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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

FRIENDS OF THE CRAZY MOUNTAINS, et al., Plaintiffs, vs. MARY ERICKSON, in her capacity as Forest Supervisor for the Custer-Gallatin National Forest, et al., Federal-Defendants.	19-CV-00066-SPW-TJC OBJECTIONS TO THE MAGISTRATE'S FINDINGS AND RECOMMENDATIONS (DOC. 101)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

REGULATIONS:

FEDERAL REGISTER:

OTHER:

In accordance with Local Rule 72.3, Plaintiffs respectfully submit these objections to the magistrate's findings (Doc. 101).

This case challenges the Forest Service's approval of the Porcupine-Ibex Trail Project (Ibex project) on the west-side of the Crazy Mountains. The project involves a new trail, an easement exchange with landowners, and closing portions of the existing Porcupine-Lowline and Elk Creek trails. Plaintiffs maintain the project violates the Federal Land Policy Act (FLPMA), the National Environmental Policy Act (NEPA), and the National Forest Management Act (NFMA).

Plaintiff also challenge the Forest Service's failure to protect existing access rights on two National Forest trails on the east-side the Crazy Mountains: The East Trunk and Sweet Grass trails. Plaintiffs maintain this failure violates the travel regulations, 36 C.F.R. 212.6(c), and the 2006 Travel Plan decision.

After the parties briefed cross-motions for summary judgment on these claims, the magistrate issued his findings (Doc. 101). The magistrate recommended Plaintiffs' motion for summary judgement be denied on all claims. In response, Plaintiffs submit these objections.

STANDARD OF REVIEW

Review of a magistrate's findings is de novo. 28 U.S.C. § 636(b)(1)(C); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). This means the court "must consider the matter anew, the same as if it had not been heard before and as if no decision previously had been rendered. *Ness v. Commissioner*, 954 F.2d 1495, 1497 (9th Cir.1992). The court's obligation is to arrive at its own independent conclusion about the magistrate's findings to which objections are made. *United States v. Remsing,* 874 F.2d 614, 617 (9th Cir.1989). Upon receiving objections, the court "may accept, reject, or modify, in whole or in part, the findings . . . The [court] may also receive further evidence or recommit the matter to the magistrate judge with instructions." 28 U.S.C. § 636(b)(1)(C).

OBJECTIONS

A. FLPMA objections.

Plaintiffs maintain the easement exchange that occurred for the Ibex project violated FLPMA because the agency never made a public interest determination, never completed the requisite valuation and appraisals or provided the requisite comment and analysis for the

exchange as required by the statute, 43 U.S.C. § 1716, regulations, 36 C.F.R. § 254, and Forest Service Manual (FSM) 5400 and Forest Service Handbook (FSH) 5409.13. *See* Doc. 79 at 21-28; Doc. 89 at 10-29.[1]

The magistrate recognized that an exchange of easement interests occurred for the Ibex project because the landowners granted the Forest Service an easement for the trail reroute in exchange for the agency relinquishing its easement interests on portions of the Porcupine-Lowline and Elk Creek trails. Doc. 101 at 8. The magistrate found, however, that FLPMA's requirement for exchanges was not triggered because the agency did not actually "own any interest" in the trails it released. Doc. 101 at 11. According to the magistrate, the Forest Service at most owned only a "potential easement interest" that was not a "fee interest" or ever "established [or] recorded" and, as such, insufficient to trigger FLPMA's exchange requirements. *Id*. at 11-13. This is incorrect for three reasons.

[1] Citations are to the ECF page number.

1. The Forest Service already determined it had a valid easement in the trails and successfully defended that determination in court.

First, the Forest Service already determined it had a valid, legally protected easement interest in the two trails in accordance with FLPMA, FLPMA's regulations, and FSM § 5460.11 and FSH § 5409.13 and successfully defended that decision in *Montana Wilderness Ass'n v. McAllister*, Case No. 07-cv-0039-DWM (D. Mont. 2008) (Doc. 48-2 at 9; Doc. 53 at 25-26).

In that case, the plaintiffs asserted the Forest Service had no authority to authorize public use and depict National Forest trails across private land on visitor maps or the Motor Vehicle Use Map (MVUM). *Id.* In response, the Forest Service successfully argued it had "easement rights on the trails in question," *id.*, and submitted a sworn declaration explaining its position: "the Forest Service has chosen to identify the Porcupine-Lowline trail system, as well as several other trail systems crossing private lands because the Forest Service believes the United States has an 'easement interest' in this trail system, and the Forest Service has a responsibility to manage this trail system under the Forest's Travel Management Plan." Doc. 79-15 at ¶9.

The Forest Service recognized that these easement interests needed to be secured or "perfected," *id.* at ¶10, but nonetheless asserted that it owned a valid "easement interest" in the trails that it acquired by prescriptive use "due to historic and ongoing public and administrative use and maintenance." *Id.* at ¶4. "The public is the beneficiary of this right of access and the Forest Service defends and maintains that right." *Id.* The court in *Montana Wilderness Ass'n* agreed, noting that the "mere fact that a landowner disputes the presence of a prescriptive easement on his or her property does not mean that the landowner is legally correct, and [the plaintiffs] point to no authority for its apparent proposition that the Forest Service should simply abandon use rights previously acquired by the public." Case No. 07-cv-0039-DWM (Doc. 53 at 25-26).

In light of the Forest Service's successful defense of the same trails in *Montana Wilderness Ass'n*, Plaintiffs in this case raised a judicial estoppel defense to preclude the Forest Service "from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position." Doc. 89 at 14

(citing *Hamilton v. State Farm Fire & Cas. Co.,* 270 F.3d 778, 782 (9th Cir. 2001)). But the magistrate never addressed this claim.

Instead, the magistrate noted that easement interests can be extinguished by the actions of landowners. Doc. 101 at 10-11. While this is true, there is absolutely *no evidence* supporting extinguishment of the Forest Service's valid easement interests in this case since *Montana Wilderness Ass'n*. And, at no time prior to its approval of the Ibex project did the Forest Service take steps to abandon or extinguish its valid easement interests in the trails. If it had, that evidence would surely have been in the record. As explained in *Wonder Ranch v. United States*, these types of easement interests in National Forest System trails are "valuable real property interests." Case No. 14-cv-0057-SEH (Doc. 214 at 132). "Abandoning or terminating an easement interest is not something the Forest Service would take lightly . . . That authority will typically rest with the regional forester in consultation with our legal counsel [and does not rest with the District Ranger or Forest Supervisor]." *Id*.

2. The record reveals the Forest Service believed it still owned a valid easement interest in the two trails.

Second, under the Administrative Procedures Act (APA), judicial review of agency action "is limited to the grounds that the agency invoked when it took the action." *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1907 (2020). Courts look to the record to determine whether the agency has articulated a rational basis for its decision, *Arrington v. Daniels*, 516 F.3d 1106, 1112 (9th Cir. 2008).

Here, the record reveals the Forest Service consistently took the position that it owned valid easement interests in the two trails that needed to be released for the Ibex project. This evidence includes the following:

- *1987* Forest Plan depicting two trails as open for public access. Doc. 80 at ¶10;
- *2006* Travel Plan depicting the two trails open for public access and for specific, "emphasized uses," (Doc. 80 at ¶¶ 54, 59-60);
- *2009* EA noting that the Porcupine Lowline trail is designated for public use across private lands. AR-00223;
- *2013-2017* efforts by the Forest Service to protect public access ron the two trails by maintaining and improving them, restoring trail markers and signs, and pushing back on landowner obstruction efforts. Doc. 80 at ¶¶92-101,112-113, 121,126, 149;

- *February, 2018* email from the Forest Service noting that the landowners want assurances that the "old trail interests are relinquished." AR-05582;

- *February, 2018* statement from the Forest Service that it "will relinquish" its interests on the trails. AR-00261;

- *March, 2018* scoping notice stating Forest Service needs to relinquish its interests in the two trails. AR-00432;

- *March, 2018* statement from the Forest Service explaining that interests in the two trails will be relinquished. AR-00424;

- *March, 2018* map showing portions of the trails where the Forest Service's interests will be relinquished. AR-434;

- *July, 2018* plan explaining when Forest Service will relinquish its interests on trails. AR-00265;

- *February, 2019* Forest Service memo explaining that it will be executing an agreement with landowners for the release of an easement interests in trails. AR-05413;

- *June, 2019* email from the Forest Supervisor to the landowners assuring them that "we are 'exchanging interests.'" AR-005498;

- *June, 2019,* Easement Agreement with the landowners explaining deal to release easement interests on the two trails and remove them from the Travel Plan. AR-05885-5886;

- *August, 2019* email from the Forest Service noting that the landowner needs to see a signed "Release of Interest" document before he is comfortable signing his donation deeds. AR-005939;

- *September, 2019* deed entitled "Release of Easement Interests" formally releasing the Forest Service's easement interests in the

two trails in accordance with the federal regulations pertaining to real property interests, 41 C.F.R. §§ 102-75.936. AR-04996; and

- *September, 2019* detailed maps attached to the deed entitled "Release of Easement Interests" depicting the specific portions of the two trails where the Forest Service's easement interests will be released. AR-004998.

This is the evidence in the record and this is the evidence that was before the agency at the time it approved the Ibex project. As such, this is the evidence this court must look to determine whether the agency complied with FLPMA (and the other laws) and has articulated a rational basis for its decision. *Arrington*, 516 F.3d at 1112. The Ibex project must be upheld, if at all, on "the grounds that the agency invoked when it took the action." *Dep't of Homeland Sec.*, 140 S. Ct. at 1907. Indeed, nowhere in the record is there *any evidence* that the Forest Service's Travel Plan trail designations were outdated or inaccurate. Nor did the Forest Service ever allude to as much when the agency put the Ibex project out for public scoping. The magistrate's findings largely ignore this fact and focus instead on legal arguments made solely in counsel's briefs or during the hearing. This is inappropriate. Such post hoc rationalizations "cannot substitute for the agency's own articulation of the basis for its decision." *Arrington*, 516 F.

3d at 1113. Courts must reject justifications "belatedly advanced by advocates." *Dep't of Homeland Sec.*, 140 S. Ct. at 1908–09. This ensures the explanations provided are "not simply 'convenient litigating position[s].'" *Id.* at 1909.

3. FLPMA applies to valid easement interests that are acquired by prescriptive use and then exchanged.

Third, the magistrate erred as a matter of law by insisting that FLMPA is only triggered if the Forest Service has acquired a "fee interest" or holds a "established, recorded easement" in the two trails. Doc. 101 at 11. This is incorrect.

FLPMA applies to exchanges in public lands or interests in public lands. 43 U.S.C. § 1716(a). "Interests in public land" are those that are "owned by the United States and administered by the Secretary of Agriculture through the Chief of the Forest Service, *without regard to how the United States acquired ownership*." 36 C.F.R. § 254.2 (emphasis added). The regulations implementing FLPMA as supplemented by FSM § 5400 and FSH § 5409.13 then set forth the procedures for (1) *acquiring* ownership in interests in National Forest lands and (2) the procedures for *exchanging* such interests under FLPMA. *See* 36 C.F.R. § 254.1(a).

First, in terms of *acquiring* property interests, FSM § 5460 explains that the agency can acquire and own rights-of-way on trails and roads by prescriptive use under state law. Doc. 79-10 at 3. FSM § 5460 then lists the requirements for establishing a right-of-way for trails through prescriptive use in Montana and explains that, once established, title "to an easement acquired by prescription is as effective as though evidenced by a deed." *Id.* FSM § 5460 also explains that such easement interests can be established and assumed to be valid based on the Forest Service's own records and in the absence of a court-decree or perfection (through recording, quiet title action, or condemnation). Doc. 79-10 at 7.

FSM § 5460 explains that many of the region's trails "are not covered by recorded easements, and there is a growing movement by current landowners to challenged continued National Forest use of theses [trails]." *Id.* at 7. For this reason, the Forest Service established three "legal interest levels for acquisition of rights-of-way for these long-existing roads and trails across non-Federal lands." *Id.* These include:

> Level I – Assume trails easements have been acquired by prescription without the benefits of status checks;

> Level II – Assume trail easements have been acquired by prescription when based on status checks, including evidence from employees, local citizens, historians, vintage maps and photographs, and other records; and
>
> Level III – Perfect title to the trail easement by acquiring deeds from the landowners, initiating condemnation actions, or initiating quiet title suits in court.

Doc. 79-1 at 7. As explained by the Forest Service, in situations where an existing National Forest System trail "crosses private lands, and no deeded easement exists, the Forest Service's position is [that] . . . [t]he United States has acquired a right-of-way for the trail through development, maintenance and continuous use of the trail. As a *matter of law*, the Forest Service believes that there is a public access easement for the trail." Doc. 29-12 at 13 (emphasis added); *see also* Doc. 79-15 at ¶¶4-9 (same).

This is why in two related federal court cases, the Forest Service successfully defended its position that it legally acquired and owned valid easement interests in National Forest System trails that cross private lands *even though* they were acquired by public prescriptive use and never held in fee interest, established by court decree, subject to a recorded or written easement, or perfected (as the magistrate insisted they be in this case).

In *Montana Wilderness Ass'n*, the Forest Service asserted it acquired and owned valid "easement rights" in the Porcupine Lowline trail (and other trails) in accordance with FLPMA and FSM § 5460 based solely on prescriptive use and even though they were never perfected, recorded, or established by court decree. *See* Case No. 07-cv-0039-DWM (Doc. 48-2 at 9, note 11); *see also* Doc. 79-15 at 3 (sworn declaration noting same); AR-3271, 3272 (same); AR-5111 (same).

The Forest Service made the same argument in *Wonder Ranch v. United States,* 2018 WL 3153123 at *3 (9th Cir. 2018), asserting that in accordance with FLMPA and FSM § 5460, the Forest Service was "empowered" to acquire easements by prescription use across private property without a deed or court decree. *See Wonder Ranch v. United States*, Case No. 14-cv-0057-SEH (D. Mont. 2016) (Doc. 99 at 8-9).

Relevant here, in *Wonder Ranch*, the landowner also argued that earlier Forest Service efforts to perfect its easement interests by purchasing a recorded easement from the landowner undermined its prescriptive easement rights. *See Wonder Ranch,* 2018 WL 3153123 at *3. The Ninth Circuit rejected this argument, noting that having a policy of seeking to secure or perfect prescriptive easement rights "it

already had" by getting them in writing was not inconsistent with having a public prescriptive easement right. *Id.*[2]

In sum, therefore, FLPMA, the regulations, FSH and FSM, and relevant caselaw all reveal the Forest Service can acquire and own valid easement interests on National Forest trails that cross private property by prescription alone and even if they are never recorded, established by a court or perfected. And any interpretation to the contrary would have significant ramifications for public access and use on hundreds of our public trails in Montana and throughout the Nation. This is why in *Wonder Ranch*, the Forest Service aggressively defended its positon and refuted the argument from the landowners that it could not acquire and own valid easement rights by prescriptive use under FLPMA. *See Wonder Ranch*, Ninth Circuit Case No. 16-36071 (DktEntry 19 at 75-82) (briefing issue); *Wonder Ranch*, 2018 WL 3153123 at *2, note 5 (resolving issue).

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[2] In *Wonder Ranch*, the Forest Service filed a statement of its interest in the disputed trail. 2016 WL 6237196, *8 (D. Mont. 2016). Here, the Forest Service did not file a statement of interest but following publication of Travel Plan which gave actual notice of the United States' easement interests, there was no need. The Travel Plan already proclaimed the United States' interests in the trails. Doc. 80 at ¶¶54–60.

Second, once easement interests are acquired by the Forest Service, FLPMA then gives the agency the authority to *exchange* these valid easement interests. FLMPA's regulations and FSH § 5409.13 explain that FLPMA applies when these types of "partial interests" in land are exchanged. *See* 36 C.F.R. §§ 254.1(a),(b); Doc. 89-1 at 9, 11. FLPMA defines an interest in land as a "partial or undivided right in real property that is less than the complete fee or estate." Doc. 89-1 at 9. A FLPMA "land-for-land exchange involves the acquisition of non-Federal land, or interests in land, by the United States in exchange for National Forest System lands, or interests in land." *Id* at 11.

Relevant here, FSH § 5409.13, which supplements the regulations, *see* 36 C.F.R. § 254.1(a), clearly explains that "[p]artial interests in land may be acquired or conveyed when it is in the public interest to do so. Partial interests may include, but are not limited to, severed mineral estates, *rights-of-way easements*, leasehold interests, and long-term or perpetual easements." *Id.* (emphasis added). In other words, valid rights-of-way easement interests acquired by the Forest Service (in accordance with FSM § 5460) are the types of partial

interests in land that can be exchanged under FLPMA. *Id*. That is precisely what happened here, for the Ibex project. *See* AR-0432.

B. NEPA objections.

Plaintiffs maintain the Forest Service violated NEPA when approving the Ibex project, which involved a new trail, securing new easements from landowners, relinquishing the Forest Service's easement interests on portions of two trails, and then conducting "closure work or rehabilitation" on these trails. AR-00432.

The magistrate correctly noted that the Ibex project is not analyzed or evaluated in the 2006 Travel Plan EIS and was not subsequently analyzed in a NEPA document following scoping for the project in 2018. Doc. 101 at 19. So NEPA compliance for the Ibex project "depends on whether the 2009 [roads and trails] EA provided sufficient analysis of environmental impacts." *Id*. The magistrate then found the 2009 EA sufficiently analyzed the Ibex project. The magistrate also faulted Plaintiffs for not alleging any "specific deficiencies" with the 2009 EA. Doc. 101 at 19. This is incorrect for four reasons.

1. The Ibex project was not included in the 2009 EA.

First, the magistrate mistakenly found that the Ibex project was included in Alternative 1 in the 2009 EA. Doc. 101 at 18. For support, he cites AR-1516, AR-1519, and AR-1525 but none of these pages describe (let alone analyze) the Ibex project.

On the contrary, AR-1516 and AR-1519 both explain that the 2009 EA only applies to improvement work already authorized by the 2006 Travel Plan. It is axiomatic that since the Ibex project was not authorized by the 2006 Travel Plan there can be no analysis of that project in the 2006 Travel Plan (as recognized by the magistrate). As explained by the Forest Service, in the 2009 EA there "are no proposed changes to the amount, type, or general location of recreation activities [already] provided by the travel plan decision." AR-1056. On its face, therefore, the 2009 EA implements the Travel Plan and, as such, does not and cannot include the Ibex project.

The magistrate's reliance on AR-1525 is equally unavailing. This page does reference potential work in the "Porcupine Area." AR-1525. But the Forest Service states that in this area, the Travel Plan is focused on providing "opportunities for motorcycle, mountain bike, stock

and foot use" on the Porcupine-Lowline trail. AR-1525. The Forest Service also stated that this trail currently "passes through large portions of private lands and fences, gates, past harvest and road building and *needs to be remarked and reconstructed*." *Id.* (emphasis added). This is not a description of the Ibex project. The Forest Service does mention shifting some portions of the existing trail onto National Forest lands in the future, but no details (besides a general vicinity map, AR-934) are provided and its plans were purely aspirational: "*Some* portions of the trail *may* be shifted onto National Forest land to the east." *Id.* (emphasis added).

This is the only reference to something even remotely relevant to *one part* of the Ibex project (the trail re-route). And other aspects of the Ibex project are not mentioned at all (including trail closures and easement exchanges) and there is no specific information on the trail reroute needed for the Ibex project, i.e., what portions of what trails will be moved, whether it includes both trails, and when or whether it will actually occur. Also missing is any analysis or specific information on the uses of the trail or where the trail will be located (besides within a general two-mile wide corridor between two points that covers

thousands of feet of vertical relief and huge differences in topography, flora, and fauna its design).

2. The 2009 EA did not analyze the direct, indirect, and cumulative effects of the Ibex project.

Second, since the 2009 EA does not include the Ibex project, its analysis of direct, indirect, and cumulative effects of the project to various resources, i.e., wildlife habitat, aquatic resources, recreational opportunities, and other resources also does not (and cannot) exist. Nor it is fair to then fault Plaintiffs for generally alleging that no such analysis exists without going through each specific resource section of the document.

That said, even assuming, *arguendo*, that the 2009 EA did include the Ibex project, review of the document reveals there is no environmental analysis about impacts to specific resources as alleged by Plaintiffs. For example, nowhere does the Forest Service analyze and consider the direct, indirect, or cumulative effects of the Ibex project on wildlife (big game, wolverine, and other species), listed species, rivers, wetlands and streams and aquatic resources, historic and cultural resources, or recreational use and access. The 2009 EA, for example, does not analyze the effects of closing low country trails and building

new trails in the high-country now open for mountain biking in forested areas that are important for big game security and other wildlife species. There is nothing about this in the 2009 EA and nothing specific about such activities in the region affected by the Ibex project. *See* AR-0065-83 (wildlife section).

The same is true for other resource, including recreational use and opportunities in the region. There is no analysis of the direct, indirect, or cumulative effects associated with closing century-old existing trails that are in the low country and building new ones in higher, more remote places were existing trails already exist. The 2009 EA is also devoid of any analysis of impacts to aquatic species and the region's rivers, wetlands and streams form the Ibex project.

The magistrate mentions Yellowstone cutthroat trout in the area – a sensitive species- and the identification of this resource in Table 3. Doc. 101 at 20. But there is no analysis in the Table about how the Ibex project (including the new mountain bike trail across streams inhabited by this and other species) may directly, indirectly, or cumulative affect Yellowstone cutthroat trout. The magistrate also cites a table listing potential work for the trail-reroute in the "Porcupine area" and the

agency's commitment to survey for rare habitats. Doc. 101 at 20. But there is no effects analysis here either, i.e., no analysis of the direct, indirect, or cumulative effects to the resources (aquatic, wildlife, cultural etc.) in this area and a commitment to conduct future surveys is not an analysis. The magistrate also repeatedly highlights impacts to the "Porcupine area" for support but nothing specific to the Ibex project is provided.

Further, even if one assumes, *arguendo,* sufficient environmental analysis about the trail re-route is provided in the 2009 EA, this only pertains to one part of the Ibex project. Missing is any analysis of how acquiring new easements, releasing existing easements, and closing and rehabilitating existing trails may affect public use and access of the area, influence use patterns and numbers, or indirectly affect big game, recreational opportunities, and other resources. This is a major oversight because these are not just connected, similar or cumulative actions that need to be addressed in a single NEPA document, 40 C.F.R.

§ 1508.25, they are part of the same agency action (the Ibex project) itself. Doc. 80 at ¶152.[3]

3. The 2009 EA did not analyze reasonable alternatives to the Ibex project.

Third, the 2009 EA never analyzed and evaluated a reasonable range of alternatives for the Ibex project as required by NEPA. This is a major oversight.

Under NEPA, an alternatives analysis is important because it presents impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options. The alternatives analysis guarantees that agencies have before them and take into account "all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance.'" *Bob Marshall Alliance v. Hodel*, 852 F. 2d 1223,1228 (9th Cir. 1988) (citations omitted). "Informed and meaningful

[3] This Court should also reject any attempt by the Forest Service to rely on post-decisional surveys, assessments or analyses (referenced in Doc. 83 at ¶34) done for the re-route *after* it approved the project and chose to forgo NEPA review.

consideration of alternatives . . . is thus an integral part of the statutory scheme" and "critical to the goals of NEPA." *Id.* at 1228-29.

Here, the Forest Service never compared and contrasted various alternatives for the Ibex project, including alternative designs for the new trail, alternative locations, and alternatives uses for the new trail. The Forest Service never evaluated alternatives to the easement exchange. The Forest Service never compared and contrasted various alternatives to obliterating and removing portions of the existing trails from the Travel Plan. Nor did the Forest Service evaluate alternatives that would preserve historic access rights on existing trails while simultaneously protecting private property rights through increased signage, enforcement and public education efforts. Notably, the magistrate's findings never addressed these alternatives claim.

4. The Forest Service failed to consider important aspects of its decision raised during scoping.

Finally, the magistrate states that the Forest Service put the Ibex project out for scoping "to determine whether the precise relocation of the reroute would change the 2009 EA's environmental analysis." Doc. 101 at 18. But this is incorrect. As previously noted, the 2009 EA did not authorize the trail reroute or commit to a precise location of it and

that was not the purpose of the scoping notice. *See* AR-00432. Scoping was done to determine whether to do an EIS, EA, or issue a CE for the Ibex project. AR-437-440.

Further, after the Forest Service put the Ibex project out for scoping, it received roughly eighty comments, the majority of which opposed the project or, at the very least, recommended the Forest Service prepare an EA for it. Doc. 80 at ¶168. Members of the public also raised a number of concerns with the project. *See* Doc. 80 at ¶¶168-183. But the Forest Service never responded or addressed the concerns raised. This includes the existence of Northern Pacific railway deeds which reserved an "easement in the public" for any public roads "heretofore laid or established and now existing over and across" odd sections of land in the Crazy Mountains, including, but not limited to, Sections 15 and 35 (Township 4 North, Range 10 East) which are directed implicated by the Ibex project. Doc. 80 at ¶183.

These types of railroad easements are generally interpreted to extend to all types of public rights-of-way, including public highways, roads, and trails. *See, e.g.,* Doc. 9-4 at ¶VI; Doc. 9-5 at 2 (memorandum defining public highway). Evidence in the record reveals portions of the

two trails released by the Forest Service were likely "public roads" on the landscape at the time the railway deeds were conveyed. Doc. 80 at ¶10-12; AR-00591 (describing history of trail). The 1937 map of the Crazies "clearly shows this public travel route, as well as the historic guard stations it connected." Doc. 80 at ¶11.

This potentially relevant information was presented to the Forest Service and the public questioned whether, given the railway deeds, the Forest Service even had the authority to release portions of the trails for the Ibex project. Doc. 80 at ¶183. But the Forest Service arbitrarily ignored these concerns and the deeds themselves and, in so doing, violated NEPA. The Forest Service failed to consider a potentially "relevant factor" and "an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n v. State Farm,* 463 U.S. 29, 43 (1983).

Critically, the magistrate states that "Plaintiff's frequently mention the railway deeds but fail to establish that these deeds are connected to any parcel of land at issue in this matter." Doc. 101 at 21. But this is incorrect: Plaintiffs established that sections of 11, 15, and 35 which are a part of the Ibex project and easement exchange are covered by railway easements. *See* Doc. 77 at ¶¶ 85, 90, 92; Doc. 80 at

¶183, Doc. 52 at 8; Doc. 29-10.

C. NFMA objections.

Plaintiffs maintain the Ibex project violates the Travel Plan, which amended the 1986 Forest Plan. AR-5223. In the Travel Plan, the Porcupine-Lowline and Elk Creek trails were designated for public use and depicted on the Motor Vehicle Use Map (MVUM) for the area. Doc. 79 at 37-39; Doc. 89 at 42-47. But the Ibex project changed these use designations, closed large portions of the trails, released the Forest Service's interests in them, and did so without first amending or modifying the Travel Plan, without any analysis and without any public input as required by NEPA, NFMA, 16 U.S.C. § 1604(f)(4), and the travel rule, 36 C.F.R. § 212.54.

While the Forest Service has the authority to amend its Travel Plan (including the MVUM) to make these changes after providing public notice and comment, 36 C.F.R. § 212.54, until it does so the existing Travel Plan controls. *See, e.g., Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 961 (9th Cir. 2005). The magistrate, however, never addressed this claim, focusing instead on the enforceability of "guidelines" in the Travel Plan. Doc. 101 at 23. The

magistrate also went further and determined the Forest Service had no management authority over trails that cross private land. *Id.* But this is not at issue in this case. As previously noted, the Travel Plan's trails that cross private property were already approved and successfully defended by the agency in *Montana Wilderness Ass'n*. *See* Doc. 80 at ¶¶73–79. The court already found that the Forest Service was well within its authority to designate trails across private land as National Forest trails. Doc. 80 at ¶78.

D. NFMA objections (east-side trails).

Plaintiffs maintain the Forest Service is failing to comply with its obligation to protect public access rights on two National Forest trails on the east-side of the Crazy Mountains: The East Trunk and Sweet Grass trails. This duty arises from: (1) the Forest Service's travel regulations which state that the use of "existing National Forest System roads and trails *shall be permitted* for all proper and lawful purposes subject to compliance with rules and regulations governing the lands and the roads or trails to be used," 36 C.F.R. § 212.6(c) (emphasis added); and (2) the Travel Plan decision which committed the Forest Service to manage the two trails for their emphasized uses. The

magistrate denied these claims on the grounds that Plaintiffs failed to identify a discrete agency action that it is required to take as required by section 706(1) of the APA, 5 U.S.C. § 706(1). Doc. 101 at 25 (citing *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004)). This is incorrect for two reasons.

1. The travel regulations direct that the Forest Service "shall" protect access on existing National Forest System trails.

First, 36 C.F.R. § 212.6(c) creates a specific, non-discretionary duty to act: The Forest Service "shall" permit use of all existing National Forest System trails for all proper and lawful purposes. 36 C.F.R. § 212.6(c). Shall means must. *Ctr. for Biological Diversity v. Norton*, 254 F.3d 833, 837 (9th Cir. 2001). The proper and lawful purposes are those included in the Forest Service's travel regulations and Travel Plan. For the East Trunk trail, designated uses are hiking, mountain biking, stock, and snowshoeing. Doc. 80 at ¶¶61-63. For the Sweet Grass trail, the uses include hiking, stock, and snowshoeing. *Id.*

In addition to these trail designations, the Travel Plan also includes a guideline stating that in situations where continued public use and access of such trails "is challenged or closed," the Forest Service

is to *"take actions necessary to protect the existing access rights* to [National Forest System] lands, and to protect the jurisdictional status of roads and trails in cooperation with area counties." Doc. 80 at ¶50. (emphasis added); *see also* AR-5247 (explaining same). But none of this is occurring on the East Trunk or Sweet Grass trails. Doc. 79 at 43-47.

The magistrate said guidelines need not be followed, but the Travel Plan's guidelines cannot be summarily ignored by the agency as they were here. *See Alliance for the Wild Rockies v U.S. Forest Service*, 907 F. 3d 1105, 1110, 1113–14 (9th Cir. 2018). The Forest Service must explain why it is deviating from them. *Id*. More importantly, the Travel Plan's guidelines supplement the route designations in the Travel Plan that outline the proper and lawful purposes of the National Forest trails as directed by 36 C.F.R. § 212.6(c). In *Norton*, the Supreme Court expressly recognized that unlike broad actions called for in land use plans, such actions required by regulations – including those pertaining to how specific trails are designated and managed – are different and can be enforceable. 542 U.S. at 69, n. 4.

The magistrate also found that managing these trails in accordance with the Travel Plan would not be a "proper and lawful

purpose" because the Forest Service never established a valid legal interest in the two trails. Doc. 101 at 26. But as previously noted, this finding is directly contradicted by the Travel Plan and the Forest Service's successful defense of it in *Montana Wilderness Ass'n*. The Forest Service already determined it had valid easement rights in the trails. *See* AR-5111-5112; Doc. 79-15. Indeed, under the travel regulations, the Forest Service cannot designate trails unless it has valid interests in them. 36 C.F.R. § 212.55. This finding is also contradicted by the record, including the Forest Service's 2017 Briefing Paper stating that it has a valid prescriptive easement on the East Trunk trail. Doc. 79-13 at 3.

2. The Forest Service made a binding commitment in its decision approving the 2006 Travel Plan to manage the two trails for public access.

Second, the magistrate ignored the binding commitments made by the Forest Service in its Travel Plan decision, specifically its commitment to manage specific trails for specific uses and produce detailed maps displaying "how travel will be managed across the Forest." AR-5231. A Travel Plan is a "plan to manage travel on the Gallatin National Forest by designating and restricting use on the

Forest roads, trails, and areas." Doc. 79-14 at 72. Here, the Travel Plan decision amended the Forest Plan by removing the document's travel plan direction and replacing it with new direction that "identifies the route corridors where various modes of travel are allowed or prohibited." AR-5231. "If a use is identified as emphasized (E) on a road or trail it is in indication that the Forest Service believes that it is a good opportunity and *will manage* the route for that use." *Id.*; *see also* Doc. 79-14 at 39 (explaining how the Travel Plan specifically "describes how each route would be managed").

In *Friends of the Animals v. Sparks*, this Court held that federal agencies are bound by these types of commitments in decision documents. 200 F. Supp.3d 1114, 1123 (D. Mont. 2016). Regulations implementing NEPA, 40 C.F.R. § 1505.3, expressly state that conditions committed to as part of agency's decision "shall be implemented by the lead agency . . ." *Id.* at 1123. This is consistent with the agency's guidance. *Id.* at 1124. "Pursuant to generally recognized principles of federal administrative law . . . an agency must comply with its own decisions and regulations once they are adopted." 46 Fed. Reg. 18026,

18037 (March 17, 1981). Other district courts agree. *See Friends of Animals*, 200 F. Supp. 3d at 1123 (citing cases).

In *Friends of the Animals*, this Court also rejected the Forest Service's reliance on *Norton*, noting that that case involved broad statutory mandates, not specific language in a plan creating a commitment binding on the agency which "is a different matter." *Id.* at 1125. "An agency action specifically called for in a plan could be compelled . . . 'when language in the plan itself creates a commitment binding on the agency." *Id.* The same principle applies here.

The Forest Service said it would manage the trails in accordance with the Travel Plan. AR-5231. And this why the agency said removing all travel direction in the Forest Plan and replacing it with the Travel Plan was not a significant NFMA amendment. AR-5353–54. As explained by the Forest Service, the Forest Plan's travel direction will be replaced by new "direction" in the Travel Plan that "identifies specifically how each road and trail on the Forest would be managed." AR-5354. The Travel Plan now determines "which routes will be open and which have restrictions . . . [and] adopts a series of goals, objectives,

standards, and guidelines that limit potential increases in motorized uses." AR-5355.

The Forest Service certainly has the discretion and is encouraged to find solutions with landowners and resolve disputes. But it cannot do so at the expense of ignoring its own Travel Plan and abandoning public access rights. Doc. 79 at 43-47. The Travel Plan says the agency must do both: "protect existing access rights and . . . cooperate with landowners to meet mutual transportation needs." AR-5247. Here, the Forest Service is only doing the latter at the expense of the former.

CONCLUSION

For these reasons, Plaintiffs respectfully request this Court reject the magistrate's findings and grant Plaintiffs' motion for summary judgment.

Submitted this 3rd day of March, 2022.

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CERTIFICATE OF COMPLIANCE

I, the undersigned counsel of record, hereby certify that this brief is proportionally spaced, has a typeface of 14 points or more, and contains less than 6,500 words. I relied on Microsoft Word to obtain the word count.

/s/ Matthew K. Bishop
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