC, 2014 WL 4904423, at *10-12 (D. Ariz. Sept. 30, 2014) ("NEPA does not require that a [federal] project fail because of such an inconsistency [with local law], only that the inconsistency be discussed and that the agency describe the extent to which it would reconcile its actions with the existing law." (citing 40 C.F.R. § 1506.2(d))).

Lastly, Plaintiffs assert that the Forest Service violated 40 C.F.R. § 1502.16(c) because the FEIS did not include discussions of conflicts with the counties' plans and policies and section

1506.2(d).[10] Pls.' Br. 20. In addressing a similar claim, the Ninth Circuit found that the Forest Service met this duty when it gave notice to state and local governments and Indian tribes, reviewed their planning and land use policies, and displayed the results of their review in the EIS. *Griffin v. Yuetter*, 944 F.2d 908, 1991 WL 178134, at *3 (9th Cir. 1991) (unpublished opinion). In this case, the Forest clearly gave notice of the Project to state and local governments and Indian tribes and reviewed the planning and land use policies presented by them. PLU-B-000488. Throughout its response to comments to the DEIS, the Forest addressed these plans and policies. The Forest stated that it did not have jurisdiction over the identified county roads but that it would use those roads as connectors with NFS roads and trails. PLU-B-001664; *see* PLU-B-001634 (stating the Butte County Plan is outside the scope of Forest Service management); PLU-B-001684 (stating that changes to system roads on the basis of what other jurisdictions benignly allow by lack of statute or may possibly legislate in the future is beyond the scope of this decision). The Forest also expressed a willingness to continue to coordinate with the counties by addressing any potential conflicts as they were presented in the future. PLU-B-001223, -1559; *see* PLU-B-01562 (stating Forest will respond to revised zoning maps once received from the county). It must be noted that there is a difference between a preference – choosing one option over another – and an inconsistency – an actual point of controversy. *Audubon Naturalist Soc'y of the Cent. Atl. States, Inc. v. U.S. Dep't of Transp.*, 524 F. Supp. 2d 642, 714 (D. Md. 2007) (finding no basis for a claim under 40 C.F.R. § 1506.2(d)).

Plaintiffs have presented their preferences but no inconsistencies. The Forest Service complied with the Travel Management Rule and NEPA. The Court should grant summary judgment in favor of Federal Defendants on this claim.

D. <u>The Project decision complies with NEPA</u>.

Plaintiffs also raise a series of complaints regarding the Project's compliance with various aspects of NEPA. Pls.' Br. 16-19, 24-30. None have any merit.

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[10] Plaintiffs cite 40 C.F.R. § 1502.16(d), but the language is found in 40 C.F.R. § 1506.2(d).

1. The Forest Service Considered an Adequate Range of Alternatives.

Plaintiffs allege the Forest Service violated NEPA by failing to consider a wide enough range of alternatives. Pls.' Br. 16-19; Compl. ¶¶ 122-30 (Claim 5). Plaintiffs' challenge fails. The Agency was not required to consider alternatives that would not meet the purpose and need of the Project, or those that have substantially similar effects to alternatives already analyzed. The scope of alternatives analyzed by the Forest Service was sufficiently broad under NEPA.

An EIS must: "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a). The range of alternatives is "bounded by some notion of feasibility;" an EIS need not consider "remote and speculative" alternatives, or alternatives that are "infeasible, ineffective, or inconsistent with the basic policy objectives for the management of the area." *Vt. Yankee*, 435 U.S. at 551; *Headwaters, Inc. v. Bureau of Land Mgmt.*, 914 F.2d 1174, 1180 (9th Cir. 1990). A rule of reason guides "both the choice of alternatives as well as the extent to which the [EIS] must discuss each alternative." *City of Carmel–By–The–Sea v. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997).

The EIS considered four action alternatives, a no-action alternative, and eleven alternatives but not in detail. SOF ¶¶ 39, 40. Plaintiffs claim this range of alternatives is not reasonable because it does not cover "the full spectrum of alternatives." Pls.' Br. 17-18. According to Plaintiffs, the "full spectrum of alternatives" consists of seven alternatives of increasing percentages (0, 10, 30, 50, 70, 90, or 100 percent) of miles of motorized trails added to the NFTS. *Id.* In support, they cite to a portion of Question 1(b) from the Council on Environmental Quality's ("CEQ") "Forty Most Asked Questions," which provides that

> [w]hen there are potentially a very large number of alternatives, only a reasonable number of examples, covering the full spectrum of alternatives, must be analyzed and compared in the EIS. An appropriate series of alternatives might include dedicating 0, 10, 30, 50, 70, 90, or 100 percent of the Forest to wilderness. What constitutes a reasonable range of alternatives depends on the nature of the proposal and the facts in each case.

46 Fed. Reg. 18,026, 18,027 (Mar. 23, 1981). Plaintiffs read the CEQ's *example* of a range of alternatives provided in the second sentence of the above quote as a *requirement* for how the Forest Service must structure its alternatives analysis. That defies common sense and is not the law. An agency's range of alternatives is reviewed under a 'rule of reason' standard that "requires an agency to set forth only those alternatives necessary to permit a reasoned choice." *Headwaters*, 914 F.2d at 1180. Here, the range of alternatives considered by the Forest Service enabled the Agency, with robust public involvement, to make an informed decision on how to manage previously unregulated motor vehicle use in the Forest while providing additions to the NFTS for recreation.

Plaintiffs' counsel made this same argument in *Friends of Tahoe Forest Access*, which both this Court and the Ninth Circuit rejected.[11] This Court should again reject the argument. The mere assertion that the Forest Service should have considered designating more miles of roads and trails for public motor vehicle use is not sufficient to demonstrate that the range of alternatives is inadequate under NEPA. *Mont. Wilderness Ass'n v. Connell*, 725 F.3d 988, 1005 (9th Cir. 2013) (NEPA did not compel agency to analyze another alternative that would have opened more than zero but less than six airstrips, when plaintiffs failed to show how consideration of a midrange alternative would have fostered agency decision-making and public participation); *Idaho Conservation League v. Guzman*, 766 F. Supp. 2d 1056, 1070 (D. Idaho 2011) ("the fact that the Forest Service did not consider an alternative that would close more than 43 percent of the motorized access . . . does not per se render the range of alternatives unreasonable. The reasonableness of the alternatives is measured from many angles, and not

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[11] Transcript of Oral Argument at 58, *Friends of Tahoe Forest Access*, ECF No. 48 (court rejecting plaintiffs' claim that the Agency "failed to analyze all reasonable alternatives between 85 miles and over 800 miles."); *id.* at 59 ("defendants were not required to consider designation of more miles because designating more than 85 miles would have caused even greater adverse effects on the environment, which is a substantially similar consequence as the alternatives that the EIS had already considered."); *aff'd*, No. 14-15336, 2016 WL 761255, at *2 (9th Cir. Feb. 26, 2016) ("Plaintiffs have failed to show how considering additional alternatives would have fostered more informed decision making than the alternatives that the Forest Service analyzed and rejected based on the adverse environmental impacts it perceived.").

simply from a purely quantitative measure of the percentage of acreage reserved for wilderness protection.").

Plaintiffs make two other points in their brief. First, they cite *Oregon Natural Desert Association v. Bureau of Land Management*, 625 F.3d 1092, 1123-24 (9th Cir. 2008) (amended Aug. 31, 2010), for the proposition that the Forest Service must analyze a range of alternatives, with greater motorized vehicle access at one end of the spectrum and greater conservation and non-motorized access at the other. Pls.' Br. 18. In that case, the court found the alternatives analysis flawed because "it considered no alternative that proposed closing more than a fraction [0.77%] of the planning area to ORV use…." *Or. Natural Desert Ass'n*, 625 F.3d at 1123. That is not the case here, where the Forest Service considered four action alternatives that added between zero and 361.34 miles of motorized trails, as well as the no-action alternative that would have continued the status quo. The alternatives analyzed here consider a much broader scope of access than in *Oregon Natural Desert Association*.

Second, Plaintiffs claim the range of the alternatives ignores the Project's purpose and need, which they say is to "determine how many of the unclassified 1,107 miles would be added." Pls.' Br. 19. Plaintiffs' characterization of the purpose and need is off target. The Project's purpose and need is to (1) regulate unmanaged motor vehicle traffic by the public and (2) provide limited additions to the NFTS for dispersed recreation activities and a diversity of motorized recreation opportunities. PLU-B-000014. The range of alternatives analyzed here enables the Forest Service to make a reasoned choice in light of the purpose and need of the Project. *Headwaters*, 914 F.2d at 1181; *Cent. Sierra Envt'l Res. Ctr. v. U.S. Forest Serv.*, 916 F. Supp. 2d 1078, 1090 (E.D. Cal. 2013) (finding that the Forest Service analyzed a reasonable range of alternatives even though the number of miles may not have meaningfully differed because the purpose and need "was to manage travel on unauthorized roads.").

Plaintiffs have not met their burden to show that the range of alternatives is arbitrary and capricious. The Court should grant summary judgment in favor of the Federal Defendants on this claim.

2. The Forest Service Took the Requisite "Hard Look" at this Project's Impacts.

Plaintiffs assert that the Forest Service failed to take a "hard look" at the impacts of its actions on the human environment (40 C.F.R. § 1508.8), particularly for dispersed recreational and aesthetic opportunities accessed by motor vehicles, such as camping, cutting firewood, aesthetic appreciation, and retrieving game. Pls.' Br. 24-25; Compl. ¶¶ 144-54 (Claim 7). Plaintiffs' arguments ignore the record and rely on mistaken assumptions. The FEIS analyzed the impacts from the Project by considering the consequences of the alternatives on the various Forest resources and human users. The analysis satisfied the Forest Service's NEPA obligations.

Plaintiffs argue that the Forest Service failed to look at the effects of the alternatives to firewood retrieval, dispersed recreation, and tourism. Yet, the Forest Service analyzed these issues and potential impacts on the public when making its decision. The Forest Service noted that firewood cutting is regulated by a separate process involving firewood permits and that the Project does not modify the public's ability to cut firewood. PLU-B-001166; *see also* PLU-B-000083 (explaining that the cross-country travel for firewood gathering has not been allowed for over a decade). Also, the FEIS states that the public would still have sufficient areas to meet their firewood needs as there will not be a significant effect on the amount of access. PLU-B-001216. Plaintiffs also argue that the Forest Service did not take a hard look at the impacts to dispersed recreation because it does not take into account "that many Forest users cannot access Forest areas for hiking and otherwise . . . without first using motorized vehicles to reach those areas." Pls.' Br. at 25. Not so. The Forest Service assessed the impact to dispersed recreation under each alternative. PLU-B-000082-83, -97-98, -102, -104, -106, -108-14, -709-10. In the selected alternative, 92% of inventoried dispersed recreation sites were accessible by motor vehicle. PLU-B-000097. There would also be motorized access to a total of 110 dispersed camping sites. PLU-B-000110. In response to public comments, the Forest Service noted that there was no restriction on dispersed campsites by this decision, "just how you access the campsites." PLU-B-001171. Further, the selected alternative had the second highest amount of access to dispersed use areas of the alternatives that added trails to the NFTS with access to a diversity of dispersed recreation activities. PLU-B-000114, -1170. In considering tourism, the

Forest Service looked at the user visits for locals and non-locals, which it defined as those with a residence over 50 miles outside of the Forest boundary. PLU-B-000568. The Forest compared whether local users versus non-local users engaged in motorized or non-motorized activities and the amounts spent by each group. PLU-B-000569-72.

Plaintiffs rely on *Valley County, Idaho v. U.S. Dep't of Agriculture*, 998 F. Supp. 2d 919, 927-28 (D. Idaho 2014), to argue that the Plumas failed to take a hard look when it declined to designate 3,306 unauthorized routes without any on-site evaluation of the impacts on the human environment. Pls.' Br. 26. However, the decision in *Valley County* is bound up with the facts of that case and has no probative value on the Court's review in this case. Upon taking a new look at a forest-wide 2007 FEIS and 2008 ROD after considering a 2010 project-level Environmental Assessment and Finding of No Significant Impact, the court concluded that the earlier analysis relied on an improper proxy methodology for evaluating impacts. *Valley County*, 998 F. Supp. 2d at 926-27. Here, the Project FEIS included a detailed examination of the impacts as described above. Further, the only parallel that Plaintiffs draw between the cases is that they both involve travel management including closing some unauthorized routes. That shared purpose does nothing to prove Plaintiffs' claim.

Plaintiffs' complaints are rooted in their disagreement with the Forest Service's conclusions as opposed to an actual violation of NEPA. NEPA is a procedural statute that does not require the agency to reach a particular outcome. *Robertson*, 490 U.S. at 350. The Forest Service followed that procedure here by taking a hard look at these issues, and Plaintiffs have failed to show otherwise. As such, the Court should grant summary judgment in favor of Federal Defendants on this claim.

3. The Forest Service Adequately Responded to Comments During the Public Comment Period.

Plaintiffs argue that the Forest Service violated NEPA by failing to respond adequately to comments made during the public comment period on the DEIS. Pls.' Br. 26-27; Compl. ¶¶ 164-73 (Claim 9). Specifically, they allege that the Forest Service did not respond to comments from Sierra Access Coalition ("SAC"), California Off-Road Vehicle Association ("CORVA"), Butte

County and Plumas County. The Forest Service responded to comments as appropriate in a 626-page document by referring the public to analysis already addressed in the planning documents, by revising its analysis, by making specific responses, and/or by acknowledging duplicative comments. PLU-B-001135-760 (FEIS/DEIS Comments and Response to Comments).

First, Plaintiffs claim that the Forest Service failed to respond to a claim from SAC regarding the Forest Service's proposed action having negative impacts on the variety of motorized vehicle riding experiences, routes available, and with the continuity of the motorized experience with the elimination of loop roads.[12] Contrary to Plaintiffs' assertions, this issue is addressed throughout the record. In its response to public comments, the Forest stated that the analysis in the planning documents already addressed this issue and provided that there would be ample opportunity for the motorized user with nearly 3,800 miles of roads and trails available for off-highway vehicle use. PLU-B-001168, -1658. In the FEIS, the Forest used indicator measures to analyze the effects of changes to the NFTS by vehicle class and season of use. PLU-B-000094. Then for each alternative, the Forest assessed the impact on motorized opportunities. For example, for the selected alternative, the Forest determined there would be a beneficial effect with a variety of experiences with easy-to-difficult riding experiences for all trail class vehicles. PLU-B-000110. The Forest also found that the proposed route additions would contribute to the continuity of the motor-touring opportunities by reducing dead-end routes, increasing loop and connector opportunities, and providing access to a diversity of dispersed recreation activities. *Id*. The Forest specifically identified the Granite Basin and Four Trees motorcycle single track and ATV areas, which provide exceptional riding experiences for all levels of motorcycle riders. *Id.* Thus, Plaintiffs' argument fails to show the Forest Service did not respond to this issue.

Second, Plaintiffs complain that the Forest Service simply stated that certain comments on the DEIS by CORVA were "acknowledged," with little or nothing else in response. The

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[12] Plaintiffs cite PLU-B-001180, but these comments are found at PLU-B-001168.

Forest Service addressed comments that were significant and not responded to elsewhere. This practice satisfies NEPA. "An agency need only respond to 'significant comments,' those which, 'if adopted, would require a change in the agency's proposed rule.'" *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1404 (9th Cir. 1995). CORVA's comments appear as 50 separate entries at PLU-B-001574-1615. While some of these comments do not provide any new information that requires a response, the Forest Service responded or revised its analysis as a result of several of these comments. *See* PLU-B-1578-86, -1608-15. Plaintiffs cite to one of CORVA's comments indicating the organization's belief that the sample rate of 3,300 people who commented and 300 workshop participants is statistically insignificant when compared to the number of visitors to the Forest. PLU-B-001582-83. This comment did not provide new information nor does it affect the decision made by the Forest. *Id*. Thus, it was reasonable for the Forest Service to merely acknowledge such an insignificant comment.

Third, Plaintiffs allege that the Forest Service also failed to adequately respond to comments made by Butte County asking the Forest Service to consider non-paved county maintained roads as mixed use roads that could act as loop access connectors with Plumas National Forest roads. Pls.' Br. 27. As to county roads, the Forest Service properly responded that it does not have the jurisdiction to control the uses on county roads; that rests with the county. The Agency also acknowledged that it would utilize county roads as connectors and show them as other public roads on the MVUM. PLU-B-001664, -1223; *see also* PLU-J-000002 (2013 MVUM showing "other public roads" designation).

Fourth, Plaintiffs argue that the Forest Service failed to address how or why it concluded that limited vehicle use near designated routes should be prohibited. Pls.' Br. 27. Not so. In response, the Forest Service explained that the Travel Management Rule allows a limit for parking of one vehicle length from the edge of the road or trail. PLU-B-001235-36, -1249, -1317. So, this issue was adequately addressed.

Again, Plaintiffs' disagreement with the substance of the Forest Service's response to comments does not make those responses unreasonable or arbitrary, nor does it constitute

grounds for remanding the decision. *See Vt. Yankee*, 435 U.S. at 553 (1978) ("comments must be significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern"). Therefore, their claim fails, and the Court should grant summary judgment in favor of Federal Defendants on this claim.

4. The Forest Service Was Not Required to Issue a Supplemental DEIS For Public Comment.

Plaintiffs allege that the Forest Service violated NEPA by failing to prepare a supplemental EIS as a result of substantial changes in the proposed action that are relevant to environmental concerns. Pls.' Br. 28-29; Compl. ¶¶ 174-81 (Claim 10). This claim is without merit. The FEIS is a logical extension of the analysis found in the DEIS and arising from the additional analysis in response to comments. There was no "new information" or conditions within the meaning of NEPA that required the preparation of a supplemental EIS.

Supplementation is not required every time an agency makes a change between a draft and final environmental analysis. 40 C.F.R. § 1502.9(c); CEQ, Forty Most Asked Questions, 46 Fed. Reg. 18026, 18035 (supplement unnecessary when new alternative is "qualitatively within the spectrum of alternatives that were discussed in the draft" and is only a "minor variation"); *see also Russell Country Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037, 1045 (9th Cir. 2011) ("[A]gencies must have some flexibility to modify alternatives canvassed in the draft EIS to reflect public input."). Particularly with respect to proposals – like a forest plan – in which many groups are keenly interested, "[i]t is not uncommon for changes to be made in a FEIS after receipt of comments on a DEIS and further concurrent study." *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1118 (9th Cir. 2002), *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011) (en banc). It is "perfectly predictable" that an administrative agency will collect new data during comment periods "in a continuing effort to give the [decision] a more accurate foundation." *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 644-45 (1st Cir. 1979).

Plaintiffs claim there are eight "substantial changes" between the draft and final EIS. Pls.' Br. 28. The first two, restrictions on routes according to season of use and implementation

of a one-fourth mile buffer for wildlife nests, were in fact included in the DEIS. *See* PLU-B-000718, -788, -1037, and -848-866. The third, implementation of a one-half mile buffer for private land "quiet recreation," is not a restriction at all. Instead, it was a measurement indicator used by the Forest in the FEIS to compare the range of effects between each alternative by measuring the number of acres at least ½ mile away from roads, trails and boundaries. PLU-B-000094-95, -100. In the DEIS, this concept was discussed in the context of "non-motorized recreation activities displaced by proposed motor vehicle use" as an environmental consequence for each alternative. PLU-B-000705-06. The FEIS refined this concept and allowed the Forest to identify these areas for "quiet recreation" that fall outside of one-half mile from designated roads and trails to calculate the number of acres created by each alternative. It was a minor change in how the analysis was presented. Thus, these changes did not require supplementation.

Items four, five, six, and seven (all of which reflect closure of approximately 16 miles of trails in the French Creek and Sly Creek areas) were required in order to achieve compliance with the programmatic agreement between the Forest Service and the U.S. Fish and Wildlife Service for threatened and endangered species, namely the California Red-legged Frog. PLU-B-000015, -22. These changes are minor variations and reduce impacts to the California Red-legged Frog, ensuring compliance with the Endangered Species Act ("ESA"). They are thus within the scope of the original analysis and do not require supplementation. *Russell Country*, 668 F. 3d at 1048 (recognizing that environmentally mitigating changes "may tend to show" that the new alternative does not require supplemental NEPA analysis); *see also Protect Our Communities Found. v. U.S. Dep't of Agric.*, 845 F. Supp. 2d 1102, 1110 (S.D. Cal. 2012) (when change to proposed action reduces environmental impacts, agency not automatically required to redo analysis "because a minimizing measure's effects on the environment will usually fall within the scope of the original NEPA analysis"). In addition to minimizing any potential environmental impact, additional public comment regarding these changes would not have altered the Forest's requirement to comply with the ESA.

The eighth change cited by Plaintiffs, the addition of a section on Law Enforcement

(Appendix I) to the FEIS, was an expansion of a discussion of law enforcement assumptions in the DEIS at PLU-B-000698-99. The appendix covers topics such as authority, jurisdiction, cooperation, implementation and tracking, implementation strategy, assumptions, and measure of success. PLU-B-000633-39. This change provided additional information in response to a public comment for law enforcement issues to be addressed; it did not impact the agency's decision or analysis of the alternatives.

Ultimately, Plaintiffs argue that these changes resulted in a substantial increase in the number of route and area closures as opposed to what was discussed in the DEIS. However, this comparison is faulty because the range of alternatives in the DEIS covered the full spectrum from adding all of the unauthorized routes to adding none of them. Therefore, the above alleged changes to the FEIS were well within the scope of the DEIS' analysis. The Court should grant summary judgment in favor of Federal Defendants on this claim.

5. The Forest Service Was Not Required to Conduct Cumulative Impact Analysis Beyond Borders of the PNF.

Contrary to Plaintiffs' claim, the Forest Service's decision to limit the geographic scope of its cumulative impacts analysis to within the borders of the PNF was not arbitrary and capricious. Pls.' Br. at 29-30; Compl. ¶¶ 182-91 (Claim 11).

An analysis of cumulative impacts requires an agency to consider the "impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7. Courts afford agencies considerable deference in determining the geographic scope of their cumulative impacts analysis. *Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976) ("determination of the extent and effect of these factors, and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies"); *Nw. Res. Info. Ctr. Inc. v. Nat'l Marine Fisheries Serv.*, 56 F.3d 1060, 1067 (9th Cir. 1995) (agencies should be given "considerable discretion" in defining the scope of an EIS).

Plaintiffs claim that the cumulative impacts analysis should have included impacts due to the reduction of motorized access opportunities on other nearby National Forests. Pls.' Br. 29-30. But they fail to overcome the deference due to the Forest Service's decision. *Kleppe*, 427 U.S. at 412. This same issue was recently addressed by the Ninth Circuit in *Friends of Tahoe Forest Access*, 2016 WL 761255, at * 2. The court found that the Forest Service did not act arbitrarily in limiting its analysis of the cumulative impacts of the Travel Management Project to the boundary of the forest. *Id*. "[W]e have affirmed that an agency's decision to use a project's boundaries as the geographic scope of its cumulative effects analysis is reasonable, even where a project may have cumulative impacts in a broader geographic area." *Id*.; *see also Kleppe*, 427 U.S. at 414 (upholding agency decision to use project boundaries as the scope of their cumulative effects analysis). There is no reason for this Court to reach a different conclusion here.

Plaintiffs suggest that the cumulative impacts analysis undertaken by the Forest was deficient because it failed to consider the cumulative impacts on nearby National Forests. Plaintiffs do not identify which forests should have been analyzed or how such analysis would have affected this decision. They also fail to show how this information would have assisted the decision-maker. The Court should defer to the Forest Service's determination to use the boundary of the Forest as the spatial scope for its cumulative effects analysis and reject Plaintiffs' half-hearted challenge to the scope of the cumulative effects analysis. Plaintiffs' claim cannot succeed, and the Court should grant summary judgment to Federal Defendants on this claim.

E. <u>Some of Plaintiffs' claims are waived</u>.

Plaintiffs' Complaint alleges that the Forest Service did not provide the public with a scientific basis for the ROD and EIS. Compl. ¶¶ 131-43 (Claim 6). The Complaint also alleges the socioeconomic impacts analysis is flawed. Compl. ¶¶ 155-163 (Claim 8). Neither of these claims is addressed in Plaintiffs' opening brief and, therefore, they are waived. *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1033 (9th Cir. 2008) ("Arguments not raised by

a party in its opening brief are deemed waived."). Plaintiffs' Complaint also alleges the Project violates the National Forest Management Act ("NFMA"). Compl. ¶¶ 6, 15, 20, 36-39; *but see id.* ¶¶ 68-201 (twelve claims for relief, none alleging a violation of NFMA). But other than a short section in the standard of review (Pls.' Br. 8-9) and a conclusory phrase later in their brief (*id.* 22), Plaintiffs do not explain how they think the Project violates NFMA. Plaintiffs' NFMA claim therefore is waived. *Friends of Yosemite Valley*, 520 F.3d at 1033.

V. CONCLUSION

For the foregoing reasons, Federal Defendants request that this Court deny Plaintiffs' Motion for Summary Judgment and grant Federal Defendants' cross-motion for summary judgment.

Respectfully submitted on this 12th day of May, 2016.

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CERTIFICATE OF SERVICE

I, John P. Tustin, hereby certify that on May 12, 2016, I caused the foregoing to be served upon counsel of record through the Court's CM/ECF system.

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