

No. 22-35555

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRIENDS OF THE CRAZY MOUNTAINS, et al.,
Plaintiff-Appellants,

v.

MARY ERICKSON, et al.,
Federal Defendant-Appellees,

and

M HANGING LAZY 3 LLC; HENRY GUTH, INC.,
Landowner Defendants-Appellees.

On Appeal from the United States District Court
for the District of Montana
No. CV-19-00066-SPW
Hon. Rebecca Watters

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellants, Friends of the Crazy Mountains *et al.*, certify that none of them has a parent corporation and that no publicly held corporation holds 10 percent or more of any Plaintiff-Appellant organizations' stock.

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INTRODUCTION

Friends of the Crazy Mountains *et al.*, challenge Federal-Defendant's ("the Forest Service's") decision to approve the Porcupine Ibex Trail project ("Ibex project") in Montana's Crazy Mountains. The Ibex project involves: (1) closing and obliterating portions of two National Forest trails that cross private land: the Porcupine Lowline and North Fork Elk Creek trails; (2) releasing all public easement interests and access rights to use the trails; (3) building a new trail re-route on public, higher-elevation forested lands to the east; and (4) acquiring new easements from landowners to accommodate the new trail.

This project, which was designed to resolve public access disputes in the area, was controversial from the start because it involves giving up historic access rights on two popular, public trails that provided important recreational opportunities in the Crazy Mountains. The two trails cross private lands but were built, used, signed, maintained, and defended by the Forest Service for public use and access for over a century (and well before current private landowners acquired title). But due to the Forest Service's Ibex decision, large portions of these two trails are no longer available for public use. This decision was also conceived and designed behind closed doors, during private meetings between the Forest Service and landowners (and other invited stakeholders) and in the absence of any meaningful public input

or involvement. Many locals who grew up near the Crazy Mountains, know the area well, and have recreated and hunted on these trails for generations were effectively shut out of the decision-making process. This includes Friends of the Crazy Mountains.

Further, when these same individuals were given the opportunity to submit “scoping” comments on the Ibex project and encouraged to raise their concerns – which they did – the Forest Service pulled the proverbial rug out from under them. The agency ignored the public’s concerns and issues, including concerns about how the new trail re-route could adversely affect hunting opportunities, big game habitat, and fisheries and other aquatic resources. The agency also ignored concerns about the loss of important, public trails that have been used for over a century, including the loss of easements on the trails that were expressly reserved for the public in earlier railroad deeds.

Indeed, instead of addressing and analyzing these public concerns – as required by the National Environmental Policy Act (“NEPA”) – the Forest Service abruptly cancelled the process altogether. The agency said the project would not be analyzed under NEPA because it was allegedly already discussed and analyzed in an earlier environmental impact statement (“EIS”) for the 2006 travel plan for the Crazy Mountains and a related 2009 environmental assessment (“EA”). But this is

incorrect: the Ibex project was never part of these earlier analyses. In the end, therefore, the Forest Service chose to approve and moved forward with the Ibex project *without any* analysis of its environmental effects and without considering any alternatives to it as required by NEPA.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because these claims arise under the Administrative Procedure Act (“APA”), 5 U.S.C. § 706. The district court’s judgment was final, and this Court has jurisdiction under 28 U.S.C. § 1291. Friends of the Crazy Mountains filed their notice of appeal on July 14, 2022. 5-ER-1054. These appeals are timely under 28 U.S.C. § 2107(b) and Fed R. App. P. 4(a)(3).

STATEMENT OF THE ISSUES

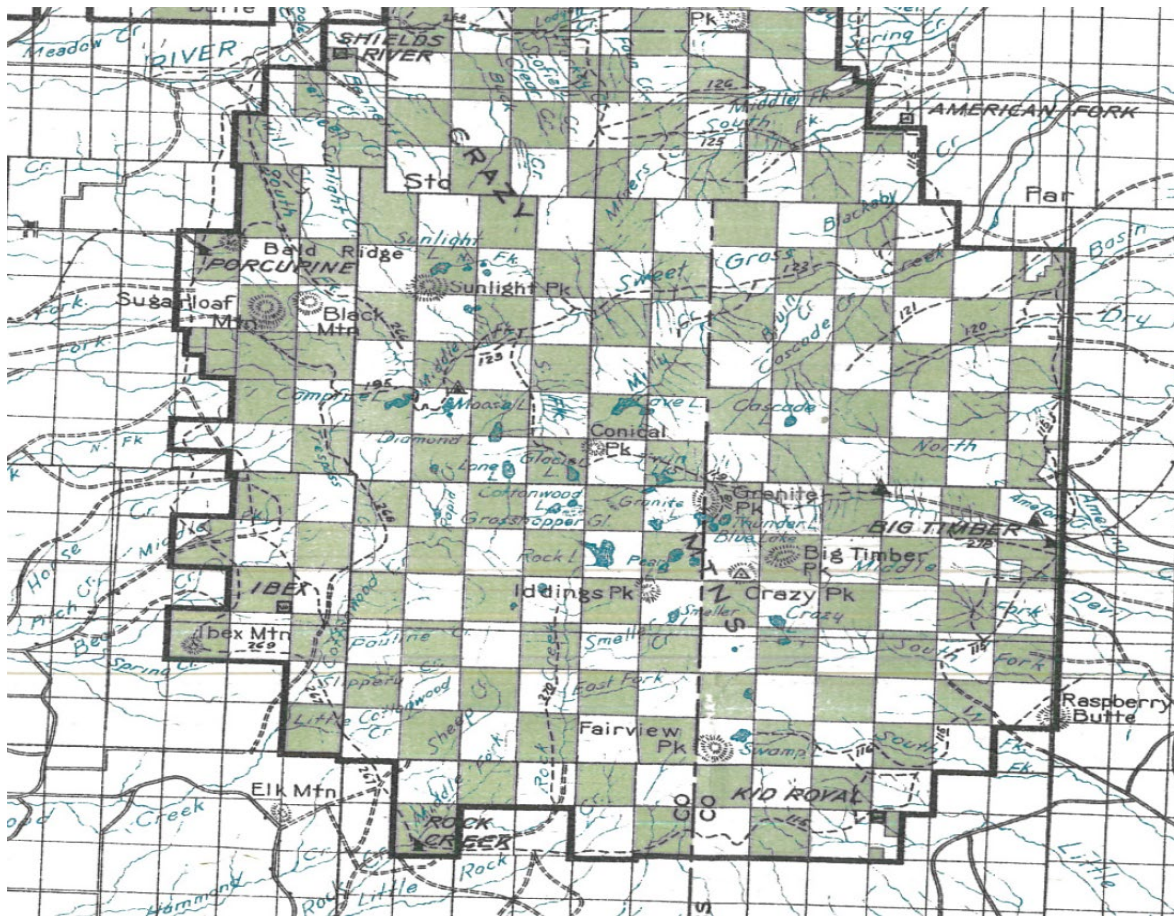
1. Was the Forest Service justified in forgoing a NEPA analysis for the Ibex project (because it was allegedly included in earlier analyses)?
2. Did the Forest Service analyze the effects of the Ibex project as required by NEPA?
3. Did the Forest Service analyze a reasonable range of alternatives for the Ibex project as required by NEPA?

STATEMENT OF THE CASE

I. The checkerboard landscape of the Crazy Mountains.

The Crazy Mountains are located in south-central Montana, just north of Yellowstone National Park, within the Custer-Gallatin National Forest. 2-ER-0081.

This area is defined by a familiar checkerboard landscape ownership pattern consisting of alternating sections of public and private lands.



5-ER-0985. This checkerboard pattern emerged following early land grants from the United States to private railroad companies, which was needed to build the transcontinental railroad and help facilitate the settlement of the American West.

The history of these railroad grants are discussed by the Supreme Court in *Leo Sheep Co. v. U.S.*, 440 U.S. 668 (1979), by the Montana Supreme Court in *Yellowstone River, LLC v. Meriwether Land Fund I, LLC*, 2011 MT 263 (2011), and more recently by this Court in *Estate of Finnegan v. United States*, 2 F. 4th 793, 795 (9th Cir. 2021).

Relevant here, the Northern Pacific Railroad Company Land Grant Act of 1864 gave the Northern Pacific Railroad a right of way “through public lands to construct a railroad and telegraph line from the Great Lakes to the Pacific Coast, specifically from Lake Superior in Minnesota to Puget Sound in Washington.” *Estate of Finnegan*, 2 F. 4th at 795 (citing Act of July 2, 1864, 13 Stat. 365). The lands surrounding the railroad’s right-of-way – including lands within the Crazy Mountains – were divided into sections with odd-numbered sections granted to the railroad and even-numbered sections reserved by the United States. *Yellowstone River*, 2011 MT 263, ¶ 10; *see also Leo Sheep*, 440 U.S. at 672 (describing a similar railroad grant). The land granted to railroad was usually surrounded by public land sections, and vice versa. *Id.* This, in turn, created the “checkerboard land-grant scheme” that exists today throughout much of the American West, including in the Crazy

Mountains. *Yellowstone River*, 2011 MT 263, ¶ 5 (citing *Leo Sheep*, 440 U.S. at 670-72).¹

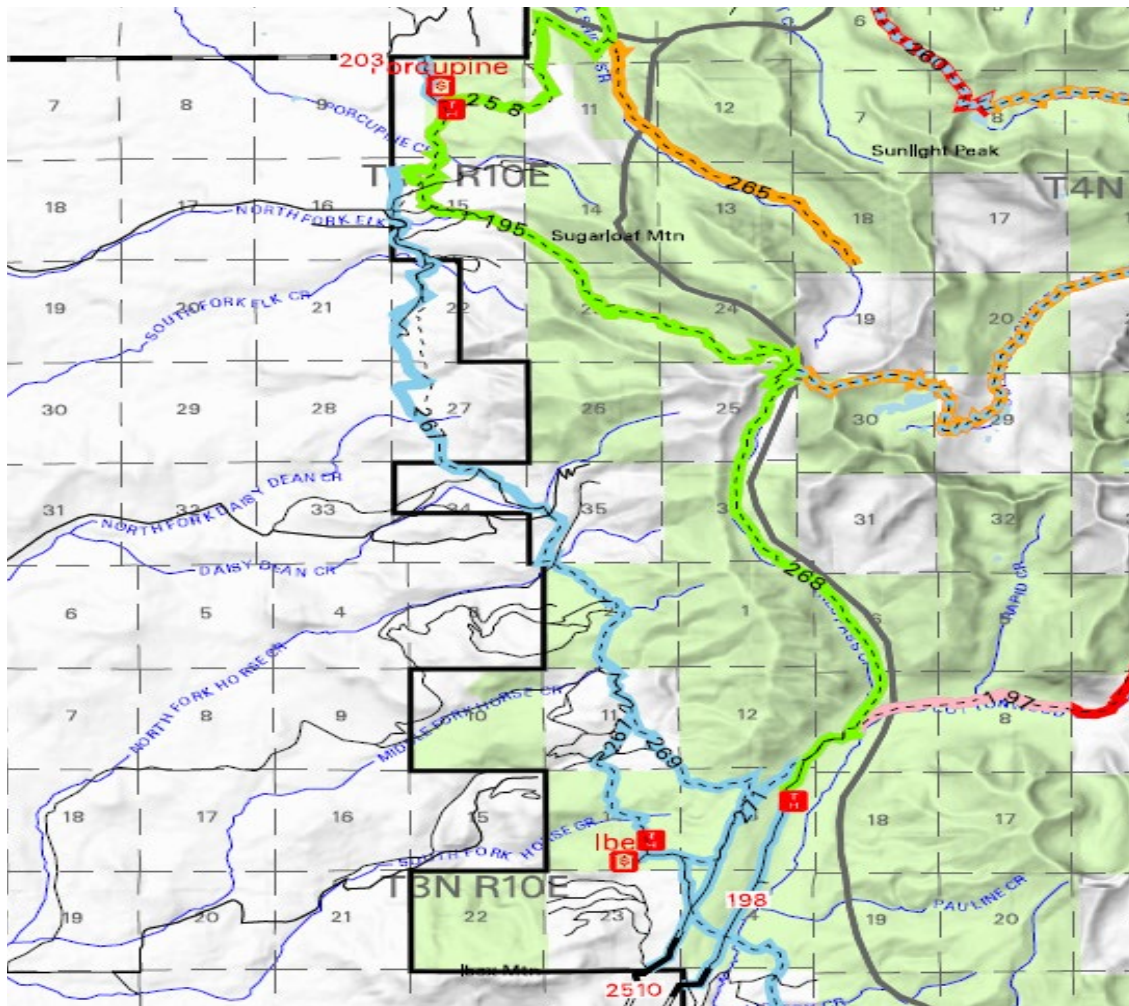
Following this “land disposal era,” there was a major shift in Federal land policy away from this era and towards the reservation and protection of lands that remained in the public domain for public use, including the even sections reserved from the railway grants. 3-ER-0344, 0345. The National Forest System and later the Gallatin National Forest emerged from this shift and the passage of the Forest Reserve Act of 1891. *Id.* The Gallatin Forest Reserves were established in 1899 by Presidential Proclamation and in 1906 President Theodore Roosevelt established the Crazy Mountains Forest Reserve by proclamation for the “use and benefit of the people.” *Id.*; 2-ER-0052. In 1912, the Crazy Mountains and neighboring Yellowstone National Forest became the Absaroka National Forest. 3-ER-0345. In 1945, the Absaroka National Forest was abolished and those lands merged into the Gallatin National Forest. *Id.* When the Gallatin National Forest was established in 1945 over

¹ Congress divided public lands into “townships.” *Yellowstone River*, 2011 MT 263, ¶ 6. Townships are typically six square-miles and are identified relative to an east-west base line and north-south principal meridian. *Id.* (citation omitted). Townships are then subdivided into 36 tracts called “sections.” *Id.* Each section is roughly one square-mile or 640 acres. *Id.*

400,000 acres of intermingled private “checkerboard” lands existed within the boundary. *Id.*

II. The Porcupine Lowline and North Fork Elk Creek trails.

Within the Crazy Mountain’s checkerboard landscape there are a number of historic roads and trails that were established back in the late 1800s and early 1900s. 3-ER-0327. These roads and trails emerged after ownership was eventually transferred from the railroad companies to other private companies who managed these lands mainly for timber, cattle grazing, and other commodity uses. 3-ER-0343, 0344. Since that time, the historic roads and trails on these lands have been “maintained, signed, and used for Forest Service management purposes and public recreational activities.” 3-ER-0327, 0328. Two such trails on the western edge of the Crazy Mountains are the Porcupine Lowline trail (No. 267) depicted in blue (below) and the North Fork Elk Creek trail (No. 195) depicted in green:



2-ER-0324.

The North Fork of Elk Creek trail is a nearly century old trail that splinters off of the Porcupine Lowline trail in Section 15 and provides access to the high-country, including the popular Campfire Lake. 4-ER-0700. The North Fork of Elk Creek trail has been depicted on National Forest and visitor use maps for the Crazy Mountains dating back to 1937. 5-ER-0916.

The Porcupine Lowline trail is also a public, National Forest trail that dates

back to the early 1900s. 4-ER-0681. This trail crosses both public and private lands “and has existed and been continuously used by the public for a wide array of recreational and subsistence purposes for decades, if not centuries.” *Id.* The Forest Service has “actively and continuously invested decades of taxpayer funds into the signage and maintenance of the [Porcupine Lowline trail]” and it was “used by turn-of-the (last)-century forest rangers stationed in the Ibex, Porcupine, and other historic forest guard stations.” *Id.* This trail is part of the historic lowline trail system that encircled the Crazy Mountains and connected Forest Service guard stations in what was then called the Absaroka National Forest. *Id.* As explained by the District Ranger in 2013, a “1937 printing of the Absaroka National Forest map hangs in the Ranger Station here in Livingston and clearly shows this public travel route, as well as the historic guard stations it connected.” *Id.*

Many of Friends of the Crazy Mountains’ members and supporters value and have used the Porcupine Lowline trail for generations, often for big game hunting, hiking, or skiing. The trail’s location in the lowlands and across open meadows and gentle pitch made it a popular trail for hunters seeking to access public lands and areas that provide important big game security along the western front of the Crazy Mountains. *See* 4-ER-0819 (describing the importance of the trail to big game hunters); *see also* 5-ER-1009-1012 (fifth generation Montanan explaining how much

he values and has used the Porcupine Lowline trail since 1968); 4-ER-0881 (same); 5-ER-1048 (discussing interests in the Porcupine Lowline trail); 5-ER-1027 (declaration noting similar interests in the trail).

III. The 1987 forest plan.

In 1987, the Gallatin National Forest adopted a forest plan which included the Crazy Mountains. 2-ER-0081. The forest plan guides all management activities and establishes management direction for the Gallatin National Forest, including the Crazy Mountains. 2-ER-0085. The goals of the forest plan included, among other things, providing additional public access to public lands and providing a National Forest System road and trail management program that is responsive to management needs. 2-ER-0089, 0090. The Porcupine Lowline and North Fork Elk Creek trails were part of this trail management system. These two trails were also part of the forest plan's "Forest Travel Map" which was produced to display "recreational opportunities and restrictions for roads, trails, and areas." 2-ER-0122, 0123. The Forest Service also stated that trailhead parking facilities will be built at the end of some roads and that recreational trails "will be provided to allow safe public access and to increase opportunities for natural area interpretation and winter sports." 2-ER-0090. In addition, the agency emphasized that all "[e]xisting roads and trails will be maintained consistent with management area goals." 2-ER-0116. These existing

trails included the Porcupine Lowline and North Fork Elk Creek trails. 2-ER-0122; 2-ER-0123; 5-ER-0921.

IV. The 2006 travel plan EIS.

In 2005 the Forest Service promulgated the Travel Management Rule which directed the agency to prepare travel plans that designate all areas, roads, and trails for motorized use and travel. 36 C.F.R. § 212.53. These designated roads and trails would then be identified on a “motor vehicle use map” made available to the public. 36 C.F.R § 212.56.

In response, the Forest Service prepared a travel plan for the Gallatin National Forest and Crazy Mountains in 2006, along with a related EIS in accordance with NEPA. 2-ER-0124. The 2006 travel plan EIS considered and evaluated seven alternatives with varying levels of routes and areas open and available for motorized use. 2-ER-0136-0139. Ultimately, the Forest Service chose Alternative 7-Modified (7-M) as its final travel plan decision. 2-ER-0202. This new, final travel plan decision (Alternative 7-M) included specific management direction for the Porcupine Lowline and North Fork Elk Creek trails, as well as maps and a

“route table” listing various “allowable” or “emphasized” uses for each trail. 2-ER-0181, 0183.²

The travel plan designated the Porcupine Lowline trail for the “emphasized” uses of motorcycles (with seasonal closure), mountain biking, hiking, and cross-country snowshoeing. 2-ER-0183. The travel plan designated the North Fork Elk Creek trail for the “emphasized” uses of mountain biking, hiking, cross-country snowshoeing and stock use. *Id.* The Forest Service published a final map for its travel plan decision depicting these two trails as open for these uses. 2-ER-0324. The Forest Service also published a motor vehicle use map showing the Porcupine Lowline trail open for reasonable motorized use in accordance with the travel plan. 2-ER-0197.

V. The 2009 roads and trails EA.

In 2008 the Forest Service announced plans to implement the route designations and improvement projects included in the 2006 travel plan. 3-ER-0372. The agency clarified that this improvement work simply implements the route designations already included in the 2006 travel plan and, as such, other decisions regarding “appropriate public uses” of the roads and trails will not be revisited. *Id.*

² An “emphasized” use on a road or trail is an “indication that the Forest Service believes that it is a good opportunity and will manage the route for that use.” 2-ER-0210. If a use is “allowed” then the “use is permitted but the Forest Service would not actively manage for it.” *Id.*

As explained by the Forest Service, the 2009 EA does not change the “amount, type, or general location of recreational activities” already provided in the 2006 travel plan decision. 3-ER-0393. For this reason, the 2009 EA does not change the “effects” already disclosed in the EIS for the 2006 travel plan, *id.*, and the decisions already made in the 2006 travel plan would not be “re-visited” in the 2009 EA. 3-ER-0372; *see also* 3-ER-0406 (same).

In the 2009 EA, the Forest Service evaluated two alternatives: Alternative 2 was the requisite “no action” alternative and Alternative 1 included a host of improvement projects approved in the 2006 travel plan but still needing to be implemented (and subject to a site-specific analysis). 3-ER-0407. Such projects included construction of new trails identified in the 2006 travel plan, construction of other trail segments, reconstruction of existing roads and trails, construction and reconstruction of trailheads and parking facilities, and various road surfacing and stabilization projects. 3-ER-0404.

The improvement work described in Alternative 1 for the general “Porcupine Area” included a proposal to remark and reconstruct the Porcupine Lowline trail. 3-ER-0413. The Forest Service noted that currently the trail passes “through large portions of private lands with fences, gates, past harvest and road building and needs to be remarked and reconstructed.” 3-ER-0413. Such work was needed because, as

noted by the Forest Service, under the 2006 travel plan the Porcupine Lowline trail is to provide “opportunities for motorcycle, mountain bike, stock and foot use.” *Id.*

In the 2009 EA, the Forest Service also mentioned – for the first time – a future proposal to possibly relocate portions of the Porcupine Lowline trail between the Ibex and Porcupine trailheads. *Id.* The Forest Service said that some “portions of the trail may be shifted onto National Forest land to the east.” *Id.* The general vicinity of the area and proposed trail re-route was included in the 2009 EA, 3-ER-0600, but the specific location and design of a new, relocated trail or when it would be built was not provided (or known) because it was simply an aspirational plan back then. *Id.* In the meantime, the Forest Service said that it intended to “continue to maintain” the Porcupine Lowline trail for existing uses as it had in the past. 3-ER-582. In April 2009 the Forest Service signed a final decision notice for the improvement work included in the 2009 EA. 4-ER-0634.

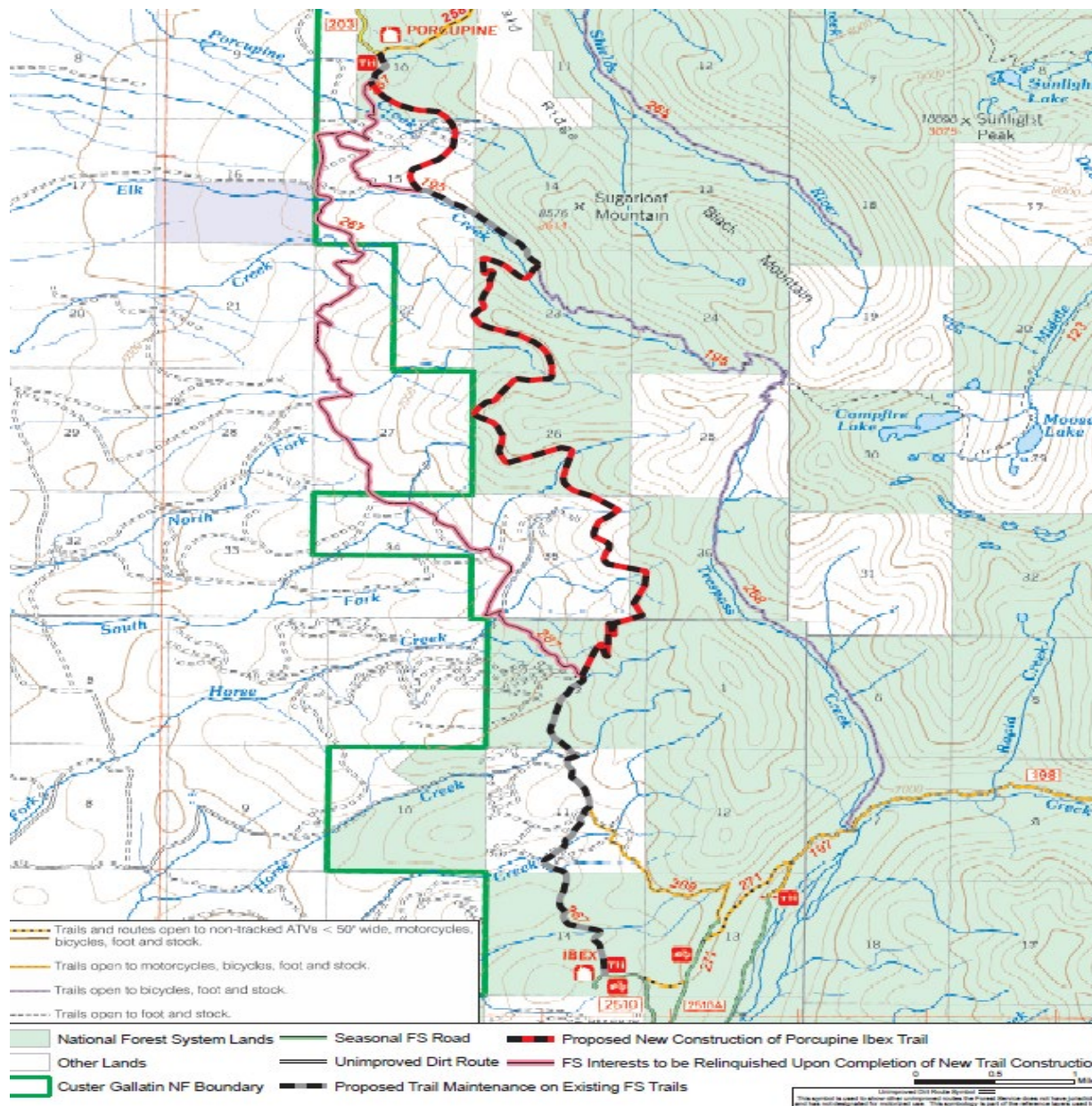
VI. The 2020 Ibex project.

In 2018, and following private meetings with landowners and other *invited* stakeholders, the Forest Service issued a public scoping notice for the Ibex project. In the scoping notice, the Forest Service explained that the project was designed to provide “quality recreational opportunities” and “resolve a longstanding dispute” with private landowners along the Porcupine Lowline trail. 4-ER-0698.

The Forest Service explained that although the Porcupine Lowline trail is a National Forest System trail designated for public use under the 2006 travel plan and has been on visitor use maps (since the early 1930s), disputes nonetheless have existed with landowners who have removed Forest Service signs and trail markers and attempted to block public access on the trail. 4-ER-0702; *see also* 4-ER-0681, 0688, 0690 (documenting disputes). The Forest Service said this is largely because its easement interests in the trail are only prescriptive in nature, i.e., there are purportedly no written or recorded deeds for public easements and use of the Porcupine Lowline or North Fork Elk Creek trails. 4-ER-0702; *see also* 4-ER-0695 (discussing Forest Service position on similar trail).

In the scoping notice, the Forest Service explained that the project involved four components: (1) closing and then obliterating portions of the Porcupine Lowline trail and Elk Creek trails; (2) relinquishing the Forest Service's (and public's) easement interests on roughly 8-miles of the Porcupine Lowline trail in Sections 15, 22, 27, 34, 35 and lower portions of the North Fork Elk Creek trail in Section 15; (3) constructing approximately 8-miles of new non-motorized trail (open to mountain bikes, stock, and hiking) on National Forest lands to the east; and (4) securing roughly 2.5-miles of new permanent easements from landowners to accommodate segments of the new trail that cross private lands. 4-ER-0698. A map

depicting the proposed IbeX project was provided to the public:



4-ER-700. In the scoping notice, the Forest Service also explained the sequencing of events: once the agency completes building the new trail and secures and records the new easements for it (from the private landowners), it will then relinquish its easement interests on the existing Porcupine Lowline and North Fork Elk Creek

trails. 4-ER-0698. The agency explained that, once completed, the Ibex project will provide a new (and additional) connection between the Forest Service's Porcupine and Ibex cabins. *Id.* The new trail will also be designed and engineered for new "non-motorized" standards, including for mountain biking and closed to motorized use (unlike the old Porcupine Lowline trail). *Id.*

In the scoping notice, the Forest Service explained that it would accept public comments on the proposed Ibex project for 30 days, 4-ER-0699, and that it had yet to decide on the appropriate level of NEPA analysis for the project, i.e., whether to issue a categorical exclusion ("CE"), EA, or EIS, 4-ER-0705, except to say that it anticipated not preparing an EIS and that other similar trail projects utilized a CE. 4-ER-0706.

In response, the Forest Service received roughly 80 comments on the proposed project. 4-ER-0755-0896. Some commenters supported the proposal but the majority did not. *See id.* Generally, public concerns were raised about giving up the important, historic Porcupine Lowline trail which had been built and maintained by the Forest Service and used and valued by locals and other recreationalists for generations (if not a century). 4-ER-0821, 0831, 0835, 0837, 0852, 0848, 0881, 0895. Other concerns were raised about potential effects to wildlife habitat, including big game security which would be directly affected by the

location of the new trail re-route. 4-ER-0770, 0775, 0819, 0828, 0832, 0883.

Concerns were also raised about impacts to fisheries and other aquatic resources, mainly due to building a new trail across streams inhabited by native Yellowstone Cutthroat Trout. 4-ER-0792, 0885.

During scoping, some members of the public also challenged the Forest Service's assumption that it did not have recorded or written public easements on portions of the Porcupine Lowline and Elk Creek trails and provided copies of a Northern Pacific Railroad deed in Section 15 (near the trailhead and where the two trails are being released) for support. 4-ER-0789; *see also* 4-ER-0896 (same).

Questions were also raised about the how the project would affect public easement interests included in the railroad deeds and Forest Service's authority to relinquish or release these important, public easement interests in Section 15. 4-ER-0782, 0860, 0894. Others raised concerns about moving forward with the project in the absence of an environmental analysis and noted, at the very least, the need to carefully consider and evaluate a reasonable range of alternatives in an EA (and not use a CE). 4-ER-0823, 0831, 0844, 0853, 0885, 0887, 0892.

In the end, the Forest Service never publicly responded to these concerns, nor any of the issues raised during the scoping process on the Ibex project. Instead, the Forest Service abruptly "cancelled" the NEPA process, 5-ER-0908, and confirmed

that there would be no “new decision” for the Ibex project because – according to the agency – it determined the project was already covered by the 2006 travel plan EIS and decision and the 2009 EA. 5-ER-0909. In other words, the Forest Service would move forward with the Ibex project and do so without preparing a CE, EA, or EIS as required by NEPA. 5-ER-0910.

VII. The proceedings below.

In 2019, Friends of the Crazy Mountains challenged the Forest Service’s approval of the Ibex project, alleging violations of NEPA and other laws. 5-ER-1060.³ In the district court, Friends of the Crazy Mountains initially moved for a preliminary injunction seeking to enjoin implementation of the Ibex project pending review by the district court. 5-ER-1061. This motion was denied. *Id.* While this case was pending, the Forest Service completed the easement exchange necessary for the Ibex project with the private landowners, 5-ER-0941-0954, which was contrary to the Forest Service’s earlier statement that the easement exchange would not occur until after completion of the trail work. 4-ER-0698. This forced Friends of the Crazy Mountains to file a supplemental complaint to join the landowners and

³ Friends of the Crazy Mountains also alleged violations of the Federal Land Policy Management Act related to the easement exchange for the project, as well as violations of the National Forest Management Act related to non-compliance with the forest plan and 2006 travel plan. They have elected not pursue these claims on appeal.

ensure complete relief could be granted. 5-ER-1064. The district court agreed and the private landowners joined in the case. 5-ER-1066.

Following the filing the administrative record, the parties filed cross-motions for summary judgment. In February, 2022 the magistrate issued findings and recommendations against Friends of the Crazy Mountains on all claims. 1-ER-0049. A month later, the district court issued a final order and judgment adopting “in full” the magistrate’s findings and recommendation. 1-ER-0021. The district court held that the Forest Service fully complied with NEPA when approving the Ibex project. *Id.* Friends of the Crazy Mountains now appeal the district court’s final order and judgment.

STANDARDS OF REVIEW

This Court reviews a district court’s grant of summary judgment *de novo*. *Greater Yellowstone Coal. Inc. v. Servheen*, 665 F.3d 1015, 1023 (9th Cir. 2011). This challenge is brought under the APA, which directs courts to hold unlawful and set aside agency action found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A). Under the APA, a court must not substitute its judgment for that of the agency but it must nonetheless engage in a “thorough, probing, in-depth review.” *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971). Courts must “ensure that the agency considered

the relevant factors and articulated a rational connection between the facts found and the choices made.” *Greater Yellowstone*, 665 F.3d at 1023 (quoting *Nw. Ecosystem All. v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007)). An agency’s action is arbitrary if it “relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc., v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

SUMMARY OF THE ARGUMENT

The Forest Service’s approval of the Ibex project violated NEPA. After putting the project out for scoping, the Forest Service abruptly cancelled the NEPA process. The agency incorrectly maintained the project was already included and analyzed in two previous NEPA documents: the 2006 travel plan EIS and decision and the 2009 EA implementing the travel plan. This finding is arbitrary and capricious and not supported by evidence in the record.

The Ibex project was not (and could not have been) addressed and analyzed in the 2006 travel plan EIS or 2009 EA. The 2006 travel plan designated the Porcupine Lowline and North Fork Elk Creek trails for public, recreational use (not closure)

and did not include any detailed information on the Ibex project or its proposed trail re-route, easement exchange, or trail closures. At most, the 2009 EA contemplated a future re-route in a general area but it was purely aspirational in nature, i.e., the agency said only that it may move the trail at some future date. The Forest Service's decision to forgo NEPA for the Ibex project was thus a mistake and the agency has yet to: (1) analyze the effects of the Ibex project on recreational interests, public easements reserved in railway deeds, wildlife habitat, or fisheries; or (2) analyze a reasonable range of alternatives for the project.

ARGUMENT

I. The Forest Service violated NEPA.

NEPA “promotes its sweeping commitment to ‘prevent or eliminate damage to the environment’ . . . by focusing Government and public attention on the environmental effects of proposed agency action.” *Marsh v. ONRC*, 490 U.S. 360, 371 (1989). By so doing, “NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.” *Id.* “Ultimately, of course, it is not better documents but better decisions that count.” 40 C.F.R. § 1500.1(c). NEPA strives to avoid “uninformed – rather than unwise – agency action.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-351 (1989).

Central to NEPA's purpose is ensuring adequate public participation in the decision-making process. NEPA's process is designed to ensure that "the agency will inform the public that it has indeed considered environmental concerns in its decision-making process." *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 97 (1983). For this reason, NEPA's regulations require agencies make diligent efforts to involve the public from the very beginning and throughout the process. *W. Watersheds Project v. Zinke*, 441 F. Supp. 3d 1042, 1059 (D. Idaho 2020). Federal agencies must, to the "fullest extent possible," implement procedures to make the process "more useful" to the public and "[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment." *Id.* at 1069-70 (citing 40 C.F.R. §§ 1500.2(b),(d)). It is thus imperative that environmental information be made available to public officials and citizens before decisions are made and before actions are taken. *Id.* at 1070 (citing 40 C.F.R. § 1500.1(b)).

The NEPA process begins with scoping. Scoping is designed to determine the "scope of the issues to be addressed" and identify the "significant issues related to the proposed action." 40 C.F.R. § 1501.7. Scoping is "an integral part of [the] environmental analysis" because it includes "refining the proposed action . . . identifying preliminary issues, and identifying interested and affected persons." 4-ER-0712. Scoping must also be done early and remain an "open process" in order to

identify the relevant and significant issues related to the proposed action. 40 C.F.R. § 1501.7; *see also* 4-ER-0712-0713(Forest Service Handbook discussing same).

The Forest Service’s guidance directs that scoping be completed for *all* “proposed actions” including those that would appear to be categorically excluded (“CE’d”) from further analysis or those for which an EA or EIS is prepared. 36 C.F.R. § 220.4(e)(1). The Forest Service thus uses the scoping process early on to determine which level of analysis to complete. 4-ER-0712-0713. Following scoping, the Forest Service will prepare an EIS if the proposed action results in (or may result in) significant effects. 4-ER-0726. The Forest Service prepares an EA for all other proposed actions not CE’d from documentation and “for which the need for an EIS has not been determined.” 36 C.F.R. § 220.7(a).

Under NEPA, an EA and EIS must include an analysis of the environmental effects of a proposed action (direct, indirect, and cumulative). 40 C.F.R. § 1502.14. An EA and EIS must also evaluate a reasonable range of alternatives, which is considered the “heart” of the NEPA analysis because it presents “impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options.” 40 C.F.R. § 1502.14. A proposed action can only be CE’d from an environmental analysis if there are “no

extraordinary circumstances related to the proposed action” and if the action fits within certain, defined categories. 36 C.F.R. § 220.6; 4-ER-0727.

For the Ibex project, the Forest Service initiated scoping, received roughly 80 comments (the majority of which opposed it), but then abruptly cancelled the NEPA process without preparing a CE, EA, or EIS. 5-ER-0908. The Forest Service informed the public that a NEPA analysis was unnecessary based on the incorrect assertion that the project was already included and evaluated in the 2006 travel plan EIS and 2009 EA. 5-ER-0909-0910. As outlined below, this decision and the Forest Service’s approval of the Ibex project violated NEPA because: (1) the project was not included and analyzed in previous NEPA analyses; (2) the Forest Service never analyzed the effects of the Ibex project on recreational interests, public easement interests reserved in the railway deed, big game and other wildlife, or fisheries; and (3) the Forest Service never analyzed a reasonable range of alternatives for the Ibex project.

A. The Ibex project was not included in earlier NEPA analyses.

The Forest Service insists no NEPA analysis, i.e., no EA or EIS or even a lesser CE, is required for the Ibex project because it was already addressed and analyzed in the 2006 travel plan EIS and 2009 EA implementing the travel plan. 5-ER-0909. This is incorrect.

The 2006 travel plan designated a road and trail system for public, recreational use in the Crazy Mountains and the travel plan's related EIS evaluated the effects of *that decision* and seven alternatives. See 2-ER-0198 (travel plan decision); 2-ER-0124 (travel plan EIS). The 2006 travel plan identified each National Forest road and trail available for public use and specified the types of uses that would be allowed and managed for on them, i.e., motorized use, ATVs, biking, hiking, horseback, snowmobiling, etc. 2-ER-0204. After evaluating seven alternatives in the travel plan EIS, the Forest Service settled on Alternative 7-M as its final decision, 2-ER-0202, and provided details on the nature of and reasons for the decision. 2-ER-0208.

Relevant here, the final decision – Alternative 7-M – designates the Porcupine Lowline trail for recreational use with an “emphasis” on the use of motorcycles (with seasonal closure), mountain biking, hiking, and cross-country snowshoeing. 2-ER-0183. Because the Forest Service chose to emphasize seasonal motorcycle use on the Porcupine Lowline trail this route is also depicted on the agency's motorized use map. 2-ER-0197. On the North Fork Elk Creek trail, the final travel plan decision emphasizes the uses of mountain bikes, hiking, and cross-country snowshoeing. 2-ER-0183. The Forest Service explained that this travel plan decision was aimed at providing for a variety of recreational uses and experiences on the western slope of

the Crazy Mountains, including hiking, horseback riding, and hunting but also seasonal motorcycle use on the Porcupine Lowline trail. 2-ER-0249. The Forest Service wanted to “provide a north-south motorcycle route on the west side of the Crazy Mountains.” 2-ER-0250.

This travel plan decision, therefore, bears *no resemblance* to the Ibex project. Instead of giving up large portions of the Porcupine Lowline and North Fork Elk Creek trails, the travel plan designates them for public, recreational uses. Instead of building a new trail re-route and exchanging easement interests with landowners, the travel plan committed the Forest Service to manage the two trails for specific, designated uses in their existing locations. As such, there was no analysis (let alone mention of) closing the trails, building new trails, or exchanging easement interests with private landowners.

In the travel plan decision, the Forest Service does explain in a few sentences that it would likely look for opportunities *in the future* to re-route this trail “to get more of it on national forest land.” 2-ER-0250. This was due, in part, to the “checkerboard ownership” pattern and easements across private property underlying the existing Porcupine Lowline trail. 2-ER-0249. But these few sentences are all there is – i.e., simply a short reference to a future, very general, aspirational plan to possibly re-route the trail that was not included or analyzed in the EIS and not part

of the travel plan decision or Alternative 7-M. This quick reference does not even come close to capturing the four-part Ibex project as approved by the agency. *See, e.g., Kern v. BLM*, 284 F.3d 1062, 1074 (9th Cir. 2002) (similarly rejecting agency's reliance on two sentence statement in old document to satisfy NEPA).

Indeed, this is why no further details or analysis are provided in either the travel plan EIS or travel plan decision. The focus rather, was on managing both the Porcupine Lowline and North Fork Elk Creek trails for their emphasized and allowable uses in their existing locations. 2-ER-0183. And, in terms of future management of the trails, while the Forest Service mentioned the possibility of “looking for ways” to reroute the trail and put it on National Forest System lands, it was largely focused on protecting, securing, and perfecting its existing access rights on the existing trails across private land sections. 2-ER-0250; *see also* 2-ER-0181 (map depicting decision); 2-ER-0324 (same).

Accordingly, *nowhere* in the travel plan EIS, the seven alternatives evaluated, or in the final decision (Alternative 7-M) or related documents is there any mention or analysis of the Ibex project. There is no mention or analysis of closing and obliterating roughly 8-miles of the existing Porcupine Lowline and Elk Creek trails and then removing them from all Forest Service and visitor use maps. There is no mention or analysis of relinquishing the public's easement interests on these two

historic trails or securing roughly 2.5-miles of new easements from private landowners to accommodate new trail construction in Section 15. There is no mention or analysis of giving up public easement interests reserved in the railway deeds in Section 15. Nor is there any mention or analysis of constructing roughly 8-miles of new trail, largely on National Forest System lands to the east. The Forest Service's reliance on the 2006 travel plan EIS and decision is therefore misplaced.

The Forest Service's reliance on the 2009 EA is equally unavailing. The 2009 EA is solely designed to implement the improvement projects included in the 2006 travel plan. 3-ER-0372. So, on its face, the 2009 EA cannot include *new* projects not already included in the travel plan. As explained by the agency, the 2009 EA simply implements another phase of the 2006 travel plan by analyzing the effects of "improvement work" already detailed and analyzed in the 2006 travel plan. 3-ER-0403. The Forest Service emphasized that decisions regarding the specific road and trail designations and appropriate public uses of them were already made in the 2006 travel plan and will not be "reconsidered" in the 2009 EA. 3-ER-0406. The "scope of the decision to be made through this [2009] EA does not include re-visiting the decisions made in the [2006] Travel Plan." 3-ER-0595.

For example, the 2009 EA included two alternatives: Alternative 1, the proposed improvement work to implement the travel plan, and Alternative 2, the no

action alternative (i.e., no improvement work). 3-ER-0407. When discussing the potential effects of Alternative 1 on recreational opportunities, the Forest Service explained there were no new effects beyond what was already analyzed and disclosed in the 2006 travel plan EIS: “these projects [in the 2009 EA] will have no effects that were not disclosed in the FEIS for the travel plan decision in 2006” because the 2009 EA does not change the “amount, type, or general location of recreational activities” already provided in the 2006 travel plan decision. 3-ER-0393.

Much like Alternative 7-M in the 2006 travel plan decision, Alternative 1 in the 2009 EA does broadly *contemplate a possible, future* trail re-route in the Porcupine Lowline area, including potentially moving the Porcupine Lowline trail further east onto National Forest lands. 3-ER-0413. And, unlike the 2006 travel plan decision, a few more details about the possible future trail re-route are provided. But as with the 2006 travel plan, this future re-route was purely aspirational in nature and focused solely on a possible trail re-route in a general area (and this aspirational plan only covered the trail re-route, not all aspects of the Ibex project including the easement exchange and relinquishment of existing trails). *See id.*

In the 2009 EA, the Forest Service explains that the “proposal for the Porcupine area is to relocate portions of the Porcupine Lowline trail (No. 267) between the Ibex and Porcupine trailheads to correspond to final rights-of-way.” 3-

ER-0413. At the time, however, the specific location and design of a new, relocated trail was not known or included in the 2009 EA because it was simply a future proposal. *Id.*; *see also* 3-ER-0600 (map showing general vicinity of possible, future re-route).⁴

Additionally, in the 2009 EA the Forest Service said only that “[s]ome portions of the trail *may be* shifted onto National Forest land to the east.” 3-ER-0413 (emphasis added). Which portions of the trails were never disclosed or discussed in the 2009 EA and the Forest Service never committed to do anything in the NEPA document. The agency said only that it “may” relocate the trail at some yet-to-be-determined future date onto National Forest lands to the east, or it may not. This is the only reference to something remotely relevant to one part of the four-part Ibex project (the trail re-route), i.e., an aspirational plan to potentially shift the location of a trail east at some future date.

⁴ In the district court, the Forest Service described the area for the possible, future trail re-route, *see* 3-ER-0600, as a “narrow corridor.” But this area is an over two-mile wide swath of public and private land that encompasses thousands of feet of vertical relief and diverse flora, fauna, and environmental conditions (*see* 5-ER-0994) and no specifics or details about the design of the trail or the work to be completed in this broad area is provided. Nor could it be in the absence a specific plan or proposal at the time of the 2009 EA.

This is why there is no specific information on what portions of what trails will be moved, whether it includes both the Porcupine Lowline and North Fork Elk Creek trails, and when or whether it will actually occur. Also missing from the 2009 EA is any analysis or specific information on where the trail will be located (besides a general vicinity between two points), its design, or its designated uses or what will happen to the existing Porcupine Lowline trail. There is also nothing about the easement exchange nor any mention of releasing the public's easement interests in the existing Porcupine Lowline and North Fork Elk Creek trails (and removing them from visitor use maps). In the 2009 EA, the Forest Service also emphasized that the Porcupine Lowline trail in its *existing location* as detailed in the 2006 travel plan would remain authorized under the travel plan for hiking, mountain biking, stock use, and motorcycles, and needed to be “remarked and reconstructed” because it passed through “large portions of private lands with fences, gates, past harvest and road building.” *Id.* As such, not only was there no mention of the easement exchange and no specifics about re-locating the Porcupine Lowline trail in the 2009 EA, the future “proposal” for the trail in the 2009 EA also included marking and improving public access on portions of the existing Porcupine Lowline trail that

passes through private land in accordance with the 2006 travel plan. This is not the Ibex project.⁵

In this case, there is thus a major disconnect between the facts found in the record – i.e., what was disclosed, addressed, and analyzed in the 2006 travel plan EIS and 2009 EA – and the Forest Service’s decision to forgo a NEPA analysis for the Ibex project. This is the hallmark of “arbitrary and capricious” action. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

B. The Forest Service never analyzed the effects of the Ibex project.

NEPA requires the Forest Service to carefully consider and analyze the effects of its proposed action. 50 C.F.R. § 1508.8. “Effects include ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect or cumulative. 4-ER-0744.

⁵ In the proceeding below, the Forest Service insisted Friends of the Crazy Mountains failed to exhaust its challenge to the Ibex project after failing to raise these issues during the comment period on the 2009 EA. But as explained above, there was nothing to exhaust back in 2009 because the agency did not commit or decide to do anything – it only contemplated a possible future trail re-route and provided no details or information or analysis on the Ibex project (as we now know it).

“Direct effects” are caused by the action and occur at the same time and place. 50 C.F.R. § 1508.8(a). “Indirect effects” are also caused by the action but are later in time or farther removed in distance. *Id.* at § 1508.8(b). These may include growth inducing effects or other effects related to induced changes in the pattern of land uses. *Id.* Cumulative effects under NEPA are the effects that result “from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative effects can result from individually minor but collectively significant actions taking place over a period of time.” 40 C.F.R. § 1508.7. Adequate consideration of cumulative effects requires federal agencies to take “a ‘hard look’ at all actions.” *Te-Moak Tribe*, 608 F.3d at 603. “Sometimes the total impact from a set of actions may be greater than the sum of the parts.” *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F. 3d 989, 994 (9th Cir. 2004). “Even a slight increase in adverse conditions that form the existing environmental milieu may sometimes threaten harm that is significant” *Grand Canyon Trust v. FAA*, 290 F. 3d 339, 343 (D.C. Cir. 2002).

When analyzing effects under NEPA, this Court has cautioned that “[g]eneral statements about possible effects and some risk do not constitute a hard look absent justification regarding why more definitive information could not be provided.”

Great Basin Mine Watch v. Hankins, 456 F.3d 955, 971 (9th Cir. 2006). Some “quantified and detailed information” on effects must be provided. *Te-Moak Tribe*, 608 F.3d at 603. “Without such information, neither the courts nor the public . . . can be assured that the agency provided the hard look that it is required to provide.” *Id.* Here, the Forest Service never considered and analyzed how the Ibex project may affect: (1) recreational opportunities; (2) public easement rights reserved in Section 15 by railway deeds; (3) wildlife (including big game); or (4) fisheries and other aquatic resources.

1. Recreational opportunities.

The Ibex project involves giving up two portions of two National Forest trails (the Porcupine Lowline and North Fork Elk Creek trails) and building a new trail re-route on public, higher elevation lands to the east. 4-ER-0698. During scoping, members of the public raised serious concerns about the potential loss of the historic and once popular Porcupine Lowline trail which provided recreational opportunities for hiking, skiing, motorized uses, and hunting. Concerns were also raised about building a new trail at a higher elevations and in steep and forested terrain important for wildlife and how that could affect hunting opportunities on public land.

For big game hunters, in particular, the historic Porcupine Lowline trail was unique and important. As explained by one hunter, the trail is in the lowlands and traverses a gentle meadow across private lands so the elk move up the mountainside and take advantage of secure areas on the timbered lands that provide hiding cover. 4-ER-0819. Importantly, these secure areas and higher timbered lands are public, National Forest lands available for all and provide important hunting opportunities. *Id.* But this will now be lost with the Ibex project because the new, higher elevation trail re-route and the new associated traffic on it (including mountain biking in the fall) will force elk herds in the area and along the western slope of the Crazies down into the lower country and on to private lands. *Id.* Hunting on private lands is by permission only so, in effect, the project will result in less public land hunting opportunities on the western slope of the Crazy Mountains. *Id.*; *see also* 4-ER-0775 (raising similar concerns and asking whether the project would “have the potential to push elk and deer off of National Forest lands?”); 4-ER-0770 (noting how the decision may affect individuals who “hunt for subsistence in the exact area slated for the trail relocation”). As one individual noted, the Ibex project would “only lead to more elk being harbored on nearby private lands [after being displaced by the new trail].” 4-ER-0883; *see also* 4-ER-0828 (noting the same).

In addition to lost hunting opportunities, other members of the public also noted that the Porcupine Lowline trail is a “one of a kind” trail in its current location. 4-ER-0837. Despite some tensions and conflict with landowners over the years, members of the public valued using the Porcupine Lowline trail for hiking, mountain biking, cross-country skiing, and motorized access and noted how many other such trails in the area had already been lost for such uses. 4-ER-0819. The public thus inquired as to why this historic trail that is used and valued for a variety of uses was being abandoned by the agency, 4-ER-0852, and how the agency was failing to address the concerns of various user groups. 4-ER-0770; *see also* 4-ER-0895 (questioning the loss of an important recreational trail used and enjoyed by mountain bikers as well as snowmobilers and motorized uses); 4-ER-0873 (urging the agency to keep the motorized use designation and existing trail in place because such opportunities are limited in this part of the state); 4-ER-0765 (urging the agency to please stop removing trails that are important for motorized access); 4-ER-0797 (same).

The Porcupine Lowline trail also provided a rare opportunity for older and/or physically challenged members of the public to use and access our public lands without having to endure a steep climb or dangerous terrain. Lou Goosey, for instance, grew up near the Crazy Mountains and from the time he was a teenager

spent at least part of the year hiking and exploring the range and using both the Porcupine Lowline and North Fork Elk Creek trails that were given up as part of the Ibex project. 5-ER-1046. He explained that losing these trails was a “big deal” for him and his family. 5-ER-1048. The Porcupine Lowline trail “is gradual and quite a nice walk, especially for older folks like me and my wife.” *Id.* He explained that the trail is “a beautiful walk that is not that difficult for someone my age. I am now in my 80s, and I and other people my age will not be able to hike the new trail.” 5-ER-1050.

Other members of the public also explained that the new trail is in an “unrealistic location” and “way too steep (especially for motorized [uses]” 4-ER-0819; *see also* 4-ER-0817 (noting that the new trail is too steep and would prevent public use). The late Tony Schoonen, longtime director of the Public Land and Water Access Association, similarly explained that the new trail re-route “will force the public to higher, steeper elevations of rock and ice conditions with trail use vastly diminished during heavy snow seasons” and the “elderly and very young couldn’t utilize it.” 4-ER-0860; *see also* 4-ER-0755 (commenter noting that he supports keeping the existing Porcupine Lowline trail because it is accessible for his 73 year old father and 15 year old son); 5-ER-1049 (noting that the new re-route is “no place

where a trail should ever be built. The area is very steep, and I believe it will wash out every year in the spring”).

From a recreational perspective, members of the public also pointed out that the new trail re-route is redundant and unnecessary: it is located in an area where there is *already* an existing National Forest trail (the Trespass trail (No. 268)). 4-ER-0819; *see also* 4-ER-0839 (noting the same); 4-ER-0700 (map). One individual who has hunted extensively in the area emphasized that “access already exists” because the existing “Trespass trail to the east provides access to the entire area the new trail would.” 4-ER-0828; *see also* 4-ER-0832 (comment noting the same). Brad Wilson, a local resident whose family has used the Porcupine Lowline and North Fork Elk Creek trails for “over 100 years,” made the same point and noted that the Forest Service is already having trouble maintaining the existing trails in the area. 4-ER-0881; *see also* 4-ER-0819 (noting the same).

Valid questions were thus raised about the recreational benefits of the Ibex project, i.e., why give up a unique and important lowline trail in gentle terrain for a new trail in the high country (in the middle of elk security) near where an existing trail (Trespass Creek) already exists? One member of the public even called out the Forest Service for misleading the public by marketing the project as a proposal to connect the Porcupine and Ibex cabins because it already exists. 4-ER-0853. “The

cabins are already connected by this historic Porcupine Lowline trail system” and the public “derives no additional benefit from this reroute proposal.” *Id.*; *see also* 4-ER-0885 (noting same). “In fact, the opposite is true” because some historic uses will be lost and no longer allowed on the new trail. *Id.*

Phil Knight from Montanans for Gallatin Wilderness explained that he and other members frequently skied on the Porcupine Lowline trail from the cabin to Elk Creek for recreation and wildlife surveys but will now lose that opportunity because the new trail will be unsafe for skiers due to “steep terrain and avalanche danger.” 4-ER-0821. The Sierra Club submitted comments agreeing with this sentiment, noting that the existing Porcupine Lowline trail’s “gentle terrain” is “more accessible to a broader group of users” and the proposed reroute would be “prohibitive for many skiers, including some graying Sierra Club members.” 4-ER-0843.

This information reveals how important and varied recreational interests are in this area of the Crazy Mountains. Yet, before approving the Ibex project, the Forest Service never considered and analyzed how the loss of the existing Porcupine Lowline trail – a trail valued by hunters, recreationalists, and others for its gentle terrain and easy access – along with a portion of the North Fork Elk Creek trail, would directly, indirectly, or cumulatively effect recreational use, opportunities, and

access in this area of the Crazy Mountains. Nor did the Forest Service consider and analyze how building the new trail in the chosen location (and for the designated uses, including mountain biking) would directly, indirectly, or cumulatively effect recreational interests, particularly public land hunting opportunities.

This is true in both the 2006 travel plan EIS and 2009 EA. As previously mentioned, the effects analysis in the 2006 travel plan EIS does not include the Ibex project because it designated the Porcupine Lowline trail and North Fork Elk Creek trail for various recreational uses (not closing and building a new trail). Nowhere in the 2006 travel plan EIS, therefore, does the Forest Service analyze the direct, indirect, or cumulative effects of the Ibex project to recreational interests. The same is true in the 2009 EA. Nowhere in the 2009 EA is there an analysis of how the Ibex project may adversely affect recreational use and interest in the Porcupine Lowline and North Fork Elk Creek trails or how building a new trail in secure big game habitat may affect recreational opportunities like big game hunting on public lands.

In fact, in the 2009 EA, the Forest Service chose to “dismiss” analyzing and addressing impacts to recreational interests on the grounds that the issue was already “addressed in the Travel Plan.” 4-ER-0626. On the issue of recreation, the Forest Service explained that the projects outlined in the 2009 EA were already addressed and analyzed in the 2006 travel plan EIS. 3-ER-0392. The recreational impacts

“revolve around the physical function and location of a road or trail” and as there are “no proposed changes to the amount, type or general location of recreation activities provided by the travel plan decision” the decision made in the 2009 EA does not “change the effects” to recreation which were already disclosed in the 2006 travel plan EIS. 3-ER-0393. This is why the 2009 EA does not include a recreational section. See 3-ER-0401 (listing resources analyzed).

As such, the Forest Service never addressed and analyzed how the Ibex project – including the new trail re-route, release and abandonment of existing trails, and easement exchange – directly, indirectly, or cumulatively effect recreational interests and uses in this part of the Crazy Mountains. This is a major oversight.

Under NEPA, agency decisions are arbitrary and capricious where the agency entirely fails “to consider an important aspect of the problem.” *Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1460 (9th Cir. 1996), *as amended* (June 17, 1996) (citing *Motor Vehicle Mfrs. Assn.*, 463 U.S. at 43); *see also, e.g., LaFlamme v. FERC*, 852 F.2d 389, 399 (9th Cir. 1988) (agency violated NEPA when failing to analyze impacts to recreational interests); *Cascade Forest Conservancy v. Heppler*, 2021 WL 641614, at *17 (D. Or. Feb. 15, 2021) (agency violated NEPA by failing to take requisite “hard look” at the proposed action's impacts on recreation).

2. Public easements reserved in railroad deeds.

One significant issue and concern that emerged from scoping on the Ibex project was the loss of public easement interests on portions of the Porcupine Lowline and North Fork Elk Creek trails. These are easement interests that were expressly reserved in the Northern Pacific Railroad deeds in certain odd sections of land, including Section 15 (Township 4 North, Range 10 East) (hereinafter “Section 15”). 4-ER-0789 (copy of deed); *see also* 4-ER-0784 (raising issue); 4-ER-0894 (same); 4-ER-0860 (same); 5-ER-0906 (summary of concerns).⁶

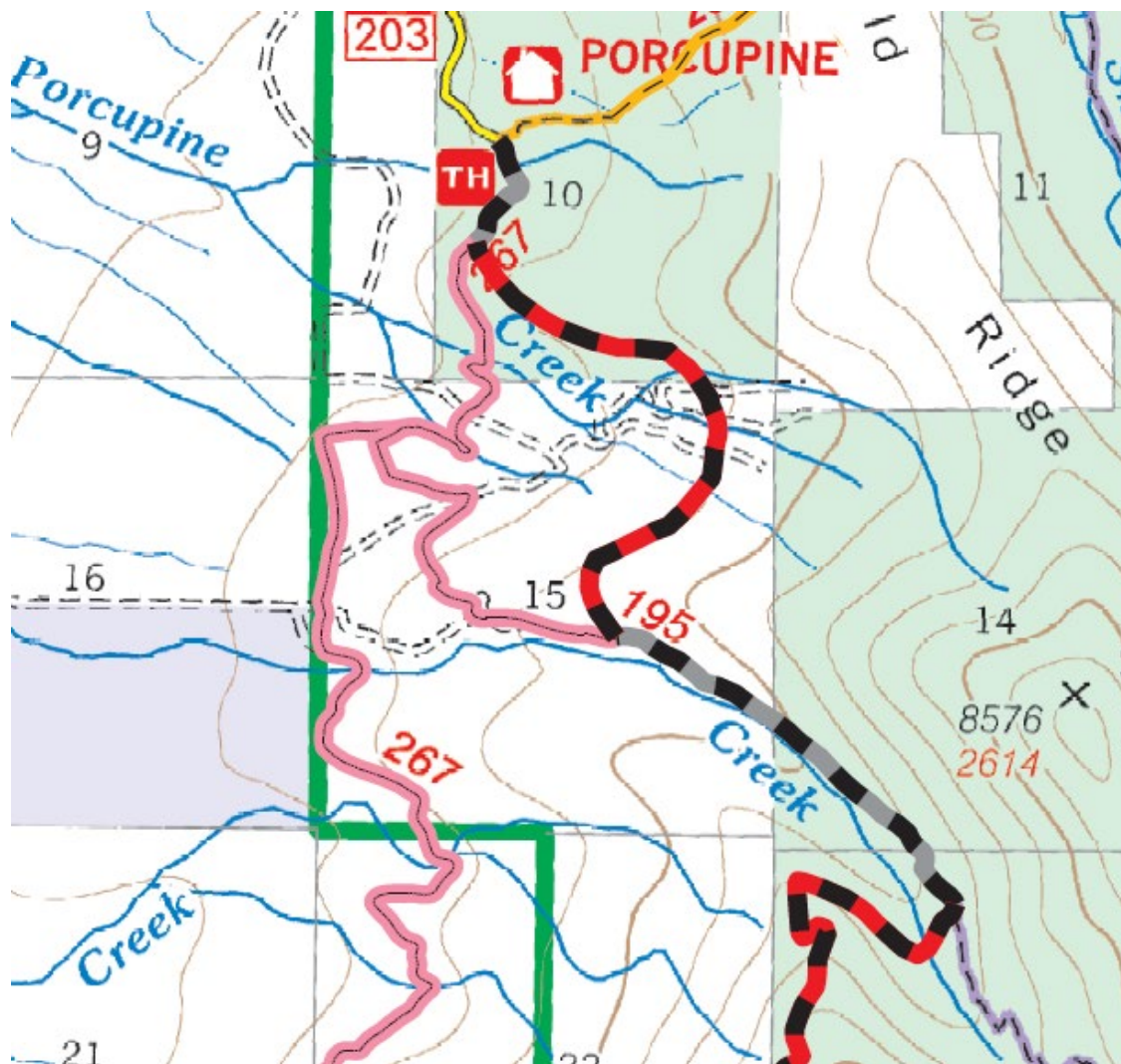
As previously explained, the United States conveyed odd sections of land in the Crazy Mountains to the Northern Pacific Railroad to help facilitate western expansion which created the “checkerboard” land ownership pattern we see today. The grant to Northern Pacific was significant: Congress ultimately gave the railroad roughly 2,128 miles of right-of-way from Duluth, Minnesota to Portland, Oregon with roughly 45 million acres of additional sections of land in a “checkerboard configuration.” 3-ER-0343. This included roughly fifteen percent of present day Montana. *Estate of Finnigan*, 2 F. 4th at 796 (citation omitted).

⁶ Other odd sections of land in the Crazy Mountains, including Sections 11, 27 and 35 in the project area also include similar public easements for all public roads. 4-ER-0894.

Within the current boundary of the Gallatin National Forest, “Congress granted an estimated 350,000 acres of ‘checkerboard’ lands to the railroad companies,” 3-ER-0343, including lands within the Crazy Mountains. In the early and mid-1900s, and following completion of the Northern Pacific railroad line, *Estate of Finnegan*, 2 F. 4th at 796, ownership of most of the odd sections of lands granted to the Northern Pacific and other railroad companies, including those in the Crazy Mountains, were sold and transferred to other subsidiaries, companies, or private individuals. 3-ER-0343.

In the Crazy Mountains, for instance, most of the original railroad lands were transferred over several decades to the Burlington Northern Railroad Company and then to its corporate subsidiary, Plum Creek Timber Company. *Id.* Throughout the 1900s, these companies managed these lands for profit “mainly through commercial timber production, grazing, and related commodity uses.” 3-ER-0344. “In so doing, the companies built a substantial amount of low standard roads across intermingled [National Forest System] and private lands . . .” *Id.* These lands were eventually sold to various private entities. Most of “the intermingled [odd] sections in the Crazies . . . were sold in the early to mid-1900s, mainly to ranchers in those areas.” *Id.*; see also *Yellowstone River*, 2011 MT 263, ¶ 20 (discussing same).

Relevant here, in 1934, the Northern Pacific sold all of Sections 15 and 23 (Township 4 North, Range 10 East) in the western Crazy Mountains – roughly 1,277 acres – to a private entity for \$3,916.17. 4-ER-0789. In so doing, however, Northern Pacific expressly reserved “an easement in the public for any public roads heretofore laid out or established, and now existing over and across any part of the premises.” *Id.* As such, the railroad deed expressly reserved public access on all “public roads” in Sections 15 and 23 and, in Montana, these types of public easement are generally upheld “as long as the deed's language sufficiently locates the easement.” *Pub. Lands Access Ass'n v. Bd. of Cnty. Comm'rs of Madison Cnty.*, 2014 MT 10, ¶ 59, 373 Mont. 277, 297, 321 P.3d 38, 50 (2014). Section 15, in particular, is central to the Ibex project because it is near the parking area and trailhead for the project and where the public easement interests in the Porcupine Lowline and North Fork Elk Creek trails (in pink) were relinquished for the project:



4-ER-0700; see also 5-ER-0943 (easement release map).

The “public roads” referenced in the Northern Pacific deeds, including the deed for Section 15, have generally been interpreted to extend to all types of public rights-of-way, including public highways, roads, and trails that existed at the time the land was transferred from the railroad – here, in 1934. The Third Edition of Black’s Law Dictionary (1933) – the edition in publication at the time the deed was conveyed for Section 15, see *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 567

(2012) (using dictionary in print at time the language was used), defined “public road” as a “highway; a road or way established and adopted . . . for the use of the general public.” 2-ER-0059. A “highway” in turn is an “easement acquired by the public in the use of a road or way or thoroughfare.” 2-ER-0057. A “public highway” includes “roads, streets, alleys, lanes, courts, trails, and bridges laid out or erected as such by the public . . .” 2-ER-0058; *see also* 2-ER-0119 (1990 memo discussing the deeds and explaining that a “public highway” is a “definitive route or way that is freely open for all to use. It need not necessarily be open to vehicular traffic, for a pedestrian or pack animal trail may qualify. A toll road or trail is still a public highway . . .”); 4-ER-0695 (Forest Service Briefing Paper discussing railroad deed when describing access rights on a trail).

This definition of “public road” in the railroad deeds is consistent with how the United States understood the term in *United States v. Van Cleve*, Case No. 1098 (D. Montana 1948). 2-ER-0060-078. In that case, the United States defined “public road” in the Northern Pacific deeds to include all public highways, roads, and trails. 2-ER-0061. This included then existing roads and trails in the Crazy Mountains. *Id.*

Notably, *Van Cleve* is instructive, because there, the United States brought an enforcement action against a private landowner on the east side of the Crazy Mountains for illegally obstructing public access on a public road and trail. 2-ER-

0063. The United States eventually obtained a preliminary injunction against the landowners which was based on the Northern Pacific Railroad deeds' reservation of a public easement on all "public roads" in the odd sections of private land. 2-ER-0070; *see also* 2-ER-0076 (discussing railroad deeds). In its amended complaint, the United States explained that the Northern Pacific deed gave it a "special right, title and interest" in the public roads and trails at issue. 2-ER-0062. The Northern Pacific deed established "an easement and right-of-way for said purposes by reason of the facts that said road and trail were established upon said land when it was in part public land of the United States . . . and in part in the ownership of the Northern Pacific Railroad Company, and its successor in interest." *Id.* Northern Pacific reserved unto "itself and the general public said public highway, road, and trail . . ." *Id.*; *see also* 2-ER-0076 (relying on railroad deed as supporting evidence).

In this case, the public submitted similar evidence to the Forest Service during scoping on the Ibex project, which revealed: (1) the Northern Pacific deeds to private landowners included the public road easement reservation in Section 15 (and other odd sections); and (2) portions of the Porcupine Lowline and North Fork Elk Creek trails in Section 15 - the two trails that were released by the Forest Service for the Ibex project - were "public roads" on the landscape at the time the Northern Pacific railway deeds were conveyed to private landowners.

The Porcupine Lowline trail, for example, was a historic two-track that connected the Forest Service's Porcupine and Ibex cabins. 4-ER-0681. As explained by the Forest Service, the 1937 map of the Crazies "clearly shows this public travel route, as well as the historic guard stations it connected." *Id.* The Porcupine Lowline trail was depicted on the 1925 forest visitor use map and has always been part of the lowline route that connected Forest Service cabins and encircled the Crazy Mountains. 5-ER-0911; *see also* 5-ER-0914 (1925 map). This trail originally "connected to the Rock Creek station (unrecorded) to the south, before the Ibex Station was established." *Id.* The trail is a "single track generally 24 inches in width, but incorporates sections of a two-track road." *Id.*; *see also* 5-ER-0898 (comment noting that since the Porcupine Lowline trail was been shown on maps since 1925, "it may very well have some public road history . . ."); 4-ER-0695 (Forest Service memorandum describing a similar lowline trail on the east-side of the Crazy Mountain and referencing the relevance of the railroad deed language).

For these reasons, during scoping on the Ibex project, members of the public raised relevant questions about the railroad deed and concerns over losing public easements on existing public roads and trails in Section 15 (and other odd sections) as a result of the Ibex project. 5-ER-0906. The public also questioned whether the Forest Service's assumption that it had no recorded or written deed for public access

on the Porcupine Lowline trail was accurate. 4-ER-0787. One individual noted that she had been “doing extensive research into Park and Sweet Grass County deed records” and explained that the same railroad deeds existed for some of the odd sections underlying the Porcupine Lowline trail, including Section 15. 4-ER-0894. She provided a copy of the Northern Pacific deed for Section 15 and then asked why the Forest Service has not addressed this subject - at all. *Id.* Another individual also provided a copy of the railroad deed for Section 15 and noted that it expressly reserved an easement for “the public” which is “broader than just the Forest Service” and, as such, questioned the Forest Service’s ability to relinquish “any access rights the public at large [has] to these routes” as part of the Ibex project. 4-ER-0782. The Forest Service was urged to address and clarify this and analyze the effects of the project on public easement rights. *Id.* The Forest Service was also urged to carefully consider and review the 1948 *Van Cleve* decision and the United States’ position in that case. *Id.* But it never did.

The agency *never* considered and analyzed the railroad deeds and how the Ibex project may effect public easement interests on the trails (that it planned to release). The Forest Service completely ignored these scoping comments. In other words, the public raised a significant issue about the Northern Pacific deeds and the potential loss of the public’s easement interests in the trails. The public also provided copies

of the deeds and asked the agency to respond and consider the effects of the project on public easement interests. But no response was provided. Nor did the Forest Service even attempt to provide a reasonable or appropriate explanation for not considering or addressing the deeds. The Forest Service chose instead to ignore the issue, the potential effects, and the existence of the railroad deed language in Section 15 altogether. This is arbitrary and a violation of NEPA. See *Wildearth Guardians v. U.S. Bureau of Land Mgmt.*, 457 F. Supp. 3d 880, 890–91 (D. Mont. 2020) (noting that the agency’s failure to provide an “appropriate explanation” in response was arbitrary and capricious).

Federal agencies must “face those stubborn, difficult-to-answer objections without ignoring them or sweeping them under the rug.” *Sierra Club v. U.S. Army Corps of Engineers*, 772 F.2d 1043, 1049 (2d Cir. 1985). Agencies cannot ignore potentially “relevant factor[s]” or “important aspect[s] of the problem.” *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43.

Indeed, the whole purpose of engaging in scoping is to identify and consider significant issues to be addressed and analyzed by the agency. 40 C.F.R. § 1501.7. As such, when certain, significant issues or crucial factors are raised in the NEPA context, the agency cannot turn a blind eye. The “omission of any meaningful consideration of such fundamental factors precludes the type of informed decision-

making mandated by NEPA.” *Found. for N. Am. Wild Sheep v. U.S. Dep't of Agr.*, 681 F.2d 1172, 1178 (9th Cir. 1982). “For an agency's decision making to be rational, it must respond to significant points raised during the public comment period. *Allied Loc. & Reg'l Mfrs. Caucus v. U.S. E.P.A.*, 215 F.3d 61, 80 (D.C. Cir. 2000) (citation omitted). The Forest Service failed to do so here.

In the proceeding below, the district court quickly rejected this claim on the grounds that Friends of the Crazy Mountains allegedly failed to identify any “specific parcel” connected to the Northern Pacific deeds or explain why they are relevant to the Ibex project. 1-ER-0019. But this is incorrect: Friends of the Crazy Mountains identified the specific, odd sections of land covered by the deeds – including Section 15 - and explained why they were relevant, mainly because they reveal the public was losing important public easement interests in portions of the trails as a result of the Ibex project. 4-ER-0894; 4-ER-0784; *see also* 5-ER-0898, 0906 (summary of concerns raised). The deeds also directly contradicted the Forest Service’s assumptions that it had no recorded or written easement for such trails. *See* 4-ER-0702.

Importantly, while precisely what the Northern Pacific deed’s reservation of an “easement in the public” means and which public roads and trails it applies to in Section 15 remains unclear and while uncertainties exist over how the project will affect any such public easement interests (or whether the Forest Service has the

authority to even release them), such ambiguity and uncertainty is solely the product of the Forest Service having never analyzed or even responded to this issue before approving the Ibex project. As this Court has previously noted, it is not the public's job to do the agency's analysis for them –that is the Forest Service's obligation under NEPA and one that should have been (but was not) undertaken before approving the Ibex project. *Te-Moak Tribe v. Interior*, 608 F.3d 592, 605-606 (9th Cir. 2010).

Compliance with NEPA “is a primary duty of every federal agency; fulfillment of this vital responsibility should not depend on the vigilance and limited resources of [the public].” *City of Carmel-by-the-Sea v. U.S. Dept. of Transportation*, 123 F.3d 1142, 1161 (9th Cir. 1997) (quoting *City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975)). Specifics “are not required.” *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1291 (1st Cir. 1996). The “purpose of public participation regulations is simply to provide notice to the agency, not to present technical or precise scientific or legal challenges to specific provisions of the document in question.” *Id.* (citation and quotations omitted).

Here, the public brought forth a relevant issue regarding the Ibex project and how it may affect the public's easement rights in Section 15 (and other odd sections). When such a dispute exists and evidence is presented to the agency that “casts serious doubt upon the reasonableness of an agency's conclusions” then

NEPA “places the burden on the agency to come forward with a well-reasoned explanation” and response. *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 736 (9th Cir. 2001) (citations and quotations omitted). “The term ‘well-reasoned explanation’ is simply a less direct way of saying that the explanation must be ‘convincing’.” *Id.* No such explanation or convincing statement of reasons was provided here.

3. Big game species (and other wildlife).

During scoping, members of the public raised concerns over adverse effects to wildlife habitat, including big game security. This is in large part due to the new trail being located “right through prime elk habitat.” 4-ER-0819. One commenter explained that the new trail will likely “destroy the natural ecosystem and elk migration in this region. Creating a trail through the proposed location will destroy the deer and elk migratory patterns by driving a manmade trail through the middle.” 4-ER-0832. Others asserted that it is “scientifically recognized that wildlife security on public lands will be negatively impacted by relocating [the Porcupine Lowline trail].” 4-ER-0770. The new trail will create “‘habitat compression’ causing avoidance by elk . . .” *Id.*; see also 4-ER-0883 (raising similar concerns about elk being displaced by the trail re-route).

As a longtime hunter in the Crazies explained, the “new trail is going to disrupt the big game that wants to live on that mountainside. The area currently provides good, secure habitat for deer and elk. A new trail used for mountain biking will threaten habitat security and disrupt an area where the game takes sanctuary . . . The more travel you have in an area, the more game has to move someplace else. Here, you’re putting a trail for mountain bikers where a trail doesn’t need to be, unnecessarily compromising habitat security.” 5-ER-1049-1050; *see also* 4-ER-0771 (noting that a recent study explored how various uses affected wildlife security and determined that mountain bike use – which is now allowed on the new trail – “ranked as the second most disruptive trail use”); 4-ER-0828 (raising similar concerns).

Montana Fish Wildlife and Parks echoed many of these concerns, noting that “recent research has shown that non-motorized activities can also impact wildlife security and use of habitat.” 4-ER-0792. The state wildlife agency therefore encouraged the Forest Service to carefully evaluate potential impacts of the Ibex project’s proposed trail re-route on habitat security for elk and other wildlife. *Id.* This sentiment was shared by others who emphasized that the action area in question is home to sensitive species, including wolverine, big game animals, smaller mammals, and “all manner of birds and other species” which demands that “the

proper NEPA process be followed.” 4-ER-0853. But the Forest Service ignored these concerns.

Indeed, the potential direct, indirect, and cumulative effects to wildlife habitat – including big game security – were never analyzed or addressed by the Forest Service before approving the Ibex project. Again, this analysis is not in the 2006 travel plan EIS. Nor could it be because, as explained above, the decision in the travel plan was to designate the existing Porcupine Lowline and North Fork Elk Creek trails for public recreational use (not abandon them and build a new trail reroute elsewhere).

The wildlife analysis is also not in the 2009 EA. In that NEPA document, there is a section called “general wildlife.” 3-ER-0462. But this section only addresses and analyzes the “effects of implementation of the Travel Plan (2006) on-the-ground over the next [five] years, beginning in 2009,” including new trail connectors specifically “identified in the Travel Plan” and other activities, i.e., restoration projects, reconstruction, new trail facilities, etc. specifically identified in the travel plan. *Id.* The Ibex project does not fall into the “general wildlife” category because, as explained, it was never part of the 2006 travel plan or related EIS. And even if one assumes, *arguendo*, it was included, there is no environmental analysis in the 2009 EA about how the Ibex project and its new trail re-route and closures of

existing trails will affect wildlife habitat and movement, including big game security *in the project area* on the west side of the Crazies. See 3-ER-0462-0479 (general wildlife section); 3-ER-0413 (Porcupine Area). In other words, there is no information or analysis on how closing the Porcupine Lowline trail (at a lower elevation and across private lands) and replacing it with a higher elevation trail in key big game habitat may affect big game habitat and security.

4. Fisheries and other aquatic resources.

The Ibex project involves new trail construction across a number of streams which have known populations of “pure Yellowstone Cutthroat trout.” 3-ER-0396; *see also* 4-ER-0853 (noting that the proposed trail re-route crosses “four creeks” home to Yellowstone Cutthroat Trout); 4-ER-0820 (noting the same); 4-ER-0775 (asking about stream crossing impacted by the new trail and whether there would be potential for sedimentation and if mitigation was planned). For this reason, Montana Fish Wildlife and Parks raised concerns about how best to avoid new, negative impacts to streambeds and banks and avoid new sources of sediment from new trail construction in the region. 3-ER-0396. But the potential direct, indirect, and cumulative effects to Yellowstone Cutthroat Trout or other aquatic resources were never analyzed or addressed by the Forest Service before approving the Ibex project.

The 2009 EA includes a section on impacts to “fisheries” and lists Yellowstone Cutthroat trout as a sensitive species that is present in the “Porcupine” region. 3-ER-0457. But this information is simply presented in a table and there is no analysis pertaining to the Ibex project itself or its proposed trail re-route across specific streams in specific areas that are home to sensitive aquatic species. *See id.* Indeed, this table in the 2009 EA refers to the impacts of the general “improvement” projects across the forest that were already authorized by the 2006 travel plan, not the Ibex project. *See id.*

Notably, *after* approving the Ibex project, the Forest Service conducted a few resource surveys to evaluate potential effects. But none of this information was submitted for public review and comment, nor included in a NEPA document. *See, e.g., Or. Natural Desert Ass’n v. Rose*, 921 F.3d 1185, 1192 (9th Cir.2019) (rejecting late analysis without any public input); *Env’tl. Prot. Info. Ctr. v. Blackwell*, 389 F. Supp. 2d 1174, 1205 (N.D. Cal. 2004) (same). This information was also produced after the Forest Service approved the project, so it is entirely *post hoc*. Courts “will not allow the agency to supply post-hoc rationalizations for its actions, so post-decision information ... may not be advanced as a new rationalization either for sustaining or attacking an agency's decision.” *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 603 (9th Cir. 2014) (internal quotations and citations omitted). This type

of post-decisional data gathering violates NEPA's very letter and purpose. *LaFlamme v. FERC*, 852 F.2d 389, 400 (9th Cir. 1988).

C. The Forest Service never considered and analyzed a reasonable range of alternatives for the Ibex project.

NEPA requires the Forest Service to “rigorously explore and objectively evaluate all reasonable alternatives.” *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008) (citation omitted). “Although ‘an agency's obligation to consider alternatives under an EA is a lesser one than under an EIS,’ *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1246, 1245 (9th Cir.2005), ‘NEPA requires that alternatives ... be given full and meaningful consideration,’ whether the agency prepares an EA or an EIS.” *Id.*

Careful consideration of alternatives is important because it presents impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options. The alternatives analysis guarantees that agencies have before them and take into account “all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance.” *Bob Marshall Alliance v. Hodel*, 852 F. 2d 1223, 1228 (9th Cir. 1988) (citations omitted).

“Informed and meaningful consideration of alternatives . . . is thus an integral part of the statutory scheme” and “critical to the goals of NEPA.” *Id.* at 1228–29.

As previously noted, the Ibex project is *not* included in the 2006 travel plan EIS or 2009 EA. Indeed, if it was, then the Forest Service would have evaluated a reasonable range of alternatives to the project, as required by NEPA, including a no action alternative, the proposed action (for the trail re-route, easement exchange, and removal of existing trails), and likely other viable alternatives that considered alternative locations, designs or uses of the trails or alternative approaches to resolve disputes with the landowners. But because the Ibex project was not addressed and analyzed in the previous NEPA analyses, the Forest Service neglected to consider and analyze the proposed action as an alternative, much less *any alternative* for the Ibex project itself or reasonable range of alternatives to it. This is a major oversight and violation of NEPA. The existence of a “viable but unexamined alternative” violates NEPA. *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1050 (9th Cir. 2013) (citation omitted).

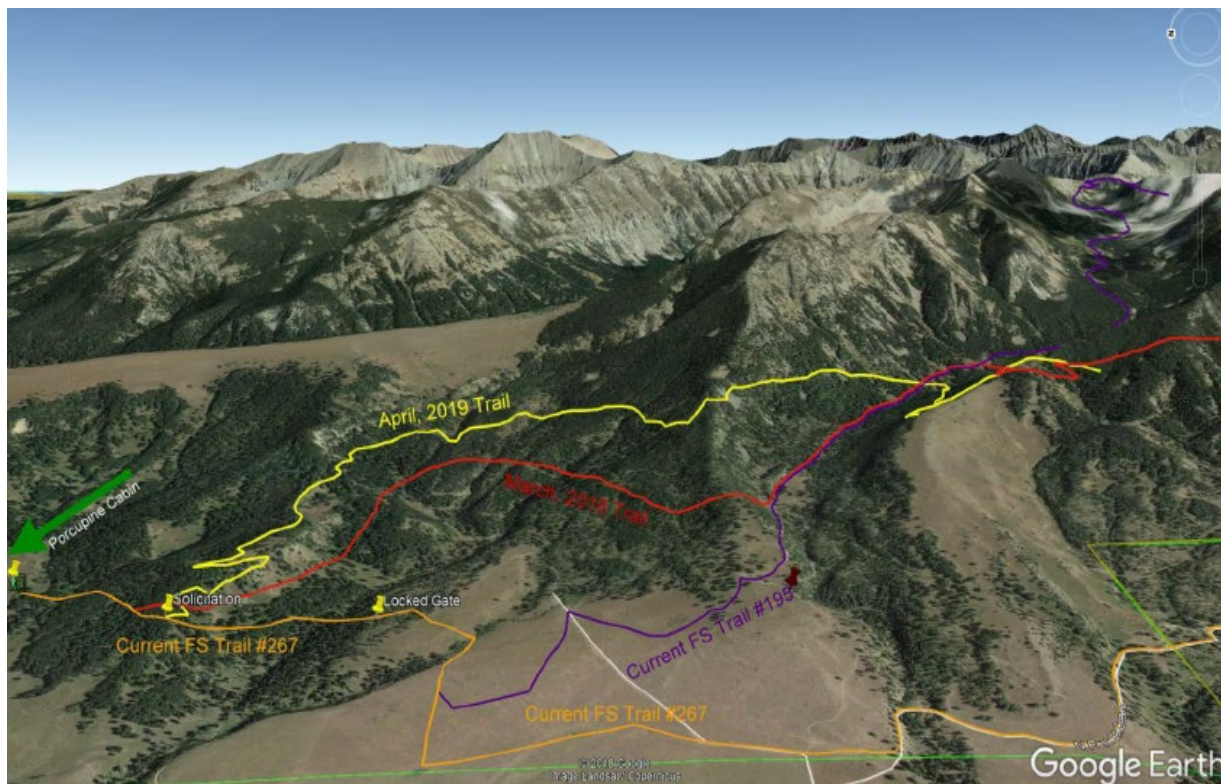
In fact, the Forest Service never evaluated the “proposed action” which became the Ibex project. It was not one of the seven NEPA alternatives analyzed in the 2006 travel plan EIS or one of the two NEPA alternatives analyzed in the 2009 EA. None of the previous alternatives considered and evaluated included the Ibex

project's new 8-mile trail re-route in its present location, its design, nor its use as a trail open for mountain bikes and hiking but closed to seasonal motorcycle use. None of the previous alternatives considered and evaluated included the Ibex project's easement exchange and related decision to release and obliterate and remove portions of the Porcupine Lowline and North Fork Elk Creek trails from all visitor use maps (including the updated motor use map, *see* 5-ER-0979).

Before approving the Ibex project, the Forest Service also never compared and contrasted alternative designs for the new trail re-reroute, alternative locations for the new trail re-route, alternatives that did not include sections of land covered by railroad deeds reserving public access, and alternative allowable uses for the new trail. All of these viable and reasonable alternatives would have satisfied the Forest Service's stated purpose and need for the project, which was to "provide quality recreation opportunities on National Forest System lands on the western side of the Crazy Mountain Range and to resolve a longstanding dispute along the Porcupine Lowline trail." 4-ER-0698.

Notably, instead of considering and evaluating a reasonable range of alternatives for the Ibex project as required by NEPA, the Forest Service simply did what it wanted and without comparing and contrasting any other options, alternative locations or alternative designs. In fact, all of the decisions about the

location, design, and uses of the new trail (including prohibiting certain uses and allowing others) were made behind closed doors with a selective group of stakeholders and without public input or consideration of other reasonable options. Throughout this internal process, the agency also continually tweaked and modified the design and location of the trail re-route and which uses would be allowed on it. For example, after providing information on the project and proposed re-route in scoping (see re-route in red below), and then after reviewing those scoping comments and deciding to forgo doing a NEPA analysis, the agency made additional changes to the location and design of the new trail in April 2019, *see* 5-ER-0934, as depicted below:



5-ER-0994. In June 2019, the Forest Service again said it was making additional changes and considering two alternative routes for the Ibex project's new trail in Section 11. 5-ER-0932. This is precisely the type of information that should have been (but was not) considered and evaluated with public input in an alternatives analysis.

The Forest Service also never evaluated an alternative that included the easement exchange or alternatives to it. The Forest Service never compared and contrasted various alternatives to obliterating and removing portions of the existing Lowline Porcupine and North Fork Elk Creek trails from the travel plan and visitor use maps, including slightly modifying the existing location of the existing trail in the lowlands or the uses allowed on it (the landowners primarily objected to the use of motorcycles). Nor did the Forest Service evaluate alternatives that would preserve historic access rights on existing trails and/or public easement interests from the railway deeds while simultaneously protecting private property rights through increased signage, enforcement and public education efforts.

In this case, therefore, the Forest Service's failure to consider and evaluate a reasonable range of alternatives - including the proposed action - for the Ibex project violates NEPA. *W. Watersheds Project*, 719 F.3d at 1053. The Forest Service must examine all viable and reasonable alternatives. *Southeast Alaska Conservation*

Council v. Fed. Highway Admin., 649 F. 3d 1050, 1059 (9th Cir. 2011). The Forest Service also neglected to provide any (let alone a reasonable) justification for forgoing an alternatives analysis for the Ibex project or rejecting other viable, reasonable and appropriate options. In the Ninth Circuit, there is no “numerical floor” on the number of alternatives that must be analyzed and considered. *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1246 (9th Cir. 2005). Two may suffice in some circumstances. *Id.* But at the very least, the Forest Service must consider “all reasonable alternatives” and provide an “appropriate explanation” as to why an alternative was eliminated. *Id.* Adequate “justification” for the omission of a viable alternative is required by NEPA. *Southeast Alaska Conservation Council*, 649 F. 3d at 1059. This never occurred.

In the proceedings below, the Forest Service insisted (and the district court agreed) that it evaluated a reasonable range of alternatives by comparing two in the 2009 EA: an action alternative (Alternative 1) and a no action alternative (Alternative 2). The district court found this sufficient because the option in the 2009 EA was “build a new trail or not.” 1-ER-0019. But, as previously explained, neither of the two alternatives in the 2009 EA include the “proposed action” – i.e., the four-part Ibex project, or even just the trail re-route part included within it. See 4-ER-0698.

Alternative 2 is simply the “no action” alternative, i.e., the 2006 travel plan designating the Porcupine Lowline trail for public use, including hiking, seasonal motorcycles, snowshoeing, and stock use. 3-ER-0430. Alternative 1 is the action alternative and includes the proposed improvement projects to implement the 2006 travel plan but, as previously explained, does not include the Ibex project (as presented in scoping and eventually approved). Indeed, the proposed “improvement” work for the “Porcupine Area” in Alternative 1 in the 2009 EA involves: (1) an aspirational plan that it might move “some portions” of the existing trail east, onto National Forest System lands in the future; but also (2) work to improve the existing Porcupine Lowline trail across private lands where it needs to be “remarked and reconstructed” and managed for motorcycles and other uses allowed by the travel plan. 3-ER-0413.

Again, the Ibex project is not part of Alternative 1 in the 2009 EA. This is where the district court erred. The district court failed to understand that the Ibex project is far different and much broader than Alternative 1 in the 2009 EA. The project involves an easement exchange, giving up the existing Porcupine Lowline and North Fork Elk Creek trails and removing them from visitor use maps, and building an entirely new, 8-mile trail east of the Porcupine Lowline trail open to mountain bikes but closed to motorcycles. 4-ER-0698. This alternative was never

included or analyzed in Alternative 1 in the 2009 EA. *Compare* 4-ER-0698 (Ibex project) *with* 3-ER-0383 (Alternative 1 in 2009 EA).

CONCLUSION

For these reasons, Friends of the Crazy Mountains asks this Court to: (1) reverse the district court; (2) declare that the Forest Service violated NEPA when approving the Ibex project; (3) remand this matter back to the Forest Service to prepare a NEPA analysis for the Ibex project (that fully analyzes all effects and alternatives); and (4) vacate the Forest Service's approval of the Ibex project pending compliance with the law.

Respectfully submitted this 6th day of March, 2023.

/s/ Matthew K. Bishop

Matthew K. Bishop

/s/ Michael Kauffman

Michael Kauffman

Counsel for Plaintiffs-Appellants

STATEMENT OF RELATED CASES

There are no related cases currently pending in this Court.

CERTIFICATE OF COMPLAINT

I hereby certify that this brief is proportionally spaced, has a typeface of 14 points or more, and contains less than 14,000 words in accordance with this Court's Local Rules. I relied on Microsoft Word to obtain the word count. See Form 8 (Attached).

/s/ Matthew K. Bishop

Matthew K. Bishop

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of March, 2023, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case will be served by the appellate CM/ECF system.

/s/ Matthew K. Bishop

Matthew K. Bishop

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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