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**THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH**

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

Plaintiffs,
v.

BUREAU OF LAND MANAGEMENT,
U.S. DEPARTMENT OF THE
INTERIOR,

Defendants,

and

SOUTHERN UTAH WILDERNESS
ALLIANCE,

Defendant-Intervenor.

**PLAINTIFFS' REPLY TO
DEFENDANTS' OPPOSITION TO
MOTION FOR RELIEF UNDER 5
U.S.C. § 705, OR, ALTERNATIVELY,
FOR A PRELIMINARY INJUNCTION**

Civil No. 2:23-cv-00923-DAK

Honorable Dale A. Kimball

Plaintiffs hereby offer this Reply to Defendants’ Opposition to Motion for Preliminary Injunction, ECF No. 30, and Defendant-Intervenor’s Response and Memorandum in Opposition to Plaintiffs’ Motion for Relief Under 5 U.S.C. § 705 or, Alternatively, for a Preliminary Injunction, ECF No. 33. As shown below, Plaintiffs are likely to succeed on the merits of their challenge to Defendants’ closure of over 300 miles of trails north and west of Moab, Utah. The closures violate the Appointments Clause of the U.S. Constitution, violate the Dingell Act, are arbitrary and capricious, and violate the National Environmental Policy Act.

Furthermore, once these trails are closed, they quickly overgrow and are, to use Defendants’ word “obliterated.” Cutting new trails is illegal and Defendants—to Plaintiffs’ knowledge—have never created new trails after a trail has disappeared due to closure. The trails are, therefore, perishable recreational resources that are enjoyed by countless Americans who explore America’s public lands alone, with friends, and with families. If Plaintiffs’ motion is not granted, these resources will disappear in short order. That is the very definition of irreparable harm, which is discussed in Section II below.

I. Plaintiffs are likely to succeed on the merits.

a. Plaintiffs are likely to succeed on their Appointments Clause claim.

District Manager Nicolle Gaddis-Wyatt authorized the Labyrinth Rims/Gemini Bridges Travel Management Plan (the “TMP”). Defendants do not contest Plaintiffs’ assertion that she is an employee. ECF No. 30 at 8. They largely focus on whether she has “significant authority.” *Id.* at 9 (quoting *Lucia v. SEC*, 138 S. Ct. 2044, 247 (2018)). They also emphasize that she reports to officials and appointed administrative law judges. *Id.* at 10.

Defendants' argument that the District Manager does not exercise significant authority is unpersuasive. The District Manager has tremendous discretion to carry out "important functions." *Lucia*, 138 S. Ct. at 2053. She is charged with, as Defendants point out, "the enormously complicated task of striking a balancing among the many competing uses to which land can be put[.]" ECF No. 30 at 2 (quoting *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 58 (2004)). She must weigh all the competing interests Defendants list, such as recreation, soil disruption, animal disturbances, and other resources. *Id.* She is responsible for taking in all the information from her agency experts, outside experts, and comments from the public, and making a decision on the TMP. This is no minor endeavor.

The Constitution's structure ensures that those officials who make decisions that affect the lives of citizens are still accountable to the political process. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1982 (2021). This is the essence of Plaintiffs' Appointments Cause claim. Allowing an employee not subject to the political process to have discretion when deciding the "enormously complicated task" of travel management planning is not compatible with political accountability. This is particularly true where, as here, her decisions can result in felony criminal penalties for those who disobey her road closures. *See* 43 C.F.R. § 8340.0-7. Plaintiffs are likely to succeed on the merits of this claim.

b. Plaintiffs are likely to succeed on their Dingell Act claim.

A simple glance at the map showing closed routes show that BLM had the clear intent of creating a buffer zone around the Labyrinth Canyon Wilderness. *See* DR at A1-4. There are no longer any true OHV routes along the river—only well-maintained county roads. Further, Defendant-Intervenor's public comments directly state it was

their intention to advocate for both sides of the Green River to be treated as wilderness. See Kelsey Cruickshank and Laura Peterson, Southern Utah wilderness Alliance, *Labyrinth Canyon Travel Planning: A New Opportunity to Solve Old Problems*, available at: <https://suwa.org/labyrinth-canyon-travel-planning-a-new-opportunity-to-solve-old-problems/>. “With this forthcoming travel plan, the agency has the chance to correct decades of mismanagement and harmonize land management on *both sides of the Green River*.” *Id.* (emphasis added). Any attempt by Defendant-Intervenor to pretend their goal was anything less than treating both sides of the Green River as wilderness is less than genuine.

As explained in the motion, Defendants’ explanation for closures along the Green River was pre-textual. In closing D2759B along the river, it listed noise conflicts with non-motorized users on the Green River twice. DR at A2-123-24. The route report also called it a “low” use “primitive” road. The 2008 RMP also found that OHV impacts to riparian, vegetation, and cultural resources to this route, also called the Ten Mile Wash route, could “be mitigated by clearly signing and flagging the desired route on the ground.” RMP at 19.

Nevertheless, Defendants contend that BLM’s justification does not violate the Dingell Act as long as there are other reasons than motorized travel for closing routes. ECF No. 30 at 13-14. For such a broad proposition, they rely on an out-of-circuit case, with different statutory language, that was decided 25 years before Congress passed the Dingell Act. See *Nw. Motorcycle Ass’n v. U.S. Dep’t of Agric.*, 18 F.3d 1468, 1480 (9th Cir. 1994). The persuasive effect of such a case is minimal. There, the Court was interpreting the Wilderness Act, which states “[t]he fact that nonwilderness activities or uses can be seen or heard from areas within the wilderness shall not, *of itself*,

preclude such activities or uses up to the boundary of the wilderness area.” *Id.* at 1480-81 (emphasis in *Nw. Motorcycle*). The Dingell Act, while similar, does not include the key phrase “of itself.” Accordingly, it should be interpreted differently than the statutory provision in *Nw. Motorcycle*. The Court should give effect to Congress’s plain directive to not let Labyrinth Canyon Wilderness Area distort BLM’s decisions outside the area and hold that Plaintiffs are likely to win on the merits of this claim.

c. Plaintiffs are likely to succeed on their Arbitrary and Capricious claim.

Defendants’ application of the Federal Land Policy and Management Act (“FLPMA”) was arbitrary and capricious. In particular, they failed to consider important aspects of the TMP and offered explanations that run counter to the evidence. *W. Watersheds Proj. v. Haaland*, 69 F.4th 689, 700 (10th Cir. 2023). Failing to respond to relevant and significant public comments also shows BLM’s decision “was not based on a consideration of relevant factors.” *Lilliputian Sys., Inc. v. Pipeline & Hazardous Materials Safety Admin.*, 741 F.3d 1309, 1312 (D.C. Cir. 2014).

Defendants’ do not even contend that BLM addressed Plaintiffs’ and other commenters’ concerns about access for elderly and disabled OHV-users, instead merely citing another district court case that dismissed concerns about disabled people accessing trails. ECF No. 30 at 17-18. Commenters and citizens are owed more than after-the-fact justifications during litigation from an agency’s lawyers. The same could be said for commenters’ concerns about the Dingell Act, which BLM now seeks to justify for the first time in litigation. Failure to address these issues shows that BLM did not consider the whole of the problem when issuing the TMP.

There are other egregious errors in the TMP that show BLM failed to consider important aspects of the problem and made a decision contrary to the evidence. The Slickensides Arch Dispersed Camping is located on Route D2421. ECF No. 4-4 at 76. It has 8 campsites, complete with signs marking campsites and an easily accessible road. *Id.* at 76-79 (McKay Comment at 289-91 using Comment pagination). Nevertheless, the TMP closes the route with an explanation that it “has no recreational value” and “there is no designated campsite.” DR at A2-96. This is demonstrably untrue, as evidenced by the pictures submitted in the McKay Comment.

Other justifications are contradictory. BLM justified closing D1270A, which is one of three overlooks on the south side of Hell Roaring Canyon, because D1434 and D1463 were still open and redundant. DR at A2-27. However, the TMP also closes D1434, the supposed open and redundant alternate. *Id.* at A2-37. BLM commits the same error regarding the scenic overlooks of Taylor Canyon. It justifies closing D1019B by stating routes D1116, D1026B, and D1042A “remain open.” *Id.* at A2-9. D1026, a 2.18-mile-long trail, however, is closed. *Id.* at A2-10.

BLM also failed to understand that nearby routes often offer different recreational experiences. For instance, BLM closed D2562, a trail known as Mashed Potatoes that is part of the Jeep Safari route, to have a “less redundant” route network. *Id.* at A2-106. It cites routes D2883C and D2383B as alternatives. *Id.* D2883C, however, does not appear in the TMP, and D2383B provides a much different recreation experience, essentially an entirely different use—the TMP describes D2383B as the “most popular and easiest of the Jeep Safari trails.” DR at A2-90. As shown in the guidebook scanned into the comment, Mashed Potatoes

(D2562) features difficult obstacles and a narrow canyon, something that can't be redundant with the "easiest" trails. *See* ECF No. 4-5 at 10-13 (McKay Comment at 302-05 using Comment pagination). BLM makes the same error with D2840, a trail known as Ten Mile Rim Trail, which is a primitive four-wheel-drive route. *See* ECF No. 4-8 at 14 (McKay Comment at 507 using Comment pagination). BLM decided it was redundant with B336, a "well maintained and heavily used" road. DR at A2-176.

The closures based on "noise" to minimize conflicts between OHV-users and river users is also arbitrary and capricious. River users are allowed to use motorboats. It does not make sense to ban OHVs based on vehicle noise adjacent to the river but allow vehicle noise *in* the river. Mineral bottom airstrip also continues to be in use along the river, again adding to the expectation of vehicle noise. EA at 88.

The justifications used by BLM to close routes are nonsensical, ignore the facts on the ground, and fail to respond to concerns raised by public commenters that were submitted during the comment period. Instead, the plan shows that Defendants were determined to reach a particular, pro-closure end, and ignored and omitted any contradictory facts that would prevent this. Plaintiffs are likely to win on the merits of this claim.

d. Plaintiffs are likely to succeed on their NEPA claim.

Defendants' failure to apply any sort of "hard look" as required by the National Environmental Protection Act ("NEPA") is evident by its failure to provide specificity for closing routes. Rarely did the DR provide anything more than "general statements." *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 491 (9th Cir. 2011). And yet, the entire purpose of NEPA is to provide an "accurate scientific analysis" so that the public can scrutinize the information before actions are taken.

Ctr. for Biological Diversity v. USFS, 349 F.3d 1157, 1167 (9th Cir. 2003). The lack of any sort of scientific or objective measure for “noise induced conflict” is indicative of a NEPA shortcoming. DR at A2-21, A2-123, A2-125; *accord S. Utah Wilderness Alliance v. United States DOI*, No 2:13-cv-01060-EJF, 2016 U.S. Dist. LEXIS 140624, at *23-24 (unpublished).

Defendants also failed to argue that the TMP does not constitute major federal action that would necessitate an involved and time-consuming environmental impact statement. *See* 42 U.S.C. § 4332(c). The TMP is a major federal action. When the federal government undertakes an action—as opposed to merely approving a third-party action—it is more likely to be considered a major federal action. *See Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1244-45 (D.C. Cir. 1980). That is the case here, where BLM is the primary actor and the decisionmaker regarding the route closures. Defendants funded the TMP, organized its research, and will implement it. This will include closing hundreds of miles of routes, policing them, obliterating them in some way, erecting signs, producing maps, continuing research on animals and vegetation, and any other activity that comes with regulating 303,994 acres of land. The TMP is a major federal action and Defendants should have conducted an environmental impact statement consistent with NEPA. Accordingly, Plaintiffs are also likely to win on the merits of this claim.

II. Plaintiffs have demonstrated a likelihood of irreparable injury.

First, Defendants and Defendant-Intervenor do not contest that a constitutional violation constitutes irreparable harm. ECF No. 30 at 24; ECF No. 33 at 15. Thus, the Appointments Clause violation discussed above is enough for the Court to grant an injunction.

Second, “obliteration” of the closed trails is also an irreparable injury. Defendants’ objections that the trails could easily be reopened, and that obliteration is “far more nuanced” are not based in reality. In fact, Defendants’ own EA lays this out: “A *first step* in reclamation is to obliterate obvious tracks and other evidence of use on closed routes.” EA at 348 (emphasis added). Defendants cannot now claim otherwise.

Further, Defendants gloss over the rapidity with which routes in the TMA can disappear naturally. Many of the routes are only maintained by OHV use. Declaration of Ben Burr, attached as Exhibit A, at ¶ 2 (hereafter, “Burr Declaration”). The San Rafael Desert Travel Management Area (“SRD TMA”) provides a good example, as it is right across the Green River of the Labyrinth/Gemini Bridges TMA and consists of nearly identical soil and vegetation.

An October 2022 decision by BLM closed 120 miles of routes in the SRD TMA, including Route SD781.¹ In the 15 months since closure, those routes have practically disappeared due to natural reclamation. Burr Declaration ¶ 6. The north access point is no longer visible at all. *Id.* ¶ 6. The south access point is similarly invisible, though a small portion can be seen in the distance. *Id.* ¶ 9-10. Once a route is no longer used by OHVs, the desert is quickly reclaimed by vegetation. *Id.* ¶ 7. The more prominent the route, especially if cut by heavy machinery, the more likely it is to become channels for water and flash floods that lead to erosion. *Id.* ¶ 7. SD781 shows how quickly this can happen as most of the trail is undetectable and the part cut by heavy machinery has eroded substantially. *Id.* ¶ 8. Without OHV-users maintaining the trails, they quickly disappear.

¹ The SRD Record of Decision is available here: <http://tinyurl.com/4r623ffm> (“SRD ROD”).

Additionally, despite Defendants' insistence that routes can be reopened or expanded, they tellingly did not point to one instance of that happening in any meaningful way. ECF No. 30 at 25. That is because it rarely, if ever, happens. As the declarant notes, despite engaging in hundreds of BLM plans, he is unaware of BLM ever reestablishing a route that had been obliterated. Burr Declaration at ¶ 11.

Third, illegal closures that restrict Plaintiffs' freedom to travel on desired routes cause irreparable harm. Plaintiff McKay wants to travel these routes soon. ECF No. 4-9 at ¶ 37. He cannot do so.

III. The public interest always lies in enjoining unlawful regulations.

Defendants' Opposition accuses Plaintiffs of "shift[ing] the burden" by arguing that injunctive relief "is not adverse to the public interest." ECF No. 30 at 26. But Plaintiff must establish that "the injunction would not be adverse to the public interest." *Fish v. Kobach*, 840 F.3d 710, 723 (10th Cir. 2016) (quotation omitted). Plaintiffs must also show that their "threatened injury outweighs the injury the opposing party will suffer under the injunction." *Id.* Plaintiffs have shown both.

First, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Awad v. Ziriox*, 670 F.3d 1111, 1122 (10th Cir. 2012) (quotation omitted). It is also in the public interest to "maintain the status quo and avoid the implementation of agency action which was likely promulgated in excess of statutory authority." *Wyoming v. United States DOI*, 136 F. Supp. 3d 1317, 1351 (D. Wyo. 2015). An injunction will also prevent the closure of one of the most popular OHV destinations in the world and "avoid regulatory uncertainty and confusion." *Id.*

Granting Plaintiffs' will merely leave the TMA in the condition it has been in for the last 15 years since the 2008 RMP. Any injury to Defendants or Defendant-

Intervenors is minimal. For Plaintiffs, however, Plaintiff McKay has concrete plans to visit the TMA and travel the closed trails. ECF No. 4-9 at ¶ 37. Plaintiff BlueRibbon has members who regularly traveled the now-closed routes, including elderly and disabled members who now have no way to see some of the TMA's areas. ECF No. 4-1 at 12-14, 20, 23; ECF No. 35, Exhibit A at ¶¶ 2, 4, 7. It will also be cheaper and more efficient in the long run to leave the trails open to allow OHV-users to continue to maintain them, rather than try to reestablish them after they have been obliterated or reclaimed. The public interest lies in continuing access to the closed trails and the balance of equities is also in favor of Plaintiffs.

CONCLUSION

Plaintiffs have met their burden for relief under 5 U.S.C. § 705, or alternatively a preliminary injunction. Plaintiffs are likely to win on the merits, face irreparable harm from the obliteration of routes, the balance of equities tip in their favor, and relief is in the public interest. The Court should grant Plaintiffs' Motion, ECF No. 4.

Dated this 9th day of February 2024.

TEXAS PUBLIC POLICY FOUNDATION

/s/ Matthew Miller

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of February 2024, I electronically filed the foregoing document with the Clerk of the Court for the U.S. District Court for the District of Utah by using the CM/ECF system, which will serve a copy of same on all counsel of record.

/s/ Matthew Miller _____
Matthew Miller

Exhibit A

**THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH**

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

Plaintiffs,

v.

BUREAU OF LAND MANAGEMENT,
U.S. DEPARTMENT OF THE
INTERIOR,

Defendants.

DECLARATION OF BEN BURR

Civil No. 2:23-cv-00923-DAK

Honorable Dale A. Kimball

I, Ben Burr, being over the age of 21 and having personal knowledge of the facts set forth herein, do declare and state as follows:

1. I am the Executive Director for the BlueRibbon Coalition. I have held my current position since July 2021. Prior to this position I held the position of Policy Director from November 2019 – July 2021. In these positions I have participated in hundreds of BLM planning processes that affect recreation access and road closures.

2. I have personally observed how off-road closures are obliterated after they are designated as closed by travel management plans. Many off-road routes are maintained through use of the route by off-road recreation users. Once that use stops, the routes can quickly disappear. The deserts of the Colorado Plateau are resilient and dynamic, and natural processes can reclaim routes in less than two years. I have observed this very process unfold on Route SD 781 in the San Rafael Desert.

3. The San Rafael Desert is a Travel Management Area located due west of the Labyrinth Rims/Gemini Bridges area. The geological topography and

ecosystems are similar between the two areas. The Bureau of Land Management released a Record of Decision¹ on October 28, 2022 (“SRD 2022 ROD”). The SRD 2022 ROD closed an additional 120 miles of routes that had been analyzed in a prior travel planning process. One of the routes closed by the SRD 2022 ROD was Route 781.

4. I first explored Route 781 in October 2020 when it was officially designated as open by the San Rafael Desert Travel Management Plan. Route SD 781 connects Route SD 778 with Route SD 774 and has a north access point where it connects with Route SD 778 and a south access point where it connects with Route SD 774. The route provides high recreation value because it has challenging terrain features. There is evidence that the route was originally cut and graded with heavy machinery such as a bulldozer, because portions of the route are highly visible.

5. During my first visit to SD 781 in October of 2020, the two-track disturbance corridor of the route was clearly visible at the north access point. I have included a picture of this route that I took in October 2020. *See* Photo 1, North Access Point 2020. After documenting this route, it was clear that if it didn’t continue to get used, that it could easily fully reclaim. We included this route in Lost Trails Guidebook Volume 1, which is a guidebook of routes with high recreation value that are at risk of closure from lack of use. We distributed nearly 2,000 copies of this guidebook to our members and supporters. I have spoken with numerous guidebook

¹ https://eplanning.blm.gov/public_projects/93510/200217651/20069364/250075546/Decision%20Record%20-%20Reconsideration%20of%20Routes%20As%20Required%20by%20the%202022%20Settlement%20Agreement.pdf

recipients who have explored these trails during the period of time that they were open. There was evidence of nonreclaimed tracks on portions of SD 781 that are less prone to reclamation. *See Photo 2, nonreclaimed tracks 2024.* The north access point is more susceptible to reclamation, because this portion of the route is in an area with heavier vegetation.

6. I revisited Route SD 781 on January 31, 2024, and the north access point has completely disappeared and is no longer visible from the ground. *See Photo 3 north access 2024.* This Route was officially closed in October of 2022, and it completely disappeared within 15 months.

7. Reclamation by vegetation is one of the ways a route can disappear, and the north access point to Route SD 781 only required one growing season for vegetation to reclaim this portion of the route. Water erosion in an environment is another natural process that can obliterate a route. Routes that are cut and graded by bulldozers often become channels for water during monsoon storms and flash floods. Regular use by OHVs can reduce route damage caused by water erosion, and light water erosion can make a trail more challenging and dynamic and increase the recreation value. This balance of use and natural processes is a common element of the off-road experience. Route SD 781 has one portion that was cut by a bulldozer, and in 2020 it showed light erosion damage to the trail. *See Photo 4, water erosion 2020.*

8. When I revisited Route SD 781 in 2024, the water erosion damage was so significant, the trail has become nearly undetectable with a substantial trench cutting the left side of the trail away for over 100 yards. *See Photo 5*, water erosion in January 2024. This was likely the damage from one monsoon season of no use.

9. The South access point to SD 781 is lower in elevation with different soils and vegetation. Because of its proximity to a scenic overlook of the San Rafael River, it also likely receives more traffic. In 2020, I took a picture of the route where it connects to SD 744 from a high vantage point on the route. I had just driven the route, so the two tracks are visible clear to the south access point. *See Photo 6*, south access point in 2020.

10. In 2024, I traveled to the same location by foot and took a picture from nearly the same location. *See Photo 7*, south access point 2024. Portions of the route are still clearly visible in this photograph, and it is clear from one section that the trail had received more traffic from OHVs than when I visited the route in 2020. Despite heavier use on the trail in prior to the October 2022 closure, the trail became non-existent as it gets closer to the south access point.

11. I have engaged through the public comment process on hundreds of BLM plans that affect the open or closed status of roads. Since 1987 our organization has participated in hundreds more. I cannot identify a single instance where the BLM has reestablished a road that has been obliterated through reclamation or other means.

12. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge, information, and belief.

DATED this 8 day of February 2024.


Signature: 
Printed Name: Ben Burr



Photo 1, a view of SD781's north access point in 2020.



Photo 2, nonreclaimed tracks on SD781 in January 2024



Photo 3, a view of SD 781's north access point in January 2024.



Photo 4, a view of water erosion on SD 781 in 2020.



Photo 5, a view of water erosion on SD 781 in January 2024.



Photo 6, the south access point to SD 781 in 2020



Photo 7, the south access point in January 2024