IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:19-cv-1449-REB

WILDERNESS WATCH,
SAN JUAN CITIZENS ALLIANCE, and
GREAT OLD BROADS FOR WILDERNESS,

Plaintiffs,

v.

BRIAN FEREBEE, in his official capacity as Regional Forester, and
UNITED STATES FOREST SERVICE, a Federal Agency within the U.S. Department of Agriculture,

Defendants.

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Rule 65(a) of the Federal Rules of Civil Procedure, Plaintiffs Wilderness Watch, San Juan Citizens Alliance, and Great Old Broads for Wilderness respectfully move the Court for a preliminary injunction to prohibit Defendants Brian Ferebee, in his official capacity as Regional Forester, and the United States Forest Service (collectively, "Forest Service" or "Agency") from enforcing or implementing a May 7, 2019, authorization to use chainsaws throughout two designated wilderness areas in Colorado, as modified by Mr. Ferebee on May 31, 2019 ("Decision"). The Decision authorizes Forest Service Personnel, commercial outfitters, and volunteers to use chainsaws to clear trails in the wildernesses beginning July 8, 2019 without further authorization or approval required despite a clear statutory prohibition on such use and a lack of any public notice, comment, or environmental review process to support it.

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I. INTRODUCTION AND SUMMARY OF MOTION

This motion seeks to enjoin motorized chainsaw use to clear trails in two Colorado wilderness areas to allow judicial review of a Decision made without compliance with federal public land management statutory standards and procedures. To Plaintiffs' knowledge, the Decision is the most extensive authorization of chainsaw use ever within the National Wilderness Preservation System and is a sharp departure from the tradition of utilizing traditional tools and skills to clear such trails. Bark beetle outbreaks and resulting tree mortality date back to at least 2000. Yet, owing to factors such as the 2019 government furlough and the seeming "impracticality" of addressing blocked trails with human-powered crosscut saws, the Forest Service is poised to implement a Decision that was made without benefit of public involvement and analysis of reasonable alternatives that could avoid or minimize impacts of the extensive trail clearing project. The Agency identified no compelling reason to implement the Decision beginning July 8, 2019; its imminence justifies emergency relief.

To avoid the harms caused by chainsaw use in wilderness while preserving the status quo, Plaintiffs request a preliminary injunction. Plaintiffs are likely to prevail on the merits of their claims that the Decision was arbitrary and capricious, an abuse of discretion, and violated the National Environmental Policy Act ("NEPA"), the Wilderness Act, and the Administrative Procedure Act ("APA"). The Decision violated NEPA by entirely forgoing public notice and review of the action and by failing to prepare a NEPA-compliant environmental document analyzing the effects of the action and alternatives that could lessen the harms posed. The Decision violated the Wilderness Act prohibition on the use of motorized equipment to clear trails and chainsaw use that is not

"necessary to meet minimum requirements for the administration of the area[s]" as wilderness. If chainsaw use is allowed to proceed, the Decision will irreparably harm wilderness character and Plaintiffs' and their members' interests in protecting and enjoying these Wildernesses. This imminent and irreparable injury outweighs any administrative injury the Forest Service might suffer, and the balance of hardships and the public interest strongly weigh in favor of a preliminary injunction. The motion does not seek to affect existing authority to use of crosscut saws and non-motorized options.

II. STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

The Weminuche Wilderness and South San Juan Wilderness lie in the San Juan Mountains of southwest Colorado, within Conejos, Rio Grande, Mineral, San Juan, Archuleta, La Plata, and Hinsdale counties. Doc. 1 (*Complaint*) ¶¶ 24-25. Two of the last locales to support grizzly bears in Colorado, they remain two of its wildest areas.[1] Each Plaintiff and its members use, enjoy, and plan to continue to use and enjoy on a regular basis, the Wildernesses and unless the relief prayed for herein is granted, will continue to suffer ongoing, concrete, particularized, and irreparable harm and injury to their interests, including their current and future use and enjoyment of the Wildernesses. Doc. 1, ¶¶ 6-9; Decl. of H. Wolke (Doc. 11-4, ¶¶ 7-12), A. Dal Vera (Doc. 11-5, ¶¶ 6-11), C. Barnes (Doc. 11-6, ¶¶ 7-11), N.M. Berry (Doc. 11-7, ¶¶ 5-10), M. Pearson (Doc. 11-8, ¶¶ 9-15), J. Buickerood (Doc. 11-10, ¶¶ 9-15), M. Silbert (Doc.11-14, ¶¶ 8-12).

Tree mortality from spruce beetle outbreaks in Colorado began 19 years ago. Doc. 11-2 (*Workbook*), p. 6. With proper funding and pluck, the resulting blowdown

[1] D. Peterson, *Ghost Grizzlies: Does the Great Bear Still Haunt Colorado?*, Raven's Eye Press, Durango, CO, 3d ed. (2009).

could be managed with crosscut saws. Doc. 11-2, pp. 8, 28; Doc. 11-7 ¶ 8 (wilderness "has been managed for decades with non-motorized methods and there should no reason to make exceptions for reasons of safety" because "chainsaws simply don't belong in Wilderness Areas"); Doc. 11-5 ¶ 5; Doc. 11-13, p. 3.

In April 2019, Plaintiffs learned from their members that Mr. Ferebee was considering authorizing the use of chainsaws to clear wood from trails within wilderness areas throughout the Rocky Mountain Region. Doc. 1 ¶ 27. On April 26, Plaintiff Wilderness Watch submitted a letter to the Mr. Ferebee requesting information about any such proposed actions and that the Forest Service disclose its anticipated timeline for undertaking a NEPA review process. Doc. 11-3, pp. 1-2. Having acknowledged receipt of that letter but prior to responding, on May 7, 2019, Mr. Ferebee executed the Decision by memorandum to the Forest Supervisors of the San Juan and Rio Grande national forests titled "Approval for Limited Chainsaw Use to Clear Trails in Wilderness," authorizing the use of chainsaws by Forest Service personnel, commercial outfitters, and volunteers to clear trail obstructions in the Wildernesses beginning June 1, 2019. Doc. 1 ¶¶ 31-32, 34-35; Doc. 11-1 (*Decision*). Plaintiff San Juan Citizens Alliance submitted a letter to Forest Service about the rumored proposal on May 7, 2019. Doc. 11-11. Plaintiffs learned of the Decision on May 8; on May 10 the Forest Service provided a copy of it and a related, unsigned Minimum Requirements Decision Guide Workbook ("Workbook") to Plaintiffs. Doc. 1 ¶¶ 37-38.

The Forest Service's primary purpose for this project is to "provide unobstructed trail access," Doc. 11-2, p. 5, "especially to outfitter and guide camps and for hunter's [sic] during the Fall hunting season." Doc. 11-2, p. 18. It chose to authorize chainsaw

use until August 17, then August 30, because hunting season begins August 31 and it wanted to "minimize noise impacts at the onset of hunting season," Doc. 11-2, p. 23, and have the work done prior to when "archery deer and elk hunters are anticipated, " Doc. 10-1; *see also* Doc. 11-2, p. 7.

The Forest Service concluded that "[i]t is difficult to estimate the quantity of chainsaws that will be needed or used" and it did not try. Doc. 11-2 at 31. The Forest Service did not disclose or analyze the impacts of its Decision from having to use and transport heavier motorized equipment, spare parts gasoline, and oil and other lubricants in the Wildernesses. Doc. 1 ¶¶ 58-59. Yet it concluded that "[t]ransportation of personnel and equipment will have no effect on the natural character" of the Wildernesses. Doc. 11-2, pp. 21-26. The Decision did not provide any analysis demonstrating that using chainsaws provides any advantage over traditional tools, instead mandating a study and report to address that question. Doc. 11-1, p. 3; *contra.* Doc. 11-13, p. 3 (noting advantages of hand tools and speed on par with chainsaws).

Without the Decision, the Forest Service admitted that the San Juan and Rio Grande national forests could choose alternatives that include temporary closure or relocation some trails or segments for safety and resource protection purposes during the normal course of maintaining wilderness trails. Doc. 11-2, p. 28. The Agency considered, but did not analyze, the use of crosscut strike teams to address the problem because "[a] multitude of factors in 2019 *including the government furlough* and lost time to arrange the logistics of assembling crosscut strike teams and arranging travel to southwest Colorado seemed impractical." Doc. 11-2, p. 28 (emphasis added). Despite admitting that the use of motorized equipment is prohibited by the Wilderness Act, Doc.

11-2, pp. 15, 31, Mr. Ferebee pointed generally to Forest Service policy allowing motorized use when (i) wilderness objectives cannot be accomplished "within reason" through the use of non-motorized methods or (ii) when an "essential activity" would be "impossible to accomplish by non-motorized means," Doc. 11-1, p. 2; Doc. 11-2, p. 30.

Plaintiffs' members visit the Weminuche and South San Juan Wildernesses for the wilderness experience that Congress acted to preserve. As Plaintiffs' members attest, they will suffer actual, imminent harm to their long-standing interest in visiting wilderness to escape signs of motorized and mechanized equipment and to seek quiet solitude, which cannot be remedied through monetary compensation. Decl. of H. Wolke (Doc. 11-4, ¶¶ 11-12), A. Dal Vera (Doc. 11-5, ¶¶ 10-11), C. Barnes (Doc. 11-6, ¶¶ 9-11), N.M. Berry (Doc. 11-7, ¶¶ 9-10), M. Pearson (Doc. 11-8, ¶¶ 12-13), J. Buickerood (Doc. 11-10, ¶¶ 15-16). The use of chainsaws in wilderness will leave "records of man's domination over his environment," A. Dal Vera, ¶ 9; "facilitate the creation of intrusive trail corridors that bust through, rather than lay upon the landscape" and "represent industrial civilization rather than wilderness," H. Wilke, ¶ 10; "facilitate the mastery over the environment for which wilderness should stand as an antidote," C. Barnes, ¶ 9; and "obliterate a primary rationale for human enjoyment of the Wilderness setting, i.e., the peaceful silence of a motor-free environment," M. Pearson, ¶ 14. The Forest Service conceded that chainsaw use would degrade the wildernesses because it is part of "growing mechanization" that "adds to man's ability to master or alter the environment in ways usually not associated with non-motorized equipment." Doc. 11-2, p. 15.

An actual, justiciable controversy exists between Plaintiffs and Defendants. Each challenged agency action is final and subject to judicial review under 5 U.S.C. §§ 702,

704, and 706. This Court has jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. §§ 1331 and 1346. This Court may issue a declaratory judgment and further relief pursuant to 28 U.S.C. §§ 2201-2202 and 2412 and 5 U.S.C. §§ 705 and 706. Venue is proper under 28 U.S.C. § 1391(b)(2) and (e)(1)(B) because all or a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this district.

III. STANDARDS FOR GRANTING A PRELIMINARY INJUNCTION

The object of the preliminary injunction is to preserve the status quo pending litigation of the merits. *Penn v. San Juan Hosp., Inc*., 528 F.2d 1181, 1185 (10th Cir. 1975). A plaintiff seeking a preliminary injunction must establish that he is "likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC*, 129 S.Ct. 365, 374 (2008); *Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir. 2002).

Preliminary injunctions are often implicated in NEPA litigation because a challenged decision "represents a link in the chain of bureaucratic commitment that will become progressively harder to undo the longer it continues." *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989) (internal citation and quotation marks omitted); *Colo. Wild, Inc. v. U.S. Forest Service*, 523 F. Supp. 2d 1213, 1221 (*quoting Davis* at 1115) (noting "the difficulty of stopping 'a bureaucratic steam roller' once it is launched").

IV. ARGUMENT

A. Injunctive Relief is Necessary to Prevent Irreparable Environmental Harm

"Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable."

Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 545 (1987). Where such injury is likely, the balance of harms will usually favor the issuance of an injunction. *Id*.

1. Irreparable Harms from Failure to Comply with NEPA Procedures

NEPA's purpose is to serve as our "national charter for protection of the environment," 40 C.F.R. § 1500.1, a substantive goal that can only be accomplished by complying with NEPA's procedural requirements. Where Plaintiffs are likely to prevail on the claim of a NEPA violation, harm to the environment and Plaintiffs is usually found and may even be presumed. *Davis* at 1115; *Catron County v. U.S. Fish and Wildlife Service*, 75 F.3d 1429, 1440 (10th Cir. 1996) ("An environmental injury usually is of an enduring or permanent nature, seldom remedied by money damages and generally considered irreparable."); *Wyoming v. U.S. Dept. of Agric*., 570 F.Supp.2d 1309, 1353 (D. Wyo. 2008) (harm to the environment "may be presumed when an agency fails to follow" NEPA). The Forest Service utterly failed to comply with its statutory duties under NEPA, causing irreparable harm.

2. Irreparable Harms to Wilderness Interests

A plaintiff satisfies the irreparable harm requirement by demonstrating "a significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damages." *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003). Plaintiffs' declarations make a "specific showing that the environmental harm results in irreparable injury to their specific environmental interests." *See Davis* at 1115; *Colo. Wild*, 523 F.Supp.2d at 1221, n. 4 (relying on irreparable harm declaration). Plaintiffs have a documented interest in protecting and enjoying the wilderness character of the Wildernesses, which they seek out for opportunities to experience

quiet, solitude, and a natural setting undisturbed by motorized disturbance and signs of human influence. Decl. of H. Wolke (Doc. 11-4, ¶¶ 6-8), A. Dal Vera (Doc. 11-5, ¶¶ 5, 6, 9, 10), C. Barnes (Doc. 11-6, ¶¶ 6, 7, 9, 10), N.M. Berry (Doc. 11-7, ¶¶ 4-6, 8, 9), M. Pearson (Doc. 11-8, ¶¶ 9-15), J. Buickerood (Doc. 11-10, ¶¶ 9-15), Doc. 11-12, ¶ 7. Navigating obstacles is consistent with enjoying the wilderness character. *Id*.

The Wilderness Act protects wild areas from our "growing mechanization" and preserves them "in contrast with those areas where man and his own works dominate the landscape." 16 U.S.C. § 1131 (a) and (c). This ensures "outstanding opportunities for solitude or a primitive and unconfined type of recreation" because wilderness areas are "managed so as to preserve [] natural conditions," and in a manner where they "appear[] to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable." *Id*. § 1131 (c).

Chainsaw use will directly injure Plaintiffs. The Forest Service plans six weeks of operations to begin July 8 and end August 30, 2019, throughout the Wildernesses. Doc. 11-1; 10-1. Plaintiffs' members plan to visit the Wildernesses during that time and will be irreparably harmed by encountering chainsaws in these areas. Decl. of A. Dal Vera (Doc. 11-5, ¶ 8), C. Barnes (Doc. 11-6, ¶ 8), N.M. Berry (Doc. 11-7, ¶ 7), M. Pearson (Doc. 11-8, ¶ 13), and J. Buickerood (Doc. 11-10, ¶ 14). The Forest Service admits that chainsaws will have "a greater effect on the visitor's experience, especially due to the sounds of the chainsaw," because visitors "come to wilderness with the expectation of hearing the sounds of nature, not the sounds of motorized equipment." Doc. 11-2, p. 16.

The challenged Decision also will cause long-lasting irreparable harm to Plaintiffs and the Wildernesses: overly developed trail corridors and visible chainsaw cuts that will

remain on tree stumps and downed logs for decades to come. Decl. of H. Wolke (Doc. 11-4, ¶¶ 10-11) (“creation of intrusive trail corridors that bust through, rather than lay upon the landscape”); Doc. 11-2, p. 15 (“Clean-cut stumps and ends are clearly identifiable as the imprint of human influence on the wilderness and will diminish its contrast with other areas of growing mechanization.”); Decl. of A. Dal Vera (Doc. 11-5, ¶ 9) (“When chainsaws have been used on a trail there are enduring signs of motorized use, such as the unique grooves made by a chainsaw in the wood of the trees next to the trail.”). Worse “would be the knowledge that the Wilderness was no longer being managed” as wilderness, Decl. of C. Barnes (Doc. 11-6, ¶ 9), and “a feeling that this land is no longer protected as Congress intended when they designated this land Wilderness,” Decl. of A. Dal Vera (Doc. 11-5, ¶ 9). As the Eleventh Circuit recognized:

> The prohibition on motor vehicle "use" in the Wilderness Act stems from more than just its potential for physical impact on the environment. The Act seeks to preserve wilderness areas "in their natural condition" for their "use and enjoyment as wilderness. " 16 U.S.C. § 1131(a) (emphasis added). The Act promotes the benefits of wilderness "for the American people," especially the "opportunities for a primitive and unconfined type of recreation." *Id*. at § 1131(c). Thus, the statute seeks to provide the opportunity for a primitive wilderness experience as much as to protect the wilderness lands themselves from physical harm.

Wilderness Watch v. Mainella, 375 F.3d 1085, 1093 (11th Cir. 2004).

B. Harms from the Government’s Uninformed Decision-Making and Violating the Wilderness Act Outweigh Any Potential Competing Harms

Proceeding with federal action before NEPA compliance constitutes “real environmental harm [as a result of] inadequate foresight and deliberation,” *Catron County*, 75 F.3d at 1433, which outweighs harm to an agency that could arise from a preliminary injunction. “We know that the environmental values protected by NEPA are

of a high order -- because Congress has told us so." *Oglala Sioux Tribe v. U.S. NRC*, 896 F.3d 520, 529 (D.C. Cir. 2018), *citing* 42 U.S.C. § 4331.

Wilderness designation requires the Forest Service to ensure that any administrative activities in wilderness, including for recreation, are conducted in a manner that preserves wilderness character and complies with the Wilderness Act. 16 U.S.C. § 1133(b). The desire to provide "unobstructed trail access" cannot outweigh the mandate to preserve wilderness character or to overcome the statute's general prohibition on motorized use. *See id*. § 1133(b), (c); *Sierra Club v. Yeutter*, 911 F.2d 1405, 1413 (10th Cir. 1990). And, had the Forest Service considered a reasonable range of alternatives with the benefit of public input, it is likely it would have found a viable, non-motorized alternative that is consistent with preserving wilderness character.

Plaintiffs cannot conceive of any irreparable harm that would befall the Forest Service under the circumstances of the present case. The asserted reason for the challenged Decision is to improve access for recreation and commercial users. Doc. 11-2, pp. 5, 6. The Forest Service will suffer no harm if the status quo is maintained and would benefit from the Court barring an uniformed agency decision from moving forward. Economic harms to non-agency persons from a delayed action cannot outweigh the irreparable harms which are suffered when an agency fails to comply with NEPA "because NEPA contemplates just such a delay." *Park County Resource Council, Inc. v. U.S. Dept. of Agriculture*, 817 F.2d 609, 618 (10th Cir. 1987).

C. The Public Interest Favors an Injunction

The threat of environmental injury without compliance with NEPA's procedures justifies equitable relief because there is an overriding public interest "in preserving the

character of the environment." *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244, 1250 (10th Cir. 1973); see also *Sierra Club v. Lujan*, 716 F. Supp. 1289, 1293. (D. Ariz., 1989) (where environmental laws have been violated and harm to the environment is imminent, "[t]he public interest is obvious," and an injunction should issue). Public interest is promoted by complying with NEPA because "[m]eaningful participation is the heart of NEPA." *Wyoming*, 570 F.Supp.2d at 1354.

Here, the Forest Service did not provide any public notification or opportunity to comment, did not prepare an environmental assessment or any other environmental document to study the impacts of the Decision, and failed to complete a NEPA process. The Forest Service did not analyze or cite legal authority to support the lawfulness of the Decision or explain how the Decision and the Agency's procedures comply with the law. The public interest would be served by a preliminary injunction.

D. Plaintiffs are Likely to Succeed on the Merits

Plaintiffs are likely to succeed on the merits of their claims.[2] By deciding to authorize chainsaw use in the Wildernesses without analyzing the environmental impacts of doing so and of reasonable alternatives in a public process, the Forest Service violated NEPA. By authorizing chainsaw use without showing that such use is "necessary to meet minimum requirements" for administering the areas as wilderness, the Forest Service violated the Wilderness Act. And by failing to articulate a rational

[2] Alternatively, where a movant has satisfied the first three requirements for a preliminary injunction, the Court may apply a modified likelihood of success standard. *Walmer v. U.S. Dept. of Def.*, 52 F.3d 851, 854 (10th Cir. 1995). Here, the equities asserted in the brief and supported by the declarations tip decidedly in Plaintiffs' favor and "questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *See Greater Yellowstone Coal.*, 321 F.3d at 1256.

basis for the Decision, the Forest Service violated the APA.

1. The Forest Service Violated NEPA

"NEPA requires federal agencies to pause before committing resources to a project and consider the likely environmental impacts of the preferred course of action as well as reasonable alternatives." *New Mexico ex rel. Richardson v. Bureau of Land Mgt*., 565 F.3d 683, 703 (10th Cir. 2009). The Forest Service violated NEPA by (1) issuing the Decision without public notice and comment and in the absence of environmental analysis; (2) arbitrarily determining that using chainsaws in wilderness will have no significant environmental impact and, on that basis, failing to prepare an EA or EIS; and (3) failing to analyze a reasonable range of alternatives.

a. The Forest Service Issued the Decision Without Public Involvement or Environmental Analysis

The Forest Service must prepare NEPA documentation before undertaking any "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). A "federal action" triggers the requirement that a federal agency use the NEPA procedures to involve the public and inform the decisionmakers in order to "prevent or eliminate damage" to the environment. 42 U.S.C. § 4332(2)(C); *Ross v. FHA*, 162 F.3d 1046, 1051 (10th Cir. 1998). The Forest Service issued the Decision without adhering to public participation and informed decision-making required by NEPA and its implementing regulations. Instead, the Forest Service issued the Decision unilaterally via an internal memorandum and without public involvement.

b. The Forest Service Arbitrarily Failed to Prepare an Environmental Assessment

Where a "federal action" exists, the NEPA process must analyze not only the

direct impacts of a proposed action, but also the indirect and cumulative impacts of past, present, and reasonable foreseeable future actions. *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024, 1035 (10th Cir. 2001). Where a proposed federal action may "significantly" impact the quality of the human environment, NEPA requires preparation of an EIS. 40 C.F.R. § 1508.27. Where there is uncertainty regarding "significance," an EA may be used to determine whether an EIS is required. 40 C.F.R. § 1508.9. An EA at least has some analysis of cumulative impacts, the scope of proposed activities, and an agency's authority to act and under what conditions. *Front Range Nesting Bald Eagle Studies v. U.S. Fish & Wildlife Serv*., 353 F. Supp. 3d 1115, 1134 (D. Colo. 2018).

Impacts not analyzed in a NEPA document, including impacts to wilderness character, solitude, wildlife and habitat (including listed threatened and endangered species and designated critical habitat), and other important values confirm significant impacts that require analysis in at least an EA.[3] Further, NEPA's implementing regulations prescribe factors for determining whether an action's environmental effect will be "significant.". *See* 40 C.F.R. § 1508.27. The presence of any significance factors precludes the use of the CE and requires at least an EA. At least three factors indicate that the Forest Service's authorization will have significant environmental effects here.

First, the Decision will harm a geographic area with "[u]nique characteristics," two statutorily protected wilderness areas. 40 C.F.R. § 1508.27(b)(3); *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 641 (9th Cir. 2004) ("A categorical exclusion cannot

[3] Although Plaintiffs contend that an EIS is required due to significant impacts based on the whole administrative record, the failure to prepare even an EA demonstrates the likelihood that Plaintiffs will succeed on the merits of the NEPA claims for this motion.

be used if extraordinary circumstances exist which include 'congressionally designated areas, such as *wilderness*, . . .") (emphasis in original). The Forest Service is authorizing chainsaw use over a six-week period in two protected areas where chainsaw use is statutorily prohibited absent narrow exception. 16 U.S.C. § 1133(c). Second, the challenged decision establishes a precedent for future authorizations. *See* 40 C.F.R. § 1508.27(b)(6). The Forest Service's rationale—that "[t]he beetle kill is pervasive, and the magnitude is significant and wilderness-wide"—would apply with equal force to approvals of continued trail-clearing operations in successive years and in other wilderness areas in Colorado. Doc. 11-2 pp. 2, 6; *see also* Doc. 11-1, p. 3 (requiring study). Third, the action threatens a violation of Federal law – the Wilderness Act – and requirements imposed to protect the environment – NEPA. This renders the Decision's environmental effects significant. 40 C.F.R. § 1508.27(b)(1).

Plaintiffs are likely to prevail on the claim that at least an EA was required, but the Decision was made without benefit of any NEPA process or NEPA documentation.

c. The Forest Service Failed to Consider and Analyze a Reasonable Range of Alternatives

To meet its NEPA duties a Federal agency must "[r]igorously explore and objectively evaluate all reasonable alternatives" to its proposed action that would minimize adverse environmental impacts. 40 C.F.R. § 1502.14; *Richardson*, 565 F.3d at 703-04. For those alternatives eliminated from detailed study, the agency must briefly discuss the reasons for their elimination. *Id*. Accordingly, an alternatives analysis is unlawfully narrow where, as here, the Agency must use the NEPA process to analyze alternatives to extensive use of chainsaws to clear downed trees in wilderness areas.

The Forest Service did not analyze impacts of alternatives in a NEPA document and dismissed reasonable alternatives without explanation. The Forest Service failed to consider the use of "crosscut strike teams" to clear trails, temporarily closing affected trails, restricting equine travel on certain trails, or increasing public education and notification efforts on trail conditions, alternative routes, and trail etiquette to address any perceived or potential impacts from visitors bypassing downed logs. *See* Doc. 11-2, p. 28. The Forest Service did not even present data or analysis justifying the efficacy of chainsaws. The Forest Service failed to take a hard look at the environmental impacts of the Decision, measures to mitigate these environmental impacts, the purpose and need for the Decision, alternatives to the Decision, and the environmental and social impacts of a reasonable range of alternatives, including no action.

2. The Forest Service Violated the Wilderness Act

The Wilderness Act, 16 U.S.C. §§ 1131-1136, establishes a National Wilderness Preservation System to safeguard our wildest landscapes in their "natural," "untrammeled" condition. *Id*. § 1131(a), (c). "A wilderness, in contrast with those areas where man and his own works dominate the landscape, is . . . an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain." *Id*. § 1131(c). Section 1133(b) "imposes an affirmative duty on the Forest Service to administer the wilderness areas so as 'to preserve [their] wilderness character' " and the Forest Service "cannot abandon, by action or inaction, the statutory mandate to preserve the wilderness characteristics of the wilderness areas." *Sierra Club*, 911 F.2d at 1413-14, n. 5. Congress made the mandate to protect wilderness character paramount over other land-management considerations, *see* 16 U.S.C. §

1133(b), and expressly prohibited certain activities that it determined to be antithetical to wilderness character—including the use of motorized equipment —unless "necessary to meet minimum requirements for the administration of the area for the purpose of [the Wilderness Act]." *Id*. § 1133(c); *see also* 36 C.F.R. § 261.18(c); 36 C.F.R. § 293.6.

The Forest Service failed to show that providing "unobstructed trail access" is necessary to meet minimum requirements for administration of the area for the purpose Act, and that no alternative to otherwise-prohibited uses could achieve that purpose.

a. The Forest Service's Decision to Authorize Chainsaws to Clear Downed Trees is Not Necessary to Preserve the Wilderness Character of the Wildernesses

The use of chainsaws for "unobstructed trail access" runs contrary to the Wilderness Act definition of wilderness, which "generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable." 16 USCS § 1131(c). The Forest Service's ad hoc analysis in the Workbook focuses on facilitating access for recreational visitors and commercial outfitters. Doc. 11-2, pp. 4-5 (project not necessary to preserve 4 of 5 "qualities" of wilderness character but "is necessary to provide unobstructed trail access to the public"). But as the Agency admitted, there is no "provision in wilderness legislation that specifically addresses the need to clear downfall from wilderness trails" or that "explicitly requires the agency to provide unobstructed trail access." Doc. 11-2, p. 7.

The preservation of wilderness and wilderness character is the overriding purpose of the Wilderness Act, not recreation. Although the Act "stresses the importance of the wilderness areas as places for the public to enjoy, it simultaneously restricts their use in any way that would impair their future *as wilderness*." *High Sierra*

Hikers Ass'n, 390 F.3d at 648 Here, the Forest Service impermissibly elevated recreational and commercial activity over preservation of wilderness character. *See id*. at 647; 16 U.S.C. § 1133(b); 36 C.F.R. § 293.2(b), (c).

Likely realizing that its purpose must be to protect wilderness character in a manner that allows forces of nature to prevail rather than to facilitate recreation and convenience, the Decision memorandum departs from the Workbook by noting that "[t]he main reason for this authorization is to reduce resource damage that occurs from hikers and horse users going around downfall and leaning trees, which can have the effect of creating social trails, trampling vegetation and causing soil erosion." Doc. 11-1, p. 2. But, the Forest Service does not explain why resource damage concerns cannot be remedied through wilderness-compatible alternatives.

b. The Forest Service's Decision is Not the Minimum Administrative Action Necessary to Achieve its Objectives

Even had the Decision been intended and designed to preserve wilderness character instead of to ease access for recreation users, outfitters, and Agency personnel, it is still not the minimum administrative action necessary to achieve that end. The Forest Service did not meaningfully consider and analyze non-motorized alternatives that could achieve the Service's minimum administration requirements through methods compatible with the Wilderness Act, including increasing crosscut saw teams; completing planning to focus on priority trails; educating the public on trail conditions, travel practices, and alternative routes; implementing temporary trail closures or use restrictions; or any combination of these and other methods. Where "many alternative actions not prohibited by the Wilderness Act very well could have

attained the Service's goal," the Forest Service cannot overcome the Act's "very limited exception" for motorized uses without rigorously exploring those alternatives. *Wilderness Watch v. U.S. Fish and Wildlife Serv*., 629 F.3d 1024, 1039 (9th Cir. 2010).

The Decision violates the Wilderness Act and its implementing regulations because the agency has not rationally demonstrated that providing "unobstructed trail access" is necessary to meet minimum requirements for administration of the area for the purpose of the Wilderness Act, and that there is no alternative to otherwise-prohibited uses that would achieve that end. *See* 16 U.S.C. § 1133(c).

3. The Forest Service Violated the APA

Because NEPA and the Wilderness Act do not provide for a private right of action, the APA provides the standards for judicial review of the Decision. *Wyoming v. U.S. Dept. of Agric*., 661 F.3d 1209, 1226 (10th Cir. 2011). As relevant here,

> Judicial review of . . . informal agency action is governed by § 706 of the APA, which provides that a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found" not to meet six separate standards. . . . These standards require the reviewing court to engage in a "substantial inquiry." An agency's decision is entitled to a presumption of regularity, "but that presumption is not to shield [the agency's] action from a thorough, probing, in-depth review."

Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1573-74 (10th Cir. 1994) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); citations omitted). Agency action 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 if the action "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Wyoming* at 1227 (citations

omitted). A preliminary injunction may issue based on declarations and exhibits; it need not wait for the administrative record. *Colo. Wild*, 523 F.Supp.2d at 1230, n. 18.

Here, the Forest Service's Decision, Workbook, and Plaintiffs' declarations confirm that the Forest Service must complete, at minimum, an EA, to comply with NEPA and provide no plausible justification under the Wilderness Act. The arbitrariness of authorizing chainsaw use is readily apparent: (1) it is not supported by any data or analysis demonstrating that the use of chainsaws to clear trails in the Wildernesses will be more efficient than traditional tools; (2) it is not supported by any analysis showing the extent of blowdown or that such emergency exists as would justify, assuming *arguendo* that any could, abrogating Congress's clear prohibition on the use of motorized equipment; and (3) the Agency admits that its objectives can be achieved with non-motorized methods and that it has secured funding to do so. The Decision was arbitrary and capricious, an abuse of discretion, and a failure to act in accordance with the law, and, therefore, violated the APA. 5 U.S.C. § 706(2).

E. No Bond, or a Nominal Bond, is Required

The Courts have recognized that under Rule 65(c) only nominal security for wrongful injunctions are imposed in NEPA cases because the imposition of substantial liability would frustrate the policy of Congress to encourage actions on environmental grounds. *State of Kansas Ex Rel. Stephan v. Adams*, 705 F.2d 1267, 1269 (10th Cir. 1983). Where Plaintiffs are non-profit environmental groups and requiring security would effectively deny access to judicial review a court has discretion to dispense with the security requirement, or to request mere nominal security. *Colo. Wild*, 523 F.Supp.2d at 1230 (internal quotation and citation omitted). Plaintiffs are non-profit environmental

groups and if a bond were required, Plaintiffs would be unable to proceed with this case, the mandates of NEPA and the Wilderness Act could not be ensured, and the public interest would suffer. Doc. 11-9, ¶ 17; Doc. 11-12, ¶ 6; Doc. 11-14, ¶ 14.

V. CONCLUSION

Plaintiffs request that the Court issue a preliminary injunction enjoining implementation of the Decision to preserve the status quo until the case is decided on the merits.

RESPECTFULLY SUBMITTED on June 4, 2019.

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LIST OF EXHIBITS

1. "Approval for Limited Chainsaw Use to Clear Trails in Wilderness" (May 7, 2019) (Doc. 11-1)
2. Minimum Requirements Decision Guide Workbook ("Workbook") (Doc. 11-2)
3. Letter on behalf of Wilderness Watch to U.S. Forest Service Re: Request for information concerning any Forest Service proposed action to authorize the use of chainsaws within designated Wilderness in Region 2 (April 26, 2019) (Doc. 11-3)
4. Declaration of Howie Wolkie (Doc. 11-4)
5. Declaration of Anne Dal Vera (Doc. 11-5)
6. Declaration of Christopher Barnes (Doc. 11-6)
7. Declaration of Nancy M. Berry (Doc. 11-7)
8. Declaration of Mark Pearson (Doc. 11-8)
    a. Exh. A: "Wilderness deserves restraint, humility," *Durango Herald* (May 19, 2019) (Doc. 11-9)
9. Declaration of James Buickerood (Doc. 11-10)
    a. Exh. A: San Juan Citizens Alliance ltr. to Brian Ferebee, Reg. Forester re "rumored approval of using chainsaws in the Weminuche and South San Juan wildernesses" (May 7, 2019) (Doc. 11-11)
10. Declaration of George Nickas (Doc. 11-12)
    a. Exh. A: "In the cut: Trail workers revive saw skills," *The Missoulian* (June 2, 2018) (Doc. 11-13)
11. Declaration of Michelle S. Silbert (Doc. 11-14)

CERTIFICATE OF SERVICE AND CONFERRAL

I hereby certify that on June 4, 2019, I served a copy of this document with the Clerk of Court using the CM/ECF system which sends notification of filing to all parties.

Pursuant to D.C.COLO.LCivR 7.1, after filing the Complaint, Plaintiffs' and Defendants' counsel conferred, Defendants postponed use under the Decision until July 8, and the parties agreed to a briefing schedule for this motion. *See* Doc. 10.

/s/ Jeffrey M. Kane
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