

Data Submitted (UTC 11): 2/27/2023 7:00:00 AM

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Title:

Comments: February 27, 2023 VIA EMAIL Objection Reviewing Officer Intermountain Regional Office 324 25th Street Ogden, UT 84401 objections-intermtn-regional-office@usda.gov Re: Final Environmental Assessment for Outfitter-Guide Management Plan for the Sawtooth NRA and Draft Decision Notice Dear Objection Reviewing Officer: I am submitting the below objection in response to the Final Environmental Assessment, Finding of No Significant Impact and Draft Decision Notice ("Final EA") for the Sawtooth National Recreation Area Outfitter & Guide Management Plan ("O&G Management Plan") as it relates to future helicopter skiing operations on the Sawtooth NRA. The responsible official for the Final EA is Jake Strohmeyer, Forest Supervisor, Sawtooth National Forest. This objection is inconsistent with the prior written comments submitted by me on this project dated August 31, 2022 which addressed the legally insufficient bases for the decision to impose a hard cap of only one authorization for what the agency has referred to as a long-term approach and why that decision does not recognize or allow adjustments for the already very high and increasing demand for these services which is also diverse. In the Final EA, the Sawtooth NRA has decided to implement a hard cap of a single special use authorization authorizing helicopter skiing in the Sawtooth NRA. A hard cap of only one authorization for what the agency has referred to as a long-term approach does not recognize or allow adjustments for the already very high and increasing demand for these services which, as noted below, is also diverse. Nor is this decision consistent with the agency's goals of ensuring high quality visitor services and the agency's awareness of the critical role that outdoor recreation plays in the local and regional economy around the Sawtooth NRA. This decision creates an inflexible government-imposed monopoly for these services rather than allow the O&G Management Plan to permit new entities to submit for the agency's consideration proposals to provide other types of packages to the public for helicopter skiing services. The Final EA acknowledges at Table 7 that the need for backcountry skiing is high. Presumably this assertion includes backcountry skiing through the use of helicopters because that specific demand is in fact very high. Table 1 in the Final EA shows that recreation use has 66 Canal Center Plaza Suite 505 Alexandria, VA 22314 (703) 535-5565 tel.kevin@gardenlawfirm.com Objection Reviewing Officer Page 2 almost doubled from 2015-2020. The Final EA also states that "the amount of actual use for land-based outfitter and guide activities on the Sawtooth NRA has steadily increased over the last 12 years" and the recent increase in recreational activity "is believed to be a climbing trend as opposed to an anomaly brought on by the pandemic." Final EA at 4, 5. However, the Final EA further states that "[b]ased on actual use reports, it is believed that the amount of guided helicopter skiing currently available meets the needs of the guided public." Final EA at 82 (Design Element A08). The current sole permittee which provides helicopter skiing services on the Sawtooth NRA, Sun Valley Heli-Ski Guides, however, is not meeting the needs of the guided public because of it only offering one type of helicopter skiing service. Nor would the actual use reports provide any basis for the agency's assertion. Therefore, the agency's assertion lacks any support in the administrative record and is therefore arbitrary. As is the case with many outfitters, helicopter skiing operations vary widely to cater to the very different demands of helicopter skiing guests. While Sun Valley Heli-Ski Guides provides services which consist primarily of day skiing, the vast majority of other helicopter skiing operations in North America provide multi-day packages that include food and lodging as well as helicopter services. In addition, each operator provides a unique product to the public and thus has its own unique customer base and target market based on its particular type of operations. As a result, one operator will not appeal to all members of the public who are interested in participating in this recreational activity. Thus, the assertion in the Final EA as to the amount of guided helicopter services meeting the need of the guided public is incorrect, arbitrary and not supported by the record. In addition, Sun Valley Heli-Ski Guides is not using all of its allocated user days. This underuse, however, is apparently not due to a lack of demand but instead is due to either Sun Valley Heli-Ski Guides not providing the types of services that are in demand, or the fact that it can only operate on a limited number of days due to weather conditions. As a result, many members of the public are unable to also enjoy this recreational activity because Sun Valley Heli-Ski Guides has a limited number of helicopters that can serve guests on these days. But even if the current demand was being met, there is no basis provided in the administrative record to conclude

the future, higher demand will be met by one operator. Given this fact, the proposed hard cap of only one operator for these services will very much tie the agency's hands in the future as this demand increases. The Final EA also states any expansion of service could effect the quality of recreation experience for other users specifically backcountry users. Final EA at 82. However, the Final EA is devoid of any support for this assertion. Therefore, this determination in the Final EA is also not supported by the record and the decision based on it is arbitrary. While the Final EA suggests that this conclusion was based on actual user reports, user reports would not provide this information. Final EA at 82. Regardless, given the very, very small percentage of recreationists which engage in helicopter skiing as compared to other users across the forest, it is not valid to assert that expanding these services would have a detrimental effect on the quality of other backcountry users. Most if not all of the helicopter operations occur in areas that are not reachable without the use of helicopters. If they were reachable by other means, most people would of course be using those means as they likely would be far less expensive than using helicopters. In addition, creating a de facto monopoly for providing helicopter skiing services in the Sawtooth NRA is extremely disadvantageous to the public. First, it limits the public to only one operator and the services that operator provides. However, as discussed above, there are many different types of helicopter skiing services. The public should not be limited to only one type of helicopter skiing service any more than they should be limited to one type of fishing or hunting outfitter service. The public's demands vary and having different operators allows these different demands to be met. In addition, having only one operator does not promote the benefits of competition and often leads to deficient services to the public. Notably, the Chugach National Forest, which also has outstanding helicopter skiing opportunities, recently issued a prospectus specifically to ensure that the public would have the ability to select from several different helicopter skiing operators both to meet the overall public demand as well as the demand for different types of services. In issuing that prospectus, the Chugach National Forest explained that helicopter skiing was an important part of the range of recreation opportunities for the following reasons, all of which apply to the Sawtooth NRA:

- Access to slopes beyond the range of the average backcountry skier.
- Opportunities to find locations with suitable terrain aligned with client skill.
- Wider dispersion of recreation uses in the backcountry by integrating helicopter skiing with other recreation uses.
- Opportunity to enjoy the beauty, freedom, solitude, and untracked snow of the backcountry for those forest visitors lacking the specialized equipment, avalanche knowledge, and/or terrain familiarity to ski in the backcountry safely.

Guided Helicopter Skiing Prospectus, Cordova Ranger District, Chugach National Forest (November 2020). [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd859365.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd859365.pdf). A copy of that document is attached and is therefore part of the administrative record pursuant to 36 C.F.R. [sect] 219.54(b). Prior to the release of the Final EA, Kirk Flanigan, the Area Ranger for the Sawtooth National Recreation Area, issued a letter dated June 27, 2022 in which he stated that the agency was "keenly aware of the critical role that outdoor recreation plays in our local and regional economy" and that it is "in many ways the foundation or driving force that keeps our community vibrant." A copy of that letter is also attached and therefore part of the administrative record in this matter. The agency's final decision to limit the providing of helicopter skiing operators to only one operator for this very popular recreational activity is inconsistent with those statements. Mr. Flanigan also asserted in that letter that the Draft EA, which is unchanged in the Final EA, "will give me the tools to provide for more flexibility and increase opportunities for existing O&G and new ones alike." Again, however, imposing a hard cap of only one helicopter skiing operator is inconsistent with this stated goal because it does not provide any flexibility to adjust for growth nor provide any opportunities for new operators.

Objection Reviewing Officer Page 4 As the Idaho District Court previously held in *Idaho State Snowmobile Association v. U.S. Forest Service*, 2021 WL 493412 at *15-16 (D. Idaho 2021), involving the Forest Service's efforts to restrict snowmobile activity on the Sawtooth National Forest: As an organization, the Forest Service is charged with a difficult task: managing national forest lands with multiple goals in mind, including pleasing the public or specific groups with widely varying interests. This case presents an example of this conflict—particularly Claim Two. Simply put, whichever alternative the Forest Service chose, someone was likely to be unhappy. Nevertheless, in cases such as this, the Court's role is not to choose the course of action it deems best, but "to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Occidental Eng'g Co.* 753 F.2d at 769.[] Regarding Claim Two and the Forest Service's actions under NEPA, the Court finds that, upon review, the evidence does not support the Forest Service's conclusions. By all

accounts the evidence suggests that lynx, wolverines, and mountain goats either are not present in the Analysis Area or would reasonably tolerate human interaction. Thus, it is difficult to understand why the Forest Service then determined that OSV use in the area needed to be restricted. Ultimately, the Court fails to see a "rational connection between the fact found and choices made." Motor Vehicle Mfrs., 463 U.S. at 43. Because substantial questions exist regarding the environmental impact of the Forest Service's Decision, the Court grants summary judgment in ISSA's favor on Count Two and remands the case to the Forest Service. (Emphasis added); id. at *6, *13 ("a court must inquire whether the agency examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made" and while the Forest Service went through the appropriate steps under NEPA, its Decision was not "founded on a reasoned evaluation of the relevant factors"). For the reasons set forth above and in my prior comments, the agency's decision is not valid as a matter of law. As held in *Sierra Club, Inc. v. United States Forest Service*, 897 F.3d 582, 589-590 (4th Circuit 2018), a court will "'hold unlawful and set aside [a federal] agency action' for certain specified reasons, including whenever the challenged act is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.'" Citing *Friends of Back Bay v. U.S. Army Corps of Eng'rs*, 681 F.3d 581, 586-87 (4th Cir. 2012) (quoting 5 U.S.C. [sect] 706(2)(A)); see also *The Wilderness Society v. United States Forest Service*, 850 F.Supp. 2d 1144, 1155 (D. Idaho 2012) ("An EA is arbitrary and capricious if it fails to consider an important aspect of the problem, or 'offer[s] an explanation that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise'). Objection Reviewing Officer Page 5

Very truly yours, THE GARDEN LAW FIRM, P.C. Kevin R. Garden Enclosures