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

WILDEARTH GUARDIANS, *et al.*, Plaintiffs, and SWAN VIEW COALITION, *et al.*, Consolidated Plaintiffs v. CHIP WEBER, *et al.*, Defendants, and DAVID BERNHARDT, *et al.*, Consolidated Defendants.	Lead Case No. 9:19-cv-0056-M-DWM Member Case No. 9:19-cv-0060-M-DWM DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS CLAIM TWO IN PLAINTIFFS' FIRST AMENDED COMPLAINT [ECF No. 23]

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I. INTRODUCTION

This consolidated action challenges the Flathead National Forest's 2018 Land and Resource Management Plan ("2018 Forest Plan" or "revised Forest Plan"). Over the course of five years, the Flathead National Forest worked extensively with the public and local, state, and federal agencies as well its own specialists to develop a comprehensive, new forest plan that would provide for the multiple use and sustained yield of products and services on the Flathead National Forest. The 2018 Forest Plan revised and replaced the previous plan from 1986.

Among the central issues addressed in the 2018 Forest Plan is the Flathead National Forest's management of over-snow vehicles on the Forest. The 2018 Forest Plan adopted the Flathead National Forest's 2006 designation of over-snow routes and areas; the earlier decision that restricted over-snow vehicle use to designated routes and areas on the Flathead National Forest is known as Amendment 24 to the 1986 Forest Plan. The 2018 Forest Plan also identified a net increase of approximately 567 acres of National Forest System land as suitable for over-snow vehicle use, but did not designate any additional acreage as open to over-snow vehicles. Any future designations for over-snow vehicle use on newly suitable acres, or revisions to existing designated acreage, will be site-specific decisions subject to the designation process under Travel Management Rule, and will allow for public involvement.

WildEarth Guardians and Western Watersheds Project ("Plaintiffs") allege the Forest Service violated the Travel Management Rule and Executive Order 11644, as amended, by failing to consider and comply with minimization criteria for over-snow vehicle designations and by failing to complete a winter travel plan. Pls.' First Am. Comp. for Declaratory and Inj. Relief ("Compl."), ¶¶ 263-272, ECF No. 23 (Claim Two). Plaintiffs have not met their burden to show that this Court has jurisdiction to hear the Travel Management Claim. Plaintiffs' challenge to the over-snow vehicle routes and areas designated in Amendment 24 in 2006 is barred by the six-year statute of limitations for civil claims against the United States. Plaintiffs' challenge to the newly suitable over-snow acreage as identified in the 2018 Forest Plan and potential changes to existing over-snow designations is not ripe for review. Substantive, programmatic challenges such as those in Claim Two are not justiciable unless and until there is a site-specific action designating an area or route open to over-snow vehicles.

The Court lacks jurisdiction over Plaintiffs' Travel Management Claim and should dismiss Claim Two in its entirety. Adjudicating this jurisdictional issue now will narrow the issues for the parties and Court at the summary judgment stage.

II. BACKGROUND

The Flathead National Forest covers approximately 2.4 million acres in northwestern Montana and, until last year, was governed by the 1986 Land and Resource Management Plan ("1986 Forest Plan"). *See* Compl. ¶¶ 23, 27, 32. In November 2006, the Forest Service issued a final Record of Decision for the Winter Motorized Recreation Forest Plan, which amended the 1986 Forest Plan and is commonly referred to as Amendment 24. *Id.* ¶¶ 226, 229. Amendment 24 included both programmatic and site-specific decisions related to over-snow vehicle use on the Flathead. *Id.* ¶ 231. Specifically, it allowed over-snow vehicles on approximately 787,000 acres and designated 3,000 miles of roads and routes for over-snow vehicle use. *Id.* Areas and routes designated as open to over-snow vehicle use are displayed in the Forest Service's Over-Snow Vehicle Use Map, as required by Subpart C of the Travel Management Rule, 36 C.F.R. § 212. Compl. ¶ 227; excerpts from the Final Record of Decision for the Flathead National Forest Land Management Plan, attached hereto as Exhibit 1, at 45.[1]

In December 2018, the Forest Service issued the final Record of Decision for the 2018 Forest Plan. Compl. ¶¶ 3, 30, 51. The revised Forest Plan took effect in January 2019 and replaced the 1986 Forest Plan in its entirety. *Id.* ¶¶ 32, 52.

[1] A court may review evidence beyond the complaint when resolving a Rule 12(b)(1) motion to dismiss. *See infra* p. 6 (citing *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004)).

Over-snow vehicle designations remained unchanged under the 2018 Forest Plan. *Id.* ¶ 227. As alleged in the Complaint, the revised Forest Plan adopts the designated routes and areas for over-snow vehicle use identified in Amendment 24. *Id.* ¶ 240. The revised Forest Plan also increased the net area suitable for over-snow motorized vehicle use by approximately 567 acres. *Id.* ¶ 246. The Forest Service plans to initiate site-specific planning for newly suitable over-snow acreage within three years from the date of the final Record of Decision for the revised Forest Plan, which would be by December 2021. *Id.* ¶ 247. No site-specific planning has begun. *Id.*

Though some paragraphs of the Complaint allege the revised Forest Plan adjusts the boundaries of some of the designated over-snow vehicle routes and areas identified in Amendment 24, these statements are potentially misleading. *See, e.g.*, *id.* ¶¶ 240, 241, 243. An increase in suitable acreage is not the same thing as an increase in designated acreage. As other allegations in the Complaint clarify, the 567 acre net increase is for suitable acreage, not designated acreage. Compl. ¶ 246 ("The revised Forest Plan made changes to motorized over-snow vehicle use suitability resulting in an increase of about 567 acres as suitable for motorized over-snow vehicle use."), 247 (stating that the Forest Service "will initiate site-specific planning within three years…where an existing order may need to be changed in light of the 2018 Forest Plan suitability direction."). The

Record of Decision provides additional support that the 2018 Forest Plan is a programmatic decision and does not designate additional over-snow acreage. Ex. 1 at 45 ("This programmatic plan decision does not authorize additional motor vehicle use, or prohibit existing motor vehicle uses, therefore those maps remain unchanged."), 46 ("Management areas with the plan component that indicates wheeled motorized travel is suitable are areas where motor vehicle use could be designated during future site-specific decision making. Plan suitability alone, does not mandate off-road vehicle use or indicate that an area is subject to unmanaged off-road vehicle use.").

Plaintiffs filed this action on April 2, 2019, and later amended their Complaint. ECF Nos. 1, 23. The operative pleading alleges Defendants violated the National Environmental Policy Act ("NEPA") (Claim One, ¶¶ 255-62), the Travel Management Rule (36 C.F.R. § 212) and Executive Order 11644, as amended (Claim Two, ¶¶ 263-72), and the Endangered Species Act ("ESA") and the Administrative Procedure Act ("APA") (Claim Three, ¶¶ 273-93). Defendants move to dismiss Claim Two for lack of subject matter jurisdiction.[2]

[2] As noted in Defendants' pretrial statement, Defendants believe the Court can resolve Plaintiffs' remaining claims (Claims One and Three), as well as all of the claims in Consolidated Plaintiffs' Complaint (Claims One through Four, alleging violations of NEPA and the ESA) on cross-motions for summary judgment. ECF No. 27.

III. LEGAL FRAMEWORK

A. Rule 12(b)(1)

Under Federal Rule of Civil Procedure 12(b)(1), a party may move to dismiss a claim for lack of subject-matter jurisdiction. "A Rule 12(b)(1) jurisdictional attack may be facial or factual. In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone*, 373 F.3d at 1039 (citation omitted). When evaluating a facial attack, the court's analysis is confined to the allegations in the complaint and any exhibits attached to the complaint. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).

"By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Safe Air for Everyone*, 373 F.3d at 1039. "In resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment . . . . The court need not presume the truthfulness of the plaintiff's allegations." *Id.* (citing *White*, 227 F.3d at 1242). The plaintiff has the burden of proving that the requirements of subject-matter jurisdiction have been met. *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (citing *Harris v. Rand*, 682 F.3d 846, 851 (9th Cir. 2012)).

B. The Travel Management Rule

In 2005 the Secretary of Agriculture adopted regulations that fundamentally changed the management of motor vehicles on National Forest System lands. Travel Management; Designated Routes & Areas for Motor Vehicle Use, 70 Fed. Reg. 68,264 (Nov. 9, 2005) (codified at 36 C.F.R. pt. 212, 251, 261, and 295). The Secretary promulgated the Travel Management Rule to improve implementation of Executive Orders 11644 and 11989 and establish a national system of roads, trails, and areas with restricted off-road vehicle use. *WildEarth Guardians v. Mont. Snowmobile Ass'n*, 790 F.3d 920, 929 (9th Cir. 2015). Subpart C, the only subpart relevant in this action, provides for a system of roads, trails, and areas that are designated for over-snow vehicle use. 36 C.F.R. §§ 212.80-212.81.[3] Once roads, trails, and areas are designated, over-snow vehicle use not in accordance with the designations, or outside designated areas, is prohibited. *Id.* at § 212.80.

In 2013, a district court struck down the portion of Subpart C that exempted over-snow vehicles from certain designation requirements enumerated in Subpart C. *WildEarth Guardians*, 790 F.3d at 933 n.13 (citing *Winter Wildlands All. v. U.S. Forest Serv.*, No. 1:11-CV-586-REB, 2013 WL 1319598 (D. Idaho Mar. 29,

[3] The Rule is divided into Subparts A, B, and C. 36 C.F.R. Part 212. Subpart A covers issues such as the inventorying of roads in administrative units of the NFS. 36 C.F.R. §§ 212.1-212.21. Subpart B covers designation of roads, trails, and areas open to motor vehicle use by vehicle type and time of year. 36 C.F.R. §§ 212.50-212.57.

2013)). The Department of Agriculture has since promulgated a revision to Subpart C that is now in effect. Use by Over-Snow Vehicles (Travel Management Rule), 80 Fed. Reg. 4,500-01 (Jan. 28, 2015) (codified at 36 C.F.R. § 212.80-212.81).

IV. ARGUMENT

Although Plaintiffs present their Travel Management Claim as a single challenge, the Complaint, supplemented with information from the Record of Decision, shows that there are two distinct components of the revised Forest Plan's Travel Management Decision. The first is for over-snow routes and areas designated in Amendment 24 in 2006. The second is for newly suitable over-snow acreage as identified in the 2018 Forest Plan and potential changes to existing over-snow designations.

A. Challenges to designated over-snow vehicle routes and areas are barred by the six-year statute of limitations for claims against the United States.

The Flathead National Forest designated over-snow vehicle areas and routes in November 2006, when it adopted Amendment 24 to the 1986 Forest Plan. Plaintiffs' Travel Management Claim challenging these designated areas and routes is barred by the statute of limitations.

Civil claims against the United States are barred "unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401;

Wind River Mining Corp. v. United States, 946 F.2d 710, 713 (9th Cir. 1991) (28 U.S.C. § 2401 applies to claims brought under the APA); *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 930 (9th Cir. 2010). "The six-year statute of limitations begins to run when the right of action first accrues, which, under the APA, is generally the time of the final agency action." *Gros Ventre Tribe v. United States*, 344 F. Supp. 2d 1221, 1228 (D. Mont. 2004), *aff'd* 469 F.3d 801 (9th Cir. 2006) (citing 5 U.S.C. § 704).[4]

The Complaint alleges the Forest Service issued the final Record of Decision for Amendment 24 in November 2006. Compl. ¶ 229. The Complaint further alleges that the 2018 revised Forest Plan adopted Amendment 24, and that the final Record of Decision states "the over-snow vehicle designations from Amendment 24 remained unchanged under the 2018 Forest Plan." *Id.* ¶¶ 226, 227; *see id.* ¶ 233 ("Amendment 24 did not alter locations of existing groomed snowmobile routes."), ¶ 248 ("The Forest Service used the grandfather provision of the 2015 Over-Snow Vehicle Rule to avoid conducting winter travel planning, despite the prior over-snow vehicle designation decisions occurring more than ten years ago…."). Based on Plaintiffs' own allegations, the final agency action for winter motorized recreation on the Flathead accrued in November 2006, when the Forest Service

[4] *Wind River*'s limited exception to the six-year statute of limitations for *ultra vires* agency action adversely applied to a litigant does not apply here. 946 F.2d at 716.

issued the final Record of Decision for Amendment 24.[5] The statute of limitations for Plaintiffs' Travel Management Claim for designated over-snow areas and routes expired in November 2012 – almost seven years ago – and therefore is time-barred. 28 U.S.C. § 2401; *see Mont. Snowmobile Ass'n v. Wildes*, 103 F. Supp. 2d 1239, 1243-44 (D. Mont. 2000) ("Plaintiffs' legal right to challenge the closure…to snowmobile use accrued when they had notice of the closure.").

Plaintiffs cannot resurrect their time-barred Travel Management Claim to designated areas and routes through allegations that the revised Forest Plan increased suitable over-snow vehicle areas by a net of 567 acres. *See* Compl. ¶¶ 240, 246. As discussed in the following section, a suitability determination for an additional 567 acres is not ripe at this time because the acreage has not yet been designated as open to over-snow vehicle use and thus has no real-world effect at this time. Even if the Court were to find that the full record is necessary to adjudicate the Travel Management Claim as it pertains to the additional suitable acreage, only the alleged 567-acre increase in suitable area is within the APA's six-year statute of limitations. Any challenge to over-snow vehicle areas and routes designated in November 2006 is time barred.

[5] The Record of Decision for the revised Forest Plan provides additional support for the fact that Plaintiffs' claim against designated routes and areas accrued in 2006. The Record of Decision states it "does not authorize additional motor vehicle use, or prohibit existing motor vehicle uses." Ex. 1 at 45.

Plaintiffs may argue that the previously designated routes and areas on the Flathead National Forest must comply with the minimization criteria adopted in the 2015 Travel Management Rule revision that applies to over-snow vehicles. The problem with this argument is that the Travel Management Rule revision expressly exempted previous over-snow vehicle decisions, such as those made in Amendment 24, from the new 2015 designation criteria – including minimization. 36 C.F.R. § 212.81(b), (d).

Plaintiffs' Travel Management Claim for designated routes and areas accrued in November 2006, almost thirteen years ago. Plaintiffs offer no reason for why they waited to challenge the Flathead National Forest's over-snow vehicle designations. The allegations alone show that Claim Two, as it pertains to designated routes and areas, is barred by the APA's six-year statute of limitations. 28 U.S.C. § 2401(a); *Wind River*, 946 F.2d at 713. The Court should dismiss Claim Two (as it pertains to designated routes and areas) for lack of subject matter jurisdiction.

B. <u>Challenges to future designations on newly suitable areas and routes are not ripe for review.</u>

As it pertains to the 2018 Forest Plan's suitability determination for new over-snow areas and routes, and any revision to existing designations, Plaintiffs' Travel Management Claim is a substantive, programmatic challenge that must wait until there is a site-specific action issued under the revised Forest Plan.

The doctrine of ripeness is designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-149 (1967); *accord*, *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 732-733 (1998). Determining whether administrative action is ripe for judicial review requires courts "to evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hosp. Ass'n v. Dep't of the Interior*, 538 U.S. 803, 808 (2003), citing *Abbott Labs.*, 387 U.S. at 149.

A seminal case in the ripeness doctrine involved a programmatic challenge to a forest plan, much like the challenge Plaintiffs level at the suitability determination here. *Ohio Forestry* held that a challenge brought under the National Forest Management Act ("NFMA"), 16 U.S.C. § 1604, to the Wayne National Forest's Forest Plan was not ripe until there was a site-specific action that implemented the challenged forest plan specifications for timber harvest. *Ohio Forestry*, 523 U.S. at 732. To determine ripeness in an agency context, the Supreme Court applied *Abbott Laboratories* and said courts must consider (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial

intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented. *Ohio Forestry*, 523 U.S. at 733. The Supreme Court found that the Wayne's forest plan specifications were not justiciable because (1) the plan did not create adverse effects or inflict significant practical harm on plaintiffs, (2) immediate judicial review of the forest plan would interfere with subsequent, site-specific decisions, and (3) review would benefit from further factual development when the specifications are applied to a particular logging proposal. *Id.* at 733-37. The Supreme Court held that "[t]his type of review threatens the kind of 'abstract disagreements over administrative policies' that the ripeness doctrine seeks to avoid." *Id.* at 736 (citing *Abbott Labs.*, 387 U.S. at 148).

On numerous occasions, the Ninth Circuit has applied *Ohio Forestry* and held that challenges to forest-wide management practices under NFMA must be made in the context of site-specific actions. *See, e.g.*, *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 658 (9th Cir. 2009); *Ecology Ctr., Inc. v. U.S. Forest Serv.*, 192 F.3d 922, 925 (9th Cir. 1999). And although *Ohio Forestry* concerned a NFMA challenge, the requirement for a site-specific action is not limited to that statute when a party brings a substantive challenge to a land management plan. *See, e.g.*, *Or. Nat. Desert Ass'n v. Shuford*, Civ. No. 06-242-AA, 2007 WL 1695162, at *15 (D. Or. June 8, 2007), *aff'd sub nom. Or. Nat. Desert Ass'n v. McDaniel*,405 F.

App'x 197 (9th Cir. 2010) ("*Ohio Forestry* precludes [plaintiff's] grazing suitability claims because the [Resource Management Plan] does not in and of itself authorize grazing in any specific allotment.").

In fact, the Tenth Circuit has applied *Ohio Forestry* to substantive, forest-wide challenges brought under the Travel Management Rule. In *Southern Utah Wilderness Alliance v. Burke*, 908 F.3d 630, 635-36 (10th Cir. 2018), the Tenth Circuit dismissed the State of Utah's challenge to a settlement agreement as unripe. As part of the settlement, the Bureau of Land Management agreed to issue travel management plans but had not yet done so. *Id.* at 633. Because there were no final travel management plans, the Tenth Circuit found Utah's concerns about travel management implementation to be anticipatory and not ripe for review. *Id.* at 635. The Tenth Circuit found that once the Bureau of Land Management developed the travel management plans "in a complex regulatory scheme" and finalized the travel management plans, it could "more confidently address the substantive legal arguments raised by Utah…." *Id.* at 636.

Applying *Ohio Forestry* and its progeny to the facts as alleged in the Complaint, it is clear that Plaintiffs' Travel Management Claim as it applies to newly suitable areas, and any future revisions to existing designations, is not ripe for review. Plaintiffs cannot show that delayed review would cause them hardship because the revised Forest Plan is a programmatic decision that does not designate

any additional routes or areas. Compl. ¶ 247; Ex. 1 at 45-46. To the extent Plaintiffs complain about existing over-snow vehicle use, those areas and routes were designated in Amendment 24 in 2006 and have not changed. Compl. ¶¶ 226, 227, 233, 248. The fact that Plaintiffs waited almost thirteen years to challenge designated routes underscores that there is no hardship from additional delay. *See Lydo Enters, Inc. v. City of Las Vegas*, 745 F.2d 1211 (9th Cir. 1984) (holding that in the context of a preliminary injunction, delay is a consideration in measuring the claim of urgency).

Review at this stage also would interfere with subsequent, site-specific decisions. As the Complaint alleges, the Forest Service "will initiate site-specific planning within three years from the date of the final [Record of Decision] for the 2018 Forest Plan where an existing order may need to be changed in light of the 2018 Forest Plan suitability direction." Compl. ¶ 247. The same paragraph alleges that the "Forest Service has not yet initiated site-specific planning. The Forest Service has not made any date-certain commitments to conduct winter travel planning to designate over-snow vehicle use on the Flathead." *Id.*; *see also id.* ¶ 48 (alleging that Plaintiffs request the Forest Service to "commit to site-specific winter travel planning within one year of signing the final [Record of Decision].").

Finally, the Court would benefit from further factual development of travel management decisions promulgated under the revised Forest Plan. Plaintiffs allege

an interest in participating in travel management decisions. Compl. ¶¶ 12-14, 16. New over-snow designation decisions are subject to the same requirements governing designation of roads, trails, and areas on National Forest System lands, such as public involvement, design criteria (like minimization), and monitoring. 36 C.F.R. § 212.81(d). Judicial review now would require "a time-consuming consideration of the details of an elaborate, technically based" travel management decision that might ultimately prove unnecessary if public involvement for specific applications of the decision address Plaintiffs' concerns. *Ohio Forestry*, 523 U.S. at 735; *see also Mt. Adams Veneer Co. v. United States*, 896 F.2d 339, 344 (9th Cir. 1990) ("a challenge to the agency's possible decision…is premature, and as such, is not ripe for judicial review").

Plaintiffs may cite to *Ohio Forestry*'s discussion of areas the Wayne National Forest Plan opened to motorized recreation in an attempt to show that their travel management claim is ripe. The Supreme Court did not consider that issue because it had not been fairly presented, given that it was raised for the first time in Supreme Court briefing. *Ohio Forestry*, 523 U.S. at 738. But even if the lower courts had ruled on that claim, the Supreme Court's discussion would not apply here. *Ohio Forestry* pre-dates the 2005 Travel Management Rule and 2015 revision. *See* Compl. ¶ 35. Subpart C of the Travel Management Rule requires areas to be *designated* for over-snow vehicle use. 36 C.F.R. § 212.80(a). The

revised Forest Plan did not designate any new areas for over-snow vehicle use. Compl. ¶ 227. The revised Forest Plan did identify an additional approximately 567 net acres as *suitable* for motorized over-snow vehicle use, but this new acreage has not yet been designated for over-snow vehicle use.[6] *Id.* ¶ 246.

In the absence of a site-specific over-snow travel management plan under the revised Forest Plan, "the Court is left with an abstract dispute, the premature resolution of which would deny the Court the benefit of further factual development and could interfere with further administrative attempts to refine the policy." *Defs. of Wildlife v. Hall*, 807 F. Supp. 2d 972, 980 (D. Mont. 2011). The Travel Management Claim, as it pertains to any future over-snow designation in newly suitable areas or future revision of existing designations is not ripe for review. The Court should dismiss Claim Two (as it pertains to new or revised designations) for lack of subject matter jurisdiction.

[6] On a related note, Plaintiffs allege the Forest Service violated NEPA when it identified new acreage as suitable for over-snow vehicle use. Compl. ¶ 261(f). The Ninth Circuit recently held that under the Healthy Forest Restoration Act, 16 U.S.C. § 6591a, landscape-level decisions identifying specific areas where future site-specific projects may be implemented does not trigger a requirement for NEPA analysis. *Ctr. for Biological Diversity v. Ilano*, 928 F.3d 774, 780-81 (9th Cir. 2019). Though the terminology used in the Healthy Forest Management Act and the Travel Management Rule may seem at odds, *Ilano* applies here. Designation of a landscape-scale area for potential future timber projects under the Healthy Forest Restoration Act is akin to a suitability determination for potential future over-snow route and area designations under the Travel Management Rule. Under both the Act and the Rule, the first step does not change the status quo. *Ilano*, 928 F.3d at 780.

V. CONCLUSION

Plaintiffs' Travel Management challenge to previously designated over-snow areas and routes is barred by the statute of limitations, and their challenge to future designations in newly suitable areas or revisions to existing designations is not ripe. The Court should dismiss Claim Two in its entirety for lack of subject matter jurisdiction.

Respectfully submitted on this 12th day of September, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), there are 4,136 words in the brief as counted using the word count feature in Microsoft Word, excluding the caption, table of contents and authorities, signature blocks, and certificates of service and compliance, and exhibit index.

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