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Submitted via email

Re: Scoping Comments on Kootenai National Forest's Ten Lakes Travel Management Proposed Action

Thank you for the opportunity to submit comments on the Proposed Action (PA) for the Kootenai National Forest's Ten Lakes Travel Plan. Members of our organizations have had a strong interest in this area for years, and most of the undersigned groups engaged significantly in both the Kootenai plan revision process and the Galton project analysis. Our commitment has not waned.

We are disappointed with the Forest Service's PA and believe it misses the mark in several critical ways. First, travel planning presents an important opportunity to restore balance to the winter backcountry.¹ In general, the PA fails to strike this balance. The PA leans heavily towards providing motorized and mechanized uses with slim consideration given to non-motorized, non-mechanized recreation and wildlife values. Second, the PA also falls short of maintaining the Ten Lakes WSA's wilderness character and the area's potential for designation as wilderness as it existed in 1977 as required by the Montana Wilderness Study Act (MWSA) and reaffirmed in recent case law. Our third concern pertains to the new rule governing over-snow vehicle (OSV) use and the agency's substantive legal duty to locate areas and trails designated as open to OSV use to *minimize* resource damage and conflicts with winter visitors enjoying non-motorized, quiet forms of recreation. Unfortunately, as detailed below, the PA falls terribly short of what is required to comply with these duties and with the plain language of the final OSV rule.

¹ As of 2006, approximately 80 million acres were open to OSV use in western states, while only 11.4 million acres outside of designated wilderness (where motorized uses are prohibited by statute) were closed to that use. Winter Wildlands Alliance, *Winter Recreation on Western National Forest Lands*, p. 4 & Fig. 2 (2006), available at http://winterwildlands.org/wp-content/uploads/2014/04/Winter-Recreation-on-Western-National-Forests-WWA_2006.pdf. The status quo on the Kootenai National Forest is similar, with nearly 86% of the forest currently open to cross-country OSV use. Kootenai Forest Plan, Table 7, p. 34 (OSV use allowed on 1,894,523 of 2,219,100 acres under existing management). Less than 15% of the forest is closed to winter motorized use.

I. The Forest Service must conduct travel analysis to inform its proposed action.

Current Forest Service directives governing travel management planning require the agency to conduct travel analysis to inform its decision-making.² Travel analysis must be completed *prior to* formulation of a proposed action and should “form the basis for proposed actions related to designation of roads, trails, and areas for motor vehicle use.”³ More specifically, travel analysis is designed to “[i]dentify management opportunities and priorities[,] formulate proposals for changes[,] . . . [c]ompare motor vehicle use . . . with desired conditions established in the applicable land management plan, and describe options for modifying the forest transportation system that would achieve desired conditions.”⁴ The Kootenai, however, appears to have skipped this critical step in the process and instead went straight to developing a proposed action. The Forest Service should conduct a travel analysis prior to developing Alternatives.

II. The Forest Service must ensure that the WSA’s wilderness character and potential for wilderness as it existed in 1977 is maintained when designating motorized and mechanized use.

A. Background

The MWSA designated portions of Montana, including the Ten Lakes area, to be managed as wilderness study areas. The MWSA requires the Forest Service to comply with two requirements for managing such wilderness study areas. “First, the Service must administer study areas so as to maintain their wilderness character as it existed in 1977. Second, the Service must administer the areas so as to maintain their potential for designation as wilderness areas—i.e., as part of the National Wilderness Preservation System.”⁵ The National Wilderness Preservation System, composed of congressionally designated wilderness areas, was established by the 1964 Wilderness Act.⁶ The 1964 Wilderness Act states that, in addition to having physical characteristics such as large acreage, a wilderness “has outstanding opportunities for solitude.”⁷ Accordingly, “because wilderness character depends in part on the availability of opportunities for solitude, the Service must provide current users [of wilderness study areas] with opportunities for solitude comparable to those that existed in 1977.”⁸

Use of motorized vehicles, such as OSVs, degrades the wilderness character and solitude of an area.⁹ This is true even if the area’s physical features have not changed.¹⁰ Increased volume of motorized use has obvious and potentially significant impacts on the opportunities for solitude available within a study area, even if the area remains physically unchanged. “Increased noise from snowmobiles and

² See generally Forest Service Handbook (FSH) 7709.55, chs. 10 & 20; Forest Service Manual (FSM) 7712 & 7715.

³ See FSH 7709.55, §§ 13(3) & 21.6; FSM 7715.03(2).

⁴ FSH 7709.55, § 21.5.

⁵ *Montana Wilderness Ass'n v. McAllister*, 666 F.3d 549, 555 (2011) (quoting *Russell Country Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037, 1042 (9th Cir. 2011) (emphasis added)). *Montana Wilderness Study Act of 1977* (Appendix 1)

⁶ See Pub.L. No. 88-577; 16 U.S.C. § 1131(a).

⁷ *Montana Wilderness Ass'n*, 666 F.3d at 556 (citing 16 U.S.C. § 1131(c)) (emphasis added).

⁸ *Id.* at 557 (quotations, alteration and citation omitted).

⁹ *Id.* at 558.

¹⁰ *Id.*

motorcycles, for example, may greatly disturb users seeking quiet and solitude.”¹¹ “If a hypothetical hiker traversing a certain route in 1977 would have encountered one noisy motorcycle, but today would encounter 10, his opportunities for solitude have plainly decreased, unless the impact can somehow be offset by other factors or considered so small as to make no qualitative difference.”¹² Logically, the same conclusion applies to snowmobiles. More generally, “[a]n area’s ability to provide solitude depends on a current user’s perception of *other* users around him—not just on the physical characteristics of the land.”¹³

Based on this case law, the relevant facts for determining whether the Forest Service is failing to comply with the MWSA regarding snowmobile use in the Ten Lakes WSA are: (i) snowmobile use in 1977, (ii) snowmobile use today, (iii) any encouragement the Forest Service has given to increase snowmobiling, such as grooming, expanding parking lots, or publishing maps, and (iv) any other information that indicates that snowmobile use has increased since 1977. Although available data quantifying the increase in snowmobile use in the Ten Lakes WSA is not perfect, as the court stated in *Montana Wilderness Association v McAllister*, “ the proper response to that problem is for the Service to do the best it can with the data it has, not to ignore the volume of use increase completely. Agencies are often called upon to confront difficult administrative problems armed with imperfect data.”¹⁴

B. Proper Application of the Montana Wilderness Study Act

The available data detailing historic and current snowmobile and mechanized use in the Ten Lakes WSA demonstrate that 1) use in the WSA has increased since 1977, and 2) the Forest Service has failed to maintain the area’s 1977 wilderness character and potential for inclusion in the NWPS including, specifically, opportunities for solitude.¹⁵ Indeed, the PA itself states that snowmobile use has “likely increased” since the 1977 MWSA.¹⁶ Appendix 2 summarizes information concerning OSV use within the Ten Lakes WSA that will inform the travel planning process and the agency’s duty to scale-back OSV use in the WSA far beyond the PA.

To help the agency restore 1977 wilderness character in the travel plan, it must understand the wilderness character of the area at that time and how much conditions have changed since. To this end, we request that the agency develop a baseline condition assessment that captures the wilderness character of the Ten Lakes WSA as it existed in 1977. The Gallatin National Forest conducted such an assessment for the Hyalite Porcupine Buffalo Horn (HPBH) WSA. The Gallatin’s report, attached as Appendix 3, summarizes the current physical and social conditions of the HPBH WSA as compared to

¹¹ *Id.* (citing *Greater Yellowstone Coalition v. Timchak*, 2006 WL 3386731, at *3 (D. Idaho, Nov. 21, 2006))

¹² *Id.*

¹³ *Id.* at 556.

¹⁴ *Montana Wilderness Ass’n v. McAllister*, 666 F.3d at 559.

¹⁵ The Kootenai’s Draft EIS for its forest plan revision stated that a survey of the wilderness character of the Ten Lakes WSA was initiated in 2010 in partnership with the University of Montana. The project was described as follows: “Community volunteers worked with the University of Montana Wilderness Institute field leaders to monitor recreation use, sites, impacts, structures, installations, and developments ... Project outcomes are to have detailed inventories, select restoration of native plants, and increased agency and community capacity for citizen stewardship.” *Kootenai Forest Plan*, DEIS at 313. A final report was pending at the time of the DEIS – this report is not mentioned in the FEIS.

¹⁶ *Kootenai National Forest, Ten Lakes Travel Plan Proposed Action*, p. 5.

historic wilderness characteristics that existed in 1977. Although the report is not perfect, changes since 1977 are documented, and their effects on the four principal characteristics of wilderness: natural integrity, remoteness, opportunities for solitude, and apparent naturalness are described. The assessment should address the increased volume, frequency, and geographic footprint of snowmobile use in the WSA. We request that the assessment also consider the adjoining non-WSA areas. With this assessment the agency will better understand what conditions it needs to restore in the travel planning process which, in turn, will help it comply with the MWSA. We request that the Forest Service conduct a similar assessment as the Gallatin and make this assessment available to the public as part of the NEPA process.

The Bitterroot National Forest in Montana offers another example of how to effectively maintain a WSA's 1977 wilderness character. The Bitterroot recently released their draft travel plan, which dealt with both summer and winter use. The Bitterroot plan prohibited the use of motorized/mechanical transport on the roads, trails, and areas in WSAs and recommended wilderness. The following excerpt is from the Draft Record of Decision, which we provide here because we believe it offers useful rationale that the Kootenai should take into account (note that Blue Joint creek is a WSA also created by the MWSA):

"[I]n the interest of preserving their wilderness attributes until such time as Congress makes the decision regarding wilderness designation, I have decided to prohibit the use of motorized/mechanical transport on the roads, trails, and areas in the Selway-Bitterroot RWA (including Blue Joint creek). If the level of such use is permitted to continue or increase, the suitability of the areas to be recommended as wilderness may change. This would put the Forest out of compliance with its Forest Plan, and eliminate the opportunity for me to continue to recommend the areas, and reduces the opportunity for Congress to designate these areas, as wilderness.

"[A]llowing uses that do not conform to wilderness character creates a constituency that will have a strong propensity to oppose recommendation and any subsequent designation legislation. Management actions that create this operating environment will complicate the decision process for Forest Service managers and members of Congress. It is important that when the wilderness recommendations are made to Congress that they be unencumbered with issues that are exclusive to the wilderness allocation decision..."¹⁷

The Bitterroot National Forest made a decision based on the December 2011, 9th Circuit Court of Appeals ruling that the Gallatin National Forest improperly ignored the impact of an increasing volume of motorized travel in a WSA created under the MWSA. That case set a precedent that guided the responsible official's decision to close both WSAs to all motorized and mechanized travel, including OSVs

¹⁷ Bitterroot National Forest, Travel Management Plan Draft Record of Decision. p. 19. Available at: http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/39018_FSPLT3_244433_5.pdf.

and mountain biking. We urge the Kootenai to model its travel plan after the recently released Bitterroot plan.

C. Concerns with the Proposed Action

i. Balancing Intensity, Frequency, and Geographic Footprint of OSV Use in the WSA

OSV use in the Ten Lakes WSA has increased both in terms of intensity, frequency, and geographic footprint. It appears as though the Forest Service is attempting to address this increased use and restore 1977 wilderness character by reconfiguring the area that is available to motorized and mechanized use. While the PA reduces the geographic footprint that is available to OSVs compared to today's existing condition (where the entire WSA is open to OSV use), that is not the correct baseline by which to judge the Forest Service's compliance with the MWSA. When judged against the correct baseline—1977 wilderness character and potential for designation—these reductions are nowhere close to what is necessary to offset the increased frequency and intensity in use. Simply put, the PA wilderness character would not be restored to 1977 condition under the PA. If the Forest Service plans to offset the intensity and frequency of use by reconfiguring where OSVs can travel, significant further reductions in the geographic footprint from those shown in the PA are necessary.

ii. Access Points

The PA's maps shows access into the WSA from at least five separate directions: 1) Blacktail Creek, 2) Stahl Creek, 3) Clarence Creek, 4) Gave Creek to Bluebird (Road 7087 and Road 7116), and 5) Grave Creek to Bluebird to Wolverine Creek (Road 7086). This does not differ from the existing access. How does the Forest Service expect to restore 1977 wilderness character without addressing the key access points to the WSA for OSV use?

iii. Non-Winter, Mechanized Travel

The PA states, "no trails are currently specified exclusively for or preclude mechanized use because the use did not occur in 1977." Mechanized use is currently very limited in the area. We believe this minor, new use should not take precedent over wilderness values recognized and legislated decades ago. If mechanized use does not facilitate restoring 1977 wilderness character in the WSA then the area should not be made available to mechanized travel.

For example, the proposed mechanized use on the Blacktail Trail – recommended for wilderness under the 1986 Kootenai Forest Plan-- provides only an in-and-out opportunity, and could lead to illegal "through-use" across the WSA. The Gibraltar to Cat Creek Trail loop is a very difficult route for mountain bikers, particularly the Cat Creek section. In addition, this route is in a part of the WSA that receives no snowmobiling. The net effect is that the PA proposes to expand/allow/promote a non-conforming use in a part of the WSA not impacted by snowmobiling, thus spreading non-conforming uses and reducing wilderness character over more of the WSA. Further, the FS does not have the resources to monitor or patrol mechanized use.

Spreading mechanized use and snowmobiling across the landscape does not meet the desired condition, degrading, further, the potential for wilderness designation. We oppose allowing mechanized and motorized use on Blacktail Creek Trail. Blacktail Creek Trail allows yet another entry point to the WSA, which degrades wilderness character for the WSA. It is clear that allowing, and even expanding, non-conforming uses to establish and persist will only serve to further degrade the potential for future designation.

iv. Wildlife Values

Another important wilderness characteristic found in the Ten Lakes WSA/IRA, along with the Thompson-Seton and Tuchuck IRAs, that merits protection from snowmobile is wildlife. These areas include secure core habitat that sustains the only healthy grizzly populations on the Kootenai, as well as wolverine, fisher, lynx, elk, moose and bighorn sheep. See Appendix 4 where we've provided maps of several species' winter habitat overlaid with the WSA. These wildlands not only sustain rare predators but provide irreplaceable habitat necessary for long-term genetic connectivity between the Northern Continental Divide Ecosystem, the Cabinet-Yaak Ecosystem, and British Columbia. These wilderness characteristics must be protected in the travel plan, which the PA would fail to do.

III. The Forest Service must designate areas that are “discrete” and “specifically delineated.”

The Kootenai's PA would designate significant acreage – 36,703 acres, or nearly 57% of the planning area – as open to cross-country OSV use. This approach is improper.

The proposed action fails to designate areas that are “discrete” and “specifically delineated.”¹⁸ As described in detail below, proper application of the executive order “minimization criteria” almost certainly would not result in designation of 46% of the WSA, and 57% of the entire planning area, as open to OSVs. Rather than leaving the majority of the planning area and 46% of the WSA open to OSV use, the Forest Service should look closely at the planning area in the context of the entire forest and designate as open only those discrete, delineated areas that are appropriate for cross-country OSV use and minimize environmental damage and conflicts with other recreational uses, as described below. All other areas that are not determined to be appropriate for open designation then must be closed.

IV. The OSV Rule states that the Forest Service must apply the minimization criteria to actually *minimize* impacts when designating *each* area and trail open to OSV use.

A. Background

In response to the growing use of dirt bikes, snowmobiles, all-terrain vehicles, and other off-road vehicles (ORVs) and the corresponding environmental damage, social conflicts, and public safety concerns, Presidents Nixon and Carter issued Executive Orders 11,644 and 11,989 in 1972 and 1977, respectively, requiring federal land management agencies to plan for ORV use based on protecting

¹⁸ 36 C.F.R. § 212.1 (definition of “area”).

resources and other uses.¹⁹ When designating areas or trails available for ORV use, agencies must locate them to:

- (1) minimize damage to soil, watershed, vegetation, or other resources of the public lands;
- (2) minimize harassment of wildlife or significant disruption of wildlife habitats; and
- (3) minimize conflicts between off-road vehicle use and other existing or proposed recreational uses of the same or neighboring public lands.²⁰

The Forest Service codified these “minimization criteria” in subparts B and now C of its travel management regulations.²¹ The agency has struggled, however, to properly apply the criteria in its travel management decisions, leading to a suite of federal court cases invalidating Forest Service travel management plans.²² Collectively, these cases confirm the Forest Service’s substantive legal obligation to meaningfully apply and implement – not just identify or consider – the minimization criteria when designating *each* area and trail, and to show in the administrative record how it did so.

It has been over four decades since President Nixon first obligated the Forest Service to minimize impacts associated with ORV use, including snowmobiles. Yet the agency has systematically failed to do so. In the meantime, irresponsible and mismanaged ORV use continues to degrade soil, air, and water quality, threaten imperiled wildlife species, and diminish the experience of the majority of public lands visitors who enjoy the natural landscape through quiet, non-motorized forms of recreation.

As one of the very first forests to implement the new OSV rule, it is important that the Kootenai properly apply the minimization criteria and ensure that the agency’s repeated failures in the summer-time travel planning context are not a harbinger for winter travel planning. The following discussion describes in more detail how the Forest Service must apply the minimization criteria to designate areas and trails for OSV use that minimize impacts to vulnerable wildlife and the non-motorized users seeking to enjoy nature free from noise and pollution.

B. Proper application of the minimization criteria

The executive orders require the Forest Service to *minimize* impacts – not just identify or consider them – when designating areas or trails for OSV use, and to demonstrate in the administrative record how it did so.²³ To satisfy its substantive duty to minimize impacts, the Forest Service must apply a transparent

¹⁹ Exec. Order No. 11,644, 37 Fed. Reg. 2877 (Feb. 8, 1972), *as amended by* Exec. Order No. 11,989, 42 Fed. Reg. 26,959 (May 24, 1977).

²⁰ *Id.* § 3(a).

²¹ 36 C.F.R. §§ 212.55, 212.81(d).

²² *See Friends of the Clearwater v. U.S. Forest Serv.*, No. 3:13-CV-00515-EJL, 2015 U.S. Dist. LEXIS 30671, at *37-52 (D. Idaho Mar. 11, 2015); *The Wilderness Soc’y v. U.S. Forest Serv.*, No. CV08-363-E-EJL, 2013 U.S. Dist. LEXIS 153036, at *22-32 (D. Idaho Oct. 22, 2013); *Cent. Sierra Envtl. Res. Ctr. v. U.S. Forest Serv.*, 916 F. Supp. 2d 1078, 1094-98 (E.D. Cal. 2012); *Wildlands CPR v. U.S. Forest Serv.*, 872 F. Supp. 2d 1064, 1081-82 (D. Mont. 2012); *Idaho Conservation League v. Guzman*, 766 F. Supp. 2d 1056, 1071-74 (D. Idaho 2011).

²³ Importantly, efforts to *mitigate* impacts associated with a designated OSV system are insufficient to fully satisfy the duty to *minimize* impacts, as specified in the executive orders. *See* Exec. Order 11,644, § 3(a) (“Areas and trails shall be *located* to minimize” impacts and conflicts.). Thus, application of the minimization criteria should be approached in two steps: first, the agency locates areas and routes to minimize impacts, and second, the agency establishes site-specific management actions to further reduce impacts. Similarly, the Forest Service may not rely on compliance with the relevant forest plan as a proxy for

and common-sense methodology for meaningful application of *each* minimization criterion to *each* area and trail being considered for designation. That methodology must include several key elements.

First, proper application of the minimization criteria is not solely an office exercise. Rather, the Forest Service must get out on the ground, gather site-specific information, and actually apply the criteria to minimize resource damage and user conflicts associated with each designated area and route.²⁴

Second, effective application of the minimization criteria must include meaningful opportunities for public participation and input *early* in the planning process.²⁵ In many cases, public lands users and other stakeholders are the best source of information for identifying resource and user conflicts. We have identified some of those conflicts in Appendix 5.

Third, application of the minimization criteria should be informed by the best available scientific information and associated strategies and methodologies for minimizing impacts to particular resources.²⁶ Winter Wildlands Alliance recently published a comprehensive literature review and best management practices (BMPs) for OSV use on national forests.²⁷ The BMPs provide guidelines, based on peer-reviewed science, for OSV designation decisions that are intended to minimize conflicts with other winter recreational uses and impacts to wildlife, water quality, soils, and vegetation. The Forest Service should incorporate these BMPs into its winter travel planning decisions. In addition to generalized BMPs, application of the minimization criteria should incorporate any site- or resource-specific scientific information or analysis. For example, to effectively minimize the significant noise impacts associated with OSV use, the Forest Service should conduct soundscape modeling and incorporate the results of that modeling into its decision-making.²⁸ Other site- or resource-specific information might include, for example, air quality modeling or monitoring; wildlife population, habitat, or monitoring data; or visitor use data.

Fourth, proper application of the minimization criteria must address both site-specific and larger-scale impacts.²⁹ For example, the Forest Service must assess and minimize landscape-scale impacts such as habitat fragmentation; cumulative noise, and air and water quality impacts; and degradation of

application of the minimization criteria because doing so conflates separate and distinct legal obligations. See *Friends of the Clearwater*, 2015 U.S. Dist. LEXIS 30671, at *46 (“Merely concluding that the proposed action is consistent with the Forest Plan does not . . . satisfy the requirement that the Forest Service provide some explanation or analysis showing that it considered the minimizing criteria and took some action to minimize environmental damage when designating routes.”).

²⁴ See, e.g., *Idaho Conservation League*, 766 F. Supp. 2d at 1074-77 (invalidating travel management plan that failed to utilize monitoring and other site-specific data showing resource damage).

²⁵ See 36 C.F.R. § 212.52(a).

²⁶ See *Friends of the Clearwater*, 2015 U.S. Dist. LEXIS 30671, at *24-30, 40-52 (invalidating route designations that failed to consider best available science on impacts of motorized routes on elk habitat effectiveness or to select routes with the objective of minimizing impacts to that habitat and other forest resources).

²⁷ Winter Wildlands Alliance, *Snowmobile Best Management Practices for Forest Service Travel Planning: A Comprehensive Literature Review and Recommendations for Management* (Dec. 2014), available at <http://winterwildlands.org/wp-content/uploads/2015/02/BMP-Report.pdf> and attached as Appendix 6.

²⁸ See, e.g., *Snowmobile Best Management Practices*, pp. 6-7 (describing noise simulation modeling used in Yellowstone National Park).

²⁹ See, e.g., *Idaho Conservation League*, 766 F. Supp. 2d at 1066-68, 1074-77 (invalidating travel plan that failed to consider aggregate impacts of short motorized routes on wilderness values or site-specific erosion and other impacts of particular routes).

wilderness-quality lands and associated opportunities for primitive forms of recreation. The agency also must assess and minimize site-specific impacts to soils, vegetation, water, and other public lands resources, sensitive wildlife habitat, and important areas for non-motorized recreation.

Fifth, the Forest Service should account for predicted climate change impacts in its application of the minimization criteria and designation decisions.³⁰ Already climate change is leading to reduced and less reliable snowpack and increasing the vulnerability of wildlife, soils, and water resources to disturbance, compaction, and pollution impacts associated with OSV use.³¹

Sixth, application of the minimization criteria must take into account available resources for monitoring and enforcement of the designated system.³² To ease enforcement obligations and ensure user compliance in the first place, OSV designation decisions should establish clear boundaries and simple, consistent restrictions designed to minimize resource damage and user conflicts.

Finally, the Forest Service should consider whether to designate areas or trails by “class of vehicle” and/or “time of year,” as provided for in the OSV rule.³³ That provision allows forests to tailor their designation decisions to account for snowfall patterns and different and evolving OSV technologies, and to minimize corresponding social and environmental impacts.

These and other considerations and best practices are discussed in further detail in Appendix 5.

C. Area designations

The Forest Service’s substantive duty to minimize impacts associated with OSV use applies to both area and route designations. Minimization of impacts associated with OSV area allocations is particularly important because the OSV rule permits the Forest Service to designate larger areas open to cross-country travel than in the summer-time travel planning context. The Kootenai’s PA would designate a vast portion of the planning area as open to cross-country travel, therefore, is highly problematic, especially prior to robust application of the minimization criteria and a showing that designating cross-country travel in those areas in fact minimizes resource damage and user conflicts. As described above, the Kootenai’s PA also conflicts with the plain language of the new rule, which requires that areas be discrete and specifically delineated.

Appendix 5 identifies a number of areas where OSV use would threaten forest resources or conflict with other recreational uses. Given those conflicts, designating those areas as open to cross-country OSV

³⁰ See, e.g., 77 Fed. Reg. 77,801, 77,828-29 (Dec. 24, 2014) (Council on Environmental Quality’s revised draft guidance on consideration of climate change in NEPA states: “Climate change can increase the vulnerability of a resource, ecosystem, human community, or structure, which would then be more susceptible to climate change and other effects and result in a proposed action’s effects being more environmentally damaging. . . . Such considerations are squarely within the realm of NEPA, informing decisions on whether to proceed with and how to design the proposed action so as to minimize impacts on the environment, as well as informing possible adaptation measures to address these impacts, ultimately enabling the selection of smarter, more resilient actions.”).

³¹ See *Snowmobile Best Management Practices*, pp. 4-5, 10, 13.

³² See *Sierra Club v. U.S. Forest Serv.*, 857 F. Supp. 2d 1167, 1176-78 (D. Utah 2012) (NEPA requires agency to take a hard look at the impacts of illegal motorized use on forest resources and the likelihood of illegal use continuing under each alternative).

³³ 36 C.F.R. § 212.81(a).

travel would violate the executive order minimization criteria. Beyond the areas we identify in Appendix 5 the Forest Service also must apply the minimization criteria to *any* and *all* other discrete, specifically delineated areas being considered for designation as open to OSV use. Additional considerations and best practices for open area designations are described in Appendix 1.

D. Trail designations

The Kootenai's proposed action would designate some trails for OSV use. Under the plain terms of the executive orders, the Forest Service must apply the minimization criteria to *all* trails designated for OSV use – even if those trails are located in areas of the forest that would be designated as open to cross-country OSV use.³⁴ When designated and placed on a map, trails focus the impacts of OSV use to those locations and generally increase the number of OSV users visiting the area. This is particularly true of groomed trails within areas otherwise open to cross-country travel. Groomed trails are desirable for traveling faster and further into remote areas. In addition, grooming often results in widening the footprint of the trail. The widened trail is then used in summer by wheeled motorized vehicles resulting in other impacts and conflicts. Additional considerations and best practices for route designations are described in Appendix 5.

E. Minimum snow depth

Minimum snow depth restrictions can be an important tool in further minimizing impacts associated with OSV area and trail designations – particularly with climate change leading to reduced and less reliable snowpack. The best available science shows that minimum snow depths should be at least 18 inches for cross-country travel and 12 inches for travel on groomed trails.³⁵ The Kootenai's proposed action does not mention minimum snow depths, which is an important tool for minimizing impacts to water quality, soils, and vegetation and to buffer for variable snow conditions. In addition to establishing adequate snow depths to those supported by the best available science, the Forest Service should address its plans to monitor and enforce minimum snow depth restrictions, including implementing emergency closures when snowpack falls below the relevant thresholds.

F. Integrating the minimization criteria with the NEPA process

Application of the minimization criteria under the executive orders and analysis of the direct, indirect, and cumulative impacts of a range of reasonable alternatives under NEPA should complement and reinforce one another. As discussed above, the executive orders require application of the minimization criteria to *each* designated area and route, and the corresponding NEPA analysis should analyze impacts associated with the *entire* system proposed for designation under each alternative – regardless of the extent to which that system is already reflected in current OSV management. In this case, the Kootenai is proposing to designate OSV use for the indefinite future, and as such the impacts – both direct, indirect, and cumulative – from that authorization must be fully disclosed and analyzed.

³⁴ According to the map of the proposed action, it appears that the majority of the designated trails are located in areas that would be open to cross-country OSV use.

³⁵ See *Snowmobile Best Management Practices*, p. 14 (Inyo, Sequoia, and Sierra National Forests proposing a minimum snow depth of 18 inches in their revised forest plans to protect forest resources).

In most cases, including on the Ten Lakes planning area, cross-country OSV travel has been allowed by default across vast portions of the national forests, with that use and its associated impacts never being subjected to a thorough NEPA analysis or application of the minimization criteria. The NEPA analysis for the travel plan must analyze – and *minimize* – the impacts of designations that allow continued OSV travel in those areas. Similarly, the Forest Service must analyze and minimize impacts associated with designating existing OSV routes and areas that have not previously been subject to NEPA or the minimization criteria. This is, of course, in addition to analyzing and minimizing impacts associated with designating any new or previously illegal, user-created areas or trails.

To facilitate this required analysis and comply with NEPA, the EIS must include an alternative under which no areas or routes would be designated as open to recreational OSV use.³⁶ This alternative is necessary to provide an accurate comparison for analysis of the impacts associated with all the area and route designations made in the winter travel plan – including those that allow continued OSV travel in existing areas or on existing routes. Unlike in a typical NEPA analysis where the no action alternative provides that baseline for comparison, the no action alternative for most winter travel planning efforts, including on the Ten Lakes planning area, reflects the current management status quo allowing cross-country OSV travel by default across vast portions of the forest. This is similar to the situation in *Western Watersheds Project v. Abbey*, where the Ninth Circuit overturned a BLM NEPA analysis that failed to analyze an alternative that would eliminate grazing in the Missouri Breaks National Monument.³⁷ Absent such an alternative, and where both the no action and action alternatives permitted continued grazing, the court found that the agency was “operating with limited information on grazing impacts,” in violation of NEPA.³⁸ The same is true here, where an alternative that designates no areas, trails, or roads open to OSV use is necessary to facilitate a fully informed decision about the impacts of the action alternatives.

V. Endangered Species Act compliance

Under the Endangered Species Act, the Forest Service must ensure that its actions will not jeopardize the continued existence of these listed species or result in the destruction or adverse modification of their critical habitat.³⁹ Species listed as threatened or endangered (Canada lynx and Grizzly bear) have important habitat or designated critical habitat in the Ten Lakes planning area.⁴⁰ Due to the presence of the listed species and designated critical habitat and the potential adverse effects of OSV travel (described in more detail in Appendix 5), the forest must formally consult with the U.S. Fish and Wildlife Service as part of its winter travel planning process.⁴¹

³⁶ Specially authorized or permitted OSV uses to, for example, access valid existing rights would still be allowed. See 36 C.F.R. § 212.81(a) (describing exempted uses).

³⁷ 719 F.3d 1035, 1050-53 (9th Cir. 2013).

³⁸ See also, e.g., *New Mexico ex rel. Richardson v. Bureau of Land Management*, 565 F.3d 683, 708-11 (10th Cir. 2009) (invalidating NEPA analysis that failed to analyze an alternative that would close the entire area to oil and gas development because, “[w]ithout substantive, comparative environmental impact information regarding other possible courses of action, the ability of an EIS to inform agency deliberation and facilitate public involvement would be greatly degraded”).

³⁹ 16 U.S.C. § 1536(a)(2).

⁴⁰ 79 Fed. Reg. 24,256 (Apr. 29, 2014) (final listing rule); 78 Fed. Reg. 24, 516 (Apr. 25, 2013) (proposed critical habitat).

⁴¹ See 16 U.S.C. § 1536(a); C.F.R. § 402.14(a).

VI. Current and anticipated future over-snow uses

The Forest Service's travel management regulations define OSV as "a motor vehicle that is designed for use over snow and that runs on a track or tracks and/or a ski or skis, while in use over snow."⁴² While the requirements of the new rule apply only to OSVs, effective winter travel management planning and compliance with the minimization criteria require the Forest Service to account for existing and potential future over-snow recreational uses that may not satisfy the definition of OSV.⁴³ For example, fat-tire bike riding is an increasing wintertime mechanized use. Other new types of motorized or mechanized over-snow uses may also exist or be developed over the life of the winter travel plan. The OSV plan and corresponding NEPA analysis should address the non-OSV over-snow uses that are already occurring on the forest, and should anticipate and provide a process for addressing future over-snow uses through updates to the plan. Failure to address these ongoing and foreseeable uses of the forest that may be impacted by OSV designations would result in both an inadequate NEPA analysis and inadequate minimization of conflicts with other uses.

VII. The Forest Service may not rely on previous OSV decisions that are outdated or failed to apply the minimization criteria.

Given the forest's stated intent to conduct winter travel planning for the Ten Lakes area, it may not rely on the OSV rule's grandfathering provision to adopt existing OSV management decisions without further public involvement.⁴⁴ Instead, as described above, the Forest Service must apply the minimization criteria to each area and route being considered for designation – even those areas and routes currently open to OSV use.

If the forest were to rely on the grandfathering provision, however, it would have to ensure that the previous OSV designation decisions satisfy the requirements of the new rule and any other regulatory requirements. Most critically, those previous decisions must have been subject to the minimization criteria, and the administrative records for the decisions must demonstrate that the agency applied the criteria when making any OSV area or route designations. If the previous decisions were not subject to the minimization criteria, the Forest Service may not adopt them on its OSV use map.⁴⁵

Similarly, the Forest Service may not adopt previous decisions that rely on an "open unless designated closed" policy. As described above, the final OSV rule rejects this approach and requires the agency to

⁴² 36 C.F.R. § 212.1 (defining over-snow vehicle as "[a] motor vehicle that is designed for use over snow and that runs on a track or tracks and/or a ski or skis, while in use over snow").

⁴³ See Exec. Order No. 11,644, § 3(a)(3) ("Areas and trails shall be located to minimize conflicts between off-road vehicle use and other *existing or proposed* recreational uses of the same or neighboring public lands . . ." (emphasis added)).

⁴⁴ See 36 C.F.R. § 212.81(b) ("Public notice with no further public involvement is sufficient if an administrative unit or a Ranger District has made previous administrative decisions, under other authorities and including public involvement, which restrict [OSV] use to designated routes and areas . . . and no change is proposed to these previous decisions.").

⁴⁵ The language of the grandfathering provision does not explicitly require that previous OSV decisions have been subject to the minimization criteria. See 36 C.F.R. § 212.81(b). To the extent the agency interprets the provision to permit adoption of OSV designation decisions that do not satisfy the minimization criteria, the rule itself violates Executive Orders 11,644 and 11,989. See *Winter Wildlands Alliance v. U.S. Forest Serv.*, No. 1:11-CV-586-REB, 2013 U.S. Dist. LEXIS 47728, at *32 (D. Idaho Mar. 29, 2013) (requiring the agency to promulgate new OSV travel management rule that complies with the executive orders and making clear that the orders "require[] the Forest Service to ensure that *all* forest lands are designated for *all* off-road vehicles").

designate discrete, specifically delineated open areas and routes that are located to minimize environmental damage and user conflicts. The agency may not adopt as its area designations previous decisions that permitted cross-country OSV travel by default and except where such travel will be specifically prohibited.

Finally, the Forest Service must ensure that previous decisions are not outdated. Older decisions likely did not account for the increased speed, power, and other capabilities of current OSV technology, which allow OSVs to travel further and faster into the backcountry and to access remote areas that were previously inaccessible. Older decisions also may not account for new scientific information on sensitive wildlife and other forest resources and how they are affected by OSV use. They may not account for current recreational use trends and increasing conflict between motorized and non-motorized winter backcountry users. And they may not account for the current and predicted impacts of climate change, which is, among other things, reducing and altering snowpack and increasing the vulnerability of wildlife and other resources to OSV-related impacts. Without this information, the Forest Service cannot demonstrate how those previous decisions minimize impacts based on current circumstances and science.

VIII. Proposed Alternative

A. Non-motorized and non-mechanized use in MA8 and MA9 in the 1987 Forest Plan

The final decision on the Kootenai forest plan revision was essentially a no-action decision specific to the Ten Lakes WSA and the Whitefish Divide. This decision deferred making a final decision on these two areas until travel management planning is complete. Thus, for now, 26,000 acres of the WSA is maintained as recommended Wilderness per the 1987 Forest Plan; however, 6,800 acres of WSA-contiguous lands are now a mix of allocations (5a, 5b, and 6) and are no longer recommended Wilderness, a change that diminishes the WSA's wilderness character and potential for designation, contrary to requirements of Montana Wilderness Study Act. Further, the Whitefish Divide is almost entirely a backcountry non-motorized allocation (5a). We are highly disappointed with this outcome because the Forest Service has severed the WSA from the contiguous wilderness-quality lands and dropped, at this time, any new recommended Wilderness in the Whitefish Divide. This approach has failed to provide needed protections for wilderness-quality lands of interest to the entire nation. With this decision, the Forest Service shifted its recommended Wilderness determination for the Ten Lakes WSA to the Ten Lakes travel plan decision, which presumably also will address the actions that are urgently needed to ensure compliance with the MWSA.

First, we request that the Forest Service analyze an alternative that would not allow any OSV or mechanized use in the areas that were MA8 or MA9 in the 1987 Kootenai Forest Plan. This Alternative would allow for analysis showing the changes in use and Wilderness characteristics of these areas since 1977. Second, we were told that the Whitefish Divide area will be addressed in travel planning. When and how will this occur?

IX. 2007 Settlement Agreement

A. The Forest Service is out of compliance with the law

In 2007 the Montana Wilderness Association and U.S. Forest Service, along with the Blue Ribbon Coalition and West Fork Property Owners Association reached a settlement agreement pertaining to Ten Lakes and other Wilderness Study Areas in Montana. This agreement stipulated that the Forest Service would “agree to use its good faith best effort to issue travel management decisions...for all WSA’s by December 31, 2009.”⁴⁶ The agreement specifically stated that the “Forest Service shall initiate travel management planning by beginning scoping no later than January 31, 2008 for the Ten Lakes, West Pioneers, Sapphire, and Blue Joint WSAs.”⁴⁷ The Forest has been out of compliance with this settlement agreement for over seven years. In the interim, snowmobiling and other non-conforming uses have only become further established in the WSA. The Forest Service’s failure to act has exacerbated the management situation and ensured a more difficult travel management process.

X. NEPA considerations

A. The Forest Service must develop an Environmental Impact Statement

NEPA and subsequent guidance requires an EIS when a PA may have a significant effect on the environment.⁴⁸ When determining what qualifies as a “significant” impact, agencies must look at the following factors, among others, according to NEPA regulations and CEQ guidance (40 C.F.R. § 1508.27):

1. Unique characteristics of the geographic area, such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
2. The degree to which the effects on the quality of the human environment are likely to be highly controversial.
3. The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
4. The degree to which the proposed action affects public health or safety.

The Forest Service’s NEPA guidance is similar to the CEQ guidance, but also lists altering the character of an IRA as one example of a proposed action which would normally require the preparation of an EIS.⁴⁹ We believe the proposal meets the “significant” standard for all of these criteria. We walk through each of these criteria below.

Factor #1: Unique characteristics of the geographic area, such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

⁴⁶ Montana Wilderness Association vs. United States Forest Service et, al. (2007) Settlement Agreement and Stipulation for Dismissal. 9:96-cv-00152-DWM

⁴⁷ Id

⁴⁸ 42 USC § 4332 (1969).

⁴⁹ Forest Service Handbook 1909.15-2012-3 (§21.2 (2)).

The planning area includes many unique characteristics, including a WSA, three IRAs, and significant wildlife resources, all of which will be impacted as a result of motorized and mechanized designations. Allowing snowmobiles and mountain bikes within the WSA and IRAs will undoubtedly degrade wilderness character and remove the tranquility people seek when they visit the area for recreation. The environmental analysis must “disclose that significant roadless areas will be affected and take the requisite ‘hard look’ at the environmental consequences of that fact,” including analyses of the plan’s effects on “water resources, soils, wildlife habitat, and recreation opportunities.”⁵⁰ “Roadless Area Characteristics” are “[r]esources or features that are often present in and characterize inventoried roadless areas, including:

- 1) High quality or undisturbed soil, water, and air;
- 2) Sources of public drinking water;
- 3) Diversity of plant and animal communities;
- 4) Habitat for threatened, endangered, proposed, candidate, and sensitive species and for those species dependent on large, undisturbed areas of land;
- 5) Primitive, semi-primitive non-motorized and semi-primitive motorized classes of dispersed recreation;
- 6) Reference landscapes;
- 7) Natural appearing landscapes with high scenic quality;
- 8) Traditional cultural properties and sacred sites; and
- 9) Other locally identified unique characteristics.”⁵¹

These criteria should be used for determining the impacts a proposed project could have to roadless character. Given the number of IRAs in the planning area, the level of motorized activity that this planning process could sanction in these IRAs, and the potentially significant impacts that this use could have on the nine elements listed above, we believe this project requires an EIS.

Factor #2: The degree to which the effects on the quality of the human environment are likely to be highly controversial.

The potential environmental impacts associated with this travel plan will likely be highly controversial. Mismanagement and conflict has surrounded the Ten Lakes WSA for decades. In 1987 the Kootenai recommended wilderness for part of the WSA and contiguous lands. Since then, a snowmobile club was formed, grooming and infrastructure surrounding the WSA has been established, various managers have facilitated increased use in the area and conflicts to maintain wilderness character have ensued. In 2007, Montana Wilderness Association entered into a settlement agreement with the Forest Service to conduct Travel Management by the end 2009. Travel planning for the Galton area commenced but has not yet been completed.

⁵⁰ Lands Council v. Martin, 529 F.3d 1219, 1230, 1232 n. 7 (9th Cir. 2008); Smith v. U.S. Forest Serv., 33 F.3d 1072, 1078 (9th Cir. 1994); Or. Natural Desert Ass’n v. Bureau of Land Mgmt., 531 F.3d 1114, 1137-38 (9th Cir. 2008).

⁵¹ 36 C.F.R. § 294.11.

For the last 13 years, the Kootenai was also undergoing a forest plan revision and, as a part of this process, the Forest Service evaluated the Ten Lakes area for wilderness recommendation. A travel planning decision was delayed until the forest plan was complete. During the objections process, conservation interests submitted extensive historical documents on the controversial use of Ten Lakes as well as case law supporting the 1977 MWSA. However, in 2014, the Record of Decision for the Forest Plan was signed, and a "no action" decision was made for Ten Lakes. Part of the WSA was recommended Wilderness for an interim basis and the contiguous lands were no longer recommended for Wilderness. Now, travel planning for the Galton area has been downsized and restarted. The ongoing controversy continues to drive the process and delay decisions.

Factor #3: The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

The Ten Lakes Travel Planning Process is one of the first planning efforts in the country under the new OSV rule. This planning process could establish planning precedents and help interpret some of the untested elements of the new rule. Further, designating motorized use in a WSA could potentially establish precedent for future actions with significant effects in terms of managing for wilderness characteristics elsewhere in Montana and across the country.

Factor #4: The degree to which the proposed action affects public health or safety.

The increasing number of snowmobile users in the area could lead to a rise in user-conflict. This conflict could have implications for public safety.

For these reasons, we believe the effects of the PA are likely to be significant and therefore warrant an EIS. If, however, the Forest Service chooses not to develop an EIS, we request that the agency release and accept public comment on the Draft EA before issuing a FONSI and draft decision. Given that the Forest Service has been out of compliance with the 2007 settlement agreement since 2008, we request that the EIS process be fast-tracked and a final EIS and Record of Decision in place by the 2016/2017 winter season.

B. We request that the Forest Service allow us to submit an additional scoping letter after the deadline that transmit any additional information that is received in response to our FOIA.

On April 17, 2015, TWS submitted a Freedom of Information Act (FOIA) Request for copies of all information provided by snowmobile users to the Forest Service that pertains to the following statement in the PA for the Ten Lakes Travel Plan:

Long-time snowmobile users in the area have provided information that indicates there are very few places they go now that they didn't go in 1977.⁵²

⁵² PA at 3-4.

We also requested any other documentation, including memoranda, correspondence or other records generated or acquired by the Forest Service, regarding snowmobile use on or before 1977 in the Ten Lakes WSA. This FOIA request letter is included as Appendix 7 to this letter. While we understand that the agency has 20 working days to respond to our request under the FOIA, we respectfully requested in our information request letter that the Forest Service expedite its response so that we can consider utilizing this information in this scoping letter. We further requested in our information request letter that we and other interested stakeholders be able to amend our/their scoping comments following the May 14 scoping deadline if documents requested in our information request letter arrive too late for us to provide completely informed comments by May 14. We reiterate that request here.

C. The Forest Service’s cumulative impacts analysis must look outside the planning area.

Approximately 86% -- or 1,894,523 acres -- of the entire forest is currently open to OSV use, while less than 15% is set aside for winter non-motorized use. The table pasted below is from the forest plan.⁵³

	Primitive	Semi-Primitive Non-Motorized	Semi-Primitive Motorized	Roaded Natural	Rural
Summer	186,215 acres (8%)	1,194,465 acres (54%)	358,976 acres (16%)	451,079 acres (21%)	26,542 acres (1%)
Winter	3,192 acres (<1%)	319,834 acres (14%)	1,719,286 acres (78%)	145,059 acres (7%)	30,178 acres (1%)

This percentage places the KNF highest among all other national forests in Montana in the area it allocates for motorized use. The Kootenai’s new forest plan converted large backcountry tracts from non-motorized backcountry (MA 2) under the 1987 plan to motorized (MA 5b) under the 2013 revision, e.g. the roadless lands adjoining the southeast Cabinet Mountains Wilderness, Barren Peak and Allen Peak.

Meanwhile, the Kootenai also has less designated wilderness than any other national forest in Montana in Region 1. See Table below.

National Forest	USFS Acres	Wilderness Acres	% of NF in Wilderness
Beaverhead-Deerlodge National Forest	3,356,044	221,572	6.60%
Bitterroot National Forest	1,587,070	750,444	47.28%
Custer National Forest	1,188,130	332,612	27.99%
Flathead National Forest	2,404,863	1,075,558	44.72%
Gallatin National Forest	1,848,646	719,206	38.90%
Helena National Forest	981,930	112,023	11.41%
Kootenai National Forest	2,219,100	93,766	4.2%
Lewis and Clark National Forest	1,864,556	386,197	20.71%
Lolo National Forest	2,202,424	148,484	6.74%

Data sources: 1) www.wilderness.net

⁵³ Kootenai Forest Plan, Table 7 at 34.

To paint the full picture, the Kootenai has more roads, fewer nonmotorized acres, and less wilderness than any other national forest in Montana in Region 1. Taking this information into account, the Kootenai's PA to allow motorized use throughout 46% of the Ten Lakes WSA thereby degrading its wilderness character and potential to be designated wilderness seems even more misguided. The cumulative impacts analysis must look outside the planning area and consider the landscape-scale impacts of designating 46% of the Ten Lakes WSA and 57% of the planning area for OSV use when 86% of the entire forest is already open to OSVs.

XI. Conclusion

The Forest Service's proposed action would strip the WSA of its wilderness core and reduce its potential for wilderness to scraps: two basins near the border (Ten Lakes and Rainbow Lake) and the Tobacco Valley side of the WSA. To comply with the plain language of the Montana Wilderness Study Act, OSV rule and the ORV executive orders, the Kootenai National Forest should abandon its proposed action, conduct a detailed travel analysis, and then properly apply:

- The Montana Wilderness Study Act by maintaining wilderness character in the Ten Lakes WSA and the area's potential for designation as wilderness as it existed in 1977, and
- The executive orders' minimization criteria to designate areas, trails, and roads available for OSV use that minimize impacts to resources and user conflicts and bring balance to the backcountry.

To that end, the Forest Service should incorporate the elements of Appendix 5 to help the agency minimize impacts and develop comprehensive Wilderness Assessment. We also request that the Kootenai develop an EIS.

Thank you for your consideration.

Sincerely,

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