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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLNGS 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 REPLY IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION *Action requested by August 1, 2019*

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EXHIBIT AA	FOIA response documents (Gallatin National Forest)
EXHIBIT BB	*United States v. Van Cleve*, Case No. 1098 (D. Mont. 1949)(Amended Complaint and motion).
EXHIBIT CC	U.S. Forest Service disclosure, *Wonder Ranch v. United States*, 2016 WL 6237196 (D. Mont. 2016).
EXHIBIT DD	Response to Comments: Travel Plan EIS (excerpt)
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INTRODUCTION

The Service's response includes a number of inaccurate statements. The Service insists the NEPA analysis for the Ibex project is included in the travel plan and forest-wide EA but neither document discusses it. The Service relies on ten new internal documents to buttress its argument but these were prepared *after* the Service issued its August, 2018 decision (and none of documents were shared with the public).

The Service says it can ignore its own travel plan but this plan is part of the Gallatin forest plan and includes binding limitations. The Service questions whether the public has an easement interest in the two trails but this matter was already resolved and litigated when the travel plan was adopted. The Service asserts the new trail will be "better" but most people disagree. The Service also maintains its "deal" with the landowners serves the public interest but the public was excluded from the discussions and the deal rewards the landowners' illegal efforts to obstruct public access on public trails. This sets a dangerous precedent. The Service maintains there is no irreparable harm because the trail can be moved back. But this does little to rectify

the harm caused by the construction, logging, and blasting needed to build the trail and the obliteration of the existing trails.

For these reasons, plaintiffs request this Court conduct a "thorough, probing, in-depth review" of this case. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). This Court should "not rely on counsel's statements . . . ; the district court itself must examine the record and itself must find and identify the facts that support the agency's action." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994).

ARGUMENT

A. Plaintiffs are likely to succeed on the merits.

1. The Service failed to comply with NEPA.

The Service insists the Ibex project complies with NEPA because: (a) it completed internal reports on the project; and (b) the project was previously analyzed in the travel plan and forest-wide EA. The Service is wrong.

First, none of the internal documents relied upon were submitted for public review and comment or included in a NEPA document. *See Envtl. Prot. Info. Ctr. v. Blackwell*, 389 F. Supp. 2d 1174, 1205 (N.D.

Cal. 2004) (rejecting agency's reliance on internal consultation for NEPA compliance); *Or. Natural Desert Ass'n v. Rose*, 921 F.3d 1185, 1192 (9th Cir.2019) (same). Further, the internal documents were produced *after* the Service already issued its August, 2018 to decision approve the project. *See* Exs. 10, 12-19. These are a post hoc rationalizations for a decision that was already made which is the hallmark of arbitrary action. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 603 (9th Cir. 2014).

Second, the Ibex project was never analyzed in the travel plan or forest-wide EA. The travel plan and EIS include *no* environmental analysis of the impacts (direct, indirect, and cumulative) or any evaluation of alternatives for one simple reason: the Ibex project was not part of the decision.

For support, the Service cites page 53 of Exhibit 28 but this page says nothing about the project. Page 53 of the travel plan decision (Exhibit K) does say the agency will "be looking for ways to re-route this trail to get more of it on national forest land" but this is a statement of future intent, not a NEPA analysis. The Service also relies on the travel plan's discussion of "general wildlife" impacts and an older (2004)

Wisdom paper regarding impacts to big game habitat. This entire discussion, however, pertains to the travel plan decision and its designation of specific routes for public use, not the Ibex project.

In the travel plan, the Service said any "future construction of new roads or trails on National Forest land will require a new NEPA analysis and period for public comments and concerns." Ex. O at 3. This never occurred. The Service now insists the forest-wide EA is this "new analysis" but even a cursory review of the document reveals otherwise.

The forest-wide EA discusses the work needed to implement the travel plan. Ex. N at 3. As such, the document *did not and could not* analyze the environmental impacts of (or alternatives to) the Ibex project because it was never part of the travel plan. The Service cites the "fisheries analysis" on pages 3-22 to 3-24 and a "general wildlife" analysis and discussion on page 3-29 of Ex. 2. But this discussion is for the forest-wide EA decision, not the Ibex project.

The Porcupine area mentioned (not analyzed) in table 3 on page 3-22 of Ex. 2 refers to "the Porcupine Area" in the forest-wide EA, Ex. N at 27. In this area, the Services says the Porcupine Lowline trail will "provide opportunities for motorcycle, mountain bike, stock and foot

use," and – since it passes through "large portions of private land" – needs to be "remarked and reconstructed." Ex. N at 27. This is not the Ibex project.

The forest-wide EA does mention that some "portions of the trail may be shifted onto National Forest land to the east" suggesting that the agency was – at most – contemplating some aspects of what would later become the Ibex project. But no details or specifics on design, location, impacts, or alternatives are provided. Nor does the Service commit to the project – it "may" happen. *Id.*The Service's assertion that it evaluated a reasonable range of alternatives is equally unavailing. The discussion cited from the forest-wide EA is not referring to (and could not refer) to the Ibex project.

The Service now admits it never analyzed the "precise delineation" or design of the Ibex project in a NEPA document but claims it need not do as per *Te-Moak Tribe of W. Shoshone of Nevada v. U.S. Dep't of Interior*, 608 F. 3d 592, 600 (9th Cir. 2010). *Te-Moak* is easily distinguishable, however.

At issue in *Te-Moak* was the sufficiency of an EA for a mineral exploration project and whether certain details were required. *Id*. at

600. The Ninth Circuit recognized the importance of providing such details in an EA, *id*., but recognized that a mineral exploration projects are unique: they "involve[] uncertainties" so an agency may approve them "without knowing the precise location of the drill" sites. *Id*. The agency, however, must compensate for such omission by analyzing the "impact of drilling activities in all parts of the project area." *Id.* Here, the Service did not prepare an EA (or any NEPA analysis) and did not consider the impacts to the "parts of the project area" affected by the Ibex project. Further, at issue is a trail project, not a mineral exploration project (where precise location of drilling operations cannot be known absent the exploration). Unlike *Te-Moak*, there is no reason the Service could not negotiate the easements with landowners, place and design the trail re-route, explain its plans to obliterate and relinquish easement interests on the existing trails, *and then* analyze the project in an EA.

2. The Service must comply with its travel plan.

The Service says its travel plan direction is unenforceable, except the standards (which are purportedly preempted by the landowner's rights). This is incorrect.

Pursuant to NFMA, project-level decisions – like the Ibex project – must comply with the forest plan. *All. for the Wild Rockies v. USFS.*, 907 F.3d 1105, 1112 (9th Cir. 2018). Here, this means the Ibex project must comply with the travel plan because it amended the forest plan. This is not in dispute.

Under NFMA, all projects must comply with the forest plan and a project only does so "if it conforms to the applicable 'components' of the forest plan." *Id.* at 1110. "'Every project and activity must be consistent with the applicable plan components." *Save Our Cabinets v. Dep't of Agriculture*, 254 F.Supp.3d 1241, 1258-1260 (D. Mont. 2017); 36 C.F.R. § 219.15(d)(1). The Service can deviate from goals, objectives, and guidelines – so long as "the rationale for deviation is documented," but the agency must strictly comply with all "binding limitations." *All. for the Wild Rockies*, 907 F.3d at 1110.

Relevant here, the travel plan includes both "forest-wide" goals, objective, standards, and guidelines, but also binding, route specific "direction." Ex. L at 1. This direction states that if a trail is designated for an "Emphasized" use, the Service *will manage* for that use. *Id*. at 3,19; Ex. K at 13 n.1. This is a binding commitment; a formal "designation" of the "modes of travel permissible and managed for . . . on specific roads and trails." Ex. L at 19. The specific route designation in the travel plan "regulates the means of public travel . . . that occurs on specific roads and trails" including "seasonal restrictions." *Id*. Public access on these routes "shall be permitted for all proper and lawful purposes," subject to compliance with the Service's rules. 36 C.F.R. § 212.6 (c).

The specific direction for the Porcupine Lowline and Elk Creek trails is for the "Emphasized" use of hiking, mountain biking, and stock "YEARLONG." Ex. L at 28. The Porcupine Lowline trail is also open for motorized use and is depicted on the Service's motorize vehicle use map, Ex. Z. The Ibex project conflicts with the travel plan (and maps) because instead of emphasizing public access on these two trails, it obliterates and abandons such access. No rational explanation for this deviation

has been provided. Further, commitments made by an agency in a record of decision are binding. *Friends of Animals v. Sparks*, 200 F. Supp. 3d 1114, 1123 (D. Mont. 2016). Conditions "committed to as part of the decision shall be implemented by the lead agency or other appropriate consenting agency." 40 C.F.R. § 1505.3. Shall means shall, so the Service "is bound to the commitments is makes in the [record of decision]." *Friends of Animals*, 200 F. Supp. 3d at 1123.

Second, the Service's claim that private property owners have a "right to exclude the public" from National Forest System trails is a red herring. This is not a private property rights case. The issue, rather, is the Service's non-compliance with its own travel plan when approving the Ibex project. As such, whether landowners have a valid claim against the travel plan or whether these trails are appropriately classified as National Forest System trails in the travel plan and related maps is outside the scope of this case. The Service already determined these are valid trails and rejected the landowners' comments on this issue:

Name	Organization	Letter #	City	Comment	Code	FS Response
Ned Zimmerman		1155	Wilsall	I am opposed to any use of Trail 267 which crosses our families private land, some inside, as well as some outside of the national forest boundary. For years the trail has been unused. The FS has shown that it has had difficulty knowing exactly where the trail is supposed to lie because each time a new map of the GNF trail system is printed, trail 267 is in a different place. We urge the Forest to maintain the trails across private property for which they have written easement. Trail 267 is not one of those.	Ibex	Under Alternative 7-M Trail #267 would be targeted as a motorcycle, mountain bike, foot and horse route. The Forest asserts that the Forest and the public has enjoyed the right to use this National Forest Trail for many decades for the prescribed uses. While recorded (writtten) easements don't exist for all segments of the trail (some do on other private lands along this trail), the Forest asserts the right to continue to use this route for public and administrative uses. The Forest is willing to work with any landowner in agreeing to a long-term location and easement of this Forest Trail as long as the public and administrative interests are preserved.

Ex. DD. The issue was also later resolved by this Court in *Montana Wilderness Association (MWA) v. McAllister*, 07-cv-0039-M-DWM (D. Mont. 2007). *See* Ex. Y.[1]

3. The Service cannot relinquish the public's easement interests.

The Service has no authority – as part of the Ibex project – to relinquish the public's easement interests in the Porcupine Lowline and Elk Creek trails because: (a) sections of these public routes, including Section 15 (T4N and R10E) are covered by a recorded easement "in the public" from the railway, *see* Ex. Q; and (b) the public has a prescriptive easement in the trails, *see* Ex. P at ¶4.

[1] In *MWA*, the plaintiffs challenged the travel plan for "depicting trails crossing or accessing private land, for which no easement" exists. Ex. Y at 4. The Service disagreed, noting that it (and the public) have an easement interest on the trails, Ex. Y at 28, 34, and a responsibility to manage the trails under the travel plan. *Id.* at 35. The Court agreed. *See id.* at 62, 67, 84.

In response, the Service proffers a number of theories as to why the recorded railway deeds are invalid. The Service says there is no evidence of a "public road" in the sections. But an administrative record has yet to be filed in this case and we know from the Service's records that Porcupine Lowline trail is a public right-of-way that was used "by turn-of-the-(last)-century forest rangers stationed in the Ibex, Porcupine, and other historic for guard stations" which encircled the Crazy Mountain range." Ex. AA at 5. The 1937 map "clearly shows this public travel route, as well as the historic guard stations it connected." *Id.*

The Service's also questions the validity and scope of the deed, but such public easements have been upheld by the courts, *see, e.g.*, *State of Montana v. Cronin*, 179 Mont. 481, 486-487 (1978), and are generally interpreted to extend to all types of public rights-of-way, including public highways, roads, and trails. *See, e.g.,* Ex. BB at ¶VI; Ex. CC (Service memorandum); Ex. DD. This broad interpretation is consistent with *Reid v. Park Cty*, 192 Mont. 231, 234 (1981), and the Service's own policy, *see* Forest Service Manual (FSM) 2734.51 (trails may qualify as

public highways). [2] The Service also questions whether such easement rights can be perfected due the trail's "undisputed movement." But no legal authority is provided and none exists. In 2013, the landowners made this very argument to the Service quickly rejected it. *See* Ex. AA at 12, 22-23.

In terms of the public's prescriptive easement on the two trails, the Service never addresses (or refutes) this claim. In terms of its own easement interest, the Service suggests it may no longer have one. But this position is contradicted by arguments made and sworn testimony provided in *MWA*, Ex. P at ¶4, Ex. Y, and the Service's own actions since then, *see* Ex. AA. If the Service had not easement interest in the existing trails, there would be nothing to "relinquish" for the project.

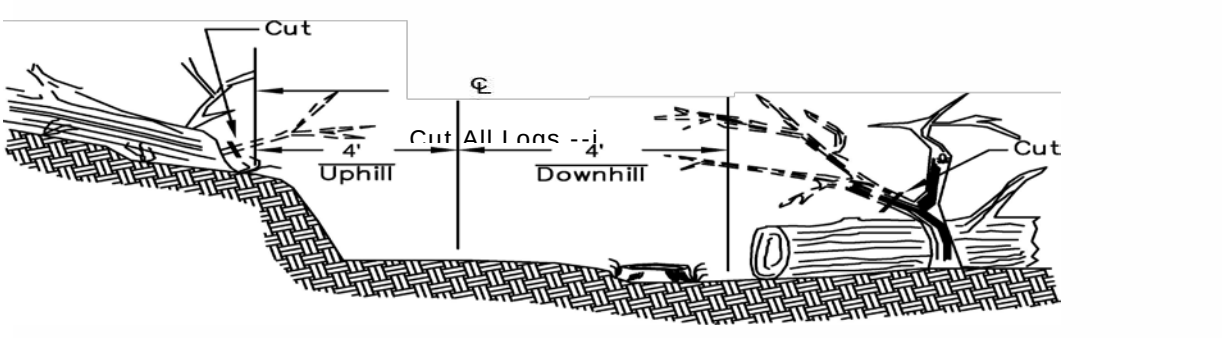
Public and administrative use of the trails did not end in 2010, after *MWA*. Nor did the Service advise the public to avoid the trails in 2010. From 2013 to 2016 the Service worked to rebuff the landowners' efforts and manage and maintain the trails. *See* Ex. AA. During this period, the Service regularly advised members of the public that they

[2] The FSM is available online at: https://www.fs.fed.us/cgi-bin/Directives/get_dirs/fsm?2700!..

had access rights to the trails. *See id.* at 5, 8, 15, 34, 38, 40-43, 47. During this time, the Service also repeatedly informed the landowners that the public had access rights to the trails and that the landowners' attempted trail obstruction was "illegal." *Id.* The pubic continued to use the trails and the Service took steps to protect and defend that right of access, including clearing the trails and replacing National Forest signs. *See id.* at 37; Doc. 1 at ¶197. This is why *every* official visitor use map for the Crazy Mountains depicts the two trails as National Forest System trails. So too does the Service's current website: https://www.fs.fed.us/ivm/ (last visited July 17, 2019).

B. The Ibex project will result in irreparable harm.

The Service insists there is no irreparable harm because the project is only "a 24 inch-wide trail." The Ibex project, however, involves more, including using excavators to construct a new trail, logging, stream crossings, and blasting to remove rock. Ex. H at 3; Ex. 37 at 4. The finished tread will be 24 inches but the area cleared will be eight feet wide (four foot buffer on each side):



Ex. H at 40; Ex. 37 at 8. Most trees will be removed in this corridor and *all* trees – including mature and old growth trees – will be logged within at least a six foot wide corridor. Ex. 37 at 4-5. The project also involves obliterating the existing trails and abandoning easement interests. Ex. L at 49-50; Ex. A at 2.

This is not a large logging project but this is not a prerequisite for demonstrating irreparable harm. Irreparable harm is harm that is difficult to rectify or repair. It is common in logging cases but also found in other contexts. *See, e.g.*, *South Fork Band Council Of Western Shoshone v. USDOI*, 588 F.3d 718, 728 (9th Cir. 2009) (mining in streams); *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 642-43 (9th Cir. 2004) (packstock operations); *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 833 (9th Cir. 2002) (grazing). Avoiding irreparable in NEPA cases such as this is particularly important given the purpose

of the statue. *See Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1184-85 (9th Cir. 2011).

Here, plaintiffs demonstrated irreparable harm from: (a) the new trail construction, *see* Ex. S at ¶13, Ex. T at ¶14, Ex. R at ¶11,18; and (b) the obliteration and relinquishment of easements on existing trails, *see* Ex. S at ¶20, Ex. T at ¶14, Ex. U at ¶9, Ex. R at ¶18, and Ex. X at ¶8. The Service questions plaintiffs "actual inability" to use the area but the declarations speak for themselves. The Service also questions plaintiffs' "speculative" preference for the existing trails. But Mr. Goosey says he "won't be able to hike the new trail – a person 80 years old will have difficulty getting up that mountain." Ex. T at ¶14; *see also* Ex. U at ¶9; Ex. R at ¶18.

The Service's primary argument is that there can be no irreparable harm because the new trail can "be moved back to its original location." But moving the trail back does little to repair the damage caused by clearing, excavating, logging, and blasting needed to build the new trail. Once this activity occurs, it will be difficult to repair–at least not in the near term. Nor will it be easy to repair the obliterated trail or reacquire the relinquished easement, *see Kettle*

Range Conservation Grp. v. BLM, 150 F. 3d 1083, 1087-88 (9th Cir. 1998). This entire situation, however, can be easily avoided by granting this motion and preserving the status quo.

C. The balance of equities and public interest tip in plaintiffs' favor.

In terms of balancing, the Service does not allege any environmental, human health, or economic harm. Rather, the Service insists only that: (a) the new trail "is better" and "more scenic;" and (b) the project will preserve its "deal" with the landowners. Neither argument carries weight.

"Better" is subjective. Most who know and use the trails disagree with the Service's assertion that the new trail is better. *See* Ex. D. The Service emphasizes the ability to hike in a more remote and scenic setting but fails to mention that the existing Elk Creek trail and Trespass Creek trail already provide this experience. *See* Ex. C; Ex. S. There is no need for an additional trail. Nor has the Service explained why a temporary delay would prohibit the building of a "better" trail in the future, after complying with the law.

The Service's interest in preserving its deal with landowners is equally unavailing. The landowners continue their efforts to illegally

obstruct public access. *See* Ex. AA. Up until the summer of 2017, the Service pushed back against these efforts. *Id.* But in 2017, the Service changed tactics and engaged in closed-door meetings with the landowners without public input. When viewed in this context, the "deal" with the landowners undermines the public interest by rewarding them for their illegal behavior. This sets a dangerous precedent for other public trails. *See* Ex. AA at 25; Ex. U at ¶¶8-10.

Finally, the Service provided no evidence that a temporary halt to the project would undermine the landowner deal. The Ibex project is not time sensitive and there is no reason why it cannot be put on hold until the parties are given the opportunity to review a record, conduct discovery, and brief the matter on the merits.

CONCLUSION

For the forgoing reasons, this Court should grant plaintiffs' motion.

Respectfully submitted this 19th day of July, 2019.

/s/ Matthew K. Bishop
Matthew K. Bishop

/s/ Michael Kauffman
Michael Kauffman

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of July, 2019, I filed a copy of this document electronically through the CM/ECF system, which caused all ECF registered counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/ Matthew K. Bishop
Matthew K. Bishop

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 3,250 words. I relied on Microsoft Word to obtain the word count.

/s/ Matthew K. Bishop
Matthew K. Bishop