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

RUSSELL COUNTRY SPORTSMEN;)
MONTANA TRAIL VEHICLE RIDERS ASS'N;)
GREAT FALLS TRAIL BIKE RIDERS ASS'N;)
MEAGHER COUNTY LITTLE BELTERS;)
GREAT FALL SNOWMOBILE CLUB;)
TREASURE STATE ALLIANCE;)
MOTORCYCLE INDUSTRY COUNCIL;)
SPECIALTY VEHICLE INSTITUTE OF)
AMERICA; THE BLUERIBBON COALITION;)

Plaintiffs,)

v.)

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

Defendants,)

and)

MONTANA WILDERNESS ASSOCIATION,)

Defendant-Intervenors.)

Case No. CV-08-64-GF-SEH

PLAINTIFFS' STATEMENT
ON REMEDY

INTRODUCTION

The Court ruled on the merits on March 10, 2010 (Doc. No. 45) and determined that Defendants' 2007 Travel Plan for the Little Belt, Castle, and North Half Crazy Mountains violated procedural requirements of the National Environmental Policy Act ("NEPA") and substantive requirements of the Montana Wilderness Study Act of 1977 ("MWSA"). The Court further directed the parties to submit positions on the appropriate remedy.

Plaintiffs, Russell Country Sportsmen et al. have been involved in detailed negotiations and exchanges of information involving all parties, and believe they have reached substantial agreement with Defendants on the appropriate remedy in this case. That remedy is detailed in this memorandum and the attached map. It is significant that the primary parties substantially agree on a remedy which is faithful to this Court's ruling on the merits, the guiding legal principles, the integrity of the ongoing administrative process, and the duty to conserve the human environment. The Court should adopt the proposed remedy submitted by Plaintiffs, which counsel believes is substantially similar, if not identical, to that submitted by Defendants.

LEGAL STANDARD

The Court has broad discretion in formulating an appropriate remedy.

The judicial review provisions of the Administrative Procedure Act (“APA”) provide the starting point of the remedy analysis, and provide that a reviewing court “shall set aside agency action found to be...arbitrary and capricious....” 5 U.S.C. § 706(2). Where procedural rights such as those under the APA and NEPA are involved, the appropriate remedy almost always begins with remand to the agency for further analysis to rectify the procedural violations.

An important question is the interim status of the invalidated order or decision pending remand. Many cases support the proposition that the invalid agency rule be vacated and that the rule previously in effect be reinstated. *See, e.g., California ex rel Lockyer v. U.S. Dept. of Agric.*, 459 F.Supp.2d 874, 916 (N.D.Cal. 2006), *aff’d*, 575 F.3d 999 (9th Cir. 2009) (citing *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005)); *Home Builders Ass’n of Northern California v. U.S. Fish and Wildlife Svc.*, 268 F.Supp.2d 1197, 1239 (E.D. Cal. 2003).

Additional principles guide formulation of injunctive relief, if any, to impose during remand. An injunction is not automatic, for “a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law.” *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). The Supreme Court has reiterated that the necessity and scope of injunctive relief is guided by a four-factor test, requiring a movant show “(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); *Winter v. NRDC*, 129 S. Ct. 365, 374, 381 (2008) (applying the four factors to preliminary injunctions).

Broad options exist in issuing appropriate injunctive relief, for district courts “retain equitable powers to shape an appropriate remedy.” *Friends of the Wild Swan v. U.S. EPA*, 74 Fed.Appx. 718, 721 (9th Cir. 2001); *see also, High Sierra Hikers Ass’n v. Powell*, 2001 WL 1382176 at *6 (N.D.Cal. 2001), *aff’d*, 390 F.3d 630 (9th Cir. 2004) (finding NEPA violation and imposing “a combination and refinement of remedies” designed “to mitigate the impact on the environment pending compliance with NEPA.”). In this context, the “environment” as defined by NEPA is the “human environment” which “shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment.” 40 C.F.R. § 1508.14; 42 U.S.C. § 4332(2)(C).

PROPOSED REMEDY

Plaintiffs and Defendants have carefully considered both the law and the practical implications of any remedial options in substantially agreeing on a proposed remedy here. While the parties are not filing a joint statement, Plaintiffs

believe that Defendants will submit a proposed remedy substantially similar, if not identical, to Plaintiffs'. Plaintiffs therefore propose that the Court remand the 2007 Travel Plan to the Lewis and Clark National Forest to determine the timing, scope, and nature of further agency review and action. Pending such further agency action, the Court should issue an injunction ordering the 2007 Travel Plan to continue in place and retain legal force and effect, except for certain interim route designations and the dispersed camping provisions. The enumerated exceptions are identified below in this memorandum, and depicted on the accompanying map (Ex. 1 the Summer Travel Map with Forest Service Position on Remedy derived from the Summer Travel - Map 5 Record of Decision Little Belt, Castle & North Half Crazy Mountain Ranges ("the Map")). In short, the Map depicts the specific route designations which would revert, to the extent practicable, to the designations in the 1988 Travel Plan as amended. *See* DEIS, AR-A-2 (identifying Summer Alternative 1 as the no-action alternative).

These proposed exceptions to the summer decision of the 2007 Travel Plan are:

- (1) Reinstate the dispersed camping restriction to 300' 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),¹
- (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 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 Etti Ridge Road 821: open for all licensed motorized use (closed December 1 to and including May 15),
 - (10) Road 6545 from Etti Ridge Road 821: open for licensed motorized use (closed 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 October 15 to and including December 1),
 - (13) Road 6529, 6530 from Road 6531: open for licensed motorized use (closed December 1 to and including May 15),

¹ Portions of Trails 301, 306, 307, and 311 will have designations that differ from both the 1988 Travel Plan as amended and the 2007 Travel Plan. The new designations would allow motorcycle access all year although the old designations allowed access only part of the year.

- (14) Road 6419 east from the south boundary at Section 28: open for licensed motorized use (closed October 15 to and including December 1),
- (15) Trail 716: open for motorcycle use (closed September 1 to and including June 30).²

The Map which Plaintiffs are filing (which has been provided by the Forest Service) shows how these designations 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. In the event that any of the narrative descriptions or tabular summaries of the route designations are inconsistent with the Map, the designation(s) on the Map are intended to control.

ARGUMENT

The proposed remedy will meaningfully address the violations of NEPA and the MWSA that the Court identified. First, this proposed remedy leaves the 2007 Winter Decision as amended in place for the period December 1 to and including May 15, as identified in the Draft Environmental Impact Statement and the agency's ultimate decision. *See* AR-R-7-3 (returning the winter period "from May

² This portion of Trail 716 will have a designation that differs from both the 1988 Travel Plan as amended and the 2007 Travel Plan. It restricts the dates to conform to the dates of use in the connecting trails.

1 back to May 15.”).³ Second, it increases the total mileage open for motorized travel from the 2007 Summer Decision by allowing motorized use to resume on certain trails important to Plaintiffs. However, this increased mileage is far below that identified as problematic by the Court – i.e. the proposed remedy would allow more motorized access than the Forest’s Decision but does not seek to recover the “nearly thirty percent [reduction] beyond the most restrictive DEIS alternative....” Order (Doc. No. 45) at 9. Third, the proposed interim remedy allows dispersed camping within 300' of all routes, which was considered in the DEIS and was the status quo before the 2007 Travel Plan. Fourth, it opens the routes in the ROD that were not closed in any alternative in the DEIS. *Id.* at 5, n.2. Fifth and finally, it re-opens several (but by no means all) of the trails in the Montana Wilderness Study Act to motorized use under the designations they bore in the 1988 Travel Plan, as amended.

Plaintiffs’ proposed remedy accomplishes most of the goals identified by the MWA and accomplishes two additional goals. Plaintiffs’ proposed remedy (1) would meaningfully cure the five violations the Court identified and, (2) during the summer months, it would allow Plaintiffs (and the general public) to enjoy greater access (but less than that preceding the 2007 Decision) along on a broader system

³ The parties recognize and acknowledge that nothing in the Parties’ proposal precludes further discussion or analysis of specific aspects of the winter decision as is consistent with normal agency procedures and the implementation process.

of trails in the Forest. MWA's proposal would not accomplish these goals. In fact, imposition of either the 2007 Travel Plan, or the 1988 Travel Plan, would disserve NEPA and other applicable law by increasing adverse impacts to the human environment, and would provide no meaningful remedy for both the procedural and substantive violations identified by the Court.

Plaintiffs' proposal leaves in place the bulk of the 2007 Travel Plan, including many closures to pre-existing motorized access. It leaves unchanged any new routes that the Forest Service has built and the routes that the Forest Service has rehabilitated of concern to MWA. Plaintiffs' proposal better enables the Forest Service to continue managing the routes and trails in the Little Belt, Castle, and north half Crazy Mountains in an effective manner. In summary, Plaintiffs' (and Defendants') proposal addresses any concerns raised by MWA, and more, in facilitating proper Forest Service management and conservation of the human environment.

CONCLUSION

For the foregoing reasons, in addition to any presented at the hearing scheduled for July 2, 2010, Plaintiffs respectfully request the Court adopt their proposed remedy in this case, which is substantially the same as (if not identical to) that proposed by Defendants.

Respectfully submitted this 18th day of June, 2010.

MOORE SMITH BUXTON & TURCKE, CHTD.

/s/ Paul A. Turcke

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/s/ Robert T. Cameron

Robert T. Cameron

William P. Horn

Of Attorneys for Plaintiffs

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Local Rule 7.1(d)(2)(E), that the foregoing document was created in Times New Roman font, 14 point, and contains 1,891 words, excluding captions and this certificate. I relied on Microsoft Word in determining the above-stated word count.

/s/ Paul A. Turcke

Paul A. Turcke