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November 19, 2018

Bitterroot Travel Management Plan, Project No. 21183
Objection Reviewing Officer
USDA Forest Service
26 Fort Missoula Rd.
Missoula, Montana 59804

Via email | appeals-northern-regional-office@fs.fed.us

RE: Objections to Closure of the Sapphire and Blue Joint Wilderness Study Areas Under the Bitterroot National Forest Travel Management Plan of 2016

Dear Objection Reviewing Officer:

The Sustainable Trails Coalition (STC) hereby presents objections to the Bitterroot National Forest Travel Management Plan of 2016. Specifically, STC objects to the closure of the Sapphire and Blue Joint Wilderness Study Areas to mountain biking, the rationale for which is set forth in a Record of Decision dated May 11, 2016. The Responsible Official was then former Forest Supervisor Julie K. King.

STC submits these objections under 36 C.F.R. § 218.1 et seq.

I. Interest of the Organization

STC exists to restore the Wilderness Act of 1964 and agency interpretations of the Act to the Act's two original purposes: conservation and rugged, self-reliant recreation.

The Record of Decision ultimately relies on the Forest Service's long-standing misinterpretation of the Act's specifications regarding human-powered travel in Wilderness. This misinterpretation undergirds the Record of Decision's discussion of "Wilderness character."

In Wilderness and in many Recommended Wilderness areas (RWAs) and Wilderness Study Areas (WSAs), the Forest Service disallows human-powered land travel unless it is on foot and unaided by anything more than a walking stick. Human-powered travel using bicycles, adaptive cycles, baby strollers, hunters' game carts, and anything else that's human-powered but has a wheel is forbidden.

This management practice misreads the Wilderness Act of 1964, in which Congress earmarked the National Wilderness Preservation System for conservation and "a primitive and unconfined type of recreation." (16 U.S.C. § 1131(c).) "Primitive" means, among other things, self-powered travel, but the term was not limited to certain forms of walking. During congressional debates, a member of Congress asked the chairperson of the House Committee on Interior and Insular Affairs, Representative Wayne N. Aspinall, "On page 17 of the bill . . . the language is as follows: 'has outstanding opportunities for solitude or a primitive and unconfined type of recreation.' I wonder what 'a primitive and unconfined type of recreation' might be?" Representative Aspinall replied, "it just simply means that there will not be any manmade structures about in order to embarrass [i.e., hinder] and handicap the enjoyers of this particular area." (110 Cong. Rec. 17443 (1964).)

The nation's federal trails system is heavily impacted by erroneous rules against human-powered travel. In Colorado, more than 80 percent of all roadless federal land is Wilderness. About 15 percent of the entire land area of California—not just of public lands, but of the whole state—is Wilderness.

The Wilderness Act of 1964 is a conservation landmark and is not the problem. The Act valuably set aside scenic public lands for nonmotorized visitors and celebrated the recreational opportunities they would experience. Congress wanted to preserve roadless areas as Wilderness and maintain trails in them to encourage intrepid visitors to see wild places under their own power.

STC's donors number in the thousands and our grass-roots base of supporters numbers in the tens of thousands. STC does not offer formal memberships and relies largely on social media to communicate with its supporters and assess their numbers. STC is incorporated in Colorado, maintains its principal place of business

in California, and is recognized by the Internal Revenue Service as a nonprofit, tax-exempt organization under section 501(c)(4) of the Internal Revenue Code.

II. The Record of Decision's Erroneous Precepts

The Record of Decision would impose dramatic and unwarranted changes to a long-established trail system. Other objectors undoubtedly will be explaining these problems in detail. STC, for its part, presents two discrete, focused objections.

A. The Forest Service Proposes to Apply the Wrong Standard for Considering Trail Uses in 1977 Versus Such Uses Today

The Record of Decision states:

"I am . . . prohibiting all summer and over-snow motorized/mechanical transport use in the Sapphire and Blue Joint Wilderness Study Areas. My primary reason for this is to preserve the wilderness character of these areas based on our analysis of the volume and location of motorized/mechanical transport use that was occurring in 1977, when the Montana Wilderness Study Act was signed into law." (P. 8.)

"Very little data was found to substantiate the volume of use or location of motorized/mechanical transport in these WSAs in 1977, when the [Montana Wilderness Study Act] went into effect. Additionally, there was no data regarding current motorized and bicycle use levels." (P. 24.)

"The lack of data regarding the volume of historic and current use limits my decision space related to motorized/mechanical transport use in the Sapphire and Blue Joint WSAs. Analysis of regional and national recreation-use data from the 1970s indicates that motorized/mechanical transport use levels in the two WSAs were likely much lower than exist today." (P. 24.)

"An examination of national recreation use data . . . concluded that mountain biking was not likely occurring in either the Sapphire or Blue Joint WSAs in 1977. Because mountain biking (mechanical transport) is prohibited in Designated Wilderness, current use in the Sapphire and Blue Joint WSAs detracts from the wilderness character that was present in 1977, the date of the pertinent legislation." (P. 25.)

In this Part A, we contend that the Forest Service's focus on 1977 uses is too granular. Bicycling constitutes human-powered travel. The Forest Service should assess the extent to which *human-powered travel* occurred in the two WSAs in 1977, making that criterion the baseline to be applied for the question of people moving about under their own power now. It is not particularly important how people travel under their own power.

In other words, bicycling should be considered alongside human-powered travel modes like hiking, backpacking, canoeing and rock-climbing, and should not be

categorized separately as “mechanical” or “mechanized.” To dwell on the latter is to miss the target, discounting mountain biking’s environmentally benign qualities and focusing on such minor matters as whether it is a rubber-soled boot or a rubber tire that touches the ground, or whether travel is at two miles per hour on foot or four miles per hour by bicycle, speeds that may be anticipated in rugged terrain.

Mountain biking is indeed environmentally benign. It is as benign as day-hiking and has less of an impact than overnight backpacking. Mountain biking’s impact pales in comparison to horse and packstock activities, activities that have damaged the character of Wilderness areas around the western United States. If Wilderness and WSA management are not directed to preferring travel modes that have low environmental impacts, but rather favor travel modes that cause trampling of trails, streams, and meadows, it is hard to square that philosophy with the public’s expectation that Wilderness should aim above all for environmental preservation.

The Record of Decision relies on the Wilderness Act of 1964 in placing mountain biking in a separate category, i.e., a middle ground that is neither motorized nor unaided by mechanical assistance. However, the Forest Service relies too much on the Wilderness Act for this proposed determination. Until Congress designates these two WSAs as Wilderness, the Montana Wilderness Study Act of 1977 (MWSA of 1977) governs their management.

The MWSA of 1977 provides in pertinent part:

“Except as otherwise provided by this section, and subject to existing private rights, the wilderness study areas designated by this Act shall, until Congress determines otherwise, be administered by the Secretary of Agriculture so as to maintain their presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System.” (Act of Nov. 1, 1977, Pub. L. No. 95-150, § 3(a), 91 Stat. 1243, 1244.)

The MWSA of 1977 does not itself define “wilderness character.” Rather, Congress defined wilderness character in committee sessions. It prescribed that existing uses, notably off-road motor vehicle use, should continue in the WSAs under review here pending any eventual congressional Wilderness designations.

The Senate report stated that people should continue to be able to visit these WSAs unless their activities would make a future Wilderness designation impossible, presumably by building hard-to-remove infrastructure or otherwise permanently altering the landscape:

“[U]ntil Congress determines otherwise, these areas are to be managed by the Secretary so as not to diminish their presently existing wilderness character and potential. This language regarding wilderness character and potential was added by the committee last Congress (and retained in this year’s version) to assure continued enjoyment of the areas by those recreationists whose pursuits will not, in the judgment of the Secretary, preclude potential wilderness designation for the areas.”

(*Montana Wilderness Study Act:* Hearing Before the Comm. on Energy and Natural Resources, U.S. Senate, 95th Cong., 1st Sess. (1977), p. 2.)

In the same year, 1977, Senator Frank Church (D–Idaho), one of the Senate's renowned conservationists, gave a Wilderness Resource Distinguished Lectureship speech before the University of Idaho Wilderness Research Center. He warned that the Forest Service's Wilderness travel policies were too severe and that established uses (in this context, human-powered travel in the Sapphire and Blue Joint WSAs in and since 1977) should continue even in designated Wilderness areas:

"Such policies are misguided. If Congress had intended that wilderness be administered in so stringent a manner, we would never have written the [Wilderness Act of 1964] as we did. We wouldn't have provided for the possibility of insect, disease and fire control. We wouldn't have allowed private inholdings to remain. We wouldn't have excluded condemnation as the means for forcibly acquiring developed ranches within wilderness areas—a practice allowed on ordinary national forest lands from which wilderness is created. We wouldn't have made wilderness classification subject to existing private rights such as mining and grazing. *We wouldn't have provided for the continuation of nonconforming uses where they were established*—including the use of motor boats in part of the Boundary Waters Canoe Area and the use of airfields in the primitive areas here in Idaho. *As these examples clearly demonstrate, it was not the intent of Congress that wilderness be administered in so pure a fashion as to needlessly restrict its customary public use and enjoyment.* Quite the contrary, Congress fully intended that wilderness should be managed to allow its use by a wide spectrum of Americans." (Italics added.) (Church, "Wilderness in a Balanced Land Use Framework," March 21, 1977, p. 11.)

Senator Church was on the committee that issued the report on the MWSA of 1977. (See https://www.c-span.org/congress/committee/?61183&congress=95.)

The House report was even more specific than the Senate report, directing that off-road vehicle use was to continue unless it was of a type that would be barred under principles applicable to the whole National Forest system:

"The use of off-road vehicles, while generally prohibited in designated wilderness areas, is entirely appropriate in wilderness study areas, including the nine areas contained in S. 393 [the source of the MWSA of 1977]. Nothing in S. 393 will prohibit the use of off-road vehicles, unless the Forest Service planning process and travel planning process, which applies to all national forest lands, determines off-road vehicle use to be inappropriate in a given area. Of course, common sense dictates that certain areas may be temporarily closed to off-road vehicle use where fire danger or physical damage to terrain indicate a closure is warranted. However, absent such circumstances or Forest Service planning decisions, it is the intention of the committee that the areas in S. 393 (and other wilderness study areas) remain open to off-road vehicle use unless and until they are formally designated as wilderness." (*Providing for the Study of Certain Lands to Determine Their*

Suitability For Designation As Wilderness in Accordance With the Wilderness Act of 1964 etc.: Hearing Before the Comm. on Interior and Insular Affairs, House of Representatives, 95th Cong., 1st Sess. (1977), p. 4.)

The Record of Decision refers to "Wilderness character," but departs from Congress's definition in the MWSA of 1977. Legislative drafters specified that even motor vehicle use ordinarily would be in keeping with maintaining Wilderness character in these WSAs and that it should continue, absent impacts severe enough that it would be prohibited virtually anywhere.

The Record of Decision says, "If the long term desire for the areas is wilderness designation, it makes sense to me to manage them in a manner consistent with the Forest's recommendation." (P. 26.) Identifying "the Forest's recommendation" as the management standard to be observed would make perfect sense if one were to defer to it. But it is Congress's determination that legally prevails. Congress directed that even motor vehicle use should continue in these WSAs. Whether or not that was a prudent decision, it is the law. Since Congress allowed motorized activities to continue, it is inconceivable that Congress would have wanted quiet, relatively slow-moving human-powered ones to be banned.

The Record of Decision defines Wilderness character as informed by metrics of isolation, freedom from noise, tranquility, and solitude. (Pp. 23, 24, 26.) "[T]he management actions and decisions affecting [areas in the Selway-Bitterroot RWA] must be made in a consistent manner that provides for protection and preservation of their wilderness character. These considerations need to address resource conditions and social values, including the loss of solitude, noise, and isolation from others." (P. 26.) (STC notes that the Record of Decision discusses WSAs, RWAs, and Inventoried Roadless Areas in various places. In each instance, the reasoning appears to apply to the Forest Service's decisions regarding the Sapphire and Blue Joint Wilderness Study Areas, so STC quotes relevant material found anywhere in the Record of Decision.)

Isolation, freedom from noise, tranquility and solitude are admirable aims, ones that mountain bikers ourselves prize and seek. Whether or not they are the indicated goal legally, in light of Congress's allowance for noise-producing motor vehicle activities, mountain biking honors and preserves these worthy elements of a back-country experience. Mountain biking is quiet. Relatively few mountain bikers possess the physical fitness and backcountry skills needed to venture deep into wild territory, so other visitors' reasonably anticipatable solitude and tranquility will not be jeopardized. It is exceedingly unlikely that the presence of an occasional mountain biker in these two WSAs, their vast expanses "totaling 89,000 acres" according to the Record of Decision (p. 49) and located far from major cities like Seattle, Calgary, Salt Lake City and Denver, will deprive others of a reasonable degree of solitude and tranquility. People who expect *perfect* solitude and tranquility would be happier visiting a place like Auyuittuq National Park on Baffin Island, in

the remote Canadian arctic. (See https://www.pc.gc.ca/en/pn-np/nu/auyuittuq.) Complete isolation from humankind is unrealistic anywhere in the American Lower 48, and benign travel by mountain bike should not be banned in a fruitless effort to achieve it.

Indeed, under the Bitterroot National Forest Travel Plan, the Sapphire and Blue Joint WSAs may become venues for more solitude than the Forest Service intends. In this writer's experience, many Forest Service trails no longer exist or are in such poor condition that they cannot be negotiated. This is especially noticeable in Wilderness areas, where a combination of deficits has led to the abandonment of many trails throughout the western United States. The main causes seem to be (1) the Forest Service's refusal to use chainsaws and wheelbarrows for trail maintenance, even though the Wilderness Act of 1964 allows for the use of this equipment, (2) the shift in the Forest Service's budget to firefighting, and (3) inadequate utilization of volunteers. On the latter point, the Forest Service is surely aware that mountain bikers are famous for our prodigious and unmatched trail-maintenance efforts.

It is quite likely that, if the Record of Decision is implemented as proposed, virtually no one will visit these two WSAs. That may please certain interest groups, but it is not what Congress intended in enacting the Wilderness Act of 1964 or the MWSA of 1977.

B. The Forest Service's Goal of Hindering Mountain Bikers' Involvement in the Federal Legislative Process Is Unconstitutional

The Record of Decision states:

"To designate these areas as wilderness, the management actions and decisions affecting them must be made in a consistent manner that provides for protection and preservation of their wilderness character. . . .

"Additionally, allowing uses that do not conform to wilderness character creates a constituency that will have a strong propensity to oppose [a Wilderness] 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." (P. 26.)

The Draft Record of Decision contained a sentence following this reasoning that was deleted from the final Record of Decision: "Congress is not the appropriate forum in which to debate travel management decisions." (Draft ROD, p. 19.) Although the final Record of Decision wisely deleted this all-too-revealing sentence, the sentiment it expresses remains plain in the final version: mountain bikers must be excluded from the Sapphire and Blue Joint WSAs lest they become

enamored of bicycling there and petition Congress to create an alternative protective designation such as a National Recreation Area or Special Management Area.

The Forest Service's effort to tilt the political playing field toward one result and away from another is unconstitutional. It violates the First Amendment to the United States Constitution and the constitutional separation of powers doctrine.

1. The First Amendment Violation

The First Amendment provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, *and to petition the Government for a redress of grievances*." (Italics added.) The italicized language is commonly called the Petition Clause.

Although the First Amendment's text refers to a prohibition on congressional action, it is indisputable that Forest Service regulations and policies must abide by the United States Constitution.

"Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." (*Landmark Communications, Inc. v. Virginia* (1978) 435 U.S. 829, 838.)

Under the First Amendment, "if the government could deny a benefit"—in this case, mountain biking access—"to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' [Citation.] Such interference with constitutional rights is impermissible." (*Perry v. Sindermann* (1972) 408 U.S. 593, 597.)

Although *Perry* emphasized the First Amendment's freedom of speech guaranty, its reasoning has been extended to the Petition Clause. (*Autor v. Pritzker* (D.C. Cir. 2014) 740 F.3d 176, 181-182.) The Record of Decision's intent to weaken mountain bikers' ability to petition Congress for relief from unjust bicycle bans, i.e., to try to stop mountain bikers from "complicat[ing] the decision process for . . . members of Congress" (Final ROD, p. 26), "deprives them of 'an especially effective way to affect government policy.' " (*Autor*, *supra*, at p. 183; see also *Harrison v. Springdale Water & Sewer Com.* (8th Cir. 1986) 780 F.2d 1422, 1427-1428 ["state officials may not take retaliatory action against an individual designed either to punish him for having exercised his constitutional right to seek judicial relief or to intimidate or chill his exercise of that right in the future."].)

The Record of Decision is thus constitutionally defective.

2. The Separation of Powers Violation

Although the final Record of Decision removed the draft version's blunt declaration that "Congress is not the appropriate forum in which to debate travel management decisions" (Draft ROD, p. 19), it expresses the same view in more veiled terms: if mountain bikers are able to ride in the Sapphire and Blue Joint WSAs, then, as would be the case with the Selway-Bitterroot RWA, "this operating environment will complicate the decision process for Forest Service managers and members of Congress." (Final ROD, p. 26.) In plainer terms, to keep Congress out of the picture, mountain biking must be prohibited in the two WSAs.

As alluded to above, the language at issue occurs in the context of discussion of an RWA, but it suffuses the Record of Decision as a whole, as evinced by language that follows it: ". . . prohibiting bicycles and other types of mechanical transport acknowledges there are impacts on the social and biotic environment that do not show as physical 'scars' on the land, but which are inconsistent with the wilderness character I am responsible for maintaining." (P. 26.)

The Forest Service's desire to impede or shape congressional deliberations on a future Wilderness designation violates the constitutional separation of powers doctrine. " '[T]he separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties.' " (*Clinton v. Jones* (1997) 520 U.S. 681, 701.) The Constitution bars the Forest Service, an executive-branch agency, from trying to intercept congressional action and hinder legislative authority over public-lands issues, including this one.

For this reason too, the Record of Decision is constitutionally defective.

III. Conclusion

The Record of Decision's proposal to ban mountain biking in the Sapphire and Blue Joint Wilderness Study Areas violates the United States Constitution and cannot be reconciled with the Montana Wilderness Study Act of 1977. It must therefore be set aside and new proceedings undertaken.

Very truly yours,

Ted Stroll

Sustainable Trails Coalition
By: Ted Stroll, board president