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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
GREAT FALLS DIVISION

RUSSELL COUNTRY SPORTSMEN, ) No. 4:08-cv-64-SEH  
MONTANA TRAIL VEHICLE RIDERS )  
ASSOCIATION, GREAT FALLS ) Judge Sam E. Haddon  
TRAIL BIKE RIDERS ASSOCIATION, )  
MEAGHER COUNTY LITTLE BELTERS, ) FEDERAL DEFENDANTS'  
GREAT FALLS SNOWMOBILE CLUB, ) STATEMENT ON REMEDY,  
TREASURE STATE ALLIANCE, ) NOTICE OF  
MOTORCYCLE INDUSTRY COUNCIL, ) CONVENTIONAL FILING,  
) AND [PROPOSED] ORDER  
(more parties on next page) )

SPECIALTY VEHICLE INSTITUTE )  
OF AMERICA; AND THE )  
BLUERIBBON COALITION, )

Plaintiffs, )

THE UNITED STATES FOREST )  
SERVICE, )  
THE LEWIS AND CLARK NATIONAL )  
FOREST, AND )  
LESLEY W. THOMPSON, )  
Forest Supervisor, )

Defendants, )

MONTANA WILDERNESS )  
ASSOCIATION, )

Defendant-Intervenor. )

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**TABLE OF ACRONYMS/ TERMS**

APA	Administrative Procedure Act
AR	Administrative Record
AR-[alpha]-x-y	Citation to Administrative Record item [alpha]-x, page y.
The DEIS	The Draft Environmental Impact Statement for the Little Belt, Castle, and North Half Crazy Mountains Travel Management Plan
EIS	Environmental Impact Statement
FEIS	The Final Environmental Impact Statement for the Little Belt, Castle, and North Half Crazy Mountains Travel Management Plan
FS	Forest Service
The Judith WSA	Middle Fork Judith Wilderness Study Area
MWSA	The Montana Wilderness Study Act, Pub. L. 95- 150, 91 Stat. 1243 (Nov. 1, 1977)
NEPA	National Environmental Policy Act
NWPS	National Wilderness Preservation System
Pls.' Mem.	Pls.' Mem. in Supp. of Mot. For Summ. J.
Pls.' Reply	Pls.' Response/Reply Mem. on Cross-Mots. for Summ. J.
The Roadless Rule	Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244 (Jan. 12, 2001)
ROD	Record of Decision
Travel Plan	The decision chosen in the ROD
WSA	Wilderness Study Area

## INTRODUCTION

On March 10, 2010, this Court resolved many of the legal issues Plaintiffs raised in objection to the travel plan for the Little Belt, Castle, and North Half Crazy Mountains Final Environmental Impact Statement (FEIS) and Record of Decision (the 2007 Travel Plan, the Decision, or the ROD). Memo. and Order (Mar. 10, 2010), Docket Number (Dkt.) 45. This Court requested the parties to file statements on remedy. *Id.*

The Court has three categories of relief available to it: vacatur, narrowly tailored injunctive relief, and declaratory relief. Here, the Forest Service proposes a carefully designed and narrowly tailored remedy that would restore the dispersed camping provision and would return, to the extent practical, particular trails to their designations under the 1988 Travel Plan, as amended (the 1988 Travel Plan). Those changes would meaningfully remedy the violations the Court identified during the interim period while the Forest Service completes additional review under the National Environmental Policy Act, 42 U.S.C. § 4321-4375 (NEPA). The Forest Service's proposal protects vulnerable natural resources while allowing broader motorized recreational use of the area. Vacatur would be an unduly drastic remedy for the violations and would not protect the natural resources that would be at risk under the 1988 Travel Plan. For these reasons, this Court should enter the narrowly

tailored injunctive relief the Forest Service has designed and is recommending.

## **BACKGROUND**

The 2007 Travel Plan changed the motorized and non-motorized recreational travel patterns for the Little Belt, Castle, and North Half Crazy Mountain Ranges in the Lewis and Clark National Forest. Plaintiffs challenged the Decision based on various NEPA challenges and a challenge under the Montana Wilderness Study Act, Pub. L. 95-150, 91 Stat. 1243 (Nov. 1, 1977) (MWSA), among other challenges. Compl., Dkt. 1. The Montana Wilderness Association intervened as a defendant. Order (Dec. 30, 2009), Dkt. 12.

Following cross-motions for summary judgment, Dkts. 16, 23, oral argument, Dkt. 32, and supplemental briefing, Dkts. 33-38, 42-44, this Court granted Plaintiffs' motion for summary judgment and denied the Forest Service's cross-motion for summary judgment. Dkt. 45.

In the Order resolving the cross-motions, the Court identified five flaws in the Forest Service's process. First, the Court found that the Decision shortened the winter recreation season from May 15 to May 1, although no alternative in the Draft Environmental Impact Statement (DEIS) identified the May 1 end date. *Id.* at 6. Second, it concluded that the total mileage open for motorized recreational travel was smaller in the Decision than in the most restrictive alternative considered in the DEIS.

*Id.* at 9. Third, it held that the Decision was outside of the range of alternatives because it allowed dispersed camping only within “one vehicle-plus-trailer-length” of the routes instead of within 300 feet, which constituted the status quo and was proposed in all of the alternatives in the DEIS. *Id.* Fourth, it found that the 2007 Travel Plan closed four routes not closed in any alternative in the DEIS (the Four Trails). *Id.* at 5. Fifth and finally, the Court held that the Forest Service violated the MWSA by enhancing wilderness character in the Judith Wilderness Study Area (Judith WSA). *Id.* at 12. The Court has now requested the parties to file briefs as to the appropriate remedy.

### **ARGUMENT**

When a Court concludes that the administrative record does not support the agency’s action or that the agency has not considered all relevant factors, it has three categories of equitable remedies available. It can vacate the decision, provide narrowly tailored injunctive relief, or issue a declaration without setting aside the agency action. *See* 5 U.S.C. § 703 (authorizing a suit for declaratory or injunctive relief); *Nat’l Wildlife Fed’n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995) (“Although the district court has power to do so, it is not required to set aside every unlawful agency action. The court’s decision to grant or deny injunctive or declaratory relief under the APA is controlled by principles of equity.”) (citations omitted),

**I. Vacatur is an inappropriate remedy because it could allow environmental harm to occur, and the NEPA violations are minor.**

The balance of the equities does not support vacatur of the 2007 Travel Plan pending the Forest Service's preparation of supplemental NEPA analysis. *See Idaho Farm Bureau v. Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) (“[W]hen equity demands, the regulation can be left in place while the agency follows the necessary procedures.”); *see, e.g., W. Oil & Gas Ass’n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980) (“guided by authorities that recognize that a reviewing court has discretion to shape an equitable remedy, we leave the challenged designations in effect.”) (citations omitted). In particular, before ordering vacatur, a Court should consider the environmental harm that could occur while the agency undertakes additional review, and the seriousness of the legal violations that the Court identified.

Courts in the Ninth Circuit have allowed certain actions to proceed, or to proceed in part, pending the completion of further court-required NEPA review. *See, e.g., N. Cheyenne Tribe v. Norton*, 503 F.3d 836, 844-45 (9th Cir. 2007) (allowing some oil and gas development to proceed pending completion of an EIS); *High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d 630, 638, 642-43 (9th Cir. 2004) (allowing limited access by commercial outfitters and guides to wilderness areas pending completion of further NEPA review); *Idaho Watersheds Proj. v. Hahn*, 307 F.3d 815, 833-34 (9th Cir. 2002) (allowing grazing activities to continue under conditions

proposed by agency pending further NEPA review).

The drastic remedy of vacatur would leave the sensitive area covered by the 2007 Travel Plan susceptible to environmental damage from recreational travel. Decl. of Thompson, ¶¶ 2-5, Ex. 1. If the Court returned all of the route designations to those in the 1988 Travel Plan, it would increase the sedimentation reaching streams, Decl. of Thompson, ¶ 3, it would reduce the elk security<sup>1</sup> during spring calving and during hunting season, *id.* at ¶ 4, and it would prohibit the Forest Service from restoring the westslope cutthroat trout species of concern to areas of their historic habitat. *Id.* at ¶ 5. Those adverse environmental effects, alone, show that vacatur is inappropriate in this situation. *Idaho Watersheds Project*, 307 F.3d at 833 (“simply ordering completion of the required environmental studies would not provide an adequate remedy because environmental harm . . . would continue during the [time] to complete the environmental studies.”).

Separately, in determining whether to leave an agency action in place pending further action by the agency, the Court should consider “the seriousness of the order’s deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.” *NRDC v.*

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<sup>1</sup> Elk security is “the protection inherent in any situation that allows elk to remain in a defined area despite an increase in stress or disturbance associated with the hunting season or other human activities.” AR-A-3-244 (quoting AR-N-122).

*U.S. Dep't of Interior*, 275 F. Supp. 2d 1136, 1143 (C.D. Cal. 2002) (quoting *Int'l Union, United Mine Workers v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 967 (D.C. Cir. 1990)); *see also Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (“the scope of injunctive relief is dictated by the extent of the violation established.”). Before remedying the violation through vacatur, a court should balance the equities and the public interest, consider the purposes of the statute at issue, and consider the potential harm to third parties from leaving the decision in place. *See Cent. Me. Power Co. v. FERC*, 252 F.3d 34, 48 (1st Cir. 2001); *NRDC*, 275 F. Supp. 2d at 1144.

Here, the relatively minor nature of the NEPA violations that the Court identified and “the disruptive consequences of an interim change that may itself be changed” counsels against vacatur. *NRDC*, 275 F. Supp. 2d at 1143. As to the end date for the winter season, during the appeal period, the Forest Service had changed the period for the winter recreation season back to the range considered in the DEIS, AR-R-7-3 (“Changing the end of cross country snowmobile use from May 1 back to May 15.”). Therefore, this can only be the most minor of violations.

In connection with the Forest Service’s designations of the Four Trails, the different motorized trail mileage, or the changes in the dispersed camping distances, the Forest Service had analyzed the effects of the 2007 Travel Plan in the ROD. *See generally* AR-A-4-13 to -42 (analyzing the effects of the travel plan that incorporated

changes to the Four Trails and the mileage for motorized users); AR-R-1-5 to -6 (explaining the analysis behind the new dispersed camping rule); *see also* AR-A-4-397 (summarizing comments); AR-Q-17-32; AR-I-e-5-44. “NEPA emphasizes the importance of coherent and comprehensive up-front environmental analysis to ensure informed decision making to the end that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.” *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1166 (9th Cir. 2003). *See Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978) (identifying the purpose of NEPA as “to insure a fully informed and well-considered decision”). Because the Forest Service had analyzed the effects of the Four Trails, the different motorized trail mileage, and the changes in the dispersed camping, the 2007 Travel Plan did not violate the spirit of NEPA that requires agencies to make informed decisions. Because the Forest Service had analyzed the environmental effects of these changes, the deficiencies are minor ones and are not the type of NEPA violations that require the drastic remedy of vacatur.

In the Judith WSA, one motorized trail along King Creek crossed the creek twenty-one times. AR-A-3-302; Decl. of Thompson, ¶ 10. The motorized recreational use there was disrupting the creek’s function and was increasing the sediment, which, in turn, was degrading westslope cutthroat trout rearing habitat. *Id.*

Because of that environmental harm, the Forest removed that trail soon after the Decision. Decl. of Thompson, ¶ 10. *See also* AR-A-4-292, 294, 296, 309. This Court should ratify that removal instead of issuing a vacatur.

In addition, vacatur of the entire 2007 Travel Plan would be overbroad to address the MWSA violations that are limited to the Judith WSA. That resolution would go well beyond the violations found by the Court.

For these reasons, this Court should not vacate the 2007 Travel Plan and return the recreational travel in that area to the obsolete 1988 Travel Plan.

**II. The Forest Service has designed a remedy to address the violations the Court found, and this Court should defer to its determination of the appropriate interim remedy.**

**A. Injunctive Relief, if ordered, must be narrowly tailored.**

An injunction is an “extraordinary remedy” that “should issue only where the intervention of a court of equity is essential in order effectually to protect against injuries otherwise irremediable.” *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (quotations, citations, and alterations omitted). In particular, “a NEPA violation is subject to traditional standards in equity for injunctive relief and does not require an automatic blanket injunction . . . .” *N. Cheyenne Tribe*, 503 F.3d at 842; *see also Winter v. NRDC*, 129 S. Ct. 365, 375 (2008). A party moving for injunctive relief carries a particularly heavy burden where the result of the injunction is to

impede the orderly administration of a governmental responsibility intended to serve the public interest. *Yakus v. United States*, 321 U.S. 414, 440 (1944); *Weinberger*, 456 U.S. at 312-313 (holding that a court may withhold relief when injunctive relief would harm the public interest even if doing so would burden the movant).

An injunction “is not a remedy which issues as of course” and “has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff.” *Weinberger* 456 U.S. at 311, 312 (citations omitted). “The grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law.” *Id.* at 313; *Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008) (“we decline to adopt a rule that any potential environmental injury automatically merits an injunction”).

To obtain a permanent injunction, a plaintiff must satisfy a four factor test by demonstrating “(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.” *eBay Inc. v. MercExchange*, 547 U.S. 388,

391 (2006); *N. Cheyenne Tribe*, 503 F.3d at 843; *Winter*, 129 S. Ct. at 374, 381 (applying the four factors to preliminary injunctions).

Even when injunctive relief is found appropriate, courts must narrowly tailor that relief to address the statutory violation, by taking into account the respective harms to the parties, the measures that can be taken to mitigate those harms, and the public interest. Through injunctive relief, courts should aim to develop a “‘nice adjustment and reconciliation’ between the [parties’] competing claims” of injury resulting from “the granting or withholding of the injunction,” by “balanc[ing] the conveniences of the parties and possible injuries to them” and “mould[ing] each decree to the necessities of the particular case.” *Weinberger*, 456 U.S. at 312 (citations omitted); *Orantes Hernandez v. Thornburgh*, 919 F.2d 549, 558 (9th Cir. 1990) (requiring injunctions to “be narrowly tailored to give only the relief to which plaintiffs are entitled.”).<sup>2</sup>

Courts in the Ninth Circuit have allowed certain actions to proceed, or to proceed in part, pending the completion of further court-required NEPA review. *See*,

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<sup>2</sup>*See, e.g., Winter*, 129 S. Ct. at 376-381. *See also Lewis v. Casey*, 518 U.S. 343, 359-360 (1996) (citing cases); *Yamasaki*, 442 U.S. at 702; *Friends of the Earth v. Laidlaw Emt'l Servs.*, 528 U.S. 167, 193 (2000) (holding that courts should ensure “the framing of relief no broader than required by the precise facts”); *Forelaws on Bd. v. Johnson*, 743 F.2d 677, 686 (9th Cir. 1984) (“NEPA, however, allows for some flexibility in remedy because Congress has mandated compliance with NEPA procedures ‘to the fullest extent possible.’”).

*e.g.*, *N. Cheyenne Tribe*, 503 F.3d at 844-45 (allowing some oil and gas development to proceed pending completion of an EIS).<sup>3</sup> As described further below, the Forest Service proposes an injunctive remedy that balances the hardships between the parties and promotes the public interest. This is the most appropriate remedy because it (1) addresses the violations that the Court identified, (2) provides for relief informed by the purposes and policies of NEPA and the MWSA, and (3) defers to the Forest Service's experts' conclusions on the environmental effects of the remedy. Therefore, this Court should enter an order providing for the following.

B. The Forest Service's Proposed Remedy

The Forest Service respectfully requests the Court to remand the 2007 Travel Plan to the Lewis and Clark National Forest to determine the timing, scope, and nature of further action. Until it completes that further action, the Forest Service respectfully requests the Court to issue an injunction ordering the 2007 Travel Plan to continue in place and to retain legal force and effect, except for certain interim route designations

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<sup>3</sup>*See also High Sierra Hikers Ass'n.*, 390 F.3d at 641-43 (9th Cir. 2004) (noting that district courts enjoy "broad latitude" to fashion relief, and upholding the district court's injunction because the "district court crafted a fair and balanced injunction that provided for interim relief for the environment pending compliance with NEPA and did not drastically curtail the packers' operations."); *Idaho Watersheds Project*, 307 F.3d at 823 ("The court . . . took what it considered to be a balanced approach . . ., which provided protection for the environment and allowed cattle grazing to continue.").

and the dispersed camping provision. The enumerated exceptions in this Statement, the Proposed Remedy Route Table, Ex. 2, and the attached map (the Summer Travel Map with Forest Service's Position on Remedy based on the Summer Travel - Map 5 Record of Decision Little Belt, Castle & North Half Crazy Mountain Ranges (the Map)), Ex. 3, describe the dispersed camping provision and the route designations that would revert, to the extent practical, to the designations in the 1988 Travel Plan. See DEIS, AR-A-2 (identifying the Summer Alternative 1 as the no-action alternative, which is the 1988 Travel Plan).

The following proposed exceptions to the summer decision of the 2007 Travel Plan include sections or complete routes from the following routes (as shown completely on the Map):

- (1) Reinstate the dispersed camping restriction to 300 feet as described in the Draft Environmental Impact Statement at page iv (AR-A-2-iv),
- (2) Deep Creek Park Area Trails, 303, 308, 309, 314, 317, 311, 301, 320, 307, 312, 339, 316, 352, and 306: open for motorcycle use (no date restrictions); Road 269 and Trail 338: open for ATVs and motorcycles (no date restrictions),
- (3) Trails 342, 712a, 724: open for motorcycle use (no date restrictions),
- (4) Roads 3384, 6464: open for licensed motorized use (no date restrictions),

- (5) Trails 407, 422, 428, 434, 436, 441, 442: open for motorcycle use (closed from October 15 to and including December 1),
- (6) Trail 444: open to ATVs and motorcycles (closed from October 15 to and including December 1),
- (7) Trails 435 and 443: open for motorcycle use (closed from October 15 to and including December 1),
- (8) Trail 458: open to ATVs and motorcycles (no date restrictions); Road 6392 open to licensed motorized use (no date restrictions),
- (9) Road 6534 from Ettien Ridge Road 821: open for all licensed motorized use (closed from December 1 to and including May 15),
- (10) Road 6545 from Ettien Ridge Road 821: open for licensed motorized use (closed from December 1 to and including May 15),
- (11) Road 2079 from Road 266: open for licensed motorized use (no date restrictions),
- (12) Road 6399 from Road 487: open for licensed motorized vehicles to Burnt Ridge as shown on the Map (no date restriction); Road 6398: open for licensed motorized vehicles from Burnt Ridge as shown on the Map (closed from October 15 to and including December 1),

- (13) Roads 6529 and 6530 from Road 6531: open for licensed motorized use (closed from December 1 to and including May 15),
- (14) Road 6419 east from the south boundary at Section 28: open for licensed motorized use (closed from October 15 to and including December 1),
- (15) Trail 716: open for motorcycle use (closed from September 1 to and including June 30).

The Map that the Forest Service is filing with this brief shows how these designations would change the 2007 Summer Travel Plan and provides a legend for those proposed routes to explain both the types of use and the dates of use for the particular trails. If the listed trail designation exceptions and the Map are inconsistent, the Forest Service expects that the designations on the Map would control. The Forest Service is also filing a Proposed Remedy Route Table that shows the differences between the routes under the 2007 Summer Travel Plan and the proposed remedy. In addition to filing the Map electronically, the Forest Service is conventionally filing one copy of the Map with an extra copy for the chambers.

C. The Forest Service's proposed remedy targets the statutory violations that the Court identified.

The Forest Service's proposed remedy would meaningfully address the violations of NEPA and the MWSA that the Court identified.

First, the Court found that the Decision shortened the winter recreation season

from May 15 to May 1, although no alternative in the DEIS used a May 1 end date. *Id.* at 6. This proposed remedy would leave the 2007 winter decision as amended in place for the period December 1 to and including May 15, as identified in the DEIS and in the agency's ultimate decision. *See* AR-R-7-3 (returning the winter period "from May 1 back to May 15.").

Second, the Court concluded that the Decision reduced the total mileage open for motorized travel below the most restrictive alternative considered in the DEIS. Order at 9. This proposed remedy would increase the total mileage open for motorized travel from the 2007 summer decision by allowing motorized use to resume on certain trails the Forest Service understands are important to Plaintiffs.

Third, the Court held that the Decision was outside of the range of alternatives because it allowed dispersed camping only within "one vehicle-plus-trailer-length" of the routes instead of within 300 feet, which constituted the status quo and was proposed in all of the alternatives in the DEIS. *Id.* The Forest Service's proposed interim remedy would allow dispersed camping within 300 feet of all routes.

Fourth, the Court found that the 2007 Travel Plan closed the Four Trails. *Id.* at 5. This proposed remedy would reopen the Four Trails allowing the same uses allowed under the 1988 Travel Plan.

Fifth and finally, the Court held that the Forest Service violated the MWSA by

enhancing wilderness character in the Judith Wilderness Study Area. *Id.* at 12. This proposed remedy would re-open several of the trails in the Judith WSA to the motorized use under the designations they bore in the 1988 Travel Plan: 407, 409, 422, 428, 433, 434, 441, 442, 444, 2079, 6398, 6399, 6418, 6529, 6530, and 6534.

By making targeted changes to the 2007 Travel Plan specifically designed to address the violations that the Court identified, the Forest Service's proposed remedy would narrowly tailor the remedy appropriately.

D. The Forest Service's proposed remedy protects the vulnerable natural resources.

As a general matter, in exercising equitable discretion, a Court should consult and consider the purposes and policies of the statute it is enforcing. *See, e.g., Hecht Co. v. Bowles*, 321 U.S. 321, 330-31 (1944); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496-498, n.9 (2001). If the relevant statute does not mandate an immediate prohibitory injunction for every violation, courts have the discretion to fashion more tailored relief to secure prompt compliance with the statute while accounting for other factors in the equitable calculations. In *Weinberger*, for example, the Court held that, instead of enjoining the challenged activity because of a violation of the Clean Water Act, a court could "order that relief it considers necessary to secure prompt compliance with the Act" by directing the agency to apply for a permit for the activity at issue. 456 U.S. at 320. The Court took a similar

approach in *Amoco Production Co.*, see 480 U.S. at 541-546, by noting that the district court's decision not to enjoin all oil exploration activities until the United States Department of the Interior completed a study of potential impacts on subsistence uses under the relevant statute "did not undermine" the policy of that statute. *Id.* at 544-546; see *Oakland Cannabis Buyers' Coop.*, 532 U.S. at 498 n.9.

A similar approach is warranted in appropriate circumstances under NEPA. Choosing a decision outside the alternatives analyzed in the DEIS does not necessarily require an injunction forbidding all action. As the Supreme Court has noted, the purpose of NEPA is to "ensure[] that [a federal] agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Marsh*, 490 U.S. at 371; see *Winter*, 129 S. Ct. at 376; *Methow Valley Citizens Council*, 490 U.S. at 349; *Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 558. During the preparation of an EIS, an agency may not take any action in connection with the implicated activity that would "[h]ave an adverse environmental impact" or would "[l]imit the choice of reasonable alternatives." 40 C.F.R. § 1506.1(a); see also *Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 203 (4th Cir. 2005) ("CEQ regulations and our own caselaw make clear that agency action prior to completing a sufficient environmental study violates NEPA only when it actually damages the environment or 'limit[s] the choice of reasonable alternatives.'" (citation omitted). Consistent with the NEPA

regulations, a court should not enter a broad injunction if an agency can show that the actions it will take while it supplements its NEPA review will not materially harm the environment and will leave open a reasonable range of alternatives for final agency decision. And in determining whether the agency has satisfied this standard, the court should take into account whether there is “little if any information about prospective environmental harms” in the case, or whether there already is a body of data and experience relating to the environmental and other consequences of the governmental action. *Winter*, 129 S. Ct. at 376.

The Forest Service’s proposed remedy implements the spirit of NEPA by targeting particular trails and the dispersed camping provision and by returning those trails and that provision, to the extent practical, to the 1988 Travel Plan. The Forest Service has recently analyzed the 1988 Travel Plan through Alternative 1 of the NEPA process for the 2007 Travel Plan, and that information allows it to act in an informed manner and decreases the possibility of unforeseen consequences. *See Marsh*, 490 U.S. at 371.

The design of the Forest Service’s proposed remedy would decrease “adverse environmental impact[s],” 40 C.F.R. § 1506.1(a), over vacatur. *See Decl. of Thompson*, ¶¶ 2-5. As shown above, returning these route designations to those in the 1988 Travel Plan would increase the sedimentation reaching streams, *Decl. of*

Thompson, ¶ 3, reduce elk security, *id.* at ¶ 4, and prohibit the Forest Service from restoring the westslope cutthroat trout in those areas. *Id.* at ¶ 5. The Forest Service’s proposed remedy would alleviate those environmental harms in the areas still covered by the 2007 Travel Plan and allow certain other mitigation measures to go forward. Decl. of Thompson, ¶¶ 2-5. Because any future travel plan could change the routes for allowing access, the Forest Service’s proposed remedy would not “[l]imit the choice of reasonable alternatives.” *See* 40 C.F.R. § 1506.1(a).

The Forest Service’s proposed interim remedy would promote the goals of the MWSA by ratifying the removal of the King Creek Trail in the Judith WSA to maintain wilderness character. *See* MWSA § 3. As explained above, the King Creek trail, which was designated for motorized use, crossed the creek twenty-one times. AR-A-3-302; Decl. of Thompson, ¶ 10. The motorized recreational use disrupted the creek’s function, and increased the sediment falling into the creek, which degraded the westslope cutthroat trout rearing habitat there. *Id.*; Decl. of Thompson, ¶ 10. *See also* AR-A-4-292, 294, 296, 309. By causing erosion, the motorized use along King Creek was decreasing the wilderness character in that area. Other than that change, the proposed remedy is similar to the 1988 Travel Plan. Because the proposed remedy would contribute to “maintaining” the wilderness character in the Judith WSA, would reduce environmental impacts, and would allow the Forest Service to continue its

mission, the proposed remedy advances the policies in the MWSA.

For these reasons, the Forest Service's proposed remedy conforms to the purpose and policy of both NEPA and the MWSA, so it is an appropriately narrow design of injunctive relief.

E. The Forest Service's experts have concluded that this interim remedy would appropriately balance the needs of the motorized users with the protection of the natural resources.

Because of the Forest Service's regulatory experience with recreational travel on national forests, it is uniquely situated to offer a proposed interim remedy while it conducts additional NEPA review.<sup>4</sup> The Forest Service's proposed remedy reflects the reasoned input of its experts and deserves the deference of the Court. *See, e.g., Idaho Watersheds Proj.*, 307 F.3d at 831 (upholding district court's decision to reject "drastic" remedy urged by plaintiffs and deferring to agency expertise in adopting an interim remedy crafted by the agency); *see also Marsh*, 490 U.S. at 378 ("[W]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts."); *Balt. Gas Co. v. NRDC*, 462 U.S.

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<sup>4</sup> Deferring to the Forest Service to determine the interim remedy is consistent with Supreme Court precedent that declares that "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). As it would on simple remand, the Court should leave it to the agency's discretion to decide how to respond to the Court's order.

87, 101, 103 (1983). That deference is due even when an agency has initially failed to comply with procedural requirements established by statute. *See Brock v. Pierce County*, 476 U.S. 253, 260 (1986) (the Court “would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake”); *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 157-163 (2003).

NEPA does not require the Court to issue a permanent injunction that would curtail all ongoing activities. *See Sierra Club v. Bosworth*, 510 F.3d 1016, 1034 (9th Cir. 2007) (recognizing that “many individual projects already have been approved and are in the operational stages” and remanding to the district court to determine the appropriate scope of an injunction); *Or. Natural Res. Council Fund v. Goodman*, 505 F.3d 884, 898 (9th Cir. 2007) (noting that “this is not a case where an injunction would halt ongoing economic activity but would simply delay the expansion of an existing facility”). Courts favor “[n]arrow, curative remedies that do not prohibit the agency from acting . . . .” *Sierra Forest Legacy v. Rey*, No. 2:05-cv-00211-MCE-GGH, 2009 U.S. Dist. LEXIS 102593, \*9 (E.D. Cal. Nov. 3, 2009).

Here, the Forest Service has balanced the environmental effects of its proposed remedy against vacatur with a return to the pre-2007 status quo, and concluded that

its proposed remedy is superior. In addition to reducing sediment reaching streams, improving elk security, and improving westslope cutthroat habitat, its proposed remedy would (1) open more loop opportunities for motorized users, (2) open more opportunities for unlicensed drivers and unlicensed vehicles to use Forest Service roads, (3) increase opportunities for solitude in recreation, and (4) leave in place the winter decision to which the Forest Service, Montana Snowmobile Association, and MWA have all agreed. Decl. of Thompson, ¶¶ 6-9. This Court should defer to the Forest Service's expertise in this area and allow it to implement this proposed remedy. *See Bosworth*, 510 F.3d at 1034; *Goodman*, 505 F.3d at 898.

The Forest Service's proposed remedy would balance the hardships between the parties and would promote the public interest by meaningfully addressing the violations the Court identified, by protecting vulnerable natural resources, by fulfilling the purpose and policies in NEPA and the MWSA, and by allowing currently scheduled Forest Service rehabilitation activities to continue. Therefore, the Forest Service's proposed remedy is the most appropriate remedy.

**III. The Forest Service's proposed remedy is superior to MWA's proposed declaratory relief.**

The MWA recommended the Court enter declaratory relief under 5 U.S.C. § 703, and recommend the Court allow the 2007 Travel Plan to remain in place while the Forest Service completes any additional analysis. Defendant-Intervenor's

Statement of Position as to Remedy, Dkt. 50. The Forest Service's proposed remedy accomplishes goals similar to those identified by the MWA, and more.

Both remedy proposals leave in place the winter decision of the 2007 Travel Plan. The winter decision is supported by the motorized and non-motorized users and was not challenged in this action. Both remedy proposals also leave in place the new routes that the Forest Service has built or rehabilitated, and allow the Forest Service to continue rehabilitating the trails it had scheduled for rehabilitation. Decl. of Thompson, ¶ 7; *see also* Letter from Lesley W. Thompson to Mark Good (Mar. 30, 2010), Dkt. 50-1.

Nevertheless, the Forest Service's proposed remedy would accomplish two additional goals that MWA's proposal does not. First, the Forest Service's remedy proposal would ameliorate the Plaintiffs' members' loss of recreational motorized access. Second, during the interim period while it completes additional analysis under NEPA, the Forest Service's remedy proposal meaningfully addresses the violations the Court identified. MWA's proposal makes no attempt to address the Court's concerns about the Four Trails, the volume of trails available for recreational motorized use, the dispersed camping provision or access in the Judith WSA. The Forest Service's proposal addresses these issues by returning the Four Trails to their designations under the 1988 Travel Plan, increasing the volume of trails available for

recreational motorized use, restoring the dispersed camping provision to 300 feet, and restoring some motorized access in the Judith WSA.

While facilitating the motorized recreational use of the area, the Forest Service's proposed remedy continues to protect vulnerable natural resources that would be at risk without the protections provided by the 2007 Travel Plan. *See* Decl. of Thompson, ¶¶ 2-5.

The Forest Service's proposed remedy best enables the Forest Service to continue to manage the routes and trails in the Little Belt, Castle, and north half of the Crazy Mountains in an effective manner. Thus, the Forest Service's proposed remedy is a "fair and balanced injunction that provide[s] for interim relief for the environment pending compliance with NEPA" while not unduly curtailing other uses. *High Sierra Hikers Ass'n*, 390 F.3d at 642-43. It is just the type of narrowly tailored relief the Ninth Circuit encourages. *See Orantes-Hernandez*, 919 F.2d at 558.

### **CONCLUSION**

For the foregoing reasons, the Forest Service respectfully requests the Court to enter its proposed order leaving in place the 2007 Travel Plan with the exceptions enumerated above while allowing the agency to take steps to remedy the deficiencies identified by the Court.

Respectfully submitted, June 18th, 2010,

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## CERTIFICATE OF COMPLIANCE

This Reply complies with the word limits of L.R. 7.1(d)(2). This brief contains 5,650 words, excluding caption, tables, and the certificate of compliance. I relied on the word count of WordPerfect to calculate the number of words in the document.

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