IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BUTTE DIVISION

BEAVERHEAD COUNTY COMMISSIONERS—TOM RICE and MIKE McGINLEY, *et al.*,

Plaintiffs,

vs.

UNITED STATES FOREST SERVICE; LESLIE WELDON, in her official capacity as Region 1 Regional Forester; DAVE MEYER, in his official capacity as Beaverhead-Deerlodge National Forest Supervisor,

Defendants,

GREATER YELLOWSTONE COALITION and MONTANA WILDERNESS ASSOCIATION,

Defendant-Intervenors.

CV 10-68-BU-SEH

MEMORANDUM AND ORDER

INTRODUCTION

This suit challenges the United States Forest Service's Final Revised Land and Resource Management Plan ("Revised Forest Plan") for Montana's largest national forest—the Beaverhead-Deerlodge National Forest ("the Forest")—which covers 3.35 million acres and stretches over eight counties in southwestern Montana. Record of Decision for the Final Environmental Impact Statement and Revised Land and Resource Management Plan ("2009 ROD"), I1-01, 4. Plaintiffs allege the Forest Service violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, and the Wild and Scenic Rivers Act ("WSRA"), 16 U.S.C. §§ 1271–1287, in promulgating the Revised Forest Plan. Declaratory and injunctive relief under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706 are sought.

Plaintiffs are the Beaverhead County Commissioners Tom Rice and Mike McGinley along with a coalition of individuals and organizations with interests in the Forest. Defendants include the United States Forest Service, Leslie Weldon in her official capacity as Regional Forester, and Dave Meyer in his official capacity as Beaverhead-Deerlodge National Forest Supervisor. The Greater Yellowstone Coalition and the Montana Wilderness Association (collectively "Defendant-Intervenors") have appeared as intervenors. All parties have filed motions for

summary judgment.

FACTUAL BACKGROUND

In 2002, the Forest Service began a process of revising the forest plans for the Beaverhead National Forest and the Deerlodge National Forest, whose original forest plans dated back to 1986 and 1987, respectively.[1] Land and Resource Management Plan: Corrected Final Environmental Impact Statement ("Final EIS"), A1-40, 1. A seven-year revision process followed, culminating with the release the Revised Forest Plan in 2009. The revision process included four comment periods and prompted considerable attention from the public. Publication of the Draft Environmental Impact Statement ("Draft EIS") prompted 11,188 comments during a 120-day comment period. 2009 ROD, 2. Although not required, the Forest Service, due to "intense public interest," offered a 75-day comment period following the publication of the Final EIS, which led to 32,536 additional comments. *Id.*

Eight revision topics were considered during the revision process. *Id.* at 7. Plaintiffs take issue with Revision Topic # 4: Recreation and Travel Management and Revision Topic # 8: Recommended Wilderness. As to Recreation and Travel

[1] The two forests were administratively consolidated into the Beaverhead-Deerlodge National Forest in 1996. Final EIS, 1.

Management, need for revision was identified due to the substantial increase in motorized recreation whose "unmanaged expansion . . . has resulted in resource damage, wildlife impacts, and competition and conflict between user groups." *Id.* at 13. The Revised Forest Plan permits motorized recreation on 55 percent of the Forest during the summer and 60 percent during the winter, *id.* at 15, while the original plans permitted motorized uses on 71 percent of the Forest during the summer and 84 percent during the winter, Final EIS, 39. As for Recommended Wilderness, 36 C.F.R. § 219.17 required the Forest Service to evaluate roadless areas for wilderness potential during the revision process. 2009 ROD, 19. It identified 322,000 acres for designation as Recommended Wilderness. *Id.* at 29. Motorized uses and mountain biking are prohibited in the Recommended Wilderness Areas. *Id.* at 21. Plaintiffs' main contention revolves around the above revisions, which have led to a reduction in recreational opportunities for motorized uses on 1,516,855 acres of the Forest during the summer and 1,336,628 acres during the winter. Record of Decision Enacting Forest Plan Travel Management Direction for Certain Areas of the Beaverhead-Deerlodge National Forest ("2010 ROD"), J1-01, 3.

Plaintiffs assert the Forest Service violated NEPA by: (1) failing to adequately include Beaverhead County as a "cooperating agency" during the

development of the Revised Forest Plan; (2) by failing to conduct an Environmental Impact Statement ("EIS") before changing the management of the Recommended Wilderness Areas from motorized to non-motorized; (3) by failing to conduct a supplemental EIS; and (4) by failing to conduct site-specific analysis prior to banning motorized uses from the Recommended Wilderness Areas. Plaintiffs also allege that the Forest Service violated the WSRA by failing to reassess the eligibility of Deadman Creek as a "wild" river. (Pl.'s Compl., Document No. 1 at ¶¶ 1–2.)

Defendants defend their actions on the merits and contend that Plaintiffs lack standing for each of their claims. They insist that all duties to Beaverhead County as a cooperating agency were fulfilled and that the Forest Service conducted a comprehensive EIS that required neither supplementation nor site-specific analysis. Finally, Defendants maintain that no authority required the Forest Service to reassess the eligibility of Deadman Creek under the WSRA.

Defendant-Intervenors echo the majority of Defendants' contentions, while adding that Plaintiffs' claims are both time-barred and fail to challenge a final agency action. Defendant-Intervenors also argue that recreational opportunities are not impacts on the environment, and thus, no analysis of the environmental impacts of excluding motorized uses from the Recommended Wilderness Areas

was required.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Because this case involves review of an administrative record, summary judgment may be granted to either party based upon the Court's review of the record. *See Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012) (en banc).

ANALYSIS

A. Standing

Plaintiffs' standing with respect to each of their claims is challenged. Plaintiffs counter with declarations submitted by Kerry White, a member of several Plaintiff organizations, and Beaverhead County Commissioner Mike McGinley. Both allege injuries suffered on behalf of their respective organizations.

The Court must undertake two distinct inquiries to determine whether Plaintiffs have established standing. *See Nuclear Info. and Resource Serv. v. Nuclear Regulatory Commn.*, 457 F.3d 941, 949 (9th Cir. 2006). First, Plaintiffs must satisfy Article III's case or controversy requirement. *Id.* If Article III

standing is established, Plaintiffs must then establish prudential standing to bring this action under the APA. *Id.* at 950.

i. Article III Standing

Standing is "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The party invoking federal jurisdiction has the burden of demonstrating standing. *Id.* at 561. Standing under Article III requires a plaintiff to demonstrate:

> (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000). Standing analysis for purposes of Article III is not "fundamentally changed" because the injury asserted here is procedural as opposed to substantive. *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004). Plaintiffs may satisfactorily plead a procedural injury by alleging: "(1) the [Forest Service] violated certain procedural rules; (2) these rules protect [Plaintiffs'] concrete interests; and (3) it is reasonably probable that the challenged action will threaten their concrete interests." *Citizens for Better Forestry v. U.S. Dept. of Agric.*, 341 F.3d 961, 969–70 (9th Cir. 2003). They must also allege that

their "concrete interests" have been threatened by the agency's failure to comply with procedural requirements. *City of Sausalito*, 386 F.3d at 1197. Such a "cognizable procedural injury exists when a plaintiff alleges that a proper EIS has not been prepared under the National Environmental Policy Act when the plaintiff also alleges a 'concrete' interest—such as an aesthetic or recreational interest—that is threatened by the proposed action." *Id.* The "concrete interest" test requires a "'geographic nexus' between the individual asserting the claim and the location suffering an environmental impact." *Cantrell v. City of Long Beach*, 241 F.3d 674, 679 (9th Cir. 2001). "Where the recreational use of a particular area has been extensive and in close proximity to the plaintiff," the Ninth Circuit has held, "that an affiant's expressed intention to continue using the land is sufficiently concrete to underwrite an injury-in-fact." *Wilderness Socy. v. Rey*, 622 F.3d 1251, 1256 (9th Cir. 2010). However, a vague desire to return to an area without concrete plans or a specification of when to return does not support a finding of actual or imminent injury. *Summers v. Earth Is. Inst.*, 555 U.S. 488, 496 (2009).

In addition to an injury-in-fact, Plaintiffs must also demonstrate causation and redressability. But "[o]nce a plaintiff has established an injury in fact under NEPA, the causation and redressability requirements are relaxed." *Cantrell*, 241

F.3d at 682. In addition, NEPA cases only require "reasonable probability" to establish causation. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1113 (9th Cir. 2002) (abrogated on other grounds by *Wilderness Socy. v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011)).

Kerry White, as a representative member of several Plaintiff organizations, established standing by his declaration, stating that (1) the reduction in acreage available for motorized uses in the Forest caused him to lose aesthetic and recreational opportunities in the Forest, (2) that he intends to continue using the land, and (3) that the Revised Forest Plan has caused his interests to be irreparably harmed. (Decl. of Kerry White, Document No. 53-1, 1–4.) The requirements to establish standing under Article III are fulfilled.

Mike McGinley, however, has failed to demonstrate standing on behalf of Beaverhead County by his assertions that its residents have suffered injuries to their recreational and aesthetic interests. As a representative of Beaverhead County, McGinley may not "simply assert the particularized injuries to the 'concrete interests' of its citizens on their behalf." *City of Sausalito*, 386 F.3d at 1197. Instead, in order for Beaverhead County to bring such an action, it "must articulate an interest apart from the interests of particular private parties, *i.e.*, the [County] must be more than a nominal party. [It] must express a quasi-sovereign

interest." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982). Further, it could maintain this action "to protect its own 'proprietary interests' that might be 'congruent' with those of its citizens." *City of Sausalito*, 386 F.3d at 1197 (quoting *Colorado River Indian Tribes v. Town of Parker*, 776 F.2d 846, 848 (9th Cir. 1985)). Such "proprietary interests" are "as varied as a municipality's responsibilities, powers, and assets." *Id.* To make such a showing, Beaverhead County would have to "allege[] an injury to a sufficiently substantial segment of its population, articulate[] an interest apart from the interests of particular private parties, and express[] a quasi-sovereign interest." *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 847 (9th Cir. 2011) (citing *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 607).

The critical question, therefore, is whether Beaverhead County has demonstrated a quasi-sovereign interest apart from the interests of private parties. *City of Sausalito* identified several proprietary interests that establish injury-in-fact for municipal entities, including management, public safety, economic, aesthetic, and natural resource harms. 386 F.3d at 1198–99. Here, McGinley's affidavit focuses predominantly on the recreational and aesthetic interests of Beaverhead County's citizens. In this respect, Beaverhead County is attempting to assert the interests of its citizens under the doctrine of *parens patriae*. *See*

Colorado River Indian Tribes, 776 F.2d at 848 ("political subdivisions . . . cannot sue *parens patriae* because their power is derivative and not sovereign").

McGinley's affidavit alleges in pertinent part that

> Beaverhead County's economics are based on multiple use of the resource values of the entire county, and as such, Beaverhead County has a tremendous interest in the Beaverhead at Deerlodge Revised Forest Plan.
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> . . .
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> Beaverhead County residents, including myself, regularly visit the [Forest] in pursuit of our own personal and aesthetic recreational interests. I intend to continue to pursue recreational activities in the [Forest] for the foreseeable future.
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> . . .
>
> Beaverhead County was also granted cooperating agency status by the Forest Service. The Forest Service, however, failed to properly consult or give any meaningful delegation of duties during the revised forest planning process to Beaverhead County, including formulation of a preferred alternative in the FEIS. Beaverhead County has been irreparably harmed by the Forest Service's failure to involve and seriously consider the special expertise of Beaverhead County, a cooperating agency.
>
> . . .
>
> Our Complaint in this case generally describes Beaverhead County and its intent to continue motorized and non-motorized access to the extent authorized by the Forest Service. There are numerous routes, areas, and uses, including access to areas recommended for wilderness that I and other Plaintiffs have used and enjoyed that are now off limits pursuant to the [Revised Forest Plan].
>
> Motorized travel in these areas is no longer authorized as a result of the [Revised Forest Plan]. Beaverhead County residents, including myself, have therefore lost the ability to visit some of these areas, which has adversely impacted our recreational and aesthetic interests in the forest. As long as the Forest Service continues to close portions of the [Forest] that were historically available for motorized recreation, my recreational

> and aesthetic interests in the forest will be irreparably harmed. The restrictions in the [Revised Forest Plan] have also precluded our ability to gain access to or use many historical areas of the forest.

(Decl. of Mike McGinley, Document No. 53-1, 7–10.)

City of Sausalito presents an array of interests that underscore the fundamental issue with respect to the *parens patriae* doctrine: that a state or political subdivision—such as Beaverhead County here—must establish a separate interest apart from its citizens in order to establish standing. *See Alfred L. Snapp & Son, Inc.*, 458 U.S. at 607. McGinley's declaration fails to fulfill that charge here as it focuses primarily on the recreational and aesthetic interests of Beaverhead County's citizens in the Forest.[2] A separate proprietary, quasi-sovereign interest on behalf of Beaverhead County is not articulated. Although McGinley avers an injury based upon the Forest Service's alleged failure to adequately include Beaverhead County during the revision process, he has failed to allege with sufficient specificity and detail, injuries suffered by Beaverhead

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[2] While McGinley does state that Beaverhead County's economics are based upon "multiple use of the resource values of the entire county," economic injuries alone are insufficient to establish standing. *See W. Radio Servs. Co., Inc. v. Espy*, 79 F.3d 896, 902–03 (9th Cir. 1996) ("NEPA's purpose 'is to protect the environment, not the economic interests of those adversely affected by agency decisions. Therefore a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA.'") (quoting *Nevada Land Action Assn. v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) (emphasis omitted)). McGinley failed to even allege an injury to Beaverhead County's economics. Rather, he alleged only that Beaverhead County's economics "are based on multiple use of the resource values of the entire county" and that it has "a tremendous interest" in the Revised Forest Plan.

County as a result of the Forest Service's actions.[3]

McGinley's declaration fails to demonstrate an injury-in-fact suffered on behalf of Beaverhead County. Plaintiffs, therefore, have failed to establish Article III standing for their first NEPA claim, which alleges that the Forest Service violated NEPA by failing to adequately include Beaverhead County as a cooperating agency. No other evidence submitted by Plaintiffs supports their standing. As such, that claim is dismissed for lack of subject matter jurisdiction.

ii. Prudential Standing

Plaintiffs' remaining claims fall under the APA. Consequentially, they must demonstrate prudential standing in addition to Article III standing. *See Citizens for Better Forestry*, 341 F.3d at 976. They must establish that there has been a final agency action adversely affecting them and that they suffer from an injury that falls within their zone of interests as a result. *Id.* The zone of interests protected by NEPA is environmental. *See Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 940 (9th Cir. 2005).

Here, publication of both the 2009 and 2010 RODs and the Final EIS

[3] Although the Supreme Court held that the State of Massachusetts had standing to pursue claims *parens patriae* in *Massachusetts v. EPA*, 549 U.S. 497, 519 (2007) because of its "well-founded desire to preserve its sovereign territory" and because it owns "a great deal of the territory alleged to be affected," a similar conclusion in this case is not warranted as McGinley's declaration is devoid of any identifiable claim of concrete injury beyond that of the aesthetic and recreational variety. Those claims belong not to Beaverhead County but to private parties.

qualify as a final agency action. An agency action is final when: "First, the action . . . mark[s] the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action . . . [is] one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (internal quotation marks and citations omitted). Both elements are met in this case. Further, the procedural injuries identified in White's declaration clearly establish that the Forest Service's actions adversely affected him and his constituents. Such procedural injury falls within the zone of interests protected by NEPA. *See Lujan v. Natl. Wildlife Fedn.*, 497 U.S. 871, 886 (1990) ("'recreational use and aesthetic enjoyment' are among the sorts of interests [NEPA] [was] specifically designed to protect") (emphasis omitted).

iii. Organizational Standing

An organization has standing to bring a claim on behalf of its members when (1) its members would have standing to bring a claim in their own right, (2) the interests at stake are germane to the organization's purpose, and (3) when neither the claim nor the relief requested require the participation of the individual members. *Friends of the Earth*, 528 U.S. at 181.

The Court has determined that Kerry White has standing to sue in his own

right as would members of the organizations he represents. Furthermore, the interests he professes are at stake here are germane to the interests of those organizations, *i.e.*, protecting recreational and aesthetic interests in the Forest. Finally, as this case exclusively involves the judicial review of an administrative record, the individual participation of members of Plaintiffs' groups is unnecessary. Plaintiffs have established organizational standing.

iv. Additional Standing Requirements

Plaintiffs must "demonstrate standing for each claim [they] seek to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). Additionally, at the summary judgment stage, a plaintiff cannot "rest on such mere allegations, but must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true." *Defenders of Wildlife*, 504 U.S. at 561 (internal quotation marks and citation omitted).

Plaintiffs here have failed to establish standing for their claim that the Forest Service violated the WSRA as the Revised Forest Plan relates to Deadman Creek. They have submitted no evidence that establishes standing for any individual plaintiff. That claim is, therefore, dismissed. The White declaration, however, is sufficient to confer standing to Plaintiffs for the remaining NEPA claims. *See Bd. of Nat. Resources v. Brown*, 992 F.2d 937, 942 (9th Cir. 1993)

(the Court may reach the merits of the claims where at least one plaintiff has demonstrated standing).

B. NEPA Claims

1. APA Standard of Review

NEPA compliance is reviewed under the APA. *Westlands Water Dist. v. U.S. Dept. of Int.*, 376 F.3d 853, 865 (9th Cir. 2004). An agency's decision may only be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Court must evaluate whether the agency's decision was based "on a consideration of the relevant factors and whether there has been a clear error of judgment." *Marsh v. Oregon Nat. Resource Council*, 490 U.S. 360, 378 (1989) (internal quotation marks omitted). The inquiry must be "searching and careful, but the ultimate standard of review is a narrow one." *Id.* (internal quotation marks omitted). An agency's decision is arbitrary and capricious if the agency has

> relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Veh. Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43 (1983). Conversely, the agency's action is valid if a reasonable basis

exists for its decision. *See Kern Co. Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006). Such a basis exists if the agency "considered the relevant factors and articulated a rational connection between the facts and the choices made." *Arrington v. Daniels*, 516 F.3d 1106, 1112 (9th Cir. 2008). Even if the agency decision is "of less than ideal clarity," the Court may uphold the agency's decision so long as its "path may reasonably be discerned." *Motor Vehicle Mfrs. Assn.*, 463 U.S. at 44. In doing so, however, the Court may not "infer an agency's reasoning from mere silence . . . ." *Pac. Coast Fedn. of Fisherman Assns. v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1091 (9th Cir. 2005).

2. NEPA Standard of Review

"The goal of NEPA is two-fold: (1) to ensure that the agency will have detailed information on significant environmental impacts when it makes decisions; and (2) to guarantee that this information will be available to a large audience." *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1063 (9th Cir. 2002). Further, NEPA "does not mandate particular results, but simply prescribes the necessary process" that an agency must follow in issuing an EIS. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). The Court must, therefore, determine whether the agency took a "hard look" at the environmental consequences of the proposed action. *Bering Strait Citizens for*

Responsible Resource Dev. v. U.S. Army Corps of Engrs., 524 F.3d 938, 947 (9th Cir. 2008). That inquiry requires the Court to determine whether the agency considered all foreseeable direct and indirect environmental consequences of its action. *See Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 973 (9th Cir. 2002). To do so, the Court employs a "rule of reason" that "does not materially differ from an 'arbitrary and capricious' review" in evaluating the adequacy of an EIS. *Neighbors of Cuddy Mountain*, 303 F.3d at 1071. Although the Court must defer to an agency action that is "fully informed and well-considered," it is not required to "rubber stamp a clear error of judgment." *Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2002) (internal quotation marks omitted).

Plaintiffs have established standing for three of their NEPA claims regarding the sufficiency of the Revised Forest Plan. Each is addressed below.

3. The Forest Service adequately evaluated the environmental impacts of banning motorized uses from the Recommended Wilderness Areas.

Plaintiffs allege that the Forest Service violated NEPA by failing to conduct an analysis before banning motorized uses from the Recommended Wilderness Areas. They contend that the Forest Service made the decision to exclude motorized uses from the Recommended Wilderness Areas as far back as 2004, and because the alleged decision occurred prior to the development of a range of

alternatives, the Forest Service was ill-informed as to the potential consequences of its decision. (Pl.'s Memo. in Support of Cross-Mot. for S.J., Document No. 36 at 14–15, (June 8, 2012)). Plaintiffs have identified notes from a meeting of the Interdisciplinary Team—which helped craft the alternatives—on February 24, 2004, which stated: "Decision: Recommended wilderness areas will be managed as non-motorized." Leadership Team Notes: February 24, 25, and 26, 2004, B1-06, 2. In essence, Plaintiffs argue that this proposal represented a predetermined, uninformed decision to ban motorized uses from the Recommended Wilderness Areas. Notwithstanding the comprehensive NEPA analysis that followed, Plaintiffs argue that the Forest Service should have conducted a separate NEPA analysis that analyzed the environmental effects of banning motorized uses.

NEPA requires an agency to prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). "Human environment" means "the natural and physical environment and the relationship of people with that environment." 40 C.F.R. § 1508.14. To evaluate the effects of proposed actions, agencies are required to prepare detailed statements on environmental impacts, adverse environmental effects that cannot be avoided, and alternatives to the proposed action. § 4332(2)(C)(i)–(iii). Adverse environmental effects include ecological effects "on natural resources and

on the components, structures, and functioning of affected ecosystems" as well as those implicating "aesthetic, historic, cultural, economic, social, or health" considerations of a proposed action. 40 C.F.R. § 1508.8(b).

Contrary to Plaintiffs' claims, the record here demonstrates that the Forest Service conducted an extensive NEPA analysis that considered and evaluated the environmental impacts of banning motorized uses in the Recommended Wilderness Areas. To do so, it evaluated six alternatives during the revision process. Alternative 1, the "no-action Alternative," would have maintained prior wilderness allocations (about 174,000 acres), in which motorized uses would have continued to be permitted. The Forest Service specifically addressed the environmental effects of wintertime motorized uses in the Forest, stating: "The existing Forest Plans, represented by Alternative 1, did not anticipate the growth demand for winter recreation which developed over the last fifteen years. As a result, they show little consideration for or concern about winter recreation except at downhill Ski Areas." Draft EIS, 256. The Final EIS goes on to explain: "All action alternatives result in reductions to areas available for motorized use and increased areas for non-motorized uses. . . . Areas being proposed as recommended wilderness will increase the protection of backcountry recreation with solitude, challenge and a natural appearing setting." Final EIS, 367.

The environmental effects of motorized uses are further examined in the Final EIS:

> [T]he presence of motorized recreation may diminish the undeveloped character in several ways. Physical impacts to vegetation and soils result from a variety of trail uses, including motorized vehicles. . . . full sized vehicles and ATVs lead to the establishment of two track routes, suggestive of roads and a more developed setting.
>
> Increased visitation is a consequence of easier vehicle vehicle access, which causes more frequent encounters, thus reducing the sense of remoteness and opportunities for solitude. Engine noise detracts from natural setting and increased trail use requires more management. Bridges, culverts, turnpikes, and signs are improvements, which may reduce undeveloped character. Motorized vehicles also transport weed seed. Vehicles driven through populations of invasive plants often pick up seeds in the radiator grill, under carriage, tire treads, etc. and transport these seeds to previously uninfested areas.

Id. at 288–89 (citation omitted). With respect to snowmobiles specifically, the Final EIS states:

> Although the long term physical impacts of over snow motorized use may be difficult to quantify, snowmobiles do cause short term physical and social impacts. Tracks in snow fields and high mark play areas may be widespread and affect natural appearance and sense of solitude. Snow machines are often audible over great distances, affecting solitude and secure wildlife habitat.

Id. at 289. Given the impacts caused by snowmobiles, the Forest Service rejected a "No Snowmobile Restriction Alternative" explaining that such a plan would "adversely impact resources by not protecting big game winter range and sensitive

wildlife habitats . . . . and would not provide wildlife security and could adversely impact [threatened, endangered, candidate, and sensitive] species. It would also not provide any quiet recreation opportunities." *Id.* at 33.

The Forest Service clearly considered the environmental impacts of banning motorized uses from the Recommended Wilderness Areas. That decision complies with NEPA's requirements and falls within both NEPA's policy objectives and the Forest Service's policy regarding Recommended Wilderness Areas. NEPA's overall objective is "first and foremost to protect the natural environment." *Kootenai Tribe of Idaho*, 313 F.3d at 1123; *see also* 42 U.S.C. § 4331 (setting out NEPA's policy objectives). Furthermore: "Fundamental to the [Forest Service's] responsibility for recommended wilderness is protection and preservation of wilderness character until designated by Congress as wilderness or released from wilderness consideration." Final EIS, 288. NEPA does not require the Forest Service to evaluate alternatives inconsistent with its basic policy objectives. *Kootenai Tribe of Idaho*, 313 F.3d at 1121.

The Forest Service fulfilled its obligations under NEPA in banning motorized uses from the Recommended Wilderness Areas. Its six alternatives represented a full range of well-developed options with varying degrees of Recommended Wilderness allocation. It ultimately selected Alternative 6, which

identified 322,000 acres of Recommended Wilderness Area and which permitted motorized uses on 55 percent of the Forest during the summer and 60 percent during the winter. Plaintiffs' claim here fails because the record demonstrates that the Forest Service carefully considered and evaluated the potential environmental impacts of managing the Recommended Wilderness Areas as non-motorized. It did so in comprehensive fashion and in compliance with NEPA's requirements.

4. The Forest Service did not violate NEPA by failing to conduct a supplemental EIS.

Here, Plaintiffs claim the Forest Service erred by failing to conduct a supplemental EIS before adding approximately 21,000 acres to the Recommended Wilderness Area—including addition of Stony Mountain and additional acreage on Snowcrest Mountain—neither of which were analyzed in the Draft EIS. Plaintiffs allege that these additions constituted a substantial change to the Draft EIS, were relevant to environmental concerns, and were qualitatively different from the impacts studied in the Draft EIS.

A supplemental EIS is required if: "(i) the agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. §

1502.9(c)(1)(i)–(ii). An agency may, however, modify action proposed in a draft EIS based upon the public's response. *Id.* at § 1503.4(a). "[T]he decision whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance: If there remains 'major Federal actio[n]' to occur, and if the new information is sufficient to show that the remaining action will 'affec[t] the quality of the human environment' in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared." *Marsh*, 490 U.S. at 374 (quoting § 4332(2)(C)). As such, an agency has flexibility to modify alternatives considered in a draft EIS, *Cal. v. Block*, 690 F.2d 753, 771 (9th Cir. 1982), and is only required to conduct a supplemental EIS if it substantially departs from the alternatives in the draft EIS, *Russell Country Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037, 1045 (9th Cir. 2011).

The Council on Environmental Quality ("CEQ") has published guidance on when a supplemental EIS is required. The Ninth Circuit has adopted its guidance as a framework for analyzing § 1502.9(c)(1). *See Russell Country Sportsmen*, 668 F.3d at 1045 (adopting CEQ's Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations [hereinafter "Forty Questions"], 46 Fed. Reg. 18026 (March 23, 1981)). CEQ's guidance maintains that a supplemental EIS "is not required when two requirements are satisfied: (1) the

new alternative is a '*minor variation* of one of the alternatives discussed in the draft EIS,' and (2) the new alternative is '*qualitatively within the spectrum of alternatives* that were discussed in the draft [EIS].'" *Id.* (quoting Forty Questions, 46 Fed. Reg. at 18035) (emphasis in original). A supplemental EIS, therefore, "is not required for *every* change; it is not uncommon for changes to be made in a Final EIS after receipt of comments on a DEIS and further concurrent study." *Kootenai Tribe of Idaho*, 313 F.3d at 1118 (emphasis in original).

As noted above, the main dispute here is over approximately 21,000 acres that comprise Stony Mountain and a portion of Snowcrest Mountain. The Forest Service concedes that these areas were not analyzed in the Draft EIS.[4] The question, therefore, is whether their additions to the Recommended Wilderness Areas qualify as a substantial departure from the Draft EIS. The Court finds that they do not. Plaintiffs' claim fails as a result.

Compared with the 322,000 acres allocated for Recommended Wilderness Areas in the Final EIS, the 21,000 acres in dispute comprise only a small portion (approximately 6.5 percent) of the overall acreage allocated for Recommended Wilderness. And, while Stony Mountain was not recommended for wilderness

[4] Of the approximately 21,000 acres, 15,883 acres made up Stony Mountain while 5,125 acres represented the increase in acreage on Snowcrest Mountain compared to the acres analyzed in the Draft EIS alternatives. FEIS Wilderness, Wilderness Study Area, and Recommended Wilderness Summary, F3-17.

designation in any of the alternatives analyzed in the Draft EIS,[5] the area was analyzed for wilderness potential in the Draft EIS. Draft EIS, A1-24, App. C, 466–72. The record also demonstrates that its physical and environmental characteristics are qualitatively within the spectrum of the alternatives considered in the Draft EIS.[6] In addition, the Final EIS analyzed Stony Mountain for its wilderness suitability, concluding that the area is "natural appearing and scenic integrity is high," that it "offers solitude and primitive recreation," that it is a roadless area that "may contribute undisturbed habitat for wide-ranging wildlife species and native fish," and that a "[w]ilderness recommendation for Stony Mountain has support from the public and the adjacent National Forest managers." Final EIS, App. C, 150–51. Finally, although Stony Mountain was accorded a "moderate rating" for wilderness suitability, it was "only a point away from a high capability rating . . . ." Final EIS, 286.

Snowcrest Mountain was also analyzed for Recommended Wilderness designation in the Draft EIS. Draft EIS, App. C, 217–24. Alternatives 3 and 5 recommended 86,500 acres and 86,900 acres for Wilderness in the Snowcrest Mountain area, respectively. Final EIS, 284. The 2009 ROD designated 92,000

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[5] *See* Recommended Wilderness Area Acres by Alternative: 11/19/2004, E5-01.

[6] *Compare* Draft EIS, App. C, 466–72 *with id.* at 54–465.

acres for Recommended Wilderness. 2009 ROD, 22. These additions to Snowcrest Mountain are quantitatively minor and qualitatively within the spectrum of the alternatives given that the Draft EIS analyzed Snowcrest Mountain for its suitability for Recommended Wilderness designation.

The CEQ's Forty Questions presents an example directly on point regarding these additions:

> For example, a commentor on a draft EIS to designate a wilderness area within a National Forest might reasonably identify a specific tract of the forest, and urge that it be considered for designation. If the draft EIS considered designation of a range of alternative tracts which encompassed forest area of similar quality and quantity, no supplemental EIS would have to be prepared. The agency could fulfill its obligation by addressing that specific alternative in the final EIS.

Forty Questions, 46 Fed. Reg. at 18035. The Forest Service fulfilled that obligation here. Final EIS, App. C, 143–46 (Snowcrest); *id.* at 150–53 (Stony Mountain).

Plaintiffs' rely extensively on *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683 (10th Cir. 2009). That case, however, is clearly distinguishable. There, the Tenth Circuit required the BLM to conduct a supplemental EIS on an issue that "went to the heart of the proposed action and posed new and previously unconsidered environmental consequences." *Russell Country Sportsmen*, 668 F.3d at 1049 (distinguishing *New Mexico ex rel. Richardson*). Here, the Forest

Service's decision to add additional acreage to the Recommended Wilderness Area posed no new consequences not already considered in the Draft EIS. *See Marsh*, 490 U.S. at 374 (supplemental EIS only required if new information shows that remaining action will affect human environment in a significant manner or to a significant degree "not already considered"). Although Plaintiffs argue the additions of Stony Mountain and additional acreage to Snowcrest Mountain presented substantial questions because the effect of eliminating motorized recreation in those areas had not been analyzed, those same environmental questions and consequences had been analyzed previously during the development of the alternatives as motorized recreation was eliminated throughout the Recommended Wilderness Areas.

Plaintiffs' claims here fail for at least four reasons. First, the addition of 21,000 acres to the Recommended Wilderness Area was, overall, a minor addition. Second, the Forest Service analyzed the environmental impacts of designating similar areas as Recommended Wilderness. Third, the additions of Stony Mountain and additional acreage to Snowcrest Mountain are qualitatively and quantitatively similar to other areas analyzed in the Draft EIS. Fourth, the Forest Service fulfilled its obligation with regards to Stony Mountain by addressing its suitability for Recommended Wilderness designation in the Final EIS.

5. The Forest Service did not violate NEPA by failing to conduct site-specific analysis.

Plaintiffs next argue that the Forest Service violated NEPA by failing to conduct site-specific analysis of the wilderness areas it closed to motorized uses. In many respects, Plaintiffs' claims here echo those made regarding the decision to ban motorized uses from the Recommended Wilderness Area. They ring equally hollow.

Plaintiffs point to a portion of the 2009 ROD in which the Forest Service stated that the Revised Forest Plan did not make "site specific decisions such as closing individual motorized routes in areas Recommended for Wilderness" and that the Forest Supervisor would issue a second Record of Decision "based on the analysis in the Revised FEIS, making site-specific decisions based on the Revised Forest Plan." Plaintiffs argue from that reference that the Forest Service attempted to skirt its obligation to analyze the effects of closing the Recommended Wilderness Areas to motorized uses. In doing so they rely heavily on *Kern v. BLM*, 284 F.3d 1062 (9th Cir. 2002). As discussed *infra*, that reliance is misplaced.

An EIS must contain a "reasonably thorough" discussion of an action's environmental consequences. *Natl. Parks & Conserv. Assn. v. BLM*, 606 F.3d 1058, 1072 (9th Cir. 2009). It must also provide a "full and fair discussion of

significant environmental impacts . . . ." 40 C.F.R. § 1502.1. Moreover, "[t]he detail that NEPA requires in an EIS depends upon the nature and scope of the proposed action." *Block*, 690 F.2d at 761. The Court must make a "pragmatic judgment whether the EIS's form, content and preparation foster both informed decision-making and informed public participation." *Id.* Finally, "[a]gencies have 'discretion to determine the physical scope used for measuring environmental impacts' so long as they do not act arbitrarily and their 'choice of analysis scale . . . represent[s] a reasoned decision.'" *WildWest Inst. v. Bull*, 547 F.3d 1162, 1173 (9th Cir. 2008) (quoting *Idaho Sporting Cong., Inc.*, 305 F.3d at 973).

The main issue here is whether the Forest Service sufficiently analyzed the effects of excluding motorized uses from the Recommended Wilderness Areas without analyzing each of those areas at the site-specific level. It is clear that it did so. The environmental effects of such a proscription are well documented in the 2009 ROD and the Final EIS. As stated *supra*, the Forest Service identified eight revision topics early in the revision process. Those topics include "Recreation and Travel Management" and "Recommended Wilderness" and "represent[ed] a systematic framework for discussing the Revised Forest Plan." 2009 ROD, 8. The 2009 ROD itself states:

> Motorized recreation, particularly the use of ATVs and over-snow vehicles, has increased substantially since the 1986 and 1987 Plans were

> approved. Advancing technology has also expanded use into new terrain. For much of [the Forest], this use has evolved over time with little management intervention. The unmanaged expansion of motorized use has resulted in resource damage, wildlife impacts, and competition and conflict between user groups.
>
> Current Plans do not proved adequate direction concerning the management of recreation opportunities in [the Forest]. Clear and specific direction is needed to manage recreation setting and travel patterns in order to provide a balanced and diverse range of opportunities across the Forest.

Id. at 13. It also noted with respect to Recommended Wilderness that "[t]he management of recommended wilderness is intended by national policy to protect wilderness potential and wilderness values." *Id.* at 20 (citation omitted). According to the Forest Service, excluding motorized uses from the Recommended Wilderness Area "provides a balance of opportunities in response to the broad range of public values." *Id.* at 21.

Each of the 12 landscapes[7] that comprise the Forest including: Big Hole, Boulder River, Clark Fork-Flints, Elkhorn, Gravelly, Jefferson River, Lima Tendoy, Madison, Pioneer, Tobacco Roots, Upper Clark Fork, and Upper Rock

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[7] The Forest Service defines a landscape as

> a large area of land (as much as 1,000,000 acres) that represents either a mountain range or a whole watershed basin. These areas reflect logical blocks of land that people relate to by name—large blocks of land where people, wildlife, water and natural processes move with some predictability. Landscapes in Montana tend to be isolated mountain ranges and the valley bottoms around them.

Big Hole Landscape Analysis 2001, L2-01, I-1.

Creek were examined during the revision process. All are further broken down into management areas. The environmental effects of each of the six alternatives for all 12 landscapes as they applied to recreation and travel management were analyzed. Final EIS, 342–402. Such analysis included the effects on motorized recreation in both summer and winter, specific locations within each landscape that would be affected, rationales for the goals of each alternative, and how changes would affect particular users, including snowmobilers. *Id.* Any argument that sufficient examination of these effects was not conducted is simply not supported by the record.

As noted, Plaintiffs' reliance on *Kern* is misplaced. There, the Ninth Circuit required the BLM to go back and analyze the effects of a tree root fungus that had not previously been analyzed during the BLM's programmatic analysis. 284 F.3d at 1072–73. However, as the Forest Service points out, its statement regarding the need for site-specific decisions referred only to the administrative closing of the recommended wilderness areas and not to additional environmental analysis that would take place at a later time. Plaintiffs neither identify environmental impacts not considered nor "provide scientific evidence that more detailed analysis would have been preferential . . . or that it would have resulted in more 'detailed information regarding significant environmental impacts.'" *Wildland CPR, Inc. v.*

U.S. Forest Serv., 872 F. Supp. 2d 1064, 1078 (D. Mont. 2012) (quoting *Robertson*, 490 U.S. at 349) (Judge Molloy rejecting arguments that the Forest Service violated NEPA by failing to conduct site-specific analysis with regards to the same Revised Forest Plan). Simply put, there is no evidence that suggests the Forest Service evaded NEPA process. The decision to ban motorized uses in the Recommended Wilderness Areas was not only in line with both NEPA's and the Forest Service's policy objectives, it was also thoroughly evaluated during the revision process. Given the foregoing, Plaintiffs' final NEPA claim fails.

CONCLUSION

Plaintiffs' first and fifth claims are dismissed for lack of subject matter jurisdiction. Plaintiffs' second, third, and fourth claims are denied on the merits.

ORDER

ORDERED:

1. Plaintiffs' Motion for Summary Judgment[8] is DENIED.

2. Defendant-Intervenor's Cross-Motion for Summary Judgment[9] is GRANTED.

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[8] Document No. 35.

[9] Document No. 42.

3. Defendants' Cross-Motion for Summary Judgment[10] is GRANTED.

4. The Clerk of Court shall enter judgment accordingly.

DATED this 22nd day of July, 2013.

Sam E. Haddon
SAM E. HADDON
United States District Judge

[10] Document No. 45.