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14 **IN THE UNITED STATES DISTRICT COURT**
15 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

16 CENTER FOR SIERRA NEVADA
17 CONSERVATION, CENTER FOR BIOLOGICAL
18 DIVERSITY, and FOREST ISSUES GROUP,
non-profit corporations,

19 Plaintiffs,

20 vs.

21 RAMIRO VILLALVAZO, in his official capacity
as Forest Supervisor for the Eldorado National
22 Forest, UNITED STATES FOREST SERVICE,

23 Defendants,

24 *and*

25 CALIFORNIA ASSOC. OF 4 WHEEL DRIVE
26 CLUBS, *et al.*,

27 Defendant-Intervenors.
28

Case No. 2:09-cv-2523-LKK-JFM

**CONSOLIDATED RESPONSE TO
DEFENDANTS' AND DEFENDANT-
INTERVENORS' CROSS-MOTIONS FOR
SUMMARY JUDGMENT AND REPLY IN
SUPPORT OF PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

Hon. Lawrence K. Karlton

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1 **INTRODUCTION**

2 In Plaintiffs’ opening brief, Plaintiffs Sierra Nevada Conservation Center, Center for Biological
3 Diversity, and Forest Issues Group explained how Defendants’ Record of Decision (“ROD”), and the
4 Final Environmental Impact Statement (“FEIS”) for the Travel Management Plan (“TMP”) for the
5 Eldorado National Forest (“ENF”), as well as the denial of their administrative appeal of the Plan, fails
6 to comply with the National Environmental Policy Act (“NEPA”), the National Forest Management Act
7 (“NFMA”), the Endangered Species Act (“ESA”), and Forest Service travel management regulations.
8 The agency’s primary response to these arguments is simply to seek refuge behind a deferential standard
9 of review, imploring the Court to ignore the various “mistakes,” changes of standards, and gaps in
10 analysis because the agency is the expert. However, as explained below, deference cannot correct the
11 substantial legal failings in the travel plan, and the agency’s *post-hoc* rationalizations by agency counsel
12 cannot cure the violations of law Plaintiffs have identified. Therefore, the travel plan must be remanded
13 so that the agency can fully and adequately comply with the law.

14 **STANDARD OF REVIEW**

15 The parties agree that the Court’s review is based on the administrative record, employing the
16 Administrative Procedure Act’s (“APA”) standard of review. While that standard is deferential, *see*
17 Forest Service Summary Judgment Memorandum (“FS SJ Mem.”) at 7-9, the standard still requires a
18 “thorough, probing, in depth review.” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402,
19 415 (1971). The Court must determine whether the agency has articulated a “rational connection
20 between the facts found and the decision made,” *Gifford Pinchot Task Force v. U.S. Fish & Wildlife*
21 *Serv.*, 378 F.3d 1059, 1065 (9th Cir. 2004), and must reject the agency decision if it is based on an
22 erroneous interpretation of law or if the agency “entirely failed to consider an important aspect of the
23 problem or offered an explanation ‘that runs counter to the evidence before the agency,’” *League of*
24 *Wilderness Defenders v. Forest Serv.*, 549 F.3d 1211, 1215 (9th Cir. 2008).

ARGUMENT

A. The Eldorado Travel Plan Violates the Travel Management Rule and Is Therefore Unlawful.

Defendants, in their response brief, concede that they did not identify a minimum road system as is required by Subpart A of the Travel Management Rule. FS SJ Mem. at 22. As Plaintiffs explained in their opening brief, during the administrative process, Plaintiffs challenged Defendants' failure to identify a minimum road system pursuant to Subpart A, as defined in 36 C.F.R. § 212.5(b)(1). The Forest Service twice rejected these arguments by asserting that the agency had, in fact, made this determination, first in the FEIS' Response to Comments, EIS at C-14 (AR 002898),¹ and second in Defendants' decision – the final agency action – rejecting Plaintiffs' administrative appeal (AR 00822). As the appeal decision states, “the FEIS and ROD succeed *in designating a minimum system* as required by the Travel Rule and provide consideration of the need for maintenance and administration *of the designated roads and trails.*” (AR 00822, emphasis added).²

In their brief, Defendants' counsel now claims the agency's statements were “in error.” FS SJ Mem. at 22. Defendants have therefore reversed the position they established in their administrative appeal and the underlying NEPA analysis – *i.e.*, that they had in fact identified a minimum road system and that this determination satisfied Subpart A. This reversal alone is fatal to Defendants' case, meeting the definition of arbitrary and capricious action that must be “set aside.” 5 U.S.C. § 706(2). Instead of acknowledging this, Defendants' counsel mounts a new defense of the agency's travel management decision, premised on various permutations of the deferential review accorded to an agency's decision-making process and asserts that the Forest Service is not required to comply with Subpart A before Subpart B. *See, e.g.*, FS SJ Mem. at 17-22.

¹ Plaintiffs' opening brief inadvertently cited this record as AR 00822.

² The agency's use of the present tense, “FEIS and ROD *succeed in designating* a minimum system” (AR 00822), makes clear that the Forest Service's suggestion that the use of future tense in other portions of the appeal decision contemplates an event yet to occur, *see* FS SJ Mem. at 22. n.14, is without foundation.

1 However, Defendants cannot cure this error by changing position in legal briefing and
 2 contending that they need not complete a Subpart A determination prior to reaching a Subpart B
 3 determination. Such a change in position must be made, if at all, by the agency itself through a new
 4 administrative process which involves the public and provides the necessary “rational connection
 5 between the facts found and the decision made.” *Gifford Pinchot Task Force*, 378 F.3d at 1065; *see also*
 6 *Northwest Env'tl. Def. Ctr. v. BPA*, 477 F.3d 668, 687 (9th Cir. 2007) (“an agency changing its course
 7 must supply a reasoned analysis indicating that prior . . . standards are being deliberately changed, not
 8 casually ignored”). Further, the “cogent explanation” required of the agency must be grounded in the
 9 administrative record; “an agency’s action must be upheld, if at all, *on the basis articulated by the*
 10 *agency itself*,” not presented for the first time in an agency’s legal brief. *Motor Vehicle Mfrs. Ass’n v.*
 11 *State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 48 (1983) (emphasis added). Courts “may not accept
 12 . . . counsel’s *post hoc* rationalizations for agency action.” *Id.* Even if this were not the case, Defendants’
 13 newfound defense is, as explained below, unpersuasive.

14 **1. The Language and Context of the Travel Management Regulation Requires a**
 15 **Subpart A Minimum Road System Determination Before or Simultaneous with the**
 16 **Subpart B Route Designation Determination.**

17 Defendants argue that the “plain language” of the travel management rule does not mandate a
 18 Subpart A designation prior to Subpart B route designation, relying, again, largely on the deference that
 19 Defendants assume, wrongly, they are entitled to. FS SJ Mem. at 16-20.³ As discussed above, where the
 20 agency’s position is not supported in the record, deference is inappropriate.

21 ³ Defendants inject a red herring, making the argument that BLM travel management regulations impose
 22 a different, higher “impact minimization” requirement than do the Forest Service’s travel rules. FS SJ
 23 Mem. at 21-22. Defendants thereby assert that the decision in *Center for Biological Diversity v. BLM*,
 24 2009 U.S. Dist. LEXIS 90016 (N.D. Cal. Sept. 28, 2009), which found BLM failed to demonstrate that
 25 “minimization criteria were in fact applied when OHV routes were designated,” is not applicable to the
 26 facts of this case. However, Plaintiffs’ claim does not rest on the robust “impact minimization”
 27 requirement but, rather, on the proposition that Defendants cannot designate routes for motorized
 28 recreation use pursuant to Subpart B without first determining the minimum road system for the forest
 pursuant to Subpart A as the Subpart A determination provides a foundation relevant to all types of
 access and use of the forest. In any event, Defendants are simply wrong that BLM and Forest Service
 rules somehow differ in substance given that fact that both sets of rules derive from and must comply
 with the same language of section 3 of Executive Order 11644, as amended.

1 The purpose of Subpart A – “Road System Management” – of the travel management rules is to
2 determine a minimum road system for each national forest. This minimum road system establishes the
3 means for “safe and efficient travel and for [the] administration, utilization, and protection the natural
4 resources,” and must meet “resource and management objectives” laid out in the Forest’s management
5 plan. 36 C.F.R. § 212.5(b)(1). Further, section 212.5(b)(2) requires Forests to identify and
6 decommission unneeded roads.

7 The purpose of Subpart B – “Designation of Roads, Trails, and Areas for Motor Vehicle Use” –
8 is to designate specific roads, trails, and areas for motorized recreation use. *Id.* § 212.50(a). Subpart B
9 determines where a specific form of travel – motorized recreation – is permissible *within* the Subpart A
10 minimum road system, which has a broader focus than just motorized recreation use. Subpart A is thus a
11 prerequisite of Subpart B.

12 By making a Subpart B motorized recreation decision *prior* to the Subpart A minimum road
13 system determination, the agency has limited and undermined any subsequent Subpart A determination
14 by determining that some roads should be open for motorized vehicle use without first determining
15 whether the road should even be part of the system. In contrast, the regulations clearly contemplate that
16 the Subpart A review be completed first and look more broadly at all forest access issues. This analysis
17 may compel the agency to determine that a particular road is unnecessary for traveling the forest and, in
18 fact, the road may harm the forest’s resources such that it should be decommissioned. Here, however,
19 the Forest Service may have already condoned use of a road that should have been decommissioned.

20 It is this sort of problem that the travel management rules were designed to prevent.
21 Accordingly, to comply with the travel management regulation, a Forest must address and implement
22 the Rule as a unitary whole; both Subparts A and B must be implemented as part of a comprehensive
23 process in which knowledge of the minimum road system informs the specific, targeted decisions
24 pertaining to motorized recreation use. While neither Subpart A nor Subpart B contain specific language
25 regarding their sequence, the purpose and context of regulations nonetheless make clear that Subpart A
26 must precede Subpart B. While the words used in a law or rule, “even in their literal sense, are the
27 primary, and ordinarily the most reliable, source of interpreting the meaning of any writing . . . statutes
28

1 always have a purpose or object to accomplish, whose sympathetic and imaginative discovery is the
2 surest guide to their meaning.” *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 454-55 (1989);
3 *Wilderness Soc’y v. FWS*, 353 F.3d 1051, 1060 (9th Cir. 2003), *amended* 360 F.3d 1374 (terms in a
4 statute “must be read in their context and with a view to their place in the overall statutory scheme”).

5 As a further example, it is instructive to recognize the central role that road maintenance
6 backlogs played in the development of both the Subpart A and Subpart B regulatory structure. Here, had
7 the agency properly evaluated its road maintenance costs and backlog under Subpart A, the agency may
8 not have proposed to designate certain routes, particularly additional routes, pursuant to Subpart B.
9 Specifically, when it promulgated what is now Subpart A, the Forest Service recognized “the need to
10 better manage funds available for road construction, reconstruction, maintenance, and decommissioning
11 [and therefore] the final rule removes the emphasis on transportation development and adds a
12 requirement for science-based transportation analysis.” 66 Fed. Reg. 3206 (Jan. 12, 2001). Subpart A
13 was expressly based on the “critical need to address the road maintenance backlog on many National
14 Forests,” *id.* at 3214, and therefore Subpart A explicitly requires that the Forest Service’s minimum road
15 analysis “reflect long-term funding expectations.” 36 C.F.R. § 212.5.

16 Further, to guide application of the new rule, the Forest Service simultaneously but separately
17 announced a new interpretive policy to govern management of the national forest transportation system
18 (“Roads Policy”). 66 Fed. Reg. 3219 (Jan. 12, 2001). The Roads Policy called upon scientific analysis
19 and public involvement to provide a road system that is safe, responsive to user needs, environmentally
20 sound, *affordable*, and efficient to manage. *Id.* To address the backlog problem, the Road Policy
21 explicitly mandated “that the availability of road maintenance funding will be considered when
22 assessing the need for new road construction; and that, instead of focusing on constructing new roads,
23 emphasis will be given to reconstructing and maintaining classified roads while decommissioning
24 unnecessary classified and unclassified roads.” *Id.* Moreover, the continuing maintenance backlog was
25 an underlying factor for the TMR containing Subpart B when that was issued five years later. *See, e.g.*,
26 70 Fed. Reg. 68264, 68270 (Nov. 9, 2005). The agency stated: “Unfortunately, resources are still
27 limited, and the Forest Service has a substantial backlog of maintenance needs. . . . In some cases, an
28

1 extended lack of maintenance can lead to deterioration of a road or trail to the point that it must be
2 closed to address user safety or to prevent severe environmental damage.” *Id.*

3 Despite Forest Service’s repeated emphasis that transportation planning must not proceed
4 without first fully addressing the nature and scope of a Forest’s maintenance obligations, Defendants
5 admit that they not only labor under massive road maintenance backlogs and are inadequately funded to
6 support their road system, *see, e.g.*, FEIS 3-201 to -02 (AR 02698-99), but they are not even aware of
7 the scale and impact of the “deferred maintenance needs” on the ENF. FEIS 3-203 (AR 02700). Yet the
8 agency designates a 1,847 mile system under Subpart B, including adding miles of previously
9 unauthorized routes.

10 For example, the FEIS candidly acknowledges that “[t]he funds available for annual road
11 maintenance fall short of the estimated costs calculated for *any of the alternatives.*” FEIS xxxix (AR
12 02424) (emphasis added). Regardless, the alternative selected, Modified B, is the most expensive of the
13 action alternatives considered in detail, with a projected annual cost of \$3,328,000. *See* Table 3-K.5,
14 FEIS 3-208 (AR 02705). Unfortunately, the Forest Service admits that “the average spent by the Forest
15 on an annual basis was \$1,351,000, which falls short of the need calculated for any of the alternatives.”
16 *Id.* Accordingly, Defendants’ data projects an annual road maintenance deficit of approximately 2
17 million dollars, or approximately 150% of the amount historically available.⁴

18
19 ⁴ Defendants suggest that they have a “strategy” to address this deficit. FEIS at 3-209 (AR 02706). This
20 “strategy” consists of: (1) “reducing maintenance levels on some roads in the future”; (2) requesting
21 unspecified “FERC licensees” to “pay their fair share of the maintenance on the roads they use”; (3)
22 seeking various unspecified grants from unidentified sources, and; (4) “build on the public’s interest in
23 volunteering.” *Id.* However, none of these options offer a reasonable solution to the budgetary crisis
24 burdening the ENF transportation system. For example, administratively “reducing maintenance levels”
25 on “some roads” — without actually closing and decommissioning the roads— is simply an accounting
26 contrivance which reduces the “book” cost of keeping the roads open while providing no protection to
27 threatened resources. The “FERC licensee” option is essentially an unrealistic request for voluntary
28 contributions from parties not obligated to comply. While there *is* objective data pertaining to the grant
funding option (the only element of Defendants “deficit strategy” for which concrete funding data is
available), that information establishes that for the five years prior to the issuance of the ROD in this
case, the ENF secured an annual average of only \$271,000 in grant monies. Table 3-K.1, FEIS 3-202
(AR 02699). Finally, the same table shows a zero dollar value for the “volunteer” option for each of the
five years preceding the challenged decision. *Id.* Defendants’ “strategy” to address the road maintenance
budget deficit is merely a chimera and is not adequately addressed or explained in the FEIS.

1 Directly consequent to the maintenance funding deficit is the ENF's road maintenance backlog.
 2 FEIS 3-203 (AR 02700) ("Deferred maintenance needs exist on the Eldorado, but we lack the data to
 3 accurately calculate that need."). "There are indicators that strongly support the statement that the Forest
 4 has a Deferred Maintenance backlog." *Id.* Among such indicators is a 2005 survey that estimated a
 5 deferred maintenance backlog for ML-5 asphalt roads of \$3.4 million, projected to increase to \$11.5
 6 million in 2010. *Id.* This applies only to ML-5 roads and does "not include what we would need to
 7 spend on the remainder of our road system." *Id.* Nothing in the record suggests that Defendants have
 8 reduced this backlog. Moreover, data from the 2003 ENF Roads Analysis establishes that these budget
 9 and maintenance deficits are chronic and that "[r]oad maintenance funding is not adequate to maintain
 10 and sign roads to standard." *Id.* The report also identified adverse environmental and safety impacts
 11 from excess usage and lack of maintenance. *Id.*

12 The ENF, and its economically unsustainable and environmentally harmful motorized use
 13 system, presents a textbook example of the reason that the Subpart A minimum road determination must
 14 not occur after the Subpart B designation process. Inverting the order, as is being done here, prevents
 15 the transportation plan from "reflect[ing] long-term funding expectations" as is required by Subpart A.
 16 36 C.F.R. § 212.5. Had Defendants undertaken a Subpart A minimum road system determination first,
 17 they would have necessarily included a cost/benefit analysis for all roads across the forest. Instead, they
 18 blithely forged ahead with a Subpart B travel planning process that expressly excluded consideration of
 19 ML-3 to -5 roads,⁵ FEIS xviii (AR 02404), and designated miles of ML-2 roads and trails for motorized
 20 use, thus exposing the ENF to crippling budgetary constraints undermining its administrative and
 21 resource protection duties.⁶

22
 23
 24 ⁵ These ML 3-5 roads are the most expensive to maintain. *See, e.g.*, FEIS 3-2095 (AR 02706).

25 ⁶ Neither the existence of, nor the adverse impacts flowing from, road maintenance budget deficits are
 26 speculative. As noted above, the ENF's admission that "[d]eferred maintenance needs exist on the
 27 Eldorado," FEIS 3-203 (AR 02700), is candid recognition that historical deficits, that are both chronic
 28 and acute, have prevented Defendants from performing needed road maintenance. Moreover, the 2003
 ENF Roads Analysis established that these budgetary shortfalls are causing adverse environmental and
 safety impacts. *Id.*

1 Consequently, the language and context of the travel management regulation requires the ENF to
 2 make the Subpart A minimum road system designation either before or as part of, the Subpart B
 3 planning process. As noted above, Defendants appear to have recognized this requirement during the
 4 administrative process leading up to this case when they twice assured Plaintiffs that a minimum road
 5 system designation had, indeed, been made. (AR 00822; AR 002898).

6 **2. Subparts A and B Are Grounded in Interdependent Legal Authority and Are Not**
 7 **“Entirely Distinct.”**

8 Defendants defy logic by contending that Subpart A is somehow independent of Subpart B in
 9 terms of legal authority, and the determinations may therefore proceed on entirely separate tracks. FS SJ
 10 Mem. at 5-6, 17-18. But the legal authority for Subpart A is far broader than Defendants admit, and
 11 Subparts A and B are *both* derived from the Forest Service’s basic authority and duty to protect the
 12 forest resources. *Compare* 66 Fed. Reg. at 3216 (promulgating Subpart A regulations and citing
 13 “Authority” as 16 U.S.C. § 551, which requires agency to “make provisions for the protection [of] . . .
 14 the public forests and forest reservations [national forests]”) *with* 70 Fed. Reg. at 68,289 (promulgating
 15 Subpart B and also citing “Authority” as 16 U.S.C. § 551).

16 For example, in the 2001 Federal Register notice promulgating Subpart A, the Forest Service
 17 “explained that the road management initiative was a key element of the Forest Service Natural
 18 Resource Agenda [which] identifies long-term program emphasis areas for the Forest Service” including
 19 “calls for the agency to emphasize watershed health and restoration, sustainable forest management,
 20 recreation, and roads.” 66 Fed. Reg. at 3207. The Federal Register notice further provides that:

21 The Agenda is the cornerstone of the agency’s Strategic Plan prepared pursuant to the Forest and
 22 Rangeland Renewable Resources Planning Act and the Government Performance Results Act.
 23 The actions and goals articulated in the Natural Resource Agenda all fall within the mission
 24 assigned to the Forest Service through the Multiple-Use Sustained-Yield Act, the National Forest
 Management Act, and the other laws that establish the agency's mission and activities.

25 *Id.* While Subpart A is required to comply with the Federal-Aid Highway Act, it is not, as Defendants
 26 wrongly contend, “entirely distinct” from Subpart B from a legal perspective but, rather, the travel
 27
 28

1 management rules are a foundational element of a comprehensive travel management strategy consisting
2 of two, interdependent subparts. FS SJ Mem. at 17.

3 **3. The Popularity of Motorized Recreation Cannot Excuse Defendants' Failure to**
4 **Complete the Subpart A Minimum Road System Determination.**

5 Defendants also argue that because OHV use on National Forest lands is increasingly popular,
6 the agency should be excused from establishing a minimum road system at this time, lest it interfere
7 with their ability to produce a Subpart B OHV management plan. FS SJ Mem. at 18-19. Defendants,
8 however, have it backwards. The need to address increasing OHV activity on the ENF simply
9 emphasizes why it is so critical to comply with Subpart A prior to designating routes for motorized use
10 in accord with Subpart B; motorized recreation designations must be balanced with other Forest uses
11 and, in particular, Forest Plan objectives. That is the very purpose of Subpart A — to ensure a broad
12 perspective that puts in place a comprehensive, though minimum, road system to manage motorized
13 transportation on a forest and its use in light of other multiple uses and needed environmental resource
14 protections. OHV designations are derivative of that broader balancing, they do not (no pun intended)
15 *drive* the process.⁷

16 In fact, Defendants' brief itself offers an example of the drawbacks associated with “putting the
17 cart before the horse” by skipping the foundational Subpart A process. They assert that there “are many
18 routes on the ENF that served important recreational needs. Designating these routes [in the Subpart B
19 process] before conducting a Subpart A analysis will allow the Agency to consider recreational
20 objectives appropriately when it undertakes further efforts to identify the minimum road system.” FS SJ
21 Mem. at 19, n 13. However, the process contemplated by this statement would necessarily incorporate a
22 *fait accompli* — “the routes are needed because they are there” — that would render the Subpart A
23 process “an exercise in form over substance, and . . . a subterfuge designed to rationalize a decision
24 already made.” *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000). As the Ninth Circuit has
25

26 _____
27 ⁷ For this same reason, when a patient meets with a doctor complaining an illness, the doctor first
28 collects the patient's “vital signs” (pulse, blood pressure, temperature), before proceeding to address the
particular symptoms complained of.

1 cautioned, “bureaucratic rationalization and bureaucratic momentum are real dangers, to be anticipated
 2 and avoided by [federal agencies].” *N. Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1157 (9th Cir. 1988).
 3 Fundamentally, Defendants’ legalistic defense of its failure to complete the requisite Subpart A
 4 minimum road system determination is not grounded in the record, and agency has not provided the
 5 necessary “rational connection between the facts found and the decision made,” *Gifford Pinchot Task*
 6 *Force*, 378 F.3d at 1065.

7 **4. This Court’s Prior Order Did Not Prevent Defendants from Issuing a Subpart A**
 8 **Determination.**

9 Defendants argue that prior rulings by this Court in *Center for Sierra Nevada v. Berry*, No. 2:02-
 10 cv-00325-LKK-JFM (E.D. Cal., Aug. 16, 2005), imposed deadline pressure to issue a Subpart B OHV
 11 plan and denied them the time necessary to issue a minimum road system determination. FS SJ Mem. at
 12 16; (AR 05635) (Court’s Order). However, Defendants never sought additional time from the Court or
 13 consulted with Plaintiffs in any way with a proposal to modify the Court’s order to allow additional time
 14 to complete Subpart A requirements. Indeed, Defendants’ brief concedes that the agency sought and
 15 received one extension of time to comply with the Order to accommodate public review needs. *Id.* at
 16 n.12. Defendants offer no reason for their failure to seek a similar extension to provide time to undertake
 17 a minimum road system determination.

18 Moreover, Defendants offer no evidence in the record of this case to support their contention that
 19 they required additional time to issue a Subpart A determination – a requirement first promulgated over
 20 a decade ago, and almost five years before the Subpart B regulations were promulgated. As noted above
 21 and in Plaintiffs’ opening brief, Defendants initially purported to issue a minimum road system
 22 determination. Pltfs’ SJ Mem. at 12-14 (citing AR 00822 and AR 002898). Although they now seek to
 23 disavow those admissions, the agency never claimed during the administrative phase that this Court’s
 24 decision in *Berry* was a barrier to compliance with Subpart A’s requirements.⁸

25 _____
 26 ⁸ Indeed, the Court may take judicial notice of the fact that a number of National Forests managed to
 27 make a Subpart A minimum road system determination prior to, or in conjunction with, the Subpart B
 travel planning process:

28 Santa Fe National Forest: <http://www.fs.fed.us/r3/sfe/travelmgt/tap.htm>

1 The agency's counsel's entirely *post hoc* rationale that the agency did not raise when this issue
2 directly asserted by Plaintiffs in comments and on appeal, must be rejected. *Motor Vehicle Mfrs. Ass'n*,
3 463 U.S. 48 ("courts may not accept ... counsel's *post hoc* rationalizations for agency action").

4 **B. Defendants Failed to Complete Adequate Site-Specific Analysis Required to Support the**
5 **ENF Travel Management Plan.**

6 Plaintiffs contend that the Forest Service has failed to perform the site-specific analysis required
7 to support the ENF travel plan under NEPA. Defendants counter that Plaintiffs have misunderstood the
8 information the Forest Service has relied upon, that the record supports the challenged decision, and that
9 Plaintiffs are merely "flyspecking," and "second guessing" the Agency's methodologies. FS SJ Mem. at
10 23-24. However, as explained in Plaintiffs' opening brief, Pltfs' SJ Mem. at 17-21, and herein, the ENF
11 travel planning process simply did not employ an appropriate-scale analysis necessary to address
12 resource impacts. Furthermore, the Agency ignored the recommendations of its own technical staff, thus
13 rendering the ROD and FEIS unlawful.

14 **1. Defendants' Soil Analysis Relies on Inappropriately Scaled Data.**

15 The FEIS – as noted in Plaintiffs opening brief, Pltfs' SJ Mem. at 18 – plainly states:

16 There are no direct, indirect, or cumulative effects from any of the *alternatives because geologic*
17 *hazards relative to roads and trails evaluated at this scale (1:24000) are not measurable.*

18 FEIS at 3-20 (AR 02517) (emphasis added). This statement does not obviate the Forest Service's duty to
19 address site-specific impacts; "[t]he government's inability to fully ascertain the precise extent of the
20

21
22 Carson National Forest: http://www.fs.fed.us/r3/carson/recreation/travel_mgmt/documents.shtml

23 Apache-Sitgreaves National Forest: [http://www.fs.fed.us/r3/asnf/projects/travel-](http://www.fs.fed.us/r3/asnf/projects/travel-management.shtml)
24 [management.shtml](http://www.fs.fed.us/r3/asnf/projects/travel-management.shtml)

25 Cibola National Forest: <http://www.fs.fed.us/r3/cibola/travel-management/index.shtml>

26 Coconino National Forest: <http://www.fs.fed.us/r3/coconino/projects/tmr/documents.shtml>

27 Coronado National Forest: <http://www.fs.fed.us/r3/coronado/travel/index.shtml>.
28

1 effects” of a decision “is not . . . a justification for failing to estimate what those effects might be before
 2 irrevocably committing to the activity.” *Conner v. Burford*, 848 F. 2d 1441, 1450 (9th Cir. 1988), citing
 3 *Envtl. Def. Fund, Inc. v. Andrus*, 596 F.2d 848, 851 (D. Mont. 1979) (uncertainty about environmental
 4 impact of water diversion “does not obviate the importance of the decision to divert and the necessity to
 5 evaluate the environmental consequences of that decision”).

6 Defendants nonetheless seek to assure the Court that — notwithstanding the explicit statement in
 7 the FEIS — the agency did actually use data generated at a scale below 1:24000. FS SJ Mem. at 30.
 8 However, this argument does not cure the error; the passage quoted above is unequivocal in explaining
 9 that the agency found that there was no risk of adverse effect *because they did not measure for it*.⁹

10 The fact that effects are not measurable at the macro scale used by Defendants does not mean
 11 they are not present. As the FEIS states, “[t]he two conditions that have the most influence on slope
 12 instability are 1) hillslopes with gradients greater than 57% and, 2) presence of springs.” FEIS 3-19 (AR
 13 02516). One example of a route that meets both conditions for slope instability is Hunter’s Trail (14E09)
 14 which has, in fact, suffered landslides. *See, e.g.*, Plaintiffs’ DEIS comments at 34 (AR 001293);
 15 Plaintiffs’ Appeal at 10, 36 (AR 00330, 00356). This trail has sections that are impassable to anyone
 16 other than a hiker due to landslides. *See* photos in Plaintiffs’ Appeal, App. 5, (AR 01396-97 (due to the
 17 poor quality of the reproductions in the record, Plaintiffs have provided color copies of these documents
 18 at Exhibit 1, attached hereto); AR 00356). *Id.* Without responding to Plaintiffs’ detailed comments, the
 19 ROD unreasonably designates this and other unstable, poorly-placed trails in the Rubicon Canyon for
 20 *motorized* use. This is just one example of why, at a minimum, site-specific analysis was necessary to
 21

22 ⁹ In a footnote, Defendants suggest that Plaintiffs’ argument “relies upon a misunderstanding” of the
 23 scale of the relevant analysis. FS SJ Mem. at 30 n.22. They offer the convoluted explanation that “the
 24 phrase ‘are not measureable’ as used in this context means that the potential for effects is extremely
 25 small, and analyzing for effects below that scale level would not yield any appreciable new information
 26 upon which to analyze the issue.” *Id.* First, this rationale is nothing more than a conclusory statement
 27 ungrounded in the factual record. Second, even if this *post hoc* rationale were sufficient and the Forest
 28 Service’s statement was intended to convey this idea, the administrative process was the time and place
 to do so. Defendants’ ENF travel planning decision must rely upon the clear language of the FEIS and
 other documents in the record, the agency cannot now “repair” its deficits through retroactive editing of
 its text. *Motor Vehicle Mfrs.*, 463 U.S. at 48.

1 provide accurate information before the agency made the decision to keep this route open for motorized
2 use.

3 Further, as already noted, Pltfs' SJ Mem. at 18, n9, Defendants' failure to complete an
4 appropriate scale analysis of the impacts of the route designations is underscored by the absence of any
5 consideration of the selected alternative, Modified B, in the FEIS's "Affected Environment" portion of
6 the geology section. Notwithstanding Defendants' contrary protests, this is not the "hard look" required
7 by law.

8 **2. Defendants Ignored Their Own Data and Conclusions.**

9 Defendants suggest that Plaintiffs' arguments pertaining to the lack of site-specific analysis of
10 soil impacts is simply an effort to "substitute their judgment" for that of the Agency. FS SJ Mem. at 30-
11 31. On the contrary, Plaintiffs have noted a series of instances in which deficiencies in the data or the
12 need for additional analysis was presented by Defendants' own staff or in the EIS documentation. Pltfs'
13 SJ Mem. at 17-20. For example, the Soil Resources section of the FEIS described the data collected as:

14 Based upon a comparison of seasonal closures during wet weather period and the following
15 information collected from the GIS database: soils susceptible to gully erosion, total miles of
16 routes open by alternative, and condition of native surfaced roads based on field assessments.
17 Since sustained, steep gradients are also an indicator of the risk of erosion a query of routes with
18 gradients of 15 percent or greater and 200 feet or more in length was attempted. *It was*
19 *unsuccessful due to limitations in the data base.*

20 FEIS 3-26 (AR 02523) (emphasis added). In other words, the FEIS concedes that a crucial analysis of
21 risk factors for erosion failed "due to limitations in the data base." This is not a reflection of Plaintiffs'
22 "second guessing," but, rather, a candid admission by Defendants that they failed to take a hard look –
23 whether quantitatively or qualitatively – at erosion risk and impacts of many of the routes.

24 Similarly, the adverse effect of runoff from designated OHV trails was addressed in the FEIS as
25 follows:

26 Many OHV trails . . . were not originally designed and constructed for OHV use but were
27 converted from roads. Road prisms are well-compacted and provide a firm running surface but
28 the compacted surface makes installing OHV rolling dips difficult. *The long sustained gradients*
of trails converted from roads demand more attention to drainage.

1 FEIS 3-25 (AR 02522) (emphasis added). Again, it is not Plaintiffs, *but the EIS* that demonstrates that
2 “more attention” must be afforded this issue to provide the hard look required by law.

3 When addressing the inter-relationship between road condition and indirect impacts from roads,
4 the FEIS said:

5 Not designating routes in poor condition would remove from the system routes that require high
6 maintenance. This would allow more effective use of limited maintenance resources. *However,*
7 *the condition surveys did not specifically address causes, so some poor condition ratings could*
be due to a lack of maintenance, and not necessarily due to poor location.

8 FEIS 3-29 (AR 02526) (emphasis added). Again, it is the FEIS itself — not a “flyspecking” plaintiff —
9 that has identified flaws in the agency’s analysis of impacts. When an agency’s own decision documents
10 state that there are significant gaps in the data or that additional analysis is required, it is incumbent
11 upon the agency to either fill those gaps to support quantitative analysis or, alternatively, at minimum, to
12 undertake a qualitative analysis based on specific, disclosed criteria to provide the hard look required by
13 law. Defendants, having done neither, violated NEPA. *Kern v. BLM*, 284 F.3d 1062, 1066 (9th Cir.
14 2002); *Cal. v. Bergland*, 483 F. Supp. 465, 483-87 (E.D. Cal. 1980), *aff’d in part, overruled in part by*
15 *Cal. v. Block*, 690 F.2d 753 (9th Cir. 1982) (“Site specific analysis is essential to meaningful
16 environmental analysis” under NEPA).

17 **C. Defendants’ Failure to Ensure Consistency with Forest Plan Requirements Violated NFMA**
18 **and the APA.**

19 The National Forest Management Act (“NFMA”) requires that all forest uses be “consistent with
20 . . . land management plans,” including the plan’s objectives, standards, and guidelines. 16 U.S.C. §
21 1604(i); *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1052 (9th Cir. 1994) (forest plans “establish
22 forest-wide and area-specific standards and guidelines to which all projects must adhere”). Defendants’
23 TMP must comply with two separate but overlapping forest plans: (1) the Eldorado National Forest
24 Land and Resource Management Plan (“ENF LRMP”); and (2) the Sierra Nevada Forest Plan
25 Amendments (“SNFPA”). (AR 04985-05201) (ENF LRMP requirements); (AR 10968-11006) (SNFPA
26 requirements). Despite these plans’ requirements that the agency prohibit meadow degradation and
27 OHV routes on meadows, the agency’s TMP designates 42 separate routes through meadows for
28

1 motorized use, without sufficiently explaining how the designations conform to the forest plans or
2 NFMA.¹⁰ FEIS at 2-41 (AR 02488); (AR 12946-47) (listing routes authorized).

3 Specifically, recognizing that meadows are critical ecological components of the ENF because
4 they provide “important riparian habitat for Sierra Nevada wildlife,” FEIS at 3-147 (AR 02644), the
5 ENF LRMP “[p]rohibit[s] motor vehicle use on meadows,” and directs the Forest Service to “[c]lose
6 roads to and across meadows.” (AR 05183; AR 05187). Yet instead of following this explicit direction,
7 the Forest Service authorized 4.1 miles of routes in meadows and attempted to “cure” this violation by
8 adopting a series of “non-significant” forest plan amendments, exempting specific routes from the
9 otherwise applicable prohibition on meadow routes.¹¹ EIS at 2-11 (AR 02458; AR 12761). Similarly, the
10 SNFPA also requires meadow protection, and as explained in Plaintiffs’ opening brief and herein, Plfs
11 SJ Mem. 2, 21-22, the agency initially determined that routes through meadows must be prohibited in
12 order to comply with the SNFPA. However, the agency reversed course, without plan amendment or
13 explanation, in violation of the APA and NFMA.

14
15
16 ¹⁰ Throughout the FEIS, the agency variously states that Modified Alternative B authorizes 4.1 or 4.8
17 miles through meadows. *Compare* AR 02488 (4.1 miles in meadows); AR 02572 (4.1 miles) *with* AR
18 02980 (4.8 miles); AR 02458 (4.8 miles in meadows requiring plan amendments); FS SJ Mem. at 32
(agency allows “approximately 4.8” miles in meadows). The agency neither acknowledges nor explains
19 this inconsistency.

20 ¹¹ The Forest Service fails to adequately justify its conclusion that these amendments were *not*
21 significant. FEIS at 2-6 (AR 02453). All “significant” amendments must be adopted “through the same
22 procedures required [in adopting] the initial forest plan,” including public participation. *Conserv. Cong.*
23 *v. USFS*, 555 F. Supp. 2d 1093, 1106 (E.D. Cal. 2008); 16 U.S.C. § 1604(f)(4), (d). In determining
24 whether a plan amendment is significant, the court considers “the timing and duration of the proposed
25 change [and] the location and size of the project.” *Id.*; FEIS at 2-6 (AR 02453) (describing factors).
26 Here, the amendments are *permanent* amendments to the forest plan, and not of limited duration for the
27 term of a site-specific project. *Conserv. Cong.*, 555 F. Supp. 2d at 1107 (noting non-significant forest
28 plan amendment “would be in effect only for the treatment duration of the” timber sale at issue).
Further, while the agency claims the amendment affects only 4.8 miles of routes “compared to
approximately 2,870 miles of routes currently existing on the Forest,” the agency fails to consider what
proportion of meadows are crossed or the impacts those routes will have on the environment. AR 02454;
see Am. Wildlands v. USFS, 1999 U.S. Dist. LEXIS 22243 (D. Mont. Apr. 14, 1999) (finding agency
had to consider what proportion of the wildlife management area was impacted by amendment, not just
what proportion of whole forest). Without this information, it is impossible to determine whether the
amendments are indeed “significant.” 16 U.S.C. § 1604(f)(4).

1 Specifically, the SNFPA requires riparian areas, including meadows,¹² “be managed consistent
 2 with” a series of broad, overlapping riparian conservation objectives (“RCOs”) and standards and
 3 guidelines. SNFPA ROD at 33, 49 (AR 10970, 10986). In order to maintain “hydrologically functional”
 4 meadows, the Forest Service must, *inter alia*: (1) “[m]aintain or restore . . . the geomorphic and
 5 biological characteristics of . . . meadows,” (2) “[p]reserve, restore, or enhance special aquatic features,
 6 such as meadows;” and (3) “[m]aintain and restore the hydrologic connectivity of . . . meadows . . . by
 7 identifying roads and trails that intercept . . . water flow paths.” (AR 10970, listing RCOs); (AR 11000,
 8 11002, listing standard and guidelines).

9 To gauge whether the Eldorado TMP meets the Forest Plan’s broad RCOs, standards, and
 10 guidelines, the Forest Service prepared a Draft Riparian Conservation Objective Analysis in 2007. (AR
 11 12691-12735, contained in App. A of the Draft Biological Evaluation). In that Analysis, the agency
 12 adopted a series of “Criteria for Establishing Consistency” with the various RCOs, including the
 13 criterion that: “*Routes do not bisect meadows.*”¹³ (AR 12695-96, emphasis added). Applying that
 14 criterion, the agency’s Draft RCO Analysis concluded that “*none of the alternatives . . . would fully meet*
 15 *the objectives*” because numerous routes, including ML-1, ML-2, and unauthorized routes, crossed
 16 meadows under each alternative proposed. (AR 12700, emphasis added); (AR 12732-33, listing
 17 designated routes that bisect meadows and thus do not comply with the SNFPA).

18 In 2008, after developing the new “Modified Alternative B” that authorized 4.1 miles of routes
 19 in meadows (42 total routes), the agency issued a Final RCO to again judge RCO and Forest Plan
 20 compliance. The agency adopted the same criterion, that “*routes do not bisect or go through meadows.*”
 21 (AR 12929-30). In contrast to the Draft RCO Analysis, however, the agency found that all routes in
 22 Modified Alternative B somehow *comply* with the SNFPA – even though the agency authorized many of

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 24 ¹² Specifically, the requirements apply in “riparian conservation areas” (“RCAs”), which are defined as
 25 the area within a specified distance of a “special aquatic feature.” AR 10979. “Special Aquatic Features
 include . . . wet meadows.” *Id.* at n.2.

26 ¹³ The agency selected this criterion because “[m]otorized routes that bisect sensitive aquatic features
 27 such as meadows have the potential to: alter hydrologic function with a consequence of lowering
 meadow productivity, increase rutting along the route . . . , [create] potential for downcutting and
 headcutting within the meadow . . . , and pose barriers to movement of herpetofauna and fish.” AR
 28 12695-96.

1 the *same* routes that the Draft RCO Analysis found to *violate* the SNFPA. (AR 12934). For example, in
 2 the Draft RCO Analysis, Table A-10 lists routes that “have been identified as those resulting in
 3 noncompliance with . . . RCOs.” (AR 12700; AR 12732, Table A-10). In the Final RCO Analysis, the
 4 agency lists many of the very same routes as designated for use.¹⁴ (AR 12946-47).

5 In reaching this result that conflicted with earlier analysis, the Forest Service did not change the
 6 chosen standard or explain that the prior analysis was somehow incorrect. Instead, the agency simply
 7 excluded many of the non-compliant routes from its analysis, including all non-compliant ML-2 roads
 8 and “4WD” trails. The agency, reversing course from its Draft, claimed that its RCO analysis need not
 9 consider “[e]xisting ML-2 roads . . . that will remain as ML-2 roads” designated for motorized use
 10 “because existing ML-2 roads that remain as ML-2 roads will not be subjected to new management
 11 activities or a new type of use.”¹⁵ (AR 12927, noting standard and guideline 92 requires agency to
 12 “[e]valuate new proposed management activities . . . during environmental analysis to determine
 13 consistency with [RCOs] at the project level”).

14 The Forest Service’s attempt to exclude existing ML-2 roads from its RCO analysis as a means
 15 to circumvent the SNFPA’s requirements runs directly counter to the acknowledged purpose of the
 16 TMP. As the FEIS states, the “purpose and need” of the TMP was to “*reconsider* whether motorized use
 17 should be allowed to continue on NFS roads maintained for high clearance vehicles (NFS *ML-2*) and
 18 NFS trails managed for OHV use,” as required by this Court’s August 2005 Order in *Berry*. FEIS at 1-5
 19 (AR 02436, emphasis added); (AR 02434) (“Based on the ENF Forest Supervisors interpretation of the
 20 February 15, 2005 Court Order, this proposal will reconsider whether motorized use should be allowed
 21 to continue on” ML-2 roads). Accordingly, the agency’s ROD specifically authorized “motor vehicle
 22 use by the public on 1,002 miles of ML-2 native surfaced roads,” many of which were previously
 23 labeled ML-2 roads. (AR 03273; AR 02410). And throughout the EIS, the agency considers impacts of
 24

25 ¹⁴ Specifically, the following routes were deemed non-compliant in the Draft RCO Analysis yet deemed
 26 compliant in the Final RCO: 09N04, 09N82, 09N83, 10N01, 10N14, 10N21, 11N23F, 11N26F, 14N05,
 14N39, 17E12, 17E19, 17E28. *Compare* AR 12732-33 *with* AR 12946-47.

27 ¹⁵ The agency provides no explanation for why non-compliant “4WD” trails are also exempt from
 28 consideration. AR 12927.

1 authorizing use on both ML-1 *and* ML-2 routes.¹⁶ *See, e.g.*, FEIS at 3-28 (AR 02525) (assessing number
 2 of ML-1 *and* ML-2 routes in poor condition as indicator for soil impacts); (AR 02572) (listing number
 3 of ML-1 *and* ML-2 routes crossing meadows to determine sensitive plan impacts).

4 The agency cannot and does not fully explain why it evaluated all ML-2 roads in its NEPA
 5 analysis and its Draft RCO Analysis, but then conveniently excluded those routes from its Final RCO
 6 Analysis. The agency's designation of 4.1 miles of routes for motorized use in meadows violates the
 7 standards the *agency* set to determine compliance with the SNFPA, and its attempt to ignore that
 8 violation by excluding these routes from its Final RCO Analysis is arbitrary and capricious and is
 9 inconsistent with the SNFPA's protections for meadows.¹⁷ 5 U.S.C. § 706(2)(A); *see Northwest Env'tl.*
 10 *Def. Ctr.*, 477 F.3d at 687 ("an agency changing its course must supply a reasoned analysis indicating
 11 that prior . . . standards are being deliberately changed, not casually ignored"); *Colo. Interstate Gas Co.*
 12 *v. FERC*, 850 F.2d 769, 774 (D.C. Cir. 1988) ("the Commission's dissimilar treatment of evidently
 13 identical cases . . . seems the quintessence of arbitrariness and caprice"); *Friends of the Wild Swan v.*
 14 *FWS*, 12 F. Supp. 2d 1121, 1133 (D. Or. 1997) (an "inadequately-explained sudden switch in tactics is
 15 arbitrary and capricious").

16 Nor is Defendants' response illuminating. As Defendants suggest, the SNFPA does not expressly
 17 prohibit routes through meadows, in contrast to the ENF LRMP. FS SJ Mem. at 34. However, to assess

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 19 ¹⁶ Similarly, in deciding whether the TMP complied with the *ENF LRMP*, the agency evaluated ML-2
 20 routes (including ML-2 routes that would remain ML-2 routes) that bisected meadows and ultimately
 21 adopted amendments to the ENF LRMP in order to authorize those non-compliant routes. *Compare*
 22 *ROD* at 5 (AR 03274) (listing ML-2 routes requiring ENF LRMP plan amendments due to meadow
 crossings including, *inter alia*, 09N01, 09N04, 09N82, 09N83, 10N01, 10N13, 10N14, 10N21, 11N23F,
 11N26F, 12NY15, 14N05, 14N39) *with* Final RCO (AR 12946) (authorizing use of same routes).

23 ¹⁷ In its opening brief, Plaintiffs referred to this APA violation as a NEPA violation. Plaintiffs' primary
 24 claim is that the agency failed to adequately explain how it met NFMA requirements, thus violating
 25 NFMA and the APA. However, "where an agency has previously made a policy choice to conform to a
 26 particular standard, and now seeks to amend that standard, 'the Agencies have an obligation under
 27 NEPA to disclose and explain on what basis they deemed the standard necessary before but assume it is
 not now.'" *Pac. Coast Fed'n of Fishermens' Ass'ns v. NMFS*, 482 F. Supp. 2d 1248, 1252 (W.D. Wash.
 2007); citing *Northwest Ecosystem Alliance v. Rey*, 380 F. Supp. 2d 1175, 1192 (W.D. Wash. 2005).
 Accordingly, Defendants also violate NEPA.

1 whether the agency's TMP complied with the SNFPA, the Forest Service adopted a standard, and then
2 deviated from that standard without explanation, changing the rules and its rationale midstream in
3 violation of the APA. *See NEDC*, 477 F.3d at 687; *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 59 (agency's
4 "obligation" under the APA "is to articulate a rational connection between the facts found and the
5 choice made"). Accordingly, the agency failed to ensure the TMP complies with forest plan
6 requirements and thereby violated NFMA. 16 U.S.C. § 1604(i).

7 **D. Defendants Failed to Consider a Reasonable Range of Alternatives.**

8 Defendants failed to "study, develop, and describe appropriate alternatives" in its FEIS because
9 the Forest Service failed to examine the "reasonable" alternative of *not* adding new, user-created routes
10 ("unauthorized routes") to the already expansive motorized system. *'Ilio'Ulaokalani Coalition v.*
11 *Rumsfeld*, 464 F.3d 1083, 1095 (9th Cir. 2006) ("The existence of reasonable but unexamined
12 alternatives renders an EIS inadequate."); 40 C.F.R. § 1502.14(a) (agency must "[r]igorously explore
13 and objectively evaluate *all* reasonable alternatives") (emphasis added); Plfs SJ Mem. 22-24. Instead,
14 the only action alternatives considered in the FEIS were alternatives that *added* between 20 to 46 miles
15 of previously unauthorized, user-created ORV routes. FEIS at xxii-xxiii (AR 002408-09).

16 Defendants respond by arguing that the agency rejected close consideration of a "no-user-
17 created-routes" alternative because the alternative did not meet the "purpose and need" for the TMP,
18 which "is to provide a diversity of road and trail opportunities" across a variety of environments and
19 modes of transportation. FS SJ Mem. at 37, citing (AR 02469). Besides blandly rendering its conclusion
20 that "not designating any unauthorized routes . . . fails to meet th[e] purpose and need," neither the FEIS
21 nor Defendants explain *why* the previously-existing route system was insufficient or why additional
22 roads and trails must be added to provide a diversity of motorized recreational opportunities. FEIS at 1-
23 5, 1-6 (AR 02436-37); *see also id.* (stating that "[w]ithout additions to the [motorized transportation
24 system], implementation of the Travel Management Rule will severely limit motorized recreation
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1 opportunities” but failing to explain why any of the user-created routes, much less any specific route, are
 2 necessary).¹⁸

3 The reasonableness of an alternative, and thus the necessity of its consideration by the agency, is
 4 measured against the purpose of the proposed action. *City of Carmel-by-the-Sea v. DOT*, 123 F.3d 1142,
 5 1155 (9th Cir. 1997); *Ctr. for Biological Diversity v. BLM*, 422 F. Supp. 2d 1115, 1160 (N.D. Cal.
 6 2006). If no previously unauthorized routes were opened, under the chosen alternative, ORV users
 7 would still have access to 1,824 miles of motorized routes across the forest. *Id.* at 2-10 (AR 02457). An
 8 alternative that only authorizes routes that were actually planned and constructed by the agency – versus
 9 user-created routes that, in the words of the agency, “were developed without agency authorization,
 10 environmental analysis, or public involvement” – certainly meets this project’s purpose and need.¹⁹ 70
 11 Fed. Reg. at 68,268. At the very least, Defendants must provide a persuasive explanation why a “no-
 12 user-created-routes” alternative was foreclosed.²⁰ *See ‘Ilio‘Ulaokalani*, 464 F.3d at 1098 (agency “never
 13 explained or justified” why action must occur in Hawaii, and thus unreasonably foreclosed alternatives
 14 in other locations).

15 A no-user-created-routes alternative would have provided a viable, less environmentally harmful
 16 option for the Eldorado TMP. As the Forest Service recognizes, unauthorized routes “were created
 17 without engineering design,” and the agency assumed the routes were in poor condition as a result. FEIS

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 19 ¹⁸ Despite Defendants’ claim that the FEIS “discussed why [the agency] added certain undesignated
 20 routes,” citing the FEIS’s general statement that “some dispersed recreation activities” require
 21 motorized access, neither Defendants nor the FEIS identify which new routes are required for access or
 22 where those routes lead. Fed. Br. at 38, citing FEIS at 1-6 (AR 02437); Interv. Br. at 11; *see id.* at C-119
 23 (AR 03003) (noting Plaintiffs’ comment that the proposed designation of an unauthorized routes
 24 “should include an explanation of what unique experience it provides, as well as an analysis of adverse
 25 impacts,” and merely responding that “[i]n the Action Alternatives [proposed], 20 to 46 miles of
 26 unauthorized routes that are determined to provide excellent outdoor recreation opportunities for
 27 motorized and non-motorized users,” without citation or basis).

28 ¹⁹ There remains an open question whether the agency should have also considered an alternative that
 closes *existing* roads, in addition to an alternative not authorizing new routes. A proper Subpart A
 analysis would have revealed which routes to close.

²⁰ As Plaintiffs explained in their opening brief, this problem is compounded by the fact that the agency
 failed to make a Subpart A minimum road system determination. Without this determination, the agency
 had no proper basis to conclude that the then-current system of routes was somehow insufficient to
 “provide a diversity of road and trail opportunities.” (AR 02469).

1 at 3-2 (AR 02499); DEIS at v (purpose and need of TMP is to deal with proliferation of unauthorized
 2 routes because “many new [unauthorized] routes hav[e] environmental impacts and safety concerns that
 3 have not been addressed”) (AR 01482). Unauthorized routes have more substantial effects on soils than
 4 agency-planned routes because “drainage structures roll the grade only by chance and may include
 5 unsustainably steep gradients,” and because routes were not built on compacted soil, ORV “treads
 6 become entrenched, concentrating runoff and resulting in deeper erosion.” FEIS at 3-25 (AR 02522).
 7 Accordingly, the agency uses the “[m]iles of unauthorized routes proposed for designation” as an
 8 “[i]ndicator” of soil impacts. (AR 02524).

9 In addition, the Forest Service was already overwhelmed with the maintenance of its previously-
 10 authorized transportation system. The Forest Service, in rejecting an alternative that would have
 11 designated *all* 526 unauthorized routes identified on the Forest as open for motor vehicle use, explained
 12 that the ENF “already suffers from a backlog of maintenance needs on its current [transportation system]
 13 and is already stretched to accomplish basic maintenance needs even without adding more roads or trails
 14 to the” transportation system. FEIS at 2-25 (AR 02472). In fact, as noted above, the agency admits that
 15 “[t]he funds available for annual road maintenance fall short of the estimated costs calculated for *any of*
 16 *the alternatives.*” *Id.* at 2-44 (AR 02491, emphasis added). Despite bluntly admitting that the agency
 17 simply did not have the funds to maintain even its then-existing motorized system, the agency
 18 nevertheless proposed to designate new, user-created routes in every action alternative.²¹

19 By disregarding a viable and more environmentally-protective alternative that meets the
 20 agency’s purpose and need, the agency failed to consider a reasonable range of alternatives, as required
 21 by NEPA. *Ilio’Ulaokalani*, 464 F.3d at 1098; *Ctr. for Biological Diversity*, 422 F. Supp. 2d at 1162
 22 (finding plaintiffs’ proposed alternative met the project’s purpose and need and was reasonable); *see*
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 25 ²¹ The fact that the Forest Service did not have funds to maintain even the then-existing motorized
 26 system undercuts any potential argument that the agency accounted for funding by rejecting an
 27 alternative that would have designated all of the user-created routes. The facts demonstrate that the
 28 addition of *any* user-created routes would place strain on already stretched, inadequate funds. Moreover,
 such an argument does nothing to undercut the facial reasonableness of an alternative that would have
 not designated any user-created routes.

1 *also Cal. v. Block*, 690 F.2d at 767 (agency cannot “uncritically assume[] that a substantial portion of
2 the . . . areas should be developed and consider[] only those alternatives with that end result”).

3 **E. The ESA Required Defendants to Consult regarding the Eldorado TMP.**

4 As Defendants readily admit, the ESA obligates the Forest Service to consult with the Fish and
5 Wildlife Service (“FWS”) whenever an action “may affect” a listed species, such as the California red-
6 legged frog. FS SJ Mem. at 3; 50 C.F.R. § 402.14. Consultation is not complete until FWS provides
7 either: (1) a “written concurrence” stating “that the action is not likely to adversely affect listed species,”
8 or (2) a biological opinion. *Id.* §§ 402.13(a); 402.14; *Pac. Rivers Council*, 30 F.3d at 1054 n.8.

9 Here, instead of initiating consultation on the Eldorado FEIS and ROD, the Forest Service argues
10 it may “tier” to a 2006 programmatic consultation. Defendants claim Modified Alternative B “fit[s]
11 within the four corners of the [programmatic consultation’s] Design Criteria,” and that no additional
12 consultation was therefore required. FS SJ Mem. at 39. However, under this Design Criteria, the Forest
13 Service may avoid consultation only if: (1) “[i]n suitable California red-legged frog habitat, [OHV]
14 routes avoid . . . Riparian Conservation Areas” (“RCAs”), and (2) “within California red-legged frog
15 habitat, areas are located outside” RCAs. (AR 00003; AR 00032).

16 Modified Alternative B authorizes OHV routes in red-legged frog habitat. As the Forest Service
17 concluded in its final “Determination” section of the 2008 Biological Assessment (“BA”): “[t]he best
18 available information indicates that 0.41 miles of unauthorized routes in the Preferred Alternative and
19 the location of two staging areas *do not meet the programmatic Project Design Criteria* developed for
20 reaching a determination of Not Likely to Adversely Affect.” 2008 BA at 14 (AR 12902) (emphasis
21 added). Similarly, in Table 7, just above the “Determination” section, the BA provides a “*Summary of*
22 *findings* in relation to Project Design Criteria for the California red-legged frog.” *Id.* (emphasis added).
23 For the two relevant criteria – the location of ORV routes and areas – the Table states that there are both
24 routes and areas “in red-legged frog suitable habitat.” *Id.* Because the programmatic consultation only
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1 covers situations where routes do not occur in suitable habitat, the Forest Service was required to
2 consult with FWS.²²

3 Despite the agency's repeated conclusions that routes occur in suitable habitat, Defendants' brief
4 claims no consultation was required because "field surveys indicate . . . that [red-legged frogs] do not
5 occupy any of the stream reaches" in suitable habitat. FS SJ Mem. at 41 (AR 12902). However,
6 according to the record, proper surveys have not been conducted on at least two routes. Further, the
7 Forest Service cannot ignore impacts to frog Core Recovery Areas or ephemeral springs by blindly
8 deferring to FWS's four-year-old programmatic concurrence; the agency itself remains obligated to
9 ensure its actions comply with the ESA.

10 **1. The Record States that Two Routes in Suitable Habitat Have Never Been Properly**
11 **Surveyed.**

12 Defendants spend several pages attempting to explain what should be simple concept: whether
13 any routes or OHV-areas occur within suitable frog habitat. FS SJ Mem. at 40-42. Footnote 1 in Table 5
14 of the 2008 BA provides the answer. While the Table indicates that, for the two routes near the North
15 Consumnes River, "[f]ield reconnaissance found habitat unsuitable," the explanatory footnote states that
16 the routes were not actually surveyed. Instead "1.4 miles of stream were surveyed approximately 3.5
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18 ²² Defendants and Intervenor wrongfully assert that Plaintiffs' ESA claim is barred because the claim was
19 not raised at the administrative appeal stage. FS SJ Mem. at 40 n.31; Interv. Br. at 13. Plaintiffs
20 submitted an ESA 60-day notice letter, thereby satisfying the "only jurisdictional prerequisite to filing
21 suit" under the ESA, and further exhaustion under the NFMA appeal procedures is not required. *Ky.*
22 *Heartwood v. Worthington*, 20 F. Supp. 2d 1076, 1091 (E.D. Ky. 1998) (court must "look[] at each
23 statute on which plaintiffs base their claims in turn to determine whether said statutes expressly require
the exhaustion of administrative remedies"); *see Wash. Toxics Coalition v. EPA*, 413 F.3d 1024, 1033-
34 (9th Cir. 2005) (finding plaintiff need not satisfy FIFRA exhaustion procedures to raise ESA claim
because the ESA provides a separate cause of action).

24 Even if exhaustion were required, Plaintiffs' appeal raised the ESA claim, arguing that Defendants
25 "violated the Endangered Species Act by failing to consult with the USFWS on Alternative Modified
26 B." AR 00353-54. The appeal notes that this failure contravenes Defendants' simultaneous conclusion
27 in its Biological Evaluation that the Eldorado TMP "may affect and is likely to adversely affect" the red-
28 legged frog. *Id.* This tracks Plaintiffs' current claim. *See Native Ecosystems Council v. Dombeck*, 304
F.3d 886, 898 (9th Cir. 2002) (appeal must only "provide[] sufficient notice to the Forest Service to
afford it the opportunity to rectify the violations" and finding appeal generally raised issue of failure to
follow NFMA procedures).

1 miles *downstream* of the proposed route[s].”²³ (AR 12899, emphasis added) (also noting the “Field
 2 Survey Date” is “n/a”). Further, the Biological Evaluation explains: “This drainage has not been
 3 surveyed to US Fish and Wildlife Service protocol for the presence of California red-legged frog habitat
 4 adjacent to the proposed routes.” (AR 12799); *see also* FEIS at 3-186 (North Consumnes River routes
 5 “are upstream of previously surveyed reaches”) (AR 02683).

6 Although Defendants admit that their “reconnaissance” regarding habitat suitability for these
 7 routes did not meet FWS survey protocol, Defendants assure us that FWS would approve below-
 8 standard surveys. FS SJ Mem. at 42 n.33. Defendants suggest FWS approved of the Forest Service’s
 9 informal reconnaissance when it concurred with the 2007 BA, which Defendants wrongly claim
 10 included non-protocol survey results. *Id.*, citing (AR 12883). But to the contrary, the 2007 BA surveys
 11 *were conducted to protocol*. (AR 12884) (footnote 1 of Table 6 stating “surveys conducted after 2003
 12 were conducted according to the agreed upon protocol discussed with the US Fish and Wildlife Service
 13 on March 26, 2003”); *see also* (AR 19540) (FWS directing water agency to conduct “protocol level
 14 surveys of [the area] following the Service’s 2005 *Revised Guidance*” for frogs). Under the ESA, it is
 15 FWS, not the Forest Service, who is the “expert agency” and thus “in the best position to make
 16 discretionary factual determinations about whether a proposed agency action will create a problem for a
 17 listed species” and whether survey protocol is required. *City of Tacoma v. FERC*, 460 F.3d 53, 75 (D.C.
 18 Cir. 2006); *W. Watersheds Project v. Kraayenbrink*, 620 F.3d 1187, 1210 (9th Cir. 2010) (noting FWS
 19 is the agency with “the more appropriate expertise” under the ESA). Defendants’ *post hoc* efforts to
 20 explain its failure to consult in light of the information in the 2008 BA fail.

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 24 ²³ In fact, this footnote further indicates that, in the area *actually* surveyed, only 20% of the area was
 25 deemed *unsuitable* breeding habitat, suggesting 80% was suitable. *Id.* (stating “less than 20% was found
 26 to have gradients over 2 percent and/or lacking egg braces in pools”); *see* 2007 BA at 16 (under FWS
 27 criteria, “breeding habitats are low gradient stream reaches (<2 percent) with pools . . . that provide egg
 28 breeding habitat. *See* AR 06550 (describing key frog habitat including both breeding and non-breeding
 suitable habitat).

1 **2. Defendants Cannot Ignore Impacts to Core Recovery Areas and Ephemeral Streams by**
2 **Relying on Previous Consultations.**

3 Defendants do not dispute that the 2008 BA failed to consider how the Eldorado TMP will
4 impact ephemeral stream habitat used by red-legged frogs. FS SJ Mem. at 44. Nor do Defendants
5 dispute that numerous newly-authorized routes traverse red-legged frog “core recovery areas” identified
6 in the Recovery Plan. *Id.* Instead, Defendants claim that – despite these potentially serious site-specific
7 impacts – the agency may blindly defer to the FWS’s programmatic consultation because the Design
8 Criteria do not specifically mention ephemeral streams or “core recovery areas.” *Id.*

9 While the Forest Service may generally defer to a FWS ESA determination, “the action agency
10 must not blindly adopt the conclusions of the consultant agency, citing that agency’s expertise” because
11 “the ultimate responsibility for compliance with the ESA falls on the action agency.” *City of Tacoma*,
12 460 F.3d at 76; *Pyramid Lake Paiute Tribe of Indians v. Dep’t of Navy*, 898 F.2d 1410, 1415 (9th Cir.
13 1990) (an action agency’s reliance on a consultation may be arbitrary and capricious if there is “‘new’
14 information – *i.e.*, information the Service did not take into account” that questions the opinion’s
15 conclusions).

16 This is particularly true in the context of “tiering” to a broad, programmatic consultation
17 document completed years before the agency’s site-specific decision. *See NRDC v. Rodgers*, 381 F.
18 Supp. 2d 1212, 1228 n.27 (E.D. Cal. 2005) (noting “[t]iering” under the ESA “will tend to obscure the
19 ability of the agency to identify the direct and indirect consequences of particular action”). Here, FWS’s
20 programmatic consultation regarding effects did not contemplate routes in “core recovery areas,” nor did
21 FWS somehow exempt suitable ephemeral stream habitat from consideration. In fact, FWS’s
22 consultation specifically states that further consultation is not required “*unless* new information reveals
23 effects of the proposed action not considered here.” (AR 00032-33, emphasis added). The Forest Service
24 was obligated to independently evaluate whether the action will have affects outside those considered by
25 FWS in the programmatic consultation, which was clearly the case here, and to consult accordingly.

CONCLUSION

The Eldorado National Forest travel planning process did not comply with key elements of the Travel Planning Rule, NEPA, NFMA, and the ESA. Consequently, for the reasons established in Plaintiffs' briefing, their motion for summary judgment should be granted and the cross-motions presented by Defendants and Defendant-Intervenors should be denied.

Respectfully submitted this date, February 4, 2011.

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