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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

HELENA HUNTERS AND ANGLERS ASSOCIATION, a non-profit organization; and the MONTANA WILDLIFE FEDERATION, a non-profit organization, Plaintiffs, vs. LEANNE MARTEN, in her capacity as Regional Forester for Region One; the UNITED STATES FOREST SERVICE, a federal agency; and the UNITED STATES DEPARTMENT OF AGRICULTURE, a federal department, Federal-Defendants.	9:19-cv-00047-DLC (Consolidated with Case No. CV-19-106-M-DLC) REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT (DOC. 55)

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Facts	Doc. 77, Helena Hunters' statement of undisputed facts.
Helena Hunters	Plaintiffs, the Helena Hunters and Anglers Association and Montana Wildlife Federation.
Mountain bikers	Defendant-Intervenor, the Montana Bicycle Guild Inc.
NEPA	National Environmental Policy Act
NFMA	National Forest Management Act
Service	Federal-Defendants, the U.S. Forest Service et al.
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INTRODUCTION

Helena Hunters submits this reply in support of its motion for summary judgment (Doc. 55) and respectfully requests this Court conduct a "thorough, probing, in-depth review" of the issues and record. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). This Court should "not rely on counsel's statements" about the record, but should examine the record for itself and determine whether (or not) it supports the agency's action. *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994).

ARGUMENT

I. Roadless Rule violations.

The Service (and other parties) maintain the Tenmile project complies with the Roadless Rule because: (a) the use of mechanized equipment will only occur on fourteen miles of "existing" roads in the Lazyman roadless area; (b) clearing, using, and maintaining these existing roads for mechanized access (followed by closure) is not road "construction or reconstruction;" and (c) even if it is, such road work is exempted by the Roadless Rule. None of these arguments have merit.

A. There are not fourteen miles of "existing" roads in the roadless area.

The Service insists the fourteen miles of roads needed for the project in the Lazyman roadless area are "currently in existence." Doc. 65 at 10. The Service says these are "non-system roads" which exist on the landscape but are "unauthorized" and not included in a "forest transportation atlas" or part of its road figures. Doc. 65 at 25. The Service is incorrect.

The existing road figures for the Lazyman roadless area do not make a distinction between "system" and "non-system" roads. *See* Divide-043658; Tenmile-005648; Tenmile-007052. There is technically no such thing as a "non-system road." The definition provided by the Service's counsel was taken from the definition of an "unauthorized road or trail." *See* 36 C.F.R. § 212.1; Tenmile-075607; Tenmile-007179.

As such – as the Service now admits – the fourteen miles of "existing" roads are nothing more than "unauthorized" user-created trails and two-tracks (most dating back to the late 1800s). These user-created trails and two-tracks are unauthorized for motorized use and are not – and never have been – part of the transportation system. *See id*. And, they are barely noticeable on the landscape. *See* Doc. 56-7.

Notably, the *only* evidence on the baseline condition of these user-created trails and two-tracks – which was provided by Helena Hunters – reveals they are overgrown with vegetation, blocked by downed trees, and have been naturally restored due to nearly a century of non-use, forest succession, beetle-kill, and re-growth. *See* Doc. 56 at 21 (photos); Doc. 56-7 (same). No evidence in the record reveals otherwise.

In fact, conspicuously missing from the record is any documentation, i.e., surveys, data, maps, photos, or evidence from the Service about the existing, baseline condition of these fourteen miles of user-created trails and two-tracks. The agency simply concludes – without any supporting information – that they are "existing" roads. This alone is a violation of NEPA. *See Oregon Nat. Desert Ass'n v. Rose*, 921 F.3d 1185, 1190–91 (9th Cir. 2019) (rejecting decision that failed to include baseline environmental conditions on purported routes). If the record "does not support the agency action . . . or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it" then the proper course is to vacate the decision and remand it back to the agency. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

In September 2016, the agency's "team" stated that it needed "some additional time to ground truth existing trails, roads, and tracks (Lazyman) and validate mechanical treatment options" and explained the need to do its "Due Diligence" on the effects to roadless values. Tenmile-010426. A month later, the team noted that it had "identified numerous two-track routes in [the] Lazyman area . . . that potentially could be used for mec[hanized] access." Tenmile-010430. The team also noted the need to walk and survey these routes to inventory historic features and that this would not be a "quick and simple process." *Id.*

The Service's response, however, was that this was "not urgent" and could be addressed at a later time. *Id.* (comment no. DHR-5). The Service also conveyed a need to "get the user created routes and old mining trails to GIS" and then update the road list for the newly created alternative 4. Tenmile-010431. A GIS map was then produced on November 14, 2016 which shows roughly fourteen miles of "existing" roads in the roadless area slated for various closure methods *where no roads previously existed*. *See* Tenmile-010705; Facts at ¶47 (map).

Apparently, however, the team's request to conduct on-the-ground surveys of the "existing" roads was never granted. This is likely why, in

December 2017, the Service's GIS team was struggling with how to "display" its road work on these user-created trails and two-tracks in the roadless area, noting that some will need to be converted to temporary roads while others will be slated for reconstruction with level 4 closure. *See* Facts at ¶49.

At one point, the Service notes that displaying the "non-system roads" in the roadless area as reconstruction or temporary roads – like new road No. 4782-003 – may "cause problems here . . . not sure what to put?" *Id.* at ¶50. The response was that the agency had discussed this internally and landed on what to display, *see id.*, which, for road No. 4782-003 and the other new roads in the Lazyman roadless area apparently meant displaying nothing at all. The final EIS and final decision are devoid of this information and focus solely on the closure levels (not the road work). *See, e.g.*, Tenmile-009181 (only displaying closure levels, not road work); Tenmile-007055 (same); Tenmile-009522 (same).

The Service even doubled-down and misleadingly told the public that no road construction or reconstruction will occur because all road work will utilize "existing" roads in the roadless area. *See* Facts at ¶52.

The Service even altered its map to depict "existing routes" in the Lazyman roadless area where none occur. *Compare* Figure 85 in the final EIS, Tenmile-007004, *with* Figure 86 in the final EIS, Tenmile-007007.

In this case, there is thus a disconnect between the facts found (there are not fourteen miles of existing roads) and the decision made (project will utilize fourteen miles of existing roads). This is the hallmark of arbitrary action. *Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053, 1067 (9th Cir. 2018). The Service asks for deference but there is nothing to defer to. This Court "cannot defer to a void." *Oregon Nat. Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1121 (9th Cir. 2010). No information, no surveys, no photos, and no evaluation or analysis on the present condition of these "existing" roads is in the record. The Service relies solely on conclusory and generic statements, which does not suffice. *See Rose*, 921 F.3d at 1191.

B. Converting fourteen miles of user-created trails and two-tracks into temporary roads for mechanized access violates the Roadless Rule.

The Service now concedes the fourteen miles of user-created trails and two-tracks in the roadless area are needed for mechanized access. Doc. 65 at 25-26; *see also* Tenmile-009185 (same); Facts at ¶48 (listing roads). The final EIS lists thirty-five units in the roadless area that will be accessed using mechanical or ground-based logging equipment. *See* Tenmile-007260; *see also* Facts at ¶58 (listing units); Tenmile-09523 (map). The Service maintains, however, that mechanized access to these units complies with the Roadless Rule because such use will only be temporary and all roads will eventually be closed. Doc. 65 at 25. The Service also insists that such use can be accomplished without any improvements because the majority (not all) of the mechanized logging equipment will involve "smaller vehicles" such as a "tracked forwarder or Utility Task Vehicle." Doc. 65 at 26. The Service is wrong.

"Road construction" in the Roadless Rule is broadly defined as any activity "that results in the addition of forest classified or temporary road miles." Tenmile-015626. Temporary road miles include those that are authorized or permitted by the Service – like the fourteen miles at

issue here – but are not intended to be permanent or part of the transportation system. *Id.* Here, during project implementation, fourteen miles of new, temporary roads will be added to the forest transportation system in the roadless area. This is reflected in the Service's GIS data and mileage estimates in the record, s*ee* Facts at ¶61, and by the Service's own admission that the fourteen miles of "non-system roads" will need to be decommissioned, i.e., removed from the system. Tenmile-007007-008.

"Road reconstruction" is also defined broadly to include any activity "that results in improvement or realignment" of an existing road.Tenmile-015626. An activity that results in "an increase of an existing road's traffic service level, expansion of its capacity, or a change in its original design function" is considered an "improvement." *Id.* In this case, mechanized equipment will be used to "remove down and standing material from units that would otherwise be burned in place . . . [and] there may be a need to clear debris such as rocks and downed trees from the routes in order to provide safe and efficient access for crews and mechanized equipment during implementation." Tenmile-009185. The Service explains the types of mechanized

equipment used for this work "could range from tracked chippers and skid steers, to larger machines such as tracked feller-bunchers." Tenmile-006125.

Once cleared of debris and downed or hazardous trees, the Service says the temporary roads will be subject to the Service's standard road maintenance levels and improved to the "minimum standard needed to provide access" for the mechanized equipment. Tenmile-006125. "Road maintenance activities would include surface blading, vegetation removal, minor slump repair, drainage structure cleaning and/or installation." *Id*. Only after completion of the fifteen-year project will the Service implement closure methods. The closure method varies by road but generally involve recontouring and stabilizing the route, decompaction and ripping, revegetation, culvert removal, and the re-establishment of natural drainage contours. *See* Tenmile-007007-008 (discussing each method); Tenmile-007008 (Table 296); Tenmile-007948 (map showing closure methods).

Despite all of this road work, the Service still insists there will be no "construction" or "reconstruction." Such conclusions simply are not supported by the project itself or evidence in the record. Even the

County (which helped develop the project) admits that temporary roads will be built and road renovations will occur in the roadless area. *See* Doc. 58 at 6–7.

The Service asks this Court for deference when interpreting its own regulation but such an interpretation is not controlling if "plainly erroneous or inconsistent with the regulation," *Auer v. Robbins,* 519 U.S. 452, 463 (1997), as it is here. The Service's reliance on *Hammond v. Norton*, 370 F. Supp. 2d 226 (D.D.C. 2005), and *Hogback Basin Preservation Ass'c v. United States Forest Service*, 577 F. Supp. 2d 1139 (W.D. Wash. 2008), is also misplaced. *Hammond* involved a "construction zone" for energy pipeline, 370 F. Supp. 2d at 262, and *Hogback Basin* involved a parking lot, 577 F. Supp. 2d at1148–49. Neither case involved converting user-created trails and two-tracks into temporary roads that will be cleared, used, and maintained for mechanized access and possibly not closed for fifteen years.

C. The Roadless Rule's exemption for road construction or reconstruction does not apply.

The State and the County maintain the Tenmile project falls within the Roadless Rule's exemption for certain types of road work. *See* Doc. 58 at 5–6; Doc. 59-2 at 3. This is incorrect.

The exemption cited by the State pertains solely to logging (not road work), *see* Tenmile-015627, and contrary to the County's assertion, the Service *never made* a finding that the Roadless Rule's exemption for road work applied. *See* Tenmile-009204. Nor could it. The Roadless Rule's exemptions for road work – by their own terms – are inapplicable. *See* Tenmile-015626-27.

II. NEPA violations.

A. The Service must prepare a supplemental EIS.

The Service maintains Helena Hunters' supplemental NEPA claim is "moot and not redressable" because it issued "the NEPA supplement . . . in the form of a Final EIS." Doc. 65 at 28. The Service is mistaken.

NEPA requires supplementation if "the final decision departs substantially from the alternatives described *in the draft EIS*." *Russell Country Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037, 1045 (9th Cir. 2011) (emphasis added); *see also* 40 C.F.R. § 1502.9(c)(1) (requiring supplementation of draft EIS); CEQ's *Forty Questions*, 46 Fed. Reg. 18026, 18035 (March 23, 1981) (same). *Russell Country* involved this very issue, i.e., whether supplementation of the draft EIS was required

due to changes that were included in the final EIS and eventually adopted by the agency. *Id.* at 1049. Draft EISs serve an important purpose – they are made available for public review and comment and present the alternatives to (and impacts of) the proposed action in comparative form. 40 C.F.R. § 1502.9. This is why supplementation is required if substantial changes to the alternatives presented in the draft EIS are made (even if those changes are eventually included in a final EIS). *See Russell Country*, 668 F.3d at 1045.

The Service's reliance on two public "check-ins" after release of the draft EIS, *see* Tenmile-015011 and Tenmile-015077, as a substitute for supplementation is also misplaced. Asking the public to "check-in" and submit comments on a new alternative – by itself and with limited information – is not contemplated by NEPA. *See* 40 C.F.R. § 1508.10 (defining the "environmental document"). Nor is it a substitute for NEPA compliance. *S. Fork Band Council of W. Shoshone of Nevada v. U.S. Dep't of Interior*, 588 F.3d 718, 726 (9th Cir. 2009).

Indeed, if the Service were permitted to correct deficiencies in a draft EIS with such "check-ins", then the "regulations governing the supplementation of NEPA documents promulgated by the CEQ, as well

as the [Service's] own rules on the issue, would be superfluous." *Idaho Sporting Congress v. Alexander*, 222 F.3d 562, 567 (9th Cir. 2000). "NEPA is a procedural statute, and we have held that 'agency action taken without observance of the procedure required by law will be set aside.'" *Id.* No exceptions, short-cuts, or surrogates for preparing a supplemental EIS are allowed. *Id.* at 566.[1]

1. Fourteen miles of new road work in the roadless area is a substantial change.

The Service insists that the fourteen miles of road work in the Lazyman roadless area does not trigger the need for supplementation because the project "does not authorize any road construction or reconstruction in roadless areas." Doc. 65 at 29–30. As discussed earlier, however, *see supra* sections I.A. and I.B., this is inaccurate.

It is largely undisputed that the Tenmile project involves converting fourteen miles of user-created trails and two-tracks into temporary roads that will be cleared, used, and maintained for mechanized access and then – upon completion of the project – closed

[1] Agencies can use non-NEPA documents to evaluate the need for supplementation, *Alexander*, 222 F. 3d at 566, but this is not what the Service did here.

and decommissioned *See* Facts at ¶¶37-74. Without question, this road work is a substantial change that was never disclosed or analyzed in the draft EIS and a change that will fundamentally alter the roadless areas' unique values and characteristics and undermine its potential for eventual wilderness designation (which is currently being evaluated, *see* Facts at ¶15).

2. Seven miles of new mountain bike trails in the roadless area is a substantial change.

The Service maintains designating seven miles of new single-track non-motorized trails open for mountain biking ("mountain bike trails") in the roadless area is a "minor change" within the "gambit of alternatives" considered in the draft EIS. Doc. 65 at 32-33. The mountain bikers agree and argue the benefits outweigh the impacts to the roadless area. Doc. 68 at 9. Not so.

Two requirements must be satisfied to avoid supplementation: (a) the change must be "qualitatively within the spectrum of alternatives" discussed in the draft EIS; and (b) the changes must be a "minor variation" to the ones discussed in the draft EIS. *Russell Country*, 668 F.3d at 1045. Neither requirement is met here.

The new mountain bike trails are not disclosed – at all – in the draft EIS. The Service refers to a sentence in the draft EIS noting that "mountain biking in the Jericho Mountain roadless area has become a popular activity" but this is a different roadless area and is unrelated to the new mountain bike trails here.

Further, there is nothing "minor" about designating, maintaining and improving, and constructing new mountain bikes trails *inside* a roadless area. There are no existing system trails (non-motorized or motorized) within the Lazyman roadless area. *See* Tenmile-007033 (figure 89). While some historic, user-created trails undoubtedly exist, the large amounts of downfall have largely limited their use to backcountry hikers and hunters. And, because these are user-created trails, they are not depicted on National Forest Service maps and the Service does not sign, maintain, or take any steps to improve them.

This is in large part why the roadless area provides such outstanding big game security and habitat and remains largely remote and quiet. It is also why the local collaborative objected to the use of mechanized equipment inside the roadless area, *see* Tenmile-008550, and why the area was previously recommended for wilderness

designation. *See* Facts at ¶15; Tenmile-011727. The Service is now evaluating the Lazyman roadless area for wilderness as part of the on-going forest plan revision process. Tenmile-008278. The addition of seven miles of new mountain bike trails inside the area, however, will certainly influence that decision and undermine the area's value and use by wildlife. *See* Tenmile-006441 (discussing impacts of mountain biking); Tenmile-039113 (mountain biking more impactful to wildlife than other uses).

The Service concedes as much, noting that such trails can adversely impact wildlife habitat and security, *see* Tenmile-006441, and "can complicate future [wilderness] designation." Tenmile-007069. The Service also admits that its decision represents "an increase in development," Tenmile-007067, and will "most likely increase" use of the roadless area. Tenmile-007078; *see also* Tenmile-007034 (discussing increased use of area, including more shuttled riders from Helena). The new mountain bike trails will also require some new construction, improvements, and maintenance inside the roadless area, *see* Doc. 65 at 33, including the need to log and remove all hazardous trees along the new system trails. Tenmile-007036.

The Service assumes directing use to new mountain bike trails will improve the status quo, given the existence of unauthorized user-created trails in the area that will be closed. Tenmile-007067. But a commitment to close trails that are already closed is redundant. Moreover, the need to manage unauthorized user-created trails should be addressed without having to build *new* ones in a roadless area. The Service also never explains why use on existing user-created trails will magically cease once the new trails are built and mapped. Nor does the Service commit to any monitoring or enforcement to prevent the creation of new trails even though it concedes that "[u]sers could continue to build unauthorized routes." Tenmile-007034.

The mountain bikers also insist biking is not illegal in roadless areas. Doc. 68 at 3. This may be true but the salient inquiry is not whether mountain biking is *per se* allowed by the Roadless Rule, but whether the impacts (direct, indirect, and cumulative) of such activity – including the construction, designation, maintenance, and improvement of such trails in the roadless area – should be analyzed in a supplemental EIS. The new trails may not be illegal, but the Service's decision to authorize them should be analyzed because they pose

entirely new and previously unconsidered environmental questions that were never disclosed in the draft EIS. *See Russell Country*, 668 F.3d at 1049.

3. Withdrawal of the elk security amendment is a substantial change and new circumstance.

The Service argues against supplementation because the withdrawn elk security amendment "was not used as a standard" for the Tenmile project. Doc. 65 at 34–35. The Service is wrong for two reasons.

First, the elk security amendment was used as a "standard." The elk security amendment *replaced* standard 4(a) in the forest plan, Doc. 65 at 34, and is presented as a new "standard" for managing elk security in the Divide Landscape. Divide-045177; *see also* Divide-045178 (listing the "Exceptions to the Standard" and providing the "Standard Definitions"). The elk security amendment changed the existing standard 4(a) in the forest plan "to a new standard for elk security." Divide-45389.

When the draft EIS for the Tenmile project was released, the elk security amendment had not been formally adopted. This occurred a few weeks later on March 1, 2016. Divide-045169. But in anticipation of

that decision, the draft EIS utilized the elk security amendment precisely as a new "standard," i.e., as a "level of performance" or "threshold specified" for protecting elk habitat and security and achieving management objectives. *See* Tenmile-005730. The elk security amendment was also used to assess the impacts to elk, *see* Tenmile-003888–89, and was described as "an alternative way of assessing elk security/vulnerability." Tenmile-005127. The Service also discussed the elk security amendment as a superior method to standard 4(a). *See* Tenmile-005131.

Second, the elk security amendment need not be used as a "standard" to trigger the need for supplementation. The elk security amendment was interwoven into the draft EIS – utilized to define security, manage for it, and assess impacts to elk. This decision dramatically changed the Service's analysis, the public's perceived impacts to elk from the project, and the public's ability to submit meaningful comments – all of which triggers the need for a supplemental EIS. *See, e.g.*, *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F. 3d 755, 760–61 (9th Cir. 2014) (requiring supplementation after travel plan

withdrawn); *Klamath Siskiyou Wildlands Center v. Boody*, 468 F3d 549, 561–62 (9th Cir. 2006) (requiring supplementation after change in policy).

The Ninth Circuit's concerns in *Connaughton* are applicable here: without supplementation "the public would be at risk of proceeding on mistaken assumptions." 752 F. 3d at 761. "When the public reviews an EIS to assess the environmental harms a project will cause and weighs them against the benefits of that project, the public should not be required to parse the agency's statements to determine how an area will be impacted, and particularly to determine which portions of the agency's analysis . . . are no longer relevant." *Id*.

Further, in this case, the Service never evaluated whether (or not) its decision to withdraw the elk security amendment warranted preparation of a supplemental EIS. This alone is a violation of NEPA. *See Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 558 (9th Cir. 2000) (citation omitted). After release of the Divide Travel Plan, for example, the Service evaluated whether withdrawing the elk security amendment warranted preparation of a supplemental EIS for that decision. *See* Divide-045764. The Service determined it did not because

the travel plan had no effect on the amount of available hiding cover. Divide-045766. No such evaluation, however, was undertaken in this case even though the Tenmile project will adversely impact elk habitat and security and remove over 13,000 acres of hiding cover. *See* Tenmile-006418 (table 114).

B. The Service failed to adequately analyze impacts to the roadless areas' values.

The Service says it analyzed the environmental effects of using "existing" roads in the Lazyman roadless area for mechanized access and then subjecting them to various closure methods as required by NEPA. Doc. 65 at 36–37. No details or specific citations are provided, however. Instead, the Service cites nearly 100 unhelpful pages, including the *entire* "roadless expanse" section in the final EIS. *See id.* at 37. This is insufficient.

Where the Service's counsel "has heaved the entire contents of a pot against the wall in hopes that something would stick," it is not the Court's job to "sort through the noodles." *Indep. Towers of Washington v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003). "Judges are not like pigs, hunting for truffles buried in briefs." *Greenwood v. F.A.A.*, 28 F.3d 971, 977 (9th Cir. 1994).

Here, nowhere in the roughly 100-pages cited by the Service does the agency actually analyze (let alone disclose and discuss) the direct, indirect, and cumulative effects of the fourteen miles of road work on the roadless area's values and character. Nor does the Service establish baseline conditions of the user-created trails and two-tracks and then assess how clearing and converting them into temporary roads may impact roadless values. This is a major oversight: where the agency proceeds with a project without "establishing the baseline conditions" i.e., without establishing the "physical conditions of the routes, such as whether they are overgrown with vegetation or have become impassible in certain spots," there is simply no way to determine the effects of the project and, consequently, no way to comply with NEPA. *Rose*, 921 F.3d at 1190 (citation omitted).

The Service also entirely fails to consider how the fourteen miles of road work, in conjunction with the mechanized logging, new mountain bike trails, and other actions may cumulatively impact the roadless areas' values and characteristics. "General statements about 'possible effects and 'some risk' do not constitute a 'hard look'" required by NEPA. *Id.* at 1191 (citation omitted). Here, the Service focuses solely

on the benefits of road closure while excluding any analysis or discussion of the baseline conditions of these routes and the impacts of clearing, using, and maintaining them in the first place.

III. NFMA violations.

A. The Service's decision to utilize the withdrawn elk security amendment is arbitrary.

The Service maintains that while it withdrew the elk security amendment, it never gave up the option of using the "concepts embedded" within it. Doc. 65 at 35. This is a distinction without a difference.

The concepts embedded within the elk security amendment, i.e., how "elk security areas" are defined and managed, the new approach to defining "open-road densities" and exclusion of private lands from the elk herd unit, cannot be severed from the amendment itself – they are one and the same. And these changes are more than just vague "concepts." The new definition of "elk security areas," for example, which eliminates the hiding cover component, the new definition of "open road density" exempting certain types of motorized use, and the exemption of private lands from the elk herd unit are entirely new (and controversial) approaches to managing elk habitat and security.

For support, the Service relies this Court's decision in *Native Ecosystems Council v. Marten,* No. CV 17-77-M-DLC, 2018 WL 6480709 (D. Mont. Dec. 10, 2018). But in that case, this Court expressly held that the Service could not use the vacated Forest Plan Amendment – including the concepts embedded therein – unless they were "consistent with the pre-amendment forest plans." *Id.* at *8. Without question, the elk security amendment at issue here is not consistent with standard 4(a). *See infra* section III.B; Doc. 56 at 52–56. The concepts utilized in *Native Ecosystems Council* were also not central to why the Forest Plan Amendment was vacated. *See* 2018 WL 2018 WL 6480709 at *8. This case is different: the "concepts embedded within" the elk security amendment represent significant changes and new management redirection for the forest. *See infra* section III.B.

B. The elk security amendment conflicts with standard 4(a).

The Service's assertion that the elk security amendment comports with standard 4(a) has no merit.

The elk security amendment directly conflicts with standard 4(a) by, *inter alia*, replacing mandatory, measured parameters (that can be easily monitored) for hiding cover and road-density, with optional

guidelines. *Compare* Divide-045174 (forest plan standard 4(a)) *with* Divide-045177–89 (elk security amendment). The elk security amendment also removes the hiding cover component from the definition of "elk security" and defines "security areas" based solely on their size and distance from open roads. *See* Divide-045178. This change represents a significant redirection for elk management in the Divide Landscape. Indeed, under this new approach, a clear-cut forest stand could technically qualify as an "elk security area" so long as it is a certain distance from an "open road."

The elk security amendment's exemption of motorized use on roads for "administrative" purposes i.e., vehicle use associated with private land access and management activities or projects (like the Tenmile project), from the "open-road density" thresholds is also a significant change from standard 4(a). The best available science reveals "[a]ny motorized vehicle use on roads will reduce habitat effectiveness [for elk]."*Native Ecosystems Council v. Krueger*, 946 F. Supp. 2d 1060, 1088 (D. Mont. 2013).

The elk security amendment also excludes private, state, and other non-National Forest System lands from the new security

thresholds even though these lands are located within the elk herd unit. *See* Divide-045178. This too is a significant change in direct conflict with standard 4(a). *See* Divide-045174; *see also Native Ecosystems Council v. U.S. Forest Service*, 418 F. 3d 953, 962–63 (9th Cir. 2005) (forest plan does not allow exclusion of private and other non-National Forest lands from elk calculations). This change alone would significantly lower the amount of available elk security and hiding cover required in each elk herd unit. *See* Tenmile-016700–02 (power point explaining importance of change).

These three changes to standard 4(a) (individually and in the aggregate) are why Helena Hunters and other organizations were compelled to challenge the elk security amendment in *Montana Backcountry Hunters and Anglers v. U.S. Forest Service*, Case No. 9:16-cv-00110-DLC. It is also why the Service's decision to utilize both competing concepts when analyzing and approving the Tenmile project is so problematic.

The mixing-and-matching of standard 4(a) and the elk security amendment makes it nearly impossible to understand the impacts to elk habitat and security or ensure compliance with standard 4(a). Even

the Service's counsel gets confused. *See* Doc. 65 at 44 (relying on table 128 in the final EIS, Tenmile-006439, to demonstrate compliance with standard 4(a), even though the table employs concepts only found in the elk security amendment).

For example, many of the tables in the final EIS refer to "open road density" in relation to standard 4(a) but do not specify which definition is being utilized. *See, e.g.*, Tenmile-006405 (table 107), Tenmile-006419 (table 115); Tenmile-006421 (table 117). The definition of "open road" in the glossary to the final EIS as a "motorized route open to the public," Tenmile-007176, parrots the definition used to define "elk security" in the elk security amendment (not forest plan standard 4(a)), *see* Divide-045178. It is also unclear whether private and other non-National Forest System lands within the elk herd unit are part of the calculus (as required by standard 4(a), but not the elk security amendment).

In response, the Service maintains such confusion is immaterial because it ultimately applied standard 4(a) and demonstrated compliance with it in the Jericho elk herd unit. Doc. 65 at 43. But careful examination of the Service's own estimates of available hiding

cover reveals the Tenmile project violates standard 4(a) in the Jericho elk herd unit. *See* Facts at ¶¶91-94. After taking into account the loss of hiding cover from the Tenmile project and other projects (including Telegraph), hiding cover in the Jericho elk herd unit drops to approximately 54 percent. *See id*. Open-road density, however, will reach 1.2 miles per square-mile during project implementation and remain at 1.0 mile per square-mile thereafter. Tenmile-006421 (table 117). This is well above standard 4(a)'s thresholds. *See* Tenmile-006404 (figure 26 – standard 4(a) compliance).

C. The Service cannot use "canopy cover" as a proxy for hiding cover in beetle-killed forests and still ensure compliance with standards 1, 2, and 3.

The Service maintains that even the canopy cover definition is not "explicitly permitted" for forest plan standards 1, 2, and 3, it is still a valid proxy for measuring horizontal hiding cover for the Tenmile project. This is incorrect.

The forest plan explicitly defines hiding cover from the horizontal perspective, as "[v]egetation capable of hiding 90 percent of a standing adult deer or elk from the view of a human at a distance equal to or less than 200 feet . . . ." Tenmile-000177. This is *the only* definition

applicable to standards 1, 2, and 3, Tenmile-000025, and any interpretation to the contrary would render the distinction between horizontal hiding cover and thermal cover in standards 1, 2, and 3 superfluous. *See id.*

The Service correctly notes that in *Native Ecosystems Council*, 2018 WL 6480709 at *10, this Court upheld the Service's hiding cover analysis for the Johnny Crow project. But in that case, the plaintiffs never challenged the methods used, only whether forest plan standard 3 was met. *See id.* This Court thus has no reason to consider or address this issue in that case.

The Service also says using canopy cover as a proxy for horizontal hiding cover is supported by the scientific literature, specifically "Lonner and Cada (1982)." Tenmile-007860. But this paper simply says that forest stands "with at least 40% canopy cover were considered elk hiding cover." Divide-019865. The paper provides no analysis or supporting data for this assumption, *see* Facts at ¶120 (discussing papers), and it is directly contradicted by the Service's own statements in this case. For this project, the Service said that changes to forest stands from the mountain pine beetle outbreak may provide more

hiding cover even though "forest canopy declines." Tenmile-006415. "The opportunity to hide and protect calves should not be diminished by the loss of canopy cover, and in fact, should improve with the increase in deadfall, shrubs, and young conifers." *Id.*

Using canopy cover as a proxy for horizontal hiding cover in forest stands subjected to the mountain pine beetle outbreak – like the stands in the Tenmile project – therefore, is not accurate or reliable; it distorts the impacts to elk security. *See* Doc. 56 at 63–65 (explaining how using the proxy allows the Service to overestimate and underestimate amount of available hiding cover); *see also* Tenmile-006419 (photo 40 – forest stand with only 5 percent canopy cover but sufficient hiding cover); Tenmile-007863 ("standing dead trees still function as hiding cover in the absence of canopy cover.").

In response, the Service says canopy cover is a valid proxy because it was measured using "R1-VMAP data," Doc. 65 at 46, but this only tells us how canopy cover was measured. The Service also relies on "999 points" that were surveyed to measure hiding cover in portions of the project area. Doc. 65 at 46. But these 999 survey points are "[r]andom points" generated by GIS nearly ten years ago that do not reflect

current forest conditions (defined largely by less canopy cover, but more horizontal hiding cover). Nor does the Service explain what measuring hiding cover at "random points" tells us about the relationship between canopy cover and hiding cover. The survey points only tell us how many plots met their definition of hiding cover. The 999 random survey points are also spotty (and do not cover all units slated for logging or other vegetative treatments), and there is no indication that the survey points were actually utilized to assess compliance with standards 1, 2, and 3 in the forest plan.

The Service's reliance on elk population numbers, *see* Doc. 65 at 39, is equally misplaced. The Service insists the "Forest Plan direction is to manage for elk populations, not habitat potential," Tenmile-008286, but standards 1, 2, and 3 are clearly habitat (not population) based standards. *See* Tenmile-000025. Population numbers – by themselves – tell us nothing about whether seasonal habitat exists on the landscape, the location of the elk, and whether they are on private or National Forest lands within the elk herd unit. Further, the population numbers relied on by the Service are collected at the hunting

district and not the elk herd unit level, as required by the forest plan. *See, e.g.*, Tenmile-006389 (table 99).

IV. Vacatur is the appropriate remedy.

Helena Hunters respectfully requests this Court: (a) declare the Service's authorization of new road work, use of mechanized equipment, and new mountain bike trails in the roadless areas unlawful; and (b) set aside or vacate this part of the Service's decision. *See, e.g.*, *NRDC v. EPA*, 735 F.3d 873, 886–87 (9th Cir. 2013) (vacating decision in part). This is the standard, presumptive remedy under the APA. *See* 5 U.S.C. § 706(2). If an agency's decision is not sustainable, it "must be vacated and the matter remanded to [the agency] for further consideration." *Camp v. Pitts,* 411 U.S. 138, 143 (1973). Courts only depart from this presumptive remedy "when equity demands," *Pollinator Stewardship Council v. U.S. E.P.A.*, 806 F.3d 520, 532 (9th Cir. 2015), and only in "rare circumstances," *Oregon Nat. Desert Ass'n v. Jewell*, 840 F.3d 562, 575 (9th Cir. 2016). No such circumstances exist here.

The Service says vacatur "would be disruptive and dangerous" due to wildfire risk but the agency never explains how Helena Hunters' narrow request for partial vacatur in this case increases that risk. Nor

could it. *See* Disputed Facts (Doc. 75) at ¶¶ 7,9. The Service simply has not met its burden of demonstrating that "equity demands" remand without partial vacatur (and cannot attempt to do so for the first time on reply, *see Eberle v. City of Anaheim,* 901 F.2d 814, 818 (9th Cir. 1990)).

CONCLUSION

For these reasons, this Court should grant Helena Hunters' motion for summary judgment (Doc. 55) and issue the relief requested.

Respectfully submitted this 20th day of December, 2019.

/s/ Matthew K. Bishop
Matthew K. Bishop

/s/ Kelly E. Nokes
Kelly E. Nokes

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December, 2019, I filed a copy of this document electronically through the CM/ECF system, which caused all ECF registered counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/ Matthew K. Bishop
Matthew K. Bishop

CERTIFICATE OF COMPLIANCE

I, the undersigned counsel of record, hereby certify that this brief is proportionally spaced, has a typeface of 14 points or more, and contains less than 6,250 words in accordance with this Court's order (Doc 20). I relied on Microsoft Word to obtain the word count.

/s/ Matthew K. Bishop
Matthew K. Bishop