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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

IDAHO STATE SNOWMOBILE ASSOCIATION,

Plaintiff,

v.

U.S. FOREST SERVICE; THE SAWTOOTH NATIONAL FOREST; JIM DEMAAGD, in his capacity as Acting Forest Supervisor for the Sawtooth National Forest; and MIKE DETTORI, in his capacity as District Ranger for the Fairfield Ranger District,

Defendants,

and

WILDEARTH GUARDIANS and WINTER WILDLANDS ALLIANCE,

Defendant-Intervenors.

Case No. 1:19-cv-00195-DCN

REPLY IN SUPPORT OF DEFENDANT-INTERVENORS' CROSS MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

In its response/reply brief, Plaintiff Idaho State Snowmobile Association ("ISSA") changes its tune once again to try and save one of its arguments by suddenly applying a new legal theory that it had never previously alleged. It attempts to convert its prior stand-alone Administrative Procedure Act ("APA") claim into a claim alleging a violation of the Forest Services' Travel Management Rule despite ISSA failing to include that claim in its complaint or its opening brief. This serious procedural error, combined with ISSA's failure to allege its current National Environmental Policy Act ("NEPA") claim in its complaint, warrants dismissal of both claims.

Additionally, ISSA's claims fail on their merits given the ample evidence in the administrative record that the Forest Service's decision to open a significant portion of the Fairfield Ranger District to public snowmobile use while also protecting habitat for wintering wildlife was reasonable, supported by the science and expert biologists, and complied with all applicable laws. Accordingly, the Court should deny ISSA's motion for summary judgment.

ARGUMENT

I. THE COURT SHOULD DISMISS TWO OF ISSA'S LEGAL CLAIMS ON PROCEDURAL GROUNDS.

The Court should not even consider the first two legal claims in ISSA's summary judgment briefing because ISSA failed to present them properly to Defendants and the Court. As noted in Intervenors' first brief, ISSA failed to allege in its complaint that the Forest Service violated NEPA by not preparing an Environmental Impact Statement ("EIS") and therefore waived that claim. ECF No. 27 at 14-15. Furthermore, after the Forest Service and Intervenors correctly pointed out that ISSA's stand-alone APA claim is not justiciable, (ECF No. 25 at 19, ECF No. 27 at 16 n.3), ISSA suddenly converted that claim into a violation of the Forest

Service's Travel Management Rule (ECF No. 29 at 6-8). However, ISSA never included that theory in its complaint and never introduced it in its opening brief. For all of these reasons, the Court should dismiss both of these claims.

ISSA asserts it sufficiently pled both claims in its complaint. ECF No. 29 at 4-5, 8 n.2. Relying on *Johnson v. City of Shelby, Miss.,* 574 U.S. 10, 11 (2014) and *Alvarez v. Hill*, 518 F.3d 1152, 1157 (9th Cir. 2008), ISSA claims that it need not make any legal allegations or identify precise legal theories in its complaint; it simply must provide the necessary factual allegations to support its claim. *Id*. Yet ISSA must still give "fair notice" of what its claims are and the grounds upon which they rest. *Echlin v. PeaceHealth*, 887 F.3d 967, 977 (9th Cir. 2018); *see also Smith v. Campbell,* 782 F.3d 93, 99 (2nd Cir. 2015) (must identify legal theory in complaint if it serves a notice function that alerts an adverse party to aspects of the case which may not have otherwise been clear on the basis of the complaint). Where the complaint does not give sufficient notice of plaintiff's claim or theory of liability, the district court should dismiss that claim. *Echlin*, 887 F.3d at 978 (complaint failed to give fair notice of later argued claim); *Trishan Air, Inc. v. Federal Ins. Co.,* 635 F.3d 422, 435 (9th Cir. 2011) (because "complaint did not raise this claim, it was not properly before the district court"); *Cervantes v. Emerald Cascade Restaurant Systems, Inc.,* 644 Fed. Appx. 780, 781 (9th Cir. 2016) (complaint did not give notice of theories of liability). A party's "attempt to add . . . a claim at the summary judgment stage is impermissible." *Echlin,* 887 F.3d at 978. As noted by the Ninth Circuit, "summary judgment is not a procedural second chance to flesh out inadequate pleadings." *Trishan Air,* 635 F.3d at 435.

Even after *Johnson v. City of Shelby, Miss.*, courts within the Ninth Circuit have dismissed legal claims that parties tried to raise during summary judgment because the complaint did not provide notice of the legal theory. *See e.g. Helicopter Transport Services, LLC v.*

Sikorsky Aircraft Corp., 2020 WL 1430380, at *1, 11 (D. Or. March 23, 2020) (summary judgment is not proper place or time to add new claims); *Sheaffer v. Superior Tank Lines Northwest Div., LLC*, 2020 WL 1330769, at *3-4 (W.D. Wash. March 23, 2020) (rejecting attempt to assert new claims during summary judgment); *Las Virgenes Municipal Water Dist.-Triunfo Sanitation Dist. v. McCarthy*, 2016 WL 393166, at *9 (N.D. Cal. Feb. 1, 2016) (dismissing claim about EPA's failure to consider economic impact because it was not alleged in complaint).

Furthermore, courts have repeatedly disagreed with ISSA's contention that this general rule does not apply in APA cases. ECF No. 29 at 5; *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1080 (9th Cir. 2008) (rejecting NEPA claim that was not alleged in complaint); *Ctr. for Biological Diversity v. Fed. Highway Admin.*, 2017 WL 2375706, at *20 (C.D. Cal. May 11, 2017) (rejecting Department of Transportation Act claim that was raised in summary judgment but not alleged in complaint); *Oceana v. Bryson*, 940 F. Supp. 2d 1029, 1059-60 (N.D. Cal. 2013) (rejecting supplemental NEPA claim that was not alleged in complaint and thus not properly before the court); *Alliance for the Wild Rockies v. Tidwell*, 2010 WL 11606787, at *3 (D. Mont. March 30, 2010) (no need to address National Forest Management Act claim that was not pled in complaint).

Here, ISSA's complaint did not provide fair notice of its EIS or Travel Management Rule claims. At the start, it alleged violations of NEPA, the APA, and the National Forest Management Act ("NFMA"), but never asserted a violation of the Travel Management Rule. ECF No. 1 ¶ 3. The complaint included the allegation that the Forest Service's analysis of the impacts to mountain goats, wolverine, and lynx was not based on reliable or high-quality scientific evidence. *Id.* ¶ 26. Then it went on to allege that the science relied upon by the forest

did not support the agency's conclusions about potential snowmobile impacts to mountain goats, wolverine, and lynx. *Id.* ¶¶ 27-39.

It used these factual allegations to support its three claims for relief. The first claim was for "Violation of the Administrative Procedure Act" and stated: "Rejecting Alternative 4 based on unsubstantiated risks to 'wintering mountain goats, lynx, and wolverine denning' was arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law under" the APA. *Id.* ¶ 44. Second, a claim for "Violation of NEPA—Failure to Rely on High-Quality Scientific Evidence" stated: "Under NEPA, the [Environmental Assessment ("EA")] may only rely on high quality scientific evidence in conducting its analysis," and "[t]he EA failed to cite high quality scientific evidence to support its conclusions that Alternative 4 would have a negative impact on wintering mountain goats, lynx, and wolverines." *Id.* ¶¶ 48-49. It alleged that "violation of NEPA [was] arbitrary, capricious, an abuse of discretion, in excess of statutory authority and limitations, short of statutory right, and not in accordance with the law and procedures required by law." *Id.* ¶ 50. Finally, the third claim for relief was for "Violation of the National Forest Management Act" and alleged the Forest Service's decision was inconsistent with the Sawtooth Forest Plan. *Id.* ¶¶ 54-59.

Nowhere did the complaint allege the Forest Service should have completed an EIS, or that there may be *significant* effects that would require an EIS. *Blue Mountains Biodiversity Proj. v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998) (to prevail on EIS claim, plaintiffs must raise substantial questions whether a project may have a significant effect on the environment). Instead, ISSA's complaint contained a single NEPA claim that simply alleged the EA was arbitrary and capricious because it did not rely on high quality science. ECF No. 1 at ¶¶ 48-50. A claim that an agency must prepare an EIS due to potential significant effects is distinct from a

claim that an EA is deficient. *See e.g. Idaho Conservation League v. U.S. Forest Serv.*, 2016 WL 3814021, at *6 (D. Idaho July 11, 2016) (noting Plaintiffs raised two NEPA challenges: (1) EA did not take required hard look, and (2) agency failed to prepare EIS); *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 780, 785 (10th Cir. 2006) (noting claim challenging EA for failure to take a hard look and separate claim for failure to prepare EIS, but dismissing EIS claim because plaintiffs waived it). Here ISSA alleged only the deficient EA claim in its complaint. ECF No. 1 ¶¶ 48-49.

ISSA asserts that its factual allegations support its EIS claim and it did not need to specify the precise legal theory that an EIS was required. ECF No. 29 at 4-5. Yet, the complaint contained just one set of relevant facts, which supported the lone NEPA claim that the EA was arbitrary and capricious. ECF No. 1 ¶¶ 26-39. There is no way the Forest Service or this court would have known that the very same factual allegations were also intended to allege the Forest Service failed to complete an EIS. Thus, ISSA's complaint did not give "fair notice" of the EIS claim, and attempting to raise this claim during summary judgment is impermissible. *Echlin*, 887 F.3d at 977-78; *Trishan Air,* 635 F.3d at 435; *Smith,* 782 F.3d at 99.

Similarly, ISSA did not provide fair notice in its complaint of a claim that the Forest Service's decision violated the Travel Management Rule by misapplying the minimization criteria, as ISSA argues in its reply brief. ECF No. 29 at 6-8. The complaint never mentioned the Travel Management Rule or the minimization criteria anywhere. ECF No. 1. ISSA's claim asserting a violation of the APA simply stated that rejecting Alternative 4 based on unsubstantiated risks to wildlife was arbitrary and capricious under the APA. *Id.* ¶ 44. Like with the EIS claim, Defendants and the court would not have known that the same set of factual

allegations in the complaint were also meant to allege a Travel Management Rule violation. Accordingly, ISSA's complaint did not provide fair notice of that claim either.

Moreover, ISSA did not argue in its opening summary judgment brief that its APA claim actually involved a violation of the Travel Management Rule because the Forest Service improperly applied the minimization criteria. Instead, ISSA's opening brief raised a stand-alone APA claim that simply asserted the Forest Service's decision was arbitrary and capricious. ECF No. 23-1 at 22-25. Only after Defendants and Intervenors pointed out that a stand-alone APA claim is invalid did ISSA raise the argument that the Forest Service's decision violated the Travel Rule. ECF No. 29 at 6-8. However, arguments that are not raised in a party's opening brief are waived. *United States v. Cox*, 7 F.3d 1458, 1463 (9th Cir. 1993) (argument was waived when it was raised only in reply brief); *United States v. Romm,* 455 F.3d 990, 997 (9th Cir. 2006), citing *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) (same); *Edmo v. Corizon, Inc.*, 935 F.3d 757, 800 n.23 (9th Cir. 2019) (same); *Oceana*, 490 F. Supp. 2d at 1060 ("Plaintiff waived the claim by not raising it until its reply"). Because ISSA did not argue that the Forest Service violated the Travel Management Rule in its opening summary judgment brief, it waived that argument and this Court should not consider it.

ISSA's attempt to shift its legal claims throughout this case is improper and warrants dismissal of claims one and two. ISSA's first claim in its complaint was a stand-alone APA claim that is not justiciable, and converting it to a violation of the Travel Management Rule will not save it because that claim was not pled in ISSA's complaint nor argued in its opening brief. With regard to its second claim for relief, ISSA's entire NEPA argument on summary judgment was based on a claim that the Forest Service failed to do an EIS, which was not pled in its complaint, and therefore must be rejected as well. "Summary judgment is not a procedural

second chance to flesh out inadequate pleadings." *Trishan Air,* 635 F.3d at 435. Accordingly, the court should deny ISSA summary judgment on claims one and two.

II. ISSA'S LEGAL CLAIMS ALL FAIL ON THEIR MERITS.

In addition to the significant procedural errors that bar claims one and two, ISSA's claims all fail on their merits as well. The Forest Service considered all of the science, as well as opinions of experts, which reasonably supported its decision to open a significant portion of the district to snowmobile use but close the area that created the highest risk to mountain goats, wolverine, and lynx. ISSA's cherry-picked statements from the record are misleading and do not reflect the overall science or the consensus of the Forest Service's wildlife expert and Idaho Department of Fish and Game ("IDFG") experts that support the Forest Service's decision.

A. ISSA has not Demonstrated an EIS was Necessary.

In its reply brief, ISSA continues to argue that an EIS is required because of the uncertainty about effects to wildlife and the need to collect additional data. ECF No. 29 at 3-4. It again relies on *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1140 (9th Cir. 2011) even though Intervenors pointed out that in *Barnes*, the Ninth Circuit determined an EIS was *not* required despite some uncertainty about effects of the project. ECF No. 29 at 3; ECF No. 27 at 25 (citing *Barnes*, 644 F.3d at 1140). In fact, ISSA ignores all of the cases Intervenors cited explaining that some uncertainty and conflicting scientific evidence in the record does not make effects *highly* uncertain to trigger an EIS. ECF No. 27 at 24-25 (citing cases).[1] As the Ninth

[1] ISSA also confusingly claims that an agency's decision not to prepare an EIS is subject to a less deferential "reasonableness" standard rather than the normal arbitrary and capricious standard by citing to a 1982 case when Intervenors established the arbitrary and capricious standard applies according to a 2005 Ninth Circuit case. ECF No. 29 at 3; ECF No. 27 at 24. *See also Barnes*, 655 F.3d at 1132 (applying arbitrary and capricious standard when reviewing agency decision to forego an EIS).

Circuit has noted, "uncertainty is inherent in any environmental decision." *Jones v. Nat'l Marine Fisheries Serv.*, 741 F.3d 989, 998-99 (9th Cir. 2013) (holding the Corps properly concluded uncertainty about risk of hexavalent chromium generation did not require an EIS).

In another analogous case, the Ninth Circuit upheld an agency's decision to not prepare an EIS despite uncertainty about adverse impacts to wildlife. *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332-33 (9th Cir. 1992). The agency's conclusions were "clearly based on substantial—though not dispositive—scientific data, and not on mere speculation." *Id.* at 1333. Here, the Forest Service based its decision on a thorough assessment of scientific literature, habitat mapping, expert opinions, and site-specific studies of wolverine and mountain goats. AR 459-88, 680-81. While there may be some conflicting statements in the record, the agency's conclusion was based on substantial scientific information, not mere speculation, and did not require an EIS. *WildEarth Guardians v. Provencio*, 923 F.3d 655, 673-74 (9th Cir. 2019) (no highly uncertain effects that demanded EIS for travel plan where the record showed agency conclusions were based on existing data and not unduly speculative); *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1240-44 (9th Cir. 2005) (some conflicting information in record about impacts to wildlife did not show project's effects were highly uncertain).

ISSA's argument that an EIS was required because the Forest Service could have resolved the uncertainty by collecting more data fares no better. ECF No. 29 at 3-4. ISSA fails to explain what further data the Forest Service could have collected to resolve the uncertainty when the agency was already relying on a 2017 aerial survey of the mountain goat population and the extensive wolverine-winter recreation study that included the very habitat at issue here, which was also completed in 2017. AR 585-86, 628, 10455-533. The Forest Service clearly had up-to-date information from site-specific studies and used that information in its analysis. AR

684. ISSA offers nothing in support of its generic assertion that more data collection would resolve the uncertainties. ECF No. 29 at 3-4. In sum, the Forest Service's decision to issue a "Finding of No Significant Impact" rather than an EIS was not arbitrary and capricious because there are no highly uncertain risks, as the agency itself explained. AR 684.

B. The Forest Service's Decision Complied with the Travel Rule.

ISSA's reply brief asserts its newly alleged claim that the Forest Service violated the Travel Management Rule because its "application of the minimization criteria was arbitrary and capricious." ECF No. 29 at 6. Notably, ISSA refers throughout its reply brief to the Forest Service's "snowmobile ban," *see id.*, but this characterization of the agency's decision is misleading. The decision at issue here is a winter travel plan for the Fairfield Ranger District. AR 672. This plan provided for public snowmobile use on more than 138,000 acres of the district that were previously inaccessible. AR 497, 502-03. The Forest Service made this decision in response to repeated requests by snowmobile groups who wanted access to the northern half of the district beyond the existing elk closure area. AR 67, 433, 1225. Although the northernmost end of the district is off limits to snowmobiles under the new plan, the public can now snowmobile across a much larger area on the district than prior to the plan. Rather than being a snowmobile ban, the new winter travel plan significantly increased snowmobile access in the northern half of the Fairfield Ranger District.

The Travel Management Rule requires that when the Forest Service is designating areas or trails open to snowmobile use, it must minimize impacts to resources, conflicts with other recreation users, and "harassment of wildlife and significant disruption of wildlife habitats." 36 C.F.R. § 212.55(b). ISSA claims that the Forest Service misapplied these criteria because it had no evidence that snowmobiles would harass lynx or denning wolverine. ECF No. 29 at 7-8.

ISSA's argument is spurious in light of extensive evidence in the administrative record supporting the agency's decision. After thorough consideration of impacts to wildlife and their habitat, the agency reasonably concluded that its chosen alternative would comply with the Travel Rule minimization criteria while the alterative of leaving the entire district open to snowmobile use (Alternative 4) would not comply. AR 384, 453-507, 536-41, 680-81, 686.

The most glaring problem with ISSA's argument is that it completely ignores a primary reason for the wildlife closure area: potential harassment of mountain goats and disruption of mountain goat habitat. ECF No. 29 at 6-8. From the start, wildlife experts from the Forest Service and IDFG recommended an alternative that was based on protecting mountain goat winter habitat and wolverine denning habitat. AR 104-05. In fact, the closure most closely corresponds with winter habitat for mountain goats and known mountain goat winter locations. AR 322, 628. IDFG biologists expressed the importance of keeping this area closed to snowmobiles to protect mountain goats. AR 291, 1514 attachment p. 2. ISSA focuses its argument on the fact that the Forest Service has no evidence lynx or denning wolverines use the closure area, but conveniently omits any mention of mountain goats, which clearly *do* occupy that area in winter. As the Forest Service explained, snowmobile use of the area would allow the machines into proximity of wintering mountain goats, putting the animals at risk of disturbance. AR 324, 467. The closure was "primarily in response to the need to minimize potential disturbance/ displacement of mountain goats and elk on their winter ranges." AR 539. The omission of mountain goats from their argument completely undercuts ISSA's claim.

Furthermore, multiple wolverines have been documented using the northern part of the district, including a female that denned just a ¼ mile west of the district boundary. AR 334-36, 477-79. Based on these observations and analysis of habitat, the Forest Service's expert

predicted that up to two dens may occur in the analysis area. AR 335-36, 477-79. And the recent wolverine-winter recreation study concluded that snowmobile use is detrimental to female wolverines during the denning period. AR 681. This study provided "compelling evidence for securing areas free of disturbance within wolverine home ranges during the denning period." *Id*. Based on the extensive use by wolverines of the Fairfield Ranger District, the likelihood of dens in the area, and the results from the wolverine-winter recreation study, it was reasonable for the Forest Service to conclude that the closure "would minimize potential disturbance effects to denning wolverines in the areas considered to have the greatest potential for denning." AR 539.

ISSA once more attempts to rely on the "take" analysis from *Arizona Cattle Growers Ass'n* to support its argument. ECF No. 29 at 7. Again, this case is irrelevant, not only because the Endangered Species Act's take provision is distinct from the requirements of the Travel Rule, but also because mountain goats and wolverines *do* exist in the area and could be subjected to harassment by snowmobiles. AR 459-62, 467, 477-79, 485, 628, 680-81. The evidence here is sufficient to support the Forest Service's application of the minimization criteria. *See Bitterroot Ridge Runners Snowmobile Club v. U.S. Forest Serv.*, 329 F. Supp. 3d 1191, 1204-05 (D. Mont. 2018) (existing data in record sufficient to support Forest Service application of minimization criteria); *Clearwater County, Idaho v. U.S. Forest Serv.*, 2017 WL 2623166, at *13-14 (D. Idaho. June 16, 2017) (upholding travel plan where agency considered available data and gave reasonable explanation for decision); *Pryors Coal. V. Weldon*, 803 F. Supp 2d 1184, 1197 (D. Mont. 2011), *aff'd*, 551 Fed. Appx. 426 (9th Cir. 2014) (travel plan that best balanced uses and resources complied with Travel Management Rule and other laws).

The Forest Service's assessment of scientific data and other information when considering whether snowmobile designations will minimize harassment of wildlife and

disruption of wildlife habitat is precisely the type of technical analysis that warrants substantial deference by this Court. *Lands Council v. McNair*, 537 F.3d 981, 993-94 (9th Cir. 2008); *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1301 (9th Cir. 2003); *Protect Our Communities Found. v. Jewell*, 825 F.3d 571, 584 (9th Cir. 2016); *Clearwater County*, 2017 WL 2623166, at *13 ("An agency has wide discretion to determine the best scientific and commercial data available for its decision-making"). The record here contains ample evidence that the Forest Service reasonably applied the minimization criteria when deciding on the new winter travel plan for the Fairfield Ranger District and thus this Court should defer to the Forest Service's conclusion.

C. The Forest Service's Decision is Consistent with the Forest Plan.

ISSA's final argument that the new winter travel plan is inconsistent with the Sawtooth Forest Plan is equally unsupported. ISSA "contends there is insufficient evidence" to show snowmobile use in the closure area would conflict with wintering wildlife such as lynx, mountain goats, or wolverine. ECF No. 29 at 9. Yet, the record shows the Forest Service considered the best available science as well as opinions of experts and used that information to explain why the proposed action (Alternative 2) would comply with the Forest Plan while leaving the entire analysis area open to snowmobile use (Alternative 4) would not comply with regard to these species. AR 459-88. The agency even completed a separate analysis to demonstrate compliance of the travel plan with the Forest Plan. AR 368-79. Intervenors pointed out these findings in their first brief but ISSA offers nothing to refute them or show they were unreasonable. ECF No. 28-29; ECF No. 29 at 8-9.

The Forest Service's interpretation and implementation of its own Forest Plan is entitled to substantial deference. *Friends of the Wild Swan v. Weber*, 767 F.3d 936, 947 (9th Cir. 2014)

(internal quotation omitted). Here, the Forest Service provided a reasoned analysis that was supported by information in the record to conclude its winter travel plan was consistent with the Sawtooth Forest Plan, and this Court should defer to that conclusion. *See Clearwater County*, 2017 WL 2623166, at *9-13 (finding travel plan consistent with Forest Plan).

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiff's motion for summary judgment and grant Defendant-Intervenors' cross motion for summary judgment.

Respectfully submitted and dated this 14th day of April, 2020.

/s/Lauren M Rule
Lauren M. Rule

Attorney for Defendant-Intervenors

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of April, 2020, I filed the foregoing REPLY IN SUPPORT OF DEFENDANT-INTERVENORS' CROSS MOTION FOR SUMMARY JUDGMENT electronically through the CM/ECF system, which caused the following counsel to be served by electronic means:

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