Russell A. Nevers (Utah Bar No. 13940)
FREEMAN LOVELL, PLLC
4568 S Highland Drive, Suite 290
Salt Lake City, Utah 84117
Telephone: (385) 355-4826
Email: russ@freemanlovell.com

James Rogers (Utah Bar No. 18783)
Nicholas Barry (Pro Hac Vice App Forthcoming)
AMERICA FIRST LEGAL FOUNDATION
611 Pennsylvania Ave, SE #231
Washington, DC 20003
Telephone: (202) 964-3721
Email: nicholas.barry@aflegal.org
james.rogers@aflegal.org

Attorneys for Plaintiffs

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.	**PLAINTIFFS' 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

Pursuant to 5 U.S.C. § 705, Plaintiffs BlueRibbon Coalition, Inc. ("BlueRibbon"), Patrick McKay, and Colorado Offroad Trail Defenders ("COTD") seek relief from this Court against Defendants Bureau of Land Management ("BLM") and United States Department of Interior to enjoin them from implementing the Labyrinth/Gemini Bridges Travel Management Plan Decision

Record (the "TMP" or "DR"). Plaintiffs challenge the constitutional and statutory authority of Defendants' agency order implementing a travel plan for an estimated 303,994 acres managed by BLM near Moab.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

INTRODUCTION

Plaintiffs are seeking relief to prevent Defendants' ongoing violation of the Constitution and federal statutes. Plaintiffs are two advocacy organizations and an individual offroad enthusiast, each seeking to improve and utilize motorized routes on Public Lands. On September 29, 2023, BLM issued a Decision Record ("DR"), Finding of No Significant Impact ("FONSI"), and Environmental Assessment ("EA")[1] that adopted a new travel plan in the Labyrinth/Gemini Bridges Travel Management Area ("TMA"). The new TMP closed 317.2 miles of previously available routes to motorized recreation in the TMA.

The TMA is located generally north and west of Moab, Utah, and is home to stunning landscapes featuring canyons, mesas, arches, and spectacular river views. It has become a world-famous destination for off-highway vehicles ("OHVs") and motorized recreation. It is also home to parts of the annual "Easter Jeep Safari," a nationally known, multi-day event that brings tens of thousands of OHV enthusiasts to the area that started in 1967.

Despite this long history of nondestructive use, OHV users have had to fight to maintain access to motorized trails. BLM closed 766 miles to motorized recreation in the TMA in 2008. Anti-OHV groups wanted more closed, however, and, following extensive litigation, BLM agreed to redraw the travel plan at issue in this case while leaving the 2008 plan in place. The latest DR ratchets motorized availability down even further, closing an additional 317.2 miles.

Worse, it does so in a way that violates the Constitution and federal statutes. First, the closures violate the Appointments Clause of the U.S. Constitution because BLM acted through an employee to create a permanent change to the land and criminalize new behavior. Second, the

[1] *See* Bureau of Land Management, *Labyrinth/Gemini Bridges Travel Management Plan Environmental Assessment*, DOI-BLM-UT-Y0101-2020-0097-EA (Sept. 2023); Bureau of Land Management, *Finding of No Significant Impact*, DOI-BLM-UT-Y0101-2020-0097-EA (Sept. 2023); Bureau of Land Management, *Labyrinth/Gemini Bridges Travel Management Plan Decision Record*, DOI-BLM-UT-Y0101-2020-0097-EA (Sept. 2023). These documents are available on BLM's website: https://eplanning.blm.gov/eplanning-ui/project/2001224/570.

closures violate the John R. Dingell, Jr. Conservation, Management, and Recreation Act (the "Dingell Act") by impermissibly using the closures to create a buffer zone around a wilderness area. Third, BLM acted arbitrarily and capriciously by failing to respond to relevant and significant public comments and by offering explanations that were counter to the evidence. Fourth, BLM failed to take a hard look at how the choices before it affected the environment and failed to conduct an environmental impact statement. These failures violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*.

SUMMARY OF REQUESTED RELIEF

Pursuant to Fed. R. Civ. P. 65 and district of Utah Local Rule 7-1, Plaintiffs respectfully request that this court:

1) Postpone the effective date of the *Labyrinth/Gemini Bridges Travel Management Plan Decision Record*, DOI-BLM-UT-Y0101-2020-0097-EA (Sept. 2023), until 60 days after this case is resolved on the merits.
2) Alternatively, issue a preliminary injunction enjoining Defendants from enforcing the new TMP and order the previous travel plan to remain in effect, and waive the requirement in Fed. R. Civ. P. 65(c) for Plaintiffs to Post a bond.

STATEMENT OF FACTS

On September 29, 2023, BLM released the Final EA, FONSI, and DR adopting the Labyrinth/Gemini Bridges Travel Management Plan. The EA analyzed four alternative travel plans, from which the final TMP was ostensibly meant to choose. BLM instead chose a plan that fit none of the proposed alternatives but was closest to Alternative B. DR at DR-3. Alternative B was the most restrictive of motorized recreation and meant to "constrain" such recreation within the TMA. EA at 16.

Plaintiffs BlueRibbon and COTD are organizations adversely affected by the DR because their members use the closed routes and heavily participated in the process leading up to BLM's decision regarding the TMP. *See* Exhibit A ("BlueRibbon Comment"); Exhibit B ("McKay/COTD Comment"). Plaintiff McKay is the Vice President of COTD and made plans to visit the TMA in Spring 2024 and travel the closed Routes. Exhibit C at ¶ 37 ("McKay Declaration"). BlueRibbon was also an intervenor in the previous litigation that led to BLM agreeing to reconsider the previous travel plan. ECF No. 1 at ¶ 12 (the "Complaint").

The TMA consists of over 300,000 acres of BLM lands located north and west of Moab, Utah. EA at 1. It has historically had "a particularly high level of OHV use" 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, and wilderness study areas. BlueRibbon Comment at 2. Accordingly, the TMA represents one of the last areas in the region where individuals and their families may enjoy motorized access to some of the most beautiful and thrilling trails, 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. Bureau of Land Management, *Record of Decision and Approved Resource Management Plan*, DOI- BLM-UT-Y010-2008-0001-RMP-EIS (Oct. 2008), available at: https://eplanning.blm.gov/eplanning-ui/project/66098/570 (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 travel management plans for 14 different TMAs, including the Labyrinth/Gemini Bridges TMA. Exhibit D 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. As noted, BLM chose a network that fit none of the alternatives but was closest to Alternative B in terms of OHV access. DR at DR-3. 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 E, BLM, *Land Use Plan Evaluation Report* (Sept. 30, 2015).

Following BLM's issuance of the DR, FONSI, and EA, Plaintiffs filed a Notice of Appeal and Petition for Stay at the Interior Board of Land Appeals ("IBLA"). *See* Exhibit F ("Petition for Stay"). The Petition for Stay raised all the same issues Plaintiffs raise in the Complaint, including an analysis of some of the most famous OHV routes that the DR closes. *See* Petition for Stay at 16-27. On November 28, 2023, the IBLA issued an order denying Plaintiffs' request for a stay. *See* Exhibit G. In doing so, it did not consider any of the legal issues raised in the stay request, instead finding only that Plaintiffs did not face immediate and irreparable harm.[2]

STANDARD FOR GRANTING THE MOTION

When deciding whether to grant a motion under 5 U.S.C. § 705 or grant a preliminary injunction, courts apply a largely identical four-factor test. *See Nken v. Holder*, 556 U.S. 418, 434 (2009) (noting the "substantial overlap" between factors for a stay pending appeal and a preliminary injunction); *Colorado v. United States EPA*, 989 F.3d 874, 883 (10th Cir. 2021) (The

[2] Denying the Petition for Stay constitutes final agency action for purposes of judicial review. *Farrell-Cooper Mining Co. v. United States DOI*, 864 F.3d 1105, 1107 (10th Cir. 2017) (quoting *Darby v. Cisneros*, 509 U.S. 137, 152 (1993)).

four preliminary injunction factors "also determine when a court should grant a stay of agency action under section 705 of the APA."). Courts consider: (1) whether the movant "has made a strong showing" of likely success "on the merits; (2) whether [they] will be irreparably injured absent" preliminary relief; (3) whether preliminary relief "will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken*, 556 U.S. at 434 (quotation omitted). The final factors "merge" and are considered together if "the Government is the opposing party." *Id.* at 435.

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS

The Complaint raises four counts. Plaintiffs are likely to prevail on each of them.

A. Defendants' actions violate the Appointments Clause of the U.S. Constitution.

The District Manager who made the decision to permanently close the routes was not properly appointed. "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 herein 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 think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

U.S. Const. Art. II, § 2, cl. 2. It sets 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).

Accordingly, there are three types of individuals serving under the President: principal officers, inferior officers, and all other employees. Officers hold duties that are "continuing and permanent" and exercise "significant authority pursuant to the laws of the United States." *Lucia*, 138 S. Ct. at 2044. Employees hold duties that are only "occasional or temporary." *Id.* at 2052 (quoting *United States v. Germaine*, 99 U.S. 508, 510 (1879)).

District manager Nicollee Gaddis-Wyatt authorized the TMP at issue in this case. DR at DR-10. She is an unappointed permanent employee and has been since 2010. *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 v. United States*, 520 U.S. 651, 663 (1997). Rather, they are employees. And because BLM District Managers 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 BLM District Manager Ms. Gaddis-Wyatt 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 significant 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 and irreversible one.

The power exercised by the District Manager is the type of authority that must be vested in an officer of the United States. The District Manager can currently and unilaterally choose to criminalize the use of public lands. The exercise of this power by an employee, and not an officer, violates the Constitution and invalidates the TMP.

B. Defendants' actions violate the Dingell Act.

The Dingell Act, in part, created the Labyrinth Canyon Wilderness, which makes up most of the TMA's western border on the opposite side of the Green River. Section 1232(e)(1) of the Dingell Act specifically forbids the creation of "protective perimeters or buffer zones" around the Labyrinth Canyon Wilderness. The act explicitly directs that non-wilderness activities outside the wilderness "shall not preclude the conduct of those activities outside the wilderness area." Section 1232(e)(2). Nevertheless, the DR closes most of the routes along the Green River, leaving open only maintained county B roads on the southwestern most corner of the TMA. This violates the Dingell Act by extending the wilderness area beyond what Congress permitted.

Notwithstanding this clear command from Congress, BLM created a buffer zone anyway. This is evidenced by an examination of the map showing the new closures along the boundary of the wilderness. *See* DR at A1-4 (Map 3 showing that almost all the trails leading to or along the river are closed under the new TMP). In explaining the route closures along the river, BLM justified them as an attempt "to minimize known visual and noise-induced conflicts with non-

motorized users on the Green River." DR at A2-123 (discussing closure of D2759A); *see also* DR at A2-46 (discussing closures of D1527A and D1527B because, in part, it would "minimize potential conflicts between offroad vehicle users and dispersed, non-motorized/non-mechanized forms of recreation (e.g., canoeists)"). In other words, this the rationale is merely a workaround to create a buffer zone around the Labyrinth Canyon Wilderness area.

BLM also violated the Dingell Act by basing route closure decisions 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. DR at DR-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. *See* DR at A2-21, A2-51, A2-123, A2-125.

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 incorporated 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, was closed to "minimize visual and

noise-induced conflicts between motorized and non-motorized users." DR 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. *See* 16 U.S.C. § 1271 *et seq.* Both designations specifically allow for access by roads to the rivers. 16 U.S.C. § 1273(b). 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. Section 1241 of the Dingell 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 if they were Wild River Segments.

C. Defendants' actions were arbitrary and capricious.

An agency decision is arbitrary and capricious under the APA where the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or if the agency action is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *W. Watersheds Proj. v. Haaland*, 69 F.4th 689, 700 (10th Cir. 2023) (internal 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. 3d 1112, 1167 (D.N.M. 2018) (quoting *Lilliputian Sys., Inc. v. Pipeline & Hazardous Materials Safety Admin.*, 741 F.3d 1309, 1312 (D.C. Cir. 2014)). BLM 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 Plaintiffs) 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." DR at A2-45. Such a decision is arbitrary and capricious and flies in the face of the Biden Administration's own executive order protecting access for disabled persons.[3] The same can be said for Route 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 disabled person's ability to access these features. DR at A2-45. In fact, BLM never once responded substantively to the many commenters concerned about access to the TMA for disabled and elderly visitors.

The TMP also fails to account for the Dingell Act's prohibition on buffer zones. Plaintiff 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. McKay/COTD Comment at 156, 272. BLM's failure to account for federal law in this regard or even respond to Plaintiff McKay's concerns makes its decision to close those routes arbitrary and capricious and contrary to law.

[3] 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/.

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." DR 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*, No. 2:13-cv-01060-EJF, 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 vague and imprecise 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 DR 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 the conclusion 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 Plaintiff McKay's comment that its map has D2763B and DC3 in the incorrect places. McKay/COTD Comment at 508-09. The real route is further from the river than BLM mapped it.

Many of the rationales for closure of the other routes 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 DR then explains why the route is being kept open. DR 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. DR at A2-73. Over a dozen routes[4] are being closed to "reduce route proliferation," but route proliferation is only listed as a problem in one of the route's areas (D1748). DR 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.

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 H, 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 hikers' locations, and they are more likely to be found off-trail, unlike vehicle 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.

D. Defendants violated 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

[4] D0017, D1035, D1038, D1044, D1076B, D1270, D1286, D1612B, D1685, D1748, D1766, D1872, D2733, D2739 (singletrack), D2750A (singletrack), D3922A

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

No such hard look was taken 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." DR 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,* No. 2:13-cv-01060-EJF, 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 to make an informed decision.

Additionally, failing to choose one of the prescribed alternatives in the EA also shows BLM did not take a hard look. "In an EA or EIS, an agency must analyze cumulative impacts from a project." *Ctr. for Bio. Diversity v. United States DOI*, 72 F.4th 1166, 1178 (10th Cir. 2023) (citing 40 C.F.R. § 1508.25(c)). Absent analyzing the route system as its own alternative, BLM could not have understood the cumulative impact of the TMP's particular combination of closures.

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 in its FONSI 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 (E.D.N.C. 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 failed to conduct an EIS when it was required to do so. 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 of outdoorsmen 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.

II. ABSENT RELIEF PLAINTIFFS WILL CONTINUE TO SUFFER IRREPARABLE HARM.

Plaintiffs can demonstrate three distinct types of irreparable harm. First, an ongoing constitutional violation constitutes irreparable harm. *See Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 806 (10th Cir. 2019). Second, Defendants are currently in the process of permanently "obliterate[ing]" the trails. EA at 347. Third, Plaintiff McKay will be unable to

travel these routes in Spring 2024 as he planned to do and Plaintiffs BlueRibbon and COTD's members will also no longer be able to travel the routes as they have planned to.

Constitutional violations, by their nature, are irreparable. *See id.*; *BST Holdings v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021) ("[T]he loss of constitutional freedoms for even minimal periods of time unquestionably constitutes irreparable injury.") (internal quotation omitted). BLM's violation of the Appointments Clause violates Plaintiffs' rights to be governed by constitutional laws. *See N.L.R.B. v. Canning*, 573 U.S. 513, 570 (2014) (Scalia, J., concurring) ("[T]he Constitution's core, government-structuring provisions are no less critical to preserving liberty than are the later adopted provisions of the Bill of Rights."). Such a constitutional violation is only made more pressing by the fact that money damages are not available in this case. "Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm." *Nelson v. NASA*, 530 F.3d 865, 882 (9th Cir. 2008) *rev'd on other grounds* 562 U.S. 134 (2011). Plaintiffs are barred by sovereign immunity from collecting money damages from Defendants. *See Modoc Lassen Indian Hous. Auth. v. HUD*, 881 F.3d 1181, 1195 (10th Cir. 2017). Such irreparable injury will ensue without an injunction from this Court.

Furthermore, Defendants' plan to "obliterate" the trails also constitutes irreparable harm. The EA explains in detail that they plan to obliterate the closed trails through "route reclamation." EA at 347-50. BLM will actively work to "hide routes from view." *Id.* At 347. As described by the EA, BLM has a "toolbox" to do this, ranging from "engineering/grading" to "passive/natural reclamation." *Id.* At 348-49. The goal is to "disguise their location." *Id.* At 331, 347. BLM will also "mechanically remove[] routes" and "revegetate[] them." *Id.* At 347. This technique is called "ripping and reseeding" and will make routes "undetectable." *Id.* BLM may also install barriers, signs, and fences to prevent travel on closed routes. *Id.* At 348-50.

The closures here do not in any way resemble the closure of a paved road. In this instance, closure equals destruction, and once the trails are gone, they cannot be remade. Indeed, it is illegal to create new trails within the TMA. *See* 43 C.F.R. Part 8340. If this litigation proceeds for several years—which it is likely to do based on historical precedent—Defendants' goal of obliterating the trails will be complete. What will be left is vast swaths of territory without any recognizable trails, and Plaintiffs will be legally foreclosed from remaking those trails even after they are successful in this legal challenge.

For millions of Americans, these trails are a precious resource. Their destruction—while this case is pending—would constitute a permanent and irreversible harm. On the other hand, leaving the trails open would simply maintain a decades-long status quo. Most of the trails began as old mining roads. As mining in the area faded away, the trails became popular with OHV users because they allow people to access the unique and beautiful areas of these public lands. And those OHV users have overwhelmingly used the trails responsibly—*that is why they are still so beautiful and popular even after decades of use*. If OHV users were destroying them, they would have long-since been trashed and rendered uninteresting for recreational purposes. But that is not the case. It is, therefore, appropriate to maintain the status quo by leaving the trails open rather than permanently "obliterating" them while this litigation is pending, as is Defendants' express intent.

Finally, 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).

Plaintiff McKay also has concrete plans to visit the TMA and travel the closed routes in spring 2024, which will be impossible if a preliminary injunction is not granted. McKay Declaration ¶ 37. BlueRibbon also has members who regularly travel the TMA on the closed routes. Burr Declaration ¶¶ 2, 7. The injury is especially acute for BlueRibbon's disabled members, who are even less able to travel the closed portions without OHVs. *Id.* ¶ 4; BlueRibbon Comment at 11-14, 20, 23.

III. RELIEF IS NOT ADVERSE TO THE PUBLIC INTEREST AND PLAINTIFFS' INJURIES OUTWEIGH ANY ALLEGED DAMAGE TO DEFENDANTS.

There is no meaningful harm to other parties. The travel plan in place prior to the TMP was in effect for over 15 years, and visitors have been using the routes for decades longer than that. Leaving the routes open for motorized recreation 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 in the effective date of the TMP while the case proceeds. This is a *de minimis* harm and is different than the concrete harms that have been claimed in other cases.

On the other hand, BlueRibbon's members, COTD's members, and McKay have concrete plans to travel these routes and experience the area by OHV. They will certainly suffer substantial harm if nearly 30% of the routes in the TMA are closed and obliterated by BLM. 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, three of the roads slated for obliteration (Hey Joe Canyon, Mashed Potatoes Trail, and Day Canyon Point Trail) are routes that are run during the annual and incredibly popular 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.

The public interest also favors an injunction. Closing the routes impacts the public interest in myriad ways, and not just the interests of the Plaintiffs. 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 closures will affect their future 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 also 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. Representative John Curtis also introduced a companion bill in the House of Representatives. *Curtis Works to Sidestep Federal Overreach on Public Roads*, Press Release (Nov. 17, 2023) available at: https://curtis.house.gov/news/documentsingle.aspx?DocumentID=2196. 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 preliminary injunction 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 of closures. The prudent thing to do is postpone the effective date of the TMP and allow this case to proceed.

IV. ALTERNATIVELY, THE COURT SHOULD ISSUE A PRELIMINARY INJUNCTION BUT NO BOND SHOULD BE REQUIRED IF THE COURT ISSUES THE INJUNCTION.

Section 705 of the APA specifically authorizes courts to "issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705. If the Court is not inclined to provide relief under Section 705, it can provide relief by issuing a preliminary injunction under Federal Rule of Civil Procedure 65 as the factors are substantively the same. *See Colorado v. United States EPA*, 989 F.3d at 883. Finally, the Court should waive the requirement for Plaintiffs to post a bond. Fed. R. Civ. P. 65(c). In the alternative, it should only require a nominal bond of $1,000 or less. Trial courts possess "wide discretion under Rule 65(c) in determining whether to require security." *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1215 (10th Cir. 2009). Here,

Plaintiffs are advocacy organizations and an activist seeking to enforce their constitutional and statutory rights, and Defendants face no direct monetary harm if an injunction is granted. Because a preliminary injunction in this case "enforces fundamental constitutional rights against the government . . . [w]aiving the security requirement best accomplishes the purposes of Rule 65(c)." *United Utah Party v. Cox*, 268 F. Supp. 3d 1227, 1260 (D. Utah 2017).

V. ALTERNATIVELY, PLAINTIFFS REQUEST THE COURT ORDER DEFENDANTS TO NOT MECHANICALLY RECLAIM THE ROUTES UNTIL THE END OF THIS CASE.

In the second alternative, Plaintiffs request the Court order Defendants to only allow natural reclamation of the closed routes and not mechanically destroy routes while this case is pending. Doing so would prevent the closed routes from permanent erasure in the near future and allow the case to be resolved while limiting the damage to the routes.

CONCLUSION

Plaintiffs respectfully request that the Court grant their motion for a preliminary injunction.

Date: December 22, 2023

FREEMAN LOVELL, PLLC

/s/ Russell A. Nevers
Russell A. Nevers

AMERICA FIRST LEGAL FOUNDATION

/s/ James Rogers
James Rogers

TEXAS PUBLIC POLICY FOUNDATION
901 Congress Avenue
Austin, Texas 78701
Telephone: (512) 472-2700
Facsimile: (512) 472-2728

ROBERT HENNEKE
(Pro hac vice forthcoming)
Texas Bar No. 24046058
rhenneke@texaspolicy.com

CHANCE WELDON
(Pro hac vice forthcoming)
Texas Bar No. 24076767
cweldon@texaspolicy.com

MATTHEW MILLER
(Pro hac vice forthcoming)
Texas Bar No. 24046444
mmiller@texaspolicy.com

NATE CURTISI
(Pro hac vice forthcoming)
Arizona Bar No. 033342
ncurtisi@texaspolicy.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2023, 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/ *Russell A. Nevers*

RUSSELL A. NEVERS