Paul A. Turcke, ID Bar No. 4759
MSBT Law, Chtd.
7699 West Riverside Drive
Boise, ID 83714
(208) 331-1800
pat@msbtlaw.com

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

SAWTOOTH MOUNTAIN RANCH LLC, LYNN ARNONE, DAVID BOREN,	)	
	)	No. 1:19-cv-0118-CWD
Plaintiffs,	)	**PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION [Dkt. 11]**
v.	)	
U.S. FOREST SERVICE, et al.	)	
Defendants.	)	

This matter is before the Court on Plaintiffs' motion for preliminary injunction. The Court should grant the motion and decide how to preserve the parties' rights pending further proceedings.

I. INTRODUCTION

The background facts and the basic framing of this case are undisputed. Plaintiffs wish to clarify or amplify certain facts. Plaintiffs do not oppose "a" Redfish to Stanley Trail. They oppose this version of the Trail. See, Boren Decl. (ECF 11-2) at ¶ 28. There is certainly broad support for "a" trail, which should not be confused with support for "this" Trail. The Conservation Easement does not dictate that a 78 inch wide, heavily engineered trail topped with compacted angular gravel through fields that will continue to be grazed by cattle be built.

Defendants suggest Plaintiffs have "slept on its rights" and "delayed until the eleventh

hour" in acting. Defs' Br. (ECF 17) at 19. This statement is misplaced. Plaintiffs can hardly be faulted for failing to comment in 2014 during scoping. They only acquired the property in the fall of 2016.[1] The agency did contact Mr. Boren shortly thereafter, but only generally referring to the project before offering to acquire fee simple title to "your property that surrounds the trail easement." AR 0001. In multiple exchanges and meetings with SNRA staff, no one ever made Mr. Boren aware of the project documents. Boren Decl. (ECF 11-2) at ¶ 16. Mr. Boren thought he was engaging a good faith discussion about "options" for the trail. *Id*. at ¶ 10 (Ex. B). He felt "a sense of connection" following the July, 2018 meeting on site. *Id*. at ¶ 13. Only recently is it apparent the SNRA in those meetings considered project design and approval a *fait accompli*.

What is also now apparent is that Plaintiffs have been stigmatized by the long and frustrating experience the Forest Service had with the prior landowners. The most persistent concerns involved potential safety and other conflicts created by public access through an active livestock grazing pasture. AR 0723-0726; AR 0877-0878. Even agency specialists noted possibilities of these concerns "resulting in injured or dead cattle, and cattle outside their allotment/pasture, (I've seen it happen unfortunately)." AR 0156. These concerns may be one reason for the SNRA's push to buy the property (and fence cattle out), along with the desire to build a more intrusive trail than contemplated by the easement language. AR 1968-1971; AR 1972-1978. These concerns have never been addressed. Rather, when negotiations stalled in 2016, the Forest Service "discovered that there are many successful examples" of "manag[ing] public use trails across active cattle-grazing lands." AR 0879. Plaintiffs remain intent on finding a solution that will work for everyone.

---

[1] There are no exhaustion issues here. See, 36 C.F.R. Part 218, Subpart B (categorically excluded projects are not subject to legal notice/objection procedures); *Pacific Rivers v. BLM*, 2018 U.S. Dist. LEXIS 222981, 2018 WL 6735090 at *11 (D. Or. 2018).

II. ARGUMENT

The SNRA's actions only highlight the procedural shortcuts, legal violations, and unresolved practical difficulties of the current project. The Court should slow the project so it might come back within the confines of governing law.

A. Plaintiffs Have Shown A Likelihood of Success on the Merits.

Plaintiffs demonstrate a likelihood of success on the merits on one or more of their claims.

1. The SNRA's Planned Actions are Contrary to the Conservation Easement Deed.

Plaintiffs' first argument asks the Court to determine whether the express easement obtained by the United States provides for the activities stated in the Decision Memo and project documents. The narrow language at issue only entitles the United States "to permit public use of…[a] strip of land to be utilized as a trail" and to "erect appropriate signs." AR 0833.

Defendants primarily contend that Plaintiffs' claim is a dispute over title which runs afoul of the federal Quiet Title Act ("QTA"). Defs' Br. (ECF 17) at 4-6. Plaintiffs do not challenge the United States' title, defined here by an express easement. They dispute whether the United States can bring in heavy road construction equipment to bulldoze, grade, excavate, place structures and take other actions in violations of the United States' limited privileges.

Defendants' cited cases are either distinguishable or aid Plaintiffs. The vast majority of QTA cases involve the United States as the servient estate owner, with the purported dominant estate owner/plaintiff seeking to override the United States' title or assertion of authority. This is precisely the scenario in *City of Tombstone v. United States*, 2012 U.S. Dist. LEXIS 191789, 2012 WL 12842257 (D. Ariz. 2012), *aff'd*, 501 F. Appx. 681 (9th Cir. 2012). The City sought to "prevent" the Forest Service from "interfering" with access, repair and/or supplementation of its water system through development/maintenance of certain wells and water sources following a

wildfire. *Id*. at *3-*4. The City was asking the Court to give it authorization to cross the Forest Service's figurative gate across the right-of-way, which directly implicated and was adverse to the United States' title. Similarly, *McMaster v. United States*, 731 F.3d 881 (9th Cir. 2013) typifies the disgruntled mining claimant cases. McMaster's primarily claimed under the QTA, seeking to compel BLM to convert a mining claim to a fee simple patent, which was denied under myriad statutes and regulations. His effort to backdoor into an Administrative Procedure Act claim was easily dismissed as "the 'essence and bottom line' of McMaster's APA claims [was] a dispute against the government over title to the reserved surface estate of the Oro Grande mining claim." *Id*. at 899 (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 587 U.S. 209, 222 (2012)).

Far more relevant is *Robinson v. United States*, 586 F.3d 683 (9th Cir. 2009), upon which Defendants also rely. *Robinson* involved an undisputed easement held by the United States in trust for the Maidu Tribe, with private landowners with an interest along the same roadway easement bringing a suit alleging illegal encroachment as a result of the Tribe's construction activities. *Id*. at 685. The district court dismissed on essentially the same logic Defendants employ here – "due to the sovereignty of the United States" under the QTA. *Id*. at 684. The Circuit identified one subset of cases involving disputed title while recognizing another with "no real dispute as to an ownership interest" where "the QTA does not apply…." *Id*. at 688. The *Robinson* court thus reversed the district court dismissal, espoused a "pragmatic approach" and held "a suit that does not challenge title but instead concerns the use of land as to which title is not disputed can sound in tort or contract and not come within the scope of the QTA." *Id*. (emphasis added).

Defendants' primary defense under the QTA falling aside, the Court must interpret the terms of the express easement. Defendants contend that installing culverts and excavating and

constructing a 78 inch wide trail of compacted angular gravel falls within "things reasonably necessary" to "permit public use of a strip of land to be utilized as a trail." Defs' Br. (ECF 17) at 6. Defendants rely solely upon *Kolouch v. Kramer*, 120 Idaho 65, 813 P.2d 876 (1991), for the basic principle that an express easement must "be interpreted in connection with the intention of the parties, and the circumstances in existence at the time the easement was granted." *Id.*, 120 Idaho at 69, 813 P.2d at 880; Pls' Br. (ECF 11-1) at 7. *Kolouch* involved clauses in two deeds granting 25 foot easements which when combined could form a 50 foot wide easement of "considerable commercial value" that would connect to a city street. *Id.*, 120 Idaho at 66, 813 P.2d at 877. Both easements contemplated roads "for ingress and egress" to residential properties, and one of the deeds specified the easement "was 'for the purpose of constructing a road.'" *Id.* Given this context, the trial court made a factual finding "that it was contemplated that the Kolouch property was to be commercially developed and that a road would be built." *Id.*, 120 Idaho at 69, 813 P.2d at 880. This is hardly comparable to the language or setting here, were Defendants penned only the ability to "permit public use of a strip of land to be utilized as a trail" in the SNRA.

A narrow interpretation of the United States' precisely drafted Conservation Easement Deed is supported by analogous cases. The record itself contains examples of what an easement should look like that contemplates what the SNRA is trying to do here. AR 0472; 0588 (easements specifically authorizing construction, operation, maintenance). Various "rails to trails" decisions in circumstances far more analogous than *Kolouch* make clear that specifically worded grants of privileges in an express easement will be construed narrowly. *Romanoff Equities, Inc. v. United States*, 119 Fed. Cl. 76, 82 (Cl. Ct. 2014).

Plaintiffs are attempting through this motion to forestall a crisis that need not occur. In an actual and ripe "case or controversy" they ask the Court to exercise discretion and offer the parties

guidance under the Declaratory Judgment Act.[2] The Court should advise that there are at least serious questions whether the Decision Memo authorizes activities outside the SNRA's limited easement.

2. The Trail Project Violates NEPA.

Plaintiffs additionally demonstrate the Trail's approval violates the National Environmental Policy Act ("NEPA").

a. Approval with a Categorical Exclusion.

Plaintiffs do not dispute that some aspect of this project "ostensibly falls within the broad language" of the "construction and reconstruction of trails" category. Pls' Br. (ECF 11-1) at 11-12. However, the action here fails the extraordinary circumstances step of the analysis.

Most revealing is the fact that the agency penned its conclusions on extraordinary circumstances before submission of the various specialist reports. Defendants contend the "many specialist reports and more in-depth analysis" should carry the day. Defs' Br. (ECF 17) at 9. That "in-depth" analysis is presented in chronological order at pages 176 through 293 of the administrative record. See, AR Index (ECF 14-2) at 1. Early in that sequence is a table with conclusions on the seven resource conditions of the extraordinary circumstances checklist, dated March 31, 2014. AR 0236. The language closely tracks what appeared in the Decision Memo. AR 0300-0302. Defendants' wetlands arguments stress the carefully-reasoned judgment of the Forest hydrologist, dated April 14, 2014, yet relied upon in the earlier table. See, AR 0238-0245. Far more egregious is the other factor Plaintiffs raise, analysis of potential impacts to the SNRA, a Congressionally-designated area. The March 2014 analysis states "a compliance check with PL

[2] See, *Spokane Tribe v. United States*, 972 F.2d 1090 (9th Cir. 1992); *C & C Properties v. Shell Company*, 2015 WL 5604384 (E.D. Cal. 2015).

92-400 was completed." AR 0236 (emphasis added). But the only corresponding document in the record is dated March 1, 2017, nearly three years after announcement of the conclusion. AR 0273-0279. This epistemological cart before the horse is fatal to Defendants' argument.

Aside from this awkward sequence, there is nothing in this record that justifies the deference to the asserted "scientific judgments and technical analyses within the agency's expertise." Defs' Br. (ECF 17) at 11 (quoting *Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1051 (9th Cir. 2012)). There is not one shred of data in any of the specialist reports. There is no expertise here to which the Court can defer. *Great Basin Resource Watch v. BLM*, 844 F.3d 1095, 1103 (9th Cir. 2016); *Sierra Nevada Forest Protection Campaign v. Tippin*, 2006 U.S. Dist. LEXIS 99458, *29 (E.D. Cal. 2006) ("NEPA does not permit an agency to rely on the conclusions [of agency experts] without providing both supporting analysis and data").

The record further documents a preordained path to a categorical exclusion. On June 7, 2013, the "level of analysis" was identified as a categorical exclusion with presentation of a corresponding budget and timeline. AR 0161. On January 27, 2014, the SNRA Ranger concluded "[l]et's go CE under the authority below unless after scoping or meeting tomorrow, we need to go EA. Let's hope not." AR 0176-0177. At the end of scoping, the agency candidly said "we are reviewing all comments and expect to publish a response to comments and project Decision Memo concurrently in June, 2014." AR 0977. The agency wasn't allowing for the possibility that scoping input might actually factor into the possibility of doing an EA, but before reviewing the comments was already planning to rely on a categorical exclusion. Points between reflect this inexorable course, such as a January 2014 update which presents a "cat ex" timeline and notes that "funding only covers staff work for the environmental review" referring to "a Categorical Exclusion decision memo for the project record." AR 0902; AR 0911 ("CE/DM not subject to appeal").

b. Additional Violations and Factors.

The limited administrative record reveals further NEPA violations. A categorically excluded action must fall within an enumerated category, and the only applicable category here is for trail construction or reconstruction. However, there are numerous other "projects" outlined by the Decision Memo that are not trail construction or reconstruction. These include road obliteration/repurposing and "trailhead" relocation and construction. Decision Memo at 3 (AR 0296); Pls' Br. (ECF 11-1) at 14-15.[3]

This project also fits within a larger series of connected actions. A "Redfish to Stanley" trail is widely supported but the immediate project is an "almost to Redfish" trail as it will terminate at the "Redfish entrance station" at an estimated cost of $2.4 million. AR 0911. The connection to "all Redfish Lake complex developed recreation sites" is anticipated through a subsequent "Redfish Internal Trails" project at an estimated cost of $3.75 million. AR 0912. This appears a classic instance of segmenting a larger project into smaller components, so as to squeeze each element into less rigorous NEPA procedures. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 895-897 (9th Cir. 2002).

The curious presentation of testimony from various supporters via a Forest Service declaration should raise additional concerns. See, Phillips Decl. (ECF 17-2) at Exs. C-F. Again, this is support for "a" trail, not "this" Trail. Surely the SNRA knows that NEPA is not a popularity contest. This is also conspicuous "post hoc rationalization" in the courtroom, when the agency's action can only be upheld "'on the basis articulated by the agency itself'" in the pre-decisional NEPA analysis. *ONDA v. BLM*, 531 F.3d 1114, 1141 (9th Cir. 2008).

[3] Construction of a parking lot alone has spawned NEPA litigation, even where an EA was prepared. *Wild Wilderness v. Allen*, 871 F.3d 719, 724 (9th Cir. 2017).

3. The Decision Memo is Not Consistent with the Forest Plan.

Plaintiffs finally raise serious questions regarding the SNRA's compliance with its duties under the National Forest Management Act ("NFMA"). The relevant Forest Plan Standard requires the Forest Service to explain why "reasonable and practical location alternatives" were not available to avoid traversing Riparian Conservation Areas ("RCAs").[4]

Defendants again argue the Court should defer to the agency's "detailed analysis." Defs' Br. (ECF 17) at 15-18. However, in presenting that analysis Defendants cite to two pages – AR 0244 and AR 0268. The former is simply the RCA cell in the "key and checklist" which presents the same conclusions seen elsewhere and parroted in the Decision Memo. AR 0268 should be even less comforting – it has an even more perfunctory assertion that "[t]he intended trail alignment within RCAs is minimized – only at unavoidable crossings." This appears alongside an entry for a different guideline stating "[i]s there a std. boilerplate answer for this one?? Which essentially says this project will do all good and no bad." *Id*. These snippets of text are not "analysis" but simply conclusions.

The Court cannot fill in the gaps in the agency's analysis or infer steps that were never taken. The agency has failed to demonstrate how it complied with the Forest Plan's binding duty to evaluate alternatives to the selected trail alignment.

B. Injunctive Relief is Necessary to Avert Imminent Irreparable Harm.

Multiple levels of irreparable injury will occur if the SNRA carries out its stated intention of proceeding with mid-June ground-disturbing project implementation. Plaintiffs' concerns do

[4] *Conservation Cong. v. U.S. Forest Service*, 2019 U.S. Dist. LEXIS 53261, 2019 WL 1405598 at *36 (E.D. Cal. 2019) only affirms dismissal of NFMA claims pleaded in the complaint but dropped at summary judgment, not the omitted procedural step here forged into a "binding" Forest Plan Standard. *All. for the Wild Rockies v. U.S. Forest Service*, 907 F.3d 1105, 1111 (9th Cir. 2018) (Service "must strictly comply" with "'standards,' which are…binding limitations.").

not reflect "purported property rights" or "eleventh hour" delay, but are supported by evidence in the record and common sense. Heavy construction of a trail expected to receive high volume travel will dramatically alter the relationship and property uses of the dominant and servient estate owners. Public safety/liability concerns about livestock seemingly paralyzed the project, and then were swept under the rug. Defendants deftly sidestep the tension in the very intent of this project to "boost the local tourist-based economy" by facilitating "high volume" travel along the Trail. AR 0303. Aside from demonstrating the nature and degree of potential change in use of the easement, this intent rebuts any suggestion that Plaintiffs raise vague or indiscernible concerns about harm to the environment. The eloquent Declaration of John Robison helps clarify that this Trail is part of a *quid pro quo* in attaining the long-coveted Boulder White Clouds Wilderness designation. Robison Decl. (ECF 18-1) at ¶¶ 17-18. Maybe that was an entirely rational bargain. But do those touched by encounters with graceful cranes, winnowing snipe or bugling elk wonder about the likelihood of such encounters along a "high volume" commuter trail? Compare, *id*. at ¶ 21, AR 0967 (wildlife concerns); AR 0297 (biologists will move any bird nests affected by construction before August 15). Defendants cannot point to any reasoned discussion of these potential impacts that occurred before decisions and commitments were made.

Plaintiffs seek a classic prohibitory injunction, to stop (or redirect) the bulldozer before irreversible impacts occur. There are ways to structure such relief here to balance these concerns.

C. The Balance of Hardships and Public Interest Favor Entry of an Injunction.

Defendants do not offer compelling arguments on the remaining factors. The purported "public support" is for "a" trail and consists of a handful of individuals offering heartfelt but superficial feedback. See, e.g., AR 0960 ("cool project"). It seems odd to suggest that the long wait for this project today makes its completion urgent. Without seeing the actual contract

documents, it is hard to evaluate the conclusory statement that "the Forest Service will be required to pay contract damages." Defs' Br. (ECF 17) at 20. Hopefully the United States, assuming it is not admitting liability, has structured any contract(s) broadly or in such a way as to allow for modification. Funding is always a concern, but seems protected by a Congressional earmark. Robison Decl. (ECF 18-1) at ¶ 18. Defendants threaten drastic effects of forestalling a $2.4 million (or $6.15 million) project, without explaining why they chose incur the risks apparent in a categorical exclusions. Plaintiffs are not trying to stop any trail but this Trail, and in being stonewalled by the SNRA's "all good and no bad" filter had no option but to bring this motion.

D. The Amount of Bond, if Any, Should Minimal.

Defendants suggest that posting of a bond is a "precondition" to a preliminary injunction that any plaintiff "must" post. Defs' Br. (ECF 17) (citing *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2005). As this Court is well aware, whether or not to require bond is entirely discretionary. Judge Bush recently explored this issue in some detail, noting "a so-called 'NEPA exemption' to the bond requirement" and the importance of determining the hardship imposed by any bond as well the true costs of any agency "backtracking" on an enjoined project. *Western Watersheds Project v. Zinke*, 336 F.Supp.3d 1204, 1246-1247 (D. Idaho 2018). In that decision, enjoining BLM-wide policies affecting oil and gas lease sales across multiple western states, the Court imposed bond in the amount of $10,000. Defendants request for $510,000 bond is unsupported and completely out of line with any similar determination in the District of Idaho.

III. CONCLUSION

Plaintiffs respectfully request the Court grant Plaintiffs' motion to maintain the status quo between the parties and enjoin ground-disturbing implementation of the Decision Memo, at least to the extent such activity would occur within the easement through Plaintiffs' private property.

Dated: May 31, 2019.

Respectfully submitted,

/s/ Paul A. Turcke
Paul A. Turcke (ISB #4759)

Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 31, 2019, I filed the foregoing Plaintiffs' Reply Memorandum in Support of Motion for Preliminary Injunction with the Clerk of Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

Christine Gealy England
christine.england@usdoj.gov

Marie Kellner, Attorney for Idaho Conservation League
mkellner@idahoconservation.org

s/Paul A. Turcke
Paul A. Turcke