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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

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BITTERROOT RIDGE RUNNERS)	
SNOWMOBILE CLUB, <u>et al.</u> ,)	Case No. CV 16-158-M-DLC
	Plaintiffs,)	
	vs.)	MEMORANDUM IN
)	SUPPORT OF MOTION FOR
U.S. FOREST SERVICE, <u>et al.</u> ,)	CLARIFICATION OR IN
	Defendants,)	THE ALTERNATIVE TO
)	AMEND THE JUDGMENT
	and)	
)	
FRIENDS OF THE BITTERROOT, <u>et al.</u> ,)	
	Defendant-Intervenors.)	
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Defendant-Intervenors respectfully ask the Court to clarify that its June 29, 2018 Order on Summary Judgment does not vacate the Bitterroot National Forest Travel Plan’s (“Travel Plan”) restrictions on mountain bike use in the Bitterroot’s Wilderness Study Areas (“WSAs”). In the alternative, to the extent that vacatur of the WSA mountain bike restrictions was intended, Plaintiffs request that the Court amend the remedy portion of its judgment pursuant to Federal Rule of Civil Procedure 59(e) to provide that the Travel Plan is remanded without vacatur, so that the Plan’s important protections for WSAs remain in place during the Forest Service’s new public objections process.

The Court in its June 29 Order remanded the Travel Plan to the U.S. Forest Service with instructions to (1) conduct an objection response period concerning the Service’s decision to close mountain bike trails in the Sapphire and Blue Joint WSAs; (2) consider the objections; and (3) “either modify the FEIS and Final ROD accordingly, or show that the eligibility of the total 110 miles of mechanized use closures in WSAs is permissible under the APA.” Order, ECF No. 61 at 31-32. The Court, however, did not explicitly vacate any portion of the Travel Plan. Id. at 31-33. Absent vacatur, all of the Travel Plan’s provisions—including the provisions restricting mountain bike use in WSAs—remain in place. See Cal. Cmtys. Against Toxics v. EPA, 688 F.3d 989, 992 (9th Cir. 2012) (noting that,

when equity demands, the court may leave challenged agency action in place rather than vacate it).

Nevertheless, after this Court's Order, on July 10, 2018, the Forest Service issued a press release indicating that it believes the Court's Order does vacate the WSA mountain bike restrictions pending the outcome of the new public comment process. See Exhibit 1 (press release). Specifically, the agency's press release stated that "trails in WSAs are open to mountain bikes" as a result of this Court's Order. See id.

The Forest Service's position effectively re-opens trails in the Sapphire and Blue Joint WSAs to mountain bike use that is inconsistent with their wilderness character and is prohibited by the Travel Plan. See 16 U.S.C. § 1133(c) (generally prohibiting "mechanical transport" in wilderness). Further, as this Court recognized, "bicycle use was not occurring [in the WSAs] in 1977 but has grown exponentially since then." Order, ECF No. 61 at 28. Accordingly, re-opening the WSA trails to such use violates the Montana Wilderness Study Act's direction to maintain the WSAs' 1977 wilderness character. See Mont. Wilderness Ass'n v. McAllister, 666 F.3d 549, 558 (9th Cir. 2011).

Defendant-Intervenors therefore respectfully request that this Court clarify that its June 29 Order did not vacate the Travel Plan's restrictions on mountain

bike use in WSAs, and that these restrictions—along with the rest of the Travel Plan—remain in force during remand.

If, however, the Court did intend to vacate the WSA mountain bike restrictions, Defendant-Intervenors respectfully ask the Court to amend its judgment pursuant to Federal Civil Rule 59(e) to provide instead for remand without vacatur. A Rule 59(e) motion may be granted “to prevent manifest injustice.” Allstate Ins. Co. v. Herron, 634 F.3d 1101, 1111 (9th Cir. 2011). Here, the amendment Defendant-Intervenors request is necessary to maintain wilderness character in the Bitterroot’s WSAs, as the Montana Wilderness Study Act requires. Pub. L. No. 95-150 § 3(a), 91 Stat. 1243 (1977) (Study Act); see Idaho Farm Bureau Fed’n v. Babbitt, 58 F.3d 1392, 1405 (9th Cir. 1995) (remanding without vacatur a decision that protected endangered species).

“Whether agency action should be vacated depends on how serious the agency’s errors are ‘and the disruptive consequences of an interim change that may itself be changed.’” Cal. Cmty. Against Toxics, 688 F.3d at 992 (citations omitted). The error found by the Court—failure to provide an opportunity for public comment concerning mountain bike restrictions in WSAs—is a procedural error that does not warrant vacatur. Idaho Farm Bureau Fed’n, 58 F.3d at 1405 (ordering remand without vacatur despite “significant procedural error”). Indeed, the Court approved the Forest Service’s determination that the bicycle restrictions

are necessary to protect wilderness character in WSAs in light of the significant increase of bicycle use in these areas since 1977. Order, ECF No. 61, at 28. Given that determination, it is likely that the Forest Service will be able to adopt the same restrictions on remand after providing a new public comment period—another reason why vacatur is not warranted. Pollinator Stewardship Council v. EPA, 806 F.3d 520, 532 (9th Cir. 2015) (in deciding whether to remand without vacatur “[w]e have also looked at ... whether by complying with procedural rules, [the agency] could adopt the same rule on remand”).¹

Further, an interim change that reinstates the former travel management regime in WSAs would reverse nearly ten years of effort, including considerable public effort by Defendant-Intervenors and others to protect WSAs from mechanized use. See Idaho Farm Bureau Fed’n, 58 F.3d at 1406 (remand without vacatur appropriate where “significant expenditure of public resources, including

¹ Defendant-Intervenors further note that the Forest Service has already provided an objection process concerning the prohibition on mountain bikes in WSAs. The Service notified the public about this prohibition in its Draft Record of Decision for the Travel Plan, issued in April 2015. See AR 2819 (stating that Service’s decision “will prohibit the use of bicycles on roads and trails in recommended wilderness areas and wilderness study areas”) (emphasis added). The Service then held an objection process, during which Plaintiff Bitterroot Backcountry Cyclists specifically objected to the Service’s decision to prohibit bicycles in WSAs. AR 28-33 (objection submitted by Bitterroot Backcountry Cyclists). The Service responded to this objection in a letter dated July 14, 2015. AR 143 (objection response letter). The agency’s provision of an objection process even further militates against vacatur of the mountain bike restrictions.

the \$400,000 spent on [scientific] studies, would be unnecessarily wasted” if decision were set aside). More importantly, vacatur would diminish the wilderness characteristics of WSAs and threaten opportunities for these areas to receive permanent protection: as the Forest Service has determined, continuing to allow uses that are inconsistent with wilderness designation “creates a constituency that will have a strong propensity to oppose [wilderness] recommendation and any subsequent designation legislation.” AR 210. This threatened environmental harm counsels against vacatur. See Pollinator Stewardship Council, 806 F.3d at 532 (In determining whether vacatur is appropriate, “we consider whether vacating a faulty rule could result in possible environmental harm, and we have chosen to leave a rule in place when vacating would risk such harm.”).

In sum, to the extent that the Court’s June 29 Order was intended to vacate the mountain bike restrictions, an amendment providing for remand without vacatur is warranted to ensure that WSAs remain protected pending the Service’s new public comment process. Defendant-Intervenors respectfully request that the Court amend its judgment accordingly.

Respectfully submitted this 13th day of July, 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this memorandum contains 1,145 words in compliance with Local Rule 7.1(d)(2)(A).

/s/ Joshua R. Purtle
Joshua R. Purtle

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was today served on all counsel of record via the Court's CM/ECF system.

/s/ Joshua R. Purtle
Joshua R. Purtle