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**UNITED STATES DEPARTMENT OF THE INTERIOR  
OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF LAND APPEALS**

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BLUERIBBON COALITION, INC.;  
PATRICK MCKAY; and COLORADO  
OFFROAD TRAIL DEFENDERS,

Appellants.

IBLA No. \_\_\_\_\_

Appeal of the Labyrinth Rims/Gemini  
Bridges Travel Plan

DOI-BLM-UT-Y010-2020-0097-EA

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**NOTICE OF APPEAL AND PETITION FOR STAY**

**NOTICE OF APPEAL**

Pursuant to 43 C.F.R. Part 4, the BlueRibbon Coalition (“BRC”), Colorado Offroad Trail Defenders (“COTD”), and Patrick McKay (collectively, “Appellants”) hereby appeal the September 28, 2023 Decision by Bureau of Land Management (“BLM”) Canyon Country District Manager Nicollee Gaddis-Wyatt. The project’s National Environmental Policy Act (“NEPA”) number is identified as DOI-BLM-UT-Y010-2020-0097-EA, and the Decision Record implements the “Labyrinth/Gemini Bridges Travel Management Plan”<sup>1</sup> (the “TMP”).

This appeal is timely filed.<sup>2</sup>

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<sup>1</sup> BLM, Decision Record (Sept. 28, 2023) at 1, attached as Exh. 1.

<sup>2</sup> The 30th day following the date of issuance of the decision herein challenged fell on Saturday, October 28, 2023. Today is the first business day following October 28. Therefore, this appeal is timely. 43 C.F.R. § 4.22(e).

## STATEMENT OF STANDING

Appellants are proper parties to maintain and pursue this appeal. Parties have standing to appeal an agency decision if they meet two requirements: they (1) must be a party to the case; and (2) must be adversely affected by the decision being appealed. *W. Watersheds Project*, 185 IBLA 293, 298 (2015). Appellants meet both of these requirements.

First, BRC, COTD, and McKay are parties to the case because they “participated in the process leading up to the decision under appeal, e.g., . . . by commenting on an environmental document.” 43 C.F.R. § 4.410(b). BRC and its members submitted multiple comments during BLM’s consideration of the TMP. Exhibit 2 (“BRC Comment”). McKay and COTD also submitted comments. Exhibit 3 (“McKay/COTD Comment”). BRC was also a defendant-intervenor and a party to the Settlement Agreement that led to BLM agreeing to issue a new TMP in the Labyrinth/Gemini Bridges Travel Management Area (“TMA”). Exhibit 4 (“Settlement Agreement”). In other words, there can be no doubt that Appellants have “otherwise participated in the process leading to the decision under appeal” and have standing to appeal. 43 C.F.R. § 4.410(b).

Second, the decision also adversely affects the Appellants. This prong is satisfied “when an appellant shows that it has a legally cognizable interest, and the decision on appeal has caused or is substantially likely to cause injury to that interest.” *American Wild Horse Campaign*, 198 IBLA 1, 5 (2022) (cleaned up). Organizations, like BRC and COTD, are “adversely affected” if one or more of their members have “a legally cognizable interest in the subject matter of the appeal, coinciding with the organization’s purposes, that is or may be negatively affected by the decision.” *Wildlands Def. & Deep Green Resistance*, 187 IBLA 233, 236 (2016) (citing 43 C.F.R. § 4.410(d)). A legally cognizable interest can include “cultural,

recreational, and aesthetic use and enjoyment of the affected public lands.” *Cascadia Wildlands & Or. Wild*, 188 IBLA 7, 9-10 (2016).

BRC is a national non-profit with a mission to improve access to public lands by securing, protecting, and expanding shared outdoor recreation access and use. Exhibit 5 at ¶ 1 (“Burr Declaration”). BRC has an interest in maintaining access to off-highway vehicles (“OHVs”) for as many routes and trails as possible. *Id.* It is actively engaged in promoting responsible use and awareness of OHV opportunities throughout the country and has even published guidebooks to allow members of the public to make better use of available routes. *Id.* BRC’s members frequently visit the TMA and often travel the routes that the TMP Decision Record closes in this case. *Id.* at ¶¶ 2, 7. Many of them have plans to use the TMA in the near future. *Id.* The guidebooks BRC publishes serve a two-fold purpose: they help BRC members plan their trips to the TMA, and they provide a significant source of fundraising for BRC. *Id.* at ¶ 7. The TMP’s route closes of 12 of the 26 routes featured in the guidebook will make the guidebook less valuable, creating a financial injury to BRC. *Id.*

BRC’s members are involved in many activities on public lands—such as dirt biking, mountain biking, e-biking, backcountry aviation, base jumping, hiking, wildlife viewing, photography, scenic driving, dispersed camping, water sports, and rock climbing—but are especially interested in activities involving their OHVs. *Id.* ¶ 4. These activities include organized rides with clubs, informal get-togethers, family vacations, and solo recreational rides. BRC Comment at 3, 22-24. The TMP will limit all of BRC’s members’ enjoyment and use of the TMA and will acutely affect disabled and senior members who are unable to travel the trails by walking, hiking, or biking. *Id.* ¶ 4; BRC Comment at 11-13, 20, 23.

The TMP adversely affects Appellant McKay. He is a member of multiple organizations that promote and protect access to motorized trails and serves as Vice President of COTD. Exhibit 6 at ¶ 2. (“McKay Declaration”). He is also a member of

the BlueRibbon Coalition. Burr Declaration at ¶ 2. He has extensively participated in the process of developing the TMP, including traveling much of the TMA and submitting a comment that analyzes the TMA in great detail. McKay Declaration ¶¶ 4-8. His work culminated in a 527-page comment complete with photographs, maps, route descriptions, and route descriptions. *Id.* ¶ 12; McKay/COTD Comment. He has regularly visited Moab for the purpose of OHV recreation since May 2019 and has planned another trip for spring 2024, where he planned to drive many of the routes subject to closure. McKay Declaration at ¶¶ 7, 37. The TMP therefore interferes with his concrete plans to visit the TMA.

### **PETITION FOR STAY**

Appellants seek immediate relief to stay BLM's decision approving the Labyrinth Rims/Gemini Bridges Travel Management Plan, which closes 317.2 miles of routes that were previously open to OHVs. TMP at DR-2.

#### **I. BACKGROUND.**

The TMA consists of over 300,000 acres of BLM lands located north and west of Moab, Utah. Exhibit 7, U.S. Dept. of the Interior, *Labyrinth/Gemini Bridges Travel Management Plan Environmental Assessment* (September 2023), at 1 (the "EA"). It has "a particularly high level of OHV use"<sup>3</sup> and is home to "several world class 4WD/OHV routes." EA at 88. Bounded by the Green River to the west, Arches National Park to the East, and Canyonlands National Park to the South, the TMA's draw is that it is a beautiful and scenic area, featuring canyons, mesas, arches, bluffs, and more. EA at 2. It is also one of the few places in the region that is not subject to higher levels of protections, such as national monuments, critical habitat, wilderness study areas, and areas of critical environmental concerns. BRC Comment at 2.

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<sup>3</sup> The TMA is so synonymous with OHVs that the cover page for the EA and TMP features a photograph that has eight Jeep Wranglers driving along the centrally featured route.

Accordingly, it represents one of the last areas where individuals and their families may enjoy motorized access to some of the most beautiful and thrilling trails, and viewpoints, and dispersed campsites in the American Southwest.

OHV access in the TMA has been shrinking for decades. The current travel network dates back to the 2008 Moab Field Office Record of Decision and Approved Resource Management Plan. Attached as Exhibit 8 (the “2008 RMP”). That decision closed 766 miles of trails in the TMA. EA at 11. Nevertheless, anti-OHV groups continued to push BLM to close more trails and filed suit accordingly. That case ended in a settlement agreement where BLM agreed to issue new TMPs for 14 different TMAs, including the Labyrinth/Gemini Bridges TMA. Exhibit 4 at 6-7.

The TMP ostensibly was meant to choose between four alternative TMPs explained in the EA. Each of the “proposed travel network action alternatives meets the purpose and need and responds to the issues described in Chapter 1 [of the EA].” EA at 11. Nevertheless, BLM chose a network that fit none of the alternatives but was closest to Alternative B in terms of OHV access. TMP at DR-3.<sup>4</sup> Alternative B was meant to emphasize “natural resource[s]” and “constrain[]” OHV use. EA at 16. This drastic closure is occurring, even though as recently as 2015, BLM reviewed the 2008 RMP and found that the travel network inside the TMA did not require any changes. *See* Exhibit 9, BLM, Land Use Plan Evaluation Report (Sept. 30, 2015).

## II. STANDARD OF REVIEW.

Department of the Interior regulations list four requirements for the Board to stay BLM’s decision:

- (1) The relative harm to the parties if the stay is granted or denied;
- (2) The likelihood of the appellants’ success on the merits;

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<sup>4</sup> Alternative B would have closed 437.8 miles of routes and limited 84 miles. EA at DR-3. The next closest Alternative, Alternative C, would have only closed 167.7 miles of routes and limited 121.4 miles. *Id.* The selected network closes 317.2 miles of routes and limits 98.4 miles. *Id.*

(3) The likelihood of immediate and irreparable harm if the stay is not granted;  
and

(4) Whether the public interest favors granting a stay.

43 C.F.R. § 4.21(b)(1). It is the appellants' burden to demonstrate that a stay should be granted. *Id.*

To obtain a stay, “[t]he petitioner does not need to prove with certainty each criterion. Instead, a petitioner must show that it *likely* meets each criterion.” *Pueblo of San Felipe*, 187 IBLA 342, 342 (2016); *see also Western Watersheds Project v. BLM*, 197 IBLA 161, 165 (2021). “In balancing the likelihood of movant’s success against the potential consequences of a stay on the other parties it has been held that ‘it will ordinarily be enough that the plaintiff has raised the questions going to the merits so serious, substantial, difficult, and doubtful, as to make them fair ground for litigation and thus for more deliberative investigation.’” *Sierra Club*, 108 IBLA 381, 384-85 (1989) (cleaned up); *see also Wyo Outdoor Council*, 153 IBLA 379, 388 (2000) (same). A stay “serves as an equitable policing measure to prevent the parties from harming one another during the litigation; to keep the parties, while the suit goes on, as far as possible in the respective positions they occupied when the suit began.” *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 742 (2nd Cir. 1953).

### **III. APPELLANTS ARE LIKELY TO SUCCEED ON THE MERITS.**

#### *A. The closures violate the Dingell Act.*

A “core administrative-law principle [is] that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.” *Util. Air Regulatory Group v. EPA*, 573 U.S. 302, 328 (2014). “Agencies are not free to adopt unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness.” *Id.* (cleaned up). Under the APA, “A reviewing court will ‘hold unlawful and set aside agency action’ that it determines to

be ‘in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.’” *Ron Peterson Firearms, LLC v. Jones*, 760 F.3d 1147, 1154 (10th Cir. 2014) (citing 5 U.S.C. § 706(2)(C)).

On March 12, 2019, Congress passed the John D. Dingell, Jr. Conservation, Management, and Recreation Act (“Dingell Act”), 16 U.S.C. § 1132 et seq., P. Law 116-0. Section 1231(a)(7) of the Dingell Act designated Labyrinth Canyon as a wilderness area (“Wilderness Area”), comprising approximately 54,642 acres, which is to be managed by BLM in accordance with the Wilderness Act (16 U.S.C. § 1131 et seq.) subject to valid existing rights. 16 U.S.C. § 1232.

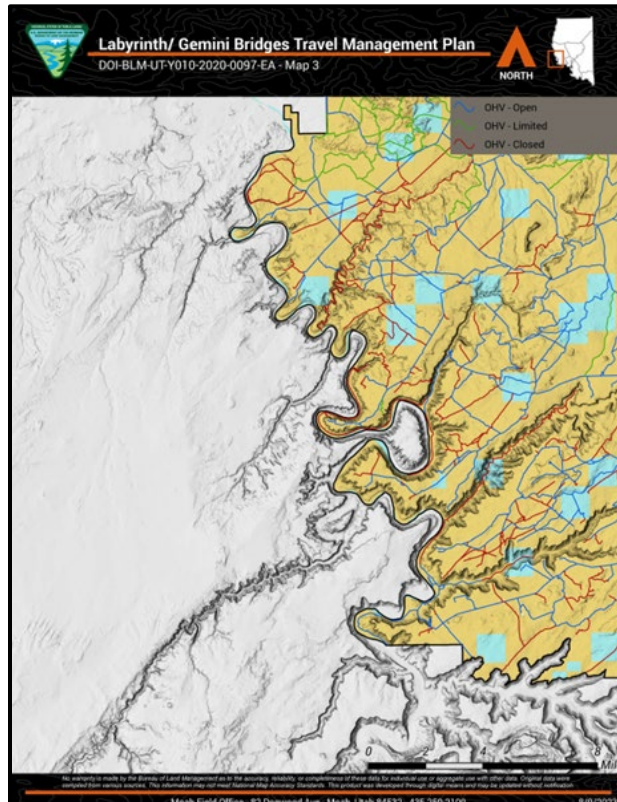
The Dingell Act was a landmark bill and was hailed as a “rare moment of bipartisanship.” Coral Davenport, *Senate Passes a Sweeping Land Conservation Bill*, New York Times (Feb. 12, 2019). As such, it encompassed compromises between competing interests. Indeed, BLM itself has stated “Congress was aware of the naturalness and solitude of the Wilderness Area” and it “decided to balance” protecting the natural environment and allowing other activities in the area. Fed. Defs. Mem. in Opp. to P’s Renewed Mtn. for a Temp. Restraining Ord. and P. I., (BLM PI) \*8 *Southern Utah Wilderness Alliance, et. al., v. Bernhardt*. No. 1:20-cv-03654-RC (D.D.C. Jan. 1, 2021) at \*29 citing Subcommittee on Natural Parks, Forests, and Public Lands, H.R. 86, 111th Cong. at 5, 17, 76 (1st Sess. 2009).

Part of that negotiation was that the designation of certain wilderness areas, like Labyrinth Canyon, would not lead to restrictions seeping into the surrounding areas. Congress was clear that it “does not intend for the designation of the wilderness areas to create protective perimeters or buffer zones around the wilderness areas.” 16 U.S.C. § 1132(e). Congress stated that “The fact that non-wilderness activities or uses can be seen or heard from areas within a wilderness area **shall not preclude** the conduct of those activities or uses outside the boundary of the wilderness area.” *Id.* (emphasis added) *See also*, BLM PI \*8.

This was not an accidental inclusion. Congress knew that when it designated wilderness areas the calls for the creation of buffer zones would be next. As Utah Senator Romney highlighted “the clear intent within Sec. 1232, section (e)” is that “non-wilderness activities or uses that can be seen or heard from areas within wilderness are to be left uninterrupted by this legislation. The clear intention of the bill was to avoid any type of a buffer zone management plan.” 165 Cong. Rec. 150 (Sept. 18, 2019) available at <https://tinyurl.com/mw3ubsk5>.

However, contrary to the clear language of the Dingell Act, the District Manager both created a buffer zone and precluded OHV access based on the noise and sight of those activities.

First, a map of the TMA’s closed routes makes clear that BLM intended to create a buffer zone around Labyrinth Canyon.



The Labyrinth Canyon Wilderness makes up most of the western border of the TMA on the above map. A large majority of the routes abutting the Labyrinth Canyon



Wilderness were closed under the district manager's plan. The only ones that were not closed are county B roads on the southwestern most tip of the TMA (the small blue loop). This creates a buffer zone, preventing people from getting close to the Labyrinth Canyon Wilderness Area and increasing the effect of Congress's wilderness designation beyond what Congress intended. This violates the Dingell Act.

In explaining these closures, the District Manager often described them as an attempt "to minimize known visual and noise-induced conflicts with non-motorized users on the Green River." A2-123 (discussing closure of D2759A). But BLM cannot use the Green River as a cover for violating the Dingell Act. The Green River is used by both motorized and non-motorized users. McKay/COTD Comment at 21. Airplanes fly overhead to land or take off from the Mineral Bottom Airstrip. *Id.* at 21, 32. The District Manager's claim to be protecting non-motorized users on the Green River appears to be nothing more than a pretextual excuse to hide her true intention to create the very buffer zone that Congress forbade her from making.

Second, the District Manager violated the Dingell Act by basing her route closure decision on the noise and sight of non-wilderness activities and uses within the Labyrinth Canyon Wilderness. The District Manager claimed that she was required to use criteria to close routes outside of the Labyrinth Canyon Wilderness Area based on the noise and sight of non-wilderness activities and uses within the TMA. TMP at 2. In particular, notwithstanding the plain language of the Dingell Act forbidding her from considering the sight and noise of non-wilderness activities in the TMA, she claimed that the route designation criteria (referred to as the "minimization criteria") contained in 43 C.F.R. § 8342.1(c) required her to consider noise when deciding to designate routes as open, limited, or closed to off-road vehicles.

The third minimization criterion states that "Areas and trails shall be located to minimize conflicts between off-road vehicle use and other existing or proposed recreational uses of the same or neighboring public lands, and to ensure the

compatibility of such uses with existing conditions in populated areas, taking into account noise and other factors.” 43 C.F.R. § 8342.1(c). But this criterion is precisely what the Dingell Act forbids. BLM lacks the statutory authority to consider how the neighboring Labyrinth Canyon Wilderness Area is affected by noise or visuals within the TMA. BLM regulations do not take precedence over statutes passed by Congress.

Nevertheless, the District Manager discussed noise and visual conflicts along the Labyrinth Canyon Wilderness when making determinations on which routes to close. For example, route D2763B, which abuts the Labyrinth Canyon Wilderness area was closed to “minimize visual and noise-induced conflicts between motorized and non-motorized users.” TMP at A2-125. While this included those occupying the river, the minimization criteria required the district manager to analyze noise and visual factors within the Labyrinth Canyon Wilderness when making determinations. This is in direct conflict with the Dingell Act and, therefore, in conflict with the APA and basic principles of administrative law.

The Dingell Act also designated the portions of the Green River that border the Travel Management Area as a Recreational River Segment and a Scenic River Segment under the Wild and Scenic Rivers Act. Both designations specifically allow for access by roads to the rivers. The Dingell Act also designated a portion of the Green River that is not part of the TMA as a Wild River Segment under the Wild and Scenic Rivers Act. If Congress intended to prioritize non-motorized recreation along the segments of the Green River that border this TMA, Congress would have designated these as Wild River Segments. They specifically did not make this designation, and it is a violation of the Dingell Act to adopt a travel management plan that manages these river segments as wild river segments.

*B. The closures violate the Appointments Clause.*

“Under the Constitution, ‘[t]he executive Power’ is vested in the President, who has the responsibility to ‘take Care that the Laws be faithfully executed.’” *United States v. Arthrex*, 141 S.Ct. 1970, 1976 (2021) (citing Art. II, §1, cl. 1; §3). The Appointments Clause states, in pertinent part:

“The President ... shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they may think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”

The Appointments Clause sets forth the “exclusive means of appointing ‘Officers.’ Only the President, a court of law, or a head of department can do so.” *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018) (citing U.S. Const. art. II, § 2, cl. 2.).

Under our constitutional structure, there are three categories of individuals serving under the chief executive: Principal Officers, appointed by the President and confirmed by the Senate; Inferior Officers, appointed by the President, a Court of Law, or a department head; and all other employees.

The Supreme Court has provided guidance for distinguishing between officers and employees. Officers have duties that are “continuing and permanent,” have positions that are “continuing,” and exercise “significant authority pursuant to the laws of the United States.” *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2051 (2018); see *Edmond v. United States*, 520 U.S. 651, 662–63 (1997); *Custodia Bank, Inc. v. Fed. Reserve Bd. of Governors*, 640 F. Supp. 3d 1169, 1191 (D. Wyo. 2022). Conversely, employees are lesser functionaries subordinate to officers of the United States that have duties that are only “occasional or temporary.” *Buckley v. Valeo*, 424 U.S. 1, 125–26 & n.162 (1976). Because BLM placed the exercise of final executive power in the hands of an

unelected employee, and not an officer, the final actions taken by that employee are invalid and unconstitutional.

First Nicollee Gaddis-Wyatt's duties are "continuing and permanent" and she is an unappointed permanent employee. *Lucia*, 138 S. Ct. at 2051. She has been an employee since 2010, and she currently holds the title of "District Manager." *BLM Canyon Country District Announces Key Leadership Changes*, Bureau of Land Management (Aug. 11, 2022) available at <https://tinyurl.com/53fwzpt2>; 43 C.F.R. § 1601.05 (stating that a "District Manager" is a type of "Field Manager" who is a "BLM employee"). BLM District Managers, including Ms. Gaddis-Wyatt are not principal officers, that is, persons appointed by the President following the Senate's advice and consent. Nor are they inferior officers, that is, officers appointed by principal officers whose work is directed and supervised by a principal officer. *See Lucia*, 138 S. Ct. at 2051; *Edmond*, 520 U.S. at 663. Rather, they are employees. And because they are not properly appointed, they have no power to exercise the federal government's sovereign authority to close hundreds of miles of previously public roads.

The founders expected that only someone accountable to the President could wield such significant authority. The TMP makes clear that it was she who decided which routes to keep open and which to close permanently. TMP at DR-2 ("it is my decision to select a route network consisting of a combination of the route networks analyzed in the EA as Alternatives B, C, and D.").

BLM regulations make clear that "[t]he approval of a resource management plan, plan revision, or plan amendment constitutes formal designation of off-road vehicle use areas." 43 C.F.R. § 8342.2(b). This is why it requires that "[p]ublic notice of designation or redesignation shall be provided through the publication of the notice required by § 1610.5-1(b) of this title." *Id.* And legal consequences flow from this designation. Entry onto a closed road constitutes criminal trespass, which can be

punished with a \$1,000 fine and up to one year in prison. 43 C.F.R. § 8340.0-7. Once a road is closed, it is BLM policy to “obliterate” that road by disguising routes, ripping out soil and reseeding the area, and installing barriers and signs. EA at 347-350. The decision to close is a permanent one.

The power exercised by the District Manager is authority that must be vested in an officer of the United States. It criminalizes using public lands. The exercise of this power by an employee, and not an officer, violates the Constitution and invalidates the TMP.

*C. The closures are arbitrary and capricious.*

An agency decision is arbitrary and capricious under the APA where the agency “relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation 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.” *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (quotations omitted). Additionally, “failure to respond to relevant and significant public comments generally ‘demonstrates that the agency’s decision was not based on a consideration of the relevant factors.’” *N.M. Health Connections v. United States HHS*, 340 F. Supp. 1112, 1167 (D. N.M. Oct. 19, 2018) (quoting *Lilliputian Sys., Inc. v. Pipeline & Hazardous Materials Safety Admin.*, 741 F.3d 1309, 1312 (D.C. Cir. 2014)). The TMP commits both errors here.

The TMP is riddled with factual errors and unresponsive answers to comments. For example, for Route Number D1515A, multiple commenters (including appellants) noted that the 0.76-mile route offers scenic views of the Green River that will otherwise be unavailable to elderly and disabled users. EA at 241-42. The BLM response acknowledges the route is used for “scenic driving,” but makes no mention of considering the needs of elderly and disabled members of the public. *Id.* The TMP

closes the route, citing nothing more than a generalized rationale that it “will enhance desert bighorn sheep lambing and migratory bird habitats by reducing motorized use and removing the route footprint.” TMP at A2-45. Such a decision is arbitrary and capricious and flies in the face of the Biden Administration’s own executive order protecting disabled persons.<sup>5</sup> The same can be said for Route Number D1520A, a 2.17-mile route with scenic views of the Green River and features an overlook of the Labyrinth Canyon. EA at 243. BLM again failed to respond to concerns about an elderly or a disabled person’s ability to access these features. TMP at A2-45.

The TMP also fails to account for the Dingell Act’s prohibition on buffer zones. Appellant McKay cited multiple routes that created “buffer zones” in violation of the Dingell Act, and BLM failed to respond to his comment. EA at 236-41 These routes included the closed Route Numbers D1501, D1507, D1507B, and D1510. BLM’s failure to account for federal law in this regard makes its decision to close those routes arbitrary and capricious and contrary to law.

The TMP’s reliance on conflicts based on “noise” was also arbitrary and capricious. BLM partially justified closures on Route Numbers D1223A, D2759B, D2763B, and D2763C—totaling over 14 miles—to “minimize known conflicts between OHV public and river users that is caused by vehicle-based noise.” TMP at A2-21, A2-123, A2-125. This is arbitrary and capricious for two reasons. First, there is no standard or meaningful measure of what BLM considers too much noise. *Accord S. Utah Wilderness Alliance v. United States DOI*, 2016 U.S. Dist. LEXIS 140624, at \*23-24 (D. Utah Oct. 3, 2016) (failure to use “any scientific protocol for assessing noise impacts” failed NEPA’s hard look requirement and constituted arbitrary action). If

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<sup>5</sup> See *Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government* (Jan. 20, 2021) (noting that “persons with disabilities” are among the populations that “have often been denied equal opportunity”), available at: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>.

vague assertions that noise is causing conflict between users were enough to close a route, BLM would have the authority to close any route in any of the lands it manages. The TMP and EA are completely devoid of any sort of objective standard or measure to determine what level of noise is acceptable and what level will result in closures.

Second, the record itself does not support that these routes result in a lot of noise. The Route Report for D1223A refers to the route as a “primitive road” that only gets “medium” use. The Route Report for D2759B is also a primitive road, but only has “low” use and is not even accessible by a stock vehicle. D2763B is also primitive with low use, and BLM did not include D2763C in its route reports. In other words, BLM claimed these low-use roads are resulting in such a high level of noise that it results in user conflicts large enough to support closure. This cannot be the case. BLM also failed to respond to Appellant McKay’s comment that its map has D2763B in the incorrect place. McKay/COTD Comment at 509. The real route is further from the river than BLM mapped it.

Many of the other routes’ rationale for closure also fail to hold up to scrutiny, contain many errors, and contradict BLM’s own documents. D1503B, for instance, is listed as “Closed,” but the listed rationale in the TMP then explains why the route is being kept open. TMP at A2-43. The TMP also closes D1879, which is listed as 0.05 miles in length, but the route report says the route is 0.54 miles in length. TMP at A2-73. Over a dozen routes<sup>6</sup> are being closed to “reduce route proliferation,” but route proliferation is only listed as a problem in one of the route’s areas (D1748). TMP at A2-64. The EA, on the other hand, states that “route proliferation is generally not a significant issue” in the TMA. EA at 11.

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<sup>6</sup> D0017, D1035, D1038, D1044, D1076B, D1270, D1286, D1612B, D1685, D1748, D1766, D1872, D2733, D2739 (singletrack), D2750A (singletrack), D3922A

Similarly, BLM relies on the presence of bighorn sheep as a rationale for closing many trails. Such a claim is contradicted by BLM's own documents, which acknowledge that wildlife, including bighorn sheep, are more disturbed by hikers and rock climbers than OHVs. Exhibit 10, BLM, *Limiting Roped and Aerial Activities in Mineral and Hell Roaring Canyons*, Environmental Assessment: DOI-BLM-UT-Y010-2020-0068, at 9 (August 2020). That document acknowledges that bighorn sheep are more sensitive to hikers because of the unpredictability of their locations and are more likely to be found off-trail, unlike road traffic. *Id.* at 33, 35. Bighorn sheep “coexist best with people when human activity in sheep habitat is predictable.” *Id.* at 34. Nevertheless, under the TMP, these routes remain open to hikers and closed to OHVs. Such a decision is the epitome of arbitrary and capricious.

Such arbitrary and capriciousness is even more apparent when one considers the multitude of historic routes that the TMP closes.

#### **1. Hey Joe Canyon - D1526B, D1527B, D1528**

Closure of the Hey Joe Canyon trail is arbitrary and capricious, and contrary to law. First, it violates the RMP direction, which found an “overriding purpose and need” to keep it open for OHV recreation. RMP at 19. Second, the BLM's primary reason for closure was alleged user conflicts with non-motorized boaters on adjacent Green River and closed all motorized routes accessing or paralleling the Green River except county B roads that only make up a small portion of the southwestern portion of the TMA. The TMP's claimed reason was that closure was necessary to minimize user conflicts with boaters. This is irrational because motorboats are allowed on the river itself and continue to be allowed. There is also an airstrip at Mineral Bottom, right next to the river.

This closure shows that the BLM decided to treat the Green River as an entirely non-motorized area, even though it never has been, and there is no RMP



direction to treat it this way. There is a recreation focus area along the Green River that emphasizes non-motorized boating and prohibits building new motorized routes in the area, but existing motorized routes were deemed completely compatible with it. RMP at 90-91. The Hey Joe Canyon road was expressly excluded from the canoe focus area, RMP at 91, (making it a motorized focus area by default), with the intent that this would resolve issues of alleged user conflict by signaling that noise from motorized use is expected in the area.

All the same user conflict arguments were made during the 2008 RMP planning process, and the BLM rejected them, saying that the importance of the route for motorized recreation gives it an overriding purpose and need. RMP at 19. In the new plan, the BLM acknowledged its prior determinations, but said that but said the travel management regulations required it to minimize user conflict. No explanation was given for why closing the route to motorized users was the only way to minimize user conflict, and the BLM failed give any evidence that the situation had changed. It simply decided the opposite of a previous decision without explaining its reasoning, making it arbitrary and capricious.

By closing this route, BLM has interpreted the regulation requiring it to minimize user conflicts with non-motorized recreation as creating an obligation to close motorized routes any time non-motorized users complain about motorized users' presence. The RMP explicitly said that the purpose of establishing recreation focus areas was to set user expectations that motorized noise would be present in motorized areas. The BLM's stance obliterates this and establishes a rule that non-motorized users' complaints require closing motorized routes even in motorized focus areas.

Other reasons given for closure are just recitations of generic impacts to riparian areas and wildlife with no evidence that this specific road is causing those impacts. The roadbed has been in place for 70 years, and there is no evidence it is harming riparian areas.

## **2. Day Canyon Point - D1625A, D1625B, D1627, D1630**

Closing Day Canyon Point is also arbitrary and capricious. BLM's main claimed reasons for closure is that the route is a bighorn sheep lambing habitat and that it receives low use, which contradicts the idea that it is impacting bighorn sheep. It is a Jeep Safari route and is featured in guidebooks, so it is highly important regardless of use levels.

BLM relies on wildlife science contradictory to its conclusion. Bighorn sheep acclimate to regular recreation use on fixed routes, which the BLM has previously acknowledged in other projects like the Mineral and Hell Roaring Canyons Roped and Aerial Activities project. *Limiting Roped and Aerial Activities in Mineral and Hell Roaring Canyons*, Environmental Assessment DOI-BLM-UT-Y010-2020-0068, at 33-34 (August 2020). In fact, it noted a "higher sensitivity of sheep to hikers . . . due to the greater unpredictability of the locations of hikers because, unlike road traffic, nearly all hiker disturbances of sheep were off-trail and variable locations." *Id.* at 33. BLM has known for decades that "Bighorn sheep coexist best with people when human activity in sheep habitat is predictable." *Id.* at 34. Instead, the TMP opens this route to hikers and mountain bikers, who are more unpredictable and more likely to leave established trails, but closes the route to OHV users, who are most likely to travel on the road in a predictable pattern.

BLM has produced no evidence that this specific route, or any motorized route in the area, is negatively impacting bighorn sheep populations. BLM also has produced no evidence that a permanent closure is necessary to protect bighorn sheep, beyond generic factors such as the route is in a habitat management area. BLM also cites generic benefits like restoring vegetation, but this "benefit" applies to any closed route, and BLM offers no explanations why vegetation restoration is necessary here. BLM simply has not provided any evidence of any actual impacts from the route requiring closure.

### **3. Mashed Potatoes - D2562**

The Mashed Potatoes closure is arbitrary and capricious because it incorrectly lists the route as redundant. The main listed reasons for closure are to minimize route proliferation and have a less redundant route network. The BLM falsely assumed this route is redundant with nearby parallel routes in the 3D Jeep Safari trail but failed to acknowledge that Mashed Potatoes is used in Easter Jeep Safari to create an alternative variant of the 3D trail that is more challenging and incorporates different types of terrain. Mashed Potatoes offers a completely different experience than the parallel trails because it is almost entirely in unique white slickrock domes that are different and more challenging than other parallel routes. It is featured independently in published guidebooks and has its own unique recreational value which the BLM failed to acknowledge even though that was pointed out in Appellant McKay's, COTD's, and Red Rock 4-Wheelers each pointed out in their comments.

Route proliferation could have been minimized by better marking the designated route, as it's currently poorly marked and confusing to navigate. BLM never considered this simple and less extreme alternative. BLM's other rationales for closing are generic and unsupported by any evidence specific to this route. As with Day Canyon Point, this route is in bighorn sheep lambing habitat, but the sheep are accustomed to OHV presence on the route.

### **4. Deadman Point/Deadman Spring - D2022, D2014, D1501, D1507B, D2015A, D1515B, D1515C, D1518, D1520A, D2017, D7209, D2031, D2030, D2035, D2033**

The Deadman Point and Deadman Spring closures are arbitrary and capricious because they ignore the facts on the ground. These are all Jeep Safari Routes or spurs off of the main safari route. BLM cited low use, redundancy, bighorn sheep habitat fragmentation, and impacts to the spring itself for closing these routes. None of these reasons have any supporting evidence, and if they are lightly used, they could not have any significant impacts or affect sheep or raptors. D2022 was listed as

redundant with D1503B, but the BLM arbitrarily decided to keep open the less interesting route that is farther from the rim of Spring Canyon with less appealing scenic value. D2014 provides access to several scenic overlooks of Labyrinth Canyon. BLM arbitrarily said the other parts of the Deadman Point Safari Trail provide adequate recreation opportunities, ignoring the unique views from these overlooks that are in a completely different part of the canyon than those other routes.

Routes D1501, D1518, and D1520A are featured in BlueRibbon Coalition's *Lost Trails Guidebook* because they are high-value routes that provide access to unique scenic overlooks of the Green River and dispersed campsites. The routes are listed as redundant with D1511, which does not provide the unique views and recreation opportunities as the closed routes. BLM also says D1520A is closed to minimize soil erosion, but a substantial portion of the route is sandstone. The BLM's stated rationale for closing D1515A, D1515B, and D1515C is that users can access popular viewpoints in the area by using the open route D1520A, which is actually closed by the TMP. As such, the BLM has offered an explanation that runs counter to the evidence before the agency.

BLM also used bighorn sheep habitat as a proxy for wilderness characteristics here, as D2014 is a boundary road for lands with wilderness characteristics, so closing it enlarges the contiguous area with wilderness characteristics. Such a decision is contrary to the Dingell Act and BLM's multiple-use mandate by favoring one use over the other, despite the fact that there is not a conflict on this route.

#### **5. Deadman Point Overlooks - D1509 (open), D1510 (closed)**

Closing D1510 is arbitrary and capricious because it fails to acknowledge its recreational value. These are two overlook spurs off the Deadman Point safari trail. Though they are not part of the safari trail itself, they are commonly driven together and are featured as part of the Deadman Point trail in OHV guidebooks, such the

FunTreks guidebook. They are regularly used and access spectacular overlooks and dispersed campsites. BLM failed to account for these routes' recreational value, which Appellants McKay and COTD pointed out in their comment. COTD at 267. The Comment further shows, by photograph how minimally the route obstructs the land as it crosses a plateau to the overlook. *Id.*

BLM's listed rationales for closing this route are bighorn sheep habitat and reducing route proliferation. BLM does not show any actual impacts from these routes. As discussed above, bighorn sheep habitat is less impacted by roads than by unpredictable hikers and bikers. It also does not point to these routes leading to any new unauthorized routes. Further, the EA is clear that "new route proliferation is generally not a significant issue" in the TMA. EA at 11. The TMP appears to be using route proliferation synonymously with excessive route density, even though those are completely different concepts, and what the BLM considers to be too many routes in an area is completely arbitrary and subjective.

#### **6. Ten Mile Canyon - D2759A, D2759B**

The TMP arbitrarily and capriciously closed D2759A and D2759B. Perhaps most egregiously, the rationale relies on user conflicts with boaters on the Green River. This ignores the facts on the ground. Very few vehicles ever make it to the Green River, as the last segment of the route is usually impassable due to mud.

Other rationales BLM provides are similarly contradicted by the evidence. BLM alleges that riparian impacts with the roadbed impact the stream, but the roadbed is out of the stream in most places and has been stable for some time. In reality, the parts of the routes that are in the stream are regularly scoured by flood events, which causes the routes to "have minimal affect [sic] on xero-riparian resources." Route Reports for D2759A and D2759B. Closing this route because of bighorn sheep habitat is faulty as well. As discussed above, bighorn sheep habitat is

less impacted by roads than by unpredictable hikers and bikers. The TMP also has not pointed to any evidence the routes are negatively impacting bighorn sheep who are accustomed to traffic on it.

The 2008 RMP also has extensive direction regarding management of these routes, which the BLM says has failed but did not give any details on what measures it had actually tried and why they failed. BLM ignored the 2008 RMP when closing these routes. The 2008 RMP found that resource impacts can be mitigated with signage despite it being “very popular with motorized users.” RMP at 19. The 2008 RMP recognized the “overriding purpose and need” to keep this route open as part of the Jeep Safari route and as a route that is singled out in local guidebooks. *Id.* Further, the 2008 RMP listed special management steps that would be tried before closure, such as restricting camping, limiting to designated routes, establishing speed limits, designating a parking area at the Green River, and requiring permits if long-term damage was found. RMP at 108. None of these measures have been tried and the TMP jumps straight to closure for this iconic route. Such an action is arbitrary and capricious.

#### **7. Ten Mile Rim - D2840**

Again, the TMP closes D2840 in spite of the facts on the ground and does not respond to comments from Appellants. The rationale primarily relies on the Route being redundant with B336. Appellants McKay and COTD noted that D2840 is not redundant, because while both this route and B336 go to Ten Mile point, this route is a markedly different recreation experience. This one is a primitive 4WD route and B336 is a maintained, graded route. Further, one of the other routes it was supposedly redundant with, D2759, was also closed. Closure of this route is arbitrary and capricious, and there is no substantial evidence to support closing this route.

## **8. Hell Roaring Canyon Trail - D1223A, D1223B, D1223C**

The closure of D1223A, D1223B, and D1223C is arbitrary, capricious, and contrary to law for at least three reasons. First, BLM justifies closure because traffic on the section of the trail near the Green River is bothersome to boaters on the river. However, the route report lists the use of this trail as low, which conflicts with the alleged justification for closure. Second, closure is allegedly justified in order to protect bighorn sheep and raptor habitat. However, this is contradicted by findings in the *Limiting Roped and Aerial Activities in Mineral and Hell Roaring Canyons*, Environmental Assessment DOI-BLM-UT-Y010-2020-0068 (August 2020) report, which describes the road in the canyon as having minimal impact on sheep because traffic is in a predictable pattern and away from their escape terrain. Furthermore, the report indicates that the road does not impact raptors at all because vehicles do not travel on the cliffs or close to their nests. Third, closure is allegedly justified because parts of the road in the upper canyon are allegedly in disrepair, which allegedly causes users to travel cross-country. However, this is impossible because the road traverses a large wash through this segment, and this wash is regularly scoured by flood events. Furthermore, closure directly contradicts extensive analysis that supports keeping the road open in the 2008 Travel Plan.

## **9. Mineral Canyon Trail - D1217**

Similar to the closure of Hell Roaring Canyon, the closure of Mineral Canyon Trail is arbitrary, capricious, and contrary to law because it is justified by the alleged need to protect bighorn sheep and raptor habitats. This contradicts findings in the *Limiting Roped and Aerial Activities in Mineral and Hell Roaring Canyons*, which concluded that the road has minimal impact on these species. Furthermore, even rock climbing—which is significantly more disruptive to these species than a road—is permitted in the area. The road itself is entirely in the “green zone,” where BLM has imposed few restrictions on rock climbing because bighorn sheep are habituated to

human activity and have the entire upper canyon, which is past the road, to retreat to. Furthermore, the Travel Plan falsely claims that the road does not access any recreation destination, completely ignoring comments pointing out that the road accesses a hiking trail into the upper canyon, and that the road allows for vehicular retrieval of BASE jumpers who parachute down from upper parts of the canyon and land on the road. The road also has significant value for general scenic viewing and OHV travel. For this reason, the route is also featured in Volume 2 of BlueRibbon Coalition's *Lost Trails Guidebook*.

### **10. Mineral Canyon Dispersed Camping Area - D1207**

The closure of D1207 is arbitrary, capricious, and contrary to law for at least two reasons. First, it is important to observe that the closure affects approximately half of the total length of the longer road. The first half will remain open while the second half will be closed. The Travel Plan alleges that closing the second half of the road will not impact recreational opportunities. However, this completely ignores the fact that BLM has designated four dispersed campsites on the segment to be closed, two of which are at the end of the road and have exceptional cliffside views that are not duplicated by any other campsites in the entire Travel Plan area. Thus, the alleged basis for closure is simply incorrect, arbitrary, and capricious. Second, the closure rationale fails to document any impacts that would result from leaving this route open, instead relying on boilerplate language about how closure would minimize visual contrast and vague assertions about impacts on (unidentified) wildlife. Any justification based on wildlife impacts is entirely undermined by the fact that BLM cleared the road of wildlife impacts when it designated campsites along it in 2017. The alleged justification for designating sites (as opposed to unrestricted dispersed camping) was to protect bighorn lambing habitat.



### **11. Taylor Canyon Overlooks - D1019B, D1026B, D1112**

The closure of routes D1019B, D1026B, and D1112 is arbitrary, capricious, and contrary to law for at least three reasons. First, at least one alleged justification is demonstrably false. The proffered justification for the closure of segment D1019B is because segment D1026B is allegedly remaining open and would provide a similar user experience. However, *segment D1026B is also being closed*. Thus, the closure of D1019B *cannot* be explained by D1026B remaining open. Again, the agency has offered an explanation for closure that runs counter to the evidence before the agency. Furthermore, each of these routes access different, unique overlooks of Taylor Canyon. Therefore, even if one were to remain open, they do not, in fact, provide similar user experiences—the overlooks are unique. To the extent that the Travel Plan alleges that D1042A provides an alternative, this is incorrect because that road dead-ends at the boundary of Canyonlands National Park in the middle of a mesa top. A long hike is then required to approach the canyon rim. Additionally, no impacts are cited as a reason to close these routes, aside from a brief mention of user conflicts for D1019B. However, conflicts are highly improbable given the remoteness of the area and the lack of evidence that it sees significant foot or mountain bike traffic. Any assertion of user conflict is simply arbitrary speculation.

### **12.7-Up Trail - D1944, D1945**

The closure of routes D1944 and D1945 is arbitrary, capricious, and contrary to law for at least two reasons. First, it improperly implies that mountain-bike traffic is to be prioritized over motorized traffic. The closure is allegedly necessary to reduce “user conflict” between motorized users and mountain bike users. This route does coincide with the 7-Up bike trail, which is part of the Magnificent 7 bike trail network that was developed early last decade, after the 2008 RMP was adopted. However, because this area is a motorized-focus area and not a mountain bike focus area, there is nothing that would permit BLM to prioritize mountain bike travel over motorized

travel, such as to justify closure. This renders the closure arbitrary and capricious. The plan acknowledges that motorized uses are low, which further undermines any claim that there are “conflicts” between motorized and mountain bike users. Second, the closure is arbitrary because bighorn sheep and raptor nests are also given as reasons for closing it, even though this route has existed for decades and there is no evidence of negative impacts to wildlife.

### **13.Slickenside Arch Dispersed Camping Area - D2421**

The closure of D2421 is arbitrary and capricious because it is allegedly being undertaken because, “[w]hile the route has been used for dispersed vehicle camping in the past, there is no designated campsite at this location currently because of the presence of cultural resources.” This is false. BLM has created an entire designated dispersed camping area that contains BLM ground signage and a kiosk showing eight campsites on the road. The proposed closure does not even acknowledge this BLM-created area to exist—the very definition of arbitrary and capricious.

### **14.Dead Cow Motorcycle Trail - DC3, D2763B**

This arbitrary, capricious, and contrary-to-law closure of DC3 and dD2763B would close the most popular motorcycle trail in the entire Moab region. The alleged basis for the closure is riparian impacts, but the trail exists in a dry wash basin with a rocky bottom, and there is no evidence provided that continued motorized access will have meaningful riparian impacts. Further, as discussed above, the map BLM used *has the trail in the wrong place*. The real trail is further from the river, and thus further from riparian habitat, than BLM believed when it made the decision to close the trail.

### **15.Lost World Butte Trail - D2624, D2633**

This arbitrary, capricious, and contrary-to-law closure of D2624 and D2633 is allegedly necessary because this route is redundant with Rainbow Terrace (D2625).

However, partway along the route, Lost World Butte Trail splits from Rainbow Terrace to offer a completely different user/recreational experience. This trail runs closer to Lost World Butte on unique slickrock terrain. It also creates a lollipop loop with Rainbow Terrace, which is a different user experience than the out-and-back experience that would result if Lost World Butte Trail were closed. The closure provides no consideration or explanation of the different qualitative experiences, despite the fact that comments were submitted highlighting this problem. *See, e.g., McKay/COTD Comment at 194-202.*

### **16. Rock Canyon Trail and The Very End Trail - D2664A, D2658**

This arbitrary, capricious, and contrary-to-law closure of D2664A and D2658 would close routes on the south rim of Ten Mile Canyon because, allegedly, they impact bighorn sheep habitat. Closing D2664A ruins an excellent loop opportunity and creates two short out-and-back stubs of the remaining route. Closing D2658 removes access to a popular scenic overlook of the mouth of Ten Mile Canyon that local Jeep clubs often run. No explanation or analysis is offered to explain how these lightly used routes impact bighorn sheep habitat, aside from boilerplate language unsupported by any record evidence.

#### *D. The closures violate NEPA.*

BLM failed to take a “hard look” as required by NEPA. “[B]y requiring agencies to take a ‘hard look’ at how the choices before them affect the environment, and then to place their data and conclusions before the public, NEPA relies upon the democratic processes to ensure . . . that the most intelligent, optimally beneficial decision will ultimately be made.” *Or. Natural Desert Ass’n v. BLM*, 625 F.3d 1092, 1099 (9th Cir. 2010). “General statements” are not enough to satisfy the hard look requirement. *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 491 (9th Cir. 2011). Agencies must provide “accurate scientific analysis . . . [for] public scrutiny

before decisions are made and actions taken.” *Center for Biological Diversity v. USFS*, 349 F.3d 1157, 1167 (9th Cir. 2003).

No such hard look happened in this case. This is made obvious by BLM’s talismanic invocation of noise causing user conflicts. The TMP closes over 15 miles of routes along the Green River, partially justifying the decision because of “noise induced conflict.” TMP at A2-21, A2-123, A-2125. However, it gives no objective criteria of what the noise level is or how many conflicts it produces. A scientific protocol is required to judge the effects on the human environment. *See S. Utah Wilderness Alliance v. United States DOI*, 2016 U.S. Dist. LEXIS 140624, at \*23-24. Similarly, the numerous egregious errors in the TMP and the EA show that BLM did not take a hard look at accurate information in order to make an informed decision.

BLM violated its non-discretionary duty under NEPA to provide site-specific impact analyses, in violation of 42 U.S.C. § 4332(2)(C) and 40 C.F.R. § 1502.14, because the TMP does not analyze the environmental impacts of motorized travel on 317.2 miles of routes that had been lawfully utilized for decades by the public. BLM wrongly concluded that the TMP does not significantly affect the quality of the human environment. An environmental impact statement (“EIS”) is required when a “major Federal action[] significantly affect[s] the quality of the human environment.” 42 U.S.C. § 4332(C). A major federal action is one that “requires substantial planning, time, resources, or expenditure.” *Nat’l Resources Defense Council, Inc. v. Grant*, 341 F. Supp. 356, 366 (March 15, 1972). “Typically, a project is considered a major federal action when it is funded with federal money.” *Southwest Williamson County Comty. Ass’n v. Slater*, 243 F.3d 270, 278 (6th Cir. 2001).

Further, the “human environment means comprehensively the natural and physical environment and the relationship of present and future generations of Americans with that environment.” 40 C.F.R. § 1508.1(m). In contemplating the human environment, agencies must consider the effects of its policies whether

beneficial or detrimental. *Id.* at § 1508.1(g)(4). Human recreation in, and enjoyment of, natural spaces is a part of the “human environment” to be considered, and closures will have a significantly detrimental effect on this aspect of that environment. In determining when site-specific EIS analysis must occur, courts must consider the full context of the agency’s decision and whether “all reasonably foreseeable impacts” were assessed “at the earliest practicable point . . . before an irretrievable commitment of resources [was] made.” *N.M. ex rel Richardson v. BLM*, 565 F.3d 683, 718 (10th Cir. 2009).

BLM clearly failed to conduct an EIS when it should have. Whether a person can continue to recreate in nature in the same manner he has for years clearly affects his relationship with the environment and will affect generations going forward. Even if closures might provide a beneficial effect on the environment, agencies are still required to conduct an EIS to determine the environmental importance of a proposed action. Additionally, BLM should have done a site-specific analysis of each closed route, as each of these routes will be “obliterated” when the TMP goes into effect.

#### **IV. APPELLANTS FACE IRREPARABLE HARM IF A STAY IS NOT GRANTED.**

Establishing irreparable harms is not “onerous.” *Cottonwood Envtl. L. Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1091 (9th Cir. 2015). “Indeed, [a plaintiff’s] expressed desire to visit the area in an undisturbed state is all that is required to sufficiently allege harm . . . .” *Alliance for Wild Rockies v. Marten*, 253 F.Supp.3d 1108, 1111 (D. Mont. 2017); *see also Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (finding plaintiffs’ allegation that a proposed timber project would “harm its members’ ability to ‘view, experience, and utilize’ the areas in their undisturbed state” satisfied the irreparable harm requirement). Further, courts have recognized that “when an action is being undertaken in violation of NEPA, there is a presumption that injunctive relief should be granted against continuation of the

action until the agency brings itself into compliance.” *Reality Income Trust v. Eckerd*, 564 F.2d 447, 456 (D.C. Cir. 1977); *see also Nat. Res. Def. Council v. Houston*, 146 F.3d 1118, 1129 (9th Cir. 1998) (observing that “the proper remedy for substantial procedural violations of NEPA . . . is an injunction,” because “injunctions serve[] the purpose of preserving the decision makers’ opportunity to choose among policy alternatives”) (internal quotations omitted).

Appellants easily meet their burden here. BRC, COTD, and McKay will suffer irreparable harm. McKay has plans to travel these routes in Spring 2024, just a few short months away. McKay Declaration ¶ 37. BRC’s members regularly travel in the TMA on trails that the TMP will close and will be stopped from doing so. Burr Declaration ¶¶ 2, 7. This is especially important to BRC’s disabled members, who are even less able to travel the closed portions without OHVs. *Id.* at ¶ 4. It will also reduce the value of BRC’s guidebooks, which account for a significant portion of BRC fundraising. *Id.* at ¶ 8.

Further, once routes are closed, they historically do not reopen. *Id.* at ¶ 5. In addition to the bureaucratic morass that prevents reopening, natural and manmade effects on the routes begin to make the routes more difficult to pass once closed. Part of this is the natural reclaiming of the land by nature, where desert plants begin to grow over the previous route. *Id.* Additionally, BLM and anti-OHV groups will also make efforts to block off routes, accelerate plant growth over them, and generally make the routes difficult to follow. EA at 348. To be more explicit, BLM’s term for the process of closing trails is to “obliterate” them. EA at 347-48. BLM will disguise routes, rip out soil, reseed the area, and install barriers and signs. EA at 347-350. Once the trails are overgrown, for all intents and purposes they are gone forever. An immediate stay is necessary to preserve the status quo while the Board considers the merits of the Appellants’ claims.

**V. IRREPARABLE HARM TO THE APPELLANTS OUTWEIGHS ANY HARM TO BLM OR ANY OTHER PARTY.**

There is no meaningful harm to other parties. The current routes have been open for well over 15 years and leaving them open will not result in any new harms to BLM or any other party with a claimed interest. The only harm alleged could be a delay while the Board considers the appeal. This is a *de minimus* harm and is different from potential harms that are claimed in other cases where new routes are opened.

On the other hand, BRC's members and McKay have concrete plans to travel these routes and experience the area by OHV. They will certainly suffer substantial irreparable harm if nearly 30% of the routes in the TMA are unilaterally closed and obliterated by BLM without following proper procedure with respect to NEPA and the RMP. As noted above, the BLM policy of "obliterating" roads means that these roads will be destroyed if a stay is not enacted while this appeal is pending. They cannot be re-created once they have been "obliterated."

The loss of the treasured recreational opportunities that these roads provide—enjoyed by tens of thousands of local residents, visitors, and families for decades—is both irreparable and substantial every year. To wit, two of the roads slated for obliteration (Mashed Potatoes Trail and Day Canyon Point Trail) are routes that are run during the annual Easter Jeep Safari in the area. As demonstrated by the comments submitted during BLM's consideration of the TMP, these historic roads are treasures. Their obliteration should not occur at all. And if it is to occur, it should only occur after a full and fair hearing on the merits and all appeals have been exhausted.

**VI. THE PUBLIC INTEREST FAVORS GRANTING A STAY.**

The public interest favors granting a stay. Closing the routes impacts the public interest in a myriad of ways, and not just the interests of the Appellants. The routes are open to the public and widely used. Further, the routes are located in a

very popular area for OHVs and there are likely members of the public who are not yet aware that these planned closures will affect their future planned trips. It is in the public interest to keep public lands as accessible as possible, and the closure of 30% of the routes in the TMA will have a significant impact on the public's ability to continue to enjoy this public land, as they have for decades.

Political representatives have publicly supported keeping the routes open. One example is Utah Senator Mike Lee, who introduced legislation to prohibit federal money from being used to enact new travel plans. *Lee Bill Seeks to Protect Utah's Historic Roads*, Press Release (October 26, 2023), available at: <https://www.lee.senate.gov/2023/10/lee-bill-seeks-to-protect-utah-s-historic-roads>.

The same bill would delay the implementation of new travel plans until court cases have been completed. The Utah Public Land Policy Coordinating Office, a coordinating agency for this plan, also opposes it. It filed an administrative appeal and request for stay on Friday October 27, 2023, signaling the State of Utah's serious concerns with the plan.

Further, it is also in the public interest to require BLM to comply with applicable law. *Seattle Audubon Soc'y v. Evans*, 771 F. Supp. 1081, 1096 (W.D. Wash. 1991) ("refusal of administrative agencies to comply with [the law] . . . invokes a public interest of the highest order"). The serious and substantial issues raised in this appeal warrant a stay to prevent BLM from benefiting from its slipshod attempts to close public routes without complying with the law. BLM failed to respond to many comments and provide adequate rationales for route closures. This includes comments about complying with the Dingell Act and about the effect closures will have on elderly and disabled people by preventing them from having access to public land. Numerous glaring factual errors within the TMP similarly cast doubt on the appropriateness closures. The prudent thing to do is to stay the decision and continue



to let the public enjoy the routes—as they have for decades—while the appeals process and any subsequent legislation plays out.

### **CONCLUSION AND PRAYER FOR RELIEF**

In light of the forgoing and pursuant to 43 C.F.R. § 4.21(b), it is appropriate and proper that a stay of enforcement of the September 28, 2023 Decision and TMP be issued by this Board while this appeal and all subsequent appeals are pending.

Appellants respectfully request that the IBLA grant a stay.

Respectfully submitted on October 30, 2023,

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 30, 2023, the foregoing NOTICE OF APPEAL and PETITION FOR STAY, was served upon the following:

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