IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

WILDERNESS WATCH, INC., Plaintiff, vs. BRENDA HALTER, Forest Supervisor of the Superior National Forest; UNITED STATES FOREST SERVICE, an agency of the U.S. Department of Agriculture, Defendants.	Civil No. 15-CV-03734 (WMW/LIB) **PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

This case is the most recent in a long line of cases challenging the Forest Service's unlawful administration of non-conforming uses, including motorboat use and commercial enterprise, within the Boundary Waters Canoe Area Wilderness ("BWCAW"). The BWCAW is located within the Superior National Forest of Minnesota and stretches one hundred and fifteen miles along the Minnesota-Ontario border. The BWCAW, along with Canada's adjoining Quetico Provincial Park, contains a complex ecosystem of nearly 3,000 lakes connected by a vast network of streams and portages providing the opportunity for weeks of uninterrupted wilderness travel. This unique ecosystem complex provides habitat for a diverse mix of wildlife, including many sensitive and imperiled species, and is renowned for its opportunities for solitude. These characteristics are also what make the BWCAW one of the most heavily visited wilderness areas within the National Wilderness Preservation system. Changes in

authorized motorboat use within the BWCAW, combined with decades of inconsistent statutory and regulatory application by the Forest Service, have resulted in a complex patchwork of management practices that sometimes contradict one another. The Forest Service's commercial towboat regulation is one such example.

This case challenges the Forest Service's violation of its legal duty to preserve the wilderness character of the BWCAW by improperly authorizing or otherwise allowing commercial towboat use that exceeds the amount allowed by the BWCAW Act and the BWCAW Management Plan. The Wilderness Act prohibits motorboat use and commercial enterprise within designated wilderness absent specific statutory exceptions. 16 U.S.C. § 1133(c). Through the BWCAW Act, Congress prohibited all motorboat use in the BWCAW except for limited use on specifically named lakes. On those specifically named lakes, Congress imposed a statutory cap at "the average actual annual motorboat use of the calendar years 1976, 1977, and 1978 for each lake." Pub. L. No. 95-495, T92 Stat. 1649 (1978), 92 Stat. at 1651, 4(f). That statutory cap was calculated in the BWCAW Act Implementation Plan through a series of entry-point quotas. USA-010755, Ex. 1; USA-008258, Ex. 2.[1] However, the Forest Service subsequently determined that permitting visitor use at the full statutory cap level was straining the wilderness character, so it further restrained motorboat use in the 1993 BWCAW Management Plan, limiting motorboat use to 75% of the full statutory cap. *See* USA-011338, Ex. 3; *Friends of the Boundary Waters Wilderness v. Bosworth*, 437 F.3d 815, 820 (8th Cir. 2006). The

[1] Citations to the administrative record will be denoted by "USA" followed by the Bates number for the cited page. References to "Ex. __" refer to exhibits attached to the Affidavit of Rachel Kitze Collins.

BWCAW Management Plan also required the Forest Service to regulate commercial towboat operators through a separate special use permit system that limits commercial towboat use to "1992 levels for numbers of boats, trips, current operators, and specific lakes." USA-010841, Ex. 4. Accordingly, permissible motorboat use in the BWCAW is narrowly circumscribed by precise numerical limits for specific lakes in the BWCAW Act and Implementation Plan, and both general motorboat use and commercial towboat use are further restricted by additional limits in the BWCAW Management Plan.[2]

The BWCAW Management Plan's use of a separate special use permit system for regulating towboat use was challenged out of concern that towboat use would be monitored and regulated differently than general motorboat use, thereby creating a loophole allowing actual commercial towboat use to avoid the statutory cap restrictions. However, based on assurances from the Forest Service that towboat use would be restricted to 1,342 trips per year (the 1992 level described in the BWCAW Management Plan), the Eighth Circuit held that the separate special use permit system for towboats under the BWCAW Management Plan was lawful because it imposed a limit on actual commercial towboat use that, when combined with the general motorboat use limitation, did not exceed the statutory cap. *See Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1122 (8th Cir. 1999).

[2] For clarity, throughout this memorandum, Plaintiff will refer to motorboat limitations imposed by the BWCAW Act as the "statutory cap" and "statutory entry-point quotas," and Plaintiff will refer to limitations imposed by the BWCAW Management Plan as "Management Plan quotas."

Contrary to its submission to the Eighth Circuit, and in direct violation of the resulting Eighth Circuit precedent, the Forest Service now maintains that 1,342 *does not* represent the number of towboat trips in 1992, that the Forest Service does not actually have information on the number of commercial towboat trips from 1992, and that it is not required to monitor or regulate commercial towboat trips. The record here demonstrates that the Forest Service has not consistently monitored actual commercial towboat use since the inception of the BWCAW Act and, in some cases, has allowed commercial towboat operators to provide commercial towboat services within the BWCAW without a special use permit. Even with the incomplete and inconsistent monitoring of towboat use, the record also demonstrates that the Forest Service has regularly authorized or otherwise allowed commercial towboat use in excess of the 1,342 trips per year permitted by the BWCAW Management Plan and in excess of the statutory cap quotas imposed for specific entry-points within the BWCAW.

The Forest Service, as federal steward of the BWCAW, has an ongoing legal duty to preserve the wilderness character of the BWCAW, which includes a duty to administer non-conforming uses within the Wilderness according to restrictions imposed by the Wilderness Act, the BWCAW Act, and the BWCAW Management Plan. The Forest Service's authorizations allowing excessive motorized use and commercial enterprise in the BWCAW—and its failure to restrict commercial towboat use in a manner that ensures compliance with the Wilderness Act, the BWCAW Act, and the BWCAW Management Plan—constitute a violation of this legal duty. The excessive motorized and commercial use in the BWCAW presents an ongoing harm to the wilderness character of this unique

landscape as well as ongoing harm to Plaintiff's interests in protecting and enjoying the wilderness character that Congress acted to safeguard.

For these reasons, Wilderness Watch respectfully requests that this Court enter summary judgment in favor of Plaintiff holding that the Forest Service is violating the law by authorizing or otherwise allowing: (1) excessive commercial towboat operations within the BWCAW that exceed the limits imposed by the BWCAW Management Plan; (2) motorboat use, including commercial towboat use and non-exempt, general motorboat use, within the BWCAW that exceeds the statutory cap imposed by the BWCAW Act; and (3) motorboat and commercial use within the BWCAW at a level that degrades the wilderness character beyond the amount allowed by law. Wilderness Watch further requests that this Court order relief that will remedy the ongoing harm to wilderness character caused by Defendants' violations of law.

I. LEGAL BACKGROUND

A. The Wilderness Act of 1964 designated the BWCAW for wilderness protection.

Congress enacted the Wilderness Act, 16 U.S.C. §§ 1131-1136, "to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition . . . ." 16 U.S.C. § 1131(a). Accordingly, the Wilderness Act establishes a National Wilderness Preservation System to safeguard our wildest landscapes in their "natural," "untrammeled" condition. *See 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" and an area "retaining its primeval character and influence . . . which is protected and managed so as to preserve its natural conditions . . . ." *Id.* § 1131(c). Thus, wilderness "shall be administered for the use and enjoyment of the American people in such a manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness . . . ." *Id.* § 1131(a).

Congress unequivocally made the mandate to preserve wilderness character paramount over other land-management considerations: "Except as otherwise provided in this chapter, each agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of the area and shall so administer such area for such other purposes for which it may have been established as also to preserve its wilderness character." *Id.* § 1133(b).

To achieve this goal, Congress also prohibited or significantly limited a variety of uses in wilderness. "Except as specifically provided for in this chapter, and subject to existing private rights, there shall be no commercial enterprise[3] . . . within any wilderness area designated by this chapter . . . ." *Id.* § 1133(c). And, "except as necessary to meet minimum requirements for the administration of the area for the

[3] Those specific statutory exceptions are discussed further below. *See* 16 U.S.C. § 1133(d)(5); 36 C.F.R. § 293.8.

purpose of this chapter . . . there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats . . . within any such area." *Id*.

The BWCAW was one of the original wilderness areas designated in the 1964 Wilderness Act. 16 U.S.C. §§ 1131-1136. While the Wilderness Act generally prohibits motorized activities within designated Wilderness, *id*. at § 1133(c), the Wilderness Act included a special provision excepting from that prohibition motorized use already existing in the BWCAW, as long as such use would not undermine the "primitive character of the area." 16 U.S.C § 1133(d)(5) (1976), *repealed by* Pub. L. No. 95-495, 92 Stat. 1649, 1650 (1978); *Bosworth*, 437 F.3d at 818. This provision sparked controversy over motorboat use in the BWCAW.

B. The BWCAW Act and the 1981 BWCAW Act Final Implementation Plan eliminated most motorized use in the BWCAW.

The Wilderness Act's special provision allowing the continuation of existing motorboat use in the BWCAW was shortlived. In response to "the confusion and litigation generated by the proviso [in the Wilderness Act], as well as in reaction to threatened deterioration of the wilderness from excessive use," *Minnesota v. Block*, 660 F.2d 1240, 1246 (8th Cir. 1981), Congress repealed the special provision and enacted the BWCAW Act of 1978, which imposed much more stringent and specific limitations on motorized use. Pub. L. No. 95-495, 92 Stat. 1649 (1978).

1. The BWCAW Act prohibits motorboat use except on a handful of lakes where permitted use is capped at historical levels.

In 1978, "Congress passed the BWCAW Act with the clear intent of insuring that the area would remain as a wilderness and could be enjoyed as such," *Block*, 660 F.2d at

1250; *see also Bosworth,* 437 F.3d at 819. Congressman Fraser introduced the BWCAW Act by stating that "[f]irst, and most important, [the bill] seeks to end those activites that threaten the integrity of the BWCA's wilderness character by expressly prohibiting the following uses: Recreational uses of motorized watercraft and snowmobiles [and other nonconforming uses]." *Block*, 660 F.2d at 1250 (citing 123 Cong. Rec. H621 (daily ed. Jan. 31, 1977)). Thus, "[l]imiting motoroboat use is integral to preserving the wilderness values and primitive character of the area." *Bosworth*, 437 F.3d at 819 (citing *U.S. v. Gotchnik*, 57 F. Supp. 2d 798, 804 (D. Minn. 1999), *aff'd*, 222 F.3d 506 (8th Cir. 2000)); *see also Block*, 660 F.2d at 1251. Accordingly, the BWCAW Act prohibited all motorboat use within the Wilderness except on a few specifically named lakes. *See* 92 Stat. at 1650, 4(c).

On those specifically named lakes where motorboat use could continue, Congress limited the size of allowable motors and also imposed a statutory cap on such motorboat use at no greater than "the average actual annual motorboat use of the calendar years 1976, 1977, and 1978 [the "base period use"] for each lake." 92 Stat. at 1651, 4(f). Congress further directed the Secretary to develop and implement entry-point quotas to restrict motorboat use in accordance with the statutory cap "based on such criteria as the size and configuration of each lake, and the amount of use on that lake." *Id*.

On other lakes where motorboat use was already occurring prior to the BWCAW Act, the Act served to "provide for the orderly and equitable transition from motorized recreational uses to nonmotorized recreational uses on those lakes, streams, and portages in the wilderness where such mechanized uses are to be phased out under the provisions

of this Act." 92 Stat. at 1649, 2(6). These statutory phase-outs for specifically identified lakes were to be completed by 1999.

92 Stat. at 1650-1651, 4(c)(3)-(4).

2. The 1981 BWCAW Act Final Implementation Plan details the statutory cap and entry-point quotas.

In the 1981 BWCAW Act Final Implementation Plan, the Forest Service calculated the average actual annual motorboat use during 1976, 1977, and 1978—the "base period use"—as a total of 14,925 motorboat entry-point permits, allocated across eleven different entry-points.[4] USA-010755, Ex. 1. The 14,925 motorboat entry-point permits in the original statutory cap included 10,719 day-use permits, 2,468 overnight-use permits, and 1,738 permits for the Trout Lake entry-point.[5] USA-010755, Ex. 1; USA-008258, Ex. 2. The Implementation Plan stated that those "quotas are the maximum amount of motorboat use allowable under the Act. They will be adjusted when certain lakes are closed to motorboat use, as directed by the Act." USA-010755, Ex. 1; *see also* USA-010953, Ex. 5.

Between 1984 and 1999, statutory phase-outs of motorboat use occurred on various lakes, and the statutory cap and specific entry-point quotas were reduced accordingly:

[4] An "entry-point" is "[t]he area designated as a drop-off point for entrance into the Wilderness." USA-010898, Ex. 4.

[5] The 1981 Implementation Plan broke permits for each entry-point into day-use and overnight-use permits except for the "Trout Lake" entry-point, which provides a permit quota for "all" motorboat use. USA-010755, Ex. 1. In the Amended Complaint, Plaintiff included all of the Trout Lake permits in the day-use number noting 12,457 day-use permits and 2,468 overnight-use permits. Pl.'s First Am. Compl., ¶ 23 [ECF No. 37].

MOTORBOAT QUOTAS
(Maximum Use Allowed by Public Law 95-495)

Entry Point	Type of Motorboat Use	Annual Quota (Number of Permits) 1982-83	1984-98 1/	1999+ 1/
Trout Lake	All	1738	1738	1738
Fall Lake	Overnight	658	291	291
	Day Use on Fall Lk. only	1457	1457	1457
	Day Use on Basswood Lake	1206	932	932
Fourmile Portage	Overnight	129	97	97
	Day Use	993	773	773
Moose Lake	Overnight	730	558	558
	Day Use on Moose Chain only	837	695	695
	Day Use on Basswood Lake	1813	1359	1359
Snowbank Lake	Overnight	81	81	81
	Day Use	610	610	610
Farm Lake	Overnight	10	10	10
	Day Use	345	345	345
Brule Lake	Overnight	266	266 2/	0 2/
	Day Use	226	226 2/	0 2/
Seagull Lake	Overnight	134	133	38
	Day Use	594	594	137
Saganaga Lake	Overnight	388	370	370
	Day Use	2023	2023	2023
Clearwater Lake	Overnight	42	42	42
	Day Use	246	246	246
E. Bearskin Lake	Overnight	30	30	30
	Day Use on E. Bearksin Lake Only	227	227	227
	Day Use on Alder Lake	142	142	142

USA-008258, Ex. 2.

The total statutory quota categories for each time period are thus as follows:

1982-1983	**1984-1998**	**1999 +**
Trout L.: 1,738 permits	Trout L.: 1,738 permits	Trout L.: 1,738 permits
Day-use: 10,719 permits	Day-use: 9,629 permits	Day-use: 8,946 permits
Overnight: 2,468 permits	Overnight: 1,878 permits	Overnight: 1,517 permits
Total: 14,925 permits	Total: 13,245 permits	Total: 12,201 permits[6]

[6] As discussed *infra*, the current statutory cap of 10,539 referenced in *Dombeck* may be a combination of day-use motor quotas and the day-use portion of the Trout-Lake quotas, but this is not clear from the record. *See Dombeck*, 164 F.3d at 1121-22 (noting that the current statutory cap is 10,539 motorboat trips); *see also* USA-011347, Ex. 3 (Forest Service *Dombeck* briefing at footnote 11 stating that statutory cap is 10,539).

See USA-008258, Ex. 2. The "1999 +" column above represents the maximum amount of motorboat use currently allowed by the BWCAW Act (the statutory cap) for each entry-point. USA-008258, Ex. 2.

C. The BWCAW Management Plan imposes further restrictions on motorboat and commercial use.

In addition to the statutory requirements of the Wilderness Act and the BWCAW Act, the Forest Service also manages the Superior National Forest and the BWCAW pursuant to the National Forest Management Act ("NFMA"). 16 U.S.C. §§ 1600 *et seq*. NFMA requires each National Forest to develop a "Land and Resource Management Plan" (a "Forest Plan"). 16 U.S.C. § 1604(a); 36 C.F.R. § 219.7 (setting forth criteria for developing, amending, and revising Forest Plans). Forest Plans "provide[] guidelines and approved methods by which forest management decisions are to be made for a period of ten to fifteen years." *Sierra Club v. Robertson*, 28 F.3d 753, 758 (8th Cir. 1994). Site-specific actions and authorizations must comply with the Forest Plan. *See id.*; *Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 932 (9th Cir. 2010) ("Procedurally, 'all management activities undertaken by the Forest Service must comply with the forest plan, which in turn must comply with the [NFMA].'") (citing *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 962 (9th Cir. 2002)); 36 C.F.R. § 219.15(d) ("Every project and activity must be consistent with the applicable plan components."). If a use or activity is not consistent with the applicable Forest Plan, the Forest Service may: (1) modify the activity to make it consistent with the Plan, (2) reject or terminate the activity, or (3) amend the Forest Plan. 36 C.F.R. § 219.15(c).

1. The 1986 Superior National Forest Land and Resource Management Plan ("Forest Plan") adopted the full statutory cap for motorboat use.

The Forest Service implemented the Forest Plan for the Superior National Forest in 1986, and that document adopted the full statutory cap and entry-point quotas for motorized use within the BWCAW. USA-008301, Ex. 6 (Forest Plan excerpt showing statutory cap after motorboat use phase-outs in 1984 and 1999); *see also* USA-008249, Ex. 7. The Forest Plan was administratively appealed with appellants expressing concerns over the impact of visitor use, including motorized use, on wilderness character. *See* USA-008250, Ex. 7. As part of a settlement agreement resolving the appeal, the Forest Service was required to conduct a visitor use study and reexamine entry-point quotas for the Wilderness. *See* USA-010908 and 10912, Ex. 5; USA-010822, Ex. 4.

Among other things, the visitor use study found that "allowing motorboat use to the maximum extent possible under the statute was 'strain[ing] the wilderness environment and [was] tending to degrade the intended primitive and unconfined recreation experience'" of the BWCAW. *Bosworth*, 437 F.3d at 820. Adding further strain, the Forest Service discovered that commercial towboat outfitters had been operating in the BWCAW without obtaining permits since the BWCAW Act was enacted. USA-008249, Ex. 7.

To address these issues, comply with the settlement agreement, and administer the Wilderness according to the Wilderness Act and the BWCAW Act, the Forest Service implemented the BWCAW Management Plan in 1993. USA-011144, Ex. 8. The Forest Service now manages the BWCAW in accordance with the Superior National Forest

Land and Resource Management Plan (Forest Plan), as amended by the BWCAW Management Plan. USA-011127 and 11132, Ex. 8.

2. To protect wilderness character, the BWCAW Management Plan implements a more restrictive "Management Plan quota cap," limiting permitted motorboat use well below the statutory cap.

In response to concerns raised in the visitor use study, and specifically in response to degradation of wilderness character from visitor-use levels, the BWCAW Management Plan implemented a 75% cap ("Management Plan quota cap") on the statutory cap. *See* USA-011338, Ex. 3 (Forest Service appellate brief for the *Dombeck* case noting that the "daily motor quota represents a 25% reduction of the number of day use permits allowed by the BWCAW Act."); *Bosworth*, 437 F.3d at 820. This 75% Management Plan quota cap resulted in a maximum quota of 7,902 day-use motorboat entry-point permits and 1,977 overnight-use motorboat entry-point permits for the entire BWCAW. USA-010879 and 10880, Ex. 4. These quotas were later reduced to 7,441 day-use motorboat entry-point permits and 1,903 overnight-use motorboat entry-point permits, for a total non-exempt general motorboat quota of 9,344 permits.[7] USA-011242-11243, Ex. 9.

The BWCAW Management Plan also required "all towboat operations [to] be authorized by a special use permit" and restricted commercial "[t]owboat use [] to the

[7] The Management Plan quota cap was initially reduced to 7,551 day-use motorboat entry-point permits and 1,903 overnight-use motorboat entry-point permits after statutory motoboat use phase-outs on Seagull Lake. USA-010879, 10880, Ex. 4; *see also* USA-010855, Ex. 4. And although it is unclear why a further reduction was made, in 2012 the Forest Service issued a clarification letter stating that the current Management Plan quota cap is 7,441 day-use motorboat entry-point permits and 1,903 overnight-use motorboat entry-point permits, for a total non-exempt general motorboat quota of 9,344 permits. USA-011242-11243, Ex. 9.

1992 levels for numbers of boats, trips, current operators, and specific lakes." USA-010841, Ex. 4. The Management Plan is clear that commercial towboat "[g]rowth will not be permitted beyond these limits." USA-010841, Ex. 4. "If an operator terminates his/her special use permit, an assessment will be completed to determine if a permit should be issued to another individual or business." USA-010841, Ex. 4. The Management Plan required the Forest Service to start issuing special use permits and informing commercial towboat operators of the Management Plan's requirements by January 1, 1995. USA-010862, Ex. 4.

Accordingly, to implement the BWCAW Act, the BWCAW Management Plan restricts motorboat use within the Wilderness through quota and entry-point restrictions and special use permits for commercial towboats. The Management Plan exempted property and resort owners and their guests from motorboat quotas on the chain of lakes to which their property abuts. USA-010843, Ex. 4. These Management Plan provisions became the subject of litigation.

a. *Friends of the Boundary Waters Wilderness v. Dombeck*: The Eighth Circuit construes the property owner exemption narrowly and allows the special use permit system for towboats because towboat use is limited to 1,342 trips.

At issue in *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115 (8th Cir. 1999), was the Forest Service's broad interpretation of the BWCAW Act's provision exempting property owners from motorboat quotas on "that particular lake" on which they are located. *See* 92 Stat. at 1651, 4(f). The Forest Service, in its BWCAW Management Plan, interpreted "that particular lake" to mean the "chain of lakes" on

which property owners are located for purposes of the quota exemption. *See Dombeck*, 164 F.3d at 1123-24. The Eighth Circuit rejected the Forest Service's interpretation of "that particular lake" holding that Congress spoke specifically and clearly in the BWCAW Act when it used the term "that particular lake," referring only to the individual lake the property owner's land abuts. *Id*. at 1124-25. The Eighth Circuit also emphasized that "[t]he premise of the BWCA Wilderness Act of 1978 is that motorboat use is prohibited in the wilderness area, except to the extent that Congress specifically authorized motorboat use on specifically designated lakes, portions of lakes, and rivers."[8] *Id.* at 1124.

Another issue in the *Dombeck* litigation was the Forest Service's decision to regulate commercial towboat use through a special use permit system, divorced from the general motorboat quota system. Environmental plaintiffs argued that the BWCAW Act requires towboat use to be counted towards the statutory cap's entry-point quotas and that permitting towboat use under a separate system would create a de facto exemption for towboats. *See Dombeck*, 164 F.3d at 1121. In defending its special use permit system for regulating commercial towboat use, the Forest Service assured the Court:

> Although towboats are placed under a special use permit system, the Management Plan specifically states that the "[t]owboat use will be limited to the 1992 levels for numbers of boats, trips, current operators, and specific lakes. Growth

[8] The Eighth Circuit has long recognized Congress's purpose in suppressing motorized use. Prior to *Dombeck*, the Eighth Circuit had held that the Forest Service's continued use of motorized truck portages was unreasonable under the plain reading of the BWCAW Act, and stressed that "congressional intent was to discourage motorized use." *Friends of the Boundary Waters Wilderness v. Robertson*, 978 F.2d 1484, 1487 (8th Cir. 1992).

> will not be permitted beyond these levels." The towboat usage for the 1992 season was less than the level shows [sic] approximately 1,342 trips.[9] Under the combined management approaches, therefore, total motor usage in the BWCAW remains below 1978 levels—the level mandated by the BWCAW Act.

USA-011347, Ex. 3 (internal citations omitted). A footnote to that paragraph clarifies:

> As explained above, the average motor use for years 1976-1978 was calculated to be approximately 10,539. [Citing BWCAW Management Plan FEIS at 2-10] . . . . The current management plan sets quotas for non-towboat motorized day use at 7,902. Towboat usage is limited to the 1992 level of 1,342 trips. In all, therefore, the total motor usage will remain below the level set in the BWCAW Act.

USA-011347 n. 11, Ex. 3 (some internal citation omitted). Thus, the Forest Service argued that the separate special use permit system does not create an exemption from the statutory cap set forth in the BWCAW Act; rather, "towboats are subject to as much of (and arguably more of) a limit" than would be required under the Management Plan's general quota system. USA-011347-48 n. 12, Ex. 3.

The Eighth Circuit accepted the Forest Service's argument that the separate special use permit system does not exempt commercial towboats from the overall motorboat use restrictions set forth in the BWCAW Act. *Dombeck*, 164 F.3d at 1121-22. In fact, the Court adopted the Forest Service's argument that the general motorboat quotas and the towboat quotas provide comparable metrics for limiting actual use:

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[9] In its *Dombeck* briefing, the Forest Service cited to administrative record document pages "A.R. 33696-33698" to demonstrate that the 1992 level of towboat use was 1,342 trips. USA-011347, Ex. 3. That referenced document is included in the administrative record for this case beginning at USA-009094, and the corresponding page range is USA-009094-9096, Ex. 10.

> The Wilderness [Management] Plan limits commercial towboats to their 1992 levels, which amounts to 1,342 trips per season. Separately, the Plan sets the general motorboat use quota at 7,902 trips. The combined number of motorized boat trips that the Plan allows (1,342 + 7,902) totals 9,244 trips, which does not exceed the 10,539 motorboat trips cap mandated by the BWCA Wilderness Act.

Id. at 1122.

b. Following *Dombeck,* the Forest Service tries to expand motorized access by recalculating base period use.

After the Eighth Circuit's *Dombeck* opinion restricting property owner exemptions to that particular lake that their property abuts, the Forest Service attempted to recalculate the base period use figures from 1976-78 (and thus the statutory cap and correlated enty-point quotas) for the BWCAW. *See Bosworth*, 437 F.3d at 820. However, the Forest Service had lost much of the data it used in 1981 to calculate the base period use for the original statutory cap, *see* USA-008295, Ex. 6, so to determine the new figures, the Forest Service estimated total homeowner and resort lake chain use and relied upon homeowner and resort owner surveys to estimate the amount of non-exempt use during 1976-78. *See Bosworth*, 437 F.3d at 824. The Forest Service's recalcuation effort resulted in a significant motorized use increase, including an increase from 3,205 motorboat permits to 12,650 motorboat permits on the lake chains at issue in *Dombeck*. *See Friends of the Boundary Waters Wilderness v. Bosworth*, No. Civ. 03-624 JRT/FLN, 2004 WL 2066848, at *5 (D. Minn. Aug. 26, 2004), *aff'd in part, rev'd in part*, 437 F.3d 815, 820 (8th Cir. 2006). In 2002, the Forest Service issued its decision amending the BWCAW Management Plan, and thus the Forest Plan, to reflect the Forest Service's new

calculations and quota increases. *See id*. Those amendments and quota increases also became the subject of litigation.

c. *Friends of the Boundary Waters Wilderness v. Bosworth*: The Eighth Circuit rejects the Forest Service's recalculation of the base period use.

In 2006, the Eighth Circuit addressed a challenge to the Forest Service's base period use recalculation efforts. *Friends of the Boundary Waters Wilderness v. Bosworth*, 437 F.3d 815 (8th Cir. 2006). The Court ruled that: (1) *Dombeck* did not mandate that the Forest Service recalculate the base period use, *id*. at 822; (2) the Forest Service had the authority to recalculate the base period use, provided that it was able to do so accurately, *id*. at 823; and (3) the Forest Service's challenged recalculation was arbitrary and capricious because the "data relied upon and calculations performed by the USFS are so unreliable or inadequately explained as to make reliance on them arbitrary and capricious." *Id.* at 824; *see also id.* at 826-27, 828. The Court noted that deference is only proper where the methodology is not "arbitrary, without foundation," or "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id*.

Responding to arguments from the Forest Service that commerical towboats were not calculated in the base period use and that recalculation should be allowed on that basis as well, the Eighth Circuit noted that "[t]he record is not clear as to whether towboats were included in the original base period use" and that the Forest Service "must explain adequately why it concludes towboat use was exempted or otherwise not counted during the 1981 calculation of actual use before it undertakes any future recalculation of

towboat use." *Bosworth*, 437 F.3d at 828-29. The Court reinforced that "towboats are allowed to the extent their use, when added to the homeowner, resort, and guest use, does not exceed the base period use [statutory cap]." *Id.* at 828. The Eighth Circuit remanded to the District Court with directions to remand to the Forest Service for a recalculation of the base period use and motorboat quotas consistent with the BWCAW Act and the Eighth Circuit's opinion. *Id*. at 829. The District Court did so. *See* Order on Remand, *Friends of the Boundary Waters Wilderness v. Bosworth*, No. Civ. 03-624 JRT/FLN (D. Minn. Aug. 26, 2004).

D. The statutory cap and Management Plan quota caps are set.

On April 18, 2011, five years after the remand order, the Forest Service issued a notice that it was "not able to identify any new or more accurate information" than the information deemed inadequate by the Eighth Circuit, and it therefore does "not believe there is any way for the Forest Service to reach a new decision which would overcome the arbitrary and capricious standard." USA-011732, Ex. 11; *see also* USA-011241, Ex. 9. Accordingly, the statutory cap and the BWCAW Management Plan quota caps in effect prior to the Forest Service's recalculation effort remain in effect today.

II. FACTUAL BACKGROUND

A. The Forest Service's commercial towboat regulation following the 1993 BWCAW Management Plan was inconsistent and failed to track and regulate towboat trips.

The BWCAW Management Plan requires the Forest Service to limit commercial towboat use to the 1992 levels for "numbers of boats, trips, current operators, and specific lakes" and to regulate that use through special use permits beginning in 1995.

USA-010841, Ex. 4. But in 1994, the Forest Service stated that while the BWCAW Management Plan requires the Forest Service to monitor and regulate towboat trips, "there is little to no data to support any trip numbers" and "[t]he number cannot be verified." USA-005606, Ex. 12. The Forest Service also took the position that it could simply ignore the word "trip" in the BWCAW Management Plan stating that, because the BWCAW Management Plan EIS and Record of Decision spoke more generally of limiting commercial towboats to 1992 levels and did not mention "trips," regulation of towboat use need only "address only the number of boats, operators, and specific lakes." USA-005606, Ex. 12. In keeping with this position, on May 3, 1995, the Forest Service sent a letter to towboat operators notifying them of the requirement to complete a special use permit application for continued towboat use in the BWCAW stating, "[t]owboat use will be limited to the 1992 levels for the number of boats and the specific lakes operated on." USA-005707, Ex. 13. Indeed, it appears the Forest Service never attempted to determine towboat trip data for 1992. In its initial application forms for commercial towboat special use permits, the application required the applicant to state: (1) whether the applicant operated a tow service in 1992; (2) how many towboats it operated in 1992; and (3) what lakes the applicant operated on in 1992. USA-005589, Ex. 14; USA-005707, Ex. 13; USA-005717, Ex. 15; *see also* USA-010738, Ex. 16. The applicants were not required to supply information regarding trips in 1992.

In addition to failing to gather data on and regulate trips, the record indicates that many commercial towboat operators provided commerical towboat services for years without special use permits. Pursuant to the BWCAW Management Plan and the Forest

Service's Wilderness Act implementing regulations, all towboat operators providing service within the BWCAW were required to apply for a special use permit. USA-010841, Ex. 4. However, the Forest Service conflated its more general rules and regulations for commercial outfitter services in the Superior National Forest with the more specific and restrictive commercial outfitter rules and regulations for services within wilderness. *See* USA-010711, Ex. 17; USA-010703-10704, Ex. 18; USA-010705-10706, Ex. 19. As a result, the Forest Service did not require towboat operators who did not touch Superior National Forest land during their towboat trips (e.g., they dropped clients off in the water within the Wilderness or on state, private, or international land after passing through wilderness waters) to obtain a special use permit. They could operate with merely a "sticker" on their boat. USA-005753, Ex. 20; USA-009248, Ex. 21; USA-005707-5708, Ex. 13; USA-005717, Ex. 15. Only those operators touching Superior National Forest land during towboat trips were required to get special use permits. USA-005753, Ex. 20; USA-009248, Ex. 21. Thus, operators who did not have special use permits were nonetheless "authorized as a valid towboat operator in the Boundary Water Canoe Area Wilderness (BWCAW) on [various lakes], and [were] recognized as such by the Forest Service issued sticker displayed on [their] towboats."[10] USA-006295, Ex. 22.

[10] At least one towboat operator has operated commercial towboat services within the Wilderness without a special use permit as recently as 2015, *see* USA-010656-10657, Ex. 25; USA-010711, Ex. 17, while many others operated with stickers only, and no special use permits, for years. For example, in 2001, the Forest Service reported 15 special use permit holders with 48 boats and 7 stickered operators with 18 boats. USA-005798, Ex. 20; USA-009247, Ex. 21. On May 13, 2005, the Forest Service reported 14 special use

The mix-up resulted in reporting lapses and inconsistencies because while special use permits contain terms and conditions requiring annual actual use reporting, *see, e.g.*, USA-005653, Ex. 23; USA-001706, Ex. 24, there is no such requirement with towboat "stickers." *See* USA-005753, Ex. 20; USA-009248, Ex. 21; USA-010711, Ex. 17; USA-010703-10704, Ex. 18; USA-010705-10706, Ex. 19. As discussed below, the actual use reports are the only mechanism by which the Forest Service currently determines the actual commercial towboat use that occur in the BWCAW each year. However, because of the confusion created by the different permitting and reporting requirements for client drop-offs in the water or on state, private, or international land, it appears that even operators with special use permits excluded from their actual-use reports towboat trips that did not involve a federal-land drop-off. *See* USA-010711, Ex. 17; USA-010703-10704, Ex. 18; USA-010705-10706, Ex. 19.

1. Special Use Permits for Commercial Towboat Operation

Special use permits do not impose prospective restrictions on the amount of actual use allowed by permitted towboat operators. *See, e.g.*, USA-001706, Ex. 24. Instead, the permits require, among other things, five-year operating plans and annual actual-use reports submitted via self-report forms in October of each year. *See, e.g.*, USA-005653, Ex. 23; USA-001706, Ex. 24. The operating plans and actual-use reports are included as Appendix B and Appendix E of the special use permits. *E.g.* USA-001706, Ex. 24. The Forest Service retains the right to amend the permits to "incorporate new terms that may

permit holders with 44 boats and 7 stickered operators with 17 boats. USA-005753, Ex. 20. In 2009, the Forest Service reported 16 permit holders with 52 boats and 2 stickered operators with 2 boats. USA-009248, Ex. 21.

be required by law, regulation, directive, the applicable forest land and resource management plan, or projects and activities implementing a land management plan." USA-001706-1708, Ex. 24; *see also* USA-001721, Ex. 24.

a. Special Use Permits Appendix B: Operating Plans

The special use permits require the permit holder to prepare, annually review, and, as necessary, revise a five-year operating plan to account for changes such as an updated list of guides and the projected use for the season. *See, e.g.*, USA-001706-1707, Ex. 24. "The provisions of the five-year operating plan and annual revisions will be reviewed and must meet the approval of the District Ranger." *E.g.* USA-001707, Ex. 24. But the Forest Service has regularly approved operating plans that included no projection of actual use, *see, e.g.*, USA-001719, Ex. 24 or that project a number of service days for the year but do not distinguish between commercial towboat service and other services offered (*e.g.*, hunting trips and winter skiing or snowshoeing trips). *See, e.g.*, USA-011620-11621, Ex. 26. Thus, the special use permits provide no up-front limitation on actual towboat use, and the only data collected about actual commerical towboat use under the special use permits is that submitted at the end of the season by the towboat operators themselves in their annual actual-use reports.

b. Special Use Permit Appendix E: Actual Use Reports

The information reported in the actual use reports varied widely from operator to operator from 2001 to 2006, with various operators expressing confusion over the information required and frustration with inconsistencies in the process. *See* USA-006767-7017, Ex. 27. Several commercial towboat operators currently operating within

the BWCAW failed to provide annual use reports for each year of operation between 2006 and 2014, and others failed to provide use reports that provide sufficient detail to enable the Forest Service or the public to know the total number of trips made, the number of boats used for each trip, and the specific entry-points and lakes accessed. *See, e.g.*, USA-009323, Ex. 28; USA-010030, Ex. 29; USA-009526, Ex. 30. One of the largest towboat operators, Voyager Canoe Outfitters, failed to provide any actual-use reports until 2009, and many of the actual-use reports provided very little information. *See, e.g.*, USA-010322, Ex. 31. Another of the largest towboat operators, LaTourell's, provided even less information for years 2007 to 2010, *see* USA-009776-9779, Ex. 32, and failed to report any Prairie Portage trips. Accordingly, as with prior years, actual-use data varied by outfitter and year, making it difficult or impossible to accurately account for all commercial towboat activity in the BWCAW for the 2006 to 2014 period. Permit and reporting documents did not require disclosure of trips, did not provide any definition for what would consitute a trip, and did not provide any guidelines regarding the extent of motorboat usage allowed under one commercial towboat permit. One commercial towboat outfitter, Williams and Hall, reported single "trips" that included up to 18 boats and 72 clients. *See* USA-010568, Ex. 33 (18 boats and 72 clients in one trip, 4 boats and 60 clients in another trip); *see also* USA-010559, Ex. 34 (10 boats and 42 clients in one trip). Likewise, it appears that separate drop-off and pick-up trips for individual clients, even if ocurring on different days and at different locations, were often counted as one single "trip." *See, e.g.*, USA-010568, Ex. 33; USA-010559, Ex. 34.

Based on self-reported actual-use forms, the Forest Service issued special use permits for or otherwise allowed, at a bare minimum, the following commercial towboat use within the BWCAW during the years 2006 through 2014: [11]

a. In 2006, at least 1,421 commercial towboat trips.
b. In 2007, at least 1,045 commercial towboat trips.
c. In 2008, at least 1,300 commercial towboat trips.
d. In 2009, at least 1,708 commercial towboat trips.
e. In 2010, at least 1,731 commercial towboat trips.
f. In 2011, at least 1,639 commercial towboat trips.
g. In 2012, at least 1,873 commercial towboat trips.
h. In 2013, at least 1,892 commercial towboat trips.
i. In 2014, at least 2,124 commercial towboat trips.

See USA-007116-7219, Ex. 35; USA-007228-7413, Ex. 36; USA-007426-7598, Ex. 37; USA-008899-8913, Ex. 38; USA-008928-9051, Ex. 39. In response to this litigation, the Forest Service provided its own tally of these self-report forms but used a different metric—the number of days of operation and the number of boats per trip. *See* USA-010672, Ex. 40 (Native File "2006 to 2013 FS compiled Towboat Use.xlsx," *see* Excel sheet titled "Combined").

Actual commercial towboat use for years 2006-2014 is significantly higher than reported because many annual use reports: (1) were not submitted to the Forest Service at

[11] Wilderness Watch tallied these numbers from hundreds of pages of self-reporting documents submitted from commercial towboat operators between 2006 and 2014. *See* USA-007116-7219, Ex. 35; USA-007228-7413, Ex. 36; USA-007426-7598, Ex. 37; USA-008899-8913, Ex. 38; USA-008928-9051, Ex. 39. Years 2009 and 2010 have been corrected from the numbers reported in the Amended Complaint based on review of the administrative record. For consistency, the number of trips reported here for each year includes only one out-and-back trip (one entry) for a party because not all outfitters logged both drop-offs and pick-ups in self-report forms. Additionally, each out-and-back trip may have included multiple boats but was still recorded as only one trip. Accordingly, the actual number of trips is likely much higher than indicated here.

all; (2) were submitted with incomplete information for various years; (3) use inconsistent reporting methodologies (e.g., some outfitters reference "boat days" or "days" rather than "trips"; many outfitters log client drop-offs and pick-ups as a single trip even when they occur on different days or in different locations); and (4) did not include trips where the operators travelled into or through the Wilderness to drop clients off on state, private, or international land, or on the water (i.e., they did not dock on National Forest land within the Wilderness). *See* USA-010672, Ex. 40 (Native File "2006 to 2013 FS compiled Towboat Use.xlsx," Excel sheet titled "Caveat about towboat use data"). Even with incomplete and inconsistent reporting, the self-report forms indicate that, at a minimum, the Forest Service allowed commerical towboat use in excess of the 1,342 trip quota cap set by the BWCAW Management Plan every year from 2009 to 2014 and that commerical towboat use appears to be steadily increasing. The actual use reports do not reliably or consistently indicate which entry point was used for each trip or day, so it is difficult or impossible to determine how many trips were conducted at each entry-point. *See* USA-010672, Ex. 40 (Native File "2006 to 2013 FS compiled Towboat Use.xlsx," providing no entry-point information) .

The self-report forms also indicate that individual commercial towboat operators are exceeding the use recorded for that particular outfitter in 1992. For example, in 1992, LaTourell's was allotted a quota of 81 permits for Prairie Portage. USA-009096, Ex.

10.[12] In 2015, LaTourell's reported approximately 685 boat days on the water with 1,050 trips all made from the Moose Chain and East Basswood Lake entry-points. USA-010681, Ex. 41. The 2015 commercial towboat operators list, USA-010673, Ex. 41, also reveals discrepancies concerning which commercial towboat companies are actually operating within the BWCAW. For example, in 1992, Voyagers North Outfitters was allotted 72 permits for the Four-mile entry-point and 1 permit for the Moose Chain entry-point. USA-009095, Ex. 10. However, Voyagers North Outfitters is not listed as a commercial towboat operation in 2015. *See* USA-010673, Ex. 41. Conversely, Voyagers Canoe Outfitters—a separate business—is listed as a commercial towboat operation in 2015 but is not listed as an operation in 1992. USA-010673, Ex. 41; USA-009094-9096, Ex. 10. The record contains no suggestion that Voyagers North Outfitters' special use permit has been reissued to Voyagers Canoe Outfitters. Indeed, both businesses are currently conducting tow service within the BWCAW[13] but only Voyagers Canoe Outfitters produced actual-use reporting documents for 2015. *See* USA-010673, Ex. 41.

In 2009, after receiving information regarding towboat use from a Freedom of Information Act request, Kevin Proescholdt wrote a letter to the Forest Service expressing concern over inconsistencies in the Forest Service's towboat use monitoring.

[12] Prairie Portage trips correspond to the "Moose Chain only" entry-point quotas under the BWCAW Act's statutory cap. *See* USA-008258, Ex. 2; USA-011600, Ex. 42 (Prairie Portage is located on the international border near Sucker Lake).

[13] Although Voyagers North Outfitters is not listed as a commercial towboat operator for 2015, its website indicates it continues to run tow services to various areas within the BWCAW including Moose Lake and Trout Lake areas. *See Tow Service*, Voyageur North Outfitters, http://www.vnorth.com/other-services/tow-service.html (last visited June 21, 2016), Ex. 43.

See USA-006340, Ex. 44. Mr. Proescholdt noted specific concern that the Forest Service is not actually tracking "trips" as mandated by the BWCAW Management Plan and that actual use appears to be significantly higher than the 1,342 trip cap attested by the Forest Service in its *Dombeck* briefing. USA-006340, Ex. 44. He further expressed concern that even if the Forest Service were to count "boat days," where an operator's use of one towboat on a particular day equals one boat day regardless of the number of trips made, the boat days reported for various years also appear to be much higher than 1,342, with boat days on Moose Chain being particularly high. USA-006340-6341, Ex. 44 (discussing boat day tallies from the Kawishiwi District at USA-006809, Ex. 27). In response to that letter, the Forest Service noted that it was ensuring levels of towboat use were below 1992 levels because the number of operators and towboats were lower than the levels in 1992. USA-011630, Ex. 45. Apparently forgetting or ignoring the *Dombeck* litigation, the Forest Service further responded that it does not use trip quotas to manage towboats and noted that Mr. Proescholdt, when asked, was unable to "answer [the Forest Service's] question about what calculations were used to arrive at [Mr. Proescholdt's] number of 1,342 trips." USA-011630, Ex. 45. Mr. Proescholdt replied that the BWCAW Management Plan specifically requires the Forest Service to limit towboat "trips" to 1992 levels and that the 1,342 number for commercial towboat trips was the number the Forest Service itself calculated during the *Dombeck* litigation to establish the number of "trips" in 1992. USA-011633, Ex. 46.

B. Improved Commercial Towboat reporting in 2015 revealed high levels of use.

In 2013, the Forest Service convened a towboat interdisciplinary team—later dubbed a towboat taskforce—to examine the status of towboat operations in the BWCAW. USA-010700, Ex. 47. In 2015, the Forest Service issued a letter to towboat operators stating:

> We have been reviewing the history of the [towboat special use permitting] program and have found inconsistencies in our management; in particular in how use data has been collected over the past several years. We discovered there has been a misinterpretation of the Superior National Forest Outfitter / Guide Supplement dated 1995, and therefore, we may not be collecting all of the towboat use occuring in the Boundary Waters Canoe Area Wilderness (BWCAW).
>
> …
>
> In some cases, towboat use that did not touch land, occurred on the international boundary, or touched only state, county or private land may not have been collected from all towboat operators.

USA-010711, Ex. 17; USA-010703-04, Ex. 18; USA-010705-06, Ex. 19. Thus, the letter confirms that, as a result of inconsistencies in reporting and monitoring—including allowing some commercial towboat operators to run commercial towboats in the BWCAW without a special use permit—actual use of commercial towboats is likely understated. The letter includes a new form for reporting actual towboat use and "[w]ithin the new forms each row records one towboat trip, which may include dropping off, or picking up, or both." USA-010712, Ex. 17 (letter instructions); USA-010707, Ex. 48; USA-010709, Ex. 49 (new actual use report forms for water drop-offs and land drop-

offs). The new forms also require the date of the trip, the towboat sticker number, the drop-off or pick-up location, the number of clients, and the total trip charge. USA-010709, Ex. 49. The 2015 forms replaced the prior actual use report forms attached as Appendix E to the special use permits, and the Forest Service required commercial towboat operators to begin using the new forms for the 2015 season to attempt to remedy the lack of reliable data about actual towboat use in previous years. USA-010714, Ex. 50.

The Forest Service's tally of the 2015 reports indicate there are 25 commercial towboat operators with special use permits with a total of 76 boats. USA-010673, Ex. 41. Permitted commercial towboat operators made a total of 3,610 trips (one boat making one out-and-back trip into the wilderness). USA-010698, Ex. 41. Permitted commercial towboat operators reported a total of 2,899 "boat days" (one boat conducting one or multiple tows in the Wilderness on a given day). USA-010698, Ex. 41. These numbers do not include trips or boat days for Anderson's Canoe Outfitters, a "stickered" commercial towboat operator with three boats and without a special use permit. *See* USA-010673, Ex. 41; USA-010711-12, Ex. 17.

III. JURISDICTION[14]

The Court's jurisdiction in this case arises under the Administrative Procedure Act ("APA"), which provides for judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Under 5 U.S.C. § 706, "the reviewing court shall (1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." Here, Plaintiff has alleged and shown both a final agency action and that the Forest Service has failed to take a discrete action mandated by law.

A. Final Agency Action

To bring a claim under § 706(2), a plaintiff must demonstrate a final agency action. Under *Bennett v. Spear*, an agency action is final when it "marks the consummation of the agency's decision making process" and is an action "by which rights or obligations have been determined or from which legal consequences will flow." 520 U.S. 154, 177-78 (1997) (internal quotations and citations omitted). It is indisputable that the issuance of a special use permit is a final agency action. A special use permit is

[14] Wilderness Watch has standing to bring these claims. "To establish Article III standing, an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (internal quotations omitted). The Forest Service's actions challenged here adversely affect Wilderness Watch's organizational interests, as well as its members' ability to continue to use and enjoy the BWCAW as subject to the wilderness protections enacted by Congress. Pl.'s Am. Compl. ¶¶ 12-13 [ECF No. 37].

the legal instrument by which the Forest Service authorizes commercial services. *See* 36 C.F.R. § 251.50. Here, the Forest Service issues permits to commercial towboat operators that authorize site-specific activities, including towboat use in the BWCAW. Thus, the issuance of a special use permit is a specific, discrete agency action that directly affects the Wilderness area and Wilderness Watch's interest in the area. *See High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 639 (9th Cir. 2004).

Furthermore, the issuance of a special use permit marks the consummation of the agency's decision making process, and it determines the rights and obligations of the permit holder—namely, the right to operate commercial towboats in the BWCAW. *See Breaker*, 977 F. Supp. 2d at 934 ("Special use permit determinations by the Forest Service are reviewable by this Court.") (citing *KOLA, Inc. v. United States*, 882 F.2d 361, 364 (9th Cir. 1989) (noting that "the Regional Forester's decision to issue a special use permit is subject to judicial review where review involves an inquiry into whether the proper factors were considered by the Forestry Service")); *see also Blackwell*, 390 F.3d at 639 (issuance of a specific special use permit is a final agency action that constitutes injury sufficient for standing). Here, Plaintiff has established that the Forest Service issued, re-issued, amended, or otherwise maintained special use permits for commercial towboat operators in the BWCAW despite knowing, based on actual use reports, that commercial towboat use in the BWCAW exceeded the statutorily mandated cap and entry-point quotas as well as the cap imposed by the BWCAW Management Plan, and thus that the issuance of the special use permits was arbitrary, capricious, and not in accordance with law, and in excess of the Forest Service's authority. 5 U.S.C. §

706(2)(A), (C). Therefore, the issuance of special use permits to towboat operators in the BWCAW is a final agency action reviewable by this Court.

B. Failure to Act

Section 706(1) of the APA grants federal courts the power to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). To be reviewable under § 706(1) the action alleged to be unlawfully withheld or unreasonably delayed must be a "discrete" action. *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62-63 (2004). Furthermore, the withheld action must be legally required. *Id.* at 63. The "agency action" to be compelled can be the whole or a part of an agency rule, order, license, sanction, [or] relief. *Id.* at 62, (citing 5 U.S.C. § 551(13)).

Here, the Forest Service has failed to take the discrete and legally mandated act of ensuring commercial towboat use does not exceed the limits imposed by the BWCAW Act and Management Plan. The relevant portion of the Act states:

> The Secretary is directed to develop and implement, as soon as practical, entry point quotas for use of motorboats within the wilderness portions of the lakes . . . Provided, That the quota established for any one year *shall not exceed the average actual annual motorboat use* of the calendar years 1976, 1977, and 1978 for each lake . . . Except for motorboats . . . as authorized and defined here, *no other motorized use of the wilderness shall be permitted*.

92 Stat. 1649, 1651, 4(f), (i) (emphasis added). Additionally, to protect the wilderness character of the BWCAW, the BWCAW Management Plan sets specific numerical limits on motorized towboat use within the BWCAW. *See Dombeck*, 164 F.3d at 1121 ("[T]he Plan provides that growth in commercial towboat operations beyond these limits

will not be permitted."). The Forest Service has a legal duty under the Wilderness Act to preserve the wilderness character of the BWCAW, 16 U.S.C. § 1133(b), and the Forest Service "has the responsibility of allocating motorboat use among homeowners, resorts, guests, and towboats in a manner consistent with the BWCAW Act." *Bosworth*, 437 F.3d at 828. The Forest Service has acknowledged that the agency itself "is responsible for enforcing the quotas and it has no authority to do otherwise," USA-008251, Ex. 7, and it retains the right to amend special use permits, in whole or in part, to "incorporate new terms that may be required by law, regulation, directive, the applicable forest land and resource management plan, or projects and activities implementing a land management plan." USA-001706-08, Ex. 24; *see also* USA-001721, Ex. 24. Accordingly, the Forest Service has an ongoing duty to administer special use permits for commercial towboat operators in a manner that ensures compliance with the law.

Courts in the Eighth Circuit have repeatedly emphasized that "[t]he Act prohibits the use of motorboats within the BWCA except as specifically authorized by the Act." *Bosworth*, 437 F.3d at 823; *see also Dombeck*, 164 F.3d at 1124 ("The premise of the BWCA Wilderness Act of 1978 is that motorboat use is prohibited in the wilderness area, except to the extent that Congress specifically authorized motorboat use on specifically designated lakes, portions of lakes, and rivers."). Although the Forest Service may have some discretion to determine the *manner* in which it will regulate towboat use, it does not have discretion to exceed the cap or ignore its own Management Plan requirements. *See, e.g.*, *FTC v. Anderson*, 631 F.3d 741, 750 (D.C. Cir. 1979) ("A citizen may be entitled to

a court ruling that an agency exercise its discretion even though the court cannot say which way the discretion is to be exercised."). If the Forest Service wants to change the manner in which it will regulate towboat use, it must amend the Management Plan.

The alleged duty here is not simply a "non-impairment" standard or a generalized duty to "maintain the wilderness character," *compare Norton*, 542 U.S. at 65-66; rather, it is a duty to adhere to specific numeric limitations on motorboat and commercial use within the BWCAW. If the BWCAW Act or the BWCAW Management Plan prohibited all motorboats in the Wilderness, surely the agency could be compelled to adhere to that mandate. *Cf. id.* at 66 (suggesting that if the Federal Land Policy and Management Act mandated "the total exclusion of ORV use," it would achieve "the clarity necessary to support judicial action under § 706(1)"); *Hells Canyon Preservation Council v. U.S. Forest Serv.*, 593 F.3d 923, 933 (9th Cir. 2010) (noting that "the Wilderness Act require[s] the Forest Service to . . . prohibit unauthorized vehicles within that area," but rejecting Plaintiff's claim on the distinguishable grounds that the area at issue was not within the Wilderness). The result is no different when the mandate is to comply with a specific numeric cap on motorboat use within the wilderness. *See Bosworth*, 437 F.3d at 828. Because the Forest Service has failed to comply with its discrete legal duty to ensure that motorboat use within the BWCAW remains under a specific numeric threshold set by the BWCAW Act and the Management Plan, the Court has jurisdiction under § 706(1).

C. Exhaustion

Finally, to challenge an agency decision, plaintiffs typically must demonstrate that they have exhausted any applicable administrative remedies. *See Breaker*, 977 F. Supp. 2d at 934 (citing *Friends of the Norbeck v. U.S. Forest Serv*., 661 F.3d 969, 974 (8th Cir. 2011)). This implicates ripeness—whether a live controversy exists such that the plaintiffs will sustain immediate injury from the operation of the challenged action, and that the injury would be redressed by the relief requested. *Id.* (citing *Wersal v. Sexton*, 674 F.3d 1010, 1018 (8th Cir. 2012)). But here, Plaintiff had no administrative remedies to exhaust. The Forest Service issues special use permits to commercial towboat operators pursuant to 36 C.F.R. § 251, Subpart B. *See, e.g.*, USA-010376 and 10384, Ex. 51. Although 36 C.F.R. § 251.82 makes the issuance of a special use permit an appealable decision, the process set forth in this section only applies to "the holder, operator, or solicited applicants who are directly affected by an appealable decision, intervenors, and the Responsible Official." *See* 36 C.F.R. § 251.86. Therefore, the administrative remedies are not applicable to members of the public who seek to challenge a special use permit, and Plaintiff had no administrative remedies to exhaust.

IV. ARGUMENT

A. Standard of Review

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a); *Sierra Club Northstar Chapter v. Bosworth*, 428 F. Supp. 2d 942, 947-48 (D. Minn. 2006) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The Court

views the evidence and all reasonable inferences drawn in the light most favorable to the nonmoving party. *See Breaker*, 977 F. Supp. 2d at 935. An issue of fact is genuine when a reasonable fact finder could return a verdict for the nonmoving party. *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The nonmoving party, however, may not rest on mere allegations or denials, but must show a genuine issue of material fact, or that the movant is not entitled to judgment. *Id.* (citing *Wenzel v. Missouri-Am. Water Co.*, 404 F.3d 1038, 1039 (8th Cir. 2005)).

The APA governs judicial review of federal agency administrative decisions like those at issue here. *See Bosworth*, 437 F.3d at 821. Under the APA, a court will set aside agency action that is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Although a court may not substitute its judgment for that of the agency, a court is not compelled to "rubber stamp" administrative decisions that are inconsistent with a statutory mandate or frustrate the congressional policy underlying a statute. *Breaker*, 977 F. Supp. 2d at 936 (citing *Bureau of Alcohol, Tobacco & Firearms v. Fed. Labor Relations Auth.*, 464 U.S. 89, 97 (1983)). In particular, when examining an agency's decision in the context of wilderness administration, the court must take into account the purposes behind the BWCAW Act and the Wilderness Act. *See Friends of the Boundary Waters Wilderness v. Robertson*, 978 F.2d 1484, 1487 (8th Cir. 1992).

Under the APA standard, an agency must "examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Assn. of U. S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An agency action is arbitrary and

capricious if the agency "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." *Id*. at 42-44. "A court must be able to reasonably discern from the record that the Forest Service is in compliance with [relevant standards]." *Native Ecosystems Council v. U.S. Forest Serv*., 418 F.3d 953, 963 (9th Cir. 2005) (citing *SEC v. Chenery Corp*., 332 U.S. 194, 196-197 (1947) ("If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive.")); *see also Fed. Power Comm'n v. Transcontinental Gas Pipe Line Corp*., 423 U.S. 326, 331 (1976) (per curiam) ("If the decision of the agency is not sustainable on the administrative record made, then the . . . decision must be vacated and the matter remanded . . . for further consideration.").

Here, for the reasons stated below, Plaintiff is entitled to summary judgment on its claims that the Forest Service is violating the Wilderness Act, the BWCAW Act, and the BWCAW Management Plan by authorizing or otherwise allowing excessive motorized and commercial use in the Wilderness. Because the basis for the Forest Service's motorboat and commercial service authorizations cannot be reasonably discerned from the record and because the Forest Service 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, the Forest Service's continued authorization of excessive commercial towboat use and failure to adequately regulate commercial towboat use cannot be sustained under the APA.

B. The Forest Service is violating the the BWCAW Management Plan and the National Forest Management Act by authorizing or otherwise allowing towboat use that exceeds 1992 levels and by failing to monitor and regulate commercial towboat use as required by the BWCAW Management Plan.

The Forest Service is violating the BWCAW Management Plan and the National Forest Management Act ("NFMA") by allowing commercial towboat use within the BWCAW without a special use permit and in excess of the amount allowed by the BWCAW Management Plan. The Forest Service manages the BWCAW in accordance with the Superior National Forest Land and Resource Management Plan (Forest Plan), as amended by the BWCAW Management Plan. USA-011127 and 11132, Ex. 8. Site-specific actions and authorizations must comply with the Forest Plan. *See Sierra Club*, 28 F.3d at 758; *Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 932 (9th Cir. 2010); 36 C.F.R. § 219.15(d) ("Every project and activity must be consistent with the applicable plan components."). The BWCAW Management Plan requires that, "[b]eginning in 1995, all towboat operations must be authorized by a special use permit," and it limits commercial towboat use to "1992 levels for numbers of boats, trips, current operators, and specific lakes." USA-010841, Ex. 4; USA-011175, Ex. 52. The Management Plan is clear that "[g]rowth will not be permitted beyond these limits [and] if an operator

terminates his/her special use permit, an assessment will be completed to determine if a permit should be issued to another individual or business." USA-010841, Ex. 4; USA-011175, Ex. 52. The Forest Service has not complied with these mandates and thus cannot ensure that commercial towboat growth beyond 1992 levels is not occurring. Indeed, it appears that actual commercial towboat use has been steadily increasing since 2006.

1. The Forest Service is violating the BWCAW Management Plan by allowing commercial towboat operators to operate within the BWCAW without a special use permit.

The Forest Service has authorized or otherwise allowed commercial towboat operators to provide commercial towboat services within the BWCAW since 1995 without a special use permit, in violation of the BWCAW Management Plan's requirement that, from 1995, all such operators possess a special use permit. *See* USA-010841, Ex. 4; USA-011175, Ex. 52.

Commercial towboat operators who lacked special use permits were "authorized as a valid towboat operator in the [BWCAW] on [various lakes], and [were] recognized as such by the Forest Service issued sticker displayed on [their] towboats." USA-006295, Ex. 22. At least one commercial towboat operator has operated commercial towboat services within the Wilderness without a special use permit as late as 2015, while many others operated with only stickers for years. *See* USA-005798, Ex. 20; USA-009247, Ex. 21; USA-005733, Ex. 53; USA-009251, Ex. 21; USA-009248, Ex. 21; USA-010656-58, Ex. 25. The Forest Service's authorizations of commercial towboat use without the issuance of a special use permit are arbitrary and capricious, an abuse of

discretion, and/or otherwise not in accordance with the law. 5 U.S.C. § 706. To the extent the Forest Service is otherwise allowing commercial towboat use without a special use permit, the Forest Service's failure to condition towboat use on the issuance of a special use permit as required by the BWCAW Management Plan constitutes agency action unreasonably withheld or delayed. *Id*.

2. The Forest Service is violating the BWCAW Management Plan by allowing commercial towboat use in excess of 1,342 trips and by failing to monitor and limit actual commercial towboat use to 1992 levels

The Forest Service is authorizing or otherwise allowing commercial towboat use in excess of 1,342 trips per year—the number that the Forest Service previously calculated as the number of towboat trips from 1992. *Dombeck*, 164 F.3d at 1121, 1122. Even with incomplete and inconsistent reporting of actual use from 2009-2014, self-reports of actual use indicate that towboat operators significantly exceeded 1,342 trips each year. *See* discussion *supra* at 22-23. In 2015, commercial towboat operators made a total of 3,610 trips (one boat making one trip into the wilderness—out and back) and reported a total of 2,899 "boat days" (one boat conducting one or multiple tows in the Wilderness on a given day). USA-010698, Ex. 41. The Forest Service's allowance of commercial towboat operations exceeding 1,342 trips per year is in violation of the BWCAW Management Plan and the ruling in *Dombeck*, 164 F.3d at 1121, 1122.

To the extent the Forest Service now disavows the representation it made to the Eighth Circuit in *Dombeck* (and on which the Eighth Circuit specifically based its ruling in that case), the Forest Service's change in position is arbitrary and capricious. In 1997,

the Forest Service submitted to the Eighth Circuit that "the average motor use for years 1976-1978 was calculated to be approximately 10,539,"[15] that "[t]he current management plan sets quotas for non-towboat motorized day use at 7,902," that "[t]owboat usage is limited to the 1992 level of 1,342 trips," and that "therefore, the total motor usage will remain below the level set in the BWCAW Act." USA-011347 n. 11, Ex. 3. The Court accepted this rationale as the basis for its holding that the Forest Service's special use permit program for limiting towboat use to "1992 levels for numbers of boats, trips, current operators, and specific lakes" is lawful. *Dombeck*, 164 F.3d at 1122. It accepted the agency's rationale because capping a defined number of trips provides an accurate way to measure "actual use" such that the Forest Service (and the public and a reviewing court) could verify that actual towboat use combined with actual non-exempt, general motorboat use does not exceed the statutory cap entry-point quotas. *See id*. The Forest Service acknowledged the *Dombeck* opinion by stating, "The court upheld our deicison to take [towboats] out of the [general] quota since we had a "cap" on towboats and were able to show that the total use (towboats and other) use didn't take us over the cap." USA-009197, Ex. 54. To the extent the Forest Service was attempting to interpret the *Dombeck* decision in a manner that ignores its explicit reliance on trips, "[t]he USFS's interpretation of *Dombeck* is not entitled to deference." *Bosworth*, 437 F.3d at 822. Additionally, the Forest Service may not successfully maintain a position in *Dombeck* and then "simply because his interests have changed, assume a contrary position." *New*

[15] As discussed above, it is not clear how the Forest Service came to this precise number. The post-phaseout statutory cap quotas are detailed at USA-008258, Ex. 2.

Hampshire v. Maine, 532 U.S. 742, 749 (2001). The doctrine of judicial estoppel protects "the integrity of the judicial process" by "prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Id.* at 749-50.

It appears that the Forest Service has simply chosen to ignore the BWCAW Management Plan's mandate to limit "trips" to 1992 levels and the subsequent Eighth Circuit order likewise requiring the Forest Service to limit towboat trips to 1,342. In addition to the doctrine of judicial estoppel, "unexplained inconsistency" between agency actions is "a reason for holding an interpretation to be an arbitrary and capricious change" under the APA. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 981 (2005). "An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009) (citing *United States v. Nixon,* 418 U.S. 683, 696 (1974)). Instead, "[u]nder *FCC v. Fox Television Stations, Inc*., when a new policy is contradicted by an agency's previous factual findings, the law does not allow the agency to simply ignore the earlier findings. Instead, the law requires that the agency provide a reasoned explanation for changing course and adopting a position contradicted by its previous findings." *Organized Village of Kake v. U.S. Dept. of Ag*., 795 F.3d 956, 971 (9th Cir. 2015) (en banc) (citing *Fox Television Stations, Inc*., 556 U.S. at 516). This reasoned explanation must demonstrate the Forest Service believes that the new position is better, that the new position is permissible under the relevant statutes, and that there are good reasons for the new position. *Fox Television*, 556 U.S. at 515-516. If the new position "rests upon factual findings that contradict those which underlay its prior

position," the Forest Service must provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id*.

Though Defendants claim that they have no obligation to measure and regulate the number of towboat trips, *see, e.g.*, USA-011630, Ex. 45, the Forest Service never petitioned the Court to correct its holding in *Dombeck*, and it never amended its BWCAW Management Plan. Likewise, the Forest Service revised its Forest Plan in 2004—five years after *Dombeck*—and incorporated the same language requiring the Forest Service to limit towboat use to "the 1992 levels for numbers of boats, *trips*, current operators, and specific lakes." USA-011175, Ex. 52 (emphasis added). In 2009, when a concerned observer asked the Forest Service why it was not limiting towboat use to 1,342 trips per year, the Forest Service replied that it was ensuring levels of towboat use were below 1992 levels because the number of operators and towboats were lower than the levels in 1992. USA-011630, Ex. 45. The Forest Service further responded that it does not use trip quotas to manage towboats and suggested that it had never heard of a 1,342-trip limitation. USA-011630, Ex. 45. In 2012, after issuing a notice that it could not find a way to overcome the arbitrary and capricious standard in recalculating the base period use following the *Bosworth* Remand Order, *see* USA-011241, Ex. 9 the Forest Service issued a letter updating Forest Plan quotas and the reservation system for motor entry-points. USA-011238-44, Ex. 9. The commercial towboat permit system was not altered at that time. The BWCAW Management Plan explicitly requires the Forest Service to monitor and limit trips to 1992 levels. An agency's position that is contrary to the clear language of a Forest Plan is not entitled to deference. *Native Ecosystems Council*, 418

F.3d at 962. Further, the Forest Service has not provided a reasoned explanation for abandoning, or simply ignoring, its position in *Dombeck.* Thus, the agency's current position cannot be sustained. *See Organized Village of Kake,* 795 F.3d at 971 (discussing *Fox Television*, 556 U.S. at 516).

The Forest Service has already stated that it does not and cannot know the number of towboat trips made in 1992, USA-010742, Ex. 16, so the Forest Service cannot now withdraw its prior calculation while complying with the BWCAW Management Plan and NFMA. Accordingly, the Forest Service must limit commercial towboat use to 1,342 trips per year, terminate the activity, or amend the BWCAW Management Plan and the Forest Plan to implement a new commercial towboat standard that is consistent with the Forest Service's statutory obligations and which can be reliably supported by relevant historical data. 36 C.F.R. § 219.15(c); *Native Ecosystems Council*, 418 F.3d at 961 ("Our scope of review does not include attempting to discern which, if any, of a validly enacted Forest Plan's requirements the agency thinks are relevant or meaningful. If the Forest Service thinks any provision of the [relevant Forest Plan] is no longer relevant, the agency should propose amendments to the [Forest Plan] altering its standards, in a process complying with NEPA and NFMA, rather than discount its importance in environmental compliance documents."). The new Management Plan standard would need to ensure compliance with the BWCAW Act and the Forest Service's obligations under the Wilderness Act to: 1) preserve wilderness character, 16 U.S.C. § 1133(b), and 2) authorize commercial services only "to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas," 16 U.S.C.

§ 1133(d); 36 C.F.R. § 219.15.

The importance of amending the Management Plan to provide a reliable methodology for monitoring and limiting commerical towboat use is demonstrated by the record here. The Forest Service cannot accurately state that towboat use levels are down from 1978 and 1992 levels levels. *See* Defs' Stmt. of the Case at 3 [ECF No. 11]. In making this statement, Defendants note that "in 2013 there were 13 fewer towboat operators (18, down from 31) and 33 fewer towboats operating (57, down from 90) than in 1992." *Id*. In 2009, the Forest Service indicated that there were 30 towboat operators with 89 boats in 1992. USA-011630, Ex. 45. Plaintiffs could not locate any documentation on how the Forest Service determined there were 90 towboats, or 89 towboats, used or available in 1992. In a 2015 FOIA request, Wilderness Watch requested "[a]ll documents regarding commercial towboat use for 1992, specifically, the number of boats, trips, existing commercial towboat operators and which lakes there were operating on, and use fees for the year 1992." *See* USA-011610, Ex. 55. The document produced in response to that request was document USA-008736, Ex. 56—the same document produced in the *Dombeck* litigation to establish that there were 1,342 towboat trips made in 1992. *See* USA-009094, Ex. 10. That document does not demonstrate that there were 31 operators and 90 boats, or 30 operators and 89 boats, in 1992. *See* USA-008736, Ex. 56. Likewise, it does not appear that the Forest Service knows the precise level of commercial towboat use in 1978, though one record document indicates that there may have been 29 towboats in operation. USA-005718, Ex. 15. Regardless, since 2013, the number of operators and boats reported has risen to, at a minimum,

25 commercial towboat operators and 76 boats.[16] USA-010673, Ex. 41. That number does not include one operator (with three boats) who has been operating commercial towboat services in the BWCAW without a special use permit. That number also does not include other towboat operators who continue to offer services within the BWCAW but are not listed as towboat operators in the Forest Service's 2015 list of operators. *See supra* note 13.

More importantly, failing to monitor and regulate towboat trips constitutes a failure to consider an important aspect of the problem. *Monitoring* the number of boats and operators alone does satisfy the Forest Service's burden to monitor *and enforce compliance with statutory entry-point quota caps on actual motorboat use* in the Wilderness. An operator may use three boats lightly during a slow month and the same three boats heavily during a heavy month—the operator and boat numbers would remain the same, but actual motorboat use would be quite different for each month. *See, e.g.*, USA-010673, Ex. 41 (Forest Service noting that the number of towboats used has varied over the years, with some operators reporting no use of certain towboats); USA-011632, Ex. 57 (letter to one towboat operator indicating that actual use of a steady number of towboats has increased each year). Indeed, actual-use reporting, though incomplete, indicates that actual commerical towboat use has increased steadily since 2009—not decreased. *See* discussion *supra* at 22-23; USA-010698, Ex. 41.

[16] The BWCAW Management Plan states that "[i]f an operator terminates his/her special use permit, an assessment will be completed to determine if a permit should be issued to another individual or business." USA-010841, Ex. 4. Plaintiff is not aware of any assessments documenting reissuance of permits after they have been terminated.

The Forest Service cannot choose to ignore part of its own BWCAW Management Plan direction, particularly the portion that provides the only actual-use metric for ensuring that actual towboat use remains at or below a quantifiable level and, when combined with general motorboat use, at or below the specific statutory entry-point quota caps. "A court must be able to reasonably discern from the record that the Forest Service is in compliance with a Forest Plan standard." *Native Ecosystems Council.*, 418 F.3d at 963 (citing *SEC v. Chenery Corp*., 332 U.S. 194, 196-197 (1947)). Here, the Forest Service cannot demonstrate that it is limiting actual commercial towboat use to 1992 levels for numbers of boats, trips, current operators, and specific lakes in violation of the BWCAW Plan, the Forest Plan, and NFMA, and it is failing to limit and monitor commercial towboat trips as required by the BWCAW Plan, the Forest Plan, and NFMA. The Forest Service's commercial towboat use authorizations are arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with the law and thus also constitute a violation of the APA. 5 U.S.C. § 706. The Forest Service's failure to track actual towboat use and impose limits on towboat use pursuant to applicable statutory and Management Plan quota caps constitutes agency action unreasonably withheld or delayed in violation of the APA. *Id*.

C. The Forest Service is violating the BWCAW Act by authorizing or otherwise allowing commercial towboat use at a level that, separately or combined with general motorboat use, exceeds statutory cap entry-point quotas and is failing to monitor actual towboat use to ensure that actual use, separately or combined with general motorboat use, remains at or below the statutory cap.

The Forest Service has authorized or otherwise allowed motorboat activity to exceed the statutory cap and entry-point quotas detailed in the 1981 BWCAW Act Implementation Plan and as reflected by the statutory phase-outs of motorboat use on particular lakes between 1984 and 1999 and the Forest Service has failed to ensure that motorboat activity does not exceed the statutory cap and entry-point quotas. USA-010755, Ex. 1 (1981 Implementation Plan direction); USA-008258, Ex. 2 (the statutory cap and entry-point quotas after phase-outs). As previously discussed, contrary to Eighth Circuit precedent, the Forest Service insists that it is not required to monitor or limit actual commercial towboat use (trips) even where the evidence before the agency indicates that actual towboat use is increasing and exceeds the statutory cap at specific entry-points within the BWCAW. The Eighth Circuit has twice held that the Forest Service's separate special use permit program for commercial towboat use is lawful under the BWCAW Act, but those rulings were specifically based on the Forest Service's representation that the combined number of motorized boat trips authorized by the BWCAW Management Plan (general motorboat use quota plus towboat use quota) does not exceed the statutory cap for actual motorboat use. *Dombeck*, 164 F.3d at 1122; *Bosworth*, 437 F.3d at 828. That calculation necessarily requires a quantifiable methodology for limiting general motorboat use and towboat use so the Forest Service, or

a reviewing court, can review the actual motorboat use for a particular year and ensure that actual use did not exceed the individual statutory cap entry-point quotas for each entry-point.

The record demonstrates the importance of consistently regulating and monitoring actual towboat use. For the 2015 season, after requiring towboat operators to use new actual-use reporting forms, the Forest Service tallied 3,608 towboat trips and 2,899 towboat days. USA-010698, Ex. 41. The Forest Service's tally indicates that commercial towboat operators completed the following number of trips on specific lakes:

Moose Chain of Lakes	1,479
East Basswood Lake	336
West Basswood Lake	23
International-Prairie Portage	897
Fall Lake	19
Burntside Lake	23
Farm Lake	30
Snowbank Lake	3
Saganaga Lake	370
International-Saganaga Lake	374
Sea Gull Lake	4
Clearwater Lake	27
Open Water Drop-Saganaga Lake	9
Open Water Drop-Seagull Lake	14

USA-010698, Ex. 41. While the above reported lakes don't correspond precisely with the entry-points detailed in the 1981 BWCAW Act Implementation Plan, they are similar:

MOTORBOAT QUOTAS
(Maximum Use Allowed by Public Law 95-495)

Entry Point	Type of Motorboat Use	Annual Quota (Number of Permits) 1982-83	1984-98	1999+ 1/
Trout Lake	All	1738	1738	1738
Fall Lake	Overnight	658	291	291
	Day Use on Fall Lk. only	1457	1457	1457
	Day Use on Basswood Lake	1206	932	932
Fourmile Portage	Overnight	129	97	97
	Day Use	993	773	773
Moose Lake	Overnight	730	558	558
	Day Use on Moose Chain only	837	695	695
	Day Use on Basswood Lake	1813	1359	1359
Snowbank Lake	Overnight	81	81	81
	Day Use	610	610	610
Farm Lake	Overnight	10	10	10
	Day Use	345	345	345
Brule Lake	Overnight	266	266 2/	0 2/
	Day Use	226	226 2/	0 2/
Seagull Lake	Overnight	134	133	38
	Day Use	594	594	137
Saganaga Lake	Overnight	388	370	370
	Day Use	2023	2023	2023
Clearwater Lake	Overnight	42	42	42
	Day Use	246	246	246
E. Bearskin Lake	Overnight	30	30	30
	Day Use on E. Bearksin Lake Only	227	227	227
	Day Use on Alder Lake	142	142	142

USA-008258, Ex. 2.

The 1981 Implementation Plan breaks "Moose Lake" into two day-use entry-points: the "Day Use on Moose Chain only" entry-point capped at 695 permits, and the "Day Use on Basswood Lake" (which refers to E. Basswood Lake) entry-point capped at 1,359 permits. USA-008258, Ex. 2 (reflecting caps after statutory phase-outs); *see also* USA-011596, Ex. 58; USA-011600, Ex. 42 (maps showing various lakes and entry-points within the BWCAW). In addition, Prairie Portage is accessed via the "Moose Chain only" entry-point. *See* USA-011600, Ex. 42 (Prairie-Portage is located on the international border near Sucker Lake). Accordingly, the reported commercial towboat

use on Moose Chain of Lakes for 2015 (1,479 trips) appears to exceed the entry-point cap for "Day Use on Moose Chain," which is capped at 695 permits. The reported commercial towboat use for Prairie Portage (897 trips) combined with Moose Chain use (1,479 trips) constitutes a total of 2,376 trips for Moose Chain only—a number well above the statutory cap for that entry-point in violation of the BWCAW Act. Alternatively, if use on specific lakes reported by the commercial towboat operators do not correspond to specific entry-points in the BWCAW Act, there is no way for the Forest Service, the public, or the court to reasonably discern if actual use complies with the statutory cap. The Forest Service "has the responsibility of allocating motorboat use among homeowners, resorts, guests, and towboats in a manner consistent with the BWCAW Act," *Bosworth*, 437 F.3d at 828, and its failure to due so constitutes a violation of the BWCAW Act. The Forest Service's towboat use authorizations are arbitrary and capricious, an abuse of discretion, and/or otherwise not in accordance with the law and thus also constitute a violation of the APA. 5 U.S.C. § 706. The Forest Service's failure to track actual towboat use and impose limits on towboat use pursuant to applicable statutory and quota caps constitutes agency action unreasonably withheld or delayed in violation of the APA. *Id*.

D. The Forest Service is violating the Wilderness Act by authorizing or otherwise allowing motorboat use within the BWCAW at a level that exceeds the amount specifically provided for by law and at a level found by the Forest Service to impermissibly degrade wilderness character and by failing to monitor and regulate motorboat use to ensure preservation of wilderness character.

The Forest Service's authorization of motorboat use above the amount specifically allowed by law and its failure to adequately monitor and regulate motorboat as required by law constitutes a violation of its duty to preserve the wilderness character of the BWCAW. *See* 16 U.S.C. § 1133(b). Congress passed the BWCAW Act "to ensure the BWCAW's wilderness character would be preserved," and "[l]imiting motorboat use is integral to preserving the wilderness values and primitive character of the area." *Bosworth*, 437 F.3d at 819 (citations omitted). To this end, "[t]he motorboat use allowed by the BWCAW Act is circumscribed: the Secretary of Agriculture is directed to establish motorboat quotas restricting use to less than or equal to the "average actual annual motorboat use of the calendar years 1976, 1977, and 1978." *Id*. (citing BWCAW Act § 4(f)). The Forest Service itself has stated, "[t]he Forest Service is responsible for enforcing the quotas and it has no authority to do otherwise." USA-008251, Ex. 7.

Accordingly, the Forest Service must ensure that motorboat activity does not exceed the statutory cap and entry-point quotas detailed in the 1981 BWCAW Act Implementation Plan as reflected by the statutory phaseouts of motorboat use on particular lakes in 1984 and 1999. USA-010755, Ex. 1 (1981 Implementation Plan direction); USA-008258, Ex. 2 (the statutory cap and entry-point quotas after phaseouts). This statutory cap sets the ceiling, the maximum amount of motorboat use

that may be permitted within the Wilderness and at each entry-point. *See* USA-008249, Ex. 7. Thus, while the Forest Service may not permit motorboat use above the statutory cap, it is within the Forest Service's discretion to reduce the amount of motorboat use to protect wilderness character, and it did precisely that in the 1993 BWCAW Management Plan.

In 1988, the Forest Service expressed concern about "deteriorating wilderness conditions" due to entry-point quota use nearing and sometimes exceeding capacity. USA-008251, Ex. 7. The Forest Service determined that, among other visitor use impacts, "allowing motorboat use to the maximum extent possible under the statute was 'strain[ing] the wilderness environment and [was] tending to degrade the intended primitive and unconfined recreation experience' of the BWCAW." *Bosworth*, 437 F.3d at 820. Recognizing that "[i]n a world that is becoming more populated and developed each day, maintaining the wilderness resource is complicated by intensive pressures, such as development along its boundaries . . . tresspass by motorized equipment, and influences on water that originate outside its boundaries," the Forest Service developed the BWCAW Management Plan to "maintain the naturalness of wilderness and protect it from human influence." USA-010822, Ex. 4. After acknowledging that amounts and types of use have been a topic of controversy for years, the Forest Service stated that the "[f]uture management of the BWCAW . . . will provide outstanding opportunities for solitude or primitive and unconfined types of recreations, while maintaining it in a state affected primarily by the forces of nature." USA-010825, Ex. 4. To achieve this end and lessen impacts to wilderness character from motorized use, the Forest Service set

motorboat use quotas at approximately 75% of the statutory cap and restricted commercial towboat use to 1992 levels for numbers of boats, trips, current operators, and specific lakes. *Bosworth*, 437 F.3d at 820; USA-010841, Ex. 4.

The Forest Service now suggests, however, that the applicable cap has never changed from the original 1981 cap of 14,925 entry-point permits, and that the Forest Service is not actually required to monitor and regulate towboat "trips," or any other particular metric of use. *See* Defs.' Stmt. of the Case at 2, 3 n. 1 [ECF No. 11]. As in *Bosworth*, the Forest Service argues that interpretation of relevant management requirements and implementation of motorized use permits are subjects best left to the Forest Service's discretion. *Id.*; *Bosworth*, 437 F.3d at 824 ("The USFS claims 'the specific means of implementing motorboat use is left to the discretion of the Secretary.'") (citing Forest Service briefing). However, the Forest Service previously found that use at levels above those authorized in the BWCAW Management Plan was impermissibly straining wilderness character. Thus, its attempts to permit motorboat use exceeding those restrictions violates the Wilderness Act. *See Blackwell*, 390 F.3d at 648 (discussing the level of deference owed to the Forest Service's decision to authorize special use permits for commercial packstock operators in wilderness). In *Blackwell*, the court found that "[t]he Forest Service's decision to grant permits at their pre-existing levels in the face of documented damage resulting from overuse does not have rational validity . . . . Given the Wilderness Act's repeated emphasis of the administering agency's responsibility to preserve and protect wilderness areas, this decision cannot be reconciled

with the Forest Service's statutory responsibility." 390 F.3d at 648. The same rationale applies here.

The Forest Service has never consistently monitored and regulated commercial towboat use, making it impossible for the agency, or the public, to ensure actual motorboat use in the Wilderness remains at or below the levels mandated by the BWCAW Act for each entry-point and at or below levels mandated by the BWCAW Management Plan. To the contrary, the evidence before the agency indicates that commercial towboat use exceeds the statutory cap at certain entry-points and exceeds actual 1992 use. The Forest Service's failure to ensure compliance with motorboat use restrictions is a violation of the Forest Service's duty under the Wilderness Act to preserve wilderness character. 16 U.S.C. § 1133(b); *Bosworth*, 437 F.3d at 828; *Blackwell*, 390 F.3d at 648. The Forest Service's motorboat use authorizations are arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law and thus also constitute a violation of the APA. 5 U.S.C. § 706. The Forest Service's failure to track actual towboat use and impose limits on towboat use pursuant to applicable statutory and quota caps constitutes agency action unreasonably withheld or delayed in violation of the APA. *Id.*

E. <u>The Forest Service is violating the Wilderness Act by authorizing or otherwise allowing commercial enterprise at a level that exceeds the amount specifically provided for by law and at a level that degrades wilderness character and by failing to monitor and limit commercial use as required by law.</u>

In addition to providing motorized access to the Wilderness, towboat operations also constitute commercial enterprise, which is prohibited by the Wilderness Act in

designated wilderness areas "[e]xcept as specifically povided for in [the Act]." 16 U.S.C. § 1133(c). The Wilderness Act further provides that "[c]ommercial services may be performed within the wilderness areas . . . *to the extent necessary* for activities which are proper for realizing the recreational or other wilderness purposes of the areas." 16 U.S.C. § 1133(d)(6) (emphasis added). The Forest Service has interpreted this provision as permitting, to the extent necessary, "public services generally offered by packers, outfitters, and guides." 36 C.F.R. § 293.8. The Forest Service's Manual,[17] which provides further guidance for the agency, requires "all private parties conducting outfitting and guiding services on National Forest System lands to have a special use authorization," FSM § 2721.53, Ex. 59, and the Manual provides additional guidance on wilderness management noting that the Forest Service must address "the need and role of outfitters in the forest plan[, and] [t]he plan must address the type, number, and amount of recreation use that is to be allocated to outfitters." FSM § 2323.13g, Ex. 60. The Forest Service may only grant special uses in wilderness when consistent with the Wilderness Act, subsequent wilderness designating legislation, the agency's wilderness implementing regulations, and the ageny's wilderness management direction in its Forest Service Manual. FSM § 2718.11, Ex. 61. Here, the Forest Service is authorizing or otherwise allowing commercial enterprise, in some cases without a special use permit, at a level exceeding the extent necessary for recreation in the BWCAW and at a level that exceeds the specific limitations imposed by the BWCAW Act.

[17] The Forest Manual is available in full online at http://www.fs.fed.us/im/directives/dughtml/fsm.html; *see also* Exs. 59, 60, and 61.

The Forest Service's failure to limit commercial enterprise in the wilderness is directly contrary to the purpose of the Wilderness Act. *See, e.g.*, *Robertson,* 978 F.2d at 1487 (finding that the purpose of the Act mandated the closing of mechanized portages unless it was not "physically possible" to do so). As the Ninth Circuit has stated, the Wilderness Act's "statutory declarations show a mandate of preservation for wilderness and the essential need to keep commerce out of it." *Wilderness Society v. U.S. Fish and Wildlife Serv*., 353 F.3d 1051, 1061 (9th Cir. 2003) (en banc). The "language, purpose and structure of the Wilderness Act support the conclusion that Congress spoke clearly to preclude commercial enterprise in the designated wilderness, regardless of the form of commercial activity, and regardless of whether it is aimed at assisting the economy with minimal intrusion on wilderness values." *Id*. at 1062. Thus, the economic interests of the commercial towboat operators are not relevant to this inquiry. Rather, the relevant inquiry is defined in § 1133(d)(6) of the Wilderness Act, which authorizes the Forest Service to allow certain commercial services "to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas." 16 U.S.C. § 1133(d)(6).

Interpreting the Wilderness Act's specific exemption for commercial services in § 1133(d)(6), the Ninth Circuit has held that "the statutory scheme requires, among other things, that the assigned agency make a finding of 'necessity' before authorizing commercial activities in wilderness areas." *Blackwell,* 390 F.3d at 646. However, "a finding of necessity is a necessary, but not sufficient, ground for permitting commercial activity in a wilderness area." *Id*. at 647. The finding must be "specialized," and "[t]he

Forest Service may authorize commercial services only 'to the *extent* necessary.'" *Id*. (citing 16 U.S.C. § 1133(d)(5)) (emphasis in original). Courts have emphasized that the prohibition against commercial activity is "one of the strictest prohibitions of the Act." *Californians for Alternatives to Toxics v. U.S. Fish and Wildlife,* 814 F. Supp. 2d 992, 1016 (E.D. Cal. 2011) (citing *Wilderness Watch v. U.S. Fish and Wildlife Serv.,* 629 F.3d 1024, 1040 (9th Cir. 2010)). And, "[t]he limitation on the Forest Service's discretion to authorize commercial services only to 'the extent necessary' flows directly out of the agency's obligation under the Wilderness Act to protect and preserve wilderness areas." *Blackwell,* 390 F.3d at 647. Accordingly, "if an agency determines that a commercial use should trump the Act's general policy of wilderness preservation, it has the burden of showing the court that, in balancing competing interests, it prepared the 'requisite findings' of necessity." *High Sierra Hikers Ass'n v. U.S. Dept. of Interior*, 848 F. Supp. 2d 1036, 1046 (N.D. Cal. 2012) (citing *Californians for Alternatives to Toxics,* 814 F. Supp. 2d at 1017; *High Sierra Hikers Ass'n v. U.S. Forest Serv.,* 436 F. Supp. 2d 1117, 1131 (E.D. Cal. 2006) ("[W]hen there is a conflict between maintaining the primitive character of the area and between any other use . . . the general policy of maintaining the primitive character of the area must be supreme.")).

The Forest Service addressed various alternatives in its preparation of the BWCAW Management Plan and listed, in an abbreviated fashion, different commercial towboat use levels available for recreational opportunities under each of those alternatives. USA-010931, Ex. 5; USA-010993, Ex. 5; USA-010998, Ex. 5; USA-011001, Ex. 5; USA-011004, Ex. 5; USA-011008, Ex. 5; USA-011012, Ex. 5. However,

as in *Blackwell*, it does not appear that the Forest Service undertook any specialized analysis to determine the minimum level of commerical service necessary for providing recretaional opportunities in the BWCAW. 390 F.3d at 647 ("Nowhere in the Wilderness Plan … does the Forest Service articulate why the extent of such [commercial guiding] services authorized by the permits is 'necessary.'"). Even assuming that the Forest Service ever performed a legally adequate analysis of necessity, the BWCAW Management Plan limits commercial towboat use in the BWCAW "to the 1992 levels for numbers of boats, trips, current operators, and specific lakes." USA-010841, Ex. 4. The Management Plan is clear that commercial towboat "[g]rowth will not be permitted beyond these limits." USA-010841, Ex. 4. If the Forest Service is unable or unwilling to restrict commercial towboat use to the 1992 levels for numbers of boats, trips, current operators, and specific lakes, the Forest Service must amend the BWCAW Management Plan (and the Forest Plan). 36 C.F.R. § 219.15(c). Through the amendment process, the Forest Service must complete a new commercial service analysis for towboat operations and make the requisite specialized findings of necessity to ensure that commercial towboat service is authorized only to the extent necessary for "realizing the recreational or other wilderness purposes of the [BWCAW]." 16 U.S.C. § 1133(d)(6).

By failing to adequately monitor or restrict commercial towboat use to the 1992 levels for numbers of boats, trips, current operators, and specific lakes, the Forest Service is failing to restrict commercial enterprise to the level specifically authorized under the BWCAW Management Plan and thus is failing to limit commercial enterprise to only "the extent necessary for activities which are proper for realizing the recreational or other

wilderness purposes of the areas" in violation of the Wilderness Act. The Forest Service's commercial enterprise authorizations are arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with the law and thus constitute a violation of the APA. 5 U.S.C. § 706. The Forest Service's failure to track actual commercial use and impose limits on commercial use pursuant to applicable statutory and quota caps constitutes agency action unreasonably withheld or delayed in violation of the APA. *Id*.

V. CONCLUSION

For the foregoing reasons, the Court should enter summary judgment in favor of Wilderness Watch on all claims in the Amended Complaint. ECF No. 37. Furthermore, the Court should order the parties to submit a schedule for separate remedy briefing within 14 days of the Court's determination of this case on its merits. That time will enable the parties to confer and attempt to reach settlement on appropriate remedial measures as well as appropriate interim injunctive measures.

Respectfully submitted,

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