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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

AMY GRANAT, CORKY LAZZARINO, SIERRA ACCESS COALITION; CALIFORNIA OFF-ROAD VEHICLE ASSOCIATION; THE COUNTY OF PLUMAS; AND THE COUNTY OF BUTTE,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, a federal agency; TOM VILSACK, in his official capacity as Secretary of the UNITED STATES DEPARTMENT OF AGRICULTURE; UNITED STATES FOREST SERVICE, a federal agency; THOMAS L. TIDWELL, in his official capacity as Chief of the UNITED STATES FOREST SERVICE; RANDY MOORE, in his official capacity as PACIFIC SOUTHWEST REGIONAL FORESTER; ALICE CARLTON, in her official capacity as the former PLUMAS NATIONAL FOREST SUPERVISOR; AND EARL FORD, in his official capacity as PLUMAS NATIONAL FOREST SUPERVISOR,

Defendants.

No. 2:15-cv-00605-MCE-EFB (TEMP)

PLAINTIFFS' RESPONSE AND REPLY TO FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO MOTION FOR SUMMARY JUDGMENT

Date: July 28, 2016
Time: 2:00 p.m.
Courtroom: 7, 14th Floor
Judge: Hon. Morrison C. England, Jr.

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ARGUMENT

I

THE SERVICE USED AN ARBITRARY AND IMPROPERLY TRUNCATED ANALYSIS TO CLOSE HUNDREDS OF MILES OF ROUTES TO MOTORIZED VEHICLE TRAVEL

A. The Service Illegally Failed To Verify the Data Underlying Its Route Closures, an Error Compounded by the Agency's Reliance on Irrelevant Factors, as Well as a Myopic Focus on Other Factors

In deciding which Plumas National Forest routes to designate, and in assessing the ensuing environmental impacts, Defendants United States Department of Agriculture, *et al*. (Service), were required to adhere to the "rule of reason" mandated by the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h. *See, e.g.*, *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004). According to this rule, an agency's analysis must contain a thorough discussion of a project's significant environmental impacts, *Conservation Cong. v. Finley*, 774 F.3d 611, 621 (9th Cir. 2014), done objectively and in good faith, not merely as a rote paper exercise. *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 491 (9th Cir. 2010). Broad and speculative statements about a project's effects are inadequate unless a more accurate assessment cannot be done. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1213 (9th Cir. 1998).

The Service contends that Plaintiffs Amy Granat, *et al.* (Forest Users), unreasonably demand that every inch of all 1,107 miles of the Plumas National Forest's non-system routes be analyzed for inclusion in the National Forest Transportation System. *See* Fed. Mem. & Opp'n at 9. That is not the basis for the Forest Users' complaint. Rather, it is that the Service cannot plausibly fulfill its obligation to "carefully weigh environmental considerations and consider potential alternatives," *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1131 (9th Cir. 2011), by failing to verify on the ground its resource and access analyses for *any* of the some 700 miles of non-system routes that the project shut down, including many routes specifically requested by the Forest Users and others. Such a remarkable failure to confirm the facts suggests that the agency's decision-making was improperly based "on factors which Congress has not intended it to consider," thus leading to a decision that "entirely failed to consider an important aspect of the problem." *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008) (en banc) (quoting *Motor*

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Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)). *See Lands Council*, 537 F.3d at 994 ("The Forest Service must explain . . . the reasons it considers the underlying evidence to be reliable.").

The Service's failure to validate its data for the majority of the routes affected by its project cannot be reconciled with NEPA's "rule of reason." By limiting its fact-checking efforts to the narrow subset of routes that had survived the paper analysis, *see* PLU-B-000081 (FEIS) ("A total of 410 miles were surveyed for possible trail additions."), the Service deprived itself of the ability to verify its "first cut" methodology.[1] *See Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914, 923 (D.C. Cir. 1998) (an agency's use of a model is arbitrary if the model bears no rational relationship to the on-the-ground facts). *Cf. Lands Council*, 537 F.3d at 992 (onsite analysis not required only when a reasonable scientific basis supports a model's accuracy). Indeed, that the Service felt compelled to verify the facts on the ground with respect to its preferred 410-mile subset shows that even the agency acknowledged its paper review to be susceptible to error, a fact confirmed by the Service's own mapping. *See* PLU-F-000005 (Service map purporting to show pre-existing off-road vehicle restrictions for areas not eligible for route designation, with the restricted areas (reflected by different colors) not aligning with their purported black-colored borders). *See also* PLU-A-000161-162 (Sierra Access Coalition (SAC)/California Off-Road Vehicle Association (CORVA) Appeal) (showing, based on more accurate mapping, that a summarily dismissed route did not in fact cross private property).

Even if the Service had adequately verified its data under NEPA, the agency's summary dismissal of hundreds of miles of non-system routes still could not be squared with the Travel Management Rule. In determining whether to add a route to the system, the Rule requires the Service to consider the effects on natural and cultural resources, public safety, recreational opportunities, access needs, inter-forest conflicts, and administration and maintenance. 36 C.F.R.

[1] Contrary to the Service's contention, Fed. Resp. to Statement of Undisp. Facts ¶ 15, the agency's field review of the 410-mile subset did *not* include all routes proposed by the public. In fact, the public, including the Forest Users, proposed the addition of many routes that never received field review because they did not survive the agency's paper-review gauntlet. *See, e.g.*, PLU-G-001242-1244 (routes 6831, 7207, 7225, 7442, 7959, 7960, 7961, 7962, 7104, 7105, 7106, 8187, 6813, 6814, 1646, 5202, 5203).

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§ 212.55(a). Contrary to this directive, the Service dismissed dozens of routes with only cursory consideration simply because they were in private ownership or were purportedly undesirable "spurs," or because they connected to a non-forest road or to a road of higher maintenance level. *See, e.g.*, PLU-G-001242 (routes 6658, 6736, 6744, 6793, 6831); *id*. at 1251 (route 8318); *id*. at 1252 (route 6640); PLU-G-001261 (routes 6205, 8725, 5255, 6607); PLU-G-001277 (routes 5416, 5691, 139); *id*. at 1280 (routes 5301, 7802, 7803); *id*. at 1281 (route 5719); *id*. at 1291 (route 109).[2]

This approach avoids key considerations. For example, that a route is a spur does not necessarily determine the recreational value of the route. *See* PLU-B-000058 (FEIS) (acknowledging that at least some spurs can provide valuable recreational opportunities). Likewise, that a route crosses private land is irrelevant if "public rights of access across private property" exist. PLU-A-000315 (Plumas County Appeal). *Cf.* PLU-D-014432 (landowner unsuccessfully requesting that a route terminating at his property be analyzed). Similarly, that a route connects with a higher maintenance-level road does not necessarily raise a safety issue. *See* PLU-A-000204 (SAC/CORVA Appeal). Even if it did, other factors—such as access needs for search and rescue and wildfire control, as well as for recreation—might outweigh road safety concerns. *See generally* PLU-B-000016 (ROD) (allowing mixed used on a Maintenance Level 3 road). Thus, in dismissing from further analysis so many routes based on factors not contemplated by the Travel Management Rule, or based on a myopic focus on just one factor, the Service committed a "clear error of judgment." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989).

B. The Service Failed To Analyze a Reasonable Range of Alternatives

An alternatives analysis must be broad enough to foster "informed decision-making." *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 868 (9th Cir. 2004). To satisfy that requirement, an agency must "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14(a). Those alternatives must be "reasonably related to the purposes of the project." *Laguna Greenbelt, Inc. v. U.S. Dep't of Transp.*, 42 F.3d 517, 524 (9th

[2] In their briefing, the Forest Users cite what the Service calls the "draft" versions of the inventory spreadsheets, Fed. Resp. to Statement of Undisp. Facts ¶ 12, because the so-called "final" versions do not contain the summarily eliminated routes.

Cir. 1994). If such a valid but unanalyzed alternative exists, the failure to have examined it renders the impact statement deficient. *Westlands Water Dist.*, 376 F.3d at 868.

The Service's analysis considered in detail four alternatives.[3] PLU-B-000062 (FEIS). Yet these four merely reflected different arrangements of the same 410-mile subset of routes to which the agency had myopically limited its examination.[4] *See* PLU-B-000068 (noting that the same Table 1 contains all of the trails to be added by any of the alternatives). The Service has not articulated any permissible reason why it could not consider alternative combinations of the same or similar number of routes *outside of* the agency's preferred 410-mile subset. Such alternatives would be feasible: the effects of their designation would presumably be no harder to ascertain than the combinations of routes within the preferred subset, nor would their implementation be any more remote or speculative. *Cf. Life of the Land v. Brinegar*, 485 F.2d 460, 472 (9th Cir. 1973) ("[T]here is no need for an [environmental impact statement] to consider an alternative whose effect cannot be reasonably ascertained, and whose implementation is deemed remote and speculative."). They would be consistent with the project's purpose and need to regulate motor vehicle travel, and to provide additional motor vehicle access for recreational and other access needs. *Cf.* PLU-B-000014 (ROD). And they might well avoid environmental impacts traceable to the agency's four principal alternatives, given that the Service dismissed many routes for *non-environmental* reasons. *See, e.g.*, PLU-G-001242 ("dead end spur," "off county road," "off [maintenance] level 3"). Thus, combinations of routes within the approximately 700-mile excluded subset could plausibly provide the same or better recreational opportunities *without* the environmental consequences associated with the agency's alternatives selected from its preferred 410-mile subset.

[3] A fifth, the "no action" alternative, also received substantial treatment, but only to serve as a baseline comparison for the other alternatives. *See* PLU-B-000043 (FEIS). As explained in the text, that the Service considered designating *all routes* does not absolve the agency of the responsibility to consider smaller combinations of routes drawn from its disfavored 700-mile subset.

[4] The Service gave cursory attention to some alternatives that would have resulted in a net increase in the total number of routes designated for motorized vehicle use. *See, e.g.*, PLU-B-000081 (FEIS) (Alternative 2.4.1 "Designate All Inventoried Routes as Motorized Trails," Alternative 2.4.2 "Designate More Trails").

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The Service did not consider alternatives drawn from outside its preferred subset because it summarily excluded those routes before embarking on the alternatives analysis. But the agency may not reduce the range of alternatives by artificially narrowing the potential array. *See Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt*., 606 F.3d 1058, 1070 (9th Cir. 2009) (a project's objectives must not be defined so narrowly so as to reduce artificially the number of otherwise available alternatives). The Service's truncated analysis therefore incorrectly resulted in the exclusion of many reasonable, feasible alternatives.

C. The Service Failed To Take a "Hard Look" at the Project's Impacts

The Service failed to take a "hard look" at how the closure of hundreds of miles of routes to motorized vehicle access would affect, among other things, the public's ability to camp, cut firewood, retrieve game, and access emergency services. *Cf. Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 560 (9th Cir. 2006) ("NEPA requires an agency to take a 'hard look' at potential environmental consequences before taking action . . . ."). The Service contends that it did analyze these impacts, Fed. Mem. & Opp'n at 22, but that is only partially true. For example, the Service understood "dispersed recreation opportunities" to include "camping, hunting, fishing, hiking, horseback riding, etc.," PLU-B-000056 (FEIS), yet its analysis of the project's impacts on opportunities for "dispersed recreation" is inexplicably limited to "camp sites," *see* PLU-B-000097-98 (FEIS). Notwithstanding that these impacts disproportionately hurt mobility-impaired persons, *see* PLU-A-000151-153, 190-191 (SAC/CORVA Appeal), the Service peremptorily declares that its mass route closure affects "just how you access the campsites." Fed. Mem. & Opp'n at 22 (quoting PLU-B-001171 (DEIS)). The agency fails to grasp that, for a mobility-impaired individual, motorized access is often the *only* access. PLU-A-000152 (SAC/CORVA Appeal).

Similarly dismissive is the Service's treatment of firewood accessability. The agency contends that the project does not modify the public's ability to cut firewood, because such activities are directly governed by a separate permitting process, and because "cross-country" firewood retrieval was already banned prior to the project's adoption. Fed. Mem. & Opp'n at 22. Although the project does not directly regulate firewood use, it obviously does so *indirectly* by

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substantially eliminating routes (especially spurs and those close to communities) that are important for firewood retrieval.[5] *See* PLU-A-000169 (SAC/CORVA Appeal). *Cf. N. Ak. Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 975 (9th Cir. 2006) (hard-look analysis requires consideration of all foreseeable direct and indirect impacts). That cross-country firewood retrieval was already precluded, PLU-B-000083 (FEIS), sidesteps the issue. After all, cross-country travel on the Forest had been prohibited *generally* for some time prior to the Service's mass route closure, *see* PLU-C-002302-2310, in preparation for the final route designation decision, PLU-C-002318. Yet even the Service acknowledges that such pre-decisional closures did not absolve the agency of the duty to comply with the Travel Management Rule and NEPA when making its final designation decisions. By the same token, the Service cannot shirk its obligation to take a hard look at the impacts on firewood retrieval caused by its mass route closures, including, for example, how the risk of catastrophic wildfire is increased when dead firewood trees are left unharvested. *See* PLU-A-000172-173 (SAC/CORVA Appeal) (noting the Service's general failure to analyze impacts on fire suppression).

II

THE SERVICE IRRATIONALLY DECLINED TO DESIGNATE MAINTENANCE LEVEL 3 FOREST ROUTES FOR MIXED USE

The Forest Users challenge the Service's decision to impose a virtual blanket ban on off-highway vehicle access to Maintenance Level 3 roads. The Service candidly admits that it has no evidence that mixed use on Maintenance Level 3 roads in the Plumas National Forest is unsafe. *Cf*. Fed. Mem. & Opp'n at 14 (contending that the agency "did not need to produce . . . traffic and accident data to justify" its decision to prohibit mixed used on Maintenance Level 3 roads). The agency therefore suggests that allowing such mixed use on forest "highways" would be unsafe as

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[5] The firewood permits are, however, specifically issued subject to the Service's travel management decision-making. *See* PLU-A-000171 (SAC/CORVA Appeal).

a matter of state and federal law.[6] That is incorrect.[7]

The Chappie-Z'berg Off-Highway Motor Vehicle Law of 1971, Cal. Veh. Code §§ 38000-38604, *excludes* from the definition of "highway" "fire trails, logging roads, service roads regardless of surface composition, or other roughly graded trails and roads upon which vehicular travel by the public is permitted." *Id.* § 38001(a). Most if not all of the Plumas National Forest's Maintenance Level 3 roads fall within this exclusion. *See* PLU-B-000610 (FEIS) (defining Maintenance Level 3 roads as "low speed, single lane with turnouts and native or aggregate surfacing"); PLU-A-000157 (SAC/CORVA Appeal) ("Virtually all [Maintenance Level] 3 roads on the Plumas [National Forest] were built during past logging activities."). *See also* PLU-C-001554 (Service mixed-use designation form acknowledging California's "highway" exemption for off-road vehicles). Thus, according to state law, operation of off-highway vehicles on such roads would be legal. *Cf.* Cal. Veh. Code § 38325 (equipment requirements for off-highway vehicles govern when the vehicle is operated pursuant to the Off-Highway Vehicle Law). That conclusion should not surprise the Service, given that one of the Counties' major objections to the Project was the agency's failure to coordinate with the Counties' efforts *to encourage* off-highway vehicle use on their public roads. *See, e.g.*, PLU-A-000322 (Butte County Appeal) (observing that "mixed use is lawful and should be allowed," and that "[u]npaved county and [forest] roads have long provided an interconnected transportation system for non-highway legal vehicles"); PLU-E-000243 (Plumas County Comment) ("Unpaved forest roads are intertwined with similar county roads which do accommodate [off-highway vehicles]. . . . Road systems should be integrated to provide a seamless transportation network for our citizens.").

No principle of agency deference can cure the Service's errors. Although Maintenance

[6] The Service's current categorical approach is inconsistent with its prior representation to the public. *See* PLU-D-014102 (March, 2007, Service FAQ) ("The Plumas will be reviewing *all* level 3 roads to determine where mixed use will be allowed." (emphasis added)).

[7] The final environmental impact statement cites a Centers for Disease Control study highlighting the dangers of teen driving as a reason to support the ban on mixed use for Maintenance Level 3 roads. PLU-B-000127. But the study was not based on accidents on forest roads, PLU-A-000154 (SAC/CORVA Appeal), which generally are built for log haul and therefore feature "curve widening, . . . construction of more turnouts, and other engineering designs to accommodate safe vehicle use." *Id.*

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Level 3 routes qualify as "public roads" under federal highway law, *see* 23 C.F.R. § 460.2(a) (defining "[p]ublic road"), the Service does *not* generally prohibit mixed use on such roads. Rather, such use normally depends on state traffic law. *See* 36 C.F.R. § 212.5(a)(1) ("Traffic on roads is subject to State traffic laws where applicable . . . ."). *See also* PLU-C-001544 ("[S]tate traffic laws generally apply on National Forest System roads."). Hence, the Service's mixed-use policy is a function of the agency's interpretation of *state* law, not its own regulations. And there is no reason to defer to the Service's interpretation of laws and regulations it neither created nor administers. *See Ass'n of Civilian Technicians, Silver Barons Chapter v. Fed. Labor Relations Auth.*, 200 F.3d 590, 592 (9th Cir. 2000) ("[C]ourts do not owe deference to an agency's interpretation of a statute it is not charged with administering . . . .").

III

IN DECIDING TO CLOSE A SUBSTANTIAL MAJORITY OF THE FOREST'S NON-SYSTEM ROUTES, THE SERVICE IMPERMISSIBLY FAILED TO COORDINATE AND TO EXPLAIN INCONSISTENCIES WITH LOCAL GOVERNMENTS' PLANNING EFFORTS

The Forest Users contend that the Service violated the Travel Management Rule and NEPA, among other mandates,[8] by failing to coordinate with Butte and Plumas Counties. These failures in turn radiated beyond the Service's inadequate interaction with local government to skew the Service's NEPA work generally, including its effects and alternatives analysis. The agency defends its dearth of interaction with the Counties by citing the various public meetings it conducted leading up to its mass route closure. Fed. Mem. & Opp'n at 16-18. But coordination requires more than the general public notice and comment afforded all interested parties under the Travel Management Rule and NEPA. Otherwise, for example, the specific obligation to coordinate—which does not apply to the general public, 36 C.F.R. § 212.53—would be superfluous. *Cf. In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1184 (9th Cir. 2013) (text should be interpreted so as not to render it superfluous).

Because the Travel Management Rule does not define "coordination," it is appropriate to

[8] *See, e.g.*, PLU-C-000250 (Forest Serv. Manual 7715.3(2)) (the Service must "[c]oordinate with appropriate . . . county . . . governmental entities . . . when making travel management decisions").

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look for guidance in how that term is used in other contexts that govern the Service's land management tasks. *Cf. Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972) ("[A] legislative body generally uses a particular word with a consistent meaning in a given context."). Such a context naturally includes the Service's land and resource management planning under the National Forest Management Act, 16 U.S.C. §§ 1600-1614. According to the version of the Act's implementing regulations applicable to the Service's mass route closures, the agency was required to "coordinate" its planning efforts with state and local governments. 36 C.F.R. § 219.7(a) (1983). Such coordination would have entailed, among other things, an analysis of the planning and land-use policies of affected counties which would consider the policies' objectives, interrelated impacts, and alternatives where conflicts were identified. *Id*. § 219.7(c)(1)-(4). The information would have been displayed in the environmental impact statement. *Id*. The Service did none of this.[9] *See* PLU-A-000319-320 (Butte County Appeal). Its failure therefore "significantly inhibit[ed] the public's ability to understand the competing priorities of the Forest Service and [non-federal governments]." *Cal. Res. Agency v. U.S. Dep't of Agric.*, Nos. C 08-1185 MHP, C 08-3884 MHP, 2009 WL 6006102, at *10-*11 (N.D. Cal. Sept. 29, 2009). In other words, the agency's refusal to coordinate its decision to close hundreds of miles of routes undercut local governments' ability to participate in the process.

The Service's indifference to local concerns also violated NEPA, because the agency failed to set forth in the environmental impact statement the many inconsistencies between its decision to close a substantial number of routes and the Counties' local planning efforts. *Cf*. 40 C.F.R. §§ 1506.2(d), 1502.16(c). The Forest Users repeatedly pointed out how the agency's mass route closure would frustrate the Counties' planning efforts, including the encouragement of off-highway vehicle use on county roads and the maintenance of a seamless transportation network between Forest and County routes, as well as the preservation of adequate access for remote-dwelling citizens, for search and rescue, and for fire suppression. *See* PLU-A-000321 (Butte County

[9] That these coordination obligations may not apply directly to the Travel Management Rule process, PLU-A-000057 (Appeal Decision), does not make them any less relevant in construing the Rule's undefined "coordination" requirement.

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Appeal) ("[T]he Forest's Motorized Travel Management Plan will have a significant negative impact on the area's transportation and circulation system."); PLU-E-000015 (Plumas County Comment) (noting the Service's failure to assess the impact of the route closures on private parcels' access to evacuation routes, forest treatment and fire suppression efforts, and the connecting role that county roads play as part of the Forest road network).[10] *See also* PLU-A-000151 (SAC/CORVA) (citing as a lack of coordination the fact that "many routes intersecting the Mt. Hough Road (a Plumas County Road) were eliminated from consideration even though this road is close to Quincy and receives heavy [off-highway vehicle] traffic"). The Service responds that what the Counties do on their roads is their business, not the agency's. *See* Fed. Mem. & Opp'n at 18. This flippant dismissal ignores that (i) the closure of hundreds of miles of routes assuredly affects the Counties and their citizens given the interconnected nature of the forest transportation network, and (ii) for county-maintained roads falling within the Plumas National Forest's boundaries, the Service *does* possess jurisdiction, concurrent with the Counties. *See United States v. Armstrong*, 186 F.3d 1055, 1062 (8th Cir. 1999) (the federal government may regulate activity within the boundaries of a federal holding even if the activity is conducted on a non-federal inholding). *Cf.* 23 U.S.C. § 317 (authorizing the federal government to grant rights of way on federal property to state transportation departments and their nominees). The Service's promise that it will use county roads as connectors when considering future additions to the system, PLU-B-001223, does not address the transportation conflicts *created by the already closed routes*. PLU-A-000314 (Plumas County Appeal). Thus, by failing to take into account how its mass route closure conflicts with the Counties' transportation policies, the Service violated NEPA. *See Openlands v. U.S. Dep't of Transp.*, 124 F. Supp. 3d 796, 808-09 (N.D. Ill. 2015) (NEPA requires an agency to explain how it will reconcile its proposed transportation project with local transportation plans that are based on different planning assumptions).

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[10] Although emergency vehicles are exempt from the route closures, 36 C.F.R. § 212.51, the closures mean that these routes will not be maintained. Without maintenance, they will quickly become unusable, thereby endangering residents as well as emergency personnel.

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IV

THE SERVICE IMPROPERLY MADE SIGNIFICANT CHANGES IN ITS FINAL ENVIRONMENTAL IMPACT STATEMENT

NEPA requires that an agency prepare a supplemental impact statement if it makes substantial changes to its proposed action following the circulation of the draft impact statement. 40 C.F.R. § 1502.9(c)(1)(i); *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d at 560. The Forest Users contend that the Service violated this command by making several substantial changes relevant to the project's environmental impacts. As shown below, the Service's defense of this failure is without merit.

First, the Service contends that seasonally based use restrictions and buffer zones for wildlife nests were contained in the draft proposal, and therefore their addition in the final impact statement was not a change. Fed. Mem. & Opp'n at 28. The Service misses the point. The Forest Users do not deny that the concepts of seasonal closures and buffer zones were discussed in the draft impact statement. The objection is that their *implementation* in the final project resulted in the closure of additional routes about which the public had no opportunity to comment. For example, the final statement contains a number of routes within Alternative Five (ultimately adopted by the Service, PLU-B-000014 (ROD)) that contain seasonal use restrictions. In contrast, the draft statement does not propose such use restrictions for these routes.[11] *Compare* PLU-B-000498-519 (FEIS) *with* PLU-B-001038-1047 (DEIS) *for* routes 6M19, 6M20W, 6M22A, 6M51, 7M17, 8M47, 8M52, 9M21, 9M23, 10M19, 13M14. Similarly, many of these routes are identified in the final statement as affecting California spotted owls, northern goshawks, and bald eagles, but they were not so identified in the draft statement. *Compare* PLU-B-000498-518 (FEIS) *with* PLU-B-001038-1047 (DEIS) *for* routes 6M19, 6M20W, 6M32, 8M52, 9M21, 9M50, 10M19, 13M14.

Second, the Service argues that it merely "refined" its use of "quiet recreation" in the final impact statement to determine the effects of motorized vehicle use. Fed. Mem. & Opp'n at 27. The final impact statement uses this concept "to determine how each alternative responds to the

[11] Unlike for these routes, the Service placed an asterisk next to a route number when it believed that additional mitigation would be necessary. PLU-B-001037 (DEIS).

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significant issues . . . and to identify the potential for conflict with other recreation opportunities." PLU-B-000100. In other words, "quiet recreation" plays a key role in the final impact statement's assessment of the recreational effects of each of the alternatives. Yet not only is this term left undefined in the final statement, PLU-A-000176 (SAC/CORVA Appeal), it is nowhere to be found in the draft statement. Even the Service admits that the closest it got to discussing the notion is in an obscure reference to the "non-motorized recreation experience" being less affected by those alternatives "with fewer motorized trails." PLU-B-000705-706 (DEIS), *cited in* Fed. Mem. & Opp'n at 27.

Third, the Service excuses its decision to close an additional 16 miles of trail on account of impacts to the California red-legged frog, because the change was minor and compelled by the Endangered Species Act's consultation provisions. Fed. Mem. & Opp'n at 27. To the contrary, the change was substantial, not merely because of the number of miles closed, but also because their closure resulted in many other routes becoming "single-track loops" and therefore not usable. PLU-A-000175 (SAC/CORVA Appeal). *See id.* (discussing various route closures as a result of new frog information). The Service cannot shield this substantial change with the Endangered Species Act. Under the Act, formal consultation would *not* necessarily erase the Service's discretion to designate. *See* 50 C.F.R. § 402.15(a) (consultation regulations) ("[T]he Federal agency shall determine whether and in what manner to proceed with the action . . . ."). And regardless, many of the route closures were based on impacts to *potential* habitat, PLU-A-000180 (SAC/CORVA Appeal); PLU-A-000321 (Butte County Appeal), which normally would not even raise an Endangered Species Act issue. *Cf. Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1243-44 (9th Cir. 2001) (evidence of actual presence of a protected species needed to impose an incidental take statement following formal consultation).

Finally, the Service defends its addition of a Law Enforcement appendix to the final impact statement as a purported innocuous expansion of the law enforcement assumptions discussed in the draft statement. Fed. Mem. & Opp'n at 28. This argument ignores the critical point that "law enforcement" is about more than implementing the Travel Management Rule. It also includes activities like search and rescue and wildfire control, which the Service's mass route closure will

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significantly impede by preventing user-led maintenance. *See* PLU-E-000015 (Plumas County Comment).

V

THE SERVICE FAILED TO RESPOND ADEQUATELY TO THE FOREST USERS' COMMENTS

NEPA requires an agency to respond to public comments in the final impact statement. 40 C.F.R. § 1503.4(a). Pursuant to this obligation, the agency must give comments "good faith attention." *Warm Springs Dam Task Force v. Gribble*, 565 F.2d 549, 554 (9th Cir. 1977). The Service violated this duty in several key respects. To begin with, the Service cannot avoid considering and responding to comments on the pretense that the comments, if adopted, would not have required a change to the "proposed rule." Fed. Mem. & Opp'n at 25. NEPA is an informational not a substantive tool. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (NEPA serves "a larger informational role" and, "perhaps more significantly, provides a springboard for public comment"). To ignore public comment because it is merely informational—or because it would, if followed, expand the sources of the agency's information, PLU-D-007580 (CORVA Comment)—would undercut NEPA's essential purpose.

Second, the Service failed to respond to the Forest Users' comment that the environmental impact statement does not address how the project substantially limits the opportunities for a varied riding experience in the Plumas National Forest. The Service responds that it did consider impacts to the number and type of experiences available, and that the selected alternative would increase these opportunities. Fed. Mem. & Opp'n at 24. But the issue is not just the type and number of opportunities (although that is significant[12]); it is their *interconnectedness* as well. *See* PLU-D-007160 (SAC Comment) (noting that the Service must take into account how "a variety of trail riding experiences" and an "increas[e in] the amount of motorized recreation opportunities" can be obtained by designating "loops [and] connectors"). It matters little to a rider that a variety of

[12] Even the Plumas Forest Supervisor acknowledged that her route designations do not provide adequate recreational opportunities. PLU-C-002299 (Service press release) ("[W]e do have a real shortage of specialty trail experiences for recreationists such as single track motorcycle riders.").

riding opportunities exist if they are scattered throughout the 1.1 million-acre forest and are not interconnected. Further, that the selected alternative performs well as against other alternatives that would close *more routes* says little about how the closure of some 700 miles of routes affects opportunities for varied riding experiences.

Third, and relatedly, the Service failed to consider Butte County's request that county roads be considered as loop connectors, thereby justifying the designation of additional non-system routes. PLU-D-007903. The Service responds that it has no control over county roads, and that such consideration can be provided in the future. Fed. Mem. & Opp'n at 25. But as noted above, the Service *does* have concurrent jurisdiction over county roads within the forest's boundaries, and the promise to consider future route designations does not explain why these county roads cannot serve as connectors now.

Fourth, the Service did not adequately respond to the Forest Users' objection to the agency's adoption of a one-vehicle-length rule for its designations. *See, e.g.*, PLU-D-007155 (SAC Comment); PLU-A-000315 (Plumas County Appeal). *See also* PLU-A-000158 (SAC Appeal) ("Virtually every other Region in the national has chosen 300' [not one vehicle length] as the distance from a designated route for dispersed camping."). The Service's response is that the Travel Management Rule requires one vehicle length. Fed. Mem. & Opp'n at 25. But the Rule contains no such restriction. *See* 36 C.F.R. § 212.51(b). In fact, during the administrative appeal process, the Service contended that the one-vehicle-length rule is compelled by the Forest Service Manual. PLU-A-000056 (Appeal Decision). This of course is the same manual that the Service now argues is not binding. *See* Fed. Mem. & Opp'n at 11 (citing *W. Radio Servs. Co., Inc. v. Espy*, 79 F.3d 896, 901 (9th Cir. 1996), for the proposition that the agency's manual is not binding). Such conflicting legal rationales do not satisfy the Service's obligation to consider comments in good faith and to respond meaningfully.[13]

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[13] Contrary to the Service's contention, Fed. Mem. & Opp'n at 29-30, the Forest Users have not "waived" their claims against the scientific basis for the agency's decision-making, or its socio-economic impact analysis. Rather, they raise them in the context of their onsite analysis, Maintenance Level 3, and "hard look" arguments. *See* Pls.' Summ. J. Mem. at 11-16, 24-26.

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VI

THE SERVICE FAILED TO CONDUCT AN ADEQUATE CUMULATIVE IMPACTS ANALYSIS

The Service relies on principles of deference to defend its decision to limit its cumulative impacts analysis to the borders of the Plumas National Forest. Fed. Mem. & Opp'n at 29. Generally speaking, such an analysis should follow a project's boundaries. But this project is different because there are several national forests either contiguous to or close to the Plumas National Forest. PLU-D-007586 (CORVA Comment). These other forests must undergo the same travel management process. It is therefore unreasonable to ignore how, for example, the closure of so many routes on the Plumas National Forest will lead to increased use on (presumably) fewer routes on other forests, and vice versa. *Cf. Nat. Res. Defense Council, Inc. v. Hodel*, 865 F.2d 288, 298-300 (D.C. Cir. 1988) (requiring an interregional cumulative effects analysis in light of evidence that marine species would travel between project areas). These cumulative effects will exacerbate all of the impacts otherwise attributable to the Service's mass route closure. Failing to disclose these impacts therefore deprived the public of "a complete understanding of the environmental effects [that the] proposed action will cause." *N.C. All. for Transp. Reform, Inc. v. U.S. Dep't of Transp.*, 151 F. Supp. 2d 661, 698 (M.D.N.C. 2001).

CONCLUSION

For the foregoing reasons, and for those stated in the Forest Users' summary judgment brief, the Forest Users' motion for summary judgment should be granted, and the Service's cross-motion denied.

DATED: June 9, 2016.

Respectfully submitted,
M. REED HOPPER
DAMIEN M. SCHIFF

By /s/ Damien M. Schiff
DAMIEN M. SCHIFF

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Eastern District of California through the Court's CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Court's CM/ECF system.

/s/ Damien M. Schiff
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